CASC BULLETIN

THE CHARTERED ACCOUNTANTS STUDY CIRCLE

Prince Arcade, 2-L, Rear Block, Second Floor,
22-A, Cathedral Road (Next to Stella Maris College)
Chennai - 600 086. Phone : 044 - 28114283
Website : www.casconline.org

Volume 67 | Issue 7 | Monthly | October 2019 | Rs.25/-

INDEX

MEETINGS

Date	Time	Speaker	Topic
12.10.2019 Saturday	09.00 am*	CA. Ganesh Prabhu	GST Audit - An Update with Latest Developments
17.10.2019 Thursday	06.30 pm**	CA. Nidhi D. Jain	MLI - Understanding the Basics

*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

CASC Annual Members are requested to renew their subscription for 2019 - 2020

THE MONTHLY MAGAZINE FROM CASC

ES

ADVISORY

esas™

Accounting Services Professional

Accounting Advisory Services & One Stop Financial Solution.,

For all your esteemed Client Needs

ACCOUNTING SERVICES IN TALLY

Along with

Statutory Compliances

At Your Business Premises

(or)

In our Back office support

Contact	:	**U. Elango,** CEO
H / P	:	98410 20581, 98416 20581
Tel	:	044 26184581 / 26184582
Direct	:	044 26186537
E-mail	:	esasbpo@gmail.com, esaskpo@gmail.com
Address	:	No 24/20, Thirumangalam Road, Villivakkam, Chennai - 600 049. (Near IOB Kambar Colony Branch)

EDITORIAL

***Transformation – New Minister – New Issues*:**

The First full time Finance Minister is already faced with new challenges from within as well as from outside economy. They were calls for taking steps to revive the economy as it had slow downed to all time low under the present Government. However, the present Government had taken a bold decision of revoking the special status to the state of Jammu and Kashmir, which was done through a Presidential order in the month of August, 2019. With an intention to provide the much related stimulus to revive the economy, the Government also brought in the Taxation Laws (Amendment) ordinance, 2019, which was promulgated by the President on 20th September, 2019. The stimulus seems to be targeted only for the corporates and leaving other contributors of the economy to survive on its own. It seems to be a halfhearted approach with the target assessees being the corporates and capital market. The proposals as envisaged through the ordinance have many conditions for taking the benefits like for example the benefit of Section 115BAB requires more than eight conditions to be fulfilled, the benefit of Section 115BA – reduced rate of taxation of 22% requires first opting for the same (which cannot be subsequently withdrawn) as well as one of other condition is the company should not claim certain deductions including the deductions under Chapter VI-A with further catch of the company assessees losing the carry forward losses. However, all the stimulus or benefits have been restricted to the corporate assessees only when the entire economy is slowing down and the impact is being felt by every businessman. May be the Government wanted to arrest the withdrawals by the FIIs, etc. It is normally understood that whenever the Government announces a stimulus by way of tax rebates and or reduction in rates / incentives is with an ultimate goal of boost spending which in turn increases demand. However, the present move may not attain this goal whereby this cannot be termed as a stimulus to revive the economy though this move did revive the capital market as could be seen from the bounce back of browses namely the BSE and NSE and reaching new all-time highs.

Annual Residential Conference

By now the members would be aware as well as many of you would have already registered for the 21st ARC of CASC which is scheduled at Jaipur during 25th January, 2020 to 28th January, 2020, to be inaugurated by CA. Sunil Goyal, the Past President of ICAI. The preparations for the same is in full swing. Along with the outings with the family members we have also planned Technical Sessions namely two Group Discussions – one on Income Tax and the other on GST – Prepared and replied by CA. Rajeev Sogani, Jaipur and CA. Venkataramani, Bengaluru. We have also planned two special session by Mr. Arvind Datar and Rohan Shah, Senior Advocates. Hope one doesn't miss the must attend sought after program of CASC. Do rush in your registration for which the details have been mailed to the members individually. In case, any further clarification is required kindly get in touch with CA. Murali J (9841028000) and or CA. R. Sundararajan (9444393420)

Appeal

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

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

For and on behalf of Editorial Board

CA. Uttamchand Jain

DISCLAIMER

The contents of this Monthly Bulletin are solely for informational purpose. It neither constitutes professional advice nor a formal recommendation. While due care has been taken in assimilating the write-ups of all the authors. Neither the respective authors nor the Chartered Accountants Study Circle accepts any liabilities for any loss or damage of any kind. No part of this Monthly Bulletin should be distributed or copied (except for personal, non-commercial use) without express written permission of Chartered Accountants Study Circle.

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***

For Further Details contact :

"The Chartered Accountants Study Circle"

"Prince Arcade", 2-L, Rear Block, 2nd Floor, 22-A, Cathedral Road,
Chennai - 600 086. Phone 91-44-28114283

Log on to our Website : **www.casconline.org**
For updates on monthly meetings and professional news.
Please email your suggestions / feedback to admin@casconline.org

Service of order:

Since, the signature on the acknowledgement card for the service of the impugned is illegible and in any event, not that of the petitioner, upon a comparison of the signature on the affidavit filed in support of this writ petition and also there is confusion as to the date of service of said order it would be appropriate to afford one more opportunity of hearing to the petitioner. Thus, the Court set aside the impugned assessment order and directed the petitioner to appear before the respondent on 19.08.2019 [Wednesday] at 10.30 a.m., for hearing and completion of assessment without any further notice in this regard. **S.Sakkeer Hussain, Maniyankuzhi Post -629 161, Kanyakumari District.Vs.The Commercial Tax Officer, Thuckalay Assessment Circle, W.P.(MD)No.14495 of 2016 DATED: 08.08.2019**

Input tax credit:

The input tax credit claim in respect of capital goods is restricted to those equipment/activities that had been used/ taken place in the State; The petitioners pleaded that the definition be extended to cover equipment/activities that are used/ take place outside the State as well. This has been considered and rejected by a Division Bench sitting in the Principal Seat in a batch of writ petitions in the case of M/s. Schwing Stetter (India) Private Ltd

CA. V.V. SAMPATHKUMAR

Vs. The Commissioner of Commercial Taxes, Chennai in W.P.No.37604 of 2015 and batch dated 05.04.2016 and held that the benefit of concessional rate of tax will be available only in respect of those transactions, where the manufacture has taken place intra-State. The Apex Court in the case of TVS Motor Company Limited Vs. State of Tamilnadu and others (2018) 59 GSTR 1 (SC) held that the provisions of Section 19(5)(c) of the Act which provides for certain contingencies, wherein, ITC would not be available. However, reading down the provisions to conclude that those dealers, who are effecting sales exclusively to other State Governments, would be entitled to the benefit of ITC. Thus, while rejecting the contentions of the petitioner with regard to interpretation of Section 2(11) of the Act, the impugned assessments are set aside and the same are remitted back to the file of the Assessing Officer to be done after consideration of the alternate contention of the petitioner in terms of Section 19(5)(c) of the Act. For this purpose, the petitioner is directed to

appear before the Assessing Authority on Thursday 20.08.2019 at 10.30 a.m along with its claim and all materials in support thereof. Without any further notice in this regard. **Bharat Heavy Electricals Limited, Vs.The Assistant Commissioner (CT), Tiruvarambur Assessment Circle, W.P (MD) Nos.1446, 1447, 1448, 1449 & 1450 of 2015 DATED: 09.08.2019**

Natural Justice:

The respondent has offered a personal hearing on 28.01.2016. The petitioner is stated to have presented his accounts, the impugned order has been passed on 22.01.2016, even prior to the conduct of personal hearing. Thus, the impugned order is liable to be set aside on the ground that it violates principles of natural justice. This Writ Petition is thus allowed and the impugned order is set aside. **Tvl.S.M.Leathers, vs The Assistant Commissioner (CT) III, Dindigul- 624 001 W.P.(MD)No.3907 of 2016 DATED: 08.08.2019**

Opportunity:

Returns were filed by writ petitioner under Central Sales Tax Act, 1956 (CST Act), Respondent issued a revisional notice dated 31.01.2019 setting out a proposal regarding assessment, primarily on the ground that writ petitioner has not filed Declaration Forms pertaining to concessional rate of tax that has been claimed and another pertaining to documents to support exemption that has been claimed. In response to this revisional notice, writ petitioner sent a reply dated 26.02.2019, submitting some Forms and seeking time with regard to some other Forms stating that writ petitioner has not received the same from their branches. Writ petitioner had also sought one month time to collect the documents from the branches/clients and furnish the same to the respondent.There is no difficulty in accepting the submission of learned Revenue Counsel that respondent does have the statutory powers to make a revised assessment, but what is of significance is, respondent having chosen to give a reasonable opportunity to writ petitioner, has neither referred to the revisional notice nor the response to the same in the impugned order. There is nothing in the impugned order to show that the revisional notice and the writ petitioner's response to the same, particularly, the writ petitioner having submitted some documents and sought time for some other documents have been considered. An impugned order cannot be improved by way of respondent counsel's submission or by a counter affidavit. It is submitted by learned Senior Counsel, on instructions, that writ petitioner will now have all the documents, particularly, the Forms and supporting documents qua concessional rate of duty and exemption, will be ready for submission within four weeks from today. In the light of the aforesaid backdrop, impugned order is set aside solely on the ground of reasonable

opportunity aspect without expressing any view or opinion on merits. Writ petitioner is now granted four weeks' time from today to submit further documents/forms qua concessional rate of duty/exemption as per revisional notice dated 31.01.2019. **M/s.Amco Batteries Ltd. Vs. The Assistant Commissioner (ST) Nungambakkam Assessment Circle Chennai W.P.No.22924 of 2019 DATE: 05.08.2019**

Remand directions:

Writ petitioner is a dealer in Hosiery garments under TNVAT Act. Monthly returns filed were taken up for scrutiny and the respondent noticed what according to the respondent defects are. On this basis, respondent issued five different revisional notices to the writ petitioner dealer, all dated 07.06.2009, setting out what according to the respondent are defects in the returns and calling for objections from the writ petitioner. Writ petitioner sent five different detailed replies all dated 13.06.2019.Post revisional notices and objections, the impugned orders came to be passed. The detailed and elaborate objections of the writ petitioner i.e., objections to the revisional notices running to 11 pages and 21 paragraphs has been simply shot down in one sentence containing seven words. That one sentence is "The dealer's reply has not been accepted". Other than this, there is no mention about the objections. It is submitted that the respondent, in the impugned orders has not mentioned as to why and how the objections of the writ petitioner are not acceptable. It was emphasised that the impugned orders do not even advert to the objections. If an appeal is to be filed, it is submitted that the only ground of appeal that can be pointed out is that the respondent has not given reasons as to why, the objections/ reply of the writ petitioner dealer has not been accepted. It is pointed out that grounds can be raised only if the respondent articulates in the order reasons for not accepting the reply/ objections of the writ petitioner. It follows as a natural sequitur that if this is the only ground raised before the appellate authority, the appellate authority will also be left with the inevitable option/Hobson's choice of remitting the matter back to the respondent with a direction to redo the revised assessment adverting to the writ petitioner's objections and setting out the reasons as to how and why the reply/objections of the writ petitioner are not accepted. This would only delay the entire process qua revised assessment. On the contrary, if the respondent is directed to pass an order afresh giving reasons for not accepting the reply/objections of the writ petitioner, it would put an end to the controversy and it would also expedite the entire assessment process. In the light of the discussion thus far, the five impugned orders are set aside with directions

M/s. CBC Fashions (Asia) Private Limited Vs. The Assistant Commissioner [ST] Bazaar Circle, Tirupur W.P.Nos.23015, 23025, 23028, 23032 & 23034 of 2019 DATE: 06.08.2019

Alternate remedy:

In the impugned order, the respondent has not made the revised assessment in accordance with and in tune with the directions given by said Appellate Authority. Directions given by Appellate Authority and impugned order turns largely on facts. Therefore, this Court is of the considered view that it would be appropriate to relegate the writ petitioner to alternate remedy. Alternate remedy rule, is a rule of discretion and it is not a rule of compulsion vide Dunlop India case [Assistant Collector of Central Excise, Chandan Nagar, West Bengal vs. Dunlop India Ltd. and ors.] reported in (1985) 1 SCC 260. Para 4 of this judgment is important which is "4. Article 226 is not meant to short circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it, that recourse may be had to Art. 226. The Court must also have good and sufficient reason to by-pass the alternative remedy provided by statute. Matters involving the revenue where statutory remedies are available are not such matters. The vast majority of the petitions under Art. 226 are filed solely for the purpose of obtaining interim orders and thereafter to prolong the proceedings by one device or the other. This practice needs to be strongly discouraged. (underlining made by this Court to supply emphasis and highlight)". Supreme Court in Satyawati Tandon Case [United Bank of India Vs. Satyawati Tondon and others reported in (2010) 8 SCC 110] has held that when it comes to cases pertaining to tax, cess etc., rule of alternate remedy should be applied with utmost rigour. This Satyawati Tandon case was reiterated by Hon'ble Supreme Court in K.C.Mathew case [Authorized Officer, State Bank of Travancore Vs. Mathew K.C. reported in (2018) 3 SCC 85].Following the above, the Impugned order dated 29.03.2019 is not interfered with, leaving it open to the writ petitioner to assail the same by way of a statutory appeal under Section 51 of TNVAT before Appellate Authority. **M/s.SVS Enterprises Vs.The State Tax Officer Gudiyatham (East) Circle W.P.No.23128 of 2019 DATE: 07.08.2019**

HSD purchase and C forms:

The petitioner was making inter-State purchases of High Speed Diesel (HSD) Oil on concessional rate of tax at 2% by way of C forms. After introduction of Goods and Services Tax (GST), petitioner continued to purchase High Speed Diesel

Oil, but, however, they could not download the C forms. When the petitioner enquired with the Revenue Department, the petitioner was informed that after introduction of GST regime on and with effect from 01.07.2017, the petitioner was not entitled to make purchase of High Speed Diesel Oil from other States on concessional rate of tax i.e., at 2% and therefore, the Department's site has been blocked to deny access to the petitioner and other similarly placed persons from downloading C forms. The undisputed legal position as of today is that, the above said issue came up for consideration before another Hon'ble Judge of this Court in a batch of writ petitions i.e., W.P.Nos.19458 to 19460 of 2018 etc., being a batch of 71 writ petitions and a common order came to be passed by a Hon'ble Single Judge on 26.10.2018 - Ramco Cements matter. Post Ramco Cements matter, a similar situation came up before another Hon'ble Single Judge vide W.P.No.12520 of 2019 and the same came to be disposed of on 26.04.2019. In the said order, learned Single Judge held that till such time the order of Ramco Cements is either stayed or reversed it is incumbent upon all Assessing Authorities within the State of Tamil Nadu to apply the rationale and the principle laid down in Ramco Cements with regard to pending assessments. This position is not disputed. In the aforesaid circumstances and in the light of the order passed above, this Writ Petition is allowed. Consequently, necessary action to be taken by the department, forthwith to issue C forms. **Amarjothi Spinning Mills Ltd. vs.The State Tax Officer, Office of the State Tax, Bharathy Street, Gobi – 638 452.W.P.No.19468 of 2019 Dated : 11.07.2019**

Mismatch:

Instant writ petitions pertain to two Assessment Years, namely 2014-15 and 2015-16. Business premises of the writ petitioner was inspected by Enforcement Wing officials, certain defects were noticed, proposals were made pursuant to which revisional notices were issued and revised Assessment Orders came to be passed for aforementioned two assessment years and these two revised Assessment Orders are the impugned orders in the two cases on hand. Learned counsel for writ petitioner submitted that respondent has held that writ petitioner has not reported purchases by taking into account the Annexure II of writ petitioner's sellers being sale particulars of writ petitioner's sellers without following JKM graphics principle. [JKM Graphics Solutions Private Limited vs. Commercial Tax Officer, Vepery Assessment Circle, Chennai, reported in [2017] 99 VST 343 (Mad)]. In this case it has stated, in respect of mismatch, that it is high time the Principal Secretary and Commissioner of Commercial Taxes in consultation with him officers lays out a detailed procedure as to how to take forward cases of mismatch, evolve a central mechanism,

which can go into these aspect and furnish details in full form to the respective Assessing Officers, who can decide for themselves as to whether there is a case made out to call upon their dealer to explain. If this centralized mechanism is not put in place exclusively for such purpose, it would result in notices and orders being issued by the respective Assessing Officers without even the knowledge of the Assessing Officer of the other end dealer resultantly no action being taken against other end dealer, assuming, he is at fault. Therefore, it is high time the Department wakes up and stops the one way approach and examine the matter in a holistic manner so that the defaulting dealer is brought to books. Stating so, two impugned orders, both dated 31.12.2018 are set aside. After submission of new methodology/module for assessment before learned single Judge, which this Court is informed is in the anvil, respondent shall make assessments afresh. Obviously such assessments shall be after final orders being passed by Hon'ble single Judge pursuant to the new module in JKM Graphics Solutions case. **J.P.Agencies Vs.Assistant Commissioner (ST) Saidapet Assessment Circle W.P.Nos.5529 and 5531 of 2019 DATE: 12.07.2019**

GST Tran Credit:

The entire writ petition pertains to transitional credit to be availed by writ petitioner, pursuant to Goods and Services Tax (GST) regime, which came into force on and with effect from 1.7.2017. It is submitted that owing to a lesser amount being credited in SGST Credit Ledger of writ petitioner, efforts were taken by writ petitioner i.e., correctional measures, but in vain. It is the specific case and stated position of writ petitioner that they had approached respondents 1 and 3 with regard to reopening, but had not received any communication after submission of documents by the writ petitioner. It is also submitted that electronic submission did not fructify as the system does not accept the same. Considering the facts and submissions the Court directed the Writ petitioner's authorised representative with due authorisation, shall go before the aforesaid Officer on 29.7.2019 (Monday) i.e., 29th day of July, 2019 at 11.30 A.M. and present all material in support of their Credit Ledger, besides articulating the difficulty that is being faced. Though obvious venue shall be abovementioned office of aforesaid Officer. To be noted, date, time and venue has been given to this Court by learned Revenue Counsel after getting instructions. **M/s.Parekh Integrated Services Pvt. Ltd..,Vs.The Superintendent of GST & Central Excise, Maduravoyal Range, Poonamallee Division and others. W.P.No.9052 of 2019 DATED: 16-07-2019**

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

CASC CHENNAI, MEMBERSHIP FEE

Corporate Membership	**Rs.**
Corporate Annual Membership	3,000.00
Corporate Life Membership (20 Years)	20,000.00
Individual Membership	
Annual Membership	750.00
Life Membership	7,500.00

CASC - HALL RENT

HALL RENT FOR 2 HOURS	1,000.00
HALL RENT FOR 2-4 HOURS	1,500.00
HALL RENT FOR FULL DAY	2,500.00
LCD RENT FOR 2 HOURS	600.00
LCD RENT FOR 2-4 HOURS	800.00
LCD RENT FOR FULL DAY	1,200.00

CASC BULLETIN - ADVERTISEMENT TARIFF - PER MONTH

Full Page Back Cover	2,500.00
Full Page Inside Cover	2,000.00
Half Page Back Cover	1,500.00
Half Page Inside Cover	1,250.00
Full Page Inside	1,200.00
Half Page Inside	750.00
Strip Advertisement Inside	500.00

Minimum 6 months advertisement is required.

If advertisement is 12 months or above, special discount of 15% is available

The above amounts are Exclusive of Government Levies like GST. Applicable taxes will be added

Your demand draft / cheque at par should be drawn in the name of **"The Chartered Accountants Study Circle"** payable at Chennai.

Kindly contact admin@casconline.org for the Clarifications and or queries.

CASE LAWS - GST / SERVICE TAX

1. GST – APPELLATE AUTHORITY FOR ADVANCE RULING -- APPELLATE AUTHORITY FOR ADVANCE RULING – CHARGES FOR DELAYED PAYMENT OF CONSIDERATION TO BROKERS TRADING IN SECURITIES – NOT LEVIABLE

CA. VIJAY ANAND

In RE: SPFL Securities Ltd. 2019 (27) G.S.T.L 95 (App. A.A.R. - GST), the applicant is engaged in the business of providing service of stock broking i.e. purchasing and selling of shares on behalf of the clients on exchange platform by virtue of being a recognized BSE/NSE appointed stock broker. An application was filed seeking advance ruling on the taxability of delayed payment charges on reimbursement of amount by client to applicant, where client failed to pay amount paid to Stock Exchanges for purchase of securities with T+1 (trading day plus one day) under SEBI Regulation norms and deducted by Stock Exchanges from the applicant's account being purchase consideration of securities which are neither GOODS nor SERVICE under GST. The authority held that the applicant is liable to pay GST on the delayed payment of charges which are overdue from the client towards trading of securities and reimbursed to them. Being aggrieved, the applicant filed an appeal before the appellate authority which observed as under:-

a. The issues placed before the authority was whether GST is payable on delayed payment charges collected by Appellant if a client makes delay (i.e. beyond T+1 statutory time limit for payment as per SEBI Regulations) in reimbursing the expense (being purchase consideration of the securities bought for client and already collected from appellant by Stock Exchange with T+1 time limit) to the appellant and the appellant charges a certain amount on delay of such reimbursement of expense, for securities purchased from the client.

b. Where the client makes delay (i.e. beyond T+ 1 statutory time limit for payment as per SEBI regulations)

in reimbursing the expense (being purchase consideration of the securities bought for client and already collected from stock broker by stock exchange with T+ 1 time limit) to the broker and broker charges amount on delay of such reimbursement of expense, for securities purchased from the client.

c. It is purely a deferment of liability only which arose since the payment was not made within the stipulated period of time by the client to the Stock Exchange for purchase of securities.

d. Therefore, since the service of buying and selling of securities which is exempted under GST, the corresponding delayed payment charges which are also linked to the above service of trading of securities should also stand exempt under GST.

e. The FAQ on the Banking, Insurance, Stock amended by the C.B.I & C. on 27-12-2018, needs to be taken into consideration, which clarified that the GST shall not be applicable on delayed payment charges.

Hence, the appellate authority ruled that the applicant is not liable to pay GST on the delayed payment charges on reimbursement of amount by client to applicant, where client failed to pay amount paid to Stock Exchange for purchase of securities with T+1 (trading day plus one day) under SEBI Regulation norms and deducted by Stock Exchange from Applicant account being purchase consideration of securities which are neither GOODS nor SERVICES under GST.

2. GST – ADVANCE RULING – ITC ON MOTOR VEHICLE FOR DEMO PURPOSE – USED FOR SALES PROMOTION AND THEREAFTER WRITTEN DOWN VALUE ON PAYMENT OF GST – NO BAR ON ITC

In RE: Chowgule Industries Pvt. Ltd. 2019 (27) G.S.T.L. 272 (A.A.R. - GST), the applicant is an authorised dealer for Maruti Suzuki India Limited for sale of motor vehicles and spares and for servicing as also for some other commercial vehicle manufacturers. The applicant purchases the demo vehicles from the supplier against tax invoices after paying taxes. Such vehicles are capitalized and are used in the course or furtherance of business. An application for advance ruling was filed as to whether Input Tax Credit on the Motor Vehicle purchased for demonstration purpose can be availed as credit on Capital Goods and set off against output tax payable under GST.

The authority observed as under:

a. The applicant purchases demo vehicles against tax invoices from the supplier after paying taxes. The demo vehicle is indispensable tools for promotion of sale by providing trail run to the customer.

b. The applicant capitalizes the purchase of such vehicles in the books of accounts. The capital goods which are used in the course or furtherance of business is entitled for input tax credit.

c. The input tax credit on the motor vehicles purchased for demonstration purpose can be availed as input tax credit on capital goods and set off against output tax payable under GST.

Hence, the authority held that Input Tax Credit on the motor vehicles purchased for demonstration purpose can be availed as credit on Capital Goods and set off against output tax payable under GST.

3. GST – ADVANCE RULING – SERVICES FOR MANAGEMENT OF NON-NETWORK TANKER WITH THE HELP OF GPRS PROVIDED BY 100% SUBSIDIARY OF NAGPUR MUNICIPAL CORPORATION – SUBSIDIARY IS AN AUTHORITY WITH CONTROL OR MANAGEMENT WITH MUNICIPAL FUNDS AND LOCAL AUTHORITY – EXEMPT UNDER SL.NO.3 OF NOTIFICATION NO.12/2017-C.T.(R)

In RE: Vidarbha Infotech Pvt. Ltd. 2019 (27) G.S.T.L 415 (A.A.R. - GST), the applicant is a contractor and was awarded a contract by the Nagpur Environmental Services Ltd (NESL) Nagpur, a 100% subsidiary of the Nagpur Municipal Corporation, Nagpur. The contract envisages providing services for the management of Non-Network Tanker with the help of GPRS system at Nagpur. An application was filed seeking advance ruling as to the whether the contract from NESL for providing services for the management of Non-Network Tanker with the help of GPRS system at Nagpur would be exempt from GST since it falls under the various exempt services in the article 243W of the Constitution of India as well as services rendered to a local authority?

The authority observed as under:

a. NESL is established as per Nagpur Municipal Corporation Act, 1948 Section 58(8) and thereby permitting corporation to implement their duty allotted by the Government through this body (NESL).

b. From the perusal of Government Resolution and various definition i.e. Government authority, Government Entity and Local authority and MOU,

it is clear that NESL is an authority with the control or management with Municipal Fund consequent to which NESL is a local authority as defined under section 2(69) of the CGST Act.

c. Arising out of the above, it can be the case that the applicant is providing pure services to local authority and is squarely covered by Entry no.3 of Notification No. 12/2017- CT (Rate) dated 28.06.2017.

Hence, the authority held that the contract from NESL for providing services for the management of Non-Network Tanker with the help of GPRS system at Nagpur would be exempt from GST since it falls under the various exempt services in the article 243 W of the Constitution of India as well as services rendered to a local authority.

4. GST – APPELLATE AUTHORITY FOR ADVANCE RULING – ITC – POST-PURCHASE DISCOUNT – NO NEED TO REVERSE PROPORTIONATE CREDIT

In RE: MRF Limited 2019 (27) G.S.T.L 578 (App. A.A.R. - GST), the appellant intended to enter into an arrangement with M/s. C2FO INDIA LLP (C2FO in short), for setting up an interactive automated data exchange which can be installed for data interaction relating to sale & purchase of goods and services between a buyer (the Appellant) and a supplier (any supplier of goods or input services of the appellant) in compliance to various ethical, accounting and business standards. Both the supplier and recipient of goods or services should register on the platform provided by C2FO. The goods and /or services are delivered and the invoice is booked in ERP and marked as approved to pay. The transactions are explained as follows:-

- Based on the defined schedule, C2FO outbound program will extract approved open invoices (remaining unpaid) and Supplier (vendor) data from SAP and transfer the data to C2FO cloud on AWS (Amazon Web Services).
- Data is first loaded to client SFTP (Secured File Transfer Protocol) staging area. Automated process picks up data from Secure Transfer of invoices Platform (SFTP) to C2FO AWS S3 cloud.
- Successfully discounted invoice data is sent back to client SFTP staging area.
- The supplier can place discount offer either as APR (Annual Percentage Rate) or flat discount on the C2FO platform 24x7.

- C2FO platform alerts Supplier Relationship Manager (SRM) on key trigger points such as supplier activity on the portal to engage with suppliers at the opportune moment.
- Client Finance team provide guidance on desired APR, minimum APR and cash pool. C2FO algorithms will use these settings to take a decision on which invoices are awarded for early payment by client.
- By accepting C2FO's Terms and Conditions, the Supplier will be agreeable to offer certain discount in return for an early payment of an Invoice from the recipient of goods or services (i.e., the appellant).
- On the online platform C2FO, where post sale, post supply and post issue of invoice depending on the early payment schedule offered by the supplier, the buyer (appellant) can accept discount and make payment. Then a commercial credit note would be issued. The payment would be made one time for each invoice at the discounted price along with the GST paid by the Supplier on the undiscounted value.

An application was filed seeking advance ruling as to whether when GST is paid on full value by supplier and credit note does not include GST, they can take full ITC on undiscounted value. The Original Authority held that as per Section 16 of the CGST Act 2017/TNGST Act 2017, the applicant can avail input tax credit only to the extent of the invoice value raised by the suppliers less the discounts as per C2FO software which is paid by him to the suppliers. On appeal, the appellate authority observed as under:-

a. The appellant intends to enter into an arrangement with C2FO for setting up an interactive automated data exchange which can be installed for data interaction relating to sale & purchase of goods and services between a 'buyer (appellant) and a 'supplier' (any supplier of goods or input services of the appellant). By entering into the platform, the supplier will be agreeable to offer certain discount in return for an early payment of an invoice.

b. The quantum of discount offered is not known at the time of supply of goods/ services and therefore a "cash discount not agreed before or at the time of supply". It is the contention of the appellant that the taxable value for the purpose of payment of GST will be the value as per purchase contract without considering such discount so offered and the supplier is liable to pay tax on the value before discount.

c. The appellant is in agreement with this end of the transaction relating to what constitutes the value on which GST is to be paid. It is further seen that the discount offered through the transactions on the said platform is settled through commercial credit notes only.

d. The point of contention is that the appellant claims to be eligible for the entire undiscounted GST paid by the supplier while the original authority has ruled that the appellant will be eligible only to the credit proportionate to the amount of value paid by them (i.e. the discounted price), even though the appellant has stated to pay the entire GST raised in the Invoice (i.e., tax on the undiscounted price).

e. The Supreme Court in the case of Commissioner of Customs (Import), Mumbai v. Dilip Kumar & Company [2018 (361) E.L.T. 577 (S.C.)], has spelt out in detail as to how to Interpret the Statute, wherein in Para 26 has stated as under:

f. Section 9 makes it clear that GST shall be levied on the value as determined under Section 15 of the Act.

g. Section 15(1) states that the value of supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply to unrelated recipients.

h. Section 15(3) is critical in determining the value of goods where discounts are involved. As per the subsection the value of the supply shall not include any discount which is given, before or at the time of the supply if such discount has been duly recorded in the invoice issued in respect of such supply and in case the discount is given after the supply has been effected, if such discount is established in terms of an agreement entered into at or before the time of such supply and specifically linked to relevant invoices.

i. Furthermore the input tax credit as is attributable to the discount on the basis of document issued by the supplier has been reversed by the recipient of the supply.

j. None of these conditions are satisfied in the matter under reference since the proposed discount would not be recorded in the invoice issued in respect of such supply and in case of the discount given after the supply has been effected, it is not established in terms of an agreement entered into at or before the time of such supply nor is the input tax credit as is attributable to the discount proposed to be reversed by the appellant who is the recipient of the supply.

k. Hence, the value would continue to be the value as determined under section 15(1), on which GST has been charged.

l. A conjoint reading of Sections 15 and 16 leads to the conclusion that a registered person is entitled to take full credit of the input tax charged on the supply of goods or services or both. The provisions of the second proviso to section 16(2) would come into play only where the buyer/ recipient fails to pay the supplier of goods the amount towards the value of the supply. This is not the situation here.

m. The buyer has discharged the GST charged on the undiscounted transaction value at the time of supply. In the circumstances, if the GST charged and paid is not reversed/ refunded in whole or part subsequently in any manner or circumstances, the credit availed on the same need not be reversed.

Hence the Appellate Authority held that the appellant can avail the Input Tax Credit of the full GST charged on the undiscounted supply invoice of goods/ services by their suppliers and that the proportionate reversal of the credit is not required to be done by them in case of a post purchase discount given by the supplier to them through the C2FO platform, subject to their fulfilling the other conditions stipulated by law and that the GST paid by them for the said goods/ service is not reversed or reimbursed/ re-credited etc. to them in any manner by the supplier or on his behalf, after the credit has been availed by M/s. MRF.

5. SERVICE TAX – SALE AND SUPPLY OF MUD AND SALE OF STATIONERY AND TEXT BOOKS – NOT SERVICES

In Bhuvnesh Shukla V. C. C. Ex & S. T., Lucknow, 2019 (27) G.S.T.L 693 (Tri.-All), the adjudicating authority confirmed the demand on the appellant on the basis of information provided by Income Tax Authorities on account of sale and supply of mud to M/s Imaging Enterprises @ Rs.263/ - per Cubic-meter & sale of stationery. On appeal, the appellate authority observed as under:-

a. The adjudicating authority has relied on work order dated 05.10.2011 to arrive that there is allotment of one year work at their site @ Rs.263/- per cubic-meter consequent to which there was a conclusion that the same is not for sale and supply of mud, inasmuch as, the quantity of mud does not stand specified in the said contract.

b. A perusal of the invoices issued by the appellant which are primarily for sale and supply of mud, which activity cannot be termed as service & that there is no justification for confirmation of demand on the said count.

c. A part of the demand stands confirmed in respect of stationery items supplied by the appellant to St. Anthony's Sr. Secondary School. The lower authorities have observed that the appellant could not produce any evidence that the said receipt of Rs.54,725/- from St. Anthony's Sr. Secondary School was on account of supply of stationary and text books. This demand cannot be upheld in as much as the revenue has also not produced any evidence to show that such receipt of amount was on account of any services provided by the appellant. Sale of stationery of text books etc. cannot by any such of imagination be considered as service liable to tax.

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

6. SERVICE TAX – TRANSFERRABLE DEVELOPMENT RIGHT – NOT COVERED UNDER SERVICE TAX

In DLF Commercial Projects Corporation V. CST, Gurugram, 2019 (27) G.S.T.L. 712 (Tri. - Chan.), the appellant is engaged in the business of construction and development of integrated township and registered with the Service Tax department. The adjudicating authority confirmed the demand on the transfer of land development rights. On appeal, the tribunal observed as under:

a. M/s DLF Ltd have given a sum of Rs. 1423.83 Crores to the appellant for purchase of land and the said amount has been paid by the appellant to various land owning company (LOCs). The activity of the appellant would have been started only after acquisition of land and thereafter to procure NOC from the various Govt. Authorities and thereafter development activities on the land.

b. The agreement does not say that the appellant has actually transferred the development rights but is futuristic in nature when it states that on the acquisition of land, the appellant shall transfer the development rights to M/s DLF Ltd.

c. It is evident that the appellant never remained the owner of the land at the time of receiving the advance from M/s DLF Ltd. against purchase of land by the appellant which disentitles him from transferring the land development right to M/s DLF Ltd.

d. Therefore, it is mere transaction of the sale and purchase of land or purchase of land by the appellant for DLF Ltd. for further development. In view of the fact that the appellant did not get any ownership of the land, the transfer of development right does not arises.

e. There is no such agreement placed on record that any LOCs (who are the owner of the land) has transferred any development rights to the appellant. If so, how much the consideration paid by the appellant and in that circumstances, the land owning company (LOCs) are liable to pay service tax.

f. LOCs were neither issued show cause notice and nor made the party to the show cause notice in question. In such a situation, the question of transfer of development right by the appellant does not arise.

g. When the land-owning company transfers land development rights to the developers, the developers gets the right to not only to develop project on such land but also the right to sell such developed property along with undivided interest in the land underneath and to receive payments for such transfers from the buyers. Once the land-owning companies' transfers the land development rights to developer for a consideration, it is obligated to transfer the undivided interest in the land in favour of developer's buyers for which no separate consideration is paid for it. In other words, such transfer of undivided interest in the land by the land-owning company is in return of the initial consideration paid by the developer to it for transfer of land development rights only.

h. Thus, it is the ownership of the land, which stands transferred effectively by the land-owning company in return of consideration payable by the developers.

i. The moment it is either land or "benefits arise out of land", it goes outside the purview of "service" as defined in Section 65B (44) of Finance Act, 1994.

j. Under the Development Agreement dated 05.12.2006, it is stated that there would be transfer of Development Rights in future and the Developer were permitted to carry out the developmental activities as per the Development Agreement, wherein the developer is permitted to enter the scheduled property for carrying out developmental activities.

k. After the developmental activities have been carried out, Sale Deed is executed among the three parties namely Landowner, Developer and the Purchaser under which the title to the undivided portion of the land is transferred to the various vendees/

purchasers from time to time as and when the Conveyance Deed/Sale Deed is executed in future.

l. It is not only the possession, which stood transferred with the right to use, enjoy and construct building/ super structure, but, the undivided right, title and interest in the land also stand transferred under the Deed of Conveyance on which stamp duty has been paid and the Deed of Conveyance has been registered before the Sub-Registrar.

m. From the above, it is a factual aspect of the case that the amount remitted by M/s DLF Ltd to the appellant is towards the acquisition of land by the LOCs which the said payment received from M/s DLF. Ltd was transferred to LOCs for acquisition of land. Further, no physical acquisition of land was taken over by the appellant.

n. Consequently, the appellant have no right to transfer land development to M/s DLF Ltd. in a situation when no land development right to M/s DLF Ltd. or its subsidiary nominees etc.

o. In the case of Shadoday Builders Private Ltd. and Ors. V. Jt. Charity Commissioner and Ors. (Supra) it has been held that transferrable development right is immovable property consequent to which the transfer of development rights in the case in hand is termed as immovable property in terms of Section 3 (26) of General Clauses Act, 1897 and no service tax is payable as per the exclusion in terms of Section 65B (44) of the Finance Act, 1994.

p. Furthermore, the query was made to the Revenue by the trade organization as well as M/s DLF Ltd whether they are liable to pay service tax on transfer of development right of land or not and the same was not answered till yet which means revenue itself is not clear whether the said activity is taxable service or not consequent to which the extended period of limitation is not invokable and it cannot be said that the appellant did not pay service tax with mala fide intentions.

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

(The Author is a Chennai Based Chartered Accountant in practice. He can be reached at reachanandvis@gmail.com)

DEPARTMENTAL AUDIT UNDER GOODS AND SERVICES TAX LAW

CA. DEBASIS NAYAK

Audit by the tax department has played a vital role in Revenue augmentation and a check on the frauds by the miscreants. Audit examines the declaration of taxpayers to not only test the accuracy of the declaration and reconciliations but also evaluate the creditability of self-assessed liability and level of tax compliant in accordance with the provisions of law. While the tax payers have already experienced the audit under the earlier indirect tax regime, GST is a complete new tax and the approach of the auditor also going to be different.

The main objective of the audit is to discover and stop taxpayer from continuing to under declare or manipulate their tax liability or defeat the provisions of law. Inspite of the established provisions for audit in earlier regime, various courts have held Rule 5A (2) of Service Tax Rules, 1994 is ultra vires to the Finance Act, 1994. The final disposal of outcome is pending with Supreme Court.

Similar to erstwhile regime, there are 2 types of audits under GST Law, 2017:

1. Specific Audit "under Sec.65 of CGST Act, 2017
2. Special Audit" under Sec.66 of CGST Act, 2017.

However before going into the specific provision of audit, it is worthwhile to understand the meaning of "Audit" as defined in Section 2(13) of CGST Act, 2017 as:

- ***Examination*** of records, returns and other documents maintained or furnished by the registered person under this Act or the rules made thereunder or under any other law for the time being in force;
- To ***verify*** the correctness of ***turnover*** declared, ***taxes*** paid, ***refund*** claimed and input tax ***credit*** availed, and
- To ***assess*** his compliance with the provisions of this Act or the rules made thereunder

The audit is defined first time in the history of indirect taxation. Perusal of the definition made it very clear that its impact is very wide and far reaching.

In this article, we are going to discuss only Section 65 which deals with ***"Audit by Tax authorities".***

Section 65 read with rule 101 of CGST rules, 2017

Section 65 is the enabling provision to commence the audit by the departmental officer. In this regard, we have presented the key clauses of act and rules in tabulated format as below:

Particulars	Description
Authorized person to conduct the audit	Commissioner or any other person authorized by him
Frequency of Audit	Financial Year or part thereof or multiples thereof
Notice for conducting audit	15 days prior to conduct of audit in Form GST ADT-1
Location of Audit	Audit may be conducted at the place of business of the registered person or in their office
Timelines for completion of audit	Within three months from the date of commencement of audit. Commissioner may extend to further period of six months.
Requirement	Verify the books of accounts and other documents as he may require
Completion of Audit	On conclusion, officer to inform within 30 days about the finding and his rights and obligation and the reasons of such finding in Form GST ADT-02
Issuance of Notice under Sec 73 or 74	On detection of tax not paid or short paid or erroneously refunded, or input tax credit wrongly availed or utilized

A. The Department has not started audit as the due date of filing of annual return (GSTR-9/9A) and reconciliation statement (GSTR-9C) gets extended which is the trigger point for commencement of audit. In this regard, as a proactive measure, Directorate General of Audit ("DGA") vide F.No. 381/49/2019 dated June 25, 2019 has issued ***"Audit Plan for the FY 2019-2020".*** We have summarized below the few key points from the Audit plan:

1. Audit will be conducted based on Risk Assessment Programme where the Directorate General of Analytics and Risk Management (DGARM) provides the list of the taxpayers with risk scores.

2. Taxpayers would be bifurcated between Large, Medium and Small based on turnover

- Large –Turnover of more than 40 crores
- Medium – Turnover between 10 to 40 crores
- Small – Turnover below 10 crores

3. List of taxpayers would include risk flag indicators along with action points

4. Feedback mechanism to evaluate the efficacy of risk parameters

5. Desk based audit for small taxpayers instead of premise based audit

6. Notice and audit finding has to be issued manually till audit manual in CBIC-GST system becomes operational.

With regard to this, Directorate General has arrived approximate number of audits in each category that can be conducted by each Audit Commissionerate. Further to this DGA has issued indicative list of risk parameter for selection of units for audit. The indicative list is enumerated below:

- Form of legal entity (i.e. company/ partnership)
- Taxpayer was not previously audited or length of time since last audit;
- Size of taxpayer's turnover, losses, refund, net profit, exemptions
- Ratio of expenses/ turnover or turnover/ total assets, expected supplies/ Total Supplies
- Size of income from risk activities (i.e. real estate income)
- Legal disputes returns previously investigated for evasion,
- Notices from other Government agencies;
- Sector specific taxpayer
- Number of branches, activities
- Return filing
- Number of E-way bills generated

B. In addition to this, DGA have issued detailed "**Goods and Services Tax Audit Manual 2019" ('Audit Manual')** in July 2019 covering objectives and principles of audit, management of GST audit, selection of registered person, preparation, verification, audit report, follow up and soles and responsibilities in delivering high standard output. The audit manual is available in public domain. This is similar to the audit manuals issued under the erstwhile regime.

Highlights of Audit Manual are as under:

1) Formation of Audit Commissionerates and change in roles of officers. In this regard, necessary changes have been carried out with regard to the designations of officers.

2) The norms for selection of units for conducting audit were revised and it will be based on risk parameters, days for audits and formation of audit parties.

3) The audit process beginning from the Assessee Master File, desk review, revenue risk analysis, trend analysis, gathering of information, evaluation of internal controls, scrutiny of annual financial statement, audit plan, audit verification, working papers, apprising the Taxpayer about irregularities noticed and ending with suggestions for future compliance have been streamlined

4) Separate Annexures have been prepared containing detailed verification checks pertaining to GST.

DGA have issued a detailed Audit Manual which is very exhaustive and include almost all the factors to be taken care off by the officers to carry out the effective, efficient and hassle-free audit. In the earlier regime, the audit party was seeking data before conducting the audit but under GST regime the audit party will come with lot of data and analysis of such data. The taxpayer will be expected to clarify the issues raised by the audit party with a specific timeline. Therefore, the taxpayers should be very clear on the various tax positions taken by their company and be ready with various reconciliation with declaration made under corporate laws.

(The Author is a Chennai based Chartered Accountant. He can be reached at debasis.nayak@pwc.com)

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

CA. VIVEK RAJAN V

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

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

Scope of the Discussion Paper

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

An Attempt

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

Acronym and Description

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

1. Rollback of Surcharge- Para 3 of our Discussion Paper of August 2019

After many representations and in order to encourage investment in the capital market, the CG vide press release dated 24th August 2019 withdrew the enhanced surcharge on income arising from transfer of equity share/ unit u/s 111A and 112A.

The following are the capital assets mentioned in Section 111A and Section 112A of the Act

a. Equity shares in a company

b. Unit of an equity oriented fund and

c. Unit of a business trust

In the case of FII's / FPI's, the derivatives are treated as capital assets and the gains arising from the transfer of the same is treated as capital gains and subjected to special rate of tax u/s 115AD. The tax payable u/s 115AD shall also be exempted from the levy of enhanced surcharge

2. Mandating acceptance of payments through prescribed electronic modes- Insertion of Section 269SU

With effect from 01st November 2019 and will apply from AY 2020-21 onwards

Present scenario and reference to Explanatory Memorandum

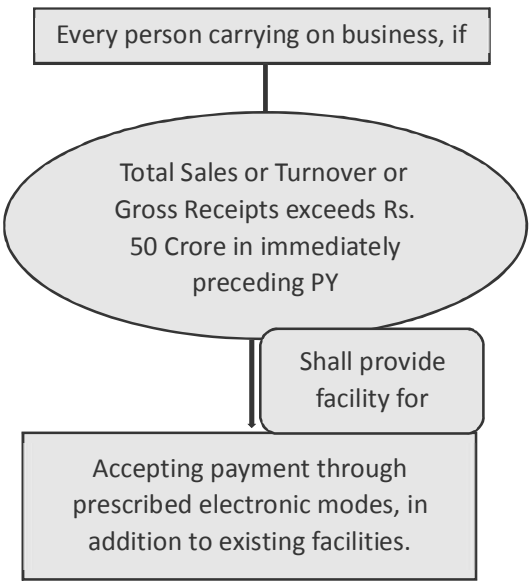
The facility to accept payment through the prescribed electronic modes is not available with all business entities. In this background and in light of the following objectives of the CG, the following section has been inserted

a. To move towards less cash economy

b. To reduce generation and circulation of black money

c. To promote digital economy

Amendment



Consequential amendments have also been proposed to Payment and Settlement Systems Act, 2007 so that no bank or system provider imposes a charge upon anyone for using the electronic modes of payment prescribed Section 269SU.

3. Mandating acceptance of payments through prescribed electronic modes – Penalty for failure to - Insertion of 271DB

With effect from 01st November 2019 and will apply from AY 2020-21 onwards

Reference to Explanatory Memorandum

To ensure more compliance with the provisions of Section 269SU (mentioned above), the section is proposed

Amendment

If there is failure to comply with the provisions of Section 269SU, then every person shall be liable to pay a penalty of **Rs. 5,000** for every day for the period of such failure.

Penalty is not leviable if there is good and sufficient reasons for such failure. Penalty can be imposed by the Joint Commissioner of Income-tax.

4. Encouraging other electronic modes of payment- Amendment of Section 269SS

With effect from 01st September 2019 and will apply from AY 2020-21 onwards

Present scenario and reference to Explanatory Memorandum

Section 269SS prohibits a person from taking or accepting from a depositor any loan or deposit or any specified sum equal to Rs. 20,000 or more otherwise than by an account payee cheque or an account payee bank draft or by use of electronic clearing system through a bank account.

Amendment

"Any other electronic mode of payment as may be prescribed" has been included in the scope of Section 269SS.

5. Encouraging other electronic modes of payment- Amendment of Section 269ST

With effect from 01st September 2019 and will apply from AY 2020-21 onwards

Present scenario and reference to Explanatory Memorandum

Section 269ST of the Act prohibits a person from receiving an amount of rupees two lakh or more in aggregate from a person in a day or in respect of a single transaction or in respect of transactions relating to one event or occasion from a person otherwise than by an account payee cheque or an account payee bank draft or by use of electronic clearing system through a bank account.

Amendment

"Any other electronic mode of payment as may be prescribed" has been included in the scope of Section 269ST.

6. Encouraging other electronic modes of payment- Amendment of Section 269T

With effect from 01st September 2019 and will apply from AY 2020-21 onwards

Present scenario and reference to Explanatory Memorandum

Section 269T of the Act prohibits specified persons from repaying any loan or deposit made with it or any specified advance received by it, in any mode other than by an account payee cheque or an account payee bank draft or by use of electronic clearing system through a bank account, if the amount being repaid is Rs.20,000 or more.

Amendment

"Any other electronic mode of payment as may be prescribed" has been included in the scope of Section 269T.

7. Rationalisation of provisions relating to claim of refund- Amendment of Section 239

With effect from 01st September 2019 and will apply from AY 2020-21 onwards

Present scenario and reference to Explanatory Memorandum

Section 239 provides that every claim of refund under Chapter XIX of the Act shall be made in the prescribed form and verified in the prescribed manner. The amendment is intended to simplify the procedure for claim of refund.

Amendment

Every claim for refund under Chapter XIX of the Act shall be made by furnishing return in accordance with the provisions of Section 139 of the Act.

The sub-section (2) which dealt with the time periods for the refund claim in certain scenarios has been omitted.

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

EXCEL TIPS

Restricting Duplicate Values

CA DUNGAR CHAND U JAIN

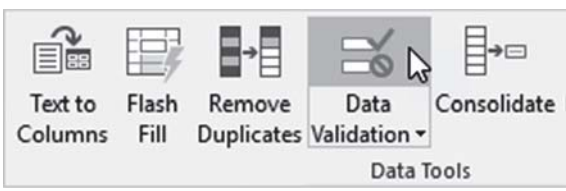
Many a time, we want to restrict the duplication values / entries in a set of data. Where the same can be found out using various techniques in Excel and analysed, It is always better if we can restrict the same at the time of entering of the data itself.

The same can be achieved by using Data Validation with Countif function.

For instance, there are invoice numbers to be typed in A Column as in the illustration below.

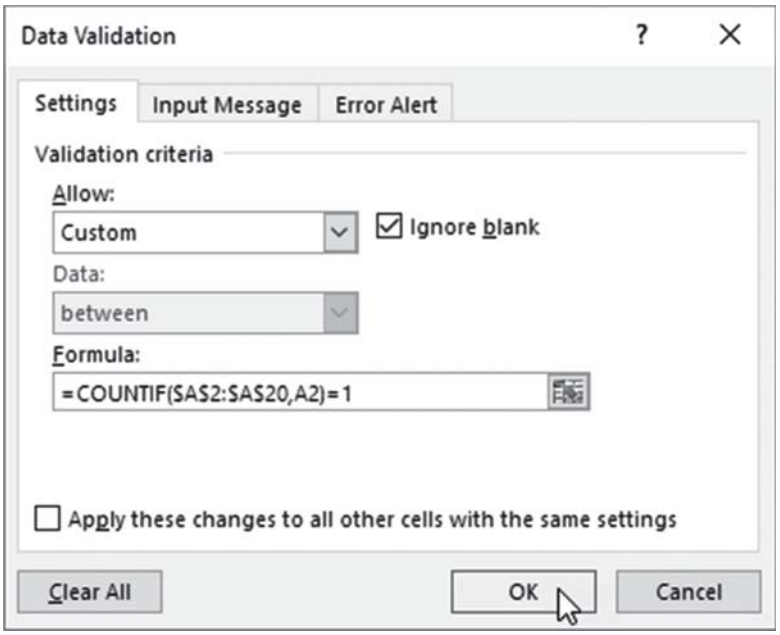
	A	B
1	Invoice Number	
2	1001	
3	1003	
4	1005	
5	1007	
6	1011	
7	1012	
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		

On the ribbon, under the Data Tab, we need to select the Data Validation



This will open a dialog box as follows.

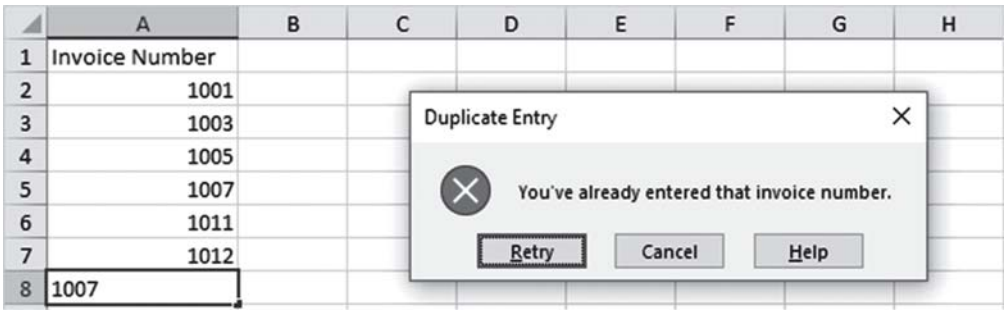
Under Setting tab, In the Allow list, click Custom. Thereafter in the Formula box, enter the formula **=COUNTIF($A$2:$A$20,A2)=1** and cl\k OK.



=COUNTIF($A$2:$A$20,A2) counts the number of values in the range A2:A20 that are equal to the value in cell A2.

This value may only occur once (=1) since we don't want duplicate entries. Because we selected the range A2:A20 before we clicked on Data
Validation, Excel automatically copies the formula to the other cells. Also, we created an absolute reference ($A$2:$A$20) to fix this reference.

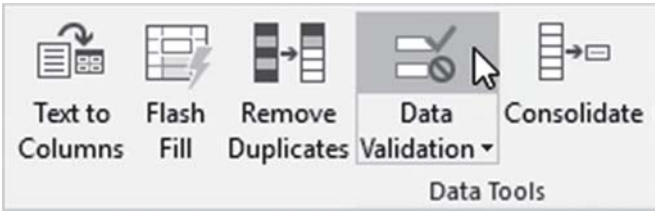
In A8, We type an invoice number which is already there in the list say, **1007**



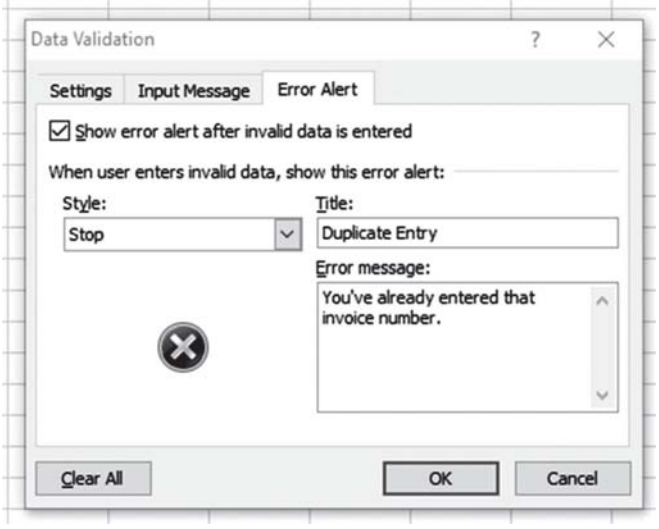
Excel shows an error alert. "You've already entered that invoice number."

Note : There is as standard error alert "The Value you entered is not valid.

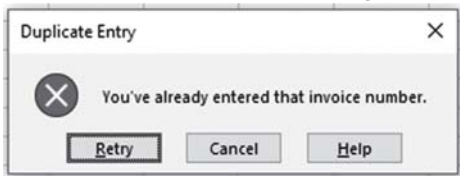
We can customise the Error alert to make it more relevant. The same is done as follows: On the ribbon, under the Data Tab, we need first click on the Data Validation



and then select the **Error Alert** Tab. Under ***Title,*** we can add heading as "Duplicate Entry" and under ***Error Message,*** we can add "You've already entered that invoice number." Click Ok once done.



This will result in providing a customized error.



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

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

CA. CS. DHANAPAL

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

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

S.NO.	SECTION NUMBER AND HEADING	NATURE OF CHANGE	IMPACT OF THE AMENDMENT
1.	2(41) – **Definition of Financial Year**	Substitution of first proviso to Section 2(41)	• The authority to permit a company to follow a different financial year has been changed from NCLT to Central Government. • Form and manner of making application to the Central Government has been prescribed by way of Rules. • Pending applications before NCLT as on 02.11.2018 to be disposed by NCLT in accordance with provisions in force prior to the amendment.

<table>
<tr>
<td>.</td>
<td>10A – Commencement of Business, etc.</td>
<td>Insertion of new Section 10A</td>
<td>

Requirement of filing 'commencement of business' with ROC has been re-introduced. The Companies Act, 2013, at the time of its inception, had provision for same in Section 11 which was later deleted by virtue of the Companies (Amendment) Act, 2015. The requirement has been re-introduced now.
It shall be applicable only for companies incorporated on or after 02.11.2018 and having share capital.
Company cannot commence business and exercise any borrowing power unless

✓ Director files a declaration with ROC within 180 days that the subscription money has been brought in, and
✓ Company files verification of registered office with ROC as per Section 12(2).

Form and manner of making the declaration by director will be prescribed by way of Rules.
Penalty for default:

<table>
<tr><th>Company</th><th>Officer in Default</th></tr>
<tr><td>Rs. 50,000/-</td><td>Rs. 1,000/- per day during which default continues up to maximum of Rs. 1,00,000/-</td></tr>
</table>

ROC may initiate action for removal of name of company from the Register of Companies if the director fails to file the declaration within 180 days.

</td>
</tr>
<tr>
<td>3</td>
<td>12 – Registered Office of Company</td>
<td>Insertion of new sub-section (9) in Section 12</td>
<td>

ROC may initiate action for removal of name of company from the Register of Companies if, on a physical verification by the ROC, company is found not to be maintaining a proper registered office capable of receiving and acknowledging all communications and notices as may be addressed to it.

</td>
</tr>
</table>

4	14 – Alteration of Articles	Substitution of second proviso in sub-section (1) of Section 14 Amendment of sub-section (2) of Section 14	• The authority to permit conversion of a public company to private company has been changed from NCLT to Central Government. • Form and manner of making application to the Central Government for the above purpose has been by way of Rules. • Pending applications before NCLT as on 02.11.2018 to be disposed by NCLT in accordance with provisions in force prior to the amendment.
5	90 – **Register of significant beneficial owners in a company**	Insertion of new sub-section 4A and amendment of sub-section (11) Substitution of Section 90(9) Insertion of new sub-section 4A	• Every company needs to take necessary steps to identify an individual who is a significant beneficial owner in relation to the company and require him to comply with the provisions of section 90. Penal provision is applicable on company in case of failure in compliance. (To be notified) • Sub-section (9) provides for making of application by the Company / aggrieved person to NCLT for lifting / relaxation of any restriction imposed by the NCLT on securities of the Company for which details of beneficial holding was not forthcoming / sufficient. By virtue of this amendment, a period of 1 year has been prescribed as the time limit within which such application may be made and not beyond that. If no application is filed during such time, such shares will be transferred to IEPF in the manner to be prescribed. (In force Since 2nd day of November, 2018) • The Central Government is empowered to make Rules for Section 90.

6.	132 - Constitution of NFRA	Insertion of new sub-sections 1A, 3A & 3B Amendment of sub-section (4)	• NFRA shall perform its functions through divisions wherein each division shall be presided over by the Chairperson or a full-time Member authorised by the Chairperson. There shall be an executive body of the NFRA consisting of the Chairperson and full-time Members of such Authority for efficient discharge of its functions under sub-section (2) [other than clause (a)] and sub-section (4). • In case of proven professional or other misconduct, NFRA shall have power of debarring the member or the firm from— I. being appointed as an auditor or internal auditor or undertaking any audit in respect of financial statements or internal audit of the functions and activities of any company or body corporate; or II. performing any valuation as provided under section 247, for a minimum period of six months or such higher period not exceeding ten years as may be determined by the NFRA.

7	**135 – CSR**	Amendment of sub-section (5) and insertion of sub-section (6)	• In case of companies for which CSR is applicable and which have not completed 3 years since incorporation, the average net profit for CSR spending shall be computed based on immediately preceding financial years of existence of such companies. • In case of CSR amount remaining unspent with Companies: ✓ Where the unspent amount relates to any ongoing project referred to in sub-section (6) undertaken by a company in pursuance of its CSR Policy, and where specified conditions are met, the company shall transfer such amount within a period of 30 days from the end of the financial year to a special account to be opened by the company in that behalf for that financial year in any scheduled bank to be called the Unspent Corporate Social Responsibility Account, and such amount shall be spent by the company in pursuance of its obligation towards the CSR Policy within a period of 3 financial years from the date of such transfer, failing which, the company shall transfer the same to a Fund specified in Schedule VII, within a period of 30 days from the date of completion of the 3rd financial year. ✓ Where the unspent amount does not relate to any ongoing project referred to in sub-section (6), the company shall transfer such unspent amount to a Fund specified in Schedule VII, within a period of 6 months of the expiry of the financial year.
		Insertion of sub-section (7)	• Penalty for contravention of sub-section (5) / (6) - the company shall be punishable with fine which shall not be less than Rs. 50,000/- but which may extend to Rs. 25 Lakhs and every officer of such company who is in default shall be punishable with imprisonment for a term which may extend to 3 years or with fine which shall not be less than Rs. 50,000/- but which may extend to Rs. 5 Lakhs, or with both.
		Insertion of sub-section (7)	• Central Government is empowered to issue general or special directions to a company or class of companies as it considers necessary for compliance of Section 135.

8	248 – Power of Registrar to Remove Name of Company from Register of Companies	Amendment of Section 248	• Additional grounds for removal of name of company introduced as below: ✓ The subscribers to the Memorandum have not paid the subscription which they had undertaken to pay at the time of incorporation of a company and a declaration to this effect has not been filed within one hundred and eighty days of its incorporation under sub-section (1) of section 10A ✓ The company is not carrying on any business or operations, as revealed after the physical verification carried out under sub-section (9) of section 12.
9	441 – Compounding of certain offences	Amendment of Section 441	• The monetary limit of fine upto which offences may be compounded by RD has been enhanced from Rs. 5 Lakhs to Rs. 25 Lakhs. • The requirement of seeking permission of Special Court for compounding of any offence which is punishable under the Act, with imprisonment or fine, or with imprisonment or fine or with both has been omitted.

(The Author is a Chennai Based Company Secretary in practice. He can be reached at csdhanapal@gmail.com)

THE TAXATION LAWS (AMENDMENT) ORDINANCE 2019 - MAJOR CHANGES MADE THEREON

CA. E. CHAITANYA

The Hon'ble Union Finance Minister, in order to provide a boost to the sluggish economy, reduced the rate of taxation for domestic companies. Effective rate of taxation applicable to domestic companies were reduced from 34.94% to 25.17%. Additionally, for new domestic companies intending to carry out manufacturing, the effective rate of taxation has been further reduced to 17.16%. The present effective tax rate of 17.16% is believed to the lower than several East Asian countries and is expected to improve inbound investment from several multinational Corporates.

The intention of the Union Finance Ministry is to provide the necessary impetus to the corporates to make India a competing business place than China and several other Asian countries. The Government hopes that the incentives would bring investments in Make in India, boost employment and economic activity, leading to more revenue.

The above announcement of the Hon'ble Finance Minister was received on a positive note by the Corporate Sector. Following the announcement, Taxation Laws (Amendment) Ordinance 2019 was passed on 20th September 2019.

This article highlights the significant changes made by the Taxation Laws (Amendment) Ordinance 2019 and its impact on other provisions of the Income Tax Act 1961.

The Taxation laws (Amendment) Ordinance 2019 introduces two new sections i.e., Section 115BAA and Section 115BAB into the statute books. Both the sections aim to reduce the tax rate applicable to domestic companies, subject to certain conditions.

A comparison of the existing Sec 115BA and the newly introduced Sec 115BAA and Sec 115BAB is tabulated below,

S. No	Particulars	Sec 115BA	Sec 115BAA	Sec 115BAB
1	Effective Date	AY 2017 -18 and all subsequent assessment years	AY 2020-21 and all subsequent assessment years	AY 2020-21 and all subsequent assessment years
2	Title	Tax on income of certain Domestic *Manufacturing* Companies	Tax on income of certain Domestic Companies	Tax on income of certain new Domestic *Manufacturing* Companies

3	Rate of Tax (Excluding SC and Ed. Cess)	25%	22%	15%
4	Deductions excluded from the Scope of section	Excluded Deductions are as follows, 1. Sec 10AA, Sec 32(1)(iia) Sec **32AC**, Sec 32AD, Sec 33AB, Sec 33ABA, Sec 35(1)(ii), Sec 35(1)(iia) Sec 35(1)(iii) Sec 35(2AA) Sec 35(2AB), **Sec 35AC**, Sec 35AD, Sec 35CCC, Sec 35CCD or Deductions stated in heading C of Chapter VI-A excluding Sec 80JJAA 2. Losses (on account of deduction arising from above sections) carried forward from earlier years NOT available for Set-off 3. Depreciation under Sec 32 except additional depreciation under Sec 32(1)(iia)	Excluded Deductions are as follows, 1. Sec 10AA, Sec 32(1)(iia), Sec 32AD, Sec 33AB, Sec 33ABA, Sec 35(1)(ii), Sec 35(1)(iia) Sec 35(1)(iii) Sec 35(2AA) Sec 35(2AB) Sec 35AD, Sec 35CCC, Sec 35CCD or Deductions stated in heading C of Chapter VI-A excluding Sec 80JJAA 2. Losses (on account of deduction arising from above sections) carried forward from earlier years NOT available for Set-off 3. Depreciation under Sec 32 except additional depreciation under Sec 32(1)(iia)	Excluded Deductions are as follows, 1. Sec 10AA, Sec 32(1)(iia), Sec 32AD, Sec 33AB, Sec 33ABA, Sec 35(1)(ii), Sec 35(1)(iia) Sec a35(1)(iii) Sec 35(2AA) Sec 35(2AB), Sec 35AD, Sec 35CCC, Sec 35CCD or Deductions stated in heading C of Chapter VI-A excluding Sec 80JJAA 2. Losses (on account of deduction arising from above sections) carried forward from earlier years NOT available for Set-off 3. Depreciation under Sec 32 except additional depreciation under Sec 32(1)(iia)

5	Availing of Option	Option to be exercised before the due-date (as specified under Sec 139(1)) of filing of Return of Income	Option to be exercised before the due-date (as specified under Sec 139(1)) of filing of Return of Income	Option to be exercised before the due-date (as specified under Sec 139(1)) of filing of Return of Income
6	Withdrawing of Option	Withdrawal permitted ONLY IF assessee opts for Sec 115BAB. Otherwise withdrawal of option is not permitted	Withdrawal from applicability of section is not permitted	Withdrawal from applicability of section is not permitted
7	Applicability of MAT	Applicable	Not Applicable	Not Applicable
8	Date of registration of company	Registered on or after 1st March 2016	Not Applicable	Registered on or after 1st October 2019 and commenced manufacturing on or before 31st March 2023

The other important points for consideration with respect to the introduction of amendments in Tax Law (Amendment) Ordinance 2019 are as follows,

a) Title of three "beneficial-rate" sections:

The Section 115BA is in the Statute books from AY 17-18 onwards. The original title of the section has been changed from "Tax on income of certain domestic companies" to "Tax on income of certain domestic manufacturing companies". Title of Sec 115BAA is "Tax on income of certain domestic companies" and Sec 115BAB is titled as "Tax on income of certain new domestic manufacturing companies".

Section 115BA and Sec 115BAB are meant only for domestic manufacturing companies, as contained therein in the respective sections. Applicability of each section depends on the date of registration and setting up of such companies. Question that arises from a comparison of titles is, whether Sec 115BAA is meant to cover only companies other than those covered by Sec 115BA and Sec 115BAB or is it meant to cover all domestic companies irrespective of their coverage under either Sec 115BA or Sec 115BAB.

The Press Note dated 20th September 2019 issued by the CBDT states that "in order to promote growth and investment", lower rate of tax for companies (which is 22%) has been prescribed. The press note further states that the section 115BAA allows any domestic company to avail the option of beneficial tax rate of 22%.

So, the existence of the words "any domestic company" together with the intent of the law maker which is to promote growth and investment, go to show that the provisions of Sec 115BAA is available to all daomestic companies including existing manufacturing companies.

urther, it a generally accepted rule that no word can either be added or subtracted while interpreting a section. Marginal Notes and headings to a section are not decisive in interpreting a substantive provision of law but in case of doubt, they can be relied upon as one of the aids for construction.

So, there is nothing in the Section to prohibit existing domestic manufacturing companies from taking benefit of provisions of Sec 115BAA.

b) Hopping between three sections:

The three sections (being Sec 115BA, 115BAA and Sec 115BAB) are mutually exclusive in nature. Further, a company availing the benefits of one section cannot opt out of that section in any of the subsequent assessment years. Option once exercised is final and no reverting back is permitted.

If a company fails to comply with the conditions mentioned in the respective sections, the company is not entitled to beneficial rate even if it the option is exercised properly. Consequently, tax at the rate of 25%/30%, as mentioned in the finance act, will be applicable and not the beneficial rate.

However, section 115BA treats an option exercised under that section as withdrawn if the company opts for Sec 115BAB in accordance with the prescribed rules, before the due date of filing of Return under Sec 139(1). So, a company can effectively

opt out of Sec 115BA provided it is opting for Sec 115BAB but not vice versa. Further, there is no possibility of opting out of Sec 115BAA, either in year of exercise or subsequent assessment years, once option is properly exercised as per law.

c) Scientific Research and its related disallowance:

On an apparent reading of the three sections granting a beneficial rate of taxation to companies, it appears that the beneficial rate is not available if certain specified deductions are availed. One such deduction is the deduction on Scientific Research.

Deduction on account of Scientific Research under Sec 35 including its sub-sections specified therein is no longer available for companies opting for beneficial rate under either of the three sections.

However, one must note that the entire deduction under Sec 35 is NOT withdrawn. Only following deductions are withdrawn.

S. No	Section	Particulars
1	Sec 35(1)(ii)	Contribution paid to Research Association, University, College or other Institution engaged in Scientific Research
2	Sec 35(1)(iia)	Contribution to a company engaged in Scientific Research
3	Sec 35(1)(iii)	Contribution paid to Research Association, University, College or other Institution which are engaged in research in Social Science or statistical research.
4	Sec 35(2AA)	Contribution to National Laboratory, University or IIT for an approved program of Scientific Research
5	Sec 35(2AB)	Approved In-house R&D

It is still permissible for a company (availing beneficial rate under Sec 115BA, Sec 115BAA and Sec 115BAB) to claim deduction under Sec 35(1) (i) which deals with the revenue expenditure incurred by the company on account of scientific research

and also permissible for a company to claim deduction under Sec 35(1) (iv) read with Sec 35(2) which deal with the capital expenditure incurred by the company on account of scientific research.

a) Applicability of MAT:

Minimum Alternate Tax (MAT) is applicable under Sec 115JB for all companies if the tax payable under normal provisions of the Income Tax Act 1961 is lower than the tax payable at the rate of 18.5% on the book profits.

The present Ordinance inserts a proviso to sub-section (1) whereby the rate of 18.5% is brought down to 15% with effect from AY 2020-21 onwards. Further, the provisions of Sec 115JB relating to MAT are made inapplicable to companies exercising their option under Sec 115BAA or Sec 115BAB.

However, no amendment is made to either curtail or reduce the existing MAT credit under Sec 115JAA. So, for the companies exercising option under Sec 115BA, MAT credit is available for utilization against any future excess total income.

But for existing companies availing the option under Sec 115BAA, in view of the non-applicability of provisions of Sec 115JB, the exact legal position of existing MAT credit availed in earlier years is not prescribed by the Ordinance. Whether the entire MAT Credit availed in earlier years is permissible to be set-off against the tax liability calculated under Sec 115BAA or whether the entire MAT credit ceases to exist is an issue which requires clarification from the Legislature.

If the entire MAT credit availed by the company, ceases to exist in view of the present provisions of Sec 115JB read with Sec 115BAA, then the company should expunge the asset as a below the line item of expenditure, which will ultimately result in lower PAT. While the cash flows may more or less remain constant, the PAT figures of those companies would take a hit.

b) Buyback of shares by listed companies:

After the introduction of Sec 115QA with effect from 1st June 2013, all companies carrying out buy-back of shares, being those shares that are not listed on a recognized

stock exchange, had to pay tax @ 20% + applicable surcharge and Cess on such distributed income.

Finance Act 2019, with effect from 5th July 2019, removed the words "not being shares listed on a recognized stock exchange" thereby making the buyback of shares of even listed companies, coming within the purview of Sec 115QA.

The Ordinance now introduces a Proviso to the subsection (1) of Sec 115QA with retrospective effect from the 5th day of July 2019 to state that the provisions of sub-section (1) of Sec 115QA shall not apply to buy-back announcements made before the 5th day of July 2019 by companies whose shares are listed on recognized Stock Exchanges and the scheme of buy-back is in accordance with the SEBI (Buy-back of Securities) Regulations 2018 made under SEBI Act 1992.

c) Additional Conditions in Sec 115BAB:

i) Bar on carrying on "any" business in the company other than specified business

Clause (b) of subsection 2 of Sec 115BAB, states that a company claiming the benefit of reduced tax rate in Sec 115BAB should not carry out any business other than the business of manufacture or production of any article or thing and research in relation to, or distribution of, such article or thing manufactured or produced by it.

Therefore, the permitted businesses for a company to be eligible for the benefits of Sec 115BAB are

1. Manufacture or production of article or thing and its sale thereon

2. Research in relation to such manufactured or produced article or thing

3. Distribution of such manufactured or produced article or thing

The position of a company, which carries on various incidental activities apart from the above, needs to be tested for compliance with the above conditions. For example, the company may attend both within warranty and outside warranty calls for its product. Can the warranty calls taken for a product which is outside the warranty

period be regarded as a distinct business? Further, the company can also take up future maintenance of its products for a consideration. Does this activity constitute a fresh line of business? What if the company carries out the future maintenance of not only its own products but for other similar products as well? Does the distinction between condition and warranty as mentioned in the Sale of Goods Act 1930 have a role to play in deciding same and distinct businesses? These are issues which are not free from doubt. While it is needless to state that the facts of the case decide the issue of single business and its related activities, due care must be taken by the companies in ensuring compliance with the provisions of Sec 115BAB before opting for the same.

ii) Applicability of Specified Domestic Transactions for Transfer Pricing under Sec 115BAB

Sub-section (4) of Sec 115BAB states that where the company arranges its business with any other person in such a manner that it gains more profits than what might be expected to arise, then Assessing Officer shall take the amount of profits as may be reasonably deemed to have derived therefrom. Further, if the above arrangement involves a specified domestic transaction, then the amount of profits from such transactions shall be determined having regard to arm's length price as defined in clause (ii) of section 92F.

The language used in Sec 115BAB (4) is similar to the language used in Sec 80IA (10), which is also coming within the purview of Specified Domestic Transactions.

Sec 92BA has been amended to include the business transacted between persons specified in subsection (4) of Sec 115BAB, as specified domestic transactions. The definition of Specified Domestic Transaction as defined in Sec 92BA clearly excludes an international transaction from its scope. Further the aggregate of transactions entered into by the company in a previous year should exceed a sum of Rs Twenty crores to trigger Specified Domestic Transactions. So unless, the limit of Rs twenty crore is breached, there can be no specified domestic transaction and consequently the computation of arm's length price under Sec 92C, maintenance of records under Sec 92D, disallowance under Sec 40A(2) on account of arm's length price, will not apply.

d) Distinction between resident companies and domestic companies.

The newly introduced sections along with the old Sec 115BA apply only to domestic companies. Domestic companies are different from resident companies. Domestic company is defined in Sec 2(22A) to mean an Indian Company or any other company which has made the prescribed arrangements for the declaration and payment, within India, of dividends payable out of its income liable to tax under the Income Tax Act 1961. Indian Company has been defined in Sec 2(26) to mean a company formed and registered under the Companies Act 1956 and includes 5 other variations.

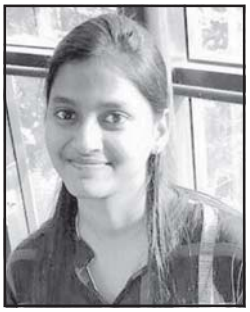
Domestic company is significantly different from a resident company. Every resident company need not be a Domestic Company under the Income Tax Act 1961. For example, due to the application of "Place of Effective Management" test as enshrined in Clause (ii) of subsection (3) of section 6, even a company incorporated under the laws of a foreign country can become a resident of India for the purpose of Income Tax Act 1961. But such company, in-spite of becoming resident in India, does not become a domestic company and hence is not eligible for benefits of Sec 115BA, Sec 115BAA or Sec 115BAB. There are several sections which are applicable only to domestic companies and not to resident companies, such as Sec 115O.

e) Conclusion

The press note dated 20th September 2019 mentions that the loss of revenue to the Centre on account of the above concessions is Rs 1,45,000 crores. It is a huge sum for Union Government too and in the opinion of the author, the decision taken by the Union Government to forgo above loss of revenue is commendable. Whether the efforts will fructify into the desired results and boost the economy is a question to be answered by the future. Timely clarifications with suitable amendments to synchronize the above sections with the other provisions of the Income Tax Act 1961 will help the government in reducing the litigation and aid in the ease of doing business.

(The Author is a Tirupati Based Chartered Accountant in practice. He can be reached at echaitanyaca@gmail.com)

SABKA VISHWAS (LEGACY DISPUTE RESOLUTION) SCHEME, 2019 - AN OPPORTUNITY TO BE FREE FROM LEGACY LITIGATIONS.



CA. NEHA JAIN

India has had indirect tax regime since 1944 and Goods and Service Tax (GST) has been introduced 2 years ago. However, GST is still a toddler with its own teething problems and complexities. The advantages of GST can be felt only in the longer run. At present, in view of the complexities involved & the numerous advance rulings in favour of revenue there is a possibility that significant cases of litigation may arise in GST too.

Hence, the Government has introduced the Sabka Vishwas Legacy Dispute Resolution Scheme (SVDLRS or the scheme for brevity). The new Finance Minister in her maiden budget presented in the house proposed to introduce this scheme which has been notified with effect from 01.09.2019.

The Scheme is split into 2 components i.e., (i) dispute resolution scheme for the legacy disputes as a measure to liquidate past dues under the Central Excise, Service Tax and Cess under other 26 indirect tax enactments and (ii) an amnesty scheme providing an opportunity for the tax payers who could voluntarily declare their dues to be free from any other consequences under the law. The Scheme has been notified by the Ministry of Finance vide Notification 04/2019 Central Excise dated 21st August 2019 and has come into force with effect from 01st September 2019. Further, to break the ice, department has also issued the procedural details through Circular and FAQ's.

Relatively similar schemes were introduced by the various State Governments (Government of Maharashtra, Karnataka, West Bengal and Gujarat) earlier to conclude the long pending matters pertaining to Value Added Tax (VAT).

Salient Features of the Dispute Resolution Scheme:

I) With the object of ensuring transparency, speed and accountability in decision making, designated committees would be formed at each Commissionerate to assist businesses in clearing all their past dues.

II) The Scheme is a one-time measure to clear all pending dues under the Central taxes.

III) Each notice/ order / appeal shall be treated as a separate organ and an independent application has to be filed for each notice/ order/ appeal.

IV) The tax declared by the tax payer shall be taken for the purposes of computing relief under the scheme. However, the department has an option to estimate the amount of relief available.

V) The below mentioned persons are not allowed to file declaration under the scheme:

A) Where Show Cause Notice (SCN) or appeal has been finally heard as on 30th June 2019;

B) When convicted under an offence punishable under any provisions of indirect tax enactments;

C) When SCN has been issued for erroneous refund or refund;

D) When subjected to an enquiry or investigation and amount of duty involved has not been quantified on or before 30th June 2019;

E) When application has been filed before the Settlement Commission;

F) When issue involved relates excisable goods under Fourth Schedule to the Central Excise Act, 1944.

VI) To enrol to the scheme, it is pertinent to understand the cases which can qualify for the scheme and the extent of relief available.

Forum Pending	Duty demanded (original SCN/order)	Relief
Show Cause Notice received before 30th June 2019/ Order received before 30th June 2019 and pending final hearing as on 30th June 2019	- Duty amount is less than or equal to INR 50 lakhs - Duty amount is more than INR 50 lakhs	- 70% of duty demanded - 50% of duty demanded
Show Cause Notice issued	- Duty plus interest and penalty where duty/ tax has already been paid - Only interest and penalty levied	- 100% of interest and penalty - 100% of interest and penalty
Where no appeal filed by declarant against the order or order in appeal before the expiry of time period to file appeal	- Duty amount is less than or equal to INR 50 lakhs - Duty amount is more than INR 50 lakhs	- 60% of duty demanded - 40% of duty demanded
Tax return filed admitting duty liability but duty was unpaid	- Tax due is less than or equal to INR 50 lakhs - Tax due amount is more than INR 50 lakhs	- 60% of tax dues - 40% of tax dues
Voluntary disclosure	- NIL	- Tax due as declared by declarant

Salient features of the Amnesty Scheme:

I) Voluntary declaration shall be made for cases only where any tax liability has not been admitted earlier.

II) It is pertinent to note that the tax payer understands that such cases may be opened for verification within a period of 1 year from the date of declaration. Such privileges earned under the scheme would be lapsed in case of identification of any misstatement or false information in the declaration.

In my view, it is advisable for the tax payers opting under the voluntary scheme to understand the laws of limitation of the department and take up calculative risks before opting for the best declaration to the department.

Foreseeable benefits of the scheme:

The tax payer has an option to avail the relief on the tax/ duty liability payable under the erstwhile regime.

a) The complete waiver of interest and penalty is the highlight of the scheme. This becomes an added advantage to the tax payers and an icing on the cake to get rid of penal provisions under the erstwhile laws.

b) The unresolved disputes opted under the scheme would not be opened in any other proceedings.

c) The scheme provides the tax payers the benefits of ease of carrying out business in the GST era and enable business to have an insight and sense of planning the pending cases, which when treated as a contingent liability or provision had raised questions on the liquidity and going concern of the business.

d) The dispute resolution scheme has bought in a revenue loss to the Government exchequer but considering the success ratio of the departmental appeals at High Court/ Supreme Court level at 14.01% and CESTAT level at 25.07%*, this scheme would be able to clear the amount which was blocked to a reasonable extent.

Lastly I would like to conclude with a few facts to ponder upon, which when looked into may provide further relief to the tax payers…

a) Why has the Government taken the due date to be 30th June 2019, as such the bench mark of 30th June 2019 may hamper the interests of many tax payers. Such date if extended to the date till when the declaration has been filed by the tax payer, would be beneficial.

b) Cases pending with the Settlement commission are not allowed under the scheme. In my view, once an option is given to withdraw appeals at Settlement commission stage, many tax payers would be benefitted.

c) Voluntary declaration under the scheme is open for verification by the Government. Would tax payers be interested to declare any additional dues under the scheme is also a question of interest?

d) No explanation of the term "final hearing". For cases which have been adjudicated and hearing has taken place before 30th June but order has been issued post 30th June 2019, would not be eligible for benefits under the scheme. Such cases when covered would be an added advantage to the tax payer and government.

e) Cases that may involve outflow from the department's end has been kept out of the scheme.

The tax payers may use this opportunity to identify and analyse the long pending cases. As it is rightly said, "A Stich in time saves nine", it is necessary for the tax payers to analyse the pending litigations.

Since the scheme has already been operational now, it is the need of the hour to assess cases with the respective demand vs. the relative cost of the litigation and interest and where the tax payer believes that the case can be relatively weak on merits.

It is important for the business to clear all backlogs and focus on the present GST regime and empower themselves with the ease of doing business initiatives of the Government. It is a great opportunity and would be advisable for the tax payers to hop on to the scheme before the ship sails.

* CAG Report – Report No 4 of 2019

(The Author is a Chennai based Chartered Accountant. She can be reached at nehajain1180@gmail.com)

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

Objectives

I) Prelude

II) Reservation Clauses - The need for?

III) Reservation Clauses - Mechanics?

IV) Debrief

Mr. SUDARSHAN RANGAN
Advocate
&
CA. VIGNESH KRISHNASWAMY

I Prelude- Reservation Clause (Opt-Out) Mechanism

- In the previous learning series, we discussed about the importance of compatibility clauses (Opt-In mechanism) and how they operate. Similar to compatibility clause, reservation clauses are another key feature of MLI and plays a pivotal role for signatory countries to be flexible while adopting MLI. As we have seen earlier the objective of the multilateral instrument is to harmonise the approaches to BEPS and create a level playing field, therefore it is imperative that the commitments of the parties are as aligned as much as possible. However, deviations are possible as the tax policy objective of countries may differ. The BEPS Action Plan report envisaging such possibilities mentioned in its report the need for MLI to be flexible, "*It is possible for the multilateral instrument to provide flexibility if there are specific cases where certain tax policies that cannot be harmonised amongst all parties to the multilateral instrument and the level of commitment the parties are prepared to undertake depends on the partner jurisdiction.*"[1]

- Hence for parties to deviate and also commit to a core set of provisions in the multilateral instrument there is the possibility to opt-in, opt-out of certain measures, choose between alternative – clearly delineated – measures and/or opt-in to additional measures.[2] Therefore, compatibility and reservation clauses are major modalities for introducing flexibility in the MLI.

- This opt-out mechanism is achieved through the reservation clauses, which we will be discussing in this learning series.

[1]OECD, Action Plan 15 Developing A Multilateral Instrument To Modify Bilateral Tax Treaties - Para A.2

[2]ibid

II Reservation Clauses: Opt-Out Mechanism -The need for?

- A reservation is defined as a "*unilateral statement made by a State, when signing, ratifying,* accepting, approving or acceding to a multilateral instrument, whereby it purports to *exclude or to modify the legal effect of certain provisions of the Convention"* (Articles 19 to 23 of the VCLT).[3]
- Reservations to multilateral conventions follows the 'admissibility principle' that was endorsed by the International Court of Justice. "*A State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention*."
- Article 20 of the VCLT follows the "admissibility principle" and also provides that a reservation is accepted by the other contracting states if they do not raise an objection to the reservation by the end of the period of 12 months after notification of the reservation or by the date on which consent to be bound by the treaty is expressed, whichever is later.
- Article 21 of the VCLT mentions specifically about the legal validity of reservations. The reservation must be accepted or objected beforehand (article 20 of the VCLT). Article 21 of the VCLT provides that (i) only the reserving state is bound to the convention subject to the conditions laid down in the reservations, and (ii) the other contracting states are not bound to the reservation unless they have expressly accepted it[4]. Therefore, reservation by one party will operate reciprocally between it and any other party that has not objected it.
- Hence, reservations under treaties, introduce flexibility in treaty negotiations, thereby becomes attractive for states to be signatory to such multilateral conventions. The general rule of the Multilateral Tax Instrument is that its parties are bound by the entire instrument unless the parties make a reservation. All the provisions of the Multilateral Tax Instrument providing for anti-BEPS measures are subject to reservations.
- With regards to opt-out mechanism, where a substantive provision does not reflect a minimum standard, a party is generally given the flexibility to opt out of that provision entirely (or, in some cases, out of part of that provision). The MLI enables states to opt out of the provisions, either entirely or partially, by introducing mechanism of reservations:

[3]Article 2, Vienna Convention On The Law Of Treaties (23 May 1969), Treaties Ibfd

[4]R.Garća Antón, Untangling the Role of Reservations in the OECD Multilateral Instrument: The OECD Legal Hybrids, 71 Bull. Intl. Taxn. 10 (2017)?

"Where a Party uses a reservation to opt out of a provision of the Convention, that provision will not apply as between the reserving Party and all other Parties to the Convention. Accordingly, the modification foreseen by that provision will not be made to any of the Covered Tax Agreements of the reserving Party."[5]

- However, in order to ensure there is uniform mechanism and no discretionary reservations made by parties, which otherwise will render the objective of entering into MLI otiose. Also, in the interests of preventing opting-out from core provisions, the MLI allows the formulation of reservations only for certain provisions by setting out an exhaustive list of permitted reservations. Article 28 of the MLI provides the list where reservations are permitted explicitly.

III Reservation Clause under the MLI - Mechanics

- A party to the MLI may reserve the right for provisions of the MLI to not apply:
- to its covered tax treaties in their entirety; or
- a subset of its covered tax treaties
- Further the reservations made under the MLI by a party will apply symmetrically wherein it applies to the reserving party and other parties to the convention. Article 28(3) of the MLI states *"…unless a provision of the Convention explicitly provides otherwise, a reservation will modify the relevant provisions of the Convention as between the reserving Party and all other Parties to the Convention, i.e. for the reserving Party in its relations with the other Parties and for those other Parties in their relations with the reserving Party. In other words, reservations will apply symmetrically, unless provided otherwise."*[6]
- It is worth mentioning that some of the MLI reservations also work asymmetrically and some provide veto power to the reserving party to invoke its reservation on another party, which is unique to multilateral treaties. [7]
- As mentioned earlier, Article 28 (1) of the MLI specifically lists the only reservations that parties can make and precludes parties from making any reservations not listed. Article 28(1) of the Multilateral Tax Instrument states that *"subject to paragraph 2, no reservations may be made to this Convention except those expressly permitted by:"* and provides a list of the paragraphs of the provisions of the instrument that exhaustively permits reservations with the exception of the reservations on the scope of the cases subject to mandatory binding arbitration.

[5]OECD, *Explanatory Statement To The Multilateral Convention To Implement Tax Treaty Related Measures to Prevent Base Erosion And Profit Shifting, Para.14,*

[6]Ibid para 270

[7]R Garcia Anton, supra note 2

- With regards to mandatory binding arbitration, the MLI provides flexibility for the parties on the scope of cases subject to arbitration. Article 28(2) sets out that a State "may formulate one or more reservations with respect to the scope of cases that shall be eligible for arbitration under the provisions of Part VI (Arbitration)".

- Article 28(8) of the MLI provides that, when reservations are made under the listed provisions, an exhaustive list of the Covered Tax Agreements which are within the scope of the reservation as defined in the relevant provision must be provided. In the case of a reservation that applies only where a Covered Tax Agreement contains a specific type of provision, a list of the article and paragraph number of each relevant provision must also be provided. The reservation list is to ensure that there is coordinated effect in introducing the MLI instead of unilateral or bilateral measures.

- Brief contents of Article 28 of the MLI -the reservation clause is summarised in the below table:

Article 28(1)	List of Authorised Reservations which may be made under the convention
Article 28(2)	Reservations pertaining to parties opting for Part VI- Mandatory Binding Arbitration and related flexibility on the scope of cases pertaining to arbitration.
Article 28(3)	Symmetric application of reservations. Reserving party's treaty with other parties and vice versa. Exception refer Article 28(2)(b) of the MLI.
Article 28(4)	Relevant for those states which are responsible for international relations pertaining to certain jurisdictions or territories such as Jersey, Isle of Man etc.
Article 28(5)	Timing for reservations to be made by the party to the MLI. It provides for reservations to be made at the time of signature or deposit of the instrument.
Article 28(6)	Reservations made at the time of signature be confirmed upon deposit of instrument of ratification, acceptance or approval.

Article 28(7)	Provisional list of reservations to be made, if no reservation is made at the time of signature unless reservations are made definitive at the time of signature. The provisional list of expected reservations under Article 28(7) does not restrict the ability of that Signatory to submit a modified list of reservations upon deposit of the instrument of ratification, acceptance or approval.
Article 28(8)	Notifying the covered tax agreements where specific reservations were made under the substantive provisions of the MLI. This will provide clarity on reservations to be applied to the CTA with specified characteristics.
Article 28(9)	Provision for parties to withdraw or amend reservation by notification in the depositary. The time limit for the same is specified as well.

IV Debrief

- The general rule of the Multilateral Tax Instrument is that its parties are bound by the entire instrument unless the parties make a reservation. Reservations under the MLI provides flexibility for parties to enter into a convention and object to certain provisions which deviates from their treaty policy.
- Reservations currently in the bilateral tax treaty context was made in commentaries of the OECD and its commentaries. If a member state disagrees with the recommendation of articles of the OECD Model, then a reservation to that extent was made in the commentaries as their reservations. The reservations to the OECD Model support a particular treaty policy followed by a state and shed light on how to interpret a particular provision of a singular treaty.[8] Therefore reservations are not common in bilateral treaty and are only common and may be necessary in a multilateral treaty.
- The reservations in the MLI similar to OECD model provides states to express their treaty policy and also provides a binding effect to the parties. This is a significant deviation from the existing reservation in the OECD model commentaries, where there is no binding effect.
- Due to the high level of flexibility provided in through the reservation clause in the MLI, there are potential reservations mismatches that arise while invoking the MLI between two parties which may also lead to certain unintended consequences and complications.

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

[8] R Garcia Anton, supra note 2

Registered with Register of News Paper of India - TNENG/2002/9058 Postal Regd.No.TN/CH/(C)/170/15-17
Licenced to Post at Egmore RMS/1 (Pathirka Channel) Publication 26th of Every Month.

Published by : Anil Kumar Khicha on behalf of the Chartered Accountants Study Circle,
2-L, Prince Arcade, 22-A, Cathedral Road, Chennai - 600 086. Phone : 2811 4283
Printed by : D. Srikanth at Super Power Press, No.1, Francis Joseph Street, Chennai - 600 001. Phone : 6536 1540
Editor : Anil Kumar Khicha