CASC BULLETIN

THE CHARTERED ACCOUNTANTS STUDY CIRCLE

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CASE LAWS - GST / SERVICE TAX

1. **<u>GST – ADVANCE RULING – DENIAL OF APPLICATION WITH RESPECT TO DETERMINATION OF EXPORT OF SUPPLY AS IT PERTAINS TO QUESTION ABOUT THE PLACE OF SUPPLY – NOT SUSTAINABLE</u>**

CA. VIJAY ANAND

In Sutherland Mortgage Services INC.v. Principal Commissioner of Cus., CGST &C.Ex., Kochi2020(35) G.S.T.L. 40 (Ker.) the petitioneris a branch office of its principal, M/s. Sutherland Mortgage Service Inc. USA and is engaged in the business of providing information technology enabled services such as mortgage orientation, primary servicing, special servicing, cash management and analytics & reporting. As per the prevailing laws in USA, the petitioner's principal (M/s. Sutherland Mortgage Service Inc. USA) is prevented from outsourcing its work to any other third party consequent to which they have made an intracompany agreement with the petitioner, being the Indian branch of the USA principal, to provide services to customers outside India. This intra company agreement has been entered into only for the purpose of transfer pricing regulations and the petitionerhas no separate legal existence and that the legal entity is the principal company. The principal company incorporated in USA is reimbursing the branch at India for the costs incurred to perform the services and the branches like the petitioner issue commercial invoice to the corporate head office at USA for services provided by the petitioner branch directly to the customers located outside India.

An application was filed seeking advance ruling as to whether the supply of services by India Branch to the customers located outside India shall be liable to GST in the light of the intra company agreement entered into by the said branch with the principal company incorporated in USA which was rejected by the authority holding that application cannot be granted as the issue of "determination of place of supply", does not come within the permissible issues to be determined by the Advance Ruling Authority in terms of Sec. 97(2) of the CGST Act, 2017 and therefore the Advance Ruling Authority lacks jurisdiction to entertain. On a petition challenging this rejection, the high court observed as under:-

1. A reading of clauses (*a*) to (*g*) of sub section (2) of Sec. 97 of the CGST Act would make it clear that 7 items are enumerated as per clauses (*a*) to (*g*) of sub section (2) of Sec. 97 and all those clauses other than clause (*e*) thereof, are in specific terms. Whereas clause (*e*) of sub section (2) of Sec. 97 of the CGST Act clearly mandates that the larger issue of "determination of liability to pay tax on any goods or services or both" would also come within the ambit of the questions to be raised and decided by the Advance Ruling Authority on which advance ruling could be sought and rendered under the said provisions.

2. Whereas the clauses other than clause (*e*), are in specific "pigeon holes" and the provision as per clause (*e*) of sub section (2) of Sec. 97 is in wide terms and the Parliament has clearly mandated that the latter issue of determination of liability to pay tax on any goods or services or both, should also be matters on which the applicant concerned could seek advance ruling from the Advance Ruling Authority on which the said authority is obliged to render answers thereto.

3. The Parliament has made the said provision envisaging that in transactions in nature, where India is now a growing economy and has to make its substantial performance in economic growth and development not only domestic investments, but even foreign investments would also be heavily required and that host of tax laws has been subsumed into the overarching umbrella of the goods and sales tax regime introduced by the Parliament and the Parliament would have certainly taken cognizance of the fact and has intended that very often applicants would require clarity and precision about various aspects of taxation in the transactions and that there should be certainty and precision in those matters, so that the applicant concerned is given the right to seek advance ruling even in such a larger issue as the one as per clause (*e*) of Sec. 97(2) of the CGST Act, which deals with issue of determination of liability to pay tax on any goods or services or both.

4. In cases of this nature, entities which come with foreign investment in India would also require certainty and precision about the tax liability so that they can plan an decide in advance about their functioning as business entities in India so that its efficacy is maximised so as to bring in a "win win situation" not only for such foreign entities, who are permitted to make such investments in India, but also for the economy of India.

5. It is in the light of these dynamic scenario in the fast changing global economy that the Parliament has taken a very proactive role with a very wide vision, the Parliament in its wisdom has decided to mandate such a provision as in clause (*e*) of Sec. 97(2), whereby the applicant is empowered to seek advance ruling even on the said larger issue of determination of liability to pay tax on goods or services or both and in view of such a scenario, the Advance Ruling Authority is obliged to entertain such plea and consider it on merits and then render its opinion/answer to such a plea that may be raised and to render its advance ruling on those aspects in accordance with the provisions contained in the abovesaid Acts.

6. In the instant case, it is true that the issue relating to determination of place supply as aforestated is not expressly enumerated in any of the clauses as per clauses (*a*) to (*g*) of Sec. 97(2) of the CGST Act, but there cannot be any two arguments that the said issue relating to determination of place of supply, which is one of the crucial issues to be determined as to whether or not it fulfills the definition of place of service, would also come within the ambit of the larger of issue of "determination of liability to pay tax on any goods or services or both" as envisaged in clause (*e*) of Sec. 97(2) of the CGST Act.

7. The Advance Ruling Authority has proceeded on a tangent and has missed the said crucial aspect of the matter simple and has taken a very hyper technical view that it does not have jurisdiction for the reason that the said issue is not expressly enumerated in Sec. 97(2) of the Act.

8. This Court has no hesitation to hold that the said view taken by the Advance Ruling Authority is legally wrong and faulty and therefore the matter requires interdiction in judicial review in the instant writ proceedings.

Hence, the high court quashed the order of the advance ruling authority and remitted the matter back to them for fresh consideration and decision.

In that view of the matter, it is ordered that the abovesaid view taken by the Advance Ruling Authority is legally wrong and faulty and is liable to be quashed and accordingly declared and ordered. Consequently, it is ordered that the said rejection order as per Ext.P-2 will stand quashed and Ext.P-1 application will stand remitted to the Advance Ruling Authority concerned for fresh consideration and decision in accordance with law. The Advance Ruling Authority will immediately permit the petitioner to submit any further written submission in the matter with any additional materials. This the petitioner will do within a period of two weeks from the date of receipt of a certified copy of this judgment. Thereafter, the Advance Ruling Authority will immediately give notice of personal hearing to the petitioner and should also afford a reasonable opportunity of being heard to the petitioner, through authorised representative/counsel, if any, and then should consider all relevant aspects of the matter and should render an advance ruling in the matter in terms of Sec. 98(4) of the CGST Act, etc. The advance ruling as aforestated in terms of Sec.98(4) of the CGST Act may be duly rendered by the Advance Ruling Authority without much delay, preferably within a period of 3 to 4 months from the date of production of a certified copy of this judgment.

Hence, the writ petition wasdisposed of.

2. <u>SERVICE TAX - NOTICE PAY IN LIEU OF SUDDEN TERMINATION – NOT EXIGIBLE TO SERVICE TAX</u>

In GET &D India Ltd. V. Dy.Commr. of C.EX, Chennai 2020(35) G.S.T.L. 89 (Mad.), the petitioner is a dealer assessed to service tax by the respondent. The terms of employment of the petitioner company include a stipulation for a notice period prior to quitting from employment, ranging from two to three months. An option is provided to the employees to the effect that if they are not in a position to stay and serve out the notice period, then in lieu of the same, the employee will be required to pay the equivalent pay of salary for the period for which notice was not served.

Thus, in a case where an employee wishes to quit, it is incumbent upon the employee to put the employer to notice in advance of a stipulated period to enable recruitment of a new employee and smooth transition of the work carried on by the employee, who proposes to quit. It also facilitates a situation where the employee may desire immediate quitting by enabling him to do so, however, also ensuring that some compensation is provided to the employer by virtue of the sudden and unexpected termination of duty.

The petitioner in this case had received certain amounts in lieu of notice period from outgoing employees. The Assessing Officer was of the view that this amount would attract service tax since the petitioner is deemed to have facilitated the termination of employment and thus a category of service entitled and described as 'facilitation of termination of employment' was carved out by the Assessing Officer.

Seven show cause notices were issued relating to different units of the petitioner all over the country. Despite objections raised, the proposals for assessment were confirmed vide the impugned orders dated 30-6-2016, which are challenged by way of the present batch of writ petitions for which the high court observed as under:-

1. According to the revenue, payment in lieu of notice constitutes payment to an employee by the employer for the notice period or vice versa where the employer/employee desires an immediate exit from the organization& this arrangementwould attract the provisions of section 66E(e), whereby agreement by an entity to the obligation to refrain from an Act or to tolerate an Act or a situation, or to do not act, would constitute taxable service. In short, the petitioner has tolerated the act of immediate quitting from service, by the employees and such agreement/ toleration results in the rendition of a taxable service.

2. Para 2.9.3 of the CBECs' Guidance Notes dated 20-6-2012 answers a query raised relates to a contra situationwhere amounts have been received by an employee from the employer by reason of premature termination of contract of employment, and the taxability thereof, in the negative pointing out that such amounts would not be related to the rendition of service.

3. Equally so the employer cannot be said to have rendered any service per se much less a taxable service and has merely facilitated the exit of the employee upon imposition of a cost upon him for the sudden exit.

4. The definition in clause (e) of section 66E is not attracted to the scenario before me as, in my considered view, the employer has not 'tolerated' any

act of the employee but has permitted a sudden exit upon being compensated by the employee in this regard.

5. Though normally, a contract of employment qua an employer and employee has to be read as a whole, there are situations within a contract that constitute rendition of service such as breach of a stipulation of non-compete. Notice pay, in lieu of sudden termination however, does not give rise to the rendition of service either by the employer or the employee.

Hence, the writ petitions were allowed without costs.

3. <u>CENTRAL EXCISE – AREA BASED EXEMPTION AVAILABLE DURING THE PRE-GST PERIOD – ON MIGRATION TO GST AS PER SCHEME NOTIFIED REIMBURSEMENT OF CENTRAL GOVT. SHARE OF CGST & IGST,I.E 58% OF CGST & 29% OF IGST, IN LIEU OF UNDER EARLIER EXEMPTION NOTIFIED – NO AUTOMATIC RIGHT TO DEMAND BENEFIT FOR THE REMAINING AMOUNT DURING THE GST REGIME</u>

In Hero MotocorpLtd. V. UOI 2020(35) G.S.T.L. 99 (Del.)the petitioner is engaged in the business of manufacturing of two wheelers in the State of Uttarakhand. It was operating and registered under the Central Excise Act, 1944. In the year 2002, special packages of incentives were announced to promote industrial development in the State of Uttarakhand. In pursuance thereto, the 1st Respondent- Union of India through the 4th Respondent-Ministry of Commerce & Industry issued an Office Memorandum dated 7-1-2003, detailing the package of incentives. The fiscal incentive provided under the memorandum included 100% ab inito Central Excise Duty Exemption to new industrial units for a period of 10 years from the date of commencement of commercial production. Accordingly, Notification No. 50/2003-CE was issued providing for the appropriate exemption.

With the introduction of Goods and Services Tax (GST) the petitioner was required to pay CGST and IGST under the provisions of the Goods and Services Tax (GST) regime in respect of intra-state, and also inter-state supplies made from the Uttarakhand unit. Immediately thereafter, CGST rules came into force on 18-7-2017 and Notification No. 21/2017-CE was issued rescinding the various area-based exemption notifications, including the exemption notification no. 50/2003-CE with effect from 1-7-2017. Due to the rescission of the exemption notification, the beneficial incentives granted to the petitioner, ceased to continue w.e.f. 1-7-2017.

In the second GST Council meeting held on 30-9-2016, it was decided that the Central Government would provide budgetary support to the eligible units for the residual exemption period by way of part reimbursement of GST, paid by the unit, limited to the Central Government's share of CGST and/or IGST retained after devolution of a part of these taxes to the States. Accordingly, the Central Government notified the Budgetary Support Scheme providing reimbursements of Central Government's share of the cash component of CGST and IGST i.e. 58% of CGST and 29% of IGST, in lieu of exemption provided under the exemption notification.

In this context, the petitioner has filed writ petition seeking a direction to Government of India to grant "complete exemption by way of reimbursement of the amount of Central Goods and Services Tax (CGST) and Integrated Goods and Services Tax (IGST) for the residual period of exemption notification" dated 10-6-2003, that granted 100% exemption on excise duty and adherence of Industrial Policy. The High Court observed as under:

1. With the change in the indirect tax laws, the petitioner wants this court to hold the Government of India to the promise it had demonstrably made by way of the exemption notification. The central question that arises for our consideration in the present petition is as to whether the Respondents can be compelled to grant exemption from payment of GST and IGST to the petitioner w.e.f from 1-7-2017 for the balance residual period of 10 years.

2. The mainstay of Petitioner's claim is the exemption notification dated 10-6-2003 whereby the Central Government granted exemptions from the payment of Central Excise Duty for a period of 10 years to the units in the State of Uttarakhand. Indisputably, the said exemption notification was under the Central Excise Act, 1944.

3. With the coming in force of the GST regime, the Central Excise Act, 1944 itself has been repealed. For that matter, the entire indirect tax structure has been overhauled. Thus, the right to exemption, pitched by the petitioner as a "vested right" can be meaningfully appreciated only if we understand the changes introduced with the advent of the GST laws.

4. GST has now enabled seamless flow of input tax credits across the chain. The Central Excise Duty exemptions did not envisage exemption from VAT, which is now available as input tax credit on account of being subsumed in GST and the credit thereof is now available for payment of duty. Similarly, VAT exemptions did not envisage exemption from service tax and excise duty, which is now available as input credit on account of being subsumed in GST.

5. In this changed scenario, the Government has decided to grandfather the incentives that were given to specific industry under the earlier industrial policy of States, or through a scheme of the Government. The new tax structure and merging of indirect taxes and the mechanism provided for input tax credit of state taxes that were earlier part of the State and Central Legislations has now resulted in a completely new tax which is known as GST.

6. Therefore, the Petitioner's argument that the policy decision of 2003 still holds the field and can be enforced against the Government as a promise is not correct. The 100% tax exemption under the industrial policy was envisaged under the previous regime. The policy can no longer be invoked and therefore, the exemption notifications issued implementing the said policy also have lost the mandate.

7. Merely because the Government has acknowledged the difficulties faced by the industrial units and introduced Budgetary Support Scheme, it cannot be said that the petitioners as a matter of right, are entitled to insist that the support should be on the entire fiscal benefits that were originally envisaged under the 2003 policy. The Budgetary Support Scheme under the GST, is not in lieu of exemptions that were granted under the previous fiscal incentives schemes for providing exemptions under the Central Excise Act, 1944 and other such legislations.

8. Just because, the Respondents have acknowledged that the units located in the States of Jammu & Kashmir, Uttarakhand, Himachal Pradesh and North East including Sikkim should be granted Budgetary Support Scheme as a measure of goodwill for a residual period for which each of the units was earlier eligible, it cannot be held that that the support is in lieu of exemptions.

9. Recognizing hardships arising out to withdrawal of exemptions notifications cannot be understood or categorized

as an admission of any such right in favour of the petitioner.

10. The decision in Mannuelsons Hotels is not relevant to the present case, the factual matrix of which is as under:-

i. On 11-7-1986, a G.O. was issued which accepted the recommendations of the Government of India, suggesting that tourism be declared as an "industry".

ii. Pursuant to the aforesaid G.O, the appellants began constructing a hotel building which was completed in the year 1991.

iii. In line with the said G.O, Kerala Building Tax Amendment Act, 1990 was passed w.e.f. from 06-11-1990 and Section 3-A was added, which granted the Government power by notification in the gazette to make exemption from the payment of building tax under the Act. However, no notification under section 3-A was issued.

iv. Notice for fling returns under the Kerala Building Tax Act was issued to the appellants and this was contested by the Appellants on the ground that they were under no obligation to furnish any return under the said Act as they were exempt from the payment of building tax as per the G.O and Section 3-A.

v. By letter dated 6-2-1997, the exemption promised by the G.O of 1986 was denied to the appellants stating that as Section 3-A had been omitted w.e.f. 1-3-1993, the power to grant exemption had itself gone and, therefore, no such exemption could be given to the appellants.

vi. The issue for consideration before the Court was that whether the appellant was entitled to claim exemption from payment of property tax under the Kerala Building Tax Act, 1975, as amended, as per section 3-A, on ground of promissory estoppel when the said section 3-A came in force from 06-11-1990 and had been later omitted w.e.f. 1-3-1993.

vii. The court held that for the period post-1-3-1993, no statutory provision for the grant of exemption being available, it is clear that no relief can be given to the appellants as the doctrine of promissory estoppel must yield when it is found that it would be contrary to statute to grant such relief.

11. In view of the proviso to section 174(2)(c) of the CGST Act, the issue that arises for consideration is whether the doctrine of promissory estoppel can be invoked against a legislative act, because in the present case, the government has clearly acted in accordance with the law laid down by the Parliament.

12. When the law itself has undergone a complete revision, can the doctrine of promissory estoppel still be invoked, in light of section 174(2) (c) of the CGST Act? The issue that arises in the present petition has been firmly established in a string of judgments and is no longer a point which is untouched by dictum.

13. In I.T.C. Bhadrachalam Paper boards v. Mandal Revenue Officer, AP [1996] 6 SCC 634, the controversy was over the applicability of an exemption notification issued under the Andhra Pradesh Non-agricultural Land Assessment Act, 1963. The only mode of publication of such exemption order was publication in the Andhra Pradesh Gazette. After such publication, orders granting exemption were required to be laid before the Legislative Assembly. There was no other mode of publication prescribed. In that context, the Supreme Court found an order of exemption granted in a Government order, which was not published in the Official Gazettes nor issued under any enactment was not enforceable.

14. Thus, the plea of promissory estoppel cannot be enforced against an act done in accordance with the statutory provisions of law. Under Section 174(2)(*c*) of the CGST Act, express provision has been made by the Parliament to provide that any tax exemption granted as an incentive against investment through a notification under, *inter alia*, the erstwhile Central Excise Act, shall not continue as a privilege if the said notification is rescinded, and in the present case, the notification which granted 100% excise duty exemption was, in fact, rescinded.

15. Hence, in the absence of any challenge by the petitioner to the rescission of the said notification which granted exemption or to the *vires* of the proviso to section 174 (2)(*c*) of the CGST Act, no plea of promissory estoppel is maintainable.

Consequently, the writ petition was dismissed.

4. <u>GST – AAR – ATTACHING CABLES AND OTHER ELECTRICAL EQUIPMENT TO EARTH WITH NO INTENTION OF REMOVING OR SHIFTING THEM IN FORESEEABLE FUTURE – SUPPLY NOT IN THE NATURE OF REPAIRS & MAINTENANCE OF EXISTING STRUCTURE BUT NEW CONSTRUCTION –WORKS CONRACT</u>

In RE: ABB India Limited 2020(35) G.S.T.L. 493 (A.A.R. – GST-W.B.) the applicant is engaged in the activity of providing technological and system solutions, including electrification, industrial automation, motion and robotics, data management and production control systems. Rail Vikas Nigam Ltd. (hereinafter RVNL) has awarded it the contract for 'extension of SCADA for Noapara - Dakshineswar Metro Corridor' (SCADA stands for Supervisory Control and Data Acquisition). The Applicant seeks a ruling on whether Entry 3(v) of Notification No. 11/2017-Central Tax (Rate), dated 28-6-2017 (State Notification No. 1135-FT, dated 28-6-2017), as amended and hereinafter collectively called the Rate Notification, is applicable for its supply to RVNL by way of erection, commissioning, installation, completion etc. of SCADA System.

The authority observed as under:

1. According to Serial No. 3(v)(a) of the Rate Notification, the composite supply of works contract, as defined under Section 2(119) of the GST Act, supplied by way of construction, erection, commissioning, or installation of original works pertaining to railways, including monorail and metro, is taxable at 12% rate.

2. Works contract is defined under Section 2(119) of the GST Act as a contract for construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract. It is a composite supply treated as service in terms of para 6(a) of Schedule II under Section 7(1A) of the GST Act.

3. Detailed Performance Specification of the contract provides that the applicant shall design, supply, install, test and commission a computer based SCADA System for smooth operation, monitoring, control, protection and logging of important features of the traction and auxiliary power supply system on the Metro Corridor between Baranagar to Dakshineswar section.

4. The field work involves site survey, concept plan, design and drawing, extensive wiring and laying of cables, civil works as required, and testing and commissioning of the system. It is a composite supply of goods and services. However, such supply will be called works contract only if it

amounts to erection and commissioning of an immovable property.

5. In the case of Solid & Correct Engineering Works, the Apex Court when examining whether a machine, fixed with nuts and bolts to a foundation, with no intent to permanently attach it to the earth, is an immovable property or not, has held that such an attachment without necessary intent to making it permanent cannot be an immovable property. The emphasis is on the intention of the party. The Apex Court observed that the specific machine in question can be moved and has indeed been moved after the road construction and repair project, for which it was installed, is completed. However, if a machine is intended to be fixed permanently to a structure embedded in the earth, the moveable character of the machine, according to the Supreme Court, becomes extinct.

6. In the present context, erection and commissioning of SCADA System involves attaching cables and other electrical equipment to the earth with no intention of removing or shifting them in foreseeable future. Moreover, the parts are so interlinked to constitute a functioning SCADA System that none can be moved separately or without causing substantial damage to the goods attached to earth. The moveable character of the goods like cables and other equipment, therefore, becomes extinct.

7. The applicant's supply thus amounts to erection and commissioning of an immovable property involving transfer of property in goods in its execution and, therefore, works contract within the meaning of Section 2(119) of the GST Act. It now needs to be ascertained whether the Applicant's supply is 'original work' within the meaning of clause 2(zs) of Notification No. 12/2017-Central Tax (Rate), dated 28-6-2017, as amended.

8. Original work, as defined under clause 2(zs) of Notification No.12/2017-Central Tax (Rate), dated 28-6-2017, means all new constructions involving (i) all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable, and (ii) erection, commissioning or installation of plant, machinery or equipment or structures, whether prefabricated or otherwise.

9. The applicant's supply is not in the nature of repair and maintenance of an existing structure, but a new construction. As already discussed, it involves installation, erection and commissioning of a network of inter interlinked equipment and structures attached to earth. It is, therefore, 'original work' within the meaning of clause 2(zs) of Notification No. 12/2017-Central Tax (Rate) dated 28/06/2017, as amended.

10. The only issue that is left for examination is whether supply to RVNL qualifies as a supply pertaining to railways, including monorail and metro.

11. The term "railways" is not defined in the GST Act. It, however, is defined under section 2(31) of the Railways Act, 1989, meaning "a railway, or any portion of a railway, for the public carriage of passengers or goods, and includes certain specific items.

12. SCADA, in the context of the applicant's supply to RVNL, is the system that controls and monitors the electrical network of the metro, enabling the operator to issue suitable commands to be followed in the operation of the metro. Using the SCADA interface, the operator sends instructions to the Remote Terminal Unit, which accordingly controls the signals, lights and other electrical equipment of the metro. It is, therefore, a power supply and distribution network installed for the purpose of the operation of the metro and, hence, a supply pertaining to railways, including metro, as defined under section 2(31)(c) of the Railways Act, 1989.

Hence, the authority ruled that the applicant is making a composite supply of works contract taxable under Entry No. 3 (v)(a) of Notification No. 11/2017 - Central Tax (Rate) dated 28/06/2017 (State Notification No. 1135-FT dated 28/06/2017), as amended, being erection, commissioning and installation of original work pertaining to railways, including metro.

5. GST – ADVANCE RULING – DVDs/CDs SUPPLIED WITH SOFTWARE ALONG WITH END-USER LICENCE AND SUPPLY OF ACCESS TO ON LINE DATA BASE ON ASSESSEE'S WEBSITE – SUPPLY OF DVDs/CDs AND DONGLE WITH ACCESS FOR INITIAL SUBSCRIPTION PERIOD – COMPOSITE SUPPLY UNDER TARIFF ITEM 8523 80 20 OF CUSTOMS TARIFF ACT – NOT COVERED UNDER DEFINITION OF EBOOKS

In RE: Venbakkam Commandur Janardhanan 2020(36) GSTL602 (AAR-GST-TN.), The Law Weekly (established in 1914), presently a proprietary concern, is a Law Journal reporting judgments of the Madras High Court and Supreme Court of India and is cited by the Lawyers and the judges in the form of Citations in Courts across the State. The journal was a registered dealer under the erstwhile Tamil Nadu General Sales Tax Act and Tamil Nadu Value Added Tax Act. The applicant supplies printed journals/books every week and the same is also sold in electronic form in DVDs/CDs with a pen drive as security lock with software to use it as an application in computers and hand held electronic devices to search and retrieve judgments. It is also available on their website www.thelawweekly.com.

In view of the developments in technology, the applicants supply E-Book of the printed version to their customers at their request& also supply of printed books/journals they have not collected any GST as it is exempt. The applicant entrusted the job of developing the E-Book with software to M/s. Sofist India and have paid the GST for the services rendered by them& have also claimed input tax for the purchase of paper, ink, CD, pen drive and other connected materials. However, for the supply of DVDs/CDs and pen drives they paid GST at the rate of 18% and subsequent to the issue of Notification 13/2018-Central Tax (Rate), dated 26-7-2018 the applicant has sought advance ruling as to the following:-

(1) Whether the assessee/dealer which publishes law journals in print and sells the same content that is in books in an electronic form in DVD's/CD's with a software to search and read it in computers and hand held devices come under the category of E-Book, so that it can avail the benefit of notification dated 26-7-2018 in respect of E-Book?

(2) Whether the liability on the sale of DVD/pen drive which contains printed version of law citations can be adjusted against the available ITC?

(3) Whether the liability on sale of e-book of printed version of law citation can be adjusted against the available ITC?

(4) Whether the balance of ITC after adjustment accrued on the purchase of paper and other material can be reversed while filing GSTR-9?

The authority observed as under:

1. When the applicant supplies the DVDs/CDs with Dongle, the supply consists of (1) supply of DVDs/CDs and Dongle and (2) 'The Law Weekly Desktop' Software application loaded onto the DVD/CD and proprietary software the Dongle. The software comes with End User Licence with weekly updates online during the period of subscription. Thus the supply of DVDs/CDs & dongle with access for an initial subscription period is a composite supply involving supply of DVD/CD & Dongle and the loaded software (Goods) along with license to use the same for a limited period (service).

2. Applying the above to the case at hand, we find the supply of DVD/CD & Dongle loaded with The Law weekly Desktop Software is an optical media loaded with software and the licence to use the software during the subscription period is a supply of service made along with the principal supply of goods in the said 'Composite Supply'. The DVD/CD & Dongle being 'Storage Devices' containing the software is the principal supply.

3. The supply of DVD/CDs with the loaded 'The Law Weekly Desktop' Software along with its end user license by the applicant is a supply of goods classifiable under CTH 8523 80 20.

4. The issue raised by the applicant is whether the supply of DVDs/CDs with a Dongle falls under the definition of 'E-Book' defined under the Notification No. 13/2018-C.T. (Rate), dated 26-7-2018 which amends the Notification No. 11/2017-C.T. (Rate), dated 28-6-2017.

5. Notification No. 11/2017-C.T. (Rate), dated 28-6-2017 provides the applicable rates for various services. As per the Explanation given in the above entry, 'E-Books' are electronic version of a printed book falling under the tariff item 4901 and supplied online which can be read on a computer or a hand held device, while in the case at hand, the contents supplied in the form of DVD/CD is a software which is used to access content containing the judgments of various fora, case laws Acts, etc. which provides for searching using a particular case number/period/Act/Court or a combination of the above .

6. The DVD/CDs do not contain electronic versions of the journals but an executable software application and therefore do not fall under the explanation of 'E-Book' given in the said entry. Furthermore, in the case at hand as held in para 6.3 above, the initial supply of DVD/CD [8523] is supply of goods and hence the Notification do not have any application.

7. The renewal is charged separately without needing any more supply of DVDs etc. and also they supply an online version of it which is available on their website with access through user id-password for specific periods. The user with the password can access the database of all the case laws, judgment etc. with search criteria that they can specify including the specific journal numbers etc. Supply of this access to the online database on their website is a supply of service classifiable under SAC 998431. Online text based information such as on-line books, on-line newspapers and periodicals, online directories and mailing lists.

8. E-Book are those books which are digitalized into a single machine readable file in any format such as .doc, .txt, .pdf etc. and read on a computer or a hand held device through some specific software. In the case at hand, the supply involves access to an on-line database hosted on the website of the applicant.

9. Thus, it is evident that the above are not 'E-Books' but supply of access to an online database online text based information [SAC 998431] and therefore the entry at Sl. No. 22 of the Notification No. 11/2017-C.T. (Rate), dated 28-6-2017 is not applicable to the case at hand.

Hence, the authority ruled as under:

1) The supply of DVDs/CDs with 'The Law Weekly Desktop' software along with end user license and the supply of access to the on-line database on the applicant's website are not eligible to avail the benefit of entry at Sl. No. 22 of Notification No. 13/2018-C.T. (Rate), dated 26-7-2018.

2) The other questions are not answered as not in the ambit of Advance Ruling.

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NEW ERA OF ADMINISTERING THE TRADE AGREEMENTS

CA. DEBASIS NAYAK

Over the past two decade, India has witnessed a sharp increase in regional and bilateral trade agreements between the various countries across the globe. Trade agreements are essential for the developing nations with a viewto expand the markets for exports as well as making available the needed raw materials, intermediates and capital goods for the domestic manufacturing to boost the economy. The objective of trade agreements are to eliminate tariffs and non-tariff barriers (Mutual Recognition Agreement), ease cross border movement, get easier marketaccess into one another's markets and promote fair trade competitions between the member nations. As per the WTO, there are total 306 regional trade agreements (RTAs) across the globe. India has preferential access, economic cooperation and Free Trade Agreement (FTA) with various member countries like Thailand, Japan, South Korea, Chile etc. India has also signed bilateral tradedeals in the form of Comprehensive Economic Partnership Agreement (CEPA)/Comprehensive Economic Cooperation Agreement (CECA)/FTA/Preferential TradeAgreements (PTAs). Most popular bilateral trade agreement is with ASEAN countries. Considering the sharp increase in trade agreements, misuse of the FTA route can't be avoided to escape custom duties.

In the Budget Speech 2020, The Hon'ble Finance Minister highlighted the misuse of FTAs and introduced a statutory amendment in the Customs Act.Finance Minister Budget Speech Extract reads as below:

136. It has been observed that imports under Free Trade Agreements (FTAs) are on the rise. Undue claims of FTA benefits have posed threat to domestic industry. Such imports require stringent checks. In this context, suitable provisions are being incorporated in the Customs Act. In the coming months we shall review Rules of Origin requirements, particularly for certain sensitive items, so as ensure that FTAs are aligned to the conscious direction of our policy.

This amendment was related to the domestic administration of Free Trade Agreements to curb issues of violations and misuse in India.

Section 28DA of Customs Act, 1962 has been inserted in Chapter VAA of the Customs Act, 1962 vide clause 110 of Finance Act, 2020 for administering free trade / preferential tax treatment under Trade Agreements. The amendment introduces a significant shift in the legal responsibility of the importers making FTA claims through increased documentation, additional disclosures and a five-year information retention period on their part. The new section seeks to prescribe for time bound verification from exporting country in case of any doubt. Pending verification preferential tariff treatment shall be suspended and goods shall be cleared only on furnishing security equal to differential duty. In certain cases, preferential tax treatment may be denied without further verification.

In exercise of powers conferred under Chapter VAA and Section 28DA, Government of India has prescribed Customs (Administration of Rules of Origin Under Trade Agreements) Rules, 2020 (CAROTAR, 2020) vide Notification Number 81/2020 (Non-Tariff) dated August 21, 2020 to provide for the documentation and compliance requirements for an importer to establish the origin criteria, including the value addition, product-specific criteria, processes and timelines for verification of the FTA claim by the customs authorities. For smooth implementation of CAROTAR Rule, CBIC has issued Circular No. 38/ 2020-Customs dated August 21, 2020.

CAROTAR, 2020 read with CBIC Circular No. 38/2020-Cus, **supplement** the existing operational certification procedures prescribed under different trade agreements (FTA/ PTA/ CECA/ CEPA).A list of minimum information which the importer is required to possess has also been provided in the rules while importinggoods under claim of preferential rate of duty.**The CAROTAR Rules has been made operational w.e.f September 21, 2020.**

The new rule casted the onus on the importer to proof origin criteria , includingthe regional value content and product-specific criteria, specified in the Rules of Originin the trade agreement. This is a significant departure from earlier one by which only 'certificate of country of origin' was issued by the exporting agencies was consideredas sufficient documents to claim the FTA benefits. This also facilitate Customs authorities in smooth clearance of legitimate imports under FTAs.

<u>Why there was a need for Administration of Trade Agreements</u>

- Rising cases of misuse of FTAs and undue claim posing the threat to the country

- Sharp deep in export of goods to the FTA countries like Japan, South Korea, Singapore, Malaysia, ASEAN Countries, SAFTA Counties. Hence, India has not gained much from the FTAs it has entered into.

- Unauthenticated or tempered Certificate of Origin

- Sharp increase in bilateral and unilateral agreements

- Non fulfillment of value addition requirements

- 'Certificate of Origin' is not the only document to claim FTAs, it has also to be supported with other documentations

<u>Key Features of Customs (Administration of Rules of Origin under Free Trade Agreement), 2020</u>

CAROTAR, 2020 provides for list of the basic information to be possessed by the importer at the time of importing the goods and the information and declaration to be furnished at the time of filing of bill of entry. It provides a detailed procedure for verification of rules of origin by the customs authority and exchange of information with the exporting countries. It contains Rule 1 to 8 along with <u>FORM I</u> which provides for list of basic information to be possessed by importer. Key aspects to be looked into is described below:

A. Preferential Tariff claim and Filing of Bill of Entry [Rule 3(1)]

1) Importer has to claim preferential rate of duty at the time of filing of Bill of Entry

2) Importer has to specifically make a declaration in the BOE that the goods qualify as originating goods (IMPORTANT)

3) Capture respective tariff notification against each item on which preferential rate of duty is claimed

4) Produce certificate of origin for each of the items imported

5) Capture the following additional information in the BOE

a. COO reference number,

b. Date of issue,

c. Originating criteria

d. Indicate if accumulation/cumulation is applied;

e. Third country COO, if any

f. Transportation directly from country of origin

The Directorate General of Systems through Advisory No.34/2020 dated September 17, 2020has made the necessary changes in ICES (Indian Customs EDI Gateway) capturing the above details. Further, the board vide Notification No.90/2020 -Cus (NT) dated September 17, 2020 has notified amendment in the BoE format under Bill of Entry(Forms) Regulations, 1976 through Bill of Entry (Forms) (Amendment) Regulations, 2020 to align the information requirements in cases where preferential duty benefit is claimed.

B. Denial of preferential rate of duty [Rule 3(2)]

The Proper officer without verification may deny the preferential rate of duty if the certificate of origin:

1) Incomplete and not in accordance with Rules of Origin

2) Alteration not authenticated by the Issuing Authority;

3) Expiry certificate of origin

4) Item not covered or ineligible under preferential trade agreements

C. Information to be possessed by the Importer at the time of Importation [Rule-4]

The importer claiming preferential rate shall at the time of import possess the information as prescribed in Form I and submit the same to the proper officer on request. The information has to be preserved for the period of five years from the date of filing of Bill of Entry.

<u>*Form I – It comprises of three sections.*</u>

- Section I (Guidance for filing up the Form I) This section captures guidelines for importers to fill the information a list of basic minimum information which an importer is required to possess while importing the goods.

- Section II ((To be filled after filing of Bill of Entry)This section contains information required to be submitted after the filing of the Bill of Entry such as BOE No, date, details of goods on which preferential duty is claimed and 8 digit HSN code

- Section III(This information should be possessed before import of goods) – This section captures information in possession of the importer prior to the import of the goods. It is divided into two parts as follows:

- Part A - Briefly describe the production process undertaken in the country of origin with respect to production of the imported good. Also, state which of the originating criteria prescribed in the Rules of Origin has been claimed.

- Part B: (To be filled if originating criteria is NOT wholly obtained, for each of such good under import, on separate sheets)

D. Customs authority seeking information from the importer [Rule 5] and reference to verification authority [Rule 6]

During customs clearance or thereafter, if the officer has reason to believe that origin criteria have not been met, he may seek information and supporting documents, as may be deemed necessary, from the importer to ascertain correctness of the claim. We have summarized the timelines and procedure for verification through pictorial presentation below.

Further, in terms of Rule 5(4) if the importer fails to furnish the information and proper officer has incomplete documents to conclude where origin criteria is meet, in such cases proper officer may seek information from exporting agencies through nodal officer nominated for this purpose. In terms of Circular 38/2020, board has designated Director (International Customs Division),CBIC as the nodal point for taking up verification of origin with partner countries. Hence allrequests for verification should be addressed to Director (ICD). Further, verification request shall be processed on the following additional grounds also:

- Doubt regarding genuineness or authenticity of the COO for reasons such as mismatch of signatures or seal

- Random basis verification;

It is very important to note here that in cases where the verification is initiated due to doubt regarding authenticity of COO or lack of sufficient information to conclude origin criteria, the proper officer may exercise the following:

1) Suspend the preferential treatment of such goods till closure of verification

2) Assess the BOE on provisional basis on request of importer upon r furnishing a security amount equal to the difference between the duty provisionally assessed and the preferential duty claimed

E. Consequences of non-furnishing the required information by importer

Situations lead to action:

1) where an importer fails to provide requisite information and documents by the due date prescribed under rule 5 (i.e. within 10 days) or

2) failed to exercise reasonable care to ensure the accuracy and truthfulness of the information furnished under these rules,

Comments

CAROTAR provides stringent documentation and strict obligation on importer who would like to avail preferential duties benefits under various trade agreements to keep a check on fraudulent transactions and thereby claiming undue advantage. Now, this is time for the importers who have material imports from countries having FTA to relook the documentation and information aspects to be complied with the CAROTAR 2020 Rules. It is be noted that the level of information required by CAROTAR is very difficult to obtain from the counterpart practically. Hence, keeping in mind the requirements and consequences of non-compliant, it is advisable to maintain a proper documentation trail before movement of goods. Further, how the customs authority maintains the pricing confidential information of the importer is another watch point.

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

A DISCUSSION PAPER ON CHAPTER-III - DIRECT TAXES OF FINANCE ACT, 2020 - FEBRUARY AND MARCH - 2020 - INCLUDING THE AMENDMENTS MADE BY THE TAXATION AND OTHER LAWS (RELAXATION AND AMENDMENT OF CERTAIN PROVISIONS) ACT, 2020

CA. VIVEK RAJAN V

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

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

Scope of the Discussion Paper

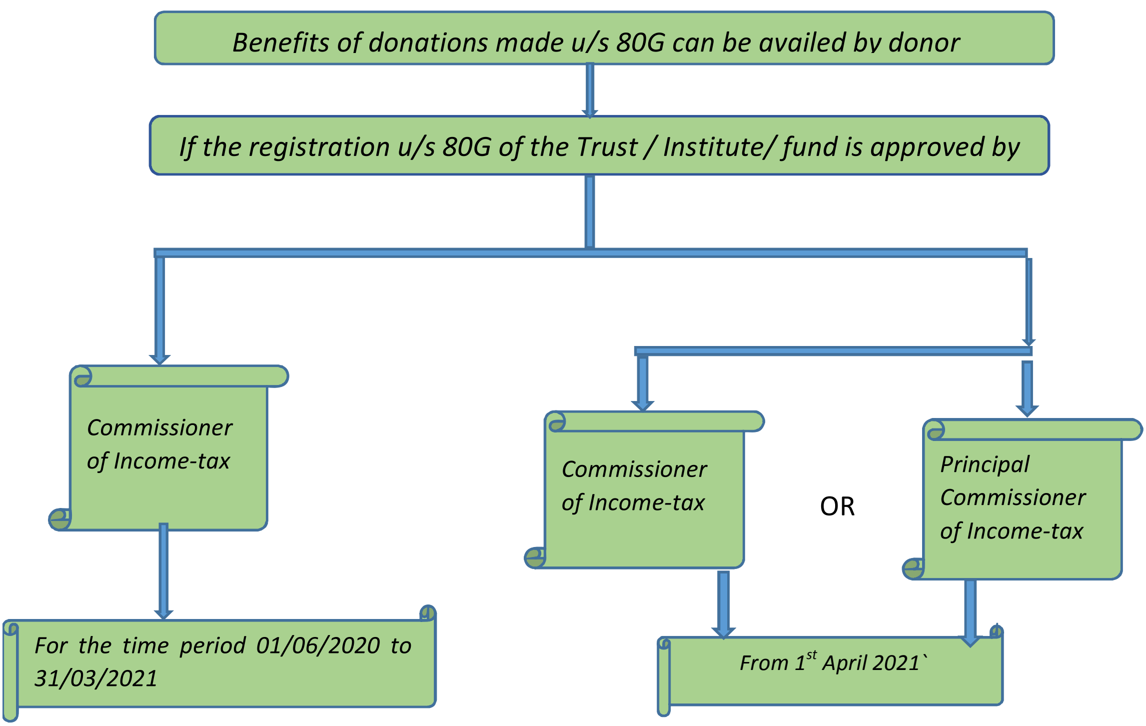
This discussion paper attempts to **cover all sections of the Finance Act, 2020** relating only to Direct Taxation along with the amendments made by **The Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 which got the assent of the President of India on 29th September 2020.** This discussion paper attempts to cover all the aspects about the amendments broadly **and not in detail.** Further unless otherwise specifically mentioned, sections discussed in this paper, relates to Income-tax Act, 1961 and the Finance Act, 2020. Please refer to Finance Act, 2020 and the relevant pronouncements before taking any decision. The readers are requested to contact the author, in case of errors (which are unintentional) and also in case of divergent views with the author's note.

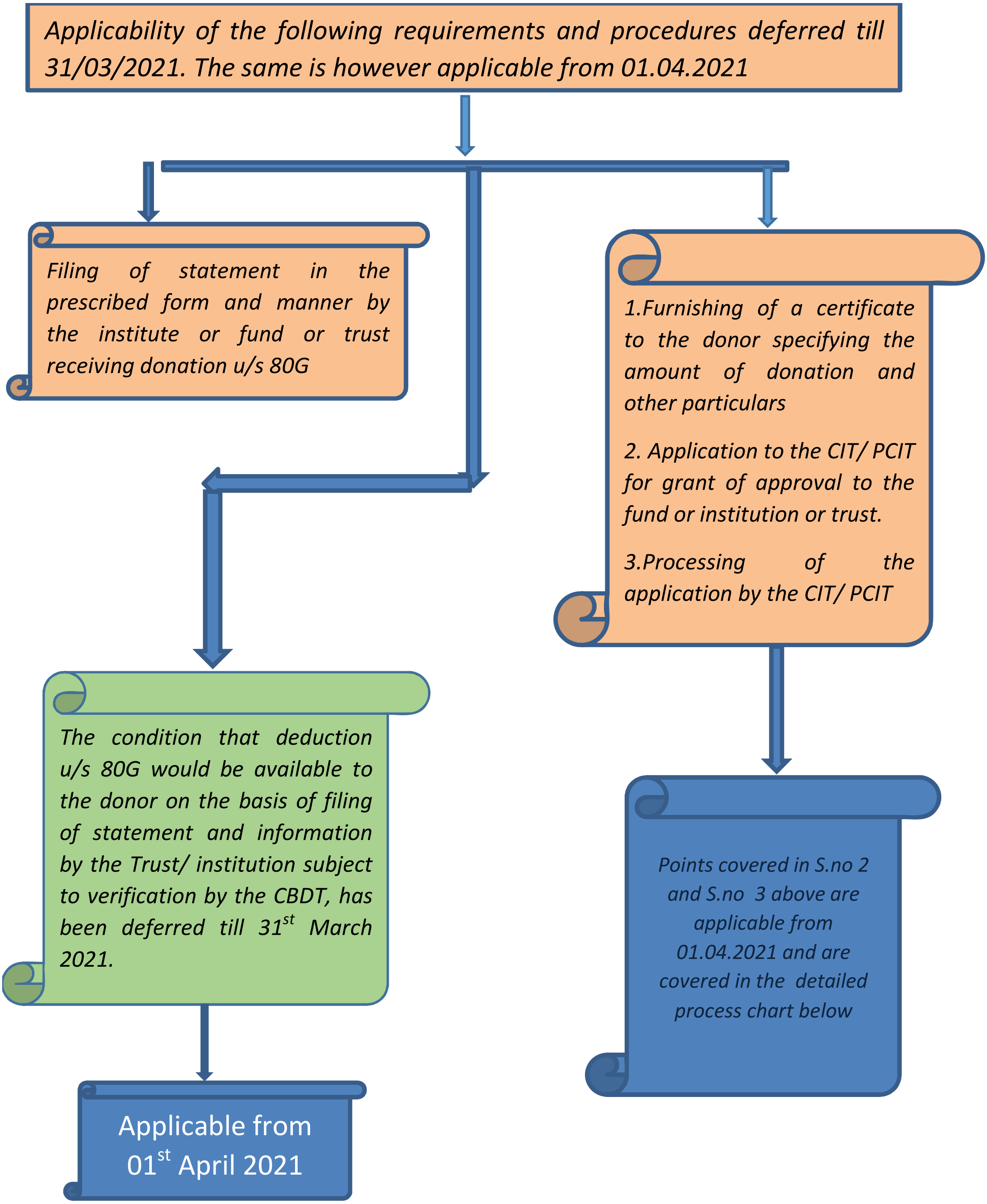
We thank the readers for giving their support for the 100% coverage attempted for the first time for the Budget 2019. Similarly, we are attempting to extend the coverage of the discussion paper **to all the sections of the Finance Act, 2020 and also to coin FAQ's to the best extent possible.** Giving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

Acronym and Description

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

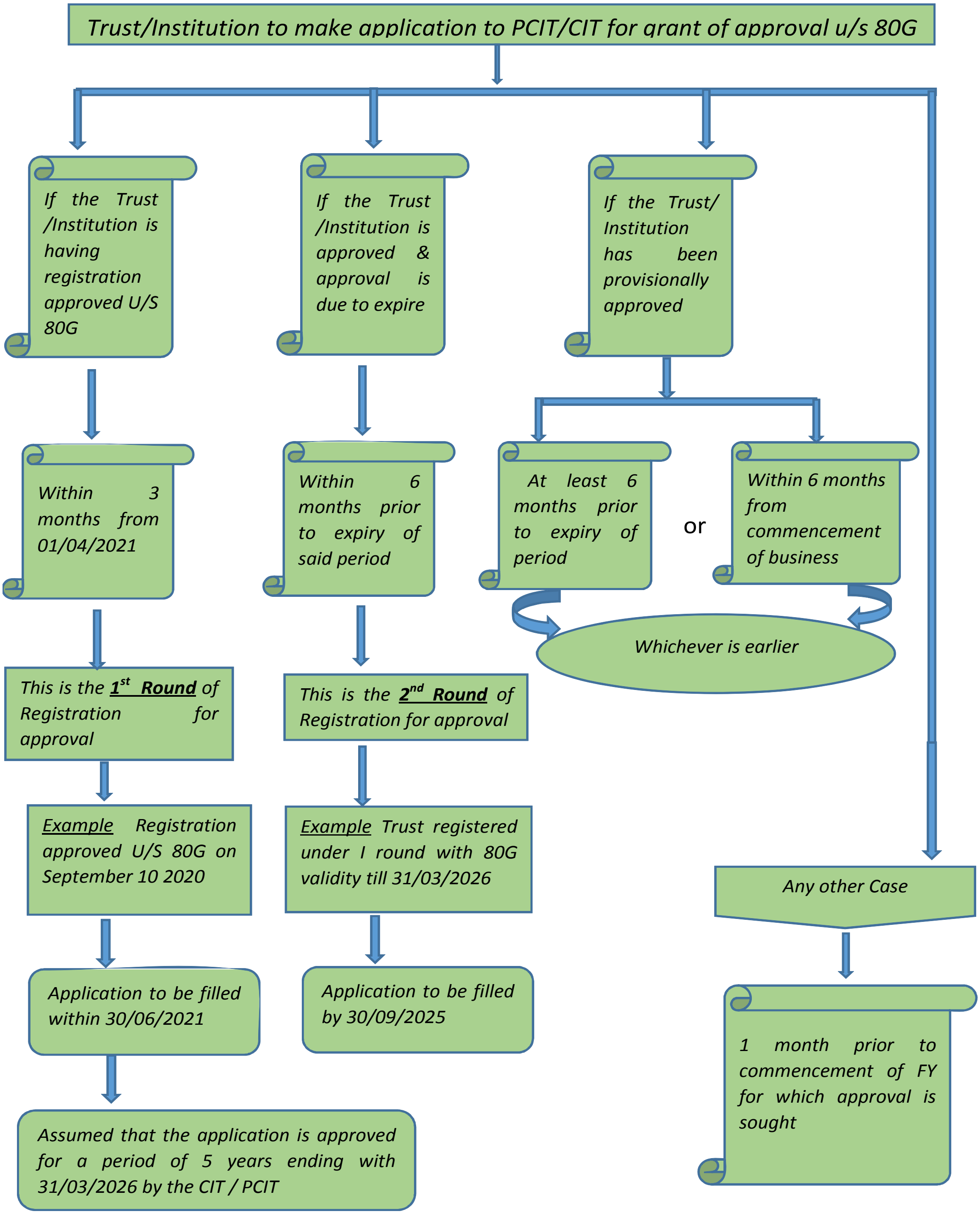
Implications with respect to Section 80G





In other words, the scenario that was prevalent prior to FA 2020 would remain in force till 31st March 2021.

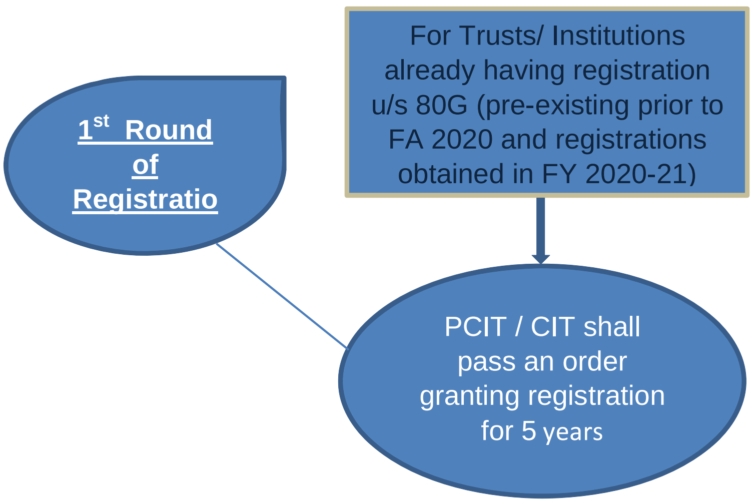
With effect from 01/04/2021



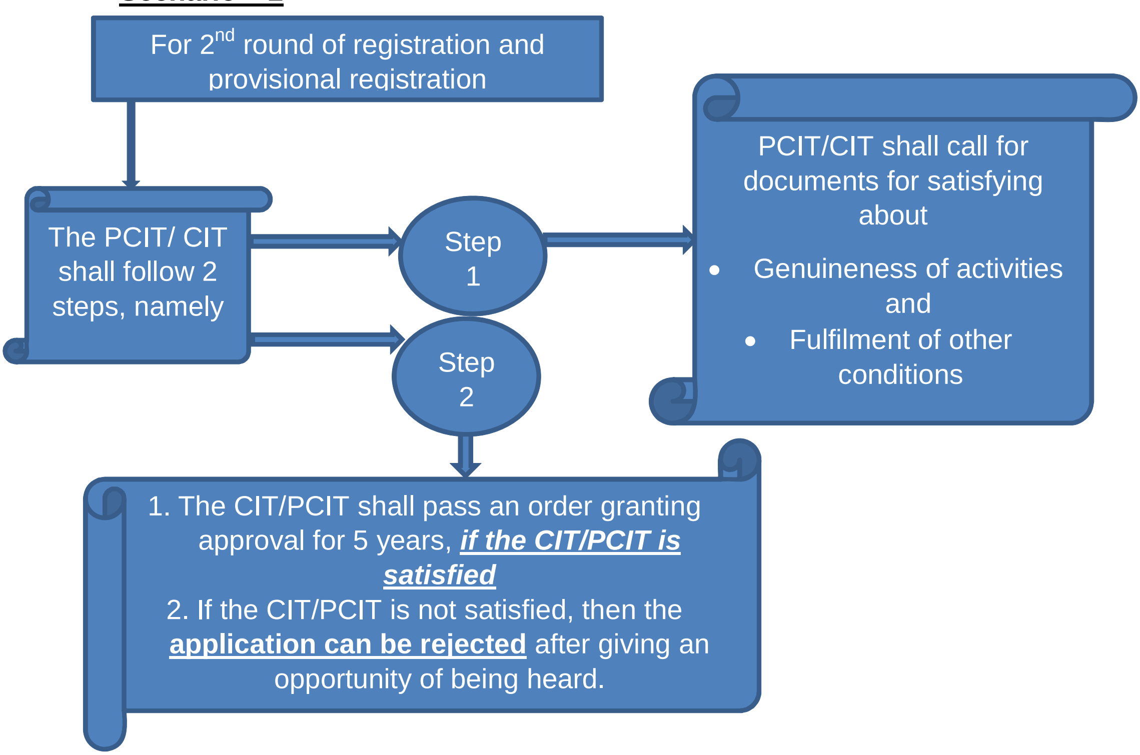
Validity of approval- With effect from 01st April 2021

This process chart consists of 3 scenarios and each of them are detailed as under

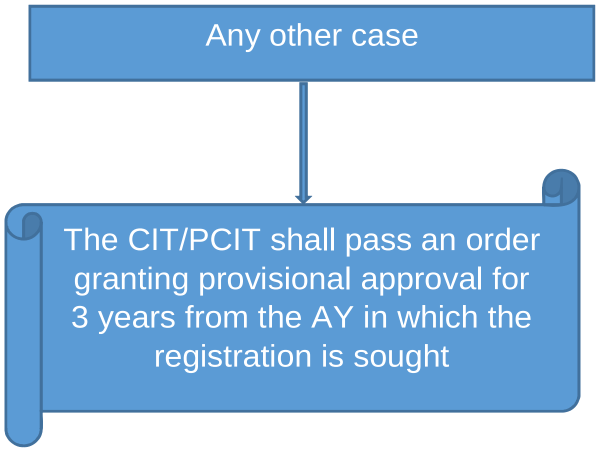
Scenario – 1-



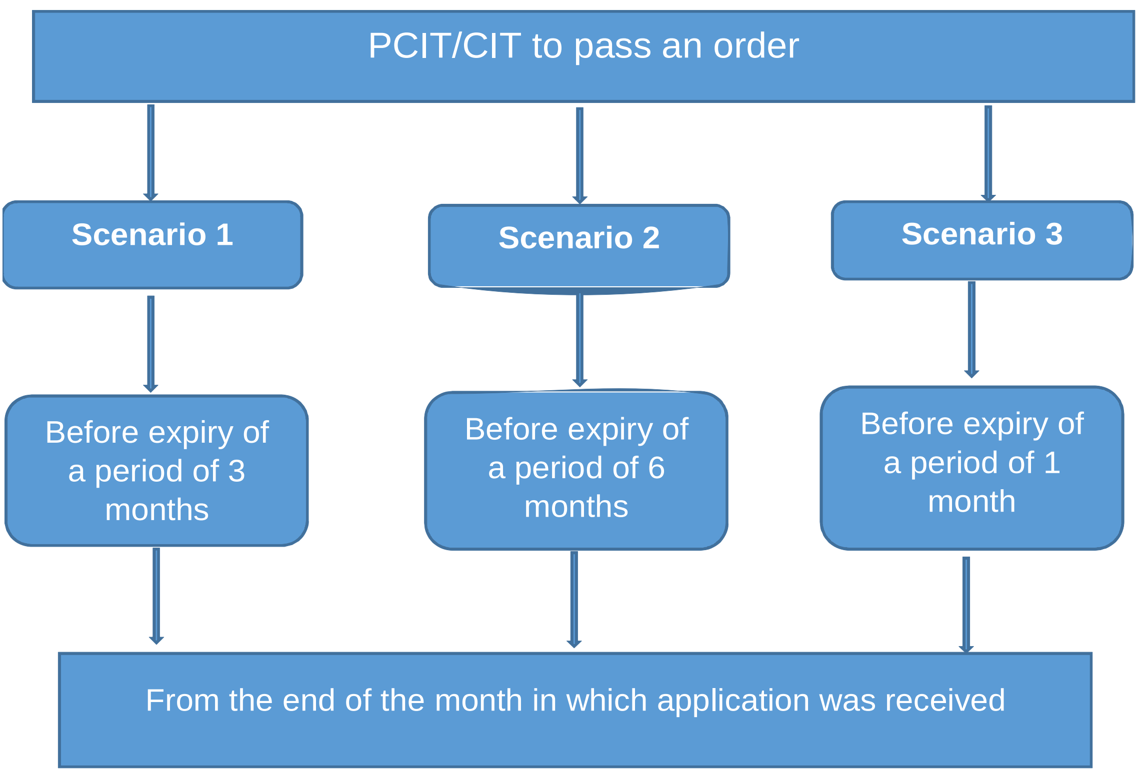
Scenario – 2



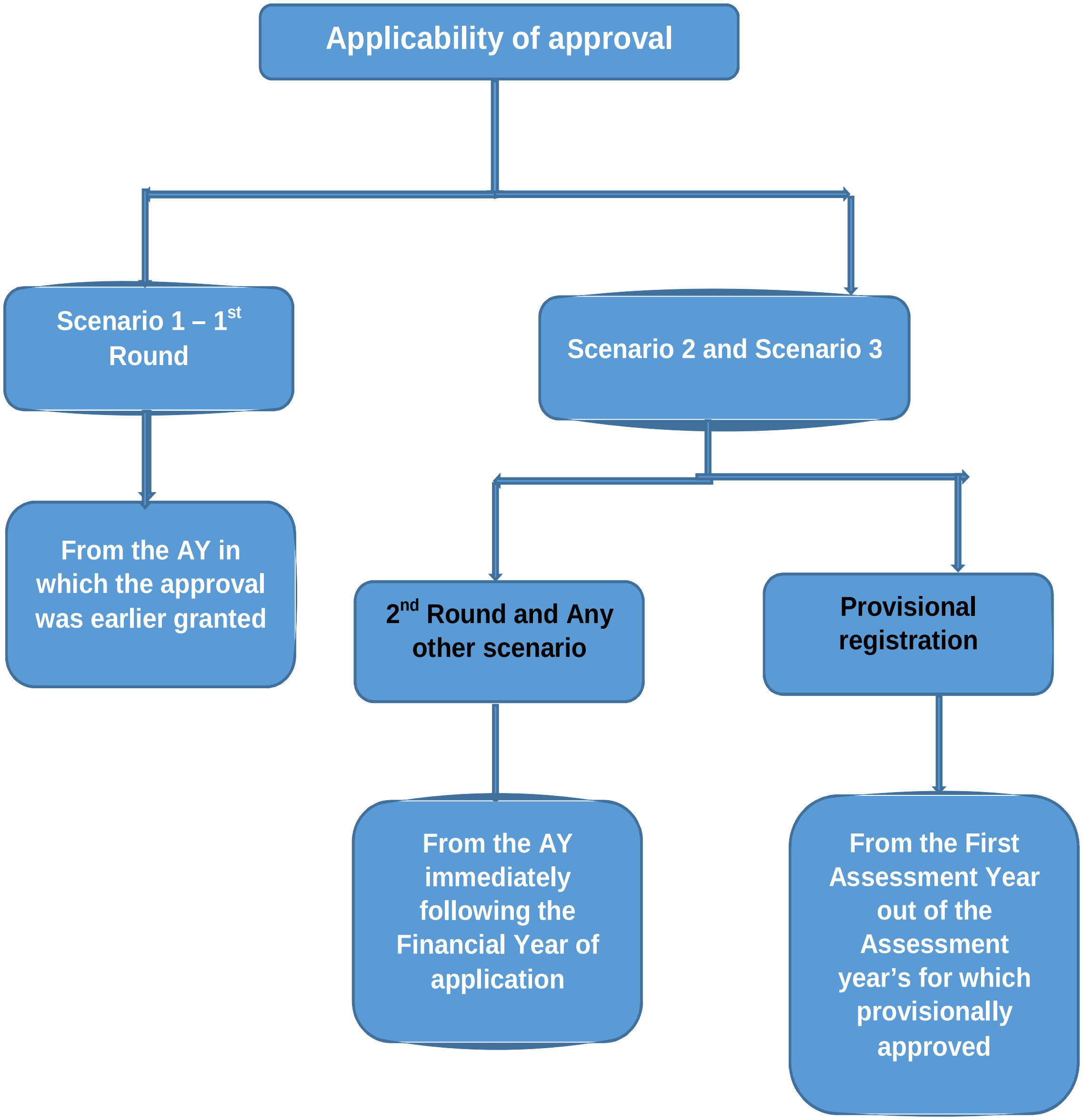
Scenario -3



Timelimit for the CIT/PCIT



AY from which the approval is applicable



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REMOVAL OF DDT - IS IT A BOON OR BANE? (FROM INCOME TAX PURVIEW)

Mrs. MANASA MEENAKSHI D.V.N.

Historically, dividend was always taxable in the hands of shareholders. The concept of Dividend Distribution Tax(DDT) being payable by the companies, was introduced for the first time by Finance Act, 1997. Dividend that was subjected to DDT was made exempt in the hands of the shareholders.Several changes were made to the provisions relating to DDT in the past, including those that remove the cascading effect of dividends received from subsidiaries, grossing up mechanism, changes in the rate of tax, etc.

Further, the tax treaties entered by India with various countries largely limit taxation on dividends in India at 10 per cent and the shareholder has the ability to claim credit for the tax deducted in India, in its country of residence. Since, DDT is levied on the Indian company distributing dividend, it was believed that the tax treaty provisions are ineffective. Also, shareholders faced challenges in claiming credit for DDT in their home country which typically resulted in high tax cost for foreign shareholders.

THEN – UPTO AY 2020-21:

As per Section 115O of the Income Tax Act-1961 (the “Act”), every Indian company declaring dividend on shares has to pay dividend distribution tax (DDT) to the government within 14 days from the date of declaration or distribution or payment of any dividend, whichever is earlier.

Since the taxes on dividend were paid by the company, the income was exempt in the hands of the shareholders (Section 10(34)) subject to certain conditions provided in Section 115BBDA of the Act.

NOW – FROM AY 2021-22 ONWARDS:

With the abolition of provisions related to DDT in the Finance Act 2020, every company declaring dividend on or after 01.04.2020 is not required to pay the DDT to the Government.

Hence, the corresponding exemption section (10(34)) is also removed, thereby taxing the dividend as income in the hands of the shareholders.

However, the company is required to deduct taxes at source (TDS) as per the provisions of Chapter XVII-B. Based on the residential status of the shareholders, the compliance requirements vary, which are elucidated in this article.

a) DIVIDEND TO INDIAN SHAREHOLDERS – RESIDENTS

i. **Section 194:** Every company declaring / paying dividend to residents is required to deduct taxes @ 10% (**) on such dividends. However, the section mentions certain situations in which taxes need not be deducted, as tabulated below:

Monetary limit and status based	TDS is not required if the shareholder is an **individual** and the dividend payout does not exceed **Rs. 5,000/- and payment is made other than by cash**
Only Status based (irrespective of monetary limit)	TDS is not required if the shareholder is • Life Insurance Corporation of India • General Insurance Corporation of India • Any other insurer

(**) Reference is drawn to the Press Release by the CBDT dated 13.05.2020 as per which TDS rate is reduced to 7.5% for payments made during 14.05.2020 to 31.03.2021

ii. **Section 196:** With a non-obstante clauseat the beginning, Section 196 specifies that nothing in Chapter XVII-B shall apply in a case where the dividend is paid to

- Government
- Reserve Bank of India
- Corporation established by a State Act
- Mutual funds as specified in Section 10(23D) of the Act.

i. **Section 206AA:** In case the shareholder does not provide PAN or provides an invalid PAN, the company is required to deduct taxes at a higher rate of 20%.

Issue 1: Whether taxes are to be deducted at the rate given in the section or rate plus surcharge plus Cess?

As per Clause (6) of the Finance Act, TDS is required at the rates in sections plus surcharge only when payments are made to non-residents. Further as per proviso to Clause (12), TDS rate shall include Cess only when payments are made to non-residents. Hence, the TDS rates shall not include surcharge and Cess when dividend is paid to residents.

Issue 2: Whether taxes deducted @ 20% under Sec 206AA to include surcharge and Cess?

Wherever the intention of the law is to include surcharge and Cess, the same is mentioned at the appropriate places. (For example – Section 115JB). Further, the word 'maximum marginal rate' is also defined and referred to at certain places. Hence, the Delhi Bench of the ITAT in the case of Computer Sciences Corporation P Ltd observed that the rate in Section 206AA is only to supersede the rate given in the section and surcharge and Cess need not be included with the 20%.

a) DIVIDEND TO NON-RESIDENT SHAREHOLDERS

As per Section 5 read with Section 9 of the Act, dividend paid by an Indian company is taxable as income in India to the non-resident shareholder. The following sections are required to be considered in this regard.

i) Section 115A: Where the total income of a non-resident includes any income by way of dividend, the income tax payable shall be aggregate of:

- 20% on the dividend income
- Such rate of tax that the assessee would have been chargeable on the remaining income

ii) Section 195: Where any sum chargeable to tax as per the Act is paid to a non-resident, the person responsible for paying is required to deduct taxes at the rates in force.

Since dividend income is chargeable to tax and is paid to a non-resident shareholder, the Indian company is required to deduct taxes at the rates in force.

iii) Section 2(37A): Rates in force for the purpose of tax deduction u/s. 195 means the rate specified in the Finance Act or the rate as per agreement entered into by the Central Government under Section 90 (the "DTAA), whichever is applicable by virtue of Section 90.

iv) Section 90: Where the Central Government has entered into an agreement with the Government of any country outside India, for granting tax reliefs, in relation to the assessee to whom the agreement applies, the provisions of the Act shall apply to the extent they **are more beneficial to the assessee.**

From a conjoint reading of the above, in a case where DTAA is available with the shareholder's country of residence, the Indian company shall deduct tax at the **lower** of:

- Rate in the relevant section – 115A – 20%
- Rate in the DTAA

However, a tax residency certificate (TRC) has to be obtained from the shareholder as required by the provisions of Section 90(4) and also Form 10F has to be obtained as per Section 90(5) of the Act to claim the benefit of lower rate under DTAA .

Issue 3:Whether Sec 206AA (higher rate of TDS in cases of NO PAN) overrides DTAA rates when payments are made to non-residents?

In the case of **Dy. DIT (International Taxation) v/s. M/s.Serum Institute of India Ltd [2015] by the Pune Tribunal** and also in the case of **M/s. Wipro Ltd v/s. ITO (International Taxation) by the Bangalore Tribunal,** it was held that TDS provisions on payments made to non-residents should be read along with the provisions of DTAA for computing the tax liability and when a non-resident is eligible for DTAA benefits, there is no scope for invoking the rate under Sec. 206AA even if PAN is not furnished. Hence, Sec 206AA cannot override the DTAA rates.

v) Payments to Foreign Institutional Investor – Section 196D and Section 115AD:

As per Section 115AD, where the total income of a Foreign institutional investor (FII) includes dividend income, the income tax payable on the dividend income is @20%.

For the purposes of Section 115AD, the expression "Foreign institutional investor" means such investor as the Central Government, may specify by a notification in the official gazette.

Further, as per Section 196D, where an Indian company makes payment of dividend to a FII, tax is required to be deducted @20%.

Issue 4: Section 196D or DTAA rates – Can they be compared for TDS purpose?

In cases where TDS is as per Section 195, the definition of rates in force makes a reference to the DTAA rates and hence the Indian company (being the deductor) can adopt the lower rate for complying with TDS provisions.

However, in **Pilcom V/s. CIT in SLP (Civil) No. 7315 of 2019, the Supreme Court held that** "in cases where specific sections are provided for TDS to non-residents, the same is required to be complied with. If the non-resident foresees a benefit under DTAA, the same can be disputed and refund shall be granted. But that does not absolve the liability to deduct taxes by the person making the payment". Though this decision was in the context of Sec 194E, it can be inferred that every section having specific provisions for TDS shall prevail over Section 195 / DTAA rate. In case the assessee is liable to lower tax rate after applying DTAA, the difference of tax actually deducted and that actually liable can be claimed as refund.

From the above, there is an artificial distinction in case of payments made to non-residents summarized as:

Non-Residents (Other than FII)	Sec 115A – Sec 195 – Sec 90 – Rate in section (20%) or DTAA whichever is lower
Non- Residents (being FII)	Sec 115AD – Sec 196D – 20%

<u>Note</u>: *When taxes are deducted on payments made to non-residents as per the rates in IT Act, such rates are to be further increased by applicable surcharge and Cess @4% (Kindly refer Issue 1 above). However, when TDS is as per rates in the DTAA, such an increase is not required as mentioned in Article 2 of the DTAA.*

<u>Issue 5:</u>Whether the term FII includes a foreign portfolio investor (FPI) or a Qualified Foreign Investors (QFI)?

<u>View 1:</u> The Securities Exchange Board of India (SEBI) has introduced the Foreign Portfolio Investors Regulations, 2014 (Notification No. LAD-NRO/GN/2013-14/36/12 dated January 7, 2014)to replace the existing SEBI (Foreign Institutional Investor) Regulations, 1995 (FII Regulations) and the Qualified Foreign Investors (QFI) framework. As per the new regulations, an FPI has been defined to mean a person who satisfies the prescribed eligibility criteria and has been registered under the FPI Regulations. ***All existing Foreign Institutional Investors (FIIs) and QFIs are to be merged into one category called FPI.***

Hence, a view can be taken that FII includes FPI and QFI and hence payments of dividends to FPI and QFI are also covered under Section 196D (20% + Surcharge + Cess@4%). This also means that reference cannot be made to DTAA rates for these payments (Pilcom Judgement).

<u>View 2:</u>Such an inclusion of FII and QFI as FPI is explained by the SEBI regulations and the CBDT has not come up with a similar inclusion till date.

Further, the CBDT, vide Notification no. 9/2014 dated 22.01.2014, specified that FPI registered under SEBI shall be treated as FII **for the purpose of Section 115AD**.

Also, the CBDT, vide Notification no. 17/2020 dated 13.03.2020, specified that a non-resident being an Eligible Foreign Investor (in accordance with SEBI) shall be deemed to be FII for the purpose of transactions in securities made on a recognized stock exchange **located in an International Financial Services Centre (IFSC)**, where the consideration is payable in foreign currency.

Hence, from the above notifications, another contrary view can be taken that the CBDT has included FPI as FII only for the purposes of Section 115AD and for trading in IFSC. Since no similar / specific mention is made as regards Section 196D, a company paying dividends to FPI need not be covered under 196D and compliance shall be as per Section 195 / Section 90.

Note: Where the shareholder submits declarations in Form 15G / 15H or provides a lower deduction certificate u/s 197, the company shall adopt such rates for deduction of taxes.

SUMMING UP:

In DDT era, the gross amount of dividend as well as the DDT on the same was on the company's hands which resulted in a higher tax burden for the dividend paying company. The financial burden of the companies paying the dividend was further increased by the Grossing up mechanism given in Section 115O. Further, the non-residents recipients can now claim the taxes deducted as credit in their country of residence. In this way, the abolition of DDT is a welcome move.

On the other side, under DDT, the company made a direct payment to the Government and the maintenance of documents related to shareholders were not much required. However, the current provisions require that the company maintains various documents like TRC, PAN, declarations, etc. which are to be properly analyzed by the company before concluding on the tax rates. Also, the law mandates any payment to a non-resident to be accompanied by the company's self-declaration in Form 15CAand a chartered accountant's certificate in Form 15CB. Though 15CB is for payments exceeding Rs. 5,00,000, Form 15CA is required for each remittance (irrespective of the amount). For listed companies having lot of non-resident shareholders, the count of Form 15CA and Form 15CB are significantly high and therefore, the companies have to incur additional cost of compliance and maintenance of the required documents than before, making the whole process time-consuming and cumbersome.Adding on, since all these compliances are time bound as per various provisions of the Companies Act, 2013 and the Income tax, 1961, the company issuing the dividend is certainly on a clock!

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