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ACCOUNTING UPDATES

ACCOUNTING UPDATES

INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA (ICAI)

EAC OPINION

RECOGNITION OF MISCELLANEOUS SCRAP ITEMS GENERATED IN THE PLANT AND SCRAPPED ASSETS AWAITING DISPOSAL UNDER IND AS FRAMEWORK

Facts of the Case:

A Company (hereinafter referred to as 'the Company') is a public sector enterprise under the administrative control of the Ministry of Mines, Government of India and is engaged in the mining of bauxite, manufacturing of alumina and aluminium, generation of power at the captive power plant for use in smelter and selling of alumina and aluminium both in domestic and international markets. Besides, the Company is also engaged in the generation of wind power with the setting up of wind power plants at distinct locations in the Country. The Company has four production units. Details are furnished below:

- Fully mechanised Open Cast Bauxite Mine having an excavation capacity of 68,25,000 tons per annum;
- Aluminium Refinery having a production capacity of 22,75,000 tons per annum;
- Captive Power Plant having a power generation capacity of 1200 megawatts (MW); and
- Aluminium Smelter Plant of 460,000 tons capacity per annum.

In addition, there are 4 Wind Power plants of about 50 MW each located in different states.

Mines Division, which is located uphill, serves feedstock to the alumina refinery located 16 km downhill. Apart from domestic and export sales of alumina, the refinery unit provides alumina to the Company's smelter plant which is about 600 km away by specially designed alumina wagons by rail transport. To produce 1 metric ton (MT) of aluminium at the smelter, about 13,600 kilowatt-hours (kWh) of power are required, which is met by a captive power plant situated 4 km away from the smelter plant. Calcined alumina and thermal power are two important inputs for producing aluminium metal. The production process starting from bauxite mines to alumina refinery to aluminium smelter and captive power plant is fully integrated. The sale of calcined alumina and aluminium metal is the mainstream of revenue for the Company.

Accounting for scrap followed by the Company:

The scrap generated at the plant is of two types:

- Process Scrap (aluminium scraps, anode rejects and butts): Scraps generated in the process of aluminium metal production are known as 'Process Scrap' and are re-used in the process by remelting the same. The process scraps are not sold in the market. The generation of such scrap is recognised as a 'change in inventory of finished goods and work-in-process' in the Statement of Profit and Loss of the Company and the inventory on the reporting date is presented as an intermediary under the inventory in the Balance Sheet of the Company. Such scraps, being reusable in the production process are not intended for sale and are valued at cost.
- Miscellaneous Scrap (used spares, used oil and lubricants, incoming packing materials, discarded and scrapped assets etc.): This category of scrap is mainly generated from used spares, oil, and lubricants, packing materials and scrapped plant and machinery. These items have no use other than

selling as scrap. The miscellaneous scraps are sold through the e-auction platform. Such kinds of scraps are collected in the scrap yard for disposal and are measured at every reporting date. The same is valued at the available market price (based on the last sale transaction) or the estimated price fixed by the management for disposal. The change in inventory and sales of miscellaneous scraps are recognised as 'Other Income' in the Statement of Profit and Loss. The inventory of miscellaneous scrap as of the reporting date is disclosed under the head 'inventory' in the balance sheet with a distinct sub-head as 'scrap' in the financial statements of the Company for the financial year FY 2021-22. The recognition of miscellaneous scrap by the Company is as follows:

- Such miscellaneous scraps are tangible items having economic value and have a market for disposal.
- The items are regularly generated during the operation of the plant and are being sold/disposed of through e-tendering. Income from the sale of miscellaneous scrap is recognised as other income.
- On generation of stock of miscellaneous scrap, the Company makes the valuation at the available market price or the estimated price fixed by the management for disposal. The change in such inventory of scrap is recognised as other income.

Income recognised against such miscellaneous scrap and inventory of scrap during the last three years is as follows:

(INR IN CRORE) PARTICULARS	2021-22	2020-21	2019-20
Income recognised during the year	33.77	15.71	19.52
Inventory at the year ending date	16.91	13.82	14.71

Observations during the statutory audit of the annual accounts of the Company for FY 2021-22, regarding the miscellaneous scrap items are as below:

- With regard to valuation of miscellaneous scrap: Generally, the miscellaneous scraps are generated from the discarded/broken parts of equipment, packing materials etc. whose cost has already been charged off in the Statement of Profit and Loss and hence, the cost of the discarded parts is Nil. As per paragraph 9 of Indian Accounting Standard (Ind AS) 2, 'Inventories', the inventory shall be measured at a lower cost or net realisable value (NRV). In the present case, since the cost is nil, the miscellaneous scrap etc. shall be valued as 'Nil' and revenue shall be recognised as income on completion of the sale only. There should not be any recognition of the generation of scrap.
- With regard to presenting the miscellaneous scrap under 'Inventories' in the Balance Sheet and revenue under 'other income': The auditors are of the view that the 'miscellaneous scrap' does not fall within the definition of inventory as per paragraph 6 of the Ind AS 2. Therefore, the same shall not be included in the inventory. Further, if the Company includes the miscellaneous scrap under inventory, then the Company should classify the revenue in 'Revenue from operations' instead of 'Other Income'.

Views of the Management:

The classification of scrap has not been defined in Ind AS. Therefore, the Company followed paragraph 10 of Ind AS 8, 'Accounting Policies, Changes in Accounting Estimates and Errors', which states that in the absence of an Ind AS that specifically applies to a transaction, other event or condition, management shall use its judgement in developing and applying an accounting policy that results in information that reflects the economic substance of a transaction. Accordingly, the Company mentions the classification and valuation of scrap in its accounting policy in Note No. 3.10 to the financial statements of the Company for FY 2021-22.

- With regard to the valuation of miscellaneous scrap: Scraps generated are the tangible assets generated in the process of production having economic value, which is recognised as inventory based on net realisable value (NRV). As these scraps have no measurable cost of purchase/ manufacturing, the Company carries these miscellaneous scraps at its fair value i.e., net realisable value or estimated price in the books of account to reflect the economic substance of the assets. Recognition of income from scrap only on completion of the sale and not recognising the same at the time of generation of scrap would not comply with the accrual basis of accounting.
- With regard to presenting the miscellaneous scrap under 'Inventories' in the Balance Sheet and revenue under 'other income': Schedule III to the Companies Act, 2013 classifies the inventories as:
  - Raw materials;
  - Work-in-progress;
  - Finished goods;
  - Stock-in-trade (in respect of goods acquired for trading);
  - Stores and spares;
  - Loose tools;
  - Others (specify nature).

Since there is an option to include an additional line item, i.e., 'Others (specify nature)', the Company included the scrap under this head and reported under 'Inventories' in the Balance Sheet.

With regard to the nature of miscellaneous scrap and the nature of items covered thereunder, the Company has separately clarified that the miscellaneous scraps are generated from various sources and constitute scrapped property, plant and equipment (PPE), used spares, used transformer oil, electrical cables, steel scraps, empty containers carrying input materials, used tyres, etc. The major source of generation of such scraps and its accounting treatment before these are declared as scraps are given below:

SL NO.	SOURCE OF SCRAPS	ACCOUNTING TREATMENT BEFORE IT IS CONSIDERED SCRAP
1	***Scrapped PPE:*** When an item of PPE is discarded after it completes its useful life or becomes uneconomical to operate, the same is removed from the PPE and kept as inventory after scrapping. The Company does not sell any item of fixed assets as such. All these discarded items of PPE are scrapped and sold as machine scraps.	Before an item of PPE is scrapped, the same is continued as a fixed asset at its carrying value (WDV).
2	***Used spares:*** When a spare part of any plant and machinery is replaced with a new one after the expiry of its useful life and the old used spare is collected for disposal and recognised as scrap.	▪ ***Major Spares:*** As it forms part of the PPE, accounting treatment explained at Sl. No. 1 is also followed for major spares. ▪ ***General Spares:*** Spares other than major spares are charged for repair and maintenance expenses when it is issued from the store for consumption. So, before scrapping, these spares are considered revenue expenses.
3	***Used transformer oil:*** After a certain period of operation, old transformer oil is taken out and replenished with fresh oil. The old used oil is kept as scrap.	Fresh oil issued for the transformer is charged to expenses before replenishment.
4	***Empty Containers/bags carrying input materials:*** Many chemicals used in the plants are supplied by the vendors in containers/bags. The empty containers/ bags are kept as scrap for disposal.	There is no identified price element of such containers which is otherwise included in the material/input cost. Hence, there is no specific accounting of such containers before it is considered scrap item.
5	***Used tyres:*** Many heavy earth moving machinery (HEMMs) and equipment are engaged in Mining and movement of materials. Damaged tyres of such HEMMs are replaced with new one and the old one is kept as scrap.	The cost of the tyres is charged to expenses when these are issued from the stores and fitted into the HEMMs. So, before considering them as scrap, the tyres are charged to revenue expenses.

Scraps collected are valued at their respective fair value (reserved price/market price) and recognised in the books of account.

Query

In view of the above, the querist has sought the opinion of the Expert Advisory Committee (EAC) of the Institute of Chartered Accountants of India (ICAI) on the following issues:

Whether the practice followed by the Company to recognise miscellaneous scrap as inventory correct?

- Whether practice followed by the Company with regard to the valuation of scrap at its fair value is correct?
- Whether the practice of the Company to recognise the income out of sale/change in stock as 'Other Income' correct?

Points considered by the Committee

The Committee notes that the basic issues raised by the Company relate to the appropriateness of recognition of miscellaneous scrap as inventory, its valuation at fair value and recognition of the income out of sale/change in stock as 'Other Income'. The Committee has, therefore, examined only these issues and has not examined any other issue that may arise from the Facts of the Case, such as accounting for the sale of alumina, aluminium and calcined alumina, accounting for power generated from captive plant and captive consumption of alumina, accounting for process scrap (aluminium scraps, anode rejects and butts), appropriateness of accounting for replaced parts of PPE,

accounting for spares not scrapped, etc. Further, the Ind AS referred to in the Opinion are the Standards notified under the Companies (Ind AS) Rules, 2015, as revised or amended from time to time.

The Committee notes from the Facts of the Case that major sources of miscellaneous scraps are scrapped PPE, used spares (major spares and general spares), used transformer oil, empty containers/bags carrying input materials and used tyres. With regard to scrapped, PPE, the Committee notes that after an item of PPE completes its useful life or becomes uneconomical to be operated, the same is removed from PPE and kept as inventory by the Company and is sold as machinery scraps. Similar accounting is followed for major spares. In the case of general spares, transformer oil, empty containers/ bags carrying input materials, tyres etc., these are considered as revenue expenses when these are issued. The Committee notes that Ind AS 16 does not deal with accounting for spares on the basis of their classification into 'major' or 'general' spares. Accordingly, in the opinion hereinafter, the Committee has used the expressions 'spares treated as PPE' and 'spares not treated as PPE' in accordance with the requirements of the aforesaid standard.

With regard to the recognition of miscellaneous scrap containing scrapped items of PPE and spares treated as PPE, as 'inventory', the Committee notes the definition of 'inventories' as per Ind AS 2, as follows:

'*Inventories* are assets:

- held for sale in the ordinary course of business;
- in the process of production for such sale; or
- in the form of materials or supplies to be consumed in the production process or the rendering of services.'

The Committee notes from the above that since miscellaneous scrap items as stated above cannot be considered as finished products/by-product held for sale, intermediate products/work-in-progresss in the process of production, or raw material/inputs/ supplies to be consumed in the production process, the same does not meet the definition of 'inventories' as per Ind AS 2. Therefore, the Committee is of the view that such scrap items should not be recognised as inventory.

With regard to accounting for scrapped items of PPE and used spares that are treated as PPE, the Committee notes the following paragraphs of Ind AS 16, 'Property, Plant and Equipment', which state as follows:

'53 The depreciable amount of an asset is determined after deducting its residual value. In practice, the residual value of an asset is often insignificant and therefore immaterial in the calculation of the depreciable amount.'

'67 The carrying amount of an item of property, plant and equipment shall be derecognised:

- *on disposal; or*
- *when no future economic benefits are expected from its use or disposal.*

68 The gain or loss arising from the derecognition of an item of property, plant and equipment shall be included in profit or loss when the item is derecognised (unless Ind AS 116, Leases, requires otherwise on a sale and leaseback). Gains shall not be classified as revenue.'

'70 If, under the recognition principle in paragraph 7, an entity recognises in the carrying amount of an item of property, plant and equipment the cost of a replacement for part of the item, then it derecognises the carrying amount of the replaced part regardless of whether the replaced part had been depreciated separately. If it is not practicable for an entity to determine the carrying amount of the replaced part, it may use the cost of the replacement as an indication of what the cost of the replaced part was at the time it was acquired or constructed.

71 The gain or loss arising from the derecognition of an item of property, plant and equipment shall be determined as the difference between the net disposal proceeds, if any, and the carrying amount of the item.

72 The amount of consideration to be included in the gain or loss arising from the derecognition of an item of property, plant and equipment is determined in accordance with the requirements for determining the transaction price in paragraphs 47-72 of Ind AS 115. Subsequent changes to the estimated amount of the consideration included in the gain or loss shall be accounted for in accordance with the requirements for changes in the transaction price in Ind AS 115.'

From the above, the Committee notes that an item of PPE shall be derecognised either on disposal or when no future economic benefits are expected from its use or disposal. The gain or loss from derecognition shall be included in the profit or loss when the item is derecognised. In the extant case, no economic benefits are expected from the use of scrapped items of PPE and the used spares treated as PPE, since they have either completed their useful lives or have become uneconomical to be operated. However, since economic benefits are expected from such scrapped items through their disposal, the same should not be derecognised after these are scrapped in view of paragraph 67(b) of Ind AS 116 reproduced above.

The Committee is further of the view that the scrapped items of PPE and used spares that are treated as PPE would normally appear in the books at their residual value as their entire economic value has already been charged to the Statement of Profit and Loss as depreciation during their useful life, as per the principles of Ind AS 16 and Schedule II to the Companies Act, 2013 and therefore, the same should be continued to be carried in the books at their carrying amount under the net block of PPE unless these items are impaired as per the requirements of Ind AS 36 'Impairment of Assets' and recoverable amount (which in case of these items, would normally be their fair value less costs of disposal rather than value in use) is less than the carrying amount. However, since the economic benefits are expected from these items, though not from their continued use but their disposal, the Company should examine whether these meet the classification and recognition criteria of 'non-current assets held for sale' as per Ind AS 105, 'Non-current Assets Held for Sale and Discontinued Operations', in which case, these should be accounted for as per the requirements of Ind AS 105. At the time of sale as scrap, these should be derecognised, with gain or loss on sale being recognised in the Statement of Profit & Loss. The gain arising from the sale may be presented as 'other income' in Statement of Profit & Loss.

With regard to the scrapped items, such as, used spares not treated as PPE e.g., those used for repairs, used transformer oil, tyres, empty containers/bags etc., the Committee notes from the Facts of the Case that these are charged as an expense in the Statement of Profit and Loss when these are issued or used/consumed and therefore, their entire cost has already been charged to the Statement of Profit and Loss, viz., these have already been derecognised in the books of account. Therefore, the Committee is of the view that these derecognised items should not be written back in the books of the account even if they exist physically, and accordingly, the question of their presentation as 'inventories' and valuation or revaluation at their fair value (reserved price or market value) or net realisable value would not arise, although, for control purposes, records in respect thereof may be kept. Any income arising on the sale of such scrap should be recognised as 'other operating revenue' as per the requirements of paragraph 9.1.10 of the Guidance Note on Division II – Ind AS Schedule III to the Companies Act 2013, (Revised July 2019 Edition), issued by the ICAI, as reproduced below:

'**9.1.10.** To take other examples, the sale of Property, Plant and Equipment is not an operating activity of a company, and hence, profit on the sale of Property, Plant and Equipment should be classified as other income and no other operating revenue. On the other hand, the sale of manufacturing scrap arising from operations for a manufacturing company should be treated as other operating revenue since the same arises on account of the company's main operating activity.'

Opinion

On the basis of the above, the Committee is of the following opinion on the issues raised:

- The practice followed by the Company to recognise miscellaneous scrap as inventory is not correct, as discussed above.
- As discussed above, scrapped items of PPE and used spares which are treated as PPE should continue to be carried in the books at their carrying amount under the net block of PPE unless these items are impaired as per the requirements of Ind AS 36 and recoverable amount (which in case of these items, would normally be their fair value fewer costs of disposal rather than value in use) is less than the carrying amount. However, the Company should examine whether these scrapped items of PPE meet the classification and recognition criteria of 'non-current assets held for sale' as per Ind AS 105, in which case, these should be accounted for as per the requirements of Ind AS 105. The scrapped items, such as, used spares that are not treated as PPE e.g., those used for repairs, used transformer oil, tyres, empty containers/bags etc., are not to be valued or revalued at their fair value (reserved price or market value) or net realisable value.
- At the time of sale of the scrapped items of PPE and used spares which are treated as PPE, these should be derecognised, with gain or loss on sale being recognised in the Statement of Profit and Loss. The gain arising on sale may be presented as 'other income' in the Statement of Profit and Loss.

With regard to the scrapped items, such as, used spares not treated as PPE e.g., those used for repairs, used transformer oil, tyres, empty containers/bags etc., any income arising on the sale of such scrap should be recognised as 'other operating revenue' in the Statement of Profit and Loss.

REGULATORY UPDATES

INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA (ICAI)

REPORTING REQUIREMENTS PERTAINING TO FEES RELATED DISCLOSURE TO ICAI UNDER THE REVISED REQUIREMENTS IN THE CODE OF ETHICS

ICAI earlier made an announcement dated 29 September 2022, on reporting requirements pertaining to 'Fees related disclosure' to ICAI under the revised provisions in the Code of Ethics. These requirements included disclosure obligations when a CA firm's annual professional fees from an audit client exceed a prescribed threshold for two consecutive years. Further, these provisions relating to 'Fees-relative size' were made applicable from 1 October 2022.

It was also prescribed that CA firms must submit a filled and signed prescribed form to the Ethical Standards Board via email as per the revised provisions in the Code of Ethics.

Now, ICAI via announcement dated 6 October 2023, prescribed the format in which the above declaration needs to be submitted by CA firms.

TECHNICAL GUIDE ON INTERNAL AUDIT OF THE PHARMACEUTICAL INDUSTRY

The Board of Internal Audit & Management Accounting of ICAI has issued 'Technical Guide on Internal Audit of Pharmaceutical Industry' (2023 Edition), which is one of the rapidly growing industries of the country, with a view –

- to equip internal auditors with the knowledge necessary to effectively assess and evaluate the risk management and internal control systems, management processes and compliance frameworks specific to the pharmaceutical sector,
- to assist the ICAI members in discharging their professional responsibilities efficiently and
- to provide the readers with a crisp insight into various technicalities arising in the operations of the pharmaceutical industry;

The Guide inter alia provides guidance on structure, history, research and development, regulatory framework, risk assessment and internal controls, key drivers of this industry and internal controls checklist for various processes; The Guide also contains an illustrative checklist for internal audit of major areas of the pharmaceutical industry.

The technical guide was issued on 11 October 2023.

MANUAL ON CONCURRENT AUDIT OF BANKS

The Board of Internal Audit and Management Accounting (BIAMA) of ICAI has released the revised and updated Manual on Concurrent Audit of Banks (2023 Edition), to comprehend the complexities of concurrent audits and consequently enhance the quality of concurrent audit reports.

This revised version of the manual is a collection of the revised/updated concurrent audit guidelines issued by the Reserve Bank of India (RBI) in 2019 and covers various important amendments thereto. The ICAI has meticulously revamped the 'Manual on Concurrent Audit of Banks,' which was previously issued in 2016.

In addition to incorporating the impacts of RBI's revised 2019 guidelines and other pertinent new circulars/directions issued by RBI, the Board has thoroughly overhauled the Concurrent Audit Checklist. Further, the manual emphasises the importance of reorienting the scope of concurrent audits to incorporate a risk-based auditing approach, which ultimately renders it more meaningful and efficacious.

The manual was issued by ICAI on 11 October 2023.

SENSITISATION OF COMPANIES TO ABIDE BY THE PROVISIONS OF SECTION 90 OF THE COMPANIES ACT, 2013 READ WITH RULES THEREUNDER RELATING TO SIGNIFICANT BENEFICIAL OWNERSHIP

ICAI vide announcement dated 18 October 2023, urged its members to fulfil the regulatory obligations rigorously to instil broader comprehension and thorough compliance with the provisions concerning Significant Beneficial Ownership stated in section 90 of the Companies Act, 2013 ('the Act') and the accompanying Companies (Significant Beneficial Owners) Rules, 2018. This is concerning the initiative of the Ministry of Corporate Affairs (MCA) to create wider awareness of provisions relating to Significant Beneficial Ownership provided in the relevant section of the Act and related rules, for ensuring compliance with the same.

ICAI also encouraged members to promptly submit any pending forms without any further delay. If the members have not yet filed these forms, they are recommended to do so immediately to avoid potential legal repercussions for non-compliance.

ICAI reaffirmed and provided these regulations for its members' easy reference. In doing so, the institute aims to not only maintain the legal integrity of the corporate sector but also ensure the responsibility of its members towards the larger financial ecosystem. It is a reminder of the critical need for transparency to uphold the ethical norms of corporate governance.

ARCHIVING OF UDINS

ICAI has issued a notification dated 25 October 2023, on Archiving of UDINs. It has been decided to archive UDINs after one year of their generation to ease off the load on the servers. Implementation of archiving UDINs has been scheduled in a phased manner beginning for the year 2019 in the first phase, followed by the years 2020, 2021, 2022 and 2023, thereafter.

To search archived UDINs on the Portal, members are required to follow these steps: Members' login > List UDIN > Document Generation Year > Select UDIN Generation Year from the drop-down menu in the List > Click Button (Filter & Sort).

MINISTRY OF CORPORATE AFFAIRS (MCA)

CLARIFICATION ON HOLDING ANNUAL GENERAL MEETINGS (AGMS) AND EXTRAORDINARY GENERAL MEETINGS (EGMS) THROUGH VIDEO CONFERENCE (VC) OR OTHER AUDIO-VISUAL MEANS (OAVM) AND PASSING OF ORDINARY AND SPECIAL RESOLUTIONS BY COMPANIES UNDER THE COMPANIES ACT, 2013

MCA via General Circular dated 25 September 2023, has allowed companies, whose AGMs are due in the year 2023 or 2024, to conduct their AGMs through VC or OAVM on or before 30 September 2024, in accordance with the requirements laid down in an earlier General Circular dated 5 May 2020, issued by MCA.

Additionally, companies can conduct their EGMs via VC or OAVM, or handle transactions through postal ballot until the same date, adhering to the existing framework provided in the relevant circulars.

However, this extension does not alter the statutory timeframes, and non-compliance may result in legal consequences under the Companies Act, 2013.

COMPANIES (INCORPORATION) THIRD AMENDMENT RULES, 2023

The Companies (Incorporation) Rules, 2014 is a set of rules and regulations formulated to provide detailed procedures and guidelines for the incorporation of companies in India.

MCA vide notification dated 20 October 2023, has issued further amendments to these rules which shall be called the Companies (Incorporation) Third Amendment Rules, 2023. An amendment has been made to rule 30, sub-rule (9), by omitting certain words and adding a new proviso. The amendment allows the shifting of the registered office in the case of new management taking over a company under an approved resolution plan, as per section 31 of the Insolvency Bankruptcy Code, 2016 subject to the following conditions:

- No appeal against the resolution plan is pending in any Court or Tribunal and;
- No inquiry, inspection, or investigation is pending or initiated after the approval of the said resolution plan.

They shall come into force with effect from 21 October 2023.

SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI)

EXTENSION OF TIMELINES FOR DEMAT AND PAN / NOMINATION / KYC

SEBI vide circular dated 26 September 2023, has extended the timelines for critical processes related to trading and demat accounts, as well as physical security holders. The following are key pointers:

- **For Trading and Demat Accounts** - SEBI vide earlier circular dated 23 July 2021 stated that trading accounts and demat accounts without a 'choice of nomination' by 30 September 2023, will be frozen, as previously mandated. To streamline operations, a voluntary option for the 'choice of nomination' has been introduced for trading accounts. Additionally, the deadline for submission of the

'choice of nomination' for demat accounts has been extended to 31 December 2023, following feedback from Exchanges, Depositories, and Brokers' Associations. Moreover, SEBI's circular emphasises the significance of protecting investor interests and fostering the overall development and regulation of the securities market.

- **For Physical Security Holders** - In response to representations from investors and the Registrars Association of India, the deadline for the submission of PAN, Nomination, contact details, Bank A/c details, and Specimen signature for physical security holders' folios is extended to 31 December 2023.

  Further, the circular stresses the need for Stock Exchanges, Depositories, RTAs, and Listed Companies to align their bylaws, business rules, and operational instructions with the circular's provisions. This circular shall come into effect immediately in supersession of relevant provisions contained in various circulars issued by SEBI including Master Circulars issued for Stockbrokers and Registrars to an Issue and Share Transfer Agents dated 17 May 2023.

EXTENSION OF TIMELINE FOR VERIFICATION OF MARKET RUMOURS BY LISTED ENTITIES

SEBI vide circular dated 30 September 2023, has announced an extension of the timeline for the implementation of the proviso to Regulation 30(11) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 requiring the top 100 listed entities and top 250 listed entities by market capitalisation to mandatorily verify and confirm, deny or clarify market rumours.

The extension applies to the top 100 listed entities by market capitalisation, moving the effective date from 1 October 2023 to 1 February 2024, and the top 250 listed entities by market capitalisation, shifting the effective date from 1 April 2024 to 1 August 2024.

This decision aims to provide additional time for the listed entities to verify, confirm, deny, or clarify market rumours, in line with the regulations outlined by SEBI, exercising its powers under Section 11 of the Securities and Exchange Board of India Act, 1992, in conjunction with Regulation 101 of the LODR Regulations.

LIMITED RELAXATION FROM COMPLIANCE WITH CERTAIN PROVISIONS OF THE SEBI (LODR) REGULATIONS, 2015

SEBI vide circular dated 6 October 2023, has introduced a limited relaxation from compliance with Regulation 58(1)(b) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (‘SEBI Listing Regulations’), which mandated listed entities to send a hard copy of the statement containing the essential features of specified documents to non-convertible security holders who have not registered. This provision had been subject to relaxation by SEBI in alignment with relaxations granted by the Ministry of Corporate Affairs (MCA) through various circulars.

In a recent circular dated 25 September 2023, the MCA extended the relaxation from dispatching physical copies of financial statements, including the Board's report and Auditor's report, until 30 September 2024.

In response to the above, SEBI has also decided to extend the relaxation of the requirements of regulation 58 (1)(b) of the SEBI Listing Regulations until the same date i.e., 30 September 2024, offering companies relief and additional time for compliance.

This circular is set to be effective immediately, providing temporary respite from certain regulatory obligations.

RELAXATION FROM COMPLIANCE WITH CERTAIN PROVISIONS OF THE SEBI (LODR) REGULATIONS, 2015 – REG.

SEBI vide circular dated 7 October 2023, has announced to extend the relaxation from compliance with provisions of regulation 36(1)(b) for Annual General Meetings (AGMs) and regulation 44(4) for general meetings (conducted in electronic mode) of the SEBI Listing Regulations.

MCA vide General Circular dated 25 September 2023, extended the relaxation from sending physical copies of financial statements (including the Board’s report, Auditor’s report, or other documents) to the shareholders for AGMs conducted until 30 September 2024.

In view of the above, SEBI has also decided to further extend the relaxations from compliance with the above-mentioned regulations until 30 September 2024.

It is reiterated that listed entities must ensure compliance with the conditions stipulated in the relevant sections of the Master Circular while availing the extended relaxations, emphasising the continued importance of adhering to regulatory requirements for transparent and accountable corporate governance.

SECURITIES AND EXCHANGE BOARD OF INDIA (LISTING OBLIGATIONS AND DISCLOSURE REQUIREMENTS) (FIFTH AMENDMENT) REGULATIONS, 2023

SEBI has issued a notification dated 9 October 2023, to further amend the SEBI Listing Regulations. These regulations may be called Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Fifth Amendment) Regulations, 2023.

The first proviso of Regulation 30(11) of SEBI Listing regulations is amended wherein certain symbols, words and numerals are substituted and certain symbols, words and numerals are omitted.

They shall come into force with effect from 1 October 2023.

MASTER CIRCULAR ON KNOW YOUR CLIENT (KYC) NORMS FOR THE SECURITIES MARKET

SEBI has issued a comprehensive Master Circular dated 12 October 2023, relating to Know Your Client (KYC) norms in the securities market. This master circular consolidates the various circulars and directions issued on this subject until 30 September 2023 and incorporates specific modifications aligning with the Prevention of Money Laundering (Maintenance of Records) Rules, 2005, and the Securities and Exchange Board of India's [KYC (Know Your Client) Registration Agency] Regulations, 2011.

SEBI emphasises the importance of implementing all updates and modifications in existing KYC records by 31 December 2023, in accordance with the provisions outlined in this Circular. This initiative aims to streamline compliance for intermediaries in the securities market, providing them with easy access to all the pertinent guidelines in one consolidated document.

Notwithstanding the circulars' rescission, the Master Circular ensures that any actions taken under the previously rescinded circulars will be considered as having been taken under the corresponding provisions of this new directive. This provision aims to facilitate a seamless transition for market participants, safeguarding their rights, privileges, obligations, and liabilities acquired under the previous circulars. This approach underlines SEBI's commitment to enhancing the efficiency and effectiveness of KYC procedures while facilitating a smooth and well-regulated functioning of the securities market.

The provisions of this Master Circular shall come into force from the date of its issue.

SECURITIES AND EXCHANGE BOARD OF INDIA (INVESTMENT ADVISERS) (AMENDMENT) REGULATIONS, 2023

SEBI has issued a notification dated 9 October 2023, to further amend the Securities and Exchange Board of India (Investment Advisors) Regulations, 2013.

The first proviso of Regulation 7(1) of the above-mentioned regulations was amended wherein certain words are substituted and inserted thereto.

They shall come into force with effect from 30 September 2023.

MASTER CIRCULAR FOR STOCK EXCHANGES AND CLEARING CORPORATIONS

SEBI has issued a Master Circular dated 16 October 2023, specifically tailored for Stock Exchanges and Clearing Corporations, streamlining the various circulars and directions issued to these entities. It aims to provide a single point of reference for all relevant guidelines, incorporating the circulars and communications issued by SEBI up to 31 August 2023.

While the Master Circular rescinds the circulars and communications listed in Schedule I to this Master Circular, it ensures that any actions taken under the previously rescinded circulars will be deemed to have been taken under the corresponding provisions of this Master Circular, emphasising a seamless transition for market participants.

In addition, the Master Circular clarifies that expressions not defined within the document will carry the same meanings as defined in the Securities Contracts (Regulation) Act, 1956, the Securities and Exchange Board of India Act, 1992, the Depositories Act, 1996, or the relevant regulations. This Master Circular shall supersede the previous Master Circular dated 5 July 2021.

This Master Circular shall come into force from the date of its issue i.e., 16 October 2023.

RESERVE BANK OF INDIA (RBI)

REVERSE REPO TRANSACTIONS - REPORTING IN FORM 'A' RETURN

RBI has issued a directive dated 16 October 2023, addressing the reporting of Reverse Repo transactions by Commercial Banks in the Form 'A' Return as per the updated Master Direction on the Cash Reserve Ratio (CRR) and Statutory Liquidity Ratio (SLR) (updated as on 25 September 2023).

To ensure consistency and uniformity in reporting across various banks, the directive specifies a standardised approach for the presentation of Reverse Repo transactions in the following manner:

- **Reverse Repo transactions with banks** - Those with original tenors up to 14 days will be reported under specific items in Form 'A', while those with tenors exceeding 14 days will be reported differently.
- **Reverse Repo transactions with non-banks or other institutions** - These are to be reported under a designated item in Form 'A'.

This directive aims to streamline reporting practices and enhance transparency in the banking sector's operations.

APPOINTMENT OF WHOLE-TIME DIRECTOR(S)

RBI has issued an announcement dated 25 October 2023, emphasising the need for banks to establish a robust senior management team in response to the evolving challenges in the banking sector.

According to the earlier guidelines specified in the circular dated 26 April 2021, on 'Corporate Governance in Banks - Appointment of Directors and Constitution of Committees of the Board,' it is now advised that banks maintain a minimum of two Whole Time Directors (WTDs), including the MD&CEO, on their Boards. The number of WTDs shall be decided by the Board of the bank by considering factors such as the size of operations, business complexity, and other relevant aspects.

Banks not meeting this requirement are urged to submit proposals for the appointment of WTD(s) within four months, while those lacking enabling provisions for WTD appointments in their Articles of Association should seek necessary approvals promptly.

The directive aims to ensure compliance with regulatory provisions and enhance the resilience of banks in managing complex operations and challenges in the financial landscape.

RESERVE BANK OF INDIA (FINANCIAL STATEMENTS - PRESENTATION AND DISCLOSURES) DIRECTIONS, 2021: PRESENTATION OF UNCLAIMED LIABILITIES TRANSFERRED TO DEPOSITOR EDUCATION AND AWARENESS (DEA) FUND

RBI has issued a notification dated 25 October 2023, emphasising the need for transparent disclosures with respect to the amount that has been transferred to the Depositor Education and Awareness (DEA) Fund.

In accordance with the RBI 'Financial Statements - Presentation and Disclosures' Directions, 2021, commercial banks are directed to include all unclaimed liabilities, where the due amount has been transferred to the DEA Fund, under 'Schedule 12 - Contingent Liabilities - Other items for which the bank is contingently liable.'

Additionally, to ensure uniformity in financial statement presentation, cooperative banks are instructed to present such unclaimed liabilities under 'Contingent Liabilities - Others.'

The RBI's directive requires all banks to specify in the notes to accounts that the balances of the amount transferred to the DEA Fund are included under 'Schedule 12 – Contingent Liabilities – Other Items for which the bank is contingently liable' or 'Contingent Liabilities – Others,' as the case may be.

These instructions apply to all commercial and cooperative banks for the preparation of financial statements for the financial year ending 31 March 2024, and onwards.

REGULATORY UPDATES

RESERVE BANK OF INDIA (RBI)

NOTIFICATION DATED 25 OCTOBER 2023: RBI NOTIFIES GUIDELINES FOR THE MINIMUM NUMBER OF WHOLE TIME DIRECTORS (WTDS) TO FACILITATE SUCCESSION PLANNING AND ESTABLISHMENT OF THE EFFECTIVE SENIOR MANAGEMENT TEAM, (THE CIRCULAR)

The Circular addressing all private sector banks and wholly owned subsidiaries of foreign banks excluding payment banks and local area banks (Banks) requires the presence of at least two WTDs on the Board of Directors (BOD) including the Managing Director and Chief Executive Officer. Banks may also have a higher number of WTDs at the BOD's discretion.

Currently, if the Banks, do not fulfil the above conditions they are required to submit their proposal for appointment of WTD within four months of issuance of the Circular. In case Banks do not have enabling provisions in their Article of Association (AOA) they are required to take necessary approvals to alter the AOA for the appointment of WTDs.

CIRCULAR DATED 26 OCTOBER 2023: RBI AMENDS MINIMUM PREMATURE WITHDRAWAL LIMIT FOR DOMESTIC TERM DEPOSITS OFFERED BY ALL COMMERCIAL AND CO-OPERATIVE BANKS (BANKS), (THE CIRCULAR)

The Circular amends the master directions on interest rates on deposits accepted by Banks.

Banks are allowed to offer domestic term deposits (TD) without an option to prematurely withdraw such deposits (option). However, Banks were compulsorily required to provide such options to individuals holding domestic term deposits for an amount not exceeding rupees fifteen lakh.

The above limit has been increased to an amount not exceeding rupees one crore i.e., now the Bank shall compulsorily be required to provide such option for TD held by individuals for an amount not exceeding rupees one crore.

Additionally, Banks shall now have the freedom to offer TD without premature withdrawal option to Non-Resident External Account TD (NRE TD) and Non-Resident Ordinary TD (NRO TD) individuals for an amount not exceeding rupees one crore.

Banks shall also be allowed to vary interest rates on NRE TD/NRO TD basis option provided to customers and depending upon its tenor and size of deposits.

The Circular comes into force with immediate effect.

CIRCULAR DATED 30 OCTOBER 2023: BANKING REGULATION (AMENDMENT) ACT 2020 - CHANGE IN NAME OF CO-OPERATIVE BANKS

RBI vide its Circular dated 30 October 2023, issued guidelines regarding the procedure to be followed for any change in name and alteration of bye-laws by a primary, state or district central co-operative bank.

Attached with the said Circular are two Annexures. Annexure 1 lists down the process to be undertaken by cooperative banks for change in its name –

- Co-operative bank to approach the Department of Supervision (DoS) of the concerned Regional Office (DoS, Central Office in case of Co-operative Banks coming under the purview of Mumbai Office) of RBI for grant of No objection certificate (NOC), clearly stating the

reason/s for such change. Such request to the RBI shall mandatorily require the approval of the General body of the bank.

- NOC from RBI is necessary only where 'confirmation' from the Central/State Government, one or more authority/authorities for alteration of byelaws under the applicable Co-operative Act /Rules is required, and a co-operative bank shall mandatorily declare in writing regarding the requirement for such 'confirmation' at the time of submission of the request.
- The cooperative banks shall submit their request for change in the name and bye-laws, only when it is supported by valid and compelling reason/s for the proposed change; the discretion of assessment of which lies with the RBI.
- Co-operative banks to approach the Central Registrar of Co-operative Societies (CRCS) or Registrar of Co-operative Societies (RCS) for amendment in their byelaws, after getting NOC from the concerned office of RBI. Subsequent to approval from CRCS/RCS, co-operative banks to apply to the concerned Regional Office of RBI along with –
  - Approval of the Board of Directors
  - Approval of the General Body of the Bank
  - Amended byelaws as approved by CRCS/RCS
  - Copy of CoR issued by CRCS/RCS with amended name
  - Original banking licence
- Co-operative Banks shall have to follow the procedure as stated above even if the name change is due to Government Notification. Also, the cooperative bank shall not display/operate with an amended name without effecting the corresponding change in its name in the banking licence issued by RBI.

Further, Annexure 2 attached with the Circular specifies the format to be followed by co-operative banks and the details to be submitted to the Regional office of RBI.

CIRCULAR DATED 16 OCTOBER 2023: PRACTICE TO BE FOLLOWED FOR PRESENTATION OF REVERSE REPO TRANSACTIONS IN FORM 'A' RETURN

To ensure consistent reporting across all banks, the RBI has outlined a new practice for presenting Reverse Repo transactions in the Form 'A' Return.

For original tenors up to and inclusive of 14 days

- Item III(b) of Form A (i.e., Money at call and short notice) and
- Memo item 2.1 of Annex A to Form A (i.e., under Inter Bank Assets)

For original tenors more than 14 days

- Item III(c) of Form A (i.e., Advances to banks) and
- Memo items 2.1 and 2.2 of Annex A to Form A (i.e., under Inter Bank Assets)

Reverse Repo transactions with non-banks (other institutions) for all tenors should be reported under Item VI(a) of Form A [i.e., Loans, cash credits and overdrafts under Bank Credit in India (excluding inter-bank advances)].

NOTIFICATION DATED 10 OCTOBER 2023: EXTENSION OF PROMPT CORRECTIVE ACTION (PCA) FRAMEWORK TO GOVERNMENT NON-BANKING FINANCIAL COMPANIES (NBFCS)

PCA Framework, which intends to act as a tool for effective market discipline and Supervisory intervention at an appropriate time, were previously made applicable to all Deposit Taking NBFCs and all Non-Deposit Taking NBFCs in Middle, Upper and Top Layers (excluding all Government NBFCs) vide Circular dated 14 December 2021. However, the Framework is now extended (w.e.f. from 1 October 2024) to all Government NBFCs (except those in Base Layer) based on their audited financials as of 31 March 2024 or thereafter.

MINISTRY OF CORPORATE AFFAIRS (MCA)

NOTIFICATION DATED 27.10.2023 - LIMITED LIABILITY PARTNERSHIP (THIRD AMENDMENT) RULES, 2023 (AMENDMENT RULES)

The MCA vide notification has inserted Rule 22A and Rule 22B to Limited Liability Partnership (Third Amendment) Rules, 2023 (Amendment Rules). These Amendment Rules shall be effective from 27 October 2023 and require every LLP to:

Rule 22A- Register of Partners

- To maintain a register of its partners in Form 4A, from the date of its incorporation, which shall be kept at the registered office.

  In case of LLP existing on the date of commencement of the Amendment Rules shall maintain the register of partners in Form 4A within 30 days i.e., by 27 November 2023.
- Changes in the register shall be made within 7 days pursuant to any change made in the LLP agreement.
- If any rectification is made in the register by the LLP pursuant to any order passed by the competent authority, the necessary reference of such order shall be indicated in the respective register and for reasons to be recorded in writing.

Rule 22B- Declaration in respect of a beneficial interest in any contribution

- A person who does not hold any beneficial interest in contribution (registered partner), such person shall file with LLP, a declaration in Form 4B within 30 days from the date on which his name is entered in the register of partners.

  Provided that where any change occurs in the beneficial interest, the registered partner shall, within 30 days, make a declaration of such change to LLP in Form 4B.

[2] SEBI/HO/IMD/DF4/CIR/P/2020/0000000151

- Beneficial partners who have an interest in contributions not registered in their name must file a declaration in Form 4C within 30 days.
  Provided that where any change occurs in the beneficial interest, the beneficial partner shall within 30 days, make a declaration of such change to LLP in Form 4C.
- Where any declaration in Form 4B & Form 4C is received by the LLP, it shall record such declaration in the register of partners and shall file within 30 thirty days a return in Form 4D with ROC.
- Every LLP shall specify a designated partner who shall be responsible for providing, information with respect to beneficial interest in Form 4 to ROC or any other officer authorised by the Central Government.
  Provided that until a designated partner is specified by LLP every designated partner shall be deemed to be responsible for providing information with respect to beneficial interest.

NOTIFICATION DATED 27.10.2023 - COMPANIES (PROSPECTUS AND ALLOTMENT OF SECURITIES) SECOND AMENDMENT RULES, 2023 (AMENDMENT RULES)

The MCA vide Companies (Prospectus and Allotment of Securities) Second Amendment Rules, 2023 (Amendment Rules):

Mandates every public company with respect to the share warrants issued prior to the commencement of the Companies Act, 2013 and not converted into shares, to carry out the following compliances:

- File the details of such share warrants with the ROC in form PAS-7 within 3 months from the commencement of the Amendment Rules, i.e., by 27 January 2024.
- Within 6 months from the commencement of the Amendment Rules, i.e., by 27 April 2024, requires the holders of such share warrants to surrender the share warrants to the company and the company to issue dematerialised shares in the holders' account. To facilitate such dematerialisation the company is to place a notice in Form PAS-8 on the website of company, if any and to publish the same in a newspaper in the vernacular language which is in circulation in the district and in the English language in an English newspaper, widely circulated in the State in which the registered office of the company is situated.
- In case within the aforesaid 6 months, the share warrant holder does not surrender the share warrants, the company is to convert such un-surrendered share warrants into demat shares and transfer the same to Investor Education and Protection Fund.

Mandates every private company (except small companies) to carry out the following compliances:

- issue securities in dematerialized form only
- facilitate the dematerialisation of all its securities

- Date within which Company shall be required to comply with the Amendment Rules A private company, which as of 31 March 2023, is not a small company as per audited financial statements shall within 18 months of the closure of the financial year be required to comply with the Amendment Rules, i.e., 30 September 2024.
- Post 30 September 2024 it shall be mandatory for:
  - For a private company – to ensure that before making any issue of securities or buyback of securities or issue of bonus shares, the entire holding of securities of its promoters, directors, and key managerial personnel has been dematerialised.
  - For holder of securities –
    - who intends to transfer such securities, to get such securities dematerialised before the transfer
    - who subscribes to issue securities or buyback of securities or issue of bonus shares of a private company to ensure that all securities already held in such private company are held in dematerialised form before such subscription.

NOTIFICATION DATED 27.10.2023 - COMPANIES (MANAGEMENT AND ADMINISTRATION) RULES, 2014 (AMENDMENT RULES)

The MCA vide notification has amended Companies (Management and Administration) Rules, 2014 (Amendment Rules). These Amendment Rules shall be effective from 27 October 2023 and require every company to:

- Designate a person who shall be responsible for providing information to the ROC with respect to a beneficial interest in shares of the company.
- The company may designate the following persons to provide information with respect to a beneficial interest in shares of the company –
  - a company secretary, if there is a requirement of appointment of such company secretary; or
  - key managerial personnel, other than the company secretary; or
  - every director, if there is no company secretary or key managerial personnel.
- Until a person is designated as mentioned above, the following persons shall be deemed to have been designated persons-
  - a company secretary, if there is a requirement of appointment of such company secretary; or
  - every Managing Director or Manager, in case a company secretary has not been appointed; or
  - every director, if there is no company secretary or a Managing Director or Manager.

[2] SEBI/HO/IMD/DF4/CIR/P/2020/0000000151

- Every company shall inform the details of the designated person in the Annual return.
- If the company changes designated person at any time, it shall intimate the same to ROC in e-form GNL-2.

SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI)

PRESS RELEASE DATED 27.10.2023 – DIRECTIONS TO STOCK EXCHANGES IN COMMODITIES DERIVATIVES SEGMENT

On 19 December 2021, the SEBI issued directives to stock exchanges having commodity derivatives segments, instructing them to suspend trading in derivative contracts related to specific commodities for a duration of one year. This suspension was subsequently prolonged for an additional year, as communicated via a press release in December 2022.

Continuing in line with these instructions, the suspension of trading has been further extended by one more year, effectively until 20 December 2024 in derivative contracts associated with the following commodities:

- Paddy (Non-basmati)
- Wheat
- Chana
- Mustard Seeds and its derivatives
- Soya bean and its derivatives
- Crude Palm Oil
- Moong

CIRCULAR DATED 6TH OCTOBER 2023 & 7TH OCTOBER 2023: RELAXATION FROM COMPLIANCE WITH CERTAIN PROVISIONS OF THE SEBI (LISTING OBLIGATIONS AND DISCLOSURE REQUIREMENTS) REGULATIONS, 2015

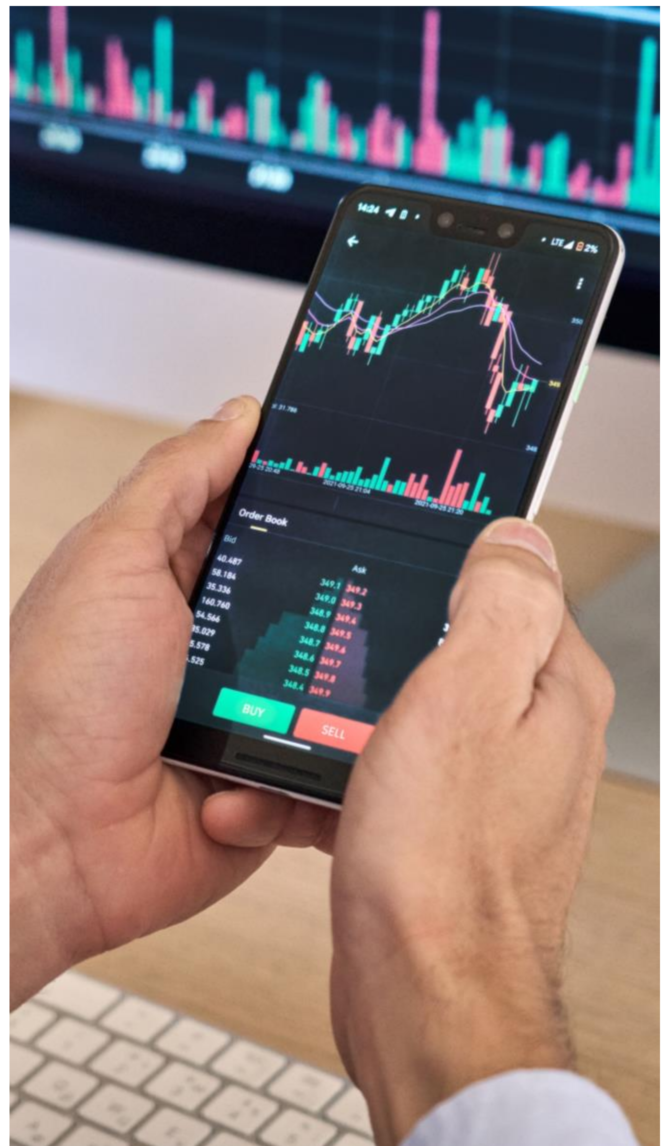
The Securities and Exchange Board of India (SEBI) has recently issued circulars aimed at providing relief to listed entities from specific provisions within the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (LODR).

Ministry of Corporate Affairs (MCA), in a recent circular dated 25 September 2023, extended relaxation to companies from the obligation to dispatch physical copies of financial statements, board of directors' reports, auditor reports, and related documents to shareholders for annual general meetings until 30 September 2024.

To ensure parity and extend similar exemptions to listed entities from SEBI LODR provisions, SEBI has issued the circulars which are summarized below:

- **Relaxations applicable to entities listed on the stock exchanges:**
  As per regulation 36(1)(b) of LODR which provides that listed entities are required to send hard copies of financial statements (including the Board's report, Auditor's report or other documents to shareholders who have not registered their email addresses with the entity or depository. In this context, listed entities have been granted relief from these provisions until 30 September 2024. However, shareholders who wish to have hard copies of the annual report may request the same from listed entities.
- **Relaxations applicable to entities which have listed non-convertible securities on the stock exchanges:**
  Under Regulation 58(1)(b) of SEBI LODR, entities that have listed non-convertible securities on stock exchanges are required to send hard copies of financial statements, board of directors' reports, auditor reports, and related documents to non-convertible securities holders who have not registered their email addresses with the entity or depository. In this regard, SEBI has granted exemptions to listed entities from these provisions until 30 September 2024.

  The provisions contained in this circular shall come into force with effect from the date of issue i.e., 6 October 2023 & 7 October 2023 respectively.



CIRCULAR DATED 19 OCTOBER 2023: EASE OF DOING BUSINESS AND DEVELOPMENT OF CORPORATE BOND MARKETS –REVISION IN THE FRAMEWORK FOR FUNDRAISING BY THE ISSUANCE OF DEBT SECURITIES BY LARGE CORPORATES.

SEBI has made revisions to the existing framework for the issuance of debt securities by listed Large Corporates (LC) vide this circular. The revised framework shall be applicable for all listed entities (except for Scheduled Commercial Banks) which meet the prescribed conditions as of the last date of their respective financial year (FY).

Under the said framework, an LC shall raise a minimum of 25% of its qualified borrowings by way of issuance of debt securities in the FYs subsequent to the FY in which it is identified as an LC.

For an entity identified as an LC, the following shall be applicable:

- From FY 2025 onwards, the requirement of mandatory qualified borrowing by an LC in an FY shall be met over a contiguous block of three years.
- If at the end of three years i.e., the last day of FY "T+2", there is a surplus in the requisite borrowings (i.e., the actual borrowings through debt securities is more than 25% of the qualified borrowings for FY "T"), then certain prescribed incentives shall be available to the LC

The Stock Exchanges to coordinate and release a uniform list of LCs for the financial year and place the same on their websites. They shall also notify listed entities so identified as LCs by email, to enable them to comply with the requirements.

CIRCULAR DATED 31 OCTOBER 2023: SEBI REVISES THE MANNER OF ACHIEVING MINIMUM PUBLIC UNITHOLDING REQUIREMENT BY PRIVATELY PLACED INFRASTRUCTURE INVESTMENT TRUSTS (INVITS) (THE CIRCULAR)

The Circular introduces an additional method for achieving minimum public unitholding as well as modifies the conditions to one of the existing methods prescribed in the Master Circular dated 6 July 2023.

The additional method for privately placed InvITs in order to achieve minimum public unitholding requirement is the issuance of units through preferential allotment – in such a case, only units issued to the public shall be considered for compliance with the minimum unitholding requirement.

Further in one of the existing methods (i.e., sale of units held by Sponsor(s) / Investment Manager / Project Manager and their associates / related parties in the open market in the prescribed ways), there was a limit linked to the trading volume of the units of InvIT – it is clarified in the Circular that such limit will not be applicable to a privately placed InvIT.

DIRECT TAX

CIRCULARS / NOTIFICATIONS / PRESS RELEASE

CBDT PROVIDES CLARIFICATION ON ASSESSMENT PROCEEDINGS AGAINST DPIIT RECOGNISED STARTUPS

As per Section 56(2)(viib) of the Income-tax Act, 1961 (IT Act), where the premium is received in excess of fair market value (FMV) by closely-held companies from the resident investor(s), such excess is taxed in the hands of recipient Company. Relaxation from the applicability of this provision was provided to Startup Companies recognised by the Department for Promotion of Industry and Internal Trade (DPIIT) and which fulfilled the conditions mentioned in para 4(i) and 4(ii) of Notification No. GSR 127(E) dated 19 February 2019. Finance Act 2023 amended Section 56(2)(viib) of the IT Act and omitted the words 'being a resident'. Instances were reported that cases of Startups were picked up for assessments. In this regard, the CBDT has recently issued a direction to reiterate and clarify the approach regarding the procedure laid down for the assessment of such Startup companies.

To read our detailed analysis please visit:

https://www.bdo.in/en-gb/insights/alerts-updates/direct-tax-alert-cbdt-provides-clarification-on-assessment-proceedings-against-dpiit-recognised-st

[Circular F. NO. 173/149/2019-ITA-1, dated 10 October 2023]

CLARIFICATION REGARDING PAN RELATED RULES FOR FOREIGN COMPANIES AND NON- RESIDENTS (NRS) TRANSACTING WITH INTERNATIONAL FINANCIAL SERVICE CENTRE (IFSC) BANKING UNITS

CBDT *vide* its Notification No.: 53/2022 dated 10 May 2022, amended Rule 114 of the Income-tax Rules, 1962 (IT Rules) and inserted new Rule 114BA and Rule 114BB for the purpose of notifying transactions for which it will be mandatorily required to quote Permanent Account Number (PAN). Recently, CBDT has issued a Notification to amend said Rules for foreign companies and Non-Residents (NRs) transacting with IFSC Banking Units.

To read our detailed analysis please visit:

https://www.bdo.in/en-gb/insights/alerts-updates/amendments-for-ease-of-pan-requirement-while-transacting-with-ifsc-banking-units

[Notification No.: 88/2023 dated 10 October 2023]

REPORTING OF REMITTANCES MADE BY UNITS OF IFSC

Rule 37BB of IT Rules provides that the person responsible for making payment to a non-resident, not being a company, or to a foreign company, shall furnish the required information in Form 15CA, 15CB and 15CC, as applicable. In this regard, CBDT has extended the reporting requirement to remittances made by units of the International Financial Service Centre (IFSC) referred to in section 80LA(1A)[1] by amending Rule 37BB of IT Rules. It has also notified Form No.15CD in which quarterly reporting shall be made by the Unit, to be filed within 15 days from the end of the quarter of the fiscal year.

The amendment shall be effective from 1 January 2024.

[Notification No.: 89/2023 dated 16 October 2023]

REPORT UNDER SECTION 10AA(8) OF THE IT ACT TO BE FURNISHED IN FORM NO. 56F AND EXTENSION OF DUE DATE FOR FILING FORM 56F TO 31 DECEMBER 2023

Section 10AA of the IT Act provides for a profit-based

[1] Section 80LA of IT Act provides for 100% deduction in respect of income earned by Offshore Banking Units and units set up under IFSC.

deduction to the enterprises operating in Special Economic Zones and who are engaged in the export of article/goods/services. Further, as per the provisions of section 10AA(8) read with section 10A(5) of the IT Act, deduction under this section is subject to the furnishing of a report from an accountant.

In this regard, CBDT has inserted new Rule 16D in IT Rules and notified Form No. 56F to be the Form in which the report of an Accountant shall be furnished. The said rule is made effective retrospectively from 29 July 2021.

Further, taking cognizance of difficulties that may arise for the taxpayer in the timely filing of Form 56F, CBDT has also issued a circular extending the deadline for filing Form 56F to 31 December 2023.

[Notification No.: 91/2023 dated 19 October 2023]

[Circular No.: 18 of 2023 dated 20 October 2023]

CONDONATION OF DELAY IN FILING FORM NO. 10-IC FOR ASSESSMENT YEAR 2021-22

For claiming a concessional tax regime under section 115BAA of the IT Act, the taxpayer is required to Form 10-IC on or before the due date of filing tax return. Taking note of the representations from various stakeholders, CBDT has recently issued a circular condoning the delay in filing of Form 10-IC for AY 2021-22 subject to the fulfilment of the following conditions:

- The return of income for the relevant fiscal year has been filed on or before the due date of filing the tax return;
- The taxpayer has opted for taxation under section 115BAA of the IT Act in item € "f "Filing Sta"us" "n "Part A-"EN" of the Form of Return of Income ITR-6; and
- Form No. 10-IC is filed electronically on or before 31 January 2024 or 3 months from the end of the month in which this Circular is issued, whichever is later.

[Circular No.: 19/2023 dated 23 October 2023]

JUDICIAL UPDATES

SC HOLDS A VARIABLE COMPONENT OF THE LICENSE FEE PAID FOR OPERATING TELECOM SERVICES 'CAPITAL IN NATURE'

The Hon'ble Supreme Court (SC) had an occasion to interpret whether a variable component of telecom licence fee paid by telecom companies is capital or revenue in nature. The Hon'ble Supreme Court, while ruling in favour of tax authorities has held the variable component of licence fee to be capital in nature.

To read our detailed analysis, please visit:

https://www.bdo.in/en-gb/insights/alerts-updates/direct-tax-alert-sc-holds-variable-component-of-license-fee-paid-for-operating-telecom-services-c

[CIT Delhi vs. Bharti Hexacom Ltd. & Others, Civil Appeal No. 11128 of 2016, Supreme Court]

SC HOLDS THAT THE APPLICABILITY OF THE 'MOST FAVOURED NATION' (MFN) CLAUSE IS NOT AUTOMATIC

India has entered into several Double Tax Avoidance Agreements (DTAA or Tax Treaty or Treaty). Some of its DTAAs contain the Most Favoured Nation (MFN) clause[2]. While the MFN Clause provides access to beneficial tax rates and scope, the application of this clause has been a matter of litigation in India over the last few years. Recently, the Hon'ble Supreme Court has pronounced its verdict holding that the MFN clause cannot be applied automatically and that a notification from Indian revenue authorities is required for its application.

To read our detailed analysis, please visit:

https://www.bdo.in/en-gb/insights/alerts-updates/direct-tax-alert-sc-holds-that-applicability-of-most-favoured-nation%E2%80%99-(mfn)-clause-is-not-automat

[AO (Int. Taxation), Delhi v M/s. Nestle SA (Civil Appeal No(s). 1420 of 2023 to 1432 of 2023)]

HYDERABAD TAX TRIBUNAL HOLDS THAT FOR FMV DETERMINATION, UNAUDITED FINANCIALS AS ON VALUATION DATE WOULD BE ACCEPTABLE IF THE SAME ARE AUDITED LATER.

Taxpayer, a private Company, is engaged in the business of developing, building, and leasing of life sciences and biotechnology parks in India and provides managerial services. The taxpayer was formed as a result of the demerger of Takshila Tech Parks and Incubators (India) Private Limited (TTPL) and Genome Valley Tech Park & Incubators Pvt Ltd (GVPL) with effect from 1 October 2016. During the year under consideration, the taxpayer entered into a share purchase agreement (SPA) whereby it had acquired shares of TTPL. The taxpayer filed the original return of income (ROI) on 31 March 2018. Subsequently, based on financials as of 30 September 2016, the taxpayer computed the fair market value (FMV) of the shares so acquired as per the Discounted Cash Flow (DCF) method. Considering that the acquisition price was less than FMV, taxpayer suo moto offered INR 26.96 crores to tax under section 56(2)(viia)[3] of the IT Act in the revised ROI. During assessment proceedings, the Transfer Pricing Officer rejected the valuation method adopted by the taxpayer and recomputed the FMV as of 31 March 2016. The Dispute Resolution Panel (DRP) also directed the tax officer to make an addition under section 56(2)(viia) of the IT Act since the consideration was less than the aggregate FMV of the assets. Aggrieved, the taxpayer filed an appeal before the Hyderabad Income Tax Appellate Tribunal (Hyderabad Tax Tribunal).

While ruling in favour of the taxpayer, the Hyderabad Tax Tribunal made the following observations:

[2] As per MFN clause, if India enters a DTAA on a later date with a third country which is an Organisation for Economic Co-operation and Development (OECD) member, providing a beneficial rate of tax or restrictive scope for taxation, a similar benefit will be available to the first country.
[3] As per erstwhile section 56(2)(viia) of IT Act, where a firm or a company in which the public are not substantially interested, receives, in any previous year, from any person or persons, on or after the 1st day of June, 2010 but before the 1st day of April, 2017, any property, being shares of a company in which the public are not substantially interested,—
(i) without consideration, the aggregate FMV of which exceeds INR 50,000, the whole of the aggregate FMV of such property;
(ii) for a consideration which is less than the aggregate FMV of the property by an amount exceeding INR 50,000, the aggregate FMV of such property as exceeds such consideration.
As per explanation to section 56(2)(vii), the FMV means the value determined in accordance with the method prescribed in Rule 11U and Rule 11UA.

- The taxpayer received shares on 4 October 2016, therefore the valuation date to be considered should be 4 October 2016. For the purposes of determining the FMV, the balance sheet as drawn on the valuation date which has been audited by the auditors of the company after being appointed under section 224 of the Companies Act is required to be considered.
- The tax officer and the DRP have made an addition under section 56(2)(viia) by determining the FMV of the shares under Rule 11UA(1)(c)(b) by adopting the Balance Sheet as on 31 March 2016 as against the Balance Sheet as on 30 September 2016.
- As per Explanation to section 56(2)(viia) of the IT Act, the manner of computing the FMV of shares is mentioned in Rule 11UA. Rule 11UA(1)(c)(b)[4] is relevant for the determination of FMV of unquoted equity shares. As per the said rule, the FMV of unquoted equity shares should be determined on the 'valuation date'. 'Valuation date' is defined in Rule 11U(j) to mean the date on which the property is received by the taxpayer. Hence, in this case, the FMV under Rule 11UA(1)(c)(b) should be determined by reckoning 4 October 2016 as the valuation date.
- Subsequently, in the present case, the tax authorities have adopted the balance sheet (unaudited financials) available on 1 April 2016 thereby negating the very provisions of the IT Act mentioned in Rule 11UA (1)(1)(c)(b) read with Rule 11U(b)(ii).
- When the balance sheet was available as of the date of receipt of shares i.e., 4 October 2016 which were subsequently audited on 31 March 2018 by the auditor in terms of the Companies Act, then it is not permissible in law for the tax authorities to take the balance sheet as on 1 April 2016.
- The taxpayer is not expected to get its accounts audited/balance sheet audited on the date of transfer itself. What is contemplated under the IT Act is that the balance sheet should be drawn by the taxpayer, and it should be audited thereafter. In the present case, the balance sheet was drawn up to 31 August 2016 which formed the basis of the valuation. The date of the audit report and the date of filing the revised return of income were the same.
- As per law, the only requirement is a drawing of the Balance sheet as of the valuation date. There is no further stipulation that the audit of the balance sheet should also be completed before the transaction date. The audit normally happens subsequently after the receipt of the shares. The audited balance sheet would be available for filing the return of income and offering the income under section 56(2)(viia) of the IT Act to tax. For the purposes of determining the FMV, the guiding principle has been provided by the IT Act for the benefit of the tax authority i.e., to adopt the valuation as per the balance sheet drawn on the date of transfer subject to it being audited. This should be the basis of making the valuation by the tax officer for making the addition under section 56(2)(viia) of the IT Act.
- The law does not expect the taxpayer to perform the impossible act. It is unimaginable that the taxpayer will get its accounts audited on the date of drawing up of the balance sheet itself. The accounting standard also provides that the accounts of the taxpayer are required to be audited after the finalisation of the balance sheet and it has provided that the subsequent events occurring after the balance sheet date can also be factored in while finalising the audited accounts.
- Reliance was placed on Chandigarh Bench of the Tribunal in Electra Paper and Board Private Ltd v ITO[5] wherein it has held that it is justifiable to accept the unaudited balance sheet as on the valuation date when the same has been audited later with no material variance in the financials.
- In the present case, the audit of the balance sheet drawn as of 31 August 2016 was completed on 31 March 2018 after considering financials as of 31 August 2016. In view of the above, the balance sheet as drawn on 31 August 2016 is the closest approximation to the balance sheet on the valuation date (date of transfer) should be considered under Rule 11U(b)(ii) read with Rule 11UA(1)(c)(b).

[Neovantage Innovation Park Private Limited vs ITO, Hyderabad [ITA-TP Nos.340 & 456/Hyd/2022) (Hyderabad Tax Tribunal)]

DELHI TAX TRIBUNAL HOLDS THAT DTAA BENEFIT CANNOT BE DENIED WITHOUT INVOKING GAAR BASIS UNSUBSTANTIATED COGENT EVIDENCE AND BY DISREGARDING VALID TRC

The Delhi Tax Tribunal had an occasion to examine whether a transaction could be declared as an impermissible avoidance arrangement without invoking GAAR provisions. The Delhi Tax Tribunal, while ruling in favour of the taxpayer has held that DTAA benefit cannot be denied without invoking GAAR basis unsubstantiated cogent evidence & by disregarding valid TRC.

To read our detailed analysis, please visit:

https://www.bdo.in/en-gb/insights/alerts-updates/direct-tax-alert-dtaa-benefit-cannot-be-denied-without-invoking-gaar-basis-unsubstantiated-cogent

[Accion Africa-Asia Investment Company vs. ACIT, ITA No. 1815/Del/2023 (Delhi Tax Tribunal)]

[4] Rule prescribed for computing FMV of unquoted shares.
[5] Electra Paper and Board Private Ltd v ITO (2022) (1194 ITD 391)

INDIRECT TAX

REFUNDS UNDER AN INVERTED DUTY STRUCTURE CANNOT BE DENIED MERELY FOR MULTIPLE INPUT AND OUTPUT SUPPLIES

Facts of the case

- M/s. Nahar Industrial Enterprise Ltd. (Taxpayer), engaged in the business of manufacturing textiles, undertakes various operations such as spinning, weaving, and processing. A comparative analysis of the applicable GST rate on inputs and outputs is tabulated below:

OUTPUT AND GST RATE	INPUTS AND GST RATE
Cotton yarn (5%)	Cotton (5%), Packing material (12%), Other inputs (28%), Store consumables and spares (18%)
Cotton blended yarn (5%)	Cotton (5%), Manmade fibre (18%), Packing material (12%), Other inputs (28%), Store consumables and spares (18%)
Polyester/Viscose blended yarn (12%)	Cotton (5%), Manmade fibre (18%), Packing material (12%), Other inputs (18%), Store consumables and spares (18%)
Polyester/Viscose yarn (12%)	Manmade fibre (18%), Packing material (12%), Other inputs (28%), Store consumables and spares (18%)
Other outward supply (0.1%)	Cotton (5%), Manmade fibre (18%), Packing material (12%), Other inputs (28%)

- Since the GST rate on inputs was higher than the GST rate on output, the transaction suffered from Inverted Duty Structure (IDS). Thus, the Taxpayer was entitled to claim a refund of unutilised input tax credit (ITC) under Section 54(3) of the Central Goods and Services Tax Act, 2017 (CGST Act).
- Accordingly, the Taxpayer filed an application claiming a refund of unutilised ITC on account of IDS. However, a Show Cause Notice was issued to the Taxpayer proposing to reject the refund application on the grounds that the present case would not fall under the category of 'IDS'.

- The aforesaid notice was confirmed by the Tax Authority. Against this, the Taxpayer filed an appeal before the First Appellate Authority. Vide the Impugned Order, the appeal was disposed of, and the order passed by the Tax Authorities was confirmed by the First Appellate Authority.
- Pending the constitution of the Goods and Services Tax Appellate Tribunal, the Taxpayer filed a Writ Petition challenging the Impugned Order.

Contentions by the Taxpayer

- The Impugned Order is based on complete misinterpretation and misconstruction of the letter and spirit of the statutory scheme of refund under Section 54(3) of the CGST Act. The refund on account of IDS is available in cases where ITC is accumulated on account of the GST rate on inputs being higher than the GST rate on output.
- Neither Section 54(3) of the CGST Act nor Rule 89(5) of the Central Goods and Services Tax Rules, 2017 (CGST Rules) stipulates a one-to-one correlation between all inputs or outputs. Instead, the 'Net ITC' claimed during the claim period is to be considered relating to all inputs.
- In the case of multi-taxable output supplies, the aforesaid provisions require a rational construction implying a workable formula that the determination of inverted duty supplies will be done by comparing the average rate of duty on inputs with the rate of duty on outputs.
- The Impugned Order is based on an incorrect consideration that the GST rate on inputs and output are almost the same, and hence, the same does not qualify for a refund on account of IDS because the law does not recognise the words 'more or less'. Even if the overall rate of all inputs is marginally higher than the rate of output, ITC accumulation on account of IDS is to be refunded.
- The rejection of refund on the grounds that high input duty purchases are in stock is unsustainable since the GST law does not make any reference to stock but only refers to the output turnover (adjusted turnover) during the claim period. Refund is dependent on the rate of tax and quantum of ITC and not on the value/quantum of individual inputs (going into an output) and the outputs.
- The refund was wrongly rejected by holding that Circular no:125/44/2019-GST dated 18 November 2019 (Circular) is not applicable to the present case as it covers a scenario of one product and many inputs, unlike the present case which deals with many inputs and many outputs. This is not based on the correct understanding of the Circular. Since this was not a ground for the rejection of the refund by the Tax Authorities, the said defence is not available to the Tax Authorities.
- Section 54 of the CGST Act uses the phrase 'output supplies' in plural form which is indicative of the legislative intent that all output supplies must be included for ascertaining IDS and not just one output. Thus, the rejection of the refund application is based on the misinterpretation of the phrase 'output supplies' as only output.

Contentions by the Tax Authorities

- The Appellate Authority has rightly upheld the order passed by the Tax Authorities considering that both the inputs and outputs attract the same rate of GST of 5%, 12% and 18%.
- To claim a refund of unutilised ITC under Section 54(3) of the CGST Act, in addition to the existence of IDS, it must also be established that ITC has been accumulated on account of IDS only. In the present case, the GST rate on inputs was found to be 'more or less' the same as the GST rate on output, and ITC availed on the inputs attracting 28% GST was negligible. As a result, IDS is not attracted in the present case, and hence, the question of allowing a refund would not arise.
- Circular no:79/53/2018-GST dated 31 December 2018 (Clarificatory Circular) states that a refund of unutilised ITC is available only when output supplies attract a single rate of GST and multiple inputs attracting different GST rates are used.
- Relying on Union of India & Ors. Vs. VKC Footsteps India Pvt. Ltd. [2022 (2) SCC 603], it was contended that the stipulation in the first proviso to Section 54(3) of the CGST Act (i.e., 'no refund shall be allowed' and 'in cases other than') operate as a limitation on the expression 'claim' used in the substantive part of Section 54(3) of the CGST Act. Accordingly, the aforesaid provision is couched in negative language which manifests the legislative intent to confine refund only to the specific situations stipulated under Section 54(3) of the CGST Act. Refund, not being a fundamental/constitutional right, cannot be claimed de hors the statutory scheme.

Observations and Ruling by the Hon'ble High Court

- Under the statutory scheme of the GST law, refund of unutilised ITC at the end of any tax period can be allowed subject to fulfilment of statutory limitations and in accordance with the formula provided under Rule 89(5) of the CGST Rules.
- On perusal of the GST rate on inputs and output supplies, it was observed that –
  - While the GST rate on many inputs and output supplies is the same, the GST rate on various inputs (raw materials) is higher than the GST rate on output supplies.
  - The rate of output tax is 0.1%, 5% or 12% whereas the GST rate on some inputs may be 5% or 12% but on remaining inputs, the GST rate is certainly higher than 5% or 12%.
- The language used in proviso (ii) to Section 54(3) of the CGST Act is plain and simple signifying the plurality of both inputs and output supplies.

- As per the settled law, a taxing statute is to be strictly construed. Accordingly, the conscious use of the plural words ‘inputs’ signifies a situation where there may be more than one input and it is not possible to read ‘inputs’ as ‘input’ alone, to restrict its meaning.
- The scheme of refund of unutilised ITC on account of IDS cannot be restricted only to those cases where there is a single input and a single output supply. Consequently, the refund scheme on account of IDS will continue to apply irrespective of the number of inputs and output supplies.
- Relying on VKC Footsteps India Pvt. Ltd. (supra), it was observed that in a case where there is an accumulation of unutilised ITC on account of IDS, the refund scheme embodied under Section 54(3) of the CGST Act gets attracted.
- The statutory scheme of refund of unutilised ITC under Section 54(3) of the CGST Act is applicable despite there being multiple inputs and output supplies, provided it fulfils the statutory pre-condition that accumulation of unutilised ITC is on account of IDS.
- Merely because the present case involved multiple inputs and multiple output supplies, the scheme of the refund based on the account of IDS cannot be held to be inapplicable. Hence, the Impugned Order and the order passed by the Tax Authority are not legally permissible and are against the statutory prescription and the legislative object.
- Once all the inputs and output supplies (on a comparative basis) lead to a situation involving IDS, the refund scheme must be given full effect and cannot be denied on the consideration that the rate of tax on inputs and outputs is almost the same.
- The determining factor for applicability of Section 54(3) of the CGST Act read with Rule 89(5) of the CGST Rules is the rate of tax and the quantum of ITC content and not the value/quantum of individual inputs and the outputs. Thus, the stock-based approach as upheld in the Impugned Order violates the statutory scheme of refund.
- Where the rate of tax on some of the inputs is higher than the rates of tax on output supplies, where the outputs are more than one, the statutory refund scheme on account of IDS is available and the manner of computation of refund is governed by Rule 89(5) of the CGST Rules.
- In view of the above, the Impugned Order and the order passed by the Tax Authorities are set aside with a direction to the Tax Authority to adjudicate the matter afresh based on the observations put forth by the Hon’ble Rajasthan High Court.

  [Nahar Industrial Enterprises Ltd. Vs Union of India & Ors. [TS-563-HC(RAJ)-2023-GST], dated 1 November 2023]

ABSENT EVIDENCE, THE VALUE OF IMPORTED GOODS CANNOT BE ENHANCED BY STRAIGHTAWAY INVOKING RULE 8 OF THE CUSTOMS VALUATION (DETERMINATION OF PRICE OF IMPORTED GOODS) RULES, 1988

Facts of the case

- M/s. Ganpati Overseas (Taxpayer), owned by its proprietor Mr Yashpal Sharma (Mr Yashpal) is engaged in the business of importing electronic goods. The Taxpayer had inter alia imported tuners from M/s. Arise Enterprises, Hong Kong (supplier), owned by Mr Suresh Sharma (Mr. Suresh), a relative of Mr. Yashpal.
- Based on the intelligence received, statements of Mr Yashpal and Mr Suresh were recorded, both of whom had admitted undertaking under-invoicing of imported goods. On 15 March 1999, Mr Yashpal was arrested and enlarged on bail on 30 March 1999 on payment of INR 3 Mn. The Tax Authorities perused the relevant materials including export declarations filed by the supplier with the Hong Kong Customs and Excise Department (Hong Kong Customs Authority) which substantiated that the price declared in the export declarations was higher than the price declared by the Taxpayer in the invoice at the time of importation.
- The aforesaid investigation culminated in the issuance of a Show Cause Notice (SCN) to the Taxpayer alleging that the value of imported goods ought to be rejected in terms of Section 14 of the Customs Act, 1962 (Customs Act) and must be determined as per Rule 8 of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 (CV Rules). Further, alleging that the Taxpayer had wilfully mis-declared and suppressed the value of imported goods, an extended period of limitation was invoked.
- Subsequently, the Taxpayer filed a reply to the SCN, post which, the Tax Authorities confirmed the allegations levelled in the SCN and did not accept the submissions put forth by the Taxpayer in its reply.
- Against this, the Taxpayer filed an appeal before CESTAT, which allowed the appeal on the following grounds:
  - The value of goods shown in the initial export declarations filed by the supplier could not form the basis for enhancing the value of imported goods on account of the following:
    - The copies available with the Tax Authorities were unattested photocopies;
    - The supplier had filed a second set of export declarations before the Hong Kong Customs Authority which was accepted on imposition of penalty which was duly paid;
    - No investigation was carried out by the Hong Kong Customs Authority to support its allegation.
  - Statements of Mr. Yashpal and Mr. Suresh were retracted at the earliest available opportunity and hence, absent any corroborative material/evidence, the statements do not have evidentiary value;

   - The taxpayer had also furnished copies of invoices of contemporaneous imports which were summarily rejected by the Tax Authorities without discharging the burden to prove the contrary.
      - Aggrieved by the above, the Tax Authorities filed an appeal before the Hon'ble Supreme Court.

Contentions by the Tax Authorities

- **Evidentiary value of unattested photocopies of export declarations:**
   - The Taxpayer's contention that the supplier had filed a second set of export declarations, the price of which, reconciled with the price declared in the import invoices, was an afterthought to frustrate the proceedings as the supplier and the Taxpayer are related parties.
- **Rejection of import value by straightaway invoking Rule 8 of the CV Rules:**
   - The rejection of the value of imported goods and determining the same as per Rule 8 of the CV Rules was justified as the invoices presented by the Taxpayer before the Tax Authorities did not represent genuine and actual transactions.
   - The value declared in the invoices was lower than the value declared by the supplier in the export declarations filed before the Hong Kong Customs Authority. Hence, the transaction value cannot be accepted as per Section 14(1) of the Customs Act and Rule 4 of the CV Rules.
   - In addition to the export declarations, Mr Yashpal and Mr Suresh, in their statements (under Section 108 of the Customs Act) had admitted to having under-valued imported goods.
   - The Taxpayer has not laid any basis for acceptance of invoice price as the transaction value and hence, a resort can be made to the CV Rules (Rule 5 onwards). Recourse was directly made to Rule 8 of the CV Rules since neither the transaction value of similar goods nor contemporary imports were available.
   - In view of the above, CESTAT was not justified in interfering with such a reasoned order of the Adjudicating Authority.

Contentions by the Taxpayer

- **Evidentiary value of unattested photocopies of export declarations:**
   - The supplier had withdrawn their initial export declarations and filed a second set of declarations which was accepted by the Hong Kong Customs Authority on imposition of penalty. The value of goods declared in the second set of export declarations reconciled with the value of imported goods. Hence, the value of imported goods was correct.
   - The export declarations relied upon by the Tax Authorities were only photocopies which were neither signed nor attested. Hence, the same did not have any evidentiary value.
- **Evidentiary value of statements of Mr. Yashpal and Mr. Suresh:**
  Statements of Mr Yashpal and Mr Suresh lack evidentiary value due to the following reasons:
   - At the time when the statements were recorded, no evidence was available to prove undervaluation.
   - Both statements are almost identical and matched with each other, thereby suggesting that those were dictated ones, obtained under coercion and stress.
   - Both statements were retracted at the first available opportunity.
   - While granting bail to Mr. Yashpal, the order passed by the Additional Sessions Judge, New Delhi noted that the statements were made under coercion and stress and therefore, the same could not be termed as a voluntary statement.
- **Rejection of import value by straightaway invoking Rule 8 of the CV Rules:**
   - The value of imported goods is governed by CV Rules, and not based on the export value declared by the supplier in the exporting country. Accordingly, the Tax Authorities were not justified in bypassing Rules 5, 6 and 7 of the CV Rules to straightaway determine the value of imported goods by invoking Rule 8.
   - The Tax Authorities had not made any effort to gather evidence to determine the transaction value of identical or similar contemporaneous imports.
   - Reliance in this regard was placed on the following judicial precedents:
      - ***Rabindra Chandra Paul Vs. Commissioner of Customs [2007 (3) SCC 93]***
      - ***Commissioner of Customs, Calcutta Vs. South India Television (P) Ltd. [2007 (6) SCC 373]***

Observations and Ruling by the Hon'ble Supreme Court

- **Evidentiary value of unattested photocopies of export declarations:**
  The Hon'ble Supreme Court concurred with the findings of the CESTAT that the initial set of export declarations could not form any reliable basis for enhancement of the value of imported goods *inter alia* holding that -
   - Unattested photocopies of the relied-upon documents without anyone providing or owning up to the veracity of the same would not have any evidentiary value.
   - The initial set of export declarations were subsequently removed and the same was duly accepted by the Hong Kong Customs Authority.
   - Thus, there cannot be any justifiable basis for the Tax Authorities to harp upon the price of goods as per the initial set of export declarations to prove the allegation of under-invoicing with an intent to evade customs duty.
- **Evidentiary value of statements given by the importer:**

  - A customs officer is not a police officer and the person summoned who makes a statement under Section 108 of the Customs Act is not an accused. However, a statement made by a person under Section 108 is admissible evidence and can be used against such person.
  - The underlying object of Section 108 of the Customs Act is to ascertain the truth and the customs officer must ensure the truthfulness of the statement so recorded, failing which, the very utility of recording the statement would be lost.
  - Thus, the Customs officer has the onerous responsibility to ensure that the statement is recorded in a fair and judicious manner providing procedural safeguards to such person to ensure that the statement so recorded is admissible as evidence and can meet the standards of basic judicial principles and natural justice. Certainly, a statement recorded under duress and coercion cannot be used as evidence against a person making the statement.
  - In the present case, the findings of the CESTAT refusing to give credence to the confessional statement of Mr Yashpal cannot be faulted considering that vide order dated 26 May 1999, the Additional Sessions Judge observed that the statement of Mr Yashpal obtained under Section 108 of the Customs Act may not be a voluntary one and subsequently, Mr Yashpal had retracted the aforesaid statement.
- **Rejection of import value by straightaway invoking Rule 8 of the CV Rules:**
  - As per Rule 3 of the CV Rules, the value of imported goods shall be the transaction value (as per Rule 4 of the Valuation Rules) and if the same cannot be determined, the value shall be determined by proceeding sequentially through Rules 5 to 8 of the CV Rules.
  - In ***Rabindra Chandra Paul (supra)*** and ***South India Television (P) Ltd. (supra)***, it was held that the transaction value can be rejected if the invoice price is found to be incorrect, but it is for the Tax Authorities to substantiate the same.
  - In the present case, the Tax Authorities were not justified in straightaway rejecting the import price and enhancing the same by straightaway invoking Rule 8 of the Valuation Rules considering that there was no evidence before them to do so.
- Considering the above, there is no error or infirmity in the order passed by CESTAT and the appeals filed by the Tax Authorities are devoid of merits and hence, are dismissed.

[Commissioner of Customs Vs. M/s Ganpati Overseas, [TS-513-SC-2023-CUS], dated 6 October 2023]

IIT PATNA AND NIT ROURKELA WILL COME UNDER THE SERVICE TAX EXEMPTION NOTIFICATION

Facts of the case

- M/s. Shapoorji Pallonji (Taxpayer) was awarded a works contract for construction by the Indian Institute of Technology, Patna (IIT) through NBCC India Ltd (NBCC). The agreed contract price was exclusive of applicable Service tax which would be reimbursed by the IIT to the Taxpayer on furnishing supporting documents.
- During the period from March 2013 to April 2015, the Taxpayer issued tax invoices to the IIT, discharged applicable Service tax, and claimed reimbursement of the same from the IIT.
- The Indian Audit and Account Department raised an objection that service providers undertaking construction activities for educational institutions meeting the criteria of a 'governmental authority' as per Clause 12(c) of Notification no: 25/2012-Service tax dated 20 June 2012 (Exemption Notification) were exempted from the levy of Service tax and hence, the IIT is not obliged to remit the Service tax to the Taxpayer. Accordingly, the IIT was directed to undertake actions for recovery of Service tax previously paid to the Taxpayer.
- Pursuant to the above, the IIT expressed its intention to establish a mechanism for recovery of Service tax reimbursed to the Taxpayer. Consequently, the Taxpayer filed a Writ Petition before the Hon'ble Patna High Court inter alia directing the Tax Authorities to refund the Service tax paid by it on the aforesaid services.
- The Hon'ble Patna High Court vide Order dated 3 March 2016 held that the services provided by the Taxpayer are exempt from the levy of Service tax and directed the Tax Authorities to refund the amount of Service tax paid to the Taxpayer or the IIT.
- Similarly, with respect to construction services provided by the Taxpayer to NIT Rourkela (NIT), the Hon'ble Orissa High Court directed the Tax Authorities to dispose of the Taxpayer's refund application seeking a refund of Service tax paid on the aforesaid services.
- Aggrieved by the Orders passed by the Hon'ble Patna and Orissa High Courts (Impugned Orders), the Tax Authorities filed Civil Appeals before the Hon'ble Supreme Court.

Contentions by the Tax Authorities

- The IIT and the NIT are not covered under the purview of 'governmental authority' in terms of Entry 12(c) of the Exemption Notification on account of the following:
  - The definition of the term 'governmental authority' as provided in Clause 2(s) of the Exemption Notification was amended *vide* Notification dated 30 January 2014 (Amendment Notification) as under: *'(s)'governmental authority' means an authority or a board or any other body:*

    - *set up by an Act of Parliament or a State Legislature; or*
    - *established by Government, with 90% or more participation by way of equity or control, to carry out any function entrusted to a municipality under Article 243W of the Constitution.'*
  - The Amendment Notification aimed to broaden the applicability of the exemption beyond the statutory bodies, thereby extending the benefits to government-established entities as well. However, the requirement of 90% or more government equity or control would apply to all governmental authorities irrespective of whether they are statutory bodies or not.
  - The Hon'ble High Courts have erred in interpreting sub-clauses (i) and (ii) as being independent and disjunctive and deliberate separation error lies in such interpretation. The deliberate separation of the condition of 90% or more participation from sub-clause (ii) serves the specific intent of making it applicable to both sub-clauses.
  - Punctuation marks alone should not dictate the interpretation of a statute, especially when the meaning of the statute is clear without them. Punctuation marks may convey different impressions, and their interpretation should not be isolated but considered in conjunction with other clauses to discern legislative intent. The terms 'or' and 'and' can be interchangeably interpreted to fulfil the legislative intent.
  - The Impugned Orders carry the risk of unconditionally broadening the coverage and scope of the Exemption Notification which could unfairly burden the exchequer.
  - The IIT and the NIT have been incorporated under the Indian Institute of Technology Act, 1961 and the National Institute of Technology Act, 2007 respectively, and they do not carry out any duties/responsibilities akin to Schedule XII of the Constitution and hence, not covered under the purview of 'governmental authority' under Clause 2(s) of the Exemption Notification.
- The Taxpayer has paid Service tax through self-assessment and the refund claim is not sustainable unless the assessment itself is set aside.
- The Taxpayer has delivered services to NBCC and not directly to the IIT. Since NBCC lacks the status of a 'governmental authority' under the Exemption Notification, the present transaction does not qualify for exemption under the Exemption Notification and hence, is leviable to Service tax.

Contentions by the Taxpayer

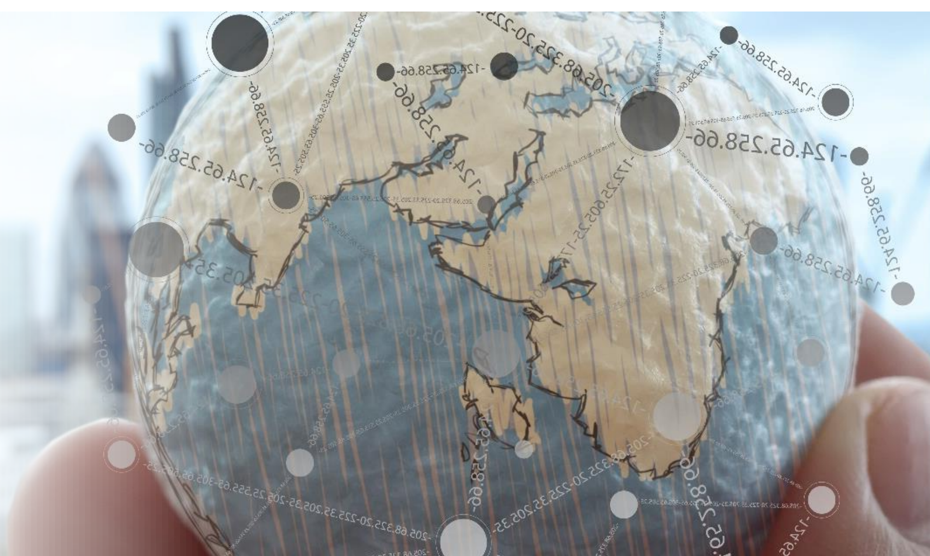
- Since IIT and NIT are established under the statutory enactments (as highlighted above), they should be considered as 'governmental authorities' as per Clause 2(s) of the Exemption Notification.
- As regards the Tax Authorities' contention that the Taxpayer has provided services to NBCC, it was also submitted that the Sl. No. 29(h) of the Exemption Notification also exempts services provided by sub-contractors by way of works contract to another contractor providing works contract services where such services were already exempted. Hence, the aforesaid contention would not have any bearing on the levy of Service tax.
- The provisions contained in sub-clauses (i) and (ii) of Clause 2(s) of the Exemption Notification are independent disjunctive provisions and the expression '90% or more participation by way of equity or control' is related to sub-clause (ii) alone. Accordingly, the authority's set-up by an Act of the Parliament/State Legislature is not subjected to such condition for claiming exemption.

Observations and Ruling by the Hon'ble Supreme Court

- On perusal of the original definition as well as the amended definition of 'governmental authority' it can be inferred that the objective behind the issuance of the Amendment Notification was to expand the definition of 'governmental authority' and widen the exemption base for services provided even to an authority or a board or any other body, set up by an Act of Parliament/State Legislature, without the condition of having been established with 90% or more participation by way of equity or control by the Union/a State Government to carry out functions entrusted to a municipality under Article 243W of the Constitution.
- The word 'or' employed in Clause 2(s) of the Exemption Notification manifests the legislative intent and hence, should be read in its ordinary, natural, and grammatical meaning and a different meaning cannot be assigned unless it leads to vagueness or makes Clause 2(s) unworkable.
- In the present case, the use of the word 'or' between sub-clause (i) and (ii) indicates the independent and disjunctive nature of sub-clause (i), meaning thereby that 'or' used after sub-clause (i) cannot be interpreted as 'and' to tie it with the condition enumerated in long line of Clause 2(s), applicable only to sub-clause (ii).
- The use of a semicolon (after sub-clause (i)) is not a trivial matter but a deliberate inclusion with a clear intention to differentiate it from sub-clause (ii). While there is a semicolon after sub-clause (i), sub-clause (ii) closes with a comma. Hence, the long line of Clause 2(s) governs only sub-clause (ii) and not sub-clause (i) because the introduction of a semicolon after sub-clause (i), followed by the word 'or' has established it as an independent category, thereby making it distinct from sub-clause (ii).
- If the Tax Authorities' interpretation that the conjunction 'or' is to be read as 'and' is accepted, the same would allow subsistence of the unworkability factor, and consequently, the legislative intention of re-defining 'governmental authority' would be defeated.
- In view of the above, the Civil Appeals preferred by the Tax Authorities were dismissed and the orders passed by the Hon'ble High Courts were upheld.

  [Shapoorji Pallonji and Company Pvt. Ltd. & Ors., [TS-523-SC-2023-ST], dated 14 October 2023]

TRANSFER PRICING



ESOP EXPENSES, FOREIGN EXCHANGE FLUCTUATION LOSS AND IMPAIRMENT LOSS ON INVESTMENTS HELD TO BE NON-OPERATING EXPENSES

The taxpayer is engaged in the business of providing software development services, Information Technology enabled Services ('ITeS') and other back-office support services to its Associated Enterprises ('AEs').

During Assessment Year ('AY') 2017-18, the taxpayer computed its PLI[1] by excluding the following three items from its operating costs:

- Share based compensation (also referred to as ESOP[2] costs) – INR 4,054 Mn
- Foreign exchange fluctuation loss – INR 110 Mn
- Impairment loss on investment in subsidiaries – INR 118 Mn

The taxpayer's case was selected for audit and a reference was made to the Transfer Pricing Officer ('TPO') for the determination of the arm's length price ('ALP') of the international transactions. After detailed inquiries and verification of submissions made by the taxpayer, the TPO passed an order u/s 92CA(3) considering the aforementioned expenses as **'Non-Operating'** in nature.

The Ld. Commissioner of Income Tax ('CIT') on examination of records took a view that the TPO has erroneously considered the aforementioned expenses as non-operating in nature and excluded them from the operating cost of the taxpayer. Subsequently, Ld. CIT issued a show cause notice ('SCN') to the taxpayer for revision of the order passed by TPO. The Ld. CIT opined that the TPO has erred in considering ESOP costs, foreign exchange fluctuation loss and impairment loss on investment in the subsidiary as non-operating expense without making proper inquiries and verification. Holding that the order passed by TPO u/s 92CA(3) is erroneous and prejudicial to the interests of the revenue, the Ld. CIT passed a revisionary order u/s 263 of the Act[3].

On further appeal by the taxpayer and on perusal of facts stated and arguments placed, the Hon'ble Income Tax Appellate Tribunal ('Tax Tribunal') opined as follows -

- *On the treatment of ESOP expenses as Non-Operating*

  The Tax Tribunal noted that the TPO had issued notices in this regard, which were duly replied to by the taxpayer submitting all the required information and documents. The ESOP expenses were notional costs, and no payments were discharged by the taxpayer qua the awards given to its employees by the parent company. These ESOP costs were necessary to be disclosed in the audited financial statements, in compliance with the provisions of Ind-AS[4] 102. Consequently, the taxpayer debited these expenses to the Profit and Loss ('P&L') account, however, did not claim these expenses as admissible expenditures in its return of income. Also, placing reliance on the below judicial precedents, the Tax Tribunal held that **ESOP Cost** is **a Non-Operating** expenditure for the purpose of computing the **Operating Margin** –

  - i2 Technologies Software (P.) Ltd v. CIT(A): 83 taxmann.com 143 (Bang – Trib.)
  - HOV Services Ltd v. JCIT: 73 taxmann.com 311 (Pune – Trib.)

- *On the treatment of foreign exchange fluctuation loss and impairment loss on investments*

  Tax Tribunal observed that the Ld. CIT himself had previously noted in his order that the mentioned losses appeared to be prima facie non-operating in nature. Thus, ITAT quashed the order on the ground that the Ld. CIT could not direct the TPO to conduct a fresh examination of the same issue.

Amazon Development Centre (India) Pvt Ltd [TS-624-ITAT-2023(Bang)-TP]

[1] Profit Level Indicator
[2] Employee Stock Option Plan
[3] Income Tax Act, 1961
[4] Indian Accounting Standards

SALARY AND COMMISSION TO DIRECTORS ARE TO BE AGGREGATED FOR THE PURPOSE OF BENCHMARKING UNDER TRANSACTIONAL NET MARGIN METHOD (‘TNMM’)

The taxpayer is engaged in the manufacturing and processing of plastics in India. During AY 2015-16, the taxpayer entered into international transactions and specified domestic transactions (‘SDT’) with its Associated Enterprises (‘AEs’).

For the relevant year, SDT transactions under Clause 92BA(i)[5] of the Act required determination of ALP for expenditure made to persons referred to under Section 40A(2)(b) of the Act. Accordingly, payments for salary and commission made by the taxpayer to its two directors were aggregated under the Transactional Net Margin Method (‘TNMM’) for the purpose of benchmarking. In this regard, the taxpayer compared the ratios of aggregate remuneration (salary & commission) to the profit before tax (‘PBT’) of the taxpayer (4.39%) vis-à-vis six comparable companies in the same industry (6.37%), thereby concluding the SDT transaction to be at arm’s length.

The taxpayer’s case was selected for scrutiny and a reference was made to TPO for determination of ALP. The TPO sought to benchmark the salary & commission paid to directors separately with the six comparables, and it was found that the salary paid to directors was at arm’s length whereas the directors’ commission was held to be excessive. Observing that the ratio of the 'Director’s commission/PBT’ of the taxpayer was 3.13% in comparison to 1.50% of the six comparables, the TPO proposed a TP adjustment of INR 7 million.

On further appeal by the taxpayer and review of facts stated and arguments on the applicability of SDT provisions to the present case, the Tax Tribunal noted that the limited issue was to decide whether the directors’ remuneration was required to be benchmarked on an aggregate basis or whether the salary & commission was to be benchmarked separately and independent of each other. The Tax Tribunal held as follows –

- Remuneration of directors is decided by the Remuneration Committee and approved by the shareholders as a single package which comprises both fixed (salary) and variable (commission) components. Hence, both these items of remuneration were noted to be closely related.
- Remuneration policies of the companies in the same industry may differ, but the overall remuneration is in accordance with provisions of the Companies Act, 2013.
- Section 197 of the Companies Act, 2013 sets the limits for payment of overall director’s remuneration, which includes salary, fee, or commission. There is no distinction between salary, sitting fees, or commission in the Companies Act, 2013.
- Section 17(1) of the Act defines ‘salary’ and includes any ‘commission’ paid in addition to salary. Therefore, the commission is considered part of the salary income of the director.

Accordingly, the Tax Tribunal held that the salary and commission are not distinct transactions and shall be aggregated for the purpose of benchmarking and deleted the TP adjustment.

The Supreme Industries Ltd [TS-609-ITAT-2023(Mum)-TP]

THE HIGH COURT (‘HC’) HOLDS THAT PENALTY FOR CONCEALMENT OF INCOME CANNOT BE LEVIED ON TP ADJUSTMENTS INVOLVING ADJUDICATION ON MATTERS PERTAINING TO ‘BASE EROSION THEORY’, A DEBATABLE ISSUE, ON WHICH TWO VIEWS ARE POSSIBLE

The taxpayer is a foreign company registered in the Netherlands. The taxpayer earned income from royalties or fees for technical services in India and accordingly filed the Accountant’s Report in Form 3CEB. The taxpayer’s case was selected for scrutiny and referred to the Transfer Pricing Officer (‘TPO’) for determination of the Arm’s Length Price of the international transactions.

The taxpayer had placed reliance on the base erosion theory to substantiate the arm’s length nature of its international transactions which were taxable in India arguing that *‘If the taxpayer had charged additional fees from its Indian Associate Enterprises (‘AEs’), it would have been taxed in India in the hands of the taxpayer @10%, while the same fees would have been treated as an expenditure in the hands of the Indian AE. Therefore, the Indian AE (which is taxed at 33.99%) would have claimed a higher expenditure which would have resulted in a lower tax outflow to the extent of approx. 24%, leading to erosion of taxes in India’.*

The TPO however made an adjustment of INR 294.36 million to the international transactions of the taxpayer, which was upheld by the Dispute Resolution Panel (‘DRP’) and incorporated in the Final Assessment Order by the Assessing Officer (‘AO’). The taxpayer’s appeal before the Hon’ble Income-tax Appellate Tribunal (‘Tax Tribunal’) was not successful and the taxpayer filed an appeal before the Hon’ble High Court (‘HC’) which was pending adjudication.

Separately, the penalty proceedings progressed as follows:

- The Deputy Commissioner of Income Tax (‘DCIT’), International Taxation Division initiated penalty proceedings and held that the taxpayer was liable to a penalty for furnishing inaccurate particulars of income and thereby concealing income.
- On appeal, the next appellate body, the Commissioner of Income-tax (Appeals) ‘CIT(A)’ held that there is no provision under the Transfer Pricing regulations to give compensatory adjustment in the hands of the AE. Hence, there was no question of difference of opinion; and accordingly, the penalty proceedings were appropriate.
- The next appellate body, the Tax Tribunal, ruled in favour of the taxpayer and held that the underlying addition on which penalty had been levied was a

[5] Clause (i) of Section 92BA has been omitted by the Finance Act 2017.

debatable issue considering the variance of legal issues and opinions of Karnataka Bench and Pune Bench on the same matter i.e., appropriateness of the base erosion theory. Considering that two views were possible on the underlying matter, the levy of a penalty was not justified.

- The Revenue Authorities therefore appealed before the HC which dismissed the appeal, while making the following observations:
  - 'Base erosion theory' is a debatable issue and two opinions being available for the validity of the same, cannot be held to be a case of penalty under Section 271(1)(c);
  - Explanation 7 of Section 271(1)(C) cannot be applied blindly in a routine manner to levy penalty on the additions made in the absence of any material to establish the concealing of income or furnishing inaccurate particulars;
  - Only because the appeal of the taxpayer was admitted on the issue of quantum, the fact that the Revenue's appeal on the issue of penalty automatically requires to be admitted, is not necessary; and
  - The appeal deserves to be dismissed since it does not involve any questions of law.

Shell Global Solutions International BV [TS-620-HC-2023(GUJ)-TP]

SEPARATE ADJUSTMENT FOR THE DELAY IN RECOVERING RECEIVABLES IS NOT WARRANTED WHEN WORKING CAPITAL ADJUSTMENT IS DONE

The taxpayer is engaged in the provision of software development services, information technology-enabled services, business support services and technical support services. During the transfer pricing audit, the Transfer Pricing Officer ('TPO') made an adjustment on account of interest on receivables outstanding for a period exceeding the credit period of 90 days.

The TPO did not grant working capital adjustment to the taxpayer by claiming that the taxpayer did not demonstrate the difference in the levels of working capital employed by the taxpayer vis-à-vis the comparable companies and the nature and intensity of assets employed.

On an appeal by the taxpayer, the Dispute Resolution Panel ('DRP') allowed the taxpayer to undertake a working capital adjustment by mentioning that holding of inventories, trade debtor/creditors, and trade receivable/payable always has an associated interest cost; proving that there is a connection between the level of working capital and price at which one is willing to offer its services/goods.

In addition, the taxpayer contended that there is no requirement for an adjustment towards interest on receivables since a working capital adjustment has been carried out.

On appeal, the Hon'ble Income-tax Appellate Tribunal ('Tax Tribunal') remanded the matter back to the Assessing Officer ('AO') for verifying the taxpayer's claim.

Aggrieved with the order of the Tax Tribunal, the tax department, filed a further appeal to the High Court (HC, which relying on the ruling in the case of Kusum Health Care Pvt. Ltd. made the following observations:

- The inclusion of the expression 'receivables' in the Explanation to Section 92B of the Act does not mean that all 'receivables' from Associated Enterprises ('AEs') would automatically be characterised as an international transaction;
- There has to be a proper inquiry by the TPO by analysing the statistics over a period of time to conclude that the arrangement leads to a benefit to the AE;
- In the instant case, the entire focus of the AO was only on one assessment year ('AY') which is inadequate to reflect any pattern that would justify the receivables constituting an international transaction in itself; and
- With the working capital adjustment already undertaken, any further adjustments only based on the outstanding receivables for one AY would distort the picture and lead to the recharacterisation of the transaction.

Based on the aforesaid, the Hon'ble HC concluded that the appeal did not involve any substantial question of law and accordingly dismissed the appeal of the tax authorities.

Qualcomm India Pvt Ltd [TS-636-HC-2023(DEL)-TP]

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