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INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA (ICAI)

CHECKLIST ON STANDARDS ON AUDITING

Auditing and Assurance Standards Board of ICAI issued a 'Checklist on Standards on Auditing' on 22 June 2023 as a part of its continuous endeavour of learning and knowledge dissemination. This publication covers a checklist of all the 38 Standards on Auditing (SAs) issued up until date covering various audit requirements given in SAs.

The checklist will enable auditors to comply with SAs effectively and it also includes various 'Notes' which contain relevant guidance given in SAs. However, ICAI cautioned that the checklist is not a substitute for the complete text of SAs and the complete text of SAs should always be referred to for comprehensive knowledge on the subject, and the checklist neither supersedes nor replaces any guidance/ pronouncements/ Standards issued by ICAI.

Lastly, the ICAI advises Members to read/ use the checklist in conjunction with the SAs, Guidance Notes and related pronouncements and also to exercise professional judgement while using the checklist.

RESTRICTING REVOCATION OF THE UDINS WITHIN 48 HOURS

ICAI has issued an announcement dated 23 June 2023 stating that the revocation of UDINs would now be possible within 48 hours from the time of its generation. This means that from now onwards the members will be able to revoke the UDINs, if they so desire, only within 48 hours from the time they have been generated.

As a result, the authorities/ regulators/ banks/ others, who verify the authenticity of the UDINs would be provided with information that the UDIN, which is being verified, could only be revoked within 48 hours from the time it has been generated.

NATIONAL FINANCIAL REPORTING AUTHORITY (NFRA)

STATUTORY AUDITORS' RESPONSIBILITIES IN RELATION TO FRAUD IN A COMPANY

NFRA via Circular dated 26 June 2023, reiterates the obligation of the Statutory Auditors in relation to reporting fraud and/or suspected fraud in a Company as mandated under the Companies Act, 2013 (CA 2013), the Companies (Auditor's Report) Order (CARO) and the Standards on Auditing (SAs) issued by ICAI.

The circular specifically highlights that the Statutory Auditor is duty bound to submit Form ADT-4 (Report to the Central Government) u/s 143(12) of CA 2013 even in cases where the Statutory Auditor is not the first person to identify the fraud/suspected fraud.

NFRA draws attention to the recent verdict by the Hon'ble Supreme Court of India, where the Apex Court has held that the consequences of section 140(5) of CA 2013 will be applicable also to those auditors who resign from their audit engagements without reporting fraud/suspected fraud; In light of this, NFRA restates that Statutory Auditors are under a mandatory obligation to report fraud or suspected fraud if they observe suspicious activities, transactions or operating circumstances in a company that

indicate 'reasons to believe' that an offence of fraud is being or has been committed against the company by its officers or employees. Also, it adds that in such an event, the Statutory Auditor shall initiate the steps prescribed under Rule 13 of Companies (Audit and Auditors) Rules 2014 which begins with reporting the matter to the Board/Audit Committee within TWO days of his/her knowledge of the fraud.

The Statutory Auditor shall exercise his/her professional scepticism while evaluating fraud and need not be influenced by legal opinion provided by the Company or its Management.

RESERVE BANK OF INDIA (RBI)

FRAMEWORK FOR COMPROMISE SETTLEMENTS AND TECHNICAL WRITE-OFFS

RBI has issued a Circular dated 8 June 2023, which lays down a comprehensive regulatory framework governing compromise settlements and technical write-offs covering all Regulated Entities (REs). This framework contains the following provisions:

- **Board Approved Policy** - REs shall put in place Board-approved policies which shall comprehensively lay down the process to be followed for all compromise settlements and technical write-offs, with specific guidance on the necessary conditions precedent such as minimum ageing, deterioration in collateral value etc. The aforesaid policy shall also cover the delegation of powers for approval/sanction of compromise settlements and technical write-offs.
- **Prudential Treatment** - Compromise settlements where the time for payment of the agreed settlement amount exceeds three months shall be treated as restructuring as defined in terms of the Prudential framework on Resolution of Stressed Assets dated June 7, 2019. In case of partial technical write-offs, the prudential requirements in respect of residual exposure, including provisioning and asset classification, shall be with reference to the original exposure.
- **Reporting Mechanism** - There shall be a reporting mechanism to the next higher authority, at least on a quarterly basis, with respect to compromise settlements and technical write-offs approved by a particular authority. The Board shall mandate a suitable reporting format to ensure adequate coverage.
- **Cooling Period** - In respect of borrowers subject to compromise settlements, there shall be a cooling period as determined by the respective Board approved policies before the REs can assume fresh exposures to such borrowers. It is subject to that in respect of exposures other than farm credit exposures shall be subject to a floor of 12 months. REs are free to stipulate higher cooling periods in terms of their Board approved policies and the cooling period for farm credit exposures shall be determined by the REs as per their respective Board approved policies.

This shall come into force with immediate effect and shall be applicable to REs to whom this circular is addressed i.e. Commercial Banks (including Small Finance Banks, Local Area Banks and Regional Rural Banks), Primary (Urban) Co-operative Banks/State Co-operative Banks/ Central Co-operative Banks, All-India Financial Institutions and Non-Banking Financial Companies (including Housing Finance Companies).

Guidelines on Default Loss Guarantee (DLG) in Digital Lending

RBI vide circular dated 8 June 2023 has permitted, subject to certain requirements as mentioned in this circular, the arrangement of the DLG between Regulated Entities (REs) and Lending Service Providers (LSPs) or between two REs in Digital Lending in which the latter agree to compensate the former up to a certain percentage in case of losses due to defaults of loan portfolios of REs while undertaking Digital Lending. DLG arrangements conforming to these guidelines shall not be treated as 'synthetic securitisation' and/ or shall also not attract the provisions of loan participation.

A few provisions of this circular are highlighted below:

- **Eligibility** - REs may enter into DLG arrangements only with an LSP/ other RE with which it has entered into an outsourcing LSP arrangement. Further, the LSP providing DLG must be incorporated as a company under the Companies Act, 2013.
- **Structure of DLG Arrangements** - DLG arrangements must be backed by an explicit legally enforceable contract between the RE and the DLG provider.
- **Cap on DLG** - RE shall ensure that the total amount of DLG cover on any outstanding portfolio which is specified upfront shall not exceed 5% of the amount of that loan portfolio. This also includes arrangements involving implicit guarantees linked to the performance of the RE's loan portfolio specified upfront.
- **Recognition of NPA** - Recognition of individual loan assets in the portfolio as NPA and consequent provisioning shall be the responsibility of the RE as per the extant asset classification and provisioning norms irrespective of any DLG cover available at the portfolio level.
- **Invocation of DLG** - The RE is required to invoke the DLG within a maximum overdue period of 120 days unless the borrower itself makes good the default before invocation.
- **Tenor of DLG** - The DLG agreement must remain in force for a period of at least as much as the longest tenor of the loan in the underlying loan portfolio.
- **Due Diligence and other requirements with respect to DLG provider** - REs shall put in place a Board approved policy before entering into any DLG arrangement. Such policy shall include, at the minimum, the eligibility criteria for the DLG provider, the nature and extent of DLG cover, the process of monitoring and reviewing the DLG arrangement, and the details of the fees, if any, payable to the DLG provider. It has been expressly clarified that DLG arrangements should not be a substitute for credit appraisal requirements and robust credit underwriting standards.

These guidelines shall come into effect from the date of this circular.

SOVEREIGN GOLD BOND (SGB) SCHEME 2023-24

RBI vide notification dated 15 June 2023, issued terms and conditions of the issuance with respect to the Bonds announced by the Government of India vide its notification no F.No 4. (6) – B(W&M)/2023 dated 14 June 2023. Those terms and conditions are summarised below:

- **Date of issue -** The SGBs will be issued in two tranches in FY24 as follows:

Tranche	Date of Subscription	Date of Issuance
2023-24 Series I	19 – 23 June 2023	27 June 2023
2023-24 Series II	11 – 15 September 2023	30 September 2023

- **Period of Subscription** - Subscription for the Gold Bonds under the Scheme shall be open (Monday to Friday) on the dates specified above, provided that the Central Government may, with prior notice, close the Scheme at any time before the period specified above.
- **Application** - Subscription of the Bonds may be made in the prescribed form and all online applications should be accompanied by PAN Number issued by the Income Tax Department and email Id of the investor/s which should be uploaded on the Ekuber portal of the RBI along with the subscription details.

  Further, to facilitate the availability of all current operative instructions regarding servicing of these bonds in one place, RBI had issued Consolidated Procedural Guidelines vide circular IDMD.CDD.1100/14.04.050/2021-22 dated 22 October 2021 (updated as on 4 October 2022), and the same is available on the website of RBI.

MASTER DIRECTION ON MINIMUM CAPITAL REQUIREMENTS FOR OPERATIONAL RISK

RBI vide notification dated 26 June 2023, issued Master Direction on Minimum Capital Requirements for Operational Risk. The Direction will require a specified commercial bank to hold sufficient regulatory capital against its exposures arising from operational risk. These directions shall be applicable to all Commercial Banks (excluding Local Area Banks, Payments Banks, Regional Rural Banks, and Small Finance Banks).

It states that, once these directions become effective, all existing approaches such as Basic Indicator Approach, The Standardised Approach or Alternative Standardised Approach and Advanced Measurement Approach for measuring minimum operational risk capital requirements shall be replaced by the new Standardised Approach (hereafter referred to as the 'Basel III Standardised Approach').

Banks shall comply with the instructions contained in these Directions with effect from the date, which will be communicated by RBI separately.

SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI)

COMPREHENSIVE GUIDELINES FOR INVESTOR PROTECTION FUND AND INVESTOR SERVICES FUND AT STOCK EXCHANGES AND DEPOSITORIES

SEBI vide circular dated 30 May 2023, merged and amended provisions of existing guidelines for the Investor Protection Fund (IPF) and Investor Services Fund (ISF). These guidelines shall be effective from 29 June 2023.

Key provisions of these guidelines are highlighted below:

- **Constitution and Management of the IPF – All stock exchanges and depositories are required to establish IPF administered through separate trusts. The IPF Trust will consist of 5 trustees including directors, investor association representatives, and compliance office. The stock exchanges have also been asked to ensure that funds are well segregated and immune from liabilities of exchange and depository.**
- **Contribution to IPF of Stock Exchange - Stock exchanges are further required to contribute to the IPF through various means, such as a quarterly contribution of 1% of listing fees, 100% interest earned on 1% security deposits held by issuer companies during securities offerings, penalties collected from trading members, and contributions based on transaction charges imposed on trading members. SEBI has further specified that the IPF should receive a minimum of 70% of interest or income derived from any investments made using the IPF corpus.**
- **Contribution to IPF of Depository- It shall contribute to IPF 5% of profits from depository operations yearly, fines and penalties recovered, interest or income received out of any investments made from IPF, funds lying to the credit of IPR and any other contribution as may be prescribed.**
- **Utilisation of IPF and interest or income from IPF - Stock exchanges should use the fund to address investment claims from clients of defaulting trading members and provide interim relief to affected investors. Depositories, on the other hand, should utilise the fund to promote investor education, meet legitimate claims of beneficial owners, support initiatives of depository participants, and fulfil other purposes permitted by Sebi. To streamline the process of settling claims from the IPF, SEBI has also introduced a new standard operating procedure (SOP).**
- **Deployment of Funds of IPF by Stock Exchanges and Depositories - The funds of the IPF Trust shall be invested in instruments such as Central Government securities, fixed deposits of scheduled banks and any such instruments which are allowed as per the investment policy approved by the respective governing boards of the stock exchanges and depository. The balance available in the IPF at the end of each month and the amount utilised during the month including the manner of utilisation shall be**

reported to SEBI in the Monthly Development Reports of the stock exchanges and depository respectively.

- **Review of IPF Corpus** - The stock exchanges and depositories are required to conduct a half-yearly review (by the end of March and September every year) to ascertain the adequacy of the IPF corpus. In case the IPF corpus is found to be inadequate, the same shall be enhanced appropriately.
- **Timelines for declaration of default of a TM, processing of investor claims out of IPF and review of claims** - In order to streamline the process and settlement of claims from IPF, a comprehensive Standard Operating Procedure (SOP), indicating the process and timelines for declaration of default of a TM, processing of investor claims out of IPF and review of claims is prescribed in the annexure to these guidelines.
- **ISF of Stock Exchanges** - Stock exchanges have also been directed to allocate 20 per cent of listing fees to the ISF, which will be utilised for public services, including investor education, awareness programs, and training initiatives. The Regulatory Oversight Committee will oversee the management and utilisation of the ISF funds. Notably, at least 50 per cent of the ISF corpus should be spent on activities in Tier-II and Tier-III cities. The interest earned on the ISF will remain with the IPF corpus.

PARTICIPATION OF MUTUAL FUNDS IN REPO TRANSACTIONS ON CORPORATE DEBT SECURITIES

SEBI vide circular dated 8 June 2023, has made a partial modification in the earlier circular via which it allowed mutual funds to participate in repo transactions on corporate debt securities. As per the amendment, the Mutual Funds can participate in repos on the following corporate debt securities:

- Listed AA and above-rated corporate debt securities.
- Commercial Papers (CPs) and Certificates of Deposits (CDs).

The circular states that for the purpose of consideration of credit rating of exposure on repo transactions for various purposes including for Potential Risk Class (PRC) matrix, liquidity ratios, Risk-o-meter etc., the same shall be as that of the underlying securities, i.e., on a look through basis. Further, for transactions where settlement is guaranteed by a Clearing Corporation, the exposure shall not be considered for the purpose of determination of investment limits for single issuer, group issuer and sector level limits.

ADHERENCE TO PROVISIONS OF REGULATION 51A OF SEBI (ISSUE AND LISTING OF NON-CONVERTIBLE SECURITIES) REGULATIONS, 2021 (NCS REGULATIONS) BY ONLINE BOND PLATFORM PROVIDERS ON PRODUCT OFFERINGS ON ONLINE BOND PLATFORMS

SEBI issued a circular dated 16 June 2023, clarifying the following with respect to online bond platform providers (OBPPs):

- **Restriction of products offered on an Online Bond Platform** - While restricting products offered on an online bond platform, SEBI reiterated that an entity acting as an online bond platform provider would cease to offer on its platform or any other platform website, products or services not permitted under the rules. The holding company, subsidiary, or associate of an online bond platform provider will not utilise the name, brand name, or any name resembling that of the online bond platform provider for offering products and services that are not regulated by a financial sector regulator.
- **Securities that can be offered on Online Bond Platforms** – SEBI allowed them to offer securities such as listed Government Securities, State Development Bonds, Treasury Bills, listed Sovereign Gold Bonds, listed municipal debt securities, and listed securitised debt instruments on their online bond platforms.

This came after SEBI noted that a few OBPPs have commenced operations and observed that certain OBPPs continue to offer products other than listed debt securities and debt securities proposed to be listed through a public offering on their platforms. Also, they are offering unlisted bonds on a separate platform or website and have not divested such offerings. Moreover, certain online bond platform providers have given a link on the online bond platform to another platform for transacting in unlisted bonds and other products. Such practices are in contravention of NCS Regulations.

Master Circular for Issue of Capital and Disclosure Requirements

SEBI has issued a Master Circular dated 21 June 2023 compiling various circulars/ directions issued under the relevant provisions of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 (SEBI ICDR Regulations), to enable the stakeholders to have access to all such circulars at one place. A few of the key changes are highlighted below:

- **Streamlining the process of rights Issue**: It has been provided in Chapter 2 of the master circular that the right entitlements will be traded on the secondary market platform of stock exchanges with T+1 rolling settlement, similar to equity shares.
- **Compensation to retail individual investors in an Initial Public Offer**: A half-yearly disclosure is provided under Chapter 5 of the Master Circular for Self-Certified Syndicate Banks (SCSB), pursuant to which the SCSB will have to disclose the details of complaints received for compensation under Application Supported by Block Amount on a half-yearly basis.
- **Framework for the process of recognition of investors for the purpose of Innovators Growth Platform**: In terms of the amendments effective from 5 May 2021, introduced under SEBI ICDR Regulation, the word Accredited Investors (AI) in the Master Circular has been replaced with the word Innovators Growth Platform Investors (IGPI) at all the relevant places.

MASTER CIRCULAR ON SCHEME OF ARRANGEMENT

SEBI has issued a Master Circular dated 20 June 2023, compiling various circulars/ directions issued, which lay

down the detailed requirements to be complied with by the listed entities while undertaking a scheme of arrangement. The circular contains various provisions with respect to the following:

Requirements before the Scheme of arrangement is submitted for sanction by the National Company Law Tribunal (NCLT)

- Requirements to be fulfilled by the Listed Entity.
- Obligations of Stock Exchange(s).
- Processing of the Draft Scheme by SEBI.
- Fractional entitlements, if any.

Application for relaxation under Sub-rule (7) of rule 19 of the Securities Contracts (Regulation) Rules, 1957

- Requirements to be fulfilled by the Listed Entity for Listing of Equity Shares
- Application by a listed entity for Listing of warrants Offered Along with Non- Convertible Debentures (NCDs)
- Requirements to be fulfilled by Stock Exchange(s)
- Processing of the Scheme by SEBI

This master circular among others, also contains the format of the compliance report to be submitted along with the draft scheme and format for the auditor's certificate.

INSURANCE REGULATORY AND DEVELOPMENT AUTHORITY OF INDIA (IRDAI)

CIRCULAR ON MONITORING OF INVESTMENTS IN ALTERNATIVE INVESTMENT FUND

IRDAI has issued a circular dated 28 June 2023, outlining monitoring requirements for insurers' investments in Alternative Investment Funds (AIFs). With a view to closely m the exposure of insurers to AIFs, it is hereby advised that the insurers shall adhere to the following requirements with respect to investments in AIFs:

- The Net Asset Values of AIFs should be declared on a quarterly basis.
- The rollover of investments in AIFs should be approved by the Board/Investment Committee.
- The insurers shall submit a quarterly return for investments in AIFs as per the format specified in Annexure-I within 15 days from the end of each quarter.

GUIDELINES ON REMUNERATION OF DIRECTORS AND KEY MANAGERIAL PERSONS OF INSURERS

IRDAI has issued revised guidelines on 30 June 2023, with respect to the remuneration of directors and key managerial persons (KMPs) of insurers to bring remuneration of KMPs other than the CEO also within the ambit of these regulations and to provide clarity on variable pay deferral, Malus and clawback provisions, accounting, disclosures etc.

These guidelines aim to promote the alignment of remuneration policies with the long-term interests of insurers to avoid excessive risk-taking, thereby promoting sound overall governance of insurers and fair treatment of customers.

Insurers must formulate a comprehensive remuneration policy approved by the Board, covering all KMPs and a different policy for directors. The policy should discourage inappropriate or excessive risk-taking for performance-based variable remuneration. The decision-making process in structuring, implementing, and reviewing the policy should identify and manage conflicts of interest. The Nomination and Remuneration Committee, in consultation with the Risk Management Committee, should adopt an integrated approach to formulating the policy.

The policy should cover various aspects of the remuneration structure, including fixed pay, retirement benefits, variable pay, and share-linked instruments. Parameters such as financial soundness, compliance, claim efficiency, grievance redressal, and overall compliance with applicable laws should be considered in performance assessments. At least 60% of the weightage in the performance assessment matrix for MD/CEO/WTDs and 30% for other KMPs should be based on these parameters. Key provisions of the guidelines governing remuneration are highlighted below:

Annual Remuneration

Annual remuneration shall be an aggregate of fixed pay and variable pay for a particular financial year.

Fixed Pay

Fixed pay includes basic pay, allowances, perquisites, contribution towards superannuation/retirement benefits, and other fixed components of compensation. Insurers are required to ensure that the fixed portion of remuneration is reasonable and adheres to statutory requirements.

Variable Pay

Variable pay can be in the form of cash and/or share-linked instruments. It should be performance-based, using measures that do not encourage inappropriate risk-taking. Variable pay should be at least 50% of the fixed pay and should not exceed 300% of the fixed pay. At least 50% of the variable pay must be under deferral arrangements, with a minimum deferral period of three years.

Malus and Claw-back

Variable pay is subject to malus and claw-back provisions. Insurers must put in place appropriate mechanisms for incorporating these provisions, considering observable and verifiable measures of risk outcomes. Malus provisions prevent the \vesting of deferred remuneration, while claw-back provisions allow the insurer to recover previously paid or vested remuneration under certain circumstances.

Age and Tenure

The guidelines set limits on the age and tenure of MD/CEO/WTDs in insurers. Subject to the statutory approvals required from time to time, the post of the MD & CEO or WTD shall not be held by the same incumbent for a continuous period of more than 15 years. Thereafter, the individual shall be eligible for re-appointment as MD&CEO or WTD in the same insurer, if considered necessary and desirable by the board, after a cooling off period of at least three years, subject to meeting other applicable conditions.

These guidelines do not apply to Foreign Reinsurance Branches (FRBs) operating in India. These Guidelines shall replace and supersede the guidelines issued vide Ref: IRDA/F&A/GDULSTD/155/08/2016 on 5 August 2016 and shall come into effect from FY 2023-24.

MINISTRY OF CORPORATE AFFAIRS (MCA)

COMPANIES (ACCOUNTS) SECOND AMENDMENT RULES, 2023

MCA notified the Companies (Accounts) Second Amendment Rules, 2023 to amend Rule 12 of the Companies (Accounts) Rules, 2014. These provisions came into force on 2 June 2023

The amendment specifies that for the financial year 2022-2023, Form CSR-2 shall be filed separately on or before 31 March 2024. This filing of Form CSR-2 should be done after submitting Form No. AOC-4/Form No. AOC-4-NBFC (Ind AS)/Form No. AOC-4 XBRL, as the case may be.

REGULATORY UPDATES

MINISTRY OF CORPORATE AFFAIRS (MCA)

NOTIFICATION DATED 14 JUNE 2023: NON-APPLICABILITY OF PROVISIONS OF SECTION 14(1) OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016 (IBC)

The MCA has issued a notification stating that the provisions pertaining to 'Moratorium' as provided under Section 14(1) of the IBC would not be applicable for the following transactions and/or agreements entered by the Corporate Debtor:

- Production Sharing Contracts, Revenue Sharing Contracts, Exploration Licenses, and specified Mining leases; and
- Joint Operating Agreement connected or ancillary to the above referred.

CIRCULAR NO. 06/2023: RELAXATION IN CASE OF DELAY IN FILING DPT-3 FOR THE FINANCIAL YEAR ENDED ON 31 MARCH 2023

MCA, vide this notification has extended the due date (30 June) of filing Return of Deposits in Form DPT-3 for the Financial Year ended 31 March 2023 to 31 July 2023 without the payment of any additional fees.

SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI)

Circular dated 21 June 2023: Due dates of dematerialisation of units issued by Alternative Investment Funds (AIFs) notified

The SEBI, vide this circular, has notified the following due dates for mandatory dematerialisation of units issued by AIFs:

Sr. No.	AIF Category	Due Date
1	Schemes of AIFs with corpus >= INR 500 cr	31 October 2023
2	Schemes of AIFs with corpus < INR 500 cr	30 April 2024

The above requirement is not applicable to schemes whose tenure ends on or before 30 April 2024. Further, it has been notified that any units issued after such due date shall be issued in dematerialised form only.

CIRCULAR DATED 21 JUNE 2023: STANDARDISED APPROACH TO VALUATION OF INVESTMENT PORTFOLIO OF AIFS

The SEBI, vide this circular, has notified the following:

Manner of valuation of AIF investment portfolio:

- Similar to securities whose valuation norms are mentioned in Mutual Fund Regulations
- In other cases, valuation to be as per guidelines by an AIF Industry association, representing >=33% of SEBI registered AIFs

Responsibilities of Manager / Key Management Personnel (KMPs):

- In case of a deviation of >20% between two consecutive valuations or >33% in a Financial Year, inform investors of reasons for the same
- Change in methodology and approach for valuation to be construed as a material change
- Disclose the following in Private Placement Memorandum annually:
  - Changes in valuation methodology and approach
  - Changes in accounting policies
  - Impact of such changes on valuation.

Eligibility criteria for Independent valuer:

- The independent valuer shall:
  - Not be an associate of manager/sponsor/trustee
  - Have >= 3 years of experience in valuing unlisted securities
  - Be registered with IBBI and be a member of ICAI / ICWAI / CFAI or be a holding company /subsidiary company of a Credit Rating Agency registered with SEBI).

Reporting to performance benchmarking agencies:

- Manager to ensure including a specific timeframe for investee companies for providing audited accounts to the AIF
- Manager to ensure to include the data based on the audited financials to the performance benchmarking agencies.

NOTIFICATION DATED 26 JUNE 2023: PROVISIONS PERTAINING TO ANNUAL SECRETARIAL COMPLIANCE REPORT SUBMITTED BY THE INFRASTRUCTURE INVESTMENT TRUSTS (INVITS) AND REAL ESTATE INVESTMENT TRUSTS (REITS)

The notification provides for the following:

- The Investment Manager of InvITs and REITs is required to appoint a Practicing Company Secretary (PCS) to examine the compliance of all applicable SEBI regulations and guidelines, on an annual basis.
- Such PCS is required to issue the Secretarial Compliance Report in the format provided in the circular.
- The Investment Manager is required to submit the above-mentioned Secretarial Compliance Report to the stock exchanges within a period of 60 days from the end of each Financial Year and shall also be annexed with an annual report of InvITs and REITs.
- The circular shall be effective from FY 2023-24.

NOTIFICATION DATED 26 JUNE 2023: PROVISIONS PERTAINING TO COMPLIANCE REPORT ON GOVERNANCE FOR THE INVITS AND REITS

The notification provides for the following:

- The Investment Manager of InvITs and REITs shall submit a compliance report on governance to the stock exchanges, in the specified format and timeline. Such a report shall be signed either by the compliance officer or the Chief Executive Officer (CEO) of the Investment Manager.
- Such compliance report must also be annexed with an annual report of InvITs and REITs.
- The timeline for submitting Compliance Report is as under:
  - Report on Governance is to be submitted within 21 days from the end of each quarter (Quarterly Report)
  - Report on Governance is to be submitted within 21 days from the end of each financial year (Annual Report)
  - Report to be submitted by the Investment Manager within 3 months from the end of the Financial Year.
- This Circular shall come into force with effect from FY 2023-24 onwards and accordingly, the first reporting shall be made for the quarter ended 30 June 2023.

CIRCULAR DATED 27 JUNE 2023: MANNER OF ACHIEVING MINIMUM PUBLIC UNITHOLDING - INVITS AND REITS

The extant Regulations of InvITs and REITs mandate that any listed InvIT/REITs which have a public unitholding of less than 25% shall increase it to at least 25% within 3 years from the date of listing of units pursuant to the initial offer. To facilitate this obligation, SEBI has suggested under mentioned methods, fulfilling of which is subject to specified conditions:

- Issuance to public
- Offer for sale of units held by Sponsors/Investment Manager/Project Manager and their associates/related parties, to the public through the offer document
- Offer for sale of units held by Sponsors/Investment Manager/Project Manager and their associates/related parties, through the stock exchange
- Rights issued to public unit holders
- Bonus issue to public unit holders
- Allotment of units under institutional placement
- Sale of units held by Sponsors/Investment Manager/Project Manager and their associates/related

parties, in the open market in any one of the following manners:

- Upto 2% of total paid-up capital, maximum up to 5 times the average monthly trading volume of units of InvIT/ REIT, on an annual basis, till the due date.
- Upto 5% of total paid-up capital, subject to the condition that public unit holding in the InvIT become 25%. This can be in single/multiple tranches, but the amount and time shall not exceed the specified threshold

- Transfer of units held by Sponsors to an Exchange Traded Fund (ETF), subject to a maximum of 5% of paid-up capital.

RESERVE BANK OF INDIA (RBI)

CIRCULAR DATED 22 JUNE 2023: REMITTANCES TO INTERNATIONAL FINANCIAL SERVICES CENTRES (IFSCS) UNDER THE LIBERALISED REMITTANCE SCHEME (LRS)

Key highlights of the Circular are as follows:

RBI, vide this circular has extended the scope of remittances to IFSCs under LRS to include the remittances to be made by resident individuals for the purpose of 'studies abroad' for payment of fees to foreign universities/institutions in IFSCs for the specified courses.

CIRCULARS / NOTIFICATIONS / PRESS RELEASE

CBDT EXTENDS TIME LIMITS TO SUBMIT CERTAIN TDS AND TCS RETURNS

The Central Board of Direct Taxes (CBDT) has provided relaxation in respect of the following compliances:

- Tax deducted at source (TDS) return for the first quarter of Fiscal Year (FY) 2023-24, required to be furnished in Form 26Q[1] and Form 27Q[2] , on or before 31 July 2023 may be furnished on or before 30 September 2023.
- Tax collected at source (TCS) return for the first quarter of FY 2023-24, required to be furnished in Form 27EQ, on or before 15 July 2023 may be furnished on or before 30 September 2023.

[Circular No. 9/2023, dated 28 June 2023]

CBDT NOTIFIES VARIOUS FORMS FOR MAKING AN APPLICATION TO OBTAIN ADVANCE RULING

- Rule 44E of the Income-tax Rules, 1962 (IT Rules) provides rules pertaining to the application of obtaining an advance ruling. Given that the Authority for Advance Ruling (AAR) has ceased to operate and the application for the advance ruling has now to be made before Board for Advance Ruling, the CBDT has amended Rule 44E of the IT Rules and has notified new Forms for obtaining an advance ruling from the Board of Advance Ruling which are as below:

FORM	APPLICABLE TO
34C	Non-resident applicant.
34D	Resident applicant in relation to a transaction undertaken or proposed to be undertaken by him with a non-resident.
34DA	Resident applicant in relation to a transaction undertaken or proposed to be undertaken by him.
34E	Resident falling within such class or category of persons as notified by Central Government.
34EA	Any other person.

[1]Form 26Q is a quarterly statement filed for TDS on all payments to residents other than salaries.
[2]Form 27Q is a quarterly statement filed for TDS on payments to non-residents other than salary.

- The application made and annexures to such application accompanied by statements and documents shall be verified as below:

APPLICANT (A)	SIGNED OR DIGITALLY SIGNED BY (B)	WHERE, FOR ANY UNAVOIDABLE REASON IT IS NOT POSSIBLE FOR THE APPLICANT MENTIONED IN COLUMN B TO SIGN THE APPLICATION
Individual	Individual himself	▪ By any person duly authorised by such individual on this behalf. ▪ The person signing the application holds a valid power of attorney from the individual to do so, which shall be attached to the application.
Hindu Undivided Family	Karta	▪ By any other adult member of such family.
Company	Managing Director	▪ First preference, by any Director ▪ By any person duly authorised by the company on this behalf. Further, such a person holds a valid power of attorney from the company to do so, which shall be attached to the application.
Firm	Managing Partner	▪ By any partner, not being a minor.
Association of Persons	Any member of the association or the principal officer thereof.	
Any other person	By that person or by some other person competent to act on his behalf.	

- The aforementioned applicants are required to furnish the application through their/its registered email address.
- The amended Rule shall come into effect from 12 June 2023.

[Notification No. 37/2023, dated 12 June 2023]

CBDT AMENDS THE E-ADVANCE RULINGS SCHEME, 2022

The CBDT notified[3] the e-Advance Rulings Scheme, 2022 (the Scheme) in January 2022 to empower the Board of Advance Ruling (BAR). In order to address the point of difference between the Members of the BAR and the decision by the rule of the majority in advance rulings, the CBDT has amended the Scheme by replacing clause (iv) and inserting clause (v) in Para 6(C) of the Scheme. The amended clauses are as below:

- Clause (iv) provides that the BAR shall, after considering the response of the applicant or the authority and after providing an opportunity of being heard (through video conferencing or video telephony) on the request of the applicant, subject to the provisions of clause (v), if applicable, pronounce the advance ruling on the question specified in the application and send a copy thereof to the applicant and the authority to whom the reference has been made
- Clause (v) provides that in case the Members of a BAR differ in opinion on any point or points, then such point or points shall be referred by BAR to the Principal Chief Commissioner of Income-tax (International Taxation) (PCCIT(IT)). The PCCIT(IT) shall nominate one member from any other BAR and such point or points shall be decided according to the opinion of the majority of the Members.

[Notification No. 38/2023, dated 12 June 2023]

CBDT PROVIDES CLARIFICATION FOR TCS ON FOREIGN REMITTANCE AND OVERSEAS TOUR PACKAGE

Section 206C(1G) of the IT Act brings remittances made under the Liberalised Remittance Scheme and on the sale of overseas tour packages within the purview of TCS. The Finance Act 2023 amended provisions of section 206C(1G) of the IT Act by revising the TCS rates and limits w.e.f. 1 July 2023. However, owing to practical difficulties that may arise and challenges faced by current IT systems of financial institutions to address issues arising from implementing TCS provision, the changes suggested by Finance Act 2023 have been postponed. In order to address this issue and remove difficulty in the implementation of changes, the Central Board of Direct Taxes has recently issued a press release and circular. To read our detailed analysis please visit: https://www.bdo.in/en-gb/insights/alerts-updates/direct-tax-alert-cbdt-provides-clarification-for-tcs-on-foreign-remittance-and-overseas-tour-packa

[Press Release dated, 28 June 2023 and Circular No. 10/2023, dated 30 June 2023]

[3] Refer our tax alert- https://www.bdo.in/en-gb/insights/alerts-updates/direct-tax-alert-cbdt-notifies-e-advance-ruling-scheme

CBDT MAKES CONSEQUENTIAL CHANGES IN IT RULES TO GIVE EFFECT TO AMENDED SECTION 115BAC OF IT ACT

The Finance Act 2023 amended provisions of section 115BAC of the Income-tax Act, 1961 (IT Act) by revising the slab rates under the new tax regime for FY 2023-24 and onwards. In order to give effect to these amendments, the CBDT has issued a notification to implement consequential changes in Rule 2BB, Rule 3 and Rule 5 and has also introduced new Rule 21AGA in the IT Rules. To read our detailed analysis please visit: https://www.bdo.in/en-gb/insights/alerts-updates/direct-tax-alert-cbdt-makes-consequential-changes-in-it-rules-to-give-effect-of-amended-section-11

[Notification No. 43/2023, dated 21 June 2023]

CBDT SPECIFIES THE CASES NOT TO BE DISPOSED OF UNDER THE E-APPEALS SCHEME, 2023

The Finance Act 2023 substituted section 246 of the IT Act with effect from 1 April 2023 to establish a new authority - Joint Commissioner of Income-tax (Appeals) (JCIT(A)) – who shall dispose off certain types of appeals. Thereafter, the CBDT recently notified the e-Appeals Scheme 2023 (the Scheme). Further, section 246 of the IT Act also empowered the CBDT to specify cases or cases to which the provisions of the Scheme shall not apply. In this regard, recently, the CBDT vide an order has specified the cases where the provisions of the Scheme shall not apply. To read our detailed analysis please visit: https://www.bdo.in/en-gb/insights/alerts-updates/direct-tax-alert-cbdt-specifies-the-cases-not-to-be-disposed-under-e-appeals-scheme-2023

[CBDT Order F.No. 370149/97/2023-TPL, dated 16 June 2023]

JUDICIAL UPDATES

200% PENALTY CAN BE LEVIED ONLY IN CASE OF SPECIFIC MISREPORTING INSTANCES PRESCRIBED UNDER SECTION 270A(9) OF THE IT ACT

For the relevant year under consideration, the taxpayer had filed its return of income which was later selected for scrutiny and after making certain additions, an order was passed under section 143(3) of the IT Act which was confirmed by the First-Appellate Authority as well. Aggrieved, the taxpayer filed an appeal before the Mumbai Tax Tribunal which granted partial relief to the taxpayer and confirmed certain additions which were not pressed by the taxpayer. Accordingly, it directed the tax officer to delete the remaining additions made to his order. Meanwhile, the tax officer levied a penalty under section 270A[4] of the IT Act at 200% of tax on additions which were held by him to be misreported. The penalty order was further confirmed by the First Appellate Authority. Aggrieved, the taxpayer filed an appeal before the Mumbai Tax Tribunal, which made the following observations while ruling in favour of the taxpayer:

- The taxpayer's quantum appeal had been partly allowed and therefore, the penalty, even if leviable, could only be confined to the additions sustained and not the entire additions made by the tax officer.
- The tax officer as well as the First-Appellate Authority failed to spell out how the taxpayer's case is covered within the specified instances as provided under clauses (a) to (f) of section 270A(9)[5] of the IT Act. In the absence of the same, the penalty levied for misreporting cannot be sustained because it is a trite law that penalty provisions have to be strictly interpreted.
- Therefore, the penalty levied at 200% by the tax officer on the additions sustained in the quantum proceedings depicts non-application of mind and violates the principle of natural justice, and accordingly, cannot survive.

[Saltwater Studio LLP vs. NFAC, Delhi, ITA No. 13/Mum/2023 (Mumbai Tax Tribunal)]

DELHI TAX TRIBUNAL HOLDS THAT A FIRST-TIME CLAIM FOR CARRY FORWARD OF LONG-TERM CAPITAL LOSS IS NOT PERMISSIBLE BY FILING A REVISED TAX RETURN

Section 80 of the IT Act restricts the carry forward of losses under the heads 'Capital Gains' and 'Profit and Gains from Business or Profession' if the return of loss is not filed within the time limit. It may so happen that after filing the original tax return within the timeline, the revised tax return may contain losses. Whether such a loss can be carried forward? In this regard, recently the Delhi Tax Tribunal has held that long term capital loss cannot be allowed to be carried forward if a fresh claim is made by way of filing a revised tax return. To read our detailed analysis, please visit: https://www.bdo.in/en-gb/insights/alerts-updates/direct-tax-alert-delhi-tax-tribunal-holds-that-a-first-time-claim-for-carry-forward-of-long-term-c

[RRPR Holdings Pvt. Ltd. vs. DCIT, ITA No. 4700/Del2014 (Delhi Tax Tribunal)]

MUMBAI TAX TRIBUNAL HOLDS THAT THE RETURN FILED BY AN AMALGAMATING ENTITY IS VOID AB INITIO, REFUND TO BE GRANTED TO A SUCCESSOR ENTITY

Recently, the Mumbai Tax Tribunal has held that a return filed by the amalgamating entity after amalgamation is non-est. However, the Tribunal observed that even if the tax return filed by the amalgamating entity is non-est, the tax officer needs to assess the taxpayer and after computing tax liability, is duty-bound to issue a refund order or Demand intimation. To read our detailed analysis, please visit: https://www.bdo.in/en-gb/insights/alerts-updates/direct-tax-alert-mumbai-tax-tribunal-holds-that-return-filed-by-amalgamating-entity-is-void-ab-ini

[Star India Private Limited (successor of Star Sports India Pvt. Ltd.) vs. ACIT, ITA No. 657/Mum/2019 (Mumbai Tax Tribunal)]

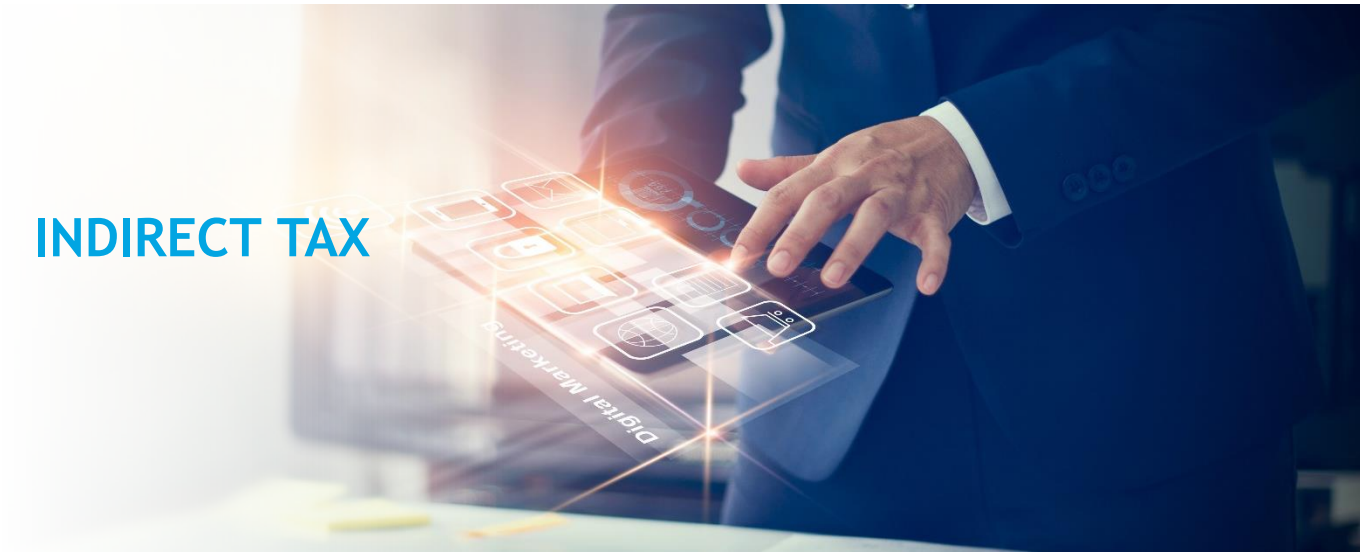
[4] Section 270A of the IT Act pertains to penalty for under-reporting and misreporting of income.
[5] Section 270A(8) of the IT Act states that where under-reported income is in consequence of any misreporting then penalty equal to 200% of the tax shall be levied. Section 270A(9) of the IT Act pertains to instances of misreporting of income which can be through (a) misrepresentation or suppression of facts (b) failure to record investments in the books of account (c) claim of expenditure not substantiated by any evidence (d) recording of any false entry in the books of account (e) failure to record any receipts in books of account having a bearing on total income; and (f) failure to report any international transaction or any transaction deemed to be an international transaction or any specified domestic transaction, to which the provisions of Chapter X apply.

SINGAPORE-BASED FII ALLOWED TO CLAIM EXEMPTION OF CAPITAL GAINS: REJECTS INVOCATION OF LOB WHEN GLOBAL INCOME IS TAXED IN SINGAPORE

The Bombay High Court, in its recent ruling, has held that the 'Limitation of Benefit' (LoB) clause cannot be invoked in the Source country when the entire global income of the taxpayer is taxed in the Resident country, and the tax authorities of such Resident country have certified the same. To read our detailed analysis, please visit:

https://www.bdo.in/en-gb/insights/alerts-updates/direct-tax-alert-singapore-based-fii-allowed-to-claim-exemption-of-capital-gains-rejects-invocati

[CIT vs. Citicorp Investment Bank (Singapore) Ltd., [2023] 151 taxmann.com 501 (Bombay High Court)]



AN ACCUSATION OF SUPPRESSION OF FACTS DUE TO NON-DISCLOSURE CAN ONLY BE MADE IF THERE IS A REQUIREMENT TO DISCLOSE

Facts of the case

- M/s. Reliance Industries Ltd. (Taxpayer) was inter alia engaged in making clearances to the buyers who were holding advance licenses (customers) and such sales were treated as deemed exports. In respect of such clearances, the Taxpayer discharged excise duty on the assessable value.
- During the period September 2000 to March 2004 (the relevant period), the Taxpayer determined the assessable value of excisable goods by not including the monetary value of duty benefits received due to purchases made by the customers under advance license, by relying on ***IFGL Refractories Ltd. [2001 (134) ELT 230 (CESTAT - Kol.)]*** dated 28 July 2000.
- Subsequently, the Hon'ble Supreme Court ***in IFGL Refractories Ltd. [2005-VIL-14-SC-CE]***, vide order dated 9 August 2005, reversed the aforesaid CESTAT decision and held that the monetary value of duty benefits constitutes an additional consideration flowing to the Taxpayer.
- In the above background, the Tax Authorities issued a Show Cause Notice (SCN) to the Taxpayer seeking to demand excise duty on the monetary value of duty benefits received from the customers during the relevant period. The said SCN was issued by invoking the extended period of limitation in terms of proviso to Section 11A(1) of the Central Excise Act, 1944 (CE Act).
- The aforesaid SCN was confirmed by the Tax Authorities, against which, the Taxpayer filed an appeal before CESTAT. Upon hearing the parties, the CESTAT issued the following order (Impugned Order):
  - Limitation: On a limitation, both the members of the Division Bench arrived at a unanimous view that during the relevant period, the Taxpayer could have entertained a bonafide belief that it had correctly discharged applicable excise duty.
  - Merits: On merits, considering the difference of opinion between the members of the Division Bench, the matter was referred to the third member and the CESTAT, by a 2-1 majority allowed the appeal filed by the Taxpayer.
- Aggrieved by the above, the Tax Authorities filed an appeal before the Hon'ble Supreme Court.

Contentions by the Tax Authorities

- CESTAT had failed to apply its mind to the allegations and specific findings of the adjudicating authority and the Taxpayer was guilty of suppressing material facts from the Tax Authorities by misleading them to believe that the duty has been correctly discharged.
- Further, the Taxpayer had wrongly clubbed the deemed export clearances with other domestic clearances and hence, had suppressed factual information from the Tax Authorities. As a result, reliance placed by the Taxpayer on the CESTAT decision in ***IFGL Refractories Ltd. (supra)*** is unsustainable.
- CESTAT order in ***IFGL Refractories Ltd. (supra)*** cannot be constituted as a valid basis for the belief entertained by the Taxpayer considering that the relevant valuation provisions had undergone amendments in the year 2000.
- During the relevant period, the Taxpayer was operating under a self-assessment procedure whereby the Taxpayer was responsible for correctly assessing and discharging applicable duty.

Contentions by the Taxpayer

- During the relevant period, the assessable value was determined by the Taxpayer as per the ratio laid down by CESTAT in the case of ***IFGL Refractories Ltd. (supra)***. Till the date of the decision passed by the Hon'ble Supreme Court (i.e., 9 August 2005), the CESTAT decision held the field and hence, the Taxpayer had reasons to believe that the assessable value for discharging excise duty was determined as per the provisions of the CE Act.
- The Taxpayer had not suppressed any facts as the copies of the pricing policy were furnished before the Tax Authorities.
- Moreover, there was no wrongful clubbing of deemed export clearances with other domestic clearances because the returns in Form ER-1 / RT-12 did not have a separate column for reporting deemed export clearances.

Observations and Ruling by the Hon'ble Supreme Court

- On perusal of Form ER-1 / RT-12, there is no separate column/requirement to declare the value and other details of clearances made to deemed export buyers. Although Note 4 under Form ER-1 mandates the Taxpayer to provide separate details for exports under bond, no similar requirement exists in respect of clearances to deemed export buyers. As a result, there was nothing wrong with the Taxpayer's action of including the value of deemed exports within value of domestic clearances.
- In the absence of any such requirement, the allegation as regards suppression of facts as a consequence of the Taxpayer's failure to separately disclose details of deemed export clearances is unsustainable. An accusation of non-disclosure can only be made if there is a requirement to disclose.
- The SCN, Impugned Order and the appeal filed by the Tax Authorities (before the Hon'ble Supreme Court) did not contain any reference to the wrongful clubbing of deemed export clearances by the Taxpayer under the details meant for domestic clearances. Accordingly, the Tax Authorities cannot be permitted to argue its matters beyond the written pleadings. Further, the Tax Authorities cannot be permitted to resurrect a point which though made at the original stage, was never pressed before CESTAT or in the present appeal.
- As regards the Tax Authorities' contention concerning amendment in the valuation provisions, the same fails on account of the following:
  - The aforesaid contention was not urged in the present appeal and was urged only during the course of the hearing.
  - The contention is diametrically opposite to the Tax Authorities' contention right from the SCN stage till the present appeal whereby the Tax Authorities were contending that the issue of valuation is squarely covered by the decision of the Hon'ble Supreme Court in IFGL Refractories Ltd. (supra). Thus, the Tax Authorities cannot be allowed to blow hot and cold in the same breath.
- During the relevant period, the Taxpayer was holding a bonafide belief that it was correctly discharging applicable duties. The mere fact that the belief was ultimately found to be wrong by the judgement of the Hon'ble Supreme Court cannot render such belief a mala fide belief particularly when such belief was emanating from the view taken by the Division Bench of CESTAT.
- The issue involved in the present case is one where two plausible views could co-exist. Accordingly, it would be unjustified to invoke the extended period of limitation by considering that Taxpayer's view lacked bonafides.
- In self-assessment, the responsibility of the Taxpayer to determine the correct duty liability must be made based on the Taxpayer's judgement and in a bonafide manner.
- Considering the above, the appeal filed by the Tax Authorities was dismissed on the ground that the demands are time-barred. However, no view was expressed on the merits of the case including the aspect of revenue neutrality.

  [The Commissioner of Central Excise and Customs & Anr. Vs. M/s. Reliance Industries Ltd., [2023 (7) TMI 196 - Supreme Court], dated 4 July 2023]

THE WORD 'ANY KIND' USED IN TAXING ENTRIES HAS A WIDE AMBIT AND ADMITS NO EXCEPTION

Facts of the case

- M/s. Reliance Industries Ltd. (Taxpayer) was inter alia engaged in making clearances to the buyers who were holding advance licenses (customers) and such sales were treated as deemed exports. In respect of such clearances, the Taxpayer discharged excise duty on the assessable value.
- M/s. Santhosh Maize & Industries Ltd. (Taxpayer) is inter alia engaged in the production and sale of maize starch in Tamil Nadu.
- Under the Tamil Nadu General Sales Tax Act, 1959 (TNGST Act), maize starch was exempted from the levy of Sales tax vide Notification no: 89 of 1970 dated 14 March 1970 (Exemption Notification). The aforesaid exemption underwent amendment as under:

RELEVANT PERIOD	REFERENCE	RELEVANT ENTRY	CHANGE IN ENTRY
14 March 1970 to 31 March 1994	Exemption Notification	Products of millets (like rice, flour, brokens, and bran of cholam, cumbu, ragi, thinai, varagu, samai, kudiraivali, milo and maize).	
1 April 1994 to 26 March 2002*	Entry 8 of Part B of Schedule III (Entry 8)	Products of millets (rice, flour, brokens, and bran of cholam, cumbu, ragi, thinai, varagu, samai, kudiraivali, milo and maize).	The word 'like' was deleted
27 March 2002 and onwards	Entry 44 of Part B of Schedule III (Entry 44)	Products of millets (rice, flour, brokens, and bran of cholam, cumbu, ragi, thinai, varagu, samai, kudiraivali and milo).	The word 'maize' was deleted

** While the Exemption Notification was amended, the exemption granted to 'maize starch' remained unchanged based on the clarification issued by the Commissioner on 31 December 1996 and 6 May 1997.*

- While the aforesaid exemption was in force, the following amendments were made under Schedule I of the TNGST Act containing the list of products leviable to sales tax:

RELEVANT PERIOD	REFERENCE	RELEVANT ENTRY	RATE OF TAX
12 March 1993 to 16 July 1996*	Entry 53 of Part C of Schedule I (Entry 53)	Sago and starch of any kind.	5%
17 July 1996 to 26 March 2002	Entry 61 of Part B of Schedule I (Entry 61)	Sago and starch of any kind.	4%
27 March 2002 and onwards	Entry 22(vi) of Part B of Schedule I	Sago and starch of any kind.	4%

** In respect of this entry, the Commissioner vide Circular dated 14 December 1993 had clarified that 'maize starch' would continue to remain exempted product as per the Exemption Notification*

- Effective 6 November 1997, Section 28-A was inserted in the TNGST Act which empowered the Commissioner to issue clarifications concerning the rate of tax. Pursuant to the above, the Commissioner issued a Circular dated 23 June 1998 clarifying that Entry 8 does not encompass 'maize starch'.
- Pursuant to the above, the Taxpayer filed an application for withdrawal of the aforesaid Circular. However, the Commissioner, vide Circular dated 8 October 1998 (Impugned Circular), clarified that 'maize starch' is leviable to Sales tax with effect from 1 April 1994. It was also clarified that Entry 8 does not include 'maize starch' and the same would be covered by the specific entry viz., Entry No. 61, thereby leviable to Sales tax @ 4% (from 17 July 1996).
- Against the Impugned Circular, the Taxpayer had filed a representation before the Tax Authorities which was rejected. Subsequently, for FY 1998-99, the Taxpayer received show cause notices which were followed by a Provisional Assessment Notice.

- Subsequently, the Taxpayer filed a petition before the Tamil Nadu Taxation Special Tribunal (TNTST) challenging the aforesaid notices as well as the validity of the Impugned Circular. The same was dismissed on the ground that it was improper for the Taxpayer to independently challenge the Impugned Circular and also contest the assessment proceedings at the same time.
- Against the aforesaid order, the Taxpayer filed a Writ Petition before the Hon'ble Madras High Court which was dismissed on the ground that the Taxpayer could agitate all the grounds before the Tax Authorities.
- Subsequently, the Taxpayer filed a Civil Appeal before the Hon'ble Supreme Court, which was allowed and the Writ Petition filed before the Hon'ble High Court was restored and the Hon'ble High Court was directed to decide the validity of the Impugned Circular.
- Pursuant to the above, the Hon'ble High Court vide the Impugned Order, dismissed the Writ Petitions on the following grounds:
  - Exemption Notification and the subsequent circulars issued by the Commissioner seeking to exempt 'maize starch' do not hold binding authority as they lack statutory backing.
  - Section 28-A of the TNGST Act which empowers the Commissioner to issue clarifications only became effective from 6 November 1997.
  - The Impugned Circular carries legal validity as the same was issued subsequent to the insertion of Section 28-A of the TNGST Act.
- Aggrieved by the above, the Taxpayer preferred a Review Application before the Hon'ble High Court which was dismissed. Against this, the Taxpayer has filed an appeal before the Hon'ble Supreme Court.

Contentions by the Taxpayer

- Hon'ble High Court failed to appreciate that Entry 8 provided an exemption on millet products, including maize. Although the production of maize starch is carried out by soaking maize in water and subjecting it to various processes, the said process would result in the sole product of millet retaining the flour form.
- 'Sago' (referred to in Entry 61) is derived from tapioca and hence, Entry 61 covering 'sago and starch of any kind' would exclude maize starch and would encompass only tapioca starch.
- Section 3(2) of the TNGST Act read with Entry 61 creates a liability on 'sago and starch of any kind'. However, Section 8 of the TNGST Act read with Entry 8 provides an exemption in favour of maize starch and hence, the same would override Entry 61.
- Reference was also made to the ***State of Tamil Nadu Vs. Lakshmi Starch [(1990) SCC OnLine Mad 777]*** and ***State of Tamil Nadu Vs. TVL. Indras Agencies (P) Ltd. [T.C.(R) 902/1999]*** which had allowed the exemption to 'maize starch' under the Exemption Notification. Considering that Entry 8 derives its origin from the Exemption Notification, it can be construed that the legislature intends to exempt 'maize starch'.
- Considering that the language of Exemption Notification has been retained, the omission of the word 'like' would not make any difference to the scope of Entry 8.
- The Hon'ble High Court erred in placing reliance on Entry 44 (which excludes maize from the exemption entry) because the same was introduced only in 2002 and prior to such amendment, Entry 8 which provides exemption in respect of 'maize starch' would be applicable.
- The Impugned Circular requiring recovery of taxes with retrospective effect is a mere change of opinion without cogent reasons and, is therefore, liable to be quashed.

Contentions by the Tax Authorities

- The phrase 'any kind' referred to in Entry 61 ought to be interpreted in an inclusive manner to include all kinds of goods within its ambit. Consequently, Entry 61 would encompass all types of starch, including maize starch.
- Exemption Notification gained statutory support only from 1 April 1994 through an amendment that introduced Entry No. 8 exempting millet products. However, Entry No. 61 was already in existence since 1993 and hence, the same would apply in respect of maize starch.
- The omission of the term 'like' in Entry 8 would result in restricting the benefit of exemption only to those products specified in the said entry.
- Entry 8 envisages maize, being a raw product and not maize starch which is a processed product. This proposition is further emphasised by the mention of items like 'flour' and 'bran of cholam' in the said Entry which are processed products.
- The legislative intent is apparent from the 2002 amendment whereby Entry 8 was repositioned as Entry 44, and the specific inclusion of 'maize' in the said entry was eliminated, thereby denying exemption to all the maize products.

Observations and Ruling by the Hon'ble Supreme Court

- The Hon'ble Supreme Court concurred with the views expressed by the Hon'ble High Court *albeit* for different reasons.
- The Hon'ble High Court erroneously held the Exemption Notification as not having statutory support because Section 17 of the TNGST Act empowers the State Government to exempt goods from the levy of Sales tax. However, the same does not matter in the present case in view of several amendments to the Schedules to TNGST Act from time to time.

- The word 'like' was used as a noun in the Exemption Notification. On perusal of Entry 8, it's clear that:
  - It does not include the noun "like" as the first word within brackets;
  - Only maize is included along with rice, flour, etc. (and not maize starch); and
  - It is only such goods within the brackets which would qualify as products of millets for the purpose of exemption.
- As to whether 'maize starch' can be considered a millet product, it was observed that 'maize' is the raw product whereas 'maize starch' is a processed product. While it is bound to hold that maize is entitled to exemption as per Entry 8, same cannot include 'maize starch' which is a product of maize derived through mechanical process.
- The phrase 'any kind' (as appearing in Entry 61) indicates that it has been used in a wide sense extending from one to all and admits of no exception. Further, the fact that the phrase 'starch of any kind' is preceded by 'sago' (in Entry 61) would not make any material difference since 'sago' in itself is a starch and starch of any kind would include maize starch.
- Entry 61 provides a more specific description and 'maize starch' is undoubtedly a 'kind of starch' and hence, covered within its purview whereas Entry 8 merely covers maize, which is a product of millet. As a result, 'maize starch' would be covered by Entry 61 and not under Entry 8 and hence, the same would be leviable to Sales tax.
- The Impugned Circular providing clarification in respect of the two taxing entries in a fiscal statute is bound to have a retrospective effect.
- In light of the above, the Impugned Order is upheld for the reasons stated above.

  [M/s. Santhosh Maize & Industries Ltd. Vs. State of Tamil Nadu & Anr., [2023-VIL-61-SC], dated 04 July 2023]

SERVICE TAX IS NOT LEVIABLE ON CENTRAL RIGHTS INCOME AND OTHER EXPENSES (SUCH AS PAYMENTS MADE TO FOREIGN PLAYERS AND THEIR AGENTS UNDER THE REVERSE CHARGE MECHANISM (RCM))

Facts of the case

- M/s. Knight Riders Sports Pvt. Ltd. (Taxpayer) is inter alia engaged in operations of a cricket team in the name of Kolkata Knight Riders (franchisee) in the cricket tournament viz., Indian Premier League (IPL), organised by Board of Control for Cricket in India (BCCI).
- The Taxpayer was issued two Show Cause Notices (SCNs) inter alia alleging the following:
  - Non-payment of Service tax on Central Rights Income received from BCCI under the franchise agreement.
  - Non-payment of Service tax under RCM on the following payments/expenditures:
    - *Fees are paid to foreign players wherein the players are required to wear team clothing and participate in media sponsorship and promotional activities of the franchisee. Accordingly, it was alleged that these players provide Business Support Services (BSS) to the Taxpayer.*
    - *Reimbursement charges towards fees paid to agents (situated outside India) of foreign players for providing professional consultancy services to foreign players.*
    - *Management, Consultancy, Design and Advertising Services towards costs incurred in marketing and public relations activities.*
    - *Fees are paid to foreign coaches and support staff on the ground that these individuals carry out promotional activities and thereby provide BSS to the Taxpayer.*
  - Non-reversal of CENVAT Credit on incomes from the production of a music album, sale of tickets and prize money.
- The aforesaid SCNs were confirmed partially by the Tax Authority, vide the Impugned Order whereby the allegations in the SCNs were confirmed, except the following:
  - Non-payment of Service tax on fees paid to foreign players under the RCM – As per the agreement, the players are entitled to earn 10% of the agreed consideration even in cases where such players do not play a single match. Accordingly, the notional value of service was determined as under:
    - *90% of the fees paid to foreign players are attributable towards the sports activity of playing cricket.*
    - *10% of the fees constitute a rendition of BSS to the franchisee, in respect of which, the Taxpayer is liable to pay Service tax under the RCM.*
  - Non-payment of Service tax on fees paid to foreign coaches and support staff under the RCM – Demand was entirely dropped.
- Aggrieved by the Impugned Order, appeals were filed by the Taxpayer (in respect of demand confirmed in the Impugned Order) as well as the Tax Authorities (in respect of demands dropped in the Impugned Order) before CESTAT, Mumbai.

Contentions by the Taxpayer

- **Central rights income:** The issue concerning the levy of Service tax on central rights income earned from BCCI has been settled by a co-ordinate bench ruling ***in KPH Dream Cricket Pvt. Ltd. Vs. CCE, Chandigarh-I [2020 (34) GSTL 456 (Tri-Chandigarh)]*** wherein it was held that such income is not leviable to Service tax.

- **Fees paid to foreign players:** As regards fees paid to foreign players, a co-ordinate bench in ***Sourav Ganguly Vs. CST, Kolkata [2020 (12) TMI 534 CESTAT]*** had held that such amounts are not taxable under the category of BSS.
- **Fees paid to player's agents abroad:** In respect of amounts paid to player's agents situated outside India, it was submitted that there is no contractual relation between the agents and the Taxpayer. As a result, such amounts cannot be subjected to the levy of Service tax in the absence of the service provider–service recipient relationship.
- **Management Consultancy, Design & Advertisement services:** The Taxpayer is contesting this issue only in respect of FY 2009-10 on the ground that during such period, the IPL was played in South Africa, and hence, the entire services were provided outside the taxable territory. As a result, such services could not be leviable to Service tax.
- **Fees paid to foreign coaches and support staff:** As regards RCM's liability on fees paid to foreign coaches and support staff, the same is in the nature of commercial coaching and cannot be classified as BSS. The Adjudicating Authority has correctly examined the relevant statutory provisions and dropped the Service tax demand. As a result, the appeal filed by the Tax Authorities in respect of this issue ought to be dropped.
- **Reversal of CENVAT Credit on sale of tickets and prize money:** Receipt of prize money for proper performance in the matches cannot be termed as a 'service' in the absence of a service provider – service receiver relationship, and hence, cannot be classified as BSS. Thus, the Taxpayer was not required to reverse CENVAT Credit on prize money.

Observations and Ruling by the CESTAT

- **Central rights income:** The issue is settled as per the co-ordinate bench ruling ***in KPH Dream Cricket Pvt. Ltd. (supra)*** wherein it was held that the central rights income arising out of the franchise agreement cannot be considered as a provision of service between the members to the franchise agreement. Accordingly, the Service tax demand in respect of such income cannot be confirmed.
- **Fees paid to foreign players:**
  - The Taxpayer has engaged foreign players and other professionals as professional cricketers. The issue as regards the taxability of such amounts (under the RCM) is settled as per the co-ordinate bench ruling in **Sourav Ganguly (supra)** wherein it was held that fees received by the foreign players are for playing cricket only and even otherwise, the same would not be leviable to Service tax in the absence of specific provision for excluding non-taxable service (i.e., playing cricket) from a composite contract.
  - As regards the appeal filed by the Tax Authorities contending the inclusion of the remaining 90% of the amount paid to foreign players (dropped in the Impugned Order) as BSS and hence, leviable to Service tax under the RCM, it was observed that the same is unsustainable in light of the CESTAT ruling **in Sourav Ganguly (supra).**
- **Fees paid to player's agent abroad:** Relying on the decision in ***Union of India Vs. Intercontinental Consultants and Technocrats Pvt. Ltd. [2018 (10) GSTL 401 (SC)]***, it was held that the demand involved in the present case pertains to 2008-09 and 2011-12, much before the amendment to Section 67 of the Finance Act. Hence, reimbursable expenses paid by the Taxpayer to the agents of foreign players would not be chargeable to Service tax under the RCM in the absence of any legal provision for charging Service on reimbursements.
- **Management Consultancy, Design & Advertisement services:** Marketing and Public Relations activities conducted outside India would not be leviable to Service tax as per the CESTAT ruling ***in KPH Dream Cricket Pvt. Ltd. (supra)***. Accordingly, the Taxpayer would not be liable to discharge Service tax under the RCM.
- **Fees paid to foreign coaches and support staff:** The issue concerning the non-chargeability of Service tax on fees paid to foreign coaches and support staff is elaborately addressed by the Adjudicating Authorities in the Impugned Order holding that the activity of the coaches and support staff stands out distinctly as coaching service provided in relation to sports and is not covered as BSS. Accordingly, there is no ground for interfering with the findings in the Impugned Order.
- **CENVAT Credit reversal on common credits:**
  - The issue is settled by the co-ordinate bench ruling ***in L Balaji and Ors. Vs. CCE & ST, Chennai [2019 (5) TIOL-1882 (Tri.-Mad.)] and KPH Dream Cricket Pvt. Ltd. (supra)*** wherein it was held that demand for reversal of CENVAT Credit on prize money, gate receipts and sale of tickets is unsustainable.
  - Further, effective 1 April 2016, Explanation 3 to Rule 6(1) of the CENVAT Credit Rules, 2004 was amended vide Notification no:13/2016-CE(NT) dated 1 March 2016 wherein the meaning of the term 'exempted service' was expanded to include an activity which is not a service defined under Section 65B(44) of the Finance Act.
  - Prior to such amendment, there was no legal requirement binding an assessee to reverse CENVAT Credit on inputs and input services taken on activities which are not under the purview of the term 'services' under the Finance Act.
  - As a result, the demand for the reversal of CENVAT credit towards common credits is not sustainable.
- In view of the above, the CESTAT allowed the appeal filed by the Taxpayer, setting aside the Impugned Order. Further, the appeal filed by the Tax Authorities is dismissed.

  [M/s. Knight Riders Sports Pvt. Ltd. Vs. CST-IV, Mumbai, [2023-VIL-581-CESTAT-MUM-ST], dated 26 June 2023]

TRANSFER PRICING

BERRY RATIO – THE MOST RELEVANT PROFIT LEVEL INDICATOR FOR MERCHANTING TRADES ACTIVITY

The taxpayer is engaged in the physical as well as merchanting trades in agricultural commodities. In the merchanting activities segment of purchase and sale trades with Associated Enterprises (AE's), the taxpayer earned a fixed profit margin of 10 basis points on the purchase price to cover the administrative cost with a little markup. The taxpayer benchmarked this segment by applying the Transactional Net Margin Method (TNMM) considering Operating Profit (OP)/ Value Added Cost (VAC) also known as the 'Berry Ratio' as the profit level indicator (PLI). The Transfer Pricing Officer (TPO) observed that the comparables selected are engaged in business auxiliary services with OP/ Operating Cost (OC) as the PLI. Consequently, the TPO computed the OP/ OC ratio of the taxpayer by adding the cost of goods sold to the merchanting trades segment, thereby making a TP adjustment of INR 821.26mn which was also upheld by the Dispute Resolution Panel (DRP).

The Hon'ble Income-tax Appellate Tribunal (Hon'ble ITAT) made the following observations while delivering its judgement:

- The taxpayer has reported revenue from two separate segments, firstly, the merchanting trades segment and secondly, the trading segment.
- In the trading segment, the taxpayer has purchased agricultural products from AE's and sold to unrelated parties which has been accepted by the Transfer Pricing Office to be at arm's length.
- In the merchanting segment, the taxpayer has entered into a purchase contract with one of its overseas AE, viz, ADM Sarl, whereas it sells the purchased goods to another overseas AE, ADM Asia Pacific.
- Though, technically, the taxpayer has entered into purchase and sale contracts for buying and selling goods, however, in reality, the taxpayer merely acts as a facilitator/service provider/arranger. The purchase and sale contracts and back-to-back and the title to the goods are transferred immediately (on the same day) from the seller to the buyer on the high seas without entering the customs barrier of India.
- The logistics are managed by the original buyer and seller, wherein the taxpayer does not take possession of the goods involved and has no responsibility for storage and warehousing.
- The taxpayer neither keeps any inventory nor has any fixed asset and does not perform functions related to price determination/ negotiation and timing of the transactions.
- The taxpayer undertakes limited economic value-adding activities of coordination and processing of documentation for which a nominal markup is charged.
- The computational mechanism provided in Rule 10B(1)(e) of the Income-tax Rules, 1962 (Rules), allows for the computation of the profit margin realised from an international transaction in relation to 'any other relevant base', which is wide enough to include berry ratio.

Further, the Hon'ble ITAT relied on an earlier ruling of the Delhi High Court in the case of Sumitomo Corporation India Pvt. Ltd. wherein it was held that berry ratio can be used where profit earned is not linked to the value of goods but to operating expenses incurred since operating expenses represent the functions performed and risks are undertaken. Accordingly, the Hon'ble ITAT directed the AO to determine the arm's length price by applying the PLI OP/VAC excluding the cost of goods sold.

ACIT Vs. ADM Agro Industries Kota & Akola P. Ltd [TS-355-ITAT-2023(DEL)-TP]

APPLICATION OF DCF METHOD FOR VALUATION OF SHARES - SUBSTITUTION OF PROJECTED FINANCIAL DATA WITH ACTUAL FINANCIAL RESULTS BY TAX AUTHORITIES REJECTED

The taxpayer is a Foreign Company and is engaged in investing activities. It is a wholly owned subsidiary of TPG Growth II Market Holdings Pte. Ltd. (Holding company), which in turn is a subsidiary of TPG Growth II SF Pte. Ltd. (TPG SF).

During the year, the taxpayer has entered into the following transactions:

- Purchase of shares of Sutures India Private Limited (SIPL) from TPG SF.
- Purchase of shares of Quality Needles Private Limited (QNPL) from TPG SF.
- Sale of shares of QNPL to SIPL against the consideration of shares of SIPL.

Purchase of shares of SIPL from TPG SF

The taxpayer benchmarked the transaction using the Other Method as the most appropriate method (MAM) on the basis of a valuation report from an independent valuer by following the discounted cash flow method (DCM). The TPO rejected the valuation provided by the independent valuer and replaced the projections with the actual financial values for computing discounted cashflows, which resulted in a lower value per share. Consequently, the TPO made a downward adjustment in the cost of purchase of shares aggregating to INR 39.50mn. Further, the excess amount paid by the taxpayer over the arm's length price determined by the TPO was considered as loan to the Associated Enterprises (AE), on which notional interest was computed by the TPO. The DRP granted relief to the taxpayer on the notional interest determined by the TPO, however, the Final Order issued by the Assessing Officer was silent on the downward adjustment in relation to the cost of acquisition of shares.

In the appeal before the Hon'ble ITAT, the tax department heavily relied on BEPS Action Plan 8 dealing with OECD Guidance for Tax Administrations on the Application of the Approach to Hard to Value Intangibles (HTVI)and argued that in cases where the actual cash flows are significantly higher than the anticipated cash flows on which the pricing was based, there was presumptive evidence that the projected cash flows used in the original valuation should have been higher, and in such situation, the actual cash flows can be adopted for valuation purposes.

The Hon'ble ITAT while ruling in favour of the taxpayer made the following observations:

- As per BEPS Action Plan 8 dealing with OECD Guidance for Tax Administrations on the Application of the Approach to Hard-to-Value Intangibles (HTVI), a detailed scrutiny factoring in the probability is required when the actual cash flows exceed projected cash flows. The TPO did not conduct the required scrutiny or probability-weighing but directly replaced the projections with the actual values. Accordingly, the action of the TPO is not in line with the OECD Guidance.
- The TPO placed reliance of Rule 10B(5) of the Rules. However, Rule 10B(5) permits the updation of the current year and previous years' data for computation of arm's length price during assessment proceedings and not the data for subsequent years. Accordingly, the reliance of the TPO on the same is incorrect.
- As per Rule 10D(1)(j) of the Rules, the data required for computation of arm's length price should be available and actual working maintained by the taxpayer at the time of determining the ALP. The updation of projections with actual financial results during assessment proceedings would defeat the purpose of this Rule. Accordingly, the approach of the TPO was incorrect.

Based on the above-mentioned observations, the Hon'ble ITAT held that no adjustment could be made to the purchase of shares.

Purchase of shares of QNPL from TPG SF

The issue relating to the purchase of shares of QNPL is similar to the purchase of shares of SIPL. The TPO rejected the valuation provided by an independent valuer and replaced the projections with the actual financial values for computing discounted cashflows, which resulted in a per-share value (INR 10,269.39) higher than the per-share transaction value (INR 8,653.85). Accordingly, the TPO concluded that the transaction was undertaken at a value which was lower than the fair market value. In this regard, the TPO made an adjustment under Section 56(2)(viia) of the Act aggregating to INR 836.06mn. Provisions of Section 56(2)(viia) of the Act are attracted when a company receives any shares of another company for a consideration which is less than its fair market value. In this context, Rule 11UA read with Rule 11U of the Income-tax Rules 1962 (the Rules) prescribes the methodology for determining the fair market value of shares and securities for the purposes of section 56(2)(viia) of the Act. The said adjustment was incorporated by the AO in the Draft Assessment Order. The taxpayer filed an application before the DRP primarily contending the jurisdiction of TPO to determine the income chargeable to tax under Section 56(2)(viia) of the Act.

While delivering its directions, the DRP made the following observations:

- Applicability of Section 56(2)(viia) - The fair market value of the shares computed as per Section 56(2)(viia) read with Rule 11UA of the Rules (INR 1,427.26 per share), was lower than the transaction value (INR 8,653.85). Accordingly, the provisions of Section 56(2)(viia) were not applicable to the Assessee.

- Jurisdiction of the TPO – The DRP rejected the claim of the taxpayer, that the TPO had acted without jurisdiction since the AO had passed an independent order in connection with the determination of income chargeable to tax under Section 56(2)(viia) of the Act; which didn't mention the adjustment under Section 56(2)(viia) as a TP adjustment.

Sale of shares of QNPL to SIPL

During the year, the taxpayer acquired shares of QNPL from its AEs as well as from Non-AEs. Subsequently, the taxpayer sold all of the acquired shares of QNPL to SIPL. The taxpayer has benchmarked the transaction using Comparable Uncontrolled Price (CUP) method by comparing the consideration received from SIPL with the consideration received by the other shareholders (for two separate transactions – a purchase by the taxpayer and a purchase by SIPL from an independent promoter). The taxpayer also obtained a valuation certificate from an independent valuer.

The TPO disregarded the CUP available as well as rejected the valuation provided by the independent valuer and considered the actual financial values (instead of projections) for computing discounted cashflows, which resulted in a lower value per share and made an adjustment of INR 716.49mn. The DRP did not grant any relief to the taxpayer.

The Hon'ble ITAT rejected the CUP method by making the following observations:

- transactions governed by a shareholders' agreement which include a valuation determined by an independent valuer, may reflect the agreed-upon valuation rather than market forces.
- the expectations of risk and return for promoters seeking an exit option may differ from those of an investor acquiring 100% shareholding.
- taxpayer had acquired shares from the promoter by exercising the call option. However, there is nothing on record to show that the call option had no impact on the determination of the sale price.

Based on the above, the Hon'ble ITAT concluded that the 'Other Method' should be adopted as the most appropriate method and the ALP should be recomputed based on the DCF valuation report provided by the taxpayer, after verifying its accuracy.

DCIT Vs. TPG Growth II Markets Pte Ltd. [TS-346-ITAT-2023(Mum)-TP]

SPECIAL BENCH PERMITS A TAXPAYER TO SWAP ALP METHOD DURING ASSESSMENT PROCEEDINGS AND UPHOLDS APPLICATION OF 'OTHER METHOD' FOR DETERMINING ALP OF SALE OF SPORTS BROADCASTING BUNDLE RIGHTS

The taxpayer is engaged in the business of broadcasting and distribution of various satellite channels primarily in India. During the year under consideration the majority of the Bundle of Sports Broadcasting Rights (BSB) was acquired by entering into novation agreements with International Sports Bodies (ISBs) and remaining by way of sub-licensing at a discount of 9.5% of the value agreed to be paid / payable by the US AE to the ISB's the acquisition price was also supported by a valuation report based on Discounted Cash Flow (DCF) approach. In the previous year, the taxpayer adopted Comparable Uncontrolled Price (CUP) method to benchmark similar transactions.

During the current year, the taxpayer adopted the Other Method as the most appropriate method (MAM) relying on the valuation report obtained for the current year. However, during the assessment proceedings, the taxpayer contended that Comparable Uncontrolled Price (CUP) method was the MAM since the amount to be paid to ESS was lesser than the amount payable by ESS to third parties. This was not accepted by the Transfer Pricing Officer (TPO) who made a transfer pricing adjustment of INR 203.10mn by treating the valuation as inflated by around 66.06% as in the previous year. The DRP disregarded the contentions of the taxpayer and upheld the adjustment made by the TPO.

A Special Bench of three members viz. Vice President (VP), Accountant Member (AM) and Judicial Member (JM) was constituted, and the following issues were identified for determination:

- Can the taxpayer resile from the MAM adopted in Transfer Pricing Study Report (TPSR)?
- What would be the MAM in the case of the taxpayer?

The Special Bench of the Hon'ble ITAT made the following observations while passing the Order:

- Taxpayers can resile from MAM as adopted in the TPSR – Technicalities of the taxpayer having selected a wrong comparable or adopted a wrong method cannot come in the way of determining the correct arm's length price (ALP). Where either the TPO rejects the taxpayer's selection of the method or the taxpayer itself realises its mistake in the selection of the method, it is for the adjudicating authority to examine the correctness of the newly selected method as the most appropriate in the facts and circumstances of the case.
- Other method would be MAM under the facts and circumstances of the case – This decision was made by a 2:1 majority by the Special Bench.

The detailed observations and analysis of each of the members of the Special Bench have been provided in the detailed BDO in India alert available at the following link:

https://www.bdo.in/en-gb/insights/alerts-updates/transfer-pricing-alert-special-bench-permits-a-taxpayer-to-swap-alp-method-during-tax-audit-and-up

[Star India Private Limited. Vs. Assistant Commissioner of Income-tax [TS-329-ITAT-2023(Mum)-TP], dated 5 June 2023]

ARM'S LENGTH TOLERANCE RANGE FOR THE FINANCIAL YEAR 2022-23

Rule 10CA(7) of the Income-tax Rules, 1962 provides that the arithmetical mean of all the values included in the dataset would be the arm's length price where the dataset constructed has less than 6 comparables. It has been notified that for the financial year 2022-23 if the variation between the arm's length price determined and the value at which the transaction has been undertaken is less than 1% / 3% of the value of the transaction pertaining to wholesale trading / other cases respectively, the transaction will be deemed to be at arm's length.

'Wholesale' trading in this context has been defined to include trading in goods, which fulfils the following conditions, namely: - (i) purchase cost of finished goods is eighty per cent. or more of the total cost pertaining to such trading activities, and (ii) the average monthly closing inventory of such goods is ten per cent. or less of sales pertaining to such trading activities.

This is much the same as notified for the previous year.

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