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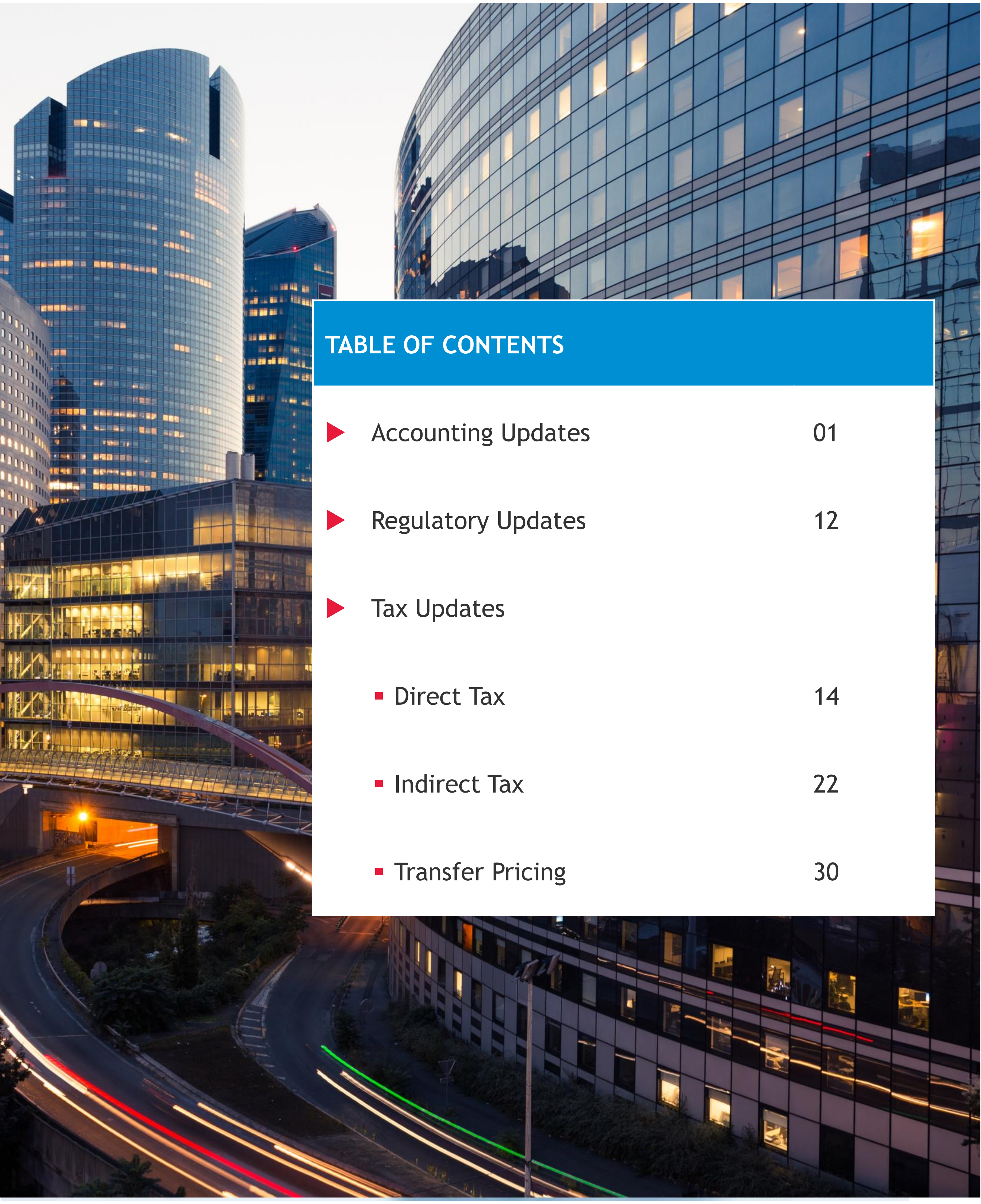

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ACCOUNTING UPDATES

INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA (ICAI)

EAC OPINION

Accounting Treatment Of Pre-Project Expenses For Which Fund Approval Is Pending Under The Ind AS Framework

Facts Of The Case

A public limited company, which is a wholly-owned subsidiary of a listed government company (hereinafter referred to as 'the Company'), is in the business of exploration and production (E&P) of oil and gas and other hydrocarbon-related activities outside India. The Company has adopted Indian Accounting Standards (Ind AS) w.e.f. 1 April 2016 (Transition Date: 1 April 2015). The functional currency of the Company is assessed as US Dollar (USD) in accordance with the provisions of Ind AS. The Company presents its financial statements in its presentation currency which is Indian Rupee (INR).

The Company operates overseas projects directly and/ or through subsidiaries, by participating in various joint arrangements and investments in associates. Globally, E&P business is carried out by way of joint arrangements or investments in the form of subsidiaries/ associates.

The Company has 16% participating interest (PI) in an overseas under-development oil & gas project (Project A) through two of its subsidiaries in the following manner: - 10% PI through its wholly owned subsidiary (subsidiary X) - 10% PI through its subsidiary company (subsidiary Y) wherein the Company has 60% holdings Project A is a joint operation, operated by a reputed international oil company and subsidiaries X and Y are non-operating partners in the Project with other members of the consortium.

As mentioned above, Project A is under-development stage and development activities for the development of oil and gas assets including the drilling of wells and production facilities are being undertaken by the operator as per the Joint Operating Agreement (JOA). With respect to estimated expenditures of the project, the operator raises monthly cash calls from non-operating partners and provides the expenditure statement of the joint operation called Joint Interest Billing (JIB) mentioning therein the details of capital and revenue expenditures including expenditure towards Exploratory Wells in Progress (EWIP), Development Wells in Progress (DWIP), under construction production facilities, etc. Subsidiary companies X and Y recognise their respective share of expenditures on the basis of the JIB statement and accordingly capitalise their shares of DWIP, EWIP, and under-construction production facilities in accordance with the provisions of Ind AS and Guidance Note on Accounting for Oil and Gas Producing Activities (Ind AS) and Ind AS 111, 'Joint Arrangements'.

Further, the Company while acquiring a 10% participating share in Project A, had financed the purchase consideration by way of external borrowings. Since the said oil and gas Project A is under development, the directly associated borrowing costs were capitalised to the qualifying assets pertaining to Project A in line with the provisions of Ind AS 23, 'Borrowing Costs'.

The Company has stated that in April 2021, force majeure was declared by the Operator in Project A due to security situations in the vicinity of the project site. As a result, the in-situ development activities in the Project remained suspended during the financial year (FY) 2021-22. Moreover, due to such a force majeure situation, the following incremental expenditures were incurred in respect of the Project: a. Stoppage costs (such as demobilisation, termination or cancellation fees and one-off settlement) and b. Standby and support costs (such as storage and asset preservation) (All such incremental expenditures are hereinafter referred to as 'stoppage and standby costs'). The Company's share (through subsidiaries X and Y) in respect of these expenditures in Project A was INR 6,886 million for FY 2021-22.

Both the subsidiary companies did not consider the said expenditure on stoppage and standby costs for capitalisation in view of paragraph 22 of Ind AS 16 which, inter-alia, states that "the cost of abnormal amounts of wasted material, labour, or other resources incurred in self-constructing an asset is not included in the cost of the asset"; and instead charged off the said expenditure as 'Other Expenses' in the Statement of Profit and Loss. In the consolidated financial statements of the Company, the said expenditure from both the subsidiaries was consolidated online on a line basis and was presented as a separate line item in the 'Other Expenses' Note in the Consolidated Statement of Profit and Loss. Moreover, the Company has provided the following explanatory note in the accompanying Notes to Consolidated Financial Statements on 'Other Expenses': "During the year, operator of Project A intimated declaration of force majeure (FM) vide letter dated 22 April 2021 in the project due to security situation. The site was evacuated on 2 April 2021. In view of the FM situation, various expenditures were incurred in the nature of stoppage, standby, settlement and preservation costs. The Group has assessed that these costs amounting to `6,886 million are not directly attributable to the completion of underlying assets and therefore have been charged to the statement of profit and loss. Further, considering the force majeure, capitalisation of borrowing costs amounting to `3,140 million has been suspended effective from April 2021 and the said borrowing costs have been charged to the Statement of Profit and Loss."

Similarly, capitalisation of borrowing costs as mentioned in paragraph 5 above was suspended in view of the suspension of development activities in the Project in accordance with paragraph 21 of the Ind AS 23, which states that "an entity may incur borrowing costs during an extended period in which it suspends the activities necessary to prepare an asset for its intended use or sale. Such costs are costs of holding partially completed assets and do not qualify for capitalisation". Accordingly, borrowing costs amounting to INR 3,140 million were charged off to the Consolidated Statement of Profit and Loss as finance costs and a disclosure with respect to the same was provided in the disclosure note as mentioned in paragraph 7 above.

During the course of supplementary audit for the financial year (FY) 2021-22, Comptroller and Auditor General of India (C&AG) audit team observed that the said standby and stoppage cost and borrowing costs incurred during the period of suspension of development activities in the Project due to force majeure are exceptional items and should be presented under the head 'Exceptional Items' in the Statement of Profit and Loss and the profit before and after exceptional items should have been arrived at accordingly.

In this regard, the audit also observed that the amount of such stoppage and standby costs along with the borrowing costs charged off, totalling INR 10,026 million is a material amount, which may influence the economic decisions that users make on the basis of financial statements, and therefore, the same should have been shown separately. Further, a declaration of force majeure in the Project due to security situation cannot be considered a regular activity in the ordinary course of business of the Company. It is an event or transaction which is clearly 'rare' and not expected to occur frequently. Thus, it needs to be disclosed separately from the transactions from ordinary operations.

The audit referred to materiality and incidence tests as mentioned in an earlier opinion of the Expert Advisory Committee (EAC) (published as Query No. 31 of Volume XXXVIII of the Compendium of Opinions), obtained by the Company in a different case to assess the exceptional nature of the costs incurred and stated that exceptional items are those items which meet the test of 'materiality' and 'incidence' wherein incidence refers to frequency of occurrence. The auditors were of the view that invoking force majeure due to terror attacks is very rare; considering the above facts, the above costs meet the test of 'materiality' and 'incidence' and hence, should have been shown as exceptional expenses in the Consolidated Statement of Profit and Loss. Company's perspective

The term 'Exceptional Items' is neither defined in Ind AS Schedule III nor any Ind AS. However, Ind AS 1 has references to such items in paragraphs 85, 86, 97 and 98. Paragraph 85 provides for presenting additional line items in the Statement of Profit and Loss if it is relevant for understanding the entity's financial performance and paragraph 86 stresses on materiality nature and function of income/expense. Paragraph 97 is more relevant and states that "When items of income or expense are material, an entity shall disclose their nature and amount separately". Paragraph 98 of Ind AS 1 gives an illustrative list where separate disclosure is required. The said list comprises events that are non-recurring or at least, non-frequent in nature.

Thus, according to the Company, from a collective reading of the above provisions, it can be concluded that the following ingredients should be there for items of income/expense to be regarded as 'exceptional items': a.

The items should arise from ordinary activities. b. They are not expected to be recurring in nature. c. The nature and amount of such items are material to the financial statements in the best judgement of the management of the entity to enable the users of financial statements to understand its financial performance. In other words, all material items are not exceptional items and exceptional items are only those items which meet the twin tests of 'materiality' and 'incidence'.

As regards 'Materiality', Note 7 of General Instructions for Preparation of Financial Statements of Division II of Schedule III to the Companies Act, 2013 states that material items are those items which could, individually or collectively, influence the economic decisions that users make on the basis of the financial statements. Materiality depends on the size or nature of the item or a combination of both, to be judged in the particular circumstances. A similar definition of the term 'Material' is also provided in paragraph 7 of Ind AS 1. In the present case, the Company is of the view that the amount of expenditure towards stoppage and standby costs (INR 6,186 million) as well as borrowing costs (INR 3,140 million) charged off to the consolidated statement of profit and loss in view of the suspension of development activities due to force majeure as explained above are material individually as well as in total.

Considering the materiality of the amount involved, the Company has provided adequate separate disclosure in respect of the nature and amount of the stoppage and standby costs in the Notes to the financial statements in accordance with the provisions of paragraph 97 of Ind AS 1, which state that when items of income or expense are material, an entity shall disclose their nature and amount separately. The said expenditure towards stoppage and standby costs has been presented in the Note on 'Other Expenses' as a separate line item distinguishing it from the remaining items of 'Other Expenses'. Moreover, a detailed explanatory note, as reproduced in paragraph 7 above has been provided below the Note on 'Other Expenses' to assist the users in understanding the nature and quantum of the said item of expenditure. Thus, the Company has provided complete information with respect to expenditure on stoppage and standby costs for enabling the users of the financial statements to make economic decisions.

The Company has not presented the expenditure for standby/stoppage preservation/settlement costs as exceptional items on the face of the Consolidated Statement of Profit and Loss since the incidence test is not met in this case. This is due to the reasons that force majeure, though undesirable for any business, is a common phenomenon for businesses. It is more so in the case of the Company engaged in the oil and gas industry with a global presence, which is more vulnerable to geopolitical and operational risks and security concerns. Further, an incidence test is applied to business activities as such. Declaration of force majeure is not an activity in itself; it is an event. Once that event is set in, i.e., force majeure is declared in a project and the development process is suspended, the activities of stoppage/standby/asset preservation etc. become the regular activities in the project as per the underlying contract till the project is under force majeure. In the case of the Company, there has been a history of occurrences of force majeure situations in several projects. Presently also, another major project of the Company is under a force majeure situation. Thus, in the case of the Company, on account of geopolitical risks due to operations of the Company in different socio-political environments, occurrences of such force majeure situations due to various possible underlying causes e.g., security situations, political instability, civil war etc. are frequent phenomena. In view of this, as per the Company, it can be reasonably deduced that the incurrence of stoppage and standby costs due to a force majeure situation in Project A does not meet the incidence test considering the frequency of such situations in the case of the Company.

Further, the Company has stated that the absence of a clear definition of 'exceptional items' in the Ind AS Framework and the provision of only broad guiding principles therein to assess the nature of any transaction, places the onus of assessing and deciding the nature of transaction on the management of the entity. Therefore, the intent of Ind AS is to leave it for the management of the entity to use its best judgement to ascertain the classification of any item as exceptional items in the financial statements as per the nature of the industry in which the entity operates, size and nature of the transaction and its impact on the user's readability of the financial statements.

As regards the borrowing costs charged off to the Statement of Profit and Loss on account of the suspension of development of qualifying assets in the Project, it is submitted that the said accounting treatment is completely in line with the provisions of Ind AS 23. Paragraph 20 of Ind AS 23, provides that an entity shall suspend capitalisation of borrowing costs during extended periods in which it suspends active development of a qualifying asset. Paragraph 21 of the Standard provides that an entity may incur borrowing costs during an extended period in which it suspends the activities necessary to prepare an asset for its intended use or sale. Such costs are costs of holding partially completed assets and do not qualify for capitalisation. According to the Company, since such borrowing costs pertain to borrowings made for ordinary business activities and are incurred regularly, these are normal and ordinary items. Merely change of accounting treatment (i.e. charging off to the Statement of Profit and Loss instead of capitalising with the costs of qualifying assets) due to the suspension of development activities does not render the basic nature of borrowing costs changed from ordinary and recurring items to exceptional items. Therefore, the Company has correctly suspended the capitalisation of associated borrowing costs in view of the suspension of development activities in Project A and charged off the same in the Statement of Profit and Loss.

Thus, as explained above, the stoppage and standby costs as well as the borrowing costs pertaining to Project A during the period of force majeure when the development activities are suspended, are not exceptional items as the items do not meet the incidence test and therefore, do not warrant presentation by way of a separate line item on the face of the Statement of Profit and Loss. Since the amount involved is material, the Company has presented the said provision as a separate line item in the Note for expenditure head 'Other Expenses' and has provided a detailed disclosure note thereunder explaining the nature of expense and treatment thereof in detail to assist the users of financial statements to comprehend the nature of expenditure.

The Company has further provided the following clarification:

- Stoppage and standby costs as mentioned in the query include the following costs:
  - Stoppage and standby costs: Stoppage and standby costs consist of charges relating to maintaining the reduced contractors' team, demobilisation, compensation, managing the different equipment spread around the fabrication yards in various countries across the world and maintaining the ability to restart after resumption of Project promptly.
  - Storage/Asset preservation costs: These are such costs that are necessary to preserve the equipment to the standards of the fabricator and avoid any wear and tear before its installation. In other words, these are necessary costs incurred to retain the original condition of the equipment so that the same can be installed with the intended quality standards when the project resumes. The absence of these costs could accelerate the wear and tear of the equipment during the force majeure period which could jeopardise the generation of future benefits from the assets when the project resumes.
- With regard to the nature of force majeure (FM) including reasons for enforcing FM, how development activities are impacted because of FM, estimated timelines for resumption of normalcy etc., the Company has informed that insurgency incidents in the vicinity of the project site in March 2021 resulted in evacuation of project personnel from the project site in the concerned country and subsequent declaration of Force Majeure (FM) by the Project Consortium. A declaration of Force Majeure (FM) was issued to suspend Concessionaire's obligation to conduct Petroleum Operations under the contract with the host government until such time as the security situation is sufficiently improved. The Project remains in preservation mode until the Government of the concerned country restores and maintains in a sustainable and verifiable manner, the peace, security and stability in the province wherein the project site is located. In situ, development and construction activities have been suspended due to the Force Majeure till the time security situation improves. However, the development activities with respect to equipment at vendors' locations are continuing. The Government has since made notable improvements in the security situation. In view of the improvement in the security situation, the Operator is expecting a resumption of the Project next year i.e., in the year 2023. Thus the force majeure and resulting suspension of development activities in the Project are temporary in nature. Ex situ development of project assets is ongoing and the Project is expected to resume next year.

Query

In view of the above facts, the opinion of the Expert Advisory Committee of the Institute of Chartered Accountants of India is sought as to whether:

- considering the frequent occurrences of force majeure in E&P industry generally and in the Company's projects particularly, the stoppage and standby expenditure incurred by the Company during the force majeure period in Project A has been correctly shown by the Company in the Note on 'Other Expenses' as a separate line item distinct from other items of 'Other Expenses' along with detailed disclosure as reproduced in paragraph 7 above; or the said stoppage and standby expenditure were required to be presented as 'Exceptional items' as a separate line item on the face of the Statement of Profit and Loss.
- the borrowing costs associated with the qualifying assets of Project A have been correctly charged off by the Company to the Statement of Profit and Loss as finance costs due to the suspension of development activities in the Project due to the declaration of force majeure therein, or the said borrowing costs are required to be presented as exceptional items on the face of the Statement of Profit and Loss.

Points considered by the Committee

The Committee notes that the basic issue raised by the Company relates to the presentation (and not recognition and measurement) of stoppage and standby expenditure and borrowing costs incurred during force majeure in Project A in the Statement of Profit and Loss. The Committee has, therefore, examined only this issue and has not examined any other issue that may arise from the Facts of the Case, such as accounting for participating interest in Project A through its subsidiaries, accounting for exploratory and development wells in progress and under-construction production facilities, accounting in the books of subsidiary and joint venture companies, manner of consolidation, recognition and measurement of stoppage and standby expenditure, recognition and measurement of borrowing costs pertaining to Project A, appropriateness of suspension of capitalisation of borrowing cost as per Ind AS 23, determination of functional currency, consideration of 'materiality' in detail, etc. Further, the Committee wishes to point out that the Indian Accounting Standards referred to in the Opinion are the Standards notified under the Companies (Indian Accounting Standards) Rules, 2015, as revised/amended from time to time. At the outset, the Committee presumes from the Facts of the Case that the stoppage and standby expenditure and borrowing costs incurred during force majeure in the Project are 'material', as per the requirements of Ind AS 1, 'Presentation of Financial Statements'.

With regard to the presentation of stoppage and standby expenditure and borrowing costs incurred during force majeure in Project A under the head 'exceptional items', the Committee notes that Part II of Division II of Schedule III to the Companies Act, 2013 (hereinafter referred to as the 'Ind AS Schedule III'), prescribes the format of Statement of Profit and Loss applicable for companies adopting Ind ASs, which requires presentation of 'Exceptional Items' as a separate line item in the Statement of Profit and Loss. Further, Note 7 of the 'General Instructions for Preparation of Statement of Profit and Loss' applicable for companies adopting Ind ASs requires that a Company should disclose by way of notes, additional information regarding aggregate expenditure and income on some items. One of the items to be disclosed in this regard is 'details of items of exceptional nature'. However, the term 'exceptional item' is neither defined in 'Ind AS Schedule III', nor it is used in Ind ASs. The Committee further notes that the Format of the Statement of Profit and Loss prescribed in Ind AS Schedule III to the Companies Act also requires the presentation of 'Finance costs' as a separate line item under 'Expenses'. Also, Note 7 of the 'General Instructions for Preparation of Statement of Profit and Loss' requires inter alia, to disclose by way of notes, additional information regarding details of aggregate expenditure in respect of 'finance costs'. Thus, considering the nature of the item, viz., finance costs, Schedule III specifies specific presentation and disclosure requirements for this item.

In this regard, the Committee also notes the following paragraphs of Indian Accounting Standard (Ind AS) 1, 'Presentation of Financial Statements':

"31 Some Ind ASs specify the information that is required to be included in the financial statements, which include the notes. An entity need not provide a specific disclosure required by an Ind AS if the information resulting from that disclosure is not material except when required by law. This is the case even if the Ind AS contains a list of specific requirements or describes them as minimum requirements. An entity shall also consider whether to provide additional disclosures when compliance with the specific requirements in Ind AS is insufficient to enable users of financial statements to understand the impact of particular transactions, other events and conditions on the entity's financial position and financial performance."

"82 In addition to items required by other Ind ASs, the profit or loss section of the statement of profit and loss shall include line items that present the following amounts for the period:

- revenue, presenting separately interest revenue calculated using the effective interest method; (aa) gains and losses arising from the derecognition of financial assets measured at amortised cost;
- finance costs; …"

"85 An entity shall present additional line items (including by disaggregating the line items listed in paragraph 82), headings and subtotals in the statement of profit and loss when such presentation is relevant to an understanding of the entity's financial performance."

"86 Because the effects of an entity's various activities, transactions and other events differ in frequency, potential for gain or loss and predictability, disclosing the components of financial performance assists users in understanding the financial performance achieved and in making projections of future financial performance. An entity includes additional line items in the statement of profit and loss, and it amends the descriptions used and the ordering of items when this is necessary to explain the elements of financial performance. An entity considers factors including materiality and the nature and function of the items of income and expense. For example, a financial institution may amend the descriptions to provide information that is relevant to the operations of a financial institution. An entity does not offset income and expense items unless the criteria in paragraph 32 are met." "Information to be presented in the statement of profit and loss or in the notes 97 When items of income or expense are material, an entity shall disclose their nature and amount separately.

98 Circumstances that would give rise to the separate disclosure of items of income and expense include

- write-downs of inventories to net realisable value or of property, plant and equipment to recoverable amount, as well as reversals of such write-downs;
- restructurings of the activities of an entity and reversals of any provisions for the costs of restructuring; (c) disposals of items of property, plant and equipment;
- disposals of investments;
- discontinued operations;
- litigation settlements; and
- other reversals of provisions.

99 An entity shall present an analysis of expenses recognised in profit or loss using a classification based on the nature of the expense method. 100 Entities are encouraged to present the analysis in paragraph 99 in the statement of profit and loss. 101 Expenses are subclassified to highlight components of financial performance that may differ in terms of frequency, potential for gain or loss and predictability. This analysis is provided in the form as described in paragraph 102.

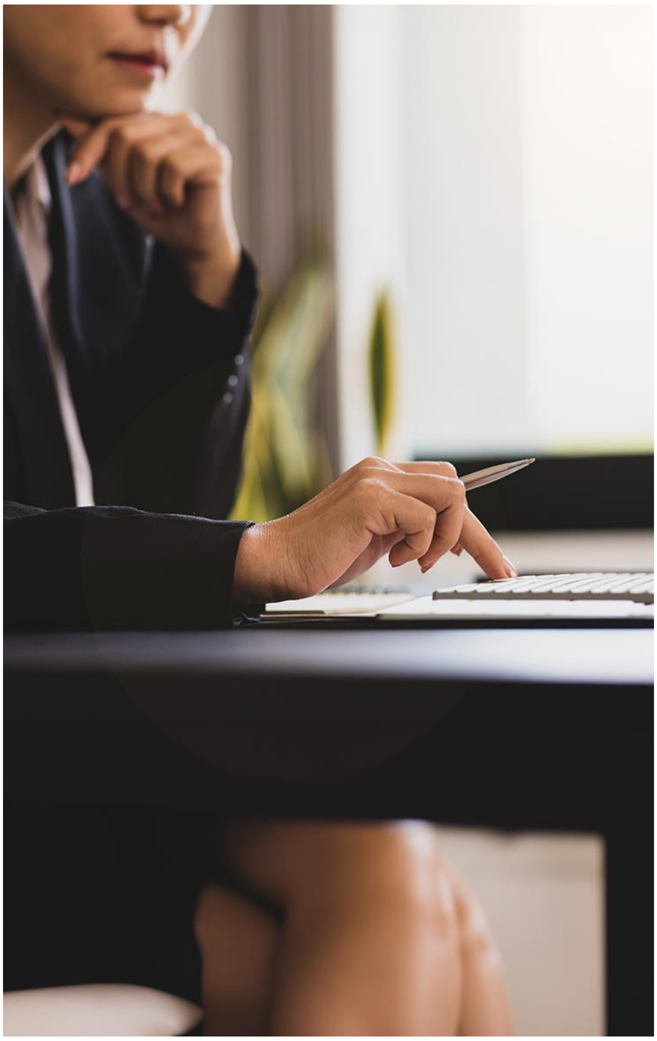
102. In the analysis based on the 'nature of expense' method, an entity aggregates expenses within profit or loss according to their nature (for example, depreciation, purchases of materials, transport costs, employee benefits and advertising costs), and does not reallocate them among functions within the entity. …" Further, the Committee notes that the concept of 'materiality' has been discussed in paragraph 7 of Ind AS 1 as below: "Material: Information is material if omitting, misstating or obscuring it could reasonably be expected to influence decisions that the primary users of general purpose financial statements make

on the basis of those financial statements, which provide financial information about a specific reporting entity. Materiality depends on the nature or magnitude of information or both. An entity assesses whether information, either individually or in combination with other information, is material in the context of its financial statements taken as a whole. …"

From the above, the Committee notes that material items need to be presented as line items and/ or disclosed in financial statements, which include the notes. As per Ind AS 1, materiality depends on the magnitude and/or nature of information and information is material if omitting, misstating or obscuring it could be expected 101 to influence the decisions of primary users of financial statements. Further, as per the requirements of paragraphs 86 and of Ind AS 1, since the effects of events and transactions differ in frequency, the components of financial performance should be disclosed and additional line items/headings should be presented when such presentation is relevant to the understanding of the entity's financial performance having regard to factors including materiality and the nature of the items of income and expense. Therefore, drawing an analogy from the abovereproduced requirements of Ind AS 1, the Committee is of the view that exceptional items are those items which meet the test of 'materiality' as well as the test of 'frequency of occurrence or incidence'; and the meaning of the term 'material' should be construed as per paragraph 7 of Ind AS 1, as reproduced above. The Committee is of the view that 'exceptional items' could be of the nature of items listed in paragraph 98 of Ind AS 1 reproduced above if such items are material and are infrequent in occurrence. Further, the Committee notes from the requirements of Schedule III and above-reproduced paragraphs of Ind AS 1 that they require items to be presented and classified as per their nature and also require specific items, such as, 'finance costs' to be disclosed in a specific manner.

In the above context, the Committee notes that the 'borrowing costs' (although arising during the temporary suspension of construction or development activities in the extant case) are of the nature of a 'finance cost', which is a common expense for any kind of business. In other words, the nature of finance costs does not change due to the suspension of construction activities because of force majeure and therefore, its nature cannot be considered as 'exceptional'. Thus, considering the requirements of Schedule III and Ind AS, the Committee is of the view that borrowing cost in the extant case should be presented as a part of 'Finance costs' and not as an exceptional item in the Statement of Profit and Loss.

With regard to the presentation of stoppage and standby expenditure incurred during force majeure, the Committee notes that in the extant case, insurgency incidents in the vicinity of the project site in March 2021 resulted in the evacuation of project personnel from the project site in the concerned country and subsequent declaration of Force Majeure (FM) by the Project Consortium. The Project remains in preservation mode until the Government of the concerned country restores and maintains in a sustainable and verifiable manner, the peace, security and stability in the province wherein the project site is located. During such FM, development and construction activities have been suspended till the time security situation improves. As a result, incremental expenditures like stoppage costs (such as demobilisation, termination or cancellation fees and one-off settlement) and standby and support costs (such as storage and asset preservation) were incurred in respect of the Project. Thus, there are varied types of costs or expenses involved in the stoppage and standby expenditure. As far as the frequency of occurrence of these costs is concerned, the Committee notes that in the present case, the Company has contended that force majeure is a common phenomenon for businesses. It is more so in the case of the Company engaged in the oil and gas industry with a global presence, which is more vulnerable to geopolitical and operational risks and security concerns. In the case of the Company, there has been a history of occurrences of force majeure situations in several projects. Presently also, another major project of the Company is under a force majeure situation. Thus, in the case of the Company, on account of geopolitical risks due to operations of the Company in different sociopolitical environments, occurrences of such force majeure situations due to various possible underlying causes e.g., security situations, political instability, civil war etc. are frequent phenomena. In the above context, the Committee is of the view that assessment of 'frequency of occurrence or incidence' is to be determined in the specific facts and circumstances of the entity concerned, considering various factors, such as the nature of its activities, the economic environment in which it operates, past experience, future expectations, etc. and not in general, as what could be a frequent item for one entity may be infrequent for others. Accordingly, in the extant case, the Committee is of the view that although in general, force majeure conditions are not frequent and therefore, the consequent costs arising due to such conditions may meet the test of 'frequency or incidence' for presentation as 'exceptional items', however, considering the specific facts and circumstances of the Company, having global presence in oil and gas sector and its past experience, the test of 'frequency or incidence' does not appear to be met. Therefore, stoppage and standby expenditure incurred during force majeure (although may meet the test of 'materiality'), should not be presented as exceptional items in the Statement of Profit and Loss. However, the Committee is of the view that since the borrowing costs and the stoppage and standby expenditure in the extant case are 'material' (as stated by the Company and presumed by the Committee), the Company should disclose their nature and amount separately, as per the requirements of paragraph 97 of Ind AS 1 and may also present these items by disaggregating, headings and subtotals under their respective heads in the Statement of Profit and Loss when such presentation is relevant to an understanding of the entity's financial performance, along with appropriate disclosures in the notes to financial statements, as per the requirements of paragraph 85 of Ind AS 1, as reproduced above.



Opinion

On the basis of the above, the Committee is of the following opinion on the issues raised by the Company in paragraph 21 above:

Considering the specific facts and circumstances of the Company, having global presence in the oil and gas sector and its past experience, the stoppage and standby expenditure incurred during force majeure (although may meet the test of 'materiality'), should not be presented as exceptional items in the Statement of Profit and Loss, as discussed in paragraph 27 above. However, since these are 'material' (as stated by the Company and presumed by the Committee), the Company should disclose their nature and amount separately, as per the requirements of paragraph 97 of Ind AS 1 and may also present these items by disaggregating, headings and subtotals under their respective heads in the Statement of Profit and Loss when such presentation is relevant to an understanding of the entity's financial performance, along with appropriate disclosures in the notes to financial statements, as per the requirements of paragraph 85 of Ind AS 1.

Considering the requirements of Schedule III to the Companies Act, 2013 and Ind AS, the borrowing cost in the extant case should be presented as a part of 'Finance costs' and not as an exceptional item in the Statement of Profit and Loss, as discussed in paragraph 26 above.

REGULATORY UPDATES

INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA (ICAI)

Revised Applicability Of Peer Review Mandate (Phase II & III)

ICAI has issued the Revised Applicability of Peer Review Mandate (Phase II & III), dated 16 March 2024. Considering the requests from Practice Units, the Council decided that the applicability of the Peer Review Mandate for the Practice Units covered under Phase II and III is extended.

Accordingly, the second phase of the mandate has been extended to 1 July 2024, for the following Practice Units:

Practice Units which propose to undertake Statutory Audit of unlisted public companies having paid-up capital of not less than rupees five hundred crores or having annual turnover of not less than rupees one thousand crores or having, in aggregate, outstanding loans, debentures and deposits of not less than rupees five hundred crores as on the 31 March of immediately preceding financial year: For these Practice Units, there is a pre-requisite of having Peer Review Certificate.

OR

Practice Units rendering attestation services and having 5 or more partners: For these Practice Units, there is a prerequisite of having a Peer Review Certificate before accepting any Statutory audit.

Whereas the third phase of the mandate has been extended to 1 January 2025 for the following Practice Units:

Practice Units which propose to undertake the Statutory Audit of entities which have raised funds from public or banks or financial institutions of over Fifty Crores rupees during the period under review or of any body corporate including trusts which are covered under public interest entities: For these Practice Units, there is a pre-requisite of having Peer Review Certificate.

OR

Practice Units rendering attestation services and having 4 or more partners: For these Practice Units, there is a prerequisite of having a Peer Review Certificate before accepting any Statutory audit.

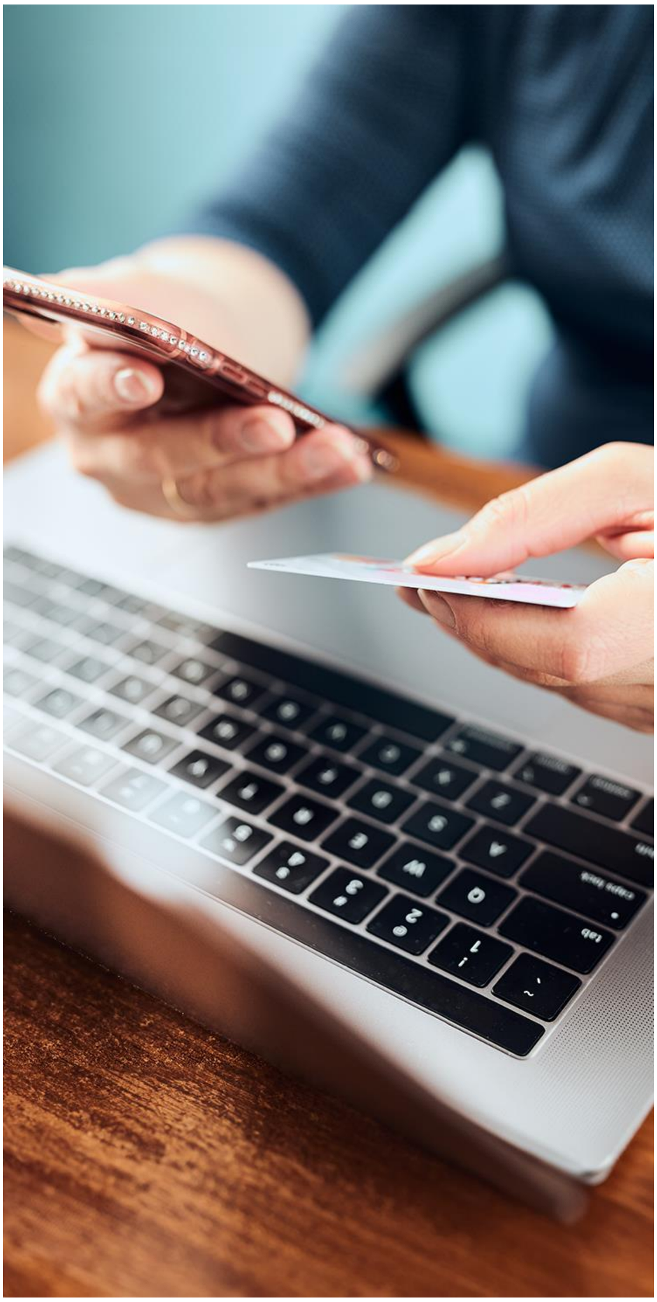
Online Panel Of Experts For Addressing Bank Branch Audit-related Queries

ICAI has issued a notification on the Online Panel of Experts for Addressing Bank Branch Audit-Related Queries, dated 28 March 2024.

Given the fact that conducting audits within the given timelines poses numerous challenges for the members of the banking industry.

These challenges may include determination of Non-Performing Asset (NPA) status, implication of complex data encountered during branch audits, encountering situations where relevant RBI circulars are unavailable, understanding the implications of requirements of RBI circulars, assessing the nature and adequacy of documentation, determining appropriate wordings for audit reports on crucial matters in bank branch audits, addressing reporting requirements for Long Form Audit Reports, considering recommendations from committees such as Ghosh and Jilani, and preparing special purpose reports and certificates etc.

With a view to supporting the members for fast resolution of queries, the Auditing and Assurance Standards Board (AASB) of the Institute of Chartered Accountants of India (ICAI), has announced an Online Panel of Experts for addressing Bank Branch Audit related queries for the financial year 2023-24. The Panel will address queries from 1 April 2024 till 30 April 2024.



Securities And Exchange Board Of India (SEBI)

Measures To Instill Trust In The Securities Market - Expanding The Framework Of Qualified Stock Brokers (QSBs) To More Stock Brokers

SEBI has issued a circular, dated 11 March 2024 on Measures to instil trust in the securities market – Expanding the framework of Qualified Stock Brokers (QSBs) to more stock brokers.

Additional parameters of compliance score. grievance redressal and the trading volumes of the stock broker have been added to the list to be considered for designating a stockbroker as QSB to the four already existing parameters. The parameters further include the total number of active clients, available total assets of clients and the end-of-day margin obligations of all clients. Values shall be calculated on an annual basis and parameters as of 31 December shall be considered

The circular also specifies the procedure to be followed for identifying a stock broker as QSB.

The revised list of QSBs shall be released jointly by stock exchanges, in consultation with SEBI. Those QSBs which no longer belong to the list shall continue to comply with the enhanced obligations and responsibilities, for an additional period of 3 financial years or such time, as may be specified by Market Infrastructure Institutions, in consultation with SEBI.

Stockbrokers also have an option to voluntarily get designated as QSBs,

The circular shall be applicable w.e.f 1 June of the subsequent year or 1 September of the subsequent year, based on the parameters and it impacts all Recognised Stock Exchanges Stock Brokers through Recognised Stock Exchanges.

Simplification And Streamlining Of Offer Documents Of Mutual Fund Schemes - Extension Of Timelines

SEBI has vide a circular dated 1 November 2023 prescribed a simplified format of Scheme of Information (SID). SEBI has now issued a circular, dated 12 March 2024 on Simplification and streamlining of Offer Documents of Mutual Fund Schemes – Extension of timelines. It has been decided to extend the date of applicability to 1 June 2024.

Draft SIDs are to be filed with SEBI by 31 May 2024.

SIDs which are already filed can use the old format, provided they are updated by 30 June 2024, with data as of 31 May 2024.

Updation of SID and KIM should be within 1 month from the end of the half year i.e. 30 April 2024 for the half year ended 31 March 2024.

This circular impacts all Mutual Funds, Asset Management Companies, Trustee Companies, Board of Trustees of Mutual Funds and Association of Mutual Funds in India.

Safeguards To Address The Concerns Of The Investors On The Transfer Of Securities In A Dematerialised Mode

"SEBI has issued a circular on Safeguards to address the concerns of the investors on transfer of securities in dematerialised mode, dated 20 March 2024 in order to harmonise the classification of inactive/dormant accounts across Stock Exchanges & Depositories and to strengthen the measures to prevent fraud/ misappropriation for inoperative demat accounts. Such safeguards include emphasising investor education, prohibiting acceptance of pre-signed Delivery Instruction Slips (DIS), and procedures for lost or stolen DIS booklets.

the Depository Participants (DPs) shall not accept pre - Signed DIS from the Beneficial Owners (BO)

If the DIS booklet is lost/ stolen/ not traceable by the BO, the same must be intimated to the DP immediately by the BO in writing and the unused DIS shall be cancelled.

The DP shall also ensure that a new DIS booklet is issued only on the strength of the DIS instruction request slip duly complete in all respects unless the request for a fresh booklet is due to loss, etc.

The DPs shall not issue more than 10 loose DIS to one account holder in a financial year (April to March and shall be issued only if the BO(s) come in person and sign the loose DIS in the presence of an authorised DP official which will be verified while processing the DIS.

The DPs shall cross-check with the BOs under exceptional circumstances before acting upon the DIS.

The DPs shall mandatorily verify with a BO before acting upon the DIS, in case of an inactive/dormant account, whenever any security in such account is transferred at a time

The provisions of this circular shall come into effect from 1 April 2024.

RESERVE BANK OF INDIA (RBI)

Foreign Exchange Management (Non-debt Instruments) (Second Amendment) Rules, 2024

The Ministry of Finance, Department of Economic Affairs, has issued a significant notification dated 14 March 2024, amending the Foreign Exchange Management (Non-debt Instruments) Rules, 2019. This amendment, S.O. 1361(E), brings about crucial changes in the regulatory framework governing non-debt instruments under the Foreign Exchange Management Act, of 1999.

They shall come into force on the date of their publication in the Official Gazette.

In the Foreign Exchange Management (Non-debt Instruments) Rules, 2019, in rule 2, in clause (aq), the following Explanation shall be inserted, namely:- “Explanation.- For the purposes of this clause, the unit shall include a unit that has been partly paid up, which is permitted under the regulations framed by the Securities and Exchange Board of India, in consultation with the Government of India.

Cut-off Time For Uploading GST, ICEGATE And TIN 2.0 Luggage Files

RBI has issued a notification dated 13 March 2024 on the Cut-off time for uploading of GST, ICEGATE and TIN 2.0 luggage files. It had been clarified that No extension in cut-off time will be allowed to agency banks by RBI beyond 1800 hours for uploading of these luggage files in QPX/e-Kuber.

Accordingly, paragraph 10 on ‘Reporting of transactions by agency banks to RBI’ of ‘Master Circular on Conduct of Government Business by Agency Banks - Payment of Agency Commission’ dated 1 April 2023 has been modified.

This circular impacts all agency banks.

Reporting And Accounting Of Central Government Transactions For March 2024

RBI has issued a Circular dated 13 March 2024, detailing the reporting and accounting procedures for Central Government transactions for March 2024.

The circular provides detailed guidelines to ensure accurate reporting and accounting of Central Government transactions for March 2024. By implementing these instructions, banks can maintain financial integrity and facilitate seamless operations during the transition between financial years.

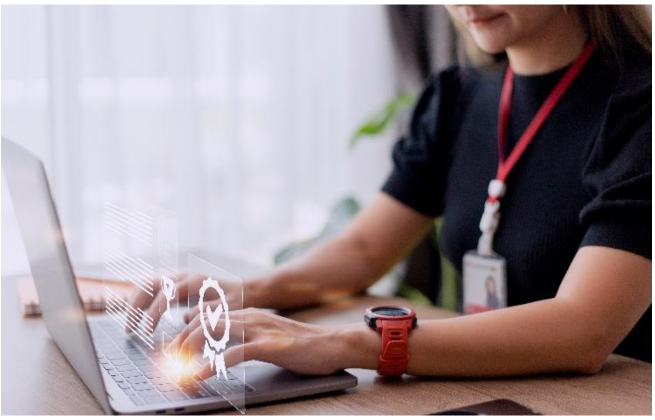
The Government of India has decided that the date of closure of residual transactions for the month of March 2024 be fixed as 10 April 2024.

Receiving branches including those not situated locally, are required to adopt special arrangements such as courier service etc., for passing on challans/scrolls etc., to the Nodal/Focal Point branches so that all payments and collections made on behalf of the Government towards the end of March are accounted for in the same financial year.

As regards reporting of March 2024 transactions by Nodal/Focal Point branches in April 2024, the branches are advised to follow the procedure as outlined in the Annexure of the circular.

The nodal/Focal Point branches will be required to prepare separate sets of scrolls, one pertaining to March 2024 residual transactions and another for April transactions during the first 10 days of April 2024.

This circular impacts all agency banks.



Omnibus Framework For Recognising Self-Regulatory Organisations (SROs) For Regulated Entities (REs) Of The Reserve Bank Of India

RBI has issued a Circular dated 13 March 2024, detailing the reporting and accounting procedures for Central Government transactions for March 2024.

The circular provides detailed guidelines to ensure accurate reporting and accounting of Central Government transactions for March 2024. By implementing these instructions, banks can maintain financial integrity and facilitate seamless operations during the transition between financial years.

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The nodal/Focal Point branches will be required to prepare separate sets of scrolls, one pertaining to March 2024 residual transactions and another for April transactions during the first 10 days of April 2024.

This circular impacts all agency banks.

Investments In Alternative Investment Funds (AIFs)

RBI has issued a notification on Investments in Alternative Investment Funds (AIFs), dated 27 March 2024. To ensure uniformity in implementation among the REs, and to address the concerns of the stakeholders, the circular provides certain instructions.

- Downstream investments shall exclude investments in equity shares of the debtor company of the RE but shall include all other investments, including investments in hybrid instruments.
- Provisioning shall be required only to the extent of investment by the RE in the AIF scheme which is further invested by the AIF in the debtor company, and not on the entire investment of the RE in the AIF scheme.
- The instructions regarding investment by REs in the subordinated units of any AIF scheme with a 'priority distribution model' given in the circular dated 19 December 2023 on the Investments in Alternative Investment Funds (AIFs), in terms of which instructions were issued to address certain regulatory concerns relating to investment by regulated entities (REs) in the AIFs, shall only be applicable in cases where the AIF does not have any downstream investment in a debtor company of the RE. If the RE has an investment in subordinated units of an AIF scheme, which also has downstream exposure to the debtor company, then the RE shall be required to comply with paragraph 2 of the said Circular.
- Further with regard to paragraph 3 of the Circular, proposed deduction from capital shall take place equally from both Tier-1 and Tier-2 capital and reference to investment in subordinated units of the AIF Scheme includes all forms of subordinated exposures, including investment in the nature of sponsor units

Further, it is also clarified that Investments by REs in AIFs through intermediaries such as funds of funds or mutual funds are not included in the scope of the Circular

The circular impacts all Commercial Banks (including Small Finance Banks, Local Area Banks and Regional Rural Banks), all Primary (Urban) Co-operative Banks/State Co-operative Banks/ Central Co-operative Banks, all All-India Financial Institutions, all NBFCs (including Housing Finance Companies)

REGULATORY UPDATES

RESERVE BANK OF INDIA (RBI)

Circular Dated 5 March 2024: Submission Of Statement On Centralised Information Management System (CIMS) Portal For Money Transfer Service Scheme (MTSS)

RBI *vide* its circular dated 19 May 2016, wherein all Authorised Persons who are Indian Agents under the Money Transfer Service Scheme (MTSS) were required to submit a quarterly statement on the quantum of remittances received through MTSS using the eXtensible Business Reporting Language (XBRL) platform.

- aThe reporting responsibility, which was formerly under the XBRL platform, has now shifted to the CIMS portal (URL: https://sankalan.rbi.org.in/) with effect from the quarter ending March 2024.
- Even if no remittance occurs during a quarter, a 'NIL' report must be submitted to maintain compliance.
- To facilitate seamless adaptation, the Master Direction on 'Reporting under Foreign Exchange Management Act, 1999' is being updated to incorporate these changes.

Notification Dated 21 March 2024: Omnibus Framework For Recognition Of Self-regulatory Organisations (SROs) For Regulated Entities (REs) Of The Reserve Bank

Pursuant to the announcement made in the Statement on Developmental and Regulatory Policies of the Reserve Bank, a draft framework titled 'Draft Omnibus Framework for recognising Self-Regulatory Organisations for its Regulated Entities' was issued for public comments on 21 December 2023.

- The Reserve Bank has now finalised the Omnibus Framework for recognising Self-Regulatory Organisations (SRO) for prescribing necessary regulatory framework for its Regulated Entities.
- The omnibus framework contains broad parameters viz., objectives, responsibilities, eligibility criteria, governance standards, application process and other basic conditions for grant of recognition, which will be common for any SRO proposed to be recognised by the Reserve Bank.
- Other sector-specific guidelines like number of SROs, membership, etc., shall be issued separately by the respective departments of the Reserve Bank wherever a sectoral SRO is intended to be set up.

Circular Dated 27 March 2024: Investments In Alternative Investment Funds (AIFs)

Pursuant to the RBI circular dated 19 December 2023 (Investments in Alternative Investment Funds (AIFs)) additional advice has been laid down in this circular to Regulated Entities (REs) as under:

- Downstream investments shall exclude investments in equity shares of the debtor company of the RE but shall include all other investments, including investments in hybrid instruments.
- Provisioning shall be required only to the extent of investment by the RE in the AIF scheme which is further invested by the AIF in the debtor company, and not on the entire investment of the RE in the AIF scheme.
- Paragraph 3 applies only if the AIF has no downstream investment in a debtor company of the RE. If the RE invests in subordinated units of an AIF scheme with downstream exposure to the debtor company, compliance with paragraph 2 is necessary.
- Deductions proposed from capital will occur equally from both Tier-1 and Tier-2 capital. The reference to investment in subordinated units includes various forms of subordinated exposures, including sponsor units

SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI)

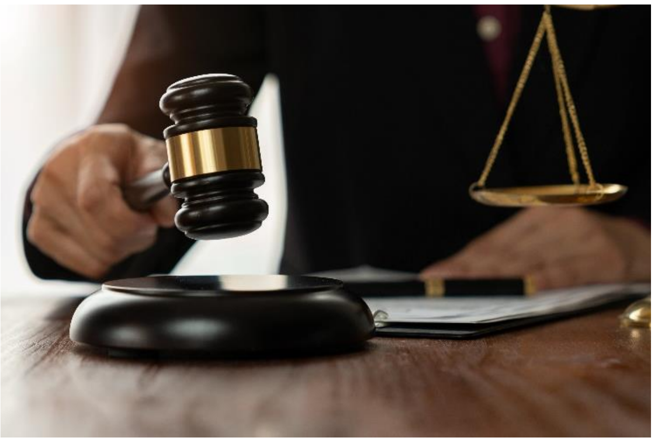
Circular Dated 5 March 2024: Addition Of Goods For The Purpose Of Derivatives, Which Is Being Notified Under The Securities Contracts And Regulation Act, 1956

Ministry of Finance through its notification has notified the list of goods on which derivatives can be launched. The list of additional goods is as follows:

- Apple
- Cashew
- Garlic
- Skimmed Milk Powder
- Cement
- Freight including trucks, railways, waterways, and airways.

Circular Dated 13 March 2024: Repeal Of Circular(s) Outlining The Procedure To Deal With Cases Where Securities Are Issued Prior To 1 April 2014, Involving Offer/ Allotment Of Securities To More Than 49 But Up To 200 Investors In A Financial Year

- On 31 December 2015 and 3 May 2016, SEBI issued a circular stating that with respect to cases under the Companies Act 1956, companies involved in the issuance of securities to more than 49 people but up to 200 people in a financial year the company may avoid penal action if they provide an option to surrender the securities and receive the refund amount at a price not less than the amount of subscription money paid along with 15% interest or such higher return as promised.
- Given that considerable time has passed since the repeal of the Companies Act 1956, considering the power conferred u/s 11(1) of SEBI Act 1992, it has now been decided to repeal the aforesaid circulars revoke with effect from 6 months from the date of issue of this circular.
- The above-mentioned option will be available to only those companies who completed the entire procedure and submitted the certificates as per the term prescribed in the circular issued by The Securities and Exchange Board of India (SEBI) dated 31 December 2015 and 3 May 2016, within 6 months from the date of circular issued.



Circular Dated 20 March 2024: Relaxation From Mandatory Additional Disclosure By Foreign Portfolio Investors (FPIs) That Fulfils Certain Criteria

Ref. SEBI Regulation Dated 24 August 2023

The Securities and Exchange Board of India (SEBI) has recently issued circulars which aimed at providing relief to FPIs having more than 50% of their Indian Equity Asset under management (AUM) in a corporate group from mandatory disclosure as specified in Para 7 of circular issued by SEBI dated 24 August 2023 all the granular details of all entities holding any economic interest on a full look through basis, up to the level of all-natural persons after satisfying following criteria:-

- The apex company of such corporate group has no identified promoters, a list of those apex companies with no identified promoters will be made public by depositories.
- The FPI holds not more than 50% of its Indian Equity AUM in the corporate group, after excluding its holding in the apex company.
- Total holding of all such FPIs in the apex company is less than 3% of the total equity share capital.

Circular Dated 21 March 2024: Introduction Of The Beta Version Of T+0 Rolling Settlement Cycle On An Optional Basis In Addition To The Existing T+1 Settlement Cycle In Equity Cash Markets

Pursuant to the SEBI circular dated 7 September 2021 that allowed for the introduction of a T+1 rolling settlement cycle. In this circular, SEBI has introduced a significant update with the introduction of the beta version of the T+0 settlement cycle.

- The beta version of the T+0 settlement cycle will be optional and limited to a set of 25 scrips and a limited number of brokers.
- Eligible investors must meet prescribed timelines, processes, and risk requirements.
- The trading session will be continuous from 09:15 AM to 1:30 PM. The price band in the T+0 segment will operate within +100 basis points from the price in the regular T+1 market, with periodic recalibration based on market movements.
- T+0 prices will not be considered in index calculation and settlement price computation.

SEBI's introduction of the beta version of the T+0 settlement cycle marks a significant milestone in India's securities market landscape.

The circular will come into force on 28 March 2024.

MINISTRY OF CORPORATE AFFAIRS (MCA)

- The Ministry of Corporate Affairs has released an advisory regarding the due date for companies to CSR form for FY 2022-23.
- All eligible companies are required to file e-form CSR-2 for the financial year 2022-23 on or before the due date i.e. 31 March 2024 to avoid penal action by MCA.

CIRCULARS / NOTIFICATIONS / PRESS RELEASE

CBDT Allows Successor Companies To Furnish Returns With Modified Particulars Where An Order Of Business Reorganisation Of The Competent Authority Is Issued Prior To 1 April 2022

- The Finance Act 2022 inserted section 170A in the Income-tax Act, 1961 (IT Act) with effect from 1 April 2022 which provides that the entities going through business reorganisation may furnish modified return of income for any fiscal year (FY) to which such order of business reorganisation is applicable, within six months from the end of the month of issuance of order of competent authority.
- The Central Board of Direct Taxes (CBDT) *vide* order dated 26 September 2022 allowed successor companies in whose case the business reorganisation order was issued between 1 April 2022 to 30 September 2022 to furnish modified returns till 31 March 2023. However, entities whose scheme of business reorganisation has been sanctioned prior to 1 April 2022 remained outside the purview of section 170A of the IT Act and therefore such entities could not file modified returns of income under section 170A of the IT Act.
- In order to mitigate the difficulties and genuine hardship faced by entities in filing modified returns of income pursuant to a business reorganisation order issued after 1 June 2016 but prior to 1 April 2022 the CBDT has issued an order. The Order shall allow the successor companies to furnish the return of income with modified particulars for the relevant FY(s) in accordance with and limited to the said order by using functionality on the e-filing portal "u/s 119(2)(b) of the IT Act - *after condonation of delay/Court Order or Sanction Order of Business reorganisation of the Competent authority issued prior to 1 April 2022".*
- The taxpayer shall first communicate with the Jurisdictional Tax Officer in a specified format, requesting for enablement of electronic filing of the return for relevant FY(s) on the e-filing portal as per the following timeline: Sine aforementioned.

Step	Action	Timeline
First	Communication by the taxpayer to the Jurisdictional Tax Officer as per the proforma	up to 30 April 2024
Second	Completion of verification by Jurisdictional Tax Officer as to whether a return is resulting from and limited to the business reorganisation order	Preferably, within 30 days of receipt of the above communication.
Third	E-Filing of return by the taxpayer.	up to 30 June 2024

[1] https://eportal.incometax.gov.in

- Henceforth, no separate application under section 119(2)(b)[1] of the IT Act is required to be filed before the CBDT by successor companies in cases where the business reorganisation order was issued after 1 June 2016 but prior to 1 April 2022.
- This order shall come into force from 13 March 2024

  [Order F. No. 225/5/2021-ITA-II, dated 13 March 2024]

CBDT Provides Clarification On A Time Limit For Verification Of Return Of Income After Uploading

- The DGIT(Systems) *vide* notification dated 29 July 2022 had reduced the time limit for verification of Income Tax Return (ITR) from 120 days to 30 days from the date of transmitting the data of ITR electronically. It is clarified that:
  - where the ITR is uploaded and e-verified/ITR-V is submitted within 30 days of uploading of ITR- Date of uploading ITR shall be considered as the date of furnishing.
  - where ITR is uploaded but e-verification/ITR-V is submitted after 30 days of uploading of ITR- Date of e-verification/ITR-V submission shall be treated as date of furnishing and all consequences of late filing of ITR under the IT Act shall be made applicable.
- The date on which the duly verified ITR-V is received at the Centralised Processing Centre, Bengaluru shall be considered to determine the 30 days from the date of uploading of the ITR.
- It is pertinent to note that if the ITR is not verified after uploading within the aforementioned timeline, such ITR shall be treated as invalid.
- This notification will come into effect from 1 April 2024.

  [Notification No. 2 of 2024, dated 31 March 2024]

CBDT Extends The Due Date Of Filing Form 26QE Pertaining To FY 2022-23

- Section 194S of the IT Act relates to tax deduction at source (TDS) on the transfer of Virtual Digital Assets (VDA). As per this section, the person making a payment, to a resident,[2] on the purchase of VDAs shall be responsible for charging a TDS at the rate of 1% of the value of the VDAs.
- Further, as per Rule 31A(4D)[3] of the IT Rules, 1962, a specified person is required to report such deductions in challan-cum-statement electronically in Form 26QE within 30 days from the end of the month in which such deduction is made. However, due to the unavailability of Form 26QE, the persons who deducted tax from 1 July 2022 to 31 January 2023 could not file Form 26QE and pay the corresponding TDS on or before the due date. This resulted in the levy of fees under section 234E[4] of the IT Act and interest under section 201(1A)(ii)[5] of the IT Act. Further, the specified persons who deducted tax under section 194S of the IT Act from 1 February 2023 to 28 February 2023 had insufficient time to file Form 26QE and pay the corresponding TDS thereon. To address these grievances of specified persons, the CBDT has issued a Circular extending the due date *ex-post facto* to 30 May 2023 for furnishing of Form 26QE for the tax deducted under section 194S of the IT Act during the period 1 July 2022 to 28 February 2023. Further, fees levied under section 234E of the IT Act and/or interest charged under section 201(1A)(ii) of the IT Act in such cases for the period up to 30 May 2023, shall be waived.

  [Circular No. 4/2024, dated 7 March 2024]

CBDT Issues Notification To Amend Form 3CD, 3CEB And Form 65

In view of the given effect of the amendments made by the Finance Act 2023 in the IT Act, the CBDT has notified amendments to the following Forms:

- **Form 3CD**
  - Clause 8a: A question for opting for taxation under a concessional regime under section 115BAE of the IT Act has been added.
  - Clause 12: Whether presumptive taxation under section 44ADA of the IT Act (profit and gains of profession on presumptive basis) has been opted and the amount thereof to be disclosed.
  - Clause 18(ca): Adjustments to written down value in relation to depreciation allowance as provided are required to be disclosed:
    - Under the proviso to section 115BAA(3) of the IT Act (for FY 2019-20 only)
    - Under proviso to section 115BAC(3) of the IT Act or proviso to section 115bad(3) of the IT Act (for FY 2020-21 only) and
    - Under the second proviso to section 115BAC(3) of the IT Act (for FY 2023-24 only) required to be disclosed.

[1] Section 119(2)b) of the IT Act grants power to the CBDT to issue an order to subordinate authorities for admitting applications/claims of exemption, deduction, refund or any other relief under IT Act in any case or class of cases for avoiding genuine hardship.
[2] Clause 18(ca):
[3] Form 31A(4D) of the IT Rules pertains to statement of deduction of tax
[4] Section 234E of the IT Act pertains to fee for default in furnishing statements.
[5] Section 201(1A)(ii) of the IT Act levies interest in case where TDS is not deducted by payer or is partially deducted or after deducting fails to pay tax as required.

- Clause 19: Details of amounts debited to the Profit and Loss account and amounts admissible under section 35ABA of the IT Act [relating to amortisation of expenditure for obtaining the right to use spectrum for telecommunication services] and any other relevant section, required to be disclosed.
- Clause 21: The following details of amounts debited to the Profit and Loss account and required to be disclosed have been aligned with an amendment to Explanation 3 of section 37 of the IT Act vide FA 2022:
  - Expenditure for any purpose which is an offence or is prohibited by law or expenditure by way of penalty or fine for violation of any law (enacted in India or outside India)
  - Expenditure incurred to compound an offence under any law for the time being in force, in India or outside India, and
  - Expenditure incurred to provide any benefit or perquisite, in whatever form, to a person, whether or not carrying on a business or exercising a profession, and acceptance of such benefit or perquisite by such person is in violation of any law, rule, regulation or guideline, as the case may be, for the time being in force, governing the conduct of such person.
- Clause 22: Details with respect to the amount not allowable under section 43B(h) of the IT Act have been added, i.e. to disallow on an accrual basis sums payable to micro or small enterprises if these are not paid within the time allowed under section 15 of the Micro, Small and Medium Enterprises Development (MSMED) Act, 2006.
- Clause 26: Details with respect to the sum payable to the MSMED Act, 2006 are required to be disclosed consequential to the amendment made under section 43B(h) of the IT Act.
- Clause 32a: Details regarding brought forward losses or depreciation need to be provided for entities claiming the benefit of Section 115BAE of the IT Act.

▪ **Form 3CEB**

- The CBDT has revised Form 3CEB and renumbered existing serial number 25 as 26 in Part C of Form 3CEB, to accommodate new serial number 25 which covers reporting requirements for transactions with persons claiming the benefit of concessional rate of tax under section 115BAE of the IT Act.
- This revision mandates the taxpayer claiming benefit under section 115BAE of the IT Act and the certifying accountant to report any specified domestic transaction which has resulted in more than ordinary profits expected to arise in such business.
- The clause requires reporting of the name of the person, description of the transaction, transaction value, arm's length price and the method used for determining the arm's length price.

▪ **Form 65**

Form 65 has been updated to include the following details in case the applicant company is a unit of an International Financial Services Centre (IFSC):

- Verification section to include the following: "I certify that the applicant company is a unit of an International Financial Services Centre and has filed the application within three months from the date on which the deduction under section 80LA of the Income-tax Act, 1961 is no longer applicable."
- Details of deduction claimed under section 80LA of the IT Act (pertaining to deductions in respect of certain incomes of Offshore Banking Units and IFSC).

[Notification No. 27/2024 dated 5 March 2024 read with Notification No. 34/2024 dated 19 March 2024]

India's Finance Ministry Invokes MFN Clause, Thereby Notifying Lower Tax Rate For Royalty And Fees For Technical Services Under India-Spain DTAA

To grant relief from double taxation, avoid double taxation and ensure a smooth exchange of information, the Government of India has entered Double Tax Avoidance Agreements (DTAA or Tax Treaty or Treaty) with several countries. Some of its DTAAs contain the Most Favoured Nation (MFN) clause. As per this clause, if India enters a DTAA on a later date with a third country which is an Organisation for Economic Co-operation and Development Member, providing a beneficial rate of tax or restrictive scope for taxation, a similar benefit will be available to the first country.

The CBDT vide had issued a clarificatory circular laying down the conditions that should be satisfied to avail the benefit of the MFN clause. One of the prescribed conditions is the issuance of a separate notification by India importing the benefits of the favourable DTAA into the DTAA with the first country. Recently, the Hon'ble Supreme Court of India has held that the MFN clause is not automatic, and that notification is required.

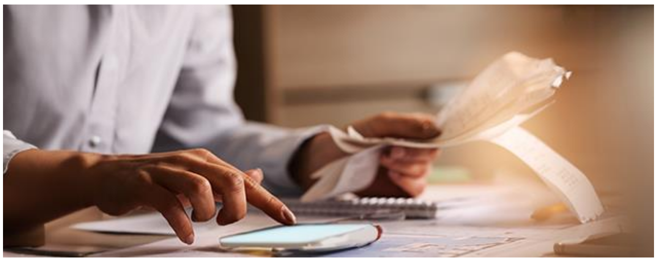
In the above backdrop, India's Ministry of Finance has recently issued a notification invoking the MFN clause to notify a lower tax rate for Royalty and Fees for Technical Services under the India-Spain DTAA. To read our detailed analysis, please go to https://www.bdo.in/en-gb/insights/alerts-updates/direct-tax-alert-india's-finance-ministry-invokes-mfn-clause,-thereby-notifying-lower-tax-rate

[Notification No. 33/2024, dated 19 March 2024]

CBDT Issues New Guidelines On Monetary Limits For Filing An Appeal By The Tax Officers

Section 268A of the IT Act grants power to the CBDT to issue orders, instructions or directions to tax authorities fixing monetary limits for filing appeals before the Tax Tribunal / High Court and Special Leave Petition / Appeals before the Supreme Court. With an overall objective to reduce litigation, the CBDT has issued circulars prescribing monetary limits, from time to time. Recently, CBDT has issued a circular under section 268A of the IT Act which shall supersede its earlier Circulars and CBDT's letter to provide detailed guidelines with respect to departmental appeals. To read our detailed analysis, please go to https://www.bdo.in/en-gb/insights/alerts-updates/cbdt-issues-new-guidelines-on-monetary-limits-for-filing-an-appeal-by-the-tax-officers

[Circular No. 5/2024 dated 15 March 2024]



CBDT Notifies That Payments Made To IFSC-Based Units Shall Not Be Subject To Tax Withholding

Recently, the CBDT has issued a notification exempting TDS compliances for specified payments made to certain IFSC units under section 197A(1F) read with section 80LA of the IT Act. This notification is effective from 1 April 2024. To read our detailed analysis, please go to https://www.bdo.in/en-gb/insights/alerts-updates/direct-tax-alert-cbdt-notifies-that-payments-made-to-ifsc-based-units-shall-not-be-subject-to-tax

[Notification No. S.O. 1135(E), dated 7 March 2024]

JUDICIAL UPDATES

Madras High Court Holds That Even If The Same Tax Officer Is In Jurisdiction For A Searched Person And Another Person, A Twelve-month Period Is To Be Counted From The Date Of Satisfactory Note By The Tax Officer Of The Searched Person

- For the relevant year under consideration, a search was conducted at the premises of the searched person. The search team seized a desktop PC and pen drive in which unaccounted transactions were maintained by the searched person which included details of various other persons for FY 2015-16 to 2018-19.
- Based on the material seized from the searched person and statements recorded from the accountant and director of the searched person, proceedings under section 153C[6] of the IT Act were initiated on other persons including the taxpayer (petitioners).
- It is pertinent to note that in most cases, the tax officer of the searched person and other persons (i.e. the petitioners) under section 153C of the IT Act are the same.
- Aggrieved by the assessment order issued under section 153C of the IT Act, the taxpayer filed a writ petition before the Madras High Court questioning the validity of the initiation of proceedings under section 153C of the IT Act and whether data stored in pen drive and software can be considered as books or books of accounts for the purpose of section 153C of the IT Act.
- Taxpayer contended that prior to the amendment in Section 2(12A) of the IT Act by Finance Act 2022, the definition of books or books of accounts did not include ledgers kept in electronic or digital forms in software applications. Hence, data stored in a pen drive/laptop/computer was not books or books of account for the purpose of Section 153C of the IT Act.
- Taxpayer also contended that when the tax officer of the searched person and other person is the same, it is sufficient for the tax officer to record in satisfaction note that documents seized from the searched person belonged to the other person and there is no requirement of transmitting documents so seized from the searched person.
- The Madras High Court made the following observations while ruling in favour of the tax authorities and dismissing the writ petition filed by the taxpayer:

Books or books of accounts for the purpose of the IT Act

- Taxpayer submitted that books or books of accounts will not include ledgers kept in electronic or digital forms in a software application. The software and pen drive seized do not satisfy the definition of books or books of accounts under section 2(12A) of the IT Act. Further, reliance on such data is in contravention of section 65B[7] of the Indian Evidence Act, 1872 (Indian Evidence Act).

  The Indian Evidence Act applies to all judicial proceedings in or before any Court. Assessment proceedings under the IT Act before a tax officer is a quasi-judicial proceeding before a quasi-judicial officer and not a judicial proceeding and hence provisions relating to special evidence under section 65B of the Indian Evidence Act are not relevant. Therefore, the reliance placed by taxpayers on various decisions[8] can be factually distinguished.
- Amendments made in section 2(12A) of the IT Act are clarificatory and retrospective. The definition of books or books of accounts is an inclusive definition and the insertion of the words “electronic form” *vide* Finance Act 2022 has been made keeping in mind the advancement of technology and its widespread utility in the daily conduct of business for maintaining books of accounts which is evident from Explanatory Notes.

Validity of proceedings under section 153C of the IT Act

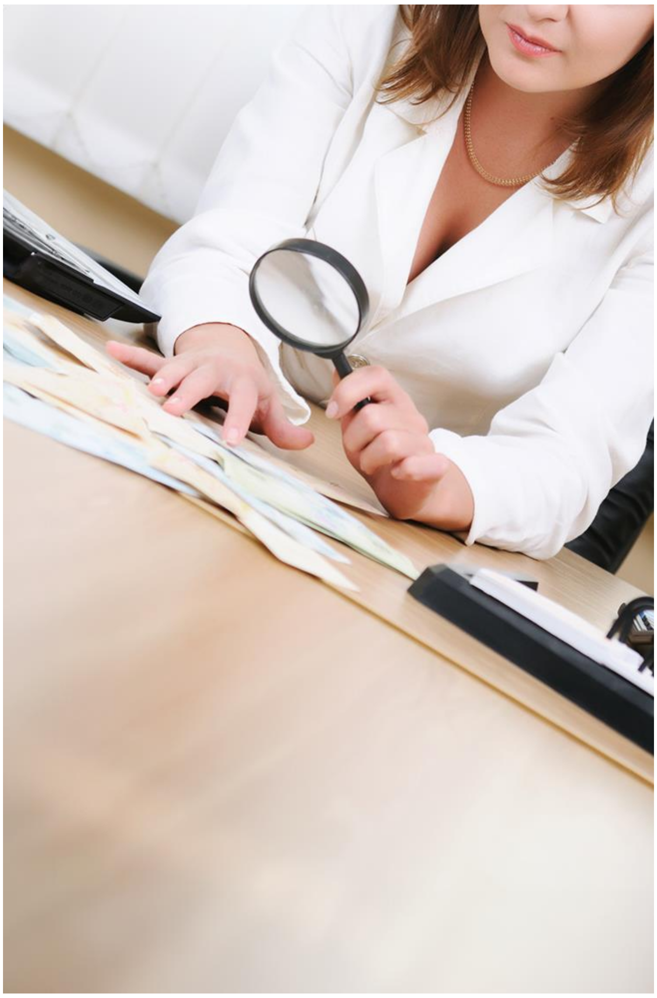
- Taxpayer by relying upon the Supreme Court decision in the case of Super Malls[9] contended that the time limit to pass order under section 153C read with third proviso to section 153B(1)[10] of the IT Act expired on 31 March 2022 (12 months from the end of the FY in which the search was conducted- November 2020). Since the tax officer for the searched person and other person were the same, limitations for either preparing “satisfaction note(s)” or completing the assessment proceedings will have to coincide with the period for completing the assessment of the searched person. Hence, the assessment orders passed under section 153C of the IT Act were beyond the time limit and ought to be issued up until 31 March 2022.
- There was no time limit prescribed for the issuance of satisfaction note(s) under section 153C of the IT Act. Supreme Court in the case of Calcutta Knitwears[11] laid down guidance in the context of Section 158BC[12] of the IT Act for time periods for preparation and issuance of the “satisfaction notes” which was also accepted by CBDT in Circular 24/2015 in the context of section 153C of the IT Act. The above time periods were relevant only for the preparation and issuance of “satisfaction note” under section 153C of the IT Act and not for purposes of computation of limitation for completing assessment proceedings and passing assessment orders under section 153C read with section 143(3) of the IT Act.
- The assessment of the searched person was completed on 31 March 2022 and thereafter the satisfaction notes of the tax officer of the searched person were made. Notices under section 153C of the IT Act in the case of the taxpayer, preceded satisfaction notes of the tax officer of the searched person followed by satisfaction notes of the tax officer and taxpayer. Thus, the last date for issuance of the satisfaction note(s) under section 153C of the IT Act for another person could be at the time of or along or during the course of

[6] Section 153C of the Act relates to assessment of income of any other person on whom search procedure was not carried out.
[7] Section 65B Evidence Act specifies the requirements for the admissibility of electronic records such as eSignatures & digital documents as evidence in legal proceedings.
[8] CIT vs. Vatika Township P. Ltd, 2014 AIR SCW 4674; K Sashidhar v. Indian Overseas Bank, AIR 2019 SC(C) 1170; Bhagat Ram Sharma vs, UOI, AIR 1988 SC 740; Vetrival Madras vs. ACIT [2021] 437 ITR 178 (Madras High Court)
[9] Super Malls (P) Ltd. vs. CIT, [2020] 4 SCC 581 (Supreme Court)
[10] The assessment or re-assessment in case of the “other person” is the later of three dates, namely:- (i) 12 months from the end of the FY in which the last of the authorisations for search under section 132 was made; or (ii) 12 months from the end of the FY in which the last of the authorisations for requisition under section 132-A was executed; or (iii) 12 months from the end of the FY in which books of account or documents or assests seized or requisitioned were handed over under section 153C to the tax officer having jurisdiction over such person, whichever is later.
[11] CIT-III vs. Calcutta Knitwears. Ludhiana [2014] 6 SCC 444 (Supreme Court)
[12] Where any search has been conducted under section 132 or books of account, other documents or assets are requisitioned under section 132A, in the case of any person, then the tax officer on determination of undisclosed income of the block period shall pass an order of assessment and determine the tax payable by him on the basis of such assessment.

assessment (or) immediately after passing of the assessment order of the "searched person" on 31 March 2022.

- As per the decision of the Supreme Court in the case of Abhisar Buildwell[13], the tax officer can reassess the "total income" after taking into consideration the incriminating material unearthed during the search and other material available to the tax officer.
- Therefore, once notices under section 153C of the IT Act were issued in time, and since the presence of incriminating material is the only requirement, the assessment had to be completed within the limitation period prescribed under the third proviso to section 153B(1) of the IT Act.
- It is only during the course of assessment proceedings of the searched person that the tax officer of the searched person will be in a position to establish the transaction which provides a link between the other person and the searched person. It is only thereafter that the satisfaction note(s) can be prepared to persuade the tax officer of the other person to initiate proceedings under section 153C of the IT Act.
- Even if the tax officer for the searched person and other person is the same, the date of satisfaction note is to be the deemed date of handing over of the books of account or documents or assets seized or requisitioned for computation of limitation. Thus, 12 months from the end of the FY from the date on which documents were handed over or deemed to have been handed over to the tax officer of the other person (taxpayer) would start running for computation of limitation from 31 March 2023.
- The decision of the Supreme Court in the case of Super Mall (supra) cannot be read to mean that where the tax officer of the searched person and other person are the same, the limitation for either preparing satisfaction note(s) or completing the assessment proceedings will have to coincide with the period for completing the assessment of the searched person.
- Even if the tax officer of the searched person and the other person are the same, it has to be construed that the officer concerned is wearing two different hats one as the tax officer of the searched person and one as the tax officer of the other person.
- Accordingly, merely because the tax officer of the searched person and other person is the same, *ipso facto* would not mean that the moment the documents were seized either by the investigating team or handed over to the tax officer for completing the assessment under section 153A of the IT Act, the limitation for completing the assessment in case of another person would start running under the third proviso to section 153B(1) of the IT Act.

[LKS Gold House Private Limited Vs DCIT (WP.Nos.11630, 11633, 11635 of 2023) (Madras HC)]



Mumbai Tax Tribunal Allows Us-Based FPI To Set Off Short-Term Capital Loss Against Short-Term Capital Gain Irrespective Of Different Tax Rates

Section 70 of the IT Act deals with set-off of loss under the same head of income, i.e., intra-head set-off of losses. Section 70(2) of the IT Act allows to set off Short-term Capital Loss (STCL) against the gains realised in respect of any other capital asset.

However, the option of setting off STCL with Short-term Capital Gains (STCG) particularly when these capital gains are subject to varying tax rates, has been a contentious issue subject to legal disputes.

In this regard, recently, the Mumbai Tax Tribunal has held that the STCL can be set off by the taxpayer against the STCG which is taxable at a higher rate. To read our detailed analysis, please go to https://www.bdo.in/en-gb/insights/alerts-updates/mumbai-tax-tribunal-allows-us-based-fpi-to-set-off-short-term-capital-loss-against-short-term-capita

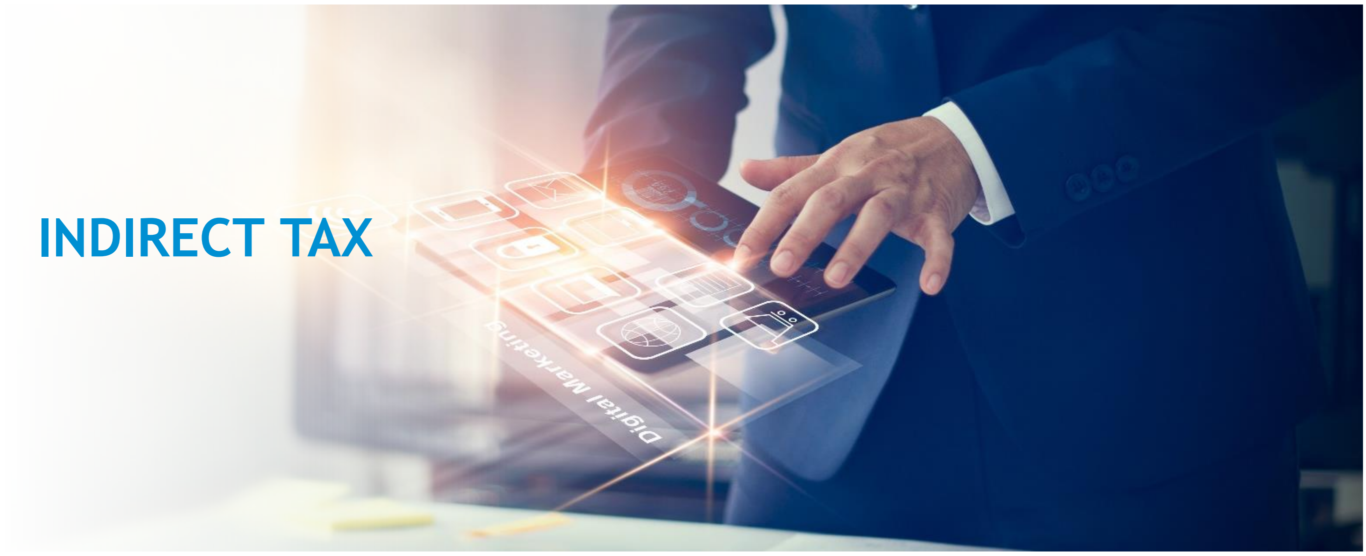
[JS Capital LLC Vs ACIT. [ITA No.3396/M/202] (Mumbai Tax Tribunal)]

[13] PCIT, Central- 3 vs. Abhisar Buildwell (P) Ltd. [2023] 454 ITR 212 (Supreme Court)

The Delhi Tax Tribunal Rejects The Concept Of Virtual Service PE And Emphasises On Physical Presence Of Employees In The Source State For The Constitution Of Service PE

One of the significant concepts in the international tax arena is that of a Permanent Establishment (PE) through which source countries can tax profits earned by non-resident entities from the business activities carried out by the non-resident in the source country. As per Article 5 of the Double Taxation Avoidance Agreement (DTAA) entered by India with other countries, a foreign enterprise would be considered to have a PE in India if it has a fixed place of business in India or carries out a business in India through Construction PE or Agency PE. Further, certain DTAAs also provide for a 'Service PE' which is established if (i) the non-resident provides services for a period longer than the prescribed threshold for instance 90 days (ii) the said services are provided in the source country through the employees or other personnel of the non-resident. Traditionally, a Service PE requires the physical presence of employees of the non-resident in the source country. However, with the advent of the digital economy, this understanding is being challenged as jurisdictions have started doing away with this requirement. For instance, Saudi Arabia, Israel and Kuwait have passed internal guidelines that suggest a non-resident will have a Service PE if it provides services, including consulting services, through employees or other personnel who are offshore and not physically present in the Source State. In this regard, recently the Delhi Tax Tribunal examined whether the condition of the physical presence of employees or other personnel of a foreign enterprise in India is necessary to constitute a Service PE as per Article 5(6) of India-Singapore DTAA or it will get attracted even if the services are provided remotely. To read our detailed analysis, please go to https://www.bdo.in/en-gb/insights/alerts-updates/delhi-tax-tribunal-rejects-the-concept-of-virtual-service-pe-and-emphasises-on-physical-presence-of

[Clifford Chance PTE Ltd Vs ACIT SA No. 437/Del/2023 (Delhi Tax Tribunal)]



INDIRECT TAX

Mere Sole Distributor Relationship Cannot Classify Two Parties As 'Related Persons'

Facts of the case

- Page Industries (Taxpayer) is the sole distributor/trader of the products of the brand owned by M/s Jockey International, USA (Jockey) and Speedo International, UK (Speedo). Further, the Taxpayer is engaged in sole trading of imported goods having exclusive franchise rights.
- The Taxpayer entered into the following Trade Mark License Agreements for which, it was liable to pay 'Royalty' to Jockey and Speedo (as the case may be):
  - Agreement with Jockey for the products manufactured by the Taxpayer; and
  - Agreement with Speedo for both licensed and distributed products which are imported and sold by the Taxpayer.
- The Taxpayer imported finished products from Jockey and Speedo in respect of which, the Tax Authorities while assessing the applicable customs duty on the imported goods issued a Show Cause Notice (SCN) alleging that –
  - The Taxpayer and the supplier of goods are related persons
  - The royalty and the costs of the advertisements incurred by the Taxpayer are required to be added to the transaction value of imported goods in terms of Rules 10(1)(c) and 10 (1)(e) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 2007 (CVR)
  - The Taxpayer is liable for payment of differential customs duty on such products.
- The Order-in-Original (OIO) confirmed the demand of the differential customs duty along with interest, redemption fine and penalty.
- Aggrieved by the above, the Taxpayer filed an appeal before CESTAT.

Facts of the case

- With respect to royalty paid to Jockey and Speedo (import of services), the Taxpayer has already discharged applicable IGST liability under the Reverse Charge Mechanism. Consequently, the addition of royalty to the assessable value of imported goods would result in double taxation.
- As regards invocation of Rule 10 of the CVR, the Tax Authorities have not brought any evidence on record to substantiate that there were contemporaneous sales/transactions at a higher price. As per the principle laid down by the Supreme Court ***in CC (Imports), Mumbai Vs. Bayer Corp Science Ltd. [2015 (324) ELT 17 (SC)]***, the Tax Authorities must give cogent reasons before rejecting the transaction value.
- The value of royalty can be included in the assessable value of imported goods only if:-
  - Royalty is directly related to the imported goods
  - Royalty is paid by the buyer directly or indirectly to the seller
  - Royalty is payable as a condition of the sale of the imported goods; and
  - Royalty is not included in the value of the imported goods.
- If the trade mark is owned by a third person, then the payment for the imported goods and for the trade mark used in the country of importation are separate. Accordingly, the 'condition of sale' test is not satisfied in such instances.

- As regards the agreement with Jockey, the royalty is payable only on the New Sale of Licensed Products whereas the raw materials are imported by the Taxpayer from suppliers who have no relationship with Jockey and the same are then used for manufacturing the Licensed Products. In the absence of a nexus between the royalty paid and the imported products, the royalty paid to Jockey cannot be added to the assessable value of imported goods.
- Similarly, in respect of the agreement with Speedo, the royalty is payable on the Licensed Products that are manufactured by or on behalf of the Taxpayer. On the other hand, the Taxpayer imports other products i.e., 'Distributed Products' bearing the Trade Marks of Speedo as are purchased from Speedo or any other approved source which are not related to the manufacturing activity.
- As regards the inclusion of the advertisement cost to the assessable value of imported goods, the same is unsustainable because:
  - The advertisement costs are voluntarily incurred by the Taxpayer given its scale of business.
  - The requirement of the minimum advertisement expenditure to be incurred by the Taxpayer as per the Trade Mark License Agreement has been waived off by Jockey since 2005.
- Reliance was placed on ***Indo Rubber & Plastics Works Vs. CC, New Delhi [2020 (273) ELT 250 (Tri.-Del.)]*** and ***CC, New Delhi Vs. Adidas India Marketing Pvt. Ltd. [2020 (373) ELT 394 (Tri.-Del.)]***.

Contentions of the Tax Authorities

- In terms of the agreements, the Taxpayer is liable to pay royalties and incur advertising expenditures. Such amounts are liable to be added to the assessable value of imported goods in terms of Section 14 of the Customs Act, 1962 (Customs Act) read with Rule 10 of the CVR because the same is a condition for the sale of imported goods.
- Reliance was placed on ***Matsushita Television & Audio (I) Ltd. Vs. CC [2007 (211) ELT 200 (SC)]*** and ***Reebok India Company Vs. CC [2018 (364) ELT 581 (Tri.-Del.)]***.

Observations and Ruling by CESTAT, Bangalore

- On perusal of the agreement with Speedo, there is a clear distinction between the Licensed Products (manufactured by the Taxpayer) and the Distributed Products (imported by the Taxpayer). Royalty is payable on the manufacture of Licensed Products and hence, the question of the addition of royalty to the assessable value of the imported goods (i.e., Distributed Products) is unsustainable in law.
- In terms of the principle laid down by the Supreme Court in ***Bayer Corp Science Ltd. (supra),*** a sole distributor would be treated as a 'related person' only if it falls within the criteria laid down in Rule 2(2) of the CVR. Thus, mere sole distributorship is not a conclusive consideration. It must also be established that the case falls in one of the clauses of Rule 2(2) of the CVR. In the OIO, there is no admissible evidence to conclude that the Taxpayer and the supplier of goods are related persons.
- Similarly, as regards the agreement with Jockey, it appears that royalty is being paid on the final products which are manufactured and cleared by the Taxpayer under the brand name Jockey. On the other hand, the Taxpayer is importing raw materials for its onward use in the manufacture of such final products. Hence, the Taxpayer's contention for non-inclusion of the royalty to the assessable value of imported goods is justified. Merely because the imported goods are contained in finished goods, it cannot be said that the royalty is related to them (See ***CC Vs. Ferodo India Pvt. Ltd. [2008 (224) ELT 23 (SC)])***.
- As regards the inclusion of the advertisement expenses, Rule 10(1)(e) of the CVR provides for the addition of all other payments made or to be made as a condition of the sale of imported goods, by the buyer to the seller/ third party to satisfy an obligation of the seller, to the extent such payments are not included in the transaction value. In the present case, there is a total absence of the prescribed condition as the Taxpayer is not obliged to incur any particular amount or percentage of the invoice value towards sales promotion/ advertisement.
- In the present case, the advertisement and sales promotion is a post-import activity carried out by the Taxpayer on its account and not towards the discharge of its obligation under the terms of sale. Accordingly, the advertisement costs incurred by the Taxpayer are not required to be included in the assessable value of imported goods under Rule 10(1)(e) of the CVR.
- In view of the above, the Appeals filed by the Taxpayer was allowed by holding that –
  - The Taxpayer and Jockey / Speedo are not 'related persons' as their relationship is on a principal-to-principal basis. Mere 'sole distributor' would not make them related parties under the Customs Act or CVR.
  - The taxpayer has imported goods from unrelated suppliers who have nothing to do with Jockey. Further, as regards the agreement with Speedo, the Distributed Products have nothing to do with the Licensed Products as far as royalty is concerned.
  - The issue being one of interpretation, there is nothing on record to prove wilful suppression of facts, and therefore, an extended period of limitation is not justified.

    [Page Industries Vs. Commissioner of Customs [TS-107-CESTAT-2024-CUST]]

Mere Sole Distributor Relationship Cannot Classify Two Parties As 'Related Persons'

Facts of the case

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- The Taxpayer imported finished products from Jockey and Speedo in respect of which, the Tax Authorities while assessing the applicable customs duty on the imported goods issued a Show Cause Notice (SCN) alleging that –
  - The Taxpayer and the supplier of goods are related persons
  - The royalty and the costs of the advertisements incurred by the Taxpayer are required to be added to the transaction value of imported goods in terms of Rules 10(1)(c) and 10 (1)(e) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 2007 (CVR)
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- The Order-in-Original (OIO) confirmed the demand of the differential customs duty along with interest, redemption fine and penalty.
- Aggrieved by the above, the Taxpayer filed an appeal before CESTAT.

Contentions of the Taxpayer

- With respect to royalty paid to Jockey and Speedo (import of services), the Taxpayer has already discharged applicable IGST liability under the Reverse Charge Mechanism. Consequently, the addition of royalty to the assessable value of imported goods would result in double taxation.
- As regards invocation of Rule 10 of the CVR, the Tax Authorities have not brought any evidence on record to substantiate that there were contemporaneous sales/ transactions at a higher price. As per the principle laid down by the Supreme Court in ***CC (Imports), Mumbai Vs. Bayer Corp Science Ltd. [2015 (324) ELT 17 (SC)]***, the Tax Authorities must give cogent reasons before rejecting the transaction value.
- The value of royalty can be included in the assessable value of imported goods only if:-
  - Royalty is directly related to the imported goods
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- If the trade mark is owned by a third person, then the payment for the imported goods and for the trade mark used in the country of importation are separate. Accordingly, the 'condition of sale' test is not satisfied in such instances.
- As regards the agreement with Jockey, the royalty is payable only on the New Sale of Licensed Products whereas the raw materials are imported by the Taxpayer from suppliers who have no relationship with Jockey and the same are then used for manufacturing the Licensed Products. In the absence of a nexus between the royalty paid and the imported products, the royalty paid to Jockey cannot be added to the assessable value of imported goods.
- Similarly, in respect of the agreement with Speedo, the royalty is payable on the Licensed Products that are manufactured by or on behalf of the Taxpayer. On the other hand, the Taxpayer imports other products i.e., 'Distributed Products' bearing the Trade Marks of Speedo as are purchased from Speedo or any other approved source which are not related to the manufacturing activity.
- As regards the inclusion of the advertisement cost to the assessable value of imported goods, the same is unsustainable because:
  - The advertisement costs are voluntarily incurred by the Taxpayer given its scale of business.
  - The requirement of the minimum advertisement expenditure to be incurred by the Taxpayer as per the Trade Mark License Agreement has been waived off by Jockey since 2005.
- Reliance was placed on ***Indo Rubber & Plastics Works Vs. CC, New Delhi [2020 (273) ELT 250 (Tri.-Del.)]*** and ***CC, New Delhi Vs. Adidas India Marketing Pvt. Ltd. [2020 (373) ELT 394 (Tri.-Del.)]***.

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- In terms of the principle laid down by the Supreme Court in ***Bayer Corp Science Ltd. (supra),*** a sole distributor would be treated as a 'related person' only if it falls within the criteria laid down in Rule 2(2) of the CVR. Thus, mere sole distributorship is not a conclusive consideration. It must also be established that the case falls in one of the clauses of Rule 2(2) of the CVR. In the OIO, there is no admissible evidence to conclude that the Taxpayer and the supplier of goods are related persons.
- Similarly, as regards the agreement with Jockey, it appears that royalty is being paid on the final products which are manufactured and cleared by the Taxpayer under the brand name Jockey. On the other hand, the Taxpayer is importing raw materials for its onward use in the manufacture of such final products. Hence, the Taxpayer's contention for non-inclusion of the royalty to the assessable value of imported goods is justified. Merely because the imported goods are contained in finished goods, it cannot be said that the royalty is related to them (See ***CC Vs. Ferodo India Pvt. Ltd. [2008 (224) ELT 23 (SC)]***).
- As regards the inclusion of the advertisement expenses, Rule 10(1)(e) of the CVR provides for the addition of all other payments made or to be made as a condition of the sale of imported goods, by the buyer to the seller/ third party to satisfy an obligation of the seller, to the extent such payments are not included in the transaction value. In the present case, there is a total absence of the prescribed condition as the Taxpayer is not obliged to incur any particular amount or percentage of the invoice value towards sales promotion/ advertisement.
- In the present case, the advertisement and sales promotion is a post-import activity carried out by the Taxpayer on its account and not towards the discharge of its obligation under the terms of sale. Accordingly, the advertisement costs incurred by the Taxpayer are not required to be included in the assessable value of imported goods under Rule 10(1)(e) of the CVR.
- In view of the above, the Appeals filed by the Taxpayer was allowed by holding that –
  - The Taxpayer and Jockey / Speedo are not 'related persons' as their relationship is on a principal-to-principal basis. Mere 'sole distributor' would not make them related parties under the Customs Act or CVR.
  - The taxpayer has imported goods from unrelated suppliers who have nothing to do with Jockey. Further, as regards the agreement with Speedo, the Distributed Products have nothing to do with the Licensed Products as far as royalty is concerned.
  - The issue being one of interpretation, there is nothing on record to prove wilful suppression of facts, and therefore, an extended period of limitation is not justified.

[Page Industries Vs. Commissioner of Customs [TS-107-CESTAT-2024-CUST]]

Proceedings Cannot Be Initiated Without Proper Evidence

Facts of the case

- Coronation Group of Companies (Naya Carnation Fireworks, Sri Cornation Fireworks Pvt. Ltd., Bee Cee Fireworks Industries and The Coronation Fireworks Factory) (Taxpayer) are *inter alia* engaged in manufacturing and clearing fireworks falling under Chapter Heading 3604 of the Central Excise Tariff Act, 1985
- An intelligence from the Directorate General of Goods and Service Tax Intelligence (DGGI) indicated that the Taxpayer is *inter alia* involved in evasion of Central Excise Duty on clearance of fireworks/crackers by receiving the part of consideration/sales proceeds in cash by various means including receiving commission through agents/conduits/local hawala brokers. The amounts received in cash by the Taxpayer did not form part of the transaction / dutiable value in the bills/invoices issued by them and hence, escaped excise duty
- Simultaneous search operations were conducted, during which, the Tax Authorities recovered various incriminating documents, records, electronic gadgets and which were seized by following the procedure under Section 36B of the Central Excise Act, 1944 (CE Act) for retrieving data under Mahazar proceedings, on the reasonable belief that the same would be useful for further investigation
- The aforesaid documents were stored in external hard discs for further investigation and the seized electronic gadgets were sealed once again after retrieving the data in the presence of the owners of the electronic gadgets and independent witnesses. Further statements were also recorded by the Tax Authorities. The scrutiny of the details in the documents, electronic gadgets and statements revealed that -
  - Taxpayer cleared goods to various buyers at an invoice value which was lower than the MRP as well as the actual transaction value
  - Actual transaction value was arrived by DGGI by adding the value declared in the invoice and the cash amount receivable/received as maintained in another ledger/record by Shri. Saravanan.
- The aforesaid modus operandi was admitted by Shri. Saravanan in the statements deposed before the Tax Authorities. However, the same was subsequently retracted
- On comparison of the ER-1 returns with the value of invoices as recovered from their billing software, it was observed that the Taxpayer had short-declared the assessable value of excisable goods in their monthly returns
- Consequently, SCN was issued to the Taxpayer seeking recovery of the excise duty short-paid by the Taxpayer along with interest and penalty. The demand proposed in the aforesaid SCN was confirmed by the Tax Authorities vide the Order-in-Original (Impugned Order)
- Aggrieved by the above, the Taxpayer filed an appeal before CESTAT.

Contentions of the Taxpayer

- The origin of the present proceedings is based on the following investigation conducted against M/s. Standard Fireworks Pvt. Ltd., Sivakasi (SFW) by the DGGI:
  - In October 2017, the Tax Authorities while conducting an investigation against SFW recovered electronic evidence viz., a laptop and pen drive from the premises of M/s. SVPNSN Balshivaji & Co. (Bala).
  - Subsequently, statements were recorded from Shri. B. Saravanan (Proprietor of Bala) and Shri. B. Thirumani Selvan (employee of Bala).
  - During cross-examination, Shri. B. Saravanan and Shri. B. Thirumani Selvan disowned the electronic evidence and contents thereof.
- The electronic evidence (laptop and pen drive) relied upon by the Tax Authorities is not only third-party evidence but also recovered in completely alien proceedings against another company viz., SFW. Such evidence cannot be relied upon against the Taxpayer to hold them liable for demand of duty and that too in the absence of any direct evidence.
- The contention of the Tax Authorities that since the aforesaid electronic evidence was recovered against a proceeding which was settled under the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 (SVLDR Scheme), the same must be treated as compliance with Section 36B of the CE Act, is not only patently illegal but also against the spirit of the SVLDR Scheme.
- There is an apparent contradiction in the Impugned Order as under—
  - On one hand, the Tax Authority holds that the electronic evidence relied upon in the present proceedings is only the laptop and pen drive and not mobile phones.
  - However, on the other hand, the tax authority has proceeded to conclude that WhatsApp chats can be used as evidence as they are virtual and verbal communications.
- No efforts were made by the Tax Authority to prove the contents of messages either by evidence-in-chief or by cross-examination. Instead, the Taxpayer had dislodged the basic evidentiary value of the electronic evidence both by referring to Section 36B of the CE Act as well as Section 65B of the Indian Evidence Act, 1872 (IE Act). Reliance was also placed on the Supreme Court ruling in ***Ambalal Sarabhai Enterprises Vs. KS Infraspace LLP Ltd.*** and ***Anr. [CA Nos. 9347 to 9349 of 2019]***.
- Despite specific requests, the Tax Authorities had not provided the documents relating to the original retrieval of data from the laptop at the Government Forensic Laboratory. Thus, the relied upon documents viz., data from the electronic devices are inadmissible in the present proceedings.
- Although there were around 200 dealers of the Taxpayer, the statements of only two dealers were relied upon, one of whom had deposed that the transactions with the Taxpayer were made only in 2018 and not during the period of the dispute. Hence, such

statements cannot be the basis for the quantification of duty.

- Further, the depositions made by Shri B Saravanan, which were alleged by the Tax Authorities to be "consistently inconsistent and unreliable right through the proceeding", were relied upon in the Impugned Order and thereby proceeded on a suit-to-the-glove convenience, even though:
  - Shri B. Saravanan is a third party to the present proceedings
  - During cross-examination, Shri. B. Saravanan had retracted his statements stating that the same were given under the fear of arrest
  - While the Tax Authorities could have examined Shri. B. Saravanan during cross-examination proceedings, no efforts were made by them and hence, the Tax Authorities cannot discard/ dismiss such retraction during adjudication.
- The electronic evidence in the present proceedings was neither legally retrieved nor corroborated with any of the dealers.
- Further, the manner in which the demand has been quantified has not been provided to the Taxpayer and hence, the same is impermissible both legally and logically.

Contentions of the Tax Authorities

- The data from the electronic devices were retrieved under Mahazar proceedings by following the due procedures provided under the law viz., Section 36B of the CE Act, Section 65B of the IE Act and the Information Technology Act, 2000. The data was stored in the external hard discs for further investigation and the electronic devices were sealed once again after retrieving the data from them in the presence of the owners of the electronic devices and independent witnesses.
- Further, the cross-examination by the Taxpayer (of persons whose statements were relied upon) was also permitted by the Tax Authorities.
- The findings in the Impugned Order are elaborate and supported by various statements. Though inconsistent, when finally opposed with evidence, the directors as well as Shri B. Saravanan have admitted to the cash receipts over and above the invoice value.
- Although a feeble attempt is made to deny the earlier admissions, such retraction being made after a lengthy passage of time, cannot be considered as a valid retraction.
- Thus, it is clear that the cash receipts mentioned in various evidence including electronic evidence correspond to the undervaluation of excisable goods manufactured and cleared by the Taxpayer as it relates to the relevant period. Hence, it can be construed that the said under-valuation has escaped payment of Central Excise duty.
- The Taxpayers have deliberately violated the provisions of the CE Act while assessing their duty liability, and thereby have intentionally evaded the payment of Central Excise duty.

Observations and Ruling by CESTAT, Bangalore

- The pen drive and laptop were recovered during the 2017 proceedings from the premises of Bala in October 2017 wherein the Taxpayer or their representatives were not present. Thus, the Taxpayer had no occasion to know anything about such investigation, search or recovery of documents considering that they were not co-noticee in the 2017 proceedings.
- In the present proceedings (in 2020), though a laptop, 2 CPUs, mobile phones, etc. were recovered during a search at the Taxpayer's premises, none of these evidences were relied upon by the Tax Authorities for establishing the allegations against the Taxpayer. Instead, the Impugned Order relies upon the electronic evidence seized during the 2017 proceedings.
- The electronic evidence seized during the 2017 proceedings was sealed by the Tax Authorities. After such seizure and recording of evidence during the 2017 proceedings, an SCN was issued to SFW and various other noticees. Subsequently, these noticees opted for the SVLDR Scheme and consequently, the 2017 proceedings were concluded/closed. Despite this, it appears that the Tax Authorities have opened the aforesaid sealed evidence again to view and retrieve the data. The evidence gathered in a case loses relevance as to whether it is kept safe and sealed when the case is concluded.
- In the case of electronic evidence, the law prescribes certain conditions to be complied with at the time of recovery as well as retrieval of data. This is because it is easy to interfere with the data contained in electronic items. The data contained in electronic items cannot be reused in a subsequent investigation without obtaining permission from a higher authority or a court.
- In the present case, there is no evidence that Tax Authorities had occasion to again open and view the data contained in the electronic evidence seized in the 2017 proceedings after 3 years. Further, the manner in which the data contained in the aforesaid evidence was retrieved for the purpose of adopting the same to the present proceedings is not available.
- There does not exist any Mahazar which is a record for retrieving the data from the electronic items seized during the 2020 proceedings. Thus, the data retrieved during the present proceedings pertains to the evidence already opened and examined and the data was already retrieved during the 2017 proceedings.
- Since the Taxpayer was not a party to the 2017 proceedings, he was not supplied with a copy of Mahazar proceedings for retrieval of data from the electronic devices seized during the 2017 proceedings. Consequently, in the present proceedings, the Taxpayer has been provided with a copy of the 2017 Mahazar and the copies of the retrieved data.
- As regards the procedure adopted by the Tax Authorities as summarised in the 2020 Mahazar, it appears that one copy of the retrieved data i.e., Master-Copy is supposed to be sealed and kept in safe custody. Accordingly, there ought to be a Mahazar recorded in the presence of independent witnesses and parties of the present proceedings for opening the sealed Master Copy of the

electronic evidence seized during the 2017 proceedings. However, no clarification has been provided as to the existence of the Master Copy, the officer who was in custody of such copy and the details of the officer who opened and examined the same for the second time. This casts heavy doubt on the evidentiary value of the data retrieved from the electronic evidence seized during the 2017 proceedings.

- **Compliance with Section 36B of the CE Act:**
  - A certificate must be made to the effect that such computer/laptop/pen drive during the material period was operating properly, was ordinarily being used in the course of business, being supplied with information, etc.
  - In the present case, no such certificate was issued in respect of the electronic evidence seized during the 2017 proceedings. Hence, it is not possible to hold that the data retrieved from such electronic items is admissible in evidence. More so, because the said evidence is the only document relied upon by the tax authorities for confirmation of demand.
  - Supreme Court in ***Anvar P. V. Vs. P. K. Basheer [2017 (352) ELT 416 (SC)]*** examined the admissibility of electronic evidence and held that unless accompanied by a certificate (for data retrieval), printouts from the electronic evidence are not admissible as evidence.
  - Since the laptop and pen drive were not seized from the Taxpayer and were seized during the 2017 proceedings, the evidence is nothing but third-party documents *qua* the Taxpayer. Hence, the same is not admissible/ acceptable in evidence.
  - Further, the application which was filed by Shri B. Saravanan under the SVLDR Scheme cannot be construed by the tax authority as the admission of liability. Hence, the same would not suffice for compliance with Section 36B of the CE Act.
- The entire investigation is in a sceptical manner which lacks credibility. Though a huge number of mobile phones were seized and data was retrieved from them, the same was not relied upon by the tax authority. Apart from the electronic evidence (seized in 2017 proceedings) and the retracted statements, there is no evidence to establish undervaluation. Hence, the tax authorities have miserably failed to establish the allegation of undervaluation. Considering the above, the Impugned Order is set aside.

  [Naya Carnation Fireworks Vs. The Commissioner of GST & Central Excise [TS-112-CESTAT-2024-EXC]]

Eligibility Of CENVAT Credit Distributed By Input Service Distributor Cannot Be Disputed *Qua* A Recipient Unit

Facts of the case

- M/s. Nalco Water India Limited (Taxpayer), a registered person under the CE Act, is *inter alia* engaged in the manufacture of water treatment chemicals and processed chemicals. Further, the Taxpayer's Head Office situated in Pune, has obtained registration as an Input Service Distributor (ISD) under the Finance Act, 1994.
- Accordingly, with respect to input services procured by the head office, the corresponding Service tax credit was availed and consequently, distributed by the ISD unit to all the units (including the Taxpayer's manufacturing unit) as per Rule 7 of the CENVAT Credit Rules, 2004 (CCR) under the cover of ISD invoice issued by the head office. Basis such ISD invoice, the Taxpayer's manufacturing unit had availed CENVAT Credit of Service tax distributed by the head office.
- During the period from 1 April 2011 to 30 June 2017, the Tax Authorities had sought to deny CENVAT Credit availed by the Taxpayer's manufacturing unit on such ISD invoices. Accordingly, an SCN was issued, and the demand proposed in the same was confirmed by the Tax Authorities vide the Order-in-Original.
- Against this, the Taxpayer's manufacturing unit had filed an appeal before CESTAT wherein the matter was remanded back to the adjudicating authority on the ground that the Tax Authorities had issued the said order without considering the earlier Orders-in-Original (for the period from April 2008 to August 2014).
- In remand proceedings, the matter was adjudicated again and the CENVAT Credit was denied by the Tax Authorities *vide* the Impugned Order.
- Aggrieved by the above, the Taxpayer filed an appeal before CESTAT.

Contentions of the Taxpayer

- The eligibility of 'input service' is to be seen by the ISD only and the Taxpayer's manufacturing unit has no role as it is receiving the invoices issued by the head office showing their proportionate share of eligible CENVAT Credit.
- Thus, the Tax Authority can merely examine whether the documents basis which CENVAT Credit is availed by the Taxpayer's manufacturing unit is correct or proper. The Tax Authority does not have jurisdiction to adjudicate the correctness of the credits distributed by ISD. Thus, the Impugned Order is beyond the jurisdiction of the Tax Authority.
- Reliance in this regard was placed on various judicial precedents *inter alia* including ***Balakrishna Industries Ltd. Vs. Commissioner of Central Excise, Jaipur [2015 (39) STR 861 (Tri.-Del.)]*** wherein it was observed in the context of similar services as being used in relation to the manufacture of final products and hence, covered under the purview of 'input service'[1].

Contentions of the Tax Authorities

- The services on which the head office had distributed the input service credit to the Taxpayer's manufacturing unit are not 'input services' and hence, the Taxpayer cannot avail of CENVAT Credit.
- Reliance in this regard was placed on ***Mahindra & Mahindra Ltd. Vs Commissioner of Service Tax, Mumbai [2017 (7) TMI 167 – CESTAT, Mumbai] and ACER India Pvt. Ltd. Vs. Commissioner of Central Excise [2023 (11) TMI 720 – CESTAT, Chennai]***.

Observations and Ruling by CESTAT

- In the present case, the head office is distributing the input service credit to the Taxpayer's manufacturing unit as per Rule 7 of the CCR. Accordingly, the contention of the Tax Authorities that the Taxpayer's manufacturing unit is not entitled to take CENVAT Credit is unsustainable. CENVAT Credit has been rightly claimed on the ISD invoices issued by the head office.
- If the Tax Authorities seek to deny the availment of CENVAT Credit, the same can only be done *qua* the head office which is registered as ISD. Since no investigation is done at the end of the ISD for distributing ineligible CENVAT Credit to the Taxpayer's manufacturing unit, CENVAT Credit cannot be sought to be denied to such recipient unit.
- The judicial precedents relied upon by the Tax Authorities are distinguishable on facts. Further, in *Balakrishna Industries Ltd. (supra)*, the eligibility of CENVAT Credit in respect of all the services in question (on which the head office has availed and distributed credit to the Taxpayer's manufacturing unit) has been answered in the affirmative.
- Considering the above, CENVAT Credit cannot be denied and recovered from the Taxpayer's manufacturing unit. In fact, the said unit has rightly availed CENVAT Credit based on the ISD invoices issued by the head office in terms of Rules 7 and 9 of the CCR.
- In view of the above, the Impugned Order is set aside.

[M/s. Nalco Water India Limited Vs. Commissioner of CGST & Excise, Howrah [TS-97-CESTAT-2024-EXC]]

[1] Editors Note: While the ruling (at Para 3.1) refers to the term 'input', we believe that the same ought to be read as 'input services'.

TRANSFER PRICING

Hon'ble Tax Tribunal, Mumbai: Holds Issuance Of Comfort Letter By The Taxpayer Constitutes An International Transaction, Given The Same Was Recognised As A Contingent Liability In The Taxpayer's Books Of Accounts And Thereby Has A Bearing On The Assets Of The Taxpayer. However, It Was Also Held That The Issuance Of A Comfort Letter Cannot Be Squarely Compared With The Provision Of A Corporate Guarantee.

The taxpayer is engaged in the business of manufacturing paints and enamels. During AY 2012-13, the taxpayer issued non-contractual comfort letters to third-party banks on behalf of 2 associated enterprises (AEs) located in Bangladesh and Singapore, without charging any consideration in this regard.

The TPO observed from Form No. 3CEB that the taxpayer had not reported the issuance of comfort letters therein and contended that disclosure should have been made as these were international transactions for which a fee should have been charged.

The taxpayer's stance was that issuing comfort letters cannot be regarded as an international transaction as:

- No financial/ legal obligation is undertaken basis the comfort letters to bear the costs of loan repayment in case of any default on the part of the AEs.
- The loans granted by the banks are against the security of the respective AEs' debts/ receivables.
- A similar issue had already been settled in the taxpayer's favour for prior AYs 2010-11 and 2011-12, wherein the coordinate bench of the Hon'ble Tax Tribunal held that the provision of support letter does not create any liability on the taxpayer in the event of default and cannot be considered as an international transaction within the purview of section 92B of the Income-tax Act, 1961 (the Act).

The TPO disregarded the taxpayer's contentions and held that issuance of a support letter is an international transaction (on lines of an intergroup service) and considering the similarity to the issuance of a corporate guarantee, the ALP fee to be charged in this regard was determined at 0.50% (i.e., 50% of 1% fee charged in case of corporate guarantees issued by the taxpayer).

On the taxpayer's appeal before the Commissioner of Income-tax (Appeals) [CIT(A)], the CIT(A) followed its predecessor's order in the taxpayer's own case of earlier years, and while considering the issuance of comfort letters as an international transaction, it restricted the ALP to 0.04%.

Both the taxpayer and the Department were in appeal before the Hon'ble Tax Tribunal. The critical issues involved were considered by the Hon'ble Tax Tribunal and the following observations were made:

- In order to constitute an international transaction, at least one of the transacting entities must be a non-resident and the transaction should, inter alia, have an impact on the profits, income, losses, or assets of such enterprises. In this case:
  - The first condition is self-evident; and
  - The taxpayer had disclosed the letters of comfort in its financial statements under "contingent liabilities and commitments". Thus, the taxpayer has not only considered corporate guarantees but also the comfort letters as a contingent liability. This means that the aforesaid letters have a bearing on the taxpayer's assets and accordingly, the second condition is also satisfied thereby constituting an international transaction under section 92B of the Act.

- There are no merits in the taxpayer's argument that it is not financially obligated to bear the cost of repayment of loans as the taxpayer *suo-moto* considered the credit facility as its contingent liability and no material was brought on record to controvert this disclosure.
- Reliance cannot be placed on the earlier decision of the Hon'ble Tax Tribunal's coordinate bench in this case, as in the present case, the taxpayer treated the liability as a contingent liability in its audited books of accounts. Therefore, the case under consideration is different from the earlier cases referenced by the taxpayer.
- The CIT(A) rightly reduced the ALP for issuance of comfort letters to 0.04% (20% of 0.20%) in conjunction with the reduction of ALP for issuance of corporate guarantees to 0.20% (20% of 1.00%).

Thus, while the Hon'ble Tax Tribunal adjudicated that issuance of a comfort letter constitutes an international transaction, the taxpayer's argument regarding corporate guarantee not being directly comparable to a comfort letter was upheld and reduced ALP determined by CIT(A) was considered.

Citation: Asian Paints Limited v/s ACIT (I.T.A. no. 5363/Mum/2017) & ACIT v/s Asian Paints Limited (I.T.A. no. 5934/Mum/2017)

Hon'ble Tax Tribunal, Kolkata: Holds Limitation Period U/S 144C (13) Is To Be Considered From DRP's Directions And Not From TPO's Order Giving Effect To The DRP's Directions, Quashes Assessment Orders

The taxpayer is engaged in the export of iron ore. In relation to AY 2011-12, reference was made to the TPO by the AO pertaining to certain international transactions undertaken by the taxpayer.

The chronology of subsequent events was as follows:

- The TPO proposed a Transfer Pricing (TP) adjustment, the basis on which the AO passed a Draft Assessment Order (DAO) dated 24 October 2017 making adjustments to the total income.
- The taxpayer duly filed objections against the DAO within 30 days of receipt of the same.
- The Dispute Resolution Panel (DRP) passed its directions on 25 September 2018, which were received by the AO on 3 October 2018.
- The AO passed the final assessment order on 6 December 2018.

The taxpayer raised an additional ground of appeal, challenging the validity of the final assessment order, in view of the fact that the same was passed beyond the statutory time limit prescribed u/s 144C(13) of the Act, i.e., the prescribed timeline of passing the final assessment order which is one month from the end of the month in which DRP directions are received by the AO. The Department contended that the TPO has to give effect to the adjustments in the TP order basis DRP directions and thereafter, the time limit for passing the final assessment order should be considered when the order giving effect is communicated to the AO. As per the Department, the order giving effect was received by the AO in November 2018 and accordingly, the time limit to pass the final assessment order shall be 31 December 2018.

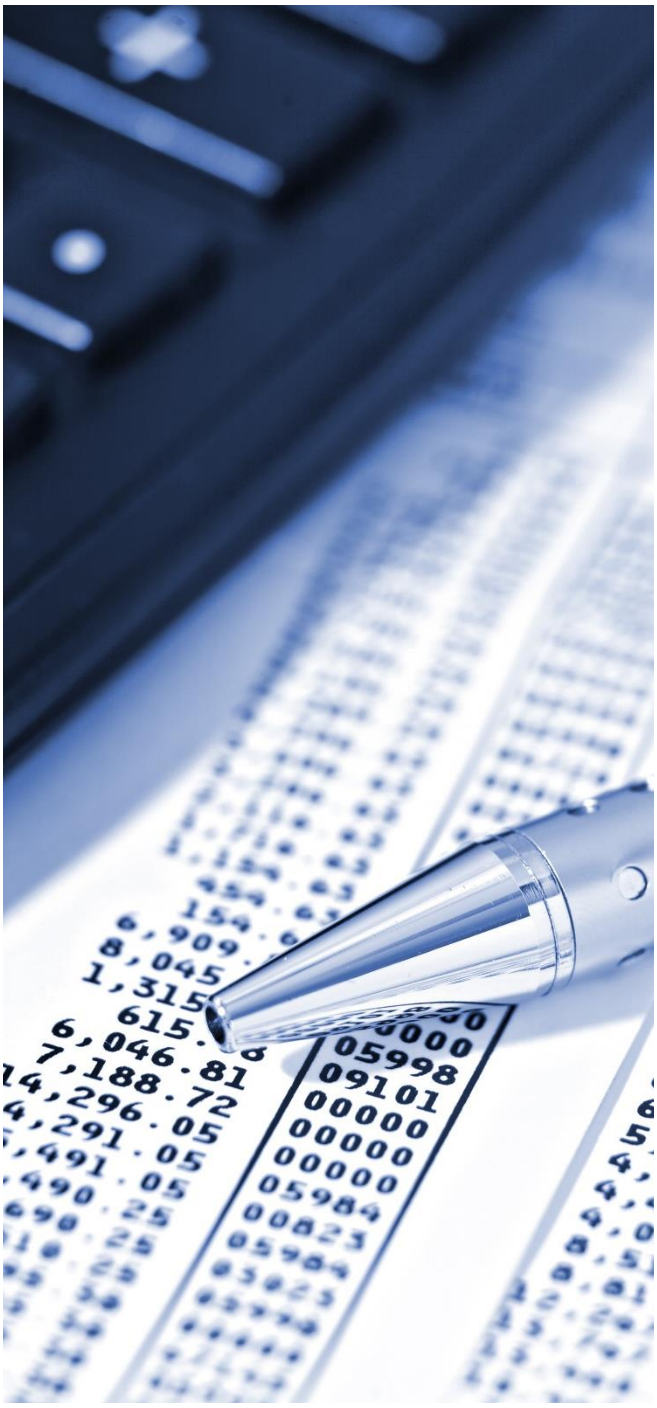
The Hon'ble Tax Tribunal observed:

- The undisputed fact that the AO and TPO received the DRP directions on 3 October 2018.
- The time limit for passing the final assessment order pursuant to DRP's directions is specified under section 144 C(13) of the Act, which states *that "(13) Upon receipt of the directions issued under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in section 153 [or section 153B], the assessment without providing any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received."*
- Thus, from the above-mentioned provision, it is evident that there is no reference to the TPO, i.e., the provision only mentions the AO with respect to receipt of directions and subsequent time limit for passing the final assessment order.
- In light of the same, the final assessment order in the instant case should have been passed by 30 November 2018. Since the AO issued the order on 6 December

2018, it is barred by limitation. A similar view was also taken by the coordinate bench of the Hon'ble Tax Tribunal, Cochin in the case of ***Envestnet Asset Management (India) (P.) Ltd. vs. ACIT as well as Dentsply India (P.) Ltd. vs. ITO.***

- Considering the provisions of section 144C(13) of the Act and the decisions pronounced by the coordinate benches, the Hon'ble Tax Tribunal held that the AO failed to adhere to the time limit as prescribed by the provisions under the Act and consequently, quashed the assessment order as it was barred by limitation.

Citation: Skylark Fiscal Services Pvt Ltd [TS-102-ITAT-2024(Kol)-TP]



Hon'ble Tax Tribunal, Delhi: Upholds Taxpayer's 'Other Method' Over TNMM For Benchmarking Purchase Of Traded Goods

The taxpayer is a subsidiary of a foreign company operating in India, engaged in the trading of vegetable oils, specifically palm oil.

During AY 2018-19, the taxpayer entered into an international transaction with its AE for the purchase of traded goods and benchmarked the same using the Other Method as the most appropriate method, whereby the ALP was determined by using quotations from brokerage firms/ associations/ exchanges with a variation of 1% as tolerance range.

During the course of TP proceedings, the TPO rejected the benchmarking methodology adopted by the taxpayer and applied TNMM, thereby conducting a fresh search for comparable companies. Basis the same, the TPO proposed an adjustment of INR 97,36,699, which was merely 0.13% of the total value of international transactions pertaining to the purchase of traded goods.

The Hon'ble Tax Tribunal observed that:

- The comparables selected by the TPO are not at all comparable on functional dissimilarity. The taxpayer is engaged in trading edible oils, whereas all the comparables considered by the TPO are into manufacturing edible/ non-edible oils.
- In light of Rule 10D(3) of the Income-tax Rules, 1962, since the market quotes were available on corresponding dates, and when data for the corresponding dates was not available on the date of the contract entered into between the taxpayer and its AE Other Method has been rightly applied by the taxpayer for benchmarking the transaction.
- The TPO failed to adequately analyse the TP documentation of the taxpayer. The taxpayer had appropriately compared the prices of third-party brokerage houses/ associations/ exchanges (wherever available) while preparing the TP documentation. The taxpayer had considered all the market quotations available while maintaining the transfer pricing report, and considering the contemporaneous nature of the documentation process as provided under the relevant provision of the Act.
- If any third-party rate is not considered for a particular date of the contract due to the non-availability of the data would not give right to the TPO to reject the method adopted by the taxpayer.
- The objective of applying any transfer pricing method is to determine the arm's length price for a given transaction, and not to justify any transfer price at which the transaction may have been undertaken.
- If there is a difference between the arm's length price determined by a particular method and the transfer price adopted by the taxpayer, it may warrant a transfer pricing adjustment in case such variation is not within the permissible tolerance range specified in the Act. However, such variations cannot be the basis for questioning the appropriateness of the method.

- Moreover, the taxpayer had also adopted a corroborative approach by selecting comparable engaged in trading activities. The TPO whilst conducting a fresh search, applied additional/ modified filters used by the taxpayer and selected comparables engaged in manufacturing activities, thereby disregarding the fact that the taxpayer is a trader and not a manufacturer.

Consequently, the Hon'ble Tax Tribunal deleted the transfer pricing adjustment.

Citation: Golden Agri Resources (India) Pvt Ltd [TS-119-ITAT-2024(DEL)-TP]

Hon'ble Tax Tribunal, Delhi: Rejected Nil-ALP Determination For Intra-group Services, Noting Contradictory Observations Rendered By The TPO/ DRP

The taxpayer is a subsidiary of a foreign company, providing testing, inspection, quality assurance, and certification of product standards.

During AY 2018-19, the taxpayer entered into various international transactions with its AEs. For the purpose of benchmarking, the aggregation approach was adopted by the taxpayer and the Transactional Net Margin Method (TNMM) was considered as the most appropriate method.

The TPO, while accepting the above-mentioned methodology of the taxpayer, opined that:

- Transactions relating to availing of other support services from AEs, being independent and separate, should not have been clubbed with the other transactions. The services under consideration are auxiliary to the functioning of the core business operations, and are required but not essential. Therefore, they should have been benchmarked independently.
- The taxpayer is also providing similar services to the AEs. Thus, there was no need to avail such services from AEs, and there was duplication involved.
- The taxpayer failed to identify the services received, the cost-benefit thereof, and the impact on profitability.

The TPO accordingly determined the arm's length price (ALP) of the overlapping services availed as nil and proposed a transfer pricing adjustment for the payment of management fees.

The taxpayer raised objections against the same before the DRP, however the adjustment was upheld.

The Hon'ble Tax Tribunal analysed the key issues involved and observed that:

- The TPO accepted the arm's length nature of all the international transactions, apart from payment of management fees, citing that these services were duplicative, the need-benefit for said services was not demonstrated by the taxpayer, and the basis of cost allocation was not furnished.
- Relevant paragraphs of the TP order clearly state that the documentation submitted by the taxpayer purportedly demonstrates the need for availing such services. The TPO has also acknowledged that the taxpayer has provided e-mail correspondences to show the requisitioning and delivery of management services.
- Further, to demonstrate the need for services availed, the taxpayer had submitted extracts of agreement with the respective AEs which highlight the functions that the respective AEs shall perform and the remuneration to be paid with sample copies of invoices.
- The TPO had also noted that the taxpayer has also tabulated certain services, which it had received during the year and corresponding benefits derived, along with documentary evidence in the nature of email correspondences/ invoices.
- While the TPO mentioned that the submissions by themselves do not discharge the burden of proof of quantifying benefit, he also states that he is not questioning the commercial wisdom of the taxpayer, but such wisdom must rest on some tangible rationale wherein a cost-benefit analysis would have been done to choose what is being shown as commercially wise.

Such observations and statements of the TPO are prima facie contradictory, and the TPO's order certainly gives an impression that he had approached the issue in a biased manner. Another glaring error committed by the TPO, after rejecting the TP analysis under TNMM, is that the TPO has not benchmarked the transaction adopting any other method and has simply determined the ALP at nil without following any specific method. This is against the provisions of the statute.

A similar view has been expressed by the jurisdictional Hon'ble High Court in the case of ***Magneti Marelli Powertrain India (P.) Ltd***. and the coordinate bench of the Hon'ble Tax Tribunal in the case of ***ACIT Vs. M/s. Yokogawa India Ltd***.

Even the DRP contradicted itself by stating that the taxpayer had provided email correspondences to demonstrate the requisitioning and delivery of management services, while also mentioning that the taxpayer could not show when and how the various services were requisitioned from the AEs, whether the services were needed by it, and whether the same were received.

The Hon'ble Tax Tribunal held that such contradictory observations by the departmental authorities reveal non-application of mind, and the rejection of taxpayer's benchmarking for intra-group services and determination of ALP at nil, without following any specific method, is unjustified.

Accordingly, the TP adjustment was deleted.

Citation: Intertek India Pvt Ltd [TS-120-ITAT-2024(DEL)-TP]

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