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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

Union Cabinet, on 7 January 2004 decided to build and operate strategic crude oil reserves of 5 MMT capacity through a special purpose vehicle, which would be 100% owned by one of the oil public sector undertakings (PSUs). Accordingly, a company (hereinafter referred to as 'the Company') was incorporated on 16 June 2004 as a subsidiary of I Ltd.

Further, in line with the Cabinet Committee on Economic Affairs (CCEA) meeting held on 6 January 2006, the Company was made a subsidiary of the Oil Industry Development Board (OIDB) by transferring the entire shareholding held by I Ltd. to OIDB. The share transfer was completed on 9 May 2006.

The Company constructed strategic crude oil storage at three locations. Capital costs for the construction of caverns were provided by OIDB against which the shares were allotted to OIDB.

All these caverns were commissioned by the year 2019 and currently are fully operational. Day-to-day expenditures for operation and maintenance are incurred by the Company out of grants/ reimbursement given by the Ministry of Petroleum and Natural Gas (Moping)/Government of India (GoI).

Vide Note dated July 2021, the Cabinet has approved partial commercialisation of the Company in the following manner:

- Leasing/Renting of 30% of overall storage capacity to Indian or foreign companies (Refer Note 1),
- Sale/Purchase of 20% of overall storage capacity of crude oil to Indian companies (Refer Note 2). The remaining 50% of the overall storage capacity will remain strategic.

Note 1: The Company has sold 30% of sovereign crude oil reserves during the Financial Year (F.Y.) 2021-22 to create space for leasing/renting and sale proceeds from the same have been remitted back to the GOI.

Note 2: No transaction has been undertaken by the Company to date.

The Company was mandated to construct additional storage at other two locations in Phase II under public-private-partnership (PPP) mode with viability gap funding (VGF) provisions through a capital grant. For the study of the suitability and feasibility of location under the Phase II project, the Company had to incur some pre-project expenses. Initially, the Company had estimated pre-project expenses on account of environmental impact assessment, a survey of offshore and onshore pipelines for single point mooring and owners' activities including national and overseas road shows etc. to INR 19 crores. As per direction from the MoPNG vide letter dated 11 December 2018, an amount of INR 19 crore was provided by the parent organisation, OIDB (100% shareholder of the Company) during the period from March 2019 to March 2022. The funds received from the OIDB were for expenses for pre-project activity (which are revenue in nature).

However, during the placement of the order and execution of pre-project activities, the cost escalated to around INR 23.20 crore against the sanctioned amount of INR 19 crores. Against the escalated cost of INR 23.20 crore, bills for a value of INR 21.22 crore have been received till the end of the financial year 2021-22 but the disbursement could be done for only INR 19 crores (approx.) i.e. to the tune of fund sanction and disbursed by OIDB. Balance payment for INR 2.22 crore for which bills are in hand, could not be made in the absence of funds.

The Company requested additional funds from the controlling ministry, MoPNG. In a subsequent development, the parent company (i.e. OIDB) has provided a shortfall of funds on the directions of MoPNG after the assurance given to the Comptroller and Auditor General of India (CA&G) that an opinion will be obtained from the Institute of Chartered Accountants of India (ICAI) regarding the depiction of liability. Current accounting practice by the Company

The Company follows the below-mentioned accounting policy with respect to shareholder grants: "Grants received from Shareholder are recognised in profit or loss on a systematic basis over the periods in which the Company recognises as expenses the related costs for which the grants are intended to compensate". On the basis of the same, the grant received by the Company from its shareholder (i.e. OIDB) is treated as income in the Statement of Profit and Loss (income recognised on an accrual basis, i.e., to the extent of expenditure incurred irrespective of the actual amount of grant receipt). Correspondingly, the amount of expenditure incurred out of that grant is shown as expenses in the Statement of Profit and Loss. Accounting policy with respect to revenue grant received from shareholders was followed for the sanctioned and disbursed grant of INR 19 crores from OIDB, however, liability for the unpaid invoices in hand to the tune of INR 2.22 crore could not be provided in the books and financials in the absence of sanction of funds from MoPNG/GoI.

C&AG in their Provisional comment No. 02 for the F.Y. 2021-22 has stated that not providing of liability in the books of account has resulted in understatement of liabilities and understatement of loss to the extent.

As per the Company, no accounting was done for the said transaction because of the following:

- There was no certainty regarding the source of funds, i.e., whether funds would be provided by the Ministry through Gross Budgetary Support (GBS) or from the grant of OIDB.
- Due to uncertainty about receipt of funds and source of funds, the Company was not able to provide for liability in its books of account, as grant from shareholder (i.e. OIDB) and corresponding expenses form part of income and expense in the Statement of Profit and Loss; however grant from MoPNG does not form part of the Statement of Profit and Loss and the expenses to the extent of grant received are to be set off in the Statement of Profit and Loss.
- Any provision of expense will result in a depiction of expense in the Statement of Profit and Loss, without recognising corresponding income in the Statement of Profit and Loss due to non-receipt of grant/fund. As the source of funds is now ascertained to the Company, necessary income and expense can now be shown by the Company in its financial statements for F.Y. 2022-23. (Emphasis supplied by the Company.) Considering the difference of opinion about the depiction of transactions in the books of account of the Company, assurance was given by the Company to C&AG that the Company will obtain an opinion from the Expert Advisory Committee of the ICAI.

Query

In view of the above, the Company has sought the opinion with respect to transactions undertaken by the Company on the following issues:

- Whether or not the Company's accounting treatment for not making provision for expenses incurred in the books of account in the absence of fund source and not providing for liability for the same in books of account was in order.
- If not, what accounting/disclosure methodology would have been adopted by the Company with respect to such transaction and/or situation?

Points Considered By The Committee

The Committee notes that the basic issue raised by the Company relates to the timing of recognition of liability/provision in respect of pre-project expenses incurred in the absence of a fund source or for which fund approval is pending. The Committee has, therefore, considered only this issue and has not examined any other issues that may arise from the Facts of the Case. The Committee notes from the annual report of the Company for the financial year 2021-22 that the Company follows Indian Accounting Standards (Ind AS) in its financial statements and has therefore examined the issue from an Ind AS perspective. Further, the opinion expressed hereinafter is purely from an accounting perspective and the Committee has not examined any regulatory or legal aspects including under the Income-tax Act, 1961 or Rules made thereunder or legal interpretation of various orders or communications with Ministry/OIDB/GoI including whether the Ministry/ OIDB/GoI is required to reimburse the Company for escalated cost etc.

At the outset, the Committee notes from the Facts of the Case that due to uncertainty about the receipt of funds and source of funds, the Company has not provided for any expense or liability in its books of account in the F.Y. 2021-22 and due to subsequent development, as the source of funds is now ascertained to the Company, necessary income and expense will be shown by the Company in its financial statements for F.Y. 2022-23. In this context, the Committee notes the following requirements of Ind AS 1, 'Presentation of Financial Statements' and Ind AS 37, 'Provisions, Contingent Liabilities and Contingent Assets', notified under the Companies (Indian Accounting Standards) Rules, 2015 and the Conceptual Framework for Financial Reporting under Ind AS, issued by the ICAI:

Ind AS 1

"88 An entity shall recognise all items of income and expense in a period in profit or loss unless an Ind AS requires or permits otherwise."

Ind AS 37

11 Provisions can be distinguished from other liabilities such as trade payables and accruals because there is uncertainty about the timing or amount of the future expenditure required in settlement. By contrast:

- trade payables are liabilities to pay for goods or services that have been received or supplied and have been invoiced or formally agreed with the supplier; and
- accruals are liabilities to pay for goods or services that have been received or supplied but have not been paid, invoiced or formally agreed with the supplier, including amounts due to employees (for example, amounts relating to accrued vacation pay). Although it is sometimes necessary to estimate the amount or timing of accruals, the uncertainty is generally much less than for provisions.

Accruals are often reported as part of trade and other payables, whereas provisions are reported separately."

Conceptual Framework for Financial Reporting under Ind AS

"Definition of a liability

4.26 A liability is a present obligation of the entity to transfer an economic resource as a result of past events.

4.27 For a liability to exist, three criteria must all be satisfied:

- the entity has an obligation (see paragraphs 4.28–4.35);
- the obligation is to transfer an economic resource (see paragraphs 4.36–4.41); and
- the obligation is a present obligation that exists as a result of past events (see paragraphs 4.42–4.47)."

"4.69 Expenses are decreases in assets, or increases in liabilities, that result in decreases in equity, other than those relating to distributions to holders of equity claims."

"5.4 The balance sheet and statement of profit and loss are linked because the recognition of one item (or a change in its carrying amount) requires the recognition or derecognition of one or more other items (or changes in the carrying amount of one or more other items). For example: (a) ... (b) the recognition of expenses occurs at the same time as: (i) the initial recognition of a liability, or an increase in the carrying amount of a liability; or (ii) the derecognition of an asset, or a decrease in the carrying amount of an asset." "

5.5 The initial recognition of assets or liabilities arising from transactions or other events may result in the simultaneous recognition of both income and related expenses. For example, the sale of goods for cash results in the recognition of both income (from the recognition of one asset—the cash) and an expense (from the derecognition of another asset—the goods sold). The simultaneous recognition of income and related expenses is sometimes referred to as the matching of costs with income. Application of the concepts in the Conceptual Framework leads to such matching when it arises from the recognition of changes in assets and liabilities. However, matching of costs with income is not an objective of the Conceptual Framework. The Conceptual Framework does not allow the recognition in the balance sheet of items that do not meet the definition of an asset, a liability or equity.

Recognition criteria

5.6 Only items that meet the definition of an asset, a liability or equity are recognised in the balance sheet. Similarly, only items that meet the definition of income or expenses are recognised in the statement of profit and loss. However, not all items that meet the definition of one of those elements are recognised."

"5.10 It is important when making decisions about recognition to consider the information that would be given if an asset or liability were not recognised. For example, if no asset is recognised when expenditure is incurred, an expense is recognised. Over time, recognising the expense may, in some cases, provide useful information, for example, information that enables users of financial statements to identify trends."

(Emphasis supplied by the Committee.)

From the above, the Committee notes that as per Ind AS 1, an entity shall recognise, in a period in profit or loss (unless an Ind AS requires or permits otherwise), all items of expense, which is defined in the Conceptual Framework as decreases in assets, or increases in liabilities, that result in decreases in equity. The 'Conceptual Framework for Financial Reporting under Ind AS defines 'liability' as a present obligation of the entity to transfer an economic resource as a result of past events. Further, Ind AS 37 states that accruals are liabilities to pay for goods or services that have been received or supplied but have not been paid, invoiced or formally agreed with the supplier and these accruals are often reported as part of trade and other payables. Thus, the Committee is of the view that irrespective of the type of liabilities, an entity should recognise the same in its financial statements when it has an obligation (legal or contractual) to pay to the other party or service provider. Further, the incurrence of liability shall give rise to an expense, which should be recognised in the Statement of Profit and Loss unless an Ind AS requires or permits otherwise.

In this context, the Committee notes that in the extant case, during the placement of the order and execution of pre-project activities, the cost got escalated to around INR 23.20 crore against the sanctioned amount of INR 19 crore. Against the escalated cost of 23.20 crore, bills for a value of INR 21.22 crore have been received till the end of the financial year 2021-22 but the disbursement could be done for only INR 19 crore (approx.) i.e. to the tune of fund sanction and disbursed by OIDB. The balance payment for INR 2.22 crore for which bills are received has not been made in the absence of funds. Thus, in the extant case, on the execution of pre-project activities by

the supplier of goods or services, a present obligation arises on the Company to pay cash to the supplier, which should be recognised by the Company with a corresponding expense in the Statement of Profit and Loss unless such expenditure can be capitalised as per the requirements of applicable standards, such as Ind AS 16, 'Property, Plant and Equipment'.

Accordingly, the Committee is of the view that the Company in an extant case should have recognised a liability in respect of the pre-project expenses when the pre-project activities are executed by the supplier of goods or services and as a result of which, a present obligation arises on the Company to pay cash to the supplier. Therefore, the present accounting treatment followed by the Company of not recognising the liability in respect of expenses incurred in the financial statements for the F.Y. 2021-22 is not correct.

The Committee is also of the view that in the extant case, since the Company did not follow the above-mentioned accounting treatment, the same (if material) should be rectified in the current reporting period, considering it as an error, as per the following requirements of Ind AS 8, 'Accounting Policies, Changes in Accounting Estimates and Errors'.

"Prior period errors are omissions from, and misstatements in, the entity's financial statements for one or more prior periods arising from a failure to use, or misuse of, reliable information that:

- was available when financial statements for those periods were approved for issue; and
- could reasonably be expected to have been obtained and taken into account in the preparation and presentation of those financial statements.

Such errors include the effects of mathematical mistakes, mistakes in applying accounting policies, oversights or misinterpretations of facts, and fraud."

"41 Errors can arise in respect of the recognition, measurement, presentation or disclosure of elements of financial statements. Financial statements do not comply with Ind ASs if they contain either material errors or immaterial errors made intentionally to achieve a particular presentation of an entity's financial position, financial performance or cash flows. Potential current period errors discovered in that period are corrected before the financial statements are approved for issue. However, material errors are sometimes not discovered until a subsequent period, and these prior period errors are corrected in the comparative information presented in the financial statements for that subsequent period (see paragraphs 42–47).

42 Subject to paragraph 43, an entity shall correct material prior period errors retrospectively in the first set of financial statements approved for issue after their discovery by:

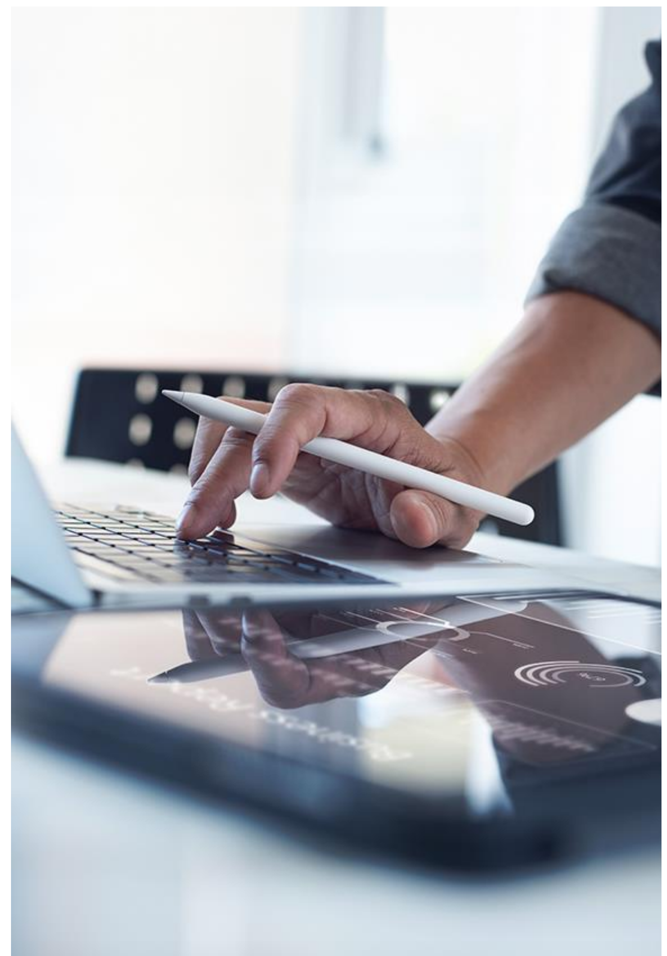
- restating the comparative amounts for the prior period(s) presented in which the error occurred; or
- if the error occurred before the earliest prior period presented, restating the opening balances of assets, liabilities and equity for the earliest prior period presented."

Further, the definition of 'material' as given in Ind AS 1, should also be considered which is as follows: "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."

Opinion

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

- The present accounting treatment followed by the Company of not recognising the liability in respect of expenses incurred (but not approved) in the financial statements for the F.Y. 2021-22 is not correct, as discussed above.
- The Company should have recognised a liability in respect of the pre-project expenses when the pre-project activities are executed by the supplier of goods or services and as a result of which, a present obligation arises on the Company to pay cash to the supplier, as discussed above. Since the Company



REGULATORY UPDATES

INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA (ICAI)

ISSUANCE OF SA 800 (REVISED), SA 805 (REVISED), SA 810 (REVISED)

ICAI has issued revised SA 800 'Special Considerations—Audits of Financial Statements Prepared in Accordance with Special Purpose Frameworks', SA 805 'Special Considerations - Audits of Single Financial Statements and Specific Elements, Accounts or Items of a Financial Statement' and SA 810 'Engagements to Report on Summary Financial Statements' on 7 February 2024 and will be applicable to audits and engagements for financial years beginning on or after 1 April 2024 i.e., these Standards will be applicable to audits and engagements for the financial year 2024-25 and onwards.

This notification is a revision to the previously issued standards on auditing.

The standards include separate sections on Objectives, Definitions, Requirements and Application. It also includes an appendix on Illustrations of Independent Auditor's Reports on Special Purpose Financial Statements.

IMPLEMENTATION GUIDE ON REPORTING ON AUDIT TRAIL UNDER RULE 11(G) OF THE COMPANIES (AUDIT AND AUDITORS) RULES, 2014 (REVISED 2024 EDITION)

ICAI has issued a revised edition of the Implementation Guide on Reporting on Audit Trail under Rule 11(g) of the Companies (Audit and Auditors) Rules, 2014 dated 12 February 2024. This guide was first issued in March 2023 by the Auditing and Assurance Standard Board (AASB) of the ICAI to provide guidance to the members on the above-said reporting requirement.

The revised Implementation Guide includes a separate section of Frequently Asked Questions (FAQs) that covers various practical situations which may be faced by the members while reporting under Rule 11(g).

The guide also contains detailed guidance on various aspects of this reporting requirement to enable auditors of companies to comply with this reporting requirement effectively and includes illustrative languages of modified and unmodified reporting.

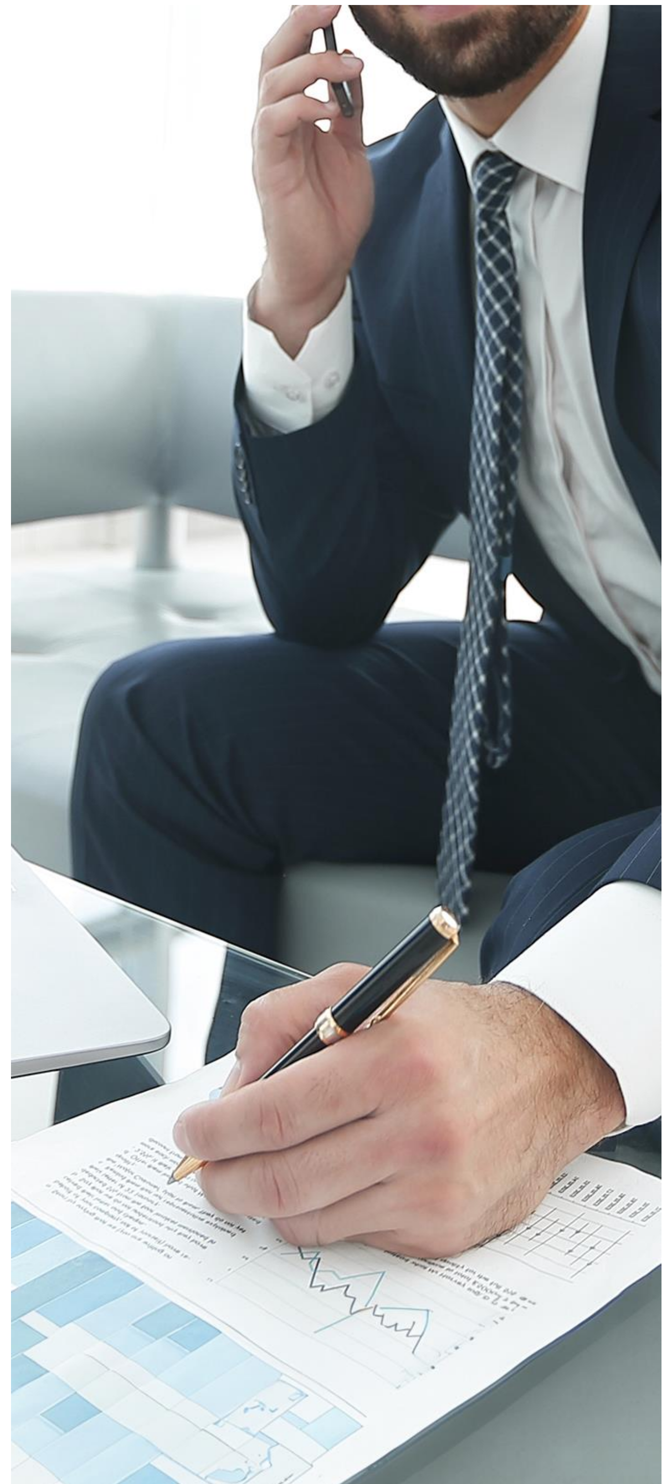
GUIDANCE NOTE ON AUDIT OF BANKS (2024 EDITION)

The Auditing and Assurance Standards Board (AASB) of ICAI under the authority of the Council of ICAI has brought out a revised version of the Guidance Note on Audit of Banks on 14 February 2024, with the objective of providing detailed guidance to the members on statutory audit of banks and bank branches.

The Guidance Note is divided into two Sections i.e. Section A - Statutory Central Audit and Section B - Bank Branch Audit.

The Guidance Note contains various Appendices like illustrative formats of engagement letters, illustrative formats of auditor's reports both in the case of nationalised banks and banking companies, illustrative formats of management representation letters, the text of master directions, master circulars and other relevant circulars issued by the RBI.

The ICAI meticulously revamps the Guidance Note every year to incorporate the latest developments, the impact of amendments, and changes in the banking landscape.



SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI)

GUIDELINES FOR RETURNING THE DRAFT OFFER DOCUMENT AND ITS RESUBMISSION

SEBI has issued a circular on Guidelines for returning of draft offer document and its resubmission, dated 7 February 2024. Draft offer documents filed with the Board for public issues or rights issues of securities are required to be in compliance with instructions provided under Schedule VI of ICDR Regulations.

Annexure A of this circular outlines the manner in which the draft offer document should be drafted, which is, that it should be in simple language with a visual representation of data, clear, concise, and intelligible manner, adhering to the standards mentioned in the annexure. It should avoid vague, ambiguous and imprecise explanations, repetition of disclosures in different sections of the document and inconsistency in the information provided. The draft document should include risk factors, clearly bringing out the risk to the investor, without undermining them. In case the above has not been adhered to, the draft offer document shall be returned to the Issuer and the Lead Manager for resubmission.

The documents shall also be returned in case any other regulatory authority or enforcement agencies have expressed material concern with regard to the document or where substantial revision is sought or corrective measures are required on account of regulatory interpretation. Lastly, where there are any pending litigation matters in any court or tribunal having an impact on the issue with regard to eligibility criteria provided under ICDR Regulations for any document, it shall be returned. However, the filing fees will not be refunded.

There is no requirement for payment of any fees on account of resubmission of the draft offer document, the requirement for paying applicable fees for the changes, if any, in terms of changes specified in Schedule XVI of the ICDR Regulations for the updated offer document shall continue to apply.

The issuer is required to make a public announcement, within two days of resubmission and the issuer shall also include a disclosure that it is a resubmitted document. The issuer is also required to make written intimation to its sectoral regulator, if any, informing about the return and resubmission of the draft offer document.

This Circular shall come into force with immediate effect.

REVISED PRICING METHODOLOGY FOR INSTITUTIONAL PLACEMENTS OF PRIVATELY PLACED INFRASTRUCTURE INVESTMENT TRUST (INVIT)

A SEBI Master Circular for InvITs dated 6 July 2023, outlines pricing guidelines for institutional placement of InvIT, which state that the institutional placement by InvIT shall be made at a price not less than the average of the weekly high and low of the closing prices of the units of the same class quoted on the stock exchange during the two weeks preceding the relevant date.

Vide this circular, SEBI has decided that the floor price for institutional placement for privately placed InvITs shall be NAV per unit of such InvIT.

Consequently, the pricing for listed InvITs has also been modified. The institutional placement by public InvIT shall be made at a price not less than the average of the weekly high and low of the closing prices of the units of the same class quoted on the stock exchange during the two weeks preceding the relevant date. Provided that the public InvIT may offer a discount of not more than five per cent on the price so calculated, subject to the approval of unitholders through a resolution.

It is further explained that the “relevant date” for the purpose of clauses related to institutional placement shall be the date of the meeting in which the board of directors of the investment manager decides to open the issue.

This circular shall be applicable with immediate effect.

MINISTRY OF CORPORATE AFFAIRS (MCA)

ESTABLISHMENT OF CENTRAL PROCESSING CENTRE

MCA has issued a Gazette Notification on the Establishment of the Central Processing Centre, dated 3 February 2024. The Central Processing Centre shall process and dispose off e-forms submitted along with the prescribed fee, as provided in the Companies (Registration of Offices and Fees) Rules, 2014.

The jurisdictional Registrar, other than the Registrar of the Central Processing Centre, within whose jurisdiction the registered office of the company is situated shall continue to have jurisdiction over the companies whose e-forms are processed by the Registrar of the Central Processing Centre in respect of all other provisions of the Companies Act, 2013 and the rules made thereunder.

This notification shall come into force from 6 February 2024.

RELAXATION OF ADDITIONAL FEES AND EXTENSION OF LAST DATE OF FILING OF FORM NO. LLP BEN-2 AND LLP FORM NO. 4D UNDER THE LIMITED LIABILITY PARTNERSHIP ACT, 2008

MCA has issued a notification on the relaxation of additional fees and an extension of the last date of filing of Form No. LLP BEN-2 and LLP Form No. 4D under the Limited Liability Partnership Act, 2008-regarding, dated 7 February 2024.

MCA had notified LLP(Significant beneficial owners)Rules 2023, on 9 November 2023 and prescribed forms LLP- BEN-2 to file a return with the registrar in respect of declaration under section 90 of the Companies Act 2013 and LLP (third amendment) rules, 2023 on 27 October 2023 and prescribed for LLP 4D to file a return to the Registrar in respect of declaration of beneficial interest in contribution received by the LLP.

The circular allows LLPs to file Form LLP BEN -2 and LLP Form No. 4D without payment of additional fees until 15 May 2024, due to MCA-21 transitioning to version 3.

The forms will be available in version 3 from 15 April 2024.

COMPANIES (REGISTRATION OFFICES AND FEES) AMENDMENT RULES, 2024

MCA vide Companies (Registration Offices and Fees) Amendment Rules, 2024, dated 14 February 2024 has inserted a new rule 10A, after rule 10 which provides that the Central Processing Centre shall examine or cause to be examined, every application, e-Form or document required to be filed with the Registrar. It further provides that the Registrar shall take a decision on the application, e-forms or documents within thirty days from the date of its filing excluding the cases in which an approval of the Central Government, the Regional Director or any other competent authority is required.

It also clarifies that the provisions of sub-rule (2) to (5) of rule 10 will apply mutatis mutandis in relation to the examination of applications, e-Forms or documents under this rule. It further outlines the jurisdiction of the Registrar of the Central Processing Centre to be all over India.

Sub-clause 4 the said rule provides a list of applications, e-Forms and documents in respect of which the examination will take place. The rules are applicable from 16 February 2024.

GENERAL CIRCULAR NO.02/2024 - DEPLOYMENT AND USAGE OF CHANGE REQUEST FORM (CRF) ON MCA -21 - REG

MCA has issued a notice on the General Circular dated 19 February 2024 on Deployment and Usage of Change Request Form (CRF) on MCA-21. The web-based form -CRF is available on the V3 portal and is to be used only under exceptional circumstances, for making a request to the Registrar of Companies, the request for which cannot be made through existing processes. It has further been clarified that this form is not a substitute for any reporting, application, and registry requirements as per the Companies Act, 2013, and LLP Act, 2008, neither should it be used for any approval-related and registration-related queries for which existing tickets and help desk facilities.

The form is primarily for Master Data correction and to comply with certain directions of Courts or Tribunals, which ordinarily cannot be complied with through existing functionality of forms or services on the MCA-21 system.

It has a processing time of 3 days by RoCs and 7 days by the Joint Director (e-governance cell).

RESERVE BANK OF INDIA (RBI)

REVIEW OF FIXED REMUNERATION GRANTED TO NON-EXECUTIVE DIRECTORS (NEDS)

Paragraph 9 of RBI circular dated 26 April 2021, on 'Corporate Governance in Banks - Appointment of Directors and Constitution of Committees of the Board' provided for a maximum fixed remuneration for a NED, other than the Chair of the board, of INR 20 lakh per annum.

The RBI vide a notification on Review of Fixed Remuneration granted to Non-Executive Directors (NEDs), dated 9 February 2024, raised the said limit from INR 20 lakh to INR 30 lakh per annum.

The banks are required to have suitable criteria for granting fixed remuneration to its NEDs, with the approval of its Board and may fix a lower amount within the ceiling limit of INR 30 lakh per annum depending upon the size of the bank, experience of the NED and other relevant factors. Banks are required to make disclosure on remuneration paid to the directors on an annual basis at a minimum, in their Annual Financial Statements.

Additionally, private sector banks would be required to obtain regulatory approval regarding remuneration to Part-time Chairman

These instructions would come into force with immediate effect and apply to all Private Sector Banks including Small Finance Banks (SFBs) and Payment Banks (PBs) as well as the wholly owned subsidiaries of Foreign Banks.

APPOINTMENT/RE-APPOINTMENT OF DIRECTOR, MANAGING DIRECTOR OR CHIEF EXECUTIVE OFFICER IN ASSET RECONSTRUCTION COMPANIES

As per the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the RBI notification dated 11 October 2022, on 'Review of Regulatory Framework for Asset Reconstruction Companies (ARCs)', ARCs are required to obtain prior approval of the Reserve Bank for appointment/re-appointment of any Director, Managing Director or Chief Executive Officer.

RBI vide notification dated 27 February 2024, on Appointment/re-appointment of Director, Managing Director or Chief Executive Officer in Asset Reconstruction Companies, has prescribed a standardised form for furnishing the requisite information about the candidate and an indicative list of documents required to be submitted along with the application, in Annexures 1 and 2 respectively.

The submissions are expected to be made at least ninety days before the vacancy arises / the proposed date of appointment or re-appointment.

These instructions shall come into force with immediate effect.

CAPITAL ADEQUACY GUIDELINES – REVIEW OF TRADING BOOK

RBI has issued a notification on Capital Adequacy Guidelines – Review of Trading Book, dated 28 February 2024, wherein, the said guidelines refer to the Master Circular on Basel III Capital Regulations dated 12 May 2023, and Master Direction on Prudential Norms on Capital Adequacy for Local Area Banks (Directions), 2021 dated 26 October 2021. This notification amends the capital adequacy guidelines in alignment with the Master Direction on Classification, Valuation and Operation of Investment Portfolio of Commercial Banks (Directions), 2023 dated 12 September 2023.

The modifications have been provided in the Annexure 1 of the circular.

These instructions shall be applicable from 1 April 2024 to all Commercial Banks (excluding Regional Rural Banks).

REGULATORY UPDATES

RESERVE BANK OF INDIA (RBI)

CIRCULAR DATED 9 FEBRUARY 2024: REVIEW OF FIXED REMUNERATION GRANTED TO NON-EXECUTIVE DIRECTORS (NED)

The RBI vide its circular dated 26 April 2021 (Corporate Governance in Banks - Appointment of Directors and Constitution of Committees of the Board) fixed a ceiling limit of INR 20,00,000 per annum on the remuneration to be paid to NEDs of private sector banks, small finance banks as well as the wholly owned subsidiaries of foreign banks.

The RBI with this circular dated 9 February 2024 has raised the ceiling of remuneration to NEDs of the above-mentioned banks including payment banks to INR 30,00,000 per annum. Further, banks are required to make disclosures on remuneration paid to the directors on an annual basis at a minimum, in their Annual Financial Statements. The said circular would come into force with immediate effect.

CIRCULAR DATED 9 FEBRUARY 2024: PARTICIPATION OF INDIAN BANKS ON INDIA INTERNATIONAL BULLION EXCHANGE IFSC LIMITED (IIBX)

Pursuant to the RBI instructions on 'Branches of Indian Banks operating in GIFT-IFSC – acting as Professional Clearing Member (PCM) of IIBX (The Circular), the RBI vide this Circular directed towards all Scheduled Commercial Banks (other than Regional Rural Banks), has additionally allowed –

- Branch/ subsidiary/ joint venture of an Indian bank in GIFT-IFSC to act as a Trading Member (TM)/ Trading and Clearing Member (TCM) of IIBX, &
- Indian banks authorised to import gold/ silver to act as Special Category Client (SCC) of IIBX.

The circular outlines the permitted activity of banks in their role as TM/ TCM of IIBX including execution of trades only on behalf of clients (without proprietary trading), ensuring adherence to certain instructions laid down in previous specified RBI Master Circulars and compliance with relevant conditions stipulated by other regulatory bodies.

In addition, as per the extant Foreign Trade Policy, RBI grants annual import authorisation to banks for import of gold/ silver and hereby allows them to operate as an SCC on IIBX for the same by ensuring adherence to specified RBI instructions previously notified and relevant conditions stipulated by other regulatory bodies.

In relation to Risk Management,

- All client trades placed shall be against 110% advance pay-in of funds (buy order) of the expected value of bullion (quantity and quality specification) intended to be purchased and securities (sell order) in the account of the bank.
- With reference to the Net Open Overnight Position Limit (NOOPL) for a bank as prescribed in Master Direction dated 5 July 2016, the Board may determine a global sub-limit for net overnight open position in gold/ silver, which shall not exceed one tonne of gold equivalent.

Lastly, this Circular lays down the procedure of application to RBI -

- For TM/ TCM activities, the parent bank shall seek an NOC from RBI prior to its branch/ subsidiary/ joint venture in GIFT-IFSC seeking TM/ TCM status, subject to fulfilment of certain prudential regulations. With prior approval, an eligible bank shall make an application to the Department of Regulation (DoR), RBI with details of a proposed business plan as a TM/ TCM for facilitating client trade.

Where a bank has already been granted NOC by RBI for its branch in GIFT-IFSC to act as PCM of IIBX, separate approval from RBI for obtaining TM/ TCM status on IIBX is not needed. However, prior intimation to the DoR, RBI shall be required.

- Banks authorised to import gold/ silver can undertake the activities of an SCC by sending prior intimation to the DoR, RBI.
- Additional approval from DoR, RBI is required by a bank acting as TM/ TCM/ SCC of IIBX, in case of any change in their role or scope of activities at IIBX.

The circular outlines the permitted activity of banks in their role as TM/ TCM of IIBX including execution of trades only on behalf of clients (without proprietary trading), ensuring adherence to certain instructions laid down in previous specified RBI Master Circulars and compliance with relevant conditions stipulated by other regulatory bodies.

In addition, as per the extant Foreign Trade Policy, RBI grants annual import authorisation to banks for import of gold/ silver and hereby allows them to operate as an SCC on IIBX for the same by ensuring adherence to specified RBI instructions previously notified and relevant conditions stipulated by other regulatory bodies.

In relation to Risk Management,

- All client trades placed shall be against 110% advance pay-in of funds (buy order) of the expected value of bullion (quantity and quality specification) intended to be purchased and securities (sell order) in the account of the bank.
- With reference to the Net Open Overnight Position Limit (NOOPL) for a bank as prescribed in Master Direction dated 5 July 2016, the Board may determine a global sub-limit for net overnight open position in gold/ silver, which shall not exceed one tonne of gold equivalent.

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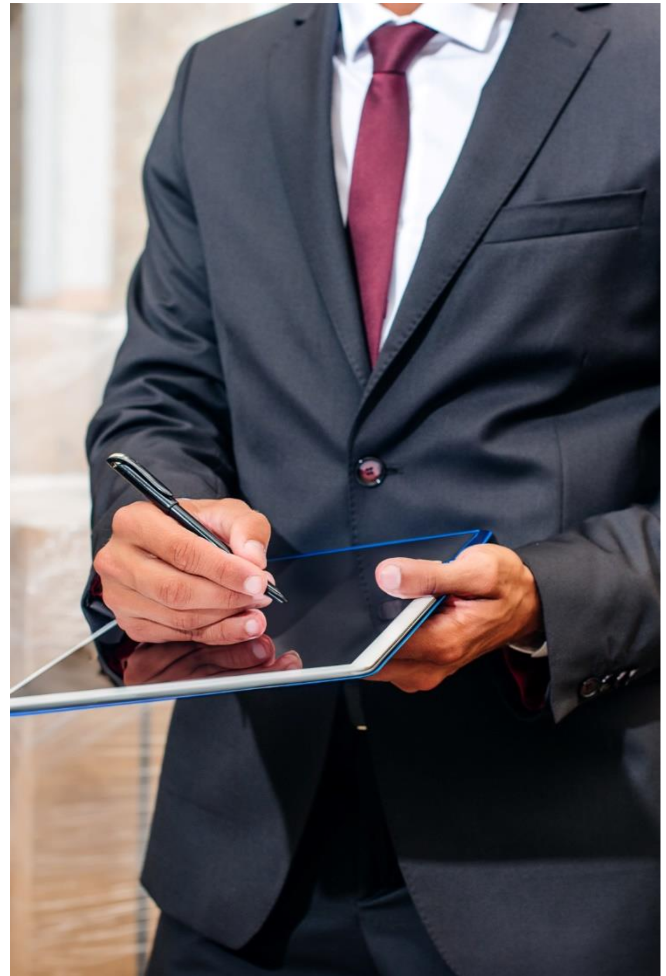
The provisions contained in this circular shall be effective from the date of the said circular.



CIRCULAR DATED 27 FEBRUARY 2024: APPOINTMENT / RE-APPOINTMENT OF DIRECTOR, MANAGING DIRECTOR OR CHIEF EXECUTIVE OFFICER IN ASSET RECONSTRUCTION COMPANIES

The Circular addresses the appointment or re-appointment of Directors, Managing Directors, or Chief Executive Officers (CEOs) in Asset Reconstruction Companies (ARCs) in accordance with the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

As per Section 3(6) of the aforementioned Act and the guidelines in Para 5(i) of Circular No. DoR.SIG.FIN.REC.75/26.03.001/2022-23 dated October 11, 2022, ARCs must seek prior approval from RBI for such appointments or re-appointments.

To ensure uniformity in the information submitted by ARCs, the Circular includes a form for furnishing candidate details and an indicative list of documents required, including board resolution, credit information, etc. ARCs are advised to submit the form along with the documents to the RBI at least ninety days before the vacancy arises or the proposed date of appointment/ re-appointment. The RBI reserves the right to request additional information/ documents if needed.

This circular shall be applicable with immediate effect.

SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI)

CIRCULAR DATED 6 FEBRUARY 2024: GUIDELINES FOR RETURNING THE DRAFT OFFER DOCUMENT AND ITS RESUBMISSION

SEBI has issued guidelines to ensure completeness of the offer document filed with the body to provide clarity and consistency in the disclosures and for timely processing since the draft offer document/ letter are found lacking in terms of instructions provided under Schedule VI of Securities and Exchange.

Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 (ICDR Regulations). This Circular shall come into force with immediate effect.

Return of Draft Offer Document -

The draft offer document shall be returned to the Issuer and Lead Manager(s) for resubmission on account of the following:

- Disclosures in the draft offer document do not satisfy requirements such as:
  - Drafting to be made in simple language with visual representation of data and complying with principles such as the use of tabular representations (wherever required), use of short sentences, etc;
  - The information to be presented in a clear, concise and intelligible manner, and shall adhere to the standards laid down in the guidelines;
  - The draft offer document should avoid complex presentations, vague, ambiguous and imprecise explanations, and complex information quoted or copied from legal documents, etc;
  - The risk factors are appropriately worded in simple, clear and unambiguous language to bring out clearly the risk to the investor without undermining the same.
- Draft offer documents require substantial revision or corrective measures on account of regulatory interpretation;
- The information required to be included in the draft offer document is not clearly understandable, and in cases where necessary, reference to rules and regulations has not been made;
- Material concern with regard to issue/ draft offer letter has been filed by regulatory authorities/ enforcement agencies;
- Any pending litigation matter which may have an impact on eligibility criteria as provided under ICDR Regulations.

Resubmission of Draft Offer Document -

- No requirement for payment of any fees for resubmission of the draft offer document. However, fees in terms of the updation of the offer document in terms of changes specified in Schedule XVI will continue to apply.
- Further, no refund of filing fees shall be applicable in case of non-submission of draft offer letter after return.
- The issuer, within two days of resubmission of the draft offer document, shall make a public announcement in the mode and manner as prescribed under ICDR Regulations, and the issuer shall also include a disclosure that it is a resubmitted document.
- Issuer shall make written intimation to its sectoral regulator, if any, informing about the return and resubmission of the draft offer document.

CIRCULAR DATED 8 FEBRUARY 2024: REVISED PRICING METHODOLOGY FOR INSTITUTIONAL PLACEMENTS OF PRIVATELY PLACED INFRASTRUCTURE INVESTMENT TRUST (INVIT)

subsequent issue of units after IPO may be by way of institutional placement. Further, SEBI's Master Circular for InvITs provides the pricing guidelines, which state that the institutional placement by InvIT shall be made at a price not less than the average of the weekly high and low of the closing prices of the units of the same class quoted on the stock exchange during the two weeks preceding the relevant date.

Based on the request of the industry and recommendation of Hybrid Securities Advisory Committee, and to promote Ease of Doing Business, the pricing guidelines have been amended and it has been decided that the floor price for institutional placement for privately placed InvITs shall be NAV per unit of such InvIT.

This circular shall be applicable with immediate effect.

NOTIFICATION DATED 20 FEBRUARY 2024: CENTRALISATION OF CERTIFICATIONS UNDER FOREIGN ACCOUNT TAX COMPLIANCE ACT (FATCA) AND COMMON REPORTING STANDARD (CRS) AT KYC REGISTRATION AGENCIES (KRAS)

Financial Institute (RFI) to obtain a self-certification from the client, as part of the account opening documentation so as to determine the client’s residence for tax purposes.

Post issuance of this circular, RFI shall upload the FATCA and CRS certifications obtained from the clients onto the system of KRAs with effect from 1 July 2024.

Further, certifications obtained from clients prior to 1 July 2024 shall be uploaded by the intermediaries onto the KRA’s system within a period of 90 days of implementation of this circular.

The onus of FATCA and CRS compliances shall lie with the respective intermediaries. The intermediary shall confirm the reasonableness of such certification and shall update the self-certification as and when there is a change reported by the client.

KRAs shall develop their system based on uniform internal guidelines in consultation with SEBI.

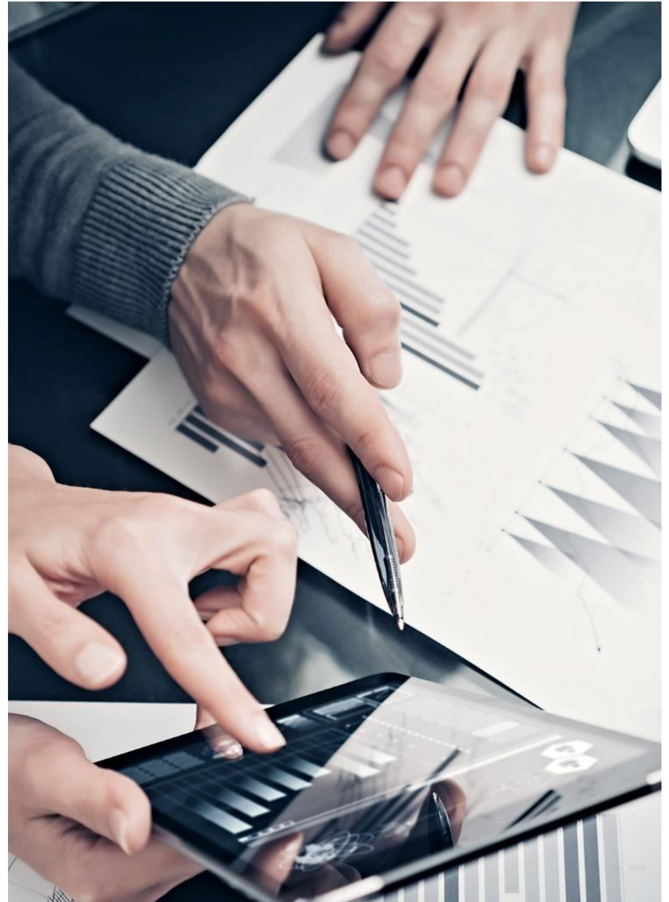
MINISTRY OF CORPORATE AFFAIRS (MCA)

CIRCULAR DATED 7 FEBRUARY 2024: RELAXATION OF ADDITIONAL FEES AND EXTENSION OF LAST DATE OF FILING OF FORM NO. LLP BEN-2 AND LLP FORM NO. 4D UNDER THE LIMITED LIABILITY PARTNERSHIP ACT, 2008

The MCA vide aforesaid notification, has informed that in view of transition of MCA-21 portal from version-2 to version-3, LLPs may file Form LLP BEN-2 (to file return to the Registrar in respect of declaration under section 90 of the Companies Act, 2013) and Form LLP 4D (to file return to the Registrar in respect of declaration of beneficial interest in contribution received by the LLP) without payment of additional fees up to 15 May 2024 and the said forms may be made available in version-3 for filling purposes w.e.f. 15 April 2024.

CIRCULAR DATED 19 FEBRUARY 2024: DEPLOYMENT AND USAGE OF CHANGE REQUEST FORM (CRF) ON MCA-21 PORTAL

The MCA vide aforesaid notification, has communicated that CRF has been made available on V3 portal. The said Form is to be used only under exceptional circumstances viz., for the purposes like Master Data correction and to comply with certain directions of Courts/ Tribunals, which ordinarily cannot be complied with through existing functionality of forms or services on MCA-21 system or functionality available either at Front Office level (users of MCA-21 services) or Back Office level (RoCs).



DIRECT TAX

CIRCULARS / NOTIFICATIONS / PRESS RELEASE

CBDT NOTIFIES TAX INFORMATION EXCHANGE AGREEMENT BETWEEN INDIA AND SAMOA

Pursuant to the powers conferred under section 90 of the IT Act, the Central Board of Direct Taxes (CBDT) has notified the Tax Information Exchange Agreement (TIEA) between the Indian Government and the Government of Samoa. The TIEA shall come into force from 12 September 2023.

[Notification No. 21/2024 F. No. 503/06/2012-FTD.II, dated 7 February 2024]

CBDT ISSUES AN ORDER TO WRITE OFF SMALL OUTSTANDING TAX DEMANDS PURSUANT TO AN INTERIM BUDGET ANNOUNCEMENT

While presenting the interim Budget for Fiscal Year (FY) 2024-25, the Hon'ble Finance Minister proposed to withdraw old disputed outstanding tax demands under the Income Tax Act, 1961 (IT Act), Wealth Tax Act, 1957 and Gift Tax Act, 1958, as of 31 January 2024. It was proposed to withdraw outstanding direct tax demands up to INR 25,000 pertaining to the period up to FY 2009-10 and up to INR 10,000 for FY 2010-11 to 2014-15. In order to bring this proposal into effect, the CBDT recently issued an Order to provide guidelines and procedures that would be followed for withdrawing these small outstanding tax demands. To read our detailed analysis, please visit https://www.bdo.in/en-gb/insights/alerts-updates/cbdt-issues-order-to-write-off-small-outstanding-tax-demands-pursuant-to-interim-budget-announcement.

[Order F. NO. 375/02/2023-IT-BUDGET, dated 13 February 2024]

FINANCE BILL, 2024 RECEIVES PRESIDENT'S ASSENT

The Hon'ble Finance Minister presented the Union Interim Budget of FY 2024-25 on 1 February 2024. The Hon'ble Finance Minister proposed a few amendments in the interim budget to provide continuity with respect to a few tax benefits and exemptions while keeping the tax rates unchanged. The Finance Bill was passed without modifications and received the assent of the Hon'ble President of India on 15 February 2024. To read our detailed analysis of Finance Bill 2024, please visit https://www.bdo.in/en-gb/insights/publications/interim-budget-an-overview-publication

IMPLEMENTATION OF E-VERIFICATION SCHEME 2021

The Income Tax Department has identified mismatches between the information received from third parties and the Income Tax Return (ITR) filed by the taxpayers. The mismatches pertain to interest and dividend income. In certain cases, the mismatch is on account of ITR not being filed by the taxpayer.

In order to reconcile the mismatch, an on-screen functionality has been made available on the Compliance portal of the e-filing website[1] for taxpayers to provide their response for mismatches relating to FY 2021-22 and 2022-23. The taxpayers are communicated about the mismatch through SMS and emails. It has been clarified that this communication is not a notice. Taxpayers who are not registered on the e-filing website will have first to register themselves on the e-filing website to view the mismatch. The on-screen functionality is self-contained and will allow the taxpayers to reconcile the mismatch on the portal itself by furnishing their response. No document is required to be

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

furnished. The taxpayer need not respond to the mismatch if he has disclosed the interest income in the ITR under the line item 'Others' in the Schedule 'Other Sources'. The said mismatch shall be resolved on its own and will be reflected in the portal as 'Completed'. The taxpayers who are unable to explain the mismatch may furnish an Updated Income Tax Return if eligible, to make good any underreporting of income.

[Press Release dated 26 February 2024]

JUDICIAL UPDATES

THE SUPREME COURT HOLDS THAT TELECOM SERVICE PROVIDERS ARE NOT LIABLE TO WITHHOLD TAX UNDER SECTION 194H ON DISCOUNTS ON PREPAID PRODUCTS OFFERED TO SIM CARD DISTRIBUTORS

Recently the Supreme Court had an occasion to examine whether the agreements between telecom operators and distributors/franchisees for the sale of prepaid SIM Cards and recharge vouchers to end-customers establish the legal relationship of principal and agent and thus liable for TDS under section 194-H of the IT Act. To read our detailed analysis, please go to https://www.bdo.in/en-gb/insights/alerts-updates/section-194h-not-applicable-on-discount-on-prepaid-products-offered-to-sim-distributors-by-telecom-s

(Bharti Cellular Limited Vs ACIT (Kolkata), Civil Appeal No. 7257 of 2011 (Supreme Court)

DELHI HIGH COURT RULES THAT CHARGEABILITY TO TAX IS PERTINENT FOR ATTRACTING WITHHOLDING PROVISIONS UNDER SECTION 195 ON PURCHASES; APPLIES NON-DISCRIMINATION CLAUSE

The taxpayer, a private limited company, had entered into certain transactions (i.e. purchases and rendering of services) with its group companies in Japan, USA, Singapore and Thailand. While remitting money for purchases from its US and Japanese group companies, the taxpayer did not withhold tax by contending that it violates the non-discrimination clause contained in Article 24(3) and Article 26(3)[2] of the Double Taxation Avoidance Agreement (DTAA) entered into by India with Japan and USA respectively. As far as remittances made for purchases from Thailand and Singapore are concerned, the taxpayer did not withhold tax on the ground that said group companies do not have a Permanent Establishment (PE) in India. Further, the DTAA entered by India with Thailand and Singapore does not contain a non-discrimination provision.

The tax officer disallowed the deduction under section 40(a)(i)[3] of the IT Act. The said additions were confirmed by the Dispute Resolution Panel (DRP) and reversed by the Income Tax Appellate Tribunal. Aggrieved, the tax authorities preferred an appeal with the Hon'ble Delhi High Court (Delhi HC). As there was a difference of opinion between the judges of the Division Bench, the matter was referred to a third judge.

The Hon'ble Delhi HC, while ruling in favour of the taxpayer, made the following observations:

- The conclusion of the tax officer about the taxability of the payments made by the taxpayer in India, was based on the rationale that since MC Japan had a liaison office located in India, which was treated as its PE, the business model of the remaining group companies being identical, would stand on the same footing. The tax officer thus concluded that all the group entities had PE in India. The tax authorities relied on Explanation 2 to section 195[4] (Inserted by Finance Act 2012, with effect from 1 April 1962).
- Prior to 1 April 2005, payments specified in Section 40(a)(i) of the IT Act did not apply to residents. The Finance Act 2004 amendment to Section 40(a) of the IT Act brought within its ambit residents, albeit with respect to payments specified in Section 40(a)(ia) which contains any interest, commission or brokerage, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work.
- Therefore, although parity had been brought about with regard to the denial of deduction where tax at source was not deducted against payments made outside India or to non-residents and residents, it was limited to certain payments. Section 40(a)(ia) of the IT Act did not bring payments made towards purchases to resident vendors within its net.
- There can be no cavil with the proposition advanced on behalf of the taxpayer that since the provision of Article 24(3)/26(3) of the India-Japan and India-USA DTAAs respectively are more beneficial, it is entitled to rely upon the same. Further, section 90(2) of the IT Act makes it abundantly clear that where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India for granting tax relief or avoidance of double taxation, the provisions of the IT Act shall apply to the extent they are more beneficial to that taxpayer.
- As per section 195(1) of the IT Act, chargeability to tax is the paramount condition for triggering the obligation to deduct tax at source. This is also confirmed by the Hon'ble Supreme Court in GE India Technology[5] wherein it was held that the most important expression in

[1] Neither of the contracting countries gives any preferential treatment in taxing its own residents or citizens vis-à-vis foreign persons

[3] Expenses payable outside India or in India to a non resident not deductible while computing the income chargeable under Profits and gains from business or profession on failure to deduct tax at source or failure to pay the tax deducted on or before the due date specified under section 139(1) of the IT Act.

[4] Section 195 provides for deduction of tax at source by any person making payment to a non-resident at the rates in force.

[5] GE India Technology Cen. (P.) Ltd. v. Commissioner of Income-tax [2010] 327 ITR 456(SC)

Section 195(1) of the IT Act consists of the words "chargeable under the provisions of the Act". A person paying interest or any other sum to a non-resident is not liable to deduct tax if such sum is not chargeable to tax under the IT Act. It may be noted that Section 195 contemplates not merely amounts, the whole of which are pure income payments, it also covers composite payments which have an element of income embedded or incorporated in them. Thus, where an amount is payable to a non-resident, the payer is under an obligation to deduct tax at source in respect of such composite payments, limited to the appropriate proportion of income chargeable under the IT Act.

- The expression "sum chargeable under the provisions of the Act" is used only in Section 195 of the IT Act. Therefore, section 195 has to be read in conformity with the charging provisions, i.e., sections 4, 5 and 9 of the IT Act.
- Reliance on the judgment rendered by the Supreme Court in Transmission Corporation of AP Ltd[6] is misplaced since that a case involving a composite transaction where the wastrading receipt was embedded with a component of income.
- The business connection test had no relevance once it was established that the Thailand and Singapore entities did not have a PE in India.

[Commissioner of Income Tax vs Mitsubishi Corporation India Pvt. Ltd (ITA 180/2014) (Delhi High Court)]

MADRAS HC HOLDS THAT POST-AMALGAMATION ASSESSMENT TO BE CONDUCTED SOLELY BASED ON THE MODIFIED RETURN

The taxpayer, a private limited company, is engaged in the business of manufacturing and trading yarn and fabric. During the FY 2020-21, the Taxpayer entered into a Scheme of Amalgamation wherein another Indian company was merged with the taxpayer. The chain of events is summarised hereunder:

DATE	EVENT
1 April 2020	Appointed date of amalgamation
14 March 2022	Standalone tax return[7] filed by the taxpayer for FY 2020-21
18 April 2022	Sanction of scheme by the NCLT
24 August 2022	Modified return filed (in physical form)
27 December 2022	Show cause notice (SCN) issued by the tax officer
29 December 2022	Reply to SCN by the taxpayer
31 December 2022	Assessment order passed

[6] Transmission Corporation of AP Ltd. v. CIT (1999) 239 ITR 587 (SC)
[7] Since the last date for filing tax return for FY 2020-21 was 31 March 2022, the taxpayer filed a standalone return.

As the Income Tax Business Application [ITBA] portal was not operationalised to enable the filing of modified returns, the taxpayer manually filed the modified tax return. In the meanwhile, the tax officer initiated proceedings and issued a show cause notice wherein fifty-three additions were proposed. Within two days of the response, the tax officer referring to the pre-amalgamation standalone financial statements at certain places and consolidated return of income at others made additions. Aggrieved, the taxpayer filed a writ petition before the Madras High Court to quash the assessment order. While quashing the assessment order, the Madras High Court made the following observations:

- The amended provision of Section 170A of the IT Act clearly indicates that any assessment after the business reorganisation is sanctioned should be on the basis of the modified return.
- Since the order of the NCLT Chennai was issued on 18 April 2022, the taxpayer had six months from 30 April 2022 to file the modified return. Since the option to file the modified return under Section 170A of the IT Act had not been enabled in the portal, the taxpayer submitted a physical copy of such a modified return.
- Under the Companies Act, 2013, a scheme of reorganisation becomes effective upon sanction from the appointed date.
- From the list of dates and events, it is clear that the first notice to the taxpayer under Section 143(2) of the IT Act was issued on 28 June 2022, which is subsequent to the effective date of the merger.
- In view of the scheme of amalgamation having become effective and thereby operational from 1 April 2020, the taxpayer's consolidated return of income, after its amalgamation, should have been the basis for assessment based on the scrutiny.
- The taxpayer submitted the return of the company on a standalone basis as the last date for filing the return was expiring.
- The tax officer has taken into account the standalone returns of the taxpayer, the standalone returns of the transferor company and the consolidated returns of the merged entity for different purposes. Such an approach cannot be countenanced.
- It is also conspicuous that the show cause notice dated 27 December 2022 was followed by the assessment order in a matter of about five or six days.
- Upon consideration of the consolidated return of the taxpayer, which has since been uploaded electronically, it is open to the tax officer to issue fresh notices and make a reassessment on the basis of such consolidated return of income.

[Pallava Textiles Private Limited vs ACIT (W.P.No.1801 of 2023 and W.M.P.No.1918 of 2023)(Madras High Court)]

INDIRECT TAX

PENALTY CANNOT BE IMPOSED FOR CARRYING A DIGITAL COPY OF E-INVOICE WITHOUT SIGNATURE

Facts Of The Case

- Hemant Taneja, proprietor of M/s. J.S. Enterprises (Taxpayer), is inter alia engaged in the trading of taxable goods falling under Chapter 74 of the Customs Tariff Act.
- The Taxpayer received an order for supply of various goods *inter alia* including copper clad laminate. Accordingly, the Taxpayer generated an E-Invoice no. 766/2022-23 (E-Invoice) and E-Way Bill No. 721309051066 (EWB) both dated 4 January 2023.
- In this regard, the goods were loaded on the vehicle for onward transportation. The soft copies of the E-Invoice and EWB were provided by the Taxpayer to the vehicle driver.
- While the goods were in transit, the vehicle was intercepted by the Tax Authorities. The driver had furnished soft copies of E-Invoice and EWB to the Tax Authorities.
- However, the Tax Authorities proceeded to conduct physical inspection of the goods in presence of the Taxpayer's representative who had also furnished hard copies of the E-Invoice and EWB. Subsequently, the Tax Authorities issued a detention order detaining the vehicle and the goods.
- Pursuant to the above, the Tax Authorities issued a Show Cause Notice (SCN) alleging that the goods were transported without valid and complete documentation and in violation of the provisions of the Central Goods and Services Tax Act, 2017 (CGST Act) while also alleging that -
  - The E-Invoice did not bear the signatures of the authorised signatory;
  - The driver of the vehicle failed to produce relevant documents.
- Subsequently, the aforesaid SCN was decided against the Taxpayer by the Tax Authorities ¬vide the Order-in-Original (OIO) whereby penalty under Section 129(1)(a) of the CGST Act was imposed on the Taxpayer. To release the goods for undertaking onward supply, the Taxpayer had duly paid the aforesaid penalty.
- The aforesaid order was challenged by the Taxpayer before the First Appellate Authority. However, the said appeal was rejected by reiterating the reasons provided in the OIO.
- Aggrieved by the above, the Taxpayer filed a Writ Petition before the Allahabad High Court.

Contentions Of The Taxpayer

- The driver of the vehicle was carrying soft copies of E-Invoice and EWB. However, the Tax Authorities failed to verify the same.
- The Taxpayer had duly generated the relevant documents viz., E-Invoice and EWB and the same were duly furnished with the Tax Authorities at the time of inspection of the vehicle. However, the same were not considered by the Tax Authorities.
- There was no intention to evade payment of tax by the Taxpayer.

Contentions Of The Tax Authorities

- While the goods were in transit, the driver of the vehicle was not in possession of the relevant documents. Consequently, production of such documents at the time of inspection of vehicle is of no avail to the Taxpayer. This clearly indicates the Taxpayer's intention to evade payment of tax.

Observations And Ruling By The High Court

- On perusal of the statutory scheme laid down under Sections 68 and 129 of the CGST Act read with Rules 48 and 138A of the Central Goods and Services Tax Rules, 2017 (CGST Rules), it is evident that –

  - While transporting goods, the driver and/ or the owner should be in possession of E-Invoice as well as EWB.
  - The Taxpayer has an option to produce physical or digital copies of the aforesaid documents.
  - The procedure for generating these documents has been provided under the GST law.
- Applying the aforesaid scheme to the facts of the present case, it is undisputed that the EWB contained the complete details in Part A and Part B. Once the documents are generated, the statutory duty is cast upon the Tax Authorities to verify the authenticity of these documents. Considering that these documents are in the official reach of the Tax Authorities, verification thereof is a simple procedure which ought to be carried out. However, in the present case, the Tax Authorities have failed to do so.
- In the present case, it is undisputed that –
  - The requirement of signatures is dispensed with as regards digital invoice (5th Proviso to Rule 46 of the CGST Rules).
  - The Taxpayer had duly furnished E-Invoice and EWB at the time of inspection of goods.
  - Having produced the aforesaid documents, there was no cause for imposition of penalty and no case for intent to evade payment of tax is made out, especially given that the authenticity of the documents is not disputed.
- If the Taxpayer had relevant documents, there was no cause for him not to provide the same to the driver during transportation of goods. Since the driver had produced the soft copies of the relevant documents, the Tax Authorities ought to verify the same from the GST portal. Having failed to do so, the Tax Authorities cannot fasten penalty on the Taxpayer for its own defaults.
- Under Section 129(1) of the CGST Act, the Taxpayer has an option either to provide security or to make payment and satisfy the demand in full. The mere fact that the assessee has made payment will not disentitle him for carrying the order for imposition of penalty in appeal.
- Since all the relevant documents were furnished before the Tax Authorities during inspection, there was no cause for detention, seizure or imposition of penalty since the Tax Authorities have not challenged the authenticity of (or found irregularities in) the documents so furnished.
- In the present case, not only did the mobile squad misdirect itself in law but the Appellate Authorities have also failed to redeem the errors.
- In view of the above, the Writ Petition is allowed with a direction to the Tax Authorities to refund the amounts deposited.

  [Hemant Taneja Vs. State of U.P. and Ors. [TS-730-HC(CAL)-2023-GST]]

MADRAS HIGH COURT SETS ASIDE NON-SPEAKING ORDER PASSED BY THE TAX AUTHORITIES

Facts Of The Case

- M/s. A. D. Jeyaveerapandia Nandar & Bros. (Taxpayer) is inter alia engaged in the wholesale and retail business of trading grocery and agricultural produce.
- Pursuant to the audit conducted by the Tax Authorities for FY 2017-18, various observations were pointed out by the Tax Authorities, post which, an SCN was issued to the Taxpayer on various issues, such as turnover mismatch, reversal of Input Tax Credit (ITC), etc.
- In response, the Taxpayer filed a detailed reply. Subsequently, the proposed demand in SCN was confirmed vide the OIO while also imposing a penalty equivalent to 10% of the tax demand on the Taxpayer.
- Aggrieved by the above, the Taxpayer filed a Writ Petition before the Madras High Court.

Contentions Of The Taxpayer

- The OIO exhibits complete non-application of mind and is an unreasoned order, which is evident from the following:
  - The Tax Authorities merely referred to the reply filed by the Taxpayer relating to turnover mismatch and recorded that the same is not acceptable without providing reasons thereof.
  - While the Taxpayer had specifically contended that the ITC was availed and used only in respect of taxable and zero-rated supplies, the Tax Authorities in the OIO held that the ITC is liable to be reversed since the procurements are used partly for exempt supplies.
  - The Taxpayer had specifically contended in reply to SCN that the payments to the creditors are made within 180 days and hence, Rule 37 of the CGST Rules was not contravened. Further, the Taxpayer had also furnished the list of sundry creditors, payment date, bank date and bank statements. Despite the aforesaid submissions, the demand has been confirmed on the ground that the invoices, bank statements and ledger copies were not produced by the Taxpayer.

Observations And Ruling By The High Court

- The OIO was issued by the Tax Authorities without taking into account the relevant material placed on record by the Taxpayer. This is evident from the following:
  - The Taxpayer furnished the Balance Sheet and Profit & Loss Account for FY 2017-18 to support its contentions regarding the allegation on turnover mismatch. However, the Tax Authorities had merely mentioned that the reply filed by the dealer was not acceptable. This clearly indicates that the Tax Authorities have merely recorded the conclusion in the nature of ipse dixit without any reasoning to support such conclusion.
  - Despite the submissions made by the Taxpayer that the procurements were used exclusively for taxable and zero-rated supplies, the Tax Authorities concluded that the ITC was partly used for effecting taxable and partly for effecting exempt supplies. The latter conclusion is clearly contrary to the submissions made by the Taxpayer.
  - Despite the various submissions made by the Taxpayer, the OIO merely concluded with a finding that the bank statement was not furnished by the Taxpayer.
- In view of the above, the OIO was quashed and the matter was remanded for reconsideration by the Tax Authorities with a direction to provide a reasonable opportunity (including a personal hearing) to the Taxpayer and to issue a fresh assessment order within a period of two months.

  [A D Jeyaveerapandia Nadar & Bros. Vs. The State Tax Officer [TS-47-HC(MAD)-2024-GST]]

SCN CANNOT BE CHALLENGED UNDER WRIT JURISDICTION ON THE GROUND THAT THE AUDIT REPORT DID NOT ALLEGE FRAUD/ SUPPRESSION

Facts Of The Case

- M/s. ABT Limited (Taxpayer) is inter alia engaged in the business of supply of light vehicles and parts thereof as also servicing of such vehicles.
- The Tax Authorities from Audit Division conducted the audit of the Taxpayer's books of accounts for FY 2017-18 to 2020-21, pursuant to which, an audit report was issued in Form GST ADT-02.
- The aforesaid audit report culminated in the issuance of two SCNs inter alia including a show cause notice issued under Section 74 of the CGST Act (Impugned SCN).
- Aggrieved by the Impugned SCN, the Taxpayer filed a Writ Petition before the Madras High Court.

Contentions Of The Taxpayer

- The audit report did not record any findings of fraud, willful misstatement or suppression of fact in respect of any of the observations made therein. Absent such findings, the Tax Authorities are not empowered to issue the Impugned SCN under Section 74 of the CGST Act.
- The Tax Authorities have not issued an intimation in Form GST DRC-01A under Rule 142(1A) of the CGST Rules. The amendment to Rule 142(1A) of the CGST Rules, making it directory from mandatory, is prospective in nature, and hence, the same would not apply to the present proceedings which relate to the period prior to and after the amendment to Rule 142(1A) of the CGST Rules.
- Since the Impugned SCN relates to the Taxpayer's unit having GSTIN 33AABCA8398K1ZA, the expenditure relating to only such unit should be taken into consideration instead of taking the expenditure on a consolidated basis.

The Taxpayer would have furnished relevant documents had the Tax Authority uploaded the communication (dated 4 July 2023) on the GST portal instead of sending it through e-mail.

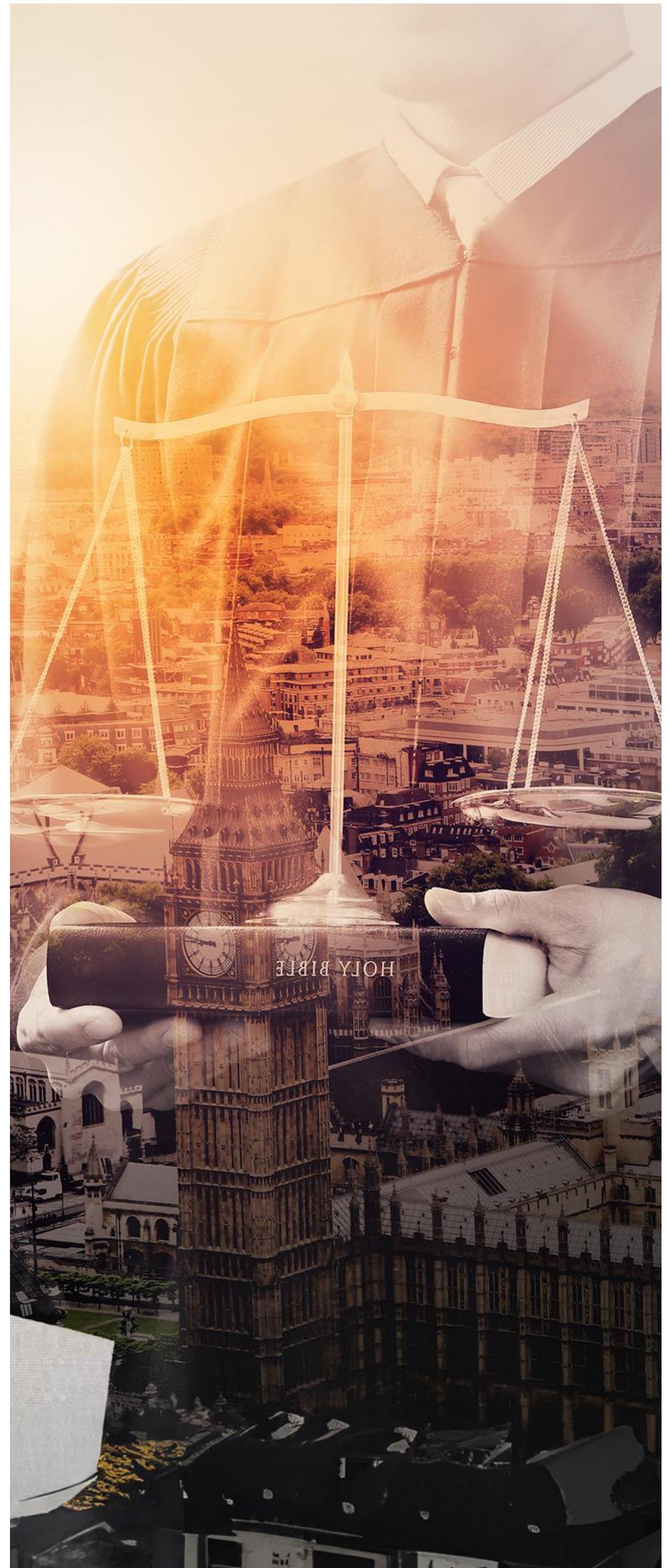
Contentions Of The Tax Authorities

- As per Section 65 of the CGST Act, show cause notice under Section 74 of the CGST Act can be issued even if the audit report does not contain any findings relating to fraud or suppression of facts. Thus, the SCN was issued by the proper officer in accordance with law.
- Further, the Taxpayer can furnish their response to the Impugned SCN and also raise the objections raised in the present Writ Petition before the Tax Authorities.

Observations And Ruling By The High Court

- Requirement to provide findings for issuing notice under Section 74 of the CGST Act:
  - Section 65(7) of the CGST Act indicates that the audit conducted under Section 65(1) of the CGST Act should result in the detection of tax not paid or short paid or erroneously refunded or that ITC was wrongly availed or utilised. Thus, the obligation with regard to the contents of the audit report (under Section 65 of the CGST Act) appears to have been satisfied in the present case.
  - There is nothing in the language of Section 65 of the CGST Act to indicate that the audit report should contain findings of fraud or willful misstatement or suppression of facts. On the contrary, Section 65(7) of the CGST Act provides that the proper officer may initiate action under Sections 73 or 74 of the CGST Act.
- Requirement to issue intimation in Form GST DRC-01A:
  - While Rule 142(1A) of the CGST Rules was amended prospectively, the Impugned SCN was issued subsequent to the date of amendment. Therefore, even if the amendment is prospective, the amendment would apply with regard to the Impugned SCN.
- As regards the Taxpayer's contention that the expenses ought to be taken qua the unit and not on a consolidated basis, it was observed that the same does not call for interference with the Impugned SCN under Article 226 of the Constitution of India.
- In view of the above, the Writ Petition was dismissed by allowing liberty to the Taxpayer to file a reply to the Impugned SCN.

  [ABT Ltd Vs. The Additional Commissioner of GST & Central Excise [TS-41-HC(MAD)-2024-GST]]



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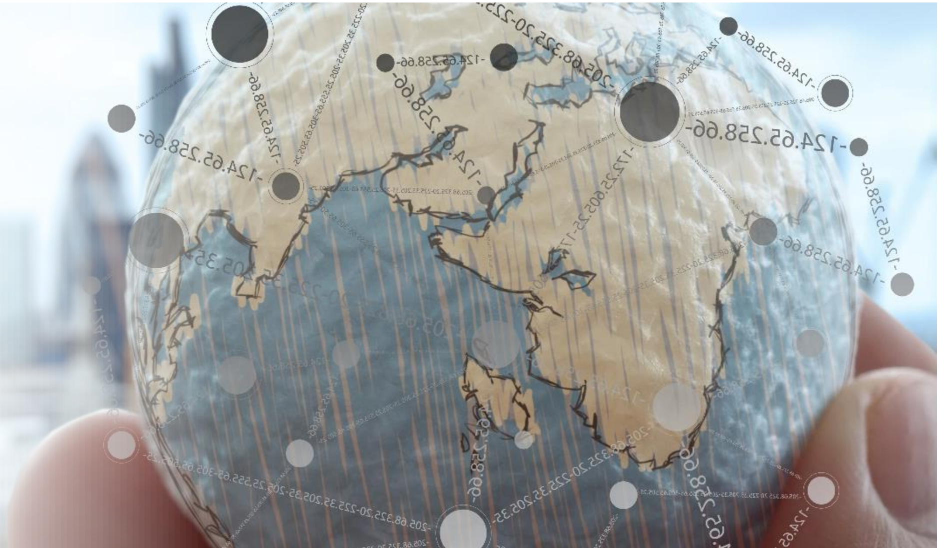

HON'BLE TAX TRIBUNAL, BANGALORE: HOLDS DELIVERY/ WARRANTY COSTS NOT PART OF AMP-SPEND FOR THE TAXPAYER AND SHARE-BASED COMPENSATION NOT TO BE CONSIDERED AS AN OPERATING EXPENSE

The case involved a subsidiary of a foreign company operating in India, providing various services and wholesale trading of e-book reader devices. The taxpayer faced scrutiny regarding its expenses during assessment proceedings, with a specific focus on share-based compensation (SBC), depreciation, amortisation, delivery charges, and warranty expenses.

Despite the taxpayer's cooperation during assessment proceedings pertaining to queries regarding SBC costs, depreciation and amortisation expenses, and warranty and delivery charges, and the Transfer Pricing Officer's (TPO) acceptance of relevant information as provided, the Commissioner of Income-tax (Transfer Pricing) [CIT(TP)] invoked revisionary jurisdiction under Section 263 of the Income-tax Act, 1961 (the Act) alleging insufficient inquiry, leading to potential revenue loss. The crux of the legal dispute centred on whether the CIT(TP) had valid grounds to set aside the TPO's order, with taxpayer's arguments emphasising the need for specific failures in inquiries before deeming an order erroneous and the retrospective application of the concerned amendment to the Act in relation to powers invoking revisionary proceedings.

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

- The *exclusion of SBC costs as non-operating expenses was correct*, citing judicial precedents referenced by the taxpayer.
- Despite a discrepancy in the taxpayer's reported figures and figures mentioned in the TPO's order regarding depreciation and amortisation expenses, there was no fault in the TPO's order as the operating margin remained within acceptable bounds, *i.e., the permissible range of +/- 3% tolerance range even with the inclusion of such costs in the business segments as operating in nature*.
- The Tribunal concurred with the taxpayer's argument that *delivery and warranty expenses were expenses relating to post-sale activities and were irrelevant to brand promotion/ development*. The detailed inquiries conducted by the TPO supported this view, absolving the TPO of any fault in its order for not considering delivery and warranty expenses as part of AMP expenditure.

  Citation: *Amazon Seller Services Private Limited [TS-60-ITAT-2024(Bang)-TP]*

HON'BLE TAX TRIBUNAL, MUMBAI: REJECTS ASSESSEE'S OWN RECHARACTERISATION AS DISTRIBUTOR UPHOLDS CUP TO BENCHMARK API-IMPORT

The taxpayer, operating in the pharmaceutical industry in India, faced adjustments by the TPO in relation to international transactions with associated enterprises (AEs) pertaining to the import of Active Pharmaceutical Ingredients (APIs) and Finished Dosage Forms (FDFs), leading to appeals regarding the recomputation of Arm's Length Price (ALP) for APIs and ALP adjustment for FDFs.

The legal issue centred on the taxpayer's characterisation as a Value-Added Distributor (VAD) versus a licensed manufacturer, the suitability of the Comparable Uncontrolled Price (CUP) method for benchmarking API imports, and the segregation of distribution and contract manufacturing segments for transfer pricing analysis.

The taxpayer contended for VAD classification instead of a licensed manufacturer, emphasising minimal risk in the API conversion process and advocating for the Transactional Net Margin Method (TNMM) as the most appropriate method for benchmarking. The taxpayer criticised the TPO's use of the CUP method and challenged the reliability of data from the Customs Data Base (TIPS).

Conversely, the Department supported the taxpayer's characterisation as a manufacturer, use of the CUP method as well as sourcing data from the TIPS database. Additionally, the dispute extended to the segregation of distribution and contract manufacturing segments, with the taxpayer emphasising functional differences, while the Department contended commonality in the functions undertaken and continuity in agreements.

The Hon'ble Tax Tribunal's observations in this case were as follows:

- No merit in the taxpayer's argument for classification as VAD, stating that *the taxpayer's involvement in the entire manufacturing process, including API procurement and FDF production, aligned more with that of a manufacturer*.
- *Objections regarding the use of the TIPS database under the CUP method were unfounded,* citing previous decisions of the Hon'ble Tribunal and industry norms that supported the use of TIPS data. However, the Hon'ble Tribunal *acknowledged the need for adjustments to account for differences in quality when using TIPS data for benchmarking.*
- *Rejected the taxpayer's assertion that TNMM was the most appropriate method for determining the ALP,* citing previous decisions that supported CUP as the most appropriate method for similar transactions.
- Concerning the segregation of segments, the Hon'ble Tribunal acknowledged the distinct nature of the segments and the taxpayer's error in their initial amalgamation. It observed the clear demarcation in roles and obligations under the manufacturing agreements, affirming the taxpayer's role as more than a distributor in the contract manufacturing segment and *concluded that the segregation of the activities was fair and reasonable, allowing for a fresh examination by the TPO of the distribution segment post-segregation.*

Citation: *Fulford (India) Limited [TS-48-ITAT-2024(Mum)-TP]*

HON'BLE HIGH COURT, MADRAS: HOLDS A REFERENCE TO SEC 144C(1) IDENTIFIES THE ORDER AS A DRAFT ASSESSMENT ORDER

The taxpayer filed an income tax return and later revised the same, resulting in a significant variation of INR 43,42,55,948/-. The Assessing Officer (AO) referred the matter to the TPO to assess the price variation issue. Subsequently, an order u/s 143(1)/144C(1) of the Act was passed by the AO.

However, the taxpayer appealed that without passing a draft assessment order as required under Section 144(C) of the Act, the AO directly passed the final assessment order. The primary legal issue revolves around whether the assessment order passed by the AO constitutes a draft assessment order under Section 144(C) of the Act or a final assessment order under Section 143(1) of the Act.

The Department contended that the order indeed constitutes a draft assessment order, citing the mention of Section 144(C)(1) of the Act in the order itself, i.e., the order contained the nomenclature "Accordingly, the assessment is being assessed u/s.143(3)/144C(1) of the Income Tax Act, 1961……" although there was no mention of the word "draft assessment" on the face of the order.

Upon consideration of submissions, the Hon'ble HC determined that *the order passed by the AO qualifies as a draft assessment order under Section 144(C)(1) of the Act*. While the word "draft assessment" was missing, the provision under Section 144(C) of the Act was cited, making it clear that it should be construed as a draft assessment order.

Thus, reference to Section 144C(1) of the Act constitutes that the order passed by the AO was to be considered as a draft assessment order. Therefore, the taxpayer was directed to file an appeal before the Dispute Resolution Panel within 30 days of the HC order. The HC set aside the demand notice since the taxpayer was given time to file the appeal against the draft assessment order, and no fresh demand was directed to be raised until the Dispute Resolution Panel's decision.

Citation: *The Ramco Cements Limited [TS-750-HC-2023(MAD)-TP]*

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