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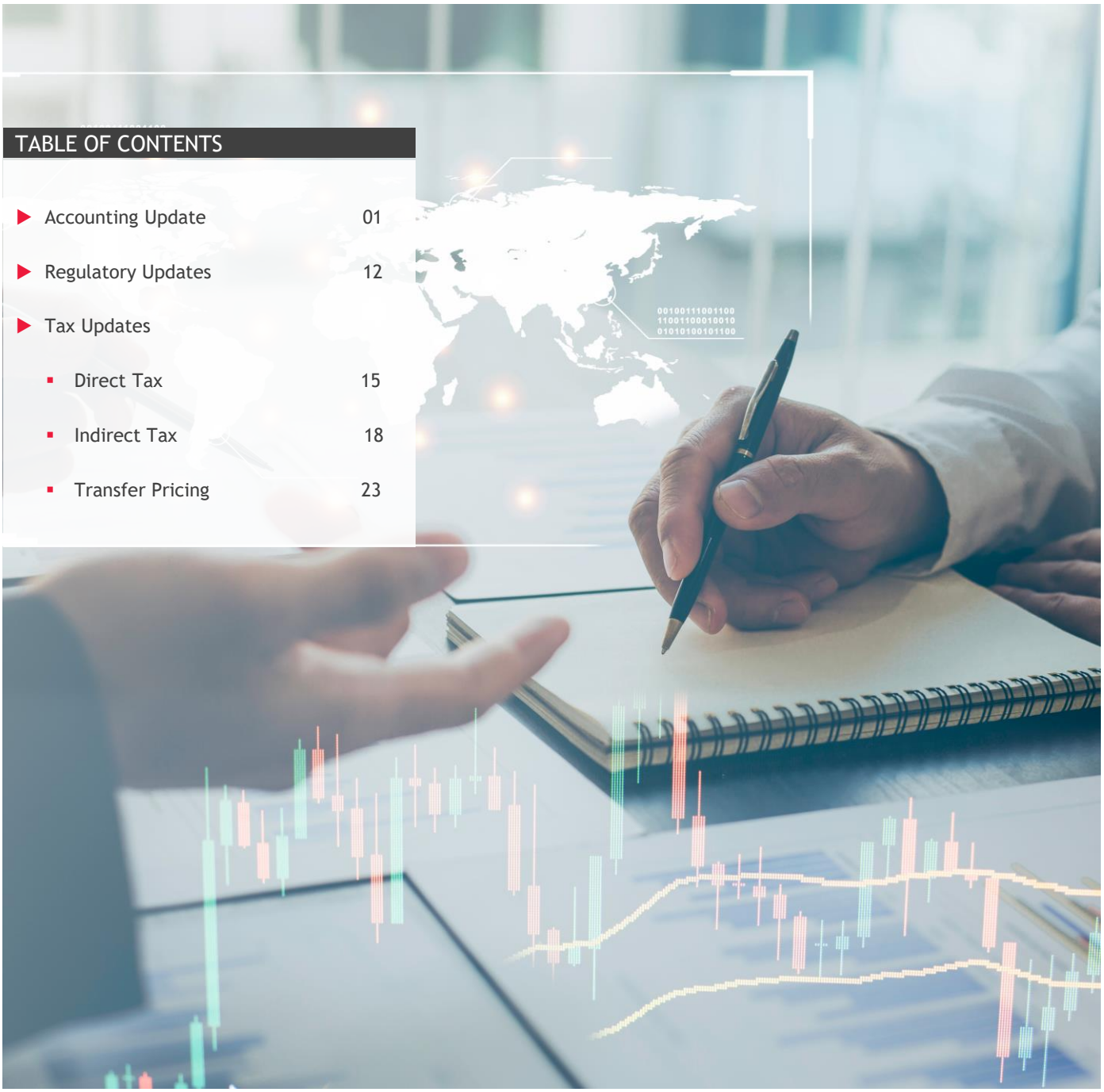

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EAC OPINION

ACCOUNTING TREATMENT OF SUBSEQUENT EXPENDITURE AS PER INDIAN ACCOUNTING STANDARD (IND AS) 16, 'PROPERTY, PLANT AND EQUIPMENT'

Facts of the Case:

A Company (hereinafter referred to as 'the Company') is a Mini Ratna 'Public Sector Undertaking' and 100% subsidiary of a Government Company. The Company is mainly engaged in the mining, production and marketing of raw coal required for power, cement and other sectors. The Company also operates coal washeries to reduce the ash contents of coal and improve its heating value so that cooking washed coal required for steel and other sectors may also be produced.

The Company is operating an R washery plant. The said washery plant was commissioned in June 1986. The initial design capacity of the said washery is 3.0 Mn tonne per Year (MTY). The capacity of the washery plant is determined based on the capacity of raw coal fed to the said plant for washing. As per the technical evaluation, the useful life of the coal washery plant is determined as 15 years.

The Company has stated that the washery plant has mainly three sections for its operations and these sections may have the following equipment/systems for the proper operation of each section:

- Raw Coal Section: Receiving Bunker, Aprons, Grizzly, Primary and Secondary Crusher, Sizing screens, Conveyor belts, chutes and motors, etc.
- Main Washing Section: Course and Fine Coal Jigs, Screens, Compressor, pumps, Blowers, Bucket elevators, Chain Conveyor, Motors, Conveyor belts and chutes, etc.
- Loading and Despatch Section: Hopper, Conveyor belts, Silos, Winch house, chutes, Control Centre and Weighbridge, etc.

If a new washery plant of a capacity of 3 MTY is constructed presently, it may have a total cost estimation of around INR 300 cr.

The R washery plant has completed its useful life in the financial year 2001-02 and the said plant is still in operation solely on account of regular maintenance activities carried out by the Company. However, the capacity utilisation of said washery plant was very poor as may be seen from the table-1 and there was also an increase in breakdown hours as may be seen from the table-2 given below:

Table – 1 (Capacity Utilisation)

S. No.	Year	Capacity of Raw Coal feedto Washery (tonne)	Actual Raw Coal feed (tonne)	% Utilisation
1	2016-17	30,00,000	13,94,500	46.48
2	2017-18	30,00,000	12,79,600	42.65
3	2018-19	30,00,000	8,52,006	28.40

Table – 2 (Breakdown hours)

S. No.	Year	Maintenance/Breakdown Hrs.
1	2016-17	1,038
2	2017-18	3,036
3	2018-19	3,375

With an objective to improve capacity utilisation and to minimise the breakdown hours, the Company has appointed X Mine Planning and Design Institute (XMPDI) (a subsidiary of its parent company) to study and prepare a detailed report based on assessment of operational constraints and remedial measures for enhancing capacity utilisation and augmentation of clean coal.

In October 2019, XMPDI submitted the study report on the said washery and projected the corrective measures to be undertaken for the enhancement of utilisation of plant capacity and the estimated cost of INR 56.19cr. The activities to be undertaken are further tabulated below:

Broad Scope of Works:

S. No.	Nature of Works	Amount (crore)
1.	Mechanical works	52.84
2.	Electrical works	1.54
3.	Civil works	1.81
	Total	56.19

The section-wise corrective measures (i.e., worn-out parts replacement/renovation of structural, civil, and other support system) to be undertaken may be seen from the following table:

Mechanical Works:

Sr. No.	Nature of Works	No. to be revived	Amount(crore)
a)	Washing Section		
	Coarse Coal Jig: Supply of 1 no. Coarse coal Batac jig along with 2 nos. bucket elevators, 1 no. fixed screen, 1 no. blower & 1 no. compressor	1	7.37
	Fine coal Jig: Supply of 1 no. Fine coal Batac jig along with 2 nos. bucket elevators, 1 no. fixed screen, 1 no. Blower, 1 no. compressor	1	6.93
b)	Fine Coal Section		
	Froath Floatation plant with all its accessories including dewatering of concrete by drum filter	1	19.50
	Static thickener completes with drive, rake mechanism, turn table and thickener arm	1	1.40
c)	Other General Works		
	Numerous Pumps Replacement	Numerous	0.52
	Numerous pump valve replacement	Numerous	0.05
	Replacement of MS Pipes	Lot	0.40
	Gearbox Replacement	Numerous	0.72
d)	Structural works with Iron and Steel		0.76
	Subtotal a) to d) above		37.65
e)	Erection & Commissioning @ 10%		3.76

Sr. No.	Nature of Works	No. to be revived
f)	Design & Engineering @ 5%	2.07
g)	Other Contingency	1.30
h)	GST	8.06
	Total Cost a) to h)	52.84

Other Electrical and Civil Works:

Electric works of INR 1.54cr mainly included the replacement of control, power cable, motors, power contractor and other miscellaneous items. Whereas the civil works of INR 1.81 crore mainly included the revival of 1 no. settling pond, replacement of CGI sheet of conveyor gallery and repairing of R.C.C. beams and columns.

Against the above cost estimation of INR 56.19cr, for the above works was published and the work was awarded to M/s H Pvt. Ltd. with a contract value of INR 42.92cr including GST. The work awarded inter alia includes Design and Engineering, supply, and fabrication along with strengthening of existing Civil and Structural Works, Erection, Commissioning, Trial Run, Performance Guarantee Test and Operation and maintenance for 4 years under a defect liability period.

To date, the total executed works out of the awarded contract value of INR 42.92cr is around INR 28.10cr. The summary of the bill of quantities (BOQs) or works awarded further may be summarized as under:

S. No.	Nature of Works	Amount (crore)
a)	Design & Engineering	0.83
b)	Civil, Structural and Development works	0.64
c)	Total mechanical and other works related to the washery system	28.04
d)	Electrical works	3.22
e)	Erection, Installation and Commissioning	2.72
f)	Other miscellaneous works including Maintenance completion	0.92
	Sub-total	36.37
	GST	6.55
	Total Awarded Cost	42.92

In the said case matter, the following information is further submitted:

The awarded works included an amount of INR 0.64cr, which is related to the strengthening of existing civil and structural works; hence it may not have any independent identification and its useful life remains aligned with the main equipment. Also, the same is not of a nature, which requires separate regular replacement before the expiration of the useful life of main equipment. None of the items executed would have separate useful life as being fixed with the capacity of the washery plant and the scale of expenditure on individual systems/parts/components is insignificant as compared to the overall total cost of the new washery.

In the matter of component accounting, the relevant paragraphs of the accounting policy of the Company regarding the Component Approach are reproduced by the Company hereunder:

'The threshold value of the asset requiring componentisation to be INR 10 crores and above as any assets below INR 10cr will not have any material effect on the financial statements.

While considering the threshold value in percentage of cost component to the total cost of the asset, the Company considered that the component having value not less than 20% of the total cost of the asset will be treated as significant and eligible for component accounting, if other conditions are fulfilled.'

As such, according to the Company, none of the items of BOQ qualifies for recognition as PPE.

Moreover, a particular expense is being incurred for a particular section of an individual item of PPE, i.e., improvement in a particular section of the washing section/fine coal section/handling and despatch section. As such, the said expenditure is not related to PPE as a whole. Hence, the reliable estimation of the enhancement of life of an item of PPE or PPE as a whole could not be technically established.

Important applicable provisions of Ind AS 16 have been reproduced by the Company as under:

'Recognition

7. The cost of an item of property, plant and equipment shall be recognised as an asset if, and only if:

- *future economic benefits associated with the item will probably flow to the entity;*
- *the cost of the item can be measured reliably.*

9. This Standard does not prescribe the unit of measure for recognition, i.e., what constitutes an item of property, plant and equipment. Thus, judgment is required in applying the recognition criteria to an entity's specific circumstances.

10. An entity evaluates under this recognition principle all its property, plant and equipment costs at the time they are incurred. These costs include costs incurred initially to acquire or construct an item of property, plant and equipment and costs incurred subsequently to add to, replace part of, or service it.'

'Subsequent costs

13. Parts of some items of property, plant and equipment may require replacement at regular intervals. For example, a furnace may require relining after a specified number of hours of use, or aircraft interiors such as seats and galleys may require replacement several times during the life of the airframe. Items of property, plant and equipment may also be acquired to make a less frequently recurring replacement, such as replacing the interior walls of a building, or to make a nonrecurring replacement. Under the recognition principle in paragraph 7, an entity recognises in the carrying amount of an item of property, plant, and equipment the cost of replacing part of such an item when that cost is incurred if the recognition criteria are met. The carrying amount of those parts that are replaced is derecognised in accordance with the derecognition provisions of this Standard (see paragraphs 67-72).'

Accounting treatment adopted by the Company:

The Company has recognised the incurred cost of INR 28.10cr in the Statement of Profit and Loss considering the following aspects of the transaction:

As the replacement activities undertaken related to a particular section of an item of PPE i.e., say the improvement in a particular section of washing section/fine coal section/coal handling and dispatch section, hence, the probability of future economic benefits associated with the item as whole (i.e., an asset) could not be established. Moreover, as such, the said expenditure is not related to PPE as a whole. Hence, the reliable estimation of the enhancement of further useful life of the whole PPE could also not be technically established.

The relevant accounting policy of the Company regarding accounting for depreciation - Component Approach is reproduced by the Company hereunder:

'The threshold value of the asset requiring componentisation to be INR 10 cr and above as any assets below INR 10cr will not have any material effect on the financial statements.

While considering the threshold value in percentage of cost component to the total cost of the asset, the component having a value not less than 20% of the total cost of the asset will be treated as significant and eligible for component accounting, if other conditions are fulfilled.'

Accordingly, as per the Company, these amounts are required to be expensed in the Statement of Profit and Loss as and when incurred.

The activity undertaken is not in the nature of replacement required at regular intervals as stipulated in paragraph 13 of Ind AS 16. Further, none of the items executed would have separate useful life with the capacity of a washery plant or related to structural, civil, and other support system improvement of an asset whose life has already expired. Moreover, the scale of expenditure on individual systems/parts/components is insignificant as compared to the overall total cost of a new washery and further, the useful life of the said washery has already expired. Hence, the suitable option available to the Company is to expense the same in the Statement of Profit and Loss in the year of occurrence.

The Company has stated that the washery has lived its rated life 20 years back and there is no reliable estimation that the said repair will enhance the life of the washery. The activity of repairing is undertaken basically to improve the operation of the washery, because even if the said repair improves the capacity by 10%, then the actual expenses of INR 42.92cr would be recovered in a very short period. Based on the past data, it is expected that the said expenditure would be recovered within a period of 6 to 9 months post-repair.

Guidance is also available from Cost Accounting Standard (CAS) 12 on Repairs and Maintenance Cost, which vide paragraphs 4.7 and 4.8 provides as under:

'4.7 Property, plant and equipment are tangible assets that:

- *are held for use in the production of goods or supply of services, for rental to others, for administrative, selling or distribution purposes; and*
- *are expected to be used during more than one accounting period.*

4.8 Repairs and maintenance cost: Cost of all activities which have the objective of maintaining or restoring an asset in or to a state in which it can perform its required function at intended capacity and efficiency.'

From the above, it may be seen that CAS-12 has a similar definition of PPE aligned with Ind AS 16. However, it requires that costs incurred to maintain and restore an asset may be required to be charged as repairs and maintenance costs.

Matter of Dispute:

During the annual accounts audit, the Comptroller and Auditor General of India (CAG Auditor) observed as follows:

'XMPDI prepared (October 2019) a study report of the R Washery for enhancement of its capacity and life and recommended expending INR 56.19cr as capital expenditure to enhance its present (as of March 2019) operational

capacity from 0.852 MTY to 3 MTY. In commensuration with the above recommendation, the Company awarded the said works at a total value of INR 42.92cr (including GST) for the installation of Coarse Coal Jigs, Small Coal Jig, Static Thickener and Heavy Media Circuit on a Turnkey Basis.

Till March 2022, R Area had paid a total of INR 28.10cr to the above contractor, as the above expenditure was incurred towards capital replacement to enhance the capacity and life of the washery. The amount incurred should be capitalised under CWIP, however, the same amount has been treated as revenue expenditure and charged in the Profit and Loss.'

However, as per the Company, it is worth mentioning that there is no mention in the XMPDI report for the enhancement of the life of the washery, but the total concept for undertaking the said activity was to restore the degraded capacity utilisation and reduce the duration of maintenance breakdown.

Query

- Whether the accounting treatment extended by the Company for replacement activities and restoration of selected structural, civil and other support system to improve the operational efficiency and reduction in maintenance/breakdown hours after the useful life of the washery is as per the applicable provisions of Ind AS 16 (i.e. the said expenses to be charged as expenses in the Statement of Profit and Loss as and when incurred)?
- If not, then, how the said expenditure is to be accounted for and what should be the basis for determination of useful life in the given case for provision of depreciation?

Points considered by the Committee

The Committee notes that the basic issue raised by the Company relates to the accounting treatment of subsequent expenditure incurred in relation to the R washery plant of the Company. 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 regular maintenance activities carried out by the Company, appropriateness of the report shared by XMPDI including estimation, appropriateness of accounting policy of the Company regarding component approach and determination of useful life, depreciation accounting in detail, accounting for any other expenditure incurred by the Company in relation to the plant, consideration of materiality in detail, timing of recognition of expenditure, etc. The Committee has expressed its opinion in the context of Indian Accounting Standards, notified under the Companies (Indian Accounting Standards) Rules, 2015, as revised or amended from time to time and not in the context of Cost Accounting Standards as referred by the Company.

Further, since the Company has stated that the activity undertaken is also not in the nature of replacement required at regular intervals as stipulated in paragraph 13 of Ind AS 16, it is presumed that the Company was not required to perform regular major inspections for faults and consequently, no costs for such major inspections/testing was recognised in the carrying amount of the PPE and component accounting in respect of such major inspection cost was not necessary. The Committee does not opine regarding whether in the Facts of the Case, component accounting is necessary or not and presumes from the Facts of the Case that as per the requirements of Ind AS 16, the Company did not follow component accounting in respect of various sections or individual parts or components of the washery plant.

At the outset, the Committee notes that the Company has mentioned that the expenditure incurred on individual systems/parts/components is insignificant as compared to the overall cost of a new washery. In this regard, the Committee notes that Ind AS 16 does not prescribe the unit of measure for recognition and states that judgment is required in applying the recognition criteria to an entity's specific circumstances. Since the Company in the extant case is not following a 'component approach' with respect to the individual sections/units/components of the washery plant, it is presumed from the Facts of the Case that the washery plant is considered as a single unit of measure applying the judgement as per the requirements of Ind AS 16, instead of individual parts/components. Therefore, the Committee is of the view that the expenditure incurred in the extant case should be considered from the perspective of aggregate expenditure on the washery plant as a whole and not in the context of expenditure incurred on individual components/ parts of the washery plant.

In the above context, the Committee wishes to point out that though the Company has mentioned that the expenditure incurred on individual systems/parts/components is insignificant as compared to the overall cost of the new washery, from an accounting perspective, the matter requiring consideration is 'materiality' as defined under Ind AS 1, 'Presentation of Financial Statements'. In this regard, the Committee notes the following requirements of Ind AS 1:

'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 based on 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 is of the view that determination of what is 'material' involves significant judgement considering the nature and/or magnitude/size of the information, assessed not only individually, but also in combination with other information and which could reasonably be expected to influence decisions of primary users of general-purpose financial statements. In other words, materiality is an entity-specific aspect of relevance based on the nature or magnitude of the items to which the information relates in the context of an entity's financial statements. Consequently, to determine what could be material in a particular situation requires judgement, in the specific facts and circumstances, considering the

requirements of Ind AS 1.

Accordingly, the Committee is of the view that whether the aggregate expenditure incurred in the extant case is 'material' as per the requirements of Ind AS 1 or not in the context of the washery plant should be determined in the specific facts and circumstances. In case, the expenditure is not considered 'material', the same may be recognised in the Statement of Profit and Loss; however, if the expenditure incurred is 'material' as per the requirements of Ind AS 1, then the Committee notes the following requirements of Ind AS 16:

'Property, plant, and equipment are tangible items that:

- *are held for use in the production or supply of goods or services, for rental to others, or for administrative purposes; and*
- *are expected to be used during more than one period.'*

'7 The cost of an item of property, plant and equipment shall be recognised as an asset if, and only if:

- *future economic benefits associated with the item will probably flow to the entity; and*
- *the cost of the item can be measured reliably.'*

'10 An entity evaluates under this recognition principle all its property, plant, and equipment costs at the time they are incurred. These costs include costs incurred initially to acquire or construct an item of property, plant and equipment and costs incurred subsequently to add to, replace part of, or service it. The cost of an item of property, plant and equipment may include costs incurred relating to leases of assets that are used to construct, add to, replace part of or service an item of property, plant, and equipment, such as depreciation of right-of-use assets.'

'12 Under the recognition principle in paragraph 7, an entity does not recognise in the carrying amount of an item of property, plant, and equipment the costs of the day-to-day servicing of the item. Rather, these costs are recognised in profit or loss as incurred. Costs of day-to-day servicing are primarily the costs of labour and consumables and may include the cost of small parts. The purpose of these expenditures is often described as the repairs and maintenance of the item of property, plant, and equipment.

13 Parts of some items of property, plant and equipment may require replacement at regular intervals. For example, a furnace may require relining after a specified number of hours of use, or aircraft interiors such as seats and galleys may require replacement several times during the life of the airframe. Items of property, plant and equipment may also be acquired to make a less frequently recurring replacement, such as replacing the interior walls of a building, or to make a nonrecurring replacement. Under the recognition principle in paragraph 7, an entity recognises in the carrying amount of an item of property, plant and equipment the cost of replacing part of such an item when that cost is incurred if the recognition criteria are met. The carrying amount of those parts that are replaced is derecognised in accordance with the derecognition provisions of this Standard (see paragraphs 67–72).'

'Elements of cost

16 The cost of an item of property, plant and equipment comprises:

- *its purchase price, including import duties and non-refundable purchase taxes, after deducting trade discounts and rebates.*
- *any costs directly attributable to bringing the asset to the location and condition necessary for it to be capable of operating in the manner intended by management.*
- *the initial estimate of the costs of dismantling and removing the item and restoring the site on which it is located, the obligation for which an entity incurs either when the item is acquired or because of having used the item during a particular period for purposes other than to produce inventories during that period.*

17 Examples of directly attributable costs are:

- *costs of employee benefits (as defined in Ind AS 19, Employee Benefits) arising directly from the construction or acquisition of the item of property, plant and equipment;*
- *costs of site preparation;*
- *initial delivery and handling costs;*
- *installation and assembly costs;*
- *costs of testing whether the asset is functioning properly, after deducting the net proceeds from selling any items produced while bringing the asset to that location and condition (such as samples produced when testing equipment); and*
- *professional fees.'*

'Depreciation

43 Each part of an item of property, plant and equipment with a cost that is significant in relation to the total cost of the item shall be depreciated separately.'

'Depreciable amount and depreciation period

50 The depreciable amount of an asset shall be allocated on a systematic basis over its useful life.

51 The residual value and the useful life of an asset shall be reviewed at least at each financial year-end and, if expectations differ from previous estimates, the change(s) shall be accounted for as a change in an accounting estimate in accordance with Ind AS 8, Accounting Policies, Changes in Accounting Estimates and Errors.'

56 The future economic benefits embodied in an asset are consumed by an entity principally through its use. However, other factors, such as technical or commercial obsolescence and wear and tear while an asset remains idle, often result in the diminution of the economic benefits that might have been obtained from the asset. Consequently, all the following factors are considered in determining the useful life of an asset:

- *expected usage of the asset. Usage is assessed by reference to the asset's expected capacity or physical output.*
- *expected physical wear and tear, which depends on operational factors such as the number of shifts for which the asset is to be used and the repair &*

maintenance programme, and the care and maintenance of the asset while idle.

technical or commercial obsolescence arising from changes or improvements in production, or from a change in the market demand for the product or service output of the asset. Expected future reductions in the selling price of an item that was produced using an asset could indicate the expectation of technical or commercial obsolescence of the asset, which, in turn, might reflect a reduction of the future economic benefits embodied in the asset.

legal or similar limits on the use of the asset, such as the expiry dates of related leases.

57 The useful life of an asset is defined in terms of the asset's expected utility to the entity. The asset management policy of the entity may involve the disposal of assets after a specified time or after the consumption of a specified proportion of the future economic benefits embodied in the asset. Therefore, the useful life of an asset may be shorter than its economic life. The estimation of the useful life of the asset is a matter of judgement based on the experience of the entity with similar assets.

The Committee notes from the above-reproduced requirements of Ind AS 16 that the recognition principle as laid down in the Standard is equally applicable to the costs incurred subsequently to add to, replace part of, or service an item of PPE. Thus, any expenditure that meets the recognition criteria under paragraph 7 of Ind AS 16 should be capitalised as part of the cost of PPE and if it does not, it should be recognised in the statement of profit or loss. Further, the Committee notes that as per paragraph 12 of Ind AS 16, expenditure on minor repairs and maintenance, including replacement costs of small parts and cost of day-to-day servicing of the items is to be recognised in profit or loss as and when incurred and only an expenditure that meets the conditions of recognition as per paragraph 7 of Ind AS 16, is recognised in the carrying amount of an item of property, plant and equipment.

As far as the recognition criteria under paragraph 7 of Ind AS 16 are concerned, the Committee notes that an item of expenditure shall be recognised as an asset if, and only if:

- future economic benefits associated with the item will probably flow to the entity, and (b) the cost of the item can be measured reliably.

In this regard, the Committee notes that in the extant case, it is stated that the activity of repairing is undertaken basically to improve the operation of the washery and that even if the said repair improves the capacity by 10%, then the actual expenses of INR 42.92 cr are expected to be recovered in a period of 6 to 9 months post repair. Thus, the expenditure incurred will improve the operations of the washery and will enhance its capacity. Therefore, the Committee is of the view that it will lead to future economic benefits in terms of improvement in operations and capacity of the washery plant. Further, since the cost incurred can be reliably measured, the recognition criteria under paragraph 7 of Ind AS 16 are met and hence, the Company should capitalise on such expenditure as the cost of the washery plant.

Further, from the above-reproduced paragraphs 16 and 17 of Ind AS 16 dealing with the items of costs that can be capitalised as part of an item of PPE, the Committee is of the view that in the extant case, only those costs/expenditures that are directly attributable to bringing the various asset(s)/plant to the location and condition necessary for it/them to be capable of operating in the manner intended by management should only be capitalised as part of the cost of the asset(s)/plant such as cost of site preparation, installation, trial run etc.

With regard to the determination of the useful life of the refurbished washery plant, the Committee notes from the work order issued to the contractor, H Pvt. Ltd. that it inter alia states that the 'Period of Contract shall comprise 150 Days (Including Trial run and PGT) and it is to be noted that after commissioning of the project, the bidder is responsible for 4 years maintenance of the equipment/system supplied after construction and handing over under the clause of defect liability'. Further, the defect liability clause states that 'Defect Liability will be 48 months. It will commence after the commissioning of the project. The Bidder is responsible for four years of maintenance of modified section/equipment after the trial operation and handing is over.

Thus, H Ltd. has committed to providing operation and maintenance for 4 years under the defect liability period, which indicates that the improved asset will at least be operational for 4 years after the expenses incurred on enhancement/improvement. Therefore, the Committee is of the view that an estimation of life should be made by the Company considering various factors as mentioned in paragraphs 56 and 57 of Ind AS 16, reproduced above including, technical evaluation, past experience, defect liability period, etc. Further, such useful life should be reviewed regularly as per the requirements of paragraph 51 of Ind AS 16, reproduced above. Reference may also be made to the requirements of Schedule II to the Companies Act, 2013 in this regard.

Opinion

The Committee is of the following opinion on the issues raised:

The accounting treatment extended by the Company for replacement activities and restoration of selected structural, civil and other support system to improve the operational efficiency and reduction in maintenance/breakdown hours after the useful life of the washery will not be appropriate as per the requirements of Ind AS 16, if such expenditure, in the aggregate, can be considered to be 'material', as per the requirements of Ind AS 1 in the context of washery plant as a whole. If the expenditure incurred is material, since it will lead to future economic benefits in terms of improvement in operations and capacity of the washery plant and the cost incurred can be reliably measured, the recognition criteria under paragraph 7 of Ind AS 16 are met; and hence, the Company should capitalise such expenditure as cost of the washery plant.

Regarding the basis of determination of useful life, an estimation of life should be made by the Company considering various factors as mentioned in paragraphs 56 and 57 of Ind AS 16, reproduced above including, technical

evaluation, experience, defect liability period, etc. Further, such useful life should be reviewed regularly as per the requirements of paragraph 51 of Ind AS 16, reproduced above. Reference may also be drawn from the requirements of Schedule II to the Companies Act, 2013 in this regard.

REGULATORY UPDATES

INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA (ICAI)

GUIDANCE NOTE ON TAX AUDIT UNDER SECTION 44AB OF THE INCOME-TAX ACT, 1961(REVISED 2023)

The Direct Tax Committee of ICAI issued Guidance Note on Tax Audit under Section 44AB of the Income-tax Act, 1961(Revised 2023) on 4 September 2023. The Guidance Note provides a comprehensive roadmap to navigate the complexities of tax audit in a strategic and informed manner and also delves into the intricacies of audit procedures; Additionally, it emphasises the importance of maintaining accurate records and provides practical insights that will aid taxpayers in ensuring adherence to the statutory norms.

This publication has been specifically updated keeping in view the amendments made up to the Finance Act, 2023 and tax audit norms applicable as of date. Further, this edition of the Guidance Note incorporates other changes in law, notifications, circulars, and other directives that have been issued since the last publication. It is updated to guide Chartered Accountants through the nuances of the current Form No. 3CD, and documentation requirements and to provide clarity on various aspects.

The Guidance Note is effective for Assessment Year 2023-24 (The previous Year 2022-23) and for the subsequent years, subject to amendments made by law, judiciary, or administration.

TECHNICAL GUIDE ON AUDIT OF NON-BANKING FINANCIAL COMPANIES (NBFCS) (REVISED 2023 EDITION)

The Audit and Assurance Board of ICAI issued a Revised 2023 edition of the Technical Guide on Audit of NBFCs, on 6 September 2023. This guide comprehensively deals with various aspects of the audit of NBFCs such as the introduction of NBFCs, points for consideration in the audit of NBFCs, financial reporting framework, auditing framework, areas of audit concern, operations of NBFCs, governance etc. It further incorporates several developments viz. applicability of Ind ASs to certain categories of NBFCs, issuance of various master directions, circulars, guidelines, notifications relating to NBFCs, etc., that have been issued since 2016.

Key Highlights of the Technical Guide:

- It describes a few audit considerations that the auditor should be aware of, to plan substantive procedures, and suggests some testing techniques, w.r.t balances with banks, money market instruments, other financial assets, financial instruments, investments, Schedule III requirements, RBI prudential norms for income recognition, classification as NPAs; restructuring norms, FDIs & External Commercial Borrowings, reporting under Rule 11(e) of the Companies (Audit and Auditors) Rules 2014, CARO 2020 reporting, etc.
- Appendices to this Technical Guide contain illustrative for the below -
  - Templates of audit report/certificate
  - Format of additional report and exception reporting
  - Audit checklist
  - List of returns to be submitted by NBFCs
  - Disclosure norms for NBFCs
  - List of master directions, circulars, and RBI notifications.

MINISTRY OF CORPORATE AFFAIRS (MCA)

LIMITED LIABILITY PARTNERSHIP (SECOND AMENDMENT) RULES, 2023

MCA vide notification dated 1 September 2023, issued Limited Liability Partnership (Second Amendment) Rules, 2023 to bring an amendment to Limited Liability Partnership Rules, 2009. This amendment has revised the following Forms:

- Form 3 - Information regarding the Limited Liability Partnership Agreement and changes.
- Form 4 - Notice of appointment, cessation, change in name/address/designation of a designated partner or partner and consent to become a partner/designated partner.

They shall come into force on the date of their publication in the Official Gazette i.e., 1 September 2023.

RESERVE BANK OF INDIA (RBI)

REQUIREMENT FOR MAINTAINING ADDITIONAL CASH RESERVE RATIO (CRR)

RBI issued a notification dated 8 September 2023, on the requirement for maintaining Additional CRR. It has been decided to discontinue the incremental CRR (I-CRR) in a phased manner. Based on an assessment of current and evolving liquidity conditions, it has been decided that the amounts impounded under the I-CRR would be released in stages so that system liquidity is not subjected to sudden shocks and money markets function in an orderly manner. The release of funds would be as follows:

Date	Amount to be released
9 September 2023	25% of the I-CRR maintained
23 September 2023	25% of the I-CRR maintained
7 October 2023	50% of the I-CRR maintained

MASTER DIRECTION - CLASSIFICATION, VALUATION AND OPERATION OF INVESTMENT PORTFOLIO OF COMMERCIAL BANKS (DIRECTIONS), 2023

RBI issued a notification dated 12 September 2023, introducing the 'Master Direction - Classification,

Valuation and Operation of Investment Portfolio of Commercial Banks (Directions), 2023' (RBI Directions 2023).

The revised framework updates the regulatory guidelines with global standards and best practices while introducing a symmetric treatment of fair value gains and losses, an identifiable trading book under Held for Trading (HFT), removing the 90-day ceiling on the holding period under HFT and removal of ceilings on Held to Maturity (HTM) and more detailed disclosures on the investment portfolio. Further, the Directions include illustrative application guidance w.r.t classification of investments by banks, initial recognition, reclassifications between categories, sale of investments from HTM, and fair value of investments to facilitate smooth implementation.

Key highlights of the RBI Directions 2023 are as follows:

- **Classification of Investment** - The Investment Portfolio will be classified under 3 categories, namely, Held to Maturity (HTM), Available for Sale (AFS) and Fair Value through Profit and Loss(FVTPL).
- **Initial recognition and Subsequent measurement** - All investments should be measured at fair value on initial recognition. Unless facts and circumstances suggest that the fair value is materially different from the acquisition cost, it must be presumed that in most cases, the acquisition cost is the fair value. Further, it prescribes the following with respect to subsequent recognition:
  - The securities held under HTM should be carried at cost and not be Marked to Market (MTM) after initial recognition
  - The securities held under AFS should be fair valued at least on a quarterly basis, if not more frequently
  - Securities that are classified under the HFT sub-category within FVTPL should be fair valued on a daily basis, whereas other securities in FVTPL need to be fair valued at least on a quarterly basis, if not more frequently
  - Investments in subsidiaries, associates and joint ventures should be held at acquisition cost.
- **Reclassification between categories -** After the transition to this framework, banks shall not reclassify investments between categories (viz. HTM, AFS and FVTPL17) without the approval of their Board of Directors. Further, reclassification shall also require the prior approval of the Department of Supervision (DoS), RBI. The reclassification should be applied prospectively from the reclassification date. At the time of transition, banks would be allowed a one-time option to re-classify their investments and adjust the gains/losses arising from such reclassification.
- **Fair valuation guidelines -** Chapter VIII on fair value of investments states that an investment portfolio is to be bifurcated into three fair value hierarchies- Level 1, Level 2 and Level 3. Disclosures pertaining to fair valuation have also been prescribed.
- **Transition and Repeal Provisions -** These directions also incorporate opening accounting adjustments at the time of transition to the revised framework, provisions on income recognition, asset classification and provisioning, audit, review, and reporting, among others. Banks shall make suitable disclosures of the transitional adjustment made in their notes to the financial statements for the financial year ending 31 March 2025.

The revised framework as detailed in the RBI directions, 2023 annexed hereto shall be applicable from 1 April 2024, to all Commercial Banks excluding Regional Rural Banks.

MASTER DIRECTION - RESERVE BANK OF INDIA (PRUDENTIAL REGULATIONS ON BASEL III CAPITAL FRAMEWORK, EXPOSURE NORMS, SIGNIFICANT INVESTMENTS, CLASSIFICATION, VALUATION AND OPERATION OF INVESTMENT PORTFOLIO NORMS AND RESOURCE RAISING NORMS FOR ALL INDIA FINANCIAL INSTITUTIONS) DIRECTIONS, 2023

RBI has issued a master direction dated 21 September 2023, titled 'Prudential Regulations on Basel III Capital Framework, Exposure Norms, Significant Investments, Classification, Valuation, and Operation of Investment Portfolio Norms, and Resource Raising Norms for All India Financial Institutions.'

The Directions include guidance on Basel III Capital Regulation, Exposure Norms, Prudential Norms for Classification, Valuation and Operation of Investment Portfolios by AIFIs which include audit, review and reporting requirements accounting and provisioning requirements, Resource Raising Norms, Exemptions, Interpretations and Repeal.

The direction is applicable from 1 April 2024, to All India Financial Institutions (AIFIs) regulated by the Reserve Bank viz. EXIM Bank, NABARD, National Bank for Financing Infrastructure and Development (NaBFID), National Housing Bank (NHB) and the Small Industries Development Bank of India (SIDBI).

SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI)

FILING OF ABRIDGED PROSPECTUS OF PUBLIC ISSUES IN XBRL FORMAT

SEBI has issued a circular dated 4 September 2023, prescribing a new format of Abridged Prospectus for public issues of Non-Convertible Debt Securities and/or Non-convertible Redeemable Preference Shares to further simplify, provide greater clarity and consistency in the disclosures across various documents and to provide additional but critical information in the abridged Prospectus.

The revised format for disclosures in the abridged Prospectus is placed in Annex-I of this Circular. A copy of the Abridged Prospectus shall be made available on the website of the issuer, merchant bankers, and registrar to an issuer and a link for downloading Abridged Prospectus shall be provided in issue advertisement for the public issue. The circular further prescribes the following:

- The issuer/Merchant Bankers shall insert a Quick Response (QR) code on the last on the last page of the Abridged Prospectus. The scan of such a QR code on the Abridged prospectus would lead to the Prospectus. Further, the issuer entity/Merchant Bankers shall insert a QR code on the front page of the documents, such as the front outside cover page, advertisement, etc., as

they deem fit. The scan of the QR code would lead to the prospectus or abridged prospectus as applicable. 10. The Issuer /Merchant Bankers shall ensure that the disclosures in the Abridged Prospectus are adequate, and accurate and do not contain any misleading or misstatement.

- Furthermore, the Issuer/Merchant Bankers shall ensure that the qualitative statements in the Abridged Prospectus shall be substantiated with quantitative factors. Also, no qualitative statement shall be made which cannot be substantiated by quantitative factors.

This Circular shall be applicable for all public issues opening on or after 1 October 2023.

CHANGE IN MODE OF PAYMENT WITH RESPECT TO SEBI INVESTOR PROTECTION AND EDUCATION FUND BANK A/C

SEBI has issued a circular dated 4 September 2023, on the Change in mode of payment with respect to SEBI Investor Protection and Education Fund Bank A/c (SEBI IPEF). SEBI has opened a new bank account to facilitate market participants to make payments to SEBI IPEF. Further, it states that the previous method of payment through demand drafts is no longer accepted, and funds can only be credited to its IPEF through the below online means:

- Net banking
- NEFT/RTGS
- Debit Cards
- UPI

While making the remittances online, through the above link, remitters shall furnish the requisite information like the name of the payer, PAN, mobile number, email ID, the purpose for which payment is made, the amount to be paid, etc.

BOARD NOMINATION RIGHTS TO UNITHOLDERS OF INFRASTRUCTURE INVESTMENT TRUSTS (INVITS)

SEBI issued a circular dated 11 September 2023, regarding board nomination rights for InvITs to further strengthen the regulatory framework governing InvITs, providing investors with greater influence and oversight in these investment structures. The circular emphasizes that unitholders holding at least 10% of outstanding units can nominate one director on the Investment Manager's board. Accordingly, the framework to exercise Board nomination rights is specified in Annexure A to this circular.

Key highlights of the framework are as follows:

- Eligible Unitholders have the right to nominate a director, but only one, subject to the specified threshold. Entities aggregating their unitholding for nomination rights cannot participate in another group of Eligible Unitholders.
- The Investment Manager is required to formulate a policy made available on the InvIT's website regarding qualifications, evaluation parameters, remuneration, removal or resignation process of Unitholder Nominee Directors, and the role of relevant committees and the Board of Directors.
- The circular outlines the process for nominating Unitholder Nominee Directors, including candidate details, eligibility criteria, and the involvement of authorised representatives for group nominations. Further, it covers scenarios involving the withdrawal of nominations, changing Unitholder Nominee Directors, and how to handle these changes.

This circular shall come into force with immediate effect i.e., on 11 September 2023.

REGULATORY REPORTING BY ALTERNATIVE INVESTMENT FUNDS (AIFS)

SEBI issued a circular dated 14 September 2023, prescribing a revised format for quarterly reporting by AIFs to enable the AIF industry to have uniform compliance standards, ease compliance reporting and for regulatory and developmental purposes. A revised quarterly reporting format, which has been developed in consultation with industry associations, will be implemented.

AIFs are required to submit reports online within 15 days from the end of each quarter, with associations assisting in understanding and resolving reporting issues.

The AIF Industry Association shall engage with all AIFs to ensure that, to begin with, and to carry out a trial run. Accordingly, the following timelines have been prescribed:

Quarter Ending	Timeline
30 June 2023	15 October 2023
30 September 2023	15 November 2023
31 December 2023	within 15 days of each quarter's end

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

SEBI vide notification dated 19 September 2023, issued further amendments to SEBI LODR Regulations, 2015. These amendments are aimed at regulating the listing of non-convertible debt securities by listed entities by inserting the following provisions:

A listed entity, whose non-convertible debt securities are listed shall list all non-convertible debt securities, proposed to be issued on or after 1 January 2024, on the stock exchange(s).

A listed entity, whose subsequent issues of unlisted non-convertible debt securities made on or before 31 December 2023, are outstanding on the said date, may list such securities, on the stock exchange(s).

A listed entity that proposes to list the non-convertible debt securities on the stock exchange(s) on or after 1 January 2024, shall list all outstanding unlisted non-convertible debt securities previously issued on or after 1 January 2024, on the stock exchange(s) within three months from the date of the listing of the non-convertible debt securities proposed to be listed.

Certain categories of non-convertible debt securities are exempt from this listing requirement, including bonds issued under section 54EC of the Income Tax Act, 1961, securities issued under agreements with multilateral institutions, and those issued as per court orders or regulatory requirements of financial sector regulators like SEBI, RBI, IRDAI, or PFRDA.

Investors are required to hold the securities until maturity, and these securities must remain unencumbered during this period as a lock-in Period for securities issued under the exempted securities.

Entities intending to issue securities under the exempted categories must disclose all key terms of such securities to the stock exchanges where their non-convertible debt securities are listed. This includes details such as embedded options, security features, interest rates, charges, commissions, premiums, maturity periods, and any other information deemed necessary by SEBI.

REGULATORY UPDATES

SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI)

CIRCULAR DATED 4 SEPTEMBER 2023: MECHANISM FOR SHARING INFORMATION BY CREDIT RATING AGENCIES (CRAS) TO DEBENTURE TRUSTEES (DTS).

By this circular, SEBI has released an Excel template which shall be used by CRAs for their daily submissions of rating revisions to DTs. Such submissions shall be sent by CRAs to DTs on the same day as the day of rating revisions.

This circular shall be applicable w.e.f. 1 October 2023 and CRAs shall report on their compliance with this circular to SEBI within one quarter of the date of applicability of this circular.

Monitoring of this circular shall be done in terms of the half-yearly internal audit for CRAs mandated under relevant CRA Regulations.

CIRCULAR DATED 6 SEPTEMBER 2023: CLARIFICATION REGARDING THE INVESTMENT OF MUTUAL FUNDS SCHEME IN UNITS OF CORPORATE DEBT MARKET DEVELOPMENT FUND (CDMDF)

By this circular, SEBI has clarified that for calculation of asset allocation limits of mutual fund schemes in terms of Part IV of Chapter 2 on 'Categorisation and Rationalisation of Mutual Fund Schemes' of Master Circular for Mutual Funds dated 19 May 2023, investment in units of CDMDF shall be excluded from the base of net assets.

The provisions of this circular shall come into force with immediate effect.

CIRCULAR DATED 29 AUGUST 2023: GUIDELINES FOR MIIS REGARDING CYBER SECURITY & CYBER RESILIENCE

Market Infrastructure Institutions (i.e., Stock Exchanges, Clearing Corporations and Depositories) are systemically important institutions as they provide the infrastructure necessary for the smooth and uninterrupted functioning of the securities market.

Due to the significant increase in interdependence and interconnectedness of the MIIs to carry out their functions, the cyber risk of any given MII is no longer limited to the MII's owned or controlled systems, networks, and assets.

Hence, based on the recommendations of the High-Powered Steering Committee on Cyber Security of SEBI and in consultation with MIIs, guidelines have been issued for strengthening the existing cyber security and cyber resilience framework of MIIs. The said guidelines cover a range of cyber-related aspects, from risk management to governance, incident reporting and even setting up a robust cyber security framework. The compliance of the guidelines shall be provided by the MIIs along with their cybersecurity audit report in accordance with the existing reporting mechanism.

The provisions of this circular shall come into force with immediate effect and MIIs are given a time period of 120 days from the date of the circular to put in place the systems for implementation of specified cyber-related practices.

Circular dated 11 September 2023: SEBI specifies framework to exercise board nomination rights by unitholders of Real Estate Investment Trusts (REITs),

(The Circular).

The Circular addressing REITs, Parties to REITs, Depositories and Recognised Stock Exchange in pursuance to the first proviso of Regulation 4(2)(g) of the SEBI (REIT) Regulations, 2014, provides that unitholder(s) holding ten

per cent or more of total outstanding units of the REIT, either individually or collectively (Eligible unitholder(s)) are entitled to nominate one director (Unitholder nominee director) on the Board of Directors of the Manager of REIT as defined in SEBI (REIT) Regulations, 2014.

Annexure A of such Circular specifies the framework for the exercise of such nomination rights by eligible unitholder(s), which includes the following:

- The conditions for the nomination of the Unitholder nominee director
- Procedure for first-time nomination and subsequent annual nomination along with eligibility criteria of Unitholder nominee director (in Annexure B)
- Manner of change in Unitholder nominee director or withdrawal of nomination
- Circumstances when the Unitholder nominee director shall vacate the office, and
- Requirement for amendment of the trust deed and investment management agreement to give effect to the Circular.

The Circular also allocates the responsibility to the Manager of the REIT to review within 10 days from the end of each calendar month and report the same to the trustee of the REIT, whether Eligible unitholders who have exercised their right to nominate a director continue to hold the required number of units.

The Circular comes into force with immediate effect i.e., from 11 September 2023.

CIRCULAR DATED 20 SEPTEMBER 2023: REDRESSAL OF INVESTOR GRIEVANCES THROUGH THE SEBI COMPLAINT REDRESSAL (SCORES) PLATFORM AND LINKING IT TO THE ONLINE DISPUTE RESOLUTION PLATFORM.

The Securities and Exchange Board of India (SEBI) has recently introduced a circular to protect the interests of investors in securities and to promote the development of and regulate the securities market. This initiative is part of SEBI's ongoing efforts to streamline the complaint resolution process and enhance investor protection.

In 2011, SEBI launched the SEBI Complaint Redressal System, commonly known as SCORES, a web-based portal integrated with an online dispute resolution platform. With this latest Circular, SEBI has laid down a detailed framework for handling investor grievances received through the SCORES portal and to monitor the redressal process.

SEBI has also provided the mechanism for authentication for registered intermediaries and market infrastructure and for companies intending to list their securities on recognised stock exchanges.

The provisions contained in this circular shall come into force with effect from 4 December 2023.

RESERVE BANK OF INDIA (RBI)

NOTIFICATION DATED 4 SEPTEMBER 2023: OPERATION OF PRE-SANCTIONED CREDIT LINES AT BANKS THROUGH UNIFIED PAYMENTS INTERFACE (UPI)

RBI has expanded the scope of the Unified Payments Interface (UPI) by including credit lines as a funding account, in accordance with the power resided with RBI under the Payment and Settlement Systems Act, 2007.

This facility enables payments through pre-sanctioned credit lines issued by a Scheduled Commercial Bank to individuals using the UPI System with the individual's prior consent. The banks may as per their policy stipulate the terms & conditions for using such credit lines which can include, amongst other items, credit limit, period of credit, interest rate, etc.

CIRCULAR DATED 20 SEPTEMBER 2023: DATA QUALITY INDEX (DQI) FOR COMMERCIAL AND MICROFINANCE SEGMENTS BY CREDIT INFORMATION COMPANIES (CICS)

In a circular issued by RBI on 20 September 2023, CICs are mandated to implement a DQI and provide monthly DQI scores to member credit institutions (CIs) by 31 March 2024 in numeric form for both the Commercial and Microfinance segments in accordance with prescribed parameters.

Further, it has advised as under:

- The DQI scores for the Commercial and Microfinance segments will be provided at both the CI and file levels. CI-level scores will be calculated as the weighted average of file-level DQI scores in the respective segments for each CI
- Weighted averages of category-wise CI-level scores will be used to calculate industry-level DQIs.
- CICs are to provide explanations for score declines to CIs and report data to RBI.

Further, the semi-annual reviews are to be conducted and reports on corrective actions are to be submitted within 2 months of each half-year for information and monitoring purposes.

CIRCULAR DATED 13 SEPTEMBER 2023: RESPONSIBLE LENDING CONDUCT – RELEASE OF MOVABLE / IMMOVABLE PROPERTY DOCUMENTS ON REPAYMENT/ SETTLEMENT OF PERSONAL LOANS

The directions are being issued to address issues faced by the borrowers and to promote reasonable lending conduct among the regulated entities (REs). It shall be applicable in cases where the release of original movable/ immovable property documents falls due on or after 1 December 2023.

The following directions are being issued:

- RE shall release all the property documents and remove charges within 30 days of final repayment/settlement.
- Borrower shall be given the option to collect documents from the branch of RE where the loan was given or any other office where the documents are available.
- Timeline and place of return of documents to be mentioned in sanction letters issued on or after 1

December 2023.

- RE to have a proper procedure to return the original property documents to the legal heirs of a borrower in the event of the demise of such borrower. Such procedures shall also be displayed on the Website of RE.
- In case of delay in returning the documents or removing the charge by RE beyond 30 days of final repayment/ settlement, RE shall communicate the reasons to the borrower and it shall compensate the borrower INR 5,000 for each day of delay.
- In case RE loses or damages any of the original documents, it shall assist the borrower in obtaining duplicate/certified copies of documents and shall bear such costs. RE shall be given an additional time of 30 days to complete such procedures and the penalty for the delay will be calculated 60 days after the final repayment/ settlement date.

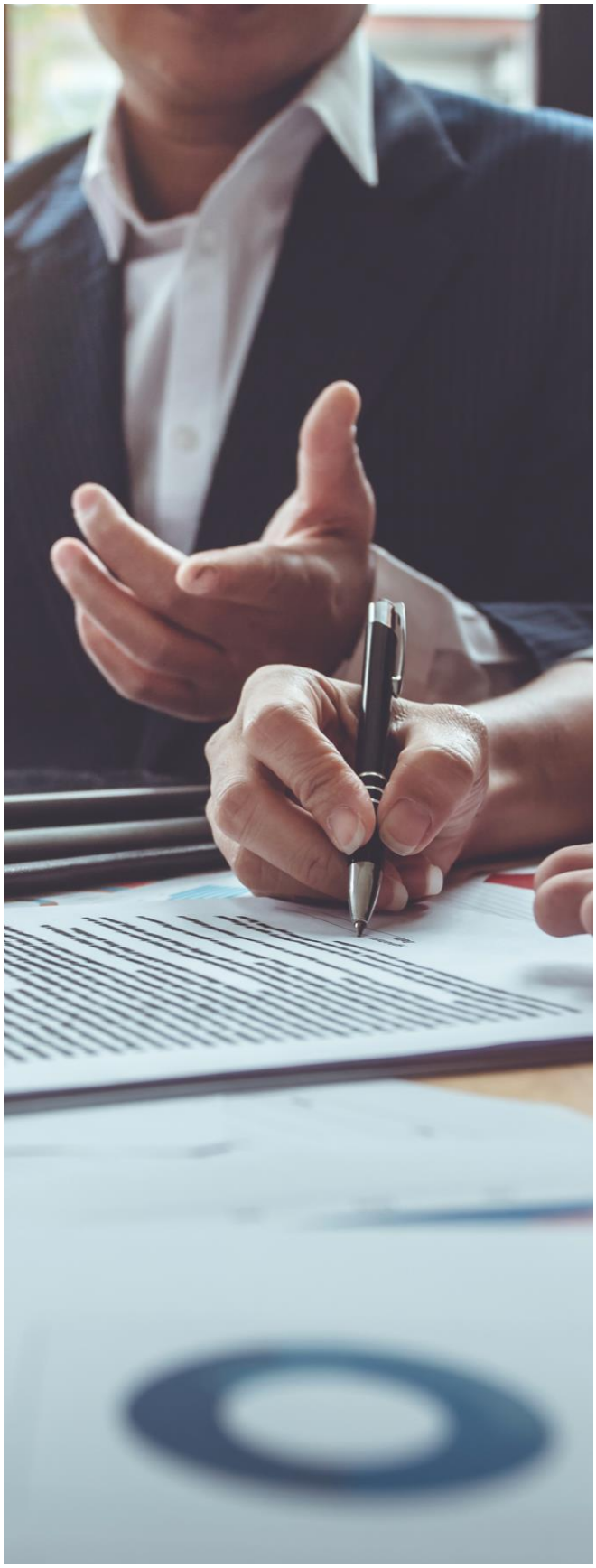
INSURANCE REGULATORY AND DEVELOPMENT AUTHORITY (IRDAI)

OFFICER ORDER DATED 14 SEPTEMBER 2023: CONSTITUTION OF INTER-DISCIPLINARY STANDING COMMITTEE ON CYBER SECURITY (ORDER)

A Standing 10-member Committee on Cyber Security has been constituted post the publication of IRDAI Information and Cyber Security Guidelines dated 24 April 2023 and with the approval of the Competent Authority.

The Committee will regularly review the threats in the existing and emerging technologies and suggest appropriate changes to further strengthen the cyber security posture and resilience of the Insurance Industry.

The Committee will also consider suggestions received from the Regulated Entities for suggesting appropriate changes to the current Framework and may also invite external members, if required, to examine specific issues /suggestions.



DIRECT TAX

CIRCULARS / NOTIFICATIONS / PRESS RELEASE

CBDT AMENDS IT RULES PERTAINING TO THE REPORT OF AUDIT AND INVENTORY VALUATION AS REQUIRED UNDER SECTION 142(2A) OF THE IT ACT

- Section 142(2A) of the Income-tax Act, 1961 (IT Act) provides for auditing the taxpayer's accounts at any stage of assessment proceedings in instances[1] where the tax officer is of the opinion that it is necessary to do so.
- The Finance Act 2023 amended the provisions of section 142(2A) of the IT Act by inserting clause (ii) to enable tax officer to direct the taxpayer to get inventory valued by a Cost Accountant, nominated by the Principal Chief Commissioner or Chief Commissioner or Commissioner of Income-tax. The taxpayer must furnish the inventory valuation report in the prescribed form duly signed and verified by the Cost Accountant.
- In this regard, recently the Central Board of Direct Taxes (CBDT) has issued a notification introducing amendments to Rule 14A and Rule 14B in the Income-tax Rules, 1962 (IT Rules).
- Amendment to Rule 14A of the IT Rules
  - Audits and inventory valuations required under clauses (i) and (ii) respectively of section 142(2A) of the IT Act now require specific forms.
  - The audit report of taxpayer's accounts shall be in Form 6B
  - The inventory valuation report of the taxpayer shall be in Form 6D
- Rule 14B of the IT Rules
  - Rule 14B of the IT Rules provides guidelines for determining expenses related to audit or inventory valuation.
  - The Chief Commissioner of Income-tax is required to maintain a panel of accountants and cost accountants for the purpose of audit and inventory valuation.
  - The Rule also provides for the hourly range of expenses (including remuneration) incidental to audit or inventory valuation. The Chief Commissioner of Income-tax shall ensure that the number of hours claimed for billing purposes is commensurate with the size and quality of the report submitted by the Accountant or Cost Accountant.
- Form 6D
  - This form requires to:
    - Examine and confirm the adequacy of the books of accounts and other documents related to inventory valuation
    - Conduct inventory valuation as per relevant provisions of the IT Act and IT Rules
    - Obtain all necessary information and explanations for the purpose of valuation
    - Provide an opinion on the accuracy of the inventory valuation
    - Provide information as required in Annexure to Form 6D
    - Explain any variations observed by comparing disclosures in Form 3CD (or audited accounts) along with reasons and justifications.
- This notification shall come into force from 27 September 2023.

[Notification No. 82/2023, dated 27 September 2023]

[1] Instances under section 142(2A) of the IT Act- Nature and complexity of the accounts, volume of the accounts, doubt about the correctness of accounts, multiplicity of transactions in the accounts or specialised nature of business activity of the taxpayer and the interest of the revenue.

CBDT NOTIFIES PROCEDURE FOR FILING FORM 13 FOR LOWER/NIL TDS CERTIFICATE WHERE PAYER DETAILS ARE NOT AVAILABLE

- Section 197 of the IT Act provides that the tax officer can issue a lower/NIL TDS certificate upon application made by a taxpayer (deductee) in a case where the total income of the deductee justifies the deduction of income-tax at any lower rates or no deduction of income-tax. Further, Rule 28 of the IT Rules provides the procedures for making such an application in an online Form 13 under Digital Signature or through an Electronic Verification Code.
- Rule 28AA(4) of the IT Rules provides that a certificate for lower/NIL deduction of tax shall be issued directly to the person responsible for deducting the tax under advice to the person who made an application for the issue of such certificate.
- Proviso to Rule 28AA(4) of the IT Rules provides that if the number of persons responsible for deducting tax is likely to exceed 100 and the details of such persons are not made available with the person making such application, the certificate may be issued to the applicant authorising him to receive income after deduction of tax at a lower rate. In such a case, the taxpayer was required to file Form 13 along with Annexure-II.
- While the CBDT had notified the e-filing process for Form 13 through Notification No. 8/2018, dated 31 December 2018, the Annexure-II to be furnished for the issue of the certificate under proviso to Rule 28AA(4) of the IT Rules was not made available.
- The CBDT has now issued a notification specifying the procedure, format and standards for e-filing of Form 13 with Annexure-II with effect from 1 October 2023. The process for the generation of certificates through TRACES is also notified.

[Notification No. 02/2023, dated 27 September 2023]

CENTRAL GOVERNMENT EXPANDS THE SCOPE OF SECTION 47(VIIAB) OF THE IT ACT

Section 47(viiab) of the IT Act provides for capital gain exemption in relation to the transfer of specified securities made by a non-resident on a recognised stock exchange located in any International Financial Services Centre (IFSC) where consideration is paid or payable in foreign currency. The specified securities were (i) foreign currency-denominated bonds (ii) units of a Mutual fund (iii) units of a business trust (iv) foreign currency-denominated equity shares of a company and (v) units of Alternative Investment fund, which are listed on a recognised stock exchange located in any IFSC. The Central Government has expanded the scope of specified securities to include (vi) a unit of Investment Trust (vii) a unit of a Scheme and (viii) a unit of an Exchange Traded Fund with effect from 12 September 2023.

[Notification No. 71/2023, dated 12 September 2023]

CBDT EXTENDS THE DUE DATE FOR FILING FORM 10B/FORM 10BB AND ITR-7 FOR FISCAL YEAR 2022-23

The CBDT on considering difficulties reported by taxpayers and other stakeholders has issued a Circular providing relaxation in respect of the following compliances:

- The due date for furnishing an Audit report in the case of a fund or trust or institution or any university or other educational institution or any hospital or other medical institution in Form 10B/Form 10BB for the FY 2022-23 is extended from 30 September 2023 to 31 October 2023.
- The due date for furnishing the return of income in ITR-7 for FY 2022-23 is extended from 31 October 2023 to 30 November 2023.

[Circular No. 16/2023, dated 18 September 2023]

CBDT NOTIFIES AMENDED VALUATION RULES IN RESPECT OF ANGEL TAX

Section 56(2)(viib) of the IT Act before Finance Act 2023 provided that if a closely held company receives any consideration, in excess of face value, for the issue of shares (equity or preference) from any resident investors exceeding the "fair market value" of such shares, then such excess amount shall be taxed as Income from Other Sources in the hands of such company. The Finance Act 2023 amended section 56(2)(viib) of the IT Act to make it applicable even in a case where shares are issued to a non-resident with effect from 1 April 2023. After the amendment, concerns were raised by various stakeholders pertaining to issues that may arise in the valuation of shares. In order to address this concern, the CBDT issued a notification specifying a draft of modified Rule 11UA of the IT Rules for public comments. In this regard, recently the CBDT has issued amended Rule 11UA of the IT Rules. To read our detailed analysis please go to: https://www.bdo.in/en-gb/insights/alerts-updates/direct-tax-alert-cbdt-notifies-amended-valuation-rules-in-respect-of-angel-tax

[Notification No. 81/2023, dated 25 September 2023]

JUDICIAL UPDATES

FTC ALLOWED IN INDIA ON DIVIDEND EXEMPT UNDER OMANI TAX LAW

The taxpayer is a multi-state Co-operative Society registered in India, under the control of the Department of Fertilizers, Ministry of Agriculture and Co-operation, Government of India. In the course of its business of manufacturing fertilizers, it entered into a Joint Venture (JV) with Oman Oil Company to form the Oman Fertilizer Company (OMIFCO), a registered company as per Omani law. The taxpayer held a 25% share in OMIFCO. The JV manufactures fertilizers which were purchased by the Central Government. The taxpayer also had a branch office which is constituted as a permanent establishment (PE) in Oman and oversees the taxpayer's investment in OMIFCO. For the relevant year under consideration, the taxpayer had received dividend income

from OMIFCO on which no tax was paid in Oman by virtue of exemption under Omani Tax Laws. Such dividend was offered to tax in India and the taxpayer claimed a Foreign Tax Credit (FTC) on such dividend income under Article 25(4) of the India-Oman Double Taxation Avoidance Agreement (DTAA) which was allowed by the tax officer at the time of assessment proceedings. Subsequently, the First-Appellate Authority passed a revisionary order under section 263[2] of the IT Act and disallowed FTC credit holding that Article 25 of Omani Tax Laws is not applicable as there is a tax payable on dividends in Oman that was not paid. Aggrieved, the taxpayer filed an appeal before the Delhi Tax Tribunal which held in favour of the taxpayer. Aggrieved, tax authorities filed an appeal before the Delhi High Court which upheld the decision of the Delhi Tax Tribunal. Further aggrieved, tax authorities filed an appeal before the Supreme Court which made the following observations while ruling in favour of the taxpayer:

- As per Article 8(bis) of the Omani Tax Law, dividends distributed by all companies, including the tax-exempt companies would be exempt from payment of income tax in the hands of the recipients. In this manner, the Government of Oman would achieve is objective of promoting economic development within Oman by attracting investments.
- The Omani Finance Ministry concluded saying that tax would be payable on dividend income earned by the PE of the Indian investors, as it would form part of their gross income under Article 8, if not for the exemption provided under Article 8(bis) of the Omani Tax Laws.
- Since the taxpayer had invested in the project by setting up a permanent establishment in the form of a JV registered as a separate company under Omani laws, it is aiding in promoting economic development within Oman and achieving the objective of Article 8(bis). Thus, Article 8(bis) exempts dividend tax received by the taxpayer from its PE in Oman.
- Article 25(2) of the India-Oman DTAA provides that India shall allow a deduction from the tax on the income of Indian residents, an amount equal to the income tax paid in Oman, whether directly or by deduction. Further, as per Article 25(4) of the India-Oman DTAA, tax payable in Oman shall be deemed to include the tax that would have been payable but not paid because of the tax incentive granted under the laws of the Contracting State to promote development.
- Based on the above, tax authorities' argument that taxpayer would not get FTC as Article 25 of India-Oman DTAA was not applicable since there was a tax payable on dividend in Oman that was not paid is not correct.
- In so far as the argument of the tax authorities regarding taxpayers not having PE in Oman, the Delhi High Court had observed that the taxpayer's establishment in Oman has been treated as a PE from the very inception up to 2011. There is no reason as to why all of a sudden, the taxpayer's establishment in Oman would not be treated as PE when for 10 years it was so treated, and tax exemption was granted based on the provisions contained in Article 25 of India-Oman DTAA read with Article 8(bis) of the Omani Tax Laws.
- The tax authorities were not able to demonstrate why the provisions contained in Article 25 of India-Oman DTAA and Article 8(bis) of the Omani Tax Laws would not be applicable to the taxpayer.

[PCIT vs. M/s Krishak Bharti Cooperative Ltd., Civil Appeal No. 836 of 2018 (Supreme Court)]

TAXPAYER LIABLE TO PAY DDT ON PURCHASE OF OWN SHARES THROUGH A COURT APPROVED SCHEME IF IT RESULTS IN DISTRIBUTION OF ACCUMULATED PROFITS

Recently the Chennai Tax Tribunal had an occasion to examine whether consideration paid by the taxpayer for the purchase of their own shares in accordance with a Court approved scheme before 1 June 2016 amounts to the distribution of accumulated profits liable to Dividend Distribution Tax (DDT) under section 115-O of the IT Act in the hands of the taxpayer. To read our detailed analysis, please go to: https://www.bdo.in/en-gb/insights/alerts-updates/direct-tax-alert-taxpayer-liable-to-pay-ddt-on-purchase-of-own-shares-through-a-court-approved-sch

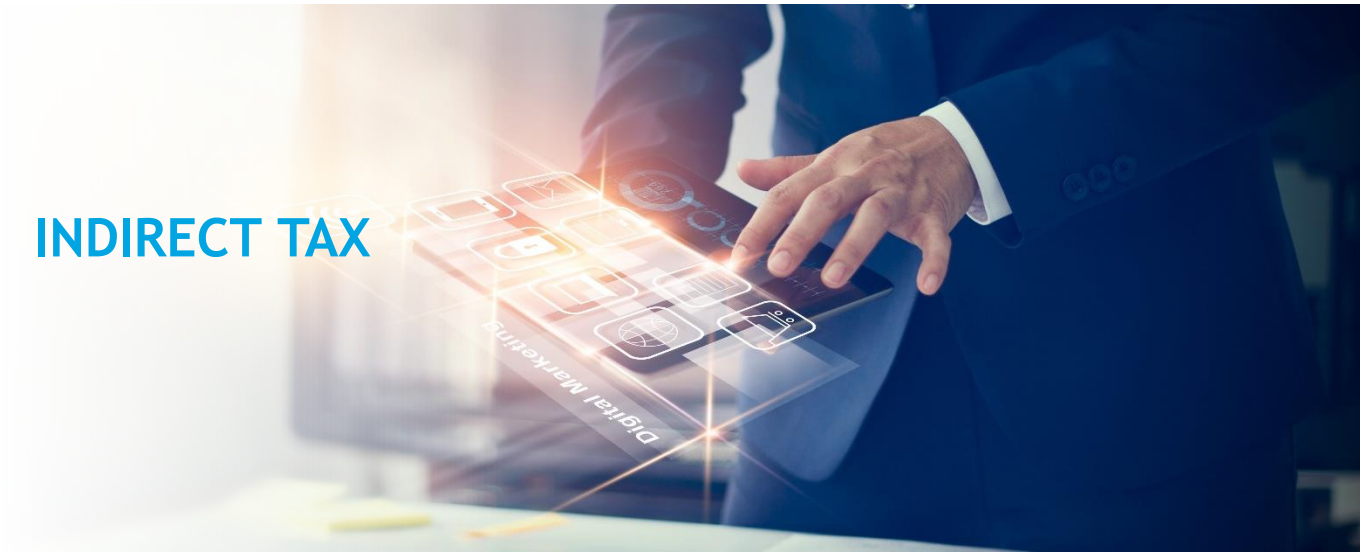
[M/s Cognizant Technology Solutions India Pvt. Ltd. vs. ACIT, I.T.A No. 269/Chny/2022 (Mumbai Tax Tribunal)]

MUMBAI TAX TRIBUNAL UPHELD THE ORDER OF CIT(A) FOR LEVY OF PENALTY UNDER THE BLACK MONEY ACT FOR NON-DISCLOSURE OF ASSETS LOCATED OUTSIDE INDIA IN ITR

A person who qualifies as a Resident and Ordinary Resident (ROR) of India in any FY and holds specified foreign assets, is required to report details of those foreign assets in the 'Foreign Assets' (FA) schedule of Income Tax Return (ITR) form irrespective of whether or not he has taxable income in India in that FY. Any misreporting/underreporting of assets in India tax filings may result in penal consequences and, in fit cases, prosecution proceedings may also be launched under The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015. Non-compliance may attract a penalty of INR 1 million as per section 43 of the Black Money Act and also, he may be punishable with rigorous imprisonment for a term which shall not be less than six months, but may extend to 7 years, with a fine. In this regard, recently the Mumbai Tax Tribunal upheld the order of CIT(A) levying a penalty of INR 1 million for non-reporting of Foreign Assets in the FA schedule of Income tax returns form which affirmed tax authorities' tough stand on such reporting. To read our detailed analysis, please go to: https://www.bdo.in/en-gb/insights/alerts-updates/direct-tax-alert-mumbai-tax-tribunal-upheld-the-order-of-cit(a)-for-levy-of-penalty-under-black-mo

[Shobha Harish Thawani vs. JCIT, B.M.A 01-03/Mum/2023 (Mumbai Tax Tribunal)]

[2] Section 263 of the IT Act provides that erroneous order passed by tax officer causing prejudice to tax authorities is revisable by the First-Appellate Authority.



INPUT TAX CREDIT (ITC) ON LEASING/RENTING/HIRING OF MOTOR VEHICLES FOR TRANSPORTATION OF WOMEN EMPLOYEES WILL BE ALLOWED IF SUCH FACILITIES ARE MANDATORILY REQUIRED TO BE PROVIDED UNDER ANY LAW.

Facts of the case

- M/s. Access Health Services Pvt. Ltd. (Taxpayer) is inter alia engaged in rendering IT-enabled support services in the healthcare sector to its customers located outside India. Since the entire customer base of the Taxpayer is located outside India, the Taxpayer's operating hours consist of the following shifts:
  - 8.30 am to 5.30 pm;
  - 9.30 am to 6.30 pm;
  - 5.30 pm to 2.30 am;
  - 6.30 pm to 3.30 am; and
  - 8.30 pm to 5.30 am
- Under the Tamil Nadu Shops and Establishment Act, 1947 (TNSE Act), Notification no: GOMs no: 60 dated 28 May 2019 (Notification) inter alia mandated the Taxpayer to provide transportation facilities to women employees working between 8.00 pm and 6.00 am.
- To comply with the aforesaid requirement, the Taxpayer procures services of leasing/renting/hiring of motor vehicles for transportation of women employees.
- As per the Taxpayer's Internal Policy, it is mandatory for women employees working beyond 8.00 pm to use the car facility provided by the Taxpayer for commuting to/from the workplace and home. Further, no outsider will be permitted to use the aforesaid facility. The policy further requires that in no circumstances shall a woman be the last person to be dropped and a male employee shall accompany women employees at all times till the point of drop.
- All the employees receiving the aforesaid transportation facilities are employed by the Taxpayer and there are no contract employees. Further, the Taxpayer does not charge its employees for providing the aforesaid transportation facility.
- Accordingly, the Taxpayer receives services from its vendors towards renting/leasing/hiring of motor vehicles in respect of which, GST is either paid by the Taxpayer under the reverse charge mechanism or is paid by the supplier on a forward charge basis.
- In light of the aforesaid background, the Taxpayer has filed an application before the Authority for Advance Ruling (AAR) in respect of the following:
  - Eligibility to claim ITC on leasing/renting/hiring of motor vehicles for providing transportation facility to women employees
  - If ITC in respect of the aforesaid services is available, whether such ITC can be availed in respect of the services received from the date of introduction of proviso to Section 17(5)(b)(iii) of the Central Goods and Service Tax Act, 2017 (CGST Act)[1] w.e.f. 1 February 2019?

Contentions by the Taxpayer

- *Proviso* after Section 17(5)(b)(iii) of the CGST Act provides that the restriction provided under Section 17(5)(b) of the CGST Act would not apply in respect of such goods or services or both where an employer must provide such goods or services or both to its employees under any law for the time being in force.
- Reliance in this regard was also placed on Circular no: 172/04/2022 dated 6 July 2022 (Circular dated 6 July 2022) wherein it was clarified that the proviso after Section 17(5)(b)(iii) would apply to the whole of Section 17(5)(b) and not only Section 17(5)(b)(iii) of the CGST Act.
- Reliance was placed on the following judgements:

[1]The provisions of the CGST Act are *pari materia* to the provisions of the Tamil Nadu Goods and Services Tax Act, 2017. For the sake of brevity, we have referred to the provisions of the CGST Act herein.

  - ***Rane TRW Steering Systems Ltd. Vs. The Commissioner of Central Excise [2019 (4) TMI 1343 - CESTAT CHENNAI]***, wherein it was held that an activity that is mandatory under a law satisfies the substantive part of the definition of 'input service'.
  - ***M/s. Troikka Pharmaceuticals Ltd. [TS-439-AAR(GUJ)-2022-GST]***, wherein it was held that ITC of GST paid on canteen charges is available in cases where it is mandatorily required to be provided to the employees, subject to the condition that the burden of GST is not passed on to the employees.
- Under the TNSE Act read with the Notification, the Taxpayer is mandatorily required to provide safe transport facilities to its women employees working outside of regular office hours.
- The Taxpayer has also furnished a copy of the agreement along with the tax invoice issued by the service providers providing the services for the transportation of employees.

Observations and Ruling of the AAR

- On perusal of the agreement and the invoices furnished by the Taxpayer, it appears that the -
  - The supplier leases out vehicles every month along with the driver;
  - The rental amount includes all costs that cover all taxes, rates and duties;
  - The invoice issued by the service provider pertains to vehicles (having a seating capacity of less than 13 persons) which was rented to the Taxpayers.
- Pursuant to the amendment to Section 17(5) of the CGST Act (Vide Notification no: 02/2019-Central Tax dated 29 January 2019, w.e.f. 1 February 2019), it appears that -
  - ITC is not available on leasing/renting/hiring of motor vehicles for transportation of passengers having approved seating capacity of not more than 13 persons (including driver);
  - As per proviso to Section 17(5)(b) of the CGST Act, ITC in respect of such goods or services or both shall be available where it is obligatory for an employer to provide the same to its employees under any law for the time being in force.
- The Circular dated 6 July 2022 further clarifies that the proviso after Section 17(5)(b)(iii) of the CGST Act applies to the whole of Section 17(5)(b) of the CGST Act.
- In the present case, since the motor vehicles used by the Taxpayer have a seating capacity of less than 13 persons (including the driver), ITC will not be available with respect to such supplies.
- The nature of the Taxpayer's business necessitates employing women employees beyond 8.00 pm. Although the seating capacity of the motor vehicle used for transportation of passengers is less than 13 persons (including the driver), there is a mandatory requirement for the Taxpayer to provide the transportation facility to the women employees working beyond 8.00 PM as stipulated under the TNSE Act and the Notification.
- However, given that the Notification was issued only on 29 May 2019, the proviso to Section 17(5)(b) is satisfied only on such date viz., 28 May 2019.
- In view of the above, the AAR concluded that:
  - The Taxpayer is entitled to avail ITC on the tax paid towards leasing/renting/hiring of motor vehicles for providing transport facility to women employees alone, who are arriving or leaving the workplace between 8.00 pm and 6.00 am.
  - ITC can be availed with effect from 28 May 2019, subject to the provisions of Section 16 of the CGST Act.

[AAR-Tamil Nadu, M/s. Access Health Services Pvt. Ltd., [TS-476-AAR(TN)-2023-GST], dated 26 September 2023]

BENEFITS UNDER THE MERCHANDISE EXPORT FROM INDIA SCHEME (MEIS) CANNOT BE DENIED ON ACCOUNT OF AN INADVERTENT ERROR IN SELECTING THE CORRECT OPTION

Facts of the case

- M/s. Reliance Industries Ltd. (Taxpayer) is inter alia engaged in manufacturing various goods at its factories located at Hazira, Dahej, Jamnagar and Silvassa for onward exports.
- During the period from February 2016 to April 2019 (relevant period), the Taxpayer exported goods which were eligible for the benefit of MEIS scrips under Para 3.4 of the Foreign Trade Policy 2015-20 (FTP).
- To claim the aforesaid benefit, the Taxpayer was required to follow the specified procedure wherein the Taxpayer was required to mark/tick 'Y' (Yes) in the rewards column of the Shipping Bills. The default configuration in respect of the aforesaid option is 'N' (No) and thus, to claim MEIS benefit, the Taxpayer is mandated to uncheck the box 'N' (No) and mark the box 'Y' (Yes).
- Out of over 55,000 Shipping Bills filed by the Taxpayer during the relevant period, around 68 Shipping Bills were inadvertently filed with the default configuration 'N' on account of error committed by the Customs Brokers and/or Taxpayer's staff.
- In this regard, the Taxpayer approached the Customs Authorities and filed letters/applications seeking amendment in respect of the aforesaid Shipping Bills thereby, allowing MEIS benefits.
- The Policy Relaxation Committee rejected the aforesaid application filed by the Taxpayer holding that Shipping Bills ticked with 'N' do not get electronically transmitted in the automated environment and hence, no case has been made by the Taxpayer for claiming the MEIS benefits.
- Aggrieved by the above, the Taxpayer filed a Writ Petition before the Hon'ble Gujarat High Court.

Contentions by the Taxpayer

- It is well settled by a plethora of judicial precedents of various High Courts (including this Hon'ble High Court) that in cases involving an inadvertent mistake in the

declarations with the intent of the claim of MEIS, the High Courts have directed the Tax Authorities to grant MEIS scrips to the assessees.

- Reliance in this regard was inter alia placed on the following judicial precedents:
  - ***Bombardier Transportation India Pvt. Ltd. Vs. DGFT [TS-63-HC-2021 (GUJ)-FTP]***
  - ***Gokul Overseas Vs. Union of India [2020(373) ELT 49 (Guj.)]***
  - ***Jindal Saw Ltd. Vs. Chief Commissioner of Customs [2022 (380) ELT 574 (Guj.)]***
  - ***L&T Hydrocarbon Engineering Ltd. Vs. Union of India [Order dated 15 December 2021 in SCA No. 7707 of 2021]***
- In the present case, the Tax Authorities have failed to consider the aforesaid judicial precedents and hence, the Writ Petition filed by the Taxpayer ought to be allowed.

Contentions by the Tax Authorities

- The eligibility to claim benefits under the MEIS is dependent on the fulfilment of all notified procedures outlined in the FTP and the Handbook of Procedures 2015-20 (HBP). Thus, the entitlement to MEIS scrips is allowed only when the said procedures are followed.
- Marking 'Y' in the Shipping Bills at the time of filing such Shipping Bills was made mandatory vide Public Notice no: 9/2015-20 dated 16 May 2016. As per Para 3.14 of the HBP, only the Shipping bills which were marked 'Yes' are transmitted by the ICEGATE server of the Customs to the DGFT Portal.
- The Taxpayer has been regularly filing Shipping Bills and claiming MEIS benefits, and if due to an error the Taxpayer had clicked 'N', then no action can be taken in this regard given that no information pertaining to such Shipping Bills would be reflected on the DGFT Portal.
- Marking of 'Y' or 'N' is not merely a procedural requirement but a substantive one from the perspective of risk management during export because the Shipping Bills marked as 'N' escape the evaluation and assessment system.
- In view of the above, the Writ Petition should be dismissed.

Observations and Ruling of the Hon'ble High Court

- It is clear that the only ground on which the Taxpayer could not claim MEIS benefit was because the option 'N' was inadvertently selected instead of 'Y'. Relying on the aforesaid decisions relied upon by the Taxpayer, it was held that such an inadvertent mistake cannot disentitle the Taxpayer from claiming the MEIS benefit.
- In view of the above, the Petition was allowed, and the Tax Authorities were directed to accept the manual applications of the Taxpayer to grant MEIS scrips in respect of the 68 Shipping bills within 8 weeks.

[M/s. Reliance Industries Ltd. Vs. Union of India, [2023-TIOL-1200-HC-AHM-CUS], dated 8 September 2023]

IMPOSITION OF ADDITIONAL CONDITIONS/RESTRICTIONS HAVING AN EFFECT OF DESTROYING THE ACQUIRED, ACCRUED AND VESTED RIGHT IS WITHOUT ANY AUTHORITY AND UNSUSTAINABLE

Legislative Background

- The Jharkhand Government (State Government), through the Department of Industries, Mines and Geology (Department) notified the Jharkhand Industrial Investment and Promotion Policy, 2016 (IP 2016) vide Notification dated 16 February 2016. The IP 2016 was aimed at creating an industry-friendly environment for maximising investments effective from 1 April 2016 for 5 years.
- Clause 7.5 of IP 2016 (Clause 7.5) inter alia provided the following incentives in respect of Value Added Tax (VAT):
  - Clause 7.5(a)(2) inter alia provided that New large projects would be given reimbursement of 75% of the Net VAT p.a. for 7 years starting from the date of commencement of production (subject to a ceiling limit of 100% of total fixed capital investments made).
  - Clause 7.5(b) extended this benefit to units undertaking expansion/modernisation /diversification, inter alia stipulating that such units would be treated as new units for determining the eligibility in respect of the aforesaid benefits.
- A 'Note' was provided to Clause 7.5 inter alia empowering the State Government to make appropriate amendments, deletion or substitution of any incentives granted under IP 2016, post implementation of the GST regime.
- Clause 10.7 of IP 2016 (Clause 10.7) provides that the implementation of various provisions covering the incentives, concessions etc., will be subject to the issue of detailed guidelines/statutory notifications, wherever necessary in respect of each item by the concerned Administrative Department. Clause 10.10 of IP 2016 (Clause 10.10) empowers the State Government to amend or withdraw any of the provisions and/or schemes under the IP 2016.
- After the implementation of the GST regime (w.e.f. 1 July 2017), the State Government issued a Notification (Memo no: 1335) dated 16 May 2018 (Notification dated 16 May 2018) amending the IP 2016:
  - Clause 7.5(aa) was inserted which inter alia stipulated that large new units including the units that have undertaken expansion/modernisation/diversification, would be reimbursed 75% of the State GST paid on Intra-state Sale subject to actual realisation in the State Government Treasury for 7 years, subject to the aforesaid ceiling limits.
  - The 'Note' provided under Clause 7.5 was deleted.
- Subsequently, another Notification (Memo no: 512)

dated 7 March 2019 (Notification dated 7 March 2019) was issued which inter alia inserted an Explanation to Clause 7.5(aa). As per the said Explanation, the phrase 'Actual realisation in the State Treasury' [referred to in Clause 7.5(aa)] was defined to inter alia mean that if the recipient of goods has claimed ITC on the goods supplied by the unit, the benefit of reimbursement of SGST subsidy would not be available under IP 2016.

Facts of the case

- In terms of IP 2016, M/s. Atibir Industries Co. Ltd. (Taxpayer), which was inter alia engaged in the manufacture of iron and steel, expanded its unit to produce Sinter and Pig Iron and commenced commercial production on 20 February 2017 during the subsistence of IP 2016.
- The Taxpayer filed applications seeking reimbursement of State GST incentive during the period 2017-18 to 2022-23 claiming a total incentive of INR 1.17bn.
- The aforesaid claim was considered by the High-Powered Committee (HPC) constituted under the IP 2016. In the HPC meeting held on 6 January 2022, a partial amount of INR 0.53bn was approved, for which, the Taxpayer was directed to obtain a 'No Dues Certificate' (NDC) from the Tax Authorities for payment of the approved incentive amounts. Although the Taxpayer had produced NDC, the partial reimbursement sanctioned by HPC was not disbursed.
- Aggrieved by the above, the Taxpayer filed a Writ Petition before the Hon'ble Jharkhand High Court [WP(C) 6476 of 2022].
- Pending the aforesaid Writ Petition, in the counter affidavit filed by the State Government, a subsequent decision of HPC (Memo no: 393 dated 17 February 2023) was communicated inter alia contending that the HPC had decided to keep its earlier decision dated 6 January 2022 in abeyance considering the amendments made by Notification dated 7 March 2019 and the Standard Operating Procedure (SOP) issued by the Tax Authorities.

Contentions by the Taxpayer

- Legality of the Notification dated 7 March 2019:
  - Notification dated 7 March 2019, issued in the exercise of powers provided under Clause 10.7, imposes additional conditions and restrictions nullifying the effect of IP 2016. This is beyond the powers of the Department which is only empowered to lay down guidelines and issue Notifications to give effect to the provisions of IP 2016.
  - Notification dated 16 May 2018 was to make IP 2016 in consonance with the GST regime and the power given to the State Government by virtue of Note to Clause 7.5 which was intentionally deleted by the aforesaid Notification.
  - After the aforesaid amendment and deletion of the enabling provision for such amendment i.e., 'Note' to Clause 7.5, Notification dated 7 March 2019 was issued in exercise of the powers granted under Clause 10.7. This averment has not been denied by the Tax Authorities in their Counter Affidavit and hence, the same stands undisputed and admitted.
  - Thus, a Notification dated 7 March 2019 was issued for laying down procedures/guidelines only for the implementation of IP 2016 and not to amend the Policy in any manner. However, in the garb of issuing the aforesaid Notification, new conditions/restrictions were imposed in the Explanation inserted into Clause 7.5(aa).
  - The Department, while issuing a Notification dated 7 March 2019, introduced an 'End User Condition within the State' which amounts to imposing additional conditions/restrictions for availing the benefit under the IP 2016 and is impermissible in law. Reliance in this regard was placed on the following judicial precedents:
    - ***State of Bihar Vs. Suprabhat Steel Ltd. [1999 (1) SCC 31]***
    - ***State of Orissa and Ors. Vs. Tata Sponge Iron Ltd. [2007 (8) SCC 189]***
    - ***Manuelsons Hotels Pvt. Ltd. Vs. State of Kerala and Ors. [2016 (6) SCC 766]***
  - Without prejudice to the above, as per the settled law, an exemption notification for the promotion of industries must be construed liberally keeping in mind the aims, objectives and purposes sought to be achieved. Reliance was inter alia placed on the Government of Kerala & Anr. Vs. Mother Superior Adoration Convent [2021 (5) SCC 602].
  - Even if it is presumed that the Notification dated 7 March 2019 seeks to amend the provisions of IP 2016, the said amendment seeks to curtail/take away/nullify/make illusionary the SGST inventive promised under IP 2016, and, in the absence of any supervening public interest, IP 2016 cannot be amended to the detriment of the Taxpayer who had made substantial investments and altered its financial position.
  - The State Government is bound by promissory estoppel and legitimate expectations which are the facets of Article 14 of the Constitution of India.
- Retrospective applicability of the Notification dated 7 March 2019:
  - After having promised to grant industrial subsidy/incentive, IP 2016 cannot be amended retrospectively vide Notification dated 7 March 2019 to deny the aforesaid benefit.
  - Assuming that the State Government is entitled to curtail the benefits promised under IP 2016, such curtailment would apply only prospectively. Since the Taxpayer had already commenced production before the issuance of the Notification dated 7 March 2019, the accrued and acquired right under IP 2016 cannot be taken away.
  - This is also substantiated by the HPC decision dated 6 January 2022 which allowed reimbursement to the Taxpayer despite the existence of a Notification dated 7 March 2019.
  - However, subsequently based on the letter dated 13

December 2022 issued by the Tax Authorities, the aforesaid decision of HPC was kept in abeyance.

- Although the Taxpayer has maintained separate records of production, investment made, details of SGST paid/payable, etc., required under Clause 7.5(b), for the expanded unit, while computing eligibility towards incentive, the Net SGST paid by the expanded unit has not been considered even in HPC decision dated 6 January 2022 and the amount of incentive payable was arbitrarily reduced.
- Due to latches committed by the State Government, the Taxpayer has been denied its valid claim of incentive and the Hon'ble High Court should direct the State Government to pay the same along with interest.

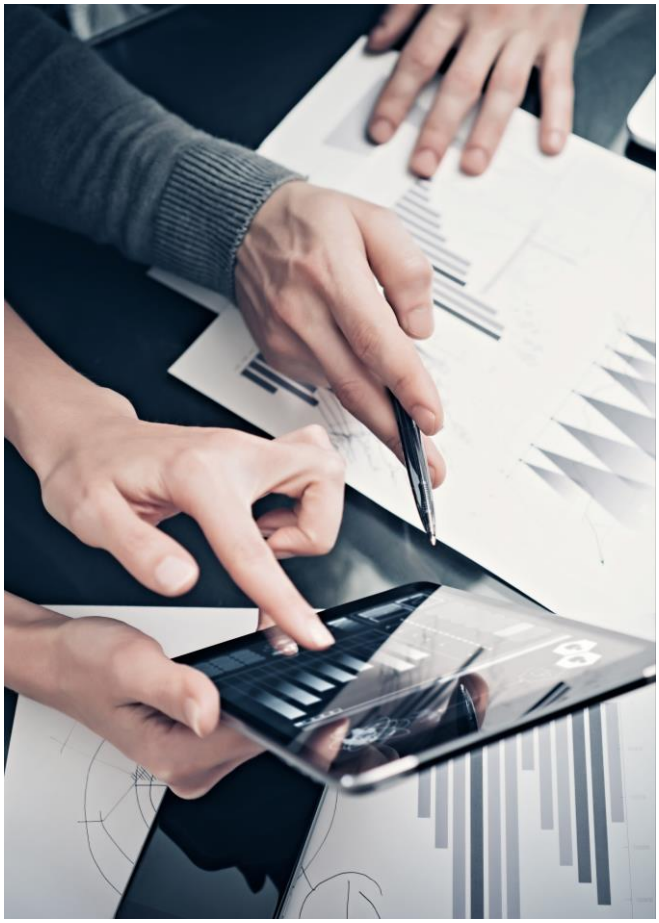
Contentions by the Tax Authorities

- Clause 10.10 empowers the State Government to amend or withdraw any of the provisions and/or scheme of IP 2016. Further, a Notification dated 7 March 2019 has been issued in the exercise of powers provided under Clause 10.10.
- Reliance was also placed on Section 24 of the General Clauses Act, 1897 to contend that the power to enact includes the power to repeal and/or amend and the issuance of Notification dated 7 March 2019 can be traced to the said power (provided under Clause 10.10).

Observations and Ruling by the Hon'ble High Court

- Legality of the Notification dated 7 March 2019 issued by the Department:
  - The second part of the Explanation to Clause 7.5(aa) inserted by Notification dated 7 March 2019 which inter alia imposes an additional condition/restriction in the form of 'End User Restriction' in the exercise of powers conferred under Clause 10.7 is clearly without jurisdiction and beyond its powers.
  - What has been promised by the State Government cannot be taken away by a Department of the State Government by laying down guidelines for implementing the IP 2016. The issue is no longer res integra and has been settled by the decisions of the Hon'ble Supreme Court in Suprabhat Steel Ltd. (supra), Tata Sponge Iron Ltd. and Manuelsons Hotels Pvt. Ltd. (supra) which are squarely applicable to the facts of the present case.
  - In view of the above, the amendments made by Notification dated 7 March 2019 are without jurisdiction, sanction of law and ultra vires IP 2016.
- Retrospective applicability of Notification dated 7 March 2019:
  - The objective of IP 2016 was to promote industrial growth and hence, it provided reimbursement of 75% of SGST. However, Notification dated 7 March 2019 nullifies or makes illusionary, the benefit provided under IP 2016 by introducing a new condition which destroys the acquired and/or vested right of the Taxpayer.
  - The Taxpayer's unit commenced commercial production on 20 February 2017 when there was no stipulation in IP 2016 which curtailed the benefit of Net VAT/SGST if the recipient of the goods had availed ITC on the goods supplied. In the absence of any retrospective effect being given to the Notification dated 7 March 2019, the accrued and acquired right of the Taxpayer cannot be curtailed.
  - In view of the above, the Notification dated 7 March 2019 is without any authority, irrational and violative of Article 14 of the Constitution of India.
- Although the Taxpayer had maintained separate books of accounts for its expanded Unit, the reimbursement of SGST payable calculated by the HPC was not based on the expanded Unit but was based on the entire Unit (existing and expanded Unit as a whole) resulting in a reduction of the amount of claim.
- In view of the above, the Petition was allowed and the decision of the HPC dated 17 February 2023 and the letter dated 13 December 2022 by the Tax Authorities was set aside.
- The State Government was directed to calculate the incentive towards reimbursement of SGST payable to the Taxpayer based on the expanded Unit only and consequently, sanction and disburse the same under IP 2016 for the period from 2017-18 to 2022-23 within 3 months.

[M/s. Atibir Industries Co. Ltd. Vs. State of Jharkhand & Ors., [2023-VIL-645-JHR], dated 12 September 2023]



TRANSFER PRICING

HIGH COURT: DRP CANNOT ISSUE DIRECTIONS ONCE APPEAL HAS BEEN PREFERRED BEFORE THE CIT(A)

The taxpayer filed its Return of Income (RoI) for the Assessment Year (AY) 2015-16 on 30 September 2015. The taxpayer had undertaken international transactions with its Associated Enterprises (AEs) and accordingly, its case was referred to the Transfer Pricing Officer (TPO) under Section 92 CA(1) of the Income Tax Act, 1961 (The Act). The chronology of the subsequent events is as follows:

- 30 October 2018: TPO passed the TP Order with an adjustment amounting to INR 11.92 crores;
- 3 December 2018: The Assessing Officer (AO) passed the Draft Assessment Order;
- 14 December 2018: The taxpayer filed a letter with the AO informing that it is in the process of filing an application before the Dispute Resolution Panel (DRP) against the TP adjustment;
- 24 December 2018: The AO incorrectly passed the Final Assessment Order without waiting for the conclusion of the mandatory 30-day period from the date of issue of the draft Assessment Order. The said Order was received by the taxpayer on 29 December 2018;
- 28 December 2018: The taxpayer filed its objections with the DRP (the taxpayer was unaware of the passing of the Final Assessment Order).

Although the Final Assessment Order dated 28 December 2018 was issued erroneously, the taxpayer filed an appeal before the Commissioner of Income-Tax (Appeals) (CIT(A)) against the same. The taxpayer also claimed that the proceedings before the DRP are now invalid.

However, the DRP issued its directions on 16 September 2019 and the AO passed a second Final Assessment Order on 31 October 2019. The taxpayer filed a writ petition before the Hon'ble High Court (HC)

The Hon'ble HC observed that the DRP could give directions which may "confirm, reduce or enhance the variations proposed in the Draft Order" and where the directions by the DRP would "enable the AO to complete the assessment". Hence, the DRP can issue directions only in "pending assessment proceedings", which was not applicable in the taxpayer's case, since the AO had passed the Final Order on 24 December 2018. Accordingly, the Hon'ble HC rejected the DRP Directions dated 16 September 2019 as well as the subsequent assessment order dated 31 October 2019.

Undercarriage and Tractor Parts Pvt Ltd [TS-554-HC-2023(BOM)-TP]

TRANSACTIONS WITH SEPARATE AES IN DIFFERENT JURISDICTIONS CANNOT BE AGGREGATED

The taxpayer is a subsidiary of Andritz Hydro Private Limited GmbH Austria and is engaged in the business of design, manufacture, servicing, erection, and installation of hydro and thermal power generators. The taxpayer entered into international transactions with around 14 Associated Enterprises (AEs) based in different tax jurisdictions.

The taxpayer aggregated all its its international transactions and benchmarked the same by adopting the Transactional Net Margin Method (TNMM) as the most appropriate method with Operating Profit/Operating Cost (OP/OC) as the Profit Level Indicator (PLI).

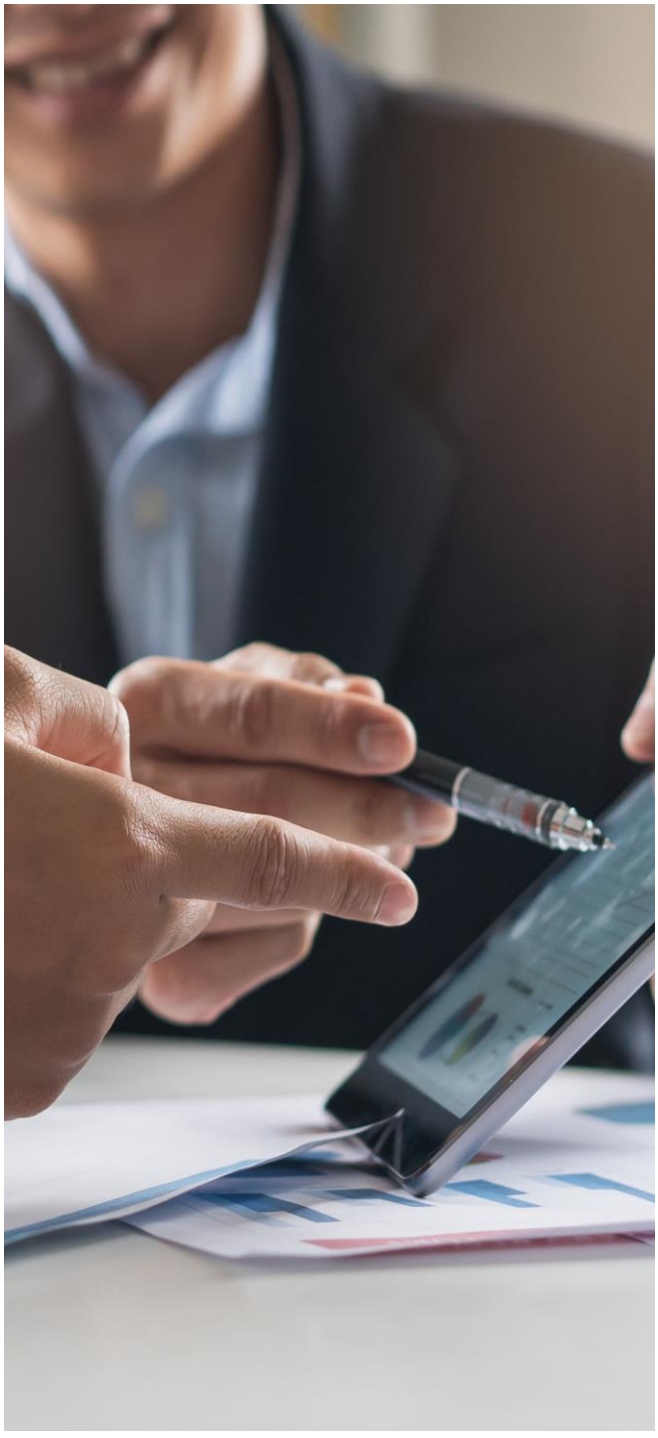
The Transfer Pricing Officer (TPO) made the following adjustment to the taxpayer's international transactions:

Issue 1 - Revenue from Projects:

During the TP proceedings, at the insistence of the Ld. TPO, the taxpayer provided the gross margin earned from each project and argued that even if the Cost-Plus Method

(CPM) is to be adopted, then the gross margin of 17.80% from the AE segment is higher than the gross margin of 10.62% from the Non-AE segment.

However, the TPO considered every project as a separate international transaction and applied CPM on a project basis. Accordingly, the TPO made an adjustment by selecting a particular project with Andritz Hydro Gmbh Austria in which the taxpayer had incurred a gross loss of 25.50% and compared the same with the gross margin of 10.62% made by the Non-AE segment. This was upheld by the Dispute Resolution Panel (DRP).



The Hon'ble Income-tax Appellate Tribunal (Hon'ble ITAT) remanded the matter back to the Ld. TPO for a fresh analysis (since the DRP had not discussed the objections raised by the taxpayer), in light of the following observations:

- When AEs are situated in different tax jurisdictions and geographical, economic and market conditions, then the international transactions with such AEs cannot be aggregated for determining the ALP;
- Aggregation cannot be rejected in totality since the Act, the Income-tax Rules, 1962 (Rules), ICAI Guidance Notes as well as the OECD Guidelines allow for aggregation of closely linked transactions;
- As per the ICAI Guidance Notes, closely linked transactions are those which emanate from a common source or arrangement;
- In case there are multiple transactions which are closely linked or continuous in nature, their FAR (functions performed, assets employed and risks undertaken) cannot be ascertained on a standalone basis and the price of one transaction has a bearing on the price of the other transactions, then such transactions can be aggregated for determining the ALP.

Issue 2 – Payment of Technical Services and Support Cost:

The Ld. TPO held that the payment towards technical services was already a part of the royalty payment for technical know-how under the royalty agreement (Agreement)and consequently the determined Arm's Length Price (ALP) of the technical services as Nil. The same was upheld by the DRP by claiming that there are no commercial reasons for double payment for duplicative services.

The taxpayer contended that the royalty was paid for the know-how provided by the AE under the Agreement, whereas the payment for technical services was dependent upon the actual expenditure incurred by the AE for providing such services. Further, the taxpayer submitted that the effective rate of royalty (if technical fees were combined with it) would be 2.27% of sales which was still lower than the 5%/8% agreed in the Agreement.

The Hon'ble ITAT remanded the matter to the Ld. TPO for fresh adjudication since the DRP had not given a speaking order.

Andritz Hydro Private Limited [TS-524-ITAT-2023(Ind)-TP]

APPEAL OF REVENUE DISMISSED ON GROUNDS OF NO SUBSTANTIAL QUESTION OF LAW

The taxpayer is engaged in the provision of Information Technology enabled services (ITeS) and Business Process Outsourcing (BPO) to its Associated Enterprise (AE). The Transfer Pricing Officer (TPO) rejected nine companies identified as comparable in the economic analysis conducted by the taxpayer. Further, the Ld. TPO identified

the following three companies as comparable viz. Acropetal Technologies Limited (Acropetal), BNR Udyog Limited (BNR) and Informed Technologies India Limited (Informed), in addition to eight others and made a TP adjustment of INR 6.12 Crore on the basis of the margins of the said companies. The TP adjustment was upheld by the Dispute Resolution Panel (DRP).

The taxpayer appeals to the Hon'ble Income-tax Appellate Tribunal (Hon'ble ITAT) against the adjustment primarily on the inclusion of Acropetal, BNR and Informed. Hon'ble ITAT made the following observations while rejecting Acropetal, BNR and Informed as comparables to the taxpayer and ruling in favour of the taxpayer:

- Acropetal: Acropetal provides KPO services which require a high level of skill and application of intellectual property. Further, it has developed and owns intellectual property related to the healthcare segment. In previous years Acropetal was rejected as a comparable by the ITAT/DRP on account of its operating in the healthcare field and being a KPO.
- BNR: BNR is engaged in medical transcription services which cannot be comparable to ITeS/BPO services. Further, BNR has high fluctuations in its profit margins vis-à-vis the previous and subsequent years. Relying on the ruling by Hon'ble ITAT (Delhi Bench) in the case of Actis Advisors Pvt. Ltd. where it was held that entities having high fluctuations cannot be considered appropriate for benchmarking purposes, BNR is rejected as comparable.
- Informed: Informed is engaged in the provision of financial research and data management services which were in the nature of KPO services; and couldn't be selected as a comparable to the taxpayer.

The Revenue Authorities appealed to the Hon'ble High Court (Hon'ble HC) against the decision of Hon'ble ITAT stating that the additional comparables are functionally similar. Hon'ble The HC while forming the decision, made the following observations:

- The Hon'ble ITAT has come to a definitive conclusion based on an appreciation and perusal of the materials placed on record;
- The Revenue Authorities had accepted the fact that the taxpayer was engaged in the provision of ITeS/BPO services;
- Rule 10B(2)(a) of the Income Tax Rules, 1962 (The Rules) requires an uncontrolled transaction to be comparable to the transaction undertaken by the tested party wherein the reference point is the services provided by the tested party. The relevant extract of the Rule 10B(2)(a) of the Rules is as under:

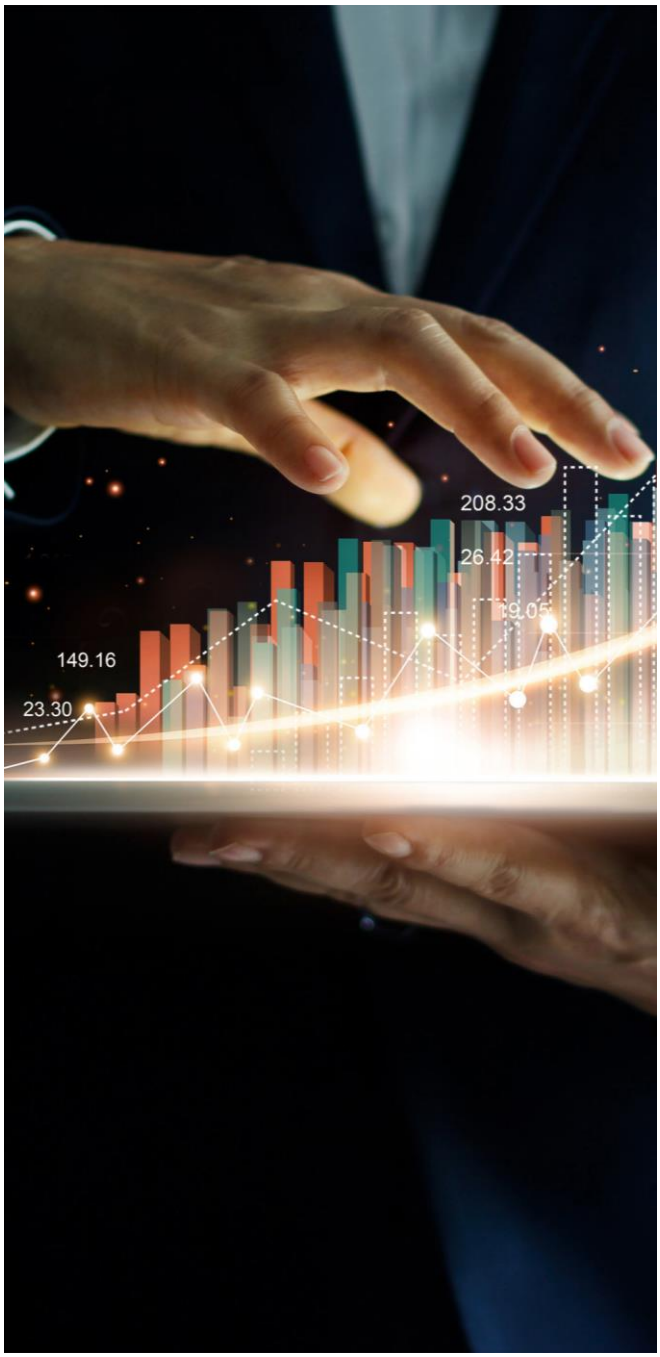
  "the comparability of an international transaction [or a specified domestic transaction] with an uncontrolled transaction shall be judged with reference to the following, namely:-

  - *the specific characteristics of the property transferred or services provided in either transaction;"*

- The observations of the Hon'ble ITAT pertaining to Acropetal, BNR and Informed were correct;
- Further, fluctuating margins weren't the only reason for the rejection of BNR. The primary reason for rejection was that the services provided by BNR were different from those of the taxpayer.

Based on the above, the Hon'ble HC dismissed the appeal by concluding that there wasn't a "question of law" for consideration.

Omniglobe Information Technologies (India)Pvt. Ltd [TS-534-HC-2023(DEL)-TP]



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For any content related queries, you may please write to the service line experts at taxadvisory@bdo.in

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BDO IN INDIA OFFICES

Ahmedabad
The First, Block C – 907
Behind ITC Narmada, Keshavbaug
Vastrapur, Ahmedabad 380015, INDIA

Bengaluru - Office 1
Prestige Nebula, 3rd Floor,
Infantry Road,
Bengaluru 560095, INDIA

Bengaluru - Office 2
SV Tower, No. 27, Floor 4
80 Feet Road, 6th Block, Koramangala
Bengaluru 560095, INDIA

Chandigarh
Plot no. 55, Floor 5,
Industrial & Business Park,
Phase 1, Chandigarh 160002, INDIA

Chennai
No. 443 & 445, Floor 5, Main Building
Guna Complex, Mount Road, Teynampet
Chennai 600018, INDIA

Coimbatore
Pacom Square, Floor 3, 104/1, Sakthi
Main Road, Bharathi Nagar, Ganapathy
Coimbatore, Tamil Nadu – 641 006

Delhi NCR - Office 1
The Palm Springs Plaza
Office No. 1501-10, Sector-54,
Golf Course Road, Gurugram 122001, INDIA

Delhi NCR - Office 2
Windsor IT Park, Plot No: A-1
Floor 2, Tower-B, Sector-125
Noida 201301, INDIA

Goa
701, Kamat Towers
9, EDC Complex, Patto Plaza
Panaji, Goa 403001, INDIA

Hyderabad
1101/B, Manjeera Trinity Corporate
JNTU-Hitech City Road, Kukatpally
Hyderabad 500072, INDIA

Kochi
XL/215 A, Krishna Kripa
Layam Road, Ernakulam
Kochi 682011, INDIA

Kolkata
Floor 4, Duckback House
41, Shakespeare Sarani
Kolkata 700017, INDIA

Mumbai - Office 1
The Ruby, Level 9, North West Wing
Senapati Bapat Marg, Dadar (W)
Mumbai 400028, INDIA

Mumbai - Office 2
601, Floor 6, Raheja Titanium, Western
Express Highway, Geetanjali, Railway
Colony, Ram Nagar, Goregaon (E),
Mumbai 400063, INDIA

Mumbai - Office 3
Floor 20, 2001 & 2002 - A Wing, 2001 F
Wing, Lotus Corporate Park, Western
Express Highway, Ram Mandir Fatak Road,
Goregaon (E) Mumbai 400 063, INDIA

Mumbai - Office 4
The Ruby, Level 9, South East Wing
Senapati Bapat Marg, Dadar (W)
Mumbai 400028, INDIA

Pune - Office 1
Floor 6, Building No. 1
Cerebrum IT Park, Kalyani Nagar
Pune 411014, INDIA

Pune - Office 2
Floor 2 & 4, Mantri Sterling, Deep Bunglow,
Chowk, Model Colony, Shivaji Nagar
Pune 411016, INDIA

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