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kcm Insight

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Dear Reader,

We are happy to present ***kcm***Insight, comprising of important legislative changes in direct & indirect tax laws, corporate & other regulatory laws, as well as recent important decisions on direct & indirect taxes.

We hope that we are able to provide you an insight on various updates and that you will find the same informative and useful.

Happy Reading !

Circulars & Notifications

Extension of various direct tax related time limit

Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 dated March 31, 2020

In a much needed respite to the Taxpayers in India due to prevalence of pandemic of COVID-19, the Ministry of Law & Justice passed the Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 providing necessary relaxation in terms of various timelines provided under different Acts. The time-limit for making various compliance has been extended to June 30, 2020.

(Read in detail)

GAAR and GST related disclosures in Tax Audit Report not applicable for A.Y.2020-21

CBDT Order u/s 119 by way of Circular No. 10/2020 dated April 24, 2020

In view of prevailing situation due to COVID-19 pandemic, CBDT has decided to keep in abeyance the reporting requirement under Clause 30C relating to General Anti-Avoidance Rules with respect to various impermissible avoidance arrangement and Clause 44 relating to disclosure of GST related details in Form 3CD for A.Y.2020-21.

CBDT gives more clarification on Viv ad Se Vishwas Scheme (VSV)

CBDT Circular No 9 of 2020 dated April 22, 2020 in suppression of earlier Circular No 7 of 2020 dated March 4, 2020

CBDT had initially provided 55 clarifications by way of FAQ in relation to VSV. CBDT has now issued updated circular replacing earlier circular to clarify further important issues so that VSV can be availed with more clarity.

(Read in detail)

Claim of Deduction u/s. 80G in respect of Contribution made to PM CARES Fund by Employers

Miscellaneous Communication by CBDT dated April 9, 2020

The donations made to PM CARES Fund u/s. 80G made by the employers by way of deductions from salary of their employees would be allowed as deduction in the hands of employees on the basis of TDS statement and Form 16 issued by the employer.

Tax Deduction certificate of financial year 2019-20 can be used up to June 30, 2020

CBDT order u/s 119 dated March 31, 2020 read clarification dated April 9, 2020, CBDT order u/s. 119 dated April 3, 2020

Circulars & Notifications

Amidst COVID-19 outbreak, CBDT has clarified that validity of the certificates issued for the financial year 2019-20 shall be extended till June 30, 2020 as if the said certificate is also in force up to June 30, 2020. The taxpayer is however been informed to file an application at the earliest, in case no such application has been filed till date.

CBDT has further clarified that with respect to any payment to non-residents (including foreign companies) having permanent establishment in India, tax shall be deducted @10% including surcharge and cess up to June 30, 2020.

The Taxpayer is also given an option to file application through official email to his designated assessing officer in case of new payees or in case he wishes to have lower rate of withholding rate as comparted to rate of withholding as per certificate granted in financial year 2019-20.

CBDT has also issued an order u/s 119 authorizing the banks and other financial institutions to consider Form 15G and Form 15H submitted earlier for the financial year 2019-20 as valid forms up to June 30, 2020.

Employer to deduct tax at source under optional personal taxation regime basis declaration of their employees

CBDT Circular No C1 of 2020 dated April 13, 2020

The Finance Act, 2020 has introduced the optional new personal taxation regime by way of introduction of Section 115BAC which shall be applicable from A.Y.2021-22.

The CBDT has clarified that any employee who wishes to avail new tax regime for taxes to be withheld from their salaries will be required to submit intimation to that effect to his employer and based on that intimation, TDS will be deducted accordingly. Such intimation submitted cannot be modified during the entire previous year.

Important Rulings

Deduction u/s.43B shall not be allowable in respect of MODVAT credit Balance

Maruti Suzuki India Limited, Civil Appeal Nos. 11923 & 11924 of 2018, SC

The issue herein concerned was whether deduction of unutilized MODVAT credit u/s. 43B can be claimed. It was the contention of the Taxpayer that MODVAT paid on purchases is in nature of tax and any unutilized balance is nothing but payment of tax in advance. Accordingly, the Taxpayer had claimed the deduction.

On the analysis of the provisions of section 43B, the SC held that the unutilised credit in the MODVAT scheme cannot be treated as sum actually paid by the Taxpayer. The Taxpayer when pays the cost of raw materials where the duty is embedded, it does not *ipso facto* mean that taxpayer is the one who is liable to pay Excise duty on such raw material/inputs. It is merely the incidence of excise duty that

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has shifted from the manufacturer to the purchaser and not the liability to the same.

It is interesting to note that in this case, the SC was dealing with the deduction of unutilized MODVAT credit and not the deduction of payments made under Personal Ledger Account (PLA). Therefore, the observations of the SC in the case of Modipon Ltd. (2017) 299 CTR 306 remains unaffected wherein it was held unutilized balance of PLA shall be allowable deduction under section 43B of the Act.

(Go to KCM Analysis)

Giving possession of land does not amount to transfer unless it involves release of control

Seshasayee Steels (P.) Ltd, Civil Appeal No. 9209 of 2019, SC

This is a very interesting decision of the SC wherein the term transfer has been interpreted with respect to clause (v) and (vi) of section 2(47) dealing with possession of the property. It has been held that unless the possession of land encompasses control over the land and not merely a physical possession, provision of section 2(47)(vi) shall not be attracted. Capital gain tax liability shall be attracted only when a party takes possession along with control over such land.

The SC has also interpreted the term "possession" for the purpose of Section 53A of the Transfer of Property Act 1882 *qua* the definition of Section 2(47) to conclude that the possession connotes the possession of control in the land. This decision will have impact on the development agreements wherein the taxability is governed by section 45(5A).

(Go to KCM Analysis)

SC decides the criteria of re-opening of assessment basis of information obtained in another year

New Delhi Television Ltd, Civil appeal no. 1008 of 2020, SC

The SC in this case has laid down some very important conditions for reopening of assessment. It has been held that material discovered during the assessment proceedings for subsequent year may constitute a tangible evidence to reopen the assessment for any other year. At the same time, it was also held that reopening cannot be done based on the material already available on record at the time of original assessment thus upholding the settled legal position that reopening cannot be done based on material available on record.

The Apex Court also noted that any new ground for validating reopening cannot be used at the time of rejection of objections against 147. Further the reason recorded by the AO cannot be improved upon at any stage of the proceeding. The decision will have an impact on deciding the validity of the reassessment proceedings by the appellate authorities.

(Go to KCM Analysis)

Important Rulings

Deduction of leave encashment expenditure on payment basis is constitutionally valid

UOI v Exide Industries Ltd, Civil Appeal No. 3545 OF 2009, SC

The Apex Court reverses the decision of Calcutta High Court in Exide Industries Limited wherein it was held that section 43B(f) is constitutionally invalid for the purpose of allowability of deduction on leave encashment on payment basis.

The Apex Court laid down certain principles of testing the constitutional validity of a tax provision. It has been held that if a court invalidates a law, the legislature is free to amend such law and alter the invalid elements thereof. If the legislature does so, it does not tantamount to invalidating the opinion of the Court.

(Go to KCM Analysis)

Bought forward business loss can be set off against dividend received from strategic investments

Tamilnadu Industrial Development Corporation Limited ITA No. 1181/2008 Chennai ITAT

In this case, a Taxpayer was holding various strategic investment and was earning dividend. The Tribunal held that notwithstanding the statutory requirement to compute the dividend income under the head "income from other sources", income by way dividend received from a strategic business investment would partake the character of business receipts and consequently the taxpayer is entitled to set off brought forward business loss against such dividend income.

This decision will be very helpful in view of the re-introduction of section 80M by the Finance Act, 2020 and cap on deduction of expenditure @ 20% u/s. 57 to advance an argument that if such divided income is considered as business income, allowability of any expenditures in relation to such income shall not be governed by section 57 of the Act.

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CBDT shares list of harmful regimes with field formations

CBDT has shared a list of harmful regimes (regimes that promote and facilitate profit shifting and base erosion, no or low tax rates, no Economic Substance Requirements, lack of transparency, etc.) with Pr. CCIT (International Taxation) in March 2020 with an advisory that AOs and TPOs on encountering transactions with entities in such jurisdictions may conduct enhanced due diligence by administering a deeper scrutiny of such transactions.

Tax Information Exchange Agreement (TIEA) between India and Brunei enters into effect

The Agreement between the Government of the Republic of India and the Government of Brunei Darussalam for the exchange of information and assistance in collection with respect of taxes was signed in New Delhi, India on February 28, 2019. The Agreement has been notified in the Gazette of India (Extraordinary) on March 9, 2020. In addition to curbing tax evasion and tax avoidance, the Agreement enables exchange of information, including banking and ownership information, between the two countries for tax purposes. It is based on international standards of tax transparency and exchange of information and enables sharing of information on request and automatic exchange of information. The Agreement provides for representatives of one country to undertake tax examinations in the other country as also provides for assistance in collection of tax claims.

TIEA entered between India and Samoa

A TIEA was signed between India and Samoa on March 12, 2020 in Apia, Samoa. The Agreement was signed between Mr. Tuilaepa Lupesoliai Neioti Aiono Sailele Malielegaoi, Prime Minister of Samoa and Mr. Muktesh Pardesi, High Commissioner of India to Samoa.

The Agreement enables exchange of information, including banking and ownership information, between the two countries for tax purposes. It provides for representatives of one country to undertake tax examinations in the other country. The agreement will enter into effect once both countries complete their internal procedures.

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Lawyer's fees paid to non-resident shall be taxable in India if it does not relate to any existing business outside India

M/s. Shriram Capital Limited, Writ Petition No.4965 of 2011, Madras High Court

In this case, the HC has held that services rendered by an Indonesian law firm in respect of possible acquisition of an Insurance Company in Indonesia by the taxpayer was taxable as "Fees for Technical Services ("FTS"). It further held that benefit of exception to section 9(1)(vii)(b) i.e. source rule exception is not available since the Taxpayer has no existing source or business in Indonesia (outside India).

The issue of what would fall within the purview of the exception carved out in section 9(1)(vii)(b), specifically "from any source outside India" and "or for earning or making any income outside India", is a matter that is far from settled. Gujarat High Court in the case of PCIT v. Motif India Infotech Pvt Ltd [TS-7222-HC-2018(Gujarat)-O] has held that location of customers could help determine the "source" of the income, whereas Delhi High Court in the case of CIT v. Havells India Ltd. [2013] 352 ITR 376 (Del.) has held otherwise.

A position of non-withholding of taxes from payments to be made to consultancy firms outside India for various approvals, due diligence, etc. in respect of prospective business under the domestic provision of the Act is disputable and various contrary decisions are available. It could be possible to defend the position of taxpayer if the services under consideration has no connection with existing or future source of income within India.

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Payment made to foreign celebrity for exclusively promoting Indian business can be taxable in India

Volkswagen Finance (P.) Ltd, ITA No.2195/Mum. /2017, Mumbai Tribunal

Income embedded in payment to the international celebrity for participation in Dubai car launch event for promoting the business of the taxpayer in India, is taxable as it is arising from a 'business connection' in India. Also, under Article 23(3) of India-USA DTAA, the same was taxable in India. Taxpayer's treaty protection claims under Article 23(1) of India-USA DTAA which provides for 'residence' based taxation' for the residuary income stood rejected.

Certain observations of the Mumbai Bench could be very interesting. Tribunal noted a principle that once a payment is claimed as tax deductible by the payer in India, any corresponding income to the recipient automatically has a "business connection" in India. This could have far

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reaching implications as any such payment would ideally be a tax-deductible business expenditure in India.

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Corporate guarantee fees shall not be considered as fees for technical services

M/s JCDecaux S.A., ITA No. 1630/Del/2015 and ITA No. 1552/Del/2016, Delhi Tribunal

Corporate guarantee fees cannot be treated as FTS either under Article 13 of India-France DTAA or section 9(1)(vii) of the Act. Further, it was held that education cess and secondary and higher education cess are not applicable while taxing the income on gross basis under DTAA.

While the ruling is not very elaborate, it is a welcome judgement in the sense that it reiterates the principle that guarantee fees do not partake the characteristics of "Fees for Technical Services". It is worth nothing that the Department has not contended taxability of the corporate guarantee fee either as "interest" under the Act or under Article 12 of India-France DTAA or as "Other Income" under Article 23 thereto. The Ruling further reiterates that the rates prescribed under a DTAA are inclusive of surcharge and education cess.

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Payment towards Expats' social security, insurance & relocation costs to Swiss company not to be considered as FTS

Authority for Advance Ruling (Source: Taxsutra, more details awaited)

In the context of taxability of reimbursement of components of salary, AAR has held that payment made by an Indian co. to its group entity in Switzerland towards recharge of social security, insurance & relocation expenses of expatriate personnel cannot be classified as FTS under Indo-Swiss DTAA as employment was in effect under Indian Company's control and hence no TDS u/s. 195 of the Act. However, the administrative fee paid to Swiss co. for managing the portion of expats' salary disbursements in their home country shall be liable to TDS u/s. 195 as FTS.

Issue of taxability of reimbursement of salary and related costs of expatriates has been a litigative matter. Even after the Supreme Court has dismissed the Taxpayer's SLP in the case of Centrica (referred to above), there have been judgments by various ITATs which have either held in favour or against the Taxpayers depending upon the facts of each case.

While this is a ruling by AAR and may not be directly applicable in all cases, it still has a persuasive value. It

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reiterates the position that if the Taxpayer is able to demonstrate that the control over employment was in effect in the hands of the Indian employer, the reimbursements of costs to the overseas entity should not constitute fees for technical services. Interestingly, the AAR has made a reference to the quantum of reimbursement to hold that a lower amount diminishes the chances of a possible camouflage of FTS as reimbursements.

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Amendment made in 2015 to Indirect transfer provision prescribing 50% threshold for word 'substantially' is retrospective in nature

Authority for Advance Ruling (Source: Taxsutra, more details awaited)

AAR rules that applicability of 50% threshold with respect to the word 'substantially' in case of indirect transfer of shares under section 9(1)(i) of the Act is retrospective even if such explanation was introduced by Finance Act 2015.

The Finance Act, 2015 introduced Explanation 6 to Section 9(1)(i) of the Act to provide that a share/interest will be deemed to derive its value substantially from assets located in India if the value of Indian assets exceeds INR10 crores and the value represents at least 50 per cent of the value of all assets owned by the foreign company/entity.

The Delhi High Court in the case of DIT (Intl' Tax) v. Copal Research Limited [TS-509-HC-2014(Delhi)] held that prior to the amendment, gains arising from the sale of a share of a company incorporated overseas which derives less than 50 per cent of its value from assets in India would not be taxable under Section 9(1)(i) of the Act. Ruling by the AAR supports the applicability of 50 per cent threshold for transactions entered into in prior years even if such objective threshold is introduced under the Act with effect from Financial Year 2015-16. This is a welcome ruling for companies that have pending litigation on the said point.

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Circulars & Notifications

Notification No.30/2020-CT dated April 3, 2020

The condition to avail the input tax credit (ITC) to the extent of 110% of eligible ITC getting reflected in GSTR 2A as per Rule 36(4) of the CGST Rules, 2017, shall not be applicable for ITC to be availed in the GSTR 3B filed for the tax periods February 2020 to August 2020. The GSTR-3B for the tax period September 2020 shall be furnished with cumulative adjustment of ITC for the months February 2020 to August 2020.

Notification No. 37/2020-CT dated April 28, 2020

The Government has enabled the facility to transfer the balance of Electronic Cash Ledger from one head to another i.e. from CGST to SGST or IGST and vice-a-versa.

Notification No. 41/2020-CT dated May 5, 2020

The time limit for furnishing of the Annual Return (GSTR 9) and Audit Report for the FY 2018-2019 has been extended till September 30, 2020.

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Separate Registration not required for executing Works Contract in another state

T & D Electricals, Advance Ruling No. KAR ADRG 18/2020 [AAR Kar.]

The Taxpayer was registered in Rajasthan and was awarded a contract to execute electrical works in the nature of works contract for an immovable property situated in Karnataka. It was held that where the Taxpayer is not having any fixed establishment in Karnataka and is executing the contract from Rajasthan, it need not obtain a separate GST registration in Karnataka.

The present advance ruling points out that a person engaged in the business of providing works contract services is not required to obtain registration in each state where such person is executing the works contract since the tax would ultimately go to the state where immovable property is situated due to the consumption based concept of supply. While this ruling would surely bring relief to persons engaged in execution of works contract in different states, one has to also take into consideration the loss of ITC in the state of execution if such person is appointing local subcontractor or is availing hotel services as an example.

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Separate registration not required for supplying goods directly from the port of import

Kardex India Storage Solution Pvt Ltd, Advance Ruling No. KAR ADRG 13/2020 [AAR Kar.]

In this case AAR held that where a Company imports goods at a port which is nearest to the customer's location and supplies the goods directly from the port to the customer, no separate registration is required in the state where the port of import is located and the place of registration of the importer shall be treated as the location of supplier.

In case of persons who are engaged in trading of imported goods, it is more convenient for them from a logistics and cost perspective to import goods at a port near to the customer's location and supply directly from such port. This is a welcome ruling as it points out that such persons are not required to obtain registration at each port of import if supply is made to customers directly from such ports.

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Transfer of construction business as a going concern exempt from tax under GST

Rajeev Bansal And Sudershan Mittal, Advance Ruling No. 10/201 9-20 [AAR WB.]

In this case AAR held that where a partnership firm transferred its under construction project to another person in the same line of business so as to finish the incomplete construction and sell the constructed flats / shops, it was held that the such transfer of business as a going concern shall be treated as exempted in terms of serial no. 2 of Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017

Transfer of a business as a going concern was exempted under the erstwhile VAT laws and there were plethora of judgements to this effect. While GST being a much recent law, the present ruling in favour of assessee is a welcome one.

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Supply of printed books to persons in India on the direction of foreign customer is taxable

Swapna Printing Works Pvt Ltd, Advance Ruling No. 454/VBAAR/2 01 9-20 [AAR WB.]

The Taxpayer has supplied printing books using own raw material on the basis of the content provided by the customer in the US and supplied books to persons located in India on behalf of the US customer.

The AAR held that the activity undertaken by the Taxpayer is a composite supply where printing services is a main supply. Further the said activity cannot be treated as export of services since the recipient of the books is in India, although the payment has been made by the customer outside India.

The GST law clearly states that a person liable to pay the consideration shall be treated as a recipient of services. However, the AAR went a step further and has considered the customers of the recipients as also the recipients.

The observation of the AAR will have a far-reaching impact on the businesses which provide services to persons in India on the instructions of persons situated outside India

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Impact of COVID-19 on Financial Reporting

ICAI advisory on Impact COVID-19 on Financial Reporting

To guide the preparers and auditors, in situation of current COVID-10 pandemic, ICAI has issued an Accounting and Auditing Advisory titled "Impact of Coronavirus on Financial Reporting and Auditors Considerations". This advisory has highlighted few important areas which require specific attention in respect of financial statements for the year 2019-2020, which will help its users (Preparers and Auditors) in performing their professional responsibilities more effectively by considering potential impact of COVID-19 in preparing and reporting in financial statements for the year ended on March 31, 2020.

This advisory applies to both, Ind AS applicable entities and AS applicable entities.

Following are the key takeaways from the said Advisory:

1. **Inventory Measurement**

   In accordance with Ind AS 2 Inventories, and AS 2 Valuation of Inventories, it might be necessary to write down inventories to net realizable value due to reduced movement in inventory, decline in selling prices, or inventory obsolescence due to lower than expected sales. The Management may consider the write down of inventories to NRV item by item if circumstances warrant so.

   Entities have to assess the significance of any write down of inventories and need to make disclosure in accordance with Ind AS 2/AS 2 as well as paragraph 98 (a) of Ind AS 1 Presentation of Financial Statements or paragraph 14 (a) of AS 5 Net Profit or Loss for the Period, Prior Period Items and Changes in Accounting Policies.

   Under Ind AS 2 and AS 2, allocation of fixed production overheads to the costs of conversion is based on the normal production capacity but as consequence of low production or `idle plant, entire amount of fixed overheads should not be allocated to each unit of production. The fixed production overheads need to continue to be allocated based on normal production capacity. The consequent unallocated overheads are recognized as an expense and charged off to Profit and Loss Statement/Account in the period in which they are incurred.

2. **Impairment of Non-Financial Assets**

   Ind AS 36 and AS 28 require an entity to assess, at the end of each reporting period, whether there is any indication that non-financial assets may be impaired. The impairment test must be carried out if there are such indications. If any such indication exists, the entity shall estimate the recoverable amount of the asset and recognize the impairment loss if recoverable amount is

lower than the carrying amount of the asset or group of assets belonging to CGU. Where the recoverable amount is estimated based on value in use, the considerations on accounting estimates and associated uncertainties apply.

Due to COVID-19, there might be temporary ceasing of operations or an immediate decline in demand or prices resulting in lowering of revenues and profitability and reduced economic activity. The management may consider these factors as indicators requiring impairment testing.

For indefinite useful life intangible asset or an intangible asset not yet available for use and goodwill, Ind AS 36 requires an annual impairment testing. There could be an indicator that impairment testing of goodwill and indefinite useful life intangible assets are tested as of reporting date even if the entity follows other annual testing cycle as per Ind AS 36.

Necessary guidance has been provided while conducting impairment testing in COVID-19 situation.

3. **Financial Instruments**

Expected Credit Loss

As per Ind AS 109, the impairment loss recognition and measurement are based on Expected Credit Loss (ECL) model. Recognition of 12 months ECL versus Lifetime ECL - based on segregation of credit exposures into 3 buckets. This segregation of credit exposures into 3 buckets is not required in case of certain financial assets, such as, trade receivables, where simplified approach is applicable.

Measurement of ECL - Adverse impact on the business of borrower entities or debtors may impact the following credit risk parameters:

Risk of default (probability of default) i.e. the likelihood of default by the borrower entity may have increased significantly due to reduced economic activity.

Estimated amount of the loss in the event of default (loss given default): value of collaterals and business cash flows may be affected, adversely affecting the expected amount of loss.

In this period of substantial business dislocation, borrowers may tend to fully utilize undrawn limits and loan commitments, which in turn would impact another credit risk parameter i.e. exposure at default.

Entities are expected to consider current as well as forecasted macro-economic conditions and more than one scenario. Entities may need to develop one or more scenarios considering the potential impact of COVID-19. Impact of any Prudential Regulatory actions to sustain the economy such as loan repayment holidays, reduction in interest rates etc., are also to be considered.

Entities may need to disclose the impact of COVID-19 on various credit related aspects such as methods, assumptions and information used in estimating ECL, policies and procedures for valuing collaterals etc. If the entity is unable to assess the impact of COVID-19 in estimating the impairment loss due to inadequacy of information, the same should be disclosed appropriately.

Fair Value Measurement

Ind AS 113

Due to rapid spread of COVID-19, current financial and capital market environment across the globe has got affected and may have developed certain elements like significant volatility or indications of the significant decline in market prices of financial instruments like equity, bonds and derivatives and significant decrease in volume or level of activity. These elements may need adequate management consideration and professional judgment to determine whether the quoted prices are based on transactions in an orderly market.

Entities using valuation techniques may have to consider the impact of COVID-19 on various assumption including discount rates, credit-spread/counter party credit risk etc.

AS 13

In respect of financial assets within the scope of AS 13, entities must carefully consider the impact of COVID-19 on determination of fair value for valuation of investments classified as Current Investments and test the non-current investments for impairment.

Hedge accounting

Ind AS 109

If entities have adopted cash-flow hedge accounting for certain forecasted transactions, it should assess whether the transaction still qualifies as a highly probable forecast transaction considering their business environment. Entities will need to assess any hedge ineffectiveness and record the impact of that in profit and loss.

Estimate the fair value of derivatives, including paying special attention to underlying assumptions of derivatives, e.g., forward curve of interest rate, foreign currency, commodity etc.

Entities to whom AS is applicable

For recognition and measurement of derivatives within the scope of ICAI Guidance Note on Accounting for Derivative Contracts, entities may need to consider the impact on key inputs/assumptions such as foreign currency rate, interest rate, etc. used in their valuation techniques, including the potential impact on hedge accounting.

4. **Leases (Both under Ind-AS & AS)**

Due to COVID-19, there can be changes in the terms of lease arrangements or lessor may give some

concession to the lessee with respect to lease payments, rent free holidays etc. Such changes in terms or concessions may lead to the application of accounting relating to the modification of leases. Entities will need to determine whether as a result of COVID-19, any lease arrangement has become onerous.

Variable lease payments may be significantly impacted, especially those linked to revenues from the use of underlying asset.

Discount rate used to determine the present value of new lease liabilities may need to incorporate any risk associated with COVID-19.

Compensation by the Government to the lessor for providing concession to the lessee, need to be considered to determine whether to account the same as lease modification as per accounting standard or whether to be accounted as government grant under applicable accounting standard.

5. **Revenue Recognition**

Entities to whom Ind AS is applicable

Due to COVID-19, there could be likely increase in sales returns, decrease in volume discounts, higher price discounts etc. Under Ind AS 115, these factors need to be considered in estimating the amount of revenue to be recognized, i.e., measurement of variable consideration.

The standard also requires entities to disclose information that allows users to understand the nature, amount, timing and uncertainty of cash flows arising from revenue. Therefore, entities need to consider appropriate and sufficient disclosure about the impact of COVID-19 on their revenue.

Entities to whom AS is applicable

Entities may have postponed recognition of revenue under AS 9 dues to significant uncertainty of collection in view of the impact of COVID-19 and requires entities to disclose the circumstances in which revenue recognition has been postponed pending the resolution of significant uncertainties.

6. **Provisions, Contingent Liabilities and Contingent Assets**

Entities to whom Ind AS is applicable (Ind AS 37- Provisions, Contingent Liabilities- Onerous contracts)

As a result of COVID-19, some contracts may become onerous for reasons such as increase in cost of material/labour, etc. Ind AS 37 requires assets dedicated to a contract to be tested for impairment before a liability for an onerous contract is recognized. Additionally, there could be losses from imposition of penalty due to delay in supply of goods, which may need to be considered under the guidance of Ind AS 115.

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Management need to disclose that it has assessed whether executory contracts have become onerous due to the adverse impact of COVID -19.If the management is unable to assess whether some of the executory contracts are onerous due to inadequacy of information, that fact should be disclosed.

Due to COVID-19 there is a need of exercising judgement in making provisions for losses and claims.

Entities may have insurance policies that cover loss of profits due to business disruptions due to events like COVID-19. Entities' claims on insurance companies can be recognized in accordance with Ind AS 37 only if the recovery is virtually certain i.e. the insurance entities have accepted the claims and the insurance entity will meet its obligations.

Entities to whom AS is applicable (AS 29 Provisions, Contingent Liabilities and Contingent Assets):

As a result of COVID-19, some contracts may become onerous for reasons such as the imposition of penalty due to delay in supply of goods or increase in cost of material / labour etc. Management should consider whether any of its contracts have become onerous. The same should be accounted as per AS 29 and should disclose that it has assessed whether executory contracts are onerous due to adverse impact of Covid-19. If, the management is unable to assess whether some of the executory contracts have become onerous due to the inadequacy of information, the same should be disclosed.

7. Modifications or Termination of Contracts or Arrangements

Certain contracts within the scope of other Ind ASs or ASs or Guidance notes highlighted below may need to be modified or terminated:

Entities to whom Ind AS is Applicable	Entities to whom AS is Applicable
Ind AS 19 Employee benefits	AS 15 Employee benefits
Ind AS 102 Share Based Payments	Guidance note on accounting for employee share based payments
Ind AS 109 Financial Instruments and Ind AS 32 Financial Instruments presentation	Guidance note on Accounting for Derivative Contracts
Ind AS 104 Insurance Contracts	
Ind AS 115 Revenue from Contracts with customers	AS 7 Construction Contracts AS 9 Revenue Recognition Guidance note on accounting for Real Estate transactions

8. Going Concern Assessment

Management of the entity should assess the impact of COVID-19 and the measures taken on its ability to continue as a going concern. The impact of COVID-19 after the reporting date is to be considered in assessing whether going concern assumption is appropriate or not.

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If, management after the reporting date, either intends to liquidate the entity or to cease the operations, or has no realistic alternative but to do so, the financial statements should not be prepared on going concern basis. In such cases, entity may need to prepare the financial statements on another basis (e.g., liquidation basis).

Necessary disclosures as per Ind AS -1/AS-1/4 shall also be made, such as material uncertainties that might cast significant doubt upon an entity's ability to continue as a going concern.

9. **Income Taxes**

Entities to whom Ind AS is applicable (Ind AS 12-Income Taxes)

Entities with deferred tax assets should reassess forecasted profits and the previously assessed probability of recoverability of deferred tax assets in accordance with Ind AS 12 considering the additional uncertainty arising from the COVID-19 and the steps being taken by the management to control it.

Management might also consider whether the impact of the COVID-19 affects its plans to distribute profits from subsidiaries and whether it needs to reconsider the recognition of any deferred tax liability in connection with undistributed profits.

Management should disclose any significant judgements and estimates made in assessing the recoverability of deferred tax assets, in accordance with Ind AS 1.

Entities to whom AS is applicable (AS 22-Accounting for Taxes on Income)

COVID-19 could affect future profits and/or may also reduce the amount of deferred tax liabilities and/or create additional timing differences due to various factors. Entities with deferred tax assets should reassess forecasted profits and the previously assessed virtual certainty of recoverability of deferred tax assets in accordance with AS 22 considering the additional uncertainty arising from the COVID-19 and the steps being taken by the management to control it.

10. **Property Plant and Equipment (PPE)**

Ind AS 16 and AS 10 require that useful life and residual life of PPE needs to be reassessed on annual basis. Due to COVID-19, PPE can remain under-utilized or not utilized for a period of time. The Standards require depreciation charge even if the PPE remains idle. COVID-19 impact may have affected the expected useful life and residual life of PPE. The management may review the residual value and the useful life of an asset. If expectations differ from previous estimates, it needs to account the same as the change(s) in accounting estimate.

11. **Presentation of Financial Statements**

Due to COVID-19 there may be instances of breach of loan agreements which may trigger the liability becoming due for payment and liability becoming current. As per paragraph 74 of Ind AS 1, such a liability shall not be

classified as current, if the lender agreed, after the reporting period and before the approval of the financial statements for issue, not to demand payment as a consequence of the breach.

As per paragraph 125 of Ind AS 1, requires an entity to disclose information about the assumptions it makes about the future, and other major sources of estimation of uncertainty at the end of the reporting period, that have a significant risk of resulting in a material adjustment to the carrying amounts of assets and liabilities within the next financial year. COVID-19 may have created many uncertainties about the likely future scenarios which may affect the estimations of amounts recognised in the balance sheet. Entities shall be guided by the prescriptions in paragraphs 125 to 133 of Ind AS 1.

COVID-19 may have affected the financial position, performance and cash flows of entities. Therefore, preparers may consider making adequate disclosures and explanatory notes.

12. Borrowing Costs

Ind AS 23 and AS 16 require that the capitalisation of interest is suspended when development of an asset is suspended. The management may consider this aspect while evaluating the impact of COVID-19.

13. Post Balance Sheet Events

Entities to whom Ind AS 10 "Events after the Reporting Period" is applicable	Entities to whom AS 4 "Contingencies and Events occurring After Balance Sheet Date" is applicable
According to Ind AS 10 Events Occurring after the Reporting Period are categorized into two (i) Adjusting Events (ii) Non-adjusting events In certain cases, Management judgement may be required to categorize the events into one of the above categories. The appropriate adjustments in financial statements need to be made if events are considered as adjusting events. The adequate and appropriate disclosure would be required to be made in financial statements for non-adjusting events.	In accordance with AS 4, adjustment to assets and liabilities are required to be made for events occurring after Balance sheet date that provide additional information materially affecting the determination of the amounts relating to conditions existing at the Balance Sheet date. However, adjustments to assets and liabilities are not appropriate for events occurring after the balance sheet date, if such events do not relate to conditions existing at the balance sheet date. Disclosure should be made in the report of the approving authority of those events occurring after the balance sheet date that represent material changes and commitments affecting the financial position of the entity.

Circulars, Notification, Clarifications etc.

Board Meetings can be held through audio-video conferencing up to June 30, 2020

Notification dated March 19, 2020

Ministry of Corporate Affairs (MCA) has granted relaxation in the requirement of holding Board meetings with physical presence of Directors under Section 173 (2) of the Companies Act, 2013 read with Rule 4 of the Companies (Meetings of Board and its Powers) Rules, 2014 for approval of the Annual Financial Statements, Board's report etc.

Such meetings, if required to be held up to 30th June 2020, can also be held through video conferencing or other audio-visual means in view of lockdown situation arising on account of COVID-19.

Certain COVID-19 related expenditure / donations can be regarded as CSR expenditure

General Circular No. 10/2020, General Circular No. 15/2020 and Office Memorandum dated March 23, 2020, April 10, 2020 and March 28, 2020

MCA clarified that the funds spent for various activities including promotion of health care, preventive health care and sanitation and disaster management etc, related to COVID-19 shall be considered as an eligible CSR activity. Further all contributions made to the PM CARES Fund shall also be considered as an eligible CSR activity.

It has been clarified that any contribution made to "State Disaster Management Authority" for COVID-19 shall quality as CSR expenditure. However, contribution to 'Chief Minister's Relief Fund' or 'State Relief Fund shall not be considered as CSR expenditure.

Payment of salary/ wages to employees/ workers/casual staff during the lockdown period (including imposition of other social distancing requirements) shall not qualify as an admissible CSR expenditure. However, any ex-gratia payment made to temporary/casual/daily wage workers specifically for the purpose of fighting COVID-19 shall be considered as CSR activity as one-time exception.

Companies Auditor's Report Order, 2020 deferred to financial year 2020-21

General Circular No. 11/2020 dated March 24, 2020

Companies Auditor's Report Order, 2020 (CARO) was earlier made applicable with effect from financial year 2019 -20. To reduce the compliance burden on companies, MCA has now deferred CARO to financial year 2020-21.

Electronic Convening of Extra Ordinary General Meetings

General Circular No. 14/2020 and General Circular No. 17/2020 dated April 8, 2020 and April 13, 2020

MCA discourages companies to conduct the extraordinary general meeting (EOGM) during COVID-19. However in

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unavoidable circumstances if a company requires to hold EOGM on or before 30th June 2020, MCA has paved out a way for holding EOGM through Video Conferencing or by any other audio visual means provided the recorded transcript of the meeting is to be made available on the website of the Company.

These provisions are applicable only for EOGM and not for Annual General Meeting (AGM). Therefore, the Companies should conduct the AGM only after the lockdown is lifted. Further, MCA vide Circular dated April 13, 2020, provided clarifications in respect of manner of sending notices to members in case of virtual EOGMs.

Relaxations of certain provisions and Extension in due dates under various provisions of Companies Act 2013

Considering the current COVID-19 situation, MCA has issued various circulars whereby time limit for certain activities under the Companies Act, 2013 has been extended. The extended due dates and circular to each is as per this table:

Provisions	Due date	Extended Date
No additional fees to be charged for late filing during the moratorium period April 1, 2020 to September 30, 2020 excluding Form SH-7 and Charge related forms	Any date up to September 30, 2020	September 30, 2020
Time Gap between two consecutive Board Meetings is extended till September 30, 2020	Within 120 days from the last Board Meeting date	180 days instead of 120 days
Filing of declaration for commencement of business	within 6 months of Incorporation	12 months from the date of incorporation
Convening of Annual General Meeting, by Companies whose Financial Year ends on December 31, 2020	June 30, 2020	September 30, 2020
Filing of Form NFRA-2 for financial year 2018-19	150 days from deployment of Form	210 days from deployment of Form

Holding of AGM through Video Conferencing (VC) or audio-visual means (OAVM)

General Circular No. 20/2020 dated May 5, 2020

MCA has allowed companies to conduct Annual General Meeting through Video Conferencing (VC) or other audio-visual means (OAVM). However proper recording in respect of the same is required to be keep on record.

Circulars, Notification, Clarifications etc.

Companies Fresh Start Scheme- Compliances related

General Circular No. 12/2020 dated March 30, 2020

MCA notified Companies Fresh Start Scheme 2020 (CFSS-2020) to grant one-time opportunity to complete the pending Compliances to make a fresh start and to condone the delay in filing various documents with the Registrar. The window period of this Scheme is April 1, 2020 to September 30, 2020. This Scheme is applicable to Defaulting Companies or Inactive Companies as defined therein. The Scheme allow companies to file the documents without paying the additional fees.

Similar Scheme has been notified for Limited Liability Partnership.

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Amendment of FDI policy to curb opportunistic takeovers/acquisitions of Indian Companies

To prevent opportunistic cross border takeovers / acquisitions due to the sharp fall in the valuations of Indian Companies on account of COVID-19 pandemic, the Government of India has issued a Press Release stating that an entity of a country, which shares land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country, can invest only under the Government route.

The major impact is now on China (*earlier only Pakistan and Bangladesh were under the Approval Route*) which shares a common border with India and shall have to take prior Government approval before undertaking any FDI in India. Further clarifications regarding applicability to certain transactions, territories, and mode of application are awaited. It is anticipated that Government will come up with clarity in May 2020.

COVID-19 – Series of Regulatory Packages

Moratorium of three months for instalments and working capital facilities

The moratorium shall be in respect of all term loans (including housing loan, car loan) outstanding as on March 1, 2020. Three (3) months deferment on payment of interest for all working capital facilities outstanding as on March 1, 2020 also announced.

Reduction in policy Repo Rate

Repo Rate under the liquidity adjustment facility (LAF) has been reduced by 75 basis points to 4.40 per cent from 5.15 per cent from the date of Circular.

Reduction in reverse repo rate

Repo Rate reduced by 90 basis points to 4.0 per cent with an additional cut of 25 basis points to 3.75% [1] announced a few days later.

Reduction in CRR of all Banks

Reduction in the cash reserve ratio (CRR) of all Banks by 100 basis points to 3.0 per cent of net demand and time liabilities (NDTL).

Export of Goods and Services- Realization and Repatriation of Export Proceeds – Extension of Period

RBI has extended the period of realization and repatriation of export proceeds for export of goods or software or services exported from 9 months to 15 months, for the exports made up to or on July 31, 2020. However, the period for realization and repatriation to India of goods exported to warehouses established outside India remains unchanged at 15 months.

[1] Further reduction was taken up vide RBI vide Notification No. RBI/2019 2020/215 dated April 17, 2020

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Additional relaxations / restriction/ clarifications in relation to compliance with certain provisions of the SEBI (LODR) Regulations

SEBI/HO/CFD/CMD1/CIR/P/2020/63 dated April 17, 2020

Regulation 29 (2) of LODR specifies that listed companies needs to provide prior intimation to stock exchanges for meetings of the board (excluding the date of the intimation and date of the meeting) at least 5 days before the meeting if financial results are to be considered and 2 working days in other cases. Vide this circular, the said time period has been reduced to 2 days in both the cases for the board meetings held till July 30, 2020.

It is also clarified that authentication / certification of any filing / submission made to stock exchanges under LODR may be done using digital signature certifications until June 30, 2020.

LODR Regulations that applies to entities that have listed their NCDs and NCRPS' and mandates the publication of the financial results in newspapers within 2 days of conclusion of the board meeting has also been exempt till May 15, 2020.

Relaxation in holding of AGM in COVID-19 crisis

SEBI/HO/CFD/CMD1/CIR/P/2020/71 dated April 23, 2020

The top 100 listed entities by market capitalization whose financial year ended on December 31, 2019 may now hold their AGM within a period of nine months from the closure of the financial year (i.e., by September 30, 2020).

Relaxations in respect of Rights Issues

SEBI/HO/CFD/CIR/CFD/DIL/67/2020 dated April 21, 2020

SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 ("ICDR Regulations) have undergone the following changes:

- Eased fast-track rights issues and reduced the threshold for minimum subscription requirements for a rights issue from the existing 90% to 75% of the offer size.
- Eligibility requirement of an average market capitalisation of public shareholding of INR 250 crore has been reduced to INR 100 crore. The move is aimed at expanding the universe of listed entities for the purpose of fast-track rights issuances.
- It also halved the time requirement on listing of equity shares of the issuer to 18 months.
- It has reduced the threshold for not filing the draft letter of offer for listed companies raising funds up to INR 25

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crore in a rights issue from the existing threshold of Rs 10 crore.

- SEBI has also given flexibility on issue size to issuers whose offer document is pending the receipt of the regulator's observations. They would be able to increase or decrease the fresh issue size by up to 50%, instead of the present limit of 20% without requiring to file a fresh draft offer document. It would be applicable for all offer documents pending receipt of SEBI observations up to December 31, 2020.
- The temporary relaxations are applicable for Right Issues that open on or before March 31, 2021.
- The relaxations mentioned in this circular are not applicable for issuance of warrants.

Relaxation in SEBI (Buy-back of Securities) Regulations, 2018

SEBI/HO/CFD/DCR2/CIR/P/2020/69 dated April 23, 2020

Regulation 24(i)(f) of SEBI (Buy-back of Securities) Regulations, 2018 provides a restriction that the companies shall not raise further capital for a period of one year from the expiry of buyback period, except in discharge of their subsisting obligations. To enable relatively quicker access to capital, it has been decided to reduce such period to six months.

This relaxation will be applicable till December 31, 2020.

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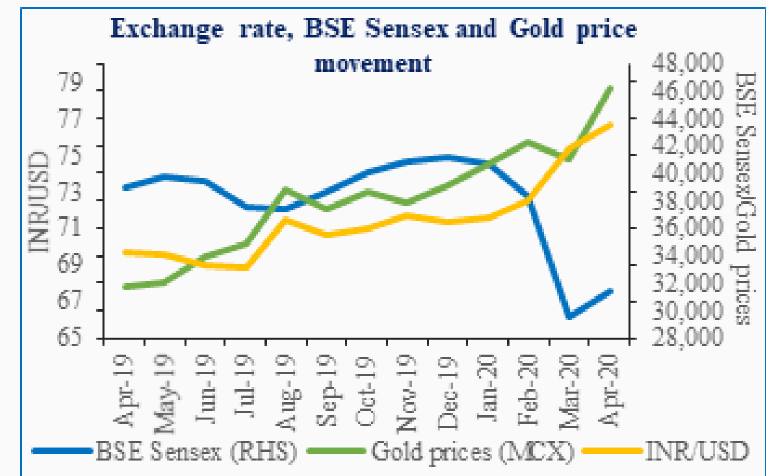
Impact of COVID-19 on financial market and liquidity scenario

As the world struggles to fight the Covid-19 pandemic, India has so far shown resilience in containing it, thanks to the timely measures by the Government. Several large economies including India have opted for a partial to complete lockdown, which has significantly impacted the financial markets and led to a liquidity crunch. The major impact of COVID-19 on financial market and liquidity position is provide below

Equity markets: BSE Sensex that was at an all-time high of c. 42,000 in Jan-20 is presently tottering around 31,000 after hitting recent lows of c. 26,000 in Mar-20. While the Sensex fell by c. 38% from its peak in Jan-20, it subsequently recovered by c. 19% from its lows in Mar-20, owing primarily to the relief measures announced by the Government as well as the RBI. However, the recent rally in equity markets may not be sustainable as an imminent recovery from the pandemic looks elusive.

Exchange rate: Immediate fallout of the pandemic was also seen on the value of the Indian Rupee (INR), which hit a record low of INR 76.83 per USD. The Indian Rupee devalued by 10% during the period from Apr-19 to Apr-20, which will severely impact the trade deficit; however, there has been some respite owing to the sharp decline in crude oil prices. Further, effective cost of unhedged foreign currency borrowings has come under enormous pressure.

Gold: The yellow metal recouped the losses incurred during Mar-20 by rising above Rs 46,000 per 10 grams as on 22-Apr-20. Gold gave a return of 30% in FY 2019-20 as it continues its upward trajectory in Apr-20 with investors moving to safer havens in times of volatility in the financial markets, which is evident in the adjacent chart where the trendline of Gold prices is seen moving away from the Sensex. Further, it is worthwhile to note that devaluation of rupee has a direct correlation with Gold prices.



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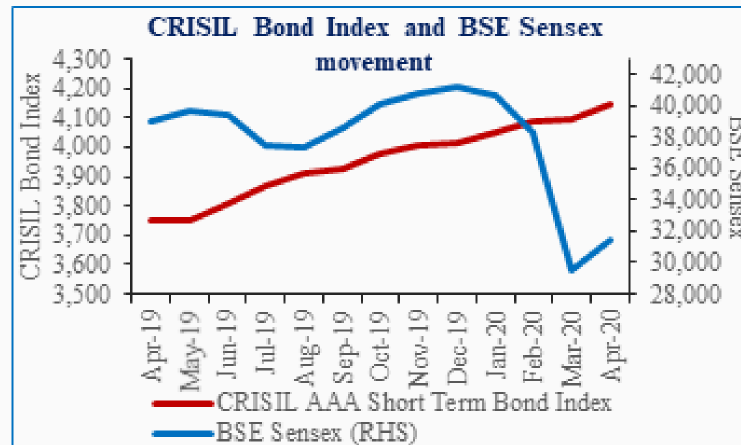

Real Estate: The affordable housing segment that had gained significant traction over the last few years is expected take a hit as a result of the crisis, leaving developers with higher unsold inventories. Based on a recent research by Anarock, housing sales across top seven property markets in India is likely to witness a decline in the range of 25% to 35% in 2020, while absorption of office spaces is likely to dip by 15% to 30%. Moreover, commercial rentals are expected to go down by 10% to 15% in 2020 in terms of the effective collections from retailers by mall owners.

Debt funds: CRISIL AAA short term bond index tracks the movement in short duration yields of high-quality debt instruments and is generally used as a benchmark for returns by short term debt funds. The index indicated a yield of 10% on short term bonds during FY 2019-20. While the index depicted a steeper trendline until Feb-20, it relatively flattened during Mar-20 owing to the rate cuts announced by the RBI.

Further the Central Government and the RBI have initiated several measures to infuse liquidity in the economy and overcome an imminent financial crisis, which include:

- Banks can recalculate drawing power by reducing margins and reassessing working capital cycle
- Targeted Long-Term Repo Operations (TLTRO) amounting to Rs 50,000 crore for deploying in investment grade bonds, commercial papers and non-convertible debentures of NBFCs with at least 50% of the amount going to small and midsized NBFCs and MFIs
- Special liquidity facility of Rs 50,000 crore whereby banks can avail funds under the repo window for onward lending to mutual funds or purchase investment grade papers held by mutual funds
- Banks will not be allowed to pay any dividend until September 30, 2020
- Liquidity coverage ratio of banks brought down to 80% of monthly net cash outflows from the existing 100%. Further, ways and means advances limit for state governments increased by 60%.

- The Government decided to release income tax refunds up to Rs 5 lakhs per assessee and issue pending GST and customs duty refunds providing relief to 1 lakh businesses including MSMEs
- The Government will fund employee's and employer's contribution to provident fund (PF) for 3 months in case of establishments with 90% of staff having wages up to Rs 15,000. Further, PF subscribers are allowed withdrawal up to 75% of PF deposits or 3 months' salary, whichever is lower.
- Following the RBI's slashing of repo rate, the Government announced sharp cut in interest rates for small savings schemes for the first quarter of FY 2020-21. Below table provides a comparison of applicable interest rates (pre-tax) for various small savings schemes:

Small Savings Scheme	Revised rate	Previous rate
Employees Provident Fund	8.50%	8.65%
Sukanya Samriddhi Scheme	7.60%	8.40%
Public Provident Fund	7.10%	7.90%
Senior Citizens Savings Scheme	7.40%	8.60%
Kisan Vikas Patra	6.90%	7.60%
National Savings Certificate	6.80%	7.90%
Post office 5-year term deposit	6.70%	7.70%
Post office monthly income scheme	6.60%	7.60%
Post office recurring deposit scheme	5.80%	7.20%
SBI 5-year term deposit (General - below Rs 2 crores)	5.70%	5.90%

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Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020

Extension of various direct tax related time limit

Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020

In a much needed respite to the Taxpayers in India due to prevalence of pandemic of COVID-19, on March 31, 2020, the Ministry of Law & Justice passed the Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 providing necessary relaxation in terms of various timelines provided under different Acts. The same has been summarized below:

Law	Actions by	Nature of Actions	Current Due Date	Extended Due Date
Specified Acts#	Any authority, Commission or Tribunal	a. Completion of any proceeding b. Passing of any order c. Issuance of any notice, intimation, notification, sanction or approval d. Such other action, by whatever name called	20 March to 29 June 2020 (or such other period as may be specified by CG)	30 June 2020 (or such other date as the CG may specify)
	Taxpayer / Authorities*	a. Filing of any appeal, reply or application b. Furnishing of any report, document, return, statement, or such other record, by whatever name called		
Income-tax Act	Taxpayer	Making of investment, deposit, payment, acquisition, construction or such other action, by whatever name called, for the purpose of claiming any deduction, exemption or allowance under section 54 to 54GB, Provisions of Chapter VI-A [B] or such other provisions as the CG may notify (subject to conditions)		
Income-tax Act	Taxpayer	Beginning of manufacture or production of articles or things or providing any services referred to in section 10AA of the Act, in a case where Letter of Approval has been issued on or before 31 March 2020	On or before 31 March 2020	30 June 2020 (or such other date as the CG may specify)
	Taxpayer	a. Time limit for payment (without extra percentage)	On or before 31 March 2020	30 June 2020

Law	Actions by	Nature of Actions	Current Due Date	Extended Due Date
Direct Tax Vivad se Vishwas Act, 2020		b. Date after which extra percentage shall be levied	On or after 01 April 2020	On or after 01 July 2020
		c. Last date to avail benefits of scheme	Yet to be notified 30 June 2020	Yet to be notified

Apart from the above it has also been provided that

1. Interest to be charged @ 0.75% per month (or part thereof) on amounts of payment otherwise due between the period of due date of payment till the actual date of payment if the payment is made on or before 30 June 2020.
2. Neither penalty shall be levied, nor prosecution shall be sanctioned in respect of such amount for the period of delay
3. Income received by any person on behalf of PM CARES Fund shall be exempt (similar to PM National Relief Fund)
4. Donation to PM CARES Fund shall be eligible for deduction @ 100% under section 80G(2)(a)(iiia) (similar to PM National Relief Fund)

Notes:

Specified Acts mean Wealth-tax Act, 1957, Income-tax Act, 1961, Prohibition of Benami Property Transactions Act, 1988, Chapter VII of Finance (No. 2) Act, 2004 (dealing with Securities Transaction Tax), Chapter VII of Finance Act, 2013 (dealing with Commodities Transaction Tax), Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015, Chapter VIII of Finance Act, 2016 (dealing with Equalisation Levy) and Direct Tax Vivad se Vishwas Act, 2020

* As time limit for filing "any appeal" is also extended, understanding is that it should also be applicable in case of authorities

CBDT give more clarification on applicability of Vivad Se Vishwas Scheme (VSV)

CBDT Circular No 9 of 2020 dated April 22, 2020 in suppression of earlier Circular No 7 of 2020 dated March 4, 2020

CBDT had initially provided 55 clarifications by way of FAQ in relation to VSV. CBDT has issued updated circular modifying certain portions of the earlier circular to clarify few important issues which are summarized as under:

- In case of assessment where quantum addition and penalty appeals both are pending, the taxpayer cannot opt for VSV Scheme for penalty issue alone. The taxpayer is required to opt for VSV Scheme for both tax appeals as well as penalty appeal.
- Matters pending before Authority for Advance Ruling (AAR) are not covered under VSV Act. However, in cases where writ petition is filed against the order of AAR, the taxpayer can apply for VSV Scheme subject to condition that AAR has determined total income and the AO has passed the consequential order to give effect of the same.
- The assessments which are set aside for giving opportunity either before the Assessing Officer or before CIT(Appeals), such order would also qualify for VSV Scheme. In such cases, the taxpayer is also required to settle other issues pending appeal for which order is not set a side before lower authorities.
- Any applications made for waiver of interest u/s 234B, 234A and / or 234C shall not be entitled for VSV Scheme.
- Where initiation of assessment proceedings u/s 148 are challenged before High Court and assessment is kept on hold till passing of such order, such cases are not entitled for VSV Scheme.
- In case of pending of final assessment order post issuance of draft assessment order, such cases would be eligible for VSV Scheme basis draft assessment order itself.
- Where only notice for initiation of prosecution has been issued without prosecution being instituted, the taxpayer is eligible to file declaration under VSV Scheme. However, where prosecution is being instituted, such case would also be eligible for VSV Scheme once the same is compounded before opting for the scheme.
- Where issue under appeal against levy of interest u/s 201 is settled through VSV Scheme, then it would also entitle such taxpayer for not paying any disputed taxed for appeal matter with respect to order u/s 143(3) relating to disallowance u/s 40(a)(i)/(ia).
- Though specific issues to which provisions of section 92CE applies are settled in VSV Scheme, the taxpayer would continue to subject to secondary adjustments u/s 92CE on such issues settled. However, the same would apply to any primary adjustment made for AY 2017-18 onwards only.
- Where appeal matter relates to reduction of loss, unabsorbed depreciation or MAT Credit, the CBDT will prescribe the procedure for calculation of liability and to give effect of reduced carry forwarded losses or unabsorbed depreciation or MAT Credit as the option so exercised by the Taxpayer.

Maruti Suzuki India Limited, Civil Appeal Nos. 11923 & 11924 of 2018 (SC)

Facts of the case

- The Taxpayer has been engaged in manufacturing and sale of various cars and also trades in spares and components of the vehicles. The Taxpayer had been taking benefit of MODVAT credit on the raw material and inputs used in the manufacturing. At the end of the relevant assessment year, the Taxpayer claimed deduction of unutilized MODVAT credit as deduction u/s 43B of the Income Tax Act, 1961 ("the Act").
- The scheme under Section 43B is to allow deduction when a sum is payable by Taxpayer by way of tax, duty and cess and had been actually paid by him. The Taxpayer thus took a view that the unutilized MODVAT Credit are in nature of tax and any unutilized balance is nothing but payment of tax in advance.
- The claim of the Taxpayer was not accepted by lower authorities. The ITAT took the view that the advance payment of Excise duty which is represented in the form of unutilised MODVAT credit without incurring the liability of such payment is not an allowable deduction under Section 43B. The High Court also answered the questions relating to the above issue in favour of Revenue.

Issue involved

- Whether the ITAT had committed an error of law in upholding the disallowance of the amount which represented MODVAT credit of Excise duty that remained unutilised by 31st March i.e. the end of the relevant accounting year, while the same is allowable as deduction in view of provisions of section 43B of the Act?

Taxpayer's Arguments

- The amount paid by way of Excise duty by the taxpayer to its suppliers of raw materials and inputs, is accepted as Excise duty under the provisions of Central Excise Act and Rules. Consequently, when the said payments are made by the Taxpayer to its suppliers, they should be treated as payments of Excise duty which straightaway qualify for deduction under Section 43B of the Act.
- The full amount of Excise duty was paid into the coffers of Government when the manufacturer of raw material/inputs had cleared the same from his factory gate for supply to the Taxpayer. The basic object of Section 43B of the Act is fully sub served and deduction should have been granted.

Department's Arguments

- The liability under the Central Excise Act to pay excise duty is only on the manufacture of the excisable goods. The Taxpayer is not one who is liable to pay Excise duty on the raw materials/inputs. It is merely the incidence of Excise duty that has shifted from the manufacturer to the purchaser and not the liability to pay the same.
- The excise duty becomes due and payable only when the Taxpayer removes the finished product from its factory gate.
- At the point in time when the Taxpayer makes payment to the suppliers the excise duty is not due and payable.

Maruti Suzuki India Limited, Civil Appeal Nos. 11923 & 11924 of 2018 (SC)

Ruling

- As per Section 43B(a) of the Act, deduction is allowed on "any sum payable by the Taxpayer by way of tax, duty, cess or fee." The credit of Excise duty earned by the Taxpayer under MODVAT scheme as per Central Excise Rules, 1944 is not sum payable by the Taxpayer by way of tax, duty, cess. The scheme under Section 43B is to allow deduction when a sum is payable by Taxpayer by way of tax, duty and cess and had been actually paid by him.
- The unutilised credit in the MODVAT scheme cannot be treated as sum actually paid by the Taxpayer. The Taxpayer when pays the cost of raw materials where the duty is embedded, it does not ipso facto mean that taxpayer is the one who is liable to pay Excise duty on such raw material/inputs. It is merely the incidence of excise duty that has shifted from the manufacturer to the purchaser and not the liability to the same.
- The SC has further distinguished the decisions of SC relied upon by the Taxpayer in the case of Eicher Motors Ltd. and another v. Union of India and others, [1999] 2 SCC 361, Collector of Central Excise, Pune and others v. Dai Ichi Karkaria Ltd. and others; [1999] 7 SCC 448 and Berger Paints India Ltd. v. Commissioner of Income Tax, 2004 (266) ITR 99. While distinguishing the case of Berger Paint (Supra), it is held that the it was not a case for unutilised MODVAT credit, hence, the said case cannot be held to lay down any ratio with respect to allowable deduction under Section 43B in respect of unutilised MODVAT credit.

Key Takeaways

- The decision very categorically provides that when a taxpayer purchases goods, taxes included in such price does not represent the taxpayer’s liability to pay such taxes and accordingly provision of section 43B shall not apply.
- However, the decision has not touched upon the applicability of section 145A read with Guidance Note of ICAI on such section whereby the effect of such unutilised MODVAT credit is required to be considered under section 145A of the Act in view of inclusive method of accounting.
- Further the SC in the case of Modipon Ltd. (2017) 299CTR 306 held that any advance payment to PLA is akin to payment of tax. This decision makes specific reference to the deposit of excise duty into PLA account whereas the current decision was considering the claim of unutilized MODVAT credit on purchases. Accordingly, it is possible to take an inference that unlike CENVAT credit, the payment under PLA is in respect of discharging liability arising on removal of goods i.e. on sales side payment & accordingly the ratio of decision of Modipon remains unaffected.

Seshasayee Steels (P.) Ltd, Civil Appeal No.9209 of 2019 (SC)

Facts of Case

- The Taxpayer had entered into an agreement to sell on 15th May 1998 with M/s Vijay Shanthi Builders Pvt Ltd ("the Builder") for transfer of land for total value of INR 5.5 Crores. Under the agreement to sell, the Taxpayer granted limited right to the Builder for permission to start advertising, selling, and construction on land. The Taxpayer also executed power of attorney whereby director of the Builder company was permitted to execute the sale agreements in favour of third parties for sale of flats to be constructed on land.
- Later on, the development agreement could not be executed, and the Taxpayer thus entered into compromise deed with such builder on 19th July 2003 under which the Taxpayer agreed to relinquish the its right of ownership on receipt of consideration agreed upon them. In pursuant to the compromised deed, the Taxpayer also received the consideration in that year.
- The Taxpayer has not filed any Return for Assessment Year 2004-2005. Based on the discovery of this fact from agreement to sell and compromised deed, the AO issued notice under section 148 of the Income-tax Act, 1961 for the AY 2004-05.
- The AO, CIT(Appeals), Tribunal and High Court has taken a view that sales consideration under present set of facts is taxable in the year in which compromise deed was executed and not the year in which agreement to sell was executed.

Taxpayer's Arguments

- The condition stipulated in section 2(47)(v) of the ITA are fulfilled in the year 1998-99 being year in which agreement to sell and power of attorney were executed and hence, for the AY 2004-05, there was no transfer within the meaning of 2(47) in AY 2004-05.
- The agreement to sell transaction has the effect of "enabling the enjoyment of immovable property" within the meaning of section 2(47)(vi) of the Act in favour of the Builder in the year 1998-99 and hence, the capital gain could not be assessed in AY 2004-05.
- The compromise deed dated 19th July 2003 could not fall into any of the limb of 2(47) and consequently, there would be no transfer of a capital asset within the meaning of Section 2(47) in Assessment Year 2004-05.

Department's Arguments

- The compromise deed was entered into on 19-7-2003 has the effect of negating the obligations casted under the agreement to sell and therefore, the requirement of section 53A of the Transfer of Property Act 1882 could not be attracted so far as the agreement to sell is concerned.
- The terms of the memo of compromise dated 19th July 2003 has the effect of relinquishment of right of ownership in the land on full payment of various amounts from Builder to the owner of the land.

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Ruling

- To constitute transfer within the meaning of 2(47)(v), the term "possession" within the meaning of section 53A of the Transfer of Property Act, 1882 denotes control over the land. The license to develop the land cannot be said to be 'possession' within the meaning of Section 53A of the Transfer of Property Act.
- The object of Section 2(47)(vi) is to bring within the tax net a de facto transfer of any immovable property and since on the date of agreement to sell, the Taxpayer's rights were intact as to the ownership and to possession; the agreement to sell does not give rise to transfer in the AY 1998-99.
- In terms of memo to compromise deed dated 19th July 2003, the Taxpayer had received all the payments including the contingent payments give rise to complete extinguishment of the right of ownership in the land in favour of the Builder in AY 2004-05 and giving rise to capital gain tax liability.

Key Takeaways

- The SC has interpreted the term "possession" for the purpose of 53A of the Transfer of Property Act 1882 qua the definition of 2(47) to bring out that the possession connotes the possession of control in the land. This decision will have glaring ramification in terms of interpreting various development agreement the taxability especially in terms section 45(5A) of the Act.

New Delhi Television Ltd, Civil Appeal No. 1088 of 2020 (SC)

Facts of Case

- The Taxpayer operated news channel. It invested in a number of foreign subsidiaries, primarily in the UK and Netherlands. During relevant AY 2008-09, Taxpayer's UK subsidiary (UKCO) issued step-up coupon bonds, for which the Taxpayer had agreed to furnish corporate guarantee. These bonds were to be redeemed at a premium after 5 years. However, these bonds were redeemed in advance at a discounted price in November 2009.
- The AO while framing the original assessment u/s 143(3) has held that the subsidiary of the Taxpayer could not have raised such a huge amount without having assurance from the Taxpayer and consequently, the AO has carried out the addition of guarantee fees and added to the total income. The AO has not doubted the genuineness of the transaction.
- Subsequently, notice under section 148 was issued wherein it was stated that there was reason to believe that income for AY 2008-09 had escaped assessment based on:
  - Order of the DRP for subsequent year 2009-10, wherein the DRP had held that though the amount was introduced through its subsidiary companies in Netherlands, it ultimately reached the coffers of Taxpayer through circuitous round tripping.
  - Complaints received from a minority shareholder in which it was alleged that the money introduced in UKCO was shifted to another subsidiary of the Taxpayer in Mauritius from where it was taken to a subsidiary of the Taxpayer in Mumbai and finally to the Taxpayer.
  - Since UKCO itself was placed under liquidation on 28-3-2011, the funds received by UKCO were the funds of the Taxpayer under a sham transaction and that the amount of Rs.405.09 crores introduced into the books of UKCO through the transaction involving the step-up coupon convertible bonds pertains to the Taxpayer.
- The Revenue did not accept the objections by holding that there was non-disclosure of material facts by the Taxpayer and the notice would be within limitation. The case of the Taxpayer would also fall within the 2nd proviso of section 147 and the extended period of 16 years would be applicable.
- On writ petition challenging the notice, the High Court dismissed the appeal of the Taxpayer.

Taxpayer’s Arguments

<u>No fresh material to have reason to believe:</u>

- When the genuineness of transaction was accepted in original proceedings, there could not be a reason to believe that the transactions of UKCO were not genuine.
- The DRP order pertained to transactions of Netherlands subsidiary and not the transactions of UKCO. The coupon bonds issued by UKCO was not under dispute before DRP. Hence, there was no material on record to doubt the transactions of UKCO.

New Delhi Television Ltd, Civil Appeal No. 1088 of 2020 (SC)

Full and True Disclosure by Taxpayer as per proviso to section 147:

- Revenue has verified the details filed by the Taxpayer during the original assessment u/s 143(3) and accepted the transaction as genuine. Hence, there was no failure on the part of the Taxpayer to furnish all the material facts necessary for the assessment as postulated in first proviso to 147.

No mention of second proviso to section 147 in the notice issued by AO:

- Revenue failed to mention in the notice issued u/s 148 that the reopening of assessment was made by invoking second proviso to section 147. No proper opportunity was given to the Taxpayer to file objections.

Department's Arguments

Valid Reason to Believe:

- At the time of issue of notice u/s 148, the requirement is only to form a *prima facie* or tentative view that any income chargeable to tax had escaped assessment. There was tangible material which was collected after passing of original assessment order u/s 143(3) and on the basis of such material there was reason to believe that the income had escaped assessment.

No Full and True Disclosure by the Taxpayer:

- When the transactions with UKCO were found to be a sham after the passing of the original assessment order u/s 143(3), it could not be said that the details pertaining to UKCO provided in the original assessment proceedings were full and true.

Valid Notice by invoking second proviso to section 147:

- Mere non naming of the second proviso in the notice does not help the Taxpayer. Even if the source of power to issue notice has been wrongly mentioned, but all relevant facts were mentioned, then the notice can be said to be a notice under the provision which empowers the revenue to issue such notice.

Ruling

- Information which comes to the knowledge of AO after the passing of original assessment order would form tangible material to reopen the assessment. This would also include any information obtained from proceedings of any subsequent AYs.
- The Taxpayer is required to make primary disclosure of the facts and it was not required to give any further assistance to the assessing officer by disclosure of other facts. It was for the Assessing Officer at this stage to decide what inference should be drawn from the facts of the case. hence, it could not be said that the Taxpayer had withheld any material information.
- The notice or the Taxpayer should not be prejudiced or be taken by surprise. The Taxpayer must be put to notice of all the provisions on which the revenue relies upon. The Taxpayer cannot be deprived of this chance while replying to the notice.
- The notice issued to the Taxpayer and the supporting reasons did not invoke provisions

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of the second proviso of section 147 and therefore at this stage the revenue cannot be permitted to take benefit of the second proviso.

Key Takeaways

- The finding of the SC reiterates the settled judicial proposition that sufficiency or adequacy of the information based on which the AO formed his opinion is not determining factor and the AO is only required to form pirma facie view that income has escaped assessment. (Raymond Woollen Mills Ltd (236 ITR 34).
- The SC has laid down the principles that the material gathered during the subsequent year proceeding or third-party evidence gathered after the completion of proceeding would constitute sufficient material for reopening of the Assessment.
- It would not be permissible for the Assessing Officer to improve upon such reasons at any stage of the proceeding and therefore the validity of the notice of reopening would be judged based on the reasons recorded by the Assessing Officer for issuance of such notice. (Aayojan Developers v ITO (Guj)
- It is to be noted that the SC has commented that the Revenue can issue fresh notice u/s 148 by invoking second proviso to section 147 since the period for issuing such notice is 16 years from end of AY. However, it has escaped to give his view as to whether the said second proviso is applicable or not.

Exide Industries Ltd, Civil Appeal No.3545 OF 2009 (SC)

Facts of Case

- Section 43B(f) of ITA provides for allowability of deduction of leave encashment expenditure of employees only on payment basis.
- Earlier the constitutional validity of such sub-section had been stuck down by the Calcutta High in the case of the Taxpayer on the following grounds:
  - The objects and reasons behind the insertion of clause (f) to section 43B were not disclosed by the legislature.
  - Clause (f) was inconsistence with the other clauses of section 43B and there was no nexus between clause (f) and the original enactment.

Taxpayer's Arguments

- Section 43B has been introduced to allow deductions in respect of certain kinds of liabilities only on actual payment. Section 43B applied only to limited set of statutory liabilities created for the welfare of employees and hence leave encashment being a trading liability cannot be subjected to the provisions of section 43B.
- In the case of a Leave Encashment Scheme, the due date for encashment of leave does not arise in the same year in which provision is made and hence it cannot be made subjected to section 43B and it cannot be subjected to allowance to the extent of actual payment
- Clause (f) has been inserted in section 43B without specifying the objects and reasons for the inclusion of this clause in section 43B. It is not in sync with the main objects and other clauses of section 43B.
- The insertion of Clause (f) is with the object of reversing the decision of SC in the case of Bharat Earth Movers (2000) 6 SCC 645. Such enactment is however without any rational.

Ruling

- The SC held that the broad objective of section 43B was to protect larger public interest including the welfare of employees. Clause (f) fits into that scheme and shares sufficient nexus with broad objective.
- Section 43B is a mixed bag and the legislature has time and again inserted dissimilar entries to cater to different fiscal scenarios. Hence, section 43B does not require oneness or uniformity.
- Section 43B is not to control the timing of payment but to control the time of claiming deduction. Hence, difference in timing of payment and provision would not impact the validity of clause (f) of section 43B. The SC therefore held that clause (f) to section 43B is constitutionally valid and reversed the order of the Calcutta High Court.
- The SC has also laid down fundamental principles in testing constitutional validity of any enactment as under:
  - The approach of the Court in testing the constitutional validity of a provision is well

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settled and the fundamental concern of the Court is to inspect the existence of enacting power and once such power is found to be present, the next examination is to ascertain whether the enacted provision impinges upon any rights enshrined in Part III of the Constitution.

- Objects and purpose of enactment is useful for a limited purpose of understanding the surrounding circumstances at the time of enactment.
- The presence or absence of objects and reason in an enactment has no impact on the constitutional validity of the provision so long as the text of the provision is unambiguous, and it comprehends its true meaning with sufficient clarity. Therefore, while adjudicating upon the constitutional validity of any enactment, the court cannot venture into any hypothetical spheres and unfounded limitation can't be read into process of judicial review.
- The constitutional power of judicial review contemplates a review of provision and not the review of circumstance in which such provision was made. Further, mere holding of a provision as unconstitutional is not sufficient unless the constitutional defect is shown in the form, substance or functioning of the provision.
- If the Legislature amends the enactment itself, which earlier formed legal basis of the judgement, then the basic cause of adjudication stands altered. If a Court invalidates a law, the legislature is free to diagnose such law and alter the invalid elements thereof. If the legislature does so, it does not tantamount to invalidating the opinion of the Court.

Key Takeaways

- The decision provides very important observation of the Apex Court to interpret constitutional validity of any tax provision.
- SC decision being law of the land, such decision will adversely affect the past claim of deduction, if any, made by any taxpayer, on accrual basis without any payment of leave encashment liability as per section 43B of the Act.

Tamilnadu Industrial Development Corporation Limited ITA No. 1181/2008 Chennai ITAT

Facts of Case

- The Taxpayer is engaged in the promotion of industries in Tamil Nadu by making investment in various companies as well as having joint venture thereon.
- The amounts invested in those companies were by way of investment in shares for which the resultant income would be in the form of dividend till the time of holding of those shares.
- The said dividend income according to the taxpayer was to be reflected under the head 'income from business' and it accordingly set off such dividend income from earlier year's unabsorbed business losses.
- The CIT has exercised revisionary power u/s 263 of the ITA wherein among the other issues, the CIT has held that the order passed by the AO is erroneous as well as prejudicial to the revenue in as much as the AO has allowed set off of brought forward business loss against the dividend income which is taxable under the head income from other sources.

Taxpayer's Arguments

- It was an admitted position that the company is engaged in the business of promotion of industries by way of making investment in shares.
- As per the agreement entered into with various industries, it is very clear that the taxpayer does not merely make investment in the said companies, but also participates in the day to day management in the affairs of the said company. Thus, the resultant income in the form of dividend would partake the character of business receipt even though is assessable u/s 56.
- The ITAT in Taxpayer's own case (124 ITD 117) for AY 1994-95 and AY 1995-96 has taken a view that the Taxpayer is performing its role as development organization to promote industries and hence, various activities conducted by the Taxpayer constitutes one single indivisible business which is of promoting industries in the state and therefore, the dividend income earned in the process assumes the character of business income. The ITAT has placed reliance on the following decisions.
  - Distributors (Baroda) (P.) Ltd. v. UOI 155 ITR 120
  - CIT v Cocanda Radhaswami Bank Ltd. 57 ITR 306
  - CIT v Amalgamation (P) Ltd. 108 ITR 895
- Subsequent investments were made with an object to continue to maintain desired percentage of stake, without dilution thereof, so that it can participate in the day to day management of affairs of those respective undertakings.

Department's Arguments

- The subsequent investments made by the Taxpayer in those respective joint sector undertakings were not meant for promotion of industries and hence the dividend income would be taxable only under the head 'income from other sources' and not under the head 'income from business'.

Tamilnadu Industrial Development Corporation Limited ITA No. 1181/2008 Chennai ITAT

Ruling

- Dividend income from investment in shares would form part of business of the Taxpayer and accordingly taxable as business income, although it is assessable under the head "other sources" u/s 56(2)(i).
- It is incumbent on the part of the Taxpayer that has promoted Industries and having undertaken to participate in day to day crucial decision making process, the dividend received on subsequent investment made by it would not be *per se* regarded as dividend on investment.
- The disclosure requirement made in accordance with Schedule VI of the Companies Act, 1956 has no relevance for the purpose of ITA.

Key Takeaways

- Tax treatment of any source of income for the purpose of ITA *per se* is devoid of its classification as per chapter IV of the ITA. If the Investment activity is an integral and indivisible part of the business activity, any investment income would always assume the character of Business Income despite the fact that for computation purpose, it is segregated in any other heads of income.
- With re-introduction of deduction of inter corporate dividend/foreign dividend u/s 80M along with limit provided under the Act for claiming deduction of only interest against the dividend income, such decision can help advance the argument that if such divided income is considered as business income, allowability of any expenditures in relation to such income shall not be governed by section 57 of the Act.

M/s. Shriram Capital Limited, Writ Petition No.4965 of 2011, Madras High Court

Facts of Case

- The Taxpayer has received services from an Indonesian law firm for acquiring an insurance company in Indonesia. Accordingly, the Taxpayer filed an application u/s 195 of the Act for exemption from deduction of tax.
- However, the request of the Taxpayer was rejected by the revenue on the ground that the services are in the nature of 'consultancy services' and does not fall within the exception of section 9(1)(vii)(b) of the Act and hence liable to tax in India at the rate of 20% as the non-resident is not having PAN in India. The Taxpayer filed a revised petition u/s 264 of the Act, however the petition was again rejected by the revenue.

Issue Involved

- Whether the services rendered by Indonesian law firm in respect of acquisition of an Insurance Company in Indonesia by the Taxpayer constitutes 'consultancy services' and hence taxable as Fees for Technical Services (FTS) u/s 9(i)(vii)(b) of the Act?

Taxpayer's Arguments

- The income will be chargeable in India only if such income is received in India by the recipient or deemed to have accrued or arise in India under section 5(2) of the Act.
- The transaction under consideration fell within the exception of section 9(1)(vii)(b) of the Act as the fees paid were in respect of services utilised in a business carried outside India and for the purpose of earning any income from any source outside India.
- The payment should not qualify as FTS since it is only made for getting legal services and does not have any technical component.

Department's Arguments

- The service provided by the law firm does not fall under the exception of section 9(1)(vii)(b) of the Act as the payment does not have any nexus with any income earned abroad but is only for the investment which is part of the Taxpayer India's business.
- Taxpayer's argument that the payment does not qualify as FTS is based on the restrictive reading of the Act as well as DTAA between Indian and Indonesia
- The Act as well as DTAA includes "consultancy" as FTS and the service provided by Indonesian law firm is purely a consultancy service in connection with acquisition of the insurance business in Indonesia.

Ruling

- The expression "Technical Services", "Consultancy Services" or "Managerial Services" have not been defined under the Act. The term "consultancy services' is very wide and can include the services of every nature and shall mean any expert advice on a particular subject.
- The services provided by the Indonesian law firm were towards preparation of Share Purchase Agreement, Share Transfer Deed, assistance in obtaining all the regulatory approvals, public announcements under the

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Indonesian Law etc. From the scope of work undertaken, it was evident that the Indonesian law firm provided "consultancy services" and thus payment for the services were taxable in India as Fees for Technical Services.

- The Court observed that in the present case, there was a mere proposal for acquiring the insurance business in Indonesia and thus, there was no source that existed in Indonesia.
- Per Section 90(2) of the Act, DTAA overrides the provisions of the Act where the provisions of DTAA are more beneficial to the assessee. Thus, the Taxpayer can avail the benefit of DTAA for lower rate of deduction. However, in absence of availability of the correct version of the DTAA for adjudication, the Court left the matter open for verification.

Key Takeaways

- The issue of what would fall within the purview of the exception carved out in section 9(1)(vii)(b), specifically "source from outside India" "or for earning or making any income outside India", is a matter that is far from settled. Gujarat High Court in the case of PCIT v. Motif India Infotech Pvt Ltd [TS-7222-HC-2018(Gujarat)-O] has held that location of customers could help determine the "source" of the income, whereas Delhi High Court in the case of CIT v. Havells India Ltd. [2013] 352 ITR 376 (Del.) has held otherwise.
- A position of non-withholding of taxes from payments to be made to consultancy firms outside India for various approvals, due diligence, etc. in respect of prospective business under the domestic provision of the Act is disputable and various contrary decisions are available. However, it could be possible to defend the position of taxpayer if the services under consideration has no connection with existing or future source of income within India.

Volkswagen Finance (P.) Ltd., ITA No.2195/Mum/2017, Mumbai Tribunal

Facts of Case

- The Taxpayer is an Indian Company and has conducted an event in Dubai for launch of Audi 8L facelift model for targeting the customers in the Indian market. For the said event, the Taxpayer had flown about 150 people from India, mostly prospective buyers, Page 3 celebrities and journalists.
- The Taxpayer paid a sum of USD 440,000 to a US based celebrity for his appearance in the event for three hours. As a part of the appearance, the celebrity was to be driven into the venue in the newly launched Audi 8L as a part of unveil process, engage with Audi India Director for short Q&A, socialising with the guests including photographs and autographs as and when required.
- The Taxpayer had a full right to use event footage/materials/interviews/films etc for a period of 6 months for promotions.
- However, the Taxpayer did not withhold any tax at the time of making payment to the celebrity claiming that as the event took place in Dubai and the celebrity appearance was also made in Dubai, no tax implications arose in India.

Issue involved

- Whether the income embedded in payment to the international celebrity for participation in Dubai car launch event for promoting the business of the Taxpayer in India constituted 'business connection' and was thus taxable in India?

Taxpayer's Arguments

- The event took place in Dubai and celebrity also made appearance in Dubai. In order to tax the income earned by the celebrity, the income must have business connection in India as per section 9(1)(i) of the Act. Since the celebrity did not carry out any activity in India, appearance fees paid to the celebrity could not be said to have accrued or arisen in India or deemed to have accrued or arisen in India and hence, the payment was not taxable in India.

Department's Arguments

- The said payment was taxable in India as royalty under section 9(1)(vi) of the Act. The AO even referred to Article 12 of India – USA DTAA and again concluded that the income is taxable in India as Royalties and thus tax is required to be deducted u/s 195 of the Act.
- The CIT(A) also confirmed the order of Assessing Officer and observed that the event was held in Dubai for the purpose to avoid "attraction of clause regarding income accruing or arising in India" and held that the income is taxable in India.
- CIT(A) also held that there was a "business connection" of the celebrity in India.

Ruling

- The Tribunal observed that the present case related to application of section 5(2)(b) i.e. when an income accrues or arises in India or is deemed to accrue or arise in India. The Tribunal focused on the first limb of section 5(2)(b) of the Act i.e. income accruing or arising in India and held that from the plain reading of the first limb of section 5(2)(b) it appears that event must be in India for income to accrue or arise in India.
- However, given the broader scheme of the Act, even the first limb of section 5(2)(b) needs to read with section 9(1)(i) of the Act which extends the scope of income accruing or arising in India by including that income arising to non-resident through or from any business

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connection in India is also chargeable to tax in India.

- Referring to the meaning of "Business Connection", the Tribunal held that 'Business Connection' has not been defined exhaustively under the Act and is only an illustrative list. Referring the Supreme Court judgement in the case of CIT v. R D Aggarwal & Co. [(1965) 56 ITR 20 (SC)], the Tribunal cited that Income-tax Act "contains no definition of the expression 'business connection' and its precise connotation is vague and indefinite and that the expression 'business connection' undoubtedly means something more than business.
- The launch event was specifically targeted for Indian based customers and the cost of the event was also borne by the Taxpayer in India as expenditure incurred for the purpose of business. The target audience was in India, the potential customers were in India, the intended benefits were in India and only the event was in Dubai UAE.
- As regards the Taxpayer's plea that the non-resident entertainer can be taxed in India only when there is performance in India under section 115BBA of the Act, the Tribunal rejected the Taxpayer's plea stating that section 115BBA covers the modalities of taxation and thus in their view it cannot be treated as restriction on chargeability to tax under section 5(2)(b) of the Act. If an income is not eligible to be for a specified treatment under section 115BBA, then such income is at best taxable under the normal provisions of the Act.
- The Taxpayer contended that the under Article 23(1) of India-USA DTAA, income from appearance in a product launch event was liable to be taxed in the State of Residence only. The ITAT rejected the Taxpayer's plea on the reasoning that Article 23(3) was a non obstante clause vis-à-vis Article 23(1) which allowed the country in which the income arose, to tax such income if the local laws so provide.

Key Takeaways

- Certain observations of the Mumbai Bench could be very interesting, for instance, the principle that once a payment is claimed as tax deductible by the payer in India, any corresponding income to the recipient automatically has a "business connection" in India. This could have far reaching implications as any payment would ideally be a tax-deductible business expenditure.
- Another interesting observation of the Mumbai Bench is around section 115BBA whereby the Bench has observed that if an entertainer performs in India, his income could be taxed at a lower / special rate (albeit on gross basis), but if he performs outside India, he can still have a business connection in India and in that case, he would not get the benefit under section 115BBA, thereby exposing his income to tax at a higher rate (on a net basis). The Taxpayer has however, not argued / relied upon the Memorandum explaining provisions of Finance Bill 2012 wherein the purpose of introduction of section 115BBA has been clearly mentioned to tax income from performance within India. It would be worth seeing how the Taxpayer takes this forward.

M/s JCDecaux S.A., ITA No. 1630/Del/2015 and ITA No. 1552/Del/2016, Delhi Tribunal

Facts of Case

- The Taxpayer was a holding company of "JCDecaux" Group, incorporated in France. During the year under consideration, the Taxpayer provided various functional and management support services to its Indian subsidiary ("JCD India"). The Taxpayer provided corporate guarantee to foreign banks for money borrowed by JCD India for such facility.
- JCD India paid corporate guarantee fees to the Taxpayer for guaranteeing a credit facility. The Assessing Officer ("AO") considered the said corporate guarantee fees as FTS in lieu of the services rendered whereas the Taxpayer contended that such fees could not be considered as FTS.

Issue involved

- Whether Corporate Guarantee Fees received from Associated Enterprise were liable to be taxed as FTS?
- Whether education cess and secondary and higher education cess were applicable while taxing the income on gross basis under India-France DTAA?

Taxpayer's Arguments

- The Taxpayer contended that it had not rendered any services in leu of corporate guarantee fees and that by any stretch of interpretation, fees for corporate guarantee could not be characterized as FTS under Article 13 of the India-France DTAA.
- The Taxpayer further referred to Article 12 – Interest of India-France DTAA as per which a receipt could be classified as 'interest' only if there existed some debt-claim between the payee and the payer. Thus, the fees for facilitating or guaranteeing a credit facility could not be termed as 'interest'.
- The learned DRP observed that corporate guarantee given by JCD France had enabled JCD India to avail high credit rating and thus held that those were certainly services of a managerial, technical consultancy nature taxable as FTS under India-France DTAA under Article 13(4) and section 9(1)(vii) of the Income-tax Act, 1961.
- Not satisfied with the order pursuant to DRP's directions, the Taxpayer approached ITAT, Delhi Bench.

Department's Arguments

- The corporate guarantee fees received by the Taxpayer from JCD India was actually in lieu of the services rendered though it has been paid in guise of corporate guarantee fees and therefore its actual nature is FTS.

Ruling

- The Revenue failed to provide any kind of details or evidence which could substantiate that corporate guarantee fee was in lieu of the services rendered for assisting JCD India in providing loan from the foreign bank and thus, rejected the contention of the AO.
- Services of corporate guarantee was not in the nature of managerial, technical or consultancy and thus could not be termed as FTS either under the section9(1)(vii) of the Act or under Article 13 of India – France DTAA.
- Further, for determining the final tax liability on FTS under India-France DTAA, Hon'ble ITAT

M/s JCDecaux S.A., ITA No. 1630/Del/2015 and ITA No. 1552/Del/2016, Delhi Tribunal

Delhi followed the ruling of Kolkata Bench of ITAT in the case of DCIT Vs BOC Group Ltd reported in (2015) 64 taxmann.com 386 and held that "income-tax" as provided for in Article 2 of the DTAA covered surcharge and accordingly, the rate provided for in Article 13 should be considered inclusive of surcharge or education cess, education cess being a form of additional surcharge, thereby not warranting addition of surcharge to such rates, separately.

Key Takeaways

- While the ruling is not very elaborate, it is a welcome judgement in the sense that it reiterates the principle that guarantee fees do not partake the characteristics of "Fees for Technical Services". It is worth nothing that the Department has not contended taxability of the corporate guarantee fee either as "interest" under the Act or under Article 12 of India-France DTAA or as "Other Income" under Article 23 thereto. The Ruling further reiterates that the rates prescribed under a DTAA are inclusive of surcharge and education cess.

AAR Ruling: [Source: *Taxsutra*]

Facts of Case

- In order to set-up a manufacturing plant in Tamil Nadu, the Taxpayer entered into an inter-company agreement with its Group Company in Switzerland for supply of its experienced personnel in India. As per the agreement, the salary of the expats was to be paid by the Taxpayer in India.
- However, payment towards social security contribution, insurance and relocation expenses of the expats were to be disbursed by the Swiss Company in their home country and these payments were to be recharged by the Taxpayer on cost-to-cost basis. For distributing these payments, the Swiss Company also charged an administration fee from the Taxpayer.
- The Taxpayer approached AAR to determine the taxability on reimbursements and administrative fees payment.

Issue involved

- Whether the reimbursement of social security and other related cost to be considered as Fees for Technical Services?

Taxpayer's Arguments

While referring to the inter-company agreement, the Taxpayer pointed out the following facts:

- The Taxpayer had full operational control over the seconded employees and the employees were liable to abide by the policies and regulations of the Taxpayer.
- The Taxpayer had the power to terminate the employment of the seconded employees
- The Taxpayer was solely responsible for payment of salary of the seconded employees and no salary payments were made outside India.
- However, in order to meet the obligations of the expats in the home country, the swiss company deposited contribution towards social security, insurance, relocation cost etc. on behalf of the personnel. Such contribution was part of the salary of the seconded employees and these were reimbursed by the Taxpayer to the Swiss company on cost to cost basis.
- The employees have even offered their salary income to tax in India including contributions deposited by the Swiss company. The Taxpayer has also deducted tax on the salary payment under section 192 of the Act.

Department's Arguments

- The Revenue treated the above payment towards social security contribution, insurance, relocation cost of the employees to the Swiss company as Fees for Technical Services by relying on the Delhi HC judgement in the case of Centrica India Offshore Pvt. Ltd. vs. CIT [W.P.(C) No. 6807/2012] (2014) wherein the amount reimbursed by the Taxpayer to the overseas company towards salary of the seconded employees was held as FTS, liable to tax in India.

Ruling

- The AAR noted that the Swiss Co. was not exercising any operational control over the seconded employees. It merely made payments of statutory dues on the behalf of

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AAR Ruling: [Source: *Taxsutra*]

the personnel for which it also charged some administration fees and thus AAR distinguished the current case with Centrica wherein the foreign company exercised full control over the employees.

- The AAR further noted that although the provision of services can be camouflaged as secondment agreements but in the current case since only a small portion of the salary is being paid out as reimbursement to the Swiss company and the substantive part of the salary is paid in India, it will not serve any useful purpose in cloaking a small portion as reimbursements. Further, the entire salary including the reimbursements has been offered to tax in India by the seconded employees.
- Thus, the AAR concluded that considering the facts of the case, the reimbursements of social security contribution, insurance and relocation expenses shall not be classified as FTS. However, administrative fees paid to the Swiss Company shall constitute FTS and TDS u/s 195 shall be applicable

Key Takeaways

- Issue of taxability of reimbursement of salary and related costs of expatriates has been a litigative matter. Even after the Supreme Court has dismissed the Taxpayer's SLP in the case of Centrica (referred to above), there have been judgments by various ITATs which have either held in favour or against the Taxpayers depending upon the facts of each case. While this is a ruling by AAR and may not be directly applicable in all cases, it still has a persuasive value.
- It reiterates the position that if the Taxpayer is able to demonstrate that the control over employment was in effect in the hands of the Indian employer, the reimbursements of costs to the overseas entity should not constitute fees for technical services. Interestingly, the AAR has made a reference to the quantum of reimbursement to hold that a lower amount diminishes the chances of a possible camouflage of FTS as reimbursements.

AAR Ruling: [Source: *Taxsutra*]

Facts of Case

- A BVI Company which is owned by shareholders based in UK, US, Hong Kong and Cayman Island indirectly holds 100% stake in the Indian Company through a Mauritian Company. All the shareholders of BVI Company holds less than 5% shares individually in BVI Company. In FY 2013-14, the shareholders of BVI Company sells the shares of the BVI Company to a Jersey based company. The BVI Company derives directly or indirectly 26.38% of its value from assets located in India.
- The Finance Act 2015 introduced Explanation 6 and 7 to section 9(1)(i) of the Act defining the word "substantially". The Applicants (the buyer company and the sellers of BVI Company) approached AAR to determine whether explanation 6 to section (9)(1)(i) of the Act will be applicable to the said transfer of shares as the transfer was done in earlier years.

Issue involved

- Whether amendment to Indirect transfer provision prescribing 50% threshold for word 'substantially' is retrospective?

Taxpayer's Arguments

- The Applicant prayed for a ruling on retrospective applicability of Explanation 6 to state the word 'substantially' used in Explanation 5 is defined to mean a threshold of 50% and more and requested for the direction that in case the value of assets in India is less than 50% then nothing will be taxable in India on account of indirect transfer of shares of the Indian Company

Ruling

- AAR observed that during 2012 to 2016, the word "substantially" appearing in the Explanation 5 was not defined in the Act and it was a subject matter of scrutiny in courts in number of cases.
- AAR further referred to the rulings of Delhi High Court in the case of Copal Research Limited wherein court has held that "substantially" should mean at least 50%.
- AAR then referred to Justice G.P. Singh's (Sixth Edition 1996) 'Principles of Statutory Interpretation' and noted that the language of Explanation 6 begins with words "for the purposes of this clause it is hereby declared...." and elucidated that such declaratory amendments would have retrospective effect.
- Thus, AAR accepted Applicants' stand that Explanation 6 was clarificatory in nature and would apply retrospectively. Similarly, Explanation 7 inserted to address the genuine concerns of small shareholders would also apply retrospectively to give meaning in true sense and to render indirect transfer provisions contained in Explanation 5 to section 9(1)(i) of the Act workable. AAR thus concluded that there would be no liability to withhold tax under section 195.

Key Takeaways

- The issue with respect to taxability of indirect transfer of shares of an Indian company has

AAR Ruling: [Source: *Taxsutra*]

been a subject matter of litigation before the courts. The Delhi High Court in the case of DIT (Intl' Tax) v. Copal Research Limited [TS-509-HC-2014(Delhi)] explained the meaning of the term 'substantially' used in the context of indirect transfers. It was held that gains arising from the sale of a share of a company incorporated overseas which derives less than 50 per cent of its value from assets in India would not be taxable under Section 9(1)(i) of the Act.

- The Finance Act, 2015 introduced Explanation 6 to Section 9(1)(i) of the Act to provide that a share/interest will be deemed to derive its value substantially from assets located in India if the value of Indian assets exceeds INR10 crores and the value represents at least 50 per cent of the value of all assets owned by the foreign company / entity.
- This ruling by the AAR supports the applicability of 50 per cent threshold for transactions entered into in prior years even if such objective threshold is introduced under the Act with effect from Financial Year 2015-16.

T & D Electricals

Facts of Case

- The Applicant is registered in Rajasthan and was awarded a contract to execute electrical works which is in the nature of works contract for an immovable property situated in Karnataka.
- The applicant is required to arrange all the required tools and tackles along with the required manpower for execution of the contract in Karnataka
- The Applicant does not have any premises in Karnataka
- The Applicant being registered in Rajasthan had first approached the Advance Ruling Authority ('ARA') which rejected the application on the grounds that the ARA of Rajasthan cannot answer question of registration in Karnataka

Issue involved

- Whether the Applicant is required to obtain a registration in the state of Karnataka

Taxpayer's Arguments

- The Applicant referred to the provisions of obtaining registration and the definition of location of supplier of services under the GST law
- The Applicant stated that their principal place of business is in Rajasthan and they do not have any fixed establishment in Karnataka
- Accordingly, they should not be required to obtain GST registration in Karnataka

Ruling

- The Applicant has only one principal place of business which is located in Rajasthan and does not have any other fixed establishment
- The location of the supplier under the GST law is such principal place of business of the applicant i.e. Rajasthan
- The Appellant is not having any fixed establishment in Karnataka and is executing the contract from Rajasthan hence, the applicant need not obtain a separate GST registration in Karnataka.
- The Applicant shall charge IGST on the works contracted executed by them in the sate of Karnataka

Key Takeaways

The present advance ruling points out that a person engaged in the business of providing works contract services is not required to obtain registration in each state where such person is executing the works contract since the tax would ultimately go to the state where immovable property is situated due to the consumption based concept of supply. While this ruling would surely bring relief to persons engaged in execution of works contract in different states, one has to also take into consideration the loss of ITC in the state of execution if such person is appointing local subcontractor or is availing hotel services as an example.

Kardex India Storage Solution Private Limited

Facts of Case

- Kardex India Storage Solution Private Limited is situated and registered under GST, in the state of Karnataka.
- Currently, the Company imports goods at the various ports, brings the said goods to their premises and then supplies the same from their factory to their customers
- In order to reduce the transportation cost as well as time and also to materialize the cost effectiveness, the Company proposes to import the goods at nearest port of the customer's place and supply the goods directly from the port to customer's location.

Issue involved

- Can the company take ITC on the IGST paid on import of goods which are sold directly from port to customer?
- Can IGST invoice be issued by the Company in case where imported goods are directly supplied from the port location of customer's state?
- Whether GST registration needs to be obtained in the state where goods are imported and sold directly to customer?

Taxpayer's Arguments

- Since imported goods are used for business purpose, ITC can be availed and utilised against the GST liability.
- For import of goods, the Place of supply ('POS') shall be the place of location of importer (Section 11 of IGST Act, 2017). In the present case, POS is the state of Karnataka being the place at which the Company is registered.
- Though the imported goods will be supplied directly from the respective port, the POS shall be the place of importer and hence, no separate registration shall be required.

Ruling

- Considering, goods are used for business activity, ITC will be admissible on the goods imported.
- The applicant can issue tax invoice from the registered place of business to the customer with IGST, when directly dispatching the goods from port of import.
- POS shall be the place of import i.e. the location of the importer even though the movement of physical goods happens from the port to the customers' premises. Accordingly, separate registration shall not be required at the port of import and invoice can be raised from place of import.

Key Takeaways

- The above ruling is in line with the fundamentals of the GST Law which envisages India as one market and provides seamless flow of ITC.
- The ruling rightly points out that a person having registration in one state and importing goods at a port situated in another state shall not be required to obtain a registration in the state where port of import is situated, even where such person supplies the goods directly to the customer from the port itself in order to save the transportation and storage costs.

Rajeev Bansal And Sudershan Mittal

Facts of Cases

- M/s. Rajeev Bansal and Sudershan Mittal, a partnership firm ('the Applicant') is engaged in the business of providing construction services at Haridwar
- The firm has an ongoing project in Jwalapur, Haridwar
- M/s. Ronav Infrastructure is also engaged in same line of business and approached to take over the incomplete construction project of the Applicant and to further carry out the business of constructing and selling the said building.
- Both the parties entered into an agreement for transfer of all assets namely the land and incomplete flats and liabilities of the partnership firm to the buys as "going concern".

Issue Involved

- Whether transfer of a business as a going concern is an exempted service under GST?

Taxpayer's Arguments

- M/s. Rajeev Bansal and Sudershan Mittal has submitted that, transfer of business as going concern is an exempted service and therefore, they shall not be liable to pay GST on such transfer.

Ruling

Having regard to the sales deed, the Authority for Advance Ruling ('AAR') observed the following:

- The "Assets" being sold by the Applicant include 105 flats, basement, gr floor.
- The building is under-construction.
- The purchaser can use and sell the flats as per his will.
- The purchaser has a right to construct another building/floor in the premises.
- The purchaser cannot demolish the said existing flats.
- The purchaser has a right to replace the name of seller in the records of Nagar Nigam.

Additionally, the AAR made following important observations with respect to the provisions of the law and transfer of business as a going concern

- Acquisition of goods/ services for commencement of business is covered under the definition of the "business"
- The transfer of business as going concern is sale of business including assets
- Transfer of a going concern can be described as transfer of a running business which is capable of being carried on by the purchaser as an independent business

Lastly, the AAR also referred to the guidelines issued by Her Majesty's Revenue and Customs department of the UK to treat transfer of business as a going concern which are as follows:

- The assets must be sold as part of the "Business" as a going concern
- The purchaser intends to use the assets to carry on the same line of business as the seller

Rajeev Bansal And Sudershan Mittal

- Sale of a part of the business is competent enough to run the operation separately.
- There is no series of immediately consecutive transfers

On the basis of the facts of the case and the above analysis the AAR held that the transfer of Business in question shall be treated as a going concern and would be exempted from GST in terms of serial no. 2 of Notification No. 12/2017-Central Tax (Rate) dated 28 June 2017.

Key Takeaways

Transfer of a business as a going concern was exempted under the erstwhile VAT laws and there were plethora of judgements to this effect. While GST being a much recent law, the present ruling in favour of assessee is a welcome one.

Swapna Printing Works Pvt. Ltd.

Facts of Cases

- Hope foundation Inc ('Hope'), is situated in United States of America.
- Swapna Printing works Pvt Ltd ('SPWPL'), is engaged in business of printing. SPWPL has received an order from Hope to supply printing services, wherein the content for printing the books is to be provided by Hope and raw materials required for the work are arranged by the SPWPL
- Post completion of the printing activity, the books will be delivered to the customers of Hope in India and Hope will make payment to SPWPL in USD.

Issue involved

- Whether the printing services provided by SPWPL to Hope can be considered as export of services?

Taxpayer's Arguments

- The Place of Supply ('POS') of such transaction would be the recipient of the services. Since, POS is outside India, tax liability will be determined as per Section 13(2) of IGST Act, 2017.
- The service recipient is located outside India and payment shall be received in foreign currency. Therefore, transaction will qualify as an Export of Services.

Ruling

- Supply of printing services is also consisting supply of books and hence it qualifies as a Composite supply where the main service is supply of printing services.
- Further, supply of services by way of printing of books are classified under chapter 48 and 49 and printing services is classifiable under SAC 9989.
- The 'recipient' is so defined under the law so as to make separation impossible between the person to whom the supply is made and the one liable to pay the consideration.
- In this case, the recipient of services will be the Indian customer of the foreign service recipient being inseparable from the foreign buyer.
- Accordingly, the services provided by SPWPL cannot be treated as export of services since the recipient is located in India and therefore, SPWPL shall be liable to pay GST on the printing services provided to Hope.

Key Takeaways

- While there are specific provisions under the GST Law for supply of goods on a bill to ship to model, similar provisions with respect to services are not specifically provided in the law.
- The GST law clearly states that a person liable to pay the consideration shall be treated as a recipient of services, however, the AAR has gone a step further and has considered the customers of the recipients as also the recipients.
- The observations of the AAR will have a far-reaching impact on the businesses which provide services to persons in India on the instructions of persons situated outside India.