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Issue #4
July 2020

eMagazine
Annual Subscription-₹1200 | $50

BY THE **PROFESSIONALS** FOR THE **PROFESSIONALS**

Certificate Course on International Tax

Our 8 days Virtual course on International Tax scheduled every Friday & Saturday of June covered the snapshot of International tax , treaties, DTAA's, BEPS and much more received immense appreciation and response from the attendees.
In this highly interactive webinar, recent issues in the field of International Tax were also discussed by our eminent experts like Pranshu Goel from Ashok Pranshu & Co., Harshal Bhuta from P.R. Bhuta & Co. , Nitin Sarda, Palaniappan A. , Anand Bhandari, Ramesh Ravishankar from BSR & Co. LLP and helped the attendees identify the best methods for integrating into the new systems while deriving the most tax benefits.

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Certificate Course On GST

Achromic point academy outlined a Cerficate Course on GST to discuss the amendments in compliance procedures and decisions in recent AARs and judicial decisions or on how industry players are adopng technology in Indirect tax department and much more. This virtual session brought together the leading tax experts like Jigar Doshi & Rebecca Pinto from TTMS LLP, Sandeep Chilana from Chilana & chilana law offices, Sudipta Bhattacharjee from Advaita Legal, NV Raman from Mazars India, Nidhi Goyal - Avinav Consulting & Himanshu Goel -TR Chadha & Co LLP to ensure all the attendees are equipped against today's biggest tax risks & be aware of the compliance requirements

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Masterclass On Supply Chain Management And Mitigating The Impact Of Fraud

Achromic Point Academy organised a Live Interactive Masterclass on Supply Chain Management and Mitigating the Impact of Fraud along with Mazars India LLP and Nexdigm (SKP) as Knowledge Partners on 18th & 19th June 2020 where experts like Amit Kirti & Rajat Juneja from Mazars India & Sundar Narayanan from Nexdigm (SKP) shared their experience & insights on Supply chain & working capital management Detecting, and Reducing Supply Chain Fraud especially in these trying times.

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Cyber Legal Aspects Relating To Telemedicine In India

A very interesting talk with S. Sai Sushanth happened on the lines of Telemedicine Guidelines- Analysis, Privacy Issues, Patient's Consent , Data Storage Legal Issues & Liabilities , Cyber Legal Due Diligence , Telemedicine Consultations as Legal Evidence on 20th June 2020.

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Certificate Course On Practical Knowledge Of Arbitration And Dispute Resolution

Achromic point along with the support of its knowledge partner Vaish Associates Advocates tailored a course to empower Corporates with a functional and practical understanding of Arbitration (both domestic and International Commercial Arbitration). Experts like Gaurav Varma, Surekh Kant Baxy, Sujoy Datta, NPS Chawla discussed practical aspects of the arbitration process- appointment of arbitrators and challenging appointment of arbitrators, procedure in arbitration, giving evidence, challenging award, execution of awards & much more in detail.

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VAT Audit By Federal Tax Authority In UAE – Learning From Experience

Achromic Point organized a special training programme for its middle east audience where Pratik Shah, Founding Partner of TTMS LLP talked upon Snapshot on UAE VAT, its practical challenges and areas of improvisation & Broad overview on Audit & Litigation on 29th June 2020.

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SPECIAL ECONOMIC ZONES IN INDIA THE SUNSET CLAUSE IS AT A NEAR FUTURE

Globally there is a move afoot to decouple China which has been facing a economic backlash from many countries. Few countries have gone to the extent of setting up funding to wean away companies to go back to their home countries to set up shop. There are also moves afoot to pull back further investments in China. The US-China Trade war has been happening for quite some time now and many of the majors have already announced their pull back from China to elsewhere in the world. South Korea, Japan are few other countries which are in the process of decoupling themselves from China.

From a Indian context, the Foreign Direct Investment has been subjected to a stronger scrutiny when investments come in from China origin companies. The element of banning certain Chinese apps is a measure that is the beginning of the slew of measures from an Indian perspective to decouple itself from China.
Companies globally, look for certain benefits be it facilitation measures, fiscal measures or simply ease of doing business when they set up operations in a foreign land. The Special Economic Zone narrative in India provide for the right context for companies that are keen on using India as a Hub for its exports plan. The SEZ offer the right atmosphere for those companies that are created with the idea of core exports out of India.

Background
The history of Special Economic Zones in India ('SEZ') dates back to md-sixties through establishment of the export processing zones.
With the economic liberalization sweeping through the nineties, emphasis was laid on renewed exports strategy leading to enactment of the Special Economic Zones Act, 2005 ('SEZ Act') in May 2005 The key objectives of the SEZs are to promote export, generate employment along with improving the physical infrastructure in the Country. With the pronouncement that the special corporate tax benefits to SEZ Units to be phased out beyond 31.03.2021, this note attempts to bring back the special focus on the advantages of setting up an SEZ Unit.

Key Features

- Single window clearance for setting up of a unit in SEZs as well as matters relating to Union and State Government.
- Income Tax / Corporate tax holiday of Ten years in the block of twenty years;
- Exemption from import duties.
- Exemption from domestic indirect taxes such as Goods and Services Tax (GST), Value Added Tax (VAT), Central Excise Duty (CED);
- Exemption from local levies such as electricity duty, stamp duty;
- In-house Customs clearances available for SEZ;
- SEZ is deemed to be a territory outside

the customs territory of India.

Options

Companies engaged in manufacture and export of goods or services have the following options:

- SEZ; to enter a Special economic Zone as a SEZ Unit.
- 100% Export Oriented Units ('EOU'). EOU and Software Technology Parke (STPI) schemes are governed by the Foreign Trade Policy, whereby specific benefits are provided similar to SEZ. However, while the EOU or STP can set up anywhere and the premises needs to be bonded, SEZ units can be set up only in those delineated enclaves which are designated as a SEZ zone per se.
- Domestic Tariff Area ('DTA'): DTA is the area outside SEZ wherein no specific benefits or exemption is provided other than the benefits that is normally available to an exporter.

Below table provides key comparison in operating as SEZ, EOU / STP or DTA units

Parameter	SEZ	EOU / STP	DTA
Corporate / Income Tax exemption on business income	• Fifteen years tax holiday in threse blocs of Five years each# • Units to commence manufacture or provision of service within April 1, 2021 to avail the benefit	Corporate tax as applicable	Corporate tax as applicable
Import duty exemption on import of goods	Available	Available	No exemption
Indirect Tax exemptions on supplies made to units	• GST exempt • CED exempt • VAT exempt	• Upfront GST exemption not available. Supply of goods treated as deemed export and separate procedure envisaged for claiming refund by the supplier • CED not exempt • No VAT exemption	No General exemption
Indirect Tax exemptions on exports made by units	Exempt	Exempt	Exempt

Parameter	SEZ	EOU / STP	DTA
Indirect Tax treatment on indigenous supplies of goods made by units	Treated as import	• Local indirect taxes such as GST, VAT is liable • Import duties to be paid if goods were imported upon claiming exemption from duty	Local indirect taxes such as GST, VAT is liable
Exemption from local levies	• Electricity duty exempt • Stamp duty is exempt in certain states	No exemption	No exemption
Single window clearance	available with absolute ease.	No such concept	No such concept
Positive Net Foreign Exchange earnings ('NFE')	Applicable	Applicable	Not applicable

#Deduction is provided towards 100% of the profits from export for the first 5 years and 50% for next 5 years and for further 5 Years.

From the above, it is pertinent that the SEZ Units in India offers both immense fiscal benefits from both corporate tax as well as indirect tax benefits. While the scheme is heading for a sunset clause on 31.03.2021 i.e. it is available for any units which is set up before the due date, it takes approximately about a month to get the Letter of Permission to set up an SEZ from the time a Company is incorporated in India. It is of course possible for an existing company to set up a Division to enter the SEZ. Caution of course, in such cases needs to be taken that the same does not among splitting, reconstruction and migration for the purposes of obtaining the fiscal incentives alone.

N V Raman
Founder Partner
Novello Advisors LLP

RE-EVALUATING TAX AND COMPLIANCE FUNCTION TO STRENGTHEN BUSINESS CONSERVATION IN CHALLENGING TIMES

COVID-19 has been declared as a pandemic, and there is no running from the demon! This pandemic has crippled the global economy, and its detrimental impact has spread rapidly. In order to tame this domino effect, India was under lockdown for more than 60 days, which has led to significant operational disruption for business houses. The Indian Government has initiated the unlock 1.0 to restart the economy as it is imperative to find ways and means to navigate through these turbulent times.

As it's rightly said, extraordinary times call for innovative thinking and extraordinary solutions. Instead of completely suspending the operations, companies have managed to operate albeit at reduced capacity during the lockdown through the effective use of technology to ensure the smooth functioning of business operations as well as compliances. However, all said and done, most of the businesses have been impacted due to lack of demand, and hence it becomes crucial for companies to spend money wisely and conserve capital. The overall measures for cost-cutting have been implemented by the companies, but it would also be worthwhile for companies to examine tax savings, which can be developed by re-aligning their tax structure, transfer pricing policies, etc. We have tried to capture a few aspects of how corporates can manage tax and compliance function.

Managing withholding taxes/TDS (local and foreign remittance)

- While the government has granted relaxation in payment
- of interest by reducing the interest rates from 12%-18% to 9%, it would be essential for the companies to manage the compliances within the time prescribed in order to avoid interest costs in such challenging times;
- The government has also reduced the TDS rates by 25% for resident vendors, which creates an opportunity for corporates to conserve such additional cash in the company by negotiating

better payment terms with vendors;
- With respect to non-resident payments, the company
- can re-evaluate its grossed-up arrangements, where on a conservative basis, taxes would have deposited. One may take a calculative risk on certain payments by adopting reasonable tax positions;
- Companies can also consider using various automated tools, which help in working on data remotely and also help in managing compliances with limited resources;
- Wherever the TDS is expected to be higher, the corporates should approach the tax officer to obtain the lower deduction certificates, which would assist in having better cash flow for them.

Direct Tax Costs

The new reality is the disrupted business across the globe due to halted operations against the background of the pandemic. In order to survive and conserve the tax outflow, the corporate may consider the following aspects:

- Re-looking at overall group structure to identify tax leakages and opportunity of tax savings and taking corrective measures;
- A corporate may re-examine its existing tax structure and evaluate with the help of tax professional whether there would be an opportunity to reduce the tax cost for the company;
- The corporates may adopt a conservative approach on projecting its profitability for the reduction in payment of advance taxes, to conserve the cash. There is no doubt that the tax officer would peruse the corporates to pay additional advance tax in cases of major shortfalls, but corporates should create its appropriate business cases for reduction payment of advance taxes.

Managing Tax Assessments

Not only the business houses, but even the revenue authorities have shifted from the usual assessment procedure to the digital platforms. New applications are developed to bring a paradigm shift in taxation by promoting faceless assessment. This approach ensures the ease of compliance, transparency, efficiency, and expeditious disposal of cases.

With the outbreak of COVID-19, the Indian Judiciary has also shifted to digital modes of hearing which can be observed with the developments below:

- Supreme court had announced hearing of urgent cases via video conferencing;
- The appellate tribunals accepted adjournments over e-mails;
- The revenue officers are also working from home.

In such an environment, it becomes a task for the corporates to be compliant with the notices issued by the tax department. Given that entities no longer work from their office area, software applications that maintain tax documents and litigation trackers would prove to be a knight in the shining armor.

Transfer Pricing

While the businesses are facing operational challenges, the multinationals are encountering additional challenges of reconsidering the reasonability of the pricing strategies being utilized for intercompany purchases and sales of goods and services.

Transfer pricing is a study rooted in economics and functional analysis. There is a need to re-examine the transfer pricing models in case there is any change or re-allocation of the functions performed or risk assumed within the group. Further, a detailed industrial analysis reflecting the impact of this pandemic on the industry, in general, is indispensable.

A few important considerations for corporates from a transfer pricing

standpoint could be –

- For a captive (Software development/IT-enabled services) services provider, having cost plus mark-up remuneration model, it would be important to factor the impact on operations/profitability at the group level while renegotiating the mark-up rate with the parent entity (service recipient). The analysis of the impact will have to be well documented to justify any reduced mark-up rate and the factors considered during renegotiation.
- Similarly, taxpayers who are using profit-based methods to justify their intra-group transactions also need to carefully analyze the financial statements of comparable companies to assess how they are impacted due to COVID-19 while making economic adjustments.
- Advance Pricing Agreement (APA) program has been highly successful in India, since its introduction. Considering the impact COVID-19 has had on the businesses across the world, it is very likely that the corporates would have to renegotiate the intra-group pricing policy, despite an APA in place. It is pertinent to note that the Indian APA program has necessary provisions to enable both tax authorities as well as taxpayers, to renegotiate the APA terms. It will not be surprising if we see taxpayers (already having entered into APA) in large numbers approaching the authority with a request to renegotiate the APA terms to reflect the commercial reality and the impact of COVID-19.
- The existing safe harbour regime in India enables taxpayers to apply for the Safe Harbour scheme for the financial year up to FY 2018-19. The CBDT is yet to renew the said provisions for FY 2019-20 and onwards. Given the current environment, it is highly possible that the CBDT would announce lower safe harbor margins for the covered transactions from the existing level.

Managing associates and team

There is no denying the fact that the lockdown may create a slowdown in overall business activity. This difficult time could be utilized by tax heads/managers productively by connecting with the team through various initiatives such as:

- Professional training for the team;
- Group and team bonding activity – ensuring continuous communication with the team in these times and motivating the team to perform at full strength;
- Brainstorming with the team on streamlining the process and ensuring compliances are managed on a timely basis.

While the government has initiated several relief measures in terms of providing liquidity, in its capacity, it is now up to the corporates to overcome these challenging times and emerge stronger. The key to success lies in the details; hence it's vital to analyze the government's relief measures as well as the existing law closely and identify as to how they can be implemented in one's case. This crisis once again reiterates the fact that more and more businesses would have to look at digitally transforming every function of their business so that disruptions like COVID-19 do not impact the business operations.

Neeraj Sharma
Senior Executive Director-
Direct Tax and Regulatory,
Nexdigm (Formerly SKP)

SECTION 115BAC

A WATERSHED FOR INDIVIDUALS AND HUFS IN THE DIRECT TAX REGIME AND ITS INEFFICACIES

The Finance Act 2020 introduced Section 115BAC to the Income-tax Act, 1961. This section lays down the option of a concessional tax regime for individuals and Hindu Undivided Family (HUF). This new regime provides an option for payment of income tax at reduced rates for any previous year relevant to the assessment year beginning on or after the 1st day of April 2021. The tax rates in the concessional tax regime in comparison with the tax rates in the old tax regime are depicted below:-

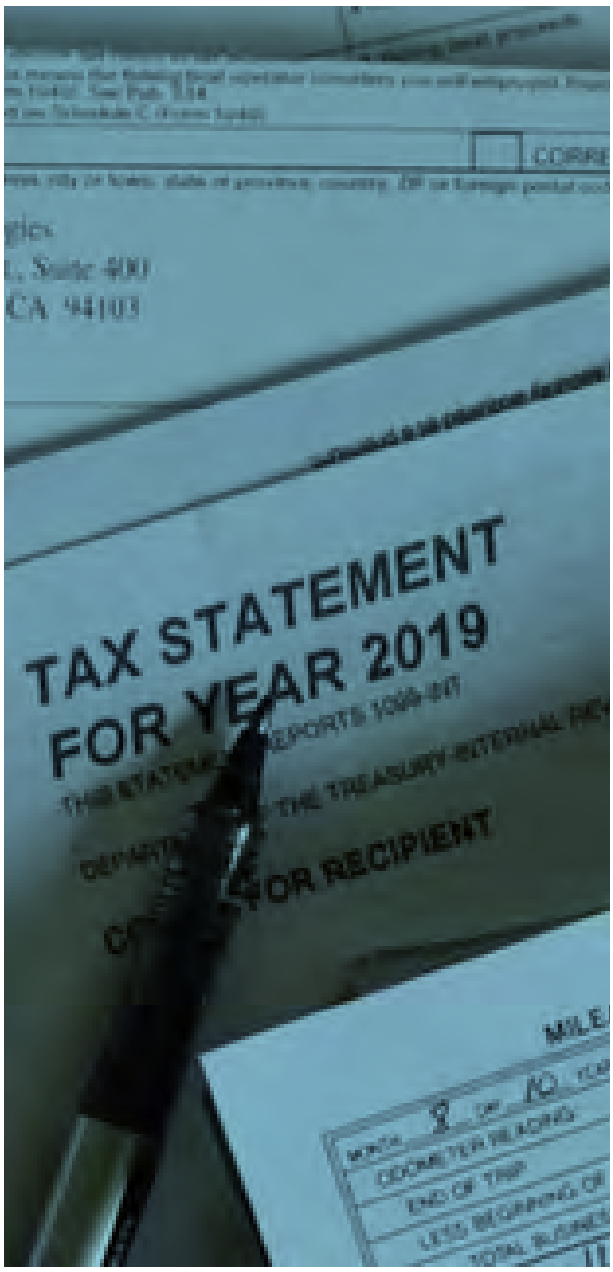
	INCOME	CONCESSIONAL RATES	REGULAR RATES		
		Individuals of all age, HUFs, and non-residents	Individuals below 60 years, HUFs, and non-residents	Senior Citizen (61 to 80 years)	Super Senior Citizen (above 80 years
1	Up to Rs. 2,50,000	0	0	0	0
2	Rs. 2,50,001 to Rs. 3,00,000	5%	5%	0	0
	Rs 3,00,001 to Rs 5,00,000	5%	5%	5%	0
3	Rs. 5,00,001 to Rs. 7,50,000	10%	20%	20%	20%
4	Rs. 7,50,001 to Rs. 10.00,000	15%	20%	20%	20%
5	Rs.10,00,001 toRs.12,50,000	20%	30%	30%	30%
6	Rs. 12,50,001 to Rs.15,00,000	25%	30%	30%	30%
7	Rs.15,00,000 and above	30%	30%	30%	30%

The table above reflects the simplicity and directness of the new tax regime along with a perk of reduced tax rates for individuals and HUFs.

However, this **benefit of reduced tax rates is available only after forgoing certain deductions and exemptions.** To opt for this concessional tax regime, an individual or an HUF is required to exercise this option on or before the due date of furnishing the return of income. **Further, If Assessee is earning business or professional income, once the option is exercised, it will be applicable to forthcoming years as well.** Moreover, such taxpayers can only opt for this new regime once and once they withdraw from it, they cannot opt back for it. However, if the taxpayer does not have any business or professional income, the assessee shall have a choice to decide every year if he wants to opt for concessional tax regime.

Inefficacies of the Concessional Tax Regime

The concessional rates though are seemingly favorable; it has its own loopholes which require sincere review. Firstly, it is significant to consider that the deductions and exemptions excluded from the new tax regime are some most commonly availed deductions. For example, the standard deduction of Rs. 50000 under section 16; all deductions under Chapter VI upto 1.5 lakhs, House rent and leave travel allowance under section 10; interest on borrowed housing loan for a self-occupied property, etc. Additionally, investment expenses, medical expenses, health insurance expenses, education expenses, rent expenses, interest on house loan etc. have all been waived off under the new tax regime. Therefore, it is unlikely that person who was availing all or many of these deductions in the regular tax regime will benefit from the concessional tax rates.



Secondly, this regime only provides concessional tax rates for individuals and HUFs with income between 5 to 15 lakhs. The income tax rates chargeable on the income of citizens outside the range of 5 to 15 lakh remains the same under both tax regimes. Therefore, citizens who were actually in need of concessional tax rates, i.e. those with incomes below 5 Lakhs have been completely neglected under section 115BAC. Thirdly, the old tax regime classifies individuals based on their age to grant special exemptions and deductions for senior and super senior citizens. However, the concessional tax regime has no such beneficial provision

[1] The Finance Act, 2020, S 53
<http://egazette.nic.in/WriteReadData/2020/218938.pdf> accessed 30 June 2020

and treats the senior citizens in par with the rest. The fact that senior citizens have increased medical expenses and comparatively face more hardshipsin their living has not been considered under section 115BAC.Such treatment can be regarded as a departure from the principle of vertical equity because those with the ability to pay more tax are either allowed a concessional tax rate or are treated at par with those with an ability to pay lesser tax.

Fourthly, the new tax regime is optional and thus, two similarly situated individuals will be subjected to different income tax treatment. This will further disturb the principle of horizontal equity. Moreover, individuals with business or professional income, will face the violation of this principle the most because once such an individual goes back to the regular regime, he/she can never avail the option of concessional rates regardless of availing any exemptions or deductions in future or not.

Fifthly, one of the primary reasons of inserting section 115BAC was to have fewer compliances and complexities in paying taxes. It is obvious that by foregoing most exemptions and deductions the new tax regime comes brings in more simplicity and certainty. However, this regime is optional and not all deductions have been abandoned. Therefore, to make a choice between the two regimes, every year a taxpayer now has to calculate his taxable income based on two different taxation methods. Hence, the process of estimating the payable income tax has become more cumbersome.

The stress for taxpayers earning professional and business incomeis unnecessarily more because they are restricted to availing this option only once. Hence, they must be extremely vigilantwhile switching from one regime to another. Moreover, individuals earning salaries subjected to TDS must intimate their employer about their choice of regime before the deduction of TDS and the choice made cannot be altered again for that previous year. This implies that taxpayers earning salaries every month are required to make a choicefor that financial year in the first month itself. Thus, taxpayers earning salaries have been imposed with an additional burden to be extra cautious while intimidating the employer regarding availing the option of the new regime for TDS on their salaries. Such limitations increase the burden of tax compliances and create disparities and unreasonable inequity among taxpayers.

[2] Circular C1 of 2020, Central Board of direct Taxes (April 13, 2020)<https://www.incometaxindia.gov.in/communications/circular/circular_c1_2020.pdf> accessed 30 June 2020

Nevertheless, besides the inefficacies, the concessional tax regime seems favorable for taxpayers who did not claim many exemptions or deductions earlier. The regular tax regime permits deductions for certain investment under section 80C to encourage investment decisions among taxpayers. However, the new regime, by abandoning such deductions for concessional rates, allows an individual to increase liquidity at hand and make flexible investment decisions which can be beyondthose that are deductible under section 80C.

Conclusion and Suggestions

It is obvious that neither of the tax regimes can be uniformly held as more favorable for all taxpayers. Favorability entirely depends on which regime yields lesser tax liability and this can also vary every year for each individual. It is mainly the manner of implementing this tax regime,and its impact on the basic principles of equity that needs deliberation.The point of foregoing exemptions and deductions to reduce complexity in compliances and tax evasion practices becomes redundant when the new tax regime is optional for the taxpayers. The complexities of exercising and evaluating this option itself make this change onerous for the citizens. Moreover, since the scope of exemptions and deductions under the regular tax regime is considerably vast, the chances of taxpayers availing the new tax regime are less.

Furthermore, to achieve or enhance simplicity and certainty in the taxation system, the principles of equity should not be overlooked or hampered. Only a holistic approach to all canons of taxation can help in sustaining a fair and just system of taxation. Differential tax treatment, for example, deduction of medical expenses for citizens with disability is another way of ensuring equality and equal opportunity for all. Hence, eliminating certain deductions and exemptions can be reassessed to attain vertical equity. Moreover, either the concessional rates can be further reduced or some most commonly availed deductions and exemptions can be included under the concessional tax regime so that the benefit under the concessional tax regime comes in par with the old tax regime for most taxpayers.

It is evident that the incorporation of section 115BAC is a watershed in the direct tax structure of India. However, instead of being advantageous for most of the citizens, it is more likely to act as a cumbersome and fruitless because of the inefficacies of its structure, operation, and impact. Therefore, such shortcomings need be reconsidered to achieve the real objective of implementing the concessional tax regime.

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IMPACT OF ARTIFICIAL INTELLIGENCE ON GOODS AND SERVICES TAX SYSTEM IN INDIA

Artificial Intelligence- A Brief Introduction

Artificial intelligence ('AI') comprises of two words "Artificial" and "intelligence", which means "a human-made thinking power." It is a system which possesses intellectual characteristics of humans, such as the ability to reason, discover meaning, generalize, or learn from experience and solving the problems. In simple words, robots performing human task. Its about creating a neural network that intakes large quantities of data and, on its own, builds algorithms that help it determine the right way to perform a task which would be more intelligent than humans.

AI is being increasingly used across different industries including finance, healthcare, taxation and many more. For example, self-driven cars, computers playing the chess, are no more unfamiliar in this world. Tax is primary source of money for the government which is necessary to support all the public sector functions. The current taxation system requires increased transparency for healthy growth of tax revenues and increasing taxpayers under the net. Collecting taxes from citizens in a shorter time and reducing the number of tax defaulters results in effective and efficient collection of tax which in-turn enables the government to make adequate investments in public sector functions. The two most common purposes of AI in taxation are preventing tax default and providing services to taxpayers, tax professionals and tax authorities.

Below are the instances or role played by AI in the taxation system of the country:

Automation and reconciliations

Performing same task again and again in form of data punching, processing documents and reporting undermines the performance of professional being engaged
in routine activities instead of focusing on strategic activities.

Consequently, AI enabled robots help tax professionals in performing routine activities by speeding up the lengthy process and spare more time for key intellectual activities.

Few instances of automation applied in indirect taxation system are as follows:

- Government has automated the process of refund in case of export of goods with payment of taxes liberalising the requirements of refund procedure by way of linking of data available on ICEGATE Portal and GST Portal in addition to automatic reconciliation of export of goods between GSTR-3B and GSTR-1 filed by the taxpayer.
- Similarly, purchase invoices of taxpayer are extracted by AI from a supplier's respective GSTR-1 and reflected in the GSTR-2A of the buyer. A summary is generated for ease of taxpayer. There are numerous AI enabled software which help taxpayers in further reconciliation of purchase invoices in books of taxpayer as against the GSTR

2A. These work on algorithms creating pattern and combination of matches and mismatches like Exact match, partial match, invoice no difference, amount difference etc against the two and admission of ITC basis the reconciliation which would otherwise be cumbersome manual task to perform. Such systems even help in shooting automatic e- mails to the suppliers who have not filed their returns.

GSTR-1 will auto-populate in GSTR-2A of recipient, this will not suffice the purpose of government for introducing matching concept through GSTR-2A reconciliation since there is no linkage in GSTR-1 and GSTR-3B of supplier. It means supplier can report the transaction in GSTR-1 without paying tax in GSTR-3B and the recipient can avail ITC on basis of GSTR-2A without the taxes being paid to the government.
On the other hand, if the supplier does not file the return, credit would be denied to the recipient even though the recipient has

Challenges faced during application of above AI:

Automation in GST refund procedure has created hardship on taxpayer as well, since the portal allows refund of lower of taxes paid as per GSTR-1 and GSTR-3B. There might be cases where the export invoices are missed to be reported in GSTR-1 whereas the taxes are paid in GSTR-3B.
In GSTR-2A reconciliation, though transactions entered by the supplier in paid legitimate taxes to the supplier which will result into undue hardship on part of the recipient.
Therefore, the automation process is not 100% fruitful.

Preventing tax frauds and corruption
As we are aware, taxation system of our country depends upon self-assessment wherein each taxpayer is required to self-asses the tax liability payable to the government. It means it is not possible for the government to assess and scrutinize

the tax liability of each taxpayer.
To prevent the tax frauds, the use of AI enabled systems and ML algorithms in the form of "**predictive modelling**" helps to detect anomalous entries in large datasets by figuring out the attributes of the present case with the earlier detected fraud cases and creates a check on tax evasion.
A check is also placed in form of "**Clustering**" where machine automatically puts all tax returns into groups that have similarities or clusters and then identifies returns falling outside these clusters that require additional investigation.
Therefore, AI enabled systems help departments of revenue in reducing the frauds and close the gaps/ loopholes which are being exploited by fraudsters lying in taxation system of the country.
Acknowledging the role of AI, Revenue Secretary Ajay Bhushan Pandey had said a targeted approach was being followed by tapping on data analytics and Artificial Intelligence which has helped improve GST collections to cross rupees one lakh crore for each month for the period November to January 2020.
It is also pertinent to note that automation in the field of picking cases for assessments and sending notices based on anomaly captured by the system has reduced corruption to a greater extent and increased transparency in the taxation laws of country.
Despite the incorporation of various laws by the government for check on corruption, AI has proved to be a boon for vanishing the bribes and unfair harassment of taxpayer which has largely deteriorated the Indian taxation system.

Time & Cost Savings with improved decision making

Adaption of AI enabled systems could save manhours to a greater extent due to minimum errors, automation of functions and improved efficiency since time will not be a constraint for machines as they can work for 24*7 as and when the data flows in the system. Thereby reducing the cost for deploying the extra manpower and accurate results with proper presentation of data.

> "By far, the greatest danger of Artificial Intelligence is that people conclude too early that they understand it."
> Eliezer Yudkowsky

Robots and AI have taken over remedial tasks, freeing workers to focus on more interesting value-added activities resulting in improved decision making and overall growth of taxation system in the country. Prior to AI enabled systems, tax professionals had to rely on inconsistent and incomplete data and increased efforts on clerical activities were put in.
Filing returns, tracking notices, processing tax bills—automating all these activities has greatly simplified taxpayer's ability to comply with jurisdictional requirements and timely compliance of law.

Challenges and concerns

A two-year study from McKinsey Global Institute suggests that AI could replace as much as 30 percent of the world's current human workforce by 2030 which would widely impact tax industry.
Automation of activities will leave workforce behind and job crisis in coming years just like the horses become obsolete by the automobiles. Will the human jobs become useless in front of highly automated machines? What if the jobs we have today would get replaced by a robot and machine?

Looking back 40 years ago, where automation in factories in production

sectors created fear amongst workers of losing their jobs and robbing them of their livelihood but it came like an opportunity where automation reduced the cost and increasing the demand thereby and more employment for workers.

Resultantly, technological advancements have always generated new kind of jobs instead of leaving industry jobless. Therefore, it is too early to make assumptions w.r.t. jobs destruction.

Author's Statement

Above discussion gave a glimpse of how AI has transformed the taxation system and is having the greatest impact today and the impact it will unfold in upcoming years. With continuous drift in technological advancements, AI has become need of the hour.

On the other side, AI is not efficient while taking decisions on practical problems which are unstructured. Therefore, before placing reliance on AI, organisation should focus on employee training so that it avoids technological unemployment and errors could be removed before getting results.

Similarly, though the government has introduced AI at various levels in taxation system, say through GSTR-2A, E-invoicing, New return system and Document Identification Number (DIN), the above proposed advancements lag in terms of proper planning and training which has created undue hardship on taxpayers and tax authorities in dealing with the said advancements. Therefore, it requires proper planning and training at all levels for its successful execution and reaping its true benefits.

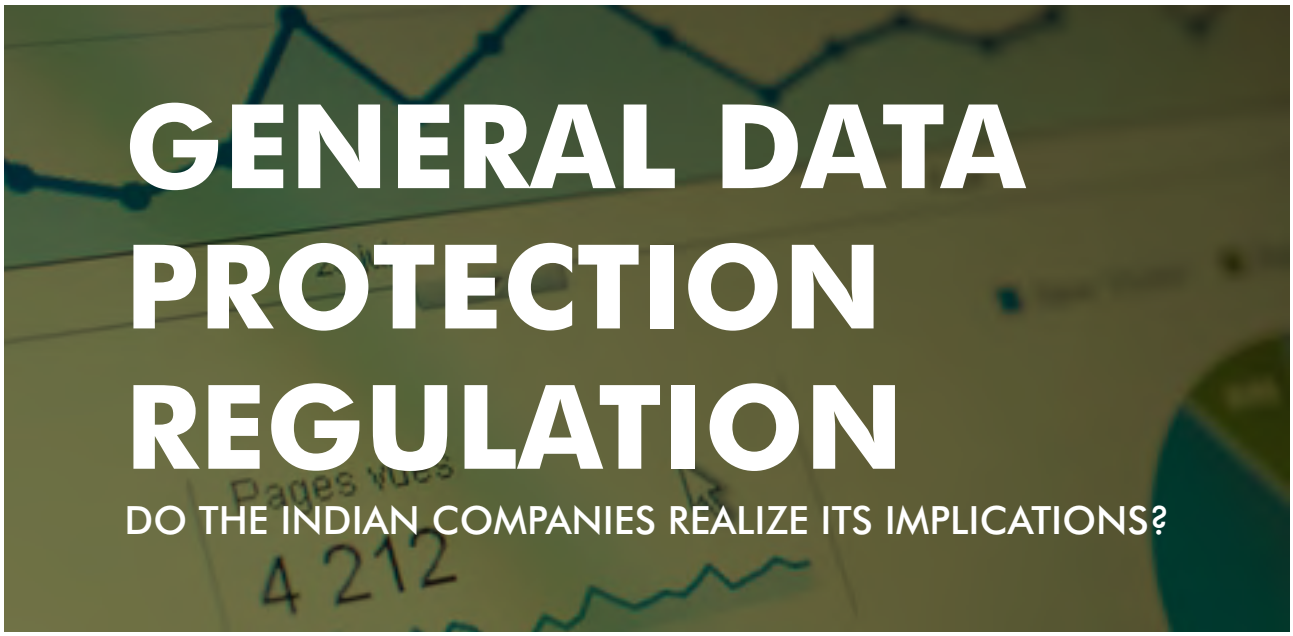
Nevertheless, the coming wave of intelligent automation will ease the work to another level and transform the taxation system into the reliable and hassle-free system of the country.

"Artificial Intelligence is the science of making machines do things that would require intelligence if done by men"

"The potential benefits of AI are huge, so are the dangers"

CA Pankaj Bansal

CA Navkar Jain



GENERAL DATA PROTECTION REGULATION

DO THE INDIAN COMPANIES REALIZE ITS IMPLICATIONS?

Introduction

"Sony PlayStation Network hackers access data of 77 million users" -April 2011

"Yahoo 2013 data breach hit all three billion accounts" -October, 2017

"50 million Facebook profiles harvested for Cambridge Analytica in major data breach"- March, 2018

"Marriott International announced in November 2018 that attackers had stolen data on approximately 500 million customers"

"UnderArmor-owned fitness app MyFitnessPal was among the massive information dump of 16 compromised sites that saw some 617 million customers accounts leaked and offered for sale on Dream Market"

These newspaper headlines give a brief run-down on the escalation of threat to personal data of individuals in the second decade of the 21st century. A reactive measure by governments all over the world has been to fortify their respective national data protection laws and protect the privacy rights of their citizens. In this context, the European Union ("EU") has drafted and adopted the General Data Protection Regulation ("GDPR"). This regulation lays down rules relating to the protection of personal data of natural persons when they undergo processing and rules relating to the free movement of personal data.

Even though European in origin, it has direct applicability to non-European entities including entities in India which have business in EU.

The GDPR was adopted on April 27, 2016 and has become effective from May 25, 2018, after a two-year transition period. With the enforcement of GDPR, the erstwhile directive i.e. the Data Protection Directive 95/46/EC has been repealed and in its stead is a single unified law which applies to all EU member states. An EU member state can in addition, frame supplementary laws to facilitate the implementation of GDPR.

To whom does GDPR apply?

EU Entities who:

- Control, collect or process the personal data of natural persons who are in the EU.
- Are established in EU and control, collect or process the personal data of natural persons based anywhere in the world.

Entities outside EU who process personal data of data subjects in the EU in order to:

- offer goods or services to data subjects in the EU, irrespective of whether a payment by the data subject is required,
- monitor their behaviour as far as their behaviour takes place within the EU[1].

This brings several Indian companies that regularly deal with the personal data of individuals in European Union within its purview.

Untangling the GDPR jargon

Personal Data and Data Subject

Personal data refers to any information relating to an identified or identifiable

[1] Article 3(2) of GDPR

natural person (also known as data subject). An identifiable natural person is an individual who can be identified, directly or indirectly, by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person[2].

Controller and Processor

A controller is a natural or legal person, public authority, agency or other body which determines the purposes and means of processing of personal data[3].

A processor is a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller[4].

One single entity can be a controller as well as a processor if it decides the purposes of processing and actually processes the personal data.

Processing

Processing means any operation performed on personal data, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction[5].

E.g.: staff management and payroll administration; access to/consultation of a contacts database containing personal data; posting/putting a photo of a person on a website; video recording (CCTV) etc.

Exemption from application of GDPR

GDPR does not apply to processing of personal data:

- In the course of an activity which falls outside the scope of EU law (activities concerning national security).
- By the EU member states when carrying out activities which fall within the scope of common foreign and security policy of the EU.
- By a natural person in the course of a purely personal or household activity.
- By competent authorities for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security[6].

Further, GDPR is applicable only to natural persons and not legal entities.[7] It also exempts personal data of deceased persons from its scope.[8]

Principles of GDPR[9]

The pith and substance of GDPR can be encapsulated in the following principles that form the basis of every prerogative, obligation and mandate provided therein:

Lawfulness, fairness and transparency

- There should be a lawful basis to undertake processing (e.g.: consent, performance of a contract etc.)
- Data subjects should be given comprehensive, specific and explicit information about processing activities at the time of collection of personal data for processing.

Purpose limitation

- The personal data has to be processed only for the legitimate purpose for which it was collected.
- Additional data processing for ancillary activities without establishing a legitimate purpose and informing the data subject about the same will not be permissible.

Data minimisation

- Only personal data which is relevant for the legitimate purposes of processing must be collected.

[2] Article 4(1) of GDPR
[3] Article 4(7) of GDPR
[4] Article 4(8) of GDPR
[5] Article 4(2) of GDPR
[6] Article 2(2) of GDPR
[7] Recital 14 of GDPR
[8] Recital 27 of GDPR
[9] Article 5 of GDPR

- No additional data should be collected or stored without a justifiable reason.

Accuracy

- The data collected must be kept up-to-date.
- Giving the data subjects an opportunity to review, erase, rectify their data is essential to ensure accuracy.

Storage limitation

- The personal data collected/processed has to be deleted/removed/transferred to the data subject once the purpose for which it was collected has been achieved.

Integrity and confidentiality

- Personal data has to be stored and handled in a safe and secure manner.

Accountability

- Demonstration of compliance.
- E.g.: Putting in place austere internal data protection policies, acquiring certification from recognized bodies, implementing appropriate security measures, conducting regular audits, etc.

Lawful basis of processing personal data[10]

In order to process data under GDPR, the controller or processor needs to justify the processing with a lawful basis. Any one of the following lawful basis can be relied on to undertaking processing activities:

Consent

- Clear and unambiguous consent is obtained from the data subject to process their personal data.
- The data subject has an unfettered right to withdraw this consent as well.

Contract

- The personal data is being processed for performance or execution of a contract, to which the data subject is a party and which is contingent upon the processing of their personal data.

Legal obligation

- Processing is necessary to comply with a legal obligation to which the controller is subject.

Vital interests

- Processing is necessary in order to protect the vital interests of the data subject or of another natural person which would include their physical integrity or life.

Public task

- Processing is necessary to perform a task carried out in the public interest or in the exercise of official authority vested in the controller.

Legitimate interests

- Processing is necessary for the legitimate interest of the controller or the third party, provided that the interest of the controller/third party does not override the rights and interest of the data subject, especially if it is a child.

Rights of Data Subjects

Specific rights have been endowed on the data subjects in relation to their personal data before, during and after it has been collected for the purpose of processing. The controller is required to ensure appropriate mechanisms are in place to allow the data subject to exercise these rights.

***Right to be informed*[11] *and notified*[12]**

The data subject has to be given detailed information about the processing activities to be undertaken on their personal data. The provision of information is an ongoing process and at different stages of processing different information has to be provided to the data subject. The data subject is also required to be given notices in case of any security breach.

Right to access [13]

This right allows the data subject to review their personal data and know what exact information is being processed at a given

[10] Article 6 of GDPR
[11] Article 13 & 14 of GDPR
[12] Article 34 of GDPR

point in time.

Right to rectify[14]

The data subject can correct any errors or mistakes in its personal data as well as keep the controller/processor updated about any changes in its personal data.

Right to erasure[15]

The right empowers the data subject to request the controller to erase all/any of the personal data relating to it.

Right to restrict processing[16]

The data subject in some instances have the right to request the restriction or suppression of their personal data. When processing is restricted, a controller/processor is permitted to store the personal data but not use it.

Right to data portability[17]

The personal data of the data subject can be transferred back to them or any other party on the data subject exercising this right.

Right to object to data processing[18]

The data subjects have a right to object to processing of their personal data on certain grounds like legitimate interest, performance of a public interest task, direct marketing and processing for scientific/historical/statistical research. This includes the absolute right to object to processing carried out for the purposes of profiling or direct marketing.

Right to not be subjected to automated individual decision-making[19]

Automated individual decision-making means making decisions affecting a data subject solely by automated means without any human involvement using their personal data. Data subjects have a right to not be subject to such decision making if it produces legal effects concerning them or similarly significantly affects them. However this is not an absolute right if the automated individual decision-making is done with explicit consent of the data subject or is necessary for performance of a contract between the data subject and the controller or is authorised by EU or EU member state law.

Right to judicial and non-judicial remedy[20]

The data subject can lodge a complaint with relevant data protection authorities, in case of any breach of their rights under GDPR. Further, the data subject can also seek a judicial remedy by initiating proceedings against a controller or a processor before the courts of the EU member state where the controller or processor has an establishment. Alternatively, such proceedings can be brought before the courts of the EU member state where the data subject has his or her habitual residence. The data subjects can be represented by a not-for-profit body, organisation or association which has been properly constituted in accordance with the law of the relevant EU member state.

Fines and Penalties

Breach of key provisions can lead to an administrative fine which is the greater of €20 million or 4% of total worldwide annual turnover of the breaching entity for the preceding financial year[21] and technical breaches can result in an administrative fine which is the greater of €10 million or 2% of total worldwide annual turnover of the breaching entity for the preceding financial year[22].

In addition to these fines, the defaulting entity could be penalized under the national laws of the relevant EU country, be liable to pay compensation to data subjects for damaged suffered and be ordered to cease their business activities in any of the EU territories.

Enforcement of GDPR in India

The natural question that arises in relation to GDPR is that how the European Union intends to enforce it in case of violations by international entities that have no establishment or physical presence in the EU. It is a question to which no direct and definitive answer can be found in the

[13] Article 15 of GDPR
[14] Article 16 of GDPR
[15] Article 17 of GDPR
[16] Article 18 of GDPR
[17] Article 20 of GDPR
[18] Article 21 of GDPR
[19] Article 22 of GDPR

GDPR.

A few plausible ways in which the GDPR could find some legal teeth in India have been explained hereunder.

- *Appointment of Representative*

If GDPR applies to a non-EU entity, they need to appoint a representative in the EU[23]. Further this representative need to be mandated by the non-EU entity (which is subject to GDPR) to be addressed in addition to or instead of them by data protection authorities established in EU and data subjects, on all issues related to processing, for the purposes of ensuring compliance with GDPR. Most importantly, the designated representative would be subjected to enforcement actions in case of non-compliance by the non-EU entities to whom GDPR applies.[24] Hence, it shall result in an enforcement of GDPR against the Indian entity for all practical purposes.

- *U.K. being a reciprocating territory*

Under GDPR, the data subject is entitled to a judicial remedy before the courts of the European Union member states where the controller or the processor has an establishment, in addition to lodging a complaint before a data protection authority[25]. If an Indian entity is "established" in EU, the data subject can approach the courts of the country where the Indian entity is established for enforcement of GDPR against it. Establishment does not merely mean physical presence. An organisation may be "established" where it exercises "any real and effective activity" through "stable arrangements" in the EU and need not be physically present. Under Indian law, Section 44A of the Code of Civil Procedure, 1908 allows for the execution in India of decrees passed by the courts in "reciprocating territories" and U.K. is listed as a reciprocating territory of India. Thus, a combined reading of the abovementioned provisions of GDPR and the Code of Civil Procedure, 1908 provides that any decree passed by the competent courts of U.K. against an Indian entity under the GDPR will be liable to enforcement in India. Therefore even if an Indian entity with no physical presence in EU has a website that caters to U.K. data subjects (amongst data subjects in other EU countries) and is required to comply with GDPR, any aggrieved EU data subject (including data subjects not in UK) can approach the courts of U.K to enforce GDPR against such an Indian entity.

- *Commercial necessity to comply with GDPR*

A controller is bound to engage only those processors who are able to demonstrate compliance with the GDPR[26]. This means that all EU controller clients of Indian processors will inevitably demand that they prove that their organization is up-to-date with the new law. If the controller fails to employ GDPR compliant processors they are liable to heavy fines as mentioned above.

Further, GDPR specifically lays down the responsibilities of the processor that are to be mandatorily set out in the data processing contract between the processor and controller before the processor processes any personal data[27]. Thus, the controller is expected to update and revise its existing contracts with the processors to bring them in line with the GDPR and accordingly the processor will be exposed to a pecuniary liability under its contract with the EU controller for non-compliance of GDPR.

Additionally, the controller is liable for all damage caused by the processing activities. Any infringement of the GDPR due to the non-compliance of the processor will result in the controller paying compensation for the same.[28] However, the controller is entitled to recover the amount of damages from the

[20] Article 77 & 79 of GDPR
[21] Article 83(5) of GDPR
[22] Article 83(4) of GDPR
[23] Article 27 of GDPR
[24] Recital 80 of GDPR
[25] Article 79 of GDPR
[26] Article 28(1) of GDPR
[27] Article 28(3) of GDPR
[28] Article 82(2) of GDPR
[29] Article 82(5) of GDPR

processor proportionate to the responsibility of the processor in the infringement of the GDPR[29]. This may be reinforced again by an air tight indemnity clause in the data processing contract between the controller and the processor making the processor accountable for all its GDPR breaches.

Thus for the aforestated reasons, Indian processors would be compelled to adopt the provisions of the GDPR or bid farewell to their EU controller clients.

Development in data protection laws in India

Protection of individual data has become a grave priority worldwide. With exemplary rigour, Australia and Japan too have recently ushered in an amended legal regime to protect the privacy rights of their citizens by introducing the Notifiable Data Breaches scheme and the amended Act on the Protection of Personal Information respectively. The existing data protection regulation in India with only a handful of judicial decisions and the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 safeguarding the privacy of individuals, falls pale in comparison. However, in response to widespread criticism and public pressure, the government has introduced Data (Privacy and Protection) Bill, 2017 in the parliament. Ministry of Electronics and Information has also published a white paper on November 27, 2017 on Data Protection Framework in India, drafted by a Committee of Experts headed by Justice B.N. Srikrishna. Further, The Personal Data Protection Bill 2019 (PDP Bill 2019) was tabled in the Indian Parliament by the Minister of Electronics and Information Technology on 11 December 2019. As of March, 2020 the Bill is being analysed by a Joint Parliamentary Committee (JPC) in consultation with experts and stakeholders. This indicates that legislative action is gaining momentum in India and centralized as well as sector-based data protection laws are only a stone's throw away.

Conclusion

With the GDPR already in force and Indian data protection laws following hard on its heels, Indian entities remain woefully unaware of and unprepared for the sweeping impact these data protection laws are likely to have on their activities. It is the need of the hour for Indian entities to map the personal data they control or process and accordingly devise processes to fall in line with the data protection regime to come.

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-Batul Barodawala, Legal Assistant, International Finance Corporation

This article is intended to serve as a general guide on the subject matter of General Data Protection Regulation. Advice of specialized experts should be sought in case of specific circumstances.

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Further, the contents of this document do not necessarily reflect the opinions/position of Vaish Associates Advocates, but remain solely those of the authors. For any further queries or follow up please contact the authors at yatin@vaishlaw.com.

THE FATE OF TRANSITIONAL CREDIT

CAN THE SAME BE CONCLUDED TO A LOGICAL END?

The Goods and Service Tax (GST) regime has completed three years since it was introduced on July 1, 2017. The biggest tax reform for indirect taxes in India has been an unprecedented endeavor of the Government with an objective to simplify the indirect tax structure of India and reduce the burden of taxes. GST has subsumed over a dozen indirect taxes with an aim of achieving 'One Nation One Tax'.

However, the complicated tax structure has not been easy to comprehend, also, the implementation of GST has not proved to be a fan-fair alliance, as it was expected to be.

In fairness, one cannot shy away that the reform was a haphazard introduction, causing a lot of teething trouble. Since the roll-out of GST, it has been a bumpy ride and frequent changes in the GST legislation has led to an unsettled effect.

One cannot deny that the volume of litigation under GST regime was expected to grow in a big manner. The major litigation under the GST regime seen repetitively before the various courts has been pertaining to the carry forward of transitional credit. In this regard, generally, there have been three categories of litigants:

- Taxpayers having sufficient proof that they could not file the Form for carry forward of transitional credit within the extended due date (December 27, 2017) due to technical issues on the Goods and Services Tax Network (GSTN) Portal.
- Taxpayers not having any or having insufficient proof to substantiate that they could not file the requisite Form for carry forward of transitional credit within the extended due date due to technical issues on GSTN Portal.
- Taxpayers, who wanted to revise the filed Form for carry forward of transitional credit after the extended stipulated due date.

Number of petitions have been filed and the Hon'ble Courts across the nation have time and again directed the GST Authorities either to reopen the portal or to allow the manual filing/ revision of the forms.

However, a retrospective amendment has been made in Section 140 of the Central

Goods and Services Tax Act, 2017 (**CGST Act**), to prescribe the time limit for availing the transitional credit. The said amendment has been made only to plug the legal loophole.

In this regard, Notification No. 43/2020 - Central Tax dated May 16, 2020 has enforced the said retrospective amendment effective July 1, 2017. This amendment may imply that the ground raised by the petitioner before various courts challenging the vires of Rule 117 of the Central Goods and Services Tax Rules, 2017 (**CGST Rules**), stands exhausted.

The amendment under Section 140 of the CGST Act was given effect after the judgment of the Hon'ble Delhi High Court in **Brand Equity Treaties Limited Vs. Union of India and Another [WP (C) No.11040/2018 & CM No.42982/2018].**

The Hon'ble Delhi High Court has held that the time limit prescribed under Rule 117 of CGST Rules for availing the transitional credit with respect to purchase of goods and services made in the pre-GST regime, is procedural and directory. The same cannot affect the substantive right of the registered taxpayer to avail the accrued and vested transitional Credit.

Thereafter, a Special Leave Petition was preferred by the Revenue authorities against the said order of the Delhi High Court before the Hon'ble Supreme Court, which has been admitted. The Hon'ble Supreme Court on June 19, 2020 has stayed the operation of the Delhi High Court judgment in Brand Equity Treaties Limited.

Whereas, the judgement of Brand Equity Treaties Limited, was pronounced by the Delhi High Court before the amendment to Section 140 of the CGST Act was made effective, the following three judgements have been pronounced after the said amendment has been given effect:

- *S K H Sheet Metals Components Vs U O I [W.P.(C) 13151/2019 - Delhi]*
- *Mangla Hoist P. Ltd. Vs U O I [W.P.(C) 3572/2020 & C M APPL. 12707/2020 - Delhi]*
- *Amba Industrial Corporation Vs UOI [CWP No.8213 of 2020 (O&M) - (Punjab & Haryana)]*

The Petitioners in the above three judgments did place reliance on the case of Brand Equity Treaties Limited, pronounced by the High Court. With the Hon'ble Supreme Court staying the operation of the said judgment, the effect of the above three orders pronounced by the High Courts may be negated.
However, it shall be open to the taxpayers

to claim transitional credits on various other grounds. It has been consistently held by various courts that the transitional credit is a substantive/ vested right. The validity of curtailing the same through a retrospective amendment, can very well be challenged.

The power of the Government to make a retrospective amendment cannot be denied. However, it has its limitations. As held by the Hon'ble Supreme Court in number of judgments, the legislature cannot, by way of an enactment, declare a decision of the court as erroneous or a nullity, but can amend the statute or the provision so as to make it applicable to the past. A procedural statute should not generally be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

In this regard, the important question before the courts in the ensuing times could be whether the retrospective amendment made in Section 140 of the CGST Act, curtailing the substantive/ vested right of taxpayers is valid or not.

Further, the Central Board of Indirect Taxes & Customs has recently issued an instruction vide F.No.CBEC-20/10/11/2019-GST/1001 dated June 22, 2020 to all Principal Chief Commissioners/ Chief Commissioners of Central Tax. The said instruction has been issued to suggest the probable defense to be taken against the number of writs being filed by the taxpayers before the various High Courts with regard to the claim of transitional credit.

The Government must appreciate that the transitional credit being sought by the taxpayers, is nothing but the credit of taxes already paid earlier. However, the mindset of the Government in denying the same cannot be equated as being a progressive approach. The Government should have been liberal to its taxpayers, especially the honest ones and should take the fate of transitional credit to its logical end.

Disclaimer - The views expressed herein are strictly personal to the author and should not be construed as a legal opinion. The content of this article is based on the interpretation of the GST Legislation, rules, notifications/ circulars, judgments etc. One should not act upon the information contained in this article without obtaining specific professional advice. The author is not responsible or liable for any loss or damage caused to anyone due to any interpretation, error, omission pertaining to this article.

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THIRD PARTY

FUNDING (TPF)

IN INDIA

Preface

Much has been said about third party funding in the recent past, particularly regarding its application to dispute resolution practices in India. While the vast majority of such works deal with Third Party Funding (TPF) in an arbitration setting, little has been said about its application to the litigation front – and even less in reference to mediation. The authors hope to restore balance (in whatever little way they can) through a three-part series of articles on TPF in India. The series begins with the obvious – a brief introduction to the concept, followed by an attempt to shed some light on a quandary that has troubled many on their first encounter with TPF – *is it legal*? We will examine the position of TPF in each of the dispute resolution spheres in India and conclude with an analysis of why the practice is not more prevalent in India.

1. Introduction:

What?

Simply put, Third Party Funding (also referred to as 'litigation financing'), is a financing arrangement between a party to a dispute and a funder, where the latter finances all or part of the former's costs in a legal proceeding(s), in return for a monetary percentage of the judgment or award, if successful. Subject to the terms of agreement between the parties, TPF may cover the deposits, counsel and/or the court/ tribunal's fee, cost incurred towards the use of expert witnesses / quantum analysts, costs of case management tools such as transcribing services / case record management, adverse costs order and other such dispute-related expenses. Disputes that are likely to result in a sizeable monetary award often receive

[1] Maintenance is the direct or indirect financial assistance from a third party to institute, carry on, or defend civil proceedings in which he himself has no legal interest or lawful motive for interference.

[2] Champerty is an aggravated form of maintenance with the maintainer receiving a share of the proceeds arising out of the ultimate decretal amount (also known as "champertous maintenance").

[3] Rules 18 (fomenting litigation), 20 (contingency fees), 21 (share or interest in an actionable claim) and 22 (participating in bids in execution, etc.).

[4] Ram Coomar Condoo v Chandra Canto Mukerjee (1876), Privy Council.

[5] In re G, Senior Advocate, (1955) 1 SCR 490.

TPF i.e. disputes relating to commercial contracts, high stakes tortious claims and class actions, anti-trust proceedings, and arbitrations (domestic and international commercial).

Who?

More often than not, the funder is a specialist company, or other such corporate entity - entirely removed from the dispute in *lis*. Investment banks, hedge funds and insurance companies are among the usual funders in addition to a more recent trend of crowd-funded litigation financiers. The party being funded is usually the claimant, seeing as he would be the recipient of a successful monetary award upon which TPF is premised. It is also possible that a defendant may seek funding on the basis of his counterclaim.

How?

The process is, in principle rather straight forward: A party seeking financing approaches the funder who undertakes a case assessment to ascertain whether the criteria for investment are met. If so, the funder then puts in an expression of interest proposing the terms of the arrangement. This is often followed by another round(s) of due diligence before the funding agreement is executed between the funder and the party to the litigation. Subject to the terms of the agreement, periodic updates on the costs invoked and progress of the case are made. Finally, upon delivery of a favourable judgment or award, it is portioned between the party and the funder in the manner and ratio previously agreed.

2. TPF in India – Is it legal?

TPF is not uncommon in jurisdictions such as the United States of America, United Kingdom and Singapore, but its advent in India is by comparison fairly recent but still rare. A common albeit misplaced preconception shared among those who encounter TPF for the first time, is that it is barred under Indian law primarily on account of a mis-reading of the principles of maintenance[1] and champerty[2] in India as well as certain provisions of the Bar Council of India Rules, 1975[3].

The doctrines of maintenance and champerty are rooted in efforts to correct and curtail the abuse of TPF in its early form – the intention of which, was to facilitate access to justice across all strata of society. The doctrines aimed to prevent insignificant litigation on grounds that litigation should be promoted and supported by those who have no concern in it on account of being against public policy. It was on this basis that the actions constituting maintenance and champerty attracted criminal and tortious liability. Over time, the strict application of these doctrines came to be watered down.

By 1876, the Privy Council[4] noted that since by the law of India a champortous agreement does not constitute a punishable offence, an action founded thereon, to recover losses and costs incurred in litigation, cannot be sustained on the ground that a remedy by action accrues where an indictable offence has been committed unless it is shown that such an agreement has been entered into maliciously, without any reasonable or probable cause. The decision went on to recognise that an agreement to supply funds to carry on an action as consideration for a share of the proceeds arising out of such action would not per se be opposed to public policy. Therefore, contracts concerning litigation funding by a third party were treated at par with other contracts. This decision was reaffirmed by others in holding that the doctrines of champerty and maintenance were no longer applicable in India, and that champertous contracts can be struck down only if the object is found to be in contradiction to public policy under the law in force at the time.

Come 1954, a constitution bench of the

Supreme Court of India[5] has acknowledged that the doctrines of champerty and maintenance are not applicable in India, and that 'there is nothing morally wrong, nothing to shock the conscience, nothing against public policy and public morals' in such transactions as long as lawyers are not involved by way of contingency fee structures[6].

This position remains relatively unchanged. Even today - an agreement between a disputant and a third party to finance the cost of litigation in consideration for a share of the proceeds arising out of said litigation is not per se illegal and could not be declared void on grounds of champerty and maintenance. The TPF contract must however hold up scrutiny against the public policy yardstick as set out in Section 23 of the Indian Contract Act, 1972[7] which is ultimately based on judicial precedent and evolves with time.

More recently, in 2019, the Supreme Court[8] held that in India, funding of litigation by advocates is not explicitly prohibited, but a conjoint reading of Rule (of the BCI Rules) 18 (fomenting litigation), Rule 20 (contingency fees), Rule 21 (share or interest in an actionable claim) and Rule 22 (participating in bids in execution, etc.) would strongly suggest that advocates in India cannot fund litigation on behalf of their clients. The J. Srikrishna HLC Report[9] takes a favourable stand on TPF and cites the legal developments in Hong Kong[10] and Singapore[11].

3. Going forward

To keep up with changing times and to keep from missing out on the opportunities that TPF can offer on the Indian scene, it goes without saying that India would benefit greatly from putting in place a regulatory framework as soon as possible. Express recognition of TPF in the context of civil suits by state amendments[12] to the Civil Procedure Code 1908 will not suffice. The authors have chosen to deal with this aspect separately in the context of arbitration, litigation and to some extent, mediation, in Part 2 of this series.

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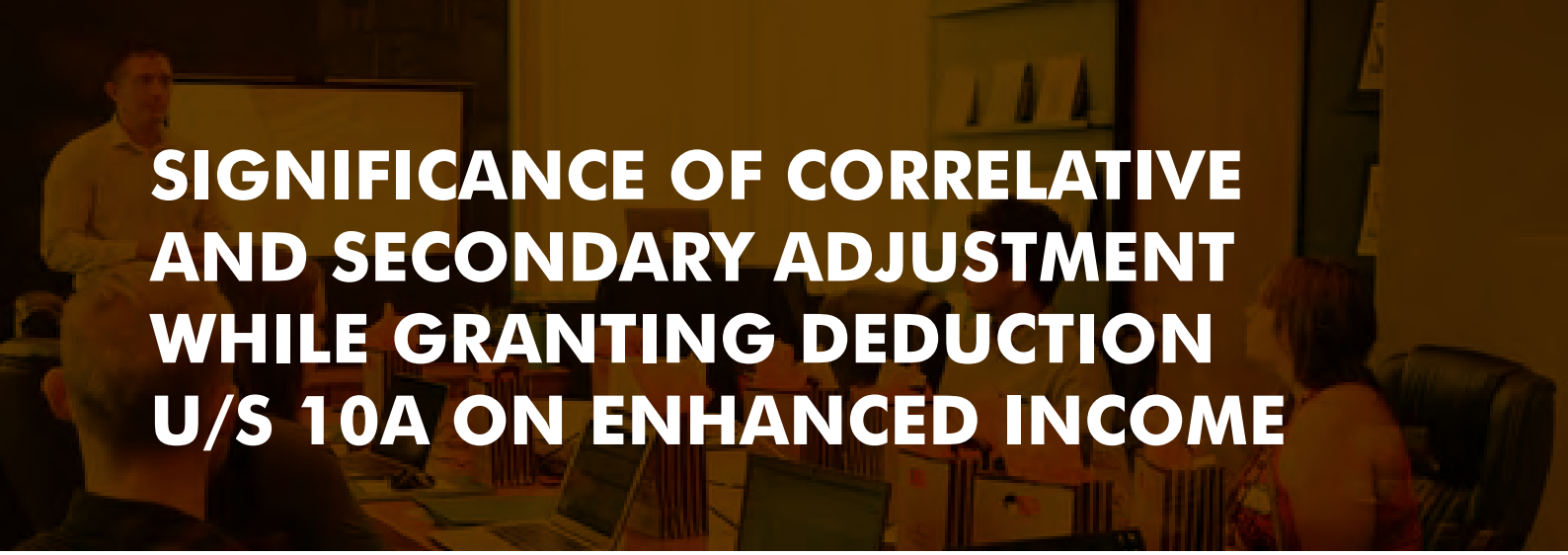
[6] Rule 20, Bar Council of India's Standards of Professional Conduct and Etiquette, Chapter II, Part VI, Bar Council of India Rules 1975 (read with Section 49(1)(c) of the Advocate's Act 1961, read with the proviso thereto).
[7] Section 23 provides that the consideration or object of an agreement is lawful, unless (a) it is forbidden by law (b) is of such nature that if permitted, it would defeat the provisions of any law or is fraudulent; (c) involves or implies injury to the person or property of another; or (d) the Court regards it as immoral or opposed too public policy.
[8] Bar Council of India v. A.K. Balaji, 2019 SCC Online SC 214; para 35.
[9] Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India – Chairman: Justice B. N. Srikrishna, Retired Judge, Supreme Court of India.
[10] Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance Order No. 6 of 2017.
[11] Singapore Civil Law Act 1999 [as amended by the Civil Law (Amendment) Act 2017 (CLA) read with the Civil Law (Third-Party Funding) Regulations 2017 (CLA Regulations)], Ch. 43, s. 5B.
[12] Amendments of the High Courts of Bombay, Gujarat, Madhya Pradesh to Order XXV, Civil Procedure Code 1908



SIGNIFICANCE OF CORRELATIVE AND SECONDARY ADJUSTMENT WHILE GRANTING DEDUCTION U/S 10A ON ENHANCED INCOME

Recently, the Hon'ble Bangalore ITAT pronounced ruling[1] in the matter of Dell International Services India Private Limited ('the Appellant'). The appeal relates to the determination of arm's length price (ALP) under section 92 of the Income-tax Act ('the Act') and the consequent additions to the total income. The issues arising from the appeal are summarized as under:

1. Wrong selection of comparables while making addition to Software Development services ('SWD'); and
2. Non-grant of deduction under section 10A of the Act determined as per Mutual Agreement Procedure ('MAP') between India and USA in relation to call centre and back-office support services ('ITeS').

This article discusses the second issue that relates to non-grant of deduction under section 10A on the enhanced export income determined as per MAP as the first issue is a routine transfer pricing issue related to selection of comparable companies.

Background

The Appellant is a wholly owned subsidiary of Dell International Inc. The Appellant provides support services to its group entities (AE) in relation to ITeS services. During the transfer pricing audit, the Transfer Pricing Officer ('TPO') found shortfall in the price received by the Appellant from AE and made an adjustment of ~ INR 1,545 million which was confirmed by the Assessing Officer ('AO'). Aggrieved by the order, the Appellant preferred an appeal before the Commissioner Appeals ('CIT(A)').

However, during the pendency of the appeal, the AE of the appellant invoked MAP for determination of ALP in relation to ITeS transaction. The competent authorities arrived at terms with respect to the mark-up on cost to be earned by the Appellant for ITeS services rendered to US tax residents. Based on the outcome, the ITeS income was enhanced by INR ~311 million and an order was passed as per Rule 44H(4) giving effect to the MAP resolution.

While passing the order, the AO did not provide benefit of deduction u/s 10A on the enhanced ITeS income pursuant to the MAP outcome because in his view, the Appellant would not be entitled to claim deduction u/s 10A of the Act as per first proviso to section 92CA(4).

The CIT(A) also rejected this contention of the Appellant and upheld that the upward adjustment made pursuant to MAP is undisclosed in the books of accounts and hence, cannot be allowed as deduction. Aggrieved by the order, the appellant filed an appeal before the Hon'ble Bangalore ITAT.

Appellant's Contention

1. Applicability of section 92CA(4): First proviso to section 92CA(4) would be applicable in cases wherein ALP is determined by AO and therefore, determination of income pursuant to MAP cannot be equated to a determination of ALP determined by the TPO. Such addition to the total income

[1] IT(TP)A No.879/Bang/2018

pursuant to MAP would be voluntary adjustments and to substantiate, the appellant placed reliance on the decision of the Hon'ble High Court of Karnataka in Igate Global Solutions Ltd (ITA No. 453/2008) and EYBGS India Pvt. Ltd vs. DCIT (2020) (I.T.(TP)A. No. 218/Bang/2015).

2. Received enhanced income should be treated similar to original transaction: It was contended that the treatment as accorded to the original transaction should be extended to the enhanced income determined under MAP considering that transactions were recorded in the books of account, invoices were raised and consideration had been received.

3. Procedure under Advance Pricing Agreement ('APA'): It was also brought to the attention of Hon'ble ITAT that to give effect to the APA outcome, a taxpayer needs to file modified return and can claim deduction under section 10AA of the Act. The Appellant placed reliance on the decision of Dar Al Handasah Consultants (Shair & Partners) India Private Limited (ITA No. 1413/PUN/2019) which upheld the deduction u/s 10A on additional income offered as per APA.

ITAT Pronouncement

The Hon'ble ITAT upheld the benefit of deduction u/s 10A to the Appellant on the following basis:

1. The Hon'ble ITAT placed reliance on the CBDT Circular No. 14/2001 wherein it has been clarified that first proviso to section 92CA(4) shall not provide deduction u/s 10A or 10B or under Chapter VI-A only in such cases where the amount represented by the adjustment would not actually have been received in India or would have actually gone out of the country.

2. The Hon'ble ITAT also placed reliance on the decision of the Pune Bench of ITAT in the case of Dar Al Handasah Consultants (Shair & Partners) India Private Limited and upheld that: (i) first proviso to section 92CA(4) of the Act will apply only to transfer pricing adjustment made by the AO; and (ii) deduction u/s 10A is to be allowed in the assessment year in which the international transaction took place even though inflow of foreign exchange has been accounted in subsequent year.

Our Comments

This ruling is a welcome step which signifies the correlation between correlative and secondary adjustment in settling the dispute through bilateral mechanism. While correlative adjustments help in resolving the effect of economic double taxation, on the other hand, secondary adjustments help in maintaining the ideal situation of arm's length principle.

Once the terms of arm's length arrangement have been agreed and adjustment amount has been brought into India, the enhanced income should be treated as if the transaction had originally been entered into between the associated enterprises following the arm's length principle and therefore, all benefit available under the provisions of the Act should also accrue to the enhanced income.

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Vivek G & Co.

TAX COURT SPEAKS!

An Insight Into The Recent Key Judicial Rulings

Income Tax Issue	Legal take away	Judicial Body
TDS default proceedings u/s 201(1)(1A) against assessee-employer	Assessee as an employer discharges its obligation by making a bonafide estimate of salary. Thus, default proceedings u/s 201 does not hold good	ITAT Bangalore
Deemed dividend u/s 2(22)(e)	Transactions under a current account, between holding and subsidiary are not within the ambit of deemed provisions of Section 2(22)(e)	ITAT Delhi
Enhancement of assessment by CIT(A) on new source of income	A source of income not considered by AO cannot be taken up by CIT(A) for enhancement of assessment	ITAT Kolkata
Power of ITAT to grant stay – Amendment to section 254(2A)	Amendment in first proviso to Section 254(2A), provides for deposit of at least 20% of the demand by assessee as a precondition for ITAT to grant stay ITAT therefore refers the matter to President for consideration of constitution of a larger bench and to frame questions for the larger bench's consideration	ITAT Mumbai
ATM is 'computer' for claiming depreciation	ATM machine is dependent on computer and is an integral part of ATM machine and on the basis of information processed by the computer in ATM machine only Thus, entitled for depreciation at a higher rate of 60%	Karnataka High Court
Nature of non compete fees paid to key employees and TDS thereon under India-USA DTAA	Non compete fees paid to key employees working in USA is in nature of salary (not business income) and liable to be taxed in USA under Article 16 of India-USA DTAA	Karnataka High Court
Nature of corporate guarantee fees for the purpose of TDS under India-Netherlands DTAA	Under the India-Netherlands DTAA, corporate guarantee fee is neither interest nor FTS. Hence, no TDS applicable	ITAT Delhi
Valuation u/s 56(2)(viib)	AO is free to determine valuation however, cannot change the basis of valuation adopted by the assessee which was DCF in the present case	ITAT Bangalore

Income Tax Issue	Legal take away	Judicial Body
Limited scrutiny' to 'complete scrutiny'	Pre-requisite to fulfill the conditions provided under CBDT Instructions No.5/2016 to convert the case from limited scrutiny to complete scrutiny As per Instructions No.5/2016, AO will be required to form a 'reasonable view' that there is a possibility of under assessment of income if the case is not examined under 'complete scrutiny'. while forming the reasonable view, the AO would ensure following: A. There exists credible material or information available on record for forming such view; B. This reasonable view should not be based on mere suspicion, conjecture or unreliable source; C. There must be a direct nexus between the available material and formation of such view.	ITAT Delhi
Penalty u/s 271(1)(c)	Non-mentioning of specific charge in penalty notice would vitiate the penalty proceedings	Bombay High Court
Claim of demerger expenses u/s 35DD	Satisfaction of conditions as provided by High Court in the scheme of demerger sufficient to hold the demerger as complete and entitles the assessee to claim expenses u/s 35DD. Any further conditions imposed by AO for claim of expenses on the assets does not hold good	ITAT Kolkata
Reopening of assessment u/s 148 basis change in opinion	Non-rejection of assessee's explanation in the assessment order would amount to the AO accepting assessee's view, thus forming an opinion. Thus, reasons for reopening assessment is mere change in opinion and thus without jurisdiction	Supreme Court

Indirect Tax Issues	Legal take away	Judicial Body
GST liability on activities of a co-operative housing society; applicability of 'doctrine of mutuality'	A co-operative housing society managing, maintaining and administering the property of the society, raising funds, organizing social, cultural or recreation activities etc. is undertaking a taxable "supply" under GST to its members. Holds 'doctrine of mutuality' inapplicable under GST since a registered co-operative society is a separate 'person' under GST.	Advance for Advance Ruling ("AAR"), Maharashtra
Classification of parts of CNG conversion kits for cars	Parts of CNG / LPG conversion kits like changeover switch, emulator, timing advance processor and pressure gauge are used to convert motor vehicles for running on CNG/LPG and qualify as parts of motor vehicles classifiable under tariff heading 8708* (liable to 28% GST). (*contrary to earlier ruling of AAR Karnataka which qualified these as 'parts of engines' under tariff heading 8409)	AAR Gujarat
Levy of service tax on import of designs and drawings on which customs duty has been paid	Import of designs and drawings into India in physical form for a project is liable to service tax (under 'Consulting Engineer services') even though customs duty has been paid on the import – levy of customs duty doesn't alter the nature of the transaction which is provision of services.	CESTAT Mumbai* (*This will remain relevant even under GST)
Challenge to validity of Rule 142(1)(a) of CGST Rules	Writ challenge to validity of CGST Rule 142(1)(a) (pertaining to issuance of summary notice) rejected and held that this rule is in "no manner conflict with any of the provisions of the Act"	Gujarat High Court
Plea for presence of advocate during search and seizure under S.67 of CGST Act	Writ filed seeking direction for presence of an advocate during search and seizure under S.67 of CGST Act since assessee apprehended coercive tactics – rejected, since no such facility in law; S.67(10) only envisages presence of two or more independent and respectable inhabitants of the locality as witnesses to a search.	Madhya Pradesh High Court

Indirect Tax Issues	Legal take away	Judicial Body
Indian branch of a foreign company providing maintenance services to Indian client – liable to GST on a forward charge basis?	Indian branch of a Russian entity providing maintenance services to Indian client with respect to the machinery and equipment it had supplied and who maintains suitable structures in terms of human and technical resources at the sites of client - 'location of supplier' is in India as per section 2(15) of the IGST Act and liable to GST on a forward charge basis	AAR, West Bengal
Can National Anti-Profiteering Authority ("NAPA") direct further profiteering investigation against all other product lines of a company?	NAPA's direction of further investigation for profiteering in supply of "other impacted products" was held to nothing but a 'roving enquiry' and was without any basis/ 'reason to believe'. Considering that Philips has a large product line, such direction for a roving enquiry would paralyze the functioning of the company. Stay granted.	Delhi High Court
Not reducing the selling price despite reduction in GST rate from 5% to NIL w.e.f. January 01, 2019 – profiteering?	Not reducing the selling price of 'Frozen Green Peas' and 'Frozen Sweet Corn' despite reduction in GST rate from 5% to NIL w.e.f. January 01, 2019 qualifies as profiteering. Following calculation methodology upheld: • Comparing average base price with selling price post rate reduction; • No concession for denial of ITC w.e.f. January 01, 2019 as there was no reversal of ITC on closing stock of inputs/input services and capital goods as on Dec 31, 2018 (as per Section 17 read with Rules 42 and 43 of CGST Rules)	National Anti-Profiteering Authority

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13.07.2020

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