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

From FOUNDER'S DESK

Aashish Verma

This isn't business as usual and the stress and uncertainty is definitely not all in a day's work.

As the world reels in from the economic effects of this crisis we pause to strengthen the relationships we have built over the years with the like-minded people throughout the community and we find deep satisfaction in witnessing encouraging response on our ideas, innovations, and immense hard work through our Knowledge Dissemination sessions.

With prudently carrying forward the consistent operating philosophy of our Organisation, we have successfully transformed our business from traditional practices to unprecedented domain of Virtual Live Sessions. Thanks to the concerted efforts of our team we have managed to sail through this global crisis into a new age with stronger foundation.

As the world seems to become more uncertain and complicated, the certainty and simplicity that our Virtual Live Sessions provide for our clients becomes more valuable.

We are not resting on our laurels. Every day we strive to get better and improve upon our core values of Excellence ,Customer focus, Empowerment Quality Assurance ,Diligence and Time Management .Our E-magazine amalgamates the same values and stands for thought provoking, cutting edge trends, statistical and in-depth analysis from the world of compliances .

Sadly, there is no instruction manual to brave these testing times ,however I hope that you and your family remain in good health as we navigate this global crisis together and Thank you for taking the time to acquaint yourself with our thoughts.

3rd Annual Fraud, Risk & Compliance
Virtual Conference & Awards

In this Virtual conference conducted with The Facility Hub as our Associate Partner on 13th August, 2020, Dr. Balsing Rajput- Superintendent of Police Maharashtra Cyber delivered the Keynote address; key issues like Cyber threat and protection of whistle blowers, fraud investigation and usage of technologies to stay ahead of fraudsters were discussed by Ankoosh Mehta Partner at Cyril Amarchand Mangaldas, Anirban Banerjee Global Head - Business Advocacy & Excellence at TCS BFSI Operations whereas Rajkumar Shriwastav Certified Fraud Examiner, Hardik Sheth Head - Internal Audit & Risk Management at Tech Mahindra Business Services, Alok Saraswat Head - Fraud Control Unit at Max Bupa Health Insurance Company Limited, Nirmal Paul Vice President and Head - Fraud Prevention Unit & Claims Investigation at Bajaj Allianz Life Insurance Company had an indepth discussion on Understanding your biases in an Interview.
Panel discussion on The power of partnership: Joining forces to fight financial crime was conducted anchored by Saurav Kumar Mohanty Director- Risk Management at FIS Global along with GK Gupta Vice-President – Internal Assurance at Max Life Insurance Company Ltd, Hardik Dixit Senior Lead – Fraud Risk Management at NPCI.

Virtual Training on
Master the Art of Family Business Dynamics
Wills, Probate & Charters

Webinar was conducted with Cyril Amarchand Mangaldas as our knowledge partner on 18th & 19th August, 2020 where Introduction to the idea of family-run businesses, brief reference to a few leading cases of family disputes and the core issues that arose in such cases were discussed on day One, and basic legal concepts of Wills, Family settlement agreements were discussed Day 2 by Ankoosh Mehta- Partner at Cyril Amarchand Mangaldas.

Certificate Course on **Detecting and Preventing Internal and External Fraud**

In virtual Certificate Course on Detecting and Preventing Internal and External Fraud conducted from 24th – 28th August, 2020, Panel discussion on The Fraud Problem was conducted by Nagesh Pinge (Moderator) Risk Management & Internal Audit Expert along with Ashish Jain- Chief Internal Audit Officer at Nayara Energy Limite, AR Parthasarathy Partner at RGN Price & Co.
Alok Saraswat Head - Fraud Control Unit at Max Bupa Health Insurance Company Limited discussed about Conducting a Fraud Risk Assessment and Recognizing the Red Flags of Internal Fraud whereas Sanjiv Kumar Dwivedi -Senior Vice President - Head of Department at Bajaj Allianz General Insurance Company Limited shared his insights on Fraud Detection. Sundar Narayanan Director, Forensic Service at Nexdigm (SKP); Shefali Desai Manager, Forensic Service at Nexdigm (SKP) had a detailed discussion on Investigation Techniques- Forensic Accounting Investigation - What it Is. During the last day, Giridhar Janardana- Partner at BlueRidge Consulting Services Board Member, IIA Madras Chapter discussed about Establishing an Anti-Fraud Culture. Overall the training course was very interactive.

2nd Annual Digital Payments Summit – Driving Digital Payments post Pandemic

2nd Annual Digital Payments Summit organized by Achromic Point virtually along with The Facility Hub as Associate Partner, on 4th September, 2020, where key issues like payment technology, mobile payments etc. were discussed.

The Conference commenced with a very warm welcome from the Director of Achromic Point - Aashish Verma and inviting Anirban Banerjee Global Head - Business Advocacy & Excellence at TCS BFSI Operations to share his insights on Impact of Covid 19 – Tipping Point for Digital Payments and Securing the Digital Payments Ecosystem.
Expanding and Deepening of Digital Payments Ecosystem was discussed by Swaroop Kulkarni Director of Products at PayU India, whereas Kunal Kathpal Chief Risk Officer at Hinduja Leyland Finance shared his insights on Heart of Digital transformation - Rise of artificial intelligence (AI) which received a lot of attention from the audience.

WHISTLE BLOWER COMPLAINTS, PROTECTIONS & INVESTIGATIONS

INTRODUCTION

Whistle-blowers play a crucial role in promoting corporate governance within a company by identifying and flagging inconsistencies or irregularities pertaining to regulatory compliance as well as governance-related issues such as fraud and misreporting. The edifice of corporate governance is built on accountability and transparency, wherein the responsibility to maintain an effective system of checks and balances in an organisation is shared between every member i.e. from top-level executives to employees of every level and division.

In this article, we explore the legislative framework and jurisprudence pertaining to whistle-blower complaints and protections. Further, we also explore the viability of internal investigations in the event of a whistle-blower complaint alleging malpractice within an organisation.

WHO IS A WHISTLE-BLOWER?

The term 'whistle-blower' can mean any person who makes a disclosure regarding any unethical or illegal activity in the operations of a company. The Supreme Court of India in its 2010 judgment in ***Indirect Tax Practitioners' Assn. v. R.K. Jain***[1], held that a whistle-blower is any ordinary employee of a public authority who has raised concerns over corruption or wrongdoing by such authority. The court went on to coin two types of whistle-blowers, namely, (i) internal whistle-blowers, who may be any person within the company and (ii) external whistle-blowers, who may not be directly associated with the company. The Supreme Court also observed that the fraud, violation of law, and corruption are part of misconduct, and complaint against

such acts may be made internally i.e. to the said organisation itself) or externally i.e. to regulators, law enforcement agencies, or the media.

Further, the Supreme Court in its 2013 judgment in ***Manoj H Mishra v. Union of India***[2] observed that to be accepted as a whistle-blower, a person's primary motive behind disclosing any illegal activity of a public organisation or authority has to be public interest.

PROTECTIONS ACCORDED TO WHISTLE-BLOWERS

Section 177 of the Companies Act, 2013, provides for a 'vigil mechanism' that certain companies can set up to monitor its directors and employees in order facilitate reporting of genuine concerns. Further, Section 177(10) also provides for adequate safeguards for those who feel victimised by the vigil mechanism. All companies which are required to implement the vigil mechanism must also disclose the same on their websites as well as Board reports. It is pertinent to note that it is not mandatory for private limited companies to implement a whistle-blower policy, however, they may do so to encourage transparency within the organisation.

The Securities Appellate Tribunal (SAT) has observed that complaints from whistle-blowers are a vital source of information for enforcement authorities. Therefore, disclosures which reveal the identity of whistle-blowers may be detrimental and run contrary to the regime itself, as individuals may be unwilling to share information pertaining to misconduct, if there is a likelihood of danger or intimidation. Further, the tribunal observed that complaints from whistle-blowers are received and held by the Securities amd Exchange Board of India (SEBI) in a fiduciary capacity, since such complaints are made under an implicit trust that the identity of the complainant would be kept confidential[3].

As per the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (**LODR**,) a listed entity is required to implement an effective whistle-blower mechanism to enable stakeholders, including employees, to freely communicate their concerns. Further, every listed company is required to publish information pertaining to their whistle-blower mechanism on their website. Similarly, under the SEBI (Prohibition of Insider Trading) Regulations, 2015, a listed company is required to have a whistle-blower policy and ensure the employees are well aware of the tenets of the same in order to encourage reporting of a leak pertaining to unpublished price sensitive information.

INTERNAL INVESTIGATIONS

When a complaint highlighting misconduct or fraud by an employee of a company is brought to the attention of the company, an internal investigation into the same may be initiated. While it is not mandatory, companies can choose to conduct an internal investigation to validate whether any irregularities or offences have been committed and assess if any financial loss has been caused as a result of the same.

Often, the allegations made against employees in whistle-blower complaints can point towards offences which attract penal provisions and warrant an investigation by the police or any other relevant investigative or regulatory authority. In such cases, the burden of proof is resultantly increased to substantiate allegations in the whistle-blower complaint. For instance, if a whistle-blower complaint contains allegation pertaining to wrongful disbursement of loans, possible offences that may be attracted include criminal breach of trust and cheating under the Indian Penal Code, 1860. In order to make out an offence of criminal breach of trust and cheating, it may be relevant to show that an employee had been (i) entrusted with the duty to ensure sanctioning,

1 MANU/SC/0593/2010
2 MANU/SC/0351/2013

disbursement and recovery of loans, (ii) the employee breached internal policies in sanctioning the loan and (iii) the loss caused to the company. Another example could be siphoning of company funds through procurements, inter alia, by creation of fake purchase orders or invoices. This kind of fraud would usually involve forgery where evidence evidence will have to be shown to demonstrate that the said employee had dishonestly created or assisted in creating a false or forged document, without the knowledge of the company.

Therefore, carrying out an internal investigation may help a company to strategise and adequately prepare on the way forward. It is also an effective tool of detecting any other underlying issues in a company's compliance and governance structure, which may resultantly help the company to mitigate future issues.

While an internal investigation report can be an important tool to identify the culpability of the company and its employees, the report may by itself not binding on the court. The Supreme Court in its 2019 judgment in ***Chennadi Jalapathi Reddy v. Baddam Patapa Reddy***[4] observed that a court cannot form its opinion merely based on the expert opinion as it is not considered as conclusive proof. However, in the event that an expert report is corroborated through evidence, the same can hold evidentiary value before a court.

KEY TAKEAWAYS

Effective whistle-blower mechanisms can be the foundation for upholding corporate governance norms within an organisation. Additionally, whistle-blower policies establish a level-playing field within an organisation and provide a platform to employees and directors of a company to raise concerns pertaining to the operations of the company. However, a key factor that may derail the purpose and objective of a whistleblowing mechanism is the perception of potential whistle-blowers that their organisation lacks seriousness when addressing complaints. Therefore, it is extremely important for organisations to demonstrate their intent towards protecting potential whistle-blowers and building a robust whistle-blower progamme.

In this regard, internal investigations can be effective in revealing relevant facts pertaining to a complaint so that the management or board can make an informed decision as to how best to proceed. Further, it also demonstrates the company's good-faith response to complaints and possibly helps in insulating the company's management or board of directors against allegations of complicity. Lastly, internal investigations are effective in promoting a culture of transparency and compliance throughout the organisaton.

3 Appeal No. 3335 of 2018
4 MANU/SC/1165/2019

Ankoosh Mehta
Partner
Cyril Amarchand Mangaldas

Samiksha Pednekar
Associate
Cyril Amarchand Mangaldas

Srinivas Chatti
Associate
Cyril Amarchand Mangaldas

GOODS SENT FOR JOB-WORK - A LACUNA IDENTIFIED

INTRODUCTION

Section 143 of the Central Goods and Services Tax Act, 2017 ('CGST Act') specifies a time limit within which a Principal must bring back the inputs or capital goods sent to its job-worker failing which would result in treating it as a deemed supply of goods. The vital question here is '***what should the taxable value be for charging Goods and Services Tax ('GST') on such deemed supply?***'.

In this write-up, we have analysed the above proposition and presented a possible correct position under GST Laws.

PROVISIONS & ITS ANALYSIS

Basics of Supply vis-à-vis Deemed Supply under Section 143

Section 7 of the CGST Act provides that consideration is mandatory for an activity or a transaction to be qualified as a supply.

Section 7(1)(c) of the CGST Act, however, provides that following activities would qualify as a supply even without any consideration:

- Permanent transfer or disposal of goods where Input Tax Credit ('ITC') has been taken
- Supply of goods or services between related persons and distinct persons
- Supply of goods between principal and agent
- Import of services from a related party in course or furtherance of business

Section 7 read with Schedule I, therefore, makes it clear that movement of goods from a Principal to a job-worker is not a supply as neither it is for any consideration

nor it is specified in Schedule I to the CGST Act. Section 19 and 143, however, make it a deemed supply.

Now, there is no consideration between a Principal and a job-worker for such a deemed supply. Therefore, it is logical to treat it as a 'supply without consideration'. Here, the moot question is 'whether Clause 1 of Schedule I to CGST Act covers such deemed supply or it is a 5th variant of a 'supply without consideration' in addition to Schedule I?'.

It seems to be a 5th variant of a 'supply without consideration' since it is a 'deemed supply' and not a supply under Section 7 and secondly, there may not be permanent transfer or disposal. Having said that, it would not make any difference from a valuation perspective if such deemed supply is said to be covered by Clause 1 of the Schedule I to the CGST Act.

Valuation vis-à-vis Deemed Supply under Section 143

Having the basics set out in above paragraphs, we now move onto the valuation aspect of a 'supply without consideration'.

Section 15(1) of the CGST Act provides that taxable value shall be the Transaction Value ('TV') i.e. the price actually paid or payable for the goods. Section 15(1) read with sub-section (4) also provides that where the supplier and the recipient are related or where the price is not the sole consideration, value given under Central Goods and Services Tax Rules, 2017 ('CGST Rules') shall be taken.

As a corollary, generally, TV shall be taken as the taxable value and resort to CGST Rules shall be made either in case of related party transactions or where the entire consideration is not reflected in the price actually paid or payable. Thus, where there is no consideration at all, resort to CGST Rules cannot be made.

Generally, supply from Principal to a job-worker does not involve any consideration neither monetary nor non-monetary whatsoever. Therefore, resort to CGST Rules cannot be made and value shall be the TV which is NIL.

Similarly, in case of Clause 1 of Schedule I i.e. Permanent transfer or disposal of business assets on which ITC is taken, resort to CGST Rules cannot be made. Thus, even if deemed supply vis-à-vis job-worker is covered by Clause 1 of Schedule I, transaction value shall be taken as the taxable value which is NIL.

Therefore, it seems that the value of deemed supply under Section 143 is to be taken as NIL.

ITC reversal vis-à-vis Deemed Supply under Section 143

As analysed above, on the outward supply front, the value of supply shall be NIL. However, it is imperative to understand it from the ITC standpoint as the erstwhile Cenvat scheme required a credit reversal in similar scenarios.

Section 16 of the CGST Act specifies certain conditions for availment of ITC. Section 17 deals with the apportionment and blocked ITC. In our view, inward supply of goods for making outward deemed supply under Section 143 meets the conditions under Section 16 and do not require reversal under Section 17.

Section 18(6) read with Rule 40 & 44 of CGST Rules, however, provides that in case of supply of capital goods on which ITC has been availed, the taxpayer shall pay an amount equal to the higher of the following:

- ITC as reduced proportionately on pro-rate basis in terms of Rule 40 & 44; or
- Transaction value

Therefore, in case the capital goods are not brought back within three years, the Principal would need to pay an amount in terms of Section 18(6) of the CGST Act. Interestingly, no such provision is there for reversal of ITC on Inputs in case of delay beyond one year.

CONCLUSION

We believe that there has been a miss by the legislature to effectively tax the deemed supply of inputs under Section 143 of the CGST Act.

Many Taxpayers face a genuine hardship in getting the inputs or capital goods back from job-workers for number of reasons. As long as, a Principal gets ITC of such deemed supply, there should not be any objection. But, when it comes to denial of ITC, whether proportionate or full, tax charged on such deemed supply would inflict certain cost on the Principal. In such a situation, one may contest on the above grounds.

Disclaimer:
The views expressed in the update are strictly personal, based on our understanding of the underlying law. We are not responsible for any injury, loss or cost arising to any person who refers this update and acts or refrains from any act accordingly. We would suggest that a detailed legal advice must be sought before relying on this update.

Yogesh Gaba
Managing Partner- Indirect Tax
GABA & CO.

Transfer Pricing on Corporate Guarantee

Continuing battle

Introduction

'Transfer Pricing' is the process where two companies belonging to the same multinational group, set up beyond national boundaries, trade with each other, by establishing the price for the particular transaction, where the price established is known as the 'transfer price'. The distinction between a regular commercial transaction between independent firms, and a transfer pricing transaction between associated enterprises is that, the latter may not be subject to the same market forces that dictate the relations between the former. Therefore, transfer pricing transactions may be arbitrary and dictated, having no relation to cost and added value, diverging from the market forces.

While transfer pricing in itself is neither illegal, nor abusive, it is transfer mispricing that is manipulative, and thus, illegal or abusive. This may be used as a tool to evade taxes, among various other illegal uses. In order to prevent evasion of taxes by undervaluing transactions, the Transfer Pricing Regulations have been accepted globally, having regard to the arm's length price for computing international transactions. Domestically, the Transfer Pricing Regulations were incorporated in India under Chapter X (Section 92-92F) of the Income Tax Act, vide Finance Act, 2002, where the OECD guidelines served the yardstick to structure these regulations.

The question thus arising is with regard to the transactions to which these Transfer Pricing Regulations are applicable. For the Transfer Pricing Chapter under the Finance Act to be applicable, it is requisite that the transaction must fulfil the criteria of an international transaction as under section 92B, Income Tax Act. However, there has been a significant amount of debate with regard to the transactions of intragroup financing, in particular, 'corporate guarantee'. A 'guarantee' has been defined as "The assurance that a contract or legal act will be duly carried out". Under Rule 10TA©, 'corporate

guarantee' has been defined to mean "explicit corporate guarantee extended by a company to its wholly owned subsidiary being a non-resident in respect of any short-term or long-term borrowing, wherein explicit corporate guarantee does not include letter of comfort, implicit corporate guarantee, performance guarantee or any other guarantee of similar nature." Hence, simply put, a corporate guarantee is a guarantee given by the parentcompany on behalf of the borrower-company ensuringrepayment of loan advanced by a lender in case ofdefault in repayment by the borrowing company.

The debate hinges around the question of whether transactions involving corporate guarantee should fall within the ambit of international transactions or remain outside its purview. It is pertinent to note that, the judicial trend concerning the issue has been considerably contrasting.

Coverage on Corporate guarantee in Sec 92B

Section 92B laid down the parameters for a transaction to qualify as an international transaction. The essentials of this section, at the time of insertion, are as follows:

- a transaction between two or more associated enterprises, where at least one of the enterprises is a non-resident;
- purchase, sale or lease of tangible or intangible property;
- provision of services, or lending or borrowing money;
- any other transaction having a bearing on the profits, income, losses or assets of such enterprises
- mutual agreement or arrangement for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided
- if there exists a prior agreement in relation to the relevant transaction between any other person and the associated enterprise, it will be deemed to be an international transaction

However, corporate guarantee was left out of transfer pricing regulation due to non-inclusion under section 92B, and varied interpretations by the judiciary. Consequently, corporate guarantee was included within international transactions by retrospectively inserting an explanation to the section pursuant to Finance Act, 2012. The explanation read as follows:

"Explanation—for the removal of doubts, it is hereby clarified that-

(i) *the expression "international transaction" shall include-*

(c) *Capital financing, including any type of long term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business;"*

Here, it is imperative to note that when an Indian company provides corporate guarantee to its associate enterprise

outside India, it does not involve any actual inflow or outflow of money, nor the transfer of any asset or liability. This corporate guarantee essentially has the following effects-

- The bank takes into consideration the credit rating of such a guarantor, in order to lend the money to the borrower (associated enterprise). Resultantly, the borrower benefits from the loan received at a much lower cost in terms of rate of interest, as opposed to the much higher rate of interest pursuant to its own credit rating. Further, the borrower has access to an increased amount of debt.
- The level of guarantee will be influenced by the risk assumed by the guarantor.

Recently, on 11 February 2020, the OECD released its transfer pricing guidelines, which provide detailed guidance on financial transactions. The report consists of a dedicated section on "Financial Guarantees", highlighting the economic benefits to be derived from financial guarantees, in order to accurately delineate financial guarantees. These include, firstly, a more favourable rate of interest; and secondly, access to a larger amount of funds.

Contrasting Judicial pronouncements

The international transaction, as explained under section 92B of the Income Tax Act has often been disputed by the department to include a corporate guarantee given by an assesseeto its foreign associate enterprise. The tribunals and the High Courts stand divided, furthering the uncertainty revolving around the transfer pricing in corporate guarantee transactions. Below-discussed cases have tried to resolve the existing conundrum but have failed to establish a firm judicial standpoint.

In Videocon Industries Ltd. v. Addl. CIT55 taxmann.com 263, ITAT was of the view that "corporate guarantee given to AEs which does not involve any cost and which does not have bearing on profits, income, losses or assets of the AE will be outside the purview of international transaction". This pre-condition about impact on profits, income, losses or assets of such enterprises is a pre-condition embedded in Section 92B(l) and the only relaxation from this condition precedent is contained in clause (e) of the Explanation which provides that the bearing on profits, income, losses or assets could be immediate or on a future date. Essentially, the Tribunal considered a series of hypothetical situations wherein a receivable or debt in the course of the business may not have any impact on the assets, income, finances or losses of the company.

Similarly, in the case of Micro Inks Ltd., Vapi vs Assessee 63 taxmann.com 353, the tribunal went into lengths and observed that a corporate guarantee is not in the nature of the provision of services. Thus, such a transaction would be outside the purview of 'international transaction' under Section 92B. Also, in the given case, since the issuance of corporate guarantees did not have "bearing on profits, income, losses or assets", it did not constitute an international transaction, in respect of arm's length price adjustment. In order to attract the arm's length price adjustment, a transaction needs to qualify as an `international transaction', as that crucial aspect was missing here the corporate guarantee transaction did not attract arm's length pricing.

The Tribunal pointed out the differences between a general bank guarantee and a corporate guarantee stressing on the most vital cog, that is, the former is given in return of capital assets of the company or on the basis of credit ranking of the bank's client, while the latter is governed by compulsions of group synergy rather than future obligations that are required to be met.

The Tribunal observed that the corporate guarantees issued by the assessee were not in the nature of 'provision for services' and but rather a shareholder activity which are mutually exclusive in nature. In the light of these discussions, it was opined that as per the OECD Guidance in this case, the issuance of corporate guarantees, was in the nature of quasi capital or shareholder activity - as is the uncontroverted position on the facts of this case, does not amount to a service in which respect of which arm's length adjustment can be done.

Further, in the case of Bharti Airtel vs ACIT, it was observed by the tribunal that generally, an assistance provided by an assessee to its associated enterprise will fall outside the ambit of international transaction under section 92B (1) of the Act.Although, such an assistance should not cost anything to the assessee and also the assessee could not have realized money by giving it to someone else during the course of its normal business. Thus, such an assistance or accommodation will not have any bearing on its profits, income, losses or assets, and therefore will not constitute as an international transaction. The judgement delivered by the Tribunal was primarily based upon the same principle as the above mentioned Videocon Industries case. It was opined that the transaction of the assessee with the AE did not to stir any effect upon the assets, losses, profits and finances of the assessee. Hence, even though it prima facie looked like an 'international transaction', the pre-condition embedded in Section 92B(1) acts as the determining factor in the given case and saves the assessee from ALP obligations. As also discussed in the Videocon case, the Tribunal stated in this verdict that the only exception from the pre-condition of Section 92B(1) would be in cases where the bearing on assets, losses, profits and finances could arise on a later date.

Deviating from the above rulings, the tribunal has at times considered a corporate guarantee as an international transaction depending upon the peculiar facts of the cases. In ACIT v Nimbus Comunications Ltd, 34 taxmann.com 298 ITAT rejected assessee's contention that corporate guarantee was part of business strategy for market penetration and held that since there was an apparent benefit (improved creditworthiness and lower interest rate) accrued to associate enterprise by the guarantee provided by the assessee, guarantee commission should have been charged at arm's length price. A financial loan guarantee is a commitment which was entered inro by the assessee with a non AE lender of its Associated Enterprise. This obliged the assessee to cover the default risk faced by its associated enterprise. This is consonance with the OECD Transfer Pricing Guidelines whrein it was stated that if the higher credit rating of an AE is due to an intra-group guarantee then this increases the profit potential of such AE. Hence, a clear benefit was accrued to the AE by the guarantee.

Similarly, in Prolifics Corporation Ltd. v. Dy. CIT, 55 taxmann.com 226 it was observed that provision of guarantee involves risk and there is a service provided to associate enterprise in increasing its creditworthiness in obtaining loans in the market. There may not be an immediate charge on the Profit and Loss account but the inherent risk cannot be ruled out in providing guarantees, and therefore, invoking provisions of transfer pricing is justified. The assessee argued that a corporate guarantee is just in the nature of an additional guarantee and does not lead to the incurring of any cost or risk to the shareholders. The assessee also argued that international transactions as defined under Section 92B does not include corporate guarantees. The authorities on the other hand argued that the retrospective amendment made by Finance Act, 2012 squarely covered corporate guarantee.

Further, in Advanta India Ltd. vs Asstt. CIT, 156 ITD 0286 it was held that the guarantee had a bearing on the profits and income of such enterprise, for the reason that the assessee did incur costs on the issuance of theguarantee to its subsidiary. Thus, the issuance of guarantees in this caseconstituted an international transaction.The Tribunal opined that the assessee did incur costs on issuance of this guarantee (i.e. payment of Rs 4,39,005 to the ICICI Bank in this respect), and, for that reason, the issuance of guarantee had an impact on the profits and income of such enterprise. Hence the guarantee qualified as an international transaction.

In Infotech Enterprises Limited, Hyderabad v. Addl.CIT41 taxmann.com 364, it was held that "the corporate guarantees issued by the assessee to City Bank of India for the benefit of its US subsidiary, is an international transaction within the meaning of section 92B. Though the immediate transaction was between assessee and CITI Bank of India, benefit of guarantee was for US Subsidiary and, hence, assessee had rendered a service to its US subsidiary for which it must charge fees at an arm's length."

In the present case, the Tribunal opined that though the immediate transaction is that of the assessee and CITI Bank India the benefit of the guarantee is for the US Subsidiary and hence the assessee has rendered a service to its US subsidiary for which it must charge fees at an arm's-length.

Conclusion

Corporate guarantee transactions between an assessee and its associate enterprise have been prevalent in the corporate world for quite some time now. Although, strenuous litigation revolves around the matter when it comes to transfer pricing proceedings. The tribunals have distinct standpoints while deciding whether a corporate guarantee provided to associate enterprise is in the limits of 'international transaction' as defined under section 92B of the IT Act. There exist numerous decisions backing arguments from both sides but a settled position is yet to be witnessed. Such a scenario ascribes ample importance to the facts of each case and the arguments presented by the department and assessee.

The explanation (c) brought in through retrospective effect by the legislature fails to bring clarity in the present matter. The only way through which tax authorities can be benefitted is when Explanation (c) to Section 92B can be made subject to Transfer Pricing Regulations. This can be done once it is shown onrecord that certain associated costs are inherent with the advance of the guarantee by the assessee to its associated enterprise. It can be expected that the legislature can make an effort to resolve this conundrum by introducing another explanation to section 92B by way of an amendment. However, till then the tribunals will have to rely on the factual basis of a case to determine the perimeters of international transactions.

CA Maneet Pal Singh
Partner, Tax & Regulatory
I.P. Pasricha & Co

PREFERENCE SHARES

Regulatory issues in valuation

Introduction

Preference shares are one of the most popular investment instruments for investors given the various benefits that come with investing into preference shares in unlisted companies. The benefits come in the form of preference dividends, option of convertibility, option of redeemability and the option of participating in additional profits of the company. This malleable nature of these instruments creates an interest in investors for such instruments.

India presents a different situation for the investors as the preference shares issued by an Indian company cannot be irredeemable i.e., they have to be redeemed and they can have a maximum tenure of 20 years. At this outset, the preference shares with limited life of 20 years do come across as more of debt than equity.

However, the Companies act, 2013 defines Preference capital as that part of the equity capital that has a preferential right over dividends and repayment in case of winding up or repayment of capital.

Valuation of Preference shares

The hybrid nature of this instrument enables the preference shares to be treated either as debt or as equity. However, this deciding question can be answered by nature of the custom-made instrument in which the investor has invested the monies. If the preference shares are, for example, Optionally Convertible Redeemable preference shares with a dividend they fall more the debt side of the equity-debt spectrum rather on the equity side.

Compulsorily convertible preference shares (CCPS), on other hand, are the most frequently used instruments by the Foreign investors, given the provisions of Foreign Exchange Management Act, 1999 (FEMA), as these instruments are compulsorily, mandatorily and fully convertible into equity shares they can be considered as equity instruments. Interestingly, valuation exercise comprehensively considers a plethora of factors including conversion timeline, dividend payment and profit participation.

Hence, valuation of such complex instruments has to be done carefully to ensure the value does not exceed nor fall below the fair value.

The internationally accepted valuation methodology divides the valuation approaches under three broad categories. They are –

a. Market Based Approach
b. Cost based approach
c. Income Approach

seldom paint the true picture for the company's preference shares being valued due to various reasons like industry in which the company operates, duration of the shares, dividends and redeemability clauses etc.

The cost-based approach also known an adjusted book value method gives the cost of reproducing the business or replacing the assets of the business net of depreciation i.e. its net asset value. Evaluating the value of preference shares

The market-based approach involves valuing the asset using the market-based precedents like exchange traded price of the asset or such price of a similar asset of comparable companies. It is difficult to find a market-traded price of such custom made instruments like optionally convertible preference shares , however, market -traded price of vanilla preference shares might be available in certain instances albeit the pool of such instruments and comparable companies using this method might be absurd as the differentiating preferential equity from common equity for evaluating fair value might be difficult.

Finally, the income approach can be used to evaluate the comprehensive value of the preference shares. Income approach measures the value of an asset based on the future cash generating ability of the asset. A simple Discounted Cash Flow (DCF) model can be used for valuing a

1 Microfirm Capital (P) Ltd. v DCIT (2018)

vanilla preference share by a valuer by choosing a discount rate that reflects the true risks and rewards associated with such preference shares.

Option valuation using the binomial method, or the Black-Scholes Model also fall under Income approach and can be used as valuing the convertible preference shares as options deriving the value from the underlying assets – equity shares.

Regulatory issues in valuing Preference Shares

Investors resort to different types of preference shares and customize them to match the requirements of their risk appetite. It is interesting to note the views of the regulators on such different types of preference shares

The Income Tax department is of the opinion that even though preference shares are having the nature of quasi-debt, they will be treated as equity shares and have to be valued using the Rule 11UA[1] for issue of such instruments which fall under the ambit of Section 56 (2) (viib) of Income tax act. This creates challenging situation for unlisted companies as the valuation has to be well-supported by the valuer to meet the regulator's requirement.

Juxtaposing the scenario with cross-border regulator, Reserve Bank of India, where the Foreign Exchange Management Act, 1999 (FEMA) clearly states that issue of preference shares by an Indian company to non-resident investor has to be Compulsorily, Mandatorily and Fully convertible in equity shares of the company. Any deviation from such Compulsorily Convertible Preference Shares (CCPS) will be considered as External Commercial Borrowing (ECB) and will not be covered under the ambit of FDI, leading to more rigorous debt compliances.

Interestingly, the valuation of such CCPS has to consider all of such factors to make sure that the fair value of the compulsorily convertible instrument is reflected. Though the common approach is going with conversion ratio of 1:1 to ensure seamless technical reporting, such ratio might create an unequal transfer of value at time of conversion from investor to investee or vice-versa. Hence, the valuer must decide on all other factors like inflation risk, currency risk, market premium risk analysis, size factors, liquidity factors and macro analysis of risk-free rates etc.

Similarly, financial reporting valuation of such instruments in compliance with Ind AS has to be dealt carefully by the valuer. Such hybrid instruments might be considered as liability in the books of accounts for Ind AS purposes but as equity for the different regulators. Hence, valuer must make sure the fair value reflects a true and equitable value of such hybrid instruments like preference shares.

Conclusion

In dynamic compliance regimes like India, where the definitions of such hybrid instruments are treated differently by each regulator, the valuation report must make sure it is in compliance with the accounting standards, regulations and valuation standards and most importantly, must make sure there is no erosion or surplus of value being transferred from one party to another in a transaction in sheer compliance of the regulations.

Jayasimha Pasumarti
Director - Investment Banking
JPR Capital

COVID-19 & Force Majeure

Analysis of its effect on Leases

Introduction:

The COVID-19 pandemic has interrupted our personal, professional/business and financial lives, affecting performance at all levels. This has led to several issues in performance of commercial contracts, and a 'force majeure' clause plays a critical role in such matters. Lease agreements are one such species of contractual relationship where lease hold enjoyment rights and performance obligations such as payment of rent, etc have been affected due to the COVID-19 crisis. This article attempts to throw light on the question whether a Lessee can take shelter under the law governing force majeure to resist performance including payment of rent during the pandemic period.

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Force Majeure clause – what it is?

A force majeure clause in a contract is intended to absolve a party from performance of its obligations absolutely or to suspend the same temporarily for reasons beyond the control of the party which affects or impairs performance. The clause's purpose is to save the performing party from the consequences of anything over which he has no control[1]. Black's Law dictionary defines force majeure as "any event or effect that can neither be anticipated nor controlled." It is a term of wider import[2].

Can COVID-19 pandemic be construed as a force majeure event?

If the definition of force majeure as drafted in a given contract, specifically includes situations such as 'epidemic', 'pandemic', 'disease outbreak', 'public health crisis', 'governmental lock downs', or like situations, it could then be argued that COVID-19 situation would be covered within such a clause. Likewise, a few other events such as reference to government actions including 'acts, orders,

1 Concise Law Dictionary, P.Ramanatha Aiyar, 6th Edition, 2019
2 Dhanrajamal Gobindram vs Shamji Kalidas And Co., AIR 1961 SC1285

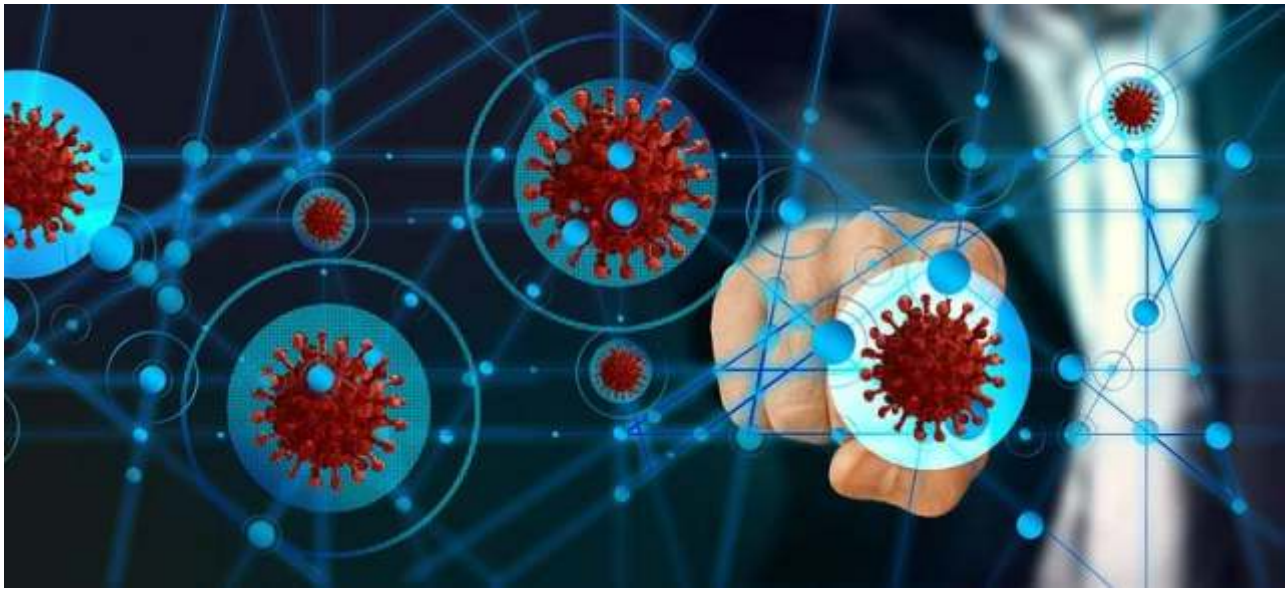
regulations, or laws of any government', could also permit construing COVID-19 pandemic as a force majeure event.

Statutory provisions governing force majeure in general:

While the word force majeure has not been specifically defined under the Indian

majeure situations in leases: Can lessee avoid the lease?

Lease agreements are governed primarily by the Transfer of Property Act, 1882(TP Act), which is a special statue. It is settled law that a special statute would trump a general statute such as the Contract Act. Section 4 of the TP Act provides that



Contract Act, 1872 (Contract Act), section 37 of the Contract Act states: "The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law" . Thus section 37, absolves a party from performing their promises, if the same is dispensed with or excused under the provisions of the Contract Act or any other law. Where a contract contains an express or implied force majeure clause, such contract could be construed as a contingent contract governed by section 32 of the Contract Act. However, if a given contract does not contain a force majeure clause then the same could be governed by Doctrine of Frustration regulated by section 56 of the Contract Act. The scope of force majeure clause has been elaborately explained by Supreme Court in **Energy Watchdog vs. CERC & Ors**[3].

Specific provisions governing force

chapters and sections of TP Act which relate to contracts shall be taken as part of the Contract Act and not the other way. The doctrine of force majeure is recognized under section 108(B)(e) of the TP Act which reads: "Rights and Liabilities of the Lessee:...(e) if by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void....."

Can a lessee avoid rent?

In **Raja Dhruv Dev Chand vs. Raja Harmohinder Singh**[4], the tenant invoked the doctrine of frustration and sought refund of the rent paid by him for the rented agricultural lands in Punjab which he could not utilize due to the 1947 Partition. The Supreme Court held "There is a clear distinction between a completed conveyance(executed contract) and an

3 (2017) 14 SCC 80
4 AIR 1968 SC1024
5 Judgment in RC. REV. 447/2017 dated 21.05.10
Order No. 40-3/2020-DM-I(A) order issued by Ministry of Home Affairs dated 29.03.2020

executory contract. Section 56 of the Contract Act does not apply to cases in which there is a complete transfer. Where the property leased is not destroyed or substantially and permanently unfit, the lessee cannot avoid the lease because he does not or is unable to use the land for purposes for which it is let to him. Temporary non-use by the tenant due to any factors would not entitle the tenant to invoke s.56"

In **Ramanand & Others vs. Dr. Girish Soni & Another**[5], the Delhi Court was confronted with the issues relating to suspension of payment of rent by tenants owing to the COVID-19 lockdown and the legal questions surrounding the same. The court held: "For a lessee to seek protection under sub-section 108(B)(e), there has to be complete destruction of the property, which is permanent in nature due to the force majeure event. Until and unless there is a complete destruction of the property, Section 108(B)(e) of the TP Act cannot be invoked. In view of the above settled legal position, temporary non-use of premises due to the lockdown which was announced pursuant to the COVID-19 outbreak cannot be construed as rendering the lease void under Section 108(B)(e) of the TP Act. The tenant cannot also avoid payment of rent in view of Section 108(B)(l)". The Court while holding that suspension of rent is not permissible in this case granted some postponement in the schedule of payment of rent owing to the lockdown on equitable grounds.

It is noteworthy to mention that Ministry of Home Affairs in exercise of powers under section 10(2)(l) of the Disaster Management Act, 2005 has issued a Government Order dated 29.03.20 wherein protection has been given to certain vulnerable sections of tenants such as migrants, laborers and students from paying rent and forceful eviction.

Conclusion:

Ordinarily, a lessee of an immoveable property cannot avoid payment of rent and performance of other obligations citing COVID-19 pandemic relying on any implied conditions of the lease.

But, if the lease agreement expressly sets forth conditions providing for waiver of rent or avoidance/suspension of lessee's obligations, or if the lease relationship is governed by any Government Order issued under the Disaster Management Act as aforesaid exempting payment of rent, the lessee can avoid payment of rent for the period affected by pandemic.

In the absence of the above, a lessee would not be entitled to avoid payment of rent. In a given situation however, if a lessee suffering grave financial hardship approaches court for relief, courts could, on a case to case basis, be open to granting appropriate relaxation/extension of time for payment of rent on equitable grounds, protecting the tenant from any adverse actions from the lessor owing to non-payment/delayed payment of rent.

Pooja.P
Senior Associate
Giridhar & Sai

THE LIMITATION QUESTION: APPLICABILITY OF LIMITATION ACT ON APPLICATION FILED UNDER SECTION 7 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

The question of applicability of limitation on proceedings under the Insolvency and Bankruptcy Code, 2016 (Code) has been a vexed one. While there was a brief period of clarity following the introduction of Section 238-A in the Code, there have thereafter been split positions adopted by benches of the National Company Law

Tribunal with respect to the applicability of the Limitation Act 1963. The present article analyses the latest judgment dated 14.08.2020 passed by the Hon'ble Supreme Court in "Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Industries Pvt. Ltd. &Anr.".

Brief Background

An application was filed by the Financial Creditor of the Corporate Debtor under Section 7 of the Code seeking initiation of corporate insolvency resolution process (CIRP) in respect of the corporate debtor. The bank accounts of the Corporate Debtor were declared NPA by the Financial Creditor / Bank on 08.07.2011. The present appeal was against an order of National Company Law Appellate Tribuna wherein it was held that the period of limitation shall start running from 01.12.2016, the date of coming into force of the Code and the right to apply under Section 7 of the Code accrued to the Financial Creditor only on 01.12.2016. The question before the Supreme Court was whether the application made by the Financial Creditor under Section 7 of the Code is barred by limitation?

The bench comprising of Justices AM Khanwilkar and Dinesh Maheshwari elaborately discussed the various provisions and judicial precedents pertaining to the immediate issue to arrive at its findings.

Section 238-A of the Insolvency and Bankruptcy Act, 2016

The Insolvency Law Committee in its report made in the month of March, 2018, recommended for introduction of the requisite provision in the Code so as to leave no room of doubt that the Limitation Act indeed applies to the proceedings under the Code. This ultimately led to the insertion of the said Section 238-A into the Code with retrospective effect from 06.06.2018. Section 238-A makes it clear that "the provisions of the Limitation Act, 1963 shall, as far as may be, apply to the proceedings or appeals" before the Adjudicating Authority under the Code.

Judicial Precedents

B.K. Educational Services Pvt Ltd v. Paras Gupta & Associates: AIR 2018 SC 5601 decided on 25.05.2019.

In this case it was held that the right to sue accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act.The court pointed out that when a debt is barred by time, the

right to a remedy is also time-barred. Further, it was observed that the intent of the legislature was not to give fresh opportunity to creditors and claimants who did not exercise their remedy under existing laws within the prescribed limitation period.

Gaurav Hargovindbhai Dave v. Asset Reconstruction Company(India) Ltd &Anr, decided on 18.09.2019.

In this case the Financial Creditor had stated the date of default to be 21.07.2011, which was also the date of NPA. The Supreme Court held that the time for the purpose of limitation begins to run from the date of NPA. Therefore, the application filed under Section 7 was time-barred.

Findings of the Supreme Court

Principles laid down –

The Supreme Court in the immediate case laid down the following principles extracted from the precedents and relevant provisions –

a) The Code is a beneficial legislation intended to put the corporate debtor back on its feet and is not a mere money recovery legislation;

b) CIRP is not intended to be adversarial to the corporate debtor but is aimed at protecting the interests of the corporate debtor;

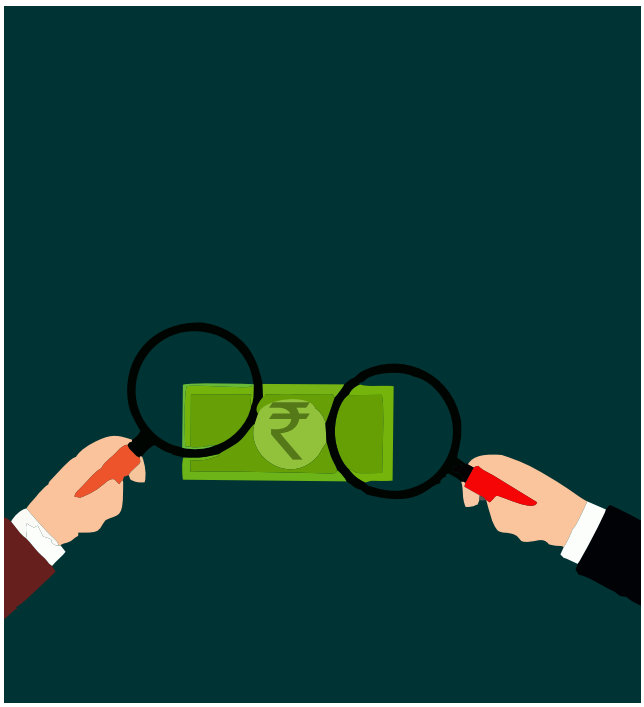
c) The intention is not to give a new lease of life to debts which are time-barred;

d) The period of limitation for an application under Section 7 of the Code is governed by Article 137 of the Limitation Act;

e) The trigger for initiation of CIRP is default on the part of the corporate debtor;

f) The default is that of actual non-payment by the corporate debtor when a debt has become due and payable;

g) If default had occurred over three years prior to the date of filing of the application, the application would be



time-barred except when the delay in filing may be condoned;

h) An application under Section 7 of the Code is not for enforcement of mortgage liability and Article 62 of the Limitation Act does not apply to this application.

Applicability of Section 18

It was observed that even if it was assumed that Section 18 of the Limitation Act was applicable in the present case, for extension of time for the purpose of the application under Section 7 of the Code, only the date of default as '08.07.2011' has been stated for the purpose of maintaining the application, and not even a foundation is laid in the application for suggesting any acknowledgement or any other date of default. The Court held that the submissions developed by the Respondents at a later stage cannot be admitted.

Summing up of the observations of the Supreme Court –

The Supreme Court in the immediate case has reiterated that for the purpose of an application filed under Section 7 of the Code, the limitation period of three years as per Article 137 of the Limitation Act will be applicable. This period shall start to run from the date of default which in the present case was the date on which the account of the Corporate Debtor was declared NPA. The Apex Court summed its observations as under –

"...the application made by the respondent No. 2 under Section 7 of the Code in the month of March 2018, seeking initiation of CIRP in respect of the corporate debtor with specific assertion of the date of default as 08.07.2011, is clearly barred by limitation for having been filed much later than the period of three years from the date of default as stated in the application. The NCLT having not examined the question of limitation; the NCLAT having decided the question of limitation on entirely irrelevant considerations; and the attempt on the part of the respondents to save the limitation with reference to the principles of acknowledgment having been found unsustainable, the impugned orders deserve to be set aside and the application filed by the respondent No. 2 deserves to be rejected as being barred by limitation."

Sujoy C. Datta
Senior Associate
Vaish Associates Advocates

Sakshi Singh
Junior Associate
Vaish Associates Advocates

Tax Court Speaks!

An insight into the recent key judicial rulings

S No	Tax Issue	Legal take away	Judicial Body	In the case of
1	Scope of average investment and expenditure for disallowance u/s Section 14A and Rule 8D	In order to compute disallowance, average value of investments - Only such investments which yield exempt dividend income during the year are required to be considered Bank guarantee commission, interest on TDS, interest on service tax, interest on professional tax, interest paid to clients on advance brokerage, interest on clients' margins money, etc. cannot be considered for the purpose of disallowance u/s 14A	ITAT Delhi	Religare Securities Ltd Vs DCIT ITA No.230/Del/2017
2	Nature and deductibility of professional expenses of aborted IPO	Professional and legal fees incurred in connection with aborted IPO, is an allowable revenue expenditure. The same is not capital in nature as by incurring such expenditure, no new asset has come into existence or any enduring benefit has accrued to the assessee company.	ITAT Jaipur	Road Infrastructure Development Company of Rajasthan Ltd. Vs ACIT ITA No. 668 to 670/JP/2019
3	Transfer of shares under amalgamation – Section 47(ii)	Receipt of shares of amalgamating company in lieu of shares of amalgamated company falls under the ambit of 'transfer' u/s. 2(47) Amount would be taxable as business income where the shares are held as stock in trade	ITAT Delhi	CIT VS NALWA INVESTMENT LTD ITA 822/2005
4	Deductions for income chargeable under the head "Income from other sources" – Section 57	Interest paid on loan raised against FD is an allowable deduction u/s 57(iii). Such interest has a direct nexus with the interest received on FD, as instead of premature encashment of FD, assessee had resorted to borrowings against FD to keep source of income intact.	ITAT Chandigarh	Anjana Vinayak Vs ITO ITA NO. 247/Chd/2019

S No	Tax Issue	Legal take away	Judicial Body	In the case of
5	Capital gains exemption on transfer of a capital asset by a subsidiary company to the holding company - Section 47(V)	Shares held by nominee shareholders qualify as shareholding by the nominating company and thus shall be counted as shareholding by the holding company for the purpose of satisfaction of conditions u/s 47(v) i.e whole of the share capital of the subsidiary company is held by the holding company. It is the beneficial ownership which is to be considered.	Hight Court of Madras	CIT Vs Shardlow India Ltd TAX CASE APPEAL NO.485 OF 2018
6	Assessment of company, name is struck off form ROC	Not intimating revenue of strike off; non cancellation of PAN and participating in assessment proceedings validates the assessment. Assessment for years prior to year of strike off not impacted from assessment.	Hight Court of Madras	CIT vs Tarachanthini Services Pvt. Ltd T.C.A.Nos.839 & 840 of 2019
7	Stay on demand by ITAT	Violating the condition to furnish security ground for non extending stay of demand Loss arising on account of writing off the investments in books cannot be sole ground to judge the ability to pay the tax demand	ITAT Delhi	Religare Capital Markets Ltd vs DCIT ITA No. 753/DEL/2016
8	Intimation u/s 143(1) and subsequent examination by the AO	Disallowance of TDS credit u/s 143(1) suffers legal irregularity on account of non furnishing of reasons therein. Intimation is only a matter of information generated in a pro forma by the Centralized Processing Centre. Intimation, not only does not speak of the reasons for the impugned disallowance, it also does not appear to be the result of any due examination of the issue by the AO.	ITAT Delhi	AWP ASSISTANCE (INDIA) PVT. LTD Vs DCIT ITA No. 5128/Del/2018
9	Secondment of employee and tax issues	Reimbursed salary costs of seconded employees is not FIS and the same is taxable as salary income in India. Indian entity is the employer of seconded employee. Judgement in case of Centrica is distinguishable.	ITAT Delhi	BOEING India Pvt. Ltd Vs ACIT ITA No. 9765/DEL/2019

S No	Tax Issue	Legal take away	Judicial Body	In the case of
10	CPC part of income tax department or an external agency of government Levy of 234E by CPC	CPC is part of Income Tax Department and is thus not an external law enforcement agency, so as to qualify under exceptions under the low the tax effect circular issued by the CBDT [Circular No. 3/2018 - revised monetary limits to file appeal]. Thus, fees charged u/s 234E by CPC, when has tax effect less than the prescribed limit as per the low the tax effect circular issued by the CBDT, the same shall be binding on the Revenue	ITAT Jaipur	Ito Vs Ajmer Vidhyut Vitran Nigam Ltd. ITA No. 595/JP/2019
11	Set-off / carry forward of STT paid long-term capital loss u/s 10(38)	Income includes Loss - When the income is exempt, then both positive income as well as the negative loss, both, do not enter into the regular computation of the assessee. Thus, no set of and or carry forward of long-term capital loss on transfer of shares on which the assessee has paid securities transaction tax as the same are covered by the provisions of Section 10 (38).	ITAT Delhi	Nikhil Sawhney Vs ACIT ITA No. 1248/Del/2017
12	Nature of share of income paid to JV partner Expenditure on asset revenue or capital	Amount paid to the JV partner as its share of income is in nature of diversion of income by overriding title and thus disallowance u/s 40(a)(ia) not applicable i.e disallowance on account of non-deduction of TDS. When repairs are for preserving and maintaining an already existing asset, the same is revenue in nature and non no new asset is coming into existence.	ITAT Delhi	Peartree Enterprises Pvt. Ltd. Vs DCIT ITA No.4199/Del/2016
13	AE under Article 10 PE under Article 5	Nonresident not AE under Article 10 of India-UK tax treaty as: • Assessee did not participate directly or indirectly in management, control or capital of the nonresident (being separate bank loan in UK, cannot said to be solely dependent upon the assessee for finance requirements) • Tax assessments of assessee have not found mention of over payments to nonresident Assessee is not a PE of the nonresident entity as contract between the assessee and nonresident is primarily on principal-to principal basis and the entire responsibility to produce the film was on nonresident against certain lump-sum consideration.	ITAT Mumbai	Next Gen Films Private Ltd. Vs ITO I.T.A. No.3782/Mum/2016

S No	Tax Issue	Legal take away	Judicial Body	In the case of
14	Depreciation on 'goodwill' arising on merger Claim in assessment proceedings when not made in tax return	Goodwill arising pursuant to merger is eligible for depreciation u/s 32. Whether the unit is incurring losses or not, has got nothing to do with the existence of goodwill prevailing in the said unit. As goodwill arises on difference in book value of assets and the equity shares issued. Claim if not made in tax return can be allowed in assessment proceedings by filing a revised computation of income when the timeline to file revised return is expired.	ITAT Mumbai	Classic Stripes Pvt. Ltd. Vs DCIT ITA No.2378/Mum/2017
15	Capital contribution by a partner	Section 45(3) covers taxability of capital contribution transfer by a partner to AOP and not section 50C.	ITAT Mumbai	Network Construction Company Vs ACIT ITA No. 2279/MUM/2017
16	Contradiction in provisions of Income tax Act and Accounting Standards	The provisions of Income Tax Act prevail when the same are in contradiction with the accounting standards of ICAI	ITAT Bangalore	DCIT Vs Cornerstone Property Investment (P) Ltd ITA No. 1082 & 1083/Bang/2019
17	Depreciation on Goodwill	depreciation on goodwill arising on 'business' acquisition is allowable u/s 32(1)(ii) Business claims, business information, business records, contracts, employees and know-how acquired by assessee thereunder were in nature of 'business or commercial rights of similar nature' as u/s 32(1)(ii)	ITAT Delhi	Geodis Overseas Pvt Ltd Vs DCIT ITA No 2305 / Del / 2015
18	Assessment of amalgamating company	Issue of notice in name of amalgamating company can not be construed as notice issued to amalgamated company and same is not a procedural defect that could be cured u/s 292B Assessment order framed on amalgamating company is void ab initio	ITAT Mumbai	Siemens Limited Vs DCIT ITA No.2181/Mum/2017
19	Compensation on compulsory acquisition of land	Compensation received on compulsory acquisition of land is chargeable to capital gains tax in the year in which the compensation is awarded and not the year in which award was notified	Supreme Court	RAJ PAL SINGH Vs CIT CIVIL APPEAL NO. 2416 OF 2010

S No	Tax Issue	Legal take away	Judicial Body	In the case of
20	Precedence of nonexistent shareholder over paper trail – Section 68	Imperative for assessee to prove existence of shareholder than mere a paper trail to prove the creditworthiness of the share applicants or the genuineness of the transaction before the AO – Additions u/s 68 justified	ITAT Delhi	ITO Vs KNS Realtors Pvt. Ltd ITA No.-1286/Del/2014
21	Fees for Technical Services – Article 12	Charges paid for services of testing and certifying the amount, colour, quality and spatial distribution of light emitted from lamps, LEDs etc constitute FTS under India-China / Germany tax treaty and liable to be taxed accordingly. Testing and certification charges not FTS under India-US tax treaty being absence of make available criteria The expression 'provision for services' (used in India-China DTAA) is much wider in scope that the expression 'provision for rendering of services' (used in other treaties) and will cover the services even when these are not rendered in the other Contracting State, as long as these services are used in the other Contracting State;	ITAT Delhi	Havells India Ltd Vs DCIT ITA No. 6072/Del/2010
22	Benefits u/s 54F	Mere addition of name of assessee along with name of wife in purchase deed of the house is not ownership of the house to deny benefits u/s 54F	ITAT Bangalore	Shree Anil Dev Vs DCIT ITA No. 1040/Bang/2018
23	Equalisation levy	Digital tax / EL will not apply where the entity has a PE in India.	High Court of Delhi	MASTERCARD ASIA PACIFIC PTE. LTD Vs Union of India W.P. (C) 10944/2018

S No	Tax Issue	Legal take away	Judicial Body	In the case of
1	Quantum of refund available under the provision for refund of input credit accumulated owing to inverted duty structure	In an important judgment, the Court read down explanation (a) to Rule 89(5) of CGST Rules which defines "Net Input Tax Credit' to mean input tax credit on inputs only and held that the Net ITC as per explanation (a) should mean "input tax credit" availed on "inputs" as well as "input services" as defined under the CGST Act. While the Court has not specifically concluded on this point, the discussion undertaken by it seems to suggest that "any unutilised input tax" may also include tax paid on capital goods. While this judgment may not be an authority for that conclusion, that may be an idea worth evaluating.	Gujarat High Court	VKC Footsteps India Pvt. Ltd. v. UOI – 2020-VIL-340-GUJ
2	Challenge to place of supply of 'intermediary services' whereunder intermediary is required to pay CGST+SGST on commission received from recipient when the service is for the benefit of such recipient outside India	Section 13(8)(b) of IGST Act (which prescribes that apropos intermediary services, location of supplier i.e. intermediary is treated as the place of supply) was challenged to be ultra vires Article 286(1) of the Constitution before the Gujarat High Court. High Court rejected this challenge and inter alia noted that the Government's stance apropos taxing of intermediary services has remained consistent since service tax era.	Gujarat High Court	Material Recycling Association of India v. UOI – 2020-VIL-341-GUJ
3	Challenge to transition of pre-GST input tax credits (ITC) when petitioner did not have credit transfer documents (CTD) required to be issued by a manufacturer as per Cenvat Credit Rules	Department objected to transition of ITC since petitioner didn't have CTD. Gujarat High Court agreed with the petitioner that based on invoices issued by other dealers to him containing chassis number or other such information, duty payment can be verified and thus credit should be allowed to be transitioned and directed the Department to verify such other documents and allow transitional credit subject to such verification.	Gujarat High Court	Downtown Auto Pvt. Ltd. v. UOI – 2020-VIL-342-GUJ
4	Summons for personal appearance during lockdown	Summons was issued to petitioners here for personal appearance before the tax officer despite restrictions on movement owing to lockdown. Unfortunately, the Supreme Court didn't grant relief and merely granted liberty to the taxpayer to request for deferring recording of statement until the lockdown is over.	Supreme Court of India	Bioveda Action Research Company v. ADG, DGGI – 2020-VIL-24-SC

S No	Tax Issue	Legal take away	Judicial Body	In the case of
5	GST rate applicable on a contractor supplying food in a hospital	Applicant was providing food to patients from the canteen in hospital but as contractor – he was invoicing the hospital. Authority held that till 26th July 2018, the GST rate would be 18% on such services and thereafter, 5% without ITC.	Advance Ruling Authority	Navneeth Kumar Talla – 2020-VIL-228-AAR
6	Detention of goods when tax amount not required to be mentioned in e-way bill	The Kerala High Court ordered release of goods and the vehicle holding that there was no violation of GST law provisions since there is no field for mentioning tax amount in the format of e-way bill. It further took note of the fact that the transportation was made under proper tax invoice along with the e-way bill.	Kerala High Court	M.S. Steel and Pipes v. Asst. State Officer – 2020-VIL-372-KER
7	GST rate on E-rickshaws	5% GST rate is available for "Electrically operated vehicles, including two and three wheeled electric vehicles" classifiable under Chapter 87. The authority held that while three-wheeled vehicles or e-rickshaws fitted with battery packs would qualify for the 5% rate, vehicles without battery packs will not have the essential character of electrically operated vehicle and they would be classifiable under Tariff Item 8706 00 31 thereby attracting 28% GST rate	Advance Ruling authority	Hooghly Motors Pvt. Ltd. – 2020-VIL-235-AAR
8	Imposition of penalty prior to amendment in Section 171 for imposition of penalty	Since profiteered amount is not 'tax', no penalty can be imposed under section 122(1) of CGST Act. Prior to 1st January 2020, there was no provision under Section 171 for levy of penalty. Accordingly, if the alleged profiteering was committed prior to that day no penalty is leviable	National Anti-Profiteering Authority	Varun Goel v. Eldeco Infrastructure – 2020-VIL-63-NAA
9	Publishing best judgment assessment order on the departmental portal is valid service	A best judgment assessment order is deemed to be withdrawn if assessee files return within 30 days of the said assessment order. Here, the assessee filed after 30 days since it received the order late – approached High Court seeking an order for withdrawal of the best judgment assessment order. High Court refused since date of filing of return was beyond 30 days of the order being placed in the portal and service of order through the portal is one of the statutorily prescribed modes under GST.	Kerala High Court	Pee Bee Enterprises v. Asst. Commissioner – 2020- VIL-384-KER

S No	Tax Issue	Legal take away	Judicial Body	In the case of
10	Whether GST exemption for renting of residential dwellings for use as residence would be available if the premises are on land allotted for industrial development board	AAAR emphasized the fact that the building in question stood on land allotted by industrial development board and such allotment is always for industrial projects and held that even though the sub-lease agreement mentioned a residential purpose, since the original lease was not specifically for residential purpose, the GST exemption would not be available	Appellate Authority for Advance Ruling	Sri DMS Hospitality Pvt. Ltd. – 2020-VIL-45-AAAR
11	Intermediary services	The assessee was providing market research services to its overseas customer and making sales presentations to prospective customers. AAAR upheld AAR's order that he was providing intermediary services.	Appellate Authority for Advance Ruling	Rajendran Santhosh – 2020-VIL-41-AAAR
12	Document evidencing land title – classification under GST	Taxpayer was a service provider who printed "Pattadar Passbook cum Title Deed" (issued under Telangana Record of Rights in Land Pattadar Passbooks Act, 1971) for the State Government authorities. The AAAR held that this passbook is classifiable under chapter 4820 since this is a document containing details of land owned by a person and such passbook merely has an evidentiary value and thus not a document of title (classifiable under 4907).	Appellate Authority for Advance Ruling	Manipal Technologies – 2020-VIL-47-AAR
13	Failure to attend summons due to pandemic	Summons were issued for personal appearance – assessee highlighted that being elderly, he has been advised not to venture out due to the pandemic. Unfortunately, the same was not accepted and a tax demand was intimated in form DRC-01A as well as attachment of factory and residence ordered. The Gujarat High Court quashed the form DRC-01A, ordered the officer to grant a hearing and pass a fresh order.	Gujarat High Court	Formative Tex Fab v. State of Gujarat – 2020-VIL-406-GUJ

Sudipta Bhattacharjee
Partner,
Advaita Legal

Alok Pareek
Chartered Accountant

pranshu.goel@apcoindia.co.in

PRANSHU G

F.C.A, LL.B

COMPLIANCE CALENDAR

OCTOBER 2020

S	M	T	W	T	F	S
				1 - Charitable Trust registration under Section 12AB	2	3 - GSTR-3B for August, 2020 for turnover < 5 crores
4	5	6	7 - Deposit of TDS/TCS for September '20 - Filing of ECB-2	8	9	10 - GSTR-7 and 8 for Sep, 20
11 - GSTR-1 for Sept, '20	12	13 - GSTR-6 for Sept, '20	14	15 - Payment of PF and ESIC for September, '20	16	17
18	19	20 - GSTR-3B, 5, 5A for Sept, '20	21	22	23	24
25	26	27	28	29	30	31 - Filing of Tax Audit Report for FY 19-20 - GSTR-1 for qtr July to Sept '20 - GSTR-4 FY 19-20 - GSTR CMP-08 for qtr July to Sept '20

Reference

- GSTR - Goods and Services tax return
- TDS - Tax deduction at source
- TCS - Tax collection at source
- PF - Provident Fund
- ESI - Employee State Insurance
- ECB-2 - Extrenal Commercial Borrowing Return
- Section 12AB Income Tax Act, 1961 - New Section introduced for registration of Charitable Trust

5A/3A, Ansari Road, Darya Ganj, New Delhi - 110002
+91-9811311668 | +91-11-43507915

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2020 Upcoming Events |

S. No	Topic	Date
1.	Digital Symposium on Goods & Services Tax - An Advanced Training Course	25th August – Session 1 27th August – Session 2 1st September – Session 3 3rd September – Session 4 8th September – Session 5 10th September – Session 6 14th September – Session 7 15th September – Session 8 17th September – Session 9
2.	Certificate Course on International Tax	2nd September – Session 1 4th September – Session 2 9th September – Session 3 11th September – Session 4 16th September – Session 5 18th September – Session 6 23rd September – Session 7 25th September – Session 8
3.	Certificate Course on FEMA and Related Compliances	7th September – Session 1 8th September – Session 2 9th September – Session 3 10th September – Session 4 11th September – Session 5
4.	Certificate course on Negotiating Contracts	22nd September – Session 1 23rd September – Session 2 24th September – Session 3
5.	Virtual Training Course on Transfer Pricing and Related Compliances	5th October – Session 1 7th October – Session 2 12th October – Session 3 14th October – Session 4 16th October – Session 5 19th October – Session 6 21st October – Session 7 23rd October – Session 8
6.	Certificate Course on Practical Knowledge of Arbitration and Dispute Resolution	6th October – Session 1 7th October – Session 2 8th October – Session 3 9th October – Session 4
7.	Direct Tax Summit- Virtual Conference	9th October – Session 1 10th October – Session 2
8.	Certificate Course on how to prevent White Collar Crimes & Cyber Crime	13th October – Session 1 14th October – Session 2 15th October – Session 3 16th October – Session 4
9.	Virtual Training on Mergers and Acquisitions	19th October – Session 1 20th October – Session 2 21st October – Session 3 22nd October – Session 4
10.	Webinar on BEPS and MLI	4th November – Session 1 5th November – Session 2 6th November – Session 3 7th November – Session 4
11.	Certificate Course on Investigation Report Writing	3rd November – Session 1 5th November – Session 2 10th November – Session 3 12th November – Session 4

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Achromic Point Consulting Pvt. Ltd.
F-11, First Floor, Kalkaji,
New Delhi - 110019, India
T: (O) +91-11-2628-1521
E: feedback@achromicpoint.com