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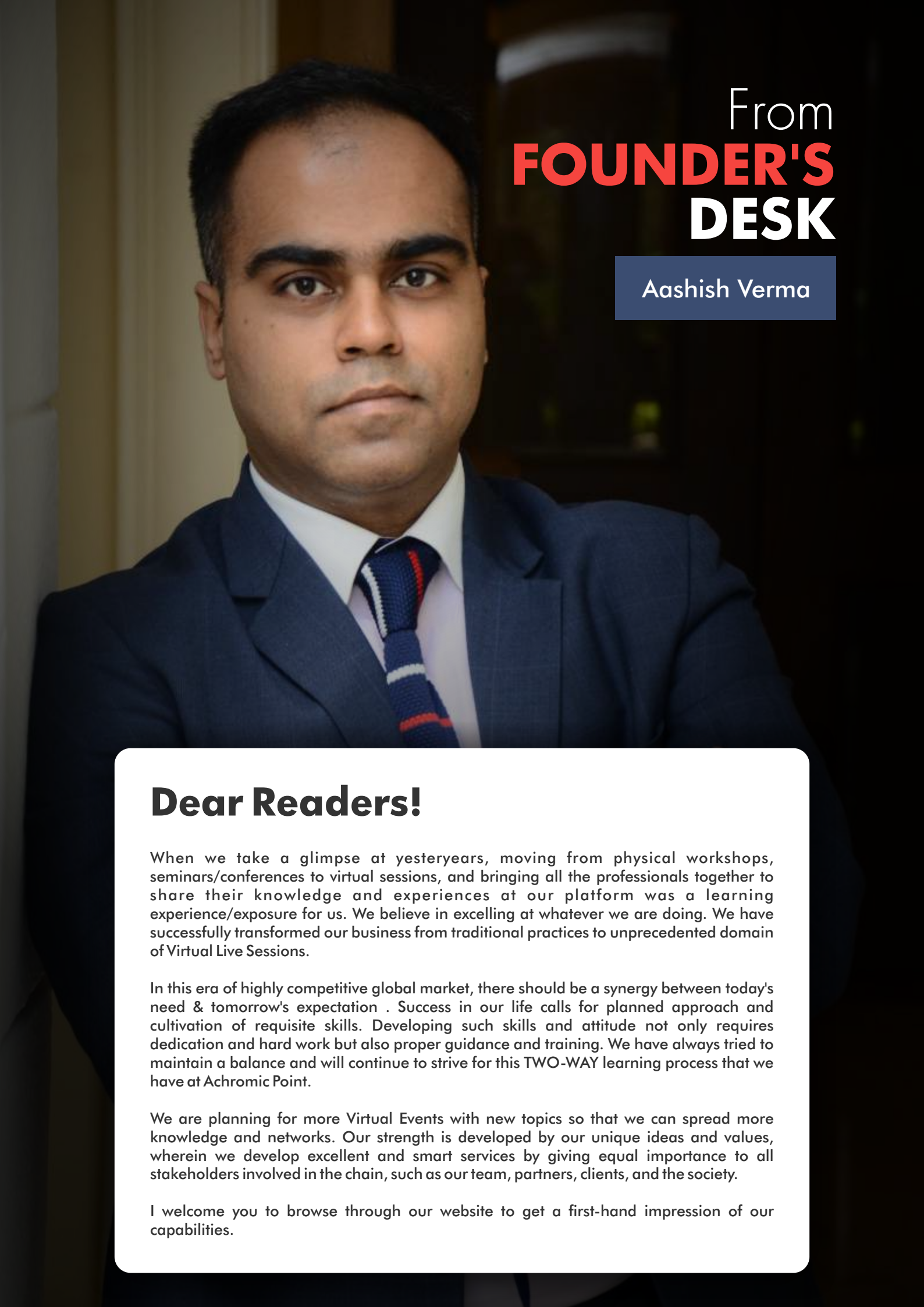

From FOUNDER'S DESK

Aashish Verma

Dear Readers!

When we take a glimpse at yesteryears, moving from physical workshops, seminars/conferences to virtual sessions, and bringing all the professionals together to share their knowledge and experiences at our platform was a learning experience/exposure for us. We believe in excelling at whatever we are doing. We have successfully transformed our business from traditional practices to unprecedented domain of Virtual Live Sessions.

In this era of highly competitive global market, there should be a synergy between today's need & tomorrow's expectation . Success in our life calls for planned approach and cultivation of requisite skills. Developing such skills and attitude not only requires dedication and hard work but also proper guidance and training. We have always tried to maintain a balance and will continue to strive for this TWO-WAY learning process that we have at Achromic Point.

We are planning for more Virtual Events with new topics so that we can spread more knowledge and networks. Our strength is developed by our unique ideas and values, wherein we develop excellent and smart services by giving equal importance to all stakeholders involved in the chain, such as our team, partners, clients, and the society.

I welcome you to browse through our website to get a first-hand impression of our capabilities.

AMENDMENTS TO DIGITAL TAX MAY OPEN A NEW BATTLEGROUND FOR MNCs

Budget 2021

In the Union Budget 2021, the Finance Minister proposed certain clarifications concerning the equalization levy of 2% introduced in 2020. The Budget has tried to address uncertainties around the equalization levy by providing clarifications and amendments that will be applicable retrospectively from 1 April 2020.

One of the major amendments is that tax on royalty, fees for technical services (FTS), and equalization levy are to be considered mutually exclusive effective from 1 April 2020. The earlier position was that if an online transaction equalization levy was applicable, then the said transaction was exempt from income tax. There was a mismatch in the date though, for FY 20-21 where an equalization levy was introduced from 1 April 2020, but the exemption from income tax was available only from 1 April 2021.

Now, it is clarified that first, one will have to evaluate the taxability of the transaction as royalty/FTS under the Indian Income Tax Act read with respective Tax Treaty before evaluating the equalization levy applicability. It also clarifies aspects of potential double taxation of income as the Budget now corrects the inconsistency of mismatch in the effective date of income tax exemption with the applicability of equalization levy retrospectively.

A boon for Indian e-commerce operators but a bane for foreign companies

It would be important to note that while the clarifications aim to correctly reflect the intention to various provisions concerning equalization levy, foreign e-commerce operators have suffered a setback. It is now clear that it applies to all cross-border transactions by foreign entities (except transactions that fall within royalty and technical services fees), even if one part of the process, such as payment for the good or service, is carried out online. On the contrary, the clarifications about the equalization levy are a welcome step for Indian e-commerce operators since it will create a level-playing field between foreign and domestic companies.

Defining the term 'online' is imperative

Some key issues persist as to the usage of the term 'digital or electronic facility or platform'. In normal parlance, it could cover

emails or calls, thus including all kinds of transactions whereby goods are ordered over a call, but delivery and payment are made through regular mode. No clarification has been provided whether a digital or electronic facility or platform includes only the transactions, which are concluded through technology, without physical involvement of any person, or whether it would also include the one-to-one communication between the parties through emails, video call, etc. One may opine that the intention of the levy was not to cover transactions, where the same are concluded or delivered over emails or video calls, as within the current global trade scenario, such would be similar to physical supply of goods or services.

However, this anomaly persists, as tax authorities have not defined the term 'online,' and in general parlance, emails, video calls, etc., could be considered as online, and tax authorities may try to cover such transactions under the levy.

MNEs may need to evaluate their position in the absence of a refund of equalization levy

Also, we all know that taxability of transactions as royalty/FTS has been a debated issue for various types of transactions (like software payments, web hosting, cloud hosting, managed services, access to databases, etc.), and judicial views are divided into these types of transaction. Accordingly, while adopting the view on FTS/royalty vs equalization levy in India, MNEs will have to thoroughly evaluate their position because there is no provision for refund of equalization levy under the law. Accordingly, where a view is adopted that equalization levy is applicable on a particular transaction and it is not royalty/FTS, and in future, tax authorities or judiciary rules the said transaction as royalty/FTS, the taxpayer may not be able to claim back the EL already deposited by them.

Opening the door to more controversy and litigation in future

Lastly, the government has introduced Significant Economic Presence (SEP) provisions under the Indian law but deferred its application to 1 April 2021. It would now be interesting to see if both the equalization levy and SEP provisions would co-exist. All in all, the equalization levy battle has not yet even begun, and we will see significant controversy and liti

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GOODWILL

IF THE TAX DEPARTMENT HAS ITS WILL THEN IT WILL NOT BE

The Finance Bill, 2021 proposes to amend various sections of the Income tax Act, 1961 (the Act) to deny depreciation on goodwill. In any acquisition or merger/amalgamation, payment over and above the aggregate value of net assets acquired of the target company is a common practice. The acquisition price which is based on the fair value of the business being acquired is calculated on either of the two methods i.e. the discounted cashflow or the market multiple method. The excess price paid by the acquirer is towards a bundle of intangible rights which is not recorded in the books of account by the target and is commonly known as goodwill.

Existing position under the Act

Section 32 of the Act which provides for allowance of depreciation deals with both tangible and intangible assets. In respect of intangible assets, the section provides an inclusive definition of intangibles that are covered for the purpose of depreciation. The section covers Intangible assets, being know-how, patents copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature. On perusal it would be noted that goodwill is not explicitly covered in the aforesaid definition of intangibles and therefore there was a controversy which was put to rest by the Hon'ble Supreme Court in the case of **CIT v Smifs Securities Ltd. (2012) 348 ITR 302 (SC)** wherein it was held that goodwill arising at the time of merger is an intangible asset and is entitled to be depreciated u/s 32 of the Act.

The facts of the case were that *YSN Shares and Securities Pvt Ltd (YSN) amalgamated with the assessee company in accordance with a scheme of amalgamation sanctioned by both the Bombay and Calcutta High Court. The excess consideration paid over the net assets acquired was treated as goodwill arising on amalgamation and depreciation was claimed by the assessee. The AO denied the depreciation holding that goodwill is not an asset by referring to explanation 3 to section 32.*

The question before the Apex Court was whether goodwill is an asset under section 32 and whether depreciation is allowable or not. The findings of the Apex Court were:

"The Commissioner of Income Tax (Appeals) ['CIT(A)', for short] has come to the conclusion that the authorised representatives had filed copies of the Orders of the High Court ordering amalgamation of the above two Companies; that the assets and liabilities of M/s. YSN Shares and Securities Private Limited were transferred to the assessee for a consideration; that the difference between the cost of an asset and the amount paid constituted goodwill and that the assessee-Company in the process of amalgamation had acquired a capital right in the form of goodwill because of which the market worth of the assessee-Company stood increased. This finding has also been upheld by Income Tax Appellate Tribunal ['ITAT', for short]. We see no reason to interfere with the factual finding.

The Hon'ble Court further held that Explanation 3 states that the expression 'asset' shall mean an intangible asset, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature. A reading the words 'any other business or commercial rights of similar nature' in clause (b) of Explanation 3 indicates that goodwill would fall under the expression 'any other business or commercial right of a similar nature'. The principle of ejusdem generis would strictly apply while interpreting the said expression which finds place in Explanation 3(b). In the circumstances, we are of the view that 'Goodwill' is an asset under Explanation 3(b) to Section 32(1) of the Act."

Subsequent to this decision there have been plethora of judgements by various Courts wherein the decision of the Hon'ble Supreme Court has been followed. In a few cases and notable amongst them is the case of **United Breweries Ltd. Vs. Addl. CIT (ITA No. 722, 801 & 1065/Bang/2014 dated 30.9.2016),** wherein a different view was taken. This view was however based on the peculiar facts of the case and is not in divergence with the view of the Apex Court. The ITAT in the said matter denied depreciation on goodwill by applying the 6th proviso to section 32(1) of the Act and Explanation 3 to section 43(1) of the Act.

The facts of the case were that during the year under consideration the assessee inter alia amalgamated its wholly owned subsidiary KBDL. The assessee acquired the entire shareholding of the company from the shareholders for consideration of Rs. 180.52 crores. In the books of account, the assessee had recorded the value of the assets on the basis of revaluation done by the valuer and thereby shown the goodwill at Rs.62.30 crores. The Assessing Officer did not accept the claim of depreciation on goodwill by holding that the assessee had not acquired any intangible assets in pursuant to the amalgamation of its subsidiary with the assessee and therefore as per the Assessing Officer the goodwill was not at all in existence. The Assessing Officer invoked the provisions of Explanation 3 to section 43(1) which confers a power on the AO to determine the cost if the Assessing Officer is satisfied that the main purpose of the transfer of such assets was the reduction of liability to income tax by claiming depreciation on the enhanced cost. As this was an amalgamation of the subsidiary with the assessee therefore all the assets which came to the assessee were already in use by the subsidiary and consequently the valuation of all the assets was subjected to the verification of the Assessing Officer as per Explanation 3 of section 43(1). The value of the goodwill shown in the books of KBDL was Rs.7.45 crores which was enhanced in the books of account of the assessee to Rs.62.30 crores.

The Assessing Officer also invoked the 6th proviso to Section 32 which restricts the depreciation in the hands of the successor or amalgamated company to the extent as apportioned between the amalgamating and amalgamated company in the ratio of number of days for which the assets are used by them as if no amalgamation had taken place. According to the Assessing Officer as goodwill was appearing in the books of the amalgamating company, no depreciation on the enhanced value of goodwill was permissible considering the said proviso.

The ITAT held and rightly so that the Assessing Officer has full powers to examine the value of goodwill under the existing provisions of the Act. It is important to note that the ITAT did not hold that goodwill is not a depreciable asset. As a matter of fact, the ITAT held that 'there is no quarrel on the issue that goodwill is eligible for depreciation'. The point being made here is that the existing provisions were sufficient to check the alleged abuse of inflating the value of goodwill by taxpayers and there was no need to amend the Act.

Usually there is no goodwill appearing in the books of the amalgamating company as there is no cost of such self-generated goodwill and therefore goodwill arises only on account of the amalgamation/merger and in such cases the aforesaid provisions of the Act as relied upon by the Hon'ble ITAT in the case of United Breweries (supra) would not be applicable. Accordingly, in a case where goodwill arises on account of amalgamation/ merger the goodwill is eligible for depreciation in accordance with the judgement of the Apex Court.

Position as per Indian GAAP and Ind-AS

As per Accounting Standard (AS-26) on 'Intangible assets' goodwill is an intangible asset which has to be tested for impairment on an annual basis. Similar is the treatment under Ind-AS 38. Thus, it would be seen that under the accounting principles goodwill is a recognized as an intangible asset which is though not to be amortized/depreciated over a period of time but to be tested annually for impairment. In case on an annual test of impairment, if no such impairment condition exists then it needs to be carried at same value in the books of accounts and not be amortized or depreciated.

Amendments proposed

Finance Bill 2021 seeks to amend the law by making amendments to the concept of block of assets and section 32 of the Act which deals with depreciation. It is proposed to provide that the block of assets shall not include goodwill and likewise in section 32 it is proposed to provide that depreciation on goodwill will not be allowed. It is also proposed to amend section 50 of the Act to provide that in a case where goodwill of a business or profession formed part of block of assets for the assessment year beginning from 1st April 2020 and depreciation has been obtained by the assessee under the Act, the written down value of block of asset and short- term capital gain, if any, shall be determined in the manner as may be prescribed. Section 55 of the Act is also proposed to be amended to provide that in case of goodwill of business or provision acquired by the assessee by way of purchase from a previous owner and any deduction on account of depreciation under section 32 of the Act has been obtained by the assessee in any previous year preceding the previous year relevant to the assessment year commencing on or after the 1st April, 2021, then the cost of acquisition will be the

purchase price as reduced by the depreciation so obtained by the assessee before the previous year relevant to assessment year commencing on 1st April, 2021. The said amendments shall take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years.

Why the Finance Bill proposals need a reconsideration?

The Memorandum explaining the provisions of the Finance Bill lists down various reasons for proposing this amendment. These reasons are dealt clause by clause in the table below:

Sl. No.	Rationale given in the Memorandum	Remarks
1	Goodwill of a business or a profession has not been specifically provided as an asset either in the definition under clause (11) of section 2 of the Act or in section 32 of the Act.	The question whether goodwill of a business is an asset and whether depreciation on goodwill is allowable has been decided by the Supreme Court in the case Smifs Securities Limited (supra). Once the Apex court has laid down a view then that becomes law of the land and whether it has been specifically provided for in the Act or not is irrelevant. A case in point is the procedure to be followed u/s 147 of the Act which was laid down by the Apex Court in the GKN Driveshaft case which procedure has been followed by the department since the time the decision was laid down by the Supreme Court. Therefore, this argument being put forth by the department has no merit.
2	Sixth proviso the section 32 of the Act mandates that in a case of succession/ amalgamation/demerger during the previous year, depreciation is to be calculated as if the succession or amalgamation or demerger has not taken place during the previous year and apportioned between the predecessor and the successor, or the amalgamating company and the amalgamated company, or the demerged company and the resulting company, as the case may be, in the ratio of the number of days for which the assets were used by them.	This proviso would be applicable only and only if goodwill is appearing in the books of the amalgamating company (Refer the United Breweries Case). If goodwill arises at the time of amalgamation or demerger then this proviso is not applicable. Therefore, re-course to this proviso to change the law is misplaced.

Sl. No.	Rationale given in the Memorandum	Remarks
3	Sub-section (1) of section 43 of the Act which defines actual cost of the assets to the assessee. Explanation 7 to this section covers a situation where in a scheme of amalgamation, any capital asset is transferred by the amalgamating company to the amalgamated company and the amalgamated company is an Indian company. It clarifies that in this situation, the actual cost of the transferred capital asset to the amalgamated company shall be taken to be the same as it would have been if the amalgamating company had continued to hold the capital asset for the purposes of its own business.	This explanation is also applicable only if goodwill is already appearing in the books of the amalgamating/ demerged company. This would have no application where goodwill is arising on account of amalgamation/ merger/demerger as the amount paid over and above the net assets acquired would be the cost of the goodwill.
4	Thus, while Hon'ble Supreme Court has held that the Goodwill of a business or profession is a depreciable asset, the actual calculation of depreciation on goodwill is required to be carried out in accordance with various other provisions of the Act, including the ones listed above. Once we apply these provisions, in some situations there could be no depreciation on account of actual cost being zero and the written down value of that assets in the hand of predecessor/ amalgamating company being zero.	This argument is not a valid justification for amending the law. In fact, the department could have carved out cases considering the existing provision of the Act where depreciation on goodwill would not be allowed. The point that is being missed by the authorities is that in business combinations more often than not the amount paid (even if consideration is discharged only by issuance of shares) is higher than the aggregate value of net assets taken over. In such a case the difference paid is nothing but an amount which represents a bundle of intangible assets/rights which is collectively known as goodwill.
5	It is seen that Goodwill, in general, is not a depreciable asset and in fact depending upon how the business runs, goodwill may see appreciation or in the alternative no depreciation to its value	This argument being out fourth by the authorities is illogical. The fact that it is being acknowledged in the memorandum that this aspect depends on how 'business runs' in itself implies the goodwill may see an erosion in value as well. Further if one were to compare the case of a "brand" which is an intangible asset duly mentioned in section 32 of the Act, a similar argument can also be put forth that brands may generally see an appreciation in value. But the fact that brand is recognized as an intangible asset on which depreciation is allowed shows how illogical is the argument of the department. Instead of giving the argument as mentioned in the memorandum the authorities could have simply amended the law by giving clarity to the concept of the block of assets that this would include goodwill and provide for exceptions where depreciation would not be allowed.

Way going forward

The proposal to deny depreciation on goodwill is likely to hurt the M&A activity in the Country. It would also result in more litigation as the taxpayer would now seek to apportion the excess amount paid over the net assets acquired on other tangible/intangible assets so as to claim depreciation on the excess amount paid. Given the fact that this Budget was supposed to be a growth-oriented budget, the proposal to deny depreciation on goodwill requires a definite reconsideration.

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"Phoenix Arc Private Limited v. Spade Financial Services Limited & Ors":

Supreme Court on "related parties" & "collusive transactions" under the IBC, 2016

A three Judge Bench of the Supreme Court comprising of Justices Dr. D.Y. Chandrachud, Indu Malhotra and Indira Banerjee in the case of Phoenix Arc Private Limited v. Spade Financial Services Limited & Ors., has laid to rest certain interesting and well-debated issues arising under the the Insolvency and Bankruptcy Code, 2016 ('IB Code'), inter alia holding that transactions which are collusive, sham or eye-wash in nature do not constitute as 'financial debt' under Section 5(8) of the IB Code.

Factual Background

To know the natures of the transactions entered into between the parties, it is essential to note that Spade and AAA Landmark were the companies owned by Mr. Arun Anand, which entered into various transactions, Inter Corporate Deposit and MOUs with AKME Projects Ltd, i.e. the corporate debtor.

By virtue of these transactions, a huge amount of money was disbursed to corporate debtor as a borrower from Spade and AAA. Spade and AAA claimed this amount as financial debt from the corporate debtor during the pending CIRP. The Court noted the existence of close relationship between the key managerial personnel of the Corporate Debtor, Mr. Anil Nanda having 80% of the shareholding in the Corporate Debtor and the director of Spade and AAA, Mr. Arun Anand.

Based on the claim forms of the Spade and AAA along with the documents filed before the NCLT, it was observed by the Court that Mr Arun Anand (Director of the Appellants) worked for Mr Anil Nanda, Director of Corporate Debtor) for over 25 years and above purported transactions from 2010 to 2013 were entered into vide Mr Arun Anand, who had worked as an employee of the corporate debtor.

Corporate debtor, Spade and AAA

throughout had common Key Managerial person Mr Arun Anand and Ms. Sonal Anand, who acted and benefited Mr Anil Nanda and his group of companies, i.e. Goetze India, NANZ or Corporate debtor during 2010 to 2013.

It was observed by the Court that the affairs of the corporate debtor as well as the Spade and AAA were deeply entangled and Director of Spade and AAA were advising the corporate debtor and its Directors, etc. Importantly, the corporate debtor was acting on advice and instruction of the Director of Spade. Drawing inference from this fact, Mr. Arun Anand was held by the Court to be a person participating in the policy-making process of the corporate debtor in accordance with Section 5(24)(m)(I).

"Related party"- a continuing classification?

Interestingly, the Court for the first time had the opportunity to interpret the first proviso of Section 21(2), which provides that a financial creditor that is a related party shall not have a right of representation, participation or voting in a meeting of the committee of creditors.

The question that a rose for consideration was- whether the disqualification under the

proviso would attach to a financial creditor only in praesenti, or it would also extend to those financial creditors who were related to the corporate debtor at the time of acquiring the debt?

It observed that the use of the simple present tense in the first proviso to Section 21(2) is indicative of the fact that the disqualification applies in praesenti in light of the definition of 'related party' under Section 5(24), which uses phrases such as 'is accustomed to act' or 'is associated' to define a related party in the present tense.

However such literal interpretation was found to be against the object and purpose for which the proviso was enacted and it was held that court should interpret the provision in a manner that would advance the object and purpose of the statute and not lead to its provisions being defeated by disingenuous strategies.

Going by this interpretation whenever any financial creditor seeks a position on the CoC on the basis of a debt which was created when it was a related party of the concerned corporate debtor, the exclusion which is created by the virtue of first proviso to Section 21(2) must apply.

Therefore, in light of these findings, the Court held that in case where the related party of the financial creditor ceases to become a related party in a business capacity with the sole intention of participating the CoC and sabotage the CIRP, by diluting the vote share of other creditors or otherwise, should also be considered as being covered by the exclusion.

In our view, this was one of the cases where the Hon'ble Apex Court was faced with a challenge to choose between literal interpretation and purposive interpretation. The Supreme Court has preferred to do a balancing act to strictly enforcing the purposive interpretation of the Code taking into account the interest of the corporate debtor and related parties.

Collusive transactions: looking

beyond the text of the documents

The Hon'ble Court laying down the principles on the Section 21 of the Code relating to constitution of Committee of Creditors observed that while determining the true effect and nature of the alleged collusive or sham transactions between the parties, NCLT and NCLAT in summary proceedings might not be in a position to go behind and find out the common intention of the parties to enter into such transactions leaving and rather draw the inference from the facts at hand.

However, the Supreme Court delved into the true nature of the transaction and found that the documentation created was mere sham, and did not accurately reflect the true nature of the transaction between the parties. Having read beyond the text of the documents, the Hon'ble Court held that the transaction did not genuinely lead to any financial debt and was a collusive transaction.

In our view, this observation of the Hon'ble Court is well aligned with the settled principles of law earlier recognized by the Hon'ble Court. It is well established principles that court have the power to "look through" documents to see true nature of transactions and which has been observed by the Hon'ble Court in many cases in the past.

The Hon'ble Supreme Court in "Sundaram Finance Ltd. vs. State of Kerala &Ors." AIR 1966 SC 1178 and V.E.A. Annamalai Chettiar & Ors. vs S.V.V.S. Veerappa Chettiar & Ors." AIR 1956 SC 12 has held that the true effect of a transaction may be determined and judged from the intention of the parties and all the circumstances of the case and it has all the power to go behind the documents and determine the nature of the transaction, whatever may be the form of the documents.

It is a step in the right direction, as dishonest parties ought not to be bale to wrongly circumvent or attract provision of the IB Code by disingenuous schemes and by creating sham documents to cloak the true nature of transactions. The decision of the Hon'ble Apex Court can be expected to act as a guide to all NCLT and the NCLAT in determining the true nature of transactions irrespective of sham documentation.

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INVESTIGATIONS/SCRUTINY/ASSESSMENTS UNDER GST: STAYING TWO STEPS AHEAD!

While we approach towards the year 4 milestone of GST, one cannot help but reminisce the momentous year 2017, when the much awaited reform finally arrived after almost a decade of deliberation. There was a large section of trade and industry which believed that the implementation of GST would be stalled even further than July 1, 2017 due to reasons like the ongoing battle between the Centre and State, the start of the financial year had passed in April and a general feeling of denial that GST is finally going to be implemented. However, the then Finance Minister, Mr. Arun Jaitley made GST a reality from July 1, 2017 discarding all such notions and reasons. Now that GST is 4 years old, the time for GST assessments, investigations, and scrutiny has arrived.

Why is there a need for preparing for assessments?

1. Ill-preparation has long term effects: It was this feeling of procrastination and denial that majority industry players, even large MNC's was not equipped enough to welcome GST in their ecosystem. Moreover, the implementation was done in a hurried manner, leading to superficial steps being taken. Implementation of GST was not only a change in taxation regime, but it transformed most of the business functions such as purchases, sales, marketing,

information technology, finance, tax, legal etc. However, the preparedness of industry

was cursory which affected the implementation in an adverse manner. Though, the trade puts the ball in the Government's court citing not enough time was given to prepare, the fact is that the industry never took the deadlines seriously and downplayed the repeated guidelines issued by CBIC in this regard. The result of this sluggishness will come out soon enough when the GST assessments or investigations or scrutiny will begin in full swing. Although a lot of companies have either faced the music or have received the notices in this regard, there are still certain assesses which are yet to face the facts. Once the results of these investigations, scrutiny, assessments are out, a clear picture of the hurried implementation shall be visible. Thus, a post-implementation analysis becomes critical.

2. Frequent changes to the law: Another reason which shall have an equal bearing would be the frequent amendments made to the GST law in these last 3.5 years. The recurrent amendments to GST law is mind boggling. The state of the matter is such that anyone can feel pity for the taxpayers of the country. These amendments, notifications, circulars etc. are a testimony of the rushed implementation and the need to streamline the law. This also proves that not only the industry but the Government was also ill prepared for the implementation. The everyday changes are hard to keep track of for the industry and may have caused errors and mistakes having far reaching impact.

3. The Glitch-ful GSTN: Moreover, the technical glitches are a constant bug for the industry. Though the much trumpeted GSTN and the benefits of e-returns are yet to be experienced, the journey of transitioning to the tech abled compliances has been far from smooth. These technical glitches have given rise to a huge number of fiascos, reconciliation issues, errors on account of technological error etc. The Tran-1 debacle is a classic example where the portal did not allow or even after submission did not reflect the transitional credit to be carried forward.

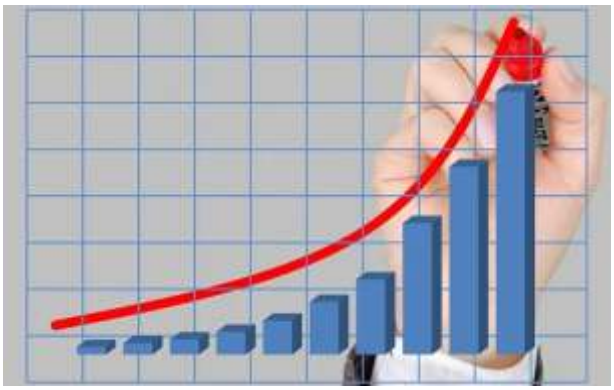
4. Covid-19, the black swan event: The arrival of Covid-19 has also changed the way business is done. Businesses have now become even more

dynamic and ready to adapt to any given situation. While it is true that tax compliances are important, it is equally correct that compliances stem from business and not the other way round. Businesses are fast paced and ever changing, making it difficult for them to adhere to complex taxation laws. Also, entrepreneurs are rightly focussed on the augmentation of business and tax compliances takes back seat. This has led to non-compliance in certain cases, and incorrect compliances in others.

5. Self-Certification of GST audit report: The Union Budget has done away with the requirement of certification of the GST annual audit report. Now, the enterprise would have to self-certify its GST audit report. This is a clear shift to the self-governance regime where no professional vetting is required. Although, this may prove to be a step in the direction of ease of compliance, the long term results may not seem encouraging. In the absence of any professional review, the businesses may keep making errors without any intervention which would lead to heavy penalty and litigation costs.

6. Different states, different rules: When GST was introduced, it was proclaimed to be a unified regime – One Nation, One Tax! However, in recent times, it is being noticed that states have started to issue their own guidelines, circulars, forms, formats etc. A business which has presence in more than one state may recall their VAT regime days when each state had their own rules and law to follow. This has also led to a chaotic situation as GST has a centre and state element involved and separate rules for each would complicate the situation even further.

7. Approach of GST officers: A practical challenge faced by the industry is the mind-set or psychology of GST officers. Though the designations of the officers may have changed from VAT/ Service tax/ Central Excise to GST, the sensibilities remain same. State officers having VAT experience try to interpret GST in the same fashion, whereas the Centre officers still have



Service tax/ Excise regime instilled in their minds which play a key role while inferring the GST law.

What needs to be done?

GST assessments, investigations and scrutiny will soon become a regular event and hence it is essential to be well-prepared for the same. However, the million dollar question being how does one do that? After all, Abraham Lincoln once said 'Give me six hours to chop down a tree and I will spend the first four sharpening the axe'. Thus, the trade needs to figure out how to sharpen the axe!

Quoting William Shakespeare – 'All things are ready, if our mind be so'. The first step that needs to be taken is to avoid the temptation of waiting for the actual assessment notices to arrive, to start preparing. If there is any time to prepare, it's certainly now! Hence, the taxpayers need to break out from their inertia which holds them back.

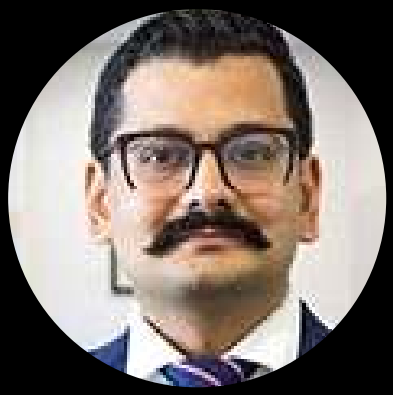
The next step is to take stock of the impact analysis done when GST was implemented. While it has been only a short tenure of 3 years, a lot has changed in terms of business functions and the law. Thus, one needs to pull out the impact analysis report and tie it up with the current operations.

Once the stock taking is done, a complete end-to-end review of activities and their taxability from GST perspective is required to be done. Different experts may name it differently viz. diagnostic review, health check review, mock audit, etc. However, principally the activity remains same, i.e. to map all operations and determine their taxability as per the current law. Technology can also be used at this stage to minimise human effort and time involved. Tools such as reconciliation tool, audit tool may come handy in such scenarios. The benefits of this step are countless; reduced penal costs as mistakes and errors are detected early and tax payments can be made suo-moto, minimal litigation cost, no harm to the reputation of large organisations etc.

Once the business has the report in hand, it needs to do a comparative analysis to check whether their tax positions are in lines with the expert opinion or not. Necessary actions are required to be taken depending on the results. This can be the end of first phase where the businesses ensure that they are on the correct side of the ever changing law and all bases have been covered.

In the second phase of this activity, an Assessment Dossier can be prepared. An Assessment Dossier is a compilation of all documents and information which is usually asked by the GST officer such as financials, GST returns, GST audit report, tax challans, details of ITC availed, details of tax paid under reverse charge mechanism, flowchart of company's activities, explanatory notes, etc. Such assessment dossier makes you a proactive taxpayer and keeps you in the good books of the GST officers. Moreover, the advantages of having all necessary information and documents at one place cannot be insisted upon enough.

So next time the GST officer issues an assessment/ investigation notice, hand him your assessment dossier and not an excuse!



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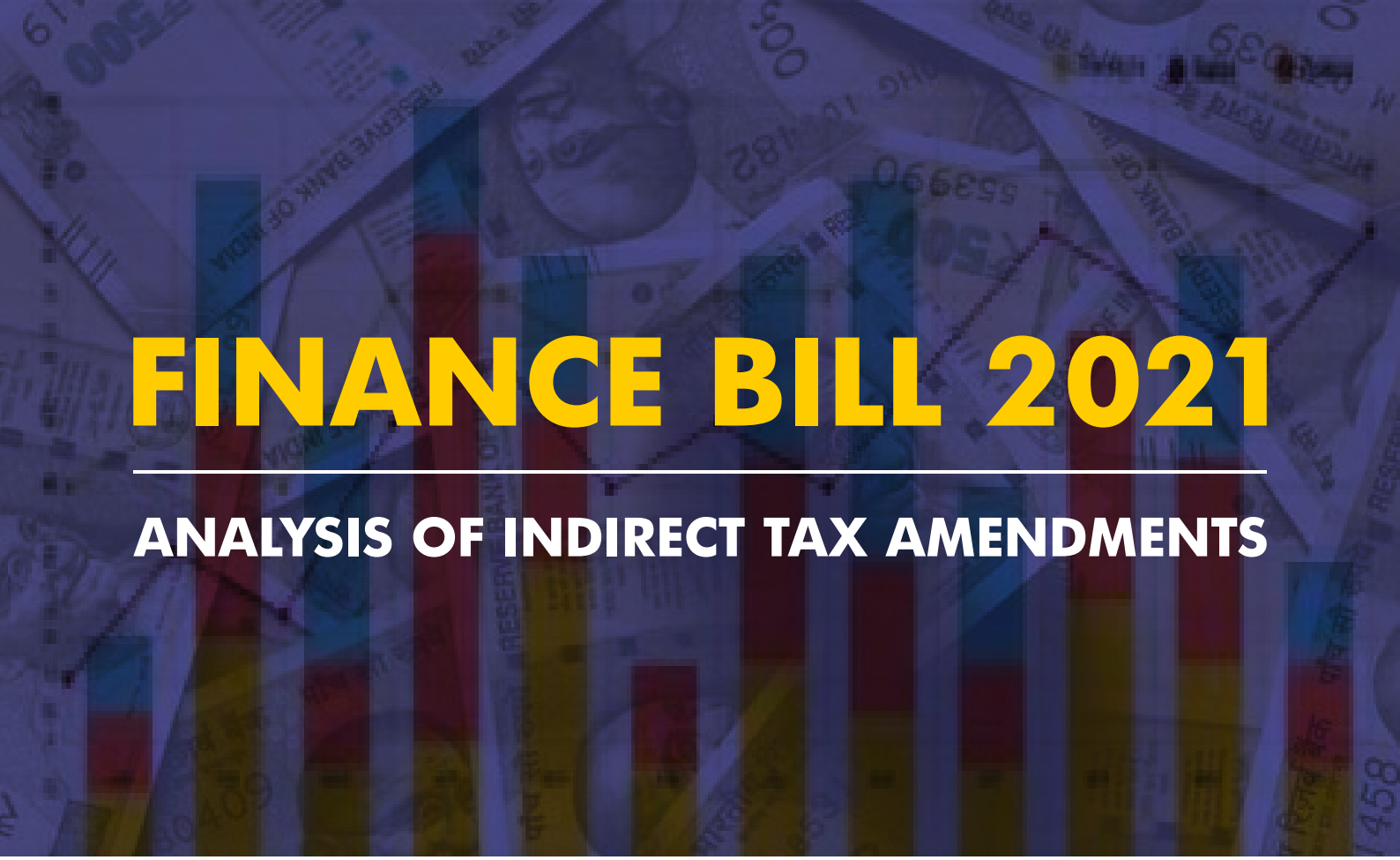

FINANCE BILL 2021

ANALYSIS OF INDIRECT TAX AMENDMENTS

A. Central Sales Tax Act, 1956

Amendment Proposed

C Forms discontinued

GABA & CO. | Remarks

Amendment intends to overrule various High Court decisions upholding issuance of C Forms even for the goods liable to tax under Goods and Services Tax ('GST') Laws. Notable that the amendment once enacted will operate prospectively.

B. Central Goods and Services Tax Act, 2017

Amendment Proposed

Unincorporated bodies like clubs, societies etc. will have to pay GST on amount received from its members for using various facilities provided by these clubs, societies etc.

GABA & CO. | Remarks

The amendment has been brought in to overrule the Supreme Court decision in the case of Calcutta Club Limited w.r.t. Doctrine of Mutuality.

Amendment Proposed

A new clause (aa) is inserted to Section 16(2) to provide that Input Tax Credit ('ITC') could be availed only when details of invoice or debit note are furnished by supplier in his Form GSTR-1 and such details are communicated to recipient of such documents.

GABA & CO. | Remarks

The amendment intends to provide a legal sanction to restrict ITC if not reflected in Form GSTR-2A of the taxpayer. Thus, it has now become imperative for taxpayers to reconcile their ITC every month before filing

Form GSTR-3B.

In our view, the proposed amendment may be challenged on the ground of fairness (Article 14) and reasonableness (Article 19). Presuming the amendment is constitutional, we believe that the Authorities cannot proceed to reverse the ITC of recipient without first being reaching out to the supplier for demand.

Amendment Proposed

Section 50 of Central GST Act, 2017 ('CGST Act') has been amended to provide that interest is payable on the net cash liability w.e.f. July 1, 2017.

GABA & CO. | Remarks

The taxpayers who have paid interest on gross tax liability can claim refund of the excess interest paid.

Amendment Proposed

An Explanation has been inserted in Section 75(12) to clarify that the expression 'self-assessed tax' shall include the tax payable as disclosed in Form GSTR-1, but not included in the return furnished under section 39.

GABA & CO. | Remarks

It has become imperative for taxpayers to reconcile the tax liability disclosed in Form GSTR-1 with the actual tax paid at the time of filing Form GSTR-3B.

Needless to mention that the Explanation, once enacted, will operate prospectively.

C. Integrated Goods and Services Tax Act, 2017

Amendment Proposed

Section 16 is being amended to provide that supplies made to SEZ will be treated as 'zero-rated' only when made for authorised operations.

Section 16(3) is being amended to remove certain anomaly and grant enabling powers to Central Government to impose conditions, restrictions, and safeguards on claiming the refund of ITC.

Section 16(4) has been inserted to provide that option to make zero-rated supplies with payment of IGST shall be open only to certain notified class of suppliers and class of goods or services.

GABA & CO. | Remarks

- For the period prior to Finance Act 2021, supplier can claim refund even if the supplies to SEZ was not made for authorised operations or the SEZ officer endorsement could not be obtained on the

invoices. Post enactment of Finance Act, 2021, it is suggested that due care is exercised to obtain such endorsements on the invoices.

- Taxpayer must follow all the conditions under CGST Rules to claim refund in case of exports made under bond or LUT without payment of tax.
- Until the Government notifies the classes of taxpayers or goods or services, the taxpayers can continue to make zero-rated supplies with payment of IGST [other than falling under Rule 96(10)].

Further, the Revenue have started issuing notices to taxpayers for verifying their input tax credit claims. Therefore, it is advisable that proper reconciliation and records of input tax credit must be ready with the taxpayers.

D. Customs Act, 1962

Amendment Proposed

Section 28BB has been inserted to provide that in case of audit, search, seizure or summons, the inquiry or investigation shall be completed within a period of two years from the date of initiation which can be extended by the Principal Commissioner or Commissioner further by one year.

Sub-Section (2) of Section 28BB provides that the period for seeking information from an overseas authority through a legal process, shall be excluded from the above-mentioned time limit.

GABA & CO. | Remarks

The time limit for issuance of Show Cause Notice has been increased very deviously. The expression 'initiation' is not defined which makes the time limit open.

Sub-section (2) is brought in for verification request sent to authorities of Trade Partner country under an FTA.

Amendment Proposed

Section 113 has been amendment to impose confiscation where any goods entered for exportation under claim of remission or refund of any duty or tax or levy to make a wrongful claim.

Adjacently, Section 114AC now provides that where any person has obtained refund of tax paid by utilizing ITC fraudulently, such person shall be liable for penalty not exceeding five times the refund claimed.

GABA & CO. | Remarks

The amendment may be tested on the Doctrine of Double Jeopardy enshrined in Article 20 of the Constitution since the

offence is already covered by the GST Laws.

Amendment

Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017 ('IGCR Rules') has been amended to now allow a manufacturer is now allowed to avail exemption even if goods are being manufactured at the job-work premises.

GABA & CO. | Remarks

The IGCR Rules earlier were not clear as to whether the job-worker's premises will be treated as manufacturer's facility or not for granting the concessional rate of duty benefit.

However, the Tribunal had in various cases treated the job-worker's premises as the manufacturer's premises itself. Amendment is, therefore, being brought in to remove the anomaly and extend the benefit to job-worker's premises in express terms.

Disclaimer:

The views expressed in this write-up 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 write-up and acts or refrains from any act accordingly. We would suggest that a detailed legal advice must be sought before relying on this write-up.

Yogesh Gaba
Managing Partner- Indirect Tax
GABA & CO.

SHOULD AN HONEST **TAXPAYER** BEAR LOSS DUE TO DEFAULT ON THE PART OF ITS **SUPPLIERS?**

Introduction

With the introduction of GST, plenty of amendments were also introduced in the robust taxation system to ensure transparency and simplicity in the system. Major transformations that were introduced include tax charged by suppliers appearing in GSTR 2A of the recipient based on GSTR-1 filed by the supplier, auto-population of GSTR 1 and GSTR 2B data in GSTR 3B, e-invoicing system, etc

One of the most vital aspect of the Goods and Services Tax ('GST') regime is the elimination of the cascading effect of taxes and ensuring seamless flow of credits. If the credit flow is disrupted, it would enhance the cost of doing business and cause issues to a variety of stakeholders. Hence, timely transfer of credit is of paramount importance for any service recipient.

In this article, we will elaborate on the dilemmas that an honest service recipient goes through due to the defaults on part of the suppliers.

Provisions of Law

As per the provisions embedded in GST Law, a registered person will be entitled to avail ITC in respect of any invoice or debit note only if the following conditions are satisfied:

1. Goods and services are received by the recipient
2. The recipient is in possession of tax invoice or debit note issued by the supplier.
3. The amount of tax charged in respect of such supply has been actually paid to the government by utilizing cash or ITC admissible in respect of such supply.
4. Monthly or quarterly returns are furnished

The points 3 above imposes that credit would be available only when the taxes are actually paid to the government. It implies that if the supplier performs its part of obligations diligently, the credit would be available to the service recipient.

Procedures for e-invoicing are also implemented for all the entities having aggregate turnover in any preceding Financial Year from 2017-18 onwards exceeding INR 500 crores w.e.f October 1st 2020 and for all entities exceeding INR 100 crore w.e.f January 1st 2021. The Applicable persons will have to issue an invoice in such manner as specified in Rules. Every invoice issued in any manner other than the manner specified, will not be treated as an invoice.

Further, the government restricted the

claimable ITC to 120% of the eligible credit amount reflecting in GSTR-2A which was later on reduced to 110% and now the government further has reduced it to 105%. So, to conclude the recipient has been left at the mercy of the supplier's action especially in case the terms of the contract states the advance payment or a shorter credit period.

Difficulties to the taxpayers

The above provisions under GST were introduced in order to bring in transparency in the system and to ensure seamless flow of credit with the aid of automation. However, this has led to an additional trauma for the honest service recipients, since the recipients will also have to verify whether the supplier

has complied with all the provisions in GST to claim their credit.

For instance, Mr. X (a trader of goods) is satisfied with the quality of goods supplied by Mr. A and wishes to purchase them from Mr. A in order to further supply. Nevertheless, Mr. A neither files the returns timely nor pays the tax to the government. Hence, Mr. X will not be able to claim the credit on bona-fide purchase of the goods even if he has complied with all the provisions and paid tax on his outward supplies to the government. This will enhance the cost of doing business and will impose an additional burden on the recipient to constantly follow-up with suppliers for paying the taxes and filing the returns.

If we also say in the above example that Mr.

A had a turnover more than INR 500 crore and was eligible to issue an e-invoice, the recipient will also have to ensure that an e-invoice is issued in lieu of regular tax invoice. Thus, it mandates for every recipient of goods and services to obtain a declaration from the supplier that he/she is not eligible to issue an e-invoice. But, that can also be challenged by the department and will open another box of litigation.

The supplier may even commit a mistake in filing of GSTR 1- late filing, wrong details entered etc. Consequently, the recipient will not be able to claim the ITC within due time causing working capital blockages.

Several Courts have taken heed of the issues faced by sincere taxpayers and have passed judgments in their favor. Karnataka High Court in case of M/s. Onyx Designs, wherein it was held that the benefit of input tax could not be deprived to the purchaser dealer, if the purchaser dealer satisfactorily demonstrates that while purchasing goods, he has paid the amount of tax to the selling dealer. If the selling dealer has not deposited the amount in full or a part thereof, it would be for the revenue to proceed against the selling dealer. Apex court dismissed the petition filed by the revenue against the order

of Delhi High Court in case of Arise India Limited wherein Delhi High Court has held that similar provision of Delhi VAT act being arbitrary and unconstitutional. Court also held that purchasing dealer cannot be expected to keep track of whether the selling dealer has in fact deposited tax. Further, court also held that the department is not helpless if the selling dealer commits a default.

So, in order to get relief, the taxpayer will have to go the court, which will increase the burden of the already overburdened judiciary.

Conclusion

Taking a view of the above points, it can be concluded that smooth availability of claims to honest recipients is a long drawn battle. Till date, certain taxpayers are still not able to claim ITC due to default on the part of suppliers. Even though some assistance is provided by the government by blocking E-way bills for non-compliant taxpayers, stricter provisions should be introduced in order to protect the interest of honest taxpayers.

A new clause is being inserted by Finance Bill 2021, which may be a game-changer in this respect. This clause provides that input tax credit on invoice or debit note may be availed only when the details of such invoice or debit note have been furnished by the supplier in the statement of outward supplies i.e. GSTR -1, and such details have been communicated to the recipient of such invoice or debit note. This clause would give a statutory framework to introduce of the provisions related to the restriction of ITC on account of GSTR 2 vs. GSTR 2B matching. Like every cloud, this one also has a silver lining. Insertion of this provision makes it clear that there were no powers conferred under the Act for the disallowance of credit on account of Rule 36(4) or mismatch in ITC from GSTR-2A prior to this insertion. Hence this can form a strong contention against the departmental notices on this account for the previous period.

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DEALING WITH FACELESS PENALTY PROCEEDINGS UNDER SECTION 270A OF THE INCOME-TAX ACT, 1961 ('THE ACT')

I. The Story so far...

1. The Finance Act, 2016, with effect from 01 April 2017, has inserted a completely a new mechanism for imposition of penalty under section 270A of the Act replacing the erstwhile section 271(1)© of the Act, dealing with levy of penalty for concealment of income or furnishing of inaccurate particulars.

2. The issue as to existence of (i) concealment of income or (ii) furnishing of inaccurate particulars of income has always been a matter of litigation owing to different interpretations under different circumstances.

3. Section 270A of the Act is a new penalty provision which was introduced with an intention to bring objectivity, certainty and clarity into the penalty provisions. Under the new provision, an altogether fresh terminology of 'misreporting' and 'underreporting' has been introduced with a view to curb the ambiguity in the interpretation of penal provisions.

4. The new penalty provisions clearly indicate that an addition to income does not automatically result in imposition of penalty. An addition to income is primarily divided into three parts:

a. The first is an addition not in the nature of under-reporting of income for which there is no penalty.

b. The second is an addition in the nature of under-reporting of income but not as a consequence of misreporting for which penalty provided is 50% of the tax amount.

c. The third is an addition in the nature of under-reporting of income as a consequence of misreporting for which penalty provided is 200% of the tax amount.

Thus, the penalty provisions of section 270A of the Act is neither mandatory nor automatic.

5. According to the plain provision of sub section (1) of section 270A, the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner may 'direct', 'during the

course of any proceeding' under the Act, to levy the penalty on a person who has 'under

reported' his income and such penalty shall be in addition to tax, if any, and would be on the 'under reported income'.

Sub section (2) provides as to who can be a person considered to have 'under reported income' whereas sub section (3) provides as to how 'under reported income' shall be computed.

Sub sections (4) and (5) provides for the 'under reported income' and the applicable preceding year(s) for such 'under reported income', in relation to detection of source of any receipt, deposit or investment being disallowed in the prior years and no penalty was levied on such disallowances. It may be noted that sub section (4) and (5) of section 270A are on the lines of Explanation 2 to section 271(1)(c) of the Act.

Sub section (6) of section 270A provides five exhaustive situations which shall not be treated as under-reporting of income and sub section (7) provides the rate of penalty in respect of the 'under reported income' equal to 50% of the tax payable on such 'under reported income'. Sub section (8) provides for the levy of penalty equal to 200% of the tax payable on the 'under reported income' if such 'under reported income is in consequence of misreporting of income' instances of which have been exhaustively listed in the form of six cases (a) to (f) under sub section (9).

Sub section (10) provides for the methodology for computing tax payable in respect of the 'under reported income'. Sub section (11) provides that there would be no penalty on any addition or disallowance made if such addition or disallowance has already formed the basis of imposition of penalty on a person either in this year or in any other year. Sub section (12) mandates the passing of penalty order in writing.

6. Therefore, the new penalty section 270A replaces all the 8 live sub sections (count wise and excluding the omitted ones) and 7 Explanations of section 271 of the Act with 12 sub sections and 1 Explanation engrafted in section 270A. Thus, at least in that sense, the new penalty provision under section 270A is 'simplified'.

II. Some important aspects of section 270A of the Act

1. As per section 270A(2)(a), underreported income would be considered to be the difference the assessed income and income processed as per intimation u/s 143(1)(a) of the Act. Thus, it is important to align the tax adjustments (whether by way of revised return or otherwise) before the tax

return is processed u/s 143(1)(a) of the Act to avoid penalty exposure u/s 270A of the Act.

2. Under the new framework, penalty

u/s 270A can be levied even before completion of assessment as the provisions suggests that tax authorities may direct "during the course of any proceedings under this Act". It may be interpreted that the completion of assessment is not necessary for passing order u/s 270A.

3. Where misreporting is found, then entire underreported income without any exclusion as provided in sub-section (6) are treated as misreported income. However, a finding by the AO that underreporting of income is in consequence of any misreporting is necessary before applying non-obstante clause of sub-section (8).

4. The amount of income in respect of which the following conditions are cumulatively satisfied shall be excluded from under-reported income under clause(a) of section 270A(6) of the Act. The conditions required to be cumulatively satisfied are:

(I) the assessee offers an explanation;

(ii) the assessee has disclosed all material facts to substantiate the explanation; and

(iii) the Specified Tax Authority is satisfied that the explanation offered is bona fide;

The term `bona fide' has been explained to mean "in good faith", "genuinely" which are suggestive of honesty of purpose. They convey absence of intention to deceive and connote that the transaction in question is a true and genuine transaction and not a colourable and sham one and there are no strings of any kind attached to that transaction and that there is no secret or covert arrangement. **[GTO vs. Gautam Sarabhai [1989] 29 ITD 212 (Ahd.)]**

"Bona fide" means good faith implying the absence of fraud, unfair dealing or acting, whether it consists in simulation or dissimulation. **[GTO vs. Rajmata Shantadevi P. Gaekwad [2001] 76 ITD 299 (Ahd.)].**

The term `satisfied' means make up one's mind not troubled by doubt or reach a clear conclusion on the evidence before the authority.

The term "material facts" has been explained by Rajasthan High Court in **Mohammed Yusuf vs. Bhairon Singh Shekhawat AIR 1995 Raj. 239,** for the purpose of the Representation of People Act, 1951, as follows –

"36. Following settled position of law emerges from the decisions already referred: ...(B) The material facts mean (a) facts necessary to formulate a complete cause of action, (b) all preliminary facts which must be proved by the party to establish a cause of action, (c) the basic facts which constitute ingredients of particular corrupt practice, (d) all the facts which are essential to clothe the petitioner with complete cause of action, (e) the facts which if established would give the petitioner the relief asked for, (f) the facts on the basis of which the Court could give a direct verdict in favour of the election petitioner in case the returned candidate did not appear to oppose the petition, (g) facts which if not proved, the petition must fail.

..... (D) There is a difference between `material facts' and `particulars'. The function of particulars is to present as full a picture of cause of action with such information in detail as to make the opposite party understand the case he will have to meet. There may be some overlapping between `material facts' and `particulars', but the two are quite distinct. The distinction is one of degree. The `material facts' are those which the party relies upon and which if it does not prove, he fails."

5. Section 270A(9) of the Act provides for the events of misreporting and the

provision of section 270AA(3) of the Act provides for immunity from penalty subject to the satisfaction of certain conditions and in cases which do not fall under the circumstances referred to in section 270A(9) of the Act. On perusal of the provision of section 270AA(3) of the Act, it implies that the AO has to record specifically at the time of conclusion of assessment proceedings that he is desirous to levy penalty for mis-reporting or under-reporting. Hence, recording of the satisfaction by the AO is mandatory to levy penalty u/s 270A of the Act.

In view thereof, the following judicial pronouncements in relation to erstwhile penal provisions, shall be equally applicable to the provisions of Section 270A with regard to recording of satisfaction:

Full Bench of Hon'ble Delhi High Court has held that 'power to impose penalty under section271(1)(c) depends upon satisfaction of assessing officer in course of assessment proceedings and it cannot be exercised, if he is not satisfied and has not recorded his satisfaction about existence of conditions specified in clause (a), (b) and (c) of sub section (1) of section 271before proceedings are concluded'. This means, if the satisfaction is missing in the assessment order, no penalty could be levied. [CIT vs. Rampur Engg. Co. Ltd. (309 ITR 143) (Delhi HC)]

Penalty proceedings cannot be commenced by the ITO before the completion of assessment proceedings by the AO. However, the power to impose penalty depends upon the satisfaction of the ITO in the course of proceedings under the Act i.e. it cannot be exercised if he is not satisfied about the existence of conditions for penalty before the proceedings are concluded. Satisfaction before conclusion of the proceeding under the Act, is a condition for the exercise of the jurisdiction. [CIT vs. S. V. Angidi Chettiar (44 ITR 739) (SC)]

In the case of CIT vs. Manjunath Cotton and Ginning Factory (359 ITR 565), the Hon'ble Karnataka High Court held that the meaning of the word direction is of importance. Merely saying that penalty proceedings are being initiated will not satisfy the requirement. The direction to initiate proceedings should be clear and not ambiguous

Element of satisfaction should be apparent from the body of the assessment Order itself. The Court cannot go in the mind or search the assessment file of ITO.[Commissioner of Income Tax V/S. Vikas Promoters Pvt. Ltd. (277 ITR 337) (Delhi)]

III. Immunity under section 270AA of the Act

1. With a view to reduce litigation and to recover taxes along with interest, legislature has also introduced the provision authorising the AO to grant immunity from imposition of penalty under section 270A and initiation of prosecution under section 276C or section 276CC, upon satisfaction of conditions mentioned in the section.

2. Section 270AA, as introduced, has 6 subsections. The section seeks to impose conditions on satisfaction of which the AO shall grant immunity from imposition of penalty and also from prosecution. The primary prescribed conditions are that the taxes along with interest are paid and no appeal is preferred against the assessment order.

3. An application for immunity has to be made within a period of 30 days from the end of the month in which the order under section 143(3) or under section 147, as the case may be, has been received. Rule 129 has prescribed Form No.68 in which the

application is to be made.

4. The order shall be passed by the Assessing Officer within a period of one month from the end of the month in which application is received by the Assessing Officer. The order accepting application or rejecting such application shall be final with no option for appeal or revision.

5. The provisions suggest that the immunity will be granted if order of assessment is under section 143(3) or under section 147. Hence, it appears that orders for assessment under sections 144, 153A or 153C may not qualify for grant of immunity under section 270AA.

6. Assessee can still explore to file an application u/s 273A of the Act before the Pr. CIT if the application of the assessee has been rejected by the AO u/s 270AA.

7. Circular 5 of 2018 dated 16 August 2018 issued by CBDT clarified that the immunity provided u/s 270AA of the Act shall not preclude such assessee from contesting the same issue in any earlier assessment year. Further, the Income-tax Authority, shall not take an adverse view in the proceedings for penalty under section 271(1)(c) of the Act in earlier assessment years merely on the ground that the assessee has acquiesced on the issue in any later assessment year by preferring an immunity on such issue under section 270AA of the Act.

IV. The Faceless Proceedings....

On 13 August 2020, the Hon'ble Prime Minister launched a platform for "Transparent Taxation – Honouring the Honest" wherein he elaborated that the platform has major reforms like Faceless Assessment, Faceless Appeal and Taxpayers Charter. The Faceless Assessment and the Taxpayers Charter came into force on the same day and the Faceless Appeal Scheme, 2020 was brought in on 25 September 2020. Thereafter, the CBDT has also introduced a "Faceless Penalty Scheme, 2021" through a notification dated 12 January 2021 defining the scope and the procedure to carry out the penalty proceedings under the faceless regime. The summary of the scheme is provided at https://www.linkedin.com/feed/update/urn:li:activity:6755775335259766784

The timing of bringing the faceless penalty scheme around mid of January 2021 indicates the intention of the brining consistency with the faceless assessments (specifically for the ongoing proceedings for AY 2018-19). The authorities have started passing the assessment orders for AY 2018-19 in e-proceedings and the authorities realized that it is more relevant to make the penalty proceedings faceless simultaneously to bring more transparency in the system.

The intention of the government is a welcoming move however sometimes certain immediate implementations leave some gaps that brings doubts in the mind of the users about its application.

Practically, all the penalty proceedings have started in a faceless manner and the responses are required to be filed online only. It would be important for all the Companies to make an extensive factual and legal submissions during the faceless penalty proceedings that shall enable a clear understanding of the arguments and submissions for the respective penalty units.

The scheme specifically provides that all communications between the Faceless Penalty Centre and the assessee or any other person, as the case may be, or his authorised representative, shall be exchanged

exclusively by electronic mode. Further, personal appearances have been specifically prohibited. This may lead to many practical challenges in dealing with the cases which are not specifically provided for the time being and one of them relates to immunity application under section 270AA of the Act.

The faceless penalty scheme does not provide any mechanism to apply for immunity online. Further, while interacting with the tax authorities via electronic mode for the purpose of penalty proceedings under section 270A of the Act, there is no specific feature/ option to apply for immunity under section 270AA in the prescribed Form 68 via electronic mode.

Representations are being filed in this regard and hopefully CBDT shall bring clarity and appropriate functions/ features that shall specially provide for applying for the immunity under section 270AA online.

In the meanwhile, as an alternative, the Companies can explore to file the immunity application as a response to notice received under 270A of the Act and request the authorities to forward it internally to the concerned penalty unit for disposition of the immunity application under section 270AA of the Act.

Concluding Remarks

The replacement of old penalty provisions with completely new framework complemented by faceless regime though brings transparent litigation, honest taxation but also leaves a mark for ambiguity amongst the taxpayers. It appears that the respective units for faceless proceedings are not adequately geared up at the moment and the Assesses are expected to face some practical challenges while interacting with the authorities in an electronic mode. The initial years of faceless proceedings might be a challenge however the same appears to be a breathing space in long run.

It is important that all the companies shall be as elaborative as it can and simultaneously as precise as it can while dealing with the tax authorities in the faceless world so as to avoid any adverse implications. In case of doubts, it is always advisable to seek advice from the professional consultants.

The above article is authored by CA. Ashu Gosain who is Executive Partner with ACQUILA Business Consulting LLP based out at Gurgaon, India and has been supported by CA. Nitin Jain, Deputy Manager at ACQUILA. The Author comes with more than a decade long experience of advising corporates and MNC's on their various tax matters and have extensive experience of working with Big 4 consulting firms in the past, both in India and abroad. For any queries/ detailed discussions, he is reachable at +91-9871358887 and ashu.gosain@acquila.in.

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Digital Training on Goods and Services Tax (GST)

Digital Training on Goods and Services Tax (GST) scheduled on 11th, 12th, 15th, 18th, 19th & 22nd January 2021 presented by Achromic Point. In this session on Chargeability and Classification was taken by Yogesh Gaba, Managing Partner- Indirect Tax at GABA & CO. Rajat Mohan, Senior Partner at AMRG & Associates shared his insights on Place of Supply and Time of Supply, whereas Valuation and contentious issues were discussed by Ankita Bhasin, Principal Associate at Shardul Amarchand Mangaldas & Co.

Neha Jain, Senior Associate & Gaurav Narula, Associate Director from NITYA Tax Associates jointly shared insights on Input Tax Credit ('ITC') and related issued. Refunds under GST was taken by Sachin Jindal, Partner at VJM Associates LLP and in the last session Shashank Gupta, Managing Partner at Marg Tax Advisors has a discussion on Handling Departmental Audit, Assessment and Litigation.

Webinar on Claims Management

Webinar on Claims Management conducted on 11th & 12th January, 2021, where Introduction and brief overview of the topic, Identifying and allocating responsibilities, Necessary document management prior to invoking disputes & Dispute resolution clauses were discussed by Ankoosh Mehta, Partner at Cyril Amarchand Mangaldas.

Virtual Session on Labour Codes – Key Issues & Recent Amendments

In this Virtual Session on Labour Codes – Key Issues & Recent Amendments conducted on 11th, 16th, 18th & 23rd January 2021. Savitha kesav Jagadeesan, Senior Resident Partner &
Gaurav Chatterjee, Partner at Kochhar and Co. shared their insight on definitions, features on Wages, Social Security, Industrial Relations & Health & Working Conditions which receive lots of attention from the audience.

Hands on Digital Training on Drafting Commercial Contracts

In this Digital Training on Drafting Commercial Contracts scheduled on 12th, 15th, 19th, 20th, 22nd, 27th & 29th, January 2021, where the session on Formation of a Contract was taken by Isha Sinha, General Manager-Group Head – Legal at Medicover Hospitals. Arti Narsana, Principal Associate at Vaish Associates Advocates gave her inputs on Breach Remedies/Damages/Indemnities,whereas Session on Ancillary Agreements was taken by Sai Srujan Tayi, Partner at Giridhar & Sai, Advocates.
Vasudev Dibbur, Founder at Altius Legal shared his insights on Implied & Express Terms in Contracts. The session on Welding Boilerplate was taken by Karishma Chanana at Aarna Law, Payments and Interest was discussed by Aparna Ravi, Partner at Samvad Partners. Term and Termination; Entire Agreement Clauses; Governing Law, Jurisdiction and Dispute Resolution Clauses Prathik Cheralathammanda, Advocate at Aarna Law.

Digital Training on FEMA- Legal, Compliance and Tax Issues

In this Digital Training on FEMA- Legal, Compliance and Tax Issues scheduled on 20th, 21st, 27th, 28th, 29th & 30th January, 2021, where Arti Narsana, Principal Associate at Vaish Associates Advocates shared her insights on Foreign Direct Investments, Overseas Direct Investments by a person resident in India & Investigations by Enforcement Directorate / Compounding by RBI was discussed by Manish Tyagi, Partner at MHA Legal.

Session on Export and import of Goods and Services was taken by Deepali Rangwani,
Senior Manager at EY, whereas S Manoj, Associate Director at BSR & Co. LLP shared insights on External Commercial Borrowings (ECB). Interplay of Laws dealing with Economic offences (with emphasis on international transactions) was discussed by Pranshu Goel at Aorakii Advisors

Certificate Course on Practical Knowledge of Arbitration and Dispute Resolution

In this Certificate Course on Practical Knowledge of Arbitration and Dispute Resolution scheduled on 2nd, 3rd, 4th & 5th February, 2021. Fundamentals of Arbitration as Dispute Resolution, Practical Aspect of Arbitration Law & Claiming and Proving Damages were discussed by NPS Chawla, Associate Partner at Vaish Associates Advocates Sakshi Singh, Associate at Vaish Associates Advocates & Surekh Kant Baxy, Associate at Vaish Associate Advocates. Sujoy Datta, Senior Associate at Vaish Associate Advocates shared his insights on Drafting and Understanding Arbitration Clauses.

Digital Workshop on Project Financing

In This Digital Workshop on Project Financing scheduled on 2nd, 3rd & 5th February, 2021. Session on Loan Documentation, Security, Types, Creation and Enforcement & Due Diligence was covered by Subhojit Sadhu, Partner at Cyril Amarchand Mangaldas, Pururaj Bhar, Partner at Cyril Amarchand Mangaldas & Vivek Rathore, Partner at Cyril Amarchand Mangaldas which received lots of attention from the delagates.

Writing Effective Audit Reports

In this Writing Effective Audit Reports which was scheduled on 10th, 12th, 17th & 19th February 2021, Session on Introduction & Best Practice Internal Audit Reports & Finalising the Report was discussed by Parthasarathy AR, Partner at RGN Price & Co. Viswanadh Kuchi, Chartered Accountant & Insolvency Professional at Sudit K. Parekh & Co. shared his insights on The Main Report.

Fraud Prevention, Detection and Investigation Training Program

The Training Program on Fraud Prevention, Detection and Investigation scheduled on 22nd, 23rd, 24th & 25th February, 2021, In this Hardik Sheth, Head - Internal Audit & Risk Management at Tech Mahindra Business Services shared his insight on How to Identify Corporate Frauds.
Fraud Schemes and Controls was taken by Sandeep Suresh Vaidya Head, Fraud Risk FCC India at Standard Chartered Bank whereas Conducting a Fraud Risk Assessment and Recognizing the Red Flags of Internal Fraud was discussed by .....

Session on Investigation Techniques- Forensic Accounting Investigation - What it Is was taken by GK Gupta, Vice President- Internal Assurance at Max Life Insurance. Varun Wadhwa, Country Compliance Officer – India at CBRE South Asia Pvt. Ltd shared his insights on Establishing an Anti- Fraud Culture.

2021 Upcoming Events |

S. No	Topic	Date
1.	Dispute Resolution and Tax Controversy Webinar	2nd March 2021– Session 1 3rd March 2021– Session 2 4th March 2021– Session 3
2.	The Cybersecurity Readiness- Emerging Threats and Defenses	12th March 2021– Session 1 16th March 2021– Session 2 19th March 2021– Session 3 23rd March 2021– Session 4
3.	Virtual Training on Mergers and Acquisitions	16th March 2021– Session 1 17th March 2021– Session 2 18th March 2021– Session 3 19th March 2021– Session 4
4.	Certificate Course on International Tax	17th March 2021– Session 1 19th March 2021– Session 2 24th March 2021– Session 3 26th March 2021– Session 4 2nd April 2021 – Session 5 7th April 2021 – Session 6 9th April 2021 – Session 7 10th April 2021 – Session 8
5.	4th Annual GST Summit and Awards- Virtual Conference & Awards	8th April 2021
6.	Auditing and Reviewing Contracts, and Detection of Irregularities and Fraud	12th April 2021 – Session 1 15th April 2021 – Session 2 16th April 2021 – Session 3
7.	3rd Annual Anti-Fraud Conclave & Awards 2021	28th April, 2021
8.	Mitigating Risk and Fraud in Procurement	18th May 2021 – Session 1 19th May 2021 – Session 2 20th May 2021 – Session 3 21st May 2021 – Session 4
9.	Data Analytics for Internal Auditors	24th May 2021 – Session 1 25th May 2021 – Session 2 26th May 2021 – Session 3 27th May 2021 – Session 4

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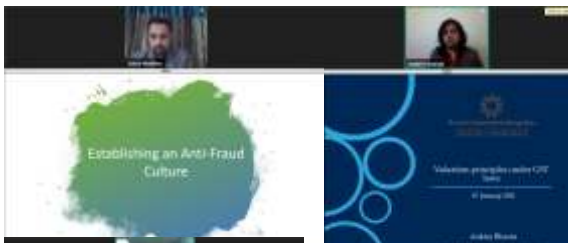

Establishing an Anti-Fraud Culture


Writing Effective Audit Reports


INPUT TAX CREDIT AND RELATED ISSUES


THE BLACK MONEY LAW

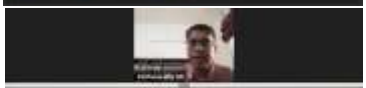

External Commercial Borrowing


THE INDUSTRIAL RELATIONS CODE


Fraud Schemes and Controls
23rd February 2021

IMPLIED AND EXPRESS TERMS IN CONTRACT

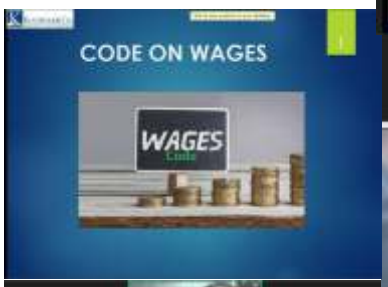

Session 2: Breach Remedies/Damages/Indemnities
by
Arti Narsana
VASH ASSOCIATES ADVOCATES




Handling Departmental Audit, Assessment and Litigation under GST


Key Concepts
Domestic and International Commercial Arbitration
Curial and Governing Law
Seat, Place and Venue
"a litigating lawyer's delight and a drafting lawyer's nightmare."


AARNA LAW
Term and Termination; Entire Agreement Clauses; Governing Law, Jurisdiction and Dispute Resolution Clauses
Prathik Cheralathammanda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Chartered Accountants


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