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DIGITAL ASSETS

Special Tax Law for Cryptocurrency and Non-fungible Tokens

BACKGROUND

India has become one of the largest markets for cryptocurrencies with Indians parking nearly USD 6.6 billion[1] in cryptocurrencies until May this year, compared to USD 923 million until April 2020. India ranks 11 out of 154 nations in terms of cryptocurrency adoption, as per blockchain data firm Chainalysis. While this growth has given Indian cryptocurrency exchanges a reason to celebrate and attract global investors, the regulatory framework has remained unclear and ambiguous.

Reserve Bank of India (RBI), in its Financial Stability Report in the year 2013, warned the public against banking on cryptocurrencies as they posed a challenge to the economy in the form of regulatory, operational, and legal risks. Later, in its circular **"Prohibition on dealing in Virtual Currencies" dated 6 April 2018**[2], RBI prohibited the entities regulated by it from dealing in/providing any services w.r.t virtual currencies, with a three-month ultimatum to those already engaged in such services.

However, on 4 March 2020, the Supreme Court has given its landmark judgment on the said issue, reviving **the market of Cryptocurrencies by holding them valid under the constitution, thereby providing a new lease of life to crypto companies, dealers, and exchanges**.

While the legality of cryptocurrencies is still uncertain, there were also issues on the classification of cryptocurrencies on the tax side and overall tax implications. Accordingly, a separate taxation scheme is proposed in the Finance Bill 2022 for Digital Assets.

SCHEME FOR TAXATION OF VIRTUAL DIGITAL ASSETS

Taxation of virtual digital assets

- Finance Bill 2022 proposes to include Section 115BBH to Income-tax Act, 1961 (Act) to provide for taxation of income from transfer of any virtual digital asset. The applicable tax rate shall be 30% plus the applicable surcharge and cess. There would not be any benefit of income slabs or minimum exemption limit.
- Under Section 2(47A) of the Act, the

1 https://scroll.in/article/999433/why-indias-cryptocurrency-boom-is-problematic

2 RBI/2017-18/154 DBR No.BP.BC.104/08.13.102/2017-18

definition of virtual digital assets has been included. The definition is wide enough to cover cryptocurrencies, Non-fungible Tokens (NFTs), or any other type of digital assets.

- It is also proposed that no deduction for any expenditure (other than the acquisition cost) shall be allowed. Furthermore, no allowance/set-off of any loss on the transfer of digital assets shall be allowed under any provision of the Act to the taxpayer. Such loss shall also not be allowed to be carried forward to subsequent years for set-off.

Taxation on a gift of virtual digital assets

- It is also proposed to amend deemed gift tax provisions under Section 56(2)(x) of the Act to provide for taxation of the gifting of virtual digital assets in the hands of the recipient. However, gifts from relatives would continue to enjoy the exemption like other gifts/assets.
- Thus, in the case of a gift, the fair market value shall be deemed to be the income of the recipient of these assets. However, how to arrive at the fair market value needs to be examined, and it is better if the government provides some clarity on it.
- Also, there could be double taxation once the receiver receives digital assets as a gift, and when they sell them on the full sales value as for that taxpayer, the cost of acquisition is zero. The government should clarify this aspect also.

Withholding tax

- It is proposed to include Section 194S to the Act to provide a tax deduction of 1% on payment for the transfer of virtual digital assets to a resident. Where such payment is in kind or exchange of another virtual digital asset or cash is not sufficient to meet the liability of tax deduction, the person before making the payment for such transfer shall ensure that the tax has been paid in respect of such consideration.
- This withholding tax is to be deducted and paid by the person responsible for making payment to the taxpayer who has transferred digital assets.

- It is also proposed that no tax deduction is to be made if:
    - The consideration payable by a specified person does not exceed INR 50,000 during the financial year
    - In any other case, the consideration payable does not exceed INR 10,000 during the financial year.
    - Specified person means:
        - Individuals and HUF having income other than business or professional income-
        - Individuals and HUF having business or professional income where the gross receipts/turnover/sales do not exceed INR 10 million (in case of a business) and INR 5 million in case of a profession in the immediately preceding year

NEXDIGM'S COMMENTS

A specific taxation scheme is certainly a welcome move. It is expected to provide much-required clarity on the taxation of transactions in digital assets and is also likely to widen the tax base. However, it appears that the provisions are adverse compared to other investment class/assets.

One will also have to see how the norms for determining fair market valuation get prescribed considering the peculiar nature of these assets. Also, while the taxation appears to be simple for residents, it would be interesting to understand the tax in the hands of non-residents. Whether such income would deem to accrue or arise in India would be dependent on the situs of the virtual digital asset and finding the situs would be next to impossible.

With the introduction of withholding tax provisions, it appears that crypto exchanges may have to carry out the compliances.

It would be pertinent to note that the government has a right to tax any income (whether it is legal or illegal). Hence, merely introducing tax provisions for digital assets would not make them legal.

Maulik Doshi

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Nexdigm

PERILS OF RUNNING A TECHNOLOGY BUSINESS IN INDIA

Perils of running a technology business in India. Startups are the new blue-eyed boys and girls of the Indian government. It runs a nice shiny website to guide and register them, bestows *sarkari* recognition on many, waives patent application fees of some and also grants attractive fiscal sops to a chosen few. The Government even has a special capital fund for the startups. Ministers flaunt startup success stories on the floor of Parliament. When some *sarkari* measures such as taxing of super premium earned by companies upon issue of share capital were threatening to throw the baby out with the bath water, the Government responded swiftly to startups' cries of help and tried to mitigate the unintended effects of what infamously came to be known as angel tax. The best part is that the Government even bans some of its pesky little officials in the local field formation to visit the startup offices on the pretext of any surveys or inspections.

All this and more government support is available if you are a very young, fledgling startup of a certain vintage. However, if you were born earlier than the cut-off date, then the Government continues to be as unfriendly as it can be. The unfortunate example of one such technology company that I have seen closely is a case in point.

About TechCo

TechCo was born in 2006. It was a global advertising technology platform for programmatic ads. It simplified the marketing technology ecosystem for small and medium segment advertisers by helping them to efficiently use their modest marketing budgets for internet reach. The Company was proudly headquartered in India, set up subsidiaries in the US and Singapore, attracted marquee investors and even turned profitable after the first few years of losses - a very common trajectory for any technology company. And all this took place without any notable supportive schemes of any Government. In fact, perhaps the successful run was because the Government kept itself away. Unfortunately, as is also very common with technology companies, it doesn't take much time for the fortunes to change. Evolving technology, dynamic practices and changing regulations world-wide meant that TechCo's business had turned a corner by 2015. It is at this turn that the Indian tax department suddenly got interested in the Company. 7 years hence, TechCo's business is no more, it has no employees, its overseas

tax and service tax cases foisted on the Company, unending litigation therefrom and huge tax refund dues pending from the Government.

Tax troubles of TechCo

Issue No. 1 – Withholding tax (TDS) on service fee paid to US subsidiary

There is ample jurisprudence in India regarding withholding tax on technical service fee paid to US residents. Most of the jurisprudence favours the taxpayers, clearly laying down that unless the technical service makes available technical know-how etc. to the Indian payer, there shouldn't be any withholding tax. Still tax officers at lower level routinely demand TDS on such payments. In TechCo's case, there is such demand for 3 years, with tax amounting to multiple crores of rupees. Since depositing at least some part of the demanded tax is the *sine qua non* for filing an appeal, TechCo had to cough up a lot of money just to be able to defend itself, even as its dwindling business meant cash flows were scarce.

Upon appeal, the Commissioner (Appeals) - the first level appellate authority - ruled against the Company. This was expected because the general experience is that this authority rarely sides with the taxpayer. When the matter reached the tax tribunal, it decided to remand the case back because it observed that both the assessing officer as well as the Commissioner (Appeals) had not even properly analysed the facts before reaching their adverse conclusion. It's been more than a year since the tribunal passed the above strictures but the tax department is yet to look into the matter afresh.

Issue No. 2 – Salary and marketing expenditure considered to be capital in nature

As the technology and internet practices evolved, TechCo was trying to cope with the changing demands of its market. It unsuccessfully attempted to rework its product, incurring expenditure on research and development. However, the expected results didn't materialize and therefore the whole project was scrapped. As if that itself was not demoralizing for the Company, the tax officer decided that all such expenditure had to be treated as capital in nature and hence disallowed it while computing its tax

liability. Similarly, certain regular marketing expenditure was wrongly treated as capital in nature. The Company was slapped with a tax demand again running into crores of rupees. Again, TechCo had to shell out substantial sum before appeal, just to remain in the fight.

Here too, the Commissioner (Appeals) sided with the assessing officer. Fortunately, the tribunal categorically overruled the tax department. Optimistic of recovering its money from the taxman, TechCo patiently persevered for more than a year, only to discover recently that the tax department is now appealing before the High Court. Apparently, the tax officers will look very bad if they simply give up on this case, as the amount involved in significant.

Issue No. 3 – Taxing TechCo India as a representative of its US subsidiary

As if the main plot involving Issue No. 1 and 2 above was not engrossing enough, the tax department decided to have some more fun. It believes the US subsidiary of TechCo should also have filed its tax returns in India. Given that it did not and it is no more in existence, they have sought to treat its parent company - who has the misfortune of surviving only to fight tax cases - as a representative assessee. This despite the fact that this case mirrors the same matter they are contesting in Issue No. 1, wherein so far they have not been able to establish their case well.

Issue No. 4 - Penalty proceedings

Tax department initiates penalty proceedings every time it makes any adjustment to the returned income. So proceedings were initiated in respect of all the years where the above issues are being contested. Nothing unusual about it. To be fair, these proceedings are often kept in abeyance if the taxpayer has

filed appeals. Here too the Company was in for a bad surprise when it was suddenly imposed with a penalty for allegedly not having attended some hearing. More surprising was the fact that this penalty was imposed in respect of a year where the tax officer had no adverse findings and had actually accepted the returned income. For a change, this does not seem to be an outcome of human mischief but possibly a technical glitch in the computer system relied upon by the department. TechCo is only hoping that this bad surprise will go way as suddenly as it came.

Issue No. 5 – Reassessment (AY 2015-16)

Even as the tax department has filed appeal against the tribunal's order in respect of Issue No. 2 above, it also wishes to reassess TechCo's income for that year. To that effect, it has issued notice to the Company. TechCo quickly responded, requesting reasons in writing (which is its statutory right) for such reopening of assessment. The department has not responded to the request yet.

Issue No. 6 – Service tax cases

It is not only the income-tax department that has been tailing TechCo. Service tax officers have been interested too. Ignoring the fact that the Company only ran a technology platform that facilitated buying and selling of online advertising spaces, they have alleged that the Company itself was engaged in display of advertisement and therefore liable for service tax. Overall, they have raised demands amounting to crores of rupees and forced the Company to pay at least a portion while the appeals before CESTAT are pending.

How TechCo and its founders suffer

- For a business that is permanently shuttered, TechCo has crores of its funds locked up in tax demands that it was forced to remit to the tax authorities. This amount in the hands of the founders might have helped them start afresh and fund their new startup that the Government would so keenly promote now.

- To protect itself from any coercive steps that the tax authorities might take to recover the unpaid tax demands, TechCo is compelled to continue contesting the matters in appeal proceedings which take long years to conclude, incurring further costs for the Company.

- Mired in so many cases and litigation, the founders are unable to focus on developing their new venture.

- Wary of dealing with Indian system where tax authorities hold up everything long after the business is gone, the founders would think twice before setting up their next venture in India.

- Life cycle of technology-driven companies can be quite short. If the wheels of tax justice are going to grind so slowly that these companies spend more of their lifetime fighting tax cases than they did doing business, India will never really be a great startup destination, notwithstanding all those initiatives of recent years.

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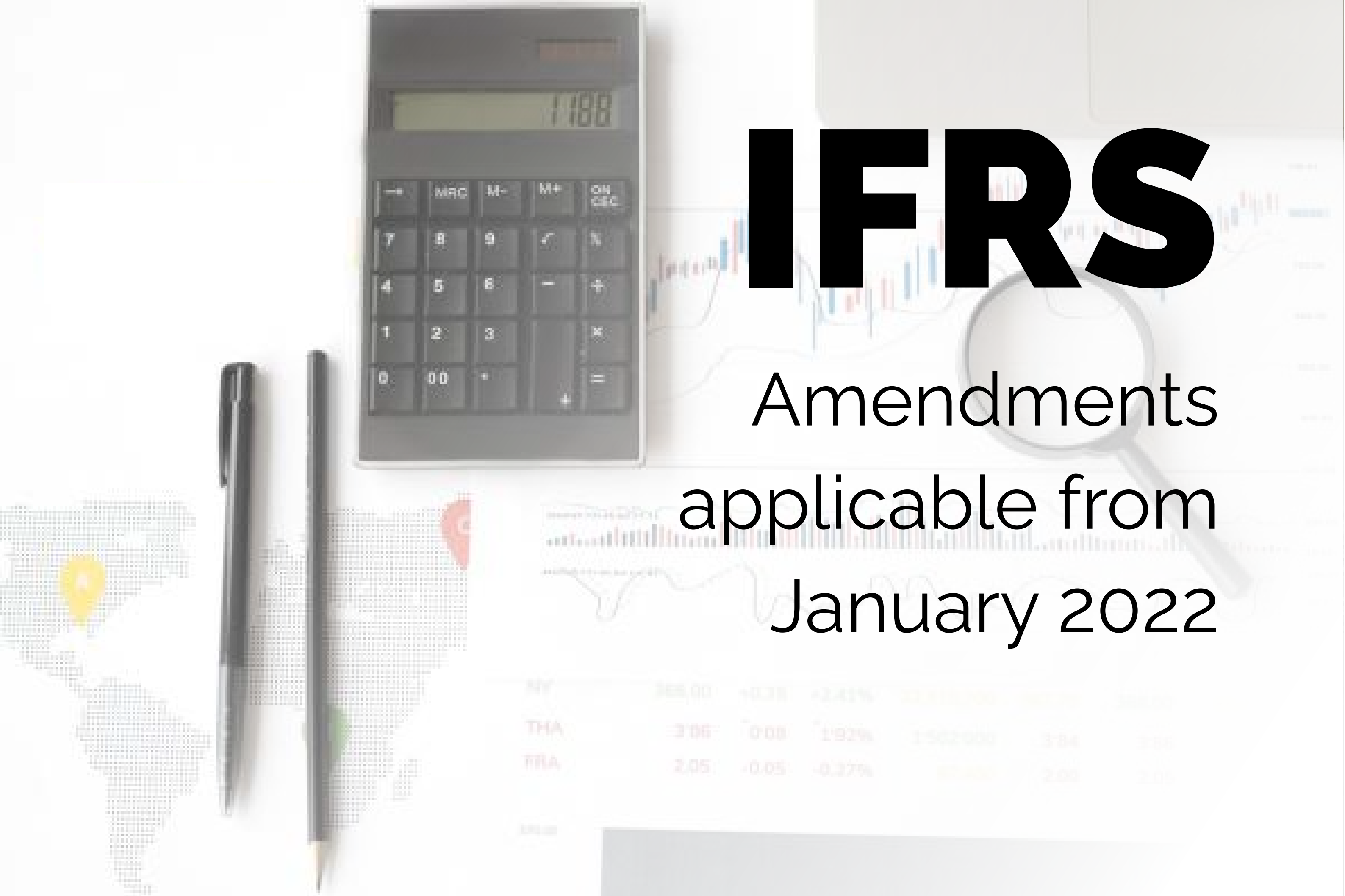

IFRS

Amendments applicable from January 2022

Introduction:
International Accounting Standards Board (IASB) has announced amendments to International Financial Reporting Standards (IFRS) which are applicable for reporting periods beginning on or after 1 January 2022. These amendments were issued by the IASB in May 2020 as narrow scope amendments. This article is a refresher on these IFRS amendments announced in 2020 which are now applicable. From an Indian perspective, these amendments if implemented in Indian Accounting Standards (Ind AS) will certainly be a qualitative addition. We discuss these amendments and their impact in the course of this article. Following standards have seen change:

1. IFRS 3: Business Combinations
2. IAS 16: Property, plant and equipment
3. IAS 37: Provisions, Contingent liabilities and Contingent assets
4. Annual Improvements: 2018-2020

IFRS 3: Business Combinations – Reference to the definition of assets and liabilties

IFRS 3 requires identifiable assets acquired and liabilities assumed in a business combination to meet the definition of assets and liabilities as laid out in IASB's Conceptual Framework on Financial Reporting. Prior to the amendment, the Conceptual Framework referred to here was the 1989 Conceptual Framework on Financial Reporting. However, as of March 2020, this 1989 framework was considered outdated. IASB, in its effort to update this outdated reference without significantly changing the requirements of the standard, now requires reporting entities to refer the 2018 version of the Conceptual Framework on Financial Reporting. The 2018 version contains revised definitions of an asset and liability that could impact which assets and liabilities of the acquiree qualify for recognition in the acquirer's books. Also, in the course of post-acquisition accounting the prescriptions of other IFRSs' could lead to the derecognition of assets and liabilities recognized in a business combination transaction thus resulting in day 2 gains or losses. Hence, exceptions to the recognition principle of IFRS 3 have been introduced to prevent the challenge of day 2 gains or losses arising for liabilities and contingent liabilities.

These exceptions use the recognition principles of IAS 37 and IFRIC 21 and they do not rely upon the Conceptual Framework. Transactions and other events that fall within the scope of these exceptions have been illustrated as under:

Specific requirements for transactions and other events within the scope of IAS 37 and IFRIC 21

Contingent liability within the scope of IAS 37	Levy within the scope of IFRIC 21	Contingent Assets
Acquirer will apply IAS 37 at acquisition date to determine of a present obligation exists as a result of past events	Acquirer will apply IFRIC 21 to determine if by acquisition date obligating event gives rise to a liability to pay the levy.	Acquirer will not recognize at the acquisition date.

Amendment Transition:

- The above amendments shall be applicable to business combinations for which the acquisition date is the first annual reporting period beginning on or after 1 January 2022.
- Prospective application is prescribed
- Early application is permitted in case the reporting entity has applied all the updated references and amendments contained in the 2018 version of the Conceptual Framework.

Our Take:

Institute of Chartered Accountants of India (ICAI) has ensured that Ind AS stays in line with IFRS by announcing amendments that complement IASB announcements. In the case of IFRS 3, the amendment to "definition of business" was announced by IASB on 22 October 2018. This IASB amendment was complemented in India by ICAI's exposure draft on Ind AS 103 in February 2019. This exposure draft was notified in the official gazette by Ministry of Corporate Affairs (MCA) on 24 July 2020 by G.S.R 463(E).
The ICAI is expected to announce referential amendments similar to those announced by the IASB to ensure that the challenge of day 2 gains or losses is dealt with.

IAS 16: Property, Plant and Equipment (PPE)- Net Proceeds from Test Runs

IAS 16 Scenario prior to amendment and the need for change:

Costs directly attributable to bringing an asset to the location and condition necessary for it to operate in the manner intended by management (directly attributable costs) comprises the cost of an item of PPE. Costs of testing whether an asset is functioning properly are a part of directly attributable cost and are eventually capitalized as a part of the cost of the item of PPE. The net sale proceeds from selling any items during the test phase are deducted from the cost of testing. After deduction of such sale proceeds from the cost of testing, the balance testing costs are capitalized as a part of PPE.
In practice, this requirement led to diverse interpretations and applications such as:

- Reporting entities deducted only the proceeds of selling test items while the testing process of testing lasted
- The proceeds of all sales from the item of PPE were deducted from total testing costs until the asset was in the location and condition necessary for it to operate in the manner intended by the management.

This in turn impacted the overall usefulness and quality of financial reporting. Let us consider the following example to understand this impact better:

An entity is in the process of installing a new assembly line. As on 31 December 2021, the assembly line is under construction but has developed the capacity to engage in test runs. CU 5,000 of proceeds have been obtained from selling sample test units. The cost of producing these test samples is CU 2,000. The total cost of testing is CU 10,000 which does not include test proceeds and test sample cost.

- Prior to the amendment, sale proceeds of test units CU 5000 and corresponding cost CU 2,000 did not find any representation in the financial statements and were automatically knocked off against the total cost of testing.

- This happened despite the sales proceeds and its corresponding expenses meeting the definition of income and expenses as laid out in the Conceptual Framework on Financial Reporting. IASB acknowledged that this practice resulted in the overall usefulness and quality of financial statements reducing owing to the following factors:

Anomaly in Statement of Profit and Loss	**Under recognized testing cost**	**Inaccurate Balance Sheet numbers**	**Impact on financial ratios**
Proceeds 5000 and Cost 2000 not recognized *Impacts the bottom-line*	*Despite 10,000 being incurred only 7,000 is recognized*	*Under recognized testing cost leads to lower capitalization and hence resulting in a lesser depreciation charge.*	*Ratios using the carrying amount of assets such as return on assets will be impacted*

Amendment to IAS 16:

IASB acknowledged the above shortcomings and in May 2020 *PPE – Proceeds before intended use*, which made amendments to IAS 16 was issued.

The amendments will:

a. Prohibit a company from deducting from the cost of PPE the amount received from selling items produced while the company Is preparing the asset for its intended use.
b. Such sales proceeds and related costs will be recognized in profit and loss.

Clarifications issued by IASB

Meaning of "Testing" →

Assessing whether the technical and physical performance of the asset is such that it is capable of being used in:

- The production or supply of goods , or
- Rental to others, or
- Administrative purposes

Cost of item produced →

Cost of items produced while bringing an item of property, plant and equipment to the location and condition necessary for it to be capable of operating in the manner intended by management **shall be measured in accordance with IAS 2.**

Impact of amendment on disclosures:

- There is no addition in disclosures under IAS 16 with respect to sales of items that are produced as output by the reporting entity in the course of its ordinary activities. In such cases IFRS 15 and IAS 2 will apply.

Impact on disclosures

- **Items sold that are not a part of the reporting entity's ordinary activities:**

✓ Sale proceeds and corresponding cost of production recognized in statement of profit and loss will be disclosed separately

✓ Specify the line items where such proceeds and their corresponding items costs are included in the statement of comprehensive income

Sale proceeds and corresponding costs if presented separately in the statement of comprehensive income will not require any disclosure

Accounting Illustration:

An entity is in the process of installing a new assembly line. As of 31 December 2021, the assembly line is under construction but has developed the capacity to engage in test runs. CU 5,000 of proceeds have been obtained from selling sample test units. Cost of producing these test samples is CU 2,000. The total cost of testing is CU 10,000, which does not include test proceeds and test sample cost.

For reporting period 2021:

Total cost of testing incurred		10,000 (A)
Sale proceeds of test items Less: Cost of producing test samples Net Proceeds of selling test items	5000 Less: 2000 3000 (B)	
Costs of testing form a part of directly attributable costs i.e. capitalized	(A)-(B)	7,000

In the financial statements for 2022:

Accounting items impacted	Impact	CU
PPE under construction	Debit	3,000
Retained Earnings	Credit	3,000

Amendment Transition:

- Early application i.e. before 1 January 2022 is permitted
- Retrospective application only. Applicable only to items of PPE that are brought to the location and condition necessary for them to function in the manner intended by management on or after the beginning of the earliest period presented in the financial statements in which the entity first applies the amendments.
- Cumulative effect of applying the amendments as an adjustment to opening retained earnings will have to be traced back to the start of the earliest presented period.

Our Take:

- Management estimation and judgment will play a key role in implementing this amendment. Since IAS 2 will have to be applied to measure the cost of items produced, a demarcation will have to be defined between the following costs:

Costs associated with producing and selling items before the item of PPE is available for use	Cost associated with making the item of PPE available for its intended use

- Auditors may require reliable and holistic data to assess the demarcation of the above costs (which needless to say, will be driven by management judgment). The unavailability/shortage of such data may create hurdles in audit closure.
- Industries where PPE is subjected to longer periods of testing such as pharma, mining, etc. may find this amendment challenging to implement.
- Expect the same amendments to be made applicable to IND AS 16.

IAS 37: Provisions, Contingent liabilities and Contingent assets

IFRS Interpretation committee received requests to clarify what costs an entity should consider in assessing whether a contract is onerous. IAS 37 defines an onerous contract as “A contract under which the unavoidable costs of meeting the obligations under the contract exceed the economic benefits expected to be received under it. The term unavoidable costs under a contract are defined as 'the least net cost of exiting the contract.' This will be lower of:

- Cost to exit or breach the contract and
- The cost of fulfilling the contract.

The Interpretation committee's research revealed contrasting views on unavoidable costs . Practitioners are tied between unavoidable costs being either:

- Only the incremental costs of fulfilling the contract; or
- All costs that relate directly to the contract.

The introduction of IFRS 15: Revenue from contracts with customers saw the withdrawal of IAS 11 and IAS 18 (erstwhile standards on revenue recognition). While IFRS 15 does not prescribe guidance on unavoidable costs for onerous contracts, reporting entities were required to refer IAS 37 which too does not expressly provide guidance on what encompasses unavoidable costs. Under the erstwhile revenue recognition standards, guidance on onerous contracts was provided under IAS 11 by specifying which costs to include under the meaning of “unavoidable costs.” However, with the withdrawal of IAS 11, IASB identified a lack of prescribed guidance on this matter.

Accordingly, on 14 May 2020, IASB has announced that for reporting periods beginning on or after 1 January 2022, a reporting entity would include all costs that relate directly to a contract under the meaning of unavoidable costs. The directly related cost approach adopted by the IASB shall result in the following costs being covered:

- Incremental costs (Direct expenses)
- Allocated costs only if they directly relate to the contract (contract management costs, depreciation on assets used specifically for the project)
- Administrative and general overheads that are explicitly chargeable to the counterparty

The reporting and presentation benefits of adopting the directly related cost approach have been summarized as under:

Benefits of adopting the directly related cost approach

- It would be more consistent to include all costs that relate directly to contract.
- This is consistent with IAS 37 and other standards as well

- Inclusion of all costs will prove to be more useful information for users of financial statements

- Benefit of providing such detailed disclosures is likely to outweigh the cost

Accounting Illustration:

As of 31 December 2021, a contact where all obligations have not been fulfilled is identified as onerous. The provisions made for this contract by the management only consider incremental costs. If all costs that directly relate to the contract are taken into consideration, overheads that are allocated to this contract would additionally amount to CU15,000.

As per the amendment, the undermentioned adjustment would be required to be made as of 1 January 2022 for financial statements of 2022:

Accounting Items Impacted	Impact	CU
Retained Earnings	Debit	15,000
Provision for Onerous Contract	Credit	15,000

Corresponding adjustments to the comparatives of 2021: **None**

Amendment Transition:

- Amendments are applicable to contracts where all obligations are not yet fulfilled.
- Amendments are effective for annual periods beginning on or after 1 January 2022.
- Early application is permitted.
- Comparatives are not restated.

Our Take:

- The amendment brings about clarity and consistency in the application of IAS 37.
- Reporting entities that previously interpreted unavoidable costs to cover only incremental costs will have to account for an increase in cost to the extent of cost allocations that relate directly to the contract.
- Reporting entities that previously followed the guidance under IAS 11 and booked contract losses will now exclude indirect costs from their accounting provisions.
- Significant management judgment will be required to arrive at costs that are directly related to the contract.
- Expect similar changes to be introduced to Ind AS 37.
- Auditor's professional judgment will be key in these aspects.
- From an Indian Accounting perspective, a similar amendment for Ind AS reporting may be expected. Ind AS 115: Revenue from Contracts with customers will provide sufficient guidance in India.

Annual Improvements to IFRS 2018-2020:

IASB has issued the Annual Improvements 2018-2020 for IFRS standards. These improvements albeit essential do not carry a pressing urgency to be implemented with immediate effect. The Annual improvements 2018-2020 introduce amendments for annual reporting periods on or after 1 January 2020 with an option for early adoption. The following IFRS standards will undergo amendments under the Annual improvements 2018-2020:

- IFRS 1: First time adoption of IFRS – The amendment covers voluntary exemption for measuring cumulative translation differences of subsidiaries becoming first-time adopters at a date later than their parent.
- IFRS 9: Financial instruments – The amendment clarifies fees paid or received between the borrower and the lender in the 10% test for derecognition of financial liabilities.
- IFRS 16: Leases – The amendment removes illustration 13 of IFRS 16. Illustration 13 catered to lease incentives and was unclear on whether the reimbursement covered therein the definition of a lease incentive. Since the amendment caters to the removal of an illustration which is merely a non-obligatory part of the core standard, there is no effective date of implementation, nor will there be any cardinal impact in reporting.
- IAS 41: Agriculture – The amendment does away with excluding cash flows for tax when measuring the fair value.

Amendment to IFRS 1: First time adoption of IFRS

The amendment applies to subsidiaries that become first time adopters of IFRS later than its parents. Para D16(a) of IFRS 1 permits subsidiaries implementing IFRS for the first time to measure their assets and liabilities

at the carrying amount included in the parent's consolidated financial statements.
However, Para D16(a) contains no guidance on cumulative translation differences. Subsidiary companies with foreign operations or branches which are foreign operations face a hiccup in the first time implementation of IFRS due to this lack of guidance.
The amendment now allows subsidiaries that use Para D 16(a) to measure their assets and liabilities as per parent's consolidated statementalso to measure cumulative translation differences as per parents consolidated statements.

Under the announced amendment, a similar leeway is granted to Associate and Joint Ventures.
Our Take:

- The amendment will bring about resultant ease in transition to IFRS for non-IFRS companies.
- The need to maintain a separate set of books of accounts will no longer be an additional cost and compliance burden for subsidiary entities.
- A similar announcement should be forthcoming in India as Para D 16(a) of Ind AS 101 replicates IFRS 1. In geographies like India, maintenance of a separate set of books of account is often a pain point for Indian arms of foreign companies. This requires a substantial GAAP conversion effort and audit support exercise during the closure process. The introduction of this amendment will make life much easier for Indian subsidiaries of foreign companies that use IFRS as their GAAP.

Amendment to IFRS 9: Financial Instruments
In the event of an exchange between an existing borrower and lender of debt instrument which involves substantially different terms from those existing, Para 3.3.2 of IFRS 9 requires the extinguishment (derecognition) of the existing financial liability and the recognition of a new financial liability. A similar requirement of derecognition of the existing liability and recognition of new financial liability is prescribed in the case of a substantial modification of the terms of an existing liability or a part thereof.
Para 3.3.6 of IFRS prescribes that the terms are substantially different if the discounted present value of the cash flows under the new terms, including any fees paid (net of any fees received and discounted using the original effective interest rate), is at least 10% different from the discounted present value of the remaining cash flows of the original financial liability.
The amendment clarifies that only the fees paid or received between the borrower and the lender, including fees paid or received by either the borrower or the lender on the other's behalf, will be included in applying the 10% test.
The amendment is applied prospectively to modifications and exchanges that occur after the date the entity first applies the amendment.
Our Take:

- This is more of a welcome clarification than an amendment.
- The past 2 reporting periods have seen a heavy impact of the pandemic on businesses. There have been numerous instances across sectors and industries of debt restructuring and reconstruction. This clarification shall enable better representation of financial liabilities in the books and add value for users of financial information, especially lenders.
- A similar clarification is expected to be made in India for Ind AS 109: Financial Instruments.

Amendment to IFRS 41: Agriculture:
Amendments to IAS 41 in 2008 prescribed removing a pre-tax discount rate when measuring fair value. However, the need to use pre-tax cash flows while calculating the fair value was not removed.
The need to discount pre-tax cash flows with a post-tax discount rate was a conceptual disconnect in the prescriptions of IAS 41 and it let to a further gap in aligning with IFRS 13.
With the intent of aligning fair value measurement in IAS 41 with IFRS 13, the requirement of excluding cash flows for tax when measuring the fair value has now been removed. Like IFRS 13, now the preparers of financial statements can use internally consistent cashflows and discount rates based on which an informed decision on whether to use pre-tax or post-tax cashflows and discount rates for fair value measurement.
The amendment is applicable prospectively. It shall be applied for fair value measurements on or after the date of application by the reporting entity.
Our Take:

- For present value techniques to be applied effectively it is essential that cash flows and discount rate are consistent i.e. Pre-tax cash flows to be discounted at a pre-tax rate and post tax cash flows at a post tax rate.
- When determining and reporting future expected cashflows, the management assumptions, factors influencing calculations, open market factors, market participants view, etc. play a crucial role. Currently, all the said factors lean towards using a post-tax basis for calculation and estimation.
- It is expected that amendment will be correspondingly introduced by ICAI and MCA in India for Ind AS 41. With Ind AS 41 aligning with Ind AS 113, Indian accounting standards will be better aligned with IFRS.
- It is essential to mention that currently, in India, the agro_- industry and its various branches are facing inflationary trends. The final output of the agro-industry is the primary input for FMCG and food processing. With rising material costs, cost control and pricing is a major mandate for leaders in FMCG and food processing industries. Such an amendment will enable users of IND AS 41 to better present their financial information enabling informed decision making for various crucial sectors dependent on agriculture for their inputs. As an agricultural economy India should prioritize amendments and improvements to Ind AS 41.

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INITIAL COIN OFFERING & WHITE PAPER

An initial coin offering ("**ICO**") is a type of capital-raising method in the cryptocurrency and blockchain technology. ICO is an unregulated approach to crowdsourcing funds from retail investors. It requires a deep knowledge of technology, finance, and the law. ICOs opened up the crypto capital market to a more diverse investor base which was previously limited to sophisticated investors.

The most important tool for blockchain and cryptocurrency ICOs is the white paper, which is the most important marketing document, inviting people to invest in their crypto tokens.

White Paper

White paper is authoritative reports that inform investors in short to understand complex issues, clear doubts and make right decision, describe problems and solutions. It promotes and highlights the features of solutions, product or services. White paper is sales and marketing document used to entice or persuade potential investors to learn more about or purchase a particular product, service, technology or methodology. A white paper is meant to persuade and present factual and technical proof that the product is superior to solving a particular business problem. Therefore, drafting a white paper is a critical and one of the important steps in an ICO.

Following are the critical and arguably the decisive points in a white paper:

1. *Idea & Introduction*

   A white paper should clearly depict the idea of the product as to its purpose, solution of problem and target audience. Introduction in a whitepaper provides the general information about the product. It contains the vision of the product. To make it more attractive, it is important to give a brief about ICO and crypto market in general and discuss about its benefit and the way this product is making ecosystem better.

2. *Abstract*
The abstract in a white paper gives the good summary of the product and draw attention of the audience by quickly covering the essentials of the product like platform, currency, plan and benefits of the product. It provides the brief that investors will find out by reading the white paper.
3. *Problem statement, solutions and target audience*
Problem statement and its solution is very important in a white paper. A white paper should explain the problem or multiple problems which the product is trying to solve. It is important that these problems must have been facing by the wide section of the society and most importantly by the target audience. It would be attractive for the investors, if the problem is explained through reference materials and authentic resources.
With respect to solutions, a white paper should describe how the product is providing solutions to existing problems. The solutions should be clearly explained addressing each problem. Its focus must be on the unique quality of the product which gives the solutions.
The white paper should be clear about its target audience and explain the understanding of its customers. The problem and solutions should be relevant to the target audience.
4. *Product Story and how it works*
A good story of the product drives the attention of investors. A story should cover the source of idea. A white paper should explain the working of product for general audience as to whether it is an application, platform or blockchain technology based product, its key players and the key features, specifically those which are supposed to solve the problems or those which are better than available alternates.
It should explain the integration of token into product and relevant information with respect to accessibility, trade, earning, wallet and its advantages.
5. *Market and competition*
A good white paper always provides the general outlook of the industry as to how big the opportunity is, and growth and revenues of the product. It should discuss about current competition in the market including major competitors. It would drive more attention and give clear thought process to the investors, if white paper gives quantitative data with respect to market captured by the competitors and market size which the product is aimed to target.
It should also be covered as how this product is different form its competitors and leverage of competitive advantages, if any.
6. *Product Development and marketing plan*
A brief of product's future plan helps the investors in understanding its growth and incline them towards investing more in the product.
The use of the product and place of its availability should be clearly mentioned. The white paper should provide the future vision as to its features with reference and relevant information, and plans with respect the future organic growth.
A marketing plan should contain methods and actions for engaging new customers, campaign, reference and affiliate programs. It should provide a

proper road map for growth and discuss how are they adding values to the market.

7. *Token Allocation and ICO*

The investors always look for the criteria for token allocation. A white paper should provide the quantity/ percentage to be allotted to private/public sector, team, advisors etc.

It should give details about ICO including start and end date, and other information regarding the qualification, instructions, price and bonus allocation. It should clearly mention the vesting schedule and date for delivery.

8. *Technical Overview and block chain adoption*

A white paper should provide the details about the technology as to how it solves the problem and leverage technology to serve users and customer, is there an API new method of proof of work, proof of stake, proof of authority, proof of elapsed time and how does technology solve the problem.

It helps investors to understand the working of blockchain technology, its future and where it will take the business.

9. *Product road map and usage of ICO fund*

The product road map should be given as to when it was conceived and whether it was funded. It should give investors a brief idea about the future and current plans with respect to token, product releases, platform upgrade and team additions, and role of funding it these plans.

Another major issue is to use the ICO fund. A white paper should clearly give the vision of the usage of ICO funds. The ICO fund can be used in common areas like product development, operations, marketing, business development, staff and technical development, legal, support, working capital, exchange and growth plan.

10. *Team and Advisors*

The details and background of team and advisor helps investors in understanding the strength of business and how they will help in the growth of the business.

11. *Legal, Disclosures, Disclaimers*

A white paper should specifically provide the included and excluded jurisdiction and governing laws of that jurisdiction. It should also give the information regarding any restriction and prohibition in respective countries.

A disclaimer should be given which clarifies what product is and is not, risk involved and forward looking statements.

Rishabh Halwai
Alpha Rajan & Partners
(Advocates & Solicitors)

RELATED PARTY

KEY TAKEAWAYS FROM RECENT ANNOUCEMENT BY SEBI

The Securities and Exchange Board of India ('SEBI') has notified SEBI (Listing Obligations and Disclosure Requirements) (Sixth Amendment) Regulations, 2021 to amend the existing Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015. These regulations shall come into force w.e.f. April 1, 2022. These amendments are in respect of the definition of related party, related party transactions, material related party transactions, audit committee approval, shareholder approvals etc. Following is the summary of the key changes of these amendments.

1) Related party definition

Existing definition of related party includes any person or entity belonging to the promoter or promoter group of the listed entity and holding 20% or more of shareholding in the listed entity. Revised definition of related party now includes following persons/entity as a related party:

a) any person or entity forming a part of the promoter or promoter group of the listed entity; or

b) any person or any entity, holding equity shares:

  i) of 20% or more; or

  ii) of 10% or more, with effect from April 1, 2023

This equity holding can be either directly or on a beneficial interest basis as provided under section 89 of the Companies Act, 2013 at any time, during the immediately preceding financial year. As a result of this definition, there will be a significant increase in the number of related parties for a listed entity.

2) Related party transactions

The scope of material related party transactions has been widened. As per the earlier definition, transactions between listed entity and a related party were considered as related party transactions. Scope of related party transaction coverage was limited to transactions with the listed entity. However, as per the revised definition, transactions between the following entities are also part of related party transactions:

a) A listed entity or any of its subsidiaries on one hand and a related party of the listed entity or any of its subsidiaries on the other hand; or

b) A listed entity or any of its subsidiaries on one hand, and any other person or entity, on the other hand, the purpose and effect of which is to benefit a related party of the listed entity or any of its subsidiaries, with effect from April 1, 2023.

3) Exclusions from related party transaction

Following transactions have been kept outside the purview of related party transactions:

a) Issue of specified securities on a preferential basis, subject to compliance of specified regulations.

b) Following corporate actions by the listed entity which are uniformly applicable/offered to all shareholders in proportion to their shareholding:

   i) the payment of a dividend.

   ii) subdivision or consolidation of securities.

   iii) issuance of securities by way of a rights issue or a bonus issue, and

   iv) buy-back of securities.

c) Acceptance of fixed deposits by banks/Non-Banking Finance Companies at the terms uniformly applicable/offered to all shareholders/public, subject to disclosure requirements.

4) Material related party transactions

As per the existing regulations, the listed entity is required to formulate a policy on materiality of related party transactions and on dealing with related party transactions and specify threshold limit for the purpose of approvals and disclosures. Presently, the transaction with related party is considered as material if it exceeds 10% of the annual consolidated turnover of the listed entity. As per the revised provisions, transaction with the related party will be considered as material if it exceeds Rs. 1,000 crore or 10% of the annual consolidated turnover, whichever is lower.

5) Approval of audit committee

a) As per the revised provisions, the audit committee of the listed entity has to give prior approval for all related party transactions. Even subsequent material modifications shall require approval from the audit committee of the listed entity. Further, transactions between subsidiary company and related party/subsidiary of the related party have to be approved by the listed company's audit committee.

b) The audit committee of a listed entity shall also define "material modifications" and disclose it as part of the policy on materiality of related party transactions and on dealing with related party transactions.

c) Approval matrix

Parties involved	Audit committee approval	Threshold limit for approval
Related party transaction to which the subsidiary of a listed entity is a party, but the listed entity is not a party	Prior approval of the audit committee of the listed entity	If the value of such transaction whether entered into individually or taken together with previous transactions during a financial year exceeds 10% of the annual consolidated turnover, as per the last audited financial statements of the listed entity.
		With effect from April 1, 2023, approval is required if transaction value exceeds 10% of the annual standalone turnover, as per the last audited financial statements of the subsidiary;
Related party transaction to which the listed subsidiary is a party, but the listed entity is not a party	Prior approval of the audit committee of the listed entity is not required.	As above
Related party transactions of unlisted subsidiaries of a listed subsidiary	Prior approval of the audit committee of the listed subsidiary	As above

6) **Matrix for approval by shareholders of the listed entity**

Particulars	Approval by shareholders of the listed entity
All material related party transactions and subsequent material modifications as defined by the audit committee	Yes. Prior approval is required
Related party transaction to which the listed subsidiary is a party, but the listed entity is not a party	No. Prior approval is not required
Related party transactions of unlisted subsidiaries of a listed subsidiary	No. Prior approval of the shareholders of the listed subsidiary will suffice

8) Exemptions

Provisions related to audit committee approval and shareholder approval are not applicable to transactions entered into between two wholly owned subsidiaries of the listed holding company, whose accounts are consolidated with such holding company and placed before the shareholders at the general meeting for approval.

9) Disclosures of related party transactions by the listed entity

Particulars	From April 1, 2022	From April 1, 2023
Time limit	Within 15 days from date of publishing financial results	On the date of publication of financial results
Periodicity	Every 6 months	Every 6 months

The requirement of disclosure of related party transactions is done away with which means that disclosures would have to be made on standalone basis for listed entity

9) **Disclosure of related party disclosures in annual report**

a) There are specified disclosure requirements for related party transactions in the annual report. These provisions will be applicable to listed entities which has listed its non-convertible securities but will not apply to listed banks.

b) New disclosure requirement is added for by listed entity and its subsidiaries of 'Loans and advances in the nature of loans to firms/companies in which directors are interested by name and amount'. This requirement shall be applicable to all listed entities except for listed banks.

Conclusion

As the public at large has invested money into the listed entity, the aim of all regulators is that the listed entity enters into related party transactions with at arm's length price, in ordinary course of business and give all disclosures. Whenever there are attempts to circumvent the applicability of such compliances, regulators are quick enough to bounce back and make necessary changes in the public interest. On the other hand, the listed entity would feel the heat as there is wider coverage of related party and related party transactions for which there will be increased compliances. Also audit committee members responsibility will increase to ensure these compliances. On an overall basis, may be increased compliances, approvals and disclosure requirements might act as a deterrent to reduce the number of related party transactions and reduce the structuring of new ways of entering into related party transactions.

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BUDGET 2022

Beginning of new era in customs administration

Introduction

The Budget 2022 proposed that more than 350 exemption entries are gradually phased out to provide a clear roadmap for the future of customs administration wherein exemption will be phased out and all duty concessions would be provided through a change in tariff rates. The Government's focus for 'Make in India' and 'Atmanirbhar Bharat' was reiterated with the removal of exemption on items that can be manufactured in India and providing concessional duties on the raw material goes into the manufacturing of intermediate products. The Budget 2022 has also proposed certain amendments in law to correct the infirmity observed by the Courts in recent judgments, which reiterated the practice that the legislature will always prevail over the judiciary in the longer run.

The proposed amendment in the Customs Act, 1962

Broadening the definition of Proper Officer

The definition of Proper Officer is proposed to be widened retrospectively to include Officers of Directorate of Revenue Intelligence (DRI), Audit and Preventive formation by amending section 3 of the Customs Act, 1962 (Act). This new provision has negated the Apex Court's decision in *Canon India v. Commissioner of Customs, 2021 (376) E.L.T. 3 (S.C.)*, where the Honourable Court had held that the DRI has no authority under law to reassess imports and recover duty under Section 28(4) of the Customs Act. In the absence of necessary power, the entire proceedings initiated by the DRI by issuing show-cause notices were invalid.

The above amendment was most anticipated after the judgement in Canon (supra), as substantial government revenue was at stake. The retrospective effect of the new provision provides validation to past actions by Customs officer notwithstanding any judgment, decree, or order *inter alia* in the matter of Levy of, and exemption from Customs Duties, Administration of Rules of Origin under Trade Agreement, Drawback, Audit, Searches, seizure and arrest, Confiscation of goods and conveyances and imposition of penalties, Offences and Prosecutions. Also, it has been clarified that any litigation pending on the date of commencement of Finance Act arising out of the actions taken by the Customs Officers shall be disposed of as per the amended provisions.

To avoid any further dispute of similar nature, it has also been proposed that the Central Board of Indirect Tax and Custom (CBIC) will be empowered to include officer as 'proper officer' who has been assigned function by the Board or the Principal Commissioner of Customs or the Commissioner of Customs by amending Section 5 of the Act.

Rationalisation of Advance Ruling Provisions

Section 28H of the Act sought to be amended to make provisions for prescribing appropriate fees by Board relating to the application for advance Ruling and give flexibility to the applicant to withdraw his application at any time before a ruling is pronounced as opposed to the current 30 days' period. Further, Subsection 2 of Section 28J seeks to retain the validity of an Advance Ruling for three years or till there is a change in law or facts.

Protection of Export-Import Related Data

Data Breach has become a significant threat with the automation of compliances. To prevent unauthorised disclosure of import/export data submitted with the Customs Department, it was proposed in the Budget that a penalty may extend to six months, or imprisonment for a term that may extend up to six months would be imposed in case of any such acts.

Further, Section 137 is being proposed to be amended so that no court shall take cognisance of any offence w.r.t. protection of the import and export data submitted to Customs by importers or exporters in their declarations without the sanction of the Principal Commissioner/ Commissioner of Customs.

CBIC can confer concurrent exercise of power and functions on more than one Customs officer

It has been proposed that the Board may, wherever necessary or appropriate, appoint two or more officers of customs (whether or not of the same class) to have concurrent powers and functions to be performed under this Act. For example, in the case of Faceless Assessment, wherever necessary, two or more officers of customs can concurrently exercise powers and functions for the proper management of work.

Undervaluation of imported goods

Section 14 is proposed to be amended to include rules enabling the Board to specify additional obligations on importers regarding any class of imported goods. The board has reasons to believe that value of such goods may not have been declared accurately or truthfully. Also, the Central Government will be empowered to make rules to detect undervaluation and specify criteria of selection of such goods.

Jurisdictional Customs Authority will have the sole authority to exercise jurisdiction in subsequent inquiry, investigation or audit or any other specified purpose.

Section 10AA has been proposed to be inserted in the Act to reaffirm that in case of subsequent enquiry, investigation, an audit by any other officer of customs where an original function duly authorised by an officer of competent jurisdiction, then, notwithstanding, such studies, investigation, audit or any other purpose, the officer, who initially exercised such jurisdiction shall have the sole authority to exercise jurisdiction for further action like reassessment, adjudications, etc. consequent to the completion of such inquiry, investigation, audit or any other purpose. The officers who have conducted the subsequent examination, research, audit need to transfer the relevant documents and their notes to the original jurisdictional officer of the subject matter.

Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017 amended to simplify and digitise the process.

Customs (Import of Goods at Concessional Rate of Duty) Rules, 2017 ("IGCR") has been used by several importers for availing duty concessions. IGCR has been amended vide Notification No. 07/2022 - Customs (N.T.) dated February 1, 2022, with effect from March 1, 2022, to introduce end to end automation in the entire process and standardise the various forms in which details are to be submitted. Detailed facilities provided are below-mentioned-

- Requirement of submitting one-time information on the common portal in Form IGCR-1 (Import of Goods at Concessional Rate of Duty)

electronically, through a common portal. Before the amendment, information was required to be furnished manually to the jurisdictional Assistant Commissioner.

- Post verification of the above information, the importer will be allotted an Import of Goods at Concessional Rate Identification Number (IIN). The importer who intends to benefit from an exemption notification shall mention the IIN and continuity bond number details while filing the Bill of Entry.
- The use of such exemption will be allowed by the Deputy / Assistant Commissioner of Customs at the time of import. The respective amount will be debited automatically from the continuity bond.
- Only in case of non-receipt or short receipt of goods imported in the relevant premises, the importer shall intimate such non-receipt or fast pass immediately on the common portal in the Form IGCR-2, unlike in previous cumbersome process where the importer was required to intimate the Jurisdictional Customs Officer regarding every receipt of such goods within two days of such permit.
- Further, the requirement of filing quarterly returns is proposed to be replaced with the filing of monthly statements in Form IGCR-3 on the common portal by the tenth day of the following month.
- Rule 6 is amended to remove the condition to intimate the Jurisdictional Customs authorities in advance when sending goods for job work. The importer is now required only to maintain records and include details of goods sent for job work in the above monthly statement. Additionally, inter-unit transfer of goods for further manufacturing is also permitted.
- An option for voluntary payment of the necessary duties and interest through the Common Portal is provided to the importer.
- The unutilised or defective goods can be either re-exported or cleared by the imported itself, without taking any prior permission from the Jurisdictional Customs authorities, provided details of such clearances are furnished in the above referred monthly statement.

Circular issued clarifying that SWS is not payable when BCD itself is exempt.

The most surprising element of the Budget Day came in the form of Circular no. 3/2022 regarding the levy of Social Welfare Surcharge (SWS) on imports where Basic Customs Duty (BCD) is exempt. Social Welfare Surcharge (SWS) is a surcharge levied u/s 110 of the Finance Act, 2018. It is set as a duty of Customs on the goods imported into India to fulfil the Government's commitment to provide and finance education, health, and social security. Earlier, there had been multiple interpretations and divergent views. It was unclear whether SWS (charged as a

percentage of Basic Customs duty) is payable when BCD itself is exempt.

The 2019 Supreme Court's judgement in the case of Unicorn Industries held that the exemption explicitly granted to specific duties of excise would not be automatically extended to other commitments/cesses, which provided a dilemma to the importers claiming exemption of SWS claimed on imports. Further, the Central Board of Indirect Taxes and Customs has clarified that the exemption provided for payment of essential customs duty cannot be extended to SWS. Accordingly, the DRI has initiated enquiries against various importers who have claimed exemption of SWS where BCD is exempt.

The CBIC has clarified vide the circular that SWS applies at the rate of 10% of the aggregate of customs duties payable on import of goods and not on the value of imported goods. Suppose aggregate customs duty payable is zero on account of an exemption. In that case, the SWS shall be computed as 10% of weight equal to 'Nil' (as the aggregate amount of customs duties payable is zero). Accordingly, the amount of SWS payable would be 'Nil' in cases where the aggregate of customs duties is zero even though SWS has not been exempted. This clarification would settle past disputes where the exemptions have been claimed and further reduce tax controversies.

Custom Duty Rate Change

- The customs duty exemptions for various products have been comprehensively reviewed. About 350 exemptions were withdrawn, while there is an increase in duty rates for Umbrellas, Imitation Jewelry, Electrical and electronic items (Loudspeaker and headphones), Solar Cells and modules and reduction in rates for Ferrous waste and scrap, Specified fabrics and garments, Stainless steel, Methyl alcohol, Acetic Acid.
- To promote the domestic Capital goods sector, several exemptions granted to capital goods for various sectors (like power, fertiliser, textiles, leather, footwear, food processing and fertilisers) have been gradually phased out and eventually taxed at 7.5%.
- Anti-Dumping duty is being revoked on certain metals, and responsibilities on drugs for rare diseases are being exempted.
- Objectives of rate rationalisation include removal of exemption on items which are or can be manufactured in India, providing concessional duties on raw material to make domestically manufactured finished goods competitive, and restricting imports to only critical raw materials not available are in short supply in India.
- Customs tariff structure has been simplified by reducing the listed tariff rates and doing away with multiple exemption notifications.

To sum up, it is an ambitious budget that now needs focused execution to sail through the thoughts of the Government!

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AVAILING **ITC** POST BUDGET 2022

A comprehensive checklist

Much has been discussed and deliberated about the amendments made to the Input Tax Credit (ITC) provisions vide Union Budget 2022; the correctness, the righteousness, the constitutionality, and all of it. However, the fact remains that soon the Union Budget shall get notified and the industry would have no option, but to lawfully comply with the said provisions. Hence, the industry needs to now brace itself and start preparing for implementing the ITC rules and regulations.

As a recap, let us briefly understand the key amendments brought in by Union Budget 2022 from ITC perspective.

1. A new sub section 16(2) (ba) has been inserted to provide for an additional condition in availment of ITC. The said condition postulates that only 'available' ITC as per GSTR 2B shall be availed by the taxpayer; thereby, disallowing the availment of 'credits not available'. Henceforth, the taxpayer would have to infer Section 38 (the enabling section for GSTR 2B) before availing ITC under section 16.
2. Intriguingly, Section 38 has been substituted in entirety to provide that ITC can be availed subject to the following restrictions/ conditions:
    - Details not provided within prescribed period of obtaining registration;
    - Supplier has not paid taxes;
    - Taxes paid in GSTR 3B is less than output tax declared in GSTR 1;
    - Supplier has availed ineligible ITC;
    - Supplier has not paid the prescribed minimum output tax liability in cash;
    - Such other cases as may be prescribed.

In view of the above additional conditions, we have drafted this article as a quick reference for taxpayers to avail eligible ITC. Below are the key 12 checks or pre-requisites that a business would have to conduct before availing credit, once the amendments are in force.

1. Procurement of goods and/ or services – The origin of ITC is from procurement of goods and/or services. Without procurement, there is no question of availing ITC. Hence, procurement of goods and/or services becomes the first pre-requisite to claiming ITC. Further, as per Section 16(2)(b) of the Act, the receipt of goods and/or services is a prerequisite. Here, a common dilemma that the industry faces

is how to establish receipt of services; for goods - GRN and other documents can be used. In case of services, a robust trail of documents including agreements, service purchase orders, e-mail confirmations etc. can be kept in record.

2. Valid tax invoice – The next pre-requisite for availing eligible ITC is obtaining a valid tax invoice as given under Rule 36 having all mandatory fields. This is one of the most crucial steps in the entire chain of availing credit especially as the issue of fake invoicing is becoming rampant in the country. If the recipients are not able to verify the correctness and the genuineness of the tax invoices received, they could become the next target for the department. There have been plethora of notices that were issued to recipients wherein the authorities have held that tax invoices issued by suppliers are invalid and consequently ITC was denied. Here, it is also important to have an e-invoice in case of suppliers where e-invoicing is mandatory (currently with turnover exceeding INR 50 crores). Moreover, bill of entry for imports and self-invoice in case of RCM transactions are the requisite documents on the basis of which ITC can be availed. Other documents such as e-way bills, delivery challans, debit notes, etc. should also be kept in record for all procurements made.

3. Using inputs and/or input services in the course or furtherance of business – As per GST law, this is the primary condition that needs to be satisfied for availing any ITC. Any input and/or input service should be used in the course of or furtherance of business. Here, 'business' has been defined u/s 2(17) of the CGST Act, 2017 to include a wide array of activities. However, multiple litigations have occurred on this aspect wherein the authorities have questioned the ITC on the premise that the expenditure was not incurred in furtherance of business; some examples are expenditure incurred on CSR, employee welfare, etc.

4. Verify if the credit is blocked u/s 17(5) – The given ITC should not be blocked u/s 17(5); this could include supplies like food and beverages, goods lost, stolen, or distributed as free samples, works contract services, etc.

5. ITC pertaining to exempted supply – The ITC pertaining to exempt supplies needs to be reversed. If a business is engaged in supply of both taxable and exempt supply, the common credit pertaining to both types of output supplies need to be reversed in the ratio of turnover of such supplies. Moreover, the ITC in relation to specified supplies such as restaurant services, real estate which are chargeable to lower rate of output GST, ITC is not available.

6. Tax is paid by vendor – The vendor must have paid the tax to the Government treasury in order to enable the recipient to avail credit. This is a very devious clause which has given sleepless nights to taxpayers. The mechanism to check whether vendor has actually paid tax or not is missing on the GSTN portal. Therefore, the businesses must resort to making changes to their vendor contracts by modifying the payment terms making them subject to tax payment done by vendors. Recently, the GST council has also made it mandatory to file GSTR 3B and GSTR 1 in sequential order. This means that unless a vendor files GSTR 3B for any given month, the subsequent period's GSTR 1 cannot be filed. This has been done to check the vendors who file GSTR 1 on regular basis to enable recipients to avail credit; however, GSTR 3B is not filed and hence tax payments

are not made, jeopardizing the credit of recipients in the long run. With this new compliance being added, recipients can identify default suppliers much earlier than the usual leading to safeguard steps being taken sooner.

7. The recipient needs to file returns – This condition has been imposed by Section 16(2)(d) requiring the recipient to file returns to claim credit. This condition is reasonable and easy to fulfill as the recipient himself is responsible for his own actions and entitlement of credit.

8. Reconciliation of ITC as reflected in GSTR 2B vis-à-vis purchase register – With effect from 1 January 2022, Section 16(2)(aa) has been notified. As per the said section, a taxpayer can only avail ITC which reconciles with the ITC as reflected in GSTR 2B. The buffer credit of 20%/10%/5% which was available earlier has been phased out. Now, there is no provisional credit that can be availed by a recipient over and above the credit that gets matched with GSTR 2B.

9. Credit eligibility as per GSTR 2B – Section 38 has been substituted vide Union Budget 2022 to provide that the entire credit available in GSTR 2B may not be available to a taxpayer. The credit that reflects as ineligible (for reasons given above) in GSTR 2B, cannot be availed by a taxpayer. With this amendment, the Government has tried to keep in check not only the person issuing fake invoices and his recipient but the entire chain of supplies till the end consumer. Therefore, if any one supplier in the entire chain commits a default, the credit of the entire chain comes under jeopardy. Nonetheless, it is still not clear that how much of the recipient's credit is in jeopardy. Additionally, one may notice that all the provisions are more or less open ended and are yet to be prescribed. Moreover, detailed clarification on the given section is awaited from CBIC.

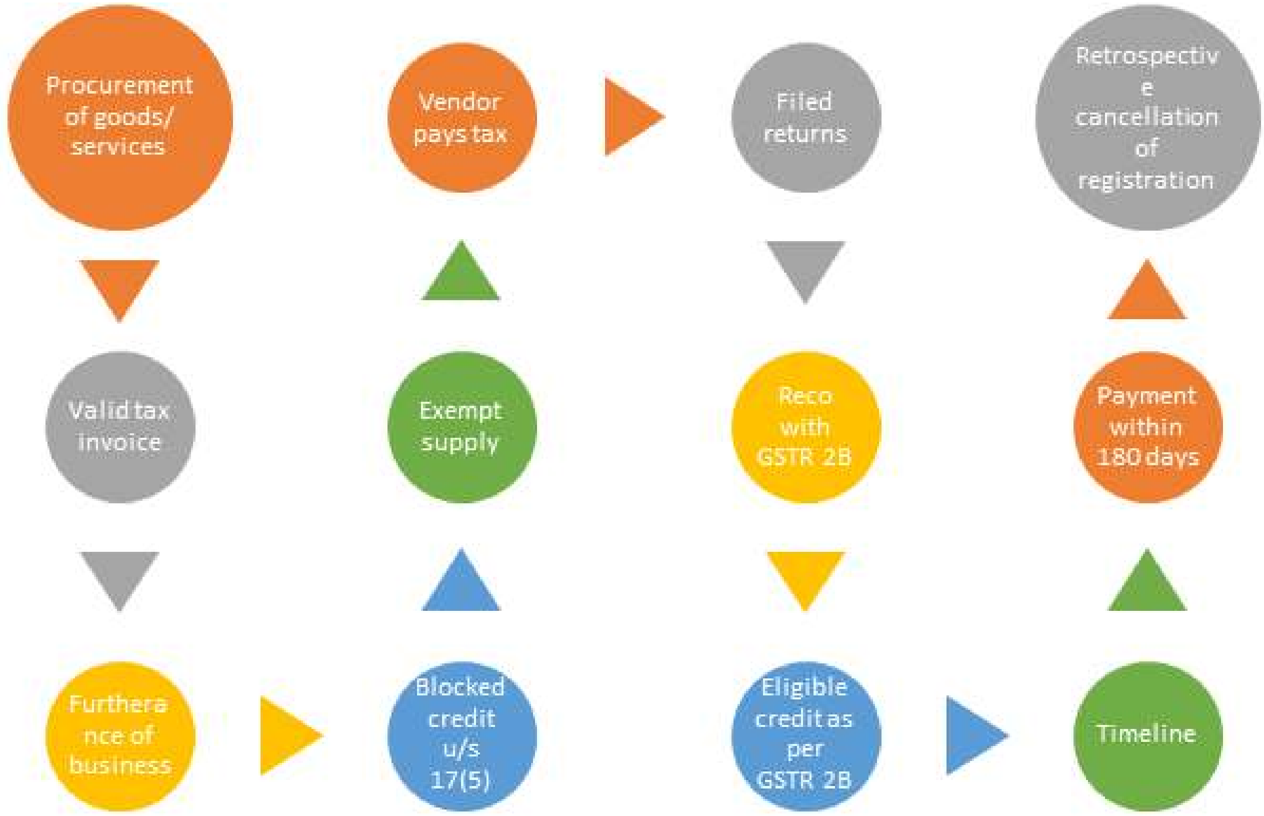
10. The timeline of availing credit – The timeline for availing credit has also been amended from 'due date of filing the return for September' to 30 November of the following financial year. Therefore, now the timeline to avail credit is now 30 November of the following financial year which shall give additional 40 days for taxpayers to reconcile and avail credit.

11. Payment to vendor within 180 days – As per the second proviso to Section 16(2), the recipient needs to make payment to vendors within 180 days, else reversal of ITC is required along with interest. Nonetheless, once the payment is made to the vendor, the credit can be re-availed. Payment also includes adjustment by way of book adjustment. Tracking the payments, reversing and re-availing credit is an additional task that the recipient must abide.

12. Vendor's registration cancelled retrospectively – Section 29(2) of the CGST Act, 2017 prescribes certain conditions wherein the proper officer can cancel the registration of a taxpayer retrospectively. In case a vendor's registration is cancelled retrospectively and the recipient has availed the credit basis the credit being reflected in GSTR 2A/ 2B, the recipient might be under the impression that such credit is now locked and cannot be questioned. However, in such cases, authorities can still later knock the doors of the recipients asking for reversal of such credit as the supplier wasn't registered at the time of making the supply. This was recently discussed in the case of ***LGW Industries Limited & Ors***. [WPA No. 23512 of 2019] wherein the Calcutta HC held that '*considering the*

facts as recorded subject to further verification it cannot be said that that there was any failure on the part of the petitioners in compliance of any obligation required under the statute before entering the transactions in question or for verification of the genuineness of the suppliers in question'. The HC remanded these cases for fresh consideration.

We have summarized the above checklist/ pre-requisites below for ease of reference:



Conclusion

As mentioned above, the recent amendments require clarity. Currently, the terminology used in Section 38 is such that the Government shall prescribe the detailing vide Notifications/ Circulars or amending rules. Nonetheless, the following are certain open questions which may haunt the taxpayers till the time clarifications are issued:

- GSTR 2B was envisaged as a static statement unlike GSTR 2A which is a dynamic statement. The substituted Section 38 prescribes that credit shall be ineligible in specified scenarios. However, the clause nowhere mentions that what would happen if the deficiency were corrected in the subsequent tax periods – will the subsequent GSTR 2B reflect the ineligible ITC as eligible? Yet, there is no clarification around this aspect.
- A functionality has been introduced on the GSTN portal which gives a broad view of the tax liability discharged by the supplier in GSTR 3B as against the liability declared in GSTR 1. Such disclosure is on percentage basis. With such functionality a recipient may become aware of any tax evasion that a supplier may be undertaking, thus giving the recipient a heads up on the non-compliances of supplier, if any. However, the said functionality works on an aggregate basis. Therefore, it is not possible for a

recipient to identify whether the supplier has discharged tax liability on his particular invoice or not and whether he is eligible to avail the credit despite lower tax payment from supplier's end. For ex. if the supplier disclosed a GST liability of INR 100/- in his GSTR 1 but discharged the output liability of only INR 80/-, the recipient would not be able to make out whether the unpaid liability pertains to his invoice or some other invoice. Further, there could be explainable reasons of why a difference between GSTR 1 and GSTR 3B exist. There is no exception carved out for such differences.

- The last condition inserted in Section 38 merely mentions 'such other cases, as may be prescribed'. This condition is wide enough to impose any other restrictions (that is, if there are any left) which may please the authorities. It is a complete delegation of power which may go for or against the taxpayers – only time will tell!
- The substituted Section 38 also provides for a condition that the recipient shall not be eligible to avail the credit if the supplier does not discharge a minimum prescribed amount of liability in cash. Now, neither has this minimum amount been prescribed, nor the machinery for implementing such provision is in place. How would the recipient come to know the total tax liability of a supplier and the means and measures used by him to discharge such liability.

The above questions are just the tip of the iceberg; the mountain runs deep into the water. It now remains upto CBIC on how the implementation is done – sloppily or carefully.

Nonetheless, the industry would have to pull up their socks and gear up for these mountain moving amendments. From the face of it, it appears that the working capital of companies may need a little (or more than little) cushioning once these provisions are implemented. Moreover, vendor agreements would once again need a review of the clauses and terms. Businesses need to safeguard themselves from the vendor non-compliances – and with the new section 38 coming into play, there are too many compliances on which a recipient's ITC could be dependent upon unlike previously where only ITC should be reflected in GSTR 2A for it to solidify. Tax teams would require training on the finer aspects of the amendments. The way the provision is worded, the industry could also have to track the ITC till the time assessments are completed. This is because, a compliant vendor today could become non-compliant six months down the line.

The provisions and the amendments would certainly help the Government in reducing the cases of fake invoicing. However, without a doubt, this would increase the compliance burden for taxpayers. Looking at the situation currently, the balance is tilted in revenue's favor. However, in the long run the stringent measures may end up benefitting the taxpayers with a clean economy and genuine transactions – the question that arises is when will India see the sunrise of that day?

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NEW SEMICONDUCTOR

INDUSTRY REFORMS AND POLICIES

The Government of India on 21 December 2021 notified the semiconductor policy which was cleared by the Cabinet earlier in third week of December 2021. According to the gazette notification, the government will provide up to 50% of Project cost for two semiconductor and two display fabs in the country. The Application window has started from January 1 and will be open for 45 days. In an attempt to attract large investments for setting up semiconductor wafer fabrication facilities within the country to strengthen the electronics manufacturing ecosystem, the Ministry of Electronics and Information Technology unveiled the scheme for development of semiconductor ecosystem within the country. The said policy push will create a new and alternative semiconductor ecosystem in India.

About the Industry

Semiconductors are material products used in various industries related their conductivity and other characteristics can be altered or modified according to the requirements. The Electronic manufacturing sector has seen an unprecedented scope for expansion and growth, especially during the COVID-19 induced lockdown wherein a majority of economic activities shifted online thereby increasing the demand in electronics and auxiliary products and services The Global Market is valued at approximately 150 Lakh Crore Rupees and is expected to grow Significantly owing to developments such as Artificial Intelligence, transferring onto 5G spectrum, Robotics, etc. It is estimated that the Industry has grown at a 17% (CAGR) from 1.9 lakh crores in 2015 to 4.97 lakh crores to 2021 owing to just 10-30% value addition which is comparatively low to the global leaders in similar industries.

New Semiconductor Policy

In continuance of the Indian Semiconductor Mission

Global hub for Electronics System Design and Manufacturing (ESDM), the four schemes [**Production Linked Incentive Scheme (PLI) for Large Scale Electronics Manufacturing**, **Production Linked Incentive Scheme (PLI) for IT Hardware, Scheme for Promotion of Manufacturing of Electronic Components and Semiconductors (SPECS)** and **Modified Electronics Manufacturing Clusters Scheme (EMC 2.0)]** have been introduced by the government of India on 21st December 2021. These schemes are aimed at attracting large investments for setting up different facilities such as compound semiconductor ATMP/OSAT facilities, Display fabrication facilities and semiconductor fabrication facilities in order to strengthen the Electronic Manufacturing Ecosystem in India. The schemes provide various incentives to investors and further provide a framework for such investments to be utilised for accelerating competition in the Indian market.

1. **Scheme for setting up to Compound Semiconductors/ Silicon Photonics/ Sensors Fab and Semiconductor ATMP/OSAT facilities in India:**

   Eligibility Criteria: Companies manufacturing High Frequency/ High Power/ Optoelectronics devices on Minimum Capital Investment of Rs. 100 Crore and setting up ATMP/ OSAT facilities on minimum capital investments of Rs. 50 Crore.

   Fiscal support: Government to provide a fiscal support of 30% of Capital Expenditure to Companies/ Joint Ventures proposing to set up Compound Semiconductors/ Silicon Photonics (SiPH)/ Sensors (including MEMES) FAB in India

   Period: Three years.

2. **Scheme for setting up of Display Fabs in India:**

   Eligibility Criteria: Companies/ Consortia/ Joint Ventures proposing to set up a Display Fabrication Unit (fab) in India for Manufacturing TFT LCD or AMOLED based display panels.

   Fiscal support: upto 50% of Project Cost and maximum support of Rs. 12,000 crore shall be provided by the Government of India whereby Appraisal shall be conducted by the Indian Semiconductor Mission, which shall act as the Nodal Agency and Ministry of Electronics and Information Technology and State Governments may provide additional financial support.

   Period: Fiscal Support shall be provided for six years initially, subject to extension

3. **Scheme for setting up Semiconductor Fabs in India:**

   Eligibility Criteria : Companies/ Consortia/ Joint Ventures proposing to set up a Silicon CMOS based Semiconductors Fab in India for manufacturing Logic/ Memory/ Digital ICs/ Analog ICs/ Mixed Signals ICs/ SoCs

   Fiscal support: On basis on node size (for 28nm or lower upto 50%; 28nm to 45 nm upto 40%; 45 nm to 65nm upto 30%) to on Minimum Capital Investment of Rs. 20,000 crore

   Period: Six years.

4. **Design Linked Incentive (DLI) Scheme:**

Eligibility Criteria: Financial incentives and design infrastructure support shall be extended to domestic companies, start-ups and MSMEs engaged in semiconductor design for Integrated Circuits (ICs), Chipsets, System on Chips (SoCs), System and IP Cores linked design under the DLI scheme.

Fiscal support: Reimbursement of 50% of the eligible expenditure subject to a ceiling of Rs 15 Crore incentive per application and reimbursement of 6% - 4% of net sales over 5 years subject to a ceiling of Rs. 30 Crore incentive per application.

Period: Three years.

FDI Funding in Electronic System Sector

The policies and reforms relating to semiconductors can be classified under Electronic Systems Sector. The global electronic devices market is estimated to be over $ 2 Trillion whereby India's share into the global market has grown from 1.3% to 3.6% and further Indian Digital economy is estimated to grow to $ 1 Trillion by 2025. India has become one of the largest electronic devices industry producing over 600 units of mobile phones every minute making India 2nd largest mobile manufacturer in the world.

Under the Electronic Systems Sector 100% Foreign Direct Investment is allowed through the automatic route, however, for electronics relating to defence, only 49% FDI is allowed under the automatic route. For investments above 49%, government approvals are required to be taken. The schemes are incorporated to make India a global competitor and hub for Electronics System Design and Manufacturing. Further India has a large consumer base with almost 1.2 billion consumers and has the third largest start-up ecosystem.

Intellectual Property Rights for protecting semiconductor integrated circuits layout-designs.

Semiconductors have become an essential commodity since they are being used in almost every electronic goods and hence the development of the layout-design on a semiconductor integrated circuit as an intellectual property has also become very significant.

India being a party to the Agreement on Trade-Related Aspects of Intellectual Property Rights (*TRIPS Agreement*), enacted the Semiconductor Integrated circuits Layout- Design Act, 2000, ("**Act**") with the objective of protecting the semiconductor integrated circuits layout-designs.

Under the said Act "**semiconductor integrated circuit"** is defined as a product having transistors and other circuitry elements which are inseparably formed on a semiconductor material or an insulating material or inside the semiconductor material and designed to perform an electronic circuitry function[1].

- It provides protection to a layout design[2], which is original and which has not been commercially exploited[3] for more than 2 years from the date of application for the registration, which

is inherently distinctive and capable of being distinguishable from any other registered layout design.

- The application for registration can be filed either alone or jointly and has to be filed within the territorial limit that is a principal place of business in India of the applicant[4].
- The said registration is valid only for a period of 10 years counted from the date of filing an application for registration or from the date of first commercial exploitation anywhere in country (*whichever is earlier*)[5].
- The Act also provides for protection of infringement of layout-design. Any person who commits infringement shall be punishable with imprisonment for a term, which may extend to 3 years, or with fine which shall not be less than INR 50, 0000 but which may extend to INR 10 lakhs, or with both.

The Indian legislation therefore provides a complete protection to the layout designs of the semiconductor integrated circuits as recognized intellectual property and also provides exclusive rights to the proprietor of the registered layout design.

Tax and Semiconductor Policy

Under the Income Tax Act, 1961, ("**IT Act**"), the tax implications related to semiconductor integrated circuits are covered under Section 35 AD (deduction in respect of expenditure on specified business). As per the said section, an assessee shall be allowed a deduction in respect of the whole of any expenditure of capital nature incurred, wholly and exclusively, for the purposes of any specified business carried on by him during the previous year in which such expenditure is incurred by him. Specified businesses under this section includes operating a semiconductor wafer fabrication manufacturing unit. There are certain conditions prescribed under Section 35 AD for claiming deduction for the specified business. The conditions are as follows:

(i) The specified business should not have been set up by splitting up/ reconstruction of the already existing business.

(ii) It should not have been set up by the transfer of plant/ machinery which was previously used for other purposes.

(iii) In such case when specified business is developing/ maintaining and operating/ developing, managing and operating the new infrastructure facility: (a) The company should be formed and registered in India, and; (b) It should have entered into an agreement with the central government/ state government/ local authority/ any other statutory body for developing/ maintaining and operating/ developing, managing and operating the new infrastructure facility.

The amount of deduction available under Section 35AD is summarized as follows:

1. Capital expenditure incurred prior to commencement of the specified business- 100% of the expenditure is allowed as a deduction in the first year of commencement.
   Condition: The deduction is available only if the expenditure amount is capitalized in the books of accounts on the date of commencement of the business
2. Capital expenditure incurred after the commencement of the specified business- 100% of the expenditure is allowed as a deduction in the year the expenditure is incurred

Besides the above-mentioned provisions of the IT Act, the Income-tax Rules, 1962, states that a semiconductor wafer fabrication manufacturing unit shall be considered for notification only if it fulfils certain conditions such as: the unit shall be exclusively for the manufacture of semiconductor wafer fabrications; it shall have prior approval of the competent authority; the date of commencement of operations of the unit shall be on or after the 1st day of April 2014; it may have one or more manufacturing facilities and all the facilities shall be located in India.

Alpha Rajan Comments

The new schemes will not only further the goals of Aatmanirbhar Bharat and Make in India but will also provide potential investors an opportunity to become a part of the value chain that is being created by the efforts of the government to establish India as the hub for electronics. This will also contribute in cementing the idea of India replacing China as a global destination for electronics manufacturing, designing, research and related services. The initiatives taken by the Indian government in setting up the ISM will be furthered by this move. Further, the initiatives will help in stabilising the economic conditions which have been affected by the pandemic induced restrictions and the increased demand of electronic products due to shifting of majority of economic activities online.

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    b. SPECS dated 01/04/2020
    c. Production Linked Incentive Scheme for Large Scale Electronics Manufacturing dated 01/04/2020
    d. Production Linked Incentive Scheme for IT Hardware dated 03/03/2021
4. Notifications dated 21/12/2021:
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    b. Scheme for setting up of Display Fabs in India
    c. Scheme for setting up of Semiconductor Fabs in India
    d. Design Linked Incentive Scheme
5. Invest India, National Investment Promotion & Facilitation Agency. https://www.investindia.gov.in/sector/electronic-systems https://www.investindia.gov.in/schemes-for-electronics-manufacturing

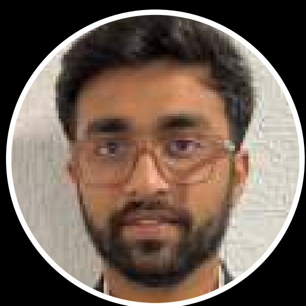
1 Section 2(r) of the Semiconductor Integrated circuits Layout- Design Act, 2000.

2 Layout-design means a layout of transistors and other circuitry elements and includes lead wires connecting such elements and expressed in any manner in a semiconductor integrated circuit.

3 Commercial exploitation, in relation to Semiconductor Integrated Circuits Layout-Design, means to sell, lease, offer or exhibit for sale or otherwise distribute such semiconductor integrated circuit for any commercial purpose.

4 Section 8 of the Semiconductor Integrated circuits Layout- Design Act, 2000.

5 Section 15 of the Semiconductor Integrated circuits Layout- Design Act, 2000.



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UTILISATION OF ITC FOR DISCHARGE OF GST ON SUPPLY OF RESTAURANT SERVICES

INTRODUCTION

The highlight of 45th GST Council meeting held on September 17, 2021, was the recommendation to transfer the liability to pay Goods and Services Tax ('GST') on 'restaurant services' from restaurant service provider to the e-commerce operators ('ECOs'), such as Zomato and Swiggy. In terms of the recommendation, the Central Government issued ***Notification No. 17/2021-Central Tax (Rate)*** dated November 18, 2021 ('Notification') under Section 9(5) of the Central Goods and Services Tax

S. No	Issue	Clarification
6.	Would ECOs be liable to reverse proportional input tax credit on his input goods and services for the reason that input tax credit is not admissible on 'restaurant service'?	ECOs provide their own services as an electronic platform and an intermediary for which it would acquire inputs/input service on which ECOs avail input tax credit (ITC). The ECO charges commission/fee etc. for the services it provides. The ITC is utilised by ECO for payment of GST on services provided by ECO on its own account (say, to a restaurant). The situation in this regard remains unchanged even after ECO is made liable to pay tax on restaurant service. ECO would be eligible to ITC as before. Accordingly, it is clarified that ECO shall not be required to reverse ITC on account of restaurant services on which it pays GST in terms of section 9(5) of the Act. **It may also be noted that on restaurant service, ECO shall pay the entire GST liability in cash (No ITC could be utilised for payment of GST on restaurant service supplied through ECO)**
7.	Can ECO utilize its Input Tax Credit to pay tax w.r.t 'restaurant service' supplied through the ECO?	No. As stated above, the liability of payment of tax by ECO as per section 9(5) shall be discharged in cash.

Act, 2017 ('CGST Act'), and brought the same into effect from January 1, 2022. The CBIC issued ***Circular No. 167/23/2021-GST*** dated December 17, 2021 ('Circular') to clarify several substantive and procedural issues arising with respect to the applicability of amendment. Paragraphs 6 and 7 of the Circular state as under:

The Circular prohibits ECOs from utilising ITC for discharge of tax on 'restaurant service' and mandates that the same be paid through cash alone.

ANALYSIS OF THE LEGAL PROVISIONS

Section 9(5) of the CGST Act empowers the Government to notify categories of services, the tax on which will be paid by the ECO if the same are provided through it. The ECO steps into the shoes of the actual supplier of the service. The ***Notification No. 11/2017-Central Tax (Rate)*** dated June 28, 2017 ('Rate Notification') provides GST rates applicable on supply of various services. S. No. 7(ii) thereof provides for a concessional rate of 5 per cent. on 'restaurant service other than at specified premises', subject to the following restriction:

> *"Provided that credit of input tax charged on goods and services used in supplying the service has not been taken"*

From the above, it follows that the suppliers of restaurant services are not allowed to 'take' ITC on inputs and input services used for providing restaurant service. In terms of Section 9(5) of the CGST Act, ECO steps into the shoes of supplier whilst discharging GST liability on 'restaurant service'. The condition under Entry 7(ii) of the Rate Notification forms the sole basis for the prohibition on utilisation of ITC under the Circular.

At this juncture, it is pertinent to highlight that the term 'taken' is co-terminus with 'availment' of ITC on inputs and input services attributable to the restaurant service. It is trite that 'availment of ITC' and 'utilisation of ITC' are two separate stages under the CGST Act. Section 41(1) of the CGST Act allows the registered person to 'take' eligible ITC in his electronic credit ledger ('Credit Ledger'), whereas Section 41(2) read with Section 49 provide for its 'utilisation' for payment of output tax. It is pertinent to highlight that the condition under Entry 7(ii) of the Rate Notification extends only to the availment of ITC. The Rate Notification nowhere restricts the utilisation of ITC otherwise available to the supplier for discharge the output tax on 'restaurant service'. Therefore, ECOs cannot avail ITC attributable to restaurant service, but there is no restriction on the ECO to utilise the ITC otherwise available in its Credit Ledger. In any event, the CGST Act does not require one-to-one co-relation between inputs / input service and the output supply. Once the ITC is properly availed in the Credit Ledger, it loses its specificity and can be utilised for discharge of any outward tax liability.

SIMILAR RESTRICTIONS UNDER ERSTWHILE REGIME

In the present context, it is important to recall the treatment meted out to similar restrictions *vis-à-vis* availment of cenvat credit under the erstwhile tax regime. The Cenvat Credit Rules,

2004 ('Credit Rules') was the sole and primary piece of legislation governing all aspects of cenvat credit. Rule 3(1) *inter alia* allowed a 'provider of output service' to 'take' credit of specific duties of excise and service tax, and Rule 3(4) allowed the utilisation of cenvat credit for discharge of service tax on output service. Issues often arose regarding utilisation of cenvat credit availed on inputs and input services received for provision of output services, for the discharge of excise duty on final products cleared from the factory premises. These issues were all decided in favour of the taxpayers.

Similarly, prior to 2011, issues regarding utilisation of ITC for payment of service tax under reverse charge mechanism were rampant. The revenue often placed reliance on Rule 5 of Taxation of Service (Provided from Outside India and Received in India) Rules, 2006 ('Import of Service Rules'), which stated that taxable services provided from outside India and received in India shall not be treated as output services for the purpose of availment of cenvat credit. The High Courts noted that the restriction under Rule 5 of the Import of Service Rules extended only till availment of cenvat credit attributable to such imported service, and held that the same could not be used to restrict utilisation of credit otherwise available to the service recipient towards such tax liability[1]. The Government acknowledged this legislative lacuna and amended Rule 3(4) of the Credit Rules *vide* ***Notification No. 28/2012-CE(NT)*** dated June 20, 2012 to insert an Explanation which specifically prohibited service recipients operating under reverse charge mechanism from utilising cenvat credit for payment of service tax.

1 Mccann Erickson (India) Limited v. CCGST, Delhi, 2019 (10) TMI 99 - DELHI HIGH COURT; UoI v. Kansara Molders Limited, 2018 (8) TMI 1230 - RAJASTHAN HIGH COURT; CCGST v. USV Limited, 2019 (7) TMI 567 - BOMBAY HIGH COURT

CONCLUSION

In the present case, there is no statutory provision under the CGST Act which prohibits the utilisation of ITC for payment of output tax on restaurant service, the restriction operates only to prevent availment of ITC attributable thereto. Therefore, the CBIC has clearly transgressed the confines of delegated legislation by imposing a blatant prohibition on ECOs from utilising the ITC to discharge output tax liability on restaurant service and mandating that the same be paid only through cash. It is a settled legal position that Circulars issued by the CBIC are not binding on the taxpayers. A taxpayer is bound by the letter of the law, not the opinions set forth by the revenue. Therefore, in light of the clear wording of the statutory provisions and the historical treatment of similar restrictions, ECOs should be entitled to discharge the tax liability on restaurant service through the ITC available in the Credit Ledger and the vires of the Circular may be challenged before the Courts.

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INTERNAL AUDITS

Why do same observations get reported repeatedly?
What should the focus be?

Context
Although organizations have grown multifold over period of time and have been subject to regular audits, most of them still have the same audit observations getting reported time and again.
Such repeated instances of same observations getting reported raises doubt on how serious is the organization and the leadership team towards audits, corporate governance and risk management.

Why? What's missing?
The major reason for this situation to arise and remain unaddressed is ***"inadequate root cause analysis"*** to identify the underlying issue which results into such observations. In a very general sense, audit observations could be co-related with illness that one may experience - till the time it's not diagnosed appropriately it would continue to surface frequently.

A lot of time and effort at corporate level is spend discussing the observation, which is the ultimate outcome however the ***efforts should be focused towards identification of underlying root cause and remediation steps to be actioned to address the root cause.***

How to address?
Having understood the importance of root cause analysis; the next question is how to go about it?
Considering that the subject of discussion (the observation) may involve several touch points and hence multiple root causes; structured approach would be to ***categorize the root causes across three buckets – People, Process and Technology.*** Such categorization enables the respective stakeholders to deliberate on remedial actionable steps which are not only restricted to area or function of audit however spans across the organization; ***a wholistic enterprise-wide approach is key, instead of a department wise silo view.***

Illustrative examples of few root causes and remedial steps which get identified through the categorization approach which otherwise would have been missed out are as follows.

Category	Root Cause	Remedial Action Steps
People	Process and activity owners not aware about the work protocols / requirements defined in the policies and procedure documents	· Key policy requirements to be communicated as part of employee induction process. · Need to publish policies and procedure documents on system which provides anytime access to all employees. · Period trainings and refresh programs to be organized. · Self-declaration procedures to be established and implemented w.r.t compliance with policy and process requirements.
Process	Management expectations not clearly known to personnel executing the transactions	· Delegation of Authority (DOA) to be defined. · Policies and Standard Operating Procedures (SOPs) to be defined and documented.
Technology	Transactions executed without required approvals Incorrect MIS reports (manually prepared) submitted for periodic monitoring and review	· Approval workflows to be configured in the system. · MIS reports for management review to be generated directly from system.

Take Away

Root cause analysis and its categorization facilitates in identifying remedial action plans which are not just confined to the auditee or the concerned department but spreads across the enablers; "People, Process and Technology". Such approach not only avoids repetition of same observations but also enables designing of preventive controls and establishing pro-active measures which further strengthens the internal control environment.

Rahul Kaushik
Internal Audit
O2 Power

DIGITALISING CORPORATE GOVERNANCE USING BLOCKCHAIN

"There are always new, grander challenges to confront, and a true winner will embrace each one."

Introduction

Digital Economy refers to economy based on digital platform. It is also referred as Internet Economy, New Economy or Web Economy[2].

"The aggressive use of data is transforming business models, facilitating new products and services, creating new processes, generating greater utility, and ushering in a new culture of management."

- Professor Walter Brenner of the University of St. Gallen in Switzerland

Digitalization is the on-going order of the day which makes the roles of the people much simpler, speedier, and accurate and in some cases, it helps combining the roles as well. From a small organization to big ones, today, everyone is minded running their business with small amount of support. In the awake of this, digital transformation has played a key role.

Corporate governance of the business is another area where organisations are endeavoring to capitalize benefits of digitalization to get more out of less.

Understanding how Digitalization enhances

2 Wikipedia (assessed on 24-02-2022).

Corporate Governance

Corporate governance is often based on three 'P's – **Process**, **People**, and **Performance**.

Governance is the <u>process</u> by which people achieve their company's purpose, and that process is developed by analysing performance. Processes are refined over time to consistently achieve the purpose.

<u>People</u> are the founders, the board, the stakeholder, consumer and impartial observer. They determine a purpose to work, develop a resulting process to unfold it, evaluate their performance outcomes, and use those outcomes to grow themselves and others as people.

<u>Performance</u> analysis is a key skill in any industry. One of the primary functions of the governance process is the ability to look at the results of a process and determine whether it was successful, and then apply those findings to the rest of the organization.

A good digital strategy and program will connect the three seamlessly and ensure that companies are in better control of the direction they take. At the crux of digital corporate governance is the ability to empower the company boards with tools to make better strategic decisions.

Following are few examples about how digital solutions can help lift corporate governance:

- An advanced portal can give greater value to board efficiency by managing board activities in a more structured way. As a safe and put under one control operating system to manage sensitive board materials and processes, it could ensure safety, efficiency and office activity for board members, business managers and controlling persons, making efficient coordination between board members and business managers.

- Instant cloud-based access to board materials with granular file-level control. Geographical mobility, multi-device support, and real-time data sharing abilities.

- Using a secure e-meeting solution with integrated functions such as e-proxy can be a great way to transform traditional meetings into digital meetings, and can be used for shareholder meetings, board meetings, online conferences, and trainings in either a hybrid or virtual setting. This is permissible under the Companies regulations as well. Like, the Vero Voting system - Vero Voting can take care of the communication and making the event announcement and invites seamlessly. The organisation only needs a list of email addresses and names of the candidates and upload it to the system and do the rest. This includes sending email with all the information required for the meeting and tracking the attendance of the voters. All communication comes from one source removing the chances of confusion. Some of the web conferencing apps such as Zoom, Teams, WebEx and other conferencing software can easily integrate to the Vero voting platform[3].

- By using e-signatures, digital HR tools and other electronic solutions, businesses can streamline operations and improve control of processes.

Innovative use of Blockchain Technology

One of the newest technologies - Blockchain has made a lot of headlines all over the world mainly, due to it's being the platform on which thousands of crypto currencies are created. However, the unique features of this technology can completely transform both the concept and the impact of corporate governance.

The Distributed ledger technology (DLT), which is the core of Blockchain technology, has emerged as a ray of hope for those who want to ensure transparency in transactions. It is a method of recording and sharing data across a network. The way the DLT system works is that it comprises of three elements:

- A ledger;
- Sharing of the database; and
- Network of computers.

Blockchain technology generally provides two important elements. These elements are extremely relevant for corporate governance[4].

- Transparency due to its verifiable system of recording data and transactions; and
- Trust since the data is immutable or incorruptible.

Some of the ways in which Blockchain can support Corporate Governance are as under:

i) **Transparency of Ownership –** Many times it is a struggle to find out who the actual owners are due to the way shareholding is structured in many companies. There are layers and layers to be unearthed before one can arrive at the actual beneficial owners. If the

[3] https://www.verovoting.com.au/blog/voting-for-your-video-conferencing-software-of-choice/

[4] ICSI Journal January 2022.

Blockchain technology is used to record the data of the shareholders of a company, then in that case all shareholders and other interested parties would be able to view the arrangement of ownership at any point of time and identify changes instantly as they occur. Like, Ford is using Blockchain technology to track its raw materials like cobalt from the suppliers. As soon the cobalt is mined, they will get on the ledger, and Ford can track where it's going from there[5]. Barclays is using Blockchain technology for streamlining fund transfers and KYC (Know-Your-Customer) processes.

ii) **Deterrent for Insider Trading –** This is one of the areas where the Blockchain technology can come in handy. Firstly, by its very nature of existence, there is no need for intermediaries in the process and secondly, once it records a transaction, that can neither be modified nor can it be erased. So, if a company devised a mechanism which uses Blockchain, all the network users can see the trading done by various parties. Since even the historical data will be stored and it is almost incorruptible, this can be a strong and effective tool to deter insider trading. Manipulation of the data will be next to impossible, and this can be a key component in the fight for transparency of transactions.

In December 2017, Australian Stock Exchange (ASX) announced its intention to replace CHESS using distributed ledger technology developed by its technology partner Digital Asset.

CHESS (Clearing House Electronic Subregister System) is the system that performs the processes of clearing, settlement of equity transactions, asset registration, record shareholdings and some other post trade services which are critical to the orderly functioning of the market. ASX is now taking the opportunity to replace CHESS with a next-generation post-trade platform using contemporary technology **"Distributed Ledger Technology" (DLT)** which will provide a broader range of benefits to a wider cross section of the market[6].

iii) **Annual General Meeting (AGM) –** All questions from shareholders can be included in the Blockchain and thus become transparent. Similarly, all the answers to those questions by the management could also be included. A historical data gets created and it will ensure greater vigilance and transparency at the end of both the board and the shareholders. Moreover, there will not be any limitation for the shareholders the traditional duration of the AGM to ask questions but can be enabled to ask questions during a longer period, e.g., from the record date till the conclusion of the AGM.

Santander and Broadridge was the first who used Blockchain technology for investor voting at an Annual General Meeting. On March 23, 2018, they ran a pilot project in parallel to the AGM, with blockchain being utilized to produce a "shadow" digital register of the proxy voting taking place in the traditional model. The co-collaboration model was extended to additional global custodians participating during the Santander AGM[7].

iv) **Real-Time Accounting –** Blockchain technology could be used for daily, but important function of bookkeeping and accounting. Under Blockchain, every entry is made in real-time and is time-stamped. By being made in real-time, there is an immediate updation which takes place, and one will have access to real time data. Further, since every entry will be permanently time stamped, it prevents any alteration or adjustment once the data has been posted. The company's entire ledger would then be visible immediately to the stakeholders.

For example, Pfizer is one of the large companies using Blockchain technology. Biogen and Pfizer led organization Clinical Supply Blockchain Working Group (CSBWG) for tracking records and managing the digital inventory of pharmaceutical products[8].

Similarly, Walmart has been a Blockchain use-case for a very long time. The company is using IBM's supply chain technology – Hyperledger Fabric platform to back up their supply chain process. The system continuously gathers information at every step from the tender offer from the carrier to the proof of delivery and the approval of payment. This information is automatically captured and synchronized in real-time and is visible only to the parties involved in the transaction[9].

v) **Smart Contracts –** A smart contract is a computer program that automatically executes/enforce predefined terms of a contract which has been made using the Blockchain technology. Smart contracts can dramatically reduce costs of verification and enforcement. For example, Arizona introduced a new law which allows enforceable legal agreements to be created via smart contracts[10].

Conclusion

In this fast-changing digital world, every economy and every organisation need to adopt and take advantage of digitalisation to create value since the organisations that control the data value chain stands the best chance of becoming the leader.

Blockchain technology is a disruptive technology that is evolving. Its benefits are expanding at a multifold pace. If employed correctly, Blockchain technology can transform Corporate Governance by making transactions transparent, reduce the risk of frauds, effectively manage the interests of the shareholders, and bring about efficient administration of an organisation.

We could conclude in saying that we should get "empowered, not overpowered' by digitalization. Digital transformation governance extends far beyond technology. However, the board does not need to be filled with technology wizards. Rather, "it must understand what can be accomplished at the intersection of business and technology" and it must be prepared to help shape how technology can transform the organization to maintain or grow its competitiveness and sustainability.

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MOST AWAITED REPORT OF THE JOINT PARLIAMENTARY COMMITTEE ON THE PERSONAL DATA PROTECTION BILL, 2019

The right to privacy in India was declared a fundamental right by the Hon'ble Supreme Court of India on August 24, 2017, in its landmark judgment in the case of *Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India And Ors*[1]. ("**Right to Privacy Case**"). After this case, the need was felt to have a stronger legislation in place to protect the personal data and privacy of individuals. Accordingly, in August 2017, the Central Government appointed a data protection committee chaired by retired Supreme Court judge, Justice Srikrishna and on July 27, 2018, the committee released an extensive white paper on the importance of data protection. Subsequently in July 2018, the committee released the draft Personal Data Protection Bill, 2018. Based on the recommendations of the industry stakeholders, and a year thereafter, the Personal Data Protection Bill, 2019 ("**PDP Bill**") was introduced in the lower house of the Indian Parliament, with few modifications.

The PDP Bill had, on December 12, 2019, been referred to a Joint Parliamentary Committee ("**JPC**") for further debate and examination.

On December 16, 2021, after nearly 2 years of deliberation on the PDP Bill, the JPC has tabled its report[2] on the PDP Bill (*hereinafter referred to as the* "**Report**"). The Report lays down various recommendations and modifications to the PDP Bill.

This note provides a summary of the Report and the recommendation provided by the JPC on the PDP Bill. It is important for the stakeholders to understand the recommendations and the effect it will have on the right of privacy of individuals.

Key recommendation of the Report

A brief summary of the key recommendations of the Report is provided hereinbelow:

a) **Change in name and scope to "Data Protection Bill"**: The PDP Bill only sought to regulate the personal data[3] of individuals as defined therein. However, as per the recommendations of the Report, the JPC has suggested to change the name of the draft bill to "Data Protection Bill", thereby covering non-personal data as well. It is to be noted here that the present draft of PDP Bill empowers the Central Government to gain access to anonymized or non-personal data from any data fiduciary to enable itself for better targeting of delivery of services or formulation of evidence-based policies. There are concerns from the stakeholders that including both personal and non-personal data in the same legislation will dilute the objectives of the PDP Bill, which was aimed to provide a framework for protection of personal data only.

b) **Selection of Data Protection Authority (DPA)**: As per the PDP Bill, the stakeholders involved in the selection for DPA were limited, which included members from the Ministry of Legal Affairs and Ministry of Electronics and Information Technology. However, the Report recommends that the selection committee for the DPA should have wider representation from technical, legal, and academic experts, as may be prescribed, in addition to the bureaucrat officers comprising the selection committee. Thus, the members of the DPA will indirectly be in control of the Central Government, as all members in the selection committee are appointed on behest of the Central Government.

c) **Exemptions to government**: The PDP Bill provided for exemption to the Government for compliances under the draft legislation, with the aim of protecting national interest. The Report adds conditions to this exemption, by recommending that the Government may exempt itself from the provisions only after a *fair, just, reasonable and proportionate procedure*. This is in line with the Right to Privacy Case, wherein the Apex Court has laid down the tests of legality, legitimate aim, proportionality and procedural safeguards which must be met for infringement of the right to privacy of individuals by the Government in pursuance to the exemptions available to it.

d) **Data breaches**: As per the PDP Bill, the companies are required to report personal data breaches, when such breaches cause harm to the data principal. However, in addition to the same, the Report not only mandates maintenance of log of all kinds of data breaches, regardless of whether the breach relates to personal or non-personal data irrespective of the likelihood of harm to the data principal, but also puts a time period of 72 hours for reporting such breach. Meaning thereby, that in addition to reporting requirements for personal data breaches, the maintenance of log will be mandatory for personal as well as non-personal data and not conditional upon the data principal bearing any harm.

e) **Social Media regulation**: The Report points out that social media intermediaries should be subject to higher scrutiny. In order to curb the menace of fake news and fake

accounts, the Report suggests that all user accounts on social media intermediaries should be verified. The Report claims that the intermediary framework under the Information Technology Act, 2000, has failed to achieve its objectives and thus recommends that the social media intermediaries should be treated as '*publishers*' in certain specific contexts, especially in relation to content from unverified accounts. Moreover, it has been recommended that no social media platform should be allowed to operate in India unless the parent company handling the technology sets up an office in India. Further, a statutory media regulatory authority, on the lines of Press Council of India, may be setup for the regulation of the contents on all such media platforms irrespective of the platform where their content is published, whether online, print or otherwise.

f) **Children's data**: The PDP Bill had specific provisions for protection of data relating to children. The PDP Bill had defined the concept of guardian data fiduciary as a data fiduciary that operates commercial websites or online services directed at children, or processes large volumes of personal data of children. Under the PDP Bill, such a guardian data fiduciary was exempt from obtaining the consent of the parent or guardian of the child as required by other data fiduciaries. The Report has recommended deletion of the concept of guardian as a separate class of data fiduciary as it may dilute the objective of safeguarding children. The Report also recommends that all data fiduciaries should be barred from carrying out profiling, tracking, or behavioural monitoring of, or targeted advertising directed at children, and processing personal data that may cause significant harm to children. This bar was previously applicable on guardian data fiduciaries alone.

g) **Data Localisation**: While under the PDP Bill, provisions related to data localization already existed, the JPC has strongly advised that all data should be stored in India as it is important for national and security reasons. The Report suggests that the Government should bring mirror copies of all sensitive and critical personal data already stored abroad and that all entities operating in India should gradually move towards localisation of all data. In addition to data localisation, the Report also proposes preparation of a comprehensive data localisation policy by the Central Government, which will be aimed around developing adequate infrastructure for local storage of data and helping start-ups comply with localisation requirements, while keeping in mind the '*ease of doing business*' objectives of the Government.

h) **Data Protection Officer (DPO)**: While the PDP Bill mandated a significant data fiduciary to appoint a DPO, the Report proposes that the DPO appointed should have an important role in the management and operations of the significant data fiduciaries, and shall be a senior level officer or key managerial personnel, having technical knowledge in the field of operations of the respective significant data fiduciary.

Dissent notes to the Report

Several members of the lower house of the Parliament (Lok Sabha) have raised their voices against the recommendations provided by the Report[4]. The main concerns regarding the recommendations of the Report and the proposed "Data Protection Bill" are that it gives sweeping powers to the Government to exempt any or all of its authorities from the provisions of the proposed legislation. The dissenting members also note that the Report does not provide any safeguards to guarantee the right of privacy of the individuals. By changing the name of the legislation and widening its scope, the recommendations of the Report have weakened the framework for protection of privacy. There have been apprehensions that the recommendations of the Report by the JPC have alienated from the framework of the PDP Bill.

What's next for right to privacy in India

Post the Right to Privacy Case and subsequent introduction of the PDP Bill, it was believed that the right to privacy, being a fundamental right, will be more strengthened and will protect the individuals against unfair invasion of their privacy. However, the Report by JPC on the PDP Bill has created further uproars. While the winter session of the Parliament has ended on December 23, 2021[5], it is unlikely that the Report will be further discussed or any recommendations carried out this year, given that the changes and deviation from the original PDP Bill are notable in the Report. The ultimate outcome of the right to privacy is dependent on the discussions and modifications made in the PDP Bill, based on the recommendations by the JPC. Since this proposed legislation will be India's first comprehensive data protection law, it will be interesting to see how the Government proposes to modify the PDP Bill and protect the right to privacy of the individuals, while balancing national security and interests of India which necessitates infringement in certain cases within the contours of law already laid down by the Supreme Court of India.

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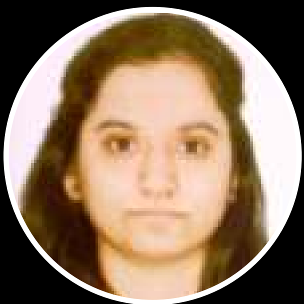
1.(2017) 10 SCC 1.
2.https://prsindia.org/files/bills_acts/bills_parliament/2019/Joint_Committee_on_the_Personal_Data_Protection_Bill_2019.pdf.
3.Personal data means data about or relating to a natural person who is directly or indirectly identifiable, having regard to any characteristic, trait, attribute or any other feature of the identity of such natural person, whether online or offline, or any combination of such features with any other information, and shall include any inference drawn from such data for the purpose of profiling.
4.https://www.business-standard.com/article/current-affairs/jpc-members-record-dissent-towards-parts-of-personal-data-protection-law-121112200607_1.html.
5.https://prsindia.org/sessiontrack/winter-session-2021/session-alert.



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VALUATION OF PRIVATE EQUITY AND VENTURE CAPITAL INVESTMENTS USING THE **IPEV GUIDELINES**[1]

Valuing early stage companies is a complex process and with the increasing number of Unicorns that we come across lately, the valuations of such companies are in the focus. Early stage companies are typically funded by Private Equity and Venture capital companies. These companies are required to record such investments at fair value per local accounting requirements as well as for compliance with local regulatory requirements. The International Private Equity and Venture Capital Board issues guidance on the methods and best practices to fair value such investments. The guidance aims to remove inconsistencies followed by several valuation practitioners while determining the fair value of investee companies.

The International Private Equity and Venture Capital ("IPEV") Board published the updated IPEV Valuation Guidelines in December 2018. The guidelines set out recommendations on the best practices to be adopted while valuing Private capital investments. With over $ 850 billion invested in the Private markets, there was a pressing requirement of authoritative guidance on valuation and reporting of such private market investments by private equity and venture capital companies. Such investment companies prior to introduction of these IPEV guidelines did undertake fair valuation of such investments for complying with the local reporting requirements, there was no consistency in assumptions and approaches being followed by appraisers and such investment companies. These guidelines aim to achieve consistencies and transparency in the assumptions and methodologies being applied to report the fair valuation of investee companies by Private equity and venture capital companies.

Private capital and venture capital companies are required to undertake periodic valuations of their investments to comply with several regulatory bodies as well as for financial reporting purpose under IFRS, Ind AS and US GAAP. Accounting standards require such investments to be recognized at their "fair value". Fair value has been defined in IFRS 13, Ind AS 113 and ASC 820. While accounting standards do not mandate fair valuing such investments using the IPEV guidelines, following the IPEV guidelines results in compliance with requirements of such reporting standards.

The IPEV guide provides clarification on the concept of fair value, the principles of valuations and the valuation methods to be used in context of valuing private capital investments. Our discussion will be limited to the concepts unique to the IPEV guide without delving into the basic fair valuation requirements that are laid down in the financial reporting standards.

I. Unit of account

Most funds make investments in multiple types of instruments issued by an investee company. This may be due to difference in timing of such investment, investee's companies need for a certain type of capital depending on the end use of such investments. The fair valuation standards typically require the fair value of an investment to be measured at a particular unit of account, in this case either as individual investments made by funds in the investee companies or value the various investment as one unit of account. The choice of such unit of account will depend on the way in which most market participant would deal with such investments. As we are aware, fair value under accounting standards talks about “exit value”, thus, for determining the unit of account an appraiser/ the fund should give consideration to the manner in which these multiple investments would be treated in a sale transaction by a market participant. More often than not, in case of a liquidity event or a sale transaction, a private equity or venture capital would liquidate all of their investments in the investee company againt liquidating only a certain category of its investment instrument. In such a scenario it would be prudent to determine the fair value of the various investments as a single unit of account against valuing each type of investment separately. However, if market participants would have treated type of instrument as a separate unit of account for the purpose of entering into a sale transaction, then the appraiser may consider computing fair value of each instrument separately.

II. Allocation of value

The guide, similar to best practices advocates use of more than one valuation method to estimate the fair value of the investment. Valuation of investment in early stage companies generally differs or rather has an extra step as compared to valuing a traditional mid-size or large company. Early stage companies typically have several classes of equity in form of convertible preference shares and various series of equity and debt instruments which each series have differential seniority, rights and obligations. Most investments are in one or more classes of such complex equity instruments. For estimating the fair value of a traditional mid-size or large company, which typically would not have multiple classes of equity instruments, the total enterprise value less debt would yield in the value attributable to the equity holders of the company. However, when it comes to early stage company, the enterprise value less debt yields in a value which is then attributed to the various classes of equity, convertible debt instruments and stock options that have been issued by the subject company as on the date of valuation. In such a scenario, the enterprise value less debt, i.e. the equity value is then allocated to the various instruments outstanding using option pricing methodologies. The process includes determining break-points, i.e. the total equity value of the company at which each of the outstanding instruments would start participating in the profits of the company, i.e. would forgo their liquidation preferences and convert to common equity of the company. The method essentially computes the value of each instruments as a call option on the overall value of the company. This allocation exercise is generally used to estimate the fair value of the private equity or venture capitals investments.

The amount of debt to be reduced from the enterprise value should consider the fair value of such debt based on seniority as well as the fair value of such debt from a market participant perspective. For example, if a debt is to be repaid in a change of control scenario, the fair value of debt is to be computed based on a hypothetical situation that the change of control would happen as at the valuation date. However, if the redemption of debt is optional, the fair value should be computed considering whether redemption or non-redemption would be most beneficial to the market participant.

III. Calibration

Calibration is one of the most critical concepts used in determining the fair value of investments by Private equity and venture capital companies. Calibration is a technique which assesses the reasonableness of the valuation analyses of investee companies using parameters of the most recent funding round or the valuation at which the initial investment was made. Calibration essentially considers the multiples or discount rates used in the most recent arm length transaction involving the investee companies and compares the same with similar valuation inputs used/ derived from the current valuation analyses. For examples, let's say Company A, a venture capital invested in an EdTech start up at a valuation of $ 5 million, yielding a 10x trailing revenue multiple. At the same time, based on market research, EdTech companies were valued at 7.5x revenue multiple. Since the initial investment was between two unrelated parties, the valuation of $ 5 million is considered to be the fair value of the subject company, and the revenue multiple for the investee company was considered to be 2.5x higher than the market multiples.

The higher multiple could have been for several factors ranging from unique concept, mass market reach, high growth potential, etc. Most private equity and venture capital companies are required to fair value their investments periodically. During each of the period valuation exercise if the implied multiple is around 2.5x higher than the industry derived revenue multiple, then the value conclusion is considered reasonable. Obviously, we also need to look at certain qualitative and quantitative factors of the company's performance. The higher multiple is justified in future periods only if the company is on track to attain milestones that were laid out at the time of the initial investment. If the company has suffered certain setbacks or is lagging in major milestones, the additional 2.5x of multiple might not be justified and the appraiser will need to make certain adjustment to reflect this impact on the overall valuation. The process of reconciling the current valuation derived using different valuation methods to the parameters used to derive the initial or the previous arms-length valuations is referred to as calibration.

Similarly, calibration can also be used in context of discount rates being used to determine the valuation. While applying a calibration technique the appraiser should ensure:

1. Adjust the prior valuation parameters for changes in overall market conditions
2. Ensure the initial valuation used as the base of calibration is based on an arm's length transaction

IV. Back testing

Back testing is a process that identifies factors or reconciles the difference between an actual exit event and the previous fair value assessment. It compares an actual liquidity event to the most recently determined fair value estimates. This process does not imply that the previous / most recent fair value assessment has to be equal to the exit price, but it can provide several insights to various factors that led to the difference in the valuations. Such insights could be then applied in developing future estimates of fair value. It also provides an insight to the valuer about certain inherent biases that he may be applying to his/ her fair value estimates

V. Valuation methods

The IPEV guides discusses various valuation methods that can be applied while valuing investments by private equity and venture capital companies. The valuation methods are aligned with the ones most valuation professional are well versed with. The methods prescribed in the guide includes:

- Market approach
- Income approach
- Cost approach
- Multiples
- Discounted cash flow
- Net assets
- Industry valuation benchmarks
- Available market prices

The price of a recent investment between market participants also represent fair value as at the transaction date. At subsequent valuation dates, the price of the recent investment may serve as a starting point for estimating the fair value. However, such value should be duly adjustment to five any impact of changes in market conditions or changes in performance of the investee company. The price of the recent investment should not be used as the sole valuation method, it should rather serve as a corroborative approach to determine the reasonableness of the value estimated using other valuation methods. Reasons why recent price is not most reliable:

- Different rights assigned to new and existing investment (existing investment might be common stock, new could be Series A preference share)
- New investor might have specific synergies which may not be captured by the existing investment value
- Transaction may be considered a distressed sale and this existing investment price might not be most reliable
- Dilution on account of new investors might be disproportionate compared to existing investors dilution

The guide also recommends using more than one valuation methods and the selection of the method is based on the judgement of the valuer.
The applications of the other methods prescribed above are in line with standard practices adopted by valuation professionals. Following are primary considerations in applying each of the above valuation methods:

Multiples	• Apply multiple appropriate to the company being valued (e.g. EV/ EBITDA, EV/Revenue) • Adjust enterprise value for surplus or non-operating asset/ liabilities and/ or contingencies typical to the subject company • Deduct fair value of higher-ranking equity and debt instruments to determine the value of investment • Adjust multiples of differences in characteristics between subject company and comparable companies
Industry valuation benchmarks	• Industry specific multiples can be applied to determine fair value of investments. Very often used for valuing hotels, television companies or social media companies. • Generally, not used as the primary valuation method
Available market price	**Quoted investments** • Instruments quoted on active markets should be valued at the most representative price within bid-ask spread **Unquoted investments** • Consider observable prices, i.e. prices of similar quoted investments. • To be used in conjunction with other valuation techniques. • **Blockage discount: An adjustment, generally downward to reflect the markets inability to absorb the high volume of instruments being sold, should not be applied** • **Other discounts: Discounts related to certain restrictions on sale of the particular security should be considered while determining the fair value.**
Discounted cash flow	• Requires judgment from the valuer • Should be corroborated with other valuation techniques • Is also applied to value debt or debt like investments. Is more reliable to value such instruments since cash flows are relatively more certain compared to equity investments
Net assets	• Determines value based on fair value of all assets of the investee company • Make appropriate deductions to estimate fair value of the investment.

I. Valuing seed, start-up and early stage investments

Such investments, in absence of current or short-term positive cash flows are **generally valued using milestone approach or a scenario based approaches.** Due to stage of lifecycle of such investments, it is difficult to determine the probability and the financial impact of their development activities to determine reliable cash flow estimates. The most appropriate technique to value such companies is the one based on market data. Valuations of such companies are driven by achievement of certain milestone that may have been laid out during their initial funding rounds. Milestone can be in form of:

- Revenue growth
- Profitability expectations
- Cash burn rate
- Phases of development
- Regulatory approvals
- Market introduction
- Market share

The valuation estimate on subsequent dates to take into consideration such milestones and should be appropriately adjusted to reflect any deviations from such milestones. Due to the subjective nature of the valuation techniques used for such investment, an appraiser may apply a discounted cash flow method to corroborate the value estimates.

The IPEV guide intends to eliminate several inconsistencies in terms of techniques and adjustments applied by different appraisers to fair value private equity and venture capital investments, which would ultimately result into more comparable and reliable value estimates of investee companies across several private equity and venture capital companies.

1 Source: IPEV Guidelines, 2018 published by the IPEV Board
2 Read more about market participant at [Market participant]
3 Read more about allocation of value at [Illustration of allocation of value]

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TRANSFORMATION OF AUDITS

Without a doubt, the COVID-19 pandemic has exacerbated many of the existing challenges faced by organisations, and exposed them to new sources of risks. In this complex and volatile environment that we live in today, the role of audit – that is, to bring integrity and trust to the financial reporting ecosystem by increasing transparency across and between stakeholders – has only grown in importance.

The world is changing and so as we. The coronavirus pandemic has forced businesses to operate remotely and embrace digital technologies — whether they were ready to or not. In the world of audits, while the audit process was already evolving with the emergence of new technology and growing investor expectations, COVID-19 has significantly accelerated the evolution toward a "virtual" audit.

This isn't simply a matter of conducting an audit over video chat, or taking a traditional process and moving it online. You can share computer screens, but you still need clear documented evidence; otherwise an audit is not an audit, it's a conversation.

Instead, it's about digital transformation, which revamps the auditing process into something entirely new — a reimagined audit experience. Prior to COVID-19, the winds were already changing. Accountants had already been experimenting with new technologies and working with big data to perform higher quality and more efficient and focused audits.

But the pandemic has sped up the process of change considerably. Uncertainty, combined with the rapid economic shift to digital ways of operating, has encouraged innovation and thinking outside the box. Suddenly, businesses are reimagining their business operations to engage clients, suppliers and regulators. With the closing of workplaces and the need for physical distancing, auditors are leveraging existing and new technology to conduct audits remotely, from remote data extraction and analysis to inventory counts using drone technologies. And these new ways of operating need to be done in a way that adheres to established standards and delivers assurance to stakeholders.

Auditing through the pandemic

Digital transformation might be a necessity during these unusual times, when physical distancing and remote work have become the norm. But the future of audit isn't just about remote audits; it's about transforming underlying processes using technology to achieve three objectives: a higher quality audit, a more efficient audit and better business insights for our clients through the traditional audit process.

The auditing standards haven't changed, yet the pandemic has resulted in new risks. There have been significant changes to internal controls as a result of remote work arrangements. This makes business more vulnerable to fraud and cybersecurity attacks, often while facing resource constraints and staff reductions — making it even more difficult to design effective controls.

Prior to the pandemic, many larger firms were well underway in the process of digitizing their documents; smaller firms were just getting started or only part way through. But the pandemic forced everyone to move to a new way of conducting audits. And cloud-based data-extraction systems were immediately put to the test.

Extracting and downloading clients' financial reporting data (including supporting documentation) allowed auditors to look at an audit differently. In the past, if an auditor was using a statistical sample approach on a batch of invoices, there was typically an assumed error rate. The remote access to all our clients' data has, however, allowed us to apply new enhanced D&A routines that have the ability to test every single transaction, so that any error is a hard error. If the numbers don't add up, there's an issue.

The pandemic forced change out of necessity; there was no time for debate. The traditional barriers for auditor access to data – client resistance and client readiness were quickly overcome and the audit technology was put to the test. And it worked. It's shown us the way of the future: clients can see real-time insights as the industry moves toward the goal of continuous auditing. The pandemic has brought us closer to that goal and is expediting the investment in technology to help us get there.

On-site visits will resume in the future, but many of these changes will be permanent. The experience has given the markets and regulators confidence that audit quality has accelerated. This has shown us the way of the future — it is possible and it's better. But it has also highlighted what else is required; the past few months are just the start of the journey.

Ways in which technology is transforming audits

Auditing has traditionally been a process based on statistical sampling techniques. For example, if you were auditing 1,000 invoices, you might run a statistical sample giving you 40 items you might test. But we can now use advanced D&A, rules-based automation and artificial intelligence to move from statistical sampling to actually reviewing 100% of a client's transactions in real time. Whether that is looking at all 1,000 invoices at a small manufacturing company or all 140,000 derivative and securities portfolios at large financial institutions, the outcome is clear: we have a much higher quality audit through the use of technology.

Allowing the machine technology to perform routine, rule-based tasks also results in a much more efficient audit, and allows the auditing professionals to get razor-focused on outliers and anomalies.

That's the power of AI — it picks up patterns that people may miss or haven't seen before.

The transformation of audit will involve real-time auditing, in which clients record transactions on a blockchain and the auditor is alerted if there are any unusual interactions — for on-the-spot auditing.

Cloud, AI and machine learning

As businesses transform the way they collect and process data, the accounting industry must remain a step ahead. That means continuing to invest in cognitive, machine learning and artificial intelligence capabilities to provide organizations with data-driven business insights as well as evolving reporting and regulatory requirements. This could require the use of both off-the-shelf and custom technologies. We at KNAV are teaming up with tech giants and start-ups on our digital auditing solutions, picking the best of what's out there and creating a bespoke technology driven audit.

While investments in technology are critical, there is no one-size-fits-all solution. Recognizing that every client's system is a bit different, KNAV has taken a different approach: upskilling auditors to harness these technologies and home in on solutions that are bespoke for each client.

Overcoming resistance and lack of readiness

While the future of audit shows promise, there are still challenges ahead. The tools are only as good as the quality of the data. Clean data in the right format is essential to apply D&A, rules-based algorithms and AI.

During this pandemic, clients who were further along in their digital transformation greatly benefited from having good, clean, formatted data resulting in little to no disruption in their audits. For example, using cloud-based remote data-extraction capabilities and data-sharing platforms, clients have been able to securely share data in a digital format. This has helped them transition to the world of virtual work and provided greater resilience during a time of uncertainty and upheaval.

Businesses that hadn't already digitized their source documents had to get it done — and done quickly — to accommodate remote working and the eventual remote audits.

Very rapidly, businesses embraced data extraction, analytics and AI tools to make the auditing process work virtually. This acceleration toward automation has turned out to be a silver lining as organizations became more resilient and better positioned to address the new business reality.

Narrowing the skills gap

The reality is that these new technologies and expectations are evolving rapidly, requiring auditors to constantly upgrade their skills and approach. We at KNAV are upskilling auditors to meet these demands through a digital program. The emergence of cutting-edge tools and innovation transforming audit has accountants thirsty for the knowledge to keep pace and thrive in the transformation of audit.

Technology driving change across the entire financial reporting ecosystem

With increased use of technology, the entire financial reporting ecosystem needs to mature, to catch up with what we're able to do and with what investors are expecting.

While there is clear value in the current audit report, the world is changing rapidly and, within that context, there is growing interest in the role audit will play as a fundamental part of the wider financial reporting ecosystem. Investors and society at large are looking for a new model of the corporate audit, one that drives greater transparency and expands beyond financial statements to provide assurance on non-GAAP (generally accepted accounting principles), non-financial information, including key performance indicators (KPIs), environmental, social and corporate governance (ESG) and cybersecurity.

Momentum is building for a common, core set of social and environmental metrics and recommended disclosures. For example, institutional investors are increasingly expecting companies to follow best practices and industry-specific guidelines set out by such organizations as the Sustainability Accounting Standards Board (SASB) and report under the Financial Stability Board's Task Force on Climate-related Financial Disclosures (TCFD) recommendations.

Pressures are emerging for securities and financial regulators to require mandatory adoption of these initially voluntary disclosure frameworks. To do this effectively, the entire financial reporting ecosystem needs to mature: auditors need upskilling; companies need to embrace live connections to data; and regulators need to strengthen and evolve standards to match new technological capabilities such as AI.

Looking ahead

Machines, no matter how well they're programmed, can't replace people. It's relationships, and the trust built with clients, that helped to accelerate this digital transition during the pandemic.

Clients have accelerated their digital capabilities and increased the speed of the transition from paper-based record-keeping to cloud-based enterprise resource planning (ERP) platforms and collaboration tools.

The core of any digital solution, however, must include fundamental principles related to security and privacy to enable the use of all these capabilities, and this needs to continue to be a key focus for Canadian businesses — now more than ever.

Technology will broaden the audit function to garner more insight into data, allowing auditors to play a more active role. For example, they could actively identify fraud in real time, rather than via a point-in-time audit using year-old data. But it does require a new set of skills, in an industry facing skills shortages. It also requires buy-in from leadership, especially when sharing data.

COVID-19 has paved a clear path for the real-time, virtual audit. The industry went from theoretical to tried, tested and true in a short period of time, accelerated by pressure from a global pandemic. On-site visits will resume as the pandemic comes under control. But the evolution of audit processes will be here to stay.

After embracing digitization and artificial intelligence for high-quality, highly efficient audits, there's no going back. The transformation of audit is within reach and closer than ever.

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THE CONUNDRUM BETWEEN AN 'INPUT SERVICE DISTRIBUTOR' OR 'HEAD OFFICE CROSS CHARGE' TURNS MURKIER

MH AAAR ORDER RE CUMMINS INDIA

Ever since the Goods and Services Tax was introduced in2017, concepts related to an 'Input Service Distributor' ("ISD") and the 'supply of goods and services to distinct persons without consideration' under entry 2 of Schedule I of the Central Goods and Services Tax Act, 2017 (CGST Act) have kept the industry, advisors and authorities debating on the questions – whether these are alternative to each other or are these two separate and mandatory compliance requirements under the law. In fact, the industry and advisors are divided alike on the interpretation, with many subscribing to the first view and few following the latter approach. The conundrum became more murkier after the Maharashtra Appellate Authority for Advance Ruling ("AAAR") passed an order in the matter of *Cummins India.*

Before discussing the facts of the Cummins India case and analysing the implications arising out of the MH AAAR decision, let us first understand these two concepts covered under the GST law.

Input Service Distributor (ISD)

As per Section 2(61) of the CGST Act, ISD simply means an office of a company (normally the head office or HO), which receives input services that are either exclusive to some other state unit of the same company or is common to various state units of the same company. These different state branches/ units, having their own GST registration in the respective state are referred to as "distinct persons" under the GST law. These also include the SEZ units or different business verticals located within the same state but having different registration.

In a typical business structure of a company, the head office of the company handles a lot of common activities on centralised basis like statutory audits, consultants, legal matters etc., and in the process receives various input services from different vendors. If the input service received by the HO is exclusive for a particular branch office/unit, then the entire input tax credit("ITC") is to be passed on to that specific branch office/unit. However, if the input services are common to two or more branch offices/units, the law prescribes mechanism to distribute the input credit basis the turnover of each branch office/unit. The ITC of such common input services is thus typically passed on or distributed under the ISD route. The HO, for the purpose of

distribution of such common ITC is thus required to obtain a separate ISD registration and file separate returns from its normal GST registration.

Supply of services to related entities or distinct without consideration - (HO Cross charge)

Entry 2of Schedule I of the CGST Act provides that supply of goods or services or both between related persons or between distinct persons made in the course or furtherance of business, even if made without a consideration is also treated as a taxable supply. This therefore requires, in respect of supplies made by a one distinct person to another distinct person without consideration, the value has to be determined and tax has to be charged on the same. The receiving location will of course get the ITC of the GST so charged, if not otherwise restricted. Here, it is important to note that supply of both goods and services are covered.

When we talk about supply of goods by way of stock transfer, either from the factory location to the warehouse or from a warehouse to other sales locations of the company qualifying as the distinct person, which is not a sale to anyone, it is relatively easy to determine the value as there is loads of experience available in this regard from the erstwhile excise and VAT regimes. The valuation rules prescribed under GST law also provides guidance as to how to go about valuing the supplies and there are different situations mentioned therein under which a supply can be valued.

When it comes to the aspect of supply of services by a HO to its branch offices/units, the matter becomes complex. First, we need to determine what are the typical services that are supplied or should we say are 'deemed' to be supplied by a HO to its distinct persons? Once an answer to this question is found, then the valuation of such supply of service is another challenge.

Difference between the two concepts

As it can be seen there is a clear difference between the two concepts. ISD route is applicable as a pure pass-through mechanism, which applies to those input services which are consumed and used by the other distinct persons, but invoices for such input services are merely received and paid by the HO. Examples of these input services could be a regulatory matter being handled by the HO related to a particular factory or warehouse in another state.

On the other hand, HO cross charge is a concept wherein there is a deemed outward

supply of services by the HO to its different state branches /units. For this purpose, the HO would also receive certain input services. These input services should not be taken under the ISD route for mere distribution but HO will take ITC of such input services and charge GST on the deemed supply by determining the valuation of deemed supplies. Example of such deemed supplies could be the IT support provided by HO to the state branches / units by obtaining hardware / servers or software licence on a centralised basis and providing maintenance or upgradation support relating to those. Another example could be the Finance or Tax department which works for the company as a whole and provide related guidance to the branch offices/units for their specific accounting, tax or legal matters.

Having discussed the two concepts, let us now discuss the order of the AAAR in the Cummins India case to understand how the order has dealt with the above two concepts and what are the implications arising out of the order.

Brief facts of Cummins India case

Cummins India approached the Authority for Advance Ruling ("AAR") in 2018 requesting for ruling on three question – (i) whether availment of ITC of tax on common input supplies on behalf of other units/units registered as distinct persons and further allocation of the cost incurred for same to such other units qualifies as supply and attracts GST and (ii) whether a nominal value can be adopted for charging the GST and (iii) whether they would be mandatorily liable to obtain ISD registration?

The MH AAR held - (i) the activity of availing ITC of common input supplies qualifies as a supply and (ii) hence obtaining registration is mandatory and (iii) the valuation should be done basis 110% of the cost under Rule 30 of CGST Rules. Cummins India apparently also made some additional submissions during the course of proceedings regarding non-inclusion of the salary of employees based at the HO, which was not discussed by the AAR in its order.

Being aggrieved by the above order of the AAR, Cummins India filed an appeal before the AAAR challenging the order on the grounds that AAR should have clarified on the non - inclusion of employee's salary for computing the valuation under the 110% rule. Further, some new queries were raised - whether the HO can avail the ITC of GST paid in such common input services. The AAAR considered all the above submissions of Cummins India and passed the order.

Order of the Appellate Authority for Advance Ruling

The AAAR while passing its order held as under:

a. The activity of availment of ITC for common input supplies on behalf of the branch offices/units qualifies as a supply and subject to GST.
b. The HO is not entitled to avail the ITC of such common input services.
c. For distribution of such common ITC to branch offices/units, the HO is bound to obtain ISD registration.
d. For levy of GST, the valuation should be determined under the second

proviso to Rule 28(c) of the CGST Rules. While passing the order on this point, the AAAR also observed that since the supply is made by the HO to its branches/ units, salary of employees based at the HO should also be allocated to different state branches/units.

Implications of the order of AAAR

The order of the AAAR has unfortunately merged the two different concepts under the law and thus the order will have a far-reaching implication on almost all types of businesses. The impact of this order will be far reaching and we could soon see lot of notices being issued to various companies demanding GST on the above lines. The biggest impact that could be seen in the coming days would be on the inclusion of salary of the employees of the HO for levy of GST.

Our comments

The order of the AAAR has unfortunately merged two different legal concepts under the GST law to answer the questions raised by the applicant.

As discussed above, ISD is purely a pass-through mechanism and is not a supply of any service from the HO. If this activity also qualified as an outward supply, there was no need to separately provide for the concept of ISD. It would have simply got covered under the concept of supply under Section 7 of the CGST Act. Since, acting as an ISD does not entail any supply, it should not be subject to GST and thus there is no question of determination of valuation of such activity.

HO Cross charge under Schedule I is a deeming fiction provided by the law to tax the inter-state supply of goods and services. The valuation of such a supply is a tricky question and should be dealt very carefully. The observation of the AAAR that employees of the HO are working at the behest of the HO and thus their salaries should also be allocated to the branch offices/units is an upsetting observation.

Schedule III to the CGST Act clearly provides that service by an employee to its employer in the course of or related to the employment is not considered as a supply at all. Hence, the salary paid by an employer to the employee is not subject to GST. However, the above observation of the AAR could lead to different interpretations by the department officers and would possibly result in unwanted queries on valuation of HO cross charges.

Although the AAAR has held that the valuation can be done under the second proviso to the Rule 28(c), which provides for accepting the value as mentioned in the tax invoice, if the recipient location is entitled to avail full ITC, this aspect entails varied situations like having exempt turnover in a branch office/unit thereby limiting the ability of such branch office/unit to avail full ITC.

To brace the impact of the AAAR order, companies should look into their business models and see how they can prepare their defense in case the department officers land up at their doorstep. Also, it would be helpful if the Government comes up with a timely clarification in this regard to save time and money being wasted on avoidable litigation in future.

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VIRTUAL CURRENCIES AND CBDC

WHERE NOW AND HEADED WHERE?

With the run up to last month's Union Budget speech of 2022 ("**Budget**"), there was intense speculation on how cryptocurrencies would be addressed, if at all. As a corollary, questions arose on whether it may be accepted as legal tender by the Indian Government. Since the Budget, the perception towards cryptocurrencies changed. This review shall look at where the legal and regulatory regime regarding cryptocurrency stands at present consequent to the Budget. As a corollary, the review will also address the Central Bank Digital Currency ("**CBDC**"), as announcements in relation to the same had an impact on the future of private crypto in India as well.

What is Cryptocurrency?

At the outset, it must be borne in mind that at present, there is no statute that governs cryptocurrencies. However, the Banning of Cryptocurrency and Regulation of Official Digital Currency Bill, 2019 ("**2019 Bill**") – one of the stages of legislative evolution surrounding cryptocurrencies in India – incorporated the following definition:

*"**Cryptocurrency**", by whatever name called, means any information or code or number or token not being part of any Official Digital Currency, generated through cryptographic means or otherwise, providing a digital representation of value which is exchanged with or without consideration, with the promise or representation of having an inherent value in any business activity which may involve risk of loss or an expectation of profits or income, or functions as a store of value or a unit of account and includes its use in any financial transaction or investment, but not limited to, investment schemes.*

History: Till the Budget

Having at least a notional definition as above, this chapter shall focus on the developments on the policy, regulatory, legislative as well as judicial front leading up to the Budget. It must be noted that India's attempts at crypto governance began several years back.

Legislative and Policy History

For present purposes, it would not be inaccurate to submit that the movement for crypto legislation effectively began in 2017.; when a high level inter-ministerial committee was constituted to study issues related to virtual currencies and propose actions to be taken. The Committee's report of 2019 highlighted various risks associated with such private party, decentralised virtual currencies, including value fluctuation risks, lack of regulation, technology-based risks such as phishing and ponzi schemes, illegal and criminal use (such as terror funding and money laundering) due to anonymity and stress on a country's energy resources due to storage and processing demands. In the same Committee Report, a recommendation was made for the CBDC. This was interlinked with the suggested criminalisation of activities surrounding (private) cryptocurrencies.

This was the harbinger of the 2019 Bill. However, the same did not reach its logical conclusion of becoming a central statute. Instead, it was succeeded by the Cryptocurrency and Regulation of Official Digital Currency Bill, 2021 ("**2021 Bill**"). While the 2021 Bill is not easily available in the public domain, Parliamentary records indicate that the 2021 Bill's purpose is:

...to create a facilitative framework for creation of the official digital currency to be issued by the Reserve Bank of India. The Bill also seeks to prohibit all private cryptocurrencies in India however, it allows for certain exceptions to promote the underlying technology of cryptocurrency and its uses.

However, the 2021 Bill remains in cold storage and its present form is likely to see changes based on the implicit recognition crypto has received in the Union Budget. The Budget announcement and its implications – for both CBDC and cryptocurrency – shall be addressed subsequently in the review.

In parallel to the 2021 Bill's journey, the Companies Act, 2013 ("**Act**") gained cryptocurrency related disclosure requirements. The Ministry of Corporate Affairs (**MCA**) *vide* Notification dated March 24, 2021, amended Schedule III of the Act prescribing the form of financial statements, effective from April 01, 2021. Thereunder, it became mandatory for all companies to disclose the details of cryptocurrency/ virtual currency in their balance sheets.

Reserve Bank of India and the Supreme Court Positions

The Reserve Bank of India ("**RBI**") has staunchly disfavoured the rampant proliferation of cryptocurrency in India. Recognising the obvious risks associated with unregulated and fluctuating virtual currency, the RBI brought about a notification in 2018 itself - Prohibition on dealing in Virtual Currencies Notification dated April 6, 2018 ("**RBI Notification**"). Pursuant to the RBI Notification, all entities regulated by it (i.e., banks, financial institutions, payment system providers, non-banking financial institutions and similar entities) were prohibited from dealing in cryptocurrency.

However, the RBI Notification was short-lived. This is owing to the decision of the Supreme Court of India in ***Internet and Mobile Association of India v RBI***, *Writ Petition (Civil) No. 528 of 2018, dated March 04, 2020* ("**IMAI Judgement**"). The Apex Court through the IMAI Judgment set aside the RBI Notification. A step further, the RBI also issued a notification to various categories of banks in May 2021; clarifying that banks that were citing the RBI Notification to caution customers against virtual currencies were erroneous, as said RBI Notification was set aside by the Supreme Court of India. However, banks were to continue carrying out relevant customer due diligence in this regard.

It may be noted that in the sub-judice matter of ***Ajay Bhardwaj v Union of India***, right at the end last month the Supreme Court appears to have asked the Indian Government to take a clear stand on whether bitcoin is legal or not. This question by the Hon'ble Court has the potential to muddy the otherwise clear waters where crypto was unregulated but not illegal.

Budget Announcement

Virtual digital assets (such as cryptocurrencies) were addressed for the first time under the Budget, as was the CBDC.

While the regulatory legislative framework remains pending, the vantage point in the Budget announcement was from a taxation perspective. The highlight points to note are as follows:

- Any income from the transfer of cryptocurrencies would be taxed @30%.
- The ringfencing of this taxable income is evident from the fact that only deduction allowed against it is the cost of acquisition and no other expenditure or allowance. Similarly, loss from any such transfer may not be set off against other income of the assessee.
- In case of a gift of crypto, the tax would be in the hands of the recipient of such gift.
- There is also a tax deductible at source proposed @1%.

On the other hand, the much-anticipated CBDC was also formally announced, by stating that the RBI would be the issuing authority starting FY 2022-23 itself.

Food for Thought

There are various points to ponder regarding the direction for crypto and CBDC in the post Budget scenario.

Cryptocurrency

Both the Indian Government and the RBI may have circumspect acceptance of the fact that cryptocurrency is here to stay in the Indian market, especially because there is a wide segment of retail investors who have already deployed capital in this virtual digital asset. It is interesting to note that their tax bracket appears to be similar to winnings from lottery, game shows etc.; possibly indicating how the government accepts that cryptocurrencies can provide tangible returns to investors but may be considered as uncertain in nature.

Furthermore, with the direction taken in the Budget, there is a prominent view that private cryptocurrency (which could have run in parallel to the Indian Rupee) is unlikely to be accepted as legal tender in India. There are other reasons why practically private and volatile crypto being considered as legal tender would pose challenges to the interests of transacting consumers in India. For instance, if India is considered as a market where the customer base is diverse (combining the wealthy with the underprivileged, and tech savvy with the digitally unaware), allowing crypto-based payments would dilute customer protective regimes like "maximum retail price" and leave room for malfeasant conduct.

CBDC

It must be noted that while the Budget announcement on CBDC launch was made; a few days after that, the RBI Governor specified that the RBI is meticulously evaluating both retail and wholesale models of the CBDC internally; with no timeline compulsions.

Currency is under the Union List of the Indian Constitution, with the Central legislations having primacy. The present legislative framework is inadequate to govern the proposed CBDC. The RBI Act, 1934 ("**RBIA**"), and the Coinage Act, 2011 ("**CA**"), are both ill equipped to cover a sovereign digital currency. Few specific observations in this regard follow:

- Currency as a legal tender in India so far has been considered for physical form only (whether through bank notes, coins, postal orders, cheques, drafts and the like). The RBIA is currently not equipped to handle completely digital or virtual currency. For instance, the RBIA has provisions that pertain to the RBI's authority and ability to issue bank notes and prescribe their specifications in this regard. In their present form, these provisions are ill-equipped to handle CBDC specifications, issuance or regulation.

- The Issue Department of the RBI created under the RBIA is responsible for issuing bank notes; and the RBIA also contains detailed provisions on what kind of assets it can hold. It remains to be seen whether the Issue Department would be revamped and empowered to issue CBDC as well as hold it as an asset; or a different department would be created. Changes in the RBIA would have to be created in this regard as well.
- While the RBI is yet exploring the implications of use of CBDC in wholesale and retail segments, it would have to reckon with implications of CBDC on obligations of scheduled banks to maintain cash reserves with the RBI, as the RBIA has requirements in this regard as well.
- The RBIA has limited overlap with the CA, the latter being the legislation through which the Indian Government covers coins as legal tender. It is only to the extent of its obligation to supply different forms of currency, which under the CA is limited to release of coins in lieu of bank notes and vice versa. Therefore, the CA too, does not appear to have neutral language to cover CBDC.

Looking Ahead

Indian blockchain and crypto startups are hungry for foreign investment. Currently, there is no express prohibition over foreign direct investment in crypto specifically. Crypto startups are often viewed as e-commerce entities under the extant foreign investment regime; whereunder 100% foreign direct investment is permitted under the automatic route for B2B e-commerce and marketplace model of e-commerce. With the evolving regulatory landscape for virtual assets, navigating this space with accuracy would be important, particularly for foreign investors.

For the CBDC, other than the existing regulatory inadequacies, stability of the sovereign digital currency would be critical. There are other practical aspects that the RBI needs to consider as well, such as the infrastructure requirements for holding and managing a potentially energy inefficient virtual currency; and whether third party outsourcing of that requirement can be undertaken at all in a risk-free manner.

From a 2017 recommendation for criminalisation of crypto-related activities to recognition as a taxable capital asset, crypto in India has come a long way and is unlikely to see a prohibition in a hurry (unless the above referred sub-judice matter changes dynamics drastically). The road ahead for the CBDC looks interesting and with immense potential, too!

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COMPOUNDING OF CONTRAVENTIONS UNDER FOREIGN EXCHANGE MANAGEMENT ACT (FEMA)

By Hardik Mehta[1] and Tanvi Vora[2]

Foreign Exchange Management Act, 1999 along with its rules and regulations, colloquially and collectively referred to as 'FEMA', govern exchange control aspects of cross border transactions. India has always aimed and hoped for one day achieving a state of capital account convertibility but until then, FEMA ensures that the foreign exchange market functions in an orderly manner in compliance with substantive and procedural formalities.

Reserve Bank of India, the regulatory and the administrative authority on foreign exchange, since repealing FERA which was known as a 'draconian law' often leading to civil imprisonment, formulated FEMA in 1999 but has been revising and liberalizing the rules and regulations governing foreign exchange, permissible and prohibited activities and related compliances continuously with changing markets scenarios and technology. This reason of an evolving law along with lack of updated knowledge often resulted in involuntary as well as voluntary non compliance under FEMA by persons undertaking cross border transactions. In this regard, with a view to avoid lengthy and expensive litigation, an applicant can seek redressal with a voluntary acceptance of his contravention by paying a penalty/fee by compounding his contraventions. Compounding refers to the process of admitting voluntarily the breach of any of the provisions of FEMA, 1999 or the rules/regulations/notifications/orders/directions or the circulars issued under the said Act. Since the person contravening the provisions admits the lapse and requests compounding to regularise its mistake, it avoids lengthy legal proceedings and makes the process simple and fast. The contravention is to be compounded within 180 days from the date of receipt of application by the officers of the Reserve Bank as may be authorized in this behalf by the Central Government in such manner as may be prescribed.

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Section 15 of Foreign Exchange Management Act, 1999 empowers the Reserve Bank of India to compound any contravention made under Section 13 of FEMA, 1999 except the contraventions under section 3(a) of the Act in the manner provided under Foreign Exchange (Compounding Proceedings) Rules, 2000. Provisions relating to compounding are regularly updated in the RBI Master Direction [RBI/FED/2015-16/1 FED Master Direction No.4/2015-16] – Compounding of Contraventions under FEMA, 1999[3]

The entire process of compounding of contraventions has been misconstrued as intimidating and confusing. In this series of articles, we aim to alleviate such misconceptions by providing an overview of the compounding procedure followed by a list of common contraventions under FEMA along with a handy checklist of do's and don'ts to avoid such contraventions.

Pre-requisites & Procedure for Compounding

- The person making an application for compounding is known as the 'applicant'. The applicant is the person who contravenes any provisions/ rules/ regulations/ notifications/ directions or orders issued under FEMA, 1999 except contraventions under section 3(a) of FEMA. An applicant can apply for compounding along with the prescribed fees of Rs. 5,000/- by way of demand draft drawn in favour of the RBI. Application can be made once the applicant is made aware by way of a memo of the contraventions by the RBI. Application can also be made suo moto on becoming aware of the error/contravention. All applications to the RBI should be routed only through the Authorised Dealer Banks ('AD Bank') who have been authorized by RBI to deal in foreign exchange or directly on the receipt of the memorandum from RBI.
- One must note that first and foremost the compounding procedure requires 'regularization of the contravention(s)'. Unless a contravention is regularized, such contravention is not eligible to be compounded by the RBI. Regularization means correcting the mistake committed. If the contravention is a reporting contravention, it can be regularized by filing the requisite forms. In case the contravention is a substantive (i.e. other than reporting) contravention, it can be regularized by unwinding the transaction or obtaining post-facto approval.
- A contravention committed by any person within a period of three years from the date on which a similar contravention committed by him was compounded under the Compounding Rules would not be compounded by the RBI.
- Contraventions relating to any transaction where proper approvals or permission from the Government or any statutory authority concerned, as the case may be, have not been obtained, such contraventions would not be compounded unless the required approvals are obtained from the concerned authorities.
- It is not mandatory to attend/opt for personal hearing. In case a person opts not to attend the personal hearing he/she may indicate so in writing. Appearing for or opting out of

the personal hearing does not have any bearing on the amount imposed in the compounding order, as the amount imposed is calculated based on the Guidance note on computation matrix explained in the Master Direction on Compounding of Contraventions under FEMA, 1999.

Documentation

- The format of the application is appended to the Foreign Exchange (Compounding Proceedings) Rules, 2000.
- Application submitted to the RBI must contain contact details i.e, name of the applicant / authorised official or representative of the applicant, telephone/ mobile number and email ID.
- Applicant may also furnish as applicable –
    - details relating to the contravention under Foreign Direct Investment, External Commercial Borrowings, Overseas Direct Investment and Branch Office/ Liaison Office
    - copy of the Memorandum of Association
    - latest audited balance sheet
    - undertaking that they are not under any enquiry/investigation/adjudication by any agency such as Directorate of Enforcement ('DoE'), CBI etc as on the date of the application
    - details of bank account in requisite format
- If an application for compounding is not submitted in the prescribed format or is found incomplete due to the absence of any mandatory details, declarations, documents, or the demand draft towards the application fee, it will not be taken up for processing and shall be liable to be 'returned' to the applicant.

Who can compound?

The RBI has laid down express scope of the Regional Offices and Central Office to compound contraventions under specific FEMA notifications:

Compounding of following contraventions of FEMA 20, FEMA 20®, FEM (NDI) Rules and FEMA 395 is delegated to respective regional offices/sub-offices

- Delay in reporting inward remittance recived for issue of shares
- Delay in filing Form FCGPR after issue of shares
- Delay in filing Annual Return in Form FLA
- Delay in issue of shares / refund of share application money within 180 days
- Violation of Pricing Guidelines
- Issue of ineligible instruments
- Issue of shares without RBI / FIFB approval wherever required
- Delay in filing Form FCTRS on transfer of shares from R to NR or NR to R
- Taking on record transfer of shares by Indian Company in abscense of certified Form FCTRS
- Delay in reporting Downstream Investments
- Delay in filing Form LLP (I) /(II)

Compounding of following contraventions is delegated to Central Office - FED, CO Cell, New Delhi

- Contraventions relating to acquisition and transfer of immovable property in India
- Contraventions relating to acquisition and transfer of immovable property outside India
- Contraventions relating to establishing Liaison office, Branch office, Project office in India
- Contraventions falling under FEMA 5 / 5® - Deposit Regulations / Non Resident Foreign Account Division

For all other contraventions, applications may continue to be submitted to CEFA, Foreign Exchange Department, Reserve Bank of India - Mumbai

However, cases of contravention, such as, those having serious contravention suspected of money laundering, terror financing or affecting sovereignty and integrity of the nation or where the contravener fails to pay the sum for which contravention was compounded within the specified period in terms of the compounding order, shall be referred to the Directorate of Enforcement for further investigation.

How is the compounding fee determined?

As per FEMA 1999, the amount of compounding fee imposed can be up to three times the amount involved in the contravention. The following indicative factors may be taken into consideration for the purpose of passing compounding order and adjudging the quantum of sum on payment of which contravention shall be compounded:

a) the amount of gain of unfair advantage, wherever quantifiable, made as a result of the contravention;
b) the amount of loss caused to any authority/ agency/ exchequer as a result of the contravention;
c) economic benefits accruing to the contravener from delayed compliance or compliance avoided;
d) the repetitive nature of the contravention, the track record and/or history of non-compliance of the applicant;
e) applicant's conduct in undertaking the transaction and in disclosure of full facts in the application and submissions made during the personal hearing; and any other factor as considered relevant and appropriate.

Vide AP (DIR Series) Circular No. 73 dated May 26, 2016, the RBI has provided a Guidance Note on Computation Matrix broadly indicating the basis on which the amount to be imposed is derived by the compounding authorities. The actual amount imposed may sometimes vary, depending on the circumstances of the case taking into account the above factors.

If the applicant has made any undue gains by undertaking a transaction it was not permitted to in the first place, then such undue gains would be neutralized by RBI by adding the amount to gains to the compounding fee. The computation of undue gains would vary according to the type of the transaction being compounded.

The amount mentioned in the compounding order for the contravention has to be paid by way of a demand draft within 15 days from the date when the order is passed. Once an order is passed, the contravener cannot seek to withdraw the order or request review of the order. The compounding process is deemed to be complete only on realization of the compounding fee by the RBI and a certificate is issued indicating that the applicant has complied with the order passed by the Compounding Authority. If the contravener fails to pay the amount of compounding fee, it shall be deemed as if he never made an application for compounding of the contravention and will be referred to Directorate of Enforcement for necessary action.

Value of compounding orders

To ensure more transparency and greater disclosure, the RBI made available the compounding orders passed on or after June 1, 2016 on the its website for disseminating the information pertaining to compounding orders. Analysis of these compounding orders provided great insights into RBI's outlook and interpretation of FEMA and its associated administrative practices. Compounding order strictly speaking are not judicial orders and do not have precedent value. However, they have certain judicial trappings and can be said to hold persuasive value. Subsequently, in partial modification of its earlier decision, RBI decided to publish only summary information, instead of the compounding orders, on its website in respect of the Compounding Orders passed on or after March 01, 2020.

Late Submission Fee

For certain purely filing based delays under Inbound Investments and more recently under ECB transactions, the RBI has enabled an even simpler form of voluntary admission of contravention in the form of Late Submission Fee (LSF). The payment of LSF is an additional option for regularising reporting delays without undergoing the compounding procedure. It is payable at the time of undertaking regularisation by filing of forms and is calculated via a fixed formula provided by the RBI for its calculation.

Commonly compounded contraventions

<u>Inbound Transactions:</u>

The FEMA notification dealing with Inbound investments has seen tremendous change over the last few years. Notification No. FEMA 20/2000-RB dated May 3, 2000 was superseded by Notification No. FEMA 20(R)/2017-RB dated November 07, 2017 which also brought with it the option of LSF for certain filing delays. However, in a series of changes, the scope of RBI w.r.t. governing non-debt instruments was divested to the government of India by creating two parallels in The Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 and Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019 i.e. Notification No. FEMA.395/2019-RB, both notified on October 17, 2019, by Government of India and Reserve Bank of India.

Common Contraventions under Inbound Investments:

- Delay in allotment of shares
- Delay in refund of share application money / excess remittance received
- Delay in reporting issue of shares in Form FCGPR
- Allotment of shares prior to receipt of consideration
- Receipt of consideration through non permitted modes
- Taking on record transfer of shares by Indian entity without filing of Form FCTRS
- Non adherence of pricing guidelines
- Non-Filing/Delay in filing of Form FCGPR for issue of bonus shares
- Allotment of shares by Indian company without taking government approval, when applicable

How to avoid making contraventions:

- When undertaking inbound investments, consult a FEMA practitioner conversant with the rules and regulations and follow a step by step checklist
- Ensure that the Indian entity is eligible to accept foreign investments based on the sector of business and if there are any attendant sectoral cap or approval required
- Time limit to file Form FCGPR is 30 days from the date of issue of capital instruments, therefore, ensure that most details and documentation required are already in place before commencement of the transaction
- In case of transfer of shares, the Indian entity whose shares are being transferred, is not technically responsible for the filing of Form FCTRS in case of transfer from a resident to non-resident or vice versa. However, if such Indian company takes a transfer on record which has not been reported in FCTRS, they are in contravention and are liable to compounding. Therefore, it is important to remember, that even though the Indian company may not be directly involved in a transfer transaction, they can be caught in the crosshairs.

Points to remember:

- Compounding of contraventions in relation to inbound investments would continue under all three notifications since the law prevalent at the time of undertaking a transaction would apply to the said person
- Regularisation of contravention (especially in relation to reporting contraventions) would be regularized as per the mode and format of reporting present today i.e. the time of regularisation
- Generally, period of contravention should be computed from the date of default till the date of regularisation / date of filing compounding application. This would depend on the nature of the contravention viz. substantive or reporting.

<u>Outbound Transactions:</u>

FEMA Notification 120/2004-RB has been in place since it was notified on 7th July 2004. There have been amendments to the notification and changes in the documentation requirements over the years but the notification has largely remained the same. However, a major overhaul is expected at any moment now as RBI published Draft Foreign Exchange Management (Non-debt Instruments - Overseas Investment) Rules, 2021 & Draft - Foreign Exchange Management (Overseas Investment) Regulations, 2021 in August 2021 for which the final rules and regulations are to be notified shortly.

Common Contraventions under Outbound Investments:

- Delay in reporting outbound investment in Form ODI
- Outbound investment by resident individuals before 5th August 2013
- Investment in round tripping structures
- Breach in net-worth limit of 100/400% for total financial commitment
- Delay in receipt of share certificate / proof of investment in overseas JV/WOS
- Receipt of share certificate / proof of investment prior to date of remittance
- Delay in submission of Form APR
- Delay in reporting post investment changes
- Delay in reporting disinvestments in Form ODI
- Non compliance with pricing guidelines

How to avoid making contraventions:

- When undertaking outbound investments, consult a FEMA practitioner conversant with the rules and regulations and follow a step by step checklist. Also consult an advisor in the proposed overseas jurisdiction of investment. Timing the documentation correctly is an important factor to consider.
- Ensure that the Indian entity/ Resident individual is eligible to make outbound investments. There is a 400% of networth limits that is applicable. Also, resident individuals can only make investments in entities within their LRS limit and which do not have further step down subsidiaries/Joint Ventures.
- Resident Individuals having undertaken outbound investments before 5th August 2013 under Liberalised Remittance Scheme generally fall in trouble when receiving repatriations/disinvesting from the transaction at the current date. It is advisable to compound the contravention and report the investment in Form ODI as per regulation 20A r.w. schedule V.

Points to remember:

- Once the new overseas investment rules are notified, compounding of contraventions in relation to outbound investments undertaken earlier would probably continue under FEMA 120/2004-RB since the law prevalent at the time of undertaking a transaction would apply to the said person. However, if the structure is unwound at a later time, the newly notified rules should apply to the disinvestment transaction.
- Regularization of contravention (especially in relation to reporting contraventions) would be regularized as per the mode and format of reporting present today i.e. the time of regularization
- Generally, period of contravention should be computed from the date of default till the date of regularisation / date of filing compounding application. This would depend on the nature of the contravention viz. substantive or reporting.

Conclusion:-

Compounding of contraventions under FEMA is a process mandated under the Act and regulated by RBI to regularize the past contraventions and discourage any non compliance of the Rules and Regulations. One must always be aware of the regulatory framework before entering into any cross border transactions. India being one of the fastest growing countries in the world attracts lot of foreign capital and it is the responsibility of the regulator i.e. RBI to make sure that such inflow or outflow of the foreign currency reserves doesn't affect the stability of the currency and the economy. FEMA Law is an unique law which is regulated by the central bank through AD Banks. Sometimes AD Banks do help in guiding the entity/individual in requisite filings and regulations affecting the transaction. However, the ultimate responsibility lies with the entity to make sure that the regulations are adhered too and the documentation including filings are made within time.

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Intangible Asset Valuation Valuing Customer Relationships

What are Intangible Assets?

An intangible asset is an identifiable non-monetary asset without physical substance. Some examples of intangible assets are Trademark, Brandname, Software, Technology, Customer Relationships, and Goodwill.

To recognize an intangible asset, the following three criteria need to be met:

1. **Identifiable**
   An intangible asset must be identifiable. Identifiable means the asset should either be separable (for example, Trademark) or inseparable (for example, Goodwill) or arise out of a contract (for example, Franchise rights) or arising out of law (for example, Copyright). An intangible asset must be controlled by a particular entity.

2. **Future Economic Benefits**
   By virtue of owning/controlling an intangible asset, an entity must accrue an economic benefit in some form.

Customer-related intangible assets arise out of a pre existing relationship between an entity and its customer. A relationship can be contractual or merely based on an entity possessing relevant information about its customer.

Customer-related Intangible Assets

Consider a situation where two competitors - Company A and B – operate in the same business line and have the same brand recognition. However, Company A has an established customer base and has collected customer data on purchasing habits, contact information, and other related data, whereas Company B is primarily reliant on the wholesale channel to market its products. How would you value them? To value Company A using similar parameters as Company B would be unreasonable as Company A has long-term direct relationships with its customers and has strategically used its customer data for supply chain management, etc. This provides Company A with a competitive edge, and Company B faces a barrier to entry as it does not possess similar insights into customer behavior and preferences. This advantage will reflect in superior operating margins of Company A.

A real-world instance of the same can be seen in the Indian Paint Industry. In the 1970s, Asian Paints revolutionized its business model by discontinuing its earlier business model that relied on traditional dealerships/wholesalers and started supplying inventory directly to the retailers. Simultaneously, Asian Paints started using the power of a mainframe computer to manage and track inventory right from the point of production to the point of sale (retailers). This produced a treasure trove of insights into consumer behavior while eliminating 30-35% dealer commission.
The market capitalization of Asian Paints versus its peers clearly reflects the value add and importance of customer relationships.

Types of Customer-related Intangible Assets

1. **Customer Relationships**
   Customer relationships can be contractual and non-contractual. If the entity develops a relationship with customers through contracts, they meet the criteria of separability, control, and possible future economic benefit. If this relationship arises out of non-contractual rights, they have to meet the criteria of separability to be recognized as an intangible asset. An example of a non-contractual relationship would be submitting personal data to participate in promotional activities such as a lucky draw.

2. **Customer Lists**
   A customer list is a form of customer-related intangible assets consisting of customer information - their names, contact information, sales generated, etc. This list can further be divided into different databases based on demography, zones, age groups, etc., which helps businesses target products/services according to their target audience. Customer lists are created by an entity when engaging with customers over a long- term. These relationships can be contract-based or non-contractual.

3. **Order Book or Order Database**
   These are sales orders and purchase orders generated over the course of regular business activities. These orders meet the recognition criteria even if the contracts are cancellable.

Some real-world examples of creating, defending, and monetizing customer-related intangibles include:

1. Tech giants like Google and Facebook provided their platforms for free to users and, over time, collected valuable data about their users. Now these tech giants gain the majority of their revenue through advertisement (advertisements target users based on the data these tech giants gather regarding user behavior and advertisement preference).
2. Facebook had been losing its younger demography to other social networking sites/apps like Instagram and Snapchat. To regain its influence over this demography, Facebook acquired Instagram in 2012. Today, Instagram is more valuable than Facebook.
3. Paytm, which collected large amounts of data by facilitating millions of transactions, is planning to open a business consultancy service on the basis of data collected by them. These services aim to facilitate small and medium businesses in identifying locations to set up operations/attract customers through the insights. Paytm has gained a competitive edge by analyzing large amounts of data.

Customer relationships are generally the most important and valuable customer-related intangible acquired during a business acquisition. Therefore, let us evaluate how and if various valuation approaches can be used to value customer relationships.

Valuation Approaches

1. Income Approach
   - Multi-Period Excess Earnings Method (MPEEM)
   - With or Without Method
   - Distributor Method
2. Market Approach
3. Cost Approach

1. Income Approach

The income approach considers the present value of cashflows that an asset is expected to generate in the future.

While valuing customer-related intangible assets, the income approach is most widely used. There are many different methods within the income approach, which are discussed below, along with how they can be used for valuing customer-related intangible assets.

a. Multi-Period Excess Earnings Method (MPEEM)

Under this method, the value of the intangible asset is the estimation of future cash flows that it might generate discounted to the present value.

This method is used when the intangible asset to be valued is the primary intangible asset of the business. If so, then the primary intangible asset is valued using the MPEEM method while other intangibles are valued using other methods.

For example, while valuing a tech-based company with intangibles in the form of Intellectual Property Rights and a large user base, customer-related intangibles are measured using the MPEEM method, and Intellectual Property Rights are measured using other methods.

MPEEM is the most widely used method to value customer-related intangible assets. In this method, the value is considered to be the present value of the cash flows attributable to customer relationships adjusted with the attrition rate of customers and cash flows pertaining to contributory assets (assets that contribute to the cash flows of the customer-related intangible asset such as working capital, fixed assets, assembled workforce, and any other intangible assets).

Over The Top (OTT) platforms such as Netflix, Amazon Prime, and Hulu Plus provide streaming services that deliver content over the internet. They offer users several programs licenses as well as original programs. These companies purchase movie and show rights for their library of content. They majorly have two types of intangible assets - licenses and the subscriber base. Considering the fact that these platforms earn the majority of their revenue from subscription fees, these customer related intangibles are valued using MPEE.

Example

Let's assume Company X is a service provider for generic IT solutions. Company X relies on its well-established and loyal customer base for a majority of its revenue. In such a case, the primary value driver for Company X will be its customer relationships. Without its customers, Company X would have been just another service provider for generic IT solutions with lower margins. The value of Company X's customer relationships can be best valued using MPEEM as most of the excess profits that Company X generates are on account of stability of revenue and lower customer acquisition costs accruing from Company X's customer relationships.

b. Distributor Method

This method is used when the primary business driver is a strong and unique intellectual property, such as a brand or technology, and customer relationships, though relevant and material, have limited relevance as compared to the primary business driver. As the primary business driver generates its own demand, and customers avail the service or product due to this demand rather than a pre existing relationship. In such a situation, the relationship with customers is based on the business' ability to provide the desired product/service in a timely and efficient manner. Therefore, in the absence of the primary business driver, the business's relationship with its customer is equivalent to a distributor's relationships with its customers - it is contingent upon providing a desired product/service in a timely manner.

If MPEEM is used to value customer relationships, it may provide a value that is inconsistent with a qualitative assessment of the underlying assets and value drivers. To overcome this inconsistency, the company-specific margin is replaced with a market-based margin of a distributor company, as a reasonable market proxy, in an MPEEM. The more unique or proprietary the primary business driver of the product/service, the lower the margin typically earned by the distributor and the lower the value contributed by the customer relationship function and vice versa. Therefore, the Distributor method provides a robust valuation conclusion.

c. With and Without Method

This method is used when customer-related intangible assets are not the primary asset of the business. In this method, the business is valued using two scenarios. In the first scenario - With - the business is valued with the customer-related intangible assets, and in the second scenario - Without - the business is valued without considering the customer-related intangible assets. The difference between both scenarios provides the value of the customer-related intangible assets.

This method is used to value customer-related intangible assets when they are not the major source of revenue, whereas MPEEM is used when the intangibles are the major source of revenue.

In this method, future cash flows are also projected, which are discounted to find the present value under both scenarios. The discounted rate to be used in both methods must be the same. The difference between the present value of cash flows under both scenarios is considered to be the value of the customer-related intangible assets.

Example

Suppose Company A operates in the Fast Moving Consumer Goods (FMCG) industry and sells products through regular channels of distributors and retailers who buy the company's products primarily due to the trust and quality associated with Company A's brands/trademarks. In such a case, though Company A would have a relationship with customers, the relationship is primarily reliant on its brands/trademarks to market its products. Therefore, while valuing customer-related intangibles for Company A, it would be unwise to assign the entire Multi-Period Excess Earnings to customer-related intangibles. Instead, it would be more prudent to use the margins and risk profile of the distribution companies as a market proxy to the company's margins/risk profile while computing the value of customer-related intangibles. Thereafter, the value of customer relationship is used as an input to value Company A's brands/trademarks using MPEEM.

Example

Let's assume that Company A runs an established business with a prominent Tradename and a loyal customer base. Company A is in the process of being sold to Company B. During the course of the transaction, it comes to light that a majority of the customers of Company A are unlikely to continue to be customers of the company post its acquisition by Company B. In such a scenario, even though Company B considers Company A's Tradename as the primary value driver, Company B would still want to revise its bid for the Company A (i.e. the value of Company A will be different if its loyal customer base continues to be loyal even after the acquisition versus if they do not). The With and Without method can possibly be used to identify the amount by which Company B should revise its bid.

2. Market Approach

While valuing intangible assets using a market approach, there has to be an active market for the intangible and sufficient information about the transactions. This method uses prices and other relevant information generated by market transactions involving intangible assets.

Using a market approach for valuing customer-related intangible assets is quite difficult, and it may seem untenable to obtain sufficient transaction data. However, it can be used for benchmarking the value of the intangible.

In 2012, Facebook acquired Instagram for USD 1 billion[1]. This acquisition gave Facebook access to the 30 million active users of Instagram. Therefore, we can benchmark the per user acquisition cost at 33.33 USD (USD 1 billion/30 million users). This benchmark can be used while valuing similar deals after adjusting for various factors. In 2014, when Facebook acquired WhatsApp, Facebook paid USD 19 billion to acquire 450 million users of WhatsApp, equivalent to USD 42 per user[2].

Example

Suppose Facebook was to acquire Telegram and expand its reach. Facebook might value Telegram for USD 30 - 50 per user after considering the deal with WhatsApp, which can be used to benchmark its deal with Telegram.

3. Cost Method

The cost method is based on the principle that an investor will pay no more for an asset than the cost to replace it with an identical or similar asset. Valuation of an intangible asset using the cost approach is based on the principle rule of substitution – the amount that will be required to create a new similar intangible asset.

This method can be used to value customer-related intangible assets when they are not the primary asset and can be recreated in a short period of time.

They can be used for early-stage companies where they are unable to forecast revenue with reasonable certainty or when other approaches are difficult or not possible.

Example

Hypothetically, Company A and Company B operate in the same business line and make marketing expenses of USD 500 and USD 1000 respectively. They achieve the same level of operating profit of USD 3000 and reached the same customer base of 250. Then the acquisition cost per customer for Company A and B would be USD 2 and USD 4 respectively (marketing expense/customer base). If Company A were to acquire Company B, it would value the customer-related intangible of Company B at USD 500 (customer base of Company B multiplied by the per customer acquisition cost of Company A).

The Multi-Period Excess Earnings Method (MPEEM) is the most appropriate method while valuing customer-related intangible assets when customer-related intangibles is the primary value driver of a business. Whereas when customer-related intangibles are a secondary value driver, the preferred method to value customer-related intangibles is the Distributor method. For the Market Approach method, past transactions involving customer-related intangibles is preferably used as an independent benchmark.

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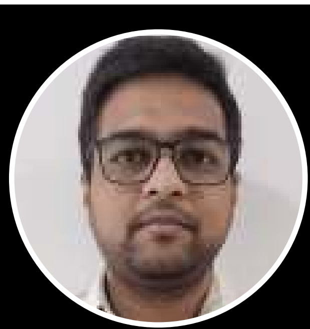

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UNION BUDGET 2022

DEEP DIVE INTO IMPORTANT AMENDMENTS

Amid Covid Omicron wave, the Union Budget 2022, presented by the Hon'ble Finance Minister, was introduced as a blueprint to steer the Indian economy and foster growth. Budget 2022 proposes to give a holistic impetus to infrastructure development, capital expenditure inducing measures, and a clear focus towards digital economy and fintech. All significant aspects of the economy have been kept in view by Hon'ble Finance Minister while presenting her budget for the year 2022-23. Amongst other proposals, from an income-tax perspective also, the Finance Bill, 2022 has proposed important changes. Set out below are the significant proposals:

Cryptocurrencies aka Virtual Digital Assets

Tax on income from Virtual Digital Assets (VDAs) – *the most talked about amendment* which has created a buzz in the entire country. With a phenomenal increase in transactions in crypto, one important highlight of the Finance Bill is the proposal to introduce a separate regime for taxation of VDAs, having an exhaustive definition, which would include all types of cryptocurrencies (like such as Bitcoin, Ripple, Ethereum, etc.), crypto tokens as well as non-fungible tokens (NFTs). Noticeable features of the said regime are as under:

- The government proposes to tax income from VDAs in a manner similar to winning from gambling. Income arising from the transfer of VDAs will be taxable at a flat rate of 30% (plus applicable surcharge, cess) irrespective of the period of holding.
- There would be no set-off of any loss or allowance or expenditure under any provision of the Act, except the cost of acquisition of such VDA. Moreover, the loss from transfer of VDAs cannot be set off against any income and will also not be allowed to be carried forward.
- To provide for taxing the gifting of VDAs, the receipt of VDAs for NIL or inadequate consideration will be taxable as ordinary income in the hands of the recipient.
- Payments made in relation to transfer of VDAs would be subject to tax deduction @ 1% (under new section 194S) of such consideration above specified monetary thresholds[1]. It has also been provided that in case the payment for such transfer is wholly in

kind or in exchange of another VDA (where there is no part in cash) or partly in cash and partly in kind but the part in cash is not sufficient to meet the liability of deduction of tax in respect of whole of such transfer, the person before making the payment shall ensure that the tax has been paid in respect of such consideration. With this, the Government is ensuring compliance on reporting and tracking of these transactions.

The introduction of a separate regime for VDA is a welcome amendment and should not be inferred as a touchstone by the government to legalise cryptocurrencies, rather, it's a tax regulatory move.

Introduction of 'Updated Tax Return' concept

Many taxpayers have encountered the vast data available with the tax department in the new Annual Information Statement (AIS). Taking this into account and the data available with the authorities, the government has proposed to introduce a new concept of 'Updated Tax Return" which reposes trust in the taxpayer and provides extra time (over and above the period that is already available under the Act for belated return / revised return) to furnish an Updated Return at any time within 2 years from the end of relevant assessment year.

To take benefit of this new concept, an amount equal to 25% (if updated return is filed within 12 months from the end of the relevant year) or 50% (if updated return is filed beyond 12 months but upto 24 months from the end of the relevant year) as additional tax on the tax and interest due on the additional income would be required to be paid. An updated tax return can be filed whether or not an original or belated, or revised return was filed by the taxpayer.

It is noteworthy that a taxpayer cannot claim any benefit by way of filing an updated return. Accordingly, an updated return cannot be a return of loss, nor can it result in a refund or have the effect of decreasing the total tax liability or increasing the refund.

Further, following cases are not eligible for this facility and hence, an updated return cannot be furnished:

- An updated return has already been filed for the relevant year.

- Cases where information is available to the tax officer under laws like anti-money laundering law, Black Money Act, etc. or information for the relevant assessment year has been received under an agreement referred to in section 90/90A and such information has been communicated to the taxpayer,
- If any assessment/ re-assessment/ re-computation/ revision proceedings are pending or have been completed for the relevant year,
- The year in which search / survey / requisition has been done along with preceding 2 years,
- If any prosecution proceedings have been initiated under the Act for the relevant year

The government, through this mechanism, seeks to make use of the huge data with the income-tax department which would result in additional revenue realization and facilitate ease of voluntary compliance to the taxpayer in a litigation free environment. Though this updated return comes with payment of additional tax, but this, in some cases, could provide substantial relief to the taxpayer in comparison to the normal assessment route

1 No tax is to be deducted in case the payer is the specified person and the value or the aggregate of such value of consideration to a resident is less than Rs. 50,000 during the financial year. In any other case, the said limit is proposed to be Rs. 10,000 during the financial year. Specified person means:

- *an individual / HUF whose total sales, gross receipts or turnover from the business / profession does not exceed Rs. 1 crore or Rs. 50 lakhs (as the case may be for business / profession), during the year preceding the financial year in which the VDA is transferred*
- *an individual / HUF having income under any head other than the head 'Profits and gains of business or profession'*

which would involve levy of penalty and onward litigation.

Widening the scope of tax deduction

Every year one witnesses some or the other amendments which increase the scope of tax deduction. This year, like any other year, has proposals to broaden the coverage of TDS compliances. The noticeable ones other than TDS on transfer of VDAs, are as under:

- <u>TDS on Benefits or Perquisites of Business - Section 194R</u> *effective from 1.7.2022*

  Section 194R is proposed to be inserted to cast an obligation on the person responsible for providing to a resident, any benefit or perquisite, whether convertible into money or not, arising from carrying out of a business or profession by such resident, to deduct tax @ 10% of the value of such benefit or perquisite before providing such benefit or perquisite. It was observed by the authorities that the recipient was not offering benefits received in kind to tax and therefore, an obligation has now been cast on the payer. The threshold has been kept quite low at Rs. 20,000 in a financial year[2].

  It has also been provided that in case where the benefit / perquisite is wholly in kind or partly in cash & partly in kind but the part in cash is not sufficient to meet the liability of deduction of tax in respect of whole of such benefit / perquisite, the person before releasing such benefit, shall ensure that the tax has been paid in respect of the benefit / perquisite.

  This amendment would pose some challenges to the payer as he will now have to determine whether the provisions of section 28(iv) of the Act are applicable or not on the benefits being provided. Moreover, the timing of deduction is 'before providing the benefit / perquisite' and the tax deduction is on the 'value of benefits / perquisites.' The term 'benefit / perquisite', being a subject matter of debate, needs a definition to avoid any future litigation.

- <u>Amendment in section 194-IA</u> *effective from 1.7.2022*

  Other noticeable proposal under the TDS regime is the amendment in section 194IA which provides for tax deduction by the buyer of immovable property. While the section is not new, the obligation for tax deduction is now on sale consideration or stamp duty *whichever is higher* as against erstwhile actual sale consideration.

  The amendment is to align the provisions of tax deduction with the provisions of section 43CA and 50C which already provide for a deeming fiction as regards taxability, by considering the stamp duty value (subject to a prescribed tolerance percentage).

  While the proposed amendment aligns these provisions, the tolerance percent as provided in these sections has supposedly been left out for the purposes of tax deduction under section 194-IA. This would mean that even if for the purposes of section 43CA/ section 50C, the actual sale consideration is to be considered (on the assumption that the difference between actual sale consideration and the stamp duty value is within the prescribed tolerance percentage), the same is to be ignored for the purposes of tax deduction. Moreover, with this amendment, the Government is actualising tax deduction on a deemed amount rather than an actual amount being paid.

2 The provisions of TDS under the proposed section 194R not to apply to an individual / HUF, whose total sales, gross receipts or turnover does not exceed Rs. 1 crore or Rs. 50 lakhs (as the case may be for business / profession) during the year immediately preceding the year in which such benefit / perquisite is provided.

Important Amendments overruling various Judicial Precedents

There are various proposed amendments which have annulled the judicial decisions which were favourable to the taxpayer. Tax authority seems to say, '*heads I win, tails you lose*'. Few noticeable amongst these proposals are below:

- <u>Allowability of education cess [Section 40(a)]</u> *effective from AY 2005-06*

  The allowability of education cess as an expenditure has been a matter of litigation for past few years. After the decision of Hon'ble Rajasthan High Court in the case of Chambal Fertilizers & Chemicals Ltd[3]. and the decision of Hon'ble Bombay High Court in the case of Sesa Goa Ltd[4]., the taxpayers started claiming education cess as an expenditure in their tax returns and by introducing additional grounds of appeal before various forums, ignoring the decision of Apex Court in the case of K. Srinivasan[5] which clearly held that Income tax includes surcharge and additional surcharge. When education cess was brought into the statute vide Finance Act 2004 i.e., w.e.f. AY 2005-06, it was called as 'additional surcharge'.

  The Government, by negating the decisions of the Courts, has proposed to introduce an explanation to section 40(a) clarifying that the term "tax" includes any surcharge and cess and thus, is not an allowable expenditure. The said proposal would apply with a retrospective effect from Assessment Year 2005-06.

  Hence, the intention of the legislature was always to consider education cess as an additional surcharge, and which is nothing but income tax. The proposed amendment further strengthens the legislative intent.

- <u>Disallowance of expenditure under section 14A</u> *effective from AY 2022-23*

  Section 14A has always been a subject matter of litigation. The intent of introduction of this section was to avoid claiming of expenditure which relates to exempt income. Among various interpretational issues revolving around the said section, one aspect that had commonly been a subject matter of litigation was whether the disallowance can be made in the absence of exempt income during the year. Various High courts and the Supreme court had held in favour of taxpayers by holding that no disallowance can be made if there is no exempt income.

  The proposed amendment in section 14A, *unsettles the settled*, as it relates to disallowance of expenditure even if the exempt income has not accrued or arisen or has not been received during the previous year.

  Another issue with the amendment is that although the memorandum expressly states that this is effective from Assessment Year 2022-23, but in view of the words '*shall apply and shall be deemed to have always applied*' in the proposed Explanation, the same may not be free from litigation as regards its applicability being retrospective.

- <u>Allowability of expenditure under section 37</u> *effective from AY 2022-23*

  Section 37 provides for allowability of expenditure incurred wholly and exclusively for the purposes of business. The incurrence of expenditure, the importance of commercial expediency, and lot many aspects have been debated in the past, and continue to be debated, for such allowability of expenditure.

3 D.B Income-tax Appeal No. 52/2018 decided on 31.07.2018
4 Sesa Goa Ltd. v. JCIT [2020] 117 taxmann.com 96
5 CIT Vs. K. Srinivasan [1972] 83 ITR 346

The said section provides that if any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law, shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure.

Finance Bill 2022 proposes to insert a new explanation to section 37 clarifying that no deduction shall be allowed in respect of the following:

- expenditure incurred by an assessee for any purpose which is an offence under, or which is prohibited by, any law for the time being in force, **in India or outside India**
- expenditure incurred by an assessee to provide any benefit or perquisite and **acceptance of such benefit or perquisite by such person is in violation of any law or rule or regulation** or guidelines
- expenditure incurred by an assessee to compound an offence under any law for the time being in force, **in India or outside India**

The above are clarificatory amendments and as one can see, the Government's intention had always been to allow legitimate and legal expense. An Illegal expense, whether in India or outside India, is not allowable and that has now been made clear. Again, the use of the words *'shall include and shall be deemed to have always included'* could imply a retrospective applicability like the amendment proposed in section 14A.

Conclusion

While some demand inducing measures like relief in terms of personal taxation would have added more cheer to the general population, but what needs to be kept in mind is the tight fiscal situation in which this budget exercise was undertaken. The proposed amendments on the TDS front would increase the compliance burden but the concept of the updated return and providing clarity on taxation of crypto's is a welcome move. Government choses to lead the path by focussing on capital expenditure without tweaking too much tax rates. Overall the Budget was focussed on Government's commitment to provide a stable and predictable tax regime by promoting voluntary compliances and reducing litigation.

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HEALTHCARE SUPPLY CHAIN EXCELLENCE

CFO's take on the Supply Chain

Kartik Nagarajan in conversation Bhavesh Shah

Kartik Nagarajan is the Managing Director of Business Consulting and Global Business Services at Nexdigm.
Bhavesh Shah is the Vice President of Finance and Operation Excellence for Global Emerging Markets as well as the Commercial Leader for North Asia at ConvaTec.
This feature is a CFO's take on the underlying factors that bring value to supply chains. Bhavesh Shah highlights factors such as supplier loyalty, interconnected ecosystems, balancing costs, guiding principles, and versatility that is required to build and run a robust supply chain.

Change and communication have been one of your focus areas. How have you been able to manage relationships and yet have regular communication with the customer in the virtual world.
"COVID-19 has taught us many things that we had not envisaged in the past few decades. The virtual world has opened up a lot of avenues in the digital space, and we must capitalize on the same. One of the things that we have today is a connection through technology, the way we are connecting today without having physical contact. We must ensure our ecosystem is well connected. Customers can connect to us via phone, email, websites, or log in to our webinars..." said Bhavesh.
He also emphasized how grabbing every opportunity to meet the client in person is important and mentioned that one should not merely depend upon virtual interactions.

If you had a chance to travel back in time to January 2020, what would you have done differently?
"I have thought about it a couple of times! At Convatec, we had embarked on a major transformation, and for that purpose, we aligned ourselves to a few key principles. We call those principles FISBE - F as in Focus, so focus on a few things. I as in, Innovate - people think innovation is only left to R&D, but one can innovate in the supply chain, marketing, and even in finance. S - Continue to Simplify. B - Build capabilities and finally, E - Execute excellence. Lastly, keep a keen eye on talent. Motivating associates and connecting with them by trying to find a common sense of purpose would be something I would have done differently."

Recently, we've seen a huge surge in global supply chain costs. How have you and your organization been able to cope with the change, and what measures have you taken

to maintain a healthy balance between inventory, stock-outs, and other cost factors?

"Supply chain and logistics costs are a nightmare. I think the payments that we are making are not merely 10%-15% higher, but some of the payments are 20x higher than what we made a few months back. Not only that, even after paying so much, there are not many suppliers available. For us at ConvaTec, we held on to the FISBE model, focused on a few markets, and protected them. Besides that, it is important to invest in end-to-end visibility tools. Ensure end-to-end visibility right from your end-customer to your intermediary, to your sales representative, to your ERP, and your sourcing and procurement. This ensures a top-level view, and any change in one leg of the whole value chain is immediately known to the other side of the value chain. Another important aspect is to constantly work with supply chain and procurement stakeholders on any gaps that could be resolved. One has to be careful about the allocation process across markets. Last but not least, simplify the portfolio to the extent possible. Try and eliminate small-value SKUs so that you focus on big items."

What are the things you've been able to do as a leader and through ConvaTec to increase or invest in supplier loyalty? What aspects would you recommend to build supplier loyalty?

"Suppliers are our partners, and we work with them on anything that we want to do, whether it's improving compliance, quality, processes – we are as much a part of their improvement process. So we treat them as partners in all respects; we treat them fairly by ensuring that they are paid well for anything they did and paid on time. We also recognize and reward them periodically. It's the smaller things that are sometimes even non-material that impact how they want to partner with us in the future."

"Suppliers are our partners, and we work with them on anything that we want to do, whether it's improving compliance, quality, processes – we are as much a part of their improvement process as they themselves. So we treat them as partners in all respects; we treat them fairly by ensuring that they are paid well for anything they did and paid on time. We also recognize and reward them periodically."

What is your opinion on the emerging role of data analytics in inventory management?

"It can play a huge role! The amount of data analytics that we have today is something that we've never seen before in our lifetime. There are two or three things I would encourage all companies to do.

The first is to ensure data analytics is endorsed by the CFO and the CEO of the company because it needs to come from the top. The second is to invest in resources, whether it is infrastructure, talent, or the analytics culture, showcase the value of analytics to everybody because not everybody is a big fan. People are used to doing things manually, and we need to show them that analytics helps you drive better decisions through the enhanced use of data. You can unlock value; you can reduce inventory; you can drive pricing; you can prevent leakages; you can create all these pilots. Analytics would be where companies will be able to differentiate themselves from others."

Bhavesh Shah
VP, Finance & Operational Excellence
Emerging Markets
ConvaTec

Kartik Nagarajan
Managing Director Consulting and
Global Business Services
Nexdigm

Certificate Course on Practical Knowledge of Arbitration and Dispute Resolution

Certificate Course on Practical Knowledge of Arbitration and Dispute Resolution
scheduled on 9th, 10th, 11th & 12th November 2021. In this Fundamentals of Arbitration as Dispute Resolution, Drafting and Understanding Arbitration Clauses, Appointment of arbitrator, constitution of arbitral tribunal and practical aspect of arbitration & Appointment of arbitrator, constitution of arbitral tribunal and practical aspect of arbitration was taken by NPS Chawla, Associate Partner, Robin Singh Rathore, Associate, Sakshi Singh Associate, Ankit Tripathi Associate, Sujoy Datta, Principal Associate & Surekh Kant Baxy, Senior Associate at Vaish Associates Advocates

Hands on Digital Training on Drafting Commercial Contracts

Digital Training on Drafting Commercial Contracts conducted on 2nd, 3rd, 4th, 5th & 6th August 2021, In this Arti Narsana, Of counsel at Vaish Associates Advocates discussed about Legal Background and Structure, How to draft and negotiate effectively & Breach Remedies/Damages/Indemnities. Implied & Express Terms in Contracts was taken by Vidisha Shetty at Aarna Law. Welding Boilerplate was explained by Aakash Sherwal at Aarna Law. Brendon Periera at Aarna Law spoke upon Payments and Interest. Last session on Term and Termination; Entire Agreement Clauses; Governing Law, Jurisdiction and Dispute Resolution Clauses was taken by Apoorva Guruprasad at Aarna Law & Tushar Mudgil at Aarna Law.

How to drive value from Data Analytics in Internal Audit

In this Virtual Event on How to drive value from Data Analytics in Internal Audit conducted on 23rd, 24th, 25th & 26th November, 2021. In this Analytics in the context of IA was given by Ganesh Balakrishnan, Audit Talent Lead and Audit Learning & Development Leader at Deloitte in India; Mohit Gupta, Partner - Governance, Risk, Resilience and Compliance at Mazars in Indiashared their insights on Use of Data through the Audit Lifecycle. The Computer Assisted Auditing Techniques was discussed by Ravi Maheshwari, Vice President - Internal Audit at Max Life Insurance. Last session on Interplay between Forensics and Audit was taken by Shashank Karnad, Partner & CEO Forensic Services at Mahajan & Aibara

Demystify the Ind AS /IFRS - A digital training on practical aspects- 2nd Edition

In this Demystify the Ind AS /IFRS - A digital training on practical aspects- 2nd Edition conducted on 15th, 17th, 18th, 22nd, 24th, 26th, 29th November, 1st, 3rd & 4th December, 2021, where the Income and Expenses IND AS 115, 20, 19, 102 & 12 were discussed by Anil Arora, Senior Manager & Robin Joseph, Director Assurance at Deloitte in India, Assets and Liabilities was taken by Ahtasham Ansari, Director & Gurjap Singh, Senior Manager at Deloitte in India. Monish Sharma, Director at Sudit K Parekh & Co LLP spoke upon Group Accounts; Presentation and Disclosures was taken by Sriram R., Manager at Deloitte in India, Shruti Lohia, Senior Manager at Deloitte in India, Pranav Pendharkar, Associate Director at ASA Associates shared his insights on Financial Instruments and foreign exchange which received a lot of attention from the audience.

Virtual Session on Labour Codes - Key Issues and recent Amendments- 3rd Edition

In this Webinar on Virtual Session on Labour Codes - Key Issues and recent Amendments- 3rd Edition conducted on 13th, 14th, 15th & 16th December 2021. Here, Sessions on Wages, Social Security, Industrial Relations & Health & Working Conditions was discussed by Savitha kesav Jagadeesan, Senior Resident Partner at Kochhar and Co. & Gaurav Chatterjee, Partner at Kochhar and Co.

Virtual Training on Mergers and Acquisitions

In this Virtual Training on Mergers and Acquisitions scheduled on 7th, 8th, 9th & 10th December 2021, where Essentials of Mergers and Acquisitions was discussed by Tanwir Shirolkar, Senior Director, Transaction Advisory at Nexdigm (SKP) & Harshal Choudhary, Principle Consultant/Associate Director, Transaction Advisory at Nexdigm (SKP), whereas, Negotiation techniques from the M&A World session was taken by Vidisha Shetty at Aarna Law. Shrinivas Sankaran, Associate Partner at Vaish Associates Advocates & Priyanka Jain, Principal Associate at Vaish Associates Advocates jointly shared his insights on M&A Deal Documentation, Legal Issues & Tax Implications. Subodh Dandawate, Senior Manager, Direct Tax & Regulatory at Nexdigm (SKP) spoke upon Corporate Restructuring.

PAST EVENTS AND ACTIVITIES

Mitigating Risk and Fraud in Procurement

In this Workshop on Mitigating Risk and Fraud in Procurement scheduled on 7th, 8th, 9th & 10th December 2021. Understanding the Context and Motivations behind Procurement Fraud and Bribery was discussed by Shreyas Jayasimha, Advocate | Arbitrator | Mediator at Aarna Law (India) & Simha Law (Singapore), Implementing Effective Anti-Fraud Controls was taken by Anirban Banerjee, Global Head - Business Advocacy & Excellence TCS BFSI Operations at Tata Consultancy Services. Shashank Karnad, Partner & CEO Forensic Services at Mahajan & Aibara shared his insights on Building Effective Barriers to Procurement Fraud & Bribery Proofing the Organisation – Tools, Techniques and Approaches.

Digital Training on FEMA- Legal & Compliance

In this Digital Training on FEMA- Legal & Compliance scheduled on 18th, 19th, 20th, 24th & 25th January 2022, where the Foreign Direct Investments was taken by Arti Narsana, Principal Associate at Vaish Associates Advocates. External Commercial Borrowings (ECB) were discussed by Shashishekhar Chaugule, Partner, Tax & Regulatory services at Desai Haribhakti & Co. Session on Investigations by Enforcement Directorate / Compounding by RBI was taken by Anup Vijay Kulkarni, Principal Associate at J Sagar & Associates; CA Hardik Mehta at Hardik D Mehta & Co. shared his insights on Export and import of Goods and Services. Last session on Overseas Direct Investments by a person resident in India was taken by Nishit Parikh, Practicing Chartered Accountants at Sudit K. Parekh & Co. LLP.

Digital Training on Corporate Fraud and Investigation

In this Digital Training on Corporate Fraud and Investigation scheduled on 19th, 20th & 21st January, 2022, Here, Overview on Corporate Fraud was given by Shashank Karnad, Partner & CEO Forensic Services at Mahajan & Aibara; Nirmal Paul, Vice President & Head – Fraud Prevention Unit & Claims Investigation at Bajaj Allianz Life Insurance Company shared his insights on Fraud Schemes and Controls Role of governance professionals in unearthing corporate frauds were explained by Vishal Narula, Managing Director at Alvarez and Marsal.

Workshop on Data Privacy, Digital Forensics and Cyber Investigations

In this Virtual Conference on Workshop on Data Privacy, Digital Forensics and Cyber Investigations conducted on 24th, 25th, 27th & 28th January 2022. Here, Overview on Data Privacy was discussed by Sowmya Vedarth, Director, Cyber Risk Services at Deloitte Touche Tohmatsu India LLP. Digital Forensics was explained by Arjun Rajagopalan, Partner at Deloitte Touche Tohmatsu India LLP; Rohan K. George, Partner at Samvad partners shared his insights on Legal Implications of India's Data Protection & Privacy Bill. Session on Redefining Cyber Crime was taken by Kartikeya Raman, Director at Grant Thornton Bharat LLP.

4th Annual Anti-Fraud Conclave & Awards 2022

4th Annual Anti-Fraud Conclave & Awards 2022 conference scheduled on 11th February 2022, commenced with the welcome address given by Director of Achromic point - Aashish Verma, Nagesh Pinge Ethics, Risk Management & Internal Audit delivers a KeyNote address. After this in Session 1 Shashank Karnad, Partner & CEO Forensic Services at Mahajan & Aibara shared his insights on Is a good Anti-Fraud strategy complementary to higher sales & profitable growth? Perspective with case studies. The first panel on Does fraud risk professional have longevity in career? What organizations look for in a fraud risk professional? was taken by Alok Saraswat, Head – Fraud Control Unit & Sales Compliance at Future Generali India Life Insurance Co. Ltd. as a moderator along with his panelists S V Sunderkrishnan, Chief Risk Officer at Reliance Nippon Life Insurance Company Limited, Anirban Banerjee, Global Head Business Advocacy & Excellence at TCS BFSI Operations, Tata Consultancy Services, Varun Wadhwa, Country Compliance Officer – India at CBRE South Asia Pvt. Ltd Ethics & Compliance, Somit Chitrey, Group Director at Standard Chartered Bank & Govind Balachandran, CEO & Co-Founder at SignalX.ai. The session on Learnings for fraud risk units to improve financial loss recovery rate, FIR conversations and legal case winnability ratio was taken by Ajay Upadhyay, Partner, Forensic Services, Risk Consulting at KPMG in India. Himanshu Arora, Director, Financial Advisory at Deloitte India spoke upon How new Forensic Accounting & Investigation Standards (ICAI) can be risk mitigation enabler? How new Forensic Accounting & Investigation Standards (ICAI) can be risk mitigation enabler? Was taken by Moushumi Vaidya Director, Forensic Services, PricewaterhouseCoopers Private Limited.

Demystifying ESG (Environmental, Social and Governance)

In this Virtual Training on Demystifying ESG (Environmental, Social and Governance) scheduled on 21st, 22nd, 23rd, 24th & 25th February 2022, In this Introduction was given by Shailesh Vishnubhai Haribhakti, Pioneer | Entrepreneur | Innovator | Author | Board Chairman | Board Director | Educationist | Chartered Accountant | Global Citizen & Gaganpreet Puri, Managing Director, Risk & Regulatory Leader at Alvarez & Marsal. Mitigating ESG risks in M&A and Commercial Transactions was taken by Inderjeet Singh, Director – Financial Advisory at Deloitte India; ESG Due Diligence – International Mergers and Acquisitions was explained by Shreyas Jayasimha, Advocate | Arbitrator | Mediator at Aarna Law (India) & Simha Law (Singapore) & Sucharita Manjunath at Aarna Law. Session on ESG and Antitrust was taken by Arjun Krishnan, Partner at Samvad Partners; Poornima Hatti, Partner at Samvad Partners spoke upon ESG and Litigation Risks.

Certificate Course on International Tax

In this Certificate Course on International Tax scheduled on 21st, 22nd, 23rd, 24th, 25th & 26th February 2022, where the Introduction to International Tax was given by Teenu Mathew, Chartered Accountant, International Tax Treaties were discussed by Neeraj Jain, Partner at Vaish Associates Advocates & Priyanka Jain, Principal Associate at Vaish Associates Advocates. Session on BEPS and MLI was taken by Debojit Mahant Chartered Accountant Guiding Concepts of Transfer Pricing was taken by Rajneesh Verma, Associate Partner at BSR & Co. LLP & Divya Yadav at BSR & Co. LLP; Vidur Puri, Senior Partner at SCV & Co. LLP shared his insights on Penalties and Dispute Resolution.

PAST EVENTS AND ACTIVITIES

5th Annual GST Summit and Awards 2022

5th Annual GST Summit and Awards 2022 conference scheduled on 4th March 2022, commenced with the welcome address given by Director of Achromic point - Aashish Verma, D. Arvind, Founder and Managing Partner at D Arvind & Associates LLP delivers a KeyNote address. After this in Session 1 on Key Amendments in the Budget 2022 was taken by Ranjeet Mahtani, Partner at Dhruva Advisors LLP; Himanshu Goel, Associate Partner at TR Chadha & Co LLP shared his insights on eCommerce Operators, Food Aggregators - Continuing Saga of Shifting the Collection of taxes. Interplay of Section 16, Rule 36, 2A and 2B. was taken by Yogesh Gaba, Managing Partner - Indirect Tax at Gaba & Co. Saket Patawari – Executive Director, Indirect Tax, Nexdigm spoke upon Nitty Gritty of Intermediaries- Services and Goods. Session on Interplay between input service distributor and Schedule I supplies was taken by Jatin Arora, Partner / Lawyer - Indirect Tax at Phoenix Legal. CA Ravi Borana, Director at I.P. Pasricha & Co shared his views on Critical Judgements. The panel on Critical Judgements and select Advance Rulings, Litigation Procedure – where are we? & Issues of Summons, calling for information, Notices, Audit Proceedings was taken by Sandeep Chilana, Managing partner at Chilana & Chilana Law Offices as a moderator along with his panelists Alok Pareek, Head of Tax at Discovery India, Ravikumar Yanamandra, Chartered Accountant, Vikas Garg, Director and Head of Indirect Tax at Siemens Limited & CA Maneet Pal, Partner at I.P. Pasricha & Co.

Upcoming Events – 2022

5th Annual Direct Tax Summit and Awards 2022

11th March 2022

[Know more]

Virtual Training on Mergers and Acquisitions

8th March 2022 – Session 1| **9th March 2022** – Session 2|
10th March 2022 – Session 3| **11th March 2022** – Session 4

[Know more]

Private Equity Masterclass

24th March 2022

[Know more]

Digital Payments: New Trends and Evolution of the Industry - Virtual Conference and Awards 3.0

25th March 2022

Know more

Digital Training on Contracts Drafting, Negotiation and Dispute Resolution

21st March 2022 – Session 1 | **22nd March 2022** – Session 2 |
23rd March 2022 – Session 3 | **24th March 2022** – Session 4 |
25th March 2022 – Session 5 | **28th March 2022** – Session 6 |
29th March 2022 – Session 7 | **30th March 2022** – Session 8

Know more

Masterclass on Due Diligence for M&A, Cross Border Transactions and Joint Ventures

14th April 2022

Know more

Digital Training on Forensic Accounting and Corporate Fraud Investigations

21st April 2022 – Session 1 & 2 | **22nd April 2022**– Session 3 & 4

Know more

4th Annual Insolvency and Bankruptcy - Conference and Awards 2022

23rd April 2022

Know more

Virtual Training Course on Transfer Pricing and Related Compliances

18th April 2022 – Session 1| **20th April 2022** – Session 2| **22nd April 2022** – Session 3| **25th April 2022** – Session 4| **27th April 2022** – Session 5| **29th April 2022** – Session 6

Know more

Virtual Session on Labour Codes - Key Issues and recent Amendments- 4.0

28th April 2022 – Session 1| **29th April** – Session 2|
30th April – Session 3

Know more

Demystify the Ind AS /IFRS - A digital training on practical aspects 3.0

9th May 2022 – Session 1| **10th May 2022**– Session 2|
11th May 2022 – Session 3 | **12th May 2022** – Session 4| **13th May 2022** – Session 5

Know more

Masterclass on GST, Customs and International Trade

10th May 2022– Session 1| **11th May 2022** – Session 2 |
12th May 2022 – Session 3| **13th May 2022** – Session 4 |
14th May 2022 – Session 5

Know more

The Role of Risk Analysis in Dispute and Litigation Management

16th May 2022 – Session 1| **17th May 2022**– Session 2|
18th May 2022 – Session 3 | **19th May 2022** – Session 4|
20th May 2022 – Session 5

Know more

The Internal Auditor of the Future- A Virtual Training Course

17th May 2022 – Session 1 & 2| **18th May 2022**– Session 3 & 4

Know more

Digital Training on FEMA - Legal & Compliance

26th May 2022

Know more

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