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New Age Frauds
what's the future looking like?

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BY THE PROFESSIONALS FOR THE PROFESSIONALS

New Age Frauds

What's The Future Looking Like?

I was recently speaking to a professional colleague about the situation in Corporate India, with certain sectors in lock down mode and certain others operating at full capacity, having to deal with supply shortages. Just a few weeks ago things were different, and the economy seemed to have been galloping back to normalcy. The stock markets were at all time highs and people had started to venture out to their favorite restaurants and their favorite holiday destinations. The situation changed so radically and in such a short span of time, that it caught everybody off guard. I will not blame you for wondering why all this is relevant to the title of this article, which quite futuristically refers to "new age frauds", so allow me to explain.

For the last 12-15 months, we have been living in what has been tagged as a VUCA World where V stands for Volatility, U for Uncertainty, C for Complexity and A for Ambiguity, or as some like to refer to it, the "new normal"; as if to reassure the human mind not used to so much high-velocity complexity. That there is such a "normal" that can be baselined when life itself is so unpredictable and that we will have a model for what is a normal, is an assumption. Much like our hunter-gatherer ancestors living in caves, we do not know if we will get eaten by a ferocious carnivore in our quest to look for the day's food. Our responses therefore need to follow the pattern of early man, in some sense, so as to be able to deal with the new realities of life.

So, what are these unknown unknowns, and how do we prepare for them? Truth be told, nobody is quite aware precisely, of what the future holds and nobody can really predict what the "new age" will look like given how our situation around the world evolves. Yet here we are, predicting the frauds that we may need to prepare ourselves for, which some might argue is a very narrow view of the world, but so be it.

A little like early man, the response of a fraudster to the new situation, is to protect himself and to provide for his family. That brings into focus the human behavior of hunting-gathering and staying aware of risks around us, as if we are in an uncharted forest, with unknown dangers lurking in the shadows. Some of the ways that we have seen frauds emerge in recent times are as follows, and I predict that we will continue to see evolved variants of these frauds in time to come due to the wave of digitization sweeping around us:

1) Bribery and Corruption: It has become increasingly easy for bribery and corruption to be rationalized given the pressure all constituents in a business transaction are going through. This involves individuals, businesses and governments. Times are tough for some of us but they are tougher for many others who are less fortunate than us. Transparency International's (TI) Chair, Delia Ferreira Rubio when releasing the 2020 Corruption Perception Index (CPI) report stated, and I quote: "Covid-19 is not just a health and economic crisis. It is a corruption crisis. And one that we are currently failing to manage. The past year has tested governments like no other in memory, and those with high levels of corruption have been less able to meet the challenge. But even those at the top of the CPI must urgently address their role in perpetuating corruption at home and abroad". Thus, this risk of bribery and corruption is expected to be higher, due to the domestic economy struggling, due to large scale investments in India as a plus-one strategy for global companies, due to the several tax breaks Government announced a while ago, and lastly, due to production-linked incentives the Government has announced to boost production, more recently. Once the Capital expenditure cycle picks up across manufacturing sectors, there is certain to be a rise in bribery and corruption. If one looks at the TI CPI for India, since 2011, our rank has dropped from 76 in 2011, to 80 in 2019 to 86 in 2020. India's rank has dropped 10 spots, at a time when several legislative changes and transparency have seemingly been brought about in both private and public sector dealings. Just a few years ago, the Prevention of Corruption Act has also been strengthened, to include bribe payers. There will be more and more innovation in the forms of gratification payment made to beneficiaries of bribes. This could be in the form of cryptocurrency or other digital assets, which would make discovery that

much more difficult. In the past, fraudsters would prefer cash, gifts, fully-paid holidays, gems and jewelry and on rare occasions, bank credits, but that is fast changing. Just as asset classes migrate to newer forms, bribe payments or gratifications will get paid out in similar ways, which will make discovery of bribery and corruption that much more difficult. The new age investigators will need to possess digital forensics skills well beyond the vanilla skills many possess today. This

new age poses unforeseen challenges to the unprepared.

2) Misappropriation of assets: This category of fraud subsumes a wide array of frauds like theft of cash, inventory, billing schemes, payroll schemes, expense reimbursement schemes, tampering and larceny among others. A lot of this is perpetrated by middle and senior management personnel, who either in collusion with outsiders or insiders, will be able to perpetrate fraud of larger values and in more sophisticated ways than before. A recent example of a fraud we uncovered in the course of our work, related to a company where they had a CEO sending an e-mail to the CFO. In this e-mail he had asked the CFO to transfer a significant sum of money to a law firm in Durban, South Africa, for a merger and acquisition transaction. Incidentally, this e-mail to the CFO came through in the wee hours of the morning. This was at a time when the CEO was in South Africa, scouting for some overseas acquisition targets. Long story short, after requisite diligence, the CFO transferred money to the law firm's account. When he called the CEO after the CEO landed in India that same evening, he was shocked to discover that the CEO had never sent the e-mail. Yet the e-mail had all the elements of what the CEO's writing style was and there was nothing wrong on the face of it, including the e-mail address. Our investigation revealed that a spoofed e-mail was used to send the e-mail and the IP address belonged to an unrelated automobile repair company in South Carolina in the US. The money that was transferred to the law firm was untraceable. The law firm was also fake as was the law firm Partner the CFO had spoken with before he transferred the money. Such fraud schemes are increasingly occurring every day, and the best of us get hoodwinked, since our guards are not up at all times. What was even more perplexing in this case, was that this CFO was from the Forensic investigator community and was a Partner with a large firm, before he moved into a finance role with this company, nearly a decade ago. This level of sophistication, that was seen in this case, was a function of social engineering, use of technology and malware in the form of Trojan programs that sniffed e-mail traffic and sent out data packets to fraudsters for several months. This is further accentuated by the fast pace at which business is done through remotely working personnel, more so now, which leads to a significantly heightened risk of more such attacks, with higher levels of sophistication. This issue is further exacerbated since the conventional controls of social checks, working in physical proximity with colleagues, cyber security and access controls to not exist, which exposes organizations to much higher levels of fraud risks, unless newer controls are implemented to mitigate these new age risks.

3) Financial statement fraud: This third and final category of fraud has two broad sub-categories. One is overstatement, and two, understatement of assets or revenues, where there are aspects such as timing differences, for example advancing or postponing costs or revenues, fictitious assets/revenues, concealed liabilities and improper asset valuations. Due to the VUCA world we will continue to live in and the pressure that companies will surely face as a result of frequent disruptions stemming from unexpected events, there will be immense pressure on company

managements. Some of them may not be able to cope with the pressures, resulting in a heightened risk of financial statement fraud or "earnings management". This has usually been an outcome of senior management fraud as senior management personnel possess the ability to override controls and to influence subordinates. Historically, this type of fraud has been perpetrated by underreporting costs or overreporting revenues, which in turn leads to fictitious values of cash/bank balances and investments, as well as inflated shareholders' funds reflecting in balance sheets. This management override has resulted in companies being able to either deceive auditors or sometimes work in connivance with them for years. They have been able to successfully defraud shareholders and lenders, by posting rosier financial results than actual underlying fundamentals and applicable accounting standards might permit. This new complexity and uncertainty as well as the remote working will exert both greater pressure and allow a greater opportunity to corporate managements to perpetrate this fraud, with their ultimate rationalization being their sheer need for survival in this phase of uncertainty and turmoil, so as to continue to access funds and markets. Auditors will also be able to carry out far fewer substantive tests than before with the result that they may increasingly rely on management representations on critical aspects that they are unable to track. Unless auditors and investigators invest in training or upskilling of human resources and investments in technology tools, this risk is bound to only increase. The digitization of business and operations also means that there is greater propensity to rely on resultant digital data as being sacrosanct, but the old phrase: "garbage-in-garbage-out", or GIGO, is very relevant to remember. So, just because it is digital, does not make data sacrosanct and one must apply the requisite level of diligence to it.

The ultimate result of all this is a world that is rapidly changing with the daunting task on company managements, capital markets, regulators, auditors, shareholders, employees and lenders to become aware of the risk of fraud and the resultant mitigations that need to be implemented, so as to countervail this heightened risk.

Having said that, as we may have learned either in business school and/or through experiences from real life, the first step towards problem-solving is practically identifying the problem. In this new age of unstructured problems, when we do not know how the World, our lives, our living spaces, our work spaces and all the processes that drive businesses and economies forward, will pan out, how at all do we prepare ourselves? In some part, the answer is to build enabling skills, to be more digitally savvy, to be more able to handle stress and uncertainty objectively rather than panicking and asking "why me?", to build confidence and mental strength, and finally, yes, technical competence. The new normal is here to stay, but the foundation of this "new" normal is an everchanging quicksand. It requires a new breed of warriors to face up to this challenge; warriors that expect the unexpected and forge ahead with a single-minded goal to succeed in this VUCA World. Only they will survive and thrive in this new accelerated wave of evolution.

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COMPANIES AUDITOR'S REPORT ORDER (CARO)

2020 EXECUTIVE SUMMARY

CARO 2016 was replaced by CARO 2020 for the statutory audits commencing on or after 1 April 2020. However, due to the pandemic, CARO was deferred and now applicable to all statutory audits on or after 1 April 2021. Reporting under CARO 2016 encompassed 16 clauses with 21 sub-clauses. Under CARO 2020, reporting requirements have been enhanced to focus on transparent reporting comprehensively. With 21 clauses comprising of 50 sub-clauses- CARO 2020 is a substantial value addition to the readers of the auditor's report compared to the erstwhile version. The increased reporting requirements of CARO 2020 put an onus on the management of the auditee entity to ensure comprehensive disclosures and provision of additional details. On the other hand, the auditor is tasked with stringent reporting requirements and checking.

This article presents a summary of new reporting requirements and modifications that have been introduced under CARO 2020. Here is the link to a webinar on CARO 2020, which deep dives into the novel reporting requirements, modifications, clauses carried forward, and deletions and provides insights both from the perspective of the reporting entity and the statutory auditor.

Executive Summary of CARO 2020

Clause 3 (i) (a), (b), (c), (d) ,(e): Property, Plant and Equipment (including right of use assets) and Intangible Assets:

New Reporting Requirements:

- Revaluation of 10% or more (upwards/downwards) based on a valuation by Registered Valuer in the aggregate of the net carrying value of each class of Property, Plant, and Equipment or intangible assets.
- Auditor to report on Proceedings initiated or pending against the Company for holding any Benami property defined under 'Prohibition of Benami Property Transactions Act, 1988.'

Modifications:

- Maintenance of proper records showing full particulars of intangible assets.
- Title deeds of immovable property that are not held in the name of the Company will have to be disclosed along with:
  - The name of the party in whose name the title deeds are held
  - Whether any title deeds are held in the name of promoters, directors or their relatives or employees
  - Reasons for not holding the title deeds in the name of the Company

Clause 3 (ii) (a): Inventory:

New Reporting Requirements:

- Auditor to report on discrepancies of 10% or more for each class of inventory and whether such discrepancies have been properly dealt with in the books of accounts.

Modification:

- Enhanced reporting requirements introduced require the auditor to comment on the appropriateness of the coverage and procedure of inventory verification carried out by the management.

Clause 3 (ii) (b): Working Capital

New Reporting Requirements:

Auditor to report:

- If at any point of the year the Company has been sanctioned working capital in excess INR 5 crores on the basis of security of current assets by banks or financial institutions.
- Whether the quarterly returns or statements filed with such banks and financial institutions are in agreement with the books of accounts of the Company.

Clause 3 (iii): Investments, Guarantees, Securities, Loans and Advances:

New Reporting Requirements:

- Reporting to include investments, guarantees or security provided in addition to loans or advances in the nature of loans to companies, firms, LLPs or any other parties.
- Additional reporting required (for all Companies other than those who are in the principal business of giving loans) for loans or advances in the nature of loans granted, guarantees provided or security given to any other entity. Reporting required for:
  - Aggregate amount during the year and balance outstanding on the balance sheet date for such loans or advances and guarantees or security to subsidiaries, joint ventures and associates
  - Aggregate amount during the year and balance outstanding in the balance sheet date for such loans or advances and guarantees or security to parties other than the ones mentioned above.
- Whether investments made, guarantees provided, security given and the terms and conditions of the grant of all loans and advances in the nature of loans and guarantees provided are not prejudicial to the Company's interest
- Renewal/extension of loans which has fallen due during the year or new loans

granted to settle overdues of existing loans given to same parties; reporting required for:
  - Aggregate amount of such dues renewed/extended or settled by fresh loans and
  - Percentage of aggregate to the total loans or advances in the nature of loans granted during the year
  - [not applicable to Companies whose principal business is to give loans]
- Reporting on loans and advances granted without stipulating any terms or period of repayment or repayable on demand; reporting required for:
  - Aggregate amount, percentage thereof to the total loans granted, aggregate amount of loans granted to promoters and related parties

Clause 3(v): Deposits:
Modification:
- Reporting under CARO 2020 for deposits is extended to include reporting on "deemed deposits."

Clause 3(vii) (a), (b): Statutory Dues:
Modification:
- Reporting on statutory dues under CARO 2020 is expanded to include:
  - Goods and services tax; and
  - Statutory dues under dispute

Clause 3 (viii): Unrecorded Income:
<u>New Reporting Requirement:</u>
- The auditor shall be required to report the transactions not recorded in the books of account that have been surrendered or disclosed as income during the year in the income tax assessments.

Clause 3(ix) (a), (b), (c), (d),(e), (f): Default in Repayment of Loans:
<u>New Reporting Requirements :</u>
Auditor to report:
- If the Company has been declared a wilful defaulter by any bank/ Financial Institution/ other lenders.
- If terms loans were applied for the purpose of which the loans were obtained by the Company; if not, amount of loan so diverted and purpose for which it is used to be reported.
- If short term funds were utilized for long term purposes, nature and amount to be indicated
- If the Company has taken any funds from any entity/person on account of or to meet the obligations of its subsidiaries, associates or joint ventures, the details thereof with nature of such transactions and the amount in each case.
- If the Company has raised loans during the year on the pledge of securities held in its subsidiaries, joint ventures or associate companies, the details and also report where the Company has defaulted in repayments of such loans.

Clause 3 (xi) (a), (b), (c): Fraud and Whistle-Blower:
<u>New Reporting Requirement:</u>
Whistle-blower Mechanism:
- The auditor shall be required to report whether any complaints from whistle-blowers were received during the year by the company.

Modification:
- CARO 2020 requires the auditor to assess and report upon all frauds whether by the company or on the Company. The assessment and reporting of frauds on the Company are not limited only to frauds committed by

officers and employees, as was the case under previous CARO.

Clause 3(xii)(c): Nidhi Companies:
New Reporting Requirement:

- Auditor shall report whether Company has defaulted in the payment of interest and principal on deposits for any period.

Clause 3 (xiv) (a), (b):Internal Audit:
New Reporting Requirement:
The auditor will be required to:

a. Comment on whether the internal audit system of the Company is commensurate with the size and nature of its business.

b. Consider the reports of the internal auditor for the period under audit.

Clause 3(xvi)(b), (c), (d): Reserve Bank of India (RBI) Compliances:
New Reporting Requirements:
Auditors of Non-Banking Financial Companies (NBFCs) will have to report:

- Whether any non-banking financial or housing finance activities have been conducted before obtaining a Certificate of Registration from the RBI.
- Whether the Company is a Core Investment Company (CIC) as per the criteria laid down by the RBI.
- Whether the Company is an exempted or unregistered CIC as per the criteria laid down by the RBI.
- If the Group has more than one CIC and the number of CICs which are part of a Group.

Clause 3 (xvii): Cash Losses:
New Reporting Requirement:

- Auditor to report whether the Company has incurred "cash losses" in the financial year and the immediately preceding financial year.
- In case of cash losses being incurred, the amount of cash loss has to be reported.

Clause 3(xviii): Resignation of Statutory Auditor:
New Reporting Requirement:

- The auditor shall have to report if there has been a resignation of the statutory auditor during the year.
- The auditor shall have to consider issues, objections, and concerns raised by the outgoing auditor.

Clause 3 (xix): Going Concern:
New Reporting Requirement:

- The auditor shall be required to opine whether there is no material uncertainty on the date of audit report, and the Company can meet its liabilities existing at balance sheet date as and when they fall due within a period of one year from the balance sheet date.

Clause 3 (xx): Corporate Social Responsibility (CSR):
New Reporting Requirement:
The auditor is required to report:

- Whether unspent amounts on CSR activities other than ongoing projects have been transferred to a fund specified in Schedule VII of the Companies Act, 2013 within 6 months from the expiry of the financial year.
- Whether unspent amounts on CSR activities for ongoing projects have been transferred to a special bank account opened in a Scheduled bank called "Unspent CSR account" within 30 days from the end of the financial year.

Clause 3 (xxi): Consolidated Financial Statements:
New Reporting Requirement:

- CARO 2020 is not applicable to the auditor's report issued for consolidated financial statements.
- The auditor is required to report on whether there have been any qualifications or adverse remarks by auditors of the Companies included in the consolidated financial statements (components).
- CARO 2020 provides an "index" of all CARO qualifications and adverse for

Clause under CARO 2020	Reporting Requirements for
Clause 3(iv)	Compliance with Sections 185 and 186 of the Companies Act, 2013
Clause 3(vi)	Maintenance of cost records
Clause 3 (x)	Application money raised by issue of own securities
Clause 3(xii) (a), (b)	Nidhi Company
Clause 3(xiii)	Reporting for related parties
Clause 3(xv)	Non-cash transactions
Clause 3(xvi)(a)	Registration under Section 45-IA of the RBI Act

Deleted clause:

Managerial Remuneration

Amendments to the Companies Act, 2013 in September 2018 resulted in reporting for the above clause being covered under "Other Legal and Regulatory Requirements" section of the audit report. Hence, reporting for clause under CARO led to duplicity and the same has been removed in CARO 2020.

Kindly listen to the detailed Webinar on CARO at https://bit.ly/3eqC3y8

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

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

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

Factual Background

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

By virtue of these transactions, a huge amount of money was disbursed to corporate debtor as a borrower from Spade and AAA. Spade and AAA claimed this amount as financial debt from the corporate debtor during the pending CIRP.

The Court noted the existence of close relationship between the key managerial personnel of the Corporate Debtor, Mr. Anil Nanda having 80% of the shareholding in the Corporate Debtor and the director of Spade and AAA, Mr. Arun Anand.

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

Corporate debtor, Spade and AAA throughout had common Key Managerial person Mr Arun Anand and Ms. Sonal Anand, who acted and benefited Mr Anil

Nanda and his group of companies, i.e. Goetze India, NANZ or Corporate debtor during 2010 to 2013.

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

"Related party"- a continuing classification?

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

The question that a rose for consideration was- whether the disqualification under the proviso would attach to a financial creditor only in praesenti, or it would also extend to those financial creditors who were related to the corporate debtor at the time of acquiring the debt?

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

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

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

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

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

the Code taking into account the interest

of the corporate debtor and related parties.

Collusive transactions: looking beyond the text of the documents

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

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

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

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

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

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Time Limit To Avail ITC On Import Of Goods – Potential Litigation?

Introduction

Prof. Jack Balkin, in a wonderful paper, argued that law is like performing art, especially music. In his words, Law, like music and drama, involves more than a reader and a text. It involves a complex of reciprocal influences between the creators of texts, the performers of texts, and the audiences affected by those performances.

Sometimes, we take our tax positions reading a particular provision in isolation and not within the spirit of the legislation as a whole. One such position which many of the taxpayers, we came across, are taking relates to the captioned topic.

Section 16(4) of the Central Goods and Services Tax Act, 2017 ('CGST Act') provides the time limit to avail Input Tax Credit ('ITC') before the due date of filing of return for the month of September following a relevant Financial Year ('FY') or filing of Annual return for such FY, whichever is earlier.

Many taxpayers are taking a position that such time limit shall not apply in case of Integrated Tax ('IGST') paid on import of goods. The rationale behind such a position is the use of the words 'invoice or debit note' and absence of the words 'bill of entry'.

In this Article, we have explained as to how such an interpretation, in our view, is too narrow a reading of a tax legislation.

The Legislations and its analysis

At the very outset, it is pertinent to mention that the time limit for availing ITC in respect of import of goods emanates from Integrated Goods and Services Tax Act, 2017 ('IGST Act') per se, though it borrows the provisions from CGST Act.

Section 20 of the IGST Act provides that provisions of CGST Act relating to ITC shall, mutatis mutandis, apply to IGST Act. The meaning of the expression 'mutatis mutandis' has been explained in plethora of Supreme Court decisions.

In the case of ***Ashok Service Centre v. State of Orissa, AIR 1983 SC 394,*** Hon'ble Supreme Court referred to various legal dictionaries and observed that the expression '*mutatis mutandis*' *means 'with the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like*'. Similar view was taken in the following Supreme Court decisions:

- ***The Rajasthan State Industrial Development and Investment Corporation v. Diamond and Gem Development Corporation Ltd., 2013 (2) TMI 870; and***

- ***Prahlad Sharma v. State of U.P., (2004) 4 SCC 113***

Therefore, when one reads the provisions referred as mutatis mutandis, proper care should be taken to modify the referred provisions keeping in mind the overall intent of the legislature. For domestic transactions, invoice or debit note is the document for availing ITC and for import of goods, bill of entry is the document for availing ITC. Thus, the words 'invoice or debit note' under Section 16(4) must be modified to 'invoice or debit note or bill of entry' when we are reading the provision in context of availment of ITC in respect of import of goods.

The next question which needs consideration is as to 'whether IGST Act intends to provide a time limit for ITC on import of goods?'. The answer is YES for the reason given below.

Section 17 of the IGST Act deals in apportionment of IGST. Clause (f) of Section 17 states that where the ITC of IGST in respect of import of goods is not availed by a taxpayer within the time specified, the amount of such ITC shall be transferred to Central Government at the rate equal to Central Tax. Section 17(f), therefore, clearly indicates that somewhere the legislation has already provided a time limit for availing ITC in respect of import of goods.

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In our view, time limit under Section 16(4) of the CGST Act is squarely applicable to ITC of IGST paid on import of goods as well.

Reading Section 16(4) of the CGST Act in isolation may be incorrect since ITC eligibility of IGST paid on inward supplies comes from IGST Act and not CGST Act. Thus, a harmonious construction must be afforded before concluding on the question.

Since our view is against what many taxpayers have followed, we would advise taxpayers to re-look into the matter in the light of above analysis.

Disclaimer:

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

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Retrospective Taxation Between Clubs and Members

Striking Down The Jurisprudence

"The art of taxation consists in so plucking the goose as to procure the largest quantity of feathers with the least possible amount of hissing"

- Jean Baptiste Colbert

These days, Government is quite regularly choosing the path of retrospective taxation to put straight their intent and understanding of law. It however fails to determine taxpayers' toil and repercussions of bringing out such changes. One such amendment recently proposed in Finance Bill 2021 is expansion in scope of term '**supply**' under Section 7 of the Central Goods and Services Tax Act, 2017 ('CGST Act') to include within its ambit, transactions undertaken **between a person, other than an individual (association, club or society) and its members,** and that too retrospectively w.e.f. July 1, 2017. Explanation appended to such clause deems association and members as two separate persons.

The genesis of taxation of supplies between an association and its members dates back to sales tax and service tax regime. The said issue was highly litigated under previous regime and owing to bad framing of GST law, cropped up under this regime as well. In a pre-anticipated move to create protective shield around such levy before taxpayers approach Courts under GST, the Government has brought this amendment and has validated the levy.

This article attempts to analyze the legal correctness of proposed amendment and validity of retrospectivity provided to it.

Background of amendment

The agenda for amendment was tabled at 39th GST Council Meeting wherein the Council examined need for such amendment in the light of Supreme Court judgement in case of **State of West Bengal v. Calcutta Club Limited and CCCE & ST & Ors. v. Ranchi Club Limited, 2019-VIL-34-SC-ST.** The said judgement was pronounced in favour of taxpayers, ruling that no tax can be levied on goods and services supplied by clubs to its members, hailing the 'Principle of Mutuality' between them.

Considering implications under GST regime, the Government reconstructed the very basis of said judgement and proposed an amendment whereafter both association (whether incorporated or not) and members will be treated as distinct person. The proposed deeming fiction will rebuke 'Principle of Mutuality' and will attract levy of GST on all transactions between clubs and its members. However, taxpayers can still contest levy of sales tax and service tax basis Calcutta Club and Ranchi Club judgement (supra).

Retrospective application of amendment

Time and again, the legislature is using retrospective amendment as a tool to deal with or cut short the judicial verdict pronounced against revenue. The present amendment has also been done in wake of Supreme Court's judgement striking down a tax levy. It is undoubted that legislature has adequate powers under the Constitution to bring about retrospective amendments. However, the validity of retrospective amendments have been challenged numerous times in past before various forums.

The Courts have consistently upheld the validity of retrospective application of laws when the same are curative or clarificatory in nature. The Courts observe that such amendments clarify the intent of legislature in respect of existing provisions

and hence are accepted with retrospective effect.

The retrospective application in case of indirect taxes has also been challenged on ground that taxpayers cannot make post-facto recovery of taxes from consumers. It, thus, creates a financial burden on them. However, under plethora of jurisprudence, it remained to be a shallow ground for challenging retrospectivity.

Basis the trend of amendments made in erstwhile and present regime, it can be construed that the Government always intended to tax supplies between association and its members and hence, impugned change only cleared air of doubt surrounding such levy. Hence, expansion in scope of 'supply' can be construed as clarificatory change brought about to cure pre-existing lacuna of law.

Summing Up

The Government is determined to tax transactions between clubs and its members. What is most surprising here is that in both positive tax regime (amendment brought in 2006 in Section 65) and negative tax regime (amendment brought in 2012 in Section 65B) under Service Tax, the legislature introduced similar provision in the Finance Act, 1994 for levy of service tax on such transactions in light of adverse High Court rulings. However, when GST was introduced, they decided not to have a similar provision under GST. Hence, it is not that Government was taken by surprise by decisions of Calcutta Club and Ranchi Club judgement (supra) and therefore missed to introduce provision under GST. Considering that 'Principle of Mutuality' was already being tested before the Supreme Court and various High Courts under erstwhile laws, the legislature should have been more cautious while framing GST law. Further, there was ample time to undertake damage control and amend the law at the earliest instead of waiting for almost 4 years!

A fierce legal battle might be round the corner once the Bill is enacted and amendments take effect retrospectively. While revenue is in better position to contest retrospectivity, taxpayers can contest levy of interest for past transactions. Liability created retrospectively could not entail punishment of interest for default in law which didn't even exist at that time. Having said that, the clubs and associations will have a hard time bearing GST cost of 4 years in one go, since they would have collected amount from members without factoring GST in it.

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Common Portal Under GST
Something which is Uncommon!

Technology is the backbone of GST. The GST law contains enabling provisions for usage of an electronic platform, beginning with seeking registration under GST to issuance of an order by the department. GST has its own bitter experience while dealing with technology in tax administration. We have seen technological failures on multiple points, be it dealing with transitional credits, e-way bills, returns, credit summary etc. Despite all this, it seems that the Government is very hopeful to make everything faceless and transparent by using technology as a platform under GST.

Under Section 146 of the Central Goods and Services Tax Act, 2017 ('CGST Act'), the Government is empowered to notify 'common portal' to deal with various procedural aspects such as registration, tax payment, returns filing, e-way bills and e-invoices, refunds, assessment and the like. Besides this, the Government has been vested with residuary powers to notify 'common portal' to deal with any other procedural aspect under GST.

Notification No.	Date	Common Goods and Services Tax Electronic Portal	Purpose
4/2017 – Central Tax	June 19, 2017	www.gst.gov.in	• Registration • Payment of tax • Furnishing returns, • Computation settlement of Integrated Tax • E-way bill
9/2018 – Central Tax (superseded 4/2017 – Central Tax)	January 23, 2018	www.gst.gov.in	• Registration • Payment of Tax • Furnishing returns • Computation Settlement of Integrated Tax
		www.ewaybillgst.gov.in	· E-way bill
69/2019 – Central Tax	December 13, 2019	www.einvoice1.gst.gov.in; www.einvoice2.gst.gov.in; www.einvoice3.gst.gov.in; www.einvoice4.gst.gov.in; www.einvoice5.gst.gov.in; www.einvoice6.gst.gov.in; www.einvoice7.gst.gov.in;	• Invoice under Rule 48(4) of the CGST Rules

As can be seen from above, the word 'common' is very 'uncommon' when it comes to common portal. There is no single portal that can be used to deal with all procedural aspects under GST. The notifications under which a particular portal is 'notified' explicitly law down the purpose for which such portal can be used. Such a portal should be used only for the notified purpose nothing more, nothing less!

Interestingly, none of the above notifications prescribe which portal is notified for (i) Issuance of Show Cause Notice ('SCN') / Order and filing of appeal against such SCN / Order; and (ii) Filing of refund application and relatable documents. At present, all these actions are happening on www.gst.gov.in. This leads to an open question that Is there no notified portal for these 2 purposes?.

Unfortunately, the answer to above question is YES!. The Government missed notifying www.gst.gov.in as a common portal for (i) Issuance of SCN / Demand Order and filing of appeal against such SCN / Demand Order; and (ii) Filing of refund application and relatable documents. The present exchange of documents via www.gst.gov.in relating to the above proceedings is a ground-level practice accepted by both the taxpayer and the department. In absence of any notification, www.gst.gov.in cannot be considered as a 'common portal' for issuance of SCN / Demand Order as well as carrying out refund proceedings. Thus, these proceedings are technically invalid under Section 169 of the CGST Act.

The above view is also accepted by various

High Courts under the GST regime wherein Demand Orders passed by the department have been set aside on the ground that service of such Demand Order was improper under Section 169 of the CGST Act. Similar judicial pronouncement exists under the erstwhile Central Excise regime and the Customs regime. Given this situation, a taxpayer can argue that service of notice via www.gst.gov.in is not a valid service of notice by the department and can request the adjudicating authority to drop the proceeding. There is one exception to this situation. Section 160 of the CGST Act provides a saving provision wherein service of notice, order or communication shall not be challenged where such notice etc. has been acted upon by the recipient. This means that the present argument of improper service of notice can not be taken where the recipient has already filed a reply to the notice. This argument shall hold good in all those situations where reply to notice, order or communication is pending from the recipient's end.

The above lacuna very well impacts refund proceedings as well. The refund rules require filing of refund application electronically on 'common portal'. Presently, all refund applications are filed on www.gst.gov.in. The present portal is not a 'notified portal' for filing refund applications. Unlike Section 160 of the CGST Act, there is no saving provision for proceedings relating to refund applications. This is a more draconian situation as a taxpayer would be in trouble in case its refund application is rejected by the department on the ground that filing such application on www.gst.gov.in is invalid and time-limit to file such an application is also lapsed by the time the rejection order is issued. It is unlikely that the department would reject refund applications on the ground that the application is filed on www.gst.gov.in which is not a common portal yet a remote possibility of doing so can not be ruled out.

A retrospective amendment to above notifications is the only solution to remove this anomaly. Till the time such retrospective amendment is made, a taxpayer can contest SCN / Demand Order or any other communication issued by the department on www.gst.gov.in for undertaking assessment proceedings, on the ground of improper service. In cases of refunds, a taxpayer is advised to file a simple letter along with physical refund application (in notified forms) with the department informing that it has filed a refund application on www.gst.gov.in and request the department to act upon this application.

The Union Budget 2021 also introduced the concept of 'common portal' in the Customs Act as well. The concept is very similar to the existing concept under GST Act. It is an interesting space to watch whether the Government continues to make above misses or rectifies such glaring errors as far as administration of Customs law is concerned.

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Taxability of Prize Money

Winnings Under GST

IPL has just witnessed its most competitive season. Seeing the prize distribution ceremony, an interesting dilemma caught our attention, 'What would be the tax implications of prize money given to top performers of the tournament?' Is it a gift, is it a consideration for service, or none of these?

Taxation of prize money has always been a bone of contention, be it under income tax, erstwhile indirect tax laws or now in GST. If we ponder upon broad cases where prize money is given, following come to our mind:

- Sports leagues like IPL, ISL etc. (Man of the Match, Man of the Series)
- Car, Bike or Horse Races (Winnings or Prize Money)
- TV game shows like KBC, Dance Shows
- Online gaming
- Gambling, betting

This article aims to throw light on multiple controversies and aspects related to taxability of prize money under GST.

GST is levied on supply of services for a consideration in the course or furtherance of business. Hence, to determine if prize money is exigible to GST or not, one needs to analyze whether there is a supply in the course of business, and if there is a corresponding consideration for such supply. In the upcoming paragraphs, we have delved into the issue to assess if these parameters are present in case of prize money.

<u>Is the activity in course of business?</u>

An important aspect in GST is that an activity is taxable only when it is undertaken in the course and furtherance of business. In case of TV game shows, online gaming, gambling, betting etc, participants or gamblers do not undertake any activity in the course of their business. Such activity is undertaken in personal capacity and does not usually fall under definition of business.

On the other hand, if a professional participates in any event, he renders his professional services to the event organizer. For instance, a cricketer, a footballer or a horse rider are practicing their respective profession and as part of their profession, they participate in sports leagues or races. Hence, activities undertaken by them are in course of their business.

Is prize money in nature of consideration?

For a professional player or a rider, the next question that becomes relevant is whether prize money given to them for performing well or winning the race can be said to be consideration for their service or not? It is trite law that there should be a direct nexus between supply and amount received as consideration. Recently, Maharashtra Appellate Authority for Advance Ruling examined the issue in case of ***Vijay Baburao Shirke, 2019 (30) GSTL 63 (AAR-GST),*** wherein the Authority carved out that uncertain nature of consideration breaks the direct nexus between supply and consideration. Certain decisions of erstwhile service tax laws and EU VAT laws also advocate this view. In essence, they conclude that prize money cannot be said to be consideration for service rendered.

After careful consideration of the above jurisprudence, authors do not coincide with this view. In their view, prize money is directly linked to the participation service. It is only that that consideration is subject to player's performance. Under contract law, promise to pay consideration may be absolute or conditional, and conditional consideration is payable only upon satisfaction of specified conditions. A conditional consideration, say prize money, will not vitiate the nature of contract. In authors' view, it will not break the direct nexus between the services provided and consideration promised.

Authors find support from Australian GST Rulings, echoing the view that participants provide participation services to the event organizer for which they receive prize money as consideration. The Rulings clarify that prize money would become taxable for participant, if participation is done in the furtherance of its enterprise. It was further observed that the fact that prize is not awarded to every participant will not alter the fact that participation services are provided to the organizer. In authors' view, this case can also be considered similar to success fee models, wherein consideration is payable only if desired results are achieved (case is won or benefit is accrued to recipient).

Conclusion

The issue of taxability of prize money needs to be analyzed afresh under GST. The wide definition of business as well as nexus with consideration may result in taxation of prize money. Having said this, taxpayers may analyze their facts and decide to adopt favorable jurisprudence of service tax and EU VAT to dispute levy of GST. The moot question which looms at large is whether prize money amounts to consideration for supplying participation services. It will be interesting to witness the probable litigation on this issue amid upswing in prize-winning competitions at various platforms.

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Input Tax Credit On Demo And Test Drive Vehicles

Advance Rulings Put Industry In Confusion!

A traditional site whenever you enter into an automobile showroom, is a series of vehicles kept for display, for customers to enjoy the look, feel and comfort of the vehicle. 'The product itself is its best advertisement' seems to be the motto, and also the need of customers. Hence, it becomes essential for dealers to purchase vehicles for demo and test drive. Further, dealers necessarily have to update such vehicles and sell previous demo and test drive vehicles after a specified period or specified number of kilometres travelled as per their agreement with OEMs.

Under GST, the issue of availability of Input Tax Credit ('ITC') on demo and test drive vehicles remains unsettled even after four years. The confusion roots from the fact that ITC is generally not available on motor vehicles.

Restriction under GST on ITC eligibility

Section 16 of the Central Goods and Services Tax Act, 2017 ('CGST Act') entitles a registered person to avail ITC on supply of goods or services received by him and used in course or furtherance of his business. As demo and test drive vehicles are used for effecting sale of vehicles and in business promotion, there is no doubt on ITC eligibility at first place.

Section 17(5)(a)(A) of the CGST Act acts a barrier to avail such ITC, by disallowing ITC on motor vehicles for transportation of persons having approved seating capacity of not more than thirteen persons (including driver) except when they are '*used for making taxable supply, namely: further supply of such motor vehicles.*'

Paraphrasing the above restriction, the intent of legislature is to provide ITC on motor vehicles that are used for making further taxable supply of such motor vehicles. On a closer scrutiny, a cautious eye will note that this exception does not differentiate between immediate sale or sale without use vis-à-vis sale after a certain period or sale after usage. One may submit that use of word 'for' before '***further supply of such motor vehicle***' indicates that ultimately the vehicle should be used for its further supply, albeit of its usage in the meantime. Further, various law lexicons depict that expression '**such**' has wide coverage, when compared with '**as such**'. Had the intention of legislature been to restrict ITC on used vehicle, it would have used the words '**as such**' instead of '**such'.** Legislature seems to have deliberately used the word '**such**' in this provision.

One may doubt on ITC eligibility basis the

accounting treatment of demo and test drive vehicles, stating that these vehicles are usually capitalised in books and not treated as stock-in-trade. Importantly, unlike VAT laws, GST law does not create any distinction on eligibility of ITC based on accounting treatment of motor vehicles.

Hence, in Authors' view, **ITC will be available on demo and test drive vehicles** purchased by dealers and sold after a particular point in time.

The Authors also wish to point that for dealers who decide not to avail ITC on such vehicles (for any reason) will have a saving grace in form of concessional rate of GST[1] applicable on sale of used motor vehicles. Hence, the loss will be limited to ITC not availed less GST payable on old vehicles (if ITC was availed).

Advance Rulings on the issue

Lately, several inconsistent Advance Rulings have been pronounced on the impugned issue. Authors have a concern that though Advance Rulings are binding only on the Applicant, department's stand may be derived therefrom (specifically those adverse for taxpayers).

In ***A.M. Motors, 2018-VIL-197-AAR (Ker.),*** the question before the Authority for Advance Ruling ('AAR') was on admissibility of ITC on demo cars. The AAR held that since demo car will be further sold, the dealer can be said to be using such car for further supply (even though sale takes place after a certain period). In ***Chowgule Industries Private Limited, 2019-VIL-213-AAR (Goa), 2020-VIL-06-AAR (Mah.),*** it was held that ITC shall be available because the GST Act does not prescribe the time within which further supply is to be affected. Hence, the provision of Section 17(5) will not be triggered.

On the contrary, in ***Platinum Motocorp***

[1] *Notification No. 8/2018 -Central Tax (Rate) dated January 25, 2018*

LLP, 2021-VIL-54-AAR (Har.), the AAR denied ITC by stating that the term 'supply' has been prefixed by the word 'further' and due weightage should be given to the prefix. In essence, the term 'further supply' connotes 'resale' which is not the purpose of the Applicant behind purchasing demo cars. Similar view has been given by AARs in case of ***Khatwani Sales and Services LLP, 2021-VIL-114-AAR (MP) and BMW India Private Limited, 2021-VIL-37-AAR (Har.).***

In Authors' view, a plain reading of exception given under Section 17 does not express any ifs and buts. The simple point is that such vehicle must be further supplied, regardless of any usage, time period of sale or accounting treatment. Multiple adverse and contradictory Advance Rulings have only added to the woes and complexities of taxpayers.

Concluding remarks

It is unfortunate to say that though the objective of introducing Advance Ruling mechanism was to limit unwanted litigations, contradictory Advance Rulings have created more confusions than it has solved. In case of ***Chowgule Industries Private Limited*** (supra) and ***Platinum Motocorp LLP*** (supra), Applicants were authorised dealers of same manufacturing company. However, one dealer was allowed ITC on demo vehicles while the other was not. This results in price difference in different States, with some dealers forced to accept GST cost on demo vehicles.

With a handful of inconsistent Advance Rulings on the impugned issue, it is expected that department will not miss any chance of disallowing ITC on demo and test drive vehicles. Further, with newer models being regularly introduced and costs in automobile industry on the rise, ITC on demo and test drive vehicles will be significant. The Authors feel that it's high time for the industry to take a stable tax position for claiming ITC. The Industry should also approach GST Council to seek a clarification in their favour, putting all disputes to rest.

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Quarterly Return Monthly Payment (QRMP)

"support To Large Tax Payer In Hand With Small & Medium Enterprises"

I. Necessity:- With the inception of GST, the chapter IX of the CGST Act, 2017 has gone into several changes after taking into the practical challenges face with businesses/trade. Initially there are 3 monthly returns for all the tax payer. Seeming the challenges faced by GSTR-2, later shorten to file the two returns i.e. GSTR-1 & GSTR-3B. Though the law provides the relaxation in filing of GSTR-1 from monthly to quarterly but the filing of GSTR-3B is still on monthly basis. With the change in time of filing of GSTR-1 i.e. monthly to quarterly, the time lag of 4 months has been created to the tax payer filing GSTR-3B monthly, wishes to avail the ITC in the same month which could be possible with existing method of return related compliances.

II. Introduction:- The GST Council in its 42nd meeting held on 05.10.2020, had recommended that registered person having aggregate turnover up to Rs 5 crore may be allowed to furnish return (GSTR-3B) on quarterly basis along with monthly payment of tax, with effect from 01.01.2021. In other words, this scheme is for the small & medium enterprises wherein certain GST related relief in submission of their financial information is provided, simultaneously supporting the large tax payers who wishes to avail the ITC on the supplies made by such small & medium enterprises. This scheme is called as Quarterly return Monthly payment (QRMP).

III. Relevant provision:- The scheme introduced by giving effect to the following provisions:-

1. Notification No. 81/2020 – Central Tax, dated 10.11.2020:- Notifies amendment carried out in sub-section (1), (2) and (7) of section 39 of the CGST Act vide Finance (No.2) Act, 2019
2. Notification No. 82/2020 – Central Tax, dated 10.11.2020:- Makes the Thirteenth amendment (2020) to the CGST Rules 2017.
3. Notification No. 84/2020 – Central Tax, dated 10.11.2020:- Notifies class of persons under proviso to section 39(1) of the CGST Act.
4. Notification No. 85/2020 – Central Tax dated 10.11.2020:- Notifies special procedure for making payment of tax liability in the first two months of a quarter

Additionally Circular no. 143/2020-CGST has been issued to enumerate the impact of other related provision on the execution of the QRMP.

IV. Features of QRMP scheme:-

	Basis	Scheme Element
1.	**Eligibility**	An aggregate turnover of up to 5 crore rupees in the preceding financial year or during any quarter in the current financial year.
2.	Timeframe to opt in	First day of second month of preceding quarter to the last day of the first month of the quarter. Eg.: For Qtr 'April to June', application can be made from 1st Feb,21 till 30th April, 21
3.	Condition to opt in	Last return must furnished on date of exercising the option.
4.	Repetitive exercise to opt in	Once scheme has been avail, need not require to re-opt it for future tax periods.
5.	Condition to opt for first quarter of implementation i.e. Q4 of FY 2020-21	The registered person furnished the Oct,20 GSTR-3B on or before 30/11/2020
6.	Default deeming option for first quarter of implementation of the scheme	-for Quarterly return:- who are already a quarterly GSTR-1 filers & aggregate turnover more than Rs. 1.5 crore & upto Rs. 5 crore in preceding FY. -for Monthly returns:- whose has aggregate turnover of up to Rs. 1.5 crore & have furnished GSTR-1 monthly
7.	QRMP for some GSTIN or for all?	QRMP scheme is GSTIN wise & distinct person have the option to avail the scheme for one or more GSTIN.
8.	GSTR-1 or availing IFF facility?	The scheme provides the IFF facility for first two months to furnish the detail of outward supply till the 13th of the succeeding month. It is optional to avail the facility. Details furnished using IFF facility need not require to re-furnish in GSTR-1. Therefore only invoices of last month of the quarter is require to furnish in GSTR-1. Exception: The said details of outward supplies shall not exceed the value of Rs 50 lakhs in each month. On non-opting of this facility, detail of outward supply to be made in GSTR-1 quarterly.
9.	Benefits of IFF	The concerned recipient can avail the ITC in the same month in which invoices furnished by supplier in IFF by way of reflecting in recipient's GSTR-2B
10.	Manner of payment	*Form:- GST PMT-06 *Due date of payment:- 25th of succeeding month for first two months of quarter

	Basis	Scheme Element
11.	Payment method (at the option of tax payer)	*Fixed sum method:- Quarterly filer of GSTR-3B of previous Qtr:- 35% of tax liability in cash paid in preceding Qtr. Monthly filer of GSTR-3B of previous Qtr:- 100% of tax liability in cash paid in last month of preceding Qtr. *Self-assessment method:- No payment in cash be made if sufficient balance available in Electronic cash/credit leger for first two month of the qtr after ascertaining all the taxes on the outward & inward supplies.
12.	When to file GSTR-3B	The opted tax payer would file GSTR-3B by the 22nd or 24th as the case may be of the succeeding month to the quarter.
13.	Any change in manner of filing the GSTR-3B	No, the manner of declaring the tax on outward & inward supplies are same. But the tax paid in first two month would now be offset along with the third month liability.
14.	When to opt out?	From first day of second month of preceding quarter to the last day of the first month of the quarter. Eg.: Opting out for Qtr 'April to June', register person can exercise during 1st Feb to 30th April.
15.	Compulsory opt out	When aggregate turnover exceed Rs. 5 crore in a qtr in current FY shall opt to furnish the return monthly from the succeeding quarter.
16.	Effect of cancellation of registration	Registered person is required to file GSTR-3B for the relevant tax period.
17.	Interest on non-payment or short payment on opting Fixed sum method.	the tax liability net of available credit on the supplies made /received was higher than the amount paid in challan for the first two month of Qtr, No interest would be charged, if entire liability discharged in GSTR-3B by due date. Short/non-payment not discharged by the due date in GSTR-3B, interest @18% would be applicable from the due date of GSTR-3B till the date of making the payment.

	Basis	Scheme Element
18.	Interest on non-payment or short payment on opting Self-assessment method.	Interest u/s 50 of CGST Act, 2017 would be payable for the tax unpaid/paid beyond the due date for the first two months of the quarter on opting self-assessing determination of tax. However, no interest would be payable if tax is short paid/not paid after netting of credit on opting fixed sum method. Interest would be leviable on the net tax liability if the GSTR-3b has been filed beyond the due date.
19.	Levy of late fees	Late fees u/s 47 of CGST Act, 2017 would be applicable for delay in furnishing GSTR-3B. No late fee is applicable for delay in payment of tax in first two months of the quarter.

V. Method of calculation of payment under Fixed Sum method:- Under this method, a deposit to the electronic cash ledger is to be made base on the preceding quarter/month tax liability when the return has been filed quarterly/monthly respectively.
For example:- The tax liability of COT Ltd. for the month of Mar 2021 are-

Particulars	CGST	SGST	IGST
Tax liability	10,100	10,100	12,100
Credit utilized	1,100	1,100	1,100
Net cash paid	9,000	9,000	11,000
Tax required to pay in cash for the month of April-21 (in case COZ Ltd. filed GSTR-3B monthly)	9,000	9,000	11,000
*Suppose above figure of tax liability pertains to quarter 4 of FY 2020-21 instead of Mar-21, then value under fixed sum method is:-			
Tax required to pay in cash for the month of April-21 & May-21	9000*35% = 3,150	9000*35% = 3,150	11000*35% = 3850

The fixed sum method can only be opted when a registered person has furnished the return for a complete tax period i.e. the period from when registered person got registered till the preceding month/quarter for which such person is willing to opt this method.
For example:- Nest Pvt. Ltd. registered in GST from 5th February 2019. The company willing to opt for Fixed sum method from April'21, then all the return must be filed till the period ending March-21.

VI. Timeline for exercising option under QRMP Scheme during FY 2021-22:-

S.no.	Period-Quarter	Timeline
1	April – June (Q1)	1st Feb 2021 to 30th April 2021
2	July – Sept (Q2)	1st May 2021 to 31st July 2021
3	Oct – Dec (Q3)	1st August 2021 to 31st Oct 2021
4	Jan – March (Q4)	1st Nov 2021 to 31st Jan 2022

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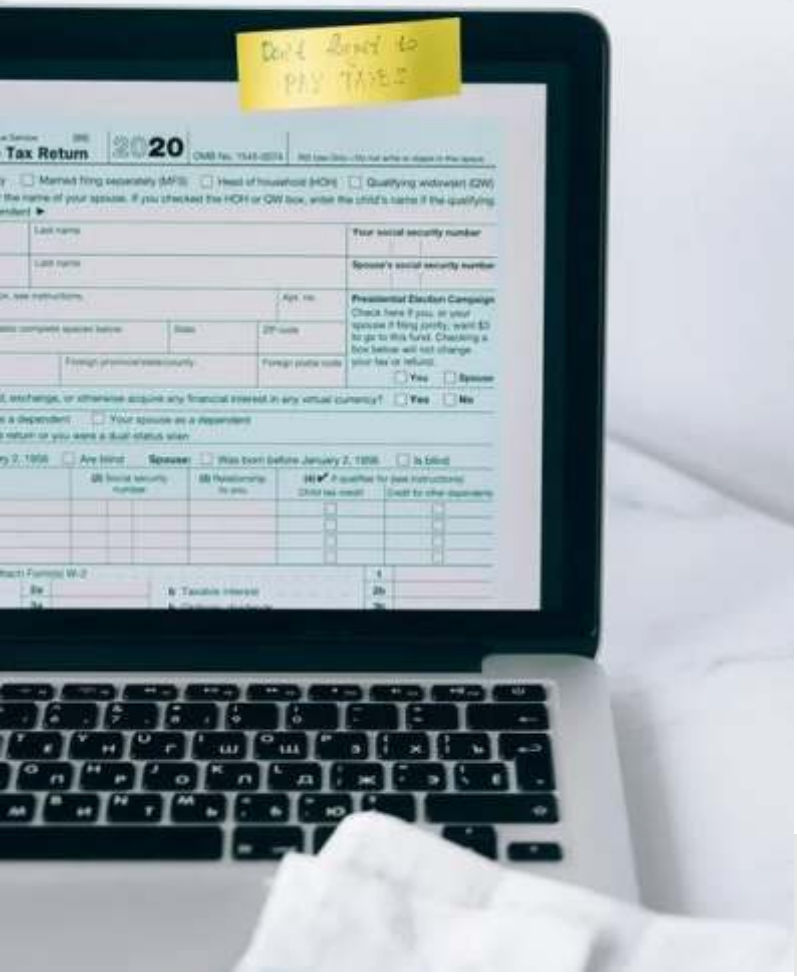

Section 16(2)(aa)

Final Nail In The Coffin?

The introduction of GST in India garnered a dream of seamless credits to taxpayers. The law when made available to public for the first time suggested some innocuous conditions to be fulfilled by taxpayers in order to avail Input Tax Credit (ITC). However, in the last three years, the numerous amendments made to the ITC related rules and regulations have raised heckles. Be it Rule 36(4) of CGST Rules, 2017 (the Rules), or Rule 86A and Rule 86B of the Rules, it seems that the ITC provisions are never good enough for the revenue.

A peculiar recent amendment is the insertion of Sub-section 2(aa) in Section 16 of CGST Act, 2017 (the Act).

What does Section 16(2)(aa) say?

Vide Finance Budget, 2021 that received the presidential assent in March 2021, a key amendment to the ITC provisions under GST was brought in.

A new sub-clause (aa) has been inserted in Section 16(2) namely:

'*(aa) the details of the invoice or debit note referred to in clause (a) has been furnished by the supplier in the statement of outward supplies and such details have been communicated to the recipient of such invoice or debit note in the manner specified under section 37;*'

Thus, post this insertion, now the recipient would be eligible to avail ITC in respect of an invoice only when two things happen simultaneously - supplier furnishes invoice details in Form GSTR-1 and communicates this to the recipient.

While it is believed that Section 16(2)(aa) of the Act is a legal guardian of Rule 36(4) of the Rules which has been challenged in courts[1] for its constitutional validity; the drafting of the section reveals much more. This is evident from the fact that it is not identical to Rule 36(4) of the CGST Rules in terms of its language giving out a different intent altogether.

Why taxpayers need to watch out for this amendment?

Essentially, the time of availing credit is set to undergo a change. The recipient would now no longer be eligible to avail ITC based on the ITC recorded in the books of accounts. The taxpayer would have to wait for the supplier to file details of the tax invoice in Form GSTR-1 which will then reflect the credit of taxes in GSTR 2A/GSTR 2B of the recipient. Moreover, the section also prescribes a communication being made by the supplier to the recipient in this regard.

Currently, the limit to avail ITC as per Rule 36(4) of the Rules is 105% of the ITC as given in GSTR 2A/2B. Therefore, it appears that the extra 5% ITC allowed would also be restricted once the relevant notification is issued in the Official

[1] M/s. LGW Industries Limited & anr. Vs Union of India & ors. (Calcutta High Court), Surat Mercantile Association Vs Union of India (Gujarat High Court), Gr Infraprojects Limited vs UOI (Rajasthan High Court)

Gazette. Moreover, the provision also seems to foresee a direct one-to-one corelation between invoices uploaded and ITC availed as against a consolidated ITC availment allowance. This can be understood well, with the help of following example:

ITC as per books – Rs 150

ITC as per GSTR 2A/2B – Rs 100 (invoices uploaded by supplier)

ITC communicated by supplier to recipient (sum of individual invoices) – Rs 80

In the above example, currently (before Section 16(2)(aa) is notified), the recipient is entitled to avail ITC of Rs 105/- (105% of ITC available in GSTR 2A/2B). However, after the said section is notified, the recipient would be entitled to avail ITC of Rs 80/- only.

This is due to the fact that the new provision requires the supplier to communicate to the recipient about the uploading of each invoice, post which the recipient can avail respective credit. This may also warrant for an invoice-to-invoice reconciliation for taxpayers which would become a tedious task. It could also entail in a monthly ITC reconciliation at minute level being done so as to avoid any penal consequences for availing incorrect ITC.

Conclusion and next steps

Even though the budget has received Presidential assent, the amendment awaits a notification in the Official Gazette. It seems as if the Government is trying to silence the clamor created by the introduction of Rule 36(4) by legalizing it with the help of Section 16(2)(aa). Nonetheless, it would not be surprising to see another uproar once the said Section is notified and exact modalities are disclosed.

However, it may take a while to bring the

Section to life as the GST council would need to deliberate on this and obtain a consent from all State Finance Ministers.

There are certain unanswered questions which one is forced to ponder upon such as:

- Though the section requires supplier to communicate details of invoices uploaded on GSTN to the recipient, no time limit has been provided. Does this mean that the recipient would be at the mercy of the supplier and await his communication for availing a credit well-earned? Moreover, there is already a large section of industry that is appalled at the unintelligible

differentia that the law creates between a recipient and supplier. A recipient is denied eligible ITC for the fault of the supplier. This provision would just aggravate the situation further.

- The harmony between Section 16(2)(aa) and Rule 36(4) would be tested once the provisions are in the ring together. While Rule 36(4) allows an extra 5% credit to taxpayers than what is reflected in their GSTR 2A/2B, Section 16(2)(aa) seems to allow only 100% credit that is reflected in GSTR 2A/2B. Moreover, Rule 36(4) was introduced when GST council was looking at introducing the new return system to simplify ITC availment for taxpayers. However, now that the new return system is scrapped, the existence of Rule 36(4) itself is questionable.

As a part of next steps, the organizations need to be proactive in reconciling their ITC as per books and ITC reflected in GSTR 2A/2B. Till date this reconciliation was required at aggregate level (i.e. to check if they are availing credit less than equal to 105% of ITC reflected in GSTR 2A/2B). However, once this provision is enacted, the organizations would need a real-time ITC reconciliation in place. This seems like a herculean task, especially for multinationals who have a large quantum of vendor invoices coming in. Nonetheless, it is only technology that come to the aid of such organizations in making this task easy and smooth.

Rationally speaking, when the Government grants registration to taxpayers, it verifies all necessary documents, information and authenticity. However, once the GSTIN is granted, it can be safely assumed by any person that the registered person is a valid and verified taxpayer. However, in a situation where such registered person turns out to be a fake entity or a fraudster, who is to be blamed? Should the honest taxpayers transacting with the fraudster be held in peril? Ideally not, because the Government gets a reasonable and fair chance to evaluate the legitimacy of all registered persons, which they appear to be unsuccessful at. If the Government of a land can be manipulated and deceived by fraudsters, isn't it obvious that honest taxpayers can be befooled as well (even after a reasonable due diligence is done with regard to its vendors). Therefore, unless the Government can prove that the recipient is a party to fraud or has an intention to evade taxes, why should the recipient be denied a legitimate ITC for which he has paid the vendor?

There is no denial of the fact that the Government needs take harsh measures to curb tax evasion and fake ITC; however, making an honest taxpayer a scapegoat for the same, hardly seems to be the right thing to do.

The author is Jigar Doshi – Founding Partner at TMSL – a tax, technology firm and the views are personal. He can be reached at jigar.doshi@tmsl.in. The article is co-authored by Nikita Lahoti – Manager at TMSL.

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Dispute Resolution and Tax Controversy

Digital Training on Dispute Resolution and Tax Controversy scheduled on 2nd, 3rd & 4th March, 2021 presented by Achromic Point. In this session on Tax Controversies was taken by Palaniappan A, Chartered Accountant & Aditya Jain, Chartered Accountant. Shashank Gupta, Managing Partner at Marg Tax Advisors shared his insights on Future of GST.Kavita Jha, Partner at Vaish Associates Advocates as a moderator along with the panelists Haroon Qureshi, Vice President – Taxes at Genpact, Mahesh Jain, Asia Pacific - Tax & T3 PCO Lead at Corteva, Ramesh Khaitan, Sr. Vice president –taxation at Lupin Limited, Umang Dhingra, Head of Tax – India at GlaxoSmithKline Asia Pvt Ltd, Pushpendra Dixit, General Manager & Global Tax Head at PVR Group & Alok Pareek, Head of Tax at Discovery India discussed about Tax Litigation & Dispute Resolution in India.

The Cybersecurity Readiness- Emerging Threats and Defenses

Webinar on The Cybersecurity Readiness- Emerging Threats and Defenses conducted on 12th, 16th, 19th & 23rd March 2021, where Introduction on the topic was taken by Savitha K Jagadeesan, Senior Resident Partner at Kochhar & Co. Electronic Evidence were discussed by Kamala Naganand, Advocate | Mediator at Aarna Law, whereas Different forms of Cybersecurity Threats: How to Identify and Report was discussed by Anirban Banerjee, Global Head - Business Advocacy & Excellence at TCS BFSI Operations. Anil Chiplunkar, Corporate InfoSec and IT Professional, Cyber Fraud Investigator at Infocounselors shared insights on Cyber Security Risk Management.

Virtual Training on Mergers and Acquisitions

In this Virtual Session on Virtual Training on Mergers and Acquisitions conducted on 16th, 17th, 18th & 19th March, 2021. Here, Fundamentals of Mergers and Acquisitions was discussed by Manish Tyagi, Partner at MHA Legal. Yatin Narang, Associate Partner at Vaish Associates Advocates & Priyanka Jain, Principal Associate at Vaish Associates Advocates shared their insights on Corporate Restructuring.Anup Vijay Kulkarni, Senior Associate at J Sagar & Associates spoke upon Merger and Demerger with the schemes of arrangement or compromise Sec 230 to 234 of the Companies Act. Last session was taken by Ekta Bahl, Partner at Samvad Partners on Important Terms of transactions which receive lots of attention from the audience.

Certificate Course on International Tax

In this Certificate Course on International Tax scheduled on 17th, 19th, 25th, 26th March 2nd, 7th, 9th, 10th April, 2021, where the Introduction to International Tax was given by Palaniappan A, Chartered Accountant & Prashanth Bala, Chartered Accountant. International Tax Treaties was taken by Vidur Puri, Senior Partner at SCV & Co. LLP. Ananya Kapoor, Advocate (Taxation) Chambers of Salil Kapoor & Sirish M I, Chartered Accountant shared insights on Double Taxation Avoidance Agreements. Ramesh Ravishankar, Chartered Accountant gave his inputs on International Tax Planning, whereas Session on BEPS and MLI was taken by Alok Sinha, Associate Director Corporate Business Tax at BSR & Co. Rajneesh Verma, Associate Partner Global Transfer Pricing Services at BSR & Co. LLP, Hemlata Sharma, Manager Global Transfer Pricing Services at BSR & Co. LLP & Yatika Arora, Manager – Transfer Pricing, India at BSR & Co. LLP shared their insights on Guiding Concepts of Transfer Pricing. The session on Penalties and Dispute Resolution was taken by Kavita Jha, Partner at Vaish Associates Advocates.

4th Annual GST Summit and Awards- Virtual Conference & Awards

In this 4th Annual GST Summit and Awards- Virtual Conference & Awards scheduled on 8th April, 2021, where the Conference commenced with a very warm welcome from the Director of Achromic point - Aashish Verma and inviting Sujit Ghosh-Advocate, Supreme Court of India & High Courts as a Key note speaker to share his insights and knowledge on GST.Yogesh Gaba-Managing Partner- Indirect Tax and International Trade, GABA & CO. spoke on Recent Amendments & Open Issues under GST. During the day, Conference participants were given the chance to understand about the Critical Key Judgements and Advance Rulings & Litigation Procedure and much more by Himanshu Goel-Associate Partner, TR Chadha & Co LLP. N V Raman-Founder Partner at NOVELLO Advisors LLP was gracious enough to moderate the panel discussion on Compliances under GST & Valuation where his co-panelists Sandeep Chilana-Managing Partner at Chilana & Chilana law offices, Vikas Garg-Director & Head of Indirect Taxes at Siemens Limited, Alok Pareek-Head of Tax at Discovery India & Rajat Mohan-Senior Partner at AMRG & Associates also share their insights on same which received a lot of attention from the audience.

Auditing and Reviewing Contracts, and Detection of Irregularities and Fraud

In this Webinar on Auditing and Reviewing Contracts, and Detection of Irregularities and Fraud scheduled on 12th, 15th & 16th April, 2021. Concepts of Contracts, detecting irregularities and fraud were discussed by Karishma Chanana, Aarna Law, Shrinivas Sankaran, Principal Associate at Vaish Associates Advocates shared his insights on Planning of Contract Review. Last session on Role of Audit and review in contracts was taken by Shashank Karnad, Partner & CEO Forensic Services at Mahajan & Aibara.

3rd Annual Anti-Fraud Conclave & Awards 2021

In this 3rd Annual Anti-Fraud Conclave & Awards 2021 scheduled on 28th April, 2021, where after the warm welcome from the Director of Achromic point - Aashish Verma, Nagesh Pinge Ethics, Risk Management & Internal Audit as a Key note speaker shared his insights and knowledge on The New World of Risk and Resilience. Shashank Karnad, Partner & CEO Forensic Services at Mahajan & Aibara spoke on Auditing Techniques and Forensic Accounting. Hardik Sheth, Head-Internal Audit & Risk Management at Tech Mahindra Business Services as a moderator along with his panelists Anirban Banerjee, Global Head - Business Advocacy & Excellence TCS BFSI Operations at Tata Consultancy Services, S V Sunderkrishnan, Chief Risk Officer at Reliance Nippon Life Insurance Company Limited, Ankoosh Mehta, Partner at Cyril Amarchand Mangaldas & Varun Wadhwa, Country Compliance Officer – India at CBRE South Asia Pvt. Ltd had a discussion on CRO/CIA Panel- Mitigating Corporate Frauds in the Era of Uncertainty. The Second panel on The need for effective coordination and interaction between the Internal Investigation, Internal Audit, Internal Control and Security functions to ensure comprehensive protection against fraud risks was taken by Zameer Nathani, Senior Vice President and General Counsel at UFO Moviez India Limited as a moderator along with his panelists Alok Saraswat, Associate Vice President - Fraud Control Unit & Sales Compliance at Future Generali India Life Insurance, Nirmal Paul, Vice President & Head – Fraud Prevention Unit & Claims Investigation at Bajaj Allianz Life Insurance Company & Shreyas Jayasimha, Advocate | Arbitrator | Mediator at Aarna Law (India) Simha Law (Singapore) which received lots of attention from the audience.

2021 Upcoming Events |

S. No	Topic	Date
1.	Mitigating Risk and Fraud in Procurement	18th May 2021 – Session 1 19th May 2021 – Session 2 20th May 2021 – Session 3 21st May 2021 – Session 4
2.	Data Analytics for Internal Auditors	24th May 2021 – Session 1 25th May 2021 – Session 2 26th May 2021 – Session 3 27th May 2021 – Session 4
3.	Digital Training on FEMA- Legal & Compliance	24th May 2021 – Session 1 25th May 2021 – Session 2 26th May 2021 – Session 3 27th May 2021 – Session 4 28th May 2021 – Session 5
4.	Direct Tax Summit and Awards 2021	28th May, 2021
5.	Certificate Course on Due Diligence and Business Valuation	8th June 2021 – Session 1 10th June 2021 – Session 2 15th June 2021 – Session 3 17th June 2021 – Session 4
6.	Certificate Course on Practical Knowledge of Arbitration and Dispute Resolution	8th June 2021 – Session 1 9th June 2021 – Session 2 10th June 2021 – Session 3 11th June 2021 – Session 4
7.	Hands on Digital Training on Drafting Commercial Contracts	14th June 2021 – Session 1 16th June 2021 – Session 2 18th June 2021 – Session 3 21st June 2021 – Session 4 23rd June 2021 – Session 5 25th June 2021 – Session 6
8.	Evolving Role of Internal Audit	14th June 2021 – Session 1 16th June 2021 – Session 2 18th June 2021 – Session 3 21st June 2021 – Session 4 23rd June 2021 – Session 5 25th June 2021 – Session 6
9.	Digital Training on Goods and Services Tax (GST)	12th July 2021 – Session 1 14th July 2021 – Session 2 16th July 2021 – Session 3 19th July 2021 – Session 4 21st July 2021 – Session 5 23rd July 2021 – Session 6
10.	Labour Codes - Key Issues and recent Amendments- 2nd Edition	23rd July 2021 – Session 1 24th July 2021 – Session 2 30th July 2021 – Session 3 31st July 2021 – Session 4

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