KSCAA

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NEWS BULLETIN

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CONVERGENCE
- Creating Impact Together

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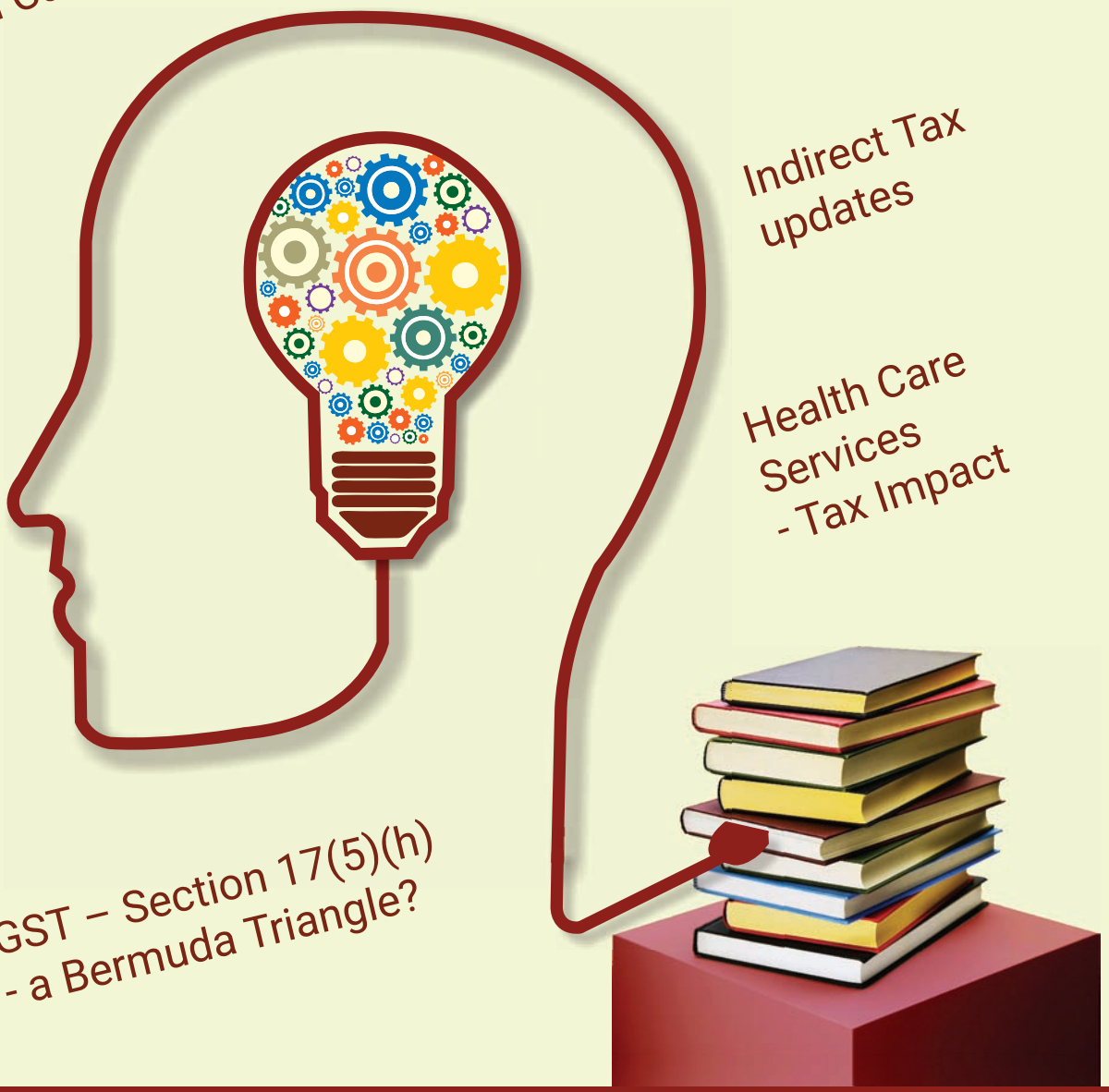

From the President

Dear Professional friends,

Often these days, the world outside and mind inside is completely filled with Covid and the fear which set in initially, seems to loosen. The government is also under pressure by many industries to liberalise the restrictions. Albeit, some view 'liberalising the initial restriction' as a dangerous precedent to a disastrous fate which we all would untastefully bite. Looking back at past 70 days, we have realised that the world would probably live with this new reality or what people call it as 'new normal'. India is also slowly marching on world top list of Covid infected, the current increase in rate of infection is inspite of the fact that lockdown was stringent in many parts of country for more than two months. ICMR even as on this day reiterates, India is still not in community transmission and so India has largely postponed the transmission to a large extent. WHO's chief scientist, noting India has a population of 1.3 billion, said that the 200,000 reported cases, "look big but for a country of this size it's still modest". On the economy front, India is pushed to some hard realities of falling GDP, poor productivity, rising unemployment etc. Some of the world's top agencies have already cut down the GDP numbers of India for the current year. However, some good news is that the GDP growth stories would continue to move positive in the fiscal 2020-21 and have been seen to outperform the peers in the same rating scale.

Even at KSCAA's activity level, every year the month of June was generally used for dispatch of financials and AGM would have been called for. This year with restriction in public assembly, we feel it apt to postpone the AGM event to a convenient subsequent date. We will let you know the same in the days to come.

News Roundup

Goods and Service Tax

CBIC has issued a Circular dated 10th June 2020 clarifying the levy of GST on Director's remuneration which had become a burning issue post the divergent rulings given by the Rajasthan and Karnataka Authority for Advance Ruling on the subject. Some of the jurisdictions had already started groundwork of gathering information about remuneration and other payments made to the directors from companies. This had created jitters among the corporates. Summary of the circular:

- Managing Director / Whole Time Director: Salary in Books and TDS u/s 192, hence out of ambit of GST.
- Independent Director: Professional / Sitting Fees in Books and TDS u/s 194J, covered by entry No.6 of Not. No.13/2017 – CT(Rate) and hence, liable for GST under RCM on the recipient company.

Government in its on-going efforts to neutralize the situation as impacted by Covid pandemic has released following additional reliefs measures to ensure there is ease in compliance of GST Law:

- Relief for small taxpayers whose aggregate turnover is up to Rs 5 crore will be provided a waiver of late fees and interest if they file the form GSTR-3B for the supplies affected in months of May, June and July 2020, by September 2020, no late fee or interest.
- Relief for small taxpayers whose aggregate turnover is up to Rs 5 crore, the rate of interest for late furnishing of GST returns for Feb-2020, Mar-2020 and April 2020, beyond July 6, 2020, the rate of interest is being reduced from 18% to 9% per annum and that is only till September 30.
- As measure to clean up pendency for people who have no tax liability the late fees will be **NIL** and people with tax liability, maximum late fee for non-filing of GSTR-3B returns for period July 2017 - January 2020 has been capped to Rs 500. This will apply to all returns submitted during July 1, 2020 - September 30, 2020.
- To facilitate tax payers who could not get their cancelled GST registrations restored in time, an opportunity is being provided for filing of application for revocation of cancellation of registration up to September 30, in all cases where registrations have been cancelled till June 12.

Corporate and Business Law

On account of Coronavirus pandemic, lot of companies had requested for leniency on the AGM rules owing to the social distancing norms and the nationwide lockdown. After considering the present situation, MCA has liberalised AGM rules clarifying that Companies can hold AGM through video conferencing (VC) or other audio-visual means (OAVM) during the calendar year 2020. Earlier the Finance Minister had relaxed the need to hold a Board meeting for once in 60 days for two quarters and had said that it would not be considered a violation of corporate governance norms if the Independent Directors do not hold any meetings.

Further, in order to ensure that the CSR funds are put to the right use, ICAI has advised that where a company undertakes the CSR activity through a third party, it should obtain an Independent Practitioner's Report on Utilisation of such CSR Funds from the auditor / CA in practice of the third party / NGO, to whom the funds are given by the Company for implementing CSR activity.

Direct Tax

- CBDT notifies new form for 26AS which shall also include information relating to assessee's specified financial transaction payment of taxes, demand/refund and pending/completed proceedings.
- CBDT amended Guidelines for application of section 9A. It contains provisions related to certain activities not to constitute business connection in India.
- CBDT notified the year of applicability of the 'Safe Harbour Rules for International Transactions' for AY 2020-21, as the existing rules were applicable only up to AY 2019-20.
- Section 269SU (using online mode for payments) is not applicable for specified person having only B2B transactions.
- CBDT issues a circular for exclusion of period of 22nd March 2020 to 31st March 2020 for computation of residential status for the financial year 2019-20.
- Instant PAN facility basis Aadhar based e-KYC launched. Now PAN can be obtained near to real time basis.
- Reduction of Tax deduction at Source and Tax collected at Source by 25% for remaining period of FY 2020-21.

Conclusion

As Mark Twain once said "If it's your job to eat a frog, it's best to do it first thing in the morning. And if it's your job to eat two frogs, it's best to eat the biggest one first."

The frog here means the job which you need to accomplish for the day, probably one of the dirtiest things which can happen to anyone is to eat a frog. The frog is one thing you have on your to-do list that you have absolutely no motivation to do and that you're most likely to procrastinate on. Eating the frog means to just do it, otherwise the frog will eat you meaning that you'll end up procrastinating it the whole day. Once that one task is done, the rest of the day will be an easier ride and you will get both momentum and a sense of accomplishment at the beginning of your day. If you have more than one important thing to achieve for the day, simply tackle the ugliest frog first. Remove the stress of choosing your frog early in the morning. Leave your resources to tackle it instead.

My Wishes to you all for a great learning and enriching experience.

Yours Sincerely,

CA. Chandrashekara Shetty

President

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Seizures in Search Cases

CA. S. Krishnaswamy

1. *Seizure of only movable relevant for assessment and other personal assets. Jewellery within reasonable limits must not be seized.*
2. *The Act provides for constructive seizure. (restraint order)*
3. *Seizer of assets found elsewhere is also covered under the section*
4. *Provisions for period of retention, extension and return of assets are also made.*
5. *The Act also provides application of seized assets, requisition.*

Introduction:

Section 132 empowers the tax authorities to initiate search proceedings at the premises of the taxpayer. During the course of search the tax authorities are also empowered to seize money, bullion, jewellery or other valuable article or thing found from the taxpayer. Generally, the seized material is taken by the tax authorities in their custody but in certain cases it may not be possible due to practical difficulties. In such a case, second proviso to section 132(1) empowers the tax authorities to seize the asset by keeping the asset at the place of the taxpayer serving an order on the owner or the person who is in immediate possession or control of the asset that he shall not remove, part with or otherwise deal with the asset, except with the previous permission of tax authorities. This action of the authorised officer shall be deemed to be a seizure of such valuable article or thing under the Income Tax Act, 1961.

Authorised Officer may seize any such books of account, other documents, money, bullion, jewellery or other valuable article or thing found as a result of such search as provided in Section 132 (1) (iii).

Extension of authorisation: 132(1A):

Where a search for any books of account, other document, money, bullion, jewellery or other valuable article or thing is authorized; and Other Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner in consequence of information in his possession, has **reason to suspect** that such document or asset is kept in any other building, place, vessel, vehicle or air craft not mentioned in the authorization, then such other Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner can authorize the officer to search such other building, place, vessel, vehicle or air craft.

Usefullness and Relevancy of a Search and Seizure:

In the case of **Sri. C. Venkata Reddy & Another vs Income-Tax Officer (66 ITR 212 1967 (Karn))** Karnataka High Court while discussing **'usefulness and relevancy'** of Search and Seizure held that-

"What the section requires is that documents should be useful for or relevant to the proceedings under the Act. In the context of the section, the usefulness or relevancy referred to could only be usefulness or relevancy of the type appropriate to the stage of investigations but not to an actual trial or inquiry. It would only suggest or require an application of the mind to make out a prima facie case of usefulness or relevancy and not a final or absolutely correct decision about the relevancy. The point really is that the searching officer should act with restraint and should not seize documents unless, on a prima facie examination, he honestly feels that they may be useful for or relevant to the proceedings under the Act."

Difference between Seizure and Impounding:

A seizure is made at a particular moment when a person or authority takes into his possession some property which was earlier not in his possession. Thus, seizure is done at a particular moment of time. However, if after seizing of a property or document the said property or document is retained for some period of time, then such retention amounts to impounding of the property/or document.

The word 'impound' has been defined to mean to take possession of a document or thing for being held in custody in accordance with law.

Section 132 (1) (iii) empowers the Authorised Person for seizure. Whereas Sec. 131 (3) empowers the Authorised

Person to impound and retain in its custody for such period as it thinks fit under any proceeding under the Act. However, Authorised Person being an Assessing Officer or an Assistant Director or Deputy Director shall not (a) impound any books of account or other documents without recording his reasons for so doing, or (b) retain in his custody any such books or documents for a period exceeding fifteen days (exclusive of holidays) without obtaining the approval of prescribed higher Authorities.

What can be Seized and what not:

The Authorised Person can seize any books of account, documents, money, bullion, jewellery or other valuable article or thing found as a result of such search.

In the case of **Shyam Jewellers vs. Chief Commissioner (Admn. (1992) 196 ITR 234 (All)** held that stock in trade of business cannot be seized during search and seizures operations conducted on or after 1st June, 2003. (Circular No.7/2003 dated 5.9.2003 (2003) 263 ITR 61 (St.) .There is no provision for sealing of the business premises either under sec. 132 or section 133A.

In the case of **Alleppey Financial Services vs. ADIT 236 ITR 562** held that it would not be correct for the search officers to seize assets not belonging to the assessee where there was explanation as to the ownership of such assessee.

Immovable property cannot be seized as held in the case of **Bapurao v. Asstt Director of Income-tax [2001] 247 ITR 98 (MP);** followed in **Sardar Parduman Singh v Union of India 166 ITR 115** and held in **CIT v. M.K. Gabrial Babu [1991] 188 ITR 464 (Ker.)**

It was held by the Supreme Court in the case of **K. Choyi v. Syed Abdulla Bafakky Thangal [1980] 123 ITR 435 (SC)** that a seizure cannot be made once assessment is completed.

In the case of **Dheer Singh v. Asst. Director or Income-tax [1997] 90 Taxman 392 (All)** and in the case of **Smt. Bimla Singh v. Chief CIT 1997 Tax LR 873 (Pat.)** it was held that assets which are not convertible/realisable into cash cannot be seized.

In the case of **S.R. Batliboi & Co. v. Department of Income-tax (Inv.) [2009] 315 ITR 137(Delhi)** it was held that client records of a Chartered Accountant cannot be seized. In terms of section 132(1) (iib) revenue is not entitled to demand an unrestricted access to and; or right to acquire electronic records present in laptops that belong to auditor of assessee and not to assessee himself, including electronic records pertaining to third parties unconnected with assessee.

Section 132 does not confer any authority on ITO to realize assets and convert them into cash. Therefore, a revenue official cannot compel bank to encash fixed deposit and make over proceeds to him as held in the case of **Windson Electronics (P.) Ltd v. Union of India [2004] 141 Taxman 419 (Cal.).**

C.B.D.T Instruction on Seizure of Jewellery:

The Central Board of Direct Taxes has issued Instruction No. 1916 dated 11th May, 1994 in the matter of seizure of jewellery, which reads:

"(i) In the case of a wealth-tax assessee, gold jewellery and ornaments found in excess of the gross weight declared in the wealth-tax return only need to be seized.

(ii) In the case of a person not assessed to wealth-tax gold jewellery and ornaments to the extent of 500 gms. per married lady 250 gms per unmarried lady and 100 gms per male member of the family, need not be seized.

(iii) The authorized officer may having regard to the status of the family and the customs and practices of the community to which the family belongs and other circumstances of the case, decide to exclude a larger quantity of jewellery and ornaments from seizure. This should be reported to the Director of Income-tax/ Commissioner authorizing the search all the time of furnishing the search report.

(iv) In all cases, a detailed inventory of the jewellery and ornaments found must be prepared to be used for assessment purposes."

From the above Instruction issued by the CBDT, it can be said that no seizure should be made by the Search Party of the Jewellery and Ornaments found during the course of search proceedings under Section 132, where the same have been duly declared in the Wealth-tax Returns filed by the taxpayer or where such ornaments are within the prescribed limits of 100, 250 or 500 grams as stated in the said instruction.

It was held by the Rajasthan High Court in the case of **CIT v. Satya NarainPatni (2014) 46 taxmann.com 440 (Rajasthan)** that CBDT had clearly provided that prescribed limit of jewellery will not be seized, it would mean that taxpayer, found with possession of such jewellery, will also not be questioned about its source and acquisition.

The Allahabad High Court held in the case of **CIT v. Ghanshyam Das Johri (2014) 41 taxmann.com 295 (Allahabad)** that if one goes with CBDT's Instruction No. 1916, dated 11-5-1994 then a married lady of reputed family is expected to own 500 gms of ornaments. Therefore, jewellery found in possession to that extent could not be treated as undisclosed investment.

In the case of **CIT v. Divya Devi (2014)**, it was held that though it is true that the CBDT Instruction No. 1916, Dt. 11th May, 1994 lays down guidelines for seizure of jewellery and ornaments. In the course of search, the same takes into account the quantity of jewellery which would generally be held by family members of an assessee belonging to an ordinary Hindu household. In the circumstances, unless the Revenue shows anything to the contrary, it can safely be presumed that the source to the extent of the jewellery stated in the circular stands explained.

In was held in the case of **Jerambhai B. Khokharia, Surat vs Department Of Income Tax** on 5 November, 2015, that gold jewellery found to the extent of limit mentioned in the circular is treated as explained.

Deemed or Constructive Seizure-Second Proviso to Sec. 132(1):

Where it is not possible or practicable to take physical possession of any valuable article or thing and remove it to a safe place due to reason of it's being of a dangerous nature, the authorised officer may serve an order on the owner or the person who is in immediate possession or control of any valuable article or things that he shall not remove, part with or otherwise deal with such article or thing without the prior permission of such authorised officer.

Such action of the authorised officer shall be deemed to be seizure of such article or thing.

In this connection, the followings points are worth noting-

- No such order can be passed for any article or thing, being stock-in-trade.
- Though such order can also be passed for reasons other than those mentioned above, but in that case, the order shall not be deemed to be seizure of such article or things and it shall not be in force for a period exceeding 60 days from the date of the order [Sec. 132(3) & (8A)]

Presumption in case of Search [Sec. 132(4A)]:

Where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are, or is found in the possession or control of any person in the course of search, it may be presumed that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belongs to such person and the contents of such books of account and other documents are true.

The signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person, are in that person's handwriting and in the case of a document stamped, executed or attested, it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested.

Provisional Attachment:

Where during the course of the search or seizure or within a period of 60 days from the date on which the last of the authorisations for search was executed, the authorised officer may attach provisionally any property belonging to the assessee and for the said purpose, the provisions of the Second Schedule shall, mutatis mutandis, apply.

Such attachment shall be subject to following conditions:

a. The authorised officer is satisfied that for the purpose of protecting the interest of revenue, it is necessary to do so.
b. The reasons for such provisional attachment should be recorded in writing.
c. Previous approval (in writing) of the Principal Director General or Director General or the Principal Director or Director has taken.

Every provisional attachment shall cease to have effect after the expiry of 6 months from the date of such order.

The authorised officer may make a reference to a Valuation Officer referred to in Sec. 142A, who shall estimate the fair market value of the property in the manner provided under that section and submit a report of the estimate to the said officer within a period of 60 days from the date of receipt of such reference.

Time Limit for Retention [Sec. 132(8)]:

The books of account or other documents seized or deemed seized shall not be retained by the authorised officer for a period exceeding 30 days from the date of the order of assessment u/s 153A; following are the exception-

a. The reasons for retaining the same are recorded in writing; and

b. Prior approval of the Principal Chief Commissioner or Chief Commissioner, Principal Commissioner or Commissioner, Principal Director General or Director General or Principal Director or Director for such retention is obtained.

However, the aforesaid authorities shall not authorise the retention of the books of account and other documents for a period exceeding 30 days after all the proceedings in respect of the years for which the books of account or other documents are relevant, are completed.

Right to Make Copies or Take Extract [Sec. 132(9)]:

The person from whose custody books of account or other documents are seized may make copies thereof or take extracts therefrom. Such right can be exercised in the presence of the authorized officer or any other person empowered by him in this behalf, at such place and time as the authorized officer may appoint in this behalf.

Power of the Board to pass an order [Sec. 132(10)]:

Where a person is legally entitled to the books of account or other documents seized, such person objects for any reason to the approval given by the authorities; and such person makes an application to the Board stating therein the reasons for such objection and requesting for the return of the books of account or other documents; then the Board may, after giving the applicant an opportunity of being heard, pass such orders as it thinks fit.

Application of Seized or Requisitioned Assets:

The seized assets may be adjusted with the amount of any existing liability under a) The Income-tax Act, 1961, b) The Wealth-tax Act, 1957 (now abolished).

Release of Asset-Sec.132B:

Where the following conditions are satisfied, the amount of any existing liability may be recovered out of such asset and the remaining portion of the asset may be released to the person from whose custody the assets were seized-

a. The person concerned makes an application to the Assessing Officer within 30 days from the end of the month in which the asset was seized for release of asset;

b. The nature and source of acquisition of such asset is explained to the satisfaction of the Assessing Officer; and

c. The Assessing Officer obtains the prior approval of the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner.

Time limit for release of asset:

Asset or any portion thereof shall be released within a period of 120 days from the date on which the last of the authorisations for search u/s 132 or for requisition u/s 132A, as the case may be, was executed.

Order of assets to be applied for discharging liability:

The above liability shall be discharged by applying the seized asset in the following order-

a. Money;

b. Asset other than money (as laid down in the Third Schedule).

It is to be noted that the assessee shall be discharged of the liability to the extent of the money and asset so applied. However, Assessing Officer shall not be precluded from the recovery of above liabilities by any other mode.

Discharge of excess money:

After discharging all liabilities if any assets or proceeds thereof left, then it shall be returned to the persons from whose custody such assets were seized.

Interest payable to the assesse:

Where the aggregate amount of money (either seized or realized through sale of assets) seized exceeds the aggregate of the amount required to meet the liabilities, Government shall pay simple interest at the rate of ½% p.m. The interest shall be payable from the date immediately following the expiry of the period of 120 days (from the date on which the last of the authorisations for search u/s 132 or requisition u/s 132A was executed) to the date of completion of the assessment u/s 153A.

Conclusion:

The power of seizure is linked to suspected income sought to be avoided at the time of search, the assessee should validly explain sources of assets linked to his returns so as to avoid unnecessary seizure. There are certain assets like stock-in-trade which cannot be seized. Where assets do not belong to the assesse, he must establish ownership of assets at the time of search to avoid seizure, for example, assets belonging to wife or other assets where proof is available.

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Health Care Services - Tax Impact

CA. Annapurna D Kabra

It is common belief that there is relaxation from taxation for the service rendered by the clinical establishments. Furthermore, the issue is whether full relaxations from taxes are provided for the services rendered by the health care services centre under the erstwhile law or under the GST law. The author in the following paragraphs analyse the impact of taxes on the composite activities rendered by the clinical establishments.

The health care services were brought within the ambit of service tax law and such services were exempted from service tax by way of notifications. Even under the GST regime, the health care services are exempted from tax by way of notification. There was no question of levy of VAT on health care services as VAT is levied only on sale of goods. If the hospitals sale any goods like medicine, food, etc then there is levy of VAT under the Erstwhile law.

The disputed issue is whether the medicines supplied, implants carried out, consumables used, and surgical tools exclusively used for inpatient during medical treatment are liable for VAT treating as sale of goods or should be treated as rendering of service. The Kerala High Court in case of ***M/s Sanjose Parish hospital Vs the State of Kerala 2019-VIL- 20- KER -LB-VAT*** held that it cannot be treated as sale of goods nor would the deeming provision under Article 366(29A) of the constitution taken in such services to differentiate the distinct elements comprised in one, inseparable, indivisible transactions. It basically state that drugs, implants and consumables administered or used in the course of medical treatment are out of definition of sale of goods and it is basically the integral or indivisible part of the composite transaction rendering medical treatment which is nothing but the rendering of service. The element of sale is an integral part of the medical service and cannot be separated or distinctly plucked away from the composite transactions to levy tax on sale element. Therefore, it is held that the levy of VAT is not competent and permissible because the sale is affected in the course of composite service and accordingly such activities should be treated as provision of service.

The Tamilnadu High Court in case of ***MIOT Hospitals Ltd Vs the State of Tamilnadu 2020-VIL-238-MAD-VAT dated 28.5.2020*** held that implants like ortho implants, plates, stents, valves, pace makers, etc in the body of the patients for treatment by surgery and providing other ancillary services are taxed as **works contract** as per Tamilnadu VAT Act 2006. It was argued by the applicant that hospital/medical service cannot amount to works contract and Medical/Health service is not recognised as a sale or purchase under Article 366(29A) of the Constitution of India. It was argued that the dominant intention is the provision of medical/health service and not sale of goods. It is held by the Honourable Court that such activities are treated as '**Works Contract'** under the State VAT law and it can include hospital/health/medical services involving composite contracts where there is not only a provision of service but also supply of goods along with such service. Therefore, it is held that there is levy of VAT treating such contract as works contract under the State VAT law.

The above contended issue under the erstwhile law was even raised before the GST Advance Ruling Authority. In the case of **M/s Baby Memorial Hospital Limited 2019-VIL-419-AAR dated 05/09/2019** wherein it is held that the supply of artificial body parts/devices such as heart valve, artificial kidney, artificial joints and coronary stents etc which are implanted in the body essentially by means of a surgical procedure can be classified as a composite supply where the principle supply is of healthcare services and are exempted from GST. In the case of **M/s Kim's Health care Management limited 2018-VIL-246-AAR dated 20.10.2018** wherein the supply of medicines, consumables and implants used in the course of providing health care services to inpatients for diagnosis or treatment are naturally bundled and are provided in conjunction with each other would be considered as composite supply and eligible for exemption under the category health care services. In the case of **M/s Royal Care Speciality Hospital Limited 2019-VIL-406-AAR dated 26.9.2019**, wherein it is

stated that supply of medicines, implants and consumables are naturally bundled with the supply of health services. In this case supply of health services is the principal supply as that is the reason the inpatients get admitted to the hospital instead of buying the medicines or consumables and using on themselves. Therefore, supply of medicines, consumables and implants to impatient in the course of their treatment is composite supply of health services. In the case of **Shifa Hospitals 2019 -VIL-409-AAR dated 23/09/2019** wherein the medicines, consumables and implants used in the course of providing health care services to inpatients by the applicants is a composite supply of inpatient services classifiable under SAC 999311. In the case of **M/s CMC Vellore Association 2019-VIL-482-AAR dated 25/11/2019** the supply of medicines, drugs, stents, consumables and implants used in the course of providing health care services to inpatients admitted to the hospital for diagnosis or medical treatment or procedures is a composite supply of inpatient healthcare services.

Under the GST law, the services rendered by the clinical establishments are treated as composite supply wherein the principal supply is of healthcare services. Health care services means any service by way of diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognised system of medicines in India and includes services by way of transportation of the patient to and from a clinical establishment, but does not include hair transplant or cosmetic or plastic surgery, except when undertaken to restore or to reconstruct anatomy or functions of body affected due to congenital defects, developmental abnormalities, injury or trauma.

Therefore, Health care services provided by a clinical establishment, an authorised medical practitioner or paramedics are exempt (Entry 74 in Rate Notification 12/2017 dated 28.6.2017). The services provided by senior doctors/ consultants/ technicians hired by the hospitals, whether employees or not, are healthcare services which are exempt from GST. Food supplied to in-patients as advised by the doctor/nutritionists is a part of composite supply of healthcare and not separately taxable. Other supplies of food by a hospital to patients (not admitted) or their attendants or visitors are taxable. The supply of medicines and allied items provided by the hospital through the pharmacy to the outpatients is taxable. The supply of medicines and allied items provided by the hospital to the inpatients is part of composite supply of health care treatment and hence not separately taxable.

Therefore, the levy of GST/Service tax on composite health care services are exempted by way of Notification but the issue is with respect to levy of VAT on the goods used in provision of composite service. The decision of Tamilnadu High Court in case of ***MIOT Hospitals Ltd Vs the State of Tamilnadu 2020-VIL-238-MAD-VAT dated 28.5.2020*** has stunned the Health care services sector treating such services as deemed sale (works contract) under the State VAT law. It is uncertain that whether there will be retrospective exemption from levy of VAT considering ST/ GST exemptions or will the above verdict result into endless litigation on composite health care services.

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Indirect Tax updates

CA. Raghavendra C R & CA. Bhanu Murthy J S

I. **Notifications and Circulars**

A. **Furnishing of returns through EVC and SMS**:

a) Prior to this amendment, GSTR-3B by a registered person (who is registered under the provisions of Companies Act, 2013), could be filed only by using "Digital Signature (DSC)". However, keeping in mind the COVID-19 situation, the facility of filing the return through Electronic Verification Code (EVC) has been extended to such registered persons also during the period from 21st April 2020 till 30th June 2020.

b) Furnishing of "NIL" return in Form GSTR-3B by SMS:

Rule 67A has been inserted to provide for filing of a 'NIL' return by a registered person through short messaging service(SMS). This facility has been made effective from 8th June 2020 and SMS shall be sent using the registered mobile number and verification through OTP i.e. One Time Password facility.

(Notification No. 38/2020-CT dt 05.05.2020 & 44/2020 dt. 08.08.2020)

B. **Amendments to the special procedure issued for corporate debtors who are undergoing insolvency resolution proceedings.**

Notification No. 11/2020 CT dt. 21.03.2020 provides for special procedure for corporate debtors undergoing the corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016, by deeming such persons as special class of persons. This provides for separate registration process and also special procedures for filing of returns and availment of credit for such class of persons.

This notification has been amended to provide that the special procedures would not be applicable to those corporate debtors who have furnished the statements (GSTR-1) under section 37 and the returns (GSTR-3B) under section 39 of the CGST Act, 2017 for all the tax periods prior to the appointment of IRP/RP. Further, registration procedure is also amended.

(Notification No.39/2020-Central tax dated 05.05.2020)

C. **Due date for filing of Annual Return and Reconciliation Statement for financial year 2018-19 extended**:

The due date for furnishing annual return in Form GSTR-9 / Form GSTR-9A and reconciliation statement in form GSTR-9C has been extended till 30th September 2020.

(Notification No. 41/2020-Central tax dated 05.05.2020)

D. **Amendment to Section 140 of CGST Act, 2017 vide Finance Act, 2020 is notified.**

Section 140 provides for transition of credits and other benefits accrued under the erstwhile provisions of Central Excise, Service tax and VAT. Initially, the said provision did not provide any time limit within which such transitional credit could be availed. Based on this certain High Courts held that no time limit could be prescribed under rules where such prescription was not provided under the statute. In this background, vide Finance Act, 2020 the provisions were amended, retrospective w.e.f. 1.7.2017. Vide Notification No. 43/2020-CT dt. 43/2020 CT dt. 16.05.2020, the amendment has been notified.

Note: Notwithstanding this amendment, the courts could take a view that the credit is a vested right and the time limit itself may still be held procedural in nature. Further, the matter is also pending before the Hon'ble Supreme Court.

E. Vide Circular No. 138/08/2020-GST dt. 06.05.2020, Board has issued clarifications on the aspects relating to special procedures issued in relation to corporate debtors who are undergoing insolvency resolution proceedings. Further, the said circular also clarifies certain issues relating to amendments brought facilitate taxpayers on account of COVID-19.

II. **Important decisions:**

1. **Classification of car matting- whether as carpets or as parts or accessories of car**

CCE Vs UNI Products India Ltd 2020-TIOL-91-SC-CX

Issue before the Court was whether car matting (textile mats used in car) are to be classified as 'Carpets and other textile floor coverings' covered under chapter heading 5703 or as parts or accessories of vehicles covered under the heading 8708.

The Court taking into account the HSN Explanatory Notes which specifically exclude "tufted textile carpets, identifiable for use in motor cars" from 87.08, held that the goods are classifiable under the heading 5703 and not under 87.08.

2. **Validity of levy of GST (under reverse charge mechanism) on ocean freight**

Mohit Minerals Pvt Ltd & Others Vs. Union of India & Others 2020-TIOL-164-HC-AHM-GST

The petitioner who imports non-cooking coal, challenged levy of IGST on ocean freight on the ground that the duty of customs is already paid on the imported value which includes freight and also the services are provided and received outside India and hence levy under RCM not permissible.

The High Court held that the notifications levying tax on supply of service of transportation of goods by a person in a non-taxable territory to a person in a non-taxable territory from a place outside India upto the customs station of clearance in India and making the petitioner, i.e. the importer, liable for paying such tax, are ultra vires the provisions of the IGST Act. The Court further observed that the importer could be said to have neither availed the services of transportation of goods in a vessel nor he is liable to pay the consideration of such service. Hence, the writ-applicant is not the 'recipient' of the transportation of goods in a vessel service as per Section 2(93) of the CGST Act.

3. **Whether the activity of chilling of raw milk, eligible for exemption from GST.**

Gujarat Cooperative Milk Marketing Federation Ltd Vs UoI, 2020-TIOL-456-HC-AHM-GST

Entry 24 of Notification No.11/2017-CTR dated 28th June, 2017, exempts "support services to agriculture, forestry, fishing, animal husbandry". Issue before the Court was whether the services of 'chilling and packing of the raw milk' would get covered under the above entry.

The Court held that chilling of milk does not alter any of its essential characteristics and it still remains raw milk, and it is this raw milk which is thereafter packed. Hence chilling and packing of milk would get covered under the exemption.

4. **Validity of amendments to VAT Act, after Constitutional (101st Amendment)**

Reliance Industries Ltd Vs State of Gujarat 2020-TIOL-837-HC-AHM-VAT:

Background: Gujarat VAT Act, 2003 was amended to insert Section 84A vide VAT Amendment Act, 2018, to be operative retrospectively w.e.f 01.04.2006, inter alia, providing for the exclusion of the period spent between the date of the decision of the appellate tribunal and that of the High Court as well as the Supreme Court in computing the period of limitation (for revision of assessments) , referred to in Section 75 of the VAT Act. The said amendment was challenged on the grounds of same being ultra-vires and beyond the legislative competence of the State of Gujarat under Entry 54 of List II of the Seventh Schedule to the Constitution of India.

The Court allowing the petition held that after amendment of the Constitution vide Constitution (101st Amendment) Act, 2016, the State does not have legislative competence to enact any law relating to levy or collection of sales tax in terms of entry 54 of List II of the Seventh Schedule, except for the goods specifically covered under the said entry after the amendment. The Court further held that if unlimited time period is available to the Revenue for assessment/reassessment/ revision in any case based on a decision rendered in the case of any other dealer the same would lead to an irreparable situation and, in such circumstances, it renders Section 84A manifestly arbitrary and unreasonable. Hence it is held that Section 84A of the VAT Act is liable to be struck down even on the ground of being manifestly arbitrary, excessive, oppressive and unreasonable.

5. **Validity of recovery of interest without adjudication**

Union of India Vs LC Infra Projects (P) Ltd [2020] 116 taxmann.com 205 (Karnataka)

Assessing authority without issuing show cause notice as contemplated under section 73 determined interest payable under section 50 and attached bank account of assessee for recovery of the same. The question before the High Court was whether issuance of show cause notice is sine qua non to proceed with recovery of interest payable in accordance with sub-section (1) of section 50.

The High Court held that issuance of show cause notice is sine qua non to proceed with recovery of interest payable in accordance with sub-section (1) of section 50. The Court observed that before penalizing the assessee by making him pay interest, the principles of natural justice ought to be complied with.

6. **Applicability of time limit (in terms of section 11B of Central Excise Act, 1944) for claiming refund of accumulated credits in terms of Rule 5 of Cenvat Credit Rules, 2004**

Suretex Prophylactics India (P.) Ltd vs CCE [2020] 116 taxmann.com 566 (Karnataka)

Issue: Whether the time limit of one year as prescribed under section 11B of the Central Excise Act, 1944, would be applicable for claiming refund being the accumulated CENVAT credit?

The High Court based on the following observations held that the time limit as prescribed under sec. 11B would be applicable:

a) Supreme Court in the case of Mafatlal Industries Ltd. v. Union of India [(1997) 5 SCC 536, observed that all claims for rebate/refund have to be made only under section 11-B with one exception that where a statute is struck down as unconstitutional.

b) Supreme Court in the case of UOI vs Uttam Steels Limited, [2015] 13 SCC 209, held that the limitation period prescribed under section 11B of the CE Act, 1944 should be strictly applied to refund claims made under subordinate legislations and it would not be open to subordinate legislation to dispense with the requirements of section 11-B.

c) The provisions of section 11B of CE Act shall equally apply to the service tax law vide section 83 of the Finance Act, 1994. Therefore, the refund claims shall also be subject to time limit specified in section 11B of the CE Act, 1944.

d) Rule 5 of CENVAT Credit Rules itself clearly specifying that such refund claims would be subject to "such safeguards, conditions and limitations as may be specified, by the Central Government, by notification". Notifications issued under the said rule clearly specify that the time limit as prescribed under section 11B is applicable.

The Court further observed that the relevant date for computation of the time limit for applications filed for claiming refund under rule 5 of CCR on account of export of services shall be the end of the quarter in which FICRs are received.

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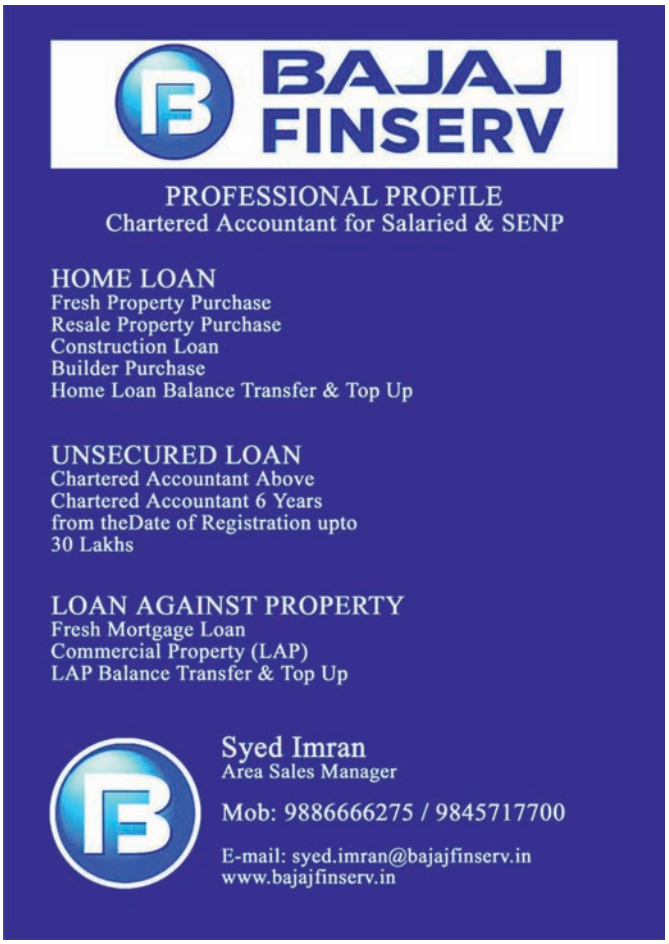

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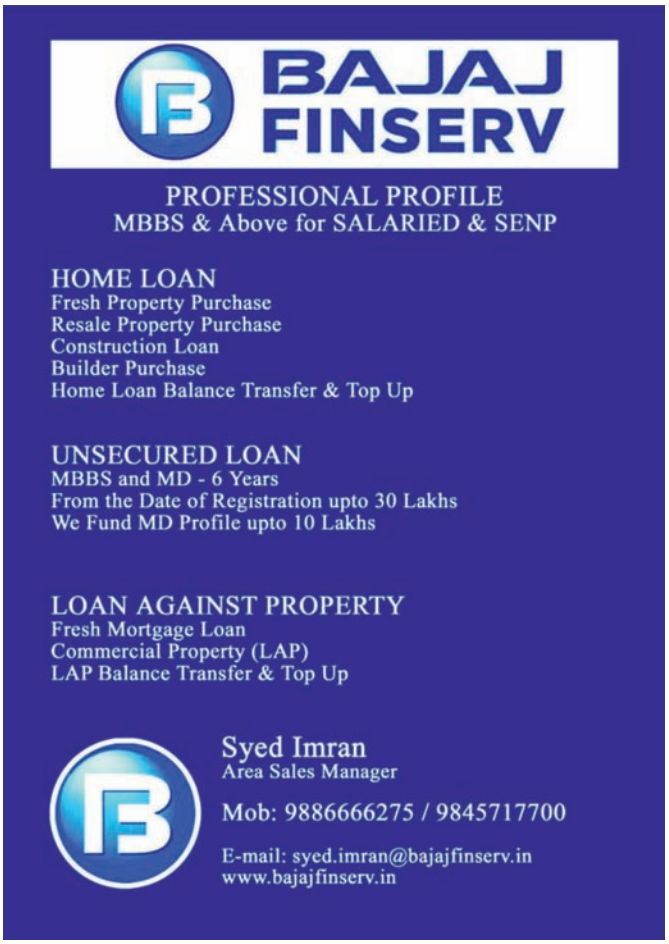

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Hybrid Instruments – A New Venue of Litigation for Tax Authorities

CA. Nikhilesh Cacarla & CA. Sachin Deshpande

Ever since introduction of '*Special provisions relating to avoidance of tax*'under Chapter X of the Indian Income Tax Act 1961 (IT Act) in 2001, Transfer Pricing (TP) has seen new dimensions of growth and tremendous thrust of application and relevance under the IT Act. The provisions enshrined under Chapter X of the IT Act provided a new breeding ground for Multinational Enterprises (MNEs) with respect to cross border transactions and the resultant tax planning that MNEs adopted to camouflage the international transactions from the ambit of both IT Act and Global Tax Laws. Any subject of such magnanimous stature shall always and inherently, have risks, controversies and litigation associated with it.

The genesis of TP litigation was on the subject of comparable companies and related nitty-gritties, which included maintaining TP documentation, adoption of filters and economic analysis. However, in the recent times, the TP litigation ambit has expanded rapidly and has adapted itself to the changing landscape of MNEs and their structuring.

In the recent years, there has been a new trend of litigation that has arisen in the field of international taxation wherein the tax authorities have invoked the use of Base Erosion and Profit Shifting (BEPS) Project and had taken recourse to the actions introduced by the Organisation of Economic Co-operation and Development (OECD). One such issue is the subject of re-characterization of hybrid instruments.

BEPS Action Plan - 2 defines a hybrid mismatch arrangement to mean *"an arrangement that exploits a difference in the tax treatment of an entity or instrument under the laws of two or more tax jurisdictions to produce a mismatch in tax outcomes where that mismatch has the effect of lowering the aggregate tax burden of the parties to the arrangement"*.In simple words hybrid mismatch arrangements are used to achieve unintended double non-taxation or for long term tax deferral. The following examples may help us for the better understanding of hybrid mismatch arrangement:

1. Creation of two deductions for single borrowing
2. Generation of deductions without corresponding income inclusion
3. Participation exemption regime
4. Misuse of foreign tax credit

In this article, we would look at one such case of domestic litigation involving hybrid instruments, the stand of the tax department on this subject and the outlook of international laws and practices.With India slowly transforming itself into a global hub for business, MNE have locked their radar on India by trying to leverage on the economic growth and also to maximize their share of the pie by way of significant infusion of funds. The infusion was done using a plethora of instruments, which were ranging from plain vanilla share subscription to complex convertible instruments.In the recent few years, given the flexibility offered for MNEs to opt for employing convertible instruments for raising funds along with the backing provided under Foreign Exchange Management Act 1999 (FEMA), such convertible instruments secured sizeable footprint. However, the tax department have been constantly questioning the intent of using such instruments by posing questions on the following lines:

1. Commercial intent for such funding; and
2. Sustenance of the said arrangement from a TP angle.

In few cases tax department proceeded to invoke the BEPS actions, drew conclusions to the effect that such transactions are tax abusive in nature, and therefore, should be disregarded in entirety.

One such issue was dealt with in the case of ***M/s. CAE Flight Training (India) Private Limited [IT(TP)A. No. 599/Bang/2016, IT(TP)A No. 2178/Bang/2016 and ITA No. 2006/Bang/2017].*** The Hon'ble Bangalore Income Tax Appellate Tribunal (ITAT) dealt with the issue on hand as to whether hybrid instruments, in the nature of Compulsorily Convertible Debentures (CCDs) issued was to be re-characterized as equity or shall retain its intended nature of being a debt instrument.

The tax department raised arguments to the tune that CCDs were treated as equity by invoking the thin capitalization rules. A summary of the arguments made by the tax department are as below:

- The Transfer Pricing Officer ("TPO") had proceeded to determine the nature of funds received as to whether they were in the nature of equity or debt.
- The TPO invoked thin capitalization rules of various jurisdictions and drew conclusions that debt capital was raised to shift profits by way of interest payments and claim exemptions in the foreign jurisdiction due to it being characterized as dividends.
- Taking recourse to other regulatory laws like FEMA and Reserve Bank of India (RBI) guidelines, the TPO held that CCDs post conversion would be equity capital and therefore are equity in nature since inception. The RBI guidelines stated that CCDs were equity in nature.
- The TPO held that revenues were inadequate to service interest payments and therefore, the same amounted to thin capitalization.

Considering the above, the TPO had proceeded to re-characterize the instrument as equity and determined the Arm's Length Price (ALP) of the transaction as NIL thereby resulting in a full adjustment under transfer pricing. As a consequence of such re-characterization, the full quantum of interest expenditure was disallowed under Section 36(1)(iii) of the IT Act.

The ITAT had considered the matter in detail and delivered the following key findings;

- Should the domestic law not have any sort of anti-abuse provisions with regard to issuance of CCDs and if they did not prohibit the issuance of such instruments, it is not the jurisdiction of the tax department to disregard the transaction and its overall structuring.
- Thin capitalization rules were not present in the IT Act (for the assessment years under litigation) unlike certain foreign jurisdictional tax laws like United Kingdom or Belgium and therefore, invoking the same in India is not under the permissible ambit of the TPO. Also noted that such provisions only act as limitation simplicator and does not change the nature of the instrument;
- The analysis of the TPO based on reliance placed on RBI policies and Foreign Direct Investment guidelines are not valid since these guidelines are to promote foreign direct investment into India along with dealing on the aspects of future repayment obligations of CCDs. Held that such characterization by the RBI cannot be applied to every aspect of CCD;
- Borrowing the principles laid out under RBI policy and FDI guidelines and applying them to the IT Act is no rational since they address different objectives;
- Should the TPO's arguments be considered with respect to treating CCD as equity, the answer to the question as to whether CCDs grant the right to vote and the right to receive dividend is negative. Therefore, CCDs are not to be considered as equity since they fail the basic character test.

Relying on the above findings, the ITAT held that CCDs cannot be considered as equity and therefore, the accompanying interest should be allowed as deduction under section 36(1)(iii) of the IT Act. Indeed, the said ITAT ruling will come as a relief to numerous Indian companies which have raised investment through the CCD route. However, with regard to determination of the ALP of interest paid as to whether the benchmarking rate to be adopted was London Interbank Offered Rate (LIBOR) or Prime Lending Rate (PLR),the matter remanded back to the TPO for determination.

Key takeaways

- With the growing boundaries of TP and rapid changes at the global level due to BEPS and other initiatives, TPOs have taken recourse to certain "extra-terrestrial" powers in proposing tax adjustments and ignoring the basic law laid down under the IT Act.
- Although BEPS Action 2 – "Neutralizing the effects of Hybrid Mismatch Arrangements" is put in place to curb the menace of double non-taxation by MNEs in various jurisdictions, India has not yet notified BEPS Action 2.
- Invoking anti-tax avoidance measures currently active in foreign countries and not yet enforced in India cannot be a valid ground to uphold adjustments.
- Although the above case provides a significant breakthrough with respect to re-characterization of hybrid instruments, the core issue of ALP

determination for interest paid is not yet decided. In this regard, one can rely on multiple case laws having dealt with this issue as to whether LIBOR or PLR is the rate to be adopted for benchmarking, which are fact-specific.

- The relevance of Section 94B of the IT Act which was introduced vide Finance Act 2017 in accordance with (BEPS) Action Plan- 4 i.e., "Limiting Base Erosion Involving Interest Deductions and Other Financial Payments", with respect to interest limitation would receive a lot of thrust with the introduction of hybrid instruments thereby opening up newer avenues for the tax department.
- Taxpayers can substantiate the above arrangement by stating that appropriate withholding was done on the interest paid and therefore, intention of tax evasion was not present.
- As a next step of action, it would be worthwhile to evaluate the presence of substantial question of law in the aforesaid arrangement in case the tax department seeks to challenge the ITAT's findings at the higher level.
- Moreover, the tax authorities may protect their interest by invoking General Anti-Avoidance Rules (GAAR) as per domestic laws, if assessee is engineered in any arrangement with an intention to take undue tax benefit which was otherwise not permissible.

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OBITUARY

We deeply regret to inform sad demise of

our Past President and

Current Chairman & Mentor of Publication Committee

CA. H B M Murugesh

left for heavenly abode

on 4th June 2020.

**"Some people come into our lives and quickly go,
some stay for a while and leave footprints on our hearts,
and we are never, ever the same".**

May his soul rest in peace.

Financial Reporting and Assurance

CA. Vinayak Pai V

1. **UPDATES:** *Monthly Roundup*[1]

AS/IND AS	• ICAI **Concept Paper** o All About ***Fair Value***.
IFRS	• **Amendment to IAS 1**, *Presentation of Financial Statements* o ***Classification of Liabilities as Current or Non-current*** ▪ IASB has proposed to defer the effective date of amendment to annual reporting periods commencing on or after January 1, 2023.
	• IASB Package of **narrow-scope amendments to IFRS Standards** o **IFRS 3**, *Business Combinations* o **IAS 16**, *Property, Plant and Equipment* o **IAS 37**, *Provisions, Contingent Liabilities and Contingent Assets* o Annual Improvements - **minor amendments** to **IFRS 1, IFRS 9, IFRS 16** and **IAS 41.**
	• **Amendment to IFRS 16**, *Leases* o Amendment to help lessees accounting for ***Covid-19 related rent concessions***.
Assurance	• IAASB Publications o *Covid-19* related Guidance on **Audit Considerations for Subsequent Events.** o **ISA 540** (Revised) Implementation: Illustrative Examples for **Auditing Simple and Complex Accounting Estimates.**
	• ICAI Decision o **Communication with the Retiring Auditor** through *E-mail.*
	• ICAI **Advisory for Statutory Bank Branch Auditors** (May 06, 2020).
	• ICAI Clarification – ***Fees from a Single Client***.
	• ICAI **Auditing Guidance** 1. **Going Concern** – *Key Considerations for Auditors amid Covid-19.* 2. **Physical Inventory Verification** – *Key Audit Considerations amid Covid-19.* 3. **Auditor's Reporting** – *Key Audit Considerations amid Covid-19.* 4. **Subsequent Events** – *Key Audit Considerations amid Covid-19.*
Company Law/ SEBI	• SEBI Circular No. SEBI/HO/CFD/CMD1/CIR/P/2020/79 dated May 12, 2020 o **Additional Relaxation in relation to compliance with certain provisions of LODR** – Covid-19 Pandemic ▪ Relaxation from **publication of advertisements** in newspapers ▪ Relaxation from **publishing quarterly consolidated financial results** under Reg 33(3) (b) for **certain categories of listed entities.**

	• SEBI Circular No. SEBI/HO/CFD/CMD1/CIR/P/2020/84 dated May 20, 2020 o **Advisory on Disclosure of Material Impact of Covid-19 Pandemic** on Listed Entities under SEBI (LODR) Regulations.
RBI Notifications	• **Risk Management and Inter-Bank Dealings** – *Hedging of Foreign Exchange Risk* – Date of Implementation (now effective from September 1, 2020).
	• **Import of Goods and Service**s – *Extension of Time Limits* for Settlement of Import Payment.
	• **Large Exposures Framework** – Increase in Exposure to a Group of Connected Counterparties.
	• Covid-19- **Regulatory Package** (May 23, 2020).
US GAAP	• **PCAOB** Spotlight – *Information for Auditors and Audit Committees* o **Audits involving Crypto Assets**.
	• **US SEC** adopts amendments to I**mprove *Financial Disclosures about Acquisitions and Dispositions* of *Businesses***.

[1] *Updates for the period May 1 to May 31, 2020.*

2. **GETTING UP TO SPEED:** *Package of Narrow-scope Amendments* –**Amendments to IFRS Standards**

On May 14, 2020, the International Accounting Standards Board issued a package of amendments that include narrow-scope amendments to three IFRS Standards and the Board's Annual Improvements. These amendments are **effective January 1, 2022**.

A summary of the amendments is provided herein below.

1. **IFRS 3**, *Business Combinations* – **Updates of a reference** in the standard to the ***Conceptual Framework***.
2. **IAS 16**, *Property, Plant and Equipment* – **Prohibits** companies from **deducting from the cost of PPE** amounts **received from selling items produced** while the company **is preparing the asset for its intended use**. Instead, a company will recognize such sale proceeds and related cost in the Statement of Profit or Loss.
3. **IAS 37**, *Provisions, Contingent Liabilities and Contingent Assets* – **Specifies** which **costs** a company **includes** when **assessing whether a contract will be loss making.**
4. Annual Improvements making minor amendments to **IFRS 1, IFRS 9, IAS 41 and IFRS 16.**

3. **FINANCIAL STATEMENT EXTRACTS:** *COVID-19* – **Impact**

Extracts from published financial statements (related to Disclosure of **COVID-19 impact** in the Notes to the Financial Statements) of a global listed company operating in the **Aerospace Industry** is provided herein below.

The global outbreak of Covid-19 is having a significant adverse impact on our business and is expected to significantly reduce revenue, earnings and operating cash flow in future quarters. The aerospace industry is facing an unprecedented shock to demand for air travel which creates a tremendous challenge for our customers, our business and the entire aerospace manufacturing and services sector. ***We currently expect it will take 2-3 years for travel to return to 2019 levels and a few years beyond that for the industry to return to long-term trend growth****. There is significant uncertainty with respect to when commercial air traffic levels will begin to recover, and whether and at what point capacity will return to and/or exceed pre-Covid-19 levels.*

We have taken actions *to reduce production rates in our commercial business to reflect the Covid-19 impact on the industry. We have furloughed certain employees and recently announced a voluntary employee layoff program which we plan to implement in the second quarter of 2020. We are also planning to further reduce our workforce by the end of this year through a combination*

of attrition and involuntary layoffs, as necessary. We are reducing discretionary spending as well as reducing or deferring R&D and Capex. We are also working with our customers and supply chain to accelerate receipts and conserve cash.

The Covid-19 ***crisis is constraining the credit and capital markets*** *and our ability to access credit markets may be reduced.*

4. **CASE STUDY:** *Reporting On A Key Audit Matter (KAM)* **– Presentation of Exceptional Items**

Background

Company X separately presents exceptional items within the Statement of Profit and Loss. The determination of whether certain items should be separately disclosed as an exceptional item requires judgement on its nature and incidence, and its use requires judgement as to whether it provides a better understanding of the Company's underlying trading performance. In the period under report this risk is elevated due to the volume of transactions affected by this classification.

How the scope of the audit responded to the KAM

The auditor's procedures included the following:

- Assessing **Principle**

  The auditors evaluated the appropriateness of the Company's accounting policy for identifying exceptional items, by considering this against external regulator guidance and applicable accounting standards.

- Assessing **Application**

  The auditors selected a sample of items presented as exceptional in order to assess if their presentation was consistent with the Company policy and consistent with underlying documentation.

- Assessing Balance

  The auditors assessed the adequacy of the disclosure of the definition and composition of exceptional items.

5. **BACK TO BASICS:** *Trade Receivables* **(Ind AS)**

The salient aspects of accounting for **Trade Receivables** under Ind AS are discussed herein below.

- Trade receivables are **initially recognized at fair value** and **subsequently measured at amortized cost less provisions for impairment** based upon an expected credit loss methodology.
- **The simplified approach to measuring expected credit losses** is applied to measure credit losses which uses a lifetime expected loss allowance for all trade receivables.
- **A provision of the lifetime expected credit loss** is established **upon initial recognition** of the underlying asset and are calculated **using historical** account payment profiles along with historical credit losses experienced. The loss allowance is **adjusted for forward looking factors** specific to the debtor and the economic environment.
- The amount of the provision is the difference between the asset's carrying amount and the present value of the **probability weighted estimated future cash flows**, discounted at the effective interest rate.
- The amount of the provision is **recognized in the Statement of Profit and Loss.**

6. **TRIVIA**

US GAAP has, for long, been a proponent of historical cost accounting for financial reporting of fixed assets (PPE). The US SEC from its inception in 1934 disapproved most upward revaluations of long-term assets. While this accounting position has been altered subsequently for certain layers, ***extant USGAAP prohibits upward revaluations of PPE***.

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Overview of Personal Data Protection Bill, 2019

Adv. M G Kodandaram
IRS, Assistant Director (Retd), NACIN

Privacy concerns of an individual

The privacy of an individual as a right has become a matter of concern as more and more entities are using data pertaining to individual's life and activities, for illegitimate purposes and money-making. The rampant deployment of digital technology tools to collect such data of a person on some pretext and commercial exploitation of the same for profit, without the consent or knowledge of the subject, has created a scary situation to the individual. When such personal data reaches the wider net of criminals, the damage it can cause to one's personal life cannot be gauged. Such data could be used by the criminals for committing various offences in the society.

As on date there are no specific laws for the protection of personal data of an individual. The need for such a law attained a larger proportion and significance, when the government started the 'Aadhaar Project' that aimed at building a database of personal identity and biometric information covering every Indian. As on date the registration of a person under Aadhaar has become inevitable as this information is mandatory for filing tax returns, for opening bank accounts, for securing loans, for buying and selling of property and many more similar transactions. The concern in respect of non- government agencies engaged in gathering personal data is much more acute, as such collected data / information are being used for profiling an individual. Such data are also presented for sale by such agencies. These illegal activities are moving on top gear unabated and unregulated, heaving fears in the private life of a citizen.

Privacy - a fundamental right

In 2012, Justice K.S. Puttaswamy (Retd.) filed a petition in the Supreme Court of India challenging the constitutionality of 'Aadhaar Project' on the ground that it violates the right to privacy of an individual. The Supreme Court in all its earlier decisions had held that the right to privacy is not a fundamental right. The Aadhar data, among others, involved privacy information of all Indian citizens, which could be misused by any person who has access to such crucial information. As it was a question of law having impact and importance on life and liberty of a person, the same was referred to a five-judge bench, which thereafter got referred to an even larger bench of nine judges, to pronounce commandingly on the status of the right to privacy.

The Supreme Court in the above case viz., Justice K.S. Puttaswamy v/s Union of India [(2015) 8 S.C.C. 735 (India)], passed the historic judgment on 24th August 2017 wherein it affirmed the constitutional right of a citizen to protect her/his privacy. The Apex Court held that the privacy of a person is a fundamental right flowing from the right to life and personal liberty as well as other fundamental rights securing individual's liberty. Further the individual's dignity is cited as the basis for extending it the status for it as a fundamental right. The Article 21 mandates that, *"No person shall be deprived of his life or personal liberty except according to procedure established by law"*. Now, by the above decision, the Article 21 is said to include 'the Right to Privacy'. Such fundamental right usurped from the citizen by any private entity or the government and doing so will be in violation of fundamental rights guaranteed by the Constitution. The judicial remedies are available to the victim through writs under Article 32 and Article 226 of the Constitution. Further, the Supreme Court clarified that the right to privacy is not an "absolute right", but may be subjected to reasonable restrictions in certain situations. For using such restrictions (i) there must be existence of a genuine state interest; (ii) such restriction should be proportionate to the interest; (iii) and it shall be through valid legislations.

The Personal Data Protection Bill, 2019

During the proceedings of the said case, the Indian government set up an expert committee, headed by Justice (Retd) B N Srikrishna, to devise a data protection legal framework. After public consultations, the committee submitted its report along with a draft Personal Data Protection Bill 2018. The Union Government, after certain modifications, introduced the 'Personal Data Protection

(PDP) Bill, 2019' in the Lok Sabha on December 11, 2019. This Bill proposes to provide a legitimate structure for protection of personal data of individuals and regulatory framework for collection and processing of such data by various agencies through establishment of a Data Protection Authority. At present, the Bill is referred to a joint parliamentary select committee for scrutiny and report, after suitable consultation with all stake holders. The Bill is designed to regulate all agencies involved directly or indirectly in the activities relating to collection and processing and preserving of personal information, and therefore has huge ramifications in management of data by almost all the entities concerned. Therefore through this article a general overview is attempted. Further detailed analysis on specific topics will be followed in the subsequent issues.

In the Preamble, the stated objectives of the Bill are: "*A BILL to provide for protection of the privacy of individuals relating to their personal data, specify the flow and usage of personal data, create a relationship of trust between persons and entities processing the personal data, protect the rights of individuals whose personal data are processed, to create a framework for organisational and technical measures in processing of data, laying down norms for social media intermediary, cross-border transfer, accountability of entities processing personal data, remedies for unauthorised and harmful processing, and to establish a Data Protection Authority of India for the said purposes...*"It is further asserted that, "*the right to privacy is a fundamental right and it is necessary to protect personal data as an essential facet of informational privacy. The growth of the digital economy has expanded the use of data as a critical means of communication between persons and therefore it is necessary to create a collective culture that fosters a free and fair digital economy, respecting the informational privacy of individuals, and ensuring empowerment, progress and innovation through digital governance and inclusion ....*".

The collection of information about individuals, their online habits and movements (through location tracing) etc., have become a lucrative source of unjust enrichments for the entities engaged, whereas the same is a potential avenue for invasion of privacy because it can reveal extremely personal aspects of the person concerned. Personal data is data which pertains to characteristics, traits or attributes of identity, which can be used to identify an individual. Various Companies, commercial organizations, governments and political parties and others find it valuable because they can use it to find the most convincing ways of their gain. The main purpose of the Bill is to prevent the breach of privacy of an individual. The Bill governs the processing of personal data by: (i) government, (ii) companies incorporated in India, and (iii) foreign companies dealing with personal data of individuals in India. The Bill governs the processing of personal data by all such agencies.

Data Principal and Sensitive personal data

The clause 4 of the PDP Bill states that, 'no personal data shall be processed by any person, except for any specific, clear and lawful purpose'. The "**personal data**" has been defined as 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 [clause 3 (28)]. The term "**data**" includes a representation of information, facts, concepts, opinions or instructions in a manner suitable for communication, interpretation or processing by humans or by automated means.[clause 3 (11)]. The personal data collected in the traditional way, using non-digital mode [paper pen method] are also covered under the scope of the Bill, as above definitions indicate. One more important factor to be noted is that the protection under this proposed legislation is limited to the personal data. The definition of personal data covers any inference drawn from personal data for the purpose of profiling since such inference typically leads to indirect identification of a natural person. The natural person to whom the 'personal data' relates are called **"data principal"**[clause 3 (14)].

The following information about an individual / principal are treated as "**sensitive personal data**".[clause 2 (36)]'(i) financial data; (ii) health data; (iii) official identifier; (iv) sex life; (v) sexual orientation; (vi) biometric data; (vii) genetic data; (viii) transgender status; (ix) intersex status; (x) caste or tribe; (xi) religious or political belief or affiliation; or (xii) any other data categorised as sensitive personal data under section 15 by the authority and the sectoral regulator concerned. From a quick look at the definition of sensitive personal data, it is evident that the chartered accountants and other tax practitioners who are handling some of the above mandated categories of data in respect of the Principal [clients]have to take immediate steps to understand, implement and manage such data as per the stated legislation in making.

Data fiduciary and processing

The entities that collect and / or process a data relating to a principal are called as **"data fiduciary"**. As per clause 2 (13), the data fiduciary means any person, including the State, a company, any juristic entity or any individual who alone or in conjunction with others determines the purpose and means of processing of personal data. The entity / person has been defined to include (i) an individual, (ii) a Hindu undivided family, (iii) a company, (iv) a firm, (v) an association of persons or a body of individuals, whether incorporated or not, (vi) the State, and (vii) every artificial juridical person.[Sn2(27)]. The "**data processor**" means any person, including the State, a company, any juristic entity or any individual, who processes personal data on behalf of a data fiduciary.[clause 2(15)].The "**processing**" in relation to personal data, means an operation or set of operations performed on personal data, and may include operations such as collection, recording, organisation, structuring, storage, adaptation, alteration, retrieval, use, alignment or combination, indexing, disclosure by transmission, dissemination or otherwise making available, restriction, erasure or destruction[clause2(31)].

Obligations of data fiduciary

The Bill allows the processing of data by fiduciaries only after the due consent is obtained from the individual / principal. For obtaining the consent of an individual for collection or processing of personal data there is need of issue of a notice by the fiduciary to such person, stating the reasons in clear, concise and easily comprehensible terms. Further such activities should be carried out, restricted to such purposes as consented, in a fair and reasonable manner, so as to ensure the privacy of the data principal.

A personal data can be processed only for specific, clear and lawful purposes. The data fiduciary shall not retain any personal data beyond the period necessary to satisfy the purpose for which it was processed and shall delete the personal data at the end of processing. The personal data may be retained for a longer period only after the data fiduciary gets necessary consent from the data principal.

In addition to the above stipulations, all fiduciaries should undertake certain transparency and accountability measures such as: (i) implement data security safeguards, such as data encryption and preventing misuse of data. (ii) Set up grievance redressal mechanisms to address complaints of individuals. They must also institute fair mechanisms for age verification and provision should be made for obtaining parental consent when processing sensitive personal data in respect of Individuals below the age of 18 years.

The sensitive personal data may be transferred outside India for processing only on explicit consent of the individual, and subject to certain additional conditions. However, such sensitive personal data should continue to be stored in India. Certain personal data notified as 'critical personal data' by the government can only be processed in India. However, in certain circumstances, such as requirement of information by the State for providing benefits to the individual, for the purposes of legal proceedings, to respond to a medical emergency, the personal data can be processed without such consent of the individual**.**

The Rights of data principal

The primary objective of the Bill is to safeguard the right to privacy of the citizen /principal. The principal, in respect of the personal data pertaining to him/her, has the following rights:

(i) Right to confirmation and access to the personal data with the fiduciary.

(ii) Right to seek correction of inaccurate, incomplete, or out-of-date personal data.

(iii) Right to have personal data transferred to any other data fiduciary in certain circumstances. [Data portability]

(iv) Right to restrict continuing disclosure of their personal data by a fiduciary, if it is no longer necessary or consent is withdrawn.

(v) The right to receive the data from the fiduciary in a machine-readable format.

Other important contents of the Bill

The PDP Bill 2019 consists of 98 clauses and one Schedule, distributed among 14 chapters. Other important features of the Bill are as follows:

Administrative mechanism by government: The Bill proposes for setting up of a Data Protection Authority (DPA) who may, (a) take steps to protect interests of individuals, (b) prevent misuse of personal data, and (c) ensure compliance of concerned with the Bill. It will consist of a chairperson and six members, with at least 10 years' expertise in the field of data protection and information technology. Orders of the Authority can be appealed to an Appellate Tribunal. Appeals from the Tribunal will go to Supreme Court.

Administrative mechanism by the fiduciary: The Bill mandates that a data fiduciary is required to formulate a privacy by design policy that ensures (a) Managerial,

organizational, business practices and technical systems designed in a manner to anticipate, identify, and avoid harm to the data principal, (b) above listed obligations towards protection of personal data, (c) technology used is in accordance with commercially accepted or certified standards, (d) legitimate interests of businesses including any innovation is achieved without compromising privacy,(e) protection of privacy throughout the processing, from the point of collection to deletion of personal data, (f) processing of data in a transparent manner and (g) interest of the data principal at every stage of processing of personal data. The data fiduciary should submit its Policy to the Authority for certification in the prescribed manner and display the certified Privacy Policy on their websites. More details will be deliberated in the coming articles.

Each company classified as significant data fiduciaries will have appoint a Data Protection Officer (DPO) who will liaison with the DPA for auditing, grievance redressal, recording, maintenance and more.

Certain exemptions to government: The central government can exempt any of its agencies from the provisions of the Act for meeting certain specified needs of the country such as (i) in the interest of security of state, public order, sovereignty and integrity of India and friendly relations with foreign states, and (ii) for preventing incitement to commission of any cognisable offence relating to the above matters. Processing of personal data is also exempted from provisions of the Bill for certain specific purposes such as: (i) prevention, investigation, or prosecution of any offence, or (ii) personal, domestic, or (iii) journalistic purposes. However, such processing must be for a specific, clear and lawful purpose, with proper safeguards.

Offences and penalties: Offences under the Bill include, (i) processing or transferring personal data in violation of the stated law and (ii) failure to conduct a data audit. The processing or transferring personal data in violation of the Bill is punishable with a fine of Rs 15 crore or 4% of the annual turnover of the fiduciary, whichever is higher. The failure to conduct a data audit is punishable with a fine of five crore rupees or 2% of the annual turnover of the fiduciary, whichever is higher.

The Officers in the DPA are vested with the power to call persons concerned for inquiry into fiduciaries, assess compliance, and determine penalties on the fiduciary or compensation to the principal. The Adjudication decisions, which are quasi judicial in nature, can be appealed in the appellate tribunal and appeals from the Tribunal will go to the Supreme Court.

The way forward

The provisions relating to obtaining consent of the principal to collect personal data may have to be followed in a scrupulous manner so that the stringent compliance of the stated law is adhered to. The entities classified as data fiduciaries should determine the purpose and means of processing personal data in a fair manner as stipulated in the law. Organisations will have to undertake a great deal of **technical changes in engineering the existing architecture** to modify business processes to meet the requirement of the proposed law. They need to place limits on data collection, processing and storage and similar responsibility they owe to the principal. There is need of proper encryption of personal data along with **t**echnical security safeguards, including de-identification, preventing an individual's identity to be inadvertently revealed so as to prevent instances of data breach. They are also subject to various new reporting requirements details of which will be discussed in the subsequent articles. All personal data (characteristic, trait, attribute or other feature of the person) online or offline, shall require the explicit and informed consent of the individual to whom it belongs to before such data can be collected or subjected to any form of analysis. This may cause huge disruption in the businesses and organisations that thrive on processing and monetising data collected from the individuals.

As countries around the globe start to enact and implement personal data governance regimes, this Bill will have an important role in shaping the regulation governing today's increasingly data-driven geopolitical landscape. The Bill contains some elements of the protectionist data policies that are similar to other statutes made or in pipe-line around the world, so as to curtail the global and open internet, which has become a cesspool of exploiters of such data for committing cyber crimes. Data localisation will immensely help enforcement agencies to access data for investigations and enforcement. Also the responsibilities mandated on the fiduciary to protect personal data will in a way pave way for regulating and ushering some order in the cyber society. In the interest of addressing the citizen's privacy concerns it is expected that JPC will start its work on a faster mode.

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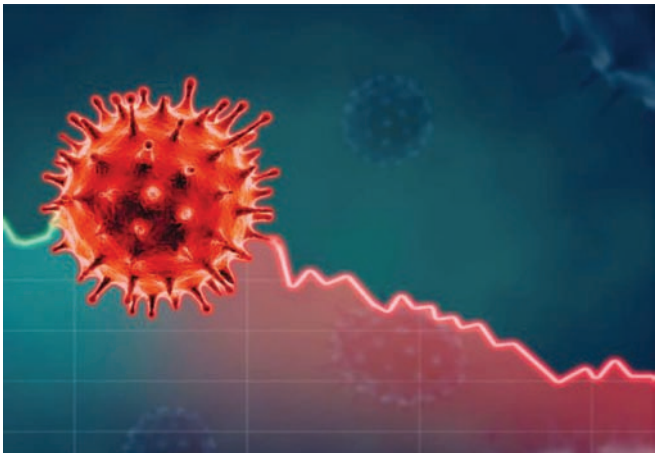
GST – Section 17(5)(h) - a Bermuda Triangle?

CA. Prabhava Hegde

The world was functioning normally as it used to be around 4 months back. But, all of a sudden everything changed! Earth closed down! Businesses were shut! People suffered! And in a snap of a finger, health was placed above all other things! All these were because of a small virus which could not even be seen with naked eyes, the CORONA virus or COVID-19. A pandemic that shook the world and made humans realise even the largest weapons or ammunitions cannot save from the nature's power.



Alike world, India also implemented lockdown and the businesses were shut for about 2 months due to pandemic situation. Businesses faced lots of problems which include losses, cash flow crunch, loss of assets and increase in liabilities due to its closure.

To add up, GST law also has some implications which has come to limelight in the present situation. One of such issues is blockage of Input Tax Credit ('ITC') on goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples.

There are certain businesses whose goods are perishable and due to lockdown, such goods may be deteriorated. The debate is that whether Section 17(5)(h) of the Central Goods and Services Tax Act, 2017 ('CGST Act') is a Bermuda Triangle which gulps the ITC on such goods? If so, whether the businesses which are already on the sinking ship be a prey to this Bermuda Triangle and vanish??

By this article, I will try to put up some light on certain aspects of Section 17(5)(h) of the CGST Act. It might not

solve the mystery, but instead add up some points for discussion.

Facts:

The facts which led to panic are as follows:

1) The businesses were severely affected due to lockdown and the normal economic cycle was disturbed. The cash flow blockage was a major hit.
2) Due to sudden lockdown measures, businesses could not do the necessary packing to the goods which were delicate and fragile.
3) There were businesses who dealt with perishable goods such as food industry, textile and leather industries, pharmaceutical industry, fisheries, chemical industry, etc. Due to lockdown, they could neither issue such goods for further processing nor sell them; this led to expiry or obsolescence of such goods.
4) Businesses had to face losses as proportion of reusable goods was very less.
5) In addition to the above facts, provision in GST Law which is restricting ITC on goods which are destroyed or written off added to the woes of businesses.

Businesses are now completely broken down and struggling to get back to normal cycle.

The first 4 points are unavoidable, but what about the 5th point. Is there any chance to neutralise the provision and reduce the woes of businesses? To answer that we shall analyse the legal provision first.

Legal Provision:

The CGST Act provides for specific situations wherein ITC on specific goods or services are restricted even though

used in the course or furtherance of business. Section 17 of the CGST Act deals with apportionment of credit and blocked credit. Extract of Clause (h) to Sub Section (5) of Section 17 is as follows:

"Notwithstanding anything contained in sub-section (1) of section 16 and Sub Section (1) of section 18, input tax credit shall not be available in respect of the following, namely:

.....

(h) goods lost, stolen, ***destroyed, written off*** *or* ***disposed of by way of gift or free samples****; and*

..... "

Analysis of Legal Provision

On the plain reading of Sub Section (5) of Section 17 as extracted above, we can understand that this Sub Section restricts the ITC on the goods or services or both listed in the clauses followed. In order to understand the clause better, there are 5 very important phrases which needs to be analysed:

a) **Non-Obstante Clause:**

The said Sub Section, starts with "*Notwithstanding anything contained in*". We can understand the said Sub Section is a '**Non-Obstante Clause**' which means this clause empowers the Sub Section to override the effects of any other legal provisions contrary to it. Meaning, Sub Section (5) of Section 17 overrides Sub Section (1) of section 16 and Sub Section (1) of section 18. So, we can concur upon the fact that ITC on such supplies will be restricted even though the supply of goods or services or both are used or intended to be used in the course or furtherance of business.

b) **Available in respect of the following, namely:**

The Sub Section ends with the wordings *"available in respect of the following"*. The said expression was examined by Supreme Court in the case of **State of Madras Vs M/s Swastik Tobacco Factory [AIR-1966 SC-1000]** where it was held that the expression *'in respect of'* would mean *'on the goods'*. Thus, by this we can understand that the ITC has to be restricted only on the goods on which ITC has been availed. Further, the word *'namely'* imports enumeration of what is comprised in the preceding clause. In other words, it ordinarily serves the purpose of equating what follows with the clause described before. Thus, no meaning other than that which is enumerated in the clauses can be assigned to the same.

c) **Destroyed:**

The very important term on which the whole idea of Bermuda Triangle lies upon is *'Destroy'*. The terms, *'destroy'* or *'destroyed'* has not been defined in the CGST Act. In such case, the primary rule of Statutory Interpretations which is **'Literal Rule of Interpretation'** is applied. As per the said rule, Courts interpret statutes in a literal and ordinary sense. They interpret the words of the statute in a way that is used commonly by all and use the grammatical meaning.

So, as per general understanding, the word *'destroy'* means damage done to anything by means of external force due to which said thing becomes unusable or no longer exists. As per Oxford Dictionary, the term *'Destroy'* is defined as *'to damage something so badly that it no longer exists, works, etc.'* Thus, by plain reading of the definition, which says ***'to damage',*** which concurs with the view that an external force is required to do damage.

d) **Written off:**

Similarly, *'written off'* is not defined in the act and the **'Literal Rule of Interpretation'** shall be applied.

As per general understanding, the term *'write off'* means to cancel or to derecognise an asset or liability with an intent to recognise loss or profit on the same. As per Oxford Dictionary, it means *'to cancel a debt; to recognize that something is a failure, has no value, etc.'* Thus, it can be understood that, an asset or liability which has no value is written off.

e) **Disposed of:**

The clause (h) to Sub Section (5) of section 17 explicitly covers 2 means of disposal which are disposal by way of gift or free samples. All other forms of disposal are covered under clause (83) to section 2 which is definition of *'Outward Supply'*.

Thus, by reading the whole analysis in a harmonious manner, it can be concurred that ITC on supply of the goods on which ITC has been availed which are destroyed or written off or disposed by way of gifts or free samples is blocked or restricted. There is no doubt regarding services as the clause specifically covers goods and not services. Thus, there is no need to

reverse ITC on input services but only in case of input goods and capital goods. Further, let us try to apply the analysis on the facts.

Application of analysis on facts (Author's view)

As explained earlier, the terms destroy, written off and disposed are to be understood in true sense in order to come to a conclusion.

Destroy:

The term, *'destroy'* as explained earlier in para (c) is through external means or forces. In other words, if destruction needs to be carried on, it has to be through some medium such as fire or water or explosion or even by breaking it. When goods are deteriorated or outdated by their internal composition or by their inherent nature, it cannot be held that such goods are destroyed. There is a very thin line of difference between destroy and deteriorate, yet they are not the same. The term *'deteriorate'* is defined as per Oxford Dictionary as *'to become worse'*. In the present scenario, goods which are blocked in godowns or factories or shops are deteriorated or outdated or expired due to the fact that such goods could not be either processed or sold but in my opinion are not destroyed per se.

Written off:

The unused inventory may be written off in the books of account. No doubt, the ITC on such goods are to be reversed back. But, in present case, doubt may arise whether ITC on inventory which has been written off partially or provision for writing off has been made, also needs to be reversed back. In erstwhile Rule 3(5B) of CENVAT Credit Rules, scope of 'write off' included full write-off, partial write-off and also provision to write off. However, no such explicit quotation is present in GST law. Further, as explained in para (b), only the ITC on goods which are written off fully is to be denied. In case of partial write off or provision to write off, it cannot be held that the goods are written off and thus ITC on such goods is to be allowed completely.

Further, it is also interesting to observe that terms destroy and disposal by way of gift or free samples are actions and write off is just a book entry. Write-offs typically happen when inventory becomes obsolete, spoils, damaged in transit, market price has fallen or is stolen or lost. Thus, write off is just recording of the action and not an action itself. Since the same clause contains specific actions such as lost, stolen, destroyed or disposed of by way of gifts or free samples, by applying the Rule of Harmonious Construction, it can be understood that write off on account of the said reasons may be considered. In other words, it may also be constructed that write off might not include writing off due to obsolescence or damage. Further, after write off, the inventory may even be disposed of as scrap or for lower value where ITC may be available. Thus, clarification on this aspect is awaited from the Government.

Disposed:

Further, the goods which are deteriorated can further be disposed of for no value or sold as scrap. There may be chances where such goods are sold to other businesses at lower price. As explained in para (e), disposal by any other means except gifts or free samples is qualified to be an outward supply and ITC cannot be denied on the same. Even though this Sub Section has a overriding clause as explained in para (a), that arises only in case of contrary provisions. Clause (h) covers disposal by way of gifts or free samples and *'outward supply'* as per section 2(83) is very clear on coverage of all types of disposals. Thus, the goods which are deteriorated can be disposed of by means other than gift or free samples and ITC cannot be denied by the department, since disposal is in the course or furtherance of business where ITC is available as per Section 16(1).

Government's view:

However, in some cases goods might have to be destroyed due to certain circumstances and ITC on such goods should be reversed back as the section explicitly provides for the same. Further, your attention is drawn to ***Circular No. 72/46/2018-GST***, wherein Government has clarified the procedure to be followed in respect of return of time expired drugs or medicines. The Government has provided 2 options to the taxpayers.

- ✓ It can either be treated as reverse supply wherein the manufacturer who destroys the goods shall reverse the ITC on the reverse supply and not on manufacture of the same; or
- ✓ It can be returned though credit note wherein manufacturer who destroys shall reverse back the ITC attributable to manufacture of such goods.

As may be observed, Government has given 2 diverse views in the same clarification on reversal of ITC on manufacture of goods. These contrary views create confusion in the minds of taxpayers. These clarifications

hold good even for other businesses as well where the manufacturer takes back the goods in case of expiry.

Further, as per the facts, there may be 2 situations:

i) A manufacturer purchases raw materials on which ITC has been claimed and manufactures finished goods.

ii) A trader purchases goods and has claimed ITC on such inward supplies.

Manufacturer of goods:

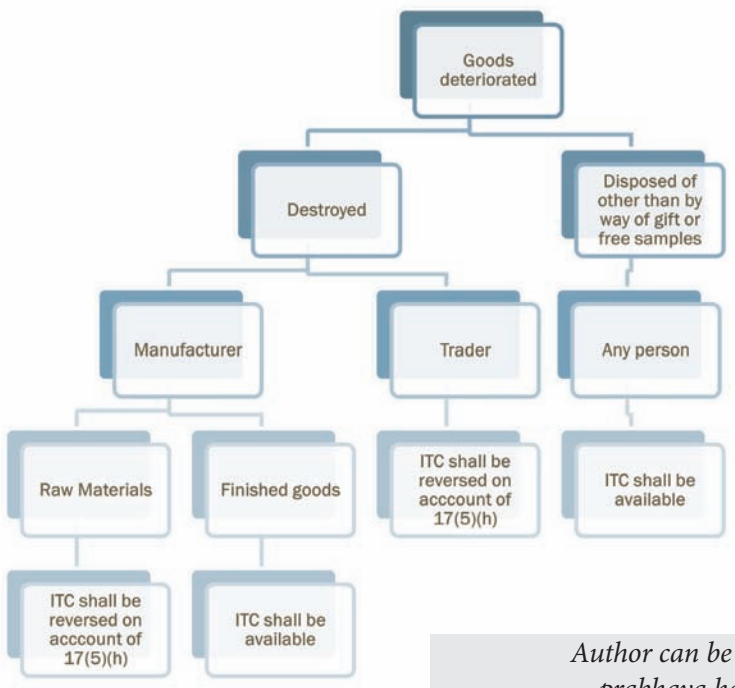
There may be situations where the manufacturer either manufactures perishable goods or buys perishable raw materials or both. We will try to draw an analogy of each combination.

Particulars	Treatment
Perishable Raw Materials	Raw materials which are perished due to lockdown can either be disposed of or destroyed. If it is destroyed, then ITC shall be reversed but in any other case, ITC will be available.
Perishable Finished Goods	Finished goods which are perished can either be disposed of or destroyed. In either case, ITC shall be made available by virtue of para (b). The logical conclusion is that goods on which ITC has been claimed is not destroyed but the goods by using raw materials on which ITC has been claimed has been destroyed.

Trader:

In case of a trader, full ITC claimed would be on respect of goods purchased. Hence, similar to perishable raw materials explained above, if goods are destroyed, then ITC shall be reversed and in any other case, ITC can be claimed.

To summarise a decision tree may be depicted as follows:



Conclusion

The blockage of ITC depends on various factors. Infact, many businesses are facing the problem of deterioration of goods due to lockdown. ITC need not be reversed due to the single fact that the goods are deteriorated or expired but instead what will be the further process is the key factor. If such goods are disposed of other than by way of gifts or free samples, or sold as scrap, then reversal of ITC is not required. Further, in case of write off, clarity is required regarding write off on what account should be considered for reversal. GST Law has been subject to frequent changes since its inception and many issues continue to arise on account of varying interpretations on several of its provisions. There may be contrary decisions which arise due to changing circumstances or Governmental notifications on the same. However, the sword hangs on. These matters need to be settled by judicial decisions.

Businesses need to plan adequately on this aspect and treatment of such goods need to be optimised and thereby increase their chances of getting away from the clutches of Section 17(5)(h), the Bermuda Triangle. As crores of rupees are blocked in the said aspect, only time will answer whether section 17(5)(h) actually turns out be a Bermuda Triangle or whether an escape route is made available.

Disclaimer

All the views are based on judgement applied on the matters as on date. Clarification on the said aspect is awaited in near future as per the GST Council decision which would be held in the month of June 2020. The opinion expressed herein are purely author's view and understanding. The author is not responsible for any liability or damages arising out of adoption of the said opinion as ground for litigation by the taxpayers. Readers are advised to take due caution and expert's opinion before taking this ground.

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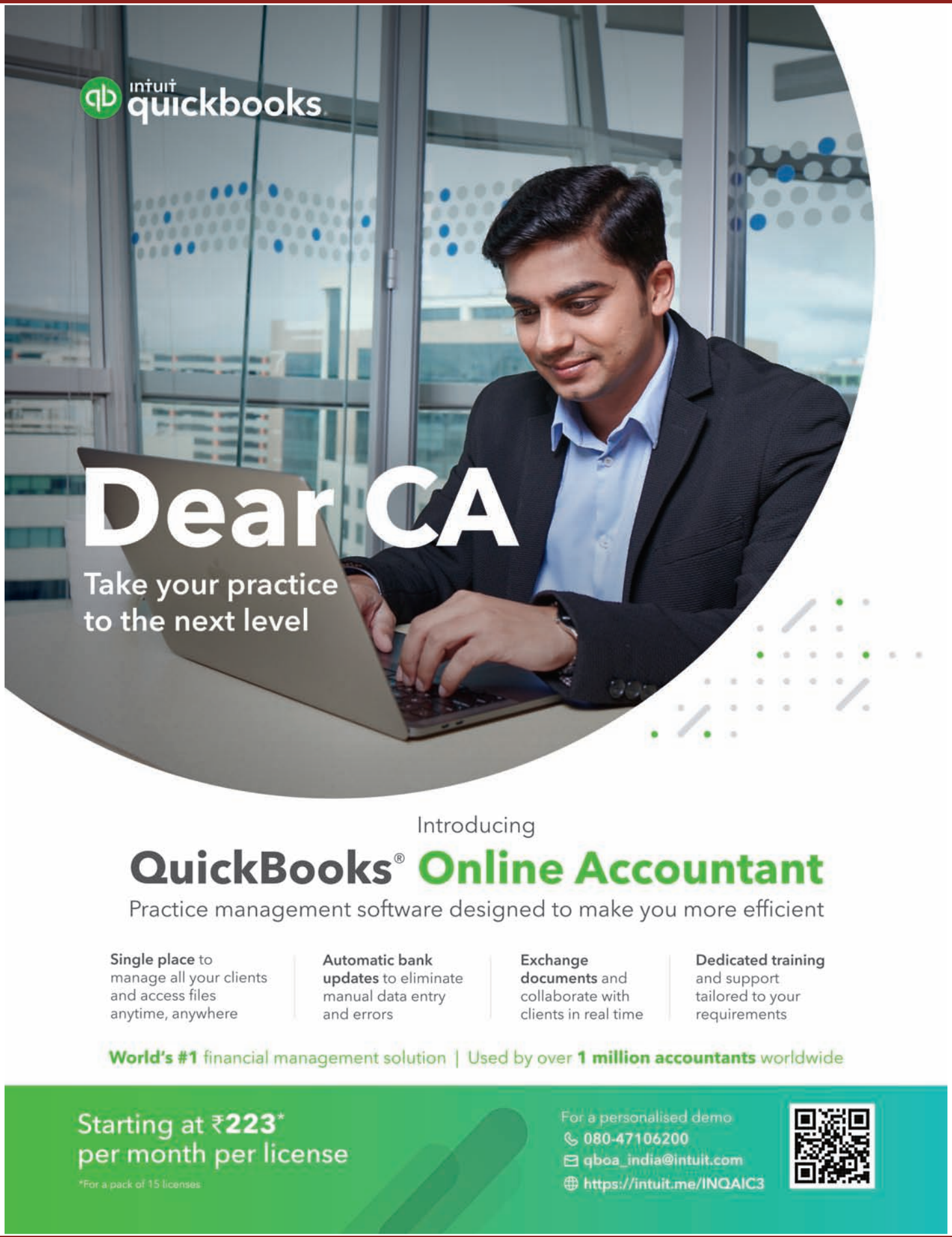

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