ACCOUNTING, REGULATORY & TAX NEWSLETTER

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INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA ("ICAI")

EAC Opinion – Presentation of interest earned from deployment of surplus funds with banks

Facts of the case

A Company (hereinafter referred to as 'the Company') is a Public Sector Undertaking (PSU), incorporated as a project executing agency under section 617 of the Companies Act, 1956 on July 12, 1999 by the Ministry of Railways (MoR) and the Government of Maharashtra (GoM) subscribing equity shares in the 51:49 ratio respectively. The project to be executed by the Company is called Mumbai Urban Transport Project (MUTP). The other main object of the Company is to carry out the rehabilitation and resettlement of project affected persons.

The MUTP is planned for development over a period of time in various phases. The funds required for MUTP are provided to the Company in a 50:50 ratio by MoR and GoM as budgetary allocation in their respective annual budgets. Some of the projects are funded through a loan from the World Bank/ Asian Infrastructure Investment Bank (AIIB), which are routed through GoI and GoM. The Company prepares feasibility reports and formulates estimates for MUTP which are sanctioned by MoR under MTP Plan Head in the Works, Machinery and Rolling Stock Programme of the Ministry of Railways. After sanction of projects by MoR, the funds are released/ arranged for/by the Company for execution of the MUTP.

The Company has been incorporated as a project executing agency. As per terms of MoU/Agreements, the ownership of all the operating assets created by the Company under MUTP remains with the Indian Railways. These assets are not accounted for as assets in the books of the Company. The unique nature of accounting for funds received and utilisation in MUTP is explained in brief hereinafter. The funds received for executing the MUTP project from MoR and GoM are accounted for as 'Funds received for MUTP Works' and are presented under 'Other Long-Term Liabilities' and funds utilised on the creation of MUTP assets are accounted for as 'Funds utilised on MUTP' and presented as a reduction from 'Funds received for MUTP' under 'Other Long-Term Liabilities' in the financial statements. So, effectively the net balance, i.e., excess of funds received for MUTP over funds utilised on MUTP appears as 'Other Long-Term Liability' in the financial statements of the Company.

Since the Company is formed without any profit motive and with the object of the advancement of the general public utility with the ultimate aim of improving transportation infrastructure for the Citizens of MMR, the Company is registered under section 12A of the Income-tax Act, 1961 with the Commissioner of Income Tax (Exemption) on October 29, 2001 w.e.f. date of incorporation, i.e., July 12, 1999. Since its registration under section 12A, the Company has been enjoying the benefit of exemption under section 11 of the Income-tax Act, 1961. To comply with the relevant provision and to continue to enjoy the exemption under section 11 of the Income-tax Act, 1961, the Company has deleted the declaration and distribution of dividend clause from its Article of Association. Thus, the Company does not have any profit motive as its object and cannot declare or distribute any dividend.

The company has stated that for the purpose of execution, depending on the nature, expertise required, and quantum of work, MUTP component works are assigned by the MoR to the Central and Western Railways, and other agencies. However, a major part of MUTP is directly carried out by the Company for which the Company receives Direction and General (D&G) Charges. Direction and General Charges are charges fixed by MoR in % terms of the amount spent on MUTP and this % is based on the nature, type and complexities of the relevant project involved and past experiences of the execution of the project of the same size and nature. While fixing Direction and General Charges of the Company, MoR also takes into account the similar projects executed by other zonal railways of Indian Railways and Indian Railway's PSU.

The Company incurs an establishment cost to execute the projects allotted under MUTP. The amount of Direction and General Charges fixed by the MoR for carrying out a particular project by the Company is actually nothing but an estimated cost, based on previous experience of execution of projects of similar size and nature, which the Company would be incurring for the execution of the project. So, the Direction and General Charges are nothing but reimbursement of cost, which the Company incurs as an establishment cost to execute a particular project.

In addition to revenues received by way of Direction and General Charges, the Company also earns interest on funds temporarily deployed with Scheduled Banks, pending the funds' utilisation in MUTP.

Financial statements of the Company are audited every year by Chartered Accountants appointed by the Comptroller and Auditor General of India (CAG). In addition to the statutory audit conducted by Chartered Accountants, annual supplementary audit of the Company is also conducted by the Principal Director of CAG.

As stated in earlier paragraphs, in addition to the Direction and General Charges, the Company earns interest from deployment of surplus funds with the banks as stated above. The details of Direction and General Charges, establishment cost and interest earned over a period of last 9 financial years are as under:

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Financial Year	D & G Charges	Establishment Cost	Deficit	Interest Income	Surplus/deficiency
2019-2020	39.98	50.03	-10.05	29.65	19.60
2018-2019	40.39	46.88	-6.49	42.36	35.87
2017-2018	22.98	44.32	-21.34	22.96	1.62
2016-2017	31.51	36.95	-5.44	34.42	23.38
2015-2016	28.42	25.72	2.70	37.51	40.21
2014-2015	26.63	27.74	-0.61	37.18	36.57
2013-2014	17.37	25.02	-7.65	30.66	23.01
2012-2013	11.66	22.66	-11.00	23.24	12.24
2011-2012	11.79	20.22	-8.43	31.14	22.71

The company has stated that from the above details, it may be observed that every year except for financial year (F.Y.) 2017-18 and F.Y. 2019-20, the quantum of interest earned is higher than the Direction and General Charges. Direction and General Charges are nothing but reimbursement of cost which the Company incurs on executing the project; it is very important to note here that while deciding such % of Direction and General Charges payable to the Company, the MoR also considers the approximate amount of interest, which the Company may earn on the deployment of surplus funds during the execution of the concerned project. Thus, Direction and General Charges and interest, both, form part of the total estimated revenue required by the Company to incur the estimated establishment cost to execute a particular MUTP Project. Hence, interest, just like Direction and General Charges invariably becomes part of the revenue from operating activities of the Company. Considering the above facts and unique circumstances, the Company is of the view that such interest earned shall be classified as 'other operating revenue', if not 'operating revenue' of the Company. The company has also referred to the minutes of meeting held in November 2000 at the juncture of foundation of the Company , wherein interest is considered along with Direction and General Charges as part of the total estimated cost required by the Company for executing a project and not just as an income from incidental or ancillary investment activity. According to the company, this is an important document, tantamounting to an MoU between the Ministry of Railways and the Company at the time of the Company's inception.

To support the above stated contention, the company has referred to paragraphs 9.1.7, 9.1.8 and 9.1.9 of the Guidance Note on Division I – Non Ind AS Schedule III to the Companies Act, 2013, (Revised July, 2019 Edition), issued by the ICAI, which read as under:

"9.1.7 For non-finance companies, revenue from operations needs to be disclosed separately as revenue from

- sale of products,
- sale of services and
- other operating revenues.

It is important to understand what is meant by the term "other operating revenues" and which items should be classified under this head visà-vis under the head "Other Income".

9.1.8 The term "other operating revenue" is not defined. This would include Revenue arising from a company's operating activities, i.e., either its principal or ancillary revenue-generating activities, but which is not revenue arising from the sale of products or rendering of services. Whether a particular income constitutes "other operating revenue" or "other income" is to be decided based on the facts of each case and detailed understanding of the company's activities. The classification of income would also depend on the purpose for which the particular asset is acquired or held. For instance, a group engaged in manufacture and sale of industrial and consumer products also has one real estate arm. If the real estate arm is continuously engaged in leasing of real estate properties, the rent arising from leasing of real estate is likely to be "other operating revenue". On the other hand, consider a consumer products company which owns a 10 storied building. The company currently does not need one floor for its own use and has given the same temporarily on rent. In that case, lease rent is not an "other operating revenue"; rather, it should be treated as "other income".

9.1.9 To take other examples, sale of Property, Plant and Equipment is not an operating activity of a company, and

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hence, profit on sale of Property, Plant and Equipment should be classified as other income and not as 'other operating revenue'. On the other hand, sale of manufacturing scrap arising from operations for a manufacturing company should be treated as other operating revenue since the same arises on account of the company's main operating activity."

The company has stated that from the close observations of the above stated paragraphs of the Guidance Note, it is established that the deciding criteria for a particular item of income to be classified either as 'other operating revenue' or 'other income' are as under:

- whether it's a principle or ancillary revenue generating activity and not the activity of the sale of products or rendering of services;
- the purpose for which the particular asset is acquired or held;
- the frequency or continuity of the revenue-generating activity; and
- on the facts of each case and detailed understanding of the Company's activities.

The company has stated that the Company fulfils all of the above-stated tests in the following manner:

- The Company deposits the funds received for executing MUTP with the banks pending the funds' utilisation in the MUTP. This activity of deposit of funds with banks is carried out on a regular basis throughout the period of execution of MUTP. The interest earned on the deployment of funds with banks, pending the funds' utilisation in MUTP, is inextricably connected to the core activity of the execution of MUTP as the size and nature of the Company and project are such that it requires funds in advance for project planning and execution. Activities of deposit of funds with the banks are made in a well thought-out, planned and prudent manner wherein the expected amount and date of receipt of funds, physical progress of the MUTP and expected amount and time of requirement/utilisation of funds in MUTP are projected, considered, reviewed and monitored in a systematic manner so as to keep uninterrupted funds' flow towards discharging project liabilities and at the same time, interest, being part of total planned revenue of the Company , on such deposits can be maximized.

  Further, how crucial and important is the activity of deposit of funds for the survival of the Company can be observed from the table given above that in the last 9 years, except for in the F.Y. 2015-16, Direction and General Charges were not able to meet the establishment cost of the Company and in the absence of interest income, the Company would have incurred losses in every such year. So, as per the company, the above establishes the fact beyond any doubt that along with Direction and General Charges, interest is considered as part of the total operating revenue required by the Company for meeting its establishment cost.

  It may also be noted that except in the F.Y. 2019- 20 and 2017-18, the quantum of interest earned is more than Direction and General Charges and on close observation, it can be seen that in a couple of years, the interest income is even more than double of the Direction and General Charges.

  From the above facts, it can be derived that the activity of deposit of funds with banks, in 7 out of last 9 years, generates more income than from the activity of Direction and General Charges. It is also because of the interest income that, in 8 out of 9 years, the Company was able to generate the surplus of income over expenditure otherwise it would have made losses. So, based on the above facts, the Company is of the view that revenue generated from the activity of deposit of funds with banks is crucial, integral and inextricable part of the core revenue generating activities of the Company.
- The purpose for which such assets (in the case of the Company its 'Funds received for MUTP'), are held or acquired is their utilisation in the development of MUTP, the main objective of the Company. The funds given by the MoR and GoM to the Company are deployed in banks pending their utilisation in the core operational activity of the Company, i.e., development of MUTP.
- The activity of deposit of funds is carried out on a regular basis, reviewed and monitored at least on a weekly basis. While deploying the funds in banks some of the important points which are kept in mind are as under:
  - The amount of funds estimated for a particular project of MUTP;
  - The expected period of the execution of the project and its important milestones;
  - The dates, schedule and amount of funds expected to be required for a project;
  - The actual progress of the project;
  - Actual funds available with the Company for the project; and
  - Special terms and conditions related to the payment for the project.

  Thus, the foundation of activity of deployment of funds is inextricably connected to the execution of MUTP and it is carried out, reviewed and monitored regularly on the same basis, frequency and manner in which the physical progress of the particular project of MUTP is carried out, reviewed and monitored.

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- Based on above stated unique facts and circumstances of the Company, the activity of planning and executing of deposit of funds, the inextricable nature of activity with the funding and execution of MUTP, the frequency of the activity itself, and the quantum of the interest earned year after year over the Direction and General Charges give sufficient strength and reason to treat and consider the activity of deposit of funds as an integral and inextricable part of the revenue generating activities of the Company. Hence, interest earned in the case of the Company, because of its unique facts and circumstances, is considered as 'other operating revenue'.

13. However, there is another view in respect to the classification and presentation of such interest. Note No. 4 of General Instructions for Preparation of the Statement of Profit and Loss in Part II of the Schedule III of the Companies Act, 2013 reads as under:

"4. Other income

Other income shall be classified as:

- Interest Income (in case of a company other than a finance company);
- Dividend Income;
- Net gain/loss on sale of investments;
- Other non-operating income (net of expenses directly attributable to such income).

The other view is based on Note No. 4, as reproduced above. It is claimed that since the Company is also a company other than a finance company, interest shall be classified and presented as part of "Other Income".

The company further wishes to bring to the notice of the Expert Advisory Committee (EAC) of Query No.11 of Volume XXXVII of Compendium of Opinions, wherein it was opined that interest should be classified as 'Other Income' and not as 'Other Operating Revenue'.

However, on the basis of reasons and grounds as enumerated above and unique facts and circumstances of the Company being different from the facts and ratio of the Opinion of EAC to Query No.11, as mentioned above, the Company is of the view that the present treatment of accounting, classification and presentation of interest earned on funds deployed with banks as 'Other Operating Income' is reasonable and correct.

The company has separately informed that the word 'establishment cost' in Railway parlance means the cost incurred to run an establishment. It includes all the costs of an establishment. In the case of the Company, 'establishment cost' means all the expenses incurred/debited in the Income and Expenditure Account by the Company to run its operations. The following items of expenses are establishment costs of the Company:

- Salary and Wages/Employee Cost
- Administrative Expenses
- Depreciation/Amortisation Expenses
- Any other Expenses.

Query

On the basis of above, considering the unique facts and circumstances of the Company as submitted above, the Company has sought the opinion of the Expert Advisory Committee as to whether the present practice of accounting and presentation of interest earned from the activity of deployment of funds with banks, pending their utilisation in MUTP, as 'other operating revenue' in the financial statements is correct. If not, then what should be the correct treatment and presentation of interest earned on deployment of funds with banks in the financial statements of the Company?

Points considered by the Committee

The Committee notes that the basic issue raised by the company relates to the presentation of interest earned on the surplus/idle funds deployed with banks, viz., whether the same should be presented as 'other operating revenue' or 'other income' in the Income and Expenditure Account of the Company. The Committee has, therefore, considered only this issue and has not examined any other issues..

The Committee notes the paragraphs 9.1.7, 9.1.8 and 9.1.9 (reproduced above) of the Guidance Note on Division I – Non Ind AS Schedule III to the Companies Act, 2013 (revised July, 2019 Edition), issued by the ICAI(hereinafter referred to as the 'Guidance Note'). In addition to this, committee also notes the following paragraph of the Guidance Note:

"9.2 Other income:

…

9.2.2 All kinds of interest income for a company other than a finance company should be disclosed under this head such as interest on fixed deposits, interest from customers on amounts overdue, etc."

From the above-reproduced requirements of the Guidance Note, the Committee notes that the 'other operating revenue' includes revenue arising from a company's operating activities, i.e., either its principal or ancillary revenue-generating activities, but which is not revenue arising from sale of products or rendering of services. Thus, whether a particular income constitutes 'other operating revenue' or 'other income' is a matter of judgement considering the specific facts and circumstances of each case, and considering the nature of activity the Company is engaged into, etc. The Committee also notes that the Guidance Note requires all types of interest income in case of a Company other than finance company to be disclosed under the head 'other income'.

Accordingly, the Committee is of the view that as per the requirements of the Guidance Note, interest income in case of a company other than finance company needs to be disclosed under the head 'other income' unless it is arising from the company's operating activities (as in case of a finance company).

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In this context, the Committee notes that in the extant case, the main object of the Company is to plan, develop, and execute the ever-growing suburban railway transportation needs of Mumbai Metropolitan Region (MMR) by carrying out surveys, preparing survey/project reports and identifying feasible rail projects/corridors etc. The project to be executed by the Company is called Mumbai Urban Transport Project (MUTP) and the Company is an executing/implementing agency of the GoM and MoR for carrying out MUTP. Thus, essentially the Company's operating activities comprise activities relating to execution of MUTP.

The Committee further notes that during project execution, excess funds are deployed with banks leading to earning of interest income.

The Committee now examines whether the interest earned in the extant case can be considered to be arising from the Company's operating activities and in this regard, the Committee notes that the company has stated that while deciding the percentage of Direction and General charges payable to the Company, the MoR also considers the approximate amount of interest which the Company may earn on the deployment of surplus funds during execution of the concerned project. In this regard, the company has also referred to the following clause from Railway Board decision (minutes) taken on 11.11.2000 which states as follows:

"Staffing Pattern

3.1 The organisation should be kept lean but this shall be left to the Board of Directors of the Company. It should, however, be ensured that the size remains small enough for the establishment costs to be contained within the D&G charges/Interest available to the Company."

Without getting into the interpretation of the Board decision, the Committee is of the view that the above paragraph or any other paragraph in the Railway Board decision does not clearly indicate that the percentage of Direction and General charges payable to the Company has been decided after considering the approximate amount of interest which the Company may earn. Further, the above also does not indicate that interest is the compensation/consideration of operating activities of the Company, which is execution of MUTP, as discussed above. Further, the various communications between the Company and the Railway Board (MoR) while making a request to the Board to allow the Company to retain the interest (separately provided by the company for the perusal of the Committee), also do not clearly demonstrate that the MoR allowed the Company to temporarily retain such interest as a compensation/ consideration of the operating activities of the Company.

Accordingly, the Committee is of the view that in the extant case, considering the requirements of the Guidance Note and the information and facts available with the Committee, interest income in the case of the Company (being an 'other than finance company') should be disclosed under the head 'other income'.

With regard to various contentions provided by the company, the Committee also wishes to point out that accounting treatment depends on the nature of income and mere allowing to retain or use interest income for meeting the expenditure does not change the nature of income. The Committee is also of the view that regularity or quantum of an item of income may not necessarily determine the nature of an income as operating or non-operating.

Opinion

On the basis of the above, the Committee is of the view that in the extant case, interest income should be disclosed under the head 'other income'.

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SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI)

Circular dated 1st February 2022: Scheme of Arrangement by Listed Entities - Clarification w.r.t. No Objection Certificate ("NOC") from the lending scheduled commercial banks/ financial institutions/ debenture trustee

SEBI vide its previous circulars dated 16th November 2021 and 18th November 2021, amended certain provisions relating to the Schemes of Arrangement by listed entities, as laid down under SEBI Master Circular. One of the amended provisions require listed entities to submit a NOC from the lending scheduled commercial banks / financial institutions / debenture trustees to the stock exchanges.

SEBI, vide circular dated 1st February 2022 clarified that such NOC from the lending scheduled commercial banks / financial institutions / debenture trustees must constitute at least 75% of value of secured creditors.

Circular dated 4th February 2022: Disclosures in the abridged prospectus and front cover page of the offer document

Key highlights of the circular are as under:

- **Disclosures in the abridged prospectus:** Disclosure such as specific details of issuer company, promoter, price band, indicative timeline, risk related clauses, weighted average cost of acquisition of shares transacted over the trailing 18 months from the date of red-herring prospectus, etc. to be provided as per the prescribed format.
- **Disclosures on the front cover page of the offer document:** Format of front cover page of offer document revised to provide simplified information pertaining to details of selling shareholders, aggregate amount proposed to be raised through all the stages of offers made through a shelf prospectus, risk related clause, schedule of issue, credit rating, IPO grading etc.

Circular dated 9th February 2022: Manner of conversion of Private Unlisted Infrastructure Investment Trust ("InvIT") into Private Listed InvIT and Private Listed Infrastructure Investment Trust ("InvIT") into Public InvIT

SEBI, vide its two separate circulars dated 9th February 2022, has provided the manner of (i) listing units issued by a Private Unlisted InvIT and (ii) converting Private Listed InvIT into a Public InvIT, key highlights of which are as under:

Manner of listing units issued by a Private Unlisted InvIT	Manner of converting Private Listed InvIT into a Public InvIT
A Private Unlisted InvIT may list its units and convert into a Private Listed InvIT on making a Private Placement ("PP") of units through fresh issue and/or offer for sale in terms of InvIT Regulations.	A Private Listed InvIT may convert itself into a Public InvIT by way of public issue of units through a fresh issue and/or an offer for sale in the prescribed manner, and subject to conditions prescribed.
Post issuance and listing of units through PP, the Private Unlisted InvIT shall be considered a Private Listed InvIT and be required to comply with all provisions of the InvIT Regulations prescribed for Private Listed InvITs.	Post issuance and listing of such units, the Private Listed InvIT shall stand transformed and be considered a Public InvIT which shall be required to comply with all provisions of the InvIT Regulations prescribed for Public InvITs.

Further, the circular also provides for certain definitions like Private Listed InvIT, Public InvIT, conditions for issuance, conditions for offer for sale of units, process to be followed for PP of units and public issue of units, minimum sponsor contribution, restriction on transferability of units, maximum subscription from investors, disclosure requirements for placement memorandum / offer document etc.

MINISTRY OF CORPORATE AFFAIRS (MCA)

Companies (Accounts) Amendment Rules, 2022

The MCA vide notification dated February 11, 2022, has amended the Companies (Accounts) Rules, 2014, wherein is inserted that every company covered under the provisions of section 135(1) of the Companies Act, 2013 i.e. the companies which are required to comply with the provisions of Corporate Social Responsibility (CSR) shall furnish a report on CSR in the Form CSR-2 to the Registrar for the preceding financial year (2020-2021) and onwards as an addendum to Form AOC-4).

It is also clarified that Form CSR-2 shall be filed separately on or before March 31, 2022, after filing Form AOC-4 for the preceding financial year (2020-2021).

Form CSR-2 will require, among various information parameters, reporting about the constitution of the company's CSR committee, its meetings, as well the disclosure of details of the CSR committee, CSR policy, and approved CSR projects

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on the company's website. The company will also need to submit details on its CSR project investments and the CSR funds that have gone unspent. Details about the impact assessment of CSR projects (as under Companies (CSR Policy) Rules, 2014) will also need to be reported in the form as well as if any capital assets have been created or acquired via the CSR funds in a given financial year.

Limited Liability Partnership (Amendment) Rules, 2022

MCA vide notification dated February 11, 2022 has further amended the Limited Liability Partnership Rules, 2009 which shall come into force with effect from the April 01, 2022. Key amendments have been summarised as follows:

- **Amendment in Rule 19(1)** – This rule is amended as per which a LLP or a company or a proprietor of a registered trade mark under Trade Mark Act, 1999 (47 of 1999) already has a name which is similar to or which too nearly resembles the name of a limited liability partnership incorporated subsequently, may apply to the Registrar in Form 23 to give a direction to that limited liability partnership incorporated subsequently to change its name or new name, as the may be:

  An application of the proprietor of the registered trade mark shall be maintainable within a period of 3 years from the date of incorporation or registration or change of name of limited liability partnership under the Act.
- **Allotment of Name to Existing LLP** - The new rule 19A provides for the allotment of the new name for the existing LLP under Section 17(3) of the LLP Act, 2008. Where an LLP does not change its name as per the directions issued under Section 17(1) of the LLP Act within three months, the new name of the LLP will be the combination of the below:
  - Letters 'ORDNC' (Order of Regional Director Not Complied)
  - Year of passing direction
  - Serial number
  - Existing LLPIN

  The LLPs whose name has been changed by the Registrar of Companies should comply with Section 21 of the LLP Act and mention the statement 'Order of Regional Director Not Complied (under section 17 of the LLP Act, 2008)' below its name on its official correspondence, invoices and publications. However, if the LLP subsequently changes its name according to Section 19 of the LLP Act, there is no requirement to mention such a statement.
- **Adjudication of Penalties -** The new rules 37A, 37B, 37C and 37D has been inserted which provides for the adjudication of LLP penalties. The Central Government can appoint any officer not below the rank of Registrar as adjudicating officers for adjudicating penalty under the LLP Act.
- **Revised Fee norms for LLP** - Revised the fee norms for LLP are also notified through Limited by substituting the existing Annexure A.

Notification dated 11th February 2022: The Limited Liability Partnership ("LLP") (Amendment) Rules, 2022 ("Amended LLP Rules")

Key highlights of the Amended LLP Rules are as follows:

- The National Company Law Appellate Tribunal Rules, 2016 to be applicable for filing an appeal against the order of the National Company Law Tribunal ("NCLT") under relevant provisions of the LLP Act, 2008.
- The proposed name of LLP should not be identical with or resembling too nearly with the name of any existing LLP or a company.
- The cases where a Company/LLP/a proprietor of a registered trademark under the Trademarks Act, 1999 has a name or trademark which is identical or resembling with the name of a LLP incorporated subsequently, such pre-existed Company/LLP/proprietor of registered trademark may appeal to the Regional Director ("RD") in a prescribed format for change of name of subsequently incorporated LLP within a period of 3 years.
- In case where the directions for change of name is issued to an LLP but it fails to comply with such directions within a period of 3 months, the letters 'ORDNC' (which stands for 'Order of Regional Director Not Complied') along with year of passing direction, serial number and existing LLP identification number shall become the new name of LLP and the revised certificate of incorporation shall be issued. However, this provision shall not apply in case e-form LLP Form No. 5 is pending for disposal at the end of 3 months.
- A complete framework for adjudication of penalties is introduced according to which the Central Government can appoint any of its officers as an adjudicating officer for adjudicating penalty under the LLP Act.
- The person against whom the settling officer passes an order of penalty can file an appeal against such order with the jurisdictional RD within 60 days from the date of receiving the order. The appeal must set forth the grounds for appealing and be accompanied by a certified copy of the order and fees of INR 1,000 in the case of small LLPs and INR 2,500 in other cases.
- Some other procedural amendments pertaining to registration of appeal, disposal of appeal by the RD are provided.

Notification dated 11th February 2022: The Companies (Accounts) Amendment Rules, 2022 ("Amended Accounts Rules")

According to the Amended Accounts Rules, every company to which provisions of Corporate Social Responsibility ("CSR") are applicable, must furnish a report in Form CSR-2 to the Registrar for the preceding financial year (2020-2021) and onwards as an addendum to Form AOC-4 or AOC-4 XBRL or AOC-4 NBFC (Ind AS), as the case may be.

Further, for the preceding financial year (2020-2021), Form AOC-4 or AOC-4 XBRL or AOC-4 NBFC (Ind AS), as the case may be, must be filed before filing the Form CSR 2 separately on or before 31st March 2022.

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Notification dated 11th February 2022: Applicability of the LLP (Amendment) Act, 2021

The LLP Amendment Act, 2021 as notified on 13th August 2021 has been applicable on and from 1st April 2022.

Notification dated 14th February 2022: Relaxations granted by MCA on levy of additional fees filing of e-forms for the financial year ended 31st March 2021

MCA vide this circular has further extended the relaxation in respect of the financial year ended 31st March 2021. No additional fees shall be levied for filing certain e-forms like AOC-4, AOC-4 (CFS), AOC-4 XBRL, AOC-4, non-XBRL up to 15th March 2022 and e-forms like MGT-7 / MGT-7A up to 31st March 2022.

THE RESERVE BANK OF INDIA (RBI)

Master Circular- Housing Finance

The RBI vide master circular dated February 18, 2022 has further consolidated the framework of rules/ regulations and clarification on housing finance issued to banks by Reserve Bank of India upto February 17, 2022 at one place.

Circular dated 10th February 2022: Voluntary Retention Route ("VRR") for Foreign Portfolio Investors ("FPIs") investment in debt

In March 2019, RBI had provided a detailed framework for VRR as a separate channel to enable FPIs to invest in debt market in India ("VRR framework"). Investments made through the VRR to remain free from macro-prudential and other regulatory norms which apply to FPI investments in debt markets in India.

The investment limit under the existing VRR framework was initially capped at INR 75,000 crores (INR 40,000 crore for VRR-Govt and INR 35,000 crore for VRR- Corp) which was then increased to INR 1,50,000 crores in January 2020.

RBI vide its latest circular dated 10th February 2022 has further revised this limit to INR 2,50,000 crores. Further, the circular also provides for some procedural modifications in the existing VRR framework such as:

- transfer of investment from General Investment Limit to VRR scheme,
- investment of at least 75% of Committed Portfolio Size within 3 months from the date of allotment etc.
- in case of exiting the VRR Scheme at the end of retention period, FPIs to either i) liquidate its portfolio and exit, or ii) shift its investments to General Investment Limit, or iii) hold investment until its maturity or until it is sold, whichever is earlier.

The revised VRR framework shall be applicable with effect from 1st April 2022.

Circular dated 23rd February 2022: Implementation of 'Core Financial Services Solution' ("CFSS") by Non-Banking Financial Companies ("NBFCs")

With reference to a revised regulatory framework for NBFCs known as 'Scale Based Regulation' ("SBR"), RBI has decided that:

- Middle layer NBFCs and Upper Layer NBFCs with 10 plus 'fixed point service delivery units' as on 1st October 2022 shall be mandatorily required to implement CFSS on or before 30th September 2025. However, Upper Layer NBFC shall ensure that at least 70% of it is implemented on or before 30th September 2024.
- For Base Layer NBFCs as also Middle & Upper Layers NBFCs with fewer than 10 'Fixed point service delivery units', implementation of CFSS is not mandatory.

The circular defines 'Fixed point service delivery unit' as a place of operation from where the business activity of non-banking financial intermediation is carried out by NBFCs, which is manned either by its own staff or outsourced agents and carries uniform signage with name of the NBFC and functions under administrative control of the NBFC. The administrative offices and back offices which do not have any direct interface with customers should not be treated as a 'Fixed point service delivery unit.'

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA (ICAI)

Extension of Last Date for Updating UDINs at e-filing Portal

The ICAI issued the notification dated January 31, 2022 has stated that e-filing portal does not support the UDIN updation for all Income Tax (IT) Forms as of now. In view of this, Central Board for Direct Taxes (CBDT) has extended the last date for updating UDINs for all the IT forms at the e-filing portal till April 30, 2022.

Publications issued by ICAI

The ICAI has issued following publications:

Topic of Publication	Date of release	Brief on Publication
Handbook on Pre-packaged Insolvency Resolution Process under The Insolvency and Bankruptcy Code, 2016	February 07, 2022	The objective of the Pre-packaged Insolvency Resolution Process(PPIRP) is to provide an "efficient alternative insolvency resolution process" for corporate debtor classified as micro, small and medium enterprises ("MSMEs") which are covered under MSMED Act, 2006. It aims to provide a cost-effective and value-maximizing mechanism for resolving insolvency with minimum disruption to business operations and thus preserving jobs. This handbook is issued to help the professionals to understand the provisions relating to PPIRP under the Code and also to know about its applicability and intricacies.

REGULATORY UPDATES

Frequently Asked Questions on The Insolvency and Bankruptcy Code, 2016	February 08, 2022	These FAQs are released with appropriate case laws to help in understanding the different provisions under the Code and also know the practical implications in day to day professional life. This Publication covers summary of Section-wise case laws under Insolvency and Bankruptcy Code till September 30, 2021.
LIBOR Transition – Valuation Guide	February 10, 2022	LIBOR, the London Inter-Bank Offered Rate, is the most widely used IBOR in financial transactions globally. Cessation of LIBOR with effect from December 31, 2021 has initiated a worldwide transition of financial institutions from old benchmarks to new Alternative Reference Rates (ARR). This transition will impact the existing exposures as well as any future contracts using LIBOR as a reference rate and will also require changes in systems, processes and tax and accounting treatment at entities that uses financial instruments. This booklet provides a brief summary of LIBOR history and way forward post its cessation and also highlights key points to be considered by Registered Valuers and Stakeholders as a part of this transition.
Handbook on Liquidation Process and Voluntary Liquidation Process under The Insolvency and Bankruptcy Code, 2016	February 10, 2022	Though the primary aim of this code is to revive the businesses through resolution of insolvency under IBC, but at times when it does not happen and in that case the Code provides for Liquidation Process and detailed regulations thereunder. Further the Code also provides that a corporate person who intends to liquidate itself voluntarily and has not committed any default can initiate Voluntary Liquidation Proceedings. Both the Liquidation Process and Voluntary Liquidation Process are being caried out by Insolvency Professionals registered with Insolvency and Bankruptcy Board of India (IBBI) in a time bound process, which is different as compared to Winding up in Companies Act, 2013. The Powers and Duties of the Liquidator are enumerated in the Code and accordingly the Liquidator so appointed has been given the responsibility to comply with various Reporting requirements under the Code. Further, for the benefit of the stakeholders, Model timeline of liquidation process of a Corporate Debtor from the Liquidation Commencement Date is also provided in the Code. This handbook is issued to help the professionals understand the relevant provisions relating to Liquidation Process and Voluntary Liquidation Process under the Code and also to know about the practical aspects based on case laws.

REGULATORY UPDATES

Concept Paper on Inventory Valuation	February 10, 2022	The ICAI has also issued ICAI Valuation Standards 2018 comprising of 8 standards on various aspects of valuation, but none of them specifically provides guidance relating to the valuation of Inventory. Ind AS 113 – Fair Value Measurement, defines fair value and sets out the framework for measuring fair value. However same does not specify guidelines particularly specific to Inventory. Hence, this concept paper has been developed to discuss technicalities involved in the valuation of Inventory. The purpose of this concept paper is to outline the process for estimating the fair value of Inventory and to bring more uniformity in this area of valuation practice. Physical verification of Inventory and/or determining the physical availability of the inventory is not considered within the scope of this concept paper.
Concept Paper on Estimating Discount Rates in Valuation	February 10, 2022	ICAI Registered Valuers Organisation and the Valuation Standards Board of ICAI have brought out this Concept Paper since discount rate is not only an important factor in valuation but at the same time estimating discount rate is difficult and also prone to judgement. Therefore, understanding the methodology and concepts in determining an appropriate discount rate is extremely critical for valuers.
		The Guidance Note is broadly bifurcated into two Sections i.e. Section A - Statutory Central Audit and Section B - Bank Branch Audit.
Guidance on Bank Audits (2022 Edition)	February 10, 2022	The Guidance Note also contains various Appendices like illustrative formats of engagement letter, auditor's report both in case of nationalized banks and banking companies, management representation letter, the text of master directions, master circulars and other relevant circulars issued by RBI.
Judicial Pronouncements in Valuation	February 11, 2022	The Valuation Standards Board of ICAI jointly with ICAI Registered Valuers Organisation has decided to bring out publication on Judicial Pronouncements in Valuation. The publication is a compilation of case studies based on Key Judicial Pronouncements in the field of Valuation under various acts like The Companies Act 2013, The Income Tax Act 1961, The Insolvency and Bankruptcy Code, 2016 and the SEBI Regulations. It also talks about the key learnings and takeaways from these verdicts for Valuation Professionals.

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA ("IBBI")

Notification dated 9th February 2022: IBBI (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2022 ("Amended CIRP Regulations")

The IBBI vide its notification dated 9th February 2022 notified the Amended CIRP Regulations, key highlights of which are as under:

- **Regulation 18** pertaining to meetings of the committee is revised to state that a resolution professional shall convene a meeting of committee or place a proposal received from members of the committee in a meeting only if he considers necessary or upon a request received from members of committee representing at least 33% of voting rights.
- **Regulation 39A** pertaining to preservation of records is revised to state that the resolution professional or an interim resolution professional shall preserve copies of all the prescribed records in a prescribed manner which are required to give a complete account of the CIRP. Further, the electronic records and physical records must be preserved at least for the period of 8 years and 3 years respectively from the date of completion of CIRP or a conclusion of any proceeding related to that.

TAX UPDATES
Direct Tax

CIRCULARS/ NOTIFICATIONS/PRESS RELEASE

Central Board of Direct Taxes clarifies on the applicability of the MFN Clause.

Some of the Double Taxation Avoidance Agreements (DTAA) executed by India contain a Most Favoured Nation (MFN) clause. As per the said clause, if India enters into a DTAA at a later date with a third Country which is an OECD member, providing a beneficial rate of tax or restrictive scope for taxation than that provided for in the first mentioned DTAA, a similar benefit will be available to the first country. Recently, the Central Board of Direct Taxes (CBDT) issued a Circular No. 3/2022 dated 3 Feb 2022 clarifying and laying down the condition for applicability of the MFN Clause.

To read the BDO analysis of the above stated CBDT Circular, please go to: https://www.bdo.in/en-gb/insights/alerts-updates/direct-tax-alert-cbdt-clarifies-on-applicability-of-mfn-clause

[Circular No. 03/2022, dated 3 February 2022]

JUDICIAL UPDATES

Distribution of freebies to medical practitioners not an allowable business expenditure.

The Taxpayer, a private limited company, is engaged in the business of pharmaceutical manufacturing and marketing. It had distributed various freebies to medical practitioners for creating awareness about its product - 'Zincovit' - a health supplement. The Tax Officer disallowed the expenditure incurred towards these freebies by treating them to have been incurred in contravention of the law. The First Appellate Authority ('CIT(A)') partly allowed the expenditure. The Tax Tribunal and the Madras High Court (HC) upheld the order passed by the CIT(A). Aggrieved, the taxpayer filed a Special Leave Petition (SLP) against the order of the HC before the Supreme Court (SC). After hearing the contentions of the taxpayer and the Tax Officer, the SC dismissed the appeal and made the following observations:

- Explanation 1 to Section 37 of the Income-tax Act, 1961 (IT Act) was introduced retrospectively from 1 April 1962, restricting the allowance of business expenses incurred under Section 37 of the IT Act which are prohibited by law or illegal or punishable.
- The Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 ('Regulations') laid down that acceptance of freebies by medical practitioners is an offence and punishable with varying consequences. The CBDT Circular issued was clarificatory in nature and effective from the date of implementation of the Regulations.

- A narrow interpretation of the provisions of the IT Act defeats the purpose for which it was inserted. Therefore, it is logical that when acceptance of freebies by medical practitioners is punishable under the Regulations, then no benefit under the IT Act of such expenses can be given to the pharmaceutical companies.
- Doctors and pharmacists being complementary and supplementary to each other, a holistic view must be adopted to regulate their conduct in view of the statutory regimes and regulations. Therefore, denial of the tax benefit cannot be construed as penalizing the taxpayer.
- These freebies are not free, and the cost of such freebies is included in the cost of the medicines, thereby increasing the cost of the medicines. Also, this results in prescribing costly medication over the generic alternatives available, creating an injurious cycle.
- The argument of interpreting the statutes strictly cannot sustain in cases where it results in absurdity and contrary to the intentions of the Parliament which was held by SC in one of its judgements[1].
- Relying on various judgements[2] passed by the SC, it stated that what cannot be done directly, cannot be done indirectly.

[Apex Laboratories Pvt. Ltd (SLP (Civil) No. 23207 of 2019)]

Reopening based on earlier years' assessment is invalid

The Taxpayer, a company incorporated in the USA, is engaged in the business of supplying of goods and software to its various customers in India. The Tax Officer reopened the assessments for fiscal years (FY) 2007-08 to 2010-11 by relying on the assessment orders passed for FY 2001-02 to 2005-06 wherein it was held that the taxpayer's activities cannot be termed as auxiliary and preparatory in nature and that it had a Business Connection as well as a Permanent Establishment (PE) in India. Also, the Tax Officer noted that the taxpayer in their submission had stated that the business activities has not changed as compared to the previous years. Accordingly, the Tax Officer completed the reassessment which was upheld by the Dispute Resolution Panel (DRP). Aggrieved, the taxpayer filed an appeal with the Tax Tribunal challenging the reopening of the assessment.

[1] Supreme Court – C.W.S. (India) Ltd. v. CIT [1994 Supp (2) SCC 296]

[2] Supreme Court – Bihari Lal Jaiswal & Ors. v. Commissioner of Income Tax & Ors [(1995) Supp (5) SCR 285] G.T. Girish v. Y. Subba Raju (D) by L. Rs & Ors [2022 SCC Online SC 60]

TAX UPDATES
Direct Tax

While quashing the reopening, the Tax Tribunal made the following observation:

- For FY 2000-01,the Tax Officer during the survey gathered evidence and information that the employees of the taxpayer's Indian subsidiary and expatriate employees were actively involved in concluding the agreements / contracts with various customers for the taxpayer. Basis these findings, the Tax Officer had concluded that the taxpayer had a PE in India and income had escaped assessment. The findings for fiscal year 2000-01 was followed for passing order for fiscal year 2001-02 to 2005-06 and the taxpayer had not raised any objections for these years.
- The reopening reasons did not contain any reason in specific for the years under consideration and have relied on the findings and orders passed for earlier years.
- There needs to be a close nexus between the information and the belief that is formed by the Tax Officer.
- Relying on the SC judgement[3], the Tax Tribunal stated that forming a belief is a pre-condition and a failure to fulfill this condition will invalidate the entire proceeding.
- The evidence sought to be used for initiating fresh enquiry and concluding that the taxpayer has a PE in India does not pertain to the year under consideration.
- Relying on the SC judgement[4], it stated that determination of PE is a fact specific issue and needs to be decided on a year-on-year basis.
- Further, relying on the SC judgement[5], it also stated that the reasons for reopening the assessment cannot be improved in the assessment order.

[Bentley Nevada Inc. (ITA No. 6300/DEL/2017)]

Separate Notification not required for applying MFN Clause.

CBDT has issued a circular laying down the conditions that need to be satisfied for exercising the MFN clause. One of these conditions requires issuance of a separate Notification by India importing the benefits of second DTAA into the DTAA with First Country. This condition could lead to a situation where for a taxpayer all other 3 conditions are satisfied but for this condition. As all the four conditions are to be satisfied cumulatively, taxpayer may lose the DTAA benefit, which he was otherwise entitled to. In this regard, recently, Pune Tax Tribunal had an occasion to examine the said circular while dealing with MFN clause of India-Spain DTAA.

To read BDO analysis please go to: https://www.bdo.in/en-gb/insights/alerts-updates/direct-tax-alert-separate-notification-not-required-for-applying-mfn-clause

[GRI Renewable Industries S.L. (ITA No.202/PUN/2021)]

[3] Supreme Court – Ganga Saran & Sons [130 ITR 1]
[4] Supreme Court – Dwarka Das Kesardeo Morarka [44 ITR 529]
[5] Supreme Court – New Delhi Television Ltd [424 ITR 607]

TAX UPDATES
Transfer Pricing

Foreign Associated Enterprise (AE) can be accepted as Tested Party if it is a least complex entity

The question before the Calcutta High Court was whether an AE of the taxpayer could be accepted as a Tested Party for the purpose of determining the Arm's Length Pricing (ALP) and whether there is a bar from doing so under the Indian Transfer Pricing regulations.

The Kolkata Tribunal had noted that perusal of the FAR profile of the taxpayer shows that substantial amount of risk was borne by the taxpayer and therefore, taxpayer has to be treated as a complex entity when compared to its AE. The High Court took note of the fact that in terms of the United Nations Practical Manual of Transfer Pricing for Developing Countries, 2013, India Chapter in Regulation 10.4.1.3, Indian Transfer Pricing Administration prefers Indian comparables in most cases and also accepts foreign comparables in cases where the foreign AE is less, or least complex entity and requisite information is available about the tested party and comparables. The High Court also took note of the fact that in identical issue in the case of Virtusa Consulting Services (P.) Ltd. v. DCIT, Circle 5(2), Chennai [2021] 124 taxmann.com 309 (Madras), it was held that the tested party normally should be the least complex party to the controlled transaction. There is no bar from selection of tested party either local or foreign party. Neither the Act nor the guidelines on transfer pricing provides so and the selection of the tested party is to further the object of comparability analysis by making it less complex and requiring fewer adjustment. High Court delved into the aspect of the meaning of 'Associated Enterprise', attributed to sections 92F(iii) ('definition of 'Enterprise') and 92A (Definition of 'Associated Enterprise') and held that statute did not indicate that 'Enterprise' should mean the taxpayer and the 'Associated Enterprise' would mean the other party as these two had been used interchangeably.

The High Court also took note of the fact that the Indian Transfer Pricing guidelines issued by the ICAI vide guidance note on report under Section 92E by ICAI and transfer pricing guidelines issued by OECD does not prohibit AE to be a tested party. The High Court accepted the stand taken by the taxpayer that the AE can be selected as a tested party.

Pr. CIT Vs. Almatis Alumina Pvt. Ltd [TS-109-HC-2022(CAL)-TP]

Tribunal deletes penalty u/s 271BA for Taxpayer's first unintentional and bonafide mistake of non-uploading of Form 3CEB even though obtained from CA

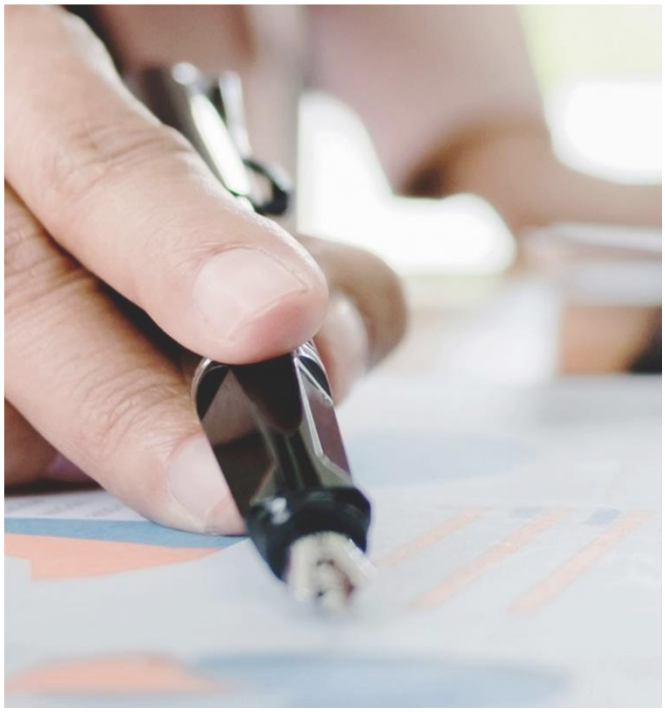
The Taxpayer is a partnership firm engaged in the business of industrial waxes and poultry feeds. During the AY 2013-14, the taxpayer had entered into international transaction and as per section 92E of the Act, the taxpayer was required to get its books of account audited and furnish a report in Form 3CEB. During assessment, the AO noted that the taxpayer had not furnished report of accountant as required u/s 92E. The AO invoked the provisions of section 271BA and levied a penalty of Rs. 100,000. This was upheld by CIT(A).

The taxpayer pleaded that the word "specified domestic transaction" was inserted in section 92E of the Act by the Finance Act, 2012 with effect from 01 Apr 2013 which is applicable for the first time from AY 2013-14. Though the form was obtained from the CA, the taxpayer failed to upload it electronically, as it was not aware about the recent changes and amendments in the provision. Further this being the first year of this new provision, non-uploading of Form 3CEB for the first time is an unintentional bonafide mistake.

The Tribunal after perusal of the relevant provisions inferred that the Parliament has used the words "may" and not "shall" in section 271BA, thereby making the intentions clear that the levy of penalty is discretionary and not automatic. The same is further justified by section 273B which encompasses that certain penalties shall not be imposed in cases where reasonable cause is pleaded. Penalty u/s 271BA is also included therein. If the statutory provisions shows that the word "shall" has been used in section 271BA, then the imposition of penalty would have been mandatory.

The Tribunal also noted that the TPO had not made any adjustment to the ALP of the transaction entered into by the taxpayer. Being satisfied by the explanation offered by the taxpayer and after considering the position of law as applicable, the penalty order was quashed by the Tribunal.

Faith Intertrade Vs. ITO [TS-121-ITAT-2022 (Ahd.)-TP]



TAX UPDATES
Indirect Tax

GOODS & SERVICE TAX

JUDICIAL UPDATES

ORDERS BY AUTHORITY FOR ADVANCE RULING (AAR)

Activities undertaken in the taxpayer's premises/production plant do not qualify as 'Job Work'

Facts of the case

- M/s. IOCL ('Taxpayer') owns and operates 15 Million Metric Tonnes Per Annum (MMTPA) oil refinery in the state of Odisha located at Paradeep. The taxpayer refines crude oil and produces several petroleum products at this location. The taxpayer requires hydrogen gas, nitrogen gas and HP steam for its refining activity (collectively referred to as 'Industrial Gases'). It can be obtained from inputs such as naphtha and other utilities such as Demineralized Water ('DM water'), power, cooling water, service water, instrument air etc.;
- The taxpayer has given contract to Praxair India Private Limited ("Praxair") for installation, lease, operation, and maintenance of inter-alia, a hydrogen reformer plant ("H2 plant") & nitrogen plant ("N2 plant") inside its premises and Praxair had installed the hydrogen and nitrogen gas plant inside the premises of taxpayer;
- Under the agreement, all the inputs required for the manufacture of industrial gases shall be supplied by the taxpayer and the resultant producing industrial gases will be sent back to the taxpayer by Praxair for the exclusive utilization in the refinery processes. All the input and output products received and processed by Praxair is transferred to the taxpayer through pipeline. The ownership of the input and output products shall always remain with the taxpayer only.

Questions before the AAR

- Whether sending of naphtha, DM water, power, cooling water, service water and instrument air by the taxpayer and receiving back of hydrogen gas, nitrogen gas and HP steam under the contract will fall under 'job work' in terms of section 2(68) of the CGST Act, 2017?
- Whether all the payments under the contract will attract GST as applicable to job work?

Contention of the Taxpayer

- The taxpayer has submitted that, as per the definition of 'job work' as defined in section 2(68) of the CGST Act, 2017 and procedures as provided in section 143 of the CGST Act, 2017, the following conditions need to be satisfied for an activity to be 'Job work'-
  - There must be treatment or process;
  - Treatment or process is undertaken on goods;
  - Goods must be owned by principal;
  - Goods must be brought back within one year in case of input;
  - The Goods sent by the principal to the job worker qualifies as "inputs".

- The taxpayer further stated that the ambit of 'job work' includes 'manufacture' in the earlier Central Excise Regime in terms of notification no:214/86-CE, dated 23 March 1986;
- Under the Central Excise regime, it was a settled position in law that job work activity could very well amount to manufacture. The decision of the Supreme Court in the case of Ujagar Prints & Ors. [1987 /27/ ELT 567 (SC)] and that of the Mumbai Tribunal in the case of Eaton Fluid Power Ltd. [2014 (308) EI.T 602 (Tri. — Mumbai)] are relevant from this perspective;
- The Mumbai Tribunal in the Eaton case (supra) specifically commented that a job work might amount to "manufacture" or might not amount to "manufacture'. The proposed activity will be covered under the ambit of 'process' or 'treatment' even if such process amounts to manufacture;
- To substantiate the activity as 'job work', the taxpayer has further highlighted the below points:
  - Items sent by the taxpayer to Praxair are owned by the taxpayer and movable in nature;
  - Industrial gases dispatched by Praxair possess all the attributes of movable property and covered under the ambit of goods.
  - All risk and rewards of ownership remains with the taxpayer.
  - The goods are brought back within 1 year from the date of sending the input which satisfies the condition of section 143 of the CGST Act, 2017.
- The taxpayer relied upon the decisions of AAR Gujarat in the case of Inox Air Products Private Limited [2018(14) GSTL 147(AAR-GST)] and AAR Kerala in the case of Bharat Petroleum Corporation Ltd [2018 (19) GSTL 119 (AAR-GST)] having similar facts of the case which held that transaction amounts to 'Job work' under section 2(68) of CGST/KSGST Acts.

Submissions by the tax authority

The tax authority stated that Praxair collects job work charges or processing charges, the taxpayer would be liable to pay agreed job charges to the job worker along with GST @ 18% vide HSN 9988.

TAX UPDATES
Indirect Tax

Observations and ruling by the AAR

From the submission made by the taxpayer, the authority has observed the below points:

- Praxair had constructed, installed, and commissioned the hydrogen and nitrogen gas plant inside the taxpayer premises;
- After installation, Praxair has leased the said plant for a period of 15 years to the taxpayer. The taxpayer is paying lease/rental charges and operation and maintenance charges for nitrogen and hydrogen plant;
- Praxair is raising invoices for fixed lease charges for nitrogen and hydrogen plant under SAC code 997212 (GST Rate 18%), fixed operation and maintenance charges for nitrogen and hydrogen plant under SAC code 998717 (GST Rate 18%) and for variable operation and maintenance charges for nitrogen and hydrogen plant under SAC code 998717 (GST Rate 18%);
- Further, the possession of the plant is with the taxpayer and there is no specific job work agreement between the taxpayer and Praxair;
- In addition to the above, the manufacturing of gases is not being done at Praxair's production plant. Therefore, the concept of 'Job Work' is not present in the entire transaction;
- Based on the above observations, the AAR concluded that the activities undertaken in the taxpayer's premises/production plant do not qualify for 'Job Work' under section 2(68) of the CGST Act, 2017.

[AAR-Odisha, M/s. IOCL, Ruling Order no:03/ODISHA-AAR/2021-22, dated 15 December 2021]

Supply of coaching services along with study materials is a composite supply with principal supply being supply of service

Facts of the case

- M/s. Symmetric Infrastructure Private Limited ("Taxpayer") is engaged in providing coaching services. The taxpayer has appointed its business associates in different cities for providing coaching services to students and other ancillary services on 'Principal to Principal' basis;
- The services provided by taxpayer through its business associates also include supply of study materials, test papers etc.; and
- The taxpayer shall receive consolidated amount as 'fee' from students comprising value for both goods and services.

Questions before the AAR

- Whether the supply is to be considered as supply of goods or services?
- Whether the supply is composite supply or mixed supply?
- Who shall be considered as recipient of service and supplier of service under the tire agreement between taxpayer, network partner and student?
- What shall be the value of service provided to students?
- Whether ITC can be availed by both taxpayer and network partner?

Contention of the tax authority

- The principal supply by the taxpayer pertains to coaching services to students. Accordingly, the supply shall be considered as supply of services. Further as the Taxpayer has supplied individual supplies in conjunction, they shall be considered as mixed supply;
- It was also submitted that the business model involves two supplies viz. supply of service by taxpayer to students and supply of service by business associates to taxpayer. Accordingly, the invoice generated by taxpayer and its business associates will form basis of value of supply.

Observations & ruling by the AAR

- The AAR held that supply of coaching services along with supply of goods is to be considered as supply of services in accordance with Schedule II to Central Goods and Services Tax Act, 2017 ("CGST Act");
- Further, the AAR stated that all essential conditions of supply for qualifying as a composite supply are met. Hence, the supply is fit to be qualified as 'composite supply' wherein principal supply shall be supply of coaching services;
- The value of supply shall be the transaction value and value of goods supplied as defined in section 15(2)(b) of CGST Act, 2017. Accordingly, consolidated amount charged by the taxpayer shall be the value of supply; and
- The taxpayer can avail the ITC being the registered person as per section 16 of CGST Act, 2017.

[AAR-Rajasthan, M/s. Symmetric Infrastructure Private Limited, Advance Ruling no:GST-RAJ/AAR/2021-22/09 dated 02 September 2021]

ORDERS BY APPELLATE AUTHORITY FOR ADVANCE RULING (AAAR)

ITC of GST and compensation cess paid on receipt of cars on stock transfer basis for use as training fleet and demo cars shall not be availed

Facts of the case

- M/s. BMW India Pvt. Ltd. ('Taxpayer'), is running a training centre in Gurugram to provide training to engineers and marketing professionals etc.;
- The taxpayer is supplied with BMW cars which are manufactured at the Chennai plant on an inter-state stock transfer basis on which IGST and compensation cess have been paid;
- The cars so received are used as training fleet for sales personnel and as demo cars for demonstration to the prospective customers;
- These demo cars are classified as capital assets in the taxpayer's books of accounts and are capitalized in conjunction with the applicable accounting standards; and

TAX UPDATES
Indirect Tax

- After a specific period of about 12 months, these cars are then sold to the company's authorized dealers as old and used vehicles.

Questions before the AAR

Whether ITC of IGST and compensation cess paid on receipt of cars on stock transfer basis are first put to use for the specified uses and disposed of after prolonged use, can be availed?

Ruling by the AAR

AAR held that ITC in respect of demo cars put to use in the course and furtherance of business cannot be availed, considering the specific provisions under section 17(5)(a) of the CGST Act, 2017.

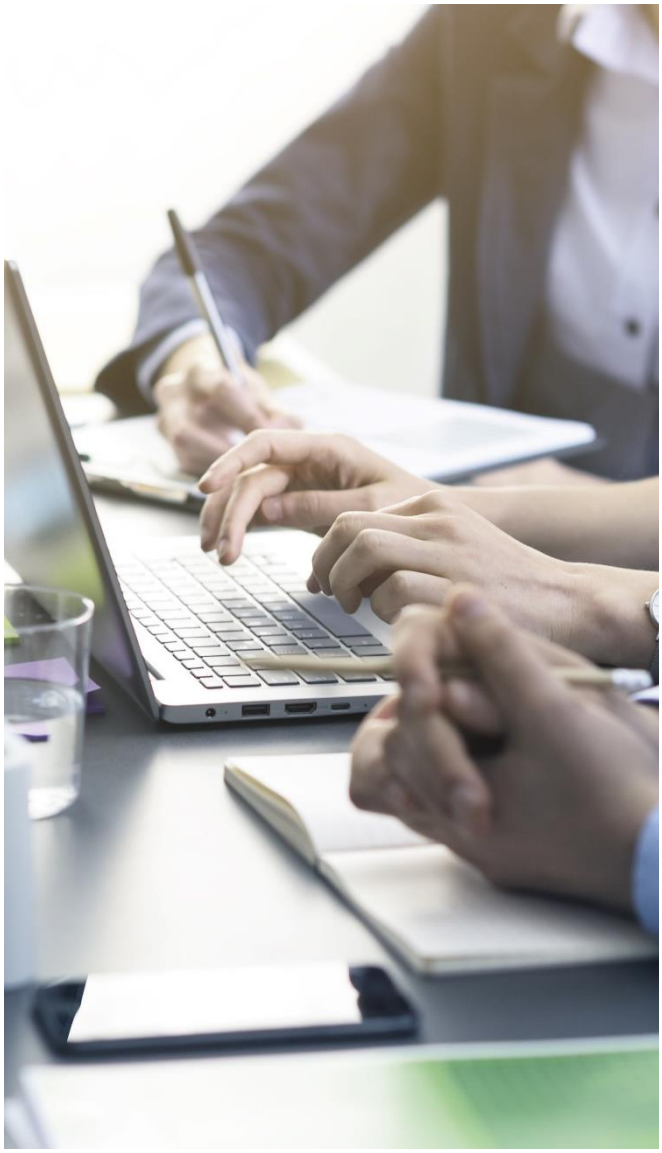
Contention of the Taxpayer

- The taxpayer contended that the vehicles were always intended to be further supply by the taxpayer after specified use;
- The taxpayer also submitted that the vehicles were used for specified taxable supply as mentioned under section 17(5)(a)(i)(A) of the CGST Act, 2017, hereby entitling them to avail the ITC on such vehicles; and
- The taxpayer concluded that the ruling passed by AAR Haryana does not fall in lines with rulings passed by other AARs, stating that as per other AAR rulings, ITC in such case would be admissible.

Observations and Ruling by the AAAR

- The AAAR has relied on the section 17(5)(a) of the CGST Act, 2017, wherein it is specified that ITC shall not be availed in respect of motor vehicles for transportation of persons having approved seating capacity of not more than 13 persons (including the driver), except when they are used for making further supply of such motor vehicles; or
- Considering that the vehicles are first put to use for the specified uses and disposed of after prolonged use, the AAAR concluded that the vehicles under question are not meant for further supply of such motor vehicles [i.e., removal of vehicle as such] and accordingly the same may not satisfy the exception condition prescribed under 17(5)(a) of the CGST Act, 2017;
- The AAAR also highlighted that the intent of law makers is to allow the ITC only to car dealers in respect of further of new motor vehicle;
- The AAAR observed that the demo car loses the character of the new motor vehicle, and such demo vehicles is akin to second hand goods, and which is different from new vehicle and accordingly treated differently under GST law;
- Accordingly, the AAAR confirms the ruling of the AAR and concluded that the motor vehicles received by the taxpayer as inter-state stock transfer were not intended to be a further supply of such motor vehicles as such and that the ITC of IGST and compensation cess paid on such motor vehicles thus cannot be availed; and
- The AAAR also clarified that ITC on services of general insurance, servicing, repair, and maintenance in respect of such motor vehicles can also not be availed.

[AAAR-Haryana, M/s BMW India Pvt. Ltd., Appeal Case no:HAR/HAAAR/2019-20/02, dated 28 June 2021]



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