ACCOUNTING, REGULATORY & TAX NEWSLETTER

Vol 64
May, 2022
www.bdo.in

TABLE OF CONTENTS

ACCOUNTING UPDATES

INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA ("ICAI")

EAC Opinion – Classification of business activity as operating activity or investing activity.

Facts of the case

A Company is a wholly-owned Government of India company, engaged in providing long-term finance to viable infrastructure projects through the Scheme for Financing Viable Infrastructure Projects through a Special Purpose Vehicle called 'the Company', referred to as SIFTI. The Company enjoys the status of public financial institution and is also registered as a Non-Banking Financial Company - Infrastructure Finance Company (NBFC-IFC) with the Reserve Bank of India. The Company is categorized as Systemically Important Non-Deposit taking company. The Company complies with various elements of RBI Regulations applicable to NBFC-IFC. As per SIFTI, "The Company would raise funds as and when required. The funds so raised may be utilized for on-lending and surplus funds may be invested in marketable government securities (G-Sec and T-Bills) and / or Certificates of Deposit, Fixed Deposits and, for Treasury Management purposes, in AAA rated PSU Corporate Bonds."

The Company has stated that the Comptroller and Auditor General of India (C&AG) conducts supplementary audit of accounts of the Company under section 143(6)(b) of the Companies Act, 2013. The office of C&AG after completing the supplementary audit of the Company for financial year (F.Y.) ended March 31, 2020 has issued a letter dated January 05, 2021 and informed, inter-alia, the following:

"Cash Flow Statement is deficient as detailed below:

- Investment of Rs. 5297.60 crore in Government Securities has been shown under Operating Activities instead of Investing Activities which is in contravention to Ind AS 7.
- Similarly, receipt of Rs. 97.87 crore on account of sale of Government Securities has been shown under Operating Activities instead of Investing Activities.
- Equity Infusion of Rs. 188.45 crore in ABC (UK) Ltd., (a wholly owned subsidiary of the Company) has been shown under operating activities instead of Investing Activities."

In this regard, the Company has submitted as follows:

- Investment of Rs. 5297.60 crore in Government Securities:
  - The Company is operated under the Scheme for Financing Viable Infrastructure Projects (SIFTI) and as per this scheme; the Company doesn't undertake any investment activities. Interest/ income on surplus funds is considered as income from operations.
  - The surplus funds are invested in marketable government securities (G-Sec and T-Bills) and/ or certificates of deposit, fixed deposits and, for treasury management purposes, in AAA rated PSU corporate bonds.
  - Government of India, on March 31, 2020 infused equity share capital, by way of Right Issue (Recapitalisation bonds) of Rs. 5,297.60 crore.
  - Consequently, the Government of India issued, vide Notification dated March 26, 2020, Special GoI securities (non-transferable) aggregating Rs. 5,297.60 crore. The special securities shall not be transferable and conversion in any other form of security is not permitted.

  As per the aforesaid Notification, "The investment in the special securities by the Company would not be considered as an eligible investment which the Company is required to make in Government securities in pursuance of any statutory provisions or directions applicable to the investing bank/company, i.e., the Company."

  Considering the fact that the Company cannot undertake the investing activities and parked the surplus funds in Government Securities, which is the part of primary operations of the Company, the subscription of Special GoI Securities is considered as operating activity by the Company.
- Receipt of Rs. 97.87 crore on account of sale of Government Securities:
  - The Company doesn't undertake any investment activities. The surplus funds are invested in marketable government securities (G-Sec and T-Bills) and/or Certificates of Deposit, Fixed Deposits and, for Treasury Management purposes, in AAA rated PSU Corporate Bonds.
  - The investment in government securities by the Company is considered as an operating activity. Accordingly, the proceeds from maturity of any government security are treated as operating activity of the Company.

  Further, the Company has clarified that the receipt of Rs. 97.87 crore was on account of redemption of marketable Government Securities, other than special Government Securities.
- Equity Infusion of Rs. 188.45 crore in ABC (UK) Ltd.:
  - ABC (UK) Limited, a 100% owned subsidiary of the Company, was incorporated in February 2008 to lend to Indian companies implementing infrastructure projects in India, or to co-finance their external commercial borrowings for such projects, solely for the capital expenditure outside India. The Company infused capital of Rs. 188.45 crore (USD 25 million) during the financial year 2019-20.
  - In accordance with the Company's plan for business continuance to further supplement financial resources for infrastructure development in India, ABC (UK) Ltd. was set up with the objective of lending in foreign currency

ACCOUNTING UPDATES

to Indian companies implementing infrastructure projects in the Country specifically for import of capital equipment. The Reserve Bank of India (RBI) has extended line of credit of USD 5 billion from foreign exchange reserves for the same.

- The Company's equity investment is a part of operating activity in the Cash Flow Statement considering it as an integral part of its operation to fund infrastructure loan.

It is also submitted by the Company that the Company had received a similar comment on classification of interest on fixed deposits as operating activity from the office of C&AG during the supplementary audit for the financial year ended March 31, 2010 and March 31, 2011. The matter was referred to the Expert Advisory Committee (EAC) of the Institute of Chartered Accountants of India (ICAI). The EAC opined that "it is appropriate for the company to treat interest on bank deposits as income from operations in its books of account and, accordingly, to consider and disclose interest on bank deposits as income from operations in preparation of financial statements including cash flow statement".

Query

On the basis of the above, the Company has sought the opinion of the EAC regarding classification of investment/redemption of government securities and equity investment in the cash flow statement.

Points considered by the Committee

The Committee notes that the basic issue raised in the query relates to classification of investment/redemption of government securities and equity investment in the statement of cash flows, presented in accordance with Indian Accounting Standard (Ind AS) 7, 'Statement of Cash Flows'. The Committee has, therefore, examined only this issue and has not examined any other issue that may arise from the Facts of the Case. Further, the Committee presumes from the Facts of the Case that investments in marketable government securities do not meet the definition of 'cash equivalent' as per Ind AS 7.

The Committee notes that the Company in the extant case is a NBFC-IFC –and therefore, can be considered as a financial institution under Ind AS 7.

The Committee notes that the following three types of transactions/investments have been referred to in the extant case:

- Investment in Special government securities: These special securities shall not be transferable and conversion in any other form of security is not permitted.
- Sale of marketable government securities other than special government securities as referred above.
- Equity infusion in the wholly-owned subsidiary, ABC (UK) Ltd.

In the context of the issue raised, the Committee notes the following paragraphs of Ind AS 7, 'Statement of Cash Flows':

"Operating activities are the principal revenue-producing activities of the entity and other activities that are not investing or financing activities.

Investing activities are the acquisition and disposal of long-term assets and other investments not included in cash equivalents.

Financing activities are activities that result in changes in the size and composition of the contributed equity and borrowings of the entity."

"11 An entity presents its cash flows from operating, investing and financing activities in a manner which is most appropriate to its business. Classification by activity provides information that allows users to assess the impact of those activities on the financial position of the entity and the amount of its cash and cash equivalents. This information may also be used to evaluate the relationships among those activities."

"14 Cash flows from operating activities are primarily derived from the principal revenue-producing activities of the entity. Therefore, they generally result from the transactions and other events that enter into the determination of profit or loss. Examples of cash flows from operating activities are:

- cash receipts from the sale of goods and the rendering of services;
- cash receipts from royalties, fees, commissions and other revenue;
- cash payments to suppliers for goods and services;
- cash payments to and on behalf of employees;
- cash receipts and cash payments of an insurance entity for premiums and claims, annuities and other policy benefits;
- cash payments or refunds of income taxes unless they can be specifically identified with financing and investing activities; and
- cash receipts and payments from contracts held for dealing or trading purposes.

Some transactions, such as the sale of an item of plant, may give rise to a gain or loss that is included in recognised profit or loss. The cash flows relating to such transactions are cash flows from investing activities. However, cash payments to manufacture or acquire assets held for rental to others and subsequently held for sale as described in paragraph 68A of Ind AS 16, Property, Plant and Equipment, are cash flows from operating activities. The cash receipts from rents and subsequent sales of such assets are also cash flows from operating activities.

15 An entity may hold securities and loans for dealing or trading purposes, in which case they are similar to inventory acquired specifically for resale. Therefore, cash flows arising from the purchase and sale of dealing

ACCOUNTING UPDATES

or trading securities are classified as operating activities. Similarly, cash advances and loans made by financial institutions are usually classified as operating activities since they relate to the main revenue-producing activity of that entity.

Investing Activities

16 The separate disclosure of cash flows arising from investing activities is important because the cash flows represent the extent to which expenditures have been made for resources intended to generate future income and cash flows. Only expenditures that result in a recognized asset in the balance sheet are eligible for classification as investing activities. Examples of cash flows arising from investing activities are:

- cash payments to acquire property, plant and equipment, intangibles and other long-term assets. These payments include those relating to capitalised development costs and self-constructed property, plant and equipment;
- cash receipts from sale of property, plant and equipment, intangibles and other long-term assets;
- cash payments to acquire equity or debt instruments of other entities and interests in joint ventures (other than payments for those instruments considered to be cash equivalents or those held for dealing or trading purposes);
- cash receipts from sales of equity or debt instruments of other entities and interests in joint ventures (other than receipts for those instruments considered to be cash equivalents and those held for dealing or trading purposes);
- cash advances and loans made to other parties (other than advances and loans made by a financial institution);
- cash receipts from the repayment of advances and loans made to other parties (other than advances and loans of a financial institution);
- cash payments for futures contracts, forward contracts, option contracts and swap contracts except when the contracts are held for dealing or trading purposes, or the payments are classified as financing activities; and
- cash receipts from futures contracts, forward contracts, option contracts and swap contracts except when the contracts are held for dealing or trading purposes, or the receipts are classified as financing activities.

When a contract is accounted for as a hedge of an identifiable position the cash flows of the contract are classified in the same manner as the cash flows of the position being hedged.

“33 Interest paid and interest and dividends received are usually classified as operating cash flows for a financial institution. However, there is no consensus on the classification of these cash flows for other entities.

Some argue that interest paid and interest and dividends received may be classified as operating cash flows because they enter into the determination of profit or loss. However, it is more appropriate that interest paid and interest and dividends received are classified as financing cash flows and investing cash flows respectively, because they are cost of obtaining financial resources or returns on investments.

“39 The aggregate cash flows arising from obtaining or losing control of subsidiaries or other businesses shall be presented separately and classified as investing activities.”

In the definition of ‘operating activity’ the term ‘principal’ qualifies the term ‘revenue-producing activity’ and not just ‘revenue’. Revenue may flow from activities undertaken by an entity or from a resource created or acquired by an entity. For example, in the case of manufacturing enterprises, plant and machinery (which are long term assets) are resources and, hence, construction/ acquisition of the same are investing activities, while purchase of raw materials, manufacturing and sale of finished goods are principal revenue-producing activities. Cash flows arising from such revenue producing activities are, therefore, cash flows from operating activities. Similarly, investments are resources and, hence, normally, acquisition and disposal of investments (whether or not long term - see the definition of investing activities) are investing activities even for a financial institution (unless held for trading or dealing purposes or which are considered to be cash equivalents), while earning of income, such as interest and dividend, may be the principal revenue-producing activity. Receipts of interest and dividend (for a financial institution) are, therefore, cash flows from operating activities.

Further, the examples cited in Ind AS 7 indicate that irrespective of the nature of an entity, purchase and sale of securities, such as debt and equity instruments, held for trading or dealing purposes or which are considered to be cash equivalents are operating activities, while purchase and sale of securities in other cases are investing activities. The reason is that in the case of purchase and sale of securities held for trading or dealing purposes, earning of interest and dividend is an incidental activity only, while revenue is principally generated by the trading or dealing activities of the entity, and, consequently, purchase and sale of the securities themselves are principal revenue-producing activities. In fact, shares, debentures and other securities held as stock-in-trade (i.e., for sale in the ordinary course of business) are not long-term assets; rather considered similar to inventories. Hence, purchase and sale of securities held for trading or dealing purposes are not investing activities.

ACCOUNTING UPDATES

In the case of purchase and sale of securities held not for trading or dealing purposes, earning of interest and dividend is generally considered as the principal revenue-producing activity for a financial institution. In such cases, purchase of the securities is considered as acquisition of a resource for generating future revenue and not as a principal revenue-producing activity. Hence, sale of securities in such cases is also not a principal revenue-producing activity. Thus, it is possible that even for a financial institution, acquisition and disposal of some investments may qualify as investing activities.

This is evident from Illustrative Example B, titled 'Statement of cash flows for a financial institution', contained in International Accounting Standard (IAS) 7, 'Statement of Cash Flows', issued by the International Accounting Standards Board, wherein proceeds from sales of non-dealing securities and purchase of non-dealing securities are exhibited as cash flows from investing activities.

In the extant case, the Committee notes that investments in non-transferrable and non-convertible special government securities are apparently long-term in nature, having a tenure of 10-15 years and therefore, cannot be considered as held for trading or dealing purposes. Accordingly, considering the above discussion, the Committee is of the view that acquisition and disposal of the special government securities are investing activities and therefore cash flows from acquisition and disposal/maturity of such investments are cash flows from investing activities.

With reference to the above discussion, the Committee also notes from the annual report of the Company for F.Y. 2019-20 that in the extant case, the special government securities are carried at amortised cost and not fair value. Therefore, considering the facts of the extant case, the Committee has not examined the situation where investments are managed on a fair value basis and fair value changes are recognised in the Statement of Profit and Loss.

With regard to cash flows from redemption of government securities other than special government securities, the Committee is of the view that as discussed above, in the case of purchase and sale of securities, distinction between operating activities and investing activities is not made on the basis of whether an entity is a financial institution or not. Rather cash flows from investments are classified as operating activities when these are held for trading or dealing purposes or are considered to be cash equivalents. Accordingly, in the extant case, the proceeds from redemption of government securities other than special government securities would depend upon whether these can be considered as held for trading or dealing purposes or are long-term resources.

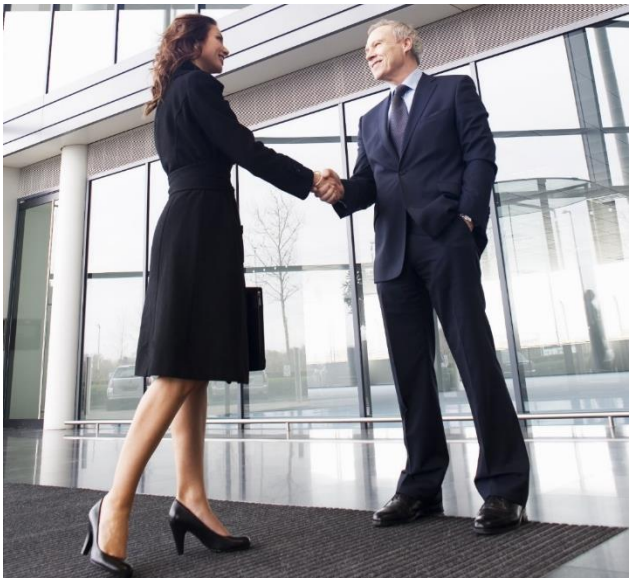
If investments in marketable government securities can be considered as held for trading or dealing purposes, cash flows from redemption of these securities should be considered as operating activities, otherwise these should be considered as investing activities.

With regard to cash flows from equity infusion in wholly-owned subsidiary, the Committee notes that the requirements of Ind AS 7 relating to investments in subsidiaries do not make distinction in classification due to an entity being a financial institution. Accordingly, considering the requirements of paragraph 39 of Ind AS 7 and the above discussion on investing activities, the Committee is of the view that the cash flows from obtaining control of a subsidiary cannot be considered as cash flows from operating activity and should be classified as cash flows from investing activity.

Opinion

On the basis of the above, the Committee is of the opinion that in the Cash Flow Statement of the Company, presented in accordance with Ind AS 7:

- Cash flows from purchase of special government securities should be classified as cash flows from investing activities.
- With regard to cash flows from redemption of government securities other than special government securities, these can be considered as operating activities only if investments in marketable government securities can be considered as held for trading or dealing purposes; otherwise these should be considered as investing activities.
- The cash flows to acquire investment in subsidiary cannot be considered as cash flows from operating activity and should be classified as cash flows from investing activity.



REGULATORY UPDATES

SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI)

Clarification on applicability of regulation 23 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ('SEBI LODR Regulations') in relation to Related Party Transactions

The SEBI vide notification dated April 08, 2022 has issued Clarification on applicability of regulation 23 of SEBI LODR Regulations in relation to Related Party Transactions..

Regulation 23(3)(e) of the SEBI LODR Regulations specifies that omnibus approval granted by the audit committee shall be valid for a period not exceeding one year and shall require fresh approvals after expiry of one year. Regulation 23(4) of the SEBI LODR Regulations requires shareholder approval for material related party transactions (RPTs).

Section 96(1) of the Companies Act, 2013 specifies that the time gap between two Annual General Meetings (AGMs) cannot be more than 15 months.

In order to facilitate listed entities to align their processes to conduct AGMs and obtain omnibus shareholders' approval for material RPTs, it has been decided to specify that the shareholders' approval of omnibus RPTs approved in an AGM shall be valid upto the date of the next AGM for a period not exceeding 15 months.

In case of omnibus approvals for material RPTs, obtained from shareholders in general meetings other than AGMs, the validity of such omnibus approvals shall not exceed one year.

Calculation of investment concentration norm for Category III Alternative Investment Funds (AIFs)

The SEBI issued a circular dated March 28, 2022 which specifies that Existing Category III AIFs may opt for calculating investment concentration norm based on investable funds with the approval of their trustees or board of directors or designated partners, as the case may be, and inform the same to their investors within 30 days from the date of the issuance of this circular.

All Category III AIFs shall disclose the basis for calculation of investment concentration norm in the placement memorandum of their schemes. The basis for calculating investment concentration norm shall not be changed during the term of the scheme.

Category III AIFs which choose to calculate investment concentration norm based on NAV, shall comply with SEBI circular dated November 22, 2021.

Master Circular on Real Estate Investment Trusts (REITs)

The SEBI vide notification dated April 26, 2021 issued Master Circular on Real Estate Investment Trusts (REITs). This Master Circular is a compilation of all the relevant circulars issued by SEBI up to March 31, 2022 which are operational as on date (except circulars providing temporary relaxations with regards to certain compliance requirements for REITs in the wake of the COVID-19 pandemic).

Master Circular on Infrastructure Investment Trusts (InvITs)

The SEBI vide notification dated April 26, 2021 issued Master Circular on Infrastructure Investment Trusts (InvITs). This Master Circular is a compilation of all the relevant circulars issued by SEBI up to March 31, 2022 which are operational as on date (except circulars providing temporary relaxations with regards to certain compliance requirements for InvITs in the wake of the COVID-19 pandemic).

Circular dated 8 April 2022: a Standard Operating Procedures ("SOP") for disputes between a listed company and its shareholders

Regulation 40 of SEBI (Listing Obligations and Disclosure Requirements) ("LODR") Regulations, 2015 provides for a dispute resolution under the Stock Exchange Arbitration Mechanism for disputes between a listed company and its shareholders.

In this regard, stock exchanges are expected to put in place by 1st June 2022, a SOP for operationalizing the resolution of all disputes pertaining to various investor services such as transfer/transmission/dematerialization/rematerialization/duplicate issue of shares, transposition of holders, dividend, bonus, rights entitlements, credit of securities in public issue, interest payments on securities etc.

Circular dated 8th April 2022: Clarification on applicability of Regulation 23(4) read with Regulation 23(3)(e) of the SEBI LODR Regulations, 2015 in relation to Related Party Transactions (RPTS").

The RPTs require prior approval of Audit Committee ("AC") of which, material RPTs require approval from shareholder's which can either be taken in Annual General Meeting ("AGM") or Extra Ordinary General Meeting ("EOGM").

As per the SEBI (LODR) Regulations, the omnibus approval of RPTs granted by the AC has a validity of maximum up to 12 months. Further, the Cos Act specifies the maximum time gap between two AGMs up to 15 months, and thus the validity of

REGULATORY UPDATES

shareholders approved material RPTs is also up to the same period which is not in line with validity period of AC approved RPTs.

Accordingly, SEBI, vide this circular, has issued a clarification on the validity of omnibus approval of RPTs which is as under:

- The omnibus approval of RPTs obtained from shareholders in an AGM shall be valid up to the date of the next AGM i.e., maximum up to 15 months.
- The omnibus approval of RPTs obtained from shareholders in EOGM shall be valid up to 12 months.

Notification dated 11th April 2022: SEBI (Issue and Listing of Non-Convertible Securities) (Amendment) Regulations, 2022 ("Amended Regulations")

The highlights of the Amended Regulations are as under:

- **General Obligations:** The issuer is not only required to cover the secured debt securities fully but also consider higher security cover as per the terms of the offer document and/or Debenture Trust Deed which shall be sufficient to always discharge the principal amount and the interest thereon.
- **Creation of charge**: The charge created on secured debt securities shall be disclosed in the offer document as well as the Debenture Trust Deed. The condition is applicable in case of public/private issue and listing of debt securities.
- **Issue of due diligence certificate**: The Debenture Trustee must furnish a separate due diligence certificate for each of the secured and unsecured debt securities, to the board and stock exchange(s), at a prescribed time and format. The condition is applicable in case of public/Private issue of debt securities and private placement of Non-Convertible Redeemable Preference Shares.
- **Disclosure**: An issuer seeking to issue its debt securities are required to include the details of credit rating along with the latest press release (not older than 1 year) of the credit rating agency validating the rating as on the issue and listing date.

Notification dated 11th April 2022: SEBI (Debenture Trustees) (Amendment) Regulations, 2022 ("Amended Debenture Trustees Regulations")

The Amended Debenture Trustees Regulations modifies the provisions related to duties of Debenture Trustees, details of which are as under:

A Debenture Trustee must:

- ensure that the company does not commit any breach of the terms of issue of debentures or covenants of the trust deed by monitoring the same in board specified manner.
- carry out the necessary due diligence and monitor the security cover on a quarterly basis.
- obtain a certificate from the statutory auditor of the issuer regarding security cover (including compliance with the covenants of the offer document/information memorandum) on a half-yearly basis.

Notification dated 11th April 2022: SEBI (LODR) Third Amendment Regulations, 2022 ("Third Amended LODR Regulations")

The highlights of Third Amended LODR Regulations are as under:

A listed entity which has listed its Non-Convertible Debt Securities:

- must maintain 100% security cover or higher security cover as per the terms of offer document/Information Memorandum and/or Debenture Trust Deed, sufficient to always discharge the principal amount and the interest thereon. Further, a listed entity must disclose the security cover along with its financial results in the prescribed format and
- shall submit a half-yearly certificate regarding maintenance of 100% security cover or higher security cover as per the terms of offer document/ Information Memorandum and/or Debenture Trust Deed, including compliance with all the covenants.

Notification dated 25th April 2022: SEBI (LODR) Fourth Amendment Regulations, 2022 ("Fourth Amended LODR Regulations")

The Fourth Amended LODR Regulations provides that the listed entity shall comply with all procedural requirements not only in relation to transfer, but also the transmission of securities as specified in its Schedule VII. Further, Schedule VII is amended to provide for the revised list of documents that are required in case of transmission of securities where the securities are held in single name with or without nomination.

Notification dated 27th April 2022: SEBI (Issue of Capital and Disclosure Requirements) ("ICDR") Second Amendment Regulations, 2022 ("Amended ICDR Regulations")

SEBI, vide its previous notification dated 14th January 2022, had amended certain provisions, brief points of some of which are mentioned hereunder:

Regulation	Provision
32(3A) and 129	Allocation to non-institutional investors category in an Initial Public Offerings ("IPOs") and Further Public Offerings ("FPOs") issue through a book building process
49(3) and 145(3)	Allotment of specified securities to applicants other than to the retail individual investors, non-institutional investors, and anchor investors (In case of IPOs and FPOs)

REGULATORY UPDATES

49(4A) and 145(4A)	Allotment of specified securities to non-institutional investor (In case of IPOs and FPOs)

SEBI, vide its notification dated 27th April 2022, has brought the above provision into force in the following manner:

- For public issue of less than INR 10,000 crores which will open on or after 1st April 2022 – with effect from 1st April 2022
- For public issue of equal to or more than INR 10,000 crores which will open after 1st April 2022 – with effect from 1st July 2022.

Circular dated 28th April 2022: Reduction of timelines for listing of units of Infrastructure Investment Trust ("InvIT") under SEBI (InvITs) Regulations, 2014 and Real Estate Investment Trust ("REITs") under SEBI (REITs) Regulations, 2014

SEBI has streamlined the procedure for public issue of units of InvITs and REITs by reducing the time taken for allotment and listing after closure of issue to 6 working days as against the present requirement of within 12 working days. The circular provides indicative timeline which starts with issue closing date and ends with trading commencement on 7th day after the issue closing date.

Above provision shall be applicable to a public issue of units of InvITs and REITs opening on or after 1st June 2022.

MINISTRY OF CORPORATE AFFAIRS (MCA)

Companies (Incorporation) Amendment Rules, 2022

The MCA vide notification dated April 08, 2022 has notified Companies (Incorporation) Amendment Rules, 2022 to further amend the Companies (Incorporation) Rules, 2014. With this notification, MCA has brought following significant amendments:

- In case a Company is being incorporated as a Nidhi, the declaration by the Central Government under section 406 of the Act shall be obtained by the Nidhi before commencing the business and a declaration in this behalf shall be submitted at the stage of incorporation by the company.
- Revised Form No. INC-20A substituted the existing form which is a declaration that needs to be filed by the directors of the company at the time of the commencement of the business.

Nidhi (Amendment) Rules, 2022

The MCA vide notification dated April 19, 2022 has notified Nidhi (Amendment) Rules, 2022 to further amend the existing Nidhi Rules, 2014. This notification has brought following significant amendments:

- A new rule 3-B has been inserted, as per which a public company desirous to be declared as a Nidhi shall apply, in Form NDH-4, within a period of 120 days of its incorporation for declaration as Nidhi, if it fulfils the following conditions, namely:-
  - it has not less than 200 members; and
  - it has Net Owned Funds of Rs. 20 lakhs or more
- A Nidhi company to be incorporated under rule 4, shall be a public company and shall have a minimum paid up equity share capital of Rs. 10 lakhs. Provided that every Nidhi existing as on the date of commencement of the Nidhi Amendment Rules,2022, shall comply with this requirement within a period of 18 months from the date of such commencement.
- Further under rule 6, No Nidhi shall, acquire or purchase securities of any other company or control the composition of the Board of Directors of any other company in any manner whatsoever or enter into any arrangement for the change of its management. Also, No Nidhi shall raise loans from banks or financial institutions or any other source for the purpose of advancing loans to members of Nidhi.
- As per the amended rule 9 Every Nidhi shall maintain Net Owned Funds (excluding the proceeds of any preference share capital) of not less than Rs. 20 lakhs or such higher amount as the Central Government may specify from time to time. Provided that every Nidhi existing as on the date of commencement of the Nidhi (Amendment) Rules,2022 shall comply with this requirement within a period of 18 months from the date of such commencement.

The amended rules shall come into force on the date of its publication in the Official Gazette i.e., April 19, 2022.

Notification dated 23rd March 2022: The Companies (Indian Accounting Standards) Amendment Rules, 2022 ("Amended Ind AS Rules")

MCA in consultation with the National Financial Reporting Authority, has issued the Amended Ind IAS Rules to further amend the Companies (Indian Accounting Standards) Rules, 2015. The areas in which amendments have been issued pursuant to this notification are here under:

Ind AS	Particulars
101	First-time Adoption of Indian Accounting Standards
103	Business Combinations
109	Financial Instruments
16	Property, Plant and Equipment
37	Provisions, Contingent Liabilities and Contingent Assets
41	Agriculture

REGULATORY UPDATES

Notification dated 6th April 2022: The Companies (Management and Administration) Amendment Rules, 2022 ("Amended Rules")

The Amended Rules state that though the registers and indices [maintained as per Section 88 of Companies Act, 2013 ("Cos Act")] and returns (filed as per Section 92 of Cos Act) are open for inspection or copies of it can be taken by any member/debenture holder/security holder/beneficial owner, certain private information of the members mentioned hereunder shall not be made available for any inspection or for taking extracts or copies:

- Registered Address
- E-mail ID,
- Unique Identification Number, and
- Permanent Account Number

THE RESERVE BANK OF INDIA (RBI)

The RBI vide notification dated April 01, 2022 has issued various master circulars. Some of the important master circulars are as follows:

S. No.	Master Circular	Brief on Master Circular
1.	Master Circular – Income Recognition, Asset Classification, Provisioning and Other Related Matters – UCBs	This Master Circular consolidates and updates all the instructions / guidelines on the subject issued up to March 31, 2022.
2.	Master Circular – Housing Finance	This Master Circular is issued to consolidate framework of rules/ regulations and clarification on Housing Finance issued to banks by RBI from time to time till March 31, 2022. This circular is applicable to Scheduled Commercial Banks (Excluding Payments Banks and Regional Rural Banks).
3.	Master Circular - Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances	This Master Circular consolidates instructions/ guidelines issued to the Bank on the Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances up to March 31, 2022.
4.	Master Circular - Bank Finance to Non-Banking Financial Companies (NBFCs)	This Master Circular consolidates instructions on the subject matter issued up to March 31, 2022. This circular is issued to lay down the RBI's regulatory policy regarding financing of NBFCs by banks and is applicable to Scheduled Commercial Banks (excluding Regional Rural Banks).
5.	Master Circular - Prudential Norms on Capital Adequacy - Primary (Urban) Co-operative Banks (UCBs)	This Master Circular consolidates and updates all the instructions / guidelines on the subject issued up to March 31, 2022
6.	Master Circular – Basel III Capital Regulations	This Master Circular consolidates instructions on the Basel III Capital Regulations issued as on date. This circular is applicable to Scheduled Commercial Banks (Excluding Small Finance Banks, Payments Banks and Regional Rural Banks). Small Finance Banks and Payments Banks may refer to their respective licensing guidelines and operating guidelines issued by Reserve Bank, for prudential guidelines on capital adequacy.

REGULATORY UPDATES

7.	Master Circular – Lead Bank Scheme	This Master Circular consolidates the relevant guidelines/ instructions issued by Reserve Bank of India on Lead Bank Scheme up to March 31, 2022.
8.	Master Circular - Guarantees and Co-acceptances	This Master Circular consolidates the instructions issued by RBI relating to conduct of guarantee business by the banks up to March 31, 2022. This circular is applicable to Scheduled Commercial Banks (Excluding Payments Banks and Regional Rural Banks).
9.	Master Circular on Investments by Primary (Urban) Co-operative Banks	This Master Circular consolidates and updates all the instructions/guidelines on the subject issued as on date.
10.	Master Circular - Asset Reconstruction Companies	This master circular consolidates the instructions contained in The Asset Reconstruction Companies (Reserve Bank) Guidelines and Directions, 2003 together with Guidance Notes updated as on March 31, 2022.

Master Direction - Classification, Valuation and Operation of Investment Portfolio of Commercial Banks (Directions), 2021 – Amendment

The RBI vide notification dated March 31, 2022 has brought few amendments to 'Classification, Valuation and Operation of Investment Portfolio of Commercial Banks (Directions), 2021'.

With this amendment, it is clarified that investments in special securities received from the Government of India towards bank's recapitalisation requirement from FY 2021-22 onwards shall be recognised at fair value / market value on initial recognition in Held to Maturity (HTM). The fair value / market value of these securities shall be arrived on the basis of the prices / Yield to Maturity (YTM) of similar tenor Central Government securities put out by Financial Benchmarks India Pvt. Ltd. (FBIL). Any difference between the acquisition cost and fair value arrived as above shall be immediately recognized in the Profit and Loss Account.

This circular is applicable to all Commercial Banks (excluding Regional Rural Banks) and these instructions shall come into force with immediate effect.

Section 24 and Section 56 of the Banking Regulation Act, 1949 – Maintenance of Statutory Liquidity Ratio (SLR)

The RBI vide notification dated April 08, 2022 has clarified that the balances held by banks with the RBI under the Standing Deposit Facility (SDF) shall be an eligible Statutory Liquidity Ratio (SLR) asset and such balances shall form part of "Cash" for SLR maintenance. Banks shall report the SDF balances under "Cash in hand" in Form VIII or Form I, as applicable.

The balances held by banks with RBI under the SDF shall not be eligible for Cash Reserve Ratio (CRR) maintenance.

Review of SLR holdings in HTM category

The RBI vide circular dated April 08, 2022 has decided to further enhance the existing (Held to Maturity) HTM limit of 22 % of Net Demand and Time Liabilities (NDTL) to 23 % of NDTL and allow banks to include securities acquired between April 1, 2022 and March 31, 2023 under the enhanced limit of 23 %.

The enhanced HTM limit of 23 % shall be restored to 19.5 % in a phased manner, beginning from the quarter ending June 30, 2023, i.e the excess SLR securities acquired by banks during the period September 1, 2020 to March 31, 2023 shall be progressively reduced such that the total SLR securities held in the HTM category as a percentage of the NDTL do not exceed:

- 22.00 % as on June 30, 2023
- 21.00 % as on September 30, 2023
- 20.00 % as on December 31, 2023
- 19.50 % as on March 31, 2024

This circular is applicable to all Commercial Banks and shall come into force with immediate effect.

Compliance Function and Role of Chief Compliance Officer (CCO) – NBFCs

The RBI issued a circular dated April 11, 2022 to introduce certain principles, standards and procedures for Compliance Function in Upper Layer NBFCs (NBFC-UL) and Middle Layer NBFCs (NBFC-ML) keeping in view the principles of proportionality.

NBFC-UL and NBFC-ML shall put in place a Board approved policy and a Compliance Function, including the appointment of a Chief Compliance Officer (CCO), based on the Framework given in the Annexure to this circular, latest by April 1, 2023 and October 1, 2023, respectively.

Basel III Framework on Liquidity Standards

The RBI vide Notification dated April 18, 2022 has issued circular on Basel III Framework on Liquidity Standards – Liquidity Coverage Ratio (LCR).

RBI, through said circular, permits banks to reckon Government securities as Level 1 High Quality Liquid Assets (HQLA) under Facility to Avail Liquidity for Liquidity Coverage Ratio (FALLCR) within the mandatory SLR requirement up to 16 per cent of their NDTL. Accordingly, the total HQLA carve out from the mandatory SLR, which

REGULATORY UPDATES

can be reckoned for meeting LCR requirement will be 18 per cent of NDTL (2 per cent MSF plus 16 per cent FALLCR).

This circular is applicable to all Commercial Banks other than Regional Rural Banks, Local Area Banks and Payments Banks and these instructions shall come into force with immediate effect.

Circular dated 19th April 2022: Disclosures in Financial Statements - Notes to Accounts of Non-Banking Financial Companies ("NBFCs").

NBFCs are required to make disclosures in their financial statements in accordance with existing prudential guidelines, applicable accounting standards, laws, and regulations.

Vide this circular, SEBI has introduced additional disclosure requirements for NBFCs in accordance with the Scale Based Regulation ("SBR") Framework that was introduced back in October 2021.

The circular provides following disclosure templates for each category of NBFC:

- Section I – Applicable for annual financial statements of NBFC-Base Layer ("NBFC-BL"), NBFC-Medium Level ("NBFC-ML") and NBFC-Upper Layer ("NBFC-UL")
- Section II - Applicable for annual financial statements of NBFC-ML and NBFC-UL
- Section III - Applicable for annual financial statements of NBFC-UL

All above formats for disclosures are common templates for all categories of NBFCs and individual NBFCs may omit those line items/disclosures which are not applicable or with no exposure both in the current year and previous year.

The circular shall be applicable to all NBFCs subject to certain conditions and shall be effective for annual financial statements for year ending 31st March 2023, and onwards.

Circular dated 19th April 2022: Guidelines for Large Exposures Framework ("LEF") for NBFC Upper Layer ("NBFC-UL")-

On 22nd October 2021, the RBI issued a SBR Framework under which it was decided to introduce Large Exposure Framework ("LEF") for NBFC-UL.

Vide this circular, RBI has introduced a separate guideline pertaining to LEF for NBFC-UL which shall be applicable to NBFC-UL, both at the solo level and at the consolidated (group) level and exposure shall comprise of both on and off-balance sheet exposures by the NBFC-UL.

Highlights of the guidelines that inter alia incorporates definition of large exposure, regulatory reporting, large exposure limits etc. are as under:

- "Large Exposure" is defined to mean as sum of all exposure values of a NBFC-UL measured in terms of this circular, to a counterparty and/ or a group of connected counterparties, if it is equal to or above 10 % of the NBFC-UL's eligible capital base.
- The NBFC-UL shall report its Large Exposures to the RBI in the given template covering all the prescribed matters.
- A summary of the LEF limits for NBFC-UL is mentioned here under:

	NBFC-UL (Other than Infrastructure Finance Company)	NBFC-UL (Infrastructure Finance Company)
Single Counterparty	▪ 20% ▪ additional 5% with approval ▪ additional 5% if exposure towards Infrastructure loan/investment (Single counterparty limit shall not exceed 25% in any case)	▪ 25% ▪ additional 5% with approval
Group of connected Counterparties	▪ 25% ▪ additional 10% if exposure towards Infrastructure loan/investment	35%

Circular dated 19th April 2022: Guidelines on regulatory restrictions placed on certain NBFCs for giving loans and advances

The SBR Framework issued by RBI in October 2021 stated that certain restrictions shall be placed on different layers of NBFCs on granting of loans and advances.

Vide this circular, RBI has introduced a separate guideline on regulatory restrictions placed on NBFCBL, NBFCML and NBFC-UL for giving loans and advances.

The key features of this guideline are as follows:

Loans and advances to Directors of NBFC-ML and NBFC-UL:

- Where any loan/advance/contract exceeding an amount of INR 5 crores is granted to directors of the NBFC or their relatives or any firm / company in which such director or their relative is interested as a partner, manager, employee, guarantor, or major shareholder including holding or subsidiary of such company, such relevant director must disclose the nature of interest to the Board of Directors ('BOD') when any such proposal is discussed.
- The loans/advances/contracts which do not exceed INR 5 crores may be sanctioned by the appropriate authority in the NBFC with the matter being reported to the BOD.

REGULATORY UPDATES

Loans and advances to Senior Officers of NBFC-ML and NBFC-UL:

- All loans/advances/contracts granted to senior officers of the NBFC shall be reported to the BOD.
- No loan/advance/contract being advanced to a senior officer of the NBFC shall be sanctioned by such senior officer or any committee where such senior officer is a member.

Loans and advances by NBFC-ML and NBFC-UL to Real Estate Sector:

- NBFCs shall ensure that the real estate borrowers have obtained prior permission from the relevant statutory authorities for undertaking the project before disbursement of loan/advance for any real estate project.
- All NBFC-BL to have a BOD approved policy which shall have a threshold beyond which all loans to the above-mentioned persons shall be reported to the BOD.

Loans and advances to Directors / Senior Officers of NBFC-BL:

All NBFC-BL must have a board approved policy on grant of loans to directors, senior officers, and relatives of directors and to entities where directors or their relatives have major shareholding, which must have a maximum threshold. Further, NBFC-BL shall disclose the aggregate amount of such loans/advances/contracts in their Annual Financial Statements.

Circular dated 21st April 2022: Legal Entity Identifier ("LEI") for borrowers

RBI has extended the LEI guidelines to large NBFCs borrowers which means non-individual borrowers enjoying aggregate exposure INR 5 crores and above from banks and financial institutions will now have to obtain LEI codes as per the timeline given in circular failing which sanctioning of new exposure or renewal/enhancement of existing exposure shall not be granted.

The timeline for obtaining LEI by borrowers is as under:

Total Exposure	LEI to be obtained on or before
Above INR 25 crores	30th April 2023
Above INR 10 crores up to INR 25 crores	30th April 2024
Above INR 5 crores up to INR 10 crores	30th April 2025

INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA ("ICAI")

Comprehensive Revision of Guidance Note on the Companies (Auditor's Report) Order, 2020

The Ministry of Corporate Affairs (MCA) issued the Companies (Auditor's Report) Order, 2020 (CARO 2020) in February 2020. CARO 2020 contains many new reporting requirements for auditors such as revaluation of property, plant and equipment or intangible assets, benami property, working capital limits on basis of security of current assets, granting loans or advances in the nature of loans which are either repayable on demand or without specifying any terms or period of repayment, undisclosed income, company declared as wilful defaulter, material uncertainty in meeting liabilities, CSR activities. The Auditing and Assurance Standards Board (AASB) of the ICAI has issued the "Guidance Note on the Companies (Auditor's Report) Order, 2020" (Guidance Note on CARO 2020) in July 2020 to provide detailed guidance on various clauses of CARO 2020 and reporting requirements for auditors.

To ensure that the management of companies provide various disclosures which pertain to clauses of CARO 2020 especially the aforesaid new reporting requirements, the MCA has brought out corresponding amendments in Schedule III (Division I, Division II and Division III) to the Companies Act, 2013 vide its notification dated March 24, 2021 for preparation of the financial statements. In addition to the said amendments, various other disclosure requirements have also been added in Schedule III to the Companies Act, 2013.

In light of the aforementioned amendments, a comprehensive revision of the Guidance Note on CARO 2020 has been initiated by AASB. In connection with this initiative, an announcement has been made by AASB dated April 02, 2022 which summarises interplay of some of the clauses in CARO 2020 and consequential amendments to Schedule III to the Companies Act, 2013.

Updation of UDINs at e-filing Portal

The ICAI vide notification dated May 13, 2022, advised the members to update those UDINs which have been invalidated earlier at the e-filing portal of Income Tax Dept and also update all the pending UDINs at the e-filing portal immediately. Please note that the last date for updating UDINs at the e-filing portal is 31st May 2022.

Implementation Guide on Reporting under Rule 11(e) and Rule 11(f) of the Companies (Audit and Auditors) Rules, 2014

MCA vide notification dated March 24, 2021 issued the Companies (Audit and Auditors) Amendment Rules, 2021. This amendment includes new Rule 11(e) which deals with reporting on lending or receiving funds through pass through entities marked for ultimate beneficiary and new Rule 11(f) which deals with reporting on the payment/declaration of dividend. These new reporting requirements are applicable for audits of financial year 2021-22 and onwards.

AASB has issued the implementation guide dated April 26, 2022 to provide appropriate guidance so that requirements of these rules can be fulfilled in letter and spirit. This Implementation Guide contains detailed guidance on various aspects of reporting under Rule 11(e) like analysis of Rules, management's responsibilities in respect of disclosures in financial statements under Schedule III to the Companies Act, 2013, various audit procedures to be performed,

REGULATORY UPDATES

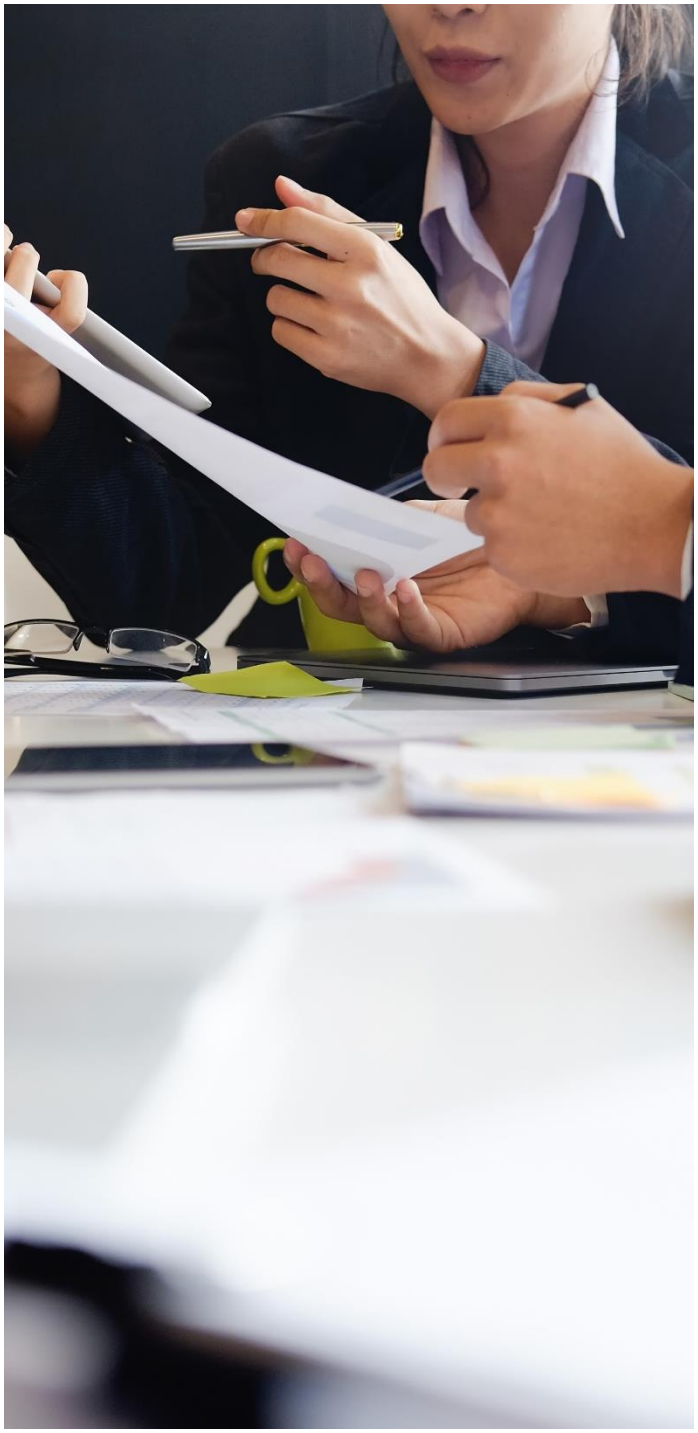
reporting considerations, illustrative formats of confirmation letters, illustrative formats of management representations. The Implementation Guide also contains detailed guidance on various aspects of reporting under Rule 11(f) like relevant requirements under the Companies Act, 2013 and Rules thereunder, audit considerations, reporting requirements, audit procedures and illustrative reporting.

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA ("IBBI")

Notification dated 5th April 2022: IBBI (Voluntary Liquidation Process) (Amendment) Regulations, 2022. ("Amended Regulations")

To curtail any delay and ensure faster exit for firms, Amended Regulations modified the timelines for some stipulated activities undertaken during the voluntary liquidation process, highlights of which are as under:

- The liquidator to prepare the list of stakeholders within 15 days (against the previously stipulated 45 days) from the last date for receipt of claims, where no claim from creditors has been received till the last date for receipt of claims.
- The liquidator shall distribute the proceeds from realization within 30 days (against the previously stipulated 6 months) from the receipt of the amount to the stakeholders.
- It has been further provided that the liquidator shall endeavour to complete the liquidation process of the corporate person within 270 days from the liquidation commencement date, where the creditors have approved the resolution under Section 59(3)(c) or Regulation 3(1)(c), and 90 days from the liquidation commencement date in all other cases (against the previously stipulated 12 months in all situations).



TAX UPDATES
Direct Tax

CIRCULARS/ NOTIFICATIONS/PRESS RELEASE

Central Board of Direct Taxes (CBDT) constitutes Dispute Resolution Committee and notifies e-Dispute Resolution Scheme, 2022

The Finance Act, 2021 has inserted Section 245MA of the Income-tax Act, 1961 (IT Act) to provide for the constitution of Dispute Resolution Committee (DRC). In this regard, recently, the CBDT has notified rules for constitution of DRC. As per these Rules, the Central Government shall constitute a DRC for every region of the Principal Chief Commissioner of Income-tax for dispute resolution. Taxpayer fulfilling the specified conditions[1] shall be entitled to approach DRC. These Rules also list down orders (viz., draft order as referred to in section 144C(1) of the IT Act; an intimation under section 143(1) of the IT Act or section 200A(1) of the IT Act or section 206CB(1) of the IT Act; rectification order having an effect of enhancing the assessment or reducing the loss; prescribed TDS/TCS order etc.) for which DRC can be approached. These Rules also provides for the constitution and powers of the DRC.

The taxpayer desirous of approaching DRC shall be required to make an application in Form No. 34BC.

[Notification No. 26 of 2022 (F. No. 370142/05/2022-TPL-PART 1) dated 05-04-2022]

The CBDT has also notified e-Dispute Resolution Scheme, 2022 ('Scheme) to dispose off taxpayer's application in a faceless manner. Salient features of this Scheme are:

Application of the Scheme

- Eligible taxpayer (i.e. taxpayer who fulfills the specified conditions[1]) shall file an e-application for dispute resolution to the DRC in Form 34BC;
- The application shall be emailed to the official email id of the DRC along with proof of payment of tax on returned income (if available) and after paying application fee of INR 1,000.

Time-limit for filing the application

The application shall be filed:

- within such specified time for cases where appeal has already been filed and is pending before the First Appellate Authority;
- within one month from the date of receipt of specified order, in any other case.

Screening of Application

- The DRC shall examine the application with respect to specified conditions and criteria for specified orders based on which it shall either accept or reject the application;
- Where DRC considers rejecting an application, a show-cause notice shall be served upon the taxpayer as to why such an application should not be rejected. Further, on request of taxpayer, an opportunity of being heard through video telephony or video conferencing shall be provided by the DRC;
- The taxpayer shall furnish a response within such time or extended time as may be allowed by the DRC;
- The DRC after considering the response furnished by the taxpayer may either reject the application or proceed to decide the application on merits. Such decision of the DRC shall be communicated to the taxpayer on his registered email address;
- The taxpayer shall, within 30 days of receiving communication of application being admitted, be required to submit a proof of withdrawal of appeal filed before the First Appellate Authority or withdrawal of application before the Dispute Resolution Panel (if any), to the DRC. The DRC may reject the application in case taxpayer fails to submit such proof.

Procedure to be followed by DRC

- The DRC may-
  - upon admission of the application and subsequent to the receipt of the response by the taxpayer, call for records from the Revenue Authorities and further examine, as it may deem fit, with respect to the issues covered in the application;
  - seek a report from the tax officer on the issues covered in the application or issues arising during the course of proceedings;
  - call for further information through email from the taxpayer or any other person before disposing off the application;

[1] Specified conditions in relation to a taxpayer means a taxpayer who fulfills following conditions:
- Where taxpayer is not covered by following:
  - In respect of whom an order of detention (with some exception such as revocation of detention order, etc.) has been made under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.
  - In respect of whom prosecution for any offence punishable under the provisions of the Indian Penal Code, the Unlawful Activities (Prevention) Act, 1967, the Narcotics Drugs and Psychotropic Substances Act, 1985, the Prohibition of Benami Transactions Act, 1988, the Prevention of Corruption Act, 1988, the Prevention of Money Laundering Act, 2002 has been instituted and he has been convicted of any offence punishable under any of those Acts.
  - In respect of whom prosecution has been initiated by an income-tax authority for any offence punishable under the provisions of the IT Act or the Indian Penal Code or for the purpose of enforcement of any civil liability under any law for the time being in force or such person has been convicted of any such offence consequent upon the prosecution initiated by a tax authority
  - Who is notified under section 3 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992
- Proceedings under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 have not been initiated for the fiscal year for which the resolution of dispute is sought.

TAX UPDATES
Direct Tax

- After considering the material available on record (including any further information or evidence from taxpayer/any other person/ tax authorities) and within six months from end of the month in which application is admitted, the DRC may decide-
  - to make modifications/not to make modifications to the variations in specified order, not prejudicial to the interest of the taxpayer;
  - waiver of penalty and immunity from prosecution and pass an order of resolution accordingly;
  - not to make any modification to the specified order and pass an order disposing off the application
- The DRC shall serve a copy of the order of resolution or order disposing off the application, as the case may be, to taxpayer and tax officer;
- The taxpayer shall not be eligible to file any reference to the Dispute Resolution Panel or an appeal to the First Appellate Authority against the modified order;
- The tax officer shall serve a copy of the modified order along with notice of demand to the taxpayer specifying a date for making payment of demand;
- On receipt of payment confirmation, the DRC shall grant immunity from prosecution and waiver of penalty (if applicable).

Termination of Dispute Resolution Proceedings

The DRC may, if considered necessary, after recording reasons in writing and after giving an opportunity of being heard to taxpayer, terminate the dispute resolution proceedings at any stagey, if:

- Taxpayer fails to co-operate;
- Taxpayer fails to respond to, or submit any information in response to a notice issued;
- DRC is satisfied that the taxpayer has concealed any information material to the proceedings or has given false evidence;
- Taxpayer fails to pay the demand.

Personal appearance before the DRC

- Taxpayer/ or any person or their authorised representative, as the case may be, can request for personal hearing to make oral submissions or present the case before the DRC which may be approved by the DRC;
- Such hearing to be conducted through video conferencing / video telephony, in accordance with procedure laid down by the CBDT;

Other relevant points

- No appeal or revision shall lie against the modified order;
- Before the commencement of the hearing, taxpayer's authorised representative is required to electronically file a document authorising him to appear for the taxpayer;
- Exchange of communication and delivery of any record shall be done electronically by placing an authenticated copy in taxpayer's / any other person's registered account or sending an authenticated copy to the registered email address of the taxpayer/ any other person.

[Notification No. 27 of 2022 (F. No. 370142/05/2022-TPL-PART 1) dated 05-04-2022]

CBDT notifies rules for claiming tax relief on income arising from foreign retirement fund

Before the amendment made by the Finance Act, 2021, income arisingfrom foreign retirement funds was taxed on accrual basis in India while the same may be taxed on receipt basis in such foreign countries. As a result, there was a mismatch in the year of taxability of withdrawal from retirement funds by residents who had opened such fund when they were non-resident in India and resident in foreign countries. To address this mismatch, the Finance Act, 2021 inserted section 89A in the IT Act. This Section provides that the income of specified person[2] from specified account[3] shall be taxed in the manner and in the year as prescribed by the Central Government. The amendment is in effect from 1st April 2022.

In this regard, recently, the CBDT issued a notification inserting Rule 21AAA in the Income-tax Rules, 1962 (IT Rules) to prescribe the manner of taxation of such income. As per this Rule, where a specified person has income accrued in a specified account during the fiscal year beginning on or after 1 April 2022, such income shall, at the option of the specified taxpayer, be included in his total income of the fiscal year in which income from the said specified account is taxed at the time of withdrawal or redemption in the notified country.

Where this option has been exercised, the total income of such specified taxpayer shall not include the following:

- income which has already been taxed in India in any of the earlier fiscal year as per the provisions of the IT Act; or
- income was not taxable in India in the fiscal year during which it was accrued since the specified person was a non-resident or not ordinarily resident as per the provisions of the IT Act; or due to the applicability of the Double Taxation Avoidance Agreement (DTAA).

(The foreign tax paid on such income, if any, shall be ignored for the purposes of computation of the foreign tax credit under rule 128)

To exercise this option, the specified taxpayer should e-file Form No. 10EE on or before the deadline for furnishing his return of income. Further, once this option is exercised, it will apply to all subsequent fiscal years and cannot be withdrawn. However, if the specified taxpayer becomes non-resident after exercising the option, then it shall be deemed that he has never exercised the option and income accrued in

[2] a person resident in India who opened a specified account in a notified country while being non-resident in India and resident in that country

[3] an account maintained in a notified country that is maintained for retirement benefits and the income from such account is not taxable on an accrual basis and is taxed by such country at the time of withdrawal or redemption

TAX UPDATES
Direct Tax

the specified account from the previous year in which such option was exercised till the date of him becoming non-resident shall be taxable in his hand.

[Notification No. 24 of 2022 (F. No. 370142/7/2022-TPL) dated 4 April 2022]

Furthermore, the CBDT has notified the following countries for the purpose of section 89A of the IT Act:

- Canada;
- United Kingdom of Great Britain and Northern Ireland;
- United States of America.

[Notification No. 25 of 2022 (F. No. 370142/7/2022-TPL) dated 4 April 2022]

CBDT permits Infrastructure Debt Fund to issue 'Zero Coupon Bonds'

Section 10(47) of the IT Act provides that any income of an infrastructure debt fund, set up in accordance with the guidelines prescribed by the Central Government, is exempt from tax. Rule 2F of the IT Rules provide guidelines for setting up an infrastructure debt fund to claim exemption under section 10(47) of the IT Act. Sub-rule (3) of Rule 2F allows the infrastructure debt fund to issue rupee-denominated bonds or foreign currency bonds. Recently, the CBDT has issued a notification amending Rule 2F of the IT Rules permitting infrastructure debt fund to also issue zero coupon bonds in accordance with Rule 8B of the IT Rules. The key changes introduced by the CBDT under Rule 8B of the IT Rules are as summarized hereunder:

- Infrastructure Debt Fund permitted to make an application in Form 5B for the issuance of zero coupon bond;
- Application made for issuance of zero-coupon bond shall be disposed off within 6 months from the date of receipt of such application;
- An undertaking needs to be submitted by the infrastructure debt fund that a sinking fund shall be maintained for the interest accrued on all the zero-coupon bonds. Such interest shall be invested in Government security as defined under section 2(f) of the Government Securities Act, 2006;
- Companies issuing zero coupon bond are required to submit electronically under a digital signature or electronic verification code a certificate in Form 5BA from an accountant specifying the amount invested each year.

[Notification No. 28 of 2022 (F. No. 370142/4/2022-TPL) dated 6 April 2022]

CBDT notifies taxpayers who are mandatorily required to file a tax return

Section 139(1) of the IT Act mandates that taxpayer (excluding Company and Firm) is required to file his tax return only if his total income or the total income in respect of any other person in respect of which he is assessable under the IT Act during the fiscal year exceeds maximum amount, which is not chargeable to tax. This section also provides instances where such exempted persons are mandatorily required to file their tax return. While expanding the list of condition for mandatorily filing of tax return, the Finance Act, 2019 granted powers to the CBDT to notify additional conditions for mandatory filing of tax return. Recently, the CBDT has notified additional conditions for mandatory filing of tax return where the total income does not exceed the basic exemption limit.

To read BDO analysis of the CBDT notification, please go to: Direct Tax Alert - CBDT notifies taxpayers who are mandatorily required to file a tax return - BDO

{Notification No. 37 of 2022 [F.No. 370142/01/2020-TPL(Part1)] dated 21 April 2022]}

CBDT notifies rule for filing updated tax return

The Finance Act, 2022 has introduced sub-section (8A) in section 139 of the IT Act to permit filing of an Updated Tax Return (UTR). The UTR can be filed to correct any discrepancy or omissions and declare such additional income which may have been overlooked while filing the tax return. To enable the filing of UTR, recently, the CBDT has issued a notification inserting Rule 12AC of the IT Rules and prescribing Form ITR-U for filing the UTR. Salient features are summarized hereunder:

- No separate ITR forms have been notified for filing of an updated return.
- Form ITR-U is to be furnished electronically using digital signature or through an electronic verification code.
- Part A of Form ITR-U captures the following information:
  - Eligibility to file an updated return
  - The ITR form used previously to file the original/revised tax return of the relevant fiscal year for which updated return is being filed now.
  - Reasons for updating income.
  - Whether Form ITR-U is filed within 12 months or between 12 to 24 months from the end of relevant assessment year?
  - Whether updated return is filed to reduce carried forward loss or unabsorbed depreciation or tax credit?
- Part B – Computation of updated income and tax payable includes heads of income under which additional income is reported.
- Tax Payments section captures details of tax payment by the taxpayer on the updated return. Also, it captures the details of payments of advance tax/ self-assessment tax/

TAX UPDATES
Direct Tax

regular assessment tax for which credit has not been claimed in the earlier return.

{Notification No. 48 of 2022 [F. No. 370142/18/2022-TPL(Part-1)] dated 29 April 2022}

JUDICIAL UPDATES

Foreign exchange loss on loan utilized for asset leasing business activities is tax-deductible

Taxpayer, a public limited company, is into the business of finance. For fiscal year 1996-97, the taxpayer had entered into a loan agreement with Commonwealth Development Corporation (CDC), a UK Company, for borrowing money to carry on its project consisting of the financing by the taxpayer of the acquisition of plant, machinery and equipment to be used in its leasing business. In other words, the money was borrowed to expand its primary business of leasing and hire purchase of capital equipment to existing Indian enterprises. The loan was obtained in foreign currency. At the time of repayment, due to the difference of rate of foreign exchange, the taxpayer had to pay higher amount, resulting in loss. The Tax Officer did not allow this loss. As the First Appellate Authority did not grant any relief, the taxpayer approached Tax Tribunal. Before the Tax Tribunal, the taxpayer made an additional claim in respect of revenue expenses, which were erroneously capitalized in the tax return. The Tax Tribunal, while allowing additional claim, granted the relief for the foreign exchange loss claimed in the tax return. Hence, the Revenue Authorities filed a writ petition with the Karnataka High Court who overturned the order of the Tax Tribunal stating that the order passed by the Tax Tribunal had not recorded sufficient reasons to support the conclusions drawn. On appeal, while permitting the deduction for foreign exchange loss, the Supreme Court made the following observations:

- The activity of financing by the taxpayer to the existing Indian enterprises for procurement or acquisition of plant, machinery and equipment on leasing and hire purchase basis, is an independent transaction or activity being the business of the taxpayer.
- The transaction between the taxpayer and CDC was in the nature of borrowing money by the taxpayer, which was necessary for carrying on its business of financing. It was certainly not for creation of asset of the taxpayer as such or acquisition of asset from a country outside India for the purpose of its business.
- The loan was used to finance the purchase of assets by Indian enterprises on hire purchase or lease basis. However, the fact remains that the activity of financing by the taxpayer to the existing Indian enterprises for procurement or acquisition of plant, machinery and equipment on leasing and hire purchase basis, is an independent transaction or activity being the business of the taxpayer.
- Taxpayer would be justified in availing deduction of entire forex loss incurred by it on the said loan as revenue expenditure since it was incurred wholly and exclusively for taxpayer's business of financing the existing Indian enterprises, who in turn, had to acquire plant, machinery, and equipment to be used by them under lease or hire purchase from the taxpayer.
- The Tax Tribunal had correctly relied on Supreme Court judgements[4] which stated the following:
  - loan obtained is not an asset or advantage of an enduring nature; the expenditure was made for securing the money and it is irrelevant to consider the purpose for which the loan was borrowed;
  - it is pertinent to consider that whether the advantage of the loan is in the capital field, if yes, then the expenditure would be disallowable and if it merely facilitates the business operations of the taxpayer by improving efficiency and leaves the fixed capital untouched, then even though the advantage being enduring in nature the expenditure would be considered as revenue.
- The special provision of section 43A is not applicable in the present case since the Taxpayer has not acquired any asset from a country outside India for the purpose of its business. Hence, the Tribunal correctly allowed the forex loss as revenue expenditure while the Karnataka High Court missed the relevant aspects when reversing the Tax Tribunal's order.
- The Tax Tribunal correctly accepted fresh claim for claiming the entire forex loss as revenue by relying on the Supreme Court judgement as mentioned above.
- There is limitation on power to entertain fresh claims during assessment in view of the Supreme Court ruling[5] but that ruling itself makes it clear that it would not impinge upon the plenary powers of the Tax Tribunal to accept the fresh claims as per section 254 of the IT Act.

[Wipro Finance Ltd. v. CIT (2022) 137 taxmann.com 230 (SC)]

SC treats assessment in the name of amalgamating company as valid assessment

Once the scheme of the amalgamation is effective, post the appointed date, the amalgamating entity / amalgamated entity on whom the assessment is to be framed is a contentious issue. Prior to the present ruling, the SC, in the case of Maruti Suzuki India Ltd. had held that post amalgamation, assessment in the name of amalgamating company will be invalid. However, recently, in another decision, Hon'ble SC have taken a divergent view after distinguishing Maruti Suzuki's Ruling on facts.

[4] Supreme Court in the case of Empire Jute Co. Ltd. vs CIT [(1980) 4 SCC 25] and India Cements Ltd. vs. CIT [AIR 1966 SC 1053]
[5] Supreme Court in the case of Goetze (India) Ltd. v. CIT [(2006) 284 ITR 323]

TAX UPDATES
Direct Tax

To read BDO analysis please go to: Direct Tax Alert - SC treats assessment in the name of amalgamating company as valid assessment - BDO

{[Pr.CIT v. Mahagun Realtors (P) Ltd. [SLP(C) No. 4063 of 2020]}

Subsequent audit of Balance Sheet drawn on share allotment date is sufficient compliance for Rule 11U

Recently, Chandigarh Tribunal has held that for purpose of Rule 11U, the balance sheet needn't be audited on the valuation date provided it is subsequently audited and there are no major changes in the unaudited numbers.

To read BDO analysis please go to: Direct Tax Alert - Subsequent audit of Balance Sheet drawn on share allotment date is sufficient com - BDO

[Electra Paper and Board (P.) Ltd. Vs. ITO (ITA No. 222/Chd/2021)]

TAX UPDATES
Transfer Pricing

High Court upholds single judge ruling that the word "may" used in Section 92CA(3A) for calculating limitation period for passing TP order needs to be interpreted as "shall"

The return of income filed by the taxpayer for the AY 2016-17 was picked up for scrutiny u/s 143(2) of the Act. Upon a reference being made to the TPO for the determination of ALP, a notice u/s 92CA(2) was issued by the TPO calling for details. **The TPO passed his order on 1 Nov 2019, which according to the taxpayer was passed after the expiry of the period of limitation (viz. 31 Oct 2019).**

The Division Bench of the Madras High Court (upholding single judge ruling) held in favour of the taxpayer over the interpretation of the time period available to the TPO to pass an order determining the ALP of the international transactions. The issue revolved around interpretation of the expression used in section 92CA(3A) of the Act namely "…may pass an order before 60 days prior to the date on which the period of limitation referred to in section 153 expires".

The High Court rejected the plea of the Revenue that the word 'may' used in the section is to be read as mere directory. High Court accepted the taxpayer's contention that the word 'may' has to be sometimes read as 'shall' depending upon the context in which it is used. The consequences of the performance or failure on the overall scheme and object of the provisions would have to be considered. In other words, the time period has to be scrupulously followed.

The word "date" in section 92CA(3A) would indicate 31.12.2019. But the preceding words "prior to" would indicate that for the purpose of calculating the 60 days, 31.12.2019 must be excluded. The usage of the word "prior" is not without significance. It is not open to this court to just consider the word "to" by ignoring "prior". The word "prior" in the present context, not only denotes the flow of direction, but also actual date from which the period of 60 days is to be excluded. Even if one goes with an alternative interpretation, in which case, 60 days from the last date would imply the exclusion of 31.12.2019. After excluding 31.12.2019, if the period of 60 days is calculated, the 60th day would fall on 01.11.2019 and the **TPO must have passed the order on or before 31.10.2019 as orders are to be passed before the 60th day.** Therefore, either way the contention of the Revenue is a fallacy and has no legs to stand.

PFIZER HEALTHCARE INDIA PVT LTD [TS-199-HC-2022(MAD)-TP]

Tribunal upholds Advertising, Marketing and Promotion expenses as international transaction in the case of a distributor where taxpayer and AE acted in concert for AMP expenses

The taxpayer Olympus India is a wholly-owned subsidiary of Olympus Corporation.

The taxpayer had undertaken Advertising, Marketing and Promotion of products of the AE by importing the same. The taxpayer also provides installation and maintenance services to end customers.

The moot issue before the Tribunal was whether incurring of AMP expenses would be considered as an international transaction and whether PSM is the Most Appropriate Method to benchmark AMP expense.

On perusal of the TP study report, the tax tribunal observed that the taxpayer was not the exclusive distributor of the Olympus product and the customers can buy products directly from the Olympus group entities outside India. The taxpayer had imported the equipments from its AEs directly for demonstration purposes. The representatives of the AE had also participated in the event of the taxpayer for promotion of products. **Hence, there is clear understanding, arrangement, and acting in concert, between the taxpayer and the AE for carrying out the AMP expenses which is also being demonstrated by the active participation by employees/representatives of the AE.**

The tax tribunal relied on the decision of the jurisdictional High Court in the case of Sony Ericson Mobile Communication India Pvt Ltd in which contention of the taxpayer that AMP expense is not an international transaction for distributors was rejected. The tax tribunal distinguished the judgment of jurisdictional High Court in Maruti Suzuki India and coordinate bench decision in Perfetti Van Melle India Pvt. Ltd and holds them inapplicable since in the present case, the taxpayer was a distributor **who even did not have the exclusive right of distribution in the territory of India and third independent parties could also directly buy from AEs from outside India.** Basis the binding ruling in taxpayer's own case for AY 2014-15, tax tribunal holds that Revenue proved substantially existence of international transaction between taxpayer and its AE as defined u/s 92B and AO/TPO were right that there existed international transaction.

As regards benchmarking, the TPO had benchmarked AMP transaction using the Residual Profit Split method. The tax tribunal remitted the file back to the TPO/AO for following the direction of the Delhi High Court in the case of Sony Ericsson for benchmarking.

OLYMPUS MEDICAL SYSTEMS INDIA PVT LTD VS. DCIT [TS-235-ITAT-2022(DEL)-TP]

TAX UPDATES
Indirect Tax

GOODS & SERVICE TAX

JUDICIAL UPDATES

ORDERS BY AUTHORITY FOR ADVANCE RULING (AAR)

Concessional GST rate on Works Contract Service (WCS) provided under Pradhan Mantri Awas Yojana (PMAY) is available only to promotor

Facts of the case

M/s. Om Construction Company ('Taxpayer') is engaged in the business of civil construction of residential premises and supplying WCS as a sub-contractor to the main contractor, who provides WCS to construct affordable housing under PMAY scheme for the economically weaker sections.

Questions before the AAR

- The applicability of entry no:3(i) under notification no:11/2017-CT(R) dated 28 June 2017 (as amended from time to time) to the taxpayer, who is one of the sub-contractors to the builder/developer/contractor of affordable housing under PMAY Scheme;
- Eligibility of concessional GST rate of 0.75% as per the above notification.

Contention of the Taxpayer

- The taxpayer has submitted that they are entering into construction of residential project of affordable Housing scheme (low-cost housing) for economically weaker section comprising of 292 units, under the PMAY scheme, with the carpet area of each unit less than 60 Square meters and the gross amount charged is not more than INR 4.5 Mn. Further, more than 50% of Floor Space Index (FSI) area shall be utilized towards construction of low-cost housing of the project so as to qualify as 'Affordable Housing Project' (AHP) and also to get infrastructure status in terms of the notification F.no:13/6/2009-INF dated 30 March 2017 issued by the Department of Economic Affairs (DEA notification);
- The taxpayer has further submitted that entire 100% land area is used towards construction of the residential flats/units, having carpet area of 60 Sq. Mtrs. or less and hence the said project would qualify as an AHP;
- The taxpayer has contended that they are eligible for concessional rate of GST @ 0.75% for construction of affordable residential apartments by a promoter in a Residential Real Estate Project (RREP) as per entry no:3(i) of notification no:11/2017-CT(R) dated 28 June 2017 (as amended from time to time), which commences on or after 1 April 2019 and the promoter, therefore, would be charging GST 0.75% (after deduction of 1/3 land cost on total consideration received);
- The taxpayer submitted that the benefit of concessional rate of tax is available to any person who is supplying the WCS pertaining to low-cost houses in an AHP. The exemption under the said entry of notification

no:11/2017-CT(R) dated 28 June 2017 (as amended) is on the supply of service and not concerning the person and therefore once a project qualifies as an AHP the concessional rate of tax shall be availed;

- The taxpayer has relied upon various advance rulings pronounced by AAR of Maharashtra to substantiate the position.

Observations & Ruling by the AAR

- The AAR referred the entry no:3(i) of notification no:11/2017-CT(R) as amended from time to time, wherein it was mentioned that the concessional rate is applicable only to the promoters in respect of the construction of affordable residential apartments in a RREP which commences on or after 1 April 2019;
- The concessional rate is also applicable in case of an ongoing RREP in respect of which the promoter has not exercised option to pay tax on construction of apartments at the rates as specified for item (i.e.) or (if) of the entry no:3 of the notification no:11/2017-CT(R) dated 28 June 2017, as the case may be, in the manner prescribed therein;
- Further, the said apartment must be intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier;
- In the instant case, the AAR has observed that the taxpayer is not a promoter but a sub-contractor and hence the benefit of the said entry i.e., concessional rate of GST of 0.75%, for the proposed construction, is not applicable to the taxpayer.

[AAR-Karnataka, M/s. Om Construction Company, Ruling no:KAR ADRG 14/2022 dated 30 April 2022]

Services of dismantling existing bridge for Indian railway will not qualify as 'original work'

Facts of the case

- M/s. Utkarsh India Limited ("Taxpayer") was awarded a contract by East Coast Railways, Khurda Road Division, Orissa for executing the dismantling of existing bridge timber/steel channel sleepers on bridge and fabrication,

TAX UPDATES
Indirect Tax

manufacture and supply of H-beam steel sleepers and installation of the same;

- As per the letter of acceptance, the work was allotted for renewal of existing steel channels with H-Beam sleepers;
- The taxpayer believes that the above works contract would form "original works pertaining to railways" and is eligible for getting the benefit of lower GST of 12% under notification no:20/2017-IGST(R) dated 22 August 2017.

Questions before the AAR

- Whether dismantling of existing sleeper fixing and/or installation of new (H-Beam steel sleepers) is amounting to execution of original work and would attract IGST @ 12% in terms of notification no:20/2017-IGST(R) dated 22 August 2017?
- Whether the taxpayer is eligible for getting the benefit concessional GST of 12% under notification no:20/2017-IGST(R) dated 22 August 2017 for the construction, erection, commission or installation of original works pertaining to railways?

Contention of the taxpayer

- The taxpayer submitted that although the nature of work is not a case of completely new construction, the work is not in the nature of repair and maintenance, the instant work can only be considered under the category of original works;
- Since there is no repair and maintenance involved in this work, the said work can be classifiable as original works and therefore, the taxpayer is eligible for the benefit of notification no:20/2017-IGST(R) dated 22 August 2017 (as amended) for the nature of works/services provided by the taxpayer to the railways;
- The taxpayer added that though the work order refers the term 'renewal', it cannot be the decisive factor for ascertaining the nature of contract. The entire scope of the work is required to be seen for understanding actual nature of contract;
- Reliance is also placed on the decision in the matter of Super Poly Fabrics Limited reported in [2008 (10) STR 545] wherein the Hon'ble Supreme Court of India has held that 'There cannot be any doubt whatsoever that a document has to be read as a whole. The purport and object with which the parties thereto entered into a contract ought to be ascertained only from the terms and conditions thereof. Neither the nomenclature of the document nor any particular activity undertaken by the parties to the contract would be decisive.';
- Hence, the taxpayer has raised invoices adopting 12% GST rate. But, at the insistence of the railway authorities, the tax rate was raised to 18% by way of debit/credit note although it was not accepted.

Observations & Ruling by the AAR

The AAR made the following observations, based on the examination of facts and submissions made:

- The supply is found to be a composite supply of works contract as defined in section 2(119) CGST Act, 2017;
- Notification no:12/2017-CT(R) dated 28 June 2017 defines "original works" as follows:

  "Original works means - all new constructions
  - all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable;
  - erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise;"
- On perusal of the detailed scope of work, it transpires that the taxpayer does not construct a new bridge nor is the taxpayer entrusted to lay a new railway track;
- Nowhere in the work order, it has been mentioned that the work is related to additions and alterations to abandoned or damaged structures that are required to make them workable;
- Therefore, the instant composite supply of works contract cannot be considered as 'original work' in terms of definition given in clause 2 (zs) of notification no:12/2017-CT(R) dated 28 June 2017;
- The AAR held that supply in the instant case is a composite supply of works contract as defined in clause (119) of section 2 of the CGST Act, 2017 but the supply cannot be regarded as composite supply of 'original work' as defined in clause 2(zs) of notification no:12/2017-CT(R) dated 28 June 2017. Therefore, the supply shall not be covered under serial number 3(v) of notification no:20/2017-IGST(R) dated 22 August 2017;
- The AAR also held that the taxpayer is not eligible for the benefit of concessional GST of 12% notification no:20/2017-IGST(R) dated 22 August 2017 under construction, erection, commission, or installation of original works pertaining to Railways.

[AAR-West Bengal, M/s. Utkarsh India Limited, Ruling Order no:01/WBAAR/2022-23, dated 07 April 2022]

Transfer of business unit as a going concern is an exempted service subject to fulfilment of the conditions

Facts of the case

- M/s. Cosmic Ferro Alloys Limited ('Taxpayer') is engaged in the business of manufacturing ferro alloys and cold rolled formed sections with its factories at Barjora (FERRO unit) and Singur (CRF business);
- The entire operations of the taxpayer are segmented in the said two units i.e., FERRO unit and CRF unit and both the units are functional and running independently;
- The taxpayer intended to sell its CRF unit as a whole, which involves transferring all the assets to the

TAX UPDATES
Indirect Tax

purchaser, which includes taking over all the liabilities due and payable as on the date of transfer for a lump sum consideration and has entered into a Business Transfer Agreement (BTA) with the purchaser.

Questions before the AAR

- Whether the transaction would amount as supply of goods or supply of services or supply of goods and services?
- Whether the transaction would be covered under entry no:2 of the notification no:12/2017-CT(R) dated 28 June 2017?

Contention of the Taxpayer

- The taxpayer contented that the term 'going concern' is not defined under the CGST Act, 2017 or rules framed;
- The concept of going concern has been defined in Accounting Standards–1 issued by Institute of Chartered Accountants of India (ICAI), which states that a fundamental accounting assumption is that of "going concern," according to which the enterprise is normally viewed as a going concern, that is, as continuing in operation for the foreseeable future;
- It is assumed that the enterprise has neither the intention nor the necessity of liquidation or of curtailing materially the scale of the operations;
- The concept of transferring a company as a going concern was examined by the Delhi High court ln re Indo Rama Textile Limited (2013) 4 Comp LJ 141 (Del). Para 27 of the said judgement points that "statement on Standard Auditing Practices (SAP) 16, "Going Concern", issued by the council of the ICAI, provides that when a question arises regarding the appropriateness of the going concern assumption, the auditor should gather sufficient appropriate audit evidence to attempt to resolve, to the auditor's satisfaction, the question regarding the entity's ability to continue in operation for the foreseeable future.

Observations & ruling by the by AAR

- The taxpayer had entered into a BTA agreeing to sell the CRF business. The purchaser has also agreed to purchase the CRF business, having assets and all liabilities attached to the said CRF unit as a going concern;
- The BTA further refers that the purchaser shall continue to employ the current employees of CRF unit even after the takeover of the CRF business. Furthermore, the seller i.e., the taxpayer has agreed that he shall not be entitled to engage in any business competing with the activities of the purchaser in respect of existing CRF business. Both the clauses indicate that the business will be continued by the purchaser with regularity;
- In the instant case the taxpayer intends to sell his entire CRF unit where the purchaser agrees to take over the assets as well as the liabilities of the said CRF unit along with the employees and their benefits. Such transfer of a unit of a business cannot be treated as supply of goods since business cannot be said to be a movable property so as to qualify as goods as defined in section 2(52) of the CGST Act, 2017. Further, anything other than goods, money, and securities falls within the meaning of services as defined in section 2(102) of the CGST Act, 2017;
- To qualify as a going concern, the business must not have the intention or necessity of liquidation or of curtailing materially the scale of the operations;
- The taxpayer has not furnished any documentary evidence from the auditor with regard to the entity's ability to continue in operation for the foreseeable future;
- In the absence of any documentary evidence, the AAR was unable to conclude that the taxpayer has neither the intention nor the necessity of liquidation or of curtailing materially the scale of the operations;
- It was concluded that the transaction of transfer of business unit by the taxpayer in the instant case shall be treated as a supply of services and would be covered under entry no:2 of the notification no:12/2017-CT(R) dated 28 June 2017 subject to fulfilment of the conditions to qualify as a going concern.

[AAR- West Bengal, M/s. Cosmic Ferro Alloys Limited, Advance Ruling no:02/WBAAR/2022-23, dated 22 April 2022]

Contact Us

For any content related queries, you may please write to the respective service line experts at:
accountingadvisory@bdo.in
taxadvisory@bdo.in
transactiontax@bdo.in

For any other queries, kindly write to:
marketing@bdo.in

BDO in India

Ahmedabad
The First, Block C – 907
Behind ITC Narmada, Keshavbaug
Vastrapur, Ahmedabad 380015, INDIA

Bengaluru
SV Tower, No. 27, Floor 4
80 Feet Road, 6th Block, Koramangala
Bengaluru 560095, INDIA

Chennai
No. 443 & 445, Floor 5, Main Building
Guna Complex, Mount Road, Teynampet
Chennai 600018, INDIA

Delhi NCR - Office 1
The Palm Springs Plaza
Office No. 1501-10, Sector-54 ,
Golf Course Road, Gurugram 122001, INDIA

Delhi NCR - Office 2
Windsor IT Park, Plot No: A-1
Floor 2, Tower-B, Sector-125
Noida 201301, INDIA

Goa
701, Kamat Towers
9, EDC Complex, Patto
Panaji, Goa 403001, INDIA

Hyderabad
1101/B, Manjeera Trinity Corporate
JNTU-Hitech City Road, Kukatpally
Hyderabad 500072, INDIA

Kochi
XL/215 A, Krishna Kripa
Layam Road, Ernakulam
Kochi 682011, INDIA

Kolkata
Floor 4, Duckback House
41, Shakespeare Sarani
Kolkata 700017, INDIA

Mumbai - Office 1
The Ruby, Level 9, North West Wing
Senapati Bapat Marg, Dadar (W)
Mumbai 400028, INDIA

Mumbai - Office 2
601, Floor 6, Raheja Titanium
Western Express Highway, Geetanjali
Railway Colony, Ram Nagar, Goregaon (E)
Mumbai 400063, INDIA

Pune – Office 1
Floor 6, Building # 1
Cerebrum IT Park, Kalyani Nagar
Pune 411014, INDIA

Pune – Office 2
Floor 2 & 4, Mantri Sterling, Deep Bunglow
Chowk, Model Colony, Shivaji Nagar, Pune
411016, INDIA

Visit us at www.bdo.in