ACCOUNTING, REGULATORY & TAX NEWSLETTER

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INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA ("ICAI")

EAC Opinion – Non-reversal of impairment in respect of investment in subsidiary in separate financial statements on account of non-reversal of impairment in underlying goodwill

Facts of the case

A public limited company which is a wholly owned subsidiary of a listed government company, is in the business of exploration and production (E&P) of oil and gas and other hydrocarbon related activities outside India. The Company has adopted Indian Accounting Standards (Ind AS) w.e.f. 1st April 2016 (Transition Date: 1st April 2015). The functional currency of the Company is assessed as US Dollar (USD) in accordance with the provisions of Ind AS. The Company presents its financial statements in presentation currency which is Indian Rupee (INR).

The Company operates overseas projects directly and / or through subsidiaries, by participation in various joint arrangements and investment in associates. Globally, E&P business is carried out by way of joint arrangements or investments in form of subsidiaries/ associates. In the separate financial statements, the Company accounts for investments in subsidiary companies at cost in accordance with Ind AS 27, 'Separate Financials Statements'. In this regard, accounting policy of the Company states that the Company records the investments in subsidiaries at cost less impairment loss, if any.

The Company has stated that during the financial year (F.Y.) 2013-14, the Company acquired 60% shares in an overseas company (subsidiary company X) which was having 10% participating interest (PI) in an overseas discovered oil and gas project under development (Project A). In the standalone financial statements (SFS) of that year, the purchase consideration for acquiring 60% shares in company X was accounted as investment in subsidiary company X. Since the purchase consideration paid by the Company, for acquiring 60% shares in company X, was higher than the proportionate net assets of the subsidiary company X at the effective date of acquisition, the difference was recognised as goodwill on business combination in the consolidated financial statements of the Company. Therefore, investment in the subsidiary company X accounted in the Standalone Financial Statements of the Company represented the proportionate net assets of the subsidiary company at the time of acquisition as well as the amount recognised towards the goodwill.

In accordance with Ind AS 36, 'Impairment of Assets', the Company carries out impairment assessment in respect of its 'Cash Generating Units (CGUs)' as well as investments in subsidiary, associate and joint venture at the end of each reporting period in order to determine whether there is any indication that these assets have suffered an impairment loss. If any such indication exists, the recoverable amount of the assets and investment is estimated in order to determine the extent of the impairment loss, if any. Accordingly, the Company carried out impairment assessment in respect of the Cash Generating Unit (CGU) comprising assets of the subsidiary company in proportion to its Participating Interest in the oil and gas Project-A (CGU X) as well as the investments in subsidiary company X. For the purpose of impairment assessment of CGU X, the value of goodwill was added to the carrying value of assets of subsidiary X for project A as per the requirements of paragraph 80 of Ind AS 36.

For the year ended 31st March 2016, impairment loss of USD 39.43 million was estimated in respect of the CGU X as per Ind AS 36. The said impairment loss was charged in the consolidated financial statements of the Company against the associated goodwill in accordance with paragraph 104 of Ind AS 36. In the standalone financial statements of the Company, an equivalent impairment loss of USD 39.43 million was provided against carrying value of the investment in subsidiary company X considering a permanent decline in the value of underlying assets represented by an impairment loss charged against goodwill which is irreversible subsequently as per paragraph 124 of Ind AS 36.

The said total impairment loss of USD 39.43 million in respect of CGU X was carried forward till 31st March 2020. Subsequently, during the impairment assessment of F.Y. 2020-21, recoverable amount of CGU X was computed to be higher than the carrying value of assets of subsidiary company X including the goodwill allocated and accordingly, there was a reversal of impairment provision of USD 39.43 million. The recoverable amount and carrying amount of the CGU X were as follows:

Carrying value of the CGU X (A)	USD 1783.52 million
Recoverable amount (represented by value-in-use) (B)	USD 2041.12 million
Impairment reversal restricted to the amount of impairment loss provided till 31.03.2020 (B-A):	**USD 39.43 million**

However, since the impairment loss of USD 39.43 million (charged in F.Y. 2015-16) was charged against the goodwill, reversal of such impairment loss was not done by the Company in its consolidated financial statements in F.Y. 2020- 21 as per paragraph 124 of Ind AS 36, which states that an impairment loss recognised for goodwill shall not be reversed in a subsequent period.

In the standalone financial statements, in respect of the carrying value of the investment in subsidiary

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company X, the Company estimated recoverable amount of the asset to be higher than the carrying value. The recoverable amount of the related asset and carrying value of investment in subsidiary X were as follows:

Carrying value of investment (A)	USD 1913.26 million
Recoverable amount (represented by value-in-use) (B)	USD 2041.12 million
Impairment reversal restricted to the amount of impairment loss provided till 31.03.2020 (B-A)	**USD 39.43 million**

However, since the impairment loss charged against the underlying assets was not reversed as the same represented impairment in goodwill, accordingly, the impairment loss of USD 39.43 million charged against investment in subsidiary company X was also not reversed in the standalone financial statements of the Company for the F.Y. 2020-21.

During the course of supplementary audit of F.Y. 2020-21, C&AG auditors observed that impairment in investment in standalone financial statements of the Company and impairment in goodwill appearing in consolidated financial statements of the Company are not interrelated to each other as criteria and methodology of impairment in standalone and consolidated financial statements are different. They also observed that impairment reversal in goodwill is prohibited by the Ind AS. However, reversal in investment is allowed by Ind AS 36. Further, any impairment and reversal in investment in standalone financial statements get eliminated while consolidation as per Ind AS 110. Therefore, the Company's plea to link impairment or reversal thereof in respect of carrying value of investment with the impairment estimation and provision in respect of underlying goodwill is not correct.

The auditor also observed that impairment in respect of carrying value of investment in subsidiary in standalone financial statements is worked out independently from the impairment in respect of CGU comprising the assets of subsidiary company including the related goodwill as per the provisions of Ind AS 36.

On the basis of above observations, the auditor was of opinion that during F.Y. 2020-21, though the Company has correctly not given effect to the reversal of impairment loss charged in the consolidated financial statements against the goodwill as the same could not be reversed as per Ind AS 36, but the Company should have reversed the impairment loss of USD 39.43 million charged in the standalone financial statements against the carrying value of investment in subsidiary company.

According to the Company, as noted above, the investment in subsidiary company X, as recognised in the standalone financial statements of the Company, represents the goodwill generated on acquisition of the subsidiary company X in addition to the proportionate net assets of the subsidiary. Since there was an impairment loss charged against this goodwill in F.Y. 2015-16 as mentioned above, which could not be reversed subsequently as per paragraph 124 of Ind AS 36, it can be construed that there is a permanent decline in the value of underlying assets necessitating a resultant impairment in carrying value of investment in subsidiary company X. Accordingly, carrying amount of investment in subsidiary company X was also reduced by charging an equivalent impairment of USD 39.43 million against the said investment in the standalone financial statements of the Company in F.Y. 2015-16.

The Company has further stated that since Ind AS 36 does not allow reversal of impairment loss provided against goodwill in subsequent years, the intention of Ind AS is to assume that there is permanent diminution in the value of goodwill if it has been impaired once, irrespective of the fact that there is subsequently an impairment reversal. As the Company's investment in subsidiary X pertains to the subsidiary's net assets as well as goodwill generated on acquisition, it was construed that carrying value of such investment is also diminished permanently to the extent of diminution in the value of goodwill. Therefore, since the impairment loss charged against the goodwill cannot be reversed, the impairment loss charged against the investment in subsidiary in standalone financial statements should also not be reversed in view of such permanent decline in the value of underlying assets.

The Company has also stated that it is pertinent to mention that provisions of Ind AS do not specifically deal with the impairment in respect of investment in subsidiary in view of any permanent decline observed in the underlying assets as against Accounting Standard (AS) 13, 'Accounting for Investments', which in paragraph 17 provides that Long-term investments are usually carried at cost. However, when there is a decline, other than temporary, in the value of a long term investment, the carrying amount is reduced to recognise the decline (emphasis supplied by the Company). Though ASs are not applicable to the Company and the Company follows Ind ASs, the intention of financial reporting framework in respect of impairment of investments may be borrowed from the provisions of AS 13. Thus, in case there is a permanent decline in the value of a long-term investment, the carrying value of the investment should be reduced to recognise such decline.

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Further, the Company has reproduced a relevant case study as given in Question 3 of Educational Material on Indian Accounting Standard (Ind AS) 27, Separate Financial Statements & Indian Accounting Standard (Ind AS) 28, Investments in Associates and Joint Ventures, issued by the erstwhile Ind AS Implementation Group of the Accounting Standards Board of the Institute of Chartered Accountants of India (ICAI) as below:

"Question 3

AB Limited has an existing investment of INR 700 crores in its subsidiary, PQR Limited. The net assets of PQR limited are only INR 400 crores as at March 31, 2018. The value in use as well as fair value less costs to sell of PQR Limited is INR 600 crores.

AB Limited has accounted its subsidiary at cost in its financial statements.

What will be the impairment loss which AB Limited needs to recognise in the separate financial statements?"

The response provided in respect of the above question, after analyzing the relevant provisions of Ind AS 36, states that in the instant case, impairment loss of Rs. 100 crores shall be recognised in the statement of profit and loss. However, it is also important to consider the underlying cash flows that support the investment while considering the investment for impairment. Therefore, though the educational material considers recoverable amount of the subsidiary instead of the net assets thereof for the purpose of determining impairment in the given question, it emphasizes that it is important to consider the underlying cash flows that support the investment while considering the investment for impairment. Accordingly, as per the Company, the underlying assets of subsidiary along with the associated goodwill are to be considered for the purpose of assessing the impairment (or reversal thereof) and if there is an indication of a permanent decline in the value of such underlying assets, the value of investment should also be reduced accordingly. Similarly, in case of permanent decline in the value of underlying assets, the impairment loss charged earlier in the investment in subsidiary should not be reversed.

Moreover, paragraph 114 of Ind AS 36 provides that an impairment loss recognised in prior periods for an asset other than goodwill shall be reversed if, and only if, there has been a change in the estimates used to determine the asset's recoverable amount since the last impairment loss was recognised. In the case of the Company, the last impairment loss in the value of investment in subsidiary X was recognised on the basis of estimation of permanent decline in the value of underlying assets. There is no change in this estimation since the last impairment loss was charged because the impairment loss charged against the underlying assets (i.e. goodwill) cannot be reversed subsequently. Accordingly, the impairment loss charged against the investment in subsidiary X charged earlier cannot be reversed as there is no change in the basic estimation on the basis of which the earlier impairment loss was recognised.

In the light of foregoing, the Company is of the view that a goodwill impairment on consolidation indicates a decrease in the value of investment since acquisition. This also triggers an impairment of the Company's investment in the subsidiary in the separate financial statements of the Company. Similarly, since the impairment loss against the goodwill cannot be reversed subsequently, indicating thereby a permanent decline in the value of underlying assets, the impairment loss charged earlier in the value of investment in subsidiary in the SFS cannot be reversed subsequently.

Query

In view of the above facts, the opinion of the Expert Advisory Committee of the Institute of Chartered Accountants of India is solicited on the following issues:

- Whether it is appropriate in the light of provisions of Ind AS 36 that the Company has not reversed the impairment loss recognised earlier against the carrying value of investment in subsidiary in standalone financial statements due to permanent decline in underlying assets represented by an impairment loss charged against the associated goodwill that cannot be reversed subsequently.
- If answer to (a) is no, whether the Company is required to recognise the said reversal of the impairment loss prospectively considering it a change in estimates or a retrospective accounting of reversal of impairment loss is required to be done by the Company.

Points considered by the Committee

The Committee notes that the basic issue raised by the Company relates to recognition of reversal of impairment loss recognised earlier in respect of investment in subsidiary company in the separate financial statements of the Company. The Committee has, therefore, considered only this issue and has not examined any other issue that may arise from the Facts of the Case.

The Committee notes that Ind AS 36, 'Impairment of Assets' states as follows:

"122 A reversal of an impairment loss for a cash-generating unit shall be allocated to the assets of the unit, except for goodwill, pro rata with the carrying amounts of those assets. These increases in carrying amounts shall be treated as reversals of impairment losses for individual assets and recognised in accordance with paragraph 119."

"124 An impairment loss recognised for goodwill shall not be reversed in a subsequent period.

125 Ind AS 38, Intangible Assets, prohibits the recognition

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of internally generated goodwill. Any increase in the recoverable amount of goodwill in the periods following the recognition of an impairment loss for that goodwill is likely to be an increase in internally generated goodwill, rather than a reversal of the impairment loss recognised for the acquired goodwill."

From the above, the Committee notes that Ind AS 36 requires that an entity should assess at each reporting date, whether there is any indication that an impairment loss recognised in a previous period for an asset other than goodwill either no longer exists or has decreased. The Committee notes that the exception in paragraph 124 that prohibits recognition of reversal of impairment loss applies only to goodwill and not to any other assets. The Committee is of the view that goodwill at the CFS level is the goodwill as on the acquisition date, which, once impaired cannot be reversed. This is because, if such reversal of impairment provision is recognised, it would result in recognition of internally generated goodwill.

The Committee further notes that Ind AS 36 states as follows:

"4 This Standard applies to financial assets classified as:

- Subsidiaries, as defined in Ind AS 110, Consolidated Financial Statements;
- Associates, as defined in Ind AS 28, Investments in Associates and Joint Ventures; and
- Joint ventures, as defined in Ind AS 111, Joint Arrangements.

For impairment of other financial assets, refer to Ind AS 109."

Thus, Ind AS 36 applies to financial assets classified as subsidiaries under Ind AS 110. The Committee also notes that paragraph 9 of Ind AS 27, 'Separate Financial Statements' explicitly requires that separate financial statements shall be prepared in accordance with all applicable Ind AS. Therefore, impairment requirements as per Ind AS 36 are equally applicable to investment in subsidiary in separate financial statements. Therefore, investment in a subsidiary in the separate financial statements of the parent shall also be subjected to impairment testing when there are impairment indicators. The Committee is of the view that generally, where an impairment provision is recognised against goodwill arising on consolidation of a subsidiary in the consolidated financial statements, the carrying amount of the parent company's investment in the relevant subsidiary should also be reviewed for impairment since it indicates a decrease in value since acquisition and thus, there would be impairment indicators. This is because the investment in subsidiary in the separate financial statements and the goodwill on consolidation arising in the consolidated financial statements of the group are initially recognised on the same date and, therefore, are linked. However, it should be noted that criteria and methodology of impairment in separate and consolidated financial statements are different.

The Committee notes that paragraph 4 of Ind AS 36 (as reproduced above) specifically covers investments in subsidiary in the SFS within its scope. If the Standard had intended to prohibit, partly or fully, the recognition of reversal of impairment on investment in subsidiary, similar to the prohibition in case of goodwill, the Standard would have specifically mentioned the same.

The Committee further notes that neither Ind AS 27 nor Ind AS 36 requires or permits breaking up the investment in subsidiary in separate financial statements into the individual underlying assets and liabilities of the subsidiary. At separate financial statements level, the investment in a subsidiary represents a financial instrument, although there may be certain scope exclusions in Ind AS 32, Ind AS 107 and Ind AS 109. An interest in a financial instrument is not split into further underlying assets / liabilities unless specifically required or permitted by a standard.

Further, the Committee notes that in the CFS, Ind AS 36 requires the impairment testing to be performed at least annually for CGUs (which may consist of a subsidiary) with goodwill. If there is an impairment, the same is required to be recognised against goodwill and other assets as per the requirements of Ind AS 36. Where there is evidence of reversal of impairment, the same is recognised against other assets as per the requirements of Ind AS 36. Ind AS 36 prohibits recognition of reversal of impairment against goodwill. The Committee notes that none of these requirements construe that there is other than temporary decline in the value of investments in subsidiary in the SFS.

The Committee also notes that the Company has estimated similar recoverable amounts at consolidated financial statements (CFS) level and at separate financial statements (SFS) level. The Committee notes that at SFS level, the recoverable amount of an investment in a subsidiary (being a CGU) would normally be based on the value in use or fair value less costs of disposal based on the parent's share of estimated cash flows from the investment in subsidiary. On the other hand, at CFS level, the net assets of the subsidiary are presented in the CFS and therefore, there may be different CGU at CFS level considering the requirements of Ind AS 36. Thus, the CGU at CFS level being different from the CGU at the SFS level, there may be differences in the recoverable amount at consolidated financial statements and at separate financial statements level. There could be further possible differences in the recoverable amounts at consolidated financial statements level and

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at separate financial statements level due to factors, such as, the level at which cash generating unit is determined, impact of intra-group transactions, business synergies arising outside the subsidiary/ sub-group and the first time adoption exemption for business combination availed by the group.

The Committee further notes that the Company has justified the non-recognition of reversal of previous impairment loss in the investment in the subsidiary in the separate financial statements, based on submission that the investment partly consists of goodwill. The Committee notes that goodwill results from a business combination involving the acquisition of a controlling interest in the equity instruments of the acquiree.

Goodwill relating to the business combination is recognised only in the acquiror's consolidated financial statements, and not in its separate financial statements. The Committee also notes that the Company has referred to an FAQ in ICAI's Educational Material on Ind AS 27 and to AS 13 under Companies (Accounting Standards) Rules, 2006 for non-recognition of reversal of impairment of goodwill in separate financial statements. However, neither the Educational Material nor AS 13, prohibit or disallow recognition of reversal of previously recognised impairment loss in the separate financial statements.

With regard to the issue as to whether the Company is required to recognise the said reversal of the impairment loss prospectively considering it a change in estimates or a retrospective accounting, the Committee notes that Ind AS 8 states as follows:

"41 Errors can arise in respect of the recognition, measurement, presentation or disclosure of elements of financial statements. Financial statements do not comply with Ind ASs if they contain either material errors or immaterial errors made intentionally to achieve a particular presentation of an entity's financial position, financial performance or cash flows. Potential current period errors discovered in that period are corrected before the financial statements are approved for issue. However, material errors are sometimes not discovered until a subsequent period, and these prior period errors are corrected in the comparative information presented in the financial statements for that subsequent period (see paragraphs 42–47).

42 Subject to paragraph 43, an entity shall correct material prior period errors retrospectively in the first set of financial statements approved for issue after their discovery by:

- Restating the comparative amounts for the prior period(s) presented in which the error occurred; or
- If the error occurred before the earliest prior period presented, restating the opening balances of assets, liabilities and equity for the earliest prior period presented."

As per Ind AS 8, material prior period errors are corrected retrospectively by restating the comparative amounts for prior periods in which the error occurred. If the error occurred before the earliest period presented, the opening balance of equity/ retained earnings for the earliest period presented are adjusted. Since, in the extant case, the Company should have accounted for reversal of impairment in its separate financial statements as discussed above, the same results into a prior period error, which should be rectified as per the afore-mentioned requirements of Ind AS 8.

Opinion

On the basis of the above, the Committee is of the following opinion on the issues raised in paragraph 17 above:

- The current accounting treatment in the separate financial statements of the Company with regard to non-recognition of the reversal of impairment loss recognised in past, is not in line with the requirements of Ind AS 27 and Ind AS 36.
- The Company should correct the accounting treatment as a prior period error retrospectively in the first set of financial statements approved for issue after the discovery of the error.

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SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI)

Circular dated 3rd June 2022: Extension of facility for conducting annual meeting and other meetings of unitholders of Investment Trusts of India (“InvITs”) and Real Estate Investment Trusts (“REITs”) through Video Conferencing (“VC”) or Other Audio-Visual Means (“OAVM”)

Vide this circular, SEBI has further extended the VC/OAVM facility for conducting annual and other meetings of InvITs/ REITs from 30th June 2022 to 31st December 2022.

Circular dated 24th June 2022: Guidelines for Large Value Fund for Accredited Investors under SEBI (Alternative Investment Funds) Regulations, 2012 (“AIF Regulations")

SEBI, vide this circular has issued a guideline for ‘Large Value Fund for Accredited Investors’ (“LVF”) under AIF Regulations to provide them certain regulatory relaxations.

Key highlights of this circular are as under:

- LVFs can launch their scheme without filing their placement memorandum with SEBI through Merchant Banker.
- While filing the placement memorandum for LVF schemes with SEBI, a duly signed & stamped undertaking by the Chief Executive Officer (“CEO”) of the Manager to the AIF or its equivalent and Compliance Officer of Manager to the AIF shall be submitted in the prescribed format.
- In case of LVF schemes already filed with SEBI, similar duly signed and stamped undertaking shall be submitted to SEBI on or before 31st July 2022.
- AIF Regulations allow the Funds to extend its tenure up to 2 years. The guideline allows to extend it beyond 2 years provided,
  - The placement memorandum, contribution agreement or other fund documents of LVF lay down terms and conditions regarding extension beyond 2 years.
  - Approval from its Trustee/Board of Directors/Designated Partners is taken at least a month prior to expiration of fund tenure or extended tenure.
- In case of non-compliance with above requisite conditions, LVF shall liquidate and wind up in accordance with AIF Regulations and circulars issued thereunder.
- All AIFs shall ensure that Manager to AIF designates an employee or director as Compliance Officer who shall be a person other than CEO of the Manager or equivalent, and responsible for monitoring compliance with the provisions of the SEBI Act, 1992, AIF Regulations and circulars issued thereunder.

Circular dated 24th June 2022: Introduction of Unified Payments Interface (“UPI”) mechanism for InvITs and REITs

The key highlights of the circular are as follows:

- The circular shall be applicable to a public issue of units of InvITs and REITs issued under the SEBI (Infrastructure Investment Trusts) Regulations, 2014 and SEBI (Real Estate Investment Trusts) Regulations 2014 respectively, opened on or after 1st August 2022.
- The option to apply in public issue of units of InvITs and REITs with a facility to block funds through UPI mechanism is applicable for value up to INR 5 Lac only.
- National Payments Corporation of India (‘NPCI’) and the UPI system developed by NPCI are a part of the newly introduced mechanism by SEBI. Further, there will be a Sponsor Bank who will be appointed by the issuer and shall act as a conduit between the stock exchanges and NPCI.
- The process of listing of securities and commencement of trading must be completed within T+6 working days
- The circular also provides for the detailed process flow for availing the option of blocking funds through UPI mechanism along with roles of issuer, registrar, Stock exchange, intermediaries and collecting banks.

Circular dated 30th June 2022: Disclosure of holding of specified securities in dematerialized (“Demat”) form

SEBI, vide its circular dated 30th June 2022, provided clarity and transparency to the investors by issuing modified formats for disclosure of holding of specified securities and shareholding pattern in demat format.

Key modifications are as under:

- In the disclosure of public shareholding, names of the shareholders holding 1% or more of shares of the listed entity, is to be disclosed.
- Revised formats of Table III (Statement showing shareholding pattern of the public shareholder) and Table IV (Statement showing shareholding pattern of the Non-Promoter – Non-Public shareholder) are provided.
- All listed entities must disclose the details regarding the foreign ownership limits in the prescribed format.

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MINISTRY OF CORPORATE AFFAIRS (MCA)

Notification dated 1st June 2022: The Companies (Appointment and Qualification of Directors) Amendment Rules, 2022 ("Amended Rules")

The Amended Rules provide that any person seeking an appointment to hold the office of a Director, is a national of a country which shares land border with India, must furnish the necessary security clearance from the Ministry of Home Affairs, Government of India at the time of making application for Director Identification Number and along with the consent form (DIR-8) after being appointed to hold office of director.

Notification dated 9th June 2022: Companies (Removal of names of companies from the Register of Companies) Amendment Rules, 2022 ("Amended Rules")

The Amended Rules provide that the registrar may now call for further information or documents within 15 days if he finds that the application made to him is defective or incomplete in any aspect. Even after re-submission, if the registrar finds that the information or documents are defective or incomplete, he may give additional 15 days to make changes. Any re-submission of the application made before commencement of this Amended Rules is not considered for the purposes of reckoning the maximum number of re-submissions.

Further, the Form STK-1 (Notice by Registrar for removal of name of a company from the register of companies), STK-5 and STK-5A (Public Notice) are now substituted with its revised version.

Notification dated 10th June 2022: The Companies (Appointment and Qualification of Directors) Second Amendment Rules, 2022 ("Second Amended Rules")

The Companies Act, 2013 provides that every individual whose name is included in the data bank, must pass an online proficiency self-assessment test ("test") conducted by the institute within a period of 2 years from the date of inclusion of his name in the data bank, failing which, his name shall stand removed.

The Second Amended Rules provides that an individual whose name has been removed from the databank is now allowed to apply for restoration of his name on payment of INR 1000 and the institute shall allow such restoration subject to the following conditions:

- His name shall be shown in a separate restored category for a period of 1 year from the date of restoration and he shall be required to pass the test in that 1 year.
- In case he fails to pass the test within 1 year from the date of restoration, his name shall be removed from the data bank, and he shall be required to apply afresh for inclusion of his name in the databank.

Circular dated 29th June 2022: Relaxation in paying additional fees for delay in filing Annual Return by Limited Liability Partnerships ("LLPs")

MCA vide its previous circular dated 5th May 2022 provided relaxation to all LLPs to file its Annual return in e-Form 11 for the Financial Year ("FY") 2021-2022 without paying additional fees, up to 30th June 2022.

Vide this circular, the above timeline is further extended up to 15th July 2022.

National Financial Reporting Authority Amendment Rules, 2022

The MCA vide notification dated June 17, 2022, has amended the rule 13 of **National Financial Reporting Authority Rules, 2018** with respect to 'Punishment in case of non-compliance' as per which failure to comply with these rules will attract a penalty of Rs.5,000 and where the contravention is a continuing one, a further fine of Rs.500 for every day during the period of contravention. This applies to offenses for which the penalty is not specified elsewhere in the NFRA law.

Prior to amendment the general penalty as mentioned in section 450 of the Companies Act, 2013 used to be levied. The rule has been amended to drop a reference to section 450 of the Companies Act which specifies a cap of Rs.200,000 in the case of a company and Rs.50,000 for an officer in default or any other person for offenses that persist.

While the reference to the upper limit for the continued offense has been dropped, the fine specified in the new rules for the first instance of the breach and each day of continued offense is less than the maximum that the law allows. Section 450 of the Companies Act allows a maximum of Rs.10, 000 at the first instance and Rs.1,000 for every day during the period in which the breach continue.

Relaxation in paying additional fees in case of delay in filing Form 11 (Annual Return) by Limited Liability Partnerships (LLPs)

The MCA vide General Circular dated June 29, 2022 has decided to extend the timeline and allow LLPs to file Form 11 (Annual Return) for the FY 2021-22 by Limited Liability Partnerships up to July 15, 2022.

RESERVE BANK OF INDIA ("RBI")

Circular dated 9th June 2022: Discontinuation of Return under Foreign Exchange Management Act, 1999 ("FEMA Act")

RBI, vide this circular, has decided to discontinue the return w.r.t 'Details of guarantee availed and invoked from non-resident entities' under the FEMA Act with effect from the quarter ending June 2022.

Circular dated 6th June 2022: Provisioning for Standard assets by Non-Banking Financial Company - Upper Layer ("NBFC-UL")

On 22nd October 2021, the RBI issued a framework on Scale Based Regulation under which it was stated RBI would issue guidelines on differential provisioning to be held by NBFCs classified as NBFC-UL towards different classes of standard assets.

Vide this circular, RBI has stated that NBFC-UL must maintain the provision in respect of 'standard' assets at the prescribed rates for the funded amount outstanding. For

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which, the circular provides a table containing different rates for different category of assets and it also states that all conditions applicable for treatment of the provisions for standard assets would also apply to the permitted derivative transactions.

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA ("IBBI")

Notification dated 14th June 2022: IBBI (Information Utilities) (Amendment) Regulations, 2022 ("Amended Regulations")

With a view to improve the availability of information, IBBI has introduced the Amended Regulations, key features of which are as under:

- The definition of 'record of default' is introduced to mean the status of authentication of default issued in Form D of the Schedule."
- Regulation 20 which provides for 'acceptance and receipt of information' has been amended mandating the creditors to file information of default with the information utility before filing an application to initiate Corporate Insolvency Resolution Process under Section 7 or 9 of the Insolvency and Bankruptcy Code, 2016 ("IBC Code") and the Information Utility shall process the information for issuing record of default.
- The Information Utility must deliver the information of default or its reminder, to the debtor either by hand, post, or electronic means at the postal or e-mail address of the debtor recorded with MCA 21 and the Central Registry of Securitization Asset Reconstruction and Security Interest of India (CERSAI) registry as repositories, or any other statutory repository as approved by the Board.
- Upon delivery of the information, the Information Utility must record the status of authentication of information of default in the tables/formats provided in the circular.

Notification dated 14th June 2022: IBBI (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2022 ("Amended CIRP Regulations")

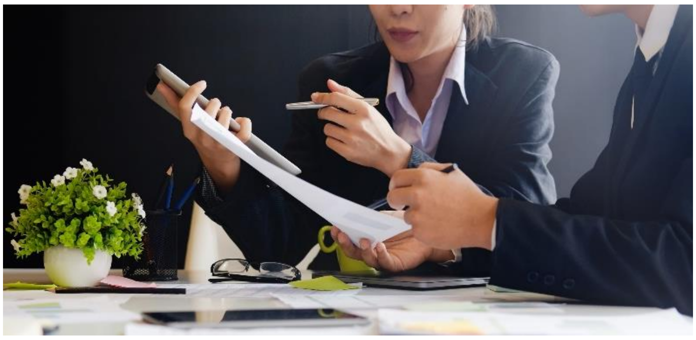
The key features of the Amended CIRP Regulations are as follows:

- The operational creditors, filing applications under Section 9 of the IBC Code are required to furnish extracts of Form GSTR-1, Form GSTR-3B and e-way bills, wherever applicable along with the copy of application except for those creditors who do not require Goods & Service Tax registration as per the applicable law.
- The financial and operational creditors filing applications under Section 7 and Section 9 respectively, are required to furnish details of their Permanent Account Number and Email-ID to ensure smooth correspondence.
- A duty is placed on corporate debtor, its promoters or any other person associated with the management of the corporate debtor to provide the information in such format and time as sought by the Resolution Professional ("RP").
- A duty is placed on the creditors to share information regarding the assets and liabilities of the corporate debtor, the financial statements and other relevant financial information from their records and available reports to assist the RP in preparation of the information memorandum, getting valuation determined and conduct a smooth resolution process.
- The definition of 'asset class and 'significantly different' is introduced.
- In case the estimates of fair value or liquidation value in an asset class as per the two registered valuers vary by 25% or more, the RP may appoint a third registered valuer and the average of the two closest estimates of the value shall be considered as the fair value or the liquidation value, as the case may be.
- The Amended CIRP Regulations provide that, for the purpose of preparing Information Memorandum, the creditors shall be required provide to the RP, the latest financial statements and other relevant financial information of the corporate debtor available with them.
- A resolution plan, other than the contents already provided, must also contain the way the proceedings in respect of avoidance transactions or fraudulent or wrongful trading, will be pursued after the approval of the resolution plan and the manner in which the proceeds, if any, from such proceedings shall be distributed.

Notification dated 15th June 2022: IBBI (Grievance & Complaint Handling Procedure) (Amendment) Regulations, 2022 ("Amendment Regulations")

With a view to streamline the complaint handling procedure, curtail delays and ensure expeditious and result oriented enforcement mechanism, the IBBI has notified the Amendment Regulations, which shall be effective from 14th June 2022, key highlights of which are as under:

- A grievance or a complaint shall be filed with the Board on its dedicated portal https://www.ibbi.gov.in.
- Effective participation of Insolvency Professional Agency ("IPAs") in regulating the Insolvency Professionals through examination of grievances received against them.
- Revision & reduction in various timelines to expediate redressal and address the issue of delay in present mechanism.



REGULATORY UPDATES

which, the circular provides a table containing different rates for different category of assets and it also states that all conditions applicable for treatment of the provisions for standard assets would also apply to the permitted derivative transactions.

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA ("IBBI")

Notification dated 14th June 2022: IBBI (Information Utilities) (Amendment) Regulations, 2022 ("Amended Regulations")

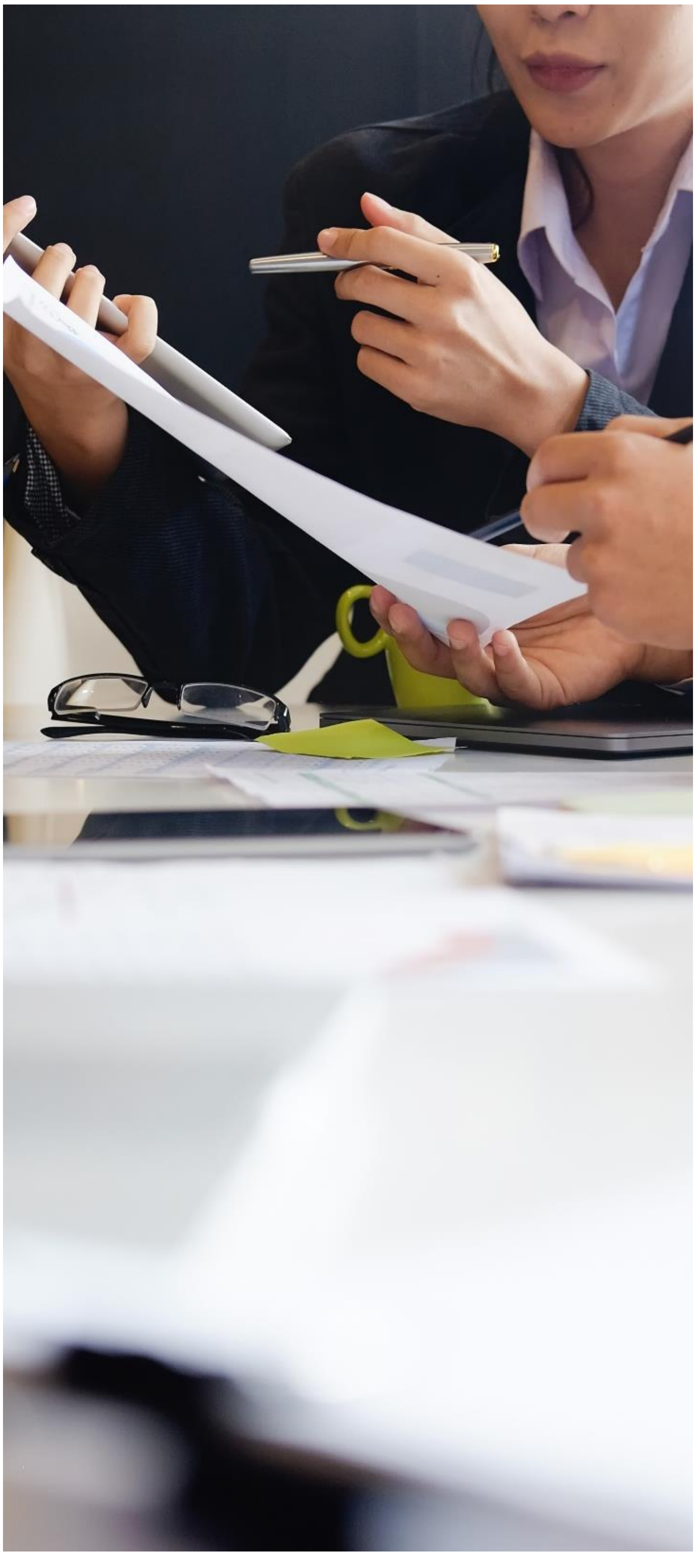
With a view to improve the availability of information, IBBI has introduced the Amended Regulations, key features of which are as under:

- The definition of 'record of default' is introduced to mean the status of authentication of default issued in Form D of the Schedule."
- Regulation 20 which provides for 'acceptance and receipt of information' has been amended mandating the creditors to file information of default with the information utility before filing an application to initiate Corporate Insolvency Resolution Process under Section 7 or 9 of the Insolvency and Bankruptcy Code, 2016 ("IBC Code") and the Information Utility shall process the information for issuing record of default.
- The Information Utility must deliver the information of default or its reminder, to the debtor either by hand, post, or electronic means at the postal or e-mail address of the debtor recorded with MCA 21 and the Central Registry of Securitization Asset Reconstruction and Security Interest of India (CERSAI) registry as repositories, or any other statutory repository as approved by the Board.
- Upon delivery of the information, the Information Utility must record the status of authentication of information of default in the tables/formats provided in the circular.

Notification dated 14th June 2022: IBBI (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2022 ("Amended CIRP Regulations")

The key features of the Amended CIRP Regulations are as follows:

- The operational creditors, filing applications under Section 9 of the IBC Code are required to furnish extracts of Form GSTR-1, Form GSTR-3B and e-way bills, wherever applicable along with the copy of application except for those creditors who do not require Goods & Service Tax registration as per the applicable law.
- The financial and operational creditors filing applications under Section 7 and Section 9 respectively, are required to furnish details of their Permanent Account Number and Email-ID to ensure smooth correspondence.
- A duty is placed on corporate debtor, its promoters or any other person associated with the management of the corporate debtor to provide the information in such format and time as sought by the Resolution Professional ("RP").



TAX UPDATES
Direct Tax

CIRCULARS/ NOTIFICATIONS/PRESS RELEASE

CBDT amends parameter and procedures for compulsory selection of scrutiny in search and seizure matters

In May 2022, the Central Board of Direct Taxes ('CBDT') had issued a Circular[1] laying down parameters and procedure for compulsory selection of returns for complete scrutiny for the Fiscal Year ('FY') 2022-23. Recently, the CBDT has issued another circular modifying the parameter and procedure in respect of search and seizure matters. The modified parameter and procedure for search and seizure matter is tabulated hereunder:

Parameter	Procedure for compulsory selection
1. Cases pertaining to search and seizure/requisition prior to 1 April 2021	
Assessments in search & seizure cases to be made under sections 153A, 153C read with section 143(3) of the Income Tax Act,1961 ('IT Act') and for return filed for Assessment Year ('AY') relevant to previous year in which the search was conducted under section 132 of the IT Act or requisition was made under section 132A of the IT Act.	▪ The cases shall be selected for scrutiny with prior administrative approval of Pr. CIT/Pr. DIT/CIT/DIT concerned, who shall ensure that such cases are transferred to Central Charges under section 127 of the IT Act within 15 days of service of notice under section 143(2)/142(1) of the IT Act by the Tax Officer. ▪ Where such cases are not centralized and Return of Income ('ROI') is filed in response to notice under section 153C of the IT Act, the Tax Officer concerned shall serve notice under section 143(2) of the IT Act. ▪ Where such cases are not centralized and no ROI is filed in response to notice under section 153C of the IT Act, the Tax Officer concerned shall serve notice under section 142(1) of the IT Act calling for information.
2. Cases pertaining to Search and seizure/requisition on or after 1 April 2021	
Assessments in cases arising from search and seizure actions / requisitions under section 132 / section 132A of the IT Act conducted on or after 1-4-2021, for returns pertaining to AY 2021-22.	The cases shall be selected for scrutiny with prior administrative approval of Pr. CIT/Pr. DIT/CIT/DIT concerned, who shall ensure that such cases are transferred to Central Charges under section 127 of the IT Act within 15 days of service of notice under section 143(2)/142(1) of the IT Act by the Tax Officer concerned.

[Circular F.NO. 225/81/2022/ITA-II, Dated 3-6-2022]

CBDT notifies section 9A of the IT Act's conditions that shall not be applicable to an eligible investment fund

Section 9A of the IT Act provides that the fund management activity carried out through an eligible fund manager acting on behalf of an eligible investment fund[2] shall not constitute business connection in India of the said fund. Sub-section (8A) of Section 9A of the IT Act grants powers to the Central Government to specify any one or more of the conditions that shall not apply or apply with such modification as may be specified in the notification. Recently, the CBDT has issued a notification to provide that following conditions specified in sub-section (3) of section 9A of the IT Act shall not be applicable for considering the investment fund to be an eligible investment fund:

- The fund has a minimum of 25 members who are, directly or indirectly, not connected persons
- Any member of the fund along with connected persons shall not have any participation interest, directly or indirectly, in the fund exceeding 10 percent
- The aggregate participation interest, directly or indirectly, of 10 or less members along with their connected persons in the fund, shall be less than 50 percent.

Further, the Notification also modified the condition provided in clause (k) of sub-section (3) pertaining to control and management of any business in India. As per the revised condition the fund shall not carry on, or participate in, the day-to-day operations of any person in India and for this purpose the monitoring mechanism to protect the investment in such person including the right to appoint directors or executive director shall not be considered as participation in day-to-day operations of such person in India.

Further, the condition specified in clause (b) of sub-section (4) of section 9A of the IT Act pertaining to registration of a person as fund manager or an investment advisor in accordance with the specified regulation for consideration as eligible fund manager has been modified. As per the revised condition, the person shall be registered as a portfolio manager or an investment advisor in accordance with the International Financial Services Centres Authority (Capital Market Intermediaries) Regulation 2021 as notified under the

[1] Circular F. NO. 225/81/2022/ITA-II, dated 11 May 2022
[2] An eligible investment fund is a fund that fulfils the prescribed conditions

TAX UPDATES
Direct Tax

International Financial Services Centres (IFSC) Authority Act, 2019 or such other regulations made under the IFSC Authority Act, 2019

[Notification S.O. 2602(E)[NO. 59/2022/F. NO. 370142/11/2022-TPL] dated 6 June 2022]

CBDT amends functionality of Compliance Check for Section 206AB and 206CCA of the IT Act

Sections 206AB and section 206CCA of the IT Act provides for deduction or collection of tax at a higher rate in the case of taxpayer who have not filed their tax return (i.e. specified person). For removing the difficulty in implementing these provisions, the CBDT had issued Compliance Check functionality. Finance Act, 2022 amended sections 206AB and 206CCA of the IT Act. Consequently, recently, the CBDT has issued a notification to amend the Compliance Check functionality. The changes in the functionality is to give effect to the amendment made in section 206AB and section 206CCA of the IT Act

[Notification No. 1 OF 2022 dated 9-6-2022]

NaFAC/AU/RU to act as NaFPC/PU/PRU

CBDT notified Faceless Penalty Scheme, 2021 to provide modalities for undertaking penalty proceedings in a faceless manner. Recently, they had amended this Scheme by notifying Faceless Penalty (Amendment) Scheme, 2022. Subsequent to amendment, the CBDT issued an order directing National Faceless Assessment Centre (NaFAC) / Assessment Units (AUs) / Review Units (RUs) to also act as National Faceless Penalty Centre (NaFPC) / Penalty Units (PUs)/ Penalty Review Units (PRUs) till the time NaFPC / PU / RPU is set up.

Further, the order also provides that the Income-tax Authorities of the NaFAC/ AUs/ RUs (i.e. Pr.CCIT/CIT/Addl.CIT/Jt.CIT/DCIT/ACIT/ITO) shall act as and perform the functions of the corresponding Income-tax authorities of the NaFPC/ PUs/ PRUs respectively. This order shall be effective from 06 June 2022.

[Order No.: F No. 187/4/2021-ITA-I dated 10 June 2022]

Cost Inflation Index for FY 2022-23 notified

The CBDT has notified the Cost Inflation Index for FY 2022-23 at 331.

[Notification No. 62/2022/F.NO.370142/20/2022-TPL dated 14 June 2022]

CBDT issues guidelines on tax withholding from benefit or perquisite

To bring benefits or perquisites arising to residents from carrying out of business or exercise of profession within the ambit of tax withholding, the Finance Act, 2022 inserted section 194R of the IT Act which shall be effective from 1 July 2022. Post its introduction, representations were made to CBDT seeking clarification / raising concerns on various issues emanating from section 194R of the IT Act. With a view to clarify such issues / address such concerns, the CBDT recently issued a Circular laying down guidelines in Q&A format.

To read our detailed analysis, please go to Direct Tax Alert - CBDT issues guidelines on tax withholding from benefit or perquisite - BDO

[Circular No. 12/2022 dated 16 June 2022]

CBDT exempts lease rental payment in respect of 'aircraft' leased out by IFSC units from withholding tax provision

CBDT relaxes rigors of tax withholding under section 194I of the IT Act in respect of lease rentals paid to aircraft-leasing units located in the IFSC which are claiming exemption under section 80LA of the IT Act. This relaxation is available subject to the following:

Lessor	Lessee
i. Furnish a statement-cum-declaration in Form No. 1 to the lessee giving details of previous years relevant to the ten consecutive assessment years for which the lessor opts for claiming deduction.	i. Not to deduct tax on payment made or credited to lessor after the date of receipt of copy of statement-cum-declaration in Form No.1 from the lessor; and
II. Such statement-cum-declaration shall be furnished and verified in the manner specified in Form No.1, for each previous year relevant to the ten consecutive assessment years for which the lessor opts for claiming such deduction.	II. To furnish the particulars of all the payments made to lessor on which tax has not been deducted in view of this notification in the withholding tax return

The above relaxation shall be available to the lessor for previous year relevant to ten consecutive AYs as declared by the lessor in Form No. 1 for which deduction under section 80LA of the IT Act is being opted. The lessee shall be liable to deduct tax on payment of lease rent for any other year.

[Notification S.***O. 2777(E) [No. 65/2022/F.NO. 275/30/2019- IT(B)], Dated 16-6-2022]***

CBDT issues guidelines in respect of tax withholding on transfer of Virtual Digital Asset (VDA)s through the exchange / other than exchange; CBDT also notifies exempt VDA as well as taxable NFTs

With a view to bring the Virtual Digital Asset transaction within tax net, the Finance Act, 2022 inserted Section 115BBH in the IT Act. It also inserted Section 194S in the IT Act with effect from 1 July 2022 to provide for tax withholding @1% from the consideration. Recently, the CBDT issued circulars to address difficulties faced by taxpayers for VDA transaction conducted either through an Exchange or other than Exchange (i.e. peer-to-peer).

Further, the CBDT also issued notifications to notify exempt VDA as well as taxable NFTs.

TAX UPDATES
Direct Tax

To read BDO analysis of the CBDT Circulars and Notification, please go to:

- Direct Tax Alert - CBDT issues guidelines on Virtual Digital Asset's tax withholding provisions
- DIRECT TAX ALERT - CBDT issues guidelines for tax withholding VDA transactions executed otherwise than exchange

[Circular No. 13 of 2022 dated 22 June 2022 and Circular No. 14 of 2022 dated 28 June 2022]

[Notification No. 74/2022 and Notification No. 75/2022 dated 30 June 2022]

CBDT notifies challan-cum-statement for reporting TDS on transfer of VDA by a specified person

With the provisions of sec 194S regarding TDS on VDA becoming effective from 1 July 2022, the CBDT has issued a notification to amend Rule 30, Rule 31 and Rule 31A of the Income-tax Rules, 1962 (IT Rules) to provide for the form and mechanism in which the TDS on VDA shall be reported / deposited by a specified person. As per the amended Rule 30, tax withheld under section 194S of the IT Act shall be paid electronically to the credit of the Central Government within a period of thirty days from the end of the month in which the tax withholding is done and shall be accompanied by a challan-cum-statement in Form No. 26QE. Further, under Rule 31(3D), the deductor shall issue TDS certificate to the deductee in Form 16E within 15 days from the due date of furnishing Form No. 26QE.

Rule 31A provides that furnishing particulars of amount deposited being prerequisite for releasing

- winnings in terms of proviso to section 194B of the IT Act.
- benefit or perquisite in terms of first proviso to sub-section (1) of section 194R of the IT Act; and
- consideration in terms of proviso to sub-section (1) of section 194S of the IT Act along with the challan details such as BSR code of the bank, date of payment and challan serial number.

  [NOTIFICATION G.S.R. 463(E) [NO. 67/2022/F.NO.370142/23/2022-TPL]dated 21 June 2022]

CBDT notifies Form 26QF for filing quarterly statement by Exchange

CBDT had issued guidelines giving clarity on who is required to deduct tax under section 194S of the IT Act when transfer of VDA is taking place on or through an Exchange. As per the said guidelines, Exchange is required to report the following transactions in the quarterly statement in Form 26QF on or before the due date prescribed in the Income-tax Rules, 1962 (IT Rules):-

- There is a written agreement between the Exchange and the broker that the broker alone shall be deducting tax if transaction between Exchange and Seller is done through a broker.

If the buyer is buying VDA from an Exchange through a broker, and there is a written between Exchange and the buyer/broker that Exchange would be paying tax on the transfer of VDA before the due date for that quarter.

[Notification No. 73/2022, dated 30 June 2022]

JUDICIAL UPDATES

No disallowance under section 14A of the IT Act if there is no exempt income during the FY

During the FY, the taxpayer had not earned any exempt income and therefore no disallowance was made under section 14A of the IT Act. However, the Tax Officer made disallowance under section 14A of the IT Act. First Appellate Authority while upholding disallowance under section 14A of the IT Act, restricted the disallowance to the amount computed in terms of Rule 8D of the IT Rules. Aggrieved, the taxpayer approached Mumbai bench of the Tax Tribunal. The Tax Tribunal deleted such disallowance by placing reliance on decision of co-ordinate Bench and decision of Hon'ble Delhi High Court in the case of Cheminvest Ltd -vs.- CIT [(2015) 61 taxmann.com 118 (Del)]. While deleting the disallowance, the Tax Tribunal made following observations:

- there is no dispute about the fact that the taxpayer did not have any tax-exempt income during the relevant FY
- the period pertains to the period prior to insertion of Explanation to section 14A of the IT Act by the Finance Act, 2022.

Observation of Mumbai Tax Tribunal that the amendment made by Finance Act, 2022 is not applicable to FY prior to FY 2021-22 will help the taxpayer to contend that this amendment is prospective in nature.

[ACIT v. Bajaj Capital Ventures (P.) Ltd (ITA No. 528/Mum/2022)]

Appeal filed by or against struck-off Companies is maintainable

The taxpayer had filed an appeal for FY 2013-14 before the Delhi bench of Tax Tribunal. By the time its matter came up for hearing, its name was struck off by the Registrar of Companies, NCT of Delhi and Haryana. Hence, before the Tax Tribunal, the Tax Authorities contended that as the said appeal has become infructuous, the same should be dismissed. To support its contention, Tax Authorities submitted Form No. STK-7[3] issued by ROC under section 248(5) of the Companies Act, 2013 alongwith the list of struck off companies. However, the taxpayer contended that the appeal cannot be dismissed as non-maintainable merely on the ground of striking off of the taxpayer's name by the ROC

[3] Notice of striking off and dissolution

TAX UPDATES
Direct Tax

and submitted that the matter should be heard on merits. Tax Tribunal after going through the relevant provision of the Companies Act, 2013 and the IT Act held that the appeal filed by the taxpayer is maintainable even though its name had been struck-off by the ROC. While coming to this conclusion, it made the following observations:

- On combined reading of section 250 and sub-sections (6) and (7) of Section 248 of the Companies Act, 2013, once the Company is struck off, it shall be deemed to have been cancelled from such date except for the purpose of realising the amount due to the Company and for the payment or discharge of the liabilities or obligation of the Company
- Even after striking off of a Company, the liability, if any, of the Director, Manager or other officers exercising any power of management and of every member of the Company shall continue and may be enforced as if the Company had not been dissolved.
- If there is any tax due from the struck off company, the Tax Authority can invoke Section 226(3) of the IT Act for satisfying such tax demands.
- As per section 179 of the IT Act, if the tax due from private company in respect of any income of any FY cannot be recovered, then every person who was a Director of the Company at any time during the relevant FY shall be jointly and severally liable for the payment of such taxes unless he proves that non-recovery cannot be attributed to any gross neglect misfeasance or breach of duty on his part in relation of the Company
- If the proceedings pending before the Court or the Tax Tribunal (regarding determination of quantum of the tax / liability of paying the tax) is dismissed for having become infructuous without adjudicating the actual tax dues or the liability of the taxpayer to pay such tax in the manner known to the Law and based on such dismissal of the proceedings, if the Tax Authorities proceeds for the recovery of such tax due, the rights of the Directors of the Company will be seriously jeopardize and the same will amount to denial of the rights guaranteed under the law.
- When the Tax Authority has not forgone the right to recover tax due or written off the demand on the ground of taxpayer being struck off by the ROC, the right of the taxpayer to determine the tax liability in due process of law cannot be denied by dismissing the appeal.
- Though the taxpayer's name has been struck-off under section 248 of the Companies Act, 2013, in view of sections 248(6), section 248(7) and section 250 of the Companies Act, 2013, the Certificate of Incorporation issued to the taxpayer cannot be treated as cancelled for the purpose of realising the amount due to the taxpayer and for payment or discharge of the liability or obligations of the taxpayer.

[Dwarka Portfolio Pvt. Ltd. v. ACIT (ITA No. 2563/Del/2017)]

Beneficial Ownership Clause cannot be inferred in Article 13 of India-Mauritius DTAA

The term "Beneficial Ownership" is relevant for the Double Tax Avoidance Agreement (DTAA) as well as the IT Act as it determines the taxation of income/person. There has been significant litigation in respect of the set-off of losses solely on the ground of beneficial ownership. On the DTAA front, there are different Articles (like Royalty, Fees for Technical Services etc.) which grant the concession if the taxpayer is the beneficial owner of the income. However, Article 13 (relevant to Capital Gains) of most of the DTAAs entered by India does not contain a reference to the requirement of beneficial ownership. Hence, a question may arise as to whether this term should be read into such an Article where there is no express reference to it. In this regard, Mumbai bench of Tax Tribunal had to decide whether the provisions of beneficial ownership can be read into Article 13 of the India-Mauritius DTAA or not. To read our detailed analysis, please go to Direct Tax Alert - Beneficial Ownership Clause cannot be inferred in Article 13 of India-Mauritius D – BDO

Blackstone FP Capital Partners Mauritius V Ltd v. DCIT [ITA No. 981 and 1725/Mum/2021]

TAX UPDATES
Transfer Pricing

Tax Tribunal upholds yield spread method for benchmarking corporate guarantee:

The taxpayer is a company engaged in the business of port infrastructure facilities and engineering, construction and consultancy services etc. It has provided corporate guarantee to its Associated Enterprises (AEs) and had adopted Yield Spread approach to benchmark the same. The yield spread analysis is based on calculating the difference in the current market interest rate for the guarantor and the guarantee recipient, which is termed as yield spread and which is divided between the guarantor and the beneficiary. On the basis of quote from the Royal Bank of Scotland (RBS), 70 bps was computed as yield spread and accordingly, 0.35% was computed as arm's length price of the corporate guarantee benefit.

The TPO concluded that quote from RBS cannot be a sound basis for computing the interest differential as it was dated 1 April 2013 i.e. after the end of the relevant previous year and was not final price agreed by bank. The TPO benchmarked the transaction at 1.50% by obtaining quotes from HDFC Bank (1.80%) and State Bank of India (1.08% to 2.1%). Aggrieved by TP adjustment made, the taxpayer filed an appeal before CIT(A) which restricted the adjustment at 0.5% by relying upon the decision of Bombay High Court in case of CIT v. Everest Kento Cylinders Ltd. (2015] 378 ITR 57 (Bom)(HC).

Tax Tribunal decision:

The Mumbai Tax Tribunal held that the yield spread approach adopted by the assessee has been wrongly rejected. Tribunal observed that quotes for interest rates need not strictly be on the date of entering into transaction because material factor is the difference between the interest rate, with guarantee and without guarantee. As regards riders in bank quotation, Tribunal observed that these are usual features of legally guarded business quotations and the presence of such rider do not vitiate the nature of quotation for indicating approximate prevailing rates. Further, Tribunal observed that quotations obtained from commercial bank is materially different from corporate guarantees which are for the benefit of AEs and hence, is a defective application of CUP method.

DCIT Vs. Sikka Ports & Terminals Ltd. [TS-418-ITAT-2022(Mum)-TP]

Tax Tribunal interprets DRP Rules - Concludes that TPO has no power to file rectification application:

The taxpayer had entered into international transaction with AE resulting in payment for bareboat charter party for which adjustment was made by TPO. Dispute Resolution Panel (DRP) deleted the TP adjustment. The TPO moved a petition with title 'Miscellaneous Application' for rectifying various mistakes apparent on record in the order of the DRP viz. in the nature of incomparability of transactions held as comparable by DRP, documents filed by assessee treated as not in the nature of evidence by DRP and yet relied upon to delete TP adjustment.

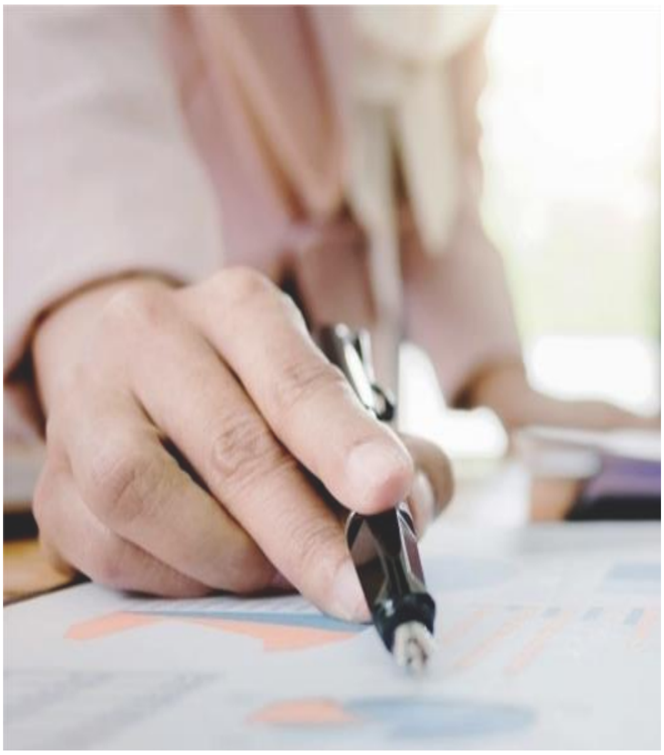
The taxpayer contented that mistake brought on record by TPO is not rectification of mistakes brought on record but a review of directions of DRP. It is beyond the jurisdiction of DRP to rectify mistakes other than 'mistakes apparent on record'.

DRP treated the MA ultra vires by stating that there is no provision under the Act or Rules wherein MA can be filed before DRP. However, the Panel decided to take the MA as application of rectification and consequently provided taxpayer with an opportunity to present its case. DRP held that after inference of MA, response filed by taxpayer and rejoinder by TPO, no apparent mistakes have been made in DRP Directions.

The Tribunal interpreted Rule 13 of Income-tax (Dispute Resolution Panel) Rules, 2009 (DRP Rules) which governs the rectification powers of DRP in three circumstances – namely, (a) suo motu, i.e. on its own by the DRP; (b) on an application made by the eligible assessee, or (c) on an application made by the Assessing Officer. Thus, **Tribunal holds that the scheme of rule 13 does not visualize any rectification of mistake by the Dispute Resolution Panel, on an application by the TPO.**

The application filed by TPO before DRP was unambiguously a petition seeking rectification of mistake which is not permitted as per Rule 13.

Shapoorji Pallonji Bumi Armada Pvt Ltd Vs. ACIT [TS-390-ITAT-2022(Mum)-TP]



TAX UPDATES
Indirect Tax

GOODS & SERVICE TAX

JUDICIAL UPDATES

ORDERS BY AUTHORITY FOR ADVANCE RULING (AAR)

Supplies to the Superior Kerosene Oil (SKO) dealers under PDS is not eligible for exemption as the government is not the recipient

Facts of the case

- The Mr. Provat Kumar Kundu ('Taxpayer') is an agent of Indian Oil Corporation Limited (IOCL) and is engaged in the distribution of Superior Kerosene Oil (SKO) for domestic purposes to fair price dealers;
- The taxpayer supplies the goods at prices fixed by the District Controller, Food and Supplies, Government of West Bengal;
- Entry no:11A of notification no:12/2017(R) dated 28 June 2017 exempts 'service provided by Fair Price Shops (FPS) to Central Government, State Government or Union territory by way of sale of food grains, kerosene, sugar, edible oil, etc. under Public Distribution System(PDS) against consideration in the form of commission or margin' from payment of tax.

Questions before the AAR

- Whether the taxpayer in the capacity of an agent would be covered within FPS for the purpose of claiming the exemption?
- Whether the invoice raised by the taxpayer to the dealers under PDS would be covered in service 'to State Government'?
- Whether the other charges like agent's commission, agent's transport charges, stationery charges, H&E loss etc. would be chargeable to GST or treated as exempt?
- Whether the supply of SKO along with other charges would be treated as a composite supply wherein the principal supply would be the supply of SKO?
- If these other charges are taxable under GST, what would be the rate of GST applicable on it?
- If these other charges are exempt under GST, would there a reversal of ITC attributable to such exempt supplies? Will the GST charged on the base price of SKO by IOCL from the taxpayer be treated as common input or input services for calculation of ITC reversal under rule 42 of the CGST Rules 2017?

Contention of the Taxpayer

- It transpires from the price chart issued by the District Controller, Food and Supplies that the taxpayer is required to charge GST @ 5% only on the base price of Kerosene. On other charges like agent's commission, agent's transport charges, stationery charges, compensation on handling & evaporation loss, no GST is applicable as per notification no:21/2017-CT(R) dated 22 August 2017 in respect to 'services provided by FPS to State Government';

- The taxpayer contends that supply of kerosene oil and other charges like transport, commission, stationery, H & E loss etc. are naturally bundled in the ordinary course of business. Since there are two or more taxable supplies, this would be treated as a composite supply and the principal supply would be supply of SKO in the given case as it constitutes the predominant element of the composite supply. Therefore, rate of tax applicable on other charges would be the same as that on SKO i.e., 5% and therefore other charges cannot be treated as exempt;
- If the other charges are treated as exempt, ITC reversal under rule 42 would only be attracted on the common input and input services. Since procurement of SKO from IOCL would be treated as fully attributable to the taxable supply i.e. supply of SKO to the FPS, ITC reversal under rule 42 should not be attracted on the procurement of SKO from IOCL;

Observations & Ruling by the AAR

- The exemption provided in the above-referred notification is applicable only in respect of 'services provided by FPS to State Government';
- Since an FPS supplies commodities to the ration card holders only, the taxpayer cannot be termed as an FPS;
- As per the 'Kerosene/ Light Diesel Oil Dealership Agreement' made between the taxpayer and IOCL, it appears that the taxpayer does not act as an agent on behalf of the oil marketing company;
- Therefore, the other elements involved in the instant supply shall not qualify for exemption and accordingly the amount received by the taxpayer in this regard shall form a part of the value of supply in terms of section 15(2)(c) of CGST Act, 2017, which includes 'incidental expenses, including commission and packing, charged by the supplier to the recipient of a supply and any amount charged for anything done by the supplier in respect of the supply of goods or services or both at the time of, or before delivery of goods or supply of services;'
- The AAR held as follows:
  - The taxpayer is found not to be an FPS;
  - The taxpayer supplies to the SKO dealers under PDS and not to the State Government;

TAX UPDATES
Indirect Tax

- Charges (like agent's commission, agent's transport charges, stationery charges, H&E loss etc.) form a part of the value of taxable supply and, therefore, shall attract tax;
- The taxpayer has been licensed to supply SKO which is supplied with transportation services. As a result, the supply can be regarded as a composite supply in terms of section 2(30) of the CGST Act, 2017;
- The supply shall attract tax @ 5% vide entry serial number 164 of notification no:34/2017-CT(R) dated 13 October 2017 on the entire value of supply;
- As the supply is held taxable and tax would be levied on the entire value of supply, the taxpayer would not be required to reverse ITC as per rule 42 of CGST Rules, 2017.

  [AAR-West Bengal Nadu, Mr.Provat Kumar Kundu, Ruling no:24/WBAAR/2021-22, dated 29 March 2022]

E-Rickshaw, which is solely operational on battery power, but supplied without battery will still qualify as a supply of electrically operated vehicle

Facts of the case

Mr. Rohit Singh Kharwa ('Taxpayer') is engaged in the import of spare parts of electrically operated vehicles. The taxpayer intends to enter into the business of manufacturing and reselling of electrically operated three wheeled vehicles in the state of West Bengal.

Questions before the AAR

- Whether a three-wheeled electrically (known as e-rickshaw), when sold without battery is classifiable as an 'electrically operated motor vehicle' under HSN 8703?
- If the answer to question no:1 is in negative, what shall be the classification and the rate of tax?

Contention of the Taxpayer

- E-Rickshaw as defined in Motor Vehicles Act as 'e-rickshaw' means a special purpose battery powered vehicle of power not exceeding 4000 watts, having three wheels for carrying goods or passengers, as the case may be, for hire or reward, manufactured, constructed or adapted, equipped and maintained in accordance with such specifications, as may be prescribed in this behalf. Further 'battery-operated vehicle' as per Central Motor Vehicle Rules, 1989 means a vehicle adapted for use upon roads and powered exclusively by an electric motor whose traction energy is supplied exclusively by traction battery installed in the vehicle;
- E-rickshaw falls under tariff code 8703 80 40 which reads as three-wheeled vehicles-other vehicles with only electric motor for propulsion;
- In schedule-II (which deals with goods taxable @ 12% GST Rate), entry no:242A reads electrically operated vehicles, including two and three wheeled electric vehicles for which an explanation has been provided which reads as 'Electrically operated vehicles' means vehicles which are run solely on electrical energy derived from an external source or from one or more electrical batteries fitted to such road vehicles and shall include E-bicycles;
- E-rickshaw qualifies as a battery-operated vehicle and the definition of an e-rickshaw/battery operated vehicle nowhere puts a condition that the battery has to be supplied by the manufacturer;
- The purpose to sale an E-rickshaw without battery pack is purely a commercial one and is meant only to lower the upfront cost of such vehicles as compared to equivalent ICE vehicles. However, it does not mean that such vehicles can run without batteries. The taxpayer also contended that supply of such vehicles without battery pack does not alter the characteristics of such vehicles and it still remains a three-wheeled electric vehicle with an electric motor which is supplied by the manufacturer;
- Thus, it can safely be concluded that the three-wheeled e-rickshaw intended for manufacture by the taxpayer is an electrically operated vehicle/three-wheeled electric vehicle falling under tariff heading 8703 80 40 and leviable to GST @ 5%.

Contention by the Tax Authority

- The tax authority contended that battery operated vehicle means a vehicle powered by an electric motor whose traction energy is supplied exclusively by traction battery installed in the vehicle. Therefore, it is evident that a battery-operated vehicle must have battery installed in it;
- An E-rickshaw without battery installed in it is to be considered as unfinished goods, and as such cannot be categorized as an electrically operated vehicle.

Observations & Ruling by the AAR

- E-rickshaw being a three-wheeled electrically operated vehicle would be classifiable under tariff item 8703 80 40;
- As per the explanation cited supra, E-rickshaw qualify as 'electrically operated vehicles';
- 'Electrically operated vehicles' require a single factum that the vehicles will run solely on electrical energy derived from an external source or from one or more electrical batteries fitted to such road vehicles. There is no doubt that unless the battery is fitted to an e-rickshaw, it will not be capable to run. But the question arises that when an e-rickshaw, having a motor fitted on it, is supplied without battery, does it lose its original character and can be termed as 'chassis';
- In this context, observation of the AAR Orissa, in the case of Anjali Enterprises [Order no:01/ODISHA/AAR/2021-22 dated 15 April 2021] noted that the judgment passed in the case of Reva Electric Car Co.(P.)[2012(275)E.L.T 488(G.O.I)] Ltd. where in it was held that if electrically battery operated cars are

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exported, though not fitted with batteries at the time of export, the same is still classifiable 'battery powered road vehicles' and would run on battery when put to use. Hence, fitting of battery in the vehicle, at or before the time of supply, is not a pre-condition for the same to be classified as electrically operated vehicle';

- In line with the view taken by the AAR Orissa it was held that when a E-rickshaw is solely operational on battery power, it will qualify as a supply of electrically operated vehicle, even if it is supplied without battery at the time of supply and therefore shall be classifiable under tariff item 8703.

[AAR-West Bengal, Mr. Rohit Singh Kharwar Order no:04/WBAAR/2022-23, dated 30 June 2022]

ORDERS BY APPELLATE AUTHORITY FOR ADVANCE RULING (AAAR)

Services provided by liaison office in India are covered under 'Supply' in GST

Facts of the case

- M/s. Dubai Chamber of Commerce and Industry-Liaison Office ("Taxpayer") is engaged promotion of business in Dubai as well as in India. Further, they are also engaged in organising events, seminars, conferences for business delegations of Dubai and India;
- No consideration is received for these services from any of the business delegations and instead only cost-to-cost reimbursement is given by the Dubai head office to its liaison office in India;
- To avoid litigation at a future stage, taxpayer filed an application before the AAR Maharashtra to know whether the services provided by taxpayer will be considered as 'Supply' under GST and whether taxpayer will be required to comply with all related GST regulations;
- The AAR held that the services provided by taxpayer will be considered as 'Supply' and the taxpayer would be required to obtain registration under GST;
- Aggrieved by the ruling, the taxpayer preferred an appeal before the AAAR.

Questions before the AAAR

- Whether the host of activities undertaken by the taxpayer at the behest of their Dubai head office can be construed as that of an "intermediary" as held by the AAR or otherwise ?
- Whether the said activities undertaken by taxpayer can be construed as "Supply" as envisaged under section 7 of the CGST Act, 2017 ?
- Whether the place of supply of the impugned activities is within taxable territory ?

Contention of the Taxpayer

- The taxpayer submitted that connecting and introducing business does not amount to arranging or facilitating business as explained under definition of "Intermediary" and thus they are outside the ambit of providing intermediary services;
- The taxpayer also submitted that since they are prohibited from undertaking any commercial or business activity, there is no supply of taxable goods or services;
- Further, there is no considerations received from business delegations of India & Dubai and thus the services provided does not fall under scope of 'supply';
- Further, the taxpayer also stated that the place of supply of services provided fall outside India as per section 13(2) of IGST Act, 2017 and thus services are not taxable in India.

Observations and Ruling by the AAAR

- The AAAR on reviewing the scope of activities as performed by the taxpayer observed that they are not arranging or facilitating the actual supply of any goods or services or both;
- Therefore, the AAAR concluded that merely acting as link for communication between the Indian businesses and the Dubai businesses, will not render them as an "intermediary";
- The host of activities performed, being a taxable supply of service along with other non-taxable service comes under the purview of mixed supply. Further, single consolidated consideration is indirectly given by Dubai head office to the Indian liaison office for organising such events and undertaking other activities;
- The AAAR ruled that GST would be leviable on entire amount which includes specific event based services along with other support services;
- Further, the AAAR observed that the place of supply in the instant case, will be governed as per section 13(5) of IGST Act, 2017 wherein, place of supply for organising events would be the place where such event has taken place i.e., being India. Thus, the same would be liable to GST;
- Basis the above, the AAAR modified the ruling pronounced by AAR and held that, the host of activities performed by the taxpayer at the behest of their Dubai head office will come under the ambit of "Supply" in terms of CGST Act, 2017 and are required to take GST registration and discharge their GST liability.

[AAAR-Maharashtra, M/s. Dubai Chamber of Commerce and Industry-Liaison Office, AAAR Case no:MAH/AAAR/AM-RM/08/2022-23, dated 23 June 2022]

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