ACCOUNTING, REGULATORY & TAX NEWSLETTER

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INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA ("ICAI")

EAC Opinion – Applicability of Ind AS 108, 'Operating Segments' on section 25 company of the Companies Act, 1956 (now, section 8 of the Companies Act, 2013)

Facts of the case

A Corporation is a Central Public Sector Undertaking (CPSU), wholly owned by the Government of India, under the Administrative Ministry of Social Justice and Empowerment and is registered under section 25 of the Companies Act, 1956 (now, section 8 of the Companies Act, 2013).

The Corporation has stated that the corporate office of the Corporation is in Kanpur. The Corporation is having five auxiliary production centers and five regional marketing centers on a Pan-India basis. The Corporation is having its manufacturing units in Head Quarter (HQ), Kanpur and all auxiliary production centers and affects sales from all the units, viz. the Corporation's auxiliary production centers and regional marketing centers including HQ, Kanpur. An auxiliary production center is also proposed to be opened in Faridabad, Haryana.

The Corporation manufactures as well as outsources various aids and appliances such as tricycles, wheelchairs, motorised tricycles, hearing aids, artificial limbs, calipers, crutches, walking sticks, spectacles, dentures, etc. for persons with disability and old age persons at its corporate office and its auxiliary production centres.

The Corporation is the nodal agency for the Senior Citizen Scheme of the Ministry of Social Justice and Empowerment, Government of India and also receives grant-in-aid under the Assistance to Disabled Persons (ADIP) Scheme of the Department of Empowerment of Persons with Disability, Ministry of Social Justice and Empowerment of the Government of India. The Corporation is also an implementing agency for the Corporate Social Responsibility (CSR) Scheme of various Central Public Sector Enterprises (CPSEs) and distributes the aids and appliances under the CSR scheme of the CPSEs.

The major portion of turnover of the Corporation is against Government grants, i.e. approximately 70% from ADIP and the Senior Citizen Scheme of the Government of India. Further, 20% to 25% of turnover depends on the order of State Government(s), Central Public Sector Enterprises, National Institutes, etc. Rest 5% to 10% of turnover occurs through cash sales/sales through the dealer. The Corporation operates on a Pan-India basis.

The Corporation has stated that the financial statements of the Corporation are being prepared as per Indian Accounting Standards as applicable with effect from financial year (F.Y.) 2018-2019. The accounts of the Corporation are subject to audit by the statutory auditors appointed by the Comptroller and Auditor General (C&AG) of India under section 139(5) of the Companies Act, 2013 (hereinafter referred to as 'the Act').

The statutory auditors are responsible for expressing an opinion on the financial statements under section 143 of the Act based on the independent audit in accordance with the standards on auditing prescribed under section 143(10) of the Act. C&AG is required to conduct a supplementary audit under section 143(6)(a) of the Act and give its report.

The Corporation has mentioned that as per core principles of Ind AS 108, 'Operating Segments', "An entity shall disclose information to enable users of its financial statements to evaluate the nature and financial effects of the business activities in which it engages and the economic environments in which it operates."

Further, as per paragraph 2 of Ind AS 108, "This Accounting Standard shall apply to companies to which Indian Accounting Standards (Ind ASs) notified under the Companies Act apply". The Corporation is established by the Government of India as a not-for-profit making and purely for the restoration of the dignity of persons with disabilities. Further, the Corporation has also enhanced its wings for the welfare of senior citizens. The Corporation is not in any type of business but the welfare of persons with disabilities and senior citizens. Since the objective of the Corporation is only the social welfare of needy and poor persons with disabilities and senior citizens, profit generation is not part of its object.

Statutory auditors during a statutory audit of F.Y. 2020-21, have raised the point that the Corporation is not preparing an operating segment report as per Ind AS 108.

The management of the Corporation is of the view that Ind AS 108, 'Operating Segments' is not applicable to the Corporation as it is not carrying any type of business, whose nature and financial effects are required to be disclosed.

The Corporation is engaged in the manufacture and distribution of rehabilitation aids and appliances to divyangjan and senior citizens and the operation is on a Pan-India basis. The Corporation, on the principle-approval from its administrative Ministry, conducts assessment camps on a Pan-India basis and then ensures the distribution by sending its team and material to the site. The materials can go to the site from any of its manufacturing units or from its marketing offices. The marketing offices also get the material through stock transfer from manufacturing plants. Thus, the Corporation considers itself to be operating in a single segment.

Query

On the basis of the above, the Corporation has sought the opinion of the Expert Advisory Committee (EAC) on the applicability of Ind AS 108, 'Operating Segments' on the Corporation. If applicable, EAC may also give its opinion on the method of presenting such data, considering the nature of operations of the Corporation, as per the requirements of Ind AS 108.

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Points considered by the Committee

The Committee notes that the basic issue raised in the query relates to the applicability of Ind AS 108, 'Operating Segments' on the Corporation and if Ind AS 108 is applicable, the method of presenting the data, considering the nature of operations of the Corporation, as per the requirements of Ind AS 108. The Committee has, therefore, examined only this issue and has not examined any other issue that may arise from the Facts of the Case.

The Committee notes from the Facts of the Case that the Corporation is a section 25 company of the Companies Act, 1956 (now section 8 of the Companies Act, 2013) and is wholly owned by the Government of India. Further, the financial statements of the Corporation are prepared as per Indian Accounting Standards from the F.Y. 2018-2019. With regard to the applicability of Ind AS 108, the Committee notes the following paragraph of Ind AS 108:

"2 This Accounting Standard shall apply to companies to which Indian Accounting Standards (Ind ASs) notified under the Companies Act apply."

From the above, the Committee notes that Ind AS 108, 'Operating Segments' shall apply to companies to which Ind ASs notified under the Companies Act apply. Since the financial statements of the Corporation are prepared as per Indian Accounting Standards, the Committee is of the view that Ind AS 108, 'Operating Segments' shall apply to the Corporation. The Committee also notes that no specific exemption is available to any entity from this Standard, on the basis that it is a not-for-profit organisation or section 8 company.

With regard to the contention of the Corporation that Ind AS 108 is not applicable to the Corporation because it does not carry out any 'business activity' and its object is 'not-for-profit making', the Committee notes the following requirements of Ind AS 108:

"1 An entity shall disclose information to enable users of its financial statements to evaluate the nature and financial effects of the business activities in which it engages and the economic environments in which it operates."

"5 An operating segment is a component of an entity:

- that engages in business activities from which it may earn revenues and incur expenses (including revenues and expenses relating to transactions with other components of the same entity)
- whose operating results are regularly reviewed by the entity's chief operating decision maker to make decisions about resources to be allocated to the segment and assess its performance, and
- for which discrete financial information is available

An operating segment may engage in business activities for which it has yet to earn revenues, for example, start-up operations may be operating segments before earning revenues.

6 Not every part of an entity is necessarily an operating segment or part of an operating segment. For example, a corporate headquarters or some functional departments may not earn revenues or may earn revenues that are only incidental to the activities of the entity and would not be operating segments. For the purposes of this Ind AS, an entity's post-employment benefit plans are not operating segments.

7 The term 'chief operating decision maker' identifies a function, not necessarily a manager with a specific title. That function is to allocate resources to and assess the performance of the operating segments of an entity. Often the chief operating decision maker of an entity is its chief executive officer or chief operating officer but, for example, it may be a group of executive directors or others.

8 For many entities, the three characteristics of operating segments described in paragraph 5 clearly identify their operating segments. However, an entity may produce reports in which its business activities are presented in a variety of ways. If the chief operating decision maker uses more than one set of segment information, other factors may identify a single set of components as constituting an entity's operating segments, including the nature of the business activities of each component, the existence of managers responsible for them, and information presented to the board of directors."

The Committee notes from the Facts of the Case that the Corporation is earning revenue from sales to CPSEs, National Institutes, etc. and by way of cash sales through dealers. Therefore, the Committee is of the view that though profit generation is not the objective of the Corporation, it is engaged in business activities from which it may earn revenues and incur expenses. The Committee is of the view that as per section 8 of the Companies Act, 2013, a section 8 company is one, which apart from following other conditions as per section 8, intends to apply its profits, if any, or other income in promoting its objects. Thus, the Act does not prohibit a section 8 company from earning profits for its sustenance or from carrying on commercial/business activities for its intended objectives; rather it only requires that any profits, if earned out of the commercial/business activities cannot be distributed as dividends. Accordingly, the contention of the Corporation in this regard that since the Corporation's objective is not profit-making and that it does not undertake any business is not valid for applicability of Ind AS 108.

The Committee further notes from paragraph 5 of Ind AS 108 that apart from engaging in business activities as discussed above, an operating segment is a component of an entity whose results are reviewed by the entity's chief decision maker to decide regarding resource allocation and assess performance and for which discrete financial information is available.

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Thus, while applying Ind AS 108, the Corporation should first identify its operating segments considering its business activities, the way results are reviewed by the chief operating decision maker and whether discrete financial information is available or not, in its own facts and circumstances as per the requirements of paragraphs 5 to 8 of Ind AS 108 (as reproduced above).

The Committee is further of the view that after identifying operating segments, the Corporation should report information about each such operating segment that has been identified as discussed above or results from aggregating two or more of those segments and that exceeds the quantitative thresholds in accordance with the requirements of Ind AS 108 as reproduced below:

"Reportable segments

11 An entity shall report separately information about each operating segment that:

- has been identified in accordance with paragraphs 5–10 or results from aggregating two or more of those segments in accordance with paragraphs 12, and
- exceeds the quantitative thresholds in paragraph 13.

Paragraphs 14–19 specify other situations in which separate information about an operating segment shall be reported.

Paragraphs 14–19 specify other situations in which separate information about an operating segment shall be reported.

Aggregation criteria

12 Operating segments often exhibit similar long-term financial performance if they have similar economic characteristics. For example, similar long-term average gross margins for two operating segments would be expected if their economic characteristics were similar. Two or more operating segments may be aggregated into a single operating segment if aggregation is consistent with the core principle of this Ind AS, the segments have similar economic characteristics, and the segments are similar in each of the following respects:

- the nature of the products and services
- the nature of the production processes
- the type or class of customer for their products and services
- the methods used to distribute their products or provide their services; and
- if applicable, the nature of the regulatory environment, for example, banking, insurance or public utilities

Quantitative thresholds

13 An entity shall report separately information about an operating segment that meets any of the following quantitative thresholds:

- Its reported revenue, including both sales to external customers and intersegment sales or transfers, is 10% or more of the combined revenue, internal and external, of all operating segments
- The absolute amount of its reported profit or loss is 10% or more of the greater, in absolute amount, of
  - the combined reported profit of all operating segments that did not report a loss and
  - the combined reported loss of all operating segments that reported a loss
- Its assets are 10% or more of the combined assets of all operating segments

Operating segments that do not meet any of the quantitative thresholds may be considered reportable and separately disclosed if management believes that information about the segment would be useful to users of the financial statements."

The Committee is of the view that the Corporation should determine its reportable segments considering its own facts and circumstances based on the requirements of Ind AS 108, as discussed above and then provide appropriate information as required by Ind AS 108.

The Committee also notes the following requirements of Ind AS 108, particularly, in case the Corporation concludes that it has a single reportable segment:

"Entity-wide disclosures

31 Paragraphs 32–34 apply to all entities subject to this Ind AS including those entities that have a single reportable segment. Some entities' business activities are not organised on the basis of differences in related products and services or differences in geographical areas of operations. Such an entity's reportable segments may report revenues from a broad range of essentially different products and services, or more than one of its reportable segments may provide essentially the same products and services. Similarly, an entity's reportable segments may hold assets in different geographical areas and report revenues from customers in different geographical areas, or more than one of its reportable segments may operate in the same geographical area. Information required by paragraphs 32–34 shall be provided only if it is not provided as part of the reportable segment information required by this Ind AS.

Information about products and services

32 An entity shall report the revenues from external customers for each product and service, or each group of similar products and services, unless the necessary information is not available and the cost to develop it would be excessive, in which case that fact shall be disclosed. The amounts of revenues reported shall be based on the financial information used to produce the entity's financial statements.

Information about geographical areas

33 An entity shall report the following geographical information unless the necessary information is not available and the cost to develop it would be excessive:

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- revenues from external customers
  - attributed to the entity's country of domicile and
  - attributed to all foreign countries in total from which the entity derives revenues. If revenues from external customers attributed to an individual foreign country are material, those revenues shall be disclosed separately. An entity shall disclose the basis for attributing revenues from external customers to individual countries.
- non-current assets other than financial instruments, deferred tax assets, post-employment benefit assets, and rights arising under insurance contracts
  - located in the entity's country of domicile and
  - located in all foreign countries in total in which the entity holds assets. If assets in an individual foreign country are material, those assets shall be disclosed separately.

The amounts reported shall be based on the financial information that is used to produce the entity's financial statements. If the necessary information is not available and the cost to develop it would be excessive, that fact shall be disclosed. An entity may provide, in addition to the information required by this paragraph, subtotals of geographical information about groups of countries.

Information about major customers

34 An entity shall provide information about the extent of its reliance on its major customers. If revenues from transactions with a single external customer amount to 10% or more of an entity's revenues, the entity shall disclose that fact, the total amount of revenues from each such customer, and the identity of the segment or segments reporting the revenues. The entity need not disclose the identity of a major customer or the amount of revenues that each segment reports from that customer. For the purposes of this Ind AS, a group of entities known to a reporting entity to be under common control shall be considered a single customer. However, judgement is required to assess whether a government (including government agencies and similar bodies whether local, national or international) and entities are known to the reporting entity to be under the control of that government are considered a single customer. In assessing this, the reporting entity shall consider the extent of economic integration between those entities."

Opinion

On the basis of the above, the Committee is of the view that Ind AS 108 shall apply to the Corporation as discussed above. Therefore, the Corporation should determine its operating segments and reportable segments considering its own facts and circumstances based on the requirements of Ind AS 108, and then provide appropriate information as required by Ind AS 108, as discussed above.

Further, in case considering the facts and circumstances, it is assessed that the Corporation has a single reportable segment, entity-wide disclosures as stated in paragraphs 31 to 34 of Ind AS 108 are required to be given by the Corporation, as discussed above.

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SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI)

Circulars dated 28 September 2022: Amendments to guidelines for Preferential Issue and Institutional Placement of Units by a listed Infrastructure Investment Trusts (InvITs) and Real Estate Investment Trusts (REITs) (Amended Guidelines)

The Amended Guidelines provide that:

- A listed InvIT/REIT is allowed to make Preferential Issue or Institutional Placement of units, where units of the same class which is proposed to be allotted, have been listed on a stock exchange for a period of at least 6 months prior to the date of issuance of notice to its unit holders for convening the meeting to pass the resolution
- The Annexure related to the 'Manner of allotment' of Institutional Placement of units by a listed InvIT/REIT is amended to state that no such allotment shall be made, either directly or indirectly, to any institutional investor who is a sponsor(s) or the investment manager or is a person related to or related party or associate of, the sponsor(s) or the investment manager.
- However, allotment of units for an un-subscribed portion in the Institutional Placement can be made to the sponsor subject to the fulfilment of the following conditions:
  - at least 90% percent of the issue size has been subscribed
  - an object of the issue is the acquisition of assets from that sponsor
  - approval of the unitholders has been obtained for such an issue
  - units allotted to the sponsor shall be subject to the prescribed lock-in period

Firewall between Credit Rating Agencies and their Affiliates

The SEBI has issued a circular dated 21 September 2022 pertaining to measures mandated to strengthen the firewall between Credit Rating Agencies (CRAs) and their non-rating entities. These include the following:

- CRAs shall formulate a policy on separation or firewall practices with the non-rating entities and document the same in their internal operational manuals or governing documents. The Board of Directors of the CRAs shall ratify such policy, and revisions thereto, which may cover the nature and extent of sharing of infrastructure, officials/employees or resources, if any, between the CRA and the non-rating entity, measures taken to ensure the independence of credit rating process and guidance to employees on sharing of information or resourced to mitigate conflict of interest

- A CRA shall disclose on its website, details of any common director or Chief Executive Officer or Managing Director between the CRA and the non-rating entity. Such disclosure shall be updated by the CRA on the first working day of each month. The disclosure should include a reference to the date it was last updated by the CRA, along with a reference or hyperlink to archives of previous such disclosures
- Credit rating scales (i.e., symbols and definitions) prescribed by SEBI vide its various circulars issued under the CRA Regulations, shall not be used by any non-rating entities of the CRA
- The websites of SEBI-registered CRAs and their non-rating entities shall be separate. A CRA's website may contain hyperlinks to the separate websites of the non-rating entities
- This circular shall be applicable with effect from 01 January 2023, and CRAs shall report on their compliance with this circular (as ratified by their respective board of directors) to SEBI within one quarter from the date of applicability of this circular. Further, monitoring of this circular shall be done in terms of the half-yearly internal audit for CRAs.

Amendments to guidelines for the preferential issue and institutional placement of units by a listed InvIT

The SEBI has brought the following amendments in guidelines for the preferential issue and institutional placement of units by a listed InvIT via circular dated 28 September 2022:

- The bar for a minimum listing period of 12 months required in case of issuance of units through "institutional placement" is removed
- The unsubscribed portion of the units can be allotted to the sponsors fulfilling the following conditions:
  - 90% of the issue size has been subscribed
  - The issue should be made for an acquisition of assets from that sponsor
  - Units allotted should be locked in for a period of 3 years from the date of trading approval granted for the units. (As per Clause 3 Annexure I of Circulars dated 27 November 2019)
  - Approval of unitholders has been taken before allotting the un-subscribed portion of the unit

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MINISTRY OF CORPORATE AFFAIRS (MCA)

Notification dated 15 September 2022: The Companies (Specification of Definition Details) Amendment Rules, 2022 (Amended Rules)

MCA vide this notification has revised the threshold for paid-up capital and turnover for the Small Companies which are as under:

- Paid-up Capital – INR 4cr (as against existing INR 2cr) and
- Turnover – INR 40cr (as against existing INR 20cr)

Notification dated 20 September 2022: The Companies (Corporate Social Responsibility Policy) Amendment Rules, 2022 (Amended CSR Rules)

The Amended CSR Rules inter-alia provides for the following:

- Every Company, having any amount in its 'Unspent CSR Account', must constitute a CSR Committee and comply with the prescribed CSR provisions (relating to the formation of the CSR committee/its responsibilities/spending of CSR amount and provisions related to unspent CSR amount)
- The companies which cease to fulfil the requirement of specified net worth/turnover/profit for 3 consecutive financial years were exempted from complying with a requirement of constituting CSR Committee and comply with the specified CSR provisions. The above requirement is now done away with
- The Board must ensure that the CSR activities are undertaken by the Company itself or through
  - a Section 8 Company (company established with charitable object) or registered public trust/registered society established by the company, either singly or along with any other company or Central/State Government
  - a Section 8 Compay (company established with charitable object) or registered public trust/registered society having established track record of at least 3 years in undertaking similar activities
  - an entity established under an Act of Parliament or a State legislature
- Every company having an average CSR obligation of INR 10cr and above in the 3 immediately preceding financial years, must undertake an impact assessment of their specified CSR Projects. The expenditure towards such impact assessment shall not exceed 2% of the total CSR expenditure for that financial year or INR 50lacs, whichever is higher

RESERVE BANK OF INDIA (RBI)

Circular dated 30 September 2022: Late Submission fees (LSF) under Foreign Exchange Management Act, 1999 (FEMA)

RBI has now decided to bring uniformity in the imposition of LSF for reporting delays across functions for various transactions related to Foreign Investment (FI), External Commercial Borrowings (ECBs) and Overseas Investment (OI), details of which are as under:

- Form ODI Part-II/APR, FCGPR (B), FLA Returns, Form OPI and evidence of investment or any other return which does not capture flows or any other periodical reporting – LSF amount shall be INR 7500/-
- Form FC-GPR, Form FCTRS, Form ESOP, Form LLP(I), Form LLP(II), Form CN, Form DI, Form InVi, Form ODI-Part I, Form ODI-Part III, Form FC, Form ECB, Form ECB-2, Revised Form ECB or any other return which captures flows or returns which capture reporting of non-fund transactions or any other transactional reporting – LSF amount shall be INR 7,500 plus 0.025% of (amount involved in the delayed reporting multiplied by the number of years of delay)
- The Circular also provides for various requirements/ conditions applicable at the time of calculating the LSF amount like the maximum LSF amount to be limited to 100% of the amount involved in delayed reporting, the facility for opting for LSF shall be available up to 3 years from the due date of reporting, etc.

Guidelines on Digital Lending

The RBI vide circular dated 02 September 2022 issued Guidelines on Digital Lending to protect the data of borrowers using digital lending apps from being misused.

Notification clarifies that the outsourcing arrangements made by Regulated Entities (Res) do not diminish their obligations. The REs must ensure that Lending Service Providers (LSPs) engaged by them, Digital Lending Apps (DLAs) (either of the REs or of the LSP engaged by the RE) comply with the Guidelines. The instructions contained in this circular shall be applicable to the 'existing customers availing fresh loans' and to 'new customers getting onboarded', from the date of this circular.

However, in order to ensure a smooth transition, REs shall be given time till 30 November 2022, to put in place adequate systems and processes to ensure that 'existing digital loans' (sanctioned as of the date of the circular) are also in compliance with these guidelines in both letter and spirit.

The Guidelines shall be applicable to digital lending extended by all commercial banks, Primary (Urban) Co-operative Banks, State Co-operative Banks, District Central Co-operative Banks; and Non-Banking Financial Companies (including Housing Finance Companies).

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Guideline on Digital Lending aims to protect borrowers by incorporating the following provisions:

- The guidelines explicitly state that digital lending apps cannot access mobile phone resources such as files and media, contact lists, call logs, telephone functions, etc. One-time access can be taken for the camera, microphone, location or any other facility necessary for the purpose of onboarding/KYC requirements only, with the explicit consent of the borrower
- The borrowers must be informed about the storage of customer data including the type of data that can be stored, the length of time for which data can be stored, restrictions on the use of data, data destruction protocol, standards for handling security breaches, etc. The information must be provided on their website and the apps at all times
- At the time of disbursing the loans using digital apps, a key Fact Statement (KFS) to the borrower before the execution of the contract in a standardized format for all digital lending products
- The borrower must be informed about the all-inclusive cost of digital loans and should also be a part of the Key Fact Statement
- The penal interest/charges levied, if any, on the borrowers shall be based on the outstanding amount of the loan. Further, the rate of such penal charges shall be disclosed upfront on an annualized basis to the borrower in the Key Fact Statement
- Any charges that are not mentioned in the Key Fact Statement are not chargeable to borrowers at any stage during the loan term
- Any fees charged etc. payable to lending service providers must be paid by the regulated entities and borrowers must not be charged for this
- At the time of the sign-up/onboarding stage, information related to product features, loan limit and cost, etc. must be informed to the borrowers
- The banks and NBFCs must publish the list of their digital lending apps, and lending service providers, engaged by them on their websites
- Digital lending apps and websites must allow a borrower to lodge their complaint

Review of Prudential Norms – Risk Weights for Exposures guaranteed by Credit Guarantee Schemes (CGS)

The RBI has issued a notification on 07 September 2022 regarding the Review of Prudential Norms – Risk Weights for Exposures guaranteed by Credit Guarantee Schemes (CGS).

As per Master Circular on Basel III capital Regulations dated 01 April 2022, banks are permitted to apply zero percent risk weights in respect of claims on Credit Guarantee Fund Trust for Micro and Small Enterprises (CGTMSE), Credit Risk Guarantee Fund Trust for Low Income Housing (CRGFTLIH) and individual schemes under National Credit Guarantee Trustee Company Ltd (NCGTC).

To provide a consistent approach with regard to risk weights for exposures guaranteed by such Trust Funds, it is advised that the risk weight of zero percent shall be applicable in respect of exposures guaranteed under any existing or future schemes launched by CGTMSE, CRGFTLIH and NCGTC satisfying some conditions.

Further, any future scheme launched under any of the aforementioned Trust Funds, in order to be eligible for zero percent risk weight, shall provide for the settlement of the eligible guaranteed claims within 30 days from the date of lodgement, and the lodgement shall be permitted within sixty days from the date of default.

Standing Liquidity Facility for Primary Dealers

The RBI has issued a notification dated 30 September 2022 regarding Standing Liquidity Facilities for Primary Dealers. As announced in the Monitory Policy Statement 2022-2023, the Monetary Policy Committee (MPC) has increased the policy repo rate under the Liquidity Adjustment Facility (LAF) by 50 basis points from 5.40 % to 5.90 % with immediate effect.

Accordingly, RBI has clarified that the Standing Liquidity Facility provided to Primary Dealers (PDs) (collateralised liquidity support) from the Reserve Bank would be available at the revised repo rate of 5.90 % with immediate effect.

INSURANCE REGULATORY AND DEVELOPMENT AUTHORITY OF INDIA (IRDAI)

Appointment or Continuation of Common Director(s) u/s 48A of Insurance Act, 1938

The IRDAI has issued a circular dated 02 September 2022 to provide the framework for the appointment of a common director under section 48A of the Insurance Act, 1938 as follows:

- The appointment or continuation of a common director representing the insurance agent, intermediary or insurance intermediary on the board of the insurance company shall be deemed to have been permitted subject to certain conditions as specified in the circular
- An individual, already acting or proposed to act as Executive Director/Whole-Time Director on the Board of the Insurer/Agent/Intermediary/Insurance intermediary, shall not be appointed as nominee/common director
- The common director may be appointed as Chairperson on the Board of the insurance company/ agent/ intermediary/ insurance intermediary subject to necessary safeguards, to be put in place at all the times, to protect the interest of policyholders and to avoid the conflict of interest as may arise due to such appointment

The Insurers shall file a certificate on an annual basis, duly certified by the CEO, confirming compliance with the provisions of this circular on a financial year basis. The compliance shall be filed with Authority no later than 30th April of the succeeding financial year.

This circular shall come into effect from the date of issuance of the same.

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Clarification on Circular on Appointment or Continuation of Common Director

The IRDAI has issued a circular dated 13 September 2022 to provide the following clarifications regarding clarification on Appointment or Continuation of a Common Director:

- The directors already appointed on the Board after obtaining prior approval of the IRDAI under Section 48A of the Act shall continue to hold the directorship till completion of the tenure of appointment
- Clause 3(b) of the circular issued on 02 September 2022 shall not be applicable in case of a director appointed or proposed to be appointed as a nominee of the promoter of the insurer

INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA (ICAI)

Announcement on External Confirmations through Third Party Vendors

ICAI has issued an announcement dated 07 September 2022, to address the issue that auditors are facing in obtaining external confirmations from banks.

ICAI has observed that one of the major concerns in this regard is that some banks are using the services of third-party vendors to provide confirmations on their behalf to auditors. The use of third-party vendors leads to the risk that the information provided by third-party vendors may not be authentic and complete. Further, it is not clear as to who will be responsible in case there is a failure of IT controls at the end of third-party vendors which may impact the integrity of the information provided. These factors raise a question as to who will be held responsible for the authenticity and completeness of the information provided to auditors, the concerned bank or such third-party vendors.

Keeping in view the above, ICAI has advised the auditors to seek direct confirmation from the concerned banks.

Withdrawal functionality of 15CB forms at the e-filing portal

The ICAI has issued an announcement dated 10 September 2022 to address the issue of a large number of 15 CB forms pending for updation of at the e-filing portal which may be attributable to the non-availability of any options for their withdrawal from the portal.

However, such a withdrawal facility has now been enabled on the e-filing portal, facilitating the CAs to withdraw the 15CB forms by recording appropriate reasons.

Mandatory Evaluation of the Audit Quality Maturity of The Firms Using Revised Audit Quality Maturity Model (AQMM v1.0)

The ICAI vide announcement dated 13 September 2022 has clarified that with effect from 01 April 2023, the firms auditing the following types of entities shall be mandatorily required to undertake an evaluation of their audit quality maturity using the Audit Quality Maturity Model Revised Version 1.0 (AQMM Rev v1.0)

- A listed entity or
- Bank other than the co-operative bank (except multi-state co-operative banks) or
- Insurance Company

The firms conducting only branch audits have been excluded from the mandate.

The following points should also be kept in mind by CA firms that fall in above the limit:

- The scores and the level arrived at shall be subject to review by a peer reviewer alongside the peer review cycle which falls anytime on or after 01 April 2023
- However, the firm(s) may choose to get their scores reviewed by an AQMM reviewer before their peer review cycle falls due
- The level of the firm arrived at, after being reviewed by the peer reviewer shall be hosted on the website of the ICAI alongside the details of the peer review certificate

The ICAI has also issued an implementation guide in February 2022 on AQMM v1.0 for a clear understanding of the various sections of the AQMM Rev v1.0.

Technical Guide on Audit of Charitable Institutions under Section 12A of the Income-tax Act, 1961

The ICAI has issued Technical Guide on Audit of Charitable Institutions under Section 12A of the Income-tax Act, 1961 on 20 September 2022.

This Technical Guide deals with the audit of institutions prescribed under section 12A(1)(b)(ii) of the Income Tax Act, 1961. Such audit has been prescribed essentially to ensure compliance with the provisions of sections 11 to 13 of the Income Tax Act, 1961. Accordingly, the Direct Taxes Committee of ICAI has come up with a brief publication namely "Technical Guide on Audit of Charitable Institutions under Section 12A of the Income-tax Act, 1961" to provide guidance to members on an audit of Public Charitable Institutions under the Income-tax Act, 1961.

Applicable date of certain deferred provisions of Volume-I of Code of Ethics, 2019

The ICAI vide announcement dated 29 September 2022 has clarified that the following provisions of Volume-I of the Code of Ethics, 2019 will be made applicable from 01 October 2022 with certain amendments which were deferred due to situations prevailing due to Covid and to ensure effective adoption and implementation by the membership at large:

- Responding to Non-Compliance with Laws and Regulations (NOCLAR)
- Fees - Relative Size
- Tax Services to Audit Client

The Council decided the above-mentioned deferred provisions will be made applicable from 01 October 2022 with certain amendments.

REGULATORY UPDATES

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (IBBI)

Notification dated 13 September 2022: IBBI (Insolvency Professionals) (Second Amendment) Regulations, 2022

The IBBI, vide the above notification, prohibits the Insolvency Professionals (IP) from receiving and/or sharing any fees or charges from any professional and/or other support service provider appointed during the process of Insolvency.

Notification dated 13 September 2022: IBBI [Insolvency Resolution Process for Corporate Persons (CIRP)] Third Amendment Regulations, 2022 (Third Amended CIRP Regulations)

Key highlights of the Third Amended CIRP Regulations are as under:

- The fee of the Insolvency Resolution Professionals (IRP) or the Resolution Professionals (RP), appointed on or after 01 October 2022 shall be decided by the applicant or committee in accordance with the Third Amended CIRP Regulations
- An IP shall be paid a minimum fixed fee in the range of INR 1lac to INR 5lacs per month, depending on the quantum of claims admitted, as specified. However, the applicant or committee may decide to fix a higher amount of fees than the said fixed fee, after taking into consideration market factors such as size and scale of business operations of the Corporate Debtor (CD), the business sector in which CD operates, level of operating economic activity of CD and complexity related to process
- For the Resolution Plan approved by the committee on or after 01 October 2022, the committee may decide to pay, for the reasons mentioned, a performance-linked incentive fee upto INR 5cr, after the approval of such Resolution Plan by the Adjudicating Authority (AA)
- The fees may be paid from the funds, available with the CD, contributed by the applicant or members of the committee and/or raised by way of interim finance and the same shall be included in the Insolvency Resolution Process cost

Notification dated 16 September 2022: IBBI (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, 2022 (Fourth Amended CIRP Regulations)

The Fourth Amended CIRP Regulations, inter-alia provides for the following:

- A common email address is used throughout the CIRP and Liquidation of a CD and this email needs to be handed over to the succeeding IP conducting the process
- The IRP/RP is to communicate to the creditors of CD, as per the last available books of accounts, the public announcement and invite claims through post or electronic means
- A meeting of the Committee of Creditors (CoC) can be convened till Resolution Plan is approved or an order for liquidation is passed
- Changes of timeline for filing an application for preferential and other transactions on or before the 130th day of Insolvency Commencement Date (ICD)- It provides that a copy of the application made regarding preferential and other transactions be shared with the prospective resolution applicants to enable them to account for such information while proposing the Resolution Plan
- Changes of timeline for submission of Information Memorandum on or before the 95th day from the ICD (from the existing 54th day). It also mandates that Information Memorandum should also include further relevant information such as operations of CD, financial statements, contingent liabilities, geographical coordinates of fixed assets and a company overview. It also includes details of business evolution for CDs with an asset size of INR 100cr and above
- The RPs must formulate a strategy for the marketing of assets of CD in consultation with the CoC where the total assets as per the last available financial statements exceed INR 100cr
- The RP and the CoC are to issue a second-time request for a Resolution Plan for the sale of one or more of the assets of the CD in cases where no Resolution Plan has been received for the CD

8. The CoC is allowed to explore the option of compromise or arrangement and file such a recommendation with AA while applying for a liquidation order. In cases where it decides to explore, it should explore the option during the period, the order for liquidation is awaited from the AA

Notification dated 16 September 2022: IBBI (Liquidation Process) (Second Amendment) Regulations, 2022 (Amended Liquidation Process Regulations)

Key highlights of the Amended Liquidation Process Regulations are as under:

- Basis the decision of the CoC with respect to exploring of compromise/arrangement route during the liquidation process, the liquidator is to file an application before AA within 30 days of the order of liquidation
- The fees payable to the liquidator must be decided by the CoC. Further, the Stakeholders Consultation Committee (SCC) are now empowered to fix the fees of the liquidator in the first meeting if the same is not fixed by the CoC during CIRP
- The liquidator shall, within 5 days of his appointment, make a public announcement providing that if any claim is not filed during the liquidation process, then the amount of claim collated during CIRP shall be verified by the liquidator

REGULATORY UPDATES

- The liquidator must operate the email account handed over to him by the predecessor RPs and in the event of his replacement, the credentials of such email ID be handed over to the new liquidator
- The CoC constituted during CIRP shall function as SCC in the first 60 days. Within 60 days of initiation of the process, SCC shall be reconstituted based upon admitted claims
- The liquidator must convene the first meeting of the SCC within 7 days of the liquidation commencement date and may convene other meetings upon receiving a request. A request constituting a minimum of 30% of total voting rights makes it mandatory for a liquidator to convene the meeting
- The SCC, may by the vote of at least 66%, propose to replace the liquidator and file an application to AA in this regard
- The Amended Liquidation Process Regulations also provide that before the filing of an application for dissolution or closure of the process, SCC shall advice the liquidator about the manner in which proceedings in respect of avoidance transactions or fraudulent or wrongful trading shall be pursued after the closure of liquidation proceedings
- The liquidator must preserve copies of all specified records which give a complete account of the liquidation process
- The specific event-based timelines have been stipulated for the auction process

Notification dated 16 September 2022: IBBI (Voluntary Liquidation Process) (Second Amendment) Regulations, 2022

IBBI, vide its notification dated 16 September 2022 has amended the IBBI (Voluntary Liquidation Process) Regulations, 2017 which lays down the manner and period of retention of records relating to the Voluntary Liquidation of a Corporate Person.

Key highlights of the notification are as under:

- Regulation 41 has been substituted with the new regulation which now prescribes that the liquidator shall preserve all such prescribed records which give a complete account of the Voluntary Liquidation Process
- The liquidator must preserve from the date of dissolution of the corporate person:
  - an electronic copy of all records (physical and electronic) for a minimum period of 8 years, and
  - physical copy of all records for a minimum period of 3 years
- In case of replacement of the liquidator during the process, the outgoing liquidator shall hand over the prescribed records to the new liquidator

Notification dated 20 September 2022: IBBI (Insolvency Professionals) (Third Amendment) Regulations, 2022 (Third Amended IP Regulations)

IBBI, vide this notification, has introduced the Third Amended IP Regulations which shall come into force with effect from 01 October 2022, key highlights of which are as under:

- An application for obtaining a certificate of registration must be made in the prescribed form along with a non-refundable application fee:
  - by an individual enrolled with an IP agency as a professional member for being recognised as an Insolvency Professional - INR 20,000 (as against INR 10,000)
  - by a Company/registered Partnership Firm/Limited Liability Partnership enrolled with an IP agency as a professional member for being recognised as an Insolvency Professional Entity - INR 2lacs (as against INR 50,000)
- The Certificate of Registration granted to the IP shall be subject to the condition of payment of the following fees to the IBBI:
  - a fee of INR 20,000 (in case the IP is an individual) or INR 2lacs (in case the IP is an entity) every 5 years after the year in which the certificate is granted
  - Both IP and IP entities must pay an annual fee calculated at the rate of 1% (as against the existing 0.25%) of the professional fee earned for the services rendered as an IP in the preceding financial year
  - a fee as provided in the Fifth Amended CIRP Regulations (1% of the cost booked in respect of hiring any professional or other services by the IRP or RP for assistance in an Insolvency Resolution Process) must be paid on a quarterly basis or upon the closure of process whichever is earlier

Notification dated 20 September 2022: IBBI (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2022 (Fifth Amended CIRP Regulations)

IBBI, vide its notification, has introduced the Fifth Amended CIRP Regulations which primarily includes the newly added provision pertaining to regulatory fees, to be payable to IBBI, as an Insolvency Resolution Process cost and shall come into force with effect from 01 October 2022

The Regulatory Fee shall be as under:

- New Regulation 31A(1) - 0.25% of the realisable value to creditors under the approved Resolution Plan, where such realisable value is more than the liquidation value (applicable for cases where the Resolution Plan is approved on or after 31 October 2022)
- New Regulation 31A(2) - 1% of the cost booked in respect of hiring any professional or other services by the IRP or RP for assistance in an Insolvency Resolution Process

REGULATORY UPDATES

Notification dated 28 September 2022: IBBI (Insolvency Professionals) (Fourth Amendment) Regulations, 2022 (Fourth Amended IP Regulations)

Key highlights of the Fourth Amended IP Regulations are as under:

- An individual or an IP entity as recognised by the IBBI can now be a professional member
- An IP entity desirous to obtain a certificate of registration as an 'Insolvency Professional' may make an application to the IBBI in the specified form along with a non-refundable application fee of INR 2lacs
- No IP entity is eligible for registration as an IP if the entity or any of its partners/directors is not fit and proper as recognised in accordance with the regulations
- An IP entity shall allow only its partner/ director, as the case may be, to sign and act on behalf of it when such person is an IP and has valid authorisation for assignment
- When an IP entity is enrolled with an IP agency, upon cessation, admission of an individual as a director/partner, an intimation shall be made to such IP agency to update its register of professional members
- Along with the satisfaction of other conditions, a company, a registered partnership firm or a limited liability partnership may be recognised as an IP entity if:
  - The objective is to provide support services to IP or perform activities of an IP or both
  - In the case of a company, the majority of equity shares and voting rights must be held by IP, who are its directors

TAX UPDATES
Direct Tax

CIRCULARS/ NOTIFICATIONS/PRESS RELEASE

CBDT notifies Rule and Form for recomputation of income without claiming deduction of surcharge or cess

The Finance Act, 2022 retrospectively amended section 40(a)(ii) of the Income-tax Act, 1961 (IT Act) by clarifying that the term 'tax' includes and will always be deemed to have included surcharge and cess. The Finance Act, 2022 also inserted section 155(18) in the IT Act to provide that where deduction in respect of surcharge and cess is claimed and allowed in any earlier years, it shall be deemed to be underreported income. However, it shall not be deemed to be underreported income if the taxpayer has made an application to the tax officer for recomputation of total income in the prescribed form and within the prescribed time. In this regard, recently, the Central Board of Direct Taxes (CBDT) issued a Notification to insert Rule 132 in the Income-tax Rules, 1962 (IT Rules) along with Form no. 69 (application for recomputation of income) and Form 70 (intimation to Tax Officer of payment of taxes on income recomputed). This Notification is summarised hereunder:

- Taxpayer to file an e-application (in Form 69) requesting recomputation of total income of earlier years without allowing the claim for surcharge or cess on or before 31 March 2023
- On receipt of such application, the tax officer will recompute the total income by amending the relevant order and issue a notice under section 156[1] of the IT Act specifying the time period within which the amount of tax payable (if any) is to be paid:
  - For the relevant fiscal year mentioned in point (a) above
  - For the subsequent years if the order for such year results in variation in carrying forward of loss or allowance for unabsorbed depreciation or credit for tax under sections 115JAA or 115JD of the IT Act
- Taxpayers are to furnish the details of tax paid (as determined above) in Form 70 to the tax officer within a period of 30 days from the date of making payment
- The notification shall come into force from 01 October 2022

[Notification No. 111/2022, dated 28 September 2022]

CBDT notifies time-limit to file ITR-A in case of business reorganization

The Finance Act, 2022 inserted section 170A in the IT Act to provide provides that the entities going through such business reorganisation, may furnish modified return of income for any year to which such order of business reorganisation is applicable.

The section further provides that such modified returns shall be furnished within a period of six months from the end of the month in which such order of business reorganisation was issued by the competent authority.

The CBDT has recently inserted Rule 12AD in the IT Rules to notify ITR-A as the Tax Return Form in which the modified return is to be furnished. This Notification is summarised hereunder:

- Successor entity to furnish modified return of income electronically under digital signature (DSC) in Form ITR-A
- The tax officer shall pass an order modifying the total income of the relevant FY after considering the pendency status of assessment or reassessment proceedings of the relevant FY
- The Principal Director General of Income-tax (Systems) or Director General of Income-tax (Systems) shall specify the procedures, formats and standards for furnishing the ITR-A
- The existing ITR-6 (applicable for companies) has been modified to include information relating to section 170A of the IT Act
- ITR-A requires the following information:
  - PAN of predecessor and successor companies
  - acknowledgement number and date of filing of return under the provisions of section 139 of the IT Act
  - details of the order including the date from which the business reorganisation has been made effective
- The notification shall come into force from 01 November 2022.

Subsequently, the CBDT issued an order dated 26 September 2022 extending the time limit for filing a modified tax return in respect of successor companies in cases where the order of business reorganisation of the competent authority was issued between the period 01 April 2022 and 30 September 2022, the time available to furnish modified returns under section 170A of the IT Act shall stand extended to 31 March 2023.

[Notification No. 110/2022, dated 19 September 2022 and Order F.No. 370142/41/2022, dated 26 September 2022]

(Note: In the CBDT order under section 119 of the IT Act, in our view, there is a typo error in mentioning 30 September 2023 instead of 30 September 2022)

[1] Section 156 of the IT Act provides that the tax officer shall serve a notice of demand in prescribed form when any tax, interest, penalty, fine or any other sum is payable in consequence of any order passed under IT Act.

TAX UPDATES
Direct Tax

CBDT extends the due date for furnishing the report of the audit

The CBDT has extended the due date of furnishing a report of audit under any provision of the IT Act for the FY 2021-22, which was 30 September 2022 in the case of taxpayers referred in clause (a) of Explanation 2 to section 139(1) of the IT Act to 07 October 2022.

[Circular No. 19/2022 dated 30 September 2022]

CBDT constitutes Collegium for section 158AB of the IT Act

TFinance Act, 2022 inserted section 158AB of the IT Act to provide a procedure where an identical question of law is pending before the High Court or Supreme Court. This section grants power to the collegium to decide on whether an appeal is to be filed with Tax Tribunal or High Court. Recently, the CBDT has issued an order specifying the Collegium. This order is summarised hereunder:

- For purpose of deciding deferment of appeals before the Tax Tribunal or the jurisdictional High Court by the Tax Officer under section 158AB of the IT Act, a Collegium shall be constituted as under:

Sr. No.	Appeals in Jurisdiction	Collegium to be constituted by
1	International Tax and Transfer Pricing	Pr. CCIT (International Tax and Transfer Pricing)
2	Exemption charge	Pr. CCIT (Exemptions)
3	Central Charges	CCIT(Central) or DGIT(Inv)-Jurisdictional
4	All other cases	Pr. CCIT(CCA) - Jurisdictional

- The Collegium shall comprise of three members who are officers of the rank of Pr.CIT or CIT;
- The members shall be:
  - the Pr.CIT or CIT having jurisdiction over the case in which deferment of appeal is to be decided under section 158AB(I)
  - two other officers of the rank of Pr.CIT or CIT nominated by respective Pr.CCIT / CCIT / DGIT mentioned in the above table
- The Collegium may co-opt one officer of the rank of Pr.CIT or CIT if it so decides
- The senior-most member of the Collegium shall act as the Chairperson of the Collegium

[Order No. 370133/13/2022/TPL dated 28 September 2022]

CBDT further clarifies on certain aspects of section 194R of the IT Act

To effectively monitor and track the perquisites arising from business or profession and to widen the tax base, the Finance Act, 2022 inserted section 194R in the IT Act with effect from 01 July 2022.

Subsequently, the CBDT issued a Clarificatory Circular (first circular) to remove the difficulties in the application of section 194R of the IT Act. Recently, the CBDT has issued another Circular (second circular) clarifying certain aspects of the first circular.

To read our detailed analysis, please go to: https://www.bdo.in/en-gb/insights/alerts-updates/direct-tax-alert-cbdt-further-clarifies-a-certain-aspect-of-section-194r

[Circular No. 18/2022, dated 13 September 2022]

JUDICIAL UPDATES

Delhi High Court resolves controversy surrounding date of issuance of reassessment notices issued under old reassessment regime

The old reassessment regime provided to initiate the proceedings within 4 or 6 or 16 years from the end of the relevant Assessment Year (AY) as the case may be. However, with effect from 01 April 2021, Finance Act 2021 introduced a new reassessment regime whereby the time limit to issue reassessment notice has been reduced and the tax authorities are required to perform a detailed pre-notice inquiry process before issuing such notice. Furthermore, the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 (Relaxation Act)[2], extended the due date of issuing notice (amongst several compliances) from 31 March 2020 and/or 31 March 2021 to 30 June 2021. Since there was a regime change with respect to the law of limitation coming into effect from 01 April 2021, which curtailed the time-limit for re-opening of assessment from 6 years to 3 years, the tax authorities in order to avail longer limitation period under the old reassessment regime (further extended by Relaxation Act), generated reassessment notices dated 31 March 2021 for AY 2013-2014 to AY 2017-2018 through Income Tax Business Application (ITBA) system.

The notices were either sent through email or was uploaded on the income-tax portal. In many instances, while notices were generated on or before 31 March 2021, the same was digitally signed and/or dispatched to the respective taxpayers on or after 01 April 2021 either through ITBA's email system or through normal post. Tax authorities contended that to determine the date on which the impugned notices have been 'issued', the date of dispatch from ITBA's system or post is not relevant and it is only the date of generation of the impugned notices on the ITBA portal, which must be considered. The writ was filed by various taxpayers before the Delhi High Court challenging the notice issued under section 148 of the IT Act. While disposing of this writ, Delhi High Court observed that determining the date of issuance is of great relevance since if it is held that the date of issuance is 01 April 2021, then such cases will be governed by the Supreme Court ruling in the case of Ashish Agarwal[3] and get covered under the new reassessment regime. However, if it is held that the date of issuance is 31 March 2021, then such cases will be covered under the old reassessment regime.

[2] Refer our tax alert- https://www.bdo.in/en-gb/insights/alerts-updates/direct-tax-alert-lok-sabha-passes-taxation-and-other-laws-(relaxation-and-amendment-of-certain-prov
[3] Refer our tax alert- https://www.bdo.in/en-gb/insights/alerts-updates/direct-tax-alert-supreme-court-treats-reassessment-notices-issued-between-april-to-june-2021-unde

TAX UPDATES
Direct Tax

In light of the above, the following questions of law for consideration had arisen before the Delhi High Court:

- Whether the tax officer's act of generating notice in the ITBA portal on 31 March 2021, without dispatching the notice meets the test of the expression 'shall be issued' used in reassessment provisions of the IT Act, and saves the notices from being time-barred
- Whether "dispatch" as per Information Technology Act, 2000 (ITA 2000) is a sine qua non for reassessment notice issued through email
- Whether the time taken by the ITBA's portal on 31 March 2021, in dispatching the e-mails to the taxpayers is not attributable to tax officers and the notices will be deemed to have been issued on 31 March 2021
- Whether reassessment notices sent as an attachment through emails, from designated email addresses of the tax officer, without bearing his/her DSC are considered as valid notices under the IT Act
- Whether the upload of the reassessment notice on the "My Account" of the taxpayer on the e-filing portal is valid transmission under the IT Act
- Whether reassessment notice issued by the ITBA system to an unrelated email address considered as valid

The Delhi High Court made the following observations while answering to aforementioned questions raised:

- Whether the tax officer's act of generating notice in the ITBA portal on 31 March 2021, without dispatching the notice meets the test of the expression 'shall be issued' used in reassessment provisions of the IT Act, and saves the notices from being time-barred?
  - For an authority to contend that a notice has been issued, the same must be duly dispatched by the issuing authority. Thus, mere generation and/or signing of the notice without its dispatch would not amount to its issuance. For this purpose, reliance is placed on several judicial precedents[4].
  - Further, there are several judicial precedents[5] that have held that in respect of notices sent by ITBA's portal to taxpayers, the date of triggering of the email shall be the date of issue of notice for reassessment purposes
  - All Courts have consistently held that the expression 'issue' in its common parlance and its legal interpretation means that the issuer of the notice must, after drawing up the notice and signing the notice, make an overt act to ensure due dispatch of the notice to the taxpayer. It is only upon due dispatch that the notice can be said to have been 'issued'
  - The instructions[6] issued by the tax authorities also duly recognise that after the generation of notice the concerned income tax authority is required to take over steps for issuing the said notice to the taxpayer. It uses the words "generation" and "issuance" distinctively
  - Furthermore, a circular[7] issued by CBDT introducing the requirement to allot DIN to maintain a proper audit trail of communication issued by tax authorities does not state that the generation of DIN would automatically constitute the issuance of the notice
- Whether "dispatch" as per Information Technology Act, 2000 (ITA 2000) is sin qua non for reassessment notice issued through email
- Whether the time taken by the ITBA's portal on 31 March 2021, in dispatching the e-mails to the taxpayers is not attributable to tax officers and the notices will be deemed to have been issued on 31 March 2021
  - Based on the provisions of ITA 2000 and the IT Act, the originator (sender of notice over email) is indisputably the income tax department. The same is confirmed by the contents of the Compliance Affidavit. The tax office is the income tax authority designated by the income tax department to generate and sign the notice.
  - The ITBA system is the computer resource designated for the income tax department and under its control. The tax officer and ITBA perform two inseparable and complementing functions for the Department, which together constitute the generation and issuance of notice.
  - The time taken by the ITBA email software system on 31 March 2021, to dispatch the email was not due to any software glitch but was as per the programming of the system, as admitted in the Compliance Affidavit. The programming to dispatch the notices in a controlled manner and batch mode was a pre-existing fact and to the knowledge of the income tax department. The time taken in the dispatch of the email on 31 March 2021, was therefore as per controls set in the ITBA system.
  - Accordingly, for Category C notices, the tax officer is directed to determine the date and time on which the emails were triggered from the ITBA system and consider the same as the date of issuance.
- Whether reassessment notices sent as an attachment through emails, from designated email addresses of the tax officer, without bearing his/her DSC are considered as valid notices under the IT Act
  - As per the Compliance Affidavit, the tax officer has two options - (a) generate notice and affix DSC later or (b) generate notice without DSC. In this case, either of the two options may be chosen. The tax officer may have selected option (a) and did not affix DSC later or chose option (b)
  - Section 282A of the IT Act gives recognition to the notices served in the e-form. It provides that any notice issued by the tax authority with his/her name and his/her office provided will be deemed to be authenticated and thus validly issued

[4] Delhi Development Authority vs. H.C. Khurana [1993] 3 SCC 196 (Supreme Court); Kanubhai M. Patel HUF vs. Hiren Bhatt [2011] 334 ITR 25 (Gujarat High Court)
[5] Smt. Parveen Amin Bhathara vs. the ITO, WP No. 1795 of 2021; Daujee Abhushan Bhandar vs. UOI [2022] 136 taxmann.com 246 (Allahabad High Court); Santosh Krishna HUF vs. UOI, WP No. 211 of 2022 (Allahabad High Court)
[6] ITBA Assessment Instruction No. 2 [F.No. System/ITBA/Instruction/Assessment/16-17/177, dated 01 August 2016
[7] Circular No. 19/2019, dated 14 August 2019

TAX UPDATES
Direct Tax

- It is pertinent to note that, where the legislature intended to mandate the affixation of the DSC, it has specifically provided for the same in the provision itself. This is illustrated in section 144B(6) of the IT Act i.e. the e-verification scheme
- Further, as per the Compliance Affidavit, the ITBA portal was itself designed by the income tax department in such a way that it makes the affixation of DSC optional
- The tax officer is therefore directed to determine the time of dispatch as recorded by the ITBA portal for each of these notices and such date and determined will be considered to be the date of issuance

- Whether the reassessment notice issued by the ITBA system to an unrelated email address is considered as valid
  - Section 282 of the IT Act read with Rule 127 of the IT Rules prescribes the mode of service of an electronic record. It states that service may be by transmitting a copy in the form of an electronic record as per ITA 2000 which prescribes only e-mail as a mode of service of notices
  - The E-Assessment Scheme, 2019 provides the mode of transmission of placing a notice on the E-filing portal/registered account of the taxpayer. However, it required a real-time update to be given to the taxpayer regarding such an upload
  - Thus, in order for this mode of transmission i.e. uploading of the notices in the e-filing portal of the taxpayer, to be considered a valid service, the income tax department should have issued a real-time alert as provisioned in the E-Assessment Scheme. Since the prescribed mode is not followed, it is akin to no due dispatch of notices, therefore it cannot be said that the notices were validly issued
  - However, considering that taxpayers in the present case became aware of the notices later and the assessment proceedings in their cases are still pending, the notices are not quashed. Instead, the first date on which the notices were accessed by the taxpayer will be considered by the tax officer as the date of issuance of the notice
- Whether the reassessment notice issued by the ITBA system to an unrelated email address is considered as valid
  - For constituting 'due dispatch', notice should be issued to the email address duly communicated through the return of income furnished and/or available on the website of the Ministry of Corporate Affairs.
  - It is a settled position of the law[8] that reassessment notice must be served to the taxpayer in accordance with the procedure established by law. Consequently, notice served on the wrong email address does not constitute valid dispatch.
  - However, considering that taxpayers in the present case became aware of the notices later and the assessment proceedings in their cases are still pending, the notices are not quashed. Instead, the first date on which the notices were accessed by the taxpayer will be considered by the tax officer as the date of issuance of notice.

The Ruling of the Delhi High Court is summarised hereunder:

Category	Date of generating notice	Date of digitally signing the notice	Date of receipt of notice by the taxpayer	Conclusion by Delhi High Court
A	31 March 2021	On or after 01 April 2021	On or after 01 April 2021	date of triggering of email shall be the date of issue of notice
B	31 March 2021	Not signed	On or after 01 April 2021	the tax officer is directed to determine the date and time on which the emails were triggered from the ITBA system and consider the same as the date of issuance.
C	31 March 2021	On or before 31 March 2021	On or after 01 April 2021	
D	31 March 2021	On or before 31 March 2021	No service either by email or post. The taxpayer came to know later on through Portal	
E	31 March 2021	Manually signed, hence the date of signing is not available	Served through speed post on or after 01 April 2021	Date of dispatch through speed post considered as the date of issuance
In addition to the above, some notices dated 31 March 2021 were not served to the taxpayer's registered email and were sent to an unrelated email address.				Notice that served on the wrong email address does not constitute valid dispatch. However, considering that taxpayers became aware of the notices later and the assessment proceedings in their cases are still pending, the notices are not quashed. Instead, the first date on which the notices were accessed by the taxpayer will be considered by the tax officer as the date of issuance of notice.

[Suman Jeet Agarwal vs ITO (WP (C) No. 10/2022) (Delhi High Court)]

[8] CIT-I vs. Chetan Gupta [2016] 382 ITR 613

TAX UPDATES
Indirect Tax

GOODS & SERVICE TAX

JUDICIAL UPDATES

Writ Petition

Merely because the physical copy filed subsequently cannot be considered as the appeal filed beyond the prescribed period as the appeal already filed electronically

Facts of the case

- M/s. G G Agencies (Taxpayer) has sought for quashing of the order dated 19 February 2022 as being illegal and untenable in law and a refund of the taxes and penalty already paid
- Aggrieved by the order passed by the Tax authority, the Taxpayer preferred an appeal on 30 March 2019 within the prescribed period as provided u/s 107 of the Central Goods and Services Tax Act (CGST Act)
- Though the said appeal had been electronically filed, the Tax authority proceeded to dismiss the appeal on the ground that the appeal was barred by limitation by assigning invalid reasons and without providing an opportunity of being heard
- The Taxpayer approached the Honorable High Court seeking the following reliefs:
  - Quash the impugned order passed by the Tax authority as being illegal and untenable in law
  - Direct the Tax authority to restore the appeal and hear it on merits in accordance with the law
  - Refund the taxes and penalty already paid by the Taxpayer
  - Pass such other suitable orders as this Honorable Court may deem fit and proper under the facts and circumstances of the case, including the cost in the interest of equity and justice

Observations and Ruling by the High Court

- The impugned order has been passed without considering or appreciating the aspects narrated and proceeds on the erroneous premise that the appeal was filed beyond the period of limitation which is factually incorrect and contrary to the material on record and thus warranting interference, particularly when neither sufficient nor reasonable opportunity was given before passing the impugned order
- As long as the appeal was filed electronically within the prescribed period, merely because the certified copy was subsequently filed physically, the same cannot be construed to mean that the appeal was filed beyond the prescribed period of limitation
- Accordingly, the findings recorded by the appellate authority were set aside and the matter is remitted back to the appellate authority for fresh consideration

[High Court of Karnataka- M/s. G G Agencies Vs. The state of Karnataka, 2022-TIOL-1266-HC-KAR-GST]

Madras High Court directed to make suitable changes in the architecture of the GST web portal to allow Taxpayers whose registration has been cancelled, to file returns and pay tax/penalty/fine

Facts of the case

- M/s. Trans India Carco Carriers (Taxpayer) and others filed a Writ petition challenging order passed on various dates cancelling their registrations under the provisions of the CGST Act
- The Taxpayers missed the several opportunities that were extended to them post-cancellation of the registrations by way of amnesty schemes wherein dealers were granted an extension of time to take necessary steps to restore the cancelled registrations
- The CGST Act stipulates two modes for enabling revocation of cancellation or restoration of registration viz. (a) remedy under section 30 of CGST Act, which none of the Taxpayers have exercised and (b) filing of appeal which some of them have filed

Observations and Ruling by the High Court

- The Taxpayers are permitted to file their returns for the period prior to the cancellation of registration, if such returns have not been already filed, together with tax defaulted which has not been paid prior to cancellation along with interest for such belated payment of tax and fine and fee fixed for belated filing of returns for the defaulted period under the provisions of the CGST Act
- The Tax authority shall take suitable steps by instructing GSTIN to make suitable changes in the architecture of the GST web portal to allow these Taxpayers to file their returns and to pay the tax/penalty/fine
- The above exercise shall be carried out by Tax authority the within a period of forty-five days from the date of receipt of a copy of this order

[Madras High Court-M/s. Trans India Carco Carriers Vs The Assistant Commissioner (Circle), Chennai 2022-TIOL-1280-HC-MAD-GST]

TAX UPDATES
Indirect Tax

The Taxpayer cannot be denied of relief allowed to other Taxpayers on similar grounds, merely due to delay and laches in filing an appeal

Facts of the case

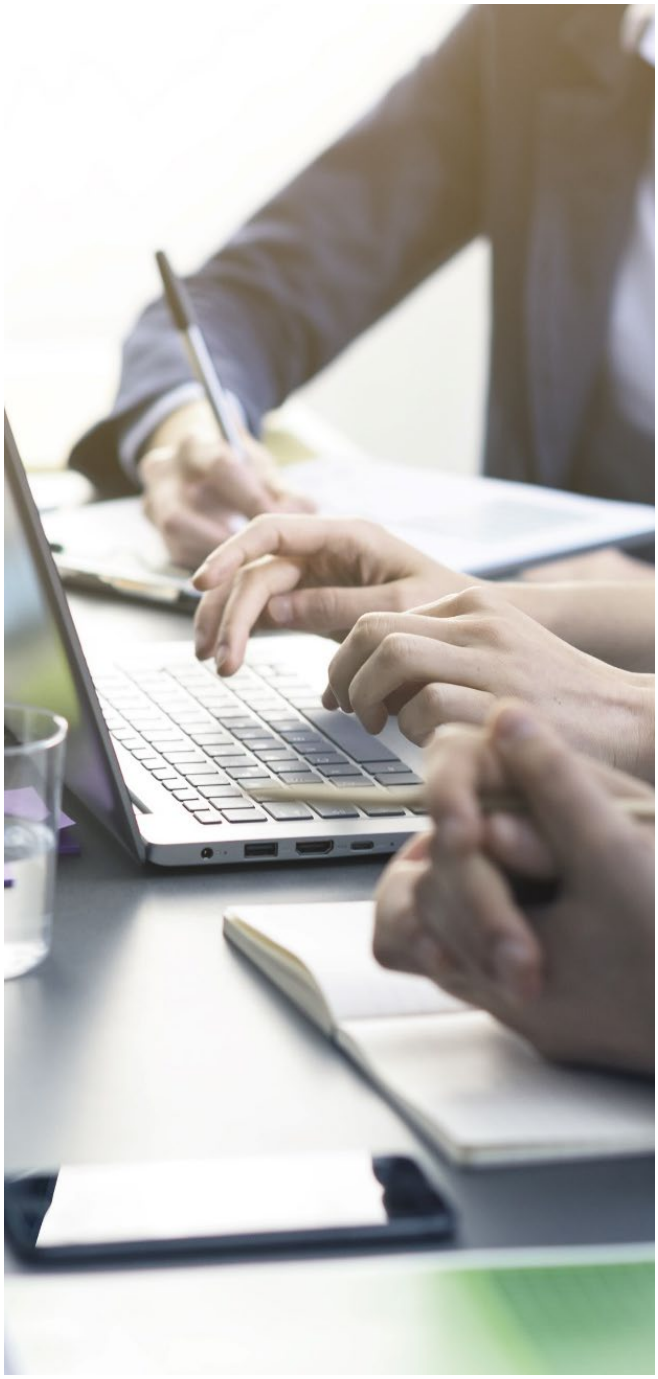
- M/s. Central Tyres (Taxpayer) filed a Writ petition against the order dated 06 June 2022, passed by the Delhi Value Added Tax Appellate Tribunal, whereby the twelve review applications preferred by the Taxpayer for various tax periods were dismissed. The Taxpayer via the aforesaid applications sought suo motu review of the Tribunal's judgment dated 28 July 2014
- On the issue that whether the Taxpayer is required to reverse ITC on account of credit notes issued by selling dealers when the selling dealers had not reduced the output tax liabilities, the Taxpayer, along with other similarly situated Taxpayers, had preferred appeals before the Tribunal
- Vide common order the Tribunal dismissed the appeals of the Taxpayers while other Taxpayers challenged the Tribunal decision before the High Court, the Taxpayer did not approach the Honorable High Court
- The Honorable High Court vide the common judgment reversed the order passed by the Tribunal
- The Honorable Supreme Court dismissed Revenue SLP in limine, both on the ground of delay as well as on merits. The Tax authority had initiated recovery proceedings against the Taxpayer with the view that as far as the Taxpayer is concerned the demand stands confirmed, although the other Taxpayers had obtained relief from this High Court
- The Taxpayer challenged the recovery proceedings initiated by the Tax authority

Observations and Ruling by the High Court

The Honorable High Court set aside the impugned order and the demand raised against the Taxpayer after making the following observations:

- While on one hand the legal issue stands decided in favor of the Taxpayers, the demand, which would have been formally set aside, had the Taxpayer preferred an appeal with this Court, remains undisturbed
- The assessment order has to be seen in the backdrop of the decision of this Court, and the fact that the Supreme Court had dismissed the SLP of the revenue, both on the ground of delay as well as on merits
- While deciding the appeals, the High Court examined the facts of each Taxpayer who had preferred an appeal before it. The High Court examined the legal issue which arose before it in the appeals and referred to the facts only illustratively
- That being the position, it is not as if the facts in the Taxpayer's case could possibly lead to a different result. On merits, the issue has been decided in the favour of Taxpayers. Accordingly, the Taxpayer cannot be denied relief in this matter only on account of delay and laches
- Having regard to the overall circumstances, the impugned order and the demand raised against the Taxpayer were set aside. However, Taxpayer has been directed to pay costs, on account of the procrastination

[High Court of Delhi-M/s. Central Tyres Vs. Commissioner Value Added Tax & Anr., 2022-VIL-694-DEL]



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