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INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

EAC OPINION

Accounting treatment for advance payment made towards way leave charges as a part of laying city gas distribution network

Facts of the Case:

A Company (hereinafter referred to as 'the Company') limited by shares is domiciled in India and was incorporated on 23 December 1998, under the erstwhile Companies Act, 1956. The Company is listed on the Bombay Stock Exchange (BSE) and National Stock Exchange (NSE).

The Company is in the business of city gas distribution. As a part of its operations for laying down a city gas distribution network, the Company enters into way leave agreements with Indian Railways wherein way leave charges are charged by Indian Railways for allowing occasional or limited use of its land by a party for a specified purpose like passage, access to private houses and establishments, and laying underground pipelines.

The Company has stated that the Company has to enter into way leave agreements with Railways for 10 years by paying upfront payment with the following relevant terms:

- As per clause 4 of the Agreement, the Agreement will be valid for a defined period of 10 years and the way leave charges are to be paid in advance in the form of capitalised amount.
- As per clause 5, the amounts are to be fixed in advance for a block of 5 years.
- As per clause 2, the Company as a grantee of way leave facility has been allowed to lay the pipeline across railway land at the sole cost of the Company; which shall be maintained, repaired and renewed by the Company.
- As per clause 3, the legal ownership of the railway land still remains with the grantor, but the Company has been permitted to use such land for laying its pipeline. The Company shall not transfer or sublet the privilege granted by the way leave the facility and use the facility granted only for a defined intended purpose.

The Company has stated that Ind AS Transition Facilitation Group (ITFG) vide bulletin No. 22 clarified (October 2019) about lease term (under Ind AS 116, 'Leases') of way leave charges paid by an entity X (lessee) to Railway (entity Y) for a period of 10 years. ITFG noted that as per contractual terms, X had no tenancy right or interest in land and some of the principal terms of the way leave agreement are detailed below:

- Either party shall be at liberty to terminate the arrangement with one-month prior notice
- In case, Y gives notice, X shall remove at its own cost the facility (transmission line)
- Y reserves full rights to enter upon pass through or use the land
- X shall not enter upon the railway land without the previous consent of Y
- X shall use the facility granted only for the purpose for which it has been granted
- X shall execute the work as per the plan approved by Y
- X shall not transfer/sublet the way leave rights.

In the above case, ITFG opined that where a lease agreement is entered into for 12 months or less, it qualifies as a short-term lease. If X concludes that the termination option would not be exercised, the agreement term would be 10 years, and consequently, the lease will be a long-term lease since Y is a government-owned entity and termination of the agreement is meant to be exercised only in exceptional circumstances as there is no economic incentive for entity Y to terminate the lease.

Thus, according to the Company, it is inferred that ITFG has well-appreciated principal terms of a way to leave the agreement and is considered the same as a lease under Ind AS 116.

The Company has informed that before the introduction of Indian Accounting Standard (Ind AS) 116, 'Leases', the Company used to classify these ways leave charges as 'Prepaid Expenses' under the heading of 'Other Non-Current Assets' and amortised the same in the Statement of Profit and Loss based on the life of Agreement.

The Company has also informed that during the CAG audit for the financial year (FY) 2019-20, the CAG opined that the aforesaid treatment of way leaves under the heading of 'Other Non-Current Assets' is incorrect as the Company gets a right to use of the underlying assets, and accordingly, the Company should reflect the same under the heading 'Right-to-Use Assets' in the Statement of Financial Position in accordance with Ind AS 116.

Thereafter, from 1 April 2020, based on a discussion with CAG auditors and statutory auditors for the F.Y. 2019-20, the Company agreed to reclassify the said prepayments prospectively. Accordingly, the carrying amount of way leave prepayments as reflected under the heading 'Other Non-Current Assets' were reclassified to 'Right-To-Use Assets' in the Statement of Financial Position in accordance with Ind AS 116.

CAG Observation during accounts audit of the financial year 2020-21:

During the accounts audit of the financial year 2020-21, another team of CAG opined that the change in accounting treatment done by the Company is incorrect as 'the Company only has a right to lay the underground pipeline and not the actual land with it in its physical form'. Accordingly, they advised the Company to reclassify such prepayments as 'Intangible Assets' under Ind AS 38.

Due to differences in opinions raised by different CAG teams, the Company assured CAG that it will seek an opinion from the Expert Advisory Committee (EAC) of the ICAI for the appropriate accounting treatment of aforementioned payments towards way leave charges and till the time the matter is decided by the EAC, the Company will treat such items as 'Right-To-Use Assets' as per the provisions of Ind AS 116.

Query

On the basis of the above, the Opinion of the Expert Advisory Committee has been sought by the Company so as to determine the appropriate accounting treatment for the classification of prepayments towards way leave charges, i.e. whether to:

- account for such prepayments as 'Right-To-Use Asset' as per Ind AS 116; or
- account for such prepayments as 'Intangible Asset' under Ind AS 38; or
- account for such prepayments as 'Other Non-Current Asset'; or
- any other accounting treatment as EAC may consider appropriate in the case.

Points considered by the Committee

The Committee notes that the basic issue raised by the Company relates to the classification of advance payment made towards way leave charges for laying the city gas distribution network. 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 wishes to point out that the opinion expressed hereinafter is in the context of Indian Accounting Standards, notified by the Companies (Indian Accounting Standards) Rules, 2015 as amended from time to time.

With regard to the classification of payments for way leave, the first and foremost issue that needs to be examined is which standard should be considered and applied first. In this regard, the Committee notes that paragraph 9 of Ind AS 116, 'Leases' states, "At inception of a contract, an entity shall assess whether the contract is, or contains, a lease.. ". From this, the Committee is of the view that the Company should first examine whether the contract in the extant case is or contains a lease as per the requirements of Ind AS 116. It is only when the contract in the extant case is not and does not contain a lease, the Company should consider the requirements of other Ind ASs including Ind AS 38, 'Intangible Assets'. In this regard, the Committee further notes that paragraphs 3 and 4 of Ind AS 116 provide the scope exceptions to the Standard as follows:

"3. An entity shall apply this Standard to all leases, including leases of right-of-use assets in a sublease, except for:

- leases to explore for or use minerals, oil, natural gas and similar non-regenerative resources
- leases of biological assets within the scope of Ind AS 41, Agriculture, held by a lessee
- service concession arrangements within the scope of Appendix D, Service Concession Arrangements, of Ind AS 115, Revenue from Contracts with Customer

- licences of intellectual property granted by a lessor within the scope of Ind AS 115, Revenue from Contracts with Customers
- rights held by a lessee under licensing agreements within the scope of Ind AS 38, Intangible Assets, for such items as motion picture films, video recordings, plays, manuscripts, patents and copyrights.

  A lessee may, but is not required to, apply this Standard to leases of intangible assets other than those described in paragraph 3 (e)."

From the above, the Committee is of the view that none of the exceptions given in paragraph 3 (a) to (e) of Ind AS 116 are applicable in the extant case. The contract with the Railways in the extant case provides to the Company, rights to underground space wherein the gas pipelines are to be laid and such underground space is tangible. Therefore, the scope exclusion given under paragraph 4 of Ind AS 116 relating to rights to or lease of an intangible asset, is also not applicable. Accordingly, if the contract in the extant case is or contains a lease, the Company should apply the requirements of Ind AS 116.

In this context, the Committee notes the following clauses from the Memorandum Agreement of terms and conditions for permission of way leave facility:

> "2.That no work shall be commenced or preceded without previous sanction and supervision of the concerned Railway Officers, not below the rank of Divisional Engineer or any officer deputed by him. The grantee of way leave the facility for laying of 1x762mm Ø U/G Ms easing pipe for passing of 1x408mm Ø CNG carrier pipe near L-Xing No-4 SPL at KM 28/1- 2 on GZB-SRE sec across Railway land shall be bound all the times at his own cost expenses and observe and carry out all rules and regulation which are already in force or which may thereafter be prescribed from time to time in future by the Govt. (Grantor). The grantee shall obey all such directions or orders of restrictions as may from time to time be given by said officers or his deputy duly authorised by him in relation to construction, lying down, deviation, shifting, stoppage, abandonment, alteration, repair or removal or with regard to time and manner of the work way leave the facility for laying of 1X762mm Ø U/G MS casing pipe for passing of 1X406mm Ø CNG carrier pipe near L-Xing No-4 SPL at KM28/1-2 on GZB-SRE sec.
>
> 3. That it is distinctly understood by the grantee that the grantor shall retain the full legal title of ownership, right of access and inspection and have full control over the use and disposal of the Railway land for which temporary permission is given to the grantee only for the limited purpose of having laid down across the Railway land without conferring upon the grantee any right of possession or occupation of the land."
>
> "8. That it is clearly understood by the party, the land is not licensed to the party for any of the purpose but only a permission granted in the form of way leave for a limited use of the land for way leave facility for laying of 1X762mm Ø U/G Ms casing pipe for passing of 1X406mm Ø CNG carrier pipe near L-Xing No-4 SPL at KM 28/1-2 on GZB-SRE sec without conferring upon the party any right of possession or occupation of the land and without in any way affecting the Railway's title, possession, Control, use of the land and right to enter upon etc. without any notice to the party."
>
> "12. That the Railway administration may terminate this way leave permission at any time without assigning any reason and also without being held responsible to pay any compensation and on receipt of such notice, the party shall remove all crossing materials at its own cost and shall also make good any damage thereby occasioned to the surface or underground."
>
> "14. That the grantee shall not transfer in any way this way leave facility/right without prior approval of the Railway."
>
> "17. That the event of the Northern Railway desiring to execute new works, on Railway land necessitating the alteration or shifting of way leave facility for laying of 1x762mm Ø U/G Ms casing pipe for passing of 1x406mm Ø CNG carrier pipe near L-Xing No-4 SPL at KM28/1-2 on GZB-SRE sec the grantee shall agree to carry out these alteration or shifting under the supervision of the said officer or the Northern Railway concern or his deputy or that he shall raise no objection to the work being done by the Railways or said officers at the cost of the grantee if in the opinion of the Railway such works are required to be done by the Railway. In either event, the grantee shall have no claim against the Govt. or Railway owing to interruption in the services."

The Committee now examines whether the contract of a right of way leaves in the extant case can be considered as a 'lease' within the scope of Ind AS 116, 'Leases'. In this context, the Committee notes the following paragraphs from Ind AS 116:

"Lease - A contract, or part of a contract, that conveys the right to use an asset (the underlying asset) for a period of time in exchange for consideration."

"9 At inception of a contract, an entity shall assess whether the contract is, or contains, a lease. A contract is, or contains, a lease of time in exchange for consideration. The above paragraphs set out guidance on the assessment of whether a contract is, or contains, a lease."

"B9 To assess whether a contract conveys the right to control the use of an identified asset for a period of time, an entity shall assess whether, throughout the period of use, the customer has both of the following:

- the right to obtain substantially all of the economic benefits from the use of the identified asset; and

- the right to direct the use of the identified asset."

"An asset is typically identified by being explicitly specified in a contract. However, an asset can also be identified by being implicitly specified at the time that the asset is made available for use by the customer."

"Even if an asset is specified, a customer does not have the right to use an identified asset if the supplier has the substantive right to substitute the asset throughout the period of use. A supplier's right to substitute an asset is substantive only if both of the following conditions exist:

- the supplier has the practical ability to substitute alternative assets throughout the period of use (for example, the customer cannot prevent the supplier from substituting the asset and alternative assets are readily available to the supplier or could be sourced by the supplier within a reasonable period of time); and
- the supplier would benefit economically from the exercise of its right to substitute the asset (i.e. the economic benefits associated with substituting the asset are expected to exceed the costs associated with substituting the asset)."

"B15 If the supplier has a right or an obligation to substitute the asset only on or after either a particular date or the occurrence of a specified event, the supplier's substitution right is not substantive because the supplier does not have the practical ability to substitute alternative assets throughout the period of use."

"Portions of assets

B20 A capacity portion of an asset is an identified asset if it is physically distinct (for example, a floor of a building). A capacity or other portion of an asset that is not physically distinct (for example, a capacity portion of a fibre optic cable) is not an identified asset, unless it represents substantially all of the capacity of the asset and thereby provides the customer with the right to obtain substantially all of the economic benefits from use of the asset."

Right to obtain economic benefits from the use

B21 To control the use of an identified asset, a customer is required to have the right to obtain substantially all of the economic benefits from the use of the asset throughout the period of use (for example, by having exclusive use of the asset throughout that period). A customer can obtain economic benefits from the use of an asset directly or indirectly in many ways, such as by using, holding or sub-leasing the asset. The economic benefits from the use of an asset include its primary output and by-products (including potential cash flows derived from these items), and other economic benefits from using the asset that could be realised from a commercial transaction with a third party."

B22 When assessing the right to obtain substantially all of the economic benefits from the use of an asset, an entity shall consider the economic benefits that result from the use of the asset within the defined scope of a customer's right to use the asset. For example:

- if a contract limits the use of a motor vehicle to only one particular territory during the period of use, an entity shall consider only the economic benefits from the use of the motor vehicle within that territory, and not beyond.
- if a contract specifies that a customer can drive a motor vehicle only up to a particular number of miles during the period of use, an entity shall consider only the economic benefits from the use of the motor vehicle for the permitted mileage, and not beyond."

"Right to direct the use

B24 A customer has the right to direct the use of an identified asset throughout the period of use only if either:

- the customer has the right to direct how and for what purpose the asset is used throughout the period of use; or
- the relevant decisions about how and for what purpose the asset is used are predetermined and:
  - the customer has the right to operate the asset (or to direct others to operate the asset in a manner that it determines) throughout the period of use, without the supplier having the right to change those operating instructions; or
  - the customer designed the asset (or specific aspects of the asset) in a way that predetermines how and for what purpose the asset will be used throughout the period of use.

How and for what purpose the asset is used

B25 A customer has the right to direct how and for what purpose the asset is used if, within the scope of its right of use defined in the contract, it can change how and for what purpose the asset is used throughout the period of use. In making this assessment, an entity considers the decision-making rights that are most relevant to changing how and for what purpose the asset is used throughout the period of use. Decision-making rights are relevant when they affect the economic benefits to be derived from use. The decision-making rights that are most relevant are likely to be different for different contracts, depending on the nature of the asset and the terms and conditions of the contract."

"Protective rights

B30 A contract may include terms and conditions designed to protect the supplier's interest in the asset or other assets, to protect its personnel, or to ensure the supplier's compliance with laws or regulations. These are examples of protective rights. For example, a contract may (i) specify the maximum amount of use of an asset or limit where or when the customer can use the asset, (ii) require a customer to follow particular operating practices, or (iii) require a customer"

From the above, the Committee notes that a contract is, or contains, a lease if it conveys the right to control the use of an identified asset for a period of time in exchange for consideration. Further, to assess whether a contract conveys the right to control the use of an identified asset for a period of time, an entity shall assess whether, throughout the period of use, the customer has the

(i) right to obtain substantially all of the economic benefits from the use of the identified asset and (ii) right to direct the use of the identified asset.

In the extant case, the permission to use underground space is explicitly specified in the contract/agreement along with the specific dimensions (path, width, etc.) and is physically distinct from the remainder of the land (e.g., area on the surface of the land). Thus, an identified asset ***exists in the extant case***.

Further, the Committee notes that even if an asset is specified, a customer does not have the right to use an identified asset if the supplier has the substantive right to substitute the asset throughout the period of use. A supplier's right to substitute an asset is substantive only if (a) the supplier has the practical ability to substitute alternative assets throughout the period of use; and (b) the supplier would benefit economically from the exercise of its right to substitute the asset. In this regard, the Committee notes that clause 17 of the Memorandum Agreement provides that "in the event of the Northern Railway desiring to execute new works on Railway land necessitating the alteration or shifting of way leave the facility, the grantee shall agree to carry out alteration or shifting facility at its own cost". This clause seems to suggest that the Railways has substitution rights in case of Northern Railway executing new works on Railway land which necessitate alteration/ shifting of the way leave the facility. However, in this regard, the Committee also notes that Basis for Conclusions to International Financial Reporting Standard (IFRS) 16, 'Leases', issued by the International Accounting Standards Board (IASB), which inter alia provides as follows:

> "… Some substitution rights are not substantive because the contract restricts when a supplier can substitute the asset. For example, if a contract states that a supplier can substitute the asset only on a specified future date or after the occurrence of a specified event, that substitution right is not substantive because it does not give the supplier the practical ability to substitute the asset throughout the period of use. … "

From the above, the Committee is of the view that since in the extant case, the Railways has the right of substitution only on the occurrence of a specified event in the future (viz., Northern Railway executing new works), the substitution right is not substantive because it does not give the supplier the practical ability to substitute the asset throughout the period of use. Thus, as per the requirements above *the supplier does not have the substantive right to substitute the asset throughout the period of use in the extant case*.

With regard to the right to obtain substantially all the economic benefits from the use of the identified asset throughout the period of use, the Committee notes that paragraph B21 of Ind AS 116 specifies that a customer can have that right, for example, by having exclusive use of the identified asset throughout the period of use. In this regard, the Committee notes that in the extant case, the Company has the exclusive right to use the specified underground space throughout the period of use (although within the defined scope of its right to use the underground space) and therefore, the Company has the right to obtain substantially all of the economic benefits from the use of an identified asset.

With regard to the right to direct the use of the asset, the Committee notes that paragraph B24 of Ind AS 116 specifically provides that where the relevant decisions about how and for what purpose the asset is used are predetermined (as in the extant case, how and for what purpose the specified underground space will be used is pre-determined), an entity has the right to direct the use of an identified asset throughout the period of use only if it has the right to operate the asset or if it designed the asset in a way that predetermines how and for what purpose the asset will be used throughout the period of use. In this regard, the Committee notes from the Memorandum Agreement that the Company has the right to operate the specified underground space by having the right to lay down the pipelines, to inspect, repair and maintain them. The Company can make all the decisions about the use of the specified underground space although within the defined scope of the contract/agreement. Therefore, the Committee is of the view that in the extant case, *the Company has the right to direct the use of identified assets throughout the period of use*.

The Committee also notes that there are various clauses in the 'Memorandum Agreement' which provide some rights to the Railways in relation to the underground space in the extant case, for instance, right of access and inspection, etc. The Committee, considering paragraph B30 of Ind AS 116 is of the view that these are in the nature of protective rights to protect the Railways' interest in the asset, to protect its personnel or to ensure compliance with laws or regulations. These clauses define the scope of the customer's right of use but do not, in isolation, prevent the customer, viz. (the Company) from having the right to direct the use of an asset.

Therefore, the Committee is of the view that the arrangement in the extant case contains a lease and the prepayments made towards the way leave charge should be accounted for as per the requirements of Ind AS 116. As the arrangement contains a lease, the question of applying other standards, for example, Ind AS 38 does not arise.

D. Opinion

In view of the above, the Committee is of the following opinion on the issues raised above:

- (i) The arrangement in the extant case contains a lease as discussed in paragraph 14 above. Thus, the prepayments made towards way leave charges should be accounted for as a 'right-of-use' asset per the requirements of Ind AS 116.
- (ii) As the arrangement contains a lease, the question of applying other standards does not arise. Therefore, Ind AS 38, 'Intangible Assets' is not applicable in the extant case.
- (iii) & (iv) In view of (i) above, answers to these questions do not arise.

REGULATORY UPDATES

INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA (ICAI)

FRAMEWORK FOR SOCIAL AUDIT STANDARDS

The ICAI has released the Framework for Social Audit Standards which defines and describes the elements and objectives of a social audit performed by social auditors. It provides a frame of reference for:

- Social auditors when performing social audit i.e., social impact assessment of project/ program executed by social enterprises.
- The responsible party, the engaging party, if any, and other stakeholders who are the intended users of a social audit report.

The Framework applies to social audits to be conducted by social auditors using the principles given in Social Audit Standards (SASs). This Framework may also be applied to any other engagement(s) conducted by a social auditor e.g. impact assessment or any other similar assignment. Any other engagement(s) conducted by other auditors of an organisation e.g. statutory audit, internal audit, tax audit will not be under the scope of this Framework.

This framework is mandatory in nature from 4 February 2023.

There are 5 elements of a social audit engagement which are:

- A three-party relationship involving a social auditor, a responsible party, and intended users
- Project/ Program/ Intervention to be covered
- Project Monitoring Framework
- Evidence
- A written audit report.

A PRIMER ON THE CONCEPT OF SOCIAL STOCK EXCHANGE

The Sustainability Reporting Standards Board of ICAI has released a publication “A Primer on the Concept of Social Stock Exchange” on 10 February 2023, covering key concepts of a social stock exchange, important requirements of SEBI notifications and an overview of social stock exchanges established across the World.

Social Stock Exchange (SSE) is a new concept in India, developed to strengthen the social sector in the country which can help Social Enterprise(s) to raise funds from the public through the stock exchange mechanism. SSE will act as a medium between Social Enterprises and fund providers and that can help them to select those entities that are creating measurable social impact and reporting such impact. The objective of bringing out this publication is to assist members and other stakeholders to get insights into the key concepts of the social stock exchange.

SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI)

ENHANCED OBLIGATIONS AND RESPONSIBILITIES ON QUALIFIED STOCK BROKERS

SEBI has issued a circular on 6 February 2023 to further strengthen the compliance and monitoring requirements relating to stock brokers and to ensure the efficient functioning of the securities market, for designating certain stock brokers having regard to their size and scale of operations, likely impact on investors and securities market, as well as the Governance and service standards, as Qualified Stock Brokers (QSBs),on the basis of certain parameters and appropriate weights thereon.

The Parameters for designating a stock broker as QSB and Procedure for assigning score to a stock broker have been provided and based on the score, initially, stock brokers with a total score greater than or equal to 5 shall be identified as QSBs. The framework may be extended to more stock brokers in due course, if necessary, including, by considering the following additional parameters:

- compliance score of the stock broker
- grievance redressal score of the stock broker
- the proprietary trading volumes of the stockbroker.

Enhanced obligations and responsibilities for QSBs have been provided with respect to Governance structure and processes, Risk Management Policy and Processes, Scalable infrastructure and appropriate technical capacity, Framework for orderly winding down, Robust cyber security framework and processes and Investor Services including online complaint redressal mechanism.

QSBs shall be subjected to enhanced monitoring and surveillance including additional submissions to be made to MIIs/SEBI, as and when sought. Stock Exchanges, in consultation with SEBI, shall carry out an annual inspection of QSBs and communicate the findings of such inspection along with the action taken report to SEBI.

REVISED DISCLOSURE REQUIREMENTS FOR ISSUANCE AND LISTING OF GREEN DEBT SECURITIES

The SEBI issued a Circular dated 6 February 2023, to amend Chapter IX of the Non-Convertible Securities (NCS) Operational circular with a view to aligning the extant framework for green debt securities (GDS) with the updated Green Bond Principles (GBP).

As per the amended norms, an issuer desirous of issuing GDS is required to make additional disclosures in the offer document for public issues/private placement such as a statement on environmental sustainability objectives of green debt securities, details of the system/procedures, details of an indicative estimate of the distribution of proceeds raised through the issuance of green debt security between financing and refinancing of projects, details of the intended types of temporary placement of the unallocated and unutilised net proceeds from the issue of green debt securities, etc.

Further, additional continuous disclosures are also to be made. In the annual report, details of the deployment of the mitigation plan for the perceived social and environmental risks are to be mentioned. Also, information pertaining to reporting of the environmental impact of the projects financed by green debt securities is to disclose.

Also, an issuer is now mandatorily required to appoint an independent third-party reviewer/certifier for green debt security to review/certify the processes. The said requirement of appointing a third-party reviewer/ certifier is applicable on a ‘comply or explain’ basis for a period of two years.

This circular also provides the format for disclosure of major elements of Business Responsibility and Sustainability Reporting (BRSR).

The circular shall come into force for all issues of green debt securities launched on or after 1 April 2023.

MASTER CIRCULAR FOR SECURITIES AND EXCHANGE BOARD OF INDIA (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS) REGULATIONS, 2011 (TAKEOVER REGULATIONS)

SEBI has issued a Master circular dated 16 February 2023 for the substantial acquisition of shares and takeover, in order to enable the stakeholders to have access to the provisions of the applicable circulars in one place.

With the issuance of this Master Circular, the directions/instructions contained in the circulars listed out in Annexure-V to this Master Circular, to the extent they relate to the Takeovers Regulations shall stand rescinded.

Notwithstanding such rescission, anything done or any action taken or purported to have been done or taken including any enquiry or investigation commenced or show cause notice issued in respect of the circulars specified in Annexure-V, shall be deemed to have been done or taken under the corresponding provisions of this Master Circular.

The circular includes the following chapters:

- Format of documents for activities pertaining to Open Offers
- Format of disclosure documents/reports
- Automation of disclosure requirements pursuant to the introduction of System Driven Disclosures
- Procedure for tendering of shares and settlement through the stock exchange
- Online filing system for submission of documents under the Takeover Regulations
- Payment of fees in connection with filings made with SEBI is mandated to be made through Payment Gateway made available at SEBI Intermediary Portal
- Tendering by shareholders holding securities in physical form
- Exemption Application for cases involving Trust as Acquirer
- Standard Format of Application under Regulation 11(1) of the Takeover Regulations
- Publication of Investor Charter and Disclosure of Complaints by Merchant Bankers on their Websites

MINISTRY OF CORPORATE AFFAIRS (MCA)

CIRCULAR NO. 04/2023 DATED 21 FEBRUARY 2023: EXTENSION OF TIME FOR FILING OF 45 COMPANY E-FORMS IN MCA 21 VERSION 3.0 WITHOUT ADDITIONAL FEE (EXTENSION CIRCULAR)

MCA allows further additional time, without payment of additional fees, for filing certain MCA e-forms:

Form Type	Actual Due Date	Extended Due Date
45 company e-forms	Falling during the period between 7 February 2023 to 28 February 2023	31 March 2023
Form PAS-03	Falling during the period between 20 January 2023 to 28 February 2023	31 March 2023
The reservation period for the names	-	Extended by 20 days
Re-submission period for the names	Falling during the period between 23 January 2023 to 28 February 2023	Extended by 15 days

CIRCULAR NUMBER 05/2023: ALLOWING COMPANIES TO FILE CERTAIN SPECIFIED FORMS IN PHYSICAL MODE DUE TO MIGRATION IN THE MCA PORTAL (CIRCULAR)

Highlights of the Circular are as under:

MCA, vide the Circular, allows the filing of certain forms like GNL-2, MGT-14, PAS-3, SH-8, SH-9, and SH-11, on the MCA-21 Portal, between 22 February 2023 and 31 March 2023 in a 'physical mode' along with a copy thereof in electronic media with the concerned Registrar without the payment of fees and take acknowledgement thereof in the format given in the Circular.

MCA further mandates the companies to submit an undertaking that such form shall also be filed in the electronic mode along with the applicable fee as per the Companies (Registration Offices and Fees) Rules, 2014.

SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI)

CIRCULAR DATED 3 FEBRUARY 2023: MANNER OF ACHIEVING MINIMUM PUBLIC SHAREHOLDING (MPS)

SEBI had previously permitted different methods that may be used by listed entities to achieve compliance with the MPS requirements.

To facilitate listed entities to achieve such MPS, SEBI has reviewed and rationalised some of the existing methods and introduced two new methods.

Accordingly, SEBI, now allows, any of the following methods, amongst others, to achieve such MPS compliance:

- Offer for sale of shares held by the promoter(s)/promoter group to the public through prospectus and/or Stock exchange mechanism i.e., Secondary market.
- Promoter(s) / Promoter group can sell up to a maximum of 5% of the paid-up capital of the listed entity in the open market during a financial year subject to the condition that the public holding in the listed entity shall become 25% after completion of such sale. Conditions: The promoter must inform stock exchanges 1 day before the proposed sale about the intention behind the proposed sale, details of the promoter(s) / promoter group, the quantum of shares, and the period within which the entire divestment process will be completed.
- Public shareholding can also be increased through allotment of shares under an Employee Stock Option Scheme, provided the maximum sale is 2% of the paid-up equity share capital of the listed entity.
- Further, the promoter(s) / promoter group can transfer shares held by them to an Exchange Traded Fund managed by a SEBI-registered mutual fund, subject to a maximum of 5% of the paid-up equity share capital of the listed entity.

Conditions: The promoters must inform stock exchanges 1 day before the proposed sale about the intention behind the proposed sale, details of the promoter(s) / promoter group, the quantum of shares, and details of the ETF to which shares are proposed to be transferred.

NOTIFICATION DATED 2 FEBRUARY 2023: SEBI (ISSUE AND LISTING OF NON-CONVERTIBLE SECURITIES) (AMENDMENT) REGULATIONS, 2023 (AMENDED NCS REGULATIONS)

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

- The definition of "Green Debt Security" has been updated to include various other categories for which such debt securities may be issued for raising funds which can be utilised for projects like pollution prevention and control, blue bonds, (water-related projects), yellow bonds (solar related projects) and transition bonds, etc.
- The notice for recall or redemption of Non-Convertible Securities prior to its maturity shall be made 21 days before the date from which such right is exercisable to all the eligible holders and debenture trustees in the manner specified. Such notice shall also be provided to the concerned stock exchange for dissemination on its website.
- The trust deed and the Articles of Association (AoA) must contain a provision mandating the issuer to appoint any person nominated by the debenture trustee(s) as a director on its Board. The trust deed must also provide for a timeline of a maximum of up to 1 month for such appointment from the date of receipt of a nomination from the debenture trustee(s).
- A public issue of debt securities or Non-Convertible Redeemable Preference Shares shall be kept open for a minimum of 3 working days and a maximum of 10 working days.
- In respect of every draft offer document filed in terms of these regulations, a non-refundable fee of 0.00025% of the issue size, subject to a minimum of INR 25,000 and a maximum of INR 50 Lacs, shall be payable to SEBI.

NOTIFICATION DATED 7 FEBRUARY 2023: SEBI (BUY-BACK OF SECURITIES) (AMENDMENT) REGULATIONS, 2023 (AMENDED BUY-BACK REGULATIONS)

The notification, inter-alia, provides for the following key amendments:

- The definition of 'frequently traded shares', 'secretarial auditor', etc. are newly added and the definition of 'Odd Lots' is now omitted.
- The maximum limit of buy-back which is 25% or less of the aggregate of paid-up capital and free reserves of the company based on the standalone or consolidated financial statements of the company is now revised to state the consideration of standalone or consolidated financial statements should be basis the one which sets out a lower amount.
- One of the existing methods of buy-back which is buy-back to be made from 'Odd-lot holders' is now omitted.
- The maximum threshold for the buy-back, to be done through the open market method, is now revised as under:
  - 15% of the paid-up capital and free reserves of the company till 31 March 2023
  - 10% of the paid-up capital and free reserves of the company till 31 March 2024
  - 5% of the paid-up capital and free reserves of the company till 31 March 2025

The amount of capital and free reserves are to be considered the basis of standalone or consolidated financial statements of the company, whichever sets out a lower amount.

- The Amended Buy-Back Regulations mandate taking the prior consent of its lenders [in case of a breach of any covenant with such lender(s)] before authorising the buy-back.
- The Companies must file a copy of the resolution passed at the general meeting under Section 68(2) of the Companies Act, 2013 with SEBI and the stock exchanges within 7 working days from the date of passing of the resolution.
- In case of a buy-back through a tender offer, the Board of Directors (BOD) of the company are allowed to increase the maximum buy-back price and decrease the number of securities proposed to be bought back, without changing the aggregate size of the buy-back, till 1 working day before the record date.
- All the buy-back related filings to the SEBI must be made only in electronic mode after being digitally signed by the company secretary or the person authorised by the BOD of the company.
- The company must file a copy of the public announcements in electronic mode with SEBI and the stock exchanges.
- The time for compliances and filings concerning the letter of offer has been reduced from 5 days to 2 working days from the record date.
- In addition to other compliances, the company must also furnish a certificate from a merchant banker (who should not be an associate of the company) certifying that the buyback complies with all the requirements provided in the regulations.
- The Buyback offer must open within 4 working days from the record date (as against 5 working days).
- The time for which the offer of buyback remains open is now reduced from 10 days to 5 days.
- The requisite amount shall be deposited in the Escrow Account within 2 working days of the public announcement of the buyback. Further, the Escrow Account may now consist of bank deposits, bank

- guarantees issued by scheduled banks in favour of merchant bankers, frequently traded and freely transferable securities, government securities, and units of mutual funds invested in gilt funds and overnight schemes.
- The time for payment of consideration to the securities holders whose offer has been accepted has been reduced from 7 days to 5 working days from the date of closure of the offer. 16. The company must utilise at least 75% of the amount earmarked for buyback (as against 50% at present).
- The revised time limit in case of closure of buyback through the stock exchange is as under:
  - within 6 months, if the buy-back offer is opened on or before 31 March 2023,
  - within 66 working days, if the buy-back offer is opened on or after 1 April 2023 and till 31 March 2024, and
  - within 22 working days, if the buy-back offer is opened on or after 1 April 2024 and till 31 March 2025.
- The following provisions are newly inserted:
  - Disclosures, filing requirements, and timelines for public announcement.
  - Offer procedure.
  - Payment to holders of shares or other specified securities.
  - Retail and Promoter participation.
  - Methodology of acceptance of bids.

NOTIFICATION DATED 14 FEBRUARY 2023: SEBI (INFRASTRUCTURE INVESTMENT TRUSTS) (INVIT) (AMENDMENT) REGULATIONS, 2023

AND

SEBI (REAL ESTATE INVESTMENT TRUST) (REIT) (AMENDMENT) REGULATIONS, 2023

(TOGETHER KNOWN AS, "THE INVIT AND REIT NOTIFICATIONS")

The InvIT and REIT Notifications, inter-alia, provide for the following:

- The definition of "Change in control" is modified to mean:
  In the case of body corporates:
  - Where the shares are listed, the meaning shall be construed with reference to the definition of 'control' provided in the SEBI Act, 1992.
  - Where shares are not listed, the meaning shall be construed with reference to the definition of 'control' provided in the Companies Act, 2013.

  In a case other than that of a body corporate: Change in control shall be construed as any change in its legal formation or ownership or change in controlling interest (any direct or indirect interest of at least 50% of voting rights or interest).
- The definition of "Independent Director" has been inserted to mean a director, other than a nominee director of the investment manager, who fulfils the prescribed conditions, some of which are mentioned here under:
  - Who is a person of integrity and possesses relevant expertise and experience.
  - Who is not or was not the promoter of parties to or related to the InvIT/REIT, its holding company (Holdco), the subsidiary or associate, or their promoters or directors.
  - Who, does not have any or has had no material pecuniary relationship (apart from receiving the director's remuneration, during the 3 immediately preceding financial years or does not have during the current financial year) with the InvIT/REIT, its Holdco, and/or special purpose vehicle, parties to the InvIT/REIT, its Holdco, the subsidiary or associate, or their promoters or directors.
  - Holds together with his relatives 2% or more of the total voting power of the InvIT/REIT, its Holdco, and/or SPV, parties to the InvIT/REIT.
  - Who is above the minimum age criteria of 21 years.
- The definition of "Senior Management" has been inserted to mean the officers and personnel of the investment manager who are members of its core management team and shall also comprise all members of the management, one level below the Chief Executive Officer or Managing Director or Whole Time Director or manager and shall specifically include the Compliance Officer and Chief Financial Officer.
- The investment manager of the InvIT/REIT must appoint an individual or a firm as the auditor for the period of 5 years (who shall hold office from the date of conclusion of the annual meeting in which the auditor has been appointed till the date of conclusion of the 6 annual meeting of the unitholders).
- There is a specific prohibition for the appointment of an individual auditor for more than one term of 5 consecutive years and a non-individual auditor for more than two terms of 5 consecutive years, subject to prescribed conditions.
- The auditor shall undertake a limited review of the audit of all the entities or companies whose accounts are to be consolidated with the accounts of the InvIT/REIT as per the applicable Indian Accounting Standards.

- The Chapter containing provisions related to "Obligations of Investment Managers" has been inserted which inter-alia includes provisions related to:
  - BOD, its composition, quorum, etc.
  - Vigil Mechanisms including the whistle-blower policy provide adequate safeguards.
  - Submission of Secretarial Compliance Report.
  - Submission of Quarterly Compliance Report on Corporate governance.

RESERVE BANK OF INDIA (RBI)

Circular dated 20 February 2023: Implementation of Indian Accounting Standards (Ind AS)

Key highlights of the Implementation of Ind AS on Asset Reconstruction Companies (ARCs) are as under:

- ARCs, while preparing their financial statements, are required to reduce below mentioned amounts from their net owned funds while calculating the Capital Adequacy Ratio and the amount available for payment of dividends.
  - Management fees recognised during the planning period that remains unrealised beyond 180 days from the date of expiry of the planning period.
  - Management fee recognised after the expiry of the planning period that remains unrealised beyond 180 days of such recognition.
  - Any unrealised management fees, where the net asset value of the security receipts has fallen below 50% of the face value.
  - Any specific expected credit loss allowances held on unrealised management fees mentioned in the above points.
- The Audit Committee of the BOD shall analyse the unrealised management fee and satisfy itself on the recoverability of the same while finalising the financial statements.

  ARCs shall disclose information on the ageing of the unrealised management fee recognised in the annual financial statements in a specified format.

CIRCULARS / NOTIFICATIONS / PRESS RELEASE

CBDT NOTIFIES SCHEME FOR CENTRALISED PROCESSING OF EQUALISATION LEVY STATEMENTS

Section 167 of the Finance Act, 2016 (the Act) requires every taxpayer or e-commerce operator to furnish a Statement of Equalisation levy (EL Statement) in Form 1 to the tax officer or any other authority or agency as may be authorised by the Central Board of Direct Taxes (CBDT). Intending to expeditiously determine the tax payable or refund due to the taxpayer or e-commerce operator, the CBDT has notified a scheme[1] for centralised processing of EL Statements (the Scheme).

Scope of the Scheme

- The Scheme shall be applicable in respect of processing EL Statements.
- The Scheme shall come into force from 7 February 2023

Furnishing of Equalisation levy Statement

- Every taxpayer or e-commerce operator:
  - Shall furnish EL Statement on or before 30 June immediately following the relevant Fiscal Year (FY).
  - May furnish the Statement or Revised Statement (as the case may be) at any time before the expiry of 2 years from the end of the FY in which the specified services were provided or e-commerce supply/services were made/provided/facilitated.
  - May furnish EL Statement in response to a notice sent by the tax officer under section 167(3)[2] of the Act.

Invalid EL Statement

- The Commissioner of Income-tax, CPC may declare an EL Statement invalid:
  - For non-compliance with procedure for using invalidated and unapproved software; or
  - If incomplete information is submitted in the Statement.

Processing of EL Statement

- CPC shall process a valid EL Statement in the following manner:
  - After adjusting for any arithmetical error in computing Equalisation Levy;
  - After considering interest (if any) based on sum deductible or payable;
  - Any sum payable or refund due to the taxpayer or e-commerce operator shall be determined after adjusting interest as per clause (b) against any equalisation levy deducted by the taxpayer or paid by the e-commerce operator or interest on delayed payment of equalisation levy and any amount paid other than tax or interest;
  - CPC shall prepare and send an intimation specifying the sum payable or refund due to the taxpayer or e-commerce operator within one year from the end of the FY in which the EL Statement or Revised EL Statement is furnished.
- In case where Revised EL Statement is furnished, CPC shall process the same and take no further action on the original EL Statement if the same has not already been processed.

[1] Notification No. 3/2023, dated 7 February 2023

[2] As per section 167(3) of the Act, in case taxpayer or e-commerce operator fails to furnish a statement within the prescribed time, the tax officer may serve him a notice to furnish the statement in the prescribed form.

- Taxpayers or e-commerce operators can make an application to the tax officer for amending any intimation issued within one year from the end of the FY in which such intimation was issued.
- In a case where CPC cannot process a Statement for any reason, the same shall be transmitted to the jurisdictional tax officer of the taxpayer or e-commerce operator.
- Any error in the processing of the Statement, resulting in an excess refund or reduced tax, shall be automatically corrected by the CPC by passing a rectification order and the excess amount shall be recovered as per recovery provisions of the Income-tax Act,1961 (IT Act).
- Refunds (if any) arising from the processing of the EL Statement shall be set off against any sum payable by the taxpayer or e-commerce operator.

No personal appearance

- The taxpayer or e-commerce operator shall not be required to appear personally or through an authorised representative before the CPC in connection with any proceedings and a written or electronic communication shall be sufficient compliance.
- Any clarification, evidence or document as may be called for by the CPC shall be furnished electronically.

Service of notice or communication

- Every intimation, notice or other communication from the CPC to the taxpayer or e-commerce operator or its authorised representative shall be computer generated and need not be signed physically.
- Such intimation, notice or communication shall be:
  - Communicated electronically through CPC's e-mail;
  - Placed in the registered account of the person on the designated portal; or
  - Any of the modes as mentioned in section 282(1)[3] of the IT Act.

Power to specify procedures and processes

- The Director General shall, with the approval of CBDT, specify procedures and processes from time to time in respect of:
  - Processing of EL Statement;
  - Validating any software used for e-filing EL Statement;
  - Call centres to answer queries and provide services to taxpayers aiding in processing of their statements; and

Managing equalisation levy administration functions such as a receipt, scanning, data entry, processing, issue of refunds, storage, and retrieval of statements and documents in a centralised manner.

[Notification No. 3/2023, dated 7 February 2023]

INCOME-TAX RETURN FORMS NOTIFIED FOR FILING RELATING TO THE FISCAL YEAR 2022-23

The CBDT has notified the income-tax return (ITR) for FY 2022-23. No significant changes have been made to the forms compared to the last year barring a few changes which are consequential to the amendments made by the Finance Act 2022. The key changes are as follows:

- New Schedule was added for disclosure on income from the transfer of Virtual Digital Asset in ITR 2, ITR 3, ITR 5, ITR 6 and ITR 7. The Schedule requires details such as the date of acquisition, date of transfer, head under which income is to be taxed (business/capital gains), cost of acquisition in case of gift and consideration received.
- ITR 2, ITR 3, ITR 5 and ITR 6 now require disclosure of Donation Reference Number under Schedule 80G in case of donations entitled to a 50% deduction.
- ITR 2, ITR 3 and ITR 5 seek the SEBI registration number allotted to the Foreign Institutional Investors and Foreign Portfolio Investors under Part A- General Information.
- ITR 3 and ITR 4 seek details if the taxpayer has ever opted out of the concessional tax regime under section 115BAC of the IT Act in earlier years. If yes, the following details are required:
  - Whether opted for a new regime in earlier years;
  - Whether opted out of Section 115BAC of the IT Act in earlier years;
  - Option for current assessment year- Opting In/ Opting Out, Not opting/Continuing to opt or Not eligible to opt-in;
  - Where opted for the concessional scheme, details of filing relevant Form 10-IE.
- ITR 3 and ITR 5 require separate disclosure of intraday trading under Part A- Trading Account. It requires a taxpayer to provide turnover from intraday trading and income from intraday trading- transferred to the Profit and Loss Account.
- ITR 1 cannot be filed by an individual, who has deposited more than INR 10Mn in one or more current accounts maintained with a bank.

[Notification No. 4/2023, dated 10 February 2023 and Notification No. 5/2023, dated 14 February 2023]

3 Section 282(1) of the IT Act provides manner of serving notice or any other communication to the concerned person.

CBDT ISSUES FAQS ON E-VERIFICATION SCHEME, 2021

With a view to provide general guidance in understanding the procedures and processes of the E-Verification scheme, 2021 (the Scheme), the CBDT has issued FAQs in an easy-to-understand manner. These FAQs are informative and advisory and are subject to updation as required. However, these should not be used as a basis for any legal interpretation of the Scheme or the IT Act. Some of the key FAQs are as below:

- What to do in case a transaction which is incorrectly recorded, or which does not pertain to the taxpayer?
  Taxpayers viewing information under AIS can click on specific information to view its details. On the right-hand side of information details, a feedback button is provided using which taxpayers can provide feedback from the menu options available.
- What happens after a taxpayer objects to any transaction reported in Annual Information Statement?
  Within 3-4 months, Income Tax Department will initiate a process for contacting the Source/Reporting entity which reported the information/transaction seeking confirmation about the correctness of the data.
- What is the usefulness of the e-Verification Scheme, 2021?
  To facilitate voluntary compliance several measures such as sharing of information through AIS, pre-filling of return of income and e-Verification Scheme have been initiated. The Scheme will help to:
  - Correct inaccuracy in data/information provided by Source/Reporting entity;
  - Inform the taxpayer about any transaction which could have been missed in computing income and taxes and filing a return of income;
  - Provide an opportunity for the taxpayer to correct any omissions in the return of income by filing an updated return of income and paying the tax due on the income missed in the original return of income;
  - Provide an opportunity for the taxpayer to explain a transaction being verified before any further action by way of Assessment or Re-assessment is undertaken.
- What to do when receiving notice for e-Verification?
  The notice under section 133(6) of the IT Act issued under the Scheme will be visible in the Compliance Portal and taxpayers will also be alerted through an SMS and email address registered with the portal. The steps to access the notice and file the response electronically are:
  - Step 1- Login to the e-filing portal by using the URL https://eportal.incometax.gov.in/.
  - Step 2- Go to the "Pending Actions" tab, click on "Compliance Portal" and select "e-Verification".
  - Step 3: Click on the applicable Financial Year.
  - Step 4: Click on the 'DIN' to download the notice.
  - Step 5: Click on the 'Submit' link to respond.
  - Step 7: Enter the remarks, attach the supporting document and click on "Submit" to submit the response to the notice.
  - What happens if the explanation given by the taxpayer is found to be (i) satisfactory (ii) not satisfactory?
  - A Communication is sent that no further clarification on the issue under verification proceedings is presently required.
  - The taxpayer will be informed that "The explanation is not found sufficient to explain the mismatch in the specific information and the taxpayer may consider updating the return of income under section 139(8A) of the IT Act, if eligible." If the taxpayer does not update the return of income within the due time, Income Tax Department will undertake Assessment or Re-assessment which could lead to tax demand and penalty etc.
- Is it possible for a taxpayer to have a physical hearing with the tax officer?
  This Scheme does not have any physical hearing by the Prescribed Authority. However, there is a provision for video conferencing in exceptional cases. This facility is under development.
- How is the e-Verification Scheme different from scrutiny assessments/reassessments?
  This is primarily a preliminary verification based on the information received by the Income Tax Department from various reporting entities. No order is required to be passed in this case because this is not a notice for assessment or reassessment. Once information is verified as correctly reflected in the return of income, further steps may not be taken by the Income Tax Department. If information is not included in the return of income, the taxpayer can update the tax return as mentioned above.
- What should the taxpayer do if the information provided by the Income Tax Department is not correct?
  The taxpayer should clearly state the same in the response filed and provide supporting evidence for the same, where applicable. The Income Tax Department would then confirm with the source the veracity of the information and take appropriate action.

[Press Release dated 1 February 2023]

JUDICIAL UPDATES

REVISION UNDER SECTION 263 IS NOT SUSTAINABLE WHERE THE ISSUE WAS ALREADY EXAMINED BY THE TAX OFFICER

Taxpayer, an Indian company, was owned by two overseas companies- Sodexo Services Asia Pte Ltd (75%) and Sodexo S.A. France (25%). For the relevant year under consideration, the taxpayer filed its return of income declaring a loss along with brought forward business losses. At the time of assessment proceedings, the tax officer disallowed a certain amount and accordingly passed the order under section 143(3) of the IT Act. The Principal Commissioner of Income-tax (PCIT) noticed that during the year there was a substantial change (more than 51%) in the shareholding pattern of the taxpayer when compared to the end of the previous FY. The former shareholder held no shares whereas Sodexo SA France held 99.99% shares of the taxpayer company. The PCIT held that as per section 79 of the IT Act, the taxpayer cannot setoff its brought forward business loss of preceding years thereby making the order passed under 143(3) of the IT Act erroneous as it is prejudicial to the interest of the Revenue and consequently passed an order under section 263 of the IT Act. Aggrieved, the taxpayer preferred an appeal before the Mumbai Tax Tribunal which, based on the following observations, held that the order passed under section 143(3) of the IT Act is neither erroneous nor prejudicial to the interest of the Revenue :

- On perusal of the order passed by the tax officer under section 143(3) of the IT Act, it is undisputed fact on record that no “set off” of business loss incurred for earlier years has been claimed or allowed. In these circumstances, the question of invoking provisions contained in section 79 of the IT Act is unwarranted and not sustainable.
- The issue flagged by the PCIT has already been enquired into and discussed. Based on the submissions made by the taxpayer, a plausible view has been taken in the face of the fact that no “set off” of brought forward loss has been claimed by the taxpayer and hence the order passed by the tax officer under section 143(3) of the IT Act cannot be termed as erroneous under section 263 of the IT Act.
- The ultimate power for a voting share was the same with the taxpayer as in the previous years as well as the year under consideration which is with the ultimate holding company i.e. Sodexo SA, France. Thus, when beneficial ownership is with the ultimate holding company, the loss cannot be disallowed. However, in the instant case, no such loss was claimed by the taxpayer.
- The changes in shareholding pattern have been duly disclosed by the taxpayer in its tax audit report wherein the pertinent question flagged by the PCIT before the tax officer has been answered.

[Sodexo India Services v/s PCIT, ITA No.930/Mum/2022 (Mumbai Tax Tribunal)]

INDIRECT TAX

GOODS & SERVICES TAX (GST)

JUDICIAL UPDATES

WRIT PETITION

SEZ UNITS ARE ELIGIBLE TO AVAIL A REFUND OF UNUTILISED ITC SUBJECT TO THE FURNISHING OF UNDERTAKING BY THE APPLICANT.

Facts of the case

- M/s. SE Forge Ltd. (Taxpayer) is an SEZ unit engaged in the manufacturing of engineering components. The Taxpayer had received supplies from the Domestic Tariff Area (DTA) on payment of applicable Integrated Goods and Services Tax (IGST). Being an SEZ unit, the Taxpayer was unable to avail and utilise the credit of such tax and the same remains unutilised in the Electronic Credit Ledger;
- The Taxpayer filed an application for claiming a refund of such unutilised input tax credit (ITC) on account of 'Export of Goods/Services without payment of tax'. The same was rejected by the Tax Authority;
- On an appeal filed by the Taxpayer against the aforesaid order, the appellate authority held that Section 54 of the Central Goods and Services Tax Act, 2017 (CGST Act) read with Rule 89(1) and 89(2)(f) of the Central Goods and Services Tax Rules, 2017 (CGST Rules) mandates only the supplier to claim the refund of ITC;
- Aggrieved by the above, the Taxpayer filed a writ petition before the Hon'ble Gujarat High Court.

Contention of the Taxpayer

- The Taxpayer contended that the appellate authority erred in holding that Section 54(3) of the CGST Act read with Rule 89(1) and Rule 89(2)(f) of the CGST Rules mandates only the supplier to claim the refund of ITC on account of the following:
  - CGST Act does not make any distinction between an SEZ unit and other registered persons so far as the eligibility of ITC is concerned. Further, SEZ is not an exclusion under the GST framework;
  - There is no express denial of refund of output tax or unutilised ITC to an SEZ unit under Section 54 of the CGST Act;
  - Therefore, the allegation that since the supplies to the SEZ unit is a zero-rated supply, the units situated in SEZ are not eligible for a refund under Section 54 of the CGST Act is not sustainable;
- The Petitioner, while filing the refund application, had submitted that its supplier (situated in DTA) had not claimed a refund, and, if any such eventuality is noticed, the Petitioner had agreed to take responsibility for the refund of such amounts;
- It was also contended that the present matter is squarely covered by ***M/s. Britannia Industries Vs. Union of India [2020-TIOL-1495-HC-AHM-GST]*** wherein the issue involved was in respect of an application filed by the SEZ unit for claiming a refund of unutilised IGST credit distributed by the Input Service Distributor (ISD). The Hon'ble Gujarat High Court in the

said case had rejected the stance of the Tax Authorities in holding that the Petitioner would not be entitled to seek a refund of ITC paid in connection with the goods/services supplied to the SEZ unit;

- Reliance was also made to ***M/s IPCA Laboratories Vs. Commissioner [2022-TIOL-270-HC-AHM-GST]*** which also squarely covers the issue involved present case.

Contention of the Tax Authorities

- The Tax Authority submitted that the Taxpayer's unit, situated in SEZ, enjoys the special status under the Special Economic Zone Act, 2005, where other benefits are extended as per the provisions of law including the benefit of tax-free supply from suppliers located in DTA under the GST laws;
- On a combined reading of the provisions of Section 54(3) of the CGST Act, Section 16 of the Integrated Goods and Services Tax Act, 2017 (IGST Act) and Rule 89(1) of the CGST Rules, it was contended that when a supply is made to the SEZ unit or SEZ developer, it is the supplier and not the receiver who is entitled to file the refund application;
- The application for refund (by filing Form RFD-01) under Rule 89 of the CGST Rules is also available to the supplier under option 7(F) under the category **'Supply made to the SEZ with Payment of Tax'** along with a declaration under Rule 89(2)(f) of the CGST Rules. In the present case, the SEZ unit would be required to reverse the ITC availed in Form GSTR-3B;
- The Tax Authority also sought to distinguish the facts in the present case from those in **Britannia Industries** (supra) by contending that the said case was about IGST credit distributed by ISD for the services of the SEZ unit and that the supplier couldn't file refund application to claim a refund of ITC distributed by the ISD;
- It was also submitted that SEZ was not required to make payment of taxes to the supplier and even if it had done so, the same could be recovered by filing civil suits. The Taxpayer cannot put an additional burden on the tax administration to verify whether the supplier has claimed a refund or not and whether the SEZ unit has paid taxes to the suppliers.

Observations and Ruling by the Hon'ble High Court

- The Hon'ble High Court observed that while the Tax Authority has challenged the order in **Britannia Industries** (supra) before the Hon'ble Supreme Court, no stay has been granted in respect of the order passed by the Hon'ble High Court. Further, the present case is also covered by the Hon'ble High Court decision in **IPCA Laboratories** (supra).
- Given the above, the Hon'ble High Court allowed the writ petition filed by the Taxpayer by quashing the order passed by the appellate authority and directing the Tax Authority to grant a refund to the Taxpayer after proper verification within 8 weeks from the date of receipt of this order and by obtaining a specific undertaking/bond stipulating that if the supplier, at any point of time, has taken refund, and it comes to the notice of the Tax Authority then the Tax Authority will be in a position to recover the same along with interest.

[High Court of Gujarat-M/s SE Forge Ltd Vs Union of India dated 03 February 2023]

JUDICIAL UPDATES -EXCISE/SERVICE TAX/CUSTOMS

REFUND OF EXCESS TAX PAID ON DOWNWARD PRICE REVISION IS AVAILABLE IF IT IS NOT HIT BY UNJUST ENRICHMENT

Facts of the case

- M/s. Deepak Cables India Ltd (Taxpayer), engaged in the manufacture and sale of ACSR conductors had filed an application for claiming a refund of excess tax paid arising on account of downward price revision on negative supplementary invoices (Credit notes) raised to M/s. Power Grid Corporation India Limited (PGCL);
- The Tax Authorities passed an order rejecting the refund claim, on the ground of unjust enrichment. Against this, the Taxpayer approached the Commissioner (Appeals) and obtained a favourable order. Aggrieved by the above, the Tax authority filed the appeal before CESTAT;
- The Taxpayer had filed another refund application for the subsequent period arising on account of the same issue whereby the Tax Authority had sanctioned a refund to the Taxpayer. However, on an appeal filed by the Taxpayer, the Commissioner (Appeals) set aside the order issued by the Tax Authority. Aggrieved by the above, the Taxpayer filed an appeal before CESTAT;
- Both the aforesaid appeals were simultaneously heard by CESTAT.

The contention by the Taxpayer

- The Taxpayer is engaged in the manufacture and sale of ACSR conductors to M/s. PGCL on which applicable Excise duty was paid by the Taxpayer. Since the aforesaid products are aluminium and steel based, their prices vary according to market fluctuation. Therefore, during clearance of such products, since the actual market price is not ascertainable, it was contractually agreed to clear goods on a provisional price which would be subsequently revised based on the actual market price prevalent at the time of clearance;

- PGCL did not release the excess duty paid by the Taxpayer during their clearance, thus rendering the Taxpayer to bear the cost of the excess duty paid on account of a downward price reduction. The same is also supported by the following:
  - Worksheet furnished by the Taxpayer stipulating that the amount claimed as refund has not been realised by the Taxpayer;
  - Financial Statements indicating that the excess duty paid is 'debited' to loans and advances;
  - Chartered Accountant Certificate indicating that tax incidence has not been passed on to PGCL;
  - Certificate issued by PGCL stating that they have not reimbursed duty to the Taxpayer.
- The Taxpayer relied on the following judicial precedents:
  - **M/s. EPE Process Filters & Accumulators Pvt. Ltd. Vs. CCE & ST, Hyderabad [2017 (352) ELT 398 (Tr.-Hyd.)]** wherein it was held that when the assessee has not collected the excess duty, it cannot be held that the refund is hit by unjust enrichment.
  - **CCE, Coimbatore Vs. Flow-Tech Power [2006 (202) ELT 404 (Mad.)]** and **Commissioner of CCE & ST, Hyderabad-IV Vs. Victory Transformers and Switchgears Ltd. [2017 (358) ELT 354 (Tri.-Hyd.)]** wherein it was held that when there is a price variation clause resulting in excess payment of duty, the supplier is entitled to claim a refund based on the Chartered Accountant Certificate proving that the incidence of duty has not been passed.
  - **CCE, Tirupathi Vs. Kruool Cylinders Pvt. Ltd. [2007 (219) ELT 473 (Tri.-Bang.)]** and **CCE, Mangalore s. Keltech Energies Ltd. [2008 (232) ELT 306 (Tri.-Chennai)]** wherein an identical case, CESTAT held that there is no unjust enrichment and hence, the supplier is entitled to claim a refund of excess tax paid.

The contention by the Tax authority

- As per the Letter of Award (LOA), the contract price is exclusive of taxes and duties which must be reimbursed by PGCL at the applicable rates. Further, 90% of the product price must be paid on the issuance of the invoice and the entire payment must be released on the presentation of the invoice;
- Hence, the Taxpayer's contention that PGCL has not reimbursed the duty supported by the certificate issued by PGCL cannot be accepted;
- It was also contended that the Chartered Accountant certificate cannot be the sole basis to hold that the incidence of duty has not been passed.

Observations and Ruling of the CESTAT

- CESTAT observed that it is undisputed that there has been excess payment of duty on account of downward price revision. It was also observed that when the Taxpayer issues a negative invoice for downward price revision, the excess payment initially made by PGCL would stand adjusted against the final amount payable by PGCL, and hence, the excess payment was borne by the Taxpayer;
- Relying on the various judicial precedents cited by the Taxpayer, the CESTAT held that the refund was not hit by unjust enrichment.
- Considering the above, the CESTAT held that the Taxpayer is entitled to claim a refund on merits.

  [CESTAT-Chennai, M/s. Deepak Cables India Ltd Vs Commissioner of GST And Central Excise-Puducherry dated 20 February 2023]

EXCISE DUTY IS NOT PAYABLE ON SCRAP/WASTE GENERATED ON REPLACEMENT OF PIPES USED IN THE OIL PRODUCTION PROCESS

Facts of the case

- M/s. Cairn India Ltd (Taxpayer) is engaged in producing oil by drilling. In the process of manufacture/production of oil, plastic barrels in which input chemicals are procured arise as scrap. Further, due to wear and tear, the pipes used in the production of oil require replacement and the residuary portion of pipes arise as waste/scrap;
- The aforesaid waste/scrap is sold by the Taxpayer to third parties;
- The Tax Authority alleged that process generating waste/scrap in the process of manufacturing of excisable goods (i.e., oil) is leviable to Excise duty. Accordingly, three show-cause notices were issued by the Tax Authority which were subsequently confirmed in the adjudicating orders;
- Further, the appeals filed by the Taxpayer against such orders were dismissed upholding the adjudicating orders;
- Aggrieved by the above, the Taxpayer filed an appeal before the CESTAT.

Contentions by the Taxpayer

- The Taxpayer contended that waste/scrap in the form of pipes and barrels only arises in the process of production of oil and that such waste/scrap is not manufactured by the Taxpayer. It was further submitted that unless the goods are manufactured, no Central Excise duty can be levied by the Tax Authority;

- Taxpayers also relied on **Grasim Industries Ltd. Vs. Union of India [2011 (273) ELT 10 (SC)]**, wherein it was held that waste and scrap which is not generated as a result of manufacture is not exigible for Excise duty;
- It was also contended that no goods can be manufactured on a large scale without using some capital goods and such capital goods cannot be treated as input. Therefore, the replacement of old pipes should be treated as waste generated in the course of maintenance of the said capital goods.

Contentions by the Tax authority

- The Tax Authority relied on **Grasim Industries Ltd.** (supra) and contended that the pipes in the present case are of significance because the entire production of oil is undertaken with the help of pipes, and therefore, such pipes act as an input to the manufacturing process itself as opposed to other companies where such pipes may be treated as capital goods;
- It was also contended that the generation of these pipes as scrap is inextricably linked to the production of oil and hence, the pipes must be treated as having been generated in the process of manufacture of the final product.

Observations and Ruling of the CESTAT

- CESTAT observed the subtle distinction between inputs and capital goods and held as follows:
  - When some waste is generated in the process of manufacturing goods, it comes out of the inputs directly or the inputs transform into some form. Thus, input is the substance of material which, after transformation, becomes the output;
  - On the contrary, capital goods are those goods which are used in the manufacture or production of the goods without getting transformed. Although the use of capital goods is inevitable for the manufacture of the final product, they do not get transformed into the final product. Accordingly, during the maintenance of such capital goods, if such waste is generated, such waste cannot be construed to be arising out of the manufacture of the final product.
- Applying the above to the present case, CESTAT noted that the pipes do not get consumed and do not get transformed into oil. Hence, they can be treated as capital goods and not inputs;
- CESTAT held that the waste generated during the repair or maintenance of pipes (i.e., capital goods) cannot be treated as scrap generated during the process of production of oil or any process incidental or ancillary to it. Consequently, no Excise duty can be levied on such waste/scrap;
- Similarly, empty barrels are only packing material in which the inputs are received, and these barrels are not generated during the process of manufacture hence, such waste/scrap cannot be made exigible for Excise duty;
- Given the above, the impugned orders confirming Excise duty demand on waste/scrap are set aside and the appeals filed by the Taxpayer are allowed.

[CESTAT-Delhi, M/s Cairn India Ltd Vs. Assistant Commissioner, Central Excise Division, Jodhpur dated 17 February 2023]

TRANSFER PRICING

MARKUP OF 5% IS SUITABLE FOR IT SUPPORT SERVICES RECEIVED FROM ASSOCIATED ENTERPRISE (AE)

The taxpayer is engaged in providing financial services. The taxpayer availed IT support services from its AE on a cost-plus 5% markup basis. The costs allocated by the AE included certain costs which were third-party costs. The Transfer Pricing Officer (TPO) held that the third-party costs do not warrant a markup by the AE, since the AE does not add any value to the functions performed by the third party. Further, the third-party cost allocated already includes markup and a double markup is not justified.

Before the Dispute Resolution Panel (DRP), the taxpayer submitted that the assumption of the TPO that the entire allocated cost is the third-party cost is incorrect since they included certain costs incurred by the AE in the provision of services. Further, the taxpayer iterated that a 5% markup on low value-adding services is supported by multiple international guidance such as EU Joint Transfer Pricing Forum, BEPS Action Plan 8-10, etc. However, the DRP upheld the decision of the TPO.

On a detailed perusal of the paper book by the ITAT, it was observed that the third-party costs were passed on by the AE on a cost-to-cost basis, while a mark-up was levied only on the additional costs incurred by the AE in connection to the services provided. In this connection, the ITAT held that a markup of 5% is sufficient to recoup the expenditure incurred by the AE in the exploration, inspection, testing and finalising of the suitable software to be used by the group. Accordingly, a 5% markup shall be allowed on the support services rendered by the AE.

DCIT Vs. BMW India Financial Services Pvt Ltd [TS-68-ITAT-2023(DEL)-TP]

ADVANCE EXTENDED TO AE CHARACTERISED AS LOAN AND NOT QUASI-EQUITY; INTEREST TO BE BENCHMARKED TO THE CURRENCY IN WHICH THE LOAN IS TO BE REPAID

The taxpayer contributed a certain sum of money in US dollars (USD) to its AEs in Singapore. The TPO is characterised the same as a loan and adjusted interest at Singapore Prime Lending Rate (PLR) for the entire year.

In an appeal before the Commissioner of Income-tax (Appeals) (CIT(A)), the TPO contented that the taxpayer itself had disclosed the advance as a loan in its audited financial statements. Further, only when the question of interest benchmark came up, the taxpayer contended that the loan was quasi-equity in nature albeit without submitting any documents to support this claim.

Accordingly, the CIT(A) characterised the advance as a loan and computed interest based on the currency in which the load was to be repaid i.e., USD. While doing so, the CIT(A) observed that the interest rates in the national currency of the borrower/lender vary considerably and are dependent on the fiscal policy of the respective central banks, whereas interest rates of currency-specific loans are universal and globally applicable.

The ITAT upheld the decision of the CIT(A) in connection to the rate of interest while making the following additional observations in connection with the characterisation of the advance:

- The decisions of the coordinate benches, where references have been made to the advances being characterised as 'quasi-capital', are situations in which (a) advances were made as capital and could not be subscribed to due to regulatory issues and the advancing of loans was only for the period till the same could be converted into equity, and (b) advances were made for subscribing to the capital but the issuance of shares was delayed;

- Quasi capital loan is not a routine loan transaction and the reward for the same is the opportunity to own the capital vis-à-vis a routine loan transaction, where the reward is interest, which is a percentage of the money advanced.

DCIT Vs. Adani Power Ltd [TS-82-ITAT-2023(Ahd)-TP]

PLEA FOR CAPACITY UNDER-UTILISATION ADJUSTMENT REJECTED ON ACCOUNT OF NON-SUBMISSION OF INDUSTRY TREND DETAILS

The taxpayer is engaged in the manufacturing and trading of computer systems including support and maintenance services and leasing of computers. The TPO adjusted the arm's length price determined by the taxpayer in its TP documentation, by (amongst other issues) rejecting the capacity under-utilisation adjustment undertaken by the taxpayer. The DRP upheld the decision of the TPO.

Before the ITAT, the taxpayer submitted data in connection with the under-utilisation of its capacity for the last three years. However, the ITAT rejected the taxpayer's plea for granting capacity under-utilisation adjustment, by observing the following:

- The taxpayer was not in the initial stages of operation and accordingly, the adjustment cannot be granted without analysing additional factors.
- The reasons for under-utilisation of the taxpayer's capacity have also not been provided.
- The downslide in the business is an industry-specific phenomenon and not affecting only the taxpayer.
- The details of the general industry utilisation trend or the circumstances existing in the industry which have led to under-utilisation of capacity have not been provided by the taxpayer.
- The taxpayer had incorrectly assumed that the capacity utilisation of the comparable companies is 100% while computing the adjustment.
- While calculating the capacity adjustment taxpayer had incorrectly considered all costs without any analysis for determining the fixed/variable/semi-variable nature of the costs.
- The taxpayer has under-utilised capacity for the year under consideration and accordingly it is legally and factually eligible for capacity under-utilisation adjustment. However, the same should have been demonstrated.

ACIT Vs Dell International Services India Private Limited [TS-43-ITAT-2023(Bang)-TP]

CUP OVER TNMM FOR ALP DETERMINATION RELATING TO A LICENSE FEE

The taxpayer is engaged in the manufacturing of clinkers and cement. The taxpayer received licence fees amounting to INR 25 lakhs being 0.30% of the net sales, from its Sri Lankan AE (Holcim Lanka Ltd.). The taxpayer benchmarked the said transaction under Transactional Net Margin Method (TNMM) (entity-level benchmarking).

Relying on the case of Serdia Pharmaceuticals Pvt Ltd Vs ACIT [(2011) 44 SOT 391 (Bom)], where it was held that the CUP method should be preferred in case the value of the transaction is small, the TPO selected CUP as the most appropriate method and rejected TNMM in case of the taxpayer also.

Accepting the approach of the TPO, the taxpayer submitted a few comparable agreements to the TPO. Further, the TPO added a few agreements identified by him as comparable. Based on the same, the TPO computed the arm's length rate of royalty as 4% of net sales. The CIT(A) upheld the approach and adjustment of the TPO.

Further, in the absence of any substantive arguments from the taxpayer, the ITAT confirmed the findings of the CIT(A).

ACIT Vs. Ambuja Cement Limited [TS-928-ITAT-2022(Mum)-TP]

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