The Institute of Chartered Accountants of India

(Set up by an Act of Parliament)

KALYAN DOMBIVALI BRANCH OF WIRC OF ICAI

Issue No.5
August 2019

e News Letter

Josh : Joy of Sharing & Helping

Powered By Professionalism
Driven by Values

Managing Committee

CA Saurabh S. Marathe
Chairman

CA Ankit R. Agarwal
Vice Chairman

CA Jeetu A. Ramrakhiyani
Secretary

CA Mayur K. Jain
Treasurer

CA Kiran R. Gangwani
WICASA Chairperson

CA Kaushik Z. Gada
Committee Member

CA Parag S. Prabhudesai
Committee Member

Newsletter Committee

CA Parag S. Prabhudesai
Chairman

CA Jeetu A. Ramrakhiyani
Convener

Members

CA Shekhar S. Patwardhan

CA Rohan R. Pathak

CA Amit A. Mohare

CA Keyur M. Gangar

Seasons Greetings to all the members of the Branch,

Monsoon is always a season that brings transformation. Water is Life and hence the monsoon is nothing less than life for us. That's the reason this month's News Letter has a theme of Monsoon. I must thank and appreciate the efforts of the Newsletter committee well lead by CA Parag Prabhudesai. I am sure the recent updates and useful articles included in this Newsletter will be really of great use to the members. Although the Monsoon has arrived late this year, it is here to stay. In fact there has been heavy rainfall in many places including Maharashtra and Gujrat. On one hand it has caused problems for the citizens it also has solved the problem of scarcity of the water. Also, if the cultivation is boosted by the satisfactory monsoon it will definitely have its positive impact on national economy which according to many is sluggish in terms of growth. Economic growth will also boost the professional opportunities for the CA Fraternity.

In the month of July 2019, Branch successfully completed the DISA Batch at Kalyan. We are very glad to Branch has also been working on hosting a course by ICAI Registered Valuers Organization in the month of September-October 2019. Many of the members are keen to appear for the exams conducted by the ICAI RVO and for that the said course will be a great advantage. The details of the batch will be published on website as well as through social media at the earliest. I request the members of the Branch to kindly enroll for the course and take maximum advantage of the same.

On 21st July 2019 Branch organized first ever Students festival named TARANG 2019 at K C Gandhi auditorium. I must say the students of the ICAI possess multiple talents apart from being excellent with the academics. The program was attended by about 300 students and 60 participants. It was a grand success and I congratulate the WICASA team of the Branch which is lead well by the WICASA Chairperson CA Kiran Gangwani along with the entire managing committee of the Branch. Event had Music, Drama, Stand Up, Indian Dance, Fancy Dress competition and Mehendi Competition. Such programs are not only needed to work as a stress buster for the students but also are excellent platform to garner the talents of the students. We are thankful to the BOS ICAI and the WIRC for great support provided by them. I am thankful to the WICASA Chairman WIRC CA Jayesh Kala for gracing the event.

Branch had a very fruitful AGM on 25th July 2019. The inputs received from senior members like CA Mukund Bapat and CA Madhav Khisti will really act as a guiding force for the Branch. I am thankful for members for actively participating in the meeting and making it a success.

Branch concluded the Orientation Batches at Bhiwandi and Ulhasnagar which was the first batch at the location. We are glad to get a very good response and we are focused to host more number of batches at these locations. I request the members to kindly inform their articles about the batches being conducted at their doorstep and urge the students to participate in the batches. This will save lot of time and energy, it also is worth as we ensure that the best of the faculties come and coach the students at the branch.

On 09th and 10th August 2019, WIRC is having its 34th Regional Conference. The compilation of the topics and the eminence of the speaker is such that it's a 'must to attend' event. Regional conference is a great culture of WIRC and participants are always enlightened by the variety of the topics and value addition to the knowledge base. One can feel the nerve of the profession and direction in which profession will progress and how members need to align themselves to the change. Hence, I make a sincere appeal to all the members of the Branch to attend the conference in large numbers.

Branch is planning for workshops on GST at various locations in first half of the month of August 2019. We believe that these will assist the members in filing the GST annual return in form 9 and Audit report in 9C for which the due date is fast approaching. Members are kindly requested to take benefits of these work-shops.

We are really keen on having more and more members contributing to the Newsletter of the Branch. Therefore, we are beginning with an effort by which the Newsletter committee will provide the members with a case study under Income Tax Act or GST Law on which members would be requested to send their views. The Best Case-study presented would be included in the next month's Newsletter of the Branch. I am aware that there are many members in our branch who are keen learners of the various enactments and they would really like to enhance the knowledge of the other members by providing their inputs on the cases. It not only will enhance the participation of the Members but also will help us to gain additional knowledge. is keen to have more and more participation in Newsletter of the Branch

I wish each and every member of the Branch a great time ahead. I know the pressure of various due dates is mounting and we all will have challenges in completing the tasks. However, the CAs are always ready for the challenges and I daresay we love to be challenged. I am sure we will all complete our respective assignments with fullest integrity and professional approach. Wishing you all the very best, I remain.

CA Saurabh S. Marathe

Chairman

Kalyan Dombivli Branch of WIRC of ICAI

Direct Tax Case Laws Update's

(Contributed by CA Shekhar S. Patwardhan)

SUPREME COURT CASES

1. **The Peerless General Finance and Investment Co Ltd Vs CIT (CIVIL Appeal No 1265 of 2007 Date of Publication 20th July 2019) :Section 4**

   Conclusion: -
   S. 4: The primary liability and onus is on the Department to prove that a certain receipt is liable to be taxed. Deposits collected by a finance company are capital receipts and not revenue receipts. The fact that the deposits are credited to the profit and loss account is irrelevant. The true nature of the receipts have to be seen and not the entry in the books of accounts.

2. **Global Estates Vs CIT (SLP No 35004 – 35005 Date of Publication 20th July 2019) : Section 80 IB (10)**

   Conclusion: -
   Issuance of completion certificate, after the cut-off date by the Local Authority but, mentioning the date of completion of project before the cut-off date, does not fulfil the condition specified in clause (a) of Section 80IB (10) read with Explanation (ii) thereunder. We reject the argument of the assessee that the effect of amended clause (a) of sub-Section 10 of Section 80IB, which has come into force with effect from 1st April 2005, has retrospective effect or that it is unjust in any manner or incapable of compliance at all

HIGH COURT CASES

1. **Kalpana Ashwin Shah Vs ACIT (Writ Petition No 1887 of 2019 Date of Publication 20th July 2019)Section 220 (6) : BOMBAY HIGH COURT**

   Conclusion: -
   S. 220(6) Stay of demand: The decision of the authorities to demand payment of 20% of the disputed demand is in consonance with the department's circulars. There are no extra ordinary reasons for imposing condition lighter than one imposed by the authorities. The contention that the assessee has received no consideration and no tax could have been demanded from him is subject matter of the Appeal proceedings and cannot be a ground for lifting the rigor of the requirement of deposit of 20% of the disputed tax pending appeal.

2. **Royal Rich Developers Pvt Ltd Vs PCIT (Income Tax Appeal No 439 of 2017 Date of Publication 27th July 2019) Section 68 A.Y 2007-08 : BOMBAY HIGH COURT**

   Conclusion: -
   S. 68 Bogus Share Capital: No rational person with sound mind will invest huge amount in the share subscription of a paper/ shell company having no worthwhile business/project in hand at such a huge premium. The onus is on the assessee to prove the genuineness of the transaction as well credit worthiness of the share subscribers. The failure to produce the subscribers and statement of the director that the entire investment is bogus justifies the addition.

3. **PCIT Vs Paramshakti Distributors Pvt Ltd (Income Tax Appeal No 413 of 2017 Date of Publication 27th July 2019) : Section 68 A.Y 2005-06 : BOMBAY HIGH COURT**

   Conclusion: -
   S. 68 Bogus Purchases: Despite admission by the assessee that the purchases were mere accommodation entries, the entire expenditure cannot be disallowed. Only the profit embedded in the purchases covered by the bogus bills can be taxed. The GP rate disclosed by the assessee cannot be disturbed in the absence of incriminating material to discard the book results.

4. **The Swastik Safe Deposit and Investments Ltd Vs ACIT (Writ Petition No 1230 of 2019 Date of Publication 3rd July 2019) : Sections 143 (1) , 147, 148 AY 2011-12 : BOMBAY HIGH COURT**

   Conclusion: -
   Sections:- 147/ 148: Even in a case where the return is accepted u/s 143(1) without scrutiny, the fundamental requirement of income chargeable to tax having escaped assessment must be satisfied. Mere non-disclosure of receipt would not automatically imply escapement of income chargeable to tax from assessment. There has to be something beyond an unintentional oversight or error on the part of the assessee in not disclosing such receipt in the return of income. In other words, even after non-disclosure, if the documents on record conclusively establish that the receipt did not give rise to any taxable income, it would not be open for the AO to reopen the assessment referring only to the non-disclosure of the receipt in the return of income. The attempt of further verification would amount to rowing inquiry.

TRIBUNAL CASES

1. **Chheda Housing Development Corporation Vs ACIT (ITA No 86 / Mum / 2017 Date of Publication 6th July 2019) : Sections 2(14),45, 48 AY 2012 -13 : MUMBAI TRIBUNAL**

Conclusion: -

Capital vs. Revenue Receipt: Damages received for breach of development agreement are capital in nature & not chargeable to tax. The only right that accrues to the assessee who complains of breach is right to file a suit for recovery of damages from the defaulting party. A breach of contract does not give rise to any debt. A right to recover damages is not assignable because it is not a chose-in-action. Such a mere 'right to sue' is neither a capital asset u/s 2(14) nor is it capable of being transferred & is therefore not chargeable under u/s 45 of the Act.

2. **Anil Kishanlal Marda Vs ITO (ITA No 1763 / Pune / 2013 Date of Publication 3rd July 2019) : Sections 143 (2) , Rule 127 AY 2009-10 : PUNE TRIBUNAL**

Conclusion: -

S. 143(2) Notice/ Rule 127: There is a difference between "issue" of notice and "service" of notice. Service of notice is a pre-condition for assuming jurisdiction to frame the assessment. Under Rule 127, service at the PAN address is valid even if it is different from the address in the Return. If a notice is issued but is returned unserved by the postal authorities and thereafter no effort is made to serve another notice before the deadline, it shall be deemed to be a case of "non-service" and the assessment order will have to be quashed.

International Taxation Update's

(Contributed by CA Prerna K. Peshori)

Amendments in Finance Bill 2019 relating to International Taxation :

1. **Deemed accrual of gift made to a non-resident:**

Section 9(1) has been amended by introducing clause (viii) to provide that income under section 56(2)(x), being any sum of money paid by a person resident in India to person resident outside India on or after 5th day of July 2019, shall be deemed to accrue or arise in India. In the Finance Bill 2019 even the property was covered, which was removed subsequently when the bill was passed by Lok Sabha.

Therefore, the amended section now provides that sum of money paid by a person resident in India to a non-resident, not being a company or to a foreign co. shall be included in the expanded income definition. Further, any resident gifting money (whether or not situated in India) to a non-resident would need to keep in mind the provisions of section 195 while making such gifts. While the above amendment is prospective in nature, the question arises is whether one can take a stand that such gift was not accruing or arising in India prior to the amendment and therefore, not taxable in earlier years.

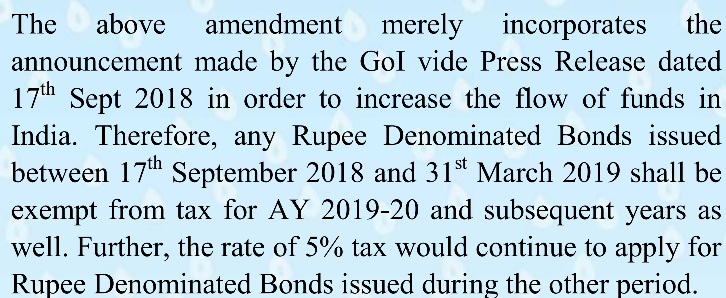
2. **Relaxation in conditions of special taxation regime for off-shore funds:**

Presently, section 9A provides that fund management activity carried out through an eligible fund manager located in India shall not constitute a business connection in India provided certain prescribed conditions are satisfied. Two of the conditions relates to the corpus size of the fund to be maintained for certain period of time and payment of remuneration payable to an eligible fund manager in respect of fund management activities. These two conditions have been liberalized considering the representation received from the fund managers. This amendment is retrospectively applicable from AY 2019-20 onwards.

3. **Exemption of interest on Rupee Denominated Bonds**

Section 194LC provides for a lower rate of tax of 5% on interest paid by an Indian company to a non-resident on Rupee Denominated Bonds issued before 1st July 2020.

The section has been amended to provide that interest paid by an Indian company to a non-resident on Rupee Denominated Bonds issued between 17th September 2018 and 31st March 19 shall be exempt from tax.



The above amendment merely incorporates the announcement made by the GoI vide Press Release dated 17th Sept 2018 in order to increase the flow of funds in India. Therefore, any Rupee Denominated Bonds issued between 17th September 2018 and 31st March 2019 shall be exempt from tax for AY 2019-20 and subsequent years as well. Further, the rate of 5% tax would continue to apply for Rupee Denominated Bonds issued during the other period.

4. Incentives to IFSC

The Finance Minister in the Union Budget 2015 had announced the setting up of India's first IFSC at GIFT city in Gujarat. IFSC caters to customers outside the jurisdiction of domestic economy, dealing with the flow of finance, financial products and services across borders.

To further promote development of IFSC and bring them in par with similar IFSC in other countries, following additional tax benefit are provided:

- The exemption from the capital gains tax available under section 47(viiab) will be extended to such other securities, to be notified by the Central Government.
- New clause 4D is introduced to Section 10 to provide for exemption for any income accrued or arisen to, or received by a specified fund as a result of transfer of capital asset referred to in under section 47(viiab) [Transfer of GDR/ RDBs/derivative] on a recognized stock exchange located in any International Financial Services Centre [IFSC], and where consideration for such transaction is paid or payable in convertible foreign exchange, to the extent such income accrued or arisen to, or is received in respect of units held by a non-resident. Specified fund is a trust/a company/a LLP/ a body corporate, established or incorporated in India and registered as Category III AIF regulated by SEBI, where all the unit holders are non-residents and satisfying other prescribed conditions.
- Deduction under section 80LA has been increased to 100% for 10 consecutive AYs. Further, deduction can now be claimed for any 10 consecutive AYs out of 15 years beginning with the year in which necessary permission was granted.
- In order to facilitate external borrowings by the units in IFSC, section 10(4C) has been inserted whereby any interest payable after 1st September 2019 by such unit in IFSC to a non-resident on rupee denominated bonds will be exempt from income tax.
- In order to incentivize relocation of mutual funds to IFSC, no DDT would be payable on any income distributed on or after 1st Sept 2019 by a specified mutual fund. Specified mutual fund would mean a Mutual Fund specified under clause 10(23D) located in IFSC, which derives income solely in convertible foreign exchange and of which all unit holders are non-residents.
- The exemption from payment of DDT only available for the dividend declared out of current income, has now been extended to dividend paid, out of accumulated income earned after 1stApril, 2017. The said amendment will be applicable from 1st September 2019

5. Clarification regarding Secondary adjustment

The provision relating to secondary adjustment on the specified primary adjustment was introduced by the Finance Act, 2017 w.e.f. AY 2018-19. There were concerns with regards to implementation of secondary adjustments for years prior to AY 2017-18. It has now been clarified that the secondary adjustment would not get triggered, when the primary adjustment does not exceed INR 1 crore or primary adjustment is made for the period prior to AY 2017-18. Accordingly, secondary adjustment cannot be made in respect of primary adjustment for AY 2016-17 and earlier AYs, even if the threshold of INR 1 crore is breached.

As per existing provision, if there is any increase in total income/ reduction of loss on account of primary adjustment, the excess money is deemed to be available with the AE which was required to be repatriated to India with the prescribed time. Where the excess money has not been brought into India within the specified time, the same shall be deemed to be an advance and interest on such advance shall be computed in the manner prescribed and taxed as secondary adjustment.

It has now been clarified that

- The assessee will be required to calculate interest on excess money or part thereof.
- Excess money to be repatriated back to India can be received from any of the non- resident AEs of the assessee.
- Secondary adjustment applicable only in case of APA signed on or after 1 April 2017. However, no refund of taxes already paid under the pre amended section would be allowed.

Option to make one-time payment on Secondary adjustment

Provision relating to Secondary adjustment now provides an option to make one-time payment of additional tax to stop secondary adjustment.

- If the excess money or the part thereof is not repatriated within time, the assessee has been granted an option to pay one time additional tax at 20.16% (18% tax plus surcharge of12%)
- This additional tax so paid by the assessee would be the final tax, non-deductible in nature. No credit of such additional tax paid can be claimed by the assessee against any other tax liability.
- Once the taxpayer pays additional tax, he will not be required make secondary adjustment or compute interest from the date of payment of such tax.

Clarification regarding accounting year for the purpose of CBCR filing

The term "accounting year" as per section 286(9) means a previous year in case, where a parent entity or alternate reporting entity is a resident in India. There were certain concerns in relation to the accounting year to be followed, in case of an alternate reporting entity in India with a parent entity outside India.

It has now been clarified that the reporting accounting year to be followed by such alternate reporting entity would be the previous year applicable to parent entity

The above amendment will take effect retrospectively from AY 2017-18.

Master file to be filed by every Indian constituent entity

Presently, proviso to section 92D(1) requires every person being a constituent entity of an international group to keep and maintain prescribed documents relating to master file. Accordingly, some of the Indian companies, even though constituent entities of an international group, were not complying with provisions relating to Master file, on the ground that they had not entered into any international transaction or Specified Domestic transaction.

It is now provided that the information and documents relating to Master file are to be kept and maintained by all Indian constituent entities of an international group, and filing of required form shall be applicable even when there is no in ternational transaction undertaken by such constituent entities.

Powers of AO in respect of modified Tax Return filed pursuant to signing of APA

Section 92CD provides for mechanism for filing of modified tax return on signing of APA and manner of completion of assessment or reassessment by the AO. Presently, the wording of section 92CD(3) suggest that the AO has powers to start fresh assessment or reassessment even in respect of assessment which were completed before the signing of the APA, once modified tax return is filed by the assessee in pursuance to APA.

Section 92CD(3) is modified so as to provide that the AO can only pass an order modifying the total income consequent to modification of tax return in pursuance to APA and cannot start fresh assessment or reassessment.

Rationalisation of provisions of BMA

Presently, the definition of assessee under section 2(2) of BMA only covers an ordinary resident of India by whom tax is payable in India under the BMA on undisclosed foreign income and assets. As a result, non-residents and not ordinarily residents are not covered under definition of assessee under BMA. Further, section 72 of BMA provides that where an undisclosed / undeclared foreign asset is acquired prior to commencement of the BMA, the date of acquisition of such asset would be deemed to be the year in which notice is issued by AO under BMA.

The provisions of BMA are now applicable, with retrospective effect from 1 July 2015, not only to residents but also non-residents and not ordinarily residents who were resident at the time when undisclosed foreign income or assets were acquired.

The amendment mainly appears to cover situations where defaulting residents may have subsequently become non-residents or not ordinarily residents in India and could challenge the application of BMA.

Indirect Tax Law Update's

(Contributed by CA Rohan Pathak)

Key amendments being proposed in Goods and Service Tax Act, 2017 under Finance (No. 2) Act, 2019 i.e. **Union Budget 2019** are as follows:-

- **Every registered person shall authenticate**, or furnish proof of possession of Aadhaar number. If an Aadhaar number is not assigned to the registered person, such person shall be offered an alternate and viable means of identification. In case of failure to undergo authentication or furnish proof of possession of Aadhaar number or furnish alternate and viable means of identification, registration allotted to such person shall be deemed to be invalid.
- The Central Government has been authorized to pay the amount of refund towards State taxes to the taxpayers.
- The Government shall constitute an Authority 'National Appellate Authority for Advance Ruling (NAAAR)' for hearing appeals. It shall pass an order within 90 days from the date of filing of appeal.
- A Proviso has been inserted to clarify that interest for late payment of tax shall be levied only on that **portion of tax which has been paid by debiting the electronic cash ledger.**
- Earlier there was a confusion among taxpayers on this issue whether such interest would be charged on gross tax liability or only on net tax liability.
- However, there is one exception to this rule wherein interest shall be levied on gross tax liability. Where returns are filed subsequent to initiation of any proceedings under GST Act, the interest shall be levied on the gross tax liability.
- Now a registered person can transfer any amount of tax, interest, penalty, fee or any other amount available in the electronic cash ledger to the electronic cash ledger for Integrated Tax, Central Tax, State Tax, Union Territory Tax or Cess through a new **Form PMT-09** subject to the conditions and restrictions prescribed under GST Act. Such transfer shall be **deemed to be a refund** from the **electronic cash ledger.**
- The value of exempt supply of services provided by way of extending deposits, loans or advances (where consideration is received in form of interest or discount) shall not be considered for determining turnover under Composition Scheme.

1. A committed panel to close pending pre-GST litigations

"Sabka Vishwas Legacy Dispute Resolution Scheme" will be launched soon to address and close the pending litigations that were raised under the central excise and service tax regime. It will run on a dispute resolution cum amnesty model.

FM in the Union Budget 2019 stated that there is more than Rs 3.75 lakh crore blocked in pre-GST tax litigations. The scheme will fasten the legal process involved in certain pre-GST cases on issues that are still ambiguous and pending before the tribunal.

Under the scheme, relief is provided in depositing the tax dues ranging from 40%-70% of the tax due under dispute for all cases, other than those disclosed voluntarily. The parties can settle all kinds of excise and service tax disputes, except for the following:

- Cases already pending before the settlement commission or
- Cases where parties face conviction.

Other benefits include waiver of interest and penalty on full payment of tax dues and not being subject to prosecution.

Clarification regarding Annual Returns and Reconciliation Statement—Press release 3rd July, 2019.

a Payment of any unpaid tax: Section 73 of the CGST Act provides a unique opportunity of self – correction to all taxpayers i.e. if a taxpayer has not paid, short paid or has erroneously obtained/been granted refund or has wrongly availed or utilized input tax credit then before the service of a notice by any tax authority, the taxpayer may pay the amount of tax with interest. In such cases, no penalty shall be leviable on such tax payer. Therefore, in cases where some information has not been furnished in the statement of outward supplies in FORM GSTR-1 or in the regular returns in FORM GSTR-3B, such taxpayers may pay the tax with interest through FORM GST DRC-03 at any time. In fact, the annual return provides an additional opportunity for such taxpayers to declare the summary of supply against which payment of tax is made.

b Primary data source for declaration in annual return: Time and again taxpayers have been requesting as to what should be the primary source of data for filing of the annual return and the reconciliation statement. There has been some confusion over using FORM GSTR-1, FORM GSTR-3B or books of accounts as the primary source of information. It is important

to note that both FORM GSTR-1 and FORM GSTR-3B

serve different purposes. While, FORM GSTR-1 is an account of details of outward supplies, FORM GSTR-3B is where the summaries of all transactions are declared and payments are made. Ideally, information in FORM GSTR-1, FORM GSTR-3B and books of accounts should be synchronous and the values should match across different forms and the books of accounts. If the same does not match, there can be broadly two scenarios, either tax was not paid to the Government or tax was paid in excess. In the first case, the same shall be declared in the annual return and tax should be paid and in the latter all information may be declared in the annual return and refund (if eligible) may be applied through FORM GST RFD-01A. Further, no input tax credit can be reversed or availed through the annual return. If taxpayers find themselves liable for reversing any input tax credit, they may do the same through FORM GST DRC-03 separately.

c Premise of Table 8D of Annual Return: There appears to be some confusion regarding declaration of input tax credit in Table 8 of the annual return. The input tax credit which is declared / computed in Table 8D is basically credit that was available to a taxpayer in his FORM GSTR-2A but was not availed by him between July-2017 to March-2019. The deadline has already passed and the taxpayer cannot avail such credit now. There is no question of lapsing of any such credit, since this credit never entered the electronic credit ledger of any taxpayer. Therefore, taxpayers need not be concerned about the values reflected in this table. This is merely an information that the Government needs for 3 rd July 2019 Page 2 of 3 settlement purposes. Figures in Table 8A of FORM GSTR-9 are auto-populated only for those FORM GSTR-1 which were furnished by the corresponding suppliers by the due date. Thus, ITC on supplies made during the financial year 2017-18, if reported beyond the said date by the corresponding supplier, will not get auto-populated in said Table 8A. It may also be noted that FORM GSTR-2A continues to be auto-populated on the basis of the corresponding FORM GSTR-1 furnished by suppliers even after the due date. In such cases there would be a mis-match between the updated FORM GSTR-2A and the auto-populated information in Table 8A. It is important to note that Table 8A of the annual returns is auto populated from FORM GSTR-2A as on 1st May, 2019.

d Premise of Table 8J of Annual Return: In the press release on annual return issued earlier on 4th June 2019, it has already been clarified that all credit of IGST paid at the time of imports between July 2017 to March 2019 may be declared in Table 6E. If the same is done properly by a taxpayer, then Table 8I and 8J shall contain information on credit which was available to the taxpayer and the taxpayer chose not to avail the same. The deadline has already passed and the taxpayer cannot avail such credit now. There is no question of lapsing of any such credit, since this credit never entered the electronic credit ledger of any taxpayer. Therefore, taxpayers need not be concerned about the values reflected in this table. This is information that the Government needs for settlement purposes.

e Difficulty in reporting of information not reported in regular returns: There have been a number of representations regarding non-availability of information in Table16A or 18 of Annual return in FORM GSTR-9. It has been observed that smaller taxpayers are facing a lot of challenge in reporting information that was not being explicitly reported in their regular statement/ returns (FORM GSTR-1 and FORM GSTR-3B). Therefore, taxpayers are advised to declare all such data / details (which are not part of their regular statement/returns) to the best of their knowledge and records. This data is only for information purposes and reasonable/explainable variations in the information reported in these tables will not be viewed adversely.

f Information in Table 5D (Exempted), Table 5E (Nil Rated) and Table 5F (Non-GST Supply): It has been represented by various trade bodies/associations that there appears to be some confusion over what values are to be entered in Table 5D,5E and 5F of FORM GSTR-9. Since, there is some overlap between supplies that are classifiable as exempted and nil rated and since there is no tax payable on such supplies, if there is a reasonable/explainable overlap of information reported across these tables, such overlap will not be viewed adversely. The other concern raised by taxpayers is the inclusion of no supply in the category of Non-GST supplies in Table 5F. For the purposes of reporting, non-GST supplies includes supply of alcoholic liquor for human consumption, motor spirit (commonly known as petrol), high speed diesel, aviation turbine fuel, petroleum crude and natural gas and transactions specified in Schedule III of the CGST Act.

g Reverse charge in respect of Financial Year 2017-18 paid during Financial Year 2018- 19: Many taxpayers have requested for clarification on the appropriate column or table in which tax which was to be paid on reverse charge basis for the FY 2017-18 but was paid during FY

18-19. It may be noted that since the payment

was made during FY 2018-19, the input tax credit on such payment of tax would have been availed in FY 2018-19 only. Therefore, such details will not be declared in the annual return for the FY 2017-18 and will 3 rd July 2019 Page 3 of 3 be declared in the annual return for FY 2018-19. If there are any variations in the calculation of turnover on account of this adjustment, the same may be reported with reasons in the reconciliation statement (FORM GSTR-9C).

h Role of chartered accountant or a cost accountant in certifying reconciliation statement: There are apprehensions that the chartered accountant or cost accountant may go beyond the books of account in their recommendations under FORM GSTR-9C. The GST Act is clear in this regard. With respect to the reconciliation statement, their role is limited to reconciling the values declared in annual return (FORM GSTR-9) with the audited annual accounts of the taxpayer.

i Turnover for eligibility of filing of reconciliation statement: It may be noted that the aggregate turnover i.e. the turnover of all the registrations having the same Permanent Account Number is to be used for determining the requirement of filing of reconciliation statement. Therefore, if there are two registrations in two different States on the same PAN, say State A (with turnover of Rs.1.2 Crore) and State B (with turnover of Rs.1 Crore) they are both required to file reconciliation statements individually for their registrations since their aggregate turnover is greater than Rs.2 Crore. The aggregate turnover for this purpose shall be reckoned for the period July, 2017 to March, 2018.

j Treatment of Credit Notes / Debit Notes issued during FY 2018-19 for FY 2017-18: It may be noted that no credit note which has a tax implication can be issued after the month of September 2018 for any supply pertaining to FY 2017-18; a financial/commercial credit note can, however, be issued. If the credit or debit note for any supply was issued and declared in returns of FY 2018-19 and the provision for the same has been made in the books of accounts for FY 2017-18, the same shall be declared in Pt. V of the annual return. Many taxpayers have also represented that there is no provision in Pt. II of the reconciliation statement for adjustment in turnover in lieu of debit notes issued during FY 2018-19 although provision for the same was made in the books of accounts for FY 2017-18. In such cases, they may adjust the same in Table 5O of the reconciliation statement in FORM GSTR-9C.

k Duplication of information in Table 6B and 6H: Many taxpayers have represented about duplication of information in Table 6B and 6H of the annual return. It may be noted that the label in Table 6H clearly states that information declared in Table 6H is exclusive of Table 6B. Therefore, information of such input tax credit is to be declared in one of the rows only.

l Reconciliation of input tax credit availed on expenses: Table 14 of the reconciliation statement calls for reconciliation of input tax credit availed on expenses with input tax credit declared in the annual return. It may be noted that only those expenses are to be reconciled where input tax credit has been availed. Further, the list of expenses given in Table 14 is a representative list of heads under which input tax credit may have been availed. The taxpayer has the option to add any head of expenses.

Clarification in respect of goods taken out of India for exhibition or on consignment basis for export promotion vide Circular No. 108/27/2019-GST dated 18.07.2019

- The activity of taking goods out of India on consignment basis for exhibition would not in itself constitute a supply under GST since there is no consideration received at this time.

- The movement of these goods out of India shall be accompanied by a delivery challan issued in accordance with the provisions contained in rule 55 of the CGST Rules.

- Since taking such goods out of India is not a supply, it necessarily follows that it is also not a zero-rated supply. Therefore, execution of a bond or LUT, as required under section 16 of the IGST Act, is not required.

- The goods taken out of India in this manner are required to be either sold or brought back within a period of six months from the date of removal.

- The supply would be deemed to have taken place if the goods are neither sold abroad nor brought back within the period of six months. In this case, the sender shall issue a tax invoice on the date of expiry of six months from the date of removal, in respect of the quantity of goods which have neither been sold nor brought back. The benefit of zero-rating, including refund, shall not be available in respect of such supplies.

- If the specified goods are sold abroad, fully or partially, within the period of six months, the supply shall be held to have been effected, in respect of the quantity so sold, on the date of such sale. In this case, the sender shall issue a tax invoice in respect of such quantity of goods which has been sold. These supplies shall become zero-rated supplies at the time of issuance of invoice. However, refund in relation to such supplies shall be available only as refund of unutilized ITC and not as refund of IGST.

- No tax invoice is required to be issued in respect of goods which are brought back to India within the period of six months.

Clarification to Circular No. 45/19/2018-GST dated 19/07/2019

- Certain registered persons, while filing the return in FORM GSTR-3B for a given tax period, committed errors in declaring the export of services on payment of IGST or zero-rated supplies made to a SEZ unit/developer on payment of IGST. They showed such supplies in the Table under column 3.1(a) (outward taxable supplies) instead of showing them in column 3.1(b) (zero rated supplies) of FORM GSTR-3B. Such registered persons were unable to file the refund application in FORM GST RFD-01A. This was because of an inbuilt validation check on the common portal which restricted the refund amount claimed to the amount mentioned under column 3.1(b) of FORM GSTR-3B filed for the corresponding tax period.

- In order to give relief to such registered persons, it was decided that for the tax periods from 01.07.2017 to 31.03.2018, they shall be allowed to file the refund application in FORM GST RFD-01A on the common portal subject to the condition that the amount of refund claimed shall not be more than the aggregate amount mentioned in the Table under columns 3.1(a), 3.1(b) and 3.1(c) of FORM GSTR-3B filed for the corresponding tax period. This was clarified vide Circular No. 45/19/2018-GST dated 30.05.2018.

- Certain registered persons have committed the errors, as detailed in para 1 above, even for tax periods after March, 2018 and are unable to claim refund of the taxes paid on export of services or supplies made to SEZ unit/developer for these periods. To help these persons, it has now been decided to extend the period of the relief, by way of the relaxed validation as detailed in para 2 above, till 30.06.2019. To this effect, a corrigendum to Circular No. 45/19/2018-GST has been issued on 18.07.2019. Exporters are encouraged to avail the benefit of this extension.

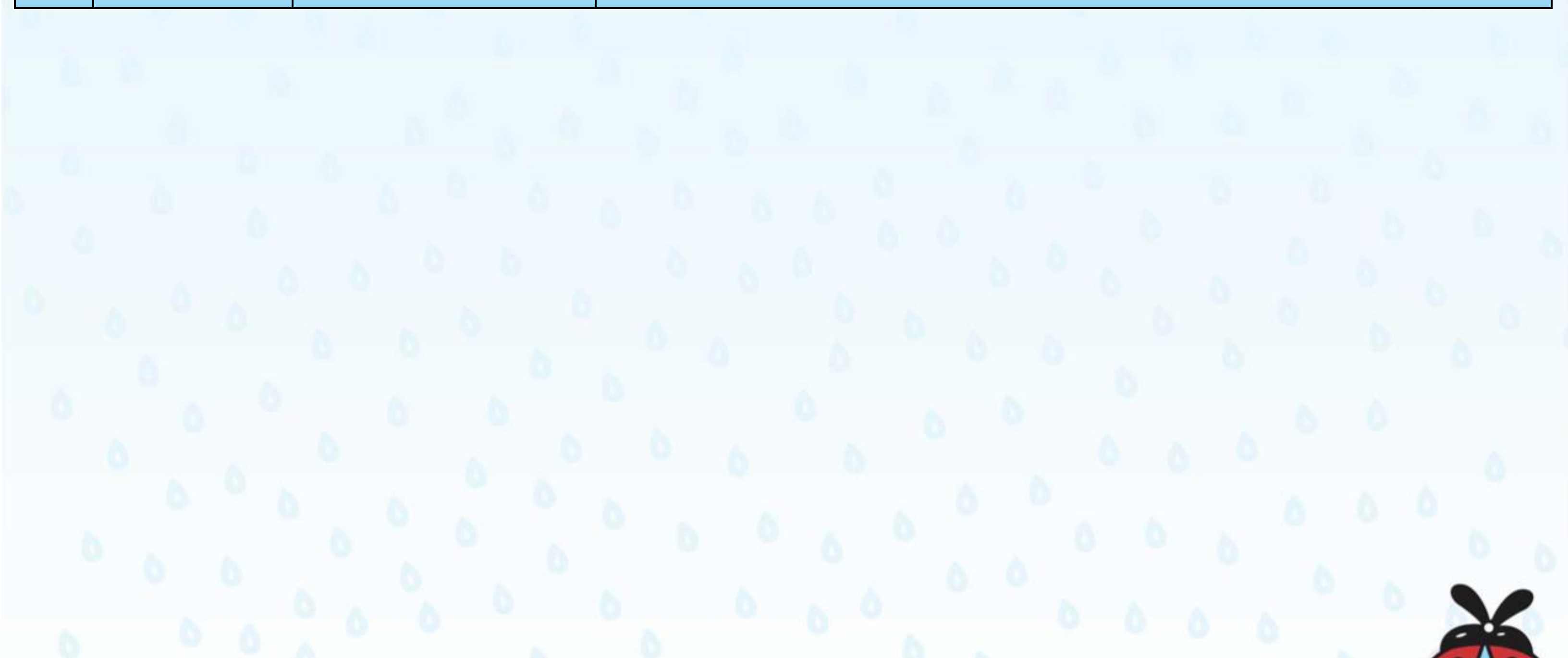
Decisions Taken in 36th GST Council Meeting was held on 27/07/2019

Reduction in the GST rate on supply of goods and services:

- The GST rate on all electric vehicles be reduced from 12% to 5%.
- The GST rate on charger or charging stations for Electric vehicles be reduced from 18% to 5%.
- Hiring of electric buses (of carrying capacity of more than 12 passengers) by local authorities be exempted from GST.
- These changes shall become effective from 1st August, 2019.
- Last date for filing of intimation, in FORM GST CMP-02, for availing the option of payment of tax under notification No. 2/2019-Central Tax (Rate) (opting for Composition) dated 07.03.2019 (by exclusive supplier of services), to be extended from 31.07.2019 to 30.09.2019.

- The last date for furnishing statement containing the details of the self-assessed tax in FORM GST CMP-08 for the quarter April, 2019 to June, 2019 (by taxpayers under composition scheme), to be extended from 31.07.2019 to 31.08.2019. **Notification No.35/2019**

Sr No.	Notification	Description	Analysis
1	Notification No. 33/2019-Central Tax Dated 18/07/2019	Changes to the CGST Rules- Central Goods and Services Tax (Fifth Amendment) Rules, 2019	Following changes are made in the CGST rules: • The GST registration rules are now amended to include reference to TDS deduction provision Section 52 of CGST Act. • e-ticketing introduced for exhibition of cinematograph films in multiplex screens. • A new rule for Surrender of enrolment of goods and services tax practitioner. • A new rule is introduced for Application for unblocking of the facility for generation of E-Way Bill and order thereof • The declaration statement in Statement 5B while applying for GST refund for deemed exports is changed.
2	Notification No. 35/2019-Central Tax Dated 29/07/2019	Extension in the filing of CMP-08 for the period April 2019 to June 2019	The due date to file CMP-08 by composition dealers is extended till 31st July 2019 for the quarter April 2019 to June 2019 from the earlier due date 18th July. CMP-08 is statement-cum-challan to be filed by composition dealers instead of erstwhile GSTR-4 from FY 2019-20 onwards.



Company Law Update's

(Contributed by CA Parag S. Prabhudesai)

Amendments Through Companies (Amendment) Second Ordinance, 2019

A. **Re-categorising of offences:**

The offences which are re-categorised as defaults carrying civil liabilities which would be subject to an in-house adjudication mechanism.

B. **Ensuring compliance of the default and prescribing stiffer penalties in case of repeated defaults :** To achieve the said reform, the Ordinance has modified sub-section (3) and (8) of section 454 and also introduced a new section 454A as follows:

Sec.	Title	Post ordinance Impact
454(8)	Adjudication of Penalties	Default would occur when the company or the officer in default would fail to comply with the order of the adjudicating officer or RD as the case may be.
454A	Penaltyfor repeated default	A new section has been inserted to provide where a penalty in relation to a default has been imposed on a person under the provisions of CA 2013, and the person commits the same default within a period of three years from the date of order imposing such penalty, passed by the adjudicating officer or RD as the case may be, it or he shall be liable for the second and every subsequent defaults for an amount equal to twice the amount provided for such default under the relevant provision of CA 2013.
454(3)	Adjudication of Penalties	The adjudicating officer shall also give the direction of making good of the default at the time of levyingpenalty.

C. **De-clogging the NCLT:**

- enlarging the jurisdiction of Regional Director ("RD") by enhancing the pecuniary limits up to which they can compound offences under section 441 of the Act.

Sr. No.	Section	Title	Post ordinance Impact
1.	441 (1)(b)	Compounding of Certain Offences	Power of Regional Director to compound offence punishable increased upto Rs. 2,500,000/- Pre-Amendment, where the maximum amount of fine which may be imposed for such offence did not exceed five lakh rupees, such offence was compounded by the Regional Director or any officer authorised by the Central Government. Through the Amendment, where the maximum amount of fine which may be imposed for such offence does not exceed Twenty five lakh rupees, such offence shall be compounded by the Regional Director or any officer authorised by the Central Government.
2.	441 (6)(a)	Compounding of Certain Offences	Section 441(6)(a), which requires the permission of the Special Court for compounding of offences, being redundant provision, is omitted.

- **vesting in the Central Government the power to approve the alteration in the financial year of a company under section 2(41):**

  As per Companies Act, in case of Indian company having Holding/ subsidiary/ Associate Company situated outside India, it is allowed the change the financial year as per such company with the approval of Tribunal. Through this Ordinance, Power of Tribunal has been transferred from Tribunal to Central Govt., therefore, financial year of Company can be changed with approval of Central Govt.

- **Vesting the Central Government the power to approve cases of conversion of public companies into private companies**

  In terms of Section 14(1), for Conversion of Public Company into Private Limited Company, the power to approve is shifted from Tribunal to Central Govt.

D. **Other corporate governance related reforms:**

Sr. No.	Sec.	Title	Post ordinance Impact
1	10A	Insertion of new section 10A Commencement of business, etc.	Re-introduction of section 11 omitted under the Companies (Amendment) Act, 2015 (after doing away with the requirement of minimum paid up capital) to provide for a declaration by a company having share capital before it commences its business or exercises borrowing power. Non-compliance of section 11 by an officer in default shall result in liability to a penalty instead of fine.
2	12	Registered Office of Company	Insertion of sub-section (9) to section 12, stating that : If Registrar has reasonable cause to believe that the company is not carrying on any business or operations, he may, without prejudice to the provision of sub-section (8), cause a physical verification of the registered office of the company and if any default is found in complying with the requirements of sub- section (1), initiate action for the removal of the name of the company from the register of companies under Chapter XVIII".
3.	90	Register of significant beneficial owners in a company.	Considering the importance of the disclosures under section 90, the punishment for violation of section 90(1) prescribed under section 90(10) is enhanced to the effect that the contravention is punishable with fine or imprisonment or both, instead of being punishable with only fine.
4.	164	Disqualifications From appointment of directors	A new clause (i) after clause (h) in section 164(1) inserted, whereby a person shall be subject to disqualification if he accepts directorships exceeding the maximum number of directorships provided in section 165.

ADDITIONAL AMENDMENTS THROUGH COMPANIES (AMENDMENT) BILL, 2019

Section 26 - Matters to be stated in prospectus

The requirement of registration of prospectus with the Registrar of Companies has been done away with. Instead the prospectus would be filed with the Registrar.

Section 29 - Public offer of securities to be in dematerialized form

The term 'public' has been omitted under section 29(1)(b). Govt. would now prescribe the class of companies (not restricted to public companies), which would be mandatorily required to issue the securities only in dematerialized form.

Section 35 - Civil liability for mis-statements in prospectus

The reference of 'Registration of Prospectus with the Registrar' is replaced by 'Filing of copy of Prospectus with the Registrar'.

Section 90 - Register of significant beneficial owners in a company

- The company shall take necessary steps to identify an individual who is a SBO. Failure to take necessary steps has been made punishable.

- Sub-Section (9A) inserted to provide the power to the Central Government to make rules for the purposes of this section.

- The company or the person aggrieved by the order of the Tribunal may make an application to the Tribunal for relaxation or lifting of the restrictions placed, within a period of one year from the date of such order: (Amendment through Companies (Amendment) Ordinance, 2019).

Section 132 - Constitution of National Financial Reporting Authority (NFRA)

- NFRA to perform its functions through such divisions as may be prescribed by the Central Government.

- Executive body of NFRA shall consist of the Chairperson and full-time Members for efficient discharge of its certain functions.

- Debarring of the member or firm from being appointed as an auditor or internal auditor etc. or performing any valuation under section 247 by NFRA in case professional or other misconduct is proved.

Section 135 - Corporate Social Responsibility

- In case the unspent amount does not relate to any ongoing project, unspent amounts to be transferred to a Fund specified under Schedule VII within a period of six months of the expiry of the financial year.

- In case the unspent amount relates to any ongoing project subject to fulfilling of prescribed conditions, unspent amounts to be transferred by the company within a period of thirty days from the end of the financial year to a special account to be opened by the company in that behalf for that financial year in any scheduled bank to be called the Unspent Corporate Social Responsibility Account.

- Such amount shall be spent by the company in pursuance of its obligation towards the Corporate Social Responsibility Policy within a period of three financial years from the date of such transfer, failing which, the company shall transfer the same to a Fund specified in Schedule VII, within a period of thirty days from the date of completion of the third financial year.

- **Penal provisions inserted as under:**

  The company - punishable with fine which shall not be less than Rs. 50,000 but which may extend to Rs. 25 lakh

  Every officer of such company who is in default - shall be punishable with imprisonment for a term which **may extend to 3 years or with fine** which shall **not be less than Rs. 50,000 but which may extend to Rs. 5 lakh, or with both**.

- MCA empowered to give general or special directions to a company or class of companies as it considers necessary to ensure compliance of provisions of thissection.

Section 212 - Investigation into affairs of Company by Serious Fraud Investigation Office

- Any officer not below the rank of Assistant Director of Serious Fraud Investigation Office (SFIO), if so authorized, may arrest any person in accordance with the provisions of this section.

- The person so arrested may be taken to a Special Court or Judicial Magistrate or Metropolitan Magistrate within 24 hours of his arrest.

- Where an investigation report submitted by SFIO states that a fraud has taken place and any director, KMP or officer has taken undue advantage or benefit, then the Central Govt. may file an application before the Tribunal with regard to disgorgement and such director, KMP or officer may be held personally liable without any limitation of liability.

Section 241 - Application to Tribunal for relief in cases of oppression, etc.

Central Government to prescribe such company or class of companies in respect of which, applications under such sub-section, shall be made before the Principal Bench of NCLT and shall be dealt with by such Bench.

In certain circumstances, the Central Government may refer the matter and request to the Tribunal to inquire into the case and record a decision about whether the person is a fit and proper person to hold the office of director or any other office connect with the conduct and management of any company.

Section 242 - Powers of Tribunal

In matters under section 241, the Tribunal shall record its decision stating specifically as to whether or not the respondent is a fit and proper person to hold the office of director or any other office connected with the conduct and management of any company.

Section 243 - Consequence of termination or modification of certain agreements

- The person who is not a fit and proper person pursuant to section 242 shall not hold the office of a director or any other office connected with the conduct and management of the affairs of any company for a period of five years from the date of the decision of the Tribunal.
- Central Government may, with the leave of the Tribunal, permit such person to hold any such office before the expiry of the said period of five years.
- The person so removed from the office of a director or any other office connected with the conduct and management of the affairs of the company shall not be entitled to, or be paid, any compensation for the loss or termination of office.

Section 272 - Power of Court to stay or restrain proceedings

In section 272 (3), as provided under, the reference to clause (e) is omitted:

The Registrar shall be entitled to present a petition for winding up under section 271, except on the grounds specified in clause (a) or clause (e) of that sub-section:

271(e) provides that a company may, on a petition under section 272, be wound up by the Tribunal, if the Tribunal is of the opinion that it is just and equitable that the company should be wound up.

Registrar allowed to present a petition of winding up on the ground that it is just and equitable to do so under clause (e) of section 271.

Section 398 - Provisions relating to filing of applications, documents, inspection, etc., in electronic form

Prospectus not required to be registered by the Registrar.

IBC Update's

(Contributed by CA Ajay Marathe)

1. **Same treatment to the 'Financial Creditors' and the 'Operational Creditors' has to be provided in Resolution Plan.**

   In NCLAT Judgement in M/s. Maruti Ferrous Pvt. Ltd. vs. Sunil Ispat & Power Ltd. & Ors., Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Kolkata, approved the resolution plan under Section 31 of the Insolvency and Bankruptcy Code, 2016 ("I&B Code" for short) where 9% of total dues was provided to Financial Creditors & 100% was provided for Operational creditors. Such a conditional approval of resolution plan by NCLT was challenged before NCLAT on the ground that while FC have been provided with 9% of their dues, the OC particularly those who have not supplied the goods nor provided the services, have been directed by NCLT to be paid 100%.

   Allowing the appeal, The Adjudicating Appellate Authority was of the view that the 'Financial Creditor' cannot be discriminated in the manner as suggested by the Adjudicating Authority by directing to pay 100% to the 'Operational Creditors' who otherwise do not contribute in operation of the Company but are entitled under the existing laws. Accordingly, the Adjudicating Appellate Authority asked the Appellant to modified the 'Resolution Plan' by providing same treatment to the 'Financial Creditors' and the 'Operational Creditors'.

2. A mere dispute relating to quantum of debt, due from Corporate Debtor to Financial Creditor, cannot be a ground to challenge NCLT order admitting application under section 7, IBC.

   While entertaining an appeal (Arun Rathi & Anr. v. Indian Overseas Bank & Anr., Company Appeal (AT) (Insolvency) No. 609 of 2019) preferred by the Director of CD (M/s Rathi TMT Saria Pvt. Ltd.) impugning NCLT's order wherein an application filed under section 7, IBC was admitted, Hon'ble NCLAT, vide its order dated 31st May 2019, has held that, when commission of "default" (in payment of debt due from CD to FC) is admitted by the CD, a mere dispute raised as regards quantum of debt cannot be a ground to set aside an order admitting the application, given the fact that the quantum is more than Rs. 1 lakh.

In order to arrive at a decision on appellant's objection, Hon'ble NCLAT referred to Hon'ble SC's dictum in the matter of Innovative Industries Limited v. ICICI Bank and Ors. (Decision dt. 31st August, 2017) wherein the Hon'ble Supreme Court held as follows:

"27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an installment amount… The Code gets triggered the moment default is of rupees one lakh or more (Section 4)..."

The speed within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important. This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due… The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete…" In view of the aforementioned, Hon'ble NCLAT dismissed the appeal.

3. <u>Liability subsisting in the balance sheet of the Corporate Debtor is an acknowledgement of liability and hence the debt is not barred by limitation.</u>

In the matter of TJSB Sahakari Bank Ltd. V/s. M/s. Unimetal Castings Ltd. CP (IB) -3622/I&BP/MB/2018. 'Petitioner' has sought the Corporate Insolvency Resolution Process of M/s. Unimetal Castings Ltd (hereinafter called the 'Corporate Debtor') on the ground, that the Corporate Debtor committed default in repayment of loan facilities granted to the Corporate Debtor to the extent of Rs.6,38,78,416.75/- including interest of Rs. 2,07,95,568/-, under Section 7 of Insolvency and Bankruptcy Code, 2016 (hereafter called the 'Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

The Corporate Debtor further contended that, the claim of the Petitioner is barred under Article 137 of the Limitation Act and to support the contention the Ld. Counsel for the Corporate Debtor relied on the decision of the Hon'ble Supreme Court in "B. K. Educational Services Pvt. Ltd. vs Parag Gupta & Associates (2018SCC OnLine SC 1921)". It is submitted that, the date of alleged default was on 30.06.2015 i.e. the date on which the account was declared as Non Performing Asset (NPA). However the cause of action would have arisen much prior to the date of NPA. Hence, the period of limitation would run starting even prior to 30.06.2015 and since this Petition was filed on 23.08.2018 this Petition is barred by limitation.

For the above contention of the Corporate Debtor, the Petitioner submitted that the loan was shown in the balance sheet of the Corporate Debtor which is an acknowledgement of liability and hence the debt is not barred by limitation. However, the Corporate Debtor has not disputed the fact that the loan was shown as a liability in the balance sheet of the Corporate Debtor. When the liability is shown in the balance sheet that is a clear acknowledgement of debt by the Corporate Debtor. There are umpteen numbers of judgements to say that the debt shown in the balance sheet is an acknowledgement of liability. Some of them are (i) Bajan singh Samra v. Wimpy International Ltd., 185(2011) DLT 428, (ii) Shreeram Durgaprasad v.Sail Soap Stone Factory & Ors. 1982, MhLJ 912, (iii) J.G. Glass Ltd. v. Indian Bank and Anr. 2002 (104(1)) Bom LR 234, and (iv) Bengal Silk Mills Co. v. Ismail Golam Hossain Ariff, AIR 1962 Cal. 115. In view of this, the contention of the Corporate Debtor that the debt is barred by limitation will not hold water.

4. <u>NCLAT allowed withdrawal of section 9 application on the basis of settlement inter se the parties before constitution of Committee of creditors:</u>

Honorable NCLAT allowed an appeal (Mr Ashish Choudhary V/s Unipak Automation solution & Anr) preferred by shareholders of the CD (M/s Choudhary Cheese Bazar Private Limited) stating that a settlement has been arrived at inter se the parties, and befor constitution of committee of creditors and seeking a prayed for setting aside of NCLT's order admitting section 9 application filed in respect of CD.

NCLAT while allowing the appeal, held as follows:

Taking into consideration the aforesaid fact that the parties have settled the matter prior to the constitution of committee of creditors and view of the decision of the honorable Supreme Court in Swiss Ribbons Pvt. Ltd. & Anrand in exercise of inherent powers under rule 11 of the NCLT Rules 2016, we set aside the impugned order dated 23rd April 2019 and allow the respondent operational creditor to withdraw the application under section 9 of IBC 2016, So far as the fee & resolution cost of the Interim Resolution Professional is concerned, The resolution professional will be entitled to for a fee of Rs.150000/- towards a professional fees and sum of Rs.113000/- cost incurred by him.

5. Disagreement regarding the quality of products is itself a dispute P.K Ores Private Limited v Narmada Construction (Indore) Private Limited [Company Appeal (AT) (Ins) No.56 of 2017]

The Appellants challenged the order passed by NCLT (Kolkatta) on the grounds that no prior notice was given and that the letters exchanged regarding the quality of products delivered is a "dispute" under IBC. The NCLAT, relying on Innoventive Industries and Kirusa Software Pvt. Ltd, respectively quashed the order of NCLT.

This appeal has been preferred by Appellant (Corporate Debtor) against order dated 3rd April 2017 passed by Ld. Adjudicating Authority (NCLT Kolkata Bench) where under the application preferred by Respondent (Operational Creditor) under Section 9 of the I&B Code had been admitted.

The Appellant submitted that the impugned has been passed by the Adjudicating Authority in violation of rules of natural justice, without any notice and without giving any opportunity to Corporate Debtor and that there is an 'existence of dispute' which the Appellant- Corporate Debtor could have brought to the notice of the Adjudicating Authority, if given an opportunity.

On investigation by the Appellate tribunal it was found that there was no notice served to the Appellant before the initiation of the Insolvency resolution process.

It was also found by the Appellate tribunal that the Appellant had sent a letter on 16th November, 2016 bringing to the notice of the Operational Creditor that one of the 'Caterpillar Engine' (CAT 6.6) which was repaired and installed by Operational Creditor was not functioning properly from the date of installation. Owing to which he had to incur loss to the tune of Rs. 2 crores.

The Respondent by means of a letter dated 15th December 2016 while shown surprise and shock, intimated the Corporate Debtor that the allegations are baseless.

Appeal can be filed for violating the principles of natural justice

The Appellants challenged the order of NCLT (Ahmedabad) claiming that the notice under rule 6 of the code was served after the hearing and violated the principles of natural justice .The postal track report given was incorrect. The appeal was allowed and the corporate debtor could function through their directors.

The appellant has challenged the impugned order on the following grounds: The operational creditor has not issued any order under sec 8 of ibc. The operational creditor had issued a notice under rule 6 but it was served only after the date of hearing. The AA had admitted the application of the operational creditor without any notice to the appellant which is violation of rules of natural justice. Suggestion made by the learned counsel for the appellant, that the track report is incorrect cannot be accepted, having been issued from Postal Department of Govt. of India.

6. It is always open to the Financial Creditor/Operational Creditor to file an application during pendency of some applications for winding up Forech India Pvt. Ltd. Vs Edelweiss Assets Reconstruction Company Ltd. & Anr

In the present case, admittedly no order for winding up has been passed against the 'Corporate Debtor' by Hon'ble High Court. No liquidation proceeding has been initiated. It appears that some of the applications for 'winding up' under the Companies Act, 1956 are pending, but no order for 'winding up' has been passed. In the circumstances, in the absence of actual initiation of 'winding up' proceedings against the Corporate Debtor, it is always open to the Financial Creditor/Operational Creditor to file an application for Corporate Insolvency Resolution under IBC.

Disciplinary case against errant Insolvency Professional

In the matter of Mr. Martin S. K. Golla, Insolvency Professional under sub-regulations (7) and (8) of regulation 11 of the

Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016 read with section 220 of the Insolvency and Bankruptcy Code, 2016.

It is unfortunate that an ineligible RA, the sole FC and the RP colluded to ensure that the people responsible for insolvency of the CD paid a fraction (33%) of the claim amount to the FC and wrested the control and management of the CD. They misused the CIRP to pass on an OTS as resolution plan and to wipe off claims of creditors, which was not possible otherwise. They did this against the explicit mandate of the Parliament and judicial pronouncements and in contravention of every provision of the Code and regulations relating to CIRP. It is worth recapitulating the matter to understand the nefarious design of the parties.

Considering the above deliberate, blatant, orchestrated and collusive contraventions, the Disciplinary Committee, in exercise of the powers conferred under section 220 (2) of the Code read with sub-regulations (7) and (8) of regulation 11 of the IBBI (Insolvency Professionals) Regulations, 2016, hereby cancels the registration of Mr. Martin S. K. Golla as insolvency professional, having Registration Number IBBI/IPA-002/IP-N00095/2017- 2018/10238 and debars him from seeking fresh registration as an insolvency professional or providing any service under the Insolvency and Bankruptcy Code, 2016 for ten years from the date of this order.

7. Committee of creditors comprises of all financial creditors and cannot be segmented class wise particularly for the purpose of computation of voting share

In the matter of IDBI Bank Limited v/s Jaypee Infratech Limited, The NCLT, Reference Bench New Delhi on 24 May 2019 (Pronounced in NCLT, Allahabad Bench on 4th June 2019). Considered the opinions of Home Buyers, Lenders, IBBI, and MCA on whether the various threshold voting share fixed for the decision of CoC under various section of IBC needs to be followed literally or whether they are only directory, and if so, what procedure has to be followed in determining the voting percentage among the CoC to pass the particular resolution

8. IB Code, 2016 expressly bars a Corporate Debtor in respect of whom a Liquidation Order has been made from initiating the Corporate Insolvency Resolution Processes.

Resolution Professional of Amar Remedies Ltd. Files MA under section 30(6) of the I&B Code, 2016 read with Regulation 39(4) of IBBI (Insolvency Resolution process of Corporate Persons) Regulations 2016 for approval of Resolution Plan by Adjudicating Authority on the ground that the Resolution Plan has been approved by the Committee of Creditors in its 7th COC meeting with a vote share of 83.02%. While hearing the arguments, the Ld. Counsel appearing on behalf of IDBI Bank Ltd., brought to our notice that after Hon'ble High Court's order for liquidation of the company, this petition was filed under section 10 of the Code, after suppressing the material facts by the Corporate Applicant, without disclosing that the company has been wound up by order of the Hon'ble High Court Mumbai

"Section 11 of the code specifies which persons are not eligible to initiate proceedings under it. In particular, section 11 (d) reads as follows:

11. Persons not entitled to make application. - The following persons shall not be entitled to make an application to initiate corporate insolvency resolution process under this Chapter, namely -

...

(d) a corporate debtor in respect of whom a liquidation order has been made.

From above it is clear that after liquidation order passed in a winding-up petition against the corporate debtor then it is barred from filing a petition under section 10 of the Code. Here the corporate debtor has not only suppressed the material fact that the winding up petition has not only been filed and admitted, but liquidation order has also been passed against the corporate applicant/corporate debtor liquidator has been directed to expedite liquidation proceedings expeditiously. The corporate applicant suppressed this material fact, knowing it to be material, and filed the petition under section 10 and in contravention of Rule 10 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The alleged act of the corporate applicant is punishable under section 77 (a) of the Insolvency and Bankruptcy Code 2016. The Registrar of Companies, Mumbai is directed to lodge prosecution against the corporate applicant under section 77(a) of the insolvency and bankruptcy code in 2016.

9. <u>If the principle amount has already been paid and as per agreement no interest was payable, the applications under Section 9 on the basis of claims for entitlement of interest, were not maintainable-Krishna Enterprises Vs. Gammon India Ltd.- NCLAT</u>

If the principle amount has already been paid and as per agreement no interest was payable, the applications under Section 9 on the basis of claims for entitlement of interest, were not maintainable. If for delayed payment Appellant(s) claim any interest, it will be open to them to move before a court of competent jurisdiction, but initiation of Corporate Insolvency Resolution Process is not the answer.

10. <u>Performance Bank Guarantee (PBG) given by the Corporate Debtor is not covered under Moratorium-GAIL (India) Ltd Vs. Rajeev Manaadiar & Ors.- NCLAT</u>

From sub-section (31) of Section 3, it is clear that the ‘security interest’ do not include the ‘Performance Bank Guarantee’(PBG), therefore, we hold that the ‘security interest’ mentioned in clause (c) of Section 14(1) do not include the ‘Performance Bank Guarantee’. Thereby the ‘Performance Bank Guarantee’ given by the ‘Corporate Debtor’ in favour of the Appellant- ‘GAIL (India) Ltd.’ is not covered by Section 14. The Appellant- ‘GAIL (India) Ltd.’ is entitled to invoke its ‘Performance Bank Guarantee’ in full or in part.

11. <u>In the event an assessee company is in liquidation under the IBC, the Income-tax Department can no longer claim a priority in respect of clearance of tax dues of the said company, as provided u/s 178(2) & (3) of the Income Tax Act, 1961- Leo Edibles & Fats Ltd Vs. The Tax Recovery Officer (Central), Income Tax Department, Hyderabad, & others-Hyderabad High Court</u>

The Court held that the Income-tax Department cannot claim any priority merely because of the fact that the order of attachment issued by him was long prior to the initiation of liquidation proceedings under the IBC against the Corporate Debtor.

In so far as liquidation of a company under the IBC is concerned, Section 178 of Income Tax Act, 1961 stands excluded by virtue of the amendment of Section 178(6) wef 01.11.2016, in accordance with the provisions of Section 247 of the IBC read with the Third Schedule appended thereto. Therefore, in the event an assessee company is in liquidation under the IBC, the Income-tax Department can no longer claim a priority in respect of clearance of tax dues of the said company, as provided under Sections 178(2) and (3) of the Income Tax Act, 1961.

In the context of liquidation of an assessee company under the provisions of the IBC, the Income-tax Department, not being a secured creditor, must necessarily take recourse to distribution of the liquidation assets as per Section 53 of the IBC. Section 53(1) provides the order of priority for such distribution and any amount due to the Central Government and the State Government comes fifth in the order of priority under Clause (e) thereof.

Photo Gallery

Ulhasnagar OT Batch

CA Day

Blood Donation

DISA Batch

TARANG
2K19

WICASA KALYAN DOMBIVLI BRANCH OF WIRC OF ICAI
CA