The Institute of Chartered Accountants of India
(Set up by an Act of Parliament)
KALYAN DOMBIVALI BRANCH
OF WIRC OF ICAI
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e News Letter

Josh : Joy of Sharing & Helping
Powered By Professionalism
Driven by Values

Seasons Greetings to the Members of the Branch,

I take this opportunity to greet you all on the auspicious occasions of Ganesh Utsav and Perushan.

I am sure you have received the earlier newsletters published by the Branch. Our Newsletter committee is really taking all the efforts to make the newsletter a useful and pleasant experience for the readers. This edition contains lot of information and practical knowledge and updates about Direct Taxes and Indirect Taxes, International Taxation, Company law updates and other updates compiled by the team. I am glad to share with you that the innovative effort to circulate a case study and to invite members to respond with the opinions on it to be published in Newsletter has been responded very well by the members and its really encouraging for the team. It also indicates that the newsletters are well received by the members which is really a heartening feeling.

August month experienced results declared by the ICAI for CA Final, IPCC and CPT. Our branch is always a bright spot on the map of ICAI in terms of vibrance, activities and results. These results also have proven the credibility of the branch region yet again. Around 120 new Chartered Accountants have emerged from our branch this time. In past 3 years the membership of the Branch has grown from 2500 to about 3500 and its growing. It's a great achievement by the Students and Members of the branch and moment to rejoice. Availability of the Branch in proximity has definitely helped the growth of the profession in terms of Number of CAs, Participation in various committees of WIRC and ICAI, emergence of talented speakers who contribute to the profession across the region. Branch is acknowledging the success of newly passed CAs and has organized 'Felicitation Program' along with a session on career guidance titled as 'Know your Career Path' on 14th September 2019 at 5 pm @ K M Agrawal College Auditorium, Kalyan. You are requested to kindly share the word with the newly passed CAs to register for the event @ https://forms.gle/oBRDvBP8PXUZk6Wa9. Program will have eminent speakers along with Chairperson of WIRC to guide the members.

Branch celebrated Independence day on 15th August 19, in unique way this year. We had Chief Guests Captain Vinay Degaonkar and Ex PI Mr. Sampat Nirmal who guided the Students and Members on the subject of 'Military and Corporate governance which in deed was very useful in our professional endeavor also. The virtues of discipline, determination and dedication are equally applicable and relevant is a Chartered Accountancy profession.

The ITT center at Dombivli has recently been replenished by the new IT hardware which was received very recently. We are thankful to the Central Council for resolving this issue swiftly. Branch has followed up the matter and with special efforts by CCM CA Shriniwas Joshi the same is completed who also inaugurated the same on 22nd August 19. He also guided the students of Advance ITT batch regarding the initiatives by the ICAI for the Members as well as how the opportunities would change and profession would take course in near future. It was extremely well received by the students.

Current period is full of due dates and compliance deadlines. First Lap of filing individual returns is finished, and we are now gearing up for Tax Audits and Company audits with GST audit to follow. We are surely capable of taking up this demanding work and deliver with due professional care and competence. Study circles under the Branch are really shouldering the responsibility by arranging timely and valuable sessions for updation of the Members. All the study circles will soon arrange refresher sessions for tax audits and company audits which will benefit the members in their work.

Branch has also approached concerned committee of ICAI for hosting a course on Valuation which is to commence from 21st September 2019. The said batch will be available in ICAI portal shortly and we request the members of the branch and the members who have shown their interest for the course to register soon.

We are thankful to WIRC and ICAI for the support provided from time and again. I am also thankful to the contributories to the Newsletter and request them to kindly keep supporting the cause. I also acknowledge and thank the efforts by the Newsletter committee and the Branch managing committee for the support and efforts in the functioning of the Branch.

I remain here by wishing all of you're a great Month ahead.

CA Saurabh S. Marathe

Chairman

Kalyan Dombivli Branch of WIRC of ICAI

Direct Tax Laws Update's

(Contributed by CA Shekhar S. Patwardhan)

- **Clarification with respect to valuation of shares of Start-up Companies involving application of Section 56 (2)(viib) of the I. T. Act ,1961 – Reg.**

Instances have come to the notice of the Board that substantial additions have been made by the AOs in "Start up Companies" involving issue of valuation of shares u/s S56(2)(viib).

Vide notification no. G.S.R. 127 (E) dated 19.02.2019 issued by the Department for Promotion of Industry and Internal Trade (henceforth referred to as "DPIIT") and notification no.13/2019 F.No.370142/S/2018-TPL(Pt.) dated 05th March, 2019 issued by the Central Board of Direct Taxes (henceforth referred to as "CBDT"), the Central Government has notified certain class of persons for which the provisions of Section S6(2)(viib) will not apply. Para 6 of the notification issued by the DPIIT dated 19.02.2019 states that the notification is applicable only with regard to recognized "Start up Companies" where no addition u/s 56(2)(viib) has been made in an assessment order before the date of issue of the notification. This has caused hardship to such companies.

The matter has been examined by the Board. To mitigate such hardships, the Central Government has decided to relax the Para-6 of the above-referred notification issued by the DPIIT and make it clear that the notification will be applicable to those Startup Companies also where addition u/s S6(2)(viib) has been made in an assessment order under the IT Act before 19th February, 2019 provided the assessee has subsequently submitted the declaration in Form-2 that it fulfils the conditions mentioned in Para-4 of the above-referred notification.

(Contributed by CA Keyur M. Gangar)

- **CBDT amends the monetary limit for filing appeals - Circular No. 17/2019 dated 8th August 2019**

Sr. No.	Appeals/SLPs in Income-tax matters	Monetary Limit (Rs.)
1	Before Appellate Tribunal	50.00.000/-
2	Before High Court	1.00.00.000/-
3	Before Supreme Court	2.00.00.000/-

- **Government withdraws enhanced surcharge on tax payable on transfer of certain assets :**

In order to encourage investment in the capital market, it has been decided to withdraw the enhanced surcharge levied by Finance (No. 2) Act, 2019 on tax payable at special rate on income arising from the transfer of equity share/unit referred to in section 111A and section 112A of the Income-tax Act,1961(the 'Act') from the current FY 2019-20. The following capital assets are mentioned in section 111A and section 112A of the Act:

1. Equity shares in a company;
2. Unit of an equity oriented fund; and
3. Unit of a Business Trust

The derivatives (Future & options) are not treated as capital asset and the income arising from the transfer of the derivatives is treated as business income and liable for normal rate of tax. However, in the case of Foreign Institutional Investors (FPI), the derivatives are treated as capital assets and the gains arising from the transfer of the same is treated as capital gains and subjected to a special rate of tax as per the provisions of section 115AD of the Act. Therefore, it is also decided that the tax payable on gains arising from the transfer of derivatives (Future & options) by FPI which are liable to special rate of tax under section 115AD of the Act shall also be exempted from the levy of the enhanced surcharge.

Therefore, the enhanced surcharge shall be withdrawn on tax payable at special rate by both domestic as well as foreign investors on long-term & short-term capital gains arising from the transfer of equity share in a company or unit of an equity oriented fund/business trust which are liable for securities transaction tax and also on tax payable at special rate under section 115AD by the FPI on the capital gains arising from the transfer of derivatives. However, the tax payable at normal rate on the business income arising from the transfer of derivatives to a person other than FPI shall be liable for the enhanced surcharge.

Direct Tax Case Laws Update's

(Contributed by CA Shekhar S. Patwardhan)

ITAT Cases

1. Chandra Prakash Jhunjhunwala Vs DCIT : ITA No 2351 /KOL/ 2017 : Date of Publication 17th August 19 : Sections 10(38), 50 C AY 2014-15 : KOLKATA

Conclusion: -

Section 50 C : Though the 3rd Proviso to S. 50C, which provides a safe harbour of 5%, applies w.e.f. 01.04.2019, it must be interpreted to apply since the insertion of s. 50C (01.04.2003) because it is curative and removes an incongruity and avoids undue hardship to assesseess.

Capital Gains on Penny Stocks

LTCG from penny stocks cannot be treated as bogus if the documentation is in order and no fault is found by the AO.

2. Harish Narinder Salve Vs ACIT : ITA No 2285 /DEL / 2016 Date of Publication 17th August 2019 Sections 37 (1) AY 2011-12 : DELHI

Conclusion: -

S. 37(1): In the professional field there are innovative ways visualized by professionals to make themselves visible in the professional circle and to build their own professional profile for generating higher and value-added business such as sponsoring seminars, becoming knowledge partners, setting up prizes and awards, creating competitive

award ceremonies, hosting vibrant summits etc. The way professionals promote themselves is changing very fast and benefits of such expenditure are huge and wide

The level at which the assessee is carrying on the profession, perhaps, he might not have thought it proper to increases visibility by attending the conferences, seminars et cetera. He has different vision of carrying himself in the professional field to increases visibility and social status. He thought fit to set up a scholarship to Indian students in Oxford University. Thus, in the present case definitely there is a nexus between the expenditure incurred by the assessee and the professional services rendered by the assessee. He has also shown that the student to moving the scholarship has been granted has helped him in famous case of Vodafone represented by him.

3. **Janani Infrastructure Pvt Ltd Vs ACIT : ITA No 698 and 699 /Bang/2018 : Date of Publication 10th August 2019 : Sections 68 AY 2007-08 and 2008-09**

Conclusion: -

S. 68 Bogus Share Capital Premium: The test of human probabilities cannot be applied to business transactions. Share premium is collected as per the understanding between the parties. The AO cannot treat the share premium as unexplained cash credit only because the same is not commensurate with the income and financial strength of the assessee. The AO cannot reach this conclusion without further investigation and bringing material on record.

The share premium has been collected as per the understanding reached between both the parties. We notice that the AO has not mentioned in the assessment order that the assessee has failed to satisfy the three main ingredients in the context of sec.68 of the Act. His only case was that the assessee did not substantiate the quantum of share premium collected. We have noticed that the assessee has furnished a valuation report in order to justify the share premium, even though the same has been rejected by the AO. However, the important point is that the doubt of the assessing officer on the quantum of share premium cannot be a ground for making addition u/s 68 of the Act.

HIGH COURT CASES

4. **Harjeet Surajprakash Girotia Vs Union of India & Others : Writ Petition No 513 of 2019 : Sections 148 Date of Publication 31st August 2019**

Conclusion: -

Reassessment—Notice under s. 148—Validity of service—Notice dt. 15th March, 2018 was despatched to the assessee's address as contained in her PAN card—This notice was returned by the postal Department on or around 22nd March, 2018 with the remark 'left'—Since the delivery of the notice could not be made at the address of the

assessee available in PAN database, by virtue of the further proviso to sub-r. (2) of r. 127, the communication had to be delivered at the address as available with the banking company - No such steps were taken - Service of notice, therefore, was not complete - In absence of service of notice before the last date envisaged under s. 149 for such purpose, the AO could not have proceeded further with the reassessment proceedings - Reassessment proceedings as also subsequent recovery of tax are quashed and set aside.

5. UNITED INVESTMENTS VS ACIT : ITA No 511/ KOL / 2017 AY 2013-14 : Section 10(38) Date of Publication 31st August 2019 :

Conclusion: -

The fact that "long-term capital gains" on listed shares are exempt from tax does not mean that "long-term capital loss" on such shares is not available for set-off against taxable income. While the gains are exempt, there is no bar against claiming set-off of the loss (J.H. Gotla 156 ITR 323 (SC) distinguished, CBDT Circular No.7/2013 dated 16.07.2013 referred, Raptakos Bret 69 SOT 383 (Mum) followed).

International Taxation Update's

(Contributed by CA Prerna K. Peshori)

Taxability of the business Income of a Non-Resident

A non-resident can be taxed in a country based on only 2 connecting factors: a) Residence or b) source of income accruing or arising or deemed to accrue or arise in country. Primarily, the taxability of business profits an enterprise in any country depends upon two distinct factors, viz.,

a) whether it is doing business with that country This would imply for eg. where an enterprise does business with a country by exporting goods/services from a place outside India.

OR

b) whether it is doing business in that country. This would imply for eg. where an enterprise carries on business in a country through establishing an office/branch or through an agent.

The business profits of an enterprise shall be taxable only when the non-resident enterprise has permanent establishment under DTAA or business connection as per the Act.The term business connection is of wide import as compared to the term PE.

As per the provisions of Section 9(1)(i) of the Act, all income accruing or arising, whether directly or indirectly, through or from any business connection in Indiashall be deemed to accrue/arise in India. The term business connection is defined inclusively under Explanation 2 to Section 9(1)(i) of the Act. Therefore, if a non-resident has business connection in India, its business profits shall be deemed to accrue or arise in India. As per Article 7 [Business Profits] of OECD MC, the profits of an enterprise resident of one state shall not be taxable in the other

unless the enterprise carries on business in the other state through a permanent establishment (PE) situated therein. If the enterprise carries on business in the other contracting state through a PE, the profits attributable to the PE may be taxed in the other state.

Therefore, the concept of 'permanent establishment' assumes significance as Article 7 of DTAA mandates that the business profits of non-resident shall not be taxable in the source state unless the non-resident has PE in that state.

The term 'Permanent Establishment' is defined under Article 5 of DTAA. Under the Act, the term is defined u/s 92F(iiia) for the purpose of Chapter X – Transfer Pricing Provisions. The term PE marks a dividing line for carrying on business with that country and doing business in that country.

Trading in a country from/through PE would give rise to taxable income attributable to PE. Trading with a country would not give to rise to any tax liability under DTAA, although business connection could be established. But as per Section 90(2), the assessee can take benefit of the provisions of DTAA.

Doing business with country	Under DTAA – taxable in home country alone Under Act – there could be business connection. Accordingly, if there is DTAA between two countries – it would not be taxable in the source country. In absence of DTAA, it would be taxable in the source country
Doing business in country	There could be existence of PE as per DTAA.

For E.g.:

X Inc, resident of UK sells its goods through its branch office in India. The profits earned by X Inc would be characterized as business profits. The same would be taxable in India only if there exists business connection of X Inc in India as per the provisions of Section 9(1)(i) of the Act or if there is PE in India as per Article 5 of India-UK DTAA.

Treaty rules provide that business profits derived by an enterprise are taxable exclusively by the state of residence unless the enterprise carries on business in the other state through a PE situated therein. In the latter situation, the source state may tax only the profits that are attributable to the PE. The PE concept is thus used to determine whether or not a contracting state is entitled to exercise its taxing rights with respect to the business profits of a non -resident taxpayer.

In the case of CIT v. Visakhapatnam Port Trust reported in [1983] 144 ITR 146 (Andhra Pradesh High Court), it was held that 'permanent establishment' postulate the existence of a substantial element of an enduring or permanent nature of a foreign enterprise in another country, which can be attributed to a fixed place of business in that country. It should be of such a nature that it would amount to a virtual projection of the foreign enterprise of one country into the soil of another country.

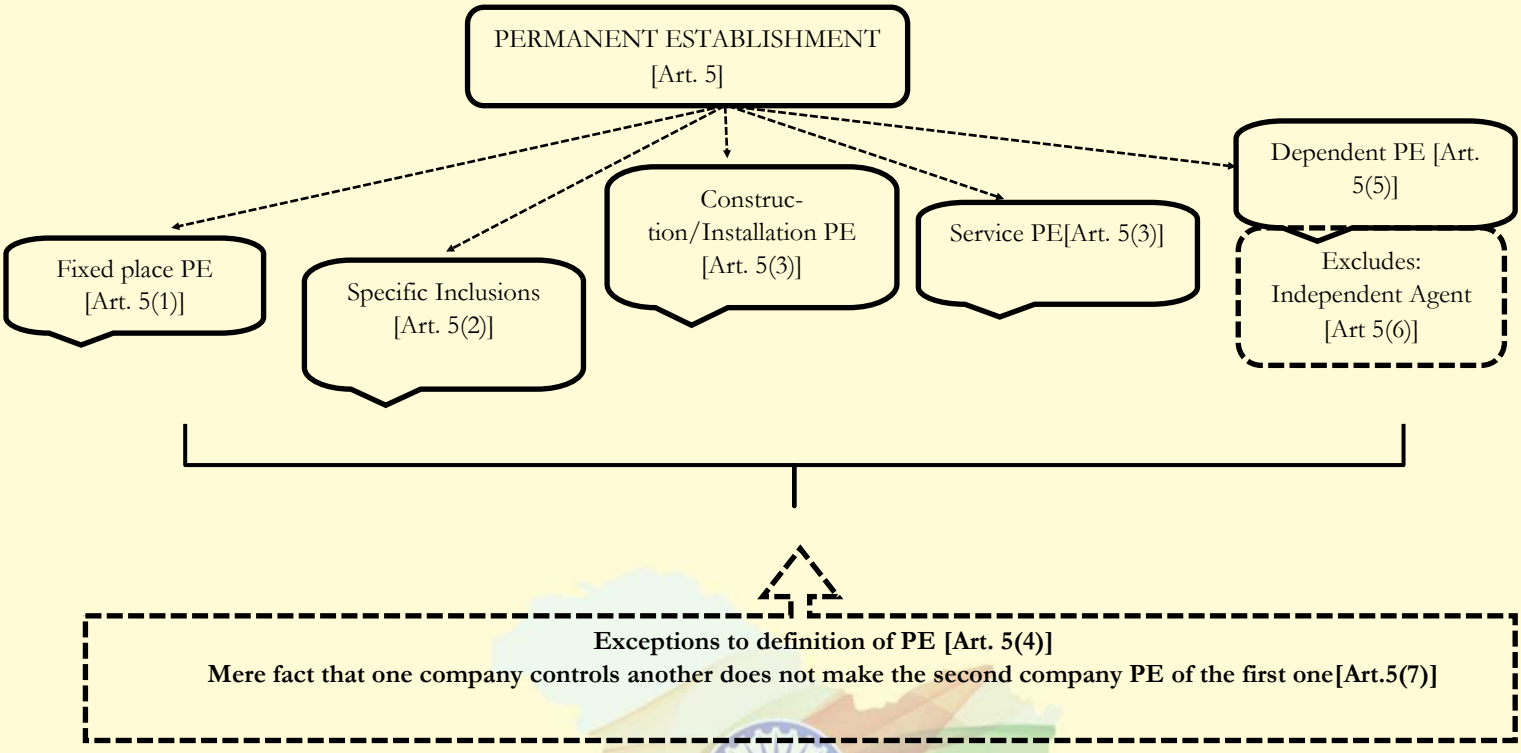
OECD BEPS Action Plan 1 (Addressing the Tax Challenges of the Digital Economy) states that *"The PE concept effectively acts as a threshold which, by measuring the level of economic presence of a foreign enterprise in a given State through objective criteria, determines the circumstances in which the foreign enterprise can be considered sufficiently integrated into the economy of a state to justify taxation in that state….*

....As a general rule, until an enterprise of one State has a permanent establishment in another State, it should not properly be regarded as participating in the economic life of that other State to such an extent that the other State should have taxing rights on its profits." (page 26 para 35)

Meaning of Permanent Establishment

Article 5 of DTAA defines the PE laying down certain specific inclusions and making certain specific exclusions from the definition of PE. The PE is generally defined under Article 5 of DTAA as under:

Article 5(1) provides that a PE is a fixed place of business through which the business of an enterprise is wholly or partly carried on. Thus, it lays down the concept of **FIXED PLACE PE.** • There should be a place of business • The place of business should be fixed • Such place of business should be at disposal of the enterprise • The non-resident enterprise should carry on business wholly or partly from that place
Article 5(2) provides a list of specific inclusions which prima facie create a PE e.g. branch, factory, place of management etc.
Article 5(3)(a) provides that a building site, construction, assembly or installation project or supervisory activities in connection therewith constitutes PE if it lasts more than prescribed threshold. While OECD MC provides for threshold of 12 months, UN MC provides for threshold of 6 months. This is referred to as **CONSTRUCTION / IN-STALLATION PE.**
Article 5(3)(b) provides that PE shall be constituted if an enterprise furnishes services, including consultancy services through employees or other personnel engaged, for more than prescribed threshold. UN MC prescribes threshold of 6 months. There is no such paragraph under OECD MC. This is referred to as **SERVICE PE.**
Article 5(4) provides for certain exclusions to the scope of PE which are in the nature of preparatory or auxiliary activities as such activities do not contribute directly to the profits. This is discussed elaborately in the ensuing parts.
Article 5(5) provides that a dependent agent of an enterprise shall constitute PE if he habitually exercises an authority to conclude contracts on behalf of the enterprise. This is known as **DEPENDENT AGENCY PE.** This is discussed elaborately in the ensuing paragraphs.
Article 5(6) provides that an independent agent acting in the ordinary course of business shall not constitute PE. This is an exception to Article 5(5).
Article 5(7) provides for associated enterprises. It states that mere fact that one company controls another company does not make the second company PE of the first company.



The Supreme Court in the case of DIT vs. Morgan Stanley & Co. Inc. (2007) 292 ITR 416 (SC) had observed that the term PE in section 92F(iiia) of Act is defined in inclusive manner and covers service PE, agency PE, software PE, construction PE etc.

In the ensuing articles, I would discuss about the PE implications and when does the PE arise and how to mitigate the same.

Indirect Tax Law Update's

(Contributed by CA Keyur M. Gangar)

- **CBIC amends the monetary limit for filing appeals - F. No. 390/Misc/116/2017-JC Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes & Customs, (Judicial Cell)**

Sr. No.	Appellate Forum	Monetary Limit (Rs.)
1	Before CESTAT	50.00.000/-
2	Before High Court	1.00.00.000/-
3	Before Supreme Court	2.00.00.000/-

Indirect Tax Law Update's

(Contributed by CA Rohan Pathak)

Analysis of Notifications issued in Aug-19

Sr. No.	Notification	Description	Analysis
1	36/2019-Central Tax dt. 20-08-2019	Blocking and unblocking of e-way bill facility till 21.11.2019	date of implementation of Rule 138E (which was 21.08.2019) regarding blocking and unblocking of e-way bills by tax payers defaulting in return filing has been extended by three months to 21.11.2019
2	RoD Order No. 07/2019-CT	Due date to furnish Form GSTR-9 /9A/9C extended to 30.11.2019	The last date for furnishing of Annual Return in the FORM GSTR-9 / FORM GSTR-9A and Reconciliation Statement in FORM GSTR-9C for the financial year 2017-18 has been extended from 31st August, 2019 to 30th November, 2019.
3	38/2019-Central Tax dt. 31-08-2019	Waiver in filing of FORM ITC-04 for F.Y. 2017-18 & 2018-19	Declaration in FORM ITC-04 is not required to be filed. For F.Y. 2017-18 & 2018-19
4	39/2019-Central Tax dt. 31-08-2019	Seeks to bring Section 103 of the Finance (No. 2) Act, 2019 in to force.	Central Government appoints the 1st day of Sept, 2019, as the date on which the provisions of section 103 of the Finance (No. 2) Act, 2019 shall come into force. The Government may disburse the refund of the State tax in such manner as may be prescribed.
5	40/2019-Central Tax dt. 31-08-2019	Extended the last date in certain cases for furnishing GSTR-7 for the month of July, 2019.	Seeks to extend due date for GSTR-7 to be filed by taxpayers in J&K and 58 flood affected districts across 7 States to 20.09.2019. As given in following Table
6	41/2019-Central Tax dt. 31-08-2019	Waive the late fees for the month of July, 2019 for FORM GSTR-1 and GSTR-6 to be filed by taxpayers in J&K and 58 flood affected districts across 7 States provided the said returns are furnished by 20.09.2019.	In exercise of the powers conferred by section 128 of the Central Goods and Services Tax Act, 2017 (12 of 2017) (hereafter in this notification referred to as the said Act), the Central Government, on the recommendations of the Council, hereby waives the amount of late fee payable under section 47 of the said Act, by the following class of taxpayers:– (i) the registered persons whose principal place of business is in the district mentioned in column (3) of the Table below, of the State as mentioned in column (2) of the said Table, having aggregate turnover of more than 1.5 crore rupees in the preceding financial year or the current financial year, who have furnished, electronically through the common portal, details of outward supplies in FORM GSTR-1 of the of the CGST Rules, 2017, for the month of July, 2019, on or before the 20th September, 2019;

			(ii) the registered persons whose principal place of business is in the State of Jammu and Kashmir, having aggregate turnover of more than 1.5 crore rupees in the preceding financial year or the current financial year, who have furnished, electronically through the common portal, details of outward supplies in FORM GSTR-1 of the Central Goods and Services Tax Rules, 2017, for the month of July, 2019, on or before the 20th September, 2019; (iii) the Input Service Distributors whose principal place of business is in the district mentioned in column (3) of the above said Table, of the State as mentioned in column (2) of the said Table, who have furnished, electronically through the common portal, return in FORM GSTR-6 of the Central Goods and Services Tax Rules, 2017, for the month of July, 2019, on or before the 20th September, 2019; (iv) the Input Service Distributors whose principal place of business is in the State of Jammu and Kashmir, who have furnished, electronically through the common portal, return in FORM GSTR-6 of the Central Goods and Services Tax Rules, 2017, for the month of July, 2019, on or before the 20th September, 2019. As per Table 2

Guidelines for tax payers to report ITC related fields properly and correctly while filing their periodic / annual return(s) i.e. GSTR-3B, GSTR-4, GSTR-9 vide Trade Circular No. 47 T of 2019 dated 26/08/2019.

1. Background:

1. As you are aware that after implementation of Goods and Services Tax (in short GST) system, the State Tax revenue constitutes MVAT Tax collected (tax on non-subsumed items and old recovery of tax arrears), tax collection under non-subsumed tax laws, State Tax under GST (SGST) and fund transfer from Centre of Integrated Tax (for short IGST) on account of settlement and apportionment.

2. The fund transfer from centre (IGST) on account of settlement and apportionment is based on returns filed by the tax payers. Incorrect disclosure of **Input Tax Credit** (for short ITC) of IGST on account of interstate inward supplies or import supplies of goods or services may result in short settlement of amount of fund transfer to State.

3. Recently, one such case has been noticed, wherein the tax payer of Maharashtra State has not disclosed the **ineligible ITC on account of IGST paid on inward interstate supply and import supplies in its periodic returns filed in form GSTR-3B. It resulted in short transfer of IGST funds to the State of Maharashtra.**

2. Fund Transfer and apportionment:

2.1. The modalities for settlement or transfer of funds from centre to state or vice a versa on account of cross utilisation of IGST or as the case may be of SGST and apportionment of IGST between centre, states and within states are provided in section 53 of CGST/ SGST Act, section 17 and 18 of IGST Act r/w the **Goods and Services Tax Settlement of Funds Rule, 2017** (in short Fund Rules). The Goods and Services Tax Network (in short GSTN) common portal, based on returns filed by tax payers periodically transmits the report of such cross utilisation and the IGST funds available for the apportionment, to competent authority. According to such periodic reports furnished by GSTN, the competent authority transfers funds towards settlement of IGST collected by the Centre on the basis of the cross utilization of ITC of IGST utilised against CGST/ SGST liability and vice versa as well as apportionment in terms of section 17 of **IGST Act 2017** r/w Goods and Services Tax Settlement of Funds Rules, 2017.

2.2. Aforesaid Fund Transfer and apportionment is predominantly based on the information of GSTR-3B returns available with GSTN. The facility to file simple and summary periodic return in form' GSTR-3B in lieu of GSTR-3 was made available to tax payers, the same is still continued and may continue till the new return system is in place.

Hence, it necessitates the availability of correct data / information of GSTR-3B with GSTN for proper settlement and apportionment of fund transfer.

3. Instructions for tax payers:

In view of the aforesaid facts, it is essential to issue guidelines for tax payers to report ITC related fields properly and correctly while filing their periodic / annual return(s), which are as follows:

3.1. Monthly GSTR-3B:

a. The provisions related to GSTR-2 are suspended for the time being. Therefore, the reversal of ITC under rule 42 & 43 is to be reported in Table 4 of GSTR-3B. Tax payers are required to determine all his eligible ITC, amount of reversal under rule 42 or as the case may be rule 43 and ineligible ITC and have to report the correct figures in appropriate columns of Table 4.

b. Tax payers shall report entire ITC eligible including reversal but excluding ineligible in table 4(A) of GSTR-3B and then report amount of reversal of ITC out of table 4(A) in table 4(B). It is needless to say that amount of reversal under rule 42 8643 shall be reported in Table 4 (B) (1), whereas reversal as per rule 37 and any other reversal shall be reported in Table 4 (B) (2). Table 4(C) would therefore be 4(A) minus 4(B).

c. Ineligible credit excluded while reporting ITC in 4(A) must be shown in table 4(D). More specifically, ineligible or blocked credit as per provisions of section 17 (5) shall be reported in the Table 4 (D) (1) only. Whereas, Table 4 (D) (2) shall include the ineligible / blocked credit as per section 17 (4) of CGST / SGST Act(s) read with rule 38 thereto. Other ineligible ITC, like ITC wrongly availed in previous period, etc. should also be reported in Table 4 (D) (2).

d. Instead, only net effect shown by tax payers in the return would result in short settlement of IGST. Therefore, reversal of ITC and ineligible ITC has to be reported by tax payers while filing his due return.

3.2. Correction GSTR-4:

The field of GSTR-4, which are related to the transfer of fund are Table 4 (A), 4 (B), 4 (C) and 4 (D) only. The tax payers are hereby directed to fill in the information in those fields correctly and report the place of supply in it.

3.3. **Correction in returns filed earlier:**

All such tax payers who have not furnished details of ineligible ITC or furnished partial details of ineligible ITC or not reported reversal of ITC fully or partially are hereby required to correct the mistakes in following manner-

a. Those tax payers who have committed errors of wrongly reporting or nor reporting ineligible ITC as well as reversal of ITC in the returns filed for the financial period 2017-18 shall have to report it in the annual return to be filed in form GSTR-9.
b. The tax payers who have committed errors of wrongly reporting or nor reporting ineligible ITC as well as reversal of ITC in the returns filed for the financial period 2018-19 may report it in return GSTR-3B for the period from April to September 2019.
c. The tax payers who have committed errors of wrongly reporting or nor reporting ineligible ITC as well as reversal of ITC in any returns filed for the return periods from April, 2019 to July, 2019 may report it in subsequent GSTR 3B to be filed from August, 2019 onwards by giving net effect in that subsequent return(s).

4. Such incorrect information of ITC in periodic returns indicates impropriety in return(s) filed by tax payers. It may result in selection of cases of such tax payers for scrutiny. And, which later on might result into imposition of penalty under the CGST / SGST Act(s):

You are hereby directed to follow the guidelines of this circular and file the periodic returns in GSTR-3B henceforth correctly. Also correct the figures reported in the returns filed for earlier period if any in the manner prescribed in this circular.

This Trade Circular is clarificatory in nature and hence cannot be made use of interpretation of provisions of the law. Difficulty if any, in the implementation of this Circular may be brought to the notice of the Office of Commissioner of State Tax, Maharashtra State.

Central GST Trade Advisory August, 2019:

Bullet points regarding the Annual Return and Reconciliation Statement

1) 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.

2) 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.

3) 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 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.

4) 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.

5) 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.

6) 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.

7) 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 2018-19. 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 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).

8) 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.

9) 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.

10) 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.

11) 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.

12) 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.

Company Law Update's

(Contributed by CA Keyur Gangar)

The Ministry of Corporate Affairs has amended the provisions relating to issue of shares with Differential Voting Rights (DVRs) :

The Ministry of Corporate Affairs has amended the provisions relating to issue of shares with Differential Voting Rights (DVRs) provisions under the Companies Act with the objective of enabling promoters of Indian companies to retain control of their companies in their pursuit for growth and creation of long-term value for shareholders, even as they raise equity capital from global investors.

The key change brought about through the amendments to the Companies (Share Capital & Debentures) Rules brings in an enhancement in the previously existing cap of 26% of the total post issue paid up equity share capital to a revised cap of 74% of total voting power in respect of shares with Differential Voting Rights of a company.

Another key change brought about is the removal of the earlier requirement of distributable profits for 3 years for a company to be eligible to issue shares with Differential Voting Rights.

The above two initiatives have been taken by the Government in response to requests from innovative tech companies & startups and to strengthen the hands of Indian companies and their promoters who have lately been identified by deep pocketed investors worldwide for acquisition of controlling stake in them to gain access to the cutting edge innovation and technology development being undertaken by them.

The Government had noted that such Indian promoters have had to cede control of companies which have prospects of becoming Unicorns, due to the requirements of raising capital through issue of equity to foreign investors.

Alongside the above two changes, another major step taken is that the time period within which Employee Stock Options (ESOPs) can be issued by Startups recognized by the Department for Promotion of Industry & Internal Trade (DPIIT) to promoters or Directors holding more than 10% of equity shares, has been enhanced from 5 years to 10 years from the date of their incorporation

The Ministry of Corporate Affairs has amended the Companies (Share Capital & Debentures) Rules by removing Debenture Redemption Reserve requirement for Listed Companies, NCFCs and HFCs.

The decision has been taken in pursuance of the Budget announcements for 2019-20 by Union Finance & Corporate Affairs Minister Smt. Nirmala Sitharaman and the Government's objectives of providing greater 'Ease of Doing Business' to companies in the country, as part of its 100 Days Action Plan.

Through these amendments, the provisions relating to creation of Debenture Redemption Reserve (DRR) have been revised with the objective of;

1. Removing the requirement for creation of a DRR of 25% of the value of outstanding debentures in respect of listed companies, NBFCs registered with RBI and for Housing Finance Companies registered with National Housing Bank (NHB) both for public issue as well as private placements;
2. Reduction in DRR for unlisted companies from the present level of 25% to 10% of the outstanding debentures.

Hitherto, Listed Companies had to create a DRR for both Public Issue as well as Private Placement of Debentures, while NBFCs & HFCs had to create DRR only when they opted for Public Issue of Debentures. It is aimed at creating a level-playing field between NBFCs, HFCs and listed companies' on the one hand and also between them and Banking Companies & All India Financial Institutions on the other, which are already exempted from DRR.

The measure has been taken by the Government with a view to reducing the cost of the capital raised by companies through issue of debentures and is expected to significantly deepen the Bond Market.

The rules, while retaining DRR requirement for Unlisted Companies, provide for reduction from a DRR of 25% to a DRR of 10% for such companies, so as to safeguard interests of investors.

Cabinet approves proposal for Review of FDI policy on various sectors :

The Union Cabinet chaired by the Prime Minister Shri Narendra Modi has approved the proposal for Review of Foreign Direct Investment on various sectors.

Major Impact and Benefits from FDI Policy Reform

1. The changes in FDI policy will result in making India a more attractive FDI destination, leading to benefits of increased investments, employment and growth.
2. In the coal sector, for sale of coal, 100% FDI under automatic route for coal mining, activities including associated processing infrastructure will attract international players to create an efficient and competitive coal market.
3. Further, manufacturing through contract contributes equally to the objective of Make in India. FDI now being permitted under automatic route in contract manufacturing will be a big boost to Manufacturing sector in India.
4. Easing local sourcing norms for FDI in Single Brand Retail Trading (SBRT) was announced in Union Budget Speech of Finance Minister. This will lead to greater flexibility and ease of operations for SBRT entities, besides creating a level playing field for companies with higher exports in a base year. In addition, permitting online sales prior to opening of brick and mortar stores brings policy in sync with current market practices. Online sales will also lead to creation of jobs in logistics, digital payments, customer care, training and product skilling.
5. The above amendments to the FDI Policy are meant to liberalize and simplify the FDI policy to provide ease of doing business in the country, leading to larger FDI inflows and thereby contributing to growth of investment, income and employment.

Background

FDI is a major driver of economic growth and a source of non-debt finance for the economic development of the country. Government has put in place an investor friendly policy on FDI, under which FDI up to 100% is permitted on the automatic route in most sectors/ activities. FDI policy provisions have been progressively liberalized across various sectors in recent years to make India an attractive investment destination. Some of the sectors include Defence, Construction Development, Trading, Pharmaceuticals, Power Exchanges, Insurance, Pension, Other Financial Services, Asset reconstruction Companies, Broadcasting and Civil Aviation.

These reforms have contributed to India attracting record FDI inflows in the last 5 years. Total FDI into India from 2014-15 to 2018-19 has been US $ 286 billion as compared to US $ 189 billion in the 5-year period prior to that (2009-10 to 2013-14). In fact, total FDI in 2018-19 i.e. US $ 64.37 billion (provisional figure) is the highest ever FDI received for any financial year.

Global FDI inflows have been facing headwinds for the last few years. As per UNCTAD's World Investment Report 2019, global foreign direct investment (FDI) flows slid by 13% in 2018, to US $1.3 trillion from US $1.5 trillion the previous year - the third consecutive annual decline. Despite the dim global picture, India continues to remain a preferred and attractive destination for global FDI flows. However, it is felt that the country has the potential to attract far more foreign investment which can be achieved inter-alia by further liberalizing and simplifying the FDI policy regime.

In Union Budget 2019-20, Finance Minister proposed to further consolidate the gains under FDI in order to make India a more attractive FDI destination. Accordingly, the Government has decided to introduce a number of amendments in the FDI Policy. Details of these changes are given in the following paragraphs.

Coal Mining

As per the present FDI policy, 100% FDI under automatic route is allowed for coal & lignite mining for captive consumption by power projects, iron & steel and cement units and other eligible activities permitted under and subject to applicable laws and regulations. Further, 100% FDI under automatic route is also permitted for setting up coal processing plants like washeries subject to the condition that the company shall not do coal mining and shall not sell washed coal or sized coal from its coal processing plants in the open market and shall supply the washed or sized coal to those parties who are supplying raw coal to coal processing plants for washing or sizing.

It has been decided to permit 100% FDI under automatic route for sale of coal, for coal mining activities including associated processing infrastructure subject to provisions of Coal Mines (special provisions) Act, 2015 and the Mines and Minerals (development and regulation) Act, 1957 as amended from time to time, and other relevant acts on the subject. "Associated Processing Infrastructure" would include coal washery, crushing, coal handling, and separation (magnetic and non-magnetic)

Contract Manufacturing

The extant FDI policy provides for 100% FDI under automatic route in manufacturing sector. There is no specific provision for Contract Manufacturing in the Policy. In order to provide clarity on contract manufacturing, it has been decided to allow 100% FDI under automatic route in contract manufacturing in India as well.

Subject to the provisions of the FDI policy, foreign investment in 'manufacturing' sector is under automatic route. Manufacturing activities may be conducted either by the investee entity or through contract manufacturing in India under a legally tenable contract, whether on Principal to Principal or Principal to Agent basis.

Single Brand Retail Trading (SBRT)

1. The extant FDI Policy provides that 30% of value of goods has to be procured from India if SBRT entity has FDI more than 51%. Further, as regards local sourcing requirement, the same can be met as an average during the first 5 years, and thereafter annually towards its India operations. With a view to provide greater flexibility and ease of operations to SBRT entities, it has been decided that all procurements made from India by the SBRT entity for that single brand shall be counted towards local sourcing, irrespective of whether the goods procured are sold in India or exported. Further, the current cap of considering exports for 5 years only is proposed to be removed, to give an impetus to exports.
2. The extant Policy provides that as regards local sourcing requirement, incremental sourcing for global operations by the non-resident entities undertaking single brand retail trading, either directly or through their group companies, will also be counted towards local sourcing requirement for the first 5 years. However, prevalent business models involve not only sourcing from India for global operations by the entity or its group companies, but also through an unrelated third Party, done at the behest of the entity undertaking single brand retail trading or its group companies. In order to cover such business practices, it has been decided that 'sourcing of goods from India for global operations' can be done directly by the entity undertaking SBRT or its group companies (resident or non-resident}, or indirectly by them through a third party under a legally tenable agreement.
3. The extant policy provides that only that part of the global sourcing shall be counted towards local sourcing requirement which is over and above the previous year's value. Such requirement of year-on-year incremental increase in exports induces aberrations in the system as companies with lower exports in a base year or any of ' the subsequent years can meet the current requirements, while a company with consistently high exports gets unduly discriminated against. It has been now decided that entire sourcing from India for global operations shall be considered towards local sourcing requirement. (And no incremental value)
4. The present policy requires that SBRT entities have to operate through brick and mortar stores before starting retail trading of that brand through e-commerce. This creates an artificial restriction and is out of sync with current market practices. It has therefore been decided that retail trading through online trade can also be undertaken prior to opening of brick and mortar stores, subject to the condition that the entity opens brick and mortar stores within 2 years from date of start of online retail. Online sales will lead to creation of jobs in logistics, digital payments, customer care, training and product skilling.

Digital Media

The extant FDI policy provides for 49% FDI under approval route in Up-linking of 'News &Current Affairs' TV Channels. It has been decided to permit 26% FDI under government route for uploading/ streaming of News & Current Affairs through Digital Media, on the lines of print media.

IBC Update's

(Contributed by CA Ajay Marathe)

1. **Trade Union as an 'Operational Creditor': The Supreme Court's Case for Purposive Interpretation (JK Jute Mill Mazdoor Morcha v. Juggilal Kamlapat Jute Mills Company Limited)**

The Supreme Court of India in JK Jute Mill Mazdoor Morcha v. Juggilal Kamlapat Jute Mills Company Ltd has recently allowed a trade union to file an application for initiating a corporate insolvency resolution process (CIRP) as an operational creditor under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC). The appellant trade union had issued a demand notice to the corporate debtor by virtue of Section 8 of the IBC for the payment of outstanding dues of approximately 3000 workers following which it filed an application under Section 9 of the IBC for default in payments of operational debts. However, the Allahabad Bench of the National Company Law Tribunal (NCLT) refused to recognize the trade union as an operational creditor and rejected the application. The National Company Law Appellate Tribunal (NCLAT) also held that a trade union is not covered within the scope of an operational creditor. It also insisted upon the filing of separate applications by individual workers to be represented as operational creditors. However, the decision has been overturned by the Supreme Court.

The apex court held that a trade union would come within the meaning of 'person' in Section 3(23) of the IBC. Clause (g) in the definition of 'person' includes any entity established under the statute. The court opined that the doctrine of noscitur a sociishas to be applied to interpret clause (g) and the meaning of clause (g) would have to be ascertained by reference to the preceding clauses. The previous entries in the definition of 'person' include a company, a trust, a partnership and limited liability partnership in clauses (c), (d), (e) and (f) respectively. The court held that all these entities are governed by different statutes and not strictly established by them. A company, for example, is governed by the Companies Act. It is not a body which has been set up by the legislation itself.

When it is apparent that the question of representation of workers' by the trade union as an 'operational creditor' under the IBC evaded the attention of the legislature, courts are obliged to fill the void, in the absence of suitable amendments. The Supreme Court has thus rightly followed the rationale of the Division Bench of the Bombay High Court in Sanjay Sadanand Varrier v. Power Horse India Pvt. Ltd. wherein a trade union was held to be competent to present a winding up petition under Section 439 of the Companies Act, 1956. Significantly, the Supreme Court also observed that Rule 6 coupled with Form 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 allowed a single worker to file a joint application for initiating CIRP on behalf of several workmen upon authorization by the others.

2. **A 'dispute' barring a Section 9 IBC claim must be pre-existing in the sense that it existed prior to the issuance of the Section 8(1) demand notice (Ahluwalia Contracts (India) Limited V/s Raheja Developers Ltd)**

The Delhi bench of the NCLT had on September,2018 rejected an application filed by Ahluwalia Contracts (India) Ltd under Section 9 on grounds that the claim was disputed and arbitration proceedings has already been initiated over it.

Setting aside the earlier order passed by the National Company Law Tribunal (NCLT), the NCLAT said existence of any "disputed claim" cannot be a ground to reject an application under Section 9 of the Insolvency and Bankruptcy Code (IBC) to initiate insolvency proceedings, if it is not raised before issuance of a demand notice u/s 8 of IBC, and remit the case to the Adjudicating Authority (NCLT) for admitting the application under Section 9 after notice to the 'Corporate Debtor' (Raheja) to enable the 'Corporate Debtor' to settle the matter prior to the admission,"

NCLAT observed that "existence of dispute must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice". Appellant submitted that as on the date of issuance of demand notice under Section 8(1), no arbitration proceeding was initiated or pending. The arbitration proceeding has been filed by the Respondent-'Corporate Debtor' after receipt of demand notice under Section 8(1) of the IBC on 28th April, 2018.

3. **Unless the proceeding has the effect of endangering, diminishing, dissipating or adversely impacting the assets of corporate debtor, it would not be prohibited under Section 14(1)(a) of the Insolvency and Bankruptcy Code. (Power Grid Corporation of India v. Jyoti Structures Ltd.,(2018) 246 DLT 485.)**

The Single Bench of Delhi High Court held that present proceeding would not be hit by the embargo of Section 14 (1), since

1. Proceedings do not mean all proceedings;
2. Moratorium under section 14(1)(a) of the code is intended to prohibit debt recovery actions against the assets of corporate debtor;
3. Continuation of proceedings under section 34 of the Arbitration Act which do not result in endangering, diminishing, dissipating or adversely impacting the assets of corporate debtor are not prohibited under section 14(1)(a) of the code;
4. Term including is clarificatory of the scope and ambit of the term proceedings
5. The term proceeding would be restricted to the nature of action that follows it i.e. debt recovery action against assets of the corporate debtor;
6. The use of narrower term "against the corporate debtor" in section 14(1)(a) as opposed to the wider phase "by or against the corporate debtor" used in section 33(5) of the code further makes it evident that section 14(1)(a) is intended to have restrictive meaning and applicability;
7. The Arbitration Act draws a distinction between proceedings under section 34 (i.e. objections to the award) and under section 36 (i.e. the enforceability and execution of the award). The proceedings under section 34 are a step prior to the execution of an award. Only after determination of objections under section 34, the party may move a step forward to execute such award and in case the objections are settled against the corporate debtor, its enforceability against the corporate debtor then certainly shall be covered by moratorium of section 14(1)(a)."

4. **Termination of mining lease violates the moratorium M/s Tiffins Barytes Asbestos & Paints Limited [MA/632/2018 in CP/39/2018]**

The issue for consideration was whether order passed for termination of mining lease violates the moratorium ? The AA observed: "…The termination of the lease by the Respondents during the moratorium has taken away the interest created in favour of the Corporate Debtor/ Applicant in relation to the mining operations which certainly has resulted in taking away the property i.e., Iron ore to be extracted / already extracted in the mining area by the Corporate Debtor/ Applicant. Consequently, the Corporate Debtor / Applicant cannot carry on mining business as a going concern which frustrates the object of the CIR Process and there may not be any occasion for the CoC to consider any Resolution Plan, as no Resolution Applicant would come forward for revival of the business of the Corporate Debtor / Applicant due to the termination of lease." It held that the action of the respondents in terminating the lease during moratorium is in violation of section 14(1)(d) as the interest created in favour of CD by virtue of the lease on which whole of the business was dependent, and declared the order of termination as null and void.

5. **Provisions of Sections 56 & 57 of the Companies Act, 2013 being a formality which can be completed even after the approval of the 'Resolution Plan. 'Insolvency Resolution Cost' is payable in priority to other costs both in the case of success of Resolution and in the case of liquidation without any haircuts (Suni Jain Vs Punjab National Bank NCLAT)**

So far as right of Shareholders are concerned, from the record we find that shareholders claim have been taken into consideration by 'Successful Resolution Applicant' in the 'Resolution Plan' submitted by him. In view of proposal of taking over the shares of the Promoters as approved by the Adjudicating Authority, it is not required to comply with the provisions of Sections 56 & 57 of the Companies Act, 2013 being a formality which can be completed even after the approval of the 'Resolution Plan', at the stage of implementation of the plan. We find no merit in the appeal preferred by Mr. Sunil Jain.

In the same case appeal is filed by 'M/s. MV Projects' for recovery of dues for essential goods supplied during resolution process period which was not considered by Resolution Applicant.

The supply of coal has been made to the 'Corporate Debtor' even after the initiation of the 'Corporate Insolvency Resolution Process' i.e. during the 'Insolvency Resolution Process' to keep the company as a going concern. The 'Resolution Professional' placed orders with the Appellant even after initiation of the 'Corporate Insolvency Resolution Process'. An amount of Rs. 26,68,298/- remained outstanding which is due and payable to the Appellant. As per the provisions of the 'I&B Code' and the Regulations framed, the 'Insolvency Resolution Cost' is payable in priority to other costs both in the case of success of Resolution and in the case of liquidation without any haircuts. The Adjudicating Authority by impugned order dated 11th July, 2018 has not addressed the aforesaid issue on the ground that the 'Resolution Plan' has already been approved.

On Appeal against decision of Adjudicating Authority NCLAT observed that.

Appellant has supplied the goods during the period of the 'Corporate Insolvency Resolution Process' to keep the company as a going concern, it was the duty of the 'Resolution Professional' to include such cost towards 'Resolution Process Cost' for payment in favour of Appellant for non-inclusion of the same, it can be held that the

'Resolution Plan' in question is in violation of Section 30(2) (a) of the 'I&B Code'. However, taking into consideration the fact that it is failure on the part of the 'Resolution Professional' who had not included the same nor looked into the matter, we do not want to put blame on 'Successful Resolution Applicant'. However, to uphold the 'Resolution Plan' hold that the plan is in accordance with law, we modify the plan and pass the following order:

The 'Corporate Debtor' along with the 'Interim Resolution Professional' will verify the claim and will pay the total admitted dues without any cut within 30 days, failing which, the 'Resolution Plan' may be held to be in violation of Section 30(2) (a) of the 'I&B Code'.

6. **Overriding Effect of IBC - Ms. Anju Agarwal, RP (Shree Bhawani paper Mills Ltd.) Vs. Bombay Stock Exchange & Ors. [CA(AT)(Ins) No. 734/2018]**

The Adjudicating Authority, vide its order dated 10th September, 2018, held that regulatory authorities are not covered under moratorium under section 14 of the Code. Therefore, SEBI and BSE are not prohibited from taking actions under the SEBI Act and regulations made there under against the Corporate Debtor. The NCLAT observed that section 28A of the SEBI Act, 1992 is inconsistent with section 14 of the Code. It held: "Section 28A of the 'SEBI Act, 1992' being inconsistent with Section 14 of the 'I&B Code', we hold that Section 14 of the 'I&B Code' will prevail over Section 28A of the 'SEBI Act, 1992' and 'Securities Exchange Board of India' cannot recover any amount including the penalty from the 'Corporate Debtor'. The 'Bombay Stock Exchange for the same very reason cannot take any coercive steps against the 'Corporate Debtor' nor can threaten the 'Corporate Debtor' for suspension of trading of shares." It reiterated its decision in Maharashtra Seamless Ltd. Vs. Shri Padmanabhan Venkatesh & Ors., that the statutory dues come within the meaning of operational debt and may be claimed but cannot be recovered during the resolution process.

7. **Pendency of the case under Section 138/441 of Negotiable Instruments Act, 1881 actually amounts to admission of debt and not an existence of dispute.(M/s. APPL Industries Limited vs. Auto Decor Pvt. Ltd. NCLAT)**

Appeal has been preferred by 'M/s Auto Décor Pvt. Ltd.' (Corporate Debtor) against order dated 2nd August, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench whereby application under Section 9 of I&B Code preferred by Respondent – 'APPL Industries Ltd.' (Operational Creditor) has been admitted and order of moratorium has been passed. Learned counsel appearing on behalf of the Appellant submits that there was an existence of dispute in view of the fact that the Respondent has instituted cases under Section 138/441 of Negotiable Instruments Act, 1881, which are pending in the court of Metropolitan Magistrate, Gurgaon and the proceeding under Section 138 is really a civil cases of recovery of the money, therefore, in view of the pendency of such case, application under section 9 of I&B Code is not maintainable.

NCLAT observed that The scheme of Section 7 of IBC stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing – i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

In the present case, it is not in dispute that there is a debt payable to the Operational Creditor and default on the part of the Corporate Debtor. The pendency of the case under Section 138/441 of the Negotiable Instruments Act, 1881, even if accepted as recovery proceeding, it cannot be held to be a dispute pending before a court of law. Thereby we hold that the pendency of the case under Section 138/441 of Negotiable Instruments Act, 1881 actually amounts to admission of debt and not an existence of dispute.

8. **Holder of Bill of exchange is treated as Operational Creditor Cooperative Rabobank U.A. Singapore Branch Vs. Mr. Shailendra Ajmera [CA(AT) (Ins) No. 261/2018]**

It is submitted by appellant that bills discounting is one of the method of raising finance a bill of exchange is an independent contract under the Negotiable Instruments Act, 1881, and time value of money is inherent in a bill. While dismissing appeal, the NCLAT noted that under section 5(20) of the Code, an OC is not only a person to whom an operational debt is owed but also a person to whom such operational debt is assigned. It held: "…. it is clear that an 'Operational Creditor', who has assigned or legally transferred any 'Operational Debt' to a 'Financial Creditor', the assignee or transferee shall be considered as an 'Operational Creditor' to the extent of such assignment or legal transfer

9. **Adjudicating Authority has no jurisdiction to pass any order with regard to any matter pending before the Court of criminal jurisdiction." Prasad Gempex Vs. Star Agro Marine Exports Pvt. Ltd. & Anr. [CA(AT) (Ins) 469/2019]**

While approving the resolution plan, the AA directed that all proceedings in the matter, whether civil or criminal, present or future, shall stand withdrawn and dismissed. While setting aside this direction of AA, the NCLAT held: "the Adjudicating Authority has no jurisdiction to pass any order with regard to any matter pending before the Court of criminal jurisdiction.

10. **The provident fund, the pension fund and the gratuity fund do not come within the meaning of 'liquidation estate' State Bank of India ...Appellant Vs. Moser Baer Karamchari Union & Anr. Company Appeal (AT) (Insolvency) No. 396 of 2019**

Liquidator, denied the payment of the gratuity fund, the provident fund and the pension fund preferentially and included the same for the payments under the waterfall mechanism under Section 53 of the 'I&B Code'. Against this decision of liquidator 'Moser Baer Karamchari Union' filed CA No. 19(PB)/ 2019 with prayer that the directions be issued to the Liquidator to exclude the amount due to them towards 'Provident Fund', 'Pension Fund' and Gratuity Trust Fund' from the waterfall mechanism envisaged under Section 53 of the 'I&B Code' and pay them the 'Provident Fund Dues', 'Pension Fund Dues' and 'Gratuity Fund Dues' as these will not constitute part of the liquidation estate.

The Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi, by impugned order dated 19th March, 2019, allowed the CA No. 19(PB)/ 2019 and held that the 'Provident Fund Dues', 'Pension Fund Dues' and 'Gratuity Fund Dues' cannot be part of Section 53 of the 'I&B Code'. The 'State Bank of India', a 'Secured Creditor', has challenged the order in this appeal.

Disallowing appeal of Secured creditor NCLAT confirm decision of AA & made following observation

While applying Section 53 of the 'I&B Code', Section 326 of the Companies Act, 2013 is relevant for the limited purpose of understanding 'workmen's dues" which can be more than provident fund, pension fund and the gratuity fund kept aside and protected under Section 36(4) (iii). On the other hand, the workmen's dues as mentioned in Section 326(1) (a) is not confined to a period like twenty-four months preceding the liquidation commencement date and, therefore, the Appellant for the purpose of determining the workmen's dues as mentioned in Section 53 (1) (b), cannot derive any advantage of Explanation (iv) of Section 326 of the Companies Act, 2013. This apart, as the provisions of the 'I&B Code' have overriding effect in case of consistency in any other law for the time being enforced, we hold that Section 53(1) (b) read with Section 36(4) will have overriding effect on Section 326(1) (a), including the Explanation (iv) mentioned below Section 326 of the Companies Act, 2013. Once the liquidation estate/ assets of the 'Corporate Debtor' under Section 36(1) read with Section 36 (3), do not include all sum due to any workman and employees from the provident fund, the pension fund and the gratuity fund, for the purpose of distribution of assets under Section 18 Company Appeal (AT) (Insolvency) No. 396 of 2019 53, the provident fund, the pension fund and the gratuity fund cannot be included. The Adjudicating Authority having come to such finding that the aforesaid funds i.e., the provident fund, the pension fund and the gratuity fund do not come within the meaning of 'liquidation estate' for the purpose of distribution of assets under Section 53, we find no ground to interfere with the impugned order dated.

11. <u>'Financial Creditor' of the 'Corporate Debtor' has no right to intervene to oppose admission of the application under Section 7 preferred by other Financial Creditor of 'Corporate Debtor'. L&T Infrastructure Finance Company Ltd., Vs Gwalior Bypass Project Ltd, ICICI Bank Limited Company Appeal (AT) (Insolvency) No. 677 of 2019.</u>

ICICI Bank Limited filed application under Section 7 of the 'I&B Code' for 'Corporate Insolvency Resolution Process' against 'Gwalior Bypass Project Limited'- ('Corporate Debtor'). After hearing the Applicant-ICICI Bank Limited and 'Corporate Debtor', when the matter was reserved for orders, the Appellant – L&T Infrastructure Finance Company Ltd. filed a petition for intervention for impalement as a party-Respondent. The Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi by impugned order dated 29th May, 2019 rejected the petition for intervention not being a necessary party. The order of rejection dated 29th May, 2019 and order of admission of application under Section 7 dated 29th May, 2019 are under challenge in these Appeals. Appellant contend that sanction of loan by ICICI Bank having not been approved by NHAI, the Bank by filing application under Section 7 cannot deprive the Appellant from occupying position of sole/ senior lender.

Rejecting the appeal NCLAT observed that

Adjudicating Authority is required to notice as to whether the application is complete or not and if there is debt and the 'Debtor' defaulted in payment and the amount is more than Rs.1 lakh, it is bound to admit an application under Section 7. Though, it is open to the 'Corporate Debtor' to object admission of application under Section 7 on the ground that the 'debt is not payable in law or in fact', but the application under Section 7 can be triggered even if the debt is disputed by the 'Corporate Debtor' and the amount of default is more than Rs.1 lakh. In view of the aforesaid position of law, we hold that the Appellant being not a Member/ Shareholder of the 'Corporate Debtor', and has claimed to be a 'Financial Creditor' of the 'Corporate Debtor' has no right to intervene to oppose admission of the application under Section 7 preferred by the ICICI Bank against the 'Corporate Debtor'.

Case Study :

(Contributed by CA Gitanjali Made)

Facts of the Case :-

Family Members formed a Partnership Firm with an objective of running a Hotel . The firm acquired land in its name and started the construction of the Hotel Building . When the Hotel was under construction it was felt to form a Pvt Ltd Company to run the Hotel Business and hence with the same objective company was incorporated. Then an agreement was signed between the Firm and the Company whereby it was agreed that the Firm will complete the construction of the building and hand over the possession to the company and that the Company will reimburse the expenses incurred by the Firm for the construction of building . Accordingly the Company paid for the cost of construction to the Firm . Since the land in the question was in the name of the Firm it was decided to lease the Land to the Company @Rs 100/- as ground rent .

Opinion sought:-

Discuss the legality of Company's right to claim Depreciation on Hotel Building

Clauses considered

1. Depreciation is defined under section 32 of Income Tax Act 1961.
2. Section 32 allows depreciation on building if owned wholly or partly by tax payer and used by tax payer for the purpose of the business and profession.

   In given case the ownership of the building is under the question since the Firm has constructed the building and the Company has reimbursed the cost of the construction as per agreement and the firm has handed over the possession. Considering the fact that possession is handed over doesn't mean that the Company is the legal owner and title of the property is transferred to the company.

3. Also explanation 1 to section 32 talks about the business or profession of the assessee is carried on in a building not owned by him but in respect of which the assessee holds a lease or other right of occupancy and any capital expenditure is incurred by the assessee for the purposes of the business or profession on the construction of any structure or doing of any work in or in relation to, and by way of renovation or extension of, or improvement to, the building, then, the provisions of this clause shall apply as if the said structure or work is a building owned by the assessee.

   Explanation I to Section 32 (1) states: If the building is taken on lease and expenditure is incurred on renovation of the same, Explanation 1 will apply and such expenditure can be capitalised for claiming depreciation.

   In given case the building is constructed on land which is given on lease to the company, there is no capital asset acquisition because it will be ultimately handed over to the Firm on expiry of the lease term. The company is not the owner of the building, though it has reimbursed the expenditure of construction of the same.

Case Law

C.I.T. Vs. TVS Lean Logistics Ltd. 07/27/2007 [2007]293 ITR 432 (Mad) Case Fact: Whether, construction of building on leasehold is capital expenditure? Decision: Held by the Hon`ble Court that, explanation 1 of section 32 (1) does not apply in a case of construction on the land which is taken on lease by the assessee, assessee did not acquire a capital asset but had put up a construction of the building only for business advantage. Therefore entire construction cost was admissible as revenue expenditure.

Opinion

Considering the above clauses and case law, company is not the legal owner of the building and nor does capital asset is acquired since at the expiry of the lease term , asset will be handed over to the Firm, hence it can be concluded that Company cannot claim depreciation under Income Tax Act, 1961.

Expert Comments :-

The Participant **CA Gitanjali Made** has correctly concluded that the Company is not entitled to claim Depreciation. Further to elaborate on this issue there is a Supreme Court Judgement in the case of Mother Hospital Pvt Ltd Vs CIT Civil Appeal No 3360 of 2006 which has dealt with the identical issue.

In that case the Supreme Court held that *"Title to immovable property cannot pass when its value is more than Rs.100/- unless it is executed on a proper stamp paper and is also duly registered with the sub-Registrar. Accordingly, a lessee cannot be said to be the 0wner"for purposes of claiming depreciation. Under Explanation 1 to s. 32, the lessee is entitled to depreciation on the cost of construction incurred by him but not on the cost incurred by the owner and reimbursed by the lessee"*

Considering the Apex Court judgement the Company has no right to claim Depreciation in the present matter.

Case study for the Month of September 19:

The Assessee received the Notice u/s 148 on 25th March 2018 for the AY 2011-12 from Income Tax Officer Ward 3(2) Kalyan. In response to the said Notice the Assessee filed a reply stating that return filed on 31.08.2012 to be considered as return in response to Notice u/s 148 and asked for the reasons for the reopening. Meanwhile the case of the Assessee was transferred to Assistant Commissioner of Income Tax Circle 3 who is the current jurisdictional officer of the Assessee. Upon receipt of the reasons recorded the Assessee found that the same has been recorded by the Deputy Commissioner of Income Tax Circle 3.

Discuss the Validity of the said notice and the various recourse's that are available to the Assessee.

Last date of submission of Case Study is 28th September 2019**.**

Other Update's

(Contributed by CA Keyur M. Gangar)

Date	Particulars
7 September 2019	Due date for deposit of Tax deducted/collected for the month of August, 2019
10 September 2019	Monthly GSTR-7 and GSTR-8 for August 2019
11 September 2019	Monthly GSTR-1 for August 2019.
13 September 2019	GSTR-6 for August 2019
14 September 2019	Due date for issue of TDS Certificate for tax deducted under section 194-IA in the month of July, 2019
14 September 2019	Due date for issue of TDS Certificate for tax deducted under section 194-IB in the month of July, 2019
15 September 2019	Second instalment of advance tax for the assessment year 2020-21
15 September 2019	Monthly PF and ESI Payment for August 2019
20 September 2019	Monthly GSTR-3B for August 2019, GSTR-5, GSTR-5A
25 September 2019	Monthly PF Return for August 2019
30 September 2019	Audit report under section 44AB for the assessment year 2019-20 in the case of a corporate-assessee or non-corporate assessee (who is required to submit his/its return of income on September 30, 2019).
30 September 2019	Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IA in the month of August, 2019
30 September 2019	Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IB in the month of August, 2019
30 September 2019	Annual return of income for the assessment year 2019-20 if the assessee (not having any international or specified domestic transaction) is (a) corporate-assessee or (b) non-corporate assessee (whose books of account are required to be audited) or (c) working partner of a firm whose accounts are required to be audited).
30 September 2019	Application in Form 9A for exercising the option available under Explanation to section 11(1) to apply income of previous year in the next year or in future (if the assessee is required to submit return of income on September 30, 2019)
30 September 2019	Statement in Form no. 10 to be furnished to accumulate income for future application under section 10(21) or 11(1) (if the assessee is required to submit return of income on September 30, 2019)
30 September 2019	Due date for claiming foreign tax credit, upload statement of foreign income offered for tax for the previous year 2018-19 and of foreign tax deducted or paid on such income in Form no. 67. (if due date of submission of return of income is September 30, 2019).

Photo Gallery

Independence day

Certificate of Appreciation to
Branch for Participants in Nukkad