MPC & CO LLP
CHARTERED ACCOUNTANTS

Corporate Update

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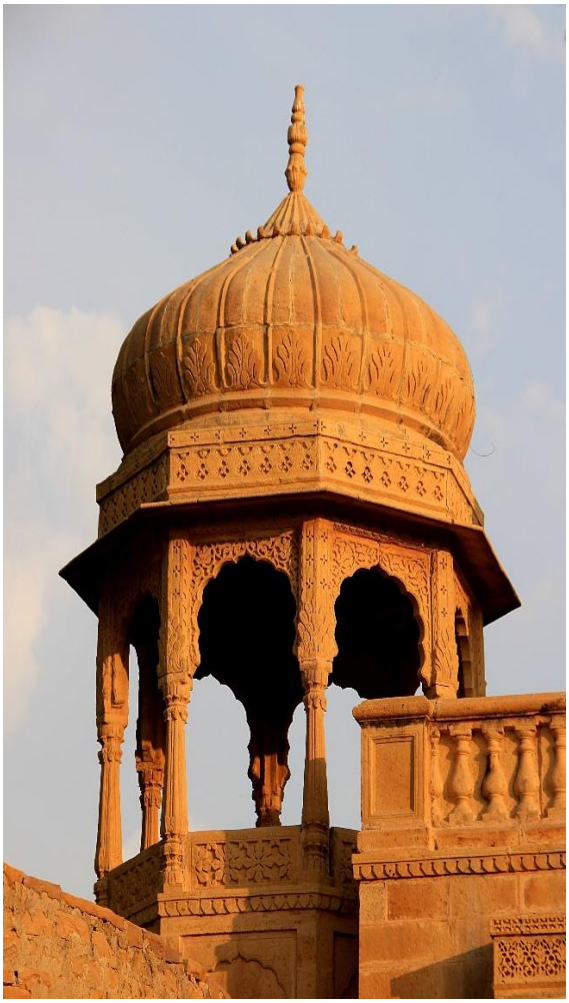

FOREWORD

Dear Reader,

In the last month, GST Council made recommendations in respect of withdrawal of certain exemptions from levy of GST and changes in tax rates, to garner additional revenue, keeping in view the fiscal situation. These are highlighted in a Note forming part of this Update.

In addition, a few notifications, guidelines were issued by the Ministry of Finance clarifying the provisions as introduced for withholding of tax on consideration paid for transfer of virtual digital asset, on benefit or perquisite provided in respect of business or profession, in furtherance to the amendments as made by the Finance Act, 2022 in respect of such provisions.

This Update also includes an article on provisions dealing with the 'E-Advance Ruling Scheme' under the provisions of Income-tax Act, which was notified a few months back and also a summary of certain important decisions dealing with taxation of a foreign company.

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INTERNATIONAL TAXATION

E-Advance Ruling Scheme

A new scheme called 'E-Advance Ruling Scheme' was notified by the Central Government and recently, the Government prescribed Forms for making applications for Advance Ruling.

An 'Authority for Advance Rulings' ('AAR') was set up in 1993 as per the provisions of Income-tax Act, 1961 which had been in existence since then. The AAR comprised of a Chairman, being a Retired Judge of the Supreme Court or a High Court, a Vice Chairman, a Retired Judge of a High Court, and three members one each from the Indian Revenue, Indian Customs and Indian Legal Service. As such, the composition of AAR was high powered.

The AAR was required to pronounce its Advance Ruling within a period of six months.

Several Important Rulings were pronounced from time to time by AAR since its inception. However, due to various reasons, including difficulty in finding appropriate Chairman, Vice-Chairman, Members, many applications as filed remained pending for several years.

This as such did not secure the objective of providing Rulings in a timely manner to the Applicants.

By the Finance Act, 2021, however, several amendments were made in respect of provisions dealing with Rulings. A new Authority, known as "Board for the Advance Rulings" ('the Board') was proposed to be substituted in place of AAR.

The Board will now have only two members of the rank of Chief Commissioner of Income-tax.

The object of the changes as made in the provisions dealing with 'Advance Ruling Scheme' as stated by the government is to provide Rulings in a timely manner, eliminating the interface between the Board for Advance Rulings and the Applicant in the course of proceedings, as well as optimizing the utilization of resources through economy of scale and functional specialization and introducing a system with dynamic jurisdiction.

The eligibility of the applicant who can make an application for Advance Ruling remains the same which includes a Non-Resident, a specified Resident or such person as may be notified by the Government, from time to time.

Applications are now to be filed only through electronic mode. All the documents, materials or evidence in support of the application has to be furnished electronically only.

The new scheme permits providing an opportunity for hearing on request of the Applicant. The hearing will be through video-conferencing or video-telephony only. The Applicant as such is not required to appear personally or through authorized representative physically in connection with the proceedings under the scheme.

All communications by the Board, the Applicant and Income-tax Authority shall only be through electronic mode.

The scheme now specifically provides that the applicant and the tax department may appeal against the Ruling before the High Court. As such, the Ruling will no longer be binding either on the Applicant or on the tax officer, as was earlier applicable.

The Rulings made by AAR were earlier

challenged by the tax officer or by the Applicant by filing a writ petition before the High Court, when not satisfied with the Ruling.

The new scheme, however, provides that in respect of filing of an appeal by a tax officer, the Central Government may introduce a team based mechanism with dynamic jurisdiction so as to impart greater efficiency, transparency and accountability, by optimum utilization of the resources through economies of scale and functional specialization.

All the applications which were pending before the AAR for Advance Rulings stand transferred to the Board for Advance Ruling with effect from 1st September, 2021.

It is to be seen whether the objective of providing Advance Rulings in a timely manner will be achieved under the completely revamped scheme for Advance Rulings.

Three Boards for Advance Rulings have been constituted, two in Delhi and One in Mumbai. The applications for advance ruling shall be allocated or transferred randomly to these Boards through an automated allocation system. The Board for Advance Rulings shall intimate the applicant about the allocation or transfer, as the case may be.

Several applications which were pending before AAR will now need to be disposed of by the Board, which in our view, can take considerable time as the pendency is for applications filed even 5 years back.

The approach of the Board as set up which comprises very senior tax officers of the tax department will need to be seen when considering approaching the Board for obtaining Advance Ruling under the new scheme.

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Offshore supplies not attributable to installation PE and thus, not taxable in India

DCIT vs. Clough Projects International Pty. Ltd [TS-507-ITAT-2022(Mum)]

Recently, the Tax Tribunal, Mumbai Bench held that receipts from offshore supply could not be attributed to permanent establishment (PE) in India and thus, were not taxable.

On facts, the taxpayer, Clough Projects International Pvt. Ltd. (CPIL) is a tax resident of Australia. It entered into an agreement with BG Exploration & Productions India Ltd. ("BG Exploration") for engineering, procurement, installation and commissioning of 3 platforms and for modifications to the existing platforms and interfiled pipelines at three locations in Mumbai. Receipts from offshore supplies were claimed as not taxable in India by the taxpayer.

However, the Assessing Officer concluded that the project constituted PE as per Indo-Australia tax treaty with regard to operations of installation and commissioning of platforms carried out in India. The AO held that entire receipts (onshore as well as offshore) were taxable in India since the contract was composite in nature. The AO rejected the books of accounts of the taxpayer and held that the provisions of Section 44BB of the Act were attracted in the given case. Accordingly, the AO subjected the entire contract receipts to tax under Section 44BB (wherein profits are presumed at 10% of the receipts).

The matter went before the High Court and the High Court directed the Tax Tribunal to re-hear the appeal. The taxpayer accepted the taxability of onshore services under Section 44BB of the Act.

In the second round of appeal before the Tax Tribunal, the only issue was with regard to taxability of offshore supplies under Section 44BB of the Act. The Revenue contended that the contract was composite in nature and the entire responsibility for execution of the project was on the taxpayer. Furthermore, the taxpayer had artificially split the contract to seek exemption from taxation of operations outside India. The taxpayer contended that purchase of material used for installation of platform was done outside India, the same was not attributable to the installation PE. Offshore supply could not be taxed in the hands of PE as the PE came into existence only after the oil well platforms were delivered to the PE in India for installation.

The Tribunal held that the taxpayer had installation PE in India under Article 5(2)(k) of the tax treaty. Furthermore, the Tribunal observed that the contract provided for separate price for onshore and offshore activities and as per the contract, the title to the 3 platforms and its designs were to pass to BG Exploration outside India and the taxpayer was to complete installation and commissioning of platforms upon delivery of the same at the installation sites. The Tribunal further noted that the platforms were fabricated in UAE and the sales were directly billed to BG Exploration.

The Tribunal, relying on the decision of Hon'ble Supreme Court in the case of Hyundai Heavy Industries Co. Ltd. (2007) (291 ITR 482) (SC), held that the material purchased from outside India could not be said to be attributable to the PE in India and the receipts from offshore supplies could not be brought to tax under Section 44BB of the Act.

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Assessing Officer directed to issue NIL tax deduction certificate on reimbursement of seconded employees' salaries as 'make available' requirement was not met and no sum was chargeable to tax

Flipkart Internet Private Limited [TS-503-HC-2022(KAR)]

Recently, the High Court of Karnataka, allowing the writ petition filed by Flipkart Internet Private Limited ("Flipkart" or "the petitioner"), directed the Assessing Officer to issue 'NIL' tax deduction certificate under Section 195(2) of the Act on payment to Walmart Inc. towards reimbursement of salaries of seconded employees.

On facts, Flipkart, an information technology solutions and support service provider for e-commerce industry, entered into Master Service Agreement with Walmart Inc., USA for secondment of employees. Flipkart entered into Global Assignment Agreement with seconded employees which provided that the employees would work for Flipkart. It also issued appointment letters to seconded employees. For administrative convenience, payment of salaries to seconded employees was firstly made by Walmart Inc. and then Flipkart reimbursed salary amount to 'Walmart Inc. on cost-to-cost basis.

Flipkart filed application before the Assessing Officer under section 195(2) for grant of NIL tax deduction certificate on the said reimbursement. However, the

Assessing Officer rejected that application and directed Flipkart to deduct tax at the applicable rate on the following premise:

- no employer-employee relationship existed between Flipkart and seconded employees since the right to decide continuation of services vested with Walmart Inc.;
- Considering that the services rendered were technical services, tax deduction under section 192 does not obviate the need to deduct tax under section 195; and
- since fees for technical services (FTS)/ fees for included services (FIS) are taxable on gross basis, there is no requirement to look into the income element embedded therein.

Before the High Court, the petitioner contended that no tax was required to be deducted on pure reimbursements as withholding tax obligation under section 195 arises only when there is any sum chargeable to tax. Further, it was contended that in terms of Article 12, FIS of the Indo-US tax treaty, rendering of technical or consultancy services must make available technical knowledge, experience, skill, know-how or processes to qualify the receipt as FIS, which was not fulfilled in the given case. Furthermore, the petitioner contended that salary payments fall outside the purview of 'FIS' under Article 12 of the treaty. The petitioner also submitted that it qualified to be the real and economic employer of the seconded employees as it exercised control over the seconded employees and it had the right to terminate the secondment arrangement.

The High Court noted that it is not mere rendering of technical service but the requirement of make available in terms of Article 12(4)(b) also needs to be fulfilled. The High Court stated that scrutiny of Master Service Agreement did not reveal satisfaction of the 'make available' requirement and considering the nature and scope of proceedings under section 195, further enquiry was not called for. The Court held that merely because the seconded employees had requisite experience/ skill/ training, that was not sufficient to treat the payment as FIS without the satisfaction of make available requirement. The Court, thus, concluded that in absence of any sum chargeable to tax under the tax treaty, the question of tax deduction did not arise.

Further, the Court observed that what is relevant is the relationship between Flipkart and the seconded employees during the term of secondment and the fact that Walmart Inc. had the power to decide continuation of employment post the secondment period is of no significance. The Court also noted that Flipkart was incorporated in 2012 and Walmart acquired majority stake in Flipkart subsequently in 2018 and it was not the case that Flipkart is merely acting as back-office for providing support service to the overseas entity. The High Court concluded that since Flipkart issued appointment letters and seconded employees reported to Flipkart, for the purpose of limited finding under Section 195, Flipkart was the employer of seconded employees.

The High Court distinguished the recent Apex Court decision of *Northern Operating Systems Pvt Ltd. [2022] 138 taxmann.com 359 (SC)* as relied upon by the Revenue on the basis that the said judgement was rendered in the context of service tax. The High Court observed that the only question for determination before the Apex Court was whether supply of manpower was covered under the taxable service and was to be treated as a service provided by foreign company to Indian company, whereas in the instant case, the legal requirement was whether 'make available' requirement was satisfied to treat a service as FIS.

The High Court also distinguished the decision of the High Court of Delhi in the case of *Centrica India Offshore (P.) Ltd. v CIT, New Delhi [TS-237-HC-2014(DEL)]* stating that the Delhi High Court had recorded a finding on facts that the overseas entity had service PE in India and the control over the employment by the overseas entity was overriding. The High Court observed that conclusion in Centrica decision was rendered in the context of facts and on the basis of the material available. The High Court further noted that the Centrica decision was reiteration of the necessity to demonstrate 'make available' for satisfaction of FIS. Regarding reimbursement, the High Court observed that as per the Centrica decision, it was not the nomenclature that was relevant, actual reimbursement had to be substantiated.

The High Court relied on its decision in the case of *DIT vs. Abbey Business Services India (P.) Ltd. (2020) 122 taxmann.com 174 (Kar)* wherein it was held that secondment agreement constituted an independent contract of services in respect of employment.

In view of the above, the High Court directed the Assessing Officer to issue "NIL" tax deduction certificate to Flipkart.

In our last corporate update edition, it was highlighted that the service tax decision of the Apex Court in the case of *Northern Operating Systems Pvt Ltd*. (supra) might have implication on how secondment arrangements are treated under income tax law. While this judgement of the High Court of Karnataka may be helpful in distinguishing the said service tax decision and in demonstrating that secondment cannot be characterised as FIS, yet this view is still contentious. Furthermore, a question also arises as to whether this judgement would be of relevance in context of those treaties where 'make available' clause is not applicable such as in the case of Germany.

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DOMESTIC TAXATION

Interest paid on delayed payment of TDS is compensatory in nature and an allowable deduction under Section 37(1)

Resolve Salvage & Fire India (P.) Ltd. v. DCIT [(2022) 139 taxmann.com 196 (Mum ITAT)]

Recently, the Mumbai Bench of Income Tax Appellate Tribunal ('Tax Tribunal') has held that interest paid under Section 201(1A) of the Income-tax Act, 1961 ('Act') on delayed payment of tax deducted at source ('TDS') is 'compensatory' in nature. Furthermore, it has been held that such compensatory interest is an allowable deduction under Section 37(1) of the Act.

As per Section 201(1A) of the Act, any person, principal officer or company is liable to pay simple interest at prescribed rate where it fails to deduct or after deducting, fails to pay TDS to the tax authorities. Section 37(1) of the Act is a residuary provision whereby, any expenditure (not being capital in nature) which is incurred wholly and exclusively for the purposes of business or profession is an allowable deduction in computing income under the head "Profits and Gains from Business or Profession". Furthermore, as per Explanation1 to Section 37(1), any expenditure incurred for an offence, or which is prohibited by law, shall not be allowable

as a deduction under Section 37(1) of the Act.

Brief facts of the case are that the Appellant, during the assessment proceedings for Assessment Year 2015-16, filed a letter putting forth a fresh claim of deduction of interest paid on late deposit of TDS and service tax amounting to INR 16.13 million (approx.). Such interest was *suo-motu* added back by the Appellant in the computation of income prepared for subject year. The Appellant claimed that such interest being 'compensatory' in nature, was eligible for deduction under relevant provisions of the Act.

The Assessing Officer disallowed deduction of aforesaid interest as the same was 'penal' in nature. On further appeal, the disallowance was sustained by the CIT(A) too.

On appeal before the Tax Tribunal, the following was observed:

1) Placing reliance on coordinate bench ruling in the case of STUP Consultants (P.) Ltd. v. Addl. CIT [ITA No. 5827 of 2012, dated 11-12-2018], it was held that interest on late deposit of TDS is 'compensatory' in nature and accordingly, deductible under Section 37(1) of the Act.

2) The Tribunal distinguished Apex Court decision in the case of Bharat Commerce & Industries Ltd. v. CIT [98 Taxman 151 (1998) (SC)] as the decision was based upon late remittance of advance tax whereas, the instant case is based on late remittance of TDS. Accordingly, it was held that the principles laid down in the aforesaid decision were not applicable to the case at hand.
3) TDS is income tax levied on income of a third party, on whose behalf such tax is deducted & paid to tax authorities. Such TDS forms a part of the expenses incurred by the payer, which is claimed in the profit and loss account prepared by the payer and in no way represents the tax of the payer. In contrast, advance tax is an income tax which is paid/ payable on own income. Thus, it was held that any delay in payment of TDS could not be linked to income tax of the Appellant, which was 'compensatory' in nature.

Thus, placing reliance on its coordinate bench ruling in the above-mentioned case of STUP Consultants (P.) Ltd. *(supra)*, it was held that interest paid on late deposit of TDS under Section 201(1A) of the Act is an allowable deduction under Section 37(1) of the Act.

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Guidelines on the scope and coverage of the new section 194R regarding withholding tax on benefit or perquisite in respect of business or profession

The Finance Act, 2022 inserted a new section 194R in the Income-tax Act, 1961 (the Act) to bring benefits or perquisites arising from business or exercise of the profession within the ambit of tax withholding, which is effective from July 01, 2022. As per this section, a person who is providing any benefit or perquisite to a resident carrying out any business or profession is required to withhold tax at the rate of 10% of the value or aggregate value of such benefit or perquisite

In order to provide clarification on applicability of section 194R on various situations, the Central Board of Direct Taxes has issued Circular no.12 dated June 16, 2022, providing some guidelines and examples on the scope and coverage of the new section. The summary of these guidelines is mentioned herein below:

1. The deductor is not required to check whether the amount of benefit or perquisite is taxable in the hands of recipient under section 28(iv) or any other section before deducting tax under section 194R. Even if the benefit or perquisite is in the form of a capital asset, the section will be applicable.

2. Discounts and rebates related to sales/purchases are in the nature of benefits. However, to the extent of such discounts, purchase price of the buyer is also reduced. Therefore, it has been clarified that no tax is required to be withheld under section 194R of the IT Act on such discounts and rebate.

   It is clarified that where a seller offers some items free along with other items (say 2 items are offered as free when the customer purchases 10 items), section 194R of the Act shall not be applicable, since, in substance, the seller is actually selling 12 items at the price of 10 items.

   Where, however, free samples are given along with items sold, tax withholding under section 194R of the Act is required.

   As per the circular, the relaxation shall not be extended to other benefits provided by the seller in connection with its sale. The following illustrations (non-exhaustive list) are provided where section 194R will be applicable:

   - Incentives (other than discounts, and rebates) in the form of cash or kind such as cars, computers, gold coins, mobile phones etc.

   - Sponsors a trip for the recipient and his/her relatives upon achieving certain targets.

   - Free tickets for an event.

   - Free medicine samples to medical practitioners.

3. Where the benefits/perquisites are used by the owner/director/employee of the recipient entity or their relatives who in their individual capacity may not be carrying on business/profession, the deductor is required to deduct tax in the name of the recipient entity since the usage by the owner/ director/ employee/ relative is by virtue of their relationship with the recipient entity and in substance the benefit/ perquisite has been provided to the recipient entity.

   Where the benefit is provided to a consultant of the service provider/ recipient entity, then to remove difficulty, as an alternative, the original benefit or perquisite provider may directly deduct tax under section 194R of the Act in the case of the consultant as a recipient.

4. The provision of section 194R of the Act shall not apply if the benefit or perquisite is being provided to a Government entity, like Government hospital, not carrying on business or profession.

5. Valuation of benefit or perquisite shall be based on fair market value.

   If the provider has purchased the benefit or perquisite before providing it, the value shall be the purchase price.

In case the provider manufactures the benefit or perquisite, the value shall be the price it charges to its customers.

GST will not be included for the purposes of valuation.

6. A social media influencer is given a product of a manufacturing company so that he can use that product and make audio/video to speak about that product on social media. If the product is retained by the social media influencer, then it will be in the nature of benefit/perquisite and tax is required to be deducted accordingly under section 194R.

7. Any expenditure which is the liability of a person carrying out business or profession, if met by the other person, is in effect benefit/perquisite provided by the second person to the first person in the course of business/profession.

   Where the consultant incurs travel expenditure which is paid by the client, it is benefit/perquisite provided by the client to the consultant. However, if the invoice is in the name of the client, then the reimbursement will not be considered as benefit/perquisite for the purpose of section 194R.

8. The expenditure incurred on dealer/business conference would not be considered as benefit/ perquisite, where such conference is held with the prime object to educate dealers/customers on aspects like new product launch, obtaining orders, teaching sales techniques, addressing queries, reconciliation of accounts with dealers/customers.

   However, the expenditure incurred for dealer/business conference for providing incentives or benefits to select dealers/customers who have achieved particular targets would be considered as benefit or perquisite. Expenses attributable to leisure trip; expenditure incurred for family members accompanying the person attending dealer/ business conference; stay before or beyond conference day; are in the nature of benefit/perquisite and section 194R would be attracted on such benefits/perquisites.

9. Section 194R requires that the deductor providing benefit/perquisite in kind (whether fully or partially) to a recipient needs to ensure that the tax required to be deducted has been paid by the recipient. Such recipients would pay tax in the form of advance tax. The deductor may rely on a declaration along with a copy of the advance tax payment challan provided by the recipient confirming that tax on the benefit/perquisite has been deposited.

   Alternatively, the deductor may deduct the tax and deposit with the Government. The tax should be deducted after grossing up taking into account the fact that the tax paid by him as TDS is also a benefit under section 194R of the IT Act.

10. CBDT has clarified that the threshold limit of INR 20,000 for applicability of section 194R is to be counted from April 01, 2022 for financial year 2022-23. However, TDS provisions under section 194R shall apply on benefit or perquisite provided on or after July 01, 2022. The benefit or perquisite provided on or before June 30, 2022, shall not be subjected to TDS.

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Notifications and guidelines with respect to tax deduction at source under newly introduced Section 194S for withholding tax on consideration paid for transfer of a Virtual Digital Asset

The Finance Act, 2022 inserted a new section 194S in the Act with effect from July 01, 2022. The new section mandates a person who is responsible for paying to any resident any sum by way of consideration for transfer of a Virtual Digital Asset (VDA) to deduct an amount equal to 1% of such sum as income tax thereon. The tax deduction is required to be made at the time of credit of such sum to the account of the resident or at the time of payment, whichever is earlier.

Where the consideration for transfer of VDA is wholly or partly in kind, the person responsible for paying such consideration is required to ensure that tax required to be deducted has been paid in respect of such consideration before releasing the consideration.

Further, Virtual Digital Asset has been defined as under:

a) any information or code or number or token (not being Indian currency or foreign currency), generated through cryptographic means or otherwise, by whatever name called, providing a digital representation of value exchanged with or without consideration, with the promise or representation of having inherent value, or functions as a store of value or a unit of account including its use in any financial transaction or investment, but not limited to investment scheme; and can be transferred, stored or traded electronically;

b) a non-fungible token or any other token of similar nature, by whatever name called;

c) any other digital asset, as the Central Government may, by notification in the Official Gazette specify.

The Central Government is empowered to issue a notification to exclude any digital asset from the definition of virtual digital asset subject to such conditions as may be specified therein.

Non-fungible token means such digital asset as the Central Government may, by notification in the Official Gazette, specify.

The Central Government vide Notification No. 74/2022 has excluded the following virtual digital assets from the definition of VDA:

1. Gift card or vouchers, being a record that may be used to obtain goods or services or a discount on goods or services;

2. Mileage points, reward points or loyalty card, being a record given without direct monetary consideration under an award, reward, benefit, loyalty, incentive, rebate or promotional program that may be used or redeemed only to obtain goods or services or a discount on goods or services;

3. Subscription to websites or platforms or application.

Further, by a separate notification no. 75/2022, the Central Government has

specified a non-fungible token as a token which qualifies to be a virtual digital asset but shall not include a non-fungible token whose transfer results in transfer of ownership of underlying tangible asset and the transfer of ownership of such underlying tangible asset is legally enforceable.

The Central Board of Direct Taxes (CBDT) has also issued guidelines on various aspects for proper administration of the provisions of section 194S through circular Nos. 13 & 14 of 2022. These circulars provide separate set of guidelines which deal with situations where the transfer of VDA is taking place through Exchanges and transactions other than those taking place on or through Exchanges, respectively. The clarifications provided under the aforesaid Circulars are as under:

1. The threshold of fifty thousand rupees (for specified persons) or ten thousand rupees (for others) for applicability of the section shall be counted from April 01, 2022. However, the provision of section 194S of the Act shall apply on any sum credited or paid for transfer of VDA on or after July 01, 2022.

2. In a peer to peer (i.e. direct buyer to seller) transfer of VDA, the buyer (i.e person paying the consideration) is required to deduct tax under section 194S of the Act. The buyer will release the consideration in kind after seller provides proof of payment of such tax.

   Where the transfer of VDA takes place on or through an Exchange and the VDA being transferred is owned by a person other than the Exchange, tax may be deducted under section 194S of the Act only by the Exchange which is crediting or making payment to the seller (owner of the VDA being transferred). In a case where the credit/payment between Exchange and the seller is through a broker (and the broker is not seller), the responsibility to deduct tax under section 194S of the Act shall be on both the Exchange and the broker. However, if there is a written agreement between the Exchange and the broker, that broker shall be deducting tax on such credit/payment, then broker alone may deduct the tax under section 194S of the Act. The Exchange would be required to furnish a quarterly statement (in Form no 26QF) for all such transactions of the quarter on or before the due date.

   In a case where the transfer of VDA takes place on or through an Exchange and the VDA being transferred is owned by such Exchange, the buyer is required to deduct tax under section 194S of the Act. However, the buyer may not know whether the VDA being transferred is owned by the Exchange or not. To remove this difficulty, as an alternative the Exchange may enter into a written agreement with the buyer or his broker that in regard to all such transactions the Exchange would be paying the tax on or before the due date for that quarter. The Exchange would be required to furnish a quarterly statement (in Form No. 26QF) for all such transactions of the quarter on or before the due date prescribed. The Exchange would also be required to furnish its income tax return and all these transactions must be included in such return. If these conditions are complied with, the buyer or his broker would not be held as assessee in default under section 201 of the Act for these transactions.

3. In a situation where VDA is being exchanged with another VDA, both the persons are buyer as well as seller. Both need to pay tax with respect to transfer of VDA and show the evidence to other so that VDAs can then be exchanged. This would then be required to be reported in TDS statement along with challan

number by both of them.

However, if the transaction is through an Exchange, there is practical issue in implementing this provision. In order to address this practical issue and to remove difficulty, it is clarified that in such a situation, as an alternative, tax may be deducted by the Exchange. Such an alternative mechanism can be exercised by the Exchange based on written contractual agreement with the buyers/sellers.

4. Once tax is deducted under section 194S of the Act, tax would not be required to be deducted under section 194Q of the Act.

5. The tax required to be withheld under section 194S of the Act shall be on the "net" consideration after excluding GST/ commission or other charges levied by the deductor for rendering service.

6. In transactions where payment is being carried out through payment gateways, the payment gateway will not be required to deduct tax under section 194S, if the tax has been deducted by the person required to make deduction under section 194S of the Act. To facilitate proper implementation, the payment gateway may take an undertaking from the payer regarding deduction of tax. This clarification is not made applicable for transaction made other than through an Exchange.

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Indirect Taxes

Changes in GST Law

The GST Council's 47th meeting was held in Chandigarh on 28th and 29th June, 2022.

A. Some of the recommendations made in the 47th GST Council meeting have been notified by the Government vide various notifications dated July 05, 2022.

The key highlights of these Notifications are provided hereunder:

1. *Levy of Interest and Transfer of Cash balance:*

- Section 50(3) of the CGST Act, 2017 has been substituted retrospectively, w.e.f. July 01, 2017, so as to provide for levy of interest on input tax credit (ITC) wrongly availed and utilized. In other words, only wrong availment of ITC without its utilization, would not attract interest implications.

- Section 49(10) has been amended to provide that a registered person may transfer the balance in electronic cash ledger under the heads CGST and IGST to its distinct persons in Form GST PMT-09 provided the said registered person does not have any unpaid liability, in the state from which he intends to transfer electronic cash balance, in his electronic liability register.

(Notification No. 09/2022 -Central Tax dated July 05, 2022)

2. *Annual GST Return (GSTR-9):* Registered persons with an aggregate turnover of upto INR Two crores in F.Y. 2021-22 are exempted from the

requirement of filing Annual Return in Form GSTR-9 for FY 2021-22.

(Notification No. 10/2022 -Central Tax dated July 05, 2022)

3. *Limitation period:* The period from March 01, 2020 to February 28, 2022 shall be excluded while calculating the limitation period for filing refund claim under Section 54 and 55 of CGST Act. The said period shall also be excluded for calculating the limitation period for issuing demand/order by the proper officer in respect of erroneous refunds under Section 73 of CGST Act.

   Further, under Section 73, orders in respect of other demands linked with the due date of annual return for F.Y. 2017-18 may be issued by the proper officer till September 30, 2023.

   (Notification No. 13/2022 -Central Tax dated July 05, 2022)

4. *Amendments brought forth in CGST Rules:*

   - **Automatic Revocation of Suspension of Registration:** In case of non-filing of GST returns upon filing of such pending GST returns by the taxpayer.

   - **Non-reversal of ITC against supply of Duty Credit Scrips:** Explanation 1 to Rule 43 of the CGST Rules, 2017 has been amended to do away with the requirement of reversal of input tax credit for exempted supply of Duty Credit Scrips by the Exporters;

   - **Declaration on Tax Invoice:** Rule 46 has been amended to provide that where a registered person is not required to issue e-invoice under the provisions of the GST law, he shall mention the following declaration on tax invoices issued by him:

     "I/We hereby declare that though our aggregate turnover in any preceding financial year from 2017-18 onwards is more than the aggregate turnover notified under sub-rule (4) of rule 48, we are not required to prepare an invoice in terms of the provisions of the said sub-rule."

     We understand that the said requirement would be applicable on invoices issued by entities/sectors which are exempt from requirement of issuance of E-Invoice such as Banking companies, insurers, SEZ, GTA etc.

   - **Re-credit of erroneous refund:** Rule 86(4B) has been introduced which provides for re-credit of the amount in electronic credit ledger in cases where erroneous refund amount sanctioned to a taxpayer on account of accumulated ITC or on account of IGST paid on zero-rated supply of goods or services, is deposited back by him through Form DRC-03 along with interest and penalty, wherever applicable, by debiting electronic cash ledger, using new FORM GST PMT-03A;

   - **Tax payment facilities:** Rule 87 has been amended to include Unified Payment Interface ("UPI") & Immediate Payment Services ("IMPS") as an additional mode for payment of GST;

   - **Manner of calculating interest on delayed payment:** In furtherance

to amendment in Section 50(3), Rule 88B has been inserted w.e.f. July 01, 2017 in CGST Rules to provide that interest on delayed payment of tax, on account of delayed furnishing of GSTR 3B Return, will be calculated on the portion of tax which is paid by debiting the electronic cash ledger (i.e., outward tax liability net of input tax credit);

The Rule further provides that in case interest is applicable on wrong availment and utilisation of ITC, interest would be computed form the date of utilisation uptill the date of reversal or payment of such ITC.

Please note that ITC wrongly availed shall be construed to have been utilised, when the balance in the electronic credit ledger falls below the amount of ITC wrongly availed and the extent of such utilisation of ITC shall be the amount by which the balance in the electronic credit ledger falls below the amount of ITC wrongly availed.

- **Additional details to be reported in Form GSTR-3B:**

  - Details of supplies made through an e-commerce operator covered under Section 9(5) on which the said e-commerce operator is liable to pay tax,
  - ITC reversals on account of Rule 38,42,43 and Section 17(5) under Table 4(B)1,
  - ITC reclaimed which was reversed under Table 4B(2) in earlier tax periods,
  - ITC restricted vide Form GSTR-2B, viz., Ineligible ITC under Section 16(4) and ITC restricted due to place of supply provisions,

- **Additional details to be reported in Form GSTR-9 for F.Y. 2021-22**:

  - Non-GST supplies under Table 5F,
  - It is optional to either separately report the supplies as exempted and nil rated supply, or report only the consolidated value under the "exempted" row (Table 5D);
  - Registered taxpayers having aggregate turnover exceeding INR 5 crores in the preceding year shall report their outward supplies at 6-digit HSN level;

  (Notification No. 14/2022 - Central Tax dated July 05, 2022)

B. However, below recommendations of the 47th GST Council meeting is yet to be notified or clarified:

The key highlights of these Recommendations are provided hereunder:

1. Withdrawal of GST Exemptions (to be implemented w.e.f. July 18, 2022):

- **Withdrawal of GST exemption on specified non-branded food items:** It is recommended to exclude all types of pre-packaged and pre-labelled retail packs of food items and grains (including pre-packed, pre-labelled curd, lassi and butter milk) in terms of Legal Metrology Act from the scope of GST exemption. Earlier, GST was exempt on certain specified food items, grains etc., when not branded or where the right on their

brand name had been voluntarily foregone.

- **Withdrawal of exemption from levy of GST on following Services:**

  - **Hotel Accommodation priced upto INR 1,000/- per day** would be taxable @12%. Earlier it was exempt from levy of GST.
  - **Renting of residential dwelling to business entities (registered persons)**- Many Corporates take on rent residential dwellings for their Directors and Employees. Earlier, residential dwellings were exempt from GST. However, with this amendment, renting of residential dwelling to business entities would become taxable.
  - **Storage or warehousing of commodities** which attract tax (**Cotton**, nuts, spices, copra, jaggery etc.).
  - Fumigation in a warehouse of agricultural produce.
  - Transportation by rail or a vessel of railway equipment and material.
  - Hospital room rent (excluding ICU) exceeding INR 5,000/- per day per patient, shall be taxable @5% (without ITC) to the extent of amount charged towards room rent only.

2. Clarifications and Measures for Trade Facilitation

- **E-Commerce Operator:** The requirement of mandatory GST registration for persons supplying goods through E-Comm Operators would be relaxed, subject to fulfilment of conditions that (i) the aggregate turnover on all India basis should be less than the threshold limit for registration and (ii) the supplier shall not make any inter-state taxable supply.

  Further, Composition suppliers which were earlier barred from supplying goods through E-Comm platforms, would be allowed to undertake supply through E-comm operators, subject to certain conditions. (The details are being worked out and scheme would be applicable w.e.f. January 01, 2023).

- **Supply of Ice cream by Ice cream parlours:** The rate of GST on supply of ice cream by ice-cream parlours was clarified to be 18% (with ITC) vide Circular no. 164/20/2021-GST dated 6th October 2021. Before issuance of this circular, most ice-cream parlours were treating themselves as restaurants charging GST at the rate of 5% without availment of ITC. To provide relief to such parlours, it has been clarified that GST would be charged @ 5% without ITC on the same during the period July 01, 2017 to October 05, 2021.

- **Sale of Space for Advertisement:** Selling of space for advertisement in souvenirs published in the forms of books would attract concessional GST rate of 5%.

- **Renting of motor vehicle for transportation of goods:** Renting of vehicle with operator for transportation of goods on time basis is classifiable under Heading 9966 (rental services of transport vehicles with operators) and attracts GST at 18%. GST would be 12% on renting where cost of

fuel is included in the consideration charged.

- **Goods Transport Agency (GTA):** GTA service provider may either opt for option of paying tax under forward charge @5% (without ITC) or 12% (with ITC). However, he has to opt the option at the beginning of the Financial Year.

- **Tour Operator**: Service provided by Indian Tour operator to a foreign resident for a tour partially in India and partially outside India is to be subject to tax proportionate to the tour conducted in India for such foreign tourist subject to conditions that this concession does not exceed half of tour duration.

- **Electric Vehicle:** Electric Vehicles whether or not fitted with battery pack, are eligible for concessional GST rate of 5%.

3. **Changes in Tax Rate and Rate rationalisation to correct Inverted Duty Structure (to be implemented w.e.f. July 18, 2022)**

- **GST Tax Rate changes with respect to Services:**

Services	Previous Tax Rate	Proposed Tax Rate
job work services in relation to manufacture of leather goods and footwear	5%	12%
job work services in relation to processing of hides, skins and leather	5%	12%
Renting of truck/goods carriage where cost of fuel is included	18%	12%

- **GST Tax rates changes for works contract services:**

Services	Previous Tax Rate	Proposed Tax Rate
Work contract for roads, bridges, railways, metro effluent treatment plant, crematorium etc.	12%	18%
Works contract supplied to central and state governments, local authorities for historical monuments, canals, dams, pipelines, plants for water supply, educational institutions, hospitals etc. & Sub-contractor thereof.	12%	18%
Works contract supplied to central and state governments, union territories & local authorities involving predominantly earthwork and sub-contracts thereof.	5%	12%

- **GST Tax Rate changes with respect to Goods:**

Goods	Previous Tax Rate	Proposed Tax Rate
LED Lamps, Lights and fixtures, their metal printed circuit board	5%	12%
Solar Water Heater and systems	5%	12%
Prepared/ finished leather/ chamois leather/ composition leathers	5%	12%
IGST on specified defence items imported by private entities/ vendors, when end-user is the Defence forces	Applicable Rate	NIL
Tetra Pak (Aseptic Packaging Paper)	12%	18%
Knives with cutting blades, Paper knives, Spoons, forks, ladles, skimmers, cake. servers etc	12%	18%
Cut and Polished diamonds	0.25%	1.5%

Please note that we have included only key highlights of the GST Council meeting recommendations in their meeting held on June 28, 2022 and June 29, 2022.

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CORPORATE LAW

The Companies (Removal of Names of Companies from the Register of Companies) Amendment Rules, 2022

The Ministry of Corporate Affairs, vide its notification dated June 09, 2022, has amended the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016, by notifying Companies (Removal of Names of Companies from the Register of Companies) Amendment Rules, 2022. Through the amendment rules, the companies have been allowed one additional opportunity of resubmission of Form STK-2 **[Application by company to ROC for removing its name from Register of Companies].** Upon filing of Form STK-2, if the ROC finds it necessary to call for further information or any document annexed with the form is defective or incomplete, he shall provide a one-time opportunity to the company to remove the defects and resubmit the form within 15 days. Now, as per the amendment rules, after first resubmission of Form STK-2, if the ROC finds that the form / document is still defective or incomplete, he shall provide one additional opportunity to the company to resubmit the form within 15 days, failing which the ROC shall treat the Form as

invalid in the electronic record and shall inform the applicant, accordingly.

Deactivation of DIN of a director is not automatic

[Satya Narayan Banik V. Union of India (2022) 171 SCL 612 decided by the Calcutta High Court on February 11, 2022]

In the above case, the following matter came up for consideration before the Hon'ble High Court of Calcutta.

The writ petitioners were aggrieved by cessation of office as directors of one M/s. Hahnemann International Pvt. Ltd. The disqualification happened under Section 164 (2) due to non-filing of balance sheets and annual returns for a continuous period of three years from the year 2014-15. The ROC had also deactivated the Director Identification Number [DIN] of the petitioners for which the petitioners are aggrieved by. The petitioners have advanced a three-fold argument challenging such disqualification:

i. That they were not permitted to avail the benefit of the "Company's Fresh Start Scheme of 2020" despite applying by letter dated November 11, 2020.
ii. That the petitioners were not given a prior hearing before the disqualification as directors and were hence denied principles of Natural Justice.
iii. The Registrar of Companies is not authorized to deactivate their DIN and that such deactivation of DIN pursuant to the disqualification is not automatic.

The Court examined as to whether the petitioners were entitled to any prior notice before disqualification under Section 164(2). In this regard, the Court placed reliance on the case of *Naresh Kumar Poddar* in which the Co-ordinate Bench had held that since the disqualification under Section 164(2) and 167(1)(a) is automatic, by operation of law and leaving no discretion on the authorities, the question of application of principle of natural justice particularly prior hearing does not and cannot arise.

Further, in the case of G*autam Mehra*, the Co-ordinate Bench has also held that Section 164(2) and 167(1)(a), do not call for any prior notice or hearing. The question of applying principle of natural justice, therefore, cannot arise. The language, object and purpose of the aforesaid two provisions of the Act of 2013 are clear and explicit and provide for automatic consequences. There are no exceptions. There is no scope of condonation or curing the omission. The Rules of Natural Justice cannot therefore be read into the process of application and operation of Section 164(2) and 167(1) of the said Act.

One more case of *Snowcem India Ltd.* v. *Union of India* as decided by Bombay High Court was placed for consideration before the Court in which it was held that Section 274(1)(g) of the Companies Act 1956, [which corresponds to Section 164(2) of the 2013 Act] would not violate Article 19 or 14 of the Constitution of India as it does not restrict an individual's freedom to carry on his business, trade or occupation, does not create any unreasonable classification and merely acts as a penal measure in cases where a Director has failed to carry out his duties. Additionally, it held that Section 274(1)(g) of the Companies Act 1956, was a necessary provision as it was in the interest of ensuring good corporate governance and transparency.

Accordingly, the Hon'ble Court opined that the object and purposes of Section 164 and 167, as amended is to ensure probity and the highest standard of governance in Companies both public and private. A failure to file balance sheet and the annual returns for three consecutive years amounts to deliberate and wilful negligence. The public

at large dealing with such companies cannot be put to the uncertainty, whim and fancy of recalcitrant directors. After all the requirements and compliances mandated under the Companies Act, are not only for the benefit of the shareholders of a particular company but also for the public at large, which rely upon such compliances, in assessing the conduct of and in deciding their relations with such companies.

Regarding deactivation of DIN the Court held that cancellation or surrender or deactivation of DIN is stipulated in Rule 11 of Companies (Appointment and Qualifications of Director) Rules of 2014. It is contended that Rule 11 does not permit cancellation of or deactivation of DIN on account of disqualification of a director under Section 164(2) of the Act at all. That DIN could be cancelled on account of the death of a director or a director being declared as a person of unsound mind by a competent Court or being adjudicated as an insolvent or for other reasons, but not for suffering a disqualification under Section 164(2) of the Act.

Hence, DIN cannot be cancelled on account of disqualification sustained under Section 164(2) of the Act, but at the same time the company must comply with filing Form DIR-9 [Report by the company to Registrar, which has incurred default u/s 164(2)]. It is, therefore, held that deactivation of the DIN of the petitioners is not automatic.

In view of the above, the DIN of the petitioners shall be revived subject to the company having filed DR-9 within prescribed or extended time. The said DIN shall not be applied to entitle the petitioners to act as directors in any other company.

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Important dates to remember

Particulars	Date
Direct Taxes	
Filing of quarterly TDS return for the Quarter ended June 30, 2022	31.07.2022
Filing of quarterly TCS return for the Quarter ended June 30, 2022	15.07.2022
Filing of income tax returns for AY 2022-23 for all assessees other than (a) corporate assessees or (b) non-corporate assessees who are liable to get their accounts audited (including partners) or (c) assessees who have entered into an international or specified domestic transaction	31.07.2022
Indirect Taxes	
Submission of Form GSTR-3B and payment of tax for June 2022	20.07.2022

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