The Malad Chamber of Tax Consultants

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MCTC Bulletin

"Every Passing Minute is Another Chance to Turn it Around"

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President's Communiqué

My Dear Professional Colleagues,

The Finance Minister Smt. Nirmala Sitharaman delivered paperless Budget 1st time in the history of India on 1st February 2021. We have witness to one of the most bold and impressive union Budget ever presented in recent times. The attempt has been to put the pains of pandemic behind and focus on the future roadmap to kick start the economic upswing. The Capital market has also given thumbs up to the budget, by posting biggest budget day gains in 22 years by zooming beyond 8% on sensex and nifty.

Immediately after the Budget is presented, Our Budget Team started Compiling the Budget Publication. As Per Tradition this year also we have successfully brought the publication within 48 hours of the presentation of Budget in the parliament

On 4th Feb 2021 MCTC Organised Jointly with Goregaon Sports Club Virtual Public meeting on Union Budget for analysing Provisions of the Finance Bill. The Budget is analyzed by Senior Advocate Saurabh Soparkar- Direct tax proposal, by-Advocate Bharat Raichandani-Indirect tax proposal & Impact on Capital Market - by CA Manish Chokshi. The event was watched by more than 400 participants & more than 1000 viewers on Youtube. The analysis by learned speakers of some of the controversial provisions was really insightful.

This year's budget is a landmark one for us as professionals too. Through two of the proposals, of increasing the limit of turnover to ₹ 10 crores from ₹ 5 crores for enterprises to be covered under tax audit and discontinuing with the requirement of GST audit for all the enterprises, substantial number and value of assignments are taken away from the practising chartered accountants. These proposals have to be evaluated by the Government not only from the professionals' perspective but also from the value derived by the tax collecting authorities from reporting by the professionals through the audits.

We have also successfully completed Webinar on GST Audit by department by Advocate Monarch Bhatt on 13th Feb 2021 Under the Auspices of Shri Rajubhai J. Chokshi Oration Fund.

We have Planned one more study circle meeting on 6th march 2021- penalties under Direct Tax by eminent speaker. The details will be circulated by emails.

All the members of the Chamber are requested to participate in these programmes in large numbers to make it successful.

"It is said that the quality of good friends is such that
they will help you overcome bad qualities and inspire you to take the right path;
they will keep your secrets but highlight your good qualities;
they will not desert you when you in trouble & give of themselves in your time of need"

Best Regards,

CA M. D. Prajapati
President

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Life Membership Fees ₹ 2,500

DIRECT TAXES - Law Update

Compiled by Haresh P. Kenia

1. FACELESS PENALTY SCHEME, 2021

NOTIFICATION S.O. 118(E) [NO. 02/2021/F.NO.370142/51/2020-TPL], DATED 12-1-2021

The Central Government, vide NOTIFICATION S.O. 118(E) [NO.02/2021/F. NO.370142/51/2020-TPL], DATED 12-1-2021, in exercise of the powers conferred by sub-section (2A) of section 274 of the Income-tax Act, 1961, gives the Scheme called the Faceless Penalty Scheme, 2021. It shall come into force on the date of its publication in the Official Gazette

The Features of the Scheme are as under ;-

- Para -2 of the Scheme provides for Definitions of various Words and expressions used therein
- Para -3 of the Scheme provides for Scope of the Scheme.
- Para -4 of the Scheme provides for set-up of Faceless Penalty Centres. It Provides that Board may set-up a National Faceless Penalty Centre, Regional Faceless Penalty Centres, penalty units, and penalty review units and specify their respective jurisdiction.
- Para -5 of the Scheme provides for Procedure in penalty
- Para -6 of the Scheme provides for Rectification Proceedings
- Para -7 of the Scheme provides for Appellate Proceedings
- Para -8 of the Scheme provides for Exchange of communication exclusively by electronic mode
- Para -9 of the Scheme provides for Authentication of electronic record
- Para -10 of the Scheme provides for Delivery of electronic record
- Para -11 of the Scheme provides for No personal appearance in the Centres or Units
- Para -12 of the Scheme provides for Power to specify format, mode, procedure and processes

Readers may refer to above mention notification for full text / details of the Scheme.

2 PENALTY - PROCEDURE FOR IMPOSITION OF DIRECTIONS FOR FACELESS PENALTY SCHEME, 2021 [Section 274]

The Central Government in exercise of the powers conferred by section 274 (2B) of the Income-tax Act, 1961, for the purposes of giving effect to the Faceless Penalty Scheme, 2021 made under Section 274(2A) of the said Act, hereby makes the following directions, Vide Notification S.O. 117(E) [NO. 03/2021/F. NO. 370142/51/2020-TPL], Dated 12-1-2021, as under

- The provisions of section 2, section 120, section 127, section 129, section 131, section 133, section 133C, section 136 and Chapter XXI of the said Act shall apply to the procedure for imposing penalty in accordance with the said Scheme subject to the Certain exceptions, modifications and adaptations as specified in this notification.
- The provision of section 246A of the said Act shall apply to appealable orders arising out of penalty imposed in accordance with the said Scheme subject to the exceptions, modifications and adaptations as specified in this notification.
- The provisions of section 140 and section 282A of the said Act shall apply to the penalty proceedings in accordance with the said Scheme subject to the exceptions, modifications and adaptations as specified in this notification.
- The provisions of section 154 and section 155 of the said Act shall apply to the order passed in accordance with the said Scheme subject to the exceptions, modifications and adaptations as specified in this notification.
- The provisions of section 282, section 283 and section 284 of the said Act shall apply to the said Scheme subject to the exceptions, modifications and adaptations as specified in this notification.

Readers may refer to above mention notification for full text / details of the Directions.

3. ORDER UNDER PARA 3 OF THE FACELESS PENALTY SCHEME, 2021, FOR ASSIGNMENT AND DISPOSAL OF PENALTY CASES UNDER THE SCHEME

ORDER F. NO. 187/4/2021-ITA-I, DATED 20-1-2021

The Central Board of Direct Taxes in exercise of powers conferred under Para 3 of the Faceless Penalty Scheme, 2021 hereby directs that all the penalty cases initiated under the Income-tax Act, 1961, pending as well initiated subsequently, is assigned to the National Faceless Penalty Centre to be disposed by the National Faceless Assessment Centre (read as NeAC) in accordance with order under para 4 of the Scheme, dated 20-1-2021 (F.No. 187/3/2020-ITA-I), except provided as hereunder :—

(i) Penalty proceedings in cases assigned to Central Charges;

(ii) Penalty proceedings in cases assigned to International Tax Charges; and

(iii) Penalty proceedings arising in TDS charges.

This order shall come into force with immediate effect.

4. ORDER UNDER PARA 4 OF THE FACELESS PENALTY SCHEME, 2021 FOR DIRECTING THE NATIONAL FACELESS ASSESSMENT CENTRE / REGIONAL FACELESS ASSESSMENT CENTRE / ASSESSMENT UNIT TO ACT AS NATIONAL FACELESS PENALTY CENTRE / REGIONAL FACELESS PENALTY CENTRE / PENALTY UNIT / PENALTY REVIEW UNIT UNDER THE SCHEME

ORDER F. NO. 187/4/2021-ITA-I, DATED 20-1-2021

The CBDT , in pursuance to sub-para 4 of Para 4 of the Faceless Penalty Scheme, 2021, hereby directs that, until the date on which National Faceless Penalty Centre/Regional Faceless Penalty Centres/Penalty Units/Penalty Review Units under the Scheme are set up, the National Faceless Assessment Centre/Regional Faceless Assessment Centres/Assessment Units/Review Units (read as NeAC/ReACs/AUs/RUs), set up under the Faceless Assessment Scheme, 2019 will also act as the National Faceless Penalty Centre/ Regional Faceless Penalty Centre/Penalty Unit/Penalty Review Unit respectively.

The Income-tax Authorities of the NeAC/ReAC/AUs/RUs i.e. Pr.CCIT / CCIT / Pr.CIT/CIT /Addl.CIT / Jt.CIT / DCIT / ACIT / ITO shall act as and perform the functions of the corresponding Income-tax authorities of the National Faceless Penalty Centre/Regional Faceless Penalty Centers/Penalty Units/Penalty Review Units respectively

This order shall come into force with immediate effect

5. SECTION 139, READ WITH SECTIONS 44AB AND 119 OF THE INCOME-TAX ACT, 1961 - RETURN OF INCOME - REJECTION OF REPRESENTATIONS FOR FURTHER EXTENSION OF DUE DATE OF FURNISHING OF INCOME TAX RETURNS AND AUDIT REPORTS

CIRCULAR F.NO. 370153/39/2020-TPL, DATED 11-1-2021 AS CORRECTED BY

CORRIGENDUM F.NO. 370153/39/2020-TPL, DATED 12-1-2021

The Hon'ble Gujarat High Court *vide* judgment dated 8th January, 2021 in the case of *The All India Gujarat Federation of Tax Consultants v. Union of India,* SCA 13653 of 2020, [2021] 123 taxmann.com 141 (Guj) as directed the Ministry of Finance to look into the issue of extension of due dates for filing of Audit Report under section 44AB of the Income-tax Act more particularly the representation, dated 12-10-2020 and take an appropriate decision in accordance with law

CBDT rejected all the representations for further extension of the due date and while deciding gave detailed reasons, discussions and Considered various supreme Court judgments. It also Compared the relaxations of similar nature of extensions of due dates provided by other economies globally and mention that with that Government of India has been very empathetic to the needs of the taxpayers as compared various other countries.

CBDT observed as under ;-

- The due dates for filing of return/tax audit have already been extended on 3 occasions.
- Internationally, the extension provided by India is more generous as -compared to other countries.
- The return filing statistics of the current year indicates that returns filed in this financial year already far exceeds the returns filed which were due on the last date of filing of returns.
- Any further extension would adversely affect the return filing discipline and shall also cause injustice to those who have taken pains to file the return before the due date. It would also postpone the collection of revenue thereby hampering the efforts of the Government to provide relief to the poor during these COVID times

Readers may refer to above mention Circular for full text / detailed reasoning and discussion.

DIRECT TAX UPDATES

Compiled by CA Rupal Shah

Nirja Khatuwala vs. ITO-2 Nagaon

Citation: I.T.A. No. 41/Gau/2019, ITAT Gauhati Bench, 27 November 2020

Addition u/s 68 where creditors did not respond to notice u/s 133(6)

Facts:

Brief facts of the case as noted by the authorities below is that the assessee had filed return of income declaring total income of Rs. 8,64,800/-. The case was selected for scrutiny through CASS for limited scrutiny with the points of identification being large sundry creditors in comparison to low net profit.

During inquiry issued u/s 133(6), three parties whose balance outstanding totalled to Rs. 35 Lakhs did not respond to the notices. Thus he made addition of Rs. 35 Lakhs to the income of the assessee.

On first appeal, CIT(A) upheld the contentions of AO and did not grant any relief to the assessee.

Held:

Out of the total creditors 84% of the creditors replied to the notice u/s 133(6). The 14% of creditors that did not respond to notice 133(6) comprised of only three parties. The assessee has submitted due paper-work that these trade creditors were subsequently paid through proper banking channels.

The two creditors are non-residents and the assessee has submitted confirmation letters from the two parties that the dues are settled by the assessee subsequently. In case of the third creditor, it was the business of a proprietor which was shut down due to financial difficulties hence the notice could not reach him as the business premised were discontinued.

Since the assessee has satisfactorily proved the existence of liabilities in case of the creditors who did not respond to notice u/s 133(6), the addition u/s 68 were deleted and the appeal was allowed.

Unnikrishnan V S vs. ITO, (International taxation), Mumbai

Citation: ITA Nos. 1200 and 1201/Mum/2018, ITAT Mumbai, 13 January 2021

Taxability of ESOP from Indian Company in case of non-resident employee

Facts:

Assessee is an employee of HDFC Bank Limited. ESOP benefits were granted to him when he was resident and in consideration for services rendered in India. These ESOP were exercised when he was deputed in UAE and was non-resident as per definition under Income tax Act.

The assessee claimed the differential value between market price and exercise price on the date of exercise as perquisite value which was not taxable in India as per provisions of Article 15 of DTAA between India and UAE.

On the other hand, AO added the perquisite value of income is taxable in India. Similar view was taken by CIT(A) on first appeal

Held:

S. 17(2)(vi) decides the timing of the income to be the year of exercise of the ESOPs but does not expressly negate the fact that the benefit had accrued when the ESOP rights were granted.

Article 15 of the India-UAE DTAA permits taxation of ESOP benefit, which is included in "other similar remuneration", in the jurisdiction in which the related employment is exercised.

Thus, an assessee who gets ESOP benefits in respect of his service in U.A.E. and he exercises these options at a later point of time, say after returning to India and ceasing to be a non-resident, these benefits will deem to be accrued in UAE and not taxed in India.

Similarly, since ESOP were granted in lieu of services provided in India, the ESOP benefit deem to accrue India and hence the perquisite value on exercise of option is taxable in the hands of the assessee.

ONLINE GAMING – RATE OF GST AND VALUE

Compiled by CA Bhavin Mehta

PREFACE

Gaming has universal recreational appeal for people across all ages. The gaming industry has witnessed a paradigm shift with the evolution of digital and online gaming models. It is reported that presently there are over 400 gaming startups in India and with more than 500 million smartphone users as of December 2019. In terms of the FDI Policy, FDI remains prohibited in certain sectors, including lottery business, gambling and betting. In India online gaming industry has attracted more than $350 million in investments from venture capitalist. Indian online gaming market is expected to grow at compound annual growth rate of 40% to $ 2.8 billion by 2022. The growth is largely driven by smartphones, affordable data, and income level of consumers improving leading to increase in disposable income. 5G network penetration will revolutionize gaming sector. The total customer base has crossed 300 million users.

Online game is procured or accessed through online channels and requires internet for the game play. One of the mobile gaming models is where the developer chooses to monetize through a one-time payment wherein the users get the game upfront for a price. Mobile games can be skilled based or chance based. Games of skill are identified as separate category because various States in India (excluding Assam, Odisha and Telangana) have gambling Acts that excludes games of skill from the ambit of gambling. Games of chance for stakes fall within the ambit of the gambling Acts of the States and are largely prohibited. The Hon'ble Supreme Court in its decision in (i) State of Andhra Pradesh vs. K. Satyanarayana 1968 AIR 825 and (ii) Dr. K. R. Lakshmanan vs. State of Tamil Nadu and Anr. 1996 AIR 1153 has laid down that a game of chance is where the element of chances predominates over the element of skill, whereas a game of skill is where the element of skill predominates over the element of chance. The card games of rummy, bridge, along with sports like golf and chess have been classified as games of skill. The Hon'ble Apex Court observed that the three card game which goes under different names such as flush, brag, etc. is a game of pure chance.

Thus if the operator is able to show that a particular online game has preponderance of skill over chance and is played as a sports without stakes, it may fall within the exception of gaming/gambling under the State gambling laws. The popular online games in India recognized as games of skill include horse racing, rummy and fantasy sports. The various games offered as Fantasy sport operator in India includes Cricket, Football, Basketball and Kabbadi.

GST IMPLICATION

A. Central Goods and Service Tax Act, 2017: {Section 2(52)} - "goods" means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be served before supply or under a contract of supply. CGST Act includes actionable claim under the ambit of 'goods'. Section 2(1) – "actionable claim shall have the same meaning as assigned to its in section 3 of the Transfer of Property Act, 1882 (4 of 1882)".

A.1 Actionable claim is defined in Section 3 of the Transfer of Property Act as under:

"actionable claim" means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or ***to any beneficial interest in movable property and not in the possession,*** either actual or constructive, of the claimant, which the civil courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent".

A.2 Every claim is not an actionable claim. It must be a claim either to a debt or to a beneficial interest in movable property. The beneficial interest is not the movable property itself, and may be existent, accruing, conditional or contingent. The movable property in which such beneficial interest is claimed, must not be in the possession of the claimant. An actionable claim is therefore an incorporeal right. In the case of online gaming, the user gains the right to participate/play game and chance to win the prize on winning the game. A game is in essence a chance for a prize. Whether such right, namely, to participate/play the game and claim the prize on winning the game constitutes beneficial interest in the moveable property and thereby qualify as actionable claim?

A.3 The word "property" may denote the nature of the interest in goods and when used in this sense means title or ownership in a thing. The word may also be used to describe the thing itself. In the Dictionary of Commercial law by A.H. Hudson (1983 Edn.) the difference is clearly brought out. The definition reads thus:

"'Property' -In commercial law this may carry its ordinary meaning of the subject-matter of ownership. But elsewhere, as in the sale of goods it may be used as a synonym for ownership and lesser rights in goods". Hence, when used in the definition of 'goods' in the different sales tax statutes, the word 'property' means the subject matter of ownership. The same word in the context of a 'sale' means the transfer of the ownership in goods.

A.4 The expression "moveable property" means property of every description except immovable property. Moveable property is obviously capable of being assigned, transferred or sold and on their transfer, assignment or sale the beneficial interests are made over to the purchaser for a price. The users/player of the game does not have any ownership right of the game they play. They cannot assign or transfer the gaming right to another person. Therefore, gaming right cannot be considered as moveable property and thereby are not actionable claim.

A.5 Schedule III pertains to activities or transaction which shall be treated neither as a supply of goods nor a supply of services. Entry 6 of Schedule III provides for "Actionable claims, other than lottery, betting and gambling".

Section 65B(15) of the Finance Act, 1994 (Service Tax laws) defines "Betting or gambling means putting on stake something of value, particularly money, with consciousness or risk and hope of gain on the outcome of a game or a contest, whose result may be determined by chance or accident, or on the likelihood of anything occurring or not occurring". Game of skill are distinguishable from gambling and enjoy protection under Article 19(1)(g) of the Constitution of India. The actionable claim which does not qualify as lottery, betting or gambling is neither supply of goods nor a supply of services. However, games which are considered as game of chance would be considered as gambling and liable to GST. The online game of chance will be covered under SAC 999692 and the rate of GST shall be @28%.

A.6 In an online fantasy sports games, the user pay-in let say Rs.100 for a game, out of which say Rs.20 is retained towards platform fee and remaining balance Rs.80 is transferred to a separate escrow account, which is distributable amongst the winners. The question that arises, whether GST is payable on Rs.20?

A.7 The Bombay High Court in the case of ***Gurdeep Singh Sachar vs. UOI 2019 (30) G.S.T.L 441 (Bom.)*** dismissed the petition seeking direction to initiate criminal prosecution against "Dream 11 Fantasy Pvt. Ltd." and alleging evasion of GST. The Hon'ble Court relying on Punjab and Haryana High Court decision in ***Varun Gumber vs. UT of Chandigarh, 2017 Cri. LJ 3827 dated 18.4.2017,*** held that these are games of skill and not games of chance. The Hon'ble Court after analysing the provision of GST Act, namely, scope of supply and consideration came to the conclusion that Dream 11 Fantasy is liable to levy of GST only to the extent of platform fees and in respect of amount kept in escrow account there is no supply and would be classified as actionable covered under Schedule III of the GST Act. The SLP filed by the State of Maharashtra in Supreme Court with respect to GST is admitted and the operation of judgment of Bombay High Court in Gurdeep Singh Sachar is stayed on 6 March 2020. As rightly held by the Hon'ble Bombay High Court the online fantasy game is game of skill and not game of chance. The success arises out of participant's exercise of superior knowledge, judgment and attention.

A.8 As far online gaming is concerned, the right to use the platform on payment of fee is overwhelmingly dominated by the element of the right to claim the prize by the winner. The Hon'ble Bombay High Court bifurcated the pay-in (subscription/pay-per play/pay-per view) by user into platform fees and prize money distributable amongst winners. In the opinion of Author the essence of gaming is prize. A game having held to be essence a chance to win the prize, the platform fee can only be for sale of chance to win the prize. The only object here would be to win the prize. There is no other element. Online paid game without a chance to win is meaningless and one cannot play the game online without the platform provided it. Every right can be sub-divided into lesser rights. When these lesser rights culminate in a legally recognizable right, it is the latter which defines the right. The right to participate in a game is a part of the composite right of the chance to win and it does not feature separately in online gaming. It is an implicit part of the chance to win. It is not a different right. The separation is erroneous since neither of the rights can stand without the other. The only object to paying platform fees is win the prizes.

A.9 In the case of lottery, the Constitution Bench of Five judges of Supreme Court in the case of ***Sunrise Associates vs. Govt. of NCT of Delhi & Ors dated 28/04/2006 {Appeal (civil) No. 4552 of 1998}*** held that the distinction of having two rights in a lottery ticket, namely, a) the right to participate in the draw and b) the right to claim a prize, as held in ***H. Anraj vs. Government of Tamilnadu (1986) AIR 63*** is immaterial to the question as to whether the subject matter of the transfer is an actionable claim, since an actionable claim may be existent, accruing, conditional or contingent. A lottery is in essence a chance for a prize, the sale of a lottery ticket can only be a sale of that chance. There is no other element. A draw without a chance to win is meaningless and one cannot claim a prize without participating in the draw. In fact the transfer of the chance to win assumes participation in the draw. The only object of the right to participate would be to win the prize. The transfer of the right would thus be of a beneficial interest in movable property not in possession. By this reason also a right to participate in a lottery is an actionable claim. There was no sale of goods within the meaning of Sales Tax Acts of the different States but transfer of an actionable claim.

A.10 In the humble opinion of author, the operator provides the services of gaming to users. The consideration including platform fee received from users is for provision of gaming service. The prize money distributed amongst the winners is expenses for rendering gaming service. Prize money distributable to winners is separate escrow account will not change the tax treatment. The tax treatment is basis the nature of transaction and not on the basis of mode or method of incurring the corresponding expenditure to such income. It will not make any difference whether amount is kept in escrow account or in bank account of operator.

A.11 Section 2(31) of the CGST Act defines "consideration" in relation to supply of goods or services. It includes any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person. The pay-ins collected from users is consideration for supply of gaming service. Section 15 of the CGST Act provides for value of taxable supply. The value of a supply of goods or services shall be transaction value, which is the price actually paid or payable for the said supply of goods or services. The pay-ins received from user is value of supply of gaming service provided by operator.

Conclusion

(i) Online game of chance would be considered as online gambling service and would be liable to GST @28% covered under SAC 999692.

(ii) Online fantasy sports gaming is not gambling services would be liable to GST @18% covered under SAC 998439

(iii) The value of service shall be pay-in received from users including amount distributable to winners.

GST PE CHARCHA

GST Budget Proposals Analysis & Impact

Compiled by Monarch Bhatt, Advocate

(Partner at FairLaw Consultancy)

The budget speech was for about 4 to 5 minutes on GST proposals but it has made very significant amendment which we must know. There are total sixteen amendments, out of which fifteen amendments are pertaining to CGST Act and one is pertaining to IGST Act. Three CGST amendments have been proposed to come into effect retrospectively and all other amendment will be coming into effect after the assent of the president from the date to be notified by issuance of notifications.

Part A of the article includes retrospective amendments and Part B of the article includes changes to be coming into effect after the assent of the president from the date to be notified by issuance of notifications.

PART A - RETROSPECTIVE AMENDMENT

All the following amendments will come into effect after enactment of Finance Act from retrospective effect which is 01st day of July, 2017.

A.1. CLAUSE 99 | SECTION 7 – SCOPE OF SUPPLY

The Section 7 providing for the scope of supply has been amended retrospectively with effect from 01st day of July, 2017 whereby new clause (aa) has been inserted under sub clause 7(1). As per the retrospective amendment the expression "supply" includes "the activities or transactions, by a person, other than an individual, to its members or constituents or vice versa, for cash, deferred payment or other valuable consideration". The term "Person" is widely defined under section 2 (84) of CGST Act, 2017 whereby it includes all entities such as Individual, HUF, Company, Firm, LLP, an association of persons or body of individuals (whether incorporated or not in India or outside India); A Co-operative society (registered under any law relating to co-operative society); anybody corporate (incorporated by or under the laws of a country outside India); Society as defined under Society Registration Act, 1960; Trust and every artificial persons. Therefore, any activity by such persons other than individual to its members or constituents or vice versa for a consideration are liable for the payment of GST. Therefore, services by members club, housing society, association, trusts to its members for a consideration is liable for the payment of GST.

The explanation has also been added to the clause whereby it has been clarified with the use of non obstante clause that this clause 7 (1) (aa) will prevail over any other law or decree or judgement or order and members club, housing society, association, trusts and their members will be treated as two separate persons. Hence, all the decisions pronounced holding that services by members club to its members are not liable for the payment of services tax and VAT based on the concept of mutuality are no longer applicable under GST. Hence, it has also overcome the judgement of Supreme Court in the case of *State of West Bengal Versus Calcutta Club Limited reported in 2019 (29) G.S.T.L. 545 (S.C.)* where it was held that members clubs are not liable for the payment of service tax and VAT.

Firstly, I feel that battle under the GST is not yet over and this retrospective amendment will get challenged before the various high courts across the country and ultimately high courts needs to decide whether such retrospective amendment is bad in law or not? Secondly, one must look at the imposition of interest which is 18% per annum on the tax payers who are getting covered by such retrospective amendment. If liability is arising on the tax payer from 01st day of July, 2017, interest will be applicable at the rate of 66% which is almost 2/3 of the liability but no provision has been provided to safe guard such high interest liability. We are of the view that government should not be so harsh on such tax payers and 3 months shall be granted to them for payment of tax without any interest implications from the date of introduction of Finance Act, 2021.

A.2. CLAUSE 113 | ACTIVITIES [OR TRANSACTIONS] TO BE TREATED AS SUPPLY OF GOODS OR SUPPLY OF SERVICES

Since the retrospective amendment has been made under the "scope of supply" itself there is no requirement to provide any entry under schedule II which provides for the activities or transactions to be treated as supply of goods or services. Accordingly, paragraph 7 of Schedule II of CGST Act, 2017 has been omitted retrospectively with effect from 01st day of July, 2017 to remove the services provided by an association to its members from the list of transactions to be considered as the supply of goods as it is directly getting covered under the scope of supply.

A.3. CLAUSE 103 | SECTION 50 – INTEREST ON DELAYED PAYMENT OF TAX

It is to be noted that various high courts have pronounced distinguishing judgement on the applicability of interest. Telangana High Court in the case of *Mega Engineering & Infrastructure Limited Versus Commissioner of C. T., Hyderabad reported in 2019-TIOL-893-HC-TELANGANA-GST* held that interest is payable on the gross tax liability without reducing the ITC. In the case of *Refex Industries Ltd reported in 2020-TIOL-358-HC-MAD-GST* it was held that ITC was always available with the department and therefore payment by way of adjustment can neither be termed as belated nor delayed. The proper application of Section 50 is one where interest is levied on a belated cash payment but not on ITC available all the while with the department to the credit of the assessee.

In the light of such distinguishing decisions, the proviso to sub section (1) of section 50 was inserted with effect from 01.09.2020 by section 100 of the Finance (No. 2) Act, 2019. Now again, for the second time in the small tenure of 44 months of GST that proviso has been proposed to be substituted with the new proviso with retrospective effect to overcome the question arose with respect to the prior period where proviso was not into effect.

As per the proposed substituted proviso, interest will be applicable only on the net cash liability payable by the tax payer after reducing the credit balance available with him on the due date of filing of return. It is to be noted that proviso has exception and it is not applicable were return is to be filed after commencement of proceeding under section 73 (Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any willful misstatement or suppression of facts) and section 74 (Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any willful misstatement or suppression of facts). However, cases were return is not required to be filed under section 73 and section 74 in our view interest will be payable only on the net tax liability payable after reducing the available ITC. Therefore, if any liability arises after commencement of any proceeding under section 73 or section 74 where it has been discharged by DRC 03, then such exception is not applicable and tax payer will be liable for the payment of interest only on the net cash liability as it is furnished through DRC 03 and not by filing of return.

PART B - CHANGES TO BE COMING INTO EFFECT AFTER THE ASSENT OF THE PRESIDENT FROM THE DATE TO BE NOTIFIED BY ISSUANCE OF NOTIFICATION

B.1. CLAUSE 100 | SECTION 16 – ELIGIBILITY AND CONDITIONS FOR TAKING INPUT TAX CREDIT:

The Section 16 provides for the eligibility for taking of Input Tax Credit. Section 16 (2) starts with non obstante clause, which provides for the conditions for taking of Input Tax Credit whereby, clause (aa) has been inserted to provide that ITC of the invoice and debit note can be taken only when such details has been furnished by the supplier in his statement of outward supplies and it has been communicated to recipient of such goods or services. Therefore, now by amendment to section 16 (2), it has been made mandatory that ITC can be availed only when it has been reflected in GSTR 2A.

It is to be noted that rule of 36(4) of CGST Rules, 2017 provides for the restrictions on availment of input tax credit which has been challenged by way of writ petitions across the country. As per rule 36 (4), Input Tax Credit on unmatched invoices / debit notes can be availed only in proportion of the specified percentage of matched invoices / debit notes to the extent it has been unmatched. Initially in October 2019, when it was introduced additional ITC on account of mismatched was allowed upto 20% and thereafter in October 2020 it was reduced to 10% and now from January 2021 it has been further reduced to 5%. However, with such proposed amendment under section 16(2) it will get reduced to 0% and ITC will be allowed only when it gets reflected in GSTR 2A and other existing conditions for availment of ITC has been satisfied by the assessee.

In view of the above proposed prospective amendment in my view, writ petitions filed across the country against the restrictions imposed under rule 36(4) will become infructuous and tax payers need to assess their contracts with vendors with fresh clauses as far as taking of ITC is concerned.

B.2. CLAUSE 101 | SECTION 35 – ACCOUNTS AND OTHER RECORDS

The Section 35 (5) of CGST Act, 2017 has been proposed to be omitted which provides that tax payers exceeding the prescribed turnover limit are required to get their accounts audited by a chartered accountant or a cost accountant and shall submit a copy of the audited annual accounts, the reconciliation statement under sub-section (2) of section 44. Hence, requirement of audit by a chartered accountant or a cost accountant under GST has been proposed to be removed. However, section 44 of CGST Act has been proposed to be substituted, which provides for the filing of annual return, where the requirement of furnishing of reconciliation statement has been incorporated within the annual return itself under the self-certification basis. Hence, requirement of getting it audited by chartered accountant or a cost accountant has been removed and it is to be done under self-certification by the tax payer.

This amendment will come into effect prospectively and therefore for the financial year 2019-2020 and 2020-2021 (if not amended by the due date of filing) the requirement of filing of annual return and getting it submitted with the reconciliation statement for the specified assessee exceeding the turnover above the prescribed limit will continue.

B.3. CLAUSE 102 | SECTION 44 – ANNUAL RETURN

The section 44 of CGST Act has been proposed to be substituted, which provides for the filing of annual return, where the requirement of furnishing of reconciliation statement has been incorporated within the annual return itself under the self-certification basis and requirement of getting it audited by chartered accountant or a cost accountant has been removed by omitting section 35(5). Hence, reconciliation is to be submitted by the tax payer within the annual return under self-certification.

This amendment will come into effect prospectively and therefore for the financial year 2019-2020 and 2020-2021 (if not amended by the due date of filing) the requirement of filing of annual return and getting it submitted with the reconciliation statement for the specified assessee exceeding the turnover above the prescribed limit will continue.

B.4. CLAUSE 104 | SECTION 74 – AMENDMENT TO EXPLANATION 1 IN CLAUSE (II)

The section 73 and Section 74 provides for Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised, where section 73 is applicable in cases other than fraud or wilful misstatement or suppression of facts whereas section 74 is applicable in cases with fraud or wilful misstatement or suppression of facts.

The proposed amendment has impacted the cases, where notice has been issued to the main person and other persons under the same proceedings, whereby as per the proposed amendment the proceedings against all persons liable to pay penalty will not get concluded under section 129 and 130. Hence, conclusion of proceedings under section 73 and 74 will not conclude the proceedings under section 129 and 130 for which they have to litigate, if they do not want to take the hit of penalty leviable under section 129 and section 130.

B.5. CLAUSE 105 | SECTION 75 – GENERAL PROVISIONS RELATING TO DETERMINATION OF TAX

As per the proposed amendment, in case liability declared under GSTR 1 exceeds the supplies declared in GSTR 3B, it will be considered as "self- assessed tax" and it will be recovered along with the interest under section 79.

B.6. CLAUSE 106 | SECTION 83 – PROVISIONAL ATTACHMENT TO PROTECT REVENUE IN CERTAIN CASES

The new sub section (1) has been proposed to be substituted. As per the proposal, commissioner will be able to attach any property or bank account of taxable person or any person who retains the benefit of the transaction or at whose instance such transaction has been conducted. Such provisional attachment will be effective from the initiation of proceedings and will be valid for a period of one year from the date of order made thereunder. The same will be proven to be dangerous provisions in the times to come.

B.7. CLAUSE 107 | SECTION 107 – APPEALS TO APPELLATE AUTHORITY

The proviso has been inserted to sub section (6) of section 107 which provides for appeals to appellate authority. The provisions have been made more stricter even for filing of an appeal by appellant against an order issued under section 129 (3), whereby appellant shall pay 25% of the penalty to file an appeal. The Section 129 (3) which has also been proposed to be amended provides for the issuance of order for payment of penalty where goods has been seized or detained in transit.

B.8. CLAUSE 108 | SECTION 129 – DETENTION, SEIZURE AND RELEASE OF GOODS AND CONVEYANCES IN TRANSIT

The section 129 provides for Detention, seizure and release of goods and conveyances in transit. As per the provisions currently, once goods and conveyance has been detained or seized in transit, tax payer is required to make the payment of tax, interest and penalty to release the goods. Now as per the proposed amendment, only penalty is required to be paid and tax and interest is not payable to release the goods as anyway tax payer is paying the taxes while filing GSTR3B. Hence, it will reduce the burden of interest and double payment of tax by the tax payer.

Certainly, penalty has been proposed to be increased exorbitantly which is 200% of the tax payable.

The tax payer can release the goods on payment of penalty or on furnishing of security. If he chooses not to pay penalty within 15 days from the date of order, goods or conveyance so detained or seized will be liable to be sold or disposed. However, as per the proposed amendment tax payer can file an appeal under section 107 against such order on payment of 25% of the penalty.

B.9. CLAUSE 109 | SECTION 130 – CONFISCATION OF GOODS OR CONVEYANCES AND LEVY OF PENALTY

The amendment has been proposed whereby it has delinked the proceedings under section 130 relating to confiscation of goods or conveyances and levy of penalty from the proceedings under section 129.

B.10. CLAUSE 110 | SECTION 151 – POWER TO COLLECT STATISTICS

The section 151 of CGST Act, 2017 has been proposed to be substituted whereby commissioner has been made powerful to collect information from any person relating to the any matter under the GST. Commissioner is also authorised to get such information in his specified forms and in his required manner.

B.11. CLAUSE 111 | SECTION 152 – BAR ON DISCLOSURE OF INFORMATION

The section 152 has been proposed to be amended whereby, restriction has been imposed on use of information collected under section 150 and 151, which provides that such information can be used for the purposes of any proceeding under GST after giving an opportunity of being heard to the concerned person.

B.12. CLAUSE 112 | SECTION 168 – POWER TO ISSUE INSTRUCTIONS OR DIRECTIONS

The section has been proposed to be amended to give power to the jurisdictional commissioner to call for the information under section 151 from any person.

B.13. CLAUSE 114 of IGST | SECTION 16 OF IGST – ZERO RATED SUPPLY

The amendment has been proposed under section 16 of the IGST Act, 2017 whereby supply will be considered as "zero rated supply" only when supply of goods or services or both have been provided to SEZ Developer or SEZ Unit for "authorised operations". Previously, even under erstwhile regime of service tax, exemption from payment of service tax was granted to the assessee only if it has been used for authorised operations. Now, the same condition has been proposed to be brought under GST to consider it as zero rated supply. If supply has been made to SEZ unit or developer is not for the authorised operations, then it will not be considered as zero rated supply and will be liable for the payment of GST as IGST. It is to be noted that no amendment has been made under section 7 of IGST which provides that where the supply of goods or services both are by / to a SEZ developer or SEZ unit, it shall be treated as inter-state supply of goods or services.

It has been noticed that in the past many registered tax payers have claimed refund of ITC against zero rated supply of goods but enable to receive export proceeds against such supply of goods. Therefore, sub section 3 of section 16 has been proposed to be substituted whereby, in case registered person who has made a Zero rated supply of goods is unable to receive foreign exchange remittances within 30 days after the expiry of time limit prescribed under Foreign Exchange Management Act, 1999, then such registered persons are required to deposit the refund along with applicable interest under section 50 of CGST Act, 2017. Hence, registered person making Zero rated supply of goods not be receiving the foreign remittances will not be entitled to get the refund but the supply will be still considered as zero rated supply.

The new sub section (4) has also been proposed to be added under section 16. Currently, registered tax payers have the option to decide whether they want to make zero rated supply on payment of IGST or without payment of IGST? The amendment has been proposed whereby, restriction will be imposed on the class of persons and on the class of goods and services, which would be entitled for zero rated supply on payment of IGST only and thereafter they would be entitled to claim the refund of the taxes paid by them. This may impact cash flow of many of the exporters as first they need to make the tax payment and then refund needs to be claimed which will take some time.

STUDENTS' CORNER

ALTERNATE METHODS OF DISPUTE RESOLUTION

Compiled by Neel Randeria

Whenever there is a dispute between two parties, and the dispute is not of criminal nature, then parties may opt for alternate methods of dispute resolution instead of opting for litigation. Hence, civil disputes can be resolved by such alternate methods.

Few important alternate methods are-Arbitration, Conciliation and Mediation To get an insight on all these methods-a comparative study is crucial.

I. Litigation and Arbitration:

- In litigation, parties can't appoint the judge, whereas in arbitration, the parties can select the judge (also referred to as- arbitrator or arbitral tribunal)
- Proceedings are not required to be conducted in a court in arbitration, which is not the case otherwise.
- There are very few grounds under which the arbitral award can be challenged.
- The highlight of this distinguish is that- the proceedings of arbitration is not open for public and hence, information is quite confidential.

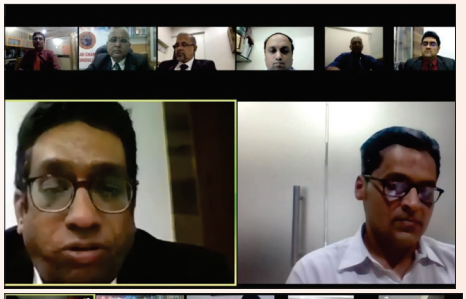
II. Conciliation and Mediation:

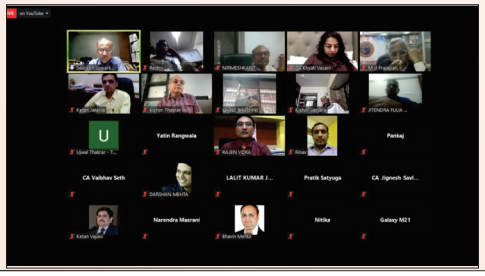
- The conciliator drafts multiple solutions for the dispute and the solution selected by the parties is then referred to as- award. The mediator, on the other hand, does not even draft a solution. He guides the parties and directs them towards a solution.
- From a legal standpoint, conciliation is governed by The Arbitration and Conciliation Act,1996. Whereas, mediation is governed by The Code of Civil Procedures, 1908.
- In case of breach of confidentiality, conciliation empowers legal action but mediation does not.

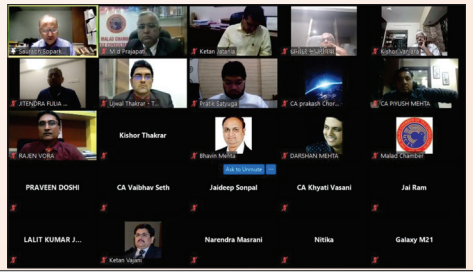
There is a slight difference in interpretation of these alternate methods of dispute resolution in various countries, but the differences are quite minor. There is huge demand for such settlements as legal proceedings are getting way more complex and tiring.

BUDGET MEETING

BUDGET PUBLIC MEETING ON 4TH FEB 2021







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