REFLECTIONS 2022

Perplexed, Yet Hopeful!

REFLECTIONS

THE BIG NEWSMAKERS/TAX EVENTS OF 2022

The Union Budget 2022-23 will go down in history for introducing the controversial Section 194R – TDS on Benefit or Perquisite in Business or Profession, apart from the elaborate tax regime for Cryptocurrency. We also witnessed amendments in Sections 14A and 37(1) that impact the businesses across the board. A retrospective amendment in Section 40(a)(ii) raised a few eyebrows initially but we have made peace with it. Needless to say, there were amendments in faceless assessment and reassessment regime to balance the perennial conflict between the taxpayers and the Revenue. Updated Return was another major highlight of the Budget.

EXPERTS' QUOTES

MUKESH BUTANI (MANAGING PARTNER , BMR LEGAL)

In a welcome step, the finance minister has extended the time limit for newly incorporated manufacturing entities and start-ups under the 15% concessional tax regime (announced in the August 2019 Ordinance) to March 31, 2023. The 30% tax on Income from Digital Assets, which, although seems penal in nature, shall provide much-needed clarity on the taxation of cryptocurrencies and NFTs. What is emerging is that the Digital Currency Bill shall witness passage, though its application for individuals remains unclear. Finance Minister continuing with the trend to curb litigation with proposals such as facilitating filing of updated tax returns and appeals to higher forums by the Union to avoid repeated litigations is laudable. At the same time, the tax evaders would be dealt with iron fists with no set-off of losses against income found added during search operations.

KETAN DALAL (MANAGING DIRECTOR, KATALYST ADVISORS PVT. LTD.)

In a sense, the Budget is more notable for what has not been done, and some of it is related to Covid-19. For example, there has been a clamour for increase in standard deduction, partly because of work from home, but that has not been done. MSMEs have been badly hit, as compared to larger companies which have managed much better; given that most MSMEs function as partnerships and LLPs, one would have expected tax rates to be lowered since corporates are taxed at 25%, but that has not happened.

Also, there was an expectation for increase in limits for mediclaim, insurance, interest on housing loans and education costs, but none of that has happened.

SANJAY TOLIA (PARTNER, PRICE WATERHOUSE & CO. LLP)

I would call the Budget- "holistic" focusing on 2 pillars: Doing Business through a clear transitioning plan to Circular Economy to help in productivity enhancement as well as creating large opportunities for new businesses and jobs, creating a Carbon Neutral Economy, focusing on the sunrise sectors & digital currency. Further, the transformative approach through PM GatiShakti driven by the 7-engines is a step towards economic growth and sustainable development.

Truly, the integration of the central and state-level system to achieve this will mark the start of a new phase.

Second pillar being Continuing with Ease of Doing Business through domestic capacity creation, providing level playing field to our MSMEs, easing the supply side constraints, repealing redundant laws and building a stable & predictable tax regime.

The budget is a testimony to the Government's vision to make India a USD 5 trillion economy.

SUDHIR KAPADIA (TAX LEADER, EY INDIA)

GOI and FM have firmly continued the path of long term growth and progressively unshackling hurdles in various sectors of the economy in Budget of 2022-23. The phenomenal and record setting increase of over 35% in capital expenditure bears testimony to this resolve and firmness in policy objective. Also, rather than providing for peripheral tweaks in existing provisions, FM has rightly opted for complete review and overhaul of important areas like SEZ and PE/VCs whereby, hopefully, many salient recommendations already made will be duly considered. The proposal to extend the date of setting up of new manufacturing unit for the concessional tax rate of 17% (including surcharge), from 31 March, 2023 to 31 March, 2024 will give time to business entities to avail of this incentive especially as many would also be applying for PLI benefits which have been only recently finalised across many sectors.

RAJEEV DIMRI (PARTNER AND NATIONAL HEAD OF TAX, KPMG IN INDIA)

The Budget proposal lay the foundation for strengthening of different sectors like transportation and logistics sectors (Gati shakti), banking and fintech (75 digital units to be set up), agriculture, EV sector (battery swapping policy), among others. …

To give a boost to the start-up community, the Government has also capped the surcharge on long term capital gains at 15% now. As a push to promote exports, SEZ Act to be replaced with a new legislation and states shall become partners for development of infrastructure is a big overhaul and seems to be a positive step. In tandem, reforms are also proposed to be undertaken in the Customs administration of SEZs, with facilitation related changes to be made.

Taxsutra covered the **74th Congress of the International Fiscal Association** that took place at Berlin from Sep 4 to Sep 8, 2022. It also marked the end of monumental tenure of **Pascal Saint-Amans** as the Head of the International Co-operation and Tax Administration Division, OECD. The four-day Special Coverage:

- 74th IFA Congress begins with sweeping brain-storming on Group v. Separate Entity Approach
- Day 2 at 74th IFA Congress focuses on Big Data - Taxation of Data Driven Business
- Heightened dialogue on Two Pillars dominates Day 3 of 74th IFA Congress as panel deciphers Critical Mass
- EU Directives on Pillar Two & DEBRA, Proposals on Unshell & SAFE mark the Final Day of 74th IFA Congress

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Taxsutra presented a Fireside Chat with Tax Legend **Prof. Philip Baker KC** in IFA APAC Conference that took place in Mumbai on Oct 13 & 14, 2022

Prof. Philip Baker KC explained the genesis of tax treaties and their evolution over the years that led to the making of the Two Pillar Solution. He discussed the tumultuous relationship that US politics had with the international tax system in the past and drew a parallel with a present situation. He is of the view that it is the time to reform the international tax architecture for which OECD is not the right organisation given its 'heavy baggage' of previous commitment to certain principles and 'strong dominance' of a small central group of OECD member countries.

Prof. Baker shared his views on myriad topics like: (i) change in India's revenue composition in past few years, (ii) market countries' rights to tax digital economy given the strong existence of destination-based indirect tax regimes, (iii) the US' role in shaping of global tax policy, its current political mood and interplay with the 'critical mass' of countries, (iv) political interconnect between the two Pillars and consequences if Pillar Two comes into play before or without Pillar One, (v) evaluation of Model GloBE Rules and its revenue impact, (vi) potential conflict between domestic law and Pillar Two, (vii) neglect of other concerning matters due to continued focus on Two Pillar Solution, (viii) UK tax reforms, political imbroglio and its impact on the world.

To sum up his views on the current situation of global tax policy, Prof. Baker quipped, *"If you have the wrong institutions asking the wrong questions, you are very unlikely to get the right answer."*

Taxsutra presented a tri-part Special Series "**Crypto Taxation – Impact Assessment & Corrective Measures**" with inputs from **Esya Centre's Report - Virtual Digital Asset Tax Architecture in India: A Critical Examination**

- Tax Fangs Poisoning Crypto Transactions in India?
- Changing Terminals - From Onerous Taxation to Liberation
- Time to Flip Tax Disaster into Investment Opportunity

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INCOME TAX

TOP 10 MOST VIEWED RULINGS OF 2022

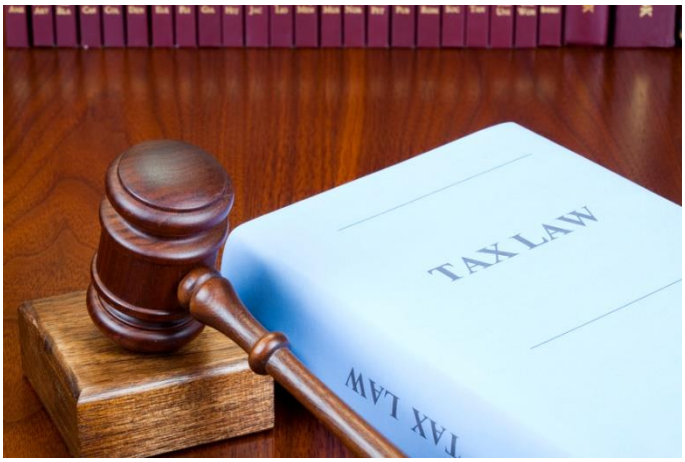
- SC: Strikes balance between Revenue's & Assessees' rights to settle reassessment controversy; Modifies HC rulings by invoking Art.142 [TS-339-SC-2022]

- SC: Lays down law on charitable trusts' exemption; Interprets 'General Public Utility', discards 'predominant object' test [TS-814-SC-2022]

- HC: Explicates on new reassessment regime while setting aside Sec.148A(d) order alleging Rs.1 lakh Cr. escaped income [TS-383-HC-2022(DEL)]

- HC: Sec.148 notice time-barred where digitally signed on last day of limitation period but emailed later [TS-189-HC-2022(ALL)]

- HC: 25 Key Takeaways from Karnataka HC ruling on Flipkart-Walmart TDS controversy on secondment of employees [TS-503-HC-2022(KAR)]



- SC: Reiterates law on bad debts' allowability; Disallows deduction where sum not written-off in books as irrecoverable [TS-671-SC-2022]

- ITAT: Revenue to decide if 'beneficial ownership' inbuilt in Art.13 of India-Mauritius DTAA; Vacates presumptuous assessment [TS-381-ITAT-2022(Mum)]

- ITAT: Upholds Sec.201 proceedings against Biocon for TDS default on year-end provisions, despite suo motu disallowance under Sec.40(a)(i)/(ia) [TS-216-ITAT-2022(Bang)]

- SC: Holds Benami Act amendments as substantive in nature; Forfeiture envisaged, punitive in nature, cannot be retroactive [TS-665-SC-2022]

MOST VIEWED EXPERT COLUMNS OF 2022

GUIDELINES ON SEC.194R – ARE DIFFICULTIES REALLY REMOVED?

Section 194R is certainly a tectonic change that the Finance Act, 2022 brought about by subjecting benefits and perquisites to TDS. This provision affects transactions across the board in the ways that one may not be able to imagine exhaustively. CBDT recently issued Guidelines to remove difficulties on applicability of Section 194R on several transactions which binds the provider of the benefits and perquisites too.

Mr. Prashant S. Maheshwari (Partner, Ernst & Young LLP) and **Mr. Hardik Khatri, (Senior Consultant)** commend CBDT for issuing elaborate Guidelines yet opine that another quarter may be provided to the industry for preparing itself for Section 194R since the Guidelines have been issued just two weeks prior. Due to the non-exhaustive nature of the provision, they apprehend that it may be extended to the rights or bonus issue since the Guidelines clarify that taxability of income in recipients' hands is no pre-condition for TDS. The authors analyse the aspects of myriad transactions sought to covered by the Guidelines including the possible overlapping of provisions of Section 194C/194J with Section 194R apart from issues pertaining to litigation, compliance and reconciliation between the payer and the payee.

CLAUSE 44 OF TAX AUDIT REPORT – UNRAVELLING THE INTRICACIES

The scope of Tax Audit Report i.e., Form 3CD was expanded by inserting Clause 44 on reporting of break-up of total expenditure of entities registered or not registered under GST and Clause 30 on GAAR. The reporting under the aforesaid clauses were deferred till Mar 31, 2022 since their inception in 2018. The new clauses are now applicable for all Tax Audit Reports furnished on and after Apr 1, 2022.

In this backdrop, **Mr. Siddharth Patel (Senior Manager (Audit), G.K. Choksi & Co.)** discusses the intrcacies in reporting under Clause 44. He opines that there is no reference as to the purpose of such reporting in the Tax Audit Report and how the same would assist the Assessing Officer to assess the income of the Assessee or for what purpose such information may be used by the tax authorities. He is of the view that since the title of the clause is 'total amount of expenditure

incurred during the year' and not head wise / nature wise amount of expenditure, a single line item would be sufficient. He is of the view, "it would also be logical to ensure that the data reported in this clause also reconciles with the information already available on the Assessee GST portal, inclusion of capital expenditure is must since GST 2A/2B (one of the source information used for extracting details of clause 44 reporting) does not bifurcate between revenue and capital expenditure since it is generated based on supply of good or services." Further, he elucidates on how to extract information for reporting relevant details on bifurcation of expenditure in respect of entities registered under GST – exempt, composition, other registered entities and non-registered entities.

SC RULING ON SECONDMENT IN SERVICE TAX - RIPPLE EFFECT ON INCOME TAX & ALLIED LAWS

The Supreme Court recently rendered its verdict in *CCCEST v. Northern Operating Systems Pvt. Ltd.* and held that in a contract for secondment of employees, the overseas company remains the employer, thus, upheld the taxability for provision of manpower supply services under the service tax law.

Mr. Sumeet Khurana (Chartered Accountant) discusses the Supreme Court's judgment and its implications in income-tax, immigration, social security, and exchange control laws. The question of taxability on secondment of employees is yet to receive a final answer from the apex court in the income-tax regime. In several rulings, High Courts and ITAT have rejected Revenue's contention that sum paid by Indian company to foreign company for seconded employees is taxable as fee for technical services, instead held Indian company to be economic employer and tax-compliant by withholding tax on salary reimbursed to foreign company. The author discusses the recent judgment in the light of the recurring debate as to what is the nature of transaction in secondment of employees and TDS on reimbursement.

The author also addresses the question whether secondment can lead to constitution of a PE in India since the Supreme Court in its judgment has observed that the overseas entities secure projects and outsource the work for execution to countries such as India, as they enjoy locational advantages along with skilled manpower to ensure the quality of delivery

MANDATORY E-FILING OF FORM 10F - CHALLENGES & NUANCES

Rule 21AB of the Income Tax Rules, 1962 provides for furnishing a self-declaration of tax residency in Form 10F by the non-resident where the Tax Residency Certificate obtained from the respective Government does not contain the various particulars prescribed under the said Rule. CBDT has made e-filing of Form 10F mandatory with effect from Jul 16, 2022.

Mr. Bhavin Shah, Ms. Hemlata Bhungare and **Mr. Mohammed Ali Memon (Chartered Accountants)**, in their article, discuss the various challenges that taxpayers face in e-filing of Form 10F. They delve into the question of retrospective application of e-filing procedure and requirement of PAN particularly for e-filing for those who do not hold PAN otherwise. The authors then discuss the potential risks that entities may face on non-compliance of e-filing procedure and explain how the non-compliance can have far reaching tax implications in the context of treaty benefits, SEP thresholds and tax proceedings through a representative assessee. They laud the initiative to be a thoughtful one that would create database for the Revenue with regard to non-residents but are of the view that lack of clarity on facets of compliance has practically opened a Pandora's Box.

INDIRECT TRANSFER OF AMBUJA CEMENTS & ACC FOR $10.5 BN – TAX FREE?

The announcement of stake-sale by Holcim Group to the Adani Group for $10.5 Bn followed an affirmation by Holcim CEO Jan Jenisch to the investors, "*…according to our analysis, it is a tax-free transaction*". This announcement has received mixed reactions given the vagaries of income-tax law in India.

Mr. Ved Jain (Advocate & Former President, ICAI) and **Mr. Nischay Kantoor (Advocate)** explain the mammoth deal and tax implications given the Indian experience in indirect transfers and withholding liability in the light of various rulings including the recent Mumbai ITAT ruling in *Blackstone FP Capital*. The authors explain the domestic law and treaty provisions in the light of various entities based in different countries that are going to be parties to the deal and also the tax benefits that may enure on stake transfer in future. They also discuss the applicability of GAAR and explain the exceptions especially in the case where the investment that is proposed to be transferred was made prior to Apr 1, 2017. The authors weigh in the impact of the Principal Purpose Test and the amendment to the Preamble of India-Netherlands DTAA by the MLI which Revenue can invoke to deny the tax benefit that makes it necessary for the parties to establish their entitlement under the treaty framework.

SPECIAL COLUMNS

SUPREME COURT OF INDIA - BEACON LIGHT OF JUSTICE

The Hon'ble Supreme Court delivered a historic verdict in the case of *Union of India v. Ashish Agarwal & Others* and settled the monumental controversy surrounding over 90,000 reassessment notices. The Supreme Court performed an Augean task of striking a balance between Revenue's right to reassess and avowed rights of the Assessees to bring an end to the uncertainty looming over the taxpayers and the exchequer alike. In order to put the controversy to rest, once and for all, the Supreme Court invoked its extraordinary powers under Article 142 of the Constitution and modified all the High Court judgments where reassessment notices issued under the old regime were quashed.

Senior Advocate N. Venkataraman, Additional Solicitor General (Supreme Court) who led the charge on Revenue's behalf in this rare legal dispute shares his insights on the judgment. He is of the view that the judgment has "*given a quietus to the issue, carrying the distinction for having laid out a progressive path in the law of Taxation*". He emphasizes how the judgment makes it amply clear that as long as the Revenue acts in a *bona fide* manner under a provision of law which required examination, "*a balance has been struck between diligence in initiation and acting under an erroneous provision, which came to be declared so, subsequently through judicial pronouncements*."

DISALLOWANCE OF CESS AS BUSINESS EXPENDITURE - EXAMINING THE AMENDMENTS...

The history of the Income-tax Act is mired with retrospective amendments. The retrospective amendment introduced by the Finance Act, 2022 for disallowing cess as business expenditure is a distinct feather on legislature's cap due to its implications on the assessees across the board. The amendment under Section 40(a)(ii) is coupled with several other amendments meant to ensure that the assessees offer tax by disallowing the already claimed expenditure failing which the assessees would attract penal consequences.

Mr. Tarun Gulati (Senior Advocate) examines the amendment in the light of settled norms on the powers of legislature vis-a-vis the judiciary and asserts how the amendment falls foul

of the Supreme Court judgments that prohibit retrospective legislation that are meant only for overturning a judgment without addressing the lacuna pointed out in the judgment sought to be overruled. He finds that the retrospective legislation is premised on the understanding that the High Court judgments allowing cess as business expenditure are 'per incuriam' which in his opinion is violative of the doctrine of Separation of Powers. He is of the view that the ingenious amendment by virtue of Section 155(18) meant to extend to limitation period and impose penalty by deeming under-reporting under Section 270A, palpably suffers from the vice of manifest arbitrariness. Mr. Gulati finds the amendments as extremely unfair, posing a formidable challenge to the rule of law.

EU TAX LITIGATOR: ATAD III - NECESSITY, SCOPE & FUTURE!

The European Commission released a draft Directive i.e., the Anti-Tax Avoidance Directive III (ATAD III) to prevent the use of shell companies and to address the tax evasion and avoidance in the European Union.

Dr. Hans van den Hurk (Professor, Maastricht University) exclusively spoke to Taxsutra on ATAD III and shared his views on the proposal that intends to end the use of 'letter-box' companies which are often supported by professional financial service providers. He, thus, foresees that only well-designed corporate structures will survive. He opines that the ATAD III is not clear about many elements including the 'beneficial ownership' which is relevant from the anti-money laundering perspective and not international tax. He also shares his views on consequences of not complying with the ATAD III and throws light on the carevouts that the ATAD III contains which requires an intermediary company to conduct a real economic activity with atleast 5 full-time employees.

He emphasises that there is no monetary threshold for applicability of the ATAD III unlike the thresholds that exist for CbCR or BEPS which makes it clear that ATAD III is intended to cover even smaller companies. He finds the proposed applicability of ATAD III from two years prior to it coming into force warrants a discussion between the member states to provide clarity. He opines that financial risk involved in involving intermediaries outside the European Union is quite high and intra-EU structures would enjoy more acceptability by the European Commission and the EU's Court of Justice.

MAN, MOTHER-IN-LAW & THE GOLD

Tax jurisprudence known for its complex transactions and legal intricacies often has a tinge of hilarity which gets eclipsed by the mundaneness of tax. Taxsutra, in its pursuit of bringing various flavours from the tax rulings, presents "Humour in Tax".

Mr. K. Vaitheeswaran (Advocate) in his first article of the special series on income-tax cases, discusses a plight of a man whose statement taken during the course of search operation was given more importance than the affidavit of his mother-in-law about the ownership of gold seized by the Department. ITAT found the mother-in-law's affidavit as a self-serving document which attributed ownership of part of the seized gold to her daughter over and above the disclosure made in the sworn statement by her son-in-law. The Madras High Court upheld the ITAT order resulting in tax burden on the man, despite a contrary affidavit filed by his mother-in-law, since the Revenue corroborated his statement with other evidence. The statements during the search operations are perceivably given under duress and the debate over retraction from such statements by filing affidavits at a later stage defines the course of assessment.

INTERNATIONAL TRADE REVIEW – IMPLICATIONS FOR INDIA

The year that has gone by was a year of struggle for global trade due to pandemic and the economy is yet to bounce back. It was eventful too as several key developments took place viz., progress on multilateral negotiations and the conclusion of several FTAs. We recently witnessed the Union Budget 2022 and it is an opportune time to look back and reflect on the key trends and developments in international trade and their implications for India and the world. This will also help us to identify possible trends in international trade that are likely to play out in the current year and indicate what businesses can reasonably expect going forward.

Mr. Sanjay Notani (Senior Partner, Economic Laws Practice), Mr. Parthsarathi Jha (Partner), Ms. Naghm Ghei (Senior Associate) and **Ms. Harleen Sandha (Associate)** in their article put forth a categorised analysis of activities of the World Trade Organisation (WTO), development of Free Trade Agreements (FTAs) and measures taken in the domestic trade policy along with their implications for India. On the WTO front, they express concern over continued suspension of the Appellate Body which keeps the dispute settlement in limbo whereas the possibility of countries adopting unilateral retaliatory measures continues to loom over. In the newly concluded FTAs, they underscore an increasing trend of containing more detailed chapters not traditionally viewed as “trade issues'' such as labour, gender, and environment. On domestic policy, they are of the view that with increased incentives for domestic manufacturing, India is likely to continue to adopt more protectionist policies, including trade-remedial measures and export of goods from incentivised manufacturing are also likely to face counter-measures from the destination countries. They expect that India will continue to grant

tariff and other concessions to certain strategic sectors, such as steel, to address continuing supply chain issues.

Due to reduced dependence on Chinese goods, the authors foresee continuation of India's tussle with China that can range from anti-dumping duties, restrictions on public procurement as well as cancelling railway projects entered into with Chinese companies. They anticipate that countries are likely to recover economically with an approach of self-reliance and China will continue to serve as a critical challenge to major economies. They observe that India's aim towards self-reliance requires recalibration of its approach in trade to meet its aspirations of export promotion and India needs to develop independent and coherent policy positions with respect to issues towards which it has previously remained ambivalent.

CORPORATE GIFTS - A BYGONE CONCEPT?

In the era of diversification, it would not be out of place for a corporate group to keep all its real estate in a particular company meant only for the purpose of dealing and developing real estate. Such an arrangement would fairly balance the risk profile of the companies within the group and provide a commercial advantage in expanding the real estate business.

In this context, **Mr. Binoy Parikh (Katalyst Advisors Pvt. Ltd.)** discusses the concept of corporate gifts to a parallel company or a subsidiary and analyses its tax implications. He finds the idea of corporate gift to a wholly owned subsidiary worth evaluating given the tax exemptions under Section 47 in the hands of the donor company and exclusions from taxability under Section 56(2)(x) for the donee. The author also explains the IndAS requirements and stamp duty incidence to suggest that despite certain adverse provisions, the idea of corporate gifts is not a bygone concept.

TAX RINGS OF 2022

REASSESSMENT CONTROVERSY - REVENUE 'OUT' BUT 'NO-BALL' RULES SC! LEGAL EXPERTS HOLD BACK NO PUNCHES!

The Supreme Court's verdict on the reassessment controversy will go down in history books for numerous reasons. The judgment has led a countrywide discussion on statutory limitations on Revenue's powers, consequences of Revenue's bona fide mistakes, purpose of reassessment, plight of the public exchequer, balance of rights between Revenue and Assessees, among others. While the judgment has, with the aid of Article 142 of Constitution, settled a vexed issue, it sure has generated a heated debate in legal circles on the correctness of the Apex Court verdict.

EXPERTS' QUOTES

SAURABH SOPARKAR (SENIOR ADVOCATE)

I have strong reservation on the invocation of Article 142 of the Constitution of India. The Supreme Court having held that the judgments of the High Courts were legal and valid, than could not turn around and say that because it causes prejudices to the Revenue and that 90,000 notices would be quashed, it would invoke Article 142, to validate, what it held as, illegal notices.

But then that is done, and one cannot really question the correctness or otherwise of the judgment of the Supreme Court.

K.K. CHYTHANYA (SENIOR ADVOCATE)

The very fiction created by the Apex Court deeming the notices issued under erstwhile section 148 as issued under section 148A of the new regime is based on incorrect understanding of change in regime. The said notices were issued on the basis of 'reason to believe' as recorded by the issuing the officer before the very issue. The issue of notice under section 148A is on the basis of 'information suggesting that the income has escaped assessment' [a statutorily defined phrase]. There is a paradigm shift in the edifice for issue of notice. It is not known how the reasons to belief could be deemed to be information suggesting escapement of income.

B.M. CHATTERJI (SENIOR ADVOCATE)

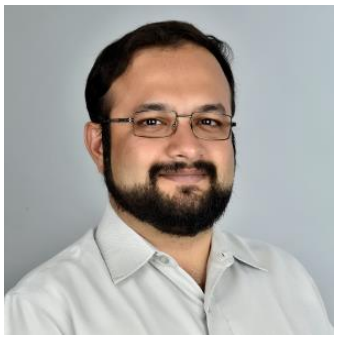
The ruling of the Supreme Court setting aside various High Court orders in connection with the 90,000 reassessment notices by the invention of a judicial "savings" clause appears to be missing the forest for the trees. The moot question before the Supreme Court was that were the Notifications (No. 20 and 38 of 2021) a bona fide mistake of extension of old law. In absence of the challenge of "bona fide mistake" by the Revenue before the various High Courts, the Supreme Court has incorporated the principle of equity in a taxing statute! The decision is ambiguous on the aspect of limitation of up to maximum 3 years for reassessment, which was the intent of the Legislature as well as the Finance Minister's speech. Before the High Courts, there were various grounds and since the High Court had decided only one ground, the Supreme Court ought to have considered various other grounds of the taxpayers. Thus, in my view, the taxpayers should seek a review of this decision.

SACHIT JOLLY (PARTNER, DMD ADVOCATES)

There is no equity in tax. The age-old accepted norm of interpretation of taxation statutes has been given a complete go-by in the recent order by the Hon'ble Supreme Court. The decision is regressive and contrary to many canons of settled jurisprudence. Invocation of Article 142 on tax matters in rare. Invocation of Article 142 to benefit the wrongdoer is alien to law. Having accepted that notices issued after 1st April 2021 were to be issued under the new regime, the Court ought not have condoned the conscious view of the tax office in issuing notices as per the old law as a bonafide mistake. Article 142 should not have been invoked to condone such conscious and deliberate misadventures of the tax office.

ALOK PRASANNA KUMAR (CO-FOUNDER AND TEAM LEAD, VIDHI CENTRE FOR LEGAL POLICY)

Like any country which abides by the rule of law, Article 265 of the Constitution guarantees that tax can only be levied or demanded in accordance with a law made by the legislature. This is a constitutional right of all persons and can be traced back even to the Magna Carta itself. However, the court in Ashish Agarwal makes a mockery of this right.



The court does not dispute that the Revenue officers who issued the notices of reassessment under old Section 148 of the Income Tax Act did not have the authority to do so once the new section came into force. If the Revenue had no authority under law to issue notices of reassessment, then it is not the court's job to find justifications in the name of "practicality" to "deem" that such notices as valid. Rather, it is the court's duty to ensure that the Revenue is held to the rigor of the law. The court's duty is not to make the lives of Revenue officers easier but to protect the taxpayer from the Revenue's overreach. Regrettably, in Ashish Agarwal, the court has done exactly the opposite.

COMMENTARY ON MODEL GLOBE RULES - JOURNEY TO TWO-PILLAR SOLUTION HALFWAY THROUGH?

Since the OECD/G20 BEPS Inclusive Framework arrived at an agreement for a two-pillar solution, we have been witnessing successive engagements on different aspects of the solution. The herculean task that the aspirational journey towards the two-pillar solution entails is being accomplished gradually by the Inclusive Framework. The release of Commentary on Model Global Anti-Base Erosion (GloBE) Rules marks a substantial development towards the avowed objective for the clarity and certainty that is needed for implementation of global minimum tax.

EXPERTS' QUOTES

RAJENDRA NAYAK (PARTNER, INTERNATIONAL TAX SERVICES, ERNST & YOUNG LLP, INDIA)

The recently published Commentary to the Model Rules is intended to promote a consistent and common interpretation of the GloBE Rules that will facilitate coordinated outcomes for both tax administrations and MNE groups. The Commentary explains the intended outcomes under the rules and clarifies the meaning of certain terms. It also includes examples which illustrate the application of the rules. As stated in Para 14 of the Commentary, the GloBE Rules are intended to be implemented as part of a common approach. A jurisdiction that joins the common approach is not required to adopt the GloBE Rules but, if it chooses to do so, it agrees to implement and administer them on a way that is consistent with the outcomes provided under the GloBE Rules and the Commentary.

To achieve the stated objective of coordination and consistency, it is important for the OECD to address the co-existence of the GloBE Rules with the US Global Intangible Low-Taxed Income (GILTI) rules as well as the apparent differences between the Model Rules and the EU proposed Directive issued on 22 Dec 2021. These differences, in some scenarios, could give rise to a risk of double taxation. Public consultation on this

subject by the OECD as well as by the EU would be critical in addressing this as the project rapidly moves into implementation phase.

NAVEEN AGGARWAL (PARTNER, TAX, KPMG INDIA)

The release of detailed technical guidance on the Model GloBE Rules is a key milestone in the BEPS 2.0 Project. Coupled with the Model Rules which were issued in December 2021, the decks have now been cleared for countries to begin the process of implementation of the GloBE Rules into their respective domestic laws. As expected, the commentary itself is very detailed, and is accompanied by a separate document that contains several examples that demonstrate the practical working of the GloBE Rules. Together, they will provide Governments, taxpayers and professionals with valuable guidance on the working of these Rules as the process of implementation and preparation gets underway.

One important area around the implementation of the GloBE Rules relates to safe harbour norms. These are intended to ensure that the compliance and administrative requirements associated with collation, processing and aggregation of a large amount of financial information is not unduly burdensome. These safe harbour rules (coupled with administrative procedures, filing obligations and review processes) are not yet released and are expected to be a part of an implementation framework that is in the process of being developed and in respect of which public comments have been sought. The Statement released in October notes that this framework will be released no later than the end of 2022.

VISHAL GADA (FOUNDER & MENTOR, AURTUS CONSULTING LLP)

The Commentary has taken into cognizance the practical challenges which may arise in the implementation of the Rules. For instance, the Commentary provides guidance on the application of the Rules where the group has not been in existence for at least 4 years, computation of consolidated revenue for testing the threshold for applicability, currency conversion etc. Further, article-wise examples coupled with the Commentary would prove to be very effective in understanding the intent of the Model Rules and further a consistent interpretation and application of the Rules, which is at the heart of GloBE Framework. To the extent possible, the attempt has been to keep the compliance costs for multinational groups at a minimum by falling back on already available metrics from the financial

statements, CbCR etc. and adopting definitions that are consistent with those used for CbCR. Accordingly, the accuracy of financial reports and CbCR would be extremely critical. The CbCR would no longer merely be a tool for indicating high-level tax risks but would actually objectively influence the amount of tax required to be paid in a jurisdiction.

JITENDRA JAIN (CHARTERED ACCOUNTANT)

The Commentary includes a comprehensive technical guidance on the operation and intended outcomes under the Rules and clarifies the meaning of certain terms. The Commentary provides guidance on several critical aspects including scoping and excluded entities; application of the Income Inclusion Rules ('IIR') and Undertaxed Payment Rules; computation of GloBE income (including qualified refundable tax credits), adjusted covered taxes and effective tax rates; application of the Rules to corporate restructuring and certain holding structures and multi-parented MNE groups; and transition rules….

Conclusion: GloBE Rules are highly complex and the calculations envisaged under the Rules may not be straightforward. Given the novelty and complexity of these Rules, the Commentary and the illustrative examples will go a long way in ensuring consistent implementation of the Rules by tax administrators and taxpayers. The public consultation on the Implementation Framework does not look for further comment on the policy choices made in the Rules or the Commentary, however, businesses should still highlight their concerns through appropriate forums.

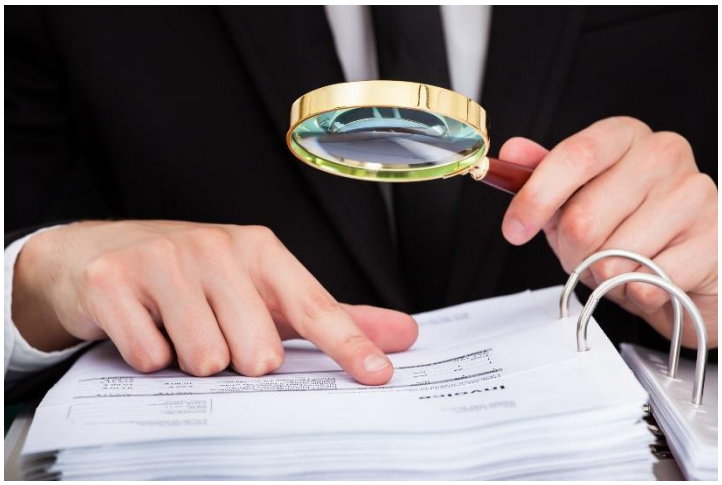
MOST VIEWED NEWS OF 2022

- CBDT issues clarification on MFN clause in DTAAs
- CBDT extends due-date for TAR to Feb 15, for ITR to Mar 15
- CBDT issues Guidelines, answers 10 vexed questions on Sec.194R
- Unravelling the Amendments Proposed to Finance Bill, 2022
- ICAI releases Eighth Edition of Guidance Note on Tax Audit; Incorporates guidance on GAAR, GST among others
- CBDT extends due date for filing Audit Reports to Oct 7
- ITRs for AY 2022-23 - Key Changes

- CBDT issues Guidelines for compulsory selection of returns for complete scrutiny during FY 2022-23
- CBDT prescribes fee for delayed intimation of Aadhaar; PANs to become inoperative after Mar 31 on non-intimation
- CBDT condones delay in filing of Form 10-IC for AY 2020-21, subject to conditions

MAJOR LITIGATION TRACKERS OF 2022

- Sr. Adv. Harish Salve critiques AAR findings, concludes MasterCard submissions; Revenue's turn in Jan
- Delhi HC interim stay order against Rs.3,000 Cr. TDS demand in Sumitomo Mitsui's case
- Reassessment Controversy 2.0; Revenue urges SC to uphold notices sanctioned in TOLA grace period
- SC to examine scope of Ghanashyam Mishra ruling on reassessment proceedings
- SC to examine taxability of revenue from exclusive distributorship of Ten Sports



- SC to examine 'deemed dividend' provision, implication of Ankitech ruling
- Delhi HC entertains writ involving Sec.170A interpretation, grants stay on assessment proceedings

- Bombay HC entertains constitutional challenge to Rule pertaining to ITR-filing; Meanwhile, allows paper-filing

- Bombay HC grants interim stay on reassessment proceedings overlapping with BMA assessment

- Delhi HC entertains challenge against CBDT's MFN Clause Circular over dividend payment; Grants interim relief

GLOBAL TAX POLICY DEVELOPMENTS

- OECD releases Draft Model Rules on Nexus & Revenue Sourcing, open for public comments upto Feb 18
- OECD releases public comments on Draft Model Rules on Nexus & Revenue Sourcing under Amount A, Pillar One
- OECD releases Draft Model Rules for Tax Base Determination under Amount A, Pillar 1; Open for public comments upto Mar 4
- OECD releases public comments on Draft Model Rules for Tax Base Determination under Amount A, Pillar One
- OECD releases Commentary on GloBE Rules; Calls for public comments on implementation framework by Apr 11
- OECD seeks public comments for Crypto-Asset Reporting Framework & amendments to Common Reporting Standard

- Stakeholders seek clarification on scope of intermediaries, inclusion of stable coins in Crypto Asset Reporting Framework
- OECD releases Draft Rules for Domestic Legislation on Scope under Pillar One, Amount A; Invites public comments by Apr 20
- Stakeholders express concern over 'twin-tests' in Draft Rules for Domestic Legislation on Scope under Amount A, Pillar One
- OECD releases Public Consultation Document on Extractives Exclusion under Pillar One; Invites comments by Apr 29

- Stakeholders seek simplification in definitions for extractive exclusion, clarity on dual test for LNG
- OECD announces public consultation on 'Regulated Financial Services Exclusion' under Pillar One; Invites comments by May 20
- Stakeholders seek exclusion of reinsurance & asset management services from Regulated Financial Services under Amount A
- OECD invites comments on public consultation over tax certainty on 'Framework' and 'Issues Related' to Amount A
- Stakeholders call for widening of scope on 'related issues' in Amount A, dispute resolution for jurisdictions beyond bilateral treaties
- Stakeholders call for deadline on reviews under Tax Certainty Framework for Amount A, welcome soft-landing for transition

- Public Consultation for Progress Report on Amount A focuses on reducing complexity in MDSH, elimination of double taxation
- Public Consultation for Progress Report on Amount A focuses on reducing complexity in MDSH, elimination of double taxation
- OECD invites comments on Administration & Tax Certainty in Amount A; Releases Annual Progress Report on BEPS
- OECD releases Public Comments on 'Progress Report on Administration & Tax Certainty of Amount A'
- European Commission proposes DAC8 for tax transparency on crypto transactions
- EU Members agree for Global Minimum Tax; Transposition into national law expected by 2023-end
- OECD invites comments on Amount B under Pillar One relating to simplification of transfer pricing rules

- OECD initiates public consultation on DST withdrawal, GloBE implementation package
- Republicans assert US Congress' taxing powers over Biden Administration's 'political agreement' on UTPR
- UN Tax Sub-Committee proposes 'Subject to Tax Rule' in Model Tax Convention
- UN resolves for international tax framework through inter-governmental process; Rejects US amendment

TRANSFER PRICING

TOP 5 MOST VIEWED RULINGS OF 2022

- HC: Non-issuance of notice u/s.143(2) vitiates sec 148 notice, consequent TPO reference; Allows assessee's writ [TS-846-HC-2022(MAD)-TP]

- ITAT: Holds guideline value of land building as fair value for redemption of preference shares; No TP and deemed dividend adjustment [TS-563-ITAT-2022(Bang)-TP]

- ITAT: Quashes assessment order passed on non-existent entity; Follows one SC ruling, distinguishing another [TS-617-ITAT-2022(Bang)-TP]

- ITAT: Holds 'arithmetic mean' u/s 92c(2) proviso doesn't include weighted average, deviates from earlier order [TS-866-ITAT-2022(Mum)-TP]

- ITAT: Pledging of shares for AE's loan akin to corporate guarantee; Upholds benchmarking on similar lines [TS-167-ITAT-2022(Mum)-TP]

MAJOR LITIGATION TRACKERS OF 2022

- SC reserves judgment in SAP Labs case on comparables selection
- Karnataka HC admits a bunch of appeals on comparables' selection for SWD/ ITeS & application of various filters
- ITAT SB concludes hearing on whether transactions between HO and PE qualify as "international transactions"

MOST VIEWED EXPERT COLUMNS OF 2022

TRANSFER PRICING: HISTORY, LESSONS AND EXPERIENCES AS A LITIGATOR

Mr. Porus F Kaka (Senior Advocate) traces some important aspects of the history of Transfer Pricing, evolution of some important concepts over the years in the various OECD TPGs and shares his experiences as a Transfer Pricing Litigator. The article was originally published by IBFD and then edited and updated for Field Court Tax Chambers (FCTC). The updated article is now being republished with the permission of IBFD and Mr. Porus F Kaka.

In this article, Mr. Kaka walks the readers through the introduction of Transfer Pricing in the US in 1968, followed by some European Countries like France, Germany and UK and eventually (though much later) by developing countries such as India and China. Apart from the Global History of Transfer Pricing, Mr. Kaka walks us through the evolution of TP practices from the use of traditional methods such as CUP to the acceptance of transactional methods such as TNMM and PSM. He also traces the evolution of some important concepts in each of the various OECD TPGs - both in a pre and post BEPS world. He rounds off the article by sharing his personal experiences as a Transfer Pricing Litigator and sharing his views on various aspects of transfer pricing litigation as well as his thoughts on what lies ahead.

TRANSFER PRICING IN INDIA – OBSESSION WITH THE TERM, "INTERNATIONAL TRANSACTION"

As we all know two decades have passed since the introduction of Transfer Pricing (TP) Legislation in India by the Parliament in 2001. As is largely accepted, the concept of TP has been built on the foundation of fundamentals of economics and requires a different approach for interpretation and analysis as compared to the other legal provisions enshrined in the Income-tax Act.

The author of this article, **Mr. Rahul Mitra (Chartered Accountant)** sheds light on such fundamental differences that are required in interpreting, analysing and applying the TP provisions as compared to the rest of the IT Act, and the challenges arising when one does not take into account the economic nuances of a TP issue. He questions everyones obsession in resorting to legal interpretation of provisions for what is essentially an economic issue. One such point he picks up for discussion is the obsession towards the term 'international transaction' by many, while dealing with any TP-related issue. The author expresses his views on how the legal definition of the term "international transaction" has been used qua corporate guarantees between AES, AMP expenses, etc. The author proceeds to highlight the recent guidelines by Organisation for Economic Cooperation and Development (OECD) and United Nations (UN) explaining under what circumstances could the provision of financial guarantee by the guarantor be said to constitute rendition of services to the borrower, or shareholder's functions, which would ideally benefit the guarantor instead of the borrower, thus not requiring any receipt of guarantee fees. A brief yet critical analysis on Advertisement, Marketing and Sales Promotion (AMP) expenses incurred by licensees of trademarks has also been made. The author evaluates how everyone has dwelt in pointless litigation on this issue instead of examining it under the lens of economic fundamentals and principles of TP.

SECTION 92A - (1) & (2) - ASSOCIATED OR DISSOCIATED?

The concept of Associated Enterprise (AE) is a fundamental aspect for application of arm's length principle in transfer pricing not only in India but also internationally. Being a contentious issue in India, **CA Kedar Karve, CA Tarun Jain** and **CA Sneha Pai** delve into the interpretation of AE under Sections 92A(1) and 92A(2).

The authors highlight that u/s.92A(1), 2 enterprises would become AEs, if one participates in the management, capital or control of other enterprise either directly, indirectly or through one or more intermediaries. However, the expression 'participation in management or capital or control' is not defined under the Act. On the other hand, Sec.92A(2) prescribes certain situations which are manifestations of 'capital', 'management' or 'control' under which two enterprises could be considered to be AEs.

Analyzing the decisions pronounced by ITAT in the case of Page Industries Ltd and Veer Gems (upheld by Apex court), wherein the analogy of definition of AE under subsection (1) and (2) of Sec.92A was examined, the authors remark that "*The divergent decisions in the aforesaid rulings may add to further ambiguity and unwanted litigation between the taxpayers and tax administrations in India*." The authors signs off by opining that "'*AE' is an indispensable part of transfer pricing and therefore an early resolution on this widely debated topic by the Revenue will be a welcome move to provide much needed relief to the taxpayers*."

REGULATIONS FOR RELATED PARTY TRANSACTIONS: DIFFERENT YET SIMILAR

The Related Party Transactions (RPTs) undertaken by group companies have been ever-increasing and with the intent to monitor the said transactions, there exists provisions under Company Act, 2013, Securities and Exchange Board of India (SEBI) Listing Obligation Disclosure Regulations, 2015 (LODR) as well as Income Tax Act, 1961. While there exists certain differences in each of the said regulations viz. the definition of related party as well as RPT, approval mechanism and disclosure requirement, etc. the primary intent of all the regulations remains the same, i.e., the inter-company RPTs should be undertaken at a price which would have been undertaken, had it been undertaken between unrelated parties.

In this context, **CA Chetan Rajput (Partner, Ernst & Young LLP), CA Pajesh Parikh (Director, Ernst & Young LLP) and CA Nikita Agrawal (Manager, Ernst & Young LLP)** touch upon various aspects of each of the regulations including the framework, applicability and compliance under each of the said regulations for the RPTs undertaken by group companies. Further, the authors also provide the interplay between Income Tax Act,1961 and SEBI LODR/ Company Act, 2013 to conclude that in the absence of sufficient guidance to compute arm's length price under Company Act, 2013 as well as SEBI LODR, reliance can be placed on the provisions of Income tax Act, 1961 by the transacting parties.

THE CURTAIN DROPS – LIBOR ENDS – IS THERE A TAX IMPLICATION?

The beginning of 2022 has witnessed two landmark developments in the global sphere of transfer pricing - replacement of erstwhile LIBOR by Alternate reference rates (ARRs)

such as Secured Overnight Financing Rate (SOFR) etc. effective 31 December 2021; and release of OECD's 2022 edition of the Transfer Pricing Guidelines which also includes Chapter X relating to "Transfer pricing aspects of Financial Transactions".

Author, **Jaiman Patel, Partner with Ernst & Young LLP** delves into the transitional issues which may arise from such a shift from LIBOR to ARRs from a transfer pricing perspective. The author discusses the possible impact on taxation considering the difference in vital traits amongst two rates such as availability of term structures, the difference in terms of security, the difference in the credit risk like the ARRs being nearly risk-free rates etc.

The author also highlights the relevant transitional issues from the Indian Transfer pricing regulations perspective, specifically for APAs, Safe Harbors, secondary adjustments provisions etc. and also the fact that the RBI has released a circular in December 2021 replacing reference of LIBOR to ARRs, and revising the all-in-cost ceiling over the ARR. In the absence of any tax-related guidance in India, the author highlights that it is all the more pertinent for the taxpayers to assess the tax implications of such change.

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GOODS AND SERVICE TAX (GST)

THE BIG NEWSMAKERS/KEY DEVELOPMENTS OF 2022

- GST Council proposes rate changes, rationalises rates to remove IDS, measures for trade facilitation
- CBIC notifies 6% GST-rate on bricks as recommended by GST Council
- CBIC issues instructions to effectuate Supreme Court order on filing/revising TRAN-1/TRAN-2
- CBIC's clarification on manner of processing and sanctioning IGST refunds of risky exporters
- CBIC's clarification regarding refund in deemed-export, blocked-credit, employee's perks & ECL utilisation

- CBIC issues guidelines relating to sanction, post-audit and review of refund claims
- Liquidated damages not consideration for tolerating contract breach/non-performance; CBIC resolves ambiguity
- CBIC: Top senior officials of Company to be summoned only upon clear indication of involvement
- CBIC: Arrest cannot be made in mechanical/routine manner without existence of mens-rea
- FinMin clears air on applicability of extended time limit to various compliances for FY 2021-22

TOP 10 MOST VIEWED RULINGS OF 2022

- SC: Copy of Supreme Court order on TRAN1/TRAN2 issue, disposing off a batch of 400 appeals [TS-369-SC-2022-GST]

- SC: Ocean freight levy violates 'composite supply' principle; GST council decisions 'non-binding' vis-a-vis 'simultaneous legislative power' framework [TS-246-SC-2022-GST]

- SC: Extends time for opening GST common portal by another month [TS-442-SC-2022-GST]

- SC: No "public duty" on state to indicate HSN code in public tender; Quashes HC's mandamus [TS-412-SC-2022-GST]

- HC: P&H issues notice in writ challenging refund denial treating assessee as 'intermediary' [TS-230-HC(P&H)-2022-GST]

- AAR: Builder liable to tax on portion of area constructed under JDA with land-owner as per new scheme [TS-406-AAR(TEL)-2022-GST]

- HC: Denial of budgetary support claim post GST without assigning reasons 'unsustainable' [TS-424-HC(J&K)-2022-GST]

- HC: Right to appeal does not end with tax-payment for goods-release; Commissioner to issue circular [TS-404-HC(KER)-2022-GST]

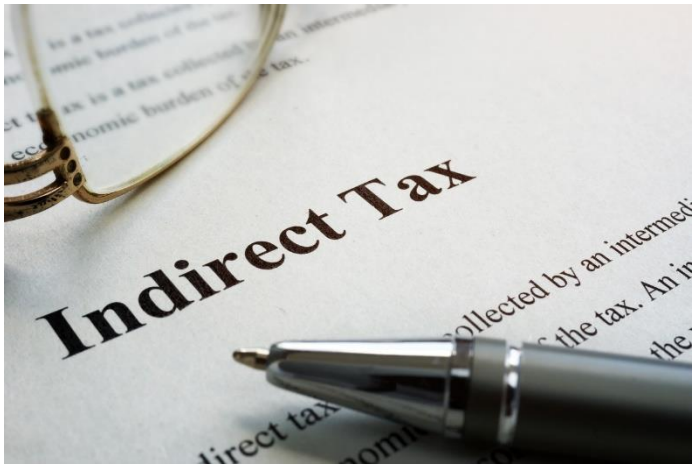
- HC: GST authority's jurisdiction to decide correctness of CENVAT-credit transitioned, questioned; Jharkhand HC grants interim- stay [TS-427-HC(JHAR)-2022-GST]

- HC: Cannot drag assessee in 'unnecessary litigation' once valid documents accompany goods; Quashes detention [TS-421-HC(ALL)-2022-GST]

INDIRECT TAXES

TOP 5 MOST VIEWED RULINGS OF 2022

- SC: Goes by 'substance', fastens service tax on employees 'seconded' by overseas group co. [TS-216-SC-2022-ST]
- SC: CESTAT absolutely correct to quash demand on 'revenue sharing arrangement' between multiplex/cine-exhibitor and film-distributors [TS-93-SC-2022-ST]
- CESTAT Distinguishing between 'compensation' and 'consideration', quashes demand on 'notice period pay' [TS-202-CESTAT-2022-ST]
- SC: Transporting employees from pick-up point to factory not 'input-service'; upholds HC ruling [TS-371-SC-2022-ST]
- CESTAT: Pre-deposit payment cannot be made through ECL debit under GST regime [TS-387-CESTAT-2022-EXC]



MOST VIEWED EXPERT COLUMNS OF 2022- GST/INDIRECT TAXES

POTENTIAL GST DISPUTES ON INSERTION OF SECTION 194R UNDER INCOME TAX ACT

The Finance Bill, 2022 vide clause 58 has inserted section 194R in the Income Tax Act, 1961 to provide that a person providing benefit or perquisite, whether convertible into money or not, to a resident arising from the business or profession of such resident will be required to ensure that a tax at the rate of 10% is deducted on their value. Looking at how more clarifications are warranted at this stage to graph what facility/amenity /freebies/incentives are covered, it's possible to speculate now that their treatment as 'benefits' under the Income Tax Act will open the opportunity for the GST department to treat the same as a subject of GST levy in the hands of the recipient. Hence, the likelihood of potential GST disputes by insertion of this new section cannot be ruled out.

Elaborating more on this issue, **Surbhi Premi (Joint Director, Lakshmikumaran & Sridharan)** highlight the dichotomy, i.e. *"once treated as benefits under the Income Tax Act, the same might be questioned by the GST department for liability of GST in the hands of the dealers/distributors alleging them to be in the nature of income and hence, consideration for service".* Drawing inference from a scenario where the additional discount reimbursed to distributors is treated as additional consideration for supplies made to customers, the author is of the view that calling it as 'benefit' requiring TDS compliance becomes a contentious issue. Likewise, on aspect of 'benefits' conveyed 'in kind', the author opines that, incentives which are adjudged as 'gifts' by some AAAR decisions like Sanofi India etc, can qualify as perquisites or benefits arising from business and in turn, can be taxed by the GST Department as consideration for promotion or marketing services. The author proclaims that the divergent rulings on this subject under the GST law have left the industry perplexed and proposed insertion of Section 194R "has just added fuel to the fire".

TAXABILITY OF EMPLOYEE SECONDMENT BY FOREIGN GROUP COMPANY - SC RULING OPENS PANDORA'S BOX

In the fossilized service tax regime, the secondment of employee by an overseas entity to the Indian group company was considered not a 'supply of manpower services' by the CESTAT in numerous occasions. This is for the reasons that the employee seconded came under complete control of Indian entity and that the salary was credited into account by the foreign entity was found to be insufficient when considering imposition of service tax on the said supply. However, recently, the larger bench of the Supreme Court in Northern Operating System has held that the salary of seconded employees reimbursed to overseas entities is liable to service tax in India.

Against this background, the authors **Vinay Jain (Partner, Lakshmikumaran & Sridharan), Sudeshna Banerjee (Joint Partner) and Monica Kasturi (Principal Associate)** write that *"The recent judgment brought about huge tax liability across industries and opened a pandora's box on deputation of employees, at say the least"*. Discussing the widespread implications of this ruling in GST as well as the Direct Tax sphere (especially in the context of international taxation), the authors form an opinion that reasoning given by Top Court would still be applicable even under GST thereby treating secondment of employees as 'supply' and Department may go one step further to tax deputations within the group companies as 'supply'. On the direct tax front, the authors express concern that this might re-ignite the debate under Income Tax on whether the overseas entity can be said to have a service Permanent Establishment (PE) in India. However, as far as deduction of TDS under Income Tax Act, authors cite the recent decision in Flipkart Internet case where the Karnataka HC has distinguished the Nothern decision to infer that merely because service tax is payable on employee secondment by non-resident, it is not enough to make section 195 applicable.

Moving forward, the authors presume that the verdict may bludgeon the benefit available to the employee and liability of the employer under various employment laws, and as a way forward, suggest that secondment and employment agreements between the group entities and its employees should be revisited to mitigate potential tax liabilities.

GST ON EQUITY SHARE CAPITAL – A PROBLEM-POSER!

The practice of Revenue in raising demand by unearthing novel issues under GST is something which the Taxpayers are finding challenging to cope with while carrying out day-to-day business activities. One such recent topic is the alleged taxability of equity share capital held by a holding/parent company in a subsidiary company and it is understood that few taxpayers have already begun receiving audit notices directing them to pay GST on share capital held in their company by a foreign principal.


The authors, **Raghavan Ramabadran (Executive Partner), Rahul Jain (Director)** and **Sahana Rajkumar (Principal Associate)** from **Lakshmi Kumaran & Sridharan Attorneys** shed light on the 'fulcrum of Department's case' which is based on Explanatory Notes to the Scheme of Classification of Services issued by CBIC. The author embarks upon the controversy whereby 18% GST is being demanded as prescribed for 'financial and other related services falling under Heading 9971'. Envisaging the 'enormous impact' involved herein, the authors in hindsight comprehend *"What is the taxable event which triggers the levy of GST on equity share capital held in a company?"*

Moving forward, the authors discuss the relevant statutory provision governing 'Supply', non-applicability of Schedule I and apprise about the 'G20/OECD Principles of Corporate Governance' which throws light upon some of the rights that an equity investor enjoys. After a detailed analysis, the author derives that *"it may be contested that a positive act is not rendered by the holding company merely by having equity share capital in a subsidiary. A mere controlling interest does not qualify as a taxable supply of service".*

CRITICAL AMENDMENTS ON GST CREDIT: A RECONCILIATION AND BUSINESS NIGHTMARE FOR TAXPAYERS


Vide **Notification No. 39/2021 – Central Tax dated 21st December 2021,** CBIC has notified January 1, 2022 as the effective date for various amendments to GST law encompassing a gamut of changes governing taxability, conditions for taking ITC, enforcement provisions, eligibility

to pay tax, etc. The authors **Ritesh Kanodia (Partner, Dhruva Advisors LLP)** and **Kulraj Ashpnani (Principal)** delve into the depth of one such noteworthy amendment to Section 16 of CGST Act pertaining to conditions of ITC which they anticipate will have "far reaching consequences for the industry".

Authors discuss the Legislative background and legal impact of the stringent provision governing ITC denial to a registered person unless details of such invoices or debit notes have been furnished by the supplier in statement of outward supplies. The authors capitulate that amendment seems to have addressed the issue of lack of substantive powers, which can now be used strongly by the tax authorities to deny ITC if invoice is not reported by the supplier in its GSTR-1. The authors thus assimilate, *"While the legal sustainability of the provisions will evolve in the long run, the taxpayers need to immediately start thinking of the way forward actions to be taken rather than getting themselves embroiled in a legal tangle with the authorities".*

In this context, the authors are quick to point out favourable rulings of Courts adopted from time to time with respect to similar provisions under erstwhile VAT laws allowing credit to a genuine bona-fide buyer. The authors thus jot down the steps that could be considered by Authorities and advocate the need for extensive automation considering the volumes involved and the kind of errors seen in carrying out reconciliation which they perceive *"is not going to be an easy exercise".*

"NON-FUNGIBLE TOKENS AND GST"

The nature of Non-Fungible Tokens (NFTs) is rather unique despite similarities with cryptocurrencies. Its uniqueness is attributable to what it represents viz., Art, Collectibles, Trading cards, and even the first tweet by Twitter's co-founder Jack Dorsey. The tech-geeks are mesmerized while others are in awe of this development. Section 56 of the Income-tax Act, 1961, by virtue of the amendment made by the Finance Act, 2022, recognizes Virtual Digital Assets as 'property'. The tax world now sees it as a product of blockchain which is probably includible in the definition of 'goods' as per the sweeping observations of the Hon'ble Supreme Court in **Tata Consultancy Services**.

Titillating the subject, author **K. Vaitheeswaran (Advocate)** quips *Whether NFTs would constitute good or service can always be the subject of debate"* under the landscape of GST. Referring to the challenges of tracking the NFT transactions, the author mention that "*Given the various ramifications and the complexities in the existing statutory framework, taxation of transactions involving crypto-assets such as NFTs in*

the GST regime is not going to be easy". Citing the recent findings of Spanish Tax Authorities that, NFTs are electronically supplied services which are services that, by their nature, are mainly automated and require minimal human intervention and are not feasible without information technology, the author writes that " *This categorization of NFTs.. when compared with Indian GST provisions would require the examination of OIDAR services defined in terms of Section 2(17) of the IGST Act*".

Pointing out that there are no amendments in GST law in the context of cryptocurrencies or crypto-assets yet, the author in the spirit of debate lucidly days down 'Five Dimensions' for examining GST applicability on NFT sale and signs off stating that " *The law may have to be amended to provide for a simpler system*".

SPECIAL COLUMN

THE GST JUDGMENT – GLIMPSES OF TRUTH

The Apex Court verdict in Mohit Minerals [TS-246-SC-2022-GST], striking down IGST levy on Ocean Freight, is now making headlines for the Court's observations on the powers of the GST Council and the 'binding/non-binding' nature of the Council's recommendations.

While the Punditry parses the judgment's impact on GST policy making, with some even questioning whether it will lead to an 'unraveling' of the GST structure itself, one of the top legal officers of the Govt.- **Additional Solicitor General (ASG) N. Venkataraman**, has a very different & nuanced view on how this seminal SC judgment ought to be interpreted.

In this exclusive opinion piece, ASG N. Venkataraman, dissecting the SC judgment threadbare, quips "*any assumption that any one of the players (States) can pull the strings or set the tunes their own way and, in the process, emasculate the equal rights of the rest, can nowhere gel with any part of the judgment.*" Mr. Venkataraman further opines that the judgment has delivered a ratio in no uncertain terms that "*...wherever the provisions of IGST, CGST and SGST Acts have agreed to align themselves with the recommendations of the GST Council, those recommendations are made binding on the Government when they exercise that power.*"

The learned ASG further elucidates on the SC ratio, especially under what circumstances, a recommendation of the GST Council is not binding and for what reasons it is not so binding. Placing a huge thrust on the parts of the judgment where the Court extensively delves into the concept of 'federalism', 'dual federalism', 'co-operative federalism' etc., Mr. Venkataraman writes "*There is not even an iota of reference, suggestion or comment on the manner and functioning of the GST Council.....any other inference is simply destroying its founding principles...*"

In conclusion, Mr. Venkataraman shows magnanimity by congratulating the assessee side for winning the case on the point of composite supply and exhorts young professionals to read the judgment line by line as there is so much to learn from it.

TAX RING OF 2022

TAX EXPERTS' INITIAL REACTION TO SC PRONOUNCEMENT IN OCEAN FREIGHT MATTER

In a pathbreaking pronouncement, the Supreme Court upheld the Gujarat High Court decision in Mohit Minerals [TS-29-HC-2020(GUJ)-NT] which had struck down the IGST levy on ocean freight for CIF import. The corollary of such dismissal may lead to a plethora of refund applications by taxpayers who have paid IGST on ocean freight.

While being wary of the definitive implications of tossing the Department's challenge and certain observations made by the Larger Bench regarding the shape of GST Council in India's federal structure, experts are lauding this shift as a game changer. As per News reports, experts perceive that SC's observation in Ocean Freight ruling could change the landscape of GST framework. It appears that the Top Court has drawn clear lines between the roles of the GST Council, Centre and State and the nature of recommendations given by the GST Council in the spirit of "cooperative federalism".