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ACAE HOUSE JOURNAL

ASSOCIATION OF CORPORATE ADVISERS & EXECUTIVES

Highlights

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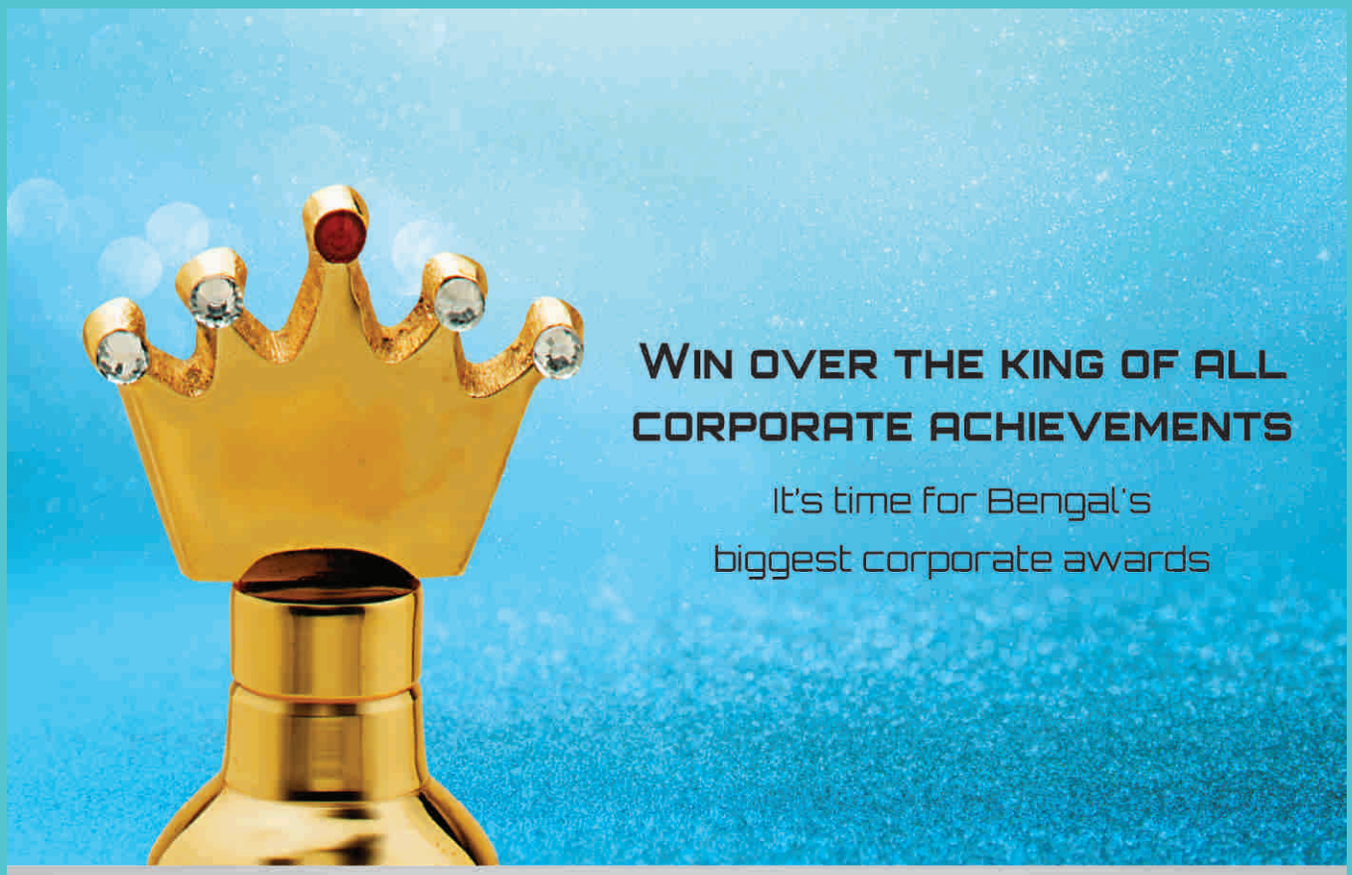

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ACAE HOUSE JOURNAL
VOL : 01/2017-2018 January 2018

CONTENTS

ACAE HOUSE JOURNAL
VOL : 01/2017-2018 January 2018

Editorial

Dear Members,

At the very outset, I would like to quote a famous American author, Helen Keller, "Character cannot be developed in ease and quiet. Only through experience of trial and suffering can the soul be strengthened, ambition inspired, and success achieved. "With immense delight and happiness, we present you with the issue of ACAE Journal for the month of January, 2018, inaugurating the New Year.

The journal shall cover the major changes, reforms and applicability of the recent laws and regulations. As we all know the India's biggest tax reform is now a reality and recently there has been few new developments taking place in the same, so our cynosure of the journal shall be the important developments in GST and the Penalty and Interest relating to ITC under GST.

The introduction of Insolvency & Bankruptcy Code , 2016 has brought a major relief to the vexed issue of corporate insolvency. The enactment of IBC, 2016 shall shift the debtor-creditor dynamics from "debtor under possession" to "creditor in control". While IBC, 2016 is expected to play a key role in NPA resolutions, much of its success would depend on its implementation, which seems challenging owing to a host of factors. The journal elaborates on topics like overview on IBC, 2016 and few case laws including the recent judgment in the matter of Uttam Galva Steel Limited has also been discuss in this issue.

Also, the applicability of IndAS has brought a bundle of changes in the accounting atmosphere which shall hence hold a major part of this journal. Few major discussions on Implementation and Impact of IndAS on accounting and financial statements and the major challenges on IndAS implementation has also been focused on. The journal shall also cover the most talked about subject, i.e., the Benami Property (Prohibition) Amendment Act, 2016.

The ministry is mulling over the introduction of Budget, 2018, and the industry expectation is at peak. Thus, we shall have a complete coverage on the same in our subsequent journal.

We hope that this Journal is able to provide valuable insight to our readers on the latest developments in the legal world. The copy of the Journal shall also be available on our website.

It is rightly quoted by Buddha, "There is no wealth like knowledge, and no poverty like ignorance". Under the shadow of this quote, I would request all the members to share their observation and feedback on this issue which will help us to improve the construction and contents of the Journal and will also serve as a tool for continued learning.

We wish to encourage more contributions/ suggestion/ feedback from the members to ensure a continued success of the journal.

Thank you. We hope you will find this issue informative.

From
Editorial Board
January, 2018

President Speaks

Dear Members,

With the impending dawn of the year, it is time to take stock of the activities, events and developments. We are towards the end of the year with the juncture bearing the massive reforms and developments in the various sectors of our nation. Thus, before the New Year, we shall recollect the major creativities, reforms, ideas, experiences and outcomes and present to you the Journal aggregating the same.

Wish you all and your families a very Happy New Year! May your dreams come true and may you help others fulfil their dreams this New Year. By now, we all must be through with filing of Tax Audit Reports, Income Tax returns and ROC returns.

We are in the final stages of getting the Budget,2018 by the Finance Ministry. Everyone is quite hopeful from this budget because under the present government this is going to be there last complete Budget before 2019 General Election.

Yet another major addition to the existing framework dealing with the Insolvency of Corporate, Individual, Partnerships and other entities is The Insolvency and the Bankruptcy Code 2016. It is a welcome overhaul in the law field.

The Key Highlights of the IBC, 2016 comprises of Insolvency Resolution Process, Corporate Debtors- The two stages process, Insolvency Resolution Process for Individuals/Unlimited Partnerships and more.

Ind AS converged with IFRS have become the new Generally Accepted Accounting Policies (GAAP) for many companies. Approximately 350 companies/groups, covered in phase I of Ind AS roadmap, have published their interim financial results under Ind AS. Ind AS contains many new concepts and many requirements are quite complex. Therefore, it would be fitting for these Ind AS phase II companies to leverage on the learning and experiences of bigger phase I companies. This has turned out to be a new accounting norm in the financial reporting landscape in India.

ACAE has been successful in holding various seminars and workshops on GST, Issues in Tax Audit and MAT, measures related to strike off of companies, various critical topics under Income Tax Act, 1961 and Companies Act, 2013.In this issue you will also find details of seminars to be conducted in February, 2018.

ACAE has conducted workshops on GST, Seminar on Issues in Tax Audit and ICDS & Impact of IndAS on MAT, Lecture meetings on Benami Transactions (Prohibition) Amendment Act, 2016 and PMLA, 2002, Lecture Meeting on Recent Developments & Actions by regulatory authorities and remedial measures there of with special emphasis on Striked Off Companies and Restoration Procedures, Lecture Meetings on IBC, 2016 by eminent speakers

Also, ACAE is organizing the 6th ET Bengal Corporate Awards, in association with The Economic Times, which is to be held soon. We look forward for your participation in the same and encourage the members to register.

It is also time to celebrate and welcome our life with a new start and embrace this New Year. Let's hope to stick to our commitment and enjoy our lives, our profession and humanity.

Since my takeover in the month of September, the journey was incredible and astounding. I am also thankful to the Editorial Board for their first journal under this term. I congratulate the Chairman, CA Vivek Newatia and Co Chairman, CA Niraj Harodia for their efforts. We sincerely hope that this issue shall be appreciated by the members of ACAE and wish to encourage more contributions and suggestion from the members to ensure a continued success of the journal.

With their untiring efforts, we hope to continue publishing journals on significant topics which will be highly beneficial to all members.

Best Regards,

CA Arun Kumar Agarwal
President
8th January, 2018

ACAE HOUSE JOURNAL
VOL : 00/2018 January 2018

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Penalty and Interest relating to ITC under GST

Shailesh Sheth
Advocate & Founder, M/s. SPS LEGAL

"Only the Rule of Law can guarantee security of life and the welfare of the people".
[Kautilya in "The Arthashastra"]

Introduction:

India has embraced GST on July 1, 2017 and with that, has ambitiously embarked upon a fascinating journey of the most fundamental Indirect tax reform which is unprecedented in its scale and impact post- independence. GST is the current favoured name for 'Value Added Tax' (VAT) and therefore, the reader would find the use of both the expressions VAT & GST throughout this article as synonymous.

VAT is the 'consumption tax' of choice of some 160 countries today. VAT is called *'unquestionably the most successful innovation of the last half-century ..... perhaps the most economically efficient way in which countries can raise significant tax revenue'*. (Bird, 2010). It is also passionately argued that *'purely from a revenue point of view, VAT is probably the best tax ever invented'*. (Cnossen, 1990).

The Rudiments of VAT/GST:

International Tax Dialogue, 2005 defines 'VAT' as *"a broad based tax levied at multiple stages of production (and distribution) with – crucially – taxes on inputs credited against taxes on output. That is, while sellers are required to charge the tax on all their sales, they can also claim a credit for taxes that they have been charged on their inputs. The advantage is that revenue is secured by being collected throughout the process of production (unlike a retail sales tax) but without distorting production decisions (as turnover tax does)"*.

Under the 'destination principle' – which is the international norm – commodities or services are taxed by the jurisdiction in which they are consumed. This is generally implemented under the VAT by zero rating exports and charging VAT on imports.

VAT as defined above can be implemented in the following three main ways viz:

a. Subtraction method (also known as Accounts method) under which each dealer is taxedon the difference between his purchases and sales.

b. Addition method under which is tax is levied on an estimate of 'value added' calculated by summing and adjusting, as needed, the 'factor incomes'. In nutshell, under this method, the tax is levied on the sum of wages and profits.

c. Invoice credit method under which the registered traders charge tax on their sales and issue corresponding invoices to their customers, who, if also registered, can use these invoices to establish a right to credit or refund against their own output VAT liability.

Except Japan that applies a 'subtraction method' of VAT, all the countries, including India, who have adopted VAT/GST,have applied 'invoice credit method' for the implementation of VAT.

Self-enforcing feature of VAT/GST:

The Advocates of the VAT/GST suggest that the VAT is '**self-enforcing**' in the sense that each trader has an incentive to ensure that its suppliers have themselves properly paid VAT, in order that they themselves can claim an appropriate credit. As VAT/GST is paid at each stage of production, in order to claim credit for the VAT/GST paid on its inputs against the VAT/GST received on its outputs, a taxpayer would need to show, if required, that the VAT/GST had been paid by its suppliers. ***"One man's proof of purchases is evidence of another man's sales."*** **[National Economic Development**

Office, Value Added Tax (2nd Ed.1971 HMSO, London)]. It is argued that there would be no incentive for two traders to fail to invoice a transaction between them, since the purchaser's liability for VAT would be increased by the amount the supplier had not been recorded as paying. With an indirect tax levied at only one stage of production, the whole of the tax is potentially at risk at that stage, whereas, with VAT, theoretically at least, it is only the tax added at that stage that is at risk. [***"VAT/GST: The UK Experience Revisited"* - by Simon James]**. It is further suggested that there is an important sense in which the VAT is self-correcting, if not self-enforcing: If for some reason a supply to some registered trader escapes VAT, that missing VAT will be recovered at the next stage in the VAT charged by that trader on their own sales, since there will, in that case, be no credit to offset against their liability.

Enforcement, evasion and VAT/GST:

As observed by Michael Keen and Stephen Smith (2007), *"The implementation of a VAT involves the same core elements as does any other self-assessed tax; the identification and registration of those required (or choosing) to pay the tax; collection and processing of amounts spontaneously remitted with periodical returns; audit to ensure accuracy of returns; and enforcement action on delinquent payers."* Like any tax, VAT (or GST) is also vulnerable to evasion or fraud. At the heart of VAT/GST is the credit mechanism, with tax charged by a seller available to the buyer as a credit against his (buyer's) liability on his own sales and, if in excess of the output tax due, refunded to him (buyer), [Keen and Smith (2007)]. This credit and refund mechanism does offer unique opportunity for abuse and gives rise to several types of fraud characteristic of VAT/GST.

The critics often stress that the case for these 'self-enforcing' or 'self-policing' or 'self-correcting' features of the VAT cannot be overstated. It had been recognised that there was scope for evasion, inspite of these intrinsic features of the VAT. For instance, while traders have an incentive to ensure that their suppliers provide them with invoices that the authorities will accept as establishing a right to refund or credit, they have no incentive - unless specific requirements of this end are imposed - to ensure that tax has actually been paid. As Hemming and Kay (1981) stress, the notion that the VAT is self-enforcing is ultimately 'illusory'.

As noted by Richard M. Bird in his Paper *"Review of 'Principles and Practice of Value Added Taxation: Lessons for Developing Countries'"*(1993): *"A VAT invoice is a check written on the Government."* Needless to say, in a country like India, it is a cakewalk for the tax evaders to encash such checks i.e. VAT invoice and encashing they have been and how?! In fact, the credit and refund mechanism of the VAT/GST creates its own opportunities for fraud.

A typology of VAT/GST fraud and evasion:

There are many ways in which VAT/GST can be evaded or fraudulently exploited. To derive a sense of the main risks, it is useful to distinguish between those that also arise under other forms of sales tax, Retail Sales Tax (RST) being an area of focus, and those reflecting distinctive features of the invoice credit VAT.

a. Frauds that can arise under both, a VAT and other forms of Sales Tax e.g. RST:

Following are the types of frauds that are generally attributed to or observed as arising under both, VAT/GST and other forms of Sales Tax including RST:

- Under-reported sales
- Failure to register
- Misclassification of commodities or services
- Omission of self-deliveries
- Tax collected but not remitted
- Imported goods not brought into tax

b. **Frauds distinct to the VAT/GST:**

At the heart of the VAT/GST is the credit mechanism, with tax charged by a seller available to the buyer as a credit against their liability on their own sales and, if in excess of the output tax due, refunded to them. This creates opportunities for several types of fraud which are distinct to the VAT/GST. VAT fraud comes in various guises, but the following main types deserve the mention:

- False claims for credit or refund
- Credit claimed for VAT on purchases that are not creditable

- Bogus traders or "Invoice mills"
- Shadow economy fraud
- Suppression fraud
- Insolvency fraud
- Carousel fraud

Given the susceptibility of VAT/GST to evasion and fraud, particularly theInput Tax Credit (ITC) related frauds, thelegislators and tax administrators all over the world, have been constantly devising the 'ways and means' to check the tax evasion, promote tax compliance and in turn, enhance revenue collection.

Determining which regulatory enforcement strategy will be the most effective in gaining long-term voluntary compliance from taxpayers is a challenge for all tax authorities around the world. A long-standing debate in the regulatory literature has been between those who think that individuals will comply with rules and regulations only when confronted with harsh sanctions and penalties, and those who believe that gentle persuasion and co-operation works in securing compliance. These two alternative approaches to enforcement have been termed the 'deterrence' and 'accommodative' models of regulation, respectively. Yet another model of regulation, amongst other varied models, that is being seriously discussed is the 'norms model' of regulation.

Tax Penalties – Deterrence versus Accommodative versus Norms Models

The use of penalties and detection is a common approach used by tax administrators to combat tax evasion and avoidance in order to enhance efficient revenue collection. The increased reliance on penalties has been based on the relationships specified in the 'deterrence theory'. The 'standard deterrence model' holds that the taxpayers comply with their tax obligations to avoid legal sanctions (such as penalties and incarceration) whenever those sanctions are expected to be more costly than compliance. This model, following the familiar economic analysis of punishment, implies that tax penalties should be severe enough that taxpayers expect that the cost of non-compliance to exceed the costs of compliance.On the other hand, the advocates of the 'accommodative model' of regulationtend to view individuals not as 'rational actors' but as 'social actors' who are ordinarily inclined to comply with the law, partly because of the belief in the rule of law, and partly as a matter of long-term self interest. **[kagan and Scholz, 1984].** Regulatory authorities adopting the 'accommodative model' tend to be more oriented toward seeking results through co-operation rather than by coercion, and prefer to see themselves as service providers rather than as a strict law enforcers. An important aspect of this approach is that it aims to establish a collaborative relationship between the regulator and regulatee (**Grabosky and Braithwaite, 1986).**The 'norms model' maintains that many taxpayers satisfy their tax obligations because they want to adhere to specific social or personal norms, such as reciprocating co-operation of others or respecting legal obligations. This model implies that harsh tax penalties may undermine compliance and argues for deemphasizing tax penalties in favour of other government actions that enhance trust in government and respect for legal obligations.

However, while the debate over the most effective model of regulation to ensure the tax compliance on part of the taxpayers continues unabated, the deterrence model has tended to dominate policy making and enforcement approaches in taxation and continues to do so even in the present era.

In fact, the highly centralised Kautilyan state was regulated by an elaborate system of penalties. That is why, the ***'Arthashastra'*** *(Economics)* is also called '***Dandaniti'*** *(the science of punishment)*. Chanakya puts it succinctly when he says, *"the maintenance of law and order by the use of punishment is the science of government."*

I. Penalty under GST Laws:

A quick glance at the penal provisions, particularly those relating to ITC, of GST laws would reveal two things, viz:

- that, the legislators are conscious of the evasion-prone, fraud-inducing nature of GST as an indirect tax policy; and
- that, they believe that the elaborate and effective penal provisions based on 'deterrence theory' would control the tax evasion and credit frauds and ensure tax compliance.

The provisions relating to penalty are contained

in Sections 73 and 74 of Chapter XV (Demands and Recovery) of the Central Goods and Services Tax Act, 2017('the CGST Act'). Aside from this, Sections 122 to 138 of Chapter XIX ('Offence and Penalties') contain elaborate provisions relating to offences, penalties, prosecution and compounding.

Those provisions shall apply *mutatis mutandis*, so far as may be, in relation to Integrated Tax, Union Territory Tax and State GST as provided under the IGST Act, 2017, UTGST Act, 2017 and the respective SGST Acts of 2017.

Penalty – Meaning of Penalty

It is interesting to note here that in spite of elaborate and substantive penal provisions it contains, the CGST Act does not provide any definition of the term 'penalty'. It will, therefore, be advantageous to refer to the dictionary meaning of the term and a few judicial pronouncements that have explained this term.

a. Dictionary meaning:

P. RamanathanAiyar's Advanced Law Lexicon defines the term 'penalty' as follows:

"A penalty is a sum which a party agrees to pay or forfeit in the event of a breach, but which is fixed, not as pre-estimate of probable actual damages, but as a punishment, the threat of which is designed to prevent the breach, or as security, where the sum is deposited or the covenant to pay is joined in by one or more sureties, to insure that the person injured shall collect his actual damages. Penalties are not recoverable or retainable as such by the person in whose favour they are framed. Charles T. McCormick, Handbook on the Law of Damages section 146, at 666 (1935).

b. *Judicial pronouncements:*

"The term 'penalty' is an elastic term with many different shades of meaning, mainly involving the idea of punishment, corporeal or pecuniary or civil or criminal, although its meaning is generally confined to pecuniary punishment. ***[Allied v. Graves 261 NC 31, 134].***

*A penalty is a sum of money which the law exacts payment of by way of punishment for doing some act which is prohibited or for not doing some act which is required to be done. [****Hidden Hollow Ranch v. Collins, 146 Mont. 321, 406 P.2d 365 368].***

"The sum a party agrees to pay in the event of a contract breach, but which is fixed, not as a pre-estimate of probable actual damages, but as a punishment, the threat of which is designed to prevent the breach." ***[Westmount Country Club v. Kameny, 82 N.J.Super.200, 197 A.2d 379, 382].***

'Penalty', 'Tax' and 'Interest' – Difference

Here, it would be interesting to understand the difference between three terms viz. 'penalty', 'tax' and 'interest', which are commonly used in the fiscal statutes. This has been explained by the Supreme Court in the case of ***Pratibha Processors v. Union of India – 1996 (88) ELT 12 (SC)***as under:

" 'Tax' is an amount payable as a result of the charging provision and it is a compulsory extraction of money by a public authority for public purposes, the payment of which is endorsed by law. 'Penalty' is ordinarily levied for some contumacious conduct or for a deliberate violation of the provisions of the particular statute. 'Interest' is compensatory in character and is imposed on an assessee who has withheld payment of any tax as and when it is due and payable. The levy of interest is geared to the actual amount of tax withheld and the extent of the delay in paying the tax on the due date. Essentially, it is compensatory and different from penalty, – which is penal in character."

Keeping in mind the meanings attributed to the term 'penalty' as above, let us now briefly study and analyse the penal provisions of CGST Act. However, considering the specific subject of this article, the penal provisions relating to ITC are only referred to and discussed here.

Penal provisions of CGST Act relating to ITC

The penal provisions of the CGST Act can broadly be divided into the following broad categories, viz:

a. Penalty for wrong availment or utilisation of ITC [S.73 or S.74 read with S. 122(2)]

b. Penalty for the specified offences [S.122 (1)]

c. Penalty for offences by any person who aids or abets the specified offences [S.122(3)]

d. Penalty for failure to furnish information return or statistics [S.123 & S.124]

e. General i.e. residual penalty [S.125]

f. General penalty in certain cases [S.127]

g. General disciplines related to penalty [S.126]

h. Waiver of penalty in certain circumstances [S.73(8) read with Explanation 1 to S.74]

A close look at the aforesaid penal provisions would reveal that the same are, by and large, patterned on the penal provisions prevalent in the erstwhile Central Excise and Service Tax regime. The principles of law laid down on various aspects of the penal provisions existing in the erstwhile tax regime may, therefore, become quite important and relevant while analysing and understanding the penal provisions of GST laws.

In the ensuing paragraphs, the above provisions are briefly discussed in the context of and to the extent the same relate to ITC.Certain important judicial pronouncements rendered in the context of the penal provisions and the provisions related to Cenvat Credit of the erstwhile tax regime are also referred to for better understanding.

a. Penalty for wrong availment or utilisation of ITC [S.73 or S.74 read with S. 122(2)] :

i. **Demand towards ITC wrongly availed or utilised for the reason other than fraud, etc. [S.73(1)]:**

Section 73(1), inter alia, empower the proper officer to issue a show cause notice to the person chargeable to tax when it appears to the proper officer that there has been a wrong availment or utilisation of ITC by such person for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax. The provision also provides for the recovery of the amount specified in the notice along with interest payable thereon under Section 50 and a penalty leviable under the provisions of the Act or the Rules made thereunder.

Sub-section (3) of Section 73, inter alia, provides for the issue of a statement by the proper officer, instead of show cause notice, containing the details of the ITC wrongly availed or utilised for the subsequent periods when a show cause notice, in terms of sub-section (1) has already been issued for an earlier period. Such statement shall be deemed to be the service of notice if the grounds relied upon for the demand for the subsequent tax periods are the same as mentioned in the earlier notice.[S.73(4) refers].

It will be interesting to note here that the provisions relating to demand and recovery of the ITC wrongly availed or utilised along with interest thereon and imposition of penalty in such cases are incorporated in the parent Act i.e. CGST Act only. This is unlike the erstwhile Central Excise & Service Tax regime, where the analogous provisions were contained in the Cenvat Credit Rules, 2004 ('CCR') and to which, the provisions relating to demand, interest and penalty of the parent Acts i.e. Central Excise Act, 1944 ('CEA') or Finance Act, 1994 ('FA') were made *mutatis mutandis* applicable. This is one of the striking features of the GST related Enactments where quite a few important provisions which were contained in the Rules in the erstwhile tax regime, have been incorporated in the parent Act itself. This imparts a stability and certainty to the operation of the provisions since the frequent amendments of the Rules resorted to under the delegated legislation, would not be possible.

ii. **Demand towards ITC wrongly availed or utilised by way of fraud, etc. [S.74(1)]:**

Section 74(1) provides for the issue of the show cause notice by the proper officer to the person chargeable with tax where the ITC has been wrongly availed or utilised by reason of fraud or any wilful misstatement or suppression of facts to evade tax. The provision also provides for the recovery of such amount along with interest in terms of Section 50 and a penalty equivalent to the tax specified in the notice.

Sub-sections (3) & (4) of Section 74 further provides for the issue of the statement, instead of a show cause notice, by the proper officer containing the details of the ITC wrongly availed or utilised in case of recurring demands for the subsequent period where the notice for the earlier period has already been issued and such statement shall be deemed to be a service of notice under Section 73(1) subject to the condition that the grounds relied upon in the said statement, **except the ground of fraud, or any wilful misstatement or suppression of facts to evade tax,** are the same as mentioned in the earlier notice. It will

thus be seen that a specific exception has been carved out so as to provide that once a show cause notice alleging wilful suppression or misstatement of facts, etc. with intent to evade tax has been issued, such allegations cannot be repeatedly made for the subsequent period for which the statement of demand is being issued even if the issue under dispute remains the same.

Explanation 2 to Section 74 states that the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under the Act or the Rules made thereunder or failure to furnish any information on being asked for by the proper officer.

iii. **Penalties in respect of the demands under Section 73 or Section 74:**

Where the demand towards ITC wrongly availed or utilised other than by reason of fraud, etc. is raised under Section 73(1), the person chargeable with tax will also be liable to penalty equivalent to 10% of tax or Rs.10,000/-, whichever is higher, due from such person.[S. 73(9) refers]. It will thus be seen that the quantum of penalty prescribed under Section 73(9) is mandatory in nature and a lower penalty cannot be imposed. This is despite the fact that the wrong availment or utilisation of ITC is not due to any fraud or wilful suppression of facts, etc. with intent to evade tax.

On the other hand, where the demand towards ITC wrongly availed or utilised is raised under Section 74(1), inter alia, alleging fraud or wilful suppression of facts, etc. with intent to evade tax against the person chargeable with tax, such person shall be liable for penalty equal to tax as provided under Section 74(9) of the CGST Act. It is pertinent to note here that once the elements of fraud, etc. are established, there is no discretion left with any authority to reduce the quantum of penalty prescribed.

iv. **Penalties under Section 73 or Section 74 vis-à-vis Section 122(2):**

It will be observed that sub-section (9) of Section 73 or sub-section (1) read with sub-section (9) of Section 74 of the CGST Act prescribes the quantum of penalty to be levied on a person chargeable with tax and against whom the demand, inter alia, towards ITC wrongly availed or utilised has been raised and upheld under the respective provisions.

At the same time, Section 122(2) of the CGST Act also deals with the similar situations and provides for the imposition of the same quantum of penalty on any registered person in case of omission or commission of any act resulting into the non-payment or short payment of tax or erroneous refund or wrong availment or utilisation of ITC , whether by reason of fraud, etc. or otherwise.

At first glance, there appears to be the 'double jeopardy' in so far as the penal action provided under Section 73 or Section 74 vis-à-vis Section 122(2) is concerned. However, clause (ii) of Explanation 1 to Section 74 provides that once penalty under provisions of Section 73 or Section 74 are paid, all proceedings are concluded and penalty cannot be imposed separately under Sections 122, 125, 129 and 130 of the CGST Act. No doubt, clause (ii) is not very happily worded and needs further refinement to put the matter beyond any doubt.

Judicial pronouncements:

1. **Issue of show cause notice is mandatory before levying penalty:**

   In a customs case, the CESTAT held that penalty under sections 112 and 114 of the Customs Act, 1962 cannot be imposed without show cause notice.

   [Henkel India Ltd. v. CC – 2007 (217) ELT 61 (Tri-Chennai)]

2. **Mensreai.e. guilty mind – Is it an essential element for imposing penalty?**

i. **Mensrea is not an essential element for breach of civil obligations:**

   It has been consistently held by the Supreme Court, High Courts and the Tribunal that *mensrea* is not an essential ingredient for imposing a penalty unless statute specifically prescribes so. In ***R.S. Joshi v. Ajit Mills Ltd. – AIR 1977 SC 2279,*** the Supreme Court observed:

   "The classical view that 'no mensrea, no crime' has long ago been eroded and several laws in India and abroad, especially regarding economic crimes and departmental penalties, have created severe punishments even where

the offences have been defined to exclude mensrea. Therefore, the contention that Section 37(1) fastens a heavy liability regardless of fault has no force in depriving the forfeiture of the character of penalty."

ii. Mensrea is mandatory when the statutory provision provides so:

In the case of ***CCE v. Pepsi Foods Ltd. – 2010 (260) ELT 481 (SC***), the Supreme Court dealt with the applicability of *mensrea* for imposition of mandatory penalty under Section 11AC of the CEA. It was held that when the statute create an offence and an ingredient of that offence is a deliberate attempt to evade duty either by fraud or misrepresentation, *mensrea* would be a necessary constituent of such offence and therefore, the imposition of penalty under Section 11AC of the CEA would be wholly impermissible when no fraud, suppression or misstatement was alleged in the show cause notice. Therefore, criminal intent or '*mensrea*' would be necessary in order to attract the penalty provisions under Section 11AC of the CEA.

iii. Maximum penalty – whether discretionary powers exist ?

In ***UOI v. Dharmendra Textile Processors – 2008 (231) ELT 3 (SC***), the Supreme Court, inter alia, held that lesser penalty was not imposable in the cases inviting imposition of mandatory penalty under Section 11AC of the CEA as there was no discretion available regarding the quantum of penalty under the said provision.

The judgement in Dharmendra Textile's case (supra) was later clarified by the Supreme Court in the case of ***UOI v. Rajasthan Spinning & Weaving Mills Ltd. – 2009 (238) ELT 3 (SC).***

In ***CCE v. Illpea Paramount Pvt. Ltd. – 2006 (202) ELT 744 (SC),*** the Supreme Court held that once the levy of penalty is found to be warranted having regard to the requirements of statute under Section 11AC of the CEA, the quantum of penalty is not at the discretion of authority and the same has to be equal to the amount of duty.

iv. Penalty not imposable if the demand of duty/tax is not sustainable:

In ***CCE vs. HMM Ltd. 1995 (76) ELT 497 (SC),*** the Supreme Court held that the penalty under Rule 9 (2) and 173Q of the Central Excise Rules, 1944 would not be imposable unless the department was able to sustain the demand under challenge on the grounds of limitation. It was held that the question of penalty would arise only if the department was able to sustain its demand and where demand failed, the penalty would follow suit.

See, ***Pahwa Chemicals P. Ltd. v. CCE – 2005 (189) ELT 257 (SC***).

v. No repeated allegations of wilful suppression of facts, etc.:

In ***Nizam Sugar Factory v. CCE – 2006 (197) ELT 465 (SC),*** the Supreme Court held as follows:

"9. Allegation of suppression of fact against the appellant cannot be sustained. When the first SCN was issued, all the relevant facts were in the knowledge of the authorities. Later on, while issuing the second and third show cause notices, the same/similar facts could not be taken as suppression of facts on the part of the Assessee as these facts were already in the knowledge of the authorities. We agree with the view taken in the aforesaid judgment and respectfully following the same, hold that there was no suppression of facts on the part of the Assessee/Appellant."

In this case, the Supreme Court had referred to and followed its earlier judgments in the case of P & B Pharmaceuticals (P) Ltd. v. CCE – 2003 (153) ELT 14 (SC); ECE Industries Ltd. v. CCE – 2004 (164) ELT 236 (SC) and Hyderabad Polymers (P) Ltd. v. CCE – 2004 (166) ELT 151 (SC).

Comment: The principle laid down in these judgements stand embodied in Section 74(4) of the CGST Act.

vi. No suppression of facts not required to be disclosed:

In ***Smt. ShirishtiDhawan v. Shaw Brothers – AIR 1992 SC 1555,*** the Supreme Court held that there can be no suppression of facts

if facts which are not required to be disclosed are not disclosed.

See, ***Apex Electricals (P) Ltd. v. UOI – 1992 (61) ELT 413 (Guj.)***

Comment: This principle of law is explicitly recognised in Explanation 2 to Section 74 of the CGST Act.

vii. **Revenue Neutrality:**

In ***Jay Yushin Ltd. v. CCE – 2000 (119) ELT 718 (Tri-LB),*** the Larger Bench of the CESTAT held as under:

"a. *Revenue neutrality, being a question of fact, the same is to be established in the facts of each case and not merely by showing the availability of an alternate scheme.*

b. *Where the scheme opted for by the assessee is found to have been misused (in contradistinction to mere deviation or failure to observe all the conditions), the existence of an alternate scheme would not be an acceptable defence.*

c. *With particular reference to Modvat Scheme (which has occasioned this reference), it has to be shown that the revenue neutral situation comes about in relation to the credit available to the assessee himself and not by way of availability of credit to the buyer of the assessee's manufactured goods."*

See also, ***Nirlon Ltd. v. CCE – 2015 (320) ELT 22 (SC).***

In ***CCE v. Mahindra & Mahindra Ltd. – 2005 (179) ELT 21 (SC***), it was, however, held by the Supreme Court that the judgment rendered by it in another case of ***Amco Batteries v. CCE – 2003 (153) ELT 7 (SC)*** where the argument of revenue neutrality was accepted on the ground of the availability of credit to the assessee himself, has to be read in the context of the facts. It was held that availability of Cenvat Credit to assessee by itself is not conclusive or decisive consideration. It may be one of the relevant consideration. How much weight is to be attached thereto would depend upon facts of each case.

In ***Essar Steel v. CCE – 2009 (19) STT 42 (CESTAT),*** it was held that if the assessee was eligible for Cenvat Credit on payment of tax (under reverse charge method), there cannot be intention to evade payment of tax and hence, penalty is not imposable.

viii. **Denial of Cenvat Credit when activity considered non-dutiable/non-taxable:**

In ***CCE v. Narmada Chematur Pharmaceuticals Ltd. – 2005 (179) ELT 276 (SC),*** the Supreme Court has held that when an optional exemption is not availed so as to avail Cenvat Credit and such Cenvat credit held to be wrongly availed is exactly equivalent to the amount of excise duty paid by not availing the exemption, the consequence is revenue neutral and hence, demand for wrong availment of credit is not sustainable.

In ***CCE v. Creative Enterprises – 2009 (235) ELT 785 (Guj.),*** the Gujarat High Court upheld the Order of the Tribunal holding that if the activity of the Respondent-Assessee does not amount to manufacture, there can be no question of levy of duty and if the duty is levied, Modvat Credit cannot be denied by holding that there was no manufacture. [***Affirmed in 2009 (243) ELT A 120 (SC)].***

ix. Retrospective amendment – Whether penalty is imposable?

In one of its historic judgments rendered in the case of ***J.K. Spinning and Weaving Mills Ltd. v. UOI – 1987 (32) ELT 234 (SC),*** the Supreme Court dealt with the challenge made to the retrospective operation of amendments of Rules 9 and 49 (of Central Excise Rules, 1944) wherein, under the Explanation, the said amendments to the Rules had been given retrospective effect. In this context, the Supreme Court held that it would be against all principles of legal jurisprudence to impose a penalty on a person or to confiscate his goods for an act or omission which was lawful at the time when such act was performed or omission made, but subsequently made unlawful by virtue of any provision of law.

In the case of ***P. V. Mohammad Barmay Sons v. Director of Enforcement - 1992 (61) ELT 337,*** the Supreme Court held that

penal provisions could neither have retrospective applicability nor could a greater penalty than the one in force at the time of commission of the offence be imposed in view of the provisions of Article 20(1) of the Constitution of India. It was held that Article 20 (1) of the Constitution of India provides that no person could be convicted of any offence except for a violation of the law in force at the time of commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence.

In the case of ***Commissioner of Central Excise, Coimbatore v. ElgiEquipments Ltd. 2001 (128) ELT 52 (SC),*** in the context of mandatory penalty stipulated under section 11AC of Central Excise Act, 1944, the Supreme Court held that such penal provisions would be prospective in operation since the illegality committed prior to the insertion of the said section in the Act could not be the subject matter of penalty under the said provision. Further, it was held that the presumption against retrospective operation was strong in cases in which the statute, if operated retrospectively, would prejudicially affect the vested rights or the illegality of the past transactions, or impair contracts, or impose a new duty or attach new disability in respect of past transactions or consideration already passed.

x. Penalty is not imposable when issue relates to the statutory interpretation:

In the case of ***Uniflex Cables Ltd. v. CCE – 2011 (271) ELT 161 (SC),*** the Supreme Court dealt with the issue with regard to the imposition of penalty where the issue involved was of interpretational nature. Taking note of the fact that the Commissioner himself had found that it was only a case of interpretational nature, the Supreme Court quashed the order of the Commissioner imposing the penalty as also the order of the Tribunal so far as it confirmed the imposition of penalty on the Appellant.

b. **Penalty for the specified offences [S.122 (1)]**

Section 122(1) of the CGST Act enumerates the offences, other than those covered vide Section 73 and 74 of the Act, which invite penal consequences for the person committing such offence.

Section 122(1) lists total 21 offences including the specific offences relating to ITC which are as under:

i. Supply of any goods or services or both without issue of any invoice or issue of an incorrect or false invoice with regard to any such supply [S.122(1)(i) refers]

ii. Issue of any invoice or bill without supply of goods or services or both in violation of the provisions of the Act i.e. CGST Act or the rules made thereunder [S.122(1)(ii) refers];

iii. Collection of any amount as tax but fails to pay the same to the government beyond a period of three months from the date on which such payment becomes due [S.122(1)(iii) refers];

iv. Taking or utilising input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of the Act i.e. CGST Act or the rules made thereunder [S.122(1)(vii) refers]

v. Obtaining refund of tax under the CGST Act fraudulently [S.122 (1)(viii) refers];

vi. Taking or distributing ITC in violation of Section 20 (Input Service Distributor) or the rules made thereunder (S.122 (1)(ix) refers];

vii. Falsification or substitution of financial records or production of fake accounts or documents or furnishing of any false information or return with an intent to evade payment of tax due under the CGST Act [S.122(1)(x) refers];

viii. Obstructing or preventing any officer in discharge of his duties under the CGST Act [S.122(1)(xiii) refers];

ix. Failure to keep, maintain or retain books of accounts and other documents in accordance with the provisions of the CGST Act or the rules made thereunder [S.122 (1) (xvi) refers];

x. Failure to furnish information or documents called for by an officer in accordance with the provisions of the CGST Act or the rules

made thereunder or furnishing false information or documents during any proceedings under the Act [S.122 (1) (xvii) refers];

xi. Issue of any invoice or document by using the registration number of another registered person [S.122 (1)(xix) refers];

xii. Tampering with, or destroying any material evidence or documents [S.122(1)(xx) refers];

The penalty, in case of any of the aforesaid offences committed by a taxable person, shall be Rs. 10,000/- or an amount equivalent to the tax evaded or ITC availed of or passed on or distributed irregularly, or the refund claimed fraudulently, as the case may be, whichever is higher.

From the careful study of Section 122(1) and the offences listed therein as also the quantum of penalty prescribed, it will be observed that the '*mensrea*' is presumed to be existing in case of any of such offences if committed by the taxable person though it is not prescribed as an essential element. The stringent penalty, equivalent to the amount of tax or ITC involved, is a pointer to this fact.

In the case of ***Chirag Gosalia v. CC – 2008 (230) ELT 224 (Bom),*** the Bombay High Court considered whether the imposition of penalty under Section 112 of the Customs Act, 1962 was mandatory in nature. It was held that on a reading of the section, it was clear that the legislature had used the term 'shall be liable'. In other words, it was a mandatory provision. Therefore, the High Court agreed with the order of the CESTAT and held that no question of law would arise and dismissed the appeal of the Assessee.

It is significant to note that a few of the offences listed in sub-section (1) of Section 122 were also earlier covered by Section 77 of the erstwhile FA for which the penalty prescribed under the said Section was '**maximum Rs.10,000/-'.** As against this, the penalty prescribed for the similar offences under Section 122(1) is '**Rs.10,000/- or equivalent to tax or credit involved, whichever is higher'** and the same is 'mandatory' in nature. This marks a quantum jump in the penalty imposable and appears to be based on the 'standard deterrence model'.

The penal consequences of Section 122(1) will be attracted only when any of the offences listed therein is committed by a '**taxable person'**and not by '**any person'.** The term 'taxable person' is defined vide Section 2 (107) of the CGST Act so as to mean 'a person who is registered or liable to be registered under Section 22 or Section 24'.

c. Penalty for offences by any person who aids or abets the specified offences [S.122(3)]

Sub-section (3) of Section 122 provides for the penal action against **any person** who is guilty of omission or commission of any specified act and in the manner specified therein. Clause (a) of sub-section (3) provides that any person who aids or abets any of the offences specified in Section 122(1) of the Act shall be liable to a penalty prescribed thereunder.

The quantum of penalty prescribed under Section 122(3) is maximum Rs.25,000/-. Since the words used in the provision are 'may extend to Rupees twenty five thousand', it is clear that the quantum of penalty prescribed is 'maximum' and not 'mandatory'.

It is interesting to note that the quantum of penalty prescribed under Section 122(3) appears to be quite low when compared to the quantum prescribed in Rule 26 of the erstwhile Central Excise Rules, 2002 or Section 78A of the erstwhile FA or Section 112 of the Customs Act, 1962 in similar circumstances.

d. Penalty for failure to furnish information return or statistics [S.123& S.124]

Section 123 of the CGST Act provides that if a person who is required to furnish an information return under Section 150 fails to do so within the period specified in the notice under Section 150(3), the proper officer may direct that such person shall be liable to pay a penalty of Rs. 100/- for each day during which the default continues, subject to maximum Rs. 5,000/-.

Section 150 of the CGST Act requires the persons specified therein to file an information return as prescribed therein.

Section 124 of the CGST Act provides that any person required to furnish any information or return under Section 151,-(a) without reasonable cause, fails to furnish such information or return;

or (b) wilfully furnishes or causes to furnish any false information or return, shall be punishable with fine which may extend to Rs. 10,000/- and in case of continuing offence, to a further fine which may extend to Rs. 100/- for each day of default subject to maximum Rs. 20,000/-.

Section 151 of the CGST Act empowers the Commissioner to collect the statistics relating to any matter dealt with by or in connection with the Act.

e. General i.e. residual penalty [S.125]

The provisions of Section 125 are residual in nature and provides for the imposition of maximum penalty uptoRs. 25,000/- in a case where no penalty is separately provided for in the CGST Act for the contravention of any of the provisions of the Act or any rules made thereunder by any person.

In the erstwhile Service Tax regime, the residual penalty prescribed was maximum Rs.10,000/- vide Section 77(2) of the FA.

f. General penalty in certain cases [S.127]

Section 127 of the CGSTAct provides that where the proper officer is of the view that a person is liable to a penalty and the same is not covered under any proceedings

- Section 62 (assessment of non-filers of returns) or
- Section 63 (assessment of un-registered persons) or
- Section 64 (summary assessment in certain special cases) or
- Section 73 (determination of tax not paid or short paid or erroneously refunded or ITC wrongly availed or utilised for any reason other than fraud, etc.)
- Section 74 (determination of tax not paid or short paid or erroneously refunded or ITC wrongly availed or utilised by reason of fraud, etc.)
- Section 129 (detention, seizure and release of goods and conveyances in transit) or
- Section 130 (confiscation of goods or conveyances and levy of penalty), he may issue an order levying such penalty after giving a reasonable opportunity of being heard to such person.

g. General disciplines related to penalty [S.126]

Section 126 of the CGST Act contains 'general disciplines related to penalty'. The provision is a beneficial piece of legislation and embodies certain sound principles of law laid down in the matter of imposition of penalty on a person for commission of any offence under the relevant statute. However, unfortunately, the principles are rarely followed in practice by the authorities.

The 'general disciplines' enshrined in Section 126 are as follows:

- No penalty shall be levied for minor breaches of tax regulations or procedural requirements and in particular, any omission or mistake in documentation which is easily rectifiable and made without fraudulent intent or gross negligence [S. 126(1) refers].

  The Explanation to sub-section (1) states that- 'for the purpose of this sub-section,-

  a) a breach shall be considered a 'minor breach' if the amount of tax involved is less than five thousand rupees;

  b) an omission or mistake in documentation shall be considered to be easily rectifiable if the same is an error apparent on the face of record.

- Penalty shall depend upon the facts and circumstances of each case and shall be commensurate with the degree and severity of the breach [S. 126 (2) refers]
- Penalty shall not be imposed on any person without granting personal hearing [S.126(3) refers]
- The nature of the breach and the applicable law, regulation or procedure under which the amount of penalty for the breach has been specified, shall be mentioned in his order by the officer while imposing a penalty for any such breach on any person. [S. 126 (4) refers]

- Voluntary disclosure by a person before the officer of the circumstances of a breach of the tax law, regulation or procedural requirement prior to the discovery of the breach by the officer shall be considered as a mitigating factor when quantifying a penalty for that person. [S.126(5) refers].

Finally, as a rider, it is provided, vide sub-section (6) that the provisions of the Section 126 shall not apply in such cases where the penalty specified under this Act is either a fixed sum or expressed as a fixed percentage. This effectively means that the above disciplines would come into play only where 'maximum' penalty is prescribed under the relevant provision and the discretion is vested in the proper officer to impose a lesser penalty under such provision.

h. Waiver of and/or lower penalty in certain circumstances [S.73 and S.74]

a. Waiver of penalty [S.73]:

As discussed above, sub-section (1) and sub-section (3) of Section 73 provides for the issue of show cause notice or the statement of demand, as the case may be, in case of the wrong availment and utilization of ITC by any person chargeable with tax. The demand raised under this provision also entails interest as well as penalty as prescribed.

However, sub-sections (5) and (6)of Section 73 provides an 'escape route' to such person. It is provided that a person chargeable with tax may pay the amount of tax (or ITC) along with interest payable thereon, on the basis of his own ascertainment of tax (or ITC) or the tax (or ITC) as ascertained by the proper officer before service of notice or the statement under sub-section (1) or sub-section (3), as the case may be and inform the proper officer in writing of such payment. Sub-section (6) provides that on receipt of such information regarding payment made in terms of sub-section (5), the proper officer shall not serve any notice or statement under sub-section (1) or sub-section (3), as the case may be, in respect of tax (or ITC) so paid or any penalty payable under the provisions of the Act or the rules made thereunder.

Sub-section (6) of Section 73 uses the phrase **'shall not serve any notice.... or the statement....'** and it means that once a person chargeable with tax pays the appropriate amount of ITC wrongly availed or utilised alongwith interest on his own ascertainment or as ascertained by the proper officer but before issue of the show cause notice or statement, the issue of any such notice or statement, whether for recovery of the amount of ITC or for penalty payable under any provisions of the Act or the rules made thereunder is prohibited.

Judicial pronouncements:

In ***MannalalKhetan v. KedarNathKhetan – AIR 1977 SC 536,*** it was held that if wording is negative i.e. 'shall not register', it will be mandatory provision, as negative words are clearly prohibitory.

See also, ***UOI v. A. K. Pandey – (2009) 10 SCC 522;***

Prakash Kumar v. State of Gujarat – AIR 2005 SC 1075

Lower penalty [S. 73(8)]

In case a person chargeable with tax has already been served with a show cause notice or the statement under sub-section (1) or sub-section (3), as the case may be, of Section 73 in respect of ITC wrongly availed or utilised, he has been given an option vide sub-section (8) of Section 73 to pay the said amount of credit along with interest thereon within 30 days of issue of the show cause notice and if so paid, no penalty shall be payable by such person and all proceedings in respect of the said notice will be deemed to be concluded.

Lower penalty in cases involving fraud, etc. [S.74 (5) & (8)]

As explained above, Section 74 of the CGST Act provides for the issue of show cause notice, inter alia, in respect of the ITC wrongly availed or utilised by reason of fraud or wilful misstatement or suppression of facts with intent to evade tax. Such amount would be recoverable with interest as prescribed and the person is also exposed to the penalty equivalent to the amount of ITC involved.

However, as a relief measure, it is provided vide sub-section (5) of Section 74 that the person chargeable with tax may pay the amount of tax (or ITC) along with interest thereon and a penalty equivalent to 15% of such tax (or ITC) on the basis

of his own ascertainment of such tax (or ITC) or the tax (or ITC) as ascertained by the proper officer before issue of the notice under sub-section (1) and inform the payment particulars to the proper officer. In other words, a person who has fraudulently or by resorting to wilful suppression of facts, etc. availed or utilised ITC, may take the benefit of reduced penalty of 15% of the amount of ITC involved by making the payment of the entire amount of ITC involved along with interest and such reduced quantum of penalty on his own before issue of the show cause notice to him. Once, the payment is made in this manner as prescribed, the issue of notice under Section 74(1) in respect of the tax (or ITC) so paid or any penalty payable under the Act or the rules made thereunder is prohibited.

However, in case a person has already been served with a show cause notice in terms of sub-section (1) of Section 74, he still has the option to pay the amount of tax (or ITC) with interest thereon and a penalty equivalent to 25% of such tax (or ITC) within 30 days of issue of the notice and in that case, all the proceedings in respect of the said notice shall be deemed to be concluded.

Yet one more opportunity is provided to the defaulting person who has missed to avail the opportunity provided under sub-section (5) or sub-section (8) of Section 74 of a reduced penalty. Any such person against whom an adjudication order has been passed consequent upon the proceedings held on the show cause notice issued under Section 74(1), may, within 30 days of the communication of the order, pay the amount of tax (or ITC) determined as payable along with interest thereon and a penalty equivalent to 50% of such tax (or ITC) and if so paid, all proceedings in respect of the said notice shall be deemed to be concluded.

Judicial pronouncements:

In the case of ***CCE v. Viraj Alloys Ltd. – 2017 (346) ELT*** 192 (***Bom),*** the Bombay High Court has, inter alia, held that the benefit of reduced penalty will not be available if the payment of duty along with interest is not made within the stipulated period of 30 days.

II. Provisions relating to 'Interest' under GST laws:

The provisions relating to 'interest on delayed payment of tax' are contained in Section 50 of the CGST Act.

Interest – Meaning of

The term 'interest' is not defined in the GST laws. However, it generally connotes the compensation payable for usage of other's money usually computed on a percentage basis. Here, it will be advantageous to refer to a few dictionary meanings of the term 'interest'.

Black's Law Dictionary: *"Interest in the context of usage of money is the compensation allowed by law or fixed by the parties for the use or forbearance of borrowed money."*

Corpus JurisSecondum, Vol.47: *"Interest is a compensation allowed by law, or fixed by the parties for the use or forbearance of money, or for detention."*

Interest – Statutory provisions [S.50]:

As discussed hereinabove, in case of non-payment or short payment of tax or erroneous refund or wrong availment or utilisation of ITC by a person chargeable with tax, the proper officer is empowered to issue a show cause notice to such person in terms of Section 73(1) or Section 74(1) of the CGST Act, depending upon the existence or otherwise of the element of fraud or wilful misstatement or suppression of facts with intent to evade tax. The notice shall contain the amount of tax (or ITC) and shall call upon the person why the said amount should not be recovered from him alongwith interest payable thereon under Section 50 and penalty should not be imposed on him as prescribed in law.

Section 50 provides for the recovery of 'interest on delayed payment of tax' in two circumstances viz.:

i. levy of interest in case of a failure of a person to pay the tax or any part thereof within the prescribed period [S.50(1) refers]; and

ii. levy of interest in case of an undue or excess claim of ITC or undue or excess reduction in output tax liability [S.50(3) refers].

For the purpose of the present article, the provisions of Section 50(3) are only briefly discussed hereinafter.

Interest on undue or excess claim of ITC [S.50 (3)]:

Sub-section (3) of Section 50 provides that if a taxable person makes undue or excess claim of ITC under Section 42(10) or undue or excess reduction in output tax liability under Section 43(10), he shall pay interest on such undue or excess claim or on such undue or excess reduction, as the case may be, as such rate not exceeding 24% as may be notified by the government on the recommendations of the Council.

Vide Notification No. 13/2017-CT dt. 28.06.2017 (parallel Notification No. 6/2017-IT dt. 28.06.2017), the government had notified **'24%'** as the rate of interest for the purpose of Section 50(3) of the Act.

It may be noted here that in case of failure of a person to pay tax or any part thereof within the prescribed period, the rate of interest leviable under Section 50 (1) has been notified at **'18%'** vide the aforesaid Notifications.

Judicial pronouncements:

i. **Provisions relating to interest are the provisions of substantive law:**

In ***J. K. Synthetics Ltd. v. CTO – AIR 1994 SC 2393,*** the Constitution Bench of the Supreme Court held that the provisions relating to the charging and levying of interest in a statute are provisions of substantive law.

In the case of ***CCE v. Ukai Pradesh SahakariKhandUdyogMandali Ltd. – 2011 (271) ELT 32 (Guj.),*** the Gujarat High Court held that interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes a substantive provision in this regard.

In a significant judgment recently delivered by the Guwahati High Court on 24th November, 2017 in the case of ***ONGC Ltd. v. UOI,*** it is held that in absence of any substantive provision in the Oil Industry (Development) Act, 1974 which obliged the Assessees to pay interest on delayed payment of cess, the interest is not leviable on the delayed payment of cess. The High Court rejected the contention of the Revenue that interest was applicable in terms of Section 15(4) of the said Act which adopts the provisions of Central Excise Act and rules made thereunder in relation to levy and collection of excise duties. The High Court, while upholding the decision of the CESTAT, referred to the decision of the Supreme Court in India ***Carbon Ltd. vs. The State of Assam - AIR 1977 SC 3054,*** wherein the Apex Court, after considering an identical provision of the Central Sales Tax Act, had held that interest on tax due could be charged only when the taxing statute made a substantive provision to pay interest for delayed payment of tax and not otherwise.

See also,***VVS Sugar v. Govt. of AP – AIR 1999 SC 2124 (SC 5 Member Bench)***

ii. **Whether the discretionary powers exist in case of levy of interest?**

In ***CCE v. Padmavati V.V. Patil SSK Ltd.- 2007 (215) ELT 23 (Bom),*** the Bombay High Court held that interest is a civil liability of assessee who has retained amount of public money. Interest is mandatory, even if evasion of duty is not malafide or intentional.

In ***Futnani Steels v. CCE – 2009 (235) ELT 869 (Trib),*** the CESTAT held that interest for delayed payment is a statutory liability and accrues automatically. It is payable even if there was a bonafide doubt or mistake. It was further held that the Tribunal cannot set aside the interest.

iii. **Interest is payable even if duty/tax is paid before issue of show cause notice:**

In ***CCE vs. Karnataka Soaps – 2011 (267) ELT 593 (Kar.),*** the Karnataka High Court held that interest is payable even if duty is paid before issue of show cause notice.

See also, ***CC v. Toyota Kirloskar Motors – 2015 (324) ELT 636 (SC)***

iv. **Interest is not payable when a time-barred demand is voluntarily honoured:**

In an interesting case, the Gujarat High Court held that interest is not payable if excise duty is paid voluntarily by assessee before show cause notice even when demand was time-barred – ***CCE v. Gujarat Narmada Fertilizers Co. Ltd. -2012 (285) ELT 336 (Guj).***

v. Interest is payable even if Cenvat Credit was available to the recipient unit of the same assessee:

in the case of ***Bayers ABS Ltd. v. CCE – 2012 (281) ELT 296 (Tri),*** assesse paid the duty without contesting and took Cenvat credit in its other unit where goods were sent. It was argued by the assessee that if duty was paid earlier, the recipient unit could have taken Cenvat credit earlier and hence interest is not payable. However, the CESTAT, by a majority order (2 v.1) held that interest is still payable. (Minority view was that it was a revenue neutral exercise and hence interest is not payable).

vi. Interest is not payable when Cenvat Credit was available to other company, or for captive consumption:

In ***Paper Products Ltd. v. CCE – 2013 (292) ELT 389 (CESTAT),*** it was held that interest is not payable when Cenvat Credit was available to other company (sister unit in this case).

In ***Reliance Industries Ltd. v. CCE – 2013 (292) ELT 378 (CESTAT),*** it was held that interest is not payable on captive consumption when Cenvat Credit was available.

vii. Whether interest is automatic or a demand is necessary?

In ***Haji LalMohd. Biri Works v. State of UP – AIR 1973 SC 2226,*** the Supreme Court held that when liability to pay interest is automatic and arises by operation of law, it is not necessary to make an assessment in respect of interest or issue notice of demand in respect of interest.

A similar view was expressed in ***Royal Boot House v. State of J & K – (1984) 56 STC 21 SC; CST v. Qureshi Crucible Centre – AIR 1994 SC 25; PrahladRai v. STO – AIR 1991 SC 1737; CCE v. K.L. Concast – 2007 (209) ELT 425 (Tri-SMB); CST v. Pepsi Cola – 2007 (8) STR 246 (Tri-SMB).***

viii. Whether the period of limitation is invokable for the demand of interest?

However, though as per the aforesaid judgments, a formal demand is not required for recovery of interest and therefore, the time limit for raising demand for interest would also not apply as a corollary, the issue is debatable. It has been held that when a specific provision for demand of interest is made in the statute like excise law, the time limit for raising the demand of duty will also apply to interest also. Nonetheless, even on this aspect, there are divergent views expressed by the differential judicial forums.

In ***ANS Steel Tubes Ltd. v. CCE – 2011 (265) ELT 127 (Tri-Del.),*** the Single Member Bench of the CESTAT held that the asssessee by not informing the department regarding non-payment of interest on differed payment of duty on supplementary invoices, had kept it in dark regarding the same and therefore, the extended period was invokable for demand of interest.

However, the judgment of the Tribunal was reversed by the Punjab & Haryana High Court in ***ANS Steel Tubes Ltd. v. CCE – 2015 (318) ELT A 160 (P&H)*** where the High Court answered the substantial questions of law as framed therein in favour of the Appellant-company. The High Court took due note of the judgment of the Delhi High Court in the case of ***Hindustan Insecticides Ltd. v. CCE – 2013 (297) ELT 332 (Del.)*** in which case, the Delhi High Court, relying upon the judgements in ***Kwality Ice Cream Co. v. UOI – 2012 (281) ELT 507 (Del.) and CCE v. TVS Whirlpool Ltd. – 2000 (119) ELT A 177 (SC),*** held that as the period of limitation that applies to recovery of the principal amount shall also apply to the claim for interest thereon, the demand is time-barred and had reversed the judgment of the CESTAT under challenge before it.

A similar view is expressed in ***CCE v. VAE VKN Industries Pvt. Ltd. – 2015 (332) ELT 269 (P&H).***

ix. Whether interest liability arises even if ITC is not utilised?

Section 73 and 74 of the CGST Act, inter alia, provides for the issue of demand in case of ITC has been **wrongly availed or utilised,** depending upon the existence or otherwise of the element of fraud, etc. The use of the disjunctive word '**or**' in the provision gives

rise to an important issue as to whether the interest will still be payable even if the taxable person has not utilised the ITC claimed by the department as wrongly availed?

A similar question had arisen in the context of the Rule 14 of the erstwhile CCR as in force prior to its amendment w.e.f. 17.03.2012 vide Notification No. 18/2012-CE (NT) dt. 17.03.2012. Rule 14, inter alia, providing for the recovery of Cenvat Credit wrongly taken/utilised and as was in force prior to 17.03.2012 also employed the disjunctive word '**or'** with the opening part of the Rule reading as 'where the Cenvat Credit has been taken **or** utilised wrongly……'.

The question that had arisen before the Supreme Court in the case of ***UOI v. Ind-Swift Laboratories Ltd.- 2011(265) ELT 3 (SC)*** wherein the Supreme Court held that once the credit is taken, the beneficiary is at liberty to utilise the same, immediately thereafter, subject to the Credit rules. Relying on its own judgment in ***CST, UP v. Modi Sugar Mills Ltd. – AIR 1961 SC 1047,*** it was observed by the Court that taxing statute shall not be interpreted on any presumptions or assumptions and the Court must look squarely at the words of the statute to interpret them. Therefore, there is no necessity of reading the word '**OR'** as '**AND'.**

It appears that this judgment was rendered considering the antecedents of the case regarding false claim of Modvat Credit at the availment stage itself.

Subsequently, in an interesting development, the Karnataka High Court in the case of ***CCE v. Bill ForgePvt. Ltd. – 2012 (279) ELT 209 (Kar.)*** very succinctly brought out the effect of the aforesaid judgment of the Supreme Court and held that credit availment is only a book entry and actual utilisation happens when the excise duty payable is short paid to the extent of credit availed. Interest, being compensatory, can be calculated only when these set off happens and payment is withheld to that extent. If the assessee reversed the credit and did not use the credit for setting off, the question of payment of interest does not arise.

Mercifully, the CBEC took note of the consternation created by the aforesaid judgment of the Supreme Court and promptly substituted the word '**or'** by '**and'** vide Notification dated 17.03.2012. Subsequently, entire Rule 14 was substituted by Notification No. 06/2015-CE (NT) dt. 01.03.2015 explicitly reflecting the nature of interest, the trigger point for the levy of interest and the legal position as amplified with regard the liability to interest by the Karnataka High Court in the case of ***Bill ForgePvt. Ltd. (supra).***

However, for some inexplicable reason, Section 73 and 74 of the CGST Act has once again used the same disjunctive word '**or'** in 'where input tax credit has been wrongly availed or utilised…..'. Consequently, the issue as to whether interest liability would arise even when ITC is merely availed but not utilised, may raise its ugly head again ! One can only fervently hope that the GST Council will take note of this issue and a suitable corrective measure will be taken for the amendment of the provision by the Parliament so as to avoid any unpleasant dispute on this issue!

Conclusion:

From the close study of the various offences listed in Section 122 and in particular, those relating to ITC, it will be observed that the same closely resemble to the frauds distinct to the VAT/GST like false claims for credit or refund, bogus traders or 'invoice mills', shadow economy fraud, carousel fraud, etc. The legislature, with a view to check the tax evasion and frauds, foster tax compliance and enhance revenue collection, has made the provisions for the stringent penalties which follow the 'standard deterrence model' of regulation.

However, even if one accepts the inevitability of such harsh penalty measures considering the rampant tax frauds, particularly relating to ITC, being witnessed in the country, it is essential that the penal provisions are clear and unambiguous. Unfortunately, the penal provisions of the GST laws leave much to be desired on this count.

The larger and the important question, however, is how far and to what extent the tax penalties encourage the tax compliance? The various findings suggest that the penalties *per se* are generally viewed as being limited in influencing

compliance behaviour. As a matter of fact, the relationship between tax penalties and tax compliance needs serious examination. [**Doran, 2009**]

Regulatory/administrative policies based only on enforcement may well be a reasonable starting point but not a good ending point for increasing tax compliance. Indeed, what is needed is a multifaceted policy approach that includes enforcement, but one that also emphasises such things as service, especially trust. People exhibit a remarkable diversity in their behaviour. There are individuals who always cheat and those who always comply, some who behave as if they maximise the expected utility of the tax evasion gamble, others who seem to overweight law probabilities, individuals who respond in different ways to changes in their tax burden, some who are at times co-operative and at other times free-riders, and many who seem to be guided by such things as social norms or moral sentiments. Any government approach toward tax compliance must address this "full house" of behaviours by devising a comparable "full house" of policies to combat tax evasion. **[Alm, 2013]**

"A severe king (meting out unjust punishment) is hated by the people he terrorises, while one who is too lenient is held in contempt by his own people. Whoever imposes just and deserved punishment is respected and honoured".

[Kautilya in "The Arthashastra"]

Repeating the same mistakes over and over is unnecessary. When lessons in life repeat, it's a call to look at things closely to find deeper understanding.

Important Developments in GST

CA Bimal Jain
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In first remarks after the GST Council's decisions in its 23rd meeting, our Hon'ble Prime Minister Shri Narendra Moditweeted that **"jan bhagidari"** was "at the core" of the government's functioning and all its decisions were **"people-inspired, people-friendly and people-centric"**. Indeed, the GST Council in its 23rd meeting has made sweeping changes to the present framework of GST, allowing taxpayers and small businesses to breathe easy. Importantly, the highest GST tax slab was slashed to retain only 50 items at 28% tax bracket. Effective from November 15, 2017, as many as around 233 items from chocolates, detergents to granite and marble will become cheaper - 177 items moving from 28% to 18%, 2 items from 28% to 12% and around other 54 items also moving to lower tax brackets. As per government algorithm, these measures are expected to cost the exchequer around Rs. 20,000 crore.

Additionally, the GST Council has come out with a string of deadline relaxations and lowering of penalty/ late fees for delayed filing of return along with an increase in the annual turnover threshold for the composition scheme to Rs 1.5 crore (overall limit to be increased to Rs. 2 Cr) from the recently revised Rs 1 crore. Taxpayers would file summary return in Form GSTR-3B along with payment of tax by 20th of the succeeding month till March, 2018. Further filing of GSTR 2 & 3 is done away with till March, 2018 and requires filing of details in FORM GSTR-1 only till March 2018, with taxpayers divided into two categories - Taxpayers with annual aggregate turnover upto Rs. 1.5 crore filing quarterly GSTR-1 and those with annual aggregate turnover more than Rs. 1.5 crore filing GSTR-1 on monthly basis, as per revised frequency provided. Eating out will also be easier as all standalone restaurants are now going to be taxed at 5% without ITC, as against attracting different rates based on whether or not they were air-conditioned.

Gist of the changes is discussed in this article for ease of reference.

- ***Rationalisation of GST rates on certain goods**:*

The Central Government vide ***Notification No. 41/2017 - Central Tax (Rate) dated November 14, 2017***has amended Notification No. 01/2017 - Central Tax (Rate) dated June 28, 2017 to, *inter-alia*, reduce GST rate on approximately 177 items earlier falling in 28% slab to 18% slab, leaving only 50 items that will still be taxed at GST rate of 28%.Further, the CBEC vide ***Press Release dated November 16, 2017*** has grouped these items for easy reference which includes beauty or make-up preparations, slabs of marbles and granite, ceramic tiles, chocolates, chewing gum/bubble gum etc.

Additionally, 2 items have been moved from 28% to 12% and around other 54 items also moved to lower tax brackets.

The changes are effective from 00hrs on 15th of November, 2017.

Note: Please also see ***Notification No. 43/***

2017 – Integrated Tax (Rate) dated November 14, 2017.

- ***Changes relating to GST rates on restaurant and other services:***

The Central Government vide ***Notification No. 46/2017-Central Tax (Rate) dated November 14, 2017***has made the following changes in GST rates of restaurant and other services:

S.No.	Description of services	GST Rate
1.	□ All stand-alone restaurants whether air conditioned or otherwise □ Food parcels or takeaways □ Restaurants in hotels with room declared tariff of less than Rs. 7,500 per day [Supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or drink provided by a restaurant, eating joint including mess, canteen, whether for consumption on or away from the premises (i.e. takeaways) **other** thanpremises of hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes having declared tariff of **any unit** of accommodation of **Rs. 7,500/- and above** per unit per day or equivalent]	5% GST without Input Tax Credit (**"ITC"**) (i.e. 2.5% CGST and SGST/UTGST each)
2.	□ Restaurants in hotels with room declared tariff (of any unit) of Rs. 7,500 per day and above Supply of (1) above, by a restaurant, eating joint including mess, canteen whether for consumption on or away from the premises (i.e. takeaways) located in the premises of hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes having declared tariff of **any unit** of accommodation of **Rs. 7,500/- and above** per unit per day or equivalent]	18% with ITC (i.e. 9% CGST and SGST/UTGST each)
Explanation- "**declared tariff**" includes charges for all amenities provided in the unit of accommodation (given on rent for stay) like furniture, air conditioner, refrigerators or any other amenities, but without excluding any discount offered on the published charges for such unit.		
4.	GST rate on job work services in relation to manufacture of those handicraft goods in respect of which the casual taxable person has been exempted from obtaining registration	5% with ITC

The changes are effective from 00hrs on 15th of November, 2017.

Notes:

1) *Outdoor catering will continue to be at 18% with full ITC.*

2) *Please also see* ***Notification No. 48/2017 – Integrated Tax (Rate) dated November 14, 2017***.

- **Amendment in the CGST Rules, 2017**

The Central Government vide ***Notification No. 55/2017 – Central Tax dated November 15, 2017*** has amended the CGST Rules, 2017. **Some of the technical changes** are as under:

✓ No reversal in respect of services supplied to Nepal & Bhutan: Manner of determination of ITC in respect of inputs/ input services/ capital goods and reversal thereof in specified cases is contained under Rule 42 and Rule 43 of the CGST Rules, 2017.

Now, an explanation has been inserted in Rule 43, after sub-rule (2), to provide for exclusion of value of supply of services to Nepal and Bhutan, against payment in Indian Rupees, at the time of calculating aggregate value of exempt supplies. **In nutshell, it can be said that ITC in respect of services supplied to Nepal and Bhutan, against payment in Indian Rupees, need not to be reversed.**

Note – *Supply of services having place of supply in Nepal and Bhutan, against payment in Indian Rupees have been exempted vide Notification No. 42/2017-Integrated Tax (Rate) dated October 27, 2017.*

✓ Issue of consolidated invoice by banking companies made optional: In Rule 54, in sub-rule (2), for the words *"supplier* ***shall*** *issue"*, the words *"supplier* ***may*** *issue"* is substituted to make it optional for an insurer or a banking company or a financial institution, including a non-banking financial company, to issue a consolidated tax invoice or any other document in lieu thereof for supply of services made during a month at the end of the month.

✓ New Rules inserted on "Manual filing & processing": After Rule 97 and Rule 107,new Rules (Rule 97A and Rule 107A) has been inserted to provide for **manual filing of application, intimation, reply, declaration, statement or issuance of the notice, order or certificate in required forms for the purpose of refund and advance ruling**.

(Process of manual filing and processing of refund claims in respect of zero-rated supplies has been detailed out in ***Circular No. 17/17/2017 – GST dated November 15, 2017***)

✓ New Refund forms: For the purpose of claiming refund manually by casual taxable person or non-resident taxable person, tax deductor, tax collector and other registered taxable person, **"Form GST RFD-01 A"** and **"Form GST RFD-01 B"** has been inserted after Form GST RFD-01.

- ***Return filing made easy***

The return filing process has been further simplified in the following manner:

✓ All taxpayers would file monthly return in Form GSTR-3B along with payment of taxes by 20th of the succeeding month till March, 2018 – ***Notification No. 56/ 2017-Central Tax dated November 15, 2017***.

✓ For filing of details in **Form GSTR-1** till March 2018, taxpayers would be divided into two categories. Details of these two categories along with the last date of filing GSTR-1 are as follows:

a) Taxpayers with annual aggregate turnover up to Rs. 1.5 Crore need to file GSTR-1 on quarterly basis as per following frequency: (***Notification No. 57/ 2017– Central Tax dated November 15, 2017)***

Quarter for which the details in FORM GSTR-1 are furnished	Time period for furnishing the details in FORM GSTR-1
Jul – Sep, 2017	31st Dec, 2017
Oct – Dec, 2017	15th Feb, 2018
Jan – Mar, 2018	30th April, 2018

b) Taxpayers with annual aggregate turnover more than Rs. 1.5 Crore need to file GSTR-1 on monthly basis as per following frequency: (***Notification No. 58/2017 – Central Tax dated November 15, 2017***)

Months for which the details in FORM GSTR-1 are furnished	Time period for furnishing the details in FORM GSTR-1
Jul – Oct, 2017	31st Dec, 2017
November, 2017	10th Jan, 2018
December, 2017	10th Feb, 2018
January, 2018	10th Mar, 2018
February, 2018	10th Apr, 2018
March, 2018	10th May, 2018

Note: The time period for filing GSTR-2 and GSTR-3 for the months of July 2017 to March 2018 would be worked out by a Committee of Officers. Therefore, filing of GSTR-1 will continue for the entire period without requiring filing of GSTR-2 & GSTR-3 for the previous month / period.

- **<u>Extension of dates for furnishing other Forms</u>**

Taking cognizance of the late availability or unavailability of some forms on the GSTN portal, it has been decided that the due dates for furnishing the following forms shall be extended as under:

Notifications/ Orders	Form and Details	Original due dates	Revised due dates
Notification No. 59/2017 – Central Tax dated 15.11.2017	**GSTR-4** for the quarter July-September, 2017 by Composition suppliers	18.10.2017	24.12.2017
Notification No. 60/2017 – Central Tax dated 15.11.2017	**GSTR-5** for the months of July-October, 2017 by Non-Resident Taxable Person	20.08.2017 or 7 days from the last date of registration whichever is earlier	11.12.2017
Notification No. 61/2017 – Central Tax dated 15.11.2017	**GSTR-5A** for the month of July-October, 2017 by supply of online information and database access or retrieval (OIDAR) services by a person located outside India made to a non-taxable person in India	20.08.2017	15.12.2017

Notification No. 62/2017 – Central Tax dated 15.11.2017	**GSTR-6** for July, 2017 by Input Service Distributor (ISD)	13.08.2017	31.12.2017
Notification No. 63/2017– Central Tax dated 15.11.2017	**GST ITC-04,** containing details of Inputs & Capital goods sent& received from/to Job Workers, for the quarter July-September, 2017	25.10.2017	31.12.2017
Order No. 09/2017& Order No. 10/2017 – GST dated 15.11.2017	**GST TRAN-1**along with one time revision for claiming transitional credit in GST	30.09.2017	27.12.2017

- **Reduction in late fees for delayed filing of return in Form GSTR-3B**

The Central Government vide ***Notification No. 64/2017-Central Tax dated November 15, 2017*** has reduced the per day penalty for delay in filing of return in Form GSTR-3B from October 2017 onwards in the following manner:

Particulars	**Till September, 2017**	From October, 2017
Nil returns	Rs. 200 per day	Rs. 20 per day
Others	Rs. 200 per day	INR 50 per day

Notes:

1) *Late fees prescribed above is total of both CGST and SGST/UTGST law*

2) *The penalty for late filing of returns for the month of July, August and September has already been waived off and refunds are being credited to taxpayers online GST account. Furthermore, it has been decided that where any such late fees were paid, it will be re-credited to the electronic cash ledger under the 'tax head' instead of 'fee head' so as to enable the taxpayers to use that amount to discharge their future tax liabilities.*

- **No GST on Advances in respect of supply of goods**

The Central Government vide ***Notification No. 66/2017 – Central Tax dated November 15, 2017***, has notified the registered person who did not opt for the composition levy, as the class of persons who shall pay the CGST on outward **supply of goods** at the time of supply as specified in Section 12(2)(a) of the CGST Act, 2017 including in the situations attracting the provisions of Section 14.

Section 12(2)(a) of the CGST Act, 2017, prescribes time of supply for goods as the date of issuance of invoice or the last date on which invoice is required to be issued.

Thus, no GST will be applicable on advance amount received in respect of goods.

It may be noted that this notification has been

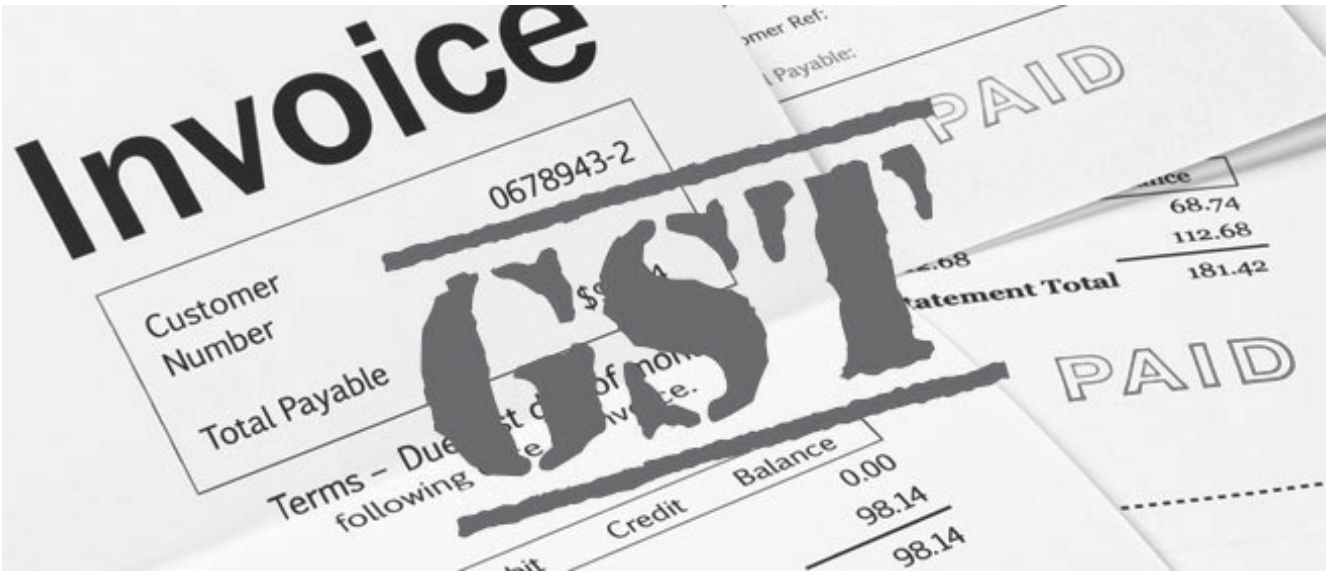
issued in suppression of earlier Notification No. 40/2017 – Central Tax dated October 13, 2017, wherein the stated benefit was allowed only to small assessees whose aggregate turnover in preceding financial year did not exceed Rs. 1.5 crore. Now, the provision has been generalised for all the registered assessees other than composition supplier.

- **Reverse charge on supply of Raw Cotton by agriculturist:**

The Central Government vide ***Notification No. 43/2017-Central Tax (Rate) dated November 14, 2017***has notified "***supply of raw cotton by agriculturist"*** as a supply, the tax on which shall be liable to be paid by the recipient of such supply (i.e. any registered person) under reverse charge.

This notification shall come into force with effect from November 15, 2017.

Note: Please also see ***Notification No. 45/2017 – Integrated Tax (Rate) dated November 14, 2017***



Satisfaction lies in the effort not the attainment. Full effort is full victory.

– Mahatma Gandhi

OVERVIEW ON THE INSOLVENCY AND BANKRUPTCY CODE, 2016

[with extracts from the IBBI Newsletter]

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A Single Unified Code for Resolving Insolvencies

The Insolvency and Bankruptcy Code, 2016 (IBC) provides a consolidated single regulatory platform for insolvency of Corporates, LLPs, Individuals and Partnership firms. It has taken the positives of US and UK Bankruptcy Laws such as moratorium during insolvency process, time bound insolvency process, role of insolvency professionals, in the process such as taking over of management, powers of creditors in the process etc.

The code has identified the delay in the insolvency and bankruptcy resolution process in the current regulatory system. Under the current system, considerable time is lost in obtaining credit information. Another source of delay is multi-layered adjudicating mechanism. The Code provides for an Insolvency Resolution Process within a period of 180 days which can be extended to a maximum of 90 more days.

Establishment of Board, Notification of Regulations

The establishment of the Insolvency and Bankruptcy Board of India (IBBI) on 1st October, 2016 and the notification of provisions of the Insolvency and Bankruptcy Code, 2016 (the 'Code') relating to Corporate Insolvency Resolution Process, Insolvency Professionals, Insolvency Professional Agencies and the Regulations/Rules made there under and notification of Sick Industrial Companies(Special Provisions) Repeal Act, 2003 with effect from 1st December, 2016, are one of the recent landmark regulatory reforms in India. This is expected to result in:

- ✓ faster and efficient adjudication mechanism
- ✓ in a time bound manner
- ✓ for maximization of the value of assets of such persons
- ✓ to promote entrepreneurship
- ✓ availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues

The Code has opened up a plethora of opportunities for the professionals in the areas of Corporate Insolvency Resolution Process, Corporate Liquidation Process, Individual Insolvency Resolution Process and the Bankruptcy Process. It calls for fresh approach in learning the new legislation and in dealing with the cases.

Key Highlights of the Code

The salient features of the law are as follows:

- ➢ Clear, coherent and speedy process for early identification of financial distress and resolution of companies and limited liability entities if the underlying business is found to be viable.
- ➢ Two distinct processes for resolution of individuals, namely- "Fresh Start" and "Insolvency Resolution".
- ➢ Debt Recovery Tribunal and National Company Law Tribunal to act as Adjudicating Authority and deal with the cases related to insolvency, liquidation and bankruptcy process in respect of individuals and unlimited partnership firms and in respect of companies and limited liabilities entities respectively.
- ➢ Establishment of an Insolvency and

Bankruptcy Board of India to exercise regulatory oversight over insolvency professionals, insolvency professional agencies and information utilities.

- Insolvency professionals would handle the commercial aspects of insolvency resolution process. Insolvency professional agencies will develop professional standards, code of ethics and be first level regulator for insolvency professionals members leading to development of a competitive industry for such professionals.
- Information utilities would collect, collate, authenticate and disseminate financial information to be used in insolvency, liquidation and bankruptcy proceedings.
- Enabling provisions to deal with cross border insolvency.

The essential idea of the new law is that when a firm defaults on its debt, control shifts from the shareholders/promoters to a Committee of Creditors, who have 180 days in which to evaluate proposals from various players about resuscitating the company or taking it into liquidation.

When decisions are taken in a time-bound manner, there is a greater chance that the firm can be saved as a going concern, and the productive resources of the economy (the labour and the capital) can be put to the best use. This is in complete departure with the experience under the SICA regime where there were delays leading to destruction of the value of the firm.

Resolution is the key after default...if not seamless exit is the need

A failure usually manifests as default in repayment obligations, though there can be occasions when a firm may default without failure and vice versa. Default is a state of insolvency. The failure and consequent insolvency needs to be prevented. Where prevention is not possible, it needs to be resolved: (a) preferably within the firm as a going concern, as closure of the firm destroys organisational capital; (b) at the earliest, preferably at the very first default, to prevent it ballooning to un-resolvable proportions; (c) in a time bound manner as undue delay reduces organizational capital of the firm making resolution difficult; (d) by stakeholders who have a claim against the firm; and (e) in a calm environment when nobody disturbs the firm. Where resolution is neither possible nor desirable, the firm needs to exit seamlessly. The Code addresses all these – endeavours to prevent insolvency, provides a market determined and time bound mechanism for resolution of insolvency, wherever possible, along with facilitators for quick and effective resolution, and promotes ease of exit, wherever required.

The Code prescribes for balancing the Interests of all Stakeholders

A corporate (other than a financial service provider) has broadly two sources of funds, namely, equity and debt. Usually, the equity owners control and run the corporate. The Insolvency and Bankruptcy Code, 2016 (Code), however, envisages that if they fail to service the debt, the corporate in default undergoes corporate insolvency resolution process (CIRP). An Insolvency Professional (IP) carries on the business operations of the corporate as a going concern until the Committee of Creditors (CoC) draws up a resolution plan that would keep the business of the corporate going on for ever.

The Code, as stated in the long title, requires a CIRP to (a) maximise value of assets of the corporate, and (b) while doing so, balance the interests of all the stakeholders, and assigns this responsibility primarily to the IP, and the CoC comprising non-related financial creditors.

The Code maximizes the value by striking a balance between resolution and liquidation. It encourages and facilitates resolution in most cases where creditors would receive at least as much as they would in liquidation. This would happen where enterprise value is 'sufficiently' higher than the liquidation value. In such cases, resolution preserves and maximizes the enterprise value as a going concern. In the remaining cases, the Code facilitates liquidation as that maximizes the value for stakeholders.

The Code enables initiation of CIRP at the earliest, even at the very first default, when enterprise value is usually higher than the liquidation value and hence the CoC has the motivation to resolve insolvency of the corporate rather than liquidate

it. It mandates resolution in a time bound manner to prevent decline in enterprise value with time, reducing motivation of the CoC to opt for liquidation. It facilitates resolution; makes a cadre of professionals available to run the corporate as a going concern; prohibits suspension or termination of supply of essential services; enables raising interim finances required for running the corporate; etc

The Insolvency Professional Agencies and the Registration of Insolvency Professionals

Insolvency Professional Agencies (IPAs)

The IPAs, which are wholly owned subsidiaries of premier institutes such as Institute of Chartered Accountants of India, Institute of Company Secretaries of India and Institute of Cost Accountants of India are incorporated as a Section 8 company and are registered with IBBI and have started enrolling the professional members to be registered as insolvency professionals The IPAs are front line regulators for the Insolvency Professionals under the Code.

Limited Period Registration for Insolvency Professionals

Under Regulation 9 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, Chartered Accountants, Company Secretaries, Cost Accountants, and Advocates having more than 15 years of practice could register themselves as insolvency professionals without appearing in any examination for a limited period of 6 (six) months only. This registration for limited period was available up to 31st December, 2016. The IBBI has granted registration to 977 Insolvency Professionals in this category. For a fresh registration beyond the said period of six months, all such professionals were required to clear the Limited Insolvency Examination being conducted by IBBI.

Limited Insolvency Examination and Registration of Insolvency Professionals

The IBBI (Insolvency Professionals) Regulations, 2016 allow chartered accountants, company secretaries, cost accountants and Advocates with 10 years' of post-membership experience (practice or employment) or Graduates with 15 years' of post qualification managerial experience to be registered as IPs on passing the Limited Insolvency Examination. For this purpose, the IBBI launched the Limited Insolvency Examination on 31st December, 2016. The IBBI has assigned administration of the Limited Insolvency Examination to National Institute of Securities Markets (NISM). The format of examination is as under:

a. The examination is conducted online (computer-based in a proctored environment) with objective multiple choice questions

b. The duration of the examination is two hours

c. A candidate is required to answer 90 questions in two hours for a total of 100 marks

d. There is a negative marking of 25% of the marks assigned for the question

e. Passing mark for the examination is 60%

f. A candidate is issued a temporary mark sheet on the submission of examination paper

g. Passing candidate is awarded a certificate by the IBBI and

h. No workbook or study material is provided

The frequency of examination is as under:

a. The examination is available from multiple locations in the country

b. The examination is available between 9:30 AM and 5:30 PM

c. A candidate pays an examination fee of Rs.1500 (Rupees one thousand five hundred only) online on every enrolment

The validity of limited insolvency examination is life time. Also there is no cap on the number of attempts for appearing in this examination.

National Insolvency Examination & Registration as Insolvency Professional

The IBBI (Board) shall, either on its own or through a designated agency, conduct a 'National Insolvency Examination' in such a manner and at

such frequency, as may be specified, to test the knowledge and practical skills of individuals in the areas of insolvency, bankruptcy and allied subjects. Probably, individuals not fitting in the above criteria specified for registration as an Insolvency Professional would be permitted to be registered as such after passing the National Insolvency Examination. The details of the same are yet to be announced by the Board.

Regulations Issued by IBBI under the Code

The IBBI issued a total of 9 regulations to provide for regulation of service providers and enable implementation of provisions relating to corporate insolvency resolution and liquidation as on the date of this article. The details of some of the relevant ones are as under:

The IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016

These regulations make it mandatory for an Insolvency Professional Agency (IPA) to adopt bye-laws that are consistent with the Model Bye Laws issued by the IBBI. More than half of the directors of its Board of the IPA shall be independent directors and not more than one-fourth of the directors shall be IPs. The IPA shall have Membership Committee(s), Monitoring Committee, Grievance Redressal Committee(s), and Disciplinary Committee(s) for regulation and oversight of professional members.

The IBBI (Insolvency Professional Agencies) Regulations, 2016

These regulations inter alia provide for the eligibility norms to be a Professional Member of an IPA and also for eligibility norms to be registered with the IBBI as an IPA. A company registered under section 8 of the Companies Act, 2013 with a minimum net worth of Rs.10 crore and a paid up capital of Rs.5 crore is eligible to be an Insolvency Professional Agency. At least 51% of the share capital of the IPA must be held, directly or indirectly, by persons resident in India. The IPA, its promoters, its directors and persons holding more than 10% of its share capital must be fit and proper persons.

The IBBI (Insolvency Professionals) Regulations, 2016

These regulations, inter alia provide for registration, regulation and oversight of insolvency professionals (IPs). These provide for three modes of registration which has already been dealt earlier in this article. These allow an IP to use organisational resources of a recognised insolvency professional entity. A limited liability partnership, a registered partnership firm and a company can be recognised as an insolvency professional entity if a majority of the partners of partnership firm or a majority of the whole time directors of the company are registered as insolvency professionals with the IBBI. The regulations provide for the code of conduct for IPs whereby IPs are required to inter alia adhere to timelines, maintain confidentiality, comply with the restrictions on employment and occupation and avoid conflict of interests.

The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

The regulations delineate the processes and activities from initiation of Corporate Insolvency Resolution Process (CIRP) till its conclusion with approval of the resolution plan. These regulations prohibit an insolvency professional from acting as a resolution professional for CIRP of a corporate debtor if he is not independent of the corporate debtor. These prohibit partners or directors of an insolvency professional entity of which the insolvency professional is a partner or director from representing other stakeholders in the same CIRP. These oblige the insolvency professional to make disclosures - initial and continuing - if he has any pecuniary or personal relationship with any of the stakeholders entitled to distribution of assets. These regulations specify the manner and contents of public announcement, receipt and verification of claims of creditors, formation of committee of creditors, and manner of holding meetings of committee of creditors and voting in such meetings. These also specify the contents of information memorandum and of resolution plan, including its implementation schedule, and the manner of determination of liquidation values. These further specify the components of resolution process costs and scope of essential supplies.

The IBBI (Liquidation Process) Regulations, 2016

These regulations inter alia provide for the details of activities from issue of liquidation order under section 33 of the Code to dissolution order under

section 54. These regulations prohibit an insolvency professional from acting as a liquidator for a corporate debtor if he is not independent of the corporate debtor. These prohibit partners or directors of an insolvency professional entity of which the insolvency professional is a partner or director from representing other stakeholders in the same liquidation process. These oblige the liquidator, and also registered valuer(s) and professional(s) assisting him in liquidation to make disclosures - initial and continuing - about pecuniary or personal relationship with any of the stakeholders entitled to distribution of assets.

These regulations specify the manner and contents of public announcement, receipt and verification of claims of stakeholders, reports and registers to be maintained, preserved and submitted by the liquidator, the manner of realisation of assets and security interest, and distribution of proceeds to stakeholders.

These regulations provide that a liquidator should ordinarily sell the assets through auctions. He may sell the assets through private sale only when the asset is perishable; the asset is likely to deteriorate in value significantly if not sold immediately or the asset is sold at a price higher than the reserve price of a failed auction. He may sell an asset on standalone basis, or assets in a slump sale, assets in parcels or a set of assets collectively. These regulations provide that the fee payable to a liquidator shall form a part of liquidation cost. These further provide that a liquidator shall be paid such fees and in such manner as has been decided by the committee of creditors during the resolution process. In all other cases, the liquidator shall be entitled to a fee as a percentage of the amount realised net of other liquidation costs and of the amount distributed.

Registration of 1st Information Utility under the Code

The Insolvency and Bankruptcy Board of India registered National E-Governance Services Limited (NeSL) as an Information Utility (IU) under the IBBI (Information Utilities) Regulations, 2017 on 25.09.2017. This registration is valid for five years from the date of registration. IU stores financial information that helps to establish defaults as well as verify claims expeditiously and thereby facilitates completion of transactions under the Insolvency and Bankruptcy Code, 2016 in a time bound manner. It constitutes a key pillar of the insolvency and bankruptcy ecosystem, the other three being the Adjudicating Authority, the IBBI and Insolvency Professionals.

Individual Insolvency Resolution

The Insolvency and Bankruptcy Board of India had constituted a Working Group to recommend the strategy and approach for implementation of the provisions of the Insolvency and Bankruptcy Code, 2016 dealing with insolvency and bankruptcy in respect of:

(i) Guarantors to corporate debtors, i.e., personal guarantors, and

(ii) Individuals having business, and submit a report along with draft Rules and Regulations.

The Working Group has since submitted a report dealing with insolvency resolution process of individuals and firms. It intends to submit a separate report for bankruptcy process of individuals and firms. IBBI intends to implement insolvency resolution in the first phase for: (i) Guarantors to corporate debtors, i.e., personal guarantors, and (ii) Individuals having business (partnership, proprietorship or any other).

Along with the report for insolvency resolution process of individuals and firms, the Working Group has submitted (i) the draft Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Individuals and Firms) Rules, 2017, and (ii) the draft Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Individuals and Firms) Regulations, 2017.

As per press reports, the above Rules and Regulations along with relevant provisions under the code dealing with Individual Insolvency is likely to be made effective very soon. This would again open lots of opportunities for aspiring professionals. The enforcement of the aforesaid individual bankruptcy related provisions will also provide more teeth to the lenders.

Epilogue

The vision of the new law is to encourage entrepreneurship and innovation. Some business

ventures will always fail, but they will be handled rapidly and swiftly. Entrepreneurs and lenders will be able to move on, instead of being bogged down with decisions taken in the past. A key innovation of the Insolvency and Bankruptcy Code is four pillars of institutional infrastructure.

The first pillar of institutional infrastructure is a class of regulated persons, the "Insolvency Professionals". They would play a key role in the efficient working of the bankruptcy process. They would be regulated by "Insolvency Professional Agencies".

The second pillar of institutional infrastructure is a new industry of 'Information Utilities'. These would store facts about lenders and terms of lending in electronic databases. This would eliminate delays and disputes about facts when default does take place.

The third pillar of institutional infrastructure is in adjudication. The NCLT will be the forum where firm insolvency will be heard and DRTs will be the forum where individual insolvencies will be heard. These institutions, along with their Appellate bodies, viz., NCLAT and DRATs is required to be adequately strengthened so as to achieve world class functioning of the bankruptcy process.

The fourth pillar of institutional infrastructure is a regulator viz., "The Insolvency and Bankruptcy Board of India". This body will have regulatory over-sight over the Insolvency Professionals, Insolvency Professional Agencies and Information Utilities.

The Insolvency and Bankruptcy Code is being experienced as a comprehensive and systemic reform, which will give a quantum leap to the functioning of the credit market. It is likely to take India from among relatively weak insolvency regimes to becoming one of the world's best insolvency regimes. It also lays the foundations for the development of the corporate bond market, which would finance the infrastructure projects of the future. The passing of this Code and implementation of the same has already given a boost to ease of doing business and also ease of resolving insolvencies in India.

Things can be viewed many different ways. Choosing to have a positive attitude regardless of circumstances will have the greatest impact on your success.

Important caselaws of Uttam Galva Steel Limited under Insolvency and Bankruptcy Code, 2016

IP Binay Kumar Singhania
Chartered Accountant and
Insolvency Professional

The Insolvency and Bankruptcy Code, 2016 (Code) was enacted with the primary objective to Ease of doing Business and in order to achieve it, a consolidated law relating to reorganisation and insolvency resolution of corporates firms and individuals (except for organisations in financial sector) is enacted.

In the last few months there have been fewsignificant orders passed by the Tribunals and the Courts.

One of these significant orders was the order passed by the National Company Law Appellate Tribunal on 28th July, 2017 in the matter of Uttam Galva Steel Ltd. V/s DF Deutsche Forfait AG and Anr.

Brief Background of the Litigation

The Corporate Debtor, Uttam Galva Steels Limited submitted an application with the Appellate Tribunal challenging the impugned order passed the National Company Law Tribunal, Mumbai Bench on 10th April, 2017.

NCLT, Mumbai Bench had passed an impugned order for commencement of Insolvency Resolution Process on an application made by DF Deutsche Forfait AG and Anr (applicant-1) &Misr Bank Europe GmbH (applicant-2), both being operational creditor of Uttam Galva Steels Limited.

Uttam Galva originally had the outstanding amount of USD 10,787,040.00 to be paid to a German company namely AIC Handels GmbH towards the supply of 19,976 MT of prime steel billets. AIC against its outstanding amount drew two bills of USD 5,387,040 and USD 5,400,000 which were duly accepted by Uttam Galva.

Later, AIC entered into a forfeiting agreement with DF Deutsche andMisrBank discounting the said bills and stating that the entire debt with present and future rightsto claims and demand had been transferred to DF Deutsche andMisrBank. The details of the transfer were brought to the knowledge of Uttam Galva and were partially acknowledged by them.

Therefore, DF Deutsche along with Misr Bank being the current operational creditor submitted a joint application quoting an a total outstanding amount of USD 16,542,886.33 i.e, a principal sum of USD 10,787,040 and interest of USD 5,755,846.33 to be in default.

Study of the appeal made by Uttam Galva (Corporate Debtor)

The Corporate Debtor, Uttam Galva challenged the impugned order on different grounds and the appeal made by the corporate debtor raised the following questions:-

1) Whether a **joint application** by two or more**'operational creditors**' under Section 9 of I&B Code is maintainable?
2) Whether it is **mandatory**' to file **'certificate of recognised financial institution**' along with an application under the code?
3) Whether the **demand notice** with invoice under Section 8 of I&B Code can be issued **by any lawyer** on behalf of an Operational Creditor?
4) Whether there is an **existence of dispute,** if any, in the present case?

Joint Application by Operational Creditor : *Not Maintainable.*

As per the code, 'Financial Creditor' either by *itself or jointly* with other financial creditors as provided in Section 7 of the code may the trigger of CIRP before the Adjudicating Authority, i.e. NCLT when a default occurs.

The relevant provision of Section 7 of the Code reads as follows:-

7.-Initiation of corporate insolvency resolution process byfinancial creditor

(1) A financial creditor either ***by itself or jointly*** *with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.*

Explanation *— for the purposes of this sub-section, a default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor.*

(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

(3) The financial creditor shall, along with the application furnish—

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) Any other information as may be specified by the Board.

Unlike section7, the provisions applicable on the operational creditor, Section 8 and Section 9 provide for the procedure to be followed by an Operational Creditor to initiate Insolvency Resolution Process.

From these provisions it is clear that a Demand Notice under Section 8 is to be issued by **an "Operational Creditor"** ***individually*** and the petition under Section 9 has to be filed by Operational Creditor **individually and not jointly**. Otherwise also it is not practical for more than one Operational Creditor to file a joint petition.

Therefore, the Appellate Tribunal held that Joint application under Section 9 as not maintainable.

Certificate of recognised Financial Institution.–*Mandatory to be filed along with the application.*

As per Rule 6 of the Adjudicating Authority rules, 2016, an operational creditor shall make an application forinitiating the corporate insolvency process under section 9, in Form 5 accompanied with documents and records required therein .

As provisions of Section 8(3)(c) the operational creditor requires to furnish thecopy of the certificate from the 'Financial Institutions' maintaining accounts of the operational creditor confirming that, there is no payment of an unpaid operational debt by the corporate debtor and

In the matter of "***smart Timing Steel Limited vs. National Steel and agro Industries Limited" on 19th May, 2017*** the Appellate Tribunal held that filing of "Certificate of recognised financial Institution" maintaining the account of the operational creditor conforming that there is no payment of unpaid operational debt made by the corporate debtor is ***mandatory***.

Excerpts of the order for reference are as follows:-

"12. On perusal of entire Section (3) along with subsections and clauses, inclusive of proviso, it would be crystal clear that, the entire provision of sub-clause 13, of Section 9 required to be mandatorily followed and it is not empty statutory formality.

13. The provisions of sub-section (3) mandates the operational creditor to furnish copy of invoice demanding payment or demand notice delivered by the, operational creditor to the corporate debtor, an affidavit to the effect that, there is no notice given by the corporate debtor relating to dispute of unpaid operational debt, a copy of the certificate from the 'Financial Institutions' maintaining accounts of the operational creditor confirming that, there is no payment of an unpaid operational debt by the corporate debtor and such other information as may be stipulated. Sub-section ('5) of section 9 is procedure required to be followed by Adjudicating Authority. ***One can say that procedural part is not mandatory but is directory***.

14. The provision being "directory' or "mandatory" hasfallen for consideration before Hon'ble Supreme Court onnumerous occasions. In Manual Shah Vs. SardarSayedAhmed (1955) 1 SCR 108, the Hon'ble Apex Court heldthat where statute itself provide consequences of breachornon-compliance, normally the provision has to beregarded as having mandatory in nature.

For determination of the issue whether a provision ismandatory or not, it will be desirable to refer to decisionof Hon'ble Supreme Court in State of Mysore Vs.V.K.Kangan (1976) 2 SCC 895. In the said case, theHon'ble Supreme Court specifically held: "10. Indetermining the question whether a provision ismandatory or director one must look into the subject matter and consider the importance of the provision disregarded and the relation ofthat provision to the general object intended to be secured. No doubt all laws are mandatory in the sense they impose the duty to obey on those who come within itspurview. But it does not follow that every departure from it shall taint the proceedings with a fatal blemish. The determination of thequestion whether a provision is mandatory or directory.

16 Therefore it is clear that the word shall used in sub – section (3) of section 9 of I& B Code is mandatory including clause 3 therein."

As per the facts of the Uttam Galva matter, operational creditor attached a Certificate dated 6th March 2017 as a 'Certificate of Financial Institution' as required by the provisions issued by **Misr Bank** which is a foreign bank andis not recognised as a 'financial institution'.

The Certificate attached was issued by 'collecting agency' as distinct from "FinancialInstitution and authenticity of the same cannot be verified by the NCLT.

Hence, the mandatory compliance of attaching Certificate of Financial Institution was not adhered to making the application made not maintainable.

Affidavit mandating that no notice of dispute was received by Operational Creditor – *Mandatory to file along with the application.*

Order also that the affidavit as per provision of Section 8 (3) (b) in support of insolvency application, as prescribed in Form 5 of the Adjudicating Authority Rules had not been filed along with the application which *mandates* that*"no notice of dispute received to be returned or it is returned when dispute was raised"*.In absence of the Affidavit theFrom 5 is not complete, and hence the application made under section 9 of the Insolvency &BankruptcyCode, was not maintainable.

Notice of Demand whether can be issued by Professional on behalf of Operational Creditor – *Allowed, provided proper authorisation is obtained from the Operational Creditor.*

To determine whether a Professional is allowed to issuethe Notice of Demand in Form 3 or Form 4 as perSection 8 of the Insolvency and Bankruptcy Code, 2016, the Adjudicating Authority on perusal of the Section was of the opinion that on occurrence of default, the operational creditor is required to deliver the demand notice of unpaid operational debt and copy of the invoice demanding payment of the amount involved in the default to the corporate debtor in such from and manner as is prescribed.

Clause (a) and (b) of sub rule (1) of Rule 5 of the 'Adjudicating Authority Rule' provides for the format in which the demand notice/invoice demanding payment in respect of unpaid 'Operational Debt' is to be issued by 'Operational Creditor'.

As per Rule 5(1) (a) & (b), the following person (s) are authorised to act on behalf of operational creditor, as apparent from the last portion of Form 3 which read as follows:-

6. The undersigned request you to unconditionally repay the unpaid operational debt (in default) in full within ten days from the receipt of this letter failing which we shall initiate a corporate insolvency resolution process in respect of [name of corporate debtor]

Yours sincerely

Signature of person authorised to act on behalf of the operational creditor
Name in block letters
Position with or in relation to the operational creditor
Address of person signing

Therefore, from Form 3 and From 4, read with sub-rule (1) of Rule 5 and Section 8 of the Code, it is clear that an Operational Creditor can apply himself or through a person authorised to act on behalf of Operational Creditor.

The person who is authorised to act on behalf of Operational Creditor is also required to state "his position with or in

relation to the Operational Creditor" meaning hereby the person authorised by Operational Creditor must hold position with or in relation to the Operational Creditor and only such person can apply.

Therefore, a professional duly authorised may issue the Notice of Demand.

As in the matter of Uttam Galva, the Advocate/ Lawyer who has issued the notice did not have on record any document that stated that the lawyer was authorised by the Board of Directors of the operational Creditors,the notice issued was not maintainable.

Existence of Dispute – *Application under Section not maintainable.*

An 'operational creditor' on occurrence of a default before making an application to the Adjudicating Authority has to serve a demand notice demanding payment of the unpaid debt to the corporate debtor under sub-section (1) of section 8 providing a 10 day window to the corporate debtor to either repay the unpaid debt or bring to the notice of the operational creditor an existence of dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of the demand notice.

Therefore the operational creditor either receives the payment of the debt due or receives a notice of dispute at the end of 10 days window.

Meaning of Dispute

Clause (6) of section 5 of the Code defines "dispute", to include, a dispute pending in any suit or arbitration proceedings relating to -

- existence of amount of the debt ;
- quality of goods or service ;
- Breach of a representation or warranty.

As per the definition of 'dispute', it is evident that clause (6) of section 5 read with sub-section (2) of section 8 cannot be confined to pending arbitration or a civil suit. It must include disputes pending before every judicial authority including mediation, conciliation, etc., as long there are disputes as to existence of debt or default, etc., which would satisfy sub-section (2) of section 8 of the Code.

Furthermore, as observed in "*Kirusa Software Pvt. Ltd. v. Mobilox*Innovations Pvt. Ltd." the term dispute is given its natural and ordinary meaning upon reading of the code as a whole,the width of dispute should cover **all disputes on debt in default etc**. and not be limited to only two ways of disputing a demand made by the operational creditor i.e. either by showing a record of pending suit or by showing a record of a pendingarbitration.

The intent of the legislature as evident from the definition of the term dispute is that it wanted the same to be illustrative (and not exhaustive). If the intent of the Legislature was that a demand by an operational creditor can be disputed only by showing a record of a suit or arbitration proceeding, the definition of dispute would have simply said dispute means a dispute pending in Arbitration or a suit.

Clause (a) of sub-section (2) of section 8 states that there should be an "existence of a dispute, if any, and a record of pendency of the suit or arbitration proceedings filed before receipt of such notice or invoice in relation to such dispute.

Therefore, the appellate court in the Uttam Galva matter admitted the dispute claimed by the debtor in reply dated 3rd January, 2017 which was a reply to the liquidation Notice given to it on 8th December, 2017.

In existence of dispute the application under section 9 was not maintainable.

It is not what you do rather than what you say that has the greatest impact.

Implementation and Impact of Ind AS on accounting and financial statements

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1. Introduction

Rapid globalization and integration of trade, commerce and economies worldwide, has obviated the need to follow homogeneity in the reporting standards in the financial sector so as to facilitate comparison, universality and comprehensiveness. This led to emergence of **International Financial Reporting Standards** (**IFRS**), which is currently permitted or required in over 125 Nations of the world. Realising the benefits of IFRS, it was all the more significant for a developing country like India to adopt it as earliest so as to ensure positive sentiments and faith and credibility in the Indian Market of the investors globally. India made a commitment towards the convergence of Indian accounting standards with IFRS at the G20 summit in 2009. In line with this, the Ministry of Corporate Affairs (MCA), Government of India previously issued a roadmap for implementation of Indian Accounting Standards (Ind ASs) converged with IFRS beginning April 2011. However, this plan was suspended due to unresolved tax and other issues.

On February 15, 2015, MCA in consultation with the National Advisory Committee on Accounting Standards (NACAS), notified the Companies (Indian Accounting Standards) Rules, 2015[1], laying down the roadmap for the implementation of internationally recognised standards in India. Ind AS, as these standards are popularly referred to, arebeing made applicable to large and listed corporate in phase out manner as discussed below.

2. Applicability of Ind AS

2.1. For Companies other than Banks, NBFCs, Insurance Companies

Companies were permitted to voluntarily and irrevocably adopt Ind AS for accounting periods beginning on or after 1 April 2015 with comparatives for period ending 31st March, 2015 or thereafter. Infosys Limited[2], Crompton Greaves Limited[3] and Jindal Saw Limited were among few corporate that voluntarily adopted Ind AS in their annual reports of 2015-16.

Ind AS was made mandatorily applicable to the Indian entities other than Banks, Insurance and NBFCs in two Phases. In Phase I, Ind AS would apply to companies with net worth of Rs. 500 crore and their holding, subsidiary, joint venture or associate companies, for periods beginning on or after **1 April 2016**, with comparatives for the period ending **31st March, 2016** or thereafter.

Under Phase II, Ind AS has been made mandatorily applicable to all remaining listed entities and unlisted entities with net worth of more than 250 crores and holding, subsidiary, joint venture or associate companies of above companies.

2.2. For Banks, Insurance Companies and NBFCs

MCA announced requirements for Scheduled commercial banks (excluding RRBs), All-India Term-lending Refinancing Institutions (i.e. Exim Bank, NABARD, NHB and SIDBI), NBFC and Insurance Companies to prepare Ind AS based standalone and consolidated financial statements[4]. Accordingly, all commercial banks, term lending institutions, refinancing institutions and their holding, subsidiary, joint venture or associate companies and NBFCs having net worth of Rs. 500 crores or more, would be required to adopt Ind AS from April 1, 2018. NBFCs with net worth of over 250 crores will have to adopt Ind AS from April 1, 2019. Urban Cooperative Banks (UCBs) and Regional Rural Banks (RRBs) are however, ***not required*** to apply Ind AS and should continue to comply with the existing Accounting Standards.

Insurance Regulatory Development Authority of India has deferred the implementation of Ind AS for insurance companies till 2020 as Ind AS 104 *Insurance Contracts* is expected to be replaced by a new standard once IASB[5] issues IFRS 17 *Insurance Contracts*. However, insurance companies like Banks would still be required to submit the proformaInd AS financial statements to IRDAI on a quarterly basis effective from 31 December 2016.

3. Impact of Implementation of Ind AS

Transition to Ind AS is big transformational change for Indian companies as there are significant differences between the existing Indian GAAP and Ind AS. To identify the implementation issues and impact it would be ideal to first study the differences between these GAAPs and have a brief idea of Ind AS 101 *First time Adoption of Ind AS* that deals exclusively with the transition to Ind AS.

4. Major Impact Areas on Transition to Ind AS

4.1. Consolidation

Retrospective application of business combination principles under Ind AS 103 may result in increased amounts of tangible/ intangible assets due to fair valuation and a consequential impact on subsequent depreciation/amortization. Definition of Control in Ind AS is principle based wherein a concept of de-facto control is introduced as result of which consolidation could be done even without majority shareholding rights or not done if minority shareholders have veto rights. Ind AS further uniform accounting policies to be used among the consolidating entities else appropriate adjustments need to be made. Accounting for joint ventures now will be done using equity method instead of proportionate consolidation.Ind AS also requires accounting of common control business combinations using the pooling of interest method where goodwill will not be recognized.

4.2. Financial Instruments

The major impact will be caused due to following:

- Measurement of financial assets such as investments in equity instruments/ mutual funds at fair value through profit and loss (FVPL)
- Use of amortised cost, fair value through other comprehensive income (FVOCI) and FVPL for debt instruments
- Recognition of impairment losses—expected credit losses (ECL)
- Discounting of long term financial assets and liabilities
- Changes in fair value of derivatives
- Fair value of compound instruments such as convertible debentures and preference shares
- Use of effective interest rate (EIR) method—transaction costs related to borrowing, redemption premium on debentures, preference dividend
- Long-term interest-free security deposits and employee loans measured at fair value

4.3. Revenue Recognition

Key changes in respect to revenue recognition will be noticed in these areas:

- Ind AS will require deferral of revenue on customer contracts where revenue recognition criteria has not been met—service arrangements, maintenance contracts, upfront fees.
- Fair value of consideration will have to be assessed in case of long-term construction contracts/extended payment terms
- Awards and incentives to customers, promotional expenses/customer reimbursements, cash discounts, etc., will be netted from revenue
- Provision for rebates/expected sales returns will be required to be made.
- Sale and repurchase kind of arrangements will have to be linked.

4.4. Other Major Impact Areas

- Discounting of retirement obligations, decommissioning and site restoration liabilities and long-term provisions under Ind AS which were recorded on an undiscounted basis under Indian GAAP.
- Under Ind AS deferred tax liability would be recognised on undistributed earnings from subsidiaries and JVs and deferred tax asset on carried forward business and long-term

capital losses. Also unrealised profits on intra group transaction would be considered for determining deferred taxes.

- Recognition of provisions related to constructive obligations under Ind AS.
- Recognition of arrangements that may not have been legally termed as leases but in substance are right to use underlying assets have been accounted as embedded leases under Ind AS.
- Recognition of provisions related to constructive obligations under Ind AS.

5. Ind AS 101 First Time Adoption of Ind AS

Ind AS 101 prescribes the accounting principles for first-time adoption of Ind AS.Ind AS 101 requires a first-time adopter to use the same accounting policies including general principle of retrospective application, optional exemptions and mandatory exceptions in its opening Ind AS Balance Sheet and all periods presented in its first Ind AS financial statements. The selection of accounting policy among diverse existing alternatives should be done carefully, fully understanding its implication on both the opening Ind AS Balance Sheet and the financial statements of future periods.

Briefly stating Ind AS 101 requires an entity to:

- Identify the **first Ind AS financial statements**;
- Prepare an **opening balance sheet** at the date of transition to Ind AS;
- Select **accounting policies** that comply with Ind AS and apply those policies retrospectively ;
- Consider whether to apply any of the **optional exemptions** from retrospective application;
- Apply the **mandatory exceptions** from retrospective application; and
- Make **extensive disclosures** to explain the transition to Ind AS.

5.1. Mandatory Exemptions:

Ind AS 101 provides that an entity should apply the following mandatory exceptions:

A. ***Estimates:*** In accordance with Ind AS 101, an entity's estimates under Ind AS at the date of transition to Ind AS must be consistent with estimates made for the same date under Indian GAAP, unless there is objective evidence that those estimates were in error.

B. De-recognition of financial assets and financial liabilities

A first-time adopter should apply the de-recognition requirements in Ind AS 109 on 'Financial Instruments' prospectively for transactions occurring on or after the date of transition to Ind AS.

C. Hedge Accounting

As required by Ind AS 109, at the date of transition to Ind AS, an entity should measure all derivatives at fair value; and eliminate all deferred losses and gains arising on derivatives that were reported in accordance with previous GAAP as if they were assets or liabilities.

D. Non-controlling interests

A first-time adopter should apply certain requirements of Ind AS 110 *Consolidated Financial Statements* prospectively from the date of transition to Ind AS like that of requirement proportionate attribution of total comprehensive income to NCI even it results in deficit balance, accounting for changes in the parent's ownership interest in a subsidiary that do not result in a loss of control and accounting for a loss of control over a subsidiary, and the related requirements under Ind AS 105 *Non-current Assets Held for Sale and Discontinued Operations*.

E. Classification and measurement of financial assets

Ind AS 101 provides exemptions to certain classification and measurement requirements of financial assets under Ind AS 109, where these are impracticable to implement.

F. Impairment of financial assets

An entity should apply the impairment requirements under Ind AS 109 *Financial Instruments*for recognition and measurement of expected credit losses, retrospectively subject to certain exemptions provided under Ind AS 101.

G. Embedded derivatives

A first-time adopter should assess whether an embedded derivative is required to be separated from the host contract and accounted for as a derivative. This assessment is based on the

conditions that existed at the later of the date it first became a party to the contract; and the date a reassessment is required under Ind AS 109.

H. Government loans

A first-time adopter should classify all government loans received as a financial liability or an equity instrument in accordance with Ind AS 32 *Financial Instruments: Presentation*. A first-time adopter should apply the requirements under Ind AS 109 and Ind AS 20 *Accounting for Government Grants and Disclosure of Government Assistance* prospectively to government loans existing at the date of transition to Ind AS.

Optional Exemptions

Ind AS 101 provides 18 optional exemptions, important ones are as follows:

A. In case of ***Property, plant and equipment, Investment property and Intangible assets***, a company can choose to measure the value using:

- Cost in accordance with Ind AS; **or**
- Fair value at the date of transition as deemed cost; **or**
- A revaluation carried out at a previous date (like a IPO) less accumulated depreciation till the date of transition; **or**
- Book value (carrying value) of assets recorded in Indian GAAP as on the date of transaction.

Thereby, allowing companies to use the existing book values of assets without requiring it to reopen past adjustments.

B. Cumulative Translation Differences:

If a first time adopter uses this exemption:

- the cumulative translation differences for all foreign operations are deemed to be zero at the date of transition to Ind ASs; and
- The gain or loss on a subsequent disposal of any foreign operation shall exclude translation differences that arose before the date of transition to Ind AS and shall include later translation differences.

C. Business Combinations:

For all transactions qualifying as business combinations under Ind AS 103, a company can choose to:

- Not restate business combinations before the date of transition.
- Restate all business combinations before the date of transition.
- Restate a particular business combination, in which case all subsequent business combinations must also be restated and the Ind AS 36 impairment guidance must be applied.

6. Conclusion

After analysis of Ind AS compliant annual results reported by various companies for FY 2016-17, the impact of adoption has been pervasive to all major sectors as Ind AS brings a fundamental change in reprting framework which calls for a shift from conventional historical cost to greater use of fair value and increased focus over substance rather than the legal form of the underlying transaction. Net income of sectors such as industrial manufacturing, automotive, metals and capital projects and infrastructure has been impacted the most. The two phase implementation has been helpful as smaller entities covered in phase two has benefited from transition experience and journey of Phase I companies. The implementation of Ind ASs might have lead to short term investments and initial challenges but the long term benefits are strong enough to justify the initial hassles of implementation and adoptability.

(Footnotes)

[1] Vide its G.S.R 111 (E) dated 16 February 2015
[2] Source: https://www.infosys.com/investors/reports-filings/annual-report/annual/Documents/infosys-AR-16.pdf
[3] Source: http://www.cgglobal.com/pdfs/annual-report/ar15-16/AR1516.pdf
[4] MCA
press release No. 11/10/2009 CL-V dated January 18, 2016
[5] International Accounting Standard Board, the International Accounting Body that issues IFRS

Ind AS Implementation – 5 Major Challenges

CA Vivek Agarwal

Financial reporting in India is passing through very remarkable moments owing to adoption of Indian accounting standards (Ind AS). For companies covered under Phase – 1 of mandatory Ind AS Financials, 31st March 2017 is first time complete reporting period and June 2016 was first Quarterly result publication date and we are months away from the second phase. Ind AS Implementation has very wide impact on the organization so companies should assess carefully impact on growth, strategies, joint ventures and tax planning. There are many challenges in implementation of Ind AS however this blog/ article focuses on 5 major challenges:

Challenges Ahead

Financial Instruments

Deferred Taxation

Revenue Recognition

Control for Group Accounting

Business Combination

Financial instrument (Ind AS 32, 109):-

There are no mandatory standards applicable under Ind GAAP, Ind AS provide the detailed guidance on accounting of classification, measurement, derecognition and impairment of financial assets and financial liabilities. The financial asset is classified based on entity's business model for managing financial asset and contractual cash flow characteristics of the financial asset. Under an Indian GAAP, the classification of financial liability or equity is largely governed by legal form of the instrument and under Ind AS 32 the same is based on substance of the contractual agreement rather than its legal form. This may create the major changes in net worth as well as net income due to reclassification.

Standard	Percentage of companies impacted
Financial instruments	83%
Income taxes	87%
Property, plant and equipment	27%
Share-based payments	22%
Business combination	15%
Operating segments	38%

Source: Observation on Implementation of Ind AS by EY

Key Differences:

- Classification of liability and equity in case of compound financial instruments like convertible bonds, redeemable preference shares, compulsory convertible debentures etc.
- Re-classification of dividend and interest in profit & loss account due to reclassification of liability and equity.
- Expected loss model for Impairment of financial assets
- All derivative instrument to be carried at

fair value, unless hedge accounting requirements met

- Investments to be categorized – Fair value through profit or loss, Fair value through other comprehensive income and amortized cost

Impact:-

Accounting Standards (AS) – 30, 31 and 32 were issued but not notified as there are constant changes in the accounting of financial instruments in International GAAP. ICAI has recently issued Guidance note on Accounting for derivatives applicable for accounting period commencing after 1st April 2016 for Non-Ind AS entities. However, there is a significant diversity in the practice. The implementation of Ind AS 32, 109, disclosure requirements of Ind AS 107 and applying fair value measurement of Ind AS 113 would be the most challenging during Ind AS Implementation. As per various reports published after reviewing June 2016 results, it is observed that Standards relating to Financial Instruments are the most challenging standards.

Control /Consolidation (Ind AS 110) :-

Under prevailing accounting standard control is assessed on the basis of more than one-half of the voting power or control on the composition of board however as Ind AS is principle based standard, it explains the control in detail and Ind AS 110 provides a single control model.

As per Ind AS 110, *"An investor controls an investee if and only if the investor has all the following:*

(a) power over the investee;

(b) exposure, or rights, to variable returns from its involvement with the investee; and

(c) the ability to use its power over the investee to affect the amount of the investor's returns"

The determination of who controls whom is the critical when we move from existing Indian GAAP to Ind AS. The universe of entities that get consolidated could potentially different under both the frame works. The application of control definition would change the line items of Consolidated financials in Ind AS.

Key Differences:

- Consolidation based on new definition of control

- Veto right with minority share holders

- Potential voting rights

- Structured entities

- De facto control

- Deferred tax on undistributed reserve
- Deferred tax on intercompany elimations
- Mandatory use of uniform accounting policy

Impact:-

With the introduction of new definition several entities that are not currently consolidated may get included and vice-versa and it will be a challenge for Corporate India and professionals.

Revenue recognition (Ind AS 115):- (Deferred till 2018-19)

Ind AS 115, Revenue recognition from contract with customers, introduce a single revenue recognition model, which applied to all type of contracts with customers, including sale of goods, sale of services, construction arrangements, royalty agreements, licensing agreements etc. In contrast under existing Indian GAAP, there is separate guidance that applies to each of these type of contracts. Ind AS brings five-step model which determines when and how much revenue is to be recognized.

Key Differences:

- 5 step revenue recognition model
- Timing of recognition of revenue (Right of return, dispatch Vs. delivery) based on satisfaction of performance obligation
- Detailed Guidance on
  - Incentive schemes
  - Service concession arrangements
  - Customer loyalty programs

- Time value of money to be considered
- Separation of contracts in case of linked transactions

Impact:-

India has deferred to implement this standard in as it has not been implemented internationally. NACAS had recommended to defer the application of Ind AS 115 and Ministry of Corporate Affairs announcedthe same on March 2016. Ind AS 18 and 11 has been notified in line with IAS 11 and IAS 18.

Business combinations (Ind AS 103):-

Currently there are no comprehensive standard which wholly addressing accounting for business combination, currently it is done by form of transaction like Merger, Acquisition etc. Under Ind AS 103, all business combinations are accounted for using the purchase method that considers the acquisition date fair values of all assets, liabilities and contingent liabilities.

Key Differences:

- Acquisition date is the date when control is transferred – not just a date mandated by court or agreement
- Mandatory use of purchase method of accounting and fair value
- Post-acquisition amortization of asset based on the acquisition date fair values
- Transaction cost charged to the profit and loss account
- Goodwill to be tested at least annually for impairment
- Common control transactions are accounted using pooling of interest method

Impact:-

With the adoption of new requirements on business combinations, it will result into consistency over the period. Companies which are in progress of negotiation regarding acquisition, need to pay kind attention to the requirement of the standard. Fair valuation of asset on the date of acquisition and resultant goodwill are major areas to look after under new Ind AS.

Deferred taxes (Ind AS 12) :-

As per Indian GAAP deferred taxes are recognized on timing difference between accounting income and taxable income for the year and it is known as income statement approach whereas under Ind AS, deferred taxes are recognized for future tax consequences of temporary differences between carrying value of assets and liabilities in their books and their respective tax base and known as balance sheet approach.

Key Differences:

- Ind AS is based on balance sheet approach whereas AS 22 is based on income statement approach
- Disclosure requirements are more detailed in Ind AS compare to AS
- Deferred tax on revaluation, undistributed profit by subsidiaries/associates, intercompany elimination
- The concept of virtual certainty does not exist in Ind AS 12

Impact:

Whole method of calculation of deferred tax provision has changed so we have to carefully assess the impact on the financial statement. On transition to Ind AS, the deferred tax on reconciliation with Ind AS, deferred tax on components of Other Comprehensive Income (OCI) and during consolidation will be challenging during implementation.

The above mentioned are some of the major challenges in implementation of Ind AS. The other areas of challenges are application of Ind AS 101 First time adoption, determination of functional currency under Ind AS 21, preparation of Statement of Changes in Equity and accounting of components of Other Comprehensive Income. Corporate India and professionals have to be cautious while dealing with transformation process to ensure smooth and effective convergence.

Benami Property (Prohibition) Amendment Act, 2016 – Salient Features

Advocate Paras Kochar

Introduction:

The Benami Transactions (Prohibition) Amendment Act, 2016, (hereinafter referred to as the "Act") received the President's assent on August 10, 2016 and has come into force from November 1, 2016. The Act will be effective in washing off and unearthing black money from the country. The Income tax department is regularly collecting data from its various sources such as Statement of Financial Transaction or Reportable Account (SFTRA) previously known as AIR, FIU, Registration authorities. The assessing officers are also sending information of Benami properties or Benami transactions to the concerned officers dealing in such cases.

The Amendment Act seeks to cover comprehensively all aspects of transactions or arrangements where the source of funding for acquisition of a benami property has no permissible links to the ownership structure. In other words, a benami transaction encompasses all such transactions in which the real beneficiary of a property is a different entity from the entity who has made the payment for such property, as a result of which, the owner of such property is a mere 'front' for the actual beneficiary/ funding entity.

Important Terms:

Certain terms such as 'benami property', 'benamidar', 'beneficial owner', 'transfer' and 'fair market value' are explained below:-

'Benami property' has been defined as a property which is the subject matter of a benamidar. If any property has been disposed off, proceeds of such property will be held to be banami and all consequences will follow.

A 'Benamidar' is a person or a fictitious person, as the case may be, in whose name the benami property is transferred or held and includes a person who lends his name.

'Beneficial owner' means a person, whether his identity is known or not, for whose benefit the benami property is held by a benamidar.

'Transfer' includes sale, purchase or any other form of transfer of right, title, possession or lien.

'Fair market value' means the price that the property would fetch, if sold in the open market on the date of transaction. For determining the price of unquoted equity shares, Central Government have framed Rule 3 of the Prohibition of Benami Property Transactions Rules, 2016, which is almost similar to Sub Rule 1 of Rule 11UA of the Income Tax Rules, 1962, notified on 12.07.2017.

Movable and Immovable Property under this Act:

Many people are of view that this Act applies only for immovable properties but this Act applies to properties (assets) whether movable or immovable, tangible or intangible, corporeal or incorporeal. Therefore, this Act applies to jewellery, valuables, etc. as movable property and buildings, flats, plot of land etc. as immovable property. As per law dictionary, corporeal and incorporeal property mean the property which affects the senses, and may be seen and handled by the body, as opposed to incorporeal property, which cannot be seen or handled, and exists only in contemplation. Thus a house is corporeal, but the annual rent payable for its occupation is incorporeal. Corporeal property is, if movable, callable of manual transfer; if immovable, possession of it may be delivered up. But incorporeal property cannot be so transferred, but some other means must be adopted for its transfer, of which the most usual is an instrument in writing. Tangible property means Property that has physical substance and can be touched; Anything

other than real estate or money, including furniture, cars, jewellery etc. are tangible property. A property which cannot be touched such as cheque amount etc. are called intangible property.

Benami Transactions:

A benami transaction, as defined under Section 2(9) of the Act is a transaction in which:

a. the property is held by one person and paid for by another; or

b. it is held in a fictitious name; or

c. the owner of such property is unaware of or denies having knowledge of such ownership; or

d. the person financing such transaction is not traceable.

However, the Act prescribes certain exceptions to benami transactions, under Section 2(9). These exceptions include property held by:

a. Karta for his or his family member's benefit; or

b. a person standing in fiduciary capacity for the benefit of another, including a trustee, an executor, a partner, a company director or a depository participant or agent; or

c. a person for the benefit of his spouse or child; or

d. a brother or sister or lineal ascendant or descendent.

Provided the consideration paid for such transactions comes from known and traceable resources. Also, the Central Government may, by notification, exempt any property relating to charitable or religious trusts from the operation of this Act. A Benami transaction applies to properties (assets) whether movable or immovable, tangible or intangible, corporeal or incorporeal. All transactions which were carried out even before 1988 are covered under this Act.

Authority under the Act:

The Initiating Officer, the Approving Authority, the Administrator and the Adjudicating Authority are the four major authorities which have been appointed by the Central Government. The office of the Initiating Officer will be held by an officer who is the Assistant Commissioner or a Deputy Commissioner as required by section 2 of the Income Tax Act, 1961. The authorities will have the same powers as those of the Civil Courts under Civil Procedure Code, 1908.

The Initiating Officer:

Such officer shall have reason to believe on the basis of material available to him and shall record the reasons in writing. Thereafter, he shall issue a notice to the parties and after obtaining the replies, if he thinks so, he may provisionally attach the property with prior permission of the approving authority for a period not exceeding 90 days and he may also revoke the provisional attachment with prior permission of the approving authority. He shall have power to conduct enquiry in regard to person, place, property, document, bank etc. He shall pass order for attachment or non attachment of the property within 90 days of issue of notice. If an order for continuing provisional attachment of the property is passed then he shall within 15 days from the date of the attachment, draw up a statement of the case and refer it to the adjudicating authority.

The Approving Authority:

The approving authority means an Additional Commissioner or a Joint Commissioner as defined in section 2 of the Income Tax Act, 1961. It shall have powers to give approval for retention of books of accounts and documents impounded within 15 days and will give permission to the initiating officer. He will also give permission or approval to the approving authority for his various actions like continuation of attachment, revocation of attachment, enquiry, investigation, etc.

The Adjudicating Authority:

This authority consisting of at least two members and one chairman will issue notice to the parties with 30 days from the date on which a reference has been received from the initiating officer. The authority may pass an order revoking or confirming attachment after holding that the property is Benami or not. Such order shall be passed within expiry of one year from the end of the month in which reference under this Act was received. This authority shall make an order for confiscation of the property after giving an opportunity of being heard to the person concerned.

The Administrator:

He shall have the power to receive and manage the property, in relation to which an order of confiscation has been made. He is empowered to take such measures as are necessary for managing such property. He also has the powers to enforce possession by giving reasonable notice to the occupier of such property.

Powers of Authorities:

The authorities shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit in respect of the following matters, namely–

a) discovery and inspection;

b) enforcing attendance of any person, including any official of a banking company or a public financial institution or any other intermediary or reporting entity, and examining him on oath;

c) compelling the production of books of account and other documents;

d) issuing commissions;

e) receiving evidence on affidavits; and

f) any other matter which may be prescribed.

The above proceedings shall be deemed to be a judicial proceedings within the meaning of section 193 and 228 of IPC. The authorities may requisition the service of any police officer or of any officer of the Central Government or State Government or of both to assist him in above matters.

Appeal:

An appeal can be filed before the Tribunal against order of the adjudicating authority within 45 days of passing of order and against order of Tribunal an appeal can also be filed before the Hon'ble High Court within 60 days of service of

Tribunal order. The Appellate Tribunal is expected to decide the appeal within one year from the last date of the month in which appeal is filed.

Rectification of Order:

In order to rectify any mistake apparent from record, the Appellate Tribunal or the Adjudicating Authority may amend its order passed within a period of 1 year from the end of the month in which the order was passed.

Penalty and prosecution:

The Act prescribes that whoever is found guilty of the offence of a benami transaction shall be punishable with rigorous imprisonment for a term which shall not be less than 1 year, but which may extend to 7 years and shall also be liable to fine which may extend to 25 % of the fair market value of the property. Further, if any person knowingly provides false information to any authority or furnishes any false document he/she shall be punishable with rigorous imprisonment for a term which shall not be less than 6 months but which may extend to 5 years and shall also be liable to fine which may extend to 10% of the fair market value of the property.

Retrospective or prospective:

The expanded scope of benami transaction, which came into effect from 01.11.2016, should not be applicable to property purchase made in 2009.

Sub-section (3) clearly states that benami transactions entered into on and after commencement of the Amendment Act, 2016, shall attract penal provisions contained in Chapter VII. It should be noted that prior to the amendment, the punishment provided under the earlier law, was much less rigorous. So also the ingredients of offence described in the Act as benami transaction.

Whether certain provisions of the original Act, i.e Benami Transactions (Prohibition) Act, 1988, were prospective or retrospective came to be considered by the Hon'ble Supreme Court in ***R. Rajagopal Reddy (Dead) by LRs vs. Padmini Chandrasekharan (Dead) by LRs, (1995) 2 SCC 630***. The controversy in this case centres around applicability of the Act to pending suits already filed and entertained prior to coming into force of section 4 (of the Original Act).

Hon'ble Supreme Court held that section 4(1) was not retrospective in operation, as it provides that only from the date of its coming into operation, no suit, claim or action preferred by the real owner, to enforce any right in respect of any property held benami, would lie in any court. The word 'lie' in the context means "admissible".

More importantly, Hon'ble Supreme Court explained that a law prescribing a prohibition and punishment for its violation cannot apply to transactions entered into during the period the prohibition was not in force.

Section 2(9)(D) has introduced a new ingredient in the office described as "benami transaction". The corresponding penal provision is in section 3(3) read with Chapter-VII of the Act. When a new offence has been brought in the statute book w.e.f. 01.11.2016, the same cannot be invoked against the Defendant for a transaction effected in 2009.

Applying the ratio of the above ruling to the present case, it is amply clear that the provisions of amended Benami Property Transactions Act, effective from 01.11.2016, should not be applicable to the property transaction made in 2009.

Accommodation entries and Benami transactions:

There are various types of accommodation entries for conversion of black money into white money, such as share capital, long term capital gain in penny stock, loans etc. Such accommodation entries are also considered as Benami transactions by the authorities. Everyone is aware that a large number of companies have been formed in India in which share capital money has been raised and the amount received has been invested in shares of other such companies either by buying the same or by subscribing the same. Such transactions are made on paper only. These transactions are called accommodation transactions. Now a days accommodation entries are provided mainly through shell companies. The Income tax department is issuing notices to all such companies which have taken accommodation entries from shell companies and have invested the said fund in immovable properties. Large number of notices have been sent to such companies. The shell company, beneficiary company and the middleman all are covered under this Act.

Factors to determine Benami Transaction –

The apex court as well as the high courts have laid down following factors to determine whether a transaction was Benami –

i) The source from which purchase money came

ii) The nature and possession of the property, after the purchase

iii) Motive, if any, for giving the transaction a Benami colour

iv) Position of the parties and relationship, if any, between the claimant and the alleged benamidar

v) The custody of the title deed after sale

vi) Conduct of the parties concerned in dealing with the property after sale

Conclusion:

The Act is being applied on politicians of repute too. Confiscation of property of Satyendra Jain (AAP Minister) and family members of Lalu Prasad Yadav are recent examples. The Government may further crack down on bureaucrats and other Government servants soon. It is expected that all matters related to confiscation of property will go up to higher court and Supreme Court, so there will be huge litigation. The income tax department may also issue notices on parties who are involved in accommodation transactions subject to certain evidences under their possession. The tax consultants should advise their clients well in advance about the scope of Benami transactions and Benami property. Proceeding under The Benami Transactions (Prohibition) Amendment Act, 2016 is more painful than action under search and seizure u/s 132 of the Income Tax Act, 1961.

Regardless of what you are doing, strive to do the very best you can. This position dissolves difficulties.

NCLT approves Resolution Plan quashing arithmetic requirement: Instates the importance of greater good

Vallari Dubey

In a recent judgment pronounced by NCLT Hyderabad, a resolution plan was approved, passed by less than the required mandate as provided under the Insolvency and Bankruptcy Code, 2016 ('the Code'), leaving an interesting precedent for other resolution plans.

In the case of *Kamineni Steel &PowerIndiaPvt Ltd*[1], the Corporate Debtor, the Hon'ble Bench of NCLT Hyderabad has vide its Order dated 27th November, 2017, approved the resolution plan submitted by the Resolution Professional ('RP').

Relevant Facts of the Case

The Corporate Debtor has been into Corporate Insolvency Resolution Process ('CIRP'). In the 4th Committee of Creditors ('CoC') meeting, resolution plan as submitted by the Corporate Debtor ('CD') was reviewed by SBI capital markets ltd, considering which, it was resolved that infusion of fresh funds as debt amounting to Rs. 150 cr. would not be acceptable since it will be a priority debt instead of equity.

It was further decided that the CD shall infuse funds for working capital and the CD must come out with a concrete resolution plan within 15 days or on/before 14th July, 2017and present to the core CoC and upon receipt of ***in-principle approval***, present the same in the next CoC meeting.

In the 5th CoC meeting, revised resolution plan as submitted by CD was considered. It contained the details of fresh infusion of funds amounting to Rs. 150 cr. either as debt/equity but not as priority debt. Given the requirements of approvals of respective creditor's boards and report to be prepared by SBI capital markets, further extension of 90 days was sought.

In 7th CoC meeting, members having 87.69% of voting share had expressed that revised resolution plan should be improved. Lead bankers indicated that sustainable debt portion should be increased to 40%. JMF ARC holding 12.31% voting share had stated that they were not in favour of the resolution plan and will only consider the same, if sustainable debt portion is increased.

8thCoC meeting was called for and it was agreed that the resolution plan shall also provide for monitoring and supervision of resolution plan by the RP. Indian bank and JMF ARC rejected the resolution plan, holding 22.33% and 12.39% respectively and expressed that they would reconsider the plan, if sustainable debt portion is increased further.

CD had sent a One-timesettlement (OTS) scheme through mail on 18.10.2017 as an alternative to resolution plan.Revised OTS proposal considering the mail of Indian Bank (Lead Banker) was prepared and presented by CD in next CoC meeting.

In the 9thcoc meeting, revised resolution plan was presented by the RP and it was approved by 55.73% of creditors, few others awaited approval from their sanctioning authorities. Final approval from members holding 66.67% was received as on 30.10.2017. Percentage of dissenting/not approving creditors stood at 26.97%. Members who remained open (Bank of Maharashtra) was 6.36%; considering these as neutral and not against the resolution plan, consenting percentagebecame 71.19%.

On receipt of the aforesaid approval, the RP filed the resolution plan with the Adjudicating Authority ('Hon'ble NCLT Hyderabad'), seeking approval of the same.

Provisions of the Code:

Submission of Resolution Plan

Section 30

(1) A resolution applicant may submit a resolution plan to the resolution professionalprepared on the basis of the information memorandum.

(2) The resolution professional shall examine each resolution plan received by him toconfirm that each resolution plan—

(a) provides for the payment of insolvency resolution process costs in a mannerspecified by the Board in priority to the repayment of other debts of the corporatedebtor;

(b) provides for the repayment of the debts of operational creditors in suchmanner as may be specified by the Board which shall not be less than the amount to bepaid to the operational creditors in the event of a liquidation of the corporate debtorunder section 53;

(c) provides for the management of the affairs of the Corporate debtor afterapproval of the resolution plan;

(d) the implementation and supervision of the resolution plan;

(e) does not contravene any of the provisions of the law for the time being inforce;

(f) conforms to such other requirements as may be specified by the Board.

(3) The resolution professional shall present to the committee of creditors for itsapproval such resolution plans which confirm the conditions referred to in sub-section (2).

*(4) The committee of creditors **may** approve a resolution plan by a vote of not less thanseventy five per cent. of voting share of the financial creditors.*

(5) The resolution applicant may attend the meeting of the committee of creditors inwhich the resolution plan of the applicant is considered:

Provided that the resolution applicant shall not have a right to vote at the meeting ofthe committee of creditors unless such resolution applicant is also a financial creditor.

(6) The resolution professional shall submit the resolution plan as approved by thecommittee of creditors to the Adjudicating Authority.

Approval of resolution plan

Section 31

*(1) If the Adjudicating Authority is satisfied that the resolution plan as approvedby the committee of creditors under sub-section (4) of section 30 **meets the requirements** as referred to in sub-section (2) of section 30, it shall by order approve the resolution planwhich shall be binding on the corporate debtor and its employees, members, creditors,guarantors and other stakeholders involved in the resolution plan.*

(2) Where the Adjudicating Authority is satisfied that the resolution plan does notconfirm to the requirements referred to in sub-section (1), it may, by an order, reject theresolution plan.

(3) After the order of approval under sub-section (1),—

(a) the moratorium order passed by the Adjudicating Authority under section 14

shall cease to have effect; and

(b) the resolution professional shall forward all records relating to the conduct

of the corporate insolvency resolution process and the resolution plan to the Board to

be recorded on its database.

Submissions of the Corporate Debtor

The CD had been submitting resolution plans revised for a number of times as per the terms of creditors. It was submitted by CD, that the proposal would not cause any haircut on the principle debt to the banks.

While submitting the resolution plan, the RP cited the following judgements:

- Raj Oil Mills Ltd and Edelwise ARC, NCLT Mumbai bench – Section 22 provides that theCoC ***may*** appoint an RP with a consent of members of CoC holding not less than 75%. Following was quoted from the judgment: "A viable solution is to give the preference to the decision taken by the

largest percentage of the financial creditors"

- Bachandevi and another v nagarnigam, Gorakhpur, Supreme Court
- Sarladevi and others v Kishan Chand, Supreme Court

Referring to the RBI Notification 2016-17/299 dated May, 2017 which amended the requirements as under Joint Lending Forum Mechanism (JLF) have been laid down, it was stated that a majority of 60% of creditors by value and 50% by number shall be sufficient to make a decision of JLF valid; even though both requirements, as under JLF and the Code are under separate enactments, the intent and spirit is similar to go, that is, the **will of the majority shall prevail**.

On based of the above arguments, the RP prayed to pass the res plan u/s 30(4) of the Code.

Further, the contents of the resolution plan contained all the details as provided under section 30(2) of the Code and the CIRP Regulations, as contended by the applicant. Implementation and supervision shall be done by the RP himself. And there would be no contravention of any law.

The CD claimed to cooperate with lenders and operate in the best interest of all the stakeholders and the economy and industry at large. The CD further claimed that once it is revived, it shall be able to start its operations for the good of the society, serve the nearby locality, increase employment and livelihood.

Submissions of the Respondent

Rights against personal guarantors

The Indian Overseas Bank which is one of the lenders, rejecting the resolution plan, alleged that the CD had completely ignored their rights against the personal guarantors and corporate guarantors, on account of which the bank wouldhave to bear enormous loss.

Further the report submitted by RP does not specify the sources of funds, required for the proposed pay out.

Contentions of the Lead Banker

The lead bank, Indian Bank had made the following contentions:

- The Bank had referred to the case of *PalogixInfrastructure ltd v ICICIBank Ltd* on the question of whether a provision is directory or mandatory. It pressed on the interpretation of certain provisions of the Code as merely directory and not mandatory, since ultimate decision of the judiciary has to be taken in the eyes of utmost good and justice for all.

Observations of the Bench

The Bench made the following observations considering all the submissions of the parties and provisions of law:

- CoC meetings – All the CoC meetings were duly held and conducted. The dissenting banks appeared to be interested in liquidation instead of resolution, while resolution is the ultimate intent of the legislature. Managers of the dissenting banks did not have the mandate to agree to the revised resolution plan, which is not in conformity with the RBI Notification. As per CIRP Regulations, RP shall take the vote of the members and convey the decision taken. However, few members had conveyed their voting post the meeting which is not in accordance with the Code and the Regulations.
- Revised OTS Scheme – the revised scheme was totally in tune with the revised report of SBI Capital Markets Ltd
- Mechanism of JLF – The mechanism is to operate together, and as far as possible, operate for the best interest of the stakeholders.
- IBC Code - It is not out of context to refer to various percentages provided under RBI circulars and notifications. The intent of the legislature is to seek all possible options to resolve the company, and once all options are exhausted, order for liquidation of the company. The three dissenting banks did not present a positive approach to revive the company, when a good revival was indeed possible, which

will also benefit the lenders including the dissenting lenders.

- Adjudicating Authority – Word 'may' is used in Section 30(4), providing that the CoC may approve the resolution plan with not less than 75%.

- Banking Sector – In order to move forward with a better plan, the lenders have to absorb few losses as well and cannot normally recover 100% of the dues. In respect of personal and corporate guarantees, the Hon'ble Bench is of the view that the same can be dealt with in accordance with individual loan agreements outside the OTS Scheme. Further, none of the dissenting banks have not filed any evidence in support of their contentions.

As rightly highlighted by the Hon'ble Bench, while pronouncing any judgment, the NCLT shall over and above arithmetic calculations, give due consideration to the following parameters:

- Various/guidelines issued by RBI;
- Economy of the Country;
- Social Obligations cast on the Government to create employment;
- Rural development;
- Judicial function of the courts of law, which differs from the administrative function of the ministry;
- Maximization of value of assets of the Corporate Debtor

Final Judgment

In light of the aforesaid contention and observations, the Hon'ble Bench approved the resolution plan filed by the RP.

Conclusion

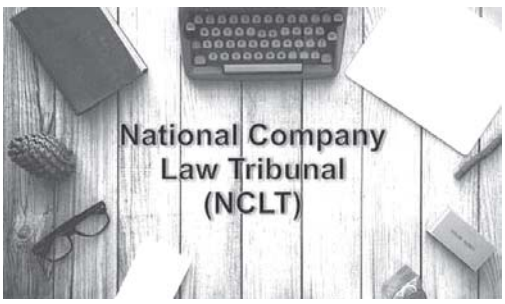
The Hon'ble Bench has clearly highlighted that the ultimate justice lies in the greater good. And greater cannot be solely bound by arithmetic calculations of written law. Of course, one has to always consider the facts and requirements of each case. However, as submitted in the current judgment, when approval of resolution plan would benefit the local economy and increase employment opportunities, once the CD is revived, there is no harm in allowing such approval, when though not as per mandate of law, however, sufficient to validate the resolution plan, a percentage of consent has been duly obtained. Since, all other procedures and provisions of law were duly followed, a resolution plan, which is otherwise absolutely fit, should not rejected basis shortage of requisite consent, when the dissenting parties are themselves at fault.

Liquidation of a CD which can otherwise be resolved, should not be allowed for common good of the society.

Though approval of each resolution plan shall be considered basis individual facts of the case and the arithmetic requirement not liable to be ignored each time, the judgment however, sets an interesting precedent allowing newer interpretations to follow.

(Footnotes)

[1]http://nclt.gov.in/Publication/Hyderabad_Bench/2017/Others/285.pdf



No one can make you feel inferior without your consent.

NEW MEMBERS ENROLLED : APRIL, 2017 TO JANUARY, 2018

Sl.No.	Name	Membership No.
1.	CA Puja Agarwal	L 1357
2.	Dr. Dilip Kr. Datta	L 1358
3.	CA Bhabataran Maji	L 1359
4.	Ms. Rachna Jaiswal	L 1360
5.	CA Rajni Lath	L 1361
6.	Mr. Manoj Kataruka	L 1362
7.	CA Lalit Kumar Shroff	L 1363
8.	CA Praveen Kumar Shroff	L 1364
9.	CA Bishnu Kant Agarwal	L 1365 *
10.	CA Rahul Sureka	L 1366
11.	CA Ravi Sarda	L 1367
12.	CA Abhijit Pathak	G 1368
13.	CA Amit Saraf	L 1369
14.	Mr. Mrityunjoy Seal	L 1370 *
15.	CA Mukesh Khandelwal	L 1371
16.	CA Adarsh Rathi	L 1372
17.	CA Harsh Satish Udeshi	L 1373 *
18.	CA Ramakant Sureka	L 1374
19.	CA Om Prakash Dokania	L 1375*
20.	CA Partha Pratim Ghosh	L 1376
21.	CA Sourabh Mitra	L 1377
22.	CA Amita Mundra	L 1378
23.	CA Sushil Kr. Agrawal	L 1379
24.	Mr. Ritesh Kr. Agarwal	L 1380
25.	Mr. Kaushik Gangwal	L 1381
26.	CA Kamlesh Kumar Agarwal	L 1382
27.	CS Ghanshyam Saraf	L 1383 *
28.	CA Rishabh Jain	L 1384
29.	CA Vivek Chiraniya	L 1385
30.	CA Aditya Chirimar	L 1386
31.	CA Vinod Kr. Khetan	L 1387
32.	CA Gagan Kedia	L 1388
33.	CA Rajiv Kr. Agarwal	L 1389
34.	CA Gurjot Singh Gulati	G 1390
35.	Ms. Priti Kanoria	L 1391 *
36.	CA Abhijit Bandyopadhyay	L 1392 *
37.	Mr. Ajay Kumar Joshi	L 1393
38.	CA Vidyut Sethi	L 1394
39.	CA Debayan Patra	L 1395
40.	CA Lata Saraogi	L 1396
41.	Mr. Kailash Dhanuka	L 1397

* **Conversion from General to Life Membership**

ACAE
NOTE

ASSOCIATION OF CORPORATE ADVISERS & EXECUTIVES

(Registered under the Societies Registration Act, 1860)

An ISO 9001 : 2015 Certified Organisation

6, Lyons Range 3rd Floor, Unit - 2, Kolkata - 700 001
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APPLICATION FORM FOR MEMBERSHIP

To
The General Secretary,
Association of Corporate Advisers & Executives
6, Lyons Range, 3rd Floor, Unit - 2
Kolkata – 700 001

FOR OFFICE USE ONLY

Date of Receipt _____
Membership Approved on _____
Membership No. Allotted _____

Chairperson
Membership Development Sub-Committee *General Secretary*

Dear Sir,

Please **ENROL** me/us as a **LIFE/GENERAL MEMBER** of the Association. I/We agree to abide by the Memorandum and Rules & Regulations of the Association.

1. Name in Full (IN BLOCK LETTERS) : _____
2. Father's Name : _____
3. Date of Birth : _____
4. Academic and/or Professional Qualifications : _____
5. Occupation : _____
6. Name of the Concern with which associated : _____
7. GSTIN : _____
8. Designation : _____
9. CA/CS/ICWAI Membership No. : _____
10. Blood Group : _____ (Self) _____ (Spouse)
11. Date of Marriage : _____ Name of Spouse _____
12. Office Address : _____
13. Resident Address : _____
14. Telephone (Nos.) : (Off.) : _____ (Resi.) : _____ Fax : _____
    Mobile : _____ E-mail : _____
15. Address where Circular etc. should be sent : ☐ Office ☐ Residence

I am/We are sending herewith Rs. _____ (Rupees _____)
by Cash/Cheque No. _____ Dated _____ Drawn on _____
towards ☐ Life Membership ☐ General Membership.

Place : _____
Date : _____

_____
Signature of the Applicant

Proposed By : Name : _____
ACAE Membership No. : _____ Signature : _____

Seconded By : Name : _____
ACAE Membership No. : _____ Signature : _____

NOTES :
1. *Fee for Life Membership Rs. 11,800/- (for individuals only) (inclusive of GST)*
2. *Fee for General Membership :*
   a) *Annual Subscription Rs. 8850/- and Admission fees Rs. 8850/- (For Firm and Body Corporate) (inclusive of GST)*
   b) *Annual Subscription Rs. 1770/- and Admission fees Rs. 1770/- (for individual) (inclusive of GST)*
   c) *Annual Subscription will be half, if Membership Commences after 30th September of the year in which the membership is approved.*
3. *Cheques should be drawn in favour of* ***Association of Corporate Advisers & Executives.***

ACAE – ALBUM

Workshop on 16.09.2017 on GST at ACAE Emami Conference Hall

L-R : Guest Speakers CS T B Chatterjee, CA Tarun Kr. Gupta, Mr. Khalid Aizaz Anwar, Senior Joint Commissioner (WBGST) and CA Pramod Kr. Mundra, Past Convenor.

L-R : Guest Speakers Mr. Desh Dulal Chatterjee, Superintendent (CGST), Central Excise & Customs and Advocate Vinay Shraff

Seminar on Issues in Tax Audit and ICDS & Impact of Ind AS on MAT on 20.09.2017 at ACAE Emami Conference Hall.

L-R : Guest Speakers CA Vivek Agarwal, CA Anup Kr. Sanghai (Convenor), CA S S Gupta and CA Ramesh Kr. Patodia.

Lecture Meeting on Recent Developments & Actions by regulatory authorities and remedial measures thereof with special emphasis on striked off Companies and Restoration Procedures on 21.09.2017 at ACAE Emami Conference Hall.

L-R : Convenor CA Anup Kr. Sanghai, Guest Speaker CS Vinod Kothari and Vice President CA Vasudeo Agarwal.

Programme for Articles & Students on Approach to Audit, Audit Sampling, Audit Documentation on 23.09.2017 at ACAE Emami Conference Hall.

One of the Students felicitating Guest Speaker CA Vivek Agarwal

Programme for Articles & Students on Approach to Audit, Audit Sampling, Audit Documentation on 23.09.2017

Lecture Meeting on Benami Transactions (Prohibition) Amendment Act, 2016 and Prevention of Money Laundering Act 2002 with Amendment Rules 2016 – An Overview on 06.10.2017 at ACAE Emami Conference Hall.

Guest Speaker Advocate Subash Agarwal giving his deliberations at the Lecture Meeting

Programme for Articles & Students on Tax Audit. on 07.10.2017 at ACAE Emami Conference Hall.

L - R Guest Speaker CA Manoj Tiwari and Chairman of Students & New Members Sub-Committee, CA Pramod Kr. Mundra

Lecture Meeting on Recent Developments in Goods and Services Tax on 12.10.2017 at ACAE Emami Conference Hall.

Guest Speaker and Past President-ACAE CA Pulak Kr. Saha being felicitated by General Secretary, CA Jitendra Lohia

Lecture Meeting on The Insolvency and Bankruptcy Code, 2016 (1) Advisory Opportunity for Young Professionals (2) Recent Developments on 13.10.2017 at ACAE Emami Conference Hall.

Guest Speaker CA Sumit Binani interacting with the participants.

Lecture Meeting on Impact of GST on (1) Real Estate and Works Contract (2) Transportation and Logistics on 24.10.2017 at ACAE Emami Conference Hall.

L-R : President CA Arun Kr. Agarwal, Guest Speaker CA Rajeev Kr. Agarwal, Chairman-GST/Indirect Tax Sub-Committee, CA Tarun Kr. Gupta and Guest Speaker CA Vivek Jalan

A Glimpse of Bijoya & Deepawali Get-together on 04.11.2017 at Middleton Chambers

A Glimpse of Bijoya & Deepawali Get-together on 04.11.2017 at Middleton Chambers

Lecture Meeting on ICAI Code of Conduct and Professional Ethics, Corporate Form of Practice for Practicing on 10.11.2017 at ACAE Emami Conference Hall.

Guest Speaker CA Ranjeet Kr. Agarwal giving his deliberations at the Lecture Meeting.

Lecture Meeting on Assessment Proceedings u/s 143 (3) of the Income-tax Act, 1961 on 17.11.2017 at ACAE Emami Conference Hall.

Guest Speaker CA Sanjay Bhattacharya being felicitated by CA R R Modi, Chairman - Direct Tax Sub-Committee.

Programme for Articles & Students on 25.11.2017 at ACAE Emami Conference Hall.

Guest Speaker CA Pramod Kr. Mundra,
Dy. Convenor CA Beena Jojodia and Guest Speaker CA Suraj Goyal.

Lecture Meeting on Goods and Services Tax (GST) on 25.11.2017 at ACAE Emami Conference Hall.

On the dais Guest Speaker CA Vivek Mehta, Manager Deloitte India, CA Tarun Kr. Gupta, Chairman - GST/Indirect Tax Sub-Committee and Guest Speaker CA Hemant Jajodia, Sr. Manager, Deloitte India

Lecture Meeting on GST (1) Interstate Movement of Goods in CST and GST (2) Export Refunds and Procedures on 09.12.2017 at ACAE Emami Conference Hall.

Deliberations by Guest Speakers, CA Jayesh Gupta, Bengaluru, CA Anshuma Rustagi and CA Gagan Kedia

Programme for Articles & Students on 16.12.2017 at ACAE Emami Conference Hall.

Guest Speaker CA Rishi Khator giving his deliberations to the Articles & Students.

Lecture Meeting on 28.12.2017 at ACAE Emami Conference Hall.

(1) Highlights of Companies Amendment Bill 2017, Opportunities in NCLT and Restoration of Struck-off Companies.

Guest Speaker CS Siddhartha Murarka, Chairman, EIRC of ICSI being felicaed by Past President, CA Indu Chatrath

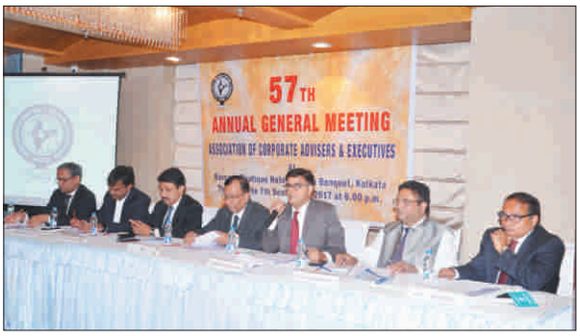
(2) Prohibition of Benami Property Transactions Act, 1988 as amended by Benami Transactions (Prohibition) Amendment Act, 2016 (BTP Amendment Act).

Guest Speaker CA Vivek Newatia giving his deliberations. On the dais Convenor CA Anup Kr. Sanghai and President CA Arun Kr. Agarwal

(3) Prevention of Money Laundering Act, 2002 : An Overview.

Guest Speaker CA Sumantra Guha giving his deliberations

57th Annual General Meeting of Association of Corporate Advisers & Executives held at Barsana Boutique Hotel, Kolkata on 7th September, 2017



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JANUARY 2018

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JULY 2018

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AUGUST 2018

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SEPTEMBER 2018

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OCTOBER 2018

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NOVEMBER 2018

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DECEMBER 2018

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JAN :
12th Vivekananda Birthday
22nd Saraswati Puja
23rd Netaji Birthday
26th Republic Day

MAR :
1st Dol Jatra
30th Good Friday
31st Yearly Bank A/c.

APR :
14th Ambedkar Birthday
15th Bengali New Years
29th Buddha Purnima

MAY :
1st May Day
9th Rabindranath Birthday

JUNE :
16th Id-ul-fitter

AUG :
15th Independence Day
22nd Id-uj-joha

SEP :
2nd Janmastami
21st Muharram

OCT :
2nd Gandhi Birthday
8th Mahalaya
16th to 19th Durga Puja
24th Laxmi Puja

NOV :
6th Kali Puja
21st Fateh D. Daham
23rd Gurunanak Birthday

DEC :
25th Christmas Day