

NEWSLETTER

MAY - 2020

INCOME TAX BAR ASSOCIATION, RAIPUR

आत्मनिर्भर भारत

COVID 19 - SPECIAL ECONOMIC PACKAGE



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President's communiqué



CA B. SUBRAMANYAM

Dear Members,

Lockdown-1, 2, 3 and now we are in lockdown 4. How many more need to face to bring back our country in normalcy. Well, slowly we have started our works under the lock down circumstances with stiff conditions imposed by the Governments in respective states giving utmost importance to the safety of the people.

Hon'ble Finance Minister Nirmala Sitaraman unveiled a 20 Lakh crore fiscal stimulus. The government's package aims primarily at encouraging banks to begin lending to small enterprises, NBFCs, housing finance companies among others. It represents an excellent start. The lockdown occasioned by Covid-19 has singed every segment of the economy. A shock of this scale can be offset only if there is a sovereign backstop to monetary measures. That is precisely what the Government has done by using a conventional channel of credit guarantees of loans and investment made by banks. The efficacy of the package in unlocking credit depends on the detailing of the guarantee and liquidity schemes. It is important now for Government and RBI to ensure there are no last mile hitches. What is praiseworthy is the emphasis on MSMEs and second tier financial intermediaries. They are interconnected through credit channels and a package which supports both holds most potential.

Vision of Atma Nirbhar Bharat, or self reliant India, promising a "quantum jump" in the economy premised on big reforms which implicitly go beyond the incremental ones seen so far. While the monetary and fiscal packages are meant to mitigate the immediate hardship, the global pivot away from China is an unexpected opportunity to reboot India's stagnating economy. Unless the vision outlined by the Government is backed by a concrete plan of action, this chance may slip away. Even as the government unveils more tranche of fiscal package, it must focus on long term reforms which encompass the factor markets as well as India's antiquated legal architecture. That will be the real game changer.

Friends, year 2020 shall be a year of existence for all people whether belong to Poor class or Middle class or higher class. For all the people, health, family and relations should be the priority. In this COVID-19 crisis, most of the people are trying to understand the facets of life in refresh manner. I strongly believe that there are four primary facets in everyone's life Viz. "Health", "Family", "Relations" and "work". Each of these can be visualised as a ball. The first three are akin to glass balls and last one is made of rubber and as your carry these in journey of life, needless to emphasise that the three glass balls need to be preserved and carefully handled, as any slip could be fatal. The fourth ball one made of rubber which has tendency to bounce back, though is essential to earn a living is not everything in life.

Friends, it is my pleasure to inform you all that, our association has started its separate you tube channel to streaming our all webinars in you tub channel. In this month, we have also organised a series of webinars for 9 days continuously on burning topics and issues under income Tax Act. These webinars were organised jointly with Federation of CG Income Tax Bar Associations. We have received overwhelming response from members of all bar associations situated in various parts of Chhattisgarh State. First time in the history of our Bar, webinars have been organised through Zoom App and it is well appreciated by all the members. I request all the members of the Bar to subscribe our newly launched you tube channel.

Looking forward to continued support & guidance from all the members. Stay at Home and be safe!
Yours Sincerely
CA. B. Subramanyam
President, IT BAR, RAIPUR

ATMANIRBHAR BHARAT

Part 1- Business Including MSMEs

A. Prime Minister's Vision

- Call for Atmanirbhar Bharat or Self-Reliant India Movement
- Five pillars of Atmanirbhar Bharat – Economy, Infrastructure, System, Vibrant Demography and Demand
- Special economic and comprehensive package of Rs 20 lakh crores – equivalent to 10% of India's GDP
- Package to cater to various sections including cottage industry, MSMEs, labourers, middle class, industries, among others.
- Bold reforms across sectors will drive the country's push towards self-reliance
- It is time to become vocal for our local products and make them global.



CA VINAY SHARMA

B. Pradhan Mantri Garib Kalyan Package

Rs. 1.70 Lakh Crore relief package under Pradhan Mantri Garib Kalyan Yojana for the poor to help them fight the battle against Corona Virus:

- Insurance cover of Rs 50 Lakh per health worker
- 80 crore poor people given benefit of 5 kg wheat or rice per person for next 3 months
- 1 kg pulses for each household for free every month for the next 3 months
- 20 crore women Jan Dhan account holders get Rs 500 per month for next 3 months

- Gas cylinders, free of cost, provided to 8 crore poor families for the next 3 months
- Increase in MNREGA wage to Rs 202 a day from Rs 182 to benefit 13.62 crore families
- Ex-gratia of Rs 1,000 to 3 crore poor senior citizen, poor widows and poor Divyang
- Front-loaded Rs 2,000 paid to farmers under existing PM-KISAN to benefit 8.7 crore farmers
- Building and Construction Workers Welfare Fund allowed to be used to provide relief to workers
- 24% of monthly wages to be credited into their PF accounts for next three months for wage-earners below Rs 15,000 p.m. in businesses having less than 100 workers
- Five crore workers registered under Employee Provident Fund EPF to get nonrefundable advance of 75% of the amount or three months of the wages, whichever is lower, from their accounts
- Limit of collateral free lending to be increased from Rs 10 to Rs 20 lakhs for Women Self Help Groups supporting 6.85 crore households.
- District Mineral Fund (DMF) to be used for supplementing and augmenting facilities of medical testing, screening etc..

C. Other Measures

- On the request of the Government of India, RBI raised the Ways and Means advance limits of States by 60% and enhanced the Overdraft duration limits.
- Issue of all the pending income-tax refunds up to ₹5 lakh, immediately benefiting around 14 lakh taxpayers
- Implemented "Special Refund and Drawback Disposal Drive" for all pending refund and drawback claims

- Sanctioned Rs 15,000 crores for Emergency Health Response Package
- Provided Relaxation in Statutory and Compliance matters, such as –
 - Extending last date for Income Tax Returns to June 30, 2020
 - Extending filing GST returns to end of June 2020
 - 24*7 custom clearance till 30th June, 2020
 - Relaxation for 3 months for debit cardholders to withdraw cash free from any ATMs, etc
 - Allowing payment before 15 May, 2020 for Motor Vehicle and Health Insurance Policies
 - Mandatory Board meetings extended by 60 days till 30 September
 - Allowing Extraordinary General Meetings through Video Conference with e-voting/simplified voting facility

D. Measures taken by Reserve Bank of India

- Reduction of Cash Reserve Ratio (CRR) has resulted in liquidity enhancement of ₹1,37,000 crores
- Targeted Long Term Repo Operations (TLTROs) of ₹1,00,050 crore for fresh deployment in investment grade corporate bonds, commercial paper, and non-convertible debentures.
- TLTRO of Rs.50,000 crore for investing them in investment grade bonds, commercial paper, and non-convertible debentures of NBFCs, and MFIs.
- Increased the banks' limit for borrowing overnight under the marginal standing facility (MSF), allowing the banking system to avail an additional ₹1,37,000 crore of liquidity at the reduced MSF rate.

- Announced special refinance facilities to NABARD, SIDBI and the NHB for a total amount of ₹50,000 crore at the policy repo rate
- Announced the opening of a special liquidity facility (SLF) of ₹50,000 crore for mutual funds to alleviate intensified liquidity pressures.
- Moratorium of three months on payment of installments and payment of Interest on Working Capital Facilities in respect of all Term Loans
- Easing of Working Capital Financing by reducing margins
- For loans by NBFCs to commercial real estate sector, additional time of one year has been given for extension of the date for commencement for commercial operations (DCCO)

E. Businesses including MSMEs

1. Rs 3 lakh crores Collateral free Automatic Loans for Business, incl MSME
2. Rs 20,000 crore Subordinate Debt for MSMEs
3. Rs 50,000 cr equity infusion through MSME Fund of Funds
4. New definition of MSMEs
5. Global tender to be disallowed upto Rs 200 crores
6. Other interventions for MSMEs
7. Rs 2500 crores EPF support for Businesses and Workers for 3 more months
8. EPF contribution reduced for Business & Workers for 3 months- Rs 6750 crores
9. Rs 30,000 crores Liquidity Facility for NBFC/HCs/MFIs
10. Rs 45,000 cr Partial Credit Guarantee Scheme 2.0 for NBFC
11. Rs 90,000 cr Liquidity Injection for DISCOMs
12. Relief to contractors

13. Extension of Registration and Completion Date of Real Estate Projects under RERA
14. Rs 50,000 cr liquidity through TDS/TCS reductions
15. Other Direct Tax Measures

1. Rs 3 lakh crores Collateral-free Automatic Loans for Businesses, including MSMEs

- Businesses/MSMEs have been badly hit due to COVID19 need additional funding to meet operational liabilities built up, buy raw material and restart business
- Decision: Emergency Credit Line to Businesses/MSMEs from Banks and NBFCs up to 20% of entire outstanding credit as on 29.2.2020
 - Borrowers with up to Rs. 25 crore outstanding and Rs. 100 crore turnover eligible
 - Loans to have 4 year tenor with moratorium of 12 months on Principal repayment
 - Interest to be capped
 - 100% credit guarantee cover to Banks and NBFCs on principal and interest
 - Scheme can be availed till 31st Oct 2020
 - No guarantee fee, no fresh collateral

2. Rs 20,000 crores Subordinate Debt for Stressed MSMEs

- Stressed MSMEs need equity support
- Govt will facilitate provision of Rs. 20,000 cr as subordinate debt
- Two lakh MSMEs are likely to benefit
- Functioning MSMEs which are NPA or are stressed will be eligible
- Govt. will provide a support of Rs. 4,000 Cr. to CGTMSE
- CGTMSE will provide partial Credit Guarantee support to Banks

- Promoters of the MSME will be given debt by banks, which will then be infused by promoter as equity in the Unit.

3. Rs 50,000 cr. Equity infusion for MSMEs through Fund of Funds

- MSMEs face severe shortage of Equity.
- Fund of Funds with Corpus of Rs 10,000 crores will be set up.
- Will provide equity funding for MSMEs with growth potential and viability.
- FoF will be operated through a Mother Fund and few daughter funds
- Fund structure will help leverage Rs 50,000 cr of funds at daughter funds level
- Will help to expand MSME size as well as capacity.
- Will encourage MSMEs to get listed on main board of Stock Exchanges.

4. New Definition of MSMEs

- Investment limit revised upwards
- Additional criteria of turnover also being introduced.

Existing MSME Classification

Criteria : Investment in Plant & Machinery or Equipment

Classification	Micro	Small	Medium
Mfg. Enterprises	Investment < Rs. 25 lac	Investment < Rs. 5 cr.	Investment < Rs. 10 cr.
Services Enterprise	Investment < Rs. 10 lac	Investment < Rs. 2 cr.	Investment < Rs. 5 cr.

Revised MSME Classification

Composite Criteria : Investment And Annual Turnover

Classification	Micro	Small	Medium
Manufacturing & Services	Investment < Rs. 1 cr. and Turnover < Rs.5 cr.	Investment < Rs. 10 cr. and Turnover < Rs.50 cr.	Investment < Rs. 20 cr. and Turnover < Rs.100 cr.

5. Global tenders to be disallowed upto Rs 200 crores

- Indian MSMEs and other companies have often faced unfair competition from foreign companies.
- Therefore, Global tenders will be disallowed in Government procurement tenders upto Rs 200 crores
- Necessary amendments of General Financial Rules will be effected.
- This will be a step towards Self-Reliant India and support Make in India
- This will also help MSMEs to increase their business.

6. Other interventions for MSMEs

- e-market linkage for MSMEs to be promoted to act as a replacement for trade fairs and exhibitions.
- Fintech will be used to enhance transaction based lending using the data generated by the e-marketplace.
- Government has been continuously monitoring settlement of dues to MSME vendors from Government and Central Public Sector Undertakings.

- MSME receivables from Gov and CPSEs to be released in 45 days
7. Rs. 2500 crore EPF Support for Business & Workers for 3 more months
- Under Pradhan Mantri Garib Kalyan Package (PMGKP), payment of 12% of employer and 12% employee contributions was made into EPF accounts of eligible establishments.
 - This was provided earlier for salary months of March, April and May 2020
 - This support will be extended by another 3 months to salary months of June, July and August 2020
8. EPF contribution reduced for Business & Workers for 3 months- Rs 6750 crores Liquidity Support
- Businesses need support to ramp up production over the next quarter.
 - It is necessary to provide more take home salary to employees and also to give relief to employers in payment of Provident Fund dues,
 - Therefore, statutory PF contribution of both employer and employee will be reduced to 10% each from existing 12% each for all establishments covered by EPFO for next 3 months.
 - CPSEs and State PSUs will however continue to contribute 12% as employer
 - This scheme will be applicable for workers who are not eligible for 24% EPF support under PM Garib Kalyan Package and its extension.
 - This will provide relief to about 6.5 lakh establishments covered under EPFO and about 3 crore such employees.

- This will provide liquidity of Rs 6750 Crore to employers and employees over 3 months.
9. Rs 30,000 crore Special Liquidity Scheme for NBFCs/HFCs/MFIs
- NBFCs/HFCs/MFIs are finding it difficult to raise money in debt markets.
 - Government will launch a Rs 30,000 crore Special Liquidity Scheme
 - Under this scheme investment will be made in both primary and secondary market transactions in investment grade debt paper of NBFCs/HFCs/MFIs
 - Will supplement RBI/Government measures to augment liquidity
 - Securities will be fully guaranteed by Gol
 - This will provide liquidity support for NBFCs/HFC/MFIs and mutual funds and create confidence in the market.
10. Rs 45,000 crore Partial Credit Guarantee Scheme 2.0 for NBFCs
- NBFCs, HFCs and MFIs with low credit rating require liquidity to do fresh lending to MSMEs and individuals
 - Existing PCGS scheme to be extended to cover borrowings such as primary issuance of Bonds/ CPs (liability side of balance sheets) of such entities
 - First 20% of loss will be borne by the Guarantor ie., Government of India.
 - AA paper and below including unrated paper eligible for investment (esp. relevant for many MFIs)
 - This scheme will result in liquidity of Rs 45,000 crores

11. Rs. 90,000 Cr. Liquidity Injection for DISCOMs

- Revenues of Power Distribution Companies (DISCOMs) have plummeted.
- Unprecedented cash flow problem accentuated by demand reduction
- DISCOM payables to Power Generation and Transmission Companies is currently ~ Rs 94,000 cr
- PFC/REC to infuse liquidity of Rs 90,000 cr to DISCOMs against receivables
- Loans to be given against State guarantees for exclusive purpose of discharging liabilities of Discoms to Gencos.
- Linkage to specific activities/reforms: Digital payments facility by Discoms for consumers, liquidation of outstanding dues of State Governments, Plan to reduce financial and operational losses.
- Central Public Sector Generation Companies shall give rebate to Discoms which shall be passed on to the final consumers (industries)

12. Relief to Contractors

- Extension of up to 6 months (without costs to contractor) to be provided by all Central Agencies (like Railways, Ministry of Road Transport & Highways, Central Public Works Dept, etc)
 - Covers construction/ works and goods and services contracts
 - Covers obligations like completion of work, intermediate milestones etc. and extension of Concession period in PPP contracts
- Government agencies to partially release bank guarantees, to the extent contracts are partially completed, to ease cash flows

13. Extension of Registration and Completion

Date of Real Estate Projects under RERA

- Adverse impact due to COVID and projects stand the risk of defaulting on RERA timelines. Time lines need to be extended.
- Ministry of Housing and Urban Affairs will advise States/UTs and their Regulatory Authorities to the following effect:
 - Treat COVID- 19 as an event of '*Force Majeure*' under RERA.
 - Extend the registration and completion date suo-moto by 6 months for all registered projects expiring on or after 25th March, 2020 without individual applications.
 - Regulatory Authorities may extend this for another period of upto 3 months, if needed
 - Issue fresh 'Project Registration Certificates' automatically with revised timelines.
 - Extend timelines for various statutory compliances under RERA concurrently.
- These measures will de-stress real estate developers and ensure completion of projects so that homebuyers are able to get delivery of their booked houses with new timelines.

14. Rs 50,000 crores liquidity through TDS/TCS rate reduction

- In order to provide more funds at the disposal of the taxpayers, the rates of Tax Deduction at Source (TDS) for non-salaried specified payments made to residents and rates of Tax Collection at Source (TCS) for the specified receipts shall be reduced by 25% of the existing rates.
- Payment for contract, professional fees, interest, rent, dividend, commission, brokerage, etc. shall be eligible for this reduced rate of TDS.

- This reduction shall be applicable for the remaining part of the FY 2020-21 i.e. from tomorrow to 31st March, 2021.
- This measure will release Liquidity of Rs. 50,000 crore.

15. Other Direct Tax Measures

- All pending refunds to charitable trusts and non-corporate businesses & professions including proprietorship, partnership, LLP and Co-operatives shall be issued immediately.
- Due date of all income-tax return for FY 2019-20 will be extended from 31st July, 2020 & 31st October, 2020 to 30th November, 2020 and Tax audit from 30th September, 2020 to 31st October, 2020.
- Date of assessments getting barred on 30th September, 2020 extended to 31st December, 2020 and those getting barred on 31st March, 2021 will be extended to 30th September, 2021.
- Period of Vivad se Vishwas Scheme for making payment without additional amount will be extended to 31st December, 2020.



Adv. Bhishma
Ahluwalia



CA Jitendra
Khanuja

THE UNENDING TRANSITIONAL SAGA:

The topic of transitional credit in GST regime has been a matter of debate over last three years and the jurisprudence in this regard has been contradicting throughout Courts. Recent decisions, on the subject matter, add a fresh perceptible and narrate yet another conflicting story about the future of the taxpayers who are still struggling to transfer the transitional credits into the GST regime. The transitional arrangement for input tax credit is contained through Section 140(1) to the CGST Act, 2017 and the Rule 117(1) to CGST Rules, 2017 which allowed carry forward of credit available in its last return of erstwhile regime. Structurally, the entitlement to carry forward credit was prescribed in Section 140(1) while Rule 117(1) prescribed the form and time limits for carry forward of credit. and the provision read as under:-

“A registered person, other than a person opting to pay tax under Section 10, shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit [of eligible duties]¹ carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under

¹Ins. by Act 31 of 2018, S. 28(a) (w.r.e.f. 1-7-2017)

the existing law [within such time and]² in such manner as may be prescribed.”

Originally, Rule 117(1) prescribed a time period of 90 days to file a declaration in Form GST TRAN - 1 to claim the aforesaid transitional credit. The said time period was extended till December 27, 2017 vide various notifications. In fact, the original Section 140(1) did not have the phrases emphasized above which dealt with kind of duties the credits for which can be passed on and empowerment to prescribe time limit. Clearly, the legislature made a grave error at the time of introduction of the provision.

Marred with teething technical issues of the GSTN, the new regime rolled out with transition becoming a disaster for many taxpayers who were left struggling to file the GST TRAN - 1 within the stipulated time period. The Government relaxed the timelines through introduction of Rule 117(1A) till March 31, 2019 for taxpayers who tried filing their GST TRAN - 1 electronically by December 27, 2017 but could not do so due to *“technical difficulties on the common portal”*. The aforesaid period was further extended till March 31, 2020.

²Ins. and shall be deemed to have been inserted by Act 12 of 2020, S. 128(a) (w.r.e.f. 1-7-2017)

What the legislature forgot to do was prescribe legal empowerment to the timeline through Section 140. This issue was taken up by the enlightened litigants before Hon'ble High Courts of the Country wherein in the case of *Siddhartha Enterprises Vs The Nodal Officer - 2019-TIOL-2068-HC-AHM-GUJ* the Hon'ble Gujarat High Court held that timeline of Rule 117 is only directory and not mandatory. The said view of the Court was on account of the fact that there was no empowering provision to set timeline for filing TRAN - 1. In absence of the same Rule 117 could not be held to be mandatory. It was also directed that GSTN be re-opened so that electronic functionality can be accessed for filing TRAN - 1.

Quick to realize this grave error, the Government came out with its ace of spade in the form a retrospective amendment in Section 140(1) in Finance Act, 2020 wherein it empowered Section 140(1) to prescribe time limit for filing TRAN - 1 & validated the sanctity of Rule 117. The Government for some reason did not notify the said amendment and it remained suspended.

In the mean while the Gujarat High Court had delivered the above judgment and it was now time for the Hon'ble Delhi High Court to take a view on this issue. In the case of *Brand Equity Treaties*

Limited vs The Union of India and Ors. - 2020-TIOL-900-HC-DEL-GST the Delhi High Court came down heavily on the GST department and read down Rule 117 of the CGST Rules as being procedural & directory in nature.

The High Court went on to add that the time limit under Rule 117 shall not apply to anyone and all assessee who were aggrieved on account of technical and non technical glitches of the GSTN can claim their vested right of credit under erstwhile taxing statutes and carry it forward in the GST regime. Major findings of the High Court are as under: -

- Cenvat credit which stood accrued and vested (Absolute Right), is the property of the assessee and is a constitutional right under Article 300A of the Constitution.
- The aforesaid right cannot be taken away merely by way of delegated legislation by framing Rules prescribing the time limit, without there being any provision in the GST Act curtailing the aforesaid time limit.
- Exception created under Rule 117(1A) to file TRAN - 1 belatedly on account of “technical glitches” would equally apply to taxpayers who did not file TRAN - 1 due to their own follies (lack of good sense).

- GSTN is still under the “Trial & Error Phase”. Government struggling with shortcomings in the GSTN portal. Taxpayers were also facing challenges in terms of IT literacy.
- There is no definition of “technical difficulty on the common portal” and it is a broader term. Hence, cannot have a narrow interpretation. Technical difficulty doesn’t only include difficulties on the GSTN portal. The same would also include difficulties as a result of the respondent's follies.
- Rule 117 is arbitrary, unconstitutional, and violative of the right to equality enshrined under the Article 14 of the Constitution to the extent that it imposes a time limit to carry forward transitional credit.
- In absence of any specific provisions under the Act, residuary provisions of the Limitation Act, should be the guiding principle & thus a period of 3years from the appointed date would be the maximum period for availing of such credit
- The department should either open the online portal so as to enable the petitioners to file declaration in form TRAN-1 electronically, or to accept the same manually.
- The above observations were not limited to the Petitioner and it has been extended to all taxpayers who missed the deadline due to non-technical difficulty.

Though the taxpayers welcomed the aforesaid decision the Hon'ble Delhi High Court, the legal fraternity has been dissecting the decision every day. Is the decision absolute and the taxpayers joy permanent? The answer is fairly debatable. There are some issues which could not be addressed by the Hon'ble High Court of Delhi while dealing with entitlement to transitional credits.

Section 140 of the CGST Act'2017 has been amended retrospectively w.e.f. 01.07.2017 vide the Finance Act'2020, to empower Rule 117 to frame timeline of availing credit. Since the said amendment was not notified, the Hon'ble Delhi Court could not address the same as by virtue of legislation it remained suspended. The Central Board of Indirect taxes and Customs (CBIC) issued Notification no. 43/2020-Central Tax dated 16th May'2020 to notify the amendment in Section 128 of the Finance Act, 2020. The said Section 128 amends Section 140 of the CGST Act'2017 retrospectively w.e.f 01.07.2017 to include the words 'within such time' and manner as prescribed.

Thus, the aforesaid retrospective amendment in Section 140(1) of the CGST Act'2017 has not been dealt by the Hon'ble Delhi High Court in its verdict and the amendment now seems to have overcome the said Decision of the Delhi High Court. At the time

of arguments before the Hon'ble Court, the amendment was already proposed but was not implemented. The Court has not considered, as to whether proposed retrospective amendment in Section 140(1) holds valid in the eyes of law or the same is not valid as the proposed retrospective amendment takes away the vested right of the tax payer & is violative of Article 14 of the Indian Constitution. In this regard reference can be made to the decision of the Hon'ble Apex Court in the case of *Osram Surya (P) limited Vs. CCE, Indore - 2002 (142) ELT 5 (SC)* which propounds that validly earned credit remains to be a vested right which cannot be taken away through retrospective amendment in law.

The manner in which the events have transpired, it appears that Government has made it a habit to implement the entire GST regime based on trial and error methods. It was time of the Government to react again in a hurry after the Delhi High Court came down heavily on revenue department for the errors in legislation. The Government was quick to notify Section 128 to Finance Act, 2020 as above without any State Government notifying the same. This is in absolute contrast to the stand of the Government in case of proposed amendment to Section 50 of the CGST Act, 2017, which gives heavy relief to tax payers by limiting applicability of interest to only cash portion of delayed

tax payment. The Government had announced the relaxation way back in 2019 and have still been unable to notify the date of applicability of relaxing amendment. The reason of the Government for not being able to notify the same is State Governments not amending Section 50 in respective SGST Acts. This has been tweeted by CBIC tweet dated 15.02.2020. However, when it came to amendment relating to preventing a benefit of taxpayer, the Government was quick to act on after the decision of the High Court and making a retrospective amendment barring vested right of tax payers without any State making a corresponding amendment in SGST Acts.

Another question which requires consideration after retrospective amendment is, whether High Court's reference to Limitation Act'1963 now holds good when the time limit has now been specifically provided in the amended CGST Act'2017. In this regard reference can be drawn to two important decisions in the case of Hotel & Restaurant Association Vs. Star India Private Limited – 2007 (5) STR 161 (SC) & Commissioner of Sales Tax Vs. M/s Parsons Tools & Plants – 1975 (4) SCC 22, wherein it has been held that, when the statutory provisions of the specific law constitute a self-contained code, all obligations there under are to be considered in terms of that special code and general provisions shall not find application thereto.

The Government has kept its arsenal ready for challenging Brand Equities case before the Hon'ble Supreme Court.

It's interesting to note that before the aforesaid turn of events, Hon'ble SC has already dismissed departmental SLP against order of P&H High Court which held that carry forward of unutilized pre-GST credit, being a 'vested right' cannot be denied on the ground of time-limit. SC held that, "we are not inclined to exercise our jurisdiction under Article 136 of the Constitution". (*Ref: - Union of India & Ors. vs. Adfert Technologies Pvt. Ltd*[TS-132-SC-2020-NT](#)). It was believed that the refusal by SC to entertain departmental SLP has settled the position of law and has put an end to the ongoing litigation on TRAN - 1. However, the events which have transpired after the *Brand Equities* clearly shows that Government is not inclined to rest its case but instead is ready to take the fight head on. It will be interesting to now see the take of Hon'ble Supreme Court in the matter.

New Delhi Television Ltd. Case – An Exposition.
(civil appeal no. 1008 of 2020) 03.04.2020
(Principles emerging from recent Apex Court
verdict on Reassessment under Income Tax)



CA Prafulla Pendse

In this case the Hon'ble Supreme Court of India quashed the reassessment notice issued by the AO for the reason that revenue has grossly failed to show cause non-disclosure of primary facts by the NDTV (*hereafter referred to as assessee*) and further rejected the benefit of the extended period of limitation for the issue of notice under Section 148 of the Income Tax Act, 1961.

QUESTIONS ADDRESSED BY HON'BLE APEX COURT :

1. Whether in the facts and circumstances of the case, it can be said that the revenue had a valid reason to believe that undisclosed income had escaped assessment?
2. Whether the assessee did not disclose fully and truly all material facts during the course of original assessment which led to the finalisation of the assessment order and undisclosed income escaping detection?
3. Whether the notice dated 31/03/2015 along with reasons communicated on 04/08/2015 could be termed to be a notice invoking the provisions of the second proviso to section 147 of the Act ?

FACTS IN BRIEF :

1. Assessee (NDTV) is an Indian company engaged in the field of running of television channels, filed its return of income for the AY 2008-09 on 29/09/2008 declaring a Loss of Rs. 53.19 Lacs. Assessee also had foreign subsidiaries including subsidiary based at UK (NDTV Network Plc) hereinafter referred to as NNPLC. NNPLC had during the year issued step-up coupon bonds amounting to US \$ 100 million in July 2007 for a period of 5 years with a premium on redemption of 7.5%, wherein Assessee was the guarantor. Step-up bonds are investment securities that pay an initial interest rate but also have a feature where set rate increases at periodic intervals. However, the bonds were late on redeemed at a discounted price of US\$ 74.2 Million in November, 2009 by NNPLC. The AO recorded a finding that NNPLC had virtually no financial net worth and had no business over there and, therefore, it was beyond belief as to how could such a company issue bonds of US \$ 100 Million, unless and until the repayment and also interest was altogether secured. AO held that this arrangement was not possible without the assurance of the assessee. In the assessment proceedings the AO never doubted the validity of the transaction between Assessee and NNPLC, however, based on the understanding that transaction should be at arms length price made addition of Rs.18.72 crores being guarantee fees of 4.68% by treating it as business income in the assessment order under section 143(3) of the Income Tax Act, 1961.

2. On 31st March, 2015 reassessment proceedings were initiated vide notice of even date wherein it was stated that the AO has reasons to believe that the net income chargeable to tax for the AY 2008-09 had escaped assessment within the purview of Section 148 of the Act. Initially the notice did not give reasons but on being asked for by Assessee they were supplied. The main crux of the reasons was the fact that in the subsequent Assessment year *i.e.* AY 2009-10 the AO had proposed a substantial addition of Rs. 642 Crores to the income of Assessee on account of money raised by the Assessee through its few of its subsidiaries based in Netherlands and UK. Further, the DRP vide its directions issued u/s 144C(5) of the Act held that all the transaction of the Assessee with its Netherlands subsidiaries were SHAM AND BOGUS. In addition to the above, the DRP had also enhanced Assessee's income by another Rs.254 crores on account of unexplained unsecured loans. Relying upon the directions of the DRP there was reason to believe for the AO that funds received by NNPLC were actually the funds of the assessee since NNPLC did not have any business activities in UK except for a postal address and a meagre capital of only Rs.40 lakhs. Therefore, it was very much doubtful to find investments of US \$ 100 million flowing in a virtually non-functioning company and more suspicious being redemption of said coupons at a discount of 28% of their original investment and subsequently NNPLC was also placed in liquidation on 28/03/2011. According to the assessing officer "The natural inference could be that it was NDTV's own funds introduced in NNPLC in the grab of the impugned bonds." Besides above reasons, reliance was also placed on the complaints received

from minority shareholders wherein it was alleged that money was introduced in NNPLC and brought back to India through circuitous round tripping. Thus in the opinion of the AO there were reasons to believe that funds received by NNPLC were the funds of the assessee under a sham transaction and that the amount of Rs.405.09 crores introduced in the books of NNPLC during the financial year 2007-08 through the transaction involving the step up coupon convertible bonds entirely belongs to the Assessee. The conclusion of the AO stated above in bold letters clearly establishes the fact that AO's observation is entirely based on surmises & conjectures and there is no specific and concrete evidence to hold that Assessee's own funds were introduced in NNPLC in the garb of step up coupon bonds.

3. Assessee filed its objections against the said notice recording reasons to believe and categorically stated that there was no failure of part of Assessee to disclose fully and truly all material facts in order for the AO to initiate reassessment proceedings. Assessee also objected that the proceedings are initiated by the AO on a mere change of opinion and there was no reason recorded by AO by escapement of income. Further, it was contended by the Assessee that the AO had duly examined the said transaction and was treated as genuine and this is corroborated by the fact that AO while accepting the legality of the transaction made addition of guarantee fees on the said transaction. It was also argued by Assessee that notice was issued beyond the period of limitation of 4 years since Assessee had never withheld any material facts as such the period of

limitation of 6 years (per 1st proviso to Sec.147) was not applicable.

4. The AO disposed off the objections of Assessee vide his order dated 23/11/1995 by stating that there was non-disclosure of material facts by Assessee. It was also written that the notice would be within the period of limitation because NNPLC being a subsidiary of Assessee was a foreign entity and the income was being derived through this foreign entity. In view of this fact, the case of Assessee would fall within the 2nd proviso of Section 147 of the Act and hence the extended period of 16 years would be applicable. Against this order the writ petition filed before the Hon'ble Delhi Court by the Assessee was dismissed on 10/08/2017 and it is against this order Assessee has filed an appeal before the Hon'ble Apex Court.

ELUCIDATION OF LAW ON QUESTIONS FRAMED BY HON'BLE APEX COURT :

Issue : Whether there existed any Reason to Believe for reopening assessment ?

Q1. Whether in the facts and circumstances of the case, it can be said that the revenue had a valid reason to believe that undisclosed income had escaped assessment ?

The Hon'ble Court considered the fact that original assessment order was passed on 03/08/2012 and the order of Dispute Resolution Panel for subsequent year i.e. AY 2009-2010 was passed on 31/12/2013. It was in this order that the DRP raised serious suspicion with regard to the corporate structure of

Assessee and its subsidiaries, thereby leading to the conclusion that the transactions of Assessee with its subsidiaries were merely sham transactions. Further, it shall also be noted that several tax evasion petitions has been filed by the minority shareholders starting from March 2014 till March 2015 which narrate at length the communication between Assessee and its subsidiaries and also showed the evidence of round tripping of the Assessee undisclosed income through a layer of subsidiaries which corroborated the AO's suspicion. The Apex court relied upon the following settled judicial precedents to arrive at a conclusion that facts which come to the knowledge of the AO after the assessment proceedings are concluded could validly form basis for the reasons to believe that income had escaped assessment:

1. *Claggett Brachi Co. Ltd., London v. CIT, Andhra Pradesh* 1989 Supp. (2) SCC 182
2. *M/s Phool Chand Bajrang Lal and Another v. ITO and Another* [1993] 4 SCC 77
3. *Ess Kay Engineering Co.(P) Ltd. v. CIT, Amritsar* [2001] 10 SCC 189

The Hon'ble Apex Court based on the above discussion, categorically held that the material disclosed in the assessment proceedings for the subsequent years as well as material placed on record by the minority shareholders validly forms the basis for initiating action under Section 147 of the Income Tax Act, 1961.

However, it is humbly submitted that the observations of the DRP for AY 2009-2010 pertained to subsidiaries in Netherland while the facts in the instant case relates to subsidiary in UK and therefore, it is respectfully submitted that findings of DRP for AY 2009-10 have actually no direct bearing on the AY 2008-09 and further there is no live link between them in order to empower the AO to reopen the assessment.

Issue : Whether disclosure was full and true during assessment proceedings ?

Q2. Whether the assessee did not disclose fully and truly all material facts during the course of original assessment which led to the finalisation of the assessment order and undisclosed income escaping detection ?

The first proviso to Section 147 of the Act clearly specifies that revenue can take recourse to the extended period of limitation for the issuance of notice if the revenue could prove that Assessee had failed to disclose fully and truly all the facts necessary for the assessment. In the instant case the revenue issued the notice under section 148 of the Act by taking the benefit of extended period of limitation (6 years) as prescribed under the first proviso to Section 147 of the Act. The Apex Court categorically held that step-up coupon bonds for US\$ 100 million were issued by NNPLC was disclosed; details of the entities which subscribed to these bonds was also disclosed and even the fact that the bonds were discounted at a lower rate was also disclosed before the

assessment was completed. The AO had accepted the entire transaction however, according to him Assessee was only liable to receive a guarantee fees on the said transaction, accordingly made addition to total income while completing the assessment order. The revenue also placed reliance on the complaints filed by minority shareholder but the Court did not go into the matter because it opined that those complaints had never seen light of the day either before the High Court or Supreme Court and relying on the same would cause prejudice to the Assessee as the same had never been permitted to be confronted with. The contention of the revenue was that the Delhi High Court relied on Phool Chand's Case wherein it was held that where the transaction of a particular assessment year is found to be a bogus transaction, the disclosures made could not be said to be all full and true, which was not so in the instant case. The revenue also raised a plea that certain documents were not supplied but according to Apex Court all these documents cannot be said to be such documents which Assessee was bound to disclose during assessment proceedings. The court further held that assessee had disclosed all primary facts before the assessing officer and it was not required to give any further assistance to the assessing officer by disclosure of any other facts. It was for the AO at this stage to decide what inference should be drawn from the facts of the case. In the instant case, the AO considering the documents as well as pleadings submitted before him did not at any point of time doubt the genuineness of the transaction entered into by the Assessee and its subsidiaries.. The Apex Court also made a very interesting observation that revenue is vigorously arguing that Assessee was guilty of non disclosure of material facts but in the affidavit filed

before the Delhi High Court it is stating entirely opposite. In the counter affidavit filed before HC it has been stated that 2nd proviso of section 147 is clearly attracted and 1st proviso to section 147 is not applicable to the facts of the case and in fact not at all relevant to decide the issue before the High Court. The Apex took serious note of the affidavit and expressed displeasure by stating that revenue cannot be permitted to blow hot and cold at the same time. The Apex court thus held that Assessee had fully and truly disclosed all material facts necessary for its assessment and, therefore, the revenue cannot take benefit of the extended period of limitation of 6 years under 1st proviso to sec.147

Issue : Whether revenue is entitled to invoke 2nd proviso to section 147 (16 years period) if the said intention is not mentioned in the notice or in the reasons provided to assessee ?

Q3. Whether the notice dated 31/03/2015 along with reasons communicated on 04/08/2015 could be termed to be a notice invoking the provisions of the second proviso to section 147 of the Act ?

While completing the Assessment order the AO held that the limitation period for the issuance of notice should be 16 years as per second proviso to Section 147 r.w.s. 149(1)(c) of the Act because Assessee has derived its income from a foreign entity. In order to answer the issue, the Apex Court referred to the notice issued under section 148 on 31/03/2015 and clearly held that the said notice is absolutely silent as regards invocation of

2nd proviso to section 147 and moreover the reasons communicated to Assessee on 04/08/2015 also failed to specifically mention that the case was being reopened under 2nd proviso to Section 147. Surprisingly, the AO only at the time of rejecting the objections of the Assessee made a reference to 2nd proviso to Section 147 of the Act. Therefore, the court correctly held that right of Assessee cannot be prejudiced, curtailed or he cannot be taken by surprise at the stage of rejection of objections or before the High Court. If the revenue intended to rely upon the 2nd proviso and urge limitation period of 16 years then in the notice or at least in the reasons in support of the notice, the assessee should have been put to notice (intimated) that revenue intends to rely upon the 2nd proviso so as to permit the assessee to offer its objections in this regard which was not done hence such deprivation is not a fair or proper procedure. Thus the Hon'ble Apex Court allowed the appeal of the Assessee and held that although the revenue had reasons to believe that the income of Assessee has escaped assessment but it utterly failed to show cause non disclosure of facts by the Assessee and therefore, quashed the entire proceedings and further held that at this stage the revenue cannot be allowed to take advantage of 2nd proviso which was never take shelter of at the appropriate point of time prescribed by the Law.

LEGAL PRINCIPLES EMANATING FROM HON'BLE SUPREME COURT :

Based on the above discussion a few important legal principles emerging from the decision of Hon'ble Apex Court in NDTV's case are

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- That AO has sufficient power to reopen the case under section 147 and it does not get curtailed merely because original assessment is detailed and comprehensive one and the assessee cannot object to the initiation of reassessment proceeding merely of this reason
- Receipt of specific and reliable information after completion of assessment about an issue already examined in the assessment is valid tangible material for initiation of proceedings under section 147 though the same may relate to subsequent years.
- When the transaction is proved to be sham or bogus, the assessee cannot be said to have disclosed fully and truly all material facts in the course of the initial round of assessment.
- The phrase "full & true disclosure of material facts", refers only to disclosure of primary facts and the assessee is not at all required to disclose the "secondary facts". The assessee is neither under any obligation to render any assistance to the AO by disclosure of any other facts nor to assist him in deciding what inference should be drawn from the facts so brought on record.

- The parties to the case cannot orally argue on issues not mentioned in the petition or counter-affidavit.
- The revenue should make no attempt add or improve the reasons for reopening of the assessment beyond what has already been disclosed.
- Where any information has not seen the light of the day and which have not been confronted with the Assessee cannot be relied upon by the revenue.
- In order to adopt judicious and fair approach the Assessee should be put to notice of the intentions of the revenue as to which provisions of law are proposed to be invoked against the assessee and that too at the appropriate time as per Law.
- Respondent in an appeal is entitled to defend the order of lower court even on a ground which may have been decided against it by the lower court.
- Where the revenue proposes to rely upon any Proviso to sec. 148, the same has to be stated either in the notice or in the reasons provided to the assessee in support of the notice and the same cannot by any means be through the order rejecting the objections or at any later stage.

in our humble opinion if the revenue proposes to rely upon the 2nd Proviso to sec.148 the same should have invariably been

specified in the notice itself as the same is prepared on the basis of reasons recorded for reopening in a standard form as per the dictum laid down by Hon'ble Delhi High Court in Sabh Infrastructure Ltd's case.

EPILOGUE:

Though technically the reassessment proceedings has been quashed by the Hon'ble Supreme Court in favour of the assessee for inability of revenue to show cause non disclosure of facts by the assessee, but it has granted a second innings to the litigation by making a reference to the fact that revenue can invoke 2nd proviso of Section 147 for reopening as the case pertains to foreign assets in accordance with Law. At this juncture it worthwhile to mention that Hon'ble Delhi HC (Sabh Infrastructure Ltd.) in its divine wisdom have enshrined some crucial guidelines to be followed by the revenue authorities so as to curtail unwanted litigation. The important guidelines include supply of standard form used for recording of reasons be provided to assessee along with approval, paraphrasing the investigation report with conclusions so derived thereon along with copies thereof, the reasons so recorded cannot be supplemented or improved upon, order disposing objections should deal with each objection along with reasons thereof and finally the reasons should loudly speak out all the reasons and grounds available specially where 1st proviso to section 147 is attracted. The same analogy invariably and squarely should apply to a case where 2nd proviso to section 148 is invoked as such the AO is under an obligation to categorically mention in the reasons to believe as to what primary facts or information was not disclosed by the assessee i.e. there has to be an undisputed allegation and not a vague or

DIRECT TAX – RECENT SUPREME COURT VERDICT ON REASSESSMENT

arbitrary one. In the instant case another issue that peeps out is whether the 2nd proviso to section 147 inserted by Finance 2012 which is though applicable prospectively, can be made applicable for assessment years for which the time period for reopening the assessment has not expired is still a hanging sword ?? This issue is again going to open a fresh round of litigation. Thus the principles emerging from the decision of Hon'ble Supreme Courts in NDTV's case above should be scrupulously be followed by the Income Tax Department to act as deterrence on the one hand and preserving the Sanctity of Law on the other hand.

Exemption under Section 54 and Section 54F

It is always confusing whether investment is allowed to be made only in one residential property or more than one residential property can be allowed:



CA Palak Jain

Section 54:

1. The exemption under section 54 against the capital gains is allowed only if the assessee invested in purchase or construction of 1 residential house. This is irrespective of number of house already held by the assessee. This clause has been introduced by Finance Act, 2014 in this section. Hence investment in single residential property will be allowed exemption to assessee.
2. Further, a very unique clause is introduced by Finance Act, 2019, which is an exemption to the above clause. In cases where amount of capital gains does not exceed Rs 2 crores, in such cases the assessee has an option that even if he invests in 2 residential properties then also he will be able to take exemption of both the houses against the capital gains. But this exemption can be claimed only once in lifetime, once it is claimed It should not be claimed again.

Section 54F

1. The exemption under section 54 against the capital gains is allowed only if the assessee invested in purchase or construction of 1 residential house. This clause has been introduced by Finance Act, 2014 in this section. Hence investment in single residential property will allowed exemption to assessee.
2. But in section 54F, there is a restriction on number of residential properties held by the assessee. This means the assessee does not own more than 1 residential property on the date of transfer exclusive of the one which he has bought as investment to claim exemption under section 54F.
3. Further, please note that the once in lifetime option of investment in 2 residential house properties which is there in Section 54 is not there in Section 54F.

Contradiction in Due date of making payment against declaration under Vivad Se Vishwas Scheme, 2020



CA Praveen Jain

Inspite of various changes, FAQs and clarification, a big contradiction still appears regarding Due date of making payment against declaration under Vivad Se Vishwas Scheme (DTVSV), 2020, resulting into penalizing those who were prompt and granting benefit to those who were not.

There is still ambiguity whether the extension announced by the Government in time limit for payment under DTVSV will serve the purpose in true spirit and whether it unfair to those who have already filed declaration forms. Attention is invited to the following provisions of the DTVSV Act, 2020:

1. Section 3 of the DTVSV Act, 2020- Amendment from time to time:

a. Section 3 of the DTVSV Act, 2020 as originally introduced:

“3. Subject to the provisions of this Act, where a declarant files under the provisions of this Act on or before the last date, a declaration to the designated authority in accordance with the provisions of section 4 in respect of tax arrear, then, notwithstanding anything contained in the Income-tax Act or any other law for the time being in force, the amount payable by the declarant under this Act shall be as under, namely:—

Sl. No.	Nature of tax arrear	Amount payable under this Act on or before the <u>31st day of March, 2020</u>	Amount payable under this Act on or after the <u>1st day of April, 2020</u> but on or before the last date....”

- b. Amendment brought by way of Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 dated 31st March, 2020:

Amendment was made in Section 3 as under:

In Column 3 of the table substituted 30th day of June 2020 in place of 31st day of March 2020.

In Column 4 of the table substituted 1st day of July 2020 in place of 1st day of April 2020.

Thus by way of Ordinance, government extended the deadline mentioned at Section 3 of DTVSV from 31st day of March 2020 to 30th day of June 2020, which implies that no additional amount is required to be paid if the payment is made by June 30, 2020.

- c. Further amendment announced by Hon'ble Finance Minister on 13th May, 2020 in her Press conference:

"...Now without any additional amount which is to be paid, in total the whole Vivad se Vishwas Scheme is getting extended upto 31st December, 2020 and for this extension no extra payment is being asked..."

2. Section 5 of DTVSV Act, 2020: - which has been never amended

"5. (1) The designated authority shall, within a period of fifteen days from the date of receipt of the declaration, by order, determine the amount payable by the declarant in accordance with the provisions of this Act and grant a certificate to the declarant containing particulars of the tax arrear and the amount payable after such determination, in such form as may be prescribed.

5(2) The declarant shall pay the amount determined under sub-section (1) within fifteen days of the date of receipt of the certificate and intimate the details of such payment to the designated authority in the prescribed form and thereupon the designated authority shall pass an order stating that the declarant has paid the amount..."

3. Contradiction:

a. Payment within fifteen days from date of issue of Form 3 or till 31st day of December 2020:

Section 3 requires to make payment upto 31st December 2020 but Section 5 restricts time limit for making payment within 15 days of clearance in Form 3 given by designated Officer. Time and again amendments were made in Section 3 but no respective amendments were made in Section 5 resulting into making amendments unfruitful.

The collective reading of the above provisions reveals that an assessee, without any burden of additional charge, can file declaration till 31st December, 2020. However, whenever he files a declaration, tax has to be paid within 15 days from the date of receipt of Certificate from Designated Authority.

The assessee those who have already applied under the scheme and received Form 3 or in the process of receiving the same, then inspite of the relaxation in Section 3, time limit to make payment for him shall be 15 days only and not till 31st December 2020.

The intention of Government should not be to penalize the persons who were prompt and compliant enough. Thus it is requested that this anomaly be cleared.

b. If the respective changes are not made in Section 5 also:

- i. If respective amendment are not made in Section 5, it will result into making relaxation under Section 3 unfruitful.
- ii. This will also demoralize the persons who are willing to file declaration under the Scheme promptly and they will not be inclined to make declaration before the month of December 2020.
- iii. Even if Form 3 clearance is granted by the department, in cases where huge outstanding payments are to be made payment might not be made in time due to this ambiguity leading to litigation and requiring to file declaration again resulting into duplicity for both.
- iv. Moreover when the majority of the Declarations will be filed in the month of December, 2020 the Designated Authorities will have a huge pressure of granting Certificates within the stipulated time.
- v. Since the assesseees will wait till December, 2020 to file declaration forms they will be seeking adjournments till December, 2020 and the entire working of the Department and Judiciary will get hampered.

c. If the respective changes are made in Section 5 also:

- i. Assesseees who have already filed the declaration and either received clearance under Form 3 are going to receive the same will not feel cheated and will be at par with other assessee who are going to make declaration.

- ii. More and more persons will start planning now to make declaration and start to make fund arrangements for payment till December so that there is no last moment rush.
- iii. The assessee will file Declarations at the earliest and the Department/ Judiciary can mark the appeal as non-maintainable because of DTVSV Act, 2020 much before 31st December, 2020 and work accordingly.
- iv. This will result in a win-win situation all – Assessee, Department, Judiciary.

4. Conclusion:

Entire purpose of giving relaxation by the government will be defeated if respective relaxation are not provided in Section 5 of the DTVSV Act, 2020. In view of this Ministry of Finance in order to make parity should come out with a clarification or suitable amendment to allow assessees to pay tax arrears till December, 2020 irrespective of the date of filing of Declaration.

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*Thank
you!*

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