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By

**SBS and Company LLP**
**Chartered Accountants**

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Dear Readers,

Greetings for the season!

We are currently in unprecedented times and fighting constantly with a virus which cannot be seen. The fight is also unique because we are asked to do the same by staying at home. The virus even though cannot be seen with naked eye, the impact it can create is being experienced. The aftermath is going to cost many of our dreams. Times like these, call for indomitable positivity and only such measures can help us navigate through this pandemic. I wish and pray that every one of us should be impacted at the minimum possible and situation may be restored to normalcy at the earliest.

At times like these, in order to demonstrate the positivity and optimism, I have asked our team to work on the journal. In this edition, we have discussed the provisions of 'Corporate Social Responsibility' in COVID times. The said article deals with the CSR Obligations and also deals with recent notifications/clarifications issued by MCA.

I am glad that the MCA has clarified that the donations made to PM CARES Fund, will be eligible as amounts spent under the CSR Obligations. Further, the Ministry of Finance also amended the provisions of Section 80G, thereby allowing donations to PM CARES Fund as eligible as deduction. Both the said moves are in right direction and helpful in garnering resources for the country.

I also take this opportunity and appeal all our clients to contribute generously to the PM CARES Fund, Chief Minister's Relief Fund and also not to forget to support who are dependent on us.

The article on LLP Settlement Scheme and Companies Fresh Start Scheme deals with various provisions of the said scheme and I urge all clients who were not complying with filing of various forms for various reasons to take this opportunity and get complied.

The article on Interest on Credit 'availed' but not 'utilised' – Resurrection of Conflict – 'Or vs 'And' deals with the future litigation pertaining to cases where credit was availed but not utilised. The said issues acquired finality under the service tax era by way of amendment, but the said amendment was not carried in the GST laws. This takes us to the litigation which was existing in pre-amendment period in service tax era which has not been concluded as on date.

The article 'Residence in India – A New Colour by Finance Act, 2020' deals with amended provisions of Section 6 of Income Tax Act. The new provisions lays down a shorter duration test for a citizen or PIO to qualify as resident if his Indian total income exceeds specified limit. Further, the deeming provisions stating that an individual shall be treated as resident if he is not a resident of any jurisdiction is dealt in the article.

I hope that you will have good time reading this edition and please do share your feedback. I will also urge clients to mail us topics or issues on which you want us to deliberate in our future editions, so that we can contribute to the same.

**Thanking You,**

SANNAREDDY SURESH BABU

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**COMPANIES ACT**

## CORPORATE SOCIAL RESPONSIBILITY - COVID TIMES

Contributed by CS D V K Phanindra

In this Article, an attempt is made to list out the concept of Corporate Social Responsibility, under the Companies Act, 2013, and the recent clarifications/directions from the Ministry, with specific reference to COVID-19.

The concept of Corporate Social Responsibility(CSR) was introduced by the Companies Act, 2013 (Act) with effect from 01.04.2014. The provisions of Section 135 of the Act, read with Schedule-VII to the Act, are to be complied with.

### A. CSR APPLICABILITY:

The provisions of CSR are applicable to every Company having:

- ➔ Net Worth of Rs.500 Crores or more, or;
- ➔ Turnover of Rs.1,000 Crores or more or;
- ➔ Net profit of Rs.5 Crores or more during ***any financial year***

**Explanations:**

1. "Net Profit" for the purpose of CSR shall be computed in accordance with the provisions of Section 198 of the Companies Act, 2013 i.e., **Profit Before Tax.**

2."Any Financial Year" implies any of the three preceding financial years.

### B. CSR COMMITTEE:

The Company to which CSR is applicable shall constitute a CSR Committee, consisting of Three or more directors, out of which at least one director shall be an Independent Director.

The CSR Committee shall:-

(a) formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII;

(b) recommend the amount of expenditure to be incurred on the CSR activities;&

(c) monitor the Corporate Social Responsibility Policy of the company from time to time.

**C. AMOUNT TO BE SPENT UNDER CSR:**

The Company to which CSR is applicable, shall ensure that the company spends, in every financial year, ***at least2 % of the average net profits of the company made during the three immediately preceding financial years,*** in pursuance of its Corporate Social Responsibility Policy.

Provided that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities:

**D. CSR ACTIVITIES:**

A Company may undertake activities as stated in its CSR Policy, as projects or programs or activities, ***excluding activities undertaken in pursuance of its normal course of business,*** *i.e., a Company engaged in the activity of Road Laying, cannot undertake Road Laying work as a CSR activity.*

*The CSR projects or programs or activities undertaken in India only shall amount to CSR Expenditure.*

It is for the Company to decide whether to undertake its CSR activities approved by the CSR Committee, through:

- ➔ A Company established under section 8 of the Act or a registered trust or a registered society, established by the company, either singly or alongwith any other company, or
- ➔ A Company established under section 8 of the Act or a registered trust or a registered society, established by the Central Government or State Government or any entity established under an Act of Parliament or a State legislature;

If the company decides to undertake its CSR activities through a company established under section 8 of the Act or a registered trust or a registered society, other than those specified above, then such company or trust or society shall have an established track record of 3 years in undertaking similar programs or projects; and the company has specified the projects or programs to be undertaken, the modalities of utilisation of funds of such projects and programs and the monitoring and reporting mechanism.

**E. CSR EXPENDITURE:**

CSR expenditure shall include all expenditure including contribution to corpus, or on projects or programs relating to CSR activities approved by the Board on the recommendation of its CSR Committee, but does not include any expenditure on an item not in conformity or not in line with activities which fall within the purview of Schedule VII of the Act.

Vide General Circular No.21/2014, Dt:18.06.2014, Ministry has further clarified that Contribution to Corpus of a Trust/ Society/ Section 8 Companies etc., will qualify as CSR expenditure as long as:

(a) the Trust/ Society/ Section 8 Companies etc. is created exclusively for undertaking CSR activities; or

(b) where the corpus is created exclusively for a purpose directly relatable to a subject covered in Schedule VII of the Act.

**F. REPORTING OF CSR IN THE BOARD REPORT:**

The Board Report of the Company to which the provisions of CSR are applicable, shall disclose the constitution of the CSR Committee.

Information/Annual report on the CSR Activities, to be provided pursuant to Section 135 read with Rule 8 of the Companies (Corporate Social Responsibility Policy) Rules, 2014, as amended from time to time, shall be attached to the Boards' Report.

The Board Report shall also disclose the details specify the reasons for not spending the amount.

**G. CSR EXPENDITURE IN SUPPORT OF COVID-19:**

Vide General Circular No.10/2020[1] , the Ministry of Corporate Affairs, has clarified that spending of CSR Funds for COVID-19, is an eligible CSR Activity. Accordingly, the companies which are required to comply with undertaking CSR activity, can spend their CSR Funds under items No.(i)[2] and (xii)[3] of the Schedule-VII to the Companies Act, 2013, with specific reference to 'promoting health care including preventive health care and sanitation and disaster management'. The MCA Circular also clarifies that the below entries can be interpreted liberally and does not call for strict interpretation.

Hence, the following expenditures are considered as eligible for the purposes of CSR activity, from COVID-19, perspective:

- Donations made to PM CARES Fund;
- Donations to National Disaster Management Authority; or the respective Disaster Management Authority;
- Spent on promoting preventive health care and sanitation;
- Spent on disaster management, including relief, rehabilitation and reconstruction activities;

[1]General Circular No.10/2020; Dated: 23.03.2020
[2]Eradicating hunger poverty and malnutrition, promoting preventive health care and sanitation and others
[3]disaster management, including relief, rehabilitation and reconstruction activities

**FURTHER CLARIFICATIONS GIVEN BY MINISTRY:**

The Ministry of Corporate Affairs has released Office Memorandum[4] Dated: 28.03.2020, and has clarified that any donations/contributions made to PM CARES Fund [5] shall qualify as CSR Expenditure under the Companies Act, 2013.

Further, vide General Circular No.15/2020 [6], the Ministry of Corporate Affairs, has released Frequently Asked Questions (FAQs), and has clarified that contribution to the Chief Minister's Relief Fund of the respective States, in relation to COVID-19, shall not qualify as a CSR Expenditure.

In view of the above, corporates are requested to give a helping hand to the Government, in any of the above ways, and avail either the benefit under CSR or the benefit under 80 G of the Income Tax Act, 1961.

[4] eF No CSR-05/1/2020-CSR-MCA dated 28.03.2020

[5] PM CARES Fund is also notified for purposes of Entry (viii) of Schedule-VII to Companies Act vide the above Office Memo

[6] General Circular No.15/2020; Dated: 10.04.2020

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**COMPANIES ACT**

## LLP SETTLEMENT SCHEME AND COMPANIES FRESH START SCHEME

Contributed by CS D V K Phanindra

Vide General Circular No.6 of 2020, Dt: 04.03.2020, the Ministry of Corporate Affairs, had introduced the LLP Settlement Scheme, to be effective from 16.03.2020, wherein, it was provided for Limited Liability Partnerships (LLP) to file the pending returns to be filed by the LLPs, without any additional fees.

Amidst the outbreak of COVID-19, the Ministry of Corporate Affairs has come up with major reliefs to the Companies and LLPs.

Vide General Circular No.12 of 2020, Dt:30.03.2020, has introduced the Companies Fresh Start Scheme, 2020, to give such an opportunity to the defaulting companies and to enable them to file the belated documents , with normal fees, and make a fresh start on a clean slate. In addition the scheme gives an opportunity to the inactive companies to get their companies declared as “Dormant Company”, under Section 455 of the Companies Act, 2013, by filing a simple application at a normal fee, and continue in the Register of Companies, with minimum compliance requirements.

vide General Circular No. 13/2020, Dt:30.03.2020, the Ministry has amended the LLP Settlement Scheme, introduced vide General Circular No. 6 of 2020, Dated: 30.03.2020to provide for the defaulting LLPs a one-time chance to file all the pending returns, with only normal fees, avail condonation of such default, immunity against prosecution with respect to such default.

The salient features of the Companies Fresh Start Scheme, 2020 and the LLP Settlement Scheme, 2020, are as follows:

**A. The Companies Fresh Start Scheme, 2020 for Active Companies:**

| Sl. No. | Details | Information |
|---|---|---|
| 1 | **Scheme Tenure from/to** | The scheme shall commence from 01.04.2020 till 30.09.2020. |
| 2 | **Scheme Applicable to** | The Scheme is applicable to a Defaulting Company, which has made default in filing of the following documents ( only indicative and not exhaustive), statements, returns etc., including Annual statutory documents on the MCA Portal.<br><br>➔ AOC-4 – Financial Statements<br>➔ MGT-7 – Annual Return<br>➔ ADT-1 – Auditor appointment form<br>➔ ADT-3 – Resignation of Auditors<br>➔ INC-22 – Shifting of Registered office<br>➔ MGT-14 – Filing of resolutions<br>➔ PAS-3 – Allotment of Shares<br>➔ Other forms |
| 3 | **Scheme not applicable to the following Companies/Forms** | The Scheme is not applicable to :<br><br>➔ The Companies against which action for final notice of strike-off has already been initiated by the ROC.<br>➔ The Company which has filed STK-2 i.e., application for striking-off.<br>➔ The Companies which have amalgamated under a Scheme of arrangement or compromise under the Companies Act.<br>➔ The Companies which have filed forms for obtaining Dormant Status under the Companies Act.<br>➔ Vanishing Companies;<br>➔ SH-7 – Increase of Authorised Share Capital.<br>➔ Charge related documents i.e., CHG-1, CHG-4, CHG-8 and CHG-9. |
| 4 | **Fees to be paid** | The Company is required to pay only the normal fees, and no additional fees shall be charged.<br><br>A huge economic benefit is provided by this scheme, enabling the Companies to file belated returns with only normal fees. |

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| 5 | **Application for seeking Immunity from prosecution** | Application for Immunity to be filed in **Form CFSS-2020**, after the closure of the scheme and filing of all the belated returns with MCA. There is no fees for the Form CFSS-2020.<br><br>**Immunity covered:** Immunity under the scheme is only to the extent of such prosecution or the proceeding for imposing penalty under the Act pertaining to the delay associated with the filing of the delayed returns.<br><br>**Immunity not covered:** Any other consequential proceedings, including any proceedings involving interest of any shareholder or any other person qua the company or its directors or KMP would not be covered by the immunity.<br><br>Based on the declarations made by the CFSS-2020 form, an immunity certificate will be issued by the designated authority i.e., the ROC concerned. |
| 6 | **Immunity when court cases and Management Disputes exist** | Immunity shall not be applicable in the matter of any appeal pending before the court of law and in case of Management disputes of the Company pending before any court of law or tribunal.<br><br>Immunity shall not be provided where any court has ordered conviction in any matter, or an order penalty has been passed by an adjudicating authority under the Act, and no appeal has been preferred against such orders of the court or of the adjudicating authority, before the scheme has come in to force. |
| 7 | **Measures/treatment where penalties imposed by the Designated Authority against the Company, and Appeal not filed** | Matters where penalties were imposed by the Designated Authority against the defaulting Company in relation to the non-filing of the statutory returns, and Appeal is not filed by the Company:<br><br>➔ Where the last date for filing appeal against the order of the designated authority falls between 01.03.2020 to 31.05.2020, an additional 120 days shall be allowed to the company to file appeal.<br><br>➔ During such additional period above, prosecution for non-compliance of the order of the authority, in relation to the delay associated in filing of the returns with MCA, shall not be initiated against such companies or their officers. |

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|---|---|---|
| 8 | **Withdrawal of appeals any prosecutions** | If the defaulting Company has filed an appeal with regard to the notice received from the ROC in respect of any statutory filings, then before filing of the Form for grant of Immunity Certificate, then the defaulting company shall withdraw the appeal first, furnish proof of the withdrawal to the ROC. |
| 9 | **Effect of Immunity** | After grant of immunity, the Designated authority shall withdraw the prosecution pending, relating to only the non-filing of the returns. Please see Sl.No.5 above. |
| 10 | **Penalties** | On the conclusion of the due date of the scheme, necessary action will be initiated by the concerned authority, against the Companies, which has not availed the scheme, and filed the pending returns. |

**B. Scheme for Inactive Companies:**

The Inactive Companies, after filing all the belated returns, while filing the Form CFSS-2020 form, can opt for either of the following:

- ➔ Apply to get the Company declared as a Dormant Company under Section 455 of the Companies Act, by filing Form MSC-1;
- ➔ Apply for striking-off the name of the Company by filing STK-2.

**C. LLP Settlement Scheme, 2020 (as amended vide General Circular No.13/2020):**

| Sl. No. | Details | Information |
|---|---|---|
| 1 | **Scheme Tenure from/to** | The scheme shall commence from 01.04.2020 till 30.09.2020. |
| 2 | **Scheme Applicable to** | The Scheme is applicable to a Defaulting LLP, in respect of the belated documents, which are required to be filed with MCA, under the provisions of the LLP Act, 2008 and rules framed thereunder, which are due for filing till 31.08.2020.<br>➔ LLP-3 – LLP Agreement<br>➔ LLP-4 – Change of Partners<br>➔ LLP-11 – Annual Return<br>➔ LLP-8 – Statement of Solvency<br>➔ Other forms |
| 3 | **Scheme not applicable to the following LLPs** | The Scheme is not applicable to :<br>➔ The LLPs which have made applications in Form 24 to the Registrar for striking-off their name from the Register of LLPs, as per provisions of Rule 37 (1) of the LLP Rules, 2009. |

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| **4** | **Fees to be paid** | The LLP is required to pay only the normal fees, and no additional fees shall be charged.<br><br>A huge economic benefit is provided by this scheme, enabling the LLPs to file belated returns with only normal fees. |
| **5** | **Immunity** | The defaulting LLPs which have filed the belated documents till 30.09.2020, and made good the default, shall not be subjected to prosecution by the ROC. |
| **6** | **Penalties** | After 30.09.2020, necessary action will be initiated by the ROC, against the LLPs, which has not availed the scheme, and filed the pending returns. |

In view of the above, the Scheme is very much beneficial for the Companies/LLPs, which have pending returns, and intend to file the same and make a fresh start.

On a lighter note, we prefer to call the CFSS, as **"CORONA FRESH START SCHEME".**

*This article is contributed by CS D V K Phanindra, The author can be reached at phanindra@sbsandco.com*

**DIRECT TAXATION**

## RESIDENCE IN INDIA - A NEW COLOUR BY FINANCE ACT, 2020

Contributed by CA Suresh Babu S & CA Sri Harsha

As all of you are aware, under the taxation statues, mainly direct taxation, 'residence' of a person plays an important and significant role. Many of the direct taxation laws across the globe, stipulate that a person resident in their jurisdiction has to offer all the global income to tax. Being resident of a jurisdiction brings to tax all their income which would have not been subjected to tax if he was not a resident in the first place. Hence, the concept of 'residence' is of utmost importance since it has direct bearing on the taxes.

In the Indian scenario, Section 6 of Income Tax Act, 1961 (for brevity 'ITA') deals with 'Residence in India'. The said section deals with residence of all type of persons namely individual, Hindu Undivided Family, firm, association of persons and company. Of all the lot, we will be dealing with 'individual' in the current article. The said article is written in the context of changes to Section 6 brought vide Finance Act, 2020.

### Residence vis-à-vis Scope of Total Income:

Before proceeding to understand the impact of the changes brought in by Finance Act, 2020, it is important to understand the basic objective that Section 6 intends to achieve. Section 6 stipulates among other things, when an individual is treated as resident in India. The said section also stipulates conditions when an individual is treated as not ordinary resident. In other words, when an individual satisfies the conditions laid down for 'resident', he first becomes a 'not ordinary resident' and then later becomes aordinary 'resident' (if we may call so). The intention of the legislature in carving out the concept of 'not ordinary resident' appears to be giving certain time or relief to such individual who was erstwhile a non-resident till he becomes ordinary resident.

The intention would be vivid when we juxtapose Section 6 with Section 5, which deals with scope of total income. Section 6 has only a mundane task of determining whether a person in resident or not during a previous year, where as Section 5 deals with consequences on total income depending on the results of Section 6. Section 5 of ITA states that if an individual is resident, then his global income is subjected to tax in India. If an individual is not a resident (that is a non-resident), then his total income would be restricted to 'received or deemed to be received in India' or 'accrues or arises or deemed to accrue or arise to him in India' and would not bring into the tax the 'accrues or arises to him outside India'.However, in case of 'not ordinary resident', the scope of total income as stipulated to a resident would apply with only exception that the 'income which accrues or arises to him outside India' shall not get included unless it is derived from a business controlled or profession set up in India. The summarised version is as under:

| Status | Received or Deemed to be Received in India | Accrues or Arises or is deemed to accrue or arise to him in India | Accrues or Arises to him outside India |
|---|---|---|---|
| Resident | Scoped -In | Scoped-In | Scoped-In |
| Not Ordinary Resident | Scoped-In | Scoped-In | - * |
| Non-Resident | Scoped-In | Scoped-In | - |

* scoped-In only if such income is derived from a business controlled in or a profession set up in India

From the above, it is evident that if the impact of Section 5 on 'not ordinary resident' and 'non-resident' is similar. The position would continue till the individual continues to be 'not ordinary resident'. Once the individual stops being 'not ordinary resident' and becomes 'resident', then the global income would be subjected to tax.

Hence, in absence of shelter of status of 'not ordinary resident', the non-resident would become resident immediately on satisfying the conditions laid down for resident, which would make his income outside India immediately taxable in India without any additional time. Hence, the concept of 'not ordinary resident' is to provide a respite to the non-resident so that he can make adequate arrangements to his affairs.

**Conditions for Resident and Not Ordinary Resident:**

**Pre- Amendment:**

**Resident:**

An individual is said to be resident in India in any previous year, if he:

- is in India in that year for a period(s) amounting in all to 182 days or more (say 'C1') or
- having within 4 years preceding that year been in India for a period(s) amounting in all to 365 days or more and is in India for a period(s) amounting in all to 60 days or more in that year (say 'C2')

In other words, an individual is said to be resident in India, if he satisfies any of the C1 or C2. C1 is a pretty simple text. An individual has to check whether he has stayed in India during the previous year for more than 182 days or not. If he has stayed, then he is resident of India. If not, he has to proceed to check C2 to decide the status.

C2 is bit complicated when compared to C1. C2 stipulates two conditions to be satisfied to call an individual as resident during the previous year. One being that the individual has to be in India for more than 365 days in preceding 4 years to the previous year. If he has satisfied that condition, then he has to proceed to examine the second condition of C2. The second condition stipulates that he has to be in India for a period of 60 days or more during the previous year. On satisfying the second condition, then he becomes resident in light of C2. That is an individual having stayed less than 182 days in a previous year but more than 59 days can be a resident, if he has satisfied the 365 days in 4 years test.

Explanation 1(a) to Section 6(1) states that a citizen of India, who leaves India in a previous year as a member of crew of an Indian Ship or for the purposes of employment, the 60 days in second condition in C2 can be substituted with 182 days. In other words, if the individual who is tested is an individual leaving India for purposes of employment, then he shall not be treated as resident even his stay is more than 59 days but not exceed 182 days.

**Not Ordinary Resident:**

As stated in the opening remarks, an individual may not be called as resident immediately after satisfying C1 or C2. He should be examined whether he could enjoy the status of 'not ordinary resident' before becoming ordinary resident. An individual is said to be 'not ordinary resident', if he satisfies the conditions mentioned in Section 6(6)(a). The said section states that an individual would be 'not ordinary resident' during the previous year:

- If he was a non-resident in India in 9 out of 10 years preceding the previous year (say C3) or
- Has not during 7 years preceding previous year stays in India for 730 days or more (say C4)

If the individual satisfies any of the conditions C3 or C4, then he is said to be 'not ordinary resident' for that previous year. Every year the same test has to be repeated by the individual and the year he stops satisfying C3 or C4, then he would be treated as ordinary resident and his entire income would be subjected to tax in India. As long as he is 'not ordinary resident' his outside India income shall not be included unless in exceptional circumstances.

**Post Amendment:**

Finance Act, 2020 has amended the provisions of Section 6. The changes which have a major impact are listed for better clarity and discussion:

- New clause to Explanation 1has been added to Section 6(1)
- New sub-section (1A) has been inserted
- New sub-sections namely (c) and (d) has been added to Section 6(6)

**New clause to Explanation 1has been added to Section 6(1)**

As stated earlier, Section 6(1) deals with conditions for treating an individual as resident. Explanation 1 (a) provides a relief to citizen of India, who is leaving India during a previous year as member of crew or for the purposes of employment, then 60 days appearing in second condition in C2, shall be replaced with 182 days. As discussed earlier, this provides a greater relief to person who leaves India during the previous year for purposes stated therein to be treated as not a resident if he was in India for 59 days or more and less than 182 days.

However, it was noticed that certain individuals were using the above relaxation as tax avoidance measure and planning visit and stay in India so that they do not meet the threshold of 182 days. In other words, such individuals were staying for more than 59 days and making sure that they do not exceed 182 days so that they can continue to be a non-resident.

In order to curb such practices, a new clause vide (b) to Explanation 1 to Section 6(1) has been brought by Finance Act, 2020, wherein an individual who is a citizen of India or person of Indian Origin (for brevity 'PIO'), who being outside India, comes on a visit to India in a previous year, then 60 days appearing in second condition of C2 has to be replaced with 120 days. In other words, the time limit which was available by clause (a) for 182 days has now been reduced to 120 days. However, such restriction of number of days to 120 shall apply to only such citizens or PIOs who have total income (excluding foreign income) exceeding INR 15 lakhs. In all other cases, the time limit of 60 days appearing in second condition to C2 shall be extended to 182 days.

By inserting the above clause, the Finance Act, 2020 aims to achieve that citizens or PIOs who have total income (excluding foreign income) [referred herein after as to 'Indian total income'] exceeding INR 15 lakhs qualify to become resident even he stays for a shorter duration of 120 days in the previous year. A question may arise, what benefit would tax authorities would achieve by reducing 62 days from the earlier quota of 182 days. The response would be by making sure such citizen or PIO spends less time in India may expose such citizen or PIO as resident in other country, which he would have been escaping hitherto because of 182 days.

Further, another important aspect that can be seen because of the amendment is even though there may not be any change in scope of total income for such citizen or PIO because of reduced duration, he would be qualified as resident or not ordinary resident instead of non-resident. This would have a greater consequence in case of payments made to such citizens or PIOs. The rates that would be applicable for deduction would be such rates as applicable to residents and not to non-residents .

If the citizen or PIOs, Indian total income does not exceed INR 15 lakhs, he has nothing to worry and he continues to be guided by the position which was existing prior to Finance Act, 2020. He can stay for a period of 182 days and still be a non-resident for that previous year.

**New sub-section (1A) has been inserted:**

Finance Act, 2020 has inserted a new sub-section (1A) to the Section 6. The new sub-section is first of its kind in Indian tax law. The said sub-section states that notwithstanding to the conditions mentioned in Section 6(1) – that is C1 or C2, a citizen of India who is having total income (excluding foreign income) exceeding INR 15 lakhs during the previous year **shall be deemed to be resident in India in that previous year, if he is not liable to tax in any other country or territory by reason of his domicile or residence or any other criteria of similar nature.**

In other words, a citizen of India (PIO is not covered) having Indian total income exceeding specified threshold would be deemed to be resident in India if he is not a resident in any other country. Such citizen need not satisfy the conditions of 182 days stay or 365 days in 4 years and 60 days in previous year test. He shall be deemed to be resident even he has not spent a single day in India if he is not a resident elsewhere as per such country's local tax laws.

For example, a citizen of India earns rental income of INR 16 lakhs during Financial Year 20-21 and he stays in United States of America (for brevity USA). Assuming he is not a resident of USA for the Financial Year 20-21, then he shall be deemed to be a resident of India by virtue of Section 6(1A) despite of the fact that such citizen has not come to India during Financial Year 20-21 for a single day.

The Government wants to curb practices of certain high networth individuals who were planning to make sure that they do not become resident of any jurisdiction to avoid payment of taxes. In order to curb such practices the stateless person is deemed to be resident of India if he satisfies certain conditions.

**New sub-sections namely (c) and (d) has been added to Section 6(6)**

As discussed earlier, Section 6(6) deals with conditions to be satisfied to call an individual as 'not ordinary resident'. Finance Act, 2020 has inserted two sub-sections in Section 6(6) as a consequence to amendments to Section 6(1) and insertion of Section 6(1A). Let us understand the same.

Section 6(6)(c) states that citizen or PIO who is covered by Explanation 1(b) to Section 6(1) and becomes resident by staying in India for more than 120 days in previous year, will be continued to be a 'not ordinary resident' if he does not crosses the 182-day threshold.

Section 6(6)(d) states that a person who is deemed to be a resident of India in terms of Section 6(1A) is to be treated as 'not ordinary resident' and accordingly the foreign income (unless it is derived from a business controlled or profession setup in India) would not be taxable.

**Case Studies:**

Let us take certain case studies to understand the impact of amendment brought in by Finance Act, 2020.

**CS # 1:**

Mr AB is citizen of India. He stays in Switzerland for his employment purposes. He pays a visit to his parents in India during Christmas every year. For the Financial Year (FY) 20-21, he has visited and stayed in India for 135 days and left India prior to March 2021. Prior to FY 20-21, he has stayed in India more than 365 days during the 4 years preceding FY 20-21. What would be the status of Mr AB in India for FY 20-21 pre and post amendment. Assuming his total income (excluding foreign income) is INR 20 lakhs during FY 20-21 in India.

**Response:**

**Status (as per Pre-Amendment position):**

As stated earlier, an individual becomes resident in India if he satisfies any of the conditions mentioned in Section 6(1). Since he has stayed less than 182 days in India during FY 20-21, C1 gets failed. As far as C2 is concerned, Mr AB has to satisfy two conditions. One the stay should exceed 365 days in the preceding 4 years to FY 20-21, which he has satisfied. The second condition in C2 is that stay during FY 20-21 should not exceed 60 days. However by virtue of Explanation 1(a) to Section 6(1), the 60-day limit gets extended to 182 days if he leaves India during the FY 20-21 for purposes of employment. Since he has stayed 135 days and left India for the purposes of employment, the 182 days limit shall be applicable and he shall not be treated as resident in India for FY 20-21.

**Status (as per Post – Amendment position):**

As stated earlier, the Explanation 1(b) to Section 6(1) states that 60 days limit has to be restricted to 120 days if the citizen or PIO has total income exceeding INR 15 lakhs during FY 20-21. Since Mr AB has total income excluding foreign income exceeding INR 15 lakhs during FY 20-21 and his stay is more than 120 days, he shall be treated as 'not ordinary resident' for FY 20-21.

However, if Mr AB also satisfies the residence test in Switzerland, then he has to apply the tie-breaker test as specified in Article 4(2) of Indo-Swiss Confederation and accordingly zero in on the status. If the tie-breaker results in Switzerland as his resident jurisdiction, then applying provisions of Section 90(2) of ITA he may chose to be resident of Switzerland and the amendment would not affect him.

**CS # 2:**

Continuing with the above question, assuming all facts remain so, other than the fact that Mr AB has Indian total income of INR 13 lakhs. What would be the status post amendment?

**Response:**

Since the total income excluding foreign income is less than INR 15 lakhs, then the normal condition of 182 days would apply instead of 120 days. Hence, Mr AB would be a non-resident during the FY 20-21.

**Summing Up:**

As understood from the above amendments, the Government of India is trying to catch up with such tax evaders who does not leave any stone unturned for evading payment of taxes. Even though such practices appear to be within four corners of the law, in long run would disincentivise honest tax payers. Hence, the changes are quite necessary to see that the Government leaves no stone untouched to make sure that taxes are being collected. Carving out exception for citizens or PIOs whose Indian total income does not exceed INR 15 lakhs would make sure that genuine citizens or PIOs are put out of the ambit. We are confident that after a year or so, the number may be revisited and increased to higher limits adding many more to the exception.

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**GST**

## INTEREST ON CREDIT 'AVAILED' BUT 'NOT UTILISED' — RESURRECTION OF CONFLICT – 'OR' VS 'AND'

Contributed by CA Sri Harsha & CA Manindar

**Introduction:**

Whether interest is payable or not on the amount of tax credit that was wrongly availed but reversed without utilising the same is always a bone of contention between taxpayer and Revenue under Indirect Tax laws. Under the erstwhile CENVAT Credit Rules, 2004, Rule 14 as prevailing prior to 01.04.2012 provided for recovery of CENVAT Credit that has been taken or utilized wrongly or has been erroneously refunded. The said issue was originated from the use of the phrase ***"CENVAT Credit has been taken or utilized wrongly"*** in Rule 14.

The said Rule 14 was amended with effect from 01.04.2012 to provide for recovery of CENVAT Credit that has been *wrongly taken and utilised* or has been erroneously refunded. The above-mentioned phrase has been suitably amended as "CENVAT Credit has been wrongly taken and utilized" to put an end to this controversy. However, the amendment was not expressly notified to be retrospective. This has made the issue wide open and the litigation is continuing for more than a decade with respect to interest demanded for the periods prior to01.04.2012. The matter is now pending before the Supreme Court under the second round of litigation.

Coming to Good & Service Tax (GST) regime, *Sections73(1) and 74(1)*[1] of the Central Goods & Services Tax Act, 2017 (CGST Act) provides for recovery of input tax credit that was *wrongly availed or utilised*. The use of the phrase 'wrongly availed or utilised' marks invocation of same issue and litigation under GST regime as well. Notices are also issued by the Department to recover interest amounts in cases where credit was wrongly availed but reversed before utilisation. With the above backdrop, we will now analyse the issue based on jurisprudence evolved as on date under the erstwhile CENVAT Credit Rules, 2004 and under GST laws as well.

**Position in Erstwhile Era:**

**Rule 14 of CENVAT Credit Rules, 2004:**

As mentioned above, under the erstwhile CENVAT Credit Rules, 2004, Rule 14 provides for recovery of CENVAT Credit, which is as under:

*Where the CENVAT credit has been **taken or utilized wrongly** or has been erroneously refunded, the same along with interest shall be recovered from the manufacturer or the provider of the output service and the provisions of Sections 11A and 11AB of the Excise Act or Sections 73 and 75 of the Finance Act, shall apply mutatis mutandis for effecting such recoveries.*

[1]Section 73(1) is applicable in case other than those involving fraud, willful misstatement or suppression of facts while section 74(1) is applicable in cases involving fraud, willful misstatement or suppression of facts.

In view of the use of the language 'taken or utilised wrongly', Revenue proceeded to recover interest from the date on which CENVAT Credit was availed irrespective of the fact whether the availed credit was utilised or not. As mentioned in the introduction para, with effect from 01.07.2012, the referred language was amended with the phrase **'taken and utilised wrongly'.** However, the dispute whether interest is recoverable in cases where CENVAT Credit was availed but not utilised continued for the period prior to amendment. The main grounds on which the assessee was before the forums was that the interest which was intended to be collected by Revenue was compensatory in nature and hence in absence of utilisation, there was no loss accruing to the exchequer and accordingly no interest is required to be paid just because of an accounting entry dealing with availment. If at all the said erroneous credit was utilised, no doubt that there would be an interest liability which the assessee were ready to pay. In this connection, we would like to take you back to the judgments, wherein it was held that 'interest' under fiscal statutes is compensatory in nature and other jurisprudence which dealt with liability in case of erroneous availment of interest.

**Interest must be of compensatory character:**

Before we take up the jurisprudence on this issue, let us consider the essential principle related to collection of interest in fiscal statutes as laid down by the Supreme Court in the landmark judgment Prathiba Processors v Union of India[2] . In the said judgment, the Supreme Court has explained the distinction between 'tax', 'interest' and 'penalty' imposed under the fiscal laws. The relevant paras are as under:

*In fiscal Statues, the import of the words - "tax", "interest", "penalty", etc. are well known. They are different concepts. Tax is the amount payable as a result of the charging provision. It is compulsory exaction of money by a public authority for public purposes, the payment of which is enforced by law. Penalty is ordinarily levied on an assessee 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 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 (para 13)*

***(emphasis supplied)***

In the said landmark judgment of Supreme Court, the essential principle laid down with respect to collection of interest is that it must be compensatory in character and can be imposed only when the assessee withhold any tax amount when it is due and payable. Taking into consideration this principle, we will now proceed to examine the jurisprudence on this issue.

**Honourable Supreme Court's decision in Ind-Swift Laboratories Limited:**

In the case of Union of India vs Ind-Swift Laboratories Limited ,[3] the fact pattern was that the Respondents therein availed CENVAT Credit based on fake invoices from 01.04.2001 to 31.03.2006. The availed CENVAT Credit was utilised for payments or claimed refund in the months of February 2006, March 2006 and November 2006. Considering the said fact pattern, the Commissioner was of the view that the

[2]1996 (88) ELT 12 (SC)
[3]2011 (265) ELT (SC)

appropriate interest liability has to be borne by the Respondent on such wrongful availment of CENVAT credit. Pursuant to the Settlement Commission order, Revenue has calculated the interest liability from the date of availment.

The Respondent approached Punjab and Haryana High Court wherein it was held that Rule 14has to be read down to mean that where CENVAT credit has been taken **and** utilized wrongly, interest should be payable on the CENVAT credit from the date the said credit had been utilized wrongly and that interest cannot be claimed simply for the reason that the CENVAT credit has been wrongly taken, as such availment by itself does not create any liability of payment of excise duty. Aggrieved by this order, the Revenue approached Honourable Supreme Court wherein it was held as under vide para 17 of the order in the matter of Ind-Swift Laboratories Limited (supra) as under:

*In our considered opinion, the High Court misread and misinterpreted the aforesaid Rule 14 and wrongly read it down without properly appreciating the scope and limitation thereof. A statutory provision is generally read down in order to save the said provision from being declared unconstitutional or illegal. Rule 14 specifically provides that where CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest would be recovered from the manufacturer or the provider of the output service.* ***The issue is as to whether the aforesaid word "OR" appearing in Rule 14, twice, could be read as "AND" by way of reading it down as has been done by the High Court. If the aforesaid provision is read as a whole we find no reason to read the word "OR" in between the expressions 'taken' or 'utilized wrongly' or has been erroneously refunded' as the word "AND". On the happening of any of the three aforesaid circumstances such credit becomes recoverable along with interest.***

***(emphasis supplied)***

In our view, the facts involved in this case before the Honourable Supreme Court were on a different footing and the dispute is arising from an order of the settlement commission. Further, reference was not made to Prathiba Processors decision (supra) and the aspect of interest being compensatory nature was not examined in this context. Further, the Court has opined that reading down of the law 'or' as 'and' is not permitted by reasoning out that such exercise is generally undertaken in interpreting statutes only to save a provision from being declared as unconstitutional or Illegal.

However, it is a well-established legal principle that the word 'or' should be read as 'and' or vice versa if the literal interpretation of the provision would lead to any absurdity or would render the provision nugatory. With due respect to the decision of Honourable Supreme Court, whether the word 'or' can be read as 'and' has not been examined in this context by taking into consideration the principle that interest is of compensatory nature, which in our opinion may not be a valid precedent.

**Honourable Karnataka High Court'sdecision in matter of Bill Forge Private Limited:**

After the decision of the Honourable Supreme Court in the matter of Ind-Swift Laboratories Limited (supra), the said issue was considered by Honourable Karnataka High Court in the case of CCE vs. Bill Forge Private Limited[4] wherein the Respondent availed CENVAT Credit wrongly on Capital Goods before their actual receipt. Upon pointingthe lapse, the same was reversed without utilisation. The Revenue demanded interest from the date of availment of CENVAT Credit which was struck down by CESTAT. In this

[4]2012 (26) STR 204 (Kar)

context, the Karnataka High Court after considering Rule 14 and the Apex Court's decision in Ind-Swift (supra) held as under:

*A reading of the aforesaid provisions makes it very clear that the said provision is attracted where the Cenvat Credit hasbeen taken or utilized wrongly or has been erroneously refunded.* ***In view of the aforesaid judgment of the Apex Court, the question of reading the word 'and' in place of 'or' would not arise. It is also to be noticed that in the aforesaid Rule, the word 'avail' is not used. The words used are 'taken' or 'utilized wrongly'.*** *Further the said provision makes it clear that the interest shall be recovered in terms of Section 11A and 11B of the Act. (para 19)*

*According to the Revenue, once tax is paid on input or input service or service rendered and a corresponding entry is made in the account books of the assessee, it amounts to taking the benefit of Cenvat credit. Therefore interest is payable from that date, though, in fact by such entry the Revenue is not put to any loss at all. When once the wrong entry was pointed out, being convinced, the assessee has promptly reversed the entry. In other words, he did not take the advantage of wrong entry. He did not take the Cenvat credit or utilized the Cenvat Credit. It is in those circumstances the Tribunal was justified in holding that when the assessee has not taken the benefit of the Cenvat credit, there is no liability to pay interest. Before it can be taken, it had been reversed.* ***In other words, once the entry was reversed, it is as if that the Cenvat credit was not available. Therefore, the said judgment of the Apex Court has no application to the facts of this case. It is only when the assessee had taken the credit, in other words by taking such credit, if he had not paid the duty which is legally due to the Government, the Government would have sustained loss to that extent. Then the liability to pay interest from the date the amount became due arises under Section 11AB, in order to compensate the Government which was deprived of the duty on the date it became due. Without the liability to pay duty, the liability to pay interest would not arise. The liability to pay interest would arise only when the duty is not paid on the due date. If duty is not payable, the liability to pay interest would not arise.*** *(para 22)*

***(emphasis supplied)***

In view of the above excerpts, it is clear that the Honourable Karnataka High Court has distinguished the facts involved in the case before them with those of Ind-Swift Laboratories Limited (supra) and accordingly held that mere wrong availment of CENVAT Credit is different from CENVAT Credit that was wrongly taken or wrongly utilised. Accordingly, held that the principle laid down by Apex Court in Ind-Swift Laboratories Limited (supra) is not applicable to the facts of the case before them. The word 'taken' as used in Rule 14 is considered on a different footing from the word 'availed'. Further, the Honourable Karnataka High Court has refereed to Prathiba Processors Limited (supra) and interpreted the provisions of Rule 14 based on the principle that interest is compensatory in nature.

**Honourable Madras High Court's decision in Sundaram Fasteners Limited& Sri Kumaran Alloys (P) Ltd:**

Subsequent to the above decision of Honourable Karnataka High Court, the said issue has been considered by the Honourable Madras High Court in the case of CCE vs. Sundaram Fasteners Limited[5] wherein the facts involved are that CENVAT Credit was availed on CTD bars used in construction of foundation for machinery.The availed CENVAT Credit was reversed without utilisation. The Madras High

[5]2014 (304) ELT 7 (Mad)

Court by relying onInd-Swift Laboratories Limited (supra) held that interest is payable from the date of availment. The relevant extracts are reproduced as under:

***In the light of the above findings of the Hon'ble Apex Court, particularly with regard to Rule 14 of the Act, we do not find any justifiable ground to accept the plea of the assessee based on the decisions relied on by the assessee*** *reported in 1996 (81) E.L.T. 3 (S.C.), 2004 (174) E.L.T. 422 (All.) and 2012 (279) E.L.T. 209 (Kar.)*[6]

*The learned counsel for the assessee submitted his notes on the contention that interest being compensatory and that question of payment of interest would arise only where the principal is due. To that contention, by placing reliance on the decision reported in 1996 (88) E.L.T. 12 (S.C.) - Prathiba Processors v. Union of India as well as the decision reported in 2007 (215) E.L.T. 3 - CCE v. Bombay Dyeing, the learned counsel for the assessee contended that, when credit has been reversed before utilization, the same did not amount to taking credit.*

***We reject the arguments of the assessee. In the said decisions, it has been no doubt held that interest is compensatory and the question arises only where principal is due. If one gets into the background of the scheme of Modvat credit, his contention that the assessee has taken credit, does not merit consideration, particularly so, in the background of Rule 14. As it stands today, one has to go only by the provisions contained in Rule 14*** *and nothing beyond.*

***(emphasis supplied)***

Thus, the Honourable Madras High Court has followed theInd-Swift Laboratories Limited (supra) of Honourable Supreme Court by rejecting the findings of Honourable Karnataka High Court in Bill Forge Private Limited (supra). Further, on the aspect that interest is compensatory in nature, the Honourable Madras High Court held that the contention of the assessee that interest arises only where the principal is due is not applicable having regard to the background of CENVAT Credit and Rule 14.

In our view, the principle that interest is compensatory in nature would equally hold good with respect to outstanding tax amount payable or recovery of CENVAT Credit for the reason that CENVAT Credit is nothing but a tax paid on input transactions and available for set-off with output tax payable.

Interestingly, within few days of the judgment given by Honourable Madras High Court (supra), the said issue was also considered by Honourable Madurai Bench of the Madras High Court in the case of CCE vs. Strategic Engineering (P) Ltd[7] . However, the Honourable Madurai Bench without cognizance of the decision given in Sundaram Fasteners Limited (supra), relied on decision of the honourable Karnataka High Court in the matter of Bill Forge Private Limited (supra) and held that interest is not payable when the CENVAT Credit was merely availed but not utilised.

The Honourable Madras High Court has again considered this issue in the case of CCE vs. Sri Kumaran Alloys (P) Ltd [8], wherein the facts involved are that the Respondent was claiming SSI exemption and availed CENVAT Credit on capital goods received from July, 2008 to March, 2009 and the CENVAT credit

[6]Decision in Bill Forge Private Limited by Honourable Karnataka High Court
[7]2014 (310) ELT509 (Mad)
[8]2019 (365) E.L.T. 305 (Mad)

taken was kept in balance in their CENVAT credit account in March, 2009 and carried over up to March, 2011. Having cognizance of these facts, the Department proceeded to recover interest from the date of availment. Prior to the matter reaching the Honourable Madras High Court, the CESTAT Chennai has ruled out in favour of the Respondent for the reason that the Revenue did not dispute the fact that the credit availed remained as mere entry in books.

In the above factual backdrop, the Honourable Madras High Court examined the above decisions pronounced earlier and has upheld the view expressed in Sundaram Fasteners Limited (supra) that interest is payable from the date on which CENVAT Credit was wrongly taken. Though the question of law has been decided in favour of the Revenue, interestingly, the Madras High Court has not accepted to apply the said legal proposition to the facts of the said case by taking into consideration the fact that credit availed remained as mere entry in books. The relevant extracts are reproduced as under:

**The above referred decision in Sundaram Fasteners Limited (supra) was rendered on 30-1-2014 and it appears that the same was not placed before the Division Bench, while the decision was rendered in the case of Strategic Engineering (P) Ltd. (supra), which was rendered on 10-2-2014.** As observed earlier, the amendment to the statute not being clarificatory cannot be retrospective. Thus, an amendment to a statute done prospectively cannot be interpreted to be an answer to doubts which had arisen earlier to the amendment. Thus, we are not persuaded to apply the decision in Strategic Engineering (P) Ltd. (supra).

***For all the above reasons, the first substantial question of law, as framed above, is answered in favour of the Revenue and against the assessee. However, for the reasons assigned by us in the preceding paragraphs and the discussions contained therein, we dismiss the appeal of the Revenue and confirm the order of the Tribunal for the reasons stated therein and decide the question of law in favour of the Revenue.*** No costs."

***(emphasis supplied)***

In view of the above decision given by the Honourable Madras High Court, a view is possible the Honourable Madras High Court is also of the understanding that the facts of Ind-Swift Laboratories Limited (supra) stands on a different footing and cannot be applied in general.

**Subsequent Conflicting Judgments, Reference to Larger Bench and Appeal to Honourable Supreme Court:**

Subsequent to the above decisions of Honourable Karnataka High Court and Madras High Court, the issue was considered by various judicial forums and are divided. There are instances [9] where the Honourable CESTAT Chennai Bench has followed the decision of Honourable Karnataka High Court while the Honourable CESTAT Bangalore Bench followed the decision of Honourable Madras High court.

[9] 2014 (36) S.T.R. 451 (Tri. - Chennai)& 2017 (49) S.T.R. 357 (Tri. - Bang.)

In view of the contrary views expressed by Honourable Karnataka High Court and Madras High Court on the requirement to pay interest for mere availment of CENVAT Credit without its actual utilisation, the Honourable CESTAT Bangalore Bench in the case of J.K.Tyre and Industries Limited vs. Asst.Commr. of C.Ex[10], has referred the matter to the larger bench. The relevant extracts are as under:

*Inasmuch as there are two contrary decisions of the High Courts, one by the Hon'ble Karnataka High Court and the other by the High Court of Madras and inasmuch as the said issue keeps on repeatedly coming up before the Tribunal. I deem it fit to refer the matter to the Hon'ble President for constitution of a Larger Bench on the following question of law : -*

***When the wrongly availed credit is reversed before utilising the same, whether interest liability would arise in respect of the same or not?***

***(emphasis supplied)***

However, the larger bench of CESTAT in the case of J.K.Tyre and Industries Limited vs. Asst.Commr. of C.Ex[11] instead of addressing the issue involved by answering the above question of law, held that in case of contrary High Court decisions including the one of the Jurisdictional High Court, the decision of the Jurisdictional High Court is required to be followed and accordingly followed the decision of Honourable Karnataka High Court in Bill Forge Private Limited (supra) and held that interest is not payable.

The Chhattisgarh High Court in the case of CCE vs. Vandana Vidyut Limited[12] has disagreed with the view of Honourable Karnataka High Court in Bill Forge Private Limited (supra) and it was held vide para 12 as under:

***Since Learned Counsel for the Respondent has heavily relied upon Bill Forge Pvt. Ltd. (supra), we consider it proper to discuss the same also even though it is not binding on us. We regret our inability to concur with the discussion in paragraph 22 of the same that the mere taking of Cenvat credit wrongly by making entries would not invite liability for interest unless it had been utilised also. In our respectful opinion, that would be against the discussion and the law laid down in Ind-Swift Laboratories Ltd. (supra) that the liability for interest arises on the wrong taking independent of utilisation.***

***(emphasis supplied)***

The above decision of Chhattisgarh High Court in appealed[13] before the Honourable Supreme Court and the matter is pending for disposal. Accordingly, the entire controversy has landed up before the Honourable Supreme Court one more time after Ind-Swift Laboratories Limited.

[10]2015 (324) E.L.T. 571 (Tri. - Bang.)
[11]2016 (340) E.L.T. 193 (Tri. - LB)
[12]2016 (331) E.L.T. 231 (Chhattisgarh)
[13]2016(336) ELT A087 (SC)

**Amendment to Rule 14— Prospective or Retrospective**

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On the other hand, after the amendment to Rule 14 effective from 01.04.2012, it was argued in several cases that the amendment is clarificatory in nature and is retrospective. Some of these[14] cases are decided in favour of the assessee while others are against. Therefore, the issue whether the amendment is clarificatory in nature having retrospective implications or not is also not yet decided. As we are analysing the litigation under CENVAT Credit Rules, 2004 in order to interpret the language of section 73 and 74 of CGST Act, 2017, we are not detailing out these cases.

**Recent perspective on 'Or' vs 'And' Conflict:**

Recently, the Honourable CESTAT Mumbai has considered this issue in the case of Vodafone South Limited vs. CST[15] and has brought a new perspective to this 'or' vs 'and' conflict. The CESTAT Mumbai observed that it is logical to collect interest if the CENVAT Credit is wrongly availed or erroneously got refunded. However, it is unusual to contemplate a scenario that utilization can go wrong as it is solely meant for the purpose of discharge of tax/duty liability. Therefore, the phrase 'taken or utilised wrongly' can only mean utilisation after credit has been wrongly taken. The relevant extract under para 14 is reproduced as under:

*From a perusal of rule 14 of CENVAT Credit Rules, 2004 and, **in particular, of the disjunctive collation of 'taken', 'utilized' and 'erroneously refunded' with the expression 'wrongly' qualifying, not all three but only two of these, it would appear that the assumption of credit and a refund of credit, if wrong, would have to pay the price in the form of 'interest.' However, it is unusual for 'utilization' to be qualified with 'ineligibility' on its own as 'utilization' is solely for the purpose of discharge of tax/duty liability which, even if not warranted, does not, by any stretch of usage, behove description as 'wrongly.' Such transfer of epithet, borne out of drafting frailty, can only reasonably mean 'utilization' after having been wrongly taken and, therefore, ineligible.** When the allegation of ineligibility is sought with fastened on the taking of the credit, demonstration by the assessee of the superfluity of such disputed credit to the integrity of its accountal, and acceptance thereof, stands on an entirely different footing from that resolved by the Hon'ble Supreme Court and the decisions that followed therefrom referred to supra. In determining the submissions of the appellant herein in de-novo proceedings, the adjudicating authority is also directed to bear in mind the limits of applicability of the referred decisions.*

***(emphasis supplied)***

In view of the above jurisprudence under CENVAT Credit Rules, 2004, it is clear that various contradicting views are expressed by courts and the matter is yet to attain finality. In light of the above discussion, the essential questions that are required to be answered on this issue are as under:

[14]2019 (9) TMI 886 - Cestat Kolkata, 2019 (365) E.L.T. 305 (Mad.), 2017 (49) S.T.R. 331 (Tri. - Mumbai)
[15]2020 (3) TMI 320 - CESTAT Mumbai

- Whether principle that interest is compensatory holds good for cases of wrong availment of CENVAT Credit?
- Whether legal proposition in Ind-Swift Laboratories Limited (supra) is fact driven or applied in general?
- Whether non-reading of 'or' as 'and', lead to a state that interest obligation arises even in there is no revenue loss?
- Whether subsequent amendment to Rule 14 is prospective or retrospective?
- Whether use of phrase 'credit taken or utilised wrongly' involves drafting error would mean 'credit utilised after having been wrongly taken'?

**Position under GST Law:**

With the above understanding of jurisprudence under CENVAT Credit Rules, 2004 we will now proceed to examine the position under GST law. As mentioned above sections 73(1) and 74(1) of the CGST Act, 2017 provides for recovery of input tax credit that was wrongly availed or utilised. Against the findings of the Honourable Karnataka High Court in Bill Forge Private Limited (supra), the phrase used under these sections is 'wrongly availed or utilised' as against the phrase 'wrongly taken or utilised' used under the erstwhile CENVAT Credit Rules, 2004. In order to analyse this issue under GST law, the provisions of section 73(1)[16] is reproduced as under:

Where it appears to the proper officer that ***any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised for any reason,other than the reason of fraud or any wilful-misstatement or suppression of facts to evade tax***, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, *requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder.*

In view of the above reproduced provisions of section 73(1), the phrase ***'where input tax credit has been wrongly availed or utilised for any reason'*** has been preceded by the phrase 'tax has not been paid, or short paid or erroneously refunded'. **The phrase 'wrongly availed or utilised' has to be interpreted keeping in mind the meanings of the phrase 'tax not paid, short paid, erroneously refunded' and the objective of section 73**. All these phrases signify non-payment of tax or erroneous claim of refund causing loss to the exchequer.

In the humble opinion of the paper writers, the interpretative principle *'noscitur a sociis'*[17] has to be applied in this context. Accordingly, the phrase 'wrongly availed or utilised' should also be understood as situations causing loss to the exchequer. Further, the use of the word 'or' in the phrase 'wrongly availed or utilised' is possibly to recover or to ensure reversal of credit involved in cases where credit was wrongly availed but not utilised as non- reversal of the wrongly availed credit is likely to cause utilisation in future thereby causes loss to the exchequer.

[16]Provisions of section 73(1) and 74(1) are in Pari Materia. Hence reference was made only to section 73(1) to avoid repetition.

[17]a doctrine or rule of construction which provides that the meaning of an unclear or ambiguous word (as in a statute orcontract) should bedetermined by considering the words with which it is associated in the context

The Honourable Patna High Court, recently in the case of Commercial Steel Engineering Corporation vs. State of Bihar[18] , has examined whether the provisions of section 73(1) can be invoked in a case where transitional credit was availed and reversed in electronic credit ledger without utilisation and it was held as under:

*I have reproduced the relevant provisions of the 'BGST Act' which finds mention in the discussion held forready reference. The legislative intent present in these provisions is eloquent and I am in no confusion to hold that be it a charge of wrong availment or utilization, each is a positive act and it is only when such act is substantiated that it makes the dealer concerned, liable for recovery of such amount of tax as availed from the input tax credit or utilized by him but in each of the two circumstances, the tax available at the credit of the dealer concerned must have been brought into use by him thus, reducing the credit balance.* ***A plain reading of Section 73 would confirm that it is only on such availment or utilization of credit to reduce tax liability, which is recoverable under Section 73(1) read alongside the other provisions present thereunder. In fact the position is made even more clear by reading the said provision alongside sub-section (5), (7), (8), (9) to (11).***

***Had it been a case where the credit shown in electronic ledger, was availed or utilized for meeting any tax liability for any year, there would be no error found in the action complained but it would be stretching the term 'availment' beyond prudence to treat the mere reflection of the transitional credit in the electronic credit ledger as an act of availment, for drawing a proceeding under Section 73(1) of 'the BGST Act'.*** The provisions underlying Section 73 is self eloquent and it is only if such availment is for reducing a tax liability that it vests jurisdiction in the assessing authority to recover such tax together with levy of interest and penalty under Section 50 but until such time that the statutory authority is able to demonstrate that any tax was recoverable from the petitioner, a reflection in the electronic credit ledger cannot be treated as an 'availment'.

***(emphasis supplied)***

Thus, the Honourable Patna High Court has opined that the objective of Section 73 is to recover taxes or input credit that was due to be recovered and held that if the availment or utilisation has not resulted in reduction of tax liability, the provisions of section 73 cannot be invoked to recover or ensure of credit along with interest and penalty.

While expressing the above views, the Honourable Patna High Court has considered the decision of Honourable Supreme Court in Ind-Swift Laboratories Limited (supra) and has distinguished the same based on facts. The decisions of Honourable Karnataka High Court and Madras High Court and other conflicting judgments were not considered. Therefore, the possibility of overruling the proposition laid down in this case by Honourable Patna High Court cannot be ruled out.

[18] 2019(28)GSTL579(Patna)

**Conclusion:**

Immediately, after the introduction of GST, the issue whether interest is payable on gross tax liability or o net tax liability after adjustment of credit has popped up, after extensive litigation and with the latest decision of GST Council to give retrospective effect to the amendment under Section 50 to CGST Act, the same has been eventually settled in favour of tax payer. As mentioned, notices are issued under GST law to recover interest in cases of wrong availment of credit but reversed without utilisation of the same.

Considering the above discussed conflicting judgments under erstwhile CENVAT Credit Rules, 2004, there is a great possibility that this issue would also be subject to extensive litigation and conflicting views are possible in the same manner as interest payable on gross or net tax liability. The conflict whether 'Or' should be read as 'And' or not would continue. Hence, it is strongly recommendable that the GST Council takes this aspect in upcoming meetings and put an end to the same as they did for Rule 14 in erstwhile law to contain the possible litigation.

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