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By

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Dear Readers,

Greetings for the season!

In this edition, we bring to you certain important articles on various aspects.

We have penned an article on 'Interesting Issues in Arrest and Interplay of GST laws, IPC and PMLA', which deals with the question whether completion of assessment is mandatory to initiate prosecution under GST laws, for which the Supreme Court has answered in negative. This judgment is important as it gives wide powers to the taxation authorities to tackle with the economic frauds. Further, in the article, we also discussed the interplay between GST laws, IPC and PMLA for the trending offence of circular trading.

We have also brought an article, which deals with the recent amendments made to Foreign Contribution Regulation Act and rules made thereunder. I request everyone to read the same to keep yourself updated with the changes which effect your businesses.

The CBDT has brought in new guidelines in suppression of the existing guidelines pertaining to compounding of offences. An article detailing and explaining the new guidelines are also part of this edition.

MCA has notified the date for implementation of Ind AS 116 from 1st April 19. In this regard, an article on how the said new accounting standard transforms the way of accounting of leases is also covered in this edition.

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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GST

INTERESTING ISSUES IN ARREST AND INTERPLAY OF GST LAWS, IPC AND PMLA

Contributed by CA Sri Harsha

The recent decision[1] of Supreme Court which has upheld the decision of Telangana & Andhra Pradesh High Court in the matter of PV Ramana Reddy & Others v. Union of India & Others[2] , wherein the High Court has held that arrest under goods & services tax laws (GST laws) is not dependent on the assessment, gives power to the authorities to tackle more efficiently with the economic frauds. In other world, the said judgment also gives power to authorities to intimidate genuine taxpayers and subject them to arrest. Hence, either appropriate changes to the legislation are to be done or instructions shall be laid by Central Board of Indirect Taxes & Customs (CBIC) when it comes for implementing the arrest provisions to see that genuine taxpayers are not harassed or subjected to intimidation and personal liberties are safeguarded.

In this article, we shall deal with certain issues pertaining to arrest and related by examining various judgments of different High Courts.

Allahabad High Court - Govind Enterprise's case[3] :

Facts & Allegations:

Petitioner has huge inward supplies but very nominal outward supplies. The bank account given at the time of registration has very few transactions. Investigation revealed that there was another bank account and there were huge cash deposits. Revenue filed First Information Report (FIR) under Section 420, 467, 468, 471, 34, 120B of Indian Penal Code (IPC).

The Revenue alleged that the Petitioner has dealt fraudulently with a dishonest intention, by submitting false documents, with an intention to evade taxes, obtained registration. Thereafter took inward supplies and passed on goods to the end users, without generating outward invoices, received money in cash and deposited in bank account which is not mentioned at time of registration.

Contentions of Petitioner:

Petitioner has contended that no case has been filed under the state goods and services tax act (ST Act) and no assessment has been done. Since assessment is not done, there cannot be any arrest under the state act. Petitioner further contented that since ST Act is a complete code, FIR filed under IPC is legally not sustainable.

[1] 2019 (5) TMI 1528 – Supreme Court
[2] 2019 (4) TMI 1320 – Telangana & Andhra Pradesh High Court
[3] 2019 (6) TMI 55 – Allahabad High Court

Petitioner stated that procedure under ST Act is that power to arrest under Section 69 of ST Act will trigger only if Commissioner has reasons to believe that an offence is committed by taxpayer as mentioned in Section 132(1)(a),(b),(c) and (d) of ST Act. It was the contention that first a proceeding has to be taken under ST Act and then there can be an arrest after recording satisfaction and accordingly lodging of FIR straightaway is not possible.

Further, the Petitioner has contended that the assuming that offences mentioned in FIR are true in nature, in such case, there can be a maximum of penalty under Section 122 of ST Act and nothing more. Assuming further, that such offences are punishable under Section 132(1)(f)/(k) of ST Act, they become non-cognizable and bailable in terms of Section 132(4) read with 132(5) and (6). Further, by referring to Section 134, the Petitioner further contended that no court has power to take cognizance of an offence punishable under the ST Act except with previous approval of Commissioner. Accordingly lodging of FIR is illegal and proceeding could be initiated only under ST Act and not under IPC and prayed that such FIR has to be quashed and stay on arrest has to be granted.

Contentions of Revenue:

Revenue contended that Section 131 clearly suggests that the provisions of ST Act are without prejudice to the provisions of IPC and accordingly FIR is not required to be quashed. It is further pleaded that in matters of economic fraud, it would not be appropriate for court to grant stay of arrest, particularly, where FIR discloses commission of cognizable offence, as such relief may thwart investigation and discovery of further information as to who all are involved in such activity.

Revenue also pleaded that by virtue of Section 131 of ST Act, it is clear that the provisions of any other act or under any other law would be applicable despite of the fact that there is a confiscation made or penalty imposed under provisions of ST Act. Further, from the provisions of Section 135, it is clear that for offences under ST Act, there is a presumption of culpable mental state on the part of accused unless the contrary is proved by the accused to the Court.

Further, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and merely when its existence is established by a preponderance of probability. However, for offences under IPC, there is no such presumption available and accordingly the offences under IPC are qualitatively different from those punishable under ST Act. For the pleading that there is no legal restriction placed on lodging FIR and the same could be lodged even when the proceedings could be undertaken for recovery of tax, Revenue relied on apex court judgment in State of West Bengal v Narayan K Patodia 2000 4 SCC 447.

Decision of High Court:

The Court has made a reference to Section 26 of General Clauses Act, wherein it was stated that if an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.

By referring to the decision of apex court in the matter of State of Rajasthan v Hat Singh[4] , wherein the principle of double jeopardy was discussed with reference to Article 20(2) of Constitution read with Section 300(1) of IPC read with Section 71, the court embarked upon the principle that if the offences under two acts are same, then the such offence can be prosecuted once in light of Article 20(2). However, if the offences under both the acts are distinct and qualitatively different, then the protection under double jeopardy does not apply and accordingly the offence can be tried under both the laws separately.

The Court then took up the decision of Apex court in the matter of State (NCT of Delhi) v Sanjay[5] , where in the question before the Apex court was whether the provisions contained in Section 21, 22 and other sections of Mines and Minerals (Development and Regulation) Act, 1957 (MMDR Act) operate as bar against prosecution of a person who has been charged with allegation under Section 379 of IPC?

The Apex court after reading the act in a minute manner has held that if an offence which is mentioned in MMDR Act is executed by the accused, then such offence can be tried only under such act by the procedure laid under the said act. ***However, if an act or offence which constitutes an offence under IPC, then the provisions of MMDR Act shall not stand in a way to stop the applicability of IPC and such offence can be prosecuted under IPC without waiting or following the procedure under the MMDR Act.***

Further, the High Court by making reference to the judgment relied upon by Revenue in the matter of State of West Bengal v Narayan K Patodia stated that there is nothing in sales tax act which inhibited the powers of police to try an offence under IPC and hence the order of High Court, wherein the High Court has held that a case under sales tax act can only be tried by Bureau of Investigation and no police officer can take action, was set aside.

Accordingly, the High Court has held that there is no provision in ST Act which may suggest that provision of ST Act will override IPC. The High Court also held that there is no bar in ST Act on lodging FIR under IPC even though such offences are punishable under ST Act. Further, Section 131 impliedly saves provisions of IPC would apply notwithstanding to the fact that a penalty under ST Act is imposed makes the case stronger for revenue.

The High Court also brushed away the pleading of Petitioner that by virtue of Section 132(4) read with 132(5), the offences are non-cognizable and bailable, by stating that such restriction under 132(4) is only pertaining to offences under ST Act but not offences under IPC. Finally, the Court relying on the decision of Ajit Singh v. State of UP stated that where the prayer to quash FIR cannot be accepted there should not ordinarily be stay on arrest and considering the current matter pertaining to economic fraud, stay on arrest is rejected.

[4](2003) 2 SCC 152
[5](2014) 9 SCC 772

Madras High Court - Mahendra Kumar Singhi's case[6] :

Facts & Allegations:

Petitioners were facing prosecution before the revenue authorities for offences punishable under Section 132. The petitioners have several entities in nature of proprietorship concerns, partnership concerns or private limited companies in which petitioners are proprietor, partner and directors and the entities are engaged in supply of iron and steel. The allegation of the revenue was that petitioners were engaged in circular trading.

The modus operandi as alleged by revenue is that the petitioners were issuing invoices without actual movement of goods by issuing bogus E-Way bills. The same goods were traded among the said entities without actual movement of goods and thereby passing on the credit to other entities so that the other entity will use the credit to pay tax without having such credit in first place.

Contentions of Petitioner:

The petitioner has taken a stand that there cannot be punishment under Section 132 of ST Act unless the revenue is satisfied that there has been tax evasion or input tax credit wrongly availed or utilised which exceeds Rs 5 Crores, which will only be known when an enquiry and opportunity has been given to petitioners in order to put forward their cases.

The petitioners further relied on the judgement of Delhi High Court in the matter of MakeMyTrip (India) (P) Limited v Union of India (2016) 73 taxmann.com 31 (Delhi) and Bir.com Pvt Limited v Union of India MANU/DE/2740/2016, wherein it was held that arrest under Finance Act, 1994 cannot be done unless an assessment is made.

Contentions of Revenue:

The Revenue argued that it is not necessary in every case to follow the procedure of assessment and make a demand and recovery under Section 73 and 74 of the Act or to follow the procedure for levying the penalty under Section 126 and only thereafter launch a prosecution under Section 132 of Act.

The Revenue relied on the judgment of Rajasthan High Court in the matter of Bharath Raj Punj v Commissioner of Central Goods & Services Tax Department, Jaipur in WP 75 of 2019 dated 12.03.19, wherein it was held that there is no force in the contention that tax has to be first determined under Section 73 or 74 before initiating the prosecution under Section 132 of Act.

Decision of High Court:

The High Court stated that the Delhi High Court in the matter of Make My Trip (supra)was dealing with an arrest under Finance Act, 1994, where in the prosecution under said act was guided by Circular and which was not followed by the Revenue and accordingly the Delhi High Court directed such prosecution was bad in law.

[6]2019 (5) TMI 310 – Madras High Court

Further, under the Finance Act, the Delhi High Court has held that penalty and prosecution provisions will have to preceded by adjudication for the purposes of determining the evasion of tax. Hence, there is a pre-requisite under Finance Act to determine the liability and then proceed for prosecution since the prosecution is dependent on such liability.

However, the High Court in the instant matter stated that there in nothing in Section 132 of ST Act which puts such condition as existed under service tax law. ***Section 132 of ST Act as per Court will apply with all force the moment an invoice or a bill issued without, movement of goods or credit has been availed wrongly without waiting for assessment.*** Accordingly, the High Court held that prosecution can be launched prior to assessment and rejected the application for anticipatory bail of petitioners.

Madras High Court -Jayachandran Alloy (P) Limited's case[7] :

Just five days later, another bench of same High Court ***has held that Section 132 applies only after completion of assessment and not prior to that. The bench stated this is clear from the usage of the word 'commit' under Section 132 which mandates the revenue to fix the act of committal of the offence first before punishment is imposed. The bench has further relied on the judgment of Delhi High Court in the matter of Make My Trip to come to this conclusion.***

Rajasthan High Court – Bharath Raj Punj's case[8]

Facts & Allegations:

Petitioner 1 (Managing Director) of Petitioner 2, which is a company have filed writ petition seeking quashing and setting aside of summons issued by Commissioner of CT. The Revenue alleges that the petitioner has fraudulently availed credit of Rs 40 Crores by issuance of fictitious sale invoices and sister concerns of company and petitioner company had fraudulently availed credit of Rs 328 Crores. On conclusion of raid, the Revenue has arrested the Director and CFO.

Contentions of Petitioners:

Petitioner 1 states that he was issued summons and apprehends that he will be arrested in similar way as the director and CFO was arrested. Petitioner further relied on the judgment of Delhi High Court in the matter of MakeMyTrip (supra) and pleaded that Revenue cannot bypass a procedure before going ahead with arrest of person.

Petitioner further relied on Meghraj Moolchand Burad v Directorate General of GST in SLP (Criminal) 244/2019 dated 13.12.18, wherein the Apex Court has granted protection from arrest and permitted the accused to appear before GST (Intelligence). Accordingly, Petitioner pleaded that till date no determination of tax has been done either under Section 73 or 74, Revenue does not have right to arrest.

[7] 2019 (5) TMI 895 – Madras High Court
[8] 2019 (3) TMI 1187 – Rajasthan High Court

Contentions of Revenue:

Revenue contended that the judgment of Delhi High Court in the matter of MakeMyTrip (supra) does not apply since in that case revenue failed to establish that tax passed onto hotels was actually remitted by hotels or not. Further, they have pleaded that determination of tax under Section 73 or 74 is not necessary for invoking the power of arrest under Section 69 read with Section 132.

Decision of High Court:

The Court has held that the judgment of Delhi High Court in the matter of MakeMyTrip (supra) does not apply to the current facts, since in that case, the arrest was made without examining that the hotels were paying service tax or not. Since the responsibility to pay service tax was on hotels, the Delhi High Court said arrest of officials of MakeMyTrip is not in accordance with the law. Further, the Court also stated that the decision of Meghraj Moolchand Burad does not apply to the current facts, since said case deal with anticipatory bail. However, in the current case , it is issue of availment of credit based on fake input invoices. Accordingly, the Court has not allowed the writ petition and upheld the issuance of summons.

Bombay High Court – Prasad Purshottam Mantri's case[9] :

Facts & Allegations:

Writ Petition is filed seeking direction to the Revenue to follow the mandatory provisions of the Criminal Procedure Code before taking any further action.

Decision of High Court:

The Court making reference to the provisions of Section 132 of CT Act and Section 91 of Finance Act and placing reliance on the judgement of Delhi High Court in the matter of MakeMyTrip (supra) has reached a prima facie conclusion that arrest cannot be made unless assessment under Section 73 or 74 is done.

The court stated alternatively, in view of provisions of Section 167(2) of Code of Criminal Procedure, the petitioner will be entitled for bail if charge sheet is not filed within 60 days from the date of arrest. Since 57 days have already exhausted and Revenue is not confident of filing charge sheet within three days, the petitioner is granted bail.

Telangana & Andhra Pradesh High Court – PV Ramana Reddy's case[10]:

Facts & Allegations:

A challenge was made against summons issued by Superintendent (Anti -Evasion) of Hyderabad GST and invocation of penal provisions of Section 69 of CT Act. The Revenue alleged that the petitioners are group of entities have been floated or incorporated for claiming of credit without invoices. The bogus or fake invoices were used to avail and utilise the fraudulent credit by the recipient of such invoices.

[9] 2019 (6) TMI 107 – Bombay High Court

[10] 2019 (4) TMI 1320 – TG & AP High Court

The documents clearly showed circular trading without there being any actual trading. Apart from circular trading the petitioners have also created fake invoices to enable their friendly business entities to take credit. Revenue alleged that by increasing the turnover, they have defrauded the banks by taking several facilities from such banks.

Accordingly, the revenue contended that petitioners have carried on offences under Section 132 and such offences when read with Section 132(5) are cognizable and non-bailable.

Contentions of Petitioner:

There are various petitions with different set of facts. The common prayer is that the summons issued under Section 70 of CT Act has to be quashed. The Petitioners main grievance is about the possibility of their arrest and detention to custody.

Contentions of Revenue:

The Revenue's objection is that the writ proceedings are not to be converted into proceedings for anticipatory bail.

Decision of High Court:

The Court stated that the prayer from Writ Petition is akin to a prayer for Anticipatory bail. Since no FIR gets registered before the power of arrest under Section 69(1), the petitioners cannot invoke Section 438 for anticipatory bail. Hence, the only way to seek protection against pre-prosecution arrest is to seek a writ remedy.

The Court stated that the contention of the revenue that the writ proceedings cannot be converted into proceedings for anticipatory bail, is unacceptable because, if proceedings initiated by Commissioner under CT Act are criminal proceedings, then petitioner can very well invoke provisions of Section 438 to seek anticipatory bail. However, if the proceedings are not in criminal proceedings, then petitioner can invoke writ jurisdiction to pray for anticipatory bail. The Court stated that even if the inquiry under Section 70(1) is not by its nature a criminal proceeding, it is nevertheless a judicial proceeding by virtue of Section 70(2).

The Court further stated that a person who faces the threat of arrest in a criminal proceeding, may be entitled to involve Section 438 subject to two conditions: (1) That Section 438 applies to the state in which the prosecution takes place and (2) that the application of Section 438 is not ousted by any special enactment under which the person is prosecuted.

Where the applicability of Section 438 is specifically excluded, the High Court shall be extremely cautious while exercising the same power indirectly resorting to Article 226, the writ jurisdiction. Though the Constitution Bench of apex court stated that there is no bar for the High Court to grant bail under Article 226 despite of the fact that Section 438 is not applicable to such state, the High Court has to sparingly use such power, since it creates a second window for the relief which is consciously denied by making Section 438 not applicable in the State. The Court referred to the judgments of Km Hema Mishra v State of Uttar Pradesh 2014 (4) SCC 453 and Kartar Singh v State of Punjab 1994 (3) SCC 569.

Hence, the Court stated that the argument of Revenue that writ petition cannot be converted into application for anticipatory bail is not in accordance with the law, however due care has to be used for granting such relief under Article 226. The Court concluded that since the petitioners in the instant case does not deserve the sparing treatment, the bail is not granted under Article 226.

One more plea taken by the Petitioner is that as per Section 41 and 41A of CrPC prohibits arrest of person who complies and continues with a notice for appearance issued under Section 41A(1) of the CrPC. Since the petitioner are ready to comply with the notices, the arrest is not required. The Revenue contended that the provisions of Section 41 or 41A will attract only after arrest of persons as per Section 69(3).

The Court stated that on reading of Section 69(1) along with Section 132(5), it is evident that Commissioner can arrest a person if he has reasons to believe that such person has committed an offence under Section 132(1)(a) to (d). By virtue of Section 132(4) except offences mentioned from (a) to (d) of Section 132(1), all other offences are non-cognizable and bailable. That is to say all other offences under (f) to (l) under Section 132(1), the Commissioner can arrest only with the permission of Magistrate.

However, the provisions of Section 69(3), which are subject to the CrPC states that a person who has been arrested under Section 132(4), he shall be admitted to bail or in default of bail, forwarded to the custody of Magistrate. The Court stated that on close reading of Section 69 and Section 132, there exists incongruence, since Section 132(4) states that certain offences are non-cognizable and on other hand vide Section 69(3)(a) states that a person arrested for an offence under Section 132(4) has to be forwarded to the Magistrate. When the offence itself is non-cognizable, where would the Commissioner yield power to arrest so that using the provisions of Section 69(3) makes reference to the Magistrate.

Therefore, the Court stated that though in light of the fact that Section 69(1) authorises arrest only of persons who are believed to have committed cognizable offences and non-bailable offences but Section 69(3) deals with grant of bail and procedure for grant of bail even to persons who are arrested in connection with non-cognizable and bailable offences, the contention of the Revenue that provisions of Section 41 or 41A will apply only after arrest as per Section 69(3) does not appear to be correct.

Conclusion:

From reading of the above judgements and consequent confirmation of decision of Telangana & Andhra Pradesh in the matter of PV Ramana Reddy & Others (supra) by the Supreme Court, the issue appears to be settled for now, that prosecution is not dependent upon the assessment unlike in the era of service tax laws. Once the Commissioner has reasons to believe that accused has committed an offence under Section 132(1) (a) to (d), he may authorise arrest without waiting for completion of assessment.

Effects of Circular Trading vis-à-vis Prevention of Money Laundering Act, 2002:

The judgment of Allahabad High Court in Govind Enterprises (supra) also clearly states that there is no bar under the GST laws which would prevent to initiate prosecution under IPC. Hence, the view that by virtue of Section 132(4), since all the offences except as provided under Section 132(5), are non-cognizable and bailable and hence no FIR can be lodged under IPC shall not be appropriate, because, Section 132(4) makes offences non-cognizable for the purposes of GST laws but not for IPC. Hence, a separate prosecution can be initiated by competent officer under IPC as far as other offences under GST laws are concerned.

The above conclusion assumes importance because of its impact under the Prevention of Money - Laundering Act, 2002 (PMLA). Section 3 of PMLA provides that *whosever directly or indirectly attempts to indulge or knowing assists or knowingly is a party or is actually involved in any process or activity connected with the **proceeds of crime** including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of money-laundering.*

The expression 'proceeds of crime' has been defined under Section 2(u) of PMLA to *mean any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a **scheduled offence** or the value of any property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad.*

The expression 'scheduled offence' has been defined under Section 2(y) of PMLA to *mean offences specified under Part A of the Schedule or the offences specified under Part B of the Schedule if total value involved in such offences is one crore or more or the offences specified under Part C of Schedule.*

On a combined reading of Section 3, Section 2(u) and Section 2(y), what transpires is that there cannot be any action under PMLA unless the proceeds of crime pertain to scheduled offence. In other words, if the offence is not a scheduled offence, then such offence shall be outside the ambit of PMLA. Hence, if the activity of circular trading is a scheduled offence, then such activity would attract action under PMLA. Let us examine, if such circular trading is covered under the schedules.

Paragraph 12 of Part A of Schedule deals evasion of duty or prohibitions under the Customs Act, 1962 and Part B notifies false declaration, false documents etc in terms of Section 132 of Customs Act, 1962 as scheduled offence. Whereas, the evasion of duty or issuance of false documents under GST laws is not covered as scheduled offences under the current PMLA. Hence, there appears that circular trading which involves issuing of fake/bogus invoices does not come under the ambit of PMLA.

However, offences under Section 120B, Section 467 and Section 471 are scheduled offences vide Paragraph 1 of Part A to PMLA. Hence, if the competent authority under IPC books the taxpayer under the said sections namely Section 120B (criminal conspiracy), Section 467 (forgery of valuable security, will, etc.,) and Section 471 (using as genuine a forged document or electronic record), then the said offence would fall under the ambit of PMLA.

In the case of circular trading, there involves a criminal conspiracy among group of players to defraud revenue by issuing fake/bogus invoices, thereby attracting Section 120B, and by issuing bogus e-way bills, the accused would also attract provisions of Section 467 and 471, resulting in various scheduled offences, giving the competent authority power to invoke provisions of PMLA.

Hence, in light of the Allhabad High Court judgment in the matter of Govind Enterprises (supra), wherein it was held that there is no bar under GST laws to invoke prosecution under IPC, an officer can invoke prosecution under IPC and simultaneously the provisions of PMLA may also get triggered. It is important to note that Section 131 of CT Act states that penalty imposed under the provisions of CT Act shall not prevent the infliction of any other punishment to which person affected thereby is liable under provisions of this act or ***under any other law*** for time being in force. Hence, in the instances of circular trading, there is every possibility that the provisions of PMLA could be invoked because the GST laws do not state otherwise.

This article is contributed by CA Sri Harsha Vardhan K Partners of SBS and Company LLP, hartered Accountants. The authors can be reached at harsha@sbsandco.com

DIRECT TAX

LATEST GUIDELINES ON COMPOUNDING

Contributed by CA Suresh Babu S & CA Ramaprasad T

Chapter XXII of the Income Tax Act, 1961 ('Act') provides for offences and initiation of prosecution for non-compliance of the provisions of the Act. Section 279 of the Act provides for initiation of prosecution for the offence specified there in. This section requires previous sanction of Principal Commissioner or Commissioner or Commissioner (Appeals) or appropriate authority[1].

Section 279(2) provides that any offence under this chapter ***may either before or after institution of proceedings*** be compounded by Principal Chief Commissioner or Chief Commissioner or Principal Director General or Director General. (authority competent to compound an offence).

Explanation to Section 279(3) provides for power of Central Board of Direct Tax (CBDT) to issue orders, instructions or directions under the Act shall include and shall be deemed include the power to issue instructions or directions obtain previous approval of CBDT to other income-tax authorities for the proper composition of offences under this section.

CBDT issued guidelines[2] on 14th June 19 in suppression of earlier guidelines pertaining to compounding of offences including the guidelines of CBDT dated 23rd December 14. The new guidelines shall be effective from 17th June19. All the applications received for compounding after the said date shall comply with new guidelines.

The guidelines states that the compounding of offences is not a matter of right. However, the competent authority on satisfactory compliance with eligibility conditions mentioned in the guidelines keeping in view factors such as conduct of person, nature and magnitude of offence in the context of facts and circumstances of each case, will proceed with application.

The guidelines states that the prosecution initiated under Indian Penal Code (IPC) are not subject to compounding under these guidelines. In case prosecution was initiated under the Act and IPC based on the same facts and the complaint under the Act is compounded, the competent authority may initiate process of withdrawal of compliant under IPC by adopting the procedure laid down vide Section 321 of Criminal Procedure Code, 1973.

The guidelines provide for classification of offences for limited purposes of compounding aspects. The offences are divided into Category A and Category B[3] . However, the offences mentioned vide Section 275A[4] , Section 275B[5] and Section 276[6] , though part of Chapter XXII of the Act, are stated not to be compoundable.

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[1]As defined in Section 269UA(c)
[2]F No 285/08/2014IT (Inv.v)/147
[3]List of Offences as per Categories at the end of this article
[4]Contravention of order made under second proviso to Sec 132(1)/ 132(3)
[5]Failure to comply with provisions of Sec 132(1) (iib)
[6]Fraudulent removal, transfer or concealment or transfer of property to thwart tax recovery

The guidelines lay down certain eligibility conditions for compounding the offence. Only on satisfaction of such conditions, the competent authority can make its order.

Eligibility Conditions:

- Applicant has to make an application in the prescribed form to the Pr. CCIT/CCIT/Pr. DGIT/DGIT having jurisdiction over the case for compounding of offences in form of an affidavit.

- Applicant can make an application on suo-moto basis at any time after the offence is committed irrespective of whether it comes to the notice of the department or not. However, compounding application be made within 12 months from the end of the month in which prosecution complaint is filed in the court of law in respect of offence for which compounding is sought.

- The Committee[7] formed for the purpose of compounding may allow filing of application beyond 12 months but before completion of 24 months from the end of the month in which complaint was filed in case where such delay is for reasons beyond the applicant's control. On such extension of time compounding charge would be 1.25 time of normal compounding charges applicable.

- Applicant has paid the outstanding tax, interest (including interest under Section 220), penalty or any other sum due, relating to the offence for which compounding is sought before making an application. In case of any related payment is found outstanding on verification by Department, the same should be intimated to the applicant and such demand should be paid within in 30 days of the intimation, so that the application filed would continue to be valid.

- Applicant should pay the compounding charges as applicable. Applicant has to pay Compounding charges which include compounding fee, prosecution establishment expenses and litigation expenses including counsel fee.

- The compounding charges are payable in addition to the tax, interest and penalty if any payable or imposable as per the provisions of the Act. Such interest, interest and penalty are to be paid before filing the compounding application as required. For the purpose of computation of compounding fee tax means tax including surcharge and any cess by whatever name called as applicable.

- Applicant should withdraw the appeals filed in relation to offence for which compounding is sought. In case appeal pertains to compoundable offences and other matters, applicant should give an undertaking for withdrawal of grounds relating to compounding.

[7]Formed for compounding an offence involving compounding charges in excess of Rs. 10 Lakhs.

Offences normally not to be compounded:

The guidelines states that following offences are generally not to be compounded:

- Category A offences on more than three occasions. Compounding more than three occasions is permissible only in exceptional circumstances only on the approval of the Committee (supra). The guidelines also define 'occasion' to mean, if in one instance the applicant files multiple applications for one or more than one assessment year, all of these applications are treated as one occasion.

- Category B offence other than first offence(s).

  The guidelines defined the 'first offence' in two limbs. The first limb deals with offences which are committed by the applicant prior to earlier of the following (i) date of issue of any letter/notice in relation to prosecution or (ii) any intimation relating to filing of prosecution complaint sent by Department to person concerned or (iii)launching of any prosecution.

  The second limb deals with offences committed but not detected but voluntarily disclosed by person prior to the filing of application of compounding of offences in the case under any direct tax acts for one assessment year or more.

  Further, the guidelines clarify that the offence is relevant if it is committed by the same person/entity. Further, the first offence is to be determined separately with reference to each section of the Act under which it is committed.

- Offences committed by a person for which he was convicted by a court of law under Direct Taxes Law

- Any offence in respect of which compounding application was rejected, except where rectification of the same is available as per the guidelines

- The case of person as main accused where it is proved that he has enabled others in tax evasion such as through money laundering or generation of bogus invoices for sale or purchase without business or by providing accommodating entries in any manner prescribed in Section 277A of the Act

- Offence committed by a person who as a result of investigation conducted by any State or Central Agency and as per information available with the Pr. CCIT/CCIT/Pr. DGIT/DGIT concerned has been found involved in any manner in anti-national/terrorist activity

- Offences committed by a person who was convicted by a court of law for any offence under any law, other than Direct Tax Laws for which prescribed punishment was imprisonment of two years or more with or without fine and which has a bearing on the offence sought to be compounded

- Offences committed by a person, which as per the information available with the Pr. CCIT/CCIT/Pr.DGIT/DGIT have bearing on a case under the investigation at any stage[8] by ED/CBI/Lokpal/Lokayukta/ any other Central or Stage Agency

- Offences committed by a person whose application for 'plea-bargaining' under Chapter XXI-A of 'Code of Criminal Procedure' in respect of any offence is pending in a Court or where a Court has recorded that a 'mutually satisfactory disposition of such an application is not worked out' and such offence has bearing on offence sought to be compounded

- Any offence which has bearing on an offence relating to undisclosed foreign bank account/assets in any manner;

- Any offence which has bearing on any offence under the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015

- Any offence which has bearing on any offence under the Benami Transactions (Prohibition) Act,1988

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- Any other offence, which the Pr. CCIT/CCIT/Pr. DGIT/DGIT concerned considers not fit for compounding in view of factors such as conduct of the person, nature and magnitude of the offence.

However, the Finance Minister may relax restrictions above for compounding of an offence in a deserving case, on consideration of a report from the Board on the petition of an applicant.

Summarised version of Compounding Procedure:

- On receipt of application for compounding a report be called for from AO/Asst. DIT/Dy DIT

- The Competent authority shall consider and dispose of every application for compounding through speaking order either rejecting or intimating the compounding charges payable. Such order may be passed within six months from the end of month of its receipt

- Competent authority shall intimate the compounding charges requiring the applicant to pay the same within one month[9] from the end of month of receipt of such intimation where the application for compounding found acceptable;

- Competent authority shall pass compounding order within one month from the end of the month of payment of compounding charges.

[8]Including enquiry, filing of FIR/Complaint.

[9]Further extended this period by 3 months under exceptional circumstances. Beyond 3 months with prior approval in writing of Committee. This payment is subject to charge of interest.

Category A

Sec	Description
276	Failure to make payment or deliver returns or statements or allow inspection (Prior to 01/04/1976)
276B	Failure to Deduct or Pay Tax (Prior to 01/04/1989)
	Failure to pay tax deducted at source under Chapter XVII-B (01/04/1989 to 30/05/1997)
	Failure to pay TDS under chapter XVII-B or tax payable U/S 115O or 2nd proviso to Sec 194B to the credit of C.G (w.e.f 01/06/1997)
276BB	Failure to Pay TCS
276CC	Failure to Furnish Return of Income
276CCC	Failure to furnish return of income in search cases in block assessment
276DD	Failure to comply with provisions of sec 269SS (before 01/04/1989)
276E	Failure to comply with the provisions of sec 269T (before 01/04/1989)
277	False Statement in verification with reference to Category A Offences
278	Abetment of false returns with reference to Category A Offences

Category B

Sec	Description
276A	Failure to comply with provisions of Sec 178(1) and 178(3)
276AA	Failure to comply with the provisions of Sec 269AB or 269I
276AB	Failure to comply with the provisions of Sec 269UC/269UE/269UL
276C(1)	Wilful attempt to evade tax
276C(2)	Wilful attempt to evade payment of tax
276D	Failure to produce accounts and documents
277	False statement in verification with reference to Category B Offences
278	Abetment of false return with reference to Category B Offences

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AUDIT

TRANSFORMING THE WAY OF ACCOUTING FOR LEASES - IND AS 116

Contributed by CA Sandeep Das

The Ministry of Corporate Affairs (MCA) has put an announcement that the new lease accounting standard, Ind AS 116 will get implemented from 1stApril 2019. The new Standard, globally implemented in several countries from 1stJan 2019, is called IFRS 16. The Standard eliminates the 6-decade old distinction between financial and operating leases, from lessee accounting perspective, thereby putting all leases on the balance sheet. Ind AS 116 introduces a single lease accounting model and requires a lessee to ***recognize assets and liabilities for all leases with a term of more than 12 months,*** unless the underlying asset is of low value.

Assessment of whether an arrangement is, or contains, a lease, will be one of the biggest practical issues when applying the new standard. Under the new standard, a lease is a contract, or part of a contract, that conveys the right to use an asset (underlying asset) for a period of time in exchange for consideration. To be a lease, a contract must convey the right to control the use of an identified asset, which could be physically distinct portion of an asset such a floor of a building. A contract conveys the right to control the use of an identified asset if, throughout the period of use, the customer has the right to obtain substantially all of the economic benefit from the use of the identified asset and direct the use of identified asset.

Some of the key take aways from the implementation of this Standard are:

- Currently, there are two accounting standards for lease transactions, first, Ind AS 17, which is applicable to the Ind AS compliant companies and second, AS 19, which is applicable to the remaining classes of companies. Ind AS 116 proposes to replace Ind AS 17, therefore, the companies which are not covered by Ind AS shall continue to follow old accounting standard.

- The applicability of this standard shall have to be examined separately for the lessor and the lessee, that is, if the lessor is Ind AS compliant and lessee is not Ind AS compliant, then lessor will follow Ind AS 116 whereas lessee will follow AS 19.

- The key changes in lessee's accounting relate to introduction of single lease accounting model by elimination of classification between operating and finance leases, and recognition of gain/ loss for sale and lease-back transactions .The new standard changes treatment of operating leases in the books of the lessees significantly. Earlier, operating leases remained completely off the balance sheet of the lessee, however, vide this standard, lessees will have to recognise a right-to-use asset on their balance sheet and correspondingly a lease liability will be created in the liability side.

- No change in the accounting treatment in case of financial leases.

- No change in the lessor's' accounting

- For aircraft and other assets taken on an operating lease, the airline company will recognise right to use asset together with a lease liability on the balance sheet.

- Foreign currency leases shall increase profit & loss volatility due to a restatement of foreign currency liability.

Accounting by Lessee:

- Lessees are required to initially recognise a lease liability for the obligation to make lease payments and a right to use asset for the right to use the underlying asset for the lease term.

- Lease liability is initially recognised and measured at an amount equal to the present value (PV) of minimum lease payments during the lease term that are not yet paid.

- Right of use of asset is recognised and measured at cost, consisting of initial measurement of lease liability plus any lease payments made to the lessor at or before the commencement date less any lease incentive received, initial estimate of the restoration, removal and dismantling costs.

- The Lease liability is measured in subsequent periods using the effective interest rate method. The right of use of asset is depreciated in accordance with the requirements in IND AS 16, Plat Property &Equipment.

- Recognition and measurement exemption are available for low value assets and short-term leases. Assets of low value include Information Technology equipment or office furniture. No monetary threshold has been defined for low value assets. Short term leases are defined as leases with a lease term of 12 month or less.

Accounting by Lessor:

- The accounting by lessor under the new standard is substantially unchanged from today's accounting in IND AS 17. Lessor classify all leases using the same classification principle as in IAS 17and distinguish between two type of leases.

- For Operating leases, lessor continue to recognise the underlying asset. For finance lease, Lessor derecognise the underlying asset and recognise a net investment in the lease similar to today's requirements. Any selling profit or loss is recognised at lease commencement.

Sales and leaseback transactions:

- Ind AS 116 contains specific guidance on accounting of a sale and lease back transaction. In a sale and lease back transaction, an entity (the Seller – Lessee) transfers an underlying asset to another entity (the buyer – lessor) and leases that assets back from the buyer – lessor.

- A seller lessee and a buyer lessor use the definition of a sale form Ind AS 115 to determine whether a sale has occurred in a sale and leaseback transaction. If the transfer of the underlying asset satisfies the requirement of Ind AS 115 to be accounted for as a sale, the transaction will be accounted for as a sale and a lease by both the lessee and the lessor. If not, transaction will be accounted for as a financing by both the seller lessee and buyer lessor.

Impact on the financial statement of the lessee :

I. Statement of financial position:

Recognition of right o fuse asset and corresponding lease liability result in increase in the amount recognised for financial liabilities and assets for entities that has material operating lease.

New Accounting requirements for lessees will impact debt equity ratios and may also cause entities to breach existing debt covenants.

II. Statement of comprehensive income:

De recognition of operating lease charges and recognition of depreciation and finance costs would positively impact EBIT & EBITDA.

Recognition of depreciation on right of use assets and unwinding of finance costs on lease liabilities results in higher costs being recognised during the beginning of the lease term.

III. Statement of cash flows:

Presentation of lease payments as cash flow from financing activities has a favourable impact on cash flow from operations.

Disclosure requirements :

Ind AS 116 requires enhanced quantitative and qualitative disclosures for both lessors and lessees.

Quantitative Information:

Balance sheet

- Additions to the right of use assets
- Carrying amount of right of use assets at the end of the reporting period by class of underlying asset
- Lease liabilities
- Maturity analysis for lease liabilities

Statement of Profit and Loss and Other Comprehensive Income

- Depreciation charge for right of use assets by class of underlying asset
- Interest expense on lease liabilities
- Expense relating to short term leases for which the recognition exemption applied
- Expense relating to variable lease payments not included in measurement of lease liabilities
- Gain or losses arising from sale and leaseback transactions.

Qualitative disclosure

- Description of how liquidity risk related to lease liabilities is managed
- Use of exemption for short term and low value item leases
- Nature of the lessees leasing activities
- Restrictions or covenants imposed by leases and
- Sale and leaseback transactions

Conclusion

Ind AS 116sets out principles for recognition, presentation and disclosure of leases. The new accounting norms have been notified by the MCA. The key change that has been introduced is the elimination of classification between operating and finance leases, which means that all leases on a lessee's balance sheet will be recognised. The balance sheet of asset-light companies will expand sharply as a result, most aviation companies acquire aircraft via lease while retail and multiplex companies in the organized space operate mainly from leased premises. Healthcare sector companies such as hospitals and diagnostic service providers acquire equipments on lease. Similarly, hotels acquire immovable properties and vehicles on operating lease. Telecom companies will have to recognize agreements for sharing passive infrastructure in balance sheet, which were till not kept off balance sheet.

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FCRA

RECENT AMENDEMENTS TO FCRA

Contributed by CA Murali Krishna G & CA Bharani

Foreign Contribution Regulation Act, 2010 ('FCRA') got the assent of the Honourable President on 27th September 2010 and came into force with effect from 11th May 2011. By virtue of this, the earlier Foreign Contribution Regulation Act, 1976 got repealed. The preamble to the current act states that it is an act to consolidate the law to regulate the acceptance and utilisation of foreign contribution or foreign hospitality by certain individuals or associations or companies and to prohibit the acceptance and utilisation of foreign contribution or foreign hospitality for any activities detrimental to the national interest and for matters connected therewith or incidental thereto. The Ministry of Home Affairs, Government of India administers the Act, as it involves safeguarding national security.

The Central Government ('CG') vide Notification G.S.R. 349(E), dated 29th April 2011notified Foreign Contribution Regulation Rules, 2011 ('FCRR'). To bring in more transparency and better governance, FCRR were amended subsequently in the year 2012 vide G.S.R. 292 (E), dated 12th April 2012 and in the year 2015 vide G.S.R. 966(E), dated 14th December 2015. Most recently, FCRR were amended in 2019 vide G.S.R.199(E), dated 7th March 2019.

This article provides a glimpse of such recent amendments, while providing the provision as was existing before such amendment.

1. Definition of 'bank account' under FCRR:

   Clause (aa) was introduced in Rule 2(1) to define the word 'bank account' to mean a bank account in a core banking compliant bank, which is integrated with the Public Financial Management System(PFMS).

   It may be relevant to note that PFMS [previously called as Central Plan Scheme Monitoring System (CPSMS)]is a Government of India public financial management reforms initiative which monitors programs in the social sector and tracks funds disbursed. Given the large number of programs on which the money is spent in the country, PFMS ensures that the money is spent according to its intended purpose and provide an accounting of the same.

2. Intimation of receiving foreign contribution:

   As per Rule 6, any person receiving foreign contribution in excess of rupees one lakh or equivalent from any of his relatives in a financial year shall inform the CG within 30 days from the date of receipt of such contribution, in form FC-1. Previously the filing of form FC-1 was manual and was later made online. Under 2019 amendment, the documents to be annexed to the form were also made to be uploaded electronically online.

3. Prior permission to accept foreign hospitality:

As per Rule 7, any person belonging to specified categories in section 6 of FCRA (like member of legislature, office-bearer of a political party, judge, government servant, etc) who wishes to avail any foreign hospitality shall apply to CG for its prior permission in form FC-2. Previously the filing of form FC-2 was manual, and it shall now be filed electronically online.

4. Application for registration / prior permission to CG:

As per Section 11(1) of FCRA, no person having a definite cultural, economic, educational, religious or social programme shall accept any foreign contribution unless such person obtains a certificate of registration from CG.

As per Section 11(2) of FCRA, any person as referred in Section 11(1) above may, if not registered with the CG, accept any foreign contribution only after obtaining prior permission of CG. Such permission shall be valid for a specific purpose and such foreign contribution shall be from a specific source.

As per Rule 9(1), the application for registration shall be made to CG in form FC-3A and in case of prior permission, it shall be in form FC-3B. Previously it used to be in form FC-3 for both the purposes.

5. Renewal of registration certificate:

As per Rule 12, every certificate of registration issued to a person shall be liable to be renewed every five years from the date of its issue in a proper application, and such application to the CG should be made six months prior to the date of expiry of such certificate. Such application should be made electronically online in form FC- 3C. Previously it used to be in form FC-3, commonly with application for registration or prior permission explained earlier.

In case no application for renewal is made or if the application made is not accompanied by requisite fee, the validity of the registration shall be deemed to have ceased from the date of completion of five years from the date of registration. In case a person provides sufficient ground, in writing, explaining the reasons for not submitting the certificate for renewal within the time stipulated, the CG may accept his application for considering the delay, upon paying requisite fee, but not later than one year after the expiry of the original certificate of registration. Previously this extended period was up to four months beyond the date of expiry only.

6. Application Fees:

The fee for initial application for registration was increased from INR 1,000 to INR 3,000. In case of application for prior permission, it was increased from INR 2,000 to INR 5,000. For renewal of registration, the fee was increased from INR 500 to INR 1,500. A late fee of INR 5,000 was introduced in case of applications for renewal with delay.

7. Intimation of changes to CG:

Rule 17A was introduced as part of FCRR 2015 amendment. As per the said rule, as stood at that time, a person who has been granted registration or prior permission should intimate CG electronically in form FC-6, within 15 days, of any change beingi. change in name of association or address within the state ii. change in its nature, aim or objects, iii. change in its bank and / or branch of the bank and / or designated foreign contribution account number and iv. change in 50% or more of key members of the association as reported in the application for registration / renewal / prior permission.

Vide 2019 amendment to FCRR, a new clause viz., intimation towards change in bank and / or branch of the bank for the purpose of utilising the foreign contribution after the same has been received, was introduced.

Till 2019 amendment, any of the above changes were to be intimated in form FC-6 electronically. Now forms FC-6A to FC-6E were introduced for intimating each such specific purpose separately, as detailed in the table provided in later paragraphs.

8. Changes to forms under FCRR:

It may be noted that forms specified to be filed under FCRR are meant for specific purposes. However, in amendments, the purpose meant for some forms was changed without change in the form number. For example, form FC-4 as per 2011 FCRR was meant for making application for prior permission of CG u/s 11(2) of FCRA specified earlier, and form FC-4 as per 2015 amendment was meant for annual return to be filed for intimating the foreign contributions received during a financial year. It might be confusing for users while downloading online if they are not aware of such changes. An attempt is hereby made to summarise the purposes and its relevant form& due dates, as stipulated by corresponding amendment rules.

Sl. No	Rule	Purpose	Form as prescribed under			Due Date
			2011 Rules	2015 Amended Rules	2019 Amended Rules	
1	6	Intimation to CG of foreign contribution received by an individual by way of gift from relative	FC-1	FC-1	FC-1	30 days from the date of receipt of contribution
2	7(1)	Application to CG seeking prior permission to accept foreign hospitality	FC-2	FC-2	FC-2	Prior permission. Two weeks before the proposed date of onward journey. In case of emergent medical aid, within 60 days of such receipt of hospitality.
3	9(1)(a)	Application for registration u/s 11(1) of FCRA to receive foreign contribution	FC-3	FC-3	FC-3A	NA
4	9(2)(a)	Application for prior permission u/s 11(2) of FCRA to receive foreign contribution when no registration under FCRA is available.	FC-4	FC-3	FC-3B	Prior to receipt of foreign contribution
5	12(2)	Application for renewal of registration certificate	FC-5	FC-3	FC-3C	Six months before the date of expiry of the certificate of registration.
6	17(1)	Annual Return intimating the details of foreign contributions received during the year, duly annexing income and expenditure account, receipts and payments account and Balance Sheet. Form shall be duly certified by a CA.	FC-6	FC-4	FC-4	9 months from date of closure of financial year, ie., December 31 in case financial year is ending on Mar 31.

7	17(3)	Intimation about foreign contributions in the form of articles during the year. Form shall be duly certified by a CA	FC-7	FC-1	FC-1	9 months from date of closure of financial year, i.e, December 31 in case financial year is ending on Mar 31.
8	17(4)	Intimation about foreign contributions in the form of securities during the year. Form shall be duly certified by a CA	FC-8	FC-1	FC-1	9 months from date of closure of financial year, i.e, December 31 in case financial year is ending on Mar 31.
9	17A(1)(I)	Intimation to CG of change in name and / or address within the state of the association / person	NA	FC-6	FC-6A	Within 15 days of such change
10	17A(1)(II)	Intimation to CG of change in nature, aim, objects and registration with local / relevant authorities of the association / person	NA	FC-6	FC-6B	Within 15 days of such change
11	17A(1) (III)	Intimation to CG of change of designated FC receipt-cum-utilisation bank account of the association / person	NA	FC-6	FC-6C	Within 15 days of such change
12	17A(1) (IIIa)	Intimation to CG of opening additional foreign contribution utilisation accounts of the association / person	NA	FC-6	FC-6D	Within 15 days of such change
13	17A(1)(iv)	Intimation to CG of change in 50% or more of the original key members of the association	NA	FC-6	FC-6E	Within 15 days of such change

14	18	Intimation to CG of receipt of foreign contribution received by a candidate for election	FC-9	FC-1	FC-1	Within 45 days of nomination as election candidate
15	24(1)	Application seeking permission for transfer of foreign contribution by a registered person to another registered/ unregistered person	FC-10	FC-5	FC-5	Prior permission

9. DARPAN Registration:

Union Home Ministry vide its public notice in October 2017 mandated that every person / NGO who wish to receive any foreign donations / contributions should get registered on the online platform, NGO-DARPAN and obtain DARPAN ID. This was an initiative by NITI Aayog for ensuring better transparency, efficiency and accountability in foreign contributions. In January 2019, the CG relaxed this mandatory norm and made DARPAN registration & quoting of DARPAN ID optional.

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