UPDATES

Monthly Tax Updates

July-August 2022

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Key Focus Areas Covered in this Update:

1 Direct Tax

This update covers key judicial and regulatory developments in the months of July and August 2022 relating to direct tax, goods and services tax, tax on windfall gains on the sale of crude and export of petrol, diesel and fuel, and customs.

1.1 Supreme Court holds the Benami Transactions (Prohibition) Amendment Act, 2016 to be prospective

On 23 August 2022, the Supreme Court, in the case of *UOI v Ganpati Dealcom Pvt. Ltd.*, held that the Benami Transactions (Prohibition) Amendment Act, 2016 (**2016 Act**) prescribes substantive provisions and would therefore apply prospectively.

In this case, a show cause notice under the 2016 Act was issued to the assessee-company, proposing to treat it as a *benamidar* for an alleged *benami* property purchased in 2011. The assessee–company responded to the notice denying the allegations. However, the adjudicating authority rejected these submissions and passed an order under the 2016 Act provisionally attaching the property.

Aggrieved, the assessee-company filed a writ petition before the High Court of Calcutta. A single judge bench passed an order directing the adjudicating authority to conclude the matter within 12 weeks. The assessee-company thereafter filed an appeal against the order. The High Court quashed the show cause notice on the basis that the provisions of the 2016 Act do not have a retrospective application and would, therefore, not apply to a transaction undertaken in 2011.

Aggrieved by the order of the High Court, the Union of India approached the Supreme Court. The Supreme Court, after analysing the history of *benami* transactions in India, the framework of Prohibition of Benami Property Transactions Act, 1988 (**1988 Act**) and the 2016 Act held that the provisions of the 2016 Act are not procedural in nature. The amendments made by the 2016 Act are substantive and would thus apply prospectively. The key observations of the Supreme Court were:

a. Section 3(2) of the 1988 Act which mandated a punishment of three years for those entering into *benami* transactions was vague, arbitrary and created an unduly harsh law.

b. Section 5 of the 1988 Act, which provided for civil forfeiture of *benami* property, was manifestly arbitrary. The Union of India argued that this provision was civil in nature and could consequently be amended with retrospective effect. However, the Court held that there is an implicit recognition of forfeiture being a punitive sanction, as the officer is required to build a case against the accused for confiscation.

c. Further, the 2016 Act created a confiscation procedure distinct from the procedure contemplated under any enactment in force in India at the time. It also altered substantive rights of evidentiary standards from '*beyond reasonable doubt*' to '*preponderance of probabilities*'. Such a change cannot be termed as merely procedural.

d. Additionally, the 2016 Act not only condemns those transactions that were traditionally denominated as *benami*, but also covers a new class of fictitious and sham transactions. Further, there is an implicit effort by the Parliament to take into consideration the fact that such transactions are often undertaken from ill-gotten wealth. Under the 2016 Act, the taint of *benami* transactions extends to proceeds arising from a *benami* property, apart from attaching to the property in perpetuity, unless the defence of innocent ownership is established. Therefore, these provisions cannot be held as enforcing civil obligations and consequently cannot have retrospective application.

e. Given the above, the Supreme Court also clarified that the authorities cannot initiate or continue criminal prosecution or confiscation proceedings for transactions entered into before 25 October 2016 - the enforcement date of the 2016 Act.

The ruling of the Supreme Court is welcome and is in accord with settled law on the retrospective applicability of penal statutes. It has also brought certainty and clarity to the scope and enforcement of the 2016 Act. However, while the Supreme Court has quashed proceedings for transactions entered into before the enforcement date of the 2016 Act, it is possible that such transactions may be scrutinised under the income tax law, which also empowers authorities to tax unexplained cash credits and investments. Therefore, such transactions may have to be carefully reviewed under the lens of the income tax provisions.

1.2 Delhi High Court allows deduction of difference between the market price and issue price of employee stock options as revenue expenditure

On 23 August 2022, the Delhi High Court, in the case of *PVR Ltd. v CIT*, reiterated that the difference between the offer price of employee stock options (**ESOPs**) and the prevailing market price of the stock on the date of grant is allowable as tax-deductible expenditure.

In this case, the assessee-company debited the difference between the price at which ESOPs were offered to its employees and the prevailing market price of the stock on the date of grant in its profit and loss account. The assessee-company thereafter claimed this amount as revenue expenditure in its return of income. The tax authorities disallowed the expense by treating it as a notional and contingent liability. The disallowance was confirmed by the Commission of Income Tax (Appeals) and the Income Tax Appellate Tribunal (**ITAT**).

When the matter reached the High Court, the Court followed its earlier ruling in *PCIT v New Delhi Television Ltd.* and the decision of the Karnataka High Court in the case of *CIT v Biocon Ltd.* where ESOP expenditure was allowed as a tax-deductible expense. Accordingly, the High Court reversed the order of the ITAT and allowed the appeal of the assessee-company.

This decision of the Delhi High Court should help to further settle the controversy surrounding the allowability of ESOP expenditure as a tax-deductible expense. However, the issue is likely to attain finality only after a ruling of the Supreme Court, where this controversy is currently pending adjudication.

1.3 Supreme Court holds that the option to opt-out of exemption requires strict compliance with the prescribed conditions

On 11 July 2022, the Supreme Court, in the case of *PCIT v Wipro Ltd.*, held that the assessee cannot be permitted to withdraw its claim of exemption under section 10B of the Income Tax Act, 1961 (**IT Act**) by filing a revised return of income to substitute the claim made in the original return.

In this case, the assessee claimed an exemption under section 10B of the IT Act in the original return of income filed on 31 October 2001. Subsequently, during the assessment proceedings, the assessee filed a declaration before the assessing officer that it did not want to avail the benefit of the exemption. Accordingly, on 23 December 2002 (i.e., after the due date of filing of the return), the assessee filed a revised return withdrawing the claim of exemption. Instead, the assessee sought to carry forward unabsorbed losses. The assessing officer passed an order denying the withdrawal of the exemption and the claim of carry forward of losses. The Commissioner of Income Tax (Appeals) upheld the order of the assessing officer.

Thereafter, the assessee's claim was allowed by the ITAT and the Karnataka High Court. However, when the matter reached the Supreme Court, the Apex Court set aside the order of the Karnataka High Court and allowed the appeal of the tax department.

The Supreme Court negated the contentions of the assessee. It held that the assessee was not eligible to carry forward losses since the declaration to opt out of the exemption under section 10B was filed after the due date of filing the return. The key observations of the Supreme Court were:

a. To opt out of the exemption under section 10B, two conditions must be satisfied by the taxpayer: (i) filing of a declaration before the assessing officer and (ii) filing of such declaration before the due date of filing of the return of income. The Supreme Court held that the fulfilment of both these conditions is mandatory (and not directory).

b. The Supreme Court overruled the decision of the Karnataka High Court that the time limit for filing the declaration is directory in nature. Since both the requirements are phrased similarly, it would be incorrect to conclude that one condition is mandatory while the other is directory.

c. An assessee can file a revised return in a case where there is an omission or a wrong statement but not to subsequently withdraw a claim of exemption and carry forward losses.

d. In a taxing statute, provisions must be read as they are and be literally construed, particularly in the case of an exemption. Exemption provisions are to be strictly and literally complied with. Therefore, the requirement to file the declaration before the due date of filing the return of income cannot be construed as a procedural requirement.

This decision of the Supreme Court is expected to have a far-reaching impact on tax litigation as it seemingly departs from the settled principle that a substantive claim must be allowed to be made until the conclusion of assessment proceedings, and that any time limit for filing a form to make such claim is only directory. Going forward, courts may take the view that exemption provisions must be strictly construed and the requirements for claiming an exemption, even if procedural, must be followed in letter as well as spirit.

1.4 Delhi High Court holds the 2022 amendment to section 14A of the IT Act to be prospective in nature

On 20 July 2022, the Delhi High Court dismissed the appeal preferred by the tax department in the case of *PCIT v Era Infrastructure (India) Ltd.* It held that the amendment to section 14A of the IT Act made through the Finance Act, 2022 is prospective in nature.

Section 14A of the IT Act provides that no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to exempt income. The Finance Act, 2022 introduced an explanation to the effect that section 14A will apply even if the exempt income (for which the expense was incurred) has not accrued or arisen or has not been received during the relevant financial year. The amendment seeks to overrule decisions holding that in the absence of exempt income, no disallowance is warranted under section 14A. According to the tax department, the amendment is clarificatory and applies retrospectively. This is because the explanation provides that it is being inserted to remove doubts and that it shall be deemed to always have applied.

In this case, the ITAT deleted the disallowance under section 14A relying upon the decision of the Delhi High Court in the case of *PCIT v IL & FS Energy Development Company Ltd.* It reiterated that no disallowance under section 14A can be made in the absence of any exempt income. Before the High Court, the tax department argued that due to the retrospective amendment made by the Finance Act, 2022, the decision of the Delhi High Court that was relied upon by the ITAT no longer holds good.

The Delhi High Court perused the memorandum explaining the Finance Bill, 2022. It noted that the Legislature has explicitly stated that the amendment to section 14A will take effect from 1 April 2022 and apply from the assessment year 2022-23 onwards. Further, the High Court referred to certain decisions of the Supreme Court and reiterated the principle that a provision inserted "*for the removal of doubts*" cannot be presumed to be retrospective if it alters or changes the law as it earlier stood.

Accordingly, the Court held that since the 2022 amendment to section 14A of the IT Act changes the legal position, it cannot be treated as retrospective. However, the debate concerning the retrospective applicability of this amendment appears to be far from settled since the Guwahati bench of the ITAT recently ruled that the provision is clarificatory and would therefore apply retrospectively.

1.5 ITAT upholds the applicability of angel tax provisions on the conversion of compulsorily convertible debentures issued by a closely held company

On 4 July 2022, in the case of *Milk Mantra Dairy (P.) Ltd. v DCIT*, the Kolkata bench of the ITAT held that section 56(2)(viib) of the IT Act (commonly referred to as the '*angel tax*' provision) will apply to the conversion of compulsorily convertible debentures (**CCDs**) issued by a closely held company. This provision effectively taxes any '*excess*' consideration received by a closely held company from a resident on the issue of shares by the company. Such '*excess*' consideration is computed as the difference between the consideration received and the fair market value of the shares (computed in the prescribed manner).

In this case, Milk Mantra Dairy (P.) Ltd. (**Milk Mantra**), a closely held company, had issued CCDs to several investors in an earlier financial year. During the subject year, these CCDs were converted into equity shares at a premium. It was contended by Milk Mantra that the angel tax provision seeks to tax any excess consideration received by a closely held company on the issuance of its shares. However, no consideration was received at all at the time of conversion. The entire consideration was received at the time of issuance of CCDs, which was done in an earlier year. Since the conversion of the CCDs into equity shares during the subject year did not involve any flow of money, the angel tax provision would not apply.

However, the ITAT rejected this argument and observed that section 56(2)(viib) employs the term '*consideration*' and not the terms '*amount*' or '*money*'. Therefore, the provision encompasses consideration in all forms and is not limited to receipt of money/cash consideration. The ITAT observed that on converting CCDs into equity shares, the issuer-company might receive consideration in several forms, including the extinguishment of the debt obligation, the release of the charge on its assets, an improved debt-equity ratio, etc.

Therefore, the ITAT held that section 56(2)(viib) of the IT Act would also apply to conversion transactions, provided the conditions stipulated in the provision are fulfilled. It would be interesting to see if other courts interpret this provision similarly.

2 Treatment of tax dues under the Insolvency and Bankruptcy Code, 2016

2.1 Supreme Court holds that the State of Gujarat is a 'secured creditor' for the purpose of the Insolvency and Bankruptcy Code, 2016 by virtue of the charge created under the Gujarat Value Added Tax Act, 2003

The Supreme Court, in *State Tax Officer v Rainbow Papers Limited*, has held that the State of Gujarat satisfies the definition of a '*secured creditor*' provided under the Insolvency and Bankruptcy Code, 2016 (**IBC**) in light of the charge created under Section 48 of the Gujarat Value Added Tax Act, 2003 (**GVAT Act**).

The tax department had filed an appeal against an order of the National Company Law Appellate Tribunal (**NCLAT**) wherein it was held that the government cannot claim first charge over the property of the corporate debtor/dealer that had an outstanding liability under the GVAT Act in light of the overriding provisions of the IBC which give priority to secured creditors over government dues.

In this regard, the Supreme Court held that if a resolution plan excludes the statutory dues payable to the government or a government authority, the Adjudicating Authority (**AA**) is bound to reject the resolution plan. Even if approved by the AA, such a resolution plan will not be binding on the government. Dealing with the interplay between Section 48 of the GVAT Act, which creates a first charge on the property of a dealer in respect of any amount payable under the GVAT Act, and Section 53 of the IBC, which provides for priority to be given to secured creditors over government dues, the Court held that Section 48 of the GVAT Act is not contrary to or inconsistent with Section 53 or any other provisions of the IBC. The Court held that the scope of the phrase '*secured creditor'* includes the State of Gujarat under the GVAT Act by virtue of the security interest in the property of the dealer created under Section 48 of the GVAT Act.

This decision of the Supreme Court has deviated from the position laid down by earlier decisions of the Supreme Court as well as various High Courts where the courts have upheld the precedence of the secured creditors' dues over dues under tax enactments such as the Customs Act, 1962, the Income Tax Act, 1961, etc. Further, since various other tax enactments such as the CGST Act also create a similar charge on the property of the taxpayers, it remains to be seen whether this decision of the Supreme Court would lead to new rounds of litigation initiated by other tax departments where such equal treatment has not been given to government dues in insolvency proceedings.

3 Goods and Services Tax

3.1 Central Goods and Services Tax Rules, 2017 amended to provide for the manner of calculating interest on delayed payment of tax

The Central Board of Indirect Taxes and Customs (**CBIC**) has inserted a new Rule 88B in the Central Goods and Services Tax Rules, 2017 (**CGST Rules**), with retrospective effect from 1 July 2017, to provide for the manner in which the interest under Section 50 of the Central Goods and Services Tax Act, 2017 (**CGST Act**) on delayed payment of tax will be calculated.

Rule 88B(1) provides for the manner of calculating interest in cases where a taxpayer files a periodic return declaring the supplies made by it during the relevant tax period after the prescribed due date for filing such return but before any proceedings for recovery of amounts are initiated against the taxpayer under Sections 73 or 74 of the CGST Act in respect of the said tax period. The interest in such cases will be calculated on the portion of tax which is paid by the taxpayer by debiting its electronic cash ledger. It further provides that interest will be calculated for the period of delay in filing the said return beyond the due date for filing the relevant return.

Rule 88B(2) provides that in all other cases where interest is payable under Section 50(1), the interest will be calculated on the amount of tax which remains unpaid, for the period starting from the date on which such tax was due till the date on which such tax is paid.

Further, Rule 88B(3) provides that where interest is payable on the amount of Input Tax Credit (**ITC**) wrongly availed and utilised by a taxpayer, the interest will be calculated on the amount of ITC wrongly availed and utilised. It further provides that such interest will be calculated for the period starting from the date of utilisation of such wrongly availed input tax credit till the date of reversal of such credit or payment of tax in respect of such amount.

By way of this insertion, it has been clarified that interest will be payable on the amount of tax paid net of ITC available with the taxpayer during the relevant period only in cases of belated filing of statutory returns. However, such benefit will not be available to the taxpayers in other situations such as when the supplies are not declared due to incorrect legal interpretation of applicable provisions by the taxpayers and the interest in such cases will have to be paid on the entire amount of tax due to be paid.

3.2 Appellate Authority of Advance Ruling, Andhra Pradesh holds that an entity shifting its business from one state to another cannot transfer the accumulated unutilised ITC

The Appellate Authority of Advance Ruling, Andhra Pradesh (**AAAR AP**), in *Re: Shilpa Medicare Limited* has held that the GST laws do not envisage the transfer of ITC accumulated with an entity from one state to another.

The assessee, in this case, was shifting its entire business from the state of Andhra Pradesh to Karnataka. The assessee thus approached the Authority for Advance Ruling, Andhra Pradesh (**AAR AP**) seeking clarification on:

a. whether such transfer of business to Karnataka would amount to a supply under the CGST Act, and

b. whether it is eligible to transfer the accumulated ITC to its registration in Karnataka.

Under the CGST Act, every taxpayer is required to obtain a separate registration in each of the states from where it makes taxable supplies and all units of the same entity having different registrations are deemed to be distinct persons and therefore, the above clarifications were sought by the assessee.

The AAR AP held that such transfer of business would amount to a supply of services and that the assessee is eligible to transfer the ITC accumulated with it to its new registration in Karnataka. Overruling this decision, the AAAR AP held that the transfer of the assets of the Andhra Pradesh unit of the Assessee to its Karnataka unit would qualify as a deemed supply of goods by virtue of Paragraph 4(1)(c) of Schedule II to the CGST Act. The said Paragraph deems the assets of an entity that ceases to be a taxable person to be supplied by it immediately before the entity ceases to be a taxable person. Whereas Paragraph 4(1)(c)(i) of Schedule II to the CGST Act provides that such deeming fiction shall not apply in cases where the business of the person ceasing to be a taxable person is '*transferred as a going concern to another person*'. The AAAR AP in this case held that the transfer of the business by an entity to its own unit in another state does not qualify to be a case where the business of a person is '*transferred as a going concern to another person*' as envisaged under Paragraph 4(1)(c)(i) of Schedule II to the CGST Act.

The AAAR AP further held that Section 18(3) of the CGST Act, which provides for the transfer of ITC in cases of change in the constitution of a registered person on account of sale, merger, demerger, amalgamation, lease or transfer of the business, will not apply to the facts of this case as the transfer of business between states by the same entity does not amount to a change in the constitution of a person. It was further held that the facility of transfer of ITC to its Karnataka unit is not available to the Assessee as the GST laws do not envisage the transfer of ITC accumulated in one state to another state.

3.3 Instructions issued by the Investigation Wing of the GST Department to Departmental Officers

The Investigation Wing (**IW**) of the GST Department has issued the following instructions to GST Departmental Officers on issuing summons, initiating prosecution, and conducting arrests.

a. ***Issuance of summons under Section 70 of the CGST Act***

GST Departmental officers are to issue summons to taxpayers judiciously and explore instances where a letter for requisition of information may suffice instead of issuing summons. The IW has also advised that issuance of summons may be avoided while seeking statutory documents, which are available online in the GST Portal.

The Departmental officers have been directed that senior management officials of a company/public sector undertaking should only be summoned when there are clear indications of their involvement in the decision-making process that led to the loss to the exchequer.

The instructions further provide that in cases where the summoned individual does not attend the investigation proceedings even after being served thrice at reasonable intervals, a complaint should be filed before the jurisdictional magistrate under Section 172 (absconding to avoid service of summons) and/or 174 (non-attendance in obedience to an order from public servant) of the Indian Penal Code, 1860 (**IPC**).

The above instructions are a step in the right direction and should discourage undue harassment caused to senior officials of assessee companies during the course of departmental investigations.

b. ***Launching of prosecution under Section 132 of the CGST Act***

The IW has also instructed that prosecution under the CGST Act should not be initiated in cases (i) that are technical in nature; or (ii) where the additional tax claim is based on a difference in interpretation of the law.

It has been clarified that prosecution must not be initiated merely because a demand has been confirmed in the adjudication proceedings. Further, the evidence collected should be adequate to establish (beyond reasonable doubt) that the person had a guilty mind, knowledge of the offence, fraudulent intention, or *mens rea* for committing the offence. The IW has further directed that in case of public limited companies, prosecution should not be initiated indiscriminately against all directors of the company but should be restricted only to individuals who were responsible for the day-to-day operations of the company at the time of commission of offence and took active part in tax evasion or connived at it.

Further, IW has directed that prosecution should normally be initiated where the (i) quantum of tax evaded; or (ii) ITC misused; or (iii) refund that is fraudulently obtained, is more than five crore rupees. However, this threshold shall not apply in habitual offenders and/or arrest cases.

Further, in cases where prosecution proceedings have not been initiated, or arrest has not been made before the conclusion of adjudication proceedings, the adjudicating authority has been directed to indicate at the time of passing the order whether a given case is fit for prosecution.

Following the Supreme Court's decision in *Radheshyam Kejriwal*, the IW has instructed that an application for withdrawal of prosecution must be filed in cases where a contravention of the provisions of the CGST Act has not been found in the adjudication proceedings and such order has attained finality.

The taxpayers would welcome these instructions as it would ensure that prosecution proceedings are not initiated in each and every case. Further senior officials/directors of companies who were not responsible for day-to-day operations of the company would also be saved from undue involvement.

c. ***Arrest and bail under Section 69 of the CSGT Act***

Keeping in mind that arrest impinges on the personal liberty of an individual, the IW has advised that the power to arrest should be exercised carefully and arrest should not be made in a routine and mechanical manner. The instructions also provide that even if all the conditions of arrest prescribed under Section 132 of the CGST Act are satisfied, it will not *ipso facto* mean that an arrest must be made and the same should only be done to ensure proper investigation and/or prevent the possibility of tampering of evidence or intimidating or influencing of witnesses.

The IW has directed that arrest should not be resorted to in cases of technical nature and that the extent of cooperation of the alleged offender in the investigation proceedings by way of complying with summons, furnishing of the requisite documents, voluntary payment of tax, etc., should also be kept in mind while making the decision to arrest.

These instructions are a step in the right direction and would ensure that arrests are not made as a matter of practice but only in cases where it is indispensable.

3.4 Clarification on the taxability of liquidated damages, bond amount received from employees leaving employment before agreed period, cancellation charges, etc.

The Tax Research Unit (**TRU**) of the CBIC, through a circular dated 3 August 2022 (**Circular**), has clarified the scope and ambit of services falling under entry 5(e) of Schedule II of the CGST Act. As per this entry, the activity of '*agreeing to an obligation to refrain from an act or tolerating an act or to do an act*' is treated as a supply of service. The scope and ambit of the transactions that are covered under this entry have been the subject of protracted litigation.

The TRU has provided a three-pronged test to determine whether an activity falls within the ambit of Paragraph 5(e) of Schedule II.

a. There should be an express or implied agreement, oral or written, between the parties to do or abstain from doing something. It has further been clarified that an agreement to do or refrain from doing an act cannot be presumed to exist merely because there is a flow of money from one party to another.

b. There ought to be a consideration for doing or abstaining from such an act.

c. Such a contractual agreement must be an independent arrangement in its own right, be it in the form of an independent stand-alone contract or part of a separate contract.

The Circular also clarifies the taxability of various transactions separately, as discussed below.

a. *Liquidated Damages*

It has been clarified that the amount paid as liquidated damages is not taxable when it is only to compensate the aggrieved party for injury, loss or damage suffered by it due to breach of the contract. The Circular further provides that there should not be any agreement, express or implied, by the aggrieved party receiving such liquidated damages, to refrain from or tolerate an act or to do anything for the party paying the liquidated damages.

The Circular provides that the key to identify whether the flow of money in a given case constitutes compensation for the activity enshrined in entry 5(e) of the Schedule II of the CGST Act is to consider whether such payments constitute consideration for another independent contract envisaging tolerating an act or situation or refraining from doing any act or situation or simply doing an act. It clarifies that if the payment is merely an event in the course of the performance of the agreement and it does not represent the '*object*', as such, of the contract then it cannot be considered '*consideration*'.

The Circular however, thereafter, goes on to list a number of payments which even though they may be referred to as fine or penalty, are clarified to be payments that amount to consideration for supply, and are subject to GST. Such payments are:

i. Penalty/fee for making the payment for receipt of goods or services beyond a certain pre-determined date.

ii. Forfeiture of part/whole of ticket amount due to no show.

iii. Forfeiture of security deposit in the event of cancellation of tour by the customer.

iv. Penalty/fee for early termination of a contract for lease of movable or immovable property.

v. Pre-payment penalty in cases where the borrower repays a loan before the maturity of the loan period.

It has also been clarified that since these supplies are ancillary to the principal supply for which the contract is signed, they shall be eligible to be assessed as the principal supply, and the same will not be taxable if the principal supply is exempt.

b. *Compensation for cancellation of coal blocks*

By way of order dated 24 September 2014, the Supreme Court had cancelled the allocation of all coal block/mines and the existing allottees were subsequently compensated by the government for transfer of the rights/titles in the land, mine, etc. to the new allotees under the Coal Mines (Special Provisions) Act, 2015.

The Circular has now clarified that this compensation does not amount to '*consideration*' for a service of agreeing to or tolerating the cancellation of the allocation on the part of the old allottees as the same was not done under a contract or an agreement between the prior allottees and the government but in terms of the directions of the Supreme Court and the provisions of a statute.

c. *Cheque dishonour fine/penalty*

The Circular has clarified that in case of cheque dishonour, charges/penalties collected by suppliers of goods or services, or banks are not consideration for any service and thus, not taxable. The Circular clarifies that such charges are not for '*tolerating an act or situation*' and instead are in the nature of a fine or penalty to deter and discourage dishonouring of cheques.

d. *Penalty imposed for violation of laws*

The Circular has clarified that penalty imposed for violation of laws such as traffic violations, or for violation of pollution norms or other laws are also not consideration for any supply received and are not taxable. It provides that such penalties imposed for violation of laws cannot be regarded as consideration charged by the government or a Local Authority for tolerating violation of laws as there is no agreement between the government and the violator specifying that violation would be allowed or permitted against payment of fine or penalty.

e. *Forfeiture of salary or payment of bond amount in the event of the employee leaving the employment before the minimum agreed period*

The Circular provides that forfeiture of salary or recovery of bond amount in the event of the employee leaving the employment before the minimum agreed period are not taxable as consideration for the service of agreeing to tolerate an act or a situation. It clarifies that such amounts are recovered by the employer not as a consideration for tolerating the act of such premature quitting of employment but as penalties for dissuading the non-serious employees from taking up employment and to discourage and deter such a situation. It further counts the fact that an employee does not get anything in return from the employer against payment of such amounts as a reason why such amounts are not taxable.

f. *Compensation for not collecting toll charges*

The National Highways Authority of India (**NHAI**) had directed the concessionaires (toll operators) to allow free access of toll roads to the users from 8 November 2016 to 1 December 2016 in light of the disruption in cash flow caused due to demonetisation. The loss of toll charge due to such free access was compensated by NHAI as per the instructions of the Ministry of Road Transportation and Highways.

The Circular in this regard has reaffirmed the position (also clarified earlier by way of a circular dated 21 May 2019) that the compensation received by the concessionaires is nothing but the consideration for the service of access to a road or bridge provided by toll operators and the fact that the consideration came from a person (NHAI) other than the actual user of service (users of toll roads) does not mean that the service has changed.

g. *Late payment surcharge or fee*

The Circular has clarified that the activity of accepting late payments with interest or late payment fee, fine or penalty is a facility granted by supplier which is ancillary to and naturally bundled with the principal supply such as that of electricity, water, telecommunication, cooking gas, insurance, etc. The Circular further clarifies that such an activity should be assessed in the same way and at the same rate as the principal supply.

h. *Fixed capacity charges for power*

The Circular clarifies that the minimum fixed charge component of the price charged for electricity by the power generating companies from the State Electricity Boards (**SEBs**)/DISCOMS, similar to the variable amount charged per unit, are compensation charged for sale of electricity and are thus not taxable as electricity is exempt from GST. The Circular further clarifies that no consumption or consumption below the contracted or available capacity or a minimum threshold does not mean that minimum fixed charge or part of it is a charge for tolerating the act of not scheduling or consuming the minimum contracted or available capacity or a minimum threshold.

i. *Cancellation charges*

The Circular clarifies that the facility of allowing cancellation of supply by the customer within a certain specified time period is a natural part of the bundle of supplies provided by a service provider of principal services such as hotel accommodation, tour and travel, transportation, etc., and it should be assessed as the principal supply. The Circular clarifies that these cancellation charges can be considered as the charges for the costs involved in making arrangements for the intended supply and the costs involved in cancellation of the supply, such as in cancellation of reserved tickets by the Indian Railways.

The Circular clarifies that these charges are different from the forfeiture of earnest money by a seller in case of breach of '*an agreement to sell*' an immovable property by the buyer or such forfeiture by government or local authority in the event of a successful bidder failing to act after winning the bid for allotment of natural resources. The Circular clarifies that the latter is a mere flow of money, as the buyer or the successful bidder does not get anything in return for such forfeiture of earnest money.

By way of this Circular, the TRU has clarified the taxability of multiple transactions such as liquidated damages, cancellation charges, employee bond compensation, etc. These transactions have been the subject of protracted litigation under the erstwhile Service Tax regime and now under GST. Taxpayers paying GST on the above transactions may now consider filing refund claims subject to applicable laws in light of the clarifications issued vide this Circular.

3.5 Supreme Court settles the issue of Transitional Credit; directs Goods and Services Tax Network to open GST portal for taxpayers claiming Transitional Credit for two months

The Supreme Court, in *Union of India & Ors v Filco Trade Center Pvt. Ltd & Anr.*, has settled the issue of carry forward of Central Value Added Tax (**CENVAT**) credit from the erstwhile tax regime into the Goods and Services Tax (**GST**) regime for taxpayers who were unable to do so post the introduction of GST due to various reasons including technical glitches on the GST portal.

The taxpayers who were unable to carry forward their CENVAT credit to the GST regime within the prescribed timeframe had approached their jurisdictional High Courts seeking redressal of their grievances and permission to transition the credit into GST. It was argued that the right to input tax credit is a vested indefensible right which cannot be restricted due to glitches on the portal. As various High Courts had granted relief to the taxpayers, the tax department had approached the Supreme Court against such rulings.

The Supreme Court, while settling the issue in favour of the taxpayers, has directed the Goods and Services Tax Network (**GSTN**) to re-open the GST portal for accepting the relevant forms for transition of CENVAT credit into GST, i.e., forms GST TRAN-1 and GST TRAN-2 from 1 September 2022 to 31 October 2022. The Supreme Court has further instructed the GSTN to ensure that there are no technical glitches during the said two months. Further, the Supreme Court has extended the benefit of this judgement to all the taxpayers who were unable to transition the credit to GST regime.

This decision is significant as it has given another window of opportunity to various taxpayers who were not able to file fresh or revised forms for transitioning validly availed CENVAT Credit into the GST regime.

4 Windfall tax on crude, petrol, diesel and jet fuel

4.1 Imposition of tax on the windfall gains made on the sale of crude by domestic crude producers and export of High Speed Diesel, petrol and Aviation Turbine Fuel

Taking into account the windfall gains made by domestic crude producers as well as exporters of petrol, High Speed Diesel (**HSD**) and Aviation Turbine Fuel (**ATF**) and owing to increase in the international prices of the said items, the Ministry of Finance had issued multiple notifications on 30 June 2022 imposing cess on the sale of petroleum crude by domestic crude producers and export of HSD, petrol and ATF. The rates of these cesses have been reviewed and amended on a fortnightly basis by way of Notifications dated 2 August 2022, 19 August 2022, 31 August 2022 and 16 September 2022. At present, the cesses on the export of petrol have been entirely scrapped off. Further, the export of HSD is currently subject to the imposition of cesses at the rate of INR 10/- per litre and the sale of petroleum crude to cess at the rate of INR 10,500/- per tonne. The export of ATF is currently subject to cess at the rate of INR 5/- per litre.

5 Customs

5.1 Bombay High Court holds that shipping bills can be amended for the purpose of conversion from Drawback Scheme to Advance Authorisation Scheme beyond three months from the Let Export Order

The Bombay High Court, in *Pinnacle Life Science Pvt. Ltd. v Union of India and Others*, has held that shipping bills can be amended for conversion between different export promotion schemes post the time limitation of three months provided under the Circular dated 23 September 2010 (Amendment Circular) by the Central Board of Excise and Customs (**Board**).

The application of the petitioner to amend five shipping bills for the purpose of conversion from Drawback Scheme to Advance Authorisation Scheme was rejected by the tax department on the ground that the application was filed beyond the period of 3 months provided under the Amendment Circular.

The High Court observed that the application for conversion was filed by the petitioner under Section 149 of the Customs Act, 1962 (**Customs Act**) which allows documents to be amended but does not prescribe any timeline for it. In view of the same, the High Court held that since the Customs Act neither provides for any time limitation nor does it confer the jurisdiction or power to the Board to do so, the time limitation of three months laid down by the Amendment Circular is illegal and without jurisdiction. The High Court further directed the tax department to consider the amendment application filed by the petitioner without raising an issue of time limit.

This judgement has reaffirmed the principle that when any time limit for a certain act has not been provided by way of an Act and no power to do so has been expressly delegated, it cannot be prescribed by way of a delegated legislation. This opens up a window of opportunity for those taxpayers who could not file their amendment applications within limitation as they can now file for amendment of shipping bills.