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Dear Readers,

I wish you a happy new year. May this new year bring prosperity and help in realising your goals and dreams. I also wish you a happy Sankranthi.

In this edition, we bring to you certain important articles. The article on 'Foreign Portfolio Investors – SEBI and FEMA Perspective' will throw light on the regulations concerned with investments by personswho are residents outside India, where the investment size is less than 10% of the post issue share capital. The article on 'Re-Initiation of Proceedings by IO – Validity' under the Prohibition of Benami Transactions Act deals with analysis of recent High Court judgment of Delhi High Court, wherein the IO is allowed to issue a fresh notice in a situation where the earlier notice was quashed in light of certain technical gaps. The journal also covers an article on 'TReDS for MSMEs – Treading the path to quick payments', which is going to make MSME space more vibrant.

The article on 'Gift of Immovable Property which is not a Capital Asset - Taxability Thereof' deals with question of chargeability of tax under Section 56 in case where an immovable property is not a capital asset'. The article on 'Corporate Governance and Role of Internal Audit' places emphasis on the role of internal audit in improving the corporate governance by companies. The presentation on 'CGST Amendment (Act) 2018' deals with the various amendments brought to Central Goods & Services Tax Act, 2017 which is going to be effective from 01.02.2019 subject to notification being issued.

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,

Suresh Babu S
Chairman &Managing Partner

BENAMI ACT

RE-INTITATION OF PROCEEDINGS BY IO

Contributed by CA Suresh Babu S & CA Sri Harsha

The Honourable High Court of Delhi recently in the case of Smt Sunita Gupta v Union of India has an occasion to examine the validity of re-initiation of proceedings by Initiating Officer (IO) under the Prohibition of Benami Property Transactions Act, 1988 (Benami Act). The Honourable High Court after considering the facts of the case has held that there is nothing in law to stop the IO from re-initiating the proceedings if the procedural defects were made correct and the issue of notice is not barred by limitation.

The facts of the case before the Honourable High Court are as follows. On 25.01.2017, the IO has passed an Order of Provisional Assessment in terms of Section 24(3) of Benami Act restraining Smt Sunita Gupta from transferring or charging the property amounting to Rs 2,99,000/- deposited in the savings bank account stating that beneficial owner of such property (amount) is Mr Nitin Jain.

On 08.02.2017, the IO issued a show cause notice under Section 24(1) of Benami Act asking Smt Sunita Gupta to explain why the provisional attachment order issued earlier should not be continued. Smt Sunita Gupta along with Mr Nitin Jain has responded to the notice denying the allegations. However, IO has passed an order continuing the provisional attachment till the Adjudicating Authority (AA) passes an order.

On 05.05.2017, the IO has made a reference to AA and on 15.05.2017, the AA has issued a show cause notice to Smt Sunita Gupta and Mr Nitin Jain to file there replies. After perusing the replies, the AA has come to a conclusion that the property held by Smt Sunita Gupta is not a benami property and has set aside the order passed by IO.

On 26.05.2018, the IO has issued a fresh show cause notice calling Smt Sunita Gupta to explain why the amount of Rs 2,99,000/- should not be considered as benami property within the meaning of Section 2(8) and 2(9) of the Benami Act. The said notice was challenged in the Writ Petition before the Honourable High Court of Delhi wherein the validity of re-initiating the proceedings by IO is questioned. The petitioners (Smt Sunita Gupta) has stated that once the AA has passed an order, the recourse available to IO is to prefer an appeal before the Tribunal under the provisions of the Benami Act but not to re-initiate the proceedings.

The Honourable High Court has held that the AA has set aside the order of IO for the reason that IO has passed a provisional attachment order under Section 24(3) without issuing a notice under Section 24(1). A plain reading of Section 24(1) makes it clear that IO has reasons to believe that any person is a benamidar in respect of a property, the IO after recording his reasons in writing, may issue a notice to person to show cause why such person should not be treated as benamidar. Further, on a plain reading of Section 24(3), the IO can issue a provisional attachment order restraining to transfer the benami property if he is of the opinion that the person in possession of such benami property would alienate such property **during the period specified in the notice, that is the time given by IO for the noticee to show cause why such property should not be treated as benami property.**

The AA on combined reading of Section 24(1) and 24(3) has held that to pass a provisional attachment order, the IO has to first issue a show cause notice. Since in the given facts of the case, the IO has resorted to issue a provisional attachment order on Smt Sunita Gupta without first issuing a show cause notice under Section 24(1). Hence, the AA has held that such provisional attachment order issued under Section 24(3) and subsequent order for continuing such provisional attachment order cannot be sustained.

Hence, the Honourable High Court has held that since the order of AA setting aside the order of IO is for the reason that IO has not adopted the procedure laid down in Section 24 and AA has not examined whether the property is actually a benami property , the IO is not precluded from issuing a fresh show cause notice by curing the procedural defect as observed by AA. The Honourable High Court has also held that the principles of res judicata do not apply since the AA has not taken any decision on the merits of the case.

The Honourable High Court after placing reliance on various Supreme Court judgments has concluded in the following words vide Para 16:

It is well settled that if an order is set aside on account of violation of the principles of natural justice or on account of any procedural defect in the decision making process, the concerned authority is not precluded from re-initiating the proceedings after curing the procedural defects. This is, of course, subject to the condition that the fresh proceedings are(a) within the jurisdiction of the authority; and (b) are not barred by limitation. In the present case, there is no dispute that the IO has the jurisdiction to issue a show notice under Section 24(1) of the Act. There is also no dispute that such notice is not barred by limitation. In view of the above, this Court is unable to accept that the IO (respondent no.3)was in any manner precluded from issuing the show cause notice.

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

MSME

TREDS - ALLIED LAWS

Contributed by CA Murali Krishna G

1. Introduction to MSME:

a. The Micro, Small and Medium Enterprises (MSME) sector has emerged as a highly vibrant and dynamic sector of the Indian economy over the last five decades. It contributes significantly in the economic and social development of the country by fostering entrepreneurship and generating largest employment opportunities at comparatively lower capital cost, next only to agriculture. MSMEs are complementary to large industries as ancillary units and this sector contributes significantly in the inclusive industrial development of the country. The MSMEs are widening their domain across sectors of the economy, producing diverse range of products and services to meet demands of domestic as well as global markets.

b. As per the National Sample Survey (NSS) 73rd round, conducted by National Sample Survey Office, Ministry of Statistics & Programme Implementation during the period 2015-16, there were 633.88 lakh unincorporated non-agriculture MSMEs in the country engaged in different economic activities (196.64 lakh in Manufacturing, 230.35 lakh in Trade and 206.84 lakh in Other Services and 0.03 lakh in Non-captive Electricity Generation and Transmission,) excluding the MSMEs registered under (a) Sections 2m(i) and 2m(ii) of the Factories Act, 1948, (b) Companies Act, 1956 and (c) Construction activities falling under Section F of National Industrial Classification (NIC) 2008.

c. As per the report, it is seen that 31% MSMEs were found to be engaged in Manufacturing activities, while 36% were in Trade and 33% in Other Services. Again, out of 633.88 estimated number of MSMEs, 324.88 lakh MSMEs (51.25%) were in rural area and 309 lakh MSMEs (48.75%) were in the urban areas. The Micro sector with 630.52 lakh estimated enterprises accounts for more than 99% of total estimated number of MSMEs. Small sector with 3.31 lakh and Medium sector with 0.05 lakh estimated MSMEs accounts for 0.52% and 0.01% of total estimated MSMEs, respectively.

2. Legal Background:

a. In accordance with the Section 7 (1) of Micro, Small & Medium Enterprises Development (MSMED) Act, 2006 the Micro, Small and Medium Enterprises (MSME) are classified as below:

Manufacturing Sector	
Enterprise Category	**Investment in Plant & Machinery**
Micro	does not exceed INR 25 lakhs
Small	is more than INR 25 lakhs and does not exceed INR 5 Crore
Medium	is more than INR 5 Crore but does not exceed INR 10 Crore
Service Sector	
Enterprise Category	**Investment in Equipment**
Micro	does not exceed INR 10 lakhs
Small	is more than INR 10 lakhs but does not exceed INR 2 Crore
Medium	is more than INR 2 Crore but does not exceed INR 5 Crore

b. It may be interesting to note that vide PIB Press Release dated 07-02-2018, the Union Cabinet chaired by the Prime Minister Shri Narendra Modi has approved change in the basis of classifying Micro, Small and Medium enterprises from 'investment in plant & machinery/equipment' to 'annual turnover'. The proposed limits are given below:

Enterprise Category	Annual Turnover
Micro	does not exceed INR 5 Crores
Small	is more than INR 5 Crore but does not exceed INR 75 crore
Medium	is more than INR 75 Crore but does not exceed INR 250 crore

Additionally, the Central Government may, by notification, vary the aforesaid proposed turnover limits, which shall not exceed thrice the limits specified in Section 7 of the MSMED Act.

c. Section 15-24 of The Micro, Small and Medium Enterprises Development (MSMED) Act, 2006 deal with the issues relating to the Delayed Payments to Micro and Small Enterprises (MSEs) by the buyers to the MSE supplier. In the case of delay in payment beyond 45 days, MSE suppliers may approach the Micro and Small Enterprises Facilitation Council (MSEFC) constituted under the Act in all States/UTs. Under Section 16 of the MSMED Act, delayed payment to supplier units, attracts compound interest with monthly rests at **three times of the bank rate** notified by the Reserve Bank.

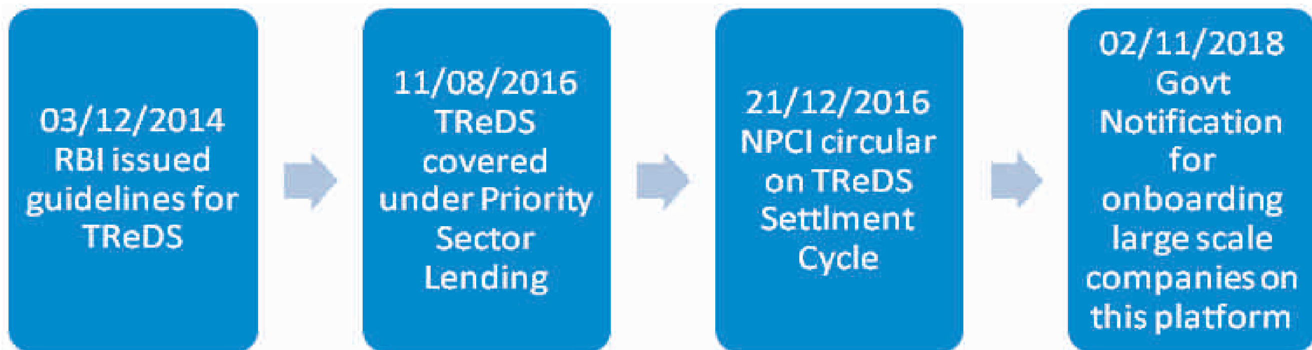
d. It may also be interesting to note that RBI has also constituted Expert Committee on MSMEs vide its press release No. 2018-2019/1540, dated 2ndJanuary, 2019.RBI in its Press Release stated that considering the importance of the MSMEs in the Indian economy, it is essential to understand the structural bottlenecks and factors affecting the performance of the MSMEs. It has, therefore, been considered necessary that a comprehensive review is undertaken to identify causes and propose long term solutions, for the economic and financial sustainability of the MSME sector. For further details, the reader may please refer to the said Press Release.

3. Genesis of TReDS

a. MSMEs continue to face constraints in obtaining adequate finance, particularly in terms of their ability to convert their trade receivables into liquid funds.

b. The concept for setting up of electronic bill factoring exchange was recommended byF inancial Sector Reforms (FSR) Committee in 2008 in their report "Hundred Small Steps".Based on the FSR Committee recommendations, SIDBI in collaboration with NSE, had taken the initiative to set up an e-discounting platform to support financing of MSME receivables. The platform was named as NTREES (Trade Receivables Engine for E-discounting, Prefix 'N' stands for NSE and Suffix 'S' stands for SIDBI). The NTREES platform was based on the reverse factoring model, where credit exposure was taken by large Purchaser / Corporates, who offered the invoices drawn by its MSME suppliers for discounting and SIDBI as the Financier discounted the same and credited the proceeds to MSME bank accounts through RTGS. The platform was based on the Mexican model (National Financiers – NAFIN) for bidding of MSME receivables.

c. Bird's eye view of flow of events is provided herein below



d. In its latest attempt to address the concerns of MSMEs, the Ministry of Micro, Small and Medium Enterprises (the Ministry), in exercise of powers conferred by Section 9 of the Micro, Small and Medium Enterprises Development Act, 2006, vide its Notification dated November 02, 2018 has mandated all companies with a turnover more than INR 500 crore and all Central Public Sector Enterprises, to get themselves on boarded on theTrade Receivables Discounting System(TReDS) platform. This measure is expected to enable MSME entrepreneurs to access credit from banks, based on their upcoming receivables and resolve their problems of cash cycle, by transferring the risk from a weak seller to a strong buyer.

e. In the aforesaid Notification, the Ministry has not provided any time line for compliance of the same. It has authorised the Registrar of Companies of each state to monitor the compliance of these regulations by the companies. However, the Ministry has not issued any notification for the same and it is still a question that how will the regulator monitor the effectiveness of the same.

f. RBI has registered following three exchanges for TReDS purpose

Name of the Exchange	Known as/ website	Commencement of Operations	Registration Valid upto
Receivables Exchange of India Limited	RXIL/ http://www.rxil.in/Home/Index	1st December, 2016	30th June, 2022
Mynd Solutions Private Limited	Mynd Online National Exchange/ https://www.m1xchange.com/about-us.php	April, 2017	31st March, 2022
A. TREDS Limited	INVOICEMART/ https://www.invoicemart.com	29th June, 2017	30th June, 2022

4. Brief introduction of the TReDS scheme introduced by RBI

a. The scheme for setting up and operating the institutional mechanism for facilitating the financing of trade receivables of MSMEs from corporate and other buyers, including Government Departments and Public Sector Undertakings (PSUs), through multiple financiers will be known as Trade Receivables Discounting System (TReDS).

b. The TReDS will facilitate the discounting of both invoices as well as bills of exchange. Further, as the underlying entities are the same (MSMEs and corporate and other buyers, including Government Departments and PSUs), the TReDS could deal with both receivables factoring as well as reverse factoring so that higher transaction volumes come into the system and facilitate better pricing.

c. The transactions processed under TReDS will be "without recourse" to the MSMEs.

5. Definitions/ References

a) **Factoring unit -** a standard nomenclature used in the TReDS for an invoice or a bill on the system. Factoring Units may be created either by the MSME seller (in the case of factoring) or by corporate and other buyers, including Government Departments and PSUs, (in case of reverse factoring) as the case may be.

b) **Financier –** refers to banks, NBFC Factors and other financial institutions as permitted by the Reserve Bank of India participating in the TReDS and accepting the factoring unit for financing purpose.

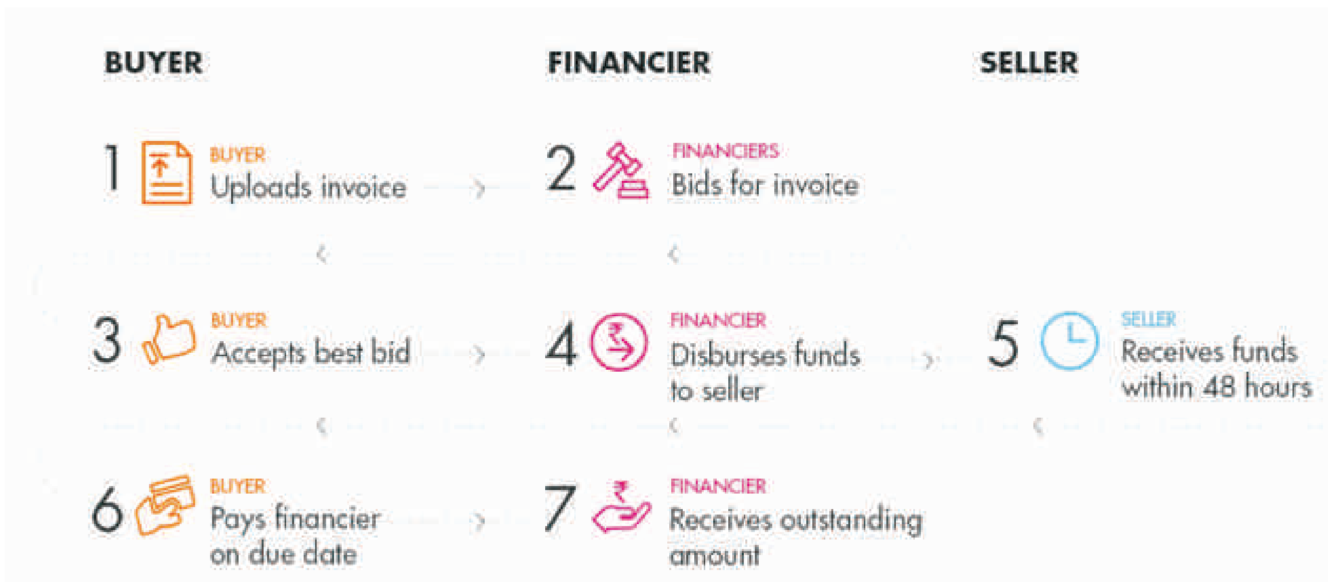
c) **Participants -** MSME sellers, corporate and other buyers, including the Government Departments and PSUs, and financiers (banks, NBFC Factors and other financial institutions as permitted by the Reserve Bank of India) will be direct participants in the TReDS. The TReDS will provide the platform to bring these participants together for facilitating uploading, accepting, discounting, trading and settlement of the invoices / bills of MSMEs. The bankers of sellers and buyers may be provided access to the system, where necessary, for obtaining information on the portfolio of discounted invoices / bills of respective clients. The TReDS may tie up with necessary technology providers, system integrators and entities providing dematerialisation services for providing its services.

6. How it Works

A. Factoring:

Source:https://www.invoicemart.com/index.html#factoring

B. Reverse Factoring:



Source:https://www.invoicemart.com/index.html#reverse

7. Significant benefits to the MSME

a. Under this system the MSME supplier is unlocking the funds without bothering about the future liability of default

b. Normally the interest rate is lesser than bank interest and other funding modes, if their corporate customers credit rating is strong

c. The existing factored invoices can be traded in secondary market also, thereby creating good demand for qualitative receivables amongst the financiers

d. Supports the growth of MSMEs

8. The Technology backbone

a. The three trade finance platforms wanted to have the benefit of sharing for fraud prevention but keep the data private from each other. All the three exchanges are presently using the **Hyperledger Fabric Technology** developed by MonetaGo. MonetaGo is a software development company and Hyperledger member based in New York City that works with financial institutions and central banks around the world to provide private permissioned blockchain solutions.

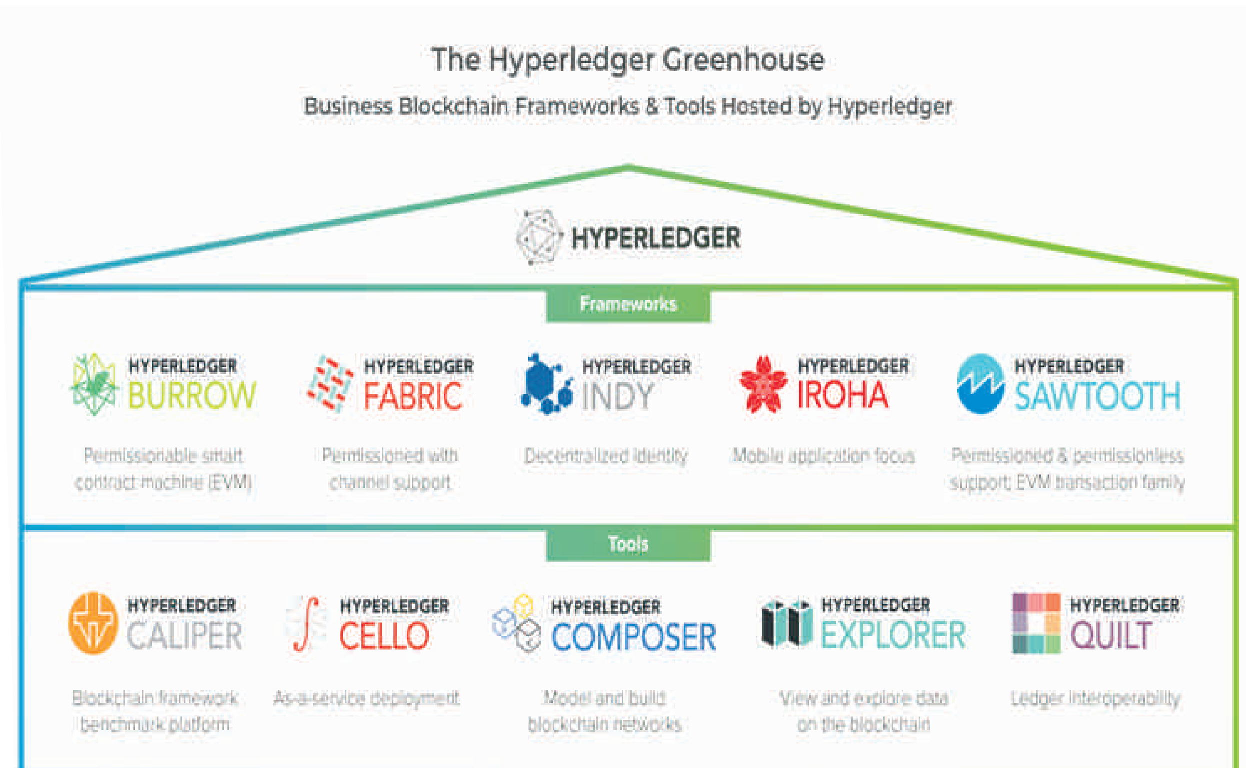
b. The solution was to create a hash of the invoice elements. A hash is a cryptographic representation of the invoice. Looking at a hash, you see indecipherable text, and you can't tell anything about the invoice. Plus mathematicians have made it almost impossible to convert a hash back to the original data.

c. However, if the trader submits the same invoice to another trade finance platform, the hash of the invoice will match the one already on the blockchain, raising a red flag.

d. So what if the trader tweaks the invoice just a little? MonetaGo additionally hashes some of the elements of the invoice. Using fuzzy matching a very similar invoice won't be rejected but will receive an amber flag, and the supplier will have to explain.

e. **Hyperledger Fabric** is a blockchain framework implementation and one of the Hyperledger projects hosted by The Linux Foundation. Intended as a foundation for developing applications or solutions with a modular architecture, Hyperledger Fabric allows components, such as consensus and membership services, to be plug-and-play. Hyperledger Fabric leverages container technology to host smart contracts called "chaincode" that comprise the application logic of the system. Hyperledger Fabric was initially contributed by Digital Asset and IBM, as a result of the first hackathon.

f. Pictorial presentation of various ongoing Hyperledger projects



Source: https://www.hyperledger.org

9. Conclusion

Based on the above one can understand that the launch of TReDS platform is a milestone in the digital initiatives of RBI. This platform is expected to be a catalyst in the growth of MSMEs by significantly improving their liquidity position and ushering in transparency in the business eco-system. This platform is the first attempt in India for introduction of factoring without recourse and is expected to help not only quick realization of receivables but also appropriate price discovery for MSME financing. This platform could be leveraged as a key tool in the new financial architecture in furthering assistance to the MSME sector.

MSMEs can utilize the TReDS platform to encash the receivables on early basis even when otherwise they are not having access to formal banking channel due to various reasons including the credit history.

This article is contributed by CA Murali Krishna G, Partner of SBS and Company LLP, Chartered Accountants.
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INTERNATIONL TAXATION

GIFT OF IMMOVABLE PROPERTY WHICH IS NOT A CAPITAL ASSET

Contributed by CA Ramaprasad T & CA Suresh Babu S

Section 122 of Transfer of Property Act, 1882 defines the phrase 'Gift'. Vide such section, 'gift' is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

The taxation of 'gift' was one interesting journey. In order to deal with taxation of gifts, the legislature has introduced, the Gift Tax Act, 1958 with effect from 01.04.1958. The said act was in effect till 30.09.1998 and been rescinded later. The important aspect of Gift-Tax Act was the tax was on the donor. In 2004, the legislature has re-introduced the taxation of gifts in specified circumstances by insertion of Section 56(2)(vii) in the Income Tax Act, 1961 (Act/Income Tax Act). Vide Section 56(2)(vii), the tax on gifts received was to be paid by donee in specified circumstances.

Section 56(2)[1] has been amended many a times to tax and exclude certain transactions. The same is summarised at the end of this article for providing the snapshot of timelines for the benefit of readers.

Section 56(2) (vii)/(x) covers transactions where an 'immovable property' is gifted. It lays down taxation in cases where an 'immovable property' is received without or inadequate consideration except in certain circumstances as detailed in the table at the end of this article.

In this article, we try to analyse, whether 'immovable property' for the purposes of Section 56(2)(vii)/(x) covers only 'capital assets' as defined in Section 2(14) or covers all types of 'immovable property'. In simpler words, an immovable property which was not a capital asset for the purposes of taxability of capital gain, is also subjected to taxation under Section 56(2) or for the purposes of taxation under Section 56(2), the immovable property should satisfy the definition of capital asset?

The term 'immovable property' is not defined for the purpose of Section 56(2). However, the term 'Property' is defined for the purpose of this clause. The term 'Property' "means the following ***capital asset*** of the assesse, namely immovable property being land or building or both, shares and securities, jewellery, archaeological collections, drawings, paintings, sculptures, any work of an art or bullion.

From the above definition, it is evident that 'property' covers only the immovable properties which are in the nature of 'capital asset'. However, Section 56(2) (vii)/(x) has used the word ***any*** immovable property while fixing the taxation. Now, the challenge is whether we should interpret the phrase 'any' in light of 'capital asset' or 'any' in its normal meaning. If we adopt the former, only such immovable properties which are in nature of capital assets are covered under the ambit of Section 56(2). If we adopt the latter, any kind of immovable property is covered and there is no necessity to go and examine whether such immovable property would fit under the definition of capital asset.

[1]Clause (v) and (vi) covers only transaction involving money.

In our view, the latter is more accurate keeping the intent of the legislature in the background. That is to say, the immovable property which is trying to be taxed under Section 56(2) need not be a capital asset, despite of the fact that the phrase 'property' uses the phrase 'capital asset'.

However, it can be argued that the phrase 'capital asset' has been defined vide Section 2(14) is not only for the purposes of capital gains and for the entire purposes of the Act and hence the immovable property which is not in nature of capital asset is not taxable under Section 56(2). However, such a view narrows the ambit of Section 56(2) and expanding the exclusion list provided in said section. If that was the intention of the legislature, the exclusions provided in Section 56(2) should have specifically mentioned that only capital assets are covered and all other are excluded. Nothing of such sort, in our view all the immovable properties, whether or not capital assets, are subjected to tax under Section 56(2).

Further, Section 49(4) which provides for cost of acquisition of capital asset being a ***property***, the value of which has been subject to tax inter-alia under Section 56(2)(vii)/(x) shall be the value which has been considered for taxing income under those clauses. Here also the reference is only to property and not immovable property. Hence, to tax income under above clauses as far as immovable property is concerned it need not be a capital asset.

Further, Section 2(1A) excludes from the scope of 'agricultural income' any gains on transfer of urban agricultural land. So, gains from rural agriculture land is an agriculture income as result exempt from tax by virtue of provisions of Section 10(1). But the same benefit was not extended to the person who receives rural agricultural land at a bargained price and be taxable under 56(2)(vii)/(x). Hence, we conclude that ambit of Section 56(2) is wider and cannot be restricted by any means expect as specified under the Act.

We also wish to bring to your kind attention that the subject issue was discussed by Honourable ITAT, Jaipur[2] recently. The question of receipt of agricultural land which is not 'capital asset' as per Section 2(14) is subject to provisions of Section 56(2)(vii) is raised before the Honourable Tribunal. The Honourable Tribunal held as under:

On reading of provisions of 56(2)(vii)(b), we find that it refers to any immoveable property and the same is not circumscribed or limited to any particular nature of immoveable property.

It refers to any immoveable property which by its grammatical meaning would mean all and any property which is immoveable in nature, i.e, attached to or forming part of earth surface.

Whether such agriculture land falls in the definition of capital asset u/s 2(14) or whether such agriculture land is stock-in-trade of the assessee, in our considered view, are issues which cannot be read in the definition of "any immoveable property" used in context of Section 56(2)(vii)(b) and are thus not relevant.

(emphasis supplied)

[2]ITO vs Shri Trilok Chand Sain – ITA No. 449/JP/2018- TS-8-ITAT-2019

Summary of changes in Section 56 from 01.09.04 to till date

Section	Applicability	Taxability	Exclusions
Sec 56(2)(v) [01/09/04 to 31/03/06	Any sum of money received without consideration by Individual or HUF of more than Rs. 25,000/-	Whole of such sum	Sum received from Relatives/ By will/Inheritance/ On Contemplation of Death of Payer/on occasion of marriage of individual/from Local Authority/ Fund or Foundation referred to in Sec 10(23C)/ Trust or institution registered U/S 12AA
Sec 56(2)(vi) [01/04/06 to 30/09/09]	Any sum of money received without consideration by Individual or HUF of more than in aggregate of Rs. 50,000/-	Whole of such sum	Sum received from Relatives/ By will/Inheritance/ On Contemplation of Death of Payer/on occasion of marriage of individual/from Local Authority/ Fund or Foundation referred to in Sec 10(23C)/ Trust or institution registered U/S 12AA
Sec 56(2)(vii) [01/10/09 to 31/03/17]	Any sum of money received without consideration by Individual or HUF of more than in aggregate exceeding Rs 50,000/-	Whole of such sum	Sum/Property received from Relatives/ By will/Inheritance/ On Contemplation of Death of Payer/on occasion of marriage of individual/from Local Authority/ Fund or Foundation referred to in Sec 10(23C)/ Trust or institution registered U/S 12AA/ Transactions not regarded as transfer U/S 47(vicb) or (vid) or (vii)
	Any immovable property received by Individual or HUF without consideration or inadequate consideration with reference to Stamp Duty Value assessed or assessable more than of Rs. 50,000/- in both cases	**Without consideration**- Stamp Duty Value **Inadequate Consideration**- Difference between Stamp Duty Value and consideration paid	
	Any property, other than immovable property, received by Individual or HUF without consideration or inadequate consideration with reference to FMV of such property more than of Rs. 50,000/- in both cases in aggregate	**Without consideration**- FMV **Inadequate Consideration**- Difference between FMV and consideration paid	

Sec 56(2)(x) [01/04/17]	Sum of money received by any person without consideration by any person in aggregate of Rs. 50,000/-	Whole of such sum	Sum/Property received from Relatives/ By will/Inheritance/ On Contemplation of Death of Payer/on occasion of marriage of individual/from Local Authority/ Fund or Foundation referred to in Sec 10(23C)/ received by fund or trust or institution referred to in Sec 10(23C)(iv)(v)(vi) (via)Trust or institution registered U/S 12AA/ Transactions not regarded as transfer U/S 47(iv)(v)(vi)(via)(viaa)(vib)(vic)(vica)(vicb) or (vid) or (vii)
	Any immovable property without consideration or for inadequate consideration with reference to stamp duty value assessed or assessable more than Rs. 50,000/- in both cases	**Without Consideration**- Stamp Duty Value **Inadequate Consideration-** Difference [being more than 5% of the consideration] between stamp duty value and the consideration paid]	
	Any property, other than immovable property, received by any person without consideration or inadequate consideration with reference to FMV of such property more than of Rs. 50,000/- in both cases in aggregate	**Without consideration-** FMV **Inadequate Consideration-** Difference between FMV and consideration paid	

SEBI & FEMA

FOREIGN PORTFOLIO INVESTORS

Contributed by CA Murali Krishna G & CA Bharani

Background:

Foreign Portfolio Investments (FPIs) are governed in India by SEBI (Foreign Portfolio Investors) Regulations 2014 ('SEBI FPI Regulations'), Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017 ('FDI Regulations') and RBI Master Direction No. 11/2017-18 on Foreign Investment in India, as amended time to time. FPI refers to foreign investment in India subject to such conditions stipulated in relevant SEBI and RBI regulations. Prior to SEBI FPI Regulations, such investments were governed by SEBI (Foreign Institutional Investors) Regulations, 1995 ('FII Regulations'), NRI Regulations and QFI Regulations issued by SEBI and RBI. India liberalized its economy in 1991 in order to save itself from severe economic crisis. While granting bailout to India at that time, World Bank and IMF stipulated many conditions and of which bringing out changes to foreign trade policy was one major item. Accordingly, India brought in FII regulations governing its foreign investments in 1995. Considering changes to global economic scenario, FII regulations were repealed and FPI regulations (subsuming FII Regulations) were brought in. In today's world, the words FII and FPI are widely used interchangeably.

Definition and Concept:

A person resident outside India may hold foreign investment either as FDI or FPI in any Indian company. As per Regulation 2 (xix) of FDI Regulations, 'Foreign Portfolio Investment' means any investment made by a person resident outside India through capital instruments where such investment is less than 10 percent of the post issue paid-up share capital on a fully diluted basis of a listed Indian company or less than 10 percent of the paid-up value of each series of capital instruments of a listed Indian company;

Explanation: The 10 percent limit for foreign portfolio investors shall be applicable to each foreign portfolio investor or an investor group as referred in SEBI FPI Regulations.

As per Regulation 2(h) of SEBI FPI Regulations, a 'foreign portfolio investor' means a person who satisfies the eligibility criteria prescribed under regulation 4 and has been registered under Chapter II of FPI regulations and shall be deemed to be an intermediary in terms of the provisions of SEBI Act. Provided that any FII or qualified foreign investor who holds a valid certificate of registration as on the date of commencement of FPI Regulations shall be deemed to be an FPI till the expiry of the block of three years for which fees have been paid as per SEBI FII Regulations.

The meaning of word 'Person' and residential status of such person shall be as per Income Tax Act. An FPI can invest in capital instruments of only listed Indian companies. Though the definition of foreign portfolio investment specifies only investment in capital instruments, FDI Regulations permit investment in securities other than capital instruments of Indian companies (listed or unlisted). Investment in capital instruments of unlisted companies shall be treated as FDI. An FPI cannot invest more than 10% of post issue paid share capital or more than 10% of paid-up value of each series of capital instruments of one company. Any investment beyond 10% will be treated as FDI at the option of such FPI. Such treatment shall continue even if such percentage holding falls below 10% subsequently.

FPI REGULATIONS UNDER SEBI

As mentioned above, FPIs are governed by SEBI (Foreign Portfolio Investors) Regulations, 2014, as amended from time to time.

Registration:

1. No person shall buy, sell or otherwise deal in securities as an FPI unless it has obtained a certificate of registration.
2. Such certificate shall be issued, up on an application being made by FPI, by a Designated Depository Participant (DDP) on behalf of SEBI, on payment of applicable registration fee as applicable to category of FPI under which it falls.
3. DDP may grant registration if it is satisfied that the applicant fulfils the eligibility criteria (discussed in subsequent paragraph).
4. DDP may seek additional information or clarifications as it deems necessary for grant of registration.
5. DDP shall endeavour to dispose the applications as soon as possible, but not later than 30 days from date of application or receipt of additional information, as applicable.
6. DDP may reject the registration if the application is not complete or is false in case of any material information. Such decision of rejection should be intimated to the applicant in writing.
7. If the applicant is aggrieved for non-grant of registration, he may apply to SEBI for consideration of his application, within 30 days of communication of decision of rejection.
8. Registration, if granted, will be permanent subject to compliance of applicable provisions and conditions by FPI.
9. An FPI may surrender his registration if he is desirous of giving up his activity, and such surrender can be accepted by DDP only up on approval from SEBI for doing so.
10. DDP may impose such conditions as SEBI may specify while accepting such surrender of registration.

Eligibility Criteria:

A DDP is required to ensure that an applicant satisfies the below criteria in order to be granted a certificate of registration as FPI, namely:

i. The applicant is not a person resident in India
ii. The applicant is not a non-resident Indian
iii. The applicant is resident of a country whose securities market regulator is a signatory to IOSCO's (International Organization of Securities Commission) Multilateral Memorandum of Understanding or a signatory to bilateral Memorandum of Understanding with SEBI
iv. The applicant being a bank, is a resident of a country whose central bank is a member of Bank for International Settlements ("BIS")
v. The applicant is not a resident of a country which is identified by FATF as having deficiencies in relation to implementing AML laws, combatting the financing of terrorism ("CFT"), etc
vi. The applicant is legally permitted to invest in securities outside its country
vii. The applicant is authorized to invest as per its MOA, AOA or any other equivalent document

viii. The applicant has sufficient exposure, financial and professional capability and good reputation of fairness and integrity
ix. That grant of certificate is in the interest of development of securities market in India
x. The applicant is a fit and proper person, as per SEBI (Intermediaries) Regulations
xi. Any other criteria specified by SEBI from time to time

Categories of FPI:

An applicant shall seek registration as an FPI in one of the categories mentioned hereunder or any other category as may be specified by the Board from time to time. This classification is an improvement as compared to erstwhile FII regulations.

Category I FPI shall include:

Government and Government related investors such as Central Banks, Governmental agencies, Sovereign Wealth Funds of foreign country, and International or Multilateral organizations or agencies.

Category II FPI shall include:

i. appropriately regulated broad based funds such as mutual funds, investment trusts, insurance/reinsurance companies;
ii. appropriately regulated persons such as banks, asset management companies, investment managers/ advisors, portfolio managers;
iii. broad based funds that are not appropriately regulated but whose investment manager is appropriately regulated, subject to condition that the investment manager of such broad-based fund is itself registered as Category II FPI. Also, the investment manager should undertake that it shall be responsible and liable for all acts of commission and omission of all its underlying broad-based funds and other deeds and things done by such broad-based funds under these regulations.
iv. university funds and pension funds; and
v. university related endowments already registered with SEBI asFII.

An applicant seeking registration as an FPI shall be considered to be"appropriately regulated" if it is regulated or supervised by the securities market regulator or the banking regulator of the concerned foreign jurisdiction, in the same capacity in which it proposes to make investments in India.

A Broad-based fund shall mean a fund, established or incorporated outside India, which has at least twenty investors, with no investor holding more than forty-nine per cent of the shares or units of the fund. Provided that if the broad-based fund has an institutional investor, who holds more than forty nine per cent of the shares or units in the fund, then such institutional investor must itself be a broad based fund.

Category III FPI shall include:

All others not eligible under Category I and II FPI, such as endowments, charitable societies, charitable trusts, foundations, corporate bodies, trusts, individuals and family offices.

Investment Conditions and Restrictions:

Chapter IV of SEBI FPI Regulations deals investment conditions and restrictions of FPI, the provisions of which are as follows:

1. An FPI shall invest only in following securities, namely
   a. Shares, debentures and warrants of companies, listed or to be listed on a recognized stock exchange in India, through primary and secondary markets;
   b. Units of schemes floated by domestic mutual funds, whether listed on a recognized stock exchange or not;
   c. Units of schemes floated by a collective investment scheme;
   d. Derivatives traded on a recognized stock exchange;
   e. Treasury bills and dated government securities;
   f. Commercial papers issued by an Indian company;
   g. Rupee denominated credit enhanced bonds;
   h. Security Receipts (SR) issued by Asset Reconstruction Companies;
   i. Perpetual debt instruments and debt capital instruments, as specified by RBI from time to time;
   j. Listed and unlisted non-convertible debentures/bonds issued by an Indian company in the infrastructure sector (the word 'infrastructure' as defined in extant ECB guidelines);
   k. Non-convertible debentures or bonds issued by NBFC- Infrastructure Finance Companies;
   l. Rupee denominated bonds (RDBO) or units issued by infrastructure debt funds;
   m. Indian Depository Receipts (IDRs);
   n. Unlisted non-convertible debentures / bonds issued by an Indian company subject to guidelines issued by Ministry of Corporate Affairs from time to time;
   o. Securitized Debt Instruments, including any certificate or instrument issued by a special purpose vehicle set up for securitization of assets, with banks, financials institutions or non-banking financial institutions as originators, and a certificate or instrument issued and listed in terms of SEBI (Public Offer and Listing of Securitized Debt Instruments) Regulations, 2008;
   p. Such other instruments specified by SEBI from time to time.

2. Following additional conditions are applicable in respect of investments in secondary market:

   i. An FPI shall transact in securities in India only on the basis of taking and giving delivery of securities purchases or sold, other than in cases of short selling of securities, transactions in derivatives in recognized stock exchange and transaction in securities pursuant to an agreement with merchant banker in the process of market making or subscribing unsubscribed portion of issue of securities
   ii. No transaction on stock exchange shall be carried forward
   iii. FPI shall hold, deliver or cause to be delivered securities only in dematerialized form
   iv. All transactions by FPI in securities shall be through SEBI registered stock brokers only, other than transactions in government securities falling under RBI purview, sale of securities in accordance with SEBI (buy-back of securities) Regulations &in response to letters of offer under SEBI (SAST) Regulations and SEBI (Delisting of Equity Shares) Regulations, transactions by Category I and III FPIs in corporate bonds, transactions on electronic book provider platform of recognized stock exchanges, etc.

3. In respect of investments in the debt securities, FPI shall also comply with terms, conditions or directions, specified or issued by SEBI or Reserve Bank of India, from time to time, in addition to above conditions specified in these regulations (discussed in subsequent paragraphs). "Debt Securities" shall include dated Government securities, commercial paper, treasury bills, listed or to be listed corporate debt, units of debt oriented mutual funds, unlisted non-convertible debentures /bonds in the infrastructure sector, security receipts issued by asset reconstruction companies or any other security, as specified by the Board from time to time.

Other Guidelines

1. An FPI shall always comply with provisions of these regulations and shall adhere to general obligations and responsibilities mentioned therein.
2. In case of jointly held depository accounts, each of joint holders shall meet the requirements specified for FPI and each shall be deemed to be holding a depository account as an FPI
3. In case the same set of beneficial owners invest through multiple entities, all such entities shall be treated as part of same investor group and investment limits of all such entities shall be clubbed at the investment limit as applicable to a single FPI.
4. An FPI or a global custodian who is acting on behalf of the FPI shall enter in to an agreement with a DDP to act as its custodian of securities before making any investment under FPI regulations.
5. An FPI shall appoint a branch of a bank authorized by RBI for opening a foreign currency denominated account or special non-resident rupee (SNRR) account before making any investment in India
6. Every FPI shall appoint a compliance officer who shall be responsible for monitoring the compliance of regulations and other applicable provisions. Such compliance officer shall immediately and independently report to SEBI and DDP of any non-compliance observed by him. In case an FPI is an individual, he himself shall be responsible for monitoring the compliances.
7. Every FPI and DDP shall keep or maintain specified records, books of account and other documents and shall preserve them for a minimum period of 5 years, subject to provisions of any other law for the time being in force.
8. SEBI may suo motto or on a receipt of information or complaint appoint one or more persons as inspecting authority to inspect the records, documents or books of account of DDP and other documents provided by FPIs as required under the regulations. Such inspecting authority shall submit its report, including interim reports if any, to SEBI directly.

FPI REGULATIONS UNDER FEMA

As mentioned earlier, Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017 ('FDI Regulations') and RBI Master Direction No. 11/2017-18 on Foreign Investment in India govern FPIs. Regulation 5(2), 5(5), 5(10), Schedules 2, 5 and 10 of said FDI Regulations provide guidelines on investment by FPIs in India.

Before going in to details, it is pertinent to understand the meaning of Capital Instruments. Capital Instruments as per Regulation 2(v) means equity shares, debentures, preference shares and share warrants issued by an Indian company. Equity shares includes partly paid shares which should be fully called up within 12 months from date of issue. Debentures and Preference Shares, for the purpose of 'Capital Instruments', shall include only those which shall be fully, compulsorily and mandatorily convertible. Non-convertible / partially convertible / optionally convertible debentures and preference shares shall be treated as debt and shall confirm to FEMA ECB Regulations.

Regulations governing investments in Capital Instruments:

As per Regulation 5(2), an FPI can purchase or sell capital instruments of a listed Indian company on a recognized stock exchange in the manner and subject to conditions provided in Schedule 2, which are mentioned below:

1. The total holding by each FPI or an investor group as referred in SEBI (FPI) Regulations, 2014, shall be less than 10% of the total paid-up equity capital on a fully diluted basis or less than 10 percent of the paid-up value of each series of debentures or preference shares or share warrants issued by an Indian company and the total holdings of all FPIs put together shall not exceed 24% of paid-up equity capital on a fully diluted basis or paid up value of each series of debentures or preference shares or share warrants issued by an Indian company. The said limit of 10% and 24% will be called the individual and aggregate limit, respectively. And the aggregate limit of 24% can be increased by the Indian company concerned up to the sectoral cap/ statutory ceiling, as applicable, with the approval of its Board of Directors. It shall also getits shareholders' approval at General Body meeting through a special resolution.

2. If an FPI breaches the investment limits, it shall sell such capital instruments within 5 trading days, up on which such breach will not be treated as contravention under FEMA. For arriving at the ceiling on holdings of FPI, capital instruments acquired both through primary as well as secondary market will be included. However, the ceiling will not include investment made by the FPI through off-shore Funds, Global Depository Receipts and Euro-Convertible Bonds.

3. In case the total holding of an FPI increases to 10% thresholds provided above, the total investment made by the FPI shall be re-classified as FDI, at the option of such FPI, subject to the conditions as specified by SEBI and RBI in this regard, and the investee company and the investor shall comply with the reporting requirements prescribed in regulation 13 of FDI Regulations.

4. An FPI may purchase capital instruments of an Indian company through public offer/ private placement, subject to the individual and aggregate limits prescribed. And in case of public offer, the price of the shares to be issued is not less than the price at which shares are issued to residents, and in case of issue by private placement, the price is not less than the price arrived in terms of guidelines issued by SEBI or the fair price worked out as per any internationally accepted pricing methodology for valuation of shares on arm's length basis, duly certified by SEBI registered Merchant Banker or Chartered Accountant or a practicing Cost Accountant, as applicable.

5. An FPI may, undertake short selling as well as lending and borrowing of securities (SLBM) subject to below conditions:

   a. The short selling of equity shares by FPIs is permitted for equity shares of those companies where there is at least 2% headroom available for total foreign investment and/or aggregate FPI limit and is not in the caution list or ban list published by RBI or any restrictive list published by any authority designated to do so by the RBI or SEBI.
   b. Borrowing of equity shares by FPIs will only be for the purpose of delivery into short sale.
   c. The margin/ collateral will be maintained by FPIs only in the form of cash. No interest shall be paid to the FPI on such margin/ collateral.
   d. The designated custodian banks shall separately report all transactions pertaining to short selling of equity shares and lending and borrowing of equity shares by FPIs in their daily reporting with a suitable remark (short sold/ lent/ borrowed equity shares) for the purpose of monitoring by RBI.

Regulations governing investments in Securities other than Capital Instruments:

As per Regulation 5(5), an FPI can purchase or sell securities other than capital instruments ('Debt Securities') permitted by RBI in consultation with Central Government, in the manner and subject to conditions provided in Schedule 5. The list of instruments / securities provided in Schedule 5 are same as those approved under SEBI FPI Regulations (discussed in earlier paragraphs).RBI closely monitors the investments by FPI in Debt Securities, especially investments in Government Securities and Corporate Bonds, definitions of which are as follows:

Government Security means a security created and issued by the Government for the purpose of raising a public loan or for any other purpose as may be notified by the Government in the Official Gazette and having one of the forms namely government promissory note, bearer bond, stock or bond held in bond ledger.

Corporate Bonds and debentures mean non-convertible debt securities issued in India which create or acknowledge indebtedness, including (i) debentures (ii) bonds (iii) commercial papers (iv) certificate of deposits and such other securities of a company, a multilateral financial institution (MFI) or a body corporate constituted by or under a Central Act or a State Act, whether constituting a charge on the assets of the company or body corporate or not, but does not include debt securities issued by Central Government or a State Government, or such other persons as may be specified by the Reserve Bank, security receipts and securitized debt instruments.

As per Regulation 5(10) read with Schedule 10, FPIs are permitted to invest in Indian Depository Receipts (IDRs) subject to condition that such IDR shall not be redeemed in to underlying equity shares before the expiry of one year from the date of issue. The overall cap for investment by eligible foreign entities in Indian markets through issuance of IDRs shall be USD 5 Bn and shall be monitored by SEBI. Any conversion / redemption in to underlying equity shares of the issuing company shall comply with FEM (Transfer or Issue of any Foreign Security) Regulations, 2004 as amended from time. However, FEMA provisions shall not apply to the holding of the underlying shares, on redemption of IDRs by the FPIs.

RBI issues AP (DIR Series) Circulars from time to time through which it governs the FPI investments in Debt Securities. Below are relevant guidelines in this regard:

1. RBI decides monetary limits up to which FPI investments can be allowed in debt securities. Govt Securities includes those issued by Central Govt (CG Sec) and by State Govt (State Development Loans – 'SDL'). For the purpose of investments in Govt Securities, FPI Investors are classified as Long Term category which includes pension funds, insurance funds, foreign central banks etc., and General category.
2. The current monetary limits for CG Sec, SDL and Corporate Bonds are as below:

CG Sec – General	INR 2,23,300 Cr
CG Sec – Long Term	INR 92,300 Cr
SDL – General	INR 38,100 Cr
SDL – Long Ter	INR 7,100 Cr
Corporate Bonds	INR 2,89,100 Cr
Total	**INR6,49,900 Cr**

3. Effective June 2014, FPIs were allowed to participate in currency futures and exchange traded currency options. RBI vide A.P. (DIR Series) Circular No. 18, dated Feb 26, 2018, fixed the cap of USD 100 Mn under this category for transactions across all currency pairs and it shall be cumulative for all exchanges (Previous limit was USD 10 Mn for USD-INR pair per exchange and USD 5 Mn for GBP-INR, SGD-INR, JPY-INRpairs put together per exchange).

4. Effective November 2015, FPIs were allowed to invest in non-convertible debentures and bonds of Indian companies which defaulted in payment of principal on maturity or principal instalment in case of amortized bonds by way of purchase from existing holders of such securities. However, the information with regard to such purchase offer should be intimated to concerned debenture trustee, and such investment should be within overall limits meant for corporate bonds.

5. RBI vide AP (DIR Series) Circular No. 31, dated June 15, 2018 has issued latest guidelines on debt instruments amending many previous circulars, as below:
   a. There shall be no minimum maturity period for investments in CG Secs, including treasury bills and SDLs, subject to condition that investments in securities with less than one-year maturity shall not be more than 20% of total investments by FPI in that category. Previously minimum maturity period was of three years.
   b. Coupon receipts by FPIs on their investments in govt securities is now part of total monetary limits allocated therefor. Previously it was outside such limits.
   c. Minimum maturity period for investments in Corporate Bonds shall be one year (earlier three years). However, FPIs are permitted to make short term investment of less than one-year subject to condition that such investments shall not be more than 20% of total investments by FPI in corporate bonds.
   d. Minimum maturity period is not applicable for investments in Security Receipts issued by Asset Reconstruction Companies

e. The requirement that short-term investments shall not exceed 20% of total investment by an FPI in any category applies on an end-of-day basis. At the end of any day, all investments with residual maturity of up to one year will be reckoned for the 20% limit.

f. Short-term investments by an FPI may exceed 20% of total investments mentioned above, only if the short-term investments consist entirely of investments made on or before April 27, 2018.

g. The cap on aggregate FPI investments in any CG Sec shall be 30% of the outstanding stock of that security. Previously this was capped at 20%.

h. Utilization limits of CG Sec and SDLs categories shall be monitored online by Clearing Corporation of India. Previously FPIs were permitted to invest up 90% of Govt Sec limits directly, and beyond that there used to be auction mechanism by stock exchanges. And usage was monitored by Depositories.

i. FPI investment in corporate bonds shall be subject to the following further requirements as below:

   1. Investment by any FPI, including investments by related FPIs, shall not exceed 50% of any issue of a corporate bond. In case an FPI, including related FPIs, has invested in more than 50% of any single issue, it shall not make further investments in that issue until this stipulation is met.

   2. No FPI shall have an exposure of more than 20% of its corporate bond portfolio to a single corporate (including exposure to entities related to such corporate). In case an FPI has, as on April 27, 2018, exposure in excess of 20% to any corporate (including exposure to entities related to such corporate), it shall not make further investments in that corporate until this requirement is met. This condition is not applicable for new FPIs which are registered after April 27, 2018 for their investment in corporate bonds till March 31, 2019 or six months of incorporation whichever is earlier. Pipe-line investments, i.e., transactions that were under process but had not materialized as on April 27, 2018 , shall also be exempt from the 20% threshold limit, subject to the condition that major terms like price, tenor and amount of investment are agreed up on, and actual investment commences by December 21, 2018.

j. No FPI shall invest in partly paid debt securities.

k. FPIs are also permitted to invest in REITs and InvITs.

AUDIT

CORPORATE GOVERNANCE PERSPECTIVE AND ROLE OF INTERNAL AUDIT

Contributed by CA Sandeep Das

Introduction:

Corporate Governance is a multi-faceted subject and trying to comprehend in a concise definition. The central theme of corporate governance is to integrate sound management policies in the corporate framework in such a manner to bring economic efficiency in the organization in order to achieve twin goals of profit maximization and shareholder welfare. Few comprehensive definitions on Corporate Governance are discussed below.

"Corporate Governance is the way a company is organized and managed to ensure that all financial stakeholders receive a fair share of the company's earnings and assets." - ***Standard and Poor***

"It is a system by which companies are directed & controlled." - ***The Cadbury Committee U.K.***

Background:

If we look at the corporate history which includes several frauds and scams further from investigation results the regulatory bodies were able to highlight control failures that had allowed several major corporations to make illegal payments and siphon the money which should have been used for purpose of business. Lack of regulatory measures from authorities as an adequate response to check them in future gave birth to COSO (Committee of Sponsoring Organization). Sarbanes – Oxley Act, 2002 (SOX), was introduced which made a sincere attempt to address all the issues associated with the corporate failure to achieve quality governance and to restore investors confidence. The most critical aspect of SOX is that it makes clear that Company's senior officers are responsible for the corporate culture they create and must be faithful to the same rules they set out for other employees.

The scope of Corporate governance

Corporate governance instills ethical standards in the company. It creates space for open dialogue by incorporating transparency and fair play in strategic operations of the corporate management. The significance of corporate governance lies in :

- Accountability of Management to shareholders and other stakeholders
- Transparency in basic operations of the company and integrity in financial reports produced by the company

- Component Board comprising of Executive and Independent Directors
- Adherence to the rules of the company in law and spirit
- Code of responsibility for Directors and Employees of the company

Internal Audit roles:

As organizations address the growing array of risks created by new technology, geopolitics, cyber security, and disruptive innovation, a vibrant and agile internal audit function can be an indispensable resource supporting sound corporate governance. Internal audit assures by assessing and reporting on the effectiveness of governance, risk management, and control processes designed to help the organization achieve strategic, operational, financial, and compliance objectives.

It is best positioned to provide assurance when its resource level, competence, and structure are aligned with organizational strategies. It can do this best when it is free from undue influence. By maintaining its independence, internal audit can perform its assessments objectively, providing management and the board an informed and unbiased critique of governance processes, risk management, and internal control. Based on its findings, the internal audit recommends changes to improve processes and follows up on their implementation.

Functioning independently within the organization, internal auditing is performed by professionals who have a deep appreciation of the importance of strong governance, an in-depth understanding of business systems and processes, and a primary drive to help their organizations succeed.

Internal audit provides insight by acting as a catalyst for management and the board of having a deeper understanding of governance processes and structures. Internal audit insights on governance, risk, and control provoke positive change and innovation within the organization. It inspires organizational confidence and enables competent and informed decision making.

Internal audit can add value by providing advisory and consulting services, intended to improve governance, risk management, and control processes, so long as internal audit assumes no management responsibility. This is vital to maintaining internal audit's objectivity and avoiding conflicts of interest.

Role of Board and Audit Committees

The board establishes structures and processes that define governance within the organization, taking into consideration the perspectives of investors, regulators, and management, among others. The board oversees and monitors the company's strategic, operational, financial and compliance risk exposures, and it collaborates with management in setting risk appetite, risk tolerances, and alignment with strategic priorities.

A corporate governance practice for listed companies – sometimes mandated -- is to use audit committees to provide strengthened oversight of the financial and ethical integrity of publicly held companies. The audit committee, made up of independent directors, can significantly strengthen the independence, integrity, and effectiveness of audit activities by providing independent oversight of the internal and external audit work plans and results, assessing audit resource and qualification needs, and

mediating the auditors' relationship with the organization. Audit committees also ensure that audit results are discussed, and any recommended improvements or corrective actions are addressed or resolved.

Ideally, internal audit should report functionally to the board or audit committee and administratively to management.

Recent Corporate Governance Issues in India

Promoters have considerable leeway to siphon corporate resources away from the minority shareholders via skewed contracts with related companies and undeserving pecuniary benefits for promoters. The focus of the boards in such promoter companies that are ubiquitous in India must be to ensure that minority shareholder rights are not trampled upon.

Unfortunately, in practice, returns to the minority shareholders depend on the benevolence of the promoter. If the promoter needs to return to the equity markets and adequately weighs the shadow of the future, minority shareholders receive natural protection. Independent directors represent the interests of minority shareholders. However, as was observed in the Tata case, these directors normally toe the promoter's line. In exceptional circumstances when they do not, even some powerful and well-connected Directors can be dismissed because of promoters ‘control' on the Annual General Meeting. Such events have a chilling effect on the ‘independence' of directors, as it reiterates to everyone the power of promoters in India.

Issues affecting Corporate governances’ practices in India:

1. **Getting the Board Right**
   The law requires a healthy mix of executive and non-executive directors and appointment of at least one woman director for diversity. There is no doubt that a capable, diverse and active board would, to a large extent, improve governance standards of a company. The challenge lies in ingraining governance in corporate cultures so that there is improving compliance "in spirit." Most companies' in India tend to only comply on paper; board appointments are still by way of "word of mouth" or fellow board member recommendations. It is common for friends and family of promoters and management to be appointed as board members. Rating of board diversity and governance practices and publishing such results or using performance evaluation shall be the minimum benchmark for director appointment.

2. **Performance Evaluation of Directors**
   Performance evaluation of directors has been part of the existing legal framework in India; it caught the regulator's attention recently. SEBI, India's capital markets regulator, released a 'Guidance Note on Board Evaluation' in January 2017. This note elaborated on different aspects of performance evaluation by laying down the means to identify objectives, different criteria, and method of evaluation. For performance evaluation to achieve the desired results on governance practices, there is often a call for results of such evaluation are made public.

3. **Directors Independence**
   Independent directors' appointment was supposed to be the most significant corporate governance reform. However, 15 years down the line, independent directors have hardly been able to make the desired impact. The regulator on its part has, time and again, made the norms tighter – introduced comprehensive definition of independent directors, defined a role of the audit committee, etc. However, most Indian promoters design a tick-the-box way out of the regulatory requirements. The independence of such promoter appointed independent directors is questionable as it is unlikely that they will stand-up for minority interests against the promoter.

4. **Removal of Independent Directors**
   Under the law, an independent director can be easily removed by promoters or majority shareholders. Independent directors have been generally criticized for playing a passive role on the board, instances of independent directors not siding with promoter decisions have not been taken well – they were removed from their position by promoters. This inherent conflict has a direct impact on independence. Earlier this year, even SEBI's International Advisory Board proposed an increase in transparency about appointment and removal of directors.

5. **Executive Compensation**
   Executive compensation is a contentious issue especially when subject to shareholder accountability. Companies have to offer competitive compensation to attract talent. However, such executive compensation needs to stand the test of stakeholders' scrutiny. Presently, under Indian law, the nomination and remuneration committee (a committee of the board comprising of a majority of independent directors) is required to frame a policy on the remuneration of key employees. Also, the annual remuneration paid to executives is required to be made public.

6. **Responsibility to Stakeholders**
   Indian company law, revamped in 2013, mandates that directors owe duties not only towards the company and shareholders but also towards the employees, community and for the protection of the environment. Directors independence has to be supplemented with greater duties for, and accountability of directors. Although these general duties have been imposed on all directors, directors including independent directors have been complacent due to lack of enforcement action. To increase accountability, it may be a good idea to require the entire board to be present at general meetings to give stakeholders an opportunity to interact with the board and pose questions.

7. **Risk Management**
   Today, large businesses are exposed to real-time monitoring by business media and national media houses. Given that the board is only playing an oversight role on the affairs of a company framing and implementing a risk management policy is necessary. In this context, Indian company law requires the board to include a statement in its report to the shareholders indicating the development and implementation of risk management policy for the company. The independent directors are mandated to assess the risk management systems of the company. For a useful governance model, a vigorous risk management policy which spells out fundamental principles and practices for mitigating risks in day-to-day activities is imperative.

8. **Data protection and confidentiality**
   Privacy and data protection is an important governance issue they are the critical aspect of risk management. In the digitalization era, a sound understanding of the fundamentals of cyber security must be expected from every director. Good governance will be only achieved if executives can engage and understand the specialists in their firm. The board must assess the potential risk of handling data and take steps to ensure such data is protected from potential misuse.

9. **Corporate Social Responsibility**
   India is one of the few countries which has legislated on CSR. A board should manage CSR projects with as much interest and vigor as any other business project of the company. Companies meeting specified thresholds are required to constitute a CSR committee from within the board. This committee then frames a CSR policy and recommends spending on CSR activities based on such a policy. Companies are required to spend at least 2% of the average net profits of the last three financial years. For companies who fail to meet the CSR spend, the boards of such companies are required to disclose reasons for such failure in the board's report. During the last year, companies which failed to comply received notices from the ministry of corporate affairs asking for reasons why they did not incur CSR spend and in some cases questioning the reasons disclosed for not spending. In these circumstances, increased effort and seriousness by the board towards CSR is necessary.

Conclusions:

Companies Act, 2013 and SEBI's listing obligations and disclosure requirements regulations have contributed significantly in strengthening governance norms and in increasing accountability by way of disclosures. Internal audit strengthens corporate governance through risk-based audits that provide assurance and insights on the processes and structures that drive the organization toward success. As risks grow and become more complex, internal audit’s role is likely to expand in areas such as risk governance, culture and behavior, sustainability, and other nonfinancial reporting measures. For achieving desired results, it is essential that regulatory measures are modeled based on the practices and business environment in India.

This article is contributed by CA Sandeep Das, Partner of SBS and Company LLP, Chartered Accountants. The author can be reached at sandeepd@sbsandco.com

RERA

CERTAIN ISSUES UNDER REAL ESTATE (REGULATION & DEVELOPMENT) ACT

Contributed by CA Sri Harsha

Since the Real Estate (Regulation & Development) Act, 2016 (colloquially referred as 'RERA law') picking its heat in the state of Telangana, we thought of writing an article on certain issues which were examined by our office in last few months pertaining to the applicability of RERA provisions and found to be interesting.

Before dwelling into such issues, it is to be noted that projects which have obtained approval post 01.01.2017 are treated as 'on-going projects' as defined vide Rule 2(j) of Telangana State Real Estate (Regulation and Development) Rules, 17. Vide Order No 04 dated 28th December 2018, TS RERA has communicated that there will be a penalty amounting to Rs 2 lakhs if the project has received approval between 01.01.2017 to 31.08.2018 and registers prior to 15.01.2019. Hence, it is urged that all projects which have received approval between 01.01.2017 to 31.08.2018 should be register prior to 15.01.2019.

Issue # 1:

ABC Private Limited (ABC) is a company engaged in construction and development of residential complexes. ABC has laid foundation for a new project and is contemplating not to advertise, market, offer for sale, or invite persons to purchase or sell until the entire project is completed and completion certificate has been obtained from the appropriate authority. In other words, ABC intends to use their own funds for the entire project and sell them to the customers as immovable properties after obtaining completion certificate. In such a scenario, whether ABC is required to obtain registration under RERA Laws?

Viewpoint:

a. Section3(1) of RE (R&D) Act states that *'No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with Real Estate Regulatory Authority established under this Act'.*

b. Section 3(2) of RE (R&D) Act states that, notwithstanding to anything contained in Section 3(1), no registration of real estate project shall be required in the following cases:
   i. where area of land proposed to develop does not exceed 500 square meters or the number of apartments proposed to be developed does not exceed eight
   ii. where promoter has received completion certificate for a real estate project prior to commencement of this Act
   iii. for the purpose of renovation or repair or re-development which does not involve marketing, advertising, selling or new allotment of any apartment, plot, or building as the case may be, under the real estate project.

c. Clearly from the provisions of Section 3(2), the project contemplated by ABC does not fit and accordingly the exemption from registration mentioned therein shall not be applicable to ABC. Now, the question is whether in the given facts, since ABC is contemplating not to advertise, market, book, sell or offer for sale or invite any person to purchase in any manner, should it be getting registered under the subject Act.

d. In other words, ABC is of the opinion that the phrase 'sell', appearing in Section 3(1) has to be read as, sale before completion of project (by taking advance from customers) and not a sale of apartment after obtaining completion certificate (where sale is akin to sale of immovable property). They have reached such conclusion for the reason that majority of the provisions of the Act deal with compliances during the execution of project and since no advance is received from the customers, the registration is not required under the Act.

e. It is tempting to adopt the rationale of ABC because it sounds logical. However, Section 3(1) read with other provisions does not support such a view. Section 14(3) of the Act provides that *'in case of any structural defect or any other defect workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act'*

f. From the above, it is clear that RE (R&D) is not only a law which protects the customer during the execution of the project but also intends to protect post-delivery of the apartment in case of any structural defects. In such case, if a project is not registered by the promoter because of the reason that such promoter is not engaged in advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner, the Real Estate Regulatory Authority (RERA) or Adjudicating authority, as the case may be, would not have any say if a compliant is received from any customer in light of Section 14(3), since the project has not been registered.

g. Recently the Honourable Division Bench of Bombay High Court in a writ petition filed by Mohammed Zain Khan against Maharashtra Real Estate Regulatory Authority has directed the Authority to accept complaints on unregistered projects and accordingly the Authority has stated it is in the process of updating the software to accept complaints in respect of unregistered projects. Hence, it cannot be said that the RERA does not have jurisdiction in case of unregistered projects, however the issue is not free from litigation.

h. Hence, ABC cannot avoid the obligation of registration of project despite of the fact that such project is sold after obtaining completion certificate without resorting to any advertising or likes mentioned in Section 3.

Issue # 2:

XYZ is a partnership firm. XYZ regularly purchases land, applies for conversion from agricultural to commercial or residential and then sells entire land to DEF Private Limited. XYZ enters an agreement with DEF to sell the entire converted land to DEF as and when DEF identifies a customer or bunch of customers. DEF develops such converted land into plots and promises certain amenities to the customers. There is no joint development agreement between XYZ and DEF. In such a scenario, who has to register with RERA, XYZ or DEF?

Viewpoint:

a. In the facts above, it is evident that XYZ is just purchasing land and getting it converted by making an appropriate application with concerned authority. In any case, XYZ does not develop the converted lands into plots or into structures. By virtue of an agreement with DEF it sells land on piece meal basis when DEF identifies customs or bunch of customers.

b. However, DEF promises the customer that the such land will be converted into plots and certain amenities would be created in such plots and receives money from customers (allottees). In other words, DEF is developer and XYZ is a land owner but there does not exist any development agreement except an agreement where XYZ states entire land would be sold in piece meal to DEF and consideration for XYZ is qua land and not any share of revenue or built-up area in the completed project.

c. Strictly speaking, it can be inferred from the above facts that XYZ is simply transferring the land and is not engaged in development of any project and hence not required to register with RERA, since XYZ is engaged in sale of land and no development.

d. However, on perusal of the phrase 'promoter' as defined in Section 2(zk), specifically vide sub-clause (ii), *it means 'a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purposes of selling to other persons all or some of the plots in the said project, whether with or without structure thereon'.* On a plain reading of the above, a person who develops land into a project whether he constructs any structures on any of plots for the purposes of selling to other persons all such plots is covered under the definition of 'promoter'.

e. The only question that has to be answered is whether conversion of land without the activity of plotting would be covered under the 'development of land into project' as laid down in the definition of 'promoter' above. For this, we have to refer to the definition of 'project', which is used in definition of 'promoter'. The phrase 'project' has been defined vide Section 2(zj) to mean a real estate project as defined in Section 2(zn).

f. 'real estate project' means *the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartment, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto*

g. Since the real estate project only includes development of land into plots and does not cover mere conversion of land from agricultural to residential or commercial, the activity of XYZ does not fall under the phrase 'development of land into project' and thereby does not fall into the definition of 'promoter'. Once XYZ is not a promoter, he is not required to be registered under RERA.

h. Since DEF is engaged into conversion of such land into plots and consequently offer for sale to allottees, DEF is required to be registered under RERA. However, since the entire land does not belong to DEF which is used for plotting, it is advisable to show XYZ as land owner while registering the project with RERA.

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GST

CGST (AMEND) ACT 18

Contributed by CA Sri Harsha & CA Manindar

Amendments to Definitions:

Section	Title	Amendments
2(4)	Adjudicating Authority	❖ The phrase 'adjudicating authority' has been amended to exclude the orders passed by authority constituted under Section 171(2) – National Anti-Profiteering Authority. ❖ By virtue of this amendment, NAA shall not become an 'adjudicating authority' and accordingly the order of NAA cannot be appealed before either Appellate Authority or Appellate Tribunal. The only remedy available is Writ e Jurisdiction.
2(17)(h)	Business	❖ Entry dealing with the activities pertaining to race club has been expanded to remove any doubts. ❖ Earlier entry was only covering services provided by race club by way of totalisator and book maker. Now, amended to cover all activities provided by race club which satisfies the meaning of 'supply'. ❖ Activities of race club including by way of totalisator or a license to book maker or activities of a licensed book maker in such club
2(18)	Business Vertical	❖ The said phrase has been omitted vide the Amendment Act. The role of such phrase was to grant separate registration in the same state for entities have separate business verticals. ❖ Now, Section 25 being amended to allow granting of registration for multiple place of business in a state subject to conditions, the concept of 'business vertical' becomes otiose and hence omitted vide Amendment Act.

Section	Title	Amendments
2(69)	Local Authority	❖The definition of 'local authority' has been amended to include development board constituted under Article 371J of Constitution. ❖Article 371J has been inserted vide The Constitution (118th Amendment) Bill, 2012. Vide such Article, the Constitution provides the Governor of Karnataka to establish a board for development of certain areas in Hyderabad – Karnataka Region. ❖The development board now being included in definition of 'local authority' enjoys certain concessional rate or exemptions provided to 'local authority'.
2(102)	Services	❖An explanation has been added to definition of 'services' to indicate that the expression 'services' includes facilitating or arranging transactions in securities. ❖Securities has been excluded from the definition of 'goods' and 'services'. Hence, there was a view that facilitating or arranging transactions in securities would also not be covered under the definition of 'services'. ❖The amendment is to clear the ambiguity if any that support activities pertaining to 'securities' is covered under expression 'services'. ❖Louis Drefyus Company India Private Limited – AAR – 2018 (10) TMI 1145 – the AAR (Punjab) has held that 'washout', 'closure', 'settlement' pertaining to derivate contracts as 'services'.

Amendments to Section 7:

Section	Title	Amendments
7	Scope of 'Supply'	❖The Honourable High Court of Bombay in the case of Builders Association of Navi Mumbai v Union of India (2018) 92 taxman.com has dealt the role of Schedule II. ❖The facts of the case are Builders Association of Navi Mumbai (BA) has won the bid for securing lease of land from CIDCO on payment of one-time lease premium. BA was under impression that since the lease is for 60 years, the said transaction is akin to sale of immovable property and therefore the one-time premium should not be subjected to tax. ❖Schedule II vide Entry 2 deals with 'Land & Building' and any lease, tenancy, license to occupy land is a supply of service. The Honourable High Court stated that the substantive provisions of Section 7 in clearest term says that expression 'supply' includes Schedule II transactions and once a transactions falls under Schedule II, it becomes a 'supply' even the said transaction is not a 'supply' in terms of Section 7(1)(a). ❖In the words of Justice S C Dhramadhikari – Para 14: *The substantive provision section 7 in clearest terms says that the activities specified in Schedule I made or agreed to be made without a consideration and the activities to be treated as supply of goods or supply of services referred to in Schedule II would be included in the expression "supply". However, clause (a) of sub-section (1) of section 7 includes all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business. We referred to the definitions simply to reinforce our conclusion that the CIDCO is a person and in the course or in furtherance of its business, it disposes of lands by leasing them out for a consideration styled as one-time premium. Therefore, if one refers to*

		Schedule II, section 7, then, Item No. 2 styled as land and building and any lease, tenancy, licence to occupy land is a supply of service. Any lease or letting out of a building, including commercial, industrial or residential complex for business, either wholly or partly is a supply of service. It is settled law that such provisions in a taxing statute would have to be read together and harmoniously in order to understand the nature of the levy, the object and purpose of its imposition. No activity of the nature mentioned in the inclusive provision can thus be left out of the net of the tax. Once this law, in terms of the substantive provisions and the Schedule, treats the activity as supply of goods or supply of services, particularly in relation to land and building and includes a lease, then, the consideration therefor as a premium/one-time premium is a measure on which the tax is levied, assessed and recovered. We cannot then probe into the legislation any further. ❖ The amendment tries to now bring the true intention of the legislature. A new sub-section (1A) has been introduced **with retrospective effect** to state that ***a transaction/activity constitutes a 'supply' in terms of sub-section (1), then they shall be treated as either 'supply of goods' or 'supply of services' as mentioned in Schedule II.***

Amendments to Section 9:

Section	Title	Amendments
9(4)	Levy and Collection	❖The existing sub-section (4) has been substituted with the following: *The Government may, on the recommendations of the Council, by notification, **specify a class of registered persons** who shall, **in respect of supply of specified categories of goods or services or both** received from an unregistered supplier, pay the tax on reverse charge basis as the recipient of such supply of goods or services or both, and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to such supply of goods or services or both.* ❖Looks so reliving as compared to the earlier sub-section. The erstwhile sub-section covers all supplies from unregistered by a registered taxable under reverse charge. The same created nightmares and was suspended from 13th Oct 18. ❖The new sub-section is rational which only fixes a class of registered persons and specified goods or services or both from unregistered persons.

Amendments to Section 10:

Section	Title	Amendments
10	Composition	❖The limit for determining the eligibility for composition scheme under the delegated legislation has been extended from 1 Crore to 1.5 Crores. ❖A new proviso has been inserted to allow the person who opts to pay tax under Section 10 to render services of value note exceeding 10% of turnover in a state in the preceding FY or Rs 5 lakhs rupees, whichever is higher. However, services as mentioned in Entry 6(b) of Schedule II are not allowed.

Amendments to Section 16:

Section	Title	Amendments
16	Eligibility and Conditions for taking Input Tax Credit	❖ A new explanation has been introduced to Section 16(2)(b). Vide such explanation, the legislature intends to deem certain instances where the goods or services are received by registered person. The following are the instances: ❑ Where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise ❑ Where the services are provided by the supplier to any person on the direction of and on account of such registered person. ❖ The amendment is to make it clear that the recipient shall be eligible to avail the credit despite of the fact that the goods or services are not physically received by him.

Amendments to Section 17:

Section	Title	Amendments
17(3)	Apportionment of Credit and Blocked Credits	❖ An explanation has been inserted to Section 17(3) stating that 'value of exempt **supply' shall not include the value of activities or transactions specified in Schedule III, except the sale of land and building.** ❖ Hence, for the purpose of arriving the value of exempt supply for restricting the common credit in terms of Section 17(2), the value from transactions or activities mentioned in Schedule III need not be considered. However, the value of land and building has to be taken for arriving the value of exempt supply.

17(5	Apportionment of Credit and Blocked Credits	❖The credit of motor vehicles for transportation of persons not more than 13 persons is allowed if they are used for making certain supplies like further supply, transportation of passengers or impart training. ❖The credit of vessels and aircrafts is now clearly being restricted only if such vessels or aircrafts are used for making certain supplies like further supply, transportation of passengers, imparting training or transportation of goods.
17(5)	Apportionment of Credit and Blocked Credits	❖The credit of motor vehicles used for transportation of goods is now removed from blocked credit and hence the same is eligible without any restrictions. ❖The services of general insurances, servicing, repair and maintenance in so far as they relate to motor vehicles, vessels or aircrafts referred above are not allowed unless such motor vehicles, vessels or aircrafts are used for making certain supplies as mentioned above. ❖Further, the manufacturer of motor vehicles, vessels or aircrafts is allowed to take such credit. Also, the person engaged in supply of general insurance services pertaining to such motor vehicles, vessels or aircrafts insured by him is also made eligible. ❖Input tax credit of hiring of such motor vehicles or aircrafts or vessels shall be allowed only if the same are used for specified purposes. All the goods or services which are obligatory on employer to provide under any law are also made available.

Amendments to Registration:

Section	Title	Amendments
22	Persons liable for registration	❖The limit of ten lakh for obtaining registration in special category states has been enhanced to a maximum of twenty lakh. The same shall be only if the Government receives request from special category state to enhance such limit and subject to certain condition and limitations.
24	Compulsory Registration in certain cases	❖Now, it is made clear that electronic commerce operator is required to be registered compulsory in cases where he is required to collect tax at source under Section 52.
25	Procedure for Registration	❖The requirement for obtaining separate registration for SEZ unit and its DTA unit is spelt out in Rule vide Rule 8 of CGST Rules, 17. Now the same is being spelt out in the Act.
29	Cancellation or Suspension of Registration	❖A proviso has been inserted to suspend the registration during the pendency of proceedings for cancellation for registration.

Insertion of Section 43A:

Section	Title	Amendments
43A	Procedure for Furnishing Return and Availing Input Tax Credit	❖A new section has been introduced for furnishing return and availing input tax credit. ❖Notwithstanding to anything contained in Section 16(2), 37 and 38, every registered person shall in the returns furnished under Section 39(1) – GSTR 3 or GSTR – 3B, verify, validate, modify or delete the details of supplies furnished by the suppliers. ❖The procedure for furnishing the details of outward supplies by the supplier on common portal, for the purposes of availing input tax credit by the recipient shall as may be prescribed. ❖The procedure for availing the credit in respect of outward supplies not furnished above shall be as such as may be prescribed and such procedure may include the maximum amount of credit which can be so availed, not exceeding 20% of input tax credit available, on the basis of details furnished by suppliers.

		❖The amount of tax specified by the supplier in the outward suppliers for which details have been furnished by supplier shall be deemed to be the tax payable by him. ❖The supplier and recipient shall be jointly and severally liable to pay tax or pay credit, as the case may be, in relation to supplies which have been furnished but return has not been furnished. ❖The recovery mechanism for recovery of tax or credit in the above situation shall also be prescribed.

Amendment of Section 49:

Section	Title	Amendments
49	Payment of Tax, Interest, Penalty and other Amounts	❖In the matter of A & M Design & Print Production v Union of India & Ors 2017 (10) TMI 253 – Delhi High Court, the petitioner has challenged that GST portal is not allowing to use the CT and ST credit partially to make payment of IT liability. ❖The petitioner stated there was no restriction under the Section 49(5) but there was a restriction in portal which does not allow partial utilisation. ❖The current amendment is to insert proviso to utilisation of ST, which states that ST can be used to make payment of IT only when there is no balance in CT.

Insertion of Section 49A & 49B:

Section	Title	Amendments
49A	Utilisation of input tax credit subject to certain conditions	❖Notwithstanding anything contained in section 49, the input tax credit on account of CT, ST or UT shall be utilised towards payment of IT, CT, ST or UT as the case may be, ***only after the input tax credit available on account of IT has first been utilised fully towards such payment.***
49B	Order of Utilisation of input tax credit	❖Notwithstanding to anything contained in this Chapter and subject to the provisions of clause (e) and (f) of Section 49(5), the Government may on recommendations of Council, prescribe the order and manner of utilisation of input tax credit on account of IT, CT, ST or UT, as the case may be, towards payment of any such tax.

Amendment of Section 79:

Section	Title	Amendments
79	Recovery of Tax	❖ An explanation has been inserted to include 'distinct persons' as referred in Section 25(4) or (5). Hence, all the provisions of Section 79 can be now used against distinct person of same establishment in same or another state.

Amendment of Section 107 & 112:

Section	Title	Amendments
107	Appeals to Appellate Authority	❖ An insertion as to the maximum amount of pre-deposit has been inserted. The pre-deposit is capped to a maximum of 25 Crores.
112	Appeals to Appellate Tribunal	❖ An insertion as to the maximum amount of pre-deposit has been inserted. The pre-deposit is capped to a maximum of 50 Crores.

Amendment of Section 140:

Section	Title	Amendments
140	Transitional arrangement for input tax credit	❖ The changes are to clear certain ambiguities which were earlier clarified by CBIC through Circulars.

Amendment of Schedule III:

Schedule	Para	Amendments
III	7	❖ A new paragraph has been inserted to make it clear that ***'supply of goods from a place in the non-taxable territory to another place in the non-taxable territory without such goods entering into India'*** is neither an activity which shall be treated as supply of goods or services. ❖ The Kerala AAR in case of Synthite Industries Limited [2018] taxmann.com 144 (AAR) has stated the same.
III	8(a)	❖ A new paragraph has been inserted to make it clear that '***supply of warehoused goods to any person before clearance for home consumption'*** is neither an activity which shall be treated as supply of goods or services.
III	8(b)	❖ A new paragraph has been inserted to make it clear that ***'Supply of goods by the consignee to any other person, by endorsement of documents of title to the goods, after the goods have been dispatched from the port of origin located outside India but before clearance for home consumption'*** is neither an activity which shall be treated as supply of goods or services.

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