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By

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CONTENTS

Dear Readers,

In this 95thedition of, we bring you the judgments which have shaken the trade. The Supreme Court in the matter of Union of India vs. Ashish Agarwal has tried to put an end to the controversy on the re-assessment. Though the majority of the High Courts have ruled in favour of tax payers, the Supreme Court stated that it was a genuine and bona fide mistake on the part of the revenue and for which the revenue cannot be made remediless and allowed the appeal of revenue, deeming the notices issued on or after 01.04.21 under Section 148 as show cause notices issued under Section 148A. Though, the Supreme Court has not specifically stated that the extensions made under TOLA, 2020 are not valid, there exists an interpretation that notices issued on or after 01.04.21 must be treated as issued in light of new time lines as per Section 149. If such an interpretation is taken, then assessment for AY 13-14, AY 14-15, AY 16-17 and AY 17-18 would get time barred. In other words, the whole TOLA is being ignored. This definitely paves way to the second round of litigation, which has to be eventually settled by Supreme Court.

The other article is on another judgment of Supreme Court in the matter of Mohit Minerals Private Limited, which tried to put an end on the issue of taxation of ocean freight involved in CIF contract under reverse charge on the importer. The Gujarat High Court in the earlier round of litigation held the matter in favour of tax payer by stating inter-alia that importer cannot be called as service recipient and accordingly he cannot be called for payment of tax under reverse charge on ocean freight in CIF circumstances. The Supreme Court though held that importer can be called as service recipient, has ruled against the revenue by holding that on application of principles of composite supply, the revenue cannot split the transaction of import into import of goods and import of services and ask to pay tax on the latter. However, the Supreme Court has not dealt with the question, whether the concept of composite supply can be applied qua import of goods transaction. Hence, in our view, this judgment may also be subjected to a review.

The next article is on certain interesting issues on refund of old taxes vis-à-vis transitional provisions under GST laws. We have identified certain issues which are being given different treatments by different courts. We have collated such issues and shared our view on the same.

The next article is on the taxability of management support services received by Indian Entity from its Parent Entity located outside India. However, we have restricted the study to a special situation, where royalty is already being paid by the Indian Entity to Parent Entity and in addition to that, there are other amounts which are being paid for management support services. We have analysed, whether the additional amounts paid would also be considered as royalty or not.

The next article is on the recommendations to the provisions of Companies Act, 2013 and LLP Act, 2008 by company law committee. We have made our analysis and provided our comments for the changes made by the committee. We recommend readers to share their views also on the suggestions made by committee for a better law.

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
Founder & Chairman

GST

ANALYSIS ON SUPREME COURT JUDGMENT IN MOHIT MINERALS – STRIKING DOWN THE LEVY ON OCEAN FREIGHT

Contributed by CA Sri Harsha

[This article was first published in taxmann.com and available at [2022] 138 taxmann.com 360 (Article)]

Introduction:

The entire country is swayed by the Honourable Supreme Court's verdict in the matter of Mohit Minerals Private Limited[1]. This is completely unexpected decision after what we have seen in VKC Footsteps India Private Limited. The Supreme Court has struck down the obligation to pay tax under reverse charge mechanism by the importer. Earlier, the Gujarat High Court qua writ petition filed by Mohit Minerals Private Limited[2], has held the notifications bringing the tax under reverse charge mechanism are ultra-vires the law. The said judgment was appealed before the Supreme Court by Revenue, which led to the current judgment. In this write -up, we shall analyse the decision delivered by Supreme Court.

The entire issue is, whether the importer is liable to pay tax on ocean freight services provided by foreign shipping line qua the foreign supplier under the reverse charge mechanism for the CIF contracts? The position under service tax law[3] and the analysis of the decision of Gujarat High Court[4] can be accessed here.

The Supreme Court after listening to the appellant (the Union of India) and the respondent (Mohit Minerals Private Limited) has opined on various issues, which are summarised hereunder:

On Nature of Recommendations of GST Council:

The whole issue arose as to whether the recommendations made by the GST Council are binding on the Union and States? The Supreme Court stated that the role of GST Council is a recommendatory body aiding the Government in enacting the legislation on GST and cannot be said to have a binding power on the Union and States. The conclusion was arrived on the reasoning that the provisions of Article 246A does not contain force which would convert the recommendations of GST Council into legislation. The Court stated that neither Article 279A does not also begin with a non-obstante clause nor does Article 246A provide that the legislative power is 'subject to' Article 279A. In absence of such a language, the argument canvassed by the Union of India that the recommendations of the GST Council are binding on Union and States is farfetched. The Court also stated that repugnancy provision that was contained as in Article 254which was not present in Article 246A further indicates that recommendations of the GST Council cannot be said to be binding. The Court stated that there concurrent power exercised by the

[1] [2022] 138 taxmann.com 331 (SC)

[2] [2020] 113 taxmann.com 436 (Gujarat)

[3] https://www.sbsandco.com/blog/sbs-wiki-e-journal-aprl-2018

[4] https://www.sbsandco.com/blog/mohit-minerals-recipient-of-service-to-be-revisited

legislatures under Article 246A is termed as 'simultaneous power' to differentiate it from the constitutional design on exercise of concurrent power under Article 246, the latter being subject to repugnancy clause under Article 254. The Court stated that it is in the context of simultaneous legislative power conferred on Parliament and State legislatures, the role of GST Council has to be understood as a constitutional and recommendatory body and cannot be said the recommendations are binding on the Union and States.

On the Aspects of Recipient of Supply and Others:

The Court has struck down all the various submissions made by the respondent dealing with the taxable person, Section 5(1) to be only the charging provision, the prescription of rate of 10% of CIF through the main act and not through delegated legislation and others. The Court was seized only with the aspects– Whether classification of imports as a specific category of supply of shipping service is valid under Section 5(3) read with Section 5(1) of IGST Act and Whether the recipient of the imported goods is also a recipient of shipping services in CIF transactions under Section 5(3)?

Whether classification of imports as a specific category of supply of shipping service is valid under Section 5(3) read with Section 5(1) of IGST Act?

The respondent's (Mohit Mineral Private Limited) main argument is that the supply of service of shipping in a CIF contract is from the foreign shipping line to the foreign exporter and the transaction has no territorial nexus to India and hence does not constitute 'supply' that can be taxed. The Court stated that in terms of Section 7(4) of IGST Act, supply of services imported into a territory of India shall be treated to be supply of services in course of a inter-state trade or commerce and accordingly an Indian importer could also be considered as importer of service of shipping which is liable to IGST, if the activity falls within the definition of 'import of service'. After tracing out the definition of 'import of service' in terms of Section 2(11) of CGST Act, the court noticed that condition of import of service entails three aspects – (i) supplier of service must be located outside India, (ii) the recipient of service must be located in India and (iii) the place of supply of service ought to be in India. The Court stated the respondent's argument that conditions (ii) and (iii) have not satisfied since the recipient of shipping services would be foreign exporter and place of supply shall be place of business of foreign exporter should not be taken on the face value, since the 'recipient' and 'place of supply' has to be analysed in the context of the GST laws and not based on contracts.

The Court brushed away the argument canvassed by the respondent that since there was no consideration payable for the import of services, the same cannot be called as 'supply' by stating that the 'consideration' is satisfied even it is made by another person in terms of Section 2(31) and accordingly held that even if the importer is not liable to pay consideration directly, still the said transaction would fall under the ambit of 'supply'. The Court also brushed away the aspect of extra-territorial by making reference to the decision of GVK Industries Limited[5] and held that since there is clear territorial nexus, the question of challenge on grounds of extra territorial does not arise.

[5] [2011] 197 Taxmann 337 (SC)

The Court then stated that since in terms of Section 13(9) of IGST Act, since the place of supply of transportation services is destination of goods and clearly the supplier of service that is foreign shipping line is located outside India, then by applying the provisions of Section 13 and Section 13(9), the place of supply of service is India. The Court then proceeded with the only remaining question, whether the importers can be called as recipients?

<u>Whether the recipient of the imported goods is also a recipient of shipping services in CIF transactions under Section 5(3)?</u>

The Court stated that the argument made by Revenue that in light of the usage of the expression 'unless the context otherwise requires' in Section 2, makes the ambit larger and accordingly the importer should be treated as recipient in terms of Section 2(93) would be farfetched. The reason for such a conclusion was that such an argument would overlook the context of Section 5(3) which reiterates that the taxable person to be the recipient of service and since the importer was not specifically mentioned as taxable person in the statute, the argument should be required to be set aside. In simple words, as we understand the relevant para of the judgment, it is evident that the Court is trying to find a specific mention of 'importer' as recipient of service in the IGST Act and just because a person is required to pay tax under reverse charge and requires registration cannot be called as recipient of service. Further, the Court observed that the current provision of Section 5(3) delegates the power to notify the good or services that are required to be paid under reverse charge but does not have the power to delegate and specify the person who would be recipient and the same has to be found in the IGST Act. Since, in the instant case, there is nothing in the IGST Act to make the importer as recipient, the arguments of Revenue would have to be struck down but for the provisions of Section 13(9) read with Section 2(93)(c).Any reference to a person to whom a supply is made shall be construed as a reference to the recipient of the supply, which is found in Section 2(93)(c), when read with Section 13(9), which makes the destination of goods as the place of supply, then it can be inferred that supply of services would have been made to the Indian importer and thus thereby he can be considered as recipient of supply. The Court stated that the conclusion comports with the philosophy of GST to be consumption and destination based tax and accordingly held that since the ultimate benefactor of shipping service is also the importer in India who will finally receive the goods at a destination which is within the taxable territory of India and hence the importer can be called as 'recipient'.

Having concluded all the aspects in favour of the Revenue, the Court then proceeded with the main question as to the composite supply and issues of double taxation.

<u>On Composite Supply and Issues of Double Taxation:</u>

The transaction involves three parties – the foreign exporter, the Indian importer and the shipping line. The first leg of the transaction involves a CIF contract, wherein the foreign exporter sells the goods to the Indian importer and the cost of insurance and freight are the responsibility of the foreign exporter. The second leg of the transaction involves an agreement between the foreign exporter and the shipping line for providing services for transport of goods to India.

On the first leg of the transaction between the foreign exporter and Indian importer, the Indian importer is liable to pay IGST on the transaction value which includes the provision of services such as insurance and freight making it classifiable as 'composite supply' under Section 2(30). Since as per Section 8, the principal supply is to be subjected to tax qua a composite supply and since the principal supply in the instant case would be the goods, the tax would be leviable as if the transaction was one of supply of goods.

The Respondent (Mohit Minerals Private Limited) has contended that the current levy which seeks to impost IGST on the 'service' aspect of transaction would be in violation of principle of composite supply. This is for the reason that the impugned levy is trying to break a part of the composite supply and try to bring the same under the tax net. The Revenue contended that impugned levy is on the second leg of transaction, which is standalone contract between foreign exporter and shipping line and accordingly stated that contract between the foreign exporter and shipping line of which the Indian importer is not a party cannot be deemed to be a part of composite supply. The Revenue contended that while the first leg of the transaction is a composite supply, the second leg is an independent transaction and relying the decision of McDowell[6] to contend that a single element can constitute a levy and a part of value for another transaction and urged that concept of aspect theory has to be applied.

The Court rejected the application of aspect theory and stated that the Revenue cannot take contradictory stands, which would imply that while on one hand the Revenue seeks to levy tax on importer by going beyond the text of contract between the foreign shopping line and foreign exporter and on the other hand, as far as submissions on composite supply are concerned, urges that the contract should viewed as separate transactions, operating in silos. Accordingly, the court rejected the levy of tax on the freight services.

Points to Ponder:

From the above analysis, it is evident that though the Revenue/Union of India/Appellant has won all the major concepts, what struck the levy was the application of concept of composite supply to the whole transaction. The question that arises is, can the foreign exporter be said to be a 'taxable person' to fall under the definition of 'composite supply'. The definition of 'composite supply' vide Section 2(30) uses the expression 'taxable person'. The said expression is defined under Section 2(107) to mean a person who is registered or liable to be registered under Section 22 or Section 24. The IGST Act or CGST Act does not mandate the foreign exporter to obtain registration. In such a case, can one say that foreign exporter is a 'taxable person'? If no, how can one apply the concept of composite supply to such a situation. Alternatively, is the Supreme Court trying to state that importer would be a taxable person and the concept of composite supply has to be applied at his end instead of foreign exporter? We feel that more time would have been spent on the aspect of aspect theory and applicability of composite supply than what has been spent by the Supreme Court. May be the job is left to another bench when it comes again in another proceeding. We have to wait and see, till then, we have to live with this judgment.

[6] 1985 (3) SCC 230

GST

CERTAIN INTERESTING ISSUES IN REFUND OF OLD TAXES VIS-À-VIS TRANSITIONAL PROVISIONS IN GST LAWS

Contributed by CA Sri Harsha

[This article was first published in taxmann.com and available at [2022] 138 taxmann.com 223 (Article)]

Introduction:

The transition to GST from erstwhile regime is quite a challenging one for the entire country. Though the transitional provisions contained in the GST laws have been substantially improved from the bill stage to the current stage, there is still vacuum prevailing, which is causing great hardship for the tax payers. The GST Council should take stock of all such aspects and provide appropriate relief, so that the tax payers are relieved from the burden of reaching the courts time and again. In this article, we have identified certain issues, which create a problem for the taxpayers.

Issue #1 –Refund of Education Cess, Secondary and Higher Education Cess and Krishi Kalyan Cess:

The fate of closing balance of credits of education cess (for brevity 'EC'), secondary and higher education cess (for brevity 'SHEC') and Krishi Kalyan Cess (for brevity 'KKC') is quite an ambiguous one. The Madras High Court in the matter of Sutherland Global Services Private Limited[1] , wherein it was clearly held that the credit of EC, SHEC and KKC would not attain the character of vested rights. On the other hand, the Bombay High Court in the matter of Godrej &Boyce Mfg. Co. Ltd[2] , has set aside a show cause notice issued by Joint Commissioner on the ground that the Explanation 3 is not applicable to Section 140(1). Further, the validity of the amendment to Section 140(1) disallowing the transition of cesses was challenged in Grasim Industries Limited[3] before Gujarat High Court.

Amidst the above, the Tribunals were kind enough to grant the refund of EC, SHEC and KKC as refund placing reliance on the Supreme Court decision in Eicher Motors[4] , the such a credit constitutes a vested right. The detailed article, whether the credit constitute vested right or not is available here[5], and that subject is not the matter for current discussion. We shall see certain judgments where the Tribunals have granted the refund of old cesses.

The leading case on this issue is Bharat Heavy Electricals Limited[6], which is delivered by the CESTAT, New Delhi. The facts in the said matter were that appellant engaged in manufacture of electrical and mechanical equipment and they have been carrying the un-utilised credit balances in excise returns as on 30th June 2017 which is pertaining to the education cess (for brevity 'EC'), secondary and higher education cess (for brevity 'SHEC') and Krishi Kalyan Cess (for brevity 'KKC'). The appellant has moved the credit to GST regime except the credit pertaining to EC, SHEC and KKC on the pretext that such cesses are not eligible for carry forward since they stand abolished under the GST regime. They have claimed the

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[1] [2020] 120 taxmann.com 295 (Madras)
[2] [2021] 132 taxamnn.com 82 (Bombay)
[3] [2019] 108 taxmann.com 285 (Gujarat)
[4] 1999 taxmann.com 1769 (SC)
[5] The Vires, Right & Retrospectivity - Transitional Credit
[6] [2020] 120 taxmann.com 363 (New Delhi – CESTAT)

refund of such credits which were not carried forward to GST regime. The refund sanctioning authority has rejected the refund claim stating that since there was no provision to carry over such cesses under GST regime and there was no provision to refund the same under the service tax/excise tax regime, the credits stands lapsed and cannot be refunded.

The Tribunal after hearing both the appellant and revenue has stated that, the appellant could not carry over the cesses under GST regime and accordingly appellants were not in a position to utilise the same and since the credit of cesses were a vested right in light of the Supreme Court judgment in the case of Eicher Motors and cannot be extinguished with the change of law unless there was a specific provision which would debar such refund. The Tribunal further stated that there is no provision in newly enacted law that such credits would lapse and hence, the vested rights cannot be taken away because of change in law. Accordingly, the tribunal held that appellant was eligible for claim of refund of such cesses.

The Tribunal clearly has not referred to other judgments on the matter, but completely placing reliance on the judgment of Supreme Court in the matter of Eicher Motors(supra) has allowed the refund of the cesses lying as on 30th June 2017. Though the appellant referred to the decision of Cellular Operator Association Of India[7] and tried to distinguish the same from the facts, the Tribunal in its concluding remarks has not made any reference to the said judgment nor directly upheld the view canvassed by the appellant. Hence, the judgment to this extent has to be taken with a pinch of salt.

In another matter in Schlumberger Asia Services Limited [8], the Chandigarh CESTAT has allowed the refund of EC, SHEC and KKC following the decision of Bharat Heavy Electricals Limited (supra), though the instant case, is different slightly on facts. In the instant case, the appellant has transferred his credit to the GST regime vide Section 140 of CT Act. When the law was amended with retrospective effect on 30.08.2018, putting an end to the controversy, whether certain credit of cesses can be taken forward to GST regime or not, the appellant has reversed the credit of cesses brought forward and applied for refund. A notice was issued to the appellant stating that he is not entitled to carry forward the credit in terms of Section 140 of CT Act. The Tribunal stated that since the Section 140 was amended on 30.08.2018, the appellant was not left with any choice except to apply for refund and accordingly held that refund is eligible, following the decision of Bharat Heavy Electricals Limited (supra). In another matter in Atul Limited [9], the CESTAT Ahmedabad has held that the closing balance of EC and SHEC as on 30th June 2017 stands eligible for refund for the fact that a notification has been issued in terms of 12/2015 allowing the usage of credit of EC and SHEC for payment of duty. In the matter of Emami Cement Limited[10] , the refund of EC and SHEC were also granted following the decision of Bharat Heavy Electricals Limited (supra). In the matter of Bharat Heavy Electricals Limited[11] , the CESTAT Hyderabad has allowed the cash refund of EC, SHEC and KKC.

[7]WP (C) No. 7837 of 2016 dated 15.02.2018/2018 (2) TMI 1264 – Delhi High Court
[8][2021] 127 taxmann.com 509 (Chandigarh – CESTAT)
[9][2021] 132 taxmann.com 165 (Ahmedabad – CESTAT)
[10]2022 (3) TMI 1254 – CESTAT New Delhi
[11][2020] 115 taxmann.com 32 (Hyderabad – CESTAT)

From the above, it is evident that the Tribunals are granting refund of EC, SHEC and KKC under the GST laws, without examining, whether such cesses can be claimed as refund under the previous laws. The primary issue that was to be decided is, whether such cesses can be carried forward even under the previous laws, after the output cesses were stopped being levied. The next issue is that, if the same can be carried forward under the previous laws, whether they will be eligible for cash refund under the previous laws. Without answering the above questions, the Tribunals have stated that, since there is no particular provision prohibiting the grant of refund, the same can be allowed, requires revisit.

Issue #2 – Refund of Credit of Service Tax (Forward/Reverse Charge) under GST Regime using Section 142(3):

Section 142(3) allows claim of refund filed by any person, on or after the appointed day, for refund of any amount of cenvat credit, duty, tax, interest or any other amount paid under the existing law, shall be disposed of in accordance with the provisions of the existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than provisions of Section 11B(2) of Central Excise Act, 1944. The said section has two provisos. The first proviso states that where any claim for refund of cenvat credit is fully or partially rejected, the amount so rejected shall lapse. The second proviso states that no refund shall be allowed of any amount of cenvat credit where the balance of the said amount as on the appointed day has been carried forward under the CT Act.

Now, the question that would arise is, whether it is necessary that to claim refund under Section 142(3), whether such credits should satisfy the conditions that entails refund under the previous laws or any credits can be claimed as refund? The said question is not free from ambiguity. The High Courts seemed to be address the said issue in different manners. However, the Tribunals have granted the refunds under the said section without resorting to answering the question framed above. Let us explore the said judgments.

In the matter of Ganges International Private Limited & Others[12] – Madras High Court

The facts involved in one of the writ petitioner is that, the petitioner is engaged in provision of construction services under the erstwhile service tax regime. The last service tax return for period April 2017 to July 2017 was filed on 15.08.2017. An audit was conducted by the tax authorities and it was pointed out that petitioner is obliged to pay certain taxes under reverse charge mechanism for the period prior to GST regime. On being pointed out by the authorities, the petitioner has paid service tax along with interest. Since, the time limit for claiming the said credit under the GST regime vide TRAN-1 has exhausted by the time, the petitioner paid service tax, the same could not be moved to the GST regime. The petitioner believing that since the said credit is eligible under the previous law and if it would have been paid before the due date for filing the TRAN-1, then he would have taken such credit to GST regime, however, the due date for filing TRAN-1 being exhausted, has applied for refund under Section 142(3) of CT Act. The refund application was rejected stating that since there is no enabling provision under GST laws to allow such tax paid as credit or payment in cash. The said order was challenged before the High Court in the instant proceedings.

[12] [2022] 136 taxmann.com 168 (Madras)

The Learned Single Judge of High Court after listening to both the parties, stated that the question involved is, whether the taxes paid pertaining to the previous regime after exhaustion of time for claiming them through TRAN-1 can be claimed as refund under Section 142(3)? The Court stated that Revenue's contention was that a claim of refund under Section 142(3) would only be possible if the petitioners would be eligible to seek such refund under the erstwhile regime. The revenue contended that since the taxes paid after 30th June 2017, the claim of credit itself is questionable much less the refund claim.

The Court stated that, considering the peculiar facts, a refund under Section 142(3) cannot be denied for taxes which were paid after the exhaustion of time limit for filing the TRAN-1. The Court by invoking the 'Doctrine of Necessity' allowed the refund claim under provisions of Section 142(3). The Court further held that, under the erstwhile law, since, the petitioners are not entitled to get any refund claim and their eligibility is confined only by taking the credit under Cenvat Credit Rules, beyond which, the relief cannot be stretched upon and moreover, the Cenvat Credit facilities which is a concession and if at all that concession has to be availed by the petitioners, that concession can be availed only in the manner known to law, for which, only credit facility can be adopted and therefore, the question of making any refund by way of cash under Section 142(3) does not arise. But at the same time, the Court stated that the petitioners application could have been considered by respondents under Section 142(3) for the purposes of taking the credit and such credit could have been considered and allowed for carrying forward in the electronic credit ledger which is nothing but different route than Section 140 and the Court concluded that is the only possibility for dealing with this kind of applications. Accordingly, passed order to examine the possibility for taking the said amount as credit instead of refund.

In the matter of Rungta Mines Limited [13] – Jharkhand High Court:

The facts of the instant case were that the petitioner herein was engaged in manufacture of excisable goods. The petitioner used to procure coal from place outside India and for importing coal, the petitioner availed input services such as 'port services'. The service provider has raised invoice for the services provided and petitioner has paid the value of invoice including service tax. However, the service provider has not issued the tax invoice for enabling the petitioner to avail the credit. In absence of the appropriate document, the petitioner was constrained not to avail the credit. Accordingly, the credit was not shown in the final ER-1 returns for want of original invoice. The petitioner has filed his last ST-3 return, wherein he has shown the credit of tax paid on port services to make sure his claim for the said credit is not lost. Though the petitioner knows that such credit should have been shown in ER-1 returns, since the service was received for manufacture of excisable goods, since he has no access to original bill, he could not show the same in ER-1 and if the same has also not been shown in ST-3 returns, he felt that the credit would be lost forever. The petitioner has not moved the said credit to GST regime vide TRAN-1, but filed an application for refund before the refund sanctioning authority. The authority has rejected the refund and accordingly the petitioner has approached the High Court seeking a writ of mandamus directing the lower authorities to sanction the refund of credit claimed.

The Court concluded that, the petitioner has failed to follow the prescribed procedure to avail such a credit and consequently having lost such a right, he cannot claim revival of such right and claim refund of the same by virtue of transitional provisions under Section 142(3). The Court stated that the petitioner had no existing right on the date of coming into the force of CT Act to avail credit of service tax paid on

[13] 2022 (2) TMI 934 – Jharkhand High Court/ TS – 77 – HC (Jhar) – 2022 – GST

'port services' as refund and accordingly the provisions of Section 142(3) cannot be construed to have conferred such a right which never existed on the date of coming into force of CT Act. The Court stated that Section 142(3) does not confer a new right which never existed under the old regime except to the manner of giving relief by refund in cash if the person is found entitled under the existing law in terms of the existing law. The Court also held that Section 174 of CT Act read with Section 6 of General Clauses Act saves the right acquired, accrued or vested under the existing law and does not create any new right which never existed on the appointed day.

From the above, it is evident that both the High Courts have rejected the claim of refund stating that, they are not eligible for refund under the previous law and they cannot use Section 142(3) to take cash refund. The same was also evident from juxtaposing the provisions of Section 142(3) with 142(9)(b), where the later employs a specific usage of expression 'cenvat credit' alongside with refund, which does not appear in the former section. However, the Tribunals have not answered the said question, but proceeded to grant refunds. Some of the judgments which are directly contradictory to the judgments of the High Courts above are as under.

In the matter of NSSL (P) Limited [14], the Mumbai CESTAT has held that service tax paid under reverse charge mechanism can be claimed as refund under GST laws vide Section 142(3) of CT Act. In the facts, the appellant has belatedly paid service tax under reverse charge mechanism. The said credit was claimed in ST-3 returns. Consequent to change in law, the appellant has claimed refund of cenvat credit of service tax paid under reverse charge under the earlier law. The adjudicating authority has rejected the refund application stating that any claim from refund should be made under the CT Act and since the application was filed under the previous laws, the same was found to be rejected. When the matter went to Commissioner (Appeals), the Learned Officer has referred to provisions of Section 142(8)(a) for rejecting the refund applications. The Tribunal found that reference to Section 142(8)(a) is not appropriate in the facts of the case and found that appellant claim refund under Section 142(3). The Tribunal has come to this conclusion based on the assumption (which was stated in the judgment) that the credit of service tax paid under reverse charge was not disputed by the tax authorities.

The Tribunal has not examined, whether the provisions of Section 142(3) should be restricted to cases of refund which were allowed under the earlier laws or can be used for all types of credits, whether the same can be claimed as refund or not under the earlier laws. Under the earlier laws, the credit of taxes shall be refunded only under certain circumstances namely as specified under Rule 5 of Cenvat Credit Rules, 2004. Just because a credit is eligible, the same does not automatically result in refund of taxes under the earlier laws. It has to pass another test of eligibility to obtain the same as refund. Applying this to the current set of facts, the appellant was never engaged in export of goods or services to become eligible for refund. However, the same was not discussed by the lower authority or Tribunal, but held that since the credits are eligible, then they can be applied for refund under Section 142(3).

In the matter of Circor Flow Technologies India (P) Limited[15] , the appellant has paid service tax under reverse charge on voluntary basis in March 2019 and claimed the same as refund under Section 142(3). The Tribunal referring to the provisions of Section 174 stated that when the liability of service tax continues even after implementation of GST laws, then the right to claim the same as refund also would

[14] [2021] 130 taxmann.com 55 (Mumbai – CESTAT)

[15] [2021] 133 taxmann.com 327 (Chennai – CESTAT)

continue. Since the said credit would be eligible for credit, the Tribunal stated that the appellant would be eligible for refund.

In the matter of Jagannath Polymers (P) Limited[16] , the appellant has paid service tax under reverse charge mechanism and claimed the refund of the same. The tax authorities rejected the refund stating that the tax was paid as a consequence of the audit. The Tribunal stated that the issue of payment of tax on ocean freight under reverse charge is quite debatable issue and since there is no malafide intention, the appellant is eligible for refund of said tax paid under Section 142(3).

Hence, it is important to clarify the scope of Section 142(3) to put rest to the above ambiguity. Further, if it clarified that the refund cannot be claimed, it is also required to be clarified, can the same be taken as credit as instructed by Madras High Court in Ganges International Private Limited & Others (supra).

[16][2021] 133 taxmann.com 328 (New Delhi – CESTAT)

INTERNATIONAL TAX

MANAGEMENT SUPPORT SERVICES VIS-À-VIS ANCILLARY AND SUBSIDIARY CLAUSE – AN ANALYSIS ON POSITION UNDER TREATIES

Contributed by CA Sri Harsha & CA Narendra

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Introduction:

The concept of Fees for Technical Services (for brevity 'FTS') or Fees for Included Services (for brevity 'FIS') is a subject matter for constant litigation. The main reason for the litigation is because of the definition of FTS/FIS differs among Income Tax Act (for brevity 'ITA') and treaties. Added to this layer of confusion, is that such definition varies from treaty to treaty. Further, there are no hard and fast rules to consider a particular service as FTS/FIS and every transaction has to be decided on facts of each case which results in multiple interpretations and long drawn litigation for FTS/FIS.

It is known fact, that multinational groups companies incorporate a subsidiary in India and provides various management or business support services to its subsidiary company in India to ensure effective and efficient maintenance of business operations in India.

These services inter alia include finance, accounting, group taxation, engineering, human resources, marketing and strategic planning, management support, legal etc. (referred as 'management support services'/'MSS').

While the taxability of MSS has multiple dimensions, this Article is limited to management support services when Indian party is paying royalty in respect of license obtained from foreign party.

ABC Inc a company incorporated in USA has entered into license agreement with ABC India Private Limited for manufacturing of goods in India. Subsequent to such license agreement, ABC Inc has entered into another agreement for providing various MSS.

Now, let us proceed, to understand taxability of such MSS in India in the context of treaty between India – USA.

The question that arises is whether the above services provided by non-resident to a person resident in India is taxable as FTS/FIS in India or not?

The definition of term FTS under Section 9(1) (vii) of ITA contains three limbs i.e., managerial, technical or consultancy services. While such terms are not expressly defined under ITA, judicial fora have defined what constitute managerial, technical or consultancy services.

MSS described earlier, would fit into the definition of FTS under section 9(1)(vii) of ITA. However, as it is required to analyse the provisions of treaty as well (considering Section 90(2) of ITA), to understand the liability of such services in India, definition of FTS/FIS under treaty is also required to be seen.

However, treaties with India have differently defined the term FTS/FIS.Let us try to understand the definition of FTS/FIS from certain treaties:

India – USA:

Article 12 (4) of India – USA treaty defines the term FIS to mean any payment for rendering of any ***technical or consultancy services*** if such services:

- are ancillary and subsidiary to the application or enjoyment of right, property or information in respect which royalty is paid (for brevity 'ancillary and subsidiary clause') or

- make available technical knowledge, experience, skill, know how, or process, or consist of the development and

In simpler words, it means that in order to consider a particular payment as FIS, such service should be in the nature of technical or consultancy services and such services satisfies any one of the two conditions i.e., ancillary and

transfer of technical plan or technical design (for brevity 'make available clause').

subsidiary clause or satisfies make available clause. Summary of FIS/FTS clause in respect of some of the treaties with India has been provided below:

Treaty with	Relevant Article	Managerial	Technical or Consultancy	Additional Conditions[1]
Canada	Article 12(4)	X		□ □
France[2]	Article 13 (4)			X
Germany	Article 12 (4)			X
Mauritius	Article 12A (3)			X
Netherlands	Article 12 (5)	X		
Portugal	Article 12 (4)	X		
Singapore	Article 12 (4)			
Spain	Article 13 (4)	X		
Switzerland[3]	Article 12 (4)			X
UK	Article 13 (4)	X		

[1]Ancillary and subsidiary to the application or enjoyment of right, property or information in respect of which royalty is made and make available clause.
[2]By virtue of MFN Clause, scope of FTS/FIS to be restricted to that of India – UK/USA treaty. For detailed analysis of MFN clause, read our article at here
[3]By virtue of MFN Clause, scope of FTS/FIS to be restricted to that of India – UK/USA treaty subject to other conditions.

The definition of FTS under ITA is wider in its coverage as it includes managerial, technical or consultancy services in its definition whereas the definition of FTS/FIS under treaty with Canada, Netherlands, Portugal, Spain, USA and UK does not have place for managerial services.

Treaty between India – USA states that FTS/FIS is taxable in India if such services are in the nature of technical or consultancy services and if such services satisfy either ancillary and subsidiary clause or make available clause.

To understand the taxability of above services when royalty is paid, such services have to qualify following tests:

- Whether such services are in nature of technical or consultancy services?
- ***Whether such services satisfy ancillary and subsidiary clause?***

Let us proceed to examine each of the above test in the context of the facts of the case study taken.

Whether such services are in nature of technical or consultancy services?

When the term 'managerial' is not included in the definition of FTS/FIS, it is not appropriate to consider MSS as FTS/FIS and such services may be taxable as business income subject conditions in this connection.

The Kolkata Tribunal in the case of Koninklijke Philips Electronics N.V.[4] has held that management support services are not taxable as FIS as per the Article 12 of DTAA. The Tribunal has found that treaty between India – Netherlands does not contain the term 'managerial' in FTS/FIS definition and assessee has received various management support services. As such services are managerial in nature, Tribunal has held that such services are not taxable in India.

The AAR in the case of CumminsLtd., In re[5] has in the context of India – UK treaty has held that as the term 'managerial' is excluded from the ambit of FTS w.e.f. from 11.02.1994, management support services could not be considered as FTS under the treaty. Same view has been held by AAR in the case of Measurement Technology Ltd, In re[6] and Mumbai Tribunal in the case of Raymond Ltd.[7]

However, the term 'Managerial' has not expressly defined either in section 9(1)(vii) or treaty. When a particular term is not expressly defined, it leads to litigation at various judicial fora.

Different tribunals have interpreted the term 'managerial'. Mumbai Tribunal in the case of UPS SCS (Asia) Ltd.[8] has analysed the meaning of the term 'managerial' in detail. The Tribunal has held that managerial services mean managing the affairs by laying down certain policies, standards and procedures and then evaluating the actual performance in the light of the procedures so laid down.The managerial services contemplate not only execution but also the planning part of the activity to be done. If the overall planning aspect is missing and one has to follow a direction from the other for executing particular job in a particular manner, it cannot be said that the former is managing that affair.

Further, in various occasions, Courts have held that human intervention is mandatory in to provide managerial services. Hence, the term managerial has to be understood from the facts of each case and cannot be defined.

When services provided by non-resident are in the nature of managerial services, such services cannot be construed as FTS/FIS when treaty does not contain such term in its definition. However, it is required to establish that services provided by non-resident are in the nature of managerial services to be out of the tax net.

[4] [2018] 99 taxmann.com 23 (Kolkata - Trib.)

[5] [2016] 65 taxmann.com 247 (AAR - New Delhi)
[6] [2015] 60 taxmann.com 1 (AAR - New Delhi)
[7] [2003] 86 ITD 791 (MUM.)
[8] [2012] 18 taxmann.com 302 (Mum.)

Whether such services satisfy ancillary and subsidiary clause?

Once it is established that such services are not in the nature of managerial services and falls under the category of 'technical' or 'consultancy' services, services would not automatically become FTS/FIS unless such services satisfy either of the two additional conditions.

First of the additional condition states that if such services are ancillary and subsidiary to the application or enjoyment of right, property or information in respect which royalty is paid then, such services would be considered as FTS/FIS.

Let us proceed to understand what constitute ancillary and subsidiary for the purpose of FTS/FIS.The memorandum to India - USA explains the context in which 'ancillary and subsidiary' clause can be invoked.

'It is understood that, in order for a service fee to be considered "ancillary and subsidiary" to the application or enjoyment of some right, property, or information for which a payment described in paragraph 3(a) or (b) is received, the service must be related to the application or enjoyment of the right, property, or information. In addition, the clearly predominant purpose of the arrangement under which the payment of the service fee and such other payments are made must be the application or enjoyment of the right, property, or information described in paragraph 3. The question of whether the service is related to the application or enjoyment of right, property, or information described in paragraph 3 and whether the clearly predominant purpose of the arrangement is such application or enjoyment must be determined by reference to the facts and circumstances of each case. Factors which may be relevant to such determination (although not necessarily controlling) include:

1. *The extent to which the services in question facilitate the effective application or enjoyment of the right, property, or information described in paragraph 3;*

2. *The extent to which such services are customarily provided in the ordinary course of business arrangements involving royalties described in paragraph 3;*

3. *Whether the amount paid for the services (or which would be paid by parties operating at arm's length) is an insubstantial portion of the combined payments for the services and the right, property, or information described in paragraph 3;*

4. *Whether the payment made for the services and the royalty described in paragraph 3 are made under a single contract (or a set of related contracts); and*

5. *Whether the person performing the services is the same person as, or a related person to, the person receiving the royalties described in paragraph 3 [for this purpose, persons are considered related if their relationship is described in Article 9 (Associated Enterprises) or if the person providing the service is doing so in connection with an overall arrangement which includes the payer and recipient of the royalties.*

From the above, it is clearly stated that in order to treat a particular service as ancillary and subsidiary to the application or enjoyment of right, property or information, above factors needs to be considered in each case. If the predominant purpose of service agreement is for effective use of license and payment for such services would constitute insubstantial portion of total payment, such services may be considered as ancillary and subsidiary to the application or enjoyment of right, property or information. In order to better understand the above clause, memorandum further provides examples.

"Example1
Facts:

A U.S. manufacturer grants rights to an Indian company to use manufacturing processes in which the transferor has exclusive rights by virtue of process, patents or the protection otherwise extended by law to the owner of a process. ***As part of the contractual arrangement, the U.S. manufacturer agrees to provide certain consultancy services*** *to the Indian company in order to improve the effectiveness of the latter's use of the processes. Such services include, for example, the provision of information and advice on sources of supply for materials needed in the manufacturing process, and on the development of sales and service literature for the manufactured product.* ***The payment allocable to such services do not form a substantial part of the total consideration payable under the contractual arrangement.*** *Are the payments for these services fees for "included services"?*

Analysis:

The payments are fees for included services. The services described in this example are ancillary and subsidiary to the use of manufacturing process protected by law as described in paragraph 3(a) of Article 12 because the services are related to the application or enjoyment of the intangible and the granting of the right to use the intangible as the clearly predominant purpose of the arrangement. Because the services are ancillary and subsidiary to the use of the manufacturing process, the fees for these services are considered for included services under paragraph 4(a) of Article 12, regardless of whether the services are described in paragraph 4(b).

Example 2
Facts:

An Indian manufacturing company produces a product that must be manufactured under sterile conditions using machinery that must be kept completely free of bacterial or other harmful deposits. A U.S. company has developed a special cleaning process for removing such deposits from that type of machinery. The U.S. company enters into a contract with the Indian company under which the former will clean the latter's machinery on a regular basis. As part of the arrangement, the U.S. company leases to the Indian company a piece of equipment which allows the Indian company to measure the level of bacterial deposits on its machinery in order for it to known when cleaning is required. Are the payments for the services fees for included services?

Analysis:

In this example, the provision of cleaning services by the U.S. company and the rental of the monitoring equipment are related to each other. However, the clearly predominant purpose of the arrangement is the provision of cleaning services. Thus, although the cleaning services might be considered technical services, they are not "ancillary and subsidiary" to the rental of the monitoring equipment. Accordingly, the cleaning services are not "included services" within the meaning of paragraph 4(a).

The Mumbai Tribunal in the case of Lloyd's Register Asia[9] has held that management services viz. corporate communications, corporate finance and group reporting services, group quality assurance, human resources, information technology, integrated business system, internal audit services, legal services, operation almanagement and reporting, risk management and secretarial services and taxation and treasury services are not to be considered as taxable as FTS/FIS by stating that such services are ancillary and subsidiary to the application or enjoyment of right, property or information.

9[2021] 133 taxmann.com 286 (Mumbai - Trib.)

However, Delhi Tribunal in the case of H.J. Heinz Company[10] , in the context of provision of services in the area of supply chain Human Resources, Strategic Planning and marketing, Finance and information systems, has rejected the assessee claim wherein the assessee has contended that those services could not be considered as 'ancillary and subsidiary' to enjoyment or application of right. Further, Mumbai Tribunal in the case of Aktiebolaget SKF[11] has held that IT services has to be considered as 'ancillary and subsidiary'.

Recently, the Delhi Tribunal in the case of Russell Reynolds Associates Inc [12] has held that managerial services are not covered under the definition of FIS, the concept of invoking para 4(a) to Article 12 i.e., services which are ancillary and subsidiary to the application or enjoyment of right does not arise.

Considering the above judicial precedents and memorandum to the India – USA treaty, whether a particular service is ancillary and subsidiary nature has to be tested with the facts of each case. However, considering the above trend of litigation, revenue may question the payment to non-resident persons even though such services are managerial in nature and treaty does not have such term in FTS/FIS definition.

Further, when treaty contains the term 'managerial' in its FTS/FIS definition and assessee is paying license fee along with fee for support services, it would be difficult to defend the tax liability. In such a situation, assessee has to substantiate that payment for various support services are not linked with license fee and both are different in nature.

Delhi Tribunal in the case of Russell Reynolds Associates Inc (Supra) has found that payment for services is not insubstantial amount and license agreement is entered after the entering to the agreement for services. Accordingly, Tribunal has held that such services are not ancillary and subsidiary to the application or enjoyment of right, property or information.

Conclusion:

The term managerial services are not expressly defined in the ITA or treaty. Hence, considering the frequent litigation by the revenue, it is advisable to maintain robust documentation and information in order substantiate that the service would fall under the definition of managerial in nature.

Further, it is required to analyse treaty before concluding whether managerial services would qualify as FTS/FIS or not. For example, treaty with Singapore contains the term 'managerial' in its definition. However, unlike other treaty which contains managerial services, Singapore treaty additionally contains additional conditions. Hence, it is required to pass either of the two conditions under Singapore treaty even though such services are managerial in nature.

Further, some of the treaties with India contains MFN clause which may change the entire concept of FTS/FIS. The Delhi Court in the case of Steria (India) Ltd.[13] has held that restrictive scope of FTS under India – UK treaty is applicable for India-France treaty as treaty with France contains MFN Clause. Accordingly, High Court has held that management services are not taxable even under India - France treaty. Same view has been upheld by various tribunals. Hence, while analysing the treaty regarding management services, above factors needs to be considered. However, taxability services may not be judged without analysing the make available clause as treaty states that either of the conditions is required to be satisfied in order to treat particular service as FTS/FIS. Hence, as a last check, it is required to understand whether such services satisfy test of make available.

[10][2019] 108 taxmann.com 473 (Delhi - Trib.)
[11][2020] 114 taxmann.com 734 (Mumbai - Trib.)`
[12]TS-337-ITAT-2022(DEL)

13[2016] 72 taxmann.com 1 (Delhi)

Whether such services satisfy make available clause?

This clause needs to be tested only when services provided by the non-resident covered under technical or consultancy services and does not satisfy the additional condition 1 i.e., 'ancillary and subsidiary' clause. This is because, FTS/FIS definition states that either of the two additional conditions needs to be satisfied in order to treat particular services as FTS/FIS.

There are multiple jurisprudences on this issue whether managerial services satisfy the test of make available.

Ahmedabad Tribunal in the case of Bombardier Transportation India (P.) Ltd[14] has held that as the management support services does not satisfy the test of make available, such services would not be considered as FIS. In this case, the assessee has obtained various management support services viz. finance an accounting, group taxation, engineering, human resources, marketing and strategic planning, management support, HR back office, legal etc. The Tribunal has point outed that the services received by the assessee were simply management support or consultancy services which did not involve any transfer of technology.

The Mumbai Tribunal in the case of Exxon Mobil Company India (P.) Ltd.[15] has held that administrative service in the nature of controller, treasurers, public affairs, tax, human resources, law, safety, health and environment services, medical security, business procurement, business line, etc., does not satisfy the test of make available and same is not taxable under Article 12 of India – Singapore DTAA. The Tribunal has pointed out that, to satisfy the test of make available, the technical knowledge, experience, skill, etc., must remain with the service recipient even after the rendering of the services has come to an end.

[14][2017] 77 taxmann.com 166 (Ahmedabad - Trib.)
[15][2018] 92 taxmann.com 5 (Mumbai - Trib.)

The Mumbai Tribunal in the case of Edenred Pte. Ltd.[16], in the context of consultancy services, legal services, financial advisory services and human resources assistance, has held that the management services are provided only to support the assessee in carrying on its business efficiently and running the business in line with the business model, policies and best practices followed by the group. These services do not make available any technical knowledge, skill, know-how or processes to assessee. While adjudicating the matter, the Tribunal has relied on various judgements on 'make available' and provided the judgement.

The Mumbai Tribunal in the case of Dimension Data Asia Pecific Pte. Ltd.[17] has held that advisory services in the field of management, sales, marketing, finance and administrative, human resources and information technology etc are not taxable as FTS under India – Singapore DTAA as they do not satisfy the test of make available.

The Kerala High Court in the case of US Technology Resources (P.) Ltd.[18] has held that advisory services in respect of management decision making, financial decision making, legal matters and public relation activities, treasury services and risk management services for making correct decision does not satisfy the test of make available.

Judicial fora have given above judgements as alternate remedy to managerial services. Courts in the first instant have held that as such services are managerial in nature and such term is absent in treaty, services are not taxable as FTS/FIS. Alternatively, courts have held that even under Article 12(4)(b) as those services do not satisfy the test of make available, such services are not taxable in India. Hence, it can be concluded that MSS in the absence of 'managerial' in FTS/FIS definition, may not be taxable in India even though services satisfy additional condition i.e., ancillary and subsidiary to the application or enjoyment of right, property or information.

[16][2020] 118 taxmann.com 2 (Mumbai - Trib.)
[17][2019] 107 taxmann.com 418 (Mumbai - Trib.)
[18][2018] 97 taxmann.com 642 (Kerala)

Which means that MSS is taxable only when FTS/FIS definition contains managerial and such services satisfy either of the two additional conditions. As many Tribunals have held that MSS does not satisfy the test of make available, MSS is taxable only when such services satisfy ancillary and subsidiary clause subject to having such term in the definition of FTS/FIS (ex: India-Singapore treaty).

DIRECT TAXES

SUPREME COURT ON REASSESSMENT CONTROVERSY – UNION OF INDIA VS. ASHISH AGARWAL

Contributed by CA Sri Harsha & CA Narendra

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Notices issued under section 148 to assessees shall be deemed to have been issued undersection 148A of the IT Act as substituted by the Finance Act, 2021- Supreme Court.

Background:

During the outbreak of COVID-19 pandemic, in order to provide sufficient time to comply with various provisions under the Income Tax Act,1961 ('ITA')and other laws, Central Government ('CG') has enacted Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 ('TOLA,2020')

Section 3 of TOLA, 2020 states that where the time for completion of proceedings, issue of notice, letter, intimation etc. falls between 20.03.2020 to 31.12.2020, such date is extended to 31.03.2021.

Further, section 3 of TOLA, 2020 has delegate power to CG to specify any other date for extending the time limit specified above.

Subsequently, though the Finance Act, 2021 ('FA 2021'), the concept of reassessment proceedings under section 147 has been reformed by substituting the new provisions for the existing provisions. Substituted section 149 of ITA states that assessment cannot be reopened after the expiry of 3 years from the end of relevant AY and these provisions are made effective from 01.04.2021.

On the other hand, by utilising the powers conferred under section 3 of TOLA, CG has issued a Notification[1] which states that where the time limit for issue of notice under section 149 expires on 31.03.2021, such date is extended to 30.06.2021 (the date further extended to 30.06.2021). Further, the said notification contains an Explanation which states that

"For the removal of doubts, it is hereby clarified that for the purposes of issuance of notice under section 148 as per time-limit specified in section 149 or sanction under section 151 of the Income-tax Act, under this sub-clause, the provisions of section 148, section 149 and section 151 of the Income-tax Act, as the case may be, as they stood as on the 31st day of March 2021, before the commencement of the Finance Act, 2021, shall apply."

The said Notification tends to extend the time limit for issue notice under erstwhile section 148 for reopening the assessment post 31.03.2021.

Issue Involved:

The issue involved is '*as the old provisions for reassessment has been substituted by Finance Act, 2021 and such old provisions are not applicable on or after 01.04.2021, whether the central government with the delegated power is empowered to issue such Notification extending the time limit for issue of notice even on or after 01.04.2021 under the old provisions?*'

In this regard, many assessees have filed instant writ petitions before various High Courts.

[1] No. 20/2021 dated March 31, 2021

The Hon'ble Chhattisgarh High Court[2] has upheld the issue of notice under section 148 whereas Allahabad High Court3 ,Rajasthan High Court[4] and Delhi High Court[5] have quashed the reassessment notice under section 148. For detailed analysis of HC judgement, please read our article[6] .

Against the High Court Judgment, revenue has filed an SLP before the Hon'ble Supreme Court .

Supreme Court:

Considering the facts of the case and in order to provide justice to the notices issued under bonafide belief, Supreme Court (for brevity 'SC') has allowed the SLP with the following remarks:

- Section 147 to section 151 has been substituted by the FA 2021 in order to achieve the ultimate object of simplifying the tax administration, ease compliance and reduce litigation.

- New provisions substituted by FA 2021 being remedial and benevolent in nature and substituted with a specific aim and object to protect the rights and interest of the assessee, ***respective High Courts have rightly held that the benefit of new provisions shall be made available even to past assessment years if notice is issued on or after 01.04.2021.We*** *are in complete agreement with the view taken by the various High Courts in holding so.*

- However, in respect of notice issued after 01.04.2021, revenue cannot be made remediless and the object and purpose of reassessment proceedings cannot be frustrated.

- Revenue has issued notice under old provisions under bonafide mistake. Same ought not to have been issued under old provisions and same ought to have been issued under amended provisions.

- There appears to be genuine non application of the amendments as the officers of the Revenue may have been under a bonafide belief that the amendments may not yet have been enforced.

- Hence, someleeway must be shown in that regard which the High Courts could have done so.

Accordingly, the Hon'ble SC has passed the order with the following directions:

❖ The respective impugned section 148 notices issued to respective assessees shall be deemed to have been issued under section 148A of the ITA as amended by FA 2021 and AO shall provide information and material to the assessee within 30 days so that assessee can reply within 2 weeks.

❖ The requirement of conducting enquiry as specified under section 148A(a) be dispensed with as one time measure vis-à-vis those notices which have been issued under old provisions from 01.04.2021 to till date.

❖ Thereafter, AO shall pass order under section 148A(d) appropriately and issue notice under section 148 as amended.

❖ All defenses which may be available to the assessee under section 149 or under FA 2021, and whatever rights available to the AO under FA 2021 are kept open and continue to be available.

[2] Palak Khatuja [TS-816-HC-2021(CHAT)]
[3] Ashok Kumar Agarwal [TS-926-HC-2021(ALL)]
[4] Bpip Infra Private Limited [TS-1081-HC-2021(RAJ)]
[5] Mon Mohan Kohli[TS-1110-HC-2021(DEL)] and others.
[6] SBS-I-19th-Edition.pdf (sbsandco.com)
[7] UOI v Ashish Agarwal [2022] 138 taxmann.com

Our Comments:

- Hon'ble SC has given its judgement in order to provide justice to over 90,000 notices issued by the revenue without any technical discussion on the matter.

- SC has passed the order under Article 142 of the constitution to make the order

- As AO is required to conduct enquiry under section 148A(a) before issue of notice which may not be possible in present cases, SC has provided one time relief to section 148A(a).

- Considering the reply submitted by the assessee, AO has to pass order section 148A(d) within the time specified therein.

- Then, AO has to issue notice under section 148 again within the time limit specified under section 149.

- applicable all over India to reverse the orders passed by various HCs and to pending judgments to reduce the repetitive appeals in over 9,000 cases.

- SC has not held notice can be issued under old provisions after 01.04.2021, but such notices have been deemed to have been issued under amended provisions.

- As SC held that order is applicable all over India, the question that arises is, whether the above order can be applied against pending cases before first or second appellate authorities for same issue.

- Considering the legal position, assessee may take plea before the appellate authorities for setting aside the order for de novo considering with the appropriate procedure as held by SC.

CORPORATE LAW

AN ANALYSIS ON RECOMMENDATIONS OF COMPANY LAW COMMITTEE

Contributed by CS D V K Phanindra

We are aware that the Companies Act, 2013, received the assent of the President on 29.08.2013, and the provisions came into effect in a phased manner from 12.09.2013. The Companies Act, 2013, was enacted on the basis of the various recommendations suggested by the very famous J.J.Irani Committee, in their report.

It is needless to say that the Companies Act, 2013, is a rule bases law, with substantive operative part of the provisions forming part of the Rules, unlike the Companies Act, 1956. The main object for the same being that,the rule based enactment, enables the Government to retain the power to amend the rules by virtue of Amendment rules, Notifications, supported by Circulars, without the requiring to approach the Parliament for amendments, unless they pertain to the provisions contained in the Act.

Since coming into effect, the Companies Act, 2013 the ministry has issued plethora of Rules, Amendment Rules, Clarificatory Circulars, Notifications, Exemption and adaptation notifications etc., for effective governance of the provisions. The Act has undergone 4 amendments vide the Companies (Amendment) Act, 2015, the Companies (Amendment) Act, 2017, the Companies (Amendment) Act, 2019 and the Companies (Amendment) Act, 2020.

Of all the amendments made to the Companies Act, 2013, till date, the Amendment Act of 2020, can be considered as the major one, vide which offences in respect of certain defaults/non-compliance**[“Offences”]** which lack element of fraud or do not involve large public interest, instead of imprisonment and/or fine, have been decriminalised, and penalty to be imposed under departmental adjudication proceedings.

With the aim of facilitating and promoting greater ease of doing business in India, the Government had set up Company Law Committee set up on 18thSeptember 2019, initially for a period of 1 year, to suggest recommendations to the Government inter alia on changes for effective implementation of the Companies Act, 2013, the Limited Liability Partnership Act, 2008 and the Rules made thereunder. The tenure of the Committee has been extended from time to time, with the present tenure being up to 16thSeptember 2022.

The terms of reference of the Committee, at the time of constitution are as under:

(i) Analyze the nature of the offences (compoundable and non-compoundable) and submit its recommendations as to whether any of the offence could be re-categorised as **‘civil wrongs’** along with measures to optimise the compliance requirements under the Companies Act, 2013 and concomitant measures to provide further Ease of Doing Business;

(ii) Examine the feasibility of introducing settlement mechanism, deferred prosecution agreement etc.,. within the fold of the Companies Act, 2013;

(iii) Study the existing framework under the Limited Liability Partnership Act, 2008 and suggest measures to plug the gaps, if any, while at the same time enhancing the Ease of Doing Business;

(iv) Propose measures to further de-clog and improve the functioning of the NCLT;

(v) Suggest measured for removing any bottlenecks in the overall functioning of the Statutory bodies like SFIO, IEPFA, HFRA etc., under the Act.

(vi) Identify specific provisions under the Companies Act, 2013 and the Limited Liability Partnership Act, 2008, which are required to be amended to bring about greater Ease of Living for the Corporate Stakeholders, including but not restricted to review of Forms under the Two Acts;

(vii) Any other relevant recommendations as it may deem necessary.

Based on the report containing the recommendations in connection with the amendments to the Companies At, 2013 and the Limited Liability Partnership Act, 2008, the Ministry of Corporate Affairs has sought for the comments/suggestions from the stakeholders.

In brief terms, let us go through the recommendations/changes proposed by the Committee to the **Companies Act, 2013.**

Sl. No.	Recommendation relating to
1	**<u>RE-ALIGNING OF FINANCIAL YEAR:</u>** **<u>Issue to be addressed:</u>** Pursuant to the proviso to Section 2(41) of the Act, a company which is the holding company or a subsidiary or associate of a company incorporated outside India, and is required to follow a different financial year for consolidation of its accounts outside India, may be allowed to follow such different FY upon making an application to the Central Government, earlier powers with NCLT, now delegated to the respective Regional Director. The Committee noted that if such a company, or body corporate, ceases to be a holding, subsidiary or associate company of the foreign entity, the existing provisions of the Act, does not have any enabling provision allowing such company to revert to the financial year, as to be followed under the Act, thereby not allowing the company to accurately measure its revenue and earnings in that Financial year, as per Indian laws. **<u>Amendments recommended/proposed by the Committee:</u>** Amendment is recommended/proposed to Section 2(41), that Companies which earlier had different financial year and which had ceased to be associated with a foreign entity, have to make an application to the Central Government to realign their financial year, as per the provisions of the Act.

	Authors comments: Recommending for making an application for re-alignment of Financial year, is not at all warranted, and this would result in clogging of the offices of the Central Government i.e., either Regional Directors or the Registrar of Companies, who would be ultimately delegated the powers to deal such application. Instead, a recommendation for amendment to the Section 2 (41) to provide that any companies, who cease to be associated with a foreign entity, and having Financial year otherwise than under the 2013, shall re-align their financial year in accordance with the provisions of the Act, should have been enough to address the issue.
2	**COMMUNICATIONS IN ELECTRONIC FORM:** **Issue to be addressed:** Section 20 (2) of the Act, provides for filing of documents with the Registrar in electronic mode, a document may be served on Registrar or any member by sending it to him by post or by registered post or by speed post or by courier or by delivering at his office or address, or by such electronic or other mode. Further a member may request for delivery of any document through a particular mode, for which he shall pay such fees as may be determined by the company in its annual general meeting. Committee noted that in line with the relaxations given by the MCA to send Financial Statements and Board Reports through E-mail, and also the relaxation by SEBI to listed entities to send rights issue related documents through electronic mode, certain companies should be mandated to serve certain documents in electronic mode only. Further with regard to the fees under the proviso to Section 20 (2), the fees borne by a company's members while requesting such documents in a particular made, may be determined at any general meeting of the company, instead of Annual General Meeting. Further the Committee observed in addition to the sending of documents through electronic mode, Postal delivery of documents should also remain available where members have specifically requested to receive such documents also in physical form. **Amendments recommended/proposed by the Committee:** Amendment to Section 20 to introduce an overriding provision enabling the Central Government to prescribe rules for such class of companies, to mandatorily serve certain documents in electronic mode only. Also an amendment to the proviso to Section 20 (2) to allow companies to stipulate the concerned fees at any General Meeting, instead of Annual General Meeting. **Authors comments:** A welcome move, which will aid in reduction of exercise of posting, and will also be cost effective. The provision to also retain physical posting, to a member, who desires to receive so, is also a good initiative.

3 **RECOGNISING ISSUANCE AND HOLDING OF FRACTIONAL SHARES, RSUs AND SARs**

Issue to be addressed:

The Act in its present form does not permit the holding of Fractional shares i.e., a portion of a share less than one share unit. Fractional shares may arise as a consequence of corporate actions like mergers, issue of bonuses or rights issues.

Further, there are no provisions under the Act, in relation to the **Restricted Stock Units [RSUs]** and **Stock Appreciation Rights [SARs],** which are schemes linked to shares of a Company, aimed at granting its employees ownership rights in the company.

What is an RSU and an SAR:

RSU: RSU is a scheme, similar to a ESOP scheme, under which the employee will be entitled to the shares at the end of the vesting period, so long as the restrictions concerning the duration of employment and performance parameters are met.

SAR: SAR is a form of incentive or deferred compensation tied to the employing company's stock performance. SARs give employees the right to the monetary equivalent of the appreciation in the value of a specified number of shares over a specified period. The settlement of the SARs may also be made by way of shares of the company.

Amendments recommended/proposed by the Committee:

Amendment to the act proposed to enable issuance, holding, transfer of fractional shares, **in dematerialised form**, for prescribed classes of companies in consultation with SEBI, for listed companies, as may be required.

It is proposed for a insertion of a section in Chapter IV [Share Capital and Debentures], to permit issuance, holding, transfer of equity shares less than one unit for prescribed classes of companies.

With regard to **Restricted Stock Units [RSUs]** and **Stock Appreciation Rights [SARs],** an amendment is proposed to Section 62 (1) to allow additional employee compensation schemes linked to the value of the share capital of a company.

Authors comments:

A welcome amendment, to provide for holding fractional shares, but how would the same practically turn-up is to be seen. With regard to RSUs and SARs, a well thought amendment, to provide for share linked compensation in addition to the fixed monetary compensation, and the start-ups will be the ones, which would benefit of this. The only catch here is that the amendments to the provisions and rules framed thereunder, should clearly spell out the valuation mechanism, and address the various issues and scenarios i.e., permutation and combinations in which such instruments may be issued.

4

EASING THE REQUIREMENT OF RAISING CAPITAL BY DISTRESSED COMPANIES:

Issue to be addressed:

Section 53 of the Act, in the present form does not permit a Company to issue shares at discount. Accordingly, it would be difficult for distressed companies where the market value of the shares becomes less than the nominal value, thereby leading to difficulties in raising fresh share capital for the revival of the company.

It is to be noted that vide Amendment Act, 2017, the Section 53 stands amended that a company may issue shares at a discount to its creditors when its debt is converted into shares in pursuance of any statutory resolution plan or debt restructuring scheme in accordance with any guidelines or directions or regulations specified by the Reserve Bank of India under the Reserve Bank of India Act, 1934 or the Banking (Regulation) Act, 1949.

Amendments recommended/proposed by the Committee:

To suggest recommendations for the above, the Committee discussed the possibility of (i) removing the concept of the nominal value of shares or (ii) relaxing the requirements under Section 53 of the Act, to allow distressed companies to issue shares at a discount. However, the Committee felt that removing the concept of nominal value would have consequences in several other laws, which refer to the nominal value of shares, and made the following recommendations.

(a) Distressed companies to be categorised as such class or classes of companies as prescribed by the Central Government;

(b) Distressed companies should be allowed to issue shares at a discount, notwithstanding the prohibition under Section 53 and according Section 53 (2A) to permit distressed companies to issue shares at a discount in such manner as may be prescribed;

(c) Valuation for such issue to be done by Registered Valuers, failing which the issue shall be void.

Authors comments:

A welcome amendment. However, strict compliance to be provided, to avoid misuse of the same.

5 **REPLACING AFFIDAVITS WITH SELF-DECLARATION:**

Issue to be addressed:

Several provisions of the Act provide for submission of Affidavits by the parties in the various forms submitted before ROC, RD, NCLT and NCLAT. The Committeeopined that the replacement of affidavits with declarations does not detract from the severity of consequences, given that furnishing a false declaration attracts punishment under Section 448 of the Act.

Amendments recommended/proposed by the Committee:

It is proposed that furnishing affidavits should be replaced with filing declarations under the provisions of the Act and Rules made thereunder, except for those provisions involving filing affidavits before the NCLT, NCLAT and RD. The Central Government may prescribe the format for filing such declarations. The Committee suggested for the following instances in which it proposes Affidavits to be replaced with Declarations:

(a) Amendment to Section 68 (6) to permit a company to file a self-declaration in place of an affidavit when purchasing its own shares.

(b) Amendment to Section 374 (c) to permit a company to file a self-declaration in place of an affidavit when seeking registration under Part I of Chapter XXI.

(c) Amendment to Rule 7(4)(i), Companies (Incorporation) Rules, 2014, to permit the company to file a self-declaration in place of Affidavit, when making an application for conversion of the Company into a One Person Company.

(d) Amendment to Rule 8A(1)(j),Companies(Incorporation) Rules, 2014, to permit the self-declaration in place of affidavit along with the name application, for including the phrase 'Electoral Trust' maybe allowed for registration of companies to be formed under Section 8 of CA-13 following the Electoral Trusts Scheme, 2013.

(e) Amendment to Rule 10(3)(b), Companies (Registration of Foreign Companies) Rules, 2014, to permit self-declaration in place of affidavit in respect of the translated documents, not in English, translation done in india, submitted by a foreign Company.

(f) Amendment to Rule 4(3)(iii), The Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 to permit self-declaration in place of affidavit when making an application for closure of the Company under Section 248 (2) of the Act.

Authors comments:

A welcome amendment, simplifying the process.

6	**CLARIFICATION OF PROVISIONS RELATING TO BUY-BACK OF SHARES:** **Issue to be addressed:** The Committee noted that in the proviso to Section 68 (2), for the limit relating to the calculation of the threshold of twenty-five per cent in case of buy-back of equity shares, the reference is given only to the paid-up share capital of the Company the Company in that Financial Year and no reference is given to include 'free reserves', which is to be included. Further the Committee discussed on granting clarity concerning the stage at which shares arising out of employee benefit schemes by companies that grant stock options (such as ESOPs) can be bought back. **Amendments recommended/proposed by the Committee:** The Committee viewed the word 'Free reserves' was left-out, in the computation of the threshold of25 % in case of buy-back of equity shares, and the reference is given only to the paid-up share capital of the Company in that Financial Year, and accordingly, the same should be explicitly included in calculating the buy-back of equity shares. Accordingly, amendment to the proviso to Section 68 (2) to explicitly include 'free reserves' while calculating the threshold of twenty-five per cent in case of buy-back of equity shares, is proposed. With regard to the buy back of the ESOPs, it is proposed to make an amendment to the explanation to Section 68 of the Act, to provide that only those Options, which are exercised, can be bought back by the Company. **Authors comments:** A welcome amendment, to remove any ambiguity in the provision, being misused.
7	**SPECIFIC PROHIBITION ON THE INCLUSION OF TRUSTS ON THE REGISTER OF MEMBERS:** **Issue to be addressed:** Section 153 of the Companies Act, 1956, provided that the register of members or debenture holders shall not contain notice of any trust expressly, impliedly or constructively. The rationale behind this section was to relieve the company from taking notice of third-party rights regarding the shares registered in the names of any members. The Committee noted that there are no provisions corresponding to Section 153 of the Companies Act, 1956, in the 2013 Act. However, Para 4, Table F, Schedule-I of 2013 Act, currently prohibits a company from recognising a person holding any share upon a trust. The Committee viewed that the provision akin to Section 153 of the Companies Act, 1956, would provide further clarity on this issue.

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<u>Amendments recommended/proposed by the Committee:</u>

The Committee proposed for inclusion of a provision that expressly prohibits companies from entering notice of any trust, express, implied, or constructive on their register of members, and accordingly recommended for inserting of a new Section in Chapter VII to expressly prohibit companies from entering notice of any trust, express, implied, or constructive on their register of members.

<u>Authors comments:</u>

A welcome amendment, to clarity the ambiguity.
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<u>HOLDING GENERAL MEETINGS THROUGH THE USE OF TECHNOLOGY:</u>

<u>Issue to be addressed:</u>

The provisions of the 2013 Act, does not provide for conducting General Meeting through VC. Owing to the COVID-19 pandemic and the social distancing norms in place, Ministry of Corporate Affairs had allowed EGMs to be convened through Video-Conferencing (“VC”) or Other Audio-Visual Means (“OAVM”), vide various circulars, and subsequently extended even to the Annual General Meetings. The same now stand extended only till 31.12.2022, for both EGMs and AGMs.

<u>Amendments recommended/proposed by the Committee:</u>

The Committee reviewed the procedure being following in various countries. Also the Committee took in to consideration various representations received from the stakeholders. Accordingly, the Committee formed a view that the Companies Act, 2013, should enable companies to hold general meetings, i.e., AGMs and EGMs physically, virtually, and in hybrid mode.

Where the Extra-Ordinary General meeting is to be conducted entirely in electronic mode, the notice period for such meetings should be reduced to such period as may be prescribed by the Central Government.

In line with the above proposals, the Committee has recommended for the following amendments:

(a) Amendment to Section 96 to enable companies to hold Annual General Meetings in electronic mode in such manner as may be prescribed.

(b) Amendment to Section 100 to enable companies to hold Extra-Ordinary General Meetings in electronic mode in such manner as may be prescribed.

(c) Insertion of a proviso in Section 101 to provide that a general meeting held in electronic mode may be called by giving such notice as may be prescribed.
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	Authors comments: A welcome amendment and is the need of the hour, but proper monitoring mechanism of the implementation of the provisions in letter and spirit, is to be put in place.
9	**MAINTAINANCE OF STATUTORY REGISTERS IN ELECTRONIC FORM:** **Issue to be addressed:** Pursuant to the provisions of the Companies Act, 2013 and Rules framed thereunder, companies are mandated to maintain records in the form of registers containing particulars relating to members, directors, charges created, etc.,. The Companies maintain the same physically in the form of a hard bound combined register, and as and when any entries are to be made, the same are done and authenticated by the such person authorised by the Board. There are lot of issues in maintaining the same. **Amendments recommended/proposed by the Committee:** Considering the issues in relation to the physical maintenance of the Statutory Registers, the Committee proposed that certain companies should be required to mandatorily maintain their registers on an electronic platform in the manner laid down by the Central Government, and for this purpose, the Central Government may set up an electronic platform, as such an electronic platform would make the process more secure and transparent, thereby avoiding duplication of effort for companies. Also the Companies can be directed by the Central Government to share the information held on such statutory registers pursuant to certain enforcement-related functions. In line with the above recommendations, amendment to Section 120 is proposed to mandate that prescribed class or classes of companies maintain registers on an electronic facility provided by the Central Government. **Authors comments:** A welcome amendment, but will be only achieve its purpose if the electronic platform set-up is properly maintained by the Central Government.

10	**IEPF RELATED CHANGES IN SECTION 124 AND 125:** **Issue to be addressed:** There are some issues with regard to the transfer of unpaid dividends and other amounts to the fund, dealt in Section 124 and 125 of the Companies Act, 2013. **Amendments recommended/proposed by the Committee:** The Committee considered the issues on hand and proposed for the following amendments: (a) Amendment to Section 124 (5) after the words "such transfer", the words "along with any dividend, which has not been paid or claimed" should be inserted to clarify that unclaimed dividend and interest, if any, concerning the shares referred to in sub-section (6) must also be transferred to the IEPF in a timely manner. (b) Amendment to Section 125(3)(a) to include "redemption amount towards unpaid or unclaimed preference shares" as a purpose for which the fund may be utilised, in addition to the existing purposes of refund in respect of unclaimed dividends, matured deposits, matured debentures, the application money due for refund and interest thereon. (c) Amendment to Section 125 empowering the IEPF authority to delegate functions to its member, officer, or any other person, subject to such conditions, if any, as may be specified, in line with the other authorities. (d) Amendment to Section 125 (2) and 125 (3) of the Companies Act, 2013 to provide that amount owed to share holders who did not claim such amount paid to them after their shares and securities were bought back or cancelled by companies under Section 68 for seven years or more should be allowed to be transferred to the IEPF. **Authors comments:** A welcome amendment to provide for further sources to the Fund, and also various further purposes, for which the money available in the fund can be used.

11	**STRENGTHENING NFRA:** **Issue to be addressed:** All are aware that section 132(1) of the Companies Act, 2013, empowers the Central Government to constitute the National Financial Reporting Authority **("NFRA")** for matters relating to accounting and auditing standards for companies. **Amendments recommended/proposed by the Committee:** The Committee had considered the various proposal received before it in connection with the various provisions governing NFRA, and has made the following proposal/recommendations: (a) Amendment to the Companies Act, so as to empower NFRA to take appropriate action against the auditor for non-compliance with Companies Act, 2013, and requirements thereunder that do not qualify as 'professional or other misconduct'. NFRA should also be empowered to take appropriate penal action if its orders are not complied with, or any appeal is not preferred against the same with NCLAT. (b) To have independence in t its operations, and to source all its expenditures, the Committee recommended for suitable amendments should be made to the Companies Act, 2013, for the constitution of a NFRA Fund. The accounts of the proposed NFRA Fund should be maintained in such form as prescribed by the Central Government in consultation with the CAG. The accounts of the proposed NFRA Fund should also be audited by the CAG and laid before each House of Parliament. (c) Amendments to the Companies Act, 2013, to empower NFRA to make regulations for specific matters. In accordance with principles of good governance and accountability by the Central Government, such powers should be sufficiently encumbered with safeguards. (d) Amendment to Section 132 of the Companies Act, 2013, to provide the NFRA Chairperson with general superintendence direction, and control regarding all administrative matters of the Authority. **Authors comments:** A welcome amendment to further strengthen the NFRA as a regulator, for better Corporate Governance.

12	**STRENGTHENING THE AUDIT FRAMEWORK:** **Issue to be addressed:** Section 144 of the Companies Act, 2013, restricts the Companies from obtaining certain services from its Auditors. Section 147 of the Companies Act, 2013 does not provide for cover penal consequences for contravention of sub-sections of Section 143. Provisions of Section 140 of the Companies Act, 2013, and the rules framed thereunder provide for to include the 'reasons for resignation' and 'any other facts relevant to the resignation', in case of resignation by Auditors, but not to make any detailed disclosures for his resignation. There is no express provision for Joint Audit under the Companies Act, 2013. There is no concept of Forensic Audit under the Companies Act, 2013. **Amendments recommended/proposed by the Committee:** In line with the above findings, the Committee proposed that: The Companies Act, 2013, should enable the Central Government to prescribe a differential list of prohibitions on availing non-audit services for certain classes of companies, so that the Companies are enabled to obtain certain services from the Statutory Auditors, which would facilitate ease of operations, and accordingly the recommended for amendment to Section 144,to prescribe a differential list of prohibitions on availing any non-audit services. The Committee proposed that Section 147 of CA-13 should be amended to cover penal consequences for contravention of sub-sections of Section 143 other than sub-section (12), and according recommended for amendment to Section 147. The Committee proposed that a resigning auditor should be under an explicit obligation to make detailed disclosures before resignation and should specifically mention whether such resignation is due to non-cooperation from the client company, fraud or severe noncompliance, or diversion of funds. Moreover, if such information comes to light after the resignation of an auditor but has not been disclosed in the resignation statement, suitable action may be taken against the resigning auditor. Additionally, the auditor should be mandated to provide assurance about the company's accounts and independence of her decision to resign, and accordingly, it was recommended to amend Section 140, in the above lines. A proposal for enabling the Central Government to mandate joint audits for such classes of companies, as may be prescribed, and as it may deem necessary, was placed and in accordance with the proposal, recommended for amendment to Section 139.

	The Committee proposed for enabling the Central Government to order forensic audits in cases of investigation under Chapter XIV [Inspection, Inquiry and Investigation] in such manner as may be prescribed, and accordingly, amendment to Chapter XIV to recognise the concept of forensic audit in such cases, and subject to such Rules, as may be prescribed by the Central Government. **Authors comments:** A welcome amendment overall to strengthen the overall Audit frame work, and to provide for the inclusion of the concept of very much required Forensic Audit under the ambit of the Companies Act.
13	**STANDARDIZING QUALIFICATIONS BY THE AUDITORS:** **Issue to be addressed:** The provisions of Sections 143(3)(f) and 143(3)(h) of the Companies Act, 2013, obligate the auditor to provide observations and comments on financial statements of the company and to provide qualifications, reservations or any adverse remarks, as the case may be, concerning the maintenance of accounts in that company. As such, an auditor is required to express a qualified opinion or an adverse remark if the financial statements indicate certain material misstatements. **Amendments recommended/proposed by the Committee:** The Committee noted that while auditors' reports often highlight reservations or adverse remarks regarding a company's financial statements, such remarks do not sufficiently elaborate on the corresponding negative effect on the economic health or functioning of the company. and accordingly, to ensure greater clarity, disclosure and standardisation, the Committee proposed for an enabling provision under the Companies Act, to allow Central Government to introduce a format for auditors to provide the impact of every qualification or adverse remark on the company's financial statements for circulation to the Board before the same is passed on to shareholders. Accordingly, an amendment to Section 143 enabling an auditor to prepare an impact statement for each qualification, reservation or adverse remark on the company's financial statements, is proposed/recommended. **Authors comments:** A welcome amendment, to provide for more information to the Shareholders to assess the effect of the reservations or adverse remarks.

14	**SETTING UP OF RISK MANAGEMENT COMMITTEES:** **Issue to be addressed:** There are no provisions relating to the formation of an Risk Management Committees under the Companies Act, 2013. However the provisions of Section 134(3)(n) requires the Board's report to contain a statement indicating the development and implementation of a risk management policy for the company, including identification of risks that may pose a threat to the existence of the company. The provisions of the SEBI LODR Regulations in relation to the constitution of the Risk Management Committees by the Listed entities were perused by the Committee. **Amendments recommended/proposed by the Committee:** The Committee was of the opinion that a robust risk management allows every company to function efficiently and facilitates the development of corporations, particularly in unprecedented situations such as the ongoing COVID-19 pandemic. Accordingly, the Committee deliberated whether provisions on the constitution of Risk Management Committee, as a separate committee of the Board, could be included in the Companies Act, 2013, and recommended that certain class of Companies as may be prescribed by the Government, and accordingly, proposed for insertion of a Section in Chapter XII [Meetings of Board and its Powers]. **Authors comments:** An amendment well though of, but only if the provisions are framed in such a manner, that the same can be implemented in letter and spirit.
15	**TENURE OF INDEPENDANT DIRECTORS:** **Issue to be addressed:** Suggestions have been given to the Committee in relation to the various discrepancies and mis-use of provisions of Section 149 in connection with the appointment of Independent Director, cooling period before re-appointment and Independent Directors taking up employment in the Company. **Amendments recommended/proposed by the Committee:** The Committee recommended that the period during which the Independent Director functioned as an Additional Director before being regularised should be included while computing the total tenure of 5 years of the Independent Director. The total tenure should not exceed the prescribed five years for a single term or ten years for two consecutive terms, as thecase may be, under any circumstances, and according amendment to Section 149 to provide that an Independent Director's total tenure would include the tenure held as an additional director immediately preceding the regularisation as Independent Director.

	Further the threshold laid down in Section 149(6)(e)(ii)(B) concerning independence as to association with a company read with Section 149(11), gives an understanding as a blanket prohibition of functioning of the Independent Director as a legal or consulting firm regardless of the threshold of 10 % of the turnover. Accordingly the Committee recommended for amendment to the provisions of Section 149 (6) in to the Section 149 (11), and to further reduce the threshold of 10 % to 5 %, to cap the maximum revenue that may be generated by a legal or a consulting firm in certain circumstances, and to promote flexibility and ease of doing business for concerned stakeholders. **<u>Authors comments:</u>** A welcome amendment to remove the ambiguity in the provisions.
16	**<u>CHANGES TO THE PROVISIONS OF DISQUALIFICATION AND VACATION OF DIRECTORS' OFFICE:</u>** **<u>Issue to be addressed:</u>** Section 164 and Section 167 of the Companies Act, 2013 lay down provisions relating to the disqualification and vacation of office of directors, respectively. Section 167 (1) (a) provides for vacation of office of a director on account of the disqualifications incurred by the said director pursuant to the provisions of the Section 164 of the Companies Act, 2013, and as per which in case a Director attains disqualifications under Section 164 (2), then the office of the director shall become vacant in all the companies, other than the company which is in default under that sub-section. This has a huge impact on all the Companies, which are not in default. Proviso to Section 164 (2) (b) provides for 6 months time to a Director, who has been appointed as a Director of the Company which has failed to file Financial Statements and Annual returns for a any continuous period of three financial years; and has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more. Further there is no exemption of disqualification under Section 164 (2) to the nominee directors appointed by debenture trustees registered with SEBI. **<u>Amendments recommended/proposed by the Committee:</u>** In view of the foregoing, the Committee has proposed that under Section 167(1)(a), the vacation of directorship should be limited to disqualifications triggered due to personal incapacity i.e., only under the provisions of Section 164 (1), and according the reference to Section 164(2), which relates to disqualification triggered on the grounds of default by companies where the director holds position, from Section 167(1)(a), needs to be deleted. The Committee suggested that the said amendment shall not be retrospective.

	Further the Committee proposed that the relaxation period/cooling period, for new directors under Section 164(2)(b) should be extended from Six Months to Two years from the date of appointment, so that they have sufficient time for complying with the filing or returns or repayment of deposits/debentures, and accordingly, amendment is proposed to the proviso to Section 164(2) to relax the disqualification trigger from six months to two years for freshly appointed directors of companies that are in default of Section 164(2)(b) The Committee proposed for insertion of a new proviso in Section 164(2) to provide that the disqualification referred to in clause (b) of Section 164 (2), should not apply to the nominee directors appointed by debenture trustees registered with SEBI. The Committee proposed that similar changes should be extended to LLPs through a notification under Section 67 of the LLP Act, 2008. **<u>Authors comments:</u>** A welcome amendment, which will address the paradox of vacation of office of all the other companies which are compliant, on account of disqualification incurred in a company, which has not filed returns.
17	**COOLING-OFF PERIOD BEFORE AUDITORS BECOME DIRECTORS:** **Issue to be addressed:** The Committee noted Section 149 (6) prohibits a person from being appointed as an Independent Director of a company if he or any of his relatives has been an employee, proprietor or partner of a firm of auditors or company secretaries or cost auditors in such company or group of companies, in any of the three financial years preceding the year in which employment is to take place. There is no express provision under the Companies Act, 2013, prohibiting the Auditors from being appointed as Non-Executive Directors, Managing Directors and Whole Time Directors. Given the auditors' critical role, their independence is a pre-condition to good corporate governance. For the auditor's reports to be credible, the auditor must not have any personal prejudice or self-interest affecting their objectivity. Pertinently, a conflict of interest may arise where the auditor could potentially benefit from a financial interest in an audit client, particularly by way of future employment in the same company. **<u>Amendments recommended/proposed by the Committee:</u>** Hence, the Committee deliberated whether an appropriate restriction, in the form of a cooling-off period, could be inserted in Companies Act, 2013, to address the situation above, and proposed that there should be a mandatory one-year cooling-off period, from the date of cessation of office, after which an auditor of a company may be permitted to hold the position

	of Non-Executive Director, Managing Director, Whole Time Director, in the same company or group of companies. In the case of an audit firm structured as a partnership/LLP, such a restriction should only operate concerning the partner that audited the company, and accordingly an amendment is proposed to Section 164(1) to provide that a person shall not be eligible to become a company's director if he has been the auditor of the company in the last one year, and such a restriction will only apply to the auditing partner in the case of an audit firm structured as a partnership/LLP. **Authors comments:** A welcome amendment, as a mark of better Corporate Governance.
18	**COOLING-OFF PERIOD BEFORE AN INDEPENDENT DIRECTOR BECOMES A MANAGERIAL PERSON:** **Issue to be addressed:** The Committee noted that pursuant to the provisions of Section 149(6)(e)(i) of the Companies Act, 2013, a person shall not be appointed as an Independent Director of a company if such a person currently holds or used to hold the position of a KMP or an employee in the same company or group of companies during any of the three financial years immediately preceding the financial year in which employment is to take place. However, there is no restriction on an Independent Director from becoming a managerial person, i.e., an MD, WTD or manager, in the same company or group of companies after ceasing to be an Independent Director of such company. **Amendments recommended/proposed by the Committee:** Hence, the Committee deliberated whether an appropriate restriction, in the form of a cooling-off period, could be inserted in Companies Act, 2013, and proposed that there should be a mandatory one-year cooling-off period, from the date of cessation of office, after which an Independent Director may be permitted to hold the position of an MD, WTD, or manager in the same company or group of companies, and to this effect, amendment to Section 196(3) to provide that a person shall not be eligible to become a company's MD, WTD, or manager if he has been an Independent Director of the company in the last one year. **Authors comments:** A welcome amendment, as a mark of better Corporate Governance and in the interest of greater transparency and accountability to the position of Independent Director.

19 **CLARIFYING THE MANNER OF THE RESIGNATION OF CERTAIN KMPS:**

Issue to be addressed:

Section 168 of Companies Act, 2013, lays down provisions relating to the resignation of directors. Accordingly, a director can file his resignation from his office by providing notice to the company in writing. Upon receiving such resignation, the Board must take note thereof and intimate the RoC, within 30 days. The proviso to Section 168(1) further provides that directors may forward a copy of their resignation, along with detailed reasons, to the RoC, within thirty days of their resignation. Section 168(2) stipulates that the resignation tendered by the director shall be effective from the date of receipt of the notice by the company or any date specified by the director in the notice, whichever is later.

The Committee noted that directors have been empowered to directly file their resignation with the RoC since there is no requirement on the company's part to formally accept a director's resignation for it to become effective.

The Committee noted that there is no express provision similar to the above in respect of the KMPs other than Directors i.e., CEO, CFO and Company Secretary.

Amendments recommended/proposed by the Committee:

The Committee deliberated whether similar provisions should be introduced in the Companies Act, 2013 for mandating filing of resignation tendered by certain KMPs, other than directors, who are entrusted with the company's day-to-day functioning and whose appointment intimations were filed with the Registry, and accordingly proposed that Companies should be obligated to notify the RoC of resignations tendered by certain KMPs whose appointment intimation was filed with the RoC. In cases where the company fails to intimate the RoC within 30 days, the KMPs should be allowed to file their resignations directly with the RoC, by way of inserting a Section in Chapter XIII to provide the procedure in which resignation by certain KMPs to be carried out or given effect.

The committee also suggested that the date on which such resignation of KMPs should come into effect may be harmonised in accordance with the provisions of Section 168 of the Companies Act, 2013, i.e., resignation of directors

Authors comments:

A welcome amendment, but will be only achieve its purpose if the electronic platform set-up is properly maintained by the Central Government.

20 **REVIEWING PROVISIONS ON MERGER AND AMALGAMATION:**

Issue to be addressed:

A Liquidator is appointed by the NCLT in case of IBC proceedings resulting in to liquidation and are also appointed under the Companies Act 2013. The Committee deliberated on whether the reference to liquidators appointed under theIBC may be omitted from Sections 230(1) and 230(6) to only limit the same to thoseliquidators appointed under the Companies Act, 2013.

Treasury shares refer to the own shares of a company and are categorised as assets of the company. Such treasury stock may arise on an amalgamation or merger where the transferee company receives its own shares pursuant to merger of transferor Company with itself. The provisions of Section 232 specifically state that as a result of the compromise or arrangement, hold any shares in its own name or in the name of any trust whether on its behalf or on behalf of any of its subsidiary or associate companies and any such shares shall be cancelled or extinguished. However, the treatment of any existing treasury stock before the compromise, is not spelt out in the Act.

Section 233 of CA-13 provides for a fast-track merger or amalgamation that may be entered into by two or more small companies, between a holding company and its wholly-owned subsidiary ("WOS"), or a prescribed class of companies. As per the section, the scheme is to be approved by shareholders holding at least ninety per cent of the total number of shares of the company. The threshold of approval by persons holding ninety per cent of total share capital and not ninety per cent of shareholders present and voting in the meeting, is difficult to achieve in listed companies, resulting in delays.

Invocation of the provisions of Section 233 not only for amalgamation between entities but may also be used mutatis mutandis for any scheme of compromise or arrangement under Section 230(1) or division or transfer of a company referred in Section 232(1)(b).However the manner of invocation not provided.

Further the existing NCLT mechanism is burdened with lot of IBC cases, resulting in delay of cases relating to Mergers and amalgamation.

Amendments recommended/proposed by the Committee:

In the above issues, the Committee deliberated and However, it was noted that omission of the reference to liquidators appointed under the IBC from Sections 230(1) and 230(6) may pose challenges since liquidators under the Companies Act, 2013 and the Liquidators appointed under the IBC by the NCLT, have been actively using the said provisions in discharge of their duties.

The Committee proposed that each company holding treasury stock should report such shares through a declaration, which may be some what similar to BO/SBO Declaration. Additionally, such Companies will have to dispose the entire treasury stock within three years. The disposal

	of such shares may take place either through sale or reduction of capital, with out the intervention of the NCLT. On the failure of the Company to comply with the provisions to dispose, the Committee also proposed for initiation of appropriate penal action against the Company, and accordingly insertion of a proviso to Section 232 to provide that treasury stock held before the commencement of the Companies At, 2013 should be dealt with and extinguished in such manner as may be prescribed. With regard to the Fast Track mergers, the Committee proposed that a twin test requiring approval by (i) majority of persons present and voting at the meeting accounting for 75 % in value, of the shareholding of persons present and voting; and (ii) representing more than 50 %, in value, of the total number of shares of the company, should be mandated for approval under Section 233. Accordingly, amendment to the Section 233 is proposed/recommended to include a twin test as stated above, for approval of fast-track mergers. In this connection, the Committee proposed that Section 233(12) should provide to empower the Central Government to make Rules concerning the invocation of Section 233 for compromise or arrangements under Section 230(1) and division or transfer under Section 232(1)(b), and according proposed for amendment to Section 233 of the Companies Act, 2013. The Committee opined that constitution of the Special Benches of the NCLT should be allowed to be constituted by the Central Government to deal with matters of economic importance relating to mergers and amalgamation or corporate restructuring or specialised IBC cases, and accordingly, proposed for amendment to Section 419 to enable the Central Government to constitute special Benches of the NCLT. **Authors comments:** A welcome amendment clearing the impediments, and the unaddressed issues.
21	**EASING RESTORATION OF STRUCK OFF COMPANIES:** **Issue to be addressed:** Section 252(1) of the Companies Act, 2013, provides that any person aggrieved by an order notifying a company as dissolved, as passed by the RoC, can file an appeal before the NCLT to restore the company's name in the register of companies within 3 years. The NCLT may order restoration of the company's name upon satisfaction that the name was struck off without any justified cause or in the absence of a valid ground. Section 252(3) of the Companies Act, 2013, further lays down that where the name of a company is struck off from the register of companies, the company's name may be restored by the NCLT on an application by the company, or any of its members or creditors before the expiry of 20 years. Accordingly, an order for restoration of the name may be passed to restore the company's name in the register of companies.

	The Committee noted that since under both Section 252 (1) and Section 252 (3) of the Companies Act, NCLT is the authority to be approached for revival of the Company, and as NCLT are dealing with the Companies Act matters and IBC matters are already overburdened. **Amendments recommended/proposed by the Committee:** The Committee deliberated whether the existing pressure on the NCLT be relived by shifting the appropriate authority for restoration of a Company to the Regional Director concerned, and proposed that in cases where aggrieved persons apply for restoration within 3 years under Section 252(1), the application should be filed before the Regional Director, and the Regional Director to pass order of restoration upon his satisfaction. Accordingly, amendment to Section 252 (1) to provide that a person aggrieved by the striking-off of a company may appeal, within a period of 3 years, to the RD instead of the NCLT. Further in cases where aggrieved persons apply for restoration beyond 3 years under Section 252(3), NCLT shall remain the authority to process the application, and the Committee does not propose any change to the same. **Authors comments:** A welcome amendment, de-clogging the already overburdened NCLT. A simplified process for restoration/revival shall be introduced under the proposed amendment, so that even with the Regional Director, the matter of restoration/revival is disposed-off at the earliest.
22	**RECOGNISING SPECIAL PURPOSE ACQUISITION COMPANIES:** **Issue to be addressed:** In the present scheme of Companies Act, there is no concept of Special Purpose Acquisition Companies ("SPAC"). The IFSCA (Issuance and Listing of Securities) Regulations, 2021, recognises SPAC as a type of company that does not have an operating business and has been formed with the specific objective of acquiring a target company. This concept allows a shell company to issue an Initial Public Offering ("IPO") without any commercial activity. After listing, the SPAC merges with or acquires a company, i.e., the target, thereby allowing the target company to benefit from such listing without going through the formalities and rigours of an IPO. **Amendments recommended/proposed by the Committee:** The Committee deliberated on the concept of SPAC, with the prevailing regulations across the globe. Therefore, the Committee felt that enabling the listing of India incorporated SPACs on global exchanges would open up avenues for Indian companies to operate and carry out business in such jurisdictions. scenarios. that a provision relating to the domestic listing of SPACs will require consultation with the SEBI.

	There committee proposed that there should be an enabling provision under the Companies Act, 2013, to recognise SPACs and allow entrepreneurs to list a SPAC incorporated in India on domestic and global exchanges. Provisions on relaxing the requirement to carry out businesses before being struck off and providing exit options to the dissenting shareholders of a SPAC if they disagree with the choice of the target company identified must also be provided for under the Companies Act, 2013 and according recommended that Insertion of a new chapter for the recognition and regulation of SPACs. Further the Committee also opined that for a foreign listing of Indian incorporated SPACs to become a reality, the commencement of Section 23(3) and 23(4) of CA-13 is a necessary pre-condition. **Authors comments:** A welcome amendment, to introduce a new concept of Companies, which will entail companies with huge funds, and without any activity, list in the stock exchange, and target on acquiring companies, which would in-turn get easily listed.
23	**PROHIBITING CONVERSION OF A CO-OPERATIVE SOCIETY INTO A COMPANY:** **Issue to be addressed:** The Committee noted that Section 366 of the Companies Act, 2013, enables entities duly registered under other Acts, including cooperative societies, to register themselves as companies under the Companies Act, 2013. Accordingly, Section 366(1) states that any partnership firm, limited liability partnership, co-operativesociety, society or other business entity can apply for registration under Companies Act, 2013. The Committee further stated that presently, there are no rules that govern the manner of such conversion of Society in to a Company, and has erred to take note of Sub-rule 2 (c) of Rule 3 of the Companies (Authorised to Registered) Rules, 2014 as amended from time to time, which deals with the prescription/documentation for conversion of a Society (which the author presumes to include even Co-operative Societies also) into Company limited by Guarantee under Section-8, which is in line with the co-operative principles and not primarily motivated by the earning of profits. **Amendments recommended/proposed by the Committee:** The Committee has proposed that Section 366 of the Companies Act, 2013, should not permit the conversion of co-operative societies into a company, and accordingly recommended deletion of a reference to cooperative societies in Section 366 concerning companies capable of being registered. The Ministry needs to take note of the same and look in to it.

	Authors comments: The Author is of the view that the Committee has erred in understanding the provisions of Section 366 of the Companies Act, 2013, providing for conversion of the Co-operative Society in a Company limited by Guarantee under Section-8, and has gone with its recommendations linking with the directives of the Reserve Bank of India, with regard to Urban Co-operative Banks (UCBs) to Small Finance Banks (SFB), which is not the subject matter per-se dealt in Section 366, **with regard to conversion of the Co-operative Society/Society in a Company limited by Guarantee under Section-8.**
24	**FACILITATING E-ENFORCEMENT AND E-ADJUDICATION:** **Issue to be addressed:** Section 398 of the Companies Act, 2013, deals with the power of the Central Government to prescribe Rules regarding the filing of applications, documents, inspection, etc., in electronic form. The Explanation appended to Section 398(1) states that: "For the removal of doubts, it is hereby clarified that the rules made under this section shall not relate to imposition of fines or other pecuniary penalties or demand or payment of fees or contravention of any of the provisions of this Act or punishment therefor." The Committee is of the view that the operation of this explanation acts as a roadblock in carrying out certain adjudication related activities in electronic mode. The Committee also opined that removing the Explanation would not entirely impede physical enforcement or adjudication since Section 400 of the Companies Act, 2013, empowers the Central Government to specify whether Rules framed under Section 398 are exclusively for electronic purposes or as an alternate/ in addition to physical form. **Amendments recommended/proposed by the Committee:** With the above, the Committee proposed that the Explanation under Section398 of the Companies Act, 2013, be omitted to enable the Central Government to make Rules for electronically imposing fines, penalties, and payment of fees, and further facilitate e-enforcement and e-adjudication. **Authors comments:** A welcome amendment, to remove ambiguity and pave way to e-enforcement and e-adjudication.

25 **STRICTER REGULATION FOR NIDHIS:**

Issue to be addressed:

All are aware that a Nidhi is a company is incorporated to receive deposits from and lend to its members for their mutual benefit.

Based on the reports submitted to the Committee, the Committee observed that during the administration of the existing frame work under Section 406 of the Companies Act, 2013, the companies incorporated as Nidhis have committed violations of numerous provisions of the Companies Act, 2013 and the applicable Rules. It was brought to the Committee's notice that the violations are repetitive and that many such companies have been incorporated after demonetisation.

Amendments recommended/proposed by the Committee:

Based on the above, the Committee proposed that provisions on Nidhis should be revised to regulate incorporation and functioning of Nidhis more stringently, with the recommendations being as below:

(a) To provide for companies to fulfil certain financial and non-financial criteria as prescribed, to be eligible to be declared as Nidhi;

(b) To provide for such additional restrictions or conditions as may be considered necessary, to be imposed at the time of declaration of a company a Nidhi, and non compliance of the same, will enable the Central Government to revoke such declaration.

(c) To provide for a specific period for which a Company to be declared as Nidhi i.e., initially for a period of 5 years, and later to be renewed, subject to compliance by the Company of the provisions of the Nidhi Rules, framed under the Act.

(d) To provide power to Central Government to provide for schemes for restructuring (merger, amalgamation or takeover) of Nidhis which are either sick, financially weak or have been mis-managed.

(e) To provide for the existing Nidhis to comply with the new requirement with in a reasonable transition period of 2-3 years.

and accordingly, Chapter XXVI-Nidhis, to be amended to include more stringent and robust provisions for incorporating and regulating Nidhis.

Authors comments:

A welcome amendment, to de-clutter the ambiguity andfor better regulation of Nidhis.

26 **DRAFTING AND CLARIFICATORY CHANGES:**

Issue to be addressed:

There were certain suggestions with regard to inconsistencies in definitions and inclusions to some provisions of the Act, which are required to be addressed through suitable amendments to the said provisions, as suggested hereunder under the heading Drafting and Clarificatory Changes.

Amendments recommended/proposed by the Committee:

The Committee proposed for the following amendments:

(a) Amendment to Section 24(2) to omit the reference to Section 458, concerning the power of the Securities and Exchange Board to regulate the issue and transfer of securities.

(b) Amendment to the first proviso to Section 136(1) to provide for companies to send copies of audited financial statements and other relevant documentation at shorter notice, for both AGMs and other general meetings.

(c) Amendment to Section 164(1)(g) to amend the provision as to "Conviction" to "Penalty in relation to Section 188" concerning related party transactions as a ground for disqualification of directors, in view of the de-criminalisation of most of the offences vide the Amendment Act, 2020.

(d) Amendment to Section 187(1) concerning holding assets to include joint ventures and to allow holding companies to be the only member in its WOS and providing similar relaxations in the case of a WOS in which the entire shareholding is held by the holding company along with one or more of its WOSs.

(e) Amendment to Section 248(6) concerning removing the name of a company from the register of companies, for the words "before passing an order under sub-section (5)", the words "before publishing the notice under sub-section (5)" needs to be substituted, to provide for as check, that before publishing the notice, satisfy himself that sufficient provision has been made for the realisation of all amount due to the company and for the payment or discharge of its liabilities and obligations by the company within a reasonable time and, if necessary, obtain necessary undertakings from the managing director, director or other persons in charge of the management of the company, rather than before passing of the order under Section 248 (5).Clarificatory amendment to Section 446B concerning lesser penalties for penalties for one person, small, start-ups, and Producer Companies, so as to provide, for the words "which shall not be more than", the word "of" should be substituted, which clears that in case of penalties for one person, small, start-ups, and Producer Companies, the same can be half of the penalties prescribed/specified under the relevant sections.

	(f) Amendment to provisions of Producer Companies with reference to Section 378Y and 378ZA(9) [Quorum for General Meetings], which presently lays down the quorum requirement of ¼ of the total members. The threshold is sought to be relaxed to provide for either of the requirement of ¼ of the members or 100 members, whichever is lesser. **Authors comments:** Welcome amendments removing inherent ambiguities in the provisions

Recommendations to the LLP Act:

With regard to the recommendations/changes to the Limited Liability Partnership Act, 2008, the Committee has made only one recommendation, and the same is detailed as below:

Sl.No.	Recommendation relating to
1	**INTRODUCTION OF CONCEPT OF PRODUCER LLPS:** **Issue on hand:** The Committee noted that the concept of Producer Companies was introduced in Companies Act, 1956, through the Companies (Amendment) Act, 2002. The amendment sought to include mutual assistance and co-operative principles within the regulatory framework of company law. There is no corresponding provision under the LLP Act, 2008, for formation of the Producer LLPs. The Committee noted that Producer LLPs would serve as a more desirable option for small producers since LLPs have been provided with a range of relaxations in the conduct of their affairs. For instance, an LLP is not required to get its accounts audited unless its turnover exceeds Rs. 40 lakhs or its capital contribution exceeds Rs. 25 lakhs. **Amendments recommended/proposed by the Committee:** In light of the benefits associated with producer institutions and the comparative advantages of LLPs vis-à-vis companies, particularly concerning reduced compliance burden, the Committee proposed the concept of Producer LLP's may be incorporated within the LLP Act, 2008, and accordingly, A new chapter is proposed to be inserted in the LLP Act, 2008. **Authors Comments:** A welcome amendment, which will enable the intending Farmers or farmer producer entities to form in a Limited Liability Partnership, who hither-to hesitated to form a Producer Company, would come within the regulatory framework of Limited Liability Partnership Act, 2008, post forming into a Producer LLP.

From the overall amendments proposed by the Committee, it is noticed that though an attempt seems to have been made for suggesting amendments to the existing provisions of the Companies Act, 2013 and Limited Liability Partnership Act, 2008, the practical issues faces by the stakeholders in the grass root level, seems to have been left unaddressed, even in accordance with the terms of the reference made to the Committee by the Ministry.

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