2023 - 2024

ALL GUJARAT FEDERATION OF TAX CONSULTANTS

TAX GURJARI

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ACTIVITIES AT A GLANCE

2023 - 2024

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MESSAGE OF THE PRESIDENT

CA Ravi Shah

Dear Esteemed Readers,

It is with great pleasure that I extend my warmest greetings to you through the pages of this esteemed tax magazine “Tax Gurjari”. As we delve into the intricate world of taxation, I am reminded of the pivotal role it plays in shaping our societies, fostering economic growth, and ensuring a fair and just distribution of resources.

In today's rapidly changing global landscape, taxation stands as a cornerstone for sustainable development and social progress. It is not merely a financial mechanism but a powerful tool that governments employ to fund public services, infrastructure, and essential programs that benefit us all. As we navigate the challenges of our times, the importance of a well-designed and effective tax system cannot be overstated.

Tax Gurjari magazine serves as a platform for insightful discussions, analysis, and perspectives on the latest trends, policies, and innovations in the realm of taxation. I am confident that the articles, features, and expert opinions presented here will contribute to a deeper understanding of the complexities surrounding taxation and its impact on individuals, businesses, and nations.

I encourage you to engage actively with the content shared in these pages. Whether you are a seasoned tax professional, a business leader, a policymaker, or a curious reader interested in the dynamics of taxation, Tax Gurjari magazine aims to provide valuable insights and foster informed dialogue.

As we move forward, let us recognize the existence of Tax Gurjari magazine for the last 30 years. I am confident that the discussions within these pages will contribute to the ongoing discourse on building robust tax frameworks that support the aspirations of our communities.

I extend my gratitude to the contributors, editors, and readers who have made this magazine a valuable resource for all those passionate about the world of taxation. May the knowledge shared here inspire thoughtful discussions and contribute to the advancement of our understanding of taxation in the 21st century.

Thank you, and happy reading.

Sincerely,

CA Ravi Shah
President
All Gujarat Federation of Tax Consultants

MESSAGE OF CHAIRMAN

Adv. (Dr.)
Kartikey B Shah

Dear Professional Member,

I have the great honour and privilege of being appointed as chairman of 'Tax Gurjari' publication of All Gujarat Federation of Tax Consultants (AGFTC) in its 32nd year of activity. I sincerely thank you from the bottom of my heart of resposing trust and confidence in me for this opportunity to serve the profession of apex body.

I am indeed greatful to president CA Ravi Shah & Hon. Secretary CA Shridhar Shah for giving an opportunity to bring different expert's knowledge in one publication.

It is highly important that we possess expert knowledge in all the subjects we deal in our profession. I am very happy to announce that this year of Tax Gurjari will be unveiled in coming Tax Conclave in the month of March and we are providing digital edition of Tax Gurjari to our professional members. Thus, we will be providing tremendous value addition as invaluable possession and a very useful addition to the library of our members.

Knowledge sharing refers to the process of exchanging information between people, teams, or organizations. This knowledge may be explicit, which comes from documents or procedures, or tacit, meaning it was developed from experience. Tax Gurjari is the best medium of knowledge sharing for our tax professional members.

At last I would like to mention the quote of **Robert T. Kiyosaki," Knowledge breeds Confidence. Confidence destroys Fear. Destroy your Fear."** Once again thank you for providing me this opportunity.

Adv. (Dr.) Kartikey B. Shah
Chairman Tax Gurjari Committee

HON. SECRETARY'S COMMUNICATION

CA Shridhar Shah

Dear Esteemed Members and Tax Practitioners,

I hope this message finds you in good health and high spirits.

It gives me immense pleasure to extend a warm invitation to all our esteemed members and tax professionals to the upcoming Two Day Tax Conclave organized by the All Gujarat Federation of Tax Consultants jointly with Income Tax Bar Association. This event, slated to be held on 15& 16 March, promises to be an enriching experience for all participants, featuring insightful discussions, expert panels, and networking opportunities aimed at enhancing our collective understanding of the ever-evolving tax landscape.

As we gear up for this significant event, I am pleased to announce the release of the latest issue of Tax Gurjari, our esteemed publication dedicated to providing valuable insights and updates on various aspects of taxation. This issue, curated meticulously by our team of experts, encompasses a diverse range of articles covering Direct Tax, Indirect Tax, Gift City, and other allied laws pertinent to our profession.

I would like to extend my heartfelt gratitude to all the contributors, editorial team members, and staff involved in the production of this issue. Their dedication and expertise have been instrumental in ensuring the quality and relevance of the content presented herein.

As we eagerly anticipate the release of Tax Gurjari during the Two Day Tax Conclave, I encourage all our members to actively participate in the event and make the most of this invaluable opportunity for learning, networking, and professional growth.

Thank you for your unwavering support and participation, which continue to enrich the endeavours of the All Gujarat Federation of Tax Consultants.

Warm regards,

CA Shridhar Shah
Hon. Secretary

Navigating ITC Maze: Key Challenges and Legal Jurisprudence under GST

- BIMAL JAIN
FCA, FCS, LLB

It is important to understand that the government has made an endeavor through the provisions of GST legislation to ensure a seamless flow of credit. The GST legislation, aimed at mitigating the cascading impact of taxes, places Input Tax Credit (**"ITC"**)at its core, allowing businesses to offset taxes paid on inward supplies. Despite its intended role as a linchpin for seamless taxation, the pursuit of ITC has become a focal point of litigation and legal scrutiny. This intricate journey through the ITC maze unfolds with complexities that transcend the straightforward vision of the legislation. Through various judgments and rulings, the courts have been instrumental in clarifying ambiguities, thereby guiding the path for taxpayers and the government alike towards achieving the objectives of the GST. This article ventures into the depths of the ITC landscape, shedding light on the key challenges and legal nuances that have surfaced within the GST framework, thereby providing a comprehensive exploration of the complex interplay between legislation and jurisprudence.

1. Time Limit Conundrum under Section 16(4)

Navigating the intricate terrain of ITC under the GST regime reveals a distinct challenge encapsulated within the temporal boundaries defined by Section 16(4) of the Central Goods and Services Tax Act, 2017 (**"the CGST Act"**). The Time Limit Conundrum, as stipulated by this provision, casts a significant shadow over the entitlement of a registered person to claim ITC.

According to Section 16(4) of the CGST Act, the window for claiming ITC with respect to any invoice or debit note for the supply of goods or services, closes sharply on the due date of furnishing return under section 39 of the CGST Act for the month of September, following the end of relevant financial year (w.e.f 01-10-2022, it is thirtieth day of November following the conclusion of the financial year) to which the respective invoice or debit note pertains, or upon the date of furnishing of the relevant annual return, whichever transpires earlier.

This temporal constraint not only adds a layer of complexity to ITC proceedings but also underscores the critical importance of timely compliance within the GST framework. In this context, exploring the nuances and implications of the Time Limit Conundrum becomes imperative for businesses and tax practitioners alike, as they strive to navigate the ITC landscape while adhering to the stipulations set forth by Section 16(4) of the CGST Act.

The said provision, being a contentious one, has been challenged in various High Courts. In the recent past, the Hon'ble Andra Pradesh High Court, in the case of ***Thirumalakonda Plywoods v. The Assistant Commissioner [W.P.No.24235 of 2022 dated July 18, 2023]***, upheld the limitations envisioned under Section 16 (4) of CGST Act.

The Petitioner raised the following contentions before the Hon'ble High Court to support its plea that the timeline for claiming ITC under the GST law is invalid:

- Time limit under Section 16(4) of the CGST Act violates Articles 14, 19(1)(g) & 300A of the Constitution of India.
- Time limit is not prescribed as a condition under Section 16(2) and Section 16(2) overrides Section 16(4) of the CGST Act.
- Filing of belated GSTR-3B exonerates delay in filing of return as well as delay in claiming ITC.

The said provision has also been challenged before various Hon'ble High Courts, specifically in the case *of* ***M/s. BBA Infrastructure Limited v. Senior Joint Commissioner of State Tax and Others [MAT No. 1099 of 2023 dated December 13, 2023]***filed before the Hon'ble Calcutta High Court, ***Gobinda Construction v. Union of India and Others [CWJC No. 9108 of 2021 dated September 08, 2023]***filed before the Hon'ble Patna High Court and ***Jain Brothers v. Union of India [Writ Petition (T) No. 191 of 2022 dated December 11, 2023]***, filed before the Hon'ble Chhattisgarh High Court wherein the aforesaid Hon'ble High Courts upheld the constitutional validity of Section 16(4) of the CGST Act.

The good news is that Section 16(4) of the CGST Act has been challenged before the Hon'ble Supreme Court of India in the case of ***M/s. Shanti Motors v. Union of India [Special Leave Petition No. 4410/2024]*** wherein vide order dated January 09, 2024, the Court has issued notice to the department, along with interim reliefs filed against the judgment of the Hon'ble Patna High Court in the case of ***Gobinda Construction v. Union of India and Others [CWJC No. 9108 of 2021 dated September 08, 2023]***, wherein the Hon'ble Patna High upheld the constitutional validity of Section 16(4) of the CGST Act.

The aforesaid matter is tagged along with the case of ***Mrityunjay Kumar v. Union of India and Others [Special Leave to Appeal (C) No. 28270/2022]***

The Petitioners in the Hon'ble Supreme Court have challenged the vires of Section 16(4) of the CGST Act, which imposes a time limit for availing of ITC, as being violative of Articles 14, 19(1)(g) and 300A of the Constitution of India.

Probable Grounds to argue on the provision of Section 16(4) of the CGST Act:

It creates an arbitrary classification among equals without any intelligible differentia bearing any rational nexus to the object of the Acts. It is a settled law that equals must be treated equally, and unequal treatment of equals would be violative of Article 14 of the Constitution. However, the provision of Section 16(4)of the CGST Act creates an arbitrary distinction between two individuals forming part of the same class, i.e., both having paid the incidence of tax on receipt/purchase of goods or services, by allowing the benefit of ITC to those who have availed the credit within the limitation period prescribed in the provision of Section 16(4) of the CGST Act and denying such benefit to others who have failed to avail the credit on account of procedural irregularities such as failure to file their returns since availment of credit is predicated on such filing of returns. Further, another facet of the unequal treatment of equals under the provision of Section 16(4) of the CGST Act is that by limiting the availability of ITC in respect of invoices or debit notes pertaining to a given financial year until 30th November of the next financial year, the provision creates an arbitrary timeline between two equals, by allowing an Assessee additional time to avail credit in respect of invoices issued during the earlier part of the financial year and lesser time to Assessee in relation to invoices issued towards the end of the same financial year.

It is pertinent to mention here that the Hon'ble

High Courts have granted relief in cases where the ITC has been availed beyond the prescribed period due to unforeseen circumstances.

In the case of ***Toyota Kirloskar Motor Private Limited v. Union of India [WP 22952 of 2023 dated October 12, 2023]***, the Hon'ble Karnataka High Court granted an interim stay on ITC recovery proceedings when the returns were filed belatedly, and ITC pertaining to the amount paid for Employee Secondment was availed belatedly after the judgment of Hon'ble Supreme Court passed pertaining to payment of service tax on services rendered by seconded employees to Indian based Assessee.

Also, in the case of ***Tvl. Kavin HP Gas Gramin Vitrak v. The Commissioner of Commercial Taxes & Ors. [W.M.P. (MD) Nos. 6764 and 6765 of 2023 dated November 24, 2023]***, the Hon'ble Madras High Court granted relief to the Assessee in case the ITC was claimed belatedly after the prescribed period under Section 16(4) of the CGST Act, as GSTR-3B was filed beyond the prescribed period due to financial difficulty.

The constraint in Section 16(4) of the CGST Act not only adds a layer of complexity to ITC proceedings but also underscores the critical importance of timely compliance within the GST framework. In this context, exploring the nuances and implications of the Time Limit Conundrum becomes imperative for businesses and tax practitioners alike, as they strive to navigate the ITC landscape while adhering to the stipulations set forth by Section 16(4) of the CGST Act.

2. ITC and Real Estate

In the aftermath of the introduction of the GST in India, the real estate sector also witnessed a significant paradigm shift in its tax landscape. However, the integration of GST into the real estate ecosystem brought forth a conundrum regarding ITC. This complex issue has been a focal point of debate, with businesses and authorities grappling to define the contours of ITC eligibility within the intricacies of real estate transactions.

The case of ***Chief Commissioner of Central Goods and Services Tax and Others v. M/s Safari Retreats Private Limited and Others [SLP(C) 26696/2019],*** which is pending before the Hon'ble Supreme Court, is at its final legs as the Department has filed an appeal against the judgment passed by Hon'ble Orissa High Court in the case of ***Safari Retreats Private Limited and Others v. Chief Commissioner, Central Goods and Services Tax and Others [W.P. (C) 20463 of 2018 dated April 17, 2019]*** wherein the Hon'ble High Court allowed the availment of ITC on material input/services used for construction of immovable property which is to be used in the course or furtherance of business i.e. being further let out to various tenant/lessees.

As the legal discourse unfolds, the outcome of this case is poised to significantly influence the broader understanding of ITC applicability within the dynamic realm of real estate transactions.

3. Mismatch between GSTR-3B and GSTR-2A, a never-ending saga

In the wake of the GST implementation, the persisting challenge of reconciling discrepancies between GSTR-3B and GSTR-2A has emerged as a perpetual saga for businesses. The misalignment between the self-declared GSTR-3B, which summarizes the tax liability, and GSTR-2A, a reflection of ITC available based on supplier invoices, has been a source of ongoing concern for taxpayers and tax authorities alike.

Here are some of the common reasons for mismatches between GSTR-3B and GSTR-2A:

- **Timing differences:** Suppliers might file their GSTR-1 late, leading to a delay in reflecting the purchase details in the recipient's GSTR-2A.
- **Errors in invoice reporting:** Mistakes in invoice details, such as invoice number, date, or tax amount, can cause discrepancies.
- **Changes in tax liability:** If the tax liability on a supply is reversed or amended, it might not be reflected in both returns simultaneously.
- **Claiming ITC beyond the prescribed time limit:** The GST law prescribes a specific time limit for claiming ITC. If a taxpayer claims ITC after the deadline, it will not be reflected in GSTR-2A and could be denied.

Addressing such issues, as per the ***Press Release dated 18th October 2018,*** the following has been clarified by the Central Board of Indirect Taxes and Customs (**"the CBIC"**) that Form GSTR-2A is just the facilitator to view the invoices reported by the suppliers in Form GSTR-1, for the recipient. It does not impact the ability of the recipient to avail the ITC. The Hon'ble Supreme Court, in the case of ***Union of India vs Bharti Airtel Ltd and Others [No.8654 of 2020, dated October 28, 2021],*** explained the effect and purpose of Form GSTR-2A. The relevant extract is reproduced below:

> *"Form GSTR-2A is only a facilitator for taking an informed decision while doing such self-assessment. Non performance or non-operability of Form GSTR-2A or for that matter, other forms, will be of no avail because the dispensation stipulated at the relevant time obliged the registered person to submit returns on the basis of such self-assessment in Form GSTR-3B manually on electronic platform."*

Also, the Hon'ble Madras High Court, in the case of ***D.Y Beathel Enterprises vs. The State Tax officers [No.2127 of 2021 dated February 24, 2021],*** held that when the seller has collected tax from the purchasing dealer, the omission on the part of the seller to remit the tax in question must be viewed very seriously and strict action ought to have been initiated against the seller.

Further, the CBIC vide ***Circular No. 183/15/2022-GST dated December 27, 2022,*** specified the way to deal with the mismatch in the ITC claimed in FORM GSTR-3B in comparison to that described in FORM GSTR-2A for FY 2017-18 and 2018-19.

Furthermore, the CBIC, vide another ***Circular No. 193/05/2023-GST dated July 17, 2023,*** issued clarification for the subsequent period up to December 31, 2021.

Thus, GSTR 2A was not a condition to avail credit until December 31, 2021. This means that businesses could claim ITC on their purchases even if their GSTR 2A reflected mismatched information.

Recently, a significant legal development has unfolded by the Hon'ble Guwahati High Court in the case of ***M/s. Surya Business Private Limited v. State of Assam and Others [WP (C) 528/2024 dated February 05, 2024],*** the court granted interim protection to the Petitioner by restraining the Department from initiating adverse proceedings in instances where discrepancies arise due to defaults at the supplier's end.

This interim relief acknowledges the challenges businesses face in scenarios beyond their control, underscoring the need for a nuanced approach in addressing mismatches between GSTR-3B and GSTR-2A.

Crucially, this legal discourse finds resonance in various High Courts, exemplified by the judgment of the Hon'ble Calcutta High Court. The Hon'ble Supreme Court has further reinforced this perspective in the case of ***Assistant Commissioner of State Tax, Ballygunje and Others v. Suncraft Energy Pvt. Ltd. [Special Leave Petition (C) No. 27827-27828 of 2023 dated December 14, 2023]***wherein the Hon'ble High Court set aside the order of reversing excess credit availed in Form GSTR-3B as compared to Form GSTR-2A and held that recovery proceedings are not sustainable when the Department has not conducted a proper inquiry into the supplier's actions.

These legal pronouncements underscore the need for a balanced and judicious approach to address the persistent mismatch challenges, safeguarding the interests of taxpayers while ensuring due diligence on the part of the tax authorities.

Conclusion

The landscape of ITC within the GST regime in India is marked by a series of complex provisions and judicial interpretations that have significant implications for businesses and tax practitioners alike. The central theme revolves around ensuring the seamless flow of credit within the GST regime, which lies at the heart of facilitating ease of doing business and potentially reducing the cost of supplies to the end consumers.

The discourse surrounding these issues is not merely about the technical legalities but also touches upon principles of equity, fairness, and the practical realities of conducting business in a rapidly evolving market environment. As the judiciary continues to play a pivotal role in shaping the contours of the GST framework through its interpretations and judgments, stakeholders remain keenly attentive to these developments. It is hoped that future legislative and judicial responses will aim towards simplifying the ITC mechanism, thus fulfilling the broader objectives of GST by enhancing tax compliance, minimizing litigations, and ensuring ease of doing business in India.

Decoding the proposal of Finance Bill, 2023 on timely payment to Micro and Small Enterprises

CA MEHUL THAKKAR
FCA, FCS, LLB

Introduction

Section 16 of Micro, Small and Medium Enterprises Development (MSMED) Act, 2006, provides that where any buyer fails to make payment of the amount to the supplier, as required under section 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank.

Further, in order to promote timely payment to Micro and Small Enterprises, a new clause (h) has been inserted by the Finance Act, 2023 in section 43B of the Income Tax Act with effect from A.Y. 2024-25. As per the said clause, deduction of any sum payable by the assessee to a micro or small enterprise beyond the time limit specified in section **15 of the MSMED Act 2006, shall be allowed only on actual payment of the same.**

Bare Text

Certain deductions to be only on actual payment.

Section 43B. *Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of—*

(h) ***any sum payable by the assessee to a micro or small enterprise beyond the time limit specified in section 15 of the Micro, Small and Medium Enterprises Development Act, 2006,;***

shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in ***section 28*** *of that previous year in which such sum is actually paid by him :*

*Provided that nothing contained in this section [****except the provisions of clause (h)****] shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of* ***section 139*** *in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return.*

Explanation 4,—

(e) "micro enterprise" shall have the meaning ***assigned*** *to it in clause (h) of section 2 of the Micro, Small and Medium Enterprises Development Act, 2006;'*

(g) "small enterprise" shall have the meaning ***assigned*** *to it in clause (m) of section 2 of the Micro, Small and Medium Enterprises Development Act, 2006.'*

Memorandum to Finance Bill, 2023 explaining Above Proposal

B. Socio Economic Welfare Measures Promoting timely payments to Micro and Small Enterprises

1. *Section 43B of the Act provides for certain*

deductions to be allowed only on actual payment. Further, the proviso of this section allows deduction on accrual basis, if the amount is paid by due date of furnishing of the return of income.

2. *In order to promote timely payments to micro and small enterprises, it is proposed to include payments made to such enterprises within the ambit of section 43B of the Act. Accordingly, it is proposed to insert a new clause (h) in section 43B of the Act to provide that any sum payable by the assessee to a micro or small enterprise beyond the time limit specified in section 15 of the Micro, Small and Medium Enterprises Development (MSMED) Act 2006 shall be allowed as deduction only on actual payment. However, it is also proposed that the proviso to section 43B of the Act shall not apply to such payments.*

3. *Section 15 of the MSMED Act mandates payments to micro and small enterprises within the time as per the written agreement, which cannot be more than 45 days. If there is no such written agreement, the section mandates that the payment shall be made within 15 days. Thus, the proposed amendment to section 43B of the Act will allow the payment as deduction only on payment basis. It can be allowed on accrual basis only if the payment is within the time mandated under section 15 of the MSMED Act*

4. This amendment will take effect from 1st April, 2024 and will accordingly apply to the assessment year 2024-25 and subsequent assessment years. [clause 13]

CDBT Circular No. 1/2024 EXPLAINING THE PROVISIONS OF THE FINANCE ACT, 2023

21. Promoting timely payments to Micro and Small Enterprises

21.1 Section 43B of the Act provides for certain deductions to be allowed only on actual payment. Further, the proviso of this section allows deduction on accrual basis, if the amount is paid by due date of furnishing of the return of income.

21.2 In order to promote timely payments to micro and small enterprises, payments made to such enterprises have been included within the ambit of section 43B of the Act vide FA 2023. A new clause (h) has been inserted in section 43B of the Act to provide that any sum payable by the assessee to a micro or small enterprise beyond the time limit specified in section 15 of the Micro, Small and Medium Enterprises Development (MSMED) Act 2006 shall be allowed as deduction only on actual payment. However, it has also been provided that the proviso to section 43B of the Act shall not apply to such payments.

21.3 Section 15 of the MSMED Act mandates payments to micro and small enterprises within the time as per the written agreement, which cannot be more than 45 days. If there is no such written agreement, the section mandates that the payment shall be made within 15 days. Thus, this amendment to section 43B of the Act allows the payment as deduction only on payment basis. It can be allowed on accrual basis only if the payment is within the time mandated under section 15 of the MSMED Act.

Applicability: This amendment takes effect from 1st April, 2024 and will accordingly apply in relation to the assessment year 2024-25 and subsequent assessment years.

Analysis

The provisions of section 43B(h) of the Act gets attracted only if following conditions are satisfied

(a) There should be a sum payable by the assessee;

(b) Such sum is payable to a micro or small enterprise;and

(c) Such sum payable is beyond the time limit specified in section 15 of the Micro, Small and Medium Enterprises Development Act, 2006.

Then deduction claimed, if any, in respect of such sum payable for a particular previous year, shall be first disallowed in computing income under the head " Profits and Gains from Business or Profession' and thereafter it can be claimed as deduction in the previous year in which actual payment for such "sum payable" is made.

It is further to note that the benefit conferred under proviso to section 43B in terms of extended time line for making payment on or before the due date of furnishing return under section 139(1) of the Income Tax Act is not available to such "sum payable".

Frequently Asked Questions

Q1. What is the meaning of Micro Enterprise?

Clause (e) of Explanation 4 to Section 43B *defines Micro Enterprise as under:*

"micro enterprise" shall have the meaning assigned to it in clause (h) of section 2 of the Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act,2006)

Section 2(h) of MSMED Act, 2006 *defines micro enterprise as under:*

"micro enterprise" means an enterprise classified as such under sub-clause (i) of clause (a) or sub-clause (i) of clause (b) of sub-section (1) of section 7;

Q2. What is the meaning of Small Enterprise?

Clause (g) of Explanation 4 to Section 43B *defines Small Enterprise as under:*

"small enterprise" shall have the meaning assigned to it in clause (m) of section 2 of the Micro, Small and Medium Enterprises Development Act, 2006.'

Section 2(m) of MSMED Act, 2006 *defines micro enterprise as under:*

"small enterprise" means an enterprise classified as such under sub-clause (ii) of clause (a) or sub-clause (ii) of clause (b) of sub-section (1) of section 7;

Q3. What are the provisions of section 7(1) of MSMED Act, 2006?

Section Heading: Classification of enterprises

The provisions of Section 7(1) of MSMED Act, 2006 reads as under:

Notwithstanding anything contained in section 11B of the Industries (Development and Regulation) Act, 1951 (65 of 1951), the Central Government may, for the purposes of this Act, by notification and having regard to the provisions of sub-sections (4) and (5), classify any class or classes of enterprises, whether proprietorship, Hindu undivided family, association of persons, co-operative society, partnership firm, company or undertaking, by whatever name called, —

(a) in the case of the enterprises engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951), as —

(i) **a micro enterprise,** where the investment in plant and machinery does not exceed twenty-five lakh rupees;

(ii) **a small enterprise,** where the investment in plant and machinery is more than twenty-five lakh rupees but does not exceed five crore rupees; or

(iii) a medium enterprise, where the investment in plant and machinery is more than five crore rupees but does not exceed ten crore rupees;

(b) in the case of the enterprises engaged in providing or rendering of services, as —

(i) **a micro enterprise,** where the investment in equipment does not exceed ten lakh rupees;

(ii) **a small enterprise,** where the investment in equipment is more than ten lakh rupees but does not exceed two crore rupees; or

(iii) a medium enterprise, where the investment in equipment is more than two crore rupees but does not exceed five crore rupees.

Q4. Whether the norms of classification prescribed under section 7(1) of MSMED Act, 2006 are static?

No. One must refer the provisions of sub-section (9) of Section 7 of MSMED Act, 2006 in this regard.

Section 7(9) of MSMED Act, 2006 reads as under:

Notwithstanding anything contained in section 11B of the Industries (Development and Regulation) Act, 1951 (65 of 1951) and clause (h) of section 2 of the Khadi and Village Industries Commission Act, 1956 (61 of 1956), ***the Central Government may,*** *while classifying any class or classes of enterprises under sub-section (1),* ***vary, from time to time, the criterion of investment*** *and* ***also consider criteria*** *or standards in respect* ***of employment or turnover*** *of the enterprises and* ***include*** *in such classification the* ***micro or tiny enterprises or the village enterprises,*** *as part of small enterprises.*

Q5. What are the latest norms of classification?

The limits referred to in Section 7(1) has been amended by notification **No S.O. 2119 (E) dated 26/06/2020** and new criteria for becoming micro, small and medium enterprises specified are as under:

It is pertinent to note here that below mentioned criteria are applicable for

(a) Manufacturing Enterprises and

(b) Enterprises rendering services

Particulars	Micro	Small	Medium
Investment in Plant & Machinery or equipment	Upto Rs.1.00 Crore	Upto Rs.10.00 Crore	Upto Rs.50.00 Crore
Turnover	Upto Rs.5.00 Crore	Upto Rs.50.00 Crore	Upto Rs.250.00 Crore

Q6. Are there any exclusions while measuring the investment in plant & machinery or equipment for the purpose of section 7(1) of the MSMED Act,2006?

Explanation 1 to section 7(1) reads as under:

For the removal of doubts, it is hereby clarified that in calculating the investment in plant and machinery, the cost of pollution control, research and development, industrial safety devices and such other items as may be specified, by notification, shall be excluded.

Q7. Whether Traders either retailer or Wholesaler be regarded as MSME?

As discussed earlier in Q3, Section 7(1) covers enterprises engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 as well as enterprises engaged in providing or rendering of services. But we have also seen in Q4, that provisions of section 7 of MSMED Act, 2006 also empower Central Government to include other enterprises as part of small enterprises also.

On being received various representations, the Central Government ***vide Office Memorandum dated 02/07/2021*** *decided to include Retail and wholesale traders as MSME and they are allowed to be registered on Udhyam Registration Portal.*

Q8. Will the proposed amendment under section 43B of the Act extends to the payments to be made to Wholesalers and Retailers?

NO. *Because inclusion of Traders under MSME was for limited benefits only i.e. benefits to Retail and Wholesale trade MSMEs are to be restricted to Priority Sector Lending only as mentioned in para 2 of the above referred Office Memorandum.*

Q9. Are there any registration requirement under MSMED Act, 2006?

Section 8 of the MSMED Act, 2006 *requires to file a memorandum with the notified authority of State Government or Central Government. The sub-section (1) of Section 8 of MSMED Act, 2006 reads as under:*

Memorandum of micro, small and medium enterprises.

8. (1) Any person who intends to establish,—

- ***(a) a micro or small enterprise, may, at his discretion,*** *or*
- *(b) a medium enterprise engaged in providing or rendering of services may, at his discretion; or*
- *(c) a medium enterprise engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951),*

shall file the memorandum of micro, small or, as the case may be, of medium enterprise with such authority as may be specified by the State Government under sub-section (4) or the Central Government under sub-section (3):

Q10. Whether filing of memorandum under section 8 of the MSMED Act, 2006 is mandatory?

No. Section 8 (1) of MSMED Act makes it clear that it is discretionary.

Q11. How many units fall within the meaning of MSME as per the provision of section 7 of the MSMED Act, 2006 but not registered under section 8 of the MSMED Act, 2006.

As per the ***Annual report of the MSME Ministry for 2022-23,*** *the estimated number of MSMEs in the country is around 633.88 lakhs. As per the said report, the number of MSMEs who filed memorandum as on 04.01.2023 is 1,59,41,168.*

Q12. What will be implication under section 43B of the Income Tax Act if enterprise is upgraded to Medium Enterprise during the year under consideration?

As per the notification of MSME S.O. 4926(E).—dated 18th October, 2022*, the non-tax benefits of MSME Act, 2006 will continue for a period of 3 years from the date of upward change.*

Q13. Clause (h) of section 43B shall come into play in the event of making payment to MSME beyond the time limit specified in section 15 of the MSMED Act, 2006. Then, what are the provisions of Section 15 of MSMED Act, 2006?

Section Heading: Liability of buyer to make payment

Section 15. *Where any supplier, supplies any goods or renders any services to any buyer, the buyer shall make payment therefor on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day:* ***Provided*** *that in no case the period agreed upon between the supplier and the buyer in writing shall exceed forty-five days from the day of acceptance or the day of deemed acceptance.*

The above provision can be summarised as under:

If Agreement between the buyer and supplier	***Due Date for payment***
Exists	***Date agreed upon between the buyer and supplier.*** *However, in no case the period agreed upon between the supplier and the buyer in writing shall exceed forty-five days from the day of acceptance or the day of deemed acceptance.*
Does not exist	*Appointed day*

Q14. What is the meaning of term "Appointed Day", "the day of acceptance", "day of deemed acceptance" and "Supplier" as appearing in section 15 of MSMED Act, 2006?

Section 2 of MSMED Act, 2006

In this Act, unless the context otherwise requires,—

(b) "appointed day" *means the day following immediately after the expiry of the period of fifteen days from the day of acceptance or the day of deemed acceptance of any goods or any services by a buyer from a supplier.*

Explanation.—For the purposes of this clause,—

(i) "the day of acceptance" means,—

(a) the day of the actual delivery of goods or the rendering of services; or

(b) where any objection is made in writing by the buyer regarding acceptance of goods or services within fifteen days from the day of the delivery of goods or the rendering of services, the day on which such objection is removed by the supplier;

(ii) "the day of deemed acceptance" means, where no objection is made in writing by the buyer regarding acceptance of goods or services within fifteen days from the day of the delivery of goods or the rendering of services, the day of the actual delivery of goods or the rendering of services;

(n) "supplier" means a micro or small enterprise, which has filed a memorandum *with the authority referred to in sub-section (1) of section 8, and includes,—*

(i) the National Small Industries Corporation, being a company, registered under the Companies Act, 1956 (1 of 1956);

(ii) the Small Industries Development Corporation of a State or a Union territory, by whatever name called, being a company registered under the Companies Act, 1956 (1 of 1956);

(iii) any company, co-operative society, trust or a body, by whatever name called, registered or constituted under any law for the time being in force and engaged in selling goods produced by micro or small enterprises and rendering services which are provided by such enterprises;

Q15. Whether time limit prescribed under section 15 of the Act runs from the date of invoice?

No. It runs from the appointed day. The definition of the term "appointed day" refers to the date of actual delivery of goods or the date of rendering of services, as the case may be.

Q16. Whether the proposed amendment in section 43B of the Act is aimed at all the micro or small enterprises (whether registered or not) or aimed at only those who obtained registration under the MSME Act, 2006?

On plain reading of the ***Clause (e) and (g) of explanation 4 to Section 43B,*** *the proposed amendment is aimed at all micro or small enterprises meeting the criteria of sub-clause (i)/(ii)*

of clause (a)/(b) of section 7(1) irrespective of their registration under section 8 of the MSME Act,2006.

However, the definition of supplier makes it clear that in order to avail benefit of section 15 of the MSMED Act, 2006, he must have filed a memorandum under section 8(1) of the MSMED Act.

This view has also been upheld by the ***Hon'ble SC in the case of Silpi Industries V/s Kerala State Road Transport Corporation CIVIL APPEAL NOS.1570-1578 OF 2021.***

Therefore, considering the above, one can safely conclude that provisions of section 43(h) are aimed at those suppliers who obtained registration under the MSMED Act, 2006.

Q17. How much disallowance be made when there is a violation of both the provisions namely clause (h) of Section 43B and the provisions of Section 40(a)(ia) of the Income Tax Act?

30% of the amount under consideration shall be disallowed under section 40(a)(ia) of the Income Tax Act and balance 70% shall be disallowed in view of the provisions of section 43B(h) of the Act

Q18. Can depreciation be disallowed in respect of asset purchased from the micro or small supplier whose payment is not made in accordance with the requirement of section 15 of MSMED Act, 2006?

One can defend the above disallowance by following the ratio laid down in the following cases

- **Pr. CIT v. Tally Solutions (P.) Ltd. [2021] 123 taxmann.com 21 (Kar.)**
- **CIT v. Mark Auto Industries Ltd. [2013] 40 taxmann.com 482 (Punj. & Har.)**

GIFT City : The Next Global Financial Hub

CA AMISH KHANDHAR

❖ INTRODUCTION

GIFT SEZ is India's first International Financial Services Centre (IFSC) under "SEZ Act 2005". At present GIFT City is an integrated development on 886 acres of land. However, GIFT City is being expanded to 3387 acres as approved by Government w.e.f. 02-11-2022.

❖ VISION OF HON. PRIME MINISTER

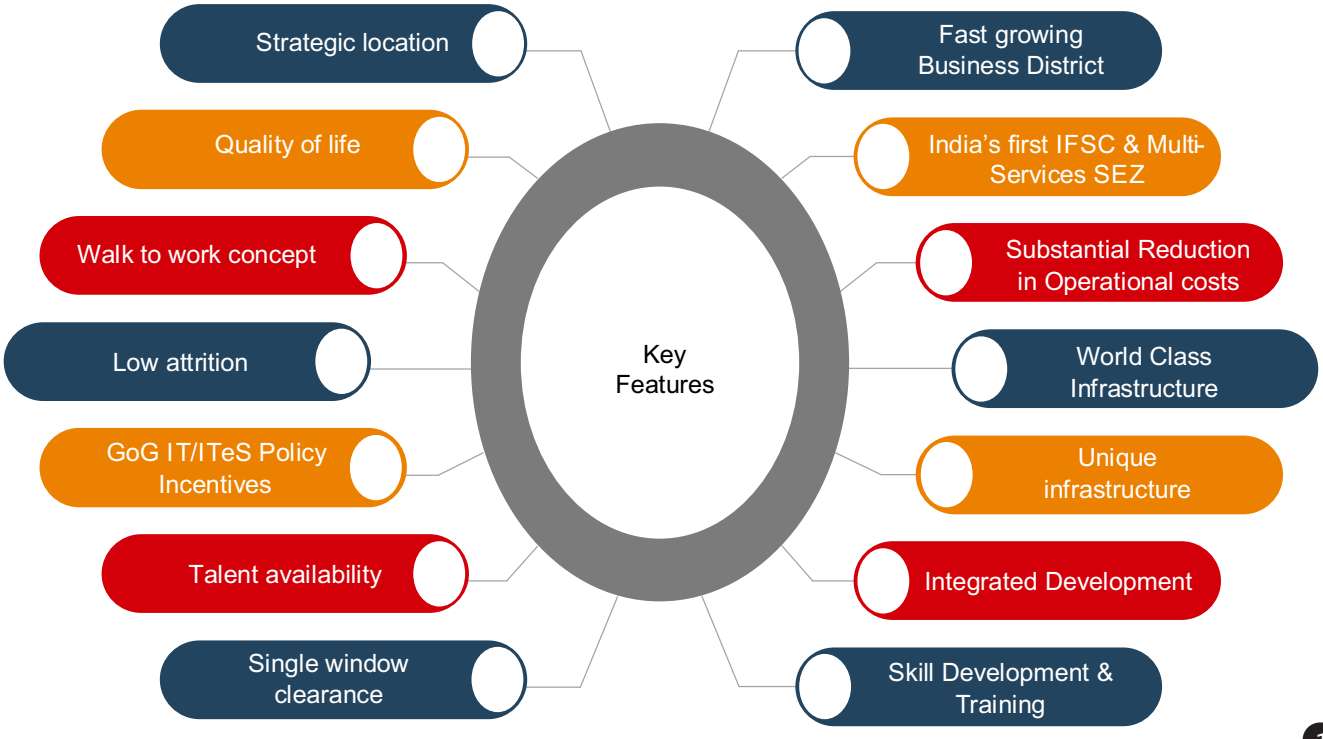
Shri Narendra Modi
Prime Minister of India

"The vision of Gujarat would be incomplete without capitalising on the in-house financial business acumen.

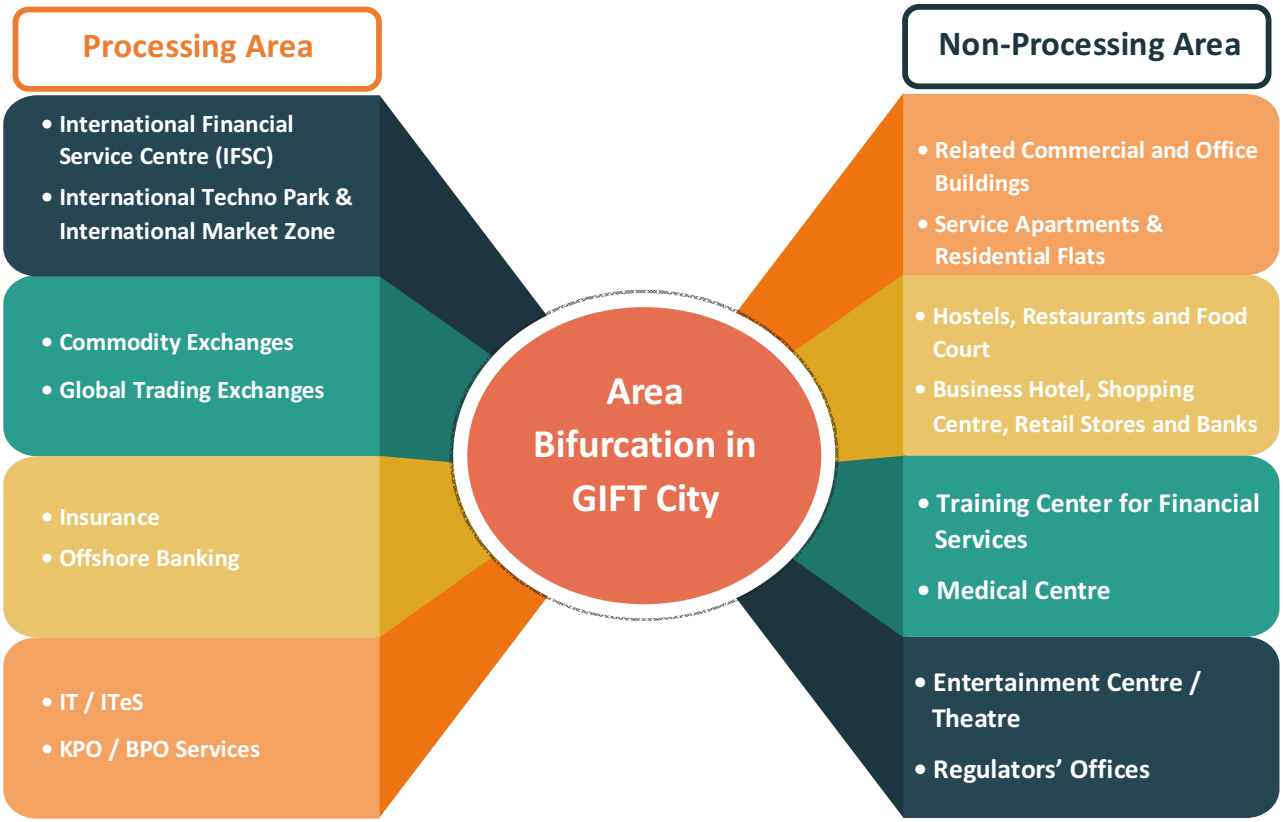
To tie-up with technology, to create a hub complete with infrastructure, to meet the needs of modern Gujarat, modern India and to create a space in the global financial world...that is my dream"

"My vision is that in ten years from now, GIFT city should become the price setter for at least a few of the largest traded instruments in the world, whether in commodities, currencies, equities, interest rates or any other financial instrument."

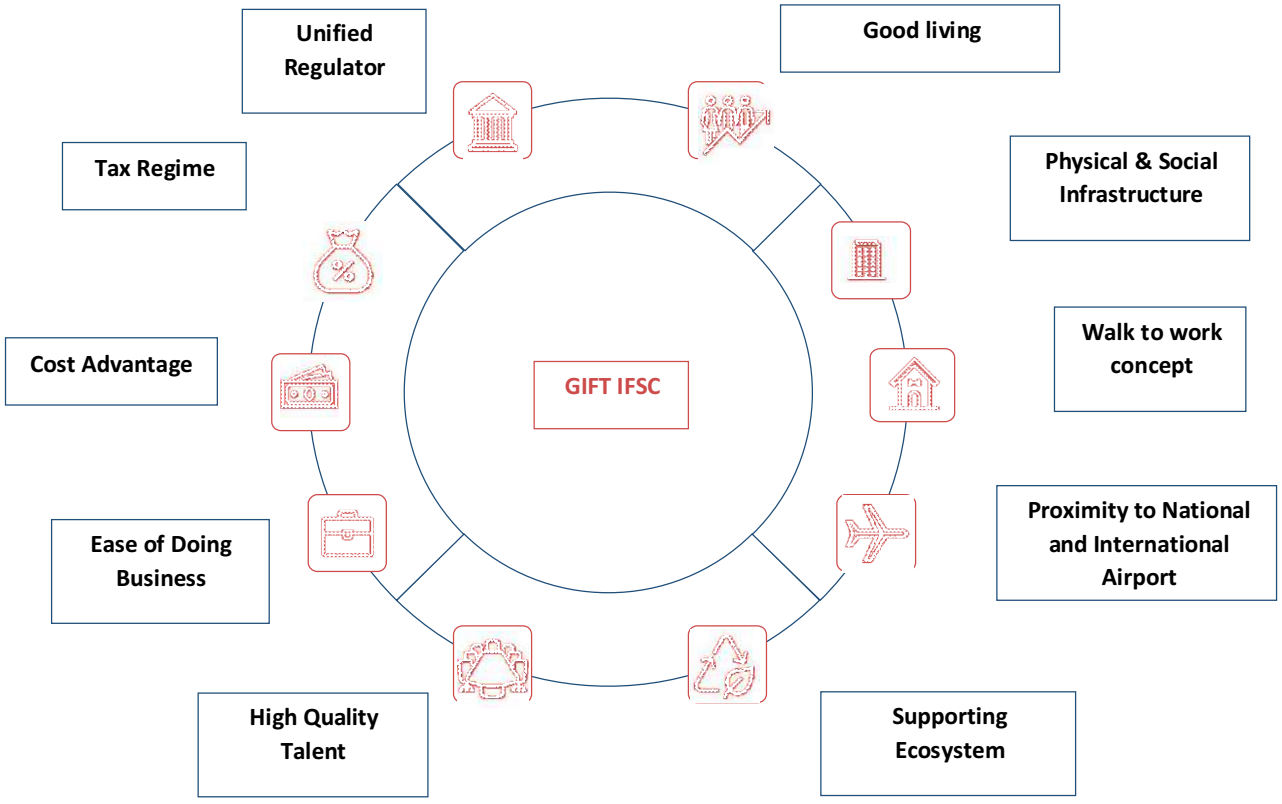
❖ KEY FEATURES OF GIFT SEZ



❖ AREA BIFURCATION



❖ KEY BENEFITS OF HAVING OFFICE IN GIFT CITY

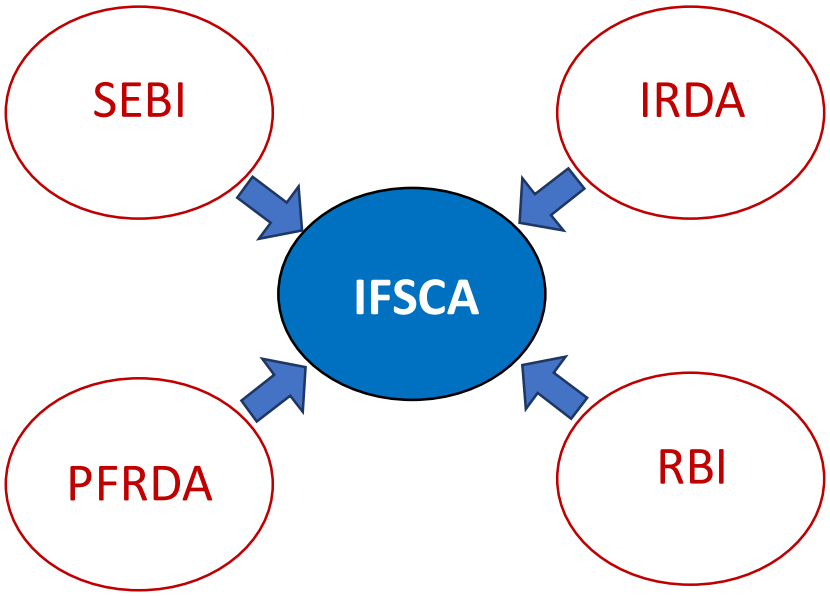


❖ IFSC IN INDIA

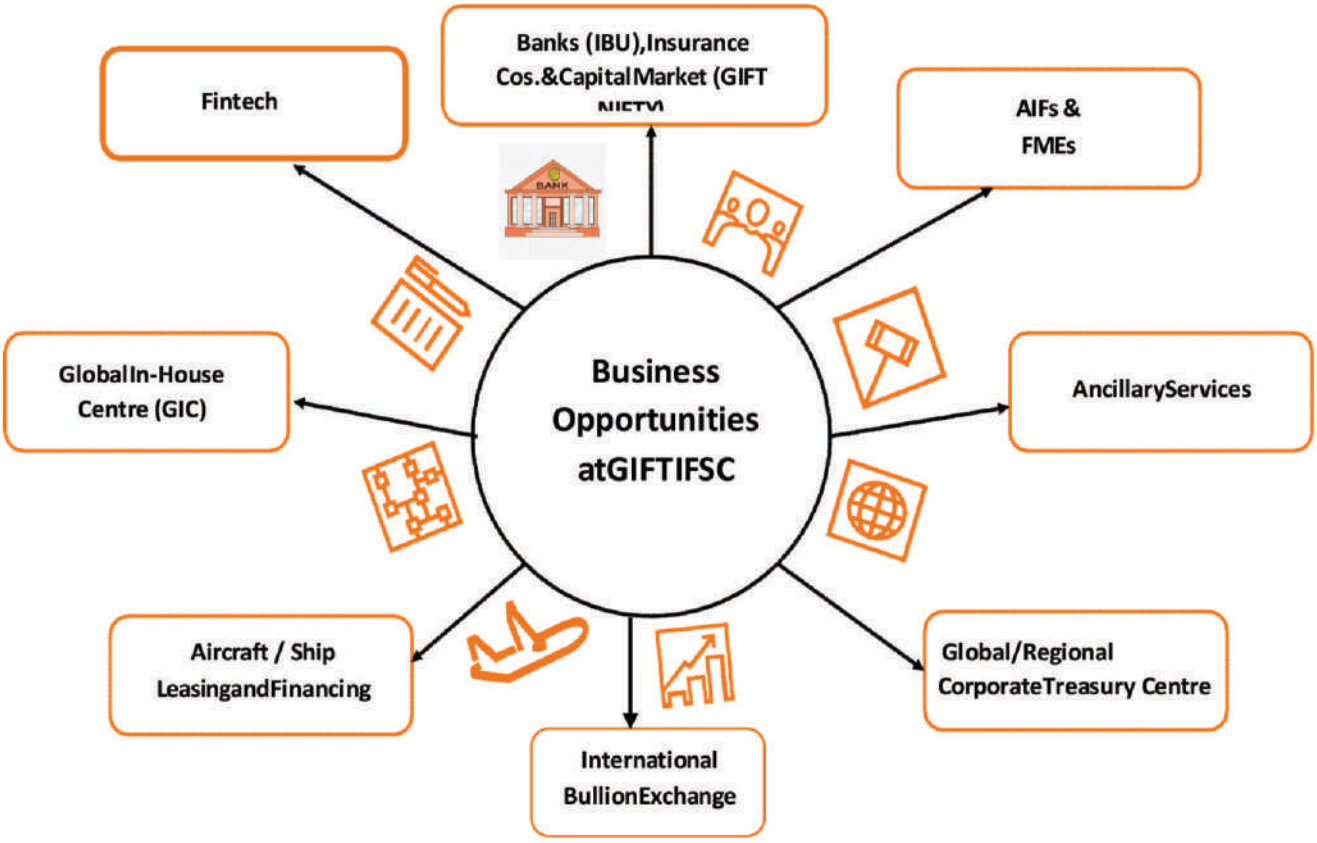
- An IFSC caters to the customers outside the jurisdiction of domestic economy. Such centres deal with the flow of finance, financial products and services across the borders.
- IFSC as envisaged under the Indian context "is a jurisdiction that provides financial services to non-residents and residents (Institutions), in any currency other than Indian Rupee (INR)".
- IFSC is set-up to undertake financial services transactions that are currently carried on outside India by overseas financial institutions and overseas branches / subsidiaries of Indian financial institutions.
- IFSC is approved and regulated by the Government of India under the Special Economic Zones Act, 2005 and is approved as a Multi Services Special Economic Zone ('GIFT SEZ'). IFSC at GIFT City is the first step towards bringing financial services transactions relatable to India, back to Indian shores.
- IFSC unit is treated as a non-resident under extant Foreign Exchange Management regulations (FEMA Regulations).

❖ INTERNATIONAL FINANCIAL SERVICE CENTRE AUTHORITY (IFSCA)

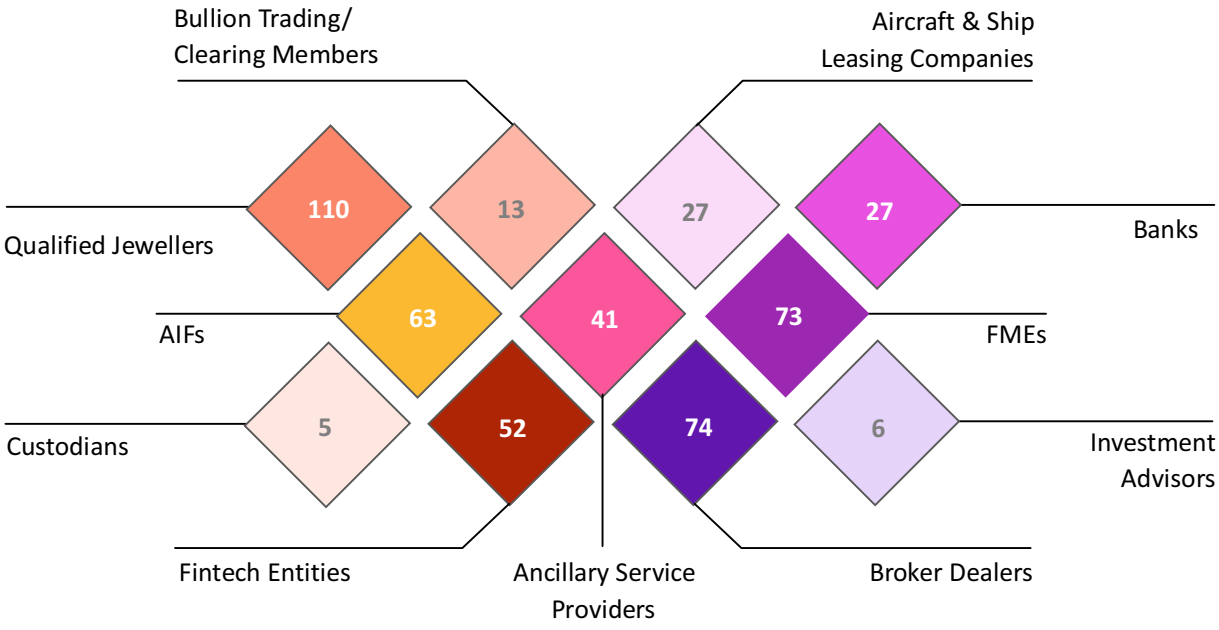
1. IFSCA has been established as a unified financial regulator in April 2020 by the Government of India under the IFSCA Act, 2019.
2. Authority is mandated to develop and regulate Financial Institutions, Financial Services and Financial Products in the International Financial Services Centre (IFSC) in India.
3. To develop and regulate IFSC's in India, IFSCA has been vested with powers of four sectoral regulators namely- RBI, SEBI, IRDAI & PFRDAs



❖ BUSINESS OPPORTUNITIES IN GIFT IFSC



❖ REGISTERED UNITS IN GIFT IFSC AS ON 01-02-2024



Source : IFSCA Website

❖ KEY BUSINESS ACTIVITIES IN IFSC

Capital Markets

Activities

- Listing and issuance of securities

Entities

- Stock/Commodity Exchanges
- Broker Dealer
- Trading Members
- Segregated Nominee Account Providers
- Clearing Corporations, Depositories, other intermediaries

Offshore Banking

Activities

- Corporate Banking
- ECB Lending
- Servicing JV/WOS of Indian companies registered abroad
- Factoring / Forfaiting of export receivables

Entities

- Indian banks
- Foreign banks
- Finance Cos and NBFCs

Offshore Asset Management

Activities :

- Portfolio Management Services
- Wealth Management Services
- Custodial Services

Entities :

- Alternative Investment Funds
- Mutual Funds
- Investment Advisors
- Portfolio Manager

Offshore Insurance

Activities :

- General / Life Insurance
- Co-Insurance
- Reinsurance
- Captive Insurance

Entities :

- Indian Insurer
- Indian Reinsurer
- Indian Broker
- Foreign Insurer
- Foreign Reinsurer

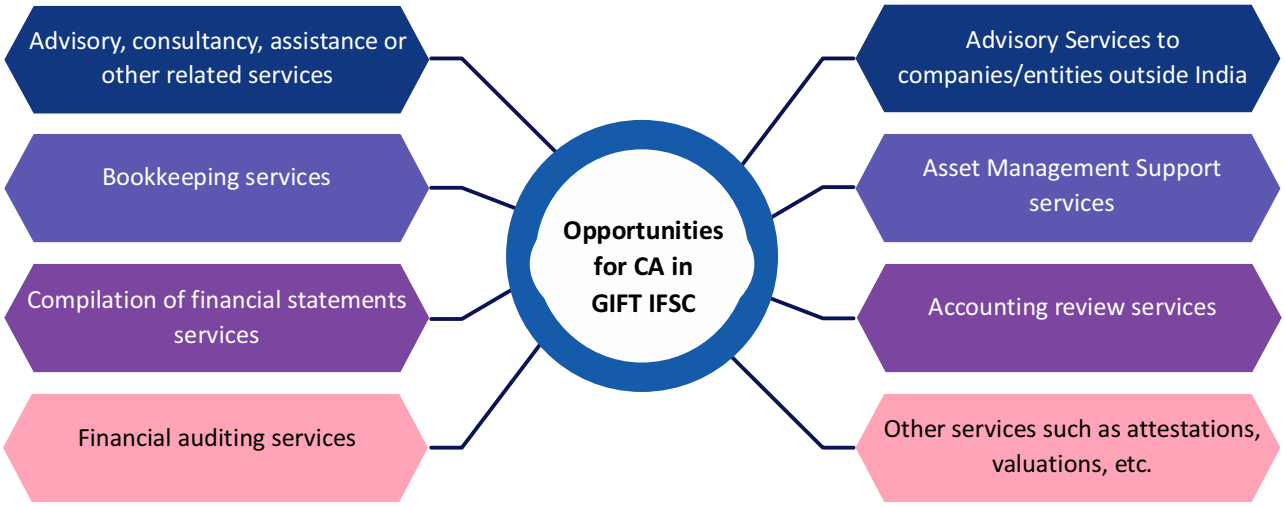
Emerging Activities

- Global Fintech Hub
- Global In-house Centres
- International Bullion Exchange
- Aircraft Leasing & Financing
- Ship Leasing & Financing
- Bullion Exchange
- Family Office
- Trust Office
- Foreign Universities

Ancillary Services

- Legal services, Compliance & Secretarial Services
- Accounting, Auditing, Bookkeeping & Taxation Services
- Professional and Management Consulting Services
- Administration, Assets Management Support Services and Trusteeship Services

❖ OPPORTUNITIES FOR CHARTERED ACCOUNTANTS IN GIFT IFSC

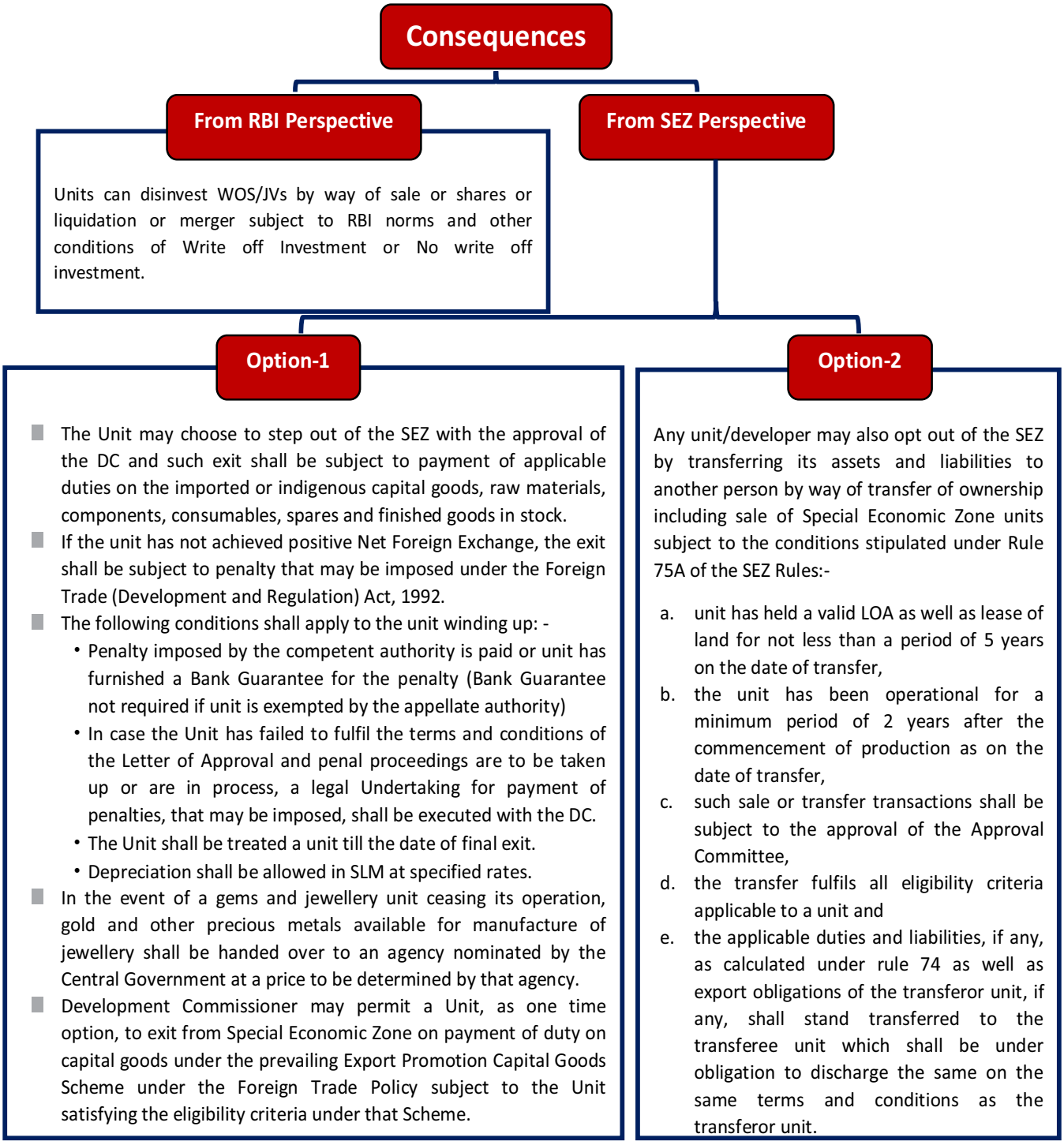


❖ COMPETITIVE TAX REGIME IN IFSC

Income Tax	**Units in IFSC**	▪ 100% tax exemption - for 10 years for Offshore Banking Unit (OBU) - for 10 years out of 15 years for other units ▪ MAT / AMT @ 9% of book profits applies to Company / others setup as a unit in IFSC – MAT not applicable to companies in IFSC opting for new tax regime ▪ Dividend income distributed by a company in IFSC is taxable in the hands of the shareholder. If the shareholder resides outside India, the tax rate is 10%, with the applicable surcharge and cess added on.
	Investors	▪ Interest income received by non-residentfrom specified bonds issued prior to 01.07.2023 and which are listed only on IFSC stock exchanges are taxed at the rate of 4%. ▪ W.e.f. 01-07-2023, interest income received by nonresidenton specified bonds issued on or after 1 July 2023 and listed only on IFSC exchange will be chargeable to tax at the rate of 9%. ▪ Transfer of specified securities listed on IFSC exchanges by a non-resident not treated as transfer – Gains accruing thereon not chargeable to tax in India
GST	**Units in IFSC**	▪ No GST on services: (i) received by unit in IFSC. (ii) provided to IFSC / SEZ units, Offshore clients. ▪ GST applicable on services provided to Domestic Tariff Area
	Investors	▪ No GST on transactions carried out in IFSC exchanges
Other Taxes & Duties	**Units in IFSC**	▪ State Subsidies for IT/ITeS Units regardingLease rental, PF contribution& electricity charges. ▪ No Stamp Duty or registration / conversion fee
	Investors	▪ Exemption from Security Transaction Tax (STT), Commodity Transaction Tax (CTT), stamp duty in respect of transactions carried out on IFSC exchanges.

❖ CONSEQUENCES OF EARLY EXIT FROM SEZ / IFSC

SEZ / IFSC units can exit from SEZ / IFSC scheme. They have to apply for exit from SEZ/IFSC Scheme and remit the funds back to India, however they will have to follow rules and regulations mentioned in SEZ Act & Rules as well as under RBI/SEBI norms for winding up of WOS/JVs abroad.



❖ CONCLUSION

As compared to existing and emerging financial centres globally, India has numerous competitive advantages. India's geostrategic location is such that it facilitates serving all time zones across world which includes major financial markets like Hong Kong, London, New York, etc. Indiapossesses large pool of talented professionals and professional service providers having huge and diversified demography. After witnessing fintech boom over the last few years in India we can say that India is emerging as a leading technology innovation hub. In addition, India is currently growing faster than most of the larger economies.

JUDICIAL VIEWS ON DEMONETIZATION OF HIGH DENOMINATION BANK NOTES (HDNs)

CA MITISH S. MODI
B.Com (Gold Medalist)
LL.B, F.C.A.

INTRODUCTION

The Citizens of India have witnessed the historical announcement on the midnight of 8th November, 2016 by the Government of India whereby the High Denomination Bank Notes / Specified Bank Notes (hereinafter referred to as "SBN") of Rs. 500 and 1000 were totally and with immediate effect withdrawn and seized to be a legal tender to meet the various objectives particularly to remove hazard of fake currency, unaccounted wealth, etc. The currency notes of Rs. 500 and 1000 was discontinued as the legal tender character w.e.f. 9th November, 2016. The SBNs was declared to be exchanged or deposited in the Banks till 30th December, 2016.

However, to check and control the malpractices to be adopted by some of the dishonest taxpayers to deposit into bank account their unaccounted income earned prior to 08–11–2016 and held by way of cash and at the same time, to provide the guidelines to the income tax authorities, the CBDT came out with various Instructions:

i) CBDT Instruction No. 03/2017 dtd. 21/02/2017

ii) CBDT Instruction No. 04/2017 dtd. 03/03/2017

iii) CBDT Circular dtd. 15/11/2017 under F.No. 225/363/2017-ITA.II

iv) CBDT Circular dtd. 09/08/2019 under F.No. 225/145/2019-ITA.II

The above Instructions/Circular issued by the CBDT imparted the complete SOP to provide guidelines for verification of cash deposited during the demonetization period i.e. for verification of source of SBNs deposited in Bank Accounts with categorical head like cash out of earlier income/savings, cash out of receipts exempt from tax, cash withdrawn out of bank accounts, cash received from identifiable persons with PAN or without PAN, cash received from unidentifiable persons, cash disclosed/to be disclosed under PMGKY and further prescribed a template to be used for issue of notices u/s 133(6) of the Act in appropriate cases for online verification of cash deposits under "Operation Clean Money".

PAN India Level assessments of SBNs during 09–11–2016 to 31–12–2016

It is noteworthy that the period of demonetization falls in the Financial Year: 2016–17 relevant to the Assessment Year: 2017–18. The authorities of the income tax department have passed the assessment orders at PAN India level *inter alia* making addition on account of cash deposited (SBN) during the demonetization period treating the SBN as unexplained money, etc. invoking the provisions of Section 69A r.w.s. 115BBE of the Act.

It is observed that during the course of assessment proceedings, the taxpayer has explained very source and nature of transactions of depositing SBNs in the Bank A/c during the demonetization period, the Assessing Officers have passed the orders making addition of cash so deposited during such period treating it as unexplained cash credits u/s 68 or unexplained money u/s 69A of the Act further invoking the trigger of increased tax rate of 60% (plus 15% surcharge + education cess) u/s 115BBE of the Act. Even following the guidelines given in the latest Instructions dtd. 09–08–2019 by the CBDT, the detailed explanations substantiated with the corroborative, credible and speaking evidences, materials, etc. demonstrating the comparative analysis of cash deposits, cash sales, month-wise cash sales and deposits given by the assessee, the additions were made as unexplained money or as

unexplained cash credits for the transactions of sales regularly recorded in the books of accounts showing the simultaneous stock position of the goods or even for the opening cash balance already disclosed in the return of income filed for the preceding years. As a result, this is the new tool in the hands of the assessing authorities of the income tax department to make the high-pitched assessment putting aside the CBDT's various Instructions/Circulars (*supra*) moreso when, the detailed and satisfactory explanations supported by the speaking evidences, documents, materials, etc. furnished in discharge of the onus upon the assessee. Substantially, the lots of cases observed under litigations are that of the assessee in the business as grain merchant, commission agent, jewelers, hospitals, milk distribution business, etc.

The litigations in most of the cases has reached to the Appellate Tribunals and yet to test the scrutiny of High Courts and Supreme Court, for the benefits of the readers, the citations of the various landmark judgments are given herein below:

(1) Salem Shree Ramavilas Chit Co. Pvt. Ltd. Vs. Dy. CIT
(2020) 423 ITR 525 (Mad.)

(2) ACIT Vs. Sudesh Kumar Gupta
(2020) 206 TTJ 1019 (Jp.)

(3) Moss Hospitality (P.) Ltd. Vs. Income Tax Officer
(2023) 152 taxmann.com 531 (Mumbai Trib.)

(4) Control Print Ltd. Vs. Pr. CIT
(2023) 102 ITR (Trib.)(SN) 5 (Mum.)

(5) Joginder Singh Johal Vs. ITO
(2023) 102 ITR (Trib.)(SN) 9 (Kol.)

(6) ACIT Vs. Hirapanna Jewellers
(2021) 212 TTJ (Vishakha) 117
(2022) 96 ITR (Trib.) (Vishakha) 24

(7) Smt. Charu Aggarwal Vs. Dy. CIT
(2022) 96 ITR (Trib.) 66 (Chandigarh)

(8) ITO Vs. Raman Kapoor
(2022) 96 ITR (Trib.)(SN) 59 (Dehradun)

(9) ACIT Vs. Ramlal Jewellers (P.) Ltd.
(2023) 154 taxmann.com 584 (Mumbai Trib.)

(10) Balwinder Kumar Vs. ITO
(2023) 102 ITR (Trib.) 228 (Amritsar)

(11) Manju Baheti Vs. AO
(2023) 102 ITR (Trib.) 369 (Kol)

(12) Gragory Francis D'Silva Vs. Dy.CIT
(2022) 100 ITR (Trib.) (SN) 62 (Bang.)

(13) ITO Vs. Manasa Medicals
(2022) 100 ITR (Trib.) (SN) 5 (Bang.)

(14) Arun Manohar Pathak Vs. Asst. CIT
(2023) 106 ITR (Trib.) 14 (Mum.)

(15) ITO Vs. Swarnsarita Jwellers
(2023) 106 ITR (Trib.) (SN) 75 (Mum.)

Relied upon:

- ***CIT Vs. Vishal Exports Overseas Ltd. (ITA No. 2471 of 2009 dtd. 03-07-2012 (Guj.);***
- ***CIT Vs. Kailash Jewellery House (ITA No. 613 of 2010, dtd. 09–04– 2010)***
- ***Dy. CIT Vs. Kundan Jewellers P. Ltd. (2023) 32 ITR (Trib.) -OL 710 (Mum.)***

(16) Dy. CIT Vs. Roop Fashion
(2022) 98 ITR (Trib.) 419 (Chandigarh)

(17) Pr. CIT Vs. Agson Global Pvt. Ltd.
(2022) 441 ITR 550 (Delhi)

(18) Eagle Fleet Services Vs. ACIT
(2023) 105 ITR (Trib.) (S.N.) 78 (Chennai)

In my humble view, the above judicial precedents are in the favour of the tax payers when the amount of cash deposited during the demonetization period has already been shown as "Sales/Gross Receipts" and the addition made treating the sales/gross receipts as unexplained cash credit/ unexplained money u/s 68 / 69A of the Act would clearly tantamount to double taxation of income, which is not permissible in the law. At this juncture, it is relevant to refer the **recent landmark judgment of the Supreme Court in *D.N. Singh Vs. CIT and Anr. (2023) 454 ITR 595 (SC)*,** wherein the Apex Court has an occasion to provide the interpretation of the deeming provisions u/s 69 and 69A of the Act.

IMPORTANT RECENT JUDICIAL DEVELOPMENTS IN CASE OF CHARITABLE TRUST

ADV. (Dr.)
KARTIKEY B SHAH

1. INTRODUCTION

Charitable trusts benefit society at large rather than an individual or group of individuals. The trust must have a "charitable purpose." Charitable trusts once formed are irrevocable. Charitable / Religious trusts have been exempted from tax under Income Tax Act, 1961 provided that it must be carrying on activity covered u/s 2(15) of the act. The trust is required to make application for grant of exemption u/s 12A & 12AA of the act. The exemption is given u/s 11 & 12 of the act provided trust is registered u/s 12A of the act. If, it is not registered, no exemption will be allowed. In the recent past lot of amendments in the act and changes in compliance requirements in case of charitable trust have been brought with the sole intention of curbing the menace of black money as per the suggestions made by the task force to the union government. At this juncture it is utmost important to understand the view of judicial authorities on different litigant issues in case of charitable trust. In this article recent judgements from different courts have been narrated to understand the view point of judiciary.

2. FRAMJIDINSHAW PETIT PARSE SANATORIUM V. ITO (EXEMPTION) [2023] 148 TAXMAN.COM 225/292 TAXMAN 251 (BOM.)- NOTICE U/ 148 ON MERE CHANGE OF OPINION LIABLE TO SET ASIDE.

Where Assessing Officer issued a reopening notice claiming that assessee-trust was not entitled to claim carry forward and set-off of deficit after claiming exemption under section 11(1) since as per provision of section 11(1)(a) assessee could carry forward deficit of earlier years and set it off against surplus of subsequent years and moreover there was no failure on part of assessee to disclose material fact, impugned notice issued under section 148 on mere change of opinion was liable to be set aside.

3. CIT/PRINCIPAL CIT V. PARADEEP PORT TRUST [2023] 149 TAXMANN.COM 19/292 TAXMAN 347 (ORISSA)- FURNISHING RESOLUTION IS NOT MANDATORY FOR ACUMULATION OF INCOME

There is nothing in either section 11(2) or rule 17(2) that mandates furnishing of resolution of the assessee-trust in order for statement with respect to income being accumulated/set apart for carrying out activities of trust in Form No. 10 to be acted upon by the Assessing Officer and, consequently, revenue cannot insist on a copy of resolution being furnished regarding amount being accumulated for charitable activities.

4. PRINCIPAL CIT V. NATIONAL HEALTH & EDUCATION SOCIETY [2023] 153 TAX-MANN.COM 636 (BOM.)-INCOME INCIDENTAL TO MAIN OBJECT SHOULDN'T BE TREATED AS BUSINESS INCOME.

The assessee-trust was running a hospital along with a pharmacy store within its premises. It was providing medical relief by selling medicines to in- house patients. The Assessing officer treated surplus (profits)

from pharmacy store as business income under section 11(4A) and taxed it separately. It was noted that the appellate authority noted that the assesse was granted approval under section 10 (23C) (via) with effect from the assessment year 2009-10 on satisfaction that the assesse was existing solely for philanthropic purposes and not for purposes of profit. Further, the pharmacy store of the assessee was ancillary to the main object of running hospital. Therefore, income accrued therefrom was incidental to dominant object of the assesse, i.e., running hospital

Held that the assessing Officer was not justified in treating the pharmacy store of the assessee as a separate business entity and holding surplus amount accrued therefrom as business income under section 11(4A).

5. **CIT (EXEMPTIONS) V. GHAZIABAD DEVELOPMENT AUTHORITY [2023] 146TAXMANN.COM 549/ [2022] 448 ITR 342 (ALL.)**

The assessee was an urban development authority constituted with the object of development of areas according to a plan. During the year, the assessee had claimed exemption under section 11. The Assessing Officer disallowed the same on the ground that registration granted to the assessee under section 12AA was cancelled by the Commissioner. It was noted that the Tribunal had set aside the order of cancellation of registration of the assessee under section 12AA and restored the same. It also, recorded that the nature of activity of the assessee was charitable and, thus, was not hit by the proviso of section 2(15). Held that in view of the said order of the Tribunal, assessee was to be allowed exemption under section 11.

6. **TAMIZHAVEL P.T.RAJAN V. ITO (EXEMPTION) [2023] 147 TAXMANN.COM 47/452 ITR 45 (MAD.)-WRIT PETITION.**

The assessee, a trust, enjoyed benefit of certification under section 12A and was beneficiary of exemption under section 11. The Commissioner on basis of an amendment to provisions of section 2(15) took revisional proceedings against assessee and passed an order of revision adversed to it. The Tribunal remanded matter to the Assessing Officer with a direction to examine aspect of utilization of income of the assessee in light of material available on record and also directed him to devote attention to various tax evasion petitions received by the Commissioner making allegations as regards functioning of the assessee. The Assessing Officer to give effect to order of the Tribunal passed fresh orders of assessment and rejected claim for exemption in terms of section 11. The assessee against assessment orders filed writ petitions. Subsequently the assessee sought permission to withdraw writ petitions seeking liberty to file statutory appeals.

Held that writ petitions deserved to be dismissed as withdrawn. The assessee was to be granted liberty to file appeals and Appellate Authority shall take same on file without reference to limitation.

7. **CIT (EXEMPTION) V. VIJAY KUMAR BAJORIA FOUNDATION [2023] 147 TAXMANN.COM 2023 (CAL.)**

While granting registration to a charitable institution/trust if it was at commencement state, powers of the Commissioner (Exemption) would be limited to aspect of examining whether or not objects of trust were charitable in nature, however in instant case the Commissioner (Exemption) had not recorded any finding that object of trust was not charitable in nature. No material was

brought on record to prove that donations were made with ulterior motives. In view of aforesaid facts, the Commissioner (Exemption) had not found object of the assessee not charitable and, thus, registration was to be granted under section 12AA.

8. DIT (EXEMPTION) V. SHE FOUNDATION [2023] 149 TAXMANN.COM 341/292 TAXMAN 216 (CAL.)

While granting registration to the charitable trust or institution, if it is at commencement stage, the powers of DIT with whom application is filed by such trust/institution are limited to the aspect of examining whether the object of the trust/institution are charitable in nature or not. In the instant case, since the revenue did not dispute the fact that the objects of the trust was religious and charitable in nature. Tribunal rightly granted registration to the assessee under section 12AA.

9. CIT V. D.N. MEMORIAL TRUST [2023] 152 TAXMAN.COM 33/293 TAXMAN 735(J&K AND LADAKH)

Where Commissioner declined registration to assessee -trust holding that it failed to justify genuineness of his activities but there was nothing on record to suggest that activities of trust were for non-charitable purpose or for personal purposes of trustees, etc., Commissioner was directed to grant registration to assessee

10. CIT V. PRESIDENT SETH MALUKCHAND HIRACHAND DIGAMBAR JAIN GOTH BEES PANTHI MANDIR DHARMIKAVAM PARAMARTHIK TRUST [2023] 154 TAX-MANN.COM 537/456 ITR 70(MP)

Tribunal has examined the case from all angles. The Tribunal has rightly come to the conclusion that while considering the application for registration, the Commissioner was supposed to enquire into the nature of the trust and since there was nothing substantive or serious to doubt the nature of the trust being charitable, the Commissioner was not justified rejecting the application for registration on the aforesaid basis. Thus, substantial question of law arises for consideration in this appeal. The question of fact cannot be examined in the present appeal.

11. MAHARISHI INSTITUTE OF CREATIVE INTELLIGENCE U.P., LUCKNOW V. CIT (EXEMPTION) [2023] 151 TAXMANN.COM 300/293 TAXMAN 445/454 ITR 533(SC)-NO DENIAL OF REGISTRATION IN ABSENE OF CERTIFICATE OF REGISTRATION

Assessing Officer was justified in granting the benefit of exemption under section 12A for the assessment year 2010-11. What was required to be considered was the relevant provision prevailing in the year 1987, namely, the day on which the assessee applied for the registration. At the relevant time there was no requirement of issuance of any certificate of registration. Be that as it may, the fact remains that for all these years after 1997 till the year 2007-08 when the assessee continued to avail the benefit of exemption solely on the basis of the registration in the year 1987 and it was never the case on behalf of the revenue and even Commissioner that in the earlier years there was any certificate of registration or the registration was not granted. Even from the material on record, namely, a communication dated 03/06/2015 which was considered by the Tribunal, it is apparent that the assessee was granted registration on 22/09/1987. Therefore, it cannot be said that there was no registration at all. In view of the above, the impugned judgement and order passed by the High Court is erroneous and is unsustainable and is

accordingly quashed and set aside. The order passed by the Tribunal is hereby restored.

12. PREM CHAND MARKANDA SD COLLEGE FOR WOMEN V. ASSTT. CIT (EXEMPTIONS) [2023] 15 TAXMANN.COM 442 (PUNJ. &HAR.)

CBDT Circular No. 1/2015, dated 21/01/2015, clearly provides that non-application of registration for the period prior to the year of registration can genuinely cost hardship to the charitable organizations. Another fact which requires consideration is that in the present case, after issuance of notice dated 16/03/2022 under section 148A (b), objections were filed by the petitioner on 22/03/2022. However, respondent No. 1, vide order dated 29/03/2022 dismissed the same and issued a notice under section 148 to the petitioner. While doing, no reference was made by the 3rd proviso to section 12A. In the instant case, once reply filed by the petitioner pursuant to the notice dated 16/03/2022 had been rejected vide order dated 29/03/2022 without examining the 3rd proviso to section 12A(2), relegating the petitioner to take alternative remedy would not be appropriate. Registration of the petitioner trust was granted on 30/09/2016, which was applicable from the assessment year 2016-17. As such, said registration was valid for claiming the benefit under sections 11 and 12. In view of the above discussion, no proceedings under section 147 can be initiated for the assessment year 2015-16. Hence, impugned notices and the consequent order passed under section 148A (d) being contrary to the 3rd proviso to section 12A (2) are set aside.

13. CIT (EXEMPTIONS) V. SARLABENTHANSALI CHARITIES TRUST [2023] 151 TAX-MANN.COM 476/454 TTR 44 (CAL.)

The assessee charitable trust filed nil return. The Assessing Officer passed the reassessment order granting exemption under section 11 and determined total income of the assessee at NIL. The Commissioner invoked his power under section 263 and held that the assessee was not entitled to get benefit of exemption under section 11 as registration granted to the assessee under section 12AA was cancelled vide order dated 11-12-2015 retrospectively with effect from the assessment year 2009-10 by invoking section 12AA (3) and hence impugned assessment order passed was erroneous and prejudicial to the interest of revenue, Tribunal applied Circular no. 1 of 2011, dated 6-4-2011 and held that section 12AA(3) would be applicable from assessment year 2011-12 and thus, revisionary order would be bad in law.

Held that the Tribunal was right in holding that the retrospective cancellation of registration was bad in law.

14. CONCLUSION

It has been tried to give you the glimpse of latest judicial developments in the area of charitable trust taxation. Charitable trusts due to the continuous change in law and timely compliance has become an emerging area of litigation.

RECTIFICATION OF ERRORS APPARENT ON THE FACE OF RECORD

CA HARDIK MODH

I. INTRODUCTION

1. When any certificate, order, decision or document issued by the GST authorities, the assessee may find some mistake in the above referred documents. Such mistake may be arithmetic, clerical or in some cases, it may be wrong interpretation of the provisions of law. We are discussing in this article what is the remedy available to the assessee in case such mistake is found. Whether an assessee can make an application to the concerned authority to rectify mistake or prefer an appeal to the higher authority to draw attention to the mistake made by the lower authority and pray to rectify it.

2. Earlier law namely the Central Excise Act,1944 did not empower the Central Excise Officer to rectify their own mistakes if it was made in any order, notice or certificate or any other documents issued by them. Section 35C(2) of the Central Excise Act, 1944 empowered the Customs Excise Service Tax Appellate Tribunal to rectify such mistake if such mistake been made by them, which is apparent from the record. Section 35C(2) provided a time limit of 6 months to rectify such mistake from the date of order or decision . The High Court and the Supreme Court have been empowered to rectify the mistakes apparent from the record in terms of the procedures laid down under the Civil Procedure Code.

3. Section 74 of the Finance Act, 1944 (in respect of service tax matters) empowered the Central Excise Officers to rectify any mistake apparent from the record in respect of any order passed by him under the provisions of Chater V of the Finance Act, 1994. Such mistake was to be amended within a period of 2 years from the date of order. Even the Central Excise Officer was not empowered to carry out amendment in any other documents other than the order issued by them.

4. Section 161 of the CGST Act, 2017 empowers the GST authorities to rectify mistakes or errors which are apparent from the record. The GST Act has widen the scope to carry out rectification of an error so as to reduce litigation and avoid multiplicity of the proceedings.

II. WHICH TYPE OF DOCUMENTS CAN BE RECTIFIED?

5. Section 161 of the CGST Act has not restricted powers of the GST authorities to rectify mistake only in respect of order or decision. But it covers the following types of the documents;

   a. Any order or decision passed by any authority;

   b. Notice;

   c. Certificate or

   d. any other types documents issued by any authority under CGST Act;

III. WHO CAN APPLY FOR RECTIFICATION OF MISTAKE?

6. Section 161 has not restricted to allow to rectify mistake by a particular designated officer. Section 161 empowers any GST

authorities who have issued documents, to rectify their own mistakes. Such mistakes can be rectified:

a. Suo motu by the authority who issued the order, decision, a letter or any document;

b. On bringing to the notice of such authority by GST Officers; c. On bringing a notice by the affected person;

IV. TIME LIMIT FOR FILING THE APPLICATION AND RECTIFICATION OF MISTAKE

7. Affected person or any officers appointed under the GST Act may request to the concerned authority who issued the order, decision, letter or certificate, within a period of three months from the date of issuance of the document to initiate the proceeding to rectify a mistake.

8. First proviso to Section 161 provides that rectification order should be passed within a period of 6 months from the date of such order, decision or notice or certificate or any document issued by the authority. However, the said time limit of 6 months is not applicable where the rectification is purely in the nature of correction or clerical or arithmetical error, arising from any accidental slip or omission. In such cases, the authority or affected person can inform to the concerned person to rectify the mistake without any time limit.

9. In case the application is not made within a period of 3 months from the date of relevant document or order to rectify mistake has not been passed within a period of 6 months, the question arises whether an authority has been empowered to condone delay and rectify mistake even after expiry of statutory time limit provided under Section 161. In the case of **Kiran Enterprises Vs. State of Tripura – 2021 (52) GSTL 21, the Tripura High Court** held that Section 5 qua Section 29 (2) of the Limitation Act is not applicable to special law like CGST Act unless it is expressly extended to special statute like CGST Act. The Limitation Act is applicable to Suit, Appeal or Application in Court and the same is not automatically applicable to local or special statute before the authorities other than the court.

V. MEANING OF ERROR APPARENT ON THE FACE OF RECORD:

10. Section 161 has not defined the term “error apparent on the face of record”. Even IGST Act and State GST law has not defined the said meaning. However, there are precedents wherein it has been held that which type of mistakes can be rectified under the garb of rectification of mistake apparent on the face of record.

11. In the case of **C.C.Ex. Vs. RDC Concrete (India) Pvt. Ltd. – 2011 (270) ELT 625,** the Hon’ble Supreme Court held that mistake apparent from the record cannot be established by the long drawn process of reasoning on points on which there could be convincible by two options. It was held that a decision on a debatable point of law cannot be a mistake apparent from the record. It is held that the authority should not have reappreciated the evidence so as to give to different conclusion while exercising its power for carry out rectification of error apparent on the face of record. It was held that the CESTAT has limited power to rectify its mistake under the provisions of Section 35C(2) of the Central Excise Act and should not exceed its power and re-appreciate the evidence and reconsider its legal view which has already been considered.

12. Whether application for carrying out rectification of mistake apparent on face of record can be filed in a case where the decision rendered by the Supreme court was not considered which is binding precedent or in

other words, non-consideration of binding precedent would constitute an error apparent on the face of record or applicability of doctrine or per incuriam. The Larger Bench of 5 Members of CESTAT in the case of **Hindustan Unilever Ltd. Vs. Commissioner of Central excise – 2006 (202) ELT 177** held that when a decision rendered by the apex court is not considered by CESTAT, then such non-consideration of such binding precedent would constitute an error apparent on the face of record by applicability of doctrine of per incuriam. In a case whether due to inadvertent mistake, the Court or Tribunal failed to notice the statutory position or binding authority, the principle of per incuriam will apply as held by Supreme Court in Fuerst Day Lawson Ltd Vs. Jindal Exports – 2001 6 SCC 356.

13. The above Larger Bench in the case of Hindustan Unilever Ltd held that notwithstanding what may have been done by any authority below the Supreme Court, when the Supreme Court pronounces on the true position of law, any decision rendered by any other authority contrary to that is required to be regarded as an error which is apparent on the record and rectification of such an error within the period permissible under the law and in accordance with the provisions of the statute was clearly required to be effected.

14. Gujarat High Court in the case of **RPG Science Ltd. Vs. Union of India – 2005 (187) ELT 433** held that the Tribunal could not have overlooked the settled position and is bound to carry out the rectification considering the ratio of decision of High Court as well as Apex Court.

15. The question arises whether subsequent decision of the Supreme Court after the decision passed by the Tribunal or any other authority is a ground to rectify the mistake by considering whether it is apparent on the face of record? The Hon'ble Kerala High Court in the case of **Malabar Regional Co-operative Milk Union Vs. C.C. Ex. – 2020 (372) ELT 708** held that when the appeal was decided by the Tribunal, the decision was taken based on the law as stood then. In a subsequent decision of the Supreme Court, law was declared otherwise based on change of opinion. Such a change of opinion of law cannot be taken as a mistake apparent on the face of record which can be rectified invoking Section 35 C (2) of the Central Excise Act. Such material cannot be used for unsettling the settled decision which attained through disposal of the appeal allowing to carry out any mistake apparent from the face of record.

16. However, the Larger Bench of CESTAT in the case of Hindustan Unilever Ltd (supra) has taken contrary view to the decision of Malabar Regional Co-operative Milk Union Vs. C.C. Ex. (supra). The larger bench held in context of the decisions of the Apex Court and the Jurisdictional High Court which are rendered after the order of the Tribunal that the doctrine of per incuriam cannot be invoked, yet there would be error apparent from the record of such order on the reasoning that the superior court declared the law as it always was, and therefore, the question whether there was error apparent from the record of the order, (which could not have taken into consideration, such subsequent decision), would still arise, since the binding decision of the Apex Court that declared the law as it always was, would cover even the period prior from the inception of such law, during which the orders contrary to such ratio of the subsequent binding decision were passed. This again will be so on the reasoning that since the binding decision of the Apex Court or the jurisdictional High Court has declared the meaning of the law, there was no scope for any debate and, therefore, the prior order of the

Tribunal, which though it could not have taken such decision into consideration, should be examined in the light of the meaning given by the binding decision, warranting rectification on the ground that there was error apparent from the record in not following the law as now declared. The Larger Bench further held that any subsequent binding precedent may trigger enquiries into the various decided cases where orders have been passed without having the benefit of subsequent binding decisions. Precisely to prevent mockery of finality of the decisions and adjudicatory processes, the amendment was made in the Code of Civil Procedure by adding an explanation with effect from 01.02.1997 to rule 2 of Order XLVII of the Code of Civil Procedure. As per this explanation, it was laid down that, the fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case shall not be a ground for the review of such judgment. Though the provisions have been made in the context of review, rectification on the basis of a subsequent decision of the Supreme Court, may bring about a total change in the nature of the order and virtually be a review.

17. It is clear from the above decision that the authorities have power to rectify the errors apparent on the face of record. However, the authority does not have power to review the order and change the order. The law has not empowered the authorities to review the order. In the absence of any provisions, the authorities are not entitled to review or modify their own order more particularly when such modification amounts to review of the order. The Hon'ble Supreme Court in the case of **Patel Narshi Thakershi and Ors Vs Pradyumansinghji Arjunsinghji (1971) 3 SCC 844,** after referring to the provisions of Saurashtra Land Reforms Act, 1951 and referring to Order 47 Rule 1 of the Code of Civil Procedure, 1908 that there is no inherent power of review with the adjudication authority if it is not conferred by law.

VI. PRINCIPAL OF NATURAL JUSTICE IS TO BE OBSERVED

18. If the authority is of the opinion that there is error in the order or decision or notice or certificate or other documents and rectification of same may adversely affect any person, then the said authority should follow principles of natural justice and should give an opportunity of hearing on the proposed errors of such persons. If no opportunity is given then such order cannot be sustainable in the appeal.

VII. APPLICABILITY OF RULES

19. Rule 142 (7) provides that where rectification of order has been passed in accordance with the provisions of Section 161 or whether an order uploaded on a system has been withdrawn, summary of the order or withdrawal order shall be uploaded electronically by the proper officer in a Form GST DRC-08. This Rule required a summary of rectification of the order passed under Section 161 to be uploaded electronically in form GST DRC-08

CO. OPERATIVE SOCIETIES: CONTROVERSIES ON DEDUCTIONS U/S 80P(2)(a)(i) and 80P(2)(d) OF THE ACT

CA AKSHAY M. MODI

In the State of Gujarat, Maharashtra and Karnataka, the co-operative societies play a vital role in encouraging Government's policies of economic growth and community driven progress and thus, the whole co-operative structure is an integral part of economic structure of our Nation.

A Co-operative Society is defined by Section 2(19) of the Income Tax Act, 1961. Section 2(19) of the Act provides that "co-operative society" means a co-operative society registered under the Co-operative Societies Act, 1912 (2 of 1912), or under any other law for the time being in force in any State for the registration of co-operative societies. The Co-operative Societies Act, 1912 defines a co-operative society as a voluntary association of persons who come together to fulfil their common economic, cultural and social needs through a jointly owned and democratically governed enterprise. The Co-operative Societies Act, 1912 is the prime law governing the Co-operative Societies carrying on various activities in India. However, in so far as the Co-operative Society carrying on its activities in Gujarat, the State Co-operative Societies Act namely The Gujarat Co-operative Societies Act, 1961 also governs the co-operative societies in the State of Gujarat. The very object of the State Co-operative Societies Act is for the promotion of economic interests and general welfare of the members of the society or of the public on the principles of co-operation. The Co-operative Societies come into existence and run its activities in accordance with their Bye-Laws, Rules and Regulations, fundamentally on the principles of "No Profit – No Loss" basis, but exclusively for the welfare of its members.

To promote, encourage and to develop the co-operative societies, the legislature has incorporated the benevolent provisions under Section 80P in the Income Tax Act. The Courts of Law have observed that the provisions of Section 80P of Income Tax Act should be liberally construed to effectuate the legislative object of encouraging and promoting the growth of co-operative societies. Section 80P grants the deduction in respect of the various categories/activities carried out by the co-operative societies and the income earned from the activities defined sub clauses to Sub Section (2) of Section 80P of the Act is eligible for deduction in accordance with and subjected to the provisions of Section 80P of the Act, where the gross total income of the co-operative society includes any income referred to Sub Section (2).

The co-operative societies are facing the controversial issue on account of the deduction claimed under section 80P(2)(a)(i) of the Act.

The basic requirement of the Sub Section (2)(a)(i) of Section 80P is that the assessee co-operative society must be engaged in carrying on the business of banking or providing credit facilities to its members. In view of insertion of Sub Section (4) of Section 80P of the Act, from the assessment year 2007–08 and onwards, the benefit of deduction u/s 80P was withdrawn for co-operative banks (as defined and the meaning assigned to the term "co-operative bank" in Part V of the Banking Regulation Act, 1949). However, the benefits of deductions under section 80P of the Act is still available to the

Primary Agricultural Credit Societies (PACS) and the Primary Co-operative Agricultural and Rural Development Bank (PCARDB). Thus, the co-operative societies engaged in the activities of providing credit facilities to its members are entitled to the benefit of deduction under section 80P(2)(a)(i) of the Act. While seeking the benefit of deduction under section 80P of the Act (Chapter VIA), one has to keep in mind the controlling provisions under section 80A read with 80AB of the Act. As per the provisions of Section 80A, the deduction under section 80P is allowable on the net profit included in the total income and not the gross profit of the business activities of co-operative societies and such quantum of deduction shall not, in any case exceed the gross total income of the assessee. Meaning thereby, if before claiming deduction under Chapter VIA (say under section 80P), if the gross total income is negative, no deduction under Chapter VIA is available to the co-operative society. If the quantum of deduction computed for the relevant year is more than the amount of gross total income, the deduction under section 80P is restricted to the extent of gross total income and not beyond that. Therefore, at the time of filing the ITR, the Computation of Total Income plays an important role.

The clauses (a) to (f) under Sub Section (2) of Section 80P of the Act operate separately and distinctively in the sense that the benefit of deduction under section 80P(2) is available considering the particular activity carried out by the co-operative societies categorized therein. Therefore, the co-operative society earns Profits & Gains of business attributable to the activity of providing credit facilities to its members is eligible for deduction under section 80P(2)(a)(i) of the Act. Unfortunately, the income tax authorities have treated the co-operative credit societies as the bank and denied the benefit of deduction under section 80P(2)(a)(i) of the Act invoking the provisions of Sub Section (4) of Section 80P of the Act. However, the Supreme Court has, recently in its order in Kerala State Co-operative Agricultural and Rural Development Bank Ltd. Vs. Assessing Officer (2023) 154 taxmann.com 305 (SC), held that the assessee co-operative society engaged in providing credit facilities to its members and not to the public in general, the co-operative society is not within the ambit and definition of the co-operative bank within the meaning of Section 5(b) read with Section 56 of Banking Regulation Act, 1949, there is no lawful jurisdiction to deny the deduction under section 80P of the Act by invoking the provisions of Section 80P(4) of the Act. Thus, after this judgment, the co-operative credit societies providing credit facilities to its members are entitled to the benefits of deduction available under section 80P of the Act. It is further required to be noted that apart from the benefit of deduction under section 80P(2)(a)(i) of the Act, the deduction under section 80P(2)(b) is also available in respect of any income by way of interest or dividends derived by the co-operative societies from its investments with any other co-operative society.

Attentions is specifically invited to the judgment of the jurisdictional High Court of Gujarat in **Surat Vankar Sahakari Sangh Ltd. Vs. ACIT (2016) 72 taxmann.com 169 (Gujarat),** considering the ratio laid down by the Punjab and Haryana High Court in the case of Doaba Co-operative Sugar Mills Ltd., it has been held by the Hon'ble High Court of Gujarat as under:

> ***"8.*** *We have considered the decisions cited by learned advocate for the assessee as well as the revenue. We feel that the decisions cited by the learned advocate for the assessee shall be applicable on the facts of the present case. In the case of K. Nandakumar v. ITO* [1993] 204 ITR 856/[1994] 72 Taxman 223 (Ker.)*, the Kerala High Court has held as under:*
>
> *'4. The effect of Section 80AB is that, for the purpose of computing the deduction under Section 80L, the amount of income of that*

nature as computed in accordance with the provisions of the Act shall alone be deemed to be the amount of income of that nature.

What the section means is that the net income by way of interest computed in the manner provided by the provisions of the Act shall alone be taken into account for computing the benefit. But it must be noted that payment of interest under a loan transaction incurred for the purpose of deriving income from business is not an item which arises in the computation of interest income "in accordance with the provisions" of the Act. The said amount has to be paid irrespective of whether any interest income is otherwise received or not. Though the interest is payable to the same bank, the fact remains that the amount of income by-way of interest is not calculated under the provisions of the Act with reference to such outgoings which fall under different heads. The assessee is entitled to deduction under Section 37 of all expenditure incurred for the purpose of deriving the business income, and it is under that head that the interest paid on the loan taken from the bank is deducted. The net amount of interest contemplated by Section 80AB should take in the net amount arrived at after meeting the expenses deductible from that item under the provisions of the Act as explained above. That is not the case here. Therefore, Section 80AB has no application to the facts of these cases. The interest paid on the loan transactions has to be deducted from the business income, and not from the interest received from the bank on the fixed deposits. The assessees were therefore right in the submissions which they made before the Commissioner of Income-tax in the revision petitions which they filed. This aspect of the matter has been overlooked by the Commissioner in passing the order, exhibit P-5.'

8.1 Similarly, in the case of Doaba Co-operative Sugar Mills Ltd (supra), the Punjab & Haryana High Court has held as under:

'5. The contention of Mr. Gupta, learned counsel appearing for the Revenue, is that the Tribunal was wrong in allowing deduction under Section 80P(2) (d) of the Act because it is not established that the assessee had derived the interest by investing all the amount of surplus funds. It is further contended by Mr. Gupta that the assessee has paid interest to Jalandhar Central Co-operative Bank and has also received interest from the said co-operative bank, thereby showing that the assessee has on the aggregate paid interest to the bank and, therefore, no deduction under Section 80P(2)(d) can be allowed. To appreciate this argument, we have to look to the provisions of Section 80P(2)(d) of the Act, For facility of reference, it is reproduced as under :

"80P. (2)(d) in respect of any income by way of interest or dividends derived by the co-operative society from its investments with any other co- operative society, the whole of such income."

6. So far as the principle of interpretation applicable to a taxing statute is concerned, we can do no better than to quote the by-now classic words of Rowlatt J., in Cape Brandy Syndicate v. IRC [1921] 1 KB 64, 71 :

"...In a taxing Act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used,"

7. The principle laid down by Rowlatt J., has also been time and again approved and applied by the Supreme Court in different cases including the one, Hansraj Gordhandas v. H. H. Dave, Assistant Collector of Central Excise and Customs, AIR 1970 SC 755, 759.

8. Section 80P(2)(d) of the Act allows whole deduction of an income by way of interest or dividends derived by the co-operative society from its investment with any other co-operative society. This provision does not make any distinction in regard to source of the investment because this Section envisages deduction in respect of any income derived by the co-operative society from any investment with a co-operative society. It is immaterial whether any interest paid to the co- operative society exceeds the interest received from the bank on investments. The Revenue is not required to look to the nature of the investment whether it was from its surplus funds or otherwise. The Act does not speak of any adjustment as sought to be made out by learned counsel for the Revenue. The provision does not indicate any such adjustment in regard to interest derived from the co-operative society from its investment in any other co-operative society. Therefore, we do not agree with the argument advanced by learned counsel for the Revenue. In our opinion, the learned Tribunal was right in law in allowing deduction under Section 80P(2)(d) of the Income- tax Act, 1961. in respect of interest of RS. 4,00,919 on account of interest received from Nawanshahr Central Co-operative Bank without adjusting the interest paid to the bank. Therefore, the reference is answered against the Revenue in the affirmative and in favour of the assessee"

In Mavilayi Service Co.operative Bank Ltd. Vs. CIT reported in (2021) 431 ITR Page 1 (SC), the Apex Court has observed and concluded that –

35. Eighthly, sub-clause (d) also points in the same direction, in that interest or dividend income derived by a co-operative society from investments with other co-operative societies, are also entitled to deduct the whole of such income, the object of the provision being furtherance of the co-operative movement as a whole.

The other important judgments on the issue of deduction under section 80P(2)(d) are summarized as under:

(i) CIT Vs. Sabarkantha District Co.op. Milk Producers Union Ltd.

(Hon'ble High Court of Gujarat's Order in Tax Appeal No. 473 of 2014 dtd. 16-06-2014)

(ii) The Sasme Co-Op. Society Ltd. Vs. Pr. CIT

In ITA No. 185/SRT/2020, Order dtd. 03–03–2021

(iii) The Uttar Gujarat Uma Co-op. Credit Society Ltd. Vs. ITO, Ward 6(1)(5), Ahmedabad

(In ITA No: 1670 & 1671/Ahd/2018, Asstt. Year: 2014-15 and 2015-16, Order dtd. 21/02/2019)

(iv) Merwanjee Cama Park Co-op Housing Ltd. Vs. ITO

(In ITA No. 6139/Mum/2014, Order dtd. 27-09-2017

(2018) 62 ITR(Trib.) 770 (Mumbai)

(v) Kaliandas Udyog Bhavan Premises Co-op. Society Ltd. Vs. ITO (2018) 94 taxmann.com 15 (Mumbai – Trib.)

(vi) Veer Co-operative Group Housing Society Ltd. Vs. ITO

(2018) 67 ITR (Trib) 268 (ITAT – Del)

(vii) Pr. CIT Vs. Totagars Co-operative Sale Society

(2017) 392 ITR 74 (Karnataka)

(viii) Menasi Seemeya Group Gramagala Seva Sahakari Sanga Niyamitha Vs. CIT, Hubli

(In ITA No: 609 & 610/BNG/2014, Asstt. Year: 2009-10 & 2010-11, Order dtd. 21-01-2015)

(ix) The Totgars Co.operative Sale Society Ltd. Vs. ACIT (in ITA No. 376 to 379/Bang/2023, Order dtd. 18–07–2023)

It is also experienced that even after the regular assessment completed/concluded by the jurisdictional AO granting rightfully the deductions claimed under section 80P(2)(d) of the Act, the Pr. CITs invoke the jurisdiction of revisionary powers under section 263 of the Act, solely on applying the ratio of the Supreme Court's judgment in Totagars Co-operative Sale Society Vs. ITO, Karnataka (2010) 322 ITR 283 (SC). Under this situation, the co-operative society has to approach the appellate forum raising the substantial grounds on the legal issue as well on the merit of the case.

On close analysis of the Supreme Court's judgment in Totagar's case (2010) 322 ITR 283 (SC), it is discernible that the said judgment given by the Apex Court with the clear mention that ***"We are confining this judgment to the facts of the present case……" "In this particular case…….".*** Thus, the ratio of the said decision has to be considered in the light of the questions considered and answered. For the purposes of ready reference, the citations of the relevant judgment of the various ITATs are as under:

(i) Bardoli Vibhag Gram Vikas Co.op. Credit Society Ltd. Vs. PCIT 2, Surat
[2021] 127 taxmann.com 334 (Surat-Trib.)

(ii) M/s Solitaire CHS Ltd. Vs. Pr. Commissioner of Income Tax
In ITA No. 3155/Mum/2019, Order dtd. 29–11–2019

(iii) Kutch District Co-operative Milk Producers' Union Ltd. Vs. Pr.CIT
(2024) 159 taxmann.com 347 (Rajkot Trib.), Order dtd. 29-01-2024

Note:
Katlary Kariana v ACIT 140 taxman.com, 602 (Gujarat HC) distinguished

(iv) Jhunjhunu Karya Vikrya Sahakari Samiti Ltd. Vs. Pr. CIT
In ITA No. 150/JP/2022 , Asstt.Year:2017–18, Order dtd. 15–12–2022

Note:
Katlary Kariana v ACIT 140 taxman.com, 602 (Gujarat HC) distinguished

(v) Shree Madhi Vibhag Khand Udyog Sahakari Mandli Ltd. Vs. Pri. CIT
(In ITA No. 233/SRT/2023, Order dtd. 10–07–2023)

(vi) The Ekta Co.op. Credit Society Ltd. Vs. Pr. CIT
In ITA No. 562/Ahd/2019, Order dtd. 24–08–2022

One more issue of controversy has been developed as to whether the "nominal members" is within the term "member" as appearing in the phrase "providing credit facilities to its members" under section 80P(2)(a)(i) of the Act. The definition of "member" is not given under the Income Tax Act. Under such circumstances, one has to refer to the State Co-operative Societies Act together with the Bye Laws of the co-operative society.

Section 2(13) of the Gujarat State Co-operative Societies Act defines the term "member" which *inter alia* provides that ***"member" means a person joining in an application for the registration of a co.operative society which is subsequently registered, or a person, duly admitted to membership of a society after registration, and includes a nominal, associate or sympathizer member.***

Since the definition of member covers within its

ambit “the nominal member” as the “member”, the activity of providing credit facilities to the members including the nominal members and the income earned therefrom is eligible for deduction under section 80P(2)(a)(i) of the Act. Recently, the Supreme Court has resolved the pale of controversy of issue in the case of Pr. CIT Vs. Annasaheb Patil Mathadi Kamgar Sahakari Pathpedi Ltd. (2023) 454 ITR 117 (SC), Order dtd. 20–04–2023, wherein the decision of the Bombay High Court in Quepem Urban Co-operative Credit Society Ltd. Vs. ACIT (2015) 377 ITR 272 (Bom) has been affirmed and Mavilayi's judgment (*supra*) has been followed. Further, the ITAT, Pune Bench, Pune in Prerna Gramin Patsanstha and others (ITA No. 1431/PUN/2018) has pronounced the decision allowing the deduction under section 80P(2)(a)(i) of the Act, whereby the judgment of the Supreme Court in The Citizen cooperative Society Ltd. Vs. ACIT reported in (2017) 88 taxmann.com 279 (SC) distinguished.

Under the Income Tax Act, as provided under section 145 of the Act, the income chargeable under the head “Profits and Gains of Business or Profession” or “Income from Other Sources” shall, subject to the provisions of Sub Section (2), be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee. On the issue of provisions towards ascertained, crystalized, quantified and finalized trade liabilities or statutory liabilities made at the time of closure of the financial year in the books of accounts is an allowable business expenditure under section 37(1) of the Act or not. The recent judgment of the Supreme Court in the CIT (Central) Vs. Kolhapur Zilla Sahakari Dudh Utpadak Sangh Ltd. (2023) 152 taxmann.com 129 (SC) affirming the decision of the Bombay High Court in the case of CIT Vs. Solapur District Co-operative Milk Producers and Process Union Ltd. (2009) 180 Taxman 533 (Bom.) may be referred. The Hon'ble Bombay High Court has, while giving the judgment in Solapur District's case (*supra*), followed the decision of the Gujarat High Court in CIT Vs. Mehsana District Milk Producers Union Ltd. (2005) 146 Taxman 355/282 ITR 24 (Guj.) and thus, the decision of the Hon'ble High Court stand approved by the Hon'ble Apex Court in Kolhapur Zilla Sahakari Dudh Utpadak Sangh Ltd. (*supra*)

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