



FOCUS



THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory Body under an Act of Parliament

WESTERN
INDIA
REGIONAL
COUNCIL

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CS Prakash K Pandya
Chairman

Dear Professional Colleagues,

Our Nation is celebrating its 71st Independence day in the month of August 2017 and it is pertinent to note that the country has witnessed ever so many progressive developments. As far as education is concerned it is at par or competing with the many developed countries. We have seen the emergence of IITs, IIMs and other statutory body like ours, which are not only excelling but also has made significant impact in the development of the nation as a whole. Today ICSI is the largest body in the globe which has set standards for the Corporate professionals.

The seeds sowed by the visionaries at the time of independence has not only seen the light of the day but also has started giving fruits. I take this opportunity to salute all the visionaries who played a significant role to develop this modern India.

I am happy to inform you that the Professional Development Committee of both Mumbai and outside Mumbai are taking keen and untiring efforts for the development of profession by organizing various programs of immense competence. Today a member can attend a Knowledge center meet in five different centres as per their convenience. We are also gearing up for the Annual Regional Conference to be held in Goa in the first week of November. I compliment the challenge undertaken by team Goa where all the management committee members are women. I request all the members to block your calendar and make ARC a grand success.

The Oral Coaching activities of WIRC is also slowly improving and various new activities are planned. Various competitions are planned and WIRC has geared up to host the Regional and National level competitions. I had the benefit of interacting with few faculty members of Oral Coaching and they could share with me some valuable feedback which can make OTC better and more student friendly. I have in turn discussed with Chairman-TEFC and he has assured me an early implementation. I also appeal to all the students to have proper plan of study to effectively face the forthcoming examinations which is four months away.

Mr.M V Chakranarayan has taken over as the new Regional Director of MCA-Western Region. He brings with him an experience spanning three decades and served earlier as ROC and OL. Above all he is a good friend of the profession. On behalf of the Regional Council let me extent a warm and cordial welcome to the Regional Director.

Knowledge Management is multi dimensional and it is a whole time exercise with out any break or holidays. We can manage knowledge with our experience, reading, listening as well as writing. The members have the option to enhance and enrich their knowledge through contributing articles in FOCUS monthly. I appeal all the members to contribute articles regularly in FOCUS.

ICSI is in full swing preparation to welcome the Honorable Prime Minister in the first week of October at New Delhi. Most of you will be planning to go to New Delhi to listen to the Honorable Prime Minister in person. However some of you may not be in a position to travel all the way, for them we are holding similar event in Mumbai on the same day and time and arrangements are also being made for a Live telecast. Do not miss the opportunity and be with us for the Golden jubilee celebrations. I also appeal to all the chapters to celebrate the Golden Jubilee in the Chapter level.

Much more to be discussed, but I will reserve it for the next issue. Looking forward to meet you all in various programs of WIRC.

Professionally Yours

CS Prakash K Pandya
Chairman
ICSI-WIRC

ICSI - WIRC



CS Jaya Singhania
Practising Company Secretary
Mumbai

Fast Track Merger: Enhancing Ease Of Doing Business.

BACKGROUND:

- Corporate restructuring often are tailored to the needs of the business undergoing the overhaul. The main objective behind corporate restructuring is realignment of divisions, positioning the company to be more competitive, surviving an adverse economic climate, or acting on the self-confidence of the corporation to move in an entirely new direction.
- In commercial parlance it is to streamline process of merger providing a simplified, quick and time bound procedure in comparison to the procedure for a traditional merger. There was a long felt need to simplify the procedure where the interest of third party is not significant.
- In this article, we intend to analyse the impact that provisions pertaining to fast track mergers, its process and the probable impact of it on the Indian economy.

INTRODUCTION

❖ Company law in India has undergoing a complete overhaul due to the recently notified by Ministry of Corporate Affairs provisions with respect to merger and acquisitions under the Companies Act, 2013 (hereinafter referred to as “the Act”). Chapter XV of the Act deals with **“Compromises, Arrangements and Amalgamations.”** vide its notification dated December 7, 2016 which come into force from December 15, 2016. In this chapter, the Act consolidates the applicable provisions of compromises, arrangements and amalgamations.



❖ The Act creates a new regulator, the *National Law Company Tribunal* (hereinafter referred to as “the Tribunal”) who will assume jurisdiction of the court for sanctioning mergers. Under the erstwhile Act, companies which have reached a consensus to merge must prepare a “scheme” of amalgamation / merger (“Scheme”).

❖ Under this the Central Government has appointed Regional Director, who has the power to approve the scheme and need not approach the National Company Law Tribunal (NCLT) by notification dated December 19, 2016.

❖ FTM process provides for a simplified, quick and time-bound procedure in comparison to the procedure for a traditional merger. With the introduction of FTM, India is in line with global practices in terms of mergers and amalgamations of holding companies and its wholly-owned subsidiary companies.

COMPANIES ACT, 1956 V/S COMPANIES ACT, 2013

Sr. No.	Section	Provisions	Companies Act, 1956	Companies Act, 2013
1.	233	Introduction to Fast Track Merger.	<ul style="list-style-type: none"> No such provision Newly introduced simplified procedure for amalgamation or merger. No specific provision in law 	<ul style="list-style-type: none"> Holding company and its wholly owned subsidiary. Two or more small Companies.
2.	232(9) & 233(1)	Power to convene/dispense off creditors meeting	<ul style="list-style-type: none"> Practically, several high courts while sanctioning schemes dispensed of creditors meeting post receipt of no objection/ consent from at least 90% of creditors in value. Specific discretionary powers vested with NCLT. Dispensation from holding creditors meeting subject to receiving confirmation, through an affidavit, of atleast 90% creditors in value. 	<ul style="list-style-type: none"> For fast track merger, no such dispensation provided.
3.	230(5)	Requirement of filing notice of petition for approving the scheme, inviting objections from various statutory authorities	<ul style="list-style-type: none"> No specific requirement unless provided under specific governing laws. However, MCA instructed Regional Directors to invite specific comments from Income Tax Department and other sectoral regulators before filing their representation to High Courts. Additional requirement for filing of notices with, inter alia, RBI, CCI, any other regulators/authorities likely to be affected. 	<ul style="list-style-type: none"> No need to seek HC approval to prove the tax neutrality of a merger or demerger. However, clarity required in case of fast -track mergers involving non-court approved schemes.
4.	230(4)	Who can raise objection to scheme of arrangement	<ul style="list-style-type: none"> Any shareholder, creditor or other interested person can raise objection if such person's interests are adversely affected. Only persons holding at least 10% of shareholding or having outstanding debt not less than 5% of the total outstanding debt as per the latest audited financials. 	<ul style="list-style-type: none"> No such provision in the law.
5.	232(3) & 233	Auditors certificate on accounting treatment	<ul style="list-style-type: none"> Currently, only listed companies to file an auditor's certificate. No such requirement for unlisted companies, including subsidiaries of listed companies. However, RDs to ensure that the accounting treatment clause in the scheme is in compliance with notified AS. NCLT not to sanction a scheme of merger, acquisition or other arrangement unless the accounting treatment is in compliance with notified AS and a certificate to that affect by the company's auditor have been filed by all entities. However, in case of fast-track procedures, exemption provided. 	<ul style="list-style-type: none"> No such provision in the law.

Sr. No.	Section	Provisions	Companies Act, 1956	Companies Act, 2013
6.	233(10)	Creation of treasury shares pursuant to scheme of amalgamation/ arrangement	<ul style="list-style-type: none"> The Companies does not prohibit companies from creating treasury shares under the scheme. 	<ul style="list-style-type: none"> The Companies Act, 2013 prohibits such practices. It requires that a transferee company will not hold any shares in its own name or in the name of trust either on its behalf or on behalf of its subsidiary/associate companies. It will require such shares to be cancelled or extinguished.

APPLICABILITY OF FAST TRACK MERGER:

- A thorough examination of some of the foreign laws reveals that there are countries who have adopted this mechanism wherein the intervention of courts / company courts is not required under their prevailing laws.
- Similarly, section 233 of the Act provides the concept of a simplified merger. The merger between the following types of companies can be possible under section 233 of the Act.

Holding company and its wholly-owned subsidiary:

- A holding company can avail the benefit of this section for merger of its wholly-owned subsidiary into itself.
- Holding company and its wholly-owned subsidiary can be public or private company or it may be Section 8 Companies.
- Further, it seems from the text of Section 233 that if the holding company desires to merge with more than one of its wholly-owned subsidiary, it has to make more than one application. The consolidate one scheme cannot be filed under this section.

Merger between two or more small companies:

- As defined under section 2(85) of the Act, a small company is a company other than public company with paid up company not exceeding Rs. 50 lac and turnover not exceeding Rs. 2 crore. Therefore, this option is not meant for public company.

Such other class or classes of companies as may be prescribed:

- However, the rules under Companies (Compromise, Arrangement and Amalgamations) Rules, 2016 have been enforced from the 15.12.2016, but these do not define the other prescribed class or classes of Companies.

➤ Under this process, the schemes approved by the boards of directors of companies will need to be sent to the Registrar of Companies (RoC) and the Official Liquidator (OL) for their suggestions or objections within 30 days.

➤ The scheme will then be considered in the meetings of shareholders or creditors, along with their suggestions or objections, and will have to be approved by the following classes of persons:

- a) Shareholders holding 90% of the total number of shares at the general meeting;
- b) Creditors representing 90% in value. After the approval of shareholders and creditors, the scheme will have to be filed with the OL, RoC and Regional Director.

➤ In the event of there being “**no objection,**” this will be deemed as approved. However, in the event of objections from the RoC or OL, the scheme may be referred to the Tribunal for it to consider the scheme under the normal process of a merger.

➤ In this case, it is upon the liberty of Tribunal to either mandate that the scheme to be considered as a normal merger or it may confirm the scheme by passing an order to this effect. *Among the various features of fast-track mergers of companies, one is the exemption from the need to obtain auditors' certificates of compliance with applicable accounting standards.*

BENEFITS OF FAST TRACK MERGER:

The benefits of Fast track merger over the Traditional merger can be envisaged as follows:

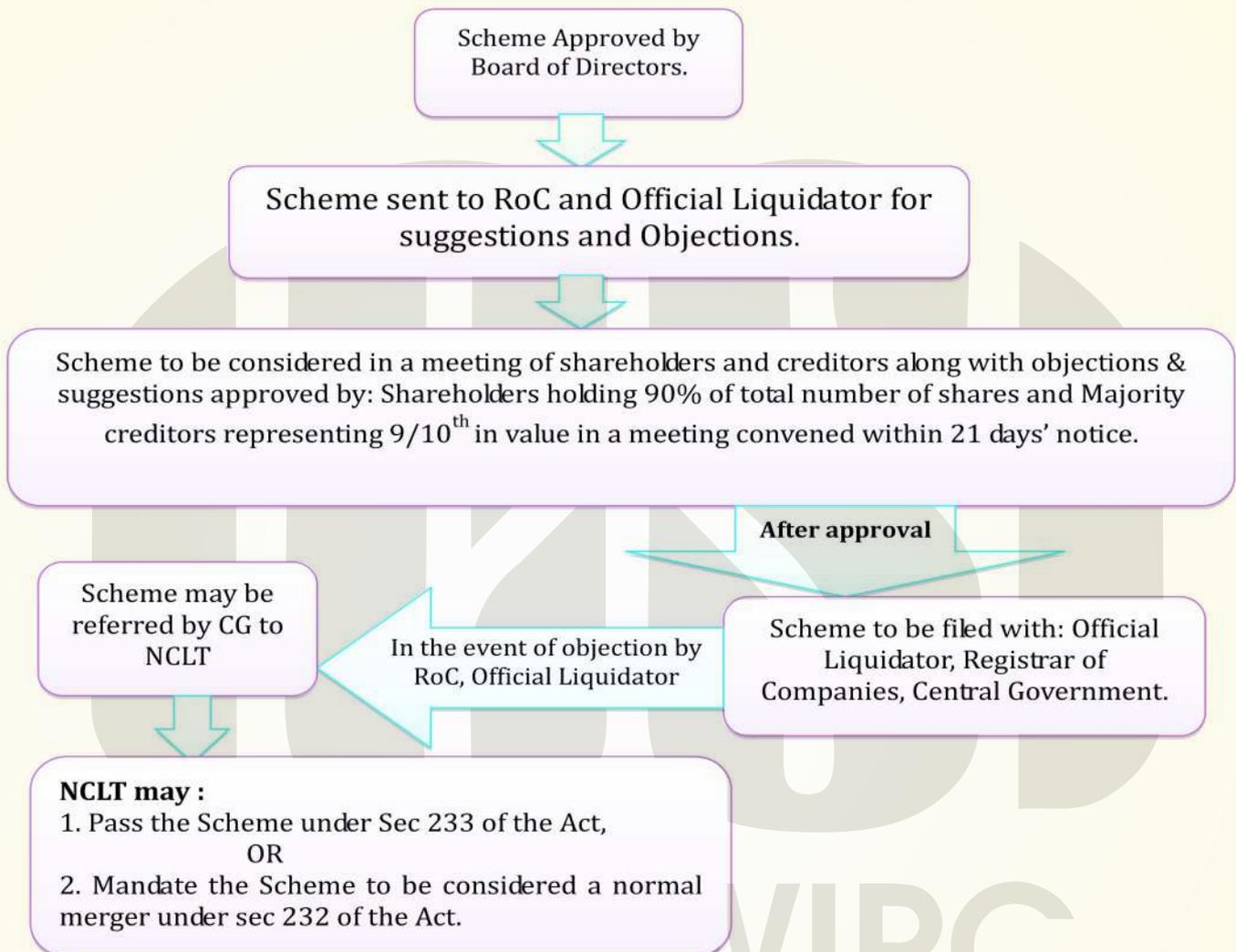
- Reduction in Administrative burden;
- Reduction in time involved via Traditional Merger;
- Reduction in cost for smaller companies falling below threshold limits.
- No Mandatory approval of the NCLT required;
- Registration of scheme shall be deemed to have effect of dissolution of transferor companies without the process of winding up.

STAMP DUTY APPLICABILITY ON FAST TRACK MERGER:

- Stamp Duty is a State subject and its applicability is determined on two grounds:
 1. The State (s) where the Registered Office of the company is situated; and
 2. The status of the properties being transferred under the Scheme.
- Further, as per Schedule 1 of the Indian Stamp Act, 1899, every instrument, whether movable or immovable, for transfer of property, attracts stamp duty. Thus, in order to create a valid charge for levy of stamp duty on conveyance, the following ingredients must exist:
 - I. There should be instrument of transfer;
 - ii. The properties whether moveable or immovable, should be transferred inter visos between parties
- It is only where a property is involved and when the transferee intends to transfer the same in its name comes the question of registration and therefore, payment of duty arises at that stage.

- In case where a property may not be situated in the state of passing of order on merger, the stamp schedule of the relevant State has to be seen if duty is applicable on immovable property registration in that state where the property is located.

PROCEDURE FOR FAST TRACK MERGER:



FORMS IN BRIEF:

Sr No.	Form No.	Provision	By	Purpose
1.	CAA.9	Sec 233(1)(a) r/w Rule 25(1)	Transferor & transferee	Notice of scheme inviting objection or suggestions from concerned authorities
2.	CAA.10	Sec 233(1)(c) r/w Rule 25(2)	Transferor & transferee	Declaration of solvency by the transferor and transferee company
3.	CAA.11	Sec 233(2) r/w Rule 25(4)(a)	Transferee	Filing of scheme of merger or amalgamation approved by members and creditors with the Regional Director. (within 7 days of approval of members and creditors).

4.	GNL-1	Sec 233(2) r/w Rule 25(4)(b)	Transferee	Filing of scheme and Form No. CAA. 11 with the Regional Director.
5.	CAA.12	Sect 233 r/w Rule 25(5)	Regional Director	Confirmation order for the scheme of Merger or Amalgamation by Regional Director.
6.	INC-28	Sect 233 r/w Rule 25(7)	Transferor & transferee	Filing of order of Regional Director with RoC (within 30 days of the date of order).

PRACTICAL DIFFICULTIES:

- ❖ One of the major difficulty faced by the companies who are adopting fast track merger scheme is that the scheme of amalgamation may be approved by the Registrar of Companies, Mumbai, Official Liquidator (OL) and Central Government (CG) but if the Central Government finds that the scheme of amalgamation is not in public interest or in the interest of the creditors then the matter, then an application may be made before the Tribunal (NCLT) within a period of 60 days from the receipt of the scheme and the same will be considered under Section 232 of this Act.
- ❖ National Company Law Tribunal (NCLT) has the right to either pass the scheme under Section 233 of this Act or mandate the scheme to be considered under normal merger under Section 232 of this Act which will be a lengthy and time consuming procedure.

CONCLUSION:

- ❖ Introduction of provision of fast track merger under the new Act has opened doors for companies intending quick merger.
- ❖ Removing the same from the ambit of Tribunal is also a big relief as it will provide the required push by saving a lot of time from the perspective of companies. Also, delegation of power from Central Government to Regional Director will be a ease for companies as it allows timely completion of processes.
- ❖ Further, while the regulators have enabled the corporates with an easy route, they have also enabled sufficient checks and balances to avoid its misuse. The RoC and OL have also been granted with second opportunity to place their objections after the scheme is approved by the members and creditors.
- ❖ This route of Fast Track Merger & Amalgamation provides extensive relief to such companies from following the meticulous and complex procedure of merger & amalgamation involving approval of NCLT.
- ❖ In order to bring the “ease of doing business” norms on par with other developed nations, such steps by the regulators is a step in the right direction.

HOW DO WE HELP:

- The role of the Company Secretary has evolved over a period of time from a mere compliance caretaker to key managerial personnel responsible for ensuring compliance of all the acts applicable to the company.
- The specialized role of the modern Company Secretary as Compliance officer has emerged to position them as one of the key governance professionals within the organization.
- To report the Board about the Compliance with regards to Secretarial Standards and assist and advice Board in complying with Corporate Governance and best practices.

COMPANY SECRETARIES BENEVOLENT FUND



Saathi Haath Badhana साथी हाथ बढ़ाना

The Company Secretaries Benevolent Fund (CSBF) provides safety net to Company Secretaries who are members of the Fund and their family members in distress.

CSBF

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- Recognised under Section 12A of the Income Tax Act, 1961
- Subscription/Contribution to Fund qualifies for the deduction under section 80G of the Income Tax Act, 1961
- Has a membership of over 12,000

Eligibility

A member of the Institute of Company Secretaries of India is eligible for the membership of the CSBF.

How to join

- By making an application in Form A (available at www.icsi.edu/csbf) along with one time subscription of ₹10,000/-.
- One can submit Form A and also the subscription amount of ₹10,000/- ONLINE through Institute's web portal: www.icsi.edu. Alternatively, he can submit Form A, along with a Demand Draft or Cheque for ₹10,000/- drawn in favour of 'Company Secretaries Benevolent Fund', at any of the Offices of the Institute/ Regional Offices/Chapters.

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- Upto ₹3,00,000 in the event of death of a member above the age of 60 years
- Upto ₹40,000 per child (upto two children) for education of minor children of a deceased member in deserving cases
- Upto ₹60,000 for medical expenses in deserving cases
- Limited benefits for Company Secretaries who are not members of the CSBF

Contact

For further information/clarification, please write at email id csbf@icsi.edu or contact Mr. Saurabh Bansal, Executive on telephone no.011-45341088.

For more details please visit www.icsi.edu/csbf



CS Balasubramaniam G
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Recommendation made by GST Council

The GST Council, in its 23rd meeting held at Guwahati on 10th November 2017, has recommended the following facilitative measures for taxpayers:

Return Filing

a) The return filing process is to be further simplified in the following manner:

i. All taxpayers would file return in FORM GSTR-3B along with payment of tax by 20th of the succeeding month till March, 2018.

ii. For filing of details in FORM GSTR-1 till March 2018, taxpayers would be divided into two categories. Details of these two categories along with the last date of filing GSTR 1 are as follows:

b) Taxpayers with annual aggregate turnover upto Rs. 1.5 crore need to file GSTR-1 on quarterly basis as per following frequency:

Period	Dates
Jul- Sep	31 st Dec 2017
Oct- Dec	15 th Feb 2018
Jan- Mar	30 th April 2018

c) Taxpayers with annual aggregate turnover more than Rs. 1.5 crore need to file GSTR-1 on monthly basis as per following frequency:

Period	Dates
Jul- Oct	31 st Dec 2017
Nov	10 th Jan 2018
Dec	10 th Feb 2018
Jan	10 th Mar 2018
Feb	10 th Apr 2018
Mar	10 th May 2018

iii. The time period for filing GSTR-2 and GSTR-3 for the months of July, 2017 to March 2018 would be worked out by a Committee of Officers. However, filing of GSTR-1 will continue for the entire period without requiring filing of GSTR-2 & GSTR-3 for the previous month / period.

b) A large number of taxpayers were unable to file their return in FORM GSTR-3B within due date for the months of July, August and September, 2017. Late fee was waived in all such cases. It has been decided that where such late fee was paid, it will be re-credited to their Electronic Cash Ledger under "Tax" head instead of "Fee" head so as to enable them to use that amount for discharge of their future tax liabilities. The software changes for this would be made and thereafter this decision will be implemented.

c) For subsequent months, i.e. October 2017 onwards, the amount of late fee payable by a taxpayer whose tax liability for that month was 'NIL' will be Rs. 20/- per day (Rs. 10/- per day each under CGST & SGST Acts) instead of Rs. 200/- per day (Rs. 100/- per day each under CGST & SGST Acts).

Manual Filing

d) A facility for manual filing of application for advance ruling is being introduced for the time being.

Further benefits for service providers

e) Exports of services to Nepal and Bhutan have already been exempted from GST. It has now been decided that such exporters will also be eligible for claiming Input Tax Credit in respect of goods or services used for effecting such exempt supply of services to Nepal and Bhutan.

f) In an earlier meeting of the GST Council, it was decided to exempt those service providers whose annual aggregate turnover is less than Rs. 20 lakhs (Rs. 10 lakhs in special category states except J & K) from obtaining registration even if they are making inter-State taxable supplies of services. As a further measure towards taxpayer facilitation, it has been decided to exempt such suppliers providing services through an e-commerce platform from obtaining compulsory registration provided their aggregate turnover does not exceed twenty lakh rupees. As a result, all service providers, whether supplying intra-State, inter-State or through e-commerce operator, will be exempt from obtaining GST registration, provided their aggregate turnover does not exceed Rs. 20 lakhs (Rs. 10 lakhs in special category States except J & K).

Extension of dates

g) Taking cognizance of the late availability or unavailability of some forms on the common portal, it has been decided that the due dates for furnishing the following forms shall be extended as under:

S. No.	FORM and Details	Original due date	Revised due date
1.	GST ITC-04 for the quarter July-September, 2017	25.10.2017	31.12.2017
2.	GSTR-4 for the quarter July-September, 2017	18.10.2017	24.12.2017
3.	GSTR-5 for July, 2017	20.08.2017 or 7 days	11.12.2017

		from the last date of registration whichever is earlier	
4.	GSTR-5A for July, 2017	20.08.2017	15.12.2017
5.	GSTR-6 for July, 2017	13.08.2017	31.12.2017
5.	TRAN-1	30.09.2017	31.12.2017 (One-time option of revision also to be given till this date)

Revised due dates for subsequent tax periods will be announced in due course.

Benefits for Diplomatic Missions / UN organizations

h) In order to lessen the compliance burden on Foreign Diplomatic Missions / UN Organizations, a centralized UIN will be issued to every Foreign Diplomatic Mission / UN Organization by the Central Government and all compliance for such agencies will be done by the Central Government in coordination with the Ministry of External Affairs.

Relevant notifications for all of the above decisions will be issued shortly, so as to be effective from 15.11.2017.

Changes recommended in Composition Scheme

The following changes were recommended in the Composition Scheme on the basis of discussions held in the 23rd meeting of the GST Council.

- i. Uniform rate of tax @ 1% under composition scheme for manufacturers and traders (for traders, turnover will be counted only for supply of taxable goods). No change for composition scheme for restaurant.
- ii. Supply of services by Composition taxpayer upto Rs. 5 lakh per annum will be allowed by exempting the same.
- iii. Annual turnover eligibility for composition scheme will be increased to Rs. 2 crore from the present limit of Rupees 1 crore under the law. Thereafter, eligibility for composition will be increased to Rs. 1.5 Crore per annum.
- iv. The changes recommended by GST Council at (ii) and (iii) above will be implemented only after the necessary amendment of the CGST Act and SGST Acts.

Major relief in GST rates

The Council has recommended major relief in GST rates on certain goods and services. These recommendations spread across many sectors and across commodities.

As per these recommendations, the list of 28% GST rated goods is recommended to be pruned substantially, from 224 tariff headings [about 18.5% of total tariff headings at 4-digit] to only 50 tariff headings including 4 headings which have been partially reduced to 18% [about 4% of total tariff headings at 4-digit].

Further, the Council has recommended changes in GST rates on a number of goods, so as to rationalise the rate structure with a view to minimise classification disputes.

The Council has also recommended issuance of certain clarifications to address the grievance of trade on issues relating to GST rates and taxability of certain goods and services.

On the services side also, the Council recommended changes in GST rates to provide relief to aviation & handicraft sectors and restaurants.

Major recommendations of the Council are summarised below.

(I) Pruning of list of 28% rated goods: The Council has recommended reduction in GST rate from 28% to 18% on goods falling in 178 headings at 4-digit level (including 4 tariff heading that are partially pruned). After these changes, only 50 items will attract GST rate of 28%.

a) Goods on which the Council has recommended reduction in GST rate from 28% to 18% include:

Wire, cables, insulated conductors, electrical insulators, electrical plugs, switches, sockets, fuses, relays, electrical connectors, Electrical boards, panels, consoles, cabinets etc for electric control or distribution, Particle/fibre boards and ply wood. Article of wood, wooden frame, paving block, Furniture, mattress, bedding and similar furnishing, Trunk, suitcase, vanity cases, brief cases, travelling bags and other hand bags, cases, Detergents, washing and cleaning preparations, Liquid or cream for washing the skin, Shampoos; Hair cream, Hair dyes (natural, herbal or synthetic) and similar other goods; henna powder or paste, not mixed with any other ingredient; Pre-shave, shaving or after-shave preparations, personal deodorants, bath preparations, perfumery, cosmetic or toilet preparations, room deodorisers, Perfumes and toilet waters, Beauty or make-up preparations, Fans, pumps, compressors, Lamp and light fitting, Primary cell and primary batteries, Sanitary ware and parts thereof of all kind Articles of plastic, floor covering, baths, shower, sinks, washbasins, seats, sanitary ware of plastic, Slabs of marbles and granite, Goods of marble and granite such as tiles, Ceramic tiles of all kinds, Miscellaneous articles such as vacuum flasks, lighters, Wrist watches, clocks, watch movement, watch cases, straps, parts, Article of apparel & clothing accessories of leather, guts, furskin, artificial fur and other articles such as saddlery and harness for any animal, Articles of cutlery, stoves, cookers and similar non electric domestic appliances, Razor and razor blades, Multi-functional printers, cartridges, Office or desk equipment, Door, windows and frames of aluminium.

Articles of plaster such as board, sheet, Articles of cement or concrete or stone and artificial stone, Articles of asphalt or slate, Articles of mica, Ceramic flooring blocks, pipes, conduit, pipe fitting, Wall paper and wall covering, Glass of all kinds and articles thereof such as mirror, safety glass, sheets, glassware, Electrical, electronic weighing machinery, Fire extinguishers and fire extinguishing charge, Forklifts, lifting and handling equipment, Bull dozers, excavators, loaders, road rollers, Earth moving and levelling machinery, Escalators, Cooling towers, pressure vessels, reactors, Crankshaft for sewing machine, tailor's dummies, bearing housings, gears and gearing; ball or roller, screws; gaskets, Electrical apparatus for radio and television broadcasting, Sound recording or reproducing apparatus, Signalling, safety or traffic control equipment for transports, Physical exercise equipment, festival and carnival equipment, swings, shooting galleries, roundabouts, gymnastic and athletic equipment, All musical instruments and their parts, Artificial flowers, foliage and artificial fruits, Explosive, anti-knocking preparation, fireworks, Cocoa butter, fat, oil powder, Extract, essence and concentrates of coffee, miscellaneous food preparations Chocolates, Chewing gum / bubble gum, Malt extract and food preparations of flour, groats, meal, starch or malt extract, Waffles and wafers coated with chocolate or containing chocolate, Rubber tubes and miscellaneous articles of rubber Goggles, binoculars, telescope, Cinematographic cameras and projectors, image projector, Microscope, specified laboratory equipment, specified scientific equipment such as for meteorology, hydrology, oceanography, geology, Solvent, thinners, hydraulic fluids, anti-freezing preparation.

b) Goods on which the Council has recommended reduction in GST rate from 28% to 12% are:

Wet grinders consisting of stone as grinder, Tanks and other armoured fighting vehicles.

(II) Other changes/rationalisation of GST rates on goods:

a) 18% to 12%

Condensed milk, Refined sugar and sugar cubes, Pasta, Curry paste, mayonnaise and salad dressings, mixed condiments and mixed seasoning, Diabetic food, Medicinal grade oxygen, Printing ink, Hand bags and shopping bags of jute and cotton, Hats (knitted or crocheted), Parts of specified agricultural, horticultural, forestry, harvesting or threshing machinery, Specified parts of sewing machine, Spectacles frames, Furniture wholly made of bamboo or cane.

b) 18% to 5%

Puffed rice chikki, peanut chikki, sesame chikki, revdi, tilrevdi, khaza, kazuali, groundnut sweets gatta, kuliya, Flour of potatoes put up in unit container bearing a brand name, Chutney powder, Fly ash, Sulphur recovered in refining of crude, Fly ash aggregate with 90% or more fly ash content.

c) 12% to 5%

Desiccated coconut, Narrow woven fabric including cotton newar [with no refund of unutilised input tax credit], Idli, dosa batter, Finished leather, chamois and composition leather, Coir cordage and ropes, jute twine, coir products, Fishing net and fishing hooks, Worn clothing, Fly ash brick.

d) 5% to nil

Guar meal, Hop cone (other than grounded, powdered or in pellet form), Certain dried vegetables such as sweet potatoes, maniac, Unworked coconut shell, Fish frozen or dried (not put up in unit container bearing a brand name), Khandsari sugar.

e) Miscellaneous

i. GST rates on aircraft engines from 28%/18% to 5%, aircraft tyres from 28% to 5% and aircraft seats from 28% to 5%.

ii. GST rate on bangles of lac / shellac from 3% GST rate to Nil.

(III) Exemption from IGST / GST in certain specified cases:

i. Exemption from IGST on imports of lifesaving medicine supplied free of cost by overseas supplier for patients, subject to certification by DGHS of Centre or State and certain other conditions.

ii. Exemption from IGST on imports of goods (other than motor vehicles) under a lease agreement if IGST is paid on the lease amount.

iii. To extend IGST exemption presently applicable to skimmed milk powder or concentrated milk, when supplied to distinct person under section 25(4) for use in production of milk for distribution through dairy cooperatives to where such milk is distributed through companies registered under the Companies Act.

iv. Exemption from IGST on imports of specified goods by a sports person of outstanding eminence, subject to specified conditions.

v. Exemption from GST on specified goods, such as scientific or technical instruments, software, prototype supplied to public funded research institution or a university or IISc, or IITs or NIT.

vi. Coverage of more items, such as temporary import of professional equipment by accredited press persons visiting India to cover certain events, broadcasting equipments, sports items, testing equipment, under ATA carnet system. These goods are to be re-exported after the specified use is over.

(IV) Other changes for simplification and harmonisation or clarification of issues

i. To clarify that inter-state movement of goods like rigs, tools, spares and goods on wheel like cranes, not being in the course of furtherance of supply of such goods, does not constitute a supply. This clarification gives major compliance relief to industry as there are frequent inter-state movement of such kind in the course of providing services to customers or for the purposes of getting such goods repaired or refurbished or for any self-use. Service provided using such goods would in any case attract applicable tax.

ii. To prescribe that GST on supply of raw cotton by agriculturist will be liable to be paid by the recipient of such supply under reverse charge.

iii. Supply of e-waste attracts 5% GST rate. Concerned notification to be amended to make it amply clear that this rate applies only to e-waste discarded as waste by the consumer or bulk consumer.

(V) Changes relating to GST rates on certain services

(A) Exemptions / Changes in GST Rates / ITC Eligibility Criteria

All stand-alone restaurants irrespective of air conditioned or otherwise, will attract 5% without ITC. Food parcels (or takeaways) will also attract 5% GST without ITC. Restaurants in hotel premises having room tariff of less than Rs 7500 per unit per day will attract GST of 5% without ITC. Restaurants in hotel premises having room tariff of Rs 7500 and above per unit per day (even for a single room) will attract GST of 18% with full ITC. Outdoor catering will continue to be at 18% with full ITC. GST on services by way of admission to "protected monuments" to be exempted. GST rate on job work services in relation to manufacture of those handicraft goods in respect of which the casual taxable person has been exempted from obtaining registration, to be reduced to 5% with full input tax credit.

(B) Rationalization of certain exemption entries

I. The existing exemption entries with respect to services provided by Fair Price Shops to the Central Government, State Governments or Union Territories by way of sale of food grains, kerosene, sugar, edible oil, etc. under Public Distribution System (PDS) against consideration in the form of commission or margin, is being rationalized so as to remove ambiguity regarding list of items and the category of recipients to whom the exemption is available.

ii. In order to maintain consistency, entry at item (vi) of Sr. No.3 of notification No. 11/2017-CT(R) will be aligned with the entries at items (ii), (iii), (iv) and (v) of SI.No.3. [The word "services" in entry (vi) will be replaced with "Composite supply of Works contract as defined in clause 119 of Section 2 of CGST Act, 2017"].

iii. In order to obviate dispute and litigation, it is proposed that irrespective of whether permanent transfer of Intellectual Property is a supply of goods or service.

(i) permanent transfer of Intellectual Property other than Information Technology software attracts GST at the rate of 12%; and

(ii) permanent transfer of Intellectual Property in respect of Information Technology software attracts GST at the rate of 18%.

(C) Clarifications

I. It is being clarified that credit of GST paid on aircraft engines, parts & accessories will be available for discharging GST on inter-state supply of such aircraft engines, parts & accessories by way of inter-state stock transfers between distinct persons as specified in section 25 of the CGST Act.

ii. A Circular will be issued clarifying that processed products such as tea (i.e. black tea, white tea etc.), processed coffee beans or powder, pulses (de-husked or split), jaggery, processed spices, processed dry fruits & cashew nuts etc. fall outside the definition of agricultural produce given in notification No. 11/2017-CT(R) and 12/2017-CT(R) and therefore the exemption from GST is not available to their loading, packing, warehousing etc.

A suitable clarification will be issued that (i) services provided to the Central Government, State Government, Union territory under any insurance scheme for which total premium is paid by the Central Government, State Government, Union territory are exempt from GST under Sl. No. 40 of notification No. 12/2017-Central Tax (Rate); (ii) services provided by State Government by way of general insurance (managed by government) to employees of the State government/ Police personnel, employees of Electricity Department or students are exempt vide entry 6 of notification No. 12/2017-CT(R) which exempts Services by Central Government, State Government, Union territory or local authority to individuals.

It is proposed to issue notifications [giving effect to these recommendations of the Council] on 14th /15th November, 2017, to be effective from 00hrs on 15th of November, 2017.

ICSI - WIRC



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CS Surendra U Kanstiya
Practising Company Secretary
Mumbai

PENALTY BE BASED ON RELEVANT TURNOVER AND NOT THE TOTAL TURNOVER

Introduction

Section 27 of the Competition Act, 2002 deals with various orders that can be passed by the Competition Commission of India (the Commission) after an inquiry. If the Commission finds that the agreements or the actions of an enterprise in a dominant position are in contravention of the provisions of section 3 and 4, the monetary penalty can be imposed on the erring enterprises. And the Commission has imposed penalties on numerous enterprises for the said contraventions. The Competition Appellate Tribunal (the Tribunal), however, has always differed with the Commission with regard to the basis of the calculation of the penalty (the Competition Appellate Tribunal has been merged with the National Company Law Appellate Tribunal). The matter has now been decided by the Supreme Court. This papers sums up the directives of the Supreme Court with regard to the basis of calculation of penalty in such cases.

Penalty under section 27(b)

Section 27(b) empowers the Commission to impose such penalty, as it may deem fit which shall be not more than 10% of the average of the turnover for the last 3 preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse. Section 27(b) reads as under:

27. Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:—

- (a) XXXXXX;
- (b) impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:

Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent. of its turnover for each year of the continuance of such agreement, whichever is higher.

Total turnover or relevant turnover ?

For a long time, the term turnover was being viewed differently by the Commission and the Tribunal. Whereas the Commission considered the 'total turnover' of the enterprise while determining the penalty, the Tribunal considered the 'relevant turnover' of the enterprise for determination of the penalty. The issue has now been settled by the Hon'ble Supreme Court in CA Nos. 53-55, 2874, 2480

§ 2922 of 2014. In the case of Excel Crop Care Limited V Competition Commission Of India and Another [2017] 138 CLA 95 (SC), the Supreme Court did a detailed examination of the issue and ruled that the same needs to be 'relevant turnover'. The bench comprising of A.K. Sikri, J. and N. V. Ramana, J. held as under:

73) It is interesting to note that the parties on either side are resting their cases on the same principle of statutory interpretations. Pertinently, Section 27(b) of the Act while prescribing the penalty on the 'turnover', neither uses the prefix 'total' nor 'relevant'. It is in this context, taking aid of the applicable and well-recognised principle of statutory interpretations we have to determine the issue.

74) In the absence of specific provision as to whether such turnover has to be product specific or entire turnover of the offending company, we find that adopting the criteria of 'relevant turnover' for the purpose of imposition of penalty will be more in tune with ethos of the Act and the legal principles which surround matters pertaining to imposition of penalties.

Two step calculation

In his concurring judgment, N. V. Ramana, J. deliberated on the interpretation of the term turnover and held that the principle of proportionality needs to be imbibed into any penalty imposed under Section 27. Otherwise excessively high fines may over-deter, by discouraging potential investors, which is not the intention of the Act. Holding that the fine under Section 27(b) of the Act should be determined on the basis of the relevant turnover, Justice Ramana also suggested the following two step calculation which needs to be followed while imposing the penalty under Section 27 of the Act.

Step 1: Determination of relevant turnover

At this point of time it needs to be clarified that relevant turnover is the entity's turnover pertaining to products and services that have been affected by such contravention. The aforesaid definition is not exhaustive. The authority should have regard to the entity's audited financial statements. Where audited financial statements are not available, the Commission may consider any other reliable records reflecting the entity's relevant turnover or estimate the relevant turnover based on available information. However the Tribunal is free to consider facts and circumstances of a particular case to calculate relevant turnover as and when it is seized with such matter.

Step 2: Determination of appropriate percentage of penalty based on aggravating and mitigating circumstances

After such initial determination of relevant turnover, commission may consider appropriate percentage, as the case may be, by taking into consideration nature, gravity, extent of the contravention, role played by the infringer (ringleader? Follower?), the duration of participation, the intensity of participation, loss or damage suffered as a result of such contravention, market circumstances in which the contravention took place, nature of the product, market share of the entity, barriers to entry in the market, nature of involvement of the company, bona fides of the company, profit derived from the contravention etc. These factors are only illustrative for the tribunal to take into consideration while imposing appropriate percentage of penalty.

Conclusion

As of now, the stakeholders have to rely upon the decisional practice by the Commission with regard to the quantum of the penalty for probable contravention. Fortunately the judgment by the Supreme Court has also stressed upon the need for release of appropriate penalty guidelines by the Commission. The same would ensure that there is a better clarity in the process followed for imposition of penalty. Let us hope that the Commission would frame the said guidelines in near future.

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GALLERY



CONGRATULATIONS

Shri J Sridhar, FCS and Past President, ICSI, on his being awarded the Ph.D. degree by Savitribai Phule Pune University (formerly University of Pune) on 7 July, 2017.



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