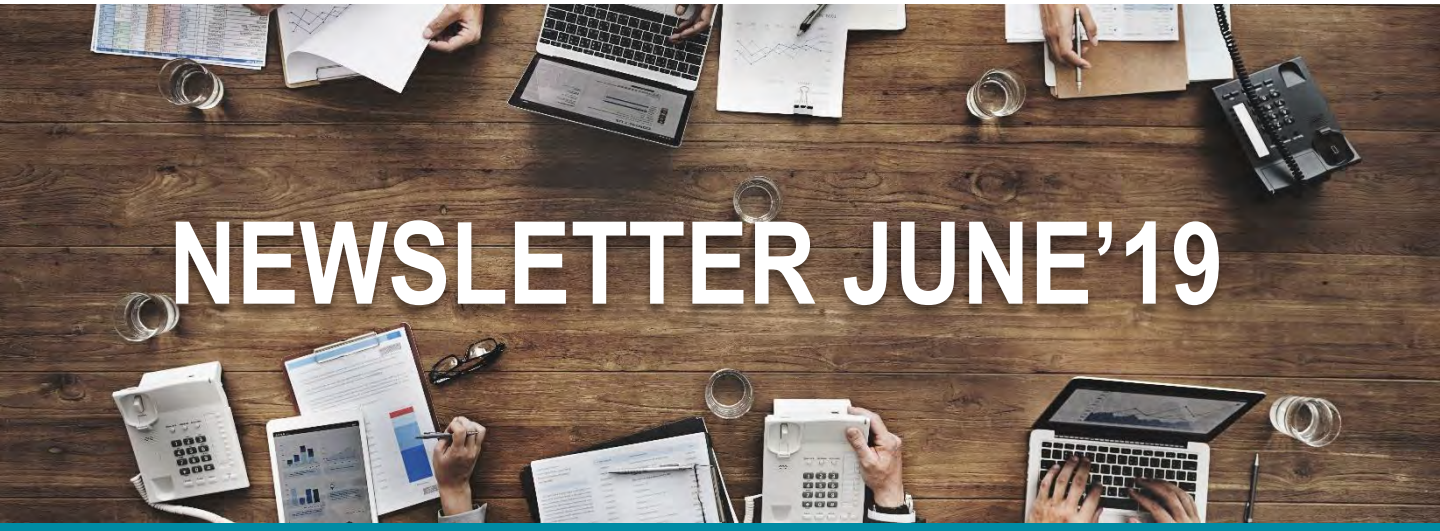


NEWSLETTER JUNE'19

"It's not the money that matters.
It's how you use it that determines it's true value!"

WHAT'S INSIDE

INCOME-TAX CASE LAWS

Cable Corporation of India Ltd. v. DCIT [2019] 106 taxmann.com 194 (Mumbai - Trib.)

Repayment of Net present value of future liability is not cessation or extinguishment of liability and same could not be brought to tax in hands of assessee

FACTS

1. The assessee company is engaged in the business of manufacturing and sales of cables. During the year under consideration, the assessee entered into a loan agreement with Memoric Pictures Private Limited (MPPL) for a sum of Rs. 12 crores. The said loan granted was an Interest free loan to be repaid over a period of 100 years. The loan was utilized to purchase the shares and not for the purpose of business.

2. Thereafter, the assessee entered into a tripartite agreement between assessee company, MPPL and Champion Pictures Private Limited (hereinafter referred as CPPL). As per the agreement the repayment of 12 crores will be done by CPPL and the same was assigned to CPPL at a present value of Rs. 0.36 crores. The resultant difference of Rs. 11.64 crores has been credited by the assessee to the Profit & Loss A/c under the Income from Other Sources as "Gain on Assignment of Loan obligation". However, the said gain was not offered to income by the assessee treating it as Capital On further appeal before the Tribunal, Tribunal held that the provisions of Section 45(4) is not applicable in the present case and placed reliance on CIT v. Dynamic Enterprises [2013] 40 taxmann.com 318 (Karnataka) (FB)

3. The Ld. AO held that the provisions of Section 41(1) are applicable to this case as the assessee has obtained benefit in respect of trading liability by way of cessation liability to the tune of Rs. 11.64 crores and treated the same as income of the assesse

4. 4. CIT (A) also upheld the order of AO. The assessee thereafter appealed to the Tribunal

HELD

1. Undisputedly, the amount was utilized for the purchase of shares and the amount invested was Rs. 12.75 Cr as is apparent from the Balance Sheet as at 31st March 2000. The assessee is engaged in manufacturing of cable and trading and not in the purchase and sale of shares and securities. Therefore, the loan was not utilized for the purpose of business and hence it is not a trading activity. It is also undisputed that the liability of loan of Rs. 12 crores to be discharged over a period of 100 years was assigned to the third parties M/s CPPL by making a payment of Rs. 0.36 crores in terms of present value of the future liability and the surplus resulting from assignment of loan liability was credited to the Profit & Loss Account under the head income from other sources but while computing the total income, the said income was reduced from the income on the ground that the surplus of Rs. 11.64 crores represented the capital receipt and therefore not taxable. It is also true that both companies' M/S MPPL and M/S CPPL were amalgamated with the assessee later on with all consequences.

2. The loan was utilized for the purchase of shares which is not the trading activity of the assessee and is of Capital Receipt. The provisions of section 41(1) of the Act are not applicable to the said surplus as the basic conditions as envisaged in section 41(1) are not fulfilled as the assessee has not claimed as deduction/allowance in earlier year or current year. For applicability of provisions of Section 41(1), it is necessary that a deduction/allowance is granted to the assessee. In the instant the case the loan was not utilized for the purpose of business and hence the surplus arising from the loan arrangement cannot be treated as trading operation of the assessee.

3. The Hon'ble Apex Court in case of CIT v. Mahindra & Mahindra Ltd. [2018] 93 taxmann.com 32/255 Taxman 305 (SC) has held that waiver of loan taken for acquiring capital assets cannot be brought to tax either under the provisions of section 28(iv) or under section 41(1) of the Act. The Hon'ble apex court held that it cannot be brought to tax u/s 28(iv) because the benefit has to be in some other form than in the shape of money. Since the waiver represented cash/money, the provisions of section 28(iv) are not applicable. It was further held that waiver can also not be taxed u/s 41(1) of the Act as sine qua non for for bring a receipt u/s 41(1) is that there has to be allowance or deduction claimed by the assessee in respect of loss, expenditure or trading liability incurred.

4. The facts of the assessee's case is similar to that of CIT v. Mahindra & Mahindra Ltd. [2018] 93 taxmann.com 32/255 Taxman 305 (SC), accordingly the surplus arising from the loan transaction cannot be brought to tax either u/s 28(iv) or u/s 41(1) of the Act.

5. Further, the assessee has paid net present value of future liability by

entering into a tripartite agreement. Thus surplus resulting from assignment of loan at present value of future liability is not cessation or extinguishment of liability as the loan is to be repaid by the third party and therefore can not be brought to tax in the hands of the assessee. The same issue has been decided in case of CIT v. Sulzer India Ltd. [2015] 54 taxmann.com 161/229 Taxman 264/[2014] 369 ITR 717 (Bom.). Further, Apex court in case of CIT v. Balkrishna Industries Ltd. [2017] 88 taxmann.com 273/[2018] 252 Taxman 375 (SC) it was rendered in the context of surplus made by the assessee when it chose to pay the net present value of the liability which was to be discharged after seven years is paid at present value of future liability under a scheme floated by the State Govt. Under the scheme the sales tax collected under deferred scheme to incentivize the industry was to be paid after certain years but the Govt came with another scheme offering the industry to pay the present value of that sales tax liability to be discharged in future.

3. The appeal of the assesse is therefore allowed.

INCOME-TAX CASE LAWS

Cinestaan Entertainment (P.) Ltd. vs. ITO [2019] 106 taxmann.com 300 (Delhi - Trib.)

As neither the Assessing Officer nor the assessee is expert under the law, the valuation of shares done by the expert as per the rules prescribed has to be accepted

FACTS

1. The assessee company is in the business of production and distribution of feature film, television film, video films, magazine tapes and video cassettes and documentary films etc., During the year there was no business of film production.

2. The assessee has received share premium of Rs. 90.95 crores from various subscribers/equity partners during the year. The valuation of such shares were done by Chartered Accountant using the DCF method which is a prescribed method under section 56(2)(viib) read with Rule 11UA(2)(b).

3. The AO disregarded the valuation report of the assessee mainly on the ground the revenues considered in the projection report does not match with actual revenues of subsequent years. Further, the AO alleged that the no basis of projections has been submitted and the assessee fails to justify the high share premium for such shares.

4. Aggrieved by the said order, the assessee preferred an appeal before

CIT(A) where CIT(A) sustained the addition made by the AO. Further, CIT(A) observed that under DCF method, it is always possible for the company to decide the proposed value of the share and then travelling back to tailor the figures with the reverse engineering process, to suit its convenience.

5. Aggrieved by the CIT(A) order, assessee has preferred an appeal before Tribunal

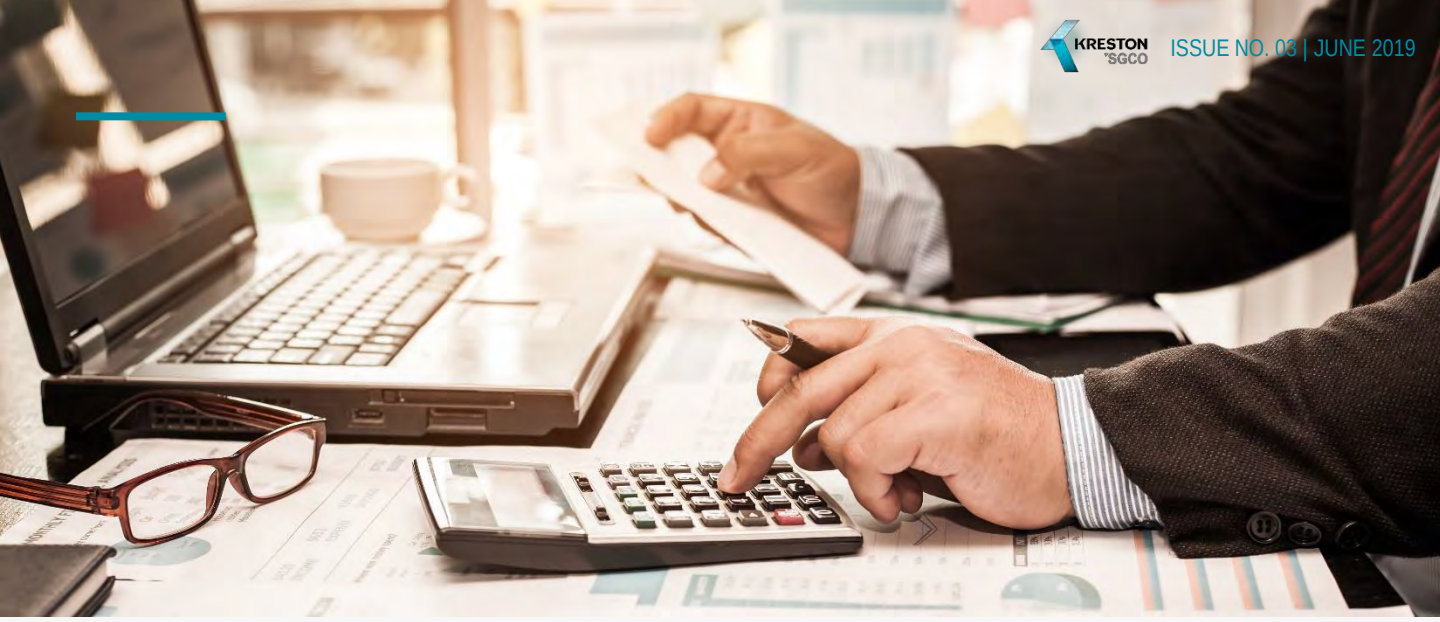
HELD

1. It has been observed that the AO has issued notices u/s. 133(6) to all the 3 investors to seek confirmation, information and documents pertaining to transaction. The AO has received all the information as asked in the said notices. The venture agreement was also filed before the AO and attention has also been drawn that the investment in the assessee company has been made in phases only after going through the projections and being satisfied with the potentials and credentials of future growth, they were willing to make such huge investment in the 'start-up company' like that of the assessee. The AO has neither doubted the identity nor the creditworthiness of the investors nor the genuineness of the transaction and the same stands fully established as envisaged u/s 68 of the Act.

2. Deciding on the issue of the deeming provisions of Sec 56(2)(vii), the deeming fiction not only has to be applied strictly but also have to be seen in the context in which such deeming provisions are triggered. It is a trite law well settled by the Constitutional Bench of Supreme Court, in the case of Dilip Kumar & Sons (supra) that in the matter of charging section of a taxing statute, strict rule of interpretation is mandatory, and if there are two views possible in the matter of interpretation, then the construction most beneficial to the assessee should be adopted.

3. Nothing has been brought on record that unaccounted money has been routed through circuitous channel or any other dubious manner. If such a strict view is adopted on such investment as have been done by the Assessing Officer and by ld. CIT(A), then no investor in the country will invest in a 'start-up company', because investment can only be lured with the future prospects and projection of these companies.

4. The Courts have held that Income Tax Department cannot sit in the armchair of businessman to decide what is profitable and how the business should be carried out. Commercial expediency has to be seen from the point of view of businessman. Even the prescribed Rule 11UA (2) does not give any power to the Assessing Officer to examine or substitute his own value in place of the value determined or requires any satisfaction on the part of the Assessing Officer to tinker with such valuation. Here, in this case, Assessing Officer has not substituted any of his own method or valuation albeit has simply rejected the valuation of the assessee.



5. There is no provision under the Rule or Act which allows the AO to tinker with the valuation report obtained by an independent valuer. These projections are based on various factors and projections made by the management and the Valuer. These projections cannot be evaluated purely based on arithmetical precision as value is always worked out based on approximation and catena of underline facts and assumptions.

6. In any case, if law provides the assessee to get the valuation done from a prescribed expert as per the prescribed method, then the same cannot be rejected because neither the Assessing Officer nor the assessee have been recognized as expert under the law.

7. Hence, the appeal of the assessee is allowed.

INCOME-TAX CASE LAWS

CIT v. Melstar Information Technologies Ltd [2019] 106 taxmann.com 142 (Bombay HC)

Mere belated claim by the assessee which results into delayed refund could not be said to be delay attributable to the assessee and not entitled to interest u/s 244A(1)(a)

FACTS

1. The assessee has not claimed certain expenditure in the assessment proceedings but raised the claim before Tribunal. The Tribunal remanded the case back to CIT (A). The additional benefit claimed by the assessee was granted. This resulted in refund and the question regarded payment of interest on such refund was raised by the Revenue.

HELD

1. Sub-section (2) of Section 244A, , provides that if the proceedings resulting in the refund are delayed for reasons attributable to the assessee whether wholly or in part, the period of delay so attributable,

would be excluded from the period for which interest is payable under sub-section (1) of Section 244A of the Act.

2. Nothing on record shows that the proceedings were delayed in any manner on account of reasons attributable to the assessee. Therefore, the Tribunal was correct in allowing the interest to the assessee.

3. The court in case of Ajanta Manufacturing Ltd. v. Deputy CIT [2017] 391 ITR 33 (Guj.) held that First and foremost requirement of sub-section (2) of Section 244A is that the proceedings resulting into refund should have been delayed for the reasons attributable to the assessee, whether wholly or in part. If such requirement is satisfied, to the extent of the period of delay so attributable to the assessee, he would be disentitled to claim interest on refund. The act of revising a return or raising a claim during the course of the assessment proceedings cannot be said to be the reasons for delaying the proceedings which can be attributable to the assessee. Mere fact that the claim came to be granted by the Appellate Commissioner, would not change this position. The Department does not contend that the assessee had needlessly or frivolously delayed the assessment proceedings at the original or appellate stage. In absence of any such foundation, mere fact that the assessee made a claim during the course of the assessment proceedings which was allowed at the appellate stage would not ipso facto imply that the assessee was responsible for causing the delay in the proceedings resulting into refund.

4. Further, if the officer is satisfied that the refund is delayed due to reasons attributable to the assessee then the matter shall be referred to Commissioner or Chief Commissioner or any other notified person whose decision thereon shall be final. In the instant case no such decision was passed by Commissioner or Chief Commissioner on this issue as the same was not referred to them by the AO.

5. Hence, no question of law arises and the appeal by the revenue is thereby dismissed.

INTERNATIONAL TAXATION CASE LAWS

Outotec (Finland) Oy, Kolkata Vs. DCIT (International Taxation), Circle-2(1), Kolkata [ITAT Kolkata] (AY 2015-16) [TS-311-ITAT-2019(Kol)]

Sale of Designs and Drawings - Retaining intellectual property in designs and drawings is similar in the nature to the retaining of patented rights in any goods/machinery. Restriction on the intellectual property in designs and drawings sold by the assessee for the purpose of setting up a plant in India does not change the character of the

transaction from the sale of the product to the use of licence/know-how. Normally, designs and drawings sold by foreign customers were used by Indian customers for internal business purposes for setting up of their plants and not for any commercial exploitation. Accordingly, the designs and drawings sold by the assessee tantamounts to the use of copyrighted article rather than use of a copyright and is, therefore, in the nature of business income.

Income from testing and other services - It may be true that the process of testing may have been conducted outside India. But the payment in question is not for the process but was for the results of testing which is used in India. Thus, the testing and other services were availed in India and hence are taxable in India.

FACTS

1. Outotec (Finland) Oy ('Assessee') is incorporated in Finland and is a tax resident of the same. The Assessee is A worldwide leader in providing innovative and environmentally sound solutions for a wide range of customers in metals processing industries

2. During the FY 2014 -15, with regard to Indian projects, the Assessee primarily earned revenue from (i) sale of designs and drawings (ii) rendition of technical services (iii) license fees and (iv) testing and other services

3. The Assessee filed its return of income on 26.11.2015 declaring total income of Rs.1,89,38,136/-. It offered to tax income from rendition of technical services of Rs.1,82,71,454/- and income from royalty (licence fees) of Rs.6,66,682/-

4. With regards to income from sale of designs and drawings, the Assessee submitted that the same is a sale of copyrighted article and the income derived therefrom is business income and as the Assessee does not have a permanent establishment in India, and hence the business profits are not taxable in India. On the issue of income from rendering of testing and other services, the Assessee relied on Article 12(5) of the India-Finland DTAA and as the services, in question, had been rendered outside India, it claimed that the same is not taxable in India.

5. The Assessing Officer (AO) did not

agree with contentions of the Assessee With regards to sale of designs and drawings, the AO held as follows:-

- Said income was taxable in India since the same was in nature of royalty under the provisions of Income-tax Act, 1961 (the Act) as well as under the DTAA Supply of design and drawings would not constitute "sale of goods" as only license to use such design and drawings for specific purpose was granted to Indian customers and no title in the designs and drawings were transferred

- The design and drawings supplied by the Assessee were protected by intellectual property rights and at the same time encompassed a series of technical services performed at every stage like indigenous manufacture of equipment, erection, start-up, commissioning and demonstration of performance test. Accordingly, the receipts/payments on account of supply of designs and drawings may have dual and overlapping character – a portion being in the nature of royalty and the other portion being in the nature of fees for technical services (FTS)

- Design and drawings supplied were tailor made as per the requirements of the customer and were linked with the erection, commissioning, testing, operation, etc. of the plant in India. They were not readymade/off-the shelf, as these designs and drawings were finalized after obtaining approval from the purchaser and technology was also modified in making these designs and drawings in order to ensure that they met the parameters specified in the contracts. Accordingly, the said designs and drawings involved technology, skill and scientific experience, therefore the contract with the customer constituted a contract for services of highly skilled and technical nature and accordingly fall under purview of technical service taxable u/s 9(1)(vii) of the Act as well as Article 12 of the DTAA

With regards to income from rendering of testing and other services, the AO held as follows:-

- The same was taxable as royalty/FTS, both under the Act as well as under the DTAA

- The service is treated to be performed only when the beneficiary is able to use it for a purpose and the intended uses of the services tested in the laboratories in Finland were ultimately in India

- In terms of Para 5 of the Article 12 of the DTAA, HCL/Tata had PEs in India and the payments were in respect of the said PEs and accordingly, the receipts from testing and other services were taxable in India

6. Aggrieved with the findings of the AO and DRP, the Assesee filed an appeal before the ITAT

HELD

1. Before the ITAT, the Assessee contended that the said income was not taxable either as royalty or FTS, as these were sold outside India, to the Indian customers. It was submitted that the Assessee had standard technologies available with it,

based on which designs and drawings was prepared outside India and the sale of the same was also affected abroad for consideration which was also received outside India in foreign currency. The Assessee also submitted that similar issue on identical set of facts had come up before different Benches of ITAT in the case of Assessee's group concerns i.e. Outotec GmbH for AY 2010-11 and 2011-12 and issue was adjudicated in its favour

2. On the issue of taxability of income from rendering of testing and other services, the Assesee submitted that the undisputed fact was that the testing and other services had been carried out outside of the country by the Assessee i.e. in Finland where its office/laboratories were located and submitted that none of the employees of the Assessee had visited India to provide these services to the Indian customers. He relied on the specific wording in Paragraph No.5 of Article 12 of the DTAA between India and Finland and submitted that while the general rule was that royalty and fees for technical services would be taxed in the sourced country, an exception had been curved out to tax and services only in the state where the services, in question, were performed

3. The Revenue, on the other hand, opposed the contentions of the Assessee and submitted that the designs and drawings in question, were imbedded in the plant set up by the Indian customers, as claimed by the Assessee in its written note and hence it was not the case of sale of designs and drawings per se

4. On the issue of taxability of income from rendering of testing and other services, the Revenue submitted that the source rule applied and the amount in question was taxable as royalty or in the alternative as FTS in the source country i.e. India, both under the Act, as well as under the treaty. He argued that the services had been availed in India and though the Assessee rendered the services outside the country, it does not take away the right of source country to tax this amount

5. The ITAT held as follows:-

Sale of Designs and Drawings

- A perusal of the Agreement and invoices demonstrates that the designs and drawings, in question, were not embedded in the plant and machinery. They were separate items which were sold to the Assessee. The designs and drawings were sold outside India

- The similar issue on similar facts was considered in the group case of the Assessee in the case of Outotec Gmbh vs. DCIT in ITA No.431 & 432/Kol/2014 AY 2010-11 wherein it was held that:-

❖ From the facts and legal position, it is clear that the basic engineering packages sold by the assessee to the Indian customers have been largely designed on the basis of

standard technologies available with it. The consideration was, therefore, for the sale of the product, which is embedded in the plant set up by the Indian customers and does not constitute royalty and is in the nature of business income. Since the work was done outside India and sale was taken place outside India, such income is not taxable under the provisions of the Act and DTAA.

❖ Retaining intellectual property in designs and drawings is similar in the nature to the retaining of patented rights in any goods/machinery. Restriction on the intellectual property in designs and drawings sold by the assessee for the purpose of setting up a plant in India does not change the character of the transaction from the sale of the product to the use of licence/know-how. Normally, designs and drawings sold by foreign customers were used by Indian customers for internal business purposes for setting up of their plants and not for any commercial exploitation. Accordingly, the designs and drawings sold by the assessee tantamounts to the use of copyrighted article rather than use of a copyright and is, therefore, in the nature of business income. This issue of assessee's appeal is allowed

- Consistent with the view taken therein, the ITAT in this case held that the income from sale of designs and drawings cannot be classified, either as royalty or as FTS. The income has to be considered as business income and as the Assessee does not have PE in India, it cannot be brought to tax in India

Income from testing and other services

- The income in question becomes taxable as royalty or fees for technical services, is deemed to arise in the contracting state where the payer is a resident of that contracting state, which is in India, in this case.

- The income, in question, is also taxable in India as the right or property for which the royalty was paid, is used within India and hence, it is deemed to arise in India, i.e. the state in which the right or property is used.

- The Assessee's argument that the technical services of testing was performed outside the country, i.e. in Finland and hence cannot be taxed in India in view of the exception curved out to Article 12(5) of the India-Finland DTAA i.e. when the fees is paid for technical services which are performed within a contracting state, then the income therefrom is deemed to accrue or arise within the state in which the services were performed, does not apply as the payment in question was made for the test results which were used within the contracting state, India. It may be true that the process of testing may have been conducted outside India. But the payment in question is not for the process but was for the results of testing which is used in India. Thus, the services were availed in India and hence are taxable in India

TRANSFER PRICING

INA Bearings India Pvt Ltd Vs. DCIT, Circle-11, Pune [ITAT Pune] [AY 2011-12] [TS-597-ITAT-2019(PUN)-TP]

The Assessee entered into an agreement with AE, Ltd for receipt of "Management support Services", for which separate benchmarking was required to be done i.e. Aggregation with other transactions not allowed Such services were actually rendered. These services are not in the nature of stewardship or shareholder activity. The payment to AE at the actual costs incurred in providing such services plus 5% mark-up is at ALP, which does not require any transfer pricing addition Once the TPO has done the exercise of determining the ALP of the transaction of, then the ball goes back to the court of the AO, who applies his mind for finding out whether any disallowance is to be made out of the determined ALP of the transaction on the grounds as set out above, such as, not needed or duplicate service, in the nature of stewardship/ shareholder activity etc.

FACTS

- INA Bearings India Pvt. Ltd. ('Assessee') is one of the companies of INA brand of Schaeffler group worldwide. It is a wholly owned subsidiary of Schaeffler KG, Germany. The assessee is engaged in the business of manufacturing, developing, marketing and distributing roller bearing, linear bearings system and engine components

- The Assessee declared 11 international transactions including Import of raw material, components & consumables; SAP, Software and IT Costs; Import of traded goods; and Services received/ fees for receipt of management services. The Assessee aggregated this transaction with other international transactions in its two business segments, namely, Manufacturing Segment and Trading Segment and applying TNMM claimed that this transaction was also at ALP when considered along with other international transactions falling under the respective Manufacturing and Trading segments

- The TPO did not approve the aggregation of the international transaction of payment of `Fees for Management services' with other international transactions. The TPO determined 'Nil' ALP of the transaction by holding that services provided by the AE were in the nature of stewardship activity and hence no payment was required to be paid as quid pro quo for such services. The AO made the transfer pricing addition to the above extent

- Following his view on this issue taken for the A.Y. 2010-11, the ld. CIT(A) directed the AO to re-work the ALP of Management services fees after reducing the amount relatable to shareholder services. He also directed the AO to apply hourly rate of USD 40 for category 3 and 4 level of employees and of USD 80 for category 1 and 2 level of employees

- Both the sides are in appeal against the respective findings of the ld CIT(A) contained in the impugned order

HELD

Whether ALP of the international transaction of payment of Fees for Management services was to be determined in a segregated manner?

- On analyzing various Transfer Pricing provisions under the Income-Tax Act, it becomes palpable that the ALP is essentially determined on transaction-by-transaction approach for each international transaction separately; and for that purpose, a transaction in singular also includes plural for closely linked transactions

- Each international transaction is viewed separately and independent of other international transactions for determining its ALP. It is impermissible to combine more than one unrelated international transaction for determining their ALP in a unified manner when such transactions are diverse in nature.

- Cross subsidization of international transactions in a combined approach is impermissible. When we consider more than one separate transaction under the combined umbrella of TNMM, it is quite possible that a probable addition on account of transfer pricing adjustment arising from one or more of the international transactions may be grabbed by the income from another international transaction giving higher income on transacted value

- The Tribunal relied on various judgements wherein it was held that that where a number of transactions are priced differently but on the understanding that the pricing was dependent upon the Assessee accepting all of them together (i.e. either take all or leave all), then it is also one international transaction. But it will be on the Assessee to prove that although each is priced separately, but they are provided under one composite agreement. It still further held that each component may be priced differently also, but it will have to be shown that they are inextricably linked that one cannot survive without other. Merely because purchase of goods and acceptance of services lead to manufacture of final product, it does not follow that they both are dependent transactions.

- In the instant case, the transaction of payment of Fees for Management services and Import of Raw material and Traded goods etc. have been done with different AEs, hence it cannot be a question of any package deal or any such understanding or any inextricable link between these transactions as one not surviving without the other. Thus, the aggregation approach was rejected and it was held that the said transaction needs to be benchmarked separately

Whether there was any agreement for rendition of Management support services? if yes, whether any services were actually rendered?

The Assessee provided the Service Level Agreement entered into with the AE for receipt of management services wherein the nature of services provided was elaborated and service fee on hourly rates basis had been provided. The AE agreed to provide Finance and Controlling services; Human Resources services; Purchasing/ Procurement services; Quality Assurance services; Supply Chain Management Services (incl. Logistics services and Business Integration services); Business Development Services; Business Operations services; and Coco-services. The rates reflect the actual fully-loaded costs incurred in providing such services, plus a profit mark-up 5% (Cost plus method)

- The Assessee has given detailed description of nature of services provided and also the benefits which resulted to it as a result of the receipt of such services. The Assessee also submitted detailed monthly invoice. In view of the above, it was held that the Management support services were actually availed by the Assessee

Whether the services were in the nature of stewardship activities?

- The meaning of the term `stewardship', has neither been defined in the Act or in the Income-tax Rules, 1962 nor in the General Clauses Act, 1897

- The meaning of the term `stewardship' from dictionary is `the job of supervising or taking care of something, such as an organization or property'. In commercial context, stewardship activities are the activities undertaken by an enterprise to protect one's own interest

- One of the forms of stewardship activities is a shareholder activity,

which takes place when some act or service is done by a shareholder to the company in order to ensure that his investment in the shares is safe and further such an act or service does not produce any effect to the company receiving it

- As per the US Treasury Regulations on intra-group services (though not having persuasive value), an activity is a shareholder activity when an activity is not considered to provide a benefit if the sole effect of that activity is either to protect the renderer's capital investment in the recipient or in other members of the controlled group or to facilitate compliance by the renderer with reporting, legal or regulatory requirements applicable specifically to the renderer, or both. Activities in the nature of day to day management generally do not relate to protection of the renderer's capital investment

- From the description of services provided AE, the Tribunal held such services were in the nature of normal business services performed with a view to enable the Assessee to carry out its business operations producing effect on the Assessee. Thus, these do not qualify as `stewardship activities'

Whether the said international transaction of payment of fees of management fees was at ALP?

- From the statutory prescription, it is amply clear that in the entire process of completing an assessment, there is a clear-cut demarcation of functions, inter alia, between the AO and TPO. Whereas it is the duty of the AO to finalize assessment by examining all the relevant applicable provisions, the duty of the TPO is confined statutorily only to determining the ALP of the international transaction

- Once it is proved that the service was rendered, then the TPO has to confine himself to only determining the ALP of such a transaction under one of the prescribed methods. Once the TPO has done the exercise of determining the ALP of the transaction of, then the ball goes back to the court of the AO, who applies his mind for finding out whether any disallowance is to be made out of the determined ALP of the transaction on the grounds as set out above, such as, not needed or duplicate service, in the nature of stewardship/ shareholder activity etc. The TPO cannot usurp the power of the AO and step into his shoes for examining such aspects and then concluding that since the service was not required etc., its ALP becomes Nil. This exercise falls in the exclusive domain of the AO

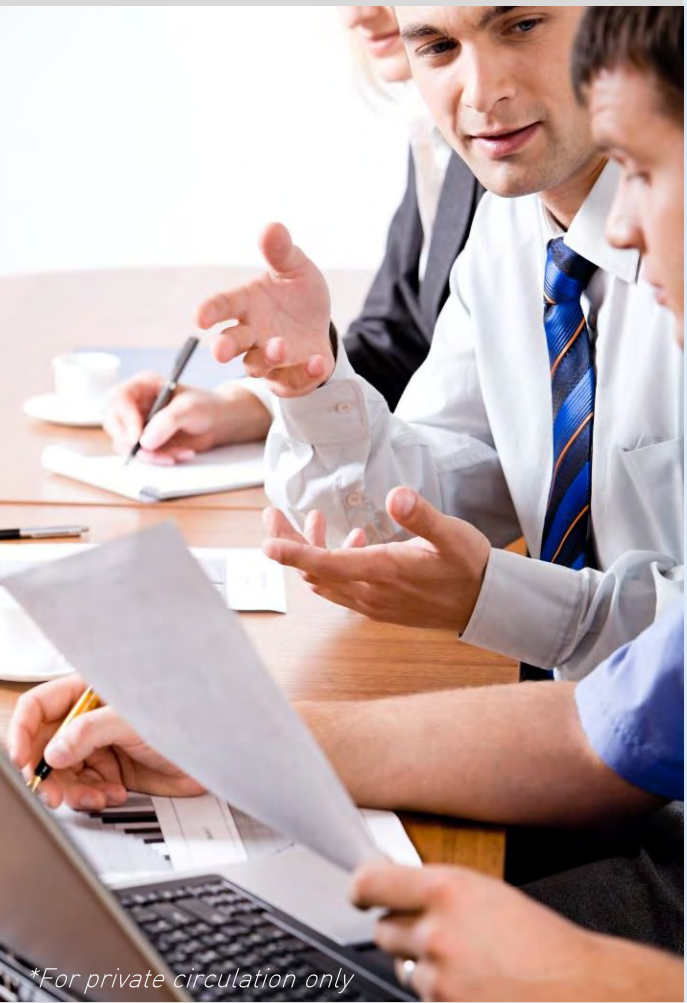
- The Tribunal held that the transfer pricing addition based on the Nil ALP determination by the TPO by treating the services rendered by the AE as shareholder services, is vitiated

- In the said case the TPO did not follow/ apply any of the prescribed methods for determining the ALP which is a statutory/ mandatory prescription and thus the addition deserved to be deleted

- Nevertheless, the payment towards management fees is based on actual expenses incurred plus 5% mark-up which is in the nature of Cost-plus method. The Tribunal held that even if it proceeded with the assumption that the

mark up of 5% is not at ALP, which should be as low as 1% or even less than that, still the difference arising on account of such mark-up going even up to 0% in a comparable uncontrolled situation, would be within +/-5% range, not requiring any transfer pricing adjustment

- The Tribunal summarized as follows:- The Assessee entered into an agreement with AE for receipt of "Management support Services", for which separate benchmarking was required to be done. Such services were actually rendered. These services are not in the nature of stewardship or shareholder activity. The payment to AE at the actual costs incurred in providing such services plus 5% mark-up is at ALP, which does not require any transfer pricing addition.



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IDTX NOTIFICATIONS

Extension of Various Due Dates notified on 28th June 2019 (Central Tax)

- Notification No. 26/2019- Central Tax-

GSTR-7 for the period October 2018 to July 2019 is extended to 31st August 2019

- Notification no. 27/2019- Central Tax-

GSTR-1 for registered persons having aggregate turnover of up to 1.5 crore rupees for the period July 2019 to September 2019 is extended to 31st October 2019

- Notification no. 28/2019- Central Tax-

GSTR-1 for registered persons having aggregate turnover more than 1.5 crore for the period July 2019 to September 2019 is extended to 11th day of the succeeding month.

- Notification no. 29/2019- Central Tax-

GSTR-3B for the period July 2019 to September 2019 is extended to 20th day of the succeeding month.

- Notification no. 32/2019- Central Tax-

ITC-04 for the period July 2017 to June 2019 is extended to 31st August 2019

- Notification no. 30/2019- Central Tax dated 28th June, 2019

Exemption from furnishing of Annual Return in Form GSTR-9 / and Reconciliation Statement in Form GSTR-9C for suppliers of Online Information Database Access and Retrieval Services ("OIDAR services") from a place outside India to person in India, other than a registered person.

Notification no. 31/2019- Central Tax dated 28th June 2019

- Furnishing of Bank Account details:

"Rule 10A- For new registrations, if Bank account details were not available at the time of registration, the same shall be furnished within 45 days from the date of registration or till filing of first GST Return, whichever is earlier. "Rule 21- Proper officer can cancel the registration, If the bank account details are not updated within 45 days

- Quick Response Code:

"Rule 46 and Rule 49- A proviso has been inserted to provide the requirement of Quick Response (QR) code on tax invoice and bill of supply, subject to certain conditions and restrictions, as may be specified.

- Cash Ledger:

"Rule 87(13)- A mechanism has been provided to registered person, to transfer any amount of tax, interest, penalty, fee or any other amount available in the electronic cash ledger under the act to the electronic cash ledger for integrated tax, central tax, state tax or union territory tax or cess in FORM GST PMT-09. PMT-09: Transfer of amount from one account head to another account head in electronic cash ledger.

- Refund for Shops in Duty free area of International airports:

"Rule 95A –– has been inserted to facilitate refund on inwards supply of indigenous goods to shops established in duty free area of International airports supplying goods to outgoing international tourist who is leaving India

- E-way bills:

"Rule 138(10)- Proviso has been inserted to provide that the validity of e-way bill may be extended within eight hours from the time of its expiry. "Rule 138(E)- Taxpayers claiming the benefit of notification number 02/2019-Central Tax dated 07 March 2019 the blocking of E-way bills shall be based on the quarterly statement i.e. FORM GST CMP-08.

CIRCULARS

Circular no. 102/24/2019- GST dated 28th June 2019

Any interest (late fee or penalty) for delayed payment of any consideration charged by the supplier shall be included in the value of supply for the payment of GST.

If any third party is involved like any bank or any other person, other than the supplier himself, who extends credit facility for such transaction, then late fee or penalty or service charge would not become part of interest and GST will be applicable on it.

Circular no. 103/24/2019- GST dated 28th June 2019

Clarification has been issued regarding the determination of place of supply in the following cases:

a) Services provided by Ports

b) Services rendered on goods temporarily imported in India.Quick Response Code:

• Circular no. 104/24/2019- GST dated 28th June 2019

Where reassignment of refund applications to the correct jurisdictional tax authority is not possible on the common portal, the processing of refund claims should not be held up and rather the same should be processed by the tax authorities to whom refund applications have been electronically transferred by the common portal.

After processing of refund application, the refund processing authority may inform on the common portal about the incorrect mapping with a request to update it. This will ensure that all the subsequent refund applications are sent to correct jurisdictional tax authority.

• Circular no. 105/24/2019- GST dated 28th June 2019

Post-sale discounts given by the supplier of goods to the dealer without any further obligation/action at dealer's end then such discount is related to the original supply of goods and not to be included in taxable value.

If the additional discount given by the supplier of goods to the dealer is the post-sale incentive requiring the dealer to do some act like undertaking special sales drive, advertisement campaign, exhibition etc then the same will be treated as a dealer (supplier of services) would be required to charge applicable GST on the value of such additional discount and the supplier of goods (recipient of services), will be eligible to claim the input tax credit.

If the additional discount is given by the supplier of goods to the dealer to offer a special reduced price by the dealer to the customer to augment the sales volume then additional discount is required to be added while determining the value of supply to be made by the dealer to the customer. The customer, if eligible, can claim the ITC benefit of GST paid on such additional discount.

Where post-sales discount granted by the supplier of goods is not permitted to be excluded from the value of supply in the hands of the said supplier not being in accordance with the provisions contained in sub-section (3) of section 15 of CGST Act, then Dealer will not be required to reverse ITC attributable to the tax already paid on such post-sale discount received by him through issuance of financial/ commercial credit notes by the supplier of goods.

ORDER (REMOVAL OF DIFFICULTIES)

• Order (Removal of difficulties) no. 6/2019- Central Tax:

The due date for FORM GSTR-9, FORM GSTR-9C is extended to 31st day of August 2019 from 30th June 2019.

• Order (Removal of Difficulties) no. 3/2019- Union Territory Tax dated 29th March 2019:

The amount of credit attributable to the taxable supplies including zero rated supplies and exempt supplies shall be determined on the basis of the area of the construction of the complex, building, civil structure or a part thereof, which is taxable and the area which is exempt.

LEGAL UPDATES

Sapna Jain & Ors Vs Union of India & Ors reported in 2019-TIOL-217-SC-GST

FACTS

The present petitions contest the power of the Revenue to make arrests for contravention of the provisions of the GST Act.

Observation:

As different High Courts of the country have taken divergent views in the matter, we are of the view that the position in law should be clarified by this Court.

As the accused-respondents have been granted the privilege of pre-arrest bail by the High Court by the impugned orders, at this stage, we are not inclined to interfere with the same.

However, we make it clear that the High Courts while entertaining such request in future, will keep in mind that this Court by order dated 27.5.2019 passed in SLP(Crl.) No. 4430/2019 had dismissed the special leave petition filed against the judgment and order of the Telangana High Court in a similar matter, wherein the High Court of Telangana had taken a view contrary to what has been held by the High Court in the present case.

HELD

The present matters as well as connected matters be listed before a three judge Bench to decide the question of law on the power of arrest.

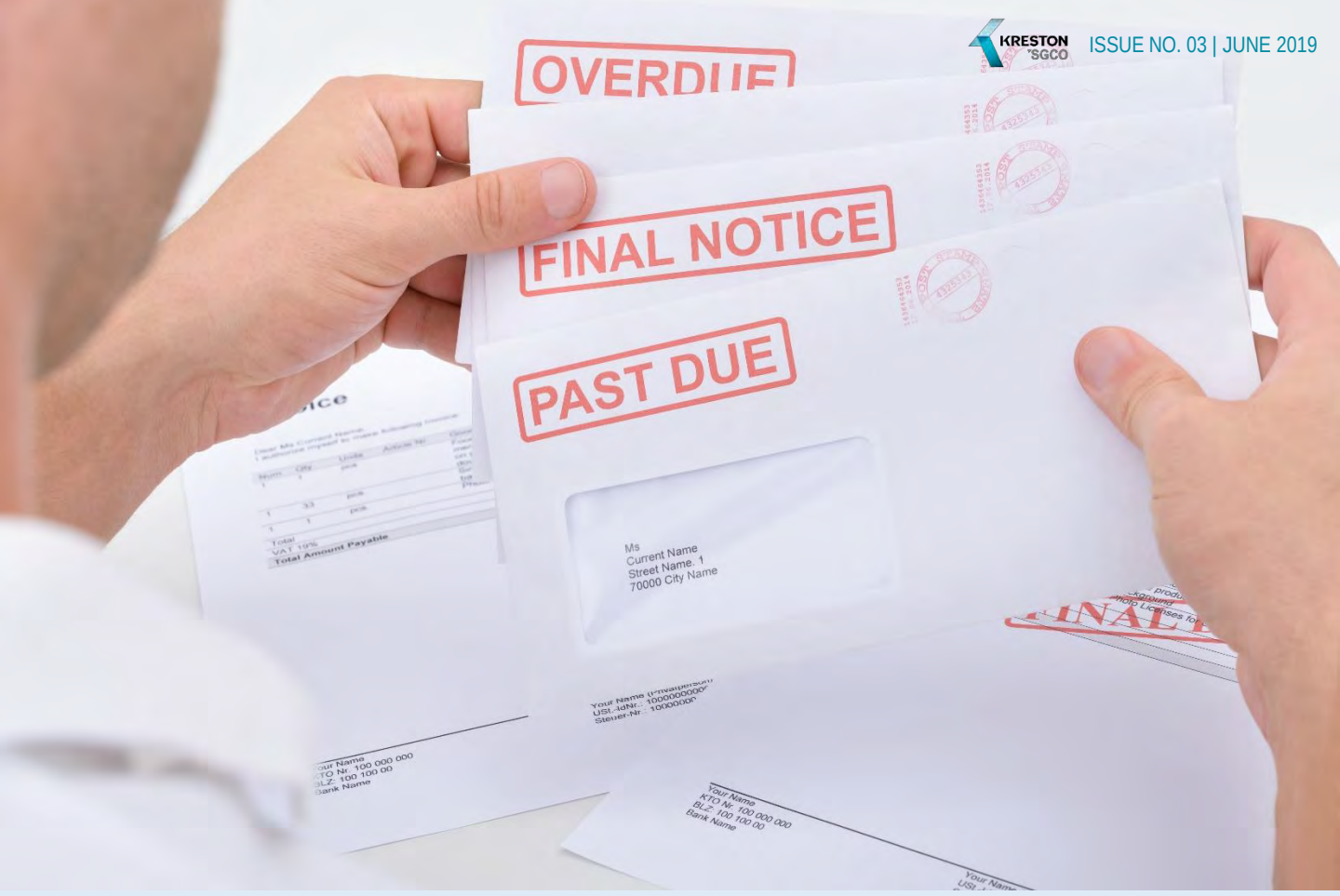
P.V. Ramana Reddy Vs Union of India & Ors reported in 2019-TIOL-216-SC-GST

FACTS

The petitioner had approached the High Court, challenging summons issued by the Superintendent (Anti Evasion) u/s 70 of the CGST Act as well as invocation of penal provisions u/s 69 of the Act. In a plea akin to one seeking anticipatory bail, the petitioner and others sought that directions be issued to the Revenue to not arrest them through exercise of powers u/s 69(1) of the Act. The main allegation of the Revenue was that the petitioners were guilty of circular trading by claiming ITC on materials never purchased & that the petitioners passed on such ITC to companies to whom the goods were never sold.

Observation:

The High Court observed that to say that prosecution could be launched only after completing assessment would run contrary to provisions of Section 132. The list of offences u/s 132 are not co-related to assessment. It was also noted that issuing invoices or bills without supplying goods & availing ITC by using such invoices were made offences u/s 132(1)(b)&(c) & that the

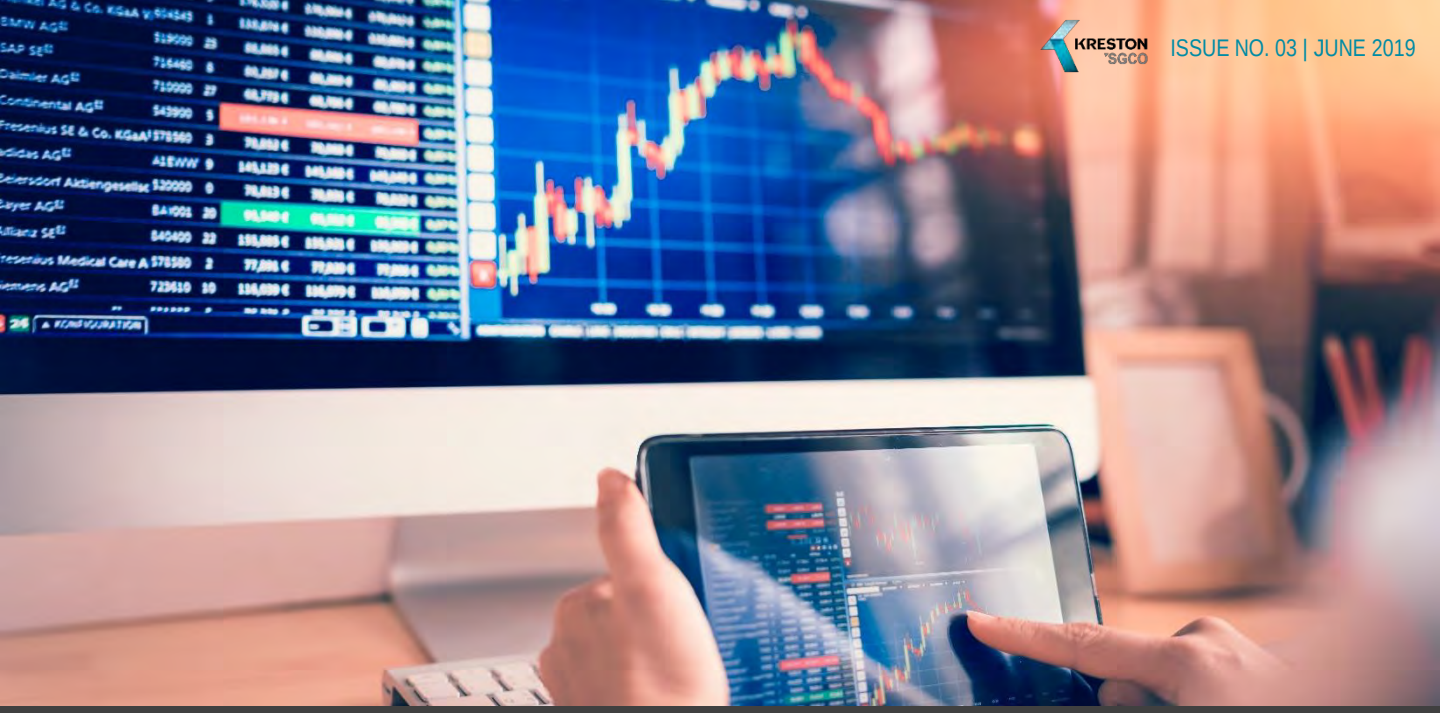


prosecution for these offences was not dependent upon completion of assessment. The High Court also rejected the petitioner's contention of there being no necessity to arrest a person for an alleged offence which is compoundable. All technical objections raised by the petitioners were rejected.

The High Court then observed that despite the petitions being maintainable & that protection u/s 41&41A of CrPC being available to the persons who are said to have committed cognizable & non-bailable offences & despite the findings of incongruities within Section 69&132 of the Act, it was not inclined to grant relief to the petitioners.

HELD

Having heard learned counsel for the petitioner and upon perusing the relevant material, High Court is not inclined to interfere. The special leave petition is accordingly dismissed. Pending interlocutory applications, if any, shall stand disposed of.



SEBI UPDATES

Handling of **clients'** securities by trading members/clearing members

In order to protect clients' funds and securities, The Securities Contracts (Regulation) Act, 1956 and Securities and Exchange Board of India (Stock-Brokers) Regulations, 1992 specifies that the stock broker shall segregate securities or moneys of the client or clients or shall not use the securities or moneys of a client or clients for self or for any other client

It shall be compulsory for all member brokers to keep separate accounts for client's securities and to keep such books of accounts, as may be necessary, to distinguish such securities from his/their own securities. Such accounts for client's securities shall, inter-alia provide for the following:-

a) Securities fully paid for, pending delivery to clients;

b) Fully paid for client's securities registered in the name of Member, if any, towards margin requirements etc

MCA UPDATES

Companies (incorporation) 6th amendment rules, 2019:

In exercise of the powers conferred by sub-sections (1) and (2) of section 469 of the Companies Act, 2013 (18 of 2013), the Central Government hereby makes the following rules further to amend the Companies Incorporation Rules, 2014, namely.

In sub-rule (1), for the words, letters and figures "Form No.INC.12", the words, letters and figures "Form INC-32 (SPICe)' shall be substituted

In sub-rule (3), in clause (a), for the word the draft memorandum", the words "the memorandum" shall be substituted;

In clause (b), for the words "the draft memorandum", the words "the memorandum" shall be substituted

MUMBAI

4A, Kaledonia-HDIL,
2nd Floor, Sahar Road,
Near Andheri Station,
Andheri (East),
Mumbai - 400069,
T: +91 22 6625 6363
E:businessmum@krestonsgco.com

NEW DELHI

No.402,
Arunachal Building,
19 Barakhamba Road,
New Delhi-1100001
T: +91 1141251489
E:businessdel@krestonsgco.com

BENGALURU

GR Plaza IV floor
433, 17th cross,
Sector IV, HSR Layout
Bengaluru – 560102
T: +91 80 25725432
E:businessblr@krestonsgco.com

KOCHI

5A, Oxford Business Centre,
Sreekandath
Road, Ravipuram,
Kochi- 682016
T: +91 484 2383133
E:businesskochi@krestonsgco.com