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NEWSLETTER

August, 2023 ▶ Price ₹ 20



Dear Members,

It gives me immense pleasure to write these monthly communiques to all of you. This is my fifth message as the Chairman of our Indore Branch, and my stint till now has been nothing short of a boon. I can confidently state on behalf my entire managing committee that we are all blessed and excited to work towards the betterment of our profession and to ensure the best services for our members. This month of August brings with it a cheerful occasion to celebrate 76 years of India's Independence.

As the national tricolor unfurls in our abodes, we shall take pride in this great nation and feel more connected with our profession which is truly a partner in nation building.

76th Independence day was celebrated at Indore Branch with joy and happiness.

In August various seminars were held related to GST , Income Tax , Company's Act keeping in mind upcoming audit season. We had opportunity to host the 2nd Regional Residential Meet of ICAI Members in Public Service wherein over 30 CA members serving the nation in esteemed and prestigious role as IAS, IPS, IRS or Judges participated and discussed about the profession and how we can collaborate to contribute to nation's progress. A grand seminar on Tax Audit was also hosted at Ravindra Natyagrah ,Indore where speaker Adv Nitin Kanwar has shared useful insights about tax audit preparation and reporting. Around 1000 participants including members, students and stakeholders participated in this seminar. The upcoming month of September is naturally a month of festivities.

This month begins with the auspicious occasion of Paryushan, Janmashtmi and Ganesh festival. We pray to the Lord of Wisdom to grant us the blessing of acting wisely and with full commitment towards our profession. Also this month shall be spent in working for finalisation of books and completion of tax and statutory audit reports for our clients. Our professional brethren, just like every year, work very hard for the benefit of their clients and to ensure that various stakeholders who rely on our profession get advantaged from our professional services towards the client, the users of the financial statements, as well as the government and public-at-large. At last, I would like to conclude with a quote that "It is not enough to win a war; it is more important to organize the peace." So, work hard to fulfill you dreams and responsibilities but don't let the work suffer your inner peace.

Yours truly,

CA Mausam Rathi

Chairman-Indore Branch of ICAI

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Unfathomed GST demands on personal guarantee given by Directors



CA. Vineey Patni

Introduction

GST audits are being carried out by the department and notices are being issued impetuously, as we are nearing the last date to issue show cause notice for non-fraud cases of FY 2017-18. Out of the many audit points, demanding GST on personal guarantees given by Directors is one of the burning issues.

It is a common practice by the financial institutions to obtain a personal guarantee from the Director of the Company in process of sanctioning loans to the company. No guarantee commission is paid by the companies to the Directors as per instructions of RBI. The guarantees are disclosed in the financial statements under Loans & Advances secured by the personal guarantee of Directors. Let us discuss the provisions of GST law which could be relevant for determining taxability of a guarantee transaction.

Discussion under GST:

GST is levied on supply of goods or services or both. The scope of supply is defined in section 7(1) of CGST Act to include—

“(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business.

...

(c) the activities specified in Schedule I, made or agreed to be made without a consideration”

Therefore, GST is levied on supply of goods or services when made or agreed to be made for a consideration. Only the activities specified in schedule I are taxed even without consideration.

In Schedule I, para 2, the supply of goods or services or both between related persons even without consideration, is deemed as “supply” when made in the course or furtherance of business.



The term “related persons” is defined in explanation to section 15 of CGST Act to include officers or directors of one another's business. Therefore, a director of the company, and the company, are related persons under GST law.

Accordingly, as per para 2 of Schedule I, supply of goods or services by a director to the company, even without consideration, when made in the course or furtherance of business, would be deemed to be “supply”.

However, supply of services by employee to employer in the course of or in relation to employment is neither supply of goods nor services, accordingly, not liable to GST as per para 1 of Schedule III of CGST Act, 2017.

Services provided by Director of company, to the company, other than in the course of employment, is taxable in the hands of company under reverse charge (RCM) as per entry no. 6 in Notification no. 13/2017-CT(Rate) reproduced below.

S.No.	Category of Supply of Services	Supplier of Service	Recipient of Service
6	Services supplied by a director of a company or a body corporate to the said company or the body corporate.	A director of a company or a body corporate	The company or a body corporate located in the taxable territory.

We would now discuss whether the activity of giving personal guarantee by director amounts to supply under GST.

Discussion on personal guarantee given by Director:

A contract of guarantee is defined under section 126 of Indian Contract Act, 1872 as “a contract to perform the promise, or discharge the liability, of a third person in case of his default.” The person who gives the guarantee is called the “surety”, the person in respect of whose default the guarantee is given is called the “principal debtor”, and the person to whom the guarantee is given is called the “creditor”.

In the instant case, the financial institution/bank giving the loan is the creditor. The Director giving personal guarantee is the surety. The borrower company is the principal debtor.

Section 127 of Indian Contract Act, 1872 provides for consideration in a guarantee contract as “anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.” Illustration: B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.

Therefore, the contract of guarantee is between the financial institution (bank) and the surety (Director). The bank giving loan to the principal debtor (company)

is the consideration for the Director in providing guarantee service to the bank. Therefore, it could be inferred from above discussion that the recipient of service given by the Director is the bank. There is no supply between the surety (Director) and the principal debtor (company).

Further, RBI Circular No. RBI/2009-10/70 DBOD. No. Dir. BC. 14 /13.03.00/2009-10 July 1, 2009 stated that the personal guarantee is obligatory in nature. The director is not having any choice to reject the personal guarantee when the lending bank insists for guarantee by the directors of the company. From the detailed guidelines, it is clear that the directors are obligated to give personal guarantee as per the requirement of the lending bank.

Further, even assuming without admitting that giving of personal guarantee by Director is a service to the company, it is beyond the scope of their employment as Directors in the company. The Director having provided his personal guarantee has acted beyond the call of duty as employee of the company. Similarly held in the case of Controls & Switchgear Contactors Limited vs. DCIT [2014 (6) TMI 46 – Delhi High Court] that the act of the directors in providing their personal guarantees and undertaking the attendant risks is clearly beyond the scope of their services as employees of the company. Therefore, in view of the author, even assuming director is providing service to the company, the same is in his personal capacity which is not covered under para 2 of Schedule I of the CGST Act, 2017.



GST

Similarly, it is clarified in the CBIC Circular no. 201/13/2023-GST dt. 01.08.2023 that services supplied by a director of the company, to the company, in his private or personal capacity, are not taxable under reverse charge in entry no. 6 of notification no. 13/2017 – Central Tax (Rate) as cited supra.

Circular no. 201/13/2023-GST is clarificatory in nature and is applicable retrospectively from 01.07.2017. Further, the circular of the Board is binding on all GST officers. GST departmental officers cannot raise contention contrary to binding circular by Board. When a circular remains in operation, the Revenue is bound by it and cannot be allowed to plea that it is not valid nor that it is contrary to the terms of statute. Similarly held in a catena of cases including Collector of CEx., Vadodara v. Dhiren Chemical Industries cited 2002 (139) E.L.T. 3 (S.C.), Commissioner v. Indian Oil Corporation Ltd. - 2005 (186) E.L.T. A119 (S.C.) and many more.

Alternatively, erring on caution and to avoid disputes, the company may enter into an employment agreement with the Managing/Whole-Time/Executive

Directors with clear duties defined. Accordingly, services provided by way of giving personal guarantee would get covered under services provided by employee to employer in para 1 of Schedule III.

Therefore, personal guarantee provided by Director to the company is neither supply of goods nor services. Accordingly, for all the reasons listed above, in view of the author, GST is not payable by the company in reverse charge. Also, when service itself is not taxable, the question of valuation does not arise.

GST Law is new and developing with grey areas, it may take 8-9 years until these matters are decided by the Apex Court. It is advisable to intimate understanding on taxability of transactions to the Jurisdictional range by written letter and seek confirmation of understanding about taxability of the transaction to ensure that there can be no sustainable demands for extended periods. Views of author are strictly personal. For feedback or clarifications author can be reached at vini@hnaindia.com

adani



A Tale of Corporate Deceit: Adani Enterprises Share Price from Rs. 150.60 in 2018 to Rs. 4,019.80 in 2022 to Rs. 1,315.65 in 2023



CA Rishabh Jain

Some Key findings of Hindenburg's 2-year investigation, evidencing that the INR 17.8 trillion (U.S. \$218 billion) Indian conglomerate Adani Group has engaged in a brazen stock manipulation and accounting fraud scheme over the course of decades

- If you take the financials of Adani Group at face value, its 7 key listed companies have 85% downside purely on a fundamental basis owing to sky-high valuations.
- 5 of 7 key listed companies have reported 'current ratios' below 1, indicating near-term liquidity pressure.
- The group's very top ranks and 8 of 22 key leaders are Adani family members, a dynamic that places control of the group's financials and key decisions in the hands of a few, hence, the Adani Group can be described as "a family business."
- Gautam Adani's younger brother, Rajesh Adani, was accused by the Directorate of Revenue Intelligence (DRI) of playing a central role in a diamond trading import/export scheme around 2004-2005. The alleged scheme involved the use of offshore shell entities to generate artificial turnover. Rajesh was arrested at least twice over separate allegations of forgery and tax fraud. He was subsequently promoted to serve as Managing Director of Adani Group.
- Gautam Adani's brother-in-law, Samir Vora, was accused by the DRI of being a ringleader of the same diamond trading scam and of repeatedly making false statements to regulators. He was subsequently promoted to Executive Director of the critical Adani Australia division.
- Some 38 Mauritius shell entities controlled by Vinod Adani or close associates were identified. Further, several entities are also surreptitiously controlled by Vinod Adani in Cyprus, the UAE, Singapore, and several Caribbean Islands.
- Many of these Vinod Adani-associated entities have no obvious signs of operations, including no reported employees, no independent addresses or phone numbers and no meaningful online presence. Despite this, they have collectively moved billions of dollars into Indian Adani publicly listed and private entities, often without required disclosure of the related party nature of the deals.
- Websites of Vinod Adani-associated entities, many were suspiciously formed on the same days, featuring only stock photos, naming no actual employees and listing the same set of nonsensical services, such as "consumption abroad" and "commercial presence", efforts seemingly designed to mask the nature of some of the shell entities.



over INR 360 billion (U.S. \$4.5 billion) in shares of listed Adani companies, according to Legal Entity Identifier (LEI) data and Indian exchange data. Monterosa's Chairman and CEO served as director in 3 companies alongside a fugitive diamond merchant who allegedly stole U.S. \$1 billion before fleeing India. Vinod Adani's daughter married the fugitive diamond merchant's son.

■ A once-related party entity of Adani invested heavily in one of the Monterosa funds that allocated to Adani Enterprises and Adani Power, according to corporate records, drawing a clear line between the Adani Group and the suspect offshore funds.

- The Vinod-Adani shells seem to serve several functions, including (1) stock parking / stock manipulation (2) and laundering money through Adani's private companies onto the listed companies' balance sheets in order to maintain the appearance of financial health and solvency.
- Publicly listed companies in India are subject to rules that require all promoter holdings to be disclosed. Rules also require that listed companies have at least 25% of the float held by non-promoters in order to mitigate manipulation and insider trading. 4 of Adani's listed companies are on the brink of the delisting threshold due to high promoter ownership.
- The research indicates that offshore shells and funds tied to the Adani Group comprise many of the largest “public” (i.e., non-promoter) holders of Adani stock, an issue that would subject the Adani companies to delisting, were Indian securities regulator SEBI's rules enforced.
- Many of the supposed “public” funds exhibit flagrant irregularities such as being (1) Mauritius or offshore-based entities, often shells (2) with beneficial ownership concealed via nominee directors (3) and with little to no diversification, holding portfolios almost exclusively consisting of shares in Adani listed companies.
- Monterosa Investment Holdings controls 5 supposedly independent funds that collectively hold
- Another Cyprus-based entity called New Leaina Investments until June-September 2021 owned over U.S. \$420 million in Adani Green Energy shares, comprising ~95% of its portfolio. Parliamentary records show it was (and may still be) a shareholder of other Adani listed entities.
- New Leaina is operated by incorporation services firm Amicorp, which has worked extensively to aid Adani in developing its offshore entity network. Amicorp formed at least 7 Adani promoter entities, at least 17 offshore shells and entities associated with Vinod Adani, and at least 3 Mauritius-based offshore shareholders of Adani stock.
- Amicorp also played a key role in the 1MDB international fraud scandal that resulted in U.S. \$4.5 billion being siphoned from Malaysian taxpayers. Amicorp established 'investment funds' for the key perpetrators that were “simply a way to wash a client's money through what looked like a mutual fund”, according to the book Billion Dollar Whale, which reported on the scandal.
- 'Delivery volume' is a unique daily data point that reports institutional investment flows. It was found that offshore suspected stock parking entities accounted for up to 30%-47% of yearly 'delivery volume' in several Adani listed companies, a flagrant irregularity indicating that Adani stocks have likely been subject to 'wash trading' or other forms of

manipulative trading via the suspect offshore entities.

- A 2007 SEBI ruling stated that “the charges leveled against promoters of Adani that they aided and abetted Ketan Parekh entities in manipulating the scrip of Adani stand proved”. Adani Group entities originally received bans for their roles, but those were later reduced to fines, a show of government leniency toward the Group that has become a decades-long pattern.
- Per the 2007 investigation, 14 Adani private entities transferred shares to entities controlled by Ketan Parekh, who then engaged in blatant market manipulation. Adani Group responded to SEBI by arguing that it had dealt with Parekh to finance the start of its operations at Mundra port, seemingly suggesting that share sales via stock manipulation somehow constitutes a legitimate form of financing.
- In addition to using offshore capital to park stock, numerous examples of offshore shells sending money through onshore private Adani companies onto listed public Adani companies were also observed. The funds then seem to be used to engineer Adani's accounting (whether by bolstering its reported profit or cash flows), cushioning its capital balances in order to make listed entities appear more creditworthy, or simply moved back out to other parts of the Adani empire where capital is needed.
- Numerous undisclosed related party transactions by both listed and private companies, were also identified, seemingly an open and repeated violation of Indian disclosure laws.
- In one instance, a Vinod Adani-controlled Mauritius entity with no signs of substantive operations lent INR 11.71 billion (U.S. ~\$253 million at that time) to a private Adani entity which did not disclose it as being a related party loan. The private entity subsequently lent funds to listed entities, including INR 9.84 billion (U.S. \$138 million at more recent substantially lower exchange rates) to Adani Enterprises.
- Another Vinod Adani-controlled UAE entity called Emerging Market Investment DMCC lists no employees on LinkedIn, has no substantive online presence, has announced no clients or deals, and is

based out of an apartment in the UAE. It lent U.S. \$1 billion to an Adani Power subsidiary.

- This offshore shell network also seems to be used for earnings manipulation. For example, we detail a series of transactions where assets were transferred from a subsidiary of listed Adani Enterprises to a private Singaporean entity controlled by Vinod Adani, without disclosure of the related party nature of these deals. Once on the books of the private entity, the assets were almost immediately impaired, likely helping the public entity avoid a material write-down and negative impact to net income.
- Adani Group's obvious accounting irregularities and sketchy dealings seem to be enabled by virtually non-existent financial controls. Listed Adani companies have seen sustained turnover in the Chief Financial Officer role. For example, Adani Enterprises has had 5 chief financial officers over the course of 8 years, a key red flag indicating potential accounting issues.
- The independent auditor for Adani Enterprises and Adani Total Gas is a tiny firm called Shah Dhandharia. Shah Dhandharia seems to have no current website. Historical archives of its website show that it had only 4 partners and 11 employees. Records show it pays INR 32,000 (U.S. \$435 in 2021) in monthly office rent. The only other listed entity we found that it audits has a market capitalization of about INR 640 million (U.S. \$7.8 million).
- Shah Dhandharia hardly seems capable of complex audit work. Adani Enterprises alone has 156 subsidiaries and many more joint ventures and affiliates, for example. Further, Adani's 7 key listed entities collectively have 578 subsidiaries and have engaged in a total of 6,025 separate related-party transactions in fiscal year 2022 alone, per BSE disclosures.
- The audit partners at Shah Dhandharia who respectively signed off on Adani Enterprises and Adani Total Gas' annual audits were as young as 24 and 23 years old when they began approving the audits. They were essentially fresh out of school, hardly in a position to scrutinize and hold to account the financials of some of the largest companies in the country, run by one of its most powerful individuals.

Audit Report in Form 10B or 10BB?



CA. Amar Jain

Vide Notification No. 7/2023 (dated 21st February 2023) the Central Board of Direct Taxes (CBDT) has notified new audit reports in Form 10B and Form 10BB to be furnished by charitable trusts, religious trusts and other institutions. It's important to know which of the two is applicable to your organisation.

Prior to this Notification, Rule 16CC specified Form 10BB for the organisations registered under section 10(23C) while Rule 17B specified Form 10B for the organisations registered under section 12AB. In other words, two separate types of forms were specified for two different types of organisations. This has now been completely changed.



Common Form depending on certain criteria

Rule 16CC and Rule 17B of the Income-Tax Rules, 1962 have been substituted with effect from 1st April 2023 vide Income-tax amendment (3rd Amendment) Rules, 2023 and as per the amended Rules, common forms have been prescribed for organisations registered under section 12AB and the organisations registered under section 10(23C) subject to fulfillment of certain criteria.

While earlier Form 10B was for organisations registered under section 12AB, and form 10BB was for organisations approved under section 10(23C), from Financial Year 2023-24 Form 10B shall be applicable for both, organisations registered under section 12AB and to organisations registered under section 10(23C) depending on certain factors.

In like manner Form 10BB would be applicable for both, organisations registered under section 12AB and organisations registered under section 10(23C) depending on certain factors.

When Form 10B is applicable?

Audit Report in Form 10B is required if any one or more circumstance exists:

- i. The total income of the trust/institution [whether registered under 12AB or 10(23C)] exceeds Rupees Five crore without giving the effect of Section 11, 12 & 10(23C);
- ii. The organisation receives any foreign contribution (even if the income is below Rupees Five crore);
- iii. The income of the trust or institution is applied outside India (even if the income is below Rupees Five crore and the organisation has not received any foreign contribution).

When Form 10BB is applicable?

Trusts or institutions registered under Section 12AB or under Section 10(23C) not falling under any of the above mentioned criteria must file audit report in Form 10BB.

Thus Form 10BB is required if all of the following criteria are fulfilled:

- i. The total income of the trust or institution [whether registered under 12AB or 10(23C)] without giving effect to the provisions of sections 11 and 12 or Section 10(23C) (iv), (v), (vi), (via) of the Act, is up to Rupees five Crore;
- ii. The trust or institution has not received any foreign contribution during the previous year;
- iii. The trust or institution has not applied any part of its income outside India during the previous year.



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ON INDIRECT TAXES**



Seminar on How to Face GST Notices by CA Anchal Kapoor, Amritsar & Commonly Found Non-Compliance in Schedule III by CA Alok Garg, Delhi

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