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K C Mehta & Co LLP
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kcm Insight

February 2024

Dear Reader,

We are happy to present ***kcm**Insight*, comprising of important updates in the legislative changes in direct tax law, corporate & other regulatory laws, as well as recent important decisions on direct taxes.

We hope that we are able to provide you an insight on various updates and that you will find the same informative and useful.

Coverage

Detailed Analysis

Abbreviations

For detailed understanding or more information, send your queries to kcminsight@kcmehta.com

Corporate Tax

Important Rulings

Section 28(ii)(e) applies in case of termination of contract related to 'Business' and not 'Profession.'

Deemed dividend u/s. 2(22)(e) of ITA is taxable in hands of shareholders and not in hands of concern

Deduction of TDS is not determinative factor for granting exemption u/s 11

Loss on capital reduction is allowable as capital loss even in absence of consideration

Important Updates

Remission and Extinguishment of Tax Demand under ITA, Wealth-Tax Act, 1957 Or Gift-Tax Act, 1958

International Tax

Important Rulings

Indian Rulings

Salary not taxable in India if services rendered outside India

No PE upon change in modus operandi of providing access to offshore Computerized Reservation System

Interest on Income tax refund not an income effectively connected with PE

Employee holding valid TRC eligible for treaty benefits on salary earned outside India

Non-discrimination clause applicable with respect to disallowance of expenses as per section 40(a)(i)

Income from offshore supply is not taxable in India, heavily relies on factual documents

International Tax

Important Rulings

Foreign Rulings

Income from container detention charges, container service charges and termination handling charges fall within "profit from operation of ships" by virtue of Article 8 of DTAAs

Important Updates

Foreign Updates

OECD's final guidance on Pillar One Amount B on baseline distribution

Chilean government proposes amendments to the GAAR

Cyprus tax authorities issue revised thresholds for TP documentation

Indonesia issues new transfer pricing regulation

UK releases new operational guidance on TP and role of risk in accurate delineation of actual transactions

Malaysia releases guidance on investment tax allowance for manufacturing industry

Corporate Laws

RBI Notifications

- Amendment to Master Direction on Prepaid Payment Instruments
- Guidelines on import of gold by Tariff Rate Quota (TRQ) holders under the India-UAE CEPA as notified by–The International Financial Services Centres Authority (IFSCA)
- Interest Equalization Scheme (IES) on Pre and Post Shipment Rupee Export Credit

Corporate Laws

SEBI Notifications

- Extension of timeline for verification of market rumours by listed entities
- Extension of timelines for effective date of implementation of the proviso to regulation 30(11) of the LODR Regulations:
- Guidelines for returning of draft offer document and its resubmission
- Revised Pricing Methodology for Institutional Placements of Privately Placed Infrastructure Investment Trust (InvIT)

MCA Notifications

- Relaxation of additional fees and extension of last date of filing Form No. LLP BEN-2 and LLP Form No. 4D
- Processing of application, e-Forms or documents
- Deployment and usage of Change Request Form (CRF) on MCA-21

Important Rulings

Section 28(ii)(e) applies in case of termination of contract related to 'Business' and not 'Profession.'

Ms. Padma Rao vs. CIT, ITA No. 2759/Del/2023, Delhi ITAT

The Taxpayer is a freelance journalist. During the year under consideration, the Taxpayer received compensation of Rs. 3 crores from a German Publisher on account of non-renewal of contract. The Taxpayer considered the said compensation receipt as capital receipt and did not offer the same to tax in the return of income filed.

The AO was of the view that since the receipt is on account of termination or modification of contract, the same is taxable u/s. 28(ii)(e) of the ITA and also u/s. 56(2)(xi) of the ITA. Based on the same, AO added the said compensation to the total income of the Taxpayer.

Aggrieved by the AO's order, the Taxpayer preferred an appeal before CIT(A). CIT(A) upheld the order of AO.

ITAT observed that the provisions of section 28(ii)(e) of ITA is applicable when any compensation received by any person on termination or modification of terms and conditions of any contract relating to its "business". Hence, the question to be addressed is whether reference to 'business' includes 'profession'. ITAT noted that wherever the Legislature thought of referring to both 'Business and Profession', it has used both the words in enactment which means that wherever the word only business is used, it does not include "profession". ITAT placed reliance on the decision of Hon'ble SC in the case of G. K. Choksi and Co. reported vide 295 ITR 376 wherein it was held that business and profession are different and separate, and they cannot be used interchangeably. Further, ITAT noted that the compensation received by the Taxpayer was on account of non-renewal of contract and not on termination of the contract. Nonrenewal of contract does not mean termination. Considering the said facts, ITAT held that the provisions of section 28(ii)(e) are not applicable to the case of the Taxpayer.

With regard to the applicability of provisions of section 56(2)(xi), ITAT held that section 56(2)(xi) is applicable in case of termination of employment. Since the Taxpayer is a freelancer and further compensation is received on account of nonrenewal of contract and not on termination of contract, provisions of section 56(2)(xi) of the ITA are not applicable to the facts of this case.

In view of the above, ITAT directed the AO to delete the addition made.

Deemed dividend u/s. 2(22)(e) of ITA is taxable in hands of shareholders and not in hands of concern

DCIT vs. M/s MAC Quality Builders Pvt. Ltd., ITA No.644/Chny/2023, Chennai ITAT

The Taxpayer was engaged in a business of real estate. Search was carried out in one of the group companies namely, M/s IG3 Infra Limited of the Taxpayer. Based on the material seized during the search proceedings, AO concluded that the amounts paid to the Taxpayer by M/s. IG3 Infra Limited during the relevant year represent loans advanced by the said company to the Taxpayer. Further AO noted that there were changes in the shareholding pattern of Taxpayer company prior to transfer of funds from M/s IG3 Infra Limited in order to avoid provisions of section 2(22)(e) of the ITA. AO

Important Rulings

observed that provisions of deemed dividend are applicable even when shareholder in a company is a direct or indirect shareholder and the ultimate controlling ownership interest in the Taxpayer and in M/s IG3 Infra Limited lies with the same family. Accordingly, addition was made in the assessment proceedings.

CIT(A) allowed Taxpayer's appeal on the ground that deemed dividend u/s 2(22)(e) is required to be taxed in the hands of the common shareholder in a case where a closely held company advances a loan to a company in which such common shareholder has substantial interest and the said deemed dividend is not liable to be taxed in the hands of the company which is in receipt of the loan. In view thereof, Revenue preferred an appeal before ITAT.

ITAT noted that AO did not controvert the fact that neither the Taxpayer nor its shareholders are the shareholders of M/s. IG3 Infra Limited and there were no common registered and beneficial shareholders between M/s IG3 Infra Limited and the Taxpayer.

ITAT noted that SC in the case of CIT v. Madhur Housing & Development Co 401 ITR 152 has affirmed the judgement of the Delhi HC in CIT v. Ankitech (P.) Ltd 340 ITR 14 and held that "shareholder being a person who is the beneficial owner of shares" referred to in the first limb of section 2(22)(e) refers to both a registered shareholder and beneficial shareholder. Delhi HC later in case of CIT v. National Travel Services 347 ITR 305 took a contrary view and appeal was preferred before SC against the same. SC referred the matter to Hon'ble Chief Justice of India to constitute a larger bench for reconsideration of the issue. However, no decision is rendered till date nor any stay is kept on applicability of judgement of the SC in case of CIT v. Ankitech (P.) Ltd. Later on, the said matter was withdrawn by Taxpayer in that case under Vivad se Vishwas Scheme. So, ITAT held that that decision of SC in case of CIT v. Madhur Housing & Development Co (supra) is binding as on date.

ITAT further held that the relevant date for determining the shareholding for the purpose of Section 2(22)(e) was the date of advancing of the loans. Since in the case of Taxpayer, neither the Taxpayer nor its shareholders were the shareholders of M/s IG3 Infra Limited as on the date of advancing of loans and further there were no common registered and beneficial shareholders between M/s IG3 Infra Limited and the Taxpayer on the date of advancing of loans. Thus, ITAT held that section 2(22)(e) was not applicable to the facts of the Taxpayer. Further, on basis of facts, ITAT held that even third limb of section 2(22)(e) of the ITA is also not applicable to the facts of the case.

Notwithstanding the above decision, ITAT also held that the deemed dividend under Section 2(22)(e) was required to be taxed only in the hands of the common registered shareholder in a case where a closely held company advanced loan to a company in which such common shareholder had substantial interest and the said deemed dividend was not taxable in the hands of the company which was in receipt of the loan.

In view of the above, ITAT upheld the ruling of CIT(A) and dismissed Revenue's appeals.

Deduction of TDS is not determinative factor for granting exemption u/s 11

Aroh Foundation vs CIT Exemption, W.P (C) 4365/2021, Delhi HC

The Taxpayer is a charitable institution registered u/s 12A r.w.s. 80G of the ITA. In order

Important Rulings

to fulfil charitable objectives, it receives various grants from the Government as well as Private Sector, which are claimed as exempt u/s 11 and 12 of the ITA.

During the year under consideration, exemption u/s 11 and 12 of the ITA was denied on the ground that donors have deducted tax at source u/s 194C and 194J of the ITA on the grants given to the Taxpayer. Taxpayer claimed that the donor's deduction of TDS under a particular head is not in the Taxpayer's control and in any case, for a similar donation/receipt, the benefits under Sections 11 and 12 of the ITA had been conferred. The Revenue contended that during the course of the work carried out by the Taxpayer, the Taxpayer acted as per instructions and guidance of the Grantor Companies and not of its own volition and further tax was also deducted by the donors, hence, the amount received cannot be treated as voluntary contribution of the Taxpayer. The Taxpayer submitted that it is implementing agency and works purely on behalf of the funder. It implements welfare schemes by making use of grant in aids given by the funder. It does not provide any service to the donor and there is no service provider-client relationship.

Dissatisfied by the above order, Taxpayer filed revision application u/s 264(1) of the ITA before the revisional authority, which was dismissed.

The aggrieved Taxpayer preferred writ petition before Delhi HC. HC held that if the deductor under misconception, deducts TDS under Sections 194C and 194J of the ITA, the same would not disentitle the Taxpayer to claim benefit under Sections 11 and 12 of the ITA unless the case of Taxpayer is specifically hit by the Proviso of Section 2(15) of the ITA, which is not the case here. The Proviso to Section 2(15) of the ITA would not get attracted merely on the basis of deduction of TDS by the donor under a particular head. HC relied on its decision in the case of Director of Income Tax v. Society for Development Alternatives [2012 SCC OnLine Del 225], where it was held that in case of charitable institutions, tied-up grants received from donors if meant to be utilized for charitable purposes and not for other purposes, then those grants are non-taxable and thus, the charitable institutions are eligible to avail the benefits under Sections 11 and 12 of the ITA.

HC noted that even in earlier assessment years and later assessment years pursuant to the year under consideration, tax was deducted by donors from the grants given to the Taxpayer and exemption u/s 11 and 12 of the ITA was accepted in assessment proceedings. In view thereof, HC, relied on the decision of Hon'ble SC in Radhasoami Satsang AIR 1992 SC 377 wherein it was held that the principle of consistent approach and res judicata could be applied even to taxation matters in the absence of material change in the facts from year to year.

Based on the above observations, HC allowed the writ petition filed by the Taxpayer.

Loss on capital reduction is allowable as capital loss even in absence of consideration

Tata Sons Ltd. vs. CIT, ITA no. 3468/Mum/2016, Mumbai ITAT

Taxpayer held equity shares in Tata Tele-services Company Ltd. (TTSL). Due to substantial losses in the business of said company, a 'Scheme of Arrangement and Re-structuring' of Capital reduction was entered with Shareholders and due to this scheme, the

Important Rulings

Taxpayer's holding was reduced to 50% and no consideration was payable to the shareholders.

In the return of income, Taxpayer had shown the long-term capital loss on reduction of shares.

AO accepted the claim of the Taxpayer in the assessment proceedings. However later on, PCIT passed order u/s 263 directing AO to revise the order on the ground that in absence of consideration, loss arising on account of reduction in capital cannot be subjected to provisions of section 45 r.w.s 48 of the ITA and accordingly, such loss cannot be allowed as capital loss.

ITAT held that as result of capital reduction, shares of the Taxpayer were reduced to half and consideration paid on acquisition of capital asset was also reduced to half, which resulted into loss for the Taxpayer. Hence, there is no dispute that there was loss on capital account by way of reduction of capital invested and therefore any loss on capital account is capital loss. The issue is whether it is notional loss since no consideration is received by the Taxpayer on account of capital reduction.

ITAT, after relying on various judicial precedence, held that if the right of Taxpayer in capital asset stands extinguished either upon amalgamation or by reduction of shares, it amounts to transfer of share within meaning of section 2(47) of the ITA and therefore, computation of capital gain has to be made. Furthermore, in case of CIT vs. Jaykrishna Harivallabhdas 231 ITR 108, Gujarat HC held that when company was voluntary dissolved and Taxpayer did not receive any consideration, Taxpayer received 'Nil' consideration for his holdings and the entire loss has to be written off.

ITAT further explained that a line of distinction has to be made between cases in which cost of acquisition is incapable of being ascertained and cases in which it is ascertained as zero. If the cost of capital asset cannot be identified or conceived due to the nature of such asset, its transfer does not lead to any profits or gain arising u/s 45(1) except where such capital asset is covered u/s 55(2). Where the cost of acquisition is nil, it would attract applicability of section 45. On the reduction of capital, Taxpayer did not receive anything and so this was case of nil consideration and not a case where consideration is incapable of ascertainment.

In view of the above, the appeal of Taxpayer is allowed. Readers may refer to KCM Flash on the said discussion dated January 25, 2024 for more details.

Important Updates

Remission and Extinguishment of Tax Demand under ITA, Wealth-Tax Act, 1957 Or Gift-Tax Act, 1958

Order F. No. 375/02/2023-IT-Budget, dated February 13, 2024

Consequent to the announcement made in the Budget Speech, remission and extinguishment of various claims, being tax demands under the ITA or Wealth-tax Act, 1957 or Gift-tax Act, 1958, which are outstanding as on January 31, 2024 to Revenue has been sanctioned, as below:

AY	Monetary Limit of Outstanding tax demand
Up to AY 2010-11	Each demand entry of Rs. 25,000
AY 2011-12 to AY 2015-16	Each demand entry of Rs. 10,000

With regard to the above, it is clarified that:

- The remission and extinguishment of the above outstanding tax demand shall be subject to the maximum ceiling of Rs. 1,00,000/- for any specific Taxpayer, including for principal component of tax along with interest, penalty, fee, cess or surcharge.
- The above remission and extinguishment is not applicable on the demands raised against the tax deductors or tax collectors under TDS or TCS provisions of the ITA.
- It is also clarified that there shall not be requirement of calculation of interest on account of delay in payment of demand under section 220(2) of the ITA.
- If any tax liability arises against the Taxpayer, as a result of application of section 2(24)(xviii) of the ITA, the same shall also be remitted and extinguished.

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For detailed understanding or more information, send your queries to ***kcminsight@kcmehta.com***

Important Rulings

Indian Rulings

Salary not taxable in India if services rendered outside India

Devi Dayal [ITA Nos. 835 & 836/Del/2023 – Order dated 18 January 2024 (Delhi ITAT)]

In this era of globalization, organizations have presence in multiple countries by way of subsidiary, branch, or liaison office, and it is a general practice to second the employees from one country to another country. The cross-border movement of such employees impact the residential status and thereby taxability of their salary in the home jurisdiction and at the place of employment.

Similar question was raised before the Hon'ble bench of Delhi ITAT wherein the taxpayer was a non-resident Indian working for an Indian Company deputed for a project outside India. AO considered salary and allowances paid by the Indian Company to the taxpayer outside India as taxable in India on account of non-furnishing tax residency certificate. The Hon'ble ITAT analyzed taxability of the salary in view of section 5 (Scope of Total income), Section 9 (Income deemed to accrue/arise in India) and section 15 (Taxability of Salary Income) of the Act. Section 5 provides that any income which is received or deemed to be received or accrued or deemed to be accrued in India is taxable in India in case of a non-resident. Further, section 9 provides that salary income is deemed to accrue/arise in India if the services have been rendered in India. The ITAT accordingly concluded that salary and allowances were not taxable in India as the services were rendered outside India.

This decision aligns with various Indian court rulings as well as international practices, such as Article 15 of the OECD Model, which distributes the right to tax employment income between the place of employment and the individual's state of residence. According to this model, salaries are typically taxable only in the individual's state of residence unless the employment is exercised in another state. This principle is further explained in the Commentary on Article 15, stating that employment is exercised in the place where the employee is physically present when performing the activities for which the employment income is paid.

No PE upon change in modus operandi of providing access to offshore Computerized Reservation System

Sabre GLBL Inc. [ITA No. 216/Del/2016, 559 & 4838/Del/2017, 7724/Del/2018 & 6040/Del/2019 – Order dated 09 February 2024 (Delhi ITAT)]

Taxpayer is a company incorporated in the USA and engaged in facilitating booking of airline tickets through its computer reservation system ('CRS'). Taxpayer had entered into a participating carrier distribution and service agreement with various airlines for facilitating booking of tickets and providing related services through its CRS, for which, it received booking fees.

Prior to 2005, taxpayer had entered into marketing and distribution agreement ('SITAR') with an Indian entity, NMD. NMD used to enter into subscriber agreements with various Indian travel agents to provide them with access to the CRS including access equipment, communication link and support services. Under this old business model, NMD used to install computers, printers etc. at travel agent's premises in India. The title of ownership of such

Important Rulings

equipment remained with NMD and cost of such equipment was partially borne and reimbursed by the taxpayer to NMD. Following the decision of Delhi ITAT and upheld by Delhi HC in the case of Galileo International Inc, the Delhi ITAT in taxpayer's case for earlier years had held that the computers installed at travel agent's premises were part of the CRS and since the taxpayer exercised control over such equipment, it constituted fixed place of business in India and that NMD was a dependent agent of the taxpayer in India. The above decision in taxpayer's case was also upheld by Delhi HC and 15% of profits were considered as business profits attributable to PE in India.

Business model of the taxpayer changed from 2005. As against earlier model, post 2005, taxpayer had entered into subscriber agreements with global travel agents ('Global subscribers') who had presence / affiliates in multiple countries including India and allowed them access to the CRS. The taxpayer earned booking fees from airlines when travel reservations were made through CRS and paid incentives to global subscribers (and not their Indian counterparts) for bookings done through CRS. The taxpayer had no office or employees in India. Under new business model, taxpayer was not responsible for providing, installing, or financing of any computer, printers, communication lines or equipment etc. to Indian subsidiary of Global Travel Agents in India. The CRS mainframe was located in the USA and the agents were allowed to access the CRS through nodes and networks independently sourced and owned by the travel agents.

The Hon'ble bench of Delhi ITAT disagreed with the view of DRP that since same gateway and interface was used before and after 2005, there was no material change in business model. The past decisions in the case of Galileo and in taxpayer's own case were distinguished considering that taxpayer did not provide with access codes, equipment, communication links and did not have any control over the equipment in India and that the travel agents were independent, non-exclusive agents functioning in the ordinary course of their business and on their own account.

The taxpayer relied on the SC decision in case of Formula One World Championship Ltd. and contended that the taxpayer was 'trading with India' and not 'trading in India' and did not have any fixed place of business in India at its disposal and also relied on the decision of Delhi ITAT in the case of Western Union Financial Services Inc wherein it was held that when a software installed in India grants access to taxpayer's mainframe located outside India, such use / access of software will not constitute PE of the taxpayer in India.

The Hon'ble Delhi ITAT held that booking fees received by taxpayer on provision of access to its CRS was not taxable in India in absence of PE in India pursuant to change in taxpayer's business model.

This is a classic instance of how different business models and difference in roles and responsibilities of parties and ownership & control of assets can impact constitution of fixed place and agency PE and that whether foreign entity has a PE in India during a tax year should be examined every year.

Important Rulings

Interest on Income tax refund not an income effectively connected with PE

Corning SAS India Branch Office [ITA No.528/Del/2022 – Order dated 06 February 2024 (Delhi ITAT)]

Taxpayer is a branch office of a French company in India. Branch did not carry out any business activity during the year under consideration. Taxpayer received refund of excess income tax paid on its business profits for business carried through the branch in past years, along with interest thereon.

Interest on income tax refund was offered to tax at 10% as per Article 12 of India – France DTAA. Tax authorities considered interest on income tax refund as business income taxable under Article 7 of the DTAA and levied tax at the rate of 40%. DRP was of the view that merely because business operations of the branch office were closed, income would not change its character and that interest on income tax refund was to be treated as business income.

The Hon'ble bench of Delhi ITAT observed that as per Article 12(5) of the DTAA, interest income would be chargeable to tax as business income under Article 7 of the DTAA only if (i) taxpayer carried on business in India through a PE and (ii) the debt-claim out of which the interest is paid is effectively connected with such PE. Relying on the special bench decision in the case of Clough Engineering Ltd., the ITAT held that responsibility to pay income-tax is that of the foreign company as foreign company (and not its branch or PE) is the person responsible to pay taxes on all incomes arising to it from Indian sources, including but not limited to income arising through business carried out by foreign company's PE. ITAT thus held that income tax and refund thereon is a debt claim vis-à-vis the foreign company and not a debt claim effectively connected with foreign company's PE in India even if tax got deducted from business receipts of the PE by operation of law. Accordingly, it was held that interest on income tax refund cannot be considered as effectively connected with PE and should be taxed in accordance with provisions of Article 12(2) of the India-France DTAA and not as business profits under Article 7 of the India-France DTAA.

Employee holding valid TRC eligible for treaty benefits on salary earned outside India

Debarghya Chattopadhaya [ITA No.24/Kol/2023 – Order dated 09 February 2024 (Kolkata ITAT)]

Taxpayer was a non-resident during the subject period. The taxpayer earned salary income for the work during stay at UK and had claimed benefit under India-UK DTAA for AY 2014-15 and did not offer salary income and interest income to tax in India. The taxpayer's total income was subject to tax in the country of his residence (i.e., UK). The AO denied the claim of DTAA benefit under section 90 of the Act since the taxpayer failed to furnish tax residency certificate ('TRC'). The AO made addition of salary and interest income which was upheld by the CIT(A).

The ITAT observed that the taxpayer furnished the copy of TRC from UK, before the CIT(A) and a remand report was called for the same from the AO. In the remand report, the AO accepted the copy of TRC declaring that the taxpayer was a resident of the UK during the period from 06 April 2013 to 05 April 2014 and stated that the claim of India-UK DTAA benefit was valid and

Important Rulings

accordingly the salary income should be exempt. In view of the same, Hon'ble bench of Kolkata ITAT deleted the addition of salary income and allowed taxpayer's claim.

This case underscores the importance of providing necessary documentation, such as TRCs at the time of assessment proceedings to substantiate claims for DTAA benefits to avoid double taxation. It may be noted that whether salary income earned overseas by a non-resident is taxable under the Act or not has not been deliberated in this case.

Non-discrimination clause applicable with respect to disallowance of expenses as per section 40(a)(i)

Mitsubishi Corporation India Pvt. Ltd. [ITA No. 180/2014 - Order dated 16 February 2024 (Delhi HC)]

Taxpayer had entered into several international transactions with its group Companies – four in Japan and one each in US, Thailand & Singapore for purchase of goods as well as intra-group services. The AO had disallowed payments made to group companies under section 40(a)(i) of the ITA for non-deduction of tax under section 195. The AO also made TP adjustments for intra-group service transactions.

The taxpayer contended that with respect to the disallowance of the purchase transaction with entities in Japan and US, AO violated the non-discrimination provision contained in Article 24(3)/ 26(3) of respective DTAAs executed by India with Japan and USA. For entities in Thailand and Singapore, the taxpayer contended that in absence of PE in India no income was chargeable to tax in India and hence there was no obligation to deduct tax on the payments made to respective entities under section 195 of the ITA. The Revenue differentiated the present case from Herbal Life International relied by the taxpayer, citing changes in section 40(a) through Finance Act of 2004. Further, the Revenue was of the view that the provisions of Articles 24(3)/26(3) of India-Japan DTAA and India-US DTAA had no application on account of exception of Article 9 (Associated Enterprise).

The Hon'ble Delhi HC noted that 2004 amendments to section 40(a)(ia) restricted disallowance in case of residents to specific expenses, while the 2014 amendment covered all the expenses in the ambit of disallowance. The provisions of section 40(a)(ia) post 2004 amendment did not cover disallowance for purchase payments made to residents, thus making the non-discrimination clauses still applicable. The Hon'ble Delhi HC ruled that since purchase and service transactions were independent in the nature, Article 9 did not apply to the purchase transactions. Accordingly, HC was of the opinion that non-discrimination clause as mentioned in Article 24(3)/26(3) of India-Japan DTAA and India-US DTAA would apply with regards to the payments for purchase of goods from the group entities in Japan and US, and hence, such payments would be tax deductible in the hands of the taxpayer, even if taxes were not withheld on the same under section 195. Referring to the SC ruling in the GE India case, the Hon'ble HC held that in the absence of a PE of Thailand and Singapore entities in India, the payments made to them were not chargeable to tax in India and hence taxpayer was not obliged to deduct tax.

Non-discrimination clauses create ongoing legal disputes for taxpayers. In the present case, the HC emphasized that despite amendments to

Important Rulings

section 40(a)(ia) in 2004, payments for purchase transactions were not captured leading to discrimination. HC reiterated that section 195 shall be applicable only in cases where income is chargeable to tax in India. This judgement has been discussed in detail in KCM Flash on Non-Discrimination vs. Section 40(a)(i) Disallowance dated 19 February 2024.

Income from offshore supply is not taxable in India, heavily relies on factual documents

Air Liquide Global EC Germany GMBH [ITA No.2401/Del/2023 – Order dated 07 February 2024 (Delhi ITAT)]

Taxpayer is engaged in the business of building air gas separator and low carbon hydrogen production units. During the relevant year, taxpayer earned revenue from sale of plants and equipment as well as provision of services to its customer in India. Receipts towards provision of services were offered to tax in India as FTS and receipt towards supply of plant and equipment were claimed to be not taxable in India as the sale transaction was completed outside India on FOB Basis.

AO contended that 1) provision of services and supply of equipment are composite contracts and have been artificially split into separate contracts 2) Provisions of section 44BB are applicable to the taxpayer 3) Taxpayer had a PE in India.

On appeal, The Hon'ble bench of Delhi ITAT held that receipts from supply of plant & equipment are not taxable in India by observing that the taxpayer had entered into five independent agreements with Indian customer, wherein, scope of work had been specifically identified and demarcated. Further, in relation to supply of equipment, situs of sale of equipment was outside India as the same was evident from the purchase order as well as invoice for sale. Relying on landmark decision of Hon'ble SC in case of Ishikawajima - Harima Heavy Industries Ltd [2007] 158 Taxman 259 (SC), the sale transaction was held not to be taxable in India.

As regards to Revenue's contention about applicability of section 44BB to the above transaction, Hon'ble bench of Delhi ITAT observed that the said section applies only where non-resident is engaged in business of providing services or facilities in connection with prospecting for or extraction or production of mineral oils or has supplied plants and machinery on hire, which is used for such purpose. The facts in present case were different as taxpayer had undertaken offshore supply of plant & equipment and hence section 44BB of the Act did not apply.

The Indian courts have consistently held that offshore supply of machinery is not taxable in India, by applying the ratio laid down by Hon'ble SC in case of Ishikawajima – Harima (supra). To avoid potential tax litigation in India, it is imperative to have a robust documentation and separate contract clearly delineating the scope of work between group entities providing support services and entity undertaking offshore sales transaction.

Important Rulings

Foreign Ruling

Income from container detention charges, container service charges and termination handling charges fall within "profit from operation of ships" by virtue of Article 8 of DTAAs

A.P. Moller Maersk vs. Commissioner of Inland Revenue and others (High Court of Sindh, Pakistan)

The taxpayers (non-resident companies incorporated under the domestic laws of Denmark and Belgium, respectively) were engaged in cargo shipping activities in international traffic. Taxpayers filed return of income claiming benefits of Article 8 of Pakistan-Denmark DTAA and Pakistan-Belgium DTAA in respect of income from freight charges, container detention charges ('CDC'), container service charges ('CSC') and termination handling charges ('THC') and treated those receipts as profit from operations of ships in international traffic and hence not taxable in Pakistan.

Appellate Tribunal Inland Revenue supported the order passed by lower authorities denying the benefit of DTAA in respect of income from CDC, CSC, THC by treating such ancillary receipts as out of the purview of profit from operation of ships as provided in the DTAAs entered with Denmark and Belgium and held them to be taxable under the domestic tax law of Pakistan.

Hon'ble HC of Sindh acknowledged the fact that there is no express mention in the DTAA about the aforesaid stream of revenues. However, the HC extensively relied upon the OECD commentary and treatise on DTAAs that clarified that the benefits conferred by Article 8 encompassed the core activity of transportation of cargo by ships and also extended to other activities so long as such activities are ancillary to international shipping operations and accordingly, the said receipts are also eligible receipts covered by Article 8 of the respective DTAAs.

Hon'ble HC also rejected alternate contention of department that taxation of CSC / CDC etc. would be taxed as per the domestic tax law of Pakistan (in terms of specific agreement with Pakistan Ship Agent Association) by holding that the said agreement is applicable only in cases not covered by DTAA. The Supreme Court of Pakistan upheld the decision of the Hon'ble HC and observed that activities are to be considered ancillary to the operation of ships in international traffic if (i) the enterprise does not need to undertake them for the purposes of its own operation of ships in international traffic but which otherwise (ii) make a minor contribution relative to such operation and (iii) are so closely related to such operation that they should not be regarded as a separate business or source of income.

In Indian Context also, the courts (for e.g., in case of ITO v Freight Systems (India) Pvt. Ltd. (2006) 103 TTJ 103 (Del), Safmarine Container Lines NV (2008) 314 ITR (AT) 15 (Mum), have held that all ancillary services which are inextricably linked with the main stream of revenue (which is freight income from operation of ships) would undoubtedly be covered within the ambit of "profit from operation of ships" and hence covered by Article 8 of the relevant DTAA.

Important Updates

Foreign Updates

OECD's final guidance on Pillar One Amount B on baseline distribution

In an effort to make the arm's-length principle's application to baseline marketing and distribution operations simpler and more efficient, the OECD published final guidelines on Pillar One Amount B on baseline distribution on 19th February 2024.

With a focus on the requirements of low-capacity nations, Amount B offers fixed returns for in-scope, in-country baseline marketing and distribution activities. Unlike Amount A of Pillar One and the global minimum tax regulations under Pillar two, Multinational Enterprise Groups are not required to fulfil any monetary limits, such as minimum global revenue, in order to fall under the purview of Amount B. The streamlined approach will be incorporated as an Annex to Chapter IV of the OECD TPG for MNEs and Tax Administrations 2022.

Jurisdictions can choose to adopt this approach, with one option allowing tested resident parties to elect to apply this approach and the second by providing the use of approach in a prescriptive manner. The report describes activities that may exclude distributors from this approach. Additionally, the report addresses documentation, transitional issues, and tax-certainty considerations.

Chilean government proposes amendments to the GAAR

Chile's President submitted a bill to the Chamber of Deputies proposing amendments to the domestic GAAR.

The Bill seeks to amend the current definition of both 'abuse' and 'simulation'. To highlight the key features of 'abuse' is obtaining tax benefits in an improper way that is when a transaction's legal structure does not align with the intended economic outcome.

Furthermore, the Bill establishes the GAAR Advisory Panel and Anti Avoidance Committee which will eliminate the existing judicial process and allow application of rule through a purely administrative process that will result into a broader application of the rule.

Cyprus tax authorities issue revised thresholds for TP documentation

The tax department of Cyprus issued revised threshold limits for requirement of preparing Local File in respect of the intercompany transactions entered into by the taxpayer as contained in section 33 of the Income Tax Law applicable from tax year 2022 and onwards.

The said requirement of preparing the Local File applies to connected person who are either tax residents of Cyprus or have PEs on behalf of non-residents if the transactions with the connected person either exceed or should have exceed Euro 750K in aggregate per category of transaction per tax year.

As an outcome of the discussion with the interested parties including the Ministry of Finance, the thresholds were increased as below:

- For connected transactions falling under the category of 'Financing', the threshold is increased to Euro 5 million from the existing Euro 750k.
- For all other categories, the threshold is increased to Euro 1 million from the existing Euro 750k. (other categories include goods, services, royalties and other intangibles and others).

Important Updates

Indonesia issues new transfer pricing regulation

The Ministry of Finance ('MoF') of Indonesia issued Regulation No. 172 of 2023 on 29 December 2023. The regulation called PMK 172 focuses on implementation of the arm's length principle in transactions affected by Special Relationship. The regulation concerns the APAs, TP documentation and MAPs in Indonesia. Effective immediately from 29th December 2023, PMK 172 supersedes previous Indonesian MoF Regulations related to TP documentation, APAs, and MAPs.

UK releases new operational guidance on TP and role of risk in accurate delineation of actual transactions

His Majesty's Revenue & Customs ('HMRC') of UK released operational guidance (INTM485025) on 26 January 2024 addressing the role of risk in accurate delineation of actual transactions as a part of TP analysis. The guidance outlines HMRC's interpretation of the six-step process outlined in Chapter I of the OECD TP Guidelines and its application to TP analysis.

The guidelines provide for recognizing economically significant risks and their management and considers this as an important component in a comprehensive TP analysis. Taxpayers are expected to submit meticulous documentation evidencing coherence of TP policies with risk analysis conducted. Notably, the guidance stresses that evaluating contributions to the control of risks should extend beyond parties assuming contractual risks in the controlled transaction. It offers insights into HMRC's perspective on remunerating contributions to control of risk within multinational enterprises. It specifically considers instances where the profit split method might be the most appropriate for rewarding contributions to risk control.

Malaysia releases guidance on investment tax allowance for manufacturing industry

The Inland Revenue Board of Malaysia has issued Public Ruling ('PR') No. 1/2024, on Investment Tax Allowance for promoted product in the manufacturing sector, providing detailed instructions expanding the previously provided guidance in Public Ruling No. 4/2023.

The PR provides explanation regarding the investment tax allowance available for a company which participates or intends to participate in a business in manufacturing sector focusing on promoted products listed in Malaysia, reinvestment in specific industries, high technology companies, and small-scale enterprises. The allowance is granted as a tax deduction on qualifying expenditures incurred during the basis period for a given year of assessment to produce promoted products.

The amount of allowance claimed by a company is proportional to its capital expenditure, subject to specific conditions for each approved investment tax allowance category. The list of promoted products under the manufacturing sector has been published through the gazetting of several subsidiary legislatives.

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RBI Notifications

Amendment to Master Direction on Prepaid Payment Instruments

RBI/2023-24/126 vide Notification No. CO.DPSS.POLC.No.S1092/02-14-006/2023-2024 dated February 23, 2024

To bring additional services under the Prepaid Instruments (PPI) ambit, Reserve Bank of India has decided to permit authorized bank and non-bank PPI issuers to issue PPIs for making payments across various public transport systems.

The initiative is to provide convenience, speed, affordability and safety of digital modes of payment to multitude of commuters for whom public transport system is generally the only mode of commute.

Guidelines on import of gold by Tariff Rate Quota (TRQ) holders under the India-UAE CEPA as notified by–The International Financial Services Centres Authority (IFSCA)

RBI/2023-24/118 vide Circular No. A.P. (DIR Series) Circular No.14 dated January 31, 2024

In May 2022, RBI permitted AD Category I Banks to remit advance payment on behalf of Qualified Jewellers notified by International Financial Services Centres Authority (IFSCA) for eleven days for the import of gold through India International Bullion Exchange IFSC Ltd (IIBX).

Likewise, Directorate General of Foreign Trade ("DGFT") vide Notification No.44/2023 dated November 20, 2023 by DGFT permitted valid Tariff Rate Quota (TRQ) holders under the India-United Arab Emirates (UAE) Comprehensive Economic Partnership Agreement (CEPA) as notified by the IFSCA to import gold under specific ITC(HS) codes through IIBX against the Tariff Rate Quota (TRQ).

To align the two notifications issued by RBI and the DGFT respectively, RBI has now permitted AD Category-I banks to allow valid TRQ holders under the India-UAE CEPA to remit advance payment for eleven days for import of gold through IIBX against the TRQ.

Interest Equalization Scheme (IES) on Pre and Post Shipment Rupee Export Credit

RBI/2023-24/124 vide Notification No. DOR.STR.REC.78/04.02.001/2023-24 dated February 22, 2024

Government of India has extended the Interest Equalization Scheme for Pre and Post Shipment Rupee Export Credit ('Scheme') up to June 30, 2024. The rate of interest equalization shall be 2% for Manufacturers and Merchant Exporters exporting under specified 410 HS lines and 3% to the MSME manufacturers exporting under any HS line.

- The banks which have priced the loans covered under this scheme at an average interest rate of greater than Repo Rate + 4% (prior to subvention) would be debarred from participation in this scheme.
- The annual net subvention amount has been already capped at Rs 10 Cr per Importer-Exporter Code (IEC) in a given financial year, effective from disbursements undertaken from April 1, 2023.

SEBI Notifications

Extension of timeline for verification of market rumors by listed entities

SEBI/HO/CFD/CFD-PoD-2/P/CIR/2024/7 dated January 25, 2024

Proviso to Regulation 30(11) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("LODR Regulations") read with SEBI Circular no. SEBI/HO/CFD/CFD-PoD-1/P/CIR/2023/162 dated September 30, 2023, required top 100 listed entities by market capitalization and thereafter the top 250 listed entities by market capitalization to mandatorily verify and confirm, deny or clarify market rumors from the date as may be specified by SEBI.

Extension of timelines for effective date of implementation of the proviso to regulation 30(11) of the LODR Regulations:

Type of Entity	Existing Timelines	Extended Timelines
Top 100 listed entities by market capitalization	February 01, 2024	June 01, 2024
Top 250 listed entities by market capitalization	August 01, 2024	December 01, 2024

Guidelines for returning of draft offer document and its resubmission

SEBI/HO/CFD/PoD-1/P/CIR/2024/009 dated February 06, 2024

SEBI vide this circular issued 'Guidelines for returning of draft offer document and its resubmission' to ensure completeness of the offer document for investors and provide greater clarity & consistency in the disclosures and for timely processing. The reason for issuing guidelines by SEBI is that it observed that offer documents filed by the issuers and lead manager(s) are at times found lacking in compliance to the instructions provided under Schedule VI of Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 ("ICDR Regulations").

The draft offer documents thus shall be scrutinized based on the broad guidelines and those found lacking with respect to the instructions given under Schedule VI of ICDR Regulations will be returned to the issuer.

Resubmission shall be broadly on the following guidelines:

- Draft offer document is drafted in simple language with visual representation of data.
- Information in the draft offer document is presented in a clear, concise, and intelligible manner.
- Draft offer document avoids complex or vague presentation / explanations / repetition of disclosures / inconsistency in facts or figures / data.
- Risk factors are stated in simple, clear and unambiguous language to bring out clearly the risks to the investor.
- Information in the draft offer document is clearly understandable without the excessive use or references to the general rules and regulations.
- Seek / Undertake remedial measures with the relevant regulator prior to resubmission of the document, where such an agency has expressed material concern with regard to issue / draft offer document.

SEBI Notifications

- SEBI will also return the draft offer document / draft letter of offer if there are any pending litigation matters in any court or tribunal having an impact on the issue with regard to eligibility criteria provided under ICDR Regulations.

In case the draft offer document is returned in terms of these guidelines, there shall be no requirement for payment of any fees on account of resubmission of draft offer document.

Furthermore, the Issuer within two days of resubmission of draft offer document with the Board, will have to make a public announcement as prescribed under ICDR Regulations, including a disclosure that it is a resubmitted document.

Applicability: Immediate effect

Revised Pricing Methodology for Institutional Placements of Privately Placed Infrastructure Investment Trust (InvIT)

SEBI/HO/DDHS/DDHS-PoD/P/CIR/2024/10 dated February 08, 2024

SEBI vide this circular has issued pricing guidelines for **institutional placements by privately placed infrastructure investment trusts (InvITs)** to promote further ease of doing business.

The Circular for pricing of **institutional placement of privately placed InvITs** is an extension to the existing pricing guidelines prescribed for institutional placement of Public InvIT which vide paragraph 7.9 of the SEBI Master Circular for InvITs dated July 06, 2023 states that:

"*such institutional placement shall be made at a price not less than the average of the weekly high and low of the closing prices of the units of the same class quoted on the stock exchange during the two weeks preceding the relevant date.*"

The new para inserted vide Para 7.9.2 to SEBI Master Circular for InvITs states that for **institutional placements by privately placed infrastructure investment trusts (InvITs), the pricing guidelines** shall be as follows:

"*The institutional placement by privately placed InvIT shall be made at a price not less than the NAV per unit, based on the full valuation of all existing InvIT assets conducted in terms of InvIT Regulations.*"

Applicability: Immediate effect

MCA Notifications

Relaxation of additional fees and extension of last date of filing Form No. LLP BEN-2 and LLP Form No. 4D

General Circular No. 01/2024 dated February 07, 2024

Ministry of Corporate Affairs (MCA) vide its notifications dated October 27, 2023 and November 9, 2023, has notified Limited Liability Partnership (Third Amendment) Rules 2023 and Limited Liability Partnership (Significant Beneficial Owners) Rules 2023, respectively. In accordance with said notifications, the Limited Liability Partnerships (LLPs) are mandated to file LLP Form No. 4D in respect of declaration of beneficial interest in contribution received by LLP and Form No. LLP BEN-2 in respect of declaration under Section 90 of the Companies Act, 2013.

Considering the issues coming on the back of transition from version 2 to version 3 on MCA and to ensure greater compliance by the reporting LLPs MCA has extended the due date for filing LLP BEN-2 and LLP Form No. 4D. Form No. LLP BEN-2 and LLP Form No. 4D will be available on MCA portal w.e.f. April 15, 2024.

Effective Date: May 15, 2024 – for filing LLP BEN-2 and LLP Form No. 4D without payment of any additional fees.

Processing of application, e-Forms or documents

Notification No. G.S.R 107(E) dated February 14, 2024

Under the powers granted to the Central Government under various sections and sub-sections of the Companies Act, 2013 (the Act), the Ministry of Corporate Affairs has amended the Companies (Registration Offices and Fees) Rules, 2014 with notification of the Companies (Registration Offices and Fees) Amendment Rules, 2024.

The Registrar of Central Processing Center shall exercise its jurisdiction all over India in respect of examination of following e-Forms:

Sr. No.	Type of e-Form	Description
1	Form MGT-14	Filing of Resolutions and agreements to the Registrar under Section 117 of the Act.
2	Form SH-7	Notice to Registrar of any alteration of share capital under Section 64 of the Act.
3	Form INC-24	Application for approval of Central Government for change of name under Section 13 of the Act.
4	Form INC-6	One Person Company- Application for Conversion under Section 18 of the Act.
5	Form INC-27	Conversion of public company into private company or private company into public company under Sections 14 and 18 of the Act.

MCA Updates

Sr. No.	Type of e-Form	Description
6	Form INC-20	Intimation to Registrar of revocation/surrender of license issued under Section 8 of the Act.
7	Form DPT-3	Return of deposits under Sections 73 and 76 of the Act.
8	Form MSC-1	Application to ROC for obtaining the status of dormant company under sub-section (1) of Section 455 of the Act.
9	Form MSC-4	Application for seeking status of active company under sub-section (5) of Section 455 of the Act.
10	Form SH-8	Letter of Offer under Section 68 of the Act.
11	Form SH-9	Declaration of Solvency under sub-section (6) Section 68 of the Act.
12	Form SH-11	Return in respect of buy-back of Securities under sub-section 10 of section 68 of the Act.

Applicability: February 16, 2024.

Deployment and usage of Change Request Form (CRF) on MCA-21

General Circular No. 02/2024 dated February 19, 2024

Ministry of Corporate Affairs (MCA) has deployed a web-based form namely Change Request Form (CRF) on the V3 portal.

The web-based CRF is for exceptional circumstances where the request to Registrar of Companies (RoCs) cannot be catered by the existing forms or functionality, either at the Front Office level (users of MCA-21 services) or at Back Office level (RoCs).

The CRF is primarily for use in cases such as Master Data correction or to comply with certain directions of Courts / Tribunals, which ordinarily cannot be complied with through existing functionality of forms or services on MCA-21 system.

CRF is **not a substitute to any reporting,** application, and registry requirements as per Companies Act, 2013 and LLP Act, 2008.

The timelines given for processing the Form by RoCs is 3 days of filing, after which it has to be forwarded to Joint Director (e-governance cell), who shall process and conclude the matter within a maximum time of 7 days. Effectively a 10-day time period is given to the MCA to process requests filed through CRF.

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Back

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Abbreviations

Back

Abbreviation	Meaning
AA	Advance Authorisation
AAR	Authority of Advance Ruling
AAAR	Appellate Authority of Advance Ruling
AAC	Annual Activity Certificate
AD Bank	Authorized Dealer Bank
AE	Associated Enterprise
AGM	Annual General Meeting
AIR	Annual Information Return
ALP	Arm's length price
AMT	Alternate Minimum Tax
AO	Assessing Officer
AOP	Association of Person
APA	Advance Pricing Arrangements
AS	Accounting Standards
ASBA	Applications Supported by Blocked Amount
AY	Assessment Year
BAR	Board of Advance Ruling
BEAT	Base Erosion and Anti-Avoidance Tax
CBDT	Central Board of Direct Tax
CBIC	Central Board of Indirect Taxes and Customs
CCA	Cost Contribution Arrangements
CCR	Cenvat Credit Rules, 2004

Abbreviation	Meaning
CESTAT	Central Excise and Service Tax Appellate Tribunal
CGST Act	Central Goods and Service Tax Act, 2017
CIT(A)	Commissioner of Income Tax (Appeal)
COO	Certificate of Origin
Companies Act	The Companies Act, 2013
CPSE	Central Public Sector Enterprise
CSR	Corporate Social Responsibility
CTA	Covered Tax Agreement
CUP	Comparable Uncontrolled Price Method
Customs Act	The Customs Act, 1962
DFIA	Duty Free Import Authorization
DFTP	Duty Free Tariff Preference
DGFT	Directorate General of Foreign Trade
DPIIT	Department of Promotion of Investment and Internal Trade
DRI	Directorate of Revenue Intelligence
DTAA	Double Tax Avoidance Agreement
ECB	External Commercial Borrowing
ECL	Electronic Credit Ledger
EO	Export Obligation
EODC	Export Obligation Discharge Certificate

Abbreviation	Meaning
EPCG	Export Promotion Capital Goods
FEMA	Foreign Exchange Management Act, 1999
FII	Foreign Institutional Investor
FIFP	Foreign Investment Facilitation Portal
FIRMS	Foreign Investment Reporting and Management System
FLAIR	Foreign Liabilities and Assets Information Reporting
FPI	Foreign Portfolio Investor
FOCC	Foreign Owned and Controlled Company
FTC	Foreign Tax Credit
FTP	Foreign Trade Policy 2015-20
FTS	Fees for Technical Service
FY	Financial Year
GAAR	General Anti-Avoidance Rules
GDR	Global Depository Receipts
GMT	Global Minimum Tax
GILTI	Global Intangible Low-Taxed Income
GSTN	Goods and Services Tax Network
GVAT Act	Gujarat VAT Act, 2006
HSN	Harmonized System of Nomenclature
IBC	Insolvency and Bankruptcy Code, 2016

Abbreviations

Abbreviation	Meaning
ICDS	Income Computation and Disclosure Standards
ICDR	Issue of Capital and Disclosure Requirements
IEC	Import Export Code
IIR	Income Inclusion Rule
IMF	International Monetary Fund
IRP	Invoice Registration Portal
IRN	Invoice Reference Number
ITC	Input Tax Credit
ITR	Income Tax Return
IT Rules	Income Tax Rules, 1962
ITAT	Income Tax Appellate Tribunal
ITR	Income Tax Return
ITSC	Income Tax Settlement Commission
JV	Joint Venture
LEO	Let Export Order
LIBOR	London Inter Bank Offered Rate
LLP	Limited Liability Partnership
LOB	Limitation of Benefit
LODR	Listing Obligations and Disclosure Requirements
LTA	Leave Travel Allowance
LTC	Lower TDS Certificate

Abbreviation	Meaning
LTCG	Long term capital gain
MAT	Minimum Alternate Tax
MCA	Ministry of Corporate Affairs
MeitY	Ministry of Electronics and Information Technology
MSF	Marginal Standing Facility
MSME	Micro, Small and Medium Enterprises
NCB	No claim Bonus
OECD	The Organization for Economic Co-operation and Development
OM	Other Methods prescribed by CBDT
PAN	Permanent Account Number
PE	Permanent establishment
PPT	Principle Purpose Test
PSM	Profit Split Method
PY	Previous Year
QDMTT	Qualified Domestic Minimum Top-up Tax
RA	Regional Authority
RMS	Risk Management System
ROR	Resident Ordinary Resident
ROSCTL	Rebate of State & Central Taxes and Levies
RoDTEP	Remission of Duties and Taxes on Exported Products

Abbreviation	Meaning
RPM	Resale Price Method
SC	Supreme Court of India
SCN	Show Cause Notice
SDS	Step Down Subsidiary
SE	Secondary adjustments
SEBI	Securities Exchange Board of India
SEP	Significant economic presence
SEZ	Special Economic Zone
SFT	Specified Financial statement
SION	Standard Input Output Norms
SOP	Standard Operating Procedure
ST	Securitization Trust
STCG	Short term capital gain
SVLDRS	Sabka Vishwas (Legacy Dispute Resolution Scheme) 2019
TCS	Tax collected at source
TDS	Tax Deducted at Source
TNMM	Transaction Net Margin Method
TP	Transfer pricing
TPO	Transfer Pricing Officer
TPR	Transfer Pricing Report
TRO	Tax Recovery Officer
UTPR	Undertaxed Profits Rules
WHT	Withholding Tax
WOS	Wholly Owned Subsidiary