K C Mehta & Co.

Chartered Accountants

kcm Insight

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Dear Reader,

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

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

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The Hue and Cry around Cryptocurrency

Overview of Blockchain and Cryptocurrency

Blockchain is a decentralized ledger technology which records transactions on a real time basis thereby making it completely transparent. When someone initiates a transaction, it is processed through nodes which is then validated and verified. The verified transaction is combined with other data to form a block which is then added to the existing chain of blocks and that is how a blockchain technology works. Blockchain technology can be used into multiple areas which includes cryptocurrencies, supply chain, legal records, accounting, payments processing, healthcare, etc.

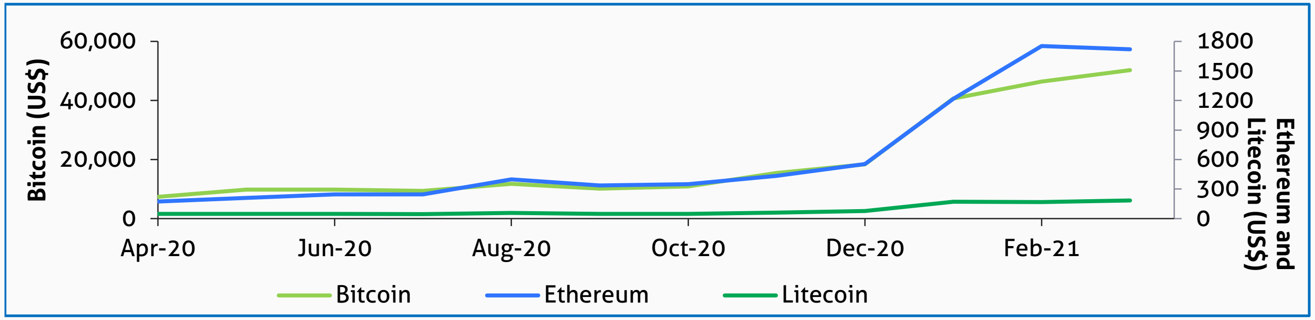
Walmart with its technology partner IBM implemented blockchain technology to make their logistics more efficient in terms of procurement of food by creating a food traceability system based on a Hyperledger fabric. Blockchain technology allows for increased accountability and transparency as it enables everyone in the process to have an identical copy of the ledger in which changes can be made dynamically, thereby ensuring each unit is accounted for.

Cryptocurrency is an electronic form of currency which does not have any physical existence and the supply of which is not determined by any central bank. There are various types of cryptocurrencies including Bitcoin (BTC), Litecoin (LTC) and Ethereum (ETH) being the widely known currencies. Each of these currencies differ in terms of transaction speed, mining, circulation and of course the market capitalization.

Case for and against Cryptocurrencies

Traditional currencies such as Indian Rupee, US Dollar, Euro, Great Britain Pound, Japanese Yen, Chinese Yuan, etc. are all regulated or controlled by a central authority/bank. The most distinguishing feature of cryptocurrencies is that these are neither regulated nor issued by any central or government authority. Rather, cryptocurrencies are mined by solving complex equations which would keep blockchain ledger and network secure and trustworthy. The 2008 financial crisis highlighted inefficiencies and flaws of a centralized regulated system which involved high processing and transaction costs. While these costs can be saved by dealing in cryptocurrencies, the key operating cost would be the cost of power utilized in mining of these currencies. Significantly higher power costs also make cryptocurrencies carbon negative as argued by many.

Price movement and Market capitalization



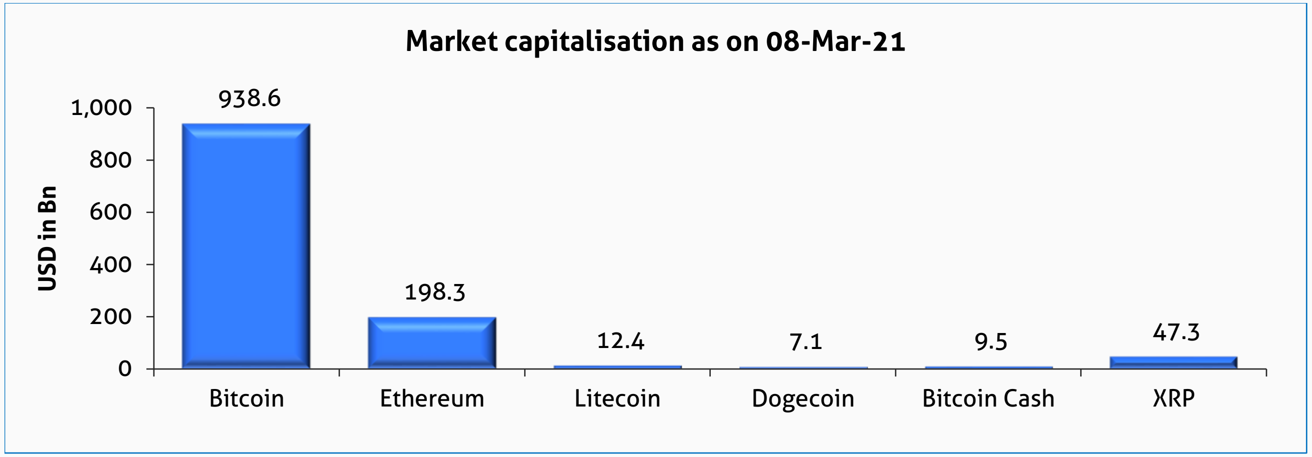
Source: Blockchain.com

Financial Market

Cryptocurrency market is highly volatile, based on news and liquidity events wild swings are observed in its price. Such volatility (i.e. high risk) is what traders and investors chase for generating high returns in short span of time.

The price per Bitcoin which was US$ 7,367 in Apr-20 reached US$ 50,265 in Mar-21 resulting into almost 6 times increase since then. The sudden surge in the Bitcoin price was seen in Jan-21 when Elon Musk owned Tesla announced an investment of US$ 1.5 Bn in Bitcoins and said it would begin accepting the digital currency as a form of payment in the near future.

The second largest cryptocurrency and the closest competitor of Bitcoin, Ethereum was traded at US$ 173 in Apr-20 which reached to US$ 1721 in Mar-21 resulting into almost 9 times increase since then. However, the market leader Bitcoin enjoys a market capitalization of almost 5 times that of Ethereum.



Source: Blockchain.com

Cryptocurrency in Indian scenario

- Ways to avail Bitcoin
  - Crypto exchange – Bitcoins can be bought from crypto exchanges and can be stored in an online bitcoin wallet in digital form.
  - Mining – A miner can add a block of transactions to the blockchain by successfully cracking complex equations and earn bitcoins as a reward.
- Legality
  - The Indian Government has made its stance very clear through a proposed bill that prohibits all private cryptocurrencies, or any other form of digital currency not backed by the RBI. It is still not clear whether the persons who hold cryptocurrencies in India would be given a transition period or a mechanism to liquidate their positions in any other form of digital currency before the law becomes enforceable.

- Although this bill would effectively make all cryptocurrencies invalid in India, it allows the use of technologies involved in cryptocurrencies; like cryptography and blockchain into areas other than cryptocurrencies.
- Though the bill has not yet been introduced, there is a growing concern amongst investors and crypto exchange owners that banning cryptocurrencies can have a negative impact on the use of the underlying technologies as many crypto exchanges have started to move towards crypto safe havens like the US, Singapore and the UK.

➢ Taxability

- There still exists a lack of clarity as to whether Bitcoin can be considered as a capital asset under the Indian Income Tax Act and be subject to capital gains tax. If considered as a capital asset, it needs to be evaluated as how should one determine the chargeability of capital gains as long term or short-term including availability of indexation benefit in case of long-term capital gains (which is taxed at lower rates).
- There is a contrary view which suggests that if Bitcoin is not considered as a capital asset, then any income/gains from Bitcoin may be chargeable to tax as income from other sources at higher rate of tax applicable to the assessee.
- However, income arising out of trading in Bitcoins would be taxable as business income in the hands of the trader at applicable rates.

The Backlash

Every coin has two sides – while cryptocurrency comes with lower transaction costs and higher security owing to its underlying technology, it also brings along glaring risks that forms the basis of backlash against cryptocurrencies. Major disadvantages of cryptocurrencies are its anonymity and opaque structure. Being unregulated, cryptocurrencies could be used as a means of carrying out illegal transactions, money laundering and tax evasion. Moreover, market value of cryptocurrencies is subject to significant speculations which makes it a risker asset class for investment.

Future of Cryptocurrencies

Technological advances may help overcome certain limitations that cryptocurrencies presently face, however with increasing penetration cryptocurrencies are bound to come under government scrutiny and regulation. Though many developed nations have started giving recognition to cryptocurrencies, these are yet to gain acceptance in emerging markets like India. While cryptocurrencies as an investment asset class may be highly speculative, one must not overlook the underlying blockchain technology which could be a key value driver if put to commercial use for various secured applications.

Modification in the current Faceless Assessment Scheme

Notification no. S.O. 741(E) & 742(E) dated February 17, 2021

CBDT has made following key amendment to the existing Faceless assessment scheme:

- It is not mandatory to specify the issues for selection of the case for assessment under the notice u/s 143(2) issued by NeAC.
- The scope of NeAC shall now be extended to include all the cases where the return of income is filed u/s 139 or 142(1) or 148(1) and/or notice u/s 143(2) is issued by AO or NEAC or including the cases where no such return is filed in response to such notices issued by the AO. Cases of assessment in pursuant to order of TPO as per 144C read with 92CA(3) shall also be covered.
- The Taxpayer may seek online adjournment by opting specific reason from down menu provided in response to notice received from NwAC in login portal.
- NeAC shall complete the pass Best Assessment order u/s 144 of the ITA if the taxpayer fails to comply with the notice issued u/s 142(1) or direction u/s 142(2A)
- Video conferencing tab will be enabled for the purpose of making representation (oral submission) by seeking personal hearing as per Rule-11 of the Scheme.
- The scheme is amended to provide the procedure for completing assessment as per provisions of section-144C of the Act in case where the variation to the income as a consequence of the order of the Transfer pricing officer passed u/s 92CA(3) of the ITA.

Faceless Penalty Scheme – A Further Step Towards Digital Governance

Notification No. 02 and 03 of 2021 dated 12 January 2021

The Board has notified Faceless Penalty Scheme, 2021 pursuant to which now onward all the penalty proceedings under ITA will be electronically conducted in accordance with the notified scheme. The broad process and objective of the scheme is akin to Faceless Assessment Scheme 2020. The scheme will thus bring transparency, accountability and elimination of interface between taxpayer and tax authority.

Case Laws

Coverage

Section 50C is not applicable in case of transfer of uncertain right in land or building

Shri Raminder Singh v The ITO (ITA No.1270/Chd/2019, Chandigarh ITAT)

In AY 2015-16 the Taxpayer offered capital gains on transfer of Letter of Intent (LOI) in respect of 3 residential plots allotted to him by GMADA in lieu of compulsory acquisition of his lands under the Land Pooling Policy of Govt. of Punjab. In the ITR, the Taxpayer declared long term capital gain from transfer of rights (LOI) at Rs.91,04,757/- after deducting the indexed cost of land originally purchased by him. He also made an investment into new residential house and accordingly claimed full deduction u/s 54 of the Act. LTCG was thus computed at nil.

The Department was of the view that transfer of LOI is equivalent to transfer of land and therefore, provision of section 50C is applicable to it. The Department relied upon the terms of LOI wherein it has been stated that in case of transfer of LOI, the Taxpayer shall be required to pay transfer fees at 2.5% of the predetermined value of LOI at Rs.2.50 crores. The Taxpayer paid transfer fees of Rs.6,25,000 on said value and therefore, the department concluded that for the purpose of computing capital gain from transfer of LOI, the said valuation shall be required to be assessed. Accordingly, the department invoked the provision of 50C and substituted the actual sale consideration of LOI with assessable value for payment of transfer fees at Rs.2.50 crores and re-computed the LTCG from transfer of LOI as per Sec-50C of ITA.

The Taxpayer primarily contended that the provisions of 50C is applicable only in case of transfer of capital asset being land or building alone and it is not applicable in case of transfer of right in land (LOI). The Taxpayer further pointed out that on transfer of LOI, stamp duty is not payable. The payment of transfer fees charged by GMADA is governed by the terms of LOI and thus, it cannot be equated with the Stamp Duty which is anyway governed by the separate enactment.

The ITAT, discussed the terms of LOI vis a vis provision of section 50C of the ITA and after considering facts of the case held that LOI is only right to own a plot of land of specific area in near future which will be allotted only after the completion of development. Thus, LOI do not confer any ownership of specific plot of land and the Taxpayer was only holding right in the proposed developed plot of land. The ITAT therefore held that deeming fiction created u/s 50C is also required to be construed strictly and hence, the fiction cannot be extended beyond the clear mandate of the section.

It is interesting to note the ITAT has held that LOI cannot be equated with land or building but while adjudicating the issue it has not specifically discussed whether the Taxpayer would be eligible to claim deduction u/s 54 or 54F of the ITA. It is also important to note that once the entire sale consideration has been invested into purchase of new residential property then for the purpose of section 54F, the entire capital gain is to be exempted even if the sale consideration is increased on account of substitution of actual consideration with SDV.

Case Laws

Salary becomes due only when the person has right to receive the salary and such right is not waived by him

DCIT v. Rajamannar Thennati, ITA No. 294/Ahd/2018, ITAT Ahmedabad

The Taxpayer is a whole-time director in a listed company (employer company). In terms of the provisions of CA 2013 and rules made thereunder, in case of insufficient profit, the managerial remuneration in excess of prescribed limit requires approval of the CG. For AY 2014-15, the Taxpayer received total remuneration of Rs.3.29 crores. The employer issued Form 16 based on which he filed ITR. Post filing of ITR, the Remuneration Committee of the CG and Ministry of Corporate Affairs sanctioned the remuneration at Rs.0.84 crores. In pursuance to this, the Taxpayer accordingly repaid excess remuneration of Rs.2.14 crores to the employer. The Taxpayer also filed revised ITR declaring therein actual remuneration received by him.

During the assessment proceeding, the AO contended that the total remuneration was already approved in the annual general meeting and was also paid and therefore in terms of the provision of section 15 the said amount would be regarded as "salary due/allowed". The AO has therefore considered the remuneration declared in the original ITR as total salary while finalizing the assessment proceedings. The CIT (A) however held that since the Remuneration Committee of the CG and Ministry of Corporate Affairs had not approved the remuneration fixed at the Annual General Meeting of the employer company, remuneration in excess of approved amount cannot be termed as 'Salary'.

Before the ITAT, the Taxpayer contended that in terms of section 15, the salary becomes due only when the employee has right to claim it and the employer is also under an obligation to pay it. Since, the excess remuneration is already repaid to the employer, the said amount cannot be treated as "Salary Due" to the Taxpayer.

ITAT after considering the facts of the case and decisions relied upon by the Taxpayer set aside the order of AO and held that the Taxpayer has to refund the excess amount received by him in compliance with the provision of the Companies Act, 1956 and accordingly said amount cannot be taxable u/s 15 (a) as 'salary due' or u/s 15(b) as 'salary allowed' to the Taxpayer.

The ITAT Mumbai in the of ITO v Darshan L Gandhi (ITA 7192/M/2013 dated March 13, 2015) has also decided similar issue. The ITAT has held that salary can be termed as accrued only when the person has right to receive the salary and such right is not waived by him. In case of refund of excess salary to comply the legal requirement, right to receive the salary is waived off and therefore said excess amount cannot be taxed as salary income.

TDS does not apply to provision for expenses where payee is not identifiable

DCIT (LTU)-1 v. Sonata Information Technology Ltd, ITA no. 3244 & 3245 of 2018, Mumbai ITAT

The Taxpayer is a wholly owned subsidiary of an Indian Company which is engaged in the business of software development. The Taxpayer is recognizing revenue from the ongoing projects as per accounting policy. Therefore, at the end of each year, in respect of the incomplete project, the Taxpayer is recognizing provision for expenses that are attributable to the said project and required to be incurred for the project and offer net income to tax. The provision of expenses is made towards expenses like salary, performance pay and provision for incentives payable to employee. Due to peculiar nature of such expenses, the exact nature, quantum of expenses and payee will be determined only when the actual expenses or work is assigned or completed in the subsequent assessment year.

The Department has observed that the Taxpayer has not deducted TDS on provision made for various expenses and therefore contended that provision of expenses would attract disallowance under provisions of section 40(a)(ia) of the ITA. The Taxpayers contended that in absence of identity of the payee, certainty about quantum of payment, the TDS is not deductible on such provision and consequently section 40(a)(ia) is not applicable. The Taxpayer also contended that it has been following the said practice over the years and therefore, the disallowance is not required in its case.

The ITAT set aside the order of the lower authority and held that though the costs are visible and can be estimated; in absence of identity of the actual payee, TDS is not deductible. The ITAT further held that the provisions are made only to follow matching principle of accounting standards and if the said provision is disallowed then it would lead to double taxation.

The matter of applicability of TDS provisions on year end provisions is contentious issue before various Tribunals. The Judgment of Mumbai ITAT in the case of Alliance Media & Entertainment Ltd. v. ITO in ITA No. 5947 & 5570 of 2014 & DCIT v. HDFC Sales Pvt. Ltd (ITA No. 852 of 2019) has laid down a principle that where payee is not identifiable in respect of any year-end provisions, there shall not be any requirement of TDS on the same. At the same time, Mumbai ITAT in case of Tata Sky Ltd. v. ACIT (ITA No. 3214/Mum/ 2014 dated September 10, 2020, Mumbai ITAT) has also laid down a principle that ad-hoc year end provisions made on account of non-receipt of invoices but where payee is identifiable, the payee shall require to deduct tax at source. Also, recently, the Delhi ITAT in the case of Inter Globe Aviation Ltd v ACIT, Circle 50(1), New Delhi, again held that TDS is required to be made on year-end provisions which are ascertained liabilities in respect of identifiable parties.

To summarize, line of distinction lies on the certainty of the transaction entered for which the expense is payable at year-end i.e. if all the parameters of the transaction are known (i.e. the amount & the payee), pending the receipt of invoices, then the TDS on such provision should be deducted.

Compensation paid after the cancellation of booking of flat partakes the character of Interest

Sahyog Homes Ltd v. Deputy Commissioner of Income Tax, ITA No. 66 of 2019-ITAT, Mumbai

The Taxpayer was engaged in the business of development of real estate. During the relevant year, the Taxpayer had claimed deduction in respect of compensation paid to its customers on account of cancellation of booking of flats. The customers were paid the refund of the amount already paid by them as well as a compensation over and above the amount of the refund. The Department contended that the customers were compensated in the form of payment of interest on booking amounts and hence, the said payment being interest, the taxpayer was liable to withhold tax u/s 194A. Since the Taxpayer had failed to deduct TDS, the Department invoked the provision of section 40(a)(ia) and disallowed the claim of expenditure.

Before the lower authorities, the Taxpayer contended that as per the terms of allotment letter, it was not under any obligation to pay interest on booking amount if the booking is subsequently cancelled. The Taxpayer contended that a lump sum amount had been paid voluntarily to the customers and hence, it cannot be regarded as payment of interest. The CIT(A) however did not accept the claim of the Taxpayer as in subsequent assessment year, the Taxpayer itself had deducted TDS on such payment.

Before the ITAT, the Department further contended that once the booking is cancelled, the relationship between the buyer and seller comes to an end and the booking amount received by the Taxpayer becomes a debt payable to the customer.

The ITAT after considering the arguments of the Taxpayer and the Department held that the Taxpayer had been charging interest to the customers in case of delayed payment and therefore, if any compensation is paid to the customers on account of cancellation of booking, the nature of such payment would be that of interest. Debtor creditor relationship would begin once the bookings are cancelled, and hence excess amount paid would therefore partake the character of interest. The ITAT while granting partial relief to the Taxpayer held that if the customers has offered such compensation to tax in their respective returns, then AO is directed not to make disallowance u/s 40(a)(ia) on submission of prescribed Income Tax Form to the AO.

The ITAT in the above case has not discussed the scope of section 2(28A) of the ITA and whether such additional amount or compensation actually in the nature of "Interest" or not. The Department may however rely upon this decision to take a view that any compensation paid on cancellation would be in the nature of "Interest" and not capital receipt.

It is interesting to note that there are several decisions wherein the courts have taken a position that compensation paid on cancellation of booking is capital receipts in the hands of customers and said amount is not taxable. The Mumbai ITAT, recently in the case of Shri Shailendra Bhandari (ITA No. 6528/M/2018) has an occasion to decide whether the additional amount or compensation received on cancellation of booking of flats is to be treated as capital receipt and if so, it is to be charged to tax under the head "Capital Gains".

Date of valuation report irrelevant for determining Fair Market Value of shares

M/s Sri Shakti Textiles Ltd ITA No. 1228/Chny/2019, Chennai ITAT

For the AY 2013-14, the Taxpayer has issued total 7,69,260 shares having face value of Rs,10 each at a premium of Rs.142 per share to Graghasakthi Infraservices Pvt Ltd (GIPL) and accordingly received total share premium of Rs.10.92 crores. During the assessment proceeding the AO did not make any inquiry in relation to the issue of share premium and the assessment order has been passed accepting the returned loss declared by the Taxpayer.

Case Laws

Coverage

The PCIT exercised its revisionary power u/s 263 and set aside the original order and directed the AO to pass the assessment order afresh after verification of issue of taxability of share premium u/s 56(2)(viib). In pursuant to this proceeding, before the AO, the Taxpayer for the first time submitted the valuation report issued by the Statutory Auditor and that of independent CA and contended that as per the valuation report, the fair value of the share is more than the price at which the shares are issued and therefore, the provision of section 56(2)(viib) is not applicable.

The AO rejected the said report as he was of the view that neither during original assessment proceeding nor during the revisionary proceeding, the Taxpayer ever stated that it had valuation report and accordingly concluded the Taxpayer had failed to substantiate the value of the shares. The AO accordingly rejected the valuation report and determined the Fair Value of the shares in accordance with the Net Asset Method provided in Rule 11UA. As per the provision of Rule 11UA, the fair value of the share comes to negative and therefore, the total share premium received during the year has been assessed to tax u/s 56(2)(viib) of the ITA.

Further, the CIT(A) while accepting the order of the AO specifically held that as the Taxpayer valued shares based on net asset method, the valuation report of Chartered Accountant is not relevant.

Before ITAT the Taxpayer argued that since it has substantiated the value of shares as per the independent valuation report, the provision of Rule 11UA is not applicable. Further, as per section 56(2)(viib), the discretion is with the Taxpayer to decide whether he wants to determine the fair value as per Rule 11UA or on any other basis which it could substantiate the valuation. The AO cannot change the fair value of share and straightaway apply rule 11UA. The Taxpayer argued that section 56(2)(viib) nowhere stipulates that valuation report should be obtained on the date of issue of shares. The Department however reiterated the arguments raised before the lower authorities and contended that valuation report should be rejected as it was made available after issue of shares and not at the time of issue of shares.

The ITAT set aside the order of lower authority and held that the existence of valuation report at the time of issue of shares is not criteria for invoking section 56(2)(viib) if such value represents FMV of shares as on date of issue of such shares.

In the above case, the ITAT has contextually interpreted the term "on the date of issue of shares" and explained that it would sufficient if the valuation report is obtained by the taxpayer. Recently, Ahmedabad Tribunal in case of Unnati Inorganics (P) Ltd (ITA No. 2474/Ahd/2017) similarly observed that valuation done after issue of shares is of no consequence and what is important is the value of shares as claimed existed or not.

It is also important to note that time and again several Courts, Tribunals have taken a position that in absence of any inaccuracies or shortcomings in the valuation report, the AO is not authorized to substitute his own value in place of value determined by the Taxpayer.

Full FTC allowed on incomes from USA, Germany, Japan, while FTC under India-Korea restricted to tax payable in India and FTC held to be computed u/s 91 for Taiwan

ITTIAM Systems Pvt. Ltd [ITA No. 2464 & 2465 / Bang / 2017]

The taxpayer, engaged in the business of signal processing application and media processing and communication, had received license fees and royalties from customers in US, Japan, Germany, Korea and Taiwan on which taxes were withheld by customers in respective countries. The taxpayer claimed entire taxes withheld in foreign jurisdictions as foreign tax credit (FTC) on the grounds that taxes have been withheld at the rate of 10% / 15%, averaging to 14.32%, whereas tax rate applicable to the taxpayer in India was 32.45%. The lower tax authorities disallowed amounts of FTC claimed on gross receipts which were in excess of taxes payable in India on net income basis.

The ITAT observed that taxpayer was entitled to claim full FTC in respect of taxes paid overseas on incomes from foreign payers under Indian DTAAs with USA, Germany and Japan as the DTAAs provided that Indian resident was eligible to claim FTC for income tax paid in those countries to the extent it is attributable to the incomes which may be taxed in USA, Germany and Japan, respectively. In other words, the ITAT ruled that entire amount withheld in USA, Germany and Japan was eligible to be claimed as FTC, even if income was offered to tax in India on net basis. With respect to taxes withheld under India-Korea DTAA, however, the ITAT observed that provisions of India-Korea DTAA were differently worded vis-à-vis US, German and Japanese DTAA and held that FTC under India-Korea DTAA was to be restricted to income taxes paid / withheld in Korea which were attributable to incomes that may be taxed in India. Further, with respect to incomes from Taiwanese customers, the Tribunal held that in absence of DTAA between India and Taiwan, FTC was to be computed in accordance with provisions of Section 91 of the Income-tax Act and was to be computed based on lower of rate of tax applicable in India or Taiwan on doubly taxed income (on net income basis).

The decision brings out understanding of very fine distinction in the language used in various Indian DTAAs with respect to elimination of double taxation. However, the taxpayer as well as Tribunal have not discussed about implications u/s 90A with respect to the DTAA between India-Taipei Association in Taipei and Taipei Economic and Cultural Centre in New Delhi (India-Taiwan DTAA) and the said DTAA has been completely ignored in the discussions in this case.

Place of employment and vesting of ESOPs to determine its place of taxability and not place of residence at the time of exercise

Unnikrishnan V S [ITA Nos. 1200 and 1201/Mum/2018]

ESOPs were granted to the individual taxpayer in June 2007 when he was employed in India and was a tax resident of India. The taxpayer was deputed to UAE since October 2007 and was resident of UAE. Later, on exercise of ESOPs, the taxpayer sought refund of taxes withheld by his employer in India under Article 15 of India-UAE DTAA contending that said income is not taxable in India.

The ITAT held that while tax liability arises at the time of exercise of ESOPs by virtue of provisions of Section 17(2) of the Act, the related rights were granted to the taxpayer in 2007 and that ESOPS were granted in consideration for the services which were rendered by the taxpayer for a prior period when he was employed in India and was a resident of India. Considering the nexus between Indian employment and vesting and grant of ESOPs, the taxpayer was denied benefits under India-UAE DTAA and ESOPs exercised by the non-resident which were granted for exercising employment in India were held taxable in India.

Cross border tax issues arising out of ESOP are matter of litigation worldwide and the ITAT in the given case has dealt with one such issue covering taxability of ESOP on the basis of place of vesting or place of exercise of ESOP. The ITAT in the given case has relied on the SC ruling in the case of E.D. Sassoon & Co. wherein it has stated that accrual or arising of an income cannot be equated with receipt of income. Accordingly, in terms of taxability of ESOP, income was accrued in the year in which the ESOP was exercised as its rights were granted at that particular time and what is being received at the time of vesting is a result of the services rendered earlier. Further, provisions of section 17(2) of the Act decides the timing of taxing the income, however, it does not negate the fact that the benefit which is to be taxed has arisen much earlier.

ITAT holds Technical Explanation to India-US DTAA issued by US-IRS non-binding in nature

NGC Network Asia LLC [ITA No.8671/Mum/2004]

ITAT observed that income received by US broadcasting company from distribution agent in India with respect to broadcast reproduction rights or distributing rights were in the nature of commercial rights and not copyrights. Accordingly, the ITAT held that incomes received by the US company was not taxable as royalties. ITAT rejected revenue's argument that definition of royalty under India-USA DTAA includes television broadcasting rights in India in light of Technical explanation to the DTAA issued by US IRS. The Tribunal ruled that the Technical explanation is a unilateral document issued by the US IRS and does not form part of the negotiated DTAA and is therefore not a binding document.

Official notification of protocol not necessary for invocation of MFN clause under Indo-Sweden DTAA

SCA Hygiene Products AB [ITA No. 7315/Mum/2018]

The ITAT held that the implementation of a MFN clause is not always in a homogenous manner and that there are different ways in which such a MFN clause can be implemented. The Tribunal observes that MFN clause under Indo-Swiss DTAA requires fresh negotiations for providing MFN treatment to Swiss residents if India accords favorable treatment to other OECD member states with respect to taxation of royalties or fees for technical services. Similarly, under the provisions of DTAA between India and Philippines, if Philippines agrees to a lower or nil rate of tax in a tax treaty with any other country entered into after signature of Indo-Philippines DTAA, Government of Philippines is required to inform the Government of India about the same, post which the two Governments will undertake to review these Articles with a view to providing such lower or nil rate.

Judicial Decisions - India

Unlike DTAAs with Switzerland and Philippines, the ITAT observes that implementation of MFN clause under DTAA between India and Sweden is automatic and does not require further action or negotiation or review by any of the Governments as the MFN clause states that if under any DTAA or protocol signed with any other OECD country, India limits its taxation at source on dividends, interest, royalties, or fees for technical services to a rate lower or a more restricted scope, the same rate or scope shall also apply to Indo-Sweden DTAA. In light of the above, the Tribunal implementation of MFN clause under India-Sweden DTAA did not require separate notification or any other action on part of Indian Government.

Relying on the decisions in the case of ITC Ltd [(2002) 82 ITD 239 (Kol)] and Steria India Ltd Vs CIT [(2016) 72 taxmann.com 1 (Del)] in context of Indo-French DTAA, the Swedish resident tax payer was granted benefit to MFN clause under Indo-Sweden DTAA and more restricted scope of taxation of FTS as provided in DTAA between India and Portugal was applied.

'Leadership Training' not taxable as FTS in absence of satisfying "make available" condition

Sandvik AB [ITA No.2524/PUN/2017]

The taxpayer, a Swedish company, had rendered Human Resource and Leadership training under the 'Sandvik Leadership Program' to certain employees of its Indian affiliate. The taxpayer contented that the services were in the nature of managerial services, not falling within the definition of fees for technical services under Article 12 of DTAA between India and Sweden and MFN clause read with DTAA between India and Portugal. The tax authorities however considered the fees to be in the nature of technical services and considered it taxable as FTS in India.

The ITAT held that imparting training for enhancing leadership skills for better management of Indian affiliate cannot be equated with rendering of managerial services to the Indian entity and that the training services could not be held as managerial services.

The Tribunal further held that technical services ordinarily cater to specialized knowledge in engineering field and consultancy services are advisory services in common parlance, but in context of India-Sweden DTAA read with India-Portugal DTAA, in light of the make available clause, these services would fall within the definition of FTS only if they largely cater to engineering or technical field. In light of the same, it was held that leadership training provided by Swedish company to employees of the Indian company were not in the nature of FTS in light of make available clause, also, the services were held not taxable in India in absence of PE of the foreign company in India.

Investing company not to be considered as shell company as per LOB clause under India-Singapore DTAA

BG Asia Pacific Holding Pte. Limited and GSPC Distribution Networks Ltd. [AAR/1376 & 1377 of 2012]

As per the erstwhile unamended India-Singapore DTAA, capital gain arising from alienation of shares shall not be subject to tax in India subject to the fulfilment of conditions of the Limitation of Benefit ('LOB') clause provided in the Protocol. In the present case, the revenue

Judicial Decisions - India

contended that the capital gain arising to the taxpayer, a Singapore investment company, on sale of the entire holding in the Indian company was taxable in India under Article 13 of India-Singapore DTAA as the conditions of LOB clause was not getting fulfilled. The conditions of LOB clause states that the primary purpose of the arrangement should not be to take benefit of the treaty and the taxpayer should not be shell company having annual expenditure on operations less than S$ 200,000 in the preceding period of 24 months.

AAR while concluding on the case held that the shares of the Indian company was held for more than 6 years prior to introduction of tax exemption clause in the DTAA and the decision to divest from certain non-core businesses was not only limited to India but to several other countries as well and thus it could not be held that the primary purpose of transferring the Indian company shares was to earn tax benefits under the Treaty. Next, the AAR noted that the taxpayer was engaged in the business of investment activity and relying on the SC ruling in Vodafone, AAR ruled that investment in itself was a legitimate, established and globally recognized business activity. In relation to the Expenditure Test for entities not to be considered as shell companies, AAR ruled that statutory expenses cannot be said to be incurred for operations of the entity, however, allowed administrative expenses in the nature of employee salary as part of operational expenses.

It is important to note that the tax treaty has been amended w.e.f. 1st April 2017 and this decision deals with the treaty as it stood before the amendment. Under the revised treaty, India has right to tax the capital gain arising from alienation of shares of Indian companies acquired on or after 01 April 2017.

Technical advice and support services taxable as FTS under India-UK DTAA

Aircom International Ltd. [AAR 1329 of 2012]

The taxpayer entered into a Management Service Agreement (MSA) with its Indian subsidiary company wherein multiple services were rendered by the taxpayer such as general management support services, marketing & business development services, financial advisory services, legal services, human resource services, IT services etc., wherein single invoice was raised for the composite services with back-up working of cost of each of such services. Pursuant to Article 13 of India-UK DTAA wherein services are classified as FTS subject to make available of technical knowledge and expertise, AAR ruled that only services rendered as "direct technical advice, support and management including implementation" provided under IT services segment, made available technical knowledge and expertise and thus was taxable as FTS.

The AAR further rules that other services under the agreement such as training for launch of new software programme, legal and financial services, contract management/negotiations, financial management etc. are advisory in nature, which merely involved discussion and advice of routine nature or exchange of information and did not fulfil the "make available" condition.

Under Composite Contracts, offshore supply held to be non-taxable whereas offshore supply of services taxable in India

Technip France SAS [AAR 1413 of 2012]

Judicial Decisions - India

The present case deals with the taxability of offshore supply of goods and services under EPC contract. Pursuant to the tender offered to Taxpayer (a French resident) by an Indian company for setting up a turnkey plant in India, the scope of work of the non-resident taxpayer was bifurcated into two parts – offshore supply of equipment & engineering services and onshore supply of equipment and services.

In relation to the offshore supply of the equipment, it was observed by the AAR that the ownership of the equipment was transferred to the Indian company outside India itself as the ownership was transferred upon FOB shipment and the title was passed outside India. The AAR held that the principle of apportionment of income on basis of territorial nexus is well accepted and referred to the provisions of Explanation 1 to section 9(1)(i) which stipulates that where all the operations are not carried out in India, only that part of income which can be reasonably attributed to the operations in India, would be deemed to accrue or arise in India. Accordingly, the AAR held that offshore supply of equipment shall not be taxable in India considering the sale was completed in France and no income was accrued or deemed to accrue in India.

However, in relation to the offshore supply of engineering design services, the AAR observed that even though such services were originally provided from outside India, the said services were not final and could not have directly be rendered from France without involvement of the Project Office in India and without the consultation and confirmation from the Indian entity. Thus, the services were actually rendered in India and not outside India. The AAR rejected the contention of the taxpayer that the services did not satisfy the condition of 'Make available' under FTS as the Indian company was able to review and approve the services along with its own suggestions before utilization of these services.

The AAR further held that services were rendered by the Fixed Place PE of the taxpayer in India as the key employees of the subsidiary company of the taxpayer were involved in the project from very beginning and did not only have secured right to use the office space but were also managing the affairs of the Taxpayer. Accordingly, as the rendering of services was done by PE of the Taxpayer, the income of the Taxpayer from offshore supply of services was chargeable as business profits under Article 7 of India-France DTAA.

The issue of offshore supply of services has always been a matter of debate in the courts. The AAR in the present case has upheld the principle that offshore supply should not be taxable in India. It made a fine analysis and held that since the offshore supply of services were inextricably connected with the setting up of plant in India and was rendered through its Fixed PE in India, the profits from such income was taxable as business income in India.

Judicial Decisions - Global

Coverage

CA held guilty of promoting 'tax exploitation scheme' for facilitating unreasonable R&D claims

[Paul Bogiatto [2020] FCA 1139]

The tax professional was found to have encouraged and assisted 13 taxpayers in incorrectly putting forth research and development tax offset claims under the provisions of the Income Tax Assessment Act 1997. Federal Court held that the taxpayers were not legally entitled to the R&D claims and that these unreasonable false R&D claims were resulting from tax exploitation scheme promoted by the tax practitioner and his associated entities.

The Court found that Mr. Bogiatto (tax practitioner) had substantial role in marketing the alleged scheme and had received consideration of 30% of R&D claim in the form of promise to pay in respect of such marketing of scheme. The Court held the tax practitioner and 3 of his associate firms guilty of contravening provisions of Promoter Penalty Laws of Australia, under which the Federal Court may impose a penalty on advisors who are involved in the design, marketing and implementation of schemes providing taxation benefits that would otherwise not be legally available.

It may also be mentioned that pursuant to pronouncement of this judgement, the ATO released a press note highlighting that Mr. Bogiatto was de-registered by the Tax Practitioners Board, his Institute of Public Accountants membership was forfeited, and his Chartered Accountant membership was terminated.

The actions taken by the Australian authorities and Court to discourage tax evasion is remarkable. It would also be relevant to see how OECD's BEPS project and its Action Plan 12 on mandatory disclosure rules which requires tax professionals and taxpayers to disclose aggressive tax planning would make tax professionals more accountable and vigilant in assisting taxpayers with aggressive tax strategies. Understanding the thin line differences between tax planning vis-a-vis tax avoidance or tax evasion has also become important with changing tax landscape across the globe. It is important to note that certain jurisdictions have either introduced regulations or are planning to introduce regulations to penalise tax advisors engaged in tax structuring / restructuring ideations involving tax evasion.

Important Updates

OECD publishes updated guidance addressing Covid-19 impact on PE, POEM, dual residency, payroll taxes

The pandemic has changed the way of work and work from home has become the new normal. However, this change impacts and brings challenges in terms of PE exposure, change in physical locus or PoEM, etc. The OECD has published updated draft guidelines addressing tax issues arising with respect to PE, PoEM, Tax Residency, payroll taxes, etc. arising out of the change in workplace due to the Covid-19 pandemic.

The guidelines intend to clarify on tax issues and provide views of OECD on various issues such as non-creation of fixed place PE due to unplanned presence of employees of companies in foreign jurisdiction working-from-home, not

Important Updates

considering a foreign company as resident in case of occasional exercise of control by directors in the jurisdiction. The guidelines clarify tie breaker rules in case of dual residency envisaging that a person could be living and working in one jurisdiction and could have home in another jurisdiction and clarifies that dislocation of a person due to public health measures should not impact a person's residential status under the tax treaty.

Recently India has also issued a circular clarifying that case-specific necessary relaxation may be provided to individuals for FY 2020-21 who might face double taxation due to forced stay in India. It was anticipated that India would roll out a blanket exemption for individuals who could not travel back due to travel restrictions, however, the Government has on a conservative basis rolled out a case-specific exemption only.

European Parliament resolves to reform EU-tax haven blacklisting criteria

European Parliament adopted resolution on reforming the EU list of tax havens (2020/2863(RSP)). The resolution seeks to change system of listing or delisting from the EU-Tax Haven blacklist and to strengthen the list through increased transparency and consistency, stricter and more impartial listing criteria, and stronger defensive measures against tax avoidance.

The EU list of non-cooperative jurisdictions currently consists of American Samoa, Anguilla, Barbados, Fiji, Guam, Palau, Panama, Samoa, the Seychelles, Trinidad and Tobago, the US Virgin Islands and Vanuatu. The Parliament notes that some of the most harmful third jurisdictions, including the Cayman Islands and Bermuda, were removed from the list upon their introduction of very minimal substance criteria and weak enforcement measures; highlights that such decisions may raise questions regarding the authenticity of specific activities and the impartiality of the decision-making process, and undermine public trust. Vide the resolution, the Union considers that the EU list needs to be reformed at EU level; highlights the importance of transparency in listing process and recommends that its process be formalized, notably via a legally binding instrument.

Among other reforms, it is recommended that there should be automatic listing of jurisdictions with a 0 % corporate tax rate or with no taxes on companies' profits as a standalone criterion. It also proposes legislation for coordinated defense measures against tax avoidance such as non-deductibility of costs, reinforced CFC rules, withholding tax measures, limitation of participation exemption, suspension of tax treaty provisions, etc. It is believed that this reform should be carried out by the end of 2021.

UK HMRC releases policy paper for revocation of Double Taxation Dispute Resolution (EU) Regulations

Considering that the UK is no longer an EU member state following Brexit with effect from 31 January 2020, UK HMRC announced that no new Mutual Agreement Procedure (MAP) claims pertaining to Intra-EU agreements would be entertained by the UK after the end of transition period. This would have limited impact as the UK has DTAAs with all member states of EU which provide for MAP provisions.

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Safe Harbour definitions does not extend to Rule 10B for determination of ALP if Safe Harbour is not claimed

M/s Dana India Private Limited Appeal No. 473 of 2018 (Pune ITAT)

Taxpayer is a wholly owned subsidiary of Dana Corporation, USA and is engaged in design, manufacture, assembling and sale of axles and components thereof for off-highway applications in finished or semi-finished forms.

Taxpayer has adopted TNMM as the most appropriate method to determine ALP under Section 92C of the ITA read with Rule 10B of the Rules to benchmark the international transaction(s) relating to its manufacturing operations. The TPO re-computed the PLI of taxpayer by calculating Operating Revenue and Operating Cost based on the definition provided in Rule 10TA of the Rules, accordingly, classifying certain revenue and expenses as non-operating.

The ITAT observed that the meaning of 'Safe Harbour' suggests that the income tax authorities shall accept the transfer price declared by the taxpayer as long as it meets the thresholds prescribed. This in fact suggests that it is for the purpose of calculating value of various components under the Safe Harbour Rules, like Operating Revenue and Operating Cost, that one needs to refer to Rule 10TA (Definitions) of the Rules.

The Safe Harbour Rules are optional to the eligible taxpayer and the taxpayer may or may not opt for the same. If the taxpayer does not opt for the same, the entire set of Rules from 10TA to 10TG freeze and are non-operational.

To conclude, in case of the taxpayer, ALP was computed by applying TNMM under Rule 10B and there was no reference to Rule 10TA. Further, Rule 10TA does not even provide for its extension to Rule 10B and it is clear that the intent of law is to cover only cases where taxpayer has opted for 'Safe Harbour', under Rule 10TA to 10TG of the Rules.

Foreign AE can be considered as Tested Party, Taxpayer can change tested party at later stage differing TP Documentation

M/s Virtusa Consulting Services Private Limited Appeal No. 615 of 2016 (Madras High Court)

Taxpayer is a Multinational Company based in India engaged in the business of software development services globally. Taxpayer had provided software development services to Citi bank entities and its subsidiaries ('AEs'). Taxpayer determined ALP of transactions with Citi Bank considering CUP as MAM and with its subsidiary considering TNMM as MAM. Taxpayer segmented profit and loss account into three for Arm's Length analysis (i) Subsidiary Segment, (ii) Citi Bank segment and (iii) Third party segment

TPO altered the segment calculations and rejected the Comparable companies identified by taxpayer in TP Documentation. TPO carried out fresh search and proposed adjustment applying TNMM as the MAM for both the transactions i.e. with Citi Bank and subsidiary and the same was upheld by DRP.

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Taxpayer later contented that the tested party is usually the participant in a transaction having least complex functions, and reliable data on comparables can be found and the tested party will also be the party with the least intangibles. Taxpayer claimed that it has overseas subsidiaries across the Globe and they predominantly provide on-site software support and related services in the local geography under the instructions and supervision of the taxpayer.

Hon'ble ITAT rejected the plea of Taxpayer in considering foreign AE as tested party on the ground that Taxpayer failed to produce evidence or document to establish FAR profile of foreign AEs. ITAT also mentioned that Indian transfer pricing provisions do not allow to select foreign AE as tested party for benchmarking the international transactions and it is the Indian Enterprise which should be taken as the tested party, placing reliance on the decision of the **Mumbai Tribunal in Aurionpro Solutions Limited**.

The taxpayer relied on the case of **Mattel Toys India Private Limited (Mumbai Tribunal)** and argued that there is no bar for the taxpayer to take a different stand before the TPO/DRP/Tribunal and merely because the taxpayer did not select the foreign AEs as tested parties in the TP documentation, it does not preclude the taxpayer from subsequently requesting the foreign AEs to be taken as tested parties. The transaction nature, the transaction value and the method were aptly stated in the accountant's report filed by the taxpayer in Form 3CEB and that the taxpayer was not making a fresh / new claim.

Taxpayer relied on the decision of **Delhi Tribunal in the case of Ranbaxy Laboratories Limited** and stated that Section 92 and Rule 10B(1)(e) of the Rules which uses the term 'enterprise' for application of TNMM. It was further submitted that Section 92F of ITA defines the term 'enterprise' as "a person (including a permanent establishment of such person) who is, or has been, or is proposed to be engaged in any activity……". Section 2(31) defines a person to include a company and in terms of Section 2(17) 'company' means any Indian Company or any body corporate incorporated by or under the laws of country outside India. Therefore, it was submitted that a tested party can either be an Indian entity or foreign entity depending upon the function profile of the transacting entities. It was also held in the case of **Yamaha Motor Private Limited** that under the Act and the Rules, the words 'Enterprise' and 'Associated Enterprise' have been used interchangeably and the arguments that the Enterprise will mean the taxpayer and the Associated Enterprise will mean the other party to whom the taxpayer has sold or purchased goods is incorrect. Therefore, the tested party can be any one of the associated enterprises involved in the International Transaction. The words 'Enterprise' and 'Associated Enterprise' have been used interchangeably in the ITA.

The Hon'ble Madras HC held that the tested party normally should be the least complex party to the controlled transaction and that there is no bar for selection of tested party either local or foreign party and neither ITA nor the guidelines on transfer pricing provides so and the selection of tested party is to further the object of comparability analysis by making it less complex and requiring fewer adjustment. It

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was further held that, in the case on hand the TPO rejected the data placed by the taxpayer in their TP documentation and undertook a fresh search for external comparables and arrived at a final list of 12 comparables. Therefore, when the TPO himself has not attached any sanctity to the TP documentation as submitted by the taxpayer, could not have foreclosed the taxpayer from canvassing the issue that the subsidiaries are least complex entities which should be taken note of.

Provisions of section 92A(1) and 92(2) are interlinked and have to be read together for determining whether the transacting parties are AEs

Page Industries Ltd [TS-19-HC-2021(KAR)-TP]

The taxpayer is a company incorporated under the provisions of the Companies Act, 1956 and is engaged in the business of manufacture and sale of ready made garments. The taxpayer is a licensee of the brand name 'Jockey' for the exclusive and marketing of Jockey readymade garments under the license agreement with Jockey International Inc, a company incorporated in USA, which is the owner of Jockey brand. The taxpayer has paid royalty at the rate of 5% of the sales as brand use fees. The TPO treated the expenditure incurred on the advertisement and marketing and product promotion as an international transaction and determined the ALP by applying the bright line method.

The question under consideration is in respect of whether the taxpayer and Jockey International Inc. should be considered as Associated Enterprises as per the provisions of section 92A of the ITA and whether the provisions of section 92A(1) and 92A(2) should be read together or independently. In this respect, the Hon'ble High Court has held that sub-section (2) of section 92A was amended with effect from 01-04-2002 to clarify that mere fact of participation by one enterprise in the management or control or capital of the other enterprise, or the participation of one or more persons in the management or control or capital of both the enterprise shall not make them associated enterprises, unless the criteria specified in sub-section (2) are fulfilled. It held that sub-sections (1) and (2) of section 92A of the ITA are interlinked and have to be read together. Accordingly, the Hon'ble High Court has upheld the decision of the ITAT that since the requirements laid down in section 92A(1) has not been fulfilled, the provisions of section 92A are not attracted to the fact situation of the case. Therefore, the taxpayer and Jockey International Inc. should not be regarded as Associated Enterprises as per the provisions of section 92A of the ITA.

The Hon'ble High Court has also pointed out that in case the provisions of sub-sections (1) and (2) are read independently, one of the provisions would be rendered otiose which is impermissible in law.

Rejects nil ALP-determination for payment of royalty

Dow Agrosciences India Pvt Ltd [TS-11-ITAT-2021(Mum)-TP]

Taxpayer is engaged in the business of manufacturing and trading of pesticides, agro chemicals & seeds. Taxpayer had entered into a Process Technology Agreement with its AE, viz. Dow AgroSciences, BV. During the year under

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consideration, Taxpayer has paid a royalty @ 8% of its net export sales to its AE, viz. Dow AgroSciences BV. CUP method was used by Taxpayer as a primary analysis basis for benchmarking the aforesaid international transaction. Using the CUP method, Taxpayer had considered the approval received from the Government of India and RBI for the purpose of benchmarking aforesaid transaction. As royalty paid by Taxpayer to its AE was approved both by the Government of India and RBI, therefore, aforesaid transaction was considered by Taxpayer to be at arm's length.

Alternatively, Taxpayer aggregated transaction of payment of royalty with its other international transactions carried out in the manufacturing segment, for the reason, that such other transactions viz. import of raw material and export of finished goods in the manufacturing segment were closely connected with the transaction of payment of royalty. Applying TNM Method at Manufacturing segment level, Taxpayer considered transaction of payment of Royalty at Arm's length.

The ITAT deleted the adjustment following the view taken in the case of taxpayer in earlier years and concluded that since the royalty paid during the year under consideration by the taxpayer to its AE @ 8% of its net exports was approved by the Government of India and RBI, and also, in conformity with the rates prescribed in Press Note No. 2 (2003 series), the same, for the current year as well, was to be held as at arm's length. It also held that TPO had clearly traversed beyond scope of his jurisdiction which is restricted to determination of the arm's length price of the transaction by following any of the method provided in Sec. 92C of the Act. Also, the TPO is not vested with any jurisdiction to question the commercial expediency of the transaction carried out by the taxpayer with its AE, and his jurisdiction is restricted to determining of the arm's length price of the transaction. The ITAT has relied on following judicial pronouncement.

a) CIT vs. Lever India Exports Ltd. (78 taxmann.com 88)
b) CIT vs. Merck Ltd. (73 taxmann.com 23)
c) CIT vs. Johnson & Johnson (80 taxmnn.com 269)
d) CIT vs. RK Ceramics India P. Ltd. (78 taxmann.com 230)
e) Firmenich Aromatics India (P) Ltd. Vs. DCIT (96 taxmann.com 649)

In view thereof, the ITAT held that since the TPO had determined the ALP of the royalty paid by the Assessee to its AE at Nil, the same on the aforesaid count is liable to be struck down.

In respect of the alternate transfer pricing adjustment made by TPO by selecting CUP method and considering an agreement entered into between two group companies of the taxpayer, the ITAT has rejected the same and observed that as the transaction considered by the TPO is between two AEs and therefore the same being blatant violation of the mandate of section 92F(ii) r.w. Rule 10B(i)(a), could not have been considered for the purpose of determining the ALP of the royalty paid by the Assessee to its AE. The said view of the ITAT is supported by the decision of a third member of the ITAT, Mumbai in the case of Tecnimont ICB P. Ltd. Vs. Addl. CIT (2012) 24 taxmann.com 28 (Mum)(TM).

The ITAT has also rejected the benchmarking on the basis of an external 'agreement' found in the

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Royaltystat database, as suggested by the TPO in the course of the remand proceedings. The ITAT observed that the said agreement is only an 'amendment agreement' and the full agreement is neither available in the database nor in the public domain. Further, the said agreement was not in force during the year and the product licensed under the agreement is different than the product in the case of the taxpayer. The ITAT has also upheld the secondary benchmarking analysis carried out by the taxpayer following TNM method and since the net margin of the taxpayer company is higher than the margin of the comparables, the adjustment made by TPO / DRP cannot be sustained.

Italian Provincial court on selection of MAM for intra-group purchases from German parent

The taxpayer, B.I. S.r.l., is an Italian company which is engaged in the distribution of products. It purchases goods from its parent entity in Germany for resale in the Italian market. German affiliate manufactured the goods and operated as an entrepreneur while the Italian entity acted as a reseller. The taxpayer has selected CUP method as MAM for determining ALP of the transaction. The taxpayer also performed a corroborative analysis as a sanity check under TNM method.

The Italian Revenue Authority (IRA) made transfer pricing assessment on the taxpayer by rejecting CUP method and performing a fresh analysis under TNMM to arrive at a set of comparable companies. The IRA selected TNMM as MAM, with Return on Sales (RoS) as the profit level indicator. Based on the benchmarking under TNMM, the IRA made transfer pricing addition as the RoS of the taxpayer was falling within the minimum and lower quartile of the PLI range. Therefore, the taxpayer filed an appeal before the Provincial Tax Court.

The taxpayer argued that once it justified the arm's length price of the imports, the burden of proof of it being not at arm's length shifted to the IRA and the notices issued by the IRA did not mention or explain as to how the TP Study maintained by the taxpayer was not reflective of the normal value. In this respect, the IRA was of the view that the tax payer had failed to discharge the burden of proof that the transactions with the German parent had undertaken at 'normal value' and prayed to the court that the appeal filed by the taxpayer be dismissed.

The court held that the taxpayer was performing routine sales functions while the German parent was operating as an entrepreneur performing all the strategic functions and decision makings. The Court noted that few of the comparables selected by the IRA were manufacturing companies and engaged in dealing with completely different products and were of different risk profile. The Court also noted that distributional channel of the comparable selected by the IRA was also different. The Court held that these differences made the analysis carried by the IRA completely unreliable and unacceptable. The Court also held that as the taxpayer's RoS fell within the two extreme RoS data points, viz, 1.40% being the minimum and 18.28% being the maximum in the full range of RoS of comparables, therefore, the transaction of imports by the taxpayer from its German parents was at arm's length price. The taxpayer's RoS being 8.38% stood at intermediate values between the two extremes of the range, ultimately representing an index of correctness and compliance with free competition of prices.

Circulars & Notifications

Goods and Service Tax (GST)

Mandatory E-Invoicing from April 01, 2021 for taxpayers having turnover between Rs. 50 Cr to Rs. 100 Cr

Notification No. 05/2021 – Central Tax dated on March 08, 2021

- The E-Invoicing is being made applicable with effect from 01, April 2021, to taxpayers having turnover above Rs. 50 crores. Earlier, E-Invoicing was made applicable from October 01, 2020 to taxpayers having a turnover more than Rs. 500 Crores and from January 01, 2021, to taxpayers having a turnover more than Rs. 100 Crores.
- The notification gives less than 30 days for the small taxpayers to prepare for this big change which requires implementation of lot of technological changes.
- It is to be noted that E-Invoicing shall be applicable where the turnover of a taxpayer has crossed the above-mentioned limit during any of the F.Y. from 2017-18.

Restrictions in furnishing form GSTR 1

Notification No. 01/2021 – Central Tax dated on January 01, 2021

- Taxpayers who have opted to file quarterly returns or to whom restriction under Rule 86B applies shall not be allowed to file form GSTR 1 or upload information using invoice furnishing facility if such taxpayers have not furnished form GSTR-3B for the preceding period.
- Taxpayers other than the ones specified above, shall not be allowed to file form GSTR 1 if such taxpayers have not filed the return in form GSTR-3B for the preceding 2 months.

Specified class of persons exempted from requirement of Aadhar authentication

Notification No. 03/2021-Central Tax dated on February 23, 2021

CBIC has exempted the following class of persons from the requirement of Aadhar undergoing authentication for obtaining GST registration:

- A person who is not a citizen of India
- Department or establishment of the central government or state government
- Local authority or Statutory body
- Public sector undertaking
- Specialized agency of United nations, consulate or embassy or class of person specified by the commissioner.

Extension of the due date of GSTR 9 and GSTR 9C

Notification No. 04/2021-Central Tax dated on February 28, 2021

CBIC has extended the time limit to furnish Annual Return in Form GSTR 9 and Reconciliation statement in Form GSTR 9C for the FY 2019-20 till March 31, 2021.

Introduction of Standard Operating Procedure for suspension of registrations

Circular No. 145/01/2021-GST dated on February 11, 2021

CBIC has notified SOP to be followed to ensure uniformity in the implementation of the provisions of suspension of registrations in

Circulars & Notifications

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specified cases. The gist of the said SOP is as under:

- System generated intimation for suspension and notice for cancellation of registration in FORM GST REG-31 along with reasons of suspension shall be sent to taxpayers at their registered e-mail address.
- Till the time the functionality for issuance of FORM GST REG-31 is made available on the portal, such notice/intimation shall be made available to the taxpayer on their dashboard on the common portal in FORM GST REG-17.
- The taxpayers whose registrations are suspended would be required to furnish a reply in FORM GST REG-18 to the proper officer within 30 days from the receipt of such notice /intimation after meeting the requirements like filing the pending returns etc.
- After examination of a reply received from the taxpayer, the proper officer may pass an order either in FORM GST REG-20 for dropping the proceedings for suspension/ cancellation of registration or in FORM GST REG-19 for cancellation of registration.
- In case the proper officer is prima-facie satisfied with the reply of the said person, he may revoke the suspension by passing an order in FORM GST REG-20. Post such revocation, if need be, the proper officer can continue with the detailed verification of the documents and, if the proper officer finds during the detailed verification that the registration of the said person is liable to be cancelled, he can again initiate the proceedings of cancellation of registration by issuing notice in FORM GST REG-17.

Clarification in respect of applicability of Dynamic Quick Response Code

Circular No. 146/02/2021-GST dated on February 23, 2021

CBIC has issued the following clarifications in respect of the applicability of Dynamic QR code on invoices issued for B2C supplies:

- QR code shall not be required to be generated in case of export transaction even though such supplies are made by a registered person to unregistered persons.
- The details to be captured in the QR code are as follows: GSTN of the supplier, UPI ID and bank A/C number and IFSC of the supplier, invoice number, invoice date, total invoice value and GST amount along with breakup i.e., CGST, SGST, IGST and CESS.
- Where the payment is made without using the dynamic QR code, the invoice shall be deemed to have complied with the requirement of Dynamic QR Code, if the cross reference of the payment is made on the invoice. Where payment is made after generation /issuance of invoice, the supplier shall provide Dynamic QR Code on the invoice. This is applicable to suppliers making supplies through E-commerce portal or an online application.

Maharashtra Goods and Services Tax Department to issue separate GST circulars

Trade Circular No. 01T of 2021 on dated January 12, 2021

The MGSTD has stated that after examination of the circulars issued by the CBIC, it would issue separate circulars for the purpose of implementation of the MGST Act.

Circulars & Notifications

However, circulars issued by CBIC before January 11, 2021 are deemed to have been adopted for the implementation of MGST Act.

GSTN Portal Updates

GSTR-2B will be available on or after 14th of every month instead of 12th of every month.

Taxpayers can opt for a composition scheme for the FY 2021-2022 on the common portal before March 31, 2021.

The taxpayer can opt for a QRMP scheme for the FY 2021-2022 on the common portal before April 3o, 2021.

Taxpayers can make payment through FORM DRC 03 in the following cases:

- Tax liabilities arise for the difference between GSTR 1 and GSTR 3B
- Tax payment on ITC mismatch between GSTR 2A/2B and GSTR 3B

The following new functionalities available on GST Portal:

Registration

Deemed approval of registration if no action is taken by the department within specified time limit.

For SEZ units and SEZ developers, the field for capturing validity period of the LOA in Form GST REG-01.

The taxpayer can now interchange their status as SEZ unit or SEZ developer, through an application of Core amendment of registration.

UIN entities can upload documents on GST Portal while filing an application for Core Amendment of registration or filing clarification on the query of the department. Facility to upload a copy of notification issued by State while applying for Registration on GST Portal in Form GST REG-13 has also been made available.

Facility for Aadhaar Authentication and e-KYC changes.

Return

The facility to report of TDS deducted of OIDAR in Form GSTR 7 has been made available

The facility to issue a notice in Form GSTR 3A to taxpayers who have not filed their GSTR 3B has been made available

Refund

- Facility to file an online appeal against the Refund order in form GST APL 01.

Trade Notices

Trade Notice No 36/2020-21 dated on January 4, 2021

The DGFT has issued a trade advisory to mitigate cyber fraud like spoofing/phishing emails by implementing security protocols such as Sender Policy Framework (SPF), Domain Key Identified Mail (DKIM) and Domain-based Message Authentication, Reporting & Conformance (DMARC) to protect their payments. The said protocols will help to prove that the sender is legitimate. It has also been advised to follow password practices on both sender's and receiver's email IDs.

Circulars & Notifications

Changes in Importer Exporter Code related provisions

Notification 58/2015-2020 dated on February 12, 2021

All the IEC holders shall have to ensure that details in the IEC are updated electronically every year. Where there are no changes, in the IEC details, a confirmation shall have to provided once every year.

In case the details are not updated / confirmed every year between April to June, the IEC will be de-activated. The IEC will be activated only when the details are updated on the portal.

Introduction of online e-PRC System for Application seeking Policy/Procedure relaxation under FTP 2015-20

Trade Notice No 38/2020-21 dated on January 15, 2021

DGFT has introduced an online e-PRC System for relaxation applications in terms of policy/procedure for any provisions of FTP with effect from January 25, 2021. Manual applications for this purpose shall not be accepted, henceforth.

Issuance of Certificate of Origins (Non-Preferential) through Common Digital Platform

Trade Notice No 42/2020-21 dated on February 19, 2021

DGFT has decided to issue Certificate of Origins (Non-preferential) through a Common digital platform with uniform fees of Rs. 100/- for each certificate effective from April 01, 2021.

<u>Customs</u>

Transhipment of Import & Export Cargo via Sri Lanka and Bangladesh-Waiver of bank guarantee –reg.

Circular No. 01/2021 – Customs dated on January 14, 2021

The CBIC has extended the exemption from the requirement of furnishing of Bank Guarantee by the carriers for carriage of EXIM cargo for transhipment through foreign territories of Sri Lanka and Bangladesh subject to fulfilment of conditions specified.

Modification in the Bond (B-17) Execution process

Circular No. 03/2021-Customs dated on February 03, 2021

The CBIC has clarified that in case of B-17 bond executed by EOU/STP/EHTPs being proprietorship or partnership firms, surety must be given by an independent legal entity other than the proprietor/ partner of the concerned proprietorship/ partnership EOU firm. All existing B-17 bonds executed are ordered to be reviewed on the basis of the above clarification.

Extension of facility provided to exporters for IGST refund pending due to mismatch in GSTR 1 and GSTR 3B data

Circular No. 04/2021-Customs dated on February 16, 2021

The CBIC has further extended the facility provided to the taxpayers facing difficulty in getting the IGST refund due to mismatch in GSTR 1 and GSTR 3B in respect of shipping bills filed/to be filed till March 31, 2021 by following specified procedure.

Circulars & Notifications

The CBIC has further clarified that the taxpayers shall be required to furnish CA certificate evidencing no discrepancy between IGST amount to be refunded and the actual IGST amount paid on exports of goods for the FY 2019-20 and FY 2020-21 by March 31, 2021 and October 30, 2021, respectively.

Circular No. 05/2021-Customs dated on February 17, 2021

Extension of facility provided to exporters for IGST refund pending due to mismatch in invoice number as per shipping bill and invoice number mentioned while filing GSTR-1

The CBIC has extended the facility for resolving invoice mis-match errors through officer interface by following specified procedure as a permanent alternative measure. The said facilitation will be subject to payment of Rs.1,000/- fee towards rendering of service by the customs officer for correlation and verification of the claim.

Circular No. 07/2021-Customs dated on February 22, 2021

Amendment in Form A to be submitted by EOU/STP/EHTP and clarification on applicability of AIDC

The CBIC has amended Form - A (to Circular no. 35/2016-Customs dated 29.07.2016) which is required to be maintained and submitted in digital format by all EOUs/STPs/EHTPs for effective and monthly monitoring of exemption of duty/taxes availed under Notification No. 52/2003-Customs dated 31.03.2003.

Instructions

Streamlining of Customs Post Clearance Audit process to reduce pendency and provide for effective reporting and monitoring

Instruction No.02/2021-Customs dated on February 16, 2021

The CBIC has issued instructions for the purpose of streamlining the PCA and provide for effective reporting and monitoring and addressing issues that have been observed during the department review. The said instructions provide for the following:

- Liquidation of pendency
- Half yearly meetings
- Formats for MIS reports and portal for maintenance of the portal
- Creation of post audit compliance cell
- Monitoring Committee Meetings
- Supervision by Principal Chief Commissioner / Chief Commissioner
- Publishing of Quarterly Bulletin by DG (Audit)

Case Laws

Challenge to Rule 89 (5) of the CGST Rules

TVL. TRANSTONNELSTROY AFCONS JOINT VENTURE (Supreme Court), SLP(C) No. 001552 - 001557 / 2021

The Hon'ble Madras HC in case of the Taxpayer had held that the Rule 89 (5) of the CGST Rules which allows refund of unutilized credit only of inputs and not input services is a valid exercise of legislative power. The said judgement has been challenged before the Hon'ble SC and a notice has been issued. The SC has also issued a notice in an SLP filed by revenue against the judgement of Hon'ble Gujarat HC in case of VKC Footsteps wherein the Gujarat High Court had, contrary to the Madras HC, held that Rule 89 (5), to the extent it does not allow refund of accumulated ITC on input services, is ultra vires the CGST Act.

Challenge to Rule 96 (10) of the CGST Rules before the admitted

Prashi Pharma Private Limited (Mumbai HC), WP (L) NO.436 OF 2021

Various taxpayers have received notices from DRI Kolkata initiating investigations in cases where taxpayers have imported goods under Advance Authorization and have claimed a refund by exporting with payment of GST. Against one such notice, the taxpayer has challenged the validity of retrospective amendment to Rule 96 (10) of the CGST Rules and the consequent initiation of investigation on the basis of such rule before the Mumbai HC.

Provisions of Section 16 (4) of the CGST Act and amendment to Rule 61 of the CGST Rules Challenged

Surat Mercantile Association Vs Union of India, (Gujarat HC), R/SPECIAL CIVIL APPLICATION NO. 15329 of 2020

A petition has been filed before the Hon'ble Gujarat HC challenging the Section 16(4) of the GST Act which disallows ITC to a taxpayer in respect of any invoice after the due date of furnishing of the return for the month of September following the end of financial year to which such invoice pertains. The taxpayer has also challenged the validity of the retrospective amendment to Rule 61 of the CGST Rules treating GSTR 3B as a return. The above challenge has been made on the grounds that the Section 16 (4) and the amendment to Rule 61 is ultra vires the Article provisions of the Constitution of India.

No AAAR ruling on ITC admissibility on expenses incurred towards business promotion.

Sanofi India Limited, Advance Ruling number - MAH/AAAR/SS-RJ/10/2019-20 – Maharashtra

The Taxpayer is engaged in the business of selling pharmaceutical products. To promote their brand, the taxpayer incurs various promotional expenses such as distributing various products to distributors/wholesalers as rewards for achieving volume sales or distribution of various products embossed with its name to promote its brand.

The taxpayer approached the AAR seeking clarification in respect of admissibility of ITC on such expenses incurred. The AAR answered in negating holding that the ITC in respect of goods distributed as gift/free of cost is disallowed in terms of Section 17(5)(h) of the CGST Act.

Aggrieved by the said order, the Taxpayer filed an appeal before the AAAR wherein there was

Case Laws

difference of opinion between the members of the AAAR on the questions raised by the taxpayer. One of the members was of the view that ITC shall be available on the ground that the scheme being purely driven by commercial intentions, the promotional products distributed cannot constitute as a gift and it was in furtherance of taxpayer's business. The second member, however, held that ITC would not be available on the ground that no since consideration is received for the supply of promotional goods, it will amount to gift and that Section 17(5)(h) of the CGST Act overrides Section 16(1) of the CGST Act. Since there was difference of opinion between the members, the AAAR held that no advance ruling can be pronounced in the present case in terms of Section 101(3) of the CGST Act.

The GST law provides that in case of difference of opinion between the member of AAR, the members shall make reference to the AAAR for decision on such disputed question. However, the in case of difference of opinion between the members of the AAAR, the GST law provides that it shall be deemed that no advance ruling can be issued in respect of such disputed question. The AAR and the AAAR have been constituted with an objective to bring clarity and certainty on the applicability of the provisions of the law, this particular case brings out the disparity in law wherein due to the difference of opinion between the members of the AAAR, the taxpayer is left remediless. One hopes that once the National Appellate Authority for Advance Ruling is constituted, such situations may not arise.

Amendment in definition of Listed Company

Notification dated February 19, 2021

The Companies Act has defined Listed Company, as "a company which has listed any of its securities on any recognized stock exchange". However, the Company Law Committee is of the view that classifying a private limited company and public limited company as a 'listed company' solely based on the listing of certain debt securities offered on a private placement basis seemed inappropriate due to the strict regulations imposed on Listed Companies. In line with the Government's steps to promote ease of doing business, MCA has amended Companies (Specification of definitions details) Rules, 2014 and inserted Rule 2A and specified the list of Companies which will ***not to be classified as Listed Companies.*** The list of such companies are:

- Private companies:
  - which have listed their non-convertible debt securities issued on private placement basis on a recognized stock exchange.
- Public Companies (whose Equity shares are not listed on a recognized stock exchange):
  - whose equity shares are listed on a stock exchange in permissible foreign jurisdiction, or such other jurisdictions as may be prescribed.
  - which have listed non-convertible debt securities in terms of *SEBI (Issue and Listing of Debt Securities) Regulations, 2008* or non-convertible redeemable preference shares in terms of *SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013*, issued on a private placement basis.

Spending of funds for awareness on COVID-19 vaccination programs treated as CSR activity

General Circular No. 01/2021 dated January 13, 2021

MCA has clarified that spending of CSR funds for carrying out awareness programmes or public outreach campaigns on COVID-19 vaccination programmes shall be considered as an eligible CSR activity under (a) promotion of health care, including preventive health care and sanitization, (b) promoting education and (c) disaster management of Schedule VII of the Companies Act, 2013.

AGM for FY 2020-21 can be held through e-mode

General Circular No. 02/2021 dated January 13, 2021

In line with FY 2019-20, MCA has provided that the company can hold the Annual General Meeting for FY 2020-21 through video conferencing or other audio visual means, up to December 31, 2021. It is to be noted that there has been no further extension in holding AGM for FY 2019-20 the last date of which was December 31, 2020.

Various amendments to CSR regulation

Notification dated January 22, 2021

To make companies more accountable and transparent in CSR obligations, the MCA has introduced various changes to the *Companies (Corporate Social Responsibility Policy) Rules, 2014*. Key amendments in the Rules are:

MCA Notifications

Compulsory Registration: The Company can undertake the CSR activities either itself or through any entity and that entity should be mandatorily registered, by filing Form CSR-1 w.e.f. April 1, 2021. Form CSR- 1 needs to be verified digitally by Chartered Accountant /Company Secretary/ Cost Accountant in practice;

Impact Assessment: Companies having CSR obligation of ten crore rupees or more in the three immediately preceding financial years shall have to undertake Impact Assessment for CSR Project having outlay of Rupees One Crore or more. The Impact Assessment Report shall then be placed before the Board and annexed with the Annual Report;

Deposit of Unspent CSR: Unspent CSR amount has to be transferred to any Fund included in Schedule VII, till such time as a specified fund is notified;

Surplus from CSR activity: Any Surplus arising out of CSR activities shall not be considered as part of business income and shall have to be used either in same Project or transferred to Unspent CSR Account, to be spent within a period of six months of the expiry of the financial year.

Set off of CSR expenditure in excess of the CSR spends may be permitted against the immediately succeeding three financial years subject to the following conditions:

- the excess amount available for set off shall not include the surplus arising out of the CSR activities;
- the Board of the company to approve the same;

CSR amount spent by a Company for creation or acquisition of a capital asset shall have to be held by:

- a company established under section 8 of the Act, or a Registered Public Trust or Registered Society, having charitable objects and CSR Registration Number
- beneficiaries of the said CSR project, in the form of self-help groups, collectives, entities; or
- a public authority

[*Note: Any capital asset created by a Company prior to the commencement of the said Rules, shall have to comply with the requirement of this Rule within a period of one hundred and eighty days from commencement of the Rules, subject to a further extension of ninety days' with suitable justification by the Board*].

Mandatory disclosure of composition of the CSR Committee, and CSR Policy and Projects on website of Company, if any;

The CSR committee to formulate and recommend to Board, an annual action plan which shall include CSR Projects or programmes, manner of execution of CSR Projects etc.

Detailed reporting formats have been specified for inclusion in the Board Report for the financial year starting April 1, 2020 including the following:

- Composition of CSR Committee
- Details of set-off on a FY basis
- CSR amount spent/unspent in the FY
- Details of CSR spent on "Ongoing Projects" in the FY

- Details of CSR spent on "other than Ongoing Projects" in the FY
- Calculation of Set-off of Excess CSR amount in the FY
- Details of Unspent CSR amount for the preceding three FYs

Revision of Definition of Small Companies

Notification dated February 1, 2021

In the definition of Small Companies, threshold of Turnover to be increased from *Rupees 2 crores to 20 crores* and Paid-up share capital from *Rupees 50 Lakhs to 2 crores*. It shall come into force from 1st April 2021. The primary intention of revising the threshold is to provide ease of doing business for a larger set of companies [coming under the revised limits] by providing minimal compliances for such companies.

Start-up Companies to enter into Scheme of Merger or Amalgamation

Notification dated February 1, 2021

Start-up Companies and Small Companies are permitted to enter into Scheme of merger or amalgamation under Section 233 of the Companies Act, 2013, which involves either two or more start-up companies or one or more start-up company with one or more small company. Start-Up Company means a private company recognized by the Department for Promotion of Industry and Internal Trade (DPIIT).

Simplified norms for One Person Companies

Notification dated February 1, 2021

Companies (Incorporation) Rules, 2014 to be amended for encouraging incorporation of One Person Companies [OPCs]. Key amendments in the said Rules are:

- *A Natural Person who is an Indian citizen whether resident in India or otherwise* [earlier only an Indian Citizen who is resident in India] can incorporate an OPC;
- The residency period reduced from 182 days to 120 days;
- The provisions of conversion of One Person Company into Public or Private Company simplified. OPC can convert by merely filing Form INC-6;
- The restrictions/cap on paid up capital and turnover to be categorized as "One Person Company" removed. Thus, the process of conversion from OPC to a Private/Public Company once the threshold of paid-up capital or turnover was exceeded no longer applies.
- The Rules shall come into force from 1st April 2021.

Scheme for Condonation of Delay for certain Companies

General Circular No. 03/2021 dated January 15, 2021

MCA had introduced Companies Fresh Start Scheme [CFSS 2020] for filing of belated returns and documents and to give a chance of revival to Companies [whose name was struck off from Register of Companies] by filing an application under Section 252 of the Companies Act, 2013. This scheme expired on December 31, 2020.

However, Companies to whom order for restoration was issued during December 2020 could not avail the benefit of CFSS 2020. To provide relief to such Companies, MCA introduced the Scheme for condonation of delay for Companies restored on the Register of

MCA Notifications

Companies under Section 252 of Companies Act, 2013, between December 1, 2020 to December 31, 2020.

Key features of the Scheme are:

- The Companies restored above shall file all overdue forms without additional fees up to March 31, 2021;
- Scheme shall be applicable to the filing of all Forms except Form SH-7 and charge related forms i.e. Form CHG-1, CHG-4, CHG-8 and CHG-9.

RBI & FEMA Notifications

Remittances to IFSC in India under LRS

RBI/2020-21/99 , A.P. (DIR Series) Circular No. 11 Dt. February 16, 2021

With the objective to broaden the financial markets in International Financial Services Centres (IFSCs) and provide another source of investment channel to Resident Individuals under the Liberalized Remittance Scheme (LRS), RBI has permitted LRS to IFSCs. The permission to invest in IFSCs under the LRS are subject to the following conditions:

- Investment is permitted in securities issued by IFSCs by entities/companies resident outside India.
- Resident Individuals are also permitted to open non-interest-bearing Foreign Currency Account (FCA) in IFSCs. The idle funds lying in this FCA for a period exceeding 15 days will be remitted back to domestic INR account of the investor.
- Domestic transactions with other residents will not be permitted to be settled through the FCAs held in IFSC by the Resident Individual.

Such transactions on the IFSC by a Resident Individual shall only be governed by regulations/directions and rules issued/notified by the Reserve Bank of India and the Government of India respectively under Foreign Exchange Management Act (FEMA), 1999.

Investment by Foreign Portfolio Investors (FPI) in Defaulted Bonds – Relaxations

RBI/2020-21/105

A.P. (DIR Series) Circular No. 12 Dt. February 26, 2021

Foreign Portfolio Investors (FPI) investments in corporate bonds were currently subject to a minimum residual maturity requirement, short-term investment limit and the investor limit as per the extant *Foreign Exchange Management (Debt Instruments) Regulations, 2019*. RBI has now exempted investments made by FPI in NCDs/bonds which are under default, either fully or partly, in the repayment of principal on maturity or principal instalment in the case of amortizing bond from the stipulated requirements.

The rationale to permit FPI in such investments is to broaden the market for debt instruments and to provide liquidity to bonds in default and to align with the provisions permitting FPI investments in security receipts and debt instruments issued by Asset Reconstruction Companies and debt instruments issued by an entity under the Corporate Insolvency Resolution Process.

Investment in NBFCs from FATF non-compliant jurisdictions

RBI/2020-2021/97

DOR.CO.LIC.CC No.119/03.10.001/2020-21 Dt. February 12, 2021

RBI has now restricted new investors from / through non-compliant FATF jurisdictions, acquiring a '*significant influence*' directly or indirectly, either in existing NBFCs or in companies seeking Certification of Registration (COR). Significant influence shall be as defined in the applicable accounting standards.

Investments (either directly or indirectly) from such jurisdictions in aggregate shall be limited to less than the threshold of 20 per cent of the voting power (including potential voting power[1]) of the NBFC. It has been mandated that new investments from FATF non-compliant jurisdictions are maintained below (i) 20 per cent of the existing voting powers and (ii) 20 per cent of existing and potential voting powers, considering that the potential voting rights have materialized, as the case may be.

[1] Potential voting power means voting power that could arise from instruments that are convertible into equity, other instruments with contingent voting rights, contractual arrangements, etc. that grant investors voting rights (including contingent voting rights) in the future.

Relaxations relating to procedural matters – Issues and Listing

SEBI/HO/CFD/DIL1/CIR/P/2021/13 dated January 19, 2021

SEBI vide Circular no. SEBI/HO/CFD/DIL2/CIR/P/2020/78 dated May 6, 2020 had granted one time relaxation in the enforcement of certain provisions pertaining to Rights Issue opening up to July 31, 2020 which was subsequently extended to Rights Issues opening up to December 31, 2020.

SEBI vide this circular has further extended the relaxation up to March 31, 2021, provided the conditions are adhered to. The following provisions had been relaxed vide Circular issued in May, 2020:

- Arranging an alternative payment mechanism (non-cash mode only) other than the mandatory ASBA facility [for Rights Issues], to accept the applications from shareholders while maintaining that no third-party payments be allowed for such applications.
- Instituting a mechanism to allow physical shareholders to apply in the rights issue where such shareholders have not been able to open a demat account or are unable to communicate their demat details [Note: SEBI circular dated January 22, 2020, SEBI introduced dematerialized rights entitlements (REs), wherein physical shareholders mandatorily required to provide their demat account details to Issuer/ Registrar to the Issue for credit of REs].

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Abbreviations

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Abbreviation	Meaning
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
BBT	Buy Back Tax
BOE	Bill of Entry
BOI	Body of Individuals
BT	Business Trust
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
CFC	Controlled Foreign Corporation
CGST	Central Goods and Services Tax
CIT(A)	Commissioner of Income Tax (Appeal)
CPC	Central Processing Centre
COI	Constitution of India
CPSE	Central Public Sector Enterprise
CSR	Corporate Social Responsibility
CTA	Covered Tax Agreement
CUP	Comparable Uncontrolled Price Method
CUP	Cost Plus Method
DDT	Dividend Distribution Tax
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
DRP	Dispute Resolution Panel
DTAA	Double Tax Avoidance Agreement
ECB	External Commercial Borrowing
ECCS	Express Cargo Clearance System
EGM	Extra-ordinary General Meeting

Abbreviation	Meaning
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
FTS	Fees for Technical Service
FY	Financial Year
GAAR	General Anti-Avoidance Rules
GDR	Global Depository Receipts
GOI	Government of India
GST	Goods and Service Tax
GSTN	Goods and Services Tax Network
GVAT Act	Gujarat VAT Act, 2006
HC	High Court
HSN	Harmonized System of Nomenclature
ICAI	Institute of Chartered Accountant of India

Abbreviations

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Abbreviation	Meaning
ICDS	Income Computation and Disclosure Standards
ICDR	Issue of Capital and Disclosure Requirements
IDS	Inverted Duty Structure
IGST	Integrated Goods and Services Tax
IRDA	Insurance Regulatory and Development Authority
ISD	Input Service Distributor
ITA	Income Tax Act, 1961
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
LO	Liaison Office
LODR	Listing Obligations and Disclosure Requirements
LTA	Leave Travel Allowance
LTC	Lower TDS Certificate
LTCG	Long term capital gain

Abbreviation	Meaning
MAT	Minimum Alternate Tax
MCA	Ministry of Corporate Affairs
MFN	Most Favored Nation clause under DTAA
MSF	Marginal Standing Facility
MSME	Micro, Small and Medium Enterprises
ODI	Overseas Direct Investment
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
RBI	Reserve Bank of India
RCM	Reverse Charge Mechanism
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
RPM	Resale Price Method
SC	Supreme Court of India

Abbreviation	Meaning
SDT	Specified Domestic Transaction
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
SST	Security Transaction Tax
ST	Securitization Trust
STCG	Short term capital gain
STPI	Software Technology Parks of India
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
WHT	Withholding Tax
WOS	Wholly Owned Subsidiary