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.

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

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Financial Market

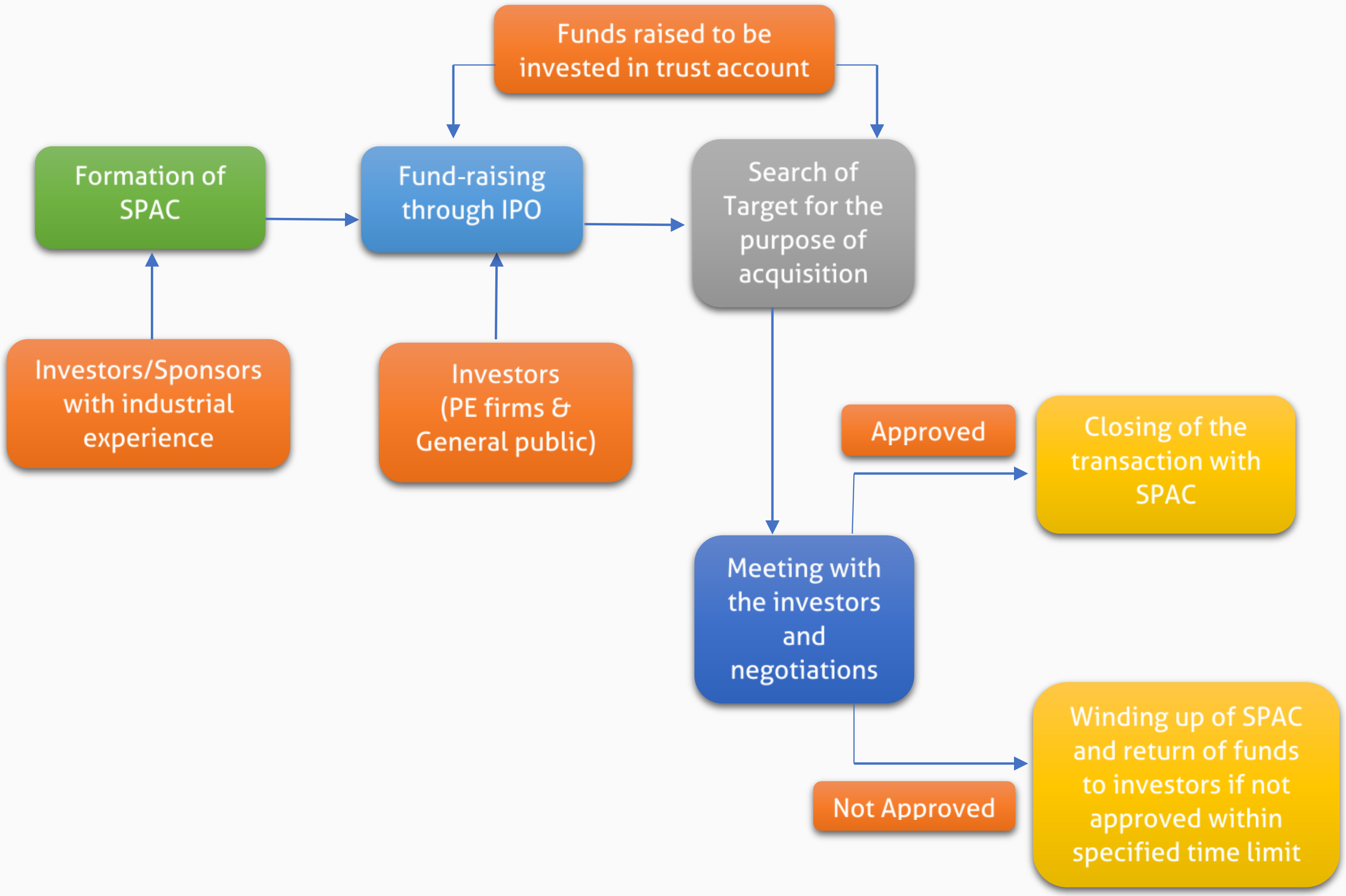
The SPAC Revolution

Introduction

A Special Purpose Acquisition Company (SPAC) is a company formed with no commercial operations but to raise funds through initial public offering (IPO) either to acquire or merge with another operating company. SPACs are also known as "blank cheque" companies as neither do they have any operations at inception nor do they have any stated targets for acquisitions at the time of floating the IPO.

Investors in SPAC include private equity funds and institutional investors who are generally the sponsors and other high net worth and retail investors upon listing.

How does a SPAC model work?



Financial Market

Advantages of SPAC

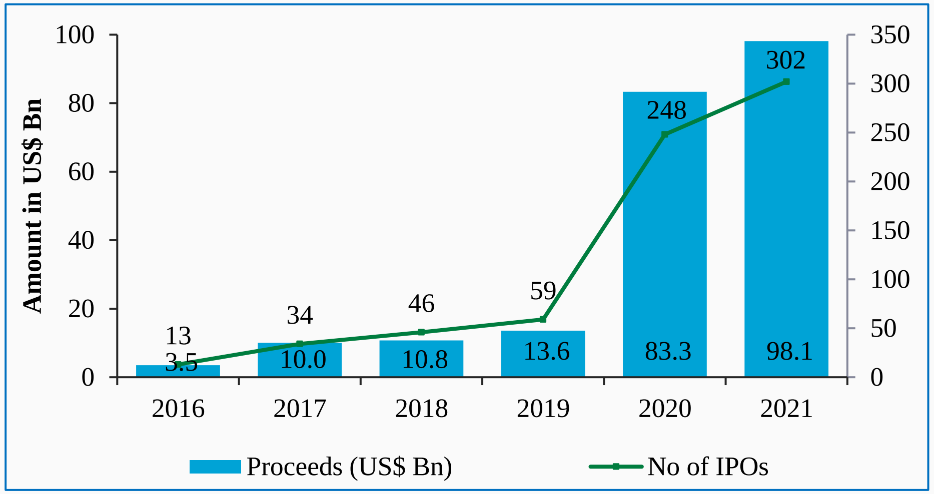
- SPAC being a listed entity enables pooling of public funds for investment in private companies including startups which otherwise have limited access to public markets.
- This model also helps private companies go public without going through the cumbersome process of an IPO.
- Since the transaction is structured as a reverse merger, shareholders of the acquired entity typically end up being majority shareholders of the listed entity.
- Investment in SPAC is considered to be a low-risk proposition as the amount invested in the IPO is kept in trust in an escrow account which earns interest and if an acquisition transaction does not take place in the given time period (generally up to 2 years), then the invested amount along with interest is refunded to the investors.

Capital Structure

During the initial public offering where the funds are pooled from investors, the sponsor generally takes up to 20% stake in the SPAC against a nominal investment which in lieu of its management fee, whereas other investors get units which consist of a share in common stock and a convertible warrant which would facilitate additional compensation to the investor at a later date once the price discovery happens after merging of the SPAC with the target.

SPAC IPO transactions in US

SPACs in the US are regulated by the Securities and Exchange Commission (SEC) and have gained popularity in the last decade. Below chart represents SPAC IPO transactions and proceeds raised during past 5 years:



Source: spacinsider.com; 2021 represents period from 01-Jan-21 to 07-Apr-21

While SPACs have bloomed over the last year and a half, it is worthwhile to note that of the 302 listings in 2021, only 6 have announced their targets so far. Further, of the 248 SPAC listings in 2020, 129 companies are still searching for targets while 93 have announced acquisitions and 26 have completed the transaction.

Financial Market

Indian scenario

The present regulatory framework in India is not supportive for SPACs. For instance, while SPACs generally take up to 2 years to get operational upon merging with the target, the Indian Companies Act provides for striking-off a company if it does not commence operations within one year of its incorporation or if a company does not conduct any business for two consecutive years and has not applied for a dormant company status.

Further, the SEBI Regulations prescribe minimum eligibility criteria for initial public listing which requires a company to have net tangible assets of more than INR 3 crore in the preceding three years, minimum average pre-tax operating profits of INR 15 crore in at least three of last five years and net worth of more than INR 1 crore in each of the three preceding years. Prominent stock exchanges in India i.e., NSE and BSE requires companies to be SEBI compliant. Over and above this, NSE requires companies to have positive EBIDTA in past two years.

Above challenges suggest that the Indian regulatory framework is not yet prepared for the formation and listing of blank cheque companies in India. However, noticing that startups are increasingly using SPAC route for listing outside India, Security and Exchanges Board of India (SEBI) has reportedly formed a group of experts to study the feasibility of bringing SPACs under the regulatory ambit.

Several Indian companies have recently explored listing in the US due to its friendlier listing environment. For instance, renewable energy firm ReNew Power Ltd is set to list through the SPAC route while several Indian startups including the likes of Flipkart, Zomato and Swiggy are looking to list abroad.

Way forward

Following the success story of SPACs in the US, it is high time that Indian regulators chart out a map for SPAC listing in India considering that Indian financial markets are mature and sizable enough to ensure the success of SPACs in the Indian IPO market. Listing of Indian startups abroad should rather be seen as an opportunity lost for the Indian capital markets and its investors.

From an investor's perspective though, investing in a SPAC requires a lot of trust on the management of the sponsor in finding valuable targets which are typically startups with no history of profitability which may lead to higher risk for the investors once the price discovery happens in the stock market.

Notifications

Dividend, Interest and capital gain income from listed securities and Mutual Fund now to be reported in Statement of Financial Transactions (SFT)

(Notification no. 01 & 02/2021 dated 20th April 2021 and 03 & 04/2021 dated 30th April 2021)

With an objective to simplify the process of filing ITR and to facilitate e-filing of pre-filled ITR, CBDT has enhanced the scope of section 285BA and now the entities paying dividend or interest income or entities being stock exchanges/mutual funds shall require to report transactions of dividend, interest and transfer of listed securities / mutual funds in SFT. This information will enable the prescribed IT Authority to monitor /cross verify whether the corresponding income has been correctly offered in the hands of recipient or not and also to take corrective steps if same is not assessed in their hands.

Additional Reporting in Tax Audit Report

(Notification no. 28/2021 dated 1st April 2021)

The CBDT has notified following amendments to Form No. 3CD (Tax Audit Report).

- New clause no 8A has been inserted wherein the Tax Auditor shall be required to report that whether the Assessee has opted to pay tax under 115BA/ 115BAA/ 115BAB/ 115BAC/ 115BAD.
- Clause 17 has been amended whereby the Tax Auditor shall now be required to specify whether the difference in consideration received/ accrued and value adopted by the authority of state government in relation to immovable property is within the safe harbour limit provided in section 43CA or 56(2)(x) of the ITA or not.
- Clause 18 has been amended whereby the Tax Auditor will be required to report the amount of adjustment required to be made to the WDV of capital assets in case where the Assessee has opted for section 115BAC and 115BAD of ITA. Further, in line with the amendment to FA 2021, the adjustment to the opening WDV of block of Intangible representing "Goodwill" is also required to be separately reported.
- Clause 32 has been amended to provide for details of brought forward loss or depreciation allowance along with adjustment to brought forward losses or depreciation allowance on account of exercising option to pay tax u/s 115BAA/ 115BAC/ 115BAD.
- Clause 36 requires reporting of information pertaining to DDT paid u/s 115-O. Since with effect from 1st April 2021 the provision of section 115-O is not applicable, this clause has been omitted.
- Further the tax auditor can now revise Form 3CD up to the end of relevant assessment year in so far, such revision is due to payment made by the Assessee which necessitates recalculation of disallowance u/s 40 or 43B.

Extension of time limit for making payment under DTVSV

(Notification no. 39/2021 dated 27th April 2021)

Board extends the time limit for making payment under DTVSV without any additional tax to 30th June 2021 from existing time limit of 30th April 2021.

Notifications

Coverage

Reporting of GAAR/ GST in Tax Audit Report is deferred

(Circular no. 05/2021 dated 25th March 2021)

In the view of Covid 19, the Board has further deferred the GAAR reporting (Impermissible Avoidance Agreement as referred in section 96) (clause 30C) and reporting of break-up of total expenditure of entities registered as well as not registered under GST (clause 44) till March 31, 2022.

New forms for filing Income Tax Returns for A.Y. 2021-22

(Notification no. 21/2021 dated 31st March 2021)

The CBDT has notified new forms for filing Income Tax Returns of A.Y. 2021-22. The CBDT further clarified that any person who has withdrawn cash exceeding the limits specified u/s 194N (Rs.1 crore) or who is in receipt of income by way of perquisite in the nature specified u/s 17(2)(vi) shall not be eligible to file ITR in form SAHAJ ITR-1.

Amendment in form-12BA, Form-16 & Form-24Q

Notification No. 15 / 2021 / F. No. 370142/04/2019-TPL dated March 11, 2021

CBDT has amended the Form-12BA, Form-16 (Part-B) & Form-24Q (Annexure-II) whereby the following additional information/details of salaried individual employees will be required to be incorporated.

- To notify whether an employee as opted for concessional tax regime as per section -115BAC.
- To notify details of aggregate contributions exceeding Rs. 7.50 lakh along with the annual accretion related to such excess contribution taxable as perquisites as per section 17(2)(vii) of the ITA.
- To notify the details of TDS deducted on perquisites arising to an employee from exercising of ESOP granted by an eligible start-ups referred to in section-80-IAC as per section 192 (1C).

These changes are effective from 1st April 2021.

Manner to computing annual accretion related to excess contribution made by employer to various welfare funds as per section 17(2)(vii)

Notification No. 11 /2021/F. No. 370142/52/2020-TPL dated March 5 2021

As per section-17(2)(vii), as amended by FA 2020, the aggregate contributions made by the employer to various welfare funds exceeding Rs.7.50 lacs along with annual accretion by way of interest, dividend or such other similar nature due on such excess contribution shall be taxable as perquisites in the hands of employee. CBDT has an accordingly inserted a new Rule-3B to the IT Rule and prescribed detailed method for calculating the value of perquisites.

Important Rulings

Coverage

Deduction u/s 80IA not restricted only to 'Business Income'

CIT Vs. M/s. Reliance Energy Ltd. , Civil Appeal No. 1327 of 2021, Supreme Court of India

The Taxpayer is engaged in the business of power generation activity which is eligible u/s 80IA of the ITA. During the course of assessment proceedings, the AO observed that the total income of the eligible undertaking included income chargeable under the head Income from other sources. The AO was of the view that as per conjoint reading of section 80AB read with 80IA, the deduction u/s 80IA is restricted to the "Business Income" of the eligible undertaking alone and the same would not be available against the income under the head 'Income from other sources. The AO therefore restricted the deduction u/s 80IA only to the extent of 'Business Income'.

Aggrieved by such order, the Taxpayer preferred an appeal before CIT(A) and contended that section 80AB only deals with the quantification of deduction and it does not prescribe that deduction is limited to a particular source of income. The CIT(A) agreeing to the above contentions held that the stand taken by the AO is devoid of section 80IA and thus, deduction u/s 80IA is not limited to 'Business income'.

The ITAT and HC both concurred with the finding of CIT(A) and while adjudicating the issue, the HC and ITAT also discussed the scope of CBDT Circular No 281 dated September 22, 1980 wherein the CBDT clarified that section 80AB only talks about the quantum of deduction. Relying on this circular, the HC allowed relief to the Taxpayer.

Before the Hon'ble SC, the Revenue reiterated that as per section 80IA(5) read with section 80AB, the deduction is limited to the business income derived by the eligible undertaking only.

The Hon'ble SC after discussing the legislative intent and scope of section 80AB as well as section 80IA of the ITA held that there is no force in the arguments advanced by the Revenue. The Hon'ble SC explained that sub-section (5) of section 80IA only deals with the determination of quantum of deduction by treating eligible business as only source of income. There is no explicit reference in section 80IA which permits the deduction of only 'Business income'. The Hon'ble SC accordingly held that 80IA(5) and 80AB cannot be read in a manner that said sub-section restricts the deduction to the extent of business income as the said interpretation would defeat the purpose of 80IA. The Hon'ble SC upheld the order of HC and accordingly allowed relief to the Taxpayer.

Time and again the claim of deduction which are typically linked to the "Income" are subject matter of litigation. The Revenue interpret the provisions to narrow down the scope of deduction. The SC in past has also taken such stand that sections which confers deduction or benefits are subject matter of strict interpretation and one cannot literally interpret the provision to expand the ambit of deduction.

Interest on late payment of TDS is not an expenditure incurred "wholly and exclusively" for the purpose of business

New Modern Bazaar Departmental Store Pvt. Ltd, ITA no. 590 of 2018, ITAT Delhi

The taxpayer is engaged in the business of groceries trading. For the year in question, the

Important Rulings

Taxpayer filed its ITR and claimed deduction on account of interest on late payment of TDS of Rs. 32,793/- u/s 37(1) of the ITA.

During the assessment proceedings, while substantiating this claim, the Taxpayer contended that interest on late deposit of TDS is compensatory and not penal in nature and therefore, it is not hit by proviso to section 37(1). Therefore, the interest paid for delayed TDS payment is fully allowable u/s 37(1). The Lower Authorities rejected the stand of the Taxpayer. The Lower Authorities held that interest on delayed payment of TDS is not an "expenditure" per-se which has been incurred wholly and exclusively for the purpose of business and therefore, the said interest is not allowable expenditure u/s 37 of the ITA.

Before the ITAT, the Taxpayer placed reliance on the decision of CIT v. ITC Ltd. (ITA No. 475,476 & 860 of 2010, Delhi HC) and contended that interest on delayed payment of TDS is not penalty and therefore, the proviso to 37(1) is not applicable. Accordingly, the Taxpayer demanded that interest paid for delayed payment of TDS should be allowed as deduction u/s 37(1) of the ITA.

The Revenue on the other hand countered that interest of delayed payment of TDS u/s 201(1A) of the ITA partakes the character of "levy of tax" and therefore, any amount paid as "tax" is otherwise not admissible u/s 37(1). The Revenue placed reliance on the decision of Madras HC in the case of CIT vs. Chennai Properties & Investment Ltd reported at (TC no. 468 of 1986). The Revenue also argued that the Taxpayer has failed to substantiate as to how the interest on delayed payment of TDS otherwise qualifies as "expenditure" within the meaning of section 37.

The ITAT after considering the contentions of the Taxpayer and that of Revenue held that interest on delayed payment of TDS cannot be considered as an "expenditure" expended wholly and exclusively for the purpose of the business within the meaning of section 37(1) of the ITA. The ITAT followed the Madras High Court decision in case of CIT vs Chennai Properties & Investment Ltd (supra) to hold that interest on delayed payment of TDS is actually in nature of "Income Tax".

On this issue, the Kolkata ITAT in the case of DCIT vs. Narayani Ispat Pvt. Ltd. (ITA No. 2127 of 2014), has however taken a position that interest on delayed payment of TDS is an "expenditure" u/s 37(1) of the ITA. However, the ITAT Ahmedabad in case of *MMR Infra vs. DCIT (ITA No. 1609 of 2018)*, after considering the decision of Narayani Ispat Pvt. Ltd. (supra), has taken a contrary position that the interest on delayed payment of TDS is not allowable business expenditure within the meaning of Section 37(1) and hence, not allowable.

Based on the above, it is quite clear that different courts/ ITATs interpret the provision in light of peculiar facts and arguments advanced before it. Here it is interesting to note that for the computation of book profit for MAT purpose section 115JB specifically provides that interest charged under the Act is required to be added back in addition to income tax.

Important Rulings

TDS credit cannot be denied merely because the deductor has not deposited TDS to the Central Government

ITO vs Jasjit Singh, ITA No 4096/Del/2016, Delhi ITAT

The Taxpayer, a non-resident, had sold his shareholding held by him in an Indian Company. Such Indian Company (deductor) had deducted tax at source u/s 195 of the ITA and remitted net sale consideration to the Taxpayer. The Taxpayer offered the capital gain income from sale of shares and claimed TDS credit of Rs. 2.05 cores.

During the assessment proceedings, the AO noted that the deductor had not deposited TDS within the stipulated time limit nor issued TDS certificate and therefore, the Taxpayer is not entitled to claim credit of said TDS. The Taxpayer contended that since the TDS has been deducted by the deductor u/s 195 of the ITA and only net amount is remitted to him, the Taxpayer is not required to pay tax on corresponding income. The AO however did not accept the claim of the Taxpayer and treated the Taxpayer as "Assessee in default" for the default committed by the deductor and consequently TDS credit was rejected.

The CIT (A) however ratified the order of AO to the extent by holding that it was the deductor Indian company which can be treated as "Assessee-in-default" within the meaning of section 201 of the ITA. However, the CIT(A) upheld the order of AO and denied the TDS claim.

Before the ITAT, the Taxpayer contended that in terms of section 205 of the ITA, once the TDS has been deducted as per the provision of chapter XVII B of the ITA, the deductee is not required to pay tax on the corresponding income. The Taxpayer in this regard placed reliance on office memorandum issued by CBDT vide F.No.275/29/2014-IT(B) dated March 11, 2016 which provides guideline for granting TDS credit in case of mis-match of actual TDS credit with 26AS.

The ITAT, after considering the facts and contention of the Taxpayer and Board's instructions held that once TDS has been deducted, the credit of TDS is required to be given to the deductee whether or not the deductor has deposited the same in time. There is adequate remedy provided by the legislature for levying of penalty and launching of prosecution proceeding against the defaulter. Non-deposit of TDS by deductor to the credit of Government or non-issuance of TDS certificate therefore cannot prevent the deductee to claim credit of TDS.

Loss arising on account of capital reduction by subsidiary is allowable as Business Loss

ACIT v. GHCL Ltd, ITA No. 1120 of 2017, Ahmedabad ITAT

The Taxpayer was engaged in the business of manufacturing of soda ash and textile business. The Taxpayer had set up a wholly owned subsidiary in Netherlands by the name Indian Britain BV ("IBB"), which in turn had made further investment into step down subsidiaries. These companies were also engaged in the identical business of manufacture of soda ash and textile business. The overseas investment was made with an aim to create a global

Important Rulings

footprint and accordingly bring its product in the global market. The investment was thus for the purpose of furtherance of existing business.

Due to recession in Europe and USA, all the foreign subsidiaries were suffering huge losses which in turn had affected the financial position of IBB, a strategic company through which the Taxpayer had made other investments. In order to recover from the adverse financial position, the Taxpayer reorganized the businesses of the foreign entities including that of IBB. In case of IBB, the reorganization was carried out through Capital Reduction and as a result of this, the Taxpayer suffered a loss of Rs. 99.89 crores. In income tax return filed u/s 139(1), the Taxpayer claimed the said loss under the head capital gain.

During the assessment proceedings, the Taxpayer requested the Department to treat the loss on account of capital reduction affected by IBB as Business Loss instead of Capital Loss. Before the lower authorities, the Taxpayer contended that the investment was made primarily for the purpose of expanding the footprint into global market and hence, there was commercial expediency. The Taxpayer accordingly contended to treat the loss on capital reduction by IBB as business loss instead of capital loss. The Taxpayer also contended that an additional legal claim can be made before appellate authorities even where such claim has not been made by way filing revised return of income.

The AO rejected the claim of the Taxpayer on the ground that such additional claim could not be entertained during the assessment proceedings without filing revised return of income. The AO relied on the decision of Supreme Court in the case of Goetz (India) Ltd. The CIT(A), after considering the facts and legal precedents, allowed the additional claim of the Taxpayer and held that the loss in shareholding on account of capital reduction is business loss and not capital loss.

The ITAT after considering the arguments of the Taxpayer and the Department held that the investment in foreign subsidiaries made through IBB was made for commercial expediency and for the business development and therefore, the loss on account of capital reduction was to be treated as business loss.

Important Rulings - India

Cross-border software purchase transactions: SC settles the dust

Engineering Analysis Centre of Excellence Private Limited vs. CIT [Civil appeal no. 8733 – 8734 of 2018, SC]

The two-decade old controversy on categorization of payments made by Indian residents for use and resale of computer software has finally been put to rest by the SC in a landmark ruling. Earlier, the dispute between the Revenue and taxpayers was whether an expenditure incurred for procuring off-the-shelf software is for 'copyright' or 'copyrighted article' and accordingly, whether it was a subject to tax as royalty. Till now the revenue has generally taken a view that income arising on grant of any software should be categorized as 'royalty', disregarding the nature of rights acquired by the recipient. On the other hand, the taxpayers classified supply of software as business profits, especially under the applicable DTAA, based on the nature and extent of rights granted to the end user.

In the judgement, the SC has analyzed the following 4 transactions for purchase of software:

- Purchase by resident end-user from a non-resident
- Purchase by Indian distributor from a non-resident to for resale to customers in India
- Purchase from a non-resident distributor/reseller; and
- Purchase of Software bundled with hardware by Indian distributors/end-user from foreign suppliers.

After analyzing various judicial precedents and definition of royalty provided in Article 12, the SC has held that as distribution agreement/End User License Agreement (EULA) do not create any interest or right in such distributors/end users, which would amount to the use of or right to use any copyright. An end user who obtains a non-exclusive, non-transferable and restricted right to a copy of the software makes a payment for the copyrighted software and not for use of the "copyright" of the owner. Likewise, where the end user does not obtain any rights in the copyright under the license agreement, making a copy of the software for internal use does not involve the grant of a right in the copyright. The SC assented with the view that a payment made by end users and distributors in such cases is similar to a payment for the sale of goods and not for the grant of a license under the Indian Copyright Act, 1957. The SC thus held that the income from the sale of software would not be taxable in India as royalty as per the DTAA. While arriving at its conclusions, the SC referred to the OECD Commentary on Article 12 of the OECD Model Tax Convention and concluded in line with the international understanding of the term 'royalty'. It is noteworthy that even though the Government of India has expressed its reservations on OECD commentary related to royalty, the SC has stated that the said commentary would still continue to have persuasive value on the interpretation of 'royalty'.

In its decision the SC has also reiterated the existing position that the machinery provisions of withholding of taxes on payments made to non-residents (section 195) are inextricably linked with the charging provisions (section 9) and such withholding tax provisions can only be made if the non-resident is liable to pay tax under the charging provision (after giving the benefit of tax treaties, where applicable). Further, the SC also recapitulated that once a tax treaty applies, the provisions of the ITA can only apply to the extent that they are more beneficial to the taxpayer and not otherwise.

Under the domestic law, 'Royalty' has a much wider connotation which covers within its ambit any payment made for purchase of software. The scope of royalty was broadened by amending Section 9 in 2012 (introduction of Exp. 4 to Section 9(vi)). In the present case, the Revenue had had also argued that the introduction of Exp. 4 was clarificatory in nature and thus the scope of Royalty stood expanded with a retrospective effect. On the matter of retrospective application, the SC held that the taxpayer could not compel the taxpayer to do the impossible and deduct tax at source during the time when the obligation did not factually exist in the statute.

This landmark ruling of the SC will put an end to the litigation on this issue. Recently, the Bangalore ITAT in the case of Altisource Business Solutions Private Limited v. ACIT dated March 17, 2021 *(ITA No. 3287 to 3289 of 2018)* has also passed a decision in favour of the taxpayer by relying on the decision of the SC. Other pending litigations relating to this issue are similarly expected to be disposed swiftly. While the Judgement settles the issue on characterization as royalty and taxability under the provisions tax treaty the taxpayers will now be posed with another question regarding the applicability of the Equalization Levy on such transactions. Considering the recent introduction of the clarification to the provisions of EL that if the consideration received for sale of software is not taxable as royalty under the ITA, read with the relevant tax treaty, then such consideration could be taxable under the EL provisions.

Taxes paid in Foreign Jurisdiction allowed as business expenditure, but no refund by Indian Exchequer

Bank of India v. ACIT (ITA No. 869 of 2018, ITAT Mumbai)

The taxpayer was a public sector bank having operations in various foreign jurisdictions and the taxpayer had earned profits and paid taxes in such countries. However, after considering its domestic and global operations, the taxpayer had in fact incurred a loss in India. Subsequently, the taxpayer claimed the refund of taxes paid in foreign jurisdictions. Foreign tax credit ('FTC') paid was claimed for jurisdictions with which India has DTAA as well as for jurisdictions with which India did not have a DTAA. As a secondary argument, the taxpayer claimed the deduction of such foreign taxes, as business expenditure.

The ITAT referred to the credit mechanism under the tax treaties relevant to the taxpayer and observed that in each case, the tax treaty sanctions only proportionate credit and does not allow for full credit. The ITAT, after placing reliance on various international tax literature,

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including the interpretation of Professor Klaus Vogel, held that when Indian tax payable in respect of such income is nil, there cannot be any FTC available to the taxpayer. Credit mechanism of the India-UK DTAA has an additional condition that the income should be 'subject to tax' in both jurisdictions for which the ITAT noted that an income would be said to be 'subject to tax' only when income tax is actually levied in respect of the said income in the jurisdiction in question. The income suffered taxation in the UK, but since the said income was offset against losses incurred by the taxpayer outside UK, the income so earned in the UK was never subjected to tax in India, which is sine qua non for the availability of tax credit under the DTAA.

In respect of foreign taxes paid in non-tax treaty jurisdictions, after relying on various judicial precedents, the ITAT held that as per section 91 of the ITA the relief is granted only with respect to "doubly taxed income", and when there is no income which has been taxed doubly, there is no question of relief being granted.

The ITAT allowed the alternate claim of the taxpayer for deduction of foreign taxes paid as a business expenditure, relying on the judgment of Bombay HC in the case of Reliance Infrastructure Ltd. vs CIT (*[2016] 390 ITR 271 (Bom)*), wherein it was held that taxes have been paid in foreign jurisdiction for the purpose of earning global income on which tax is payable in India, therefore, such foreign taxes paid shall be allowed as expenditure, to the extent credit for the same is not availed.

The allowability of taxes paid in foreign jurisdictions as a business expenditure is highly debated and it is expected that this order of the ITAT maybe challenged by the Revenue before the Higher courts. It is peculiar that the bench that delivered this ruling comprised of member - Shri Pramod Kumar, who, while presiding over a similar issue at Ahmedabad ITAT, decided the matter against the taxpayer [*DCIT Vs Elitecore Technologies Pvt Ltd (2017) 80 taxmann.com 6 (Ahd)*]. It seems that in the present case, the claim of allowing the foreign taxes as a business expense was mainly guided by the decision of the jurisdictional Bombay HC which is binding on the ITAT. Given that different benches and courts have varying views on this issue, we can expect that issue will reach its finality only after ruling by the SC.

It should be noted that earlier the ITA did not have a specific regulation for calculation of Foreign tax credits and thus solely the DTAA was taken into consideration in the present case. However, in 2017, Rule 128 was the introduced which lays down the mechanism for FTC and thus now the same also requires consideration.

Conditions for characterizing payment as 'Reimbursement' laid down

BYK Asia Pacific Pte. Limited v. ACIT (ITA No. 2110 of 2019, ITAT Pune)

The Taxpayer is a Singaporean Company in India, which had made certain payments (for seminar, training, printing & IT expenses) to its Head Office without deducting any taxes considering that the payments were in the nature of reimbursement. However, the lower authorities did not accept the contention of the taxpayer and the said expenses were disallowed u/s 40(a)(i).

The current position of law states that deduction of tax at source is warranted on payment of "any other sum chargeable under the provisions of this Act." Thus, the chargeability of amount to tax in India in the hands of recipient is *sine-qua-non* so as to trigger deduction of tax at source u/s.195 of the ITA. Chargeability under ITA pre-supposes some profit element involved in the receipt and thus if the recipient simply recovers the amount spent by it without any profit element, such a receipt, being reimbursement, cannot be characterized as any 'sum chargeable under the provisions of this Act' and hence would be immune from tax deduction at source. The ITAT in this case has laid down 2 conditions for characterizing any payment as reimbursement:

- There is one-to-one direct correlation between the outgo of the payment and inflow of the receipt must be established, i.e., at the time of incurring of expenditure it is known to be for the benefit of other person which is later on recovered
- The second is that the receipt and payment must be of identical amount i.e., when the original amount is received back without any markup.

Based on the above test, the ITAT evaluated the various expenses which were claimed to be reimbursements and later allowed most of the expenses as reimbursement except for the element of IT expenses which was remanded back to the AO for further evaluation.

There have been instances where the Indian companies are availing services from an unrelated foreign party, but merely payment for these services is being routed through their foreign group companies, and such receipts are claimed to be reimbursements not requiring any withholding of taxes. In such cases, the courts have started evaluating the exact nature of the underlying transactions and determining the tax liability accordingly *[C.U. Inspection (I) P Ltd vs DCIT (ITA No. 577/Mum/2011)]*. However, in the present case, the ITAT not has ventured into the substance of the transaction and the decision has been pronounced solely based up on the theoretical tests set out by it. Therefore, it also becomes pertinent to evaluate the taxability of the underlying expenses which are being claimed as reimbursements and should not be restricted by the mere form of arrangements.

Services provided through servers located outside India not taxable as Royalty or FTS

Atos Information Technology Singapore Pte Ltd (ITA No. 7144 of 2017 & 5744 of 2018, Mumbai ITAT)

Rendering of mailbox hosting and database management services from servers located outside India not taxable in India in the nature of Royalty or FTS. The Tribunal while evaluating the meaning of Royalty under India-Singapore DTAA observed that payment can be classified as Royalty under the treaty if any of the following three basic situations are being satisfied – i) payment is for the use or right to use industrial, commercial or scientific experience, ii) payment is for use or right to use any copyright, patent, trademark, design, model, plan, process etc. and iii) payment is for use or right to use any industrial, commercial or scientific equipment.

The Tribunal held that while rendering mailbox hosting and database management services, not only the servers and hardware but even the employees of the taxpayer were located in Singapore. The Tribunal further observed that while rendering such services the taxpayer has neither allowed use or right to use of any copyright or use of any industrial, commercial or scientific experience or equipment to its Indian subsidiary. Also dismissing the revenue's contention that taxpayer has rented the server to the Indian subsidiary, the Tribunal held that the ownership of the intellectual property was with the taxpayer throughout the project and the Indian company was even not allowed to used the intellectual property independently and in exclusion of the taxpayer.

The Hon'ble Tribunal relied on the ruling of the co-ordinate bench in the case of Edenred Pte Ltd vs DCIT and held the payment shall not constitute royalty as per India-Singapore DTAA. The ITAT further rejected the alternate contention of the revenue to classify such payment as FTS considering the provisions of make available clause present in the FTS definition in the treaty. The Tribunal observed that while rendering mail hosting and database management services, the Indian subsidiary was not able to use any technical knowledge or skill on its own without the involvement of the taxpayer.

Characterization of payments made for digital services has become a contentious issue wherein identifying the presence of the taxpayer while providing such services becomes crucial. It is important to note that India is already expanding its tax base for taxing digital and remote services by introducing provisions of Significant Economic Presence and Equalisation Levy under the domestic laws.

Delhi ITAT reiterates the test for beneficial ownership

Betoking Ltd [ITA No. 7717 of 2019, ITAT Delhi]

The case deals with a Cyprus taxpayer earning interest income on debentures issued by an Indian Company. Article 11 of the India-Cyprus DTAA provides for lower rate of tax of 10% on such interest income provided the recipient of the interest income is the beneficial owner. The revenue rejected the beneficial provisions of the treaty contending that the beneficial ownership of the interest income lies with the parent company of the taxpayer and the taxpayer is merely a conduit company on the basis of its assets and liabilities.

The Tribunal relied on the Mumbai ITAT ruling in the case of Golden Bella Holdings Ltd. wherein under the identical situation the tribunal laid down the test for determining the beneficial ownership of the interest income. In the given case, Mum ITAT laid three basic tests for beneficial ownership - i) the taxpayer should have exclusive possession and control over the interest income received, ii) the taxpayer is not required to seek any approval from any entity to invest and iii) the taxpayer is free to utilize the interest income received at its sole and absolute discretion.

Accordingly, Delhi Tribunal directed the revenue to examine the beneficial ownership test in the taxpayer's case.

Considering the inherent subjectivity in the determination of beneficial ownership, factors such as group structure, substance of the entities, rights of the recipient of the income plays a vital role. Further, considering recent developments in anti-abuse rules under the domestic law as well as under tax treaties, a

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detailed and robust analysis shall be required for determining beneficial ownership of the income earned.

MFN clause to be applicable from date when third state became OECD member

Concentrix Services Netherlands B.V. Vs. Income Tax Officer (Tds) [W.P.(C) 9051 of 2020, Delhi HC]

The Taxpayer (a Dutch company) who was to receive dividend from its Indian subsidiary made application to deduct withholding tax at a lower rate of 5% instead of 10% as provided in the India-Netherlands. The taxpayer placed reliance on the Most Favoured Nation ["MFN"] Clause contained in the protocol appended to the DTAA which stated that the lower rate or the restricted scope in the DTAA executed between India and any third country which is a member of the OECD would apply to the India-Netherlands DTAA. The Tax authorities issued the withholding of tax certificate stipulating the TDS rate of 10% and the taxpayer has challenged the certificate by filing a writ petition before the HC.

The Taxpayer has sought to trigger the MFN clause based on India's Treaty with Slovenia, Lithuania, and Columbia. The Revenue observed that all 3 aforementioned countries had first executed the DTAA with India and later these countries became members of OECD. The Revenue was of the view that the benefit of the MFN Clause would apply only if the country with which India enters into a DTAA is a member of the OECD at the time of the execution of the India-Netherlands DTAA. Further, the Revenue also contended that there was no separate notification issued, which entailed importing the benefit of the MFN Clause from DTAAs executed with countries like Slovenia, Lithuania, and Columbia into the current DTAA.

In relation to self-trigger of MFN clause, the HC ruled in favour of the taxpayer and affirmed the view expressed in the case of Steria (India) Ltd (386 ITR 390) that protocol forms an integral part of the Tax Treaty and no separate notification is required.

Further, in respect of the applicability of MFN Clause being conditioned on the membership of the OECD, the HC interpreted the phrase in the protocol 'a third state which is the member of OECD' in a manner that a third state needs to be a member of the OECD at the time of application of MFN clause and not necessarily at the time of entering of DTAA with India. The court heavily relied on the decree issued by Dutch Tax authorities which stated that the lower rate as provided in India-Slovenia DTAA to be applicable to India-Netherlands DTAA. Relying on the principles of common interpretation, the HC held that, India cannot interpret the provisions in a manner which is contrary to Netherlands. Delhi HC also relied on the SC's judgment in the case of Azadi Bachao Andolan [10 SCC 1], to hold that while interpreting Tax Treaties, the rules of interpretation that apply to domestic or municipal law need not be applied, as such treaties are negotiated by diplomats and not necessarily by men instructed in the law. Accordingly, the HC held that MFN clause shall be applicable to the taxpayer from the date when Slovenia became OECD member.

In 2020, the Indian government has reintroduced the classical form of dividend taxation i.e., dividend is now taxed in the hands of the shareholder and not the company. In light of these changes, this ruling will prove beneficial not only for Dutch investors but also for investors from other jurisdictions having similar MFN clauses in their tax treaties with India such as France, Switzerland, Hungary etc. It should be noted that every MFN clause may contain different paraphrasing and therefore, application of the MFN clause should be checked separately for each treaty.

Mumbai Tribunal allows carry forward of short-term capital loss exempt under treaty

Goldman Sachs India Investments (Singapore) PTE Limited v. DCIT (ITA no. 6619 of 2016, Mumbai ITAT)

The erstwhile provisions of India-Singapore DTAA exempted any capital gain arising from alienation of shares in India. In the present case, the taxpayer incurred capital losses in India on transfer of shares and claimed carry forward of such losses as per provisions of section 74 of the ITA. The taxpayer contended that section 90(2) of the Act provides that the provisions of the ITA shall apply to the extent its more beneficial to assessee and accordingly the taxpayer has claimed the beneficial provision of section 74 of the ITA which allows carry forward of capital losses.

The Tribunal rejected the claim of the revenue that since the capital gain earned by the taxpayer is exempt under the India-Singapore treaty, any capital losses incurred are to be ignored. The Tribunal held that the section 74 of the Act allows carry forward of capital losses in the subsequent years and if such losses are not set off, its not open for the revenue to deny the carry forward of such losses.

The Tribunal reiterated the widely accepted principle that if the provisions of the ITA are more beneficial as compared to the treaty, then the beneficial provisions of the ITA shall apply. Accordingly, the Tribunal held that the provisions of the treaty cannot be thrusted upon the taxpayer simply because the taxpayer is the resident of a country with which India has entered into a tax treaty.

While concluding on the above case, the Tribunal relied on the judgement in the case of the sister concern of the taxpayer, wherein in the similar matter the Tribunal has allowed the taxpayer to carry forward the brought forward capital losses without setting it off against the capital gain which was otherwise exempt under the treaty. Also, it should be noted that the amended India-Singapore treaty allows India to tax capital gain arising from alienation of shares in India.

Cross border employment: WFH may not constitute PE in several cases

Danish Tax Council, Case no. 20-1378698

Covid-19 has changed the dynamic of the traditional work culture as the entire world is faced with prolonged travel restrictions. Companies now have their employees working all over the world, from the safety of their homes. In such situations, the companies are exposed to the risk of forming a Permanent Establishment in the place of residence of its employees. Recently, the Danish Tax Court had an opportunity to delve on the matter of formation of PE where an employee of a UK based company was working from Denmark for his personal reasons.

The Court placed heavy reliance on the OECD commentary on PE in arriving at its decision. And after much consideration the Court held that the home office of the employee would not form a PE of the Taxpayer. This decision of the court was pronounced based on two arguments:

- Availability of place of business: The court held that the employee's residence would mainly be considered as a 'place of business' for the Taxpayer if it has an interest in or benefit from the work being performed from the home office. In the present case, the employee of the Taxpayer had moved to Denmark due to personal reasons and same was not mandated by the Taxpayer.
- Work performed by the employee: A home office can constitute a PE for the taxpayer in case the employee in question usually enters into contracts in the name of the company or which must be fulfilled by the company, or usually play a leading role in the conclusion of such contracts that are routinely entered into by the company without significant changes. In the present case, it was observed that the employee only provided back office support services and did not enter into any contracts or played significant role for conclusion of any contracts.

It is interesting to note that in a separate judgement, the Danish Tax Court held that a German company would be said to have a PE in Denmark after considering the type of work being carried out by the employee whilst living in Denmark (*SKM no. SKM2020.208.SR*). In that case the court had noted that the employee was performing core business activities for the German Company which thus tantamounted to formation of PE. Accordingly, concluding on whether home office of an employee constitutes a PE or not is a subjective exercise and the same should be evaluated on a case-to-case basis.

Amid ongoing pandemic, the prolonged stay of employees in different countries is an unavoidable situation and not under the control of employers or employees. In 2020, the OECD published an Analysis of Tax Treaties and the Impact of the COVID-19 Crisis where it has been noted that, "the exceptional and temporary change of the location where employees exercise their employment because of the COVID-19 crisis, such as working from home, should not create new PEs for the employer". The OECD has also noted that it is unlikely that the COVID-19 situation will create any changes to the PE determination. However, it should be borne in mind that while the OECD commentary

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holds persuasive value, it is not binding on domestic tax authorities. Further, in the present case, the court held that home office does not constitute PE for the employer even though the employee decided to work from home out of his personal choice and the court stressed on the fact that it was not what the employer wished for and the activities performed by the employee in the different country was not core business activities.

Time limit of initiating MAP is subject to domestic period of limitation

Danish City Court, Case No. BS-22068/2020

The Danish Tax Agency refused to initiate a mutual agreement procedure (MAP) under Article 24 of the Double Taxation Agreement, as the Danish Tax Agency is of the opinion that the request was not submitted in time. In late 2019, the Taxpayer had made the MAP application for the income years 2006-2009 for which the tax assessment was made in 2012. The Taxpayer was of the view that the application was lodged in good time. The DTAA itself does not contain a deadline for this. The question before the court is whether, in the event of no prescribed time limits in the DTAA, would mean that there are no deadlines at all for the taxpayers' right to raise objections and have any double taxation lifted under the DTAA.

The Court observed that there needs to be a strong legal base in order to support the contention that the national time limits, including both the tax law and the ordinary limitation periods, are completely disregarded and thereby MAP proceedings can be initiated without any time limits i.e. indefinitely. However, the court noted that there was no such legal basis in the present case which means that national time-limits cannot be disregarded. As there is no direct filing deadline enshrined in the DTAA, the domestic laws in force at any given time apply. When submitting the Taxpayer's request for MAP, the usual limitation periods under the domestic law had expired. The court thus held that the Danish Tax Agency had rightly rejected the request for MAP regarding the income years 2006-2009.

The OECD Model convention prescribes a time limit of 3 years from the date of notice of action giving rise to taxation for the purpose of initiating MAP. However, there are times when this clause is specifically opted out by the contracting states. For instance, in India's Tax treaty with UK, under Article 27 which relates to MAP, the time limit of 3 years has not been included. In such cases, the Indian companies contemplating the option of MAP should be mindful of the period of limitation existing in the Indian domestic law.

Tax Court reiterates that revenue is not precluded from challenging taxpayer's previously accepted filing positions

Landbouwbedrijf Backx B.V And Her Majesty The Queen

In the renowned ruling of 2019, the Canada Federal Court agreed with the opinion of its lower Tax court that the central mind and management of a Netherlands incorporated company with a sole Dutch director was exercised in Canada by its Canadian resident shareholders. Accordingly, it was held the Dutch taxpayer was subject to Canadian income tax on the sale of partnership interest of a Canadian partnership firm in the year 2009.

Although the Federal Court agreed with the Tax court's analysis that the central management and control of the corporation was in Canada, the Federal Court directed the Tax Court to re-examine the immigration rules under the domestic tax laws of the Canada which requires a corporation to dispose of and reacquire all of its properties at fair market value on the date of becoming the Canadian resident. As a consequence, the cost base of the property to the corporation is essentially reset at fair market value as of the immigration date. Accordingly, the taxpayer contended that it filed the tax return in Canada from 1998 to 2008 as non-resident which the revenue also accepted without any dispute. Thus, in case the taxpayer becomes resident of Canada in 2009 then as per the disposition rule the cost of the partnership interest would effectively be same as the sales price (being fair market value) and hence no capital gain.

The Tax Court rejected that argument, emphasizing that it is settled law that the revenue is not restricted from reassessing or making an additional assessment of a taxpayer's liability, subject to a statutory limitation period. Moreover, the Court held that a taxpayer's filing position accepted by the revenue for the year 1998 to 2008 does not prevent the Court from reaching a different conclusion. It was held that the taxpayers cannot rely on an assessment issued by the revenue in one year to insulate themselves from a challenge to the correctness of a filing position in a subsequent or preceding year.

Concessional tax rate for Interest income of Foreign Portfolio Investors still in force

Press Release dated March 17, 2021.

Section 115AD of the ITA contains provisions for taxation of income of FPIs. Proviso to section 115AD(1)(i) provides that the tax shall be chargeable at the concessional rate of 5% on interest income referred to in section 194LD. After the amendment to Section 115AD(1)(i), there were reports in the media that the concessional tax rate of 5% has been withdrawn. The CBDT has clarified that even after the amendment, the concessional rate of tax of 5% shall continue to be applicable for interest income referred to in section 194LD.

Rules prescribed for lower tax deduction certificate while making payment to Non-residents

Notification No. 18 of 2021 dated March 16, 2021.

Finance Act 2019 had amended the provisions of Section 195(2) to provide for online filing of applications for lower TDS certificates. The CBDT has now introduced Rule 29BA which provides the mechanism & process for obtaining such certificate and the application would be made by the payer electronically through the newly introduced Form 15E.

CBDT notifies DTAA with Iran

Notification no. 29 of 2021 dated 01 April 2021

CBDT notified the DTAA with the Government of Islamic Republic of Iran. The Agreement between the Government of India and the Government of the Islamic Republic of Iran was signed at New Delhi on February 17, 2018. The

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Agreement entered into force on the September 29, 2020, and as per Article 30 of the Agreement, the DTAA shall be effective from April 01, 2021.

CBDT releases synthesized texts of MLIs and DTAAs

CBDT published synthesized texts of MLIs and India's DTAAs with Cyprus, Czech Republic, France, Italy, the Netherlands, Norway, Portugal, Russia, and Ukraine.

Greece and Hungary deposits MLI ratification instruments

Greece and Hungary have deposited their ratification instruments for the Multilateral Convention to implement tax treaty related measures to prevent Base Erosion and Profit Shifting (BEPS MLI). The MLI shall enter into force from July 01, 2021 taking the total number of jurisdictions who have ratified or approved MLI to 65. Further, both Greece and Hungary have notified India as Covered Tax Agreement.

OECD publishes Arbitration profiles of 30 countries under MLI

The OECD has published the arbitration profiles of 30 jurisdictions applying Part VI of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. Part VI of the MLI allows jurisdictions to adopt mandatory binding arbitration for the resolution of tax treaty disputes. The arbitration profiles allow those jurisdictions to make clarifications on their positions on the MLI publicly available.

UN approves final draft of Article 12B (Income from Automated Digital Services) into the UN Model Tax Convention

New Article 12B has been introduced in the UN tax model convention which relates to income from Automated Digital Services (ADS). The model treaty provisions allow source countries to apply a withholding tax on gross payments made in exchange for the specified automated digital service. Alternatively, companies can elect for the withheld amount to be based on profits earned in the source country from the automated digital service.

their tax treaties.

US proposes additional tariff of 25% as retaliatory measure against Equalization Levy

In a retaliatory effort to India's Equalization levy of 2% on foreign technology majors, the United States has proposed additional tariffs on approximately 40 Indian imports including basmati rice, sea food, jewellery, bamboo, semi-precious stones and pearls, among others. A tariff of up to 25% has been proposed, which is expected to collect around $55 million, which is similar to what India will collect from US companies through the 2% equalization levy.

UK to hike corporate tax rate to 25% from 2023

The UK government in the Finance Bill 2021 has proposed to increase the Corporation Tax rate from 19% to 25% with effect from 1st April 2023. The 19% rate will continue to apply to companies with profit of not more than £50,000. The increase in Corporate Tax rate is expected as a result of significant level of government spending in response to measures being undertaken for COVID-19 pandemic. It is expected that even other countries are considering to hike their corporate tax rates.

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ALP of Intra-Group Services can't be Nil; the documents submitted to establish rendition of services are to be considered

M/s Sulzer Pumps India Limited Appeal No. 6660 of 2018 & others (Mumbai ITAT)

The Taxpayer is engaged in the business of manufacturing of single and multistage power-driven pumps for industrial use. It is a part of the Sulzer group headquartered at Switzerland.

The taxpayer had paid Management fees to its AE in China being the centralised service centre of the Sulzer group. The taxpayer contended that it had received various intra-group services from its AE which are administrative in nature and encompasses business area marketing including business intelligence, tender support and tracking system support, general management (including human resources), finance controlling, quality environment and safety support and segment support.

In addition to this, the taxpayer received various services from its AEs like SAP related costs, annual Microsoft license charges, trademark fees, engineering services, IT service costs, reimbursement of cost of Restricted Stock Units (RSUs) etc.

The TPO determined the ALP of such services to be Nil alleging that the taxpayer was not able to substantially prove that the services had been actually rendered and the benefit derived from such services. He further argued that the expenditure was incurred for the benefit of the Group as a whole and therefore, there is no necessity of charging such expenditure as it is not incurred in connection with the individual member of the Group, whereas the benefit would be available to all the members within the Group.

The taxpayer submitted various documentary evidence and other supporting to prove that the services were in fact rendered and benefitted the taxpayer. These were in form of agreements, tickets raised, emails, invoices, timesheets etc. The taxpayer benchmarked the same using TNMM on the grounds that all the above-mentioned payments are directly linked with the Manufacturing activity carried on by the taxpayer. The TPO did not agree with the said contention and went on to determine the ALP of each cost individually; most of which were determined as having NIL ALP.

The ITAT held that since the taxpayer had submitted all evidence to prove the rendition of services and corresponding benefits, the 'burden of proof' had shifted to the TPO to prove his claim. The TPO, however, had made the disallowances / adjustments on general propositions. Accordingly, the ITAT allowed taxpayer's appeal.

In relation to the costs relating to reimbursement of charges pertaining to Restricted Stock Units (RSU) issued by the AE, the taxpayer contended that the RSU's were issued by the AE on behalf of the taxpayer to one of its highly performing employee in order to retain and motivate him. Hence, he was granted 457 stock units of the Swiss AE & these shares were listed on the Swiss Stock Exchange and the market value of the shares on the respective vesting dates was considered to determine the value of RSUs.

The taxpayer is expected to derive benefits from the employee's experience and exposure and hence, the taxpayer had awarded RSUs to him.

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Considering the same, it is stated that any cost incurred in exercise of the RSUs by the employees typically represents the cost of the taxpayer-company and since, the cost was initially incurred by the AE, the taxpayer reimbursed the same to its AE as the same was for the benefit of the taxpayer-company. Accordingly, the said adjustment by TPO was deleted and the reimbursement of RSU costs to the AE was also allowed in favour of the taxpayer.

To conclude, it is extremely important to substantiate, with strong documentation & evidence, the actual rendition of intra-group services and the resulting benefits to the taxpayer. Further, since the taxpayer was engaged in manufacturing activities and the international transactions included various other transactions including purchase and sale of goods and services that the payment for intra-group services and trademarks became so inter-related and inter-linked to the business of the taxpayer that it was not possible to benchmark the same separately and accordingly had been aggregated for the purpose of benchmarking under TNMM.

Internal TNMM aggregation rejected based on difference in functions performed and risks assumed

M/s Piaggio Vehicles Private Limited Appeal No. 3029 of 2017 (Pune ITAT)

The taxpayer exports service spares to its AEs as well as non-AEs. In addition, it also carries out sourcing & export of components required by the AE for manufacturing of two, three wheelers and four wheelers. The taxpayer had benchmarked the transaction of sale of spares applying TNMM by relying on external comparables.

The TPO created sub-segments of international transactions on the basis of its application –

- spares and components required for servicing of the vehicles
- spares and components required for manufacturing of vehicles

The aggregation approach used by the taxpayer was rejected by him and said transactions were benchmarked by TPO separately.

The taxpayer is engaged in manufacturing of three wheeled motor vehicles which could be used for transportation of goods and passengers. It also sold spares and components of three wheeled motor vehicles manufactured by it to support its after – sale services both to AEs and Non-AEs (which is mandated in terms of the dies, design, quality, warranties, etc. by the taxpayer at the time of procurement for manufacturing).

Further, the taxpayer is also engaged in sourcing & export of components which are required by its AEs abroad for manufacturing of two/three/four wheeled motor vehicles (which is only a support function and the taxpayer is only involved in logistics and coordination).

Hence, both the situations are very different since in the former one, the taxpayer encompasses functions and assumes risks relating to entrepreneurial activities that would be significantly different from those in the latter situation.

According to the taxpayer, the two kinds of transactions are not comparable and there were no credible internal comparable transactions which could be used for benchmarking the transaction of export of spares and components to its AEs.

The Revenue divided the entire business activity of the taxpayer into two segments for the purpose of benchmarking –

- Sale of spares and components to its AE (which included spares and components for after - sale service and those for manufacturing).
- Sale of spares and components to its Non-AE (which included spares and components for after - sale service, both Domestic and Export)

The taxpayer sub-segmented the same and compared only sale of after - sale service-related spares to AE and to Non-AE. The same was rejected by the AO / CIT(A).

The ITAT held that in case of comparison using internal TNMM, the taxpayer is right in excluding sale of spares and components to AEs for manufacturing activities as the functions performed and risks assumed in case of spares and components sold for manufacturing activities are different than that in case of sale of service spares.

Recovery of expenses re-characterised as provision of intra-group services; mark-up to be recovered

M/s Tata Coffee Limited Appeal No. 568 & 729 of 2015 (Bangalore ITAT)

The Taxpayer is engaged in the business of growing, curing of coffee and Tea and also manufacturing & marketing of value-added coffee/tea products. The Taxpayer was proposing to make investment in a subsidiary company by acquiring shares of an existing company in Russia. In relation to the same, it had incurred expenses in relation to carrying out a due-diligence exercise. However, such acquisition was shelved at a later stage. Subsequently, one of the AEs of the taxpayer acquired the said Russian company and hence the taxpayer raised a debit note upon the AE, being pre-acquisition expenses incurred by the taxpayer on due diligence exercise. The taxpayer showed the said amount as 'Refund of Advance' in the 3CEB filed by it. Later, during assessment by TPO, the taxpayer changed the nomenclature of such amount to 'Reimbursement of expenses to be received' on the ground that the said expenses are not to be undertaken by the taxpayer and are for and on behalf of the AE. Accordingly, they do not impact the 'Revenues' of the taxpayer and hence the arm's length price should be Nil. The TPO made an upward adjustment of the entire amount spent on due diligence.

Upon reference, the DRP held that only the amount of arm's length mark-up shall be added to the income of the taxpayer since it had incurred such expense in the pursuit of acquiring a Russian company. Since there was no agreement / communication / understanding relating to the same with the AE, the expenditure in the initial could not have been taken into the books of the AE as expenditure for said groundwork, if the relationship between the two entities had been uncontrolled. If the taxpayer was passing on the benefit of its groundwork done for an acquisition project to an uncontrolled party, it would have charged a mark-up in the normal course of business since its resources, infrastructure, skills, time etc., were invested in the activities and a mark-up for the same was justified.

The ITAT held that the DRP was justified in holding that the transfer pricing adjustment by way of a markup on the amount spent by the taxpayer and claimed back from AE is required to be made. However, the entire amount spent on due diligence should not be added to the income of the taxpayer as the AE never intended to acquire the Russian company from the beginning and the taxpayer was not incurring expenditure on behalf of the AE. The taxpayer's contention that the transaction itself would fall outside the scope of transfer pricing provisions in the absence of any income element is not tenable and the same was rejected.

PBDIT can be considered appropriate PLI in certain cases

M/s Aerzen Machines (India) Private Limited Appeal No. 111 of 2016 (Ahmedabad ITAT)

The taxpayer, M/s. Aerzen Machines (India) Private Limited is engaged in the business of manufacturing of machineries and component such as positive displacement blowers. It has undertaken various international transaction of purchase of goods, provision of services, Interest on ECB and warranty claims receivable with its AE in Germany.

The taxpayer had mentioned CPM as the Most Appropriate Method ('MAM') to benchmark the transaction of purchase of goods and sale of services. Whereas, in respect of the other two transactions, CUP was selected as the MAM. The TPO held TNMM as the most appropriate method on the grounds that the taxpayer had no basis for selecting the methods chosen by it and mentioned in Form 3CEB. The taxpayer's claim was rejected and TNMM was selected as the MAM.

In addition to this, the taxpayer had adopted PBDIT (i.e., Profit before Depreciation, Interest and Taxes as the PLI) on the ground that the taxpayer's business is newly set up and that its depreciation cost is very high as compared to comparables. The TPO as well as CIT(A) rejected such claim on the grounds that the taxpayer also had to take into account the high repair, maintenance and insurance costs incurred by a comparatively old entity, which are almost negligible in case of a new entity, as is, the case of the taxpayer.

The ITAT observed, that the purpose of transfer pricing provisions is to ensure that profit is not diverted outside the country as a result of related party dealings and that the transaction should take place at a price or cost agreeable to independent / unrelated parties. Having said that, any differences that materially affect the price or cost should either not materially affect the price / cost charged / paid or reasonably accurate adjustments can be made to eliminate the material effects of such differences.

The ITAT also relied on the decision of the **Hon'ble Delhi High Court** in the case of **Rampgreen Solution (P) Ltd. [60 taxmann.com 355]** wherein it was held that analysis must include comparables which are similar in all aspects that have a material bearing on their profitability. Rule 10B also provides that the comparability of transactions shall be judged based on the 'Comparability factors' mentioned therein.

Since there was no guideline / formula available to quantify the adjustment to be made on account of depreciation, the ITAT relied on the order of coordinate bench in the case of **Erhardt + Leimer (Inida) (P.) Ltd, [78 Taxman.com 258]** wherein it was held that excess depreciation claim in a financial year, which would impact the regular net profits had to be excluded and accordingly, PBDIT was considered as acceptable PLI.

It is worth noting that while in general parlance, depreciation is considered as an Operating expense and the generally accepted PLI is PBIT (i.e., after reducing Depreciation amount), it should not be considered to be the only available PLI. Like selection of most appropriate method, selection of PLI is also an important factor. Especially in cases of capital intensive industries where the charge of depreciation would be higher in earlier years, it would be prudent to select PBDIT as an appropriate PLI to iron out the material variation caused by depreciation cost.

No disallowance u/s 40A(2) if TPO has concluded the transaction to be at ALP

M/s Lifestyle International Private Limited Appeal No. 2258 & 2259 of 2016 (Bangalore ITAT)

The taxpayer had paid professional consultancy fees to its AE in relation to setting up of new stores and running the same after its set up. The professional fees paid for setting up stores were capitalized in the books of account of the taxpayer and depreciation was claimed accordingly. As regards professional fees for post set up of stores (for running the store by AE), the same is claimed by the taxpayer as revenue expenditure.

The AO disallowed such expenditure under Section 40A(2) of the ITA on the grounds that the same unreasonable, excessive and the taxpayer has an in-house team with expertise needed to execute such operations. The AO also disallowed the said expenses under Section 37 on the grounds that the same were not incurred for the purpose of business of the taxpayer.

The CIT(A) held that AO failed to bring on record fair market value analysis for making such disallowance and ruled in favour of the taxpayer.

The ITAT made reference to the case(s) of **Herbalife International India (P) Ltd. [65 taxmann.com 143]** wherein the **Bangalore ITAT** had held that once a particular transaction is admitted as international transaction then the same falls in the ambit of the provisions of X chapter of the Act which are specific provisions to deal with such transactions between the taxpayer and its AE. Therefore, once the transaction is undisputedly subject matter of Chapter X of the IT Act, then the other general provisions of the Act cannot be applied simultaneously. Once the TPO had accepted the payments to be at arm's length, there was no justification on part of AO to hold the expense unreasonable and invoke disallowance under Section 40A(2) of ITA.

Reference was also made to the case of **Nestle India Ltd. [11 taxmann.com 106]** wherein the **Hon'ble Delhi High Court** held that once the taxpayer has discharged the initial onus, the burden to prove that the said payments are in excess of fair market value and that the taxpayer had made less than ordinary profits lie with the Revenue i.e., AO in this case.

Accordingly, since the TPO had also held the said transactions to be at arm's length in its TP order for the said assessment years & no adjustment was made to the transfer price, the Revenue's appeal was dismissed. With respect to whether the expense is allowable under Section 37, the **Supreme Court** has already concluded on the said matter in the case of **Dalmia Cement (P.) Ltd. [254 ITR 377]** that once it is established that there was nexus between expenditure and purpose of business, the Revenue cannot justifiably claim to put itself in the armchair of a

Important Rulings

businessman or in the position of the board of directors and assume the said role to decide how much is a reasonable expenditure having regard to the circumstances of the case.

Adjustment to margins of Tested Party on account of abnormal cost incurred is allowed

M/s Flextronics Software Systems Ltd Appeal No. 2881 of 2011 (Delhi ITAT)

The taxpayer is a company engaged in the business of developing package software and providing software consulting services primarily for the use in delivery communication Industry. The taxpayer had benchmarked transactions relating to Software Segment using TNMM as MAM, whereas it had used CUP for the international transactions pertaining to BPO Segment.

TPO rejected CUP as the MAM and applied TNMM to BPO Segment as well. During the proceedings Taxpayer submitted operating margin of BPO Segment to be 4.08% after carrying out adjustment for abnormal expenses as compared to comparable cases. TPO also rejected the claim by Taxpayer under TNMM and determined comparable margin of 9.66%

Taxpayer during proceedings at first appellate stage before CIT(A), submitted revised calculation of operating margin wherein taxpayer revised the amount of comparability adjustment and submitted operating margin of BPO Segment to be 12.71%

CIT(A) allowed the appeal in favour of the taxpayer. The TPO / AO contended that CIT(A) erred by not allowing TPO / AO an opportunity and considered a fresh submission from the taxpayer. Accordingly, admission of additional evidence by CIT(A) was not as per Rule 46A of the Income Tax Rules. It was argued that the documents available with the TPO did not provide terms and conditions such as payment terms, service level agreement and qualification of taxpayer's power deployed in BPO. It is also contended by Revenue that the CIT(A) had also accepted the revised margins submitted by the taxpayer by excluding abnormal losses by making a comparability adjustment, which was in violation of Rule 46A as the remand report was not called from the TPO / AO.

It was observed by the ITAT that the taxpayer had already claimed margins of 4.08% before the TPO after making the said adjustments on account of abnormal expenses as the taxpayer was in its start-up phase. Therefore, comparing the operating profit margin of the appellant without any appropriate adjustment, with the operating profit margin of the comparable companies identified by the TPO, would go against the true intention of the transfer pricing regulations.

It was only submission of revised margins of 12.71% by the taxpayer and no new evidence or information was submitted before the CIT(A) for the first time which was not submitted at the TPO / AO level. Accordingly, the claim of the TPO / AO in considering action of CIT(A) in violation of Rule – 46A is rejected by ITAT.

Further, the Tribunal also observed that the transactions were already at arm's length by applying CUP as MAM which the taxpayer had done in its Form 3CEB and TP Documentation. Thus, the adjustment made by the TPO is not sustainable even applying the CUP method.

Goods and Service Tax

Penalty for non-complying with QR code provisions waived off

Notification No. 06/2021 – Central Tax dated on March 30, 2021

In case of taxpayers required to issue invoices with a dynamic QR code for B2C supplies, no penalty shall be levied for not generating such QR code during period October 1, 2020to June 30, 2021, if the taxpayer complies with the conditions from July 1, 2021.

Clarification on various refund related issues

Circular No. 147/03/2021-GST dated March 12, 2021

Filing of refund claim by the recipient of Deemed Export Supply:

- Where a recipient of deemed exports supplies intended to claim a refund of ITC, the portal required such recipient to debit the said amount in the ECL. Further, CBIC's circular[1] restricted the availment of ITC by the recipient of deemed export supplies, where such recipient intended to claim a refund of such ITC. Thus, on one hand, the recipient was not allowed to avail the ITC as per the circular, and on the other hand, the recipient was required to debit the amount in the ECL for claiming a refund.
- To address this anomaly, the CBIC has clarified that there is no restriction on the recipient of deemed export supplies in availing the ITC on deemed export supplies. The relevant para of the Circular no. 125/44/2019-GST has been modified to state that the amount of refund shall not exceed the amount of ITC availed in the relevant return.

Extension of relaxation for filing refund claims in cases where zero-rated supplies has been wrongly declared in GSTR 3B:

Certain taxpayers who had inadvertently entered the details of zero-rated supplies in table 3.1(a) instead of table 3.1(b) of FORM GSTR-3B were facing problems in filing refund claims. It has been clarified that refund shall be allowed in such cases for period up to March 31, 2021 subject to the condition that the refund claim does not exceed the aggregate amount of IGST/Cess declared in in column 3.1(a), 3.1(b) and 3.1(c) of GSTR -3B.

The manner of calculation of Adjusted Total Turnover under sub-rule (4) of Rule 89 of CGST Rules:

For the purpose of Rule 89(4) of the CGST Rules, the value of export/ zero-rated supply of goods to be included in calculating "adjusted total turnover" shall be determined as per the amended definition of "Turnover of zero-rated supply of goods" in the said sub-rule (4) of Rule 89.

GST Portal updates

Updation of Core filed business activity in the portal

- Changes in core business activity can now be made online at any time.
- Persons/ applicants applying for new registration in GST, through MCA portal in SPICe -AGILE Form, can now opt for Aadhaar Authentication (while applying for registration).

Circulars & Notifications

- The taxpayers were not allowed to file their refund application on GST Portal in case where the value realised mentioned in BRC/FIRC column, was less than the refund amount claimed. This validation has now been removed from the portal and the taxpayers will now be able to file refund application in such cases.
- Audit related functionalities such as issuance of notice, reply to notice, uploading of documents, accept/reject/payment of liabilities, etc. have been made available on the GSTN portal.

Customs

Non- Tariff Notifications

Custom Verification of Identity and Compliance Regulations,2021

Notification no. 41/2021- Customs (NT)- dated April 05, 2021

- The CBIC has issued these regulations for verification of compliance of the provisions of the Customs Act by importers, exporters and customs brokers who engage in the activity of import export after commencement of these regulations. The Commissioner has also been granted powers to select an existing importer, exporter or a customs broker for verification in specific circumstances.
- The selection will be notified through Common Portal, or any other mode deemed appropriate by the Commissioner of Customs.
- The person selected for verification shall furnish the requisite documents
- If a taxpayer does not comply with the requirements, the Commissioner may suspend the activities of clearance of goods, claiming exemptions, drawbacks, refund etc. for such person and after giving an opportunity of being heard, revoke the benefits permanently and impose penalty up to Rs. 50,000.
- The benefits as suspended above shall be restored upon compliance with the requirements / furnishing of correct information.

DGFT

Trade Notice

DGFT designed the COVID – 19 Helpdesk for International trade-related issues, Trade Notice no. 02/2021-22 – DGFT Dated April 26, 2021.

- With a view to monitor the status of export and imports and difficulties being faced by trade stakeholders in view of the surge of COVID-19 cases, the DGFT has operationalised 'COVID-19 Helpdesk' provide resolutions to issues arising in respect of International Trade.
- Issues can be raised either by creating a request on the DGFT website or sending an email at dgftedi@nic.in with the subject header: Covid-19 Helpdesk or by way of a call at Toll-Free No 1800-111-550.

NIL late cut for submission of MEIS applications for the period from April 01, 2019 to March 31, 2020

Public Notice no. 053/2015-2020 – DGFT dated April 09, 2021

The due date for submission of MEIS applications for the period April 01, 2019, to March 31, 2020 without late cut has been extended up to 30 September 2021.

Nil fee for updation/modification of IEC

Public Notice no 049/2015-2020 dated on March 31, 2021

The DGFT has made it mandatory for tax taxpayers to update IEC once a year between April to June. It has been notified that no late fee shall be charged for applications for updation /modification of IEC made during such period.

Online Module for Adjudication, Appeal, Review proceedings under FTP

Trade Notice No 44/2020 -2021 dated on March 1, 2021

- The DGFT has introduced an online module for conducting Adjudication, Appeal, and Review Proceedings online. All activities including service of notice, reply, seeking comments from Adjudicating Authority, passing of Review order shall be conducted online. All the correspondence shall be sent through email as updated in the DGFT portal to the exporter.
- Further, filing of non-Preferential COO as well as applications and issuance of import authorisations in case of import of restricted items as well as shall be made online.

Instructions

SCNs issued by DRI under Customs Act to be kept in abeyance

Instruction No. 04/2021 - Customs dated on March 17, 2021

In light of the decision of the Hon'ble SC in case of Canon India Private Limited holding that an officer of DRI is not a proper officer to issue SCN under Section 28 of the Customs Act, the CBIC has issued instructions stating the SCNs issued by the DRI shall be kept in abeyance until further directions. Further, in cases where presently the investigation is being undertaken by DRI, the SCN needs to be issued by the jurisdictional Commissionerate from where imports have taken place.

State VAT

Karnataka introduces scheme for waiver of interest and penalty for assessment/ reassessment/ revision

ORDER NO. FD 49 CSL 2021, dated March 29, 2021

The government of Karnataka has introduced the Karasamadhana Scheme, 2021 under which 100% waiver of interest and penalty is proposed to be provided (subject to the conditions specified) in case of assessments / re-assessments/ rectification orders which are already completed or to be completed on or before July 31, 2021 and the taxpayer makes payment on or before 31 October 2021. The scheme covers 8 statutes including Karnataka VAT, sales tax, entry tax etc.

The scheme seems to be similar to SVLDRS announced by the Central Government in 2019. However, where the state has filed an appeal

Circulars & Notifications

Maharashtra introduces Scheme of withdrawal of assessment proceedings

Notification no VAT/1521/ C.R. 1. Taxation-1 dated April 1, 2021

The government of Maharashtra has introduced the scheme of withdrawal of pending assessment proceedings where the probable revenue involved is not more than INR 10 lacs.

Online Module for Adjudication, Appeal, Review proceedings under FTP, Trade Notice No 44/2020 -2021 dated on March 1, 2021

The DGFT has introduced an online module for conducting Adjudication, Appeal, and Review Proceedings online. All activities including service of notice, reply, seeking comments from Adjudicating Authority, passing of Review order shall be conducted online. All the correspondence shall be sent through email as updated in the DGFT portal to the exporter.

Further, filing of non-Preferential COO as well as applications and issuance of import authorisations in case of import of restricted items as well as shall be made online.

Important Rulings

Coverage

Validity of provision of the GST law challenged and pending before Courts Orissa HC

A Challenge to Section 16(2) (c) of the CGST Act which seeks to allow the ITC only on payment of taxes by the supplier

M/s. Shree Gobind Alloys Pvt. Ltd. V/s Union of India and others, W.P.(C) No.16242 of 2021– HC – Orissa at Cuttack

The Hon'ble Orissa HC has admitted a writ petition filed by the taxpayer challenging the constitutional validity of the provisions of Section 16 (2) (c) of the CGST Act, which allows the taxpayer to avail the ITC based on the payment of taxes by the supplier either though cash or utilization of ITC.

Challenge to Rule 89 (4) of the CGST Act which restricts claim of refund, admitted

M/s. Ambika Creation Through Proprietor Anil Gupta V/s Union of India, R/Special Civil Application No. 5557 of 2021 – HC – Guj

The Hon'ble Gujarat HC has admitted a writ petition filed by the taxpayer challenging the constitutional validity of the provisions of Rule 89 (4) as amended by Notification 16/2020 dated March 23, 2020, which restricts the value of zero-rated turnover of supply of goods to 1.5 times of the value of turnover of the goods domestically supplied by the same or similarly placed supplier, in order to claim a refund of ITC.

Decided Cases

Re-Assessment under the Customs Act can be made by the designated officer who has carried assessment, not any other officer

M/S. Canon India Private Limited v/s Commissioner of Customs, CIVIL APPEAL NO.1827 OF 2018 - SC

The taxpayer imported certain goods under an exemption which were verified by the Deputy Commissioner of Customs before clearance for home consumption.

Later, a SCN was issued by the DRI alleging seeking to deny the benefit of exemption claimed by the taxpayer and adjudicated the same against the taxpayer. After being unsuccessful before the CESTAT who upheld the demand against the taxpayer, the taxpayer filed an appeal before the Hon'ble SC, contesting that

Important Rulings

the DRI does not have the power to re-assess the assessment already made by the Deputy Commissioner of Customs since the DRI is not the proper officer as contemplated under Section 28 (4) of the Customs Act.

The Hon'ble SC observed that Section 28(4) of the Customs Act empowers "the proper officer" for recovery of duty not paid or partly paid or review of an earlier order. Further, the Hon'ble SC observed that the meaning of the word "THE" with the proper officer to be interpreted that reassessment could have been exercised only by the proper officer who had allowed the clearance of the goods or his successor in officer but not any other officer.

Accordingly, the Hon'ble SC held that the SCN issued by the DRI is invalid without any authority of law and the demands were set aside.

This is a very important judgment given the fact that the DRI has issued many notices to taxpayers across India and such notices, or the orders passed based on such notices would now be questioned across all corners. Under GST, the DGGI has been constituted which performs functions similar to the DRI under Customs. It remains to be seen as to whether the above interpretation can be applied to the notices issued by the DGGI under GST.

ITC available on expenses incurred for CSR Activities

Dwarikesh Sugar Industries Limited, Advance ruling number - UP/AAR/52 – AAR - UP

The taxpayer is a Company registered under the Companies Act and had incurred the following expenses to comply with the requirements of CSR in terms of the Companies Act:

- Construction of school building, additional rooms, laboratories
- Free supply of furniture/fittings such as tables, chairs, etc., to be used in the school
- Free supply of electrical goods for use in school
- Other expenses such as provision of goods/services to Registered Charitable Trusts / NGO's

The taxpayer approached the AAR to seek clarifications on eligibility of ITC with respect to the procurement of the above-mentioned goods and services.

The AAR observed that as per Section 135 of the Companies Act, any company who falls within the criteria defined, is mandatorily required to incur certain amount of expenditure towards CSR activities. Therefore, the taxpayer is compulsorily required to undertake CSR activities, thereby making CSR expenditure an essential part of his business required to run the business. The AAR also referred to the decisions of Hon'ble CESTAT and Hon'ble HC under Service Tax where the ITC of expenses incurred towards CSR was allowed under the erstwhile service tax and excise laws.

The AAR further observed that since goods or services are not given voluntarily in case of CSR, the same do not qualify as gifts and therefore, the ITC is not restricted under Section 17(5) of the CGST Act. The AAR, however, held that the ITC of goods and services used for the construction of any building will not be

Important Rulings

available to the taxpayer to the extent of capitalization.

There have been contrary rulings of the AAR in the past holding that the ITC of expenses incurred towards CSR activities would not be available considering that such expenses do not pertain to any outward supplies. The present ruling deals with the important aspect of the mandatory nature of CSR under the Companies Act and thereby considers the same to be in furtherance of business.

Amount forfeited on account of breach of agreement of sale of land is liable to GST

M/s. Fastrack Deal Comm Pvt. Ltd, AAR NO. GUJ/GAAR/R/58/2020 - AAR - Guj

The taxpayer intended to sell a piece of land to a buyer who paid a certain amount as an advance as per the terms of the agreement entered between the taxpayer and the buyer, which the taxpayer had a right to forfeit in case the buyer fails to pay the full amount. The buyer did not complete the transaction due to which the taxpayer forfeited the amount of advance collected as per the agreement.

The taxpayer approached the AAR to seek clarification in respect of the taxability of the amount forfeited by it. The taxpayer was of the view that since the sale of land is not treated as supply as per Schedule III of the CGST Act, the amount forfeited towards the sale of land shall also not be liable to GST.

The AAR observed that the taxpayer has forfeited the amount of advance received in terms of the agreement and has refrained from taking any subsequent action on the buyer i.e., the taxpayer tolerated an act of the buyer, for which consideration has been received by him. The AAR concluded that the amount received by the taxpayer is not on account of the sale of land but on account of non-fulfillment of conditions as stipulated in the agreement and the same would qualify as supply of service in terms of clause 5(e) of Schedule II of the CGST Act i.e., 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act' and therefore, liable to GST.

The taxability of 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act' has been long debated since the said clause was first introduced as a declared service under the service tax law in July 2012. From the order, it seems that the taxpayer did not raise ground before the AAR that recoveries made towards a breach of a contract would not fall under the deemed service category of 'agreeing to tolerate an act' and the only submission of the taxpayer was that since the amount was received towards the sale of land, it would qualify for exemption even though the sale of land did not eventually materialize. There have been a few decisions under the service tax law which have held that recoveries made towards a breach of contract would not be liable to service tax. It remains to be seen how the jurisprudence develops around this subject under the GST law, given that the authorities have been taking a consistent stand on the levying GST on such transactions.

MCA Notifications

Removal of Indebtedness and other details from Form MGT-7 [Annual Return]

Notification dated March 5, 2021

Effective March 5, 2021 the requirement of mentioning the indebtedness details in the Annual Return of the Company (clause (i) of Section 23 of the Companies Amendment Act, 2017) has been removed. MCA has also omitted providing certain details regarding Foreign Institutional Investors related to their names, addresses, countries of incorporation, registration and percentage of shareholding held by them. The Section also authorizes the Central Government to prescribe abridged form of annual return for One Person Company, Small Company and such other class or classes of companies as may be prescribed by way of Rules.

Introduction of Form MGT-7A for One Person Companies and Small Companies

Notification dated March 5, 2021

MCA alters the Companies (Management and Administration) Rules, 2014 by introducing the Companies (Management and Administration) Amendment Rules, 2021. According to the amended Rules, One Person Companies and Small Companies shall file their Abridged Annual Return in Form MGT-7A from the Financial Year 2020-21.

Payment of Remuneration to Non- Executive Director including Independent Director in case of no profits or inadequate profits

Notification dated March 18, 2021

MCA appointed March 18, 2021 as the commencement date for the amendment in Section 149(9) of Companies Act 2013 and Section 197(3) of the Companies Act, 2013 which states that in case the Company has no profits or its profits are inadequate, an Independent Director may receive remuneration, not taking into account any sitting fees payable for attending meetings, subject to the limits as specified under Section 197 of the Act.

There were no provisions under Companies Act 2013 for payment of remuneration to Non-Executive Director in case if company had no profit or inadequate profits. Government has created a way to compensate Non-Executive or Independent Directors of Companies, which are loss-making or have inadequate profits as due to increase in responsibilities of Independent Directors, it was important that they were appropriately remunerated.

Amendment in Schedule V of the Companies Act, 2013 for payment of Remuneration to Non-Executive Director including Independent Director

Notification dated March 18, 2021

MCA amended Schedule V to allow payment of remuneration by company having profits in a financial year to Non-Executive Director or Independent Director in addition to a managerial person or persons subject to the limits as specified in Section 197 of the Companies Act, 2013.

MCA also allows payment of remuneration by company having no profit or inadequate profits to Non-Executive Director or Independent Director in addition to a managerial person subject to the limits as specified in Table below.

MCA Notifications

	(1)	(2)	(3)
Sr. No.	Where the effective capital (in Rupees) is	Limit of yearly remuneration payable shall not exceed (in Rupees) in case of a managerial person	Limit of yearly remuneration payable shall not exceed (in rupees) in case of another Director [Non-Executive Director or Independent Director]
(i)	Negative or less than 5 crores	60 lakhs	12 lakhs
(ii)	5 crores and above but less than 100 crores.	84 lakhs	17 lakhs
(iii)	100 crores and above but less than 250 crores.	120 lakhs	24 lakhs
(iv)	250 crores and above.	120 lakhs plus 0.01% of the effective capital in excess of Rs.250 crores	24 Lakhs plus 0.01% of the effective capital in excess of Rs.250 crores

However, Schedule V and Section 197 of the Companies Act, 2013 are not applicable to Private Companies. Therefore, the amendment shall not impact Private Companies.

Mandatory use of Accounting software having Audit trail

Notification dated March 24, 2021 read with Notification dated April 1, 2021

MCA amends Companies (Accounts) Rules, 2014 by introducing Companies (Accounts) Amendment Rules, 2021 which states that every Company which uses Accounting software for maintaining books of accounts, shall use only such Accounting software having feature to record Audit trail of each transaction, creating an edit log of each change made in books of accounts along with the date of each change and ensuring that the audit trail cannot be disabled.

It shall come into force from April 1, 2022.

"Setting up makeshift hospitals and temporary COVID care facilities"- An eligible CSR Activity

Circular dated April 22, 2021

MCA took one more step to help the nation in this current health crisis by issuing the circular related to spending of CSR Funds for COVID 19 in which MCA clarified that spending of CSR funds for "setting up makeshift hospitals and temporary COVID care facilities" is an eligible CSR activity under Schedule VII of the Companies Act, 2013 relating to promotion of health care, including preventive health care, and disaster management respectively.

This Clarification shall boost support from corporate sector in the form of CSR funds to fight the pandemic via setting up temporary COVID Care facilities.

External Commercial Borrowings (ECB) Policy – Relaxation in the period of parking of unutilized ECB proceeds in term deposits

RBI/2021-22/16

A.P. (DIR Series) Circular No. 01 Dt. April 07, 2021

As per extant provisions of "*External Commercial Borrowings, Trade Credits and Structured Obligations*", ECB borrowers are permitted to park ECB proceeds in term deposits with AD Category-I Banks in India for a maximum period of 12 months cumulatively.

With a view to provide relief to the ECB borrowers affected by the Covid-19 pandemic, resulting in stalling of new project / expansion and or modernization of existing plant / slowdown in commercial operations etc. (the reason for which ECB was availed), a one-time relaxation has been provided. RBI has now permitted parking of the unutilized portion of ECB proceeds (**for ECB amounts drawn down on or before March 01, 2020**) in term deposits, for a period up to March 01, 2022.

This relaxation will provide relief to corporate entities which have availed the ECB but because of extended lock down and the resultant slow down in economic activity, have not been able to utilize the ECB proceeds as projected.

Resolution Framework 2.0 – Resolution of Covid-19 related stress of Micro, Small and Medium Enterprises (MSMEs)

Circular No. DOR.STR.REC.12/21.04.048/2021-22 Dt. May 05, 2021

- Due to the uncertainties created by the resurgence of the Covid-19 pandemic in India in the recent weeks, Reserve Bank of India ("RBI") has extended the facility under the "MSME Restructuring Circulars" for restructuring existing loans of MSMEs (*only to those MSMEs which did not avail the benefits under the earlier Resolution Scheme launched by RBI during 2020*), subject to the following conditions:
  - The Borrower should be a Micro, Small or Medium Enterprise as on March 31, 2021.
  - It has GST registration on the date of implementation of the restructuring.
  - The aggregate exposure (including non-fund based facilities) of the MSME from all its lenders does not exceed INR 25 crore as on March 31, 2021.
  - The account is classified as "standard asset" as on March 31, 2021.
  - The said account was not restructured in earlier MSME Restructuring Phase 1 launched last year as a COVID measure.
  - The restructuring of the borrower account is invoked by September 30, 2021, meaning the lender and the borrower have agreed to a restructuring plan.
  - The restructuring of the borrower account is implemented within 90 days from the date of invocation.
- For the Borrowers who opted for restructuring in 2020 under Resolution Framework 1.0, the Lenders have been given the powers to review the working capital

sanctioned limits and or drawing power, without the same being treated as restructuring.

Resolution Framework – 2.0: Resolution of Covid-19 related stress of Individuals and Small Businesses

Circular No. DOR.STR.REC.11/21.04.048/2021-22 Dt. May 05, 2021

- In order to, support individual borrowers and small businesses affected by COVID pandemic, the following set of measures have been announced by the RBI. These measures are in line with earlier measures announced in August 2020 as part Resolution Framework – 1.0.
  - Benefit available to individuals who availed personal loans[1], other than the credit facilities provided by lending institutions to their own personnel/staff.
  - Loans and advances for business purposes by such individuals not more than INR 25 crore as on March 31, 2021.
  - Benefit also available to small businesses, including those engaged in retail and wholesale trade (*other than those classified as MSMEs as on March 31, 2021*), with exposure of not more than INR 25 crore as on March 31, 2021.
  - The benefit for invocation of resolution is permitted up to September 30, 2021.
  - Rescheduling of payments, conversion of any interest accrued or to be accrued into another credit facility, revisions in working capital sanctions, granting of moratorium etc. can form part of the resolution plan. Moratorium period can also be granted, subject to a maximum period of two years.

Permission is given to Lenders to review the working capital sanctioned limits and / or drawing power for borrowers who had opted for benefit under Resolution Framework – 1.0 launched in 2020 as a one-time measure.

Personal loans refer to loans given to individuals and consist of (a) consumer credit, (b) education loan, (c) loans given for creation/ enhancement of immovable assets (e.g., housing, etc.), and (d) loans given for investment in financial assets (shares, debentures, etc.).

[1]Personal loans refer to loans given to individuals and consist of (a) consumer credit, (b) education loan, (c) loans given for creation/ enhancement of immovable assets (e.g., housing, etc.), and (d) loans given for investment in financial assets (shares, debentures, etc.

SEBI Notifications

Relaxation from stricter provisions of Regulations for Rights issue opening up to September 30, 2021

SEBI/HO/CFD/DIL2/CIR/P/2021/552 dated April 22, 2021

SEBI vide Circular dated May 6, 2020 had granted one time relaxation from strict enforcement of certain provisions of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018, pertaining to Rights Issue opening up to July 31, 2020. This relaxation was subsequently extended to Rights Issues opening up to December 31, 2020 and relaxation was further extended to Rights Issues opening up to March 31, 2021.

In view of increasing difficulties due to COVID-19 pandemic, SEBI decided to further extend the relaxation for the Rights Issues opening up to September 30, 2021 to ease and facilitate investors. The relaxation has been given subject to adherence of certain conditions (as per circular dated May 6, 2020).

SEBI also stated that refund in case of un-allotted / partial allotted application for Rights issue shall be completed on or before T+1 day (T: Basis of allotment day).

Relaxation from compliance with certain provisions of the SEBI (Listing Obligations Disclosure Requirements) Regulations, 2015 (LODR Regulations)

Amid the second wave of COVID-19 pandemic and considering the representations received from the Listed entities, professional bodies, industry associations, market participants, etc. for extension of timelines for various filings and relaxation from certain compliance under LODR Regulations, SEBI vide the following circulars has granted relaxations from compliance with certain provisions of LODR Regulations:

Sr. No.	Regulations	Requirement	Due Date	Extended Date	Circular No.	Date of Circular
1	**Regulation 24A**: Annual Secretarial Compliance report	60 days from end of the financial year	May 30, 2021	June 30, 2021	SEBI/HO/CFD/CMD1/P/CIR/2021/556	April 29, 2021
2	**Regulation 33(3)**: Annual Audited Financial Results for quarter and year ended on March 31,2021.	45 days from end of quarter/ 60 days from end of the financial year	May 15, 2021 / May 30, 2021	June 30, 2021	SEBI/HO/CFD/CMD1/P/CIR/2021/556	April 29, 2021

SEBI Notifications

Coverage

Sr. No.	Regulations	Requirement	Due Date	Extended Date	Circular No.	Date of Circular
3	**Regulation 32(1):** Statement of deviation or variation in use of funds to be submitted with Financial Results for quarter and year ended on March 31, 2021.	45 days from end of quarter/ 60 days from end of the financial year	May 15, 2021/ May 30, 2021	June 30, 2021	SEBI/HO/CFD/CMD1/P/CIR/2021/556	April 29, 2021
For Entities that have listed their Debt Securities under the SEBI (Issue and Listing of Debt Securities) Regulations, 2008, SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares Regulations, 2013, and SEBI (Public Offer and Listing of Securitised Debt Instruments) Regulations, 2008						
4	**Regulation 52:** Submission of Financial Results					
	Half yearly Financial Results	45 days from end of quarter	May 15, 2021	June 30, 2021	SEBI/HO/DDHS/DDHS_Div1/P/CIR/2021/557	April 29, 2021
	Annual Audited Financial Results	60 days from end of the financial year	May 30, 2021			
5	**Regulation 52 (7):** Statement of deviation or variation in the use of funds to be submitted with Financial Results					
	Half yearly Financial Results	45 days from end of quarter	May 15, 2021	June 30, 2021	SEBI/HO/DDHS/DDHS_Div1/P/CIR/2021/557	April 29, 2021
	Annual Audited Financial Results	60 days from end of the financial year	May 30, 2021			

SEBI Notifications

Sr. No.	Regulations	Requirement	Due Date	Extended Date	Circular No.	Date of Circular
For Entities that have listed their bonds under the SEBI (Issue and Listing of Municipal Bonds) Regulations, 2015						
6	Submission of Annual Audited Financial Results	60 days from end of the financial year	May 30, 2021	June 30, 2021	*SEBI/HO/DDHS/DDHS_Div1/P/CIR/2021/557*	April 29, 2021
For entities that have listed Commercial Paper						
7	Submission of Annual Audited Financial Results					
	Half Yearly Financial Results	45 days from end of half year	May 15, 2021	June 30, 2021	SEBI/HO/DDHS/DDHS_Div1/P/CIR/2021/557	April 29, 2021
	Annual audited Financial Results	60 days from end of the financial year	May 30, 2021			
8	Use of Digital Signature Certifications for authentication certification of filings/submissions made to the stock exchanges	NA	NA	December 31, 2021	SEBI/HO/DDHS/DDHS_Div1/P/CIR/2021/557	April 29, 2021

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For further analysis and discussion, you may please reach out to us.

Locations

Ahmedabad

Arpit Jain
Level 11, Tower B,
Ratnaakar Nine Square,
Vastrapur,
Ahmedabad - 380 015
Phone: + 91 79 4910 2200
arpit.jain@kcmehta.com

Bengaluru

Payal Shah
19/4, Between 7th & 8th
Cross, Malleswaram,
Bengaluru - 560 00

Phone: +91 80 2356 1880
payal.shah@kcmehta.com

Mumbai

Vishal Doshi
508, The Summit Business Bay,
Nr. WEH Metro Station,
Gundavali, Andheri East,
Mumbai - 400069
Phone: +91 22 2612 5834
vishal.doshi@kcmehta.com

Vadodara

Milin Mehta
Meghdhanush,
Race Course,
Vadodara - 390 007

Phone: +91 265 2440400
milin.mehta@kcmehta.com

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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
BOI	Body of Individuals
BRC/FIRC	Bank Realisation Certificate / Foreign Inward Remittance Certificate
CBDT	Central Board of Direct Tax
CBIC	Central Board of Indirect Taxes and Customs
CCA	Cost Contribution Arrangements
CCR	Cenvat Credit Rules, 2004

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

Abbreviation	Meaning
LTCG	Long term capital gain
MAT	Minimum Alternate Tax
MCA	Ministry of Corporate Affairs
MEIS	Merchandise Exports from India Scheme
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

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