K C Mehta & Co.

Chartered Accountants

kcm Insight

November 2021

Dear Reader,

We are happy to present kcmInsight, 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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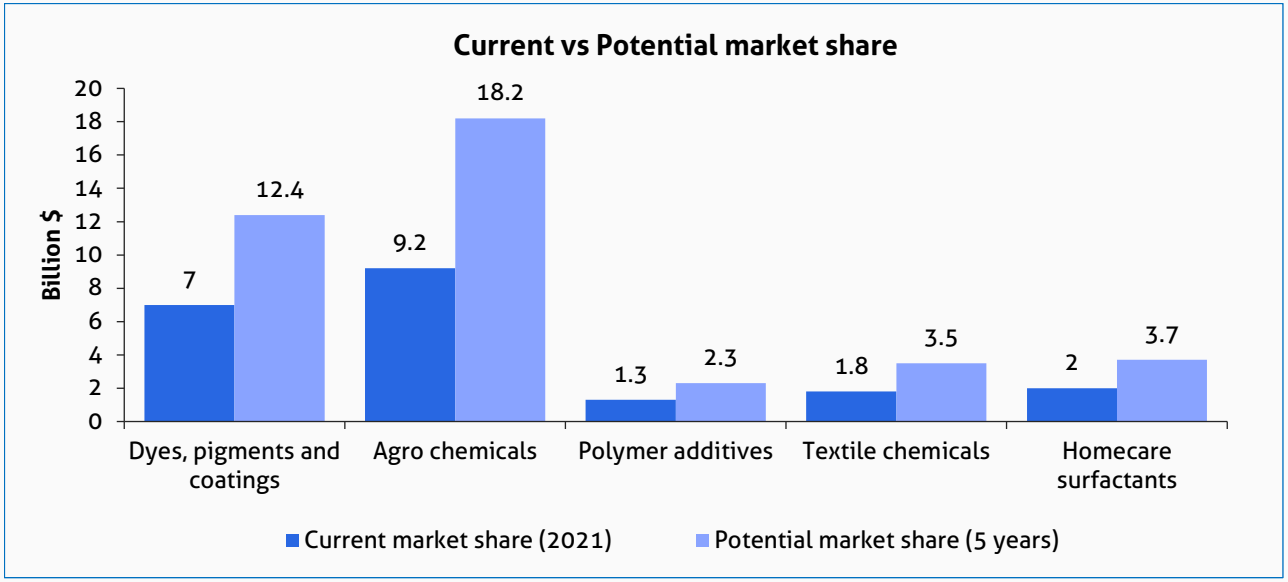
Indian Specialty Chemicals Sector

Coverage

Deciphering the Specialty in Specialty Chemicals Sector

India's chemical industry is diversified and can be broadly grouped into bulk chemicals, specialty chemicals, agrochemicals, petrochemicals, polymers, and fertilizers. Companies in specialty chemicals sector are primarily engaged in production of chemicals which are demanded and sold on the basis of their function rather than composition. Within the specialty chemical space in India, agrochemicals, pharmaceuticals, surfactants, specialty polymers, textile chemicals and dyes are among the top segments expected to maintain their relative leadership and grow further in line with market demand.

Cosmetic chemicals, flavors and fragrances, adhesives and sealants, printing inks, food additives are a few emerging segments expected to have higher growth with an improvement in their relative positions amongst other specialty chemical segments in India.



Source: Motilal Oswal Financials Services Ltd; Livemint

Despite challenges posed by the pandemic, strategy used by several countries to diversify their supply chain and reduce dependence on supply of specialty chemicals from China has favored the Indian specialty chemicals industry. The factors which have proved to be advantageous include low labor costs, rising domestic consumption and increase in demand from end-use industries such as personal care, home care and food processing. Also, the increase in demand of hygiene products, disinfectants, sanitizers, pharmaceuticals, etc. has proven to be beneficial for the specialty chemicals sector.

Comparison of Valuation: Public markets vs Private deals

Companies with recent Initial Public Offering (IPO)

The table below covers valuation multiples for companies which rolled out their IPO during the period from FY19 to FY21.

	Mar-19		Mar-20		Mar-21		Sep-21	
	EV/EBITDA	P/E	EV/EBITDA	P/E	EV/EBITDA	P/E	EV/EBITDA	P/E
Tatva Chintan Pharma Chem	NA	NA	NA	NA	NA	NA	42.0	51.2
Clean Science and Technology Ltd	NA	NA	NA	NA	NA	NA	72.2	103.4
Laxmi Organic Industries ltd.	NA	NA	NA	NA	21.9	37.5	48.7	79.7
Anupam Rasayan India Ltd.	NA	NA	NA	NA	23.0	70.1	32.6	72.1
Rossari Biotech	NA	NA	NA	NA	41.2	68.1	55.1	92.5
Chemcon speciality	NA	NA	NA	NA	17.2	26.5	18.0	26.7
Neogen	NA	NA	16.4	28.5	34.3	64.2	44.0	79.2
Shankar Lal Rampal Dye-Chem Ltd.	9.0	16.9	7.4	12.2	6.1	9.5	5.6	7.4
Sirca Paints India ltd.	8.1	13.6	12.5	18.4	31.9	52.1	19.2	28.6
Average	8.5	15.3	12.1	19.7	25.1	46.8	37.5	60.1
Median	8.5	15.3	12.5	18.4	23.0	52.1	42.0	72.1

Source: Company Websites, Stock Exchanges

An increasing trend was observed in the average EBITDA multiples of IPO companies, which increased from 8.5 times in FY19 to 12.1 times in FY20, 25.1 times in FY21 and 37.5 times in H1FY22. The Price to Earnings (P/E) ratio also reflected a similar pattern. Average P/E ratio increased from 15.3 times in FY19 to 19.7 times in FY20, 46.8 times in FY21 and 60.1 times in H1FY22.

The average EBIDTA multiple and P/E multiple increased almost 4 times from Mar-19 to Sep-21.

Existing Listed Companies

Similar to the IPO Companies, in case of selected listed companies with track record, average EBITDA multiple has been showing an increasing trend from Mar-19 to Sep-21.

Indian Specialty Chemicals Sector

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Average EBITDA multiple of selected listed companies increased from 15.7 times in FY19 to 16.4 times In FY20, 29.4 times in FY21 and 46.2 times in H1FY22.

	Mar-19		Mar-20		Mar-21		Sep-21	
	EV/EBITDA	P/E	EV/EBITDA	P/E	EV/EBITDA	P/E	EV/EBITDA	P/E
Vinati Organics	9.3	15.0	17.2	23.7	38.0	53.4	47.2	66.8
Pidilite Industries	42.5	64.4	43.4	62.6	56.7	85.0	63.6	92.1
Aarti Industries	5.3	6.9	9.0	12.7	14.8	22.3	30.7	51.4
Deepak Nitrite	13.2	27.1	6.8	9.7	41.1	63.7	51.1	76.2
Atul limited	13.8	24.7	12.8	18.4	22.0	33.2	28.2	43.1
Alkyl Amines	4.9	8.2	3.5	4.6	10.5	15.7	43.2	63.0
Navin Fluorine	13.9	23.7	20.2	15.2	30.0	45.5	41.2	61.0
Gujarat Fluorochemicals	12.0	7.5	8.1	16.8	10.3	NA	53.3	NA
Solar Industries	29.6	50.9	27.8	38.6	39.1	61.2	58.0	90.2
Galaxy Surfactants	13.0	22.5	15.1	22.8	31.0	50.9	45.1	76.3
Average	15.7	25.1	16.4	22.5	29.4	47.9	46.2	68.9
Median	13.1	23.1	14.0	17.6	30.5	50.9	46.2	66.8

Source: Company Websites, Stock Exchanges

The average P/E ratio marginally decreased from 25.1 times in FY19 to 22.5 times in FY20 and subsequently increased to 47.9 times in FY21 and to 68.9 times in H1FY22. The average EBIDTA multiple and P/E multiple increased almost 3 times from Mar-19 to Sep-21.

Private market M&A deals

The average EBITDA multiple in the private M&A deals (where information was made public) reflected a declining trend from FY18 to FY21, however the same increased to 21.5 times in H1FY22.

Indian Specialty Chemicals Sector

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	Mar-18		Mar-19		Mar-21		Sep-21	
	EV/EBITDA	P/E	EV/EBITDA	P/E	EV/EBITDA	P/E	EV/EBITDA	P/E
Pluss Advanced Technologies Pvt. Ltd.							29.82	NA
Privi Speciality Chemicals Ltd.							13.17	NA
Convergence Chemicals Pvt. Ltd.					4.59	9		
Solaris Chemtech Industries Ltd.			15.75	NA				
Sethness-Roquette India Ltd.			9.93	15.44				
Aims Impex Pvt. Ltd.			7.59	NA				
Meghmani Finechem Ltd.			3.55	NA				
Vee Micron Minerals Ltd.	17.52	NA						
Cipy Polyurethanes Pvt. Ltd.	8.84	NA						
Average	13.18	NA	9.21	15.44	4.59	9.00	21.50	NA
Median	13.18	NA	8.76	15.44	4.59	9.00	21.50	NA

Source: VCC Edge

Valuation drivers

While the valuation multiples in the private M&A space have increased over time, it has not kept pace with the valuation frenzy that is noticed in the listed space. Primary reasons for the anomaly in valuation multiples between private and public markets has been the illiquidity discount in private deals and the fact that most of the private M&A deals have been exit deals by existing promoters which typically happen at conservative multiples owing to the inherent risk of change in control. As such, exit by existing promoters is not seen in a good light by public market investors. Key valuation drivers in the specialty chemicals sector include better product mix with niche end-use applications, increasing research and development and rising growth expectations largely fueled by the aftermath of the pandemic.

Way forward

Indian specialty chemicals industry is expected to grow at a compounded annual growth rate of 12.4% over the next five years commanding a value of US$ 64 Bn by the end of this period. While the increasing P/E and EV/EBITDA multiples reflect investors' belief in the growth prospects of this sector, sustainability of the meteoric rise in valuations over a longer term could be a cause of concern. With the apparent gap in valuation multiples of private acquisitions vis-à-vis listed companies, we may witness more buyout deals in the private space which would ultimately target a public listing for raising further growth capital at higher valuation.

The CIT(A) observed that there was no violation of the companies Act and the contention of the AO to treat the said amount as dividend was not tenable considering that if dividend was to be paid then all the director shareholders would be receiving it, which is not the case on hand. Aggrieved, the revenue had filed an appeal with the Hon'ble ITAT however, the ITAT concurred with the view of CIT(A) and dismissed the appeal of the revenue.

Extension of timelines for electronic filing of Forms- Circular 16 of 2021

Vide the above circular, CBDT has extended timeline for filing of various forms under the ITA. The same is summarized as under:

Particulars	Original due date	Previously extended due date	Further extended due date
Application for registration or intimation or approval under Section 10(23C), 12A, 35(1)(ii)/(iia)/(iii) or 80G in Form No. 10A	30.06.21	31.08.21	31.03.22
Application for registration or approval under Section 10(23C), 12A, or 80G in Form No.10AB	28.02.22	-	31.03.22
Equalization Levy Statement in Form No.1 for FY 2020-21	30.06.21	31.08.21	31.12.21
Intimation by a constituent entity, resident in India, of an international group, the parent entity of which is not resident in India, for the purposes of Section 286(1) in Form No.3CEAC	30.11.21	-	31.12.21
Report by a parent entity or an alternate reporting entity or any other constituent entity, resident in India, for the purposes of section 286(2) or (4) of the ITA, in Form No. 3CEAD	30.11.21	-	31.12.21
Intimation on behalf of an international group for the purposes of the proviso to Section 286(4) of the ITA in Form No. 3CEAE	30.11.21	-	31.12.21

Computing the interest income accrued on excess contribution to provident fund- Notification No. 95/2021

CBDT has issued a notification on August 31, 2021, wherein the rules for methodology for computing the interest income accrued on excess contribution to provident fund has been specified. As per the new rules, within the provident fund account two separate accounts shall be maintained – Taxable

contribution & Non-taxable contribution account. Non-taxable Contribution account shall include closing balance of the provident fund up to 31st March 2021, contribution in subsequent years within the threshold limit and interest accrued on such funds. Whereas Taxable Contribution Account shall include contribution in provident fund account, after 31st March 2021, in excess of the threshold limit and accrued interest thereon. Accordingly, the interest accrued in the previous year in the Taxable Contribution Account shall be taxable as per the first and second proviso to section 10(11) and section 10(12) of the ITA. The threshold limit of contribution to provident fund is INR 250,000 wherein both employer & employee contribute to the provident fund and INR 500,000 when there is no contribution from the employer.

Annual Information Statement (AIS)

In order to promote transparency and simplifying the tax return filing process, CBDT vide Notification dated May 28, 2020, has amended Form 26AS vide Sec 285BB of ITA r.w.r.114-I of ITR w.e.f. June 1, 2020. The new Form 26AS is an Annual Information Statement ('AIS') which will provide a complete profile of the taxpayer for a particular year.

The Format of AIS comprise of ***Part A*** containing Name of taxpayer, PAN, Aadhar, Date of Birth / Incorporation, Mobile No, Email, Address whereas ***Part B*** of AIS comprise of information relating to:

- Tax deducted or collected at source.
- Specified financial transaction (SFT)
- Payment of taxes
- Tax Demand and refund
- Pending proceedings
- Completed proceedings
- Information received under an agreement referred to in section 90 or section 90A

The important features of AIS are inclusion of new information such as interest income, dividend income, shares & securities transactions, mutual fund transactions, foreign remittance information etc.

Further, the taxpayer will be able to view AIS information and submit different types of response / feedback on the information such as information given in AIS is correct, not fully correct, not correct, relates to other PAN / Year, duplicate etc. Such feedback will be processed in accordance with risk management rules and high-risk feedback will be flagged for seeking confirmation from the information source.

Important Rulings

Provisions introduced for plugging loophole cannot be used against bonafide transactions

M.M. Aqua Technologies Ltd., Civil Appeal No. 4742-4743 of 2021, Supreme Court of India

The Taxpayer filed its return for the A.Y. 1996-97. The Taxpayer had discharged his interest liability on funds borrowed from the financial institution by issuing debentures to the institution. In the return filed, the Taxpayer claimed said amount as deduction u/s 43B (d) of the ITA as actual payment of the interest liability by way of issue of debentures. The AO invoked the provision of Explanation 3C of the section 43B and contended that the issue of debenture in lieu of interest payable on borrowed funds would not amount to interest actually paid as referred in the section 43B(d) of the ITA. The AO disallowed the claim of the Taxpayer u/s 43B(d) by holding that the mode of discharge of interest liability is different than originally agreed terms and conditions.

The CIT and the ITAT have decided the issue in favor of the Taxpayer. The ITAT also contended that the payment of liability by any mode (conversion, adjustment entries etc.) other than by cash/cheque/draft is covered by the provision of section 43B and thereby allowable as deduction.

The Hon'ble High Court concluded the matter on a different footing. The court held that conversion of outstanding interest into debenture is nothing but conversion of interest into the loan and the same would attract Explanation 3C of section 43B. The High Court also held that Explanation 3C has retrospective effect with effect from 1-4-1989 and the same would also be applicable to AY 1996-97. The court held that since the interest is converted into loan amount, the same cannot be deemed as actually paid and accordingly it is not allowable u/s 43.

The Taxpayer challenged the order of the High Court before the Supreme Court. The Taxpayer argued that since the word 'debenture' is not specified in Explanation 3C of section 43B, the applicability of this explanation cannot be presumed in the event of issue of debentures. The Apex court after going through the facts of the case, provision of section 43B and orders of the lower authorities held that since debentures were issued against the interest payable, under a rehabilitation scheme agreed between the lender and the borrower, it was a case of actual payment of interest and therefore deduction u/s 43B was allowable. The Apex Court further held that since persons misused section 43B by converting outstanding interest into loan, Explanation 3C to section 43B was introduced to plug the loophole. The Court held that when a provision is introduced to plug a loophole, the same cannot be used against the Taxpayer in a bonafide transaction. Such provisions can be invoked only when a misuse of the law is shown. Since in the present case, it was genuine case of mutual agreement between borrower and lender for discharge of interest liability, provisions of Explanation 3C could not be invoked.

This decision can prove to be useful in cases where the Department has invoked deeming provisions to compute the artificial value of transaction. In such cases, through this decision, it can be argued that such deeming provisions cannot be applied where there is genuine transaction carried out and consideration is mutual agreed by the parties to the transaction. Further, this decision must be read along with

the General Anti-Avoidance Rules (GAAR) which provides that the Taxpayer must establish a commercial substance in a transaction.

Department bound to give reasons for adjustment of demand in excess of 20%

Eko India Financial Services Private Limited, WP (C) 5819/2021, Delhi High Court

The Taxpayer had outstanding demand for AY 2017-18 and the matter for the said assessment year was pending before the CIT(A). During the pendency of appeal, an order u/s 245 was passed for AY 2019-20 through which an aggregate of 40.21% of the demand of AY 2017-18 was collected by the Department by way of adjustment against the refund of AY 2019-20.

The Taxpayer filed a writ before the High Court challenging the action of the Department in adjusting demand in excess of 20% when the matter was pending before the CIT(A). The Taxpayer contended that as per the guidelines contained in the Office Memorandum, dated 29.02.2016 as amended by Office Memorandum dated Aug 25, 2017, issued by the CBDT, the Revenue is bound to grant a stay on recovery of outstanding demand upon recovery of 20% till the disposal of appeal before CIT(A). In view of the same, the action of the Revenue in adjusting the demand in excess of 20% was contrary to the CBDT guidelines and accordingly, the Department was required to refund the amount collected in excess of 20% of the outstanding demand.

The Department argued that the pre-deposit of 20% of the demand is not a rule of thumb and that the Department has the discretion to direct set off a higher sum. The Department also relied upon the relevant portions of the Office Memorandum dated 29.02.2016.

The High Court, relying on the SC rulings in Amrit Singh Ahluwalia vs. State of Punjab & Ors. and Ramana Dayaram Shetty vs. International Airport Authority of India & Ors. (Appeal Number), held that the Revenue is bound to follow the rules and standards they themselves had set. The High Court accordingly held that the Department shall normally grant stay of demand till disposal of the first appeal on payment of 20% of the disputed demand and if the Department is of the view that the payment of an amount higher than 20% is warranted, then it is required to give specific reasons to show that payment of amount higher than 20% is required. Adjustment of higher demand against refund cannot be made in absence of reasons. In the present case, no reasons were provided by the Department while adjusting demand in excess of 20% and therefore the excess adjusted demand was to be refunded to the Taxpayer.

The above case is useful for all those taxpayers whose refunds have been either adjusted even after payment of 20% of the demand or where the Department is pursuing the taxpayer to pay demand in excess of 20%.

Incomplete construction of residential house eligible for exemption u/s 54F

JCIT v. Santosh Suresh Gupta, ITA No. 06 of 2018, Pune ITAT

The Taxpayer is an individual declared long term capital gain from sale of flats and claimed exemption u/s 54F in the return of income for A.Y. 2013-14. The Taxpayer deposited part amount in capital gain account scheme and paid certain amount for purchase of land for construction of residential house. The

deduction u/s 54F was claimed for the amount deposited in the capital gain account and the amount paid for purchase of land for construction of house.

The AO disallowed exemption u/s 54F on the ground that the construction of residential house was not completed within 3 years from date of transfer of original assets. The CIT(A) rejected the contention of the AO and allowed exemption to the Taxpayer u/s 54F as the Taxpayer has invested the capital gain in new residential house.

The Department filed appeal before ITAT against the order of CIT(A) and Hon'ble ITAT on bare perusal of section 54F held that completion of construction within period of three years is not mandatory for claiming exemption. It was observed that once the capital gain is apportioned towards construction of new residential house within stipulated time, the conditions specified u/s 54F gets satisfied. ITAT further observed that for claiming exemption u/s 54F, investment and construction in new residential house is important and the section does not emphasize on completion of construction house within period of 3 years. Accordingly, ITAT allowed exemption u/s 54F on investment in new residential house even in case where the construction of residential house was not completed within period of 3years from date of transfer.

Time and again various Tribunals have held that investment of capital gain in new property within stipulated time was sufficient for the purpose of claiming exemption u/s 54 / 54F and completion of construction within timeframe is not pre-requisite condition. Few such decisions are Kannan Chandrasekar vs ITO (ITA 2932 (MDS) of 2016, ITAT Chennai); Bhavna Cuccria vs. ITO (ITA No. 341 (Chd) of 2017, ITAT Chandigarh); Smt Harminder Kaur vs. ITO (ITA No. 2656 (Del) of 2017, ITAT Delhi).

Refund claimed in tax return cannot be withheld u/s 241A without citing reasons for the same

Mcnally Bharat Engineering Company Limited and ANR Vs. ACIT, Kolkata., Write Petition No.80 of 2020, Calcutta High Court

The Taxpayer is a public company. In view of loss, it has claimed refund of entire amount of TDS. The return was processed u/s.143(1) and refund claimed as per tax return was accepted. However, the intimation a note that stating that the refund has been withheld as per the provisions of section 241A. Subsequently, a notice u/s 143(2) was also issued to the Taxpayer and order u/s.143(3) was passed raising demand. Considering that no demand was outstanding as on the date of the intimation, the Taxpayer approached the AO multiple times for the release of the refund however, since the refund was not released and neither the reasons for withholding the refund was provided, Taxpayer filed a writ petition before the High Court.

Before the court, the Taxpayer argued that to invoke the provision of section 241A, the AO has to form an opinion that the grant of refund is likely to adversely affect the revenue. However, no such reasons were recorded by the AO at the time of invoking the provisions of section 241A of the ITA. Further, there was no demand against the Taxpayer as on the date of determining the refund and hence action of the AO is not justified. On the other hand, revenue proposed to invoke section 245 of the ITA referring to a subsequent demand of tax assessment which came into existence subsequently and stated

that the invoking of provisions of section 241A was justified to safeguard the interest of the revenue.

The High Court observed that the very essence of passing of the order under Section 241A is application of mind by the AO to the issues which are adequate for withholding the refund. The AO must form an opinion that the refund is likely to affect the revenue and further Taxpayer also must be given an opportunity of being heard before reasons are recorded for withholding the refund under this section. The scope of power u/s 241A is narrow which requires a speaking order as to how the grant of refund is likely to affect the revenue. In absence of these proceedings being followed the action of the AO withholding refund was unjustified. Further considering the facts of the case, the HC ruled that the AO could not have kept the refund withheld to link such refund with any demand of a subsequent period which was not in existence on the date when the refund was notified. The writ petition of the Taxpayer was allowed.

This is a good decision and will be useful in cases where refund was withhold without processing due course of action as specified in section 241A.

'Management Consultancy' to be considered as business and not profession for the purpose of audit u/s 44AB

Shri Pramod Lele Vs ITO, ITA No.4306 of 2019, ITAT Mumbai

The Taxpayer is an individual & Chartered Accountant engaged in the business of providing Management Consultancy services. For the AY 2015-16, he declared total income of Rs.2,10,69,340 which included Management Consultancy fee of Rs.61,40,000. During the course of assessment proceedings, the AO observed that the gross receipts of the Taxpayer from the Management Consultancy had exceeded Rs.25,00,000. Further tax has been deducted tax at source u/s.194J (Professional Fees) on such payment while making payment of fees to the Taxpayer. Considering that 'Management Consultancy' falls within the expression of 'Technical Consultancy' as mentioned in Section 44AA of the ITA, the AO levied penalty u/s.271B of the ITA for failure to get the accounts audited u/s.44AB of the ITA.

The Taxpayer argued that he had not rendered any professional services, instead he is engaged in the business of rendering Management Consultancy Services and accordingly, the eligibility for getting the accounts audited would arise only if the gross receipts exceeded Rs. 1 Crore. However, both the AO as well as CIT(A) have not accepted such argument.

Aggrieved, the Taxpayer filed an appeal with the ITAT which held that that the rate at which TDS was deducted by the clients while making payments to the Taxpayer is of absolutely no relevance to determine whether the Taxpayer was engaged in a business or profession. Further, the expression 'Management Consultancy' does not form part of various professions (including 'Technical consultancy') mentioned in Section 44AA. It concluded that the expression 'Technical Consultancy' would only mean rendering of technical services by the Taxpayer and therefore management consultancy cannot be brought within the ambit of section 44AA(1) of the ITA. Hence, the Taxpayer is not liable to get its accounts audited u/s 44AB of the ITA and the penalty-imposed u/s 271B was deleted.

Important Rulings

It is to be noted that such principle should not be applied blanketly since there remains the possibility that the nature of management consultancy may have element of 'Technical Consultancy' considering exact nature of services rendered.

iPads shall not be regarded as computers - Depreciation restricted to 15%

Kohinoor Indian Pvt Ltd, ITA Nos. 234 & 316 of 2017, ITAT Amritsar

The Taxpayer had purchased an Apple iPad and claimed depreciation on it at the rate of 60%, being the depreciation rate attributable to block of computers. During assessment proceedings, the Taxpayer relying upon the definition of computers given in the Information Technology Act contended that the iPad is an electronic device which performs data processing through manipulation of electronic impulses and thus qualifies as a computer. The AO rejecting the argument of the Taxpayer and restricted the depreciation on the iPad to the rate of 15% by considering it similar to a mobile phone instead of computer. The learned AO noted that iPad and Mac Book work on two different operating systems.

The ITAT considering the order of the lower authorities as well as the arguments of the Taxpayer held the predominant function, usage and common parlance understanding would have to be considered if the meaning of the word "Computers" is not defined in under ITA. The predominant purpose of an iPad is for communication and not for computing, as its main features are email, WhatsApp, Facetime calls, calls, music, films etc. The ITAT concluded that there is no difference between iPad and Mobile Phone except screen size. The definition of Computer as given under Information Technology Act, 2000 should not referred as meaning given under one statue would have different application than meaning given under the ITA which requires to apply common & commercial parlance tests. Though iPad may discharge some of the functions of computers it is not a substitute of the computer and therefore it cannot be subjected to a higher rate of depreciation of 60%.

After technological advancement taking place day to day where computing devices are re-designed to make more convenient in all manner including its size, the present judgement of ITAT requires to be revisited by higher appellate authority.

Incentive cannot be regarded as divided if it is paid to a shareholder-director in lieu of his performance

M/s VVF Ltd., I.T.A. No. 6908/Mum/2019, Mumbai ITAT

The Taxpayer company had paid an incentive to one of its directors – who was also holding 34% of its shares. The matter came to light during the course of the assessment proceedings wherein the AO sought to disallow the said incentive under section 36(1)(ii) of the ITA. The Taxpayer argued that the director cum shareholder had not drawn any remuneration for almost 3 years for his services as a managing director. For his contributions towards the growth of the Taxpayer company, it was decided to reward him with a special performance incentive of 250 Lacs. In this connection a Board resolution was passed, and shareholder's approval was obtained by special resolution in the Extraordinary general meeting.

However, the AO alleged that the special resolution was not passed in fair and transparent manner and that dividend was being paid in guise of incentive. The Taxpayer contended that if incentive was only a device to extend benefits to the director and to avoid DDT, similar payments would have been made to other shareholders. However, the Taxpayer's submissions were rejected, and the amount was added to the income of the Taxpayer.

Tribunal allows capitalization of pre-commencement expenditure (administrative and salary) in the ratio of cost of asset

Waterline Hotels Private Limited, ITA No. 1689/Bang/2016, Bangalore ITAT

The Taxpayer incurred certain expenditure (rent, salary and administrative expenditure) pre-commencement of its business operation. The same were capitalized to the cost of the building in accordance with the AS-10 issued by ICAI which provides that all expenses incurred in relation to bring an asset into existence have to be capitalized. The Taxpayer relying on the provisions of ICDS-V which provides the actual cost of fixed asset shall include expenses which are incurred for the acquisition of a tangible fixed asset as well as bringing it to its working condition. Accordingly, Taxpayer claimed depreciation u/s 32 on such pre-commencement expenditure being salaries and other administrative expenses by capitalizing the same in block of building in the ratio of cost of building to cost of total assets.

The AO denied the claim of the Taxpayer on the ground that such administrative expenditure did not increase the value of the assets and thus could not be capitalized. The view of the AO was also upheld by the CIT(A) by affirming the view of the AO and added that the general administrative expenses don't have any marketable item in exchange for that outlay. Aggrieved by such order, The Taxpayer preferred an appeal with the Tribunal.

The Tribunal by relying on various judicial precedents, held that depreciation is allowable on actual cost of the asset even for the expenditure incurred pre-commencement of business. The Tribunal observed that pre-commencement should be construed in ordinary commercial manner and noted examples provided in AS-10 which provides to includes indirect expenditure which are not related to construction, have also been included in the cost of the asset. The Tribunal also relied on the definition of 'actual cost' as given u/s 43(1) of ITA as well provisions of ICDS-V to held that indirect expenses should be capitalized if same is incurred prior to commencement of business. Further, by relying on the judgement of Hon'ble High Court of Madras in case of CIT vs Lucas TVS Ltd [1977] 110 ITR 246, the ITAT upheld the view of the Taxpayer to allocate the indirect expenditure in form administrative expenses in the ratio of direct cost incurred for the assets.

While the Tribunal has upheld the principal that any expenditure incurred pre-commencement of business activities should be capitalized, it has more importantly affirmed the principle that common expenditure incurred like salaries of administrative staff and other common expenses which are incurred prior to commencement of business and do not directly relate to any asset, can be capitalized in the ratio of direct cost incurred for fixed assets. The ruling of Bangalore Tribunal would be useful to Taxpayers to deal with tax treatment of pre-commencement expenditure incurred which are not directly relatable to any assets.

Important Rulings

Withdrawal of relaxation in respect of period of limitation granted by Apex Court w.e.f. October 2, 2021

In RE: Cognizance for Extension of Limitation, Miscellaneous Application No. 665 of 2021

Considering the Covid 19 Pandemic, the Supreme Court vide order dated March 23, 2020, had indefinitely extended the period of limitation for filing petitions/ applications/ suits/ appeals/ all other proceedings, irrespective of the period of limitation prescribed under the general or special laws. Further, this order was put to an end on March 8, 2021 owing to the improvement in the Covid 19 scenario in the country and it was stated that the balance period of limitation shall be computed from March 15, 2021 onwards. However subsequently considering the second wave of the Covid 19 outbreak vide Order dated April 27, 2021, the Apex Court had again extended the period of limitation w.e.f. March 15, 2021, until further orders. In view of such order of apex court, the CBDT vide Circular No 10 of 2021 has specifically clarified period of limitation in case of filing of appeals before CIT(Appeals) shall stand extended till further orders by Hon'ble Supreme Court. Now, considering the improved condition of the Covid 19 Pandemic in the country, the Hon'ble Supreme Court has passed the following direction with regard to the period of limitation.

- For any suit, appeal, application or proceeding, the period of limitation being due date for filing such suit, appeal etc. fell between the period from March 15, 2020, till October 2, 2021 shall stand excluded for computing the period of limitation.
- For other cases where the period of limitation being due date would have expired during the period between March 15, 2020, till October 2, 2021, all persons shall have a limitation period of 90 days from 03.10.2021 or if a period longer than 90 days is available under relevant law, the longer period shall apply.

No disallowance of interest expense under Rule 8D when own funds exceed tax free investments

South Indian Bank Ltd, Civil Appeal No. 9606 of 2011, Supreme Court of India

The Taxpayer is a Scheduled bank which had made investments in securities, which intern yielded it tax free interest and exempt dividend income. Further it did not maintain separate accounts for the investments from where the tax-free income is earned. The AO observed that the assessee had interest and non-interest-bearing funds for making such investments and therefore went on to conclude that interest baring funds were also used for earning interest free income and proceeded to make proportionate disallowance of interest expense by taking a base of the average cost of deposit. The CIT(A) also concurred with the view taken by the AO.

The ITAT observed that considering the business of the Taxpayer, the investment made by it would be in the nature of stock in trade. It further noticed that the Taxpayer is having surplus reserves being non-interest-bearing funds higher than the value of investments which generates exempt income and thus accepted the Taxpayer's contention that investments were not made out of interest or cost bearing funds hence disallowance u/s 14A is not warranted. This decision of ITAT was

reversed by the High Court by accepting the contentions advanced by revenue.

Before the Supreme Court, the Taxpayer argued that its investment business was indivisible from its banking business and further it had sufficient interest free funds (reserves), which were more than the investment made for earning tax free income and thus, the investments made in securities which yielded tax free income should be considered to have been made out of interest free funds, hence there shall be no disallowance u/s 14A. On the other hand, the revenue argued that the Taxpayer had not maintained separate accounts and such tax-free income was earned from investment made from both i.e. interest and non-interest bearing funds and thus the revenue had rightly made the disallowance u/s 14A.

The Apex Court referred to its decision in the case of Pr. CIT Vs. Bombay Dyeing and Mfg. Co. Ltd in I.T.A. No. 1225 of 2015 wherein the SLP of the department had been dismissed and it was held that when the Taxpayer had mixed funds, it is the Taxpayer who has the right to assert from which part of the funds a particular investment was made and the revenue could not make an estimation of a proportionate figure. Further it relied upon its decision in the case of CIT Vs. Reliance Industries Ltd (2019) 410 ITR 466 and HDFC Bank Ltd Vs. DCIT (2016) 383 ITR 529 wherein it was held that where the Taxpayer possessed sufficient interest free funds as against the investments generating tax free income, then there is a presumption that the investments have been made through the interest free funds available with the assessee and section 14A would not be applicable. Further on the matter that the Taxpayer did not maintain separate accounts with regard to the interest free income, it was held by the Apex court that the law never obligated the Taxpayer to maintain such separate accounts and further the revenue could not bring to light any statutory provision which required the Taxpayer to maintain such separate accounts. The Apex Court has also clarified that the theory of apportionment of expenditure as held in case of Maxopp Investment Ltd vs CIT (2018) 15 SCC 523 shall apply only when the business is divisible. Therefore, considering the judicial pronouncements and the provisions of section 14A, the matter was ruled in favour of the Taxpayer.

The decision puts to rest the major controversies surrounding the disallowed made u/s 14A where during the course of assessment proceedings the AO used to make disallowances u/s 14A simply on the basis that the assessee has not maintained separate books of accounts to bifurcate the expenditure incurred to earn tax free income. This decision of the Apex Court now lays down the law that no separate books of accounts may be kept by the Taxpayer when he earns tax free income from investment held as business assets and hence no disallowance u/s 14A can be made where the Taxpayer has sufficient interest free funds (i.e. free reserves) in comparison to value of investments generating tax free income.

Reassessment notice u/s 148 issued beyond March 31, 2021, is void

Ashok Kumar Agarwal v. Union of India, Write No. 524 of 2021 dated September 30, 2021, Allahabad High Court

The Taxpayer along with other 73 applicants had filed a writ petition before the Allahabad High

Important Rulings

Court challenging the issuance of notice u/s.148 of the Act on or after April 1, 2021 for initiation of re-assessment proceedings under the old provision as applicable up to March 31, 2021.

The Government considering the difficulties on account of the Covid 19 pandemic had introduced the Taxation and Other Laws (Relaxation of Certain Provisions) ordinance which later received the assent of the President on September 29, 2020 and became an Act (Herein after referred to "Enabling Act"). Section 3(1) of the Enabling Act governed the time limit for initiation and completion of various proceedings, the due dates of which were extended from time to time through various notifications including extension of the time limit for issuing notice under section 148 as per time-limit specified in section 149 or sanction under section 151, to 30th June 2021.

Meanwhile, with the enforcement of FA 2021 the pre-existing sections 147 to 151 of ITA were replaced and the provisions of section 148A of the ITA came into force whereby the entire statutory scheme of initiating, inquiring, conducting, and concluding the reassessment proceedings underwent a change.

Before the HC, the Taxpayer argued that the Enabling Act was enacted solely to extend the limitation periods under the provisions of the ITA as they stood prior to the amendment made by the FA 2021. The Enabling Act or the FA 2021 do not contain any clause that may allow the pre-existing provisions to be extended, especially after the enactment of the FA 2021 which was approved by the Parliament after the Enabling Act was passed.

Had it been the intent of the legislature to extend the scope of the Enabling Act beyond March 31, 2021, they would have done the same in the FA 2021. It was also argued that the Enabling Act was passed with regard to the provisions existing at the time of passing the said Act, it cannot be given a wider meaning so as to curtail the powers of the FA 2021, especially when it was not in existence at the time of passing the FA 2021. Further, the FA 2021 substituted the manner of reassessment by introducing the provisions of section 148A into the ITA and therefore the provisions of the Enabling Act cannot override a provision that was not in existence at the time of passing the Enabling Act.

On the other hand, the revenue argued that constitutional validity of a law can only be challenged on the ground that there was a legislative incompetence in enacting such law or the law curtails a fundamental right. In the present petition the law cannot be struck down on a simple basis that it is arbitrary. It was further argued that the Enabling Act read with the notifications were required to mitigate the hardships of the Taxpayers as well as the revenue on account of the pandemic and that the benefit of extensions cannot be enjoyed only by the Taxpayers. The revenue also pointed out that the section 3(1) of the Enabling Act contained the word "Notwithstanding" which implies that it overrides the other provisions of the ITA. Therefore, the provisions of the section 148 were valid and the notices to the Taxpayer was rightly issued.

The High Court hearing both the sides held that, the section 3(1) of the Enabling Act only provides a general relaxation of limitations and does not itself speak of reassessment proceedings or section 148 of the Act as existed prior to April 1, 2021. However, the manner of reassessment has been substituted by

introduction of section 148A into the ITA and therefore the scope of Enabling Act cannot be extended to cover a principal legislation introduced by a Finance Act simply by passing a notification for extending a time limit. Further the court observed that there appears to be no conflict in the application and enforcement of the Enabling Act and the FA 2021 which the latter being applicable from April 1, 2021.

Thus, HC allowed writ petition by giving due importance to submission of the Taxpayers to the principle that the delegated legislation cannot defeat the principal legislation. Consequently, the reassessment notices were quashed.

Hospital remunerating doctors at par with commercial hospitals ineligible for exemption u/s 10(23C)(via)

Ashwini Sahakari Rugnalaya & Res. Centre, Civil Appeal No 3453 of 2007, Supreme Court of India

The Taxpayer, cooperative society, is a hospital operating for philanthropic purpose with an objective of providing medical and surgical amenities at a reasonable charge. The Taxpayer filed its return of income for AY 1999-2000 to 2002-03 claiming exemption u/s 10(23C)(via) of the ITA.

Such exemption was denied by CCIT, Pune whose order was further confirmed by CIT(A) and ITAT, Pune. The tax authorities denied such exemption on dual grounds that: (i) the Taxpayer disbursed the remuneration out of the earnings of IPD patients to the doctors who may not be working in such department and, (ii) the rates charged by the Taxpayer were at par with the hospitals running on commercial basis and held that the benefit under this section is available only to the hospitals existing solely for philanthropic purposes and not for purposes of profit.

The HC rejected the appeal of the Taxpayer on the ground that in absence of any scheme providing confessional or free treatment to the socially or financially weaker sections in society indicates that the receipts of the hospital were not different from those of the other privately run hospitals. The HC also added that if merely running a hospital is to be stated as philanthropic activity without any additional benefit to the citizens, that cannot be accepted as philanthropic activity eligible for deduction u/s 10(23C)(via) of the ITA.

On appeal to the Apex Court, it was held that because the Taxpayer was granted benefit for earlier ten years, the Taxpayer would not be ipso facto entitled to exemption u/s 10(23C) in years under consideration since exemption u/s 10(23C)(via) is subject to approval by prescribed authority who has complete discretion to disallow the same basis facts of the case.

The Apex Court further observed that though matter requires verification of facts as to whether rates charged by the Taxpayer are at par with rates charged by private hospitals, there is another reason to deny the exemption on the ground that the remuneration payable to doctors is not confined to the doctors performing the task but also distributed among the board of doctors. Thus, the appeal of the Taxpayer was dismissed.

Important Rulings

Legitimate right issue of shares at face value not liable to tax under anti-abuse

Income Tax Officer v. Shri Rajeev Ratanlal Tulshyan, I.T.A. No.5748/Mum/2017, Mumbai ITAT

The taxpayer who was a director and a major shareholder was offered rights issue in a Company at the face value. The Taxpayer accepted the rights issue offer, whereas the other shareholders did not accept it which resulted in increase in percentage holding of the Taxpayer in the Company and thereby resulting in a disproportionate increase in shareholding. It was alleged by the tax authorities that the consideration of face value was less than the fair market value as calculated under the provisions of the Income Tax Rules and therefore the difference between the FMV and the consideration paid by taxpayer would be taxable in the hands of the Taxpayer as income from other sources as per Section 56(2)(vii) of the ITA. The view of the tax authority was also upheld by the CIT(A) and the Taxpayer preferred an appeal with the Tribunal.

The Taxpayer before the Tribunal argued as under:

- The provision of the ITA applies only in case where the property is in existence and not at the time when property comes into existence.
- The provisions of the ITA should not be applicable in case of genuine rights issue transaction.
- The Tribunal had given a favorable ruling in case of Sudhir Menon HUF [45 taxmann.com176] wherein the Tribunal has held that the provisions of the ITA are not applicable in case of rights issue.

The Tribunal held that Section 56(2)(vii) of the Act were anti abuse provisions inserted post abolition of the Gift Tax Act. The same is evident from CBDT Circular No. 05/2010 dated June 03, 2010, which provided that Section 56 of the IT Act is being introduced as an anti-abuse measure. Further the Tribunal, relying on the Karnataka HC decision in case of DCIT v. Dr. Ranjan Pai, held that there is no reason to depart from the understanding that the provisions were a counter evasion mechanism to prevent the laundering of unaccounted income. Therefore, the same does not apply to genuine issues of shares to existing shareholders. Further, the Tribunal relying on the decision of Sudhir Menon held that Section 56(2)(vii) of the Act is not applicable in case of rights issue even if the shareholding becomes disproportionate.

Though the rationale of whether in case of rights issue when shareholding does not change proportionately, has been upheld by the Tribunal in case of Sudhir Menon, the present judgement affirms that the provisions of Section 56(2)(vii) (corresponding to Section 56(2)(x) of the Act) shall not apply even when the issue of rights share results in disproportionate shareholding due to inability of some of the shareholders to accept the rights offer.

Circular & Notifications

CBDT notifies Rules for recent amendment related to offshore indirect transfer of Indian assets

Notification No. 118/2021 dated 01 October 2021

The Taxation Laws (Amendment) Act, 2021 (2021 Act), amended the ITA so as to provide that no tax demand shall be raised in future on the basis of the amendment to section 9 of the Income-tax Act made vide Finance Act, 2012 for any offshore indirect transfer of Indian assets if the transaction was undertaken before 2012. The CBDT has now issued Rule 11UE and Rule 11UF which prescribe the specified conditions, Form and manner for furnishing of undertaking for withdrawal of pending litigation, claiming no cost, damages, interest, and other relevant procedures.

CBDT provides exemption from filing return to certain non-residents

Notification No. 119/2021 dated 11 October 2021

CBDT has exempted non-residents who do not earn any income other than income from investment in Alternate Investment Fund Category III located in International Financial Services Centres (IFSC) or GIFT city from filing ITR from AY 2021-22.

Additionally, certain eligible foreign investors (operating in accordance with specified SEBI circular), who only have income from transactions in capital assets like Global Depository Receipts, Rupee Denominated Bonds, derivatives or other notified securities, listed on recognised stock exchange in IFSC and the consideration on transfer of such capital asset is paid or payable in foreign currency, have also been exempted from ITR filing.

The above exemptions are subject to the condition that the non-residents are not required to obtain PAN as per the provisions of section 139A.

Important Rulings – India

ITAT hold that Inter-connected job orders placed under the same contract undeniably leads to formation of PE

Telenor ASA v. DCIT [ITA No. 1307 of 2015, Delhi ITAT]

The Taxpayer, a Norwegian Co., entered into Business Service Agreement with an Indian company as per which the Taxpayer provided services under various Service Order Forms (SOFs). The taxpayer treated each SOF as an independent project and the income from the same was treated as FTS and offered to tax @10% on gross basis, relying on Article 12 of the India-Norway DTAA. By aggregating the time spent by the Taxpayer's employees in India for all the SOFs jointly & the overall nature of the arrangement, the Revenue argued that the Taxpayer had a PE in India in terms of Article 5(2)(i) of the Treaty wherein the PE is constituted if an enterprise furnishes services through its employees for the same or connected project for a period aggregating to more than six months within any 12 months period. Accordingly, the revenue contended that the profits of the taxpayer were to be taxed at 40% (as Business Profits) instead of 10% (as FTS).

The ITAT took note of various types of SOFs raised by the Indian company and observed that the activities started with preparation, execution and negotiation of the GSM (a mobile communication system) to devising the strategy development, preparation of IT solutions architect, benchmarking the same, recruiting the manpower for the purpose of implementation and training them for various activities. The ITAT noted that a clear commercial coherence could be seen between the activities as no single activity mentioned above serves any purpose individually.

The ITAT referred to the OECD commentary on 'connected projects' and drew a distinction between interconnected 'services' and connected 'projects' and observed that the OECD commentary only dealt with different 'projects' of a service provider, but it did not deal with a case of single project with a bouquet of interconnected services. It was noted that even from the perspective of the taxpayer, the project as defined in the Article 5(2)(i) consists of bundle of inter-connected and interrelated services with the underlying theme of completion of projects. In the instant case, the outcome of one SOF became the inputs for the other SOF. The ITAT also mentioned that consolidated invoices were raised by the taxpayer irrespective of the SOFs under which the services were rendered. ITAT remarked that the common billing by the recipient and the common payments give rise to a conclusion that it was one single contract. Therefore, based on the existence on a single business service agreement, consolidated billing pattern and the inter-relation amongst the activities, ITAT concluded that the existence of the PE of the taxpayer was undeniable.

Based on a possible school of thought, the Taxpayer argued that in order to trigger the provisions of Article 12(5) of the DTAA, there should be a pre-existing PE and therefore, in its case, the provisions of Article 12(5) could not be triggered. The ITAT has however, not dealt with the same. With the introduction of BEPS Action plans, Multi-lateral Instrument and various other measures for anti-avoidance of taxes, it has become pertinent to look at the substance of the entire arrangement rather than the mere

documentation relating to it. In view of such developments, it shall be increasingly difficult for Taxpayers who intend to reduce taxability by artificial splitting up of contracts thereby trying to avoid creation of PE.

ITAT grants FTC for income on which benefit of Section 10AA was claimed

Infosys BPM Limited v. DCIT (ITA Nos.1151 & 1157 of 2018, Banglore ITAT)

The Taxpayer was in the business of providing business process outsourcing services. The taxpayer claimed deduction under Section 10AA (deduction related to setting up in SEZ) and also claimed the FTC of taxes paid on such income in USA. This claim was based on the decision of the Karnataka HC, in the case of Wipro Limited v. DCIT 382 ITR 179, where the FTC was allowed on income which was not taxable under Section 10A (deduction related to setting up in free trade zone).

The CIT(A) denied the FTC by stating that in the case of Wipro Ltd., the benefit under Section 10A was considered as an exemption whereas in the case of CIT v. Yokogawa India Ltd 244 Taxman 273, the SC held that benefit under Section 10A is in the nature of deduction (and thus not an exemption). Therefore, on conjoint reading of the decision of the Karnataka HC & SC the first appellate authority stated that the taxpayer was not eligible to claim the benefit of FTC on an income on which benefit of section 10AA of the ITA was available to the taxpayer, as the benefit under 10AA of the ITA was in the nature of a deduction and not exemption.

The ITAT disagreed with the view of the CIT(A) and observed that while the Karnataka HC had considered Section 10A as an exemption, it had also laid down the ratio that what was required to be seen was whether the income under section 10AA was chargeable to tax under section 4 and was includible in the total income under section 5 of the ITA. The fact that the taxpayer is not paying tax due to exemption or deduction granted under the ITA is not relevant. Based on this, the ITAT has allowed the claim of the Taxpayer and granted the FTC.

It should be noted that the Special Leave Petition filed by the Revenue against the order of the Karnataka HC in the case of Wipro Ltd. has been granted by the SC, leaving the decision of the HC to be adjudicated upon by the Apex Court.

Subsequent retrospective amendment cannot be pressed to disallow expenses u/s 40(a)(i)

TVS Electronics Limited [ITA No. 949 of 2017]

The taxpayer has made payment towards management fees to a non-resident without deduction of tax as services rendered outside India were outside the scope of Fees for Technical Services under the old provisions of law. However, section 9 was amended with retrospective effect to also include fees in respect of services rendered outside India. Accordingly, the revenue contended that since the amendment is applicable from retrospective effect and thus the taxpayer was liable to deduct tax.

The taxpayer contended that as per the pre-amendment law, the taxpayers are required to deduct tax if services are rendered as well as received in India and further placing reliance on the India-Mauritius treaty wherein there was no specific clause for FTS, the taxpayer contended that the services will fall under Business Profits under Article 7 of the treaty and in absence of

Important Rulings – India

Permanent Establishment in India, there is no scope of taxability of a non-resident in India.

The ITAT observed that taxpayer has relied on SC judgement in the case of Ishikawajma-Harima Heavy Industries Ltd, which was the law prevailing for deciding taxability of FTS, wherein the court held that for taxing FTS, services should be rendered and received in India. Further, ITAT relied on several judicial pronouncements wherein the courts have held that it is impossible for the taxpayers to foresee the retrospective amendment and deduct TDS on the transactions which fall outside the purview of tax at that point of time. Accordingly, ITAT ruled in favor of the taxpayer and deleted the disallowance made by the revenue.

Recently, various courts have ruled in favor of the taxpayers and held that subsequent retrospective amendment could not be enforced upon the taxpayers so as to make disallowance under section 40(a)(ia) of the ITA.

Royalty paid for use of trademark held as revenue tax deductible expenditure

Groz Engineering Tools Pvt. Ltd. [ITA No. 3894 & 3895 of 2017]

The taxpayer has paid royalty charges to a non-resident for use of trademark for its product and has also paid commission payment to non-resident agents for export of goods. In regard to the royalty paid by the taxpayer, the revenue contended that the taxpayer should not be allowed deduction of royalty as it was a capital expenditure. The revenue stated that the royalty agreement was vague and there was nothing in the agreement to show that benefit of the royalty was offered for a limited period only.

The Tribunal relied on earlier order in the taxpayer's case itself wherein ITAT observed that royalty was being paid for use of trademark on the products of the taxpayer and that the expenditure was incurred wholly & exclusively for the purpose of the business. Further, the taxpayer has properly deducted and deposited tax on the royalty paid to the non-resident and the genuineness of the transaction was not questionable. ITAT held that royalty was payable per unit of the product sold and thus it was clearly linked to sales and thus not to be capitalized. The said view has also been upheld by the High Court in the assesses' case in earlier year.

In addition to above, the revenue also disallowed the commission payment made by the taxpayer to non-resident agents for selling goods outside India by considering the income taxable u/s 9(1)(i) and 9(1)(vii) of the Act. The Tribunal evaluated the facts of the case and held that in regard to section 9(1)(i) of the Act, the services were rendered by the non-residents outside India and non-residents did not have any PE or Business Connection in India. Further, in regard to section 9(1)(vii) of the Act, the Tribunal held that no consulting, technical or managerial services were rendered by the non-residents as they were responsible only for procuring orders for the taxpayer and hence the services fall outside the purview of FTS.

The issue of deductibility of royalty expense has been raised in the recent past wherein revenue authorities tend to consider the same as capital expenditure, but appellate authorities have

consistently held that if royalty is calculated as a percentage of sales and is paid for use of trademark then it shall be considered as a revenue expenditure.

No deduction of unutilized foreign tax credit as business expenditure

Infor (India) Private Limited, ITA No. 198/HYD/2021, Hyderabad ITAT

The taxpayer claimed the foreign tax credit ('FTC') arising on foreign sourced income as a deductible expenditure under the provisions of the ITA (post claiming some portion of FTC under Section 91 of the ITA).

The claim was however rejected by the tax officer. The taxpayer contended that foreign taxes were in the nature of an expenditure incurred wholly and exclusive for the business purpose and relied on the decision of Bombay HC in the case of *Reliance Infrastructure Limited [2017] 390 ITR 271 (Bom)]* wherein it was held that if the benefit of double taxation relief is not available, the same can be claimed as business expenditure. On an appeal by the taxpayer, the CIT(A) remanded the matter back to the tax officer, which again rejected the claim of the taxpayer. The taxpayer preferred an appeal with the Tribunal.

The Tribunal relied on the decision of Ahmedabad Tribunal in case of *Elitcore Technologies Private Limited [(2017) 165 ITD 153]* wherein it was held that income tax deductible outside India cannot be allowed as deduction under Section 37 of the ITA since the same is covered under the disabling provision of Section 40(a)(ii) of the ITA (which does not cover taxes paid outside India). Further, the Tribunal observed that to claim the FTC a specific provision has been provided in the ITA i.e. section 91 of the ITA and the taxpayer has already claimed a portion of the FTC under the said section. If the position of the taxpayer is accepted, it would make section 91 of the Act redundant.

The Tribunal held that a co-ordinate bench's decision, not taking into consideration the relevant law and facts, is not a binding precedent and held that the decision of Bombay HC in case of Reliance Infrastructure was not a binding precedent and rejected the taxpayer's contention to claim the unutilized FTC as business expenditure. The Tribunal held that considering section 91 of the ITA is a specific provision, it shall prevail over general provision of the ITA i.e. section 37 of the ITA.

FTC relating to exempt income can be claimed under India-Japan DTAA

Canon India Private Limited, ITA No. 468/Del/2021, Delhi ITAT

The taxpayer had rendered service in Japan which was subject to tax in Japan. In India, the taxpayer claimed deduction u/s 10A of the ITA. The taxpayer restricted its FTC claim to actual income tax liability which was substantially lower. However, during the course of the assessment, the taxpayer claimed full credit of the foreign taxes paid in Japan against the assessed income which was rejected by the revenue.

Delhi Tribunal relied on its own case of HCL Commet (on India-US DTAA) and the ruling of the Karnataka HC in case of Wipro Limited and noted that section 90(1)(a)(ii) of the ITA allows the taxpayers to claim relief from double taxation where income is chargeable to tax under the ITA as well as under the

corresponding law in force in the foreign country. The Tribunal further noted that if the tax treaties are drafted in a similar manner wherein for claiming the relief of the taxes paid in the source country only mandatory condition is that the tax should have been paid in the source country and not linked with the taxes paid in India then a taxpayer can claim credit of the entire foreign tax provided such income is chargeable to tax in India.

The Tribunal held that section 10A of the ITA provides for deduction of profits or gains from the income chargeable to tax u/s 4 and 5 of the ITA. Therefore, the total income of the taxpayer includes income of the unit eligible for section 10A benefit and thereafter deduction is claimed from such income. Accordingly, the Tribunal held in favour of the taxpayer as the provisions of the India-Japan treaty only mandates that the taxes should be paid in Japan in order to claim its credit in India.

The present issue has been subject matter of debate before the different courts. In the given case, the Tribunal has allowed the claim of credit under the provisions of the treaty without referring to the provisions of the domestic law. Rule 128 of the Income Tax Rules providing the computation methodology for FTC should also be evaluated carefully before claiming such credit.

ITAT allows benefit of tax treaties to the partners of the tax transparent partnership firms

Infosys BPO Ltd., ITA No. 986/Bang/2017, Bangalore ITAT

The taxpayer, engaged in the business of BPO services, received legal services from a limited partnership firm, a resident of Poland. The partnership firm was a fiscally transparent entity as per the domestic laws of Poland and thus the taxpayer contended that the income of the partnership firm is taxable in the hands of the partners and as per Article 15 (Independent Personal Services) of India-Poland treaty such income is not taxable in India in the hands of the partners. Further, the taxpayer claimed that partners being residents of Poland are eligible to claim the benefit of tax treaties.

The disputed issue in the given case is whether treaty benefits can be extended to the partners / beneficiaries of the partnership firm if the firm is not taxable in the resident country. The issue arises due to the understanding that the benefits of the tax treaties can only be availed by the residents of the tax treaty countries and the term 'Residents' as defined in the treaties include only those persons who are liable to tax in the resident country. A tax transparent partnership firm being not liable to tax in the resident country and thus the question whether income earned by such transparent entities is eligible for treaty benefits.

The Tribunal relied on the principles laid down in *Linklaters LLP v. ITO [(2010) 40 SOT 51]* wherein it was held that what is important is that the income is actually taxed in the residence country rather than the manner in which the said income is taxed. Accordingly, if any income is liable to tax in the hands of the beneficiaries of the tax transparent entities rather than the transparent entities itself then treaty benefits cannot be restricted on such income.

The above ruling is in sync with the OECD guidelines which also states that treaty shall apply to the partnership's income to the extent

the income is treated as the income of the partner who is the resident of the state. The above judgement reiterates the position that the tax treaties should be interpreted in a liberal way wherein if any income is ultimately getting taxed in the country of residence in the hands of the beneficiaries of a tax transparent entities, the treaty benefits should be allowed to such income.

ITAT holds that management fees to be taxable as business profits in case of PE in India and not as FTS under tax treaty

Juniper Hotels Pvt Ltd., ITA No. 931 to 933/M/2005, Mumbai ITAT

In the present case, the taxpayer has availed a service of non-resident Australian company for setting up a hotel in India. The non-resident company has provided co-ordination and supervisory services in relation to overall project management for which the taxpayer has paid management fees to the non-resident after deducting tax as FTS at 15% under India-Australia DTAA being provisions of treaty more beneficial then ITA.

Since, the supervisory activity continued for a period of over 6 months, it was contended that non-resident has a PE in India under Article 5(2)(k) of India-Australia treaty and thus the income cannot be taxed as FTS under Article 12(1) or 12(2) as the income falls under Article 12(4) which provides that in existence of a PE, the income shall not be taxed as FTS but as Business Profits under Article 7 of the treaty.

The tribunal upheld the contention of the revenue that since there exists a PE of the non-resident in India, the income although in the nature of FTS is to be taxed as Business Profits and recourse is to be taken of the domestic law of India which provides for a higher rate of tax as compared to the FTS rate in the treaty. Further, in relation to the contention of the taxpayer that provisions of the Act or DTAA whichever is beneficial to the taxpayer should be applied, the tribunal held that if the treaty is applied then the benefits of Article 12(1) or (2) ceases to be available as the income falls under Article 12(4) which takes recourse to Article 7-Business Profits wherein profits are to be taxed as per the domestic laws which provided for 20% of tax rate on gross basis.

It is to be noted that the above judgement deals with provisions of section 44D prior to AY 2004-05 which provided that no deduction in respect of expenditure shall be allowed from FTS/Royalty income and such income is to be taxed on gross basis. The Tribunal applied Article 7 for taxing FTS in case of PE in India and referred to domestic law for taxation, however, failed to appreciate that Article 7 categorically refers to offering profits to tax and not gross income. Further, reference to First Schedule to the Finance Act for determining the TDS liability was also not made which otherwise is relevant for determining the TDS rates under the domestic laws.

Important Rulings – Abroad

Argentina's Apex Court applies the principle of good faith to deny treaty benefit

Molinos Río de la Plata SA

The Taxpayer, an Argentine Co., established an inter-holding company in Chile that received dividends from its foreign subsidiaries in Peru and Uruguay, which were exempt from tax in Chile as per Chile's local laws. The dividends were then passed on to Argentina Co., which claimed a further exemption from tax in Argentina under Argentina-Chile tax treaty, as the treaty gave an exclusive taxation right to Chile. As a result, no tax was paid on dividends earned by the taxpayer from its foreign subsidiaries.

Argentine tax authorities denied the claim of exemption on the ground that the Chilean holding company was established as a conduit company in order to claim the platform regime and treaty benefits and avoid paying tax in both Argentina and Chile.

The Taxpayer challenged the rulings of tax authorities with the Apex Court. The Apex Court held that no international tax treaty in force in Argentina can be invoked abusively and must be interpreted in accordance with the principle of good faith and reasonableness, as per Article 27 of Argentine constitution and as per Vienna Convention. Exempt dividend received by the Argentina Co., would not result in the avoidance of double taxation, but rather would result in double non-taxation, which is not the purpose of the treaty as interpreted in good faith. Basis the above and even in absence of specific anti-abuse provisions in the treaty, the Apex Court denied the benefit of treaty to Argentina Co.

Argentina faces a new treaty environment today with a treaty network where DTAA's are now in lines with OECD model convention (article on dividend in Argentina – Chile DTAA has been amended to tax dividend in Argentina as well). With introduction of GAAR principles in many countries and also Multilateral Instrument principles (such as principal purpose test) which are now a part of DTAA's, restructuring done specifically for tax avoidance will now be examined by the authorities in detail.

Important Rulings – Abroad

Swiss authorities release statement on India-Swiss tax treaty's MFN clause

India concluded two new DTAA's with Lithuania and Colombia in 2011, which granted lower rates for tax on dividends. The said two countries joined the OECD in 2018 and 2020, respectively.

The Swiss competent authorities have released a Statement clarifying that, on the basis of the MFN clause in the India-Switzerland DTAA, Lithuania's and Colombia's accession for claiming lower rates for tax on dividends shall be retroactively applicable when the country became member of OECD and there is no requirement for any notification to trigger the MFN clause.

Further, the Statement covers the following:

- Post July 2018, Indian tax residents receiving dividends from Swiss source may seek refund from Swiss authorities in respect of the excess tax withheld
- In respect of Swiss tax residents receiving dividends from Indian source on which they are entitled to claim foreign tax credit, such credit shall be limited to 5% from 1 January 2021.
- If the competent authority of India takes a position which is different from what is mentioned in the Statement, Swiss authorities shall have a right to reverse the interpretation as mentioned in the release.

Recently, the Hon'ble Delhi HC in case of India – Switzerland DTAA [WP(C) 3243/2021] had allowed the benefit of lower tax withholding of 5% on payment of dividend by invoking MFN clause. The court relied on its earlier judgement [WP(C) 9051/2020] wherein the court in case of India-Netherlands DTAA had relied on the same principles as mentioned in the Statement and the position taken in the Netherlands.

Important Rulings

Corporate Guarantee not an International Transaction if no bearing on profits

M/s. Kiri Dyes & Chemicals Ltd. Appeal No. 1849 of 2016 (Ahmedabad ITAT)

The taxpayer had a wholly owned subsidiary in Singapore, M/s Kiri Holding Singapore Pvt. Ltd. ('AE'), which was incorporated as an SPV to acquire two companies of Dystar group in Europe. For this acquisition, the SPV / AE procured loan from banks, against which the taxpayer had given a Corporate Guarantee.

Since the transaction pertained to provision of corporate guarantee directly in respect of borrowings of the AE i.e., since it was not a counter-guarantee where the taxpayer was required to incur any costs, the taxpayer did not charge any commission / fees from its AE in respect of the corporate guarantee. Further, citing commercial expediency, i.e., increase in market of the taxpayer owing to acquisition of companies in Europe, the AE decided not to charge a fee / commission in respect of guarantee issued.

The taxpayer also placed reliance on decisions of the Hon'ble Delhi Tribunal in case of Bharti Airtel Ltd vs. ACIT [43 taxmann.com 150] and decision of Ahmedabad Tribunal in case of Micro Inks Ltd [63 taxmann.com 353], wherein the non-charging of commission on corporate guarantee was accepted by the respective Tribunals.

The primary ground of the Revenue in this regard was that in any provision of guarantee, there is inherent cost involved pertaining to administrative expenses or maintaining substantial capital in case the guarantee materialises as well as risks associated with the same and accordingly, a commission ought to be charged in this respect. Based on an external search on US Bond Market, the TPO arrived at arm's length rate of 4.67% as appropriate in this case.

The taxpayer also contended that the issue of corporate guarantee stands in its favor as it has not incurred any cost and having no bearing on profit or losses. In this respect the taxpayer placed its reliance on the order of the Hon'ble Delhi Tribunal in case of Bharti Airtel Ltd vs. ACIT.

The facts of the case were examined by the ITAT, wherein it was also observed that the taxpayer had charged a commission in respect of the said guarantee in earlier year, which was waived off in the year under consideration owing to the aforementioned reasons. The TPO did not raise any objection in this regard.

Considering the facts, including indirect acceptance of waiver of commission of earlier year, as well as placing reliance on the decision of Micro Inks Ltd (supra), the Ahmedabad ITAT in this case ruled in favour of the assessee.

While the decision does not give much context about the reason for provision of such guarantee i.e., guarantee in respect of and for the purpose of acquisition of a subsidiary outside India, it ought to be noted that in cases like these, where the exposure of the taxpayer has been shifted from fund-based i.e., investing in share capital of a foreign company directly to acquire the shares vis-à-vis non-fund based i.e., merely providing a guarantee to banks who have effectively funded the acquisition, non-charging of commission could be demonstrated as a viable business decision.

Important Rulings

Having regard to corporate guarantees in respect of business-purpose borrowings, it is seen in practice that various benches of Hon'ble Tribunals have ruled in favour of a reasonable commission of 0.5% to be charged by a taxpayer providing corporate guarantee to its AE. It is relatively an established principle that the banks would charge a higher commission, however, the taxpayers providing guarantee could charge a reasonable 0.5% commission. Both these aspects i.e., the purpose of the guarantee as well as the generally accepted commission % may be considered before entering into intra-group commission arrangements.

Average of MAP approved margins applied to other non-MAP jurisdictions as well

M/s. IQVIA RDS (India) Pvt. Ltd. Appeal No. 3161 of 2010 (Bangalore ITAT)

The taxpayer was providing IT enabled Services to various AEs in USA, UK, France, Ireland, Singapore, Japan, Canada, South Africa and Australia. The TPO had made an adjustment to the taxpayer's profit by determining arm's length profit of said services at 14.78% over operating costs, while the assessee's profit over its operating costs was computed at 1.66% after disallowing capacity utilization adjustment. Since, the arm's length margin was beyond tolerance range of 5% as permitted by the tax law for the year under consideration (AY 2006-07), an adjustment of 3.09 Crores was proposed.

The taxpayer pursued Mutual Agreement Proceedings (MAP) under Article 27 of the Double Tax Avoidance Agreement (DTAA) between India-USA and India-UK. The UK MAP was settled at an ALP of 10% and the USA MAP at 17.87%. The taxpayer submitted to the Tribunal that the above ALP rates should be applied in case of UK and USA.

In this respect, the assessee argued before the ITAT that an average of UK MAP and USA MAP i.e., 13.93% should be applied to transactions with the other jurisdictions (other than USA and UK) since MAP settlement represents arm's length rate agreed between India and competent authority of other jurisdiction.

The Hon'ble Tribunal, with the consideration that there was no difference between services provided to USA / UK and other jurisdictions and that any distinction on these lines had never been made by the Revenue in any of the earlier years as well, held that the average margin of TP adjustment settled under the UK MAP and TP adjustment settled under the USA MAP should be adopted across the board for assessee's international transaction with AE's situated in other jurisdictions. Similar judgement was given by the **Mumbai Tribunal** in the case of **JPMorgan Services Pvt. Ltd (ITA No.8987/Mum/ 2010)** which had been followed by this Tribunal in the case of **CGI Information Systems & Management Consultants Pvt. Ltd. (IT(TP)A Nos.439 & 452/Bang/2011).**

In this regard, it may be noted that the ITAT had concluded thus with an additional comment regarding long pending status of the appeal and with an objective to put quietus to the issue. While the MAP conclusion for one jurisdiction (or one tax year) may have a persuasive impact for TP matters pertaining to other jurisdiction (or other tax years), it may be noted that going by the tax law in this regard, the tax office is not bound to accept a similar view for other AE / other year. Accordingly, while these judgments are ruled in favor of the assessee, the matter is

fact-specific and since the tax office is not bound to take a liberal approach, it may not be offered in all cases.

Capacity underutilization adjustment should be made to the tested party in case of lack of information / data on comparable companies

Flint Group India Pvt Ltd [IT(TP)A No. 2750-Bang-2017, AY 2013-14]

The taxpayer is engaged in the business of manufacturing and trading of printing ink in India. During the year under consideration, the taxpayer shifted its manufacturing facility from Bangalore (Hosur) to Vadodara. As a result of which, the taxpayer has considered certain expenditures as non-operating due to underutilization of its capacity at new manufacturing facility.

The ITAT, in taxpayer's own case for AY 2014-15, had remanded the issue of capacity underutilization adjustment to the TPO with a direction that in case of capacity underutilization, the taxpayer would be eligible to an adjustment. However, in absence of information of capacity utilization of comparable companies, the assessee would not be able to provide an accurate adjustment and accordingly, the TPO would call for such details exercising its power u/s 133(6) of the ITA.

The ITAT followed the aforementioned decision for AY 2013-14 as well and remand the issue to TPO for evaluating the capacity utilization of comparable companies. It is notable that in its order, the ITAT categorically mentioned that if the TPO is also unable to collect details u/s 133(6) of the ITA i.e., if the challenges on lack of information / data is accepted, then the adjustment has to be made to the tested party.

The primary takeaway from this case is the acceptance of ITAT of the issue pertaining to lack of certain information / data of comparable companies and hence, the acknowledgment that in such cases, the taxpayer cannot be denied the adjustment. While the Rules require an adjustment to computation of margin of comparable companies, it should not be read as denying a genuine adjustment to the taxpayer in case of lack of information. In this case, the ITAT agreed in principle that in case of difficulties being faced due to lack of information or data on comparable companies, the adjust should be made to the tested party.

Mismatch in amount paid to related persons u/s 40A(2)(b) does not constitute TP risk parameter and hence doesn't warrant reference to TPO, Quashed order of PCIT u/s 263

Origami Cellulo Pvt Ltd [ITA No. 394-Bang-2020, AY 2015-16]

The taxpayer is engaged in the business of manufacture and sale of paper products. During the year under consideration, the taxpayer has entered into transaction with related parties as specified u/s 40A(2)(b) of the ITA. Therefore, the said transactions were regarded as specified domestic transaction as per the provisions of then section 92BA of the ITA. The AO completed the Assessment u/s 143(3) of the ITA without referring the case to TPO for determination of Arm's Length Price ('ALP'). Therefore, the PCIT passed order u/s 263 with a direction to AO to make a reference to the TPO as not referring the issue to the TPO rendered the order of assessment to be erroneous and prejudicial to the interests of the revenue.

Important Rulings

One of the reason due to which the case of the taxpayer was selected for limited scrutiny was mismatch in amount paid to related persons u/s 40A(2)(b) reported in audit report and ITR. From plain reading of the said CASS reason, the ITAT is of the view that no prudent person properly instructed in law would have inferred that the aforesaid parameter constituted 'transfer pricing risk parameter' so as to warrant mandatory reference u/s 92CA of the ITA in terms of the Para 3.2 of CBDT Instruction No. 3 of 2016 and failure to make TP reference made the assessment order erroneous.

In view thereof, the ITAT held that the TP risk parameter was not one of the reasons for limited scrutiny of the case and as such the PCIT was not justified in invoking jurisdiction u/s. 263 of the ITA so as to direct the AO to refer the matter to the TPO in view of CBDT instruction No. 3/2016. The ITAT relied on the decisions of Kolkata Bench of the Tribunal in the case of Eveready Industries Ltd. v. PCIT in ITA (No.805/Kol/2019) and the judgement of the Hon'ble High Court of Delhi in the case of CIT Vs Sunbeam Auto Ltd (332 ITR 167).

The ITAT also noted that the said instruction nowhere even suggests, let alone provide, that for every case of the taxpayer selected on non-transfer pricing risk parameter but involving 'complete scrutiny', the reference must be made to the TPO if such taxpayer had entered into international transactions or specified domestic transactions during the relevant year. Instead in Para 3.3, the Board has enumerated only three specific instances/ situations when the reference to TPO has been made mandatory even though as per the CASS, the case of an assessee is not selected on "transfer pricing risk parameter".

No mark-up to be applied for transaction cost in loan provided

Shyam Telecom Ltd. [ITA No. 2682 & 2683 / Del / 2013, AY 2008-09 & 2009-10]

The taxpayer is engaged in manufacturing of various telecom equipments. The taxpayer has advanced a loan to its subsidiary in USA and charged interest thereon at the rate of 8% and 3% for AY 2008-09 and AY 2009-10 respectively. The dispute is regarding the mark-up of 700 basis points in AY 2008-09 and mark-up of 500 basis points in AY 2009-10 over the LIBOR rate applied by the TPO for determining ALP of international transaction of interest. The mark-up of 700 basis points comprises of 400 points on the basis of credit rating of the AE and 300 points on the basis of transaction cost.

The ITAT held that no mark-up for transaction cost should be applied on LIBOR rate for benchmarking of the international transaction of interest. The ITAT relied on the decision of the Hon'ble Delhi High Court in the case of Cotton Naturals (I) Pvt. Ltd. wherein it has held that transaction cost or hedging cost is to be born and paid by the borrower and not by the lender. The Hon'ble High Court also noted that the mark-up towards the transaction cost is exorbitant and even comparison with banks is unsound and unintelligible. The taxpayer is not the borrower but the lender. Therefore, it is not applicable.

In respect of the dispute related to deciding mark-up for credit rating over LIBOR rate of interest, the ITAT has restored the case to the file of the Assessing Officer for deciding the mark-up after taking into consideration criteria for credit rating during relevant period.

Important Rulings

Average of MAP approved margins applied to other non-MAP jurisdictions as well

M/s. Mubea Automotive Components India Private Limited Appeal No. 260 of 2017 (Pune ITAT)

The taxpayer, a company engaged in manufacturing of car suspension related products, had purchased raw material, spares and finished goods from its AE(s) located in Germany, USA, China and Spain. The said transactions were benchmarked using CUP as the most appropriate method.

AE of the taxpayer in Germany had sold similar products to a non-AE in Germany, average price of which was compared with the average price charged by all the AEs combined to the taxpayer. This was contested by the Revenue, which selected TNMM as the most appropriate method, absent relevant CUP details including product / functional comparability analysis for CUP for any of the geographies.

The ITAT observed that, based on the mechanism under which CUP method operates, as also provided in Rule 10B(1) of the Income Tax Rules, 1962, the application of most appropriate method should also include evaluation and quantification of material differences in the transactions and accordingly, provide such adjustments as may be required.

The ITAT took into consideration that there was a huge quantitative difference between sale made by the German AE to non-AEs and to the taxpayer. Further, sufficient details for evaluating product / functional similarity in this case was not available. There was also no comparable uncontrolled transaction for sale by other AEs to any non-related entity, whether in India or otherwise.

Owing to such differences and the fact that there was no data available with the assessee to quantify the impact of such differences on product pricing, the ITAT rejected the application of CUP by the assessee.

It follows from the above case that for application of CUP, there are certain non-negotiable elements that need in-depth evaluation, which include all those factors which could materially alter the price e.g., geography, functional / product comparability, volumes involved, etc. The ITAT has very categorically laid out that all these facts need evaluation and if, they materially alter the price, an adjustment for the same is also required. In absence of such evaluation, CUP application would be incomplete and redundant.

SEB rate held as ALP for transfer of electricity; Reliance on Cost Certificate for inter unit transfer of steam

DCM Sriram Limited vs. Addl. CIT (ITA No. 7362/Del/2018)

The taxpayer, engaged in business of manufacture and trading in chemicals, PVC resins & compounds, UPVC door & windows systems and various agri products has established a captive power generation unit. During the year under consideration, the power unit i.e., the eligible unit for tax deduction had transferred electricity as well as steam generated in its process to the manufacturing units of the taxpayer. For such transfer of electricity, the eligible unit had charged rates that the State Electricity Boards (SEB) i.e., DISCOMs charge from industrial consumers. For steam, the eligible unit had charged the cost of generation of steam in absence of any information on market rate for the same.

Important Rulings

The first issue pertains to the price at which eligible unit could transfer electricity to non-eligible unit. The TPO had rejected the benchmarking of the assessee and considered arm's length price as the average of rates charged by SEB and rates at which transactions had happened on IEX – the Indian Energy Exchange portal.

The ITAT has held in favour of the assessee by observing that electricity purchased and sold on IEX constitutes only 3% of total electricity traded in India. Further, IEX being a spot exchange vis-à-vis continuous power supply agreement of the eligible unit with non-eligible unit, the contractual terms are also different. Accordingly, relying on assessee's own case in an earlier AY, the ITAT has ruled that the rate at which SEB supplies electricity in the region should be considered as the arm's length price.

Having regard to the other issue under consideration i.e., transfer of steam to sugar manufacturing units, the TPO had considered the arm's length price to be *nil* considering that steam is a by-product and cost of steam generated by power unit is already recovered through transaction of transfer of electricity.

In this regard, the ITAT has observed that as per the Guidance Note on Cost of Utilities issued by the ICWAI, cost of each utility is to be determined separately and for inter-unit transfers, each cost should be separately considered. The procedure for determining inter-unit transfer of steam for captive unit has also been specifically provided, which has been adhered by the assessee and a certificate by a Cost Accountant has also been provided along with certificates from Chartered Accountant and Chartered Engineers in this regard. Since the assessee has transferred steam at cost, the ITAT has deleted the adjustment made by the TPO in this regard.

It is important to note in above respect that in case of inter-unit transfer of steam, the ITAT has relied on principles of costing and accordingly, they provide a strong basis for cases of inter-unit transfers, especially since there would either be no transaction or no data available in public domain for generation and transfer of steam between non-related entities. In case of companies where reliance is placed on certificate from a Cost Accountant, this caselaw could serve as a strong support.

Circulars & Notifications

Goods and Service Tax

Clarifications on various aspects issued

Clarification on the scope of "intermediary"

Circular No. 159/15/2021-GST dated September 20, 2021

The CBIC has provided a much-needed clarification on the scope of intermediary services by way of detailed explanations as well as well as various illustrations.

Clarification relating to export of services condition (v) of Section 2 (6) of the IGST Act

Circular No. 161/15/2021-GST dated September 20, 2021

The CBIC has clarified that supply of services by a group concern, etc. of a foreign company, which is incorporated in India under the Companies Act, 2013 (a 'company' as per Companies Act), to the establishments of the said foreign company located and incorporated outside India, would not be barred by the condition (v) of the sub-section (6) of the section 2 of the IGST Act for being considered as export of services, as it would not be treated as supply between merely establishments of distinct persons under Section 8 of IGST Act.

Clarification on certain GST related issues

Circular No. 160/15/2021-GST dated September 20, 2021

The CBIC has clarified various aspects under the GST as follows:

- For availment of ITC on of after January 1, 2021 in respect of debit notes issued either prior to or after 1 January 2021, the date of issuance of debit note shall be relevant to determine the eligibility of ITC in respect of such debit note and not the underlying invoice.
- The restriction specified in Section 54 (3) of the CGST Act (not allowing refund in case of goods which are liable to export duty) shall not apply in case of goods which do not attract export duty either by way of an exemption or having "NIL" rate also
- There is no need to carry a physical invoice in case where the invoice has been generated under Rule 48(4) of the CGST Rules and the QR code and IRN are produced before the officer.

Issuance of Show Cause Notices under GST law

Instruction No. 02/2021-22 [GST - Investigation]

The CBIC has observed that the number of cases of GST evasion and fraudulent availment of ITC are high whereas SCN has been issued only in few cases for the period 2017-18 (from July 17) to 2019-20. It was noted that the time limit for filing Annual Return for the said period is already over and the time limit for issuance of SCN under section 73/ 74 of CGST Act has already kicked in. Accordingly, the CBIC has directed the officers to take stock of the pending investigations / other cases and ensure that investigations are closed in a timely manner, SCNs are issued, and adjudication orders are passed in a timely manner.

GSTN Portal Updates

Facility to search Bill of Entry details

The GSTN has implemented a new functionality to facilitate importers of goods and recipients of SEZ supplies to search Bill of Entry details which have not auto populated in GSTR 2A.

Circulars & Notifications

Customs

Clarification regarding applicability of IGST and Compensation Cess on goods re-imported after being exported for repairs

Circular No. 16/2021 dated July 19, 2021

The CBIC has clarified that goods which are re-imported after being exported for repair shall be liable to IGST and Compensation Cess on a value equal to the repair value, insurance, and freight. Further, a clarificatory amendment has also been made in the respective notifications to remove any ambiguity regarding the same.

Amount of security required to be decided by Commissioners of Customs

Circular No. 19/2021 dated August 16, 2021

The CBIC has empowered Principal Commissioners or Commissioners of Customs to decide or reduce the amount of security required in certain cases of provisional assessments.

Verification of Preferential Certificates of Origin in terms of Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020

Instruction No. 18/2021 dated August 17, 2021

- The CBIC has clarified that only representative certificates should be forwarded to the Board for verification of the Preferential Certificates of Origin.
- The proper officer shall be required to indicate the reason to believe on why goods are not meeting the prescribed origin criteria and also enlist specific information required to be obtained from the Verification Authority that the officer considers necessary to determine the origin.
- Further, it has been clarified that if the product of a given manufacturer has already been verified following the verification process, subsequent consignments of the same manufacturer imported with a claim to meet the same originating criteria shall not be considered for verification again.

The Customs Authority shall not be allowed to issue any circular or reports which are in the nature of interpretation or clarification

Instruction No. 19/2021 dated August 17, 2021

- Section 151A of the Customs Act empowers the Board alone to issue instructions/ directions for the purpose of uniformity in classification of goods or with respect to levy of duty. In certain cases, it was observed that communications are issued by the Directorates / Commissionerates (D/C) without reference to the Board.
- In order to establish standard practice, the (D/C) are instructed not to issue any circulars, reports, alerts etc. in the nature of interpretation or clarification regarding classification of goods or levy of duty.
- It is also clarified that if the (D/C) have any opinion or observation which contrary to any circular then it must be brought to the notice of the CBIC.

Circulars & Notifications

DGFT – Foreign Trade Policy

Guidelines and Rates under the RoDTEP Scheme have been notified

Notification No. 19/2015-20 dated August 17, 2021

The Ministry of Commerce and Industries has notified detailed guidelines of the Remission of Duties and Taxes on Exported Products Scheme and rates of benefit under the RoDTEP Scheme.

Trade Notices

Rates of benefits under Service Export from India Scheme (SEIS) for services provided during the year 2019-20 notified

Notification 29/2015-2020 dated September 23, 2021

The list of services and rates for SEIS claims for the period 2019-20 have been notified. The last date for filing application is notified to be December 31, 2021, with the cap of Rs. 5 cr. on total entitlement per applicant. It has also been stated that SEIS shall not be available on payments received in Indian rupees.

Last date for submission of applications for MEIS

Notification 28/2015-2020 dated September 23, 2021

The last date of submitting applications under MEIS, SEIS, Rebate of State and Central Levies and Taxes (ROSCTL), Rebate of State Levies on Export of Garments (ROSL) and 2% additional ad hoc incentive (under para 3.25 of FTP) has been notified to be 31 December 2021.

The revised late cut applicable would be as follows:

Sr. No.	Scheme	Period of Exports (Let Export Date in the period) / Services rendered in the period	Late Cut (as % age of Entitlement under the Scheme)
1	MEIS	FY 2018-19 (01 July 2018 to 31 March 2019)	10%
2	MEIS	FY 2019-20 and FY 2020-21 (up to 31 December 2020)	Nil
3	SEIS	FY 2018-19	5 %
4	SEIS	FY 2019-20	Nil
5	ROSCTL and ROSL	Up to31 December 2020	Nil

No applications would be allowed to be submitted after December 31, 2021. Such claims would become time barred and would not be allowed to be submitted even with late cut.

Circulars & Notifications

The validity of any scrip issued under FTP from the date of this Notification have been notified to be 12 months from the date of issue, in supersession of validity provisions in the Handbook of Procedures, 2015-20.

Extension of EO period for Advance Authorization (AA) and EPCG Authorizations

Notification 28/2015-2020 dated September 23, 2021

In case of AA and EPCG Authorizations, where the original or extended EO period is expiring between August 01, 2020, to July 31, 2021, the EO period shall be extended up to December 31, 2021 without payment of any composition fees subject to fulfilment of additional export obligations of 5%. The taxpayers also have an option to pay the composition fees instead of going for additional export obligations. In case where taxpayers have already sought extension in EO period by paying composition fees, such fees shall not be refunded.

Online Procedure for transfer of Advance/EPCG Authorization in case of amalgamation, de-merger or acquisition

Trade Notice. 14/2021 dated August 04, 2021

The DGFT has prescribed an online procedure for transfer of AA and EPCG Authorization from the earlier entity to the new entity in case of amalgamation, de-merger, or acquisition etc.

De-activation of IEC not updated till October 05, 2021

Trade Notice 18/2021-2022 dated September 20, 2021 and 25/2021-2022 dated November 19, 2021

Further to the earlier directions of the DGFT for updating the details of IEC, the DGFT has now specified that the IECs which are not updated till October 05, 2021 (in case of IECs not updated from 2005) and December 05, 2021 (in case of IECs not updated from 2014), shall be de-activated from October 06 and December 06, 2021, respectively. The list of such IECs have been uploaded

https://www.dgft.gov.in/CP/?opt=dgft-ra and https://www.dgft.gov.in/CP/?opt=LIEC, respectively. In case of de-activation, the IEC holder may re-activate by updating the IEC details online on the website.

Extension of Foreign Trade Policy 2015-20

Notification 33/2015-2020 dated September 28, 2021

The existing FTP and the Handbook of Procedures which was valid up to September 30, 2021 has been extended till March 31, 2022.

Last date for filing claim for scrip-based schemes

Trade Notice 22/2015-2020 dated November 02, 2021

The DGFT has reiterated that in terms of Notification no. 26 dated September 16, 2021, the last date for making applications under MEIS/SEIS/RoSL/RoSCTL is December 31, 2021, after which the IT system will not be operational, and no application / claim can be submitted even with late cut.

Re-constitution of committee for RODTEP

Trade Notice 23/2015-2020 dated November 09, 2021

The Government has constituted a committee for determination of RODTEP rates for exports made by AA/EoUs/SEZ and to give recommendations on issues relating to errors anomalies with respect to the RODTEP rates already notified. Members of trade and industry may submit the representations through export promotion council / industry associations to the RODTEP committee directly.

Case Laws

No presumption of intention to evade tax can be drawn on account of non-extension of validity of the e-way bill

Satyam Shivam Papers Private Limited vs. Assistant Commissioner of State Tax Writ Petition No. 9688 of 2020

The taxpayer generated an EWB for dispatch of goods but due to unavoidable circumstances delivery of could not be completed within the time period (i.e. same day) as per the WEB related rules. On the next day of the expiry of the EWB the conveyance was detained by the authorities demanding tax and 100% penalty on the grounds that the validity of e-way has expired, and an order was passed accordingly.

Aggrieved by the said order, the taxpayer filed the writ application before Telangana HC wherein the HC observed that the driver was in receipt of tax invoice and e-way bill which had expired on the previous day. The HC hold that since there was no other material produced by the respondent to conclude that there was evasion of tax by the taxpayer, levying penalty merely on account of expiry e-way bill was a blatant use of power by the respondent. The HC directed the department to refund the amount collected along with costs to taxpayer.

No reversal of Input Tax Credit on loss arising from manufacturing

M/S. Ars Steels & Alloy International Pvt. Ltd. V. The State Tax Officer, Group – I, Inspection, Intelligence – I, Chennai, Writ Petition No. 2888 of 2020

The taxpayer filed a writ petition before the Madras HC against an order passed by the department seeking reversal of ITC on loss of inputs inherent to the manufacturing process in terms of Section 17(5)(h) of GST Act which provides for reversal of input tax credit on goods lost, stolen, destroyed, written off or disposed by way of gift or free samples. The HC observed it is an undisputed fact that every manufacturing process would result in certain loss of inputs which is part of production process, and such loss cannot be equated to or considered as being hit by the instances covered under Section 17(5)(h). The HC, accordingly, held that no reversal of ITC is required for loss occurring in the inherent process of manufacture.

Validity of provisions of Rule 89(5) denying refund of input services to suppliers of goods covered under Inverted Duty Structure (IDS)

Union of India & Ors. Vs. VKC Footsteps India Pvt. Ltd. Civil Appeal No. 4810 of 2021

The taxpayers were selling goods which were falling under IDS. The formula for calculation of refund available in case of IDS on sale of goods provided under Rule 89 (5) of the CGST Rules does not allow refund of ITC accumulated on input services. A writ petition was filed before the Hon'ble HC of Gujarat challenging the validity of provisions of Rule 89(5) of CGST Rules stating that Rule 89 (5) of CGST Rules is not line with section 54 (3) and 164 (1) of CGST Act and hence ultra vires the Act. This was on the ground that Section 54 (3) allows refund of 'ANY unutilized Input tax credit'. The definition of 'Input Tax' as per section 2 (62) of CGST Act also covers both 'Inputs' and 'Input services' and does not distinguish between inputs and input services. The Hon'ble HC of Gujarat allowed the petition in favor of the taxpayer and held the provisions of Rule 89 (5) as ultra vires Section 54 (3) of the CGST Act.

In a separate petition filed before the Hon'ble HC of Madras in case of Tvl. Transtonnelstory Afcons Joint Venture, a contrary view was adopted wherein the Hon'ble HC of Madras upheld the provisions of Rule 89 (5) of the CGST Rules as being within the powers of the Government and consequently dismissed the petition filed by the taxpayer.

Case Laws

The matter was taken up to the Hon'ble SC by both the parties i.e., tax taxpayers as well as the Government in view of the divergent views adopted by the Hon'ble High Courts of Gujarat and Madras. The Hon'ble SC sided with the view taken by the Hon'ble HC of Madras and held that it is open for the legislature to define the circumstances in which a refund can be claimed and the proviso to Section 54(3) is not a condition of eligibility but a restriction which must govern the grant of refund under Section 54(3). The Apex Court also held that there is no disharmony between Section 54(3) and Rule 89(5) and the later cannot be held as ultra vires, though there may be some practical issues while implementing the same.

The Hon'ble SC however, also observed that there were certain anomalies in the formula prescribed under Rule 89 (5) of the CGST Rules and urged the GST Council to reconsider the formula to remove the difficulties faced by taking a policy decision on the same. It is hoped that the GST Council considers this in their next meeting.

GST returns cannot be rectified even in case where certain functionalities were not available on the GSTN portal

UOI vs Bharti Airtel - S.L.P. (C) NO. 8654 of 2020

The taxpayer had filed their GSTR-3B for the months of July to September 2017 after which they realized that they had mistakenly not availed ITC to the tune of Rs. 923 crores and accordingly, the were required to pay the tax in cash. Circular No. 26/26/2017-GST dated December 29, 2017 of the CBIC stated that GSTR-3B return once filed cannot be rectified. The taxpayer approached the Hon'ble Delhi HC challenging the circular restricting the rectification of GSTR3B. The Hon'ble Delhi HC took note of the repeated technical glitches in the GSTN portal during the transition phase from the erstwhile regime to the GST and accepted the contention of the taxpayer that it had to discharge the outward tax liability for the relevant period in cash, even though it had ITC available to its credit in electronic credit ledger, due to the fault of the Department in not operationalizing the statutorily prescribed Forms GSTR-2, 2A and 3 as was envisaged earlier which had inbuilt checks and balances that could ensure that the data uploaded by the taxpayer was accurate. The HC read down the relevant para of the circular and allowed rectification of the returns filed by the taxpayer for the months of July to September 2017.

The department filed an appeal before the Hon'ble SC on the grounds that the order of the HC suffered from various errors. The SC held that availing ITC is the responsibility of the taxpayer who is required to maintain proper books of accounts on the basis of which self-assessment is done by the taxpayer including about his eligibility and entitlement to get ITC and of outward tax liability. GSTR 2A is merely a facilitator for taking an informed decision. Swapping the entry from ECL to ECrL, if permitted, may result in chaotic situation and collapse of the tax administration. The SC, accordingly, overturned the judgement of the HC by holding that returns cannot be revised under GST.

MCA Notifications

Exemptions to Foreign Companies and Companies incorporated outside India

Notification dated August 5, 2021

Foreign companies and companies incorporated or to be incorporated outside India have been exempted from complying with sections relating to issuing of Prospectus and offering of Indian Depository Receipts ("IDR"). Sections 387 to 392 of Companies Act, 2013 have been covered under this immunity and relate to issuance, circulation, distribution of Prospectus, particulars to be contained in prospects, registration of prospectus, offering Indian Depository Receipts.

The exemptions are only applicable to such companies stated above which are incorporated / to be incorporated in International Financial Service Centres ("IFSC") set up under Section 18 of the Special Economic Zones Act, 2005.

Electronic based offering of securities in International Financial Services Centres – Not considered as Electronic Mode

Notification dated August 5, 2021

Ministry of Corporate Affairs ("MCA") issued a clarification that any Company incorporated in an International Financial Services Centre ("IFSC") set up under Section 18 of the Special Economic Zones Act, 2005, offering securities, subscription thereof or listing of such securities in electronic mode will not be considered as a Foreign Company as per Section 2(42) of the Companies Act, 2013 and shall not be governed by Companies Act provisions applicable to a Foreign Company.

Exemption from Online Proficiency Self-Assessment Test for becoming Independent Director to certain Professionals

Notification dated August 19, 2021

The following category of Professionals intending to become Independent Directors are exempt to clear online proficiency test for adding their names in Independent Director Data Bank:

- Individual who has served for not less than 3 years as on the date of inclusion of his name in the databank, in the pay scale of Director or equivalent or above in any Ministry or Department, of the Central Government or any State Government, and having experience in handling:
  - the matters relating to commerce, corporate affairs, finance, industry, or public enterprises; or
  - the affairs related to Government companies or statutory corporations set up under an Act of Parliament or any State Act and carrying on commercial activities.
- Individual having qualification for at least 10 years as:
  - an advocate of a court; or
  - in practice as a chartered accountant; or
  - in practice as a cost accountant; or
  - in practice as a company secretary.

MCA Notifications

Extension in holding Annual General Meeting [AGM] for FY 2020-21

Office Memorandum No. CL-ll-03/252/2021-O/o DGCoA-MCA dated September 23, 2021

The Central Government has directed all Registrar of Companies (RoCs) to issue order granting extension of two months beyond the normal / regular due date [within six months from the end of financial year] for conducting the AGM, i.e. from September 30, 2021 to November 30, 2021. In line of this Memorandum, all the ROCs have issued Order for extension of AGM by two months subject to the condition that the period between two AGMs should not be more than 15 months.

The aforesaid extension shall not be applicable to Companies:

- which are holding AGM for the first time;
- which have already received extension from RoC of more than two months.

Extension in filing of Cost Audit Report to the Board of Directors

General Circular no. 15/2021 dated September 27, 2021

Ministry of Corporate Affairs [MCA] has extended the last date for filing of Cost Audit Report (CAR) for the financial year 2020-21 from September 30, 2021, to October 31, 2021. As a result, the due date of filing of e-form CRA 4 also gets extended by 30 days as the timeline to file e-form CRA 4 is within 30 days from the date of receipt of a copy of CAR from cost auditor.

However, the Companies which have been granted extension of time of holding Annual General Meeting under Section 96 (1) of the Companies Act, 2013, shall have to file Form CRA-4 within such resultant extended period of filing financial statements under Section 137 of the Companies Act, 2013.

Extension of various timelines by MCA and Relaxation in additional fees

Considering the representations received from numerous stakeholders in view of second wave of COVID 19 pandemic to extend various due dates, MCA has granted relaxation in filing fees of various Forms for FY 2020-21 and extended the due date of filing of Cost Audit Report. The same is summarized as under:

Sr. No.	Provisions	Revised / Extended Date	Circular No./Notification
1	LLP Form 8 [Statement of Account and Solvency]	December 30, 2021	General Circular no. 16/2021 dated October 26, 2021
2	Annual filing Forms i.e. AOC 4, AOC 4 (CFS), AOC 4 XBRL, MGT 7, MGT 7A	December 31, 2021	General Circular no. 17/2021 dated October 29, 2021
3	Cost Audit Report	November 30, 2021	General Circular No. 18/2021 dated October 29, 2021

RBI & FEMA Notifications

Resolution Framework for COVID-19-related Stress – Financial Parameters – Revised timelines for compliance

RBI/2021-22/80 DOR.STR.REC.38/ 21.04.048/ 2021-22 dated August 6, 2021

Reserve Bank of India (RBI) had set up an Expert Committee under Shri K. V. Kamath to make recommendations for achieving various financial parameters for restructuring of loans of eligible borrowers as per COVID related resolution plan. Accordingly, all lending institutions shall have to mandatorily consider the key ratios such as Total Debt / EBITDA, Current Ratio, Debt Service Coverage Ratio (DSCR) and Average Debt Service Coverage Ratio (ADSCR), along with the ratio Total Outside Liabilities / Adjusted Tangible Net Worth (TOL/ATNW) while finalizing the resolution plans.

The target date for meeting such threshold ratio by such borrowers was March 31, 2022, which has been deferred to October 1, 2022. However, the target date for achieving the TOL/ATNW ratio remains unchanged as March 31, 2022.

Guidelines for Implementation of the Circular on Opening of Current Accounts by Banks

RBI/2021-22/77 DOR.CRE.REC.35/21.04.048/2021-22 dated August 04, 2021

In order to implement the credit discipline amongst Borrowers and monitor lending, RBI has instructed banks to implement the following till 31st October 2021:

Sr. No.	Facilities availed (by Borrower)	Opening New Current Account
1	– CC/OD with Bank	Not permitted to open Current Account with any other bank.
2	– No CC/OD facility and; – Aggregate exposure* with Banks less than INR 5 crore	Permitted to open Current Account with any bank.
3	– No CC/OD facility and; – Aggregate exposure with Banks >INR 5 crore and < INR 50 crores.	Only permitted to open Current Account with lending bank/s.

** Aggregate exposure for the purpose of these guidelines is based on the information available from Central Repository of Information on Large Credits (CRILC), Credit Information Companies (CICs), National E-Governance Services Ltd. (NeSL), etc. and by obtaining customers' declaration, if required issued vide RBI Notification* ***"Opening of Current Accounts by Banks - Need for Discipline Dt. December 14, 2020".***

Safe Deposit Locker/Safe Custody Article Facility provided by the banks - Revised Instructions

RBI/2021-2022/86 DOR.LEG.REC/40/09.07.005/2021-22 dated August 18, 2021

RBI has issued new guidelines/instructions regarding the safe deposit locker facilities. The following are the important points of the new guidelines:

RBI & FEMA Notifications

- Clause in the locker agreement to be added stating that the locker-hirer/s shall not keep anything illegal or any hazardous substance in the Safe Deposit locker.
- E-mail and SMS alert at the registered email ID and mobile number of the customer before the end of the day confirming the date and time of the locker operation.
- Banks given discretion to break any locker following due procedure if the rent has not been paid by the customer for three years in a row.

Rationalization of Overseas Investment Regulations under FEMA, 1999 – Draft rules/regulations for Comments

RBI had placed Draft Foreign Exchange Management (Non-debt Instruments - Overseas Investment) Rules, 2021 and Draft Foreign Exchange Management (Overseas Investment) Regulations, 2021 for comments / feedback on the draft rules / regulations from all stakeholders. Once the draft rules / regulations are finalized, the same shall be effective from the date of notification.

The objective of induction of new Overseas Direct Investment ("ODI") Regulations is to bring in line the Overseas Investment Regulations in line with the Foreign Direct Investment ("FDI") Rules which were notified vide Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 in October 2019. As Indian Companies are seeking more and more opportunities for expanding their business operations worldwide, the need of the hour was to amend the extant FEMA Regulations pertaining to Overseas Direct Investments which were notified in 2004 vide Notification No. FEMA.120/RB-2004 dated July 7, 2004.

Key recommendations:

- Bifurcation of Regulations into equity instruments and debt instruments with each regulation independently guiding investments overseas according to nature of investment.
- Differentiation between what is categorized as Overseas Direct investment (ODI) and Overseas Portfolio Investment (OPI).
- Definition of **Overseas Direct Investment** (ODI) which was ambiguous in the extant FEMA regulations has now been explicitly stated in the draft regulations and "*means investment by way of acquisition of equity capital of an unlisted foreign entity, or subscription to the Memorandum of Association of a foreign entity, or investment in ten percent or more of the paid-up equity capital of a listed foreign entity, or where the person resident in India making such investment has or acquires control, directly or indirectly, in the foreign entity*".
- The definition of ODI includes the term "**control**" which too has been introduced in the draft regulations to mean "*the right to appoint the majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders' agreements or voting agreements that entitle to ten percent or more of voting rights or in any other manner in the foreign entity*".

RBI & FEMA Notifications

- The timeline for **submission of Annual Performance Report** (APR) which was on or before 31st December after the close of the financial year ended of Overseas JV / WOS has been recommended to be submitted "*within six months from the date of the end of the accounting period of the foreign entity concerned*".
- **Pricing Guidelines** for acquisition in overseas entity have been introduced in the draft regulations and state that "*the price should be within 5 percent range of the fair value arrived on an arm's length basis as per any internationally accepted pricing methodology for valuation duly certified by a* registered *valuer as per the Companies Act 2013; or similar valuer registered with the regulatory authority in the host jurisdiction to the satisfaction of the AD bank*".

Use of any Alternative reference rate in place of LIBOR for interest payable in respect of export / import transactions

RBI/2021-2022/101 vide A.P. (DIR Series) Circular No.13 dated September 28, 2021

As per the extant Regulations, interest payable was linked to the LIBOR for any export/import transactions. The said provision has been amended and now AD banks are permitted to use any other **widely accepted/Alternative reference rate** in the currency concerned for such transactions.

The necessary enabling amendment to FEMA 23(R)/2015-RB has since been notified vide Notification No. FEMA 23(R)/(5)/2021-RB dated September 08, 2021 wherein:

"*the rate of interest, if any, payable on the advance payment shall not exceed 100 basis points above the London Inter-Bank Offered Rate (LIBOR) or other applicable benchmark as may be directed by the Reserve Bank, as the case may be*".

FCRA Notifications September 2021

Extension of validity of the registration certificate

No. II/ 21022/23(22)/ 2020-FCRA-III dated September 30, 2021

As per Section 12(6) of the FCRA 2010, the certificate of registration shall have a validity of 5 years from the date of issue.

To ensure relaxation due to COVID-19, entities with FCRA registration certificates which have been expired or expiring during the period between September 29, 2020 and December 31, 2021 including those awaiting renewal, shall remain valid up to **December 31, 2021**.

Opening of Current Accounts by Banks - Need for Discipline

RBI / 2021 – 2022 / 116 DOR.CRE.REC.63 / 21.04.048/2021-22 dated October 29, 2021

Certain changes have been made based on the feedback received from the stakeholders on the opening of current accounts by Borrowers having CC/OD facility (as well as those which did not have such facilities) issued vide RBI Circular DOR.No.BP.BC/7/21.04.048/2020-21 dated August 6, 2020 "Opening of Current Accounts by Banks" and the subsequent guidelines issued vide RBI / 2021–22 / 77 DOR.CRE.REC.35 /21.04.048/2021-22 dated August 04, 2021.

Banks are now permitted to open Current Accounts for borrowers who have availed credit facilities in the form of cash credit (CC)/ overdraft (OD) from the banks subject to certain guidelines:

Sr. No.	Facilities availed (by Borrower)	Opening Current Account
1	• CC/OD with Bank and; • Exposure* with Bank/(s) less than INR 5 crores	– Permitted to open current account with any bank. – Permitted to avail CC/OD facility with any bank with the Borrower giving an Undertaking that it shall intimate to Bank/(s) once the credit facilities reaches /exceeds INR 5 crore.
2	• CC/OD with Bank and; • Exposure* with Bank/(s) INR 5 crores or more	– Permitted to maintain current account with the Bank/(s) with which it has CC/OD facility, and; *provided the Bank has at least 10% of the exposure of the banking system with that borrower. *In case none of the Banks has at least 10% exposure of the banking system to the borrower, the bank having the highest exposure may open current account. – Other Lending Banks may open only **collection accounts** provided the funds are remitted to the CC/OD account within 2 working days. – Non lending banks not permitted to open current account.

**'Exposure' means sum of sanctioned fund based and non-fund based credit facilities.*

Scale Based Regulation (SBR): A Revised Regulatory Framework for NBFCs

RBI / 2021-2022 / 112 DOR. CRE. REC. No. 60 / 03.10.001/2021-22 dated October 22, 2021

On account of the recent stress in the non-banking sector, RBI found it necessary to re-examine the suitability of the regulatory approach, especially where failure of an extremely large NBFC could

cause severe systemic risks. RBI has thereafter found it pertinent to introduce a scale-based regulatory approach linked to the systemic risk contribution of NBFCs.

In this context, RBI has revised the classification of NBFCs, and the new regulatory regime categorizes the NBFCs based on their scale (asset size), activity, and riskiness, which shall now comprise of four layers as explained here under:

Regulatory Guidelines Effective From: October 01, 2022

Regulatory Structure for NBFCs

Sr. No.	Type of Layer	Type of NBFC (Scale and Activity wise)
1	Base Layer	– Non-Deposit taking NBFCs below the asset size of INR 1,000 crore – NBFCs undertaking the following activities- o NBFC-Peer to Peer Lending Platform (NBFC-P2P), o NBFC-Account Aggregator (NBFC-AA), o Non-Operative Financial Holding Company (NOFHC) and o NBFCs not availing public funds and not having any customer interface.
2	Middle Layer	– All deposit taking NBFCs (NBFC-Ds), irrespective of asset size – Non-deposit taking NBFCs with asset size of INR 1000 crore and above, – NBFCs undertaking the following activities: o Standalone Primary Dealers (SPDs), o Infrastructure Debt Fund - Non-Banking Financial Companies (IDF-NBFCs), o Core Investment Companies (CICs), o Housing Finance Companies (HFCs) and – Infrastructure Finance Companies (NBFC-IFCs).

Sr. No.	Type of Layer	Type of NBFC (Scale and Activity wise)
3	Upper Layer	– It shall comprise those NBFCs which are specifically identified by RBI for enhanced regulatory requirement based on a set of parameters and scoring methodology. – The top ten eligible NBFCs in terms of their asset size shall always reside in the Upper Layer, irrespective of any other factor.
4	Top Layer	– The Top Layer will ideally remain empty. – This layer can get populated if the RBI is of the opinion that there is a substantial increase in the potential systemic risk from specific NBFCs in the Upper Layer. Thus, NBFCs shall move to the Top Layer from the Upper Layer.

Note: Certain type/category of NBFCs (based on nature of activity undertaken) will always be classified under a specific layer only (such as Middle Layer for Core Investment Companies (CIC)), irrespective of the asset size of such NBFC.

Regulatory Minimum Net Owned Fund (NOF)

Regulatory minimum Net Owned Fund (NOF) for NBFC-ICC, NBFC-MFI and NBFC-Factors shall be increased to INR 10 crore till 31st March 2027 as per the below mentioned slabs:

NBFCs	Current NOF	By March 31, 2025	By March 31, 2027
NBFC-ICC	INR 2 crore	INR 5 crore	INR 10 crore
NBFC-MFI	INR 5 crore (INR 2 crore in NE Region)	INR 7 crore (INR 5 crore in NE Region)	INR 10 crore
NBFC-Factors	INR 5 crore	INR 7 crore	INR 10 crore

However, for NBFC-P2P, NBFC-AA and NBFCs with no public funds and no customer interface, the NOF shall continue to be INR 2 crore.

SEBI Notifications

Permitting non-scheduled Payments Banks to register as Bankers to an Issue

SEBI/HO/MIRSD/MIRSD_DOR/P/CIR/605/2021 dated August 3, 2021

Non-scheduled payments banks having prior approval from Reserve Bank of India ("RBI") are now eligible to act as Bankers to an Issue ("BTI"). Such banks are also permitted to act as a Self-Certified Syndicate Bank subject to fulfilment of criteria laid down by SEBI.

Application money / subscription money can also flow from saving bank account of investor held with the non-scheduled payments banks.

Disclosure of shareholding pattern of promoter(s) and promoter group entities

SEBI/HO/CFD/CMD/CIR/P/2021/616 dated August 13, 2021

According to Regulation 31(4) of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 all the entities falling under Promoter and Promoter Group had to be disclosed separately in the shareholding pattern on the website of all the stock exchanges.

SEBI vide Circular No. CIR/CFD/CMD/13/2015 dated November 30, 2015, has prescribed the formats for disclosure of shareholding pattern of listed entities wherein the holdings of promoter(s) and promoter group entities are disclosed collectively.

With the view of bringing additional transparency in disclosure to investors, SEBI has amended the existing format wherein Promoter(s) and Promoter group holdings have to be shown separately.

Automation of Continual Disclosures under Regulation 7(2) of SEBI (Prohibition of Insider Trading) Regulations, 2015 - System driven disclosures - Ease of doing business

SEBI / HO / ISD / ISD / CIR / P / 2021 / 617 dated August 13, 2021

SEBI vide its circular no. SEBI/HO/ISD/ISD/CIR/P/2020/168 dated September 09, 2020 introduced Automated system for System Driven Disclosures ("SDD") for disclosures under the promoters (and members of promoter group), directors and employees category as per Regulation 7(2) of SEBI (Prohibition of Insider Trading) Regulations 2015 and the system has become fully operational with the Exchanges and Depositories from April 1, 2021.

With the SDD going live, listed companies that are in compliance with the aforesaid SEBI Circular are no longer mandated to make disclosures [Continual disclosures] manually.

Introduction of T+1 rolling settlement on an optional basis

SEBI/HO/MRD2/DCAP/P/CIR/2021/628 dated September 7, 2021

Currently, the trades are settled on T+2 basis i.e., on 2nd working day of the trade.

Considering the increased volume of trading on Exchanges and based on the discussions with the Market Infrastructure Institutions (including Stock Exchanges, Clearing Corporations and Depositories), SEBI has given the option to Stock Exchanges to offer either T+1 or T+2 settlement cycle with effect from January 01, 2022.

The settlement cycle once opted shall be applicable to all categories of transactions in the security i.e., for regular market deals and

block deals on Stock Exchange. The settlement cycle once opted shall have to be continued for at least six months by the Stock Exchange.

Alignment of interest of Asset Management Companies ('AMCs') with the Unitholders of the Mutual Fund Schemes

SEBI/HO/IMD/IMD-IDOF5/P/CIR/2021/624 dated September 2, 2021

According to Regulation 25(16A) of SEBI (Mutual Funds) Regulations,1996, AMCs are mandated to invest a minimum amount as a percentage of assets under management ('AUM') in their own scheme(s) based on the risk profile of the scheme.

AMCs may invest from their net worth or the sponsor may fund the AMC to fulfil the aforesaid obligations.

The provisions of this circular shall come into force from May 01, 2022.

Guidelines for Investment Advisers - Extension of timelines

SEBI/HO/IMD/IMD-I/DOF1/P/CIR/2021/632 dated September 30, 2021

"**Investment Adviser**" means any person, who for consideration, is engaged in the business of providing investment advice to clients/other persons/group of persons and includes any person who holds out himself as an investment adviser.

Timeline for conducting the annual compliance audit for F.Y. 2020-21 has been extended from September 30, 2021 to December 31, 2021. In addition, the reporting of adverse findings, which has to be reported within one month from the date of audit report, has been extended to January 31, 2022.

Relaxations relating to procedural matters – Issues and Listing for Rights Issue

SEBI / HO / CFD / DIL2 / CIR / P / 2021 / 633 dated October 1, 2021

The relaxations granted by SEBI vide circular dated May 6, 2020, in respect of Rights Issues opening up to July 31, 2020 and later extended from time to time has been further extended and are now applicable to the Rights Issues opening up to March 2022.

In addition, the Issuer Company shall conduct a Vulnerability Test in respect of the optional mechanism (non-cash mode) from an independent Information Technology (IT) Auditor.

Discontinuation of usage of pool accounts by entities including online platforms other than stock exchanges

SEBI / HO / IMD / IMD - I DOF5 / P /CIR/2021/634 dated October 4, 2021

Presently, Mutual Fund Distributers ("MFDs)", Investment Advisers ("IAs"), Mutual Fund Utilities ('MFU'), channel partners and other entities including online platforms (Service Providers/Platforms) provide services to investor to transact in units of mutual funds by pooling investors' funds to a nodal account and subsequently transfer to AMCs on per transaction basis/lump sum basis outside the stock exchanges.

On the recommendations of Mutual Fund Advisory Committee for mitigating risks of co-mingling of funds at the level of Payment Aggregators/Payment Gateways and effecting

faster transfer of funds, intermediate pooling of funds/units will be discontinued effective from April 1, 2022.

Discontinuation of usage of pool accounts for transactions in units of mutual funds on stock exchanges

SEBI / HO / IMD / IMD - I DOF5/P/CIR/2021/635 dated October 4, 2021

SEBI had permitted registered stockbrokers and clearing members to transact in mutual fund units and in the current scenario, funds / units of mutual funds were being pooled by stock brokers and clearing members for buying and selling of such units and making pay-ins and pay-outs.

On the recommendation of Mutual Fund Advisory Committee and for mitigating risks and to effect faster transfer of funds, pooling of funds/units by stockbrokers and clearing members are discontinued with compliance of certain guidelines/ requirements for mutual fund transactions. This proposed action is in line with that of discontinuance of pool accounts by entities outside the stock exchanges.

The provisions of this Circular shall be applicable with effect from April 01, 2022.

Disclosure of Complaints against the Stock Exchange(s) and the Clearing Corporation(s)

SEBI/HO/CDMRD/DoC/P/CIR/2021/636 dated October 4, 2021

To bring transparency in Investor Grievance Redressal Mechanism, all the stock exchanges and clearing corporations are required to disclose information on complaints received and redressal thereof on monthly basis with effect from January 01, 2022.

The information will be compiled and presented on a monthly basis as well as on a 5 yearly rolling basis.

Filing of Financial information

SEBI/HO/DDHS/CIR/2021/0000000637 dated October 5, 2021

SEBI had mandated entities having non-convertible securities listed on stock exchanges to disclose financial results along with Limit Review Report/ Audit Report, Statement of Assets & Liabilities and cash flows on quarterly, half yearly and annual basis for which the formats have been revised.

In addition, SEBI has mandated listed entities to submit to stock exchange(s), detailed explanation for non-disclosure/ delay in disclosure of financial result in a scheduled time period.

Transmission of Securities to Joint Holder(s)

SEBI/HO/MIRSD/MIRSD_RTAMB/P/CIR/2021/644 dated October 18, 2021

As per to the provisions of clause 23 of Table F in Schedule 1 and Section 56(2) and 56(4)(c) of the Companies Act 2013, securities held by joint holder(s) are to be transmitted to the surviving joint holder(s) in the event of demise of one or more joint holder(s).

Registrar and Transfer Agents (RTAs) have been instructed to transmit such securities in accordance with the provisions of the Companies Act 2013.

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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 2015-20
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