K C Mehta & Co LLP

Chartered Accountants

kcm Insight

June 2022

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

Coverage | Detailed Analysis

Mergers & Acquisitions

Is the Ed-Tech balloon finally deflating?

Funding winter in Ed-Tech

Corporate Tax

Circular & Notifications

CBDT clarifies TDS applicability on Virtual Digital Assets Transaction

No TDS u/s 194I on aircraft lease rent payment to Unit located in IFSC

Central Government notifies Cost Inflation Index for FY 2022-23

CBDT notifies Form 16E & 26QE and amends IT Rules and Form Relating to TDS

Case Laws

Referral commission fees paid to medical practitioners is not allowable as business expenditure

Mere mentioning "misreporting of income" does not debar the Taxpayer from immunity u/s 270AA

Corporate Tax

Important Rulings

Cost of Acquisition can be negative in case of Slump Sale Taxability where liabilities taken over are higher than assets of the undertaking

Remuneration from partnership firm is not subject to tax audit

International Tax

Circular & Notifications

CBDT issues updated Mutual Agreement Procedure ('MAP') Guidance

Important Rulings - India

Matter remanded to tax officer to verify if the concept of "Beneficial Ownership" should be read in Article 13 of India-Mauritius DTAA

Filing of Form 67 on or before the due date of filing return of income is mandatory to claim credit of foreign tax paid

No withholding tax obligation even if arrangement of secondment of employees constitutes contract of services

International Tax

Important Rulings - Abroad

Mere purpose of 'tax avoidance' behind an arrangement is enough to invoke GAAR even in absence of resultant tax avoidance

Treaty between source State and State of beneficial owner can be applied in case where immediate recipient of income is not a beneficial owner of such income

Transfer Pricing

Circular & Notifications

Extension of safe harbour provisions and applicable rules' time limit

Important Rulings - India

SBLC and CG issued for AEs are not shareholders activity, 0.5% is Arm's Length commission for CG

AMP expenses are not international transactions for want of agreement, Bright line test cannot be applied

Coverage | Detailed Analysis

Transfer Pricing

Important Rulings - Abroad

Indirect Tax

Circulars & Notifications

Goods & Services Tax

Indirect Tax

Case Laws

Corporate Laws

MCA Notifications

Corporate Laws

RBI & FEMA Notifications

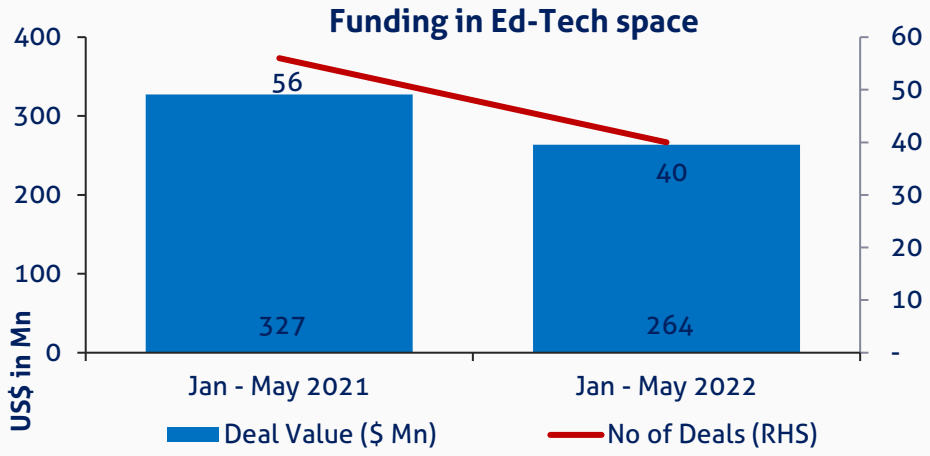
SEBI Notifications

Is the Ed-Tech balloon finally deflating?

Funding winter in Ed-Tech

Education Technology ("Ed-Tech") became a buzzword after onset of the pandemic in 2020 as students began to enroll on platforms that offered various forms of online coaching. Ed-Tech companies used this sudden demand rush as an opportunity to raise large sums of money to fund the business helped by widespread narratives about the "new normal".

However, by the end of May 2022, a worrying downward trend has emerged within the Indian Ed-Tech startups space. While funding amount decreased by c. 20% in Jan-May 2022 as compared to the previous year, the number of equity deals dropped by c. 30% during the same period.



Source: VCCEdge

VC market in India has entered a markedly different environment. A disrupted supply chain and rising inflation pressures have had an adverse impact on many of the portfolio companies of VC funds. High bond yields are also forcing investors to rebalance their portfolios and are impacting allocation of funds to India. Further, the ongoing Russia-Ukraine conflict has affected the world economy and Indian startups are no exceptions to it. Slump in public equity markets has also had a trickle-down impact, leading to rationalization in valuations and increased focus on unit economics. The resultant liquidity crunch in addition to structural weaknesses in the Ed-Tech space has resulted in a funding winter.

Why is the Ed-Tech model struggling?

This sector faces a high cost of customer acquisition driven by intense competition (especially since the pandemic) due to high marketing costs including digital advertisements to generate leads and thereafter making significant investments in sales & marketing teams to convert these leads.

Another issue is around affordability for end users as an average Indian household spends much less on conventional means of education as compared to the subscription charged by the Ed-Tech players. In addition to the subscription plans, there is the cost of gadgets and accessories which only adds to the dent in the pockets of parents sponsoring the education.

Questions have also been raised around the adverse effects of increased screen time on mental and physical health of students including their exposure to online games and cybercrime which is another potential threat.

Finally, the return to school (or onsite education) is severely affecting demand for Ed-Tech subscription plans resulting in consolidation in the space as only the fittest (i.e., the ones with sufficient funding war chest) would survive this funding winter.

Is the Ed-Tech balloon finally deflating?

Ed-Tech witnessing layoffs and shutdowns

Big Ed-Tech players, who were once on a hiring spree, are now laying off employees to sustain in the market. Since the beginning of the year, Ed-Tech companies have increased layoffs practically every month as nearly 3,600 people were let go by Ed-Tech companies in 2022 per several news reports.

Over 1,200 employees were asked to resign by Lido Learning during a virtual town hall meeting which eventually shut shop thereafter. In an effort to reduce costs, Unacademy laid off 1,150 employees in 2022. The unicorn Ed-Tech company, Vedantu, laid off 624 employees, or more than 10% of its workforce, in May 2022, including many teachers.

Over 800 Whitehat Junior employees who worked for Byju's also resigned after being told to relocate. Financing shortage was cited as the reason for 150 staff layoffs at Frontrow, another Ed-Tech business. As a result of the major layoffs, about 150 more employees voluntarily quit. Following Frontrow, the unicorn - Eruditus laid off over 100 staff and another unicorn - Udayy shut down and laid off entire staff in June 2022.

Ed-Tech startups are currently aiming at conserving cash and shoring up profitability by focusing on customer retention and unit economics. Lay-offs by start-ups have only been accelerated due to the ongoing capital crunch led by squeezing of easy money.

Ed-Tech startups going hybrid

Along with adverse economic factors, Ed-Tech startups are also facing a decrease in the demand for online learning as the schools and colleges in India have opened due to relaxation in COVID norms. K-12 is the most affected segment as parents want to send children back to schools. Ed-Tech companies have started embracing the hybrid model and innovating to scale up their offline presence by forging acquisitions and strategic tie-ups as the consumption market is still the same.

Byju's last year acquired 32-year-old Aakash Educational Services in a $1 billion deal, marking its foray into the offline education market with 200 plus centers. Unacademy last month announced its foray into offline learning with its upcoming Unacademy Centers for competitive examinations. Vedantu is also reportedly exploring hybrid options. Most Ed-Tech players have started working towards an omnichannel approach to remain in the game.

Way forward

After the boom, comes the fall! While it may not be the end of Ed-Tech in any manner, we are certainly at a crossroads in the online vs offline education mode. Ed-Tech startups had huge ambitions fueled by easy money in the past two years, but the euphoria seems to be ebbing now as even giants are scrambling for stability. While there may be an apparent funding winter in this space, there is no dearth of capital for business models that aim for scalability and sustainability. Mindset of founders and investors have started to shift from growth at all costs to ensuring survival and stability by effective fund utilization.

Contributed by

Mr. Chinmay Naik, Mr. Shankar Bhatt, and Ms. Jasika Jain

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

Circular & Notifications

CBDT clarifies TDS applicability on Virtual Digital Assets Transaction

Circular No. 13/2022 [F. NO. 370142/29/2022-TPL (PART-I)], dated June 22, 2022

Section 194S is inserted, vide Finance Act 2022, to mandate a person, responsible for paying to any resident, consideration for transfer of Virtual Digital Asset (VDA), to deduct tax at source at 1% of such sum, at the time of credit or payment, whichever is earlier, if it exceeds by specified amount. In exercise of powers conferred by section 194S(6) of the ITA, CBDT has issued this notification and clarifies applicability of such provision in various cases.

Important clarifications are summarized as under:

- In case where transfer of VDA takes place on or through an Exchange and VDA is owned by person, other than the Exchange, tax may be deducted u/s 194S of the ITA by the Exchange from payment made to the seller (owner of VDA being transferred). In a case where broker owns the VDA, the Exchange is also liable to deduct tax at source on consideration paid to the broker.
- In case where transaction between the Exchange and seller is through a broker, the responsibility to deduct tax is on both, the Exchange and broker. If there is written agreement between the Exchange and broker, the broker shall deduct tax u/s 194S of the ITA and the Exchange shall furnish quarterly statement (in Form no 26QF - yet to be notified) for all such transactions.
- In case VDA is owned and sold by the Exchange, the responsibility to deduct tax is on the buyer or the broker. As an alternative, the Exchange may enter into a written agreement with the buyer or broker that in regard to all such transactions the Exchange would be pay the tax on or before the due date, would furnish a quarterly statement (in Form No. 26QF) for all such transactions and include all such transactions in its ITR. If these conditions are complied with, the buyer or his broker would not be held as Assessee in default u/s 201 of the ITA for these transactions.
- In case consideration is in kind or in exchange of another VDA or partly in kind and cash and,
  - If a transaction is not through the Exchange, the buyer shall release the consideration in kind after the seller provides proof of payment of such tax. If there is an exchange of VDA against another VDA, both the parties, buyer/seller need to pay tax with respect to transfer of VDA and show evidence to each other so that VDAs can be exchanged.
  - If a transaction is through the Exchange, alternative mechanism can be exercised based on written contractual agreement with the buyers/sellers stating that the Exchange would be required to deduct tax for both legs of the transaction and the buyer/seller would not be independently required to follow the procedure. The mechanism to convert tax amount deducted in kind into cash, for deposit with GOI, has been prescribed.
  - Once tax is deducted u/s 194S of the ITA, tax would not be required to be deducted u/s 194Q of the ITA.
  - Tax required to be withheld u/s 194S of the ITA shall be on 'net' consideration after

excluding GST/charges levied by the deductor for rendering such service/s.

- In transaction where payment is carried out through payment gateways, it is clarified that payment gateways will not be required to deduct tax u/s 194S of the ITA provided that tax has been deducted by the person required to make deduction u/s 194S of the ITA.

It is be noted that as per section 194S(7) of the ITA, every guideline issued by CBDT under sub-section (6) shall be binding on the income-tax authorities and on the person responsible for paying the consideration on transfer of such VDA.

No TDS u/s 194I on aircraft lease rent payment to Unit located in IFSC

Notification S.O. 2777(E) [No. 65/2022/F.No. 275/30/2019-IT(B)], dated June 16, 2022

Central Government has notified that no deduction of tax shall be made u/s 194I of the ITA on payment in nature of lease rent or supplemental lease rent made by a person ('lessee') to a person being a Unit located in International Financial Services Center ('lessor') for lease of an aircraft subject to following conditions:

(a) The lessor shall furnish and verify statement cum declaration in Form 1 giving details of PYs for which lessor opts to claim deduction u/s 80LA of the ITA

(b) The lessee shall not deduct tax on payment made or credited after receipt of Form 1 and furnish particulars of payments made to lessor in statement of deduction of tax.

The above relaxation is available to lessor only for the PYs as declared in Form 1 for which deduction u/s 80LA is being opted. For the other years, lessee shall be liable to deduct tax on payments made u/s 194I of the ITA. This notification shall come into force from July 1, 2022.

Central Government notifies Cost Inflation Index for FY 2022-23

Notification S.O. 2735(E) [No. 62/2022/F.NO.370142/20/2022-TPL], dated June 14, 2022

Central Government has notified Cost Inflation Index as 331 for FY 2022-23 under Explanation (v) to section 48 of the ITA. The CII for FY 2021-22 is 317.

CBDT notifies Form 16E & 26QE and amends IT Rules and Form Relating to TDS

Notification S.O. 969 (E) [No. 67/2022/F. No. 370142/23/2022-TPL], dated June 21, 2022

CBDT has amended Rule 30 to provides that any sum deducted u/s. 194S shall be paid to the credit of the Central Government within a period of 30 days from the end of the month in which deduction is made and shall be accompanied by a challan cum statement in Form No. 26QE. Further it also provides to furnish a certificate of tax deduction at source in Form 16E to the payee within 15 days from the due date of furnishing statement in Form No. 26QE.

Existing Form No. 26Q has been amended to furnish information of TDS u/s. 194B, 194R & 194S. In relation to sections 194R & 194S, changes in the form shall come into force w.e.f. July 1, 2022 wherein specific disclosure of tax paid by the deductee is required be furnished. Further vide its detailed circular on section

Circular & Notifications

194R, CBDT has clarified that, in case advance tax has been paid by the recipient, in respect of any benefit or prerequisite as referred in section 194R, the deductor is required to furnish details of payment of such advance tax in the amended form.

Further, CBDT has substituted Form No. 26QB for furnishing information of tax deduction u/s. 194-IA, so as to incorporate the information pertaining to payment of all instalments & tax deducted thereon on purchase of immovable property. The deductor shall also be required to furnish information whether the stamp duty valuation is higher than the sale consideration.

Form Nos. 26QB, 26QC & 26QD have been substituted since the provisions of section 206AB for tax deduction at higher rate are not applicable to sections 194-IA, 194-IB & 194M respectively w.e.f. 1st April 2022 as amended by the Finance Act 2022.

Case Laws

Referral commission fees paid to medical practitioners is not allowable as business expenditure

Stemade Biotech Private Limited vs DCIT, ITA No. 7823 of 2019, ITAT Mumbai

The Taxpayer is a private limited company engaged in the business of extraction, collection, preservation and banking of stem cells. The Taxpayer paid commission to the medical practitioners (doctors) in pursuance of referral services (for availing stem cell banking facilities) provided by them. The AO disallowed the claim of such referral commission paid to doctors as a business expenditure. The AO held that the referral fees were paid in violation of code of conducts of medical practitioners and therefore Explanation 1 to section 37 was applicable. Accordingly, the AO disallowed the referral fees claimed as deduction by the Taxpayer.

The CIT(A) also held that referral fees paid to the doctors is in violation of the professional conduct under the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002 ("IMC Regulations") and therefore it is not allowable as business expenditure. Accordingly, the CIT(A) rejected the appeal filed by the Taxpayer and upheld the view taken by the AO.

Before the ITAT, the Taxpayer challenged the action of the CIT(A) on the following grounds:

- The Taxpayer is not governed by the IMC Regulations since the Taxpayer is not part of pharmaceutical industry or allied healthcare industry. Hence, payment of referral fees should not be considered as payment in violation of any law.
- Referral fees/commission paid to the doctors in lieu of referral service are not freebies paid by the Taxpayer.
- The decision of SC the case of Apex Laboratories Pvt Ltd (Civil Appeal no 23207 of 2019) dealing with payment of freebies to the doctors (in the nature of LCDs, laptops, refrigerators and gold coins etc.) is not applicable in the present case.

The ITAT decided the issue against the Taxpayer by holding that referral commission/fees paid to the doctors is not allowable expenditure u/s 37 of the ITA. The ITAT categorically stated that the allowability of claim is required to be decided in light of the framework of law and not according to hyper technical interpretation. The ITAT firstly rejected the plea of the Taxpayer that the Company does not fall into allied healthcare industry and therefore proviso to section 37 is not applicable. The ITAT held that while interpreting a word "allied healthcare industry" what is to be considered is the code of conduct for medical practitioners and not the journals or website where reference to such word is provided. As per the code of conduct, an industry that provides, on a commercial basis, any healthcare service or product would be part of allied healthcare industry and accordingly, the Taxpayer would be covered under said industry.

Further, against the argument that referral fees are not freebies, the ITAT observed that the referral commission/fees were paid by the Taxpayer for a service which should not have been rendered by the doctor. The referral fees were paid for services which were rendered in breach of fiduciary duties and in violation of code of conduct for medical practitioners. The ITAT held that such breach of fiduciary duties

was also disapproved by the SC in case of Apex Laboratories (supra).

Lastly, the ITAT held that Medical Council of India (MCI) prohibits receipt of any cash or monetary grants from any pharmaceutical and allied healthcare industry. Further, the SC in case of Apex Laboratories (supra) has held that tax benefit for providing any freebies, the receipt of which is punishable by MCI, cannot be allowed. Hence, the ITAT held that this finding of SC should also be extended to any cash or monetary grants which is also prohibited by MCI.

The issue of allowability of expense on freebies or referral payments to the doctors/professional association has been a contentious issue and various courts have decided the issue either in favour or against the Taxpayer. To end the litigation on this issue and make the legal position unambiguous, the provisions of section 37 of the ITA have been amended vide Finance Act, 2022. As per the amended provisions, providing benefits or perquisites which are in violation of any laws or prohibited under any law in India or outside India shall not be considered as allowable deduction u/s 37 of the ITA. The Finance Act, 2022 has also inserted a new section 194R to the Income Tax Act, 1961 providing for deduction of tax at source (TDS) @ 10% on the benefit or perquisite paid to a resident businessman or professional arising from its business or profession. Whether the payment of fees/ commission etc. to doctors or other professionals paid by any hospital or other para medical industry shall be required to be critically examine in light of the observations made by the ITAT in this case.

Mere mentioning "misreporting of income" does not debar the Taxpayer from immunity u/s 270AA

Prem Brothers Infrastructures LLP vs NFAC, W.P.(C) 7092/2022, Delhi High Court

The Taxpayer is an LLP which made suo-moto disallowance u/s 14A of the ITA in respect of exempt income earned during the year. The AO enhanced the amount of disallowance u/s 14A and initiated the penalty u/s 270A of the ITA for misreporting of income. The Taxpayer filed an application u/s 270AA of the ITA for seeking immunity from levy of penalty and prosecution u/s 270A of the ITA. The AO stated that since the penalty proceeding has been initiated on "misreporting of income", the Taxpayer was not entitled to file an application u/s 270AA of the ITA for seeking any relief under the ITA. The AO accordingly passed penalty order u/s 270A of the ITA and levied the penalty. .

The Taxpayer filed a WP before Delhi HC and prayed for seeking immunity from imposition of penalty and prosecution u/s 270AA of the ITA on the following grounds:

- Disallowance u/s 14A made by the Taxpayer was already more than the exempt income and therefore no further disallowance could be made. Accordingly, there was no misreporting of income. Reliance was placed on Joint Investments Pvt Ltd vs CIT (IT Appeal No. 117 of 2015).
- Penalty u/s 270A could not be levied where underreported income was determined on the basis of an estimate. Reliance was placed on section 270A(6).
- Lastly, the issue of disallowance u/s 14A cannot be considered as misreporting of income when all the facts, information and

documents were submitted by the Taxpayer and accepted by the AO.

The Department contended that the Taxpayer is not eligible for immunity as lower disallowance u/s 14A would be tantamount to misreporting of income and therefore, it is fit case for levy of penalty u/s 270A of the ITA. The HC by placing reliance on the decision of Schneider Electric South-East Asia (HQ) PTE Ltd vs. ACIT (WP (C) No. 5111/2022) held that when all the information and particulars of income were furnished by the Taxpayer and the AO used the same information to arrive at a different estimate of disallowance u/s 14A, it could not be said that there was misreporting of income by the Taxpayer.

The Hon'ble HC also categorically held that in the assessment order, the AO only mentioned that the penalty u/s 270A of the ITA has been initiated for "misreporting of income" however, the AO has not specified the limb of section 270A(9) under which such disallowance could be treated as misreporting of income. The HC accordingly held that mere mentioning of word "misreporting" would not debar the Taxpayer from immunity u/s 270AA. The HC accordingly set aside the penalty order u/s 270A of the ITA and directed the AO to grant the immunity u/s 270AA of the ITA.

The Hon'ble Delhi HC in its decision has once again reaffirmed the settled positions that (1) where all the material facts were disclosed which were not found to be incorrect then mere disallowance does not lead to penalty u/s 270A of the ITA and (2) even in context of section 270A; the AO is statutorily required to specify the specific charge / limb under which the penalty proceeding is initiated.

Section 270AA of the ITA has been enacted by the legislature with an objective to encourage / incentivize the Taxpayer to reduce protracted litigation by fast-track resolution of the dispute and eventually leading to speedy recovery of tax demand. Thus, the Taxpayer will have an option to file an application u/s 270AA and seek relief from levy of penalty and prosecution on any contentious issue by making payment of tax. However, quite often the AO initiate the penalty u/s 270A of the ITA by mentioning "misreporting of income" without specifying the charge of penalty u/s 270A(9) and thus, jeopardize the right to seek immunity u/s 270AA. The Hon'ble HC has therefore laid down a principle that the application filed by the Taxpayer u/s 270AA of the ITA shall be required to be decided by the AO keeping in mind the broad framework of the legislative intent behind enacting the law and the application should not be rejected on mere technicalities.

It is therefore advisable for the Taxpayer to examine the facts of the case and legal position of section 270A of the ITA in each case where the penalty is initiated on "mis reporting of income" in light of the principles discussed by the court and consider to file an application u/s 270AA of the ITA.

Cost of Acquisition can be negative in case of Slump Sale Taxability where liabilities taken over are higher than assets of the undertaking

Medi Assist Insurance TPA (P.) Ltd. v. DCIT (ITA no. 1933 of 2018, ITAT Bangalore)

The Taxpayer is a Company which had sold its pharma undertaking to wholly owned subsidiary company through Slump Sale. Since the net worth of the undertaking transferred was

negative (liabilities taken over are more than assets), the Taxpayer considered the Net worth as zero and arrived at 'Nil' income from Slump Sale in the ITR.

During the course of assessment, the AO treated the amount of negative net worth as Income from STCG and added the same to total income. The Taxpayer, relying on the decision of *Zuari Industries Ltd. v. ACIT (ITA no. 71 and 75 of 2005, ITAT Mum.)* and *Paperbase Co. Ltd. v. ACIT (ITA no. 477 of 2004, ITAT Delhi)*, contended before the CIT(A), that if liabilities exceeded assets, the net worth ought to be taken as Nil since net worth itself indicates a positive figure and cannot be negative; in any case, capital gain cannot exceed sale consideration in normal course. However, the CIT(A) upheld the order of the AO, relying on the decision of Special Bench in case of *DCIT v. Summit Securities Ltd (ITA no. 4977 of 2009, ITAT Mum)*, wherein the case of *Zuari Industries Ltd (supra)* was specifically considered and distinguished.

The matter came up before ITAT, wherein, reliance was again placed on the decision in case of *Summit Securities Limited (supra)* and was noted that Slump Sale involves transfer of an undertaking as one, including all its assets and liabilities. The ITAT has mentioned that section 50B deems 'Net worth' of the undertaking as its 'Cost of acquisition', which is computed as aggregate value of assets as reduced by liabilities of such undertaking as appearing in books of account. The ITAT has therefore interpreted such provision literally and rejected the argument of the Assessee that it has not received any consideration for such transfer.

It is to be noted that the provision of section 50B(2) deems net worth as the cost of acquisition for the purpose of computing capital gain. Since cost of acquisition shall be deemed to be the net worth value, the argument of the Assessee that cost of acquisition cannot be nil has been rejected by the ITAT by relying upon the decision in case of *Summit Securities Limited (supra).*

ITAT has also noted that when liabilities are greater than assets, capital gain will be higher than value of consideration, since value of liabilities is also taken over by the transferee apart from the consideration actually paid as result of transfer. Accordingly, respectfully following the Special Bench decision, ITAT held that negative net worth cannot be ignored for computing capital gain on slump sale.

It is interesting to note that provision of section 50B has been amended by the Finance Act, 2021 wherein the full consideration has been defined as higher of the actual consideration say FMV 1 (e.g. cash or fair market value of consideration if it is in kind) or adjusted fair market value of assets/liabilities of the undertaking transferred say FMV 2. In a situation, where FMV 2 is higher than FMV 1 (assuming FMV 1 is Zero), FMV 2 shall be regarded as sales consideration. In such a case, the negative net worth will be further added (being deemed cost of acquisition) to such deemed sales consideration while computing the capital gain tax liabilities. Meaning thereby even if you pay capital gain tax on excess of defined fair market value of capital asset over liabilities, the capital gain will further increase by the negative net worth as computed with reference to book value of all assets less liabilities. This aspect can be considered to defend the applicability of such decision in

respect of Slump Sale Transaction executed post such amendment.

Remuneration from partnership firm is not subject to tax audit

Perizad Zorabian Irani v. PCIT (Writ petition no. 1333 of 2021, Bombay HC)

The Taxpayer is a an individual, who is an actor by profession and a partner in two partnership firms. The Taxpayer filed her ITR for AY 2018-19 u/s. 139 of the ITA. The ITR filed by the Taxpayer was treated as invalid by the AO u/s. 139(9) since the same was filed without getting her accounts audited u/s. 44AB. The Revenue contended that gross receipts of the Taxpayer, including remuneration from the partnership firm exceeded the stipulated limit u/s. 44AB and therefore, she was required to get her accounts audited. Aggrieved by such order, the Taxpayer filed a revision application u/s. 264 of the ITA. Such application of the Taxpayer was rejected.

Aggrieved by the order u/s. 264, the Taxpayer filed a writ petition before the Bombay HC, wherein, reliance was placed on the decision *Madras HC in Anandkumar Vs. ACIT*, wherein it was held that where the Assessee is a partner in a partnership firm and is not carrying on any business or profession independently, remuneration or interest from the partnership firm cannot be treated as gross receipt of the Assessee. In the present case also, it was contended by the Taxpayer that, the remuneration received by the Taxpayer from partnership firm cannot be construed as gross receipts from profession, since the business is carried on by the partnership firm and not by the Taxpayer in her independent capacity.

Accordingly, it was held by the HC that, the remuneration received by the Taxpayer shall not form a part of her gross receipts from profession and therefore, there is no requirement to get accounts audited u/s. 44AB. Therefore, the ITR filed by the Taxpayer was held to be valid and the order passed u/s. 264 was to be set aside.

In this decision ITAT has stated that a partner is not carrying out any independent business. However, partner receives consideration by way of remuneration for contributing his time and doing activity for the benefit of the firm wherein he is a partner. Whether such activity can be regarded as business/profession is debatable especially in view of judicial decisions wherein it was held that such partner is entitled to claim deduction of expenditure incurred while offering remuneration received from partnership firm as business income u/s 28 of the ITA. Accordingly, both the arguments have different consequences as well as benefits considering the facts of the case. Therefore, the better view would be to contend that remuneration received by a partner from a firm (which is taxable as business income) cannot be characterized as sales or turnover or gross as stated in section 44AB of the Act and therefore tax audit provision should not be applicable.

Contributed by

Mr. Akshay Dave, Mr. Virat Bhavsar, Mr. Nirmit Mehta, Ms. Jolly Bajaj, and Ms. Vidhi Pooj.

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

Circular & Notifications

CBDT issues updated Mutual Agreement Procedure ('MAP') Guidance

India brought a tax dispute resolution scheme through the Direct Tax Vivad se Vishwas Act, 2020 with the objective of reducing the pending income tax litigation. As per the provisions of VSV Act, the order issued under this Act was to be considered conclusive and could not be reopened in any other proceeding.

The new CBDT guidelines issued on MAP states that where the resident has opted for VsV scheme and where the AE has submitted a MAP application, the specified country may accept the application, but the result shall not deviate from what was held in VsV scheme. Non-resident Taxpayer shall be allowed access to MAP in India if Taxpayer opted for VsV.

Also, the said guidelines states that there needs to be full disclosures by the Taxpayer to the Competent Authorities ('CAs') for quick resolution and where the Hon'ble ITAT passes an order in cases where appeal and MAP are simultaneously in process, CAs of India shall not deviate from the order passed.

Important Rulings – India

Matter remanded to tax officer to verify if the concept of "Beneficial Ownership" should be read in Article 13 of India-Mauritius DTAA

Blackstone FP Capital Partners Mauritius V Ltd. ITA Nos. 981 & 1725/Mum/2021, Mumbai ITAT

The Taxpayer, a Mauritian Company, sold equity shares of an Indian Company to a Singapore Company resulting into long term capital gains under the provisions of the Act and claimed the same as exempt under Article 13(4) of the Indo-Mauritius DTAA ('the DTAA')

Contentions of the Taxpayer were rejected by the tax officer on the ground that it was a perfect case of lifting of corporate veil since the effective control of the Taxpayer was with an entity of Cayman Islands. Accordingly, the tax officer concluded that the entire transaction was a façade to derive tax benefit under the DTAA and hence, denied the application of the DTAA. The Taxpayer aggrieved by the order, filed an appeal with Mumbai Bench of ITAT.

Observing that the tax officer proceeded on a presumption that concept of 'beneficial ownership' of capital gains could be read into the scheme of Article 13 of the DTAA, the ITAT stated that in absence of a specific provision, such a concept could neither be deduced nor assumed. The ITAT in its order has not explicitly ruled out the concept of beneficial ownership while interpreting Article 13 and has remanded the matter back to the tax officer for deciding the fundamental issue as to whether the requirement of beneficial ownership could be read into the scheme of Article 13 of the DTAA.

Simply because a Mauritius entity was held by a Cayman Islands Holding Company, the ITAT held that it was not a reason enough to lift the corporate veil and invoking the concept of beneficial ownership would mean rewriting Article 13 wherein the concept of beneficial ownership is absent. Once ITAT has established that the beneficial ownership criteria could not ideally be read into Article 13, remanding the matter back to the tax officer seems unwarranted and may prolong the litigation.

Also, it is to be noted that CBDT vide its Circular no. 789 dated April 13, 2000 stated that for the purpose of dividend income received by Mauritius investor, TRC would constitute sufficient evidence for accepting the status of

residence as well as beneficial ownership for applying the DTAA (Para 2 of the Circular). Para No. 3 of the said Circular further provides that in case of Capital Gains income only residency test is required to be applied and there is no mention of beneficial ownership. Accordingly, even the CBDT Circular indirectly suggests that for capital gains, concept of beneficial ownership is not to be considered and this Circular may support the judgment.

Filing of Form 67 on or before the due date of filing return of income is mandatory to claim credit of foreign tax paid

Muralikrishna Vaddi v. ACIT, IT Appeal No.269 of 2021, dated 14-6-2022, Vishakhapatnam ITAT

In this case, The Taxpayer was a salaried employee. While filing the return of income, the Taxpayer had claimed FTC but could not file Form 67 as per the requirement of Rule 128 of the Rules.

During the assessment proceedings, tax officer did not grant FTC on the ground that Form 67 was not filed on or before the due date of filing the return of income, which was a mandatory compliance under Rule 128. The CIT(A) upheld the action of tax officer. Aggrieved by the order, Taxpayer filed appeal before the Hon'ble Vishakhapatnam Bench of ITAT.

In the proceedings before the ITAT, the Taxpayer contended that requirement of filing Form 67 was procedural in nature and failure to comply with procedural requirement would not preclude the Taxpayer from claiming credit of FTC. The Taxpayer also placed reliance on the recent decision of Bangalore Bench of ITAT in case of *Hertz Software India (P) Ltd [IT Appeal No. 29 (Bang.)* of 2021, dated 7-3-2022], where in the ITAT, relying upon its earlier decision in case of *Rama Krishna v. ITO [2022] 135 taxmann.com 358 (Bang - Trib)* held that requirement of filing Form 67 could not be held as mandatory in nature but was merely a directory requirement for the reason that Rule 128 did not provide for disentitlement of FTC in case Form 67 was not filed on or before the due date of filing return of income.

ITAT rejected the stand of the Taxpayer and found that the Taxpayer had filed Form 67 only after initiation of scrutiny proceedings and there was a delay of more than two years without any valid reason or reasonable cause. ITAT further held that on a plain reading of Rule 128, it was clear that Form 67 was required to be filed on or before the due date of filing the return of income and in doing so, it emphasized on the word 'shall' used in Rule 128. It held that whenever word 'shall' be used, it denoted compulsion on the part of Taxpayer to comply with such condition within prescribed time limit.

ITAT accordingly held that filing of Form 67 was not merely a procedural requirement, but it was a mandatory compliance and failure to comply with the same would result into denial of claim of FTC.

It appears that ITAT has placed heavy reliance on the language of Rule 128 without appreciating plethora of judicial precedents including decision of Hon'ble Supreme Court in case *G. M. Knitting Industries (P.) Ltd vs CIT [2016] 71 taxmann.com 35 (SC)*, wherein it was held that procedural lapse in complying with procedural section / rule should not result into denial of genuine deduction / exemption / claim of the Taxpayer which is otherwise entitled for. While relied upon by the Taxpayer, the ITAT has not

considered the favorable ruling pronounced by Bengaluru Bench of ITAT on the subject matter. One may possibly argue that this decision of Visakhapatnam Bench of ITAT requires reconsideration.

No withholding tax obligation even if arrangement of secondment of employees constitutes contract of services

Flipkart Internet Private Limited, Writ Petition No. 3619/2021 (T-IT), Karnataka High Court

In this ruling, the Taxpayer made a payment to Walmart Inc., a Company incorporated in USA, as reimbursement of salaries of deputed expatriate employees. While making a payment, the Company sought for nil withholding certificate under section 195 of the Act which was rejected by the income tax department, based on multiple grounds including that employer-employee relationship did not exist between the Company and the expatriate employee and that the services rendered by expatriate employee were in the nature of technical services and fees for the same were chargeable to tax as FTS.

Against rejection of nil deduction certificate, the Company filed a writ petition before Hon'ble Karnataka High Court. In the proceedings before the High Court, the Company had taken multiple contentions including the fact that it was the 'employer' as it had issued appointment letters to expatriate employees and expatriate employees also reported to the Company and further, it contributed to the social security contribution of expatriate employees in India and such employees were working in India on employment visa wherein the Company was declared as employer.

The High Court heard the entire matter and held that the Master service agreement between the Company and Walmart Inc. did not support 'make available' test. The Court also distinguished the decision of Centrica India relied by the income tax department on the ground that facts of this case and Centrica India are not same. Further, unlike Centrica, the Company in the present case was not providing back-end support and it had its own market. On the recent SC ruling in Northern Operating Systems, SC held that the SC judgment was is in the context of service tax and the only question for determination was whether supply of manpower was covered under the taxable service and was to be treated as a service provided by foreign company to Indian company, whereas in the instant case, the legal requirement is whether to treat a service as FIS, which is 'made available' to the Indian Company.

Taxability of reimbursement pursuant to secondment of employee is litigative area since long and conflicting rulings are available on the same. Further, in the recent Hon'ble SC's decision in case of Northern Operating System, it was held that secondment of employee by foreign company is in effect supply of manpower for providing services. Though the said decision was rendered in the context of Service Tax, it may have implications under the Income-tax Act, 1961 while adjudicating a matter. However, in this decision, High Court had categorically distinguished the decision of Norther Operating System. Each case of secondment will have to be evaluated in detail and no particular judgment would apply in all cases. Multiple factors like nature of

Important Rulings – India

secondment, lien on employment, relationship of the secondment with business of both the entities, activities perform by such employees and its benefit to legal employers etc. has effect on their bearing on the employee-employer relationship and taxability of services, if any.

Important Rulings – Abroad

Mere purpose of 'tax avoidance' behind an arrangement is enough to invoke GAAR even in absence of resultant tax avoidance

Tower One St George Wharf Ltd. v. HMRC No. TC08481, United Kingdom First-Tier Tribunal

A transaction was entered between the legal owner of a tower ('SGSL') and the Taxpayer (SPV of the same group), whereby SGSL was supposed to transfer the tower to the Taxpayer. However, the transaction was undertaken by leasing the tower from SGSL to another group company ('B64') at book value (significantly less than the market value) and then the said company i.e. B64 in turn was transferred to the Taxpayer followed by the transfer of the lease. This arrangement was put in place to supposedly gain corporate tax benefit.

The Taxpayer recognized the intended corporation tax benefit in its company's tax return, but during an HMRC enquiry, accepted that no benefit was available. However, the assessment also denied the Stamp Duty Group Relief claimed by the Taxpayer considering that the transaction was entered primarily for avoidance of corporate tax. The Taxpayer appealed against the assessment to UK Tribunal stating that since the arrangement was not able to achieve the intended corporate tax benefits, it would not fall within the ambit of *"the transaction forms part of arrangements of which the main purpose, or one of the main purposes, is the avoidance of liability to tax"*.

The Tribunal considering the facts of the case noted that the Taxpayer not only had the intention of avoiding tax liability, but the Taxpayer put to work such intention into execution which they believed would result in a significant tax advantage and took advice from tax consultant for such arrangements. This inference was enough to establish that the Taxpayer has opted to such arrangements for the purpose of avoiding tax. The Tribunal further clarified the meaning of the term "Main Purpose" can also be another main purpose which may not be as significant. The decision of HMRC was upheld by the Tribunal.

This is an interesting ruling wherein though a transaction did not result into any corporate tax avoidance, the authorities disallowed incidental stamp duty Group Relief (available even in

absence of the arrangement / transaction) on the ground that the transaction had tax avoidance as the / one of the main purposes. Assume a case wherein a Taxpayer enters into a transaction, otherwise eligible for exemption under DTAA, through an arrangement which also results in an exemption under the Act. If the principle laid down in the judgment were to be accepted, it would mean that in the example, the Indian tax authorities may invoke GAAR, ignore the transaction and deny treaty benefits, even though the same could have been available sans the arrangement.

Treaty between source State and State of beneficial owner can be applied in case where immediate recipient of income is not a beneficial owner of such income

Planet - Council of State, 9th - 10th chambers combined, 20/05/2022, No. 44445, Supreme Court of France

In this case, a Company incorporated in France was paying royalty to an intermediate Company incorporated in Belgium and Maltese, in consideration of use of intangible assets developed by a Company incorporated in New Zealand.

Tax authorities denied the application of beneficial provisions of the DTAA entered into by France with Belgium and Maltese, on the ground that intermediary companies are incorporated in respective jurisdictions are not beneficial owners of royalty income. Instead, tax authorities applied the treaty between France and New Zealand and applied 10% withholding tax on such royalty payment.

Subsequently, the Taxpayer claimed application of DTAA between France and Belgium / Maltese, which was approved by the Administrative Court of Marseille. Against the decision of the Administrative Court of Marseille, matter went to the Supreme Court of France.

While rendering the decision, Supreme Court of France held that where immediate recipient of payment is not a beneficial owner of the income, tax authorities may apply the provisions of a DTAA with third State, where actual beneficial owner is situated, even in case payment is made to intermediaries situated in other States. In this case, Supreme Court explicitly stated that where DTAA between Source State and recipient State cannot be applied due to lack of beneficial ownership, DTAA between Source State and State of beneficial owner should apply. In short, the Court had adopted a 'look-through' approach.

In this regard, one would appreciate that tax department is generally not obliged to verify the existence of DTAA between Source State and State of beneficial owner and the only requirement is to verify whether benefit under DTAA can be granted or not. Taxpayers may identify the third country and seek to claim the benefit of provisions of such DTAA, to the extent available. Further, this case imports the concept of **'implicit beneficial ownership'** in the DTAA even though it does not contain any such conditions.

It is important to note that OECD commentary also provides for non-granting of DTAA benefits, in case of **conduit companies** which are incorporated in any jurisdiction solely for

Important Rulings – Abroad

obtaining a particular benefit under such DTAA. Further, in the Indian context also, there is a plethora of judicial precedents wherein it was held that if the requirement of beneficial ownership was not satisfied and if a Company was interposed with a sole object of obtaining DTAA benefit, such benefit should not be granted. Further, now, a lot of anti-abuse provisions form part of DTAA pursuant to OECD Action Plans and MLI measures (such as Preamble, principal purpose test, limitation of benefit, etc.).

In such case, it would be interesting to see how this ruling would be relevant while contesting a matter before the Indian Courts.

Contributed by

Mr. Dhaval Trivedi, Mr. Yash Purohit and Mr. Kshamin Shah.

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

Ciruclars & Notifications

Extension of safe harbour provisions and applicable rules' time limit

Central Board of Direct Taxes vide Income-tax (18th Amendment) Rules, 2022 (notification no. 66 of 2022), has extended the applicability of the safe harbour provision to assessment year 2022-23 w.e.f. April 1, 2022. This shall provide much required relief to the Taxpayers covered by safe harbour rules in prior assessment years.

Important Judgements - India

SBLC and CG issued for AEs are not shareholders activity, 0.5% is Arm's Length commission for CG

GMR Infrastructure Limited, ITA Nos. 1705, 1622, 1599, 1600, 1741 to 1744/Bang/2017, Banglore ITAT

The Taxpayer is a company engaged in the business of promotion of infrastructure development and investments in the shares and securities.

The Taxpayer facilitated its AE with SBLC and corporate guarantee to support AEs funding from banks. It recovered partial amount of expenses incurred in respect of issuing SBLC. TPO and AO carried out an adjustment of full amount of expense incurred in addition of already charged by the Taxpayer. TPO and AO considered the amount already charged by the Taxpayer as risk premium over total expenses incurred.

Considering judgement of ITAT in the Taxpayers case for earlier year, the claim of Taxpayer in considering the SBLC in the nature of Shareholders Activity is rejected, and the adjustment was restricted to difference between total expenses for SBLC incurred by the Taxpayer and that is already charged to AE.

Further, Taxpayer had provided corporate guarantee in respect of the funds borrowed by the associated enterprise from the foreign banks. The Taxpayer contended that the corporate guarantee is not an international transaction considering the same as part of Shareholders activity. ITAT outrightly rejected the contention of the Taxpayer in accordance with the ruling by the Kolkata ITAT in the case of Instrumentarium Corporation Ltd. ITA Nos. 1548 & 1549/Kol/2009 & ITA No. 2058/Kol/2010, wherein it was provided that any transaction that has an impact on the profit or loss of the assessee has to be considered as per section 92(3) of the Income-tax Act, 1961.

Separate issue in relation to the benchmarking of the corporate guarantee was also raised. TPO had made an adjustment based on the conditions prevailing in the case of guaranteed commission charged by commercial banks, whereby in case of default, the bank may charge a higher commission. In present case, it is the Taxpayer which had issued the corporate

guarantee and not any commercial bank or financial institution. ITAT stated that commission charged by the TPO is not comparable under the economic circumstances concerned and accordingly, ITAT considered the commission on guarantee fee at the rate of 0.50% as per the ruling of Delhi High Court in the case of CIT vs Cotton Naturals India Pvt Ltd (2015) 55 taxman.com 523.

AMP expenses are not international transactions for want of agreement, Bright line test cannot be applied

Essilor India Pvt Ltd, IT(TP)A No. 219/Bang/2021, Banglore ITAT

The Indian Taxpayer is a company engaged in the business of trading in ophthalmic lenses, optical meters and processing of semifinished ophthalmic lenses. The Taxpayer had incurred advertisement and market promotion (AMP) expenditure for the purpose of selling its products in the Indian market.

TPO made a transfer pricing adjustment in relation to the AMP expenditure citing that the expense so incurred results in brand promotion of the AE, thereby benefiting the AE and creation of marketing intangibles in the hands of AE. Accordingly, TPO contended that appropriate compensation should be remitted by the AE to the Indian Taxpayer. TPO employed the use of Bright Line Test i.e. the excess of the AMP expenditure by the Taxpayer over the AMP expenditure incurred by the comparable entities was added to the income of the Taxpayer. The action of TPO was upheld by the DRP.

ITAT noted that similar issue was dealt with in the earlier assessment year. The ITAT in the earlier year had observed that as per the ruling by Delhi High Court in the case of M/s Maruti Suzuki India Ltd that mere benefit passed on to the AE for the AMP expenditure incurred by the Taxpayer is not sufficient to infer the existence of international transaction.

Further, ITAT had reiterated the above stand as per the ruling in the case of CIT (LTU) v. Whirlpool of India Ltd., 381 ITR 154, where it stated that Bright Line Test is not a valid method for determining the existence of international transaction or the determination of the arm's length compensation. In addition to aforesaid observation, ITAT also stated that the definition of international transaction provided for two parties to act in concert, whereby there must be some tangible evidence to show that parties had acted in concert. Further, mere financial interest by a foreign entity may not be presumed that the AMP expenses incurred by the Taxpayer are on the behest of the AE and it is the responsibility of the tax authority to prove that the related / controlled parties had acted in concert and there existed an agreement to enter into an international transaction concerning AMP expenditure.

ITAT also observed that ruling by special bench of ITAT in the case of L.G. Electronics India Pvt. Ltd. v. ACIT (2013) 22 ITR (Trib.) 1 (Del)(SB) which provided for the application of the Bright Line Test for determination of the excess AMP expenditure was held by the Hon'ble Delhi High Court to be not correct, thereby ruling out its application in the present case.

Important Judgements - Abroad

Fundamental changes in the transfer pricing policy to be preceded with economic substance – France

The Taxpayer is a fast-food chain which operates its restaurants across the globe, including France. The subsidiaries of McDonalds Group i.e. Mc Donald's France SA (MSA) and Mc Donald's System of France LLC (MSF), were operating restaurant chain in the France region. A Royalty for use of trademarks at the rate of 5% was payable by the Subsidiaries to Mc Donald's Corporation (located in the USA) until 2009.

In 2009, the Mc Donald Group went under a restructuring exercise, wherein, the rights / ownership of Trademark (intangibles) was transferred from USA entity to newly incorporated Luxembourg based entity i.e. MCD Luxembourg Real Estate S.A.R.L. (MCD Luxembourg). In furtherance thereof, the rate of royalty was increased from 5% to 10%.

The substantial increase in the rate of royalty led to an investigation by Parquet national financier (French National Financial Prosecutor's Office) which held that the increase in the rate of the royalty was mainly to obtain the tax benefit due increased profits in the French jurisdiction.

Both the France based subsidiaries paid royalty at the rate of 10% to the Switzerland based PE of MCD Luxembourg. France authority upon investigation concluded that the entire restructuring was carried out for tax avoidance in France based on their observation that the Luxembourg entity has failed to establish economic substance for increasing rate from 5% to 10%. Further, authorities also observed that MCD Luxembourg was not taxed in Luxembourg, Switzerland, and France. Accordingly, findings led to the classification of the aforesaid arrangement as tax fraud under Article 1741 of the French General Tax Code and Article 121-7 of the Criminal Code.

Contributed by

Mr. Prashant Kotecha and Mr. Nitin Chaudhary.

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

Circulars & Notifications

Goods and Service Tax

Waiver of interest for specified electronic commerce operators for specified tax periods

Notification No. 08/2022 Central Tax dated June 7, 2022

Requirement to pay interest has been waived for the months of September 2020 to January 2021 for specified e-commerce operators who have filed the Form GSTR 8 after the due dates due to technical glitches on the portal but had deposited tax collected in the electronic cash ledger. This waiver of interest would be applicable from the date of depositing the tax till date of filing Form GSTR 8.

Guidelines relating to sanction, post audit and review of refund claims

Instruction No. 03/2022 GST dated June 14, 2022

Given the reports received by CBIC of different practices being followed by field formations, CBIC has issued guidelines on procedure to be followed for sanction, post audit and review of refund claims.

- It has been clarified that post audit should be conducted only in case refund claim is amounting to more than Rs. One Lakh.
- Also, it has been instructed that while passing refund orders, officers are required to upload a detailed speaking order along with the refund sanction order in the GST form.

GST Compensation Cess levy extended till March 31, 2026

Notification No. 01/2022 Compensation Cess dated June 24, 2022

- Compensation Cess is levied on goods such as automobiles and air conditioners that attract GST levy of 28% and on so-called sin goods such as aerated drinks, coal, pan-masala, and cigarettes.
- Such levy which was imposed for five years was to end on June 30, 2022. However, the levy has been extended further till 31 March 2026.

GST Council June 2022 meeting update

The 47th GST Council meeting was held on June 28-29, 2022, at Chandigarh after a gap of almost 6 months. Deliberation on 4 GoM Reports (reports by Group of Ministers) took place during the GST Council meeting. Topics of the 4 GoM Reports forming part of the core agenda of GST Council meeting were –

- Rate Rationalization
- Casino, horse racing and lottery / online gaming
- IT taxation
- Movement of precious metals

Certain key outcomes from the 47th GST Council Meeting are summarised as under –

- Rate rationalization (by way of increase in the rate) to remove inverted duty structure has been recommended for 9 goods and 7 services.
- It has been recommended to revise the scope of exemption to exclude from it pre-packaged and pre-labelled retail pack in

Circulars & Notifications

terms of Legal Metrology Act, including pre-packed, pre-labelled curd, lassi and butter milk.

- GST Council asked GoM to re-deliberate tax rate on horse racing, online gaming, casinos by July 15, 2022.
- All taxable service of Department of Posts would be subject to forward charge. Hitherto certain taxable services of Department of post were taxed on reverse charge basis.
- Goods transport agency (GTA) is being given option to pay GST at 5% or 12% under forward charge; option to be exercised at the beginning of Financial Year. RCM option to continue.
- Amendment in formula prescribed in sub-rule (5) of rule 89 of CGST Rules, 2017 for calculation of refund of unutilized Input Tax Credit on account of inverted rated structure recommended to include input services as well.
- Amendment in Rule 96 of the CGST Rules, 2017 has been recommended to provide for transmission of IGST refund claims on the portal in a system generated RFD-01 to the jurisdictional GST officers for processing in case where the taxpayer is considered to be of high risk, so as to expedite the processing of the refund claims.
- It has been recommended to extend the waiver of late fee for delay in filing Form GSTR 4 for FY 2021-22 till July 28, 2022 (existing waiver is till June 30, 2022).
- Recommendation given to extend the due date of filing Form GST CMP-8 for first quarter of FY 2022-23 from July 18, 2022, to July 31, 2022.
- A new Form GST PMT 03A recommended to be introduced to enable the taxpayers get re-credit of the amount of erroneous refund, paid back by them, in their electronic credit ledger.
- Present exemption of IGST on import of goods under Advance Authorization / EPCG / EOU scheme to be continued.
- Exemption from filing of annual return in Form GSTR 9/ 9A for FY 2021-22 to be provided to taxpayers having aggregate annual turnover up to Rs 2 Crore.
- Explanation to be added to rule 43 of CGST Rules to provide that there is no requirement of reversal of Input Tax Credit for exempted supply of Duty Credit Scrips by the exporters.
- Amendment in CGST Rules recommended to provide for refund of unutilized Input Tax Credit on account of export of electricity.
- Supplies from Duty Free Shops (DFS) at international terminal to outgoing international passengers to be treated as exports by DFS and consequential refund benefit to be available to them on such supplies.
- Artificial Intelligence and Machine Learning utilities shall be developed to ensure that

there is better GST compliance and for this the GoM shall keep giving suggestions to GSTN.

- GST Council will meet on limited agenda during first week of August 2022.

The above are recommendations of the GST Council and notifications giving effect to the above shall be issued separately.

Activities performed by Liaison office at behest of overseas HO is liable to IGST and Liaison office should obtain GST registration

Dubai Chambers of Commerce & Industry, Maharashtra Appellate Authority for Advance Rulings

Order No. – MAM/AAAR/AM-RM/08/2022-23 dated June 23, 2022

Maharashtra AAAR has held that a host of activities performed by Dubai Chamber of Commerce and Industry (DCCI/Appellant) in its capacity as Liaison-Office (LO) such as representation, business facilitator and event organizer for its Dubai Head Office (HO) will come under the ambit of 'supply'. Thus, Appellant is required to discharge IGST on amount received from HO after taking GST registration. The Karnataka AAAR ruling in case of Fraunhofer-Gessellschaft Zur Forderung has been distinguished on facts. It was observed by the AAAR that that Appellant are also charging a single price or consolidated amount for their services to the HO, i.e., reimbursement of monthly expenses on cost-to-cost basis which can be construed as 'consideration' under the wide definition of consideration given under section 2(31) of the CGST Act. On the basis of the said observation, the AAAR concludes that "the bunch of activities undertaken is nothing but a 'mixed supply' as provided under section 2(74) of the CGST Act. The AAAR has also observed that FEMA and GST Act are entirely different Acts without any correlation and therefore, the definition assigned to the term 'business' in these two Acts are completely different. Hence, any activity which is not business as per FEMA / RBI can be construed as a business under the GST Law.

Intra-State movement of goods from one unit to another having same GSTIN not taxable

Crown Craft India Private Limited, Rajasthan Advance Ruling Authority

Order No. –RAJ/AAR/2022-23/03

Rajasthan AAR held that there is no GST liability for the movement/sending of goods between two manufacturing units, located within the same State, working under the same GSTIN since there is no occurrence/constitution of 'supply' in respect of movement of raw material, semi-finished, finished, capital goods between two units. Clarifies that, Applicant would have to take a value of such goods as explained in Explanation-2 to Rule 138(1) and issue an E-way bill for such transfer (if required depending on the value of such transferred goods). Moreover, as per section 16(1), since the Applicant would be having single GSTN for both the units, then there would be only one electronic credit ledger for ITC credit and hence, Applicant can use ITC for the goods/raw material/capital goods received in one factory for payment of GST for the clearance made from second unit and vice-versa.

Order passed without specifying the reasons cannot stand the test of scrutiny of law

Case Laws

Sree Lakshmi Traders vs. The Sales Tax officer, High Court of Kerela

No.- WP(C) NO. 21879 OF 2021

Application for revocation / cancellation of GST registration was rejected by a one sentence order without specifying any reasons. The Court observed that the order must reflect an application of mind of the authority. Due to absence of any reasoning reflected in the order, it held that notwithstanding the merits or demerits of the case, the order cannot stand the test of scrutiny of law and was accordingly set aside.

Contributed by

Mr. Bhadresh Vyas and Mr. Tapas Ruparelia

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

MCA Notifications

Relaxation in paying of Additional fees in case of LLP filings

General Circular No. 4 dated May 27, 2022 & General Circular No. 6 dated May 31, 2022

The Ministry of Corporate Affairs (MCA) in March 2022 has launched new v3 portal for all e filings related to Limited Liability Partnership (LLP).

To reduce the burden of stakeholders by transitioning from v2 to v3 version, the MCA has decided to waive additional fees payable on various event-based LLP e-forms (including filing of Annual Return in Form 11) up to June 30, 2022, for which due dates were falling between February 25, 2022, to May 31, 2022.

MCA permits two Resubmissions in case of voluntary strike off

Notification dated June 9, 2022

The Ministry of Corporate Affairs (MCA), vide this notification has made the following amendments in the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016, namely:

- In case of deficiencies / incorrect information found by the Registrar in Form STK-2, the applicant is permitted to complete the form within a period of fifteen days. On the first resubmission if there are still some deficiencies / inaccuracies found, the applicant is given another chance by the Registrar to rectify the same and re-submit it for the second time.
- In the inability to re-submit the Form STK-2 within the time period of fifteen days, the Form will be considered as invalid.
- There have been amendments to the formats of Form No. STK-1, Form No. STK-5 & Form No. STK-5A, formats of which are provided in the Notification.

Opportunity given by the Ministry to Independent Directors whose names have been removed from the Data Bank

Notification dated June 10, 2022

The Ministry of Corporate Affairs (MCA) vide Notification, Companies *(Appointment and Qualification of Directors)* Second Amendment, Rules, 2022 gives relief to Independent Directors whose names have been removed from the Data Bank for not clearing /failing to appear and clear the online proficiency self-assessment test to have their names restored on payment of INR 1,000. The condition for restoration of the name in Data Bank is that they need to clear the online proficiency self-assessment test within one year their name shall be shown in a separate restored category for the said period of one year.

Under the existing system, if the name of an Independent Director was removed from the data Bank, he/she was required to apply afresh for the registration.

Quantification of penalty for Non-Compliance with National Financial Reporting Authority (NFRA) Rules

Notification dated June 17, 2022

National Financial Reporting Authority has been specially created to protect the public interest and the interests of investors, creditors and others associated with the companies or bodies corporate governed by establishing high quality standards of accounting and auditing and exercising effective oversight of accounting functions performed by the companies and

bodies corporate and auditing functions performed by auditors.

With a view to strengthen the processes and ensure highest degree of transparency and integrity by companies and its auditors, the Ministry of Corporate Affairs (MCA) has quantified the penalties for the non-compliance with the National Financial Reporting Authority Rules, 2018 which were earlier covered under Section 450 (punishment where no specific penalty of punishment is provided) of the Companies Act, 2013 vide *Notification Companies (Appointment and Qualification of Directors) Second Amendment, Rules, 2022*.

As per the new Rule, whoever contravenes any of the provisions shall be punishable with fine not exceeding five thousand rupees and where the contravention is a continuing one, with a further fine not exceeding five hundred rupees every day after the first during which the contravention continues. **[An interesting point to note is that the penalty quantified under this Rule is lower than what is specified under Section 450 of the Act].**

RBI & FEMA Notifications

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

RBI / 2022-23 / 60 DOR. STR. REC. 39 / 04. 02. 001 / 2022-23 dated May 31, 2022

Government has given a clarification that extended Interest Equalization Scheme (IES) shall be available to beneficiaries for segments / sectors other than those for which the Production Linked Incentive (PLI) scheme benefits are being availed.

Exporters availing credit under IES shall have to submit a self-declaration to the Banks at the time of seeking such credit.

E-mandates for recurring transactions

RBI / 2022 – 23 / 73 CO. DPSS. POLC. No. S-518/02.14.003/2022-23 dated June 16, 2022

Under the e-mandate framework RBI has prescribed an Additional Factor of Authentication (AFA), inter alia, while processing the first transaction in case of e-mandates / standing instructions on cards, prepaid payment instruments and Unified Payments Interface. For subsequent transactions AFA was waived for transaction values up to INR 5,000/-. The AFA limit has been enhanced from the existing INR 5,000/- to INR 15,000/- per transaction.

SEBI Notifications

Simplification of procedure and standardized formats for issuance of duplicate securities certificates

SEBI / HO / MIRSD / MIRSD_RTAMB / P / CIR / 2022 / 70

SEBI has simplified the process for issuance of duplicate share certificates with the introduction of the following initiatives:

- Submission of surety for issuance of duplicate securities is no more required.
- FIR copies/Police complaints with details of the securities and issuance of advertisement regarding loss of securities in newspaper shall not be required if the value of securities as on date of application does not exceed INR 5 lakhs.
- Overseas shareholder shall be permitted to provide self-declaration (instead of FIR/Police Complaint) of share certificates lost if notarized/apostilled and submitted with self-attested passport and overseas address proof.

Processing of ASBA applications in Public Issue of Equity Shares and Convertibles

SEBI / HO / CFD / DIL2 / P / CIR / 2022/75

SEBI had introduced the facility of Application Supported by Blocked Amount (ASBA) in Public Issues, way back in 2009. Over the years SEBI has made substantial changes to the ASBA facility so as to streamline the bidding process for public issues and this circular is another such initiative for more orderly development of the securities market.

The following changes have been proposed and shall apply to all public issues opening on or after September 01, 2022:

- Application Supported by Blocked Amount (ASBA) applications shall be processed only after the application monies are blocked in the investor's bank accounts.
- Stock Exchanges shall accept ASBA applications only with mandatory confirmation on the application money blocked.
- Provisions are applicable to all categories of investors i.e. retail, Qualified Institutional Buyers (QIB), Non Institutional Investors (NII).

Circular on Development of Passive Funds

SEBI / HO / IMD / DOF2 / P / CIR / 2022 / 69

Passive funds i.e. Exchange Traded Funds (ETFs) and Index Funds are investment products designed primarily for retail investors and offer the advantages of passive investing like transparency, diversification, lower cost vis-à-vis active funds.

A Working Group (WG) was constituted with representation from various stakeholders whose recommendations were examined in the Mutual Funds Advisory Committee (MFAC) and the following areas have been addressed including norms for Debt Exchange Traded Funds (Debt ETFs)/ Index Funds, Market making framework for ETFs, Investor Awareness and Education, disclosure of Indicative Net Asset Value (iNAV), disclosure norms etc.

Nomination for Mutual Fund Unit Holders

SEBI / HO / IMD / IMD-II DOF3 / P / CIR / 2022 / 82

There has always been a lack of transparency / information when it came to nomination facility.

SEBI Notifications

With the objective to bring uniformity in practices by various stake holders in the securities market, the process for nomination or opting out by Mutual Fund unit holders has been introduced:

- New Investors subscribing to mutual funds on or after August 1, 2022 have been given a choice to either:
  - provide nomination in specified format; or
  - opt out of nomination through a signed declaration form.
- Existing individual unit holder(s) holding mutual fund units either solely or jointly shall have the timeline of up to March 31, 2023 to choose between nomination facility or opting out. Failure to do so within the stipulated time period will result in the folios being frozen for debits, thus the units would not be permitted to be sold till the condition fulfilled.

Contributed by

Mr. Nitin Dingankar, Ms. Naziya Shaikh, Ms. Hemangini Suthar and Ms. Hirangi Desai

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

Back

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

Independent Member of

BKR INTERNATIONAL

Abbreviations

Back

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

Back

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