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kcmInsight

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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.

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

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Revival of M&A activity in the Banking sector

Consolidation of Public Sector Banks (PSBs)

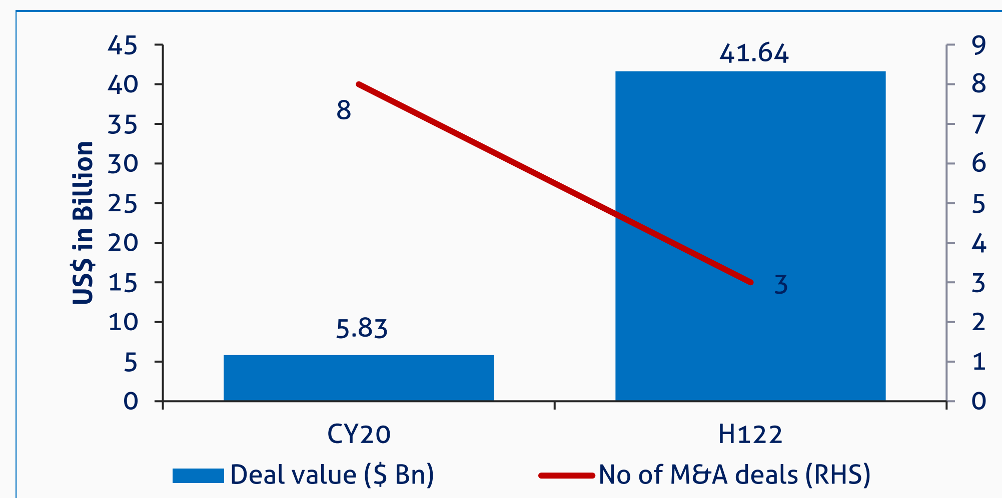
In the year 2019, the Centre announced merger of 10 nationalized banks into 4 large lenders, in turn reducing the number of public sector banks to 12. Two years prior to that in 2017, India had 27 state-run lenders. Currently, India has seven large public sector banks (i.e., State Bank of India, Punjab National Bank, Bank of Baroda, Canara Bank, Union Bank of India, Indian Bank, and Bank of India) and five smaller PSBs (i.e., Central Bank of India, Indian Overseas Bank, UCO Bank, Bank of Maharashtra, and Punjab and Sind Bank).

Finance Ministry in December 2021 informed the Rajya Sabha that, post-merger, the profitability of PSBs improved significantly. As per the tabled data, profitability of PSBs that had merged during the period from 2016 to 2021 had improved on a consolidated basis. State Bank of India (SBI), in which five associate banks of SBI and Bharatiya Mahila Bank merged in April 2017, reported a profit of over Rs 22,000 Cr in FY 2020-21 as against a loss of over Rs 4,000 Cr in FY 2017-18. Likewise, reported performance of Bank of Baroda, in which Vijaya Bank and Dena Bank were amalgamated in April 2019, improved from a loss of c. Rs 2,000 Cr in FY 2017-18 to a profit of c. 1,500 Cr in FY 2020-21. Punjab National Bank's reported performance, in which Oriental Bank of Commerce and United Bank of India were merged in April 2020, improved from a loss of c. 10,000 Cr in FY 2018-19 to a profit of over Rs 2,000 Cr in FY 2020-21.

The Centre is aiming at commencing next round of public sector bank consolidation with a view of having 4 to 5 large banks as strong as the country's biggest lender State Bank of India. This would be done after examining a comprehensive study that has been commissioned on the outcome of amalgamation in PSBs. Concerned banks have been asked to submit their feedback and wider consultations will be held through Indian Banks' Association (IBA) and with other stakeholders before firming up future strategy. Niti Aayog has recommended privatization of Indian Overseas Bank (IOB) and Central Bank of India (CBI), however the Government is yet to take a final call.

A Bill facilitating the same is likely to be introduced in the monsoon session of Parliament to make amendments for privatization of PSBs. One of the amendments under consideration is to allow the Government to completely exit from banks being privatized. The Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, presently requires the Central Government to hold at least 51 % stake in PSBs.

M&A deals in the Banking sector from 2020 until June 2022



Source: VCCEdge

Revival of M&A activity in the Banking sector

The year 2020 witnessed 8 M&A deals aggregating to US$ 5.83 Bn which included 6 deals pertaining to consolidation of PSBs valuing US$ 4.45 Bn. Other major deal in that year was bailing out of Yes Bank by the consortium led by SBI for US$ 1.35 Bn. In contrast, the first six months of 2022 witnessed 3 deals aggregating to US$ 41.64 Bn, lion's share of which was held by HDFC's merger with HDFC Bank for c. US$ 40 Bn when announced. It is worthwhile to note that no M&A deal took place in the year 2021 in the Commercial Banking space.

Two major developments that took place in the current year were - the merger of Housing Development Finance Corporation (HDFC) with private sector lender HDFC Bank, being touted as 'once-in-a-lifetime' deal; and Axis Bank buying out Citi Bank India's consumer banking business. HDFC Bank, though an aggressive private lender, has been a weak player in the mortgage lending space. Home loans form only about 6.2 percent of HDFC Bank's lending book, and another 4.5 percent is loan against property, based on December 2021 data. Post-merger, the entity could see a lower cost of funds for the mortgage business and increased revenue with the bank cross-selling home and life insurance products. In the recent Axis-Citi case, the foreign bank wanted to sell the consumer business as a part of its global strategy while for Axis, the $1.6 billion all-cash deal included credit cards, retail banking, wealth management and consumer loans. Axis Bank will have access to the large and affluent customer franchise of Citibank. Citi's credit card portfolio is largely made up of high-net-worth customers. Average spends per card for Citibank remains 1.4 times higher than the industry average and so are their customers' international spends.

In recent years, banks were not actively scouting for mergers and acquisitions because the larger players were going through their own challenges to improve asset quality and capitalization levels after the NBFC crisis and Covid pandemic. Performance of commercial banks was helped by several relief measures implemented by the RBI including deferment of recognition of stressed assets during the pandemic period. RBI also eased monetary and fiscal policy by keeping the repo rate at a low of 4% and lowering the Cash Reserve Ratio which provided additional liquidity to the banking system for onward lending. Large banks, now strengthened with improved balance sheets, have the confidence to scout for acquisitions. NBFCs could be the best acquisition targets, given their higher-margin products, large pool of priority-sector loans, and potential cross-selling opportunities.

Sector Outlook

Earlier, banks were acquired for their branch strength but in the digital-focused lending space, the need for branches is reducing with most of the big banks not adding any new branches. Hence, the consolidation in the Banking space is no longer driven by the need of additional branches but by potential cost synergies and technological absorption leading to enhanced profitability. Banks are now scouting for investments in promising targets including FinTech startups working on innovative technologies which could act as the backbone for future growth. FinTech startups such as Jupiter, Fi, Niyo, and RazorpayX are currently working in partnerships with traditional banks.

Another promising theme in the banking space is Neo-banking. Neo-bank is a digital (online only) bank that does not have any physical branches, bridging the gap between services that traditional banks offer vis-à-vis evolving expectations and needs of new-age tech-savvy customers by providing personalized customer experiences, data-driven insights and other value-added

Revival of M&A activity in the Banking sector

services. Neo-banks can provide services at quite affordable fees since they don't have to incur expenses of running physical branches. However, in India, Neo-banks don't yet have a nod to operate from the RBI. With competition mounting among traditional banks, new-age FinTech firms and non-banking entrants, it will be interesting to see as to how the adoption of Neo-bank could come up in India.

Sources of information: The Hindu Business Line, Business Standard, Times Now, Forbes, Moneycontrol.com, VCCEdge

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

Case Laws

Coverage

Judicial GAAR applied in case of Court-approved scheme of demerger to disallow set off losses of de-merged company

Cummins Sales & Services (I) Ltd. DCIT, ITA No.2121/PUN/2017, Pune ITAT

An undertaking of 100% subsidiary company of the taxpayer was demerged into the taxpayer via a scheme of demerger which was approved by the Hon'ble HC of Bombay. The company had claimed set-off of the brought forward business losses and unabsorbed depreciation losses relating to the demerged undertaking against its taxable income, as provided u/s 72A(4) of the Income-tax Act, 1961 ('ITA').

During the assessment proceedings, the tax authorities denied such claim of set-off of brought forward business losses and unabsorbed depreciation stating that the scheme of demerger was not carried out for a genuine purpose since the assets of the demerged Company were held for sale. CIT(A) held that once the demerger was approved by the Bombay High Court, the tax authorities had no jurisdiction to question the motive behind the demerger and accordingly directed the tax authorities to allow the set-off of accumulated loss and unabsorbed depreciation.

The Hon'ble Pune ITAT observed as under:

- Provisions of ITA have prescribed the conditions under which the set-off of brought forward business losses can be allowed in the case of the demerger. Thus, the ITAT ruled that the mere fact of a demerger has been approved by the court does not entitle the taxpayer to claim the benefit of the set-off of brought forward business losses and unabsorbed depreciation.
- The ITAT further noted that after the scheme of the demerger, the taxpayer had not carried on any business of the demerged undertaking, and the assets were held for sale which showed the intention of the taxpayer of not carrying on the business of the demerged undertaking.

Accordingly, the ITAT ruled that the scheme of demerger was carried out only with the sole object of availing the benefit of set-off of accumulated losses and unabsorbed depreciation of the demerged undertaking and thereby denied such accumulated loss and unabsorbed depreciation.

Though the provision of GAAR has already been incorporated in tax law to do away with tax benefits obtained in a transaction having no commercial substance, the Indian tax, and appellate authorities still use the objective test of the provision while interpreting the provision under ITA. Though there is no condition specified in section 72A(5) for ensuring that the demerger is for genuine business purposes, ITAT has held that if the demerger is solely for obtaining tax purposes and there is no interest in the business of the de-merged entity, the benefit of section 72A(4) is not available to the resulting company. This suggests that for any tax planning under ITA there must exist a commercial substance to justify the said transaction.

Dysfunctional unit can be regarded as a going concern for the purpose of demerger

KBD Sugars And Distilleries Ltd, I.T.A No.169/2014, High Court of Karnataka

The taxpayer who is engaged in the business of Indian-made foreign liquor, sugar, and

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generation of wind energy, had acquired a dysfunctional undertaking via demerger and had set off brought forward loss relating to the said undertaking.

During the tax proceedings, the tax authorities denied such set off of brought forward loss on the ground that the taxpayer has not received the undertaking on a going concern as required by Section 2(19AA) of ITA and the undertaking was dysfunctional since 1999. Aggrieved by the order of the tax authorities, the taxpayer preferred an appeal with CIT(A) which upheld the order of AO. Against the order of CIT(A), the taxpayer filed an appeal with the ITAT which allowed such set off of brought forward loss. The tax authorities challenged the method before the Hon'ble Karnataka HC.

In the proceedings before the HC, the tax authorities contended that the undertaking was dysfunctional since 1999 and it was not a going concern and does not satisfy the demerger as defined u/s 2(19AA) of ITA hence the taxpayer cannot setoff the loss u/s 72A(4) of ITA.

The Hon'ble Karnataka KC observed that the scheme of demerger was approved by the Karnataka HC as well as the AP High Court as per which the undertaking was demerged and was deemed to be transferred and vested on going concern basis (which was mentioned in the HC order itself that the undertaking is transferred on going concern basis). Further, the Hon'ble Karnataka HC agreed with the taxpayer's view that if an undertaking were to be running and profitable one, the same would not be available for demerger. Accordingly, the HC agreed that the conditions u/s 2(19AA) of ITA are satisfied and allowed set off of loss u/s 72A(4) of ITA.

It is to be noted that while the decision was decided in favour of the taxpayer, it was noted by the Karnataka High Court that the Revenue has withdrawn its appeal in the case of the taxpayer in respect of appeal filed for earlier years wherein the facts suggests that such demerger has taken place as going concerned as stated in the scheme. Further, the Court also held that treating going concern as a running unit is not appropriate. Thus, this decision will be helpful in the case of the de-merger of non-running units whereby it has their own assets and liabilities and is capable of being treated as separate unit for their revival.

Revised return cannot be filed to withdraw a claim made in the original return

PCIT v. M/s Wipro Limited, Civil Appeal no. 1449 of 2022, Supreme Court of India

The Taxpayer is a 100% export-oriented unit, engaged in the business of running a call center and providing IT Enabled and Remote Processing services. On 31.10.2001, the Taxpayer filed an original return of income declaring a loss of Rs. 15.47 crores with a note to computation stating that since the Taxpayer is entitled to claim exemption u/s 10B of ITA, no loss is carried forward. Thereafter the Taxpayer filed a declaration before the AO stating that it does not want to avail benefit u/s 10B of ITA as per section 10B(8) of ITA. Subsequently, the Taxpayer filed a revised return of income wherein exemption u/s 10B of ITA was withdrawn and losses were carried forward.

The AO rejected the withdrawal of exemption and denied carrying forward of losses on the ground that the declaration u/s 10B(8) of ITA was not filed before the due date of filing the return of income. The CIT(A) also upheld the order of AO. ITAT decided the issue in favour of the Taxpayer and HC dismissed the appeal filed by Revenue.

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The matter came up before the Hon'ble SC, wherein Revenue contended that:

- HC erred in observing that though the requirement u/s 10B(8) is mandatory, but the time limit within which declaration is to be filed is a directory in nature. If the view taken by HC is accepted, then it would nullify the provisions of sections 10B(5) and 10B(8) of ITA.
- Revised return of income cannot be filed for an altogether new claim of carrying forward of losses since 139(5) permits the filing of revised return only to remove omission/mistake and correct arithmetical error.
- There is a clear distinction between exemption provisions and deduction provisions. Section 10B, being an exemption provision, the condition for seeking exemption is required to be strictly complied with.

Responding to the above arguments the Taxpayer relied upon the decision of HC and further contended that:

- Section 80 of ITA requires that the Taxpayer claiming carry forward of loss should file a return showing loss before the last date for submitting the return and in its case, this condition was fulfilled.
- The interpretation of section 10B(8) of ITA is squarely covered by the judgment of SC in the case of CIT v G.M. Knitting Industries Private Limited (Civil Appeal nos. 10782 OF 2013 & 4048 of 2014), wherein, it was held that even if Form 3AA was not filed with the return of income but before completion of the assessment, the Taxpayer was entitled to claim additional depreciation.
- Reliance was also placed on the decision of Delhi HC in the case of Moser Baer in ITA No. 950/2007 and CIT v Rana Polycot Ltd (IT Appeal No. 400 OF 2005), which were rendered in the case of section 10B itself.
- Section 10B is a deduction provision and not an exemption provision as held by SC in the case of CIT v Yokogawa India Ltd (Civil Appeal Nos. 8498 OF 2013 & Others)

While deciding the case in favor of the Revenue, the Hon'ble SC held that:

- In a taxing statute, the provisions are to be read as they are and they are to be literally construed, more particularly in case of exemption sought by the Taxpayer.
- In the present situation, the Taxpayer filed its original return u/s 139(1) and not u/s 139(3). Revised return filed by The Taxpayer u/s 139(5) can only substitute original return u/s 139(1) and cannot transform it into return u/s 139(3), to avail benefit of carrying forward of loss u/s 80 of ITA.
- By filing a revised return of income, the Taxpayer cannot be permitted to substitute the original return of income filed u/s 139(1) of ITA.
- With regard to the reliance placed upon the decision of SC in the case of G.M. Knitting Industries Pvt Ltd, Section 10B(8) is an exemption provision and cannot be compared with the claim of additional depreciation u/s 32(1)(iia) of ITA.
- SLP against the decision of Delhi HC in the case of Moser Baer has been dismissed as withdrawn due to low tax effect and therefore the decision cannot be held against the revenue since the question of law is open.

It is pertinent to note that while considering section 10B as an exemption provision, Apex Court has interpreted the provision of section 10B very strictly, however it has not

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distinguished its earlier ruling in the case of Yokogawa India where it had held that after amendment by Finance Act 2000, section 10A has become a deduction provision, which rationale could also be extended to section 10B. Considering the present decision, the Tax Department will apply the same logic while verifying the claim of deduction u/s.10B for compliance with applicable conditions.

Further, in the present case, the Taxpayer has claimed the exemption u/s.10B of ITA in the original return as well as obtained the certificate of a chartered accountant for a claim of the said deduction. Hence it was held by the Apex Court that withdrawal of the claim of such exemption cannot be regarded as omission or wrong statement in the original return so as to uphold the validity of a revised return. However, while holding so, the Apex Court in its order also noted that claiming exemption, which was specifically not claimed in the original return of income, is not permissible since a revised return can be filed only in the case where there is omission or wrong statement. However, such a view expressed by the Apex Court is not in line with its decision in the case of Goetze India Ltd v. CIT (Civil Appeal No. 1761 of 2006).

Accordingly, if from the facts of the case it appears that there is a genuine reason for not making any claim in the return of income due to oversight or omission (and not a claim which was not made after application of mind), it is still arguable to contend that revised return can be filed to rectify such mistake of oversight or omission. However, in view of the current decision, all such claims become litigative.

Taxpayer liable to verify the residential status for TDS purpose if imminent from document

Nitesh Estates Ltd v Asst. Director of Income-tax, ITA no. 3135 of 2018, Bangalore ITAT

The Taxpayer, in course of its Real estate business, developed a residential apartment complex in Bangalore. The Taxpayer sold one of the apartments to Mahesh Bhupathi (payee) for consideration of Rs. 2 crores on February 16, 2009. Subsequently, on July 17, 2010, the payee offered to sell back the said apartment to the Taxpayer for Rs.4 crores. The AO treated the Taxpayer as the Taxpayer in default u/s 201 of ITA since the tax was not deducted u/s 195(1) of ITA in respect of consideration paid to the non-resident payee.

The Taxpayer contended that it was of a bona fide belief that the payee was a resident of Bangalore by the residential address furnished by him in various agreements and was not aware of the fact that the payee was a non-resident since he had appeared in person before various authorities for the execution of sale documents; therefore, provisions of section 195(1) are not applicable.

The CIT(A) observed that the Taxpayer was in regular contact with the payee from the day of booking the apartment and further, as per the website of the company, the payee was an independent director of the company and claimed to be associated with the company since 2005. Therefore, merely making payment in Indian currency or not being aware of residential status does not absolve the taxpayer of the liability cast upon it within the provisions of section 195 of ITA.

ITAT upheld the order of CIT(A) by observing that the Taxpayer is required to determine the income component involved in payment to non-residents and deduct tax before making payment of sales consideration. ITAT has stated that the Taxpayer is well aware of the residential status of the payee in view of its association with the Taxpayer and was in regular contact before such transaction. Hence the Taxpayer is

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therefore at default for not deducting tax at source u/s.195 of ITA. ITAT has also rejected the argument of the Taxpayer that the payee had reported the said transaction in his income tax return and there was no liability to pay capital gain tax as he had shown capital loss.

The decision is important where various buyers in India are making payments for the purchase of immovable properties from Indian non-resident taxpayers, having Indian addresses by assuming that such persons are tax residents of India. In such a case, it is advisable to verify tax residential status or in the absence thereof to obtain a declaration from him that he is resident/non-resident for tax purposes while evaluating withholding tax implications. Bonafide belief will be helpful only in case of saving from penalty.

Re-assessment notice over 'change of opinion' set aside under new regime

Seema Gupta, W.P.(C) No.10740/2022 & C.M.No.31174/2022, High Court of Delhi

In the case of the Taxpayer, an individual, the AO passed an order u/s. 148A(d) of ITA initiating reassessment proceedings u/s. 148 under the new regime. The AO alleged that the case of the Taxpayer was fit for reassessment proceedings since the Taxpayer had not disclosed the sale of property and long-term capital gain on such sale in the ITR filed by it.

The Taxpayer filed a writ petition before Delhi HC against the order passed by the AO. The Taxpayer contended that since such an issue had been duly examined by the AO in the course of original assessment proceedings, reassessment under the new regime shall not be permissible over a change of opinion.

The Court held that such an issue had been decided in favor of the Taxpayer by the AO after a detailed discussion, deliberation, and verification of the facts at the time of original assessment proceedings. Hence the Court has set aside the order passed by the AO under section 148A(d) of ITAT and remanded back the matter to the AO for passing fresh order in accordance with the law.

From the above decision, it appears that the principle established under the old regime that reassessment shall not permissible over 'change of opinion' as held in various landmark judgments of various courts including the decision of the Apex Court in the case of Kelvinator of India Ltd., has been followed by the Court under the new regime as well while passing order u/s.148A(d) by the AO. This suggests that though notice u/s.148A(b) can be issued based upon the provision of Explanation 1 to section 148 while disposing of the objection raised by an assessee for re-opening of the case, the fact that the issue under consideration has been examined in the original or earlier assessment shall require consideration.

Value of debentures received as dividend can be claimed as cost on transfer of such debentures

JP Morgan Funds, ITA No. 2430/Mum/2019, Mumbai ITAT

The Taxpayer is a non-resident entity engaged in the activity of foreign portfolio investment. The Taxpayer held equity investments in BDEL. The Taxpayer received bonus debentures from BDEL and applying the provisions of section 2(22)(b),

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such bonus debentures were treated as dividend u/s 2(22)(b) of ITA. BDEL accordingly paid DDT on the value of debentures. During the relevant year, the Taxpayer transferred the debentures and while calculating the capital gain claimed as deduction the amount treated as dividend as cost of acquisition.

The AO held that since the debentures were received without paying any consideration, the cost of acquisition must be taken as Nil. Accordingly, the AO disallowed the cost of acquisition claimed by the Taxpayer. The action of the AO was challenged before the CIT(A) and the CIT(A) upheld the findings of the AO.

The Taxpayer challenged the order of the CIT(A) before the ITAT. Before the ITAT, the Taxpayer argued that the debentures were acquired by reinvesting the sum received as dividend. Moreover, since the dividend were already subjected to DDT, the said amount must be allowed as deduction to avoid double taxation of the same income i.e. firstly as dividend and then under the head capital gain.

The ITAT noted that the debentures were allotted/ issued to the members in pursuant to the scheme approved by the HC and therefore, the amount (representing the actual cost of debenture) was indeed received by the members on which DDT was also discharged and therefore, it amounts to reinvestment of dividend in the debentures. The ITAT accordingly held that the debentures received by the Taxpayer were not "bonus" debentures since the Taxpayer had paid consideration for the same. The amount of dividend received and invested was therefore to be treated as cost of acquisition for such debentures. The ITAT also pointed out that since the DDT was paid on such dividend, it was already treated as income of the Taxpayer. Accordingly, the dividend was to be allowed as cost of acquisition of the debentures.

It is important to note that section 49 of the ITA deals with the provision for determination of actual cost of acquisition in certain specific circumstances. It is specifically provided in section 49(4) that value of capital asset treated as income u/s 56(2)(x) shall be regarded as "actual cost" of such capital asset for the purpose of computing capital gain. Further, section 49(9) clearly provides that the fair value of asset which is treated as income u/s 28 shall become actual cost. Section 46 of the ITA further carves out amount of distribution treated as dividend u/s 2(22)(c) from the purview of capital gain tax. Keeping in mind the legislative intent and background of these provisions, it is therefore possible to take a view that once the amount of distribution is treated as income of the Taxpayer, the corresponding value becomes / partakes the character of actual cost in the hands of the taxpayer. This decision also clarifies that the DDT paid by the company is essentially a tax on dividend income received by the taxpayer and therefore, the principle laid down by the ITAT may be useful in cases where beneficial rate under a DTAA is sought for the DDT.

Circulars & Notifications

Coverage

CBDT mandates electronic filing in specified cases

Notification No. 3/2022 dated 16-7-2022

CBDT mandates electronic filing of Specified forms, returns, statements, reports, and orders as mentioned below:

Form	Description
3CEF	Annual Compliance Report on Advance Pricing Agreement
10F	Form for a claim of relief under DTAA as per section 90(5) or 90A(5) of ITA
10IA	Certificate of the medical authority for claim of deduction in case of a person with disability u/s 80DD and 80U
3BB	Monthly statement to be furnished by a Recognized Stock Exchange u/s 43(5)
3BC	Monthly statement to be furnished by a Recognized Association u/s 43(5)
10BC	Audit report of an electoral trust
10FC	Authorization for claiming deduction in respect of any payment made to any financial institution located in a Notified jurisdictional area
28A	Intimation to the AO for payment of advance tax under section 210(5) of ITA
27C	Declaration by a buyer for obtaining goods without TCS u/s 206C(1A) of ITA
58D	Report to be submitted by a public sector company, local authority approved association, or institution u/s 35AC (5) of ITA
58C	Report to be submitted by an approved association or institution u/s 35AC(4) of ITA
68	Form of application for immunity from imposition of penalty u/s 270AA(2) of ITA

Kindly note that the above forms are now required to be filed by an applicable person through their website login. This may cause some practical difficulty in a few cases. E.g. the Form No.10F is required to be filed by a non-resident for obtaining tax treaty benefit. However, it would not be possible for them to file such a form in absence of having a PAN and income tax login facility.

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Important Rulings – India

Foreign rental income entitled to treaty relief

Natasha Chopra [ITA No. 6121 and 6122 of 2018] – Delhi ITAT - Order dated 30 June 2022

Taxpayer is a resident of India and has earned rental income from house property located in Australia and United Kingdom ('UK'). Rental income earned from a property situated in foreign jurisdictions was reported and offered to tax in the return of income filed in respective foreign jurisdictions.

During the assessment proceedings, AO brought the amount of foreign rental income to tax in India. While making such addition, AO had relied upon Article 6(1) of relevant DTAA between India and foreign jurisdiction, which provides that income from immovable property may be taxed in a contracting state where the property is situated. Further, AO has also relied upon the CBDT Circular 91 of 2008 issued on 20 August 2008, to substantiate his argument that the word 'may be taxed' shall be construed as 'shall be taxed only in the resident state'.

CIT(A) has also upheld the order passed by the AO. CIT(A) further held that rental income from a house property situated in foreign jurisdictions should be taxed in India and not in foreign jurisdictions. CIT(A) further held that benefit of provisions of section 90(2) of the Act and respective DTAA cannot be availed in present facts of the case.

Against the order passed by CIT(A), Taxpayer filed an appeal before the Hon'ble Delhi ITAT. With respect to the contention of the Taxpayer that rental income is not includible in income chargeable to tax in India, ITAT held that **right of resident country to tax its residents cannot be taken away under DTAA**. Hence, rental income earned from a house property located in foreign jurisdictions is includible in income chargeable to tax in India.

Further, with respect to contention of AO / CIT(A) that the term 'may be taxed' shall be construed as 'shall be taxed only in resident State', ITAT held that the term 'may be taxed' cannot be construed as 'shall be taxed only in resident state' unless otherwise expressly stated. Hence, AO has misinterpreted the circular issued by the CBDT.

It is also important to note that if the said circular is interpreted to construe that income is liable to be taxed in resident State and not in foreign jurisdictions then there was no need to further provide for granting relief from double taxation of income in the said Circular.

In view of above, ITAT held that provisions of section 90(a)(i) shall be applicable in present facts of the case and allowed the appeal in favor of the Taxpayer.

Foreign exchange loss incurred by PE on restatement of loan from HO is an allowable expenditure

Cobra Instalaciones Y Services S.A [ITA No. 7173 of 2019] – Delhi ITAT – Order dated 12 July 2022s

The Taxpayer, being the Project Office of a Spanish based company, was setup in India to carry out a turnkey infrastructure project and constituted a PE of its Head Office ('HO') in India. For meeting the working capital requirement for executing the turnkey projects, the Taxpayer received funds in foreign currency from its HO. At the end of the year, the outstanding amount to HO was restated and loss on account of

Important Rulings – India

foreign fluctuation was claimed as deduction for the purpose of computing profits chargeable to tax in India.

The revenue disallowed the said deduction stating that such loss is a notional loss and the capital provided by the HO cannot partake the nature of loan but is a capital contribution. The Revenue relied on the books of the Taxpayer wherein the transaction was reported as remittance and not as loan. Additionally, the revenue contended that Article 7(3) of India-Spain treaty to state that the treaty specifically prohibits any deduction of expenses relating to the HO except reimbursement of expenses and only in case of banking company the expenses on money lent to the PE is allowed as deduction.

The Hon'ble ITAT noted that there was no dispute that the funds received from the HO was revenue in nature as it was used in day-to-day operations. Further, for obtaining the funds, the Taxpayer has also obtained permission from the RBI and hence there was no violation of FEMA provisions. It was also held that the instant case was not that of generation of income from self and hence, the Department's reliance upon Calcutta HC's decision in the case of Betts Hartley Huett and Co. Ltd. vs. CIT [116 ITR 425] was misplaced. Relying on the co-ordinate bench judgement in the Taxpayer's own case wherein the Bench had relied upon SC decision in the case of CIT.v. Woodward Governor India P. Ltd. [312 ITR 254 (SC), ITAT allowed the claim of the Taxpayer on the reasons that the foreign fluctuation loss was account of revenue transaction, and that the Taxpayer has not actually paid any interest on such amount remitted as restricted under Article 7(3) of the treaty.

It is interesting to note that in this case, the ITAT has held that, once there is a revenue loss on account of foreign exchange fluctuation, such loss should be allowed as tax deductible irrespective of the nomenclature given (loan, borrowing or otherwise). Considering that the Bench allowed the loss on principle of incurring a loss (Euro vis-à-vis INR), it has not gone into the aspect of whether there was an actual transaction between HO and PE or whether they could be considered as separate.

Capital gain on transfer of shares of foreign company taxable in India, recourse to treaty not allowed

Prabhukumar Aiyappa Kullatira [ITA No. 3048 of 2018] – Bangalore ITAT – Order dated 15 June 2022

In the given case, the Taxpayer, being an Indian resident, invested in the shares of UAE based company during his employment in UAE. Later, he sold these shares in the year he was an Indian resident and generated long-term capital gain. The Taxpayer did not offer such gain to tax in India by taking recourse to Article 13(4) of the India-UAE treaty which provides that capital gains from sale of shares of the company resident in a country may be taxed by such country i.e. UAE in the given case.

However, the revenue contended that the Taxpayer is not eligible for India-UAE treaty as it failed to prove that the foreign company is a tax resident of UAE. As per Article 4(1)(b), a company is said to be resident of UAE if it's incorporated in UAE and is managed and controlled wholly in UAE. The Revenue argued that since the Taxpayer had failed to provide

Important Rulings – India

certificate of tax residency of UAE Company and since the Taxpayer was managing and controlling the company from India, the company cannot be said to be resident of India.

The Taxpayer relied on several factors to submit that the company was managed & controlled from UAE such as majority of the shareholders were resident in UAE, all the board meetings took place in UAE, the Taxpayer did not have any signing authority etc. However, none of the above observations are countered in the judgement.

It was noted by the Hon'ble Tribunal that the Taxpayer was a resident of India in the year of sale of shares. Interestingly, the Hon'ble Tribunal held that since there was no tax in UAE as per its tax laws and since India taxes the global income of the resident under section 5 read with section 9 of the Act, the Taxpayer is not eligible for taking recourse to treaty benefit.

It appears that though the Taxpayer was a resident of India, he seems to have tried claiming relief under Article 13(4) on the premise that only UAE had a right to tax the said income by interpreting the term "may be taxed" as used in Article 13(4) as "shall only be taxed". It is now a settled position that the country of residence would not lose its taxing right when the words used are "may be taxed" unless there are explicit exclusions provided for. Further, the Bench has refrained from concluding whether the foreign company was a resident of UAE or not for the Taxpayer to be eligible for Article 13(4) (subject to other requirements). The Bench was of the view that recourse to tax treaty was not available because the said income was not taxable in UAE and India has a right to tax such income as per the domestic law. In the process, the Bench has stated that all treaties give the country of residence a right to tax, which may not be true necessarily. While the Bench seems to have come to a right conclusion, it seems to have ignored the provisions of Article 13(4).

Important Rulings – Global

Coverage

Employee's home office constitutes Permanent Establishment

Sporger v. The Danish Tax Agency, SKM2022.250.SR, The Danish Tax Council

Taxpayer, a German company, had hired an employee as 'Area Sales Manager' and agreed that he can work from his residence in Denmark to the extent that his presence was not required elsewhere. The employee's place of work, as per Employment contract, was mentioned as 'with the customers as well as his private address (home workplace)'. The role of the employee was to develop markets in Africa, Belgium, Germany, Netherlands, the Baltics, and the Nordic countries.

The question under consideration was whether the home office constituted PE of Taxpayer in Denmark as per Article 5 of DTAA between Denmark and Germany.

The Taxpayer submitted that the employee did not have authority for price negotiation/order confirmation and worked from home in Denmark owing to his personal reasons. The turnover of the Taxpayer in Denmark was merely 0.05% to 0.16% of its annual turnover. The employee had to travel almost 50% to 60% of his total working hours outside Denmark. In either case, the employee's work was of preparatory and helpful nature, so it shall not constitute PE.

The Tax Council noted that in order to constitute PE as per Article 5(1) of the DTAA between Germany and Denmark, three conditions should be satisfied: (i) there must be place of business; (ii) it must be fixed and (iii) foreign entity must carry on its business wholly or partly from such place of business.

With respect to first and second condition, the Tax Council referred to the OECD Commentary, which clarified that, home office can be considered at disposal of the company, if employee does not have an office made available at the company and the employee continuously carries out the company's business activities from the home office. The Tax Council, relying on the Employment contract, noted that the employee did not have another permanent workplace available in Denmark and worked regularly for 40% to 50% of his official time from home.

With respect to third condition, the Council noted that employee's task was to develop the Nordic (including Danish) market, which included contacting with potential dealers. Therefore, merely because he did not have power to negotiate/confirm the orders, did not imply that business was not carried on from Denmark. Further, since the tasks of the employee, appointed as 'Area Sales Manager', were closely related to core sales activities of the company, it indicated that his work was significant and not of preparatory or helping nature.

Therefore, the Council ruled that the employee's home office constituted PE of the Taxpayer in Denmark. Presently, there are no Indian judicial precedents on issues relating to constitution of PE on account of home office, so, the principles laid down in this ruling may serve as guidance for Indian courts.

Important Rulings – Global

Distribution made by AIF taxable as dividend income regardless of 'initial characteristic'

Mauritius Tax Ruling ('TR') 235 dated 29 June 2022

Entity based out of Mauritius (Say X) holds a Global Business license ('GBL') and Collective Investment Scheme ('CIS') license with the Financial Service Commission. X pools funds from various investors across the globe (excluding Indian residents) and invests in India through AIF category II and category III.

AIF are the funds incorporated in India for the purpose of pooling capital from Indian and foreign investors, which in-turn invest as per the pre-determined strategy. In the present case, AIF is registered in the form of Trust under the Indian Trust Act, where the investments are held by Trustees for the benefit of Indian and foreign investors / beneficiaries. Said AIF is also regulated by Securities and Exchange Board of India ('SEBI'). Investors who invest in AIF hold units in AIF and are the ultimate beneficiaries.

Pursuant to investment in various SPVs made by the AIF, it has earned various streams of income such as dividend, interest, and capital gains. The income earned from investments made in various SPVs are further distributed to its unit holders depending upon their percentage of holding in AIF.

Question before Mauritius Revenue Authorities:

Whether dividend and interest income accrued to AIF and distributed to entity in Mauritius (X) will be considered as a dividend and interest as such for Mauritius tax purposes?

It is important to note that as per the provisions of section 115UB of the Act, for any income (except income chargeable under the head 'Profits and Gains from Business or Profession'), 'pass through' status has been granted to the Category I and II AIF trust. It means, income earned by AIF shall be pass on to its unit holders and it will be deemed as if such income is directly earned by the unit holders. In other words, AIF is treated as pass through entity.

However, in the present case, MRA held that as a unit holder in AIF, X will receive dividend income and capital gains from subsequent disposal of units held by them. As per Mauritius Income Tax Act, any distribution made by the trust shall be regarded as dividend income in the hands of beneficiaries. Hence, it was held that all income distribution made by AIF Category II and III funds will be treated as a **dividend and shall not retain its initial characteristics**. In this ruling, MRA has disregarded the tax transparent nature of AIF trust and ruled that income received by AIF trust in the form of dividend, interest and capital gains would be treated as dividend income in the hands of unit holders in Mauritius.

It is important to note that after this ruling, conflict has arisen between the tax treatment given to income distributed by AIF in India (Source State) and Mauritius (Resident State), which may create a practical difficulty for investors who have invested in Indian AIFs via Mauritius. Please refer to **Notification section** for further clarification issued by MRA on this subject.

Foreign Notification / Clarification

Clarification issued by MRA on income distributed by foreign fiscal transparent entity

MRA issued a Communique (clarification)[1] on 01 July 2022 in respect of distribution made by foreign fiscal transparent entities to Mauritius residents. **It was clarified that income distributed by AIF shall retain its initial characteristics.** As such, for example capital gains distributed by AIF to Mauritius residents shall be treated as capital gains only, which is not chargeable to tax in Mauritius.

This is a welcome clarification issued by the MRA and it is expected that because of this clarification, TR 235 (as discussed in foreign ruling above) would be revoked, and new ruling may expect to be issued. Further, this clarification is in line with the Tax Ruling 38[2], where MRA held that income distributed by foreign fiscal transparent entity shall retain its initial characteristics and shall be taxed in Mauritius as per taxation rules applicable to source of income in Mauritius.

It is also important to note that OECD Model Commentary 2017 has also dealt with a situation of where source state and resident state treat the item of income differently (**referred as Conflicts of qualification – Para 32.1 to 32.7 of Commentary**). Commentary provides various examples of conflict and mechanism to deal with the same, in a case where there is a conflict between the treatment as per law of resident state and law of source state. Hence, clarification issued by MRA gets its support from OECD Commentary.

[1] https://mra.mu/download/CommuniqueTaxImplication010722.pdf
[2] https://mra.mu/download/TR38.pdf

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Important Rulings

CUP Method - prices charged on B2B basis is not comparable to that is charged on B2C basis

ACIT, Circle-10(2), Kolkata vs M/s Philips Carbon Black Ltd. [I.T.A. No. 2628/Kol/2019]

The Taxpayer is engaged in manufacturing pf carbon black having its units at Durgapur, Palej, Kochi and Mundra. The Taxpayer has set up a captive power plant (CPP) at Palej, Gujrat.

The power generated by the said CPP was consumed captively by other non-eligible unit of the Taxpayer for carrying out the manufacturing activities. The aforesaid non-eligible unit has also consumed power by purchasing the same from State Electricity Board (SEB). **According to the Taxpayer the dominant object behind the setting up of power plant at Palej was to save overhead cost of procurement of power from SEB**. The CPP also sold the surplus power to third parties namely Noida Power Co Ltd., Global Energy, RPG Power Trading Co and IEX etc which are distribution companies selling power to the consumers. For claiming deduction u/s 80IA of the Income-tax Act, 1961 the Taxpayer needed to determine the profits of CPP eligible unit on standalone basis and thus required to determine the arms' length price of the power transferred by the CPP to the non-eligible unit.

The Taxpayer followed internal comparable uncontrolled price (CUP) for benchmarking these specified domestic transactions of transfer of power from CPP to non-eligible unit at the price at which the non-eligible unit used to procure electricity from the SEB. Accordingly, the Taxpayer has taken the non-eligible unit as the tested party and ALP of power captively consumed has been benchmarked in accordance with power purchased by the tested party from SEB.

The TPO rejected the ALP determined by the Taxpayer and considered the third parties to whom the eligible unit (as the tested party) supplied power and concluded that the price at which the power was sold to these third parties would be the ALP.

Aggrieved by the aforesaid decision of TPO, the Taxpayer argued against the observations of the TPO before the CIT(A). The CIT(A) accepted the Taxpayer's viewpoint of taking the price at which the non-eligible unit procured electricity from the SEB as the appropriate ALP. CIT(A) rejected the prices charged to third party by eligible unit for supply of power to be the appropriate CUP based on the fact that such prices have been charged under compelling circumstances which was targeted to just recover the cost of power generation.

The department had challenged order of the CIT(A) before ITAT. The Kolkata ITAT concurred with the decision of CIT(A) and added that the power sold by the eligible unit to the third parties was from one supplier to another supplier (i.e., from a producer to a distributor (B2B)), whereas the power sold by SEB to the non-eligible unit can be categorized as the one from a supplier to a consumer (i.e., from a producer to a consumer (B2C)). Accordingly, Kolkata ITAT held that the sale of power by the eligible unit to the third parties is not comparable to the sale of power by the eligible unit to the non-eligible unit. Therefore, Kolkata ITAT upheld the view of the Taxpayer that the appropriate ALP shall be the price at which the power is procured by the eligible unit from the SEB.

Important Rulings

For application of CUP as the most appropriate method the product and circumstances under which prices are charged under controlled transactions and uncontrolled transactions must be having high degree of comparability.

Law of limitation applicable to TPO's order passed one day late

Sigma Aldrich Chemicals Private Limited vs DCIT [IT(TP)A No.418/Bang/2015 & 596/Bang/2016]

The Taxpayer had raised a ground in relation to a transfer pricing issue. The Taxpayer alleged that the Transfer Pricing Officer's (TPO) order for the relevant assessment year (AY) is barred by limitation in terms of section 92CA(3A) of the Income-tax Act,1961 ("the Act"). For AY 2010-11, the TPO had passed orders u/s 92CA of the Income-tax Act, 1961 on January 30, 2014. The Taxpayer contended that in accordance with the ruling of the Madras High Court in case of DCIT v. M/s. Pfizer Healthcare India Pvt. Ltd. (Writ Petition Nos.1148 and 1149 of 2021 judgment dated March 31, 2022), the order of the TPO ought to have been passed on or before January 29, 2014.

In Pfizer Healthcare's case, the relevant AY was 2016-17. The Madras High Court had held that the due date for passing the order by the TPO shall be December 31, 2019 and not January 01, 2020 (being 21 months plus 12 months in case of reference to TPO made u/s 92CA of the Act). The Madras High Court held that the time to pass the assessment order shall end at 23:59:59 hours of December 31, 2019 and therefore, 00:00:00 shall be considered as the beginning of the next day. The Madras High Court noted that a day for the purpose of reckoning the date ends before the stroke of midnight and the next date would commence at midnight immediately after the expiry of the previous day. The last date would be the last day of the month (31.12.2019), which cannot be the first day of the next month (01.01.2020).

Further, the Madras High Court emphasized the significance of the language employed by section 92CA(3A), the relevant extracts of which has been reproduced below:

"(3A) Where a .... an order under sub-section (3) may be made at any time before sixty days prior to the date on which the period of limitation .... expires."

Madras High Court noted that, December 31, 2019, was the last date for the assessing officer to pass his order under Section 153. The TPO has to pass order before 60 days prior to the last date. The 60 days is to be calculated excluding the last date because of the use of the words "prior to" and the TPO has to pass order before the 60th day. The word "before" used before "60 days" would indicate that an order has to be passed before November 01, 2019, i.e., on or before October 31, 2019.

ITAT considering the judgement of hon'ble Madras High Court held that the TPO must have passed orders for AY 2010-11 and AY 2011-12 on January 29, 2014, and January 29, 2015, respectively for the years under consideration. Since the order was passed on January 30, 2014, and January 30, 2015, for the respective years the orders are considered bad in law and accordingly the TP Adjustments have been quashed.

Important Judgements

Non-payment of royalty by the AE not a valid ground for disallowing the payment of the same to the AE

KHS Machinery Pvt. Ltd. Vs Asst. CIT [ITA no. 2948/Ahm/2010, 1314/2014, 1148/ 2015, 181/2016]

The Taxpayer had paid royalty to its AE being a joint venture partner, which was benchmarked by adopting the Transactional Net Margin method (TNMM) for determination of the ALP. The TPO rejected the employment of TNMM for benchmarking the royalty transaction and noted that the AE to whom the royalty payment was made did not charge similar royalty from any other group entities. Accordingly, the TPO disallowed the payment of royalty in its entirety, which was further upheld by the DRP.

ITAT held that the fundamental pillar of ALP is, that the price at which the transaction would have been conducted at arms' length, ruling out the scope of any manipulation on account of relation between the two parties entering into it. In the present case AO determined ALP of Royalty to be Nil on the ground that AE has not charged such Royalty to other AEs. ITAT held that there cannot be any determination of ALP of the transaction by comparing it with an AE of the tested party. Therefore, the adjustment by AO in respect of royalty is deleted.

ITAT further also held that even otherwise, the only authority of the TPO is to conduct a Transfer Pricing analysis to determine ALP and not to determine whether there is a service or not from which assessee benefits. In view thereof the action of TPO in determination of ALP of Royalty transaction at Nil is held to be not in accordance with the law.

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Circulars & Notifications - GST

Various Notifications issued

Notification number	Dated	Subject
9/2022-Central Tax	July 5, 2022	5th July has been appointed as a date with effect from which the following amendments made in the Finance Act 2022 would be made effective – • Clause 110 (C) of the Finance Act 2022 which amended provisions of section 49 of CGST Act to allow transfer of any amount of tax, interest, penalty, fee or any other amount available in electronic cash ledger to electronic cash ledger for IGST, CGST, SGST, UTGST or cess and to transfer IGST and CGST in electronic cash ledger between distinct persons. • Clause 111 of the Finance Act 2022 which amended provisions of section 50 (3) of CGST Act retrospectively from 1 July 2017 to provide that interest shall be levied only if ITC has been wrongly availed and utilized.
10/2022-Central Tax	July 5, 2022	Seeks to exempt taxpayers having aggregate annual turnover up to Rs. 2 crores from the requirement of furnishing annual return for FY 2021-22
11/2022-Central Tax	July 5, 2022	Seeks to extend due date of furnishing FORM GST CMP-08 for the quarter ending June 2022 till July 31, 2022
12/2022-Central Tax	July 5, 2022	Seeks to extend the waiver of late fee for delay in filing FORM GSTR-4 for FY 2021-22
13/2022-Central Tax	July 5, 2022	Time limit for the Proper Officer to issue order under section 73 (9) for recovery of tax not paid or short paid or ITC wrongly availed or utilized in respect of a tax period for FY 2017-18 has been extended till September 30, 2023 Also, the period from the 1 day of March 2020 to the 28th day of February 2022 for computation of period of limitation under section 73 (10) for issuance of order under section 73 (9) for recovery of erroneous refund, shall be excluded Period from the 1st day of March 2020 to the 28th day of February 2022 for computation of period of limitation for filing refund application under section 54 or section 55, shall also be excluded

Circulars & Notifications - GST

Notification number	Dated	Subject
14/2022-Central Tax	July 5, 2022	Provisions of CGST Rules amended to give effect of 47th GST Council Meeting held on June 28-29, 2022
15/2022-Central Tax	July 13, 2022	Notification number 10/2019- Central Tax dated March 7, 2019 has been amended with effect from July 18,2022 to include manufacturers of Fly ash bricks, Fly ash aggregates and Fly ash blocks as persons who shall not be allowed to opt for composition levy
16/2022-Central Tax	July 13, 2022	Notification number 14/2019- Central Tax dated March, 7, 2019 has been amended with effect from July 18,2022 to include person engaged in making supply of Fly ash bricks, Fly ash aggregates and Fly ash blocks as person who shall have to obtain compulsory GST registration

Various Circulars issued

Circular number	Dated	Subject
170/02/2022-GST	July 6, 2022	Circular issued to clarify that following details shall be required to be mandatorily shown in GST returns – • Place of supply wise details of supplies made to unregistered persons and to composition dealers • Reversal of ITC of ineligible credit under section 17(5) or any other provision of GST law
171/03/2022-GST	July 6, 2022	Clarification has been issued on various issues relating to applicability of demand and penalty in respect of transactions involving fake invoices

Circulars & Notifications - GST

Circular number	Dated	Subject
172/04/2022-GST	July 6, 2022	Clarification has been issued on various issues pertaining to GST as follows – • It has been clarified that ITC of tax paid on deemed export supplies, allowed to the recipients for claiming refund of such tax paid, is not ITC in terms of the provisions of Chapter V of the CGST Act, 2017 and therefore, the ITC so availed by the recipient of deemed export supplies would not be subjected to provisions of Section 17 of the CGST Act, 2017 • ITC availed by the recipient of deemed export supply for claiming refund of tax paid on supplies regarded as deemed exports is not to be included in the "Net ITC" for computation of refund of unutilized ITC on account of zero-rated supplies under rule 89(4) or on account of the inverted rated structure under rule 89(5) of the CGST Rules, 2017 • The proviso after sub-clause (iii) of clause (b) of sub-section (5) of section 17 of the CGST Act – which provides that ITC shall be available where it is obligatory for an employer to provide the same to an employee under any law for the time being in force, applies to the whole of clause (b) of section 17(5) of the CGST Act • ITC is not restricted for leasing other than leasing of motor vehicles, vessels, and aircraft • Perquisites provided by the employer to an employee in terms of the contractual agreement entered into between the employer and employee will not be subject to GST when the same is provided in terms of the contract between the employer and employee • Any payment towards output tax (other than the tax payable under the reverse charge mechanism), whether self-assessed in the return or payable as a consequence of any proceeding instituted under the provisions of GST Laws, can be made by utilization of the amount available in the electronic credit ledger of a registered person • ITC can be utilized only for making payment of output tax and cannot be utilized for making payment of any interest, penalty, fees, or any other amount including payment of erroneous refund sanctioned in cash. • The amount available in the electronic cash ledger can be used for making any payment towards tax, interest, penalty, fees, or any other amount payable under the provisions of the GST laws.

Circulars & Notifications - GST

Circular number	Dated	Subject
173/05/2022-GST	July 6, 2022	It has been clarified that a refund of accumulated ITC would be given also in cases where the input and output supplies are the same but where the output supplies are made under a concessional rate (other than where output supplies are nil rated or fully exempted)
174/06/2022-GST	July 6, 2022	Manner of re-credit in electronic credit ledger using Form GST PMT 03 A has been prescribed
175/07/2022-GST	July 6, 2022	Manner of filing refund of unutilized ITC on account of export of electricity has been prescribed
176/08/2022-GST	July 6, 2022	Circular number 106/25/2019 dated June 29, 2019, clarifies certain aspects in relation to rule 95A which dealt with the refund of taxes paid on the inward supply of indigenous goods by retail outlets established at the departure area of the international airport beyond immigration counters when supplied to outgoing international tourists against foreign exchange, has been withdrawn, as rule 95A has been omitted.

Orders issued

Order number	Dated	Subject
01/2022 – GST	July 21, 2022	Principal Director General/ Director General of Directorate General of Analytics and Risk Management (DGARM), CBIC, New Delhi has been authorized to exercise the function of throughout the territory of India for the newly introduced rule 96(4) (c) which empowers the Commissioner in the Board or an officer authorized by Board to withheld the refund based on data analysis and risk parameters

Important Rulings

Service tax liability under reverse charge mechanism upheld on secondment of employees

Northern Operating Systems, Civil Appeal No.2289-2293 of 2021, Supreme Court of India

Observing that control over deputed employees is not only the singular determinative test, the Supreme Court held that, such examination must be based on a multitude of factors. Thus, adopting a "substance over form" approach to identify the "real" employer, the SC held that overseas companies would be treated as real employers of employees sent on secondment, owing to the following –

- The seconded employees continued to be on the payrolls of foreign entities
- Salary along with social security benefits were paid by a foreign entity in their home country
- The seconded employees were sent on deputation for the use of their specific skills and to optimize economic edge to perform
- The salary was paid in foreign currency
- Post a short, fixed-term deputation, the seconded employees would be repatriated back to an overseas entity

Given the above, it was held that the activity of sending employees on secondment is a supply manpower service by the overseas entity and should be subject to levy of service tax under the reverse charge mechanism.

As the decision would have a major implication, KCM will publish shortly a detailed analysis of the decision including its implication on various secondment arrangements for the benefit of the readers.

Supreme Court directs GSTN to open portal for Tran -1 and Tran – 2 forms

M/s Filco Trade Centre Pvt Ltd, Appeal (C) no. 32709-32710 / 2018, Supreme Court of India

Supreme Court has directed GSTN to allow a two-month additional window from September 1, 2022, to October 31, 2022, for claiming transitional credit. Any aggrieved registered assessee would be allowed to file or revise the already filed Tran 1 / Tran 2 form – irrespective of the fact that whether they have filed any writ petition or not before any High Court and irrespective of the fact whether their case has been decided by Information Technology Grievance Redressal Committee (ITGRC) or not.

GSTN has also been directed to ensure that there are no technical glitches during the said two-month additional window to be provided during September and October 2022.

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MCA Notifications

Companies (Incorporation) Second Amendment Rules, 2022

Notification dated May 20, 2022

Incorporation Form for subscribers to memorandum / Appointment of first Directors amended with additional declarations with respect to persons with nationality of a country which shares land borders with India. The names of the amended Forms along with the additional declaration are:

Form No.	Additional Declaration
Form INC 9	Declaration stating whether a person is required to obtain the Government approval under the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 prior to subscription of shares or not.
Part-B of Form No. INC-32 (SPICe+)	Declaration stating whether the person seeking appointment as Director is a national of a country which shares a land border with India or not. If so, security clearance from Ministry of Home Affairs, Government of India mandated and consent to be affixed in the Form.

Introduction of Company Forms on MCA21 V3 portal

Important Updates

The Ministry of Corporate Affairs (MCA) is introducing the following changes in filing of various e-forms.

9 forms shall be rolled out from the new V3 platform on August 31, 2022 for Companies:

- Form DIR3-KYC Web
- Form DIR3-KYC e form
- Form DPT-3
- Form DPT-4
- Form CHG-1
- Form CHG-4
- Form CHG-6
- Form CHG-8
- Form CHG-9.

Company **e-Filings** on the existing V2 portal will be disabled from August 15, 2022 for the above 9 forms. Thus, for the interim period between August 15, 2022 to August 30, 2022, filing of the aforesaid forms will not be permitted.

Therefore, it is recommended to clear the payment and / or close the resubmission status before August 15, 2022 for the Service Request Numbers (SRNs) in view of the transition to the new V3 portal.

It should also be noted that offline **payments** for the above 9 forms in MCA V2 (via Pay later option) shall be disabled from August 7, 2022.

RBI & FEMA Notifications

Investment by Foreign Portfolio Investors (FPI) in Debt - Relaxations

Notification No. RBI/2022-23/87 issued vide A.P. (DIR Series) Circular No.07 dated July 07, 2022

Exemption from 30% limit for investments made by FPIs in Government Securities and corporate bonds between the period July 8, 2022 to October 31, 2022.

Relaxation to FPIs investing in commercial papers and non-convertible debentures with original maturity of up to one year (earlier investment permitted in instruments with a minimum residual maturity requirement of one year). Exemption granted from the limits on short-term investments till maturity or sale of such investments.

Overseas foreign currency borrowings of Authorized Dealer Category-I banks

Notification No. RBI/2022-23/88 issued vide A. P. (DIR Series) Circular No. 08 dated July 07, 2022

AD Cat-I Banks have been permitted to utilize funds raised from overseas foreign currency borrowings between the period July 08, 2022, to October 31, 2022 for lending in foreign currency to its constituents in India (subject to end uses prescribed under Master Direction on External Commercial Borrowings).

International Trade Settlement in Indian Rupees

Notification No. RBI/2022-2023/90 issued vide A.P. (DIR Series) Circular No.10 dated July 11, 2022

With a view to liberalize foreign exchange trade transaction, Reserve Bank of India has permitted settlement of international transactions in Indian Rupees. Till date, RBI had permitted execution of contracts, raising of invoices / pro forma invoices in foreign currency / Indian Rupees but the receipt of such export proceeds had to be realized in foreign currency barring certain exemptions.

With the view to facilitate import and export transactions settlement in Indian Rupee, Reserve Bank has permitted the following:

- AD Banks in India may open Special Rupee Vostro Accounts of correspondent bank/s of the partner trading country.
- Advance against exports may be realized in the account as per existing guidelines.
- Set-off of export receivables against import payables is now permitted (subject to fulfillment of conditions for set-off in Master Directions) under the Rupee Payment Mechanism.
- Bank guarantees may be issued for trade transactions under this arrangement.
- Balances in the Special Vostro account may be used for specified capital / current account transactions.

SEBI Notifications

Introduction of Unified Payments Interface (UPI) mechanism for Infrastructure Investment Trusts & Introduction of Unified Payments Interface (UPI) mechanism for Real Estate Investment Trusts

SEBI/HO/DDHS/DDHS_Div3/P/CIR/2022/085

SEBI/HO/DDHS/DDHS_Div3/P/CIR/2022/086

Application Supported by Blocked Amount (ASBA) was implemented for ease of subscription to units of Real Estate Investment Trusts (REITs) and Infrastructure Investment Funds (InvITs) in 2019. With the increased use of digital payments system by investors, SEBI has introduced Unified Payments Interface (UPI) mechanism as an additional option for subscribing to public issues of REITs and InvITs.

Under this option, individual investors can block funds upto a limit of INR 5 lacs through UPI.

Reduction of timelines for listing of units of privately placed Infrastructure Investment Trust (InvIT)

SEBI/HO/DDHS/DDHS_Div3/P/CIR/2022/087

Till now, Regulations had given an indicative timeline of 30 days for listing of privately placed units of InvITs from the date of allotment.

For improving on the existing systems, the time for listing and commencement of trading of units has been cut down to 6 working days from the date of the closure of issue.

Levy of Goods & Services Tax (GST) on the fees payable to SEBI

SEBI/HO/GSD/TAD/CIR/P/2022/0097

Fees and other charges payable to SEBI by Market Infrastructure Institutions, Listed Companies and Companies intending to get listed shall be subject to GST at the rate of 18% (earlier exempt), effective from July 18, 2022.

Contributed by

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

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