K C Mehta & Co LLP

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kcm Insight

August 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.

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

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PPI and its impact on FinTech Startups

RBI's clarification on Prepaid Payment Instruments (PPI) and its impact on FinTech Start-ups

What is PPI?

Prepaid Payment Instruments (PPIs) according to guidelines issued by the RBI under Payment and Settlement Act, 2007 is defined as an instrument of payment that facilitates buying of goods and services, transfer of funds, financial services against the value stored in the instrument. Such value in the PPIs can be added through cards, wallets, net banking, etc. Some PPIs also come with a pre-set credit limit in it.

RBI's ban on PPI linked to credit lines from NBFCs

The RBI on 20th June 2022 came out with a clarification to its Master Direction on Prepaid Credit Instruments issued in 2017 stating that PPIs issued by non-banks with a pre-set credit limit were no longer to be issued by non-banks and such PPIs which have already been issued by such non-banks prior to such circular were to immediately stop operating. The RBI said that companies found not adhering to this clarification would be fined. While the PPIs may still be loaded using a debit/credit card, it cannot be funded through credit lines from NBFCs. The risk that prompted RBI to enforce the ban was that payment instruments were being camouflaged as credit instruments bypassing regulatory oversight.

How FinTechs operated PPIs

Since most of the Fintech startups do not have banking license, such startups approach a bank or NBFC and partner with them in issuing such PPI cards. To fund these PPI cards, startups used to primarily get credit lines from NBFCs. As the RBI banned the loading of PPI cards with credit lines from NBFCs, startups operating e-wallets and buy-now-pay-later (BNPL) services have faced a severe jolt.

Impact on Startups

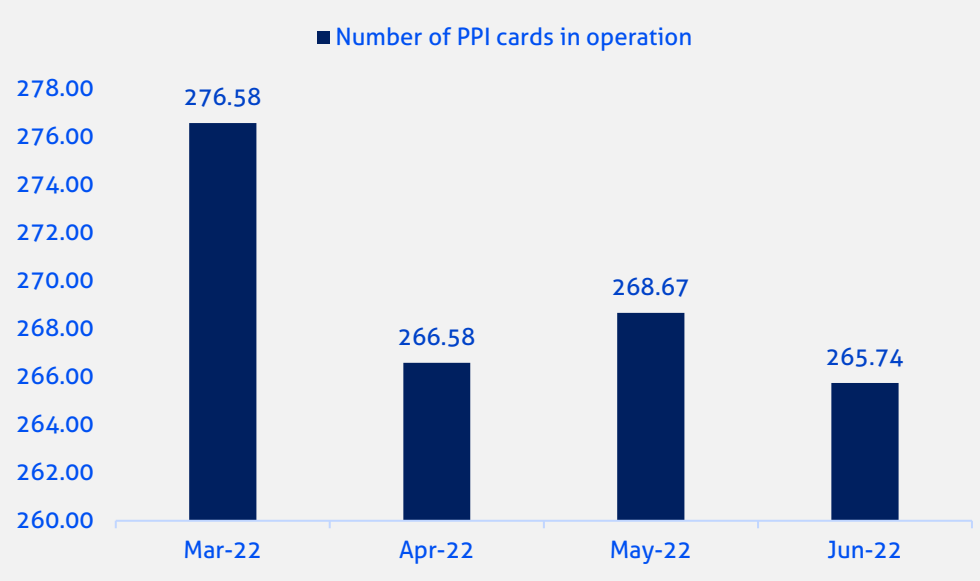
This ban widely affected startups in the booming FinTech industry particularly the ones with BNPL model of services. The FinTech industry in India has grown at an exponential rate since the pandemic. It has almost grown at a pace where the market size reached $50 Billion and accounted for almost 6000 startups in the country. FinTech was also the most sought-after industry during the funding spree post pandemic in the country with close to $9 Billion received in funding from various investors. India currently has 20-25 million BNPL users and non-banks accounted for almost 40% of the chunk. As such, this ban is set to affect 40% of all users using BNPL as an option to transact.

One of the main reasons for implementation of this ban is owing to the FinTech industry skirting off the Know-Your-Customer (KYC) norms mandated by the RBI before disbursing loans. Due to this ban, all BNPL companies will now have to associate themselves with a banking partner to issue such PPIs.

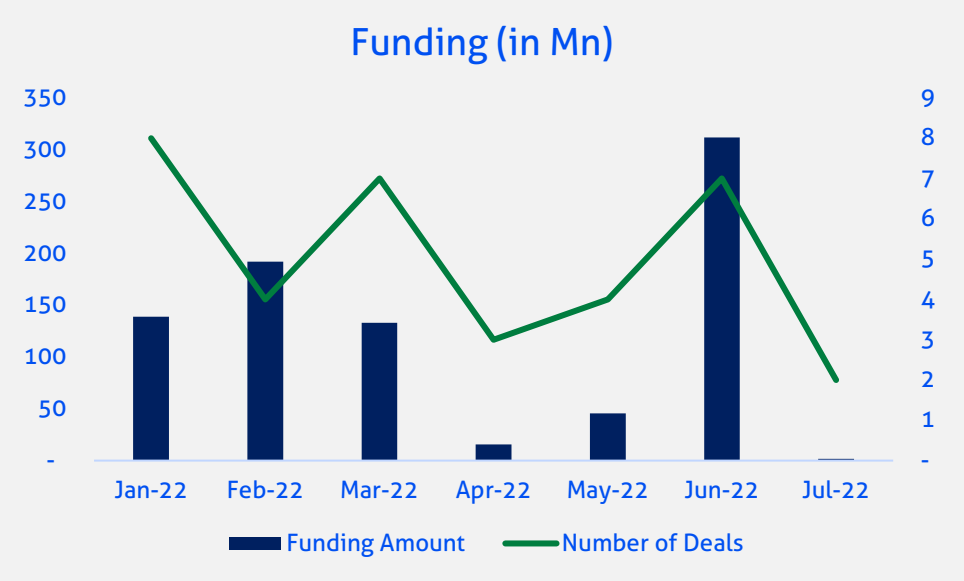
This is a knee jerk moment for the FinTech industry which helped the Indian digital loan industry grow 12-fold since the pandemic. Most of these loans accounted for small ticket loans with limited duration. The BNPL industry grew at a staggering rate of ~321% CAGR from FY19 to FY21. However, since March 2022, the number of PPI cards being used has significantly decreased primarily due to the tightening of the industry by the RBI.

PPI and its impact on FinTech Startups

Coverage



Source: RBI



Source: VCC Edge

Ensuing Funding Crunch

With the current prevalent geopolitical situation and increasing interest rates, this ban has only added to the woes of the FinTech industry in raising funds. PE/VC funding deals have significantly dropped from a high of 8 deals in Jan'22 to only 2 deals in Jul'22 coupled with substantial drop in funding values underlying the impact of the ban on FinTechs.

Road Ahead

It is worthwhile to note that the restriction imposed by the RBI is only relating to funding of PPI with a credit line from NBFCs and is not a blanket ban on all PPIs. The PPIs can still be linked to a debit/credit card or bank account to make it operational. Separately, the RBI has also acknowledged the importance of BNPL and its role in its latest Payment Vision Document 2025. BNPL as an industry cannot be kept away from the largely unbaked Indian market. However, it is important for the regulator to keep vigil on the increasing FinTech products and the need to set right standards.

PPI and its impact on FinTech Startups

Regulators must acknowledge that the ban will impact investor confidence in the FinTech industry and try to adopt a balanced approach to keep investor's confidence alive as also to help the FinTech industry grow.

Sources of Information: RBI, Invest India, Moneycontrol, News Wire, VCC Edge, Livemint

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Important Rulings

Revised return can be filed against defective return notice to give effect to amalgamation

ACIT Vs. M/s Rohit Bal Designs Pvt Ltd, ITA No. 8270/Del/2018, Delhi ITAT

In the facts of the case, two companies were amalgamated with the Taxpayer, with effect from April 1, 2013 vide the order of Delhi HC dated November 24, 2014. To give effect to the amalgamation, the Taxpayer, filed revised return for AY 2014-15 based on consolidated balance sheet, but, against the notice of defective return issued to it u/s 139(9) of the ITA.

The AO, in order u/s 143(3), observed that section 139(9) of the ITA allows the Taxpayer to correct the defects and does not permit to file revised return. Accordingly, the income of the Taxpayer was assessed as that reported in original return, based on standalone financial statements.

The CIT(A), in appeal filed by the Taxpayer, observed that the Learned AO was aware of scheme of amalgamation by virtue of various details sought and verified during the assessment proceedings. The CIT(A) allowed the appeal of the Taxpayer on the ground that, once the scheme is approved, the amalgamating company ceases to exist in law and any income/loss of transferor/amalgamating company relating to period after the appointed date of transfer becomes the profit/loss of the transferee company.

ITAT upheld the order of CIT(A) by observing that as per scheme sanctioned by the High Court, the tax authorities are bound to take note of the state of affairs of Taxpayer as on April 1, 2013, and therefore, return filed reflecting the state of affairs as on April 1, 2013, cannot be ignored on the strength of section 139(9) of the ITA.

It is important to note that provision of section 270A has been inserted by the Finance Act, 2022 wherein the law now clearly prescribes that in case of business re-organization (amalgamation, merger, demerger), the modified return is required to be filed within 6 months from the end of the month in which the relevant order approving such business re-organization was passed.

Corrigendum does not validate defective notice issue for reassessment

Infineon Technologies AG, Writ Petition No.49458 OF 2018 (T-IT), Karnataka HC

The Taxpayer was in receipt of re-assessment notice u/s. 148 of ITA for AY 2015-16. Thereafter, the AO issued a corrigendum to the taxpayer stating therein that the notice was to be issued for AY 2010-11 and not for AY 2015-16. The Taxpayer challenged such notice vide a writ petition before the Karnataka HC.

The Taxpayer contended that the notice issued by the AO for AY 2010-11 was time barred since the same had been issued after six assessment years from the end of the relevant AY. The Taxpayer also contended that since the mistake sought to be corrected is not merely a procedural lapse but a material mistake, the same shall be construed as a fresh notice and not merely a corrigendum to the original notice.

The Karnataka HC held that vide the first notice, Revenue had invoked its jurisdiction to reopen assessment for AY 2015-16. With regard to AY 2010-11, the authorities sought to invoke their jurisdiction by issuance of another notice which

was styled as a corrigendum. Even otherwise, such notice was barred by time as substantiated by the taxpayer. Thus, Karnataka HC set aside the notice issued as a corrigendum by the Revenue for AY 2010-11.

It is crucial to note that the tax department cannot resort to the provisions of section 292B of the ITA to correct a material mistake which alters the very nature and premise of the notice in respect of any proceedings under the ITA. Such provisions have been incorporated in the ITA to provide a remedy against the procedural lapses in the notices issued.

Reporting in Tax Audit Report shall not be the sole base for making disallowance in Intimation u/s. 143(1)

Coronation Cigar Co., ITA No. 1728/Mum/2022, Mumbai ITAT

The return of income filed by the taxpayer was processed u/s. 143(1) of the ITA and the AO – CPC had disallowed an amount in respect of delay in deposit of sum of employee's contribution to PF and ESIC u/s. 36(1)(va) r.w.s 2(24)(x) of the ITA. On appeal before CIT(A), the disallowance made by the AO – CPC was upheld. Aggrieved by such order, the taxpayer filed an appeal before Mumbai ITAT, wherein the taxpayer while relying upon the decision of the Bombay HC in case of Kalpesh Synthetics Ltd v. DCIT [(2022) 137 taxmann.com 475 (Mum)] contended that in view of various binding judicial precedents of jurisdictional HC, when sum of employees' contribution to PF & ESIC has been deposited on or before the due date of filing of tax return u/s. 139(1) of the ITA, the same shall not be disallowed.

ITAT while relying upon the decision of Kalpesh Synthetics Ltd (supra) held that in view of binding judicial precedents of jurisdictional HC, the AO cannot proceed to make an adjustment u/s. 143(1) of the ITA in respect of an issue which has been settled by the jurisdictional HC. Such disallowance cannot be made based solely upon the tax audit report, in contradiction to a settled legal principle vide a binding judicial precedent and therefore, the disallowance made by AO – CPC u/s. 36(1)(va) was deleted.

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), 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.

Important Rulings

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.

Important Notifications

CBDT prescribes Books of Accounts & Other Documents to be maintained by entities approved u/s 10(23C) or 12A

Notification No. 94/2022 dated August 10, 2022

CBDT has inserted Rule 17AA notifying the books of accounts & other documents to be maintained by every fund or institution or trust or any university or other educational institution or any hospital or other medical institutions in accordance with clause (a) of the tenth proviso to section 10(23C) or sub-clause (i) of clause (b) of sub-section (1) of section 12A. Further, such books of accounts & documents shall be maintained for a period of 10 years from the end of the relevant assessment year at its registered office.

Considering the recent amendments under the ITA with respect to application out of loans and borrowings or contributions made to corpus, the documents prescribed under the Rule would be useful for preparing the return of income as well.

CBDT amends Rule 17 to exercise option under Explanation 3 to third proviso to section 10(23C)

Notification No. 96/2022 dated August 17, 2022

Finance Act 2022 inserted Explanation 3 to third proviso in section 10(23C) to provide for accumulation related conditions similar to section 11.

In line with the same, CBDT has amended Rule 17, w.e.f. April 1, 2023, for furnishing statement in Form No. 10 by an entity approved u/s 10(23C) of the ITA. CBDT has also amended Form 10 incorporating necessary changes. Such form is required to be furnished electronically on or before the due date of furnishing the return of income u/s. 139(1) of the ITA.

Central Government notifies conditions for claiming exemption of amount received on account of Covid-19

Notification S. O. 3703, Notification S.O. 3704 and Notification S.O. 3705 dated August 5, 2022

The Finance Act 2022 has amended provision of section 17(2) and section 56(2)(x) of the ITA. In view of amendment in said sections, any payment by the employer/any person to an employee/recipient in respect of (i) his medical treatment or (ii) treatment of his family member on account of Covid-19 or (iii) any payment to a family member of deceased person on account of death of the employee/any person would not be taxable perquisite/taxable receipt in the hands of the employee/any person.

The above notification specifies following conditions/ documents to be obtained from the employee/recipient to avail exemption –

- COVID-19 positive report or medical report of the employee/person or his family member;
- All necessary documents of medical diagnosis or treatment of the employee/person or family member due to COVID-19 or illness related to COVID-19 suffered within six months from the date of being determined as a COVID-19 positive;
- A medical report or death certificate issued by a medical practitioner or a government civil registration office specifying the reason for death is COVID-19

Important Notifications

- Statement of money received for expenditure incurred on medical treatment of the employee/any person or his family member (Form 1);
- Statement of money received by a family member of a deceased person from employer/any person on account of death due to COVID-19 (Form A)

Further in the case of receipt of money on event of death of the employee/any person, the CG has also notified the condition that the death of the individual should be within six months from the date of testing positive or from the date of being clinically determined as a COVID-19 case.

It is also notified that the prescribed form (Form 1 and Form A) for furnishing statement of money received in any financial year shall be furnished within nine months from the end of the financial year or 31-12-2022, whichever is later.

CBDT notifies time limit for e-verification or submission of ITR-V

Notification no. 5/2022 dated July 29, 2022

Vide above notification the CBDT has notified the time limit for e-verification or submission of form ITR-V from the date of uploading of ITR electronically as summarized under –

Date of filing of ITR	Time limit
Prior to 01-08-2022	120 days
On or after 01-08-2022	30 days

CBDT has also clarified that in case of delay in e-verification or submission of ITR-V beyond 30 days, the date of e-verification or submission of ITR-V shall be considered the date of furnishing the ITR. Consequently, it would be treated as late filing of ITR, and consequential interest would be charged (though ITR was filed within due date of filing the ITR).

It is also clarified that Form ITR V is to be sent to the specified address (Centralized Processing Centre, Income Tax Department, Bangaluru – 560500, Karnataka) through speed post only. The date for computing time limit of 30 days would be considered from the date of transmitting data of ITR electronically.

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Important Rulings

India

Payments to a non-resident under Shared Service Agreement not taxable as Royalty

Deloitte Haskins & Sells LLP [ITA No. 201 to 233 of 2021, 4800 to 4804 of 2019 & 4010 to 4814 of 2019] [ITAT - Mumbai]

The Taxpayer (and other related entities) made payments to a Network Company based out of the UK in respect of three items, (i) global brand, (ii) global communications, and (iii) global technology/knowledge management without withholding any tax in India. Revenue contended that the payment was in nature of royalty and liable to withholding of tax under section 195 of the Act. The Taxpayer challenged the contention of the Revenue on several grounds, viz. payment not being in the nature of royalty, principle of consistency, principle of mutuality and lastly, payment being in the nature of reimbursement.

As regards global brand, the Mumbai Bench of ITAT held that payment for the same was not in the nature of royalty as what the Network Company provided were common policies and guidance relating to the brand and it involved no intellectual property, use of trademark or patent. Further, the guidance was for internal consumption of the members and therefore, no information concerning industrial, scientific, or commercial experience was provided.

Similarly, for Global Communication, the Bench held the payments towards the same as not royalty as the only activity that the Network company did was to distribute publications and reports to member firms, provide guidance and support global public relations for having alignment in internal and external communication and it was only for internal consumption of members (as held for Brand).

Lastly, the Bench held that payments towards Global technology/knowledge management would also not fall within the definition of "royalty" since the foreign company only acquired the software from the vendor for internal use of member firms which did not involve transfer of any right in the software or copyright.

In arriving at the conclusions favorable to the Taxpayer, the Bench has relied heavily upon the understanding (and arriving at a principle) that all the services were purely for internal consumption of the member firms which brought them out of the purview of "commercial experience" and thereby also out of the purview of "royalty". It would be interesting to see if the appellate authorities would apply the same principle to cases of all intra-group transactions wherein group companies provide services for internal consumption of other group companies. The Bench has refrained from commenting on the other contentions of the Taxpayer related to Principle of Continuity, Principle of Mutuality and the payment being reimbursement in nature.

Business support services and referral fees not taxable as fees for technical services

Michael Page International Recruitment Pvt Ltd v. DCIT [ITA No.144/Mum/2021] [ITAT – Mumbai]

Taxpayer was a tax resident of Singapore and provided business support services (to its Indian group entity) that mainly consisted of management support, administrative support,

finance, marketing and internet support, routine operational support services and referral work. The Taxpayer did not offer the fees received for the said services to tax, on the ground that the services did not "make available" any technical knowledge and accordingly was not taxable as FTS in terms of Article 12 of the India-Singapore DTAA.

During tax proceedings, Revenue denied claim of the Taxpayer contending that that support services provided by the Taxpayer were covered under "Fees for included services" as the "make available" clause was fully satisfied since the said services made available to the Indian group entity an enduring benefit and the said services could be used by the group entity for the business purposes in succeeding years.

The observation of Revenue was confirmed by the Dispute Resolution Plan and hence the Taxpayer filed an appeal with the Mumbai Bench of ITAT.

The Bench, after considering decision of Ahmedabad Bench in the case of Shell Global International Solutions BV and as per the provisions of India-Singapore DTAA held in favor of the Taxpayer observing that in order to invoke make available clause, and to fit into the terminology "making available", the technical knowledge and skill must remain with the person receiving the services even after the particular contract comes to an end and the technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. Technology will be considered "made available" when the person acquiring the service is enabled to apply the technology independently.

It accordingly held that in the present case, the condition of "making available" was not getting satisfied and hence the payments were not taxable under India-Singapore DTAA.

The issue of "make available" seems to be largely settling in favor of taxpayers wherein Tribunals and Courts have been relying upon the principle discussed above. Referring to the language of section 90(2), the Bench held that once the taxability failed in terms of treaty provisions, there was no occasion to refer to the provisions of the Act. As regards the argument of the tax authorities that the taxpayer had itself offered the said payments to tax in the preceding year, the Bench held that merely because a taxpayer offers an income to tax in an earlier year, it does not take away its right to take a correct position of non-taxability in the subsequent year.

Beneficial DTAA rates to prevail over rates prescribed under section 206AA

Air India Limited [TS-619-HC-2022 (Del)] – Delhi High Court

In this case, an appeal was filed by Revenue against the order passed by ITAT holding that provisions of section 206AA of the Act could not override beneficial provisions of the DTAA as per section 90(2) of the Act.

In the instant case, Taxpayer made payments in the nature of rent for hiring engine of Aircraft from a company that was a tax resident of the Netherlands that and did not have any permanent establishment in India. It had also not obtained a PAN in India.

Important Rulings

While making the payment under a grossing up arrangement, Taxpayer applied tax rate of 10% as per the provisions of India-Netherlands DTAA. While processing the statement of TDS, order under section 200(1) was passed wherein the demand was generated on account of short deduction of tax as per the provisions of section 206AA of the Act. As per the revenue, in absence of PAN of the foreign company, tax should have been deducted at the highest rate of 20% as prescribed under section 206AA of the Act.

Against the said order, Taxpayer filed an appeal before the CIT(A) and then ITAT. ITAT ruled in the favor of the Company.

On appeal by the Revenue, High Court held that the issue was already covered and answered in the favor of another taxpayer [Danisco India (P) Ltd] by the same High Court in the case of Danisco India (P) Ltd. In the said judgment, the High Court had relied upon multiple judgments including that of the Supreme Court in the case of Azadi Bachao Andolan and Pune Bench of ITAT in the case of Serum Institute of India wherein it was held that in case of a non-resident, provisions of a DTAA would prevail over that of the Act including the charging provisions of section 4 and 5, to the extent such DTAA provisions are more beneficial. In view of above decision and settled position of law, High Court dismissed the appeal filed by the Revenue and held in favor of the taxpayer.

It is important to note that there is a specific Rule 37BC (inserted w.e.f. 24 June 2016) in the Income-tax Rules, 1962 that provides for relief from the rigors of section 206AA in case of payments to non-residents subject to certain conditions. This may possibly imply that provisions of section 206AA would apply even in DTAA cases. However, there is now a plethora of rulings including the instant case wherein Courts have upheld the supremacy of DTAA provisions over section 206AA.

Important Notifications

India

Mechanism for claiming refund in "grossing-up" cases

CBDT Notification 98 of 2022 [F. No. 370142/33/2022-TPL] dated 17 August 2022

Vide issue of this notification, CBDT has inserted Rule 40G in the Income-tax Rules, 1962, which provides for a mechanism of claiming refund under section 239A of the Act. The said refund can be claimed by filing Form 29D in the prescribed manner. Form 29D asks for various details in respect of payer, payee, nature of transaction, past refund of similar tax, if any, tax payment details, reason for non-deduction of tax, etc.

Section 239A was inserted in the Act vide Finance Act, 2022. This section provides that where under any agreement or arrangement in writing, any tax deductible on any income, other than interest, under section 195 of the Act is borne by the person by whom the income was payable and after making such payment of tax, if person claims that no tax was required to be deducted on such income, then he can file an application before the AO, within 30 days from the date of payment of tax, for claiming refund of such tax.

Non applicability of TCS provisions pertaining to LRS and overseas tour payments in case of non-resident buyers

CBDT Notification 99 of 2022 [F. No. 370142/9/2022-TPL Part (2)] dated 17 August 2022

Vide issue of this notification, CBDT has clarified that provisions of section 206C(1G) shall not be applicable to a person (being a buyer) who is a non-resident in terms of section 6 of the Act and who does not have a permanent establishment in India.

Section 206C(1G) inter-alia provides for collection of tax by:

- AD banker who receives any sum from a buyer for remitting the sum out of India under Liberalized Remittance Scheme of RBI;
- Seller of an overseas tour program package, who receives any amount from a buyer, being a person who purchases this package.

CBDT extends the time limit to furnish Form No. 67

Notification No. 100/2022 dated August 18, 2022

In a major relief to Taxpayers for claim of foreign tax credit, now, Form No. 67 and the certificate/statement as referred in Rule 128(8)(ii) can be filed on or before the end of the relevant assessment year in which income is offered to tax and the return for such assessment year has been furnished u/s 139(1) / 139(4) of the ITA. In a case where updated return is furnished u/s 139(8A) of the ITA, Form 67 and the certificate/statement as referred in Rule 128(8)(ii) can be filed on or before the date on which such return is filed.

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Important Rulings

Similar functional profile of the international / controlled transactions calls for similar consideration / pricing irrespective of the location of the associated enterprises

EIT Services India Pvt. Ltd. (formerly known as Hewlett Packard Global Soft Pvt. Ltd.) IT(TP)A No. 810/Bang/2016

The taxpayer is a captive service provider which is engaged in provision of software development and information technology enabled services to its Group entities across the globe.

TPO proposed adjustments to ALP of the international transactions carried out by the Taxpayer for Software Development services, ITeS services, and Marketing services provided by it to various AEs including AE in USA. While the appeal against the Assessment order passed by AO pursuant to Dispute Resolution Panel (DRP) Direction was pending, Assessee filed an Application to Competent authority of India and USA to initiate Mutual Agreement Procedure (MAP) under Article 27 of India USA DTAA.

The MAP was initiated to seek relief and certainty with respect to the markup charged in the provision of aforesaid services to US based AE. The Competent Authorities issued resolution with markup to be charged for various services provided US Based AE which was accepted by the Taxpayer.

In view thereof, the Taxpayer filed additional ground before ITAT wherein the Taxpayer contended that arm's length price agreed between competent authorities of India and USA in MAP should be applied for determining ALP of services provided to AEs situated in countries other than USA as well.

The taxpayer argued that the functional profile (i.e., the functions performed, assets utilized, and risks undertaken) in the services provided to the US based AE is similar to the functional profile of the services provided to the non-US based AEs. Therefore, the ALP considering in MAP should also be applied for non-US based AEs.

The ITAT accepted the argument of the Taxpayer in applying ALP as concluded under MAP for US based client for determining ALP of same transaction with non-US based AEs considering similar functional profile and circumstances under which such services were provided to both the set of AEs.

'Yield Spread' method for benchmarking Commission on Corporate Guarantee

Sikka Ports & Terminals Ltd [ITA No. 2139/Mum/2021]

For AY 2013-14, the Taxpayer gave certain corporate guarantees to third parties, undertaking the contractual and other obligations of its AEs. To benchmark the commission for guarantee, the Taxpayer adopted 'yield spread approach'. The yield spread analysis is based on calculating the difference in the current market interests for the guarantor and the guarantee recipient, which is termed as yield spread and which is divided between the guarantor and the beneficiary.

On the basis of quote obtained from the Royal Bank of Scotland (RBS), the Taxpayer computed 70 bps as yield spread and, accordingly, computed 0.35% as arm's length price of the corporate guarantee benefit.

However, TPO was of the opinion that the quote from RBS cannot be an appropriate basis for

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computing the interest differential, as it was dated 01-04-2013 i.e. after the end of the relevant previous year, and was with a rider that such quote does not constitute any commitment or offer by bank and that the bank had the right to change the terms. TPO then proceeded to ascertain ALP of corporate guarantee at 1.5% based on relevant information requisitioned from HDFC Bank and State Bank of India (SBI) for "all types of guarantees."

On appeal, CIT(A) restricted the ALP adjustment to 0.5%, following Bombay HC ruling in Everest Kento Cylinders Ltd.

ITAT held that date or time period of quotation is not significantly important while adopting yield spread approach for determining Arm's Length fees for issuing corporate guarantee. ITAT mentioned that the material factor is the difference between such quoted rates of interest for loan with guarantee and without guarantee.

ITAT further observed that if the rate differential between these two rates of interest is 70 bps at the end of the relevant previous year, it is reasonable to proceed on the basis that such a differential would also prevail during the relevant previous year.

ITAT mentioned that the riders in quotes by banks are usual feature of legally guarded business quotations it does not vitiate the nature of the quote. Accordingly, the objections taken by the revenue authorities to the adoption of yield spread approach were held as not legally sustainable. Further, ITAT also mentioned that the quotations obtained from HDFC Bank and SBI were for the bank guarantees simplicitor and not for corporate guarantees. These two kinds of guarantees are materially different and cannot be compared for arm's length analysis.

ITAT upheld the yield spread approach adopted Taxpayer for determining ALP for fees for corporate guarantee to be appropriate.

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Important Notifications

Notifications

Compulsory e-invoicing

Notification number 17/ 2022- Central Tax dated August 1,2022

Seeks to implement e-invoicing for the taxpayers having aggregate turnover exceeding Rs. 10 Crore from October 1, 2022.

Presently e-invoicing is mandated only for taxpayers having aggregate turnover exceeding Rs. 20 Crore.

Circulars

Clarifications on GST rates and exemptions

Reference number - 177/09/2022-GST; Date - August 3, 2022

Following clarifications regarding applicable GST rate & exemptions to be applied on certain services have been issued –

- Supply of ice-cream by ice-cream parlors for the period prior to October 6, 2021, at the rate of 5% without ITC shall be treated as fully GST paid. With effect from 6 October 2021, the ice-cream parlors are required to pay GST on supply of ice-cream at the rate of 18% with ITC.
- Amount or fee charged from prospective students for entrance or admission or for issuance of eligibility certificate to them in the process of their entrance/admission as well as the fee charged for issuance of migration certificates by educational institutions to the leaving or ex-students is covered by exemption under Sl. No. 66 of Notification No. 12/2017-Central Tax (Rate) dated June 28, 2017.
- Service by way of storage or warehousing of cotton in ginned and/or baled form was covered under entry 24B of notification No. 12/2017-Central Tax (Rate) dated June 28, 2017, in the category of raw vegetable fibers such as cotton.
  It may however be noted that this exemption has been withdrawn w.e.f. July 18, 2022.
- It is clarified that exemption under serial number 9B of notification 12/2017 – Central Tax (Rate) shall cover services associated with transit cargo both "To" and "From" Nepal & Bhutan.
  It is also clarified that movement of empty containers from Nepal & Bhutan, after delivery of goods there, is a service associated with the transit cargo to Nepal & Bhutan and is therefore covered by the exemption.
- Sanitation and conservancy services procured by Indian Army or any other Government Ministry / Department which does not perform any functions listed in the 11th and 12th schedule in the manner as a local authority does for the general public, would not be eligible for exemption under serial number 3 and 3A of the notification 12/2017-Central Tax (Rate).
- Sale of space for advertisement in souvenir book would be attracting GST rate of 5%.
- Renting of trucks and other freight vehicles with driver for a period of time is a service of renting of transport vehicles with operator and not service of transportation of goods by road.
- Location charges or preferential location charges (PLC) paid upfront in addition to the lease premium for long term lease of land constitute part of upfront amount charged

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for long term lease of land and are eligible for the same tax treatment [i.e. eligible for exemption under serial number 41 of notification no. 12/2017-Central Tax (Rate) dated June 28, 2017- when provided by State Government Industrial Development Corporation or Undertakings or by any other entity having 20 percent or more ownership of Central Government, State Government, Union Territory to the industrial units or developers in any industrial or financial business area].

- Services provided by guest anchors in lieu of honorarium attracts GST liability.
- Additional fee collected in the form of higher toll charges from vehicles not having Fastag is essentially payment of toll for allowing access to roads or bridges to such vehicles and shall be given the same treatment as given to toll charge.
- Services by way of IVF are also covered under the definition of health care services for the purpose of GST exemption.
- Sale of developed land (i.e., after development such as levelling, laying down of drainage lines, water lines, electricity lines etc.) is also a sale of land and shall not attract GST.

  However, service provided for development of land like levelling, laying of drainage lines, shall attract levy of GST.
- Where the body corporate hires motor vehicle (for transport of employees etc.) for a period of time, during which the motor vehicle shall be at the disposal of the body corporate, the service would fall under Heading 9966 (i.e., renting of motor vehicle designed to carry passengers), and the body corporate shall be liable to pay GST on the same under RCM.

  However, where the body corporate avails the passenger transport service for specific journeys or voyages and does not take vehicle on rent for any particular period of time, the service would fall under Heading 9964 (i.e. service of transportation of passengers) and the body corporate shall not be liable to pay GST on the same under RCM.
- Exemption shall not be applicable where contract carriage is hired for a period of time, during which the contract carriage is at the disposal of the service recipient and the recipient is thus free to decide the manner of usage (route and schedule).
- Transportation of passengers by public transport, other than predominantly for tourism purpose, in a vessel between places located in India, is exempted. It is clarified that this exemption would apply to tickets purchased for transportation from one point to another irrespective of whether the ferry is owned or operated by a private sector enterprise or by a PSU / government.
- It is further clarified that the expression 'public transport' used in the exemption notification only means that the transport should be open to public. It can be privately or publicly owned. Only exclusion is on transportation which is predominantly for tourism, such as services which may combine with transportation, sightseeing, food and beverages, music, accommodation such as in shikara, cruise etc.

Clarifications on taxability of certain transactions

Reference number - 178/10/2022 – GST; Date - August 3, 2022

Important Notifications

Following clarifications has been issued with regard to taxability of certain transactions –

A. Liquidated damages

Where the amount paid as 'liquidated damages' is an amount paid only to compensate for injury, loss or damage suffered by the aggrieved party due to breach of the contract and there is no agreement, express or implied, by the aggrieved party receiving the liquidated damages, to refrain from or tolerate an act or to do anything for the party paying the liquidated damages, in such cases liquidated damages are mere a flow of money from the party who causes breach of the contract to the party who suffers loss or damage due to such breach. Such payments do not constitute consideration for a supply and are not taxable.

B. Compensation for cancellation of coal blocks

Compensation given for cancellation of coal blocks cannot be considered as a service provided by prior allottees of the coal block and is therefore not taxable.

C. Cheque dishonor fine / penalty

The fine or penalty that the supplier or a banker imposes, for dishonor of a cheque, is a penalty imposed not for tolerating the act or situation but for not tolerating, and thereby deterring and discouraging such an act or situation. Therefore, cheque dishonor fine or penalty is not a consideration for any service and not taxable.

D. Penalty imposed for violation of laws

Penalty imposed for violation of any law is not a taxable service. No GST would be required to be paid.

E. Forfeiture of salary or payment of bond amount in lieu of notice period

Amounts recovered by the employer from employee not serving the agreed contractual period, are not taxable.

F. Compensation for not collecting toll charges

Compensation received from NHAI by toll operators during November 8, 2016, to December 1, 2016, for loss of toll charges during demonetization, will have to be considered as towards toll charges only and not as a taxable service.

G. Late payment surcharge or fee

Late payment charges should be assessed as the same rates as the principal supply for which the late payment charges has been paid.

H. Fixed capacity charges for power

Both the components of the price, the minimum fixed charges/capacity charges and the variable/energy charges are charged for sale of electricity and are thus not taxable as electricity is exempt from GST.

I. Cancellation charges

Facilitation service of allowing cancellation of an intended supply against payment of cancellation fee or retention or forfeiture of a part or whole of the consideration or security deposit in such cases should be assessed as the principal supply.

Important Notifications

Clarification regarding 47th GST Council Meeting

Reference number - 179/11/2022-GST; Date - August 3, 2022

Clarification has been issued regarding GST rates & classification based on the recommendations of the 47th GST Council Meeting for following –

- Electric vehicles whether or not, fitted with a battery pack- to attract GST of 5%.
- Stones otherwise covered in Sr. No. 123 of Schedule-I (such as Napa stones), which are not mirror polished, are eligible for concessional rate under said entry.
- Mangoes under CTH 0804 (including mango pulp), other than fresh mangoes and sliced, dried mangoes, attract GST at 12% rate.
- Treated sewage water attracts Nil rate of GST.
- Nicotine Polacrilex Gum attracts a GST rate of 18%.
- Fly ash bricks and aggregate - condition of 90% fly ash content applied only to fly ash aggregate, and not fly ash bricks.

Instruction

Implications for offences punishable under CGST Act

Instruction number 02 & 03 of 2022-23 [GST-INV] dated August 17, 2022

Guidelines for arrest and bail in relation to offences punishable under the CGST Act, 2017 and guidelines on issuance of summons under provisions of section 70 of CGST Act have been published.

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Important Notifications

MCA

Clarification on Corporate Social Responsibility (CSR) Expense related to "Har Ghar Tiranga" campaign

General Circular No. 08 dated July 26, 2022

Any Company that spent funds under the 'Har Ghar Tiranga' campaign upto August 15, 2022, by way of either supplying of National Flag or by doing mass production of National Flag or any related activities shall be entitled to claim the same as expense undertaken for CSR Activities under the head "promotion of education relating to culture" of Schedule VII of the Companies Act, 2013.

Introduction of Companies (Incorporation) Third Amendment Rules, 2022 for physical Verification of Company's Registered Office (RO) by Registrar of Companies (RoC)

Notification dated August 18, 2022

Ministry of Corporate Affairs (MCA) has been introducing various steps to ensure necessary checks and balances to avoid frauds and malpractices, including verification of registered office by filing Form INC-22.

To ensure greater transparency an amendment has been made in the Incorporation Rules 2014 by inserting Rule 25B - **physical verification of the Registered Office (RO) of the company by Registrar of Companies (RoC)**, which gives the powers to RoC to physically verify the address where the Company has the registered office. The process of physical verification and the steps thereafter are stated below:

- The RoC officer shall carry out the physical verification of the said Registered Office in the presence of two independent witness of the locality and if required, RoC Officer may seek assistance of the local Police.
- On the basis of verification, the RoC Officer shall prepare a detailed report with detailed information, including location details and photographs as per the prescribed format.
- Where the RoC Officer believes that the company is not capable of receiving and acknowledging communication at its registered office, he shall send a notice to the company and to all its directors of the intention to remove the name from the register of companies.
- Unless the company and/or its directors revert within 30 days from the date of the said notice, necessary action shall be taken by the RoC as per Section 248 of the Act.

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RBI & FEMA

Foreign Exchange Management (Overseas Investment) Rules, 2022 and Foreign Exchange Management (Overseas Investment) Regulations, 2022

Notification No G.S.R. 646(E) dated 22 August 2022, issued by Ministry of Finance (Department of Economic Affairs)

Notification No. FEMA 400/2022 – RB dated August 22, 2022, issued by RBI

Overseas investments norms earlier issued in 2004 have been completely revamped on the lines of Foreign Investment in India Rules & Regulations with the notification of Rules and Regulations by Government of India and Reserve Bank of India respectively on August 22, 2022. Detailed note on the amended provisions on the Overseas Investments by a Person Resident in India has been presented and shared in our kcmFlash September 03,2022.

Some of the salient features of the new provisions are as follows:

- Introduction of 'Strategic sector' as a separate class for overseas investment where ODI limits can exceed the 400% of the net-worth criteria.
- Overseas Direct Investment (ODI) and Overseas Portfolio Investment (OPI) defined with cap of 10% for OPI, including the concept of 'control'.
- ODI-FDI structures ("Round-tripping structures") not permitted under the extant guidelines now permissible subject to not more than two layers of subsidiaries.
- Non-financial services sector entities in India now permitted to invest in an entity engaged in the financial services sector outside India.
- No Objection Certificate (NOC) required for an Indian entity having NPA with a financial institution / declared willful defaulter or undergoing investigation by an investigative agency such as ED/CBI etc., before undertaking financial commitment overseas.
- Divestment norms eased in cases of overseas merger / demerger / amalgamation, where investment held for less than one year.
- Restrictions on restructuring of balance sheet removed for both listed / unlisted entities having overseas investments, on the condition that the overseas entity is loss making.
- Resident Individual permitted to acquire foreign securities by way of inheritance (from a person resident in India or outside India) or gift (from a relative resident in India) without any limits.
- Overseas Investment in International Financial Services Centre ('IFSC') permitted to a person resident in India as per the new Rules / Regulations regulating such investments.

External Commercial Borrowings (ECB) Policy – Liberalization Measures

Notification No. RBI/2022-23/98 issued vide A.P. (DIR Series) Circular No. 11 dated August 01, 2022

With a view to further liberalize the forex flows into the country, Reserve Bank of India (RBI) has introduced the following measures for availing External Commercial Borrowings (ECB) by Indian

Important Notifications

borrower. The easing measures are applicable up to December 31, 2022:

- Increased the existing limit of eligible borrowers to raise ECB under the automatic route from USD 750 million to USD 1.5 billion (or equivalent per financial year).
- All-in cost ceiling for ECBs raised by 100 bps, but only for such eligible borrowers with investment grade rating from the Indian Credit Rating Agencies (CRAs).

SEBI

Listing obligations and disclosure requirements for Non-convertible Securities, Securitized Debt Instruments and/ or Commercial Paper

SEBI/HO/DDHS/DDHS_Div1/P/CIR/2022/103 dated July 29, 2022

Operational guidelines for listing obligations and disclosure requirements for Non-convertible Securities (NCS), Securitized Debt Instruments and Commercial Paper notified. The Circular covers the following key areas such as:

- detailed disclosure requirements in respect of filing of financial information
- formats for Limited review report
- impact of audit qualifications, related party transactions
- Statement indicating utilization and deviation/variation in use of proceeds of issue of listed NCS
- format for review of rating obtained from Credit Rating Agencies.

Effective Date: from August 1, 2022.

The objective of this Circular is to ensure effective regulation of the corporate bond market and to enable the issuers and other market stakeholders to get access to all the applicable circulars at one place.

Automated deactivation of Trading and Demat accounts in cases of inadequate KYCs

SEBI/HO/EFD1/EFD1_DRA4/P/CIR/2022/104 dated July 29, 2022

SEBI has proposed a framework for deactivation of Trading and Demat accounts of the entities whose KYC details are not accurate / updated in the records of stock exchanges and depositories ("MIIs") and subsequent re-activation post acknowledgement of Show Cause Notice (SCN) issued by SEBI and fulfilment of KYC compliances on confirmation given by the registered intermediary (BSE/NSE/NSDL/CDSL).

Effective Date: from August 31, 2022.

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Framework for restricting trading by Designated Persons ("DPs") by freezing PAN at security level

SEBI/HO/ISD/ISD-SEC-4/P/CIR/2022/107 dated August 05, 2022

Clause 4 (1) of Schedule B read with Regulation 9 of PIT Regulations states that the trading window shall be closed for 'Designated persons' for the period when the compliance officer determines that a designated person or class of designated persons can reasonably be expected to have possession of unpublished price sensitive information (UPSI).

As a part of these restrictions, there is a trading restriction period from the end of every quarter till 48 hours after the declaration of financial results. To avoid inadvertent non-compliance of trading restrictions, SEBI has initiated a process of freezing PAN of Designated Persons (DPs) and their immediate relatives undertaking transactions during trading window closure period pertaining to the declaration of the financials results. On the basis of information of DPs provided by the listed company to their Designated Depositories (DD), the same will be shared with the concerned Stock Exchanges for trading window closure commencement date.

This process shall initially be applicable to listed entities which are part of benchmark indices (i.e.) National Stock Exchange (Nifty 50) and Bombay Stock Exchange (SENSEX).

Effective Date: from the quarter ending September 30, 2022.

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Abbreviations

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Abbreviation	Meaning
AAR	Authority of Advance Ruling
AAAR	Appellate Authority of Advance Ruling
AAC	Annual Activity Certificate
AD Bank	Authorized Dealer Bank
AE	Associated Enterprise
AGM	Annual General Meeting
AIR	Annual Information Return
ALP	Arm's length price
AMT	Alternate Minimum Tax
AO	Assessing Officer
AOP	Association of Person
APA	Advance Pricing Arrangements
AS	Accounting Standards
ASBA	Applications Supported by Blocked Amount
AY	Assessment Year
BOI	Body of Individuals
BRC/FIRC	Bank Realisation Certificate / Foreign Inward Remittance Certificate
CBDT	Central Board of Direct Tax
CBIC	Central Board of Indirect Taxes and Customs
CCA	Cost Contribution Arrangements
CCR	Cenvat Credit Rules, 2004

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

Abbreviation	Meaning
FEMA	Foreign Exchange Management Act, 1999
FII	Foreign Institutional Investor
FIFP	Foreign Investment Facilitation Portal
FIRMS	Foreign Investment Reporting and Management System
FLAIR	Foreign Liabilities and Assets Information Reporting
FPI	Foreign Portfolio Investor
FOCC	Foreign Owned and Controlled Company
FTC	Foreign Tax Credit
FTP	Foreign Trade Policy 2015-20
FTS	Fees for Technical Service
FY	Financial Year
GAAR	General Anti-Avoidance Rules
GDR	Global Depository Receipts
GOI	Government of India
GST	Goods and Service Tax
GSTN	Goods and Services Tax Network
GVAT Act	Gujarat VAT Act, 2006
HC	High Court
HSN	Harmonized System of Nomenclature
ICAI	Institute of Chartered Accountant of India

Abbreviations

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Abbreviation	Meaning
ICDS	Income Computation and Disclosure Standards
ICDR	Issue of Capital and Disclosure Requirements
IEC	Import Export Code
IGST	Integrated Goods and Services Tax
IRDA	Insurance Regulatory and Development Authority
ISD	Input Service Distributor
ITA	Income Tax Act, 1961
ITC	Input Tax Credit
ITR	Income Tax Return
IT Rules	Income Tax Rules, 1962
ITAT	Income Tax Appellate Tribunal
ITR	Income Tax Return
ITSC	Income Tax Settlement Commission
JV	Joint Venture
LEO	Let Export Order
LIBOR	London Inter Bank Offered Rate
LLP	Limited Liability Partnership
LO	Liaison Office
LODR	Listing Obligations and Disclosure Requirements
LTA	Leave Travel Allowance
LTC	Lower TDS Certificate

Abbreviation	Meaning
LTCG	Long term capital gain
MAT	Minimum Alternate Tax
MCA	Ministry of Corporate Affairs
MEIS	Merchandise Exports from India Scheme
MSF	Marginal Standing Facility
MSME	Micro, Small and Medium Enterprises
ODI	Overseas Direct Investment
OECD	The Organization for Economic Co-operation and Development
OM	Other Methods prescribed by CBDT
PAN	Permanent Account Number
PE	Permanent establishment
PPT	Principle Purpose Test
PSM	Profit Split Method
PY	Previous Year
RBI	Reserve Bank of India
RCM	Reverse Charge Mechanism
RMS	Risk Management System
ROR	Resident Ordinary Resident
ROSCTL	Rebate of State & Central Taxes and Levies
RoDTEP	Remission of Duties and Taxes on Exported Products

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