K C Mehta & Co LLP

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kcm Insight

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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.

Coverage

Detailed Analysis

Abbreviations

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

Coverage | Detailed Analysis

Mergers & Acquisitions

Valuation Prescription in Healthcare

Changing Valuation Prescription in the Healthcare Sector

Corporate Tax

Important Rulings

Disallowance for non-deduction of tax at source not attracted for expenditure not debited to P&L account

10AA deduction is eligible on 'Deemed Exports' under SEZ Act

Fair value of the share need not necessarily be the price for which it is actually sold in the market

Unpaid GST liability is disallowable u/s 43B even though not debited to P&L statement - exclusive method of accounting

Corporate Tax

Important Notifications

CBDT issues revised guidelines for compounding of offences under the ITA

CBDT has issued additional guidelines for removal of difficulties u/s 194R of the ITA

International Tax

Important Rulings

India

Services inextricably linked to supply of equipment cannot be taxed as Fees for Included Services under India-US DTAA

Filing of Form 67 on or before the due date of filing the return of income is not mandatory to claim of foreign tax credit

Non-resident taxpayer entitled to refund in virtual bank account in India in absence of existing mechanism to receive refund in overseas bank account

Interest on Income-tax refund not liable to TDS under India – Netherlands DTAA by virtue of MFN Clause

International Tax

Important Rulings

Foreign

Managing Director working from home does not constitute a PE

Important Notifications

Foreign

Columbia proposed to introduce Significant Economic Presence (SEP)

Coverage | Detailed Analysis

Indirect Tax

Important Notifications

Notifications
Effective date for Union Budget changes notified

GST Rules amended

Extension of due date for filing refund application by notified agencies rescinded

Circulars
Guidelines issued for filing / revising GST Tran-1 and Tran-2 returns

Instructions
Guidelines for prosecution

Important Rulings

M/s Sterling Simplified India Private Limited Vs Commissioner of CGST, East Delhi [Final order number 50825 / 2022 – pronounced by CESTAT Delhi]

Sembcorp Energy India Limited Vs State of AP [TS-468-HC (AP) 2022-GST]

Directorate General of Foreign Trade / Foreign Trade Policy

Corporate Laws

Important Notifications

MCA
Alteration in the definition of Small Company

Introduction of Companies (Corporate Social Responsibility Policy) Amendment Rules, 2022

Important Notifications

RBI
Master Directions on Interest Rate on Deposits

Rupee Drawing Arrangement - Enabling Bharat Bill Payment System (BBPS) to process cross-border inbound Bill Payments

Important Notifications

SEBI
Change in Beneficial Owner (BO) account in case of death of Karta of HUF

Performance/return claimed by unregulated platforms offering algorithmic strategies for trading

Valuation Prescription in Healthcare

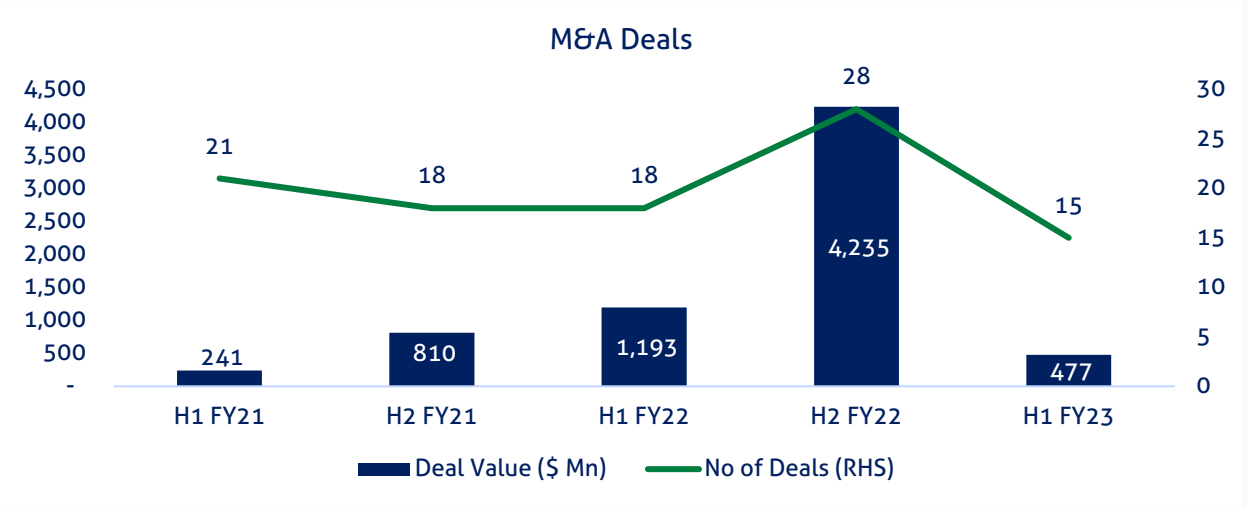
Changing Valuation Prescription in the Healthcare Sector

Background

Popular perception amongst several stakeholders that Covid-19 has been a boon to the healthcare industry has been waning with progressive decline in the aftereffects of Covid-19. India being the 3rd largest player in the world by volumes of drugs produced in the pharmaceutical sector, witnessed significant traction of M&A, PE and public capital market deals starting in FY21 until end of FY22. However, with the effects of Covid-19 practically seeping in by the second half of FY22, the sector lost its steam and started seeing a decline in number of deals as well as valuation.

Recent Deal Scenario in Healthcare Sector

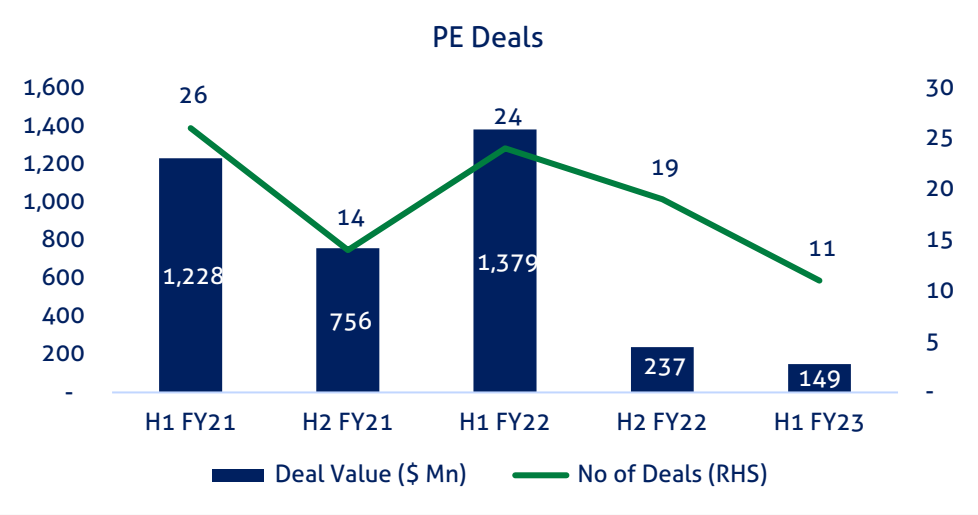
M&A space witnessed around 18-20 deals in each half of the year starting FY21 until H1FY22 which increased to 28 deals in H2FY22. Deal values also progressively increased through this period. Biocon's acquisition of Viatris (Biosimilars Business) from Mylan for US$ 3,335 Mn in H2 FY22 topped the charts. However, M&A deal values as well as volumes declined in H2 of FY23 together with decrease in valuation multiples as the effect of Covid-19 normalized.



Source: VCCEdge; Deal values were considered only where publicly available

PE investment ecosystem also showed a similar trend where the number of deals fell from 24 in H1FY22 to 11 in H1FY23 witnessing decline by more than a half. PE deal values in the healthcare space also decreased sharply from US$ 1,379 Mn in H1FY22 to a meagre US$ 149 Mn in H1FY23 coupled with significant correction in valuation multiples offered. Key deals here included private equity fund raising by Piramal Pharma (US$ 467 Mn) and J B Chemicals and Pharmaceuticals (US$ 496 Mn) in H1FY21 and by Zydus Lifesciences (US$ 342 Mn) and Novopan Industries (US$ 320 Mn) in H1FY22.

Valuation Prescription in Healthcare



Source: VCCEdge; Deal values were considered only where publicly available

In the public capital market space, India witnessed 5 pharma companies (i.e., Gland Pharma, Glenmark Lifesciences, Windlas Biotech, Supriya Lifesciences and Ami Organics) getting listed on the stock exchanges during FY21 and H1FY22. Existing listed companies like Alembic Pharma, Remedium Pharma, Wockhardt and Gennex Laboratories also raised funds from the market through rights issue and QIP during this period. However, a lull in IPOs and public market fund raising has prevailed thereafter.

It is worthwhile to note that all new public listings that happened in this period are currently trading on the stock exchanges at a discount ranging from 30-40% of their listing price. Further, Nifty Pharma Index has corrected by c. 12% over the last one year providing negative returns to the investors who entered at the peak.

What is driving the decline/correction?

Pharmaceutical sector is witnessing severe margin pressure due to increase in input costs. India is heavily dependent on China for some of the key raw materials required in manufacturing of drugs. The situation has been aggravated by the inability to fully pass on the price increase to the market, disruption in international freight operations, increased crude oil prices amid geopolitical tensions, return of lockdowns in China, increasing interest rates and soaking up of liquidity in financial markets by central banks of major economies. Resultantly, the pharmaceutical industry is witnessing significant decrease in margins in the current financial year.

All these factors are reflected in the behavior of Indian financial markets as the average enterprise value to EBITDA (EV/EBIDTA) multiples of top listed companies by market cap in the healthcare sector witnessed gradual decline from the initial highs of 2020 to the recent correction in Sep-22.

Valuation Prescription in Healthcare

Company	EV/EBITDA multiple CY20	CY21	Sep-22
Sun Pharmaceuticals Industries Ltd	35	21	31
Divi's Laboratories Ltd	40	39	23
Cipla Ltd	17	15	18
Dr Reddy's Laboratories Ltd	27	19	13
Torrent Pharmaceuticals Ltd	20	22	25
Alkem Laboratories Ltd	17	19	23
Gland Pharma Ltd	30	38	19
Abbott India Ltd	27	21	13
Zydus Lifesciences Ltd	17	14	11
Aurobindo Pharma Ltd	10	5	7
Top 10 Listed Drug Manufacturers	24	21	18
Apollo Hospitals Enterprise Ltd	27	33	32
Max Healthcare Institute Ltd	77	47	40
Fortis Healthcare Ltd	37	18	22
Top Listed Hospitals	47	32	31
Biocon Ltd	33	24	20
Syngene International Ltd	35	31	27
Top Listed Biotech Companies	34	28	24

Source: Morningstar.in

Further, pharmaceutical companies such as Emcure Pharma, Infinion BioPharma, Veeda Clinical Research and Macleods Pharmaceuticals had filed for IPOs in FY22 but have currently kept their plans on hold due to uncertainties around valuation, growth, and sustainability of earnings.

Way forward

India being one of the instrumental players in the pharmaceutical industry is expected to grow significantly than its global peers. Government thrust towards production linked incentives, liberalized foreign direct investment criteria, boosting support infrastructure, fostering an ecosystem of research and innovation along with digital disruption should work as growth drivers to the healthcare industry.

Within the healthcare industry, innovative sectors such as biotechnology, medical technology, bioinformatics & bioelectronics, genomics & proteomics, and areas involving bio innovation and biomanufacturing are expected to witness traction in the deal space going forward.

Further, public companies like Mankind Pharma, Concord Biotech and Innova Captab have recently filed their draft red herring prospectus with the SEBI to raise funds through IPO. It will be interesting to see how the valuation and growth story gets unfolded in the healthcare sector, now that we have left behind the vagaries of Covid-19, hopefully!

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

Important Rulings

Disallowance for non-deduction of tax at source not attracted for expenditure not debited to P&L account

PCIT Vs. M/s Linde India Limited, ITAT/338/2016; IA No.GA/2/2016, Kolkata HC

The Taxpayer has made payment for installation of a gas plant at its premises in India to a foreign company. AO disallowed said payment u/s 40(a)(i) for non-deduction of tax u/s 195 of the ITA. CIT(A) and ITAT deleted the disallowance on the ground that said amount formed part of capital work in progress and was not debited to the profit and loss account.

HC observed that the provisions of section 40 start with non-obstante clause providing that certain amounts which are otherwise allowable as deduction u/s 30 to 38 of the ITA shall not be 'deducted' unless tax has been deducted at source. Therefore, if the disputed amount is neither debited to profit and loss account nor has been deducted while computing profits and gains of business or profession, section 40 of the ITA does not come into operation as such amount cannot be said to have deducted in computing income chargeable under such head.

HC relied on the decision of P&H HC in case of Mark Auto Industries IT Appeal No. 57 OF 2009 and Karnataka HC in case of Tally Solutions IT Appeal Nos. 199, 951 & 952 OF 2017 wherein it was held that when no amount was claimed as revenue expenditure, no disallowance u/s 40(a)(i) and 40(a)(ia) of the ITA can be made.

It is to be noted that depreciation, being an allowance and not an expenditure under ITA, is arguably not hit by provision of section 40(a)(i) unlike cash payment made for capital expenditure, hit by provision of section 40A(3), which shall not form part of actual cost of asset for the purpose of computing depreciation under ITA.

10AA deduction is eligible on 'Deemed Exports' under SEZ Act

DCIT v. Serum Institute of India Ltd ITA no. 323/Pun/2021, Pune ITAT

The Taxpayer has claimed deduction u/s 10AA in respect of sales made to United Nations International Children's Emergency Fund (UNICEF) in India. It has received sale proceeds in convertible foreign exchange, even in respect of supplies made in India. AO was of opinion that since sales were delivered in India and were not exported out of India, the Taxpayer is not entitled for deduction u/s 10AA of the ITA and accordingly denied deduction u/s 10AA of the ITA in respect of said sum.

CIT(A) relied on definition of 'exports' under the SEZ Act, 2005, which included 'deemed exports' and allowed the benefit of deduction u/s 10AA to the Taxpayer.

ITAT noted that the legislative history of provisions of section 10AA reveal that said provisions have been inserted in the Income Tax Act in order to give effect to the provisions of Special Economic Zone Act, 2005. Therefore, it is imperative that if a particular transaction of supply of goods falls within the ambit of the terms "export" as defined under Special Economic Zone Act, 2005, the same definition should be imported while construing the provisions of section 10AA of the ITA. As per the Rules framed under the Special Economic Zone Act, 2005 for the purpose of computing net foreign exchange earnings, even the supply made to the project funded by United Nation Agencies is considered as a "export".

In view of the above, ITAT concluded that Literal Interpretation of provisions under section 10AA produces a clear absurdity which could never have been intended by the Parliament. It is well settled

principle of construction that if a Literal Interpretation produces absurd results, then the purposive interpretation should be adopted having regard to the purpose behind the enactment of provisions of statute. Moreover, if a particular provision of statute has been incorporated in order to give effect to the provision of another enactment, like provisions of section 10AA under the ITA have been inserted to give effect to the provisions of SEZ Act, the provision of section 10AA should be interpreted in the sense in which they harmonize with the object of the SEZ Act.

Therefore, ITAT held that the benefit of deduction under the provisions of section 10AA cannot be denied to an assessee merely on the ground that the assessee had not exported the goods outside India despite the fact that the consideration was received in convertible foreign exchange in India.

It should be noted that the ITAT has not given its remark on definition of "export in relation to the Special Economic Zones" under Explanation 1 to section 10AA, which is defined as 'taking goods or providing services out of India from a Special Economic Zone by land, sea, air, or by any other mode, whether physical or otherwise'. In the instant case, the goods have not moved out of India and therefore, going by the definition, physical sales in India would not qualify as 'exports' even though consideration was received in foreign convertible currency.

Fair value of the share need not necessarily be the price for which it is actually sold in the market

Sushiladevi R Somani, ITA No 5795 (Mum) of 2016, ITAT Mumbai

The Taxpayer was a shareholder of a closely held company SCPL and during the year she has transferred the shares of SCPL and offered the long-term capital gain to tax in her ITR. The shares of SCPL were acquired prior to 01.04.1981 and therefore, The Taxpayer has computed the fair market value of the shares as on 01.04.1981 in accordance with section 55 of the ITA and computed the capital gain. The Taxpayer has adopted the intrinsic value of the assets held by SCPL as on 01.04.1981 as its fair value.

During the assessment proceeding, the AO observed that The Taxpayer has not adopted the recommended method for determining the FV of SCPL and that the FV determined by The Taxpayer is in variance with the price taken for the purpose of Wealth Tax. In view of the same, the AO rejected the FV and re-computed the capital gain tax by considering face value of SCPL as cost of acquisition.

The CIT (A) has upheld the order of the AO by holding that The Taxpayer cannot adopt different approach/method for the purpose of computing the capital gain under the ITA and that under the WTA.

Before ITAT, the Taxpayer has contended that the FV of the share need not to be the face value or the price at which it is sold but the price which it could fetch from the open market. The Taxpayer further argued that it has adopted intrinsic value of share i.e. net assets divided by the total number of equity shares.

The ITAT after considering the facts of the case and decision of ITAT Mumbai in the case of Shashi Dhamnidharka (ITA No 5314 of 2008) held that there is suitable difference between the term "Face Value" and "Fair Value" of the shared. The ITAT categorically referred to section 2(22B) of the ITA and held that intrinsic value of the shares is also one of the recognized methods under the ITA. The fair value of the share need not necessarily be the price at which it is actually sold. The ITAT accordingly set aside the order of AO and upheld the FV of SCPL adopted by the Taxpayer.

Important Rulings

Unpaid GST liability is disallowable u/s 43B even though not debited to P&L statement - exclusive method of accounting

Smt. Husna Parveen, ITA No 3/VNS of 2022, ITAT Varanasi Special Bench

The Taxpayer is an Individual and she was required to maintain books of accounts and get the accounts audited u/s 44AB of the ITA. In the year in question, in 3CD, the tax auditor has reported unpaid GST liability u/s 43B of the ITA. Since, the GST was not routed through P&L statement (Exclusive Method); The Taxpayer has not disallowed the GST payable u/s 43B of the ITA while computing the income. During the assessment, the AO has observed that section 43B is applicable irrespective of the method of accounting followed by The Taxpayer. The AO has stated that in terms of section 43B of the ITA, any tax, duty, cess or fee under any law is allowable only on actual payment basis. The AO has also referred to section 145A and concluded that The Taxpayer is required to recast the P&L statement including the GST and therefore since the GST liability was unpaid, in terms of 145A read with 43B, same needs to be disallowed.

The CIT(A) has confirmed the disallowance u/s 43B and rejected the appeal of The Taxpayer. Before the ITAT, The Taxpayer has reiterated the above arguments by relying upon the decision of Calcutta High Court in the case of Associated Pigments Ltd (write petition no 106 of 1990) and decision of Andhra Pradesh High court in the case of S. Subba Rao & Co (write petition no 7207 of 1984).

The ITAT after considering the peculiar facts of the case and decision of Hon'ble SC in the case of Chowranghee Sales (supra) categorically held that the books of accounts are required to be maintained by following the inclusive method of accounting u/s 145A of the ITA and the accounting treatment given by The Taxpayer would not change the position of law. Since, the sales, purchase and stock are required to include GST component, the unpaid GST, being statutory liability shall be required to be disallowed u/s 43B of the ITA even though the same is not passed through profit and loss account.

An 'inclusive method' of accounting is not permitted by the Accounting Standards (AS) and/or Ind AS. However, the provision of section 145A read with Income Computation and Disclosure Standards (ICDS) is mandatory and therefore, for the tax purpose, the books of accounts are required to be recast as per "Inclusive Method" only. The issue of allowance of sale tax/VAT/excise duty/service tax/GST u/s 43B of the ITA is always subject matter of grave litigation. The Hon'ble Delhi HC in the case of Noble & Hewlett (I) (P) Ltd (write petition no 839 of 2007) has settled the position that if the service tax is not debited to profit and loss account and not claimed as deduction there would not be disallowance u/s 43B of the ITA.

Contrary to this, recently, the ITAT Pune in the case of Munaf Ibrahim Memon (ITA No 1806 of 2013) has held that non-payment of VAT liability is disallowable u/s 43B of the ITA even if the same is not passed through P & L Account. Considering the provision of 145A and that of ICDS, the unpaid tax liability should be subject matter of disallowance u/s 43B if same is not discharged before the due date of filing ITR u/s 139(1).

Important Notifications

CBDT issues revised guidelines for compounding of offences under the ITA

Letter F. No. 285/08/2014-IT (Inv.V) / 196, Dated 16-9-2022

CBDT has issued revised guidelines on compounding of offences in supersession of earlier guidelines issued vide F. No. 285/08/2014IT (Inv.V) /147, dated 14th June 2019.

The major changes in the revised guidelines are enlisted as below:

- An offence punishable under Section 276 of the ITA can be compounded.
- The scope of eligibility for compounding of cases has been relaxed whereby case of an applicant who has been convicted with imprisonment for less than 2 years being previously non-compoundable, has now been made compoundable. The discretion available with the competent authority has also been suitably restricted.
- The time limit for acceptance of compounding applications has been relaxed from the earlier limit of 24 months to 36 months now, from the date of filing of complaint. Procedural complexities have also been reduced/simplified.
- Specific upper limits have been introduced for the compounding fee covering defaults across several provisions of the ITA.
- Additional compounding charges in the nature of penal interest @ 2% per month up to 3 months and 3% per month beyond 3 months have been reduced to 1% and 2% respectively.

CBDT has issued additional guidelines for removal of difficulties u/s 194R of the ITA

Circular No. 18/2022 [F.NO. 370142/27/2022-TPL], dated 13-9-2022

In exercise of the power conferred by section 194R(2) of the ITA, CBDT had issued guidelines vide Circular no. 12 of 2022, dated 16th June, 2022. Subsequently, some more clarifications are requested by stakeholders on various issues. Accordingly, CBDT vide this Circular has provided further clarification on certain issues as under:

- One time loan settlement with borrowers or waiver of loan by specified institutions would not be subject to tax u/s 194R. However, taxability of such settlement/waiver in the hands of the beneficiary will be governed by the relevant provisions of the ITA.
- If service provider gets input credit of GST of expenses incurred, then, reimbursement of such expenses is benefit/perquisite on which tax should be deducted u/s 194R of the ITA. However, if there is case of "pure agent" and GST input credit is allowed to the recipient, then, amount reimbursed would not be treated as benefit/perquisite for the purpose of section 194R of the ITA.
- If tax is already deducted under other provisions of the ITA on 'Out of pocket' expenses (reimbursement), other than section 194R, in accordance with the Circular No. 715, dated 8th August 1995, it is clarified that there will not be further liability for tax deduction under section 194R of the ITA.
- Certain clarifications have been issued for deduction of tax in respect of benefit arising out of dealer conference to

Important Notifications

educate the dealers about the products of the company

- For purpose of claim of depreciation, the amount of benefit included by recipient in its income tax return shall be treated as 'actual cost.'
- Provision of section 194R is not applicable on benefit/perquisite provided by an organization in scope of The United Nations (Privileges and Immunity Act) 1947, an international organization whose income is exempt under specific Act of Parliament (such as the Asian Development Bank Act 1966), an embassy, a High Commission, legation, commission, consulate, and the trade representation of a foreign state.
- Tax under section 194R of the ITA is not required to be deducted on issuance of bonus or right shares by a company in which the public are substantially interested, where bonus shares are issued to all shareholders by such a company or right shares are offered to all shareholders by such a company, as the case may be.

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Important Rulings

India

Services inextricably linked to supply of equipment cannot be taxed as Fees for Included Services under India-US DTAA

Electronics Corporation of India Limited

ITA No. 228/ Hyd / 2017 - Hyd. ITAT

The taxpayer made payment to a U.S based entity in respect of site testing charges without deduction of tax. The Revenue disallowed the said payment on the grounds that the charges were in the nature of Fees for Technical Services / Fees for Included Services, and no tax was deducted. It was contended by the taxpayer that the said installation and testing charges was pursuant to the purchase of equipment from the same vendor and relying on paragraph 5(1) of Article 12 of the India-USA DTAA stated that 'Fees for included services' did not include amounts paid for services that were ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property.

The ITAT held in favor of the taxpayer on the ground that services which could independently or on stand-alone basis be provided would only attract the Article on 'Fee for included services' under DTAA. In the present case, the ITAT observed that services could not be independently or on stand-alone basis be provided to the taxpayer as the purchase and installation of equipment was a sine qua non. Accordingly, it was held that the fees do not form part of Fees for included services and hence were not taxable in India.

While the ITAT has ruled in favor of the taxpayer considering the beneficial provisions of Article 12 of the treaty, the taxpayers also need to evaluate existence of PE especially the installation PE in cases where services are in nature of testing services or installation services which may result into business profits of the non-resident getting taxed in India under Article 5 read with Article 7 of the DTAA. Taxability of services rendered in connection with designing and installation of an equipment has been a matter of litigation in India and each case would have to be evaluated in detail before concluding on the same.

Filing of Form 67 on or before the due date of filing the return of income is not mandatory to claim of foreign tax credit

Vinod Kumar Lakshmipathi

IT Appeal No. 680 of 2022 - Bangalore ITAT

Taxpayer was a salaried employee and ordinary resident in India. He filed his return of income after the extended due date of filing the return of income. While filing the return of income, he also claimed FTC by filing belated Form 67.

CPC, while processing the return of income, did not grant FTC on the ground that Taxpayer had not filed Form 67 on or before the due date of filing the return of income, which was a prerequisite under Rule 128 of the Rules. CIT(A) also confirmed the stand of CPC. Aggrieved by the order of CIT(A), Taxpayer filed an appeal before the ITAT.

Before the ITAT, Taxpayer contended that he had offered the foreign source income to tax in India and non-allowance of FTC would result into taxing the same income twice. ITAT accepted the plea of the Taxpayer and in the process, also relied upon the co-ordinate Bench's decision in case of *Brinda Rama Krishna (ITA No. 454/Bang/2021 for AY 2018-19, dated 17.11.2021)*. The Bench observed that filing of Form 67 on or before due date of filing the return of income was not mandatory. Accordingly, ITAT directed AO to grant FTC to the Taxpayer.

This is another welcome decision of the ITAT which ensures that the vested right of the Taxpayer to

Important Rulings

claim FTC is safeguarded and ensures the commitment of the income tax department towards the Taxpayer contained in the Taxpayer's Charter.

Also, Mumbai Bench of ITAT in case of *Sonakshi Sinha [2022] 142 Taxman 414 (Mumbai ITAT)* has also rendered a favorable decision wherein it has been held that Form 67 is not a mandatory requirement for claiming FTC and the credit can also be claimed if the Form is furnished on or before completion of assessment proceedings.

At this juncture, it is also important to note that CBDT has recently amended the Rule 128 of the Rules, wherein the due date of filing of Form 67 has been extended and clarified that Form 67 can be filed up to the end of the relevant assessment year. This amendment has come in effect from 01 April 2022.

Non-resident taxpayer entitled to refund in virtual bank account in India in absence of existing mechanism to receive refund in overseas bank account

M. Tech Holdings PTE Limited

Writ Petition No.14924 of 2022 (T-IT) – Karnataka High Court

Taxpayer, a foreign company, had filed writ petition for non-receipt of income-tax refund receivable from the income tax department. Refund amount was undisputedly determined by the CPC vide intimation order passed under Section 143(1) of the Act, however, the refund could not be processed as taxpayer's foreign bank account could not be validated on e-filing portal of Income-tax department.

High Court directed ADIT (CPC) to refund the amount determined as per intimation along with applicable interest till the date of grant of refund to the taxpayer within 2-6 weeks' time as detailed in the decision. To facilitate the grant of refund, the taxpayer was directed to open a virtual bank account with Indian branch of the Bank.

In this decision, it has been specifically acknowledged by the Revenue that non-residents are unable to receive income-tax refund in their overseas bank account on account of Income-tax department not having deployed the functionality to validate foreign bank account on e-filing portal. This is a welcome ruling for all non-resident taxpayers who are unable to obtain refund in their overseas bank account who can now validate a virtual bank account opened with any bank in India for receiving the refund.

Interest on Income-tax refund not liable to TDS under India – Netherlands DTAA by virtue of MFN Clause

Koninklijke Philips N.V

ITA Nos.437 to 441/Kol/2021 – Kolkata ITAT

Taxpayer, a tax resident of Netherlands, had received income tax refund along-with interest under Section 244A of Income-tax Act, which was subjected to TDS. Taxpayer challenged the applicability of TDS.

The Bench took a note of the provisions of MFN Clause under the Protocol to India – Netherlands DTAA. As per the said clause, India has agreed to restrict its right to taxation at source on interest income to a lower rate or more restricted scope under India – Netherlands DTAA, if India enters into a convention / agreement with any other OECD member jurisdiction which provides lower rate / restricted scope of taxation on interest income. ITAT also held that protocol is an integral part of DTAA and should be given automatic effect, unless otherwise mentioned in the DTAA.

Invoking MFN clause, reliance was placed on Article 12(3)(a) of India – Italy DTAA, which exempts interest on any debt claim from taxation

in source jurisdiction, if payer is a Government of that country. Interest on Income-tax refund paid to the Netherlands resident Taxpayer was held to be in the nature of income from 'debt-claim' and thus considered to fall within the meaning of 'interest' as defined in Article 11(6) of India – Netherlands DTAA as well as Article 12(4) of India – Italy DTAA. In this regard, reliance was also placed upon the decision of Madras High Court in the case of *Ansaldo Energio SPA v. CIT (IT) (2016) 384 ITR 312 (Mad.)*. Accordingly, interest on income tax refund paid to Netherlands Taxpayer was held to be exempt from tax in India under the provisions of India – Netherlands DTAA read with India – Italy DTAA imported into India – Netherlands DTAA by virtue of the protocol.

Foreign

Managing Director working from home does not constitute a PE

Danish Tax Board (DTB) Ruling dated 29 August 2022 - SKM2022.406.SR

In this ruling, the subject matter of dispute was with respect to the creation of PE if a managing director of the Company worked from home situated in a Denmark. In this case, the managing director of a foreign MNE group was a Danish citizen and wished to work from Denmark due to personal reasons. The managing director's duties involved managing the company's overall operations and affairs. When he was not traveling to other jurisdictions, he worked from his home in Denmark. The MNE group did not require the managing director to work from home or from another specific place in Denmark, but it accepted the condition of the managing director to stay in Denmark more frequently.

The MNE group also had a subsidiary company in Denmark. However, the managing director did not have any operational role in that subsidiary. He also did not have any space or office available in the subsidiary and he did not work from there either. Further, it was expected that, after the pandemic, the managing director would work in Denmark on a sporadic basis.

According to the DTB, merely the fact that the managing director partly worked from home in Denmark did not mean that the non-resident entity had a PE in Denmark. This conclusion was based on the fact that the non-resident did not have a place of business at its disposal in Denmark and did not have control over the managing director's remote workplace. Among other things, the DTB also emphasized that the employee would not be involved in sales prospecting work in Denmark, as this function was handled by the subsidiary, and that the work in Denmark could not be planned but arose randomly and sporadically.

Also, this ruling is in line with the Commentary on Article 5 of the OECD Model (Para 18) which explains that even though part of the business of an enterprise may be carried on at a location such as an individual's home office, that should not lead to the conclusion that that location is at the disposal of that enterprise simply because that location is used by an individual (e.g., an employee) who works for the enterprise. The carrying on of intermittent business activities at the home of an employee does not make that home a place at the disposal of the enterprise. Also, for a home office to be a PE for an enterprise, it must be used on a continuous basis for carrying on business of an enterprise and the enterprise generally has to require the individual to use that location to carry on the enterprise's business. It would be interesting to see how Indian income tax authorities are responding to this issue while adjudicating the same from Indian tax law point of view.

Important Rulings

This adds to the kitty on favorable rulings wherein based on exact facts, it has been held that presence of employee in his / her home country should not create a PE for employer if the presence is not mandated out of employment or requirement of the employer.

Important Notifications

Foreign

Columbia proposed to introduce Significant Economic Presence (SEP)

On 8 August 2022, the Colombian Government submitted to the Colombian Congress a tax reform bill introducing new measures. Among other items, the bill introduces the concept of 'significant economic presence.' This new concept will tax the foreign entities as if they have a permanent establishment (PE) and therefore create a local taxable presence in Colombia.

A nonresident entity would be considered to have a significant economic presence in Colombia when meeting one of the following requirements:

(i) gross income from transactions with customers in Colombia higher than 31,300 tax units (approx. US$297,000) during the relevant tax year; or
(ii) using a website with a Colombian domain; or
(iii) interaction with more than 300,000 users in Colombia during the relevant tax year. If the activities in Colombia are carried on by different entities of the same Multinational Enterprise (MNE) group, the aforementioned criteria would be tested for the transactions of all related parties.

Payments to non-residents with a significant economic presence in Colombia would generally be subject to a 20% withholding tax. Furthermore, the bill recognizes that a tax treaty should prevail over Colombian domestic law when foreign entities reside in a tax treaty jurisdiction.

The provisions of SEP in Columbia seem to be in line with SEP provisions under the Act and the parameters are more or less same / similar to that provided in the Act read with the Rules. This shows that India continues to remain a frontrunner in terms of introducing newer mechanism for determining taxing rights for source jurisdictions which is then followed by other jurisdictions.

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Important Notifications

Notifications

Effective date for Union Budget changes notified

Notification number 18 / 2022- Central Tax dated September 28, 2022

October 1, 2022, has been appointed as date on which provisions of section 100 to 1114 (except section 110 (c) and 111) of Finance Act 2022 shall come into force.

Changes proposed vide Finance Act 2022 (Union Budget) pertaining to GST were to be made effective from a date to be notified by Central Government. Section 110 (c) and 111 of the Finance Act were already notified to be effective from July 5, 2022. Remaining sections have been notified to be effective now from October 1, 2022.

GST Rules amended

Notification number 19 / 2022- Central Tax dated September 28, 2022

Amendments in CGST Rules have been notified – to be effective from October 1,2022. Major changes are:

(1) Rule 21 of CGST Rules has been amended to provide that GSTR registration is liable to be cancelled if a registered person does not furnish GST returns for a continuous period of six months (two tax periods for taxpayers filing return on a quarterly basis).

(2) Rule 37 of CGST Rules has been amended to provide that reversal of ITC for payment not made to vendor within a period of 180 days, shall not apply for cases liable for payment of GST under reverse charge mechanism.

Interest upon reversal of such ITC would be applicable for the tax period immediately following the period of 180 days from the date of issue of invoice [earlier it was from the date of availing ITC].

Extension of due date for filing refund application by notified agencies rescinded

Notification number 20 / 2022- Central Tax dated September 28, 2022

Notification number 20/2018 dated March 28, 2018, granting extension of due date for fling application of refund under section 55 by notified agencies has been rescinded.

Circulars

Guidelines issued for filing / revising GST Tran-1 and Tran-2 returns

Reference number - 180/12/2022-GST; Date - September 9,2022

Supreme Court of India in case of Filco Trade Centre Private Limited had has directed GSTN to allow a two-month additional window for claiming transitional credit. – refer our KCM Insight edition for the month of *July 2022*.

In accordance with the directions of Hon'ble Supreme Court, the facility for filing TRAN-1/ TRAN-2 or revising the earlier filed TRAN-1/TRAN-2 on the common portal by an aggrieved registered taxpayer will be made available by GSTN during the period from October 1, 2022 to November 30,2022.

Guidelines for filing / revising TRAN-1 / TRAN -2 (for claim of transitional credit) has been issued.

Important Notifications

Instruction

Guidelines for prosecution

Reference number - 4/2022-23; dated September 1, 2022

Guidelines for launching of prosecution under the provisions of CGST Act 2017 has been issued.

Important Rulings

M/s Sterling Simplified India Private Limited Vs Commissioner of CGST, East Delhi [Final order number 50825 / 2022 – pronounced by CESTAT Delhi]

No requirement to get registration of each office / premise from where services are exported, for a service provider exporting services to its group companies located outside India and holding a central registration.

Sembcorp Energy India Limited Vs State of AP [TS-468-HC (AP) 2022-GST]

Andhra Pradesh upholds the maxim *'Lex Non Cogit ad impossibilia'* (law does not compel a man to do things which he cannot possibly perform). Held that ITC cannot be curtailed by insisting for shipping bill as documentary evidence for substantiating zero-rated supply of cross-border electricity transmission to Bangladesh.

Directorate General of Foreign Trade / Foreign Trade Policy

- Vide notification 37/2015-20 dated September 29, 2022, the existing Foreign Trade Policy (FTP 2015-20) has been further extended till 31 March 2023.
- DGFT has further extended last date for filing annual returns under EPCG scheme till December 31,2022 (earlier it was September 30, 2022).

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Important Notifications

MCA

Alteration in the definition of Small Company

Over the past few years, Government of India has been making constructive efforts to reduce the compliance requirements for small companies. As a part of these progressive measures, the Ministry of Corporate Affairs (MCA) vide this Notification has **revised the definition of Small Company** by altering the Companies (Specification of Definition Details) Rules, 2014, through Companies (Specification of definition details) Amendment Rules, 2022.

Amendment in the definition of Small Company has been reproduced as below:

Parameter	Earlier threshold limit	Revised threshold Limit
Paid up capital	not exceeding Rs. 2 crores	not exceeding Rs. 4 crores
Turnover	not exceeding Rs. 20 crores	not exceeding Rs. 40 crores

This amendment is made effective from September 15, 2022.

Introduction of Companies (Corporate Social Responsibility Policy) Amendment Rules, 2022

Notification dated September 20, 2022

Ministry of Corporate Affairs ("MCA"), vide its Notification No. G.S.R. 715(E) dated September 20, 2022, has notified the Companies (Corporate Social Responsibility Policy) Amendment Rules 2022 with the following provisions:

- Constitution of CSR committee in case any amount lying in Unspent CSR Account (exceeding three years);
- Widening the scope of implementing agencies; and
- Ceiling of expenditure towards impact assessment and reporting of CSR activities.

The detailed analysis of the aforesaid amendments is enumerated as follows:

Sr. No.	Particulars	Section / Rule	Current Provisions	Amended Provisions	Remarks
1	Constitution of CSR Committee	Section 135 read with Rule 3	Constitution of CSR Committee is mandatory for all companies whose total CSR obligation exceeds INR 50 lakhs. Note: However, it is not mandatory for companies to constitute a CSR Committee, where the CSR spends is less than 50 lakhs.	A Company having any amount in its Unspent CSR Account in terms of ongoing projects as per Section 135(6) of the Act shall constitute CSR committee and comply with the provisions of Section 135(2) to (6)	• All companies which do not utilize the balances (in the subsequent three years) from the Unspent CSR account have to mandatorily constitute a CSR Committee. • Such companies have to undertake CSR activities for the next three years, even if the CSR provisions do not warrant such CSR spends.

Important Notifications

2	Scope of implementing agencies	Rule 4(1)	Implementing agencies which were registered under Section 12A and approved under Section 80G of the Income Tax Act, 1961 or an entity established under an Act of Parliament or State Legislature	Now includes implementing agencies exempted under sub-clauses (iv), (v), (vi) or (via) of Section 10(23C) of Income Tax in addition to those registered under Section 12A and approved under Section 80G or an entity established under an Act of Parliament or State Legislature	The scope of implementing agencies has been widened up to also include those entities which are exempt under Section 10(23C) of Income Tax Act 1961. Note: All eligible implementing agencies are required to obtain registration by filing Form CSR-1. Prior to undertaking CSR activities from such implementing agencies, Companies are guided to seek CSR-1 certificate.
3	Threshold Limits for Impact Assessment	Rule 8(3)(c)	Five percent of the total CSR expenditure or fifty lakh rupees, whichever is less	Two percent of the total CSR expenditure or fifty lakh rupees, whichever is higher.	This change in limits of expenditure for Impact Assessment will now enable Large Companies with high CSR expenditure to increase their spend on impact assessment study.

In addition to aforesaid amendments in the provisions of the CSR Rules, a format of Annual Report on CSR activities has now been changed by omitting the requirement of mentioning details of each project. There are a few more changes done in sequencing of the information.

Important Notifications

RBI

Master Directions on Interest Rate on Deposits

RBI/2022-2023/117 DOR.SOG (SPE). REC. No 68/13.03.00/2022-23 dated 16 September 2022

The reference rate for arriving at the interest rates to be given on FCNR (B) deposits as quoted / displayed by Foreign Exchange Dealers Association of India (FEDAI) shall be replaced by the interest rates being quoted / displayed by Financial Benchmarks India Pvt. Ltd. (FBIL).

The list of entities which are prohibited from opening a savings deposit account with Scheduled Commercial Banks / Co-operative Banks have been earmarked and includes any "political party" registered with the Election Commission of India.

Rupee Drawing Arrangement - Enabling Bharat Bill Payment System (BBPS) to process cross-border inbound Bill Payments

Notification No. RBI/2022-23/115 A.P. (DIR Series) Circular No. 14 dated 15 September 2022

With a view to further liberalize the forex flows into the country and subject to certain conditions, Reserve Bank of India (RBI) has authorized and enabled Bharat Bill Payment System (BBPS) mode to transfer foreign inward remittances (received under Rupee Drawing Arrangement) to KYC compliant beneficiary bank account.

Under the existing provisions, foreign inward remittances received under Rupee Drawing Arrangement (RDA) could only be transferred to such KYC compliant accounts through electronic mode, such as, NEFT, IMPS, etc.

SEBI

Change in Beneficial Owner (BO) account in case of death of Karta of HUF

SEBI/HO/MRD/MRD-POD-2/P/CIR/2022/114 dated August 26, 2022

SEBI had issued a Master Circular for Depositories dated February 05, 2021, which included guidelines with respect to opening of DEMAT account in the name of Hindu Undivided Family (HUF). The guidelines also included the process to be followed with respect to the Beneficial Owner (BO) account in case of death of the Karta of the HUF.

To further ease compliances / documentation, the Master Circular has provided that in case of death of the Karta, the existing BO account need not be closed and the same account may be continued.

The change prescribed now is that in the event of death of Karta, his name in the BO account shall be replaced by the new Karta who shall be eldest coparcener in HUF or a coparcener who is appointed as Karta by an agreement reached amongst all the coparceners of the HUF instead

Important Notifications

of new Karta who should be the senior most member of the family.

Performance/return claimed by unregulated platforms offering algorithmic strategies for trading

SEBI/HO/MIRSD/DOP/P/CIR/2022/117 dated September 2, 2022

SEBI has observed that unregulated platforms are offering algorithm trading services with claims of high return on investment to attract and lure investors along with ratings on such trading strategies thereby leading to mis-selling of services. To bring awareness among investors, SEBI vide Press Release No. 20/2022 dated June 10, 2022, had cautioned the investors while trading rough such unregulated platforms.

SEBI had also observed that stockbrokers were also providing algorithmic trading facility to investors through such platforms. SEBI through this notification has instructed stockbrokers not to give reference to past or expected future return/performance of the algorithm or associate with such platforms giving dubious claims so as to prevent mis-selling and to protect the interest of investors in the securities market.

Effective Date: Immediate (i.e.) from the date of notification.

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Abbreviations

Back

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

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

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

Abbreviations

Back

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

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

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