K C Mehta & Co LLP

Chartered Accountants

kcm Insight

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Dear Reader,

We are happy to present ***kcm*Insight**, comprising of important updates in the legislative changes in direct tax law, corporate & other regulatory laws, as well as recent important decisions on direct 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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Price under Power Purchase Agreement with State Electricity Board is non-competitive and not Market Value for section 80-IA

CIT v. Jindal Steel & Power Limited, Civil Appeal No. 13771 of 2015 and others, Supreme Court of India

The Taxpayer, being engaged in the business of generation of electricity, manufacture of sponge iron, MS ingots, etc. claimed deduction u/s 80-IA, being profits of its power generating units. The power generated was partially used for captive consumption at the rate of Rs. 3.72 per unit and partially supplied to State Electricity Board at rate of Rs. 2.32 per unit as per the power purchase agreement.

AO claimed that the Taxpayer had declared inflated profits by showing supply of power at the rate of Rs.3.72 per unit to its sister units and the "market value" in accordance with section 80-IA (8) of the ITA should be calculated at Rs. 2.32 per unit, the rate at which the Taxpayer supplied electricity to State Electricity Board and thus, disallowed the impugned excess deduction. CIT(A) affirmed the order of AO.

ITAT set aside the order of CIT(A) considering that the Taxpayer was bound to sell the surplus electricity to State Electricity Board at the rate in accordance with the power purchase agreement and thus the same cannot be considered to be the rate in "open market" as per Explanation to section 80-IA(8) of the ITA. HC as well answered the question against the revenue.

Against the Revenue's appeal before SC, Taxpayer contended that Generation and sale of power was a monopoly of the State. Approval was granted for setting up of captive power plants by the manufacturing units for the purpose of meeting their power requirement subject to the terms and conditions imposed. The surplus power, if any, could be sold under a power purchase agreement entered into between the captive power producer and the State Electricity Board. As per the Electricity (Supply) Act, 1948, the surplus power that was not captively consumed could not be sold in the open market to any third-party consumer except with the prior permission of the State Electricity Board, that too, subject to the terms and conditions imposed therein.

SC took into consideration that State Electricity Board sold power to industrial units at rate of Rs. 3.72 per unit. SC also noted the Explanation to sub-section (8) defining the expression "market value" which mean the price that such goods or services would ordinarily fetch in the open market. However, the expression "open market" is however not defined. SC took the reference of Black's Law Dictionary to define the expression "open market" to mean a market in which any buyer or seller may trade and in which prices and product availability are determined by free competition. Prices in an open market are determined by the laws of supply and demand.

SC noted that surplus electricity had to be compulsorily supplied by the assessee to the State Electricity Board and price of Rs. 2.32 per unit is contracted price and there was no room or any elbow space for negotiation on the part of the assessee. Therefore, such price cannot be said to be an exercise between a buyer and a seller in a competitive environment and cannot be considered as 'market price'. Alternatively, if the industrial units of the assessee did not have the option of obtaining power from the captive power plants, then in that case it would have had to purchase electricity from the State Electricity Board at the same rate, i.e, Rs. 3.72 per unit. Thus, market value of the power supplied by the assessee to its industrial units should be computed by considering the rate at which the State Electricity Board supplied power to the consumers in the open market and not comparing it with the rate of power when sold to State Electricity Board.

Diminution in value of Bonds received as Cash Subsidy and School running Expenditure are allowable as Business Expenditure

PCIT vs. Paradeep Phosphates Limited, ITA no. 1 of 2019 and others, Orissa HC

The Taxpayer is engaged in business of manufacturing and trading of fertilizers. There were two issues under consideration before the HC:

Diminution in value of Bonds received as subsidy:

The GOI Fertilizer bonds were provided to the Taxpayer in lieu of cash subsidy. Therefore, the reduction in the value of the bonds was claimed as a revenue loss by the Taxpayer. While AO and CIT(A) disagreed with the stand of the Taxpayer, ITAT held that since the fertilizer bonds were received in lieu of cash, they were incurred in the course of business and any reduction in the value of the bonds could be claimed as revenue loss.

Revenue contended that the reduction in value of such Bonds cannot be claimed as the loss has not actually been incurred but it is merely on anticipation of loss that a deduction is being claimed.

HC relied on the decision of SC in case of Patnaik Company Limited vs. CIT 161 ITR 365, wherein it was held that since the investment in fertilizer bond was made by the Taxpayer under commercial expediency, it did not bring an asset of a capital nature and the diminution in the value of the said bond are allowable as revenue loss. Accordingly, HC allowed this ground in favour of the Taxpayer.

Disallowance of expenditure incurred for school for benefit of employees:

The second issue was disallowance of expenditure incurred by Taxpayer in running school for benefit of its employees as incidental and additional business expenditure u/s 40A(9) of the ITA. ITAT held that the amount that was being incurred for education and being paid to School was for the welfare of the staff which would ultimately result in the smooth functioning of the business and therefore, it was allowable expenditure.

Before HC, Taxpayer contended that the payment for School Management is neither falling under "setting up" nor under "formation of" nor under "as contribution to" any fund/trust. As a result of this, it is outside the purview of Section 40A(9) of the IT Act. Further, the running of a school for the benefit and welfare of the staff is a business expenditure and is an allowable deduction u/s 40A(10) and Section 37(1) of the ITA.

HC observed that if the expenditure has been incurred by the assessee voluntarily, even without necessity, but if it is for promoting the business, the deduction would be permissible under section 37(1). Reliance was placed on SC ruling in Sassoon J. David 118 ITR 261 wherein it was observed that for the "purpose of business" used in section 37(1) should not be limited to the meaning of "earning profit alone". Accordingly, HC opined that the school running expenses are wholly and exclusively for the welfare of the employees of the Assessee and, thus, allowable u/s 37(1) r.w.s 40A(10) of the ITA.

43B applies to Service tax collected from customers and not paid to government till due date of filing of return

Mr. Ashraf Nafisa Althaf v. ITO Ward-1 & TPS Udupi, ITA No.614/Bang/2023, ITAT Bangalore

During the year under consideration, the Taxpayer has shown in the Balance sheet under the head "current liabilities and provisions" amount payable towards service tax. The Taxpayer had collected service tax from customers and had not paid to Government till the due date of filing return of income.

AO disallowed the same u/s 43B of the ITA. Taxpayer contended that though it had collected service tax, on this amount, he neither claimed any deduction nor debited the amount as an expenditure in the P&L account, so there could not be any disallowance. CIT(A) confirmed the addition.

ITAT relied on SC ruling in Chowringhee Sales Bureau 87 ITR 542 wherein it was held that the sales tax collected by the assessee is revenue receipt even if it is shown by the assessee under non-revenue head and such treatment by the assessee is not decisive. Accordingly, ITAT held that the collection of service tax and non-payment of the same, attracts the provisions of Section 43B and the provisions of Section 145A cannot be applied in view of non obstante clause in Section 43B.

Credit of Undeposited TDS allowable to Assessee

BDR Finvest Pvt Ltd v. DCIT, W.P.(C) 9043/2021 & CM No.55881/2023, Delhi HC

During the year under consideration, the Taxpayer had advanced loan to one party and in return, interest was remitted to the Taxpayer net of tax deducted. The Taxpayer claimed credit of such tax deducted at source in the return filed. However, the said credit of tax was denied in intimation passed u/s 143(1) of the ITA, since said credit was not reflected in Form 26AS.

HC noted that the borrower is undergoing CIRP and a Resolution Professional (RP) has been appointed by the concerned bench of the National Company Law Tribunal and had therefore, deducted tax but did not pay to the Government.

Revenue contended that in terms of section 199 of the Act, credit for tax deducted at source can be granted only when the amount is received in the Central Government account.

However, HC, relying on decision of Delhi HC in case of Sanjay Sudan v ACIT 148 taxmann.com 329, held, as per section 205 read with instruction dated 01.06.2015, that the deductee /assessee cannot be called upon to pay tax, which has been deducted at source from his income.

Further, HC also emphasized that deduction of taxes at source is one of the methods of collecting tax. The tax deducted at source is part of the asseseee's income and therefore, the gross amount is included in the total income and offered to tax. It is on this premise that the tax deducted at source would have to be treated as tax paid on behalf of the assessee. If credit is not given, the respondents would end up doing indirectly what they cannot do directly i.e., that recover tax directly from the assessee i.e., the deductee.

Since the payer failed to deposit the tax with the government, recovery proceedings can only be initiated against the payer and not against the payee (Taxpayer).

Corpus donation received for specific purposes is capital receipt, irrespective of trust's registration u/s 12AA

ACIT v. M/s Financial Inclusion Trust, ITA 2001/DEL/2020, New Delhi ITAT

Taxpayer is a trust but is not registered u/s 12AA of the ITA. During the year under consideration, the taxpayer received corpus donation grant from another trust, which was to be utilized as per will of the donor.

AO noted that such grant is not eligible for exemption u/s 11(1)(d) and therefore treated such grant as income of the taxpayer. CIT(A) allowed the appeal of taxpayer by observing that corpus donation is in nature of capital receipt which is to be kept on permanent basis and only accretions are to be used as per directions of donor.

The ITAT acceded to the fact that corpus grant was to be utilized as per will of the donor. ITAT relied on the decision of Vizag ITAT in ITA no.

558/VIZ/2018, wherein it was held that corpus donation is in nature of capital receipt and therefore it is not chargeable to tax. In the said decision, it was observed that section 2(24) (iia) is to be read in context of introduction of section 12, as per which, corpus contributions shall not be considered as income of the trust since it is in nature of specific fund created for fulfilling specific objective.

In view of the above, ITAT dismissed appeal of the Revenue and concluded that irrespective of whether the trust is registered u/s 12AA or not, voluntary contribution received for specific purpose are exempt from tax.

Prosecution u/s 276CC liable to be quashed if there is refund receivable

Manav Menon v. DCIT CRL.O.P.No.26013 of 2021 and Crl.M.P.Nos.14387 & 14390 of 2021, Madras HC

The taxpayer had defaulted in filing his return of Income within the due date u/s 139(1) for the AY 2013-14. Hence, the AO filed compliant for offence punishable u/s 276CC of the ITA for non-filing of return. After receipt of show cause notice, taxpayer filed belated return of income, wherein he claimed refund receivable after credit of advance tax paid, tax deducted/collected at source and self-assessment tax.

The taxpayer filed criminal petition before the Madras HC to quash the said proceedings u/s 276CC of the ITA.

HC observed the taxpayer has failed to file return of income u/s 139(1). As per clause (ii)(b) in proviso to Section 276CC, if tax payable, after reducing advance tax, tax deducted/collected at source and self-assessment tax paid, is less than Rs. 3000/-, then taxpayer shall not be proceeded under this section. Hence, the High Court quashed the initiation of prosecution u/s 276CC of the ITA against the assessee.

Reopening notices issued after 01.04.2021 for AY 2016-17 and AY 2017-18, where alleged escaped income is below Rs. 50 lacs, to be quashed

Ganesh Dass Khanna v. ITO, WP(C) No. 11527 of 2022 and others, Delhi HC

The bunch of taxpayers were issued notice u/s 148 of the ITA for AY 2016-17 and AY 2017-18 and alleged escaped income in all cases was below prescribed monetary threshold of Rs. 50 lacs. The said notices were issued after expiry of time limit for issuing notice as per Section 149(1)(a) of the ITA, which is three years from end of relevant assessment year.

The issue under consideration was in regard to the period of limitation available to the Revenue for issuance of notice u/s 148 of the ITA.

Taxpayers contended that end date for period of limitation for AY 2016-17 and AY 2017-18 would be 31.03.2020 and 31.03.2021 respectively, three years from end of relevant assessment year. Since notices in these cases are issued after 01.04.2021, they have to be quashed. The extended period of limitation u/s 149(1)(b), 10 years, cannot be applied since alleged income escaped from tax is below Rs. 50 lacs. Further, it was argued that the law and Apex Court decision in case of Ashish Agarwal does not support the 'travel back in time' theory propounded by the Revenue. Reliance was placed on decision of Gujarat HC in case of Keenara Industries Pvt Ltd vs. ITO 3 TMI 104, Bombay HC in case of Rajiv Bansal v Union of India 2 TMI 1081 and Delhi HC in case of Mon Mohan Kohli (2021) SCC OnLine Del 5250. Further, Apex Court in case of Ashish Agarwal mandated that post 31.03.2021, the new regime has brought vide Finance Act, 2021 would apply and all defences would be available to the taxpayer.

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Revenue relied on decision of Delhi HC in case of Touchstone Holdings Pvt Ltd v ITO 451 ITR 196 and Salil Gulati 2022: DHC: 3709-DB wherein it is ruled that since SC held notices issued u/s 148 as notices u/s 148A(b) of the ITA, the said notices stood revived and thus within limitation period prescribed u/s 149(1)(a) of the ITA read with TOLA. Further, the criterion of Rs. 50 lacs is not applicable in these matters. It was further contended that notices are within limitation based on conjoint reading of provisions of the law with judgement of Apex Court in case of Union of India vs Ashish Agarwal, Instruction no. 1 of 2022 issued by CBDT and the Taxation and Other Laws Act, 2020 ('TOLA').

HC noted two significant directions of Apex Court in case of Ashish Agarwal, firstly, all defences including those available u/s 149 of the ITA would remain open to the assessees and secondly, all rights and contentions available to the assessees and revenue under FA 2021 and in law will continue to subsist. HC distinguished the decisions in case of Touchstone Holdings Pvt Ltd v ITO and Salil Gulati on the ground that alleged escaped income in both the cases exceeded Rs. 50 lacs and therefore, the provisions of section 149(1)(b) were applicable in those cases. Further, it was observed that the notifications dated 31.03.2021 and 01.04.2021 for extending due date were contrary to the provisions of Section 149(1) (a) of the ITA, therefore they lost their legal efficacy.

Hence, HC allowed the petition in favour of the taxpayer.

Important Updates

Guidelines issued u/s 194-O(4) of the ITA, Circular no. 20/2023

CBDT has provided below clarifications with respect to deduction of tax u/s 194-O(4) of the ITA in case of e-commerce operator (ECO) transactions:

- Where multiple ECOs are involved in a single transaction of sale of goods or provision of services through ECO platform or network, and where the seller-side ECO is not the actual seller of the goods or services, Seller side ECO who finally makes the payment or the deemed payment to the seller is required to deduct tax u/s 194-O on the "gross amount" of such sale of goods or provision of services.
- Tax u/s 194-O is required to be deducted on gross amount of sales, inclusive of shipping, packaging, convenience fees, commission, etc. Once tax is deducted u/s 194-O, the said payment shall not be subject to tax deduction u/s 194S or 194H or any other section of the Act.
- When tax is deducted at the time of credit of amount in the account of seller and the component of GST/various state levies and taxes comprised in the amount payable to the seller is indicated separately, tax shall be deducted under section 194-O of the ITA on the amount credited without including such GST/various state levies and taxes. However, if the tax is deducted on payment basis, being earlier than the credit, the tax would be deducted on the whole amount as it is not possible to identify that payment with GST/various state levies and taxes component of the amount to be invoiced in future.
- If Purchase-return where the tax has already been deducted under section 194-O, then Tax deducted may be adjusted against the next purchase against the same seller. If Purchase-return is replaced by the goods, no adjustment would be required.
- In case of seller discount, Seller would reduce the price of the product sold or service provided, Tax will be deducted at discounted price. Where discount given by buyer ECO or seller ECO, Seller receives full consideration for the product- out of part of the amount received from buyer and the balance from buyer ECO or seller ECO, tax will have to be deducted at gross amount of the sale without considering discount amount.

Revision of Timelines, Monetary Limits and Workflow in matter of recording of reasons for withholding of refunds u/s 245 of the ITA

Instruction No. 2/2023 [F. NO. 312/82/2022-OT], dated November 10, 2023

The Monetary Limit for withholding refund u/s 245(2) of the ITA shall be Rs 10 lakhs or more. In case where 245(2) is applicable, FAO (Faceless Assessing Officer) on receipt of communication from CPC shall intimate the JAO (Jurisdictional Assessing Officer) with regard to demand likely to be raised in pending assessment within 20 days. After analyzing the case on factual basis JAO shall record such reasons in writing and seek approval of the Jurisdiction PCIT. JAO will communicate the final decision regarding withholding/release of refund to the CPC within 30 days.

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Important Rulings

Indian Ruling

SC settles longstanding dispute over invocation of MFN Clause, ruling against taxpayers

Nestle SA [CA No. 1420 of 2023 – Order dated 19 October 2023]

The legal dispute regarding the application of the MFN clause in tax treaties has been an enduring issue before the courts. The presence of the MFN clause in the protocol to tax treaties allows taxpayers to assert additional benefits if such benefit is extended to any third country with which India has entered a treaty. A series of appeals were presented to the Hon'ble SC, wherein the court deliberated on two key issues: 1) Whether the MFN clause is automatically applicable or necessitates a separate notification for its application, and 2) Whether the Third State, with which India has entered into a treaty, should be an OECD member at the time of treaty initiation or if it suffices if the Third State is an OECD member at the time of invoking the MFN clause, irrespective of its status at the treaty's inception.

The SC after taking into consideration the taxpayer's and Revenue's contentions held that the protocol has the effect of amending the treaty provisions and accordingly separate notification is mandatory to give effect to such amendments. The court differentiated the manner of giving effect to the changes in treaties in India as compared to other treaty countries and observed any changes in the treaties has to be mandatorily approved through a notification in India. Thus, held that without a separate notification giving effect to the MFN clause in the treaties, the taxpayers cannot invoke MFN clause.

With respect to the issue related to the time when the Third State should be an OECD member, the court while interpreting the phrase 'is a member of the OECD' of the MFN clause observed that the expression 'is' has present significance. Accordingly, it was held that the Third State must be a member of the OECD when it enters a treaty with India, for the earlier treaty beneficiary country to be able to claim applicability of the MFN clause.

The ruling delivered by the SC will have significant implications regarding the application of the MFN clause. This is particularly crucial as numerous taxpayers may have already invoked the MFN clause without a distinct notification, leading to a reduction in the withholding tax rate. Although the SC has relied on interpretation of treaties by Vienna Convention on the Law of Treaties (VCLT), the justification of this ruling in alignment with one of the fundamental articles of the VCLT, which asserts that treaties should be applied in good faith, remains debatable.

Statistical inputs not taxable as FTS/FIS in absence of technical know-how made available

McKinsey & Company Singapore Pte Ltd [ITA No. 2123 to 2125/Mum/2023 - Order dated 23 October 2023]

Taxpayer is a non-resident corporate entity incorporated in Singapore and is a tax resident of Singapore. The Taxpayer is part of McKinsey group of entities, the primary business of which is to render strategic consultancy services & qualitative inputs to their clients.

During the year under consideration, the Taxpayer had entered into international transaction with its associated concern i.e., McKinsey & Co. Inc (India Branch). The said transaction was referred to TPO and addition to the income of the Taxpayer was made Pursuantly, the order was passed by AO relying upon the order of DRP.

Aggrieved by the order, the Taxpayer filed an appeal with the Hon'ble ITAT (Mumbai). Against the said order, the Taxpayer had contested by submitting the following arguments to the Hon'ble ITAT(Mumbai):

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- Hon'ble ITAT(Mumbai) has already upheld that non-taxability of borrowed strategic consultancy service under India-Singapore Tax Treaty in the Taxpayer case on a consistent basis for various AYs
- For previous AY, the department had withdrawn the appeal on the similar issue as the issue was resolved under MAP. Hence, once a set of facts and legal position has been accepted by the department, the income tax authority cannot deviate from the past position and take a contrary view
- Relying on judicial precedents, a price determined under MAP mechanism could be adopted in respect of non-MAP transaction
- Relying upon the meaning of "make available", the borrowed strategic consultancy services do not make available any technical knowledge, skill, etc.to McKinsey India
- The said income is classified as business income and in absence of PE, the said income is not taxable in India

Pursuant to hearing the contentions form both the side, Hon'ble ITAT (Mumbai) was perused with the order of the ITAT in case of McKinsey & Co. Inc, US and other case laws relied upon by the Taxpayer. Hon'ble ITAT observed that the taxability of receipts including borrowed strategic consultancy service fees/loaned service fees was to be determined as per MAP statement. Accordingly, the said receipts were business profit and not FTS and in absence of Indian PE of the Taxpayer, these receipts are not taxable in India.

To summarize the said judgement, it is interesting to note that Hon'ble ITAT (Mumbai) relying on the various past judicial precedents adopted MAP resolution for the international transactions entered into with non-US AEs. Therefore, the said judgement providing a way forward for non-US AEs for following MAP resolution being internally accepted procedure to determine Arms-Length of the international transaction, in absence of MAP article in Tax Treaty.

Further, it has been observed that despite of "make available" clause present in Tax Treaties, the Revenue has not been considering that in order to qualify a fee under FTS, it should be ensured that the service receiver shall be equipped to apply the technical knowledge or know-how independently in future. The said judgement has again brushed aside all the arguments of the revenue by relying upon the settled principles laid down by Hon'ble Courts from time to time.

Engineering services used for extraction or exploitation of aluminium would not amount to FTS by virtue of MFN clause of Protocol to DTAA

Aluminium Pechiney [ITA Nos. 9483/Del/2019, 9484/Del/2019 and 3410/Del/2016 – Order dated 06 September 2023]

Taxpayer is a foreign company and a tax resident of France. The taxpayer was a leader in metals and their by-products industry and also provides a variety of technical and related services that include quality control, design of machines, supervision, installation etc. mainly in the field of aluminium. In this background, the issue under consideration was whether the engineering package fee and on-site man-day charges can be treated as FTS as per provisions of India-France DTAA and India-Portugal DTAA.

In this context the Hon'ble bench of ITAT has allowed the benefit of MFN clause claimed by taxpayer as provided in paragraph 7 of India-France DTAA Protocol which says that if under any Convention, Agreement or Protocol signed after 1-9-1989, between India and a third State which is a member of the OECD, India limits its taxation at source on dividends, interest, royalties, fees for technical services or payments for the use of equipment to a rate lower or a scope more

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restricted than the rate of scope provided for in India-France DTAA on the said items of income, the same rate or scope as provided for in that Convention on the said items income shall also apply under India-France DTAA. Accordingly, taxpayer has restricted the meaning of definition as provided in Article 12(5)(f) and 12(5)(g) of India-Portugal DTAA and claimed benefit of MFN clause.

As per Article 12(5)(f) and 12(5)(g) of India-Portugal DTAA, FIS does not include payments for services rendered in connection with an installation or structure used for the exploration or exploitation of natural resources referred to in para 2(g) of Article 5 and services referred in para 3 of Article 5.

Article 5(2)(g) says that 'a mine, an oil or gas well, quarry or any other place of extraction of natural resources, including an installation or structure used for the exploration or exploitation of nature resources only if so, used for a period of more than 120 days in a financial year shall qualify as a PE' Whereas, Article 5(3) provides that 'a building site, structure, installation or assembly project or supervisory activity in connection therewith constitutes a PE, only if it lasts more than 9 years'.

Accordingly, considering below parameters the Hon'ble bench of ITAT, has allowed the contentions of taxpayer arguing that the engineering package fees and on-site man-day charges received were not in the nature of FTS in terms of exceptions provided under Article 12(5)(f) and 12(5)(g) of India-Portugal DTAA, hence not taxable in the hands of taxpayer.

- The applicability of MFN clause has not been challenged by the rival appellant.
- The services rendered by taxpayer was in connection with installation/erection of plant and machinery involved in mining of natural resources. Moreover, scope of Article 5(2)(g) of India-Portugal DTAA is not merely limited to mining or extraction of natural resources but also covers installation or structure used for exploration and exploration of natural resources.
- Amount received from the parties would qualify as FTS under Article 12(4)(a) of India-Portugal DTAA. However, a conjoint reading of Articles 12(5)(f), 12(5)(g), 5(2)(g) and 5(3) would make it clear that fees received towards services in connection with a mine, an oil or gas well, quarry or any other place of extraction of natural resources, including an installation or structure used for the exploration or exploitation of nature resources, a building site a construction, installation or assembly project, including supervisory activities in connection therewith would fall within exceptions provided under Article 12(5)(f) & 12(5)(g) of India-Portugal DTAA.
- Accordingly, engineering package fees and on-site man-day charges shall not be treated as FTS, hence not taxable.

The above judgement is a pure example of interpretation of the language provided under different clauses of tax treaties. Hence, it is very important to have a clear interpretation of the tax treaties so that the case can be defended well.

Mere existence of subsidiary in India does not constitute fixed place PE in India

Mosdorfer GMBH [ITA No. 286/Del/2023 – Order dated 20 November 2023]

Taxpayer is a foreign company and a resident of Austria. The objects of the taxpayer are the development and industrial production of overhead accessories and damping system from steel and metal goods, which can be manufactured by pressing, forging, bending, welding and shaping

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by metal cutting as well as the industrial operation of a galvanizing plant. The taxpayer has a subsidiary in India named Mosdorfer India Private Limited.

During the subject year, the taxpayer has received certain revenue from India along with revenue from export of goods. Out of the total income received by the taxpayer, it has claimed income in the nature of reimbursement of expense from Indian subsidiary as exempt income.

The AO and the DRP has concluded that the taxpayer had not provided any cogent explanation as to the nature of reimbursement of expenses which it has cross charged to Indian subsidiary and treated the same as FTS under the DTAA. Hon'ble bench of ITAT has considered the evidence in the form of lab test reports provided by the taxpayer at the time of assessment and concluded that the same was sufficient to establish that the expenses was merely on account of reimbursement of lab test report expenses and the taxpayer had not added any value to the test reports. Accordingly, the same shall not be treated as income in the hands of the taxpayer.

On the second issue which was a revenue from exports made to Indian subsidiary, AO and DRP both held that Indian subsidiary company shall be considered as a fixed place PE. DRP further held that the Indian business of the taxpayer is being procured through the Indian subsidiary and the taxpayer has been supplying goods and services to various customers in India through the use of Indian subsidiary and also provides it with necessary service and supervision.

In this regard, the Hon'ble ITAT has not treated the India subsidiary as fixed place PE of taxpayer by stating as under:

- The taxpayer has provided copies of invoices, bill of ladings which shows that the consignees were situated outside India.
- The Indian subsidiary had made payments on account of services received from the taxpayer after applicable withholding of taxes.
- It was presumed by the tax authorities that whatever sales in the form of export is made to Indian entities, the same is with indulgence of Indian subsidiary without substantiating as to how Indian subsidiary was privy to the purchases by other entities.
- Accordingly, to hold PE on the basis of existence of a subsidiary company of taxpayer in India cannot be sustained.

The above ruling is a clarificatory ruling which says that merely existence of Indian subsidiary in India does not amounts for PE in India. One must look into the roles to be performed by the Indian subsidiary and proof of documents provided by the Indian subsidiaries. Accordingly, role of a Indian subsidiary is crucial part to arrive at a conclusion of PE.

Absent evidence of cost-allocation and actual incurrence, upholds taxability of reimbursement as FTS

Kraft Foods Group Brands LLC [ITA No. 2495/Mum/2022 - Order dated 27 September 2023]

The taxpayer is a company incorporated in USA and a tax resident of USA. The taxpayer does not have any branch office or employees in India. The management and control of taxpayer's affairs are entirely situated in the USA. Accordingly, the residential status of the taxpayer is that of a non-resident for tax purposes in India and it can claim the benefit of DTAA between India-USA by providing the TRC issued by the USA authorities and necessary information and documents.

The taxpayer entered into support service agreement to provide support services through

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various cost centres and recharged its group entities. The taxpayer failed to provide any details or proper factors or allocation basis to classify the various support service charges provided/collected from various affiliates, in particular Heinz India Private Limited. The taxpayer did not offer this to tax claiming it was reimbursement expense since no markup was involved. The revenue rejected the taxpayer's contention and argued that the mere mention of 0% mark up on costs incurred in the agreement entered into by parties does not sum up to reimbursement. Additionally, the taxpayer had raised a single invoice for all costs incurred instead of determining the allocable cost by adopting allocation factor. The revenue held that the support services provided also satisfied the make available criteria and thus was taxable as FTS.

Further, the Hon'ble bench of ITAT looked into the agreement and observed that a markup of 0% was to be applied to the costs of performing support services unless a different markup is required under the US TP rules. However, the taxpayer did not bring the relevant assessment made under the US TP rules. Also, the taxpayer did not even bother to submit any details of cost allocation by the respective cost centres and relevant cost factors for allocation. Hence the Hon'ble bench of ITAT disregarded the taxpayer's contention to treat the cost recharge as a reimbursement of expenses. The Hon'ble bench of ITAT categorically ruled that the cost allocations claimed on actual cost should be supported by the due backups and allocation mechanism. Merely doing it on the basis of a service or support agreement would not be enough. Thus, lack of evidence and supporting calculations to establish the incurrence of expenses and their allocation upholds taxability of reimbursement as FTS.

In the absence of any obligation to deduct tax under section 195, Taxpayer cannot be treated as "Assessee in default"

LG Electronics India Ltd. [ITA Nos. 7926 TO 7932 (DELHI) OF 2018 – Order dated 21 November 2023]

Taxpayer is a subsidiary of Korean company ('LG Korea'), engaged in trading, assembly, manufacturing, marketing and sales of electronics and home appliances. Taxpayer entered into transactions with LG Korea and several other group companies for purchase of raw materials, finished goods, capital goods etc. AO treated the taxpayer as assessee in default for non-deduction of TDS under section 195 of the ITA, in respect of payments made to LG Korea and other group companies under the pretext that group companies including LG Korea had PE in India.

Taxpayer argued that during the course of proceedings under section 201(1)/201(1A), the assessment proceedings were also ongoing in case of group entities, wherein, pursuant to directions of DRP, it has been concluded that except LG Korea, no other non-resident group entities had any PE in India and in respect of LG Korea, the DRP directed that the income attributable to the PE has to be determined by taking a portion of the salary cost of expatriate employees and applying an appropriate mark-up on the said cost.

In light of the above facts, Hon'ble bench of ITAT ruled in favour of the taxpayer and observed that since the basis of attribution of profit to the payee, LG Korea is purely notional and when taxpayer has already deducted TDS u/s 192 of the Act in respect of salary cost paid to the expatriate employee and has not made any direct payment to the LG Korea towards the salary cost of expatriate employees, there was no liability on the taxpayer to deduct tax on such notional payments made to LG Korea.

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This is an interesting ruling wherein ITAT has reiterated the principle that taxpayer cannot be treated as assessee in default for alleged failure to perform an impossible act.

Crossfall breach clause not a basis for combining Offshore Supplies and Onshore Services Contract

Jiangdong Fittings Equipments [ITA Nos. 2290 & 229/Del/2022 – Order dated 29 November 2023]

One more decision has been added to the controversy regarding artificial splitting up of Engineering, Procurement and Construction (EPC) contracts. Recently, Hon'ble bench of Delhi ITAT in case of taxpayer has held that non-resident shall not be taxable for offshore supplies on CIF basis as the title was transferred outside India and sale was also completed outside India.

Taxpayer entered three contracts with Power Grid Corporation India Ltd. and its two subsidiaries (PGCIL) for offshore supply of goods and equipment. ZTT India Pvt. Ltd. (ZTT India), an Indian subsidiary of taxpayer also entered into separate contracts with PGCIL for onshore supply of services. AO treated ZTT India to be PE of the taxpayer on basis of following observations and apportioned income of taxpayer in India.

- Onshore and Offshore contracts have crossfall breach clause wherein breach in terms of one contract leads to violation of another contract.
- Employees of ZTT India works under direction and control of taxpayer. Hence, ZTT India is PE of taxpayer in India.
- ZTT India has discharged various responsibilities for dispatch of goods from port to purchaser.

Taxpayer has contended that goods were transferred on CIF Basis which means title in goods would pass on port of origin (i.e., China) and accordingly goods have been transferred outside India. It was further submitted that there was no evidence that ZTT India has played any role in offshore supply of goods. It also relied on a plethora of judgements to contend that both the contracts were separate and independent of each other.

Hon'ble bench of Delhi ITAT observed the terms of contract and also observed that 90% of CIF Value is to be paid progressively and balance consideration is payable on receipt of goods after acceptance certificate of purchaser's quality department, only to ensure goods being free from defect. ZTT India only performed clearance as well as port handling services for which it was reimbursed by taxpayer. Accordingly, title of goods has been passed outside India only. Hon'ble bench of Delhi ITAT further observed that merely because there is crossfall breach clause to ensure seamless execution of the contract, two separate and distinct contracts can't be held to be composite contracts. Thus, relying of judgements in case of Ishikawajma-Harima Heavy Industries Limited as well as Delhi HC in case of Mitsui & Co., held that income from offshore supplies is not taxable in India.

Taxability of EPC contracts has been a point of litigation at various levels in different scenarios, especially in the context of Profit attribution for PE and taxability of offshore supplies. It has been observed that while determining such issues courts have placed hefty reliance on bid documents / formats / conditions which could play an important role in determining the substance of contract. Further, the fact that the scope & pricing of each of these contracts is verified by the customers independently from a commercial perspective during the bid discussion stage could also support a taxpayer's position (also in case of related parties being parties to the contracts) subject to clarity of roles and responsibilities, both in letter and spirit.

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Explanations 6 and 7 to Section 9(1)(i) effective retrospectively

Augustus Capital PTE Ltd. [ITA 405/2022 – Order dated 30 November 2023]

Taxpayer, a foreign company, sold shares of Singapore company (SG Co) in March 2015. SG Co derived substantial value from Indian assets. Taxpayer had held less than 5% voting rights and share capital of SG Co and it did not have any right of management or control in relation to SG Co. In light of the same, the taxpayer did not offer any income to tax at the time of filing of tax return in India relying on the provisions of Explanation 7 to Section 9(1)(i) of the ITA.

Tax authorities argued that Explanations 6 and 7 to Section 9(1)(i) are not merely declaratory or clarificatory but introduce a new set of exemptions for small taxpayers and, therefore, are like substantive amendments, which can only apply prospectively with effect from assessment years commencing on 1st April 2016 as introduced vide Finance Act 2015.

Delhi HC was of the view that while deeming fiction under Section 9(1)(i) of the ITA brought to tax net all income accruing or arising, whether directly or indirectly, through or from any property in India or through or from any asset in India, Supreme Court, in the Vodafone ruling, had excluded from the scope and ambit of Section 9(1)(i) gain or income arising from the transfer of shares of a company located outside India, although the value of the shares was dependent on assets which were situated in India and that Explanations 4 and 5 to Section 9(1)(i) were introduced via Finance Act 2012 to cure this gap in this legislation.

Delhi HC further held that the expressions "share and interest" and "substantially" mentioned in Explanations 4 and 5 were not defined and therefore resulted in vagueness, the ambiguity in provisions only vested more power to tax authorities and caused undue hardship to taxpayers, specially where they had insignificant stake. Taking into consideration the background, legislative history, legislative intent reflected in Shome Committee report and speech of the Finance Minister, introducing amendments vide Finance Act 2015, the Court held that Explanation 6 and 7 to Section 9(1)(i) of the ITA clarify the provisions of Explanation 5 and were introduced as curative measures and being clarificatory in nature, should be retrospectively applicable with effect from date of applicability of Explanation 5 to Section 9(1)(i) of the ITA. Delhi HC thus emphasized on the substance and intent of introduction of Explanation 6 & 7 to Section 9(1)(i) and upheld the decision of ITAT in favour of taxpayer.

Inextricably linked services of offshore supplies, not taxable

DSD Noell GMBH [ITA Nos. 3186 / Del / 2016, 255 / Del / 2017, 6190 / Del / 2017, 7070 / Del / 2018, 7282 / Del / 2019, 115 / Del / 2021 and 1619 / Del / 2022 - Order dated 21 November 2023]

Taxpayer is a non-resident corporate entity incorporated in Germany and is a tax resident of Germany. The assessee is engaged in the business of engineering, designing, manufacturing, and installing plants for the Hydro Electric Power Projects.

Taxpayer entered into agreement(s) with M/s Hindustan Construction Company Ltd (HCC) for carrying out Hydro-Mechanical Works. During the year under consideration taxpayer had rendered offshore supply of plant and equipment as well as offshore services (involving supply of related drawings design) which were not offered to tax in India and the same was disputed by AO vide passing an order which was also upheld by the hon'ble CIT(A). Aggrieved by the said order, the

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taxpayer filed an appeal with the Hon'ble ITAT (Delhi).

Pursuant to hearing the contentions form both the side and perusal of the case laws relied upon by the taxpayer, the Hon'ble bench of Delhi ITAT was of the view that the said matter of appeal revolves around the following question:

"Whether the amount received from HCC for the offshore supply of plant & equipment and offshore services during the year under consideration is chargeable to tax in India as per the provisions of the ITA as well as under the India-Germany DTAA?"

AO had vehemently harped on the point that the taxpayer had taken insurance for the said plant and equipment and alleged that offshore supply is taxable in India. However, during the year under consideration, the taxpayer had supplied the said goods plant and equipment outside India and consideration for such offshore supply was also received outside India. Additionally, the title to the said plant and equipment was duly passed on to the customer outside India on FOB basis.

The Hon'ble bench of ITAT based on the aforesaid observations and relying on the decision of Hon'ble SC in case of Ishikawajima-Harima Heavy Industries Limited reported in 288 ITR 408 (SC) held that no part of consideration received outside India for offshore supplies of plant and equipment could be taxed in India. Additionally, in absence of any PE of the taxpayer in India such consideration would only be in the nature of business income not attributable to PE in India and hence not taxable under Article 5 read with Article 7 of the India-Germany DTAA.

With respect to offshore services, offshore service contract primarily involves preparation and supply of drawings and design for imported plant & equipment and thus is inextricably linked with the offshore supply of plant & equipment. The drawings and designs made by the Taxpayer are tailor made to suit the requirements of the plant and equipment supplied. Relying on various judicial precedents, the Hon'ble bench of ITAT concluded that when the supply of drawings and designs is coupled with supply of equipment, which is manufactured in accordance with the designs supply, the amount received cannot be characterized as FTS. Additionally, the receipts from offshore services does not give rise to any income accruing or arising in India and therefore services provided is neither taxable under the ITA nor under the India-Germany DTAA.

To summarize, it is important to determine the nature and taxability, the pith and substance, the dominant purpose of the agreement under which payment is to be made. In present case, payment was made towards both offshore supply and services, and services would take colour of offshore supply as discussed in ensuing paras as both are inextricably linked with each other. Thus, the payment received by the taxpayer is considered to be in nature of offshore supply of plant and equipment.

Revenue not empowered to question TRC without establishing a company as shell / conduit

CPI India Ltd [ITA No. 382/Del/2023 - Order dated 21 November 2023]

Taxpayer is a non-resident investment holding corporate entity and a tax resident of Mauritius. The taxpayer also holds a valid TRC for the year under consideration.

The case of the taxpayer was not selected for scrutiny. However, by virtue of information received by the ITO with respect to remittance of an amount by an Indian Company amounting to INR.162 crores to the taxpayer towards purchase of shares of M/s. Noida Cyber Park Pvt. Ltd. without withholding any tax raised the eyebrows of the AO.

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Accordingly, the AO reopened the assessment under section 147.

During the year under consideration, the taxpayer had filed its return declaring a long-term capital loss. Pursuant to verification, the AO was of the view that the taxpayer had erred in computing capital gain and accordingly, made addition to the income of the taxpayer. On top of that the AO rejected the taxpayer's claim of exemption under India-Mauritius DTAA. Similarly, DRP also rejected the objections of the taxpayer.

Aggrieved by the order, the taxpayer filed an appeal with the Hon'ble bench of Delhi ITAT Wherein the taxpayer had contested on the following grounds:

- Reopening of assessment in case of the taxpayer is invalid;
- Without prejudice, the taxpayer cannot be deprived of the benefit of treaty, by virtue of holding a valid TRC.

On hearing the contentions of both the parties, the Hon'ble bench of ITAT was of the view that the core issue arising for consideration is taxability of capital gain on sale of shares under the treaty provisions.

From perusal of all the material and evidence submitted by the taxpayer in order to substantiate its residential status, the Hon'ble bench of ITAT was in a view that both the AO and DRP not considered the same and had made only vague allegations regarding the status of the directors and the structure of the company and held that since, the taxpayer is mere a paper company, it is not entitled for treaty benefits.

It is against the spirit of CBDT Circular no. 789, dated April 13, 2000 and the ratio laid down by in case of Union of India vs. Azadi Bachao Andolan and Blackstone Capital Partners. Accordingly, the Hon'ble bench of ITAT held that the TRC is conclusive evidence for determining the status of residence and the benefit of India-Mauritius DTAA should be available to the taxpayer on account of taxpayer not being a shell/conduit company.

Therefore, from the said ruling one can appreciate the fact once the taxpayer holds a valid TRC, the departmental authorities cannot question taxpayer's residential status and entitlement to treaty benefits only subject to taxpayer not being a shell/conduit company. Thus, the said decision is in line with the past judicial precedents passed by the various judicial bodies with respect to validity of TRC.

FTC can be claimed if Form 67 filed before processing of return

Duraiswamy Kumaraswamy v. PCIT, WP No. 5834 of 2022, Madras HC

The taxpayer was resident of India and had filed return of income in India including income received from Kenya and claimed foreign tax credit in respect of Kenya income tax paid u/s 90 of the ITA read with Article 24 of India Kenya DTAA. However, while filing the return, the taxpayer inadvertently missed uploading Form 67 but filed the same before processing the return of income.

The credit in respect of foreign tax was not granted in intimation passed u/s 143(1) of the ITA. The taxpayer also filed rectification request before CPC, however, still the foreign tax credit was not granted. Thereafter, the taxpayer filed application for revision u/s 264 of the ITA, which was also rejected since Form 67 was not filed with return u/s 139(1) of the ITA.

The taxpayer filed writ petition before Madras HC to direct CPC to condone delay in filing Form 67 and grant foreign tax credit.

HC, after relying on the decision of Apex Court in case of CIT v GM Knitting Industries in Civil Appeal no. 10782 of 2013 and 4048 of 2014, observed that filing of FTC in Rule 128 is directory in nature and only for implementation of provisions of the Act. Further, in the instant case, the claim to avail benefits of FTC is filed before the Assessment.

In view of the above, HC directed CPC to give due credit of Kenya income tax paid to taxpayer.

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Foreign Ruling

Mexico - Netherlands - Mexico Treaty benefit denied as technical fee did not qualify as Business Profits

Taxpayer, (tax resident of Netherlands) provided technical assistance to a service recipient (tax resident of Mexico). Taxpayer treated the fees received towards said services, as business profits and since there was no permanent establishment in Mexico, taxpayer did not offer the receipts for taxation in Mexico, relying on Article 7 of Netherlands – Mexico tax treaty.

The matter travelled to the Mexican Federal Tax Court and the Court ruled said receipts would be subject to withholding tax under the domestic tax laws of Mexico under source rule by observing as under:

- In terms of Article 3 of tax treaty, any term not defined in tax treaty (unless the context otherwise requires), have the meaning that it has at that time under the domestic law of the relevant State (Mexico in the present case). 'Technical Assistance' has been defined under the domestic tax laws of Mexico as 'the provision of independent personal services through which one party provides non-patentable knowledge does not involve the transmission of confidential information relating to industrial, commercial, or scientific experiences, and commits to be involved in the application of such knowledge, whereas there is no such separate definition under the tax treaty.
- Article 7 of the tax treaty applies to the business profits and does not apply to such items of income as are dealt with separately in other Articles of the treaty. The Court noted that because certain items of income are not included in other articles of the treaty, it does not necessarily mean that Article 7 of the treaty would apply.

Accordingly, the Court concluded technical assistance payments do not qualify as business activity under domestic tax code or under the treaty and held such technical assistance payments to be outside the purview of any other Article of the treaty. Rather, such receipts were held to be subject to withholding tax under the domestic tax laws of Mexico under source rule.

In Indian context, wherever the treaty does not specifically provide for the separate distribution rule / Article dealing with Fees for technical Services (e.g. India-Thailand / India-UAE), the Tax Authorities have always attempted to resort to the domestic law definition of FTS, whereas the Indian Courts and Tribunals have held that in the absence of article dealing with FTS in treaty, income would be characterized as Business Profits taxable in India only if the recipient has PE in India. In few cases, the Courts have also resorted to the distribution rule as per 'Other Income' article.

Luxembourg - Administrative Court (the Court) overrules Advance Ruling due to inconsistency of facts and evidence

Taxpayer is a limited liability company, established in Luxembourg which in turn, set up a branch office in the USA (branch), for undertaking intra-group financing activities. For tax purposes, the taxpayer and the branch had separate assets. Accordingly, Taxpayer obtained advance ruling as to income generated by assets attributed to branch shall be taxable at branch level and therefore, any dividend from participation of branch shall be allocated to branch and would not be taxed in Luxembourg in view of Article 23(2) (Taxing of Capital) as well as Article 25 (Relief from Double Taxation) of USA-Luxembourg DTAA.

The taxpayer filed its corporate tax return treating the branch to be its PE in the USA, therefore, excluded the income (dividend in-kind) received by the branch from a group company in view of advance ruling. Tax officer sought to verify such claim after seeking few clarifications on the US PE. After analysing the facts, the tax officer directed the taxpayer to pay additional tax on the dividend income earned by the branch thereby refusing to recognise the branch as a PE of the taxpayer in the USA.

On appeal by taxpayer, the Court upheld the lower authority's decision that the branch did not constitute PE of the taxpayer in the USA upon finding the inconsistency in the facts initially described whilst obtaining the advance ruling vis-à-vis the facts stated and the documents furnished before the Court.

The key observations of the court are as below:

- No proof of receipt of dividend by US branch was furnished.
- Events occurrence on the same day (i.e., creation of the branch, the distribution of dividends to the branch and the reallocation of the said dividend to the taxpayer)
- Taxpayer failed to furnish the crucial pages of the agreement of setting up the branch office and inter-company agreement for the contribution of shares of a group company by branch.
- From minutes of board meeting, the intention to distribute dividend directly to taxpayer was clearly evident.
- No tangible evidence for reallocation of dividend to taxpayer.

The Court, in the above decision, underlined the fact that the decision of the advance ruling is not binding on the tax authorities in case either (i) the facts or circumstances described were incomplete or inaccurate; (ii) key elements of the actual transaction undertaken differs from the description provided based on which the ruling was obtained, or (iii) the decision is no more compliant with the national or international law.

In view of the said judgement, it is critical to bear in mind that obtaining an advance ruling does not ipso facto prohibit the tax authorities from inquiring about the transaction during the assessment proceedings. Thus, maintaining robust documentation to substantiate the facts is of utmost importance and cannot be undermined by any stretch of the imagination.

Australia – Tax withholding upheld on royalty embedded in consideration for raw material purchases

PepsiCo Inc [2023] FCA 1490 - Federal Court of Australia

PepsiCo, Inc (PepsiCo) and Stokely-Van Camp, Inc (SVC) were companies incorporated in the USA, owning world-wide portfolio of trademarks, designs and other rights and assets relating to the Pepsi & Mountain Dew brands and the Gatorade brand, respectively. PepsiCo and SVC entered into Exclusive Bottling Agreements (EBAs) with SAPL, an Australian company, appointing SAPL as the sole and exclusive licensee to bottle, sell and distribute trademarked PepsiCo Group carbonated soft drinks and SVC's non-carbonated beverages.

As per the EBAs, PepsiCo and SVC had agreed to sell or cause a related party to sell beverage concentrates to SAPL. A Singapore based company (CMSPL) manufactured concentrates, supplied the same to a PepsiCo group's subsidiary (PBS) in Australia who distributed concentrates to SAPL. SAPL was required to procure concentrates from PBS, mix the same with other ingredients in accordance with formulas, specifications and other information provided by the PepsiCo Group to produce finished beverages for retail sale in Australia. SAPL was granted rights to use trademarks and other intellectual property rights such as artwork, proprietary package, technical, commercial or industrial information, etc. to manufacture, bottle, sell and distribute the

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finished beverages in Australia under the brands owned by PepsiCo & SVC groups.

Tax authorities contended that price paid for procuring concentrates was not only consideration for purchase of concentrates but also included consideration for right to use trademarks and other IPRs. Tax authorities thus sought to deem about 8.5-9% of net revenues as SAPL as royalties, subject to tax withholding at the rate of 5% on gross basis as per domestic laws of Australia read with Article 12 of Australia–USA DTAA. Alternate contention of Tax Authorities was that if the payments are considered as not subject to tax withholding as Royalties, the same should be liable to 40% Diverted Profits Tax considering the same as an artificial arrangement undertaken to avoid taxes in Australia & USA.

PepsiCo & SVC contended that no consideration was paid or credited for right to use any trademark or other IPR or for any scientific, technical, industrial or commercial knowledge or information under the EBAs and that there was neither any actual payment by SAPL to the US companies, nor were they entitled to receive any amount from SAPL in any form.

The Federal Court of Australia (FCA) was posed with two questions – whether payments made by SAPL comprised royalty for use of IPRs owned by PepsiCo & SVC and if yes, how to quantify the same. The FCA held that the exclusive licence to manufacture, bottle, sell and distribute with use of the trademarks and other intellectual property was fundamental to and inseparable part of the agreement. While the agreements at some places referred to 'royalty free' license to use some IPRs, the Court was of the view that Article 12(6) of the DTAA did not require the consideration to be named or described as royalty and that the characterisation of consideration would not depend upon the nomenclature used in the agreement but would depend upon the analysis of terms of EBAs in business and commercial context. The FCA observed that it was PepsiCo and SVC who entered into the EBAs which defined the price at which Concentrates will be supplied to SAPL and that PBS was not even a party to the contract. The Court thus held that as the parties to the EBAs, PepsiCo & SVC were entitled to receive the payments made by SAPL under the EBAs and that SAPL's payment obligations under the EBAs were owed to them. The Court thus held that there was a component of royalty inbuilt into the price agreed to be paid for supply of Concentrates and the same was chargeable to tax in accordance with Article 12 of the DTAA with USA and 5.88% of SAPL's net revenue for the year under consideration with some adjustments for exclusivity under EBAs was considered as royalty for use of PepsiCo & SVC's trademarks and IPRs, subject to 5% tax withholding in Australia.

It is very interesting to note how the FCA examined the EBAs in details and emphasised that it did not rely on a prior assumption that because valuable IPRs were licensed by PepsiCo/SVC under the EBAs, SAPL must have paid something for that licence but based on an analysis of the terms of the EBAs concluded that there was licensing of IPRs for a consideration. Interestingly, the judgement provides detailed analysis and also took note of qualifications and experience of Valuer in valuation of IPRs or licensing in the soft drink beverage industry and detailed evaluation of different valuation methodologies in arriving at the valuation of royalty rates. As an academic discussion, the Court further held that if it would have not considered the withholding tax provisions on royalties applicable, the transaction would have been considered as taxable under the provisions relating to diverted profit tax.

Luxembourg - Mere presence of branch doesn't automatically trigger a fixed place PE

[Administrative Court of the of Luxembourg Case No. 45030 – Order dated 26 May 2023]

Important Rulings

Canadian Company B SAS established a limited liability company (taxpayer), in Luxembourg, which, in turn, set up a branch in the USA in 2013 for intra-group financing activities. This led to a tax dispute regarding the recognition of the branch as a PE under the Luxembourg-US DTAA.

Taxpayer filed an advance ruling application in August 2013 seeking recognition of the branch as a PE under the Luxembourg-US DTAA. While the taxpayer awaited the response, tax office issued a tax assessment for 2013 in September 2015 and informed that no response to advance ruling will be provided as assessment was completed. Thereafter tax office completed assessments for the tax year 2014 to 2019. Taxpayer was unable to furnish proper evidence with respect to PE in USA. As a result tax office does not agree to recognize the branch as PE and directed to tax all the income from its US Branch in Luxembourg.

Taxpayer filed complaint with the director of administration of direct contributions ('director'). The director after assessing the information and documents received from taxpayer, denied the claim of taxpayer for tax year 2015 and rejected claims for remaining tax year.

The taxpayer further appealed with administrative court of Luxembourg (Court) and the court made following observations:

- Address of the Branch was not clearly identifiable, whereas, on one hand the office shared agreement between SARL and D LLC (Company incorporated in the USA) which mentions two addresses and on the other hand, Form 8858 filed with American tax administration provide different address, in which it is also declared that D LLC is independent agent.
- As per the taxpayer's own declaration, no payment has been made within the framework of office share agreement as well as service agreement.
- Taxpayer also confirms that its branch did not have bank account in its own name due to lack of its own legal personality and on the one hand, the documents submitted by taxpayer were not official documents but issued by its group company, and on the other hand, the fund paid to the Company B SAS under the loan contract were directly paid by taxpayer and not by branch.
- As per the service agreement the persons mandated to manage branch were also the managing Luxembourg entity.
- As per the legal opinion from American lawyer the branch should not file a tax return in the USA in absence of "considerable, continuous, and regular" activity, as branch does not have any "trade or business" in the USA.

Based on above observations, the Court affirms that mere existence of Branch doesn't automatically trigger PE or the existence of fixed place of business through which business of enterprise is wholly or partly carried on is essential.

Important Updates

Coverage

Indian Update

CBDT amends definition of 'intra group loan' and Safe Harbour conditions under Rule 10TD

Definition of Intra group loan has been revised to include loan extended to 'Associate Enterprise' instead of wholly own subsidiary. And omits condition for the loan to be advanced must be sourced in Indian Rupees, i.e., Loan denominated in foreign currency shall also be included.

For the purpose of minimum interest rate, reference to CRISIL credit rating has been omitted and rating from SEBI registered and RBI accredited credit rating agency shall be considered. Amendment is made in reference rate and additional basis point in case the intra group loan is denominated in foreign currency.

Further the definition of operating expenses has been amended to include loss on sale of asset on which depreciation is included in operating expenses and operating revenue shall include income on sale of asset on which depreciation is included in operating expenses.

Foreign Update

Kuwait to introduce new corporate tax initiative

Kuwait is poised to reform its tax system in its efforts to join the OECD/G20 Inclusive Framework on base erosion and profit shifting, as it is the only gulf cooperation council state that has yet to become a member.

The Kuwait government is set to introduce a new corporate tax initiative, known as the "Business Profits Tax Law" as part of a complete plan to revamp the existing tax framework. This reform will be implemented in two stages and is expected to be fully phased out as early as 2025. At present, only foreign companies engaged in business/trade in Kuwait are facing taxation on their profits and capital gain income.

The BPT would impose a 15% tax on the profits of various operating structures, encompassing corporate entities, partnerships and legally distinct businesses established, incorporated or operating in Kuwait. Individuals and small enterprises may enjoy exemptions.

Starting from 1 January 2025, Kuwait multinational companies including government entities operating internationally and generating annual revenue surpassing Euro 750 million ($806 million) will fall under the purview of the proposed BPT.

The plan outlines the BPT as an amendment to existing tax laws, aligning with the globally implemented Pillar Two framework.

The existing Kuwait corporate income tax law imposes a tax on the income of any body corporate wherever incorporated, earning income from Kuwait sources. No income tax is currently imposed on companies incorporated in the GCC and entirely owned by the citizens of the GCC. Corporate income tax is currently only imposed on the income earned by non-GCC (foreign) companies.

Germany approves global minimum corporate tax

The German parliament has approved the implementation of a global minimum corporate tax, aligning with an international agreement to establish a minimum tax rate of 15% for large companies.

The multinational corporations under this agreement will be obligated to pay a 15% tax on their global profits irrespective of the location where these profits are generated.

This agreement aims to curb the practice of major corporations evading taxes by shifting profits to

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jurisdictions with lower tax rates. The agreement is slated to be implemented starting next year.

Taiwan to restrict travel of Directors of companies having unpaid taxes

The MOF in Taiwan has recently released a notification on the travel restrictions that may be imposed on the directors of companies with outstanding tax debts, including in the cases of company liquidation.

The Bureau says that according to Paragraph 3, Article 24 of the Tax Collection Act, if a profit seeking enterprise owes confirmed tax payments exceeding NT$ 2,000,000 or owes tax payments exceeding NY$ 3,000,000 before the conclusion of procedures for administrative remedies and meets the conditions stipulated for "Restriction on Existing and Lifting of Exit Restrictions on Tax Debtors or Responsible Persons of Profit-Seeking Enterprises with Tax Arrears", the responsible person may be restricted from leaving the ROC.

Further the Bureau clarifies that according to Article 24 and Article 26-1 of the Company Act, if a company goes into liquidation and the company's articles of incorporation does not specify a liquidator and if the shareholders have not passed a resolution with regards to appoint a liquidator, all directors should act as the liquidators. In such a case, if it is deemed necessary to restrict the responsible persons (directors) from leaving the country, the liquidators should be subject to travel restrictions.

OECD Updates

OECD releases Pillar Two implementation handbook

The OECD/G20 Inclusive Framework on BEPS has released the "Minimum Tax Implementation Handbook". The handbook provides an overview of the key provisions of global minimum tax and considerations to be taken into account by the tax policy and administration officials and other stake holders in assessing their implementation options. It is limited to the Global Anti-Base Erosion (GloBE) rules and does not address the Subject to The Rule (STTR).

The handbook is divided into two chapters (i) Overview of the global minimum tax and (ii) Implementation considerations. The handbook was prepared under the Indian Presidency of the G20 and is not intended to modify the application or interpretation of any aspect of the Model Rules, the Commentary or the Agreed Administrative Guidance. The handbook supplements a variety of other resources and programs that have been developed to assist jurisdictions with the implementation of the GloBE rules and could undergo occasional updates.

Important Updates

Colombian MOF issues final regulations on SEP

OECD has released the new Multilateral Instrument (MLI) to facilitate the implementation of the Pillar Two "Subject to Tax Rule" (STTR). The STTR will enable developing countries to tax certain intra-group payments where these payments are subject to a nominal corporate income tax rate below nine percent. It allows source jurisdictions to impose a tax where they otherwise would be unable to do so under the provisions of tax treaties.

The STTR MLI will enter into force on the first day of the month following the expiration of a three-month period from the date of deposit of the second instrument ratification, acceptance, approval.

OECD releases Multilateral Convention to implement Amount A of Pillar One

The members of the OECD/G20 Inclusive Framework on BEPS have published the text of the Multilateral Convention to implement amount A of Pillar One (the MLC). The purpose of MLC is to enhance stability in the international tax system by:

a) Creating a coordinated agreement to reallocate taxing rights to market jurisdictions with respect to a portion of the profits of multinational enterprises in excess of 10% of revenues – often referred to as "excess profits" or "residual profits".
b) Providing tax certainty to in-scope MNEs with respect to both Amount A disputes and other tax disputes on existing rules.
c) Preventing the imposition of digital services tax (DSTs) and other similar measures on all companies (whether or not they fall under the scope of Amount A).

According to TEDE, the text of the MLC which is not yet open to signature, represents the consensus reached by members to date. Like the MLC, the TFDE also released an explanatory statement to clarify how each statement is intended to apply. In addition, the MLC is accompanied by an Understanding on the Application of Certainty for Amount A Pillar One. It contains further details on how aspects of Amount A tax certainty framework will operate in practice. An additional overview document was also released which provides a brief summary of the MLC, its layout and some of the other selected issues.

Colombian MOF issued final regulations on SEP

Colombian MOF introduced SEP rules in 2022 under which non-resident selling goods or rendering services digitally to users located in Colombia may trigger SEP. SEP will exist when non-resident or its related party earns gross revenue of more than 31,300 Tax Value Unit (approximately $2,97,000) from transaction carried out with customers located in Colombia and has 3,00,000 or more users located in Colombia or displaying price in Colombian pesos.

Current Regulatory Decree provided definitions of digital services, clients, users, digital interface. Definition of digital services specifically excludes services that have a tax treatment established in other provisions such as technical services, consulting services, technical assistance, and education services," even if they are provided through an electronic network or platform.

Regulation also specifies the criteria to determine when the customers/users are located in the national territory based on payment, shipping address, domicile, IP address, country's mobile code.

Important Updates

Non-resident meeting SEP criteria has an option to file the tax return and pay 3% tax or having tax collected via withholding tax at the rate of 10%.

Swedish Tax Agency issues new guidelines on allocation of shares to PEs

The Sweden Tax Agency has updated its guidelines in respect of allocation of shares to PE, wherein, now the shares will be allocated to that part of the company where the decision-making functions regarding acquisition, financing and disposing of shares lies. The tax agency did not rule out the fact that despite lack of decision-making functions, the PE's other operations may also constitute decision-making function.

Thus, the decisive factor is the activities carried out by the PE and whether these activities are extensively integrated with the activities carried out by the subsidiary in a way that the shareholding of subsidiary is necessary for and contingent on the activities carried out by the PE even if the decision-making functions are not located within the PE. However, simply providing services to the subsidiary would not be tantamount to extensive integration of activities for purpose of allocation of shares to PE.

HMRC issues guidance on Transfer Pricing Documentation and profit attribution for PEs in the UK

His Majesty's Revenue and Customs (HMRC) have updated its guidance regarding the requirements of transfer pricing records for PEs in the UK. There are no specific requirements for PEs beyond the general duty to keep and preserve such records as are required to make and deliver a correct and complete return as per the guidelines.

As per HMRC, the standards set out in the 2022 Transfer Pricing Guidelines, regarding attribution of profits to PE, represents an appropriate way to establish that the profits of PE are calculated as per arm's length principle. Further, the details pertaining to transactions concerning PE can be included in the Local File of the groups to maintain single set of documents covering their related party transactions.

Further, the taxpayers shall account the existence of PE and the characterizations and terms of dealing between the PE and the rest of the enterprise to establish that the profit is in accordance with arm's length principles.

Inland Revenue Authority of Singapore released guidance on the "Tax Treatment of Gains or Losses from the Sale of Foreign Assets"

In a significant departure from its longstanding tradition of non-taxation on capital gains, with effect from 1st January 2024, gain from sale of foreign assets by relevant entity that are received in Singapore by covered entity, gain is derived from entity not having adequate economic substance or gains from disposal of foreign IPR shall be treated as income chargeable to tax.

The scope is limited to gains derived by an entity of a "relevant group". A group is a "relevant group" if one of the entities of the group is incorporated, registered or established in another jurisdiction or where at least one entity of the group has a place of business outside Singapore. As such, domestic groups and standalone entities are excluded. Also when the disposal is carried out by prescribed financial institutions, as well as entities that benefit from specific tax incentives, where the disposal is carried out as part of, or incidental to, their business activities are excluded.

Important Updates

Coverage

IRS issues Guidance Regarding the Foreign Tax Credit and Dual Consolidated Losses in Relation to the GloBE Model Rules

Notice provides much-needed guidance on the interaction of the US FTC rules, the IIR, and the QDMTT. It provides that no FTC is allowed on a "final top-up tax." In some instances, a final top-up tax could be considered creditable to one US shareholder, but not to another US shareholder depending on the makeup of the MNE group. A QDMTT should not be considered a final top-up tax, hence should generally be considered creditable for the US federal income tax purposes (with some exceptions).

The Notice also acknowledges that calculation of effective tax rates under the GloBE Model Rules may give rise to issues under the dual consolidated loss rules, these rules allow the US taxpayers to consider such losses if they make a "domestic use election", certifying that there will not be a foreign use of the same loss. Effective Tax Rate under GLoBE rules considers Jurisdictional approach, this may lead to double claiming of losses, Hence Dual Consolidated Loss rules need to be considered. Additional guidance will be issued addressing the interaction of these rules.

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RBI Notifications

Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2023

Notification No. FEMA 14(R)/2023-RB dated December 21, 2023

With the object to improve and factor in the dynamic economic and financial situation of the country for the manner of receipts and payments in foreign currency between person resident in India and person resident outside India, RBI has issued *Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2023 dated December 21, 2023* ("the Regulations") in supersession of *Notification No. FEMA 14(R)/2016-RB dated May 02, 2016*, which comes into effect from the date of publication in the Official Gazette.

The receipts and payments between a person resident in India and a person resident outside India shall, *unless provided otherwise*, be **made only through an Authorised Bank or Authorised Person and** in the manner as stated in the Table below:

Countries	Trade Transactions	Other than Trade Transactions
Nepal and Bhutan	In Indian Rupees (except in case the importer in Nepal has been permitted by the Nepal Rashtra Bank to make payment in foreign currency for the exports made from India)	In Indian Rupees provided that in case of overseas investment in Bhutan, payment may also be made in foreign currency
Member countries of Asian Clearing Union (ACU)	Through ACU mechanism or as per the directions issued by RBI to AD Bank	In Indian Rupees or any foreign currency
Other Countries	In Indian Rupees or in any foreign currency.	

Payments and receipts in India for any current account transaction, other than a trade transaction, between any person resident in India and a person resident outside India, **who is on a visit to India**, may be made only in Indian Rupees or by way of debit/credit to a bank account maintained by such person visiting India.

Classification of MSMEs

RBI/2023-24/100 FIDD.MSME & NFS.BC.No.13/06.02.31/2023-24 dated December 28, 2023

Ministry of MSME had earlier notified revised criteria for classification/reclassification of enterprises as MSME which has been further amended. As per the guidelines issued by Ministry of MSME, RBI has made amendments to the Master Direction - Lending to Micro, Small & Medium Enterprises (MSME) Sector wherein all the micro, small and medium enterprises are required to register online on the Udyam Registration portal and obtain 'Udyam Registration Certificate'.

RBI Notifications

For Priority Sector Lending (PSL) purposes banks shall be guided by the classification recorded in the Udyam Registration Certificate (URC).

The certificate issued on Udyam Assist Portal (UAP) to Informal Micro Enterprises (IMEs) shall be treated at par with Udyam Registration Certificate for the purpose of availing PSL benefits. IMEs with an Udyam Assist Certificate shall be treated as micro enterprises for the purpose of PSL classification.

Processing of e-mandates for recurring transactions

RBI/2023-2024/88 vide CO. DPSS. POLC. No. S - 882 / 02.14.003 / 2023-24 dated December 12, 2023

The e-mandate framework prescribed an Additional Factor of Authentication (AFA) while processing the **first transaction** in case of e-mandates / standing instructions on cards, prepaid payment instruments and Unified Payments Interface.

- For **subsequent transactions** with transaction values up to INR 5,000/- (AFA limit), prescription of AFA was waived as per notification issued in December 2020.
- Relaxation from Additional Factor of Authentication (AFA) for subsequent recurring transactions was enhanced to values up to INR 15,000/- in June 2022.
- The limit has been further enhanced to INR 1,00,000/- per transaction for the following categories:
    - subscription to mutual funds,
    - payment of insurance premiums, and
    - credit card bill payments.

SEBI Notifications

Extension of timeline for implementation of provisions of circular on Redressal of investor grievances through the SEBI Complaint Redressal (SCORES) Platform and linking it to Online Dispute Resolution platform

SEBI / HO / OIAE / IGRD / CIR / P / 2023 / 183 dated December 01, 2023

The provisions of circular no. SEBI / HO / OIAE / IGRD / CIR / P / 2023 / 156 dated September 20, 2023 related to work flow of processing of investor grievances by Entities and framework for monitoring and handling of investor complaints by the Designated Bodies were required to come into force with effect from December 04, 2023.

SEBI vide this circular has extended the effective date of implementation of above provisions to April 01, 2024, a delay of practically four months.

Revised framework for computation of Net Distributable Cash Flow (NDCF) by Real Estate Investment Trusts (REITs)

SEBI / HO / DDHS / DDHS – PoD / P / CIR / 2023 / 185 dated December 06, 2023

Regulation 18(16) of SEBI (Real Estate Investment Trust) Regulations, 2014 ("REIT Regulations"), provides that the Net Distributable Cash Flow (NDCF) shall be computed at the level of REIT and HoldCo/SPV. In order to promote ease of doing business, the SEBI has decided to standardize the framework for calculation of available Net Distributable Cash Flows (NDCF). Accordingly, the revised framework for computation of NDCF by REITs, INVITs, and its Holdcos/SPVs shall be as per the computation formula provided in the circular. [*Note: for sake of brevity the working of NDCF is not being placed here but the working table may be referred in the Circular stated above*]

The revised framework shall supersede the Framework for calculation of Net Distributable Cash Flows provided in Master Circular for Infrastructure Investment Trusts (InvITs) dated July 06, 2023 and Real Estate Investment Trusts (REITs) dated July 06, 2023.

Applicability: April 01, 2024

Dematerialization of units issued by Alternate Investment Funds (AIFs) and issuance of units in dematerialized form

SEBI / HO / AFD / PoD1 / CIR / 2023 / 186 dated December 11, 2023

SEBI vide its circular no. no. SEBI/HO/AFD/PoD1/CIR/2023/96 dated June 21, 2023, had mandated all schemes of AIFs to dematerialize their units as per following timeline.

Particulars	Schemes of AIFs with corpus ≥ INR 500 Crore	Schemes of AIFs with corpus < INR 500 Crore
Dematerialization of all the units issued	Latest by October 31, 2023	Latest by April 30, 2024
Issuance of units only in dematerialized form	November 01, 2023, onwards	May 01, 2024, onwards

It was observed that a standard process was required to be followed for dematerializing / crediting the units issued for cases wherein investors were yet to provide demat account details to AIFs. Accordingly, the following process has been put in place for cases where the necessary demat details are provided to the AIFs:

SEBI Notifications

- Units already issued by schemes of AIFs to existing investors who have not provided their demat account details, shall be credited to a separate demat account named "*Aggregate Escrow Demat Account*".
- This account shall be opened by AIFs for the sole purpose of holding demat units of AIFs on behalf of such investors.
- As and when such investors provided their demat account details to the AIF, their units held in Aggregate Escrow Demat Account would be transferred to the respective investors' demat accounts, within 5 working days.
- No transfer of units of AIFs from /within Aggregate Escrow Demat Account shall be allowed other than for the aforesaid purpose.

Applicability: With immediate effect

Upstreaming of clients' funds by StockBrokers (SBs) / Clearing Members (CMs) to Clearing Corporations (CCs)

SEBI / HO / MIRSD / MIRSD – PoD – 1 / P / CIR / 2023 / 187 dated December 12, 2023

SEBI vide this circular revised the framework outlined in earlier circulars requiring Stock Brokers [SBs]/Clearing Members [CMs] to upstream clients' funds to Clearing Corporations [CCs] with the aim to enhance operational efficiency while ensuring the safety of clients' funds. Based on the representations received from various stakeholders viz. stockbrokers, and Brokers' associations, citing certain operational difficulties in implementation, a revised framework was recommended by the Broker's Industry Standards Forum (ISF) to SEBI, which has been thereafter suitably revised by SEBI.

The revised framework introduces key principles for upstreaming client's funds:

1) **Principle of Upstreaming:** SBs/CMs shall upstream all clients' clear credit balances to CCs on an End of Day (EOD) basis in the form of cash, lien on Fixed Deposit Receipts (FDRs), or pledge of units of Mutual Fund Overnight Schemes (MFOS) created out of clients' funds.
2) **Nomenclature and Accounts:** SBs/CMs must maintain designated client bank accounts, distinguishing between Upstreaming Client Nodal Bank Account (USCNBA) and Down Streaming Client Nodal Bank Account (DSCNBA). The clients may request SBs/CMs to release funds at any time during the day.
3) **Upstreaming via FDRs:** FDRs created from clients' funds must adhere to specific conditions, ensuring protection and compliance with CC's exposure norms.
4) **Upstreaming via Mutual Fund Overnight Scheme [MFOS]:** SBs/CMs can now pledge units of MFOS with CCs, offering a new avenue with minimal risk transformation due to the overnight tenure and exposure to risk-free government securities.
5) **Eligibility of bank instruments as collateral**: The bank instruments provided by clients as collateral (i.e. client FDRs and BGs) cannot be up streamed to CCs, and they shall be ineligible to be accepted as collateral in any segment of the securities market.

The provisions of this framework shall not be applicable to Bank-CMs (including Custodians that are banks) and for proprietary funds of SBs/CMs in any segment and SB's proprietary funds deposited with CM in the capacity of a client.

Applicability: With immediate effect

SEBI Notifications

Simplification of requirements for grant of accreditation to investors

SEBI / HO / AFD / PoD1 / CIR / 2023 / 189 dated December 18, 2023

SEBI vide its circular no. SEBI/HO/IMD/IMD-I/DF9/P/CIR/2021/620 dated August 26, 2021, specified the framework for accreditation of investors by Accreditation Agencies [also known as KYC Registration Agencies (KRAs)]. A need has been felt to simply the requirements for grant of accreditation to investors and therefore for which revised guidelines have been framed:

Eligibility Criteria:

The persons, including individuals, entities, trusts, HUFs and body corporates are considered as Accredited Investors ("AI"):

Sr. No.	Category	Criteria
1	Individuals, HUFs, Family Trusts and Sole Proprietorships*	a) Annual Income ≥ INR 2 Crore; OR b) Net Worth ≥ INR 7.5 Crore, out of which at least INR 3.75 Crore is in the form of financial assets; OR c) Annual Income ≥ INR 1 Crore + Net Worth ≥ INR 5 Crore, out of which at least INR 2.5 Crore is in the form of financial assets.
2	Partnership Firms set up under the Indian Partnership Act, 1932	Each partner independently meets criteria for accreditation.
3	Trusts (other than Family Trusts)	Net Worth ≥ INR 50 Crore [Net Worth = (Book value of all assets, other than intangible assets) – (Book value of total liabilities)].
4	Body Corporates	Net Worth ≥ INR 50 Crore [Net Worth = (capital + free reserves) – (Accumulated losses + deferred expenditure not written off)]
5	Foreign investor incorporated / established in form other than those mentioned above	Net Worth ≥ INR 50 Crore

Procedure for Accreditation:

- The prospective AI ("Applicant") shall make an application to the Accreditation Agency in the manner specified by the Accreditation Agency.

SEBI Notifications

- Accreditation agencies, which are also KYC Registration Agencies (KRAs), will access Know Your Customer (KYC) documents of applicants available with them in capacity of KRA or may also access the same from the database of other KRAs.
- Accreditation Agencies shall grant Accreditation Certificate which shall have a unique accreditation number, name of the Accreditation Agency, PAN of the Applicant, validity of accreditation and will be granted solely based on KYC documents and financial information of investors.

Validity of Accreditation

Condition	Validity
AI meets the eligibility criteria for preceding one financial year	Two years from the date of issuance.
AI meets the eligibility criteria in each of the preceding two financial years	Three years from the date of issuance.
AI is new incorporated entity which does not have financial information for the preceding financial year but meets the applicable net-worth criteria as on the date of application	Two years from the date of issuance.

Applicability: With immediate effect

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Abbreviations

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Abbreviation	Meaning
AA	Advance Authorisation
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
BAR	Board of Advance Ruling
BEAT	Base Erosion and Anti-Avoidance Tax
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	Central Goods and Service Tax Act, 2017
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
EO	Export Obligation
EODC	Export Obligation Discharge Certificate

Abbreviation	Meaning
EPCG	Export Promotion Capital Goods
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
GMT	Global Minimum Tax
GILTI	Global Intangible Low-Taxed Income
GSTN	Goods and Services Tax Network
GVAT Act	Gujarat VAT Act, 2006
HSN	Harmonized System of Nomenclature
IBC	Insolvency and Bankruptcy Code, 2016

Abbreviations

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Abbreviation	Meaning
ICDS	Income Computation and Disclosure Standards
ICDR	Issue of Capital and Disclosure Requirements
IEC	Import Export Code
IIR	Income Inclusion Rule
IMF	International Monetary Fund
IRP	Invoice Registration Portal
IRN	Invoice Reference Number
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
LOB	Limitation of Benefit
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
MeitY	Ministry of Electronics and Information Technology
MSF	Marginal Standing Facility
MSME	Micro, Small and Medium Enterprises
NCB	No claim Bonus
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
QDMTT	Qualified Domestic Minimum Top-up Tax
RA	Regional Authority
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
SOP	Standard Operating Procedure
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
UTPR	Undertaxed Profits Rules
WHT	Withholding Tax
WOS	Wholly Owned Subsidiary