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kcm Insight

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Dear Reader,

We are happy to present kcmInsight, comprising of important legislative changes in direct & indirect tax laws, corporate & other regulatory laws, as well as recent important decisions on direct & indirect taxes.

We hope that we are able to provide you an insight on various updates and that you will find the same informative and useful.

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Disclosure in TDS return for transactions exempted from TDS -Scope expanded

Notification No. 43 of 2020 dated July 3, 2020

Every person responsible for deducting tax at source is required to furnish quarterly returns of tax deduction & payment in Form 26Q (for payment to residents) and in Form 27Q (for payment to non-resident). The IT Rule 31A requires reporting of certain transactions in such form where no tax is deducted or same is deducted at rate lower than the specified rates. e.g. where payee has furnished certificate u/s 197 or declaration from transporters u/s 194C(6) of ITA etc. CBDT has amended the provisions of Rule 31A whereby the following additional transactions are required to be reported in TDS returns where no tax is deducted, or tax is deducted below specified rate;

- Specified category of transactions which will be prescribed in respect of e-commerce operator and e-commerce participants u/s section 194-O.
- Exemption provided in section 194 N with respect to Cash withdrawals
- Transactions prescribed u/s 194A in respect of payment of interest income for class of persons prescribed under section 194A (5)
- Transaction of dividend paid by business trust to unit holders where same is exempt u/s 10(23FC)
- Interest paid by offshore banking unit on deposit made by non-resident or person not ordinary resident in India as provided in section 197(1F)
- Interest paid by offshore banking unit on borrowings from non-resident or person not ordinary resident in India as provided in section 197(1F)
- Payment made to any person on which tax is not deducted in view of exemption provided by CBDT vide Circular No. 3 of 2002 dated June 28, 2002 or Circular No. 11 of 2002 dated November 22, 2002 or Circular No. 18 of 2017 dated May 29 2017. [This includes various governments and non-government entities whose income is exempt from tax]

It is necessary to consider the reporting of the above transactions, if applicable, as non-reporting of such transactions would attract penalty u/s 271H ranging from Rs. 10,000 to Rs. 1,00,000 including disclosure of non-reporting thereof in Tax Audit Report.

Further, Form 26Q has been amended to include new sections as applicable from April 1, 2020 such as 194K and 194-O. Also, necessary changes are made in Form 26Q to report above mentioned transactions.

Disclosure in TCS return for certain exempted transactions- Scope Expanded

Notification No. 54/2020 dated July 24, 2020

Considering the amendments made in Section 206C by the Finance Act, 2020, CBDT has amended Rule 31AA whereby the below mentioned additional information is required to be reported in TCS returns:

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- Non-collection of tax at source by an authorised dealer on amount received under liberalised remittance scheme (LRS) of RBI if the amount remitted under such scheme is less than Rs.7 lacs per financial year and such amount is remitted for the purpose other than overseas tour program package
- Non-collection of tax by an authorised dealer on the amount on which tax is collected by the seller
- Non-collection of tax by seller of overseas tour program package where purchaser of such tour program has deduced and paid tax under any other applicable provision of ITA
- Non-collection of tax by seller on sale of goods where buyer of goods has deduced and paid tax under any other applicable provision of ITA
- Non-collection of tax at source by an authorised dealer or by a seller of overseas tour program package where the amount is received from the Central Government, a State Government, other specified government bodies, foreign state, specified local authorities or any other person as specified by the Centre Government
- Non-collection of tax by seller on sale of goods where buyer of goods has deduced and paid tax under any other applicable provision of ITA
- Non-collection of tax by seller on sale of goods where the buyer of such goods is the Central Government, a State Government, other specified government bodies, foreign state, specified local authorities or any other person as specified by the Centre Government

Further existing Form 27EQ has been replaced with a New Form 27EQ incorporating the transaction relating to tax collected at source on LRS, overseas tour packages and sale of goods.

It has also been provided that the credit for tax collected at source on LRS, overseas tour packages and sale of goods shall be given to the person from whose account tax is collected and paid in the year in which such collection has been made.

It is necessary to consider the reporting of the above transactions, if applicable, as non-reporting of such transactions would attract penalty u/s 271H ranging from Rs. 10,000 to Rs. 1,00,000 including disclosure of non-reporting thereof in Tax Audit Report.

Relaxation from TDS at higher rate in absence of PAN for divided income to non-resident

Notification No. 54/2020 dated July 24, 2020

As per Section 206AA, tax is required to be deducted at higher of 20% if the receiver of such income does not have PAN. Rule 37BC grants relaxation to a non- resident or a foreign company from such provision on payment made for interest, royalty, technical fees, payment on transfer of any capital asset at higher rate if such person provides specified details and documents. Since divided becomes taxable in the hands of shareholder, vide above-referred notification, the payment of dividend is also included within the scope of Rule 37BC.

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Extension of due date of filing of belated / revised return of AY 2019-20

Notification No. 56 of 2020 dated July 29, 2020

CBDT has further extended the due date for filing belated or revised income tax return for AY 2019-20 from July 31, 2020 to September 30, 2020. Further in respect of return of income of AY 2020-21, in case of resident senior citizen, if he does not have any business income, it has been provided that interest u/s 234A shall not be payable if the self-assessment tax has been paid on or before July 31, 2020.

One-time relaxation for e-verification of ITR filed for AY 2015-16 to AY 2019-20

Circular No 13 of 2020 dated July 13, 2020

In order to verify all pending tax returns for the AY 2015-16 to AY 2019-20 which were uploaded electronically (without digital signature) within due date of filing the ITR u/s 139 of the ITA, CBDT has introduced one-time relaxation scheme. It has been provided that the e-verification process must be completed by September 30,2020. All such ITRs shall accordingly be processed by December 2020.

The above relaxation is however not applicable in cases where the Income Tax Department has already taken actions such as issue of notice u/s 139(9) of the ITA for defective return or invalid return. CBDT has further clarified that in refund cases, interest on refund u/s 244A of the ITA will not be granted for delay period on account of pending e-verification.

Sharing of information with CBDT by SEBI etc.

Press Release dated July 8, 2020, July 20, 2020, & July 21, 2020

To gather a more financial information for better tax management, CBDT has signed memorandum of Understanding with following agencies for sharing of date or information on regular basis.

- Securities Exchange Board of India
- Ministry of Micro, Small and Medium Enterprises
- Central Board of Indirect Taxes and Customs (CBIC) to facilitate the sharing of data between these organisations on July 21, 2020.

Exchange of information by the income tax authorities with the prescribed authorities

Notification No 48 dated July 14,2020, Notification No 51 and Notification No 52 dated July 21, 2020

Section 138(1) provides for exchange of information relating to income tax assessees by the tax authorities with other authorities for performing their functions under any other law. In pursuance to this, CBDT has notified that information relating to income tax assessees will be shared with following authorities namely:

- Additional Secretary and Development Commissioner, Ministry of Micro Small and Medium Enterprises, Government of India
- Joint Secretary, (Farmers Welfare), Department of Agriculture, Cooperation and

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Farmers Welfare, Ministry of Agriculture and Farmers Welfare, Government of India

- Cabinet Secretariat, Intelligence Bureau, Narcotics Control Bureau and National Investigation Agency

Pension Scheme for Central Government Employee

Notification No 45 dated July 7, 2020

National Pension Scheme Tier II – Tax Saver Scheme, 2020 (NPS Scheme, 2020) has been notified by the Central Government in view of power conferred under section 80C (2) (xxv) (b) vide Notification No 45 dated July 7, 2020. Any contribution to NPS Scheme, 2020 by the Central Government Employee will now be eligible for deduction u/s 80C of the ITA. Minimum contribution to activate such scheme is Rs. 1000 and subsequent contribution amount as Rs.250. The contribution shall have lock in period of three years and during lock in period it shall not be permitted to be assigned, pledged, or hypothecated.

Case Laws

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Amended provision of 30% of disallowance of expenditure for TDS default is not retrospective & others

Shree Choudhary Transport Company vs ITO in CIVIL Appeal No. 7865 of 2009, Supreme Court of India

The Taxpayer was engaged in transportation business. It had entered contract in FY 2004-05 with one company for transportation of its cement to various places in India. Since the Taxpayer was not owning any fleet of vehicles it had availed services of another transporters. However, it had not deducted tax at source on such payments. During assessment proceedings, the AO noted that the truck operators were sub-contractor and therefore the Taxpayer was required to deduct tax on payments u/s.194C of ITA. The AO rejected the argument of the Taxpayer that it was merely acting as facilitator or intermediary in process. The AO accordingly invoked section 40(a)(ia) and made disallowance of entire expenditure. The AO rejected the argument of taxpayer that such provision shall be applicable only where the amount is payable and not when the amount was already paid to payee.

CIT(A) as well as ITAT confirmed the disallowance made by AO. The ITAT negated the argument of the Taxpayer that the provision of 40(a)(ia) is applicable from AY 2006-07 and not from AY 2005-06. The HC also rejected the appeal of the Taxpayer and upheld the view taken by the lower authorities that section 194C is applicable. The HC held that the provision of section 40(a)(ia) shall be applicable from AY 2005-06 onwards and further the amendment made by the FA 2014 whereby the disallowance was restricted to 30% of expenditure is not retrospective.

The Hon'ble SC after considering the facts, contentions of the Taxpayer and Revenue held as under:

- There was no privity of contract between truck operators and the Company and the responsibility of transportation of goods was completely lying with Taxpayer only.

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Therefore, the Taxpayer was responsible to deduct TDS as per 194C of the ITA,

- The Apex Court by relying upon its coordinated bench decision in case of Palam Gas Service vs CIT at 394 ITR 300 held that the provisions of section 40(a)(ia) the ITA applies to amount payable as well as the amount already paid.
- With respect to the year from where the provision of section 40(a)(ia) is applicable, the Apex Court noted that such provision was inserted by FA(No.2), 2004 with effect from 1st April 2005. Such amendment in law has to be read with reference to assessment year unless stated otherwise by express provision in law as held in Karimtharuvi Tea Estate Ltd vs. State of Kerala (SC) 60 ITR 262.
- The Apex Court therefore rejected the argument of the taxpayer that such provision shall not be applicable from FY 2004-05 relevant to AY 2005-06. The law laid down by Calcutta HC in case of PIU Ghosh vs DCIT reported at 386 ITR 322 was held as incorrect law. SC also held that though the FA (No.2), 2004 received the president of India on September 10, 2004, the provision of section 40(a)(ia) shall continue to apply for entire financial year of 2004-05. The provision of the statute is applicable from the date enacted by the legislature in law and date of assent by the President of India to FA is not relevant.
- With respect to the amendment made in section 40(a)(ia) by the FA(No.2), 2014 whereby the disallowance was restricted to 30% of the amount of expenditure, the Apex Court rejected the reliance placed by the Taxpayer on decision of Calcutta HC in case of CIT vs Calcutta Export Company 404 ITR 654. In such case, the High Court upheld the retrospective applicability of another amendment made by FA 2010 in section 40(a)(i).
- The SC distinguished the High Court decision by stating that the issue of amendment involved in Calcutta Export case was similar to amendment made by FA, 2008 which legislature itself made applicable retrospectively. However, the amendment made by FA(No.2), 2014 is not similar to such amendments. Accordingly, the Apex Court rejected the argument of the taxpayer to apply such amendment of 30% of disallowance in AY 2005-06.

It is pertinent to mention here that recently Delhi ITAT in case of Muradul Haque in ITA No. 114 of 2019 dated June 18, 2020 and in case of R.H. International vs ITO in ITA No. 6724 of 2018 dated March 20, 2019 held that such amendment to restrict disallowance to the extent of 30% of expenditure is curative in nature and same should be applied retrospectively. In view of the Apex Court decision now, the law laid down by Delhi ITAT is no longer a valid law.

Slump Sale amounts to "Succession" within the meaning of section 170

Archroma India Pvt Ltd, ITA No. 306 of 2019, Mumbai ITAT

In the given case the Taxpayer had entered into a Business Transfer Agreement ('BTA') with a seller to acquire its undertaking for lump sum consideration on slump sale basis. Under the

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BTA the Taxpayer acquired several assets, liabilities. The Taxpayer has carried out the valuation of such business acquired and allocated the purchase consideration paid on the basis of such valuation. The Taxpayer has accordingly claimed depreciation on such allocated value of purchase consideration.

In the assessment proceedings the AO noted that the acquisition of such business on slump sale basis amounted to "succession of business" within meaning of section 170 of the ITA and therefore the claim of depreciation shall be governed by the sixth proviso to section 32. As per sixth proviso to section 32(1) of ITA, in case of succession of business, the depreciation u/s.32 on assets transferred has been computed on time basis in the hands of predecessor and the successor based upon holding period of such assets in respective hands by assuming that there is no succession of business.. The AO accordingly ignored the allocated value of purchase consideration and computed the allowable depreciation based upon the written down value of such assets in the hands of seller by invoking such provision. The CIT(A) placed reliance on the decision of ITAT, Delhi in case of Saipem Triune Engineering Pvt. Ltd vs DCIT in ITA No. 5239 of 2012 dated July 25. 2014 and held that slump sale u/s 50B does not amount to "Succession" within meaning of section 170 of ITA. The CIT(A) accordingly allowed the claim of depreciation subject to value determined by Valuation Report.

Before the ITAT, the Revenue contended that acquisition of business on slump sale basis amounts to "Succession" within the meaning of section 170 and therefore, the claim of depreciation on assets acquired is required to be computed as per sixth proviso to 32(1). The Taxpayer on the other hand referred to the provision of section 2(42C) and section 50B and contended that since there are specific provisions under the ITA dealing with the slump sale transaction, the provision of section 170 is not applicable to it.

The ITAT held that section 170 not only envisages succession of a person but also covers a succession of Business. ITAT has heavily relied upon the decision of Hon'ble Apex court decision in CIT vs K.H. Chambers reported Civil appeal No. 1106 of 1963. Considering such decision ITAT held that since in the case of the taxpayer a business was acquired as going concern basis under BTA with all assets and liabilities of the undertaking, it amounts to succession of business u/s.170 and accordingly the AO was correct to compute the tax depreciation by invoking sixth proviso to section 32(1). ITAT held that the scheme of section 50B only deals with the mode of charging tax on profit and gain arising from slump sale. It nowhere deals with the issue of claim of depreciation. In absence of specific provision dealing with the depreciation on slump sale, the general provision dealing with the claim of depreciation will be applicable. ITAT however considered the difference between the purchase consideration and the tax WDV of assets taken over as "goodwill" and allowed the depreciation on such goodwill.

This decision will have a far-reaching implication in respect of non-tax neutral transactions whereby a buyer of a business is prevented to claim depreciation on the paid value of business acquired by allocating such

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value to assets acquired. It is however interesting to evaluate the sixth proviso to section 32(1) as to whether such proviso shall apply only in the year of slump sale and not to subsequent years so as to claim depreciation on excess amount in subsequent years. This would be more relevant if in a given case, the tax department does not consider the difference between the price paid over assets acquired as depreciable goodwill.

Purchase of agriculture land below its Stamp Duty value shall not be regarded as other income- Section 56(2) is not applicable

Mubarak Gafur Korabu, ITA No. 752 of 2018, Pune ITAT

The Taxpayer is engaged in the business of dealing in land. In year under consideration, the Taxpayer had purchased agricultural land for a consideration which is less than its value adopted for by the Stamp Duty Valuation authority. The AO invoked the provision section 56(2)(vii)(b) of ITA and taxed the amount representing the difference between the stamp duty value and actual purchase consideration. The CIT(A) upheld the order of the AO.

Before the ITAT, the Taxpayer argued that the provision of section 56(2)(vii)(b) is not applicable since the land is not a capital asset within the meaning of section 2(14). On the other hand, the Revenue argued that section 56(2)(vii)(b) only talks about the "Immovable Property" and same is not therefore limited to only "Capital Asset" as contended by the Taxpayer.

The ITAT gone into the entire provision of section 56(2)(vii) and held that such provision shall be applicable only when a "property" as defined in clause (d) of Explanation to section 56(2)(vii) has been acquired. As per this definition, the term property includes various assets as stated therein, which inter-alia includes immovable property being land or building or both, held as capital asset. ITAT noted that though there is no reference to term "property" while referring immovable property in section 56(2)(vii)(b), by jointly reading of provision of clause (c) dealing with "property other immovable property" and clause (b) of section 56(2)(vii), it reveals that section 56(2)(vii)(b) only refers to immovable property being land or building or both held as capital asset. Since in the given case the agriculture land not being regarded as capital assets u/s.2(14) and further such land was held as stock in trade, the provision of section 56(2)(vii)(b) is not applicable. Accordingly, the difference between the stamp duty value and purchase consideration shall not be taxable u/s.56(2)(vii)(b) of the ITA.

It is important to note that while delivering the above decision, Pune ITAT has also considered the recent country decision of Jaipur ITAT in the case of Trilok Chand Sain 101 taxmann.com 391 dealing with the identical issue. Pune ITAT held that in Jaipur ITAT failed to take into cognizance the provisions of clause (c) of section 56(2)(vii), which talks of property other than immovable property. The Jaipur Tribunal has only considered clause (b) and the definition of 'immovable property' to hold that it is not circumscribed or limited to any nature of

property. However, clause (c) very clearly talks of property other than immovable property and the word 'property' has further been defined under clause (d) of Explanation thereunder. In our view the Pune ITAT decision is more informed decision on the subject matter considering the entire provision of section 56(2)(vii) and accordingly it will have more judiciary value.

Mere registration of sale deeds does not tantamount to transfer, real income principle upheld

Ijyaraj Singh, ITA No 91 & 152 of 2019, Jaipur ITAT

In the given case the taxpayer filed original ITR declaring income from capital gain on sale of certain agriculture lands duly executed by way of various registered sale deeds. During the tax assessment proceedings, the taxpayer has filed revised computation of income whereby he has reduced the income of capital gain from sale of certain agriculture lands on the argument that two postdated cheques issued at the time of registration were dishonored subsequently as the transferee instructed for stop payment. Further in respect of such dishonored cheques, no possession of lands was given to buyer. The taxpayer then brought on record that the Hon'ble Rajasthan HC has also granted stay on the said sale deeds and therefore no real income accrues to him u/s 45 of the ITA.

The AO disagreed with the submission of the Taxpayer. The AO was of the view that transfer of land was as per valid contract between the seller and purchaser and therefore transaction is covered within the meaning of "transfer" as per section 2(47) of the ITA. The AO held that as per the provision of section 45 of the ITA, the capital gain income arises on accrual basis and subsequent development in terms of dishonor of cheques cannot invalidate the transfer of land and consequential liability u/s 45.

The CIT(A) held that though the sale deed is registered in the name of transferee, such sale could not be considered as valid sale. The sale would take place only when the bilateral obligations agreed between the parties in instrument for effecting sale are discharged.

Before the ITAT, the Taxpayer contended that there was breach of contract and thus there was no valid contract which gave rise to any real income. The Taxpayer reiterated that neither sale consideration has been received nor real income has accrued to him from the said transaction and therefore provision of section 45 & 48 shall not apply. The Revenue on the other hand contended that as per the scheme of ITA, no deduction for not receiving part of sale consideration is allowable from Full Value of Consideration as section 45 read with section 48 of the ITA.

The ITAT after considering the facts of the case held that though the registered sale deed has an evidentiary value, if the taxpayer can substantiate through cogent evidences that no sale has taken place, then issue cannot be adjudicated without considering all such evidences. The title in the property does not necessarily pass as soon as instrument of transfer is registered. The true test is what is the intention of the parties to the transaction. The Registration is no final proof of an operative

transfer and if both the parties have mutually agreed to discharge of payment as per the registered sale deed, transfer by way of sale will become effective only if payment of the entire consideration amount has been paid.

ITAT noted that the intent of the purchaser was evident from his conduct since he himself has instructed for stop payment. Thus, there was no intention on his part to complete the sale transaction. Further the Rajasthan HC has also stayed the sale deed and proceeding for dishonor of Negotiable Instrument has been separately instigated before he Civil Court.

Thus, the effective title in the land will take place only on receipt of full sale consideration. It is important to note that ITAT has placed heavy reliance on the theory of real income as upheld by the Hon'ble Apex court decision in case of CIT v Shoorji Vallabhdas & Co. (Civil Appeal No. 419 of 1961) as well as decision in case of CIT v Balbir Singh Maini (Civil Appeal No. 15619 to 156677 of 2017) to conclude that under the ITA only real income can be taxed and there cannot be tax on hypothetical income which never accrued or received by the taxpayer.

The decision provides interesting analogy on application of real income theory for capital gain related transactions while dealing with definition of transfer.

It is to be noted that in the given case though the sale deed was registered, no possession of land was given pertaining to sale deed whose amount was not received. Hence the transaction was outside the purview of section 2(47)(v). It is therefore necessary to examine the complete facts of the case, the intention of the parties, in addition to the sale deed while determining a taxable transfer event for capital gain related transactions.

Income from leasing of workstation shall not be regarded as income from house property

Telekon Media India Pvt Ltd, ITA No 5352 of 2019, Delhi ITAT

In the given case the Taxpayer has offered to tax income from leasing out 50 workstations under the head Income from House Property by considering the same as leasing of building and claimed standard deduction u/s 24(a) of the ITA. Post tax assessment, the PCIT invoked his power u/s 263 of the ITA and set aside the order u/s 143(3) of the ITA by considering that the order of the AO is erroneous and prejudicial to the interest of the revenue since no standard deduction shall be allowable as this income is to be regarded as income from other source.

The AO, while passing the assessment order in pursuance of PCIT order u/s.263 rejected the claim of the Taxpayer since letting out of workstation was inseparable from letting out building. The AO placed reliance on the Apex Court decision in the case of Sultan Brother (P) Ltd Civil Appeal No. 63 of 1961 wherein the Apex Court has decided the position of charging rent from building in case of inseparable let under the residuary head of income. CIT(A) also confirmed the disallowance.

Before the ITAT, the Taxpayer argued that the primary object of the lease agreement was to let out the building and additional rights were given to use the workstations in the building. Since primary object was to let out the building and not to exploit the property for commercial

business activities, the rental income is correctly offered under the head income from house property after claiming standard deduction. The Taxpayer has relied upon the judgement of Hon'ble SC in the case of Shambhu Investment Pvt Ltd Civil appeal no. 6459-6460 of 2001 (SC) whereby the Hon'ble Apex Court has held that intention or object of letting of the property should alone be considered for determining the chargeability of rental income. The Revenue on the other hand contended that as per the terms of the lease agreement, the intention of the Taxpayer was to lease out workstation only and hence, the said income is assessable as Income from Other Sources only.

The ITAT after considering the terms of the lease agreement and judicial precedents on this issue held that income from letting out of the workstations is assessable under the head income from other sources. ITAT noted that as per the lease agreement, it transpires that prime objective is of exploitation of workstations installed in the building and not the building or part thereof. Use of common area and easement is incidental to the lease of exploitation of workstation only. According since the income from letting out of machinery, plant or furniture represented by work-station which is inseparable to letting out of the building and if said income is not chargeable to tax under the head Profit and gains of business or profession, then it is to be chargeable under the head IOS. ITAT after following the decision of Hon'ble SC in the case of Sultan Brothers Pvt Ltd (Supra) and jurisdictional HC in the matter of Garg Dyeing and Processing Industries (supra) held that if the income from letting is inseparable than income should be taxed u/s 56 of ITA.

The decision provides interesting analysis of classification of leasing income. In the given case the income was derived by charging fixed amount per workstation and this was considered by the Tribunal as major reason to decide that the motive of leasing is not to lease building but to give workstation which include furniture and other relating items and space used by such workstation. Such space being building was not regarded as material asset so as to classify such income as income from house property. It is therefore necessary to evaluate the lease agreement minutely while classifying the head under which such income would become taxable where it involves various types of assets including building.

Important Rulings

India Rulings

Receipts towards non-exclusive access to the market research reports not taxable as royalty

IMS AG, ITA No. 6445 of 2016, Mumbai ITAT

The taxability of payment towards database access as royalty is always a matter of dispute among the taxpayers and tax authorities. In the current case, the taxpayer, a Switzerland based company, provided access to market research report and database on pharmaceutical sector to its customers in India on predetermined subscription prices. The Revenue relying on various judicial pronouncements argued that the said receipts were required to be taxed as royalty u/s 9(1)(vi) of the ITA and also under Article 12(3) of India-Swiss Treaty.

The Tribunal heard the contention of the parties involved. It laid a lot of reliance upon ruling of AAR in the case of Dun & Bradstreet with similar facts which was also subsequently approved by the jurisdictional HC. In the said case, the taxpayer imported Business Information Reports from a foreign company and made remittance without withholding any tax u/s 195 of ITA. The AAR observed that it was not a case of paying consideration for the use of or right to use any copyright of literary, artistic, or scientific work or any patent trademark or for information of commercial experience. Further, the Tribunal noted the fact that the market research reports were standardized products of the Taxpayer wherein it provided factual information which was accessible by any subscriber on payment of requisite fees for which no particular hardware or software was required.

The Hon'ble Tribunal further agreed with the AAR ruling that the transaction of sale of Business Information Reports was similar to the transaction of sale of books which does not involve transfer of any intellectual rights/ property and thus fall outside the purview of Royalty. Therefore, the Tribunal held that the receipt for accessing the market research reports was not taxable as per India-Swiss DTAA.

It is to be noted that the Hon'ble Tribunal has not determined the taxability of the said receipts under ITA on the ground that since the Taxpayer was not taxable under respective DTAA, there was no occasion to examine the taxability under ITA. The Hon'ble Tribunal has taken a view that the provisions of ITA is to be applied only when these provisions are more favorable to the Taxpayer vis-à-vis DTAA provisions. While there are contradictory judgments, the matter seems to be now settling in favor of the taxpayer wherein Courts / Benches have been holding that payment for access to standardized reports should not constitute "royalty".

Payment made for site promotion activities not to be considered as FTS under India-USA DTAA

ESM Sys Pvt. Ltd., ITA No. 350 of 2018, Ahmedabad ITAT

The Taxpayer being engaged in the business of web designing services and social media management made a payment (without withholding any tax) to a US based vendor for obtaining the services of data promotion, social media management and general consultation in order to derive traffic to specific website.

Important Rulings

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The Assessing Officer contended that the said payment was in the nature of FTS and hence liable to withholding tax u/s 195 of the ITA.

In response to the same, the taxpayer contended that the payment was not in the nature of FTS as no technology was made available to the taxpayer as required under India-USA DTAA. The taxpayer further argued that as a fact, the payment was in the nature of business profits, however, since the US vendor did not have any PE in India, the said payment was not taxable in India. The AO did not agree with the contention of the taxpayer, aggrieved by which the taxpayer filed an appeal with the CIT(A). The CIT(A) also dismissed the appeal of the taxpayer considering the payment as FTS.

The Bench observed that the taxpayer received the services in the nature of site promotion activities such as bandwidth provisions, data storage, web hosting services, etc. where there was no sharing of knowledge, technology or know-how. Further, the Tribunal noted that the entire transaction took place on internet through virtual server. The Hon'ble Tribunal referred to the meaning of FTS / FIS as per Article 12(4) of the India-USA DTAA and observed that the services could be covered under the ambit of FTS / FIS under the DTAA only if the technical knowledge or skill was made available to the service recipient.

The Bench held that since there was no sharing of knowledge or know-how or any other technology as a result of which the taxpayer himself could carry out the site promotion activity, the payment was not taxable in India.

In the given case, the Taxpayer paid fees for web hosting services which also included services of online advertisement. Although the Tribunal has held that the said payment was not taxable as FTS / FIS under DTAA considering the law applicable for that respective year, however, it is to be noted that Equalisation Levy has been introduced vide Finance Act 2017 and thus while determining the taxability as on date, one has to analyse the taxability of web hosting charges from online advertisement under Equalisation Levy provisions.

Reimbursement for centralised co-ordination activities not regarded as FTS or Royalty

Damco International A/S, ITA No. 933 & 6465 of 2017, Mumbai ITAT

The Taxpayer, a Denmark based Company, was engaged in the business of shipping and logistic services and provided support services to its Group Companies. The Taxpayer had incurred certain costs towards procurement of insurance, accounting software, travel, low-end BPO Services, fixed assets etc. at group level which were subsequently recovered from various group entities. The said payment received from its Indian Group Company was claimed as not chargeable on account of cost to cost reimbursement and in absence of any PE in India.

The AO after examining the Management & Service Agreement between the entities contended that the services provided by the Taxpayer were in the nature of technical services. The AO contended that the Indian entity was getting access to IT network systems

as well as maintenance and support services. The AO further held that the employees of the Taxpayer who visited India rendered managerial and technical services.

The Taxpayer contended that as a central coordinator of the Group entities, it procured various services needed by the Group Entities in order to benefit from the economies of scale and homogeneous services being offered to the entities across the Group. The Taxpayer further contended that it has recovered only the cost of procurement/provision from the entities and no mark-up has been charged.

The Hon'ble Tribunal observed that the services were in the nature of coordinating services whereby various costs incurred were pooled together and charged / recovered as reimbursement costs on the basis of various allocation keys audited by an Independent Auditor which were uniformly applied across the group.

It was also observed by the Tribunal that the cost recovered for low end BPO services were in fact provided by the third party and could not be categorised as managerial, technical or consultancy services.

The Tribunal relied on various judicial pronouncements where in it was held that business support services in such case could not be chargeable to tax in absence of PE in India and further the payments did not qualify as FTS or Royalty under ITA or DTAA.

The issue with respect to taxability of business support services has been a subject matter of debate before the Courts/Tribunal. In the present case, the Taxpayer was able to prove that the actual services were rendered by third party and the Taxpayer was only providing coordinating services in relation to those services and that the Indian Entity was making the payment on actual cost basis without any mark-up.

Reimbursement of salary of seconded employees neither constitutes FTS nor leads to Service PE in India

Yum! Restaurants (Asia) Pte. Ltd., ITA No. 6018 of 2012, Delhi Tribunal

The Delhi Bench of Tribunal has held that secondment of employee to India did not constitute Service PE in India under India-Singapore DTAA as the deputed person was the employee of the Indian Entity according to the terms defined in the Deputation Agreement entered between the taxpayer and the Indian Entity.

The Taxpayer was a non-resident company incorporated in Singapore and was engaged in the business of franchising food outlets. It entered into a Technical License Agreement with an Indian Company for the operation of restaurant outlet in India for which it received royalty. It also sent an employee on secondment basis for managing the business of the Indian Concern. Also, a marketing company in India was set up for undertaking Advertising, Marketing

and Promotion (AMP) activities on behalf of the Indian Company and its franchisees. The Taxpayer was not a party to the said marketing agreement.

Revenue argued that furnishing of services by the seconded employee was technical in nature and thus it classified as FTS under India-Singapore DTAA. Revenue was of the view that the payment of salary by the Indian Company as a reimbursement cost to the Taxpayer should be taxable in the hands of the Taxpayer in the nature of FTS. In addition to this, Revenue also contended that the Taxpayer constituted Dependent Agent PE in India on account of marketing activities being undertaken by another Indian Company on behalf of the Taxpayer.

The CIT(A) concluded that the seconded employee was under the control of the Indian Company and he was not the employee of the Taxpayer. Further, the Taxpayer had no lien/ right over his employment and hence there was no Service PE in India.

The Hon'ble Tribunal observed that the seconded employee had shifted to India and took part in the day to day functioning of the Indian Company. He also attended the Board Meetings and also signed the Financial Statements of the Company in the capacity of the Director. Thus, the Tribunal held that the seconded employee was working with the Indian Company and was not an employee of the Taxpayer. Thus, there cannot be any service PE in India.

Further, observes that since the seconded employee had already paid taxes in India on the salary, the same amount being taxed as FTS in the hands of the Taxpayer, would lead to double taxation. Also held that the 'make available' condition under Article 12 of the DTAA is not getting satisfied in order to classify the payment as FTS.

In relation to existence of Agency PE on account of marketing activities undertaken by Indian entity on behalf of the Taxpayer, the ITAT observed that none of the conditions of Article 5(8) of the DTAA and thus no profit attribution can be done.

It is pertinent to note here that the Tribunal has distinguished the judgement of Delhi HC in the case of Centrica India Offshore Pvt. Ltd. on facts and stated that in that case Centrica UK was providing services to Indian company through seconded employees, which was not the fact in the present case.

Issue of taxability of reimbursement of salary in the case of seconded employees has always been a litigative issue. Even after Supreme Court has dismissed the Taxpayer's SLP in the case of Centrica (supra), there are various judgements either in favour or against of the Taxpayers. In the case of Centrica, the foreign company was providing services to the Indian company through seconded employees to ensure quality control and management of their vendors of outsourced activities, with the intention to provide staff with appropriate expertise and knowledge about process and practices implemented. Therefore, the Tribunal has rightly not applied the aforesaid case in the present case.

Important Rulings

From Around the World

Treaty benefit on dividends not available where the recipient is merely a pass-through entity

Judgment of the Poland Provincial Administrative Court in Szczecin [file reference number I SA / Sz 944/19]

The court ruled that the dividends distributed to a Cypriot Company (by a Polish Company), who in turn routed the dividends back to Polish individuals on the same day of receipt of dividend, was not a "beneficial owner" of the dividend and hence the Cypriot company would not be eligible to claim the treaty exemption of withholding of taxes on dividends.

Reference was made to OECD commentary and thereby concluded that there should be complete identity between the person receiving the dividend & the person entitled to the dividend and only then the beneficial provisions of the Tax treaty can be applied. Consequently, the court held that if a Polish entity makes a dividend payment to a tax resident of another country who is not a person entitled to this dividend, then Poland is not obliged to apply the provisions of double taxation conventions.

No Attribution of losses of the PE to its Parent in absence of clarity of functions performed, assets used, and risks borne

Italy vs Citibank [Supreme Court, Case No 7801/2020]

The Italian PE of Citi Bank NA granted loan agreements to its Italian clients which were sold to a third party and the operation generated losses which were attributed to the PE's profit and loss accounts. The tax office challenged the deduction of the amount concerning the losses deriving from the transfer of the agreements, stating that the relating costs should have been attributed to the U.S. parent and not to the Italian PE.

The taxpayer appealed the decision before the Supreme Court (SC) on the ground that the tax office had not provided any proof demonstrating the ultimate connection of the costs challenged with the general business activity conducted by the parent. While the lower court ruled against the taxpayer, the SC reversed the said judgment and decided in favor of the taxpayer, confirming that the lower court did not clearly explain the functions performed, assets used and risks borne by the Parent under which it could be possible to consider the losses under review pertained to the parent and consequently denying the deductibility of the costs from the PE taxable income.

Dynamic Interpretation of Tax treaty adopted for "beneficial ownership"

Judgment of the Swiss Federal Court 2C_880/2018 dated 19 May 2020

This decision of the Swiss Federal court was recently published wherein the taxpayer (a bank located in the UK) had purchased certain Swiss shares on the behest of its clients for hedging purposes.

As per the understanding between the taxpayer & its clients, the clients would be bearing the market risk posed by these shares and the dividends received by the taxpayer would be

Questions?

remitted to its clients. In 2008, the taxpayer received dividend from the Swiss shares for which the taxpayer sought for refund of the taxes withheld as per the Switzerland – Great Britain tax treaty. The Swiss federal court has rejected this claim of the taxpayer by adopting Dynamic interpretation of the tax treaty and concluding that the taxpayer was not the beneficial owner of the shares.

The court stated that Article 10 of the CH-GB tax treaty which deals with the taxability of Dividend is adopted from OECD Model Convention of 1977 wherein the concept of beneficial ownership was first introduced and in the accompanying commentary, the OECD expressed that the concept of the beneficial owner could be specified in more detail in the bilateral negotiations by the contracting states if necessary, so it is therefore an open term.

Thus the court opined that the countries while adopting this article would have recognized that the concept of beneficial owner, which was new for international tax law at the time, would change in the following years, which would be reflected in particular in the work of the OECD.

The court also stated that although the 2007 protocol was applicable to dividends from January 2009 onwards, the 2007 protocol did not mean any change, but merely a clarification of the legal situation that was already in force. Thus, the taxpayer was not regarded as the "beneficial Owner" of the shares and was not granted refund of the tax withheld.

International Tax Updates

Oman Deposits its MLI Ratification Instrument

On 07 July 2020 Oman deposited its MLI Ratification Instrument with the OECD. The country has enlisted tax treaties with 35 countries which it desires to cover under the convention. However, India has been kept out of the said list.

The MLI will enter into force for Oman three months after the deposit of its instrument of ratification, i.e., on 1 November 2020.

IRS issues final regulations for deductions for GILTI and FDII

The Internal Revenue Service has issued final regulations that provide guidance on deductions for foreign-derived intangible income (FDII) and global intangible low-taxed income (GILTI) allowed to domestic corporations under the Internal Revenue Code.

These final regulations provide guidance on both the computation of the deductions available and the determination of FDII. These regulations will take effect from 14 September 2020 and shall generally affect domestic corporations and individuals who elect to be subject to tax at corporate rates for purposes of inclusions under subpart F and GILTI.

Netherlands proposes withholding of tax on dividends paid to tax havens

The Netherlands intends to propose an additional withholding tax on certain dividends. If adopted by the Netherlands' parliament, the new withholding tax would take effect in 2024

and specifically affect dividend payments made to "low-tax jurisdictions" i.e. jurisdictions with corporate tax rate of less than 9% and to countries named on the EU "blacklist".

This step is proposed to be taken by the Netherlands with a view to fight tax avoidance. The Government has stated that this withholding shall be over & above the introduction of withholding tax on certain interest and royalties, effective from 2021.

Further, the Government has announced that in order to enable developing countries to levy tax, the Netherlands is willing to make agreements with these countries to give them more taxation rights, including in situations where dividend, interest or royalty payments are made from these countries. The government has proposed that for the 47 poorest developing countries, the Netherlands is open to include a 'source state tax' on payments for technical services carried out in the developing country.

Important Rulings

No interest adjustment on outstanding AE receivables for debt free company

Global Logic India Ltd., ITA No. 8726 of 2019 Delhi ITAT

The taxpayer is engaged in providing software development services to its group companies and operates through EOUs registered with the STPI. The TPO had made an ALP adjustment on account of delay in receipt of payment from the AE. Relying on the taxpayer's own case for earlier years as well as the case of Kusum Health Care Pvt. Ltd. in ITA 765/2016 dated 25-04-2017, the ITAT has held that every item of receivable from an AE appearing in books of an entity cannot automatically be characterised as an international transaction.

The ITAT has further observed that there may be a delay in collection of monies for supplies made, even beyond the agreed limit, due to a variety of factors which will have to be investigated on a case to case basis.

Importantly, the impact this would have on the working capital of the taxpayer will have to be studied. Further, since the taxpayer had already factored the impact of the receivables on the working capital and thereby on its pricing / profitability vis-à-vis that of its comparables, any further adjustment only on the basis of the outstanding receivables would have distorted the picture.

The ITAT has also observed additionally that the taxpayer is a debt free company and does not charge any interest from non-associated enterprises for delayed payments as well. Hence, there is no question of charging any interest on receivables. Reliance placed on decision of Hon'ble Delhi High Court in the case of M/s Bechtel India Pvt. Ltd. in ITA 379/2016 order dated 21-07-2016.

Unutilized share application money cannot be characterized as loan

Voltas Limited, ITA No. 5/Mum/2019, Mumbai ITAT

The taxpayer company had transferred share application money to its Saudi-Arabian wholly owned subsidiary for revival and foreseeing the business opportunities available. The TPO had made an addition by re-characterizing the share application money paid (pending allotment beyond a *reasonable* period) as loan and computed interest thereon.

On appeal, the CIT(A) relying on the judgment of the Bombay High Court in the case of Vodafone India Services Pvt. Ltd. (2014) 368 ITR 1 (Bom) observed, that as the transaction of investment in share capital of subsidiaries outside India was not in the nature of a transaction referred to in Sec. 92B of the Act, transfer pricing provisions were not applicable.

Before ITAT it was argued that the financial health of taxpayer's AE was not good. The money was advanced with a view to infuse further capital in the Subsidiary with a view to acquire controlling stake. The money has been utilized by its AE to pay-off business debts and to meet working capital requirements. Ultimately the shares have been allotted to the taxpayer after getting the desired regulatory approvals from concerned authority.

ITAT therefore held that whatever benefit would accrue to taxpayer's AE, they would indirectly

accrue to the taxpayer since AE ultimately became wholly owned subsidiary of the taxpayer company. The entirety of the facts and circumstances would demonstrate that the investment made by the taxpayer was for genuine business purpose and the stated transaction was not found to be a sham transaction, in any manner.

The ITAT has also drawn observation from the Bombay High Court in case of Aegis Limited (ITA No. 1248 of 2016 dated 28/01/2019) that in the absence of finding that the transaction was sham, the TPO could not have treated such transaction as a loan and charge interest thereon on notional basis.

The ITAT, based on the above, confirmed deletion of notional interest thus computed on share application money, pending allotment of shares.

Claim under section 10AA eligible on incremental income arising pursuant to APA

IBM India Pvt Ltd, IT(TP)A No. 725/Bang/2018, Bangalore ITAT

The taxpayer entered into APA with CBDT in respect of transactions pertaining to export of IT services and in consonance with the rollback of concluded APA to year under consideration, filed its modified return for year under consideration and claimed enhanced deduction under section 10AA on the additional income offered.

The claim of deduction under Section 10AA in totality was rejected by Revenue on the ground that taxpayer failed to establish that services provided were in the nature of software development / ITeS and also failed to comply with the requirement of filing information with SEZ / STPI. Since ITAT held that Taxpayer is eligible to claim Section – 10AA, the question arose whether incremental income due to profit adjustment to align it with Arm's Length Price as per the concluded APA can be considered for calculation of deduction under section – 10AA.

On appeal, the ITAT, relying on the Pune ITAT co-ordinate bench ruling in case of Dal Al Handasah consultants (Shair & partners) India Pvt Ltd [ITA No.1413/Pun/2019], observed that as the incremental income is offered by the taxpayer itself in the modified return in accordance with the APA, it cannot be equated as TP Adjustment by the AO u/s 92C/92CA of the Act and therefore claim under Section – 10AA cannot be denied on incremental income arising pursuant to APA

The suo-moto offering of additional income pursuant to APA is akin to offering suo-moto transfer pricing adjustment offered by a taxpayer in the return of income, in which case the additional claim is permissible. On the same lines, the additional claim pursuant to APA cannot be denied.

Important Rulings

Product registration being compliance cannot be equated as intangible so as to charge for Royalty

The Himalaya Drug Company, IT(TP)A No. 1385/Bang/2017, Bangalore ITAT

The taxpayer developed all its products at its Research & Development unit in India. To be able to market its pharma / beauty products in different countries, the taxpayer had obtained approval from local authorities of respective countries. However, taxpayer did not directly market any of its products in those countries, i.e. it exported the products to its AEs located in that country which in turn marketed the products. The taxpayer also informed that the selling price charged to its AEs was inclusive of everything. This was also comparable to its arrangements with non-AEs, where it had not collected any amount over and above the selling price.

TPO noted that taxpayer possessed various product registrations in various countries and took a view that the "Product registration/ license" was an intangible asset. TPO held that AEs exploited the benefits of product licenses obtained by taxpayer without paying royalty or usage charges to the taxpayer.

The ITAT affirmed the contentions of the taxpayer that the process of product registration / licensing is a matter concerning compliance with government regulations of each country and in most countries, the licenses will only be granted to a manufacturer by virtue of technical details and details of trials of the product being available with the manufacturer. Further, the AEs were marketing the products as mere traders and in their capacity of distributors, and would have obtained separate trading licenses, where applicable. Hence there is no question of charging of royalty for the same.

ITAT distinguished Revenue's reliance on Delhi ITAT ruling in Dabur India Ltd [TS-512-ITAT-2017(DEL)-TP] noting that in that case, Dabur International Ltd was manufacturing certain goods without support of Dabur India using Dabur brand name, hence it was the case of exploitation of brand name. ITAT noted that non-charging of royalty was sought to be defended by submitting that there was no agreement for collecting royalty, which was rejected by ITAT and subsequently by Delhi HC [TS-979-HC-2017(DEL)-TP]. On the contrary, ITAT observed that in the given case, foreign AEs did not manufacture any product, they only marketed the finished products exported by the taxpayer. In view of the above observations, the ITAT deleted the Royalty Adjustment made by the AO.

Swiss Court attributes value-adding functions to the taxpayer based on conduct, disregards contractual arrangement

Administrative Court of Canton of Zurich, SB.2018.00094

In this case, two Swiss investors had established a Swiss Investment Advisory entity, which was to provide investment advisory services to its AE, a Jersey Investment Management entity, for a fee. (The total asset management fee derived by both entities was 2.25%, of which 1.5% was to be retained by Swiss entity). The contractual arrangement between the parties entailed initial analysis to be carried out by the Swiss

entity, which would then be evaluated by the Jersey entity, before advising on the asset management. The Swiss entity benchmarked the fee of 1.5% against management fees earned by independent private equity firms, which was in the range of 0.75% - 1%.

The Zurich Tax Administration evaluated the contractual division of functions, assets and risks among the entities and concluded that the two swiss entrepreneurs were the only two entrepreneurs contributing to the FAR, by taking significant decisions. The Jersey entity did not employ any employees and it was contractually assigned contribution to FAR, which was not factually correct.

Zurich Administrative Court ruled in favour of Zurich Tax Authority and dismissed the appeal of the taxpayer. Relying on OECD TP guidelines, the court has observed that the TP methodology of the guidelines is essentially a two-step process. In a first step, the situation is determined by means of a functional analysis and the services rendered. It also notes that it should be based on the transactions actually carried out and not on the contractual arrangements.

This decision of the Zurich Administrative Court goes further to establish that world over, the ongoing BEPS project of the OECD has led to a shift in the way contracts are perceived and hence, any contractual assignment of functions, assets or risks without a factual corresponding action shall not be considered for a TP analysis.

Circulars & Notifications

Coverage

Customs

Further progress on Faceless Assessment

Circular No. 32/2020 – Customs dated July 05, 2020

To enhance the efficiency in the customs clearance processes under faceless assessment programme, all Principal Chief Commissioners of Customs/Chief Commissioners of Customs have been instructed to setup the Turant Suvidha Kendra in all Customs stations by July 15, 2020.

Certain functionalities such as registration of Authorised Dealer Code, Bank Accounts through ICEGATE, Automated debit of bond after Assessment and Simplified Registration of Importers/Exporters in ICEGATE in ICEGATE have been provided which would reduce the need for physical interaction between Customs and trade.

Amendments to the All Industry Rates of Drawback (AIRs)

Notification No. 56/2020- Customs (N.T.) and Circular No. 33/2020 – Customs dated July 15, 2020

Following amendments have been made to the AIRs of Duty Drawback W.e.f. July 15, 2020:

- Enhanced the Drawback rate of Footwear items made of leather (Chapter 64)
- Enhanced the Drawback rate Gold jewellery (Chapter 71)
- Rationalised Drawback rate for silver jewellery/articles (Chapter 71)
- Description of tariff items 870301, 870303, 870305 and 870307 pertaining to motor cars amended to include motor cars with Automated Manual Transmission (AMT) and such cars are now eligible for drawback

Goods and Service Tax (GST)

Filing of NIL Form GSTR-3B and Form GSTR-1 through SMS

Notification No. 58/2020 – CT dated July 01, 2020

NIL Form GSTR-3B and Form GSTR-1 can be filled through SMS facility using registered mobile number. Verification of returns through OTP was prescribed earlier.

Extension of due date for filing Form GSTR-4

Notification No. 59/2020-CT dated July 13, 2020

The due date for filing Form GSTR-4 for the F.Y. 2019-20 has been extended till August 31, 2020 from July 15, 2020.

E-Invoicing - Revised turnover criteria and other amendments in rules

Notification No. 60/2020-CT and 61/2020 dated July 30, 2020

- E-invoicing shall be mandatory for the registered persons whose aggregate turnover in F.Y. exceeds INR 500 Crore (earlier the said limit was INR 100 Crore).
- E-invoicing shall not be applicable to SEZ Units.
- Revised format of FORM GST INV-1 i.e. format/schema for E-Invoicing has been prescribed

Circulars & Notifications

DGFT

Amendments in MEIS Schedule

Public Notice 12/2015-2020 dated July 10, 2020

Certain additions/amendments have been made in the MEIS Schedule (Appendix 3B), Table 2 to harmonize it with Notification No. 38 dated 1 January 2020 and the changes in the Fifth Schedule of the Finance (No. 2) Act, 2019.

Registration of MEIS scrips

Office Memorandum F.No.01/61/180/ AM20/PC-3/343 dated July 27, 2020

From July 23, 2020 the online MEIS module has been blocked from accepting new application for registration of MEIS scrips for shipping bills with Let Export Order date April 01, 2020 onwards to limit the issuance of any more scrips due to excess allocation has been made.

Case Laws

Coverage

Levy of tax on intermediary services is not unconstitutional

R/Special Civil Application No. 13238 of 2018 and 13243 of 2018, Gujarat High Court

The taxpayer is an association comprising of recycling industry engaged in manufacture of metals and casting etc. The members of the taxpayer are engaged in facilitation of sale of recycled scrap goods of their foreign principals to their customers within and outside India for which they are charging and receiving commission in foreign currency. The goods are directly sold by and invoiced by the foreign companies to their customers which the customer directly imports.

The taxpayer was of the considered view that the service provided by their members is essentially consumed by their customers outside India, consequently an export of service and hence should not be liable to GST. The taxpayer therefore challenged the constitutional validity of Section 13(8)(b) of the IGST Act being ultra vires the COI on the ground that the Parliament is not empowered to artificially assign the place of supply to be within India for this service, which qualifies as an export of service. The taxpayer argued that the transactions executed are in the course of export covered under Article 286(1) and therefore levy of tax on such transactions is not permitted.

It was submitted that Section 13 (8) (b) of the IGST Act makes differential treatment for a person who provides service within India and outside India. In the former case, the recipient of service is place of supply and in the latter case, the location of supplier is place of supply, Therefore, it violates article 14 of COI as it prescribes different yardsticks for the same set of services.

The Hon'ble HC observed that issuance of an invoice to a person outside India and receipt of money in foreign currency are not the only characteristics to distinguish as to whether the services have been provided within or outside India. One of the conditions for export of service is that the place of supply of service is outside

India and the legislature has thought it fit to consider intermediary services as within India. The Hon'ble HC also did not agree to the argument placed by the taxpayer that the present section would cause double taxation.

There have been many news articles stating that KPOs and BPOs providing outsourcing services to companies outside India shall also be affected by the present judgement and would be liable to GST. It is pertinent to note that the above judgement of the Hon'ble HC only upholds the constitutional validity of the provisions contained Section 13 (8) (b) of the IGST Act i.e. the place of supply in case of intermediary services. The Hon'ble HC has not opined on what would constitute intermediary services and whether KPOs and BPOs would be covered under the scope of intermediary services. Such an interpretation seems to be in based on a previous AAR ruling and does not seem to depict the correct interpretation. Whether a particular service would fall under the scope of intermediary services would depend upon the specific facts of each case.

Marketing consulting service to foreign entity is an intermediary service

Advance Ruling number - 04/AP/GST/2020, AAR - Andhra Pradesh

Grace Products (Singapore) Pte. Ltd. ('Grace') appointed DKV Enterprises Pvt. Ltd. (the taxpayer) as a non-exclusive consultant for the sale of their products to their customers in India. The taxpayer was required to the products of Grace and solicit orders for the products in India in accordance with the marketing plans & objectives of Grace for which the taxpayer charged commission to Grace based on the net sales made and received the same in foreign currency. The taxpayer approached the AAR to seek clarification on whether the marketing and consultancy services provided by them amounts to export of service or not?

The AAR Ruled that the taxpayer is engaged in facilitating of supply of goods by Grace to its customers and the transaction is not done by the taxpayer on its own account. Therefore, the services provided by the taxpayer qualified as "intermediary services." Further, AAR held that, Service is being provided to the person outside India, same is liable for payment of IGST.

It is pertinent to note that while the taxpayer argued that they were providing marketing services to Grace, the consideration that they received was in the form of Commission on the basis of actual sales made by Grace. In cases where the remuneration for providing marketing services is not based on the actual sales made, it remains to be seen if such marketing services take the colour of services supplied on own account and therefore go out of the net of intermediary.

Salary of Expatriate employees accounted in books of a project office (PO) not liable to GST

Advance Ruling number - GST-ARA-38/2019-20/B-27 AAR, Maharashtra

M/s. Hitachi Power Europe GMBH (the taxpayer), a Company incorporated under the Laws of Germany, entered into an agreement for supply of goods and supervisory services with Indian Company and constituted three POs in India

under FEMA. Few employees of the foreign company were stationed at the PO. The said employees have their primary bank accounts outside India and salary of the said employees is being paid from the HO's bank account located abroad. As per the Companies Act, 2013, the foreign company has to maintain their books of accounts for the business in India and accordingly expenses of foreign employees are accounted in the books of accounts of PO. The taxpayer approached the AAR to seek a clarification on whether the salary expenses accounted in the books of the PO would be liable to GST?

The AAR ruled that the PO is an extension of the foreign company, and thus, the employees of the PO are actually the employees of foreign company only and therefore, there is an employer and employee relationship between the Employees and the PO. Accordingly, salary cost accounted in books is not liable for payment of tax.

It is important to note that Section 8 of IGST Act, provides branch or representational office of a registered person in any territory are considered as different establishments and accordingly considered as distinct persons for the purpose of GST. In terms of Schedule I of CGST Act, any service between distinct persons even without consideration is liable to GST. The logic provided in the present ruling would have an impact the long-debated issue of cross charge where an HO of a Company in one state is considered to provide services to the registration of the same company in other state and whether the GST cross charged by one registration to another would include the cost of salary paid to employees or not.

GST is not applicable on Reimbursement of salary paid on behalf of foreign entity

Advance Ruling number - GST-ARA-34/2018-19/B-99, Maharashtra Advance Ruling

DRS Marine Services Private Limited (the taxpayer) is engaged in recruiting shipping personnel for Foreign Ship Owners and for the said services, taxpayer receiving the consideration and remitting the tax as applicable. RSM Ltd ('RSM'), situated outside India to whom the taxpayer is providing the above services requested the taxpayer to disburse the salary to their employees i.e. crew members on their behalf. To facilitate such transaction, RSM will transfer the exact amount of salary to the taxpayer in a bank account specifically marked for this purpose and the taxpayer shall pay the salaries to the crew members. The taxpayer shall receive a separate consideration for facilitating such salary reimbursement and pay the applicable taxes.

The taxpayer approached the AAR to seek clarification on whether the service provided by them qualifies as pure agent services, and therefore, the salary amount received and paid by them on behalf of RSM to the crew members is not liable for payment of taxes?

AAR held that, all the conditions of Rule 33 of CGST Rules, are satisfied and found that the taxpayer is acting as a pure agent of RMS for purely disbursing the salary and accordingly GST would not apply on receipt or payment the amount pertaining to the salary of employees of RSM.

Case Laws

GST implications on reimbursement of expenses is a critical aspect to consider, as the term reimbursement is not defined in GST law and only the concept of pure agent concept is explained. While in the present case, not all the conditions as specified to become a pure agent are satisfied, the AAR has taken a liberal approach and held that the receipt of money was as a pure agent since a separate account was opened for such reimbursements. An in-depth analysis of contractual agreements between the parties will play an important role in the deciding the taxability of reimbursements.

Renting of residential property along with other services to a business entity would be liable to GST

Advance Ruling Number - 12/AP/GST/2020, Andhra Pradesh Advance Ruling

M/s. Lakshmi Tulasi Quality Fuels (the taxpayer) being an owner of a building, entered into a lease agreement with D-Twelve Spaces Private Limited, a registered person, which is engaged in the business of running and managing the residential premises by sub leasing such residential premises to individuals for the purpose of their long stay. The taxpayer receives a monthly lease rent apart from all operating costs which are charged extra. The lease agreement provides that the lessee has the right to sub-lease the property to third parties for the purpose of long-term accommodation.

The taxpayer approached the AAR to seek clarification on whether the service of renting a residential building to another person would be exempt where the said premises is given for to a business entity for running a business of sub-letting the premises further to individuals for long term stay. The taxpayer contended that the renting of a residential dwelling is an exempted service and no GST shall apply on such services.

The authority observed that not only residential dwelling, but other services were also provided by the taxpayer. The authority concluded that the service is not in nature of renting of residential property as the entire building has been provided on rent and not a standalone residential unit, the building cannot be termed as a residential dwelling. It is pertinent to note here that the Karnataka AAR had earlier given similar findings in the case of Sri. Taghar Vasudeva Ambrish wherein the service provider rented his residential premises to a business entity to run a hostel.

The controversy stems from the wordings of the exemption notification which provides exemption to services by way of renting of residential dwelling **for use as residence**. In case where the residential dwelling is rented to a business entity, the exemption may not be available even though such business entity may ultimately provide the said dwelling to a person for use as a residence for a long or short duration. This is based on fact that the business entity itself is not using the premises for own residence and the condition of the recipient using the premises as own residence is not being fulfilled as held the AAR.

Case Laws

Foreclosure charges received is not liable to service tax

Service Tax Appeal No. 511 of 2011- CESTAT - Chennai Larger Bench

M/s Repco Home Finance Ltd (the taxpayer) is engaged in providing of housing loan to their customers. The taxpayer recovered the foreclosure charges on termination of premature loans without charging Service Tax. The department issued a notice for demanding the service tax on such service on the ground that termination of loan prior to the agreed terms and recovery thereof amounts to facilities provided by the bank for a consideration and the same would liable to service tax under the category of "Banking and other financial services." The taxpayer argued that the foreclosure charge is an instrument to remunerate the loss of interest on accounts of premature termination of loans and not for providing the "lending services." Accordingly, the same is not liable to service tax.

Considering that two division benches of CESTAT had taken divergent views on levy of service tax on foreclosure charges recovered by the banks and NBFCs on premature termination of loans, the matter was referred to a Larger Bench of the CESTAT to decide on the issue.

The Larger Bench of the CESTAT noted that, as per Section 2 (d) of Indian Contract Act, 1972, consideration should be at the desire of promisor and if that is not the case then recovery cannot be termed as a consideration. Unanticipated closure of loan is a unilateral act from the borrowers' end which leads to claim of damages and is therefore not in the nature of services provided.

Consideration is an essential element which is required to be present to levy tax and in absence of it, tax cannot be levied. While the judgement relates to a positive list regime under the service tax, the analogy applied in the judgement may be relevant in the negative list regime of service tax as well as under GST.

It remains to be seen as to how the present judgement shapes the future of cases pertaining to liquidated damages, notice pay recovery from employees particularly in the negative list regime of service tax where the department has alleged that recovery of a damage would lead to agreeing to the obligation to refrain from or to tolerate an act or a situation.

Circulars & Notifications

Amendment of Schedule VII of the Companies Act, 2013

Notification dated June 23, 2020

MCA has amended Schedule VII [narrating various activities which may be included by companies in their CSR activities] whereby the activity relating to "measures for the benefit of Central Armed Police Forces (CAPF) and Central Para Military Forces (CPMF) veterans, and their dependents including widows" has been included in such Schedule.

Accordingly, any expenditure incurred by Companies for the paramilitary forces' benefit, shall also be considered as CSR expenditure.

Extension in filing of Form NFRA-2

General Circular No. 26/2020 dated July 6, 2020

MCA extended the time limit for filing of Form NFRA-2 [annual return to be file by statutory auditors to National Financial Reporting authority for the reporting period FY2018-19 and set the revised time limit of 270 days from the date of deployment of Form on the website of National Financial Reporting Authority.

Such form was deployed on December 9, 2019. Accordingly, such form is now required to be filed on or before September 3, 2020.

Availability of Form PAS-6 with effect from July 15, 2020

MCA Portal "News and Important Updates"

As per Rule 9A(8) of the Companies (Prospectus and Allotment of securities) Rules 2014, every unlisted public company shall submit reconciliation of Share Capital Audit Report in *Form PAS-6* within sixty (60) days from the conclusion of each half year, duly certified by a Company Secretary in practice or Chartered Accountant in practice.

Form PAS-6 is now available on MCA Portal, with effect from July 15, 2020.

Relaxations relating to procedural matters – Issues and Listing

SEBI/HO/CFD/DIL1/CIR/P/2020/136 dated July 24, 2020

Earlier SEBI vide Circular no. SEBI/HO/CFD/DIL2/CIR/P/2020/78 dated May 6, 2020 granted one-time relaxation from strict enforcement of certain regulations of SEBI ICDR Regulations, 2018, pertaining to Rights Issue opening upto July 31, 2020. Based on the representations received from the market participants, the validity of following relaxations has been further extended and shall now be applicable for Rights Issues opening upto December 31, 2020:

Regulation	Old Provisions	Relaxations	Other conditions
77(2) of the ICDR	Service of the abridged letter of offer, application form and other issue material to shareholders may be undertaken by electronic transmission or registered post or speed post or courier service.	Failure to send such documents through physical mode shall not be treated as non-compliance during the lock-down period.	The issuers shall publish such documents on the website of the company, registrar, stock exchanges and the lead manager to the rights issue. Shareholders will also be reached through other means such as ordinary post or SMS or audio-visual advertisement on television or digital advertisement, etc.
84(1) of the ICDR	The Issuer is required to release an advertisement prior to the Issue, specifying the date of opening the issue, manner of fling of an application etc.	In addition to the requirements mentioned in Regulation 84 (1), the Issuer will also provide the manner in which the shareholders, who have not been served notice electronically, can apply.	The Issuer shall make use of advertisements in television channels, radio, internet etc. The advertisement should also be made available on the website of the Issuer, Registrar, Lead Managers and Stock Exchanges.
76 of the ICDR	Rights issue shall be made only through Application Supported by Blocked Account (ASBA) facility. The shareholders are required to provide their Demat account, if any, details to Issuer/ Registrar to the Issue for credit of Right Entitlement in respect of their physical shares.	Rights issue can be made by any other non-cash mode, without any charges. In absence of Demat account, shareholder may be allowed to apply as per alternative mechanism set by the Issuer.	Shareholder not having Demat account shall not be eligible to renounce his rights entitlement. Further he shall receive the rights shares only in Demat mode. No third-party payments shall be allowed in respect of any application.

Case Laws

Relaxations relating to procedural matters – Takeovers and Buy-back

SEBI/HO/CFD/DCR2/CIR/P/2020/139 Dt. July 27, 2020

Earlier SEBI vide circular issued on May 14, 2020, had granted a one-time relaxation pertaining to open offers and buy-back tender offers opening upto July 31, 2020 under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 and SEBI (Buy-back of securities) Regulations, 2018.

It further stated that the service of the letter of such offers and the tender form and other offer related material to shareholders could be undertaken by electronic transmission due to COVID-19 and the acquirer or company and the manager to offer could provide procedure for inspection of material documents electronically. The said relaxations have now been extended upto December 31, 2020.

Extension of time for submission of financial results for the quarter/half year/ financial year ended June 30, 2020

SEBI/HO/CFD/CMD1/CIR/P/2020/140 Dt. June 29, 2020

The timeline for submission of financial results under Regulation 33 of the LODR Regulations, for the quarter/half year/financial year ended June 30, 2020, has been extended upto September 15, 2020.

Recent fundraising by Jio Platform

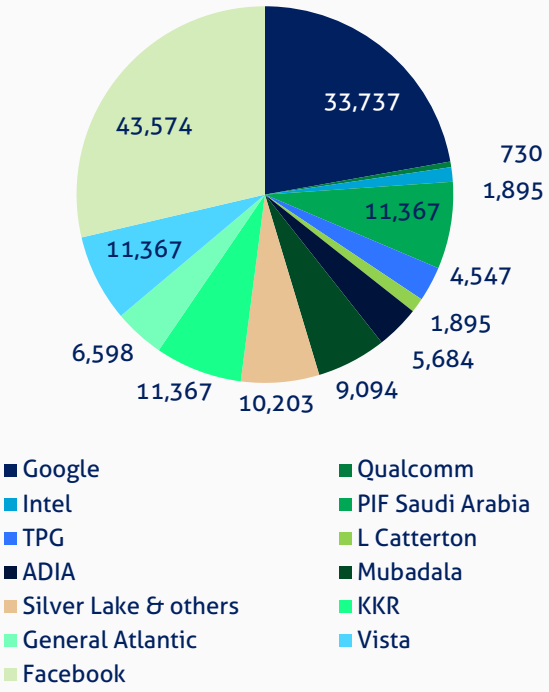
While Reliance Industries Limited (RIL), India's largest private sector company, was looking for means to deleverage its balance sheet since quite some time, its digital technology arm Jio Platforms has finally come to the rescue.

Jio Platforms has garnered investments from 13 strategic and financial investors totalling to INR 1.52 Lakh Crore in a period of less than 3 months. This comes as a pleasant surprise in an otherwise subdued funding environment in recent times.

Jio Platforms is expected to create a digital landscape across sectors covering telecom, financial services, e-commerce, education, and healthcare, among others. The ecosystem will encompass wireless broadband, 5G connectivity, internet of things (IoT), mobile devices, cloud computing, big data, artificial intelligence (AI) and blockchain to name a few.

The long list of marquee investors included global technology giants like Facebook which invested INR 43,574 Crore for 9.99% stake in Apr-20 and ended with the latest round of investment by Google amounting to INR 33,737 Crore for 7.73% stake in Jul-20.

RIL mopped up a total investment of INR 1.52 Lakh Crore by diluting c. 33% stake in Jio Platforms at an equity valuation of INR 4.61 Lakh Crore from the following investors: **(INR in Crores)**



Source: RIL media releases

Valuation

The aforesaid rounds of investments valued Jio Platforms at an enterprise value (EV) of c. INR 4.86 Lakh Crore which was almost half of RIL's market capitalisation when the first deal with Facebook was announced.

This was an achievement in itself for Jio, which crossed this milestone just within three and half years of its launch. Based on Jio's FY20 results, the above valuation translated into revenue multiple of 7x and EBITDA multiple of 21x, something unheard of at such a large scale.

Hence, for the proud parent RIL, when the elder children (Refining and Petrochemicals) could not deliver the goods, its youngest child made it shine even during the most difficult times.

While RIL's proposed deal with Saudi Aramco to sell 20% stake in its petrochemicals and refining businesses for US$ 15 Billion hangs in balance after almost a year, Jio Platforms has helped RIL raise nearly 1.5x this amount within a period of just under 3 months.

Recent fundraising by Jio Platform

Value drivers

So, what drove this investor frenzy? The vision of creating a Digital India and making India's largest private sector company debt-free and future ready for further growth opportunities generated traction from strategic as well as financial investors.

Key pillars of Digital India as envisioned by Jio Platforms include:

- best-in-class wireless and wireline data networks for consumers as well as businesses at affordable price
- enabling digital platforms for media & entertainment, e-commerce, education, financial services, healthcare, government services, agriculture and more
- working with next-generation technologies such as blockchain, big data, AI, IoT, augmented and virtual reality, super-computing, and robotics, among others

The idea is to digitize 1.3 Billion people of India by building a platform where customers can talk, shop, bank, learn, watch, play and listen to digital content with effortless ease. Moreover, India with the second largest number of internet users in the world makes it a potential game changer for the digital platforms.

Looking at the damage that Jio inflicted onto its competitors in the telecom space, the idea of Digital India to reach 1.3 Billion Indians does not seem exaggerated at all.

Apart from the fund-raising spree at Jio Platforms that made RIL net-debt free. RIL surpassed INR 14 Lakh Crore of market capitalisation on 07-Aug-20 with its share price ending at 2,146 per share, also making Reliance the second biggest brand after Apple on the Future Brand Index 2020.

We could possibly see the next wave of fund raising by RIL through monetisation of JioFiber as news sources recently reported a proposed investment of US$ 1.5 Billion by Qatar Investment Authority in JioFiber.

Nevertheless, it now needs to be seen as to, how Jio Platforms deliver on its promise of Digital India by being Vocal for Local.

Disclaimer: Please note that the above article is not intended to be a stock recommendation.

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Should you need detail understanding or more information, kindly reach out to subject team

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Abbreviations

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Abbreviation	Meaning
AAAR	Appellate Authority of Advance Ruling
AAR	Authority of Advance Ruling
ASBA	Applications Supported by Blocked Amount
ADR	American Depository Receipts
AE	Associated Enterprise
AGM	Annual General Meeting
AIF	Alternate Investment Fund
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
AY	Assessment Year
BBT	Buy Back Tax
BMA	Black Money (Undisclosed Foreign Income and Assets) and Imposition Tax Act 2015
BOE	Bill of Entry
BOI	Body of Individuals
BT	Business Trust
CBDT	Central Board of Direct Tax

Abbreviation	Meaning
CCA	Cost Contribution Arrangements
CESTAT	Central Excise and Service Tax Appellate Tribunal
CFC	Controlled Foreign Corporation
CGST	Central Goods and Services Tax
CIT(A)	Commissioner of Income Tax (Appeal)
CPC	Central Processing Centre
COI	Constitution of India
CPSE	Central Public Sector Enterprise
CSR	Corporate Social Responsibility
CTA	Covered Tax Agreement
CUP	Comparable Uncontrolled Price Method
CUP	Cost Plus Method
DDT	Dividend Distribution Tax
DGIT	Director General of Income Tax
DRP	Dispute Resolution Panel
DTAA	Double Tax Avoidance Agreement
ECB	External Commercial Borrowing
EPF	Employee's Provident Fund
EGM	Extra-ordinary General Meeting
EOU	Export Oriented Unit
EQL	Equalization Levy
FA	Finance Act

Abbreviation	Meaning
FAR	Function Assets and Risk
FEMA	Foreign Exchange Management Act, 1999
FII	Foreign Institutional Investor
FPI	Foreign Portfolio Investor
FOF	Fund of Funds
FTC	Foreign Tax Credit
FTP	Foreign Trade Policy
FTS	Fees for Technical Service
FY	Financial Year
GAAR	General Anti-Avoidance Rules
GDR	Global Depository Receipts
GOI	Government of India
GST	Goods and Service Tax
GVAT Act	Gujarat VAT Act, 2006
HC	High Court
Hold Co	Holding Company
ICAI	Institute of Chartered Accountant of India
ICDS	Income Computation and Disclosure Standards
ICDR	Issue of Capital and Disclosure Requirements
IGST	Integrated Goods and Services Tax

Abbreviations

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Abbreviation	Meaning
IRDA	Insurance Regulatory and Development Authority
ITA	Income Tax Act, 1961
ITR	Income Tax Return
IT Rules	Income Tax Rules, 1962
ITAT	Income Tax Appellate Tribunal
ITO	Income Tax Officer
ITR	Income Tax Return
ITSC	Income Tax Settlement Commission
LAF	Liquidity Adjustment Facility
LIBOR	London Inter Bank Offered Rate
LIC	Life Insurance Company
LO	Liaison Office
LODR	Listing Obligations and Disclosure Requirements
LTA	Leave Travel Allowance
LTC	Lower TDS Certificate
LTCG	Long term capital gain
MAP	Mutual Agreement Procedure
MAT	Minimum Alternate Tax
MCA	Ministry of Corporate Affairs
MFN	Most Favored Nation
MLI	Multilateral Instrument
MMR	Maximum Marginal Rate

Abbreviation	Meaning
MNE	Multinational Enterprise
MPS	Minimum Public Shareholding
MSF	Marginal Standing Facility
MSME	Micro, Small and Medium Enterprises
NBFC	Non-Banking Finance Company
NCDS	Non-convertible Debentures
NPA	Non-Performing Asset
NRI	Non-Resident Indian
OECD	The Organization for Economic Co-operation and Development
OM	Other Methods prescribed by CBDT
PAN	Permanent Account Number
PE	Permanent establishment
PPT	Principle Purpose Test
PSM	Profit Split Method
PY	Previous Year
RBI	Reserve Bank of India
RCM	Reverse Charge Mechanism
REs	Dematerialized Rights Entitlements
RNOR	Resident and Not Ordinarily Resident
ROR	Resident Ordinary Resident
RPF	Recognized Provident Fuds

Abbreviation	Meaning
RPM	Resale Price Method
SC	Supreme Court of India
SDT	Specified Domestic Transaction
SE	Secondary adjustments
SEBI	Securities Exchange Board of India
SEP	Significant economic presence
SEZ	Special Economic Zone
SFT	Specified Financial statement
SION	Standard Input Output Norms
SST	Security Transaction Tax
ST	Securitization Trust
STCG	Short term capital gain
STPI	Software Technology Parks of India
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
UPE	Ultimate Patent Entity
VCF	Venture Capital Fund
WHT	Withholding Tax