K C Mehta & Co.

Chartered Accountants

kcm Insight

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Dear Reader,

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

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

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

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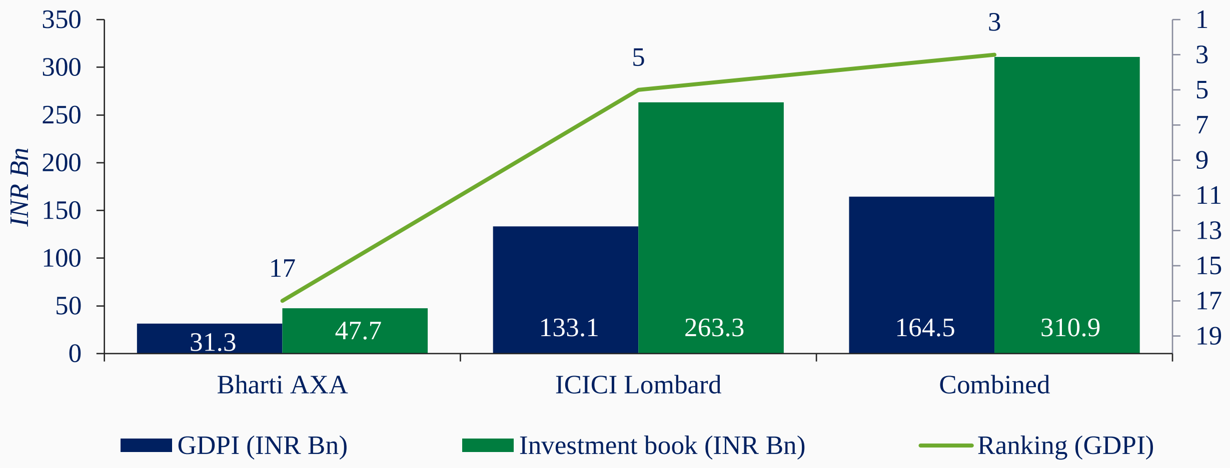
Deciphering ICICI Lombard's acquisition of Bharti AXA General Insurance

The Deal

ICICI Lombard General Insurance, India's largest private non-life insurer, had announced the acquisition of Bharti AXA's General Insurance business in Aug-20, which subsequently received in principle approvals from the Competition Commission of India, stock exchanges and the Insurance Regulatory and Development Authority of India.

ICICI Lombard is a listed entity promoted by ICICI Bank which presently holds 51.89% in the former and the rest is public shareholding. ICICI Lombard earned gross direct premium income (GDPI) of INR 133.1 Bn in FY20 making it the 5th largest insurer by GDPI in the country. Bharti AXA General Insurance, which is a joint venture between Bharti General Ventures (holding 51% stake) and French insurer AXA (holding 49% stake), earned GDPI of INR 31.3 Bn in FY20 at a CAGR of 33.6% over FY17.



Source: ICICI Lombard Investor Presentation

As per the draft scheme of arrangement, the entire general insurance business of Bharti AXA (excluding certain specified assets and brands) would be transferred on a going concern basis by way of demerger to ICICI Lombard in an all-stock deal whereby the shareholders of Bharti AXA would receive 2 shares in ICICI Lombard for 115 shares held in Bharti AXA. Upon completion of the transaction, ICICI Bank would hold 48.11% in ICICI Lombard while Bharti General Ventures and AXA would be a part of the public shareholding.

Valuation

As ICICI Lombard is a listed entity on Indian stock exchange, it was valued as per the market price method under the market approach based on the guidelines provided in the ICDR Regulations. Accordingly, ICICI Lombard was assigned a value of INR 612.1 Bn.

The demerged undertaking of Bharti AXA was valued based on comparable companies multiple (CCM) method and comparable transactions multiple (CTM) method under the market approach by applying comparable price

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to book value multiples. Under the CCM method, price to book value multiple of 6.43x was considered based on ICICI Lombard's P/B multiple of 8.58x after adjusting the same for size and illiquidity. Under the CTM method, median price to book value multiple of 6.60x was considered based on five recent comparable transactions in the general insurance space.

Equal weight was assigned to both the aforesaid multiples to arrive at the valuation of Bharti AXA's general insurance business, which was then adjusted for the value of excluded assets and accumulated tax losses. As such, the demerged undertaking of Bharti AXA's general insurance business was assigned a value of INR 48.2 Bn.

Accounting Treatment

In the books of Bharti AXA: All the assets and liabilities of the demerged undertaking being transferred to ICICI Lombard would be reduced from the books of accounts at their respective book values. The excess/deficit (if any) of the book value of the assets over the book value of the liabilities of the demerged undertaking would be debited/credited to the "Debit Balance in Profit and Loss Account".

In the books of ICICI Lombard: ICICI Lombard would record the assets, liabilities and reserves pertaining to the demerged undertaking at their respective book values/carrying values as appearing in the books of Bharti AXA. Identity of the reserves would be preserved by ICICI Lombard in the same form in which they appeared in the financial statements of Bharti AXA. Inter-corporate balances (if any) between ICICI Lombard and Bharti AXA would stand cancelled.

The surplus/deficit (if any) of the net value of assets, liabilities and reserves of the demerged undertaking acquired by ICICI Lombard over the amount recorded as share capital issued (including securities premium) and any Interim Funding Compensation would be credited/debited to the reserves in the financial statements of ICICI Lombard.

Rationale and Synergies

The combined business would consolidate market position to become the 3rd largest general insurer by GDPI in India with an enhanced market share of 8.7%. The combination would result in economies of scale by lowering average costs through operating leverage thereby enhancing profitability. From a customer standpoint, the combined business would offer a wider product basket and more access points.

ICICI Lombard would benefit from Bharti AXA's growing distribution platform that comes along with a balanced product mix with an increasing share of health insurance business. Bharti AXA also offers synergies through its existing partnerships that include bancassurance tie-ups with large private banks/NBFCs as well as relationships with vehicle OEMs.

Given the fragmented nature of the general insurance market in India, the possibility of further consolidation among existing players cannot be completely ruled out in light of present and upcoming challenges being foreseen in the aftermath of the pandemic.

Circulars & Notifications

Assessment proceeding initiated in the name of amalgamating company prior to sanction of the merger held to be sustainable

Serendipity Infolabs Pvt. Ltd. V. DCIT (ITA 2428 of 2018, Bangalore ITAT)

For AY 2015016, the Taxpayer, an amalgamating company filed its ITR and the case of the Taxpayer was then selected for scrutiny assessment proceeding u/s 143(2) of the ITA. The Taxpayer participated in the assessment proceeding and based on the that the assessment proceeding was completed u/s 143(3). During the assessment proceeding, the Taxpayer informed to the department that in pursuant to order of NCLT dated July 28, 2017, the Taxpayer (Amalgamating Company) has been merged with another company (Amalgamated Company) with effect from March 31, 2015. The Department has passed the assessment order u/s 143(3) on December 26, 2017 in the name of the Taxpayer and carried out certain additions.

Before the Appellate Authority, the Taxpayer contended that the assessment order passed in the name of non-exiting entity is nullity and therefore, the order passed u/s 143(3) is required to be set aside as bad in law. The Taxpayer placed reliance on the decision of SC in the case of PCIT v. Maruti Suzuki India (Civil Appeal No. 5409 of 2019) and contended that the Hon'ble SC has held that the assessment proceedings conducted in the name of the non-existing entity (transferor company) is not valid and such defect cannot be ratified by operation of Section 292B of the ITA.

The ITAT, after considering the facts of the case via-a-vis legal position discussed by the Hon'ble SC in case of Maruti Suzuki India Ltd. (supra) held that though the assessment order passed by AO in the name of the Taxpayer was an irregularity however such it cannot invalidate the assessment order in view of section 292B of the Act. Since the Taxpayer was existing on date of issue of notice u/s 143(2) and therefore, the decision relied upon by the taxpayer is distinguishable on facts.

It is pertinent to note that recently the Delhi HC in the of PCIT v Nokia Solutions & Network India (P.) Ltd (ITA 135 of 2018 dated February 06, 2018) has an occasion to decide similar issue. The HC has held that that an assessment u/s 143(3) passed in the name of non-existing entity is a nullity.

Annual Letting Value (ALV) cannot be computed in respect of building under construction

M/s Brigade Enterprise Ltd v. Addl. Commissioner of Income Tax, ITA No. 528 of 2015-Karnataka High Court

The Taxpayer is engaged in the business of construction and sale of residential and commercial building. The appeal was relating to AY 2010-11 during which the Taxpayer had constructed a school building and part of the building was handed over by it to Brigade Foundation to run school. For the AY 2010-11, the Taxpayer did not offer notional rent income in ITR. The school building was completely constructed in the next year i.e AY 2011-12 and the Taxpayer started receiving actual rent income of Rs. 30 lacs form AY 2011-12.

During the assessment proceeding, the department has observed that part of the building was handed over to the trust for

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running a school and therefore, as per the provision of section 23 of the ITA, the Taxpayer ought to have offered notional rent income to tax in its ITR in AY 2010-11 itself. The Department adopted 50% of the Annual Letting Value (ALV) based on the actual rent income received in AY 2011-12 and determined national rent income at Rs.15 lacs as per section 23 and added this notional income to the total income.

The Taxpayer contended that under the Building Bye Laws of Bruhat Benguluru Mahanagara Palike (BBMP), person is not permitted to occupy a building before issuance of Occupancy Certificate. The Taxpayer accordingly argued that as the Occupancy Certificate was issued on 03-08-2010 i.e. in FY 2010-11 relevant to the AY 2011-12, the tenant (Brigade Foundation) was legally not permissible to occupy the school building and run school there before such date. The Taxpayer has accordingly contended that determination of ALV is not applicable in case of building under construction and therefore, no addition of rent is required to be made.

The HC after considering the peculiar facts held that the notional rent income cannot be computed for building which is under construction since the building comes into existence only on issue of occupancy certificate. The HC accordingly held that as the Taxpayer got the occupancy certificate in AY 2011-12, in AY 2010-11, the lower authorities were not justified in confirming the addition of notional rent in case of under construction property.

Indian Representative Office of German Bank held not to constitute Permanent Establishment, Taxability of interest income upheld under Article 11 and not Article 7 of Indo-German DTAA

DZ Bank AG – India Representative Office [ITA No.: 1815/Mum/18, Mumbai ITAT]

A German Bank had received some interest income from loans advanced to borrowers in India, which was subject to tax withholding on gross basis under Article 11 of Indo-German DTAA. The Assessing officer proposed to consider Indian Representative Office of the German bank as a PE and accordingly, proposed to tax interest incomes arising to the foreign branch of the bank as incomes attributable to PE taxable under Article 7 of the Indo-German tax treaty.

Mumbai ITAT highlighted that there is a distinction between carrying on business of banking vis-a-vis carrying on activities which contribute directly or indirectly earning of income by the banking business. The ITAT held that even if there is a real relationship between activities of representative office and the business carried on by the assessee abroad and even if the activities of the liaison office contribute directly or indirectly to earning of income by the assessee, such relationship is not enough for the liaison office to constitute a permanent establishment in India. Considering that the representative office's activities were in the nature of preparatory and auxiliary, it was held that the German bank did not constitute PE in India.

The ITAT further held that specific provisions of Article 11 had an overriding effect on the general provisions of Article 7 and that the exclusion clause under article 11(5) is triggered only when the twin conditions of the foreign enterprise carrying on business in the source jurisdiction and of the debt claim being effectively connected with the PE were satisfied. The ITAT ruled that the debt claim cannot be effectively connected with the PE merely because the PE had a supporting role in creation of the debt claim but the provision required the income to arise from debt claim which is part of the assets of the PE. In light of the above, it was held that the interest income fell within the ambit of Article 11 of the DTAA and the same could not be taxed under Article 7 of the DTAA on net basis.

This judgment reiterates that a foreign company as a whole is a taxable person under the provisions of the Act and that the Indian office, which is a part of the foreign company cannot be considered as a separate taxable unit. It further clarifies on the provisions of Article 11(5) which provides for a clear linkage between the income and the PE.

Offshore supplies held taxable in India as Huawei China bore 'rejection risk' for telecom equipment supply and constituted Permanent Establishment in India

Huawei Technologies Co. Ltd. [ITA No. 1500/DEL/2014, ITA No. 6921/DEL/2014, ITA No. 937/DEL/2016, ITA No. 6376/DEL/2016, ITA No. 6377/DEL/2016, ITA No. 6799/DEL/2017, ITA No. 5506/DEL/2018, ITA No. 8263/DEL/2019 – Delhi ITAT]

The assessee, Huawei China (HC Co.), a company incorporated in China, was engaged in supply of tele-communication network equipment and mobile handsets. Huawei Telecommunications India Company Private Ltd. (HI), a subsidiary of HC Co., was involved in provision of integration, installation and commissioning services in relation to telecom network equipment supplied from outside India.

Profits of the foreign entity from supply of equipment were held taxable in India as ITAT observed that the buyers had right to reject the equipment on failure of acceptance test to be carried at buyers' sites in India. Considering that HC Co. bore 'rejection risk', the ITAT ruled that taxpayer's claim that title and risks relating to equipment supplied was passed on outside India could not be accepted.

Further, ITAT also observed that HC Co. was responsible for supply as well as services under the composite contracts entered into with Indian customers and the dominant purpose of the HC was not to sell telecommunication equipment but to commission it after due customisation of hardware and software in accordance with the requirement of telecommunication service provider. The ITAT observed that customisation and installation of equipment was integral and most important part of the contracts entered into with customers. The ITAT also observed that the responsibility for installation and commissioning along with supply of equipment was with HC Co.

Besides, the Indian subsidiary was held to constitute PE of HC Co. in India by the Delhi ITAT taking into consideration various facts. There were observations like the personnel of HC performed certain negotiations and bidding activities from HI's office in India. Further, Indian resources were involved in deal negotiations on behalf of the appellant and that the joint bidding team included resources from Indian entity as well as HC Co.. Services were also performed in India for a period exceeding 183 days. It was therefore held that HI constituted fixed place PE, service PE as well as dependent agent PE of HC in India in terms of Article 5 of India-China DTAA.

In light of the above, profits of the foreign entity from supplies as well as services were held taxable in India. The ITAT brings out fine distinction between bearing 'rejection risk' as against responsibility of repairing or replacing part of equipment in case of manufacturing defects, as an important factor in determining the place of passing of title and risks to the customer. Further, ITAT relied on various factual documents, including statements from the employees of the two entities and customer contracts evidencing that installation and commissioning services was a responsibility of HC and that the services were integral and significant part of the contract. The ruling signifies importance of segregation of roles and responsibilities in case of composite contracts as well as emphasises on conduct of personnel and the principle of substance over form.

Interest waived on CCD not liable to withholding tax under Section 195 read with India-Cyprus DTAA

Coffeeday Enterprises Ltd [ITA No.2931/Bang/2018 & C.O. No. 42/Bang/2019, Bangalore ITAT]

In the said case, coupon interest on Compulsorily Convertible Debentures (CCDs) was deferred and subsequently waived by the Cypriot investor, and accordingly reversed in

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the books of the assessee company. Bangalore ITAT held that where interest was neither charged to nor claimed as deductible expenditure by the assessee, no withholding tax obligation under Section 195 of the Act could be cast on the taxpayer. The ITAT dismissed revenue's appeal subjecting the said interest to withholding tax also taking into consideration that under Article 11 of the DTAA between India and Cyprus, tax was to be levied on interest paid to the resident of Cyprus. Relying on the decision of National Organic Chemical Industry vs. DCIT 5 SOT 317 (Mum), the ITAT held that the expression "paid" used in the DTAA is to be interpreted as intended to be taxed on "paid" basis and not on accrual basis and hence in the present case, the assessee was not liable to deduct tax at source.

Similar judgement relating to interpretation of the term 'paid' in DTAA have been recently held in the case of Ampacet Cyprus Limited [TS-414-ITAT-2020(Mum)] with respect to Article 11 of India-Cyprus DTAA, as also in certain other decisions relation to fees for technical services paid under various Indian tax treaties and is pending adjudication in the case of Siemens Aktiengesellschaft (ITA No. 124 of 2010) before the Supreme Court. However, in the present case, the interest was neither accrued nor paid due to waiver of interest and accordingly, withholding tax could not be levied in absence of any income chargeable to tax in India.

Reimbursement of expenses of seconded employees not subject to withholding tax as FTS

Abbey Business Services India Pvt Ltd [ITA No. 214 of 2014, Karnataka High Court]

The Karnataka High Court held that hotel and travelling expenses incurred by foreign group companies on employees seconded to the Indian assessee company were not in the nature of fees for technical services under Section 9(1)(vii) of the Act read with Article 13 of the India-UK DTAA. Reimbursement of hotel and travelling expenses so incurred on seconded employees were thus held not liable to tax deduction at source in India.

It appears from a bare reading of the judgment that in the present case, the company had withheld tax on reimbursement of salaries of the seconded employees which was taxable in India and only hotel and travelling expenses, which were not in the nature of income taxable in India were reimbursed to the UK enterprises without deduction of tax at source. The High Court also distinguished the decision in the ruling of Delhi High Court in the case of M.s Centrica India Offshore Private Limited [WP(C) No. 6807 / 2012], considering that in the present case, the foreign enterprises did not have a permanent establishment in India, whereas, in the case of Centrica, the foreign enterprise had constituted service PE in India.

Subscription fees for online database containing e-books and journals not taxable as Royalty

Elsevier BV [AAR No. 1481 of 2013, Authority for Advance Rulings]

Netherlands based applicant company was engaged in the business of providing electronic and print version of books, journals and articles from various authors and publishers. It earned income from two kinds of models in India –

Important Rulings - India

Under 'pay per view transactions', the customer was allowed to view or download a particular book or journal or article after making online payment, and under 'subscription agreements', the customers were allowed to view, print download, etc. various books, journals or articles on the subscribed topic and for subscribed period.

The Applicant submitted that both the models were similar in essence as under both the models, the customers had rights to view books, journals and articles in electronic format and that in both cases, proprietary rights and interests remained with the Applicant and that the customers / subscribers were placed with restrictions on usage of contents and were given no rights to reproduce or distribute the content. The AAR upheld the view that in both the cases, access to content on the Applicant's web portal was similar to purchase of books, articles, journals in an electronic mode. AAR held that this was akin to buying books from bookstore, wherein, royalty is paid by the publisher for transfer of copyright from author to sell/ distribute the books to public, thereby leaving no scope for transfer of copyright between publisher/ bookstore to ultimate customer.

In light of the above, the AAR allowed Applicant's contention that subscription fees received by it was not in the nature of royalties as per Section 9(1)(vi) of the Act read with under Article 12 of India-Netherlands DTAA. Incomes arising to the Applicant were thus held to be in the nature of business income and were not considered liable to tax in India in absence of a permanent establishment in India under Article 7 read with Article 7 of the DTAA.

Important Rulings - International

Danish Tax Council rules in two cases on constitution of PE on working from home

[Case No. 20-0585117 and 20-0895442]

Recently, in two different cases, the Danish Tax Council ruled on whether employees working from home in a different country could constitute a PE for the employer in that country. In the first case, employee of a German company was working totally out of him home in Denmark due to COVID-19 restrictions and attending meetings, etc. from there. In this backdrop, the Danish Tax Council held that the German company had a PE in Denmark as the employee was performing key functions sitting out of Denmark.

In another case involving a UK company, the employee working out of the UK for four days in a week and for one day, he worked out of Denmark as he wanted to stay with his family. The Danish Tax Council held that the presence of employee in Denmark did not constitute a PE for the UK employer as the employee was working for a day in the week out of Denmark because of his personal obligations and the same did not benefit the company as the company did not have any business interest on account of the employee's presence in Denmark.

The issue of exposure to constituting PE on employees working from home in another country has become significant in these times of the pandemic and the two contrasting decisions from the Danish Court depict how facts and circumstances would be relevant and determining factor in such cases.

French Supreme Court holds that Tax Residency Certificate is a prerequisite for availing treaty benefits, not for determining residential status

In this decision, French resident individuals had moved from France to Switzerland in end of 2007 and had become tax residents of Switzerland thereafter in terms of Article 4 of DTAA between France and Switzerland. French tax authorities however sought to tax gains arising to the individuals on alienation of shares of certain companies sold in March 2008 on the grounds that the tax residency certificate provided by the taxpayer was not in accordance with formats provided as per Article 31 of the DTAA.

The French Supreme Court held that Tax Residency Certificate in specific format was a pre-requisite to claim 'benefits' accorded to residents of Switzerland under the DTAA from incomes arising from French sources. However, the Court held that determination of residential status under Article 4 of the DTAA was not a 'benefit' or 'advantage' accorded by the tax treaty and therefore, the same would not be affected by availability of tax residency certificate in a specified form. Accordingly, the individuals were held residents of Switzerland and gains arising on alienation of shares were held not taxable in France.

An important observation brought out by the French Supreme Court is that articles under tax treaties such as determination of residence and tie breaker rules should be available even in absence of tax residency certificates as the same is not a 'benefit' but is determination of a factual position.

Important Global Updates

International arbitration under India-UK Bilateral Investment Protection Agreements favours Cairn Energy

The Arbitral Tribunal constituted under the Bilateral Agreement between India and UK for Protection and Promotion of Investments (BIPA) ruled in favour of Cairn Energy Plc and Cairn UK Holdings Ltd. in a tax dispute relating to indirect transfer of assets located in India involving USD 1.6 billion. The dispute arose on account of sale of shares of Cairn India Holdings Ltd., a Jersey based company holding investments in 9 Indian subsidiaries engaged in oil and gas business of the group in India. On transfer of shares in the foreign entity, the transferor, Cairn UK Holdings Ltd., a UK resident company, claimed that the transaction was not liable to tax in India as the amendments under Section 9(1)(i) of the Indian Income-tax Act relating to indirect transfer of assets were carried out in 2012, subsequent to the Indo-UK DTAA which entered into force in 1994. The Arbitral Court upheld these contentions and ruled that India failed to uphold its obligation under the UK-India BIPA and international law, and in particular, that it has failed to accord the Claimants' investments fair and equitable treatment in violation of Article 3(2) of the Treaty.

In a similar case on India's action of bringing retrospective amendments to the tax laws to plug in loopholes and bring to tax net indirect transfer transactions pursuant to Supreme Court disapproving revenue authorities' tax claim on USD 11.1 billion Vodafone – Hutchison deal, Indian government had lost in an International arbitration proceeding at Netherlands. Permanent Court of Arbitration in the Hague, Netherlands had ruled that the Indian government seeking Rs 22,100 crore in taxes from telecom giant Vodafone using retrospective legislation was in violation of provisions of and in breach of the guarantee of fair and equitable treatment guaranteed under India – Netherlands BIPA. India has now challenged the arbitral award before Singapore Court.

These would have far reaching impact on pending arbitration cases under Indian BIPAs and it will be interesting to see what course of action Indian Government proposes to opt for in case of Cairn Energy and whether Vodafone proceeds to take recourse under India-UK BIPA considering that the Delhi High Court in August 2017 had restrained Vodafone Group Plc. UK from initiating arbitration proceedings under India-UK BIPA, parallel to pending arbitration in case of Vodafone International Holdings BV under India-Netherlands BIPA for identical reliefs.

It may be worthwhile to note that currently, Indian BIPA with only few jurisdictions such as Bangladesh, Colombia, Latvia, Libya, Lithuania, Senegal are operative and that India has terminated most of its BIPAs as India proposes to renegotiate the Agreements.

India's APA / PE Ruling exchanges increased by 90% from 2018 to 2019 says OECD

OECD's Inclusive Framework on BEPS released annual peer review report on spontaneous information exchanges on tax rulings as per Action Plan 5 of BEPS on Countering Harmful Tax Practices. The report covered progress made by 124 jurisdictions in this behalf during calendar year 2019. As per the report, during the year,

Important Rulings - Global

India has exchanged 905 unilateral APAs or other transfer pricing rulings and 6 PE rulings, which marked a 92% overall increase as compared to 454 APAs and 21 PE rulings exchanged in 2018. The report recognises that 20,000 rulings have been identified and 36,000 exchanges took place between the jurisdictions. This signifies evolution of the international tax regime and how quick the world is moving towards global tax transparency through information exchanges.

US-IRS releases final regulations on rules for determining source of income from sale of inventory and personal property connected with US trade or business

In lines with proposals under the Tax Cuts and Jobs Act, the IRS has published final regulations on source of income rules with respect to inventory assets as also sale of personal property (including inventory) by non-residents that are attributable to an office or other fixed place of business that the non-resident maintains in the US. Before the TCJA, Section 863 of the Internal Revenue Code (IRC) provided that income from the sale of inventory produced (in whole or in part) by the taxpayer in the US and sold outside the US, or vice-versa, were partly sourced in US and partly in foreign jurisdiction, however, the source rules did not specify a method for bifurcating the income amongst the US and foreign sources. The final regulations specify location of production activity as the factor for determination of incomes attributable to US and foreign sources. The Regulations also modify certain principles of the Section 954(d) foreign base company sales income rules for purposes of defining production activities and expanding the anti-abuse rules.

The Regulations also lay rules for determining the source of income from sales of property by non-residents attributable to an office or fixed place of business in the United States under Section 865 of the IRC. The Regulations also clarify treatment of certain foreign source income as effectively connected with the conduct of a trade or business within the United States.

The Final Regulations provide important guidance and clarifications for taxpayers with cross-border supply chains, particularly those corporations that manufacture inventory outside the United States for sale into the United States or vice versa as well as foreign corporations where a US office materially participates in the sale of inventory.

Important Updates

Coverage

OECD: Transfer Pricing Implications of the Pandemic

On 18 December 2020, the OECD issued Guidance on the transfer pricing implications of the COVID-19 pandemic ("OECD Guidance"). This looks at the impact of the pandemic on areas of the transfer pricing analysis and APAs.

Comparability analysis

Ensuing economic crises due to slow down during 2019 followed by unprecedent change in business environment due to outbreak of COVID-19, creates unique challenge for performing comparability analysis. Pandemic may have significant impact on the pricing of some transactions under both controlled and uncontrolled situation and therefore comparability analysis based on historic data (Indian Transfer Pricing regulation requires to consider current plus two previous years for comparability analysis) may not be reliable. Further, adjustment for such difference cannot accurately be carried out for want of relevant information.

OECD Guidance provide detailed answers to each question that may arise while performing comparability analysis. The summary of guidance in respect of comparability analysis are as under:

- Contemporaneous information is to be preferred over historical data analysis. The source of which may be an analysis of sales volume (pre and post COVID 19 period), comparison of Capacity Utilization, exceptional cost analysis, Government assistance and interventions that have affected the prices etc., Country specific GDP and other macroeconomic indicators to support the impact on prices.
- Cost Variance analysis and impact of COVID 19 thereupon. All positive and negative factors and details of profitability adjusted to where the outcome would have been if COVID-19 had not occurred.
- The rationale and evidence for any increased allocation of costs or a reduction of sales
- While applying TNMM, to use contemporaneous data for comparable cases it would be important to demonstrate that the prices decided for controlled transactions was not negotiated or decided based on long term arrangement wherein multi-year data was considered.
- Practical approaches that may be available to address information deficiencies are:
  - use of reasonable commercial judgement supplemented by contemporaneous information to set a reasonable estimate of the arm's length price
  - allow for an arm's length outcome testing approach to take into account information that becomes available after the close of the taxable year in filing their returns – If provisions of law permits
  - Use of more than one transfer pricing method
- As a pragmatic means of addressing divergent economic conditions in the pre- or post-pandemic period, and when the pandemic was in effect and its effects on economic conditions were material, it may

be appropriate to have separate testing periods (and periods considered for price setting) for the duration of the pandemic or for the period when certain material effects of the pandemic were most evident.

- The accurate delineation of a controlled transaction will determine the effect, if any, of Government intervention on the price or form of any controlled transaction associated with such activities.
- Price Adjustment approach may be used, to the extent permissible by domestic law, to allow the adjustment of prices relevant for current year through adjusted invoicing or intercompany payments effectuated in a later period (i.e. next financial year) when more accurate information of ALP is available.
- It may be useful to revise the set of comparable companies / transactions rather just rolling over the set of comparable used in previous year with updated information of current year. This would help in considering the impact of COVID-19 over economic condition of comparable.

Losses and allocation of Covid-19 specific costs

The pandemic has led to a decrease in demand and restrictions on supplies, in addition to additional operating costs, with the result that some MNE groups have incurred losses. As the allocation of the losses between entities in the group is a potential source of disputes, consideration must be given to certain specific issues around Covid-specific costs and the allocation of losses.

The allocation of risks between the parties will affect the arm's length allocation of profits or losses that are allocated at arm's length through the pricing of the transaction. The current guidance on the analysis of risks in commercial or financial relations is relevant to loss allocation but multinational groups also need to consider the allocation of exceptional, non-recurring operating costs that result from the pandemic and the economic crisis.

The allocation should be based on how independent enterprises would operate under comparable circumstances. The treatment of exceptional costs in a transfer pricing analysis must be guided by an accurate delineation of the transaction, an analysis of the risks assumed by the parties and consideration of how independent enterprises would reflect the costs in the arm's length price. Accounting standards should be taken into account in the comparability analysis bearing in mind the characterization of particular costs as exceptional or extraordinary costs.

Government assistance programs

Government assistance is a monetary or non-monetary programme where a government or other public authority provides a direct or indirect economic benefit to eligible taxpayers such as grants, subsidies, forgivable loans, tax deductions, or investment allowances. Job retention programmes have been used in many jurisdictions to preserve jobs in enterprises experiencing a temporary reduction in business activity.

Governments have also provided broader financial and liquidity supports to ensure enterprises can continue to operate through the period of reduction in business activity. Those include: (i) loan guarantees; (ii) direct financing to business on preferential terms; (iii) loan deferrals; (iv) specific grants and (v) tax relief.

Government assistance can affect the transfer pricing analysis if it is provided to a member of an MNE group directly or if it is available to independent parties operating in the same industry, thereby affecting the behavior of the enterprises involved in potentially comparable transactions. The terms and conditions of the government assistance programmes should be considered in assessing the effect of the government programmes on the controlled transactions. The determination of the economic relevance of government support will inform its effect, if any, on accurately delineating the controlled transaction and performing the comparability analysis.

Temporary support to support businesses during the pandemic may have a different impact on the transfer pricing analysis compared to ongoing assistance programmes covering several years.

The most reliable approach in identifying reliable comparables will be to refer, where possible, to data regarding comparable uncontrolled transactions in the same or comparable geographic market between independent enterprises performing similar functions, assuming similar risks, and using similar assets.

Advance Pricing Agreements

The changes in economic conditions due to the pandemic affect many advance pricing agreements (APAs) that cover 2020 and any future financial years that may be affected by the pandemic and its economic consequences. Consideration must be given to how the change in economic conditions has affected the application of existing APAs.

Existing APAs and their terms should be respected, maintained and upheld, unless a condition leading to the cancellation or revision of the APA (e.g. breach of critical assumptions) has occurred. Taxpayers and tax administrations cannot automatically disregard or alter the terms of existing APAs due to the change in economic circumstances.

The impact of change in economic conditions due to pandemic and whether it would constitute a breach of a critical assumptions shall be analyses on case-to-case basis. it should take into account the individual circumstances of the taxpayer and commercial environment. The COVID-19 pandemic has not had the same impact on all enterprises. While many industries and business have experienced a drop in demand and revenues because of forced lockdowns, others have expanded their consumer-base or benefitted from new business opportunities. Where taxpayers have concerns, they should approach the relevant tax administration in a transparent way to discuss their concerns.

Where the critical assumptions of an APA are breached, it is important that taxpayers collect and provide tax administrations with relevant supporting documentation. Depending on the particular critical assumption and other facts and circumstances, this could include, but may not be limited to:

- A description of the narrowest relevant taxpayer business segment tracked by

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management that encompasses the entities and covered transactions involved in the APA.

- Forecast and actual business segment profits for the financial years ending with or within financial years affected by COVID-19.
- Copies showing any proposed or implemented modifications to pre-existing agreements or new agreements affecting to covered transactions.
- A narrative explaining the anticipated effects of the current economic conditions on an agreed transfer pricing methodology during the financial years affected by COVID-19.
- Information about effect of exception cost due to Pandemic over profit and loss for the covered transactions
- Information about behavior under similar situation by independent parties.

Where APAs are being negotiated by taxpayers and tax administrations they must consider how

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Adjustment to comparable margins available only for variance in depreciation-rates; not depreciation to WDV ratio

M/s Vishay Components India Private Limited Appeal No. 1198 & 1501 of 2018 (Pune ITAT)

Taxpayer manufactures resistors, capacitors used in various applications and products. The Taxpayer undertook certain international transactions during the year and applied TNMM to demonstrate the arm's length nature of such transactions.

Taxpayer adopted Operating Profit before Depreciation, Interest and Taxes (OPBDIT) while computing its PLI ratio of Operating Profit to Total Cost under the pretence that OPBDIT/Total Costs presented a better comparison as it had charged higher amount of depreciation in comparison with the comparables.

Taxpayer claimed that its average rate of depreciation, i.e., the ratio of depreciation to average written down value (WDV) at 17.97% was higher than the similar average ratio of the comparables at 12.07%. Therefore, difference in the claim of depreciation by taxpayer vis-à-vis that is in case of comparables, an adjustment should be carried out in the case of comparables.

The ITAT observed that the Hon'ble Supreme Court in DIT (IT) Vs. Morgan Stanley & Co. (2007) 292 ITR 416 (SC) has held that ratio of Operating profit to Costs or Sales etc. is mandated under the TNMM. Thus, the entire emphasis in Rule 10B(1)(e) is on determining the Operating profit rate of taxpayer and comparables and then comparing the adjusted operating profit rate of the comparables with that of taxpayer for benchmarking the international transaction.

It further held that, once figure of operating profit has been mandated to be considered, there remains no sanctity for claiming that a particular item of operating expense be reduced because of the same being excessive or lower in comparison with comparables and the resultant operating profit before such an item of expenditure be considered for making comparison.

There is a *raison d'etre* for comparing operating profit rate of taxpayer with comparables and not truncated operating profit computed by excluding certain item(s) of operating costs. The

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legislature has stipulated the adoption of Operating Profit as a Numerator under Rule 10B(1)(e) rather than Profit before distinct items of operating costs / revenue so that the effect of such varying business models may be eliminated to facilitate a better comparison.

Adjustment shall only be granted for the difference in rates of depreciation on similar assets charged by taxpayer and comparables and not for difference either in the amounts of depreciation or value of assets.

For application of RPM cost of expatriates providing warranty / after sale services to be considered as direct cost

M/s Toyoda Micromatic Machinery India Private Limited; Appeal No. 3834 of 2017 (Delhi ITAT)

Taxpayer is a JV with a Japanese company and engaged primarily engaged in the business of distribution in providing delivery and/or installation services of the machines tools and taxpayer sold it directly or through third parties to the customers. Taxpayer benchmarked the trading transactions with its AE by applying RPM. The TPO noted certain expenses and stated that taxpayer is undertaking other functions like advertising, sales promotion and having a distribution network and incurring of these other costs are also indicate that taxpayer is not acting as a mere trader but taking on significant other functions also and passed an order applying TNMM.

Taxpayer claimed that the cost incurred by it in respect of 3 expatriate employees amounting to more that INR 1 Crore and such cost is prevalent in the industry and MNC enterprises.

The ITAT observed that based on the profile of the expatriates, either those were for providing Warranty services or after sales services. ITAT noted that when the goods were sold, prices of these items/ services were already embedded in the sales price. ITAT further stated that After sale support services, training to customers and local staff for troubleshooting and service coordination expenses are required to be included for determining the gross profit margin for application of resale price method.

Issue of OCD / CCD not to be classified as shareholder activity; Thin Capitalisation and GAAR to not apply

M/s Kolte Patil Developers Ltd.; Appeal No. 1980 & 2111 of 2017 (Pune ITAT)

Taxpayer is a domestic company, is engaged in the business of development of Real estate. Taxpayer had issued Compulsory Convertible Debentures (CCDs) and Optionally Convertible Debentures (OCDs) to its AEs in India and abroad. The TPO was of the view that debentures be considered as issue of shares in as much as it was in the nature of 'Shareholder activity'. Further, Taxpayer had a very high debt-equity ratio of 4:1 due to which the TPO further took note of the Thin capitalization principle of having higher proportion of debt vis-à-vis equity and General Anti-Avoidance Rules (GAAR) resulting into tax avoidance.

The ITAT, going through the ambit of "Shareholder activity" as given in the OECD guidelines, observed that it becomes imminent that these activities are in the nature of certain acts performed by a parent company SOLELY because of its shareholding in other group companies, which is obviously not the case of the Taxpayer.

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Shareholder's activity may include COSTS of activities relating to the juridical structure of the parent company itself, such as meetings of shareholders of the parent, issuing of shares in the parent company and costs of the supervisory board, COSTS relating to reporting requirements of the parent company including the consolidation of reports, COSTS of raising funds for the acquisition of its participations.

There is no legal bar in accepting loans from shareholders / related concerns in the same way in which it is open to issue fresh shares to its existing lenders who are non-shareholders.

ITAT clarified that, in India, Thin Capitalisation rule is covered by section 94B of ITA, which provided a limit of deductible interest at 30% of earnings before interest, taxes, and depreciation where payment of interest exceeds Rs. 1 crore. Therefore, no other ratio or formula can be used to consider an adjustment based on the concept of 'Thin Capitalisation'.

ITAT opined that the instant case falls in the general provision of accepting the transaction as such and not in the exception requiring recharacterization of the transaction of debt into equity.

Filing Form 3CEB does not relieve from compliance of TP documentation u/s 92D

M/s Convergys Customer Management Group Inc; Appeal No. 3529 & 3530 of 2015 (Delhi ITAT)

Taxpayer is a non-resident company who had entered into certain international transactions with its Associated Enterprise in India. Form 3CEB was obtained from an independent chartered accountant duly disclosing the aforesaid international transactions. Taxpayer had not maintained information and documents as required under Section 92D of the Act.

The ITAT observed that information and documents required to be maintained were not available with Taxpayer but it relied on TP study of the Indian AE only. ITAT held that Form 3CEB are to be furnished according to Section 92E and different set of documents are to be maintained u/s 92D. ITAT held that mere submission of Form 3CEB will not be treated as documents submitted under Section 92D of the Act.

The foreign company is liable to prepare, keep & maintain transfer pricing documentation for the year during which it has entered into international transactions with its AEs, as per the provisions of Section 92D read with Rule 10D of the Act failing to which would entail penalty of a sum equal to 2% of the value of each international transaction entered into by the company with its AEs for each such year of default.

Such documentation should be contemporaneous to the due date for filing return of income u/s 139(1) of the Act. Further, such documentation is required to be submitted to income tax authority upon being asked within 30 days from the date of receipt of notice. If it fails to provide such documentation within 30 days or maximum within 60 days (if extension granted by officer), the further penalty of 2% of the value of each international transaction may be imposed.

Circulars & Notifications

Goods and Service Tax (GST)

Eight-digit HSN code mandatory on tax invoice

Notification No. 90/2020 – Central Tax dated on December 01, 2020

Registered persons engaged in supply of specified goods broadly falling under the categories of medical chemicals shall be required to mention eight-digit HSN code on the tax invoices.

Extended time limit for compliances in respect of anti-profiteering measures

Notification No. 91/2020 – Central Tax dated on December 14, 2020

The time limit for compliances and actions falling during the period March 20, 2020 to March 30, 2021 by the authorities in respect of anti-profiteering measures has been further extended till March 31,2021.

Certain amendments to the CGST Act carried out by Finance Act, 2020 to come into effect from January 01, 2021

Notification No. 92/2020 – Central Tax dated on December 22, 2020

Amendments to the CGST Act to fix certain issues such as delinking the debit notes from the date of invoice for availing ITC, amendment to entry in Schedule II etc., which were carried out by the Finance Act, 2020 are now made effective from January 1, 2021.

Wavier of late filing fees for GSTR 4 for taxpayers registered in the Union Territory of Ladakh

Notification No. 93/2020 – Central Tax dated on December 22, 2020

The CBIC has waived off the late fees for late filing of GSTR 4 for the F.Y. 2019-20 in respect of the taxpayers who are registered in the Union Territory of Ladakh.

Insertion of new provisions / Amendments to the various provisions of the CGST Rules to tackle the issue of fake invoicing

Notification No. 94/2020 – Central Tax dated on December 22, 2020

Various amendments carried out to the CGST Rules to be effective from January 1, 2021:

- Restriction on availing Input Tax Credit Claim under Rule 36(4) has been now reduced from 10% to 5%.
- Rule 86B has been introduced to impose a restriction on certain taxpayers for utilising more than 99% of output tax liability using ITC.
- Validity of E-way bill reduced to one day for a distance of 200 kms.
- In case of non-filing of Form GSTR-3B, filing of GSTR 1 shall be blocked.
- Generation of E-way bill to be blocked in case of non-filing of returns or suspension of registration.
- Biometric based registration procedure along with physical visits.
- Powers granted to officers to suspend registrations without providing opportunity of being heard.

Extended time limit for filing GSTR 9 and GSTR 9C for FY 2019-20

Notification No. 95/2020 – Central Tax dated on December 30, 2020

The time limit for filing GSTR 9 and GSTR 9C for the FY 2019-20 has been extended till February

28, 2021. The utility for filing GSTR 9C for the F.Y. 2019-20 has been made available by the department in late December 2020.

DGFT

Modifying PAN based Import Export Code (IEC)

Public Notice No 34/2015-20 dated on December 24, 2020

The DGFT has introduced provisions for modifying or obtaining PAN based IEC in case of merger, acquisition, liquidation and inheritance etc., as well as linking the old IEC with the new PAN / IEC and linking of obligations of the old IEC.

Customs

Anti-dumping duty on imports of Cold-Rolled Flat Products of Stainless Steel

Notification No. 44/2020 – Customs (ADD) dated on December 03, 2020

CBIC has extended the levy of anti-dumping duty on imports of Cold-Rolled Flat Products of Stainless Steel falling under tariff heading 7219 of the First Schedule to the Customs Tariff Act, 1975, originating in or exported from, the People's Republic of China, Republic of Korea, European Union, South Africa, Taiwan, Thailand and the United States of America imposed, till January 31, 2021.

Circulars

Third party invoicing will be accepted in case of Preferential Certificates of Origin issued in terms of DFTP Scheme

Circular No. 53/2020 – Customs dated on December 08, 2020

The CBIC has clarified that Certificate of Origin issued in terms of DFTP Scheme for least developed countries with third party commercial invoice will be accepted where value of goods does not have impact on originating status i.e., the originating criteria is wholly obtained.

Special measures to facilitate MSME for Authorized Economic Operator (AEO) T1& T2 accreditation

Circular No. 54/2020 – Customs dated on December 15, 2020

The CBIC has provided the following relaxations to MSMEs applying for an AEO accreditation:

- Eligibility requirement for handling minimum documents has been reduced from 25 to 10 documents.
- Requirement of having business activities has been reduced to two financial years from three financial years.
- For AEO T1 and AEO T2 accreditation, the annexures required to be submitted with the application have been rationalized.
- Time limit for processing AEO T1 and AEO T2 application has been reduced to fifteen working days and three months respectively.
- Requirement of furnishing of Bank Guarantee for AEO has been further relaxed to 25% and 10% for MSME AEO T1 and T2 respectively.

Clarification on faceless assessment

Circular No. 55/2020 – Customs dated on December 15, 2020

CBIC has issued guidelines with respect to the following issues for smoothen process of faceless assessment:

- Re-assessment in accordance with the Principles of Natural Justice

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- Complete description of the imported goods to be mentioned while filing the BOE
- Illustrative list of documents along with document codes for regular documents to be uploaded with filing BOE in e-Sanchit
- Monetary limit for assessment of BOE by the Appraising Officers enhanced to 5 lakhs
- Steps to be taken to expedite assessments in respect of Liquid Bulk Cargo

Maharashtra Goods and Services Tax Department (MGSTD) issues guidelines for conducting GST Audit

Tarde Circular No. 13T of 2020 dated on December 21, 2020

The guidelines issued by the MGSTD cover the following:

- Procedure for conducting the Audit under Section 65 of the MGST Act.
- The scope of conducting the Audit including the documents to be verified.
- Rights & duties of the taxpayer as well as the department.
- Indicative list of documents to be submitted/ kept ready by the taxpayer for verification.

Karnataka Goods and Services Tax Department (KGSTD) launches e-shodhane IT platform for conducting GST Audit

Circular No. 14/2020 dated on December 19, 2020

The KGSTD has developed an e-audit module called e-shodhane. The department has issued a detailed circular covering the features of the tool which are as follows:

- Selection of cases for Audit based pre-defined risk parameters.
- Issuance of notice, reply to notices and details of documents verified to be logged on the platform.
- Time limits for conducting audits specified.
- Procedure with respect to conducting Audit specified in detail in KGSTD Audit manual 2020 to be followed.
- Communication between department and taxpayer has to be through Government mail ID and registered e-mail ID of the taxpayer.

Case Laws

Writ admitted on challenging provisions of the CGST Act denying ITC in respect of construction of warehouse

Insta Kart Services Pvt. Ltd. Vs Union of India, (Calcutta HC), Writ Petition Nos. - 8205 of 2020

The Hon'ble Calcutta HC has admitted the writ petition filed by the Taxpayer challenging the constitutional validity of Section 17(5)(d) of the CGST Act which seeks to deny ITC on construction and works-contract service availed in respect of construction of warehouse.

Writ admitted on challenging the provision denying ITC to buyer for supplier's default

Surat Mercantile Association Vs Union of India, (Gujarat HC), R/SPECIAL CIVIL APPLICATION NO. 15329 of 2020

The Hon'ble Gujarat HC has admitted a writ petition filed by the Taxpayer challenging the constitutional validity of Section 16(2)(c) of the CGST Act which seeks to deny ITC on goods or services to the recipient taxpayer, if the tax charged in respect of supply of goods or services has not been actually paid to the Government by the supplier.

Delay in generation of E-Way Bill for transport of imported goods cannot be liable to penalty and seizure

Raj iron & building materials Vs Union of India, (Allahabad HC)

Writ Petition Nos. - 826 of 2017

The Taxpayer has imported goods which were in transit without an E-Way Bill. The department intercepted the vehicle and issued a show cause notice for seizure of the goods. The Taxpayer generated the E-WAY Bill before the issuance of the order. The authority however, passed an order for seizure of the goods on the ground that E-Way Bill was not found accompanying the goods and also imposed penalty.

The Taxpayer vide the present petition before the Hon'ble Allahabad HC argued that there were certain difficulties with regard to the downloading of the E-Way Bill and hence, the same was not found accompanying the goods. The Taxpayer further argued that there was no intention to evade tax as goods were being imported against a tax invoice.

The Hon'ble HC observed that there are certain difficulties with regard to the downloading of the E-Way Bill and also certain doubts still remain with regard to the requirement and submission of E-Way Bill. It further observed that the goods were imported under a regular tax invoice. The Hon'ble HC accordingly concluded that the order imposing seizure and penalty upon a mere technical breach and not on account of any intention to evade tax cannot be sustained and should be set aside.

This is an important ruling by the Hon'ble HC holding that where it cannot be proved that the absence of E-Way Bill was not with any malafide intention then such lapse may be considered as only a technical breach and, in such cases, the Taxpayer should not be saddled with penalties.

AAAR cannot condone delay beyond 30 days in filing an appeal

Deputy Conservator of Forests (Under trade name of Karnataka Forest Department)

Advance Ruling number - KAR/AAAR-15/2019-20- Karnataka

The Taxpayer being aggrieved by the ruling passed by the AAR, had filed an appeal before the AAAR. As per the provisions of Section 100

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of CGST Act, 2017, an appeal against an order of the AAR shall have to be filed within 30 days from the date of communication of order to the Taxpayer. Further, the Appellate Authority has a power to condone a delay of in filing the appeal for a further period not exceeding 30 days upon sufficient cause being shown.

In the present case, the Taxpayer contended that they had received the advance ruling order on October 5, 2019. However, it was observed that the order was sent through registered post with acknowledgment due and was received by the Taxpayer on October 4, 2019. Accordingly, the extended period of 60 days for filing the appeal expired on December 3, 2019 whereas the appeal was filed by the Taxpayer on December 4, 2019 i.e. with a delay of 1 day. The said date was arrived at by the AAAR after excluding the day on which the order has was received by the Taxpayer in terms of the General Clauses Act.

The AAAR relied upon the judgements of Hon'ble SC wherein it has been held that the Commissioner (Appeals) being a creature of statute was not empowered to condone the delay beyond the time prescribed in the statute.

The AAAR also referred to the judgements of the Hon'ble SC wherein it has been held that when a statute prescribes a specific time limit has been prescribed in a law, then the general time limit provided under the Limitation Act shall not be taken into consideration. The AAAR accordingly, concluded that it does not have a power to condone a delay of even one day beyond the period specified under the CGST Act.

While the AAAR has rejected the appeal on the grounds of delay, it is important to be considered while filing appeals under GST considering the current situation of the outbreak of the pandemic. It is also important to note that in view of the prevalent pandemic situation, the Hon'ble SC has passed an order directing that the statutory limit prescribed under any law for filing an appeal shall stand extended till further orders. It would be important to analyse as to whether the AAAR would be covered under the said directions of the SC.

MCA Notifications

Extension of timelines under various provisions of Companies Act, 2013 due to COVID-19 pandemic:

Provisions	Due date	Extended Date (Revised)	Circular No. / Notification / Order	Date
Applicability of Companies (Auditor's Report) Order, 2020 on Statutory Audits	April 1, 2020	April 1, 2021	Order	December 17, 2020
Convening of Board Meetings* through Video Conference (VC)/Other Audio- Visual Means (OAVM)**	December 31, 2020	June 30, 2021	Notification	December 30, 2020
Convening of Extra ordinary General Meetings through Video Conferencing or Other Audio-Visual means or transact items through postal ballot	December 31, 2020	June 30, 2021	General Circular No. 39/2020	December 31, 2020

**for approving of Financial Statements, Board's Report, Prospectus, Merger, Demerger, Amalgamation, Acquisition, Takeover and for conducting Audit Committee Meetings for consideration of Financial Statements.*

Insertion of Definition of Corporate Action and new Rule 26A**

Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 dated December 17, 2020.

Section 236 of the Companies Act, 2013 deals with purchase of minority shareholding. The Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 deals with transactions involving Merger, Amalgamation, Acquisition, or any other arrangement between Companies. Rule 26A has been inserted, which deals with acquisition of minority shareholding held in demat form by the Acquirer in view of any corporate action involving transfer of shares. Accordingly, a new Rule 26A has been inserted with a meaning of term "*corporate action*" as under:

- "**Corporate Action**" means "*any action taken by the Company relating to transfer of shares and all the benefits accruing on such shares namely, bonus shares, split, consolidation, fraction shares and right issue to the acquirer"* specifically for these Rules.
- Rule 26A inserted with respect to "***Purchase of minority shareholding held in demat form***". The salient features of the new Rule are:
  - The Company shall verify the details of minority shareholders holding shares in demat form.
  - After verification, Company shall send notice to minority shareholders about the cut- off date for acquiring their shares, which shall also be published in Newspapers.
  - The Company shall inform the depository about cut-off date and Corporate Action.

MCA Notifications

Coverage

- On receipt of information, the depository shall make transfer of shares of minority shareholders in favour of Company on cut- off date and then, Company shall make payment to each of the minority shareholders.

Relief to Independent Directors**

Companies (Appointment and qualification of Directors) Rules, 2014 dated December 18, 2020

Relief has been provided to individuals whose name is included in the databank of Independent Directors:

- Time frame to pass the online proficiency self-assessment test increased to two years *[earlier one year]* from the date of inclusion of name in databank and;
- For individuals who have served as a Director or Key Managerial Personnel in certain specified Companies for a period not less than 3 years *[earlier time period was 10 years]*, he/she shall not be required to undergo the online proficiency self-assessment test.
- The passing marks for online proficiency test have been reduced from sixty percent to fifty percent.

Application for extension of Reservation of Name**

Notification dated December 24, 2020.

MCA has provided an extended period for reservation of name or change of name, provided the application has been made by using web service SPICe+, subject to payment of prescribed fees and within the time limit specified, as stated in table below:

Extended Period	Fees [in Rupees]	Payment of Fees - Time Limit
Forty days from the date of approval	One Thousand	within twenty days from the date of approval
Sixty days from the date of approval *	Two Thousand	within the above extended period of forty days from the date of approval
Sixty days from the date of approval	Three Thousand	within twenty days from the date of approval

*with the initial application for extension sought for forty days.

***These Notifications are yet to be published in the Official Gazette and shall come into force, once published.*

Amendments relating to Write off, Set off, refund etc. relating to Export of Goods and Services

RBI/2020-21/77, A.P. (DIR Series) Circular No. 08 Dt. December 04, 2020

For the ease of doing business and faster approval, greater powers have been delegated to Authorised Dealer Category – I banks (AD banks) in the following areas:

Direct Dispatch of Shipping Documents

The limit for regularizing (by AD Bank) direct dispatch of shipping documents by the Exporter to the consignee or the agent resident in the country of the final destination, for shipments upto USD 1 million or its equivalent (per export shipment) has been done away with, subject to the following conditions:

- The export proceeds have been realized in full except for the amount written off, if any.
- The exporter is a regular customer of AD bank for at least six months.
- The exporter's account with AD Bank is fully compliant with KYC/AML guidelines.
- The AD bank is satisfied about the bonafides of the transaction.

"Write-off" of unrealized Export bills

For greater flexibility to the AD Bank, provisions for approval of write-off of unrealized export bills has been amended.

Write off without Limits:

For export bills routed through the AD Bank that have remained unrealized for any of the specified reasons stated below, such export bills may be **written-off without any limit**, subject to satisfaction of AD Bank and provision of documentary evidence:

- The overseas buyer has been declared insolvent and a certificate from the official liquidator has been provided; or
- The unrealized amount represents the balance due in a case settled through the intervention of the Indian Embassy, Foreign Chamber of Commerce or similar Organization; or
- The goods exported have been auctioned or destroyed by the Port/Customs/Health authorities in the importing country.

Write off with Limits:

- For cases of Direct Dispatch of shipping documents:

  The benefit of write off has been extended to cases of "*Direct Dispatch of shipping documents*", who can provide documentary evidence as listed under Pt. 1 (a) to (c) above. The write off in such cases shall be subject to the limits prescribed in the Table specified below.

- For cases of documents routed through AD Bank:

  For the following cases the limits prescribed by RBI for self or AD Bank approved write off shall apply:

  - Overseas buyer is not traceable for a reasonably long period of time.
  - Unrealized amount represents the undrawn balance of an export bill (*not exceeding 10% of the invoice value*)

remaining outstanding despite best efforts of the exporter;

- Cost of resorting to legal action would be disproportionate to the unrealized amount of the export bill or the overseas buyer not in a position to execute the Court decree due to reasons beyond his control;
- Bills were drawn for the difference between the letter of credit value and actual export value or between the provisional and the actual freight charges, but the amounts have remained unrealized and with no prospects of realization.

Write Off Limits:

Particulars	Limit	Limit (%) in relation to
Self-write-off by an exporter (other than Status Holder Exporter)	5%	Total export proceeds realized during the calendar year preceding the year in which the write-off is being done
Self-write-off by Status Holder Exporter	10%	
Write-off by AD Bank	10%	

Conditions for write-off of Export Bills:

- Exporter has to be a **regular** customer of the bank for at least 6 months and be fully compliant with KYC/AML guidelines.
- In case of self-write off, certificate from Chartered Accountant indicating the export realization in the preceding calendar year and details of the amount of write-off to be submitted.
- Submission of documentary evidence towards surrendering of proportionate export incentives, availed if any in respect of the export bill/(s) proposed to be written off.

The following cases do not qualify for write-off:

- Exports made to countries with externalization problem (where the Central Bank of the importer country does not permit remittance of export proceeds).
- EDF/Softex are under investigation by investigative agencies like, Enforcement Directorate (ED), Directorate of Revenue Intelligence (DRI), Central Bureau of Investigation (CBI) etc. or the outstanding bills are subject matter of civil / criminal suit.

Set-off of Export receivables against Import payables

The set-off of outstanding export receivables against outstanding import payables by an Exporter/Importer from/to the same overseas buyer/supplier has been widened to allow set-off with their overseas group/associate companies either on net basis or gross basis.

The AD Bank has been delegated powers for such requests subject to the following additional conditions (over and above the existing conditions for set-off):

- The settlement is operationalized through one AD bank only.
- AD bank is satisfied with the bonafides of the transactions and Exporter / Importer is KYC/AML/CFT compliant.

- The invoices under the transaction are not under investigation by Directorate of Enforcement/Central Bureau of Investigation or any other investigative agency.
- Import/export of goods/services has been undertaken as per the extant Foreign Trade policy (*important to note that services has been specified which was not there in the extant FEMA regulations*).
- Set-off of export receivables against goods shall not be allowed against import payables for services and vice versa.
- Set-off shall be allowed provided the export and import legs take place during the same calendar year.
- In case of bilateral settlement (*cases other than settlement within group companies*), the set-off shall be in respect of same overseas buyer/supplier subject to it being supported by verifiable agreement/mutual consent
- In case of settlement within the group/associate companies, the arrangement shall be backed by a written, legally enforceable agreement or contract.
- Set-off not to result in tax evasion/avoidance by any of the entities involved in such arrangement.
- AD bank may seek Auditors/CA certificate from the Exporter/Importer wherever felt necessary (*additional certification for CA professionals*).

Refund of Export Proceeds

As per extant FEMA Regulations, refund of export proceeds of goods was permitted only in such cases where the exported goods were re-imported back to India on account of poor quality.

However, there was many cases where re-importing of goods was not possible as the exported goods had either been auctioned or destroyed in the importing country. The amendment does away with the re-import of goods where such goods have either been auctioned or destroyed by the Port/Customs/Health authorities or any other accredited agency in the importing country, subject to the Exporter submitting satisfactory documents against the same.

Introduction of Legal Entity Identifier for Large Value Transactions

RBI/2020-21/82

DPSS.CO.OD No.901/06.24.001/2020-21 Dt. January 05, 2021

Current Circular:

As per the current RBI Circular, the Legal Entity Identifier (LEI) system shall apply to all payment transactions of value INR 50 crore and above by entities (non-individuals) using either the Real Time Gross Settlement (RTGS) or National Electronic Funds Transfer (NEFT). Entities can obtain LEI from a Local Operating Unit (LOU) accredited by the Global Legal Entity Identifier Foundation (GLEIF), the body created for the implementation and use of LEI. In India LEI can be obtained from the Legal Entity Identifier India Ltd. (LEIL), a wholly owned subsidiary of Clearing Corporation of India Limited (https://www.ccilindia-lei.co.in).

RBI & FEMA Notifications

The premise for Reserve Bank of India to introduce LEI for routine domestic high value transactions (exceeding 50 crores currently) seems to be to trace all transactions which have the potential to destabilize the financial eco system and to ensure a paper trail of high-risk financial transactions. A brief of the LEI as concept and its evolution over the years, in the Indian context has been provided below.

The Legal Entity Identifier (LEI) Concept:

Legal Entity Identifier or LEI was conceptualized as a key measure to improve the quality and accuracy of financial data systems for better risk management post the Global Financial Crisis in 2008. The LEI is a 20-character unique identity code assigned to an entity who is party to a financial transaction. LEI is a globally accepted unique number, required to be taken only once, but has to be renewed regularly.

The concept of LEI was functionalized globally with the setting up of Global Legal Entity Identifier Foundation (GLEIF) by the Financial Stability Board in June 2014 and is entrusted with the task of supporting the implementation and use of the Legal Entity Identifier (LEI).

In India:

In India, Legal Identity Identifier India Limited, a wholly owned subsidiary of Clearing Corporation of India Limited (CCIL) has been designated as the Local Operating Unit (LOU) for assigning LEI to Entities, in compliance with international standards as well as updating the Entity details in the Global Legal Entity Identifier System.

Enforcement of LEI in India:

LEI was initially introduced in India in a phased manner since November 2017. The initial mandate for availing LEI was for transactions undertaken by entities on the Over the Counter (OTC) derivatives market.

Thereafter RBI introduced the requirement of LEI to include entities in non-derivative markets[1] as well as large borrowers of banks.

- The due date for phased manner for availing LEI for large borrowers, i.e. borrowings exceeding INR 50 crores was up to December 31, 2019.
- In the non-derivative trades segment, LEI introduction in a phased manner was based on net-worth criteria, with the last date for application of LEI by entities having net-worth up to INR 200 crores being September 30, 2020.
- The limit of undertaking non-derivative transactions without LEI is USD one million or equivalent (limit of USD one million or equivalent applicable for every single transaction and not cumulative).

[1] Non-derivative markets include Government securities markets, money markets (markets for any instrument with a maturity of one year or less) and non-derivative forex markets (transactions that settle on or before the spot date) that is cash, tom and spot transactions.

Introduction of a New E-Voting Facility Provided by Listed Entities

SEBI/HO/CFD/CMD/CIR/P/2020/242 dated December 09, 2020

SEBI has proposed e-voting for all the demat account holders by way of a single login credential through either their demat accounts or directly through the websites of Depositories/Depository Participants. The earlier remote e-voting process was cumbersome especially to public non-institutional shareholders/retail shareholders as they had to maintain user IDs and passwords for multiple e-voting service providers (ESPs), resulting in negligible participation in shareholders' meetings. The new system is planned for introduction in a two staged process.

Phase-1

The first phase is planned for implementation within 6 months of the release of this Circular. The two Options available to shareholders will be:

Direct Registration with Depositories

Shareholders can register directly with the Depositories to access the e-voting page of various ESPs through the Depository's website.

OR

Through Demat Accounts with Depository Participants

Demat Account holders can access the e-voting page of the ESPs (*by routing through the webpage of their respective Depositories*) through their demat accounts.

The Listed Entity will provide details of upcoming shareholders' meeting through the Depository, who in turn shall intimate the demat account holder at least 2 days' prior to the date of e–voting.

Phase-2

To make the e-voting system more secure, the second phase system shall require the Depository to validate the demat account holder through a One-Time Password (OTP) verification process. This phase is planned for implementation within 12 months from the completion of Phase-1.

Direct Registration with Depositories

Login will be through registered Mobile number / E-mail based OTP verification as an alternate to login through username and password.

Through Demat Accounts with Depository Participants

The shareholders can access the websites of the Depositories through their demat accounts using Mobile / E-mail based OTP.

To enable e-voting under this process, the demat account holders shall have to update their mobile number and email ID with their Depositories/Depository Participants.

For better decision making by the shareholders while casting their votes, the ESP Portals have to provide weblinks to the following:

- Disclosures by the Company on the websites of the stock exchanges
- Report on the websites of the proxy advisors.

Applicability:

- The aforementioned proposed facility will be available to only those shareholders holding securities in demat mode.
- The current system of e-voting provided by the ESPs shall continue for the holders of physical shares and other institutional shareholders.

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For further analysis and discussion, you may please reach out to us.

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Abbreviations

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Abbreviation	Meaning
AAR	Authority of Advance Ruling
AAAR	Appellate Authority of Advance Ruling
AAC	Annual Activity Certificate
AD Bank	Authorized Dealer Bank
AE	Associated Enterprise
AGM	Annual General Meeting
AIR	Annual Information Return
ALP	Arm's length price
AMT	Alternate Minimum Tax
AO	Assessing Officer
AOP	Association of Person
APA	Advance Pricing Arrangements
AS	Accounting Standards
ASBA	Applications Supported by Blocked Amount
AY	Assessment Year
BBT	Buy Back Tax
BOE	Bill of Entry
BOI	Body of Individuals
BT	Business Trust
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
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
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
DRP	Dispute Resolution Panel
DTAA	Double Tax Avoidance Agreement
ECB	External Commercial Borrowing
ECCS	Express Cargo Clearance System
EGM	Extra-ordinary General Meeting

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

Abbreviations

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

Abbreviation	Meaning
MAT	Minimum Alternate Tax
MCA	Ministry of Corporate Affairs
MFN	Most Favored Nation clause under DTAA
MSF	Marginal Standing Facility
MSME	Micro, Small and Medium Enterprises
ODI	Overseas Direct Investment
OECD	The Organization for Economic Co-operation and Development
OM	Other Methods prescribed by CBDT
PAN	Permanent Account Number
PE	Permanent establishment
PPT	Principle Purpose Test
PSM	Profit Split Method
PY	Previous Year
RBI	Reserve Bank of India
RCM	Reverse Charge Mechanism
RMS	Risk Management System
ROR	Resident Ordinary Resident
ROSCTL	Rebate of State & Central Taxes and Levies
RoDTEP	Remission of Duties and Taxes on Exported Products
RPM	Resale Price Method
SC	Supreme Court of India

Abbreviation	Meaning
SDT	Specified Domestic Transaction
SDS	Step Down Subsidiary
SE	Secondary adjustments
SEBI	Securities Exchange Board of India
SEP	Significant economic presence
SEZ	Special Economic Zone
SFT	Specified Financial statement
SION	Standard Input Output Norms
SST	Security Transaction Tax
ST	Securitization Trust
STCG	Short term capital gain
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
WHT	Withholding Tax
WOS	Wholly Owned Subsidiary