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.

Coverage

Detailed Analysis

Abbreviations

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

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Corporate Tax

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International Tax

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Recent deal activity in Educational-Technology Startups

Background

Key value propositions offered by education technology (Ed-tech) startups include ease of learning, any-time learning, merging technology with education to make learning more interesting and engaging, bridging the gap between theoretical learning and its practical applications, among others. Ed-tech startups witnessed significant growth in enrolments in the recent months owing to the prolonged lockdown of educational institutions which led people to forego the traditional way of learning by adapting to digital means of learning. Integration of augmented reality, virtual reality and 3D models has also played a pivotal role in making learning more immersive and long lasting.

M&A activity

Changing trends in the educational sector has increased the demand for skilled based education, which has also led to an increase in the number of Ed-tech startups being floated in the market. Further, the established players in this space have started making acquisitions of other startups seeking value from their technology platform, market penetration and pedagogy in order to enhance as well as diversify existing portfolio.

Some of the recent deals in this space include –

- Think & Learn Private Limited, the parent company of Byju's, acquired WhiteHat Jr in an all cash deal for US$ 300 Mn in Aug-20, providing a blockbuster exit to the existing investors in WhiteHat which included Omidyar Ventures, Nexus Venture Partners and Owl Ventures. Valuation of WhiteHat Jr, which provides a coding platform to learn programming, creating applications, games and animations to kids aged between 6 and 14 years, surged from US$ 6 Mn to US$ 300 Mn in just 18 months. This acquisition would help Byju's diversify from its existing K-12 and test preparation portfolio to the coding space and also expand global reach with WhiteHat's existing operations in USA and further plans to launch in UK, Germany, Australia, New Zealand and Singapore. It is worthy to note that WhiteHat turned cash positive in 15 months of its inception, reinforcing the high valuation it commands unlike other cash burning startups.
- Byju's acquired LabInApp in an undisclosed deal in Sep-20. LabInApp is a virtual simulation platform which enables students and teachers to perform science activities and experiments on various devices in 3D virtual laboratory, covering concepts across physics, chemistry, biology, and mathematics.
- In Jun-20, Sorting Hat Technologies Private Limited operating under the brand name Unacademy acquired the custodianship of CodeChef, a non-profit online platform for programmers to enhance skills on algorithm and coding. While the size of deal was not disclosed, the acquisition would help CodeChef gain access to the technology platform and team at Unacademy.

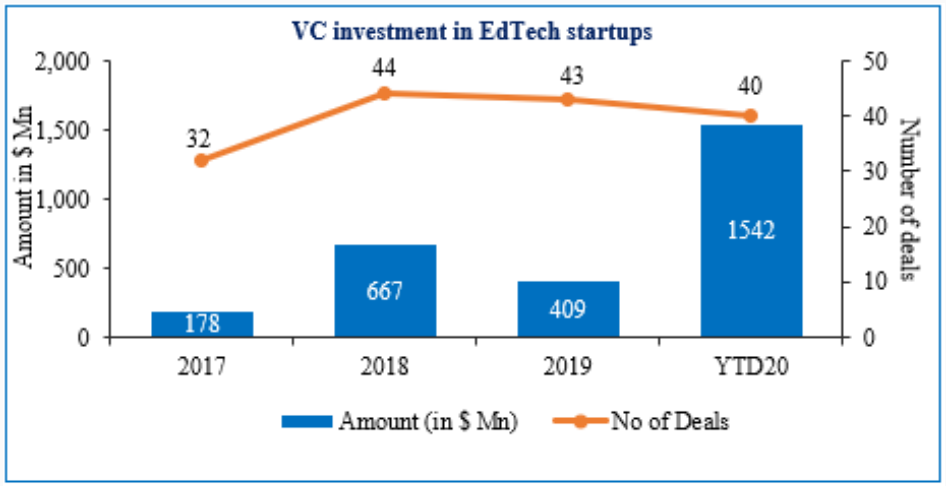
Investment Banking

Coverage

- Unacademy also acquired PrepLadder in Jul-20 for US$ 50 Mn in a cash and stock deal. PrepLadder provides an online platform for medical exam preparation through mock tests and video lectures, which would strengthen Unacademy's existing test preparation portfolio. Unacademy's acquisition basket also includes Kreatryx (engineering exam preparatory portal), WifiStudy (online education and career portal) and Coursavy (UPSC exam preparatory platform), taking its total tally to 5 acquisitions in just two years.

Venture capital funding

It is worthwhile to note that Ed-tech is the most funded sector in case of startups during this pandemic period. Following chart depicts trend in VC funding and deals in the Ed-tech space, indicating as many deals in the first 7 months of 2020 as in the previous year with almost 4x jump in deal values –



Source: Venture Intelligence, TOI

- Byju's, now a Decacorn, is growing leaps and bounds by making acquisitions and diversifying its portfolio by simultaneously raising funds from VC investors like Tiger Global (US$ 200 Mn in Jan-20) followed by General Atlantic (US$ 200 Mn in Feb-20) and the latest round led by Silverlake (US$ 500 Mn in Sep-20).
- Multiple rounds of fund raising was undertaken by Unacademy, which raised US$ 110 Mn in Feb-20 from marquee investors including Facebook and General Atlantic, and US$ 150 Mn in Sep-20 in a funding round led by SoftBank Group, making Unacademy a Unicorn. The funds would be deployed towards pursuing organic as well as inorganic growth strategies.
- Vedantu (an online tutor for K-12) raised US$ 100 Mn in Jul-20 from group of investors led by Coatue Management which also included Tiger Global, Accel and Omidyar Network. This round of funding valued Vedantu at US$ 600 Mn. The funds raised would be used towards scaling up the live classes vertical and also to enhance the existing content and technology.
- Several other startups that raised funds during 2020 included Doubtnut, Interviewbit, Classplus, Lido learning and Toddle.

The above funding would not only help these startups expand their technology and resource base but also create more employment opportunities. According to a research by Barclays, global Ed-tech expenditure is projected to grow at more than 12% CAGR to touch US$ 342 Bn by 2025.

Investment Banking

Way forward

The lockdown acted as a catalyst that led to a spurt in investments into the Ed-tech sector, showcasing how the sector could potentially replace the conventional education system. The sector is expected to receive further boost with the implementation of the New Education Policy 2020, which paves way for digital transformation of education with focus on artificial intelligence, machine learning and blockchain to address the shortcomings of the present education system.

Though a strong argument exists to claim the physical school learning, the recent pandemic and its continuation is changing the mindset of teachers, students, and their parent to adopt and to adjust with new way of e-learning. The technology which effectively provides the best ease of learning is surly to gain the race and every investor wants to invest such technology.

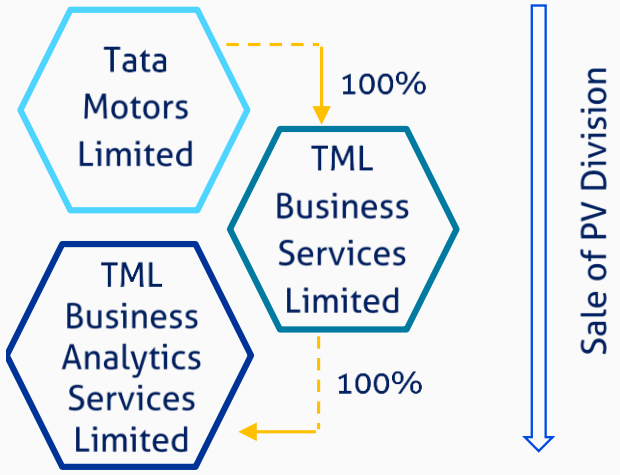
Restructuring

Coverage

Hive-off to a subsidiary and loss write-off - Tata Motors Limited

Subsidiary hive-off (Slump Exchange)

In an attempt to ensure differentiated focus on its various businesses, Indian giants Tata Motors Limited entered in a Scheme of arrangement with TML Business Analytics Limited. Tata Motors has decided to transfer its Passenger Vehicle Undertaking to TML Business Analytics which is a step-down subsidiary via slump exchange. The transaction is depicted as follows:



Slump Exchange refers to the transfer and vesting of undertaking of Transferor Company to Transferee Company on a going concern basis for a lump sum consideration, discharged by issuance of securities by the Transferee. For Slump Exchange, there has to be a transfer of an undertaking against non-cash lumpsum consideration. Various courts have held that Slump Exchange is not a taxable transaction.

In the present case, the consideration will be discharged in form of shares of the transferee company. Tata Motors will receive 941.7 crore shares of Rs. 10 each of TML Business Analytics.

Under Ind AS, such a transaction will be treated as a business combination for the Transferee Company. Considering that, Ind AS 103 will be applicable. There is a lot of ambiguity in relation of application of Ind AS 103 and currently the same is subject to a lot of interpretational issues. Since the accounting treatment isn't elaborated in the current scheme, the exact accounting is not known.

Loss write-off

Restructuring

Coverage

Transferor has an accumulated loss of Rs. 11,174 crores. For a better presentation of the financial position of the Transferor Company, the Board of the Transferor Company considered it prudent to consider a reduction of its share capital without extinguishing or reducing its liability on any of its shares by writing down a portion of its Securities Premium Account.

Section 52 of the Companies Act governs Securities Premium Account, and the transferor has maintained it as per the section. It provides the purpose for which the account can be used. Share premium can be used for issue of bonus shares, buyback of shares and setting off some preliminary expense. In case it is to be used for anything outside what is mentioned under section 52, the same will be with court approval. Securities premium is equated with paid up capital, and reduction of securities premium (except u/s 52) is akin to reduction of capital.

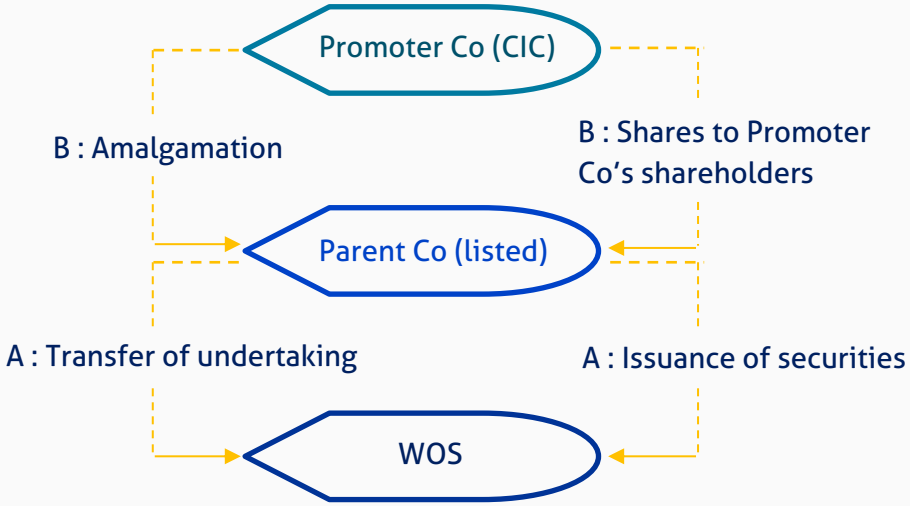
The outcome of this is that the financials of the transferor will look more attractive to the stakeholders.

Complex integrated scheme - Motherson Sumi Systems Limited

A scheme of arrangement was entered amongst Motherson Sumi Systems Ltd, Samvardhana Motherson International Ltd and Motherson Sumi Wiring India Ltd.

There are 2 parts of the scheme –

- Demerger of DWH undertaking of Motherson Sumi Systems Ltd (MSSL or Transferor Co or **Parent Co**) with Motherson Sumi Wiring India Ltd (Transferee or **WOS**)
- Amalgamation of Samvardhana Motherson International Ltd (Amalgamating or **Promoter Co**) into Motherson Sumi Systems Ltd (MSSL or Amalgamated or **Parent Co**)



Part A – Demerger

Prior to the scheme, Transferor holds 100% stake in Transferee Company. The Transferor company is a multi-business corporate. One of its business is of Domestic Wiring Harness (DWH). The DWH business has different market dynamics to its remaining businesses.

The transferor company wants to separate and transfer the DWH undertaking. The objective being sharper focus on DHW undertaking and also to align interests of key stakeholders which will benefit the strategic direction of Transferee Company.

MSSL will reclassify its authorised share capital. On reclassification, 2.5 Crores preference shares of face value of Rs. 10 shall be reclassified into 25 Crores preference shares of face value of Re 1. Also, authorised equity share capital of Rs. 650 Crores to be divided into 650 Crores equity shares of Re. 1 each.

Upon transfer and vesting of undertaking, transferee shall issue its 1 equity share of Re 1 each to shareholders of transferor for every 1 equity share each of transferor. Pursuant to issue of consideration all equity shares held by transferor in transferee shall stand cancelled.

Ind AS 103 is to be followed by both the parties to record the transaction, which will be accounted for as follows –

Transferor- liability to be recorded of amount equivalent to book value of net assets of DWH undertaking. Further, to derecognise the book value of assets and liabilities of the undertaking.

Transferee- assets and liabilities will be recorded at book values, and the difference between net assets received and consideration issued will be adjusted in Capital Reserve.

Part B - Amalgamation

Promoter Co is a non-deposit taking systemically important core investment company (CIC-ND-SI) and holds 33.43% of the Parent Co. It is the promoter of the Parent Co. Both parties jointly hold 100% of Samvardhana Motherson Automotive Systems Group B.V. (SMRP BV). This amalgamation will result in simplification of group structure. Consequently, consolidation of SMRP BV and its joint ventures under Amalgamated company will lead to a larger market capitalization.

In consideration, Parent Co will issue 51 equity shares of Re 1 of Parent Co to shareholders of Promoter Co for every 10 shares of Rs 10 each held by them. Upon scheme becoming effective, existing equity shares of Parent Co held by Amalgamating company shall stand cancelled.

Accounting Treatment is to be done as per acquisition method under Ind AS 103. In the books of Parent Co, assets and liabilities to be recorded at fair value and the difference between fair value of net assets and fair value of shares issued will be treated as goodwill or capital reserve.

Slump sale and Reduction of Capital - Reliance Industries Limited

A scheme of arrangement was entered by Reliance Industries Limited (RIL or Transferor or the Company) and Reliance O2C Limited (Transferee) wherein O2C undertaking is transferred on a slump sale basis. There is also reduction of capital of RIL.

Facts and Rationale

The transferee company is Wholly Owned Subsidiary of transferor company. Transferor has various businesses including O2C business.

O2C business attracts a distinct set of investors. RIL, being a listed company, in terms of SEBI LODR Regulations cannot issue shares with differential rights (i.e. equity shares with

interest linked only to O2C Business) to the Investor(s). Therefore, it has been decided that the O2C Undertaking will be transferred to a wholly owned subsidiary of RIL, in which the investors can invest.

Consideration

Transferor is supposed to transfer all assets, liabilities, employees, contracts and legal proceedings related to O2C undertaking to Transferee. In consideration transferee shall pay lumpsum consideration equal to Tax Net Worth. The peculiar thing here is that the companies have not agreed on an exact amount of consideration. The scheme mentions that the transferee may issue one or more securities carrying interest and also the transferee may convert it into an interest-bearing loan. This is another interesting point as they have not mentioned the specific security type. Also, the security is to be converted into a loan.

Accounting Treatment

Transferor to reduce the book value of assets and liabilities pertaining to the undertaking. Further, the difference between book value of net assets and consideration received is adjusted in P&L, which is uncommon. The transaction seems to be under common control as per Ind AS 103 wherein it says that such difference should be adjusted in capital reserve when transaction is under common control.

Accounting treatment in books of transferee is normal as assets and liabilities are to be recorded at book value and difference between net assets and consideration is adjusted in capital reserve.

Reduction of Capital of RIL

The difference between net assets and consideration has been debited to statement of P&L. This debit amount shall be offset by transfer and credit of an equal amount to the statement of profit and loss of RIL from the credit balance available in Deferred Tax Liability, Capital Reserve, Securities Premium Account and balance General Reserves in the stated order.

Circulars & Notifications

Extension of due dates for Direct Tax Vivad Se Vishwas Scheme

Notification No. 85/2020, F. No. IT(A)/1/2020-TPL dated October 27, 2020

In the wake of the persisting pandemic of COVID-19, CBDT has extended the statutory time limit for making payment of taxes (without additional payment) under Vivad Se Vishwas Scheme from December 31, 2020 to March 31, 2021.

It is to be note that currently in case where an application is filed under the above scheme on or before the 31st December 2020, the Applicant will be required to be make the payment of disputed tax within 15 days from receipt of certificate of designated authority. Therefore, the taxpayer is unable to get the benefit of the above extension. To remove this difficulty and to put all the taxpayers at par, CBDT has clarified that in cases where the declarant files a declaration on or before 31st December, 2020 then the designated authority shall allow the declarant to make payment without additional amount on or before 31st March, 2021.

CBDT amended Form 3CD & ITR-6 to incorporate concessional tax corporate tax regime changes

Notification No. 82 of 2020 dated October 01, 2020

In pursuant to introduction of concessional tax regime introduced for all corporate and non-corporate tax payers as provided u/s.115BAA, 115BAB, 115BAC and 115BAD, CBDT has issued Income tax (22nd Amendment) Rules, 2020 to notify certain amendments to the IT Rules and further made consequential changes in the utility for e-filing of 3CD, No 3CEB and ITR6. The amendments are summarized in the following table:

Applicable Rule/Form	Amendments
Rule 5	Depreciation u/s.32 of the Act is restricted to 40% on the written down value of the block of assets, where the rate of tax depreciation is more than 40%
Rule 21AG & Form 10-IE	A new Form 10-IE has been notified for an Individual and HUF who exercises option u/s 115BAC. This form is required to be filed before filing of ITR.
Rule 21AH & Form 10-IF	A new Form 10-IF has been notified for Co-operative societies exercising option u/s 115BAD. This form is required to be filed before filing of ITR.

Circulars & Notifications

Coverage

Forms	Amendments introduced
Form 3CD	▪ In newly instead serial no. '8a' the Assessee is required to report whether he has opted for the alternat tax regime u/s 115BAA/115BAB/115BAC or not. ▪ The Assessee shall be required to report adjustment made to the written down value in terms of section 115BAA in serial '18(ca)' and '18(cb)' in the Part-B of Form No. 3CD. ▪ In serial no. '32(a)' in Part-B of 3CD, the Assesses is required to provide the amount of brought forward loss forgone on account of opting concessional tax regime u/s 115BAA.
Form No 3CEB	▪ TP provision is not applicable in case of SDT covered by 40A(2)(b). In pursuant to this, serial No. 22 in 3CEB has been omitted ▪ A new clause 24 has been introduced wherein the auditor shall be required to report the arm's length value of profit earned by eligible company u/s 115BAB.
ITR-6	In line with the above amendments, corresponding changes have been made in the existing schedules of ITR to give effect of the adjustments to be made to depreciation, losses, and unabsorbed depreciation of earlier years. Accordingly, Schedule-DPM, Schedule-CFL and Schedule-UD.

Central Government makes Sovereign Gold Bond Scheme 2020-21

(Notification G.S.R. 627(E) [F. No. 4(4)-B(W&M)/2020], dated October 9,2020)

The Government of India, in consultation with the Reserve Bank of India, has decided to issue Sovereign Gold Bonds in six traches from October 2020 to March 2021. The defining features of the Scheme are as under:

- The Bonds will be restricted for sale to resident individuals, HUFs, Trusts, Universities and Charitable Institutions.
- They will be denominated in multiples of gram(s) of gold with a basic unit of 1 gram. Minimum permissible investment will be 1 gram of gold and maximum limit of subscription shall be 4 kg for individual, 4 kg for HUF and 20 kg for trusts and similar entities per fiscal.
- The tenor of the Bond will be for a period of 8 years with exit option after 5th year to be exercised on the next interest payment dates.

Circulars & Notifications

- The redemption price will be in Indian Rupees based on simple average of closing price of gold of 999 purity, of previous 3 working days published by India Bullion and Jewellers Association Limited.
- The Bonds will be sold through Scheduled Commercial banks (except Small Finance Banks and Payment Banks), SHCIL, designated post offices, and recognised stock exchanges viz., NSE and BSE.
- The bonds will carry a fixed rate of 2.50% p.a. payable semi-annually on the nominal value.
- The interest on Gold Bonds shall be taxable as per the provision of ITA. The capital gains tax arising on redemption of SGB to an individual has been exempted.

Case Laws

ITAT denied deduction u/s.80IB in absence of approving applicable audit report electronically within statutory time limit

Pradeep Kumar Batra v. DCIT, ITA 6384 of 2019 dated October 23, 2020, Delhi ITAT

It is a settled legal position of law that a claim of deduction can be made before the completion of assessment. If there is failure to file an audit report necessary for making a claim, the audit report can be filed before the completion of assessment and the Assessing Authority is bound to verify and allow the claim. It was the law that filing of audit report is procedural and can be cured before the completion of assessment.

This law needs to be understood considering the new scheme of online filing of the returns and the objective of the Government to provide pre-filled income tax returns.

In this case the Taxpayer had filed his return along with Form No.10CCB for claiming deduction u/s.80-IB of ITA. However, the Taxpayer has approved such form electronically after due date of filing of return of income but before the processing of return of income u/s.143(1). Thereafter the return was processed u/s 143(1) wherein the CPC had disallowed the claim of deduction u/s 80IB for non-filing of audit report in Form 10CCB within the statutory time limit specified u/s. 139(1). The Taxpayer contended that Audit Report was electronically uploaded on or before the due date specified u/s 139(1) and same has been approved much before the return was processed by CPC. Therefore, CPC is not permitted to make any such adjustment while processing of return u/s 143(1).

After considering the scheme of e-filing of return, the Rules and provision of section 80IB, the ITAT held that after introduction of the e-filing of return and particularly the fact that in "electronic era" of compliances, the process of selection of cases for scrutiny, refunds etc. is determined based on the data electronically uploaded by the Taxpayer. ITAT therefore held that when the law strictly provides that all the document, Reports etc. should be filed along on

or before the due date of filing of return of income, then filing of such report after the due date shall not be entertain by CPC u/s.143(1) of the Act. Accordingly, the claim of deduction was disallowed.

It appears that whether such adjustment is within the scope of section 143(1) of the ITA has not been argued before or examined by the ITAT. Section 143(1)(a)(v) specifically empowers the CPC to disallowance the claim of deduction where the return of income was filed on or after the due date of filing of return of income. However, this was not the case of the Taxpayer. The only basis to justify such adjustment is where such claim is classified as "incorrect claim" as per section 143(1)(a) read with Explanation thereto. However, ITAT has not discussed such provision in the order while disallowing the claim of the Taxpayer.

Further if an assessment notice u/s. 143(2) is issued, the Taxpayer can put an argument of making such claim based on the settled judicial law that if the required certificate is filed before the completion of assessment, the AO is bound to consider the claim of deduction. In absence of assessment, one can explore the possibility of filing of application u/s.264 before CIT since this being a procedural issue and causing genuine hardship to the Taxpayer if other conditions for claiming such deduction being fulfilled.

Written off investment of wholly Own Subsidiary is allowable as business loss

Ace Designers Ltd V. ACIT, ITA No. 184 of 2013 dated September 9, 2020, Karnataka HC

It is settled position of law that the term" for the purpose of business" is wider in scope than the expression "for the purpose of earning income" and any expenses/loss incurred by a taxpayer on the ground of commercial expediency will qualify for the full deduction except for capital expenditure/loss. Whether a particular claim is capital or revenue in nature, there is no single test, or any single criteria and it should be decided based on the facts of the case and surrounding circumstances.

The HC in present case has discussed whether the loss arising from writing off an investment made in foreign subsidiary can be allowed as business loss or not. In this case, the Taxpayer had set up an establishment in USA in 91-92 for the exclusive purpose of promoting and marketing its products in US and Latin America. During the tax assessment year, based on the past performance of the said entity, the Taxpayer after obtaining the approval from RBI had written off the balance of investment in its books of account. In ITR, the Taxpayer had accordingly claimed deduction of Rs.3.41crores on account of investment written off as business loss.

The Taxpayer contended that the total balance of investment into WOS was represented by aggregate amount paid up over the past years to cover the operational expenses in USA and therefore, these expenses/contributions could not be treated as share capital in substance. The lower authorities had held that the amount written off by the taxpayer was capital loss and not business loss.

Case Laws

The HC after considering the facts of the case and settled judicial precedent on this issue, held that the Taxpayer had set up WOS for the purpose of extension of its existing business activity and there was direct nexus between the payment/ contributions and existing business of the Taxpayer. The investment was also not made with an objective to create any capital asset in the form of holding shares and therefore , the HC has held that the ratio laid down by the Hon'ble SC in the case of CIT v. Colgate Palmolive (India) Ltd. (SLP No.25987 of 2015) is squarely applicable to the facts of the case. The HC accordingly held that the loss arising on writing off an investment is business loss u/s 28(1).

In view of the above, it is possible to take an inference that the strategic investment of the Taxpayer are more akin to loan to the company and any loss arising on account of either transfer/writing off in books is admissible deduction u/s 28(1) provided that the investment has been made in furtherance of its existing business.

Goodwill "arising" in tax neutral amalgamation is a depreciable asset

Urmin Marketing P. Ltd., ITA No. 1806 of 2019, Ahmedabad ITAT

Claim of depreciation on Goodwill arising pursuant to the scheme of tax neutral merger is subject matter of litigation and several judicial authorities have taken different standpoint on this. In the present case, among the other specific issues, while negating the assessment order passed in the case of non-existing entity, the ITAT specifically discussed the issue whether depreciation u/s 32 is admissible on the "Goodwill" arising in the course of implementing a scheme of amalgamation or not.

In this case the Taxpayer has taken over another group company in the scheme of amalgamation. The scheme had been approved by the HC whereby it was mentioned that the Taxpayer had to acquire the business at a price higher than the net asset value of amalgamating company and thus, the excess consideration discharged by it shall be the reflected as goodwill. The treatment in the books of the account was also in confirmatory with applicable accounting standard. The Taxpayer accordingly recognised the excess consideration paid to shareholders of amalgamating company as Goodwill. As per the ratio laid down by SC in case of CIT vs. Smifs Securities Ltd (Civil Appeal No. 5961 of 2012) and followed in Gujarat HC in case of PCIT vs. Zydus Wellness Ltd (Tax Appeal No. 779 of 2017) and claimed depreciation u/s 32.

The lower authorities while rejecting the claim of depreciation u/s 32 stated that the transaction involves two closely connected companies which are under the owned, managed and controlled by same promoters/director and hence the transaction is not prima-facie genuine. Further, the goodwill was not existing in the books of UPPL at the time of amalgamation and therefore in terms of sixth proviso to 32, the depreciation on goodwill is not admissible. Lastly, it was held that the goodwill is basically arising on account of revaluation of assets / self-generated assets and hence, the cost of goodwill is required to be adopted at Nil.

Case Laws

The ITAT held that the decision of Hon'ble SC in the case of Smifs Securities Ltd (supra) is well settled on this issue and therefore the difference arising on account of consideration paid and assets taken over shall be regarded as "Goodwill" generating in the scheme of amalgamation eligible for depreciation u/s 32. The ITAT also held that Explanation 7 to section 43(1), which treats the cost of a capital asset of amalgamated company as the cost of capital asset for amalgamated company, shall not apply since such Goodwill was not recorded in books of the amalgamating company and the Taxpayer has not acquired such goodwill from the amalgamating company. ITAT has therefore allowed the depreciation on such Goodwill.

It is to be noted that earlier Ahmedabad ITAT in the case of **Bodal Chemicals Limited 112 taxmann.com 217**, while dealing with the identical issue of allowability of depreciation on Goodwill arising in case of tax neutral merger, held that when an amalgamation is a tax neutral scheme for companies as well as for the shareholders it may not provide a tax planning mechanism to either of them. ITAT in this case after considering all tax neutrality provision of amalgamation including Explanation 7 to section 43(1), noted such goodwill being a self-generated asset, depreciation on such goodwill is unwarranted under the ITA. It is very surprise to note that such conflicting decision was not referred by Ahmedabad ITAT while delivering the decision in case of the Taxpayer.

Whether such goodwill is a self-generated asset of an amalgamating company or an asset created by the amalgamated company in view of extra consideration over the net assets value of amalgamated company? Why such amalgamated company decides to pay such extra to shareholders of amalgamating company? Whether such extra in not a form of giving value to self-generated goodwill of amalgamating company? There are various questions to be answer by higher judiciary in a coming year on such important controversy where the members of same judicial ITAT has divergent views on the same subject matter. The efforts of a taxpayer to justify such claim will be compounded when such scheme of amalgamation is claimed to be tax neutral under the Act by the parties involved.

Provision to treat loan receipt as deemed divided income not applicable in case of mutually beneficial transactions

Abhijit Ramanlal Lunkad ITA No. 2963 / 2017, Pune ITAT

Section 2(22)(e) creates a legal fiction to treat amount advance to shareholders or the entities in which such shareholders is interested as deemed divided income to the extent the company possesses accumulated profit. There are however certain transactions / circumstances under which if the payments are made to the shareholder then such payments are carved out of this provision. The ITAT has an occasion to decide whether deeming fiction created/s 2(22)(e) is applicable in respect of any mutual beneficial transaction or not.

Facts of the case is that the Taxpayer is a beneficial shareholder of one private limited company holding 50% shares. During the year in question, the Taxpayer explained that he has given loans to such company from time to time

as per the company's requirement and in turn the company has also periodically repaid this loan to the shareholder. However, on certain occasion it appears that such company has given advance to such shareholders. The AO treated the same as deemed divided.

The ITAT has noted that as per the ledger account of the Taxpayer in the books of the Company, the Taxpayer was regularly giving loans and advances to the Company and that position broadly remains same throughout the previous year except on few occasions the Taxpayer was standing in position of creditor to the company due to certain adjustment entries The ITAT categorically mentioned that the transactions between the company and the Taxpayer were for mutual benefit of both the company as well as the Taxpayer and hence, an element of "personal benefit" for invoking section 2(22)(e) was missing in the case. The ITAT also placed reliance on the decision of Pradeep Kumar Malhotra v CIT (IT Appeal No.2019 of 2003 dated August 2, 2011) and held that only gratuitous payment advanced to the shareholder as loan can be assessed u/s 2(22)(e).

It is pertinent to note that as per the bare provisions of section 2(22)(e), deeming fiction gets triggered when the amount is paid/advanced to the shareholder as "loan" or any payment is provided for the *individual benefit* of the shareholder. The above decision however explains that if the loan transaction is mutually beneficial to both the company and the shareholder then section 2(22)(e) is not applicable. It is important to note that the ITAT has not discussed the scope of section 2(22)(e) qua *individual benefit.*

Important Updates - India

Equalisation levy (Amendment) Rules,2020 notified by CBDT effective from October 28, 2020

[Notification No. S.O. 3865(E) dated October 28, 2020]

Equalisaiton Levy at the rate of 6% was first introduced vide Finance Act 2016 and was levied on consideration paid or payable to a non-resident person for specified services, being online advertisement services. The scope of Equalisation Levy has been expanded by Finance Act 2020 to include a charge at the rate of 2% on consideration received or receivable for e-commerce supply or services made or facilitated by an e-commerce operator. Equalisation Levy Rules 2016 have been amended vide CBDT Notification in light of the introduction of Equalisation Levy 2.0 vide Finance Act 2020 on ecommerce operators along with revised Forms to be filed under the said Rules.

Important Updates - Global

OECD releases Blueprints on Pillar 1 & 2 for public comments on tax challenges under digitalization

The Organization for Economic Co-operation and Development (OECD)/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS) provides for two pillars to develop a consensus-based solution on issues arising due to digitalization. Pillar One focuses on the allocation of taxing rights in the digital age and profit allocation and nexus rules that are no longer focusing merely on physical presence. Pillar Two focuses on remaining BEPS issues and minimum taxation of internationally operating businesses. The OECD has released blueprints on the two pillars inviting public inputs by December 14, 2020.

Austria issues information letter on obligations under EU Directives for mandatory automatic exchange of information in the field of Taxation on reportable cross-border arrangements

In order to detect potentially aggressive tax arrangements, the European Union (EU) Council has issued Directive 2011/16 and 2018/22 (DAC 6) mandating reporting obligations with respect to cross-border tax arrangements, which meet one or more specified characteristics (hallmarks), and which concern either more than one EU country or an EU country and a non-EU country. The Directive requires taxpayers and intermediaries like legal, financial, business consultants, and sister concerns that are involved in the arrangements to monitor cross border arrangements from June 25, 2018, while the reporting obligations commence from mid of 2020.

In line with EU Compulsory Registration Act (EU-MPfG), Austria's Ministry of Finance published final DAC6 guidelines for reporting cross-border arrangements that have an impact on the direct taxes of the country, casting reporting obligations on the taxpayers and intermediaries with effect from October 31, 2020. Various arrangements and structures capable of exploiting favorable tax treatments in various jurisdictions or leading to double deductions or double non-taxations such as hybrid

Important Updates - Global

mismatches, cross-border leasing of assets entitling both lessor and lessee to claim depreciation, transactions exempting income in both states, transactions undertaken under unilateral safe harbour regulations, transfer of hard to value intangibles between associated entities, etc. are considered as mandatorily notifiable structures under the directives.

The initiative by the EU council is in lines with OECD's BEPS Action 12 Mandatory Disclosure Rules which recommends designing of rules to require taxpayers and advisors to disclose aggressive tax planning arrangements and exchange of information between tax authorities from across jurisdictions as a step towards tax transparency. Most EU member nations and also United Kingdom have already joined the initiative and adopted the rules in their local legislations and propose to start exchanging information on the same in 2020.

US IRS releases final regulations on BEAT and on transfer of interest in US partnerships by a foreign partner

Subsequent to releasing final regulations on Foreign Derived Intangible Income (FDII) & Global Intangible Low Tax Income (GILTI) in June 2020, US IRS has recently released final regulations on the Base Erosion and Anti-abuse Tax (BEAT) under Section 59A of the Internal Revenue Code as introduced by the Tax Cuts and Jobs Act in December 2017. The BEAT is a minimum tax imposed on tax deductible payments made to foreign related parties by a domestic corporation that (i)) has average annual gross receipts of at least USD 500 million for the prior three years (the gross-receipts test), and (ii) has a "base erosion percentage" of 3% or more (the base-erosion percentage test). The final 2020 regulations largely incorporate proposed regulations issued in December 2019 and provide more clarity on calculation of group's base erosion percentage, modify elections to waive deductions and provide additional guidance on partnerships. The final regulations are effective from December 8, 2020.

In another update, the Treasury Department of the US Internal Revenue Service released final rules on Withholding of Tax and Information Reporting with Respect to Interests in Partnerships Engaged in a U.S. Trade or Business. Gains arising to non-residents on transfer (sale, exchange or disposition) of interest in partnerships engaged in trade or business in the US were brought to tax net vide the Tax Cuts and Jobs Act. The final rules issued by the IRS, which are yet to be published in the Federal Register, provide for tax to be withheld from transfer of interest in partnership, engaged in trade or business in the US, by foreign partners at a rate of 10% of realization amount. The withholding rules apply subject to certain exceptions for instance where no gain arises to the transferor from the transaction or where tax treaty benefits are available, etc. The regulations would be effective 60 days after its publication in the federal register.

Important Updates - Global

Australian Tax Office releases 'Practice Statement' for applying Principal Purpose Test to its Tax Treaties

As an internal guidance document for its tax authorities, Australian Taxation Office released Practice Statement (PS LA 2020/2) on 'Administering general anti-abuse rules, such as a principal or main purposes test, included in any of Australia's tax treaties'. The Practice Statement lays down detailed guidance on list of information and documents that Australian Tax Officers (ATO) can seek from the taxpayers to understand the object and purposes of the arrangement in applying the Principal Purpose Test while granting benefits to tax treaties.

The detailed list includes questions involving terms of arrangement; broader business context in which arrangement is implemented; possible alternate ways to achieve the non-tax objectives of the arrangement; indirect transfers or transfers of valuable intangibles; substance/form of arrangement; creation or assignment of shares, debt claims or other rights; recharacterization of payments; Functions-Assets-Risks (FAR) analysis; PE avoidance; industry practice; etc. It also lays down various forums where the taxpayers can approach for guidance and clarity such as International Specialist Team, Tax Council Network, GAAR Panel, etc.

Being one of the mandatory action plans under BEPS, post MLI, most tax treaties in various jurisdictions contain the PPT rule and therefore guidance statements like these could have far reaching persuasive value in various jurisdictions.

Important Rulings - India

Dividend Distribution Tax to be subject to Tax Treaty provisions for taxation of Dividend income

Giesecke & Devrient [India] Pvt Ltd in ITA No. 7075/DEL/2017, Delhi ITAT

You may refer to KCM Flash dated October 15, 2020 for a detailed analysis of this Ruling.

Substituted DTAA Article applies to entire year even if old Article is repealed mid-year

Autodesk Asia Pvt. Ltd in ITA NO.133 OF 2013, Karnataka HC

Royalties and Fees for Technical Services arising to resident of Singapore from India could be taxed in India at a maximum rate of 15% as per Article 12 of India-Singapore Double Taxation Avoidance Agreement (DTAA) which had entered into force in 1994. Protocol to India-Singapore DTAA notified in June 2005 deleted and replaced paragraph 2 of Article 12 of India-Singapore DTAA, which reduced Source State taxation right from 15% to a maximum rate of 10%. While the said Notification was given effect from August 1, 2005, the benefit of provision was extended to Singapore resident assessee for the whole of fiscal year 2005-06 by Bangalore ITAT and upheld by Karnataka High Court.

The High Court observed that Protocol had the effect of substituting Article 12(2) of the DTAA and opined that substitution of a provision results in repeal of earlier provision and replacement by new provision and that when a new rule in place of an old rule is substituted, the old one is never intended to be kept alive and the substitution has the effect of deleting the old rule and making the new rule operative. Accordingly, incomes arising to the Singapore resident entity during FY 2005-06 was held as taxable at the rate of 10% in lines with 2005 Protocol to India-Singapore DTAA.

In our KCM Insight of August 2020, we had referred to a Transfer Pricing ruling wherein it was held that the effect of omission of a particular provision had the result of it being omitted from the inception. These judgments could pave way for interpretations which could lead to retrospective application for a lot of amendments.

2015 Amendments to Indirect Transfer Tax Provisions held retrospective in nature

Augustus Capital PTE Ltd in ITA No. 8084/DEL/2018, Delhi ITAT

In a case of transfer of shares of Singaporean Company holding investments in shares of Indian Company to Snapdeal group, Delhi ITAT rules that the no income accrues or arises in India to the Taxpayer in light of Explanation 7 to Section 9(1)(i) of the Act. Explanation 7 to Section 9(1)(i) of the Act carves out exemption from indirect transfer tax provisions for non-residents holding direct or indirect interest in Indian assets wherein, the non-resident transferor neither holds right of management or control nor has voting power or share capital or interest exceeding 5% in the Company holding assets in India.

Explanation 5 to Section 9(1)(i) relating to indirect transfer provisions was introduced *vide* Finance Act 2012 with a retrospective effect from 1961. The ITAT rules that Explanation 7 to the Section which were introduced *vide* Finance

Important Rulings - India

Act 2015, are in furtherance of Explanation 5 and therefore cannot be read in isolation and the same has to be given retrospective effect as well. Tax authorities had put forth argument that these provisions lay down new set of exemptions or carve outs from the indirect transfer tax provisions for small investors. In its detailed judgement, the ITAT, taking into consideration the background in which the aforesaid provisions were inserted into Section 9, ruled in favour of the Taxpayer holding that the provisions were not independent exemptions but were clarifications to enable determine whether or not the interest in foreign entity derives substantial value from Indian assets.

Similar ruling was also pronounced by AAR in April 2020, wherein, the AAR held that applicability of 50% threshold with respect to the word 'substantially' in case of indirect transfer of shares as per Explanation 6 to Section 9(1)(i) of the Act was to be retrospective in nature. Both the decisions are welcome rulings for companies having pending litigations relating to indirect transfers.

Beneficial provisions of Act vis-à-vis Tax Treaty to be applied qua-agreement for royalty

IBM World Trade Corporation in ITA No.759/Bang/2011 & SP No.50/Bang/2012, Bangalore ITAT

The assessee had received royalty incomes on (i) 'IBM Software Remarketer Agreement' with IBM India Pvt. Ltd. entered into on October 1, 2004 i.e. prior to June 1, 2005; (ii) Marketing Royalty Agreement with IBM India Pvt. Ltd. dated June 1, 2005; and (iii) Royalty on sale of software to third parties pursuant to agreements entered into after June 1, 2005. The assessee claimed that with respect to agreement entered into on October 1, 2004, the royalty income was chargeable to tax at the rate of 15% as per Article 12 of DTAA between India and USA, considering that the rate of tax under tax treaty was more beneficial than 20% tax rate under the provisions of Income-tax Act. On the other hand, with respect to agreements entered into on or after June 1, 2005, royalty income was considered as chargeable to tax at the rate 10% under Section 115A of the Act.

Tax officer denied application of differential rates of tax as claimed by the assessee and taxed entire royalty income on aggregate basis at the rate of 15% as per the provisions of the DTAA.

The Bangalore ITAT allowed Taxpayer's claim that section 115A(1)(b) dealt with different sources of income based on the nature of income i.e. royalty or fees for technical services and date of agreement and each sub-clause thereto is mutually exclusive and independent of each other. The ITAT held that the fact of Section 115A(1)(b) providing for aggregation of tax computed under each of the sub-clauses (A), (AA), (B), (BB) and (C) indicated that the charge of tax provided under the said sub-clauses were separate and independent. ITAT thus allowed Taxpayer's claim and held that beneficial provisions of Section 115A of the Act vis-à-vis India-US DTAA should be applied to the royalty incomes under agreements entered into prior to and on or after June 1, 2005 separately.

Important Rulings - India

Offshore supplies pursuant to contract between Consortium and Customer not taxable in India in absence of a PE of the foreign entity in India

Bombardier Transportation Sweden AB in ITA No. 859/DEL/2016, Delhi ITAT

The assessee, Bombardier Transportation Sweden AB, a Swedish resident, was engaged in the business of manufacturing of train control and signaling systems for mass transit system.

The Assessee along-with its Indian AE, Bombardier Transportation India Ltd [BTIN] had entered into a consortium agreement with DMRC for Delhi Metro project. The ITAT observed that the scope of work between the taxpayer and BTIN were clearly bifurcated under the MOU. The ITAT also noted that all business activities with respect to the offshore supplies were carried outside India, the equipment were manufactured and sold outside India. Tax officer's argument that the contract between DMRC and Consortium consisting of the appellant and BTIN was interlinked, intervened and indivisible was thus rejected by the ITAT.

Income arising to the Swedish company from offshore supply of equipment was thus held not taxable in India in absence of permanent establishment following the decisions in the cases of Ishikawajima Harima Heavy Industries Ltd 158 Taxman 259 (SC) and Nortel Networks India International Inc & Ors 386 ITR 0353 (Delhi High Court). This is an important ruling as it reiterates the principle that offshore supplies cannot be taxed in India unless the foreign entity has a PE in India.

Important Rulings - Global

Danish Tax Council holds that hosting of website at data centre located in Denmark not to constitute Permanent Establishment

Case No. 20-0605756, Danish Tax Council

The question before the Danish Tax Council was whether the non-resident taxpayer availing web hosting services from Danish entity constituted permanent place of business or permanent establishment in Denmark in light of provisions of Section 2 of the Corporation Tax Act and Section 16 of the VAT Act. The Taxpayer had entered into hosting agreement with Danish Company, H2, for hosting of taxpayer's website on H2's data centre located in Denmark. The Council observed that the data centre was owned, controlled and managed by the Danish company and that non-resident taxpayer did not own, lease or operate the physical hardware in the data center, nor did it have physical access to the data center. Under the hosting agreement, H2 was responsible for the hardware side of the services i.e. procurement & maintenance of the IT equipment & servers and the manpower required for such activities whereas the taxpayer only managed the software remotely.

Referring to Article 5(1) of the OECD Model Tax Convention reflecting the provisions of the DTAA between Denmark and assessee's country of residence, the Tax Council held that an Internet website, does not in itself constitute a tangible asset and therefore, cannot constitute an "operating location" and accordingly the data centre could not constitute permanent place of business of the taxpayer in Denmark. Also taking into consideration of the fact that H2 did not perform any sales & marketing/ R&D activities neither did it have any right to conclude contracts on behalf of the taxpayer, it was held that the non-resident did not constitute Permanent Establishment in Denmark under the Corporation Tax law read with relevant DTAA as well as under VAT Act.

Australian Tribunal upholds Taxpayer's residential status in Australia, places heavy reliance on Taxpayer's intention to return to Australia

Arjunan and Commissioner of Taxation [2020] AATA 4024

Australian Tribunal has upheld a citizen's tax residency in Australia despite a 7-month long employment in Kuwait considering that the Taxpayer satisfied the residency tests laid down in the Australian Tax Law. In coming to the conclusion, the Tribunal observed that the taxpayer had neither rented nor sold off his home in Brisbane, he had largely left his personal belongings in Australia and took only limited items to Kuwait, he had been visiting doctors and maintaining health insurance in Australia and only had short term employment as a nexus with Kuwait. The taxpayer had further stayed in Australia for a period of more than 183 days plus his usual place of abode was Australia based on certain parameters discussed above.

This Ruling by the Australia Tribunal could provide some guiding principles in determining the residential status of an expatriate, especially in the year of return to the home country.

Important Updates - Global

Oman introduces Country-by-Country Reporting for Fiscal Years beginning on or after January 1, 2020

Oman introduced legislation for Country-by-Country Reporting vide its Royal Decree (Decision No. 79/2000 dated September 17, 2020) effective for fiscal years beginning on or after January 1, 2000. Ultimate Parent or Oman resident Reporting entity of MNE Groups having consolidated revenue of 300 million Rial Omani or more in immediately preceding fiscal year are now required to file Country-by-Country Report in Oman on or before 12 months from end of Fiscal Year.

Oman had recently signed Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Report (CbC MAA) on July 16, 2020. While CbC MCAA has 88 signatories as on August 30, 2020, as per the Omani Decree, only 32 reportable jurisdictions, including India, have participated with Oman for automatic exchange of CbC reports until September 17, 2020.

Important Rulings

Mere reliance on Indian AE's TP Documentation not sufficient compliance, Non-resident to maintain separate TP Documentation

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

The tax payer is Company incorporated in USA and non-resident in India. The tax payer is chargeable to tax in India for Interest on Loan given and technical services provided to its subsidiaries and associates in India. Tax payer filed its return of income disclosing income from transactions with its Associated Enterprises ('AE') (as referred in Section – 92A of ITA).

AO, while passing order u/s 254 giving effect to the order of hon'ble ITAT adjudicating other issues in case of the Tax Payer, imposed penalty u/s 271AA of ITA considering tax payer having failed to prepare and maintain a transfer pricing documentation in support of the arm's length nature for international transactions entered into during the year as envisaged u/s 92D read with Rule 10D.

Tax payer relied upon the transfer pricing documentation prepared by its Indian AE and claimed the same to be the reasonable cause for not maintaining a separate transfer pricing documentation under section 273B of ITA.

ITAT held, citing provisions of Section 92D(1) of ITA, that every person who has entered into international transactions or specified domestic transactions is required to maintain separate TP Documentation. ITAT further mentioned that mandate given under any provisions of ITA cannot be diluted by referring to reasonable cause as referred in Section 273B.

This decision emphases the requirement of compliance u/s 92E and 92D by Non-Residents having income chargeable to tax in India. The fact that Indian AE has analysed the concerned transaction to be at Arm's Length, does not relieve Non-Resident from its liability to comply with the requirement of obtaining Accountant's Report in Form – 3CEB as per Section – 92E and requirement of maintaining TP Documentation as per Section – 92D of ITA. Accordingly, Non-

Important Rulings

Resident company is required to maintain TP Documentation even if it relies on Arm's Length analysis carried out by Indian AE with which it has entered into an International Transaction.

Interest rate benchmark should be based on the currency in which loan is advanced

M/s Dharampal Satyapal Ltd; Appeal No. 1380 of 2017 (Mumbai ITAT)

The Tax Payer, engaged in manufacture and trade of pan masala, guthka, zarda etc. had provided loan to its wholly owned subsidiary in Switzerland, DS Business AG (AE). The loan was advanced by the Tax Payer to its AE in foreign denominated currency and accordingly it applied LIBOR rates prevailing in the international market to benchmark the said transaction. The same was rejected by the Revenue, who in turn applied SBI Prime Lending Rate (PLR) plus 300 Bps.

The ITAT reiterated the settled legal position that in case of foreign currency loans, the interest should be charged as well as benchmarked on the basis of LIBOR and not as per domestic rates as prime lending rate offered by Indian banks has no relevance on such foreign currency loans. This is considering the logic that a borrowing entity would approach banks in its own country of residence for a loan in its own currency and the interest that would have been charged in such a scenario would be based on LIBOR or applicable equivalent reference rate based on the currency of loan.

The ITAT relied on Delhi High Court's decision in case of CIT vs. Cotton Naturals Private Limited [55 taxmann.com 523] and by Gujarat High Court in case of Jyoti CNC Automation Private Limited [2018-TII-169-HC-AHM-TP] wherein it was held that since AE is situated in France, it is most appropriate to consider mark up on basis of average spread over LIBOR charged in France.

This decision reiterates the various judicial pronouncements having regard to foreign currency loans, the interest should be charged and benchmarked on the basis of interest rate mechanism for the currency of borrowing. Lending / borrowing in foreign currency cannot be compared with lending / borrowing in INR, since the parameters are different, including foreign exchange risk undertaken in case of the former, etc.

Inter-unit transactions between two eligible units u/s 10AA outside the scope of SDT

M/s Wipro Limited; Appeal No. 3115 of 2018 (Bangalore ITAT)

The Tax Payer is engaged in providing software and IT services to its customers through various undertakings located in Special Economic Zone (SEZ) or Software Technology Park (STPI) or other places. The undertakings owned by the Tax Payer fall within the following categories –

- Undertakings eligible for deduction @ 100% or 50% u/s 10AA of ITA ('eligible units')
- Non-eligible undertakings ('non-eligible units')

While assessing the transfer pricing matter of the Tax Payer, the TPO determined the arm's length margin of companies engaged in similar

business to be 15.58% and any excess margin recorded by any eligible unit was adjusted accordingly. In doing so, the TPO placed reliance on the argument that the purpose of transfer pricing provisions is to avoid shifting of profits from one entity (or unit) to another entity (or unit) to obtain a tax advantage. Hence, if, by shifting profits from entity eligible for lower deduction to entity eligible for higher deduction, the Tax Payer is obtaining a tax advantage, the same should be adjusted having regard to the transfer pricing provisions.

Having regard to the contention that transactions between eligible units should not be subjected to transfer pricing provisions, the ITAT has observed that the provisions of Section 80-IA(8) refer to transactions between "eligible business" and "other business" of the Tax Payer i.e. transactions between eligible unit and non-eligible unit. Hence, even if the argument of the TPO that there could be a tax arbitrage from inter-unit transfers between eligible units is considered, the provisions of ITA are clear in this case. Accordingly, ITAT held that transactions between eligible units of the Tax Payer are not intended to be covered by transfer pricing provisions.

The Tax Payer, further contended that the Arm's Length price should be applied to both eligible unit and non-eligible unit. Meaning thereby that the income of both 'eligible unit' and 'non-eligible unit' should be computed having regard to arm's length price so computed. ITAT mentioned that provisions of Section 92(3) of ITA is not applicable to SDT being inter-unit transaction of same tax entity. This is because computation of income of individual unit shall not result into reducing income chargeable to tax or increasing loss of a tax entity. Accordingly, the contention of Tax Payer was accepted by ITAT to allow corresponding adjustment to the non-eligible unit (being the service recipient) where an adjustment was made to the income of the eligible unit (being the service provider) and vice versa. ITAT demonstrated through illustration that such calculation would not change income chargeable to tax at entity level as it would only affect the amount allowable as deduction u/s 10AA of ITA.

It follows from the above that in the present structure of ITA, provisions of transfer pricing do not apply in case of inter-unit transactions where both units are eligible units, since the provisions clearly apply only to transactions between 'eligible unit' and 'non-eligible unit'. Further, since income of the entity is required to be computed having regard to arm's length price, the income from both the 'non-eligible unit' and 'eligible unit' should be calculated having regard to Arm's Length price.

Circulars & Notifications

Customs

Extending the RoSCTL scheme

Notification No.36/2020 – Customs dated October 05, 2020

The validity of RoSCTL scheme has been extended from March 31, 2020 to March 31, 2021 or until such date the RoSCTL scheme is merged with RoDTEP scheme, whichever is earlier.

Goods and Service Tax (GST)

Clarification relating to applicability of Rule 36(4) of the CGST Rules,2017

Circular No. 142/12/2020 dated October 10, 2020

The CBIC has clarified that the taxpayer has to reconcile the ITC availed in FORM GSTR-3B for the tax period February to August, 2020 with the details of invoices uploaded by their suppliers for each month on a cumulative basis and the excess ITC availed, if any arising out of such reconciliation, shall be required to be reversed in Table 4(B)(2) in GSTR-3B. Failure to reverse such excess ITC would be treated as availment of ineligible ITC during the month of September 2020.

Due date for filing of GSTR-1

Notification No. 74 and 75/2020 – CT dated October 15, 2020

The due date for filing of GSTR-1 for the period October 20 to March 21 has been notified as follows:

Taxpayers with aggregate turnover	Quarter/Month	Due Date
Up to Rs. 1.5 Crores	October 2020 to December 2020	January 13, 2021
	January 2021 to March 2021	April 13, 2021
More than Rs. 1.5 Crores	October 2020 to March 2021	11th day of the month succeeding such month

Due date for filing of GSTR-3B

Notification No. 76/2020 – CT dated October 15, 2020

The due date for filing of GSTR-1 for the period October 20 to March 21 has been notified as follows:

Taxpayers with aggregate turnover	Taxpayers having principal place of business in the state/UT of	Due date
More than Rs. 5 Crores	All states and UTs	20th day of the month succeeding such month.
Upto Rs. 5 Crores	Category A states	22nd day of the month succeeding such month
Upto Rs. 5 Crores	Category B states	24th day of the month succeeding such month

Circulars & Notifications

Category A states - Chhattisgarh, Madhya Pradesh, Gujarat, Maharashtra, Karnataka, Goa, Kerala, Tamil Nadu, Telangana, Andhra Pradesh, the Union territories of Daman and Diu and Dadra and Nagar Haveli, Puducherry, Andaman and Nicobar Islands and Lakshadweep

Category B States - Himachal Pradesh, Punjab, Uttarakhand, Haryana, Rajasthan, Uttar Pradesh, Bihar, Sikkim, Arunachal Pradesh, Nagaland, Manipur, Mizoram, Tripura, Meghalaya, Assam, West Bengal, Jharkhand or Odisha, the Union territories of Jammu and Kashmir, Ladakh, Chandigarh and Delhi

Optional filing of Annual Return for F.Y. 2019-20

Notification No. 77/2020-CT dated October 15, 2020

Taxpayers having an aggregate turnover of less than Rs. 2 crores have an option to not file GSTR-9 for the F.Y. 2019-20.

Change in the number of digits of HSN to be mentioned on tax invoice

Notification No. 78/2020-CT dated October 15, 2020

The revised requirement of mentioning the number of digits of HSN on a tax invoice is as follows:

Aggregate Turnover in the Preceding Financial year	No. of digits of HSN
Up to Rs. 5 crores	4
More than Rs. 5 crores	6

Amendment to various provisions of the CGST Rules, 2017

Notification No. 79/2020-CT dated October 15, 2020

NIL Filing of Return through SMS

NIL GSTR 1, GSTR-3B and CMP-08 can be filed through Short messaging service (SMS) facility.

Filing of form GSTR – 9C

For Financial Year 2018-19 and 2019-20, the GST audit i.e. requirement to file GSTR 9C shall arise only if the turnover of the taxpayer exceeds Rs. 5 Crores during the said Financial Year.

Generating Part-A of E Way-Bill

If a taxpayer fails to file CMP-08 (Composite Taxpayer) for a consecutive 2 quarters or GSTR-1 and GSTR-3B for a consecutive 2 months, such person shall not be allowed to fill PART A of E-WAY bill. Such restriction shall, however, not apply during the period from the 20th day of March 2020 till the 15th day of October, 2020.

Extension of due date for filing of Annual return and Annual Audit

Notification No. 80/2020-CT dated October 28, 2020

The due date for filing of GSTR-9 and GSTR-9C for the F.Y. 2018-19 has been extended till December 31, 2020 from October 31, 2020.

Circulars & Notifications

DGFT

Scheme of Duty Drawback on supply of steel by steel manufacturers

Notification No. 35/2015-2020 dated October 1, 2020

Steel manufacturers through their Service Centers/ Distributors/ Dealers/ Stock yards shall be eligible to claim duty drawback subject to the conditions specified.

Scheme for Rebate of State Levies

Notification No. 36/2015-2020 dated October 6, 2020

Scheme of rebate of state levies will be implemented by the DGFT in scrip mode, for which procedure will be laid down separately.

Case Laws

Liaison office is required to obtain a GST registration. Transactions between LO and HO cannot be treated as exports

FRAUNHOFER – GESSELLSCHAFT ZUR FORDERUNG DER ANGEWWANDTENFORSCHUNG

Advance Ruling number - KAR ADRG 50/2020 - Karnataka

The taxpayer is having its HO which is incorporated in Germany and is engaged in the business of promoting applied research. The HO has established their LO in India which is acting as an extended arm of the HO to carry out activities that are permitted by the RBI. As per the conditions stipulated by the RBI, the LO will not generate any income in India, will not engage in any trade/commercial activity and will not have any signing / commitment powers. The LO is permitted to promote technical/ financial collaborations by way of representing the HO in India and act as communication channel between the HO and the Indian Companies. The entire expenses of the LO will be met exclusively out of the funds received from abroad through normal banking channels.

The LO in India approached the AAR to seek clarifications on the following points:

- Whether the Activities of a liaison office amount to supply of services?
- Whether a liaison office is required to be registered under CGST Act, 2017?
- Whether liaison office is liable to pay GST?

The LO contended that it is nothing more than an extended arm of the HO and is accordingly not a person as defined under the GST Act. Further, the LO performs no separate functions other than those specified by the RBI, is restricted to carry out any business or commercial activities and is as such not earning any income. The HO reimburses the expenses incurred by LO for its operations in India which are in the nature of salary, rent, security, electricity, travelling, etc. Accordingly, the activities of the LO would not qualify as supply under the GST Law.

Case Laws

The AAR held that the definition of a person under the CGST Act is very wide and covers every artificial juridical person within its ambit. Further, the activities performed by the LO are in furtherance of business and hence, would fall under the scope of supply under Section 7 of CGST Act,2017 read with schedule I of CGST Act, 2017. The AAR also observed that since the HO and LO are distinct persons (LO is merely an establishment of the HO), the activities performed by the HO cannot be treated as export of services. The AAR concluded that the LO is required to be registered under the CGST Act and shall be liable to pay GST if the place of supply of services provided by the LO is in India.

Denial of refund of IGST to Advance-Authorization holders is valid but operates prospectively w.e.f. October 23, 2017

Cosmo Films Limited Vs. Union of India & 3 Ors. (Gujarat HC)

R/Special Civil Application 15833 of 2018

COSMO FILMS LIMITED ("the taxpayer") had obtained an Advance License in terms of the FTP. The taxpayer imported goods without payment of Customs duty and IGST under the Advance License. Further, the Taxpayer exported goods on payment of IGST and claimed a refund of such IGST paid.

In October 2018, Rule 96 of the CGST Rules was retrospectively amended since inception of GST to not allow taxpayers to export with payment of duty if the taxpayer has procured the goods under any specified exemption notification. Due to which the Taxpayer was unable to claim the benefit of exporting with payment of duty and claim refund in case of duty-free imports under Advance Licenses. The Taxpayer, therefore, challenged the validity of sub-rule (10) of Rule 96 of CGST Rules which was substituted in October 2018.

The Hon'ble HC on a conjoint reading of Notifications 39/2018, 54/2018 and 16/2020, held that the insertion of explanation to Rule 96 which restricts refund of IGST to a taxpayer who has claimed exemption for BCD and paid IGST, is valid but operates w.e.f. October 23, 2017 and not from the inception of GST.

CENVAT Cannot be denied for export of exempted goods outside India

Eastern Chemofarb Limited (DTA Unit) Vs Commissioner of Central Excise (CESTAT Kolkata)

Excise Appeal No. 77114 of 2019

Eastern Chemofarb Limited ("the Taxpayer") was engaged in the manufacture of goods which were exempt from the payment of Central Excise duty. The company exported the said goods outside India. The department sought to disallow the CENVAT credit of duty paid on inputs used for manufacture of the goods which were exported on the grounds that such goods were exempted.

Upon appeal to the CESTAT, the CESTAT relied upon Rule 6 of the CCR, which specifies that CENVAT credit shall not be allowed on inputs when is used in manufacture of exempted goods. The CESTAT further observed that there is an exception to the said provision which states that if the goods are cleared to an SEZ or a 100% EOUs, EHTP, etc. the restrictions contained in the said rules shall not apply.

Case Laws

The CESTAT accordingly held that the Taxpayer is entitled to avail CENVAT credit in respect of all goods exported whether exempted or not. While the GST law is worded differently as compared to the CENVAT Credit rules, the fundamental principles of ITC and CENVAT Credit being same, it remains to be seen if this judgement can be relied upon in the GST era also.

MCA Notifications

Non- Compliance of Minimum Residency Requirement not a violation

General Circular No. 36/2020 dated October 20, 2020

As per Section 149(3) of the Companies Act, 2013, every Company needs to have at least one resident Director. Resident Director means a person who stays in India for a total period of at least 182 days during the Financial year.

Due to COVID-19, MCA has relaxed the requirement from the residency status and has clarified that if in any Company, none of the Director is staying in India for a period of at least 182 days, **it** shall not be considered as non-compliance of Section 149 of the Companies Act, 2013 **for the Financial Year 2020-21**. *This is in fact an extension to the relaxation provided by the MCA under this section for the Financial Year 2019-20.*

FEMA Notifications

Export of Goods and Services

Removal of Automated Caution/De-caution Listing of Exporters in Export Data Processing and Monitoring System (EDPMS) Module

A.P. (DIR Series) Circular No.03 dated October 09, 2020

RBI had introduced the automated procedure for cautioning / de-cautioning of exporters in May 2016. However, this system proved to be harsh and inequitable as many exporters who were caution listed even in genuine cases.

On review of the existing system, it was observed that the automated system resulted in undue hardships to genuine exporters and warranted a change. *As per the revised system, an exporter would be caution-listed by the Reserve Bank only based on the recommendations of the AD Bank concerned. Similarly, the AD bank has been given the powers to recommend the Regional Office of the RBI for de-caution-listing an exporter.*

Only in certain circumstances, wherein the exporter has come under investigation by the Enforcement Directorate (ED) / Central Bureau of Investigation (CBI) / Directorate of Revenue Intelligence (DRI) etc. or the exporter is not traceable, would the AD Bank recommend for caution listing.

Reporting Compliance Timelines to RBI – Foreign Exchange Management Act, 1999 (FEMA)

There are various statutory deadlines which require to be adhered to make various compliance under the Foreign Exchange Management Act, 1999 and various regulation issued thereunder. The following table summarizes the same for ease of reference.

FEMA Notifications

Coverage

Sr. No.	Nature of Activity	Reporting under	Form	Onus of Reporting	Platform	Timeline
1	Fresh Issue of shares - to Persons Resident outside India on a repatriation basis	FDI	Form FC-GPR	Investee Company [*Company which receives Foreign Investment*]	FIRMS	30 days from date of allotment of shares
2	Transfer of Shares (from Resident to Non-Resident or Non-Resident to Resident - on repatriation basis)	FDI	Form FC-TRS	Resident transferor/transferee	FIRMS	60 days from date of transfer or receipt / payment of consideration, whichever is earlier
3	Introduction of Capital Contribution in LLP by Person Resident outside India on a repatriation basis	FDI	Form LLP - I	Investee LLP	FIRMS	30 days from receipt of funds (capital contribution)
4	Transfer / Sale of Capital Contribution or Profit share in LLP to / by a Person Resident outside India	FDI	Form LLP - II	Resident transferor/transferee	FIRMS	60 days from the date of receipt of funds
5	Downstream Investment / Indirect Foreign Investment [Investment by a Foreign Owned and Controlled Company (FOCC) in another Indian Company]	FDI	Form DI	Step Down Subsidiary (SDS) issuing shares to Indian Company	FIRMS	30 days from date of allotment of shares [Note: DPIIT has to be intimated by the Indian Company making investment in SDS within 30 days of such investment on FIFP portal, irrespective of whether shares allotted or not]

FEMA Notifications

Sr. No.	Nature of Activity	Reporting under	Form	Onus of Reporting	Platform	Timeline
6	Reporting by Liaison Office (LO) / Branch Office (BO) of Foreign Co. in India	LO/BO/PO	AAC	Authorized Representative of LO / BO in India	Physically to AD Bank	30th April (i.e.) one month from the close of the financial year
7	Investment in Overseas JV / WOS – Annual Reporting	ODI	Form ODI - Part II (Annual Performance Report)	Indian Party (Company investing in JV/WOS overseas)	Physically to AD Bank	31st December
8	Annual Filing of Foreign Assets and Liabilities	FDI/ODI	Form FLAR	Indian Company having FDI / making ODI	FLAIR	15th July - Unaudited financials (extended to 14th August 2020) 30th September - Audited financials (extended to 15th October 2020)
9	External Commercial Borrowings (ECB) - Monthly reporting	ECB	ECB-2 Return	Indian Borrower Company	Physically to AD Bank	7th working day of the subsequent month [*RBI had relaxed the physical filing of Returns by accepting digital Returns. However certain AD Banks have started instructing clients to file physical Returns now*]

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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
AAAR	Appellate Authority of Advance Ruling
AAC	Annual Activity Certificate
AD Bank	Authorized Dealer Bank
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
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
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
EOU	Export Oriented Unit
FAR	Function Assets and Risk

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
GVAT Act	Gujarat VAT Act, 2006
HC	High Court
HSN	Harmonized System of Nomenclature
ICAI	Institute of Chartered Accountant of India

Abbreviations

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Abbreviation	Meaning
ICDS	Income Computation and Disclosure Standards
ICDR	Issue of Capital and Disclosure Requirements
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