Tax Glimpses 2017

We bring you a concise analysis of important judgements and noteworthy regulatory developments in corporate and financial services tax, global mobility, M & A tax, transfer pricing, indirect taxes and regulatory developments during 2017.

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Foreword

Gautam Mehra

Leader, Tax and Regulatory Services

I am delighted to present our annual compilation, Tax Glimpses 2017.

Continuing with the mantra of "Change is the new normal", the year 2017 witnessed some major developments, both globally and in India.

Internationally, on the tax and regulatory front, increased discussions relating to global tax issues among countries resulted in the signing of the OECD BEPS Multilateral Instrument on 07 June 2017 by 69 countries.

Separately, a joint initiative by IMF, OECD, UN and the World Bank led to the release of a discussion draft on taxation of indirect transfers of local assets through offshore transfer of shares and interests. Some countries proposed significant cuts in domestic tax rates, and the discussion on the US tax reforms has taken centre stage even as we go to print.

In India, GST, arguably the most impactful tax change since decades, finally got implemented. Its ramifications are far beyond tax, stretching from vendor price negotiations and anti-profiteering to a relook at the supply chain, quite apart from the technological and tax operational aspects which has kept stakeholders engaged in recent times.

The other 'G' - GAAR - finally came into effect on 01 April 2017, coinciding with the rollout of the Place of Effective management (POEM) provisions. India took the lead in release of the final CbCR rules, and also introduced the thin capitalisation rules. The wide impact of first time implementation of Income Computation and Disclosure Standards (ICDS) and Indian Accounting Standards was felt on tax returns due this year, ending with the Delhi High Court invalidating many ICDS or parts thereof.

Enabling provisions of the insolvency law, a further rationalisation of foreign exchange regulations and the effective operationalisation of the Real Estate (Regulation and Development) Act 2016 were some of the important changes on the regulatory front.

The pace of change, and the impact thereof in wider spheres, has highlighted the need to be nimble enough to think quickly, strategise rapidly and adapt and implement appropriate measures at an even faster pace.

Tax Glimpses 2017, brings to you, in brief, some of the significant tax and regulatory developments which we shared with you over the year. A list of PwC Thought Leadership papers released during the year is also included.

I trust you will find this compilation useful, and look forward to your suggestions.

Wishing you the very best for 2018.

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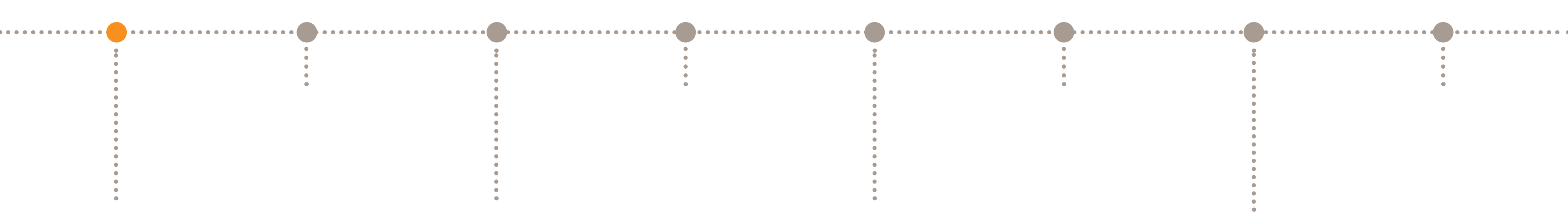

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Judgement

Amounts not deductible

Provisions pertaining to disallowance under section 40(a)(ia) are applicable to amounts that are "payable" as well as "paid"

Palam Gas Service *v.* CIT [Civil Appeal No. 5512 of 2017 (SC)]

Provisions of section 40(a)(ia) of the Act are applicable not only to the amount that was outstanding at the end of the relevant previous year, but to the entire expenditure that became liable for payment at any point during the year under consideration, including the amount that was paid before the end of the relevant previous year. (Section 40(a)(ia) of the Act enumerates certain items of expenditure that will not be allowed to be deducted while computing income under the head "Profits and Gains from Business or Profession," in the event of default in the deduction and payment of the taxes required to be withheld thereon, as required under Chapter XVII-B of the Act.)

Facts

The taxpayer was engaged in the business of purchase and sale of LPG cylinders. The main contract of the taxpayer was for carriage of LPG with the Indian Oil Corporation, Baddi. During the year, the taxpayer had received freight payments from the IOC, Baddi. The taxpayer in turn sub-contracted the transportation of the LPG to three persons who were paid during the year. The TO observed that the expenditure for the sub-contract for the transportation of the LPG by the taxpayer, was liable to withholding tax under section 194C of the Act. Further, on failure of the taxpayer to withhold tax on the aforesaid expenditure, the same was disallowed by the TO under the provisions of section 40(a)(ia) of the Act. The taxpayer preferred an appeal with successive appellate authorities *viz.* the CIT(A), the Tribunal and the HC of Himachal Pradesh, contesting both the assertions of the TO, i.e., the expenditure being liable to withholding tax under section 194C of the Act and the consequential disallowance under section 40(a)(ia) of the Act on default in withholding of tax. However, the appellate authorities upheld the actions of the TO were upheld. The taxpayer subsequently filed an appeal before the SC, restricting the ground to the disallowance under provisions of section 40(a)(ia) of the Act.

Held

The SC observed that the issue has come up for hearing before various HCs and divergent views have been expressed by the said HCs. The SC affirmed the view taken by Punjab and Haryana HC in the case of P.M.S. Diesels & Ors. *v.* CIT - 2, Jalandhar & Ors., [(2015) IT Appeal Nos. 716 of 2009 (O & M), 130 of 2012 and 171 & 188 of 2014 (Punjab & Haryana HC)], which had ruled that the disallowance under the provisions of section 40(a)(ia) of the Act were attracted in respect of the entire expenditure that arose for payment and not restricted merely to the amount unpaid at the end of the year. The P&H HC, had noted that, grammatically, the words "payable" and "paid" have different connotations. The word "paid" is, in fact, an antonym of the word "payable." This, however, is not significant to the interpretation of section 40(a)(ia) of the Act. The SC agreed with the observation of the P&H HC that the liability to withhold tax under the provisions of Chapter XVII-B was mandatory. A person responsible for paying any sum was also liable to deposit the amount in the government account. The sections in Chapter XVII-B required a person to withhold tax at the rates specified therein. The requirement in each of the sections was preceded by the word "shall." The provisions were, therefore, mandatory. Nothing in any of the sections warranted reading the word "shall" as "may." The point of time at which the withholding was to be made also established that the provisions were mandatory. The SC also agreed with the view of the P&H HC that the method of accounting followed by the taxpayer, i.e., cash or mercantile system of accounting was irrelevant in the context of applicability of provisions of section 40(a)(ia) of the Act. The SC, while making a reference to section 194C, 200 and 201 of the Act, observed that when the entire scheme of obligation to withhold tax and paying it over to the Central Government was read holistically, it could not be held that the word "payable" occurring in section 40(a)(ia) referred to only those cases where the amount was yet to be paid and did not cover the cases where the amount was actually paid. The SC, further mentioned

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that, if the provisions were interpreted in the manner suggested by the taxpayer then, even when it was found that a person, such as the taxpayer, had violated the provisions of Chapter XVII-B (or specifically sections 194C and 200 in the instant case), he would still go scot free, without suffering the consequences of such default in spite of specific provisions laying down consequences.

Takeaways

This is a significant decision of the SC, as it discusses conflicting views by HCs and settles the controversy in so far as the amount, whether "paid" or "payable at the end of the year" is to be considered for purposes of disallowance under section 40(a)(ia) of the Act.

Capital gains

Capital gains arising to Mauritius company not taxable in India under the India-Mauritius tax treaty

Writ Petition No. 3070 of 2016 (Bombay HC)

Capital gains arising to a Mauritius company on sale of shares held in an Indian company to another group company of the investee was not taxable in India under the provisions of the tax treaty between India and Mauritius.

Facts

The taxpayer was a company incorporated in Mauritius holding Category 1 Global Business License issued by the financial service authorities of Mauritius and had been issued a TRC. It acquired shares of A Limited in June 1996 and sold the same in June 2009 to another A Group Company. The taxpayer sought an advance ruling to ascertain whether capital gains on the transfer of shares of A Limited to another A Group Company was taxable in India in the hands of the taxpayer by virtue of the India-Mauritius tax treaty. The AAR ruled in favour of the taxpayer. The revenue filed a writ petition before the HC.

Held

The taxpayer company was holding valid business license issued by the financial services authority of Mauritius and a certificate issued by the Mauritius revenue authorities, evidencing that the taxpayer was a tax resident in Mauritius during the relevant period and the same had been renewed from time to time. The taxpayer had also filed its return in Mauritius, offering its income to tax and paid taxes in Mauritius, thereby, making it eligible to claim the benefit of the provisions contained in section 90(2) of the Act. The shares were held by the company for a long period of 13 years, which itself suggests the bona fide intent of the company evidencing and it is not a fly-by-night or shell company. The SC in the case of Union of India *v.* Azadi Bachao Andolan [Civil Appeal No. 8161 to 8164 of 2003 (SC)] observed that treaty shopping was not illegal and its legality could not be judged merely because of one section of thought considers it improper. The provisions of Explanation 5 to section 9(1)(i) would not be applicable in the present case, as the taxpayer was covered by the provisions of the tax treaty and as per the tax treaty it could only be taxed in Mauritius. Capital gains on the proposed sale of shares by the taxpayer were not liable to capital gains tax in view of Article 13(4) of the tax treaty.

Takeaways

The share transfer transactions involving entities resident in Mauritius had been a subject matter of litigation. The Indian revenue authorities in several instances had questioned the purpose test and denied the treaty benefits where transactions were designed solely to take advantage of the tax treaty.

This ruling reiterates and relies on the principle laid down by the SC in the case of Azadi Bachao Andolan (supra) that treaty shopping is not taboo and does not warrant further enquiry.

It may be noted that the India Mauritius tax treaty was amended in May 2016, pursuant to which capital gains on shares acquired on or after 01 April, 2017 shall be taxable in India subject to the prescribed relaxations. However, such benefit shall not be applicable to a shell/ conduit company that do not meet the criteria of LoB prescribed under the amended tax treaty.

Solar days are relevant for determination of service PE under the India-Saudi Arabia tax treaty

IT (TP) No. 1104 (Bangalore Bench of ITAT) of 2013

Bangalore Tribunal has held that solar days as against man days, are relevant for determination of threshold for service PE. Further, the Tribunal has held that in the absence of the FTS Article in the India-Saudi

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Arabia tax treaty, the income would be taxed as per the residual "other income" clause in the tax treaty.

Facts

The taxpayer was a company based in Saudi Arabia. During the year under consideration, the taxpayer rendered certain services in India through four of its engineers who were present in India for a period of 90 days.

Held

The Tribunal, relying on the decision of the Mumbai Tribunal in the case of *Clifford Chance v. DCIT [2002] 82 ITD 106 (Mumbai)]* held that solar days were relevant for determination of service PE as against man days. Multiple counting of the common days was to be avoided so that the days when two or more employees were present in India together, they were to be counted only once. The Tribunal distinguished its earlier decision in the case of *ABB FZ-LLC v. DCIT [ITA Nos. 1103 of 2013 & 304 of 2015 (Bangalore Tribunal) dated 21 June, 2017]* wherein the Tribunal held that services were rendered virtually by way of email, internet, VC, etc., as against the facts of the present case wherein engineers were physically present for performance of the services and the invoice was also raised by the taxpayer on the basis of man hours. The stay in India of the taxpayer by the presence of its engineers was only 90 days and since it was less than 182 days as required under Article 5(3)(b) of the tax treaty, there was no service PE of the taxpayer in India. In respect of income not specifically covered under any Article, such income should be taxable under the residual Article on "other income" under the tax treaty, which provides for taxability in the state of residence only. Reliance was placed on the decision of the Madras HC in the case of *Bangkok Glass Industry Co. Limited v. ACIT [Tax Case (Appeal) Nos. 1187, 1307, 1342, 1460 & 1464 of 2005, 34 of 2006 and743 of 2007 (Madras HC)]*. With respect to whether the income qualifies as royalty or FTS, in absence of the exact details of the work done by service engineers in India, this issue was remitted back to the revenue for determination.

Takeaways

This decision reiterates that consideration of solar days as against man days would be relevant for computing the threshold for a service PE in India.

In absence of the "FTS" clause in the tax treaty, the receipts would fall under Article 22 of the tax treaty, i.e., the residual clause. This ruling would provide some cushion to the taxpayers in litigation, where the revenue wishes to tax the receipt as per provisions of the tax law in absence of specific clause in the tax treaty.

SC rules that no PE of a foreign company can be formed in India where its Indian subsidiary is performing support services, which enables such foreign company to render services to its client abroad

ADIT *v.* E Funds IT Solution Inc. [Civil Appeal No. 6082 of 2015 dated 24 October, 2017(SC)]

The SC held that support services performed by an Indian subsidiary, which enables the foreign company to render IT and ITES to its client abroad, will not create a PE of the foreign company in India.

The SC held that an Indian subsidiary did not create a fixed place PE of its foreign company in India unless the premises of the subsidiary were at the disposal of the foreign company. The SC also negated the possibility of service PE in India on the ground that none of the customers of the foreign company received any services in India. In relation to agency PE, the SC held that it has never been the case of the revenue that an Indian subsidiary was authorised to or exercised any authority to conclude contracts on behalf of the foreign company. The SC further held that even if the foreign company is held to have a PE in India, the transaction between the foreign company and its Indian subsidiary being at arm's length, no further profits can be attributed in India. Further, it was held that the MAP agreement for an earlier year could not be considered as precedent for subsequent years

Facts

A Group Inc. and B Corporation, USA (hereinafter, collectively referred to as "AB USA") were resident companies in the USA. AB USA were in the business of providing ATM management services, electronic payment management, decision support and risk management and global outsourcing and professional services (IT and ITES) to its customers outside India. AB USA were assessed to tax in USA on their global income. C Private Limited (C India) was a company resident in India. It provides various support services to AB USA in relation to its IT and ITES. C India was taxed in India on its global

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income, in accordance with the provisions of the Act. The Revenue contended that the income of AB USA should also have been taxed in India as they had PE in India in the form of C India, to which income from provision of IT and ITES could be attributed

Held

Fixed place PE

- The following were relied upon for determining the test applicable for constitution of fixed place PE.
  - The principal test, to ascertain whether an establishment had a fixed place of business or not, was that such physically located premises had to be "at the disposal" of the enterprise.
  - For this purpose, it was not necessary that the enterprise owns or even rents the premises. It will be sufficient if the premises were at the disposal of the enterprise.
  - However, merely giving access to such a place for the purposes of the project would not suffice.
  - The place would be treated as "at the disposal" of the enterprise when the enterprise had right to use the said place and had control thereupon.
- It was held that there must exist a fixed place of business in India, which was at the disposal of AB USA, through which they carried on their business. There was, in fact, no specific finding in the assessment order or the appellate orders that applying the aforesaid tests, any fixed place of business had been put at the disposal of these companies.
- The following observations of the HC were upheld by the SC:
  - C India provided various services and depended upon AB USA for its earning was not the relevant test to determine location PE.
  - C India did not bear sufficient risk was irrelevant when deciding whether a location PE exists.
  - The close association between C India and the taxpayer and application of functions performed, assets used and risk assumed criteria was not a proper and appropriate test to determine the location of the PE.
  - C India being reimbursed the cost of call centre operations, plus certain percentage, was not relevant for determining location of fixed place PE.
  - Assignment or sub-contract to C India was not a factor or rule to be applied to determine existence or otherwise of fixed place PE.
  - Whether or not any provisions for intangible software was made or had been supplied free of cost was not a relevant criterion.
  - C India would not become fixed place PE merely because there was interaction or cross transactions between C India and AB USA.
  - Even if foreign entities save and reduce their expenditure by transferring business or back office operations to their Indian subsidiaries, this would not by itself create a fixed PE.
- No part of the main business and revenue earning activity of AB USA was carried on through a fixed business place in India, which had been put at their disposal.
- C India only rendered support services, which enabled AB USA to render services to their clients abroad. This outsourcing of work to India would not give rise to a fixed place PE.
- Reliance on the United States Securities and Exchange Commission Form 10K Report was also misplaced. It was clear that the report spoke of the A group of companies worldwide as a whole, which was evident not only from going through the said report, but also from the consolidated financial statements appended to the report, which showed the assets of the group worldwide.

Service PE

- An enterprise must furnish services within India through employees or other personnel for a service PE to be constituted. In the present case, C India only rendered support services to AB USA.
- Presence of employees in India was relevant under the tax treaty but the said employees should have furnished services within contracting state.
- None of the customers of AB USA had received any services in India.
- Mere auxiliary operations that facilitate services rendered by AB USA to its customers were carried out in India.

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- Further, in respect of employees seconded, it was held that
  - The seconded employees were working under the control and supervision of C India. The TO did not negate this assertion made by AB USA.
  - The entire remuneration paid to such employees was borne by C India.
  - The TO had not given any finding on whether these employees reported to AB USA or any group companies.

Agency PE

- C India could not exercise any authority to conclude contracts on behalf of AB USA and no other clauses of the tax treaty dealing with the agency PE were applicable.
- Further, as the arms-length conditions was satisfied, no further profit would be attributable, even if there existed an agency PE in India.

MAP

The agreement entered into by AB USA under MAP pertained to disputes in earlier assessment years and could not be considered as a precedent for subsequent years.

Takeaways

The SC decision brings out certain guidelines for determination of existence or otherwise of the PE of a foreign company in India, which are as follows:

- *The principal test, to ascertain whether an establishment has a fixed place of business or not, is that such physically located premises have to be "at the disposal" of the foreign company.*
- *No fixed place PE can be established if the main business and revenue earning activity of the foreign company are not carried on through a fixed place in India, which has been at the disposal of the foreign company.*
- *Based on the facts of a case, a FAR analysis may not be the appropriate test to determine location of the PE.*
- *The mere fact that a 100% subsidiary may be carrying on business in India does not mean that the holding company would have a PE in India.*
- *If any customer were rendered services in India on behalf of the foreign entity, whether resident or non-resident, a service PE may be established.*
- *If arm's-length conditions were satisfied, no further profit would be attributable, even if there exists a PE of a foreign company in India.*
- *The MAP resolution arrived for a year cannot be considered as precedent for subsequent years.*

Capital receipt

Subvention from parent company for making good losses is a capital receipt not chargeable to tax

Civil Appeal No. 6946 of 2016 (SC)

Subvention received by an Indian company from the parent company to make good the losses incurred by it, was in the nature of a capital receipt. The basis for this conclusion was that the subvention was a voluntary payment made by the parent company in Germany to protect the capital investment in the subsidiary company.

Facts

The taxpayer was engaged in the business of manufacture of electronic products and computer software. For the relevant AY, the taxpayer had filed its return of income declaring a loss. During the relevant AY, the taxpayer had received monies from its parent company, which were not offered to tax by the taxpayer. During the course of the assessment proceedings, the taxpayer stated that the monies represented subvention payments by the parent company to make good the losses incurred by the taxpayer and as the taxpayer did not have sufficient working capital, the parent company infused further capital. The taxpayer claimed these payments to be capital in nature. The tax officer rejected this stand of the taxpayer and treated such receipt as revenue receipt taxable in the hands of the taxpayer. The CIT(A) and the Tribunal agreed with the contention of the taxpayer and deleted the addition to the taxpayer's income. On further appeal by the Revenue authorities, the HC reversed the order of the Tribunal

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and upheld the addition made by the TO. The ruling of the HC was on the principle laid down by the SC in the cases of *CIT v. Ponni Sugars and Chemicals Limited [Civil Appeal No. 5694 of 2008]* and *Sahney Steel & Press Works Limited v. CIT[Civil Appeal No. 2193 of 1985(Supreme Court)]*. The SC in these cases had held that the purpose of the subsidy or subvention is relevant, and unless the subsidy is towards assistance for setting up or expanding of business or repayment of loan or creation of a new asset, it would be revenue in nature. The HC held that the subvention was to make good the losses and run the business more profitably, and hence, the subvention was a revenue receipt taxable in the hands of the taxpayer.

Held

The SC distinguished the present case from its earlier decisions in the cases of Ponni Sugars and Sahney Steel (*supra*) on the basis that in those decisions, the subsidy or assistance in question was from public funds (government subsidies) and not voluntary contributions from the parent company. Further, the SC held that the voluntary payments by the parent company to the taxpayer to make good its losses were with a view to protect its capital investment in the taxpayer. Accordingly, the SC upheld the contention of the taxpayer and reversed the decision of the HC. The SC also drew reference from and agreed with the decision of the Delhi HC in the case of *CIT v. Handicrafts and Handlooms Export Corporation of India [(2014) IT Appeal No. 3 of 2001 (Delhi HC)]* where, on similar facts, the Delhi HC had held that subsidy was a capital receipt, as the payment was to secure and protect the capital investment.

Takeaways

The ruling of the SC supports the position that any assistance or subvention received from parent companies is capital receipt.

The amendment to section 2(24) (xviii) of the Act relating to inclusion of subsidies and grants within the ambit of "income" will not be applicable in the case where subvention is received from parent company as it specifically includes the grant received from the government or its agencies.

Deduction

Supreme Court holds section 10A/ 10B to be a deduction provision

CIT & ANR *v.* Yogogawa India Limited [Civil Appeal No. 8498 of 2013 (SC)]

Section 10A of the Act, as amended by the Finance Act, 2000, is a provision for deduction, and the stage of deduction would be while computing the gross total income of the eligible undertaking under Chapter IV of the Act, and not at the stage of computation of the total income of the taxpayer under Chapter VI.

Facts

The following facts were considered based on the HC decision in the lead case of *CIT v. Yogogawa India Limited [IT Appeal No. 78 of 2011 (Karnataka HC)]:*

The taxpayer had claimed exemption under section 10A before adjusting the brought forward losses and depreciation of its non-10A units. The TO recomputed the exemption under section 10A after adjusting the brought forward losses of non-10A units. The CIT(A) set aside said the assessment order and granted relief to the taxpayer on the premise that the income under section 10A had to be excluded at source itself, and not after computing the gross total income. Both, the Tribunal and the HC, dismissed the appeal by Revenue authorities and upheld the CIT(A)'s order. Accordingly, the Revenue authorities preferred an appeal before the SC.

Held

The deductions under section 10A would be while computing the gross total income of the eligible undertaking under Chapter IV of the Act, and not at the stage of computing the total income under Chapter VI, on the following premises:

- Based on the cardinal principles of interpretation of taxing statutes laid down by J. Rowlatt in Cape Brandy Syndicate *v.* Inland Revenue Commissioner [1921] 1 KB 64, it was well established that in a taxing act, one had to look merely at what was said clearly.
- The introduction of the word, "deduction" in section 10A by the amendment through the Finance Act, 2000, in the absence of any contrary material, must be considered as enunciation of the legislative decision

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to alter its nature from one providing for exemption to one providing for deduction.

- Further, the deduction contemplated in section 10A was qua the eligible undertaking of a taxpayer standing on its own, without regard to other eligible or non-eligible units or undertakings of the taxpayer.
- Reference was made to the Circular dated 09 August, 2000 (explaining the rationale for amendment in section 10A), wherein the said principle was reflected.
- The deduction of the profits and gains of the business of an eligible undertaking must be made independently, and therefore, immediately after the stage of determination of its profits and gains.
- The term, "total income of the taxpayer" in section 10A must be understood as the "total income of the undertaking."

Takeaways

This is a welcome judgment as it puts to rest the controversy as to whether section 10A/ 10B is a deduction provision or an exemption provision. Further, the taxpayer, depending on the specific facts, may rely on the principles laid down by the SC and claim set off of losses of 10A/ 10B unit against other business income or income from other sources, as the case may be.

Claim of depreciation mandatory while computing deduction under section 80-IA

Plastiblends India Limited *v.* ACIT [Civil Appeal No. 238 of 2012 (SC)]

SC held that depreciation is mandatorily required to be reduced while computing eligible profits for deduction under section 80-IA of the Act.

Furthermore, the SC held that section 80-IA of the Act is a code by itself and any device adopted to reduce or inflate the profits of eligible business has to be rejected.

Facts

The taxpayer, a company engaged in the manufacturing of master batches and compounds, had two undertakings eligible for 100% deduction under section 80-IA of the Act. For AY 1997-98, the taxpayer did not claim depreciation under the Act while computing its income. The taxpayer claimed deduction under section 80-IA of the Act based on the same profits, i.e., without claiming depreciation allowance. The TO reassessed the income of the taxpayer and computed GTI after allowing depreciation under section 32 of the Act and setting off brought forward losses. The resultant GTI being a loss, no deduction under section 80-IA was allowed to the taxpayer. On appeal, the CIT(A), upheld the taxpayer's submission that the claim of depreciation was optional and directed the TO to work out the deduction under section 80-IA of the Act without taking into consideration the depreciation allowance. Aggrieved, the TO preferred an appeal before the Tribunal, which reversed the order of the CIT(A).

Held

The SC rejected the arguments of the taxpayer. The SC discussed the judgement of the Bombay HC and upheld the following findings made by the Bombay HC:

- The judgment of the SC in the case of *CIT v. Mahendra Mills [Civil Appeal No. 5394 of 1994 (SC)]*, wherein it was held that whether to claim the depreciation or not was the option available with the taxpayer and it could not be thrust upon the taxpayer, was not applicable in the present case as -
  - i the judgment was rendered in the context of computation of income by the virtue of Chapter IV not in the context of Chapter VI-A of the Act; and
  - ii the said decision could not be read to mean that by disclaiming current depreciation, enhanced deduction could be claimed under any other provision of the Act.
- Chapter VI-A of the Act (which contains section 80-IA) is a complete code by itself *Liberty India v. CIT [Civil Appeal No. 5891 of 2009 (SC)], CIT v. Williamson Financial Services & Ors. [Civil Appeal No. 3803 to 3805 of 2005 (SC)]; CIT, Dibrugarh v. Doom Dooma India Limited [Civil Appeal No. 1094 of 2009 (SC)])* and section 80-IA is a special deduction, which is linked to profits unlike investment linked incentives.
- Section 80-IA contains both substantive and procedural provisions for computation of the special deduction. The deduction under section 80-IA of the Act has to be computed after all deductions allowable under sections 30 to 43D of the Act and any device adopted to reduce or inflate the profits of the eligible business has to be rejected.

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- The taxpayer by not claiming current depreciation sought to inflate the profit-linked incentives provided under section 80-IA of the Act which was not permissible as per the law laid down by the SC in the case of Liberty India.

Takeaways

Depreciation is mandatorily required to be reduced while computing deduction under section 80 IA of the Act.

Deductible expenses

Tribunal allows expenses in the nature of "freebies" to doctors

ITA No. 4605/ Mumbai/ 2014 (Mumbai Bench of ITAT)

In the case of a pharmaceutical company, expenses such as holding of national level seminars for eminent doctors, product promotion before doctors, distribution of gift articles and samples, under section 37 of the Act are deductible expenses.

Such expenses were not in the nature of freebies to doctors and were not in violation of MCI regulations [Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (MCI Regulations) as amended by notification dated 10 December, 2009 issued by the MCI], which prohibits medical practitioners from receiving any kind of gift, travel facilities, hospitality and any kind of cash or monetary grants from the pharmaceutical or healthcare industry. In support of allowing claim for these expenses, the Tribunal held that the subject expenses were incurred to create awareness of the products and medicines manufactured and launched by the taxpayer, and stated that such expenses were definitely in the nature of sales and business promotion, which were allowable.

With respect to the CBDT Circular no. 5/ 2012, dated 01 August, 2012 on this issue, it held that the CBDT in its clarification had enlarged the scope and applicability of MCI regulations by making it applicable to pharmaceutical companies or allied healthcare sector industries, which was not permissible. Further, it also observed that in any case, the CBDT circular could not be applied retrospectively.

Facts

The taxpayer was a pharmaceutical company engaged in the business of providing pharma marketing consultancy and detailing services to develop a mass market for pharma products. During AY 2010-11, the TO disallowed advertising and sales promotion expenses of INR 22,99,72,607 (incurred post 10 December, 2009) on the ground that these expenses were in violation of MCI regulations, and accordingly, disallowable under section 37 of the Act. These expenses included expenses on distribution of free sample/ gift articles, sponsoring seminars/ conferences, subscriptions to journals, etc.

Held

The Tribunal upheld the order of the CIT(A) for the following reasons:

- The MCI regulations were meant to be followed and adhered to by medical practitioners/ doctors alone, and did not cover pharmaceutical companies or the healthcare sector in any manner. Reliance in this regard was placed on the decision of *Max Hospital v. MCI [WPC 1334/2013 (Delhi HC)]*.
- The CBDT circular, in its clarification, has enlarged the scope and applicability of the MCI regulations by making it applicable to pharmaceutical companies or allied healthcare sector industries. Such an enlargement by the CBDT was without any enabling provisions either under the Income-tax law or by any provisions under the MCI regulations.
- In any case, the CBDT circular, which created a burden or liability or imposed a new kind of imparity, could not be applied retrospectively. Reliance was placed on the decision of the Mumbai Tribunal in the case of *Syncom Formulations India Limited v. DCIT (ITA no. 6429/ Mumbai/ 2012) (Mumbai Bench of ITAT)*.
- In relation to expenses for holding seminars, conferences, doctors' meetings, etc., the Tribunal noted that the said activities by the taxpayer were to create awareness among doctors of its products and its research work for a successful launch. Such type of expenditure was definitely in the nature of sales and business promotion, which had to be allowed.
- In relation to gift articles and free samples, the Tribunal noted that all the gift articles under consideration were very cheap and low cost articles that bore the name of the taxpayer, and they were purely for

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promotion of its products, brand reminder, etc. These articles could not be reckoned as freebies given to doctors.

- Even the free samples of medicine were only to prove efficacy, and to establish the trust of the doctors in the quality of its drugs. This too could not be reckoned as freebies given to doctors.
- The decision of the coordinate bench in the case of *Liva Healthcare Limited v. ACIT [(ITA No. 4791/ Mumbai/ 2014) (Mumbai Tribunal)]* was distinguished on facts, as in that case, there was material on record to show that doctors and their spouses were given foreign tours, cruise travel, etc., in lieu of expected favours. It was also observed that this decision did not consider the earlier decision of the coordinate bench of the Tribunal in the case of UCB India Private Limited *v.* ITO [(ITA No. 6681/ Mumbai/ 2013 (Mumbai Bench of ITAT)], wherein it had been held that the CBDT circular could not have a retrospective effect.
- The Tribunal noted that the ratio of decision of *CIT v. Kap Scan and Diagnostic Centre Private Limited [ITA No. 445 of 2006 (Punjab and Haryana HC)]*, wherein it had been held that the payment of commission to doctors for referring the taxpayer's products was against public policy, and hence, not allowable. In the present case, it held that there was no violation of any law or anything opposed to public policy.
- The Tribunal noted that though the Himachal Pradesh HC in the case of *Confederation of Indian Pharmaceutical Industry v. CBDT [(CWP No. 10793 of 2012-J) (Himachal Pradesh HC)]* had upheld the validity of the CBDT Circular denying deduction for freebies to doctors, the HC had also provided a rider that if the taxpayer satisfied the TO that the expenditure was not in violation of MCI Regulation, then it may legitimately claim the deduction.

Takeaways

Relying on the decision of the Delhi HC in the case of Max Hospital v. MCI [WPC 1334/ 2013 (Delhi HC)] – a civil appeal and not an income-tax appeal, the Tribunal observed that the MCI regulations are applicable only to doctors/ medical practitioners and not to pharmaceutical companies. Further, it also clarifies that the CBDT circular is prospective in nature. For the reasons discussed, the Tribunal proceeded to allow the subject expenses as the same were incurred for the purpose of business.

In relation to allowability of expenses for free samples, there are a few other Tribunal decisions wherein it has been held that distribution of samples is not prohibited by the MCI regulation. To this extent, there is reasonable clarity on the deductibility of expenses relating to samples, unlike other sales promotion expenses generally incurred by the pharmaceutical companies.

Having said the above, considering the contrary decisions of the Tribunal on the aforementioned principles, this matter continues to be litigative. Considering the importance of the issue to the pharmaceutical industry, a higher court decision may reduce the uncertainty arising out of the divergent views.

Depreciation

Lessee cannot claim depreciation under section 32 in the absence of legal ownership; to avail the benefit of depreciation, the lessee has to undertake the construction activity himself as per Explanation 1

Mother Hospital Limited. ***v.*** **CIT [Civil Appeal No. 3360 of 2006 (SC)]**

The taxpayer (lessee) had not become the owner of the immovable property in question; depreciation could not be allowed to the taxpayer as per section 32 of the Act. The title in the immovable property could not be passed from lessor firm when its value was more than INR 100, unless it was executed on a proper stamp paper and was duly registered with the sub-registrar. In the absence thereof, the taxpayer could not be said to be the owner of the immovable property and depreciation could not be allowed in such circumstances. On the alternative argument of claiming depreciation under Explanation 1 to section 32, the SC held that the lessee was entitled to depreciation on the capital expenditure incurred by him by way of renovation, extension or improvement to the building and not on the construction carried out by the owner, the cost of which was subsequently reimbursed by the lessee.

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Facts

In this case, the taxpayer (lessee) was a private limited company, running a super speciality hospital in Thrissur Town in central Kerala. Earlier, a partnership firm was set up to run a hospital on land belonging to the firm and it started the construction of the hospital building. As it was felt expedient to form a private limited company to run and manage the hospital (then under construction), a company was formed for the said purpose and was incorporated on 30 December, 1988. Thereafter, an agreement was entered into between the firm and the company and it was agreed that the firm would complete the construction of the building and hand over possession to the taxpayer on the condition that the entire cost of construction shall be borne by the taxpayer. The taxpayer took possession of the building on its completion on 18 December, 1991 and started the hospital operations with effect from 19 December, 1991. The accounts of the taxpayer have been debited with the cost of construction of the building, i.e., INR 13.7 million. The accounts of the firm were also credited with the payment of INR 10.6 million made by the taxpayer. The balance amount payable by the taxpayer to the firm was carried as liability in the taxpayer's balance sheet, for which the firm had a lien on the building. The balance amount was paid to the firm in due course. The taxpayer also paid the one-time building tax payable by the owner of the building under the Kerala Building Tax Act. As the ownership of the land had to remain with the firm, the taxpayer agreed to lease the land from the firm for a monthly ground rent of INR 100 from 01 April, 1993. The taxpayer filed its first tax return for AY 1992-93 in which it claimed depreciation on the building part under section 32 of the Act on the ground that it had become the "owner of the property." The TO rejected the aforesaid claim of taxpayer holding that it had not become the owner of the property during the relevant AY. The taxpayer preferred an appeal before the CIT(A), which met with the same fate. However, in further appeal before the Tribunal, the taxpayer succeeded. Revenue filed an appeal before the HC, against the order of the Tribunal, which was allowed by HC in favour of the Revenue.

Held

The SC held that the building constructed by the firm belonged to the firm. As the property in question was an immovable property, the title in the said property could not pass unless it was executed on a proper stamp paper and was duly registered with the sub-registrar. In the absence of transfer of title, it could not be said that the taxpayer had become the owner of the building. Further, the SC also mentioned that it was only when the taxpayer held a lease or other right of occupancy and any capital expenditure was incurred by the taxpayer on the construction of any structure or doing of any work in or in relation to and by way of renovation or extension of or improvement to the building, that the taxpayer would be entitled to depreciation to the extent of any such expenditure. In the present case, the records show that the construction was undertaken by the firm. It was another matter that the taxpayer had reimbursed the amount. The taxpayer did not carry out the construction. Therefore, the Explanation 1 to section 32 would not come to the aid of the taxpayer.

Takeaways

Section 32 allows depreciation on buildings, etc., which are owned by the taxpayer and used for its business and profession. Therefore, the word "owned" is at the core of the controversy. Is it only an absolute owner or an owner of the asset as understood in its legal sense who can claim the depreciation? The Indian judiciary has—in few instances—interpreted this issue.

The SC in the case of CIT v. Poddar Cement (P) Limited [Tax Reference Case No. 9-10 of 1986 (SC)] and Mysore Minerals Limited v. CIT [1999 Civil Appeal No. 5374 of 1994 (SC)] held that beneficial ownership is relevant for claim of depreciation under the provisions of the Act.

However, in the present case, the SC has upheld the concept of legal ownership for claiming depreciation. Hence, the present ruling may further lead to controversies in the claim of depreciation on account of ownership of assets without the transfer of legal title.

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Foreign tax credit

FTC allowed on "income embedded in gross receipts," computed having regard to taxpayer's distinctive facts

Elitecore Technologies Private Limited *v.* DCIT [ITA No.623/ Ahmedabad/ 2015 (Ahmedabad Bench of ITAT)]

FTC had to be allowed on the basis of "income embedded in the gross receipts," and not on basis of the "gross receipts" themselves. For computing the "income embedded in the gross receipts," it held that where the taxpayer had furnished reasonable computation of foreign sourced income, there was no need to compute the income by allocating overall expenses in the proportion of turnover.

Facts

The taxpayer was a wholly owned subsidiary of a US based company, which was engaged in the business of software development. During the relevant PY, the taxpayer did not have taxable income under the normal provisions of the Act, and paid taxes under the MAT provisions. During the assessment proceedings, the TO noted that the taxpayer had received income from a Singapore entity, in the nature of margin money on the sale of a software license, where tax withholding of INR 5,41,029 was done in Singapore. The taxpayer had also received income from an Indonesian entity on sale of incremental software license and undertaking an annual maintenance contract, where tax of INR 5,71,878 was withheld in Indonesia. Aggregating this, the taxpayer had claimed FTC amounting to INR 11,12,907, in respect of taxes withheld in Singapore and Indonesia. The TO did not approve the taxpayer's claim and restricted the amount of FTC to INR 86,571. The TO was of the view that the FTC was to be allowed only to the extent that the corresponding income had suffered tax in India. In respect of the taxpayer's case, the TO was of the view that the extent to which income had suffered tax in India had to be computed as follows:

$$\frac{\textit{MAT*Foreign Receipts}}{\textit{Overall Turnover}}$$

On the other hand, the taxpayer contended that the "gross receipts" were relevant for the purpose of computing the tax credit. The relevant article of the tax treaty states that tax credit would be available for "profit or income," which had been subjected to tax in both the countries. *(The relevant articles are Article 23 of the India-Indonesia tax treaty and Article 25 of the India-Singapore tax treaty.)* According to the taxpayer, the entire receipt should have been considered as doubly taxed, looking to the intention and scheme of the tax treaties. Thus, the entire foreign tax should have been eligible as FTC in India. The taxpayer appealed before the CIT(A), who upheld the TO's order. Aggrieved, the taxpayer filed an appeal before the Tribunal.

Held

The Tribunal observed that the India-Singapore tax treaty as well as the India-Indonesia tax treaty provide for FTC not to exceed the income tax attributable to the "income," which was taxed in the other state. However, there was limited guidance on the manner of computing such "income." Placing reliance on the Commentary to OECD Model Convention, the Tribunal noted that the expression "income," essentially implied "income embedded in the gross receipts," and not the "gross receipts" themselves. Thus, it stated that the taxpayer's approach of considering "gross receipts" as income was incorrect. However, the Tribunal acknowledged distinctive facts of the taxpayer's case, as follows:

- The taxpayer's main business was conducted in India, and only three isolated transactions had resulted into income from Singapore and Indonesia.
- The first two transactions were for the release of margin money and addition of users, which did not require any activity on the taxpayer's part, and thus resulted in passive earnings. No part of the costs incurred in India could be allocated to such earnings from Singapore and Indonesia.
- With respect to the third transaction, being earnings from maintenance contract, the taxpayer had allocated the costs on a proportionate basis and no defects were pointed out in such allocation.

In view of the above facts, the Tribunal stated that the taxpayer had furnished a reasonable computation of income, and thus, rejected the TO's stand of allocating all the costs borne by the taxpayer, in proportion of turnover, to the earnings from Indonesia and Singapore. The Tribunal further observed that the concept of averaging of costs to the overall revenues

could only come into play when the income embedded in the gross receipt could not be worked out on any other reasonable basis. The taxpayer, in this case, had furnished computation of income arising from foreign receipts to the satisfaction of the Tribunal, and thus, the averaging of cost to foreign income was not required. The Tribunal remarked that this ruling should not be used as a general proposition that only the marginal or incremental costs incurred in respect of the foreign income were to be taken into account, and overheads were not to be allocated. The Tribunal noted that the FTC had to be computed on a proportionate basis, not exceeding tax attributable to the income, which may be taxed doubly. Given that the taxpayer had paid taxes on the book profits, the Tribunal computed the FTC by apportioning the actual tax paid under MAT provisions in the ratio of double taxed profit to the overall profits, *viz.*

Using this formula, the Tribunal worked out the FTC to be INR 9,47,344.

$$\frac{\textit{MAT*Foreign (net) income}}{\textit{Total Book Profits}}$$

Takeaways

This is a welcome ruling of the Tribunal providing guidance on the manner of computation of FTC in cases where tax is paid under the MAT provisions.

The ruling also brings clarity that the double-taxed income, to be considered as "income embedded in the gross receipt," i.e., gross receipts minus eligible expenses. The concept of averaging of costs on the basis of overall revenues is to be applied only when the doubly-taxed "income" element cannot be worked out on a reasonable basis.

While the FTC rules do not provide clarity on the issue dealt herein, this ruling may be relied upon by the taxpayers facing similar instances. (Please click here to access the CBDT Notification on FTC Rules.)

Taxes paid outside India not deductible from business profits under section 37(1); Disallowable under section 40(a)(ii)

DCIT v. Elitecore Technologies [(2017) ITA No. 508/ Ahmedabad/ 2016 (Ahmedabad Bench of ITAT)]

Deduction under section 37(1) of the Act shall not be available for taxes paid abroad and the same shall be disallowable under section 40(a)(ii) of the Act.

Facts

The taxpayer was an Indian company, engaged in the business of developing software products. During the year under consideration, the taxpayer had earned business income from Indonesia, Malaysia and Rwanda, from which, taxes had been withheld in the source countries. The taxpayer had claimed relief for these taxes under section 90/ 91 of the Act. The FTC, granted to the taxpayer by the TO during the assessment proceedings, was lower than the amount claimed by the taxpayer as relief. In the appeal before the CIT(A), the CIT(A) had confirmed the quantification of eligible FTC made by the TO. Further, for the remaining amount of taxes paid abroad, the CIT(A) had allowed deduction from the business profits under section 37(1) of the Act. This issue had been previously brushed aside by the TO during the assessment proceedings without any discussion thereof.

Held

In addressing the question related to the impact of section 2(43) of the Act on the connotations of the term "tax" given in section 40(a)(ii) of the Act, the Tribunal referred to the guidance provided in earlier decisions, such as the decision of the Bombay HC in the case of *Lubrizol India Limited v. CIT [(1991) IT Reference No. 19 of 1989 (Bombay HC)]*, wherein it was held that the word "tax" given in section 40(a)(ii) of the Act was used in conjunction with the words "any rate or tax" and had been further qualified as tax levied on or assessed at a proportion of business profits. Further, it was held that if the term "tax" given in section 40(a)(ii) of the Act was to be assigned the meaning given to it in section 2(43) of the Act, the word "any" used before it would become otiose and the further qualification as to the nature of levy would also become meaningless. Thus, the term "tax" given in section 40(a)(ii) of the Act referred to any kind of tax levied on or assessed at a proportion of business profits. The SC in the case of *Smithkline & French India Limited [(Civil Appeal No. 1187-1188 of 1985) (SC)]* noted that all what was mentioned in section 40(a)(ii) of the Act was that it must be a tax levied on business profits and there was no indication that such profits should have been computed in accordance with the provisions of the Act. The Tribunal also took note of a decision in

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the case of Tata Sons (1991) 9 ITR (Tribunal) 154 (Bombay), wherein it was held that the meaning of the expression "tax" should have been understood in the context of section 40(a)(ii) of the Act and the statutory definition given in section 2(43) of the Act could not be applied everywhere on a "one size fits all" basis. Accordingly, it was held that no deduction under section 37(1) of the Act shall be allowed for income tax paid abroad. The judicial precedents relied upon by the taxpayer were distinguished by the Tribunal as follows:

- Reliance Infrastructure Limited *v.* CIT [(2017) IT Reference No. 75 of 1998 (Bombay HC)] was based on peculiar facts and it was not urged by the Revenue that the context in which the term "tax" had been used in section 40(a)(ii) of the Act would require it to mean taxes paid anywhere in the world and not only taxes payable/ paid under the Act.
- The case of *Mastek Limited v. DCIT [ITA No.1821/ Ahmedabad/ 2005, 2274/ Ahmedabad/ 2006 and 2042/ Ahmedabad/2007 (Ahmedabad Bench of ITATl)]* was a per incuriam decision because it had been rendered without taking into account earlier decisions on similar issues. Thus, the ruling in the case of Mastek Limited (*supra*) was not considered as binding on the Tribunal.

Further, the Tribunal stated that the Explanation to a section does not extend the scope of a section but rather explains the said scope. If something was covered by the Explanation, it could not be said that it was not covered by the main provision. Accordingly, it was held by the Tribunal that if taxes, for which relief under section 90/ 91 was available, was covered by the Explanation 1 to section 40(a)(ii) of the Act, they were covered by the scope of section 40(a)(ii) of the Act also.

Takeaways

This is an important decision for resident taxpayers paying taxes outside India; especially as it discusses and considers the differing judicial precedents available on the issue of whether deduction under section 37(1) of the Act shall be available for that portion of income-tax paid abroad, for which relief is not available under section 90/ 91 of the Act, or whether such tax shall come under the purview of the term "tax," as mentioned in section 40(a)(ii) of the Act and be disallowed while computing business profits.

Race circuit used for organising motor racing event in India held to be a fixed place PE of the non-resident

Formula One World Championship Limited. *v.* CIT [Civil Appeal Nos. 3849 to 3851 of 2017 (SC)]

A NR taxpayer had a fixed place PE in India in the form of a motor racing circuit. Accordingly, payments made by the owner of the circuit to the taxpayer for acquiring the right to host, stage and promote a motor racing event in India were in the nature of business income of the taxpayer and liable to be taxed in India.

Facts

- The taxpayer, a UK tax resident company, was the CRH in respect of the motor racing World Championship (Championship). As a result of it being the CRH, the taxpayer was the exclusive nominating body at whose instance, organisers/ promoters were added to the official motor racing calendar.
- The summary of agreements entered into between various parties was as follows:
  - An agreement was entered between the Federation responsible for regulating the Championship and another group company, whereby the Federation had parted with the commercial rights with respect to the Championship in favour of that company.
  - That company entered into a separate agreement with the taxpayer on the same day, transferring the commercial rights in favour of the taxpayer for a period of 100 years.
  - A RPC (first RPC – entered in 2007) was entered into between the taxpayer and the Indian Company, by which the Indian Company was only given the right to **promote** the motor racing event in India (event/ Championship).
  - Thereafter, an OA was entered into between the Federation and the Indian Company, wherein the Indian Company was given the responsibility to **organise** the event.

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- Thereafter, the first RPC was superseded by way of another RPC (second RPC – entered in 2011) that granted the Indian Company rights to host, stage and promote the Event. Another agreement was entered into between the taxpayer and the Indian Company, as per which the Indian Company was permitted to use certain marks and intellectual property belonging to the taxpayer.
- On the day of entering into the second RPC, agreements were signed between the Indian Company and three affiliates of the taxpayer, as per which two of the affiliates were separately granted the circuit rights, mainly media and title sponsorship and the paddock rights. Another affiliate was engaged to generate TV feed.
- A SA was also entered into by the taxpayer with another one of its affiliates on the race day, for provision of various services such as liaison and supervision of other parties at the Event, travel, transport and data support services.

- After entering into the aforesaid agreements, the taxpayer and the Indian Company approached the AAR, for a ruling on the following questions:
  1. Whether the consideration receivable by the taxpayer from the Indian Company in terms of the RPC was in the nature of royalty as per Article 13 of the tax treaty between India and the UK?
  2. Whether the taxpayer had a PE in India in terms of Article 5 of the tax treaty?
  3. Whether any part of the consideration received/ receivable by the taxpayer from the Indian Company was subject to withholding tax in terms of section 195 of the Act?
- The AAR answered the first question by stating that that the consideration paid/ payable by the Indian Company to the taxpayer would amount to royalty under the tax treaty. The second question was answered in favour of the taxpayer, holding that it did not have a PE in India. With respect to the third question, it was held that since the amount received/ receivable by the taxpayer was income in the nature of royalty, the Indian Company was liable to withhold taxes on the same.
- The taxpayer and the Indian Company challenged the AAR ruling on the aspect of royalty by way of a writ petition before the Delhi HC. The Revenue too filed a writ petition before the Delhi HC, challenging the ruling of the AAR on the aspect of PE.
- The Delhi HC reversed the findings of the AAR on both the issues and held that though the amount paid/ payable by the Indian Company would not be treated as royalty, it would be taxable in India as business income as the taxpayer has a fixed place PE in India in the form of motor racing circuit. The Indian Company would be liable to withhold taxes from the payments to be made to the taxpayer under section 195 of the Act (to read the Delhi HC judgement, please click here).
- The taxpayer, the Indian Company and the Revenue challenged the judgement of the Delhi HC before the SC.

Held

- A combined reading of Article 5(1), 5(2) and 5(3) of the tax treaty clearly reveals that only certain forms of establishments are excluded [as mentioned in Article 5(3)], and which would not be considered as PEs. In order to bring any other establishment that was not specifically mentioned, the following twin conditions laid down in Article 5(1) was to be satisfied:
  1. Existence of a fixed place of business; and
  2. Through that place, the business of an enterprise was wholly or partly carried out.

  As far as the first condition was concerned, it was held that the motor racing circuit was undeniably a fixed place from which different races were conducted. Accordingly, the core questions to be examined were whether the place was at the disposal of the taxpayer and whether this was a fixed place of business of the taxpayer.
- For determining whether the motor racing circuit was at the disposal of the taxpayer and whether it had carried out its business therefrom, the entire arrangement between the taxpayer, its affiliates and the Indian Company had to be kept in mind.

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The various agreements could not have been looked into by isolating them from each other. This was essential to determine who was having real and dominant control over the event, which will consequently answer the question of whether the motor racing circuit was at the disposal of the taxpayer or not.

- The SC took note of the fact that on the same day of entering into the second RPC, the Indian Company had given the circuit rights, mainly media and title sponsorship, and the paddock rights to the taxpayer's affiliates. Further, the Indian Company had engaged another affiliate of the taxpayer to generate the TV feed. Furthermore, the taxpayer's affiliate, who had been given the media rights by the Indian Company, had entered into the Title Sponsorship Agreement with the Sponsor more than a month before obtaining the rights from the Indian Company. Additionally, the SA for providing various services in relation to the event on the race day was signed by the taxpayer. The entire arrangement clearly demonstrated that the taxpayer and its affiliates took over and controlled the entire event.
- The physical control of the circuit was with the taxpayer and its affiliates from the inception of the Event until its conclusion. The omnipresence of the taxpayer and its stamp over the event was clear and firm. It was an undisputed fact that the race was physically conducted in India and that the income from this race was generated in India. Thus, common sense and plain thinking about the entire situation would lead to the conclusion that the taxpayer had made its earnings in India through the said track over which it had complete control during the period of race.
- The SC took cognisance of the Revenue's argument that the duration of the second RPC was five years, which was further extendable by another five years. Even the examination of the said contract leads to the same conclusion.
- Accordingly, the fact that the taxpayer had full access to the motor racing circuit through its personnel, the number of days for which the access was there would not make any difference.
- Coming to the question of whether the taxpayer had carried out business or commercial activity from the circuit, it was noted that all the possible commercial rights, including advertisement, media rights and even the right to sell paddock seats were assumed by the taxpayer and its affiliates. Thus, as a part of its business, the taxpayer as well its affiliates had undertaken commercial activities in India.
- Mere construction of the motor racing circuit by the Indian Company at its own expense was of no consequence. The ownership or organising of other events by the Indian Company was immaterial. It is difficult to accept that the taxpayer had no role in conducting the event and its role ended with granting permission to host the event. The argument that the motor racing circuit was not under the control and at the disposal of the taxpayer was rejected.
- As CRH of these events, the taxpayer was in the business of exploiting these rights, including intellectual property rights; however, these became possible only with the actual conduct of these races and active participation of the taxpayer in the said races, with access and control over the circuit.
- The test laid down by Andhra Pradesh HC in the case of *CIT v. Vishakhapatnam Port Trust [(1983) 144 ITR 146 (Andhra Pradesh HC)]* with respect to the requirement of there being a virtual projection of the foreign enterprise on Indian soil was satisfied in the instant case, along with the presence of the three characteristics for constitution of fixed place PE, namely, stability, productivity and dependence.
- Since payments made by the Indian company to the taxpayer under the RPC were business income of the taxpayer's PE in the form of motor racing circuit, the Indian Company was bound to withhold taxes therefrom under section 195 of the Act.
- However, only that portion of the taxpayer's income that was attributable to the said PE could have been treated as its income in India and from which, taxes were required withheld by the Indian company. The decision in relation to how much of the income was attributable to the said PE and whether penalty was to be imposed upon the Indian Company for its failure to withhold taxes was left for the TO to quantify.

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- With respect to the powers of the Delhi HC to revisit the AAR ruling on the issue of fixed place PE, it was held that the Indian Company and taxpayer themselves had approached the Delhi HC, challenging the AAR's ruling on certain issues. The Delhi HC had examined the legal issues and facts while delivering its judgement, and accordingly, the contentions of the taxpayer and the Indian Company in this regard were unacceptable.

Takeaways

This decision has the potential to stir a debate on the relevance of duration test to determine whether a foreign entity has a fixed place PE in India.

A holistic view of the entire commercial arrangement would need to be undertaken before concluding on the existence of a PE or otherwise.

Fee for included services

Implementation/ maintenance services taxable as FIS, being ancillary and subsidiary to the licensed software

i2 Technologies US Inc. *v.* DDIT [IT (TP) No. 1303/ Bangalore/ 2011 and 226/ Bangalore/ 2014 (Bangalore Bench of ITAT)]

Implementation/ consultancy/ maintenance services for the effective use of the software were taxable as "FIS" under the India-USA tax treaty, being ancillary and subsidiary to the licensing of the software.

Facts

- The taxpayer, a non-resident foreign company, was incorporated in the USA and was involved in the supply of software to Indian customers. Further, implementation, consulting, maintenance and other technical services in connection with software were also supplied. During AY 2008-09, the company earned the following income from its customers in India:
  - Sale of software licenses
  - Implementation and consulting
  - Annual maintenance fees
  - Training fee
  - Partnership fees
- The taxpayer filed the return of income offering only the training fees as taxable income in India.
- The subject matter of appeal was the taxability of sale of software licenses as royalty and revenue from implementation, consulting and annual maintenance of software as FIS.

Held

The payment for licensed software qualifies as royalty as per the provisions of Article 12(3) of the India-US tax treaty. In relation to taxability of income from licensed software as royalty the Tribunal has followed the jurisdictional HC's pronouncement in the case of *CIT v. Samsung Electronics Co. Limited [ITA No. 2808 of 2005 (Karnataka HC)]*. The implementation and consultancy services were provided for the effective use of licensed software. The terms of the agreement, between the taxpayer and the customers stated that the taxpayer had no right to use any information, wherein the customers had the right to intellectual property. The maintenance and consultancy services for the software were the customer's specific requirements rendered for the purposes of effective use of the existing software. These services were ancillary and subsidiary to the software supplied, as per Article 12(3) and without these services, the software could not be used in an efficient way. Implementation, consulting and maintenance was incidental to the sale of software licenses and fall within the purview of Article 12(4)(a) of the tax treaty and hence, taxable in India.

Takeaways

The Bangalore Tribunal has held that the implementation, consultation and maintenance services for the effective usage of software would be taxable as FIS under Article 12(4)(a) of India-USA tax treaty.

If the sale of software were held to be taxable as Royalty, the services ancillary and subsidiary to the usage of software would constitute FIS under India-USA tax treaty.

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The Bangalore Tribunal in this case has held that the payment made for software is taxable as Royalty, relying on the jurisdictional HC's decision in the case of Samsung Electronics Co. Limited (supra). However, a divergent view has been taken by another HC. Accordingly, taxability of software payments will need be evaluated on case-to-case basis.

ICDS

Delhi HC decides on constitutional validity of amended section 145(2) and notified Income Computation and Disclosure Standards

The Chamber of Tax Consultants & ANR *v.* Union of India & Ors [W.P (C) No. 5595/ 2017 (Delhi HC)]

The powers conferred in section 145(2) of the Act have to be read down to restrict the power of the CG to notify ICDS that sought to override binding judicial precedents or provisions of the Act. The HC considered the amendment to section 145(2) as ultra vires to the Act and Article 141 read with Article 144 and 265 of the Constitution of India. The power to enact a validation law was an essential legislative power that could be exercised in the context of the Act, only by the parliament and not by the executive.

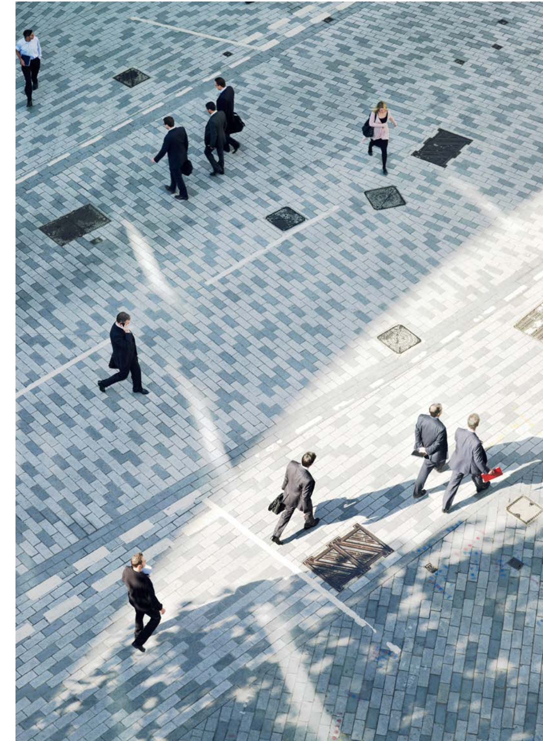
Background

Section 145 of the Act was amended by the Finance Act (No. 2) 2014, empowering the CG to notify ICDS. Accordingly, the CBDT notified 10 ICDS via Notification No. 87/ 2016 dated 29 September, 2016. It was provided that the provisions of the Act and the Rules would prevail over the ICDS provisions. The CBDT issued a Circular No. 10 of 2017 dated 23 March, 2017, which resulted in ICDS provisions prevailing over judicial precedents, which may be to the contrary. A petition was filed before the Delhi HC challenging the constitutional validity of the notified ICDS.

Held

Delegation of essential legislative functions

- Whether there was a binding judicial precedent, by virtue of Articles 141 and 144 of the Constitution, it is not open to the executive to override it unless there is an amendment to the Act by way of a validation law.
- In case the notified ICDS sought to alter the system of accounting or tax treatment to a particular transaction, it would require the legislature to step in to amend the Act to incorporate such change.
- The amended section 145(2) of the Act has to be read down to restrict power to notify ICDS that sought to override binding judicial precedents or provisions of the Act. The power to enact validation law was to be exercised only by the Parliament and not by the executive. If the amended section 145(2) of the Act were not so read down, it would have been ultra vires the Act and Article 141 read with Article 144 and 265 of the Constitution.



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Excessive delegation of legislative powers

The HC considered it necessary to look at each of the ICDS that was contrary or sought to overcome binding judicial precedents and held as follows:

ICDS No.	Name of ICDS	ICDS provision	HC order
I	Accounting policies	The concept of prudence, which was present in the earlier AS – 1, has been completely done away with. ICDS - 1 stipulates that prudence is not to be followed unless specified under the provisions of any other ICDS.	Concept of prudence is embedded in section 37(1) of the Act, which allows deduction in respect of expenses "laid out" or "expended" for the purpose of business. To this extent, the provisions of ICDS, are contrary to the provisions of the Act and the principles laid down in binding judicial precedents: CIT *v.* Triveni Engineering & Industries Limited ITA No. 346 of 2009 (Delhi HC)], CIT *v.* Advance Construction Co. (P) Limited [IT Reference No. 175 of 1991 (Gujarat HC)], and are therefore, unsustainable in law.
II	Valuation of inventories	Valuation of inventory in case of dissolution of a partnership firm has to be on net realisable value. No distinction whether the business is continued or discontinued after dissolution.	The provisions will lead to taxing notional income and are contrary to the decision in Shakti Trading Co *v.* CIT [Civil Appeal No. 3818 of 1999 (SC)]. Failing to acknowledge the valuation of inventory at market value upon settlement of accounts of the outgoing partner is distinct from valuation of the inventory of the business, which is continuing. ICDS II is held to be *ultra vires* the Act and struck down as such.

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ICDS No.	Name of ICDS	ICDS provision	HC order
III	Construction contracts	Retention money Retention money to be part of revenue, assessable to tax on proportionate computation method, also clarified in Question No. 11 of Circular No. 10. Set off of incidental income The ICDS does not allow reduction of incidental income from borrowing cost.	Retention money The treatment of retention money to be determined as per the terms of the contract on case-to-case basis, by applying the settled principles of accrual of income. It is upheld in various judicial precedents [CIT *v.* Simplex Concrete Piles India (P) Limited [IT Reference No. 67 of 1979 (Calcutta HC), CIT *v.* P&C Constructions P Limited [Tax Case Appeal No. 577 to 578 of 2009 (Madras HC)], Amarshiv Construction P Limited *v.* DCIT [Tax Appeal No. 554 & 555 of 2003, 1045 & 1420 of 2005, 959 & 1093 of 2006, 1165 2007, 1348 & 1670 of 2008, 1182 of 2009 and 1154 of 2011 (Gujarat HC), DIT *v.* Ballast Nedam International [Tax Appeal No. 145 of 2003 (Gujarat HC)], CIT *v.* State Trading Corporation [IT Reference No. 351 of 1979 (Delhi HC)] that retention money does not accrue until and unless the defect liability period is over and it is certified that no liability is attached further. Taxing the amount, the receipt of which is uncertain/ conditional, is contrary to the settled position. Set off of incidental income The ICDS provisions are contrary to the decision of the SC in CIT *v.* Bokaro Steel Limited [Civil Appeal No 2544-2545 of 1988(SC)], wherein it was held that if the amount received is inextricably linked with the setting up of plant, the same will be reduced from the cost of asset. To the extent explained above, ICDS III is *ultra vires* and struck down as such.

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ICDS No.	Name of ICDS	ICDS provision	HC order
IV	Revenue recognition	Export incentive Recognise income from export incentive in the year of making claim, if there is "reasonable certainty" of its ultimate collection. Revenue recognition method The ICDS prescribes only one method, i.e., the percentage completion method for computing revenue from service contracts. Interest income Interest income to be offered to tax on time basis and corresponding deduction can be claimed under section 36(1)(vii) of the Act. The provision is in line with the amendment by the Finance Act, 2015 under section 36 of the Act.	Export incentive Contrary to the decision of the SC in CIT *v.* Excel Industries [Civil Appeal Nos. 5195 of 2011 and 125, 9100 & 9101 of 2013 (SC)], wherein it was held that the right to receive accrues in the year in which the claim is accepted by the government. Therefore, held to be ultra vires the Act and struck down as such. Revenue recognition method The proportionate completion method and the contract completion method have been recognised as valid methods of accounting under the mercantile system of accounting by the SC in the case of CIT *v.* Bilhari Investment Private Limited [Civil Appeal No. 1625 to 1632 of 2008(SC)].Therefore, to the extent that the ICDS permits only one of the methods, it is held to be *ultra vires* the Act and struck down as such. Interest income This is to create a mechanism of tracking unrecognised interest amounts for future taxability and is in line with the amended provisions of the Act. Para 8 has been held to be valid.
VI	Effects of changes in foreign exchange rates	Marked to market loss/ gain in case of foreign currency derivatives, held for trading or speculation purposes, not to be allowed.	Disallowance of marked to market gain/ loss is contrary to the ratio laid down by the SC in Sutlej Cotton Mills Limited *v.* CIT [Civil Appeal No. 1847 and 1848 of 1972 (SC)]. Therefore, it is held to be ultra vires the Act and struck down as such.
VII	Government grants	Recognition of government grants cannot be deferred beyond actual receipt.	Income may have to be recognised on receipt basis, which may not have accrued. This position is contrary to the accrual system of accounting and is held to be ultra vires and struck down as such.
VIII	Securities	Entities on which the Reserve Bank of India regulations are not applicable, are required to value securities category wise and not on individual basis.	Such treatment is contrary to accounting prescribed by AS, leading to the requirement of maintaining separate books of accounts for tax purposes. The change cannot be effectuated without a corresponding amendment to the Act. To that extent, it is held as *ultra vires*.

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Constitutional validity of amended section 145(2) of the Act and the consequential ICDS and circular

The CBDT is meant to clarify the law by exercising the powers under section 119 of the Act and not to change it. Some of the ICDS mandate the applicability of accounting principles contrary to the provisions of the Act, for the purpose of computation of income.

In order to preserve its constitutionality, section 145 (2) of the Act as amended is required to and is hereby read down to restrict the power of the CG to notify ICDS that sought to override binding judicial proceedings or provisions of the Act.

Takeaways

The Delhi HC has reaffirmed that the ICDS provisions cannot overrule the provisions of the Act, the Rules and the judicial precedents interpreting the provisions of the Act. The interpretations laid down by various judicial precedents would prevail and will not be affected by ICDS.

Given the above, the taxpayers will have to decide the positions to be taken in the tax returns, which are yet to be filed and whether a revision of return is necessitated for the returns already filed. Amongst other things, the possibility of effects of this decision being subsequently modified, any applicable interest liability, the limitation period to revise tax returns, etc., may need to be considered.

Income

Retention money is not taxable as "income," under both normal provisions and MAT regime

ITA No. 100/ Kolkata/ 2011 (Kolkata Bench of ITAT)

Company engaged in executing turnkey contracts, retention money was not income under the normal provisions of the Act and retention money, although credited to the profit and loss account, was to be excluded while computing book profits under MAT regime as stipulated under section 115JB of the Act.

Facts

The taxpayer was a company engaged in the business of manufacture and sale of metallurgical machinery, materials handling and conveying plant/ machinery/ spares and coal washing plant on a turnkey contract basis. Under the terms of the turnkey contracts, the taxpayer's customers retained a certain percentage of the value of contract until the successful trial run and final acceptance by the customer. The taxpayer credited the said retention money to its profit and loss account, as per the mercantile system of accounting followed by the taxpayer. During the year under consideration, the taxpayer was liable to tax under the MAT regime. The taxpayer claimed that its right over the retention money was contingent until acceptance by the customer. Therefore, this amount could not be considered as income under the normal provisions of the Act. Furthermore, the same should be excluded while computing the book profit under the MAT regime. The CIT(A) accepted the taxpayer's contentions, stating that the retention money had not accrued to it and could not be regarded as income. The CIT(A) further held that the MAT could not be levied on notional income that had not accrued to the taxpayer. Aggrieved by the CIT(A)'s order, the Revenue preferred an appeal before the Tribunal.

Held

With respect to computation under normal provisions, the taxpayer's reliance on the Calcutta HC's decision in the case of *CIT v. Simplex Concrete Piles India (P.) Limited [IT Reference No. 67 of 1979 (Calcutta HC)]* was appropriate. The retention money could not be regarded as the taxpayer's income, as it would become legally due to the taxpayer only on successful completion of the contract. With respect to MAT, the Tribunal held that levying MAT on receipts that were not in the nature of income would defeat two fundamental principles, *viz.*, it would levy tax on a receipt that was not in nature of income at all, and second, it would not result in arriving at real working results of the company. This principle was also upheld by a co-ordinate bench in the case of *DCIT v. Binani Industries [ITA No. 144/ Kolkata/ 2013 (Kolkata Bench of ITAT)]*. Amounts taxable as income, but exempt under a specific provision of the Act, were to be included while computing book profits, as held by the Special Bench of the Tribunal in the case of *Rain Commodities Limited v. DCIT [IT Appeal No. 673 of 2009 (Hyderabad Bench of ITAT)]*. However, where a receipt was not in the nature of income at all, it could not be

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included while computing book profits under the MAT regime. Therefore, the retention money could not be regarded as income even for computing book profits under MAT regime, though it was credited to the profit and loss account.

Takeaways

This ruling is welcome, as it supports the position that notional income should not be subjected to tax under the MAT regime irrespective of the fact that the same is credited to the profit and loss account. Furthermore, this ruling reaffirms the principle that unless the taxpayer has a right to receive it, the amount cannot be taxed as income. The right to receive retention money arises on satisfaction of the obligations under the contract. Therefore, retention money does not partake the character of income.

It is important to note that ICDS – III on construction contracts, applicable from FY 2016-17, provide that retention money is to be considered as income. The Delhi HC decision in the case of The Chamber of Tax Consultants & Anr. (supra) on ICDS may also be considered.

MAT

Book profit under section 115JB should be computed without considering the provisions of section 14A read with Rule 8D; For the purpose of computing disallowance under section 14A read with Rule 8D, only those investments to be considered for computing average value of investments that yield exempt income during the year

ACIT *v.* Vireet Investments Private Limited [ITA No. 502/ Delhi/ 2012 (Delhi Bench of ITAT)]

Computation of book profit under section 115JB (MAT provisions) of the Act was to be made without considering the disallowance under section 14A read with Rule 8D of the Rules, and for the purpose of computing disallowance under section 14A read with Rule 8D, only those investments were to be considered for computing the average value of investments that yielded exempt income during the year.

Facts

The taxpayer, in its return of income filed for AY 2008-09, had claimed certain income as exempt, which comprised of exempt dividends/ interest income (comprising of 24.94% of total exempt income) and long-term capital gains (comprising balance 75.06% of the exempt income). In the computation prepared under normal provisions of the Act, the taxpayer itself had made disallowance in respect of section 14A being 0.5% of average value of investments yielding tax-exempt income. The TO, computed the disallowance under section 14A by applying the ratio of total expenses to the exempt income/ taxable income and made additions under the normal provisions as well as in computing book profit under section 115JB of the Act. On appeal by the taxpayer, the first appellate authority held that the disallowance under section 14A was restricted to 0.5% of average value of total investments, thereby negating the taxpayer's contention that only those investments that yielded tax free income during the year should be considered. For computation of book profit, the addition was restricted to 24.94% of the amount derived as above. Both the Revenue and the taxpayer aggrieved with the order of the first appellate authority filed appeals/ cross objections before the Tribunal. The President had constituted a SB to adjudicate the issue arising from the appeals.

Held

The SB noted that the Jurisdictional Delhi HC, in two different cases, had taken a contrary view on the issue of applicability of provisions of section 14A read with Rule 8D in the computation of book profit under the MAT provisions. The SC in the case of *CIT v. Vegetable Products Limited [Civil Appeal No. 497 of 1970 (SC)]* had held that if two reasonable constructions of a taxing provision were possible, the construction that favours the taxpayer must be adopted. Under the circumstances, the SB, followed the later decision of the Delhi HC in the case of Pr. *CIT v. Bhushan Steel Limited [ITA No. 593 and 594/ Delhi/ 2015 (Delhi HC)]*, wherein it was held that the computation under the MAT provisions was to be made without resorting to the computation as contemplated under section 14A read with Rule 8D and decided the matter in favour of the taxpayer. On the second issue, whether total investments as appearing in the balance sheet needs to be considered or only those investments that yielded exempt income during the year, the SB held that the decision of the jurisdictional HC was directly on the point in dispute, whereas the decision of the SC in the case of

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Rajendra Prasad Moody relied upon by the Revenue had been rendered in the context of section 57(iii), the applicability of which had been ruled out by the Delhi HC in the case of *Cheminvest Limited v. CIT [ITA No. 749 of 2015 (Delhi HC)]*. While computing disallowance under section 14A read with Rule 8D, only those investments should have been considered for computing average value of investments that yielded exempt income during the year.

Takeaways

This is a welcome decision by the SB, wherein it has addressed the following issues:

- *The disallowance made by the TO under section 14A read with Rule 8D under normal provisions should not be added in the computation of book profit under MAT provisions.*
- *While computing disallowance under section 14A read with Rule 8D, only those investments should be considered for computing the average value of investments that yield exempt income during the year.*

Index benefit deductible in computation of book profit, relating to capital gain exempt under section 10(38), for computation of MAT

Karnataka State Industrial Infrastructure Development Corporation Limited *v.* DCIT [ITA Nos. 1659, 1660 & 1861, 1862/ Bangalore/ 2013 (Bangalore Bench of ITAT)]

The Tribunal held that held that the taxpayer is entitled to the benefit of indexation while computing long-term capital gains that are to be considered for the purpose of computing MAT liability under section 115JB.

Facts

The taxpayer is engaged in the business of rendering financial assistance to set up industries in the State of Karnataka. The taxpayer considered long-term capital gains arrived at by reducing the indexed cost of acquisition for computing tax liability under section 115JB of the Act; however, the TO denied the claim.

Held

The Tribunal observed that the term "any income" used in section 10(38) of the Act refers to only the amount of long-term capital gains computed under section 48 of the Act. Thus, the benefit of indexation of cost of acquisition should be allowed to the taxpayer while computing long-term capital gain for the purpose of section 115JB of the Act.

Therefore, the Tribunal held that the taxpayer is entitled to the benefit of indexation while calculating long-term capital gains that are to be considered for the purpose of computing tax liability under section 115JB.

Takeaways

The Tribunal has considered proviso to section 10(38) for concluding that the amount to be included in book profit under section 115JB should be same as was exempted under section 10(38). The SC in the case of Apollo Tyres Limited held that the TO does not have the jurisdiction to go behind the net profit shown in the profit and loss account except to the extent provided in the Explanation to section 115J (now section 115JB). This decision now provides an additional dimension that the TO should also consider specific adjustment in relation to section 115JB provided under other provisions of the Act.

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Penalty

Notice initiating penalty under section 271(1)(c) of the Act should clearly and explicitly specify the reasons for levying the penalty

Pr CIT *v.* Baisetty Revathi [ITTA No. 684 of 2016 (Andhra Pradesh HC)]

It is a prerequisite for the TO to specify the grounds, i.e., concealment of income or furnishing of inaccurate particulars under which penalty proceedings were initiated. In the absence of a clear and unambiguous finding, the penalty order should have been unsustainable in law.

Facts

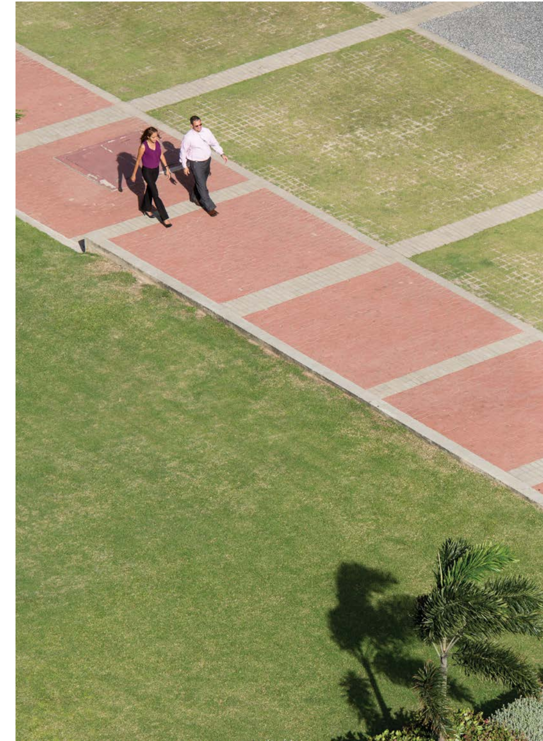
The taxpayer was an Indian resident, who derived income from house property and interest on bank deposits during the AY 2010-11 and reported a loss in its return of income. While framing the assessment under section 143(3) of the Act, the TO made additions/ disallowances on account of excess interest claimed and unexplained cash deposits and reduced the loss claimed by the taxpayer. Further, a show-cause notice under section 271(1)(c) of the Act was issued initiating the penalty proceedings against the taxpayer. In response, the taxpayer contended that penalty should not have been levied as disallowance of interest expenditure was on an agreed basis and for requirement to produce strict proof of evidence in respect to unexplained cash credit. The taxpayer had accepted the order to buy peace and avoid protracted litigation. The TO rejected the taxpayer's explanation and levied minimum penalty for concealment/ furnishing of inaccurate particulars of income. The matter was carried to the HC by the revenue authority as the Tribunal had ruled in favour of the taxpayer.

Held

In the penalty proceedings initiated under section 271(1)(c) of the Act, the specific ground that forms the basis thereof has to be spelt out in clear and unambiguous manner. The HC observed that concealment of income and furnishing inaccurate particulars of income were two different acts. While concealment was an act of omission, furnishing inaccurate particulars was an act of commission. The consequences of the above acts being penal in nature, the charge must be unambiguous so that the taxpayer was provided a fair opportunity to defend its case. In the absence of a clear finding, no relief could be allowed to the Revenue that the taxpayer did not challenge the validity of the notice earlier.

Takeaways

This decision reaffirmed that positions upheld by the other HCs that the revenue authorities should clearly specify the basis for initiation of penalty in the notice itself. Issuance of printed form without specifying the particular ground will not satisfy the requirement of law.



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Reopening assessments

Delhi HC lays down guidelines for reopening of assessment proceedings

Sabh Infrastructure Limited *v.* ACIT [Writ Petition No. 1357 of 2016 (Delhi HC)]

The Delhi HC has laid down guidelines on the essentials for determining "reasons to believe" in reopening an assessment. The court held that reasons to believe have to be self-explanatory and could not be thereafter supported by extraneous material. In addition, the reasons could not be based on mere surmise and conjecture. There have to be reasons to believe and not reasons to suspect that income has escaped assessment.

Facts

The taxpayer was a private limited company engaged in the business of real estate and property development. During the course of assessment proceedings, the TO sought details of share application money received, if any, during the year. In response, the taxpayer disclosed the details of five companies from whom share application money was received (hereinafter referred to as the "payers") and filed additional details such as confirmations from the payers along with PAN ITR and audited financial statements. The assessment was completed by the TO with no further discussion in respect of share application money. After the expiry of four years, a notice for reopening the assessment was issued to the taxpayer on the basis of a letter received from the Investigation Wing of the Tax Department, which mentioned that on the basis of information received from another Investigation jurisdiction, the payers were "Paper Companies." The taxpayer's objections (both on jurisdiction and merits) to such reasons were rejected by the TO.

Held

The power to reopen the assessment after four years could be exercised only if there was a failure to disclose fully and truly all material facts and information by the taxpayer. The reasons to believe should have been self-explanatory and could not be supported by any extraneous material. The order disposing objections or any counter affidavit filed during the writ proceedings before the court could not be substituted for "reasons to believe." No new material had been found or mentioned in the "reasons to believe," which were not contained in the information provided by the taxpayer before the conclusion of assessment proceedings. The reasons for reopening did not mention as to what facts or information was not disclosed by the taxpayer. This was vital information and goes to the root of the matter. The reopening of the assessment had to be on a strong and sound legal basis. Mere conjecture or surmise was not sufficient. There have to be "reasons to believe" and not merely reasons to suspect that income has escaped assessment. In case the Revenue had any basis to show that the "primary facts" were incorrect, the same ought to have been set out in the reasons to believe. In view of the above, the notice issued for reopening the assessment along with the order disposing the objections to the notice issued was quashed. Further, the Delhi HC has issued the following guidelines that the Revenue Authorities should adhere to when reopening assessments:

- The copy of the standard form used by the TO for obtaining the approval of the Superior Officer (containing the comment or endorsement of the Superior) should be provided to the taxpayer.
- The reasons to believe should contain all the reasons and grounds available for reopening the assessment and should also paraphrase any investigation report, which may form the basis of reason along with the enquiry conducted by the TO and the conclusion of such enquiry.
- Where the reasons refer to another document such as a letter or report, such document/ relevant extract should be enclosed along with the reason.
- Disposing the objections to the reopening of the assessment is a *quasi-judicial* function, and accordingly, the order should dispose each objection along with the proper reasons for the conclusion. No attempt should be made to add to the reasons for reopening of assessment beyond what has already been disclosed.

Takeaways

The decision of the Delhi HC is a welcome step as it lays down the information and documentation to be supplied to the taxpayer for reopening of an assessment.

These guidelines should help reduce reopening of assessments in a routine manner and consequent litigation.

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Royalty

Payment to telecom operators towards connectivity charges without right to use "equipment' or 'process" is not taxable as royalty; retrospective amendment cannot fix liability to withhold tax on past payments

Gupshup Technology India (P) Limited *v.* DCIT (TDS) [ITA No. 848/ Mumbai/ 2015 and ITA No. 850/ Mumbai/ 2015 (Mumbai Bench of ITAT)]

Payment for standard connectivity charges could not be considered as "royalty," as the deductor had neither any access/ control over the equipment nor was there any usage of any process/ equipment, which could be said to have been made available to the deductor. A deductor could not be held liable for withholding tax on past payments in view of retrospective amendment, as the law could not compel a person to perform the impossible.

Facts

The deductor was a company engaged in the business of providing mobile message services and operating SMS messaging platform to enable users to create mobile communities and broadcast bulk messages to such communities. The deductor engaged a telecom operator (an Indian company) to send bulk messages and made payment in the nature of SMPP connectivity charges to such telecom operator. The telecom operator created customer's account and provided IP addresses, username and password to the deductor. The deductor then integrated such details in its system for transmitting bulk messages to the telecom operator without any access or control over the SMPP connectivity facility, telecom operator's server or network. The deductor withheld tax under section 194C of the Act while making payment of SMPP connectivity charges to the telecom operator, treating the arrangement as a works contract. The tax authorities, while issuing the certificate under section 197 of the Act to the telecom operator, treated the payment for SMPP connectivity charges liable to withholding tax under section 194C of the Act *(although a certificate had been issued to the telecom operator under section 197 of the Act; however, this fact has not been discussed by the Tribunal while pronouncing the order)*. The TO held that the payment for SMPP connectivity charges was "royalty" as defined under section 9(1)(vi) of the Act, and that tax should have been withheld under section 194J instead of 194C of the Act. Accordingly, the TO held the deductor to be a taxpayer in default under section 201(1) of the Act, and raised demand on account of tax and interest. The CIT (A) confirmed the TO's stand. The CIT(A) held that transmission of bulk SMS was through a "process," which was covered within the category and ambit of definition of royalty as provided in section 9(1)(vi) of the Act, specifically in light of the retrospective amendment brought by Finance Act, 2012. *[Explanation 6 to section 9(1)(vi) of the Act inserted by Finance Act, 2012 w.r.e.f. 01 June, 1976 provides that "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret.]* Aggrieved, the deductor filed an appeal before the Tribunal.

Held

The payment for standard connectivity charges could not be considered as "royalty," as the deductor neither had any access/ control over the equipment nor was there any use of any process/ equipment that could be said to have been made available to the deductor. Further, the concept of "use" or "right to use" any equipment alludes to the concept of leasing, which was admittedly not there in this case. The agreement between the deductor and the telecom operator was in the nature of a works contract, for which the deductor had rightly withheld tax under section 194C of the Act. The Tribunal, relying on the ruling of the coordinate bench in the case of *Channel Guide India Limited v. ACIT [(2012) IT Appeal No. 579 and 1221 of 2006 (Mumbai Bench of ITAT)]*, emphasised the legal maxim "*lex non cogit ad impossplia*" that is, the law cannot compel a person to perform the impossible. Accordingly, a deductor could not be held liable for not withholding tax on past payments in view of retrospective amendment, brought from a later date.

Takeaways

This decision is welcome, as it has analysed the definition of "royalty" under the provisions of the Act and has concluded that the payments of connectivity charges to telecom operations would be subject to withholding tax under

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section 194C of the Act. The Tribunal has emphasised the aspect of actual use of "equipment" or right to use the "process" to render the payment as royalty. Further, the ruling has reiterated that the deductors cannot be compelled to withhold tax in view of retrospective amendments brought at a subsequent date.

Liability to withhold tax on royalty paid to an Italian resident shall arise at the point of its payment rather than at the time of its recording in the books of accounts of the Indian taxpayer

Saira Asia Interiors Private Limited *v.* ITO [ITA No. 673/ Ahmedabad/ 2014 (Ahmedabad Bench of ITAT)]

Based on the India-Italy tax treaty, the liability to withhold tax on royalty shall arise at the time of actual payment and not at the time of recording the entry in the books of accounts of the Indian taxpayer. Further, the aforesaid position will not change even though the taxpayer has withheld tax as per the beneficial rate provided under the Act.

Facts

The taxpayer was an Indian company liable to make a royalty payment to an Italian resident on account of technical know-how. The liability was recorded in the books of accounts of the taxpayer during the FY under consideration; however, it was only paid in the immediately subsequent FY. The tax on such payment was withheld and deposited with the government at the time of making the payment to the Italian resident. The Revenue raised a demand for interest under section 201(1A) of the Act on the taxpayer by treating the due date for depositing tax as seven days from the end of the month in which the amount was credited in the books of accounts. Further, the CIT(A) rejected the appeal on the basis that the provisions of the tax treaty are not relevant in determining the withholding tax liability of the taxpayer. Furthermore, the Act specifically casts an obligation on the taxpayer to withhold tax at the time of credit of liability in the books of accounts or its actual payment, whichever was earlier. Accordingly, it was held that the taxpayer delayed in withholding tax and the levy of interest was justified. Aggrieved by the order of the CIT(A), the taxpayer filed an appeal before the Tribunal.

Held

The liability to withhold tax under section 195 of the Act is a vicarious liability and such liability on the taxpayer is dependent upon the fact whether such income was taxable in the hands of the NR. Reliance was placed on the decision of the SC in the case of *GE Technology India v. CIT [Civil Appeal No. 7541-7778 of 2010 (SC)]* in this regard. The income was taxable in the hands of the NR in the year in which the payment was made by the taxpayer. Consequently, the liability of the taxpayer to withhold tax under section 195 of the Act on royalty payment arises in the year in which such payment was made and not in the year in which the amount was credited in the books of accounts of the taxpayer. Reliance was placed on a decision rendered by the Mumbai Tribunal in the case of *National Organic Chemical Industries Limited v. DCIT [IT Appeal No. 2723-2724 of 1998 (Mumbai Bench of ITAT)]* in this regard. The taxpayer was correct in applying the beneficial withholding tax rate of 10% as prescribed in the Act. However, adoption of the beneficial withholding tax rate under the Act would not imply that the taxpayer was liable to withhold tax on the royalty income in the year in which such income was credited in its books of accounts as prescribed in the Act.

Takeaways

This is an important decision for resident taxpayers liable for withholding tax on payments of royalties and FTS made to non-residents, which are taxable on a payment basis under the respective tax treaties. This principle may even be applied to payments other than royalties and FTS, which are taxable on a payment basis under the respective tax treaties.

Payment for purchase of software for trading purposes is not royalty in absence of right to use/ modify the software

CIT *v.* Vinzas Solutions India Private Limited [Tax Case Appeal No. 861 of 2016 (Madras HC)]

Consideration paid for the purchase of computer software would not fall within the ambit of "royalty" as defined under section 9(1)(vi) of the Act.

Facts

The taxpayer was a company engaged in the business of trading in software, software maintenance and provision of manpower

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services. The taxpayer purchases computer software from various Indian companies and re-sells it in the open market to end users, acting as a distributor or trader. The software was customised to the customer's requirements, and the taxpayer had no right to modify or use it. During the assessment proceedings, the TO alleged that the payment for the purchase of software was royalty, in view of Explanations 4 and 5 to section 9(i)(vi) of the Act [Explanation 4 to section 9(i)(vi) of the Act inserted by the Finance Act, 2012 w.r.e.f. 01 June, 1976 provides that *"for the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred."*]. Accordingly, the TO disallowed the amount paid for purchase of software on account of non-withholding of taxes, by invoking provisions of section 40(a)(i) of the Act. The CIT(A) upheld the TO's order, stating that Explanations 4 and 5 to section 9(i)(vi) were clarificatory in nature and intended to bring transfer of rights along with the software under "royalty." On further appeal, the Tribunal decided the issue in the taxpayer's favour by placing reliance on the Delhi HC decision in the case of Principal *CIT v. M. Tech India Private Limited [ITA No. 890/ 2015 (Delhi HC)]*. Aggrieved by the Tribunal's order, the Revenue preferred an appeal before the HC.

Held

The transaction under consideration was one of purchase and sale of a product, and section 9(1)(vi) of the Act, dealing with the definition of "royalty" did not apply to such transactions. The HC referred to its earlier decision in the case of *CIT v. South India Flour Mills [Tax Case No. 157 and 158 of 1990 (Madras HC)]* to highlight that the term "royalty" connoted the amount received by a person (having exclusive right over a thing) for allowing another to make use of that thing (either physical or intellectual). Reliance was also placed on the definition of "royalty" in a legal encyclopaedia [*The Corpus Juris Secundum*]. Section 9(i)(vi) of the Act was attracted on the transaction involving transfer of "copyright," and not "copyrighted article." Explanation 4 to section 9(i) (vi) of the Act could not expand the realm of this section.

Takeaways

This is a welcome ruling, providing certainty for software traders, re-asserting the difference between "copyright" and "copyrighted article." The judgment also emphasises that an Explanation must be read in the context of the provision of the main section, and it cannot expand the ambit of the section.

Payment made for limited right to use of copyrighted information not taxable as royalty

Mckinsey Knowledge Centre India Private Limited *v.* ITO [ITA No. 407/ Delhi/ 2013 (Delhi Bench of ITAT)]

In absence of transfer of any or all rights in respect of copyright of literary work, the payment could not be taxed in India as royalty as defined under the Act read with India Singapore tax treaty. The Tribunal has highlighted that the payment was made towards use of "copyrighted material" rather than the use of "copyright" causing the payment to fall out of the definition of royalty. Further, the Tribunal has observed that the payment made by the taxpayer was for merely accessing databases, without any license for commercial exploitation of the copyright with regard to the database maintained by the recipient of the payment.

Facts

In this case, the taxpayer was engaged in the business of export of computer software (including data processing), rendering of support services and acting as a back office for its parent entity. For the purpose of its business, the taxpayer obtained access to database maintained by another entity, T Limited, a company incorporated in Singapore and a tax resident therein, for a consideration *(T Limited neither rendered any services in India nor had any place of business in India)*. The database contained general information on share price, market, commodity price, currency exchange rates, etc., and was publically available. As per the terms of agreement, payment was merely for accessing database and did not have any license for commercial exploitation of copyright with respect to database maintained and owned exclusively by T Limited. Accordingly, the taxpayer filed an application under section 195 of the Act with the TO. The TO rejected the application of the taxpayer and directed

to withhold tax at 10% as per the India-Singapore tax treaty, treating the payment as royalty/ FTS as per section 9(1)(vi) of the Act. On first appeal, the CIT(A) upheld the order of TO.

Held

In order to qualify a payment as royalty under Article 12 of the tax treaty, it was necessary to establish that there was a transfer of all or any rights in respect of copyright of literary work. From a perusal of the agreement between the taxpayer and T Limited, the Tribunal noted that the database was merely a compilation of general information relating to share market, which was neither relating to T Limited's own experience nor was it secret or divulged information. The taxpayer made payment for merely accessing the databases and did not receive any knowledge as to how the databases were maintained nor did the taxpayer receive any licence for commercial exploitation of the copyright with regard to the database maintained by T Limited. That the payment made by the taxpayer was for the use of "copyrighted material" rather than use of copyright, and hence, could not be treated as royalty.

Takeaways

The pronouncement has reaffirmed that the payment made for the use of the copyrighted material cannot be taxed as royalty relying on jurisdictional HC in the matter of Infrasoft.

On the issue of taxability of Royalty there are divergent views of various courts and its tax treatment depends upon specific facts of the case.

Stay of demand

Circular dated 29 February, 2016, does not supersede the earlier Instruction No. 1914 dated 2 February, 1993, in toto, but it merely "partially modifies" the guidelines contained in Instruction No. 1914

W.P. No 1339-1342/ 2017 (T-IT) (Karnataka HC)

Office Memorandum dated 29 February, 2016, clearly is "in partial modification of Instruction No. 1914" and merely prescribes the percentage of the disputed demand that needs to be deposited by the taxpayer. Thus, although the Office Memorandum had streamlined and standardised the grant of stay, said Office Memorandum has left Guideline No. 2-B(iii), contained in Instruction No. 1914 dealing with the situation wherein the assessment is unreasonably high pitched or wherein genuine hardship is likely to be caused to the taxpayer, absolutely untouched. Therefore, both these factors are required to be examined by both the TO and the Pr. CIT before directing the taxpayer to pay 15% of the disputed demand amount.

Facts

The taxpayer was engaged in the business of wholesale distribution of books, mobiles, media, computers, gaming consoles and other related accessories. Since the beginning of its business in 2011, the taxpayer had suffered losses in AY 2012–13, AY 2013–14, AY 2014–15 and AY 2015-16. However, the TO, under the scrutiny assessment, had made substantial additions in the hands of the taxpayer for AY 2014–15 and AY 2015–16 *vide* separate orders and determined the outstanding demand payable. The taxpayer filed appeals before the CIT(A) against both orders of the TO, and moreover, requested the TO to keep the disputed demand in abeyance. However, the TO directed the taxpayer to deposit 15% of the disputed demand outstanding for the relevant years. Aggrieved, the taxpayer filed review petitions before the Pr. CIT but was rejected. Hence, these petitions before the HC.

Held

The HC explained that the Revenue has to precisely balance the conflicting interests between certain guidelines that have been prescribed by Instruction No. 1914, dated 02 February, 1993, and the Office Memorandum dated 29 February, 2016. Further, the HC observed that the Revenue could not and has not been permitted by the circulars to act like Shylock. The HC further observed that the Office Memorandum dated 29 February, 2016, clearly does not supersede Instruction No. 1914 in toto, but merely "partially modifies" the guidelines contained in Instruction No. 1914. It was further observed that a comparative perusal of both the circulars clearly reveal that Instruction No. 1914 deals with the collection and recovery of the income tax, broadly divided into four parts: first, responsibility of the collection and recovery; second, the stay petitions; third, guidelines for staying of demand; and last, the miscellaneous provisions. However, said Instruction does not standardise the quantum of lump-sum payment required to

be made by the taxpayer as a pre-condition of stay of disputed demand before the CIT (A), and such vacuum has been filled by the Office Memorandum dated 29 February, 2016. Thus, the Office Memorandum dated 29 February, 2016, merely prescribes the percentage of the disputed demand amount to be deposited by the taxpayer. It was further observed that Guideline No. 4 of the Office Memorandum dated 29 February, 2016, uses the words "partial modification of Instruction No. 1914," and thus, obviously, said Office Memorandum has left Guideline No. 2-B(iii) contained in Instruction No. 1914 absolutely untouched. Therefore, while dealing with the taxpayer's application, both the TO and the Pr. CIT were required to see if the taxpayer's case would fall under Guideline No. 2-B(iii) of Instruction No. 1914. It was further observed that Guideline No. 4(A) of the Office Memorandum dated 29 February, 2016, is a general rule asking the taxpayer to deposit 15% of the disputed demand amount. However, according to Guideline No. 4(B)(a), the demand can be increased to more than 15%; and according to Guideline No. 4(B)(b), the percentage can be lower than 15%, provided the permission of Pr. CIT is sought by the TO. However, in case the TO does not seek permission from the Pr. CIT and the taxpayer was aggrieved by the demand of 15% to be deposited, the taxpayer was free to independently approach the Pr. CIT. The HC held that the orders passed by the TO naturally suffer from being a non-speaking order and are legally unsustainable on the ground that a bare perusal of the TO's orders reveal that the TO had jumped to the conclusion that the taxpayer was not entitled to seek relief merely because the taxpayer's case did not fall within the two illustrations given in Guideline No. 4(B)(b) of the Office Memorandum dated 29 February, 2016, and the taxpayer's finances did not indicate any hardship. The HC further observed that the least TO was required to do was to elaborately discuss whether "genuine hardship" would be caused to the taxpayer in case it was directed to pay 15% of the disputed demand amount or not. HC also held that the order passed by the Pr. CIT was legally unsustainable on the ground that the Pr. CIT had failed to appreciate the co-relation between Instruction No. 1914 and the Office Memorandum dated 29 February, 2016, and had failed to notice the fact that the latter has only "partially modified" the former Instruction and that Guideline No. 2-B(iii) contained in Instruction No. 1914 continues to exist independently of and in spite of the Office Memorandum dated 29 February, 2016. Thus, the Pr. CIT had failed to apply the two important factors mentioned therein. The HC further observed that the Pr. CIT had erred in applying the reasons given in the case of *Teleradiology Solutions Private Limited v. DCIT & Others [Writ Petition No. 26370/ 2015, dated 18 April, 2016 (Karnataka HC)]*, wherein the issues involved were entirely different from that of the present case and had blindly appreciated the precedence. Therefore, the HC set aside the orders and remanded back to the Pr. CIT with further directions to decide the Review Petition.

Takeaways

With the huge pressure of payment of disputed demand faced by taxpayers emanating from the high-pitched assessments from the TO, said ruling is a welcome step, as it is expected to give some relief to the taxpayers facing genuine hardship. The said ruling states that in case of unreasonably high-pitched assessment or where genuine hardship is likely to be caused to the taxpayer, the taxpayer is free to independently request the Pr. CIT to make the percentage of disputed demand amount less than 15%. Overall, this Ruling definitely serves as a strong basis for requesting the tax authorities to decide each application on the merits of the case.

It is to be noted here that the CBDT vide office memorandum dated 31 July, 2017 has further modified Instruction No. 1914 and has revised the standard rate prescribed from 15% to 20% for grant of stay at the first appeal stage.

Corporate Tax

Technical know-how

Fees for availing technical know-how to bring a new business into existence in the form of a JV company treated as a capital expenditure

Civil Appeal No. 4918 of 2017 (SC)

Expenditure incurred for availing technical know-how and technical information was capital expenditure as it was incurred for the formation of a new business.

Facts

The taxpayer was an Indian company incorporated pursuant to a JV agreement between an Indian company and a foreign company. The foreign company was engaged in the business of development, manufacture and sale of automobiles and parts. The taxpayer entered into a TCA with the foreign company for availing technical know-how and technical information for a lump sum fee to be paid in five equal instalments commencing from the third year of commercial production along with a royalty of 4% on its sales. The taxpayer treated these payments as revenue expenditure. Simultaneously, certain other agreements were entered between the taxpayer and the foreign company for providing technicians and engineers for necessary guidance for setting up of plant, supply of parts for manufacture of cars and supply of manufacturing facilities (the agreement *inter-alia* stipulated specifications for manufacturing facilities to be sold by the foreign company to the taxpayer). The taxpayer treated the payments made under these agreements as capital expenditure. The TO, in the reassessment proceedings, treated the amount towards technical know-how and royalty payable under the TCA as capital expenditure and disallowed the claim of the taxpayer. The taxpayer carried the matter to the SC.

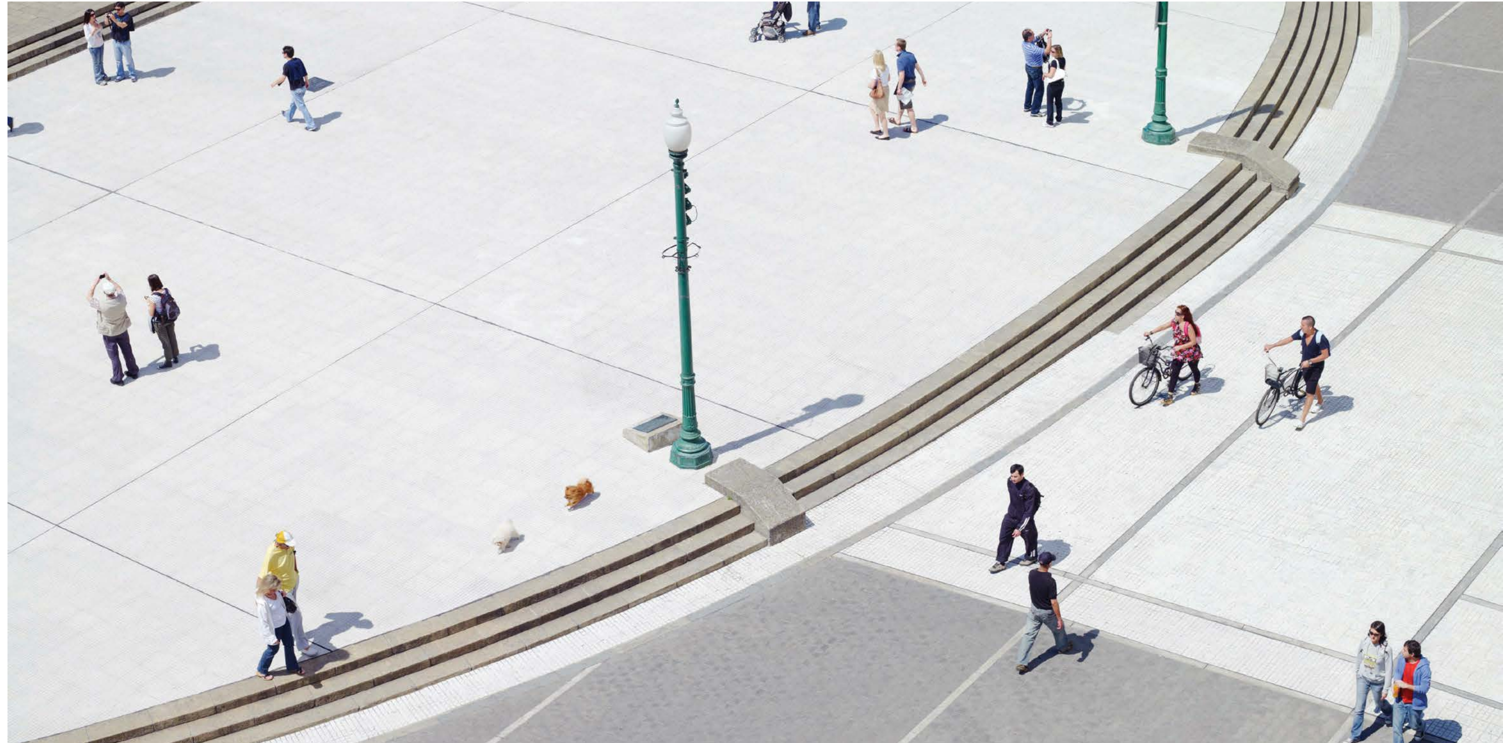
Held

There is no single rule of thumb, principle or test that is paramount and each case needs to be probed in the light of circumstances of that particular case. The solution has to be derived from many aspects of the whole set of circumstances, some of which may point in one direction, some in the other. It is a common sense appreciation of all guiding features, which must provide the ultimate answer. The distinction between capital and revenue expenditure with reference to acquisition of technical information and know-how has also been spelt out by the SC in the case of *CIT v. Ciba of India Limited [(1968) Civil Appeal No. 9 to 16 of 1967 (SC)]* and HCs in many cases. Where there was transfer of ownership in the intellectual property rights or in licenses, it would clearly be capital expenditure. However, where no such rights had been transferred but an arrangement facilitates the grant of license to use those rights for a limited purpose, it would be in the nature of revenue expenditure as no enduring benefit was acquired thereby. Where the technical know-how availed was for improvising the existing business, the expenditure would be treated as revenue expenditure. Thus, this case indicates that if such technical know-how was for the purpose of setting up a new business, the position may be different. The very purpose of entering into the JV agreement was to set up a JV company with an aim and objective to establish a unit for manufacture of automobiles and part thereof. As a result of the JV agreement, the taxpayer was incorporated, which entered into the TCA in question for technical collaboration. This technical collaboration included not only transfer of technical information, but also complete assistance, actual, factual and on the spot, for establishment of plant, machinery, etc., to create a manufacturing unit for the products. Thus, a new business was set up with the technical know-how provided by the foreign company. In case of termination of the TCA, the JV itself would end and there may not have been any further manufacturing using the technical know-how of the foreign collaborator. The TCA was crucial for setting up of the plant project in question for manufacturing of the goods. Thus, the question of improvising the existing technical know-how by borrowing the technical know-how from foreign company did not arise, and accordingly, the expenditure in the form of fees paid would be in the nature of capital expenditure and not revenue expenditure. Distinguishing the decision of the Delhi HC in the case of *CIT v. Hero Honda Motors [IT Appeal Nos. 694, 696, 698 & 699 of 2011 and 625 & 633 of 2012 (Delhi HC)]*, the SC held that the technical know-how therein was obtained for improvising the scooter segment, which was already in existence, as against the TCA, which was meant for setting up a new plant to manufacture cars.

Corporate Tax

Takeaways

The SC has reiterated the long-standing position that the expenditure incurred on formation of a new business is capital in nature. However, as noted by the SC, whether a particular expenditure is capital or revenue in nature depends on specific circumstances and facts of the case, a detailed investigation needs to be undertaken to determine whether a particular expenditure of this nature has been incurred on capital field or revenue field.



Corporate Tax

Circulars, notifications and others

Capital gain

Exemption to long-term capital gain on listed shares under section 10(38) curtailed

CBDT Notification No. 43/2017/F. No. 370142/09/2017-TPL

The Finance Act, 2017 amended section 10(38) of the Act, inserting a proviso stating that long term capital gains from transfer of listed equity shares acquired on or after 01 October, 2004, would be exempt from tax under section 10(38) of the Act only if the STT was paid at the time of acquisition of such shares. However, to protect the exemption in respect otherwise regulated genuine cases, it was proposed to notify transactions for which the proviso on pre-condition of chargeability to STT on acquisition should not be applicable.

Pursuant to the above power under section 10(38), the CBDT has issued notification under section 10(38) of the Act on 05 June, 2017. The notification provides a negative list and exempts all transactions other than those covered in the list from applicability of newly inserted proviso to section 10(38). The negative list primarily includes the following:

- Acquisition of equity shares issued under a preferential issue by a company whose shares are not frequently traded, unless such issue was approved by the court, Tribunal, SEBI or RBI in this behalf, or is covered under FDI or under specific carve outs specified in the notification.
- Acquisition of existing equity shares otherwise than through stock exchange (off market deals), unless such transactions were approved by the court, Tribunal, SEBI or RBI in this behalf or is covered under FDI or under specific carve outs specified in the notification. Other carve outs includes acquisition through mode of transfer referred to in section 47 (gift, merger, etc.) or as part of slump sale under section 50B.
- Acquisition of shares of a company, which was listed on a recognised stock exchange, during the period starting from the date the company was delisted but until the date it is re-listed.

DSIR Guidelines

Updated guidelines for approval of in-house R&D centres and submission of report under section 35(2AB)

Guidelines for approval in form 3CM of in-house R&D centres recognised by the DSIR and submission of report in form 3CL under section 35(2AB) of the Act

The DSIR has recently updated the guidelines for approval of in-house R&D centres and submission of prescribed report under section 35(2AB) of the Act.

Section 35(2AB) of the Act provides weighted tax deduction of 150% (200% up to AY 2017-18) of expenditure incurred by a specified company (engaged in the business of bio-technology, manufacture or production of any article/ thing (other than those specified in the Eleventh Schedule) on scientific research (not being expenditure in the nature of cost of any land or building) in the in-house R&D centres as approved by the prescribed authority (the Secretary, DSIR).

The extant guidelines issued in 2014 (click here to refer to our news alert in this regard) are now updated in July 2017 with certain additional conditions as discussed below:

Ineligible expenditure

The following capital expenditures on R&D have now been listed as ineligible expenditure for weighted deduction under section 35(2AB) of the Act:

- Expenditure reported as CWIP
- Vehicle purchased for reference and testing purpose

Policy and procedure for approval

As per the guidelines, specified companies are eligible to claim weighted deduction of capital investments on R&D centre of more than INR 10 million (excluding expenditure on land and building) in the preceding financial year of application for section 35(2AB) approval. Such specified companies are as follows:

a. not having DSIR recognised R&D centre, but have applied for section 35(2AB) approval

b. having R&D centres already recognised by DSIR, but have applied for section 35(2AB) approval

Corporate Tax

The guidelines have been updated to provide the following details while making application for approval:

1. request for claim of expenditure under a cover letter
2. complete details of capital equipment investment on R&D of more than INR 10 million (excluding expenditure on land and building).

Takeaways

- *The Karnataka HC has dealt with a case [Writ Petition No. 7004 of 2014 (T-IT)] where the DSIR had, inter-alia, approved CWIP expenses as eligible for weighted deduction. The HC held that action of assessing officer to deny deduction of already approved expenses by DSIR is beyond jurisdiction.*
- *The updated guidelines seek to negate the view of the HC. As a corollary, the weighted deduction of CWIP expenditure should be available to specified company in the year of capitalisation.*
- *These updated guidelines issued in July 2017 are silent on its effective date (i.e. whether they are applicable for claims to be made for AY 2017-18). A clarificatory circular from authorities would help to clear the ambiguity.*
- *Separately, it may be noted that the CBDT had already amended Rule 6 [vide Income-tax (10th Amendment) Rules 2016, effective from 01 July, 2016] of the Rules rescribing the revised forms to be filled by the specified companies and DSIR for the purpose of the above provisions.*

Exempt income

Central government issues notification under section 10(38) of the Income-tax Act, 1961

CBDT Notification No. 43 of 2017 dated 05 June, 2017

The Finance Act, 2017 amended section 10(38) of the Act stating that long-term capital gains from the transfer of listed equity shares acquired on or after 01 October, 2004 would be exempt from tax under section 10(38) of the Act only if STT was paid at the time of acquisition of such shares. However, with the intent to continue the exemption in respect of genuine cases, it was proposed to notify transactions of acquisition, for which the pre-condition of chargeability to STT on acquisition would not be applicable.

Towards this end, the CBDT had issued a press release on 03 April 2017, along with a draft notification to be issued under section 10(38) of the Act, seeking comments/ suggestions from various stakeholders. The draft notification contained a "negative list" of transactions of acquisition in respect of which the exemption under section 10(38) would not be available.

On 05 June, 2017, the central government issued the final notification under section 10(38) of the Act in this regard. While the final notification is similar to the draft notification in terms of prescribing a negative list of transactions, further relaxation has been provided in respect of select transactions of acquisition. This notification applies to all transactions on or after 01 April, 2017.

Background

- Under the erstwhile provisions of section 10(38) of the Act, the income arising from transfer of long-term capital asset, being equity share of a company or a unit of an equity oriented fund, is exempt from tax if the transaction of sale is undertaken on or after 01 October, 2004 and is chargeable to STT under Chapter VII of the Finance (No.2) Act, 2004 (Exemption).
- With an intent to curb malpractices, the Finance Act, 2017 amended the provisions of section 10(38) of the Act. By virtue of this amendment, the exemption available under this section has been restricted only to those listed equity shares, for which STT was also paid at the time of acquisition of the shares.
- The Memorandum to the Finance Bill, 2017 mentioned that transactions in which the STT could not have been paid, such as acquisition of shares in IPOs, FPOs, bonus or rights issue by a listed company, acquisition by non-resident in accordance with the FDI policy of the government, etc., would be carved out by issuance of separate notification.
- In this regard, the Central Government has issued a notification. We have discussed the provisions of this notification in detail as follows.

Corporate Tax

Notification

The notification prescribes a negative list of transactions of acquisition in respect of which exemption under section 10(38) of the Act would not be available.

The negative list of transactions prescribed in the notification has been iterated below:

Acquisition of existing listed equity share in a company whose equity shares are not frequently traded in a recognised stock exchange of India by way of a preferential issue (for definition of "frequently traded share" refer segment "Key Definitions").

[**Key takeaway:** This clause covers only fresh issue of equity shares by a listed company under the preferential issuance route. Definition of "preferential issue" is as per the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 (ICDR Regulations). Therefore, this clause would not include equity shares issued under public issue, rights issue, bonus issue, ESOP schemes, issue of depository receipts issued outside India, etc.]

Acquisition of existing listed equity share in a company, not entered through a recognised stock exchange of India.

[**Key takeaway:** This clause covers secondary acquisition of listed equity shares, regardless of whether they are frequently traded outside a stock exchange.]

Acquisition of equity shares of a company during the intervening period starting from the date on which the company is delisted and ending on the date on which the company is re-listed on a recognised stock exchange, in accordance with the Securities Contracts (Regulation) Act, 1956, read with Securities and Exchange Board of India Act, 1992 and any rules made there under.

[**Key takeaway:** This clause covers both primary as well as secondary transactions undertaken during the intervening period between delisting and re-listing of a company.]

Exceptions to the above

However, the notification also prescribes a list of exclusions to the above negative list of transactions under clause (a) and (b) above. For these transactions, the condition of chargeability to STT would not be applicable for availing the exemption. No exclusions have been prescribed in respect of point (c) above.

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We have tabulated below the exclusions to the negative list of transactions of acquisition prescribed by the notification.

Exclusions to clause (a) of the negative list	Exclusions to clause (b) of the negative list
Acquisition that has been approved by the SC, HC, NCLT, SEBI or RBI in this behalf.	Acquisition through an issue of shares by a company other than the issue referred to in clause (a) of the negative list.
Acquisition by any non-resident in accordance with FDI guidelines issued by the Government of India.	[This clause specifically clarifies that it covers only secondary transactions.]
Acquisition by a Category I or Category II AIF or a VCF or a QIB.	Acquisition by scheduled banks, reconstruction or securitisation companies or public financial institutions during their ordinary course of business.
[Definition of QIB is as per ICDR Regulations. Per the ICDR Regulations, QIB includes, inter alia, AIFs (all categories), Category I and II FPIs, FVCIs, mutual funds, scheduled commercial banks and insurance companies.]	Acquisition that has been approved by the SC, HC, NCLT, SEBI or RBI in this behalf.
Acquisition through a preferential issue to which the provisions of Chapter VII of the ICDR Regulations do not apply. The following is the list of transactions to which Chapter VII of ICDR Regulations do not apply subject to conditions stated therein:	Acquisition under employees' stock option scheme or employee stock purchase scheme framed under the SEBI (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999.
Conversion of loan or option attached to convertible debt instruments in terms of sub-sections (3) and (4) of section 81 of the Companies Act, 1956 or sub-section (3) and (4) of section 62 of the Companies Act, 2013, whichever applicable;	Acquisition by any non-resident in accordance with FDI guidelines of the Government of India.
Scheme approved by a HC under section 391 to 394 of the Companies Act, 1956 or a Tribunal under section 230 to 234 of the Companies Act, 2013, whichever applicable;	Acquisition of shares of company under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.
Rehabilitation scheme approved by the Board of Industrial and Financial Reconstruction under the Sick Industrial Companies (Special Provisions) Act, 1985 or the Tribunal under the Insolvency and Bankruptcy Code, 2016, whichever applicable; and	Acquisition from the government.
Acquisition by secured lenders pursuant to conversion of their debt into equity shares under the strategic debt-restructuring scheme in accordance with the guidelines specified by the RBI.	Acquisition by a Category I or II AIF or a VCF or a QIB.
	Acquisition by mode of transfer referred to in section 47 (transactions not regarded as "transfers") or section 50B (slump sale) of the Act if the acquisition by the previous owner was not covered under the negative list under this notification.

Corporate Tax

Key definitions

Explanation – For the purpose of this notification:

i. "Frequently traded shares" means the shares of a company in which the traded turnover on a recognised stock exchange during the 12 calendar months preceding the calendar month in which the transfer is made, is at least 10% of the total number of shares of such class of the company.

ii. Provided where the share capital of a particular class of shares of the company is not identical throughout such period, the weighted average number of total shares of such class of the company shall represent the total number of shares.

iii. "Listed" means listed in a recognised stock exchange in India, in accordance with the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and any rule made thereunder.

iv. "Preferential issue" and "QIB" shall have the meanings respectively assigned to them in sub-regulation (1) of regulation (2) of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009.

v. "Public financial institution" and "scheduled bank" shall have the meanings respectively assigned to them in Explanation to clause (viia) of sub section (1) of section 36 of the Act.

vi. "Recognised stock exchange" shall have the same meaning as in clause (f) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956).

vii. "Reconstruction company" and "securitisation company" shall have the meanings respectively assigned to them in sub-section (1) of section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002).

Takeaways

The notification is a welcome step in terms of notifying a restricted negative list of acquisitions in respect of which exemption under section 10(38) of the Act would not be available. The central government has taken due note of representations received by it on the draft notification by prescribing further relaxations to the negative list.

Foreign bank account disclosure

CBDT's communication regarding furnishing of foreign bank account details in income-tax return in case of non-residents

CBDT Press Release dated 24 July, 2017

Background

Quoting of bank account details in the ITR is a precondition for direct credit of refund in the bank account. Until last year, there was no provision in the ITR Form for NRs not having bank accounts in India, to furnish the details of their foreign bank accounts for receiving refund in such foreign bank accounts.

Further, the ITR forms notified for financial year 2016-17 required non-residents to furnish the details of their foreign bank accounts.

Communication by CBDT

The CBDT *vide* Press Release dated 24 July, 2017 has communicated the following regarding the latest version of ITR Forms:

- NRs who do not have a bank account in India and are claiming income-tax refund, have an option to furnish the details of foreign bank account in the ITR for issuance of refund.
- NRs who are not claiming any income-tax refund nor have a bank account in India for the purposes of refund are not required to furnish details of their foreign bank accounts.

Takeaways

This communication is a welcome step, which clarifies the requirement of furnishing foreign bank account details by NRs and dispels doubts regarding direct payment of income-tax refund in the foreign bank account of NRs.

Corporate Tax

GAAR

CBDT gives its views on the applicability and implementation of GAAR

CBDT Circular No. 7 of 2017 dated 27 January, 2017

The GAAR are included in Chapter X-A of the Act and shall come into force from 01 April, 2017. While certain rules in relation to the scope of GAAR were introduced earlier, the stakeholders, in relation to the implementation of GAAR provisions, had raised certain queries. CBDT constituted a Working Group in June 2016 for considering such issues. The CBDT after considering the comments of the Working Group has issued a Circular providing its views on some of the aspects of GAAR.

These include its views on the interplay between GAAR and SAAR and the LOB test under certain tax treaties. The CBDT has also indicated the manner of determination of the threshold for tax benefit for invoking and the scope of investments, which will be grandfathered from the applicability of GAAR.

The CBDT has issued its views in a question-answer form. We have dealt with the significant ones in the table below.

Question No.	Query	CBDT response
1.	Will GAAR be invoked if SAAR applies?	Specific anti-avoidance provisions may not address all situations of abuse and there is need for general anti-abuse provisions. The GAAR and SAAR can coexist as applicable in the facts of the case.
2.	Will GAAR be applied to deny treaty eligibility in a case where LOB clause under the treaty has been complied?	Anti-abuse rules in tax treaties may not be sufficient to address all tax avoidance strategies and the same are required to be tackled through GAAR. If a case of avoidance is sufficiently addressed by the LOB, GAAR shall not be invoked.
3.	Will GAAR interplay with the right of the taxpayer to select or choose the method of implementing a transaction?	GAAR will not interplay with such right of the taxpayer.
4.	Will GAAR apply where the jurisdiction of the FPI is based on non-tax commercial consideration and FPI has issued P-notes referencing Indian securities? Will GAAR apply to deny treaty to a SPV on the ground that it is located in a tax friendly jurisdiction or that it does not have its own premises or employees?	GAAR shall not be invoked merely on the ground that the entity is located in a tax efficient jurisdiction. If the jurisdiction of the FPI is finalised based on non-tax commercial considerations and the main purpose of the arrangement is not to obtain tax benefit, GAAR will not apply.
5.	Will GAAR apply to (i) bonus shares issued for original shares acquired prior to 01 April, 2017, (ii) shares issued post 31 March, 2017 on conversion of Compulsorily Convertible Debentures, Compulsorily Convertible Preference Shares, Foreign currency convertible bonds, Global Depository Receipts acquired prior to 01 April, 2017, (iii) shares that are issued consequent to the split up or consolidation of such grandfathered shareholding.	Grandfathering will be available to investments made before 01 April, 2017 for instruments compulsorily convertible from one form to another, at terms finalised at the time of issue of such instruments. Grandfathering will also be eligible to shares brought into existence by way of split up or consolidation or bonus issuances of shares acquired prior to 01 April, 2017 in the hands of the same person.

Corporate Tax

Question No.	Query	CBDT response
7 & 8	Will GAAR apply if the arrangement has been held as permissible by the AAR or if the arrangement is sanctioned by an authority such as the Court, NCLT or is in accordance with judicial precedents, etc.?	GAAR will not apply if the arrangement is held as permissible by the AAR. Where the court has explicitly and adequately considered the tax implication while sanctioning an arrangement, GAAR will not apply to such arrangement.
13	It may be ensured that in practice, the consequences of a transaction being treated as an impermissible avoidance arrangement are determined in a uniform, fair and rational basis. Compensating adjustments under section 98 of the Act should be done in a consistent and fair manner. It should be clarified that if a particular consequence were applied in the hands of one of the participants, there would be corresponding adjustment in the hands of the other participant.	Adequate procedural safeguards are in place to ensure that GAAR is invoked in a uniform, fair and rational manner. In the event of a particular consequence being applied in the hands of one of participants as a result of GAAR, the corresponding adjustment in the hands of the other participant will not be made. GAAR is an anti-avoidance provision with deterrent consequences and corresponding tax adjustments across different taxpayers could militate against deterrence.
14	Tax benefit threshold of INR 30 million may be calculated in respect of each arrangement and each taxpayer and for each assessment year separately. The review should extend to tax consequences across territories. The tax impact of INR 30 million should be considered after taking into account impact to all the parties to the arrangement, i.e., on a net basis and not on a gross basis (i.e. impact in the hands of one or few parties, selectively).	For calculation of threshold of INR 30 million, only the tax benefit enjoyed in Indian jurisdiction owing to the arrangement or part of the arrangement is to be considered. Such benefit is assessment year specific. GAAR is with respect to an arrangement or part of the arrangement and limit of INR 30 million cannot be read in respect of only a single taxpayer.

Views of CBDT on some other aspects

- Lease contracts and loan arrangements are by themselves not "investments," and hence, grandfathering is not available to such arrangements.
- Admissibility of claim under treaty or domestic law in different years is not a matter to be decided by GAAR provisions.
- Proposal to declare an arrangement as an impermissible avoidance arrangement under GAAR will be vetted first by the Pr. CIT and at the second stage by an Approving Panel, headed by a HC judge. Thus, adequate safeguards are in place to ensure that GAAR is invoked only in deserving cases.
- If an arrangement is covered as impermissible avoidance arrangement, then the arrangement will be disregarded by application of GAAR and necessary consequences will follow.
- The period of time for which an arrangement exists is only a relevant factor and not a sufficient factor to determine whether an arrangement lacks commercial substance.

Corporate Tax

- If the Pr. CIT/ Approving Panel has held the arrangement to be permissible in one year and the facts and circumstances remain the same, as per the principle of consistency, GAAR will not be invoked for that arrangement in the subsequent year.
- Levy of penalty depends on facts and circumstances of the case and is not automatic. No blanket exemption for a period of five years from penalty provisions is available under law. The taxpayer may apply for benefit under section 273A if he satisfies the conditions prescribed therein.

Takeaways

- *The Circular provides much welcomed clarity on certain elements in the application of the GAAR provisions*
- *However, the Circular leaves open issues related to sufficiency of a SAAR/ LOB clause vis-à-vis GAAR, and under what situations a Court would be seen to have adequately considered the tax implications of an arrangement.*
- *Interestingly, however, the Circular goes further than some of the recently amended tax treaties, in specifically indicating availability of grandfathering benefits to instruments derived from convertible investments held prior to 01 April, 2017 or certain situations such as subsequent consolidation, split or bonus issue.*

GST on services

CBDT communicates that no tax is required to be withheld under Chapter XVII-B of the Act on the component of "GST on services" if it is indicated separately in the amount payable to a resident

CBDT Circular No. 23/ 2017 dated 19 July, 2017

Background

The CBDT had previously issued Circular No. 01/ 2014 dated 13 January, 2014, which clarified that where in terms of agreement between the payer and the payee, the service tax component in the amount payable to a resident is indicated separately, no tax was required to be withheld on such service tax component.

With effect from 01 July, 2017, the government has introduced the GST regime replacing amongst others, service tax, which was charged prior to 01 July, 2017.

Various representations were made to the CBDT seeking clarification regarding the withholding of tax on the GST component on service remuneration.

Communication by the CBDT

Following such representations by the industry, the CBDT *vide* Circular No. 23/ 2017 dated 19 July, 2017, to harmonise the content of the earlier circular with the new GST regime, has clarified the following:

- Wherever in terms of the agreement between the payer and payee, the component of "GST on Service" comprised in the amount payable to a resident is indicated separately, tax shall be withheld under Chapter XVII-B of the Act on the amount paid or payable without including "GST on service" component. In other words, tax shall be required to be withheld only on the amount paid or payable without including such "GST on services" component.
- GST for this purpose shall include Integrated GST, Central GST, State GST and Union Territory GST.
- Any reference to "service tax" in an existing agreement or contract entered prior to 01 July, 2017 shall be treated as "GST on services" with respect to period from 01 July, 2017 onwards until the expiry of such agreement or contract.

Takeaways

The above circular is a welcome step in clarifying the position that no income tax shall be withheld on payments made to residents in respect of GST component on services rendered. This will have a positive impact on reducing the prevailing ambiguity in the industry.

Corporate Tax

ICDS

Communication issued by CBDT on ICDS notified under the Income tax Act, 1961

CBDT Circular no. 10/ 2017 dated 23 March, 2017

The central government had notified ten ICDS to be applicable with effect from AY 2016-17 for the purpose of computation of income under the head “Profits and gains of business or profession” and “Income from other sources” (Please click here to access the CBDT Notification in this regard). Post receipt of concerns of various stakeholders the government had deferred the applicability of ICDS by one year and re-notified the amended ICDS to be applicable w.e.f AY 2017-18. (Please click here to access the CBDT Notification re-notifying the standards). Now, the Board has issued various clarifications on the amended ICDS by issuance of a circular dated 23 March, 2017.

This is the summary of FAQs released by the CBDT addressing the queries raised by the stakeholders.

S. No.	FAQs	Answers/ Clarifications
1	What is the interplay between ICDS-I and maintenance of books of accounts?	The ICDS is not meant for maintenance of books of accounts or preparing financial statements. The accounting policies mentioned in ICDS-I shall be applicable for computing income under the heads “profits and gains of business or profession” or “income from other sources.”
2	Whether inconsistent judicial precedents shall prevail over ICDS?	The ICDS have been notified after due deliberation and after examining judicial view for bringing certainty on the issues covered by it. As certainty is now provided by notifying the ICDS, the provisions of ICDS shall be applicable to the transactional issues dealt therein in relation to AY 2017-18 and subsequent AYs.
3	Does ICDS apply to non-corporate taxpayers that are not required to maintain books of accounts and/ or those are covered by presumptive scheme of taxation?	The ICDS shall also apply to persons computing income under the relevant presumptive taxation scheme, as the ICDS are applicable to specified persons having income chargeable under the head “profits and gains of business or profession” or “income from other sources.”
4	If there is a conflict between ICDS and other specific provisions of the Rules, which provisions shall prevail?	The provisions of the Rules, which deal with specific circumstances, shall prevail.
5	How will the ICDS apply to companies that adopted the Ind-AS?	The ICDS shall apply irrespective of the accounting standards adopted by companies, i.e., ASs or the Ind-AS.
6	Whether the ICDS shall apply to the computation of MAT under section 115JB of the Act or AMT under section 115JC of the Act?	The ICDS shall not apply for the computation of MAT. However, the ICDS shall apply to AMT, as the AMT is computed on adjusted total income, which is derived by making specified adjustment to total income computed as per normal provisions of the Act.

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S. No.	FAQs	Answers/ Clarifications
7	Whether the provisions of the ICDS shall apply to banks, non-banking financial institutions, insurance companies, power sector, etc.?	The general provisions of the ICDS shall apply to all persons, unless there are sector specific provisions contained in the ICDS or the Act.
8	Whether similar principles as contained in ICDS-I related to MTM loss or an expected loss applies to recognition of MTM gain or expected incomes?	The principle as contained in ICDS-I relating to MTM losses or an expected loss shall apply mutatis mutandis to MTM gains or an expected profit.
9	ICDS-I provides that an accounting policy shall not be changed without "reasonable cause." The term "reasonable cause" is not defined.	Under the Act, "reasonable cause" is an existing concept and has evolved well over a period conferring desired flexibility to the taxpayer in deserving cases.
10	Which ICDS would govern derivative instruments?	ICDS-VI provides guidance on accounting for derivative contracts, such as forward contracts and other similar contracts. For derivatives not within the scope of ICDS-VI, provisions of ICDS-I would apply.
11	Whether the recognition of retention money, the receipt of which is contingent on the satisfaction of certain performance criterion is to be recognised as revenue on billing?	Retention money, being part of the overall contract revenue, shall be recognised as revenue, subject to reasonable certainty of its ultimate collection condition contained in para 9 of ICDS-III on construction contracts.
12	Whether ICDS-III and ICDS-IV should be applied by real estate developers and BOT operators. In addition, whether the ICDS is applicable for leases?	At present there is no specific ICDS notified for real estate developers, BOT projects and leases. Therefore, the relevant provisions of the Act and ICDS shall apply to these transactions as may be applicable.
13	The condition of reasonable certainty of ultimate collection is not laid down for taxation of interest, royalty and dividend. Is the taxpayer obliged to account for such income even when the collection thereof is uncertain?	As a principle, interest accrues on time basis and royalty accrues on the basis of contractual terms. Subsequent non-recovery in either cases can be claimed as deduction in view of section 36(1)(vii) of the Act.

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S. No.	FAQs	Answers/ Clarifications
14	Is the ICDS applicable to revenues that are liable to tax on gross basis for non-residents under section 115A of the Act?	Yes
15	What shall be the treatment of expenses incurred after test runs and experimental production but before commencement of commercial production?	It shall be treated as capital expenditure as per para 8 of ICDS -V.
16	What is the taxability of opening balance as on 1 April, 2016 of FCTR relating to non-integral foreign operation, if any, recognised as per AS 11?	It shall be recognised in the previous year relevant for assessment year 2017-18 to the extent not recognised in the income computation in the past.
17	For subsidy received prior to 01 April, 2016 but not recognised in the books pending satisfaction of related conditions and achieving reasonable certainty of receipt, how shall the same be recognised under ICDS on or after 01 April, 2016?	Government grants received on or after 01 April, 2016 and for which recognition criteria is also satisfied thereafter, the same shall be recognised as per the provisions of ICDS-VII. However, if subsidy is already received prior to 01 April, 2016, ICDS-VII shall not apply and it shall continue to be recognised as per the law prevailing prior to that date.
18	Whether the taxpayer shall be permitted to claim deduction of interest on security offered to tax on accrual basis but not received while computing the capital gain?	Yes
19	How the securities held as stock in trade shall be valued “category wise” under ICDS-VIII?	For the measurement of securities held as stock in trade, the securities are to be first aggregated category wise. The aggregate cost and NRV of each category of security is compared and the lower of the two is to be taken as carrying value as per ICDS-VIII.

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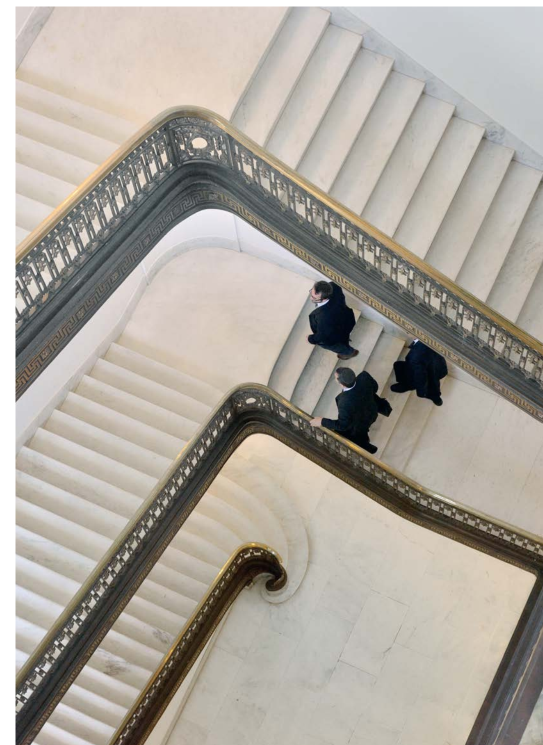
S. No.	FAQs	Answers/ Clarifications
20	Whether borrowing costs to be capitalised under ICDS-IX should exclude the portion of borrowing costs disallowed under specific provisions, such as 14A, 43B, 40(a) and 40A(2)(b)?	Borrowing costs shall exclude those borrowing costs that are otherwise not allowable under specific provisions of the Act.
21	Whether bill discounting charges and other similar charges would fall under the definition of borrowing cost?	Yes, as the definition of "borrowing cost" is an inclusive definition.
22	How to allocate borrowing costs relating to general borrowing to different qualifying assets?	On asset-by-asset basis
23	What is the impact of Para 20 of ICDS-X containing transitional provisions?	Para 20 of ICDS-X provides that provisions or assets and related income shall be recognised for the year commencing on or after 01 April, 2016 in accordance with this ICDS after taking into account amount recognised, if any, for the same in any previous year ending on or before March 2016.
24	Whether the provisions for employee benefits such as provident fund, gratuity, etc., are excluded from the scope of ICDS-X?	Provisions for employee benefits that are otherwise covered by AS 15 shall continue to be governed by specific provisions of the Act and are not dealt with by ICDS-X.
25	Where is the taxpayer required to make disclosures specified in the ICDS?	Disclosures shall be made in the tax audit report in Form 3CD. However, there shall not be any separate disclosure requirement for persons that are not liable to tax audit.



Takeaways

The aforesaid circular has addressed various issues on the applicability of the ICDS. The ICDS shall be applied for the first time by the taxpayers while filing the income tax returns for AY 2017-18. Thus, the said clarifications are a welcome step.

Corporate Tax

POEM

CBDT issues final guidelines for determination of POEM

CBDT Circular No. 6 of 2017 dated 24 January, 2017

CBDT has issued a Circular laying down the final guidelines for determination of the POEM of a company. The final guidelines take forward the concept laid down in the draft guidelines for POEM determination based on the bifurcation of companies engaged in active business outside India and other companies. It further provides clarification in the following areas.

- Computational aspects for the determination of "active business outside India" test.
- Exclusion for shareholder decisions by the parent company.
- Adherence to global group policies on accounting, HR, IT, supply chain and routine banking operations shall not lead to POEM in India.
- Broader strategic and policy decisions to be relevant in determining POEM, as against routine operational decisions for oversight of day-to-day business operations.
- The TO shall initiate POEM determination only after prior approval of the Pr.CIT/ CIT. The decision on upholding the determination of POEM needs to be approved by a collegium of three Pr. CITs/ CITs.
- The POEM guidelines shall not apply to companies having turnover or gross receipts of INR 500 million or less in a FY (provided in the CBDT press release dated 24 January, 2017, but not stated in the guidelines).

A few illustrations have also been provided to highlight the applicability of principles enumerated in the guidelines.

Pre-cursor

The Finance Act, 2015 amended the residency test for a company, wherein a company would be considered as resident in India if it is an Indian company, or if the company's POEM is in India during the relevant year. The POEM was defined as "*a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance made*."

The Explanatory Memorandum to the Finance Act, 2015 mentioned that the CBDT would issue certain guiding principles for the determination of POEM for the benefit of taxpayers and the tax administration. Accordingly, the CBDT issued draft guidelines in December 2015 for the determination of POEM and invited comments and suggestions on the guidelines from the stakeholders.

The Finance Act, 2016 had deferred the applicability of POEM provisions, and they are now effective from 01 April, 2016 (i.e. FY 2016-17). The CBDT has now issued the final guiding principles for the determination of POEM. These final guidelines are broadly in line with the principles laid down in the draft guidelines, with a few illustrations being added and some guidance being provided with respect to areas such as shareholders' decisions, adherence to group global policies, meetings by way of circular resolutions, routine operational decisions *vis-à-vis* key management and commercial decisions, and certain computational aspects for the determination of active business outside India test. The final guidelines provide for the following aspects for the determination of POEM.

General guidance

- The process of determination of the POEM would generally be as follows:
  - based on facts and circumstances;
  - driven by substance over form;
  - based on the place where decisions are taken, rather than the place of implementation of the decisions.
- Day-to-day routine operational decisions shall not be relevant for the determination of the POEM.
- An entity may have more than one place of management, but it can have only one POEM at any point of time.
- The POEM will be required to be determined on a year-to-year basis.

Guidance for companies engaged in active business outside India

Determination of "active business outside India"

A company would be considered as engaged in active business outside India if the passive income of the company is not more than 50% of its total income, and

- Less than 50% of its total assets are situated in India; and less than 50% of the total number of employees are situated in India or are resident in India; and
- The payroll expenses incurred on such employees is less than 50% of its payroll expenditure.

Passive income of a company is defined to mean the aggregate of

- Income from transactions where both purchase and sale of goods is from/ to its associated enterprises; and
- Income by way of royalty, dividend, capital gains, interest or rental income.

The final guidelines have clarified that income by way of interest shall not be considered passive income in case of a regulated company engaged in the business of banking or a public financial institution. The income for the above purpose shall be as computed for tax laws in the country of incorporation, or as per the books of accounts (if no such tax computation is required).

Guidance has also been provided in the final guidelines for the computation of the value of assets, number of employees and payroll expenses. It is relevant to note that "employee" shall include persons who perform tasks similar to those performed by employees, although not employed directly by the company.

For the above test, the average of the data of the PY and two years prior to that shall be considered. If the company has been in existence for a shorter period, the data of such period shall be considered. The final guidelines provide that where the accounting year for tax purposes is different from the PY, then the data of the accounting year that ends during the relevant previous year and the two accounting years preceding it shall be considered.

POEM guidelines for "active business outside India"

For a company engaged in active business outside India, the POEM will be presumed to be outside India if a majority of the meetings of the board of directors of the company are held outside India. However, if it is established that the board of directors are standing aside and not exercising their powers of management, and either the holding company or any other person resident in India is exercising such powers, the POEM shall be considered to be in India.

The final guidelines have clarified that for this purpose, merely because the board of directors follow the general and objective principles of the global policy of the group laid down by the parent entity, which may be in the field of payroll functions, accounting, human resource functions, IT infrastructure and network platforms, supply chain functions, routine banking operational procedures, and not being specific to any entity or group of entities *per se*, would not constitute a case of board of directors of the company standing aside.

Guidance for companies not engaged in active business outside India

For companies not engaged in active business outside India, a two-stage process for the determination of POEM is provided as follows.

- Identifying or ascertaining the person or persons who actually make the key management and commercial decisions for the conduct of the company's business as a whole.
- Determination of the place where these decisions are being taken.

The following guiding principles are provided in this context, none of which could unilaterally decide the POEM but will have to be considered on a holistic basis.

Location of meeting of the company's board

The place where the company's board regularly meets and makes decisions can be considered as the POEM, provided that the company's board

- Retains and exercises its authority to govern the company; and
- Does, in substance, make the key management and commercial decisions necessary for the conduct of the company's business as a whole.

If the key decisions by the directors are being taken in a place other than the place where the formal meetings are being held, then such other place would be relevant for the determination of the POEM.

If the board has *de facto* delegated the authority to make key management and commercial decisions for the company to the senior management or any other person, including

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a shareholder, promoter, strategic/ legal/ financial advisor, and does nothing more than ratify such decisions, then the POEM would be the place where such senior management or other persons make those decisions. The term “senior management” has been defined and it includes key managerial personnel, such as managing directors, CEOs, CFOs and the heads of various divisions/ departments, such as sales or marketing.

Executive committee

If the company’s board has delegated (*de jure* or *de facto*) some or all authority to an executive committee consisting of members of the senior management, the location where the members of such committees are based, and where that committee develops and formulates the key strategies and policies for approval of the board, will be considered as the POEM.

Location of the head office of a company

A company’s head office would be a very important factor in the determination of its POEM. The head office of a company has been defined as “*The place where the company’s senior management and their direct support staff are located or, if they are located at more than one location, the place where they are primarily or predominantly located. A company’s head office is not necessarily the same as the place where the majority of its employees work or where its board typically meets.*”

In this connection, the following points have been provided for determining the location of the head office of the company.

Situation	Head office location
The company’s senior management and their support staff are based in a single location, which is held out to the public as the company’s principal place of business or headquarters.	Such principal place of business or headquarters.
The company is more decentralised, and hence, the senior management operates from time to time from offices in various countries.	The location where these senior managers are primarily or predominantly based; or Normally return to, following travel to other locations; or Meet when formulating or deciding key strategies and policies for the company as a whole.
The members of the senior management operate from different locations on a more or less permanent basis, and participate in various meetings *via* telephone/ video conferencing.	The location, if any, where the highest level of management (e.g. managing director and financial director) and their direct support staff is located.
Where the senior management is so decentralised that it is not possible to determine the company’s head office with reasonable certainty.	The location of the head office would not have much relevance in determining the POEM.

Use of modern technology

If, owing to the use of modern technology, it is determined that the physical location of the board meetings or executive committee meetings may not be where the key decisions are, in substance made, then the place where the directors or persons taking decisions or where the majority of them usually reside may also be a relevant factor.

Circular resolution

The final guidelines provide that in case of circular resolution or round robin voting, factors such as its frequency of use, the type of decisions made in that manner and the location of the parties involved in those decisions, etc., are to be considered. It would be necessary to determine the person who has authority and who exercises such authority to take decisions. The place of location of such person would be more important.

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Shareholders' decisions

The final guidelines have clarified that the decisions made by shareholders on matters reserved for shareholder decisions under the company laws are not relevant for the determination of POEM. Those decisions typically affect the existence of the company itself or the rights of the shareholders as such, rather than the conduct of the company's business from a management or commercial perspective, and hence, are generally not relevant for the determination of the POEM.

The shareholders' involvement can, in certain situations, turn into that of effective management through a formal arrangement by way of shareholders' agreement, etc., or by way of actual conduct. For instance, if the shareholders limit the authority of board and senior managers of a company, and thereby, remove the company's real authority to make decisions, the shareholder guidance transforms into usurpation, and such undue influence may result in effective management being exercised by the shareholders.

It has to be determined on a case-to-case basis if shareholder involvement is crossing the line into that of effective management.

Secondary factors

If the above factors do not lead to a clear identification of the POEM, the following secondary factors can be considered.

- Place where the main and substantial activities of the company are carried out; or
- Place where the accounting records of the company are kept.

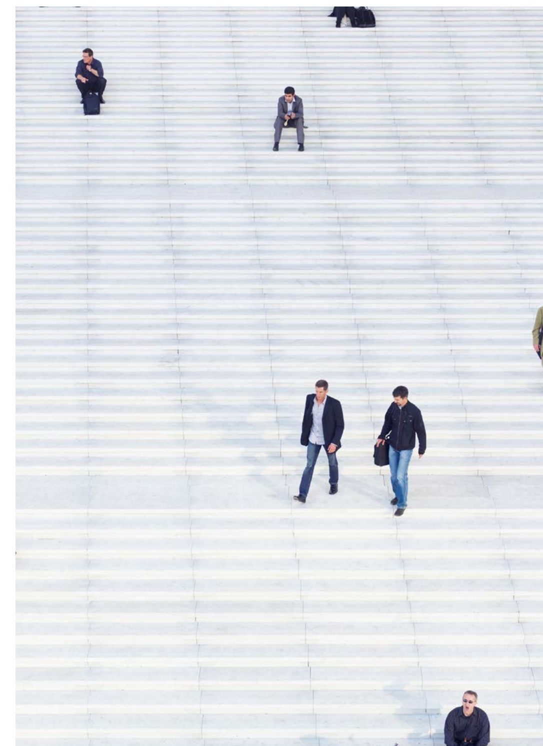
Factors that do not by itself establish POEM

The determination of the POEM is to be based on all relevant facts related to the management and control of the company and not on the basis of isolated facts, which do not establish effective management, as illustrated below.

- A foreign company is completely owned by an Indian company.
- A foreign company has a PE in India.
- One or some of the directors of a foreign company reside in India.
- Local management situated in India, in respect of activities carried out by a foreign company in India.
- The existence in India of support functions that are preparatory and auxiliary in character.

Other points

- The above principles are for guidance only and no single principle will be decisive in itself.
- The principles have to be seen with reference to activities performed over a period of time and no "snapshot" approach is to be adopted.
- If, based on facts and circumstances, it is determined that during the previous year, the POEM is in India and also outside India, the POEM shall be presumed to be in India if it has been mainly/ predominantly in India.
- The final guidelines provide that the TO shall seek the prior approval of the Pr. CIT or the CIT, as the case may be, before initiating any proceedings for POEM determination.
- A TO can hold a company incorporated outside India, on the basis of its POEM, as being resident in India only after seeking the prior approval of a collegium of three members consisting of the Pr. CITs or the CITs, as the case may be, to be constituted by the Pr. CCIT of the region concerned. The collegium so constituted shall provide an opportunity to the company of being heard before deciding the matter.



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Illustrations

There are five illustrations provided in the guidelines, which highlight the applicability of certain principles covered in the guidelines. These illustrations deal with following key aspects.

Illustration No.	Key aspect
Example 1	Only those transactions where both purchases and sales are with associated enterprises shall be considered for the determination of passive income.
Example 2	If payroll expense incurred on employees situated in India exceeds 50% of total payroll expense, the foreign company shall not be considered as engaged in active business outside India.
Example 3	For entities engaged in active business outside India, if the majority of board meetings are held outside India, the POEM shall be considered outside India, even if all directors are Indian residents.
Example 4	If the majority of decisions are taken by the Indian parent company, and the foreign company's senior management is merely signing the contracts, the POEM shall be presumed to be in India, even though the said company is engaged in active business outside India and the majority of its board meetings are held outside India.
Example 5	Merely because the POEM of an intermediate holding company is in India, the POEM of its subsidiaries shall not be taken to be in India. The POEM shall be determined for each subsidiary separately.

Takeaways

- *These final guidelines have been long awaited, and are broadly on the same lines as the draft guidelines, with bifurcation for companies engaged in active business outside India and other companies.*
- *Providing guidance on aspects relating to shareholders' decisions, adherence to group global policies, meeting by way of circular resolutions, routine operational decisions vis-à-vis key management and commercial decisions is a welcome move.*
- *The monetary threshold for non-applicability of POEM guidelines to companies with turnover or gross receipts of INR 500 million or less in a financial year (as laid down in the press release), needs to be incorporated in the guidelines.*
- *As the determination of the POEM is dependent on facts and circumstances, the principles laid out involve a holistic factual analysis, and should not be applied in an isolated manner. The guidelines are applicable for current FY 2016-17, unless the Budget on 01 February, 2017 defers the applicability to FY 2017-18.*
- *The notification with respect to applicability of various provisions of the Act for a foreign company, which is treated as resident on account of its POEM being in India, as stipulated in the Finance Act, 2016 is awaited, and the same should be released soon to provide clarity.*
- *With the release of the final guidelines for POEM determination, one will now have to wait and watch the position with respect to the adoption of the CFC rules as stated in the BEPS action plan.*

Corporate Tax

CBDT communicates that mere regional headquarter operations may not establish POEM in India of group companies

CBDT Circular No. 25 of 2017, dated 23 October, 2017

The CBDT has communicated that the regional headquarters operating for group companies in a region within the general and objective principles of global policy of the group in certain fields would not alone be a basis for establishment of POEM in India.

- The provisions of the Act were amended with effect from 01 April, 2016 to stipulate that a company incorporated outside India, would be treated as a tax resident in India if its POEM is in India. The POEM has been defined as a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole, are in substance made. Subsequently, the CBDT issued guiding principles for the determination of the POEM (click here to access our news alert on the final guiding principles for the determination of the POEM).
- The final guiding principles inter alia stated that for a company engaged in active business outside India, the POEM would be presumed to be outside India if the majority of the meetings of the board of directors of the company are held outside India. However, if it is established that the board of directors are standing aside and not exercising their powers of management, and the holding company or any other person resident in India is exercising such powers, the POEM will be considered to be in India.
- In this regard, stakeholders raised certain concerns that the POEM may be triggered in cases of certain multinational companies with regional headquarter structure, merely on the ground that certain employees having multi-country or oversight operations in other countries of the region are working from India.
- Dispelling the above concerns, the CBDT has now issued a circular clarifying that the board of directors may not be constituted to be standing aside on account of the regional headquarter activities, if:
  - The regional headquarter operates for subsidiaries/ group companies in a region within the general and objective principles of the global policy of the group laid down by the parent entity in the field of pay roll functions, accounting, human resource functions, information technology infrastructure and network platforms, supply chain functions, routine banking operational procedures; and
  - The activities of the regional headquarter are not specific to any entity or group of entities *per se*.

Accordingly, it has been clarified that a regional headquarter in India alone will not be a basis for establishment of POEM for subsidiaries/ group companies.

However, the clarification comes with a rider that provisions of the GAAR contained under Chapter X-A of the Act may be triggered in such cases, where the clarification is found to be used for abusive/ aggressive tax planning.

Takeaways

This is a welcome clarification by the CBDT for the multinational companies having regional operations based out of India.

However, concerns may still exist, where the role of regional headquarters is wider than the stipulated non-core business functions.

Stay of demand

CBDT partially modifies the instruction no 1914 of 1996 for stay of demand and increases the payment requirement from 15% to 20%

CBDT Office Memorandum dated 31 July, 2017

Background

The CBDT had earlier vide memorandum dated 29 February, 2016, modified the guidelines for stay of demand at the first appeal stage issued under Instruction No. 1914 of 1996. The CBDT made it mandatory for the TO to grant stay of demand once the taxpayer pays 15% of the disputed demand, while the appeal is pending before the CIT(A).

However, in certain scenarios, the TO after taking approval from superiors could ask for a higher/ lower payment of the demand before granting the stay for the balance demand.

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Modification by CBDT

The CBDT *vide* office memorandum dated 31 July, 2017 has further modified the Instruction No. 1914 of 1996 and has revised the standard rate prescribed in the office memorandum dated 29 February, 2016 from 15% to 20% for grant of stay at the first appeal stage. The CBDT has mentioned that the standard rate of 15% prescribed earlier was found to be on the lower side.

Takeaways

This increase in the standard rate from 15% to 20% may be linked to the recently released first quarter revenue collections for FY 2017-18, which has shown growth of 8% in gross revenue collections. This may not be a welcome move for the genuine taxpayers and will definitely increase their burden.

Trade advances

CBDT communicates that trade advances in the nature of commercial transaction do not fall within the ambit of section 2(22)(e) of the Act

CBDT Circular No. 19 of 2017 dated 12 June, 2017

Background

The provisions of section 2(22)(e) of the Act create fiction and bring amounts paid otherwise than as dividends, in the form of loans or advances, into the net of dividends. These provisions were intended to bring into the tax net, the distribution of accumulated profits by closely held companies to shareholders or connected concerns, otherwise than by declaration of dividend to escape taxation.

The deeming provisions excluded the payment of loan or advance in the ordinary course of business; however, this exclusion was limited to cases in which the lending of money was a substantial part of the business. The general nature of these deeming provisions led to widespread litigation involving genuine advancement of monies as part of normal business/ trade transactions brought into the tax net as dividends.

A plethora of rulings has held these deeming provisions to be not applicable in cases involving genuine advancement of monies for trade/ business transactions.

Communication by the CBDT

To reduce litigation, the CBDT, *vide* Circular no. 19/ 2017 dated 12 June, 2017, has recognised the view propounded in various rulings and clarified that trade advances, which are in the nature of commercial transactions, would not fall within the ambit of the deeming provisions of section 2(22)(e) of the Act.

While recognising this position as being the settled view of the matter, few illustrations of trade advances/ commercial transactions, based on past rulings, have been mentioned in the CBDT Circular, which are as follows:

- Advances made by a company to a sister concern and adjusted against the dues for job work done by the sister concern.
- Advances made by a company to its shareholder to install plant and machinery at the shareholder's premises to enable him to do job work for the company to enable the company to fulfil an export order.
- Floating security deposit given by a company to its sister concern for use of electricity generators to supply electricity at concessional rates to the sister concern.

It has also been instructed that appeals may not be filed by the department on this ground and those already filed may be withdrawn/ not pressed.

Takeaways

This Circular is another addition to the administrative circulars issued by the CBDT to provide certainty on tax positions and reduce litigation. However, the practical applicability of this clarification and acceptability of the taxpayer's contentions in different fact patterns will depend on the approach and interpretation of tax officers at lower levels.

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Withholding tax

Procedure notified for furnishing Form 26A electronically for correction and removal of technical defaults under withholding tax provisions

CBDT Notification No. 11 of 2016 dated 02 December, 2016

Notification no. 11 of 2016 has recently been issued under the delegated powers of the CBDT, with the object of introducing the procedure of furnishing Form 26A electronically on the income tax portal to obtain benefits of the first proviso to section 201(1) of the Act.

Background

Provisions of section 201(1) of the Act were amended by the Finance Act, 2012, with effect from 01 July, 2012. This amendment inserted a proviso, which states that a person shall not be treated as a taxpayer-in-default if he/ she fails to withhold the whole or any part of the taxes in accordance with the provisions of the Act, on any sum paid to a resident or on any sum credited to the account of a resident, provided the resident payee.

- Has furnished his/ her return of income under section 139 of the Act;
- Has considered such sum for computing income in such return of income;
- Has paid the tax due on the income declared by him/ her in such return of income; and

the person has furnished a certificate to this effect from an accountant in Form 26A, prescribed under Rule 31ACB of the Rules.

From the very beginning, taxpayers have faced major challenges in availing benefits of the aforesaid provisions because Form 26A could not be filed electronically, and the ultimate objective of the amendment in section 201 was not met.

The Notification

In exercise of powers delegated by the CBDT under sub rule (2) of Rule 31ACB of the Rules, the Director General of Income-tax (Systems) has authorised the field TO (TDS) and CPC-TDS to receive Form 26A through paper and electronic modes, respectively, for correction of withholding tax defaults. The new system will be effective from 15 January, 2017.

The broad level steps for furnishing Form 26A as provided in the notification, are summarised as follows:

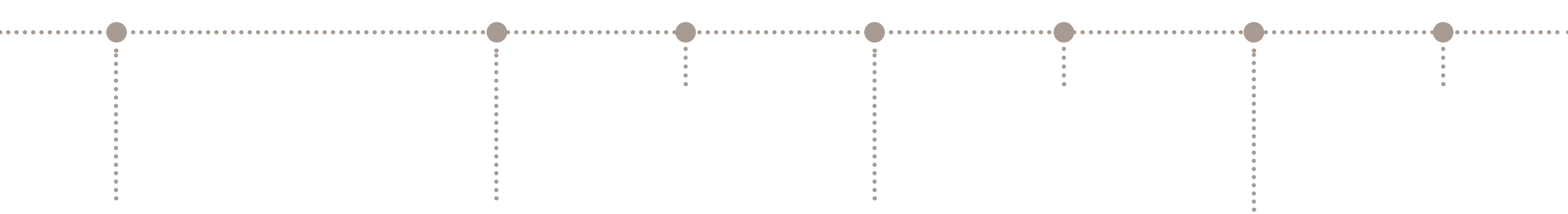
Steps	Place of action	Activity
	TRACES Portal	The deductor needs to submit request to obtain the details of short deduction from the portal, and can submit the information related to non-deduction on the said portal.
	TRACES Portal	The above request/ information will be processed and a unique ID shall be given to each short deduction/ non-deduction transaction identified. This unique ID will be communicated to the deductor on the e-Filing Portal. [In case of short deduction, a unique identification number (DIN) will be generated for each deductee row. In case of non-deduction, a unique alpha numeric string would be created consisting of TAN, PAN and FY.]
	Offline	The deductor will communicate the unique transaction ID to the accountant identified for certifying Annexure A of Form 26A.
	E-Filing Portal*	The unique transaction ID will be mapped with the membership number of the accountant for authorisation.
	E-Filing Portal	On successful authorisation, the accountant so authorised may fill in the relevant details in Annexure A to Form 26A with respect to the deductee in question, and certify it by digitally signing Annexure A.
	E-Filing Portal	Post the accountant's certification, the deductor needs to digitally sign Form 26A and submit its final request.

** The role of e-filing as per the notification is to check whether the ITR of the deductee is filed under section 139 of the Act and that no demand is payable at the time of assessment.*

Corporate Tax

Takeaways

Taxpayers were facing difficulty in taking advantage of the beneficial provisions introduced vide the Finance Act, 2012. This would provide much relief to taxpayers. Overall, this is a welcome step by the Indian government to promote the ease of doing business in India.



Financial Services

Judgement

Status of trust

Determinate status of the trust not to be affected if the trust deed capable of identifying the beneficiaries and determining their respective shares

ITA No. 191/ 2015 (Karnataka HC)

For a trust to be a determinate trust, it would be sufficient if the trust deed laid down that the beneficiaries would be the persons who would have made, or agreed to make, contributions to the trust in accordance with the contribution agreement, and their shares were capable of being determined based on the provisions of the trust deed.

Facts

The taxpayers were trusts, the benefits of which were shared amongst its beneficiaries as per the trust deeds, and were separately assessed under the Act. The TO, in the assessment, found that as the shares of the beneficiaries were non-determinable, the income should have been taxed in the hands of the trustees at the maximum marginal rate, and accordingly, passed the assessment order. On appeal, the CIT(A) reversed the order in favour of the taxpayer, as it found that the shares were determinable. The Tribunal found that the grounds raised by the Revenue regarding non-ascertainability of the shares of beneficiaries, and consequent chargeability of income in the hands of the trustees at the maximum marginal rate lacked merit. A further appeal was filed before the HC.

Held

The HC upheld the decision of the Tribunal on the following principles:

All that was necessary was that the beneficiaries should have been identifiable based on the provisions of the trust deed, and it was not necessary that the beneficiaries should have been specifically named in the trust deed. In the present case, the trust deed clearly laid down that beneficiaries meant the persons, each of whom had made or agreed to make, contributions to the trust in accordance with the contribution agreement.

It was not necessary that the trust deed should have actually prescribed the percentage share of the beneficiaries for the trust to be determinate. It was enough that the share of the beneficiaries was capable of being determined based on the provision/ formula as on the date of the trust deed and not at the discretion of the trustee. In the present case, the trust deed clearly specified the manner in which the income had to be distributed.

If the trust deed authorises the addition of further contributors to the trust at different points in time, in addition to the initial contributors, the beneficiaries would not become unknown or their shares indeterminate.

Takeaways

This is a welcome decision in the area of taxation of contributory trusts and should provide relief to the domestic fund industry. While Circular No. 13/ 2014 mentioned above, in the context of taxation of the trusts, has not been discussed in the present case, this HC decision would have a binding effect on all tax Tribunals until any other HC or SC takes a different view on this matter.

Circulars, notifications and others

Characterisation of income

CBDT communication on characterisation of income on transfer of unlisted shares by Category I and Category II AIFs registered with the SEBI

CBDT Clarification F.No.225/ 12/ 2016/ ITA. II dated 24 January, 2017

Taxation regime for AIFs

Under the provisions of the Act, an investment fund established or incorporated in India and registered with the SEBI as a Category I or a Category II AIF is accorded tax pass through status, i.e., income of the AIF shall be chargeable to tax directly in the hands of its investors. However, where the income of the investment fund is characterised as income under the head “profits and gains of business or profession,” the investment fund would be taxable in respect of such income at the maximum marginal rate of tax.

Characterisation of income

There have been many judicial pronouncements on whether gains on transfer

of securities should be taxed as "business profits" or as "capital gains." However, these pronouncements, while laying down certain guiding principles, have largely been driven by the facts and circumstances of each case. The CBDT had provided guidance (*vide* its Instruction: No. 1827, dated 31 August, 1989 and Circular No. 4/ 2007, dated 15 June, 2007) in respect of characterisation of gains as either capital gains or business income. Subsequently, with respect to the characterisation of gains arising on transfer of unlisted shares, the CBDT had issued an instruction dated 02 May, 2016 providing that income from transfer of unlisted shares would be considered under the head "capital gains," irrespective of the period of holding. However, the CBDT, carved out the following three exceptions for the TO to take an appropriate view on the characterisation of income, if:

1. The genuineness of transactions in unlisted shares itself is questionable; or
2. The transfer of unlisted shares is related to an issue pertaining to lifting of corporate veil; or
3. The transfer of unlisted shares is made along with the control and management of underlying business.

CBDT communication

The CBDT has noted that Category I and II AIFs registered with the SEBI invest in unlisted shares of companies, being new set-ups or start-ups, and to safeguard the interest of its investors, such AIFs may exercise some form of control and management in the underlying business of the start-ups. Hence, based on representations received in this regard, the CBDT has clarified that the exception relating to the transfer of unlisted shares along with the control and management of the underlying business, as mentioned in the CBDT instruction dated 02 May, 2016, would not be applicable to SEBI registered Category I and II AIFs only. Accordingly, gains earned by the SEBI registered Category I and II AIFs on transfer of unlisted shares, even where the transfer is made along with the control and management of the underlying business would be characterised as capital gains.

Takeaways

This is a welcome clarification, and will provide certainty on the taxability and pass through nature of the income earned by Category I and II AIFs on transfer of unlisted shares, thereby, reducing litigation exposure for such AIFs.

Exempt income

Exemption of tax on long-term capital gains where no STT has been paid on purchase – CBDT issues final notification

CBDT Notification No. 43 of 2017 dated 05 June, 2017

Recently, (as per the Finance Act, 2017), the provisions relating to exemption of tax on long-term capital gains, as per section 10(38) of the Act have been amended. Tax exemption on transfer of equity shares acquired on or after 01 October, 2004 shall be available only if the acquisition of share is chargeable to STT.

However, to protect the exemption for genuine cases in which the STT could not have been paid, the Central Government shall notify the acquisitions for which the condition of chargeability of STT shall not apply.

In this regard, the government had earlier issued the draft notification for comments (please click **here** to access the draft notification). Pursuant to public comments, it has issued the final notification, which provides that all non-STT paid transactions will be eligible for exemption except for the negative list. The said notification is attached below for your reference.

On perusal of the notification, you may note that the following transactions relevant to FPIs should be eligible for long-term capital gain tax exemption on the sale of such shares, even if no STT was paid at the time of their acquisition:

- Acquisition of shares by Category I and Category II FPIs;
- Acquisition through issue of share by a company, other than preferential issue (example IPO, FPO, Bonus or Rights issue);
- Acquisition by mode of transfer referred to in section 47 of the Act (transactions not regarded as transfer)
- Acquisition of shares that have been approved by the SEBI (e.g. free-of-cost transfer)

The notification shall come into force with effect from 01 April, 2017, i.e., FY 2017-18 and onwards.

Financial Services

Condition for conversion of Indian branch to an Indian subsidiary company

CBDT issues draft notification specifying condition for conversion of Indian branch of foreign bank into an Indian subsidiary company

CBDT Draft Notification F. No. 370133/34/2017-TPL, dated 17 November, 2017

Foreign banks have a presence in India through their branches.

During 2008, a global financial crisis occurred and the major reason for it was the domestic incorporation of foreign banks. Having said the above, the RBI, in the public interest and in the interest of banking policy, had issued a 'Scheme for setting up of WOS by foreign banks in India'.

To incentivise the foreign banks to set up wholly owned subsidiaries in India, Finance Act, 2012, inserted Chapter XII-BB, consisting of section 115JG of the Act, section 115JG of the Act provides for the following benefits:

- *Exemption from capital gains tax arising upon conversion of the Indian branch of a foreign bank into a Indian subsidiary company, in accordance with scheme framed by RBI; and*
- *Exceptions, modifications and adaptations with regard to treatment of unabsorbed depreciation, set off or carry forward of losses, availability of MAT credit and the computation of income of the foreign bank and the Indian subsidiary company.*

However, these benefits were further subject to the conditions that may be notified by the Central Government.

CBDT has now issued a draft notification which provides for conditions that an Indian branch of a foreign bank needs to adhere to at the time of its conversion into an Indian subsidiary company in order to avail benefits under section 115JG of the Act.

The Finance Act, 2012 inserted Chapter XII-BB, consisting of section 115JG of the Act, which contains 'Special provisions relating to conversion of Indian branch of a foreign bank into a subsidiary company'.

Section 115JG of the Act, inter alia, provides that where a foreign company, being a company engaged in the business of banking in India, through its branch situated in India, converts its branch into a subsidiary company, in accordance with scheme framed by the RBI, then subject to the conditions notified by the Central Government, the capital gains arising from such a conversion shall not be chargeable to tax.

Further, section 115JG of the Act also provides that the provisions relating to unabsorbed depreciation, set off or carry forward and set off of losses, tax credit in respect of tax paid on deemed income relating to certain companies and the computation of income in case of foreign company and Indian subsidiary pursuant to such conversion shall apply with such exceptions, modifications, etc., as may be specified in the notification.

The CBDT has, under the draft notification, proposed that the following conditions need to be fulfilled, in addition to the scheme framed by the RBI, for availing benefits of section 115JG of the Act:

a. all the assets and liabilities of the Indian branch immediately before conversion become the assets and liabilities of the Indian subsidiary company;
b. the foreign company referred to in sub-section (1) of section 115JG of the Act or its nominees hold the whole of the share capital of the subsidiary company; and
c. the foreign company referred to in sub-section (1) of section 115JG of the Act does not receive any consideration or benefit, directly or indirectly, in any form or manner, other than by way of allotment of shares in the Indian subsidiary company;

To summarise, where a conversion of an Indian branch of a foreign bank to Indian subsidiary company is done in accordance with RBI scheme and the above conditions, capital gains arising on account of such conversion shall not be taxable.

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Further, the draft notification proposes following exceptions, modifications and adaptations with regard to applicability of provisions of the Act for treatment of unabsorbed depreciation, set off or carry forward of losses, availability of MAT credit and the computation of income of the foreign bank and the Indian subsidiary company:

S. No.	Particulars	Exception/Modification/Adaptation
1	Allowance of depreciation under section 32 of the Act	a. The aggregate deduction, in respect of depreciation of buildings, machinery, plant or furniture, being tangible assets or know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets allowable to the Indian branch and the Indian subsidiary company shall not exceed in any previous year the deduction calculated at the prescribed rates, if the conversion had not taken place; b. deduction shall be apportioned between the Indian branch and the Indian subsidiary company in the ratio of the number of days for which the assets were used by them
2	Accumulated losses and unabsorbed depreciation	The accumulated loss and the unabsorbed depreciation of the Indian branch, shall be deemed to be the loss or allowance or depreciation of the Indian subsidiary company for the purpose of the previous year in which conversion was effected and provisions of the Act relating to set off and carry forward of loss and allowance for depreciation shall apply accordingly. For the purpose of this clause, **'Accumulated losses'** means so much of the loss of the Indian branch before conversion into Indian subsidiary company under the head 'Profits and gains of business or profession' (not being a loss sustained in a speculation business) which such Indian branch would have been entitled to carry forward and set off under the provisions of section 72 of the Act if the conversion had not taken place. **'Unabsorbed depreciation'** means so much of the allowance for depreciation of the Indian branch before conversion into Indian subsidiary company, which remains to be allowed and which would have been allowed to the Indian branch under the provisions of this Act, if the conversion had not taken place.
3	Actual cost of capital asset	For the purposes of clause (1) of section 43, the actual cost of the block of assets in the case of the Indian subsidiary company shall be the written down value of the block of assets as in the case of the Indian branch on the date of conversion of the Indian branch into the Indian subsidiary company. The actual cost of any capital asset on which deduction has been allowed or is allowable to the taxpayer under section 35AD of the Act, shall be treated as 'nil' for the purposes of clause (1) of section 43 of the Act if the capital asset is acquired or received as a result of conversion referred to in sub-section (1) of section 115JG of the Act
4	MAT credit	The tax credit of the Indian branch shall be deemed to be the tax credit of the Indian subsidiary company for the purpose of the previous year in which conversion was effected and the provisions of section 115JAA of the Act shall apply accordingly. For the purposes of this clause, tax credit means so much of the tax credit of the Indian branch before conversion into Indian subsidiary company which such Indian branch would have been entitled to carry forward and set off under the provisions of section 115JAA of the Act, if the conversion had not taken place.

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S. No.	Particulars	Exception/Modification/Adaptation
5	Cost of acquisition of capital asset	Where the capital asset became the property of the Indian subsidiary company as a result of conversion of Indian branch, the cost of acquisition of the asset for the purposes of computation of capital gains shall be deemed to be the cost for which the Indian branch acquired it or, as the case may be, the cost for which previous owner had acquired it.
6	Credit balance of provision for bad and doubtful debts	The credit balance in the provision for bad and doubtful debts account made under clause (viia) of sub-section (1) of section 36 of the Act of the Indian branch on the date of conversion shall be deemed to be the credit balance of the Indian subsidiary company and the provisions of section 36 of the Act shall apply accordingly.

Further, for the purpose of the notification, 'date of conversion' shall be the date on which the RBI appoints for the vesting of undertaking of the Indian branch in Indian subsidiary company under paragraph 20(i) of the 'Scheme for setting up of wholly owned subsidiary by foreign bank in India'.

Takeaways

The finalisation of the draft CBDT notification, shall provide clarity to foreign banks on the following:

- *Conditions which needs to be adhered to, at the time of conversion of the Indian branch of a foreign bank into a subsidiary, in order to qualify as a tax neutral conversion;*
- *Guideline for treatment of unabsorbed depreciation, set off or carry forward of losses, availability of MAT credit and the computation of income of the foreign bank and the Indian subsidiary company (upon conversion of Indian branch into subsidiary); and*
- *Pursuant to the above, foreign banks shall be in a position to take a more informed decision on the conversion of Indian branch into Indian subsidiary company and tax issues surrounding such conversions*

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Derivative markets

Indian capital markets regulator releases "Discussion paper on the growth and development of equity derivatives market in India"

SEBI Circular No.: SEBI/ HO/ CIR/ P/ 2017/ 79 dated 11 July, 2017

The equity derivatives market in India has grown rapidly in recent years, i.e., at 35.10% CAGR between FY 2004-05 to FY 2016-17. The ratio of turnover of equity derivatives to equity cash segment was 15.59 for FY 2016-17.

The Indian capital markets regulator, the SEBI, in its recent board meeting held on 21 June, 2017, decided to initiate stakeholder consultations to review the equity derivatives market framework, including aspects such as product mix, stock eligibility, product suitability for investors, etc., to further strengthen the framework in line with emerging trends and global best practices.

In connection with the above, SEBI has released a discussion paper on the "Growth and Development of Equity Derivatives Market in India" seeking comments. (Please click **here** *to access the discussion paper)*

The paper provides several data points and information around the equity derivatives market and lists matters for further discussion.

We have captured the key aspects related to the equity derivatives market and summarised the issues enlisted for further deliberation in the discussion paper.

Tracing the history of the equity derivative market, the paper recognises the recommendations of the L. C. Gupta Committee and the Derivative Market Committee under the chairmanship of Prof M Rammohan Rao, which have been pivotal in the development of the equity derivatives market in India. The paper notes, amongst others, the following:

Trading in derivatives

- Equity derivatives turnover is largely dominated by index options, which contributed 77.14% to the total turnover, followed by stock futures at 11.79%, stock options at 6.47% and index futures at 4.60%.
- Between FY 2004-05 to FY 2016-17, the CAGR of turnover in cash market has been 11.39%, whereas the CAGR for turnover in equity derivatives has been 35.10%. The market capitalisation of listed companies has grown at 17.82% CAGR during this period. The ratio of notional turnover in equity derivatives to equity cash segment increased from 1.54 for FY 2004-05 to 15.59 for FY 2016-17.
- There is significant concentration of volumes in terms of products, exchange and investor category.
- In terms of indices, NIFTY futures are highly traded and volumes are almost divided between domestic and SGX Nifty futures, indicating overseas interest in the NIFTY futures. The turnover ratio of NSE NIFTY futures to SGX NIFTY futures was 53.7 for FY 2016-17.
- Options dominate trading in the derivatives segment by accounting for 83.61% of total trading in derivative segment.

Participant profiles

- The participants in equity derivatives market include institutional investors, proprietary stock brokers, corporates and other investors.
- Proprietary traders and individual investors contribute 42% and 26%, respectively, of the total volume of equity derivatives in India.

Product-wise profiling of investors

- Foreign investors contribute between 15-20% of the total volume across all product categories available in the equity derivatives segment. The presence of FPIs can be felt in all types of product categories.
- FPI participation is low, which is attributable to trading of futures and options on major indices in foreign markets, such as Singapore, Hong Kong and Dubai, etc.
- The participation by mutual funds in derivatives is negligible. This could be attributed to certain regulatory restrictions applicable to mutual funds.
- A large number of individual investors are active in the derivative segment. From their trading pattern in the cash segment, these investors may or may not have adequate financial capability to withstand risks posed by complex derivative instruments. In the absence of a product suitability framework, this may not be in the interest of the securities market.

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Factors governing trading behaviour

- Margin required for trading in derivatives
  - Margin for equity derivatives is computed using software called the SPAN. The minimum margin requirement on index and stock futures is 5% and 7.5%, respectively.
  - Investors with offsetting positions can avail the cross-margin benefit, which is not available in the cash segment. Currently, no adjustment in margin is permitted for taking offsetting positions in two different exchanges.
- STT framework in India
  - STT is levied on transactions done in the equity derivatives segment of the stock exchanges. Various STT rates have been prescribed over the years in the cash, future and option segments.

SEBI initiatives

- The SEBI has taken steps to develop the cash market by initiating various measures, which amongst others, include the introduction of new products, redesigning existing products and investor awareness.
- Similarly, to enhance the liquidity in the SLB mechanism, the framework has been revised. SEBI has received many suggestions to improve the SLB framework and is examining them.

Feasibility of product suitability in derivatives

- The report placed emphasis on the regulation of sales practices and disclosure for derivatives, which is relevant now and in the context of derivatives trading.
- The SEBI conducted an Investor Survey in 2015, which revealed the risk perceptions to investors with respect to various financial instruments. Therefore, the SEBI considers that there is a need for focused investor awareness about such financial instruments, and particularly, derivative products.
- Currently, trading members are required to have a qualified and approved user and sales person to operate in the derivative market. However, the concept of product suitability framework for investors as prevalent in other jurisdictions is not yet present in the Indian market.

Matters for discussion

The paper lists down the following matters for discussion:

- The ratio of turnover in derivatives to turnover in the cash market is around 15 times. To what extent are the drivers of this ratio in India comparable with drivers in other markets?
- What are the global best practices and experiences in international markets when it comes to aligning the cash and derivative markets?
- Considering the participants' profiles, what measures would be required to create balanced participation in the equity derivatives market?
- Taking into account the trading of individual investors in derivatives, especially options, is there a need to introduce a product suitability framework in our market?
- Considering the participants' profiles, product mix and leverage in equity derivatives, what could be the guiding principles for setting the minimum contract size and open position limits for equity derivatives?
- Is there a need to review existing criteria for the introduction of derivatives on stocks or derivatives on indices?
- Taking into account the margin levied in the derivative segment and the consequent leverage, is the present margin framework adequate? Is there a need to review the trading and risk management framework for derivatives?
- Are there any inefficiencies in the market that need to be addressed?
- Is there any regulatory arbitrage that needs to be addressed?

Takeaways

- *SEBI's current initiative is a part of its larger objective of developing and aligning both cash and derivatives markets and introduce best practices.*
- *The paper identifies and seeks comments from stakeholders on critical aspects of the equity derivative markets, which could be deliberated further.*
- *The consultative approach adopted by SEBI in this regard is a step in the right direction.*

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Receipt of loan repayment by NBFCs and HFCs - Clarification regarding the applicability of section 269ST issued by the CBDT

CBDT Circular No. 22 of 2017 dated 03 July, 2017

Background

The Finance Act, 2017 introduced a new section 269ST in the Act with the objective of reducing transactions in cash. Section 269ST of the Act prohibits receiving an amount of INR 0.2 million or more by a person, *inter alia*, in respect of a single transaction other than by way of an account payee cheque or account payee bank draft or use of electronic clearing system through a bank account.

Further, the Finance Act, 2017 also introduced provisions for levying penalty in case of contravention of the provisions of section 269ST of the Act.

CBDT communication

The CBDT has issued Circular No. 22/ 2017 dated 03 July, 2017 clarifying that the receipt of one instalment of loan repayment by NBFCs and HFCs will constitute a "single transaction" and all the instalments paid for a loan would not be aggregated for the purposes of determining the applicability of the provisions of section 269ST of the Act.

The above comes as a relief for various NBFCs and HFCs operating in retail/ rural segments.

SEBI releases consultation paper to streamline the process of monitoring of Offshore Derivative Instruments

SEBI Consultation paper dated 29 May 2017

The Indian market regulator, the SEBI has been frequently expressing concerns over possible misuse of investments through ODI (commonly known as P-notes) for round tripping and tax evasion.

In the recent past, SEBI has taken several steps for streamlining and tightening the conditions for issuance and reporting of ODIs by FPIs. Some of the key measures include extending the FPI eligibility criteria to ODI issuances, placing certain restrictions on transfer of ODIs, compliance with KYC norms, reporting of suspicious transactions, periodic review of systems, modifying the ODI reporting format, etc.

As a result of the aforementioned steps, there has been a significant reduction in the notional value of outstanding ODIs. Recent data indicates that notional value of ODIs as on April 2017 is 6% of the overall FPI AUC as compared to 10.5% in January 2016.

In order to further enhance transparency in the process of issuance and monitoring of ODIs, SEBI has issued a consultation paper for public comments outlining the following steps:-

Levy of regulatory fees on FPIs issuing ODIs

In order to encourage ODI subscribers to register themselves as FPI, SEBI proposes to levy a regulatory fee of US$ 1,000 on each FPI issuing ODI for each and every ODI subscriber coming through such FPI. This fees would be levied for a period of every three years, beginning 01 April, 2017.

Prohibit ODIs from being issued against derivatives except for those used for hedging

Presently, ODIs are being issued against derivatives along with equity and debt. SEBI proposes to prohibit ODIs from being issued against derivatives for speculative purpose.

Further, the ODI issuers shall be given time till 31 December, 2020 to wind up the ODIs issued against derivatives which are not for hedging purpose. It will be incumbent on ODI issuing FPI to ensure that ODI is issued against those derivatives which are purely for hedging purpose and not for naked speculation. The ODI issuing FPI shall put in place necessary system to ensure the same.

Clarification on overseas transfer provisions (Circular No. 41/ 2016) kept in abeyance

CBDT press release dated 17 January, 2017

The CBDT had issued **Circular No. 41 of 2016 - F. No. 500/ 43/ 2012-FT&TR on 21 December, 2016 (Please refer to our news alert dated 22 December 2016.)** which clarifies the applicability of overseas transfer provisions in the context of FPIs. Given the expansive nature of the clarifications/ overseas transfer provisions, several representations were filed with the authorities highlighting the concerns of, amongst others, India-focused funds and offshore portfolio investors.

The CBDT has issued a press release noting the concerns raised by various stakeholders,

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particularly the issue of multiple taxation of the same income. The representations made by various stakeholders are currently under consideration by the CBDT. Pending a decision in the matter, the CBDT has kept the operation of the aforementioned circular in abeyance for now.

FATCA

FATCA & CRS update: CBDT issues updated guidance note for implementation of rules for FATCA & CRS reporting in India (fourth edition)

Guidance note on FATCA and CRS

In 2015, the Indian revenue authorities amended the Rules relating to FATCA and CRS reporting in India. Rules 114F to 114H and Form 61B were enacted to provide legal basis to the Reporting Financial Institutions for maintaining and reporting information about reportable accounts (for the notified rules, clarifications and previous guidance notes on FATCA reporting, please refer to our news alert dated 11 August, 2015; news alert dated 07 January, 2016; newsflash dated 19 February, 2016 and newsflash dated 04 April, 2016).

On 30 November, 2016 the Indian revenue authorities issued the fourth edition of the updated Guidance Note on implementation of FATCA and CRS reporting requirements, as prescribed under the Rules. The guidance note endeavours to explain FATCA and CRS reporting requirements in a simple manner in order to assist Indian Financial Institutions in complying with reporting requirements.

Entity managed by another entity

The term "Investment Entity" refers to an entity whose primary income is from the business of investing, re-investing or trading in financial assets, and such an entity is managed by another entity, which is a depository institution, a custodial institution, an investment entity or a specified insurance company. The gross income of the entity from such business activities is more than 50% of the entities' gross income over a three-year period.

The guidance note now provides the definition of the phrase "entity managed by another entity" as follows:

"An entity is 'managed by' another entity if the managing entity performs, either directly or through another service provider, any of the activities or operations on behalf of the managed entity."

However, an entity does not manage another entity if it does not have discretionary authority to manage the entity's assets (in whole or part). In a case where an entity is managed by a mix of FI, NFEs or individuals, the entity is considered to be managed by another entity, which is a depository institution, a custodial institution, a specified insurance company, or an investment entity if any of the managing entities is such an entity.

The activities and operations described here are similar to the primary business activities on the basis of which the entity is considered an investment entity.

Branch

The guidance note clarifies that a "branch" is a unit, business or office of a FI, which is treated as a branch under the regulatory regime of a jurisdiction or is otherwise regulated under the laws of a jurisdiction as separate from other offices, units or branches of the FI.

A branch includes a unit, business or office of a FI located in a jurisdiction in which the FI is resident, and a unit, business or office of a FI located in the jurisdiction in which the FI is created or organised.

All units, businesses or offices of a RFI in a single jurisdiction shall be treated as a single branch.

Definition of Non-Active NFE

An entity will not be treated as an active NFE that functions or holds itself out as an investment fund, such as a private equity fund, venture capital fund, leveraged buyout fund or any investment vehicle whose purpose is to acquire or fund companies and then hold interests in those companies as capital assets for investment purposes.

Self-certification

The guidance note has clarified that all RFIs must make all efforts to collect the self-certification with respect to a Controlling Person of a Passive NFE.

If self-certification is not obtained with respect to a Controlling Person of a Passive NFE, in order to determine whether it is a

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Reportable Person, the RFI must rely on its review of electronically searchable data to identify any indicia in its records for the controlling person. If the RFI has no such indicia in its records, no further action would be required until there is a change in circumstances, which results in one or more indicia with respect to the controlling person being associated with the account.

Scope of "Change in Circumstances"

"Change in circumstances" includes any change that results in the addition of information relevant to a person's status or otherwise conflicts with such person's status previously declared with FIs. In addition, a change in circumstances would include any change or addition of information to the account holder's account (including the addition, substitution or other changes to an account holder) or any change or addition of information to any account associated with such account (applying the account aggregation rules), if such change or addition of information affects the status of the account holder.

In case of change in circumstances with respect to a pre-existing entity account that causes the RFI to know, or have reason to know, that the self-certification or other documentation associated with an account is incorrect or unreliable, the RFI must re-determine the status of the account in accordance with the due diligence procedure at the earliest. This should be done by the latest of the last day of the relevant calendar year or 90 calendar days following the notice or discovery of the change in circumstances.

Due diligence

For due diligence procedures, "documentary evidence" includes any of the following:

i. A certificate of residence issued by an authorised government body, including a government agency or a municipality, of the country or territory in which the payee claims to be a resident;

ii. With respect to an individual, any valid identification issued by an authorised government body, including a government agency or a municipality, which includes the individual's name and is particularly used for identification purposes;

iii. With respect to an entity, any official documentation issued by an authorised government body, including a government agency or a municipality, which includes the name of the entity and either the address of its principal office in the country or territory in which it claims to be a resident or the country or territory in which the entity was incorporated or organised; and

iv. Any financial statement, third party credit report, bankruptcy filing, or a report of the government agency regulating the securities market. Any such financial statement should be audited by an appropriate authority.

- The RFI is expected to institute procedures to ensure that any change that constitutes a change in circumstances is identified by the RFI.
- The RFI is expected to notify any person providing self-certification of the person's obligation to notify the RFI of a change in circumstances.
- The RFI must keep records of the steps undertaken and any evidence relied upon for the performance of due diligence procedures.
- The RFI must be able to obtain those records when required. The RFI should also record the date on which the due diligence for an account was completed.

Every RFI has to maintain information on financial accounts in accordance with the procedure and manner specified by its sectoral regulator periodically. In rare situations, when the sectoral regulator specifies no such procedure and manner, the information on financial accounts shall be maintained for at least six years, as specified under the Act.

Takeaways

The latest guidance note issued by the Indian revenue authorities discusses and reiterates the government's intent to achieve maximum compliance in terms of FATCA and CRS reporting. This also reiterates the government's approach in ensuring registration and reporting compliance by all FIs. As the deadline for FATCA and CRS due diligence falls on 31 December, 2016 and the reporting deadlines for both falls on 31 May, 2017, respectively, it is pertinent for FIs to review the status of due diligence procedures and complete the necessary compliances in a timely manner.

Financial Services

CBDT notifies deadline for completion of FATCA due diligence in respect of certain new account holders

CBDT press release dated 11 April, 2017

In 2015, the Indian revenue authorities amended the Rules to legislate the framework of FATCA and the CRS reporting in India. Rules 114F to 114H and Form 61B were enacted to provide a legal basis to the RFIs for maintaining and reporting information about reportable accounts.

As per Rule 114H (8), FIs were required to obtain self-certification and complete due diligence for new accounts opened during the period 01 July 2014 until 31 August, 2015 by 31 August, 2016.

As there were several difficulties faced by different stakeholders in complying with the self-certification requirements for the above accounts, the CBDT clarified on 31 August, 2016 that the above deadline shall be extended up to a further period to be notified in due course and directed the FIs to continue to work on completing the required due diligence in the interim.

In continuation of the above, the CBDT has issued a press release dated 11 April, 2017 advising FIs to reach out to account holders and obtain pending self-certification forms latest by 30 April, 2017. If the same are not provided by the respective accounts by such date, the FI would be required to block the account of such account holder and the account holder should be prohibited from carrying out any transactions from such account until submission of the self-certification form and completion of due diligence on the part of the FI.

Takeaways

While we understand that a number of FATCA/ CRS related initiatives on obtaining self-certifications, for all new accounts (individual and entity opened during the period of 01 July, 2014 to 31 August, 2015) have been underway amongst various FIs, the above directive puts a very tight timeline around ensuring compliance for those cases where self-certifications are still pending. Non-compliance by the customer would have implications in the form of blocking of customer accounts, which will have a significant impact on customer experience, especially given the fact that each of these customers would be high value customers of the FIs (banks, insurance companies, mutual funds). While we are sure that the FIs would complete the self-certification exercises, we expect the regulators (RBI/ SEBI/ Insurance Regulatory and Development Authority) to pick this up as an area of thematic review during their inspections. Hence, it would be important for the organisations to evaluate the quality of compliance in this domain by ensuring quality of documentation, validation of know your customer, review of customer classification and identification of reportable accounts.

We are in constant discussions with the regulators to further demystify the next steps and believe this is the final call from the regulators to ensure compliance with the requirements of the law.

In addition, this will be the first year of reporting for Indian FIs under the CRS, which will require robust systems to be in place and require diligent interactions with customers to complete remediation.

Financial Services

Foreign portfolio investors

Union Budget 2017 - Proposals relevant to FPIs

Union Budget 2017

The Indian Finance Minister presented the Union Budget, 2017 in the Parliament along with the Finance Bill, 2017 containing tax proposals. While our team is examining the fine print and a detailed analysis will follow, a quick summary of key proposals affecting FPIs is given below:

Key policy announcements

- Common application form for registration, bank account, securities account and PAN to be introduced.

Key tax announcements

- No change in the current tax rates.
- Investors in Category I and Category II FPIs exempted from overseas transfer provisions.
- Sunset provisions for interest income earned from rupee-denominated corporate bonds and government securities extended until July 2020.
- Interest income on rupee-denominated offshore bonds (Masala bonds) subject to tax at the rate of 5%.
- Transfer of such bonds overseas to be exempt from tax in India.
- Exemption from capital appreciation on account of foreign exchange fluctuation at the time of redemption of Masala bonds, extended to secondary holders as well.
- Certain anti-abuse amendments introduced for long-term capital gains exemption on listed securities to address sham transactions, if securities transaction tax not paid on acquisition of such shares.
- In the context of safe harbour provisions, which deal with managing offshore funds from India, maintenance of minimum fund size not necessary in the year in which the fund is being wound up.

SEBI Board Meeting - Key announcements for FPIs

SEBI Press Release No. 25 of 2017 dated 26 April, 2017

1. **SEBI reiterates that NRIs/ resident Indians cannot subscribe to ODIs**

   The SEBI Board has decided to prevent NRIs and resident Indians, or entities beneficially owned by NRIs and resident Indians from subscribing to ODIs. Currently, Regulation 22 of SEBI (Foreign Portfolio Investors) Regulations, 2014 (FPI Regulations) deals with the issuance of ODIs. An FPI is not allowed to issue or subscribe or otherwise deal in ODI directly or indirectly unless such ODIs are issued only to persons who are regulated by the appropriate foreign regulatory authority and KYC conditions are satisfied. SEBI issued a circular date 22 November, 2014 further tightening the rules related to issuance of ODIs by FPIs. The circular specifically required FPIs to issue ODIs to only those subscribers who meet the eligibility criteria for registration as FPIs [Regulation 4 of FPI Regulations]. The said regulation, amongst others, has a restriction on grant of FPI registration to persons resident in India and NRIs. It has been decided that these restrictions for issuance of ODIs should be brought into the FPI Regulations. In addition, it also stated that the restriction shall apply to entities that are beneficially owned by NRIs/ resident Indians from subscribing to ODIs. In the context of KYC requirements for ODI subscribers, in its 10 June, 2016 circular (please click **here** to read this circular), the SEBI has provided guidelines to identify the beneficial ownership, which among others, includes reference to Rule 9 of the Prevention of Money-laundering (Maintenance of Records) Rules, 2005.

2. **Framework for consolidation and re-issuance of debt securities**

   To provide depth in the secondary market for debt securities, SEBI had issued a Consultation Paper on 02 February, 2017 to seek comments on proposals relating to consolidation and re-issuance of debt securities issued under SEBI (Issue and Listing of Debt Securities) Regulations, 2008. The SEBI Board has now approved the following framework for consolidation and re-issuance of debt securities:

i. Maximum of 12 ISINs maturing per financial year may be allowed for debt securities.

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ii. Within these 12 ISINs, the issuer can issue both secured and unsecured NCDs/ bonds and no separate category of ISINs may be provided to them.

iii. The issuer may issue five additional ISINs per financial year for structured debt instruments of a particular category.

iv. These restrictions shall not be applicable to debt instruments such as Tier I and Tier II bonds, bonds for affordable housing and capital gains tax bonds issued under section 54EC of the Act.

v. The issuer can, as a one-time exercise, choose bullet maturity payment or the issuer can make staggered payments of the maturity proceeds within that FY to resolve this issue of concentration of liabilities, which may give rise to asset-liability mismatch for the issuer.

vi. Consolidation of existing outstanding debt securities may be made recommendatory at present.

vii. There should not be any clause prohibiting consolidation and re-issuance in the Articles of Association of the issuer/ company.

3. Introduction of option trading in commodity derivatives market

The Union Budget 2016 proposed the introduction of new derivative products in the commodity derivatives market. Consequently, the SEBI issued a circular on 28 September, 2016 approving the trading of options in commodity derivatives markets. Recently, in January 2017, the SEBI also sought public comments to the proposed amendments in the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2012. The SEBI Board has now approved these proposals. The SEBI shall issue detailed guidelines on trading in such securities.

4. Single license for brokers in equity markets and commodity derivatives markets

At present, a broker or clearing member dealing in commodity derivatives market cannot deal in other securities or vice versa. A broker or clearing member operating in both markets has to set up different entities to deal in these securities. Consequent to the merger of SEBI and the Forward Markets Commission, the SEBI is responsible for the regulation of commodity derivative brokers. Hence, the SEBI Board has now approved the removal of above-mentioned restriction by amendment in SEBI (Stock Brokers and Sub-brokers) Regulations, 1992 and recommending the government to amend the Securities Contracts (Regulation) Rules, 1957.

SEBI Board Meeting - Key announcements for FPIs

SEBI press release dated 21 June, 2017

1. ODIs

A few weeks ago, the SEBI released a consultation paper on monitoring ODIs. The SEBI Board has decided to levy a “Regulatory Fee” of $1,000 on each ODI subscriber, to be collected and deposited by the ODI issuing FPI of such ODI subscriber, once every three years, starting from 01 April, 2017. The SEBI shall amend the SEBI (FPI) Regulations, 2014 to implement the same. The SEBI Board has also decided to prohibit ODIs from being issued against derivatives, except on those used for hedging purposes. The SEBI will issue a circular in this regard.

2. Consultation paper to be issued on easing of access norms for investment by FPIs

To ease the access norms for investments by FPIs in the Indian securities market, SEBI proposes to amend the SEBI (FPI) Regulations, 2014, and issue the necessary circulars/ guidelines. Some of the norms proposed to be liberalised include:

- Expansion of eligible jurisdictions for grant of FPI registration to category I FPIs by including countries having diplomatic tie-ups with India.
- Simplification of broad based requirements.
- Rationalisation of fit and proper criteria.
- Permitting FPIs operating under the Multiple Investment Managers structure and holding FVCIs registration to appoint multiple custodians. The SEBI Board has approved initiation of public consultation process before implementing the above mentioned changes.

3. **Growth and development of equity derivatives market in India**

   The SEBI Board has decided to have a stakeholder consultation on the need to review the derivatives market framework including product suitability for investors to further strengthen the framework in line with the emerging trends and global best practices.

SEBI releases consultation paper on "Easing of access norms for investments by FPIs"

SEBI consultation paper dated 28 June, 2017

The SEBI overhauled the entry norms for overseas investors by introducing the FPIs regime in 2014 and adopting a risk based approach for KYC. Since, the SEBI has constantly endeavoured to simplify the entry and investment norms for FPIs. To ease the access norms for investments by FPIs in the Indian securities market further, the SEBI released a consultation paper yesterday on "Easing of access norms for investment by FPIs" outlining the following proposals:

Eligibility criteria

Expansion of eligible jurisdictions for grant of Category I FPI registration

Currently, in order to seek FPI registration, the applicant, amongst others, is required to be resident of a country whose securities market regulator is a signatory to International Organisation of Securities Commission's Multilateral Memorandum of Understanding (Appendix A signatories) or a signatory to bilateral MoU with the SEBI.

It is proposed to expand the list of eligible jurisdictions for grant of FPI registration to Category I FPIs by including countries that comply with the extant regulatory framework laid down in the Foreign Exchange Management Act and have formal diplomatic ties with India. The list of such countries will be notified by SEBI in consultation with the GoI.

Rationalisation of "fit and proper" criteria

Currently, the FPI applicant, in addition to satisfying the "fit and proper" person criteria must also satisfy various other requirements, such as be legally permitted to invest outside its home country, should be authorised by its MoA/ AoA or agreement to invest, has sufficient experience, good track record, is professionally competent, financially sound, has a generally good reputation of fairness and integrity and grant of FPI certificate in the interest of the development of securities market.

It is proposed that Category I and II FPI applicants will have to satisfy only the criteria of "fit and proper person" and not the other requirements mentioned above. However, Category III FPIs shall be required to satisfy all the above requirements, including the "fit and proper" person requirement. Further, the criteria of "fit and proper" person shall be added as part of the general obligations and responsibilities of FPIs.

Permitting appropriately regulated private bank/ merchant bank to invest on their behalf and on behalf of their clients

Currently, Private Banks and Merchant Banks are allowed to undertake only proprietary investments.

It is proposed to allow Private Banks and Merchant Banks to undertake investments on behalf of their clients provided, (1) details of beneficial owners are available and will be provided as and when required by the regulators; and (2) they do not have secrecy arrangements with the investors and secrecy laws do not apply to the jurisdiction in which the bank is regulated.

Expansion of entities considered as "appropriately regulated" persons

It is proposed to broaden the definition of "appropriately regulated" persons by including broker-dealer, swap dealer, etc., which are regulated by an appropriate regulator. Such entities will be allowed to seek Category II FPI registration if they provide details of beneficial ownership of their clients as and when required by SEBI and/ or any other enforcement agencies.

Broad based criteria

- Currently, if the FPI applicant has a bank as an underlying investor, such applicant is deemed to be broad based in nature. It is proposed to extend this rationale to other investors, such as sovereign wealth funds, insurance/ re-insurance companies, pension funds and exchange traded

funds subject to the condition that these underlying investors either individually or jointly hold majority stake in the FPI at all times.

- It is proposed to grant three months to a Fund to regain its broad based status if it loses such status (and consequently, the Category II FPI status) because of the exit of some offshore global investors in the Fund.
- It is proposed that in case of addition of one or more than one share class, which are not broad based and having a segregated portfolio, an undertaking may be obtained by the DDP that all the newly added share classes shall attain broad based status within 180 days from the date of approval issued by the DDP.
- It is proposed to extend the benefit of conditional Category II FPI registration to existing funds as against only newly established India dedicated funds currently.

Approvals

Discontinuation with the requirement of seeking prior SEBI approval for change in local custodian/ DDP and placing reliance on due diligence carried out by erstwhile local custodian/ DDP at the time of change of local custodian/ DDP

It is proposed to discontinue with the requirement of seeking prior SEBI approval for change in local custodian/ DDP. FPI or its global custodian will be allowed to place a request for change of local custodian with the new local custodian/ DDP. The transferor local custodian/ DDP is required to provide a no-objection certificate to the transferee local custodian/ DDP to facilitate this change. The transferor local custodian/ DDP shall also inform the compliance officer of the FPI regarding change in their local custodian/ DDP if request for such change was received from the global custodian. Further, the transferee local custodian/ DDP can place reliance on registration granted by the transferor local custodian/ DDP.

Exemption to FPIs having MIM structure from seeking prior approval from SEBI in case of free-of-cost transfer of assets

It is proposed to allow DDPs (instead of SEBI currently) to process requests for free-of-cost transfer of assets submitted by FPIs registered under the MIM structure. For other cases, SEBI shall continue to approve such requests.

Simplification of process for addition of share class

It is proposed to do away with the requirement of seeking prior approval of DDP for addition of share class, if a common portfolio is maintained and broad based criteria is fulfilled at the portfolio level. However, prior approval of DDP shall be required for addition or deletion of share classes where segregated portfolio is maintained.

General

- Currently, DDPs are required to ensure that equity shares held by FPIs are free from all encumbrances. It is proposed to provide that this requirement shall not be applicable if the obligation is created to meet statutory and regulatory requirements.
- Currently, FPIs operating under the MIM structure are allowed to appoint only one custodian. It is proposed to allow such FPIs to appoint multiple custodians if they so require. In any case, the depositories (NSDL and CDSL) are required to monitor the investment limits of the FPIs.
- Currently, FPIs holding FVCI registration are required to have the same custodian. It is proposed to permit different custodians for FPI and FVCI registrations for the same entity. To facilitate proper information flow with respect to such group accounts to NSDL, the FPIs are proposed to be advised to report details of all other FVCI accounts that share 50% or more of common beneficial ownership to DDP at the time of seeking registration.
- It is proposed to do away with the requirement of re-submitting certain declarations and undertaking and information regarding FPI investor groups at the time of payment of registration fee for continuance of registration if there is no change in information previously furnished to the DDP. FPIs in such cases are only required to submit a declaration to the DDP confirming no change in information previously furnished.

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Acceptance of e-PAN card of FPIs for KYC purposes

SEBI Circular dated 30 June, 2017

Currently, DDPs verify the Tax ID/ PAN of FPIs online from websites authorised by the Income tax Department for the purpose of opening accounts of FPIs. A copy of the PAN card is required to be submitted to the DDP within 60 days of opening of the account or before remitting funds out of India, whichever is earlier.

Recently, the CBDT has introduced a facility of issuing e-PAN (electronic PAN card). (Please click **here** to access the CBDT press release in this regard)

The SEBI has now clarified that ePAN card can also be produced by FPIs for KYC compliance purposes.

SEBI circular on issue of ODIs with derivatives as underlying by the ODI issuing FPIs

SEBI Circular July 2017

The SEBI had in its Board Meeting held on 21 June, 2017 decided to prohibit ODIs from being issued against derivatives, except on those used for hedging purposes.

In a press interview subsequent to the Board Meeting, G Mahalingam, the whole time member of the SEBI, in response to a query from the press on the definition of "hedging," stated that they were talking about one-to-one hedging. He went on to explain that if one has taken a position in the underlying cash market, hedging would constitute a derivative in only that particular scrip. The SEBI did not want a broader definition, as the idea was not to use derivatives for speculative purposes but for purely hedging purposes. Therefore, it wanted to keep the definition restrictive. He also stated that a monitoring mechanism for the same would be put in place.

Pursuant to above, the SEBI has issued a circular wherein it has clarified that with the date of this circular, the ODI issuing FPIs are advised as follows:

1. The ODI issuing FPIs shall not be allowed to issue ODIs with derivative as underlying, with the exception of those derivative positions that are taken by the ODI issuing FPI for hedging the equity shares held by it, on a one-to-one basis.
2. In the case of existing ODIs issued by the ODI-issuing FPIs with derivatives as underlying, where the said underlying derivatives position are not for purpose of hedging the equity shares held by it, the ODI issuing FPI has to liquidate such ODIs latest by the date of maturity of the ODI instrument or by 31 December, 2020, whichever is earlier. However, ODI issuing FPIs should endeavour to liquidate such ODI instruments prior to said timeline.
3. In the case of issuance of fresh ODIs with derivatives as underlying, a certificate has to be issued by the compliance officer (or equivalent) of the ODI issuing FPI, certifying that the derivatives position, on which the ODI is being issued, is only for hedging the equity shares held by it, on a one-to-one basis. The said certificate shall be submitted along with the monthly ODI reports.
4. It is clarified that the term "hedging of equity shares" means taking a one-to-one position in only those derivatives which have the same underlying as the equity share.

SEBI Circular - Investments by FPIs in Corporate Debt

SEBI Circular dated 20 July, 2017

The SEBI has issued a circular dated 20 July, 2017 in the context of investments by FPIs in corporate debt.

The key takeaways from the circular are as follows:

1. FPI investment in corporate debt is subject to CCDL (Current CCDL = INR 2.44 trillion). Currently, these limits are "on tap." CCDL will now be available on tap for investment by foreign investors until the overall investment reaches 95%, after which they will be auctioned. Previously, CCDL was auctioned where the overall limit breached 90%.
2. In the past, when debt limits were auctioned, the auction was conducted on the twentieth day of every month, based on availability of free limits at the end of previous month. This procedure has now been modified, as follows:
   i. Once the limit of 95% is breached, the depositories shall direct the custodians to halt all FPI purchases as well as

inform the exchanges (BSE and NSE) regarding the unutilised debt limits for conduct of auction.

ii. On receipt of information from the depositories, the exchange (starting with BSE) shall conduct an auction of the unutilised debt limits on the second trading day from the date of receipt of intimation. Thereafter, the auction shall be conducted alternately on NSE and BSE.

iii. The auction shall be held only if the free limit is greater than or equal to INR 1 billion.

iv. On sale/ redemption of debt securities, an FPI will have a reinvestment period of two trading days, which if not utilised, then the limits shall come back to the pool of free limits.

v. A single FPI/ FPI group cannot bid for more than 10% of the limits being auctioned.

3. It may be pertinent to note that the current debt limit utilisation stands at 92.89%, as per data on 19 July, 2017.
4. As rupee-denominated bonds issued by Indian corporates overseas are covered under CCDL, issuance of such bonds overseas shall temporarily cease, until the limit utilisation falls back to below 92%.
5. The auction mechanism shall be discontinued and the limits shall be once again available for investment on tap when the debt limit utilisation falls below 92%.
6. FPI investments in unlisted corporate debt securities shall compulsorily be in dematerialised form.

Levy of regulatory fees on ODI subscribers

SEBI Notification dated 20 July, 2017

The SEBI had decided in its Board Meeting held on 21 June, 2017 to levy a “Regulatory Fee” of $1,000 on each ODI subscriber, to be collected and deposited by the ODI issuing FPI, once every three years, starting from 01 April, 2017. The SEBI has now issued a notification dated 20 July, 2017, amending the SEBI FPI (Regulations), 2014 to give effect to the same.

The key takeaways from the Notification are as follows:

1. FPIs shall be required to collect a regulatory fee of $1,000 from each subscriber of ODI and deposit the same with the SEBI.
2. The regulatory fee shall be deposited once every three years. For the block of three years beginning from 01 April, 2017, FPIs shall collect and deposit the regulatory fee within two months from the date of publication of the Notification, i.e., by 19 September, 2017.

Safe harbour provisions - Relaxations in the context of FPIs

CBDT Notification No. 77 of 2017 dated 03 August, 2017

CBDT Notification No. 78 of 2017 dated 03 August, 2017

The Indian tax laws contain safe harbour provisions whereby an “eligible investment fund” is not to be regarded as a tax resident in India merely because the “fund manager” is located in India. Benefits under the safe harbour provisions are subject to compliance with certain conditions.

Conditions under the safe harbour provisions include the following:

- The fund is a resident of a country or a specified territory with which India has a tax treaty or is established or incorporated or registered in a country or a specified territory notified by the Central Government in this behalf; in this connection, the CBDT on 04 August, 2017, notified a list of 121 countries/ specified territories. This includes some of the countries/ specified territories such as the British Virgin Islands, Cayman Islands, Guernsey, etc., with which India does not have a tax treaty.
- The fund has a minimum of 25 members who are, directly or indirectly, not connected persons;
- Any member of the fund along with connected persons shall not have any participation interest, directly or indirectly, in the fund exceeding 10%;
- The aggregate participation interest, directly or indirectly, of 10 or less members along with their connected persons in the fund, shall be less than 50%. The CBDT today separately notified that the above three conditions shall also not apply in case of an investment fund set up as a Category-I or Category-II FPI registered under the SEBI (FPI) Regulations, 2014.

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Investment limit by FPIs in corporate bonds

RBI Circular No. RBI/ 2017-18/ 64 dated 22 September, 2017

For background, investment by FPIs in debt securities is subject to investment limits. Currently, investment by FPIs in corporate bonds is capped at INR 2,443 billion. This includes issuance of rupee-denominated bonds (also popularly known as Masala bonds) by resident entities of INR 440 billion.

The RBI has issued a circular dated 22 September, 2017, in connection with the safe harbour provisions - relaxations in the context of FPIs with the review of investment limits by FPIs in corporate debt securities.

Key takeaways from the RBI circular are as follows:

- Masala bonds issuance will no longer form a part of the limit for investments by FPIs in corporate debt securities, with effect from 03 October, 2017. Masala bond issuances will form part of ECBs and will be monitored accordingly. As a result, there will be additional "head-room" for investment by FPIs in corporate debt securities.
- The additional head-room of INR 440 billion will be made available in two quarters for FPI investment in corporate debt securities as follows:
  - From 03 October, 2017 - INR 270 billion (approximately $4.15 billion)
  - From 01 January, 2018 - INR 170 billion (approximately $2.62 billion)
- Out of the above, an amount of INR 95 billion (approximately $1.46 billion) in each quarter will be reserved for investment in infrastructure sector by long term FPIs (i.e. sovereign wealth funds, multilateral agencies, endowment funds, insurance funds, pension funds and foreign central banks). Pursuant to the above changes, corporate debt securities may be available "on-tap" (until FPI investment breaches 95% of the overall limit).

FPIs can now trade on an Indian international stock exchange

India INX inaugurated by Prime Minister

The Prime Minister of India inaugurated India INX, an international stock exchange set up in IFSC in the GIFT in January 2017. India INX has commenced trading and is operational for 22 hours daily to cover various time zones. The NSE too is in the pipeline to start an international exchange in IFSC. Several stock broking firms and banks have set up in the IFSC.

A wide range of products would be available for foreign investors, such as index based derivatives, INR bonds, equity shares of a company incorporated outside India, depository receipts, debt securities, currency and interest rate derivatives, etc., issued in foreign currency. Currently, index futures, index options, equity futures and equity options have been launched as products for trading on India INX.

The Indian government has announced certain regulatory and fiscal incentives to attract investors and financial services players from across the globe:

- Corporate tax holiday, minimum alternate tax reduced from 18.5% to 9% and dividend distribution tax waived off for the business units located in IFSC.
- Securities transaction tax, commodities transaction tax waived off, thereby, significantly reducing the cost of trading.
- Long-term capital gains tax exemption on equity shares and short-term capital gains tax rate of 15% extended to those trading on a stock exchange in IFSC.
- FPIs registered with SEBI permitted without undergoing any additional registration or approval process.

FPIs permitted to participate in non-agricultural commodity derivatives traded on IFSC stock exchanges

SEBI Circular No. SEBI/ HO/ CDMRD/ DMP/ CIR/ P/ 2017/ 106 dated 26 September, 2017

The SEBI had permitted trading in commodity derivatives on stock exchanges operating in IFSC. Currently gold, silver and copper derivatives are traded on stock exchanges in IFSC. The SEBI has now issued a circular, allowing FPIs to trade in non-agricultural commodity derivatives on IFSC stock exchanges. The key takeaways from the SEBI circular are as follows:

1. FPIs participation would be limited

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to derivatives in non-agricultural commodities.

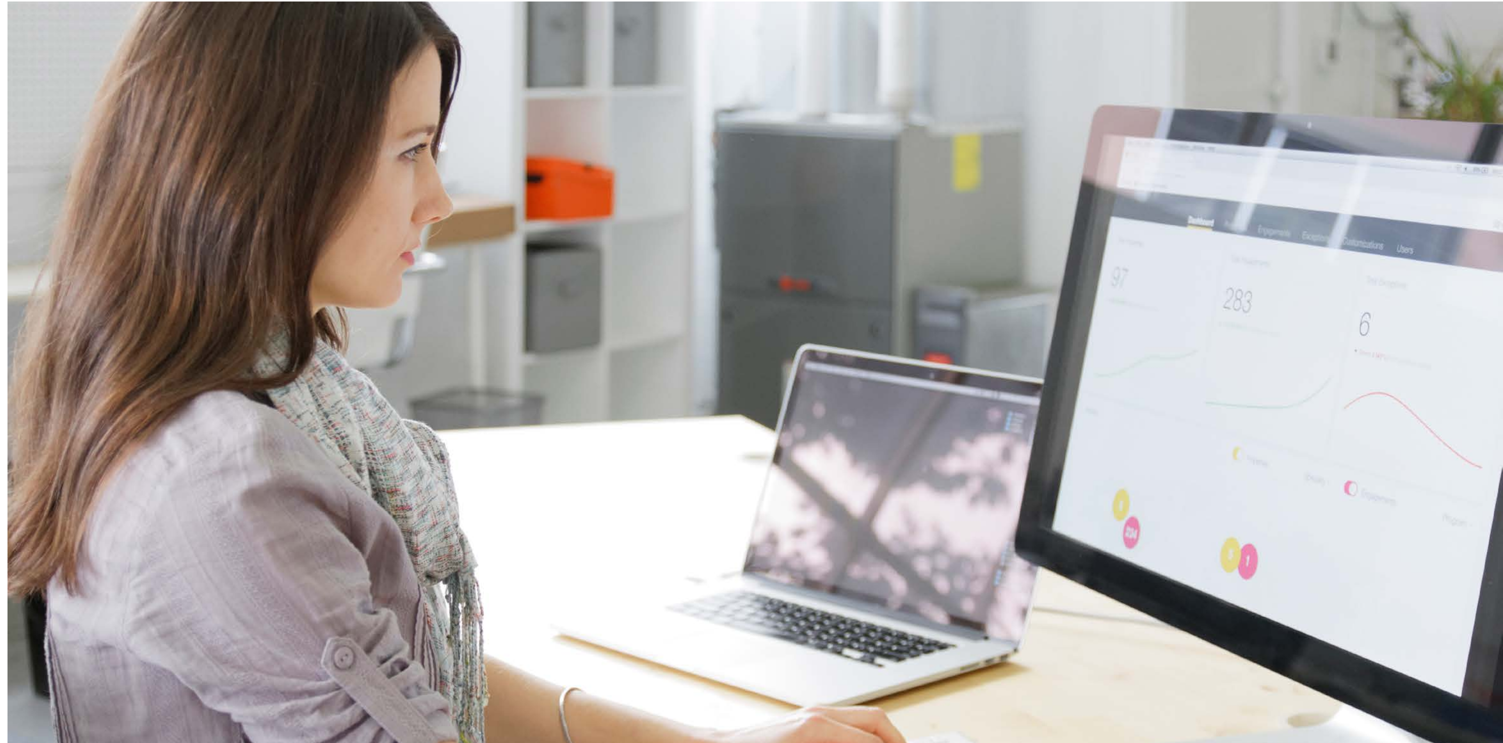
2. Derivative contracts would be cash settled on the settlement price determined on overseas exchanges.
3. Transactions shall be only denominated in foreign currency.

Rationalisation in settlement period norms for over-the-counter transactions in government securities by FPIs

RBI Notification 18/ 97 FMRD.DIRD.05/ 14.03.007/ 2017-18 dated 16 November, 2017

The settlement of outright secondary market transactions in government securities, where one of the parties is an FPI, is on a T+2 basis. All other outright secondary market transactions in government securities are settled on a T+1 basis.

The RBI has issued a notification, providing an option to FPIs to settle over-the-counter secondary market transactions in government securities either on T+1 or on T+2 basis. The RBI has also instructed the custodian banks to ensure that all trades are reported on NDS-OM on the trade date itself.



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General Anti-Avoidance Rules

Indian General Anti-Avoidance Rules are stated to come into effect from 01 April, 2017

CBDT press release dated 27 January, 2017

The GAAR have been codified in the Indian income tax law to counter aggressive tax planning arrangements. These provisions empower Indian revenue authorities to declare an arrangement as an "impermissible avoidance arrangement," if the main purpose of the agreement is to obtain a "tax benefit," and the arrangement lacks or is deemed to lack commercial substance.

The GAAR provisions are applicable to income arising on or after 01 April, 2017. Gains arising from transfer of investments made up to 31 March, 2017 have been grandfathered.

Further, the GAAR provisions are not applicable in the following cases:

- Where the tax benefit from an arrangement in a relevant tax year does not exceed INR 30 million (approximately $450,000);
- Where FPIs registered with the Indian market regulator do not avail any tax treaty benefits;
- Investment made by a non-resident through offshore derivative instruments or otherwise, directly or indirectly through an FPI.

Once the GAAR provisions are triggered, the Indian revenue authorities could possibly disregard an arrangement resulting in denial of treaty benefits.

It would be relevant for FPIs availing tax treaty benefits to analyse their current structure from a GAAR perspective.

More recently, the OECD released the "Multilateral Convention to implement Tax Treaty related measures to prevent BEPS" (MLI). The MLI, amongst others, includes a "principal purpose test," wherein tax treaty benefits can be denied if one of the principal purpose of an arrangement or a transaction was to, directly or indirectly, obtain tax benefit.

One may have to revisit tax implications in light of the evolving international tax landscape.

IFSC

Securities tradable on the stock exchanges operating in IFSC

SEBI Circular on IFSC dated 13 April, 2017

Securities/ products tradable on a stock exchange operating in IFSC as per SEBI Guidelines (please click **here** to read the guidelines) currently comprise:

i. Equity shares of a company incorporated outside India;

ii. Depository receipt(s);

iii. Debt securities issued by eligible issuers;

iv. Currency and interest rate derivatives; and

v. Index-based derivatives.

The SEBI has now issued a circular, which specifies derivatives on equity shares of a company incorporated in India as a permissible security for trading on a stock exchange operating in IFSC, subject to prior approval of the SEBI.

Further, it also provides that SEBI registered FPIs, operating in IFSC, and eligible entities, which are incorporated and operating in IFSC, shall be eligible to trade in such derivatives on equity shares.

The MWPL for such derivatives on equity shares shall be as follows:

- 10% of the number of shares held by non-promoters (free-float holding);
- MWPL in recognised stock exchange in IFSC to be reckoned separately from that in domestic market; and
- MWPL in recognised stock exchange in IFSC shall not exceed 50% of MWPL in recognised stock exchange in domestic market, in value terms.

Earlier this year, the SEBI simplified the IFSC on-boarding process (please click here to read the SEBI Circular) for FPIs and eligible foreign investors as follows:

- No additional documentation and/ or prior approval required for SEBI registered FPIs
- A trading member may rely on the due diligence already carried out by:
  - A SEBI registered intermediary for FPIs.
  - A bank operating in IFSC for eligible foreign investors.

FPIs can now also trade on NSE IFSC - an Indian international stock exchange

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NSE IFSC, an international stock exchange promoted by the NSE in IFSC in GIFT City, was inaugurated on 05 June, 2017 by the Chief Minister of Gujarat State. NSE IFSC will be operational for 16 hours daily covering timings of other international markets. The other international stock exchange - India INX (promoted by BSE) - is in operation since January 2017.

The permissible securities on an international stock exchange in IFSC include index based and specific stock derivatives, currency, interest rate and commodity derivatives and depository receipts.

Currently, NSE IFSC has launched following securities for trading:

- Derivatives in three indices being Nifty 50, Nifty Bank and Nifty IT;
- Stock derivative of 10 Indian companies - Axis Bank, HDFC Bank, ICICI Bank, Infosys, Maruti, SBI, Larsen and Toubro, Tata Motors, Reliance Industries and TCS;
- Currency derivatives in pairs of EUR-USD and GBP-USD; and
- Commodity derivatives in gold and silver.

The Indian government has extended certain regulatory and fiscal incentives to attract foreign investors on the international stock exchange in IFSC, such as waiver of securities transaction tax and commodities transaction tax on transactions, and no requirement of any additional registration or approval for FPIs already registered with the SEBI.

Indirect transfer

Indirect transfer provisions: CBDT communicates in case of redemption of share or interest outside India

CBDT Circular No. 28 of 2017 dated 07 November, 2017

Under the provisions contained in section 9(1)(i) of the Act, all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India or through the transfer of a capital asset situated in India, shall be deemed to accrue or arise in India. Explanations 5, 6 and 7 of section 9(1)(i) further define the scope of the said provision.

The CBDT has communicated that the provisions of section 9(1) (i) read with Explanation 5 thereof shall not apply in respect of income accruing or arising to a non-resident on account of redemption or buy-back of its share or interest held indirectly in the specified funds, if such income accrues or arises from or in consequence of transfer of shares or securities held in India by the specified funds and such income is chargeable to tax in India.

Background

After the introduction of Explanation 5 to section 9(1)(i) of the Act, many investment funds [including private equity funds and VCFs] had expressed concerns that owing to the extant indirect transfer provisions, multi-tier non-resident investment funds investing in India will suffer multiple taxation of the same income:

i. At the level of the fund in India in the form of short-term capital gains/ business income; and

ii. At the upper level of investment in the fund chain on subsequent redemption or buy-back.

In his budget speech on 01 February, 2017, the Finance Minister granted exemption to Category I and Category II FPIs from the indirect transfer provisions, with effect from 1 April, 2015 (second proviso to Explanation 5 of section 9(1)(i)).

Issue

Multi-tiered investment structures generally give rise to situations wherein a non-resident holds share or interest indirectly in an investment fund or VCF (collectively referred to as “specified funds” in the circular).

When these specified funds transfer the shares or securities held by them in India, it would result in income that would be subject to tax in India.

Further, when NR investors in an upstream vehicle outside India consequentially redeem their shares or interest, applying provisions pertaining to indirect transfer to such redemption may lead to multiple taxation of the same income.

Financial Services

Communication

The CBDT has communicated that such provisions shall not apply on income accruing or arising to a NR on account of redemption or buy-back of its share or interest held indirectly (i.e. through upstream entities registered or incorporated outside India) in the specified funds if:

i. Such income accrues or arises from or in consequence of transfer of shares or securities held in India by the specified funds and such income is chargeable to tax in India; and

ii. Is applicable only in those cases where the proceeds of redemption or buy-back arising to the NR do not exceed the pro-rata share of the NR in the total consideration realised by the specified funds from the said transfer of shares or securities in India.

It has been communicated further that a NR investing directly in the specified funds shall continue to be taxed as per the extant provisions of the Act.

Takeaways

Specified funds include VCFs, venture capital company and investment funds.

Investment funds have been designated to have the same meaning as Explanation 1 of section 115UB of the Act, i.e., they will mean any fund established or incorporated in India in the form of a trust or a company or a limited liability partnership or a body corporate, which has been granted a certificate of registration as Category I or Category II AIF and is regulated under the SEBI (AIFs) Regulations, 2012.

Thus, the exemption has been granted only in case of unified structures where the securities of the Indian entity are transferred by AIF/ VCF and not to offshore funds in general.

Further, the exemption will be restricted to the pro-rata share (of the non-resident) in the total consideration realised by the specified funds from the said transfer of shares or securities in India, i.e., the proceeds of redemption or buy-back arising to the NR should not exceed its share in the total consideration.

Real Estate

Judgement

Business income

Rental income earned by the "deemed owner" from letting out of properties taxable as "income from house property"; mere entry in the object clause not enough to characterise the rental income as business income

Raj Dadarkar & Associates *v.* ACIT [Civil Appeal Nos. 6455-6460 of 2017 (SC)]

Mere reliance on the object clause of the taxpayer would not be the determinative factor in characterising the rental income as business income. In absence of any evidence that the taxpayer carried out systematic or organised activities to provide services to the lessees, the rental income earned was held to be taxable as "income from house property."

Facts

The taxpayer, a partnership firm, was engaged in the business of renting properties and earning income by sub-letting them. The object clause of the partnership deed read as follows:

"The Partnership shall take the premises on rent and to sub-let or any other business as may be mutually agreed by the parties from time to time"

The taxpayer acquired from the MCGB the right to build and lease a shopping centre (market area) named "Saibaba Shopping Centre." The taxpayer was allotted a bare structure on stilts (i.e., pillars/ columns with four walls). The taxpayer made additions/ alternations to the premises, including demolishing the existing platform and reconstructing it according to plans sanctioned by the MCGB. The taxpayer constructed 95 shops and 30 stalls of different carpet area. The taxpayer was responsible for the day-to-day maintenance, cleanliness and upkeep of the market premises. The taxpayer incurred expenses on account of water charges, electricity charges, taxes and repairs of the premises. The taxpayer sub-leased the premises and earned the following income:

- Compensation from sub-licensees;
- Leave and license fees; and
- Service charges for providing various services, including security charges and utility.

For FY 1999-2000, the taxpayer offered the income to tax as business income, and the same was assessed as business income. Subsequently, the case was re-opened and the income was reassessed under the head "income from house property." On appeal, the CIT(A) allowed the appeal of the taxpayer. However, the Tribunal reversed the order of the CIT(A). The HC dismissed the appeal filed by the taxpayer.

Held

The SC observed that the fact that the taxpayer was the deemed owner of the property was not disputed by the taxpayer. The SC held that, normally, the income from letting out of property is to be regarded as "income from house property." However, depending on the facts of the case, the income can also be characterised as business income. The SC held that merely an entry in the object clause for letting out of property would not be the determinative factor in concluding that the income should have been treated as business income. The SC observed that the taxpayer had only relied on the object clause in the partnership deed. The taxpayer did not produce any material to suggest that it was engaged in systematic or organised activity of providing services to the occupiers of the shops/ stalls. The SC relied on the findings of the Tribunal, being the last forum for factual determination. The SC held that it was for the taxpayer to produce sufficient material on record to show that its entire income or substantial income was from letting out of property, which was its principal business activity. The SC relied on its decision in the case of *East India Housing and Land Development Trust Limited v. Commissioner of Income Tax [Civil Appeal No. 157 of 1958 (SC)]* and held that the income earned by the taxpayer was taxable as "income from house property." The reliance by the taxpayer in the cases of *Chennai Properties & Investments Limited v. Commissioner of Income Tax [Civil Appeal No. 4491 to 4494 of 2004 (SC)] and Rayala Corporation (P.) Limited v. Assistant Commissioner of Income Tax [Civil Appeal No. 6437 of 2016 (SC)]* were distinguished and hence not applicable.

Takeaways

This decision lays down the principle that a mere object clause would not be relevant for determining the characterisation of rental

income as "income from house property" or as "business income." The actual conduct of the business in terms of providing systematic services along with letting out of property would be relevant in characterising the income as business income. This is consistent with the judicial precedents rendered by other appellate authorities in the context of commercial properties, especially industrial parks.

The CBDT has acknowledged that the activity of rendering complex services in addition to renting out of property gives rise to business income. The CBDT has recently issued Circular No. 16 of 2017 dated 25 April, 2017 to the effect that the income earned by letting out property along with other amenities in an Industrial Park/ SEZ should be taxable as business income.

In this decision, the initial assessment order was passed by treating the rental income as "business income." Subsequently, the income was reassessed as "income from house property." This decision does not discuss the validity of the reassessment order, as to whether or not the re-characterisation of income can be regarded as "change of view," and hence, not liable for reassessment.

Capital gains

Transfer of development rights and transfer of share of constructed area are separate transactions, liable for capital gains tax at respective points of time

Income Tax Officer *v.* Shri Shafiq Mohammed Shah [Income Tax Appeal No. 1331 of 2016 (Chennai Bench)]

Capital gain arising on transfer of development rights is taxable in the year when possession of land is given to the developer. Further, the sale of constructed area (received under the development agreement) is a separate transaction, liable for capital gains tax in the year in which the constructed area is transferred.

Facts

The taxpayer, along with other family members, entered into a JDA with the developer on 27 June, 2006 for the development of a commercial-cum-residential complex. Under the JDA, the landowners handed over 50% undivided share of the land. The taxpayer received a refundable security deposit of INR 115 million and a share in the constructed area. The taxpayer handed over the possession of the land to the developer on 27 June, 2006, on receipt of a substantial amount of the refundable security deposit. On 15 December, 2010, the taxpayer and other co-owners entered into an agreement to sell a part of the constructed area. During AY 2011-12, the taxpayer filed its return of income by offering the income from sale of constructed area as "capital gains." The TO recomputed the income in accordance with section 45(2) of the Act by treating a portion of the income as "business income." The CIT(A) held that a portion of the refundable security deposit should be apportioned towards the sale proceeds of the constructed area. The CIT(A) directed the TO to compute long-term capital gains and rejected the TO's computation under section 45(2) of the Act.

Held

On transfer of development rights

- The Tribunal held that "Transfer" takes place at the time when the possession of land is handed over to the developer or when the developer is allowed to enter the premises.
- Further, the possession of the developer need not be sole or exclusive. The transferee should be able to exercise general control over the property and make use of it for the intended purpose. The mere fact that the transferor also has the right to enter the property to oversee the development work or to ensure performance of the terms of the agreement cannot defer the taxation event.
- Even if some part of the consideration remains to be paid, the transaction does not postpone the liability to pay capital gains tax.
- The fact that the legal ownership of the land continued with the taxpayer and other co-owners does not affect the applicability of section 2(47) (v) of the Act.
- Based on the facts of the case, the Tribunal held that the gains arising on transfer of development rights is taxable in AY 2007-08. The Tribunal relied on the decision of the Bombay HC in the case of Chaturbhuj Dwarkadas Kapadia *v.* Commissioner of Income Tax [Income Tax Appeal No. 24 of 2003 (Bombay HC)].

Real Estate

On transfer of constructed area

- The transfer of land (development rights) and transfer of constructed area constitute different transactions. It does not result in the conversion of one capital asset (i.e., land/ development rights) into another (i.e. constructed area).
- The sale of constructed area along with undivided share in land constitutes another transaction, giving rise to short-term capital gains or long-term capital gains, depending upon the period for which the same is held.
- The Tribunal held that the capital gains arising on the constructed area can be taxed only on the area actually transferred by the taxpayer. The share in the constructed area retained by the taxpayer cannot be taxed on receipt basis.

Takeaways

This decision reiterates the position that in case of transfer of development rights under a JDA, the capital asset can be regarded to be "transferred" on granting the possession of the land. The receipt of consideration (share of constructed area or share in revenue) in future does not affect the timing of the taxable event. Further, it emphasises that "development rights" and "constructed area" received are separate capital assets, liable to capital gains tax at different points of time.

The Finance Act 2017 has brought an amendment with respect to the payment of taxes in case of transfer of development rights by individuals and Hindu undivided families in certain cases. In case of transfer of development rights for a consideration involving the share of constructed area, with or without payment of cash consideration, the capital gains tax would now be payable on receipt of the certificate of completion or transfer of constructed area, whichever is earlier. No tax would be payable by individuals and Hindu undivided families in the year of granting the possession of land.

However, this decision would be relevant for other types of taxpayers (other than individuals and Hindu undivided families) for evaluating the timing of taxable events under a JDA.

SC upholds deletion of capital gains under section 2(47) (v) in the absence of registration of JDA; income cannot be taxed on hypothetical basis

Commissioner of Income Tax v. Balbir Singh Maini [Civil Appeal No. 15619 of 2017(SC)]

Capital gains addition was deleted in the hands of the taxpayer-individuals (members of a co-operative society) in the absence of registration of the JDA between the co-operative society and developers. The SC ruled that there must be a "contract" that could be enforced in law under section 53A of the TOPA to qualify as "transfer" of capital asset under section 2(47)(v) of the Act.

Further, the SC held that profits and gains, being in the nature of capital gains, should "arise" from the transfer of a capital asset and income that has not arisen or accrued cannot be taxed on hypothetical basis.

Facts

A JDA was entered into between a co-operative housing society (Society) and two developers (Developers) on 25 February, 2007. The said JDA was not a registered agreement. *Vide* the JDA, it was agreed that the Developers would undertake to develop the land owned and registered in the name of the Society and the agreed consideration (being money and flats) would be given by the Developers to each individual member (collectively referred to as Members) of the Society. The Developers were to make payments in four instalments depending on the milestones, as mentioned in the JDA. The Developers, in pursuance of the JDA, made payments of two instalments against conveyance of 7.7 acres of land parcel. However, the JDA did not take ground for want of approvals; the receipt of approvals being the milestone for triggering the third instalment. While the Members offered the two instalments received against the conveyance of a part of the land parcel to capital gains tax, the amounts not received, owing to the cancellation of the JDA, were not offered to tax. In 2001, the Registration and Other Related Laws (Amendment) Act, 2001 and the TOPA were amended to the effect that unless the document containing the contract to transfer for consideration any immovable property (for the purpose of section 53A of TOPA), is registered, it shall not have any

effect in law (other than it being received as evidence in a suit for specific performance or as evidence of any collateral transaction not required to be effected by a registered instrument).

Held

The position that an agreement of sale, which fulfilled conditions mentioned in section 53A of the TOPA was not required to be registered, was amended vide an amendment made in 2001. As a result, unless such an agreement was registered, it would not have any effect in law (other than being received as evidence in certain cases). That is, in the eyes of law, no contract could be taken cognisance of for the purpose of section 53A of the TOPA. To qualify as a "transfer" under section 2(47)(v), there must be a "contract," which could be enforced in law under section 53A of the TOPA. Further, since its introduction in 1988, section 2(47)(v) incorporates the words "of the nature referred to in section 53A." Hence, the expression could not be stretched to refer to an amendment made years later in 2001. Thus, the said expression would be interpreted to mean the ingredients of applicability of section 53A of the TOPA. Since registration was one of the ingredients of section 53A, in absence of such registration, section 2(47)(v) of the Act would not apply. Given that in the facts of the case, section 2(47)(v) of the Act was not attracted, the analysis of any factual information with respect to whether or not the possession of the property was handed over, for determining delivery of "possession," as envisaged by section 53A of the TOPA was considered unnecessary. Section 2(47)(vi), in the absence of transfer of rights akin to ownership by the Members to the Developers, would also not apply. Income tax cannot be levied on hypothetical income. Income is said to accrue when it becomes due and is accompanied by a corresponding liability of the other party to pay the amount. In the present case, as the members did not acquire any right to receive income, such a right being dependent upon the receipt of relevant approvals (which did not come through), the income that the Revenue sought to tax was at best hypothetical income. As no profits or gains "arose" under section 45 and section 48 of the Act, tax could not be levied on such hypothetical income.

Takeaways

The SC's decision has made it clear that for section 53A of the TOPA to be applicable to a JDA, the transfer of effective possession is necessary and not merely transfer by way of a license to develop. Further, for section 2(47)(v) of the Act to be attracted, it is necessary that all ingredients for the applicability of section 53A of the TOPA are satisfied (registration being one such ingredient).

With regard to the concept of non-taxability of hypothetical income upheld by the SC, one would need to examine whether, in principle, the concept of "real income" can be applied to defer taxation of a consideration (for the purpose of computing capital gains on development agreements), which is contingent upon future events.

Real Estate

Circulars, notifications and others

Business income

CBDT communicates that income from letting out buildings/ developed space along with other amenities in an Industrial Park/ SEZ is taxable as business income

CBDT Circular No. 16/2017 dated 25 April, 2017

Background

Traditionally, the characterisation of income from letting out of premises/ developed space along with other amenities under the head "income from house property" or "profits and gains of business or profession" has been a subject matter of litigation.

The recent trend of judicial precedents on the characterisation of income earned from operating and maintaining an SEZ/ Industrial Park does suggest the acceptance by the appellate authorities that the income earned from such activity is business income. The appellate authorities have held that income is earned from such activity not merely in the capacity of ownership of immovable property, but by virtue of rendering complex services associated with letting out of property. However, practically, tax authorities are still challenging this position (i.e., characterisation as business income or income from house property), resulting in unwarranted tax litigations.

To put an end to these litigations, the CBDT has issued Circular no. 16 dated 25 April, 2017 on the characterisation of such income for income tax purposes.

CBDT Circular CBDT has taken note of principles laid down by the Karnataka HC in the case of *CIT v. Velankani Information Systems (P) Limited [(2013) 265 CTR 250 (Karnataka HC)] and CIT v. Information Technology Park Limited [(2014) 46 taxmann.com 239 (Karnataka HC)]*, rendered in the context of income earned from development, operation and maintenance of Industrial Parks.

The CBDT has instructed that:

- In the case of an undertaking that develops, develops and operates or maintains and operates an Industrial Park/ SEZ notified in accordance with the scheme framed and notified by the government, the income from letting out of premises/ developed space along with other facilities in the Industrial Park/ SEZ would be charged to tax under the head "profits and gains of business or profession."
- On the said issue, henceforth, no appeals would be filed by the Revenue Authorities. Further, in case any appeal is already filed, the same may be withdrawn or not pressed upon.

Takeaways

The CBDT circular clearly lays down the position for characterisation of income, and therefore, all existing litigation should be resolved. Further, future potential tax litigations should reduce as well. The circular would cover the developers engaged in developing SEZ/ Industrial Parks in accordance with the scheme framed by the government and earning income from letting out the premises/ developed space along with amenities.

For other commercial assets [e.g., retail malls, commercial assets (not satisfying the conditions of the Industrial Park scheme) etc.], one would, subject to facts of each case, have to rely on the judicial precedents, including the SC's decision in the case of Chennai Properties and Investments Limited v. CIT [2015] 373 ITR 673 (SC) and Rayala Corporation Private Limited v. ACIT [2016] 386 ITR 500 (SC), wherein the SC has held that rental income should be taxed as business income.

ICDS

CBDT issues draft ICDS on real estate transactions:

CBDT press release dated 11 May, 2017

On 29 September, 2016, the Ministry of Finance notified 10 ICDS to be effective from AY 2017-18. The current set of ICDS does not apply to real estate transactions.

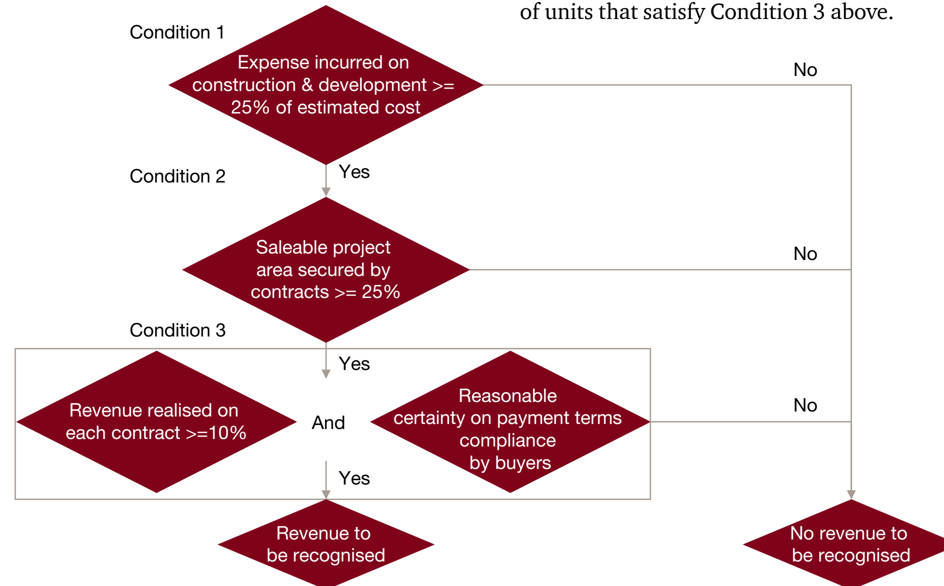
The Finance Minister had constituted a committee comprising of representatives from various fields to provide suggestions for introducing ICDS for real estate transactions. Based on the committee's suggestions, the CBDT has released draft ICDS on real estate transactions for public comments. The draft ICDS takes into account the Guidance Note on accounting for real estate transactions (Guidance Note) issued by the ICAI.

Real Estate

Draft ICDS

Applicability

- Consistent with other ICDS, the draft ICDS is applicable for computation of income chargeable under the head "profits and gains of business or profession" or "income from other sources." Further, in case of conflict between the provisions of the Act and the draft ICDS, the provisions of the Act shall prevail to that extent.
- The draft ICDS shall be applicable for determining the income from all forms of real estate (land, buildings and rights in relation thereto) transactions. This will include:
  - Sale of plots of land (including long-term sale type leases) without any developments/ with development in the form of common facilities;
  - Development and sale of residential and commercial units, row houses, independent houses, with or without an undivided share in land;
  - Acquisition, utilisation and transfer of development rights;
  - Redevelopment of existing buildings and structures;
  - JDAs for any of the above activities.



Applying the POCM

- **When** - Point of recognition of revenue under POCM
- **How Much** - Revenue shall be recognised proportionately based on POCM in respect of units that satisfy Condition 3 above.

Real estate projects – recognition of project revenue and project cost

- In case of projects in which the economic substance is similar to that of a construction contract, the project revenue and cost shall be recognised based on POCM.
- In case the economic substance is not similar to a construction contract, revenue shall be recognised in accordance with ICDS IV relating to Revenue Recognition.

Real Estate

Transferable development rights

- The cost of acquisition of the TDR shall be as follows.

TDR acquired by way of	Cost of acquisition
Direct purchase	Purchase cost
Development and construction of built-up area	Cost incurred on development or construction of built-up area
Giving up rights over existing structures or open land	Fair value of development rights acquired ("Fair value" is defined as the amount for which an asset could be exchanged between a knowledgeable, willing buyer and a knowledgeable, willing seller in an arm's length transaction.)

- In case of sale of TDR, revenue shall be recognised when the following conditions are satisfied.
  a. Title to the TDR is transferred to the buyer; and
  b. It is reasonable to expect that the revenue will be ultimately collected.

Transactions with multiple elements

In case the contract with a buyer provides for delivery of goods or services in addition to construction or development of real estate, the contract consideration shall be split into separately identifiable components. The consideration received or receivable for each component shall be allocated based on the fair value of each component.

Transitional provisions

- The draft ICDS shall apply to projects that will commence on or after 01 April, 201X.
- In respect of projects that have commenced on or before 31 March, 201X but not completed by the said date, project revenue and project cost shall be recognised based on the method regularly followed prior to the previous year beginning on 01 April, 201X.

Real Estate

Significant changes in draft ICDS v. Guidance Note on real estate transactions issued by ICAI

Sr No.	Particulars	As per Guidance Note	As per draft ICDS	PricewaterhouseCoopers view
1	Definition of "project"	Units connected with a common set of **amenities** constitute a single project.	Units connected with a common set of **basic facilities** constitute a single project.	Under ICDS, a large project may be broken down into smaller projects. **Difference in trigger point of POCM** There could be a scenario in which, as per the Guidance Note, the POCM may not have been triggered (considering large projects), and hence, no revenue would be recognised in the financial statements. However, as per ICDS, POCM may trigger, thereby requiring the taxpayer to maintain accounts as per ICDS to compute taxable income.
2	POCM for real estate projects	Four conditions are prescribed for application of the POCM. The conditions include obtaining **all critical approvals.**	Only three conditions are prescribed for application of the POCM. The condition of obtaining critical approval is not applicable under ICDS.	Although construction and development cost does not include land cost, other incidental costs such as land conversion costs, betterment charges, municipal sanction fee and other charges for obtaining building permission would fall under "construction and development cost." Thus, while obtaining the requisite approvals would not be relevant for the application of POCM under ICDS, the costs incurred for obtaining approvals would be taken into account for determining the application of POCM. This may result in a difference in the trigger point of the POCM. Please refer to our comments in point no. 1.
3	TDR	In case TDR is acquired by giving up rights over existing structures or open land, the TDR shall be recorded at the **fair market value or net book value.**	In such a case, TDR shall be recorded at **fair value of rights so acquired.**	**For companies following Ind AS** As per the Guidance Note read with paragraphs 45 to 47 of Ind AS 38, Intangible Assets, TDR is recorded at fair value unless (a) the exchange transaction lacks commercial substance or (b) the fair value of neither the asset received nor the asset given up is reliably measurable. If the TDR is not recorded at fair value, the cost is measured at the carrying amount of the asset given up. Under ICDS, even if the transaction lacks commercial substance, the TDR shall be recorded at fair value. Further, the ICDS does not deal with a scenario in which the fair value of rights given up or acquired cannot be reliably measured. **For companies following Indian GAAP** As per the Guidance Note, TDR is recorded at fair value (of asset given up or asset acquired, whichever is more evident) or net book value of the asset given up, whichever is less. Thus, if the TDR is recorded at net book value (being lower than the fair value) for tax purposes, the project cost would still be computed based on the fair value of TDR.

Real Estate

Sr No.	Particulars	As per Guidance Note	As per draft ICDS	PricewaterhouseCoopers view
4	Definition of “project cost”	Contains an illustrative list of items to be included, allocated or excluded in the project cost.	The illustrative list has been excluded, while the principles have been retained.	No significant impact
5	Real estate projects	Revenue is to be recognised based on the principles of AS 9 or AS 7, depending on the economic substance of the project.	Same principles retained without the use of illustrative language.	No significant impact

Real Estate

REIT and InvIT

SEBI releases amended REIT and InvIT Regulations

Amendment in REIT and InvIT Regulations

SEBI issued the SEBI (Real Estate Investment Trusts) (Amendment) Regulations, 2016 and SEBI (Infrastructure Investment Trusts) (Amendment) Regulations, 2016 (together referred to as "Amendment Regulations"), amending the SEBI (Real Estate Investment Trusts) Regulations, 2014 (REIT Regulations) and SEBI (Infrastructure Investment Trusts) Regulations, 2014 (InvIT Regulations), respectively on 30 November, 2016.

1. The key amendments made to the InvIT Regulations are summarised below:

Changes relating to "sponsor"

- Limit on the number of sponsors removed.
- Each sponsor shall be clearly identified in the application of registration to SEBI and in the offer document/ placement memorandum.
- Minimum sponsor holding reduced from 25% to 15% on a post-issue basis.
- Other conditions:
  a. Sponsors would be responsible to the InvIT for all acts, omissions and representations/ covenants related to formation and transfer of assets/ securities;
  b. InvIT/ trustee shall have recourse to the sponsor for any breach with respect to (a) above; and
  c. Sponsor/ associate of the sponsor shall act as the project manager for a minimum period of three years, unless a suitable replacement is appointed by unitholders. However, this condition shall not apply if the sponsors hold a minimum of 25% stake on post-issue basis for at least three years from the date of listing.

Changes relating to "public issue"

- Multiple classes of units not permitted.
- However, subordinate units, carrying inferior rights, may be issued only to the sponsor and its associates.
- Restriction on investment by associates of trustee in units of REIT removed
- Slabs for minimum offer size and public float introduced:
  a. If post-issue capital is less than INR 16 billion: Minimum 25% or INR 2.5 billion, whichever is higher;
  b. If post-issue capital is equal to or more than INR 16 billion but less than INR 40 billion: Minimum INR 4 billion; and
  c. If post-issue capital is equal to or more than INR 40 billion: Minimum 10%.
- However, the public float in all cases shall be increased to a minimum of 25% within a period of three years from the date of listing.
- Minimum subscription percentage increased from 75% to 90%.

Changes relating to holding structure

- InvITs allowed to hold assets through a two-level entity structure.
- Concept of holding company (Hold Co.) introduced. Hold Co. defined to mean a company or a limited liability partnership:
  a. In which InvIT holds or proposes to hold controlling interest and minimum 51% of the equity share capital/ interest; and
  b. Which is not engaged in any activity other than holding of underlying SPVs/ infrastructure projects.
- Investment through Hold Co. should be subject to the following:
  a. Ultimate holding interest of the InvIT in the SPVs is atleast 26%;
  b. Other shareholders/ partners do not restrict the InvIT, Hold Co. or SPV from complying with the InvIT Regulations, and an agreement shall be entered into with such other shareholders/ partners to that effect;
  c. The investment manager shall appoint majority of the board members of Hold Co. and SPV; and
  d. In every meeting of Hold Co. and SPV, the voting of the InvIT shall be exercised.
- Minimum net distributable cash flows to be distributed by Hold Co. to InvIT:
  a. 100% of cash flows received from the SPVs; and
  b. 90% of the balance.
- Minimum holding in SPV by InvIT/ Hold Co. - 51%.

Real Estate

Changes relating to investment conditions

- Scope of PPP projects expanded to include infrastructure projects having achieved commercial operations date and not having a track record of revenue from operations for a period of at least one year.
- Maximum 10% of the amount raised by InvIT by public issue of units could be used for "general purposes" as mentioned in the offer document. Issue-related expenses shall not be considered as a part of general purposes.
- Further, retained oversubscription proceeds shall not be utilised towards such general purposes.

Changes relating to privately placed InvITs

- If a privately placed InvIT invests or proposes to invest 80% or more of the value of the InvIT assets in completed and revenue generating projects:
  a. Minimum investment from an investor shall be INR 250 million; and
  b. Trading lot shall be INR 20 million.
- Private placement issue shall open within three months from the receipt of in-principle approval for listing.
- Further, a placement memorandum shall be filed with the SEBI at least five days prior to the opening of the issue.

Changes relating to voting conditions

- Minimum percentage voting in favour of resolutions revised as follows:
  a. Issues requiring unit holder approval in the ordinary course of business (such as approval of annual accounts, approval of auditor and auditor's remuneration, valuation reports, appointment of valuer, etc.): reduced from not less than 60% to more than 50%;
  b. Important issues (such as investment conditions, distribution policy, related parties, valuation, etc.): reduced from not less than 60% to more than 50%; and
  c. Material changes (such as removal of investment manager, material change in investment strategy, delisting of units, change in trustee, etc.): reduced from not less than 75% to not less than 60%.

Other changes

- Definition of "valuer" broadened to include "financial" and "technical" valuation of the InvIT assets. The list of "financial" and "technical" valuers has been prescribed.
- Minimum experience requirement for a valuer reduced from ten to five years.
- Definition of "associate" and "related party" (erstwhile term "related parties of the InvIT") amended to align with the definition of the term under the Companies Act, 2013 or under the applicable accounting standard. Further, a unitholder holding more than 20% of the units of the InvIT (directly or indirectly) shall no longer be treated as a "related party."
- Definition of NAV amended to exclude "external debt" in the calculation of NAV.
- Lending by InvIT to Hold Co./ SPV shall be permitted.
- Audit of accounts of the InvIT shall be undertaken once a year (erstwhile, twice a year).
- Time limit for initial/ follow-on/ rights offer by an InvIT from the date of issuance of observations on offer document by SEBI increased from six months to one year.
- Power granted to SEBI to relax strict enforcement of the InvIT Regulations in the interest of investors or for the development of the securities market.
- In addition to the above, a few other procedural and operational changes have been carried out in the InvIT Regulations.

Takeaways

As has been the trend since the introduction of the REIT and InvIT Regulations, SEBI continues with its "inclusive" approach in evolving these regulations. Based on the discussions with the professional bodies and stakeholders, SEBI has aligned these regulations as per the requirements of certain business practices and ironed out a few operational level discrepancies.

SEBI board approves amendments to REIT and InvIT Regulations

SEBI Board Meeting Press Release No. 57/ 2017 dated 18 September, 2017

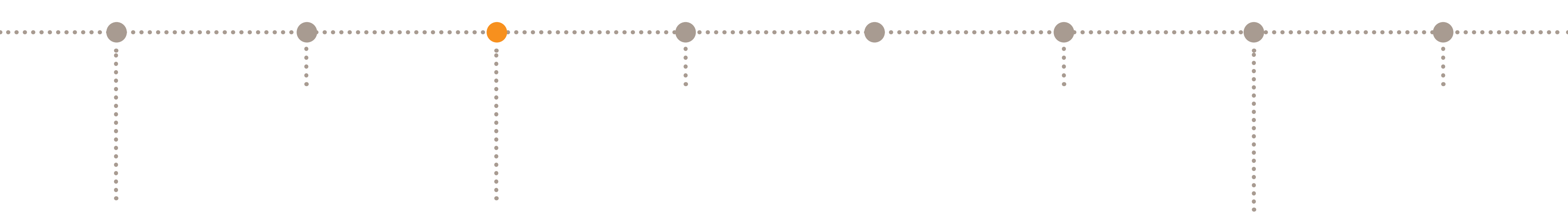
Taking another step towards refining the regulatory framework for REITs and InvITs in India, the SEBI on 18 September, 2017, in its board meeting, decided on a few points that could go a long way in creating a successful platform for these vehicles in India. This tax insight provides a snapshot of these decisions.

Real Estate

It is expected that in due course, a notification will be issued amending the SEBI (REITs) Regulations, 2014 (REIT Regulations) and SEBI (InvITs) Regulations, 2014 (InvIT Regulations) to enact the decisions taken by the SEBI board.

In addition, the SEBI board also decided to further consult with stakeholders on the proposal to allow REITs to invest at least 50% of equity share capital, or interest in SPVs, or holding companies of the SPVs (Hold Cos) and similarly, allowing Hold Cos to invest at least 50% of the equity share capital, or interest in SPVs (as against the current 51%).

- The REIT Regulations and InvIT Regulations do not allow REITs and InvITs, respectively, to issue debt securities for raising funds. However, it has now been decided to allow REITs and InvITs to raise debt capital by issuing debt securities.
- The REIT Regulations prescribe that a REIT shall hold at least two projects and not more than 60% of the value of its assets shall be held in a single project. However, no such stipulation exists under the InvIT Regulations. It has now been decided to allow single asset REITs on similar lines as InvITs.
- While the InvIT Regulations were amended to allow InvITs to undertake lending to Hold Cos/ SPVs, the REIT Regulations remained unchanged. It has now been decided to allow REITs also to lend to underlying Hold Cos/ SPVs.
- The concept of “strategic investor” exists under the prevailing InvIT Regulations. In this context, it is important to note the following:
  - The definition of strategic investors, inter-alia, includes scheduled commercial banks, foreign portfolio investors, etc., together holding not less than 5% of the total offer size of the InvIT; and
  - InvIT is required to disclose commitments received from strategic investors in the offer documents.
- It has now been decided to introduce the concept of strategic investors for REITs on similar lines as InvITs.
- It has been decided to amend the definition of “valuer” in both the REIT Regulations and the InvIT Regulations.



Personal tax

Judgement

Income Tax

Place of rendering services is important for determining the taxability of salary for non-resident

Pramod Kumar Sapra *v.* ITO [ITA No. 5965/ Delhi/2015 (Delhi Bench)]

The taxability of salary income received in India by a non-resident is based on the place of service and not the place of the receipt of salary.

The Delhi Tribunal's ruling is a welcome move as it re-affirms the principle that salary received in India by a non-resident for services rendered outside India should not be taxable in India on a wider spectrum. Just because the salary income has been received in India, i.e., it has been credited in the bank account of the taxpayer in India and also tax was withheld by the employer, this fact could be a determinative of the taxability of resident or non-resident in terms of provisions of the Act. What was relevant was whether the income could be said to be received or deemed to be received in India. Sub-section (2) of section 5 of the Act merely provides that total income of any PY of a non-resident includes all income from whatever source, which is received or deemed to be received in India in such year or accrues or arises or is deemed to accrue or arise to him in India during such year.

The said section does not envisage that the income received by a non-resident for services rendered outside India can be reckoned as part of total income in India. In this case, the taxpayer has received the salary income during his employment in Iraq as a country manager, for activities carried out in Iraq. The taxpayer has received no such income for carrying out any activity in India or the source of income is from India, which could be reckoned as income received or accrued in India. Thus, the salary income of the taxpayer for the previous year cannot be held to be taxable because he was not resident in India, as he was outside India for more than 182 days. Accordingly, the salary of the taxpayer cannot be taxed in India and the same has rightly been claimed as deduction in the return of income.

Personal tax

Circulars, notifications and others

Income-tax

Aadhaar for income tax returns and PAN - Government exempts foreign nationals and non-residents

Notification No. 37/ 2017, F.No. 370133/ 6/ 2017-TPL, dated 11 May, 2017

The Finance Act, 2017 has introduced a new provision (section 139AA), which mandatorily required quoting of Aadhaar number/ Enrollment ID of Aadhaar application to file a tax return in India or to apply for a PAN or to continue keeping the existing PAN active. This amendment is effective from 01 July, 2017 and applicable to all individuals who are eligible to obtain Aadhaar number.

The Government of India has now notified *vide* Notification No. 37/ 2017, F.No. 370133/ 6/ 2017-TPL, dated 11 May, 2017 that foreign nationals are no longer required to quote the Aadhaar number to file return and/ or while applying for PAN/ or for keeping the existing PAN active, which comes as a relief, particularly for foreign nationals and non-residents of India, as they were facing the challenge of physically visiting the Aadhaar centre to obtain Aadhaar number. The following other category of individuals have also been exempted from this requirement

i. Who is an non-resident as per the Act;

ii. Who has attained the age of 80 years at any time during the previous year;

iii. Who is residing in the States of Assam, Jammu and Kashmir and Meghalaya.

International worker

EPFO clarifies the definition of international worker for Indian employees

EPFO Circular No. IWU/7/(25)/2017 dated 23 June 2017

The EPFO has recently issued a clarification on the definition of IW applicable to Indian employees who have been deputed for working outside India. As per the clarification, Indian employees will qualify as IW until they have worked/ are working without having obtained a COC, in a country with which India has an SSA. Upon repatriation to India, such employees will re-acquire the status of "Indian employee" and will not be governed by the special provisions as are applicable to IW.

Intimation

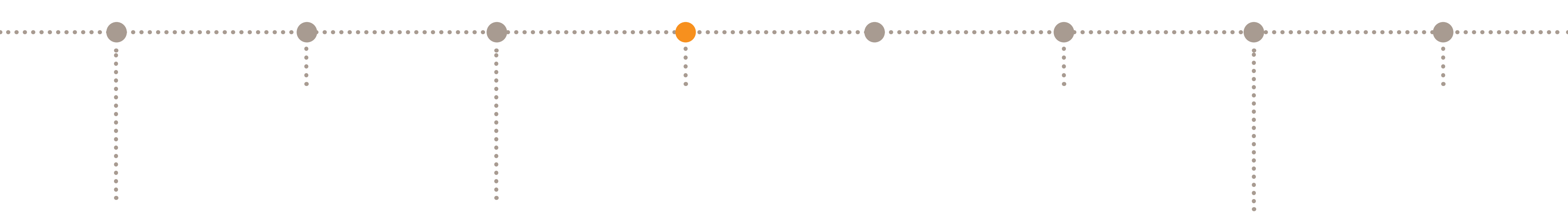
CBDT lays down guidelines for issuing intimation proposing adjustments under section 143(1)(a)(vi) of the Act

CBDT Instruction No. 9/2017 dated 11 October 2017

The CBDT vide instruction 9/ 2017 issued instructions clarifying the processing of return furnished in Form ITR-1 with respect to information appearing in Form 26AS, Form 16 or Form 16A (forms). As Form ITR-1 provides information about particular head/ item of income only on net basis, a meaningful comparison with data/ information contained in the forms is not possible.

Hence, it has been directed that the provisions of section 143(1)(a)(vi) should not be invoked to issue intimation proposing adjustment to income/ loss in such cases. However, the provisions of section 143(1)(a)(vi) would continue to apply in cases where any head/ item of income is altogether omitted to be included in return in Form No. ITR 1.

Further, it also clarifies that where in case of intimation already issued before the said circular and the proposed adjustment is pending and the taxpayer has submitted an explanation or has not responded until now, such cases should be dealt with in accordance with this instruction. However, the cases where the concerned assessee has filed the revised return on receiving intimation under section 143(1)(a)(vi), such returns shall be treated as valid and handled accordingly.



Mergers & Acquisitions

Judgement

Capital gain

Sale on "going concern" basis is "slump sale," not sale of depreciable asset covered under section 50(2)

CIT *v.* Eqinox Solution Private Limited [Civil Appeal No. 4399 of 2007 (SC)]

The SC held that sale of business on a going concern basis is a slump sale and not a sale of depreciable assets covered under section 50(2) of the Act.

Facts

The taxpayer was manufacturing sheet metal components. It sold its entire business, with all the assets and liabilities. The taxpayer filed its return of income, treating the sale to be in the nature of "slump sale" of going concern, resulting in long-term capital gain and claimed deduction under section 48(2) of the Act.

The TO did not accept the contention of the taxpayer. According to the TO, the sale was of short-term capital asset, covered under section 50(2) of the Act. The TO recomputed the gain as short-term gain under section 50, without allowing deduction under section 48(2), as claimed by the taxpayer.

Held

The SC opined that the case of the taxpayer did not fall within the four corners of section 50(2) of the Act. The said section applies where any block of assets was transferred, but where the entire business carried on by the taxpayer for less than three years, was sold along with assets and liabilities, such sale could not be considered as "short-term capital assets" liable to be taxed under section 50(2).

The taxpayer sold the entire business as a going concern, with all assets and liabilities; therefore, it was a case of slump sale of a "long-term capital asset" and was required to be taxed accordingly.

Takeaways

This is an important decision considering the changing scenario of upsurge in business takeovers and acquisitions. The SC has reiterated that sale of business carried on for long-term, on a going concern basis is a slump sale, and thus, should be liable to be taxed as long-term capital gains.

Family settlement – transfer of shares by a "company" held taxable

B. A. Mohota Textiles Traders Private Limited *v.* DCIT [Income Tax Appeal No. 73 of 2002 (Bombay HC)]

Facts

The entire share capital of the taxpayer company was held by members of Group A, Group B and Group C of a family. In addition, the members also held joint interest in various other limited companies, partnership firms and immovable properties. In order to settle the differences that arose and restore peace and harmony among the family, the dispute was referred to an arbitrator who rendered his Arbitration Award by way of family settlement. Pursuant to the family settlement, the shares of the taxpayer was allotted to and was to be owned by Group "B"; however, shares in company 1 and company 2 held by the taxpayer were allotted to and were to be owned by Groups "A" and "C" collectively. The settlement required the taxpayer to transfer the shares in company 1 at a fixed consideration of INR 225 per share and company 2 at a fixed consideration of INR 10 per share in favour of members of Group "A" and Group "C" collectively.

The taxpayer claimed that the above transfers were pursuant to a family settlement, and therefore, did not result into taxable capital gains. The TO did not accept the claim of the taxpayer and held the transfer of shares to be taxable as capital gains.

Held

As far as the members of family were concerned, who were parties to the family settlement, any transfer *inter se* between them on account of family settlement would not result in a transfer to attract the provisions of the capital gain tax under the Act.

The court held that the taxpayer was independent and distinct from its members and a shareholder had no interest in the property of the company. It has only a right to participate in the profits of the company as and when the company decides to divide them.

The objective of family settlement would restrict itself only to the persons who entered into the family settlement and were part of

the settlement. It could not extend to the persons who were strangers to the settlement.

Although courts have permitted the lifting of corporate veil to prevent injustice in some cases, in the present case, the same cannot be allowed, as the Revenue was not seeking to lift the corporate veil. This lifting of corporate veil was not allowed when it was not for the benefit of the Revenue. Further, lifting of corporate veil at the instance of the taxpayer would mean that it was denying its corporate existence. After having incorporated the limited company and given it separate existence from its shareholders, it was not open to the company to urge, “Please ignore my separate existence and look at the persons behind me.” If that be so, the appellant/ company must opt for voluntarily winding up and then the shares allotted to the individual members on liquidation would be governed by the family arrangement/ settlement.

It was held that the transaction of transfer of shares by the independent corporate entity was assessable to capital gain tax and dismissed the appeal.

Takeaways

This decision reiterates the position that transition of assets pursuant to family settlement would not amount to transfer, as it only recognises pre-existing rights. It, also reiterated that a family settlement can only be applied to members of the family, who were party to it and cannot extend to corporate entities.

Post appointed transaction of amalgamating company become transactions of amalgamated company

Makino India Private Limited *v.* ACIT [Income Tax Appeal No. 1015 of 2014 (Bangalore Bench of ITAT)]

Bangalore Tribunal has held that STCG arising to the amalgamating company from the transfer of a block of assets, post appointed date, to be held good only until the time there was no amalgamation. Once the amalgamation was effected, all transactions post the appointed date would be treated as transactions of the amalgamated company (the taxpayer), and consequently, the transfer of assets would be treated as transfer by the taxpayer.

Facts

Vide order dated 19 December, 2003, the HC approved the amalgamation of the amalgamating company with the taxpayer with the appointed date of 01 April. Post the appointed date; the amalgamating company had sold its block of assets resulting in STCG under section 50(1) of the Act. The amalgamating company had offered the gain for taxation in its original return of income, which was removed in the revised return filed post amalgamation.

The TO had not objected to above deletion of income but had disallowed part of the claim on depreciation for want of requisite details.

The taxpayer filed an appeal to the CIT(A) for the claim of depreciation being disallowed. Pending the appeal, the TO rectified its order allowing depreciation on submission of requisite details.

However, instead of disposing the case, the CIT(A) issued a show cause notice to the taxpayer for enhancing the assessment by including STCG, which was originally offered to tax by the amalgamating company on sale of part of the block of assets.

Held

It was undisputed that the merger was effected from the appointed date of 01 April, 2002.

Although the amalgamating company sold its entire block of assets of plant and machinery during the relevant AY, post appointed date the said transfer would be treated as transfer by the taxpayer.

It was undisputed that even after the transfer of the said assets the taxpayer still had balance written down value in the block of assets of plant and machinery. Therefore, the conditions stipulated in section 50(1) of the Act were not satisfied to give rise to any capital gains in the hands of the taxpayer.

It was undisputed that the taxpayer at the time of filing the revised return of income had claimed depreciation on the consolidated block of assets, and thereby, the claim of depreciation was reduced after giving effect to the consideration received on transfer of assets in question.

Although the transfer of the block of assets by the amalgamating company resulted in STCG,

Mergers & Acquisitions

the same would exist until the completion of amalgamation. Once the amalgamation was effected, all transactions thereafter would be treated as transactions by the taxpayer. Thus, when the transfer of assets in question did not result in the extinguishment of block of assets of the taxpayer, it would not result in deemed capital gains under section 50(1) of the Act in the hands of the taxpayer.

It was held that the enhancement made by the CIT(A) was not sustainable and was deleted.

Takeaways

This decision reiterates and upholds the concept of the appointed date and impact thereof. It confirms that once the appropriate authority approves the amalgamation, the transactions from the appointed date will be looked at as if the transaction was carried out by the amalgamated company. Tax and other implications will be re-computed on a consolidated basis and not be considered as aggregation of separate tax computation of the companies involved in the amalgamation.

Bonus shares and shares received as gift continues to be eligible for concession under section 115E

Shashi Parvatha Reddy *v.* DCIT [ITA No. 392/Hyderabad/2017 (Hyderabad Bench of ITAT)]

Facts

The NR taxpayer had declared long-term capital gain on sale of shares in an Indian company and claimed the concessional rate of tax of 10% under section 115E of the Act.

The shares transferred by the taxpayer comprised of

- Bonus shares received by virtue of holding original shares, which were acquired in convertible foreign exchange; and
- Shares received from overseas investor, free of cost, which included original shares acquired in convertible foreign exchange by the overseas investor and bonus shares allotted thereon.

TO held that the taxpayer did not acquire the shares using convertible foreign exchange, and therefore, was not eligible for the concessional rate of 10% under section 115E.

Held

The bonus shares acquired the nature of the original shares. Therefore, the bonus shares would also be considered as foreign exchange assets under section 115E of the Act.

With respect to the shares received as gift, the cost of acquisition of the previous owner was treated as the cost of such shares to the taxpayer. Applying the same analogy, the nature of shares would also remain the same for the taxpayer.

Accordingly, the Tribunal concluded that, the taxpayer should have been eligible for the concessional tax rate of 10% under section 115E with respect to bonus shares and shares received as gift where original shares were acquired in convertible foreign exchange.

Takeaways

This is an important ruling by the Tribunal in the context of capital gains taxation of NRIs with respect to shares acquired in convertible foreign exchange, providing guidance on taxation of bonus shares and shares received as gift. The Tribunal has reiterated the principle that if the cost of shares of original owner of shares is accepted as cost of the recipient of shares, all other attributes relating to such shares, relevant for taxation, which existed with the original owner continues to be available to the successor shareholder.

Non-compliance with conditions prescribed under section 47(xiii) does not give rise to capital gains

Writ Petition No. 510 of 2016 (Bombay HC)

The Bombay HC upheld the ruling of AAR holding that violation of the conditions prescribed under clause (d) of proviso to section 47(xiii) does not give rise to capital gains, as no profit or gain was arising at the time of conversion of a partnership firm into a company.

Facts

The company along with its nominees acquired 100% of the equity shares of the taxpayer in August 2008. Taxpayer company was incorporated as a private limited company succeeding erstwhile partnership firm whose conversion into a company was effected under section 565 (Part IX) of the

Companies Act, 1956 in September 2005.

All the partners of erstwhile firm continued as shareholders having shareholding identical with their profit-sharing ratio and their aggregate of shareholding continued to be more than 50% of the total voting power until the company acquired the taxpayer in August 2008.

Section 47(xiii) states that transfer of capital assets pursuant to conversion of a firm into a company will be exempt from capital gains tax provided conditions prescribed thereunder are complied with. Clause (d) of proviso to section 47(xiii) requires partners of erstwhile firm to hold at least 50% of total voting power in the company for a minimum period of five years from the date of succession.

Held

The Bombay HC upheld the following ruling of AAR:

a. What is deemed to be profit and gains of the successor company is the amount of profit or gains arising from transfer not charged earlier. If no profit arose earlier when conversion took place or if there was no transfer at all of capital assets of the firm, the deeming provision under section 47A(3) cannot be invoked to levy capital gains tax.
b. In case of such reconstitution of the company under Part IX of the Companies Act, 1956, the assets automatically become vested in the newly registered company as per statutory mandate contained in the provisions of law.
c. The contention of the Revenue that in case of violation of conditions prescribed under section 47(xiii), exemption from capital gains enjoyed by the firm upon conversion ceases to be in force cannot be accepted.
d. No capital gains accrued at the time of conversion of the firm into company.

Accordingly, the HC held that notwithstanding the non-compliance with clause (d) of section 47(xiii) of the Act by premature transfer of shares, the taxpayer was not liable to pay capital gains tax.

The HC observed that even if capital gains are sought to be taxed in the hands of erstwhile partners/ shareholders, it would not affect the decision of AAR that there were no capital gains at the time of conversion of the firm into company.

Takeaways

The HC has confirmed that no capital gains arose or accrued upon conversion of firm into a company and subsequent violation of any prescribed condition cannot result in taxation of capital gains tax, which never arose.

However, the observation of the HC about taxability in hands of partners raises a question mark on tax implications in the hands of the partners of the firm.

Assessment

Assessment in the hands of non-existing amalgamating company is void

Civil Appeal No. 285 of 2014 (SC)

The HC had held that the assessment in the hands of non-existing amalgamating company is void. This was not merely a procedural irregularity of the nature that could be cured by invoking section 292B, but a jurisdictional defect, as there cannot be any assessment against a "dead person."

Facts

For the PY relevant to the AY 2002-03, the taxpayer filed its return of income on 30 October, 2002 declaring NIL income. Subsequently, *vide* order dated 11 February 2004, passed by this court, the taxpayer stood amalgamated with the amalgamated company with effect from 01 July, 2003.

The TO issued notice under section 143(2) dated 18 October, 2003 in the name of the amalgamating company. The factum of the amalgamating company being dissolved as a result if its amalgamation was duly brought to

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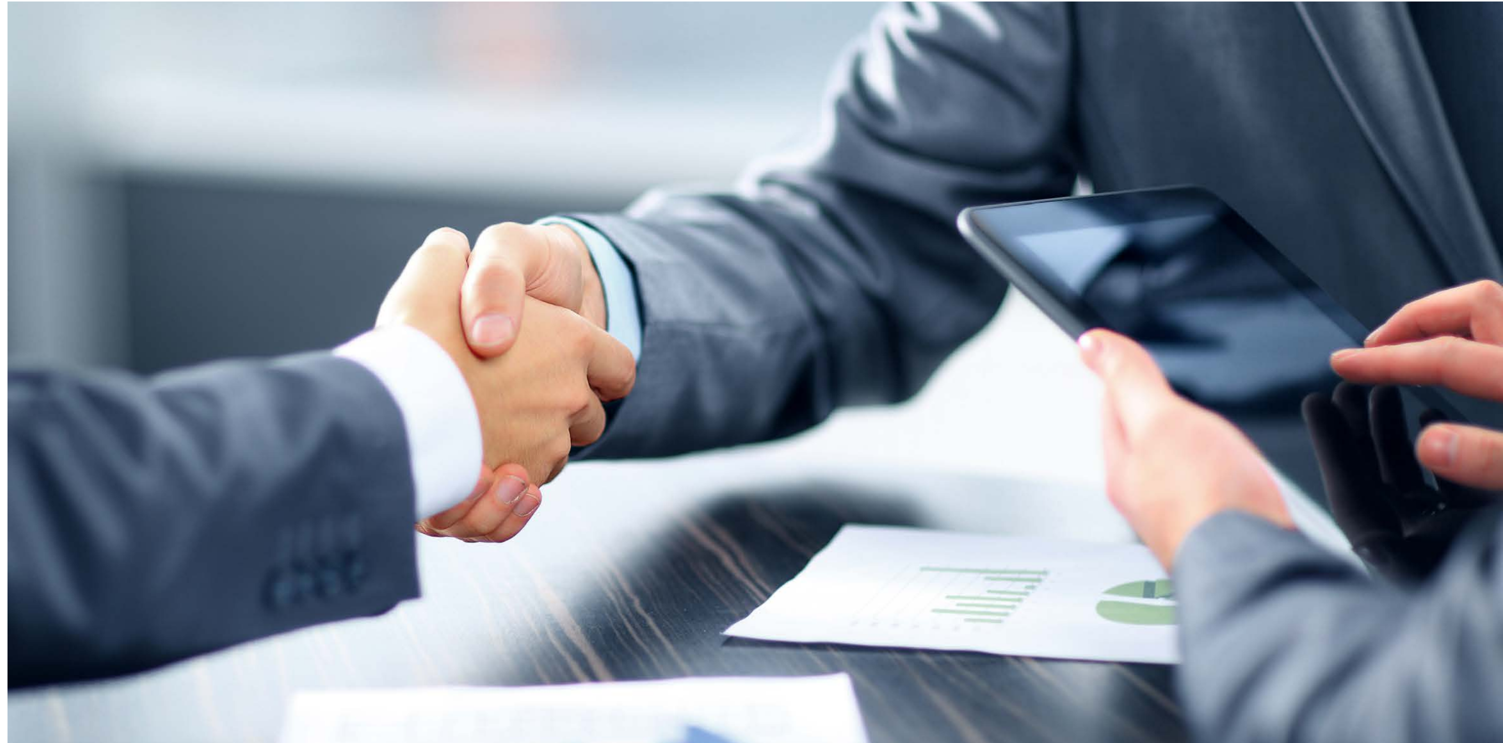
the notice of the TO. Despite the information, the TO, *vide* order dated 28 March, 2005 framed the assessment on the amalgamating company. The order was appealed by the amalgamated company on the ground that the same was bad in law and void *ab initio* as the assessment was framed upon and in the name of a non-existent entity.

Held

SC dismissed the Revenue's appeal and upheld the Delhi HC decision that the assessment in the hands of non-existing amalgamating company is void. The SC also upheld the HC ruling that assessment framed in the name of non-existing entity was not merely a procedural irregularity of the nature that could be cured by invoking section 292B, but a jurisdictional defect, as there cannot be any assessment against a "dead person." Dismissing the Revenue's appeals and SLPs, the SC holds that "We do not find any reason to interfere with the impugned judgment(s) passed by the HC."



Mergers & Acquisitions

Circulars, notifications and others

Fair market value

Final rules for the valuation of unquoted equity shares

CBDT Notification No. 61 /2017/F. No. 149/136/2014-TPL

On 12 July, 2017, the CBDT notified rules amending existing rules for the determination of FMV of unquoted equity shares for the purposes of section 56(2)(x) and section 50CA of the Act. The rules apply to all the transactions taxable during FY(s) ending on or after 01 April, 2017.

The erstwhile Rule 11UA(1)(c)(b) determined the FMV of unquoted equity shares wholly on the basis of book value of the company, without considering valuation impact relating to assets for which specific valuation rules were provided, and thus, there was an inconsistency in direct and indirect valuation of certain assets. The amended rule 11UA(c)(b) removes above inconsistency and provides valuation adjustment for such assets in valuation of unquoted equity shares of company holding it. The valuation of the remaining assets, including intangible assets, business undertaking, investment held in LLP or partnership firm, etc., and the liabilities of the company continues to be valued at book value.

A new Rule 11UAA is inserted to provide valuation methodology for the new section 50CA. It provides for valuation of shares covered thereunder to be same as valuation for the purpose of section 56(2)(x).

The rules failed to address some of the existing issues as follows:

- Adoption of actual fair value, in case the FMV of immovable property is less than the stamp duty value;
- Reduction in relation to securities premium payable on redemption of preference shares,
- Relaxation should have been provided to transactions entered between 01 April, 2017 and 12 July, 2017 as Rules were notified on 12 July, 2017 and were not in existence during the above period.

Insolvency and Bankruptcy Code

Insolvency and Bankruptcy Code provisions dealing with corporate insolvency become operative

The MCA, *vide* notification S.O. 3594(E) dated 30 November, notified 01 December, 2016 as the date on which the provisions of IBC dealing with corporate insolvency should become operative.

The Ministry of Finance *vide* notification no. S.O. 3568(E) and 3569(E) has notified 01 December, 2016 as the date on which the provisions of Sick Industrial Companies (Special Provisions) Repeal Act, 2003 (Repeal Act) shall come into force. The Repeal Act provides for repeal of the SICA and related matters. Therefore, the SICA is repealed with effect from 01 December, 2016 and BIFR/ AIFR stands dissolved with effect from that date and all the proceeding before them stands abated. It provides that such abated matters may be referred to the NCLT under the provisions of the IBC within 180 days from the commencement of the Insolvency Act and no fees will be charged on abated appeals/ references referred to the NCLT within the prescribed time.

Provisions of the IBC relating to winding up are notified with effect from 15 December, 2016 and voluntary winding up of companies are notified with effect from 01 April, 2017.

Thus, SICA is finally out and corporate insolvency process, including revival thereof or ultimate winding up is covered under the IBC.

Companies Act, 2013

Foreign Company Merger Rules notified

The MCA has notified the much-awaited provisions of section 234 of the 2013 Act, dealing with the merger or amalgamation between a company incorporated in India and a foreign company. The rules *inter alia* provides for

- Merger of any foreign company with a company in India.
- Merger of a company in India with a company incorporated in specified jurisdictions (as per Annexure “B” to the notification).

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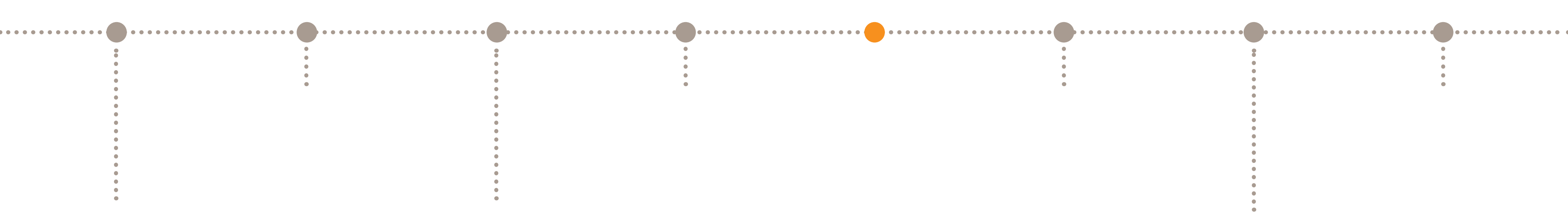
- All the above mergers require RBI approval.

The RBI has issued draft regulations relating to the cross border mergers between Indian companies and foreign companies, called Foreign Exchange Management (Cross Border Merger) Regulation, 2017. These regulations propose to deal with cross border merger transactions pursuant to section 234 of the 2013 Act.



Transfer Pricing

Judgement

Convertible loan

Tribunal rules favourably on TP adjustment for interest receivable on optionally convertible loan

IT (TP) No. 898/ Ahmedabad/ 2014 and 694/ Ahmedabad/ 2015

Based on facts of the case, the Tribunal held that OCLs could not be compared with ordinary loan transactions given their differential commercial terms, which resulted in the taxpayer owning capital on favourable terms. Given these variances, the approach adopted by Revenue authorities (treating the OCLs as interest bearing loans) was considered as not sustainable and the TP adjustment for interest receivable was deleted in favour of the taxpayer.

Facts

The taxpayer, being an Indian company, had issued two OCLs to its wholly owned Irish subsidiary. Both OCLs had a tenor of five years and carried a LIBOR plus spread interest rate in the event of non-conversion or early repayment at the behest of the taxpayer. The interest on these OCLs would be accumulated over their tenors and if the option to convert was not exercised or they were repaid prior to expiry of their respective tenors then the interest on the OCLs would be paid on accumulative basis. The taxpayer exercised its option to convert the first OCL into equity shares on 30 September, 2008. During the assessment year under consideration, the second OCL was not converted. The TPO observed that the taxpayer had not accrued the interest income in its books and the same ought to have been subject to tax. For the first OCL that was converted, the taxpayer contented that the intrinsic value of the converted share was more than the conversion rate (done at par). Further, by not charging interest, the taxpayer retained the option of conversion, thereby, not prejudicing its right to potentially higher gains. The Revenue authority rejected the taxpayer's contentions, carried out the adjustment by charging interest and made an addition of INR 50 million. Aggrieved by the TPO's order, the taxpayer appealed before the DRP. The DRP upheld the TPO's order, agreeing with the TPO's reasoning on the addition made in relation to OCL. Aggrieved, the taxpayer appealed before the Tribunal.

Held

The transaction under dispute was not a plain vanilla lending transaction. The reward for loan transactions was "interest" whereas the reward for OCL was the opportunity and privilege to own the capital of the borrower on favourable terms. Thus, the nature of OCL was that of "quasi capital" and the right comparable for benchmarking would be other loans giving rise to similar privileges, but not a simple loan transaction. In passing its judgement the Tribunal relied on the ruling in case of Soma Textiles & Industries Limited *v.* ACIT [ITA No. 262 of 2012 (Ahmedabad Tribunal)] wherein the question of quasi capital was deliberated, as discussed below:

- the relevance of "quasi capital" and its ALP determination needs to be seen from the viewpoint of comparability of borrowing transaction between the AEs and during such comparability analysis, materially similar transactions (subject to adjustments) need to be considered;
- generally, loan transactions/ commercial borrowings were to be benchmarked based on applicable interest rate. However, this approach could not be used to benchmark transaction that were materially different from loan transactions/ commercial borrowings;
- substantive reward for loan transactions/ commercial borrowings was interest and for transaction in the nature of *quasi* capital loan/ advance was not interest but opportunity to own capital;

Thus, *quasi* capital loan/ advance were different in nature from loan transactions/ commercial borrowings. Such transactions needed to be compared with similar loan/ advances and not with simple commercial borrowings.

On the Revenue authorities' reliance on the US Supreme Court ruling for Pepsi Cola Bottling Co of Puerto Rico Inc. (Docket Nos 13676-09, 13677-09 order dated 20 September, 2012), the Tribunal opined that the Pepsico ruling was in relation to claiming interest deduction and it did not provide any guidance for determination of the ALP for a loan/ convertible loan transaction. Therefore, this ruling was not relevant. The taxpayer, having 100% ownership in the subsidiary, would be the only subscriber to its shares, and hence, the conversion ratio was irrelevant

in the given situation. The concept of ALP was based on the assumption of hypothetical independence between AEs, and based on this assumption the parent company's right to subscribe to the capital of subsidiary needed to be ignored. That the Irish subsidiary earned a higher income, and hence, it ought to have paid interest to the taxpayer was dismissed on the basis that the profits earned by the Irish subsidiary was not a factor for determining the ALP, as it was not a normal commercial practice while determining interest rates. Further, merely because the Irish subsidiary earned a higher income from its investments would not entail that the cost of funds should also have been higher or that the OCL should have earned interest income.

Based on the above, the Tribunal rejected the arguments of the Revenue authorities and adjudicated the appeal in favour of the taxpayer.

Takeaways

The decision of the Tribunal is certainly a welcome one and a step in the right direction. The Tribunal in its ruling has provided valuable guidance in terms of the following aspects:

- *While evaluating the transaction, duly recognising that consideration for extending the loan is the option to convert the same into capital at favourable terms;*
- *Taking a cue from the Soma Textiles decision (supra) in the context of quasi capital, opining that while determining the ALP of transactions with conversion options attached to them, comparison cannot be made with ordinary loan transactions/ commercial borrowings*
- *De-linking cost of funds from the deployment/ returns thereof, i.e., while determining the pricing of a transaction, it is immaterial as to what benefit an AE subsequently derives from the transaction.*

A peculiar aspect of the arrangement in the present case was that interest was payable only upon repayment of loan and not in case the lender opted to convert into equity. As the taxpayer exercised the conversion option in the year of dispute; therefore, the facts of the case did not warrant the Tribunal to give a finding on the appropriateness of the interest rate agreed between the parties to the transaction. One question that remains unanswered is that for having a conversion option, which gives the ability to convert the loan into equity on pre-agreed terms, how much interest would an investor be willing to forego?

For taxpayers having debt transactions, such as optionally or compulsorily convertible debentures/ bonds (OCDs/ CCDs), which have interest coupons as well as conversion terms attached to them, it would be imperative to duly recognise the importance of the agreed terms and conditions and factor them in the economic analysis, supporting ALP determination for interest. It may be highlighted that independent parties, while agreeing upon the commercials for such convertible instruments, would take into consideration the projected profitability/ return on equity while ascribing a value to such option, which gives the investor the ability to convert its debt into equity on favourable terms.

Notional cost

Tribunal rules on TP adjustment considering notional costs

i2 Technologies Software Private Limited *v.* CIT [IT (TP) Appeal No. 1207 of 2014 (Bangalore Bench)]

The Tribunal directed exclusion of costs pertaining to the uncharged ESOPs granted by AEs to employees of the taxpayer from the operating cost. However, the Tribunal directed the inclusion of A&M support services and fixed assets received from AEs, free of cost, in the operating-cost base for determining the arm's length remuneration.

Please note that this ruling also deals with the selection/ rejection of comparables. However, herein we have primarily discusses the issues relating to uncharged ESOP costs, free of cost assets and support services.

Facts

The taxpayer was an Indian company. During assessment year 2003-04, the taxpayer rendered software development services to its AEs based on an R&D agreement and compensated with a mark-up on its operating

costs. Further, the taxpayer's employees participated in ESOPs of the parent company for which no costs were cross-charged to the taxpayer. In addition, certain fixed assets and A&M services were provided to the taxpayer, without any charge from its AEs.

The TPO held that the taxpayer did not make any payment for the ESOPs granted by the AE; although, as per the R&D agreement, this cost was to form part of the operating cost base on which the AE had to pay a mark-up. Further, the charge towards free of cost fixed assets and cost free A&M services received from its AEs should have been included in the cost base for calculating the mark-up. However, by not including the above costs in the operating cost base (albeit considering the costs as notional), the taxpayer suppressed its cost, and consequently, its income, as the taxpayer was receiving its remuneration on cost plus basis from its AE.

In the absence of information from the taxpayer, the TPO estimated an amount of INR 20 million for using the said assets and support services and cost of ESOPs granted to the employees of the taxpayer. The TPO included the value in the total cost for computing the cost plus remuneration representing the arm's length price of the international transactions with the AEs, thereby, making an adjustment for the transactions.

In the appeal filed before the CIT(A), the authority deleted the notional costs pertaining to the ESOP and for various fixed assets and support services received from its AE, which were included in the operating costs for mark-up purposes by the TPO. The CIT(A) was of the view that the taxpayer has not actually incurred any such expenditure, and thus, an imaginative and fictional value of assets/ services provided by the AEs does not have a nexus with the revenues of the taxpayer, and hence, is not sustainable.

Held

A&M support services and for use of various fixed assets received from its AE free of cost

In case of a pure cost plus entity, when the taxpayer reduces its cost (either by recording the costs at a lower value or by not including a particular cost in determining remuneration), it results in the reduction of its income. Accordingly, while presiding on the assertion as to whether the TPO is correct or not, it is important to analyse whether the taxpayer has suppressed its cost by not including the cost relating to the A&M services and for the use of various fixed assets received from its AE. Further, the onus to state that there was no suppression of cost lies with the taxpayer. As the assertion of the TPO has not been proved wrong, the taxpayer has no case. Accordingly, the Tribunal held that the amount of such free of cost assets and support services has to be included in the cost base of the taxpayer to work out the cost plus margin of the taxpayer.

On issue pertaining to ESOP

The Tribunal noted that it was held by various benches of Tribunal that the costs related to ESOP were extra-ordinary in nature. Hence, the Tribunal held that the value of ESOP ought to be excluded from the operating costs.

Conclusion

The matter was restored back to the file of the TO/ TPO for statistical purposes and fresh calculation of adjustment by adopting the cost of various assets and services received free of charge and not accounted for by the taxpayer, but after excluding the value of ESOP.

Takeaways

The Tribunal ruling focuses on three major issues, i.e., the treatment of uncharged ESOP costs, fixed assets and A&M services received from the AEs free of charge, for the computation of operating cost base.

On treatment of ESOP costs

The rulings relied upon by the Tribunal in the present case for ESOP cost seem to indicate that the ESOP costs are extraordinary in nature, and hence, should not be a part of the operating costs. However, a view could be taken that the expenses pertaining to share-based payments (including ESOPs) are akin to any other employee benefit expenses, and hence, operating in nature. If the expenses have a nexus with the operations of the taxpayer, and thus, the revenue, they can be argued to be operational expenses. Further, an appropriate measurement of profit (after analysing whether or not the various income and expense items relating to the operations) is fundamental to the application of profit-based TP methods, such as the resale price method, TNMM or PSM.

Interestingly, in our experience and in recent conversations with the CBDT on APAs seems

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to indicate that the ESOP costs be included in the computation of operating cost base of the taxpayer (in case of cost plus entities), irrespective of whether such costs have been cross-charged or not by the AEs to the taxpayer.

A noteworthy aspect is also the recent amendment to the Safe Harbour Rules announced by the CBDT, which inter alia, seeks to amend the definition of operating expenses. The definition of operating expenses has been specifically expanded to particularly include the costs pertaining to ESOPs or similar stock-based compensation provided by an AE to employees of the eligible taxpayer.

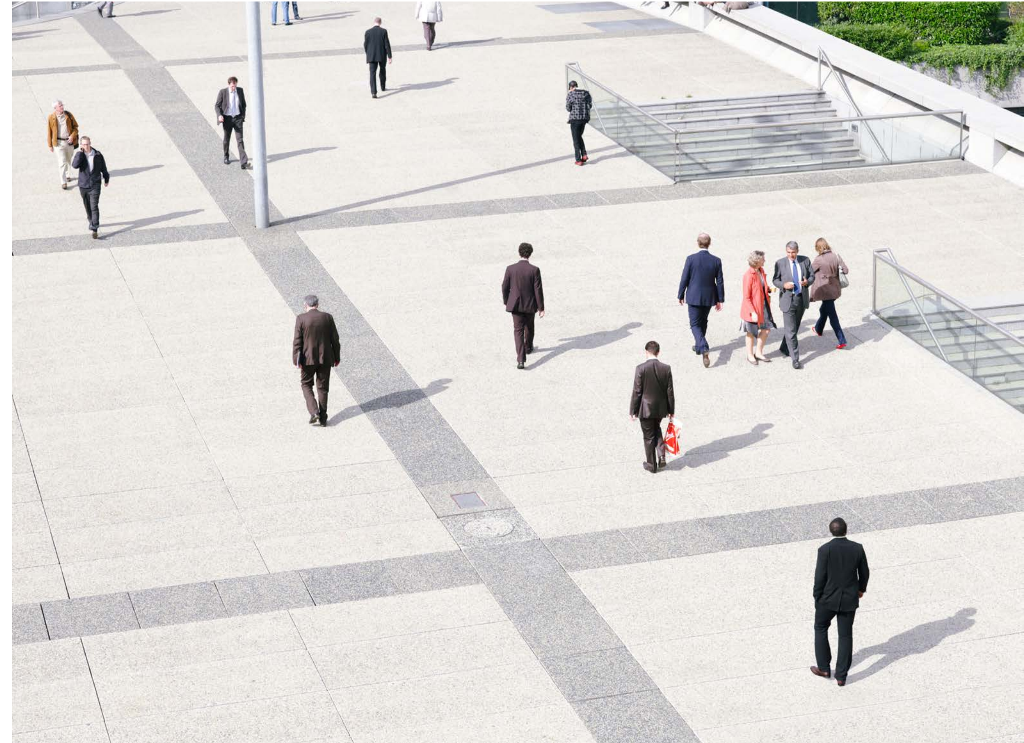
On treatment of cost pertaining to A&M support services and fixed assets received from AEs, free of cost

The Tribunal, in the above case, ruled that the costs pertaining to fixed assets and A&M services received free of cost should be a part of the operating cost. It based its judgement on the fact that there has been suppression of cost, and consequently, of the income. Further, it is indicated that the onus of stating anything to the contrary lies with the taxpayer.

However, as stated by the Tribunal in the present case, where the pricing method/ revenue earned is not based on cost of the taxpayer, it cannot be said that the taxpayer has suppressed its cost, and consequently, its profit, as under such circumstances the price charged would not be based on the operating cost of the taxpayer.

Thus, a question in principle, of inclusion of such notional costs relating to cost free assets and support services for non-cost-plus entities, such as companies operating on hourly rates, etc., remains unanswered. Although logical thinking supports that whether a cost is operating or non-operating, it cannot be judged merely by the mode of compensation of the services, but whether in principle, the expenses have a nexus with the operations carried out for which revenue is earned.

Therefore, in light of past judgements and considering the recent amendments to the SHR, the issue of treatment or inclusion or exclusion of ESOP costs not cross charged and assets/ support services received free of cost from the AE is an evolving one and it shall be absorbing to see how the Tribunals seek to rule on the same going forward.



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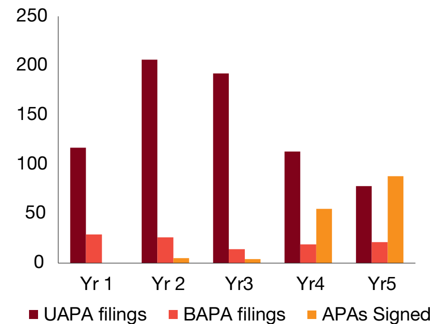
Circulars, notifications and others

Advance pricing agreement

CBDT publishes first India APA Annual Report

Annual Report on Advanced Pricing Agreement

The CBDT on 01 May, 2017 published the first India APA Annual Report. The APA Report contains statistics and performance details of the Indian APA programme for the five years of its existence from FY 2012-13 up to FY 2016-17. The overall APA conclusion is quite impressive, with 152 APAs concluded in four years and 815 applications filed by 31 March, 2017. With FY 2016-17 witnessing the conclusion of a record 88 APAs, the taxpayers should be positive about the continuing efforts taken by the CBDT in concluding APAs. A recent development is the appointment of two new APA commissioners in Mumbai and in Bengaluru, in addition to the two existing APA commissioners, to reinforce the teams. Further, the opening of bilateral APAs with the United States and the possibility to file bilateral APAs with Singapore and Korea should attract more companies in converting current unilateral APAs and filing bilateral APAs with these countries.



Impressive statistics

In total, 815 APA applications have been filed in five years starting FY 2012-13, out of which, 109 are bilateral APA applications (approximately 13% of total APA applications).

In total, 152 APA applications (approximately 19% of total) were resolved over the last five years.

Of the 152 APA applications resolved, approximately 94% were concluded in last two years, which indicates accelerated efforts by the CBDT in dedicating more resources to the APA teams and the proactive approach taken by the APA commissioners and their teams.

The average time taken to process the concluded APAs is 29 months for unilateral cases and 39 months for bilateral cases.

Service sector cases dominated the APA conclusions with 72% of APA concluded relating to service sector transactions, predominantly transactions relating to provision of IT and ITeS services by the Indian entities (in case of unilateral APAs).

Other prominent industries featuring in concluded cases involved banking and finance, industrial/ commercial goods manufacture, pharmaceutical, oil and gas, engineering services and telecommunications.

Some of the other transactions covered in the concluded APAs are intra-group payments, sale and purchase of goods, provision of investment advisory services, interest payment, business and marketing support services.

More than 50% of the concluded APAs include rollback of the APA to prior years, providing tax certainty up to nine years.

While the TNMM is by far the preferred method in the concluded APAs, it is interesting to see that in the concluded APAs, a large number of taxpayers are using the Other Method (most likely for reimbursement at cost) and the CUP method.

Although the United States opened its door to bilateral APAs only in February 2016, it is the top country for the filing of bilateral APAs, followed by the UK, Japan and Switzerland.

Bilateral APA filing statistics shows that on an average, there is 50% increase in number of bilateral filings from FY 2014-15 to 2016-17.

With Singapore and Korea opening up bilateral APAs with India, it will be interesting to see how the conversion to bilateral cases span out with respect to Singapore and Korea and whether both Singapore and Korea will make it to the top five list over the next fiscal years.

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Challenges to be addressed

Owing to the high number of cases filed in first four years, there is a huge backlog of APA cases to be resolved, i.e., around 77% of unilateral cases and 85% of bilateral cases that were filed are yet to be concluded.

The pace of concluding bilateral APAs with the United States (42 cases) will have significant impact on the conversion rate of US unilateral cases to bilateral and new bilateral cases with the United States. Considering the model used to resolve MAP cases between India and the United States over the last two years, based on an agreed framework, it remains to be seen if a similar strategy will be adopted in resolving some of the routine IT and ITeS cases.

While approximately 72% of the resolved cases relate to the service industry, out of which a majority relates to IT and ITeS cases using TNMM, the backlog contains transactions that are more complex. These complex cases are likely to need substantial time for negotiations.

Although the current average processing time of the concluded cases is better than some other countries, approximately 47 unilateral cases (filed in FY 2012-13) will exceed 48 months and approximately 134 unilateral cases (filed in FY 2013-14) will exceed 36 months of average processing time.

Takeaways

It will be interesting to see how the CBDT takes up cases involving transactions that are more complex, in the coming years, e.g., royalty, management services, advertisement, marketing and promotion, guarantee transactions. The CBDT's endeavour to appoint additional APA commissioners in Mumbai and Bengaluru will possibly produce faster APA resolutions, as the majority of APA cases are from these regions. However, it remains to be seen how the CBDT aligns the APA positions across APA jurisdictions, so that all taxpayers obtain a fair resolution. It is encouraging to see that a large number of taxpayers are availing the rollback year benefit, which shows the Indian government's will to provide tax certainty for a larger period ranging from five to nine years. More taxpayers are looking forward to the Indian government's efforts to open up bilateral APA filing with more countries, e.g., by addressing the Article 9(2) clause in treaties. The APA programme has matured over the past five years and various statistics testify that APAs are viewed as the solution to TP issues rather than long-term litigation in India.

India takes another step ahead to resolve transfer pricing disputes bilaterally

Press release ID: 173885 dated 27 November 2017

In a recent press release, the CBDT has clarified that India will now accept requests for MAP in respect of TP disputes and BAPAs, regardless of the presence of Article 9(2) in the tax treaty.

Until now India had imposed an embargo on accepting applications pertaining to MAPs for TP related disputes and BAPAs in respect of countries where Article 9(2) was absent in the tax treaties. This was contrary to the OECD view in this regard.

The embargo affected MNEs having inter-company transactions with France, Germany and Italy.

Owing to this restriction, the CBDT had been getting several requests for revising existing tax treaties to include Article 9(2), which has in fact already been done in the recent revisions of tax treaties with Singapore and South Korea.

Even in the recently signed MLI pursuant to OECD's BEPS Action Plan 15, India did not express any reservations on Article 17 which is on 'Corresponding Adjustments', thereby making its stand evident in this matter. The CBDT's recent press release provides a sanction to this position of India.

As a result, even before the MLI is put into action and even without amending the existing tax treaties, India will now accept applications in respect of BAPAs and MAPs for TP related disputes involving those countries where Article 9(2) is absent in the tax treaties.

Takeaways

This is a much awaited clarification, as access to MAPs will open up a preferred avenue for dispute resolution, and access to BAPAs will go a long way in providing certainty and avoid double taxation with respect to TP positions taken by multinational groups.

As a fallout of this clarification, companies who have cross border transactions with such countries should assess whether they would

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want to apply for MAP or BAPA or both; MAP may also be available for some of the prior year disputes. Also, such companies which may have filed a unilateral APA could reassess conversion of such application into a BAPA as that should also be possible now.

CbCR

CBDT releases draft rules on CbCR and Master File requirements for public comments

CBDT Press Release dated 06 October, 2017

The prolonged wait is finally over! Reiterating India's commitment to implement the OECD's BEPS Action Plan 13, the Indian CBDT has prescribed the draft rules for maintaining and furnishing of TP documentation in the MF and CbCR.

Following an inclusive approach when introducing a new and important regulation, the CBDT, in line with global best practices, has sought public comments on the draft rules.

The new rules proposed to be inserted are Rules 10DA and Rule 10DB of the Rules, and the new Forms prescribed are Form Nos. 3CEBA to 3CEBE.

Master File (governed by Rule 10DA of the Rules, and Form Nos. 3CEBA and 3CEBE)

I) Applicability made subject to threshold:

The MF shall be applicable to every CE of an international group [whether inbound (having parent entity resident in a jurisdiction other than India) or outbound (having parent entity resident in India)], subject to the following twin conditions (hereinafter referred to as "Applicable CE"):

- The consolidated revenue of such international group, as reflected in its CFS for the previous accounting year should exceed INR 5 billion; and
- The aggregate value of international transactions of the CE:
  - during the reporting accounting year (as per books of accounts) exceeds INR 500 million, or
  - aggregate value of international transactions of the CE in respect of purchase, sale, transfer, lease or use of intangible property during the reporting accounting year (as per books of accounts) exceeds INR 100 million.

***Observation:** Various stakeholders have made several representations to the CBDT for linking the applicability of MF filing with a certain threshold. Quite evidently, the CBDT has heard this.*

However, the consolidated group revenue threshold of INR 5 billion seems quite low for inbound groups and could result in situations requiring the inbound group to prepare a MF only for India, whereas inbound CEs resident in India may not even have access to information to prepare a MF. In fact, countries such as Japan, Russia and Australia have a higher consolidated group revenue threshold with respect to MF.

Similarly, for outbound groups, the threshold of INR 500 million and INR 100 million seems to be on the lower side. Therefore, a review of the thresholds may be required.

On a micro level, it may be noted that the language used in this rule with respect to the INR 5 billion threshold is with respect to "accounting year preceding such PY" – the reference to "PY" seems to imply that the accounting year being referred to herein is the FY in the Indian context. Although this will apply to an Indian outbound group, but may not for an inbound CE resident in India, whose parent entity follows an accounting year different from the Indian FY. Accordingly, a modification to the language of this rule may be warranted.

II) Information and documents to be kept and maintained

The documentation prescribed in respect of the MF is largely in line with the OECD's final BEPS Action Plan 13 report, but for the following key deviations:

- The Indian MF requires a description of the functions performed, assets employed and risks assumed by CEs of the international group that contribute to at least 10% of revenues, assets and profits of the group, whereas the OECD requires a description of principal contributions to value creation by individual entities of the group.

***Observation:** At the outset, it is not clear whether the 10% is with reference to a singular base or a cumulative base of revenues, assets*

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and profits. Further, although the financial metric of 10% is more definitive, it is likely to create greater compliance burden.

- The Indian MF has introduced a new requirement of providing a list of all the entities of the international group engaged in the development and management of intangibles along with their addresses.

  Observation: With this new requirement, the focus seems to be not only on legal ownership of intangibles, but also on their economic ownership.

- The Indian MF, in several instances, has warranted the need for "detailed" information as against the "general description" required by the OECD.

  Observation: The focus of the CBDT is clearly towards obtaining in-depth information rather than anything generic.

  Overall, it may be worth considering that more the Indian Rules prescribe MF requirements over and above the OECD template, higher will be the compliance burden in India, because globally prepared MFs will need to be customised for India.

III) Due date and prescribed authority:

The MF is to be furnished in Form No. 3CEBA and it shall be furnished to the DGIT (Risk Assessment) by the due date of filing of ROI, with the exception of FY 2016-17, in which case the MF (i.e. Form No. 3CEBA) may be furnished by 31 March, 2018.

Observation: The MF filing due date has been aligned to the due date for filing the ROI, and it also seems that the MF filing has been contemplated for a reporting accounting year, which is the same as the Indian FY (i.e. April to March).

While this may work well for an Indian outbound group, it may not for an inbound CE resident in India. This is because there is a high likelihood of the parent entity of an inbound CE resident in India, following a different reporting accounting year and having a filing deadline that does not coincide with the Indian ROI filing deadline. Accordingly, at least for the first year of implementation, the filing timeline for a MF for an inbound CE resident in India could have been made concurrent with filing timelines in the jurisdiction of the parent entity.

In addition, practically, inbound CEs resident in India will not have access to the MF unless it has been filed/ made available by the parent entity in the first place. Thus, the above-mentioned alignment of filing timelines would go a long way in ensuring ease of compliance by inbound CEs resident in India.

IV) Filing specifications

- Part A of Form 3CEBA to be filed by every CE (regardless of any threshold).

  Observation*: The provisions relating to MF in the Act require MF maintenance and filing by every C "who has entered into an international transaction." On the contrary, it seems that Part A of the Form 3CEBA is required to be filed by every CE even if it has not entered into an international transaction. Accordingly, this rule may require some modification to align with the provisions of the Act.*

- Part B of Form 3CEBA to be filed only by the Applicable CE.
- The MF is to be filed electronically, and the procedures to do so will be specified.
- The MF shall be kept and maintained for a period of eight years from the end of the relevant AY.
- Where more than one CE is resident in India, the MF is to be furnished by the CE that has been designated by the international group to do so and the international group or the designated CE has notified the same to the DGIT (Risk Assessment). Such notification is to be filed in Form 3CEBE, and must be done at least 30 days before the due date of filing the MF.

  Observation: This rule will mostly benefit Indian outbound groups and inbound groups, which have many entities operating in India, as it will provide administrative relief in filing of MF.

  Further, another administrative point worth noting is that although the MF has to be filed electronically, it seems that the rules have inadvertently missed specifying the requirement of electronic filing of

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Form 3CEBE.

*V) **Security of information filed in the MF***

The specified income-tax authorities shall be responsible for evolving and implementing appropriate security, archival and retrieval policies in relation to the information furnished in the MF.

Observation: *Various stakeholders have had concerns about the confidentiality and security of information filed as part of the MF. The fact that the draft rules have specifically spelt out that the responsibility for holding secure of such information vests with the Indian income-tax authorities is a significant positive.*

CbCR (governed by Rule 10DB of the Rules, and Form Nos. 3CEBB to 3CEBD)

I) Threshold for CbCR

The total consolidated group revenue of the international group shall be INR 55 billion or more in the CFS of the preceding accounting year for applicability of CbCR provisions.

Observation: *The threshold for applicability of CbCR is prescribed in Indian Rupees. This will work well for an Indian outbound group. However, it may not for an inbound CE resident in India, particularly if the consolidated turnover of the international group of which it is a part, is lesser than the turnover threshold prescribed by the jurisdiction of the parent entity, but on conversion to INR exceeds the threshold of INR 55 billion. This may lead to situations where the CbCR is required to be prepared only for India, and such situations as far as possible should be avoided.*

In such cases, an exemption from CbCR applicability may be prescribed for the inbound CE resident in India.

II) Filing specifications and due dates

- An inbound CE resident in India shall notify to the authorities in Form 3CEBB, the following:
  - Whether it is the ARE of the international group; or
  - The details of the parent entity or ARE, as the case may be, of the international group and their country of residence.

  This notification shall be made at least 60 days before the due date of filing the ROI.

  Observation: *It seems uncanny to link the notification filing deadline for an inbound CE resident in India to a date which is relevant for CbCR filing by an Indian outbound group (i.e. due date of filing ROI). If at all the notification filing deadline is made subject to the due date of filing the ROI, then for FY 2016-17 – this date may clearly require an extension.*

- For every Indian outbound parent entity or an ARE resident in India (which is required to file a CbCR) – the CbCR shall be furnished to the DGIT (Risk Assessment) in Form 3CEBC.

  Observation: *Similar to MF filing, the due date for CbCR filing for FY 2016-17, i.e., 30 November, 2017 may need to be extended.*

- For every inbound CE resident in India [which is required to file a CbCR, i.e., if the provisions of section 286(4) of the Act are applicable to it] – the CbCR shall be furnished within the specified time.

  Observation*: The due date of filing the CbCR by an inbound CE resident in India has not been explicitly clarified. The due date may not be linked to the due date of filing the ROI as the CbCR filing requirement for inbound groups is contingent to the provisions of section 286(4) of the Act. In this case, at least in the first year of implementation, the due date may be linked to the due date of filing of CbCR by the parent entity in its jurisdiction.*

- If there are more than one inbound CEs resident in India for an international group (required to file a CbCR), Form 3CEBD is to be furnished by the CE that has been designated by the international group to do so, and the same has been notified to the DGIT (Risk Assessment).

  Observation*: It may be noted that the due date for filing of such notification has not been specified.*

- The CbCR and related Forms are to be filed electronically, for which procedures to do so will be specified.

III) Information requested

The prescribed details in respect of the

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CbCR (Form No. 3CEBC) are largely in line with the OECD's final BEPS Action Plan 13 report.

IV) Security of information filed in the CbCR

The specified income-tax authorities shall be responsible for evolving and implementing appropriate security, archival and retrieval policies in relation to the information furnished in the CbCR.

Takeaways

While various stakeholders have welcomed the release of the draft rules for public comments, certain aspects require some ironing out to ensure the smooth implementation of the Rules. In particular, the Indian Rules seem to require more data as compared to the OECD requirements. Here, there is perhaps need for balance between the need for additional data (leading to higher compliance burden) and data that may be deemed sufficient for a risk assessment.

Clearly, with the new Rules, both inbound and outbound entities operating in India will have a fair bit of information to maintain and disclose. This will require entities to gear up their execution capabilities especially from the perspective of human resources and technology.

In the past there has been an overarching concern as to how information disclosed in the MF and CbCR will be used. In this regard, in various forums, representatives of the GoI have stated that CbCR data shall be used for TP risk assessment and assessment of other BEPS related risks, and not for making TP adjustments. However, as the information flow will soon start, it would be important for the GoI to ensure that appropriate policies and timely safeguards are in place.

Further, post finalisation of these Rules, we also hope that like in the past, the GoI may release FAQs to provide additional guidance on implementation of these Rules. In specific, guidance on whether or not an inbound CE resident in India is required to file a CbCR in the absence of a CbCR being prepared/ required globally, will provide the much needed clarity around CbCR filing requirements for such groups. This would go a long way in ensuring ease of compliance.

CBDT releases final rules on CbCR and Master File requirements

CBDT Notification No. 92 of 2017 dated 31 October, 2017

The Indian CBDT has notified the final rules (the rules) for maintaining and furnishing of TP documentation in the MF and CbCR.

Following an inclusive approach when introducing a new and important regulation, the CBDT, in line with global best practices, had sought public comments on the draft rules. It is apparent from a reading of the rules that the CBDT has incorporated some of the recommendations/ comments, which were put forth by us.

However, certain aspects in the rules still need clarity. We hope that the GoI will soon release FAQs to clarify some of these aspects and also provide additional guidance on implementation of the rules.

Our analysis of the rules is structured as follows:

- Key changes in the rules vis-à-vis the draft rules (Please refer to our news alert dated 7 October, 2017 on the draft rules), and their implications [including aspects requiring clarity (To better contextualise these aspects, please refer to our recommendations on draft rules in respect of CbCR and MF)]
- A snapshot of the Indian compliance requirements with respect to MF and CbCR as per the rules.

I) Key changes in the rules vis-à-vis the draft rules, and their implications

A. Master File

1. Threshold for applicability of MF

a. The INR 5 billion threshold is to be now computed with reference to the "accounting year" under consideration (rather than preceding accounting year). [Rule 10DA(1)(i)]

Observation: *The reference to accounting year clarifies the*

applicability of the concerned sub-rule to inbound (having parent entity in a jurisdiction other than India) as well as outbound (having parent entity resident in India) multinational groups.

b. References to the "reporting year" for computing the threshold in respect of international transaction has been replaced with "accounting year." [Rule 10DA(1)(ii)]

Observation: *The "reporting year" was not defined anywhere in the rules or in the Act. Therefore, the reference to accounting year is appropriate and clarifies the applicability of the concerned sub-rule to inbound as well as outbound groups. For inbound groups, the accounting year should be read as previous year for the concerned sub-rule.*

2. *Information and documents to be kept and maintained*

a. The rules require the list and address of all entities of the international group (rather than that of "operating entities"). [Rule 10DA(1)(a)]

Observation: *As operating entities were not defined in the draft rules, it would have created ambiguity around identifying such entities, which will not be the case any longer. However, this change is not in line with the OECD's final report on Action Plan 13, which requires a chart illustrating the group's legal and ownership structure and the geographical location of operating entities.*

b. The rules require that the MF provides a description of the functions performed, assets employed and risks assumed by CEs of the international group that contribute to at least 10% of revenues or assets or profits taken on an individual basis (rather than "revenues, assets and profits of the group" taken cumulatively). [Rule 10DA(1)(c)(VIII)].

Observation: *Application of the 10% metric on an individual rather than on a cumulative basis is a welcome change. However, the assets and profits per se may not have consistent definitions across jurisdictions, which may lead to inconsistent results when applying the 10% threshold.*

3. *Filing specifications*

a. It has been explicitly clarified in the rules that all CEs are required to file Part A of Form No. 3CEAA regardless of threshold applicability. [Rule 10DA(3)(i)]

Observation: *The explicit clarification is helpful. However, from a reading of the concerned sub-rule, it appears that Part A is required to be filed by every CE even if it has not entered into an international transaction. This requirement is not aligned with the provisions of the Act, which require MF maintenance and filing by every CE "who has entered into an international transaction."*

It may be noted that the rules being a sub-ordinate legislation should not override the provisions of the Act.

While the details required in Part A are basic in nature, yet this sub-rule increases compliance for CEs that do not have any international transactions.

b. The rules now provide an option to designate a CE resident in India, in case of more than one CEs resident in India, to file Part A of Form No. 3CEAA (as against only Part B of the said Form) [Rule 10DA(4)].

Observation: *This would undoubtedly ease the compliance burden. However, by referring to CEs "resident in India," the rule seems to inadvertently not cover non-resident CEs of an international group that will have to file both Part A and Part B individually, thereby, increasing their compliance requirements.*

c. Clarity on the use of foreign exchange conversion date/ rate to compute threshold of INR 5 billion of the international group [Rule 10DA(8)].

Observation: *The threshold computation determines whether MF requirements will be applicable to a CE. Accordingly, clarity on the foreign exchange conversion date/ rate is a positive move, as it will avoid any computational issues/ anomalies associated with conversion from foreign currency into INR.*

d. Form No. 3CEAA and Form No. 3CEAB now require information on the accounting year for which the MF is being submitted.

Observation: *This insertion in the forms allows the CE of an inbound group to provide MF related information for the parent entity's annual accounting period.*

However, from a reading of the proviso to Rule 10DA(2), it appears that for the first year, 2016-17, the MF information content has been contemplated for an accounting year that seems to have been construed to be the same as the Indian FY (i.e. April to March). While this may work well for an Indian outbound group; however, it may not for an inbound CE. This is because there is a high likelihood that the parent entity of an inbound CE follows a different reporting accounting year.

e. The Forms explicitly state that they must be signed by the person competent to verify the ROI.

Observation: *This insertion in the forms is a welcome administrative clarification.*

A. CbCR

1. Threshold for the applicability of CbCR

a. Clarity on use of foreign exchange conversion date/ rate to compute threshold of INR 55 billion of the international group. [Rule 10DB(7)]

Observation: *Whether a CbCR must be prepared and filed, should at the outset be determined based on whether the international group crosses the prescribed threshold in the parent entity's jurisdiction, and not from the perspective of thresholds established in the local jurisdictions of other CEs. Although most countries have followed the Euro 750 million threshold, others (such as India) have established thresholds in local currency, which may not be entirely aligned with the Euro 750 million threshold owing to the exchange rate adopted when converting into local currency or because of rounding off.*

Therefore, for an inbound CE resident in India the CbCR preparation and filing requirement should ideally be determined only from the perspective of the threshold established in its parent entity's jurisdiction. Similarly, for an outbound group with its parent entity resident in India, the CbCR preparation and filing requirement will be evaluated based on the threshold established in India.

Accordingly, the threshold of INR 55 billion, being an India specific threshold, should be applicable only to outbound groups. This view is in line with section IV(1) of the OECD Guidance on Implementation of CbCR. It is also in line with the regulations in respect of CbCR proposed by the IRS of the United States of America (as per Internal Revenue Service, 26 CFR Part 1, [REG-109822-15], RIN 1545-BM70, Country-by-Country Reporting), and subsequently, adopted by a Treasury Decision (TD 9773) and as laid out under the sub-heading "Reporting Threshold."

Therefore, clarity on the use of foreign exchange conversion date/ rate to compute threshold of INR 55 billion of the international group was not warranted.

2. Filing specifications

a. Form No. 3CEAC now requires information on "reportable accounting year."

Observation: *This insertion in the Form allows the CE resident in India of an inbound group to disclose upfront the period for which their group's CbCR will be prepared. Further, this insertion should also help Indian Revenue Authorities to track CbCR reporting requirements in the parent entity's jurisdiction with respect to inbound groups. Therefore, this change shall be particularly helpful in the first few years of CbCR implementation.*

b. The Forms explicitly state that they must be signed by the person competent to verify the ROI.

Observation: This insertion in the Forms is a welcome administrative clarification.

Transfer Pricing

II) A snapshot of the Indian compliance requirements as per the rules

A. Master File

Who	What	When	When
A constituent entity (irrespective of • whether the entity has entered into an international transaction • threshold applicability • whether the entity is resident or not)	Part A of Form No. 3CEAA	By the due date of furnishing ROI, except for FY 2016-17, which is on or before 31 March, 2018	Director General of Income-Tax, Risk Assessment (DGIT, RA)
A constituent entity, having a. Consolidated group revenue of more than INR 5 billion (conversion in foreign currency shall be the telegraphic transfer buying rate of such currency on the last day of the accounting year) for the accounting year; and b. Aggregate value of international transactions during the accounting year - • Exceeds INR 500 million; or • Exceeds INR 100 million in respect of purchase, sale, transfer, lease or use of intangible property	Part B of Form No. 3CEAA	By the due date of furnishing ROI, except for FY 2016-17, which is on or before 31 March, 2018	DGIT, RA
The designated entity, where there are multiple CEs resident in India	• Form No. 3CEAA (Part A and Part B) • Form No. 3CEAB	• Form No. 3CEAA (Part A and Part B) - by the due date of furnishing ROI, except for FY 2016-17, which is on or before 31 March, 2018 • Form No. 3CEAB - at least 30 days before the due date of filing Form No. 3CEAA, except for FY 2016-17, which is on or before 01 March, 2018	DGIT, RA

Transfer Pricing

B. CbCR

Who	What	When	To Whom
CE resident in India, of an international group, whose parent is a non-resident	Form No. 3CEAC (Intimation)	At least two months prior to the due date of furnishing ROI, except for FY 2016-17, which is on or before 31 January, 2018	DGIT, RA
Parent entity, or alternate reporting entity, which is • resident in India; and • part of an international group, the consolidated group revenue of which exceeds INR 55 billion	Form No. 3CEAD (CbCR)	By the due date of furnishing ROI, except for FY 2016-17, which is on or before 31 March, 2018	DGIT, RA
CE resident in India, of an international group, whose parent is non-resident [and if conditions of section 286(4) of the Act are satisfied]	Form No. 3CEAD (CbCR)	Filing date will be contingent to the provisions of section 286(4) of the Act	DGIT, RA
The designated entity, where there are multiple CEs resident in India of an international group, whose parent is non-resident [and if conditions of section 286(4) of the Act are satisfied]	Form No. 3CEAE (Intimation)	Not specified, as the filing date will be contingent to the provisions of section 286(4) of the Act	DGIT, RA

Transfer Pricing

Takeaways

The CBDT's quick turnaround in finalising the rules has been appreciated by various stakeholders. However, one of the more significant concerns relating to lower thresholds for MF applicability remains unaddressed. An upward revision in the thresholds would have eased off the compliance burden in India, especially for inbound groups, and also eliminated practical difficulties that a CE, resident in India, may face of not having access to information to prepare the MF.

Further, there are certain aspects in the rules, as have been discussed above, which would still need clarity. We hope that the GoI will soon release FAQs to clarify some of these aspects and provide additional guidance on implementation of the rules.

As the timelines prescribed in the rules for the first year of implementation are fast approaching, the entities of inbound and outbound groups operating in India will have a fair bit of information to collate, maintain and disclose. This will require entities to gear up their execution capabilities especially from the perspective of human resources and technology.

In the past there has been an overarching concern as to how information disclosed in the MF and CbCR will be used. In this regard, in various forums, representatives of the GoI have stated that CbCR data shall be used for TP risk assessment and assessment of other BEPS related risks, and not for making TP adjustments. However, as the information flow will soon start, it would be important for the GoI to ensure that appropriate policies and timely safeguards are in place.

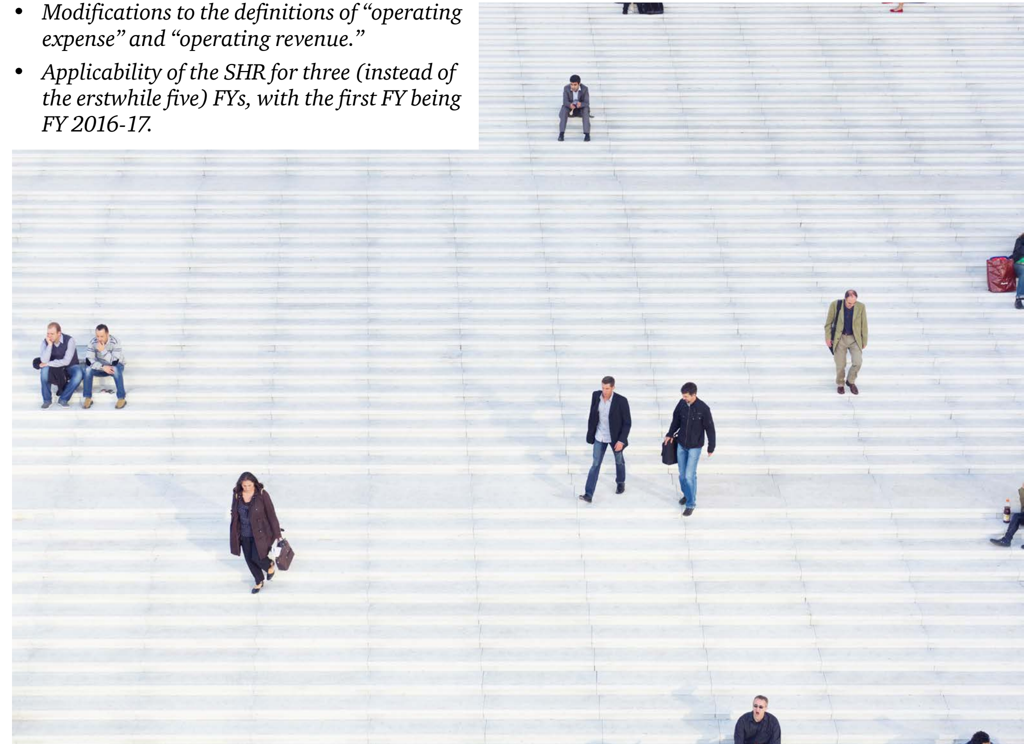
Safe Harbour Rules

CBDT revises Safe Harbour Rules

CBDT Notification No. 46/ 2017 dated 07 June, 2017

The much-awaited amendments to the SHR have been announced by the CBDT. The key changes are as follows:

- *Reduction in SH rates for most eligible transactions, along with other changes made to the specified circumstances.*
- *Introduction of receipt of low value-adding intra-group services to the list of eligible transactions.*
- *Modifications to the definitions of "operating expense" and "operating revenue."*
- *Applicability of the SHR for three (instead of the erstwhile five) FYs, with the first FY being FY 2016-17.*



Transfer Pricing

I) Reduction in existing SH rates and changes to specified circumstances

The reduction in existing SH rates and changes to the specified circumstances are analysed as follows:

Eligible international transaction	SHR – Post-revision	SHR – Pre-revision	Our observations
Provision of: a. Software development services b. ITES	OP/ OE*: • ≥ 17% where value of IT** ≤ INR 1,000 mn • ≥ 18% where value of IT > INR 1,000 mn but ≤ INR 2,000 mn *Operating profit/ Operating expense **International transaction	OP/ OE: • ≥ 20% where value of IT ≤ INR 5,000 mn • ≥ 22% where value of IT > INR 5,000 mn	This reduction in SH rates is indeed welcome. However, the CBDT has also restricted eligibility to the SHR for taxpayers with relatively small and mid-sized transaction values (i.e. not exceeding INR 2000 million). For taxpayers with larger transaction values, unilateral or bilateral APAs would now be the only option for proactively attaining certainty. Further, the dichotomy of dual SH rates (i.e. 17%/ 18%) could have been done away with for the following reasons: The difference in the SH rate as well as the associated transaction value are themselves not significant. Further, as the transaction value increases, owing to the typical “cost-plus” nature of the billing model, the absolute quantum of margins will also increase. Accordingly, even without a higher margin percentage, the objective of increasing the revenue base of India for high value transactions would anyway be achieved.
Provision of KPO services	Value of IT ≤ INR 2,000 mn, and OP/ OE: • ≥ 24% - if employee cost to operating expense is at least 60% • ≥ 21% - if employee cost to operating expense is 40% or more but less than 60% • ≥ 18% - if employee cost to operating expense is ≤ 40%	• OP/ OE ≥ 25%	Besides restricting eligibility to small and mid-sized transaction values (i.e. not exceeding INR 2000 million), the variable SH rates (unlike the erstwhile flat rate of 25%) have been pegged to the ratio of EC to OE. To complement this change, the definition of EC has been introduced in the SHR. The rationale for this change seems to be that in KPO services, a highly skilled workforce may typically result in a higher EC. The higher the EC, the higher is the presumed level of skill. Therefore, a higher SH rate will correspond to a higher EC/ higher skill level. Based on practical experience, the EC/ OE ratio in the service industry has been observed to be in the range of 50 to 60% or more. Accordingly, taxpayers may be likely to fall in the higher bracket of the new SH rates, thereby, implying that the benefit of the reduced SH rates will only be marginal. On a separate note, there has been ambiguity around differentiation between ITES and KPO services. Taxpayers would have welcomed some clarity on this front.

Transfer Pricing

Eligible international transaction	SHR – Post-revision	SHR – Pre-revision	Our observations
Provision of contract R&D services wholly or partly relating to a. Software development b. Generic pharmaceutical drugs	OP/ OE ≥ 24% where value of IT ≤ INR 2,000 mn	OP/ OE: • ≥ 30% for software development • ≥ 29% for generic pharmaceutical drugs	Coupled with a reduction in SH rates, the CBDT has, in case of these services also, restricted the eligibility to the SHR to taxpayers with relatively small and mid-sized transaction values (i.e. not exceeding INR 2000 million). Thus, for taxpayers with larger transaction values in case of these services too, unilateral or bilateral APAs would now be the only option for attaining certainty. However, it may be worth highlighting that the categorisation of services as per the SHR is not practical and typical in real taxpayer situations. In real taxpayer situations, the following categories of services are generally found: • Provision of software development services; and • Provision of contract research and development services Accordingly, when revising the SHR, a rationalisation of the categories could have been undertaken so that the services for which safe harbours are available correspond with real taxpayer situations.
Manufacture and export of c. Core auto components d. Non-core auto components	• Core auto components ≥ 12% • Non-core auto components ≥ 8.5%		Even in the pre-revision SHR, most manufacturers in the auto components sector did not find this SH attractive. The “unchanged” status of this SH is more likely than not to again meet a lukewarm response.

Eligible international transaction	SHR – Post-revision	SHR – Pre-revision	Our observations
Advancing intra-group loan (INR denominated)	Interest rate not less than marginal cost of funds lending rate of SBI plus • 175 BPS, where CRISIL rating of AE is between AAA to A or equivalent • 325 BPS, where CRISIL rating of AE is BBB-, BBB or BBB+ or equivalent • 475 BPS, where CRISIL rating of AE is between BB to B or its equivalent • 625 BPS, where CRISIL rating of AE is between C to D or its equivalent • 425 BPS, where credit rating of AE is not available and the amount of loan advanced to the AE including loans to all AEs does not exceed INR 1,000 million as on 31 March of the relevant PY	Base rate of SBI as on 30 June of the relevant PY plus: • 150 BPS where the amount of loan is ≤ INR 500 mn • 300 BPS where the amount of loan is > INR 500 mn	The scope of intra-group loans has been expanded to include loans denominated in foreign currency as well, and include loans to all AE. However, the definition of “intra-group loan” has not been correspondingly amended, as it continues to read as one which is “advanced to WOS” and one which “is sourced in Indian rupees.” The determination of the lending rate based on the currency of a loan is a best practice followed globally, and has been appropriately adopted in the SHR. Further, the interest rate has been rightly pegged to the credit rating of the borrower. However, it has not been correlated to the tenure of a loan, which is another important determinant of interest rate. Notably, the credit rating in all cases must be provided only by CRISIL. This may pose practical challenges and additional burden for taxpayers, as they will now specifically need a CRISIL rating, as opposed to any other rating. When the credit rating of the borrower is not known, the SHR have limited the risk by placing a limit on the total value of outbound lending, beyond which the SH will not be available.

Transfer Pricing

Eligible international transaction	SHR – Post-revision	SHR – Pre-revision	Our observations
Advancing intra-group loan (foreign currency loan)	Interest rate not less than six months LIBOR of relevant foreign currency plus: • 150 BPS, where CRISIL rating of AE is between AAA to A or equivalent • 300 BPS, where CRISIL rating of AE is BBB-, BBB or BBB+ or equivalent • 450 BPS, where CRISIL rating of AE is between BB to B or its equivalent • 600 BPS, where CRISIL rating of AE is between C to D or its equivalent • 400 BPS, where credit rating of AE is not available and the amount of loan advanced to the AE including loans to all AEs does not exceed a sum of INR 1,000 million as on 31 March of the PY	-	Same as above

Transfer Pricing

Eligible international transaction	SHR – Post-revision	SHR – Pre-revision	Our observations
Providing corporate guarantee	≥ 1% p.a. of the amount guaranteed	• 2% p.a. of the amount guaranteed where the total guaranteed amount is ≤ INR 1,000 million • 1.75% p.a. of the amount guaranteed where the total guaranteed amount is > INR 1,000 million	The SH guarantee commission has been pegged at 1%, regardless of the amount guaranteed. The reduction in the rate is indeed welcome. Further, although the scope of intra-group loans has been expanded to include loans to all AEs (and not just to the WOS) – a similar change does not seem to have been made with respect to corporate guarantees.

Transfer Pricing

II) Receipt of low value-adding intra-group services introduced as an eligible transaction

The amendment

Receipt of low value-adding intra-group services (LVA IGS) has been added as an eligible transaction. The definition of LVA IGS has also been provided, which amongst others includes services that are in the nature of support services, not part of the core business of the taxpayer, not in the nature of shareholder or duplicate services, etc.; various services that are excluded from the scope of LVA IGS are also specified. The prescribed SH is as follows:

- Entire value of international transaction (including a mark-up of up to 5%) should be less than or equal to INR 100 million, and
- The method of cost pooling, the exclusion of shareholder costs and duplicate costs from the cost pool and the reasonableness of the allocation keys used for allocation of costs, is certified by an accountant (definition of "accountant" has been prescribed).

Our observations

- The definition of LVA IGS, as introduced in the SHR, is largely in line with the OECD's BEPS Action Plan 10 Report (OECD Report on Proposed Modifications to Chapter VII of the transfer pricing guidelines relating to low value-adding intra-group services) barring the exclusion of IT services, business process outsourcing services, KPO services and purchase activities from the scope of LVA IGS, most of which are not specifically defined and could create challenges around what they may or may not include. Further, such exclusion will restrict the applicability of SH to intra-group services owing to the limited coverage of services.
- Speaking of limited coverage of services, the definition of LVA IGS includes a reference to services provided on "behalf of other members of the group." This is in line with the OECD Report and seems to indicate that the LVA IGS will typically be those provided by shared service centres or under cost pooling arrangements.
- It may be worth noting that the OECD Report refers to "services of corporate senior management," which has been specifically excluded from the scope of LVA IGS. However, such an explicit exclusion does not exist in the Indian SHR, which leaves room for inclusion of such services in the Indian context, subject to satisfaction of other prescribed conditions.
- The OECD Report states that if there are reliable internal comparables for services, such services cannot be referred to as LVA IGS. A similar exclusion has been attempted in the definition of LVA IGS under the SHR. However, the current language of the SHR is confusing, as it alludes to services not having any "external comparables," which may not be the intent of the CBDT. The intent in fact seems to be to exclude services in the definition of LVA IGS where comparable services are provided to unrelated customers of the taxpayer's group.
- The terms used in the SHR, such as "support service," "core business," "shareholder services," "duplicate services," etc., have not been specifically defined in the SHR and can have different connotations. To aid in interpretation of these terms, reliance may be placed on the guidance provided in the OECD Report, unless subsequently clarified by the CBDT.
- The requirements for the mark-up to not exceed 5%, exclusion of costs related to "shareholder services" and "duplicate services" from the cost base, evaluation of allocation keys, etc., appear reasonable and are in line with the OECD guidance. However, the requirement of obtaining a certificate from an accountant may pose an operational challenge for the AE, if not already in place.

III) Modifications to the definition of "operating expense" and "operating revenue"

The amendment

The definition of "operating expenses" has been expanded to include the following:

- ESOP or similar stock-based compensation provided by the AE to the employees of the eligible taxpayer.
- Reimbursement of expenses incurred by the AE on behalf of the taxpayer provided the reimbursement is at cost.
- Amounts recovered by the taxpayer on account of expenses incurred on behalf of the AE, which relate to normal operations of the taxpayer, provided such amounts are at cost.

Transfer Pricing

Our observations

Amounts recovered by the taxpayer will presumably and logically so, have the effect of netting off against the corresponding expenses so incurred. However, in this context, the reference to "*normal operations of the taxpayer*" is ambiguous as such expenses are the AE's expenses, which would relate to the AE's operations rather than to the operations of the taxpayer.

The amendment

The definition of "operating revenue" has been expanded to include the cost relating to ESOP or similar stock based compensation provided by the AE for the employees of the taxpayer.

Our observations

The reference to inclusion of ESOP in the "operating revenue" seems ambiguous and may require some clarification from the CBDT regarding the intent of such inclusion.

III. Applicability of SHR for three FYs

The amendment

The revised SHR are applicable to three (instead of the erstwhile five) FYs, with the first FY being FY 2016-17. For the first FY (being an overlap FY between the erstwhile and the revised SHR), an eligible taxpayer has been granted an option to apply those SH parameters (i.e. erstwhile versus revised) which are more beneficial to the eligible taxpayer.

Our observations

When applying for a safe harbour option, the impact of a secondary adjustment will also need to be duly considered by taxpayers.

Takeaways

The amendments have brought the SHR closer to economic reality, and seem to align with the outcomes observed in APA resolutions. Clearly, through a more rationalised SH structure, the government seems to be walking the talk on providing tax certainty to taxpayers, as opting for safe harbours will now be more attractive than before, with APAs not being the only option. However, this will hold good for taxpayers with relatively small and mid-sized transaction values. For taxpayers with larger transaction values, APAs will continue to be the primary path to certainty.

Moreover, the government's intent to align the Indian transfer pricing regime with the BEPS philosophy seems to become even more apparent with the introduction of LVA IGS and the associated concepts.

Secondary adjustment

CBDT notifies interest computation for secondary adjustments

CBDT Notification No. 52/ 2017 dated 15 June, 2017

The introduction of secondary adjustment mechanism – a background

The Indian Finance Act, 2017 introduced the SA mechanism *vide* section 92CE in the Act. An SA, which follows a PA, seeks to reflect in the books of AEs such allocation of profits as is consistent with the transfer price determined in a PA.

SAs will be required in case of the following PAs:

- *Suo-moto* adjustment offered by the taxpayer.
- Adjustment made by the TO and accepted by the taxpayer.
- Adjustment determined by an APA.
- Adjustment made as per Indian safe harbour rules.
- Adjustment arising as a result of MAP resolution.

A PA is the difference between the transfer price determined based on the arm's-length principle and the transfer price at which the transaction took place. This difference also represents the "excess money" with the AE, which is required to be repatriated to India. If such "excess money" is not repatriated to India, it will be considered as an advance and interest will be computed thereon.

The time limit for repatriation and the manner of computation of interest were to be prescribed, which the Indian CBDT has now notified (the notification).

Transfer Pricing

The notification – key elements

The key elements of the notification are as follows:

- An SA will apply to a PA that is greater than INR 10 million and relates to/ made in respect of FY 2016-17 and onwards.

  Observation: *This clarification comes as a much-needed relief from the potential retrospectivity impact that this provision had earlier set forth.*

- The "excess money" is to be brought into India within 90 days from the following:
  - Due date of filing ROI – in case of a suo moto adjustment, and where a Safe Harbour has been opted for
  - Date of filing the ROI (or modified return) – in case of an APA

  Observation: *In this regard, with respect to APAs signed after the ROI is filed, the reference to the "due date of filing of return" in the notification has created some confusion. However, the simultaneous reference to "section 92CD" of the Act seems to clarify the intent.*

  Section 92CD of the Act provides for filing of modified return. Accordingly, the intent appears to have been to provide for the "date of filing the modified return" to be the reference date for computing 90 days. This seems to be a prudent and practical interpretation. Nonetheless, a clarification from the CBDT will help.

  - Date of ROI – in case of a MAP

  Observation: *Here also the reference to the "due date of filing of return" in the notification has created confusion. This is because the acceptance of a PA by a taxpayer in a MAP scenario arises only after the taxpayer confirms to the competent authority of its acceptance of a MAP resolution, which is far ahead in time vis-à-vis the "due date of filing of return." Therefore, a clarification in this regard from the CBDT will be required.*

  - Date of TO's order or Appellate authority's order – in case of acceptance by the taxpayer

  Observation: *Section 92CE of the Act envisages the acceptance of PA made only by the TO only. However, the notification refers to the "order of…the Appellate authority." Thus, the notification seems to enhance the scope of "acceptance" to mean one that could be at any stage of the appellate proceedings.*

  Further, clarity is required on whether the appellate order will further need an order giving effect (OGE) by the TO, and if so, whether the reference point for computing 90 days will be extended to include the date of such OGE.

  Having said that, the reference to "date of the order" as against the "date of receipt of order," may, practically speaking, often lead to a breach of the 90 day timeframe. This could prove to be unwittingly punitive for taxpayers, and may thus warrant a clarification from the CBDT.

- The interest rate will be as follows:
  - For an international transaction denominated in INR – one year marginal cost of fund lending rate of State Bank of India as on 01 April of the relevant previous year plus 325 basis points
  - For an international transaction denominated in foreign currency – six month LIBOR as on 30 September of the relevant previous year plus 300 basis points

Observation: *Apart from the high interest rates being a dampener, it seems that if the "excess money" is not brought into India within 90 days, then the interest will apply for perpetuity until such time that the "excess money" comes in. This apparently comes across as a harsh provision particularly in APA/ MAP cases.*

Further, if the "excess money" is not brought into India within 90 days, then the interest is understood to apply from the 1st rather than the 91st day. For example, where a PA of say INR 100 in the form of a suo moto adjustment is made for FY 2016-17 and the "excess money" (i.e. INR 100) is not brought into India within 90 days from 30 November, 2017, i.e., by 28 February, 2018, then for FY 2017-18, the interest will have to be calculated and offered for the period from 01 December, 2017 to 31 March, 2018.

With respect to international transactions denominated in foreign currency, while not clear – it seems that the rate of exchange for conversion into INR will be based on Rule 115 of the Rules.

Transfer Pricing

Takeaways

The notification was meant to prescribe and clarify, which it has done partially. However, the notification has also led to the need for more clarification, as outlined above.

That said, the relief on account of elimination of the retrospectivity impact is undoubtedly very welcome. Further, the 90 day timeframe appears to be largely in line with global practice/ regulations.

However, overall, the notification is unlikely to be received well by businesses and the international tax community, particularly on account of the perpetuity factor attached to the interest computation.

Tax treaty

Double taxation avoidance agreement between India and Singapore renegotiated

CBDT Press Release dated 30 December, 2016

The GoI and the Government of Singapore (GoS), on 30 December, 2016, signed a Protocol (2016 Protocol) amending the tax treaty between India and Singapore (India-Singapore tax treaty). The key features of the 2016 Protocol are as follows:

- Introducing source based taxation for capital gains arising on the transfer of shares acquired on or after 01 April, 2017;
- introducing the mechanism of corresponding tax adjustments in order to prevent economic double taxation; and
- enabling the application of domestic laws to curb tax avoidance or tax evasion.

The 2016 Protocol will come into force latest by 01 April, 2017, even if there is a procedural delay by either of the countries to bring the Protocol into force, as per their domestic laws.

The 2016 Protocol inserts provisions to facilitate relieving of economic double taxation in TP cases. In Article 9 of the tax treaty on "AEs," an additional paragraph has been inserted [i.e., Article 9(2)]. The introduction of Article 9(2) *vide* the 2016 Protocol will allow taxpayers to claim corresponding tax adjustments in case of TP disputes arising from cross-border transactions between India and Singapore.

Simply, in case of a dispute relating to a cross border transaction, where the income of a taxpayer is re-determined on account of a TP adjustment, Article 9(2) enables the enhanced income to be taxed in one country, with the other country providing tax relief (i.e., a corresponding tax adjustment) to the extent of the enhancement. This is to ensure that there is no double taxation of the same amount.

The prevention of such economic double taxation will typically require the competent authorities of both countries to engage in case of TP disputes.

Takeaways

Transfer pricing

The introduction of the much-awaited Article 9(2) in the India-Singapore tax treaty is undoubtedly a significant step towards the stated objective of the GoI towards making dispute resolution mechanisms more effective. This taxpayer friendly measure is in line with India's commitment to implement the minimum standards agreed under OECD's BEPS Project. The BEPS Action Plan 14 is one of the minimum standards agreed to be implemented, the objectives of which are essentially to ensure: (i) improvement of access to MAP; (ii) implementation of MAP in good faith; and (iii) that MAP cases are resolved in a timely manner.

Given that many multinational groups that operate in India have transactions with Singaporean entities, the introduction of Article 9(2) vide the 2016 Protocol has opened the window for taxpayers to settle TP related disputes/ issues by either moving an application for a MAP, or by applying for a Bilateral APA.

Promotion of bilateral investments

As per the media release issued by the GoS, both the countries have agreed to conclude an agreement in the second half of 2017 laying down new joint initiatives to be undertaken for promotion of bilateral investments.

This is a welcome development, and may give impetus to future cross border investments.

Transfer Pricing

Recourse to MAP and bilateral APA (rollback) available between India and South Korea

CBDT Press Release dated 17 March, 2017

India and South Korea signed a revised tax treaty on 18 May, 2015, in Seoul. The revised treaty replaces the existing treaty signed between the two countries in 1985. As per a GoI press release dated 26 October, 2016 (press release), the revised treaty entered into force on 12 September, 2016. Further, as per the press release and in accordance with Article 30(3) of the revised treaty, it shall be effective in India from 01 April, 2017, i.e., for FY 2017-18 and onwards.

Among other changes, the revised treaty incorporates para 2 in Article 9 (AEs). The introduction of Article 9(2) allows taxpayers to claim corresponding tax adjustments in case of TP disputes arising from cross-border transactions between India and South Korea. Simply, in case of a dispute relating to a cross-border transaction, where the income of a taxpayer is re-determined on account of TP adjustment, Article 9(2) enables the enhanced income to be taxed in one country, with the other country providing tax relief (i.e., a corresponding tax adjustment) to the extent of the enhancement. This is to ensure that there is no double taxation of the same income.

Therefore, the introduction of Article 9(2) provides recourse to taxpayers of both countries to apply for MAP in respect of TP disputes, and to apply for bilateral APA for APA period beginning FY 2017-18.

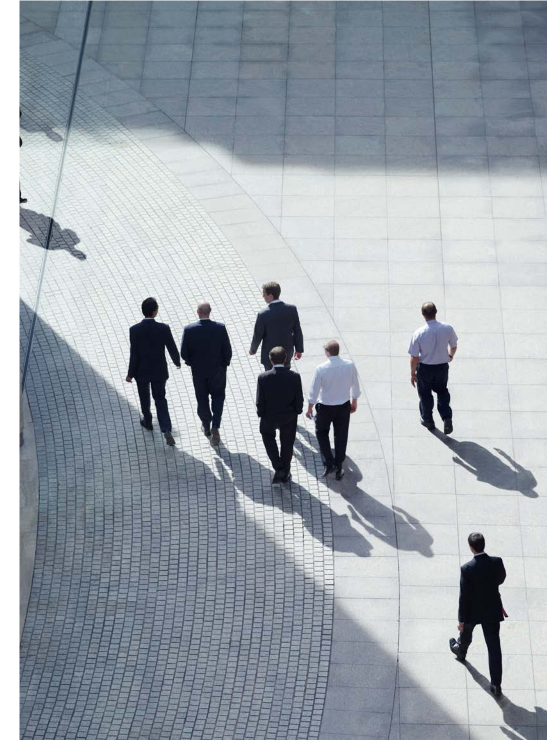
In response to queries received from taxpayers on the availability of rollback provision for bilateral APA applications, the CBDT has clarified that such rollback option will be available to taxpayers having international transactions with AEs in South Korea for the APA period beginning FY 2017-18.

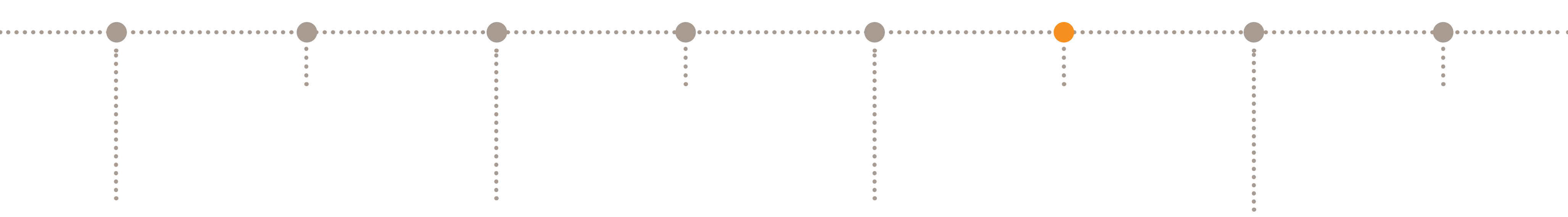
The availability of the rollback option clearly enhances certainty for such taxpayers for up to nine years, and provides a great opportunity for them to seek assurance on their past years' TP positions.

Further, from an application/ eligibility standpoint for such taxpayers in bilateral APAs as well as MAP, the following points are noteworthy:

- Applications for bilateral APAs (including rollback, if any) shall be accepted for APA periods beginning FY 2017-18 and onwards, and should accordingly be expedited by taxpayers, considering the limited window of time available as of date.
- Requests for MAP in TP cases, on the other hand, can be presented by taxpayers to the competent authority:
  - any day after 12 September, 2016 (being the date of entry into force of the revised treaty) and
  - within three years of the date of receipt of notice of action giving rise to taxation not in accordance with the revised treaty.

Therefore, all TP disputes where the above - mentioned three years are not completed prior to 12 September 2016, are eligible for MAP under the revised treaty. Accordingly, taxpayers who are contemplating a MAP application should note this timeline.





Indirect Tax

Judgement

Central Excise

MRP valuation does not breach the principle of charging duty on manufacturing costs and profits

Tuton Pharmaceuticals & Anr *v.* CCE [Special Civil Application No. 14068 of 2007 (Ahmedabad HC)]

The Gujarat HC dismissed the challenge to value P&P medicines on MRP with abatement and held that abatement is allowed on MRP, which includes taxes and other charges such as advertisement, transportation, etc. The HC also held that a physician's free samples have to be assessed only under section 4 and not section 4A in as much as the very requirement of affixing of MRP is not required for a physician's samples.

Restricting input credit utilization up to month/ quarter-end is ultra vires CENVAT scheme

Advance Surfactants India Limited & Anr *v.* Union of India & Ors. [Special Civil Application No. 5101 of 2016 (Ahmedabad HC)]

The Gujarat HC held that restricting CENVAT credit utilisation up to the balance available on the last day of the month/ quarter for discharging excise duty relating to that month/ quarter is *ultra vires* Rule 3(1) of CENVAT Credit Rules and section 37 of the Central Excise Act, 1944. The HC held that a manufacturer should be permitted to utilise the CENVAT credit legally availed during the first five or six days of the subsequent month for paying duty of the excise for the goods cleared in the previous month, relying on the ratio of SC decisions in Dai Ichi Karkaria Limited and Eicher Motors Limited.

Mere omission to disclose scrap and waste clearance in returns not "wilful suppression"

Commissioner of Central Excise, Chennai *v.* Tamil Nadu Petro Products Limited & Others [Civil Miscellaneous Appeal Nos. 2721 and 3122 of 2005]

The Madras HC held that mere failure to declare/ disclose clearance of waste and scrap in returns does not amount to "suppression" in the absence of any "intention to evade payment of excise duty."

Interest on delayed refund of pre-deposit computable from CESTAT's favourable order and not that of order passed by the SC in appeal

Writ Petiton No. 39089 of 2016 (Kerala HC)

The Kerala HC held that interest on delayed refund of pre-deposit is payable after expiry of three months from the date of favourable CESTAT order and not from the order passed by the SC in appeal. As for rate of interest, the HC referring to various SC rulings held that interest will be payable at 12% in the absence of any statutory provisions.

CENVAT credit on inputs allowed on the principle that exports cannot suffer taxes directly or indirectly

Venus Wire Industries Private Limited *v.* Commissioner of Central Excise, Raigad [CESTAT Appeal No E/2559/05-Mumbai]

The Mumbai CESTAT allowed CENVAT credit on hot rolled stainless steel wire rods used in manufacture of pickled and annealed stainless steel wire rods exported under the claim of rebate, despite the Revenue's claim that the process of pickling and annealing does not amount to manufacture. The avowed principle of the government is that no duties/ taxes should be included in value of export goods.

Credit irreversible where inputs booked as "scrap of lesser value" and not "written-off" from books

CESTAT Appeal No E/1159/12-Mumbai

The Mumbai CESTAT held that CENVAT credit is not reversible in respect of inputs shown as scrap of lesser value, but not cleared from factory and the credit is reversible only if the taxpayer has written off the value of inputs or made provision for writing them off.

Indirect Tax

Bulletproofing of vehicles on job work basis does not amount to manufacture, in the absence of change in character/ use

Defence Land Systems India Private Limited *v.* CCE [CESTAT Appeal Nos. E/51172/2014, E/53424/2015 & E/60585/2016- Chandigarh]

The Chandigarh CESTAT held that bulletproofing of Mahindra & Mahindra vehicles on job work basis does not amount to manufacture in the absence of emergence of any new product, having a new name, character or use. The Tribunal observed that after bulletproofing, the purpose of vehicles, i.e., carriage of passengers, and even their character does not change after the addition of accessories.

Supply of goods to merchant-exporter constitutes "export," excludible from SSI exemption threshold

Bhalaria Metal Craft Private Limited & Anr *v.* Commissioner of Central Excise, Thane-II [CESTAT Appeal Nos. E/2344 and 2369/06-Mumbai]

The Mumbai CESTAT held that supply of goods to merchant-exporter constitutes "export clearances," not includible in the aggregate turnover for the purpose of SSI exemption. It also held that if supplies are correlated with details from the sales tax form for export, the adjudicating authority must accept it.

Assembling components and units into "computer system" does not constitute "manufacture"

Lampo Computers Private Limited *v.* Commissioner of Central Excise, Bangalore [CESTAT Appeal No. E/876 - 877/2003 – Bangalore]

The Bangalore CESTAT held that assembling various components into a computer system does not constitute "manufacture." The CESTAT, relying on the test propounded by the SC in Delhi Cloth & General Mills Co. Limited case, held that by assembly of various units into a working system, no new goods with a distinct name, character or use different from units of computer came into existence.

Service tax

Distributor's subscription towards representational and selling rights taxable as "franchise service"

Civil Appeal Diary No. 37364 of 2016 (SC)

The SC confirmed the levy of service tax on subscription received towards representational rights granted to various distributors to sell company products, under the "Franchise Service" category.

Person liable to pay tax in renting of immovable property service is service provider. However, since the lessee accepted in a letter that liability of service tax will be borne by it, the SC refused to intervene

Civil Appeal No. 9952 of 2017 (SC)

The SC has laid down an important principle of law insofar as the liability to collect taxes *inter-se* between the parties is concerned. The court observed that the "taxable person" is the person liable to pay tax and indirect tax need not be collected from the customer. The Indian Constitution, unlike the British North America Act of 1867, makes no distinction, constitutionally speaking, between direct and

Indirect Tax

indirect taxes. Therefore, judgments of this court, which referred to service tax being an indirect tax is in economic theory and not constitutional law. Section 12B of the Central Excise Act only casts the burden of proof upon the service provider to prove negatively that he has not passed on the incidence of the tax to the recipient of the service. It does not help in determining as to who is the person liable to pay service tax. Based on these observations, the court held that in law and under the lease deed, the lessor is required to pay the service tax. However, as the lessee had stated in a letter written to the lessor that it was liable to pay service tax, the court held that the lessee was liable to pay the lessor.

Data connectivity services to global customers of parent entity qualifies as "export"

Verizon Communication India Private Limited *v.* Assistant Commissioner, Service Tax, Delhi III Writ Petition No. 11569 of 2016 (Delhi HC)

The Delhi HC held that the data connectivity services rendered by Indian entity to global customers of the parent entity under the master supply agreement qualifies as "export of telecommunication services," both under the export of service rules and Rule 6A(1) of the Service Tax Rules. Hence, refund of unutilised CENVAT credit allowed under Rule 5 of the CENVAT Credit Rules.

Rule 6A of Service Tax Rules declared "invalid"; Indian package tours to inbound foreign tourists non-taxable pre-GST

Indian Association of Tour Operators *v.* Union of India & Anr. [Writ Petition No. 5267 of 2013 (Delhi HC)]

The Delhi HC, in determining the taxation of tour operator services in the pre-GST era, held that services provided by tour operators to foreign tourists visiting India and neighbouring countries during the period July 2012 to June 2017, where payment has been received in convertible foreign exchange would not be liable to service tax.

Educational trust imparting training/ coaching liable to tax, irrespective of non-profit motive

Chanakya Mandal *v.* Union of India and Others [Writ Petition No. 4235 of 2011 (Bombay HC)]

The Mumbai HC upheld the constitutional validity of explanation to section 65(105)(zzc) of the Finance Act, clarifying the levy of service tax to all training and coaching centres, including non-profit oriented educational public trusts.

Food supplied by restaurant to workers at subsidised rates constitutes "sale," not "service"

Bhimas Hotels Private Limited *v.* Union of India and others [Writ Petition No. 217 of 2017 (Telengana & Andhra Pradesh HC)]

The Telangana and AP HC held that food supplied by restaurants to employees at subsidised rates would not qualify as "service," observing that the supply of subsidised food to employees/ workers by the company management has to be seen as part of the pay package that workers have negotiated with the employer, and as the term "wages" under the Factories Act and the Industrial Disputes Act includes anything supplied at subsidised rate, subsidised food would form part of "wages."

Equipment renting constitutes "deemed sale," not "supply of tangible goods for use service"

Gimmco Limited *v.* Commissioner of Central Excise & Service Tax, Nagpur [CESTAT Order A/94489-94490/16/STB]

The Mumbai CESTAT held that the renting of earthmoving equipment involves the "transfer of right to use," and hence, taxable as "deemed sale" under the MVAT Act read with Article 366(29A) of Constitution, and no service tax would be liable under "supply of tangible goods for use" category from 16 May, 2008.

Indirect Tax

No tax payable on technical know-how transfer in the absence of proprietary rights of holder

Catapro Technologies *v.* Commissioner of Central Excise, Nashik [CESTAT Order Nos. A/94489-94490/16/STB]

The Mumbai CESTAT held that no service tax is payable on receipt of royalty towards permitting use of unregistered technical know-how and documentation for production and marketing of goods.

CVD credit allowed on imported equipment installed at subscriber's premises by telecom operator

CESTAT Appeal No. ST/86352/2013 – Mumbai

The Mumbai CESTAT allowed CENVAT credit of CVD paid on "fixed wireless phones" imported and installed at the premises of subscribers by the telecom service provider, relying on the decision in Pepsico Holdings Limited, which held that the placing of equipment outside the premises of manufacturer would not impede credit availment, as long as a physical link with the premises is maintained.

CESTAT grants relief to taxpayer, quashes demand towards expats deputation

CESTAT Appeal No. E/3910/2012 – Chandigarh

The Chandigarh CESTAT held that the taxpayer is not liable to pay service tax under the reverse charge basis in respect of salaries and perquisites of expats reimbursed to the holding company under manpower recruitment and supply service.

Leasing helicopters from abroad constitutes "deemed sale," not "service"; Payment of sales tax is inconsequential

Heligo Charters Private Limited *v.* Commissioner of Service Tax, Mumbai-VI [CESTAT Appeal No. ST/85468/17 ST/CO-91068/17 Mumbai]

The Mumbai CESTAT held that the leasing of helicopters from foreign lessors involving transfer of the right of possession and effective control/ transfer of the right to use helicopters constitutes "deemed sale," covered by Article 366(29A)(d) of the Constitution and not a "service," defined under section 65B(44) read with section 66E of the Finance Act.

Revenue cannot dispute input services admissibility while processing refunds under Rule 5 of CENVAT Credit Rules

B. A. Continuum Private Limited *v.* Commissioner of Service Tax, Mumbai II [CESTAT Appeal No. ST/ 89165, 89172, 89173/ 13 – Mumbai]

The Mumbai CESTAT dismissed the Revenue's appeal seeking rejection of CENVAT credit refund under Rule 5 of the CENVAT Credit Rules in the absence of nexus between input and output services. When the sanctioning authority did not raise the issue of admissibility of input services such as health and fitness, mandap-keeper, club membership, accommodation, event management and commercial training and coaching services in the show cause, the refund claim on account of BPO services outside India cannot be disputed by the Revenue.

Indirect Tax

Customs and foreign trade policy

Customs

Continuation of "anti-dumping duty" not automatic, issuance of extension notification post expiry of levy is untenable

Union of India & Anr. *v.* Kumho Petrochemicals Company Limited & Anr [Civil Appeal No. 008309-008310 of 2017 (SC)]

The SC held that the continuation of anti-dumping duty is not automatic and that such a duty has to be imposed before the expiry of the period of five years, which is the life of the notification imposing anti-dumping duty.

"Appellate remedy" is a compulsive jurisdiction; CESTAT cannot reject appeal on the ground of pendency of writs

Manali Petrochemicals Limited *v.* Union of India & Ors. [Writ Petition (Civil) 11548/ 2016 (Delhi HC)]

The Delhi HC held that pendency of a writ petition cannot be a ground to deny appellate remedy, which is created specifically by statute and exists as a right and set aside CESTAT order dismissing the taxpayer's appeal on the ground that writ petitions challenging the relevant notification were pending before HCs.

Duty drawback allowable even if material is received by one SEZ unit and exported by another

Kariwala Industries Limited *v.* Development Commissioner, Falta Economic Zone & Ors [Writ Petition No. 959 of 2013 (Calcutta HC)]

The Kolkata HC allowed duty drawback where raw materials from DTA were procured by one SEZ unit, but finished products were manufactured and exported by another unit of the same legal entity.

CA certificate and balance sheet not primary documents to rebut unjust enrichment presumption

Shoppers Stop Limited *v.* Commissioner of Customs (Export) [Civil Miscellaneous Appeal No. 2600 of 2015 (Madras HC)]

The Madras HC upheld the CESTAT order regarding production of primary documents/ evidence to support the contention of duty being passed onto the customers under section 28D of the Customs Act.

DGFT Notification is not a mere "executive instruction"; import permit mandatory despite non-insecticidal use.

Shree Pharma *v.* Commissioner of Customs (Chennai-II) [Civil Appeal No. 2487 of 2015 (Madras HC)]

The Madras HC upheld the requirement of furnishing permit from the Central Insecticide Board Registration Committee for import of "Bronopol" as mandated by DGFT Notification No. 106 (RE-13)/ 2009-14, despite the taxpayer's claim of non-insecticidal use. The taxpayer's contention that section 38 of the Insecticide Act exempts licensing/ obtaining of permit from the Central Insecticide Board under section 9, when imported goods are meant for non-insecticide purpose rejected by the HC, stating that the DGFT Notification is not a mere executive instruction. The HC also observed that the taxpayer failed to produce evidence to establish that Bronopol will be used only for non-insecticidal purpose and mere declaration to this effect is not sufficient to apply exemption under section 38 of the Insecticide Act.

Rejection of refund application untenable when duty is paid on the basis self-assessment; re-assessment of Bill of Entry inconsequential

Writ Petition No.3486 of 2016 (Madras HC)

The Madras HC allowed the taxpayer's writ challenging the rejection of refund of customs duty paid on import of mobile phones, tablets, and television sets, stating that the scheme of assessment after amendment *vide* Finance Act 2011 includes self-assessment, and as there was no facility to lodge a protest, as the Bill of Entry had to be uploaded in electronic form, it is incumbent upon the department to pass a speaking order for the non-entitlement of any concessional rate benefit.

Deposit partake nature of "duty" upon adjudication; interest granted on delayed refund

Calcutta Iron & Steel Company *v.* Commissioner of Customs, Chennai & Anr. [Civil Miscellaneous Appeal No. 3504 of 2010 (Madras HC)]

The Madras HC granted interest on delayed refund of differential duty deposited during

Indirect Tax

DRI investigation of imported consignments under section 27A of the Customs Act, observing that the deposit partook the nature of "duty" when the same was directed to be adjusted against the liability for present as well as past clearances upon adjudication.

EOU entitled to proportionate benefit of exports, despite non-fulfilment of EO obligation or conditions of notification

Moonlight Exim (P) Limited *v.* CCE, Jaipur [CESTAT Appeal No. C/34/2012-CU. (DB) – Delhi]

The Delhi CESTAT held that in case of failure to fulfil export obligation and conditions of notification, proportionate benefit would be available to EOU for exports made against which foreign exchange is realised.

Actual high sea sales' contract price determinative of assessable value; inclusion of a notional commission inappropriate

Jharsanya Logistics Private Limited and others *v.* Commissioner of Customs, Mumbai [CESTAT Appeal Nos. C/90163/14 – Mumbai]

The Mumbai CESTAT held that to determine the assessable value of goods imported on high sea sale basis, the actual high sea sales commission is to be included in the CIF value of imported goods and the inclusion of notional commission is not appropriate.

Exemption available to parts of equipment, irrespective of classification

Silvassa Machines *v.* Commissioner of Customs (Airport), Mumbai [CESTAT Appeal No. C/916/2004-Mumbai]

The Mumbai CESTAT allowed customs duty exemption to "timing belt" as part of "Draw Texturising Machine," irrespective of its classification under the Customs Tariff Act.

"Project Import" benefit allowable even on plant & machinery disposed after installation + use

NOCIL *v.* Commissioner of Customs [CESTAT Appeal No. C/239/05-Mumbai]

The Mumbai CESTAT held that "Project Import" benefit cannot be denied upon disposal of imported plant and machinery after two years of installation and use thereof.

Duty on drawings & designs imported for hotel construction leviable at "transaction value"

Hotel Leela Ventures Limited *v.* Commissioner of Customs, Mumbai [CESTAT Appeal No. C/483 to 488/06-Mumbai]

The Mumbai CESTAT upheld that customs duty on import of drawings and designs for construction of hotels, treating them as "goods" after following the SC ratio in Associated Cement Companies Limited. It also held that the amount paid towards research and concept design, preparation of plan elevation and furnace specification fall under category of "drawings and designs" and to be considered as "transaction value" for discharge of customs duty.

Project import benefit allowed for construction of LPG storage tanks

IMS Petrogas Limited & Anr *v.* Commissioner of Customs (Imports), Mumbai [CESTAT Appeal No. C/1404-1405/05 Mumbai]

The Mumbai CESTAT allowed benefit under project import scheme for the construction of LPG storage terminal tanks by considering the same as "Port Development Project."

Exemption for packaging material denied; undisposed steel drums assessable as distinct goods

Elephanta Oil and Vanaspati Industries Limited & Ors *v.* Commissioner of Customs [CESTAT Appeal No. C/168 to 170/2004 and C/15 to 24/2004 – Mumbai]

The Mumbai CESTAT held that stainless steel drums used for import of goods do not qualify as packaging materials and not eligible for any exemption under Notification No. 184/76-Cus, as the intent of the Notification was to forego revenue only on indistinguishable packaging materials.

Indirect Tax

Fees for exhibition and distribution of motion pictures, includible in imported "cine-prints" value

CESTAT Appeal Nos. C/705, 729, 743/04-Mumbai

The Mumbai CESTAT held that fees paid towards the exclusive license for exploitation, exhibition and distribution of motion pictures in specified territories including India are includible in assessable value of cine prints imported from foreign supplier as the same is paid as a condition for import.

"Related-party" imports are assessable at greatest aggregate sale-price to the institutional buyer and not on MRP

Encyclopaedia Britannica India Private Limited *v.* C.C. New Delhi [CESTAT Appeal No. C/50155/2015- Delhi]

The Delhi CESTAT held that the assessable value of imported DVDs/ CVDs should be arrived at by considering unit price of goods sold to institutional buyers and not based on MRP.

Foreign trade policy

Adjudication proceedings of composite notice for scrip cancellation and penalty, beyond competence of Jt. DGFT owing to pecuniary limits

Special Civil Application No. 14545 of 2016 (Gujarat HC)

The Gujarat HC held that joint DGFT is not competent to issue composite notice and then adjudicate the same owing to lack of pecuniary jurisdiction, as the joint DGFT has concurrent power to suspend or cancel any license or scrip or any instrument granting fiscal benefits under the Act, but does not have the jurisdiction to adjudicate penalties.

Circular denying CST reimbursement on inter-EOU procurements quashed

Asahi Songwon Colors Limited and others *v.* Union of India & others [Special Civil Application No. 16301 of 2016 (Gujarat HC)]

The Gujarat HC quashed the Ministry of Commerce circular dated 11 April, 2014 restricting the reimbursement of CST to goods purchased by EOU from DTA.

No prohibition for discharge of EO in Indian rupees under advance license

Bishwanath Industries Limited *v.* Director General Foreign Trade & Anr [Writ Petition No. 1952 of 1997 (Delhi HC)]

The Delhi HC allowed the taxpayer's writ and quashed the cancellation of advance license where the EO was discharged in Indian rupees. Referring to Appendix XIII of the Handbook of Procedures of EXIM Policy, 1992-97, the HC stated that the EXIM Policy itself makes ample provision for discharge of EO in non-convertible Indian rupee exports from India against the liquidation of rupee balance to the credit of erstwhile RPA countries.

VAT/ sales tax/ entry tax

Entry tax levy on import of goods upheld by the SC

FR William Fernandez & Ors *v.* Commissioner of Sales Tax & VAT [Civil Appeal No. 3381-3400 of 1998 (SC)]

The SC upheld the levy of entry tax on import of goods from outside the country into local areas for consumption, usage, sales, etc.

Double ITC reduction for branch transfers and fuel for manufacture, upheld

Civil Appeal Nos. 13047-13048 of 2017 (SC)

The SC upheld the double reduction of ITC in respect of raw material/ inputs *viz.* furnace oil, natural gas and light diesel oil used in manufacture/ packing of taxable goods, *viz.* polymers and chemicals dispatched outside the State, as branch transfer as well as "fuel" used in the manufacture of said goods.

Indirect Tax

Partial ITC rebate applicable on exempt by-product sale; HC's purposive construction of law rejected

State of Karnataka *v.* M. K. Agro Tech Private Limited [Civil Appeal Nos. 15049-15069 of 2017 (SC)]

The SC held that only partial ITC would be available on the sale of sunflower oil, which is taxable as well as exempted by-product *viz.* de-oiled cake, arising during the solvent extraction process of sunflower oil.

Post sale deduction of "trade discount" allowed; provision of law requiring reflection of discount in invoice, read down

Southern Motors *v.* State of Karnataka & Ors. [Civil Appeal Nos.10955-10971 of 2016 (SC)]

The SC allowed the deduction of trade discount not reflected on the invoice.

Entry tax leviable on inter-State e-commerce transactions; CST set-off available

Special Civil Application No. 7019 of 2016 (Gujarat HC)

The Gujarat HC upheld constitutional validity of levy of entry tax on goods purchased by individual consumers in the State through e-commerce for personal use and consumption, pursuant to the SC decision in Jindal Stainless Limited.

E-commerce sales envisaging goods movement from one state to another, constitutes "inter-State sales"

Writ Petition Nos. 3442 of 2016 (Madras HC)

The Madras HC held that when a purchaser exercises his option to purchase goods *via* the online platform, they are outside the State of Puducherry, and thus, exercising the option of purchase occasions the movement of goods.

Disallowance of ITC for bonafide purchaser due to seller's default, unconstitutional

Arise India Limited *v.* Commissioner of Sales Tax & VAT [Writ Petition No. 2106 of 2015 (Delhi HC)]

The Delhi HC held provisions of section 9(2)(g) of Delhi VAT Act to the extent that it disallowed ITC to the purchaser due to default of selling dealer, as violative of Articles 14 and 19(1)(g) of the Constitution and also held that *bonafide* dealers who make valid purchases cannot be denied ITC of VAT paid thereon to the selling dealer.

Branch office not distinct from head office; purchases made by branch for transfer outside the State not taxable as sale within State

Gaurav Agrochem Industries *v.* Commissioner of Sales Tax & VAT [Sales/ Trade Tax Revision No. 28-30 of 2011 (Allahabad HC)]

The Allahabad HC held that a branch office does not have a separate and distinct legal existence of its own and when there is an unbroken and inextricable link between purchases made in UP and dispatch to J&K, such transaction qualifies as "sale in the course of inter-State trade or commerce."

SIM cards and recharge vouchers constitute "goods" for the purpose of levy of LBT, but e-recharges are outside its ambit

Writ Petition No. 2532 of 2013 (Bombay HC)

The Mumbai HC held that SIM cards and recharge coupons/ vouchers brought into municipal limits by telecom service provider are subject to local body tax by treating them as goods.

VAT on amalgamating entities' interim sale/ purchase transactions until appointed date, constitutionally valid

Special Civil Application No. 3364 of 2016 (Gujarat HC)

The Gujarat HC upheld the constitutional validity of section 52 of the Gujarat VAT Act, 2003 deeming amalgamated companies as "distinct persons" for the levy of VAT on purchase/ sale of goods from the appointed date of merger until the date of the order of the court.

Mould designing/ tooling cost reimbursed by customer, part of "sale-price"

Sales Tax Reference No. 42-43 of 2009 (Bombay HC)

The Mumbai HC held that mould designing charges and tooling cost reimbursed by the customer for manufacturing automotive seating systems and components will form part of the "sale price."

Indirect Tax

In the absence of transfer of "right-to-use" trademark, franchise agreement to operate "restaurant system," not liable to VAT

Service Tax Appeal No. 26 of 2013 (Delhi HC)

The Delhi HC held that royalty received under franchise agreement for use of "trade mark" is not liable to VAT under the Delhi Sales Tax on Right to Use Goods Act, 2002 and the Delhi VAT Act, 2004.

Charter hiring rigs for drilling non-taxable in the absence of a "right to use" transfer

Writ Petition No. 44908 of 2016 (Telengana and Andhra Pradesh HC)

The Telangana and Andhra Pradesh HC held that charter hire of "jack-up rigs" used exclusively in the Arabian Sea for drilling operations does not amount to "transfer of right to use" and ousts the jurisdiction of State VAT authorities to assess such transactions under the provisions of the APVAT Act, in the absence of execution of contracts within the State.

Upholds luxury tax on resort members availing free accommodation under time-share arrangement

Writ Petition (Civil) No. 20728 of 2015 (Kerala HC)

The Kerala HC held that resort providing residential accommodation and renting out of rooms would be construed as "hotel" and attract luxury tax, including on members availing free accommodation provided by the resort under timeshare arrangement.

Interest on tax refund payable only from the date of finalisation of assessment and not from the date of original assessment order

Bawa Trading Co *v.* Sales Tax Officer and others [O.J.C. Nos. 14041 & 14042 of 2001 (Orissa HC)]

The Orissa HC held that interest is payable on refund of excess tax paid only when the assessment is concluded but not from the date of first assessment order.

Warehoused goods cleared to license holders are taxable; cannot be regarded as "sale in course of import"

Order No. ARA Mumbai/04/2016-17/Disp No. 05

The Maharashtra AAR held that the sale of imported goods to license holders from a customs bonded warehouse located in Maharashtra does not constitute "sale in the course of import," but is a "local sale" taxable under the MVAT Act.

Indirect Tax

Circulars, notifications and others

Goods and Services Tax updates

GST was introduced from 01 July, 2017.

CBEC issues clarifications and guidelines for claiming refund of IGST on exports

Customs Circular No. 42/ 2017 dated 07 November, 2017

CBEC issues clarifications and guidelines to exporters for facilitating claim of refund of IGST paid on export of goods.

CBEC issues clarification on leviability of IGST on high sea sales

Customs Circular No. 33/ 2017 dated 01 August, 2017

CBEC clarified that IGST would be paid by the final buyer who will file the bill of entry as the importer of goods purchased on high sea sales and the value for the purpose of import shall be the price paid in the last transaction by the importer. No IGST would be levied on transaction of high sea sales.

Customs and FTP

Customs

CBEC issues clarifications on operational problems faced by EOUs in GST regime

Customs Circular No. 29/ 2017-Cus dated 17 July, 2017

CBEC issued clarifications on various operational problems faced by EOUs in procurements in the GST regime.

Amendment in notional values of cost of transport and insurance to be included in the value of imported goods

Notification No. 91/ 2017-Customs (N.T.) dated 26 September, 2017, amending Customs Valuation Rules

The customs valuation rules have been amended to exclude the loading, unloading and handling charges incurred at the place of importation. The amendment also clarifies the computation of the notional values attributable to the cost of transport and insurance to be included in the value of imported goods in some cases.

New Drawback Rules and Drawback Schedule notified

Notifications No. 88/ 2017-Customs (N.T.) and No. 89/ 2017-Customs (N.T.) both dated 21 September, 2017

New Customs and Central Excise Duties Drawback Rules, 2017 have been issued, superseding the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995. The new all industry rates of duty drawback have also been notified.

Foreign trade policy

Guidelines issued regarding filing of installation certificate filed beyond 18 months for imports under the EPCG Scheme

Public Notice No. 37/ 2015-20 dated 25 October, 2017

EPCG authorisation holders are required to submit installation certificates for capital goods imported, within the prescribed time to the regional authority. However, to ease difficulties in cases of non-submission, as a one-time measure, the DGFT has relaxed the condition to accept installation certificates in instances where capital goods were installed within 18 months but certificates were submitted after 18 months.

One-time relaxation for extension of export obligation and clubbing of advance authorisations

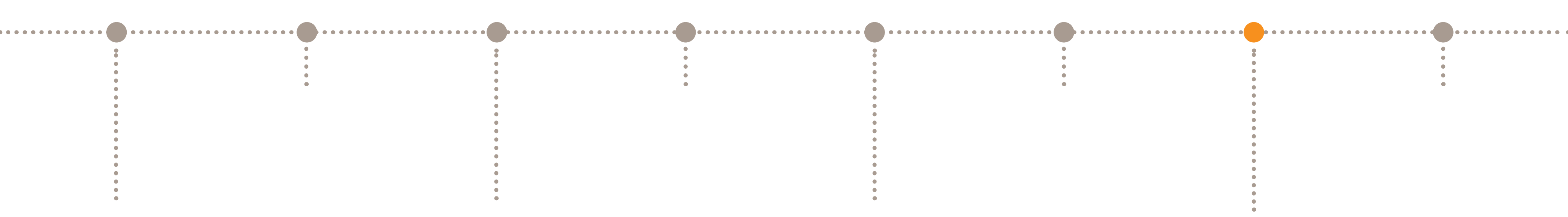
Public Notice No. 34/ 2015-20 dated 24 October, 2017

The DGFT has issued guidelines for clubbing of advance authorisations issued under the Foreign Trade Policy, 2002-07, 2004-09 and advance authorisations issued prior to 5 June, 2012 under the Foreign Trade Policy, 2009-14 as a one-time measure, subject to conditions, if the applications in the designated Form ANF-4C is filed on or before 31 March, 2018.

Increase in validity period of duty credit scrips

Public Notice No. 33/ 2015-20 dated 23 October, 2017

The DGFT has increased the validity period for duty credit scrips issued on or after 01 January, 2016 from 18 months to 24 months.



Regulatory

Circulars, notifications and others

Corporate Governance

Committee submits report for overhaul of corporate governance norms to SEBI

SEBI Report on Corporate Governance

In order to enhance the standards of corporate governance of listed companies in India, SEBI had formed a Committee under the Chairmanship of Mr. Uday Kotak in June 2017. The 25 member Committee comprising of officials from the government, industry, professional bodies, stock exchanges, academicians, lawyers, etc., has now submitted its report to SEBI on 05 October, 2017.

The Committee report recommends a host of changes in the SEBI regulations, majorly to boost corporate governance through enhanced disclosures and safeguards, ensuring independence in spirit of independent directors, improving accounting and auditing practices and addressing issues faced by investors.

Key recommendations from the committee report

Corporate governance

- In order to bring in sufficient number of directors with diverse backgrounds and skills sets, it is recommended that there should be a minimum of six directors on the board of a listed entity. Currently, there is no provision for this in the SEBI listing regulations.
- To reduce excessive concentration of powers in the hands of a single individual, it is suggested that the roles of a chairperson and managing director/ CEO be separated. Considering this, it is recommended that all listed entities with effect from 01 April, 2020, having public shareholding of 40% or more at the beginning of a FY shall ensure that the chairperson is a NED.
- Minimum number of meetings of the board of directors be increased to five every year and in one such meeting, the board shall specifically discuss aspects such as strategy, succession planning, budgets, board evaluation, risk management, environment, sustainability and governance.
- Listed entities, once in a year shall undertake a formal program to update the Board of Directors on changes in applicable laws, regulations and compliance requirements.
- It is recommended that secretarial audit be made mandatory for every listed entity and its material subsidiaries incorporated in India.

Independent directors

- With effect from 01 April, 2019, the boards of the top 500 listed entities (determined on the basis of market capitalisation), shall have at least half the board of directors comprising of ID's. In case of the other listed entities, the requirement shall be applicable with effect from 01 April, 2020.
- To promote gender diversity in the board of a listed entity, it is suggested that the board of directors shall have at least one woman as an ID. Currently, the regulations prescribe appointment of a woman director (not necessarily being an ID).
- To bring about a risk-reward balance in the compensation payable to ID's, it is recommended that a listed entity may be required to pay certain minimum compensation to ID's as specified. It is suggested that in case of top 500 listed entities, the minimum remuneration for an ID per year shall be INR 0.5 million.
- The top 500 listed entities (determined on the basis of market capitalisation) to undertake directors and officers insurance for its ID's with effect from 01 October, 2018. The board needs to determine the quantum and type of risks covered under such insurance.
- ID's to comprise two-thirds of the members of the NRC.
- ID's to undergo formal training once every five years on their roles and responsibilities with particular emphasis on governance aspects and shall certify compliance with the same to the listed entities every year. Existing ID's currently on board of listed entities would be given two years to comply.

Regulatory

Remuneration aspects

Shareholders' approval to be obtained if the remuneration of a single NED exceeds 50% of the pool being distributed to all the NED's. This recommendation is made to bring in check excess remuneration being paid to NED's who are generally promoter directors.

Enhanced responsibility for audit committee

- Role of audit committee to include review of the utilisation of loans and/ or advances from/ investment by the holding company in the subsidiary exceeding INR 1 billion or 10% of the asset size of the subsidiary (whichever is lower).
- Minimum number of meetings for audit committee proposed to be increased to five every year.

Related party transactions

- It is recommended that listed entities must submit half-yearly disclosures of related party transactions on a consolidated basis, within 30 days from the publication of its standalone and consolidated financial results.
- Related party definition in the regulations to be amended. As per the recommendation, any person or entity belonging to the promoter group of the listed entity and holding 20% or more of the shareholding in the listed entity shall also be a related party.
- Transactions involving payments made to a related party with respect to brand usage or royalty shall be considered material, if such transaction to be entered into (individually or taken together with previous transactions), exceed 5% of the annual consolidated turnover of the listed entity.

Enhanced disclosures and transparency

- It is recommended that every listed entity must disclose to the stock exchange, details of holders of global depository receipts, who hold more than 1% shareholding of the entity.
- Where the board have not accepted the recommendations of any mandatory committee, the same shall be disclosed along with the reasons thereof, in the corporate governance report (which falls part of the annual report).
- In the notices sent for an AGM, where statutory auditors are proposed to be appointed or re-appointed, the explanatory statement to include, (a) disclosure on the fees payable to the auditors along with the terms of appointment, (b) any material change in fee (in case a new auditor is appointed) along with the rationale for such change, and (c) basis for recommendation of the auditor and credentials of the auditor proposed to be appointed.

Accounting and audit

- Listed entity shall submit as part of its standalone and the half-yearly consolidated financial results, a note on the statement of cash flows for the half-year.
- If an auditor is not satisfied with the views/ opinions of the management or of an expert whose services have been availed by the management, the auditors can independently obtain external opinions from experts appointed by the auditors themselves. The listed entity shall bear the cost for the same.
- Listed entity to disclose the total fees for all services paid by the listed entity and its subsidiaries (i.e. on a consolidated basis) to the statutory auditor and all entities in the network firm/ network entity of which the auditor is a part.

Investor participation

Top 100 listed entities (determined on the basis of market capitalisation as on 31 March every FY), with effect from 01 April, 2018, shall hold their AGM within a period of five months from the close of the FY. Further, such entities shall provide one-way live webcast of the proceedings of all shareholder meetings held on or after 01 April, 2018.

Regulatory

Foreign investment

Ministry of Finance issues framework for obtaining government approval post abolition of Foreign Investment Promotion Board

Ministry of Finance Office Memorandum F. No. 01/01/FC12017 –FIPB dated 05 June 2017

The Union Cabinet on 24 May, 2017, had approved the abolition of the FIPB. Upon abolition, the process for approving foreign investment was proposed to be dealt with by the concerned administrative ministries/ department. In this regard, the MoF on 05 June, 2017, has issued an Office Memorandum, listing the concerned administrative ministry/ department for 11 notified sectors/ activities requiring government approval under the FDI policy.with particular emphasis on governance aspects and shall certify compliance with the same to the listed entities every year. Existing ID's currently on board of listed entities would be given two years to comply.

Administrative ministries responsible going forward to accord approval under the FDI policy

S. No.	Sector/ Activity	Administrative ministry/ department
1.	Mining	Ministry of Mines
2.	Defence	Department of Defence Production, Ministry of Defence
2A.	Cases relating to FDI in small arms	Ministry of Home Affairs (MHA)
3.	Broadcasting	Ministry of Information and Broadcasting (MIB)
4.	Print media	MIB
5.	Civil aviation	Ministry of Civil Aviation
6.	Satellites	Department of Space
7.	Telecom	Department of Telecommunications, Ministry of Communications
8.	Private security agencies	MHA
9.	Trading (single and multi-brand and food products retail trading)	DIPP, Ministry of Commerce & Industry
10A.	Financial services not regulated by a regulator or if there is more than one regulator or in respect of which there is doubt about the regulator. (As per FDI policy)	Department of Economic Affairs (DEA), MoF
10B.	Banking (public and private) (As per FDI Policy)	Department of Financial Services, MoF
11.	Pharmaceuticals	Department of Pharmaceuticals, Ministry of Chemicals and Fertilizers

Regulatory

Cases not falling under the automatic route of FDI policy, in which DIPP will be the administrative ministry

- Investments by NRIs/ EOUs.
- Issue of equity shares against import of capital goods/ machinery/ equipment (excluding second-hand machinery).
- Issue of equity shares against pre-operative/ pre-incorporation expenses (including payments of rent, etc.).
- Where there is doubt about the administrative ministry concerned, the DIPP shall identify the concerned administrative ministry/ department.
- Concurrence of DIPP mandatory for applications proposed to be rejected by the administrative ministry or where approval is proposed, subject to additional conditions not provided in the FDI policy.

Cases in which the DEA will be the administrative ministry/ department

- Investment into core investment company or an Indian company engaged only in the activity of investing in the capital of other Indian company(ies).
- Investing company irrespective of the sector in which the investment is being made.

Approval required from MHA

- For matters under the automatic route, where the investments are from countries of concern, it will be processed by the MHA.
- Cases under approval route requiring security clearance may be processed by the nodal administrative ministries/ department in consultation with MHA.

Standard operating procedure

- DIPP to issue SoP to help administrative ministries process FDI proposals.
- The SOP shall involve the process of inter-ministerial consultations for the examination of FDI proposals, where necessary.
- SoP to recognise that ordinarily, FDI applications, including those related to NRI/ EOU, food processing, SBRT and MBRT to be decided in 60 days.

Administrative handover

- All pending FIPB applications, past and existing files of matters handled by FIPB shall be transferred to the respective administrative ministry/ department by the DIPP.
- Monitoring of compliance of conditions under the FDI approvals, including the past cases approved by FIPB, shall be done by the concerned administrative ministries/ departments.
- All past, present and future litigations and liabilities, in various courts and adjudicatory forums in relation to the approvals of the government shall be handled by the respective administrative ministry/ department.
- RTI applications and appeals pending with the FIPB Secretariat shall be transferred to the respective administrative ministry/ department.
- The management and responsibility for running the website, i.e., fipb.gov.in. shall be transferred to the DIPP.
- A joint quarterly review meeting will be undertaken by a committee co-chaired by the Secretary, DEA and the Secretary, DIPP on pendency of proposals with the government. The secretary of the concerned administrative ministry/ department may also be invited to attend the meeting.
- The applications requiring approval of the government shall continue to be received by the existing FIPB portal, the oversight of which shall be transferred to the DIPP from the DEA within four weeks.
- The administrative ministry/ department will seek approval of the Minister-in-charge/ CCEA on the application, as per the existing FDI policy.

Regulatory

Foreign investment in India – Rationalisation

RBI Notification No. FEMA 20(R)/ 2017-RB dated 07 November 2017

The FEMA governs foreign investment into India. One of the key regulations under FEMA, which deals with foreign investment into India, is FEMA Notification No. 20 [Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000]. The RBI has revised FEMA 20 and the key highlights of the revised notification are as follows:

Issue of Capital Instruments

- Equity instruments, i.e., equity shares (including partly paid up shares), debentures, preference shares and share warrants have now been clubbed under one definition of "capital instruments."
- FDI, has been defined to mean investment through capital instruments by a person resident outside India in an unlisted Indian company, or in 10% or more in a listed Indian company.
- FPI means any investment made by a person resident outside India, where such investment is less than 10% of the post issue paid-up share capital on a fully diluted basis of a listed Indian company.
- Under the erstwhile regulation, general permission was available to issue shares upon merger/ demerger/ amalgamation, subject to prescribed conditions. Under the revised regulation, Indian companies can now issue any capital instrument pursuant to merger/ demerger/ amalgamation, subject to prescribed conditions.
- The timeline of issue of capital instruments has been aligned with the Companies Act, 2013. The period was 180 days under the erstwhile regulations. In case of non-issuance of capital instruments within 60 days, money will be required to be refunded within 15 days.
- It has been clarified that foreign investment has to be calculated under a fully diluted basis, i.e., the total number of shares that would be outstanding if all possible sources of conversion are exercised.
- For computation of limits applicable to FPI (i.e. less than 10%), investment by investor group (i.e. the same set of ultimate beneficial owners investing through multiple entities) to be considered.

Transfer of capital instruments

- The following transfers have now been permitted under the automatic route
  - Transfer by NRI or OCI to person resident outside India by way of sale or gift subject to prescribed conditions;
  - Transfer from person resident outside India to another person resident outside India pursuant to liquidation, merger, demerger, amalgamation of foreign companies.

NRI

Consequent changes made in various regulations in relation to investment under Schedule 4 (NRI on non-repatriation basis) considered as investment by resident.

Other key highlights

- Foreign investment in Commodities Spot Exchange has been permitted up to 49% under the automatic route.
- The definition of "Downstream Investment" has been amended to include investment by LLP/ Investment Vehicle in downstream Indian company or LLP.
- RBI permitted to prescribe late payment fee for delay in reporting to it.

RBI issues revised framework for Issuance of Masala Bonds

RBI/2016-17/316 A. P. (DIR Series) Circular No.47 dated 07 June 2017

In order to facilitate Rupee denominated borrowing from overseas, the RBI had put in place a framework for the issuance of Rupee denominated bonds overseas (commonly known as "Masala Bonds") within the overarching ECB policy in September 2015.

Considering the current economic climate and to harmonise the various elements of the ECB framework, the RBI has now issued a revised framework for the issuance of Masala Bonds.

Regulatory

The key highlights of the revised framework are as follows:

1. **All proposals under approval route**

   The earlier framework permitted eligible entities to borrow up to INR 50 billion per FY under the automatic route. Under the revised framework, any proposal of borrowing by eligible Indian entities by issuance of these bonds will be examined by the RBI.

2. **Recognised investors**

   Recognised investors should not be related parties (of borrowers)1* as per IndAS 24. There was no such restriction in the earlier framework.

   (1* parenthesis added)

3. **Maturity period**

   The minimum original maturity period for Masala Bonds raised up to $50 million equivalent INR per FY should be three years and above $50 million equivalent INR should be five years. Under the earlier framework the period was three years irrespective of the size of the issue.

4. **All-in-cost ceiling**

   The all-in-cost ceiling for the bonds will be 300 basis points over the prevailing yield of the Government of India securities of corresponding maturity. The earlier rate was commensurate with prevailing market conditions.

Issue of convertible notes by startup companies

RBI Notification No.FEMA.377/2016-RB dated 10 January 2017

The RBI has issued a Notification No. 377 dated 10 January, 2017 wherein it has introduced a new instrument in case of startups. The notification has amended Foreign Exchange Management (Transfer of Issue of Security by a Person Resident Outside India) Regulations, 2000 (FEMA 20) to provide for the following key aspects:

1. **The definition of 'Convertible Note' has been inserted in FEMA 20 to mean -**
   - an instrument issued by a startup company evidencing receipt of money initially as debt,
   - which is repayable at the option of the holder, or which is convertible into such number of equity shares of such startup company,
   - within a period not exceeding five years from the date of issue of the CN,
   - upon occurrence of specified events as per the other terms and conditions agreed to and indicated in the instrument.
2. **A new Regulation 6D on Issue of CNs by startup companies has been inserted to state the following:**
   - A person resident outside India may purchase CNs issued by an Indian startup company for an amount of twenty five lakh rupees or more in a single tranche.

     A 'startup company' means a private company incorporated under the Companies Act, 2013 or Companies Act, 1956 and recognised as such in accordance with notification issued by the DIPP, Ministry of Commerce and Industry.
   - Government approval to be obtained in cases where the startup company is engaged in a sector where foreign investment requires Government approval.
   - Consideration on issue of CNs to be received by inward remittance through banking channels or by debit to the NRE/ FCNR (B)/ Escrow account.

     Escrow account to be closed immediately after the requirements are completed or within six months, whichever is earlier.
   - NRIs are permitted to invest in CNs on non-repatriation basis in compliance with Schedule 4 of FEMA 20.
   - Acquisition or transfer of CNs to be in accordance with the pricing guidelines prescribed by RBI.

     Prior approval from the Government to be obtained for such transfers in case the startup company is engaged in a sector where foreign investment requires Government approval.
   - Reportings to be done by the startup company as prescribed by RBI.

Regulatory

Companies (Restriction on number of Layers) Rules, 2017

GSR No. 1176 (E) dated 20 September 2017

The Companies (Restriction on number of Layers) Rules, 2017 has been notified by the MCA on 20 September, 2017.

The Rules provide that no company (subject to certain exceptions) shall have more than two layers of subsidiaries. These provisions do not affect a company from acquiring a company incorporated outside India with subsidiaries beyond two layers as per the laws of such country and further for computing the number of layers under this rule, one layer which consists of one or more wholly owned subsidiary or subsidiaries shall not be taken into account.

Further, it has also been notified that the proviso to clause (87) of section 2 of the Companies Act, 2013 shall come into force on 20 September, 2017.

Wages

The Code on Wages Bill, 2017

The Code on Wages as introduced in the Lok Sabha

In keeping with its objective to streamline the labour laws in India, the Central Government introduced the Code on Wages Bill, 2017 in the Lok Sabha on 10 August, 2017. The Bill consolidates laws relating to wages by replacing: (i) the Payment of Wages Act, 1936, (ii) the Minimum Wages Act, 1949, (iii) the Payment of Bonus Act, 1965 and (iv) the Equal Remuneration Act, 1976.

Background

One of the biggest issues faced by employers in India is the myriad of laws governing the employer-employee relationship. This issue has been on the government's radar for a while now and taking the first step towards reduction in number of labour laws in India, the government introduced The Code on Wages Bill, 2017 (Code). The Bill consolidates laws relating to wages by replacing: (i) the Payment of Wages Act, 1936, (ii) the Minimum Wages Act, 1949, (iii) the Payment of Bonus Act, 1965 and (iv) the Equal Remuneration Act, 1976.

The Code will be applicable to establishments where any industry, trade, business, manufacturing or occupation is carried out. For fixing wages, the appropriate authority for taking decisions would be

i. Central Government for, inter alia, (a) establishments carried on by or under the authority of the Central Government, (b) public sector undertakings/ corporations/ companies formed under the Central Act and their respective subsidiaries; and (c) autonomous bodies;

ii. State Government for all other establishments.

Minimum wage

Under the Code, the Central Government may fix a NMW and may also fix different national minimum wages for different states or geographical areas. The NMW will be the floor for State Governments to set the minimum wage in their respective states.

The Code requires employers to at least pay minimum wage to employees. The terms "wages," includes salary, allowance, or any other component expressed in monetary terms, but does not include, *inter alia*, bonus payable to employees and travelling allowance. In a big push to digital transactions, the Code recognises digital and electronic payments as a mode of payment of wages. The wages can be paid on daily, weekly, fortnightly or monthly basis.

Bonus

Under the Code, the employer is required to pay employees an annual bonus of at least: (i) 8.33% of their wages, or (ii) INR 100, whichever is higher. The ceiling regarding eligibility of employees to be paid this bonus would be notified by the Central/ State Government. Further, the Code requires the employers to distribute a part of the gross profits amongst the employees (allocable surplus). The Code provides a ceiling on the maximum bonus payment to an employee, i.e., 20% of the wages earned by the employee.

Regulatory

Valuation rules

Section 247 – governing section for valuation by registered valuers and the Companies (Registered Valuers and Valuation) Rules, 2017 notified

PIB Press Release dated 20 October 2017

MCA has notified the provisions governing valuation by registered valuers [section 247 of the Companies Act, 2013] and the Companies (Registered Valuers and Valuation) Rules, 2017 (the Rules), both to come into effect from 18 October, 2017. In addition, to administer and perform functions under the said rules, the MCA by way of notification on 23 October, 2017, has specified the IBBI as the responsible authority.

Section 247 of the Act requires that where a valuation is to be made of any property, stocks, shares, debentures, securities or goodwill or any assets or net worth of a company or its liabilities under the provisions of the Act, the same shall be valued by a person having the requisite qualifications, experience, registered as a valuer and member of a registered valuers organisation, in the manner prescribed in the Rules.

The notified Rules lays down the criteria for individuals, partnership entities and companies to be eligible to be registered as valuers under the Act. Apart from this, the Rules contain other aspects pertaining to registered valuers and valuation as follows:

- *Process for registration as valuers*
- *Recognition of registered valuer organisations*
- *Valuation standards*
- *Transitional arrangement*

Currently, the Act requires a valuation report from a registered valuer in certain cases, such as for further issue of share capital (preferential allotment), non-cash transactions involving directors, compromise and arrangements with creditors and members, purchase of minority shareholding, etc.

Key provisions from the Rules

Eligibility, qualifications and registration of valuers

- Any person, partnership entities (includes limited liability partnerships) are eligible to be registered valuers, provided they meet the eligibility conditions prescribed in the rules.
- In case of partnership entities or companies, in order to be eligible as registered valuers (apart from other conditions), it is necessary that the entity is formed for rendering professional or financial services including valuation and at least three or all the partners or directors (whichever is lower), are registered valuers.
- Qualifications and experience requirements have been prescribed for individuals, to be eligible for registration as valuers. Further, an indicative matrix on requisite qualifications/ experience in specified discipline for asset classes has been provided in the rules.
- To test professional knowledge, skills, values and ethics in valuation, IBBI to either on its own, or through a designated agency, conduct examinations for one or more asset classes, for individuals (who possess the qualifications and experience as specified) and have completed their educational courses as member of a registered valuers organisation.
- Until the Central Government notifies the Indian valuation standards, the registered valuer shall make valuation as per – (1) internationally accepted valuation methods; (2) valuation standards adopted by a registered valuers organisation.
- The Central Government may constitute a committee to be known as “committee to advise on valuation matters” to make recommendations on formulation and laying down of Indian valuation standards and policies for compliance by companies and registered valuers.

Transitional arrangement

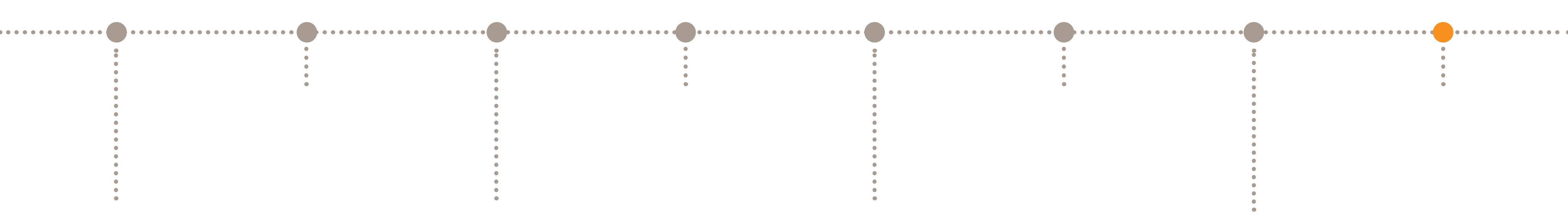
Any person rendering valuation services, under the Act, on the date of commencement of the rules, may continue to render valuation services without a certificate of registration up to 31 March, 2018. However, if a company has appointed a person for valuation, and the valuation or any part has not been completed before 31 March, 2018, the valuer shall then be given an additional time period of three months to complete the valuation.

Regulatory

Recognition of registered valuers organisations

A company registered under section 8 of the Companies Act, 2013 (or section 25 of the erstwhile Companies Act, 1956), with the sole object of dealing with matters relating to regulation of valuers of an asset class or classes and professional institutes established by an Act of Parliament enacted for the regulation of a profession are eligible to be registered as Registered Valuers Organisations, provided they meet the following key requirements:

- It conducts educational courses in valuation, in accordance with the syllabus determined by the IBBI.
- Grants memberships or certificate of practice to individuals who possess qualifications and experience as required under the Rules.
- Conducts training for individual members before a certificate of practice is issued.
- Monitors and reviews the functioning, including quality, of services, or valuers who are its members.



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66	22 June 2017	Timing of India Withholding Tax on Royalty/Technical Service Fees for overseas entities– the Dichotomy continues?	Taxmann	Poonam Prabhu and Jenisha Gala
67	26 June 2017	Eight things that businesses need to do before GST	Economic Times	Pratik Jain and Kartik Solanki
68	27 June 2017	Transition provisions under GST regime	Economic Times	PwC analysis
69	28 June 2017	Unease over GST's anti-profiteering clauses	The Hindu Business Line	Anita Rastogi
70	29 June 2017	GST in India: A benefit or barrier for the e-commerce sector?	YourStory	Kunal Wadhwa and Soumya Murthy
71	30 June 2017	GST rollout, launch in India: From cars to ACs, housing and clothing, here's how Goods and Services Tax affects common man	The Financial Express	Kunal Wadhwa
72	03 July 2017	GST impact on price fixation: Government guidance missing	The Financial Express	Anita Rastogi
73	06 July 2017	GST making you anxious? Here is a fact-check on how new tax will impact you	Smart Investor	Pratik Jain
74	10 July 2017	Secondments to India - Ray of hope for income-tax litigation	Taxmann	Rakesh B Jain
75	15 July 2017	GST impact on common man: New tax regime will deliver a mixed bag with some items turning costly	The Financial Express	Gautam Khattar, Kishore Kumar and Vidushi Gupta
76	21 July 2017	Few takers for simple tax for small businesses: A look at Composition Scheme under GST	Business Standard	Pramod Banthia, Feneel Shah and Yogesh K Shah
77	24 July 2017	Check-in issues	The Hindu Business Line	Anita Rastogi
78	30 July 2017	GST: Less taxing in the long run	Business Standard	Gautam Khattar, Kishore Kumar and Vidushi Gupta
79	02 August 2017	Buying a car, gold or property? How GST will impact your expenses	Business Standard	Kunal Wadhwa
80	04 August 2017	GST: Reviewing The First Month Of Rollout	Bloomberg Quint	Pratik Jain

PwC Thought Leadership Articles

Sn	Date of publication	Particulars of Articles/ TL Publication	Where published	Author names
81	05 August 2017	Income Tax Return Filing: 10 common mistakes people make while filing return of income	The Financial Express	Vikas Kumar
82	06 August 2017	Dependent agent Permanent Establishment after MLI… Nothing permanent about it	Bloomberg Quint	Jitendra Jain
83	08 August 2017	Why simpler debt investment norms can lead to enhanced foreign capital inflow	VC Circle	Bhavin Shah and Vishal Singh
84	11 August 2017	Has GST benefited healthcare sector?	The Financial Express	Anita Rastogi
85	14 August 2017	Reader's corner: Taxation	Business Standard	Kuldip Kumar
86	25 August 2017	For serve-from-India fund management	The Financial Express	Bhavin Shah, Shahin Badsha and Bhavik J Shah
87	27 August 2017	Managing offshore funds from India needs tax reforms	Business Standard	Gautam Mehra and Nehal Sampat
88	14 September 2017	Interest Limitation Rules – A tryst with non-discrimination clause in tax treaties	Taxsutra	Jitendra Jain
89	24 September 2017	Employees may have to bear the GST burden on benefits	Business Standard	Anita Rastogi
90	25 September 2017	GST - A work in progress for exports!!	Taxmann	Prashanth Agarwal and Nandita Nawalakha
91	27 September 2017	Freebies' to Doctors - Under the Tax Radar	Taxmann	Noopur Agashe and Piyush Gupta
92	29 September 2017	IND AS 102: A paradigm shift in accounting	CFO India	Pallavi Singhal, Sandesh Kumar and Yashyank Agarwal
93	01 October 2017	SAAR versus GAAR – Hierarchy	Chamber's Tax Journal	Nitin Karve
94	08 October 2017	GST still has some way to go before it becomes a genuinely uncomplicated tax	Economic Times	Pratik Jain
95	09 October 2017	Under GST, firms can get input tax credit for official air travel of staff	Business Standard	Amit Bhagat and Aditya Khanna

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Sn	Date of publication	Particulars of Articles/ TL Publication	Where published	Author names
96	10 October 2017	GST 100 days: Here is what will smoothen the path for new tax regime	The Financial Express	Pratik Jain
97	10 October 2017	100 Days into New Indirect Tax Regime: After initial difficulties, improvements pushing GST for promising turn	The Indian Express	Pratik Jain
98	12 October 2017	100 days of GST: Functioning of Council remarkable	Financial Chronicle	Prashanth Agarwal and Nandita Nawalakha
99	15 October 2017	An uphill drive in GST's first 100 days	The Hindu Business Line	Anita Rastogi
100	22 October 2017	The balancing act that is GAAR	Livemint	Gautam Mehra
101	06 November 2017	GST and Anti-Profiteering Law! Are we complying? Is the Government ready?	Taxmann	Gautam Khattar and Nikhil Mediratta
102	21 November 2017	Hand those cut benefits down	Economic Times Blogs	Pratik Jain
103	21 November 2017	GST impact: What will happen if taxpayers are not heard on time	The Financial Express	Anita Rastogi and Preetam Singh

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Sn	Date	Issue	Ruling/ Notification/ Circular
1	01 December 2016	Sick Industrial Companies (Special Provisions) Act, 1985 repealed and BIFR/ AIFR dissolved	Notification No. S.O. 3568 (E)
2	03 December 2016	GST Council meeting remains inconclusive	
3	07 December 2016	ESOP expenditure incurred pursuant to a Business Transfer Agreement is deductible while computing gain for a transfer by way of slump sale	75 taxmann.com 282 (Delhi High Court)
4	15 December 2016	Notification of various sections under the Companies Act, 2013	
5	18 December 2016	India rescinds notification treating Cyprus as 'Notified Jurisdictional Area'	CBDT Notification No. 114/2016 dated 14 December 2016
6	19 December 2016	India rescinds notification treating Cyprus as 'Notified Jurisdictional Area' with retrospective effect	Corrigendum Notification No. 119 of 2016 dated 16 December 2016
7	22 December 2016	Taxation on overseas transfers - clarifications in the context of Foreign Portfolio Investors	CBDT Circular no. 41 of 2016, F. No. 500/ 43/ 2012-FT&TR
8	02 January 2017	Proceedings under section 201 of the Act to be initiated within a reasonable time even in the case of non-residents	TS-667-HC-2016 or 76 taxmann.com 256 (Delhi High Court)
9	04 January 2017	Revised Enrolment Schedule by GSTN	https://www.gst.gov.in/enrolplan
10	05 January 2017	Seventh and Eighth meetings of the GST Council	
11	05 January 2017	CBDT extends deadline for Direct Tax Dispute Resolution Scheme, 2016 and issues further clarifications	Circular No. 42 of 2016 and F. No. 142/11/2016 - TPL
12	07 January 2017	Step by Step Guide for GST Enrolment for Service Tax and Central Excise Assessees and Guidance Note for Department officers	
13	03 January 2017	Revised Enrolment Schedule by GSTN	https://www.gst.gov.in/enrolplan

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Sn	Date	Issue	Ruling/ Notification/ Circular
14	03 January 2017	EPFO launches a limited period amnesty scheme for defaulting employers	Notification No F.No. S- 35012/13/2016 – SS – II dated 30 December, 2016
15	05 January 2017	Seventh and Eight meeting of GST Council	
16	04 January 2017	EPFO issues declaration form under the Employees Enrolment Campaign, 2017	http://www.epfindia.com/site_docs/PDFs/Circulars/Y2016-2017/Coord_DeclarationForm_EEC_03012017.pdf
17	06 January 2017	EPFO provides clarification in the form of FAQs	No. Coord /3(1)2016/EPF Member Enrolment Scheme, 2017
18	12 January 2017	Advances received by HUF from closely-held company is taxable as deemed dividend under section 2(22)(e) in hands of the HUF	Civil Appeal No. 12274 OF 2016 arising out of SLP (C) No. 22059 OF 2015 or [2017] 77 taxmann.com 71 (SC)
19	07 January 2017	Step by Step Guide for GST Enrolment for Service Tax and Central Excise Assessees and Guidance Note for Department officers	http://www.cbec.gov.in/resources//htdocs-cbec/migration-to-gst/user-guide-for-migration.pdf
20	16 January 2017	Significant progress made on GST front - 1 July 2017 is the expected GST roll-out date	
21	17 January 2017	Time charter payments not “royalty” under section 9(1)(vi)	TS-701-ITAT-2016 (Chny) or ITA No. 1074 to 1079/Mds/2015
22	16 January 2017	Significant progress made on GST front - 1 July 2017 is the expected GST roll-out date	
23	27 January 2017	Jurisdiction under section 263 cannot be assumed by the CIT for making roving enquiries on the issues that are already enquired by the TO, however not expressly discussed in the assessment order passed	TS-16-ITAT-2017(Bang)
24	8th February 2017	CBDT gives its views on the applicability and implementation of GAAR	CBDT Circular No. 7 of 2017 and F. No. 500/43/2016 - FT and TR - IV

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Sn	Date	Issue	Ruling/ Notification/ Circular
25	16 February 2017	Pradhan Mantri Garib Kalyan Yojana, 2016:: FAQs	Circular No. 2 of 2017 dated 18 January 2016
26	19 February 2017	GST Council clears Compensation law - To finalise other laws in next meeting on 04 and 05 March 2017	
27	21 February 2017	Delhi HC upholds Article 8 exemption for income from provision of technical facilities/ services to other airlines at Indian airports; distinguishes British Airways ruling	TS-35-HC-2017 (DEL)
28	19 February 2017	GST Council clears Compensation law - To finalise other laws in next meeting on 04 and 05 March 2017	
29	04 March 2017	Eleventh meeting of GST Council - GST Council clears CGST and IGST law	
30	14 March 2017	Consideration on assignment of indigenously developed patent taxable as capital gains; cost of acquisition of patent to be taken as nil	TS-72-ITAT-2017(Mum)
31	16 March 2017	Singapore citizens covered under India-Singapore CECA excluded from contributing to social security schemes in India - EPFO clarifies	http://epfindia.com/site_docs/PDFs/Circulars/Y2016-2017/IWU_SpProvision_Singapore_20803.pdf
32	16 March 2017	GST Council clears SGST and UTGST laws	
33	17 March 2017	MEA notifies date of entry into force of agreement on social security with Portugal	https://www.mea.gov.in/press-releases.htm?dtl/28078/India_Portugal_Social_Security_Agreement
34	27 March 2017	GST Bills tabled in Lok Sabha	
35	02 April 2017	GSTN launches a facility “Check registration status” for verification of registrations to promote transparency under GST	https://services.gst.gov.in/services/check-registration-status
36	03 April 2017	Government issues rules for credit, valuation, transition and composition under GST and makes amendments in registration, invoicing, payment, refunds and returns rules issued earlier	

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Sn	Date	Issue	Ruling/ Notification/ Circular
37	04 April 2017	Government introduced new income tax return forms for the financial year 2016-17	CBDT Press Release dated 31 March 2017
38	05 April 2017	Central Board of Direct Taxes releases draft notification to be issued under section 10(38) of the Income-tax Act, 1961	Draft Notification and Press Release by CBDT dated 3 April 2017
39	10 April 2017	No withholding of tax under section 195 on reimbursement of payroll cost of seconded employees under secondment agreement to parent company	TS-127-ITAT-2017(Ahd)
40	13 April 2017	CBDT clarified taxability of remuneration received in NRE bank account in India by a non-resident seafarer	CBDT Circular No. 13 of 2017 F. No: 500/0712017-FT & TR-Y
41	14 April 2017	Draft Rules for Electronic way bill for movement of goods under GST	http://www.cbec.gov.in/resources//htdocs-cbec/gst/ewaybill-rules.pdf
42	17 April 2017	Notification of rules for amalgamations involving foreign companies	http://www.mca.gov.in/Ministry/pdf/section-234Notification_14042017.pdf
43	21 April 2017	No time limit prescribed by CBDT for filing of compounding application; Compounding application not rejectable merely since the fee was not paid	W.P.(C) 6825/2016
44	21 April 2017	No liability to withhold tax on payment made at cost to member company on the concept of mutuality	TS-150-ITAT-2017(Mumbai-Tribunal)
45	22 April 2017	LO held to constitute PE in India; upholds FAR analysis as a reasonable basis for profit attribution	TS-142-ITAT-2017(Bang)
46	02 May 2017	Government issues draft rules for accounts and records, appeals and revision, and advance ruling	
47	02 May 2017	RBI issues Draft Regulations in relation to Cross Border Mergers	https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=40288
48	07 May 2017	No requirement to “pre-deposit” 15% of the demand before consideration of stay application by TO	Special Civil application No. 5679 of 2017
49	08 May 2017	Presence of affiliates in India and a peripheral role played by them did not constitute PE in India	[2017] 81 taxmann.com 5 (Chennai Tribunal)

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Sn	Date	Issue	Ruling/ Notification/ Circular
50	08 May 2017	Draft rules for the valuation of unquoted equity shares	http://www.incometaxindia.gov.in/Lists/Press%20Releases/Attachments/619/PressRelease-50CA-05-05-2017.pdf
51	20 May 2017	The GST Council finalises seven set of rules and approves rate structure on majority of goods and services	
52	29 May 2017	SEBI issues guidelines for the listing of NCRPS/ NCDs issued pursuant to a Scheme of Arrangement	SEBI Circular CIR/IMD/DF/50/2017 dated 26 May, 2017
53	04 June 2017	The Government confident of 01 July as the roll out date, finalises rules relating to return and transition provisions and approves the rate structure on goods and services which were not decided earlier	
54	07 June 2017	Government issues final transition rules and forms and issues draft rule for amending CENVAT credit rule for issuance of credit transfer document	
55	11 June 2017	The Government reduces tax rate on 66 items, increases the composition limit from INR 5 million to INR 7.5 million, and finalises accounts and records rules	
56	12 June 2017	Government issues revised rules on accounts and records and on registration	
57	14 June 2017	CBDT clarifies that remittance of Passenger Service Fees by an airline to the airport operator shall not be construed as rent for the purposes of tax withholding under section 194-I of the Income-tax Act, 1961	CBDT Circular No. 21 of 2017 dated 12 June 2017
58	19 June 2017	CBDT issues draft notification for implementation of PoEM based taxation for foreign companies and invites comments and suggestions by 23 June	CBDT Draft Notification F No 370142/19/2017-TPL dated 15 June 2017
59	19 June 2017	The Government reaffirms the introduction of GST from 01 July and finalises pending rules	
60	22 June 2017	FATCA and CRS update: CBDT and SEBI mandate the reporting of interest and dividend information in case of custodial accounts	
61	05 July 2017	Share transfer by a Netherlands Company in an Indian subsidiary not taxable under the tax treaty provisions	ITTA Nos. 55 and 71 of 2014 and Writ Petition No. 41469 of 2015

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Sn	Date	Issue	Ruling/ Notification/ Circular
62	05 July 2017	Government issues press release to clarify the meaning of the term ‘registered brand name’	CBEC Press Release dated 5 July 2017
63	05 July 2017	Manufacturers/ packers/ importers of pre-packaged commodity allowed to declare changed retail sale price	Ministry of Consumer Affairs letter dated 4 July 2017
64	06 July 2017	Mauritius signs Multilateral Convention but India tax treaty not covered	
65	08 July 2017	GST applies to Jammu and Kashmir	
66	09 July 2017	The Government relaxes bond/ letter of undertaking requirement for export of goods without payment of IGST	
67	10 July 2017	The fact of rendering services for a specified period is relevant and not the stay of employees for determining a Service PE; rendering of services which tantamounts to provision of information is taxable as Royalty	ITA(TP) No. 1103/Bang/2013
68	10 July 2017	Extension of registration deadline for PIO into OCI card	
69	10 July 2017	Government clarifies the applicability of GST on gifts and perquisites given to employees	
70	12 July 2017	SEBI amends guidelines for participation/ functioning of EFIs and FPIs in an IFSC	SEBI Circular No. IMD/HO/FPIC/CIR/P/ 2017/ 003 dated 04 January, 2017 and SEBI Circular No. SEBI/HO/CIR/P/2017/79 dated 11 July, 2017
71	14 July 2017	OECD issues draft content of the 2017 update to the Model Tax Convention - Invites comments on selected points by 10 August, 2017	http://www.oecd.org/tax/treaties/draft-contents-2017-update-oecd-model-tax-convention.pdf
72	17 July 2017	Gujarat HC, in the context of section 200A, has decided that a machinery provision cannot override or overrule a charging section	[2017] 83 taxmann.com 137 (Gujarat High Court)
73	18 July 2017	CBEC issues clarification on various operational issues of procurements made by the EOUs without payment of customs duty	
74	18 July 2017	Increase in Compensation cess on cigarettes made in the 19th meeting of the GST Council	

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Sn	Date	Issue	Ruling/ Notification/ Circular
75	19 July 2017	Sales tax subsidy without restriction on its use taxable as revenue receipts	TS-276-HC-2017 (Delhi)
76	21 July 2017	Amount paid for operating an executive lounge at Airport is “rent” under section 194-I of the Act and not Royalty	TS-274-HC-2017(DEL)
77	26 July 2017	Initiation of proceedings under section 201 of the Act valid even after 10 years in case of non-residents, if delay in exercise of power is for valid and bona fide reasons	TS-289-HC-2017(ALL)
78	27 July 2017	CBEC has issued a circular clarifying that the provisions of zero rating on exports will also apply to compensation cess	Circular no. 1/ 1/ 2017-Compensation Cess dated 26 July, 2017
79	31 July 2017	GST rules amended	
80	01 August 2017	No tax withholding required on reimbursement of expenses claimed through separate bills	ITA No. 224/Cochin/2016
81	02 August 2017	CBEC clarifies that IGST would be levied on high seas sale of imported goods only once, at the time of customs clearance	Circular No. 33/ 2017-Cus dated 01 August 2017
82	06 August 2017	Decisions taken by the Government in 20th meeting of the GST Council	
83	12 August 2017	Return filing requirements for the month of August, 2017	
84	13 August 2017	CBEC issues additional clarifications on issues relating to furnishing of bond/ letter of undertaking for exports	CBEC circular no. 5/5/2017-GST dated 11 August
85	17 August 2017	The Platform for Collaboration on Tax – a joint initiative of the IMF, OECD, UN and World Bank releases discussion draft on taxation of offshore indirect transfers – invites comments by 25 September, 2017	OECD Press Release and Discussion Draft
86	18 August 2017	CBEC issues enabling notification to claim transition credit and use it for payment of GST liability for July, 2017 and extending due date to file Form 3B for July, 2017 for taxpayers opting to claim transition credit; also amends other rules	
87	19 August 2017	The Government extends due date for filing GSTR 3B and for payment of GST for July, 2017	CBEC Press Release

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Sn	Date	Issue	Ruling/ Notification/ Circular
88	24 August 2017	CBEC issues FAQs for IT/ ITES sector under GST Sectoral Series of FAQs	http://www.cbec.gov.in/resources//ht-docs-cbec/gst/sectoral-faq-it-ites.pdf
89	24 August 2017	CBEC issues notifications for amending tax rates on specified services	CBEC notification nos. 20-23/2017-Central Tax (Rate) dated 22 August, 2017
90	29 August 2017	Government extends due date for filing returns by an ISD and by a non-resident OIDAR service provider	CBEC notification nos. 25 and 26/2017-Central Tax, both dated 28 August, 2017
91	30 August 2017	CBEC prescribes final self-sealing procedure for exports	CBEC Circular No. 36/2017-Customs dated 28 August 2017
92	01 September 2017	Government issues final e-way bills rules and Forms; also replaces some Forms	
93	04 September 2017	High Court holds non-compete agreement as genuine recognising taxpayer's stature and potential in the advertising industry	ITA No. 154 of 2005 (Delhi High Court)
94	04 September 2017	Government extends due date for filing GSTR 1, GSTR 2 and GSTR 3 for the months of July and August, 2017	
95	05 September 2017	EPFO issues clarification on lump sum withdrawal of PF/ Pension contributions for Japanese international workers	http://www.epfindia.com/site_docs/PDFs/Circulars/Y2017-2018/IWU_Clari_Japan_11311.pdf
96	06 September 2017	SC dismisses revenue's SLP, upholding HC's view that time-limit prescribed for reassessment under section 149 cannot be lifted on the basis of Tribunal's finding in another case unless an opportunity of being heard has been accorded to taxpayer	SLP No 612/2014 (Supreme Court)
97	07 September 2017	Loss on embezzlement of funds is an allowable deduction in the year of "discovery" not in the year of "detection"	ITA No. 18/2007 (J&K High Court)
98	10 September 2017	GST Council extends the timelines for compliance and amends the rate of tax for some goods	http://pib.nic.in/newsite/PrintRelease.aspx?relid=170642
99	19 September 2017	Tribunal confirms the addition of share premium on taxpayer's repeated failure to prove genuineness and creditworthiness of the investors	ITA No. 1679/Ahd/2014 (Ahmedabad Tribunal)

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Sn	Date	Issue	Ruling/ Notification/ Circular
100	19 September 2017	CBEC notifies the effective date for tax deduction at source and the persons liable for deduction of tax	
101	20 September 2017	CBDT issues draft rule proposing a self-reporting mechanism for estimated income and tax payments	CBDT Draft Notification dated 19 September 2017
102	20 September 2017	Export Commission paid to Indian agent of NR, taxable in India; Disallowance of commission in hands of payer under section 40(a)(i)	T.C Appeal No. 121 of 2009
103	25 September 2017	CBEC notifies Customs and Central Excise Duties Drawback Rules, 2017 and revises drawback rate schedule	
104	26 September 2017	Tribunal confirms ignoring of tenancy period for computing period of holding	ITA No. 1125/Mumbai/2015 (Mumbai Tribunal)
105	26 September 2017	GST Council issues guidelines for division of taxpayer base between the Centre and the States for administrative control	
106	27 September 2017	CBEC revises customs valuation norms relating to inclusion of the landing charges at the place of import	
107	28 September 2017	Taxes withheld in foreign jurisdiction and medicare cannot be construed to be part of taxable salary in India	ITA No.2149 (Bang) 2016
108	04 October 2017	The Government permits export of goods without payment of IGST only on letter of undertaking	
109	07 October 2017	GST Council relaxes compliance requirements for small and medium enterprises and gives relief to the exporters	
110	30 October 2017	NRIs having investments in PPF/ NSC will no longer earn higher rates of interest	Notification No. GSR 1237(E) dated 3rd October 2017
111	01 November 2017	The Government extends due dates for filing various GST returns	
112	8 November 2017	Routing expenditure as reimbursement cannot absolve withholding tax liability	ITA No. 984/Bangalore/2017
113	8 November 2017	Gujarat High Court allows expenditure on premium, on premature redemption of Special Purpose Notes, as interest	Tax Appeal No. 1219 of 2006 (Gujarat High Court)
114	12 November 2017	GST Council reduces the tax rates of various goods, mainly goods taxed at 28% and relaxes the compliance due dates	

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Sn	Date	Issue	Ruling/ Notification/ Circular
115	16 November 2017	Government removes requirement of payment of GST on advances received for supply of goods and allows manual filing of refund applications	
116	21 November 2017	RBI Directions on Managing risks and Code of Conduct in Outsourcing of Financial Services by Non-Banking Financial Companies	RBI/2017-18/87 dated 09 November 2017
117	25 November 2017	CBEC clarifies that IGST would be levied twice on sale of goods lying in a customs bonded warehouse	CBEC circular no. 46/2017-Cus dated 24 November, 2017
118	28 November 2017	OECD releases 2017 update to the Model Tax Convention	2017 update to OECD Model Tax Convention
119	29 November 2017	India takes another step ahead to resolve transfer pricing disputes bilaterally	CBDT Press Release dated 27 November 2017
120	5 December 2017	Highlights of mid-term review of Foreign Trade Policy 2015-20	
121	6 December 2017	IRDAI issues guidelines on investments by private equity funds in Indian insurance companies	IRDAI (Investment by Private Equity Funds in Indian Insurance Companies) Guidelines, 2017 dated 05 December 2017
122	8 December 2017	Tax holiday for small scale industrial undertakings not available if conditions not met for the entire period	Civil Appeal No. 20854 of 2017 [arising out of Special Leave Petition (Civil) No. 4565 of 2015 (Supreme Court)]
123	10 December 2017	Tribunal rejects sale consideration as per SPA; considers FMV determined as per binding contractual obligation between the parties	ITA No. 4737/Delhi/2017 (Delhi Tribunal)
124	11 December 2017	Treaty benefits granted to UAE shipping company with non-resident shareholders and directors	ITA No. 7 to 9/Rajkot/2011 (Rajkot Tribunal)
125	11 December 2017	Amendments proposed to the Special Economic Zone Rules, 2006	SEZ Circular dated 11 December 2017

PwC Publications

Sn	Date	Name of publication
1	11 January 2017	India's new real estate and infrastructure trusts: The way forward
2	02 February 2017	India Budget 2017 - On the growth path
3	02 February 2017	Budget 2017 - Key proposals for Financial Services sector
4	15 March 2017	PwC ReportingInBrief
5	27 March 2017	Tax technology: The next wave in business transformation
6	27-Mar-2017	PwC ReportingInBrief MAT - Amendment
7	19 April 2017	India Online: Emerging Business Models and Taxation
8	07 June 2017	Transfer pricing: Impact of Ind AS
9	11 July 2017	IFRS, US GAAP, Ind AS and Indian GAAP: Similarities and differences
10	14 July 2017	Transactions in the real estate sector
11	24 July 2017	India's new real estate and infrastructure trusts: The way forward
12	24 July 2017	PwC ReportingInBrief- Impact of GST on Ind AS reporting
13	25 July 2017	Destination India 2017
14	10 August 2017	PwC ReportingInBrief - Clarifications on MAT for Ind AS reporters
15	14 September 2017	The Past, Present and Future of Permanent Establishment
16	18 October 2017	PwC ReportingPerspectives - October 2017
17	30 October 2017	The Multilateral Convention and BEPS: Investment in and from India
18	09 November 2017	GAAR Decoded

List of Double Taxation Avoidance Agreements

Sr No	Country	Notification No. and Date	Date when signed	Date of coming into force
1	Albania	Notification No. 2/2014 [F. No. 501/1/2003-FTD-I]/SO 47(E), dated 7-1-2014	08 July 2013	04 December 2013
2	Armenia	Notification No. GSR 800E, dated 8-12-2004	31 October 2003	09 September 2004
3	Australia	Notification No. GSR 60(E), dated 22-1-1992	25 July 1991	20 December 1991
4	Austria	Notification No. GSR 682(E), dated 20-9-2001	08 November 1999	05 September 2001
5	Azerbaijan		20 November 1988	01 April 1990
6	Bangladesh	Notification No. GSR 758(E), dated 8- 9-1992	27 August 1991	27 May 1992
7	Belarus	Notification No. GSR 392(E), dated 17-7-1998	27 September 1997	17 July 1998
8	Belgium	Notification No. GSR 632(E), dated 31-10-1997, as amended by Notification No. SO 54(E), dated 19-1-2001. Earlier agreement was entered into vide GSR 323(E), dated 6-6-1975 which was later amended by GSR 321(E), dated 2-3-1988.	26 April 1993	01 October 1997
9	Bhutan	NOTIFICATION NO. 42/2014 [F.NO.503/4/2004-FTD-II], dated 5-9-2014	04 March 2013	17 July 2014
10	Botswana	Notification No. 70/2008-FTD, dated 18-6-2008	08 December 2006	31 January 2008
11	Brazil	Notification No. GSR 381(E), dated 31-3-1992	26 April 1988	11 March 1992
12	Bulgaria	Notification No. GSR 205(E), dated 9-5-1996	26 May 1994	23 June 1995
13	Canada	Notification No. SO 28(E), dated 15-1-1998. Earlier agreement was entered into vide GSR 1108(E), dated 25-9-1986, as amended by GSR 635(E) dated 24-6-1992. Circular No. 638, dated 28-10-1992 dealt with this agreement.	11 January 1996	06 May 1997
14	China (People's Republic of China)	Notification No. GSR 331(E), dated 5-4-1995	18 July 1994	21 November 1994
15	Croatia	Notification No.24/2015 [F.NO.501/09/1995-FTD-I], dated 17-3-2015	12 February 2014	Not yet in force.

List of Double Taxation Avoidance Agreements

Sr No	Country	Notification No. and Date	Date when signed	Date of coming into force
16	Chinese Taipei (Taiwan)	Notification No. 48/2011 [F.NO. 500/02/2001-FTD-II]/S. O. 2040(E), DATED 2-9-2011	12 July 2011	12 August 2011
17	Colombia	Notification No.44/2014 [F.NO.501/3/99-FTD-II], dated 23-9-2014	13 May 2011	07 July 2014
18	Cyprus	Notification No. GSR 805(E), dated 26-12-1995	13 June 1994	21 December 1994
19	Czech Republic	Notification No. GSR 811(E), dated 8-12-1999	01 October 1998	27 September 1999
20	Denmark	Notification No. GSR 853(E), dated 25-9-1989	08 March 1989	13 June 1989
21	Egypt (United Arab Republic)	Notification No. GSR 2363, dated 30-9-1969	20 February 1969	30 September 1969
22	Estonia	Notification No. 27/2012 [F.NO.503/02/1997- FTD-1]/SO NO. 1677(E), dated 25-7-2012	19 September 2011	20 June 2012
23	Ethiopia	Notification No. 14/2013 [FT & TR-II/F. No. 503/01/1996-FT&TR-II], dated 21-02-2013	25 May 2011	01 April 2013
24	Fiji	NOTIFICATION NO.35/2014 [F.NO.503/11/2005-FTD-II], dated 12-8-2014	30 January 2014	15 May 2014
25	Finland	Notification No. 36/2010 [F. NO. 501/13/1980-FTD-I], dated 20-5-2010	15 January 2010	19 April 2010
26	France	Notification No. 9602 [F. No. 501/16/80-FTD], dated 6-9-1994, as amended by Notification No. SO 650(E), dated 10-7-2000	29 September 1992	01 August 1994
27	Georgia	Notification No. 4/2012[F.NO.503/05/2006-FTD.I], dated 6-1-2012	24 August 2011	08 December 2011
28	Germany	Notification No. SO 836(E), dated 29-11-1996. Earlier an agreement was entered with Federal German Republic vide GSR 1090, dated 13-9-1960 and vide GSR 107(E), dated 2-3-1990 and agreement was entered with German Democratic Republic.	19 June 1995	26 October 1996
29	Greece	Notification No. GSR 394, dated 17-3-1967	11 February 1965	17 March 1967
30	Hungary	Notification No. GSR 197(E), dated 31-3-2005	03 November 2003	04 March 2005

List of Double Taxation Avoidance Agreements

Sr No	Country	Notification No. and Date	Date when signed	Date of coming into force
31	Iceland	Notification No. S.O. 241(E), dated 5-2-2008	23 November 2007	21 December 2007
32	Indonesia	Notification No. S.O. 1144(E) [NO.17/2016 (F.NO.503/4/2005-FTD-II)], dated 16-3-2016	27 July 2012	05 February 2016
33	Ireland	Notification No. 45/2002 [F. No. 503/6/99-FTD], dated 20-2-2002	06 November 2000	26 December 2001
34	Israel	Notification No. GSR 256(E), dated 26-6-1996	29 January 1996	15 May 1996
35	Italy	Notification No. GSR 189(E), dated 25-4-1996. Earlier agreement was entered into vide GSR 608(E), dated 8-4-1986	19 February 1993	23 November 1995
36	Japan	Notification No. GSR 101(E), dated 1-3-1990, as amended by Notification Nos. SO 753(E), dated 16-8-2000 (w.r.e.f. 1-10-1999), SO 1136(E), dated 19-7-2006, w.r.e.f. 28-6-2006 and SO 2528(E), dated 8-10-2008, w.e.f. 1-10-2008	07 March 1989	29 December 1989
37	Jordan	Notification No. GSR 810(E), dated 8-12-1999	20 April 1999	16 October 1999
38	Kazakhstan	Notification No. GSR 633(E), dated 31-10-1997	09 December 1996	02 October 1997
39	Kenya	Notification No. GSR 665(E), dated 20-8-1985	12 April 1985	20 August 1985
40	Korea, (Republic of)	Notification No. SO 3265(E) [NO.96/2016 (F.NO.500/121/1996-FTD-II)], DATED 24-10-2016	18 May 2015	12 September 2016
41	Kuwait	Notification No. SO 2000(E), dated 27-11-2007	15 June 2006	17 October 2007
42	Kyrgyz Republic	Notification No. GSR 75(E), dated 7-2-2001	13 April 1999	10 January 2001
43	Latvia	NOTIFICATION NO.12/2014 [F.NO.503/02/1997-FTD-I], dated 5-3-2014	18 September 2013	01 April 2014
44	Libya	Notification No. GSR 22(E), dated 1-7-1982	02 March 1981	01 July 1982
45	Lithuania	Notification No. 28/2012 [F. No. 503/02/1997-FTD-1], dated 25-7-2012	26 July 2011	10 July 2012
46	Luxembourg	Notification No. 78/2009 [F. No. 503/1/96-FTD-I], dated 12-10-2009	02 June 2008	09 July 2009

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Sr No	Country	Notification No. and Date	Date when signed	Date of coming into force
47	Macedonia	Notification No. 94/2015 [F.NO.503/08/2004-FTD-I] / SO 3499(E), dated 21-12-2015	17 December 2013	12 September 2014
48	Malaysia	Notification No. 07/2013 [F. No. 506/123/84-FTD-II], dated 29-1-2013	29 Jauary 2013	01 April 2013
49	Malta	Notification No. 34/2014 [F. No. 504/06/2003-FTD-I], dated 5-8-2014	05 August 2014	01 April 2015
50	Mauritius	Notification GSR No. 920(E), dated 6-12-1983	24 August 1982	06 December 1983
51	Mexico (United Mexican States)	Notification No. 86/2010 [F. NO. 503/4/91-FTD-I], dated 26-11-2010	10 September 2007	01 February 2010
52	Mongolia	Notification No. SO 635(E), dated 16-9-1996	22 February 1994	29 March 1996
53	Montenegro	Notification No. 4/2009 [F.NO. 503/1/1997-FTD-I]/S.O. 96(E), dated 7-1-2009	08 February 2006	23 September 2008
54	Morocco	Notification No. GSR 245(E), dated 15-3-2000	30 October 1998	20 February 2000
55	Mozambique	Notification No. 30/2011-FT&TR-II [F.NO.501/152/2000-FT&TR-II], dated 31-5-2011	30 September 2010	28 February 2011
56	Myanmar	Notification No. 49/2009-FT & TR-II [F. NO. 504/10/2004-FT & TR-II], dated 18-6-2009	02 April 2008	30 January 2009
57	Namibia	Notification No. GSR 196(E), dated 8-3-1999	15 February 1997	22 January 1999
58	Nepal	Notification No. 20/2012 [F.NO.503/03/2005-FTD-II], dated 12-6-2012	27 November 2011	16 March 2012
59	Netherlands	Notification No. GSR 382(E), dated 27-3-1989 as amended by Notification No. SO 693(E), dated 30-8-1999 and Notification No. 2/2013, dated 14-1-2013	30 July 1988	21 January 1989
60	New Zealand	Notification No. GSR 314(E), dated 27-3-1987, as amended by GSR 477(E), dated 21-4-1988 and GSR 37(E), dated 12-1-2000	17 October 1986	23 December 1986
61	Norway	Notification No. 24/2012 [F.NO. 505/3A/81-FTD-I], dated 19-6-2012	02 February 2011	20 December 2011
62	OECD Member Countries	Notification No. 35/2012 [F. No. 500/154/2009-FTD-I], dated 29-8-2012	26 Januray 2012	01 June 2012

List of Double Taxation Avoidance Agreements

Sr No	Country	Notification No. and Date	Date when signed	Date of coming into force
63	Oman	Notification No. SO 563(E), dated 23-9-1997	02 April 1997	03 June 1997
64	Philippines	Notification No. GSR 173(E), dated 2-4-1996 and as amended by Notification No. SO 125(E), dated 2-2-2005	12 February 1990	21 March 1994
65	Poland	Notification No. GSR 72(E), dated 12-2-1990	21 June 1989	26 October 1989
66	Portuguese Republic	Notification No. GSR 542(E), dated 16-6-2000, as corrected by Notification No. SO 673(E), dated 25-8-2000 and GSR 597(E), dated 20-9-2005	11 September 1998	30 April 2000
67	Qatar	Notification No. GSR 96(E), dated 8-2-2000	07 April 1999	15 January 2000
68	Romania	Notification No. GSR 80(E), dated 8-2-1988	08 March 2013	16 December 2013
69	Russian Federation	Notification No. 10677 [F. No. 501/6/92-FTD], dated 21-8-1998. Earlier agreement was entered into vide GSR 812(E), dated 4-9-1989, as amended by GSR 952(E), dated 30-12-1992.	25 March 1997	11 April 1998
70	Saudi Arabia	Notification No. 287/2006-FTD [F.No. 501/7/91-FTD], dated 17-10-2006	25 January 2006	01 November 2006
71	Serbia and Montenegro	Notification No. 5/2009 [F.No. 503/1/797-FTD-1]/S.O. 97(E), dated 7-1-2009	08 February 2006	23 September 2008
72	Singapore	Notification No. GSR 610(E), dated 8-8-1994 as amended by Notification SO 1022(E), dated 18-7-2005	24 January 1994	27 May 1994
73	Slovenia	Notification No. GSR 344(E), dated 31-5-2005	13 January 2003	17 February 2005
74	South Africa	Notification No. GSR 198(E), dated 21-4-1998	04 December 1996	28 November 1997
75	Spain	Notification No. GSR 356(E), dated 21-4-1995	08 February 1993	12 January 1995
76	Sri Lanka	Notification No. 23/2014 [F.NO.503/8/2005-FTD-II]/SO 956(E), dated 28-3-2014	22 January 2014	01 April 2014

List of Double Taxation Avoidance Agreements

Sr No	Country	Notification No. and Date	Date when signed	Date of coming into force
77	Sudan	Notification No. GSR 723(E), dated 1-11-2004	22 October 2003	15 April 2004
78	Sweden	Notification No. GSR 705(E), dated 17-12-1997. Earlier agreement was entered into vide GSR 38(E), dated 27-3-1989.	24 June 1997	25 December 1997
79	Switzerland	Notification No. GSR 357(E), dated 21-4-1995, as amended by Notification No. GSR 74(E), dated 7-2-2001, 62/2011, dated 27-12-2011 w.e.f. 1-4-2012	02 November 1994	29 December 1994
80	Syria	Notification No. 33/2009-FTD-II [F.NO. 503/7/2005-FTD-II], dated 30-3-2009	06 Februray 1984	25 June 1985
81	Tajikistan	Notification No. 58/2009 [FT & TR-II [F.No. 503/10/95-FT & TR-II], dated 16-7-2009	20 November 2008	10 April 2009
82	Tanzania	Notification No. 8/2012 [FT & TR-II/F. No. 503/02/2005-FTD-II], dated 16-2-2012	27 May 2011	12 December 2011
83	Thailand	Notification No.88/2015 [F.No.503/5/2005-FTD-II], dated 1-12-2015	29 June 2015	13 October 2015
84	Trinidad & Tobago	Notification No. GSR 720(E), dated 26-10-1999	08 February 1999	13 October 1999
85	Turkey	Notification No. SO 74(E), dated 3-2-1997	31 January 1995	01 February 1997
86	Turkmenistan	Notification No. GSR 567(E), dated 25-9-1997	25 February 1997	07 July 1997
87	Uganda	Notification No. GSR 666(E), dated 12-10-2004	30 April 2004	27 August 2004
88	Ukraine	Notification : GSR 24(E), dated 11-1-2002	07 April 1999	31 October 2001
89	United Arab Emirates	Notification No. GSR 710(E) [No. 9409 (F. No. 501/3/89-FTD)], dated 18-11-1993, as amended by Notification No. SO 2001(E), dated 28-11-2007. Earlier agreement was entered into vide GSR 969(E), dated 8-11-1989.	29 April 1992	22 September 1993
90	United Kingdom	Notification No. GSR 91(E), dated 11-2-1994	25 January 1993	26 October 1993
91	United States	Notification No. GSR 990(E), dated 20-12-1990.	12 September 1989	18 December 1990
92	Uruguay	NOTIFICATION NO. 53/2013 [F.NO.500/138/2002-FTD-II]/SO 2081(E), dated 5-7-2013	08 September 2011	01 April 2014

List of Double Taxation Avoidance Agreements

Sr No	Country	Notification No. and Date	Date when signed	Date of coming into force
93	Uzbekistan	SO No. 2689(E), dated 7-11-2012	29 July 1993	25 January 1994
94	Vietnam	Notification No. GSR 369(E), dated 28-4-1995, as amended by Notification No. 9860 [F.No. 503/7/91-FTD], dated 12-9-1995	07 September 1994	02 February 1995
95	Zambia	Notification: No. GSR 39(E), dated 18-1-1984	05 June 1981	18 January 1984

List of Tax Information Exchange Agreements (TIEAs)

Sr No	Country	Notification No. and Date	Date when signed	Date of coming into force
1	Argentine	Notification : No. 22/2013 [F.No. 504/3/2010-FTD-II]/SO 824(E)	21 November 2011	28 January 2013
2	Bahamas	Notification : No. 25/2011 [F.No. 503/6/2009-FTD-I]/SO 1049(E)	11 February 2011	01 March 2011
3	Bahrain	Notification : No. 44/2013[F.No.503/03/1994-FT&TR-II]/SO 1766(E)	31 May 2012	11 April 2013
4	Belize	Notification No. 3/2014[F.No.503/4/2012-FTD-I]/SO 48(E)	18 September 2013	25 November 2013
5	Bermuda	Notification : No. 5/2011 [F. No. 503/2/2009-FTD-I]	07 October 2010	03 November 2010
6	British Virgin Islands	Notification No. 54/2011 [F.No. 503/10/2009-FTD-I] S.O. 2301	09 February 2011	22 August 2011
7	Cayman Islands	Notification No.61/2011[F.No.503/03/2009-FTD-I]/S.O. 2902(E)	21 March 2011	08 November 2011
8	Gibraltar	Notification : No. 28/2013 [F.NO.503/11/2009-FTD-I]/SO 924(E)	01 February 2013	11 March 2013
9	Guernsey	Notification : No. 30/2012 [F. No. 503/1/2009-FTD-I]/SO 1782(E)	20 December 2011	11 June 2012
10	Isle of Man	Notification : No. 26/2011 [F.No. 503/01/2008 - FTD-I]/SO 1048	04 February 2011	17 March 2011
11	Jersey	Notification : No. 26/2012 [F. No. 503/6/2008-FTD-I]/SO 1541(E)	03 November 2011	08 May 2012
12	Liberia	Notification : No. 32/20012-FT&TR-II [F.No. 503/02/2010-FT&TR-II]/SO 1877	03 October 2011	30 March 2012
13	Macao	Notification No. 43/2012[F.No.503/04/2009-FT&TR-II]/SO 2427(E)	03 January 2012	16 April 2012
14	Maldives	Notification No. SO 2865(E) [No.76/2016 (F.NO.500/79/2008-FTD-II)]	11 April 2016	02 August 2016
15	Principality of Liechtenstein	Notification No. 30/2014[F.NO.503/4/2009-FTD-I]	28 March 2013	20 January 2014
16	Principality of Monaco	Notification No. 43/2013 [F.NO.503/05/2009-FTD-I]/SO 924	31 July 2012	27 March 2013
17	Saint Kitts and Nevis	Notification No. SO 2488(E) [NO.62/2016 (F.NO.503/09/2009-FTD-I)]	11 November 2014	02 February 2016
18	San Marino	Notification No.63/2015 [F.No.500/02/2003-FTD-I]	19 December 2013	29 August 2014
19	Seychelles	Notification No. SO 2894(E) [NO.80/2016 (F.NO.503/07/1993-FT&TR-IV)]	26 August 2015	28 June 2016

List of Social Security Agreements

Sr No	Country	Date when signed	Date of coming into force
1	Australia	18 November 2014	01 Janury 2016
2	Austria	04 February 2013	01 July 2015
3	Belgium	03 November 2006	01 September 2009
4	Canada	06 November 2012	01 August 2015
5	Czech Republic	09 June 2010	01 September 2014
6	Finland	12 June 2012	01 August 2014
7	French Republic	30 September 2008	01 July 2011
8	Germany	08 October 2008	01 October 2009
9	Hungary	03 February 2010	01 April 2013
10	Japan	16 November 2012	01 October 2016
11	Kingdom of Denmark	17 February 2010	01 May 2011
12	Kingdom of Netherlands	22 October 2009	01 December 2011
13	Luxembourg	30 September 2009	01 June 2011
14	Norway	29 October 2010	01 Janury 2015
15	Portugal	04 March 2013	08 May 2017
16	Republic of Korea	19 October 2010	01 November 2011
17	Sweden	26 November 2012	01 August 2014
18	Swiss Federal	03 September 2009	29 Janury 2011

Signed but not notified: Quebec - 26 November 2013 | Germany - 12 October 2011

List of Limited Tax Treaties

Sr No	Country	Notification
1	Afghanistan	Notification : No. GSR 514(E)
2	Ethiopia	Notification : No. GSR 8(E) and GSR 159(E)
3	Iran	Notification : No. GSR 284(E)
4	Lebanon	Notification : Nos. GSR 1552 and 1553
5	Maldives	Notification No. SO 2853(E) [No.77/2016 (F.NO.503/4/2013-SO/FT&TR-II(1)]
6	Pakistan	Notification :No. GSR 792(E)
7	SAARC Countries	Notification No. 3/2011 [SO 34(E)]-FTD-II [F.NO. 500/96/97-FTD-II]
8	People's Democratic Republic of Yemen	Notification : No. GSR 857(E), dated 12-8-1988.

Glossary

AAR	Authority for Advance Ruling
AoA	Articles of Association
AE	Associated Enterprise
AGM	Annual General Meeting
AIF	Alternative Investment Fund
ALP	Arm's Length Price
AIR	Annual Information Return
ALV	Annual letting value
A&M	Administrative and Management
AMP	Advertising, Marketing and Promotion expenses
AMT	Alternate Minimum Tax
APAs	Advance Pricing Arrangements
ARC	Asset reconstruction company
ARE	Alternate Reporting Entity
AS	Accounting Standard
AY	Assessment Year
BAPAs	Bilateral Advance Pricing Agreements
BEPS	Base Erosion and Profit Shifting
BLT	Bright Line Test
BOT	Build-operate-transfer
BSE	Bombay Stock Exchange
B2B	Business to Business
CG	Central Government
CAGR	Compounded Annual Growth Rate
CASS	Computer Assisted Scrutiny Selection
CbCR	Country-by-Country Reporting
CBDT	Central Board of Direct Taxes
CBEC	Central Board of Excise and Customs
C&AG	Comptroller and Auditor General of India
the 2013 Act	Companies Act, 2013
CCPS	Compulsory Convertible Preference Shares
CCDs	Compulsory Convertible Debentures
CCDL	Combined Corporate Debt Limit
CCEA	Cabinet Committee on Economic Affairs
CE	Constituent Entity
CFC	Controlled Foreign Company
CFS	Consolidated Financial Statements
CRH	Commercial Rights Holder
CNs	Convertible Note
CIB	Central Information Branch
CLB	Company Law Board
CRS	Common Reporting Standard
CIT(A)	Commissioner of Income-tax (Appeals)
CIT	Commissioner of Income-tax

CUP	Comparable Uncontrolled Price
CENVAT	Central Value Added Tax
CWIP	Capital Work in Progress
CWT(A)	Commissioner of Wealth-tax (Appeals)
DIPP	Department of Industrial Policy & Promotion
DDP	Designated Depository Participant
DSE	Designated Stock Exchanges
DPs	Depository Participants
DRP	Dispute Resolution Panel
tax treaty	Double Taxation Avoidance Agreement
the Scheme	Direct Tax Dispute Resolution Scheme
the Rules	Direct Tax Dispute Resolution Scheme Rules, 2016 (the Rules)
DSIR	Department of Scientific and Industrial Research
EC	Employee Cost
ECB	External Commercial Borrowings
EFIs	Eligible Foreign Investors
EFM	Eligible fund manager
EIF	Eligible investment fund
EO	Export Obligation
EOUs	Export Oriented Units
EVC	Electronic Verification Code
EPFO	Employees Provident Fund Organisation
Rules	Equalisation Levy Rules, 2016
FAR	Functions performed, Assets employed and Risk assumed
FATCA	Foreign Account Tax Compliance Act
FAQs	Frequently Asked Questions (FAQs)
FCTR	Foreign Currency Translation Reserve
FDI	Foreign direct investment
FEMA	Foreign Exchange Management Act, 1999
FIs	Financial Institutions
FIS	Fees for Included Services
FIPB	Foreign Investment Promotion Board
FPI	Foreign Portfolio Investment
FPOs	Follow-on Public Offers
FMV	Fair market value
FSI	Floor Space Index
FS	Financial Statements
FTS	Fees for Technical Services
FTC	Foreign Tax Credit
FVCI	Foreign Venture Capital Investors
FY	Financial Year

GAAR	General Anti-Avoidance Rule
GIFT	Gujarat International Finance Tec-City
GoI	Government of India
GST	Goods and Service Tax
HC	High Court
HFCs	Housing Finance Companies
HFT	High Frequency Trading
IBBI	Insolvency and Bankruptcy Board of India
ICDS	Income Computation and Disclosure Standards
ICAI	Institute of Chartered Accountants of India
ID	Independent Director
IFSC	International Financial Services Centre (IFSC)
IGST	Integrated Goods and Services Tax
IPR	Intellectual Property Rights
IRS	Internal Revenue Service
ISC	Internal Screening Committee
the Act	Income-tax Act, 1961
Tribunal	Income-tax Appellate Tribunal
the Rules	Income-tax Rules, 1962
IBC	Insolvency and Bankruptcy Code, 2016
InvIT	Infrastructure Investment Trust
IPOs	Initial Public Offers
ISD	Input service distributor
IT	Information Technology
ITC	Input Tax Credit
ITESs	Information Technology enabled services
ITR	Income-tax Returns
IW	International Workers
JDAs	Joint Development Agreements
JV	Joint Venture
KPO	Knowledge Process Outsourcing
KYC	Know Your Customer
LLP	Limited Liability Partnership
LMB	Lead Merchant Bankers
LO	Liaison Office
LOB	Limitation of Benefit
MoA	Memorandum of Articles
MAP	Mutual Agreement Procedure
MAM	Most Appropriate Method
CbC MCAA	Multilateral Competent Authority Agreement on the exchange of Country-by-Country Reports

MCGB	Market Department of Municipal Corporation Greater Mumbai
MNEs	Multinational Enterprises
MAT	Minimum Alternate Tax
MCA	Ministry of Corporate Affairs
MF	Master File
MFN	Most Favoured Nation
MBRT	Multi Brand Retail Trading
MIM	Multiple Investment Managers
MTM	Marked to Market
MLE	Ministry of Labour & Employment
MoF	Ministry of Finance
MoU	Memorandum of Understanding
MLI	Multilateral Convention/ Instrument (MLI)
MWPL	Market Wide Position Limit
NAV	Net asset value
NBFC	Non-banking finance company
NCDs	Non-convertible debentures
NCLT	National Company Law Tribunal
NCLAT	National Company Law Appellate Tribunal
NDCFs	Net Distributable Cash Flows
NED	Non-Executive Director
NFE	Non-Financial Entity
NIIs	Non-Institutional Investors
NJA	Notified Jurisdictional Area
NMW	National Minimum Wage
NOFHC	Non-Operative Financial Holding Company
NRC	Nomination and Remuneration Committee
NRI	Non-resident Indian
NRV	Net Realisable Value
NSE	National Stock Exchange
OA	Organisation Agreement
OPCDs	Optionally Convertible Debentures
OCI	Overseas Citizen of India
OCL	Optional Convertible Loan
ODIs	Offshore Derivative Instruments
OECD	Organisation for Economic Co-opertaion Development
PA	Primary Adjustment
PAN	Permanent Account Number
PE	Permanent Establishment
PoEM	Place of Effective Management
POCM	Percentage of Completion Msethod
PF	Provident Fund
PLI	Profit Level Indicator

Abbreviation	Full form
POA	Power of Attorney
PRS	Permanent Residency Status
IPOs	Public issues
PSM	Profit Split Method
PY	Previous Year
QIB	Qualified Institutional Buyers
RBI	Reserve Bank of India
REITs	Real Estate Investment Trusts
R&D	Research & Development
ROFR	Right of First Refusal
RFI	Reporting Financial Institution
RFPIs	Registered foreign portfolio investors
ROI	Return of Income
RPC	Race Promotion Contract
RPTs	Related Party Transactions
RPA	Rupee Payment Area
RTAs	Registrar and Transfer Agents
SA	Secondary Adjustment
SA	Service Agreement
SAAR	Specific Anti Avoidance Rules
SB	Special Bench
SBRT	Single Brand Retail Trading
SDT	Specified Domestic Transactions
SEAC	Standing External Advisory Committee
SEBI	Securities and Exchange Board of India
SEZ	Special Economic Zone
SC	Supreme Court
SHR	Safe Harbour Rules
SICA	Sick Industrial Companies (Special Provisions) Act, 1985
SLB	Securities Lending and Borrowing
SMPP	Short Message Peer to Peer
SOP	Standard Operating Procedure
SPV	Special purpose vehicle
SPAN	Standard Portfolio Analysis of Risk
SPV	Special Purpose Vehicle
SSA	Social security agreement
STCG	Short-term capital gain
STT	Securities Transaction Tax
CESTAT	The Customs, Excise and Service Tax Appellate Tribunal
TCA	Technical Collaboration Agreement
TCS	Tax collected at source
TDR	Transferable Development Rights
TNMM	Transactional Net Margin Method
TO	Tax Officer (TO)

TPO	Transfer Pricing Officer
TP	Transfer pricing
TRC	Tax residency certificate
TOPA	Transfer of Property Act, 1882
VAT	Value Added Tax
VCFs	Venture Capital Funds
WDV	Written Down Value
WOS	Wholly Owned Subsidiary

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