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kcm Insight

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Dear Reader,

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

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

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Mergers & Acquisitions

M&A Blues in Healthcare Services Space

Corporate Tax

Important Rulings

Free samples distributed to doctors by Pharma Company is business expenditure

Work contracts u/s.194C excludes 'Contract of Supply' without using material purchased from customer

Expenditure on Abandoned Software Development in existing business is revenue in nature

Reporting of remittance of employee contribution to PF with delay in tax audit report is not prima facie adjustment u/s 143(1)

Successor company is entitled to carry forward and set off capital losses and MAT credit pursuant to amalgamation

Corporate Tax

Important Rulings

Financial Services business passes test of 'Undertaking' in case of tax-exempt Demerger

Important Notifications

Partial Relaxation with respect to Electronic Submission of Form 10F by Taxpayers not having PAN

International Tax

Important Rulings

India Rulings

Set off of business loss and deduction under section 80G allowable against foreign dividend income taxable under section 115BBD

Order remanding matter back to the lower authorities recalled as all necessary facts were before the Tribunal

Matter remanded back in relation to reassessment proceedings involving India Mauritius DTAA benefit

International Tax

Important Rulings

Foreign company providing services in India through personnel does not create a fixed place PE in absence of satisfaction of 'disposal' test

Claim of foreign tax credit cannot be denied due to delay in filing Form 67

Constitution of Special Bench of ITAT to hear the matter of applicability of DTAA to Dividend Distribution Tax

Important Updates

Foreign Updates

Swiss Parliament approves constitutional amendment for implementation of BEPS 2.0 (Pillar 2) into Swiss domestic laws, subject to public voting

European Council Member States unanimously adopt directive for implementing Pillar 2 Global Minimum Tax Rules

Transfer Pricing

Important Rulings

Mere directorship / appointment as a KMP does not in itself fulfil the meaning of 'control' to qualify as an associated enterprise

Convertible debentures cannot be recharacterized as loan in absence of substantiation by the tax officer

Indirect Tax

Important Updates

Amendment to CGST Rules

Rule 8 and Rule 9 – Changes to the process of obtaining GST registrations

Rule 8 and Rule 9 – Option for making voluntary applications for cancellation of registration obtained for TDS and TCS compliances under GST

Rule 37 – Proportionate reversal of ITC to be made in case of non-payment of consideration to the vendor within 180 from the date of invoice

Indirect Tax

Important Updates

Rule 37A – Reversal of input tax credit in the case of non-payment of tax by the supplier and re-availment thereof

Rule 46 and Rule 46A - Details in Tax Invoice and Invoice-cum-bill-of-supply (Rule 46 and Rule 46A)

Rule 88C and Rule 59 – Manner of dealing with difference in liability reported in GSTR 1 and that reported in GSTR 3B

Rule 59 – Furnishing details of outward supplies

Rule 108 and 109 – Appeal / Application to Appellate Authority

Rule 138 – E-way Bill required for transportation of Jewellery

Rule 161 – Continuation of certain recovery proceedings

Indirect Tax

Important Updates

Goods and Services Tax

Clarification with respect to mismatch of ITC availed in FORM GSTR-3B v/s ITC available in FORM GSTR-2A for FY 2017-18 and 2018-19

Clarification with respect to ITC eligibility with respect to goods transported outside India

Time period to issue SCN for re-determination of tax demand

Clarification on taxability of NCB offered by Insurance companies

Clarification on applicability of e-invoicing w.r.t an entity

Clarification regarding the treatment of statutory dues in respect of the taxpayers for whom the proceedings have been finalized under Insolvency and Bankruptcy Code, 2016

Coverage | Detailed Analysis

Indirect Tax

Important Updates

Goods and Services Tax

Clarification on procedure for filing Refund by unregistered persons

Applicability of GST on accommodation services supplied by Air Force Mess to its personnel

Applicability of GST on incentive paid by (MeitY) under Incentive scheme for promotion of RuPay Debit Cards and low value BHIM-UPI transactions

Corporate Law

MCA Notifications

Introduction of 2nd Set of Company Forms (covering 56 forms) on Version 3 Portal of Ministry of Corporate Affairs (MCA)

Company Law

RBI Notifications

Master Direction – Foreign Exchange Management (Hedging of Commodity Price Risk and Freight Risk in Overseas Markets) Directions, 2022

Operationalization of Central Bank Digital Currency – Retail (e-Rupee – R) Pilot

SEBI Notifications

Transfer of Dividend and Redemption proceeds to unitholders of Mutual Funds

Penalty for delay in transfer of redemption / repurchase proceeds or dividend

Limits for investment by Mutual Fund Schemes in debt and money market instruments

Inclusion of Equity Exchange Traded Funds as eligible securities under Margin Trading Facility

Foreign Investment in Alternative Investment Funds (AIFs)

M&A Blues in Healthcare Services Space

Coverage

Background

A common notion floating around in the aftermath of the pandemic was that the healthcare sector has been attracting quite a bit of traction in the M&A space. However, it turns out that this is not the case. With the pandemic finally subsiding (albeit some jitters still prevail), the healthcare sector has also started witnessing a slowdown in the number of M&A deals and deal value in the year 2022. In 2022, just like the previous year, the healthcare services industry (hospitals and diagnostic centers) saw a total of 15 M&A deals. However, the value of deals has been significantly lower. The total value of M&A deals in 2022 was c. USD 23.5 Mn as compared to USD 304 Mn in the year 2021.

What has resulted into a downturn?

Increasing Cost of Capital

With rising inflation across the globe, central banks across countries are taking measures to control it by increasing the interest rates. India alone witnessed a 2.25% jump in its repo rate during the year. This in turn has led to increase in cost of capital for businesses. The impact was witnessed by several sectors as there was a significant fall in deals across different industry sectors.

Elevated Valuations

The Indian start-up ecosystem witnessed very high valuation multiples with little fundamental basis, which was largely fueled by investors' FOMO (fear of missing out) factor to park the surplus investible cash available.

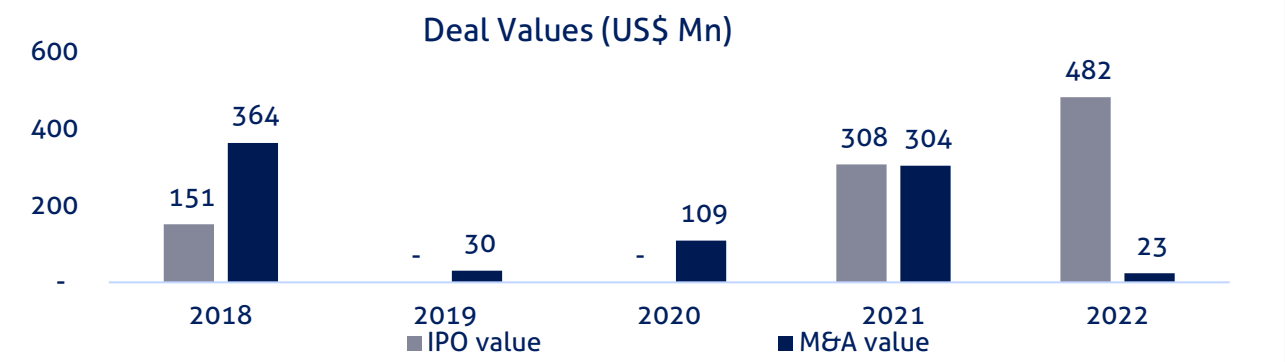
COVID Endemic

With the reduction in COVID cases, number of hospitalizations and adverse effects of the virus subsiding, questions are now being raised around the sustainability of earnings and returns on investment made during the pandemic period.

Dependencies

Hospitals and diagnostic centers are highly dependent on doctors (generalists as well as specialists), paramedics and medical equipment companies which are now proliferating in the economy and therefore there are no barriers to entry per se in the healthcare services space.

Fundraising activity in Healthcare space – IPO vs M&A



Source: VCC Edge

Note: We have excluded Fortis Healthcare deal in 2018 amounting to USD 1,068 Mn from M&A value

M&A Blues in Healthcare Services Space

This space has witnessed on an average 15 M&A deals in a calendar year since 2018 whereas there were no IPOs in this space during the year 2019 and 2020. There was only 1 IPO in 2018, 2 in 2021 and 3 IPOs in the year 2022 in the healthcare services sector. There was decline in M&A deals in 2019 and 2020 which picked up pace in 2021 owing to sudden surge in demand and uncertainty of COVID shaping the ecosystem. Thereafter, with the virus becoming milder, increase in vaccination coverage and sudden drop in the demand for healthcare services, there looms uncertainty in sustainability of revenue of hospitals and diagnostic centres. However, M&A deals of smaller size were still executed at lower valuation in 2022 as compared to 2021.

While there was an apparent decline in the M&A space, hospitals and diagnostic centers started looking at IPOs as a route to exit and raise funds for expansion and/or diversification. In year 2022, hospitals and diagnostic centers raised c. USD 482 Mn through IPO route as compared to USD 23 Mn through M&A deals. Global Health Limited and Rainbow Children's Medicare Limited were the two largest IPOs in the hospitals segment collectively raising USD 476 Mn from the market at an EV/EBIDTA multiple in the range of c. 20-22 times whereas in the M&A space these multiples ranged from c. 8-10 times.

Way Forward

Healthcare service providers are facing uncertain times ahead owing to the excessive capacity created in the economy. The sector is expected to consolidate to sustain and develop synergies. However, a cash crunch caused by macroeconomic trends, as outlined above, might lead to even lower valuations. This may also push some players to postpone their M&A plans. Strengthening equity markets in the country will increase confidence of investors bolstering prospects of successful IPOs. However, the continued strength of equity markets also depends on various global and geopolitical factors. Strong cash-rich hospitals and diagnostic center chains have an advantage to increase their geographical footprint by acquiring smaller local brands and diversification in services offered at lower premium.

Sources: VCC Edge, Economic Times, Stock Exchange filings, KPMG

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Important Rulings

Free samples distributed to doctors by Pharma Company is business expenditure

CIT v. Merck Limited, ITA No.1525/Mum/2016, Mumbai ITAT

The Taxpayer, a subsidiary of a German company, was engaged in business of manufacturing of pharmaceutical products. The Taxpayer had distributed free samples of medicines to doctors for promotion of its products.

The AO held that expenditure on free samples is not allowable as deduction in view of SC decision in the case of Apex Laboratories 135 taxmann.com 286 and resultantly, disallowed the said expenditure.

ITAT observed that the doctors test the marketability of new drug through the free sample and give necessary inputs regarding its acceptability. The provision of free samples impart knowledge to doctors about the new medicine/product coming into the relevant practice of their profession. Therefore, it is directly related to business promotion activity of the pharmaceutical company and accordingly wholly and exclusively for the purpose of business of the company.

Further, ITAT noted that providing samples of pharmaceutical products is not prohibited either under the Indian Medical Council Regulations 2002 or the Uniform Code of Pharmaceutical Marketing Practices by the Department of Pharmaceuticals, 2014 (UCPMP) or 2019 Organization of Pharmaceutical Producers of India's Code of Practice. UCPMP prescribes guidelines under which medical samples should be dispensed which ensure that they are used strictly for clinical evaluation purposes and each sample shall be marked "free medical sample – not for sale". Even the Drugs and Cosmetics Rules, 1945 recognizes the practice of providing drugs for distribution to medical professionals as a free sample with specified labelling. In view of the above, ITAT directed the AO to delete the disallowance of cost of free samples.

This decision is in line with an old order of Hon'ble SC in the case of Eskayef Pharmaceuticals (India) Ltd. v. CIT Civil Appeal Nos. 2717 & 4545-4547 of 1996, wherein it was held that the object of distribution of the samples of the drugs to the doctors is to make them aware that such drugs are available in the market in relation to the cure of a particular affliction and, therefore, to persuade them to prescribe the same in appropriate cases and this tantamount to publicity and sales promotion.

Further, it is also worthwhile to note that recently CBDT vide Circular 12 of 2022 dealing with FAQ on applicability of section 194R had clarified that tax has to be deducted on free samples distributed to doctors in hands of hospital or in hands of doctor, as may be applicable. Though disputable, this shows the intention of the department to tax free samples as income in hands of hospital or doctor and allow the expenditure as deduction in hands of pharmaceutical company.

Work contracts u/s.194C excludes 'Contract of Supply' without using material purchased from customer

ACIT v. Shoppers Stop Limited, ITA.NO. 1783/Mum/2021, Mumbai ITAT

The Taxpayer is a company which runs retail stores across India. The Taxpayer purchased goods/products from vendors either on outright

basis or under 'Sale or Return' ('SOR') basis. In case of 'SOR' based purchase, if products remain unsold, taxpayer may choose to return goods back to vendors. Some vendors may also depute their personnel to assist in sales at retail outlets of the taxpayer to increase visibility of the products.

The AO alleged that the taxpayer had agreements with vendors as per which, vendors would send sample products and if approved by the taxpayer, said products would be manufactured by vendor and then sold to taxpayer. Also, the taxpayer would make payment to vendor after the products are handed over without any defect. Therefore, according to AO, contracts between taxpayer and vendor were 'contracts of work and labour' and not 'contract of supply', which was squarely covered u/s 194C of ITA. AO accordingly held taxpayer as 'assessee in default' u/s 201(1) for failure to deduct tax at source u/s 194C of ITA.

CIT(A) ruled in favour of the taxpayer. The matter reached to ITAT, wherein ITAT referred to the Memorandum explaining Finance Bill 2009, as per which, if no raw material is supplied by the assessee to the manufacturer for production of goods, then, it cannot be considered as 'work' u/s 194C of ITA even if manufacturer has produced goods in accordance with specifications of taxpayer. ITAT relied on the decision of Bombay HC in case of CIT v Glenmark Pharmaceuticals Ltd ITA no. 2256 of 2009.

ITAT also noted that all vendors are independent suppliers/traders having their own existence and goods supplied are standard products under the vendor's brand name, which are also supplied to other retailers or sold through their own showrooms as well. Further, ITAT noted that there is no manufacturing arrangement in place between taxpayer and vendor as alleged by AO. Taxpayer neither provided any specification for manufacture of these products nor supplied raw materials to vendors. Taxpayer only selected from wide array of products offered by vendors.

In view of the above, ITAT acceded to findings of CIT(A) that SOR arrangements were on principal-to-principal basis and in nature of contract for sale of goods and thus arrangement cannot be categorised as 'works contract' u/s 194C of ITA. ITAT further held that mere deputation of sales staff or payment post receipt of goods without any defect, does not make SOR arrangements in the nature of 'works contract'.

The decision upheld the position that even if the final products are manufactured with the direction and specification of customer, the provision of section 194C shall not apply if such goods are manufactured by using raw material source from a person other than such customer and sold to such customer on principal-to-principal basis.

It should also be noted, the Finance Act 2020 has amended definition of 'works contract' u/s 194C to include contract manufacturing by supply of raw material by associate company of customer. Therefore, even though raw material is not supplied by customer but is provided by its associate, the said contract manufacturing arrangement would be covered within the purview of section 194C of ITA if the goods are manufactured as per specification of the customers.

Expenditure on Abandoned Software Development in existing business is revenue in nature

Important Rulings

PCIT v. Trigent Software Limited ITA no. 634 of 2018

In this case, the Taxpayer is engaged in the business of software development solution and management. Taxpayer had debited expenditure of Rs. 7.09 crores in connection with development of new product under the head 'Exceptional Items' in Profit and Loss account. The Taxpayer had treated said expenditure as part of Capital Work in Progress in earlier years but since development of software was abandoned, said expenditure was claimed as revenue expenditure.

CIT(A) allowed the appeal of taxpayer by holding that expenditure for development of new product by taxpayer was in existing line of business.

ITAT relied on decision of Delhi High Court in case of Indo Rama Synthetic I Ltd ITA 843 of 2009 wherein it was held that if expenditure was incurred for starting new business, then such expenditure would be capital in nature, and it would irrelevant if the project really materialised or not. However, if expenditure was incurred in respect of same business, then even if it was for expansion of business, then such expense was to be treated as business expenditure. In such situation, whether a new business asset came into existence or not would become a relevant factor and if there was no creation of new asset, then expenditure incurred would be of revenue nature.

Applying the ratio of aforesaid decision, ITAT held that the Taxpayer is already in business of development of software solution and its endeavour to develop a new software is an attempt in its existing line of business of developing software solutions. Since product which was sought to be developed never came into existence and same was abandoned, expenditure could only be said to be revenue in nature.

Reporting of remittance of employee contribution to PF with delay in tax audit report is not prima facie adjustment u/s 143(1)

P R Packaging Service v. ACIT, ITA No. 2376/Mum/2022

The return of income filed by the taxpayer was processed u/s. 143(1) of ITA. The AO – CPC had made disallowance in respect of delay in deposit of employee's contribution to PF and ESIC based on the Tax audit report by applying provisions of section 143(1)(a)(iv) of the ITA. CIT(A) upheld the disallowance made by AO.

Aggrieved by such order, the taxpayer filed an appeal before Mumbai ITAT. The taxpayer contended that fact of remittance of employees' contribution to PF made with delay reported in tax audit report is mere recording of facts by the Tax Auditor. Tax auditor has not suggested for disallowance of such sum u/s 36(1)(va) of the ITA. Therefore, such disallowance while processing return of income u/s 143(1) of the ITA does not fall within ambit of prima facie adjustments. Mumbai ITAT relied upon the decision of Jurisdictional ITAT in case of Kalpesh Synthetics Ltd v. DCIT [(2022) 137 taxmann.com 475 (Mum)].

It is pertinent to note that in similar facts, Pune ITAT in case of Cemetile Industries ITA no. 693/Pun/2022 has taken a contrary view relying upon the recent decision of Hon'ble SC in case of Checkmate Services [(2022) 143 taxmann.com 178(SC)]. Whereas, Mumbai ITAT has distinguished the ruling of Apex Court in

case of Checkmate Services (supra) since the said ruling is in the context of assessment u/s 143(3) and not u/s 143(1)(a) of the ITA. In our view the Ruling of Mumbai ITAT is more appropriate as it has considered both the taxpayer and revenue argument in detail including the decision of Apex Court supra.

This ruling may be useful for taxpayers to claim relief under 143(1) proceedings since there are certain instances wherein payment is delayed on account of genuine reasons like non-operating of PF/ESI website.

Successor company is entitled to carry forward and set off capital losses and MAT credit pursuant to amalgamation

Capgemini Technology Services India Ltd, ITA No. 1857 of 2017, ITAT Pune

The Taxpayer in the ITR claimed set off of long-term capital loss ("LTCL") and MAT credit of erstwhile company which got amalgamated with the Taxpayer under the Scheme of amalgamation approved by Hon'ble HC. As per the various clauses of the Scheme, all the assets and liabilities, benefits including entitlements and incentives of any nature including tax concessions, any exemption, or any benefit by way of set off or carry forward of unabsorbed depreciation or investment allowance or any other allowance or loss of the Transferor (amalgamating) company shall be transferred or made available to the Transferee (amalgamated) company i.e., the Taxpayer.

The AO as well as CIT(A) disallowed set off of LTCL in view of section 72A of ITA which provides for set off and carry forward of loss exclusively incurred under the head PGBP by the amalgamating company in the hands of the amalgamated company. As opined by AO and confirmed by CIT(A), set off of LTCL is outside purview of section 72A and not covered by provisions of section 74 of ITA as well. On similar lines the MAT credit of the amalgamating company being not covered by provisions of section 72A was disallowed by the AO.

The ITAT analysed various clauses of the Scheme and noted that as per the law of succession wherein the successor company steps into the shoes of the predecessor company, any loss which is available to the amalgamating company shall become available to the amalgamated company for set off. The ITAT held that the term "assessee" in section 74, which provides for carry forward and set off of capital loss, refers to both the original company which has suffered loss and later on substituted by the amalgamated company for the purpose of setting off and carry forward of LTCL.

Similarly, ITAT noted that section 115JAA(7) restricts carry forward and set off of MAT credit in case of conversion of company into LLP. Since there is no restriction for set off and carry forward of MAT credit from amalgamating company to amalgamated company, ITAT held that the MAT credit earned by the amalgamating company would be entitled for set off by the amalgamated company.

Financial Services business passes test of 'Undertaking' in case of tax-exempt Demerger

Grasim Industries Ltd ITA No 1935 of 2020 and 41 of 2021, ITAT Mumbai

Through a composite scheme of merger and demerger approved by NCLT, two companies were merged with the Taxpayer and subsequently, finance service business ("FSB") of the taxpayer was demerged.

Important Rulings

The said arrangement was challenged by the Revenue on the ground that financial service business does not qualify as undertaking as defined u/s 2(19AA) of ITA, as it is not capable of being run independently as a business unit. It was considered as transfer of assets and liabilities and not transfer of undertaking. The AO treated allotment of shares as deemed dividend u/s 2(22)(a) of ITA on the ground that there is transfer of assets to shareholders.

Taxpayer contended that scheme of arrangement specifically mentioned that demerger of FSB satisfied the conditions stipulated u/s 2(19AA) of ITA. Further, FSB was engaged in activity of financial services as well as holding and nurturing investments in company carrying on financial service business. Taxpayer submitted that demerged undertaking in case of FSB comprised of assets, liabilities, employees, borrowings, contracts, litigations, etc. which was sufficient to constitute an independent NBFC as per requirement of RBI. Further, the interest income on lending was also offered to tax under the head PGBP. The Tax Audit report also mentioned FSB as one of the businesses.

Taxpayer further contended that scheme of arrangement cannot be challenged once the scheme is approved by placing reliance on Circular no. 1/2014 issued by MCA dated 15.01.2014; CBDT instruction no. F No. 279/Misc/M-171/2013-IT dated 11.04.2014 and decision of Ahmedabad Tribunal in case of Urmin Marketing (P) Ltd (ITA No. 1806 of 2019).

Taxpayer also contended that conditions stipulated u/s 2(22)(a) for treating transfer of shares as deemed dividend were not satisfied since there is no distribution to the shareholders from the accumulated profits or release of all or any part of the assets.

On the other side, Revenue contended that interest income shown under the head IOS. FSB was not carried on standalone basis and on the contrary investment were made in subsidiaries / joint ventures which carried out FSB. Investment in subsidiaries were shown under the head non-current investments. Revenue alleged that scheme of arrangement was a colorable device, therefore, department can analyze the consequences arising out of the Scheme. Revenue also submitted that deemed distribution u/s 2(22)(a) can be in kind in form of release of assets.

ITAT noted that undertaking is constituted of separate business activity i.e., a wholesome business unit and not an individual asset. FSB was one of the segments of the company and mere non-disclosure of nature of activity in the return does not mean otherwise. FSB as business activity was duly reported in the audit report and interest income was offered to tax as business income. All the assets, liabilities contracts and litigation of an undertaking as appearing in the books of accounts before the demerger were transferred at book value for which the resultant company issued shares on proportionate basis. Accordingly, it was held that conditions stipulated u/s 2(19AA) of ITA are complied with.

ITAT further noted that the shares were issued as a consideration of demerger in consonance with the provisions of section 2(19AA) and covered by the exceptions provided u/s 2(22). Reliance was placed on Circular 5-P dated 09.10.1967 wherein it is specified that transfer of assets in scheme of amalgamation cannot be

Important Rulings

regarded as distribution by the company from its accumulated profits to the shareholders.

Important Notifications

Partial Relaxation with respect to Electronic Submission of Form 10F by Taxpayers not having PAN

Circular F. No. DGIT (S) – ADG (S) - 3 / E-filing Notification/Forms/2022/9227, dated 12-12-2022

Notification no. 03/2022 required taxpayers to file Form 10F electronically on the e-filing portal. In view of practical challenge faced by non-resident taxpayers not having PAN in filing Form 10F electronically, CBDT clarified that such category of non-resident taxpayers who are not having PAN and not required to have PAN are exempted from mandatory electronic filing of Form-10F till March 31, 2023. Such taxpayers may file Form 10F in manual form till March 31, 2023.

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Important Rulings

India Rulings

Set off of business loss and deduction under section 80G allowable against foreign dividend income taxable under section 115BBD

Tata Industries Ltd [ITA No.217/Mum/2020, Mumbai ITAT]

Taxpayer had received dividends from an overseas wholly owned subsidiary. The Taxpayer paid tax under section 115BBD of the Act on the dividend income, after setting off brought forward & current year's business loss and deductions under Chapter VI-A.

Revenue authorities denied deduction under Chapter VI-A and set off of business losses against the dividend income, on the ground that non-obstante provisions of section 115BBD(2) indicate taxation on a gross basis and provide that no deduction in respect of any expenditure or allowance shall be allowed under any provision of the Act in computing its income by way of dividends referred to in section 115BBD(1).

Taxpayer claimed that Section 115BBD applies to dividend income from foreign subsidiaries which forms part of 'Total Income' and that 'Total Income' for the same is to be computed after taking into consideration computation provisions of the Act. The Taxpayer contended that Section 115BBD falls within Chapter XII which deals with 'Determination of Taxes in Certain Special Cases' and does not deal with Computation of Total Income.

The ITAT allowed Taxpayer's claim with respect to set off of business loss and deductions under Chapter VI-A based on following:

a) The plain and unambiguous reading of the provisions of section 115BBD of the Act makes it clear that only after determination of 'Total Income' as per the provisions of the Act, the remaining foreign dividend income which is included in the said total income would be taxed at the rate of 15% and balance income (other than foreign dividend income) would be taxed at normal rate of tax. Accordingly, in order to compute total income, losses and deductions should be taken into consideration before computing taxability under section 115BBD of the Act.

b) The provision of section 115BBD only restricts deduction of expenditure relating to earning of dividend income from specified foreign company and it does not prohibit set off of loss and deductions under chapter VI-A.

c) Relying on the decisions of Mumbai ITAT in the case of Tata Motors Ltd vs DCIT in ITA No. 3424/Mum/2019 and Essar Shipping Limited in ITA No. 821/Mum/2022, it was held that Section 115BBD of the Act, unlike provisions of Section 115BBE and some other sections, does not restrict set-off of losses. It held that there was no provision in Section 115BBD to eliminate / exclude the dividend income from total income before setting-off of loss and accordingly, in computing total income, losses should be allowed to be set off from dividend income from specified foreign companies.

Further, the ITAT also observed that the taxpayer was in the business of making investment in various companies and promotion of companies in various fields and hence it could be construed as an investment company. Accordingly, the ITAT held that resultant income in the form of dividend is business income, though it was assessable to tax under the head 'income from

other sources' pursuant to specific provision contained in section 56(2)(i) of the Act. Further, section 72 of the Act provides that brought forward loss computed under the head 'profits and gains from business or profession' can be set off against the income from business (not necessarily income assessable to tax under the head 'profits and gains from business or profession'). Hence, current as well as preceding years' business loss should be allowed to be set off against dividend income (which business income in present case). Various judicial decisions were relied in this regard.

Provisions of Section 115BBD are abolished from assessment years 2023-24 and dividend income is now chargeable to tax at normal rates applicable to the taxpayer. Further, the interesting facet in this ruling is that ITAT has held that even if earning of dividend income is a business activity and taxable as 'Business Income', the same would be assessable to tax under section 56 and thereby it would be important to note that restriction of deductions of expense prescribed under section 57 (i.e., deduction of interest expense not exceeding 20% of dividend income) would apply. Hence, by virtue of this decision, possibility of litigation between taxpayers and revenue authorities cannot be ruled out, when a taxpayer wishes to offer dividend income under the head "Profits and Gains from Business or Profession" by adopting a view that provisions of section 57 would not apply.

Order remanding matter back to the lower authorities recalled as all necessary facts were before the Tribunal

Blackstone FP Capital Partners Mauritius V Ltd. [MA Nos.258 and 259/Mum/2022- Mumbai ITAT]

In the context of whether the provisions of beneficial ownership can be applied to Article 13 of the treaty, the Hon'ble ITAT originally held that presumption of beneficial ownership by the AO in Article 13 of the treaty can't be taken for granted since Article 10 and 11 of the treaty had specific clause for beneficial ownership condition. Hence, the absence in Article 13 can't be **inadvertent and unintentional**. Accordingly, the tribunal remanded the case back to the AO to decide on the **fundamental question** that whether the concept of beneficial ownership can be read into the scheme of Article 13 of India-Mauritius DTAA and if so what is it's contextual connotation of the term 'beneficial ownership'.

However, the taxpayer, relying on the jurisdictional HC decision in the case of *Sony Pictures Network* and *Coco Cola India*, requested ITAT to **rectify or recall** its order on the ground that ITAT being the final fact-finding authority cannot refer the case back to lower authority on a **Question of law**, when enough material on record were present before ITAT to decide the case itself. The Mumbai ITAT has now **recalled** the impugned order considering it as **error apparent from record** and listed the case for hearing before a regular bench.

The question whether the concept of beneficial ownership has to be read in Article 13 of the treaties is litigative since long time. The tax authorities have time and again challenged the availability of treaty benefits by challenging beneficial ownership across the world. In India context, one may counter that CBDT vide its Circular no. 789 dated 13.4.2000 has clarified that the beneficial ownership provision is not to be read in Article 13 (Capital Gains). In the

context of Article 10 (Dividend), it has been stated in the circular that TRC shall be sufficient for proving the status of 'residence' as well as 'beneficial ownership' of the taxpayer. However, in the context of Article 13 in the same circular, the CBDT states that TRC should be sufficient proof for proving the residency status of the taxpayer and has not invoked the provisions of beneficial ownership in Article 13 of the treaty. Considering that there is no specific guideline, final ruling of the Tribunal shall have far-reaching impact on the issue.

Matter remanded back in relation to reassessment proceedings involving India Mauritius DTAA benefit

Vodafone Mauritius Limited [W.P. (C) 12600.2022 & CM Nos. 38193-94/2022 – Delhi High Court]

Taxpayer was a foreign company and a tax resident of Mauritius. In Financial Year 2015-16, taxpayer had sold equity shares of an Indian Company and incurred a capital loss. The resident buyer company of shares had not deducted any tax on payment of consideration towards sale of shares to Mauritius Company.

Revenue authorities have commenced reassessment proceedings on the ground that taxpayer had not filed its return of income for the year under consideration in which the transaction of sale of shares were undertaken and accordingly it is a case of deemed income escapement. Hence, order under section 148A(d) was passed and notice under section 148 was issued to the taxpayer. In the order passed under section 148A(d) of the Act, revenue authorities have inter-alia mentioned that tax residency certificate obtained by a taxpayer from Mauritius tax authorities is not conclusive evidence with respect of tax residency and to grant DTAA benefits.

Against the order passed and notice issued under section 148 by revenue authorities, taxpayer filed a Writ Petition before Delhi High Court under Article 226/227 of Constitution of India and challenged the jurisdiction of reassessment exercised by the revenue authorities, mainly on the ground that taxpayer has a valid TRC and eligible to claim the benefits of DTAA and taxpayer had incurred a loss from the transaction which was not even carried forward by non-filing of return of income. Hence, there is no escapement of income to invoke reassessment proceedings.

High Court remanded matter back to the revenue authorities with a direction to entertain the entire case a fresh and provide the taxpayer an opportunity of being heard. Revenue authorities have been directed to proceed with a speaking order after providing an opportunity of being heard to the taxpayer and only after considering taxpayer's submission on merits.

We understand that there are two disputes in the present case law. The first one is with respect to reopening of assessment which was challenged by the taxpayer. In this regard, though Court has remanded the matter back to AO, claiming DTAA benefit and adopting a stand of non-filing of return of income should ideally not preclude the revenue authorities from initiating reassessment proceedings. Hence, the said contention of taxpayer may require a reconsideration.

Second dispute between taxpayer and revenue authorities in this case was with respect to granting benefit of DTAA between India and Mauritius in respect of sale of shares of an

Important Rulings

Indian Company. There is plethora of judicial precedents (including decision of Hon'ble Supreme Court in case of Azadi Bachao Andolan, CBDT Circular 789 of 2000 and recent decision of Delhi ITAT in case of MIH India Mauritius Limited), where benefit of India Mauritius DTAA is upheld if taxpayer produces valid tax residency certificate and revenue authorities are not allowed to question the validity of said certificate. At the same time, certain negative rulings have also been delivered by AAR and Courts wherein the benefit of India Mauritius DTAA was denied to conduit companies.

Foreign company providing services in India through personnel does not create a fixed place PE in absence of satisfaction of 'disposal' test

Tax rate provided under DTAA will not increase by surcharge and cess

FCC Ltd v. ACIT [ITA No.1789/Del/2022, Delhi ITAT]

Fixed place PE

Taxpayer is a Company incorporated in Japan and a tax resident of Japan. Taxpayer had entered into various international transactions with its Associated Enterprises in India such as royalties, fees for technical services, sale of goods etc. Revenue authorities have held that Indian subsidiary company of the taxpayer is a fixed place PE of the taxpayer in India under India Japan DTAA and hence, goods sold by the taxpayer (offshore sale of goods) is effectively connected to PE in India and accordingly liable to be taxed in India. Taxpayer had challenged the stand of revenue authorities before ITAT.

ITAT had relied upon the decision of coordinate bench in the taxpayer's own case and held that in order to constitute fixed place PE, there has to be a fixed place of business, at the disposal of the foreign enterprise, from which a taxpayer can conduct its business wholly or partly. It was also held that merely giving access to the premise of an Indian company for providing services by the foreign enterprise would not suffice to create a fixed place PE. Also, if an Indian company is an independent entity with separate business operations and if foreign enterprise is merely providing time to time agreed services, the same would not lead to creation of fixed place PE unless business of foreign enterprise is carried on from such place. In the present case, as far as income from sale of goods is concerned, goods were manufactured outside India, consideration for sale of goods was received outside India and title of goods was passed outside India. Hence, there was no operations in relation to sale of goods were carried out in India and therefore, fixed place PE is not constituted.

Whether or not presence of person in India creates a Fixed Place PE in absence of a Service PE clause has remained a grey area. This is a welcome ruling wherein ITAT had confirmed that mere existence of persons of the foreign company for providing services does not create a fixed place PE in absence of a place being available at the disposal of the foreign company.

Surcharge and cess in case of DTAA

Taxpayer had received a payment in the nature of royalties / Fees for Technical Services from Indian company. The said receipts have been offered to tax in India tax return at the rate of 10% as per DTAA between India and Japan. Revenue authorities have held that surcharge and cess would also be levied over and above the tax rate provided under Article 12 of India

Important Rulings

Japan DTAA. Taxpayer had challenged the stand of revenue authorities before ITAT.

ITAT has accepted the contentions of the taxpayer and held that rate of tax provided under Article 12 read with Article 2 of India Japan DTAA is a maximum rate of tax (inclusive of surcharge and cess is also a type of surcharge) and the same cannot exceed further by rate of surcharge and cess. While reaching to said conclusion, ITAT had also relied upon various judicial precedents in this regard and held that it is a settled issue that rate provided under DTAA is a final rate and no surcharge and cess can be levied on rate of tax provided under DTAA.

Claim of foreign tax credit cannot be denied due to delay in filing Form 67

Nirmala Murli Relwani Vs ADIT [ITA No. 2094/Mum. /2022 – Mumbai ITAT]

Taxpayer was a resident individual. For Assessment Year 2019-20, taxpayer had filed original return of income. Thereafter, taxpayer had also filed revised return of income. While filing the revised return of income, taxpayer had submitted Form 67, for claiming a relief in respect of foreign tax paid. While processing the revised return of income, credit of foreign tax claimed was denied on the ground of delay in filing Form 67.

ITAT held that mere delay in filing Form 67 for claiming a foreign tax credit would not preclude the taxpayer from claiming a credit as the credit got denied due to technical aspects without considering merits of the case. Hence, ITAT had directed assessing officer to decide the claim of foreign tax credit, after considering merits and after accepting Form 67 and other related documents filed in this regard.

In recent past months, there have been various judicial precedents, wherein ITAT had confirmed a settled position of law and held that delay in filing Form 67 is merely a procedural lapse and the same would not preclude the taxpayer from a claiming a genuine deduction / exemption / relief to which taxpayer is otherwise entitled for as per the provisions of the Act.

At this juncture, it is also important to note that CBDT has recently amended the Rule 128 of the Rules, wherein the due date of filing of Form 67 has been extended and clarified that Form 67 can be filed up to the end of the relevant assessment year. This amendment has come in effect from 01 April 2022.

Constitution of Special Bench of ITAT to hear the matter of applicability of DTAA to Dividend Distribution Tax

Finance Act, 2020 had made a significant amendment to the provisions of the Act with respect to taxability of dividend income, by shifting the incidence of tax on dividend from the Company to its shareholders. Before shifting to classical system of taxation, section 115-O of the Act was in force wherein the Company declaring dividend was liable to discharge dividend distribution tax ('DDT') at the rate prescribed under section 115-O (shall be further increased by applicable surcharge and cess).

In recent last years, many taxpayers have started taking a recourse to relevant DTAA between India and other Country by restricting the rate of DDT at rate of tax provided under respective DTAA (for declaration of dividend to non-resident shareholders). In order to support the argument, taxpayer took a stand that DDT is a tax on dividend income and thereby covered within the ambit of taxes covered under DTAA. Also, on

Important Rulings

perusal of various amendments made to the scheme of dividend taxability vide various Finance Acts and having regard to the intention of legislature, the incidence of tax was shifted in the hands on the Company (vide introducing section 115-O) was merely for administrative convenience and it is nothing but a tax on dividend income.

Many taxpayers have also exercised their jurisdictions by filing an additional ground of appeal before the Appellant authorities to adjudicate the issue of applicability of rate of tax provided in DTAA to DDT. ITATs have also given a decision in the favour of taxpayer by holding that rate prescribed under DTAA shall prevail over rate of DDT.

Recently, Mumbai Bench of ITAT in case of Total Oil Industries [ITA No. 6997/Mum/2019] had requested the President of ITAT to refer the matter to a Special Bench to decide an issue of applicability of rate of tax prescribed under DTAA to DDT. A Special Bench is now constituted and the cases of Maruti Suzuki and Gujarat Gas have also been tagged with the same.

Ironically, the question framed by the Bench while requesting for a Special Bench and the final question framed by ITAT to be answered by Special Bench have created many speculations as the same seem to have been framed with the following presumptions:

- The rate of tax provided for in a Treaty is the "rate of tax applicable to Non-resident shareholders"
- There is no specific provision in a Treaty dealing with DDT

As such, DTAA does not per-se prescribe rate of taxes for non-resident shareholders and it merely provides the right of taxing the income amongst countries. In most of DTAAs, for dividend income it has been prescribed that the source country may tax dividend income as per its local laws and that such tax rate should not exceed 10%. Also, the presumption of Mumbai ITAT that DTAA does not have any specific treaty provision for DDT also appears to be out of place. Hence, looking to the dichotomy of arguments at various judiciary level, it will be pertinent to keep an eye on decision of Hon'ble Special Bench of Mumbai ITAT to address such an issue.

Important Updates

Foreign Updates

Swiss Parliament approves constitutional amendment for implementation of BEPS 2.0 (Pillar 2) into Swiss domestic laws, subject to public voting

Swiss parliament has approved constitutional changes on 16th December 2022 for implementation of OECD's BEPS Pillar 2. Subject to a public voting on 18 June 2023, Switzerland proposes to legally implement the Pillar 2 proposals w.e.f. 1 January 2024.

The Constitutional amendment would enable Switzerland to introduce the Global Anti-Base Erosion Model (GloBE) Rules for a minimum global tax of 15%, including a Qualified Domestic Minimum Top-up Tax (QDMTT), an Income Inclusion Rule (IIR) and an Undertaxed Payments Rule (UTPR), in line with the GloBE Model Rules as published by the OECD under Pillar 2 in December 2021.

This would impact MNE groups that have reported annual revenues of EUR 750 million or more in their consolidated financial statements in at least two of the four preceding fiscal years.

European Council Member States unanimously adopt directive for implementing Pillar 2 Global Minimum Tax Rules

On 15 December 2022, the Council of the EU (i.e., the EU Member States) unanimously adopted the Directive ensuring a global minimum level of taxation for MNE groups and large-scale domestic groups in the Union. EU Member States have time until 31 December 2023 to transpose the Directive into national legislation with the rules to be applicable for fiscal years starting on or after 31 December 2023, with the exception of the UTPR which is to be applicable for fiscal years starting on or after 31 December 2024.

The EU adoption of the Directive represents a significant advancement of the Pillar 2 global minimum tax. Other countries around the world also have begun activity with respect to the implementation of global minimum taxes and global legislative activity on Pillar 2 is expected to intensify in 2023.

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Important Rulings

Mere directorship / appointment as a KMP does not in itself fulfill the meaning of 'control' to qualify as an associated enterprise

Reliance Industrial Holdings Pvt Ltd [TS-763-ITAT-2022(Mum)-TP]

The taxpayer is a core investment company and holds investments in group companies.

During the relevant assessment year, the taxpayer had provided financial guarantee to a bank for sanctioning loan to an entity ('hereinafter referred to as BML'). Also, one of the Key Managerial Persons (KMPs) of the taxpayer held a majority stake (91% in voting power) in BML. The TPO alleged that the since the KMP had control over both the entities i.e., by virtue of being the KMP of the Assessee and by virtue of holding 91% voting right in BML, the Assessee and BML were associated enterprises as per section 92A(2)(j) of the ITA, 1961. Accordingly, on this ground, the taxpayer's case was reopened alleging escapement of income and an upward adjustment was made in respect of the guarantee furnished by the Assessee in favour of BML.

Aggrieved by the order, the taxpayer filed an appeal before the Hon'ble Mumbai ITAT. The Hon'ble Mumbai ITAT has dealt with the connotation of the term 'control' as per section 92A(2)(j) as well as the reasons recorded by the assessing officer for reopening the case. The matter was decided in light of decision of the Hon'ble Mumbai HC in case of Hindustan Lever Ltd. v. R.B. Wadkar [(2004) 268 ITR 332 (Bom)], wherein the HC had held that "the reasons recorded by the AO should be self-explanatory and should not keep the assessee guessing for reasons. Reasons provide link between conclusion and the evidence....". In this case, the reasons recorded by the AO for reopening the assessment of taxpayer was limited to making an observation that the KMP of the assessee was holding 91% voting rights in BML.

The ITAT held that the reasons recorded by the AO are neither self-explanatory nor conclusive in nature. The ITAT further held that the term 'control' as per 92A(2)(j) is to be examined in the backdrop of other clauses of section 92A(2) i.e., clause (b) and (f). The clause (b) of section 92A(2) holds that voting power of more than 26% is required to qualify as a controlling stake. Further, clause (f) of the said section iterates a controlling stake in case one has a power to (and has exercised such power to) appoint more than half of the directors or members of governing body or one or more executive directors or members of the governing body. Mere being a KMP in a company does not afford one either more than 26% voting right, nor does it afford one a power to appoint more than half of the Board. In this backdrop, in absence of any conclusive reasons recorded by the AO to demonstrate 'control' within the meaning of section 92A(2)(j), the ITAT has quashed the proceedings and held in favour of the assessee.

While the aforementioned case law holds in favour of the assessee, what also emerges is that the provision of section 92A(2)(j) is subjective in nature. The 'control' discussed herein needs to be demonstrated to have been present / absent conclusively for determining relationship between two persons.

Important Rulings

Convertible debentures cannot be recharacterized as loan in absence of substantiation by the tax officer

M/s. Siva Industries and Holdings Ltd. vs. DCIT [ITA No. 1390/Chny/2016]

Siva Industries and Holdings Ltd., (Siva) a Chennai based taxpayer, is a venture capital infrastructure company with an aim of promoting strategic tie-ups in emerging sectors such as telecom, shipping, realty, renewable energy, media etc.

The assessee advanced funds to two of its Associated Enterprises (AE) i.e., Avis Ventures Ltd., Mauritius (AVL) and Daleworld Ltd., Cyprus (Dale) and also subscribed to optionally fully convertible debentures (OFCD) issued by Dale carrying a coupon rate of 2%. The said infused funds were meant for takeover of a Norwegian shipping enterprise.

In the above context, the TPO considered the structure and the funding to be without merit and held that such an arrangement was merely with a purpose to avoid capital gains tax. Further, the TPO held that the OFCD are in substance, loan advanced to its AE and hence, sought to recharacterize the OFCD as loan. The TPO rejected the assessee's benchmarking based on FCCB rates and made an adjustment by considering LIBOR plus 1.9% (as in the case of loan advanced by assessee to its AE) as the appropriate interest rate.

The ITAT held that the debentures would give an option to the assessee to convert the same to equity shares i.e., voting rights in the future and accordingly, they carried inherent benefits. Without any concrete substantiation, the same cannot be recharacterized as loan merely on an assumption. The Hon'ble ITAT upheld the FCCB benchmark carried out by the assessee and deleted the adjustment.

More and more rulings in recent times have focused more on the substance of transaction, especially in light of material brought to record, rather than merely ruling based on assumption basis. Any decision, therefore, must be read in context, and accordingly, the possibility of recharacterization of a transaction where substantiation is available cannot be ruled out.

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Important Updates

Amendment to CGST Rules

Rule 8 and Rule 9 – Changes to the process of obtaining GST registrations

- The email ID and phone numbers linked to the PAN database with CBDT shall be auto populated while obtaining new GST registration.
- A biometric-based Aadhaar authentication along with taking photograph of the applicant shall also be undertaken in cases where a person has opted for Aadhar authentication.
- The original copies of the documents uploaded shall be verified and a physical verification of the business premises shall be conducted
- The above shall be done in cases identified on the common portal, based on data analysis and risk parameters. This process is currently made appliable only to the applications made in the state of Gujarat on a pilot basis.

Rule 8 and Rule 9 – Option for making voluntary applications for cancellation of registration obtained for TDS and TCS compliances under GST

- Persons who have obtained registrations to deduct tax at source under section 51 or collect tax at source under section 52 have been granted an option to make application for cancellation of registration which hitherto not available.

Rule 37 – Proportionate reversal of ITC to be made in case of non-payment of consideration to the vendor within 180 from the date of invoice

- As per second proviso to Section 16 (2) of the CGST Act, in case where payment has not been made by the recipient to the vendor within 180 days from the date of the invoice, then ITC is required to be reversed. Rule 37 of the CGST Rules which was substituted from 1 October 2022 has been amended retrospectively from such date to provide that such reversal shall be proportionate to the amount not paid.

Rule 37A – Reversal of input tax credit in the case of non-payment of tax by the supplier and re-availment thereof

- New rule 37A has been inserted to the CGST Rules to provide for a procedure to be adopted for reversal of ITC in case where the supplier has reflected the relevant invoices / debit note in the GSTR 1 furnished by him.
- The new rule provides that the ITC with respect to such invoice or debit note shall be liable to be reversed by the taxpayer if the supplier has not filed the GSTR 3B of the relevant month by 30th September following the end of financial year. Such reversal shall have to be made on or before the 30th of November following the end of such financial year.
- Failure to reverse the ITC within the time as prescribed above shall attract interest.
- The taxpayer may re-avail such amount of ITC once the supplier files GSTR 3B for the said tax period.

Important Updates

Rule 46 and Rule 46A - Details in Tax Invoice and Invoice-cum-bill-of-supply (Rule 46 and Rule 46A)

- Where any taxable service is supplied by or through an electronic commerce operator or by a supplier of online information and database access or retrieval services to an unregistered recipient, a tax invoice shall be issued by the registered person irrespective of the value of such supply.
- Where a single "invoice-cum-bill of supply" is issued by a registered person supplying taxable as well as exempted goods or services or both to an unregistered person, such "invoice-cum-bill of supply" shall contain the particulars as specified under rule 46 or rule 54, as the case may be, and rule 49 of the CGST Rules.

Rule 88C and Rule 59 – Manner of dealing with difference in liability reported in GSTR 1 and that reported in GSTR 3B

- Where the tax payable as per GSTR-1 or details as per Invoice Furnishing Facility in respect of a tax period, exceeds the amount of tax payable by such person as per FORM GSTR-3B, an intimation shall be issued in Part A of FORM GST DRC-01B.
- The taxpayer shall be required to pay the differential tax or furnish reply explaining the difference within a period of seven days. In absence any response, the said amount shall be recoverable in accordance with the provisions of section 79 of the CGST Act.

Rule 59 – Furnishing details of outward supplies

Where any intimation has been issued to a taxpayer for any tax period under Rule 88C (1) of the CGST Rules for difference in liability reported in GSTR 1 and tax payable in GSTR 3B, then the said person shall not be allowed to furnish GSTR 1 or use the invoice furnishing facility for a subsequent tax period unless the taxpayer has either deposited the amount specified in the said intimation or has furnished a reply explaining the reasons for any amount remaining unpaid.

Rule 108 and 109 – Appeal / Application to Appellate Authority

- Where the decision or order appealed against is uploaded on the portal the date of issue of the provisional acknowledgment shall be considered as the date of filing of appeal.
- Where decision or order appealed against is not uploaded on the portal the appellant shall submit a self-certified copy of the said decision or order within a period of seven days from the date of filing of appeal. Where the self-certified copy of the decision or order is submitted within such prescribed time, a final acknowledgment shall be issued in by the Appellate Authority and the date of issue of the provisional acknowledgment shall be considered as the date of filing of appeal. Where the said self-certified copy of the decision or order is not submitted within such prescribed time, the date of submission of such copy shall be considered as the date of filing of appeal.

Important Updates

Rule 138 – E-way Bill required for transportation of Jewellery

Rule 138(14) of the CGST Rules has been amended to provide that e-way shall be required to be issued for transportation of imitation jewellery.

Rule 161 – Continuation of certain recovery proceedings

An intimation or notice for the reduction or enhancement of any demand under Section 84 of the CGST Act i.e., cases covered under IBC proceedings shall be issued in FORM GST DRC-25. Earlier, an Order was required to be issued for such change in demand.

Goods and Services Tax

Clarification with respect to mismatch of ITC availed in FORM GSTR-3B v/s ITC available in FORM GSTR-2A for FY 2017-18 and 2018-19

Circular No. 183/15/2022-GST dated 27 December 2022

- Where there is a mismatch between ITC availed as per books and ITC reflected in the GSTR 2A, it has been clarified that in the following scenarios, the department shall not ask the recipient to reverse the ITC and may ensure prescribed safeguards / additional checks are present before allowing the ITC
    - The supplier has failed to furnish Form GSTR-1 but has furnished Form GSTR-3B
    - The Supplier has furnished both Form GSTR-1 and Form GSTR-3B, but has failed to declare the particular supply in form GSTR-1
    - The supply was made to the registered persons and an invoice was also issued with the recipient GSTIN; however, the said supply was wrongly reported as B2C instead of B2B
    - The supplier has filed both Form GSTR-1 and Form GSTR-3B, but the particular supply was declared in Form GSTR-1 with a wrong GSTIN.
- The safeguards that may be applied by the department as are as follows:
    - Actual possession of a tax invoice or debit note issued by the supplier;
    - The taxpayer has received the goods or services or both;
    - The taxpayer has made payment of amount towards the value of supply along with tax payable thereon to the supplier. In order to verify that the tax has been paid by the supplier, the officer may demand a certificate from the supplier where if the mismatch amount is less than Rs. 5 lakhs and a certificate from a CA or CMA certifying that the supply was actually made, and tax was paid to Government, where the mismatch amount is more than Rs. 5 lakhs.

Important Updates

Clarification with respect to ITC eligibility with respect to goods transported outside India

Circular No. 184/16/2022-GST dated 27 December 2022

- An exemption under GST was granted till 30 September 2022, to services by way of transportation of goods, including by mail or courier, where the transportation of goods is to a place outside India, and where the supplier and recipient of the said supply of services are located in India. Considering that the exemption was discontinued with effect from 1 October 2022, doubts were raised in relation to the place of supply and the ITC eligibility of the said transactions.
- It has been clarified that the place of supply in such cases is the foreign destination where the goods are being transported and the transaction shall be considered as inter-State Supply liable to IGST. The supplier of service shall report place of supply as '96-Foreign Country' in FORM GSTR-1.
- It has also been clarified that ITC in respect of such services shall not be denied on the basis that the place of supply has been selected as '96-Foreign Country'.

Time period to issue SCN for re-determination of tax demand

Circular No. 185/15/2022-GST dated 27 December 2022

- As per section 75 (2) of the CGST Act, in cases where the appellate authority or appellate tribunal or court concludes that the notice issued under section 74 (1) is not sustainable for reason that the charges of fraud or any willful-misstatement or suppression of facts to evade tax have not been established then the tax payable shall determine deeming as if the notice was issued under section 73 (1).
- In cases where any direction is issued by the appellate authority or appellate tribunal or the court to re-determine the amount of tax payable, the order redetermining the tax, interest and penalty payable, shall have to be issued within two years from the date of communication of the said direction.
- The period that can be covered for such re-determination shall be such period which is within the prescribed period of issuance of show cause notice under Section 73 i.e., 2 years and 9 months from the due date of furnishing of annual return for the respective financial year. If the entire or part of the demand pertains to a period which is beyond such normal period of limitation under Section 73, such full or partial demand shall be dropped.

Clarification on taxability of NCB offered by Insurance companies

Circular No. 186/18/2022-GST dated 27 December 2022

- There is no supply provided by the insured to the insurance com4pany in form of agreeing to the obligation to refrain from the act of lodging insurance claim during the previous year(s) and NCB cannot be considered as a consideration for any supply provided by the insured to the insurance company.
- NCB is a permissible deduction under clause (a) of sub-section (3) of section 15 of the CGST Act for the purpose of calculation of value of supply of the insurance services

Important Updates

provided by the insurance company to the insured where the deduction on account of NCB is provided in the invoice issued by the insurer to the insured.

Clarification on applicability of e-invoicing w.r.t an entity

It has been clarified that the exemption provided to certain entities such as insurers, banks, financial institutions, GTA, passenger transport service provider from the generation of e-invoices is for the entity as a whole and is not restricted by the nature of supply being made by the said entity. Therefore, invoices issued for all supplies of goods or services by said entities shall not require e-invoicing. For e.g. A banking company making supply of some goods.

Clarification regarding the treatment of statutory dues in respect of the taxpayers for whom the proceedings have been finalized under Insolvency and Bankruptcy Code, 2016

Circular No. 187/18/2022-GST dated 27 December 2022

- In case where the government dues are reduced in the appeal/revision or in any "other proceedings", the Commissioner is required to issue an intimation in Form GST DRC-25 intimating the reduction of demand of such dues to the concerned taxable person or any other person and the authority before whom recovery proceedings are pending.
- Proceedings conducted under the IBC shall be treated as "other proceedings" Section 84 of CGST Act.

Clarification on procedure for filing Refund by unregistered persons

Circular No. 188/20/2022-GST dated 27 December 2022

- Where the contract/agreement for supply of services of construction of flat/ building has been cancelled or where a long-term insurance policy has been terminated, in order to enable the unregistered persons to file refund application, necessary changes have been made in CGST Rules and FORM GST RFD-01
- A new functionality has been made available on the common portal which allows unregistered persons to take a temporary registration and apply for refund under the category 'Refund for Unregistered person' including requirement to undergo Aadhaar authentication by such person and providing his / her PAN.
- The unregistered person shall select the state/UT where his/her supplier is registered, in respect of whose invoice refund is to be claimed.
- Separate applications for refund shall have to be filed in respect of invoices issued by different suppliers. Where the suppliers, in respect of whose invoices refund is to be claimed, are registered in different States/UTs, the applicant shall have to obtain temporary registration in the each of the concerned States/UTs
- Further, it has been clarified that the refund claim under the above category can be filed by the unregistered persons only in those

Important Updates

cases where the time period for issuance of credit note has been expired.

- The relevant date for filing the refund application would be the date of issuance of letter of cancellation of contract/ agreement for supply by the supplier.

Applicability of GST on accommodation services supplied by Air Force Mess to its personnel

Circular No. 190/20/2022-GST dated 27 December 2022

- Accommodation services provided by Air Force Mess and other similar messes, such as, Army mess, Navy mess, Paramilitary and Police forces mess to their personnel or any person other than a business entity are covered by Sl. No. 6 of notification No. 12/2017 – Central Tax (Rate) dated 28.06.2017 provided the services supplied by such messes qualify to be considered as services supplied by Central Government, State Government, Union Territory or local authority.

Applicability of GST on incentive paid by (MeitY) under Incentive scheme for promotion of RuPay Debit Cards and low value BHIM-UPI transactions

Incentives paid by MeitY to acquiring banks under the Incentive scheme for promotion of RuPay Debit Cards and low value BHIM-UPI transactions are in the nature of subsidy and thus not taxable in view of the provisions of section 2(31) and section 15 of the CGST Act, 2017.

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MCA Notifications

Introduction of 2nd Set of Company Forms (covering 56 forms) on Version 3 Portal of Ministry of Corporate Affairs (MCA)

MCA Update dated December 26, 2022

Ministry of Corporate Affairs (MCA) has initiated the process of phase-wise shifting of filing e-Forms from the current version available on the portal, Version 2 (V2) to the newer version, Version 3 (V3). In the initial stage, all LLP forms were migrated to V3 portal on March 8, 2022, and 9 Company forms were made available for filing on the V3 version on the portal which became effective from August 31, 2022 [Annexure 1].

In continuation of the transition to V3, MCA on December 26, 2022, announced that another 56 Company Forms will be made available on the V3 portal in two phases during January 2023. Phase I (10 Company forms) – to be effective from January 9, 2023 [Annexure 2]; and Phase II (46 Company forms)- to be effective from January 23, 2023 [Annexure 3].

Additional instructions:

- Company e-Filings on V2 portal for phase I forms will be restricted from January 7, 2023 and accessible for filing on V3 portal from January 9, 2023. Please note that during the said period, all 10 forms will not be available for filing on V2 portal;
- Company e-Filings on V2 portal for phase II forms will be deactivated from January 7, 2023 (except Form PAS 3) and shall be offered for filing on V3 portal from January 23, 2023. Please note that during the said period, all 46 forms will not be available for filing on V2 portal;
- Form PAS-3 will be deactivated for filing on V2 Portal from January 20, 2023;
- No SRNs (Service Request Numbers) should be either in pending payment status or in resubmission status for these 56 forms as on January 6, 2023;
- Offline payments for the above 56 forms on V2 portal using Pay later options has been discontinued from December 28, 2022, online payment option i.e., Credit Card / Debit Card / Net Banking will be allowed;
- All other forms (excluding these 56 forms) will continue to be available for e-filing on V2 portal.

Annexure 1 (effective from August 31, 2022)

Sl. No.	Form No.	Form Name
1	DIR3-KYC Web	WEB KYC of Directors
2	DIR3-KYC	KYC of Directors
3	DPT-3	Return of Deposits
4	DPT-4	Statement Regarding Deposits existing on the commencement of the Act
5	CHG-1	Application for Registration of Creation, Modification of Charge (other than those related to debentures)
6	CHG-4	Particulars for satisfaction of charge thereof
7	CHG-6	Notice of appointment or cessation of receiver or manager

MCA Notifications

Coverage

8	CHG-8	Application to Central Government for extension of time
9	CHG-9	Application for registration of creation or modification of charge for debentures or rectification of particulars filed in respect of creation or modification of charge for debenture

Annexure 2 (to be effective from January 09, 2023):

Sl. No.	Form No.	Form Name
1	SPICe+ PART A	Application for reservation of name for new company incorporation
2	RUN	Application for change of name of existing company
3	SPIce+ PART B	Integrated Company Incorporation Application
4	AGILE PRO S	Application for Goods and services tax Identification number, employees state Insurance corporation registration plus Employees provident fund organisation registration, Profession tax Registration, Opening of bank account and Shops and Establishment Registration
5	e-AOA[INC-34]	Articles of Association
6	e-MOA[INC-13]	Memorandum of Association
7	e-AOA[INC-31]	Articles of Association
8	e-MOA[INC-33]	Memorandum of Association
9	INC-9	Declaration by Subscribers and First Directors
10	URC-1	Application by a company for registration under section 366

Annexure 3 (to be effective from January 23, 2023):

Sl. No.	Form No.	Form Name
1	DIR-12	Particulars of appointment of directors and the key managerial personnel and the changes among them
2	DIR-11	Notice of resignation of a director to the Registrar
3	DIR-3	Application for allotment of Director Identification Number
4	DIR-3C	Intimation of Director Identification Number by the company to the Registrar DIN services
5	DIR-5	Application for surrender of Director Identification Number
6	DIR-6	Intimation of change in particulars of Director to be given to the Central Government

MCA Notifications

Coverage

7	INC-12	Application for grant of License to an existing company under section 8
8	INC-18	Application to Regional Director for conversion of section 8 company into any other kind of company
9	INC-20	Intimation to Registrar of revocation of license issued under section 8
10	INC-20A	Declaration for commencement of business
11	INC-22	Notice of situation or change of situation of registered office
12	INC-23	Application to the Regional Director for approval to shift the Registered Office from one State to another state or from jurisdiction of one Registrar to another Registrar within the State
13	INC-24	Application for approval of Central Government for change of name
14	INC-27	Conversion of public company into private company or private company into public company or Conversion of Unlimited Liability Company into Limited Liability Company
15	INC-28	Notice of Order of the Court or any other competent authority
16	INC-4	One Person Company - Change in Member/ Nominee
17	INC-6	One Person Company - Conversion form
18	MGT-14	Filing of Resolutions and agreements to the Registrar under section 117
19	MR-1	Return of appointment of managing director or whole-time director or manager
20	MR-2	Form of application to the Central Government for approval of appointment or reappointment and remuneration or increase in remuneration or waiver for excess or over payment to managing director or whole-time director or manager and commission or remuneration to directors
21	NDH-4	Form for filing application for declaration as Nidhi Company or updation of status by Nidhis.
22	PAS-3	Return of Allotment
23	SH-7	Notice to Registrar of any alteration of share capital
24	SH-11	Return in respect of buy-back of securities
25	SH-8	Letter of Offer
26	SH-9	Declaration of Solvency
27	NDH-1	Return of Statutory Compliances

MCA Notifications

Coverage

28	NDH-2	Application for extension of time
29	NDH-3	Return of Nidhi Company for the half year ended
30	GNL-3	Particulars of person(s) charged for the purpose of sub-clause (iii) or (iv) of clause 60 of section 2
31	PAS-6	Reconciliation of Share Capital Audit Report (Half-yearly)
32	MGT-3	Notice of situation or change of situation or discontinuation of situation, of place where foreign register shall be kept
33	PAS-2	Information Memorandum
34	DIR-9	Report by the company to Registrar for disqualification of Directors
35	DIR-10	Application for removal of Disqualification of Directors
36	AOC-5	Notice of address at which books of account are maintained
37	FC-1	Information to be filed by foreign company
38	FC-2	Return of alteration in the documents filed for registration by foreign company
39	FC-3	Annual accounts along with the list of all principal places of business in India established by foreign company
40	FC-4	Annual Return of a Foreign company
41	GNL-2	Form for submission of documents with the Registrar
42	GNL-4	Addendum to form
43	MSC-1	Application to ROC for obtaining the status of dormant company
44	MSC-3	Return of dormant companies
45	MSC-4	Application for seeking status of active company
46	RD-1	Form for filing application to Regional Director

RBI Notifications

Hedging of Gold Price Risk in Overseas Markets

Master Direction – Foreign Exchange Management (Hedging of Commodity Price Risk and Freight Risk in Overseas Markets) Directions, 2022

Notification No. RBI/2022-23/151 vide circular A.P. (DIR Series) Circular No 19 dated December 12 2022 and Notification No RBI*/2022-23/94 vide circular A.P. (DIR Series) Circular No 20 dated December 12 2022*

RBI has permitted Residents other than individuals *(Eligible Entities)* to hedge their exposures to price risk of Gold on exchanges in the International Financial Services Centre (IFSC), recognized by the International Financial Services Centre Authority. Earlier, Eligible Entities were only allowed to hedge direct exposures to price risk on commodities other than Gold, Gems, and precious stones.

Operationalization of Central Bank Digital Currency – Retail (e-Rupee – R) Pilot

Press Release No RBI*/2022-2023/1275 dated November 29, 2022*

With an intent to bolster India's digital economy and enhance inclusion of seamless and efficient cross border payment system, RBI has introduced Central Bank Digital Currency (CBDC) as legal tender, issued by the Reserve Bank of India in a digital form initially as a pilot project in Closed User Group (CUG) effective from December 01, 2022. The key features of the pilot project would be:

- The pilot would cover select locations in closed user group (CUG) comprising participating customers and merchants.
- The e₹-R would be in the form of a digital token that represents legal tender distributed through eight select banks including SBI, ICICI Bank, YES Bank, IDFC First Bank, Bank of Baroda, Union Bank of India, HDFC Bank and Kotak Mahindra Bank.
- Users will be able to transact with e₹-R through a digital wallet offered by the participating banks and stored on mobile phones / devices.
- Transactions can be both Person to Person (P2P) and Person to Merchant (P2M). Payments to merchants can be made using QR codes displayed at merchant locations.
- The objective of the pilot study is to test the robustness of the entire process of digital rupee creation, distribution, and retail usage in real time.

The Concept Note of digital currency by the Central Bank was first made public by the RBI in its Press Release on October 7, 2022. The Press release contained the objectives, choices, benefits, and risks of issuing a CBDC in India as well as the rationale of the Central Bank to introduce CBDC. A few salient points of the CBDC are provided below:

- There are two models envisaged for issuance and management of CBDCs:
  a) Direct model (Single Tier model) wherein central bank is responsible for managing all aspects of the system, including issuance, account-keeping, and transaction verification; and

RBI Notifications

b) Indirect model (Two-Tier model) wherein central bank handles wholesale payments to intermediaries and any claim by consumers is managed by the intermediaries.

- CBDC is further classified into two types:

a) Retail CBDC being electronic version of cash potentially available for use by private sector, non-financial consumers, and businesses, which shall be "token based" consisting of bearer instruments like banknotes; and

b) Wholesale CBDC for restrictive access to select financial institutions and intended for settlement of interbank transfers, which shall be "account based" maintaining record of balances and transactions.

SEBI Notifications

Transfer of Dividend and Redemption proceeds to unitholders of Mutual Funds

SEBI/HO/IMD/IMD-I DOF2/P/CIR/2022/161 dated November 25, 2022

With the amendment to Regulation 53 of SEBI (Mutual Funds) Regulations, 1996, Mutual Fund and Asset Management Company (AMC) shall have to transfer dividend or redemption / repurchase proceeds as per the revised timelines:

Sr. No.	Nature of event	Timeline for event (Revised)
Transfer of Dividend Payments		
1	Record date for payment of dividend	Two (2) working days from issue of public notice.
2	Payment of dividend	Seven (7) working days from the record date.
Transfer of Redemption or Repurchase Proceeds		
1	Transfer of redemption / repurchase proceeds	Three (3) working days from the date of redemption /
2	Transfer of redemption / repurchase proceeds, where schemes investing at least 80% of total assets in permissible overseas investments	Five (5) working days from the date of redemption / repurchase.

Penalty for delay in transfer of redemption / repurchase proceeds or dividend

AMCs shall pay interest at 15% p.a. along with redemption / repurchase proceeds or dividend for any delay beyond the prescribed period.

Limits for investment by Mutual Fund Schemes in debt and money market instruments

SEBI/HO/IMD/IMD-1 DOF2/P/CIR/2022/164 dated November 29, 2022

According to Regulation 44(1) read with clause 1 of VII schedule of SEBI (Mutual Funds) Regulations, 1996, restrictions have been imposed on any mutual fund scheme to invest in debt and money market instruments issued by the single issuer exceeding the following limits

Sr. No.	Credit Rating of debt and money market securities	Investment limits*
1	AAA	10% of NAV
2	AA	8% of NAV
3	A	6% of NAV

** The aforesaid limits may be increased by another 2% of the NAV subject to prior approval of Board of Trustees and Board of Directors of Asset Management Company but within the overall limit of 12% of NAV.*

SEBI Notifications

Applicability:

with immediate effect for schemes launched on or after the date of the circular. Existing schemes are exempt till the maturity of the underlying debt and money market securities.

Inclusion of Equity Exchange Traded Funds as eligible securities under Margin Trading Facility

SEBI/HO/MRD/MRD-PoD-3/P/CIR/2022/166 dated November 30, 2022

In June 2017, SEBI had issued framework for Margin Trading Facility (MTF) wherein Equity Shares ("Group I Security") were eligible for MTF.

On the recommendation from Secondary Market Advisory Committee (SMAC) given the emergence of Exchange Traded Funds (ETFs) as a popular investment vehicle, units of Equity ETFs ("Group I security") too shall also be eligible as a form of security and collateral for MTF.

Foreign Investment in Alternative Investment Funds (AIFs)

SEBI/HO/AFD-1/PoD/P/CIR/2022/171 dated December 09, 2022

AIF may raise funds from Indian, foreign or non-resident Indian investors by way of issue of units in terms of Regulation 10(a) of SEBI (Alternative Investment Funds) Regulations, 2012 ('AIF Regulations'). On the subject of foreign investment in AIFs, the following guidelines have been prescribed:

1. Foreign investor shall be a resident of the country whose securities market regulator is a signatory to the International Organization of Securities Commission's Multilateral Memorandum of Understanding or a signatory to the bilateral Memorandum of Understanding with SEBI.
2. Investor being Government or Government related investor (*who is not a resident of country specified in Pt. 1 above*), should be resident of country approved by the Indian Government.
3. The investor, or its underlying investors contributing twenty-five percent (25%) or more in the corpus of the investor does not belong to person(s) mentioned in Sanctions List notified by the United Nations Security Council and is **not a resident in the country being identified by Financial Action Task Force (FATF) as**:
   - a jurisdiction having strategic Anti-Money Laundering (AML) or Combating the Financing of Terrorism (CFT) deficiencies; or
   - a jurisdiction that has not made adequate progress in addressing the deficiencies or has not committed to an action plan developed with the Financial Action Task Force (FATF) to address the deficiencies.

Applicability:

The circular shall come into force with immediate effect.

Contributed by

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Back

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Abbreviations

Back

Abbreviation	Meaning
AAR	Authority of Advance Ruling
AAAR	Appellate Authority of Advance Ruling
AAC	Annual Activity Certificate
AD Bank	Authorized Dealer Bank
AE	Associated Enterprise
AGM	Annual General Meeting
AIR	Annual Information Return
ALP	Arm's length price
AMT	Alternate Minimum Tax
AO	Assessing Officer
AOP	Association of Person
APA	Advance Pricing Arrangements
AS	Accounting Standards
ASBA	Applications Supported by Blocked Amount
AY	Assessment Year
BOI	Body of Individuals
BRC/FIRC	Bank Realisation Certificate / Foreign Inward Remittance Certificate
CBDT	Central Board of Direct Tax
CBIC	Central Board of Indirect Taxes and Customs
CCA	Cost Contribution Arrangements
CCR	Cenvat Credit Rules, 2004

Abbreviation	Meaning
CESTAT	Central Excise and Service Tax Appellate Tribunal
CGST Act	Central Goods and Service tax Act, 2017
CIT(A)	Commissioner of Income Tax (Appeal)
COO	Certificate of Origin
Companies Act	The Companies Act, 2013
CPSE	Central Public Sector Enterprise
CSR	Corporate Social Responsibility
CTA	Covered Tax Agreement
CUP	Comparable Uncontrolled Price Method
Customs Act	The Customs Act, 1962
DFIA	Duty Free Import Authorization
DFTP	Duty Free Tariff Preference
DGFT	Directorate General of Foreign Trade
DPIIT	Department of Promotion of Investment and Internal Trade
DRI	Directorate of Revenue Intelligence
DTAA	Double Tax Avoidance Agreement
ECB	External Commercial Borrowing
ECL	Electronic Credit Ledger
EGM	Extra-ordinary General Meeting

Abbreviation	Meaning
FEMA	Foreign Exchange Management Act, 1999
FII	Foreign Institutional Investor
FIFP	Foreign Investment Facilitation Portal
FIRMS	Foreign Investment Reporting and Management System
FLAIR	Foreign Liabilities and Assets Information Reporting
FPI	Foreign Portfolio Investor
FOCC	Foreign Owned and Controlled Company
FTC	Foreign Tax Credit
FTP	Foreign Trade Policy 2015-20
FTS	Fees for Technical Service
FY	Financial Year
GAAR	General Anti-Avoidance Rules
GDR	Global Depository Receipts
GOI	Government of India
GST	Goods and Service Tax
GSTN	Goods and Services Tax Network
GVAT Act	Gujarat VAT Act, 2006
HC	High Court
HSN	Harmonized System of Nomenclature
IBC	Insolvency and Bankruptcy Code, 2016

Abbreviations

Back

Abbreviation	Meaning
ICDS	Income Computation and Disclosure Standards
ICDR	Issue of Capital and Disclosure Requirements
IEC	Import Export Code
IGST	Integrated Goods and Services Tax
IRDA	Insurance Regulatory and Development Authority
ISD	Input Service Distributor
ITA	Income Tax Act, 1961
ITC	Input Tax Credit
ITR	Income Tax Return
IT Rules	Income Tax Rules, 1962
ITAT	Income Tax Appellate Tribunal
ITR	Income Tax Return
ITSC	Income Tax Settlement Commission
JV	Joint Venture
LEO	Let Export Order
LIBOR	London Inter Bank Offered Rate
LLP	Limited Liability Partnership
LO	Liaison Office
LODR	Listing Obligations and Disclosure Requirements
LTA	Leave Travel Allowance
LTC	Lower TDS Certificate
LTCG	Long term capital gain
MAT	Minimum Alternate Tax
MCA	Ministry of Corporate Affairs
MeitY	Ministry of Electronics and Information Technology
MSF	Marginal Standing Facility
MSME	Micro, Small and Medium Enterprises
NCB	No claim Bonus
OECD	The Organization for Economic Co-operation and Development
OM	Other Methods prescribed by CBDT
PAN	Permanent Account Number
PE	Permanent establishment
PPT	Principle Purpose Test
PSM	Profit Split Method
PY	Previous Year
RBI	Reserve Bank of India
RCM	Reverse Charge Mechanism
RMS	Risk Management System
ROR	Resident Ordinary Resident
ROSCTL	Rebate of State & Central Taxes and Levies
RoDTEP	Remission of Duties and Taxes on Exported Products
RPM	Resale Price Method
SC	Supreme Court of India
SCN	Show Cause Notice
SDS	Step Down Subsidiary
SE	Secondary adjustments
SEBI	Securities Exchange Board of India
SEP	Significant economic presence
SEZ	Special Economic Zone
SFT	Specified Financial statement
SION	Standard Input Output Norms
SST	Security Transaction Tax
ST	Securitization Trust
STCG	Short term capital gain
SVLDRS	Sabka Vishwas (Legacy Dispute Resolution Scheme) 2019
TCS	Tax collected at source
TDS	Tax Deducted at Source
TNMM	Transaction Net Margin Method
TP	Transfer pricing
TPO	Transfer Pricing Officer
TPR	Transfer Pricing Report
TRO	Tax Recovery Officer
WHT	Withholding Tax
WOS	Wholly Owned Subsidiary