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kcm Insight

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Dear Reader,

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

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

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Faceless E-assessment - consequential change of jurisdictions of tax officers

Press Release dated August 4, 2020 and Notification No. 60 to 66 of 2020 dated August 13,2020 and Circular No. 173 of 2020 dated August 14, 2020

Earlier the CBDT notified amendments to existing E-assessment Scheme 2019 and further renamed it as Faceless Assessment Scheme 2019. Now the CBDT has taken following actions in respect of implementing the Faceless Assessment Scheme 2019.

- Jurisdiction of Pr. CCIT, Chief CIT and Chief CIT (TDS) across all jurisdictions in India have been discussed in Notification No. 62/2020 dated August 13,2020.
- Jurisdiction of Pr. CIT/CIT has been widened whereby each PCIT/CIT will have jurisdiction over more than one circle and Range. For example, PCIT/CIT, Ahmedabad-1 will now have consolidated charge of PCIT/CIT – 2, PCIT/CIT -5 and PCIT/CIT – 6. (Notification No. 63/2020 dated August 13,2020)
- To facilitate the conduct of Faceless Assessment Scheme, jurisdiction of Pr. CCIT (NeAC), CIT (NeAC), Joint/Additional CIT (NeAC), Assistant/Deputy CIT (NeAC), Income Tax Officer (NeAC) (HQ) is defined by the CBDT in Notification No.64/2020 dated August 13, 2020.
- Charge of CCIT, PCIT, Additional/Joint CIT, Assistant//Deputy CIT, ITO/ITO (HQ) of ReACs and other e-assessment centres such as Assessment Unit (AU), Verification Unit (VU), Technical Unit (TU) and Review Unit (RU) is defined in Notification No. 65/2020 dated August 13,2020.
- Pr CIT (Regional e-assessment Centre) (VU) has been authorized to act as a Prescribed Authority and issue order for exercise of powers and performance of functions by Additional/Joint CIT (ReAC) (VU). Such Additional/Joint CIT will issue order for exercising powers by Deputy/Assistant CIT or Income Tax Officer of (ReAC) (VU) (Notification No. 66/2020 dated August 13,2020)

Complete process involved under the "Faceless Assessment scheme" and scope of officer outside NeAC is discussed in *KCM Flash published on 20th August 2020 and can be accessed at our LinkedIn page*.

Refund of charges collected on E-transactions by Banks

Circular No. 16/2020 dated August 30, 2020

In pursuant to introduction of section 269SU, every person carrying on business and turnover exceeding specified monetary limit is required to afford additional facilities for collection of funds via electronic modes such as BHIM UPI, BHIP UPI QR Code or Debit card powered by Rupay. In view of this mandatory requirements, CBDT has advised all Banks to immediately refund the charges collected from customers on transactions carried out through electronic modes such as BHIM UPI, BHIP UPI QR Code or Debit card powered by Rupay prescribed u/s.269SU on or after 1st January 2020.

Case Laws

Coverage

Intimation, being proof of processing of return, does not tantamount to examination of tax issue

AWP Assistance (India) Pvt. Ltd in ITA No. 5128 of 2018 dated August 7, 2020, Delhi, ITAT

The Taxpayers has received income in advance from its customers in AY 2015-16. The customers also deducted TDS on such advance payment in AY 2015-16. While filing of ITR, the Taxpayer has not claimed credit of such TDS as the income was not accrued. Further such credit has been carried forward in ITR for claiming in future.

In AY 2016-17, the Taxpayer offered such advance to tax and claimed the TDS which was carried forward in ITR of AY 2015-16. However, the Centralised Processing Unit (CPC), while processing the return u/s 143(1) of the ITA for AY 2016-17 has not granted the claim of credit of such TDS. The Taxpayer on realising this mistake, filed belated appeal before the CIT(A). The CIT(A) refused to condone the delay on the ground that reasons stated by the Taxpayer does not constitute sufficient cause for condoning the delay.

Before the ITAT, the Taxpayer plead for admitting the appeal belatedly and further contended that denial of proportionate TDS credit pertaining to AY 2016-17 is devoid of the provision of section 199 of the ITA read with Rue 37BA of the IT Rules. ITAT has condoned the delay on the ground that there is no malafide on the part of the Taxpayer for delay in filing of appeal. The ITAT admitted the belated appeal on the ground that substantial justice should take precedence over technicalities.

While deciding issue on merit, the ITAT stated that an intimation u/s 143(1) of the ITA is only a matter of information generated in a pro forma by the CPC. There is no reason given by the CPC while disallowing the credit of such TDS. An intimation is not in the form of a speaking order that speaks basis for making any disallowance or adjustment to income. ITAT therefore held that an intimation passed by CPC u/s 143(1) suffers legal irregularity and accordingly set aside the said order and directed the AO to pass speaking order with reason.

The decision of ITAT reiterates the settled principle that scope of processing ITR u/s 143(1) by CPC is far inferior to the process of conducting scrutiny assessment. Thus, any disallowance of claim u/s 143(1) without substantiating reasons for such action is not legally sustainable.

Capital reserve created on amalgamation shall not be characterised as Revaluation reserve for MAT purpose

Hespera Realty Pvt. Ltd in ITA No. 764 of 2020 dated July 27, 2020, Delhi, ITAT

Pursuant to the scheme of amalgamation, five group companies were amalgamated with the Taxpayer. As provided under the scheme, such amalgamation was accounted in books of the Taxpayer under Purchase Method as per AS-14 Accounting for Amalgamation. Accordingly, the Taxpayer accounted the value of assets & liabilities acquired at fair value and the difference was credited to Capital Reserve in books of account. One of the assets recorded at fair value include shares of one listed company. Subsequently, the Taxpayer sold the shares of such listed company and claimed long term

Questions?

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capital gain arising therefrom as exempted u/s 10(38) of ITA. In books of account, the difference between sales consideration and fair value of such shares, accounted in books of account at the time of amalgamation, was accounted as gain from sale of investment. While computing the books profit the Taxpayer has considered such accounting gain as part thereof.

During the assessment proceeding, the AO questioned the commercial rational behind adopting Purchase Method as per AS -14 for accounting purpose. The AO stated that all the entities were actually owned by the one ultimate parent entity and therefore the Taxpayer deliberately adopted such method to artificially inflate the value of assets/investments in books of account. The AO noted that as per clause (j) of explanation to Section 115JB of ITA, any amount standing in revaluation reserve relating to revalued asset on sale therefore is required to be added back while computing book profit The AO accordingly held that scheme of amalgamation was colourable device and accordingly recharacterized the Capital Reserve created at the amalgamation as Revaluation Reserve and made the addition. The CIT(A) also confirmed the action of AO.

Before the ITAT, the Taxpayer contended that the accounting treatment in the books of accounts was strictly in accordance with the binding scheme of amalgamation as approved by the High Court as well as it is in line with the provisions of the Companies Act and mandatory accounting standards. Thus, Book Profit has been rightly computed in accordance with 115JB of the ITA. The Revenue however argued that though the scheme of amalgamation was approved by the Hon'ble High Court, the revenue has the right to look into the taxability of the revenues arise out of such amalgamation. Though the reserve created was treated as Capital Reserve, it is in effect represented revaluation towards upward revision of assets acquired by the Taxpayer. Therefore, balance of Capital Reserve in substance is Revaluation Reserve and therefore, for computation of profits u/s 115JB of ITA, corresponding adjustment made by AO is required to be upheld.

While accepting the submission of the Taxpayer that there is a commercial rational behind such scheme, the ITAT held that a revaluation reserve is created when an enterprise re-value its own assets already acquired and recorded in books at certain values. In contrast, the Taxpayer has not revalued its existing asset but recorded the fair values of various assets and liabilities acquired in pursuance to scheme of amalgamation. It has also noted that AS 13 dealing with 'Accounting for Investments', does not permit revaluation of long-term investments at a value higher than the cost. Thus, the treatment in books of the Taxpayer was in line with provision the Companies Act read with AS14. Accordingly, the reserve created at the stage of amalgamation cannot be recharacterized as revaluation reserve. ITAT also placed reliance on decision of Co-ordinate Bench of Tribunal in the case of Priapus Developers Pvt. Ltd. 176 ITD 223 and deleted the addition.

This decision is in line with the decision of the Apex Court in the case of Apollo Tyres Ltd. v. CIT

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[2002] 122 Taxman 562 wherein it was held that AO cannot disturb the books of account for the purpose of MAT if the same is in compliance with applicable accounting standards.

It is to be noted that companies which are proposing to undertake any restructuring activities should be mindful of the GAAR provisions. CBDT has clarified that GAAR will not apply to a scheme sanctioned by a NCLT provided the tax implications have been explicitly and adequately dealt by NCLT. However, it is worth noting that the Revenue has started taking a proactive approach to object to scheme placed before NCLT where there is as a substantial tax advantage. Further such objection of the Revenue has led to rejection of the scheme of merger if there is no commercial substance in such schemes.

Expenditure incurred for protecting the source income, taxable under the head other income, is allowable as deduction

Anjana Vinayak, ITA No 247 of 2019, Chandigarh ITAT

In this case, the Taxpayer had earned interest income from fixed deposits (FD) and saving bank account. The Taxpayer had also availed loan against FD from the bank in which FD was placed. While filing the ITR, the Taxpayer claimed deduction of interest paid on loan taken under section 57(iii) of the Act from the amount of interest income earned on FD.

During the assessment, the Taxpayer contended that she has made FD at 9.15% whereas loan was availed at 10.15%. The Taxpayer explained that if she had withdrawn FD prematurely than as per the norms of bank, she would not only loose the source of income but will also pay penal interest at 1.5%. The Taxpayer accordingly contended that the interest paid on loan was incurred for the purpose of protecting the source of income and therefore it is fully allowable deduction.

The AO however did not agree with the view of the Taxpayer and stated that interest paid on loan taken against FDs cannot be said to have been incurred wholly and exclusively for the purpose of earning interest income of FD. Therefore, AO disallowed the claim of deduction u/s 57(iii) of the ITA. The AO in this regard placed reliance on the decision of decision of the Apex Court in the case of CIT v VP Gopinathan (Civil Appeal Nos. 6506 and 6507 of 1997). The CIT(A) also confirmed the action of the AO.

Before ITAT, the Taxpayer contended that to avoid pre-mature withdrawal of FD, she had availed loan against FDs in order to retain its source of earning income from FD. The Taxpayer placed reliance on decision of ITAT Agra in the case of Raj Kumari Aggarwal (ITA No. 176/Agra/2013).

The ITAT noted that while computing income from other source, as per section 57(iii) of the ITA, any expenditure laid out or expended wholly and exclusively for the purpose of making or earning such income is allowable as deduction. After going through the peculiar facts of the case and decisions of Raj Kumari Aggarwal (Supra), ITAT held that the term "*wholly and exclusively for earning income*" for the purpose of section 57(iii) does not necessarily confer to those expenditures which are incurred directly for earning such income but also include all such expenses incurred to

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protect the source of income. The ITAT distinguished the decision of Apex court in case of V P Gopinathan (Supra) relied upon by lower authorities by holding that in such case in view of different bank involved, there is no nexus of earning of interest income and payment of interest on loan.

The Hon'ble SC in case of Rajendra Prasad Moody (Tax Reference Case No. 1 and 2 of 1971) explained the scope of section 57(iii) and held that for the purpose of section 57(iii), the expenditure must be laid out or expended wholly and exclusively for the purpose of earning or making income and it does not require that purpose must be fulfilled to qualify for deduction. Following the said decision and current ruling of ITAT, one can argue that wider interpretation can be given to section 57(iii) in case of having sufficient and visible nexus of earning of income and incurrence of expenditure.

Provision of ITA prevails over the provision of Accounting Standard

Cornerstone Property Investment (P) Ltd ITA No 1082 and 1083 of 2019, Bengaluru, ITAT

The ITAT in peculiar facts of the case has an occasion to decide whether for the purpose of Income Tax, the treatment of any particular transaction in accordance with AS will have precedent over the provision of ITA or not.

The Taxpayer is a real estate company. It has taken several loans for acquiring the land for its real estate business for the purpose of construction project lasting for more than 12 months. The assessee has debited interest expenditure on such loan to profit and loss account and claimed deduction of such interest expenditure.

During the scrutiny assessment, the AO noted that as per AS 16 on Borrowing Cost, interest on borrowed funds shall be required to be capitalized if the borrowing is related to acquisition of qualifying asset. As per AS- 16, an inventory is a qualifying asset if it requires 12 months or more to bring them to a saleable condition. The AO accordingly held that treatment of interest paid on borrowed funds given by the Taxpayer in ITR was not in conformity with AS 2 and AS 16 and accordingly he disallowed the interest expense of claimed by taxpayer in ITR.

The CIT (A) however deleted the disallowance of interest made by AO in view of section 36(1)(iii) of the ITA which provides the deduction of interest expenditure if it is taken for the purpose of business.

Before the ITAT, the Revenue relied upon the findings of AO and contended that disallowance of interest made by AO should be upheld. The Taxpayer argued that in terms of section 36(1)(iii) of the ITA, interest paid on borrowed funds utilized for its business activity is duly allowable deduction. The Taxpayer in this regard placed reliance on the decision of ITAT, Delhi in case of DLF Ltd Write Petition ITA No. 2677 of 2011.

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The ITAT while upholding the order of CIT(A) held that interest paid on borrowed funds utilized for acquisition of lands which are held as inventory for its real estate business is revenue expenditures u/s 36(1)(iii) of the ITA in view of the decision of DLF Ltd. (supra). The ITAT also clarified that proviso to section 36(1)(iii), which restricts the allowability of interest until the asset is put to use, is applicable only in respect of acquisition of capital asset and not asset held in form of inventory. The ITAT also explained that under the ITA treatment given in books as per applicable AS is not decisive and in case of any conflicts between the provision of the ITA and AS issued by the ICAI, the provision of ITA shall always prevail.

It is important to note that with effect from AY 2017-18, ICDS is to be follow while computing income from business and profession and income from other sources. Such ICDS requires necessary adjustment, if applicable, to accounting profit to arrive taxable income. One of the ICDS IX on Borrowing Cost *inter alia* requires capitalisation of interest expense to inventory if it takes more than 12 months to bring such inventory in saleable condition. Section 145A of ITA has also been amended to make valuation of inventory under ITA as per ICDS. Considering such provision, any borrowing specifically made for acquisition of such nature of inventory is required to be added to the cost of thereof post applicability of ICDS. It is therefore interesting to analyse the provision of section 36(1)(iii) on standalone basis, post such amendments in the ITA, to claim deduction of such interest cost on the basis of judicial view that proviso to section 36(1)(iii) is applicable to only capital asset.

Important Updates

UN Committee proposes new Article for taxation of Automated Digital Services

The UN Committee of Experts on International Cooperation in Tax Matters has released a proposed UN model tax treaty article (Article 12B) that would grant additional taxing rights to source countries where an automated digital services provider's customers are located.

Automated digital services are defined as payments for services provided on the internet or an electronic network requiring minimal human involvement from the service provider.

The new article provides for two options to the companies to pay tax to source countries for automated digital services viz. – on gross-basis, at a rate to be agreed upon by the two treaty parties or on net income basis. The net income approach would apportion 30% of a company's net income from automated digital services to countries where the revenues from those sales arise.

The proposed Article 12B does not require any threshold, such as a PE, fixed base, or minimum period of presence in a source country as a condition for the taxation of income from automated digital services.

While OECD and UN Committees are working on the methodologies for taxing the digital economy, the Indian Government had introduced 'Equalisation Levy' provisions for taxing digital transactions, which appears to be an interim measure in absence of any clarity for taxing digital transactions at a global level. Once inclusion of Article 12B in Treaties is discussed and implemented by India with its partner countries, it may eventually make way for "Equalisation Levy".

Singapore and Australian Govt. issues additional COVID-19 guidance on taxation of foreign employee's income

Singapore Tax Authorities have provided relief to the non-resident foreign employees who were on short-term business assignments in Singapore and could not leave due to COVID-19. These nationals shall not be taxable in respect of their employment income if their period of extended stay is not more than 60 days and the work done during their stay in Singapore is not connected to business assignments in Singapore.

Similarly, the Australian Tax Office has also published a guidance on residency and source of incomes of individuals amid COVID-19. The income of non-resident employees currently staying in Australia shall not be taxed in Australia provided the foreign national usually permanently resides overseas and intends to return there as soon as possible. However, for Australian residents temporarily working overseas due to COVID-19, the tax obligations would not change. In Indian context, while CBDT has vide Circular dated 08 May 2020 provided relaxations for residency rule for FY 2019-20 and vide Press Release dated 09 May 2020, announced a similar roll out of a Circular for FY 2020-21 (circular awaited), it is worth noting that the relaxation is purely for the purpose of determining residency and does not provide for relaxation from taxation of certain income. It would be important for Government to roll out additional relaxations in line with global practice.

Important Rulings - India

ITAT refers the matter to Special bench for analyzing the term 'paid' in DTAA

Ampacet Cyprus Ltd, ITA No. 1518 of 2016 & 560 of 2017, Mumbai ITAT

In the given caselaw, the Taxpayer had not paid interest on the loan borrowed from its holding company on account of moratorium period. However, the TPO made adjustment towards notional interest considering intra-AE relations. The Taxpayer argued that since no interest was 'paid' by him as contemplated in Article 11 (Interest) of India-Cyprus DTAA, the interest income could not be charged to tax.

After analyzing the facts of the case, the ITAT observed that the term 'paid' has not been defined in DTAA. The ITAT believed that for the meaning of the term 'paid' recourse could be taken to section 43(2) of the ITA as Article 3(2) of the DTAA permits referring the meaning of undefined term from the domestic law. The ITAT held that earlier decisions as relied upon by the Taxpayer which provided for taxability of dividend, royalty, interest etc. on receipt basis, were passed in ignorance of law as rendered by SC in the case of Standard Triumph Motor wherein the SC had held that credit entry in the taxpayer's book would amount to receipt for the recipient.

The ITAT was of the view that the above ground could be answered only after considering the applicability of the above-mentioned domestic law for the meaning to the term 'paid'. Accordingly, the Bench has made a reference to the President, ITAT for constitution of the Special Bench to adjudicate the ground of appeal raised by the Taxpayer.

Tax treaties use the word 'paid' for determining the taxability of various income like dividend, interest, royalty and FTS. However, the term 'paid' has not been defined in the tax treaties and thus the matter is always litigative when the expression 'paid' is to be interpreted.

The term 'paid' has a very wide impact on taxability of the income and thus it is important that a settled position is taken for its interpretation. The past rulings dealing with the term 'paid' have not examined the applicability of the Article 3(2) of the DTAA at length. Now, it would be interesting to wait for ruling of the Special Bench as the ruling shall also impact the validity of the earlier decisions.

Reimbursement of salary of seconded employees not taxable as FTS

BOEING India Pvt. Ltd., ITA No. 9765 of 2019, Delhi ITAT

The Taxpayer has made reimbursement of salary cost of the seconded employees to its AEs outside India. The Taxpayer has considered the payment as salary and accordingly deducted tax under section 192 of the Act. Accordingly, at the time of remittance of money it has not deducted any tax treating the payment as reimbursement of salary, not chargeable to tax in India.

The Hon'ble ITAT observed that the seconded employees were in the employment of the Taxpayer and the AEs were only paying salary in their home country on the behalf of the Taxpayer and AEs had no control over the employees. Thus, ITAT found that payment made by the Taxpayer to its AEs were purely reimbursements and cannot be treated as FTS.

Important Rulings - India

The Hon'ble ITAT while arriving at the conclusion, relied on the ruling of its co-ordinate bench in the case of AT&T Communication and distinguished the decision of Delhi HC in case of Centrica. It stressed on the facts that the Taxpayer was the real and economic employer of the seconded employees, employees were under the control of the Taxpayer without any connection to the AEs and also that the Taxpayer had appropriately withheld and deposited taxes u/s 192 of the Act.

The matter of reimbursement of salary cost of the seconded employees has remained a litigative matter as the rulings entirely depend upon the facts of each case. There are plethora of judgements wherein Courts/ Tribunals have either ruled in favor of the Taxpayer considering the payments as reimbursement or have held that the payment towards seconded employees were chargeable as FTS as was done in the case of Centrica. In the present case, the ITAT has held that the payment made by the Taxpayer is reimbursement in nature, not liable to tax in India.

Testing and Certification charges falls under the purview of FTS

Havells India Ltd., ITA No. 6073 of 2010, Delhi Tribunal

In the present case, the Taxpayer has availed laboratory services for testing and certifying the amount, colour, quality and spatial distribution of light emitted from lamps, LEDs etc. from multiple entities in China and Germany and claimed that since the services were rendered outside India and utilized for the export business outside India, the fees cannot be charged to tax in India u/s 9(1)(vii) of the Act as well as under Article 12(4) of India-China DTAA.

After hearing the contentions of both the sides, the ITAT held the following in context of the arguments put forth by the Taxpayer for non-taxability:

- No human intervention - ITAT placed reliance on the decision of SC in the case of Kotak Securities Ltd. wherein SC had held that even if a process is fully automated and there is no human intervention, still the particular activity or technical analysis may fall into the definition of 'technical services'.
- Standard facility - ITAT held that the various testing services provided to the Taxpayer were with respect to specific country, specific product and specific manufactured lot of the taxpayer which may or may not be as per the standard specified in that country and thus the services cannot be said to be a standard services.
- Non-discrimination - ITAT denied to invoke the article on non-discrimination to restrict the disallowance to 30% as provided for in section 40(a)(ia) of ITA by holding that there was no discrimination against the non-resident payee and that it was the 'payer' to whom the disallowance applied.

The ITAT further rejected that contention of the Taxpayer that as per Article 12(4) of the India-China DTAA, the services must be rendered in India for it to be called as FTS as the Article says that 'provision of services' must be in India.

Important Rulings - India

Important Rulings - Global

The Tribunal relied on the ruling of its co-ordinate bench in the case of Ashapura Minichem wherein it was held that the expression 'provision of services' as used in India-China DTAA is much wider in scope as compared to the expression 'provision for rendering of services' as used in Pakistan-China DTAA. The expression 'provision of service' shall also include the services even if the services are not rendered in India however are utilised in India. The ITAT held that since the services were availed and utilised in India, the said services fall under FTS and hence liable to tax.

The above ruling rest on the legal premises that 'place of performance' test is irrelevant for determining the taxability of FTS. The ITAT has relied on the decision of its co-ordinate bench and held that 'Provision of Services' does not necessary mean 'rendering of services' in a specific country. In the context of India-China DTAA, while Taxpayers have been trying to rely upon the peculiar language used in the Article on Fees for Technical Services, Benches of ITAT have now consistently ruled against such a plea.

Beneficial ownership: A must for withholding of tax exemption on dividend

French Supreme Administrative Court (Conseil d'Etat), Case no. 423810

French Supreme Administrative Court (Conseil d'Etat) issued its decision regarding eligibility for the dividend withholding tax exemption under the Parent-Subsidiary Directive (PSD). PSD is a mechanism similar to relaxation under Article 10 of the OECD model convention whereby payments of profits by the subsidiary to the foreign parent company are taxed less heavily to avoid recurrent taxation and to facilitate international investment.

PSD, under the French law, prescribes that the withholding tax exemption applies if the EU recipient is the beneficial owner of the dividends. However this benefit is not extended if the EU recipient is directly or indirectly controlled by non-EU residents, unless the payer substantiates that the structure was not put in place to benefit from the withholding tax exemption under the directive.

The decision of the French SC pertained to a French subsidiary (FCo) of a Luxembourg entity (LCo). FCo distributed dividends to LCo without withholding tax on the distribution based on the PSD exemption. The French tax authorities assessed FCo for failure to withhold tax on the grounds that the distribution was made to a Swiss bank account which was not held by LCo and thus the beneficial owner of the dividends and, consequently, the distribution did not qualify for the PSD exemption.

In its decision, the Supreme Court has upheld the position of the tax authorities and ruled that the beneficial ownership condition is a lawful and valid condition for eligibility to the withholding tax exemption under the directive.

The decision of the Supreme Court appears to be in conformity with a similar decision of the European Court of Justice of 26 February 2019 (so-called Danish cases decision, C-117/16). Parallels can also be drawn to judgement of other foreign courts which, while interpreting the tax treaty, have also held that beneficial ownership is a pre-requisite for claiming the treaty benefits.

(Judgment of the Poland Provincial Administrative Court in Szczecin [Ref. No. I SA / Sz 944/19] - KCM Insight July 2020)

Important Rulings - Global

Swiss Supreme Court refuses refund of taxes withheld on dividend by invoking General anti abuse provisions

Swiss Supreme Court, decision 2C_354 /2018

Considering that the shares of a Swiss Company were transferred to an Irish Company without any economic substance coupled with the fact that the Irish Company did not have its own employees or funds and the investments in the Swiss Company were made from funds borrowed by the Irish Company from its other related parties, the Swiss Federal Supreme Court denied the benefit of Article 15 of Swiss-EU Agreement to the Irish Company and accordingly denied refund of the taxes withheld in Switzerland. In arriving at the conclusion, the Swiss Federal Supreme Court also relied on the decision of the CJEU in the Danish cases to establish that art. 15 of the Swiss-EU Agreement was subject to a prohibition of abuse of rights.

It is worth nothing that jurisdictions like Switzerland which are otherwise considered tax-friendly are also evolving and have started adopting a look-through approach for determining taxability or otherwise of transactions. This judgment adds to the series of judgments by Apex Courts from across the globe on the aspect of beneficial ownership and substance over form while dealing with taxability of dividends pursuant to DTAA. Considering that India has recently moved from Dividend Distribution Tax to tax on dividends in the hands of shareholders, applicability of DTAA and satisfaction of the requirement of "beneficial ownership" will need to be evaluated in detail by Taxpayers from an India tax perspective.

Important Rulings

Reference to TPO for bad in law considering section 92BA(i) 'ommission'

Shree Shai Smelters (I) Ltd., IT Appeal No. 228 of 2019 (Kolkata ITAT)

Shivani Ispat and Rolling Mill (P) Ltd., IT Appeal No. 227 of 2019 (Gauhati ITAT)

As per the provisions of Section – 92BA(i), all transactions with domestic related parties as defined under section 40A(2)(b) were subject to Transfer Pricing Regulations. Accordingly, all such transactions were to be reported in Form – 3CEB since AY 2013-14. Subsequently, vide Finance Act 2017, Section – 92BA(i) is omitted w.e.f. AY 2017-18.

In present cases the Taxpayer reported all transactions with related parties in Form – 3CEB for the AY 2014-15 as Specified Domestic Transactions (SDT) as required by then prevailing provisions of u/s 92BA(i). The AO referred the case to TPO u/s 92CA(3) of ITA to determine the ALP of such SDT.

The ITAT relied on the decision of Kolkata ITAT in the case of Raipur Steel Casting India (P) Ltd. and Srinath Ji Furnishing Pvt. Ltd. in ITA No. 895 & 1035/Kol/2019, for AY 2014-15 wherein the Kolkata ITAT held that effect of omission of clause (i) of section 92BA of ITA w.e.f. 01-04-2017 had the effect of it being omitted from its inception. Therefore, reference to TPO is bad in law.

The Kolkata ITAT observed that the clause (i) of section 92BA is unconditionally omitted without a saving clause in favour of pending proceedings. Therefore, it means that the above provision was not in existence or never existed in the statute book. The Kolkata ITAT has taken guidance from the judgements of Hon'ble Supreme Court in the matters of Rayala Corporation (P) Ltd (1970 AIR 494) and Kolhapur Canesugar Works Ltd (2000), Civil Appeal No.2132of 1994 wherein it has defined the terminology "omission" and "repeal" and held that an "omission" of a provision is different from a "repeal" and section 6 of the General Clauses Act applies to a repealed law and not to omission. Based on such judgement of Hon'ble Supreme Court, The ITAT, in both the cases, notes that any penalty/prosecution under clause (i) of section 92BA may be punished before its "omission" that is, before 01.04.2017 and as soon as ITA omits any proceedings which are being taken against a person will ipso facto terminate.

The judgements of Apex Court in Rayala Corporation and Kolhapur Canesugar were in the context of omission of provisions under Defence of India Rules and Central Excise Rules respectively. Applying interpretation of Apex Court to the omission of Section – 92BA(i) is contentious and subject to test whether application of these judgements for interpreting omission of Section – 92BA(i) is in the same context in which Apex Court held. Accordingly, while ITATs in both the decisions held the acion of AO in referring transactions covered by 92BA(i) to TPO as invalid and bad in Law, it may have far reaching impact on pending cases at various levels and would highly be contentious.

Important Rulings

Adjustment to ALP without applying methods defined u/s 92C is not sustainable in law

The Boston Consulting Group (India) Pvt. Ltd., IT Appeal No. 7600 of 2012 (Mumbai ITAT)

The Taxpayer is a wholly owned subsidiary of BCG Holding Corporation, USA ('BCG Hold Co.'). The Taxpayer is mainly into strategy consulting. It is also engaged in the business of rendering strategy consulting services such as business strategy, marketing and sales strategy, portfolio strategy etc. The international transactions pertain to payment of License Fees for Time and Billing Software, Regional and Worldwide Training cost allocation, and Information Technology Cost Allocation. The Taxpayer determined ALP applying CUP Method and reported such transactions in Form – 3CEB while filing return of income.

The Taxpayer paid Rs. 1.62 crores for Time and Billing Software and Rs. 3.73 as Training cost. TPO considered ALP as Nil for both the transactions. TPO was of the belief that shelf life of software have been expired and therefore no such cost is required to be paid by the Taxpayer. Further, TPO also considered ALP of training cost to be Nil claiming that the Taxpayer failed to pass service rendition test.

Further, The Taxpayer has also paid Rs. 2.60 crores for IT Services / WAN services. TPO considered that software used by the Taxpayer are common and only Rs. 50,00,000 shall be paid had such transactions was entered into between two independent parties. TPO did not mention as to how such value of Rs. 50 lacs was determined as Arm's Length price and applying which method.

ITAT held that the action of TPO is invalid and bad in law as TPO has not followed any of the methods prescribed u/s 92C of ITA.

The ITAT has relied on the various decisions of the jurisdictional High Court of Bombay wherein the High Court has held that the jurisdiction of the TPO is specific and limited i.e. to determine the ALP of an international transaction in terms of Chapter X of ITA r.w. Rule 10A to 10E of the Income Tax Rules. The High Court has also held that by not adopting one of the mandatorily prescribed methods to determine the ALP of the international transaction, make the entire transfer pricing adjustment unsustainable in law.

Accordingly, by applying the ratio laid down by the jurisdictional High Court of Bombay in various cases, the ITAT deleted the TP adjustment made by TPO without the application of any of the methods prescribed u/s 92C of ITA.

Provision for Impairment of assets is non-operating item

M/s Imsofer Manufacturing India Pvt Ltd IT Appeal No. 5158 of 2015 & 1049 of 2016 (Delhi ITAT)

The Taxpayer is wholly owned subsidiary of Ferrero S.p.A with the ultimate holding company being Ferrero International SA. The Taxpayer is engaged in the business of manufacturing chocolate and other confectionery products. The Taxpayer had purchased machinery for the production of poly packs of tic tac and these machines were lying under capital work in progress as on March 31, 2010 as the company

Important Rulings

decided not to start the business of poly packed tic tac, the value of machinery reduce by scrap value is considered as provisions for impairment of asset. Since the provision was related to impairment of asset, the Taxpayer considered the same as non-operating expense for the purpose of calculation of operating profit for applying TNMM as the MAM. The TPO considered such provision as operating item and reduced the operating profit of the Taxpayer.

The ITAT held that the machinery purchased by the Taxpayer was lying in Capital Work in Progress and the treatment given by the Taxpayer was in line with the Accounting Standards issued by the ICAI. Further, ITAT held that provision for impairment of assets is not a depreciation charge nor amortisation of fixed assets but is a provision made to the carrying amount of fixed assets which is reversible in nature.

ITAT referred provision of Section – 92(1) of ITA which requires that any income arising from an international transactions / allowance of any expenses shall be computed having regard to arm's length price and held that impairment of asset cannot be related to international transaction. Accordingly, the amount of said provisions is considered to be non-operating for calculating operating profit for application of TNMM.

Company becoming an AE during the year is not a valid 'comparable'

M/s Lonsen Kiri Chemical Industries Ltd IT Appeal No. 1116 of 2015 (Ahmedabad ITAT)

The Taxpayer is engaged in the business of manufacturing of various types of synthetic dyes and is a joint-venture of two companies namely Well Prospering Ltd (Chinese company) and Kiri Dyes and Chemicals Ltd (Indian company) which was entered as on 4th February 2010. The Indian company, Kiri Dyes and Chemicals Ltd, belonged to Dyestar Group of companies. Resultantly, the Dyestar group of companies became AEs of the Taxpayer with effect from February 4, 2010.

The Taxpayer used CUP method for the purpose of benchmarking and considered Dyestar group of companies as one of its comparables and compared the average price of all transactions entered into with it prior to February 4, 2010, for goods exported by the Taxpayer to its AE(s).

The ITAT observed that sub-section (2) of section 92A of ITA provides that a company shall become Associated Enterprise of the other company if at any time during the previous year such company meets criteria specified under the provisions of Section 92A of ITA.

The ITAT further observed that clause (ab) of Rule 10A of the Income Tax Rules also provides that "uncontrolled transaction" means a transaction between enterprises other than associated enterprises, whether resident or non-resident. Accordingly, any transaction undertaken by the Taxpayer with Dyestar Group of companies during the year under consideration shall be deemed to be a 'controlled transaction'.

The Hon'ble Tribunal held that once a comparable company becomes an AE during the year under consideration, then such company cannot be used for the purpose of comparison. It applied the same ratio as applied by it in the

Important Rulings

case of Gemstone Glass Pvt Ltd. [63 taxmann.com 1].

The term 'uncontrolled transaction' is statutorily defined and it cannot be superseded by any other superior logic. Whether the associated enterprise is Resident in India or Outside India, the prices at which transactions are undertaken with such enterprises cannot be taken as comparable uncontrolled prices for the purpose of transfer pricing analysis to determine arm's length price.

Global Asset allocation basis for intra-group services rejected

M/s Jabil Circuit India Pvt Ltd; Appeal No. 7315 of 2012 (Mumbai ITAT)

The Taxpayer is engaged in the business of manufacturing of assembly and customisation of Printed Circuit Boards. The Taxpayer had availed Business Support Services from its AE in USA and accordingly had made payment to its AE for the intra-group services obtained. The Taxpayer had considered 'Asia Pacific asset' as a base for allocation of such service costs which was rejected by the Department and 'global asset' base was applied instead for allocation of Selling, General & Administration (SG&A) expenses recharged by its AE.

The ITAT observed that the costs incurred in form of 'Corporate operations', Global IT manufacturing except 'SG &A' is reaped by group entities around the globe and accordingly these costs have been allocated on the basis of 'global assets'

The ITAT also observed that the Taxpayer had in fact submitted all corroborative evidences substantiating its claim that SG&A expenses were incurred specifically for the benefit of regional entities (Asia Pacific) and did not benefit all other entities across the globe. The Taxpayer submitted all documentary evidences including sample invoices, internal correspondence evidence of receipt of services, financial statement of its AE (Parent), cost allocation working with cost allocation keys, details of allocation method adopted by the AE for allocating such costs along with certificate from AE relating to the allocation keys and method used.

ITAT held in favour of the Taxpayer as the benefit of direct SG&A cost was reaped by the entities in the Asia Pacific Region, whereas as the benefit of the other services which were allocated on the basis of percentage of the Taxpayer's global asset is reaped by the group around the globe.

Amendments in various Ind-AS and its applicability

Coverage

The Ministry of Corporate Affairs (MCA) in consultation with the National Financial Reporting Authority (NFRA), has amended the Companies (Indian Accounting Standards) Rules, 2015 on July 24, 2020 which are summarised as under. These amendments are aimed to keep the Ind-AS converged with International Financial Reporting Standards (IFRS) issued by the International Accounting Standards Board (IASB). The broad descriptions of the amendments are enlisted below:

Ind-AS	Applicable from	Description
Ind-AS 103 – Business Combinations	April 1, 2020	To give a clear understanding as to what constitutes a "business" and its applicability.
- Ind-AS 107 – Financial Instruments: Disclosures - Ind-AS 109 – Financial Instruments	April 1, 2020	- Ind-AS 107 - Disclosure requirements in pursuance of Interest rate benchmark reform (IBOR reform-Phase 1). - Ind-AS 109 – To provide temporary but mandatory relief from specific hedge accounting requirements to address potential effects of the uncertainty arising from IBOR reform – Phase 1.
Ind-AS 116 – Leases	April 1, 2020 (for the financial statements for the year ended March 2020, not approved till July 24, 2020, the date of application will be 1st April,2019	To provide practical expedient for the lessees who have been able to get or expected to get rent concessions from lessors due to Covid-19 for lease payments originally due on or before June 30, 2021. The practical expedient allows the lessees not to consider lease rent concessions as lease modification.
Ind-AS 1 - Presentation of Financial Statements	*April 1, 2020*	To bring in consistency across all the Ind-AS on the explanation of Materiality. Further, it explains which information will be considered "obscured information".
Ind-AS 8 - Accounting Policies, Changes in Accounting Estimates and Errors	April 1, 2020	
Ind-AS 10 - Events after the Reporting Period	April 1, 2020	
Ind-AS 34 – Interim Financial Reporting	April 1, 2020	
Ind-AS 37 - Provisions, Contingent Liabilities and Contingent Assets	April 1, 2020	To require assessing the changes in the disclosure requirements pertaining to restructuring activities.

Amendments in various Ind-AS and its applicability

Ind AS 103 – Business Combinations

The amendment would assist entities in determining whether a particular transaction needs to be accounted as a business combination or as an acquisition of assets. What constitutes a "business" has been amended and now there is more emphasis on the set of activities that is capable of being conducted and managed for the purpose of providing goods or services to customers, generating investment income, or generating other income from ordinary activities. Previously, business included anything that provided return to the investors or owners or members or participants, as a result of inputs and processes associated therewith.

The existence of "output" is not required for integrated set of activities and assets to qualify as a business. However, to be considered a business, the above referred activities and assets must include, at a minimum, an input and a substantive process that together significantly contribute to the ability to create output.

To ease the identification of set of activities and assets as "business" or otherwise, the Standard has now prescribed an optional test (concentration test) to be conducted separately for each transaction or event. If the said test is met, then the acquisition will be considered as an acquisition of asset and not a business combination. If the test is not met, the entity needs to perform further assessment as per guidance given in the amendment.

The crux of this test is that if substantially all of the fair value of the gross assets acquired is concentrated in a single identifiable asset or group of similar identifiable assets, then the test is treated as met. It has also been provided in the amendment as to what is to be included in gross assets, and in single identifiable asset or group or similar identifiable assets.

The amendment contains that determination whether set of activities and assets is a business shall be based on whether integrated set is capable of being conducted and managed as a business **by a market participant.** The amendment further elaborates upon how to assess whether an acquired process is substantive if the acquired set of activities and assets do not have outputs and when they do have outputs.

An acquired set of activities and assets that do not have outputs at the acquisition date is an early-stage entity that has not started generating revenue, for example, a start-up enterprise or a new division of business. Moreover, if an acquired set of activities and assets were generating revenue at the acquisition date, they are considered to have outputs at that date, even if subsequently they will no longer generate revenue from external customers.

Ind AS 107 – Financial Instruments: Disclosures

This amendment covers the changes in the disclosure requirements for hedging relationships to which amendments to Ind AS 109 related to IBOR Phase 1 applies. The amendment has been brought in as a result of potential effects of uncertainty arising from IBOR Phase 1 on an entity.

Now, an entity is required to disclose:

- the significant interest rate benchmarks to which the entity 's hedging relationships are exposed;

Amendments in various Ind-AS and its applicability

- the extent of the risk exposure the entity manages that is directly affected by the interest rate benchmark reform;
- how the entity is managing the process to transition to alternative benchmark rates;
- a description of significant assumptions or judgements the entity made in applying these paragraphs (for example, assumptions or judgements about when the uncertainty arising from interest rate benchmark reform is no longer present with respect to the timing and the amount of the interest rate benchmark-based cash flows); and
- the nominal amount of the hedging instruments in those hedging relationships.

Ind AS 109 – Financial Instruments

Interbank Offer Rates are going to be phased out soon and there will be alternate benchmark rates which will be used and relied upon going forward. The Interbank Offer Rates are currently used as a reference rate for financial market transactions at a global level. Further, the entities refer these rates as benchmark rate for majority of their financial contracts. Therefore, there will be a number of contracts which will have to be modified when alternate benchmark rates would be used. This could trigger a lot of accounting implications and volatility in financial numbers. In order to mitigate this undesired probable consequence to certain extent, the amendment lends temporary, but mandatory exceptions from applying specific hedge accounting requirements to all those hedging relationships that are directly affected by interest rate benchmark reforms- Phase 1.

How does this impact entities?

If these reforms give rise to the uncertainties about-

- the interest rate benchmark (contractually or non-contractually specified) designated as a hedged risk (For e.g. Hedges taken on LIBOR to mitigate the fluctuation); and/or
- the timing or the amount of interest rate benchmark-based cash flows of the hedged item or of the hedging instrument (For e.g. Loan Repayment - interest rates are based on MIBOR),

then the entities shall apply the following amendments from annual period beginning on or after April 1, 2020:

- Assume that the interest rate benchmark on which the hedged cash flows (contractually or non-contractually specified) are based, **is not altered** as a result of interest rate benchmark reform:
  a. In order to fulfil highly probable requirement for cashflow hedges;
  b. For reclassifying the amount accumulated in the cash flow hedge reserve; and
  c. Assessing the economic relationship between the hedged item and the hedging instrument.
- Except when an entity frequently resets a hedging relationship, the entity shall apply identifying and designating separately identifiable risk component only at the inception of the hedging relationship.

Amendments in various Ind-AS and its applicability

Till when these exceptions are applicable?

Application of the amendment will cease at the earlier of occurrence of-

- when the uncertainty arising from interest rate benchmark reform is no longer present with respect to the timing and the amount of the interest rate benchmark-based cash flows of the hedged item; and
- when the hedging relationship that the hedged item is part of, is discontinued.

The above amendment applies prospectively. However, the retrospective application is permissible if it applies only to those hedging relationships that existed at the beginning of the reporting period in which an entity first applies those requirements or were designated thereafter, and to the amount accumulated in the cash flow hedge reserve that existed at the beginning of the reporting period in which an entity first applies those requirements.

Ind AS 116 – Leases

The amendment has been discussed at length in firm's publication "KCM Spark", which can be accessed at: KCM Spark dated August 12, 2020

Ind AS 1 – Presentation of Financial Statements, Ind AS 8 - Accounting Policies, Changes in Accounting Estimates and Errors, Ind-AS 10 - Events after the Reporting Period and Ind-AS 34 – Interim Financial Reporting

The amendment to Ind AS 1 deal with what is to be considered as a material information. The amendments to other Ind ASs referred above give reference to the definition of materiality as amended in Ind AS 1. Ind AS 1 also explains which information will be considered "obscured information" as below:

- Information regarding a material item, transaction or other event is disclosed in the financial statements
  - but the language used is vague or unclear;
  - is scattered throughout the financial statements;
- Inappropriately aggregating / disaggregating the dissimilar / similar information; and
- Material information being hidden by immaterial information.

The amendment also states that the information is obscured if it could reasonably be expected to influence decisions that the primary users of general-purpose financial statements make on the basis of those financial statements, which provide financial information about a specific reporting entity. The primary users could be existing and potential investors, lenders, other creditors etc.

Ind-AS 37 - Provisions, Contingent Liabilities and Contingent Assets

The disclosure as contained in existing para 75 of Ind AS 37 has been amended to include reference to material information as defined in amendment to Ind AS 1.

Questions?

Circulars & Notifications

Customs

Permission not required for availing the Deferred payment of Customs by an AEO

Notification No. 79/2020-Customs (N.T.) August 19, 2020

In order to avail the benefit of Deferred payment of Customs duty an Authorized Economic Operator (AEO) was required to seek permission of jurisdictional Principal Commissioner or Commissioner about the intention to avail the benefit of deferred payment of Customs duty. The said requirement has been done away with now.

Deferred payment of duty allowed to Authorized Public Undertaking

Notification No. 78/2020-Customs (N.T.) and Circular No. 37/ 2020 Customs dated August 19, 2020

Deferred payment of Customs duty benefits extended to Authorised Public Undertakings i.e. Public Undertakings of Central and/or State Government which satisfy the conditions specified. The said provisions were earlier applicable only to Authorised Economic Operators.

Notified the Rule for claiming of Preferential rate of duty

Notification No81/2020-Customs (N.T.) and Circular No. 38/ 2020 Customs dated August 21, 2020

CBIC has notified Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020 prescribing the procedure to be followed by the importers when the goods are being imported under a claim of preferential rate of duty in accordance with a trade agreement.

Goods and Service Tax (GST)

Aadhaar Authentication for registration

Notification No. 62/2020 – CT dated August 20, 2020

- With effect from August 21, 2020, an applicant shall have an option to authenticate of Aadhar Number for the purpose of obtaining a GST registration.
- In case the person does not opt for Aadhaar Authentication or fails in completing the validation, a registration is granted only after physical verification of the place of business
- Registration will be deemed approved if proper office fails act within the period specified

Effective date of insertion of proviso to Section 50 of the CGST Act notified

Notification No. 63/2020-CT dated August 25, 2020

The Finance (No. 2) Act, 2019 had inserted a proviso to Section 50 of the CGST Act to provide that interest in case of delayed filing of GST returns shall be applicable on the amount which is paid in cash. The Government has notified that the said proviso shall be inserted with effect from September 1, 2020. A press release issued by the Government subsequently, clarifies that the present amendment is only prospective, and the said amendment shall be made effective retrospectively later.

Circulars & Notifications

Extension of due for filing of FORM GSTR – 4

Notification No. 64/2020 – CT Dated August 31,2020

The due date for filing of yearly return in FORM GSTR – 4 by a composition dealer for the year 2019-20 is extended to October 31, 2020 from August 31,2020)

Guidelines for conducting the virtual hearing

Instruction F.No.390/Misc/3/2019-JC Dated August 21, 2020

The CBIC has made it mandatory to conduct personal hearings through video conferencing. The CBIC has also issued guidelines for conducting virtual personal hearings for the smooth implementation. In rare situations where personal hearings cannot be done virtually, request to conduct the same physically shall be approved by the concerned officer by recording reasons in writing.

DGFT

Notification No. 30/2015-2020 dated September 1,2020

Prescribe the ceiling limit and last dated for availing the benefit of MEIS

- The total reward under MEIS is limited to Rs. 2 Cr per IEC holder in respect of exports made between September 1, 2020 to August 31,2020 (based on let export date)
- Any IEC holder who has not made any export between September 1, 2019 to August 31, 2020 or in case of a new IEC obtained on or after September 1, 2020 shall not be eligible to claim MEIS benefits w.e.f. September 01, 2020.
- The aforesaid limit of 2 Cr may be subject to downward revision to ensure the total claim under the scheme during the period does not exceed the allocation

Benefits of MEIS shall not be available for exports made w.e.f. January 1,2020.

Case Laws

ITC on lifts procured and installed in hotel building not available

Jabalpur Hotels Private Limited - *Advance Ruling number - MP/AAR/10/2020, AAR-Madhya Pradesh*

The Taxpayer constructed a hotel premises in which lifts were installed. The company approached the AAR to seek clarification on whether the ITC on lifts purchased and installed in the hotel building would be available, as the same is used in the furtherance of business. Following arguments were placed before the AAR

- It is not possible to run multi storey hotel without lifts. Hence, it can be said that the lifts are used for the furtherance of the hotel business and providing the services of renting of hotel rooms.
- Lifts fulfil the conditions specified under Section 16 of the CGST Act.
- Section 17 (5) of the CGST blocks credit of works contract services and other goods and services (other than plant and machinery) received by a taxable person for construction of immovable property. The lifts are plant & machinery falling under HSN 8428, and hence would fall under exclusion of section 17(5) (d) of CGST Act
- The company has not availed depreciation on GST portion of lifts and capitalised net value in the books of accounts.
- The company has capitalized the installations under separate heads independent from building or civil structure.

AAR held that, a lift is assembled and manufactured as per the requirement and cannot be sold as such. A lift becomes a part of the building upon installation and it does not have an identity when removed from the building, hence, cannot be said to be separate from the building. The AAR also, referred to the Section 17 (5) of the CGST Act and the explanation provided in Section 17 with respect to the definition of plant and machinery and held that lift as such is not plant and machinery and is a part of the building only. The AAR also observed that the judicial precedents relied upon by the Taxpayer pertain to pre-GST regime and are not applicable.

The exclusions provided under Section 17 (5) of the CGST Act have long been debated and have been challenged at various corners. While the similar provisions under the erstwhile law have still not been settled, there have been a few favourable judgments under the GST law around this aspect such as of Orrisa HC in case of Safari Retreats Private Limited and it remains to be seen as to seen how the GST law evolves in terms of giving restrictive or wide interpretation to the Section 17 (5) of the CGST Act.

Interest recovery actions cannot be initiated based on e-mail sent by revenue

Saha Hospitality Ltd Vs. The state of Maharashtra & Ors, Bombay HC,WP-LD-VC-No.112 of 2020

The Taxpayer received e-mails from the revenue for payment of interest for delay in filing the GSTR 3B returns. Upon receipt of such e-mails,

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the Taxpayer challenged such direct recovery of interest before the Hon'ble HC by stating that:

- The revenue cannot pass the order without issuing the show cause notice and allowing opportunity of being heard
- No working was given to check the amount of interest demanded
- The revenue cannot recover interest u/s 50 of CGST Act, 2017 through coercive provisions of section 79 of CGST Act,2017.

The revenue submitted that the e-mail sent to the Taxpayer was **merely an intimation** to make the payment of interest for delay in filing the GSTR 3B returns and it was not an order. They will initiate the recovery procedure by issuing the SCN. The Hon'ble HC noted the affidavit submitted by revenue and disposed-off the writ as merely sending email does not amount to order, it is an intimation by revenue to make the payment of tax.

Many of the Taxpayers have received the e-mails from revenue for making the payment of interest u/s 50 of CGST Act, 2017 for delay in filing the GSTR 3B from Jul'2017, wherein the interest calculation is grossly incorrect and does not have any calculation basis. While such intimation from the department should not go unnoticed, it is to be noted that such e-mails may not be required a detailed response and the Taxpayers should ensure that proper action has been taken. It is important to note that the revenue cannot initiate the recovery proceedings, unless show cause notice is issued and opportunity for hearing is given.

Refund is eligible for GST paid on Ocean freight

Bharat Oman Refineries Ltd Vs. Union of India & 1 other (s), Gujarat High court R/Special Civil Application No.8881 of 2020

The Taxpayer has paid IGST on ocean freight on import of goods under RCM. Considering that the Hon'ble Gujarat HC had earlier struck down the notification levying GST on ocean freight, the Taxpayer has filed a writ petition praying for refund of IGST paid on ocean freight along with interest.

The Hon'ble HC noted that the issue raised by the Taxpayer is exactly covered by the recent judgement of Gujarat HC in case of ***Mohit Minerals Private Limited Vs. Union of India (Special Civil Application No.726 of 2018 decided on 23rd January 2020)*** wherein the Hon'ble HC had stated that the levy of GST on ocean freight on import of goods as per Notification No.8/2017-Integrated Tax (Rate) dated 28th June 2017 and the Entry No.10 of the Notification No.10/2017-Integrated Tax dated 28th June 2017 is ultra vires.

The Hon'ble HC admitted the writ and directed the revenue to sanction the refund of GST paid on ocean freight.

There are many Taxpayers who have paid GST under RCM on ocean freight before the pronouncement of the judgement of Hon'ble Gujarat HC in case of Mohit Minerals (supra.) and were not able utilise the same on account of accumulation of ITC. The present decision reinforces the right of the Taxpayer to claim a refund of taxes paid under the provisions of law which were struck down by the Courts.

Case Laws

Refund is allowed on the unutilised balances of the cesses

M/s Bharat Heavy Electricals Ltd. v/s The Commissioner (Appeals), Bhopal, Excise Appeal No. 50081 of 2019

The Taxpayer's products were exempted from payment of duty under sub rule 6(6) of Cenvat Credit Rules which exempted the supplies even when the CENVAT credit has been availed on the inputs. That resulted into accumulation of ITC for the Taxpayer. The Taxpayer had unutilised balances of credit in respect of Education Cess, Secondary and Higher Secondary cess and Krishi Kalyan Cess (collectively referred to as "cesses") in their ER-1 return filed for the month of June 2017. The Taxpayer carried forward the accumulated ITC of service tax & excise duty through TRANS-1 in GST regime. However, the accumulated ITC of cesses could not be carried forward to GST as these cesses stood abolished in new regime.

The Taxpayer filed a refund application of the balance of cesses with the adjudicating authority which the application on the ground that there was no provision to carry forward the cesses under GST regime or for refund of cesses and accordingly, these balances would lapse. An appeal before the Commissioner (Appeals) was also rejected.

The Taxpayer being aggrieved, filed an appeal before the CESTAT on the grounds that they would have been eligible to utilize the ITC of cesses on their domestic clearances had it been allowed to carry forward the same in GST regime. The Taxpayer relied up on the judgement in case of CCE Hyd. V/s Apex Drugs & Intermediately Ltd. and other similar cases where it was stated that where credit becomes un-utilizable due to some reason like stoppage of factory, it can be granted by cash. The credits which were validly earned suddenly became utilizable due to sudden change of statue where there is no provision to carry forward the same. It was therefore contended that the refund is admissible as the ITC of the cesses are stood valid in the books of account as on 01/07/2017.

The CESTAT held that the CENVAT credit earned by the Taxpayer were a vested right. And there is no provision in the newly enacted law that such credits would lapse. Thus, merely by change of legislation suddenly the Taxpayer could not be put in a position to lose this valuable right.

This is an important ruling which can be relied upon by Taxpayers who had accumulated balance of CENVAT Credit on cesses lying at the time of transitioning to GST but could not do the same in absence of specific provision.

Levy of additional court fees for filing appeals under GST is justified

Akay Flavours and Aromatics Pvt vs Asst. Commissioner, , WP(C).No.35419 OF 2019(B), Kerala HC

The Taxpayer had filed an appeal against the assessment order which was returned by the revenue with an observation that the appeal preferred should have court fees of 1% of disputed amount as per the KCFSVA. The Taxpayer, being aggrieved by such demand of court fees at the rate of 1% of the disputed tax amount, filed a petition before the Hon'ble

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challenging the levy of court fees by the state authorities by arguing that Section 108 of CGST Act, which deals with appeal to the appellate authority and stated does not have any reference to levy of additional court fees court under Section 76(1) of the KCFSVA. The Taxpayer also argued that the levy of court fees at the rate of 1% of the disputed tax amount under the GST law was violative of Article 14 of the COI and hence the levy should be struck down.

To test whether levy of additional court fees is violative of Article 14 of the COI or not, the Hon'ble HC placed reliance on the decision of Hon'ble SC supreme court case of ***Jindal Stainless Steel Ltd. & Anr. V. State of Haryana & Ors, reported at 2016 VOL. 66 SC-CB*** and concluded that the levy of additional court fees is neither discriminatory nor violating the Article 14. The Hon'ble HC accordingly dismissed the petition.

The levy of court fees is generally capped at an upper limit. However, in Kerala the court fees are applicable at the rate of 1% of the disputed tax amount which would mean that Taxpayers shall have to incur an upfront cost of 1% of the tax demand in order to get justice. Such levy of court fees at 1% of the disputed tax amount may result into huge unnecessary costs to the Taxpayers specially in case of frivolous demands amounting to crores of rupees. It remains to be seen as to whether the other states resort to such levy or not.

MCA Notifications

Extension of Annual General Meeting

Order dated September 8, 2020

Ministry of Corporate Affairs (MCA) vide its order dated September 8, 2020, extended the timeline for holding of Annual General Meeting for the financial year ended March 31, 2020 (*other than first Annual General Meeting by 3 months*) to **December 31, 2020**, without filing an application seeking for extension.

The Order overrides the earlier Notification issued *dated August 17, 2020,* which advised Companies to make application seeking extension of time in holding of AGM.

Copy of Annual Return to be placed on website

Notification dated August 28, 2020

MCA amended Section 92(3) of the Companies Act, 2013 whereby it has provided that every company which has a website shall place a copy of the annual return (MGT-9) on it and the web-link of such annual return shall be disclosed in the Board's report. It is applicable to all Companies including Private Companies.

No Requirement to attach extract of Annual Return

Notification dated August 28, 2020

A Company need not attach the extracts of the Annual Return (MGT-9) in the Board Report, if the web link of such annual return has been disclosed in the Board's report. The effect has been given by amending the *Companies (Management and Administration) Rules, 2014.*

Contributions for Research in science and technology to incubators/other specified organization treated as CSR activities

Notification dated August 24, 2020

Any contribution made to incubators or R&D Projects in the field of science, technology, engineering and medicine funded by Central or State Government or public sector undertaking or any agency of the government as well as contributions to Public Funded Universities, Indian Institute of Technology (IITs), National Laboratories and autonomous bodies established under Department of Atomic Energy (DAE), Department of Biotechnology (DBT), Department of Science and Technology (DST), Department of Pharmaceuticals; Ministry of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy (AYUSH), Ministry of Electronics and Information Technology and other bodies, namely Defence Research and Development Organisation (DRDO); Indian Council of Agricultural Research (ICAR); Indian Council of Medical Research (ICMR) and Council of Scientific and Industrial Research (CSIR), engaged in conducting research in science, technology, engineering and medicine aimed at promoting Sustainable Development Goals (SDGs) shall be considered as CSR activities.

R&D undertaken for developing vaccine / medicines /devices for COVID-19 considered a CSR Activity

Notification dated August 24, 2020

Companies which in their normal course of business develop new vaccines, drugs and medical devices, may carry out the research and development of new vaccine, drugs and medical devices related to COVID-19 for financial years 2020-21, 2021-22, 2022-23 and such R&D shall be considered as a legitimate CSR Activity for the said financial years. However, the R&D shall have to be undertaken in collaboration with the entities specified in Schedule VII list and the information of such research spends needs to be disclosed in the Board Report.

Various amendments related to Core Investment Companies

Notification No. DoR (NBFC) (PD) CC. No.117/03.10.001/2020-21 dated August 13, 2020

Core Investment Company (CIC) is a non-banking financial company carrying on the business of acquisition of shares and securities with not less than 90% of its net assets in the form of investments including loans to group companies and the investments in the equity constituting not less than 60% of its net assets.

CICs are prevalent both with huge conglomerates as well as well diversified corporate houses across India. Some of the CICs have investments running into thousands of crores in Group companies, both listed and unlisted and the need to regulate them become all the more important. With this objective, the *Working Group (WG) to Review the Regulatory and Supervisory Framework for Core Investment Companies (CICs)* was formed and on the basis of their recommendations, amendments have been made in the applicable guidelines of Core Investment Companies (CICs). Some of the key amendments are summarised as under:

Definition / Nomenclature of Core Investment Company (CIC)

Core Investment Company has been split into two categories, namely registered and those not requiring registration, and the definition for both these categories have been reclassified:

Systemically Important Core Investment Company – will be termed as a "**Core Investment Company**".

Non-Systemically Important Core Investment Company – will be termed as '**Unregistered CIC**' instead of 'exempted CIC'.

Definition of Adjusted Net worth (ANW)

While computing Adjusted Net Worth (ANW), the amount representing any direct or indirect capital contribution made by one CIC in another CIC (within the Group), to the extent such amount exceeds ten per cent of Owned Funds of the investing CIC, shall be deducted. This is primarily aimed at reducing the systemic risks inherent to NBFCs and maintain the minimum capital requirements.

Layers of CICs

To prevent web of complex structures by a Corporate Houses, the number of layers of CICs within a Group (*including the parent CIC*) are now restricted to two, irrespective of the extent of direct or indirect holding/ control exercised by a CIC in the other CIC.

Corporate Governance and Disclosure Requirements

Corporate governance and disclosure requirements will be as per the Companies Act, 2013 and those prescribed by RBI for NBFC-CICs. The CICs will also have to put in place a Policy with the approval of the Board for ascertaining the '*fit and proper*' status of Directors, not only at the time of appointment but also on a continuous basis.

Registration

Other than the two exceptions, namely (i) CICs with an asset size of less than ₹100 crore, irrespective of whether accessing public funds or not and (ii) CICS with an asset size of ₹100

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crore and above but not accessing public funds, all other CICs shall be required to register (*apply for Certificate of Registration*) with the RBI under Section 45IA of the RBI Act, 1934.

Consolidation of Financial Statement (CFS)

CICs will be required to submit consolidated financial statement (CFS) as per provisions of Companies Act, 2013. In the process of consolidation, the auditor of a CIC, '*principal auditor*' shall use the work of other auditors with respect to the financial information of other entities, subject to the accounting standards and Guidance Notes issued by ICAI. There is a possibility of certain entities coming under the definition of group as per extant NBFC regulations but not covered under consolidation due to exemptions granted as per statutory provisions/applicable accounting standards. For such entities disclosures shall be made as prescribed by the RBI.

[*Note: The Master Directions have not been amended as of date of this publication. To that effect there might be a difference in the revised guidelines issued vide the Notification and that stated in the Master Directions.*]

Reliance's Future Deal

What was the Deal?

After having mopped up investments amounting to c. INR 1.5 Lakh Crore in Jio Platforms from a list of marquee investors over the last few months, Reliance recently announced the acquisition of retail & wholesale business and logistics & warehousing business of Future Group through its consumer & retail subsidiary Reliance Retail Ventures Limited on a slump sale basis for an aggregate consideration of INR 24,713 Crore.

The deal encompasses acquisition of key retail formats of the Future Group across food, FMCG and fashion including Big Bazaar, FBB, Foodhall, Easyday, Niligiris, Central and Brand Factory. Reliance Retail owns key retail brands across the consumer segment such as Reliance Fresh, Reliance Smart, Reliance Market, Reliance Digital, Reliance Trends, Reliance Jewels and the recently launched grocery e-commerce format JioMart.

Structure of the Deal

The deal structure includes merger of several companies (including five listed companies) of the Future Group housing the retail, wholesale, logistics and warehousing businesses into Future Enterprises Limited, which would then transfer the aforesaid verticals to Reliance Retail Ventures Limited including its subsidiary on a slump sale basis in an all cash deal.

Reliance Retail would further invest up to INR 2,800 Crore for acquiring c. 13% stake in Future Enterprises Limited.

The deal is however subject to regulatory (SEBI, CCI and NCLT), shareholders and creditors approval.

Rationale of the Deal

Reliance Retail currently operates c. 12,000 retail stores covering c. 28.7 million sq. ft. of retail footprint. With this acquisition, Reliance will add c. 1800 stores and expand its footprint to c. 52.5 million sq. ft., further consolidating its leadership position in the organized retail space.

The deal will help augment Reliance's retail revenue to c. INR 1.9 Lakh Crore, more than 7 times the revenue of its nearest rival DMart, apart from yielding cost efficiencies through improved sourcing and logistics operations. The deal will also enhance efficiencies at Reliance's e-commerce venture JioMart, thereby further strengthening Reliance's position as an omni-channel retailer.

Apart from the commercial substance of the deal, it certainly provides a breather to the lenders of the Future Group which is indebted by c. USD 2 Bn by ensuring that the underlying assets do not turn sub-standard in the books of the lenders. The deal that is seen as a saviour to the debt-laden Future Group will further strengthen Reliance's retail presence against the likes of DMart and Amazon.

What is next?

Having raised c. USD 20 Bn through the Jio Platforms stake sale and now having acquired its nearest competitor in the retail & warehousing space, all eyes are set on the restructuring of Reliance's Oil to Chemicals business which last year announced a strategic investment to sell 20% stake to Saudi Aramco but the deal has been in abeyance ever since.

These strategic initiatives at Reliance of late have started to picturise Reliance as a consumer company (encompassing telecom, digital and retail businesses) while overshadowing its legacy business of energy and petrochemicals.

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

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

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Abbreviation	Meaning
AAAR	Appellate Authority of Advance Ruling
AAR	Authority of Advance Ruling
ASBA	Applications Supported by Blocked Amount
ADR	American Depository Receipts
AE	Associated Enterprise
AGM	Annual General Meeting
AIF	Alternate Investment Fund
AIR	Annual Information Return
ALP	Arm's length price
AMT	Alternate Minimum Tax
AO	Assessing Officer
AOP	Association of Person
APA	Advance Pricing Arrangements
AS	Accounting Standards
AY	Assessment Year
BBT	Buy Back Tax
BMA	Black Money (Undisclosed Foreign Income and Assets) and Imposition Tax Act 2015
BOE	Bill of Entry
BOI	Body of Individuals
BT	Business Trust
CBDT	Central Board of Direct Tax

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

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

Abbreviations

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

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

Abbreviation	Meaning
RPM	Resale Price Method
SC	Supreme Court of India
SDT	Specified Domestic Transaction
SE	Secondary adjustments
SEBI	Securities Exchange Board of India
SEP	Significant economic presence
SEZ	Special Economic Zone
SFT	Specified Financial statement
SION	Standard Input Output Norms
SST	Security Transaction Tax
ST	Securitization Trust
STCG	Short term capital gain
STPI	Software Technology Parks of India
TCS	Tax collected at source
TDS	Tax Deducted at Source
TNMM	Transaction Net Margin Method
TP	Transfer pricing
TPO	Transfer Pricing Officer
TPR	Transfer Pricing Report
TRO	Tax Recovery Officer
UPE	Ultimate Patent Entity
VCF	Venture Capital Fund
WHT	Withholding Tax