Nangia Andersen LLP

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Direct Tax

1. ITAT holds that assessee cannot be fastened with liability to deduct TDS retrospectively

Issue: Deduction of tax at source
Outcome: In favour of the assessee

Background

Income Tax Appellate Tribunal, Bangalore (ITAT) in the case of Acer India Private Limited (the assessee), quashed the order under section 201(1) of the Income Tax Act (the Act) which held the assessee as 'assessee in default' on account of failure to deduct tax at source for purchase of software license. The ITAT accepted the assessee's contention that it was under bona fide belief that it was not liable to deduct TDS since there were many judicial precedents to support its claim. ITAT noted that the ruling of the Karnataka High Court (HC) in the case of Samsung Electronics Co Ltd.[1] (wherein it was held that software license payments were the nature of royalty) was pronounced on 15th October 2011, after the assessee's transaction and therefore liability to deduct tax at source cannot be fastened on the assessee retrospectively.

Brief Facts and Contentions

- The assessee company was engaged in the business of manufacture and trading of computer systems and peripherals. It also provided marketing support services for Acer brand products.
- The assessee purchased software from non-residents and did not deduct TDS from payments made towards the purchases. Hence, the Assessing Officer (AO) treated the assessee as 'assessee in default' under section 201(1) of the Act for 2009-10 to AY 2012-13.
- The AO had placed reliance on the ruling of the Karnataka HC in the case of Samsung Electronics Co Ltd[1] wherein it was stipulated that payment made for purchase of license to use a software is "royalty" income in the hands of non-resident. Accordingly, the assessee should have deducted tax at source under section 195 of the Act from payments made to non-resident for purchase of license to use software. He raised demand and charged interest for the four years under consideration.
- The Assessee contended that it had not deducted tax at source under bona fide belief that it was not liable to deduct the same since there were rulings in support of the assessee's claim. The ruling in the case of Samsung was pronounced on 15th October 2011, after the assessee's transaction.
- Accordingly, the assessee submitted the liability to deduct tax at source should not be fastened based on retrospective amendment to the Act or a subsequent ruling of a Court. To establish the claim the assessee derived support from various rulings of the jurisdictional tribunal.
- Before the ITAT, the assessee pleaded for the deletion of demand raised under section 201(1) and 201(1A) of the Act for payments made prior to 15th October 2011.

ITAT's Judgement

- The ITAT relied on the ruling of the co-ordinate bench in the case of Infineon Technologies India P Ltd[2] wherein ITAT held that *"liability to deduct tax at source cannot be fastened on the assessee on the basis of retrospective amendment to the Act or subsequent ruling of a court"* after observing that:
  - In the case of Sonata Information Technology Limited[3], in 2006, it was held that payments for software license did not constitute royalty. The change in the legal position of taxation of computer software was

[1] [2011] 16 taxmann.com 141 (Karnataka)
[2] (IT(TP)A No.405/Bang/2015)

on account of the ruling in the case of Samsung, which was pronounced on 15.10.2011 that is much later than the close of FY 2010-11

- The assessee did not have the benefit of clarification brought by the retrospective amendment to section 9(1)(vi) of the Act vide Finance Act 2012, that, payments for inter alia license to use computer software, would qualify as royalty.

- The ITAT held that the assessee cannot be treated as an assessee in default in respect of payments made for purchase of licensed software prior to 15th October 2011, being the date of pronouncement of the decision in the case of Samsung Electronics[1].
- Accordingly, the ITAT set aside the orders passed by the CIT (A) for 2009-10 to 2011-12 and directed the AO to delete the demands so raised. For AY 2012-13, the AO was directed to delete demand for period prior to 15th October 2011.

Nangia Andersen LLP's Take

In the instant case, the ITAT has justly appreciated the fact that it was impossible for the assessee to perform the stipulations of the High Court ruling that was pronounced subsequent to the transaction for which the assessee was being penalised. The ITAT has acknowledged that the assessee did not have the benefit of clarification that was offered by the High Court ruling referred to above. It also accepted that the assessee's position that it was under bona fide belief that it was not required to deduct tax at source, since there were certain decisions holding so.

Such judgements build faith of the taxpayer in the Indian Taxation System. This ruling has established that alternate interpretation of law in the absence of legal clarity would be duly heeded before the court of law.

Past Precedents on the issue

In the case of Allegis Services India Pvt Limited[4], which has also been relied heavily in the present case, disallowance of expenses made, was deleted by the ITAT, while holding that that TDS liability cannot be fastened upon the assessee retrospectively.

Similarly, in the case of M/s Teekays[5], the ITAT deleted an impugned addition acknowledging the assessee's bona fide belief and the judiciary's divergent views on the issue, before the clarification brought about by the Finance Act 2012 and the HC ruling in the case of Samsung Electronics.

[3] Sonata Information Technology Ltd. v. ACIT (103 ITD 324)
[4] Allegis Services India Pvt. Ltd. v.DCIT [(2017) 51 CCH 0083]
[5] ITA No.400/Bang/2017

2. ITAT explains that 'Share Allotment' activates taxability under Section 56(2)(viib), holds share application money received before enactment of provision immaterial

Issue : Applicability of Section 56(2)(viib)
Outcome : Partially in favour of the assessee

Background

The Income Tax Appellate Tribunal, Bangalore (ITAT), in the case of Taaq Music Private Limited (the assessee), held that section 56(2)(viib)[1] would be applicable for taxing the excess share premium received over the fair market value (FMV) of shares in the assessee's case. ITAT stipulated that despite the fact that share application money was received in the year preceding the enactment of Section 56(2)(viib) of the Income Tax Act (the Act), it is the act of allotment that actuates 'issue of shares' for the purpose of applicability of Section 56(2)(viib) of the Act. Therefore, since the shares were 'issued' in AY 2013-14, provisions of section 56(2)(viib) of the Act would be applicable. ITAT further stipulated that Assessing Officer (AO) cannot change the method of valuation of shares, legitimately adopted by the assessee and remitted the matter back to the AO for fresh consideration.

Brief Facts and Contentions

- The assessee company, engaged in the business of providing education in music, entered into a share subscription and shareholders' agreement in December 2011 for the issue of shares and on 31st March 2012, received share application money.
- The assessee issued and allotted the shares at a premium in November 2012.
- The assessee contended that the provisions of Section 56(ii)(viib) of the Act were introduced vide Finance Act 2012 (effective from 1st April 2013) and consideration for the issue of shares was received in AY 2012-13. Therefore, the provisions were not applicable to the aforementioned transaction.
- The AO rejected the contention holding that the 'issue of shares' is the relevant point of time for the application of Section 56(ii)(viib). Since the shares were allotted in AY 2013-14, the provisions of the said section were applicable to the case.
- Separately, the AO was of the view that valuation of shares was not carried out independently as the Chartered Accountant who had prepared the report was also the authorised representative of the assessee. Besides, the AO objected to the usage of the Discounted Cash Flow (DCF) method as the basis of valuation and proceeded to value the shares as per book value method.
- CIT (A) concurred with the views of the AO. Aggrieved, the assessee preferred an appeal before the ITAT

ITAT's Judgement

- The ITAT agreed with the views of the Revenue on the first ground and elucidated that Section 56(ii)(viib) talks about receipt of consideration 'for issue of shares'.
- ITAT stated *"It is only on such act of allotment that the consideration received as share application money becomes consideration for issue of shares. Admittedly, shares were issued in the previous year relevant to AY 2013-14 and therefore the provisions of Sec.56(2)(viib) stood attracted in the present case."*

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[1] Section 56(ii)(viib) states that where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares shall be treated as 'income from other sources'

- ITAT remarked that the above conclusion is also fortified by the definition of FMV given in the explanation to section 56(2)(viib) of the Act, which provides that FMV shall be the value as may be substantiated by the company, to the satisfaction of the AO, based on value, on the date of *'issue of shares'* of its assets.

- ITAT thus upheld the order of the Revenue Authorities on the aspect of applicability of Section 56(2)(viib) to AY 2013-14 in the present case.

- Regarding the matter of share valuation, the ITAT explained that the law contemplates invoking the provisions of Section 56(2)(viib) only in situations where the shares are issued at a premium and at a value higher than the FMV. For the calculation of FMV, the provision provides two choices to an assessee -of adopting either NAV method or DCF method (in case of determination by merchant banker)

- The choice of method is that of the assessee and if the assessee determines the FMV in accordance with a prescribed method, the AO does not have a choice to dispute the justification.

- The ITAT placed reliance on the judgement of the Bombay High Court in the case of Vodafone M-Pesa Limited[2] to take the view that *"AO can scrutinize the valuation report and he can determine a fresh valuation either by himself or by calling a determination from an independent valuer to confront the Assessee but the basis has to be DCF method and he cannot change the method of valuation which has been opted by the Assessee".*

- ITAT concluded that *"the primary onus to prove the correctness of the valuation Report is on the assessee. Hence, he has to satisfy about the correctness of the projections, Discounting factor and Terminal value etc. with the help of Empirical data or industry norm if any and/or Scientific Data, Scientific Method, scientific study and applicable Guidelines regarding DCF Method of Valuation."*

- The ITAT remitted the matter back to the AO for fresh adjudication.

Nangia Andersen LLP's Take

The ITAT in the present case has shed light on the fact that it is the 'allotment of shares' that actuates the 'issue of shares' and not the 'receipt of application money'. Consequently, the ITAT has held that provisions of section 56(2)(viib) shall be applicable in the assessee's case owing to the fact that the shares were 'issued' in the year of applicability of section 56(2)(viib). Regarding the method of valuation, the ITAT has established that AO cannot change the method of valuation, which has been opted by the assessee.

Past Precedents on the issue

Interestingly, ITAT Kolkata in the case of Diach Chemicals[3] rejected the applicability of Section 56(2)(viib) upon observing that the share application money was received in AY 2012-13, when the said section was not a part of the Income Tax Act. The ITAT inferred that the phrase 'received in any previous year' used in section 56(viib) of the Act would be in respect of the year of receipt and not the year of allotment.

However, the Delhi ITAT in the case of Cimex Land and Housing[4] upheld the applicability of Section 56(2)(viib) and rejected the assessee's contention that share allotment date is relevant for determination of applicability of section 56(2)(viib).

[Source: ITA No.161/Bang/2020]

[2] 164 DTR 257
[4] ACIT v Diach Chemicals & Pigments Pvt.Ltd ITA No.546/Kol/2017
[5] Cimex Land and Housing Pvt. Ltd. v ITO ITA No.5933/DEL/2018

3. ITAT: Income from grant of distribution rights of TV channels is not taxable as royalty under India-USA tax treaty

Issue : Royalty
Outcome : In favour of the assessee

Background

The Income Tax Appellate Tribunal, Delhi (ITAT) in the case of Turner Broadcasting System Asia Pacific Inc. (the assessee) held that the revenue derived from Turner International India Private Limited (Indian company/ TIIPL) towards granting distribution rights of TV Channels (Cartoon Network, Pogo, etc.) constituted business income. ITAT observed that the sole ownership of rights and the content of the product always remained with the assessee and that TIIPL had no right to copy, modify or alter the content therein. Further, the taxpayer had already offered the said income as business income in terms of Mutual Agreement Procedure (MAP). Therefore, ITAT held that assessee only granted 'broadcast reproduction rights' to the Indian Subsidiary which is not categorised as copyright and hence not taxable as 'royalty'.

Brief Facts and Contentions

- The assessee, a company incorporated in USA, derived advertisement and distribution revenue from grant of exclusive rights to TIIPL to distribute satellite delivered television services (Cartoon Network, Pogo, etc.), interactive entertainment services (like pogo.tv) and mobile telecom services.

- TIIPL acted as an exclusive distributor of the aforementioned products to the cable operators and other permitted systems on principal-to-principal basis. The distribution agreement permitted TIIPL to distribute products to various cable operators and ultimately to consumers in India. The distribution revenue so generated was to be shared between the assessee and TIIPL.

- The distribution agreement stated that *"copyrights and other propriety rights in the products (channels) shall vest solely in the appellant company"* and at no point of time were they transferred either to TIIPL or the sub-distributor

- In accordance with an agreement entered into by the competent authorities of India and the USA (MAP order), the assessee consistently offered 10 percent of its advertising and subscription revenue, received from Indian sources (deemed net profit) to tax in India.

- The Assessing Officer (AO) in all earlier assessment years had accepted the nature of distribution revenue as business income, following the MAP order. However, in the subject assessment year he treated the distribution revenue as 'royalty' under section 9(1)(vi) of the Income Tax Act (the Act)

- The AO explained that the assessee had granted various rights relating to its products including the right to sub-license. He held that in allowing TIIPL, the right to sub-distribute, the encrypted television signals for commercial exploitation, the assessee had granted the right to 'communicate the work to public' as per the Copyright Act and thus taxed the distribution revenue as royalty.

- The draft order prepared by the AO was confirmed by the DRP. Aggrieved, the assessee filed an appeal before the ITAT.

Decision of the ITAT

- Referring to the agreement entered into by the assessee and TIIPL, the ITAT observed that the assessee had the sole right to determine the content of the products and modify the same. Further, all the copyrights and other priority rights in the products and promotional material vested in the assessee alone.

- ITAT explained, *“It is a copyright of the content in the product which always remained with the appellant-assessee and was never transferred. The clause merely provides right to distribute the product”*

- ITAT made note of the fact that in earlier years the assessee had offered the deemed net profit as per the MAP order, which was accepted by the AO. However, only in the impugned assessment year the position had been digressed by the AO, *without there being a material change in facts and circumstances.*

  Therefore, the ITAT in agreement with the assessee, held that *“when a fundamental aspect is permeating through different assessment years, which has been accepted by the parties, then as a rule of consistency, the same position should not be altered or should be allowed to be changed”*

- Separately, the ITAT noted that the assessee never granted any licenses to use any copyright, either to the distributor or to the cable operator. The Indian company was carrying out the distribution and selling of the advertisement and did not have any kind of right to edit, interpret, add the products distributed by it.

- ITAT opined that the assessee only granted commercial rights in the nature of ‘broadcast reproduction right’ to TIIPL, which had been defined separately under the Copyright Act and could not be categorised as ‘copyright’ for the purpose taxability as royalty. However, revenue derived by the assessee is in the nature of business income.

- ITAT repudiated the Revenue’s justification to apply the retrospective amendment made in the explanation 6 to section 9(1)(vi) for taxing the distribution revenue stating that *“such an approach cannot be upheld because there is no similar amendment in the definition of royalty under the DTAA”*

  The ITAT relied on the ruling of the Delhi High Court in the case of New Skies Satellite[1] wherein it was held that amendment in the domestic law cannot be imported or read into DTAA.

- ITAT concluded by saying that distribution revenue earned by the assessee cannot be taxed as royalty albeit as business income. The income declared by the assessee, in accordance with MAP (accepted by the department in earlier years) has to be accepted for the relevant year also.

Nangia Andersen LLP’s Take

The ITAT in the present case has eloquently elucidated that simply granting distribution rights to an Indian counterpart while retaining the copyright of the content does not amount to ‘transfer of copyright’. Observing that there was no change on the facts and circumstances over the years, the ITAT placed reliance on the ruling of the Supreme Court in the case of Radhasoami Satsang v CIT[2]. ITAT concurred with the decision of the Supreme Court that where a fundamental aspect permeating through different assessment years has been found as a fact and parties have allowed that position to be sustained by not challenging the order, it would be appropriate to follow the position consistently in subsequent years.

Past Precedents on the issue

In the case of MSM Satellite (Singapore) Pte. Ltd.[3] the Bombay High Court rejected Revenue’s stand that payment was in the nature of royalty for use of copyright. The High Court stated that the assessee was not parting with any of the copyrights for which payment can be considered as royalty payment.

[Source: I.T.A. No. 1343/DEL/2014]

[2] [[1991] 100 CTR 267 (SC)]
[3] TS-236-HC-2019(BOM)

4 ITAT holds that provision of bandwidth services shall not be taxable as ‘Royalty’

Issue : Royalty
Outcome : In favour of the assessee

Background

The Income Tax Appellate Tribunal, Delhi (ITAT) in the case of Telstra Singapore Pte Limited (the assessee), held that the receipts from Indian customers for provision of bandwidth services outside India would not be taxable as ‘royalty’ under section 9(1) (vi) of the Income Tax Act (the Act) as well as under the India-Singapore Tax Treaty (DTAA). The ITAT explained that mere receipt of service using equipment under the control, possession and operation of service provider would only be transaction of a service and not to “use or right to use” an equipment, and would not attract 'Royalty' under the Act or the Tax Treaty.

Brief Facts and Contentions

- The assessee, a company incorporated in Singapore, was engaged in the business of providing digital transmission of data through international private line or multi-protocol label switching, etc. to facilitate high-speed data connectivity (bandwidth services).
- The Assessing Officer (AO) was of the opinion that amount received by the assessee from Indian customers for provision of services outside India was ‘equipment/ process royalty’ under Section 9(1)(vi) of the Income Tax Act (the Act) read with Article 12(3) of the India-Singapore DTAA.
- The assessee contended the provision of bandwidth services for digital transmission of data by the assessee did not result in use of any equipment or process by the customers. Further, the bandwidth services were provided as standard services to deliver voice and data at a particular volume and speed. Hence, the consideration received for the services did not fall in the definition of ‘royalty’ under the DTAA.
- The assessee claimed that mere receipt of service using equipment that is under the control possession and operation of service provider would only be transaction of a service and not to “use or right to use” an equipment, and would not attract ‘Royalty’ under the Act or the Tax Treaty.
- The revenue however ruled that the receipts of the assessee fell within the scope of ‘royalty’ under both the Income Tax Act and the DTAA.
- Aggrieved, the assessee appealed before the ITAT

Ruling of the ITAT

- The ITAT held that there was no question of any equipment royalty, where the assessee was only using lease lines for transmitting data. The ITAT placed reliance on the judgement of the Delhi High Court in the case of New Skies Satellite BV[1]
- Regarding the applicability of the amended definition of Royalty on the assessee’s case, the ITAT held that the amendment to the Act cannot be applied to tax treaties. It quoted the ruling of the Delhi High Court in the case of Nokia Networks OY[2] wherein it was held that where the assessee has opted to be governed by treaty and the language of the treaty differs from the amended Section 9 of the Act, such amendment cannot be read into the treaty.

[1] [2016] 68 taxmann.com 8 (Delhi)
[2] DIT & Others vs Nokia Networks OY & Others [2013] 358 ITR 259 (Del)

- ITAT observed that India Singapore DTAA does not specifically include “transmission by satellite, cable, optic fibre or similar technology” in the definition of ‘Royalty’.

  Further, since the tax treaty has not undergone any amendment, the more beneficial provisions of DTAA shall apply. Therefore, the assessee is not liable to be taxed on the amount received from Indian customers for the provision of bandwidth services outside India.

- The ITAT concluded that the assessee is providing bandwidth services to various Indian Telecom Operators in India outside India. The consideration received by the assessee company is not taxable as ‘Royalty’ in view of the beneficial provisions of DTAA between India and Singapore under which, the definition of ‘Royalty’ has not been amended.

Nangia Andersen LLP’s Take

The ruling has accorded relief to the assessee, to which it was legitimately entitled. ITAT has plunged into the provisions of the DTAA and has rightly observed that the DTAA does not include “the transmission by satellite, cable optic fibre or similar technology” in the definition of Royalty. Therefore, the contrary provisions of the Income Tax Act have been overlooked to grant the benefits of the DTAA to the assessee. The ruling instils the faith of the foreign taxpayers in the Indian Judiciary that a rightful benefit under law shall not be denied to those eligible for the same.

Past Precedents on the issue

The ITAT strongly relied on the ruling of the Delhi High Court on the case of New Skies Satellite BV[3] in the present case wherein it was held that unless DTAA is amended jointly by both parties to incorporate income from data transmission services as partaking of nature of royalty, or amend definition in a manner so that such income automatically becomes royalty, Finance Act, 2012 which inserted Explanations 4, 5 and 6 to section 9(1)(vi) by itself would not affect meaning of term 'royalties' as mentioned in article 12 of India-Thailand DTAA.

Therefore income earned by assessee, a Thailand based company, for rendering digital broadcasting services through its satellite, to both residents of India as well as non-residents, was not taxable in India as royalty under section 9(1)(vi). The Supreme Court has accepted an SLP against the said order but the ITAT stated that the fact does not render the High Court ruling inoperative.

[Source: ITA Nos.1548/Del/2015 & 286/Del/2016]

[3] [2016] 68 taxmann.com 8 (Delhi)

Transfer Pricing

1. ITAT upheld penalty u/s 271AA of Income Tax Act, 1961 (“the Act”) on non-resident, for non-maintenance of documents prescribed u/s 92D of the Act.

Outcome: In favour of revenue
Category: Penalty for non-maintenance of documents u/s 92 D.

Facts of the Case

- Convergys Customer Management Group Inc. (“the taxpayer”), is USA based non-resident company. It is engaged in providing outsourced customer, employee, marketing support services and comprehensive Customer Management Services.

- During the year under consideration (“AY 2006-07”), the taxpayer has entered into International transactions pertaining to interest income and fee for technical services with its Indian based Associate Enterprise (“AE”) which provides IT enabled call centre/back office support services.

- In the first round of proceedings, assessee had filed an appeal in regards to Permanent Establishment (PE) which was further challenged before the jurisdictional HC. In the meantime, Assessing Officer (“AO”) issued show cause notice u/s.271(1) (c) and 271AA. Thereafter AO levied penalty u/s.271AA vide order dated 3/1/2014 to the tune of Rs.10.37 crores which was 2% of the value of international transactions of Rs. 518.73 crores. Aggrieved, taxpayer approached CIT(A) who allowed taxpayer’s appeal.

- Aggrieved by the same, the revenue filed an appeal before Income Tax Appellate Tribunal (“ITAT”).

ITAT’s Ruling

ITAT held that that the AO is right on imposing penalty u/s 271AA and rejected deletion of penalty by CIT (A) on account of following observations:

- According to section 92D of the Act, it is mandatory for all taxpayers without exception, to obtain an independent accountant's report in respect of all international transactions between Associated Enterprises (“AEs”) or Specified domestic transactions (“SDTs”) and the report has to be submitted before the due date of filing of return.

- Also, in the absence of any international transaction, taxpayer cannot escape to obtain accountant’s report/maintaining TP documents for specified domestic transactions; and

- Non-maintenance of documents on account that there is no international transaction entered into between AE and taxpayer and merely placing reliance on supporting documents of AE cannot be considered as reasonable cause u/s 273B of the Act in respect to the international transactions as well as the specified domestic transactions as well.

In view of the aforementioned observations, ITAT held that “Assessing Officer was right in imposing the penalty under Section 271AA of the Income Tax Act and the CIT(A) was not right in deleting the penalty” and thereby allowed Revenue’s appeal.

Nangia Andersen LLP’s Take

In the present case, the requirement to maintain proper TP documentation has been fastened on the Foreign Entity and emphasis has been laid on the fact that Section 92D of the Act provides that all taxpayers are required to obtain an independent accountant's report in respect of all international transactions/SDTs between AEs and the documentation maintained by the Indian AE shall not suffice. In view of the aforementioned, it is recommended that the foreign entities dealing with or receiving payments from Indian AEs should ensure TP compliance in order to avoid any penalty implications from the Indian TP perspective.

Source: Convergys Customer Management Group Inc [TS-543-ITAT-2020(DEL)-TP]

2. ITAT rules on application of domestic TP while computing profit-linked tax holiday deduction, held inter-unit transactions between two eligible units u/s 10AA outside ambit of TP

Outcome: In favor of taxpayer
Category: Specified domestic transactions (SDT), guarantee, commission, Interest on loan, CUP method

Facts of the Case

- Wipro Limited (“the taxpayer”) is engaged in diverse business activities including providing information technology (IT) and software development services through various units. Some of the units were eligible to avail of the benefits of the incentive provisions of the Income-Tax Act, 1961 (“the Act”). Some units were eligible to avail of 100% profit deduction while the others were eligible to claim deduction of 50% profits from eligible business under the Act. The Taxpayer also carried on business through certain units (non-eligible units) which were not eligible to claim the benefit of the incentive provisions.

- During the years under consideration, i.e. Assessment Year (“AY”) 2009-10 to AY 2014-15, the taxpayer though its various units had entered into various transactions with its Associated Enterprise (“AE”). Each of the units entered into contracts for rendering IT services to their customers independently. In case where the necessary skill or expertise for rendering the service was not available with any of the units, the work was sub-contracted to the other units which possessed the necessary skill set and expertise in return for a specified fee (sub-contracting arrangement). While the unit which sub-contracted the work accounted for the fee paid as an expense, the unit to which the work was sub-contracted accounted for it as a sale turnover.

- During the course of assessment proceedings, the Transfer Pricing Officer (“TPO”) proposed an upward addition by enhancing the total income of the taxpayer to the extent of excess profits declared by the eligible units. The Dispute Resolution Panel (“DRP”) confirmed the domestic TP addition proposed by the TPO. Accordingly, the taxpayer filed an appeal before the Income Tax Appellate Tribunal (“ITAT”/“the tribunal”).

- The brief facts of the case and ITAT ruling is elaborated in the following table -

Transaction	Facts of the case & Assessment proceedings	ITAT’s ruling
Specified Domestic Transaction (“SDT”)	• The taxpayer provides software and IT services from SEZ/STPI/ other places owned by taxpayer. • The taxpayer was availing deduction u/s 10AA of the Act in respect to 28 of its undertakings (13 units being eligible for 50% deduction and 11 units being eligible for 100% deduction). • TPO noted that there were inter-unit transactions between different eligible and non-eligible units and the net margin declared by the eligible units varied from 21.02% to 159.36%.	• ITAT referred the provisions of section 80IA(8), which states that transaction only between eligible and non-eligible unit is covered in TP regime. • ITAT explained that even though difference in rate of deduction between two eligible units may result in tax arbitrage, yet the same shall be outside the provisions of section 10AA/TP provisions, since sec 80IA(8) does not cover transaction between two eligible units.

Transaction	Facts of the case & Assessment proceedings	ITAT's ruling
Specified Domestic Transaction ("SDT")	• TPO noted that units eligible for 50% deduction were more in number than that eligible of 100% deduction and there was high value of transaction between the same • TPO further noted that the taxpayer in the TP study a showed an arithmetic mean margin of 15.58% in respect of comparable companies chosen by the taxpayer under the Transactional Net Margin Method ("TNMM"); • Accordingly TPO opined that there was a clear picture of shifting of profits from taxable to non-taxable units and also between SEZ units. In view of this, TPO held 15.58% as ALP and proposed an upward adjustment on SDT. • The same was upheld by DRP	• ITAT further clarified that the taxpayer's contention with regard to ALP application to the eligible and non-eligible units is correct for the purposes of application of the TP provisions. The TP provisions require that the "total income" from a transaction subject to domestic TP should be computed at ALP. Hence, the income of both the service-providing unit and the service-recipient unit is required to be computed at ALP. • Accordingly, ITAT put forward various illustrations demonstrating the same and remitted the issue (limited to calculation of ALP for eligible and non-eligible units) back to TPO.
Liquidated damages	• The taxpayer along with its AE i.e. Wipro Inc., USA entered into agreement with third party for provision of IT services. • The said services were 100% provided by taxpayer basis a back to back agreement ("Mutual contracting agreement") by the taxpayer and AE. • AE paid certain liquidated damages to the third party in respect to the agreement which were reimbursed by the taxpayer on cost to cost basis. • TPO held that no Indian entity would have paid such expenses incurred by foreign AE in an uncontrolled transaction and accordingly, benchmarked the transaction by CUP taking ALP to be NIL.	• ITAT was of the view that TPO has not considered the Mutual contracting agreement while com puting the ALP as the taxpayer contented that the said payment was done in accordance with the agreement. • Accordingly, ITAT remitted back issue to the TPO/AO to reassess the issue in light of documents presented by the taxpayer.
Interest on short term advances	• The taxpayer granted short term advances to various AEs. • TPO held that interest @ 14.35% to be charged as per the ALP requirements of the Act. The adjustment made by TPO was affirmed by DRP.	• ITAT relied on ruling of **HC of Rajasthan in case of Vaibhav Gems Limited**, wherein the interest rate to charge on loan was held to be LIBOR rate. • Since the taxpayer could not establish parity of facts in the said case, ITAT held the ALP of interest rate to be LIBOR + 150 basis points as the same was also accepted by revenue in the subsequent assessment year.

Transaction	Facts of the case & Assessment proceedings	ITAT's ruling
Corporate guarantee commission	• The taxpayer provided corporate guarantee to its AE and charged commission@ 0.50% and benchmarked the same by CUP method. • TPO held that the ALP for commission should be 3%. The view of TPO was affirmed by the DRP.	• ITAT relied on ruling of **Mumbai bench of ITAT in case of IL&FS Technologies Ltd.,** wherein ALP for corporate guarantee commission was held to be at 0.50%. • Accordingly, ITAT deleted the TP adjustment.
Software development services	• The taxpayer provided software development and IT services to its AEs. The taxpayer benchmarked the same by Internal CUP method as the transaction with AE was only 3% of the total turnover. • TPO rejected the taxpayer's benchmark-ing and adopted TNMM method and worked out average margin of compara-bles at 31.18% and accordingly proposed upward adjustment. The adjustment was upheld by the DRP.	• ITAT noted that TPO did not examined the invoices presented by the taxpayer to demonstrate that identical services are being provided to AE and non-AE. • ITAT relied on ruling of **Delhi bench of ITAT in case of Hughes Systique India Pvt. Ltd,** wherein the contention of the taxpayer was upheld and accordingly, ITAT held that internal CUP is the Most appropriate method for the said transaction and remitted the issue back to TPO for fresh examination.

Nangia Andersen LLP's Take

The ITAT reiterated the basic principle that where the interpretation of the law is sufficiently clear, in such cases, the tax authorities cannot proceed with their own version of interpretation that will benefit them. In view of the same, the said ruling supports that the lower level of tax authorities cannot consider inter-unit transaction between two eligible units under the purview of transfer pricing regime. At the same time, ITAT also highlights that there is lacunae in the Act to the extent where rate of deduction allowable to two eligible units differs and such inter-unit transaction between them may result in tax arbitrage, however it can only be cured by the parliament.

In light of the aforementioned judgment, domestic TP may not be applied to transactions between two eligible units, even if there is a possibility of tax arbitrage due to a difference in the quantum of deduction to which both units are entitled.

Source: Wipro Limited [TS-528-ITAT-2020 (Bang)- TP]

Regulatory

1. The Companies Act 2013

• Measures under The Companies Act, 2013 and Limited Liability Partnership Act, 2008

According to Section 149 of the Companies Act 2013 ('Companies Act') and Section 7 of the Limited Liability Partnership Act 2008 ('LLP Act'), every company/ LLP shall have at least one Resident Director/ Designated Partner who stays in India for a total period of not less than 182 days during the previous financial year.

However, due to the travel restrictions imposed during the COVID-19 pandemic, Ministry of Corporate Affairs ('MCA') vide General Circular No.36/2020, dated 20 October, 2020 ('General Circular'), has clarified that the non-compliance of the provision of minimum residency in India for a period of at least 182 days shall not be treated as a non-compliance for the year 2020-21.

• Companies (Prospectus and Allotment of Securities) Amendment Rules, 2020

According to Section 42 of the Companies Act read with Companies (Prospectus and Allotment of Securities) Rules, 2014 ('the Prospectus and Allotment of Securities Rules'), a company may issue shares on a private placement basis subject to prior approval of shareholders of the company.

MCA on 16 October 2020 has issued a notification amending Rule 14 of the Prospectus and Allotment of Securities Rules. According to the amendment, in case a Company offers any securities to Qualified Institutional Buyers ('QIBs'), it may pass a Special Resolution only once a year for allotment to such QIBs during the year.

2. Reserve Bank of India

• Revised Regulatory Framework for Housing Finance Companies ('HFCs')

Reserve Bank of India had issued a draft regulatory framework for HFCs and placed it in public domain on 17 June 2020 seeking comments from the stakeholders. Based on the inputs received, the revised regulatory framework for HFCs has been issued vide Notification no. DOR.NBFC (HFC) .CC.-No.118/03.10.136/2020-21 dated 22 October 2020 ('Notification').

According to the revised framework, following changes have been introduced:

A. The **"Housing finance company"** shall mean a company incorporated under the Companies Act, 2013 that fulfils the following conditions:

   - It is an NBFC whose financial assets, in the business of providing finance for housing, constitute at least 60% of its total assets (netted off by intangible assets).
   - Out of the total assets (netted off by intangible assets), not less than 50% should be by way of housing financing for individuals.

The Notification also defines the business of Housing finance as financing, for purchase/construction/re-construction/ renovation/ repairs of residential dwelling units, including:

- Loans to individuals or group of individuals including co-operative societies for construction/ purchase of new dwelling units.
- Loans to individuals or group of individuals for purchase of old dwelling units.

- Loans to individuals or group of individuals for purchasing old/ new dwelling units by mortgaging existing dwelling units.
- Loans to individuals for purchase of plots for construction of residential dwelling units provided a declaration is obtained from the borrower that he intends to construct a house on the plot within a period of three years from the date of availing of the loan.
- Loans to individuals or group of individuals for renovation/ reconstruction of existing dwelling units.
- Lending to public agencies including state housing boards for construction of residential dwelling units.
- Loans to corporates/ Government agencies for employee housing.
- Loans for construction of educational, health, social, cultural or other institutions/centres, which are part of housing projects and which are necessary for the development of settlements or townships (see note below).
- Loans for construction meant for improving the conditions in slum areas, for which credit may be extended directly to the slum-dwellers on the guarantee of the Central Government, or indirectly to them through the State Governments.
- Loans given for slum improvement schemes to be implemented by Slum Clearance Boards and other public agencies.
- Lending to builders for construction of residential dwelling units.

All other loans including those given for furnishing dwelling units, loans given against mortgage of property for any purpose other than buying/ construction of a new dwelling unit/s or renovation of the existing dwelling unit/s as mentioned above, will be treated as non-housing loans and will not be falling under the definition of "Housing Finance".

Registered HFCs which do not currently fulfil the criteria as specified above shall be provided with the following timeline for transition:

Timeline	Minimum percentage of total assets towards housing finance	Minimum percentage of total assets towards housing finance for individuals
March 31, 2022	50%	40%
March 31, 2023	55%	45%
March 31, 2024	60%	50%

These HFCs shall be required to submit a Board approved plan within three months including a roadmap to fulfil the above-mentioned criteria and timeline for transition. HFCs unable to fulfil the above criteria as per the timeline shall be treated as NBFC – Investment and Credit Companies (NBFC-ICC) and they will be required to approach the Reserve Bank for conversion of their Certificate of Registration from HFC to NBFC-ICC.

Net Owned Fund Requirement

The Reserve Bank has specified a minimum net owned funds requirement of INR 20 crore, for a company to commence its principal business as a housing finance company.

Housing finance company holding a Certificate of Registration (CoR) and having net owned fund of less than INR 20 crores may continue to carry on the business of housing finance, if such company achieves net owned fund of INR 15 crore by 31st March, 2022 and INR 20 crore by March 31 2023.

B. Further, various provisions, such as Definition of public deposits, Implementation of Indian Accounting Standards, Loans against security of shares, Loans against security of single product – gold jewellery, Levy of foreclosure charges, Securitization Transactions and reset of Credit Enhancement, Managing Risks and Code of Conduct in Outsourcing of Financial Services, Liquidity Risk Management Frame work, Liquidity Coverage Ratio ('LCR'), etc. prescribed under different regulations for NBFC's shall apply mutatis mutandis to all HFCs.

• Framework for Recognition of a Self-regulatory Organisation for Payment System Operators

The Reserve Bank of India ('RBI') has decided to encourage the establishment of a Self-Regulatory Organization ('SRO') for Payment Systems Operators ('PSOs'), as the payment ecosystem is growing and the number of payments systems are multiplying.

According to RBI, it is necessary that the industry should itself develop the regulatory standards in respect of system security, pricing practices, customer protection measures, grievance redressal mechanisms, etc. in terms of developing the systems that conform to the best international practices.

These standards will be better focused on issues of systemic importance. It would, by virtue of being developed by the industry itself, be more appropriate and encourage better compliance. These regulations would supplement, and not replace the applicable laws or regulations.

The SRO is expected to resolve disputes among its members internally through mutually accepted processes to ensure that members operate in a disciplined environment and even accept penal actions by the SRO. An ideal SRO would function beyond the narrow self-interests of the industry and address larger concerns, such as protecting customers, furthering training and education and strive for development of members, the industry and the ecosystem as a whole.

3. FDI Policy

• Clarification on FDI Policy for uploading/streaming of news and current affairs through digital media

Background on FDI Policy in Digital Media

The Department for Promotion of Industry & Internal Trade ('DPIIT'), Ministry of Commerce & Industry, Government of India had vide Press Note 4 of 2019 dated September 18, 2019 ('Press Note') amended the Foreign Direct Investment ('FDI') Policy and introduced a new restricted sub-activity under Broadcasting Content, viz., Digital Media.

By way of the said amendment, Government of India had allowed FDI up to 26% in an Indian entity engaged in the business of ***Uploading/ Streaming of News & Current Affairs through Digital Media***, through government approval route.

However, in view of the overlapping nature of activities within the Media sector, doubts arose on the scope and applicability of above provisions on industry players. For instance, Streaming of News and Current affairs is undertaken by Media entities using various broadcasting mediums such as Television channels, web applications/ platforms etc. The DPIIT has through its latest clarification elucidated the various digital media activities on which provisions of the aforesaid Press note would become applicable along with specific operational conditions.

DPIIT Clarification dated 16 October 2020

The DPIIT vide Clarification dated October 16, 2020 ('Clarification') has clarified that Press Note 4 of 2019 shall be applicable to the following categories of ***Indian entities, registered or located*** in India:

Digital media entity streaming/uploading news and current affairs on websites applications or other platforms;

- News agency which gathers, writes and distributes/transmits news, directly or indirectly, to digital media entities and/or news aggregators; and
- News aggregator, being an entity which, using software or web application, aggregates news content from various sources, such as news websites, blogs, podcasts, video, user submitted links, etc. in one location.

Also, these entity would have to adhere to the following conditions:

- The majority of Directors on the Board of the company shall be Indian citizens;
- The Chief Executive Officer shall be an Indian citizen;
- The entity shall be required to obtain security clearance of all foreign personnel likely to be deployed for more than 60 days in a year by way of appointment, contract or consultancy or in any other capacity for functioning of the entity prior to their deployment. In the event of security clearance of any of the foreign personnel being denied or withdrawn for any reasons whatsoever, the investee entity will ensure that the concerned person resigns or his/her services are terminated forthwith after receiving such directives from the Government.

Given that the Central Government was aware that local Indian entities were operating in the digital media space with FDI beyond the stipulated 26%, it has now given such entities, a one year window to re-align themselves with the 26% FDI cap.

One year shall be reckoned from the date of issue of the Clarification.

Nangia Andersen LLP's Take

Indian Digital media entities with FDI are required to approach the Central Government for approval of activities while re-aligning foreign investments to the 26% level within a period of one year. Identifying domestic Joint-venture partners within a short span of time would pose a big challenge for existing players wishing to continue operations.

It is pertinent to note that in an increasingly platform-agnostic world where Print, Television and Digital co-exist on the internet, having multiple FDI caps for news and current affairs does not hold merit.

A composite cap for news media under the Government approval route would provide better cross-platform access to entities engaged in disseminating news and current affairs.

Provisions of the Press Note are applicable on Indian entities, registered or located in India. Therefore, foreign entities not registered in India and engaged in uploading news and current affairs content from servers located outside India would be outside the purview of the Press Note.

- ## Consolidated Foreign Direct Investment ('FDI') Policy released by Department for Promotion of Industry and Internal Trade ('DPIIT') with effect from 15 october 2020

The DPIIT, vide the subject Circular has released the Consolidated FDI Policy ('Consolidated FDI Policy') replacing the erstwhile Circular dated 28 August 2017. The Consolidated FDI Policy incorporates changes brought in by the Press Notes released by the DPIIT between 2017 and 2020 along with changes necessitated from the replacement of FEM (Transfer r or Issue of Security by Persons Resident Outside India) Regulations, 2000 by the FEM (Non Debt Rules), 2019.

The Consolidated FDI Policy has aligned the definition of 'control' with the Companies Act 2013 and the SEBI (Substantial Acquisition of Shares and Takeovers), 2011. The amended definition broadens the scope of what would constitute control and now includes *"control on management or policy decisions, exercisable by a person acting individually or in concert, directly or indirectly".*

4. Central Government Incentives

- ## Guidelines of PLI Schemes to promote Domestic Production of Bulk Drugs and manufacturing of medical devices revised

Changes in PLI for Bulk Drugs Scheme

Based on industry representations, it has been decided by the Department of Pharmaceuticals ('DoP') that the last date for receiving applications under the Bulk Drugs Scheme be extended by a week to 30 November 2020.

The criteria of 'minimum threshold' investment has now been replaced with 'committed investment' by the selected applicant. The change has been made to encourage efficient use of productive capital as the amount of investment required to achieve a particular level of production depends upon choice of technology and it also varies from product to product.

Change in the minimum annual production capacity for 10 products viz Tetracycline, Neomycin, Para Amino Phenol (PAP), Meropenem, Artesunate, Losartan, Telmisartan, Acyclovir, Ciprofloxacin and Aspirin. Minimum annual production capacity is a part of eligibility criteria under the scheme

S. No.	Name of KSM/ API	Minimum annual production capacity (metric tonnes)	Minimum annual production capacity (metric tonnes) - Revised
1	Neomycin	175	80
2	Tetracycline	450	200
3	Para amino phenol	8000	4500
4	Meropenem	10	4
5	Losartan	80	40
6	Ciprofloxacin	300	150
7	Artesunate	35	20
8	Telmisartan	80	45
9	Aspirin	2800	750
10	Acyclovir	175	75

Changes in PLI for Bulk Drugs Scheme

The criteria of 'minimum threshold' investment has now been replaced with 'committed investment' by the selected applicant. The change has been made to encourage efficient use of productive capital as the amount of investment required to achieve a particular level of production depends upon choice of technology and it also varies from product to product.

The tenure of the scheme has been extended by one year keeping in view the capital expenditure expected to be done by the selected applicants in FY 2021-22. Accordingly, the sales for the purpose of availing incentives will be accounted for 5 years starting from FY 2022-2023 instead of FY 2021-2022.

The last date for receiving applications under the scheme is now extended by a week to 30 November 2020.

Nangia Andersen LLP's Take

The above-mentioned changes have been made after industry representations. One provision of the scheme with respect to minimum net worth requirement, however, has been retained and may deter smaller payers from participating in the schemes.

GST

1. GST Clarifications and Updates

• Special Procedure for taxpayers for issuance of e-invoices for October 2020

- One-time relaxation is provided in e-invoicing provisions for invoices issued during October 2020. Taxpayers can obtain an Invoice Reference Number (IRN) for such invoices by uploading the specified particulars in **Form GST INV-01** on the common portal, within 30 days from the date of invoice, failing which the same shall not be treated as an invoice.

- Please note that e-invoicing provisions are applicable from 1 October 2020 to taxpayers having aggregate turnover exceeding Rs. 500 Crores in any of the preceding three financial year starting from FY 2017-18.

(Notification No. 73/2020 – Central Tax dated 1 October 2020)

• Clarification relating to application of Rule 36(4) of Central Goods and Services Tax Rules, 2017 ('CGST Rules') for the months of February 2020 to August 2020

- Vide Notification no. 30/2020 – Central Tax dated 3 April 2020, it had been prescribed that the condition made under sub-rule (4) of rule 36 of the CGST Rules shall apply cumulatively for the tax period February, March, April, May, June, July and August, 2020 and that the return in Form GSTR-3B for the tax period September 2020 shall be furnished with the cumulative adjustment of input tax credit for the said months.

- It has been clarified that taxpayers shall reconcile the ITC availed in their Form GSTR-3B for the period February 2020 to August 2020 with the details of invoices uploaded by their suppliers till the due date of furnishing Form GSTR-1 for the month of September 2020.

- It has been further clarified that the cumulative amount of ITC availed for the said months in FORM GSTR-3B should not exceed 110% of the cumulative value of the eligible credit available in respect of invoices or debit notes uploaded by the suppliers till the due date of furnishing FORM GSTR-1 for the month of September 2020.

- The excess ITC availed arising out of reconciliation during this period, if any, shall be required to be reversed in Table 4(B)(2) of FORM GSTR-3B of September 2020. Failure to reverse such excess availed ITC on account of cumulative application of rule 36(4) of the CGST Rules would be treated as availment of ineligible ITC during the month of September 2020.

(Circular No. 142/12/2020 – GST dated 9 October 2020)

• Notified due dates for filing of FORM GSTR-1 for the period from October 2020 to March 2021

- Due date for filing of Form GSTR-1 for the period from October 2020 to March 2021 has been notified as under:

S.No.	Aggregate turnover	Frequency	Due date
1	More than Rs. 1.5 crores	Monthly	October - 11 November 2020 November - 11 December 2020 December - 11 January 2021 January - 11 February 2021 February - 11 March 2021 March - 11 April 2021

S.No.	Aggregate turnover	Frequency	Due date
2	Up to Rs. 1.5 crores	Quarterly	Oct to Dec - 13 January 2021 January to March – 13 April 2021

(Notification No. 74/2020 – Central Tax and 75/2020 – Central Tax dated 15 October 2020)

- ## Notified due dates for filing of FORM GSTR-3B for the period from October 2020 to March 2021

- Due date for filing of Form GSTR-3B for the period from October 2020 to March 2021 has been notified as under:

S.No.	Aggregate turnover	Frequency	Due date
1	More than Rs. 5 crores	Monthly	20th of next month
2	Up to Rs. 5 crores having place of business in Group states and union territories[1]	Monthly	22nd of next month
3	Up to Rs. 5 crores having place of business in Group states[2] and union territories[1]	Monthly	24th of next month

(Notification No. 76/2020 – Central Tax dated 15 October 2020)

- ## Filing of Annual Return in Form GSTR-9 for FY 2019-20 made optional for small taxpayers

- Filing of Annual Return in Form GSTR-9 under section 44(1) of Central Goods and Services Tax Act, 2017 ('CGST Act') for FY 2019-20 has been made optional for small taxpayers whose aggregate turnover does not exceed Rs. 2 crores.

(Notification No. 77/2020 – Central Tax dated 15 October 2020)

- ## Notified changes in HSN code details required to be mentioned on tax invoice

- Effective from 1 April 2021, taxpayers shall be required to report the number of HSN code on tax invoice as below-

S.No.	Aggregate turnover in the preceding Financial Year	Number of digits of HSN code	B2B Supplies	B2C Supplies
1	Up to Rs. 5 crores	4	Mandatory	Optional
2	More than Rs. 5 crores	6	Mandatory	Mandatory

(Notification No. 78/2020 – Central Tax dated 15 October 2020)

[1] Chhattisgarh, Madhya Pradesh, Gujarat, Maharashtra, Karnataka, Goa, Kerala, Tamil Nadu, Telangana, Andhra Pradesh, the Union territories of Daman and Diu and Dadra and Nagar Haveli, Puducherry, Andaman and Nicobar Islands or Lakshadweep

[2] Himachal Pradesh, Punjab, Uttarakhand, Haryana, Rajasthan, Uttar Pradesh, Bihar, Sikkim, Arunachal Pradesh, Nagaland, Manipur, Mizoram, Tripura, Meghalaya, Assam, West Bengal, Jharkhand, Odisha, Jammu and Kashmir, Ladakh, Chandigarh and Delhi

Relevant Amendment in CGST Rules

- *Rule 46 of CGST Rules* has been amended which gives power to government to notify certain supply and the number of digits of HSN code that need to be mentioned in the invoice.

- *Rule 67A of CGST Rules* has been substituted to the effect that any registered person who is required to file Nil Return under section 39 of CGST Act in Form GSTR-3B or a Nil details of outward supplies under section 37 of CGST Act in Form GSTR-1 or a Nil Statement in Form GST CMP-08 can file the same through a short messaging service using registered mobile number which shall be verified by a registered mobile number based OTP facility.

- *Proviso to Rule 80(3) of CGST Rules* has been substituted to the effect that every registered person whose aggregate turnover exceeds five crore rupees shall get his accounts audited as per section 35(5) of CGST Act and shall furnish a copy of audited annual accounts and certified reconciliation statement in Form GSTR-9C for FY 2019-20. Normally the threshold limit for audit and filing of Form GSTR 9C is two crores rupees.

- *Fourth Proviso to Rule 138E of CGST Rules* has been inserted which deals with restriction on furnishing of information in PART A of Form GST EWB-01 stating that the said restriction shall not apply during the period 20 March 2020 to 15 October 2020 in case where Form GSTR-3B or Form GSTR-1 or Form GST CMP-08, as the case may be, has not been furnished for the period February 2020 to August 2020. This proviso has been made effective from 20 March 2020.

(Notification No. 79/2020 – Central Tax dated 15 October 2020)

Extension in due date for FORM GSTR-9 and FORM GSTR-9C for FY 2018-19

- Due date for filing of GST Annual Return in Form GSTR-9 and Reconciliation Statement in Form GSTR-9C for FY 2018-19 has been extended to 31 December 2020. These returns were earlier due on 31 October 2020.

(Notification No. 80/2020 – Central Tax dated 28 October 2020)

2. Advance Rulings & Judgements

- **Karnataka Authority for Advance Ruling held that activities of Liaison Office in India are covered under the scope of supply and required to obtain registration under GST**

- The Applicant is a Liaison Office ('LO') of a Germany based company involved in the business of applied research. LO undertakes various activities as permitted by the Reserve Bank of India ('RBI').

- The Applicant sought the ruling on the following:

  - Whether the activities of a LO amount to supply of services?
  - Whether a LO is required to be registered under GST?
  - Whether LO is liable to pay GST

- The Applicant submitted that the activities undertaken are permitted activities and it is an extended arm of the Head Office ('HO') and not involved in any business activity on its own. It also states that it neither charges nor collects any fee or consideration.

- The Applicant also emphasized certain legislative provisions [i.e. Section 7 read with Schedule I, Section 9, Section 15 of the CGST Act] and advance ruling pronounced in identical matter and submitted that their activities are not covered under the scope of supply and not liable for registration.

- The Authority for Advance Ruling ('AAR') examined the definition of business which and includes trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit and it also includes any activity or transaction in connection with or incidental or ancillary thereto and activities of LO are covered by the scope of business.

- The AAR also analysed the definition of person [Section 2(84) of the CGST Act] and concluded that it includes artificial judicial person and referring to explanation to Section 15(C) of the CGST Act concluded that HO and LO are related persons and promoting business of HO in India by LO is covered in the scope of supply even in absence of any consideration.

- It held that activities undertaken by LO are nothing but activities covered by the scope of the term intermediary. AAR also observed that the Applicant has representational office i.e. LO in Bangalore, India and hence has an establishment in India.

- The AAR concluded that activities undertaken by the LO are in the course of interstate supply of services in terms of Section 7(5) of the IGST Act and liable for registration.

Nangia Andersen LLP's Take

The recent Karnataka AAR is contrary to the view taken by the Rajasthan AAR and Tamil Nadu AAR. The recent Karnataka ruling appears to be incongruent with the provisions of Foreign Exchange Management Act which prohibits the LO from engaging in any trade/ commercial activities in India.

[Advance Ruling Order No. KAR ADRG 50/2020 dated 08 October 2020 – Karnataka Authority of Advance Ruling]

- **AAR held that reimbursement of expenses to overseas holding company is leviable to GST**

- The Applicant is a company incorporated under the Companies Act, 1956 and subsidiary of Foreign holding company. The holding company provides credit card facility to its employees as well as employees of its subsidiaries including Indian subsidiary. The employees are entitled to use credit card for travel, accommodation, meals etc. for official purposes. Holding company makes payment to bank and thereafter claim reimbursement from subsidiaries including Indian subsidiary (Applicant) on actual basis.

- The Applicant sought advance ruling whether the Applicant is liable to pay GST on reimbursement made to holding company.

- The AAR held that credit cards were issued to employees to meet business related expenses and the Applicant was required to reimburse such charges to holding company. AAR held that reimbursement of expenses will qualify as provision of credit-granting services. Accordingly, the same qualify as import of service and Applicant is liable to pay GST on such reimbursement under reverse charge basis.

[ICU Medical India LLP, 2020-VIL-288-AAR (Tamil Nadu)]

- **Hon'ble Madras High Court held that assesses are not entitled to carry forward the CENVAT Credit of Education Cess, Secondary and Higher Education Cess and Krishi Kalyan Cess to GST**

- Single Bench of the Madras High Court in the matter of Southerland Global Services Private Limited ('the Appellant') had allowed the transition of credit of Education Cess ('EC'), Secondary and Higher Education Cess ('SHEC') and Krishi Kalyan Cess ('KKC') to GST.

- The revenue preferred an appeal before the Division Bench of the High Court. The Division Bench has now reversed the single member' judgement and disallowed the transition of cess credit to GST.

- Division Bench while dealing with the question observed various provisions of law for the reasons mentioned below and allowed the writ filed by the revenue.

    - Availing credit of cesses in books is not a vested right to transition of such credit to GST. Such credit is in the nature concession and facility and not a vested right. Even if one were to rank such a right of CENVAT credit on the pedestal of a statutory right, even that right can be curtailed and regulated by conditions for availing such right. It is clear from the Scheme of Section 140 of the CGST Act that the transition and carry forward of Input Tax Credit of the taxes and duties paid under the earlier indirect tax regime was subject to conditions and specifications given in Section 140 of the CGST Act and unless specifically allowed.

    - Unutilised EC and SHEC in the hands of the Assessee had become dead CENVAT Credit claim in the year 2015 wherein these levies dropped.

    - GST Law, by enactment of respective laws by the Parliament and States and creation of GST Council to subsume the 16 indirect taxes which were in vogue prior to 1-7-2017 was a watershed moment in the taxation reforms in India.

    - Three types of Cesses involved were not subsumed in the new GST Laws, either by the Parliament or by the States. Therefore, the question of transitioning them into the GST regime and giving them credit under against output GST liability cannot arise.

    - By virtue of CGST Act and amendments made therein in 2018, there is implied lapsing of credit of Cesses.

Nangia Andersen LLP's Take

While implementing GST, one of the objective was to avoid cascading impact of taxes and it was envisaged that implementation would be smooth and there would be elaborate transitional provisions for transition of existing tax payers including without loss of credit earned in the erstwhile regime.

Credit is vested right and not a concession. For of determination of transition of credit, it is relevant to determine the nature of such credit. In our view, merely because these cesses were abolished does not mean that legitimately availed credit becomes dead claims.

Transition of credit has been one of the most contentious issue. Various courts have given divergent judgements including holding that ITC is a vested right. Pursuant to this order, the uncertainty over eligibility to transition of cess credit to GST would continue until settled by the Apex court.

[(2020) 120 taxmann.com 295 (Madras) dated 16 October 2020 - Assistant Commissioner of CGST and Central Excise Vs. Sutherland Global Services (P.) Ltd.]

- **AAAR upholds the decision pronounced by Maharashtra AAR that air conditioning plant cannot be classified as work contract services being not in the nature of immovable property and Supply, Erection, Testing and Commissioning of air-conditioning plants accounts to composite supply of goods and services**

- M/s Nikhil Comforts ('the Appellant') entered into an agreement with Goa State Infrastructure Development Corporation ('GSIDC') for carrying out Supply, Erection, Testing and Commissioning of Air Conditioning plant for a building. The Appellant sought ruling as to whether the above transaction would be classified as works contract services considering air conditioning plant as an immovable property or Supply, Erection, testing and commissioning of air conditioning plant would account to composite supply of goods and services and liable to tax at the rate applicable on principal supply i.e. Air Conditioner. AAR held that the scope of work presented for ruling is a composite supply.

- On filling appeal, AAAR observed that works contracts means contract exclusively in relation to an immovable property, therefore, for supply of air conditioning plant to come under the purview of work contracts, it ought to fulfil parameters of immovable property.

- AAAR while dealing with the issue applied the test of marketability and permanency i.e. supplies attached to the earth to ascertain whether air conditioning plant can be considered as an immovable property and concluded that air conditioning plant is marketable and so far as with permanency is concerned the air conditioning parts [i.e. ducts, and pipes, etc.] are insulated only to have wobble free operation of plant leading to conclusion that air conditioning units cannot be classified as an immovable property as it is not permanently attached to earth.

- On these grounds, AAAR confirmed the ruling given by the AAR.

[M/s Nikhil Comforts – Order No. MAH/AAAR/SS-RJ/16/2019-20 Date- 11 November 2019) – Maharashtra Authority of Advance Ruling]

- **Rectification of ruling passed by AAAR in light of subsequent Circular**

- The Appellant collects penal interest from customers on delayed payment of EMI. AAAR had an occasion to decide whether penal interest received on delayed payment of monthly EMI is eligible for exemption under S.No.27 of Notification No. 12/2017-Central Tax (Rate). AAAR had held that penal interest is recovered towards toleration of an act and is duly covered under Entry 5(e) of Schedule II of the CGST Act. Therefore, such penal charge is subject to GST. The Appellant filed rectification application before AAAR on the ground that the ruling is contrary to the Circular No. 102/21/2019 dated 28 June 2019. AAAR rectified its ruling to hold that CBIC Circular is binding on it and observed that Circular being beneficial in nature, will have retrospective effect. AAAR rectified its order and held that penal interest recovered from customers would be exempt from GST.

[Bajaj Finance Limited, 2020-VIL-56-AAAR (MAH)]

3. Customs Updates

• CBIC amends Customs Circular on Guidelines for Provisional Assessment under Section 18 of the Customs Act, 1962

- Pursuant to the introduction of the Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020 ('CAROTAR, 2020'), Circular No. 42/2020 has been issued to amend Circular No. 38/ 2016-Customs dated 22 August 2016 to provide for revised security amount.

- After amendment, all class of importers (including AEO) are required to furnish 100% of differential duty as security if provisional assessment is requested when inquiry is initiated in terms of Rule 5 or when verification is initiated in terms of Rule 6(1)(a)/ 6(1)(b) of the CAROTAR, 2020.

(Circular No. 42/ 2020 dated 29 September 2020)

• Contactless delivery of international courier consignments

- In view of Covid-19 pandemic, delivery of international courier shipments has been allowed based on the OTP validation. OTP based validation has been allowed an alternative means of obtaining the proof of delivery to the existing procedure of taking physical signatures. Authorised couriers need to maintain the specified data for a period 0f 5 years.

- The Central Board of Indirect Taxes and Customs ('the CBIC') has issued the Circular No.47 prescribing the details for OTP validations.

(Circular No. 47/ 2020 Customs dated 20 October 2020)

Compliance Calendar

Direct Tax

Due Date	Particulars
7th November 2020	Payment of TDS - For the period 1st October 2020 to 31st October 2020
	Payment of TCS - For the period 1st October 2020 to 31st October 2020
	Payment of Equalisation Levy on online advertisement and other specified services, to be discharged by Indian payers, referred to in Section 165 of Finance Act, 2016 - For the period 1st October 2020 to 31st October 2020
30th November 2020	Last date of filing of revised and belated Income tax Return for A.Y. 2019-20 (This was extended vide the Taxation and Other laws (Relaxation and Amendment of certain Provisions) Act, 2020)
	Due date of filing of Income Tax Return for taxpayer having international and specified domestic transactions for A.Y. 2020-21 (This has been extended to 31st January, 2021 vide the notification dated 24th October, 2020)

GST

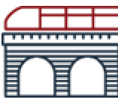
Compliance Category	Compliance Description	Frequency	Due date (old)	Due Date falling in November 2020
GSTR-1 (Details of outward supplies)	• Registered person having aggregate turnover over INR 1.5 crores	Monthly	11th day of succeeding month	• October - 11 November 2020
	• Registered person having aggregate turnover less than INR 1.5 crores	Quarterly	Last day of the subsequent month following the end of quarter	• October to December - 13 January 2021
Form GSTR-3B (Monthly return)	• Registered person having turnover more than INR 5 crores	Monthly	20th of next month	• October - 20 November 2020
	• Registered person with aggregate turnover up to INR 5 crore having place of business in Group 1 states and union territories[1]	Monthly	22nd of next month	• October - 22 November 2020
	• Registered person with aggregate turnover up to INR 5 crore having place of business in Group 2 states and union territories[2]	Monthly	24th of next month	• October - 24 November 2020
Form GSTR-6 (Return for input service distributor)	• Return for input service distributor	Monthly	13th of the succeeding month	• October - 13 November 2020
Form GSTR-9 (Annual Return)	• Annual Return if revenue is INR 2 crore or more	Yearly	On or before the 31st December following the end of FY	Annual Return and reconciliation statement for FY 2018-19 - 31 December 2020
Form GSTR-9C (GST Audit)	• GST Audit if revenue is INR 5 crore or more			

[1] Chhattisgarh, Madhya Pradesh, Gujarat, Maharashtra, Karnataka, Goa, Kerala, Tamil Nadu, Telangana, Andhra Pradesh, the Union territories of Daman and Diu and Dadra and Nagar Haveli, Puducherry, Andaman and Nicobar Islands or Lakshadweep
[2] Himachal Pradesh, Punjab, Uttarakhand, Haryana, Rajasthan, Uttar Pradesh, Bihar, Sikkim, Arunachal Pradesh, Nagaland, Manipur, Mizoram, Tripura, Meghalaya, Assam, West Bengal,Jharkhand, Odisha, Jammu and Kashmir, Ladakh, Chandigarh and Delhi

Regulatory

S. No.	Compliance	Due Date
1.	ECB-2 (Monthly Return of ECBs for the month of October)	November 07, 2020

Our Locations



NOIDA
(Delhi NCR - Corporate Office) A-109,
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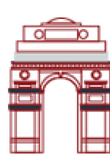
T: +91 120 5123000



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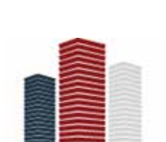
(Registered Office) B-27, Soami
Nagar, New Delhi-110017 | India
T: +91 120 2598000



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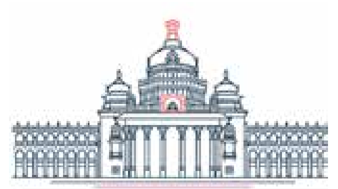

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Embassy Square, #306, 3rd Floor, 148 Infantry
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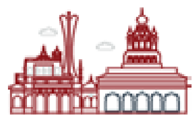
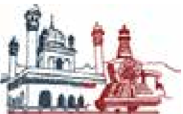
T: +91 80 2228 0999



PUNE
Office number 3, 1st Floor,
Aditya Centeegra, Fergusson College Road,
Next to Mantri House, Pune – 411004, India



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