Nangia Andersen LLP

Newsletter

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What's Inside?

Direct Tax

1. Cashless exercise of stock option by Consultant yield income under head Capital Gains, not Salary

Issue: ESOP taxation, Capital Gain/ Salary
Outcome: In the favour of assessee

Background

The Karnataka High Court (HC) in the case of Chittharanjan A. Dasannacharya (the assessee) reversed the order of the Income Tax Appellate Tribunal (ITAT) in the assessee's own case and stipulated that income from cashless exercise of stock options (ESOP), by an Independent Indian Consultant, of a US-based company shall be taxable as capital gains and not salary.

Brief Facts and Contentions

- The assessee, a software engineer, was employed with Aerospace Systems Private Ltd, a company registered in India. He was deputed to SIRF Technology Inc. (USA) in 1995, as an independent consultant, by the employer. Later, the assessee served as an employee of the US Company from 2001-2004. Thereafter, he returned to India to be employed by SiRF India.
- While on deputation, the assessee was granted stock option by SiRF USA. He exercised his right under the stock option by way of "cashless exercise", in AY 2006-07, wherein the underlying shares were not allotted but the assessee was entitled to receive the proceeds of sale of such shares after deducting the exercise/option price.
- The assessee offered the gain to tax, as a long-term capital gain (LTCG), as the stock options were held nearly for ten years and also claimed deduction under Section 54F of the Income Tax Act (the Act).
- The assessee contended that he was an independent consultant at the time of grant of the stock option. Therefore, since there was no employer-employee relationship between SiRF USA and himself, no part of the income from exercise of stock option can be treated as Income from Salary.
- The assessee argued that the 'right to purchase the shares of a company' falls in the definition of 'capital asset' and the sale/ extinguishment of the same (by way of cashless exercise option) qualifies as 'transfer of capital asset' under the Act. Therefore, income from exercise of cashless stock option must be taxed as 'Capital Gains'.
- However, the Assessing Officer (AO), in his order, taxed the difference between the market value of shares (on the date of exercise) and the exercise price as 'income from salary' and the difference between the sale price of shares and market value of shares on the date of exercise, as 'income from short-term capital gain' (STCG). Further, the claim under section 54F was also disallowed.
- On appeal before the ITAT, it was held that the assessee was to be regarded as an employee for the purposes of the stock option plan and the benefits arising therefrom were to be treated as income in the nature of salary. Aggrieved, the assesse approached the HC.

HC's Judgement

- Upon examination of communication sent by SiRF USA to the assesse, HC observed that the assessee was an independent consultant to the US Co. and not an employee at the relevant time.
- The HC ruled that there was no relationship of employer and employee between the US Company and the assesse and therefore, the contention of the ITAT of treating the income from the exercise of stock option, as 'income from salaries' is perverse.

- The HC elucidated that *it is trite law that unless the relationship of employer and employee exists, the income cannot be treated as salary.*

- Relying on the judgement of the Supreme Court in the case of Dhun Dadabhoy Kapadia and Hari Brothers Private Limited[1], *the HC enunciated that "the stock option being a right to purchase the shares underlying the options is a capital asset in the hands of the assessee under Section 2(14) of the Act"*. Thus, the HC concluded that the cashless exercise of option was a "transfer" of capital asset under the Act, by way of 'relinquishment/ extinguishment of right' in capital asset.

- The ITAT noted that at the time of grant of option to the assessee (1996), Section 17(2)(iiia) of the Act was not applicable, which included ESOPs provided by employer to employee in the definition of 'perquisite'.[2] Further, ITAT also observed that the assessee never received the shares in stock option.

- The ITAT thought it pertinent to note that the revenue in several other cases had accepted the stance that cashless exercise of option entails capital gains. It therefore relied on the law laid down by the Supreme Court in Berger Paints[3] that *it was not open for the revenue to take one stand in case of the assessee and challenge the correctness of the same in case of other assessee.* Therefore, HC did not allow revenue to take a different view.

Nangia Andersen LLP's Take

The ruling is a fair enunciation of the fact that an employer-employee relationship must exist for taxation of income as 'salary'. The HC has elaborately explained that 'right to purchase the shares underlying the options' i.e. cashless exercise of option falls in the ambit of 'capital asset' and the extinguishment of such right qualifies as 'transfer of capital asset' under the Income Tax Act. The ITAT also condemned the ITAT for inequitable treatment of assesses, thus establishing the faith of the taxpayers in the Indian Judiciary.

Past Precedents on the Issue

In the case of Sumit Bhattacharya, the Mumbai ITAT had ruled that income received on the redemption of Stock Appreciation Rights (SAR) was a revenue receipt, which was liable to tax as 'income under the head salaries' even if the same were received from the ultimate parent company of the employer. Further, it was held that employer-employee relationship was not necessary for taxation of income as 'salary'. This decision was overruled by the Bombay High Court in the assessee's own case[4], which has been recounted in the present case as well.

[Source: ITA No 153 of 2014]

[1] (1967) 63 ITR 651 (SC)

[2] After omission of Section 17(2)(iiia) through FA 2000, section 17(2)(vi) was inserted by Finance Act, 2009 to provide for taxation of ESOPs

[3] (2004) 135 taxman 586 (SC)

[4] (2020) 118 Taxmann.com 371 (Bom)

2. ITAT holds that Intermediary services cannot be classified as FTS

Issue: Fee for Technical Services (FTS)/ Permanent Establishment (PE)
Outcome: In the favour of the assessee

Background

The Income Tax Appellate Tribunal, Delhi (ITAT) in the case of Bombardier Transportation Sweden AB (the assessee), opined that intermediary services provided by the assessee to Bombardier Transportation India Limited (BTIN/ Indian AE) were not in the nature of FTS as the assessee did not make available any technical knowledge, skill, etc. to BTIN. Moreover, BTIN did not get equipped to apply technology contained in services rendered by the assessee in future. Accordingly, the said services shall not be taxable in India. Further, ITAT also deleted the additions made by the Dispute Resolution Panel (DRP) and held that the assessee did not have a PE in India

Brief facts and contentions

- The assessee was a tax resident of Sweden and a HUB entity for the Rail Control Solutions (RCS) business of Bombardier Group and was engaged in the business of manufacturing of train control and signalling systems for mass transit system.
- During the relevant assessment year, the assessee had rendered intermediary services like marketing, sales, business development, project management, customer services etc. to its Indian AE and received fee for the same.
- On reference to the Transfer Pricing Officer (TPO), no adverse inference was drawn and no adjustment was made to taxable income.
- Explaining as to why its income should not be taxed as FTS, the assessee contended that it had claimed benefit of Article 12 of the India-Sweden DTAA, since the provisions were more beneficial to the assessee. The assessee also claimed that the scope of FTS was restricted on the account of requirement of the 'make available' clause.
- However, the Assessing Officer (AO) argued that the nature of intermediary services provided by the assessee to BTIN were in the nature of FTS. He remarked that it is not only technical knowledge or skill that must be made available, but even common place 'experience', 'know-how' or 'processes' if made available, can result in taxability as FTS.
- The AO stated that services like guidance, advice, installation and management of equipment supply cannot be considered as managerial services. Since the assessee was involved on guidance of the projects, the services have been 'made available' to the recipient as per the India-Sweden DTAA. He therefore categorised intermediary services as FTS and brought the same to tax.
- Objections were raised before the DRP but were of no avail. The assessee therefore appealed before the ITAT.
- Another issue set forth before the ITAT was that DRP had enhanced the income of the appellant alleging that the assessee had a PE in India. DRP had examined the agreement between assessee, BTIN and DMRC and concluded that assessee has PE in India in the form of BTIN.

ITAT's Judgement

Taxation of Intermediary services

- The ITAT noted that the CIT (A) in assessee's own case, of an earlier assessment year had observed that the said intermediary services rendered by the appellant to BTIN did not satisfy the 'make available' clause and hence were not in the nature of FTS.

- The ITAT opined that to qualify as FTS, *technical or consultancy services should be aimed at and result in transmitting technical knowledge, etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider.*

- The ITAT stipulated that technology would be considered '*Made Available*' *when the person acquiring the service is enabled to apply the technology.*

- Further, the fact that, the provision of the service, may require technical knowledge, skills, etc., does not mean that technology is made available to the person purchasing the service.

- ITAT relied on the decision of the Karnataka High Court in the case of De Beers India Minerals Private Limited[1] wherein it was held that *payment of consideration would be regarded as 'fee for technical/included services' only if the twin test of rendering services and making technical knowledge available at the same time is satisfied.*

- The ITAT concluded that intermediary services rendered by the appellant did not make available technical knowledge, skill etc. to BTIN and did not equip it to apply technology contained in the services rendered. Therefore, the said services were not in the nature of FTS and accordingly, shall not be taxable in India.

Existence of Permanent Establishment

- The ITAT observed that the supplies made under the agreement (for design, manufacture, supply, installation testing and commission of train control and signalling systems) were offshore supplies.

- ITAT placed reliance on the ruling of the Supreme Court in the case of Ishikawajima Harima Heavy Industries Ltd[2] and the Delhi High court in the case of Nortel Networks India International Inc[3]. wherein it was directed that only such part of the income as is attributable to the operations carried out in India can be taxed in India.

- ITAT considered the agreement between the assessee and BTIN to note that the scope of work was clearly bifurcated. While the assessee was responsible for offshore part of the contract, BTIN was responsible for on-shore operations.

- ITAT took note of the fact that that the assessee did not have any place of business in India and all business activities with respect to offshore supplies were carried outside India. Moreover, equipment supply had been manufactured at the overseas manufacturing facility of the assessee and sale of equipment had also occurred outside India. Even payment had been received by the assessee outside India.

- ITAT found that the entire findings of the DRP were based on erroneous application of wrong facts as it had considered a different contract, which was not under consideration. Further, DRP had held BTIN was the PE of the assessee *without appreciating the true fact that appellant had no place of disposal in India in the office of BTIN from where the assessee could have conducted business in India.*

- Based on the totality of facts and the fact that TPO had examined the international transactions and had accepted the same to be at Arms-Length Price, ITAT ordered the AO to delete the additions of income attributable to PE.

Nangia Andersen LLP's Take

This ruling is another add-on to one of the most litigated issue of FTS taxation wherein, as a conventional practice the ITAT has relied on the "twin-test" to decipher whether intermediary services were in the nature of FTS. It has been once again established that to qualify as FTS, the technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. The matter of constitution of PE has also been examined, after thorough examination of facts, to hold that the assessee did not have a PE in India, as the Indian AE was not at the disposal of the assessee.

[1] 346 ITR 467

[2] 158 Taxman 259

[3] 386 ITR 0353

Past Precedents on the Issue

In the case of General Motors Overseas Corporation[4], the Mumbai ITAT noted that by way of transfer on deputation of its experienced/ expert technical employees, technology was 'made available' by one entity situated in one tax jurisdiction to another. Accordingly, ITAT concluded that salary and other costs, in relation to deputing its employees to GMIL, constituted Fees for Included Services (FIS) under Article 12 of the India-USA DTAA.

In the case of Buro Happold Limited[5], the Mumbai ITAT held that the technical designs/ drawings/ plans supplied by the taxpayer to Indian entity were project-specific and could not be used in any future projects. Therefore, it did not 'make available' the technical knowledge, skill, knowhow, etc. to the recipient. Therefore, payments received were not taxed as FTS.

Source: ITA No 859/DEL/2016 [AY 2011-12]

[4] [TS-134-ITAT-2020(Mum)]

[5] ITA No. 1296/Mum./2017

3. ITAT rules that FTS is taxable only in the year of receipt

Issue: Fee for Technical Services (FTS)
Outcome: In the favour of the assessee

Background

The Income Tax Appellate Tribunal, Bangalore (ITAT) in the case of M/s ABB AG (the assessee) has held that FTS is taxable only in the year of receipt as per the provisions of India-Germany DTAA.

Brief facts and contentions

- The assessee was a company incorporated and operating in Germany
- The Assessing Officer (AO), noticed from Form 3CEB that the assessee had received a sum of money towards testing and inspection charges, in the nature of FTS, which it had not offered to tax.
- The AO also noted that the company from whom the amount was payable, (ABB India Limited) had created a provision in its books for the amount. Hence, he proposed addition to the income of the assessee.
- However, the assessee submitted that it had not received the said sum in the year under consideration. The amount was taxable as FTS, but since the assessee had not raised any invoice on ABB India Limited, there was no necessity to declare the income as FTS. The assessee believed that as per India-Germany DTAA, FTS is taxable only in the year in which it is received.
- The AO did not accept the contentions of the assessee and argued that as per section 9(1)(vii) of the Income Tax Act, FTS income is chargeable on accrual basis and not on payment basis. Moreover, the assessee had failed to substantiate that the said income had been offered in the subsequent year. Accordingly, he assessed the amount as income of the assessee.
- The CIT(A) upheld the order of the AO. Aggrieved, the assessee pleaded the case before the ITAT.

ITAT's Judgement

Before the ITAT, the assessee submitted that the provisions of DTAA, being more beneficial to the assessee, shall apply to it. Accordingly, FTS shall be taxable on receipt basis. The assessee also put forth the fact that it was following cash basis of accounting and that the impugned amount had been offered to tax in the year of receipt.

Ruling in favour of the assessee, the ITAT made the following observations:

- The ITAT agreed that it was a settled proposition of law that the DTAA provisions shall override the provisions of the Income Tax Act unless the provisions of Act are more beneficial to the assessee.
- The ITAT also relied on the decision of the Mumbai ITAT in the case of UHDE GMBH[1] wherein it was concluded that:
    - *Where there is a conflict between the agreement for avoidance of double taxation and the domestic laws relating to taxation of income arising in the Contracting State, the former has to prevail.*
    - *Though under Section 5(2)(b) of the IT Act, in the case of a non-resident, income which accrues or arises or deem to accrue or arises to him in India is taxable, in view of the specific provisions of Art. VIIIA, what could be taxed, is only a payment to him.*

[1] (1996) 54 TTJ 355 (Bom.)

This presupposes that the liability to tax arises only on the non-resident receiving such payment. The same is not liable to be taxed on an accrual basis as has been laid down under Section 5 of the IT Act.

- The decision of the Bombay High Court in the case of Siemens Aktiengesellschaft[2], was also relied upon, wherein it was stipulated that assessment of FTS should be made in the year in which the amounts are received and not otherwise.
- ITAT concluded by saying that FTS is taxable only in the year of receipt as per the provisions of DTAA. Accordingly, ITAT held that tax authorities were not justified in assessing the impugned income on accrual basis.
- The matter was restored to the AO for the limited purpose of satisfying himself that the impugned amount had been offered to tax in another Assessment Year.

Nangia Andersen LLP's Take

The ITAT's order sheds light on the fact that FTS is taxed only on the receipt basis owing to the overriding effect of the tax treaties over the provisions of the Income Tax Act. The judgement has established that a legitimate benefit under the law shall be accorded to the taxpayers entitled to receive the same.

Past Precedents on the Issue

In the case of Johnson & Johnson,[3] it was held that 'Royalty' income is not taxable on accrual basis under India-USA treaty, as it explicitly uses the word 'paid'.

[Source: IT(IT)A No.1444/Bang/2019]

[2] Income Tax Appeal No.124 of 2010 dated 22.10.2012) (Bom.)

[3] [2013] 32 taxmann.com 102 (Mumbai - Trib.)

Transfer Pricing

1. ITAT characterized the taxpayer's transaction with AE as "negotiation services" and not "deemed purchases"

Outcome: In favour of taxpayer
Category: Deemed International Transactions

Facts of the case

- Gujarat Gas Trading Company Ltd ("the taxpayer") is engaged in the business of trading in natural gas. During AY 2010-11, the taxpayer entered into international transactions relating to payment for corporate guarantee commission with its Associated Enterprise i.e. B.G. Energy Holding Ltd. ("AE").
- During the course of assessment proceedings, the Assessing Officer ("AO") observed that the AE had negotiated the transaction of purchase of natural gas with Cairn Energy Group ("Cairn") from its Laxmi Gas field. The contract of purchase of gas was transferred by the AE to Gujarat Gas Company Limited and subsequently transferred to the taxpayer. Therefore, the AO was of the view that the said transaction of purchase of gas by the taxpayer from Cairn was covered under the definition of "international transaction" as per provisions of section 92B(2) of the Income Tax Act, 1961 ("the Act").
- In view of the above, the AO benchmarked the transaction of payment of commission to AE by adopting comparable uncontrolled price ("CUP") on monthly basis as against the average USD 3.9975 per GigaJoule taken by the taxpayer. As against the comparable price, purchase price of the gas purchased was calculated at USD 3.9414 per GigaJoule which included the commission of 1% paid to the AE.
- The taxpayer submitted that the application of provision of Section 92B (2) was not justified owning to the following reasons:
    - The AE had only rendered negotiation services to Cairn and there was no prior agreement between Cairn and the AE in relation to the gas supply to the taxpayer and the agreement was with British Gas India Pvt. Ltd. which was an Indian entity;
    - The purchase of gas from Laxmi field was assigned to a number of parties including independent parties namely ONGC and World Tata Petrodyne Ltd apart from the Cairn Group.
    - The taxpayer had purchased gas from two other entities apart from Cairn Group and the same price was paid to all of them and the purchase of gas was already benchmarked in the benchmarking for payment of commission made by the taxpayer in the TP documentation.
    - The taxpayer had entered into a subsequent contract with the sellers of Laxmi field without any assistance from the AE. Taxpayer submitted that AE was not involved in negotiation of this contract and the comparable price was higher than the price considered under the deemed international transaction.
- However, AO rejected the aforementioned contentions of taxpayer and made an upward Transfer Pricing ("TP") adjustment of INR 4.73 crores by alleging that the transaction was covered in the second limb of the definition of deemed international transaction.
- Aggrieved by the AO order, the taxpayer, appealed before the CIT(A) and CIT(A) allowed taxpayer's appeal by deleting the said TP-adjustment.
- Aggrieved by the order of CIT(A), the Revenue filed an appeal before the Hon'ble Income Tax Appellate Tribunal ("ITAT").

ITAT's Ruling

ITAT relied on the taxpayers contentions and made the following additional observations:

- The taxpayer submitted that as per circular no. 14/2001 of the CBDT, there has to be a prior agreement between

the AE and the unrelated party in relation to the transaction between the taxpayer and the third party. If there is no prior agreement as envisaged under section 92B(2), then that section does not have any application.

- The taxpayer referred to the copy of agreements between ONGC, World Tata Patrodyne Ltd., Cairn Energy group of companies and Gujrat Gas Limited and contended that the price was negotiated between the parties to the agreement and there was no role of the AE to negotiate the price of the gas purchased by the taxpayer and the AO had wrongly made the addition.
- The taxpayer would be the beneficiary of the long-term agreement between Gujarat Gas Company Limited and Cairn, therefore it had paid commission to the AE for carrying out negotiation with Cairn.
- ITAT also noted that the AE had also extended guarantee for the performance of the contract. Therefore, the taxpayer had paid annual commission equivalent to 1% of the guaranteed amount, which was equivalent to the comparative rate of 1% quoted by ICICI Limited.

In view of the aforementioned, ITAT opined that the taxpayer had entered into the aforementioned transaction according to the arm's length principles by observing that the taxpayer had purchased the gas from Cairn and from other operators such as Laxmi field, ONGC, etc. at the same price. Accordingly, ITAT dismissed Revenue's appeal and confirmed the order of CIT(A).

Nangia Andersen LLP's Take

Deemed international transactions were introduced to the Income Tax Act, 1961 to emphasize the 'substance' of transactions over their legal form. In other words, the intention of the section 92B(2) is to cover all the transactions/arrangements which are disguised as uncontrolled transactions and thereby to curb any attempt by taxpayer /enterprises to circumvent the transfer pricing provisions. However, there is ambiguity in the interpretation of the provision of the said section.

In the instant ruling, ITAT has opined that since there was no prior agreement between the AE of the taxpayer viz. British Gas Energy Holding Limited and the third party Cairn Energy group with respect to the transaction being undertaken by the taxpayer with the third party, the applicability of section 92B(2) relating to deemed international transactions does not arise.

The instant ruling in the aforementioned case is a welcome ruling acting as a guiding light for the taxpayers on deemed international transactions.

Source: Gujarat Gas Trading Company Ltd [TS-594-ITAT-2020(Ahd)-TP]

2. High Court approves reference made by AO to TPO (case selected by AO under limited scrutiny) where AO has complied with the procedure for making reference

Outcome: In the favour of Revenue
Category: Reference made to TPO

Facts of the case

- Transsys Solutions Private Limited ("taxpayer") is engaged in the business of providing Software Business and Technology Solutions to its clients.
- The case of the taxpayer was selected for scrutiny under 'Limited scrutiny' i.e. Computer Aided Scrutiny Selection ("CASS") to verify 'whether value of international transactions is correctly shown in Form 3CEB and Return of Income'.
- During the course of proceedings, Assistant Commissioner of Income Tax ("ACIT") or the Assessing Officer ("AO") sought approval from the Principal Commissioner of Income Tax ("PCIT") for making a reference to the Transfer Pricing Officer ("TPO").
- The taxpayer filed a writ petition with the High Court ("HC") stating that assessment was taken for scrutiny only on 'limited' basis which is for merely a comparison of the value of the international transactions in the Form 3CEB with the value reported in the income tax return & which does not involve the examination of Transfer Pricing ("TP") risk parameters and thus was no necessity to make a reference to the TPO to determine Arm's Length Price ("ALP").

High Court Ruling

- HC stated that AO should only have a prima facia belief that there was a need for reference to TPO since it was a preliminary stage that did not required detailed enquiry about correctness of ALP. Further, clarified that prior approval of PCIT or Commissioner is required by AO prior to making reference to TPO.
- HC also highlighted that it is must for AO to explicitly mention the issue on which reference was thought to be necessary.
- HC noted that the AO has found to have complied with the aforesaid condition and thus held that *"no doubt that the proper procedure has been followed by the AO in approaching the PCIT seeking approval for reference."*
- HC opined that the understanding that reason for selection of scrutiny by CASS only involves a numerical reconciliation was *"over simplification of the reason stated for selection."*
- HC thus dismissed the petition filed by the taxpayer finding no merit in the writ petition.

Nangia Andersen LLP's Take

The Instant ruling of High Court highlights the fact that if the AO/tax authorities has complied with procedure as prescribed for making reference to the TPO, then same cannot be questioned by the taxpayer even though his case was initially selected for scrutiny on limited basis. The HC upheld the reference made by the AO to the TPO, as due approval from Pr. CIT was sought and obtained by the revenue authorities.

The judgement adds to the plethora of judgements, highlighting procedures to be followed by the tax authorities for making reference to the TPO as prescribed in the Indian Tax Law.

Source: [TS-584-HC-2020(MAD)-TP]

Regulatory

1. Ministry of Electronics and Information Technology

- ## Production Linked Incentive Scheme (PLI) in 10 key sectors

The Union Cabinet chaired by the Prime Minister, vide Press Release dated 11 November 2020, approved Production Linked Incentive ('PLI') Schemes for 10 key sectors for enhancing India's manufacturing capabilities. The sectors proposed to be covered under the upcoming PLI Schemes, to be implemented by concerned Ministries, shall include: Electronic/ technology products, automobiles and auto components, pharmaceuticals, telecom & networking products, textile products, food products, solar PV modules, white goods, specialty steel. The financial outlay shall be worth Rs.1.46 lakh crores for a period of five year.

Approval of PLI Schemes under 10 new sectors, in addition to PLI schemes for mobile phones, high end electronics, bulk drugs and medical devices, is in line with the Government's focus on increasing domestic manufacturing under the Aatmanirbhar Bharat (Self-reliant India) initiative.

The Schemes for each of the 10 sectors mentioned above are expected to be notified soon. Notification of Schemes shall be followed by release of operational guidelines by respective Ministries/ Department.

2. Companies Act, 2013

- ## Extension of Coverage of LLP Settlement Scheme, 2020

The Ministry of Corporate Affairs ("MCA") vide General Circular No. 13/20 dated March 30, 2020 had issued LLP Settlement Scheme, 2020 to provide a one-time opportunity to LLPs to file belated returns due up to August 31, 2020 without any additional fee. Considering the disruptions caused by the COVID-19 pandemic, MCA extended this scheme up to December 31, 2020. However, the extension was valid only for those returns which were due up to August 31, 2020.

MCA has now come out with General Circular No. 37/2020 dated November 09, 2020 to cover all returns which fall due up to November 30, 2020.

In addition to providing extension for filing of overdue returns without additional fee, MCA has also allowed signing of statement of account and solvency for FY 2019-20 up to November 30, 2020 which were otherwise required to be signed by September 30, 2020.

3. Foreign Exchange Manangement Act, 1999

- ## Delegation of Powers for Compounding of Certain Contraventions Under Fema,1999

The Reserve Bank of India has decided to align Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 ('Non Debt Rules') and Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019 (Non Debt Reporting Regulations') with the extant Master Directions on "Compounding of Contraventions under FEMA, 1999". Accordingly, the Reserve Bank of India has issued A.P. (DIR Series) Circular on November 17, 2020 and with this the powers to compound offences related to contravention of various provisions of Non Debt rules and Non Debt Reporting Regulations stands delegated to the Regional Offices/ Sub Offices of RBI.

Further, classification of a contravention as 'technical' to issue cautionary advice and impose minimum compounding penalty has been discontinued.

- ### Establishment of Branch Office (BO) / Liaison Office (LO) / Project Office (PO) by Foreign Law Firms

RBI vide A.P. (DIR Series) Circular dated October 29, 2015 had advised banks to not grant any fresh permissions/ renewals to foreign law firms for opening of Liaison Office in India. RBI has reiterated its stand vide A.P. (DIR Series) Circular dated November 23, 2020 and made it clear that no permission shall be granted to foreign law firms/companies or foreign lawyers or any other person resident outside India, to establish any branch office, project office, liaison office or other place of business in India for the purpose of practicing legal profession. Accordingly, AD Category – I banks are directed to continue to not grant any approval for the same.

4. Foreign Direct Investment (FDI) Policy

- ### Standard Operating Procedure (SOP) for Processing FDI Proposals

Department for Promotion of Industry and Internal Trade ('DPIIT'), Ministry of Commerce & Industry, on November 09, 2020 has issued much awaited, revised set of Standard Operating Procedure (SOP) for Processing FDI Proposals. The SOP has been framed in harmony with the revised FDI Policy of 2020 dated October 15, 2020 read with the Foreign Exchange Management (Non-Debt Instrument) Rules, 2019.

The key excerpts from the SOP are set out below:

- Timelines for processing the proposal has been relaxed for the department as well as the applicant. Now, proposals not requiring security clearance will have to be processed in Ten (10) weeks which was earlier eight (8) weeks and the proposals requiring security clearance from Ministry of Home Affairs ('MHA') will be processed in Twelve (12) Weeks. Further, the timeline for submission of physical copies by the applicant in the concerned ministry will get 7 days + additional 7 days, which was earlier only 5 days.

- Further, an inter-ministerial committee has been constituted, consisting of Secretaries from DPIIT, MCA, MHA, RBI, Department of Economic Affairs, concerned administrative Ministry/ Department and NITI Aayog to examine, guide and take appropriate decision on delayed FDI proposals and those escalated by the processing Ministry/Department concerned for quicker and timely disposal.

5. Foreign Contribution Regulation Act ('FCRA')

- ### Extension for Submission of Annual Return for the Financial Year 2019-20

In terms of Rule 17 of the Foreign Contribution (Regulation) Rules, 2011, every person who receives Foreign Contribution shall submit a report carrying details of contribution received, its utilization etc. in e-Form FC-4 along with income and expenditure statement, receipt and payment account and balance sheet within nine months of the closure of the financial year i.e. by December 31, 2020. The Ministry of Home Affairs has vide public notice No. II/21022/23(15)/2020-FCRA-III dated November 23, 2020 decided to extend the deadline for submission of e-Form FC-4 for FY 2019-20 up to June 30, 2021.

GST

1. GST Clarifications and Updates

• Amendment in Central Goods & Services Tax Rules, 2017 ('Rules')

- Rule 59 related to Form and manner of furnishing details of outward supplies shall be substituted w.e.f. 1 January 2021 wherein the taxpayers furnishing the details of outward supplies quarterly in FORM GSTR-1 may furnish their first and second month B2B invoices in Invoice Furnishing Facility ('IFF') on or before 13th day of the month succeeding such month.;
- Total value for such B2B invoices is capped to INR 50 Lakhs per month and details of such invoices shall not be reported again in FORM GSTR-1, if already reported in IFF;
- Rule 60 related to Form and manner of ascertaining details of inward supplies shall be substituted w.e.f. 1 January 2021, wherein the details of outward supplies of goods or services furnished by various taxpayers in various forms shall be auto-populated in FORM GSTR-2A (including the details of IGST paid on import of goods or goods brought into DTA from SEZ unit/ SEZ developer on a Bill of Entry);
- Rule 61(6) has been inserted to provide staggered due dates for furnishing FORM GSTR-3B for supplies made for the months of October 2020 to March 2021 for different taxpayers based on turnover and location of principal place of business (kindly refer the Compliance chart);
- Rule 61 related to Form and manner of furnishing of monthly return shall be substituted w.e.f. 1 January 2021, wherein the taxpayers are provided the option to opt for furnishing of FORM GSTR-3B on quarterly basis along with the due dates and procedure of payment in prescribed form.
- Rule 61A newly inserted for providing the manner to opt for furnishing quarterly return;
- Amendment to instructions in filing GSTR-1 as to mention HSN/ SAC Code on a mandatory basis for the class of taxpayers specified from time to time under proviso to Rule 46 of the said Rules; and
- An Auto-drafted ITC Statement in Form-2B - under Rule 60 (7) has been inserted and will be available for every month.

(Notification No. 82/2020 – Central Tax dated 10 November 2020)

• Extension in time-limit for furnishing of FORM GSTR-1

- As per the amendment, the time-limit for furnishing the details of outward supplies in FORM GSTR-1 for each of the months from October 2020 to March 2021 is extended till the 11th day of month succeeding each month;
- In respect of taxpayers required to file quarterly returns, the due date is extended till 13th day of the month succeeding each such tax period (i.e. October 2020 to December 2020 & January 2021 to March 2021); and
- This notification shall come into force w.e.f. 1 January 2021.

(Notification No. 83/2020 – Central Tax dated 10 November 2020)

• Notifies class of persons under proviso to section 39(1)

- It is notified that taxpayers filing quarterly returns shall pay the tax due every month in accordance with the proviso to sub-section (7) of section 39 of CGST Act, also prescribes the special procedure to be followed by such persons to make the payment;
- A registered person whose aggregate turnover crosses five crore rupees during a quarter in a financial year shall not be eligible for furnishing of return on quarterly basis from the first month of the succeeding quarter.

(Notification No. 84/2020 – Central Tax dated 10 November 2020)

• Special procedure for making payment of tax liability for taxpayers opted for quarterly furnishing of Form GSTR-3B

- A special procedure has been introduced for taxpayers who have opted to furnish GSTR-3B for every quarter or part thereof, by making a deposit of an amount (equivalent to 35% of tax liability) in their electronic cash ledger for the first or second or both the months of the quarter in the return:
    - for the preceding quarter where the return is furnished quarterly; or
    - for the last month of the immediately preceding quarter where the return is furnished monthly;
- The said notification shall come into force w.e.f. 1 January 2021.

(Notification No. 85/2020 – Central Tax dated 10 November 2020)

• Quarterly Return Monthly Payment Scheme ('QRMP Scheme' or 'Scheme')

- CBIC has issued clarification in relation to the aforesaid notifications to implement w.e.f 01 January 2021, the Scheme of quarterly return filing along with monthly payment of taxes for taxpayers having aggregate turnover up to INR 5 crore;
- The facility to avail the Scheme on the common portal would be available throughout the year and in order to exercise this option, the registered person must have furnished the last return, as due on the date of exercising such option;
- The taxpayers who have not filed Form GSTR-3B for the month of October 2020 on or before 30 November 2020 will not be migrated to the QRMP Scheme and will be able to opt for the Scheme once the Form GSTR-3B as due on the date of exercising option has been filed;
- The option to avail the Scheme is GSTIN wise i.e. some GSTINs for a PAN can opt for the QRMP Scheme and remaining GSTINs may not opt for the Scheme;
- Taxpayers under the Scheme would be required to pay the tax due in each of the first two months of the quarter by depositing the due amount in Form GST PMT-06, by the twenty fifth day of the month succeeding such month;
- Two Options/ mechanisms specified for payment of taxes namely – Fixed Sum Method and Self- Assessment Method along with interest payment basis the option opted; and
- Late fee applicable for delay in furnishing of the said quarterly return / details of outward supply. No late fee is applicable for delay in payment of tax in first two months of the quarter.

(Circular No. 143/13/2020 – GST dated 10 November 2020)

• Rescinds Notification prescribing staggered due-dates for filing Form GSTR-3B

- CBIC rescinds Notification No. 76/2020 - Central Tax dated 15 October 2020 which prescribed staggered due-dates for filing of FORM GSTR-3B for October 2020 to March 2021.

(Notification No. 86/2020 – Central Tax dated 10 November 2020)

• Extension in time-limit for furnishing the declaration in Form GST ITC-04

- As per the amendment, the time-limit for filing of FORM GST ITC-04 (in respect of goods dispatched to or received from a job worker), during the period from July 2020 to September 2020 is extended till 30 November 2020, clarifies that the said extension shall be deemed to have come into force w.e.f. 25 October 2020.

(Notification No. 87/2020 – Central Tax dated 10 November 2020)

• Aggregate turnover for e-invoicing provisions

- E-invoicing provisions are being made effective for taxpayers having aggregate turnover exceeding INR 100 crores in any preceding financial year (from FY 2017-18 onwards) w.e.f. 1 January 2021.

(Notification No. 88/2020 – Central Tax dated 10 November 2020)

- The trial e-invoice portal (https://einvoice1-trial.nic.in/) for testing the upload of invoices by notified taxpayers through offline utility (bulk generation tool) has been activated from 6 November 2020.

• Penalty waived for non-compliance to QR code

- Penalty waived for non-compliance to QR code provisions for B2C supplies in case supplier turnover exceeds 500 crore, if complied by 1 April 2021 for default during the period 1 December 2020 to 31 March 2021.

Notification No. 89/2020 – Central Tax dated 29 November 2020)

2. Advance Rulings & Judgements

• Karnataka Authority for Advance Ruling ('AAR') rules that amounts received by the applicant, either by himself or through his agents, towards sale of their share of flats are not exigible to GST

- In the instant case, share of residential flats have been handed over by the developer after the issuance of completion/ occupancy certificate. Relevant clauses of the area sharing agreement restrict the right of the taxpayer to execute any sale agreement or any conveyancing deeds till the issuance of completion certificate;
- Sale of said flats is not exigible to GST, if they are sold after issuance of completion/occupancy certificate, in which case the said transaction is to be treated neither as supply of goods nor supply of services;
- AAR stated that the time of supply in the instant case would be the time at which the constructed flats are handed over by the developer to the taxpayer;
- AAR held that the amounts received by the taxpayer, either by himself or through his agents, towards sale of their share of flats are not to be exigible to GST.

M/s. Sri B.R. Sridhar
(Advance Ruling No. KAR ADRG 55/2020, Dated 07 November, 2020)

• Uttarakhand AAR rules that services availed from an overseas commission agent not termed as Import of services

- The Uttarakhand AAR in the matter of M/s Midas Foods (P) Ltd ('Applicant') observed that the overseas commission agent is covered in the definition of intermediary as the agent is engaged to arrange or facilitate the supply of goods to the international market;
- AAR ruled that the services availed by the Applicant are not considered as Import of services as the place of supply in the instant case would be outside India (being the location of the intermediary);
- AAR further held that the applicant is not required to pay GST under RCM on commission paid for the services availed.

M/s Midas Foods (P) Ltd
(Advance Ruling No. 10/2020-21 dated 15 October 2020)

• Madras High Court order quashing levy of interest on Input Tax Credit ('ITC') component

- In the matter of M/s. Maansarovar Motors Private Limited ('Petitioner' or 'Assessee'), the authorities have proceeded to levy interest on remittances of tax which is paid by adjustment of available ITC. Challenging the same, the Petitioner stated that the proviso to Section 50 of the Act which states that interest shall be levied only on that part of tax that is paid in cash had been inserted to set right an anomaly and was therefore retrospective in operation;
- The revenue argued that Section 16(2) entitles a person to take credit of input tax and Section 41(1) provides for a credit entry in the electronic credit ledger, which is provisional in nature and since, Section 41 provides that the entitlement to credit is only with the filing of return on self-assessment basis, this entitlement cannot be availed of till such time a return is filed by an assessee. Revenue made a reference to Section 49, which deals with payment of tax, interest, penalty and other amounts to support the aforesaid argument emphasizing that it is only when a credit entry is made in the electronic credit ledger that the entitlement to avail the same arises;
- Madras High Court observed that the GST authorities have adopted a contradictory stand by issuing orders, styled as notices, levying interest for allegedly belated remittance of tax by reversal of ITC and no opportunity appeared to have been granted in most of the matters calling for explanation from the assessees prior to raising

of the impugned demands of interest. High Court opined that there was no loss insofar as the revenue was in possession of the credit 'which is good as cash' as held by the Supreme Court in the case of Eicher Motors (supra) and cannot thus be said to be prejudiced in any way;

- Further, High Court stated that CBIC extended a waiver of recovery for the past period in line with the decisions of the Council Notification dated 18 September 2020, that cemented the long line of assurances of the GST Council and the Board in letter and spirit.

- Hon'ble High Court allowed the Petitioner's writ and directed the Revenue to compute interest liability for belated remittances of cash and refund the balance of the amount collected from the Assessee.

Nangia Andersen LLP's Take

The judgment by the Madras High Court to compute the interest liability for belated remittances of cash only and refund the balance of the amount collected from the petitioner is a very sound and welcome judgment and would bring clarity and relief for the assessees.

M/s. Maansarovar Motors Private Limited
(Writ Petition No. 4468 of 2020 dated 29 September 2020)

3. Key Foreign Trade Policy Updates

• Migration of Advance Authorisation/ EPCG/ DFIA Online modules to the new IT environment

- DGFT services for Advance Authorization, EPCG, DFIA and Norms are soon to be migrated to the new Online DGFT systems from 01 December 2020.
- Further, amendment of any Advance Authorization, EPCG or DFIA Licenses online services were temporarily suspended from 20th November 2020 till 30th November 2020. However, the services for new license issuance, or submission of any new application file remained available throughout this period.
- Exporters/Importers are requested complete the process of registration/linking of their IECs in on the DGFT website (https://dgft.gov.in) sufficiently well in advance, as this is a pre-requisite for filing online applications/ claims in the new IT environment.

(Trade Notice No. 35/2020-21 dated 12 November 2020)

4. Other IDT Updates

• Procedure for filing declaration under the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 by the eligible declarant in the UT of Jammu & Kashmir and UT of Ladakh

- Time limit for filing the declaration has been extended till 31 December 2020;
- The last date of issuance of statement shall be on or before 31 January 2021 and issuance of estimate of amount payable by the declarant shall be on or before 15 January 2021; and
- The last date of payment of dues as indicated in the statement shall be on or before 28 February 2021.

(Circular No. 1075/01/2020-CX dated 14 November 2020)

• Clarification on Pre-consultation before Show Cause Notice (SCN) issuance

- Pre-show cause notice consultation with assessee, prior to issuance of SCN in case of demands of duty is above Rupees 50 Lakhs (except for preventive/offence related SCNs), is mandatory and shall be done by the SCN issuing authority.

(Circular No. 1076/02/2020-CX dated 19 November 2020)

Compliance Calendar

Direct Tax

Due Date	Particulars
7th December 2020	Payment of TDS - For the period 1st November 2020 to 30th November 2020
	Payment of TCS - For the period 1st November 2020 to 30th November 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 November 2020 to 30th November 2020
15th December 2020	Due date for payment of the third instalment of the Advance Tax pertaining to A.Y. 2021-22.
30th December 2020	Payment in respect of tax deducted under section 194-IA in the month of November 2020
	Payment in respect of tax deducted under section 194-IB in the month of November 2020
	Payment in respect of tax deducted under section 194-M in the month of November 2020
31st December 2020	Due date for furnishing of Tax Audit Report ("TAR") u/s 44AB of the Income-tax Act, 1961 for A.Y. 2020-21. (This was extended vide the Press Release dated 24th October 2020)
	Due date for furnishing report u/s 92E in Form 3CEB in respect of International and specified domestic transactions for A.Y. 2020-21. (This has been extended vide the press release dated 24th October, 2020)
	Extended due date of filing of Income Tax Return for A.Y. 2020-21 for Non-Corporate taxpayers which are not liable for the Tax Audit Report and do not have international or specified domestic transactions. (This has been extended vide the press release dated 24th October, 2020)
	Last date for filing declaration under Direct Tax Vivad se Vishwas Act, 2020 (This has been extended vide notification dated 27 October 2020)

GST

Compliance Category	Compliance Description	Frequency	Due date	Due Date falling in December 2020
GSTR-1 (Details of outward supplies)	• Registered person having aggregate turnover over INR 1.5 crores	Monthly	11th day of succeeding month	• November - 11 December 2020
Form GSTR - 3B (Monthly return)	• Registered person having turnover more than INR 5 crores	Monthly	20th of next month	• November - 20 December 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	• November - 22 December 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	• November - 24 December 2020
Form GSTR-6 (Return for input service distributor)	• Return for input service distributor	Monthly	13th of succeeding month	• November - 13 December 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 - FY 2018-19 - 31 December 2020
Form GSTR-9C (GST Audit)	• GST Audit if revenue is INR 5 crore or more	Yearly	On or before the 31st December following the end of FY	• Reconciliation Statement - FY 2018-19 - 31 December 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 or Odisha, the Union territories of Jammu and Kashmir, Ladakh, Chandigarh or Delhi

Regulatory

S. No.	Compliance	Due Date
1.	ECB-2 for November 2020	Within first 7 working days of December 2020
2.	Submission of belated returns as prescribed under Companies Fresh Start Scheme (CFSS) and Limited Liability Settlement Scheme	31.12.2020

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