Nangia Andersen LLP

Newsletter

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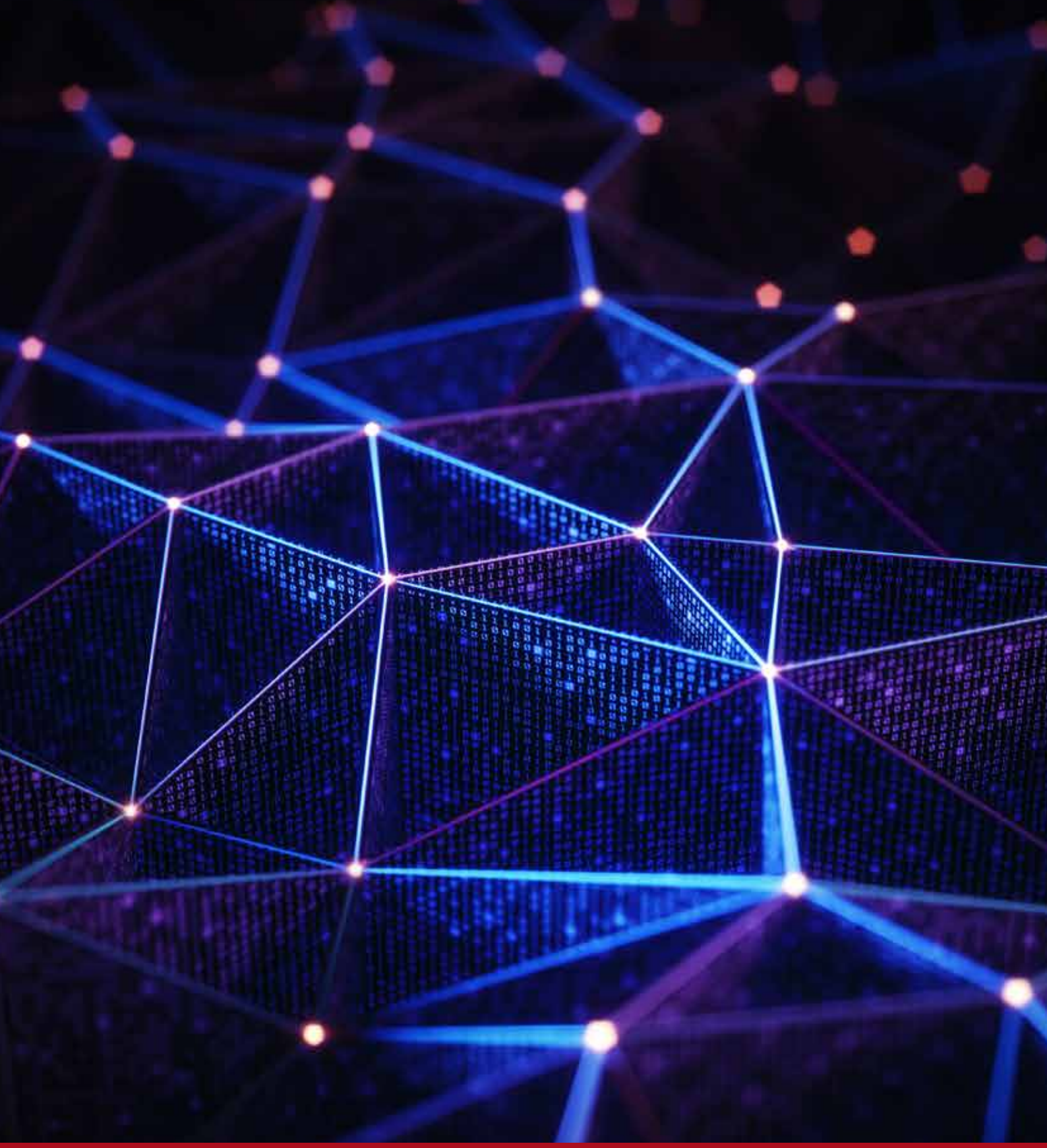

Direct Tax

1

Payments for grant of distribution rights of channels are not taxable as royalty or FTS under the India-USA tax treaty

Issue: Royalty/ FTS
Outcome: In favour of the assessee

Background

In the case of NGC Network Asia LLC (the assessee), the Mumbai Bench of the Income-tax Appellate Tribunal (ITAT) dealt with the issue of taxability of distribution rights of channels granted by the assessee, a US based media company, to its Indian subsidiary. The Tribunal held that the distribution right granted by the assessee to the Indian entity was only a commercial right or broadcast reproduction right and not a copyright and consequently, consideration for the same could not be treated as Royalty or Fees for Included Services (FIS or FTS) under Article 12 of India-USA DTAA.

Brief Facts and Contentions

- The assessee, engaged in the business of broadcasting of its channels over various countries, including the Indian sub-continent, granted rights to distribute the channels broadcasted by it in India to its subsidiary company for a lump-sum consideration.
- The assessee did not have any control over the activities undertaken by the Indian entity upon grant of distribution rights, nor did it undertake any activity in India as regards the distribution rights granted.
- The Indian subsidiary was allowed to independently enter into contracts with the media intermediaries/ subscribers (i.e. cable operators) for distribution of channels in India.
- The distribution agreement explicitly provided the Indian subsidiary shall ensure that the intermediaries do not to modify or replace any copyrights, trademarks, trade names, logos, names or likewise or any content. Further, it was an obligation for Indian subsidiary to distribute the channel on an 'as is' basis without making any amendments to the channel.
- Therefore, the assessee argued that the right granted to the Indian subsidiary was merely the right to distribute the channel and not in the nature of copyright.
- However, the Assessing Officer (AO) held that the distribution revenue earned by the assessee was in the nature of "royalty" and consequently, such distribution revenue would be taxable in India. The AO relied on the technical explanation provided in the protocol of the tax treaty and contended that "royalty" included television broadcasting in India.
- On appeal, the CIT(A) upheld the order of the AO. Aggrieved, the assessee pleaded its case before the ITAT.

ITAT's Judgement

- Based on the aforementioned facts and observations of the case, the ITAT elucidated that assessee had granted limited rights to the Indian subsidiary to use the trade name, trademarks, service marks and logos (the Channel marks) with the mere intent to enable it to market and distribute the channel in accordance with the distribution agreement. The Indian subsidiary did not have the rights to exploit these service marks, in any manner. Therefore, neither any copyrights were granted nor any rights to copy any programme had been granted to the Indian subsidiary or to any other intermediaries. The rights given by the assessee could not be construed as a 'copyright' as defined under the Copyright Act and consequently could not be covered by the definition of 'Royalty'.

- The ITAT affirmed that the 'technical explanation' was issued by the tax authorities of USA and the same was not an official protocol or clarification, which had been mutually agreed upon between the two countries. Therefore, the Tribunal was not bound by the said technical explanation. Relying upon such technical explanation, revenue had alleged that the definition of royalty under treaty includes television broadcasting in India.

- Relying on the decision of the Delhi High Court in the case of Asia Satellite Tele Communications Limited[1], the ITAT concluded that merely because the footprint of the satellite is in India and/or advertisers are in India, the source of income could not be considered to be in India.

- Further, even if it is contended that the channel has a copyright, what the Indian subsidiary is paying for, is the right to use the copyrighted article by virtue of being permitted to distribute the channel. Accordingly, since the Indian subsidiary does not acquire any right in the underlying copy right (i.e. right to modify / reproduce channel / content), the distribution rights granted by the taxpayer to the Indian subsidiary is only a commercial/ broadcast reproduction right. Consequently, consideration received by the assessee for the same cannot be treated as royalty/ FTS under Article 12 of the DTAA.

- Separately, the ITAT also ruled on the issue regarding the taxation of commission paid to the assessee's Indian advertising agent (Star India Private Limited). Assessee had entered into an agreement under which it paid its resident advertising agent 15% commission on income earned from advertisements. In the subsequent years, the TPO held that payment of commission at the rate of 15% was at Arm's length. Further, the Indian advertising agent's commission income from assessee was less than 1% of its total commission income. Therefore, the ITAT held that Indian advertising agent cannot be treated as dependent agent of the assessee.

  The judgement of the Bombay High Court in the case of SET satellite (Singapore) Pte Ltd[2] was relied upon to hold that no further attribution of profits can be done in the hands of the assessee, if agent has been remunerated at arm's length.

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'. Consequently, consideration for the same would not fall under the scope of Royalty or Fees for Included Services (FIS or FTS). Further, ITAT affirmed that any technical explanation not mutually agreed upon by two contracting states would not bind the ITAT.

Past Precedents on the issue

Recently, In the case of Turner Broadcasting System Asia Pacific Inc.[3] it was held that the income derived by a foreign channel company from granting distribution rights of TV channels to an Indian company is not taxable as royalty under the India-USA DTAA. The assessee had merely granted rights to the Indian company. The copyright of the content in the product remained with the assessee and it was not transferred to the Indian company.

Further, in the case of MSM Satellite (Singapore) Pte. Ltd.[4] 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: ITA No.1343/Del/2014]

[1] 332 ITR 340 (Del)

[2] 307 ITR 205 (Bom)

[3] I.T.A. No. 1343/DEL/2014

[4] TS-236-HC-2019(BOM)

2

ITAT holds that provision of 'leadership training' to employees of Indian affiliate shall not qualify as FTS

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

Background

The Pune Bench of the Income Tax Appellate Tribunal (ITAT), in the case of Sandvik AB (the assessee), held that consideration received by it for imparting training to its associate company is not in the nature of Fee for Technical Services (FTS).

Brief Facts and Contentions

- The assessee, a Swedish company received an amount from its Indian counterpart, Sandvik Asia Private Limited (SAPL/ Indian affiliate) towards training charges for AY 2014-15.
- The assessee contended that the receipt is towards managerial training provided to three of the employees of its Indian affiliate so as to manage the operations of the organization effectively. The same was not in the nature of FTS in accordance with Article 12 of India-Sweden DTAA read with the Protocol as expanding to the India-Portuguese DTAA.
- The Revenue denied the benefit of the MFN clause and remarked that services were technical in nature, which made available technical knowledge and hence the same were taxable as FTS under Article 12 of the DTAA.
- The DRP upheld the order of the Assessing Officer (AO). Aggrieved, the assessee appealed before the ITAT.

ITAT's Judgement

- The ITAT agreed with the contention of the taxpayer that once two sovereign states have added Protocol to the India-Sweden DTAA, which contains the MFN clause, the inference could be drawn is that beneficial provisions contained in India-Portuguese Tax Treaty is to be read into the India-Sweden DTAA. It was held that *"protocol is a part of the DTAA and there is no need for separate notification incorporating the beneficial provisions of the other DTAA as forming part of the DTAA to which the Protocol is attached"*
- The ITAT noted the definition of the term FTS was different in India-Sweden and India-Portuguese DTAA and that the term 'managerial' was missing in the latter and therefore the assessee took refuge under the India-Portuguese DTAA.
- ITAT remarked that ordinarily, training is conceived as passing on some proficiency by the trainer to the trainee. It simply leads to honing-up the skills of the other in the subject, which cannot be termed as equivalent of rendering services in the field.
- Observing that *"simply equipping or enabling the others for doing an activity is a step anterior to rendition of such services"* ITAT opined that leadership training provided to employees of SAPL cannot be equated to imparting managerial services so as to fall within the ambit of FTS of the India-Sweden DTAA read with the Protocol and resultant India-Portuguese DTAA.
- ITAT also observed that leadership training did not 'make available' any technical knowledge, experience or skill to the employees of SAPL which could enable them to use it later on and therefore held that the Revenue was not justified in considering 'Training Fee' as consideration for rendering FTS within the meaning of Article 12 of the India-Portuguese DTAA.

- Further, the ITAT stated that though the amount does not fall within the purview of FTS under Article 12 of India-Sweden DTAA read with the protocol which contains the MFN clause, its taxability cannot be ousted. The ITAT turned to Article 7 of the DTAA and remarked that the profits of the enterprise of Sweden may be taxed in India but only so much as are attributable to the Permanent Establishment (PE) in India. Since the AO in its draft order had categorically observed that the assessee did not have a PE in India, consequently, the profits from receipt from Indian affiliate cannot be taxed as business income. Thus, the training fee shall escape taxation in the absence of there being any PE in India in terms of Article 5.

Nangia Andersen LLP's Take

The ruling demonstrates that taxation of income as FTS depends upon 'making available' technical knowledge, skill or experience. Simply equipping or enabling the others for doing an activity is a step anterior to rendition of such services and cannot be termed as an equivalent of rendering services in the field. In the judgement, maximization of benefit to the assessee has been given precedence over the concern of swelling the revenue kitty of the government, thereby instilling the faith of the taxpayers in the judiciary.

Past Precedents on the Issue

- In the case of Steria India Limited[1], the Delhi High Court held that in view of clause 7 of 'Protocol' forming part of India-France DTAA, less restrictive definition of expression FTS appearing in Indo-UK DTAA, must be read as forming part of India-France DTAA as well, hence payment by an Indian company to a French company for management services would not constitute FTS under India-French DTAA.

[1] 72 taxmann.com

3

ITAT: ESOP exercised by non-resident, not eligible for treaty benefits, if granted for employment in India

Issue: Employee Stock Option Plan (ESOP) taxation
Decision: Against the assessee

Background

In the case of an individual non-resident assessee, Unnikrishnan V S (the assessee), the Mumbai Bench of Income-tax Appellate Tribunal (ITAT) dealt with the issue of treaty benefit under section 90 of the Income Tax Act on taxation of ESOP exercised by him, granted for employment in India. The ITAT ruled that for assessee being a non-resident, claim of benefits under the relevant treaty would not be available if ESOP so exercised, is granted for employment in India.

Brief Facts and Contentions

- The assessee, employed with HDFC Bank Limited, Mumbai was deputed to HDFC Bank representative office, Dubai in October 2007. In the relevant assessment year, the assessee exercised the options granted to him by HDFC Bank Limited in June 2007, which had later vested in June 2008 (50 per cent) and June 2009 (50 per cent).
- In the relevant Assessment Year, the difference between the grant price and the market price of the options (amounting to approximately INR 73 lakhs), was considered as perquisites and accordingly taxes were deducted at source by the employer (i.e. HDFC Bank Limited).
- In the relevant assessment year, the assessee's residential status was that of a non-resident. While filing his return of income, the assessee declared a total income of INR 78 lakhs (approx.) and claimed treaty benefit seeking refund of taxes deducted at source.
- During the scrutiny assessment, the Assessing officer (AO) observed that the options were granted to the assessee in consideration for services rendered in India during the year 2007, when the assessee was a resident in India. Therefore, the AO disallowed the claim of relief under Section 90 in his return of income.
- The assessee contended that ESOP perquisite was not taxable in India as he was a non-resident in India during the relevant AY and this income did not accrue or arise in India. He further contended that though the income from ESOP perquisite was not taxable in India, he had reported such income in his return of income and made relevant disclosures in order to seek the refund of the tax deducted at source by the employer.
- The assessee made an alternate submission relying on Article 15 of DTAA on Dependent personal services[1] that the ESOP benefits earned by him during the relevant AY shall be covered under the scope of expression "other similar remuneration". Further, the expression 'employment is so exercised' shall mean a place where the employee physically rendered the services.
- The assessee argued his case by taking support of various judicial precedents wherein it was stipulated that income cannot be taxed in India if the employment services over the period from years of grant to years of vesting/ exercise are rendered outside India.
- Aggrieved by the order passed by the AO, the assessee filed an appeal with the CIT (A), who upheld the order of the AO. Consequently, the assessee pleaded his case before the ITAT.

[1] Salaries, wages land other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State, unless the employment is exercised in the other-contracting State. If the employment is so exercised, such remuneration as is derived there from may be taxed in that other State

ITAT'S Judgement

- Quoting the judgement of the Apex Court in the case of E D Sassoon & Co Ltd Vs C.I.T[2], the ITAT explained that accrual or arising of an income cannot be equated with receipt of an income. Though the ESOP benefit had arisen to the assessee in the relevant AY, the related rights were granted in 2007 for the services rendered in India.

- ITAT opined that *"all that section 17(2)(vi) decides is the timing of an income, but it does not dilute or negate the fact that the benefit, which is being sought to be taxed, had arisen much earlier i.e. at the point of time when the ESOP rights were granted."* It was therefore derived that income, even if it was inchoate at the point of time when the options were granted, had accrued and arisen in India.

- The ITAT relied on the principles laid down by the United Nations Model Convention Commentary 2017 that an *ESOP should not be considered to relate to any services rendered after the period of employment that is required as a condition for the employee to acquire the right to exercise that option.* Secondly, ESOP should only be considered to relate to services rendered before the time when it is granted as a reward for services.

- The ITAT explained that Article 15 envisages taxation of ESOP benefit (other similar remuneration), in the jurisdiction in which the related employment is exercised. In the instant case, since the employment services were rendered in India, such claim would not be available in the hands of the assessee.

- On the basis of above assertions, the ITAT opined that since the assessee was in receipt of the ESOP benefit on account of the services rendered in India at the time of grant, he would not be eligible to avail the benefit of Article 15 of the DTAA in respect of such income at the time of exercise. Accordingly, ITAT rejected the assessee's claim.

Nangia Andersen LLP's Take

This ruling fairly enunciates the taxability of income based on source. A non-resident in India, is taxed on income sourced in India i.e. income received, deemed to be received, accrued, deemed to be accrued, arising or deemed to be arising in India. The ITAT in the present case has analysed the facts of the case to hold that relief under relevant tax treaty would not be available if ESOP so exercised, is granted for employment in India. It has been explained that income from ESOP, even if it was inchoate at the point of time when the options were granted, had accrued and arisen in India. Further, all that section 17(2)(vi) decides is the timing of an income, but the benefit that is taxed, arises at the point of time when the ESOP rights were granted.

Past Precedents on the issue

In the case ED Sassoon & Co Ltd[3], the Supreme Court derived the meaning of the word "accrue and arise" and remarked that both the words are used in contradistinction to the word 'receive' and indicate a right to receive. They represent a state anterior to the point of time when the income becomes receivable and connote a character of the income, which is more or less inchoate. The ruling has been relied upon in the present case as well.

[2] [(1954) 26 I.T.R. 27 (S.C.)]

[3] [(1954) 26 I.T.R. 27 (S.C.)]

Transfer Pricing

1

High Court upheld ITAT's order considering Jockey USA and Indian Licensee as Non- AE, taking into account that provisions under Sub-section (1) and (2) of Section 92A of Income Tax Law are interlinked.

Outcome: In favour of taxpayer
Category: Principles for analysing whether the entities constitute as AEs.

Facts of the Case

- Page Industries Ltd ("the taxpayer") is engaged in the business of manufacturing and sale of ready-made garments. The taxpayer is licensee of Jockey International Inc. (USA) for the executive marketing of Jockey ready-made garments in exchange of Royalty @ 5% of sales under the brand name.
- During the year under consideration, the taxpayer has paid Royalty to Jockey International Inc. amounting to INR 67,829,024.
- The Assessing Officer scrutinized the Income Tax Returns filed by the taxpayer and observed that the taxpayer had reported the amount of Royalty as an international transaction under the Accountant's Report Form 3CEB.
- Accordingly, the AO made reference to the Transfer Pricing Officer ("TPO") for determining the arm's length price ("ALP") of the international transactions under section 92CA of the Act.
- The TPO considered the Advertisement, Marketing and Promotional (AMP) expenditure amounting to INR 202,007,861 as an International transaction and determined the Arm's Length Price of transaction using Bright Line Test method and consequently, disallowed the expenditure.
- Aggrieved by the same, the taxpayer filed an appeal before the Dispute Resolution Panel ("DRP"). The DRP upheld the adjustment made by TPO/AO.
- Aggrieved by the same, the taxpayer filed an appeal before the Income Tax Appellant Tribunal ("ITAT"/"the Tribunal").

Proceedings before the ITAT and High Court

- ITAT observed that requirements of establishing two enterprises as AEs under section 92A (1) of the Act are not met in the case of taxpayer. Hence, the taxpayer and Jockey International Inc. are not considered as AEs and accordingly, the transaction is not considered as an International transaction between AEs.

  In view of above, ITAT allowed the taxpayer's appeal.
- Revenue preferred an appeal before the HC and represented that arrangement between the taxpayer and Jockey International Inc. falls under the provisions specified under Section 92A (2)(g) of the Act. Hence, the entities under consideration are AEs.
- At the outset, HC observed the amendment brought to sub-Section (2) of Section 92A of the Act through Memorandum of Finance Bill, 2002 wherein it was clarified that *"mere participation by one enterprise/ persons of enterprise in management of control or capital of other enterprise shall not make them AE unless the criteria specified under sub-Section(2) are fulfilled".*
- Further, HC also observed that the provisions of sub-sections (1) and (2) of Section 92A of the Act are interlinked and are required to be read and interpreted harmoniously. In view of the aforementioned observations, HC upheld the ITAT's order in favour of the taxpayer.

Nangia Andersen LLP's Take

The approach of the High court in the instant case is in line with the intention of legislature which serve as a defence mechanism against the aggressive application / interpretation of Section 92A of the Act (Indian Transfer Pricing regulations) by the lower level of Tax authorities.

The judgment clarifies that sub-sections (1) and (2) of Section 92A of the Act are interlinked and need to be read together and not independently for determining whether the two entities are to be considered as AEs. The HC further clarified that when the sub-sections are read independently, one of the provisions becomes redundant which is against the principle of law.

This shall surely go a long way in bringing certainty for multinational companies and enhance the ease of doing business in India. Furthermore, a clarification from the CBDT regarding this would certainly ease the battles of the taxpayers in one stroke.

Source: Page Industries Ltd [TS-19-HC-2021(KAR)-TP]

2

ITAT upheld cost of expatriate employees providing warranty/after-sale services to be considered for PLI computation under RPM.

Outcome: In favour of Department
Category: Adjustment in Profit Level Indicator ("PLI") computation under Resale Price Method ("RPM")

Facts of the Case

- Toyoda Micromatic Machinery India Pvt Ltd. ("the taxpayer"), is engaged in the business of providing delivery and/or installation services of the machine tools.
- During the year under consideration ("AY 2011-12"), the taxpayer has entered into International transaction with its Associate Enterprise ("AE") for purchase of traded goods amounting to INR 57.6 crores. The taxpayer adopted RPM as the Most Appropriate Method ("MAM") to benchmark afore said transaction.
- During the course of assessment proceedings, the TPO adopted TNMM over RPM as MAM, and proposed a TP adjustment of INR 2.94 crores on the ground that the taxpayer has incurred substantial personnel expenses of INR 2.6 crores. The TPO observed that such expenses were not justified in relation to the total turnover of INR 8.98 crores considering that the taxpayer was only performing trading functions.
- Aggrieved by the same, the taxpayer appealed before the Commissioner of Income Tax Appeals ("CIT(A)"). While the CIT(A) upheld the application of RPM as MAM for distribution function, however, CIT(A) directed that while computing the PLI, the expatriate employee cost of INR 2.6 crores was to be treated as direct expense for computing the gross profit margin and accordingly, the amount of TP adjustment was reduced.
- Aggrieved by the same, the taxpayer filed an appeal before Income Tax Appellate Tribunal ("ITAT")

ITAT's Ruling

ITAT upheld CIT (A)'s finding that such employee cost of expatriate employees should be factored in while computing PLI under RPM in line with Rule 10B(1)(b) of the Income tax Rules, 1962 ("the Rules") based on of following observations:

- On perusal of the profile of the expatriates provided by the taxpayer, ITAT noted that these employees were providing warranty services or after sales services.
- ITAT opined that when sales price consists of price for warranty and after sales services, which are promised at the time of sales, corresponding expenses are also to be considered while computing the margin of the taxpayer.
- ITAT concluded that such after sale support services, training to customers and local staff for troubleshooting and service coordination expenses are required to be included for determining the gross profit margin in RPM.

Nangia Andersen LLP's Take

ITAT in the instant ruling upheld the applicability of RPM in case of trading functions and emphasizes on the provisions of Rule 10B(1)(b) of the Rules which prescribes the manner in which RPM is effectuated. Based thereon, ITAT elucidates that since sales price consists of price for warranty and after sales services and accordingly corresponding expenses are also to be considered while computing the gross margin of the taxpayer under RPM.

On the other hand, lower level of tax authorities in the instant ruling alleges that the taxpayer has incurred substantial personnel expenses and the same is not justifiable considering that the taxpayer was only performing trading functions and accordingly, applied TNMM over RPM and proposed adjustment accordingly.

In view of the above, the instant ruling provides more clarity to the taxpayer in identification of the most appropriate method and thereby computation of PLI under RPM. Based thereon, it is recommended that the taxpayers should carefully evaluate the components directly attributable to the sales price while computing the PLI under RPM and accordingly maintain robust documentary evidence to substantiate the same.

Source: Toyoda Micromatic Machinery India Pvt Ltd [TS-658-ITAT-2020(DEL)-TP]

Regulatory

1

Updates under Companies Act 2013

I. Commencement notification dated 22.01.2021

The Companies (Amendment) Bill, 2020 ('Amendment Bill') was passed in the Lok Sabha and Rajya Sabha in the Monsoon session of the parliament and thereafter received the assent of the President of India on 28th September 2020. The bill was also notified in the official gazette on the same date. However, Ministry of Corporate Affairs ('MCA') reserved certain appointed dates to be notified subsequently through separate gazette notifications.

In view of the same, MCA has through notification dated 22nd January 2021, enforced specific provisions of Companies (Amendment) Act, 2020. ('Amendment Act').

Key amendments under the Companies Act 2013 are as follows:

- **Exclusion from Listed Companies**

  The Amendment Act now empowers the Central Government, in consultation with the Securities and Exchange Board of India (SEBI), to exclude companies issuing specified classes of securities from the definition of a "listed company".

- **Rights Issue of Shares**

  The Companies Act, 2013 ('The Act') prescribes offer period to comprise of a minimum and maximum number of days in case of issue of shares on right basis. The current offer period prescribed a span of 15-30 days as lower and upper time line. The Amendment Act provides for a reduction of timeline from minimum 15 days to any such period as may be prescribed to speed up the right issue process.

- **Exemptions from filing resolutions passed by Non-banking Finance Companies ('NBFC') and Housing Finance Companies ('HFC')**

  Section 117 of the Act requires companies to file inter-alia board resolutions with respect to borrowing, lending or giving guarantee with Registrar of Companies ('RoC'). However second proviso to Section 117(3) provides an exemption to the banking companies from filing of such resolutions with RoC if these are passed in the ordinary course of their business. The Act has now extended the same exemption from filing to NBFCs and HFCs.

- **Submission of periodic financial results by unlisted companies**

  The Amendment Act empowers the Central Government to require classes of unlisted companies to prepare periodic financials, have the same audited or limited reviewed, and file it with RoC within 30 days of closure of relevant period.

- **Lesser penalties for certain companies**

  According to Section 446B of the Act, one person companies (i.e., companies with only one member) or small companies (i.e., with lower paid-up share capital and turnover thresholds) were liable to a penalties at a lower rate (not more that 50% of the penalty) for offences related to non-filing of Annual Report, Annual Return and resolutions & agreements required to be filed under Section 117.

  The Amendment Act has now extended this benefit of lower penalty to **Small Companies, One Person Companies, Producer Companies and Start-ups from all provisions of the Companies Act.** Further, the Amendment Act provided a cap on maximum penalty of Rupees Two Lakh for the defaulting company and Rupees One Lac for the officer in default.

II. Extension for holding AGM by Video Conferencing (VC) or Other Audio Video Means (OAVM)

MCA vide circular dated 31st December 2020 had extended the facility to hold Extraordinary General Meeting ('EGM') through Video Conferencing ('VC') or Other Audio Video Means ('OAVM') till 30th June 2021. Now, vide a general circular no. 2/2021 dated 13th January 2021 it has also extended the facility to hold Annual General Meeting (AGM) by VC or OAVM till 31st December 2021.

III. Introduction of "Scheme for condonation of delay for companies restored on the register of companies"

MCA vide its General Circular no. 03/2021 dated 15.01.2021 has introduced the Scheme for condonation of delay for Companies restored on the Register of Companies between 1st to 31st December 2020.

This scheme proposes to provide benefit to the companies who had preferred appeals under **Section 252** of the Act against the orders of striking off of the names of the companies before the respective Benches of the National Company Law Tribunals and could not avail the benefit of filing under CFSS-2020 by 31st December 2020.

The scheme is effective from February 01, 2021 till March 31, 2021. The companies covered under this scheme will be able to complete all delayed filings (except Form SH-7 (other than for increase on authorized share capital) and charge related forms) without any additional fees.

IV. Relaxation on additional fee on annual filings

MCA vide its General Circular no. 04/2021 dated 28.01.2021 has extended the timeline for filing of e-forms AOC-4, AOC-4 CFS, AOC-4 XBRL and AOC-4 NON- XBRL for the financial year 2019-20 till 15th February 2021.

V. Revamp of CSR Provisions

Bringing a major overhaul under CSR regime, the Ministry of Corporate Affairs ('MCA') on 22nd January 2021 has given its nod to enact the amendments notified under CSR provisions while also making substantial changes to the CSR Rules.

The changes inter -alia include introduction of penal provisions for non-compliances in relation to CSR spends, transferring unspent CSR sums relating to the ongoing projects to the new bank accounts, mandatory registrations by implementing Agencies to undertake CSR activities, Impact Assessment for big CSR projects and exemption from constitution of CSR Committee based on CSR liability. The rules also provide for setting off the excess amount spent under CSR, acquisition of capital assets, among others.

Key changes under the CSR Provisions

- **Requirement to transfer amount to unspent CSR account and/or to fund specified by Central Government and introduction of penal provisions**

  The Companies are required to transfer the unspent amount to a Fund specified in Schedule VII within 6 months from the end of financial year. However, if the unspent amount pertains to any ongoing project then the Company must transfer the unspent amount to a new bank account within 30 days from the end of the financial year. The amount transferred to such bank account needs to be spent within 3 years, and thereafter it must be transferred to a Fund specified in Schedule VII.

  Any non-compliance with respect to above requirements shall make the Company liable to a penalty of INR 1 Crore or 2 times of the amount required to be transferred to Unspent CSR Account/ Fund specified, whichever is less. Also, every officer in default shall be liable to a penalty of INR 2 lakh or 10% of the amount required to be transferred to Unspent CSR Account/ Fund specified, whichever is less.

- **Mandatory registration of implementing agency with MCA**

  Every entity which intends to undertake CSR activity on behalf of a Company must register itself with MCA by filing e-form CSR-1 with RoC with effect from April 01, 2021. Upon submission of CSR-1, a unique CSR Registration Number shall be generated.

- **Treatment of surplus or excess CSR amount spent**

  Any surplus arising out of the CSR activities is now required to be:

  - ploughed back into the same project, or
  - transferred to the Unspent CSR Account and spent as per CSR policy, or
  - transferred to a Fund specified in Schedule VII

  The rules further allow setting off the excess amount spent in immediate succeeding three financial years.

- **Acquisition of Capital Asset**

  CSR amount may be spent by a company for creation or acquisition of a capital asset. However, such asset can only be held by:

  - Section 8 Company/ Registered Public Trust/ Registered Society, or
  - Beneficiaries of the said CSR project, or
  - a public authority

  Any asset created before 22nd January 2021, must comply with above requirement within 270 days i.e., by 19th October 2021.

- **Exemption from forming CSR Committee**

  The Companies are exempted from forming CSR committee in case CSR liability is less than Rs. 50 lakh.

- **Impact Assessment**

  Companies having CSR obligation of Rs. 10 Crore in 3 preceding financial years, shall need to also under take impact assessment through an independent agency:

  - for CSR projects having outlays of 1 crore or more, and
  - which have been completed not less than 1 year before undertaking impact study.

2

Updates under Foreign Exchange Management Act 1999

I. Foreign Exchange Management (Export of Goods and Services) (Amendment) Regulations, 2021

Reserve Bank of India ('RBI') *vide* Notification No. FEMA 23(R)/(4)/2021-RB, dated January 08, 2021 amended Foreign Exchange Management (Export of Goods & Services) Regulations, 2015 doing away with requirement to furnish declaration on re-export of leased aircraft/ helicopter/ engines/ APUs in CKD or SKD condition that have been repossessed by an overseas lessor after receiving requsite approvals from DGCA.

3

Updates under SEBI

I. Extension of relaxations provided under Rights Issue Provisions

In view of the impact of the COVID-19 pandemic and the lockdown measures, SEBI has earlier provided exemption from physical dispatch of offer letter in case of Rights Issues up to December 31, 2020. Considering the ongoing situation, the same extension has now been extended up to March 31, 2021.

II. Extension of relaxations for holding AGM/EGM via VC/OAVM and physical dispatch or reports

In line with the extension provided by MCA to hold AGMs and EGMs via VC or OAVM, SEBI has also extended the similar facility for the listed companies. Now the listed companies will also have the facility to conduct AGM through VC/OAVM till December 31, 2021.

Further, SEBI has also decided to provide relaxations in respect of sending physical copies of annual reports to shareholders and requirement of proxy for general meetings held through electronic mode for listed entities, till December 31, 2021.

GST

1

GST Clarifications and Updates

I. Restriction on filing of FORM GSTR-1

A new sub-rule 6 has been introduced to Rule 59 of the Central Goods and Services Tax Rules, 2017 ('CGST Rules') restricting the filing of GSTR-1 as follows:

- For monthly filing of GSTR-1, a registered person shall not be allowed to file Form GSTR-1 if he has not furnished the return in Form GSTR-3B for preceding two months.
- For quarterly filing of GSTR-1 under Quarterly Return Monthly Payment ('QRMP') scheme, a registered person shall not be allowed to file Form GSTR-1 or using the invoice furnishing facility ('IFF') if he has not furnished return in Form GSTR-3B for preceding tax period.
- For registered person who is mandatorily required to deposit 1 per cent of tax liability in cash under Rule 86B of the CGST Rules, he shall not be allowed to file Form GSTR-1 or using IFF, if he has not furnished the return in Form GSTR-3B for preceding tax period.

(Notification No. 01/2021 – Central Tax dated 1 January 2021)

2

Advance Rulings and Judgements

I. Supreme Court upholds Delhi High court's decision allowing transition of unutilised credit through Tran-1

- The Petitioner filed Form TRAN-1 through GST Portal but encountered error on GST portal. The High Court stated that the petitioner could not file Form TRAN-1 within time limit for reasons beyond its control due to technical glitches on GST portal. Accordingly, the Court held issue in favour of the petitioner and directed department to either enable the petitioner to file Form TRAN-1 electronically or accept the same manually.

- The Department preferred to file an SLP before the Supreme Court challenging the High Court order. The Supreme Court rejected the SLP filed by the department on the ground of delay and **on merits**, thereby upholding the High Court ruling.

Nangia Andersen LLP's Take

Transition of pre-GST credits to GST regime has been one of the most litigative issue and various High Courts have been flooded with writ petitions on various issue/ grounds and High Courts have given divergent views. In this case, though Supreme Court did not provide any detailed reasoning, but this ruling will support various pending cases who could not transition pre-GST credits to GST on account of inadvertent errors or technical glitches.

(Nodal Officer Delhi State GST Department v. Aagman Services, 2021-VIL-01-SC)

II. Punjab & Haryana High Court quashes AAR order holding Genpact India (BPO) as 'Intermediary' and further remands matter for re-adjudication

- The petitioners[1] filed writ petitions before the Punjab & Haryana High Court challenging the order passed by the Appellate/ adjudicating Authority, whereby the refund claimed by the petitioners has been rejected. The Hon'ble High Court having heard the counsel for the parties and going through the impugned orders, quashed the mentioned orders passed by the Adjudicating and the Appellate Authority, holding the companies as 'Intermediary'.

- The High Court observed that impugned orders are cryptic and non-speaking and the reasons assigned for holding the petitioners to be intermediaries, do not sustain as they do not pass the test of law. The Court further, remanded the matter to the concerned authority for a fresh decision.

(Genpact India Pvt. Ltd. V/S Union of India And Ors [CWP-10302-2020 and other connected cases])

III. Gujarat Authority for Advance Ruling ('AAR') rules that intermediary services provided by a resident to its principal located outside India shall be subject to CGST + SGST and not IGST.

- The Applicant is engaged in the agency business where Applicant enters into an agency agreement with the foreign entities who are supplying such machinery directly to the end customer and the Applicant gets commission. With respect to commission income, Applicant sought an advance ruling whether such supply would attract IGST or CGST + SGST.

[1] Genpact India Private Limited, NThrive Global Solutions Private Limited, and M/s Clifford Chance Business Services Private Limited

- The AAR observed that the said service can be called as intermediary services defined under section 2(13) of the IGST Act, 2017. The nature of GST to be paid i.e., CGST + SGST or IGST is dependent on the type of supply i.e. intra-state or interstate. The authority referred to section 13 of the IGST Act, 2017 to deter mine the place of supply of services, place of supply of intermediary services shall be the location of the supplier of services.

- The supplier, in the instant case is the Applicant and the location of the said supplier is in Gujarat. Since both the supplier of service as well as the place of supply of service is in Gujarat, supply of services would be considered akin to the intra-state supply of services and would be liable to CGST and SGST as per the provisions of Section 9(1) of the CGST Act, 2017.

(M/s. Sagar Powertex Private Limited [Advance Ruling No. GUJ/GAAR/R/98/2020])

IV. Gujarat AAR held that GST will be applicable on Notice Pay Recovery from employees

- The appointment letter executed between the Employer (the Applicant) and the employees mentions that either party shall serve three months mandatory notice to terminate the contract and in case employee does not serve the notice period after tendering the resignation, Applicant is entitled to recover the notice pay from the agreed portion of salary to compensate the loss of the company and *vice-a-versa*. The Applicant sought the ruling if it is liable to pay GST on recovery of notice pay from the employees.

- The AAR held that employees who resign from their job are expected to serve notice period as mentioned in the appointment letter and if employee does not serve notice period, salary of the unserved portion of notice period is retained by the employer which is called notice pay recovery.

- It further stated that notice pay is nothing but the amount stipulated in the employment contract for breach in serving (not serving) the stipulated notice period. In other words, notice pay is a sum mutually agreed between the employer and the employee for breach of contract. It can be regarded as a consideration to the employer for tolerating the act of the employee to not serve the notice period, which was the employee's agreed contractual obligation. Therefore, employer agreeing to the obligation of tolerating an act (quitting without any advance notice) on the part of the employee for payment of a sum (notice pay), will be covered under Clause 5(e) to Schedule II to CGST Act, 2017, as a declared service and exigible to GST. The AAR also refereed and discussed various jurisprudence supporting the Applicant view that notice pay is not taxable however held that these rulings pertain to service tax regime and hence not applicable to the present case.

Nangia Andersen LLP's Take

The issue has been one of the most debatable issue under service tax regime post negative list based service taxation and going to be litigative under GST regime as well. There are various rulings where it has been held that service tax is not payable on notice pay, however, the AAR has ruled out on the ground that these rulings pertain to service tax regime without going into the principles laid down by the courts. In order to be taxable under this category (tolerating an act etc.), there should be explicit scope and consideration for the same. The courts have marked distinction between condition to a contract and consideration for the contract and accordingly held that penalty/ LD charges should not be covered under this taxable entry.

(M/s. Amneal Pharmaceuticals Private Limited [Advance Ruling No. GUJ/GAAR/R/51/2020])

V. Tamil Nadu AAR held that supplies between distinct persons can adopt invoice value as open market value as envisaged in second proviso to Rule 28 of the CGST Rules

- The Applicant is engaged in manufacturing and trading of chemicals having units / branches across India and registered under GST. The unit in Tamil Nadu supplies goods to other units at and discharging GST on invoice value. The Applicant sought advance ruling on valuation to be adopted on stock transfer of goods between distinct persons as envisaged in Second Proviso to Rule 28 of the CGST Rules, 2017.

- The AAR observed that there is no restriction in Rule 28 and its proviso for its sequential application. If the recipient is eligible for full input tax credit, then invoice value can be deemed to be the open market value as provided under Proviso 2 to Rule 28 of the CGST Rules.

- The AAR also observed that value in respect of supply between distinct person can be
  - Available open market value;
  - In cases of 'as such' supply by the recipient, the supplier has an option to value the supply at 90% of the ultimate sale value;
  - When the recipient is eligible for full input tax credit, the invoice value is deemed to be the open market value.

- With this, AAR concluded that any of the three methods prescribed above can be adopted for the purpose of stock transfer of goods between distinct persons.

M/s Thirumalal Chemicals Limited [Order No. 41 /AAR/2020]

VI. Haryana AAR rules that ITC of IGST/Compensation Cess shall not be available on cars received on a stock-transfer basis for sales promotion, marketing, test drives, etc.

- Applicant is engaged in the manufacturing, trading & selling of motor vehicles, spare parts, accessories, and related services in India. Applicant stock-transfers vehicles to its other unit for further use in business activities on payment of GST and Compensation Cess. These vehicles are registered in the name of the Applicant and are used for various purposes such as marketing & promotional activities, test drives etc. The vehicles thereafter are always intended to be sold to the authorized dealers. Such vehicles are capitalized in the books of accounts and upon sale to the dealers, these vehicles are de-capitalized and are converted into stock-in-trade. The Applicant had a policy to sell such vehicles after 12 to 18 months.

- The question before the AAR was availability of ITC on such vehicles procured by the Applicant of GST and Compensation Cess.

- AAR observed that the general provisions for availing the input tax credit contained in section 16 (1), Section 17 (5), and Section 18 (1) of the CGST and HGST Act read with the relevant rule. On perusal of provision of Section 17(5), AAR held that input tax credit on motor vehicle is not available. The AAR did not even discuss the Applicant's contentions relating to exception under Section 17(5) of the CGST Act relating to further supply of motor vehicle.

(BMW India Private Limited [Advance Ruling No. HAR/HAAR/R/2018-19/17])

3

Customs Updates

I. Customs Authority for Advance Rulings Regulations 2021 notified

The Central Board of Indirect Taxes and Customs ('CBIC' or 'Board') has notified the Customs Authority for Advance Rulings Regulations, 2021. Notification has been issued in exercise of the powers conferred by section 157 read with sub-section (1) of section 28H, sub-section (1) of section 28KA and sub-section (1) of section 28M of the Customs Act, 1962 and in supersession of the Authority for Advance Rulings (Customs, Central Excise and Service Tax) Procedure Regulations, 2005 so far as matter related to the Customs Act.

The new regulation come into force from 4 January 2021.

(Notification No. 01/2021- Customs (NT) and Notification No. 02/2021- Customs (NT) dated 4 January 2021)

II. Waiver of bank guarantee for transhipment of Import & Export Cargo via Sri Lanka and Bangladesh

The requirement of execution of bank guarantee for the purpose of transhipment in respect of carriers of containerized cargo, who are handling more than 1000 TEUs as import containers in a financial year was already waived. Further, Jurisdictional Commissioners of Customs are empowered to exempt the requirement of furnishing Bank Guarantee in respect of carriers having annual transhipment volume below the limit of 1000 TEUs but having good track record.

Now the above exemption from furnishing bank guarantee is also extended to the carriers for carriage of EXIM cargo for transhipment through foreign territories of Sri Lanka and Bangladesh.

(Circular No. 01/ 2021 Customs dated 14 January 2021)

III. No Requirement of filing of Bill of Coastal Goods (BCG) for coastal goods

The Board has clarified that there is no requirement for filing BCG if the coastal vessels are carrying exclusively coastal goods whether berthing at coastal berth or EXIM berth.

(Instruction No. 01/ 2021 Customs dated 14 January 2021)

Compliance Calendar

Direct Tax

Due Date	Particulars
7th February 2021	Payment of TDS - For the period 1st January 2021 to 31st January 2021
	Payment of TCS - For the period 1st January 2021 to 31st January 2021
	Payment of Equalisation Levy on online advertisement and other specified services, to be discharged by Indian payers - For the period 1st January 2021 to 31st January 2021
14th February 2021	Issuance of TDS certificate in Form 16B for tax deposited u/s 194-IA (TDS on sale of immovable property) in the month of December 2020.
	Issuance of TDS certificate in Form 16C for tax deposited u/s 194-IB (TDS on rent of immovable property) in the month of December 2020.
	Issuance of TDS certificate in Form 16D for tax deposited u/s 194-M (TDS on payment made to contractors) in the month of December 2020.
15th February 2021	Due date of furnishing of the Income Tax Return in case Corporate Assessee, Non-corporate Assessee whose accounts are required to be audited under the Income-tax Act, Partner of a firm whose accounts are required to be audited and assessee required to furnish report u/s 92E of the Income-tax Act, 1961.
	Due date of furnishing of TDS Certificates to the Deductee whose TDS has been deducted in the Quarter ending on 31st December 2020.

GST

Compliance Category	Compliance Description	Frequency	Due date	Due Date falling in February 2021
Form GSTR-1 (Details of outward supplies)	• Registered person having aggregate turnover more than INR 5 crores including registered person having aggregate turnover up to INR 5 crores who has not opted for Quarterly Returns Monthly Payment ('QRMP') Scheme	Monthly	11th day of succeeding month	• January - 11 February 2021
Form GSTR-3B (Monthly return)	• Registered person having turnover more than INR 5 crores	Monthly	20th of next month	• January - 20 February 2021
	• Registered person with aggregate turnover up to INR 5 crore having place of business in Group 1 states and union territories[1] (not opted for QRMP Scheme)	Monthly	22nd of next month	• January - 22 February 2021
	• Registered person with aggregate turnover up to INR 5 crore having place of business in Group 2 states and union territories[2] (not opted for QRMP Scheme)	Monthly	24th of next month	• January - 24 February 2021
QRMP Scheme				
Invoice furnishing facility ('IFF')	• Optional facility to furnish the details of outward supplies under QRMP Scheme	Monthly	1st day to 13th day of succeeding month	• January - 11 February 2021

[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

GST

Compliance Category	Compliance Description	Frequency	Due date	Due Date falling in February 2021
Form GST PMT-06 (Monthly payment of tax)	• Payment of tax in each of the first two months of the quarter under QRMP Scheme	Monthly	25th of the succeeding month	• January - 25 February 2021
Form GSTR-1 (Details of outward supplies)	• Registered person having aggregate turnover up to INR 5 crores who has opted for QRMP Scheme	Quarterly	13th day of the subsequent month following the end of quarter	• January to March - 13 April 2021
Form GSTR-3B (Monthly return)	• Registered person with aggregate turnover up to INR 5 crore (opted for QRMP Scheme) having place of business in Group 1 states and union territories	Quarterly	22nd day of the subsequent month following the end of quarter	• January to March - 22 April 2021
Form GSTR-3B (Monthly return)	• Registered person with aggregate turnover up to INR 5 crore (opted for QRMP Scheme) having place of business in Group 2 states and union territories	Quarterly	24th day of the subsequent month following the end of quarter	• January to March - 24 April 2021
Form GSTR-6 (Return for input service distributor)	• Return for input service distributor	Monthly	13th of the succeeding month	• January - 13 February 2021
Form GSTR-9 (Annual Return)	• Annual Return if aggregate turnover 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 2019-20: 28th February 2021
Form GSTR-9C (GST Audit)	• GST Audit if aggregate turnover is INR 5 crore or more			

Regulatory

Segment	Particulars	Due Date
Monthly ECB Return	ECB-2 (Monthly Return of ECBs for the month of January)	February 07, 2021
Financial Statement	AOC-4 (Form for filing financial statement and other documents with the Registrar)	February 15, 2021

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