Nangia Andersen LLP

Newsletter

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What's Inside?

Direct Tax

1

Management & IT support services received from UK, except 'direct technical advice, support', not FTS / Royalty

Issue: Fee for Technical Services (FTS)/ Royalty/ Business Income
Outcome: Partially in favour of the Assessee

Background

In the case of a UK based company “Aircom International” (the assessee), the AAR dealt with the issue of taxability of income from dispensing services under a Management Service Agreement (“MSA”). The AAR held that the income from rendering direct technical advice, support and management including implementation service relating to Information Technology (IT) shall be taxable as Fees for Technical Services (FTS). However, consideration for rendering services in the nature of advisory for routine business affairs shall neither come under the purview of FTS nor Royalty under the India-UK treaty. In the absence of PE, such income shall not be taxed as business income either.

Brief facts and contentions

- The assessee, engaged in development of software, network planning, optimization, open source software and consultancy for mobile network, had various subsidiaries including a wholly owned Indian subsidiary Aircom International India Private Limited (Aircom India/ Indian Subsidiary).
- The assessee entered into a Management Service Agreement (MSA) with its subsidiaries including the Indian subsidiary. The agreement encompassed rendering of business development services, general management and financial advisory services along with legal, human resource and Information Technology services in pursuance of standardization of business practices of the Aircom Group.
- The assessee sought an advance ruling as to the characterization of its income as royalty/ FTS or business income and requirement of withholding tax on the same.
- The assessee averred that the services rendered to Aircom India were fundamentally managerial and support services and did not “make available” technical knowledge or skill to Aircom India. In view of the fact that the Income Tax Act includes “consideration in respect of managerial services” in the gamut of FTS, whereas the India-UK Tax Treaty explicitly excludes the same, the assessee insisted that the beneficial provisions of the India-UK Treaty shall apply and accordingly consideration received from Aircom India shall be outside the purview of taxability as FTS. The Revenue, however, contended that the assessee provided technical inputs to Aircom India and provided the right to use its software products to the subsidiaries.
- Besides, the Revenue asserted that consideration received by the assessee from its Indian subsidiary was for the right granted to use its IPRs and supply of information concerning industrial, commercial or scientific experience under the terms of MSA agreement.
- In its response, the assessee explicated that the consideration received from Aircom India did not fall within the purview of ‘Royalty’ as the term essentially necessitates transfer of a right or right to use from the owner of such right to another person for commercial exploitation. Whereas its services did not involve transfer of any rights and were limited to internal support services.
- Additionally, from the list furnished by the assessee of its employees present in India, the Revenue observed that the employees had been in India for more than 30 days in a twelve-month period. Based on the facts on record, the Revenue contended that there was a service PE in India. However, the assessee averred that there was no permanent establishment (PE) in India as it did not carry on business in India.

AAR's Judgement

Fees for Technical Services

The AAR evaluated the nature of services rendered under the MSA and observed that direct material advice, support and management including implementation services, provided under IT services segment, could not be rendered without domain knowledge of the relevant field and therefore were technical in nature. Further, the same were also 'made available' as per Article 13 of the DTAA. It was noted that technical advice in respect of problems faced by the clients was rendered through the employees of Indian subsidiary only. Accordingly, such services were classified as FTS as they were not only technical in nature but was also 'made available'.

Further, with respect to the other services such as training for launch of a new software program, legal and financial services, contract management/negotiations, financial management etc. the AAR held that consultancy services were advisory in nature and merely involved discussion and advice of a routine nature or exchange of information, and did not fulfil the 'make available' condition. Therefore, such services were not in the nature of FTS.

Royalty

The AAR opined that consideration in respect of rendering such services under MSA could not be construed as consideration for supply of any knowledge or information, concerning industrial, commercial or scientific experience.

In the instant case, assessee had merely entitled the subsidiaries to enjoy the benefit of the services without violation of its IPR rights and hence the consideration cannot be said to be in respect of grant of right to use IPR. Accordingly, assessee's case would not be subject to the provisions of "Royalty".

Service PE

The AAR expounded that a Service PE gets constituted in India only when provision of services by an assessee is for a period transcending 30 days in a twelve month period. A mere stay of an employee in India doesn't substantiate that he had rendered services during the entire period of stay. A concrete evidence is imperative to corroborate that services were rendered through an employee for 30 days or more. Therefore, in the absence of any such evidence, it cannot be held that a Service PE existed in India and resultantly the consideration in respect of services rendered under MSA cannot be construed as business income.

Nangia Andersen LLP's Take

The ruling enunciates that in order to comprehend the scope of the term "technical", it should not be confined to technology relating to engineering, manufacturing or other applied sciences. Professional services imbued with expertise would also qualify as technical services. The ruling, thus, provides more clarity to the assessees in categorisation of services for the purposes of determining applicability of tax provisions. Furthermore, it reiterates that taxation of income as FTS depends upon 'making available' technical knowledge, skill or experience.

The AAR has lucidly explained the fact that mere stay of an entity's employees for more than 30 days in India does not result in constitution of service PE. It is "actual rendering of services" that needs to be taken into consideration.

Past precedents on the Issue

In a decision held by the Mumbai ITAT, it was ruled that management fees received by US Co. [assessee][1] from its Indian subsidiary was not taxable as Fees for Included services [FIS] under Article 12 of the India-USA DTAA. ITAT noted that the services rendered by the assessee entailed provision of support services in advising the entities globally on policies and standards based on international best practices support in terms of IT, financial functions, and other business support services. Further, services rendered by assessee were not ancillary and subsidiary to the enjoyment of rights granted to Indian co. and therefore could not trigger provisions of Royalty.

The Mumbai ITAT in the case of Aktiebolaget SKF[2] held that IT services rendered by the taxpayer were subservient to Royalty agreement and ancillary and subsidiary to the main frame Royalty agreement entered into by both the parties. Since the taxpayer already had a Royalty Agreement under which transferred its knowledge in relation to products covered in the agreement, it would be taxable as FTS as such services made available technical knowledge, skill, etc.

[Source: A.A.R. No. 1329 of 2012]

[1] Kelly Services Inc [TS-832-ITAT-2019(Mum)]

[2] [TS-45-ITAT-2020(Mum)]

2

ITAT holds that receipts from Logistics support cost-allocation and global management charges reimbursement were not in the nature of FTS

Category: Fee for Technical Services (FTS)
Outcome: In favor of the assessee

Background

In the case of Expeditors International of Washington Inc. (the assessee), the Delhi ITAT dealt with the issue of taxability of income from providing logistic support services and reimbursements of Global Management charges. The Delhi ITAT held that the income from rendering logistic support services and reimbursements of Global Management charges shall not be taxable as Fees for Technical Services (FTS).

Brief facts and contentions

- The assessee company was engaged in the business of providing global logistics services. Its services primarily encompassed airfreight, ocean freight & ocean services in addition to customs brokerage and other services. It provided services in India through its wholly-owned subsidiary "Expeditors International (India) Pvt. Ltd."
- During the Assessment Year 2011-12, the assessee undertook international transactions with its associated enterprises. It filed its return of income, declaring royalty income. In the course of assessment proceedings, the Assessing Officer asked the assessee to serve the details of receipts from India along with the copy of agreements/contracts with all the parties in India from whom considerations were received during the year under consideration. Accordingly, the assessee submitted the requisitioned details which included receipts from providing International Freight Logistic Services and Reimbursements of Global Account Management (GAM) Expenses.
- The Assessing Officer contended that International Freight Logistic Services and Reimbursements of GAM Expenses constituted FTS as per the provisions of the Income-tax Act and India-USA tax treaty and consequently shall be subject to taxes.
- The assessee submitted that the issue had been decided in its favor in the previous assessment year (AY 2010-11), and the Tribunal had held that GAM reimbursements and cost allocation of International Freight Logistic Support Services did not fall within the purview of managerial, consultancy or technical services and accordingly were not taxable either under Section 9 of the Indian Tax laws or under Article 12 of the DTAA.
- However, the Revenue contended that in the previous assessment year, the Tribunal had not considered the agreement related to freight logistic support services and GAM and the DRP was also silent on the terms and conditions of the agreement, which ought to have been considered.
- Subsequently, the Assessing Officer passed a draft assessment order. The assessee filed objection before the DRP but the DRP confirmed the order of the Assessing Officer.
- Aggrieved, the assessee pleaded its case before the Delhi ITAT.

ITAT's Judgement

- The ITAT explicated that the Freight Logistic services did not fall within the gamut of Managerial or Consultancy or Technical Services. The services were general services in nature and its provisioning did not require any managerial/technical or consultancy expertise. Thus, the consideration in its respect cannot be construed as Fees for Technical Services.

- Further, as regards to the GAM expenditure, the ITAT noted the cost was incurred outside India and was allocated to the respective countries that benefited from this service. The actual expenses incurred by the assessee were allocated in proportion to the revenue and were reimbursed to the assessee by Expeditors International India.
- Also, the factual matrices of the assessee's case for the Assessment year 10-11 and 11-12 were essentially the same. The facts were neither disputed by the Revenue before the DRP in Assessment Year 2010-11 nor in the Assessment Year i.e. A.Y 2011-12. Furthermore, agreement related to logistic support services and GAM charges was mentioned in order by the Tribunal. Therefore, the contention that the agreement was not taken into account in Assessment Year 2010-11 was not correct.
- The ITAT, therefore, reaffirmed that the income from rendering logistic support services and reimbursements of Global Management charges shall not be taxable as Fees for Technical Services (FTS).

Nangia Andersen LLP's Take

The ruling highlights and reaffirms that mere reimbursements are not in the nature of income and therefore cannot be made subject to taxes. Furthermore, provisioning of logistic support services does not require specific domain knowledge and hence cannot be categorized under managerial, consultancy or technical services.

Past precedents on the Issue

In the case of a Denmark based company, The Damco International A/S[1], the Mumbai ITAT held that amounts received by the assessee from its Indian counterpart towards reimbursement of cost for rendering administrative services was not taxable in India as 'fee for technical services' under article 13 of India-Denmark DTAA.

In the case of Sundaram Fasteners Ltd[2]., the Chennai ITAT held that the warehousing, logistic, inventory management, marketing and other support services rendered by the foreign agents cannot be deemed as 'fee for included services' or 'fee for technical services', as defined under the relevant DTAAs, but only as business profits.

[Source: ITA No 1705/ DEL/ 2016]

[1] [2020] 118 taxmann.com 37

[2] [2017] 82 taxmann.com 436 (Chennai - Trib.)

3

AAR holds that offshore services shall be taxable being intrinsically connected with setting-up of plant in India

Issue: Permanent Establishment (PE)/ Fee for Technical Services (FTS)
Outcome: Partly in favour of the Assessee

Background

In the case of Technip France SAS (the assessee), the AAR dealt with the issue of taxability of income from offshore supply of equipment and engineering design/advisory services under a composite works contract. The AAR held that the consideration received by the assessee for offshore supply of equipment would not be subject to taxes in India. However, the compensation in respect of provision of basic engineering design services and detailed engineering advisory services would be liable to taxes in India as business income as these services were rendered through a PE.

Brief facts and contentions

- The assessee is a company engaged in Engineering, Procurement and Construction (EPC) business for oil production - offshore and onshore, refining, petrochemicals, etc. having an Indian subsidiary Technip KT India Limited (TIL).
- An Indian entity "ONGC Petro Additions Limited (OPAL)" invited price bids through tendering for engineering and construction of a Plant. The assessee submitted an offer which was accepted by OPAL and the contract was awarded to the assessee.
- The assessee's scope of work included
  - offshore supply of equipment, offshore services for basic engineering design in relation to setting up of plant site, assistance in detailed engineering and technology licensing and
  - onshore supply of equipment, third party inspection and onshore services for detailed engineering, procurement, construction, erection in relation to setting up of plant at site, start-up commissioning and post commissioning service
- The assessee sought an advance ruling asking whether any part of offshore work was liable to tax in India under the India France DTAA. Further, whether basic engineering design services and offshore advisory services were taxable in India.
- The assessee submitted that that income from offshore supply of equipment under the contract was not taxable in India as the consideration for the supply of such equipment was received outside India and the title of the equipment was transferred to OPAL outside India.
- Further, the assessee's Project office/ PE had no role play in the offshore supply of equipment and, therefore, the income from such offshore supply was not attributable to activities carried on by the project office in India.
- Regarding offshore design services in relation to setting up plant at site, the assessee contended the same were not in the nature of FTS owing to the non-satisfaction of the 'make available' condition and the applicability of the MFN clause contained in the Protocol to India-France DTAA. As regarding the taxability as business profits, it was submitted that such services were not attributable to PE of the assessee in India. Similar contentions were made regarding advisory services (preparation of drawings, design, layout, etc.)

- The Revenue argued that offshore services was taxable in India as the contract was negotiated, entered into and executed in India. It was further submitted that the revenue in respect of offshore supply and offshore service portions were earned from business connection in India and through a PE in India. Regarding taxability of design and engineering services it was argued that the same was taxable as Royalty/ FTS.

AAR's Judgement

Fixed Place PE

The AAR noted that assessee had decided to undertake offshore scope of work and entitled its Indian subsidiary to undertake the onshore activities. It was noted that even though the PO was set up after the effective date of contract, the assessee had the services of its subsidiary at its command. Its subsidiary was involved in the bidding process of the assesse and the key personnel were managing the affairs of the assessee. The employees had not only secured the right to use the office space but were also carrying on the business of the parent enterprise. Therefore, it is established that the assessee had a fixed place of business (PE) from the effective date of contract.

Taxability of offshore supply of Equipment

The AAR referred to the judgement passed by the Supreme Court in the case of Mahabir Commercial Company Limited[1] where it was explicated that property in goods passes once the documents are tendered by the seller to the buyer. Also, where the seller retains control over the goods by either obtaining a bill of lading in his name or to his order, the property in the goods does not pass to the buyer until he endorses the bill to the buyer. From the facts on record, AAR noted that the invoice and the bill of lading in respect of offshore supply were in the name of OPAL. Therefore, the title and property in the goods shipped by the assessee was transferred at the port of shipment itself i.e. outside the territory of India. Therefore, the income arising on account of such transaction cannot be said to have accrued or arisen in India.

Taxability of offshore services

The AAR held that the engineering design services could not have been provided directly from France. Even if a part of design services was developed in France, it was used by the Project office of the assessee for setting up the Plant at site. All preliminary drawings and specifications were provided by the assessee and OPAL had reviewed the same. These services enabled the recipient to perform the services, in future, without recourse to the assessee. Thus, the condition of 'make available' was held to be satisfied from the terms of the contract. As the basic engineering services were rendered in India and were also made available to the recipient, the same were held to be taxable not only in accordance with the provisions of the Act but also under the DTAA. Accordingly, reliance on MFN was held to be become futile.

The services rendered by the assessee were not particularly stand-alone services and were intrinsically connected with setting up of the Plant. The actual rendering of services was not done directly by the assessee but by its PO in India. Therefore, the consideration received by the assessee in respect of 'Basic Engineering' and 'Detailed Engineering' services had accrued in India. Therefore, the profit of the PO/PE were chargeable to tax in India as per the provision of Article 7.1 of the India-France DTAA.

Nangia Andersen LLP's Take

In India, non-resident companies are taxed on Indian sourced income i.e. on accrual or receipt basis, subject to beneficial provisions of DTAA. In the instant case, the AAR deduced that as the title and property in the goods shipped by the assessee was transferred outside the territory of India, the resultant income could not be deemed to have accrued or arisen in India and therefore could not be made subject to taxes in India. Further, the actual rendering of the engineering design services was provided by assessee's project office in India. Although certain design services were rendered from France, the resultant resources were used by the project office for setting up the plant in India and, therefore, payments for the offshore services constituted taxable income in India.

[1] (86 ITR 417)

Past Precedents on the Issue

In the case of a Japanese company “Toshiba” , the AAR had held that if sale was completed outside India, there can be no accrual or deemed accrual of income in India and accordingly receipts from offshore supply of equipment or materials under offshore supply contract shall not be taxable in India.

The AAR in the case of Alstom Transport SA , Vodafone International BV applied the ‘look at’ and held that composite contract offshore supply of equipment for installation and commissioning of project in India cannot be dissected for the purpose of taxability of contract. Therefore, offshore supply of equipment was taxable in India. The AAR in the present case held that consideration received for offshore supply of equipment under the composite contract was not taxable in India.

The Delhi ITAT in the case of Shanghai Electric Group , held that taxpayer was having Supervisory PE in India. Profits from offshore and onshore supply of services in respect of Indian projects were attributable to the Supervisory PE since they were effectively connected with each other.

[2] 2021] 124 taxmann.com 308 (AAR - New Delhi)

[3] 208 taxman 223 [AAR]

[4] 341 ITR 1 (SC)

[5] 84 taxmann.com 44 (Delhi ITAT)

Transfer Pricing

1

ITAT held Corporate-guarantee, 'not international transaction', deletes TP-adjustment; Distinguishes National Engineering ruling.

Outcome: In favour of taxpayer
Category: Corporate Guarantee, International transaction u/s 92B of the Income-tax Act ("the Act),

Facts of the Case

- IFGL Refractories Ltd. ("the taxpayer") is engaged in manufacturing of refractory items.
- During the year under consideration ("AY 2012-13"), the taxpayer has given a corporate guarantee against a foreign currency loan taken by its UK based wholly owned subsidiary ("herein referred to as AE"). The taxpayer did not charge any corporate guarantee fee in respect of the aforementioned guarantee provided.
- During the course of assessment proceedings, the TPO held that the corporate guarantee given by the taxpayer to its AE constituted an international transaction u/s 92B of the Act and accordingly, proposed an upward adjustment of INR 28.53 lakhs.
- Aggrieved by the same, the taxpayer filed an appeal before the Commissioner of Income Tax Appeals ("CIT (A)"). Relying on the Ruling in case of Dy. CIT vs. **National Engineering Industries Ltd. (ITA No. 986 & 987/Kol/2017)**, CIT (A) upheld the action of the TPO in benchmarking the corporate guarantee fee at the rate of 0.5 percent.
- Aggrieved by the same, the taxpayer filed an appeal before Income Tax Appellate Tribunal ("ITAT")

ITAT's Ruling

ITAT held that that the Corporate Guarantee issued by the taxpayer company to its wholly owned subsidiary, is not an international transaction under Section 92B of the Act and accordingly directed deletion of TP adjustment made by TPO on account of the following observations:

- ITAT placed reliance on the Rulings in the case of DCIT, Circle-8(1) vs. EIH Limited in ITA Nos. 153/Kol/2016 and 110/Kol/2016 wherein it was held that provision of Corporate Guarantee was in the nature of Shareholder activity since the objective behind providing corporate guarantee was not to earn fee, but to protect its interest by fulfilling shareholder's obligation.
- Further, ITAT also placed reliance on the Ruling of Siva Industries and Holdings Ltd vs DCIT [ITA No. 2756/CHNY/2017] and [S.P 90/CHNY/2018] wherein it was held that corporate Guarantee provided by the assessee to the its AE enables them to secure credit/funds, in the absence of which the assessee would have to support its AE by providing funds through equity or otherwise, thereby making it a shareholder activity. The ITAT further held that providing corporate Guarantee does not involve any cost to the assesse and has no bearing on profits, income, losses or assets of the assessee.
- ITAT also relied on various other Judicial precedents wherein it was concluded that such transaction of Corporate Guarantee does not tantamount to international transaction u/s 92B and accordingly, deleted TP-adjustment.
- Furthermore, ITAT distinguishes Revenue's reliance on Tribunal's decision in case of National Engineering Industries Ltd wherein it was held that corporate guarantee for AY 2011-12 and 2012-13, is an international transaction after relying on Instrumentarium Corporation which was not a corporate guarantee, but a case on interest free loans.

Nangia Andersen LLP's Take

The issue of corporate guarantee is one of the most contentious issues in the battleground of TP litigation. There have been Rulings in the past upholding both views i.e. on one side, the Tribunal dealt with the cases, wherein the transaction related to corporate guarantee has been considered outside the ambit of international transaction, while on the other side, the same has been considered as an international transaction and benchmarked accordingly.

The instant Ruling supports the position that corporate guarantee does not fall under the ambit of international transaction u/s 92B of the Act. Further, placing reliance on previous rulings, the ruling emphasizes the fact that the objective behind providing corporate guarantee is not to earn a guarantee fee, rather the expectation was of a shareholder to protect its investment interest to help achieve the taxpayers business objective, thereby characterising such transaction as shareholder activity.

Such rulings shall help taxpayers in making a counter defence mechanism against decisions by lower tax authorities contending such transaction to be an international transaction.

Source: IFGL Refractories Ltd [TS-63-ITAT-2021(Kol)-TP]

2

High Court set aside ITAT's order of disallowing the taxpayer to consider the foreign AE as tested party for benchmarking international transaction

Outcome: In favour of taxpayer
Category: Principles for selection of tested party

Facts of the Case

- Virtusa Consulting Services Private Limited ("the taxpayer") is engaged in providing software development services. During the assessment year ("AY") 2011-12, the taxpayer has entered into certain international transactions with its Associated Enterprises ("AEs").
- For transfer pricing analysis, the Profit and Loss Account of the taxpayer was segmented into three parts, namely, (1) Subsidiary Segment, (2) Citi Segment and (3) Others/Third Party Segment.
- The international transactions entered by the taxpayer are pertaining to provision and receipt of software development services under Subsidiary Segment and provision of software development services under Citi bank segments.
- The taxpayer adopted Transactional Net Marginal Method ("TNMM") by considering itself as tested party and Comparable Uncontrolled Price ("CUP") as the Most Appropriate Method ("MAM") for the purpose of benchmarking its international transactions with Subsidiary Segments and Citi bank segments respectively.
- During the assessment proceedings, the TPO rejected the benchmarking analysis carried out by the taxpayer for subsidiary segment and also rejected CUP method for Citi segment.
- The TPO proceeded with a TNMM analysis at segmental level [Subsidiary Segment and Citi Segment] for benchmarking the international transactions undertaken with overseas subsidiaries and Citi bank entities.
- The TPO revised the segment provided by the taxpayer and also undertook a fresh benchmarking analysis. Consequently, TPO made an upward adjustment amounting to INR 39,43,73,743 in the Subsidiary Segment.
- 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") wherein the taxpayer changed its stand and contended that their overseas subsidiaries who are least complex entities to the international transactions to be considered as tested party for the purpose of benchmarking analysis.
- ITAT observed that the taxpayer failed to produce material evidences/documents to establish the functional profile and risks assumed by the overseas subsidiaries and ruled that since such a position was not taken in the TP report, the taxpayer ought to be taken as the tested entity. Further ITAT stated that "Indian TP provisions do not allow to select foreign AE as a tested party for benchmarking the international transactions and it is the Indian Enterprise which should be taken as the tested party".
- In light of the above, ITAT disallowed the taxpayer's appeal by rejecting selection of overseas subsidiaries as tested party. Aggrieved by the same, the taxpayer filed an appeal before the High Court ("HC").

Proceedings before the HC

- HC observed that taxpayer had submitted evidences and documents relating to the taxpayer's TP documentation, global transfer pricing reports of the foreign AE; extracts of inter-company service agreement, etc. Also, risks assumed by the taxpayer had been elaborately brought out in the TP documentation. In view of the same, HC rejects ITAT's factual finding that taxpayer failed to establish functional risk assumed by the foreign AE;

- Further, HC rejects Revenue's stand that having considered itself as the tested party in its TP-documentation & auditor's certificate, the taxpayer cannot change its stand without filing a revised return and if permitted, it would amount to changing the "Goal post". In this regards, HC explains that the auditor's certificate pertains only to the transactional claims and has got nothing to do with a tested party and states that "The revenue cannot compare the case of the taxpayer with that of the taxpayer who fails to claim in his return of income a deduction or a benefit which he would be otherwise entitled to.".

- Further, HC noted that the TPO had rejected the data in the TP-documentation and undertook a fresh search and in view of the same, ITAT holds that "when the TPO himself has not attached any sanctity to the TP documentation as submitted by the taxpayer, could not have foreclosed the taxpayer from canvassing the issue that the subsidiaries are least complex entities which should be taken note of".

- Further, HC rejects ITAT's finding that as per law "Enterprise" will mean the taxpayer and "Associated Enterprise" will mean the other party (the AE) to whom the taxpayer has sold or purchased the goods and hence, the foreign AE cannot be considered as a tested party. In this regard, HC Refers to Sec. 92F(iii) & 92A (defining the said terms) and the decision of HC & ITAT in case of Yamaha Motors and observes that the words 'Enterprise' and 'Associated Enterprise' have been used interchangeably.

- Also HC rejects ITAT distinguishing of taxpayer's reliance on Delhi ITAT ruling in Ranbaxy Laboratories Limited (stating that it had proceeded on the basis of the OECD guidelines) and notes that the ITAT in the said decision held that the tested party normally should be the least complex party to the controlled transaction and that there is no bar either in the Act or in the TP guidelines for selection of tested party either local or foreign party;

- Lastly, considering that the TPO accepted the foreign AE in subsequent years, HC remands the issue to the TPO for a fresh decision on merits and in accordance with law having due regard to the orders passed by the TPO in the taxpayer's own case for the subsequent assessment years;

Nangia Andersen LLP's Take

The issue of selection of foreign AEs was the subject matter of litigation amongst the various benches of the ITAT. This ruling is a landmark High Court ruling which accepts selection of foreign AE as the tested party.

The approach followed by the High court in the instant ruling is aligned with the intention of provisions specified under Indian TP regulations and OECD TP guidelines as the same emphasis on analysis of functional and risks assumed in order to determine the least complex entity. Further, the ruling considers the importance of availability of material on record with the TPO and also reiterates that the taxpayer is not barred from reconsidering its TP methodology before the Tax authorities even though the same has not been taxpayer's initial choice in the TP report.

Accordingly, the High Court decision is a much welcome judgment on the issue of interpretation of "tested party" as envisaged under the Indian Income Tax Act.

Source: Virtusa Consulting Services Private Limited [TS-45-HC-2021(MAD)-TP]

Regulatory

1

Company Law Updates

I. Extending benefits of Fast Track Merger to Start-ups

Ministry of Corporate Affairs ('MCA') vide notification dated 1 February 2021 has issued Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2021 amending Rule 25 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.

By virtue of amendment start-ups may now enter into fast track mergers by approaching Regional Directors instead of National Company Law Tribunal ('NCLT')

The amendment is applicable for merger or amalgamation under Section 233 of Companies Act, 2013 entered into between:

- Two or more start-up companies; or
- One or more start-up companies with one or more small companies

II. Notification of provisions relating to producer companies under Companies Act 2013

MCA *vide* notification dated 11 February 2021 has notified Chapter XXIA of the Companies Act, 2013 containing provisions relating to the Producer Companies. The said provisions were introduced under the Companies (Amendment) Act, 2020.

Earlier the producer companies were governed under the provisions of Companies Act, 1956.

Since the Companies Act 1956 ('1956 Act') has now been repealed, it was not feasible for the government to amend any of the provisions of Part IXA of the 1956 Act, even though these continue to remain in force. The procedure for amending provisions pertaining to producer companies even if it is assumed that such amendment is legally tenable, would become convoluted and tedious in the light of the repeal of the 1956 Act. Therefore the government has introduced the similar provisions under Companies Act 2013.

III. Revamping provisions for One Person Companies ('OPC')

MCA *vide* G.S.R 91(E) dated 1 February 2021 issued Companies (Incorporation) Second Amendment Rules, 2021 to notify amendments proposed in Union Budget 2021. According to the notification, these rules shall come into effect from 1 April 2021.

Summary of the amendments is reproduced below:

- Non-resident individuals who are citizens of India have now been permitted to set up a One Person Company ('OPC').
- Residency rule for the person setting up an OPC has been relaxed from 182 days to 120 days;
- Provisions relating to mandatory conversion of OPC into any other form of entity upon exceeding ceiling of INR 50 lakhs paid up share capital and average annual turnover of INR 2 crore have been dispensed with.
- Accordingly, provisions relating to voluntary conversion of OPC into a private/ public limited company introduced.

The above changes would promote incorporation of new OPCs and lead to ease of doing business for existing OPCs.

IV. Reduced timelines for Right Issue Notice

The Companies (Amendment) Act, 2020 had granted powers to the Government under section 62 of the Companies Act, 2013 to provide for a reduced timeline for issue of notice in case of Rights issue of shares.

MCA *vide* G.S.R. 113(E) dated February 11, 2021 has now issued Companies (Share Capital and Debentures) Amendment Rules, 2021 to specify that the notice for issue of shares on Rights issue basis shall remain open for acceptance for a period not less than seven days from the date of offer.

The said amendment shall come into force from 1 April 2021.

V. Revised Limits For Small Companies

MCA *vide* G.S.R 92(E) dated 1 February 2021 has issued Companies (Specification of definitions Details) Amendment Rules, 2021 to notify the amendments that were proposed in Union Budget 2021.

According to the notification the ceiling of paid up capital to qualify as a small company has been increased from Rs. 50 lakhs to Rs. 2 crore while the limit for turnover has been increased from Rs. 2 crore to Rs. 20 crore.

The said notification shall be effective from 1 April 2021.

VI. Relaxation of provisions for certain classes of listed company

The Companies (Amendment) Act, 2020, by way of a proviso to Section 2(52) of the Companies Act, 2013 that came into effect from 22 January 2021, granted powers to 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".

Pursuant to the above and following the recommendations of the report of the Company Law Committee ('CLC'), headed by Shri. Injeti Srinivas, issued in November 2019, MCA on 19 February 2021 issued Companies (Specification of Definitions Details) Second Amendment Rules, 2021 to specify Companies issuing the following class of securities which shall not be considered as listed companies:

a) Public companies which have not listed their equity shares on the recognized stock exchange but have listed there:
   - Non-convertible debt securities issued on private placement basis.
   - Non-convertible redeemable preference shares issued on private placement basis

b) Private companies which have listed their non-convertible debt securities on private placement basis on the recognized stock exchange.

c) Public companies which have not listed their equity shares on a recognized stock exchange but whose equity shares are listed on stock exchange in permissible foreign jurisdictions.

Impact: The above amendment is likely to help develop the corporate bond market in India.

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Financial Sector Updates

I. Master Direction on Digital Payment Security Controls

Reserve Bank of India ('RBI') vide notification dated 18 February 2021 issued Master Direction on Digital Payment Security Controls. The Master Direction provides necessary guidelines for regulated entities to set up a robust governance structure and implement common minimum standards of security controls for digital payment products and services.

RBI has given a timeframe of 6 months to regulate entities to comply with the requirements specified under these regulations:

The provisions of these directions shall apply to the following Regulated Entities:

- Scheduled Commercial Banks (excluding Regional Rural Banks);
- Small Finance Banks;
- Payments Banks; and
- Credit card issuing NBFCs.

Some of the key provisions under the directions are as follows:

- Governance and Management of Security Risks
- Generic Security Controls
- Authentication Framework
- Fraud Risk Management

II. Master Direction on Non-banking Financial Company ('NBFC')- Housing Finance Company ('HFC') (Reserve Bank) Directions, 2021

Department of Regulation, RBI vide notification dated 17 February2021 issued master directions for HFCs to regulate the affairs of registered HFC and auditor of HFCs.

According to the master direction, HFC shall mean a company that fulfils the following conditions:

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

However, existing HFCs have to comply with the limits in phased manner till 31st March 2024

Some of the key provisions under the directions are as follows:

- Net Owned Fund ('NOF') Requirement of Rupees Twenty crore for a company to commence or carry housing finance as its principal business.
- Asset Classification, Provisioning and Accounting requirements
- Norms for credit/investment concentration
- Exposure of HFCs to group companies engaged in real estate business
- Investment in real estate by HFC capped at 20% of capital funds
- Limits on housing finance companies' exposure to capital market
- Acceptance of Public Deposits
- Corporate Governance Norms
- Fair Practice Code

III. Remittances to International Financial Services Centres (IFSCs) in India under The Liberalised Remittance Scheme (LRS)

In order to deepen the financial markets in IFSC and provide an opportunity to resident individuals to diversify their portfolio, the RBI has, vide enclosed AP DIR Circular no. 16 dated 16 February 2021, amended LRS Guidelines to permit resident individuals to make remittances under LRS to IFSCs subject to the following conditions:

- Remittance shall be made only for investments securities, other than those issued by entities/companies resident in India. These Companies can, however, be located in the IFSC
- Resident Individuals may also open a non interest bearing FC Account in IFSCs for making the above permissible investments under LRS
- Resident Individuals shall not settle any domestic transactions with other residents through these FC Accounts held in IFSC

Iv. New Investors from or through Non-FATF Compliant Jurisdictions not allowed to Invest in NBFCs

Reserve Bank of India ('RBI') vide a circular dated 12 February 2021 has disallowed investments leading to direct or indirect acquisition of 'Significant Influence'; i.e. acquisition of 20% or more of the voting power including potential voting power; from or through a non- FATF compliant jurisdiction into an NBFC.

Therefore, fresh investors, investing directly or indirectly, from non-FATF compliant jurisdictions in aggregate should be less than the threshold of 20 % of the voting power (including potential voting power) of the NBFC.

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Other Regulatory Updates

I. Spectrum Usage Charge Telcos

Further to the upcoming auction of spectrum in 700MHz, 800 MHz, 900 MHz, 1800 MHz, 2100 MHz, 2300 MHz and 2500MHz bands and in pursuance of clause 2.4 of the Notice Inviting Application ('NIA') dated 6 January 2021 issued by the Department of Telecommunications ('DoT'), the Spectrum Usage Charge ('SUC') has been fixed at 3% of the Adjusted Gross Revenue of successful bidders by the DoT vide Order dated 26 February 2021.

Top 3 telecom service providers in India, i.e. Bharti Airtel Limited, Reliance Jio Infocomm. Limited and Vodafone Idea Limited, have shown interest in participating in the upcoming auction.

II. Master Direction on Non-banking Financial Company ('NBFC')- Housing Finance Company ('HFC') (Reserve Bank) Directions, 2021

The DoT has notified a scheme for promotion of domestic manufacturing of telecom equipment including Core Transmission Equipment, 4G/5G, Next Generation Radio Access Network and Wireless Equipment, Access & Customer Premises Equipment (CPE), Internet of Things (IoT) Access Devices and Other Wireless Equipment, enterprise equipment: Switches, Routers.

Key highlights of the Scheme have been reproduced below.

- Minimum investment threshold (over a 4 year period):
  - o For MSMEs: INR 10 crore
  - o For non-MSMEs: INR 100 crore

- Incentives of 6% (7% in case of MSMEs) of sales turnover in year 1, tapering down to 4% in year 5.

III. Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021

Ministry of Electronics and Information Technology ('MeitY') on 25 February 2021 has issued Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ('Rules') under Information Technology Act, 2000 (hereinafter referred to as 'Act') to regulate the affairs of digital intermediaries including social media intermediary and significant social media intermediary.

The Rules shall be applicable to any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes.

The rules lays down the following requirement:

- Due Diligence to be followed by Intermediaries;
- Grievance redressal mechanism
- Code of ethics and procedure and safeguards in relation to digital media
- Self-Regulating mechanism for Intermediaries
- Oversight Mechanism by the Regulator etc.


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GST

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GST Clarifications and Updates

I. Standard Operating Procedure for implementation of the provision of suspension of registrations under sub rule (2A) of rule 21A of the Central Goods and Services Tax Rules, 2017 ('CGST Rules')

- Under sub rule (2A) of Rule 21A of the CGST Rules, when there are significant differences or anomalies in details of outward supplies in GSTR-1 or differences in input tax credit between GSTR-2A and GSTR-3B leading to cancellation of registration of a person, his registration shall be suspended and the said person shall be intimated in FORM GST REG-31 on the common portal, or by sending a communication to his e-mail address asking him to explain within 30 days as to why his registration shall not be cancelled.
- Till the time FORM REG-31 is made functional on portal, such notice/intimation for suspension of registration shall be made available to the taxpayer in FORM GST REG-17 on the common portal under "View/Notice and Order".
- Taxpayer whose registration is suspended is required to furnish reply in Form GST REG-18 to the jurisdictional tax officer within 30 days from the receipt of such notice/intimation.
- In case the intimation for suspension and notice for cancellation of registration is issued on grounds of non-filing of returns, taxpayers shall file all the due returns and submit the response.
- Post examination of the response received from taxpayer, the proper officer may pass an order for dropping the proceedings for suspension/cancellation of registration in FORM GST REG-20 or for cancellation of registration in FORM GST REG-19.
- Based on the action taken by the proper officer, the GSTIN status would be changed to "Active" or "Cancelled Suo-Moto" as the case may be.

(Circular No. 145/01/2021-GST dated 11 February 2021)

II. Clarification in respect of applicability of Dynamic Quick Response (QR) Code on B2C invoices for taxpayers with aggregate turnover of more than INR 500 crores in any of the financial year starting from 2017-18 onwards.

Vide Notification No. 14/2020-Central Tax dated 21 March 2020, Dynamic QR Code is required on B2C invoices issued by taxpayers having aggregate turnover more than INR 500 crores effective from 1 December 2020.

Further, vide Notification No. 89/2020-Central Tax dated 29 November 2020, penalty has been waived for non-compliance of the provisions of Notification No.14/2020 – Central Tax for the period from 1 December 2020 to 31 March 2021, if taxpayers comply with the provisions of the said Notification from 1 April 2021.

The CBIC has issued a circular clarifying various issues on applicability of QR code on B2C invoices. Key clarification is summarised below:

Non applicability:

Dynamic QR Code on B2C invoice is not applicable in case of following suppliers:

a. Where supplier falls under following category:
   - An insurer or a banking company or a financial institution, including a non-banking financial company.

- A goods transport agency supplying services in relation to transportation of goods by road in a goods carriage.
- Supplying passenger transportation service.
- Supplying services by way of admission to exhibition of cinematograph in films in multiplex screens

Details required to be captured in QR Code:

The Dynamic QR code has to be self-generated by the taxpayer and should include following details:

- Supplier GSTIN number
- Supplier UPI ID
- Payee's Bank A/C number and IFSC
- Invoice number & invoice date,
- Total Invoice Value and
- GST amount along with breakup i.e. CGST, SGST, IGST, CESS, etc.

The main objective of generation of QR codes for B2C invoices is to promote digitalization of payments using any UPI. Implementation of QR code will enable the government to get hold over B2C transactions. Also, it promotes the digitalization of payments. Payment can be done using UPI in a single go. There is no need to enter the amount, directly enter the UPI PIN/password and the payment will be made as per the amount mentioned on the invoice.

Mode of Customer Payment:

a. Post-paid
Invoice along with Dynamic QR Code is mandatory for all supply where payment is not yet made.

a. Pre-paid
If the cross reference of the payment receipt [whether electronic mode (like UPI, credit/debit card, online banking etc.)/ cash] is made on the invoice, the invoice would be deemed to have complied with the requirement of having Dynamic QR Code

Supply by way of e-commerce platform:

The provision would be applicable to each taxpayer separately whose turnover exceeds aforementioned limit. Therefore, the supplier who is using e-commerce platform to supply its goods/services will also be required to issue invoice with Dynamic QR Code. Further, if the supplier gives cross references of the payment received in respect of the said supply of the invoice, then such invoices would be deemed to have complied with the requirement of having Dynamic QR Code.

(Circular No. 146/01/2021-GST dated 23 February 2021)

III. Exemption from Aadhar authentication to certain notified person

Notification No. 17/2020- Central Tax dated 23 March 2020 was issued requiring notified persons to whom Aadhar authentication is applicable.

Now, Notification No. 3/2021- Central Tax dated 23 February 2021 has been issued notifying certain person to whom Aadhar authentication is not applicable, namely:

- Not a citizen of India; or
- A Department or establishment of the Central Government or State Government; or
- A local authority; or
- A statutory body; or
- A Public Sector Undertaking; or
- A person applying for registration under the provisions of sub section (9) of section 25 of the said Act.

(Notification No. 03/2021-Central Tax dated 23 February 2021)

IV. Extension in time limit for furnishing the Annual Return and Annual Reconciliation Statement

The time limit for furnishing Annual Return in Form GSTR-9, Form GSTR-9A & GSTR-9B and Annual Reconciliation Statement in Form GSTR-9C for the financial year 2019-20 has been further extended till 31 March 2021. Earlier the due date was 28 February 2021.

(Notification No. 04/2021-Central Tax dated 28 February 2021)

2

Advance Rulings & Judgements

I. Mumbai CESTAT held that free of cost supplies by recipient of service to the service provider cannot be added to the taxable value to charge Service tax

Brief Facts

M/s Vantage International Management Company ("the Appellant") was appointed by Oil & Natural Gas Corporation Limited ("ONGC"/ "Recipient") to provide mining services, i.e. drilling operations on oil wells. For providing services, the Appellant chartered its vessel on time charter basis. The contract specifically provided that for providing services, diesel will be provided by ONGC without any additional cost.

During the course of the Service Tax audit, Service Tax authorities observed that free of cost supplies by the recipient to the supplier have not been added in the gross amount of provision of service and consequent Service Tax was short paid and issued a show cause notice demanding Service Tax along with interest and penalty.

Decision

The CESTAT referred to the relevant clauses of the agreement and stated that ONGC (recipient) was required to supply fuel for running of the drilling equipment. The Appellant was not required to charge for such fuel from ONGC and supplied by ONGC free of cost.

On perusal of Section 67 of the Finance Act, 1994, the CESTAT observed that Section 67 provides mechanism for valuation of taxable services. The term consideration has been defined to include any amount that is payable for the taxable services provided or to be provided. This provision was amended vide the Finance Act, 2015 w.e.f. 14 May 2015 and, amended provision inter alia includes any reimbursable expenditure or cost incurred by the service provider and charged in the course of providing or agreeing to provide taxable service, subject to fulfillment of prescribed conditions.

Applying the relevant legal provision to the facts of the case, the Mumbai CESTAT held that the Appellant never charged any cost of fuel to ONGC and the amount claimed by it for providing the taxable service. Further, ONGC was not required to make payment of fuel to the Appellant therefore, its value cannot be added to the taxable value. Also, the Appellant received the entire consideration for provision of service in monetary terms.

The CESTAT followed the judgement of the Hon'ble Supreme Court in the case of M/s. Bhayana Builders (P) Ltd. and set aside the impugned order.

[Vantage International Management Company V. Commissioner of CGST, Mumbai East Final Order No. A/85359/2021 dated 12 February 2021]

Nangia Andersen LLP's Take

The issue of inclusion of free supply by the service recipient has been a matter of dispute under service tax. Taxability of such supply by recipient depends upon the terms & conditions of contract to the effect that is liable to supply/ incur such goods or services. This judgement should help in pending litigation on the similar fact pattern.

II. Haryana AAR held that GST is applicable on services to other branches/ units having same PAN and ITC pertaining to inward services to be distributed by way of ISD

Brief Facts

The Applicant, TATA SIA Airlines Limited, is engaged in the provision of scheduled air passenger transport and cargo services. The Company has head office ("HO") at Haryana and branch offices ("BO") in various other states. The HO procures various goods/ services as required for transportation activity for all the states at Haryana and inter alia includes:

- Services in the nature of lease of aircraft;
- Services in the nature of assurance for aircraft repair;
- Spares for aircrafts; and
- Any other cost for maintenance of aircraft, plus mark-up thereon is charged by the HO to the BOs as maintenance of aircrafts.

To ensure effective working of the aircraft at all locations, the Applicant maintains pool of spares which can be used by any BO whereas, ownership of the spares remains with the HO. Further, with reference to procurements, the Applicant has taken the aircrafts on lease and discharges IGST under reverse charge and imports spares by way of Customs duty payment. The Applicant also procures, various assurance services from outside India and discharges IGST in Haryana.

The aircraft in running conditions being used by other BO's however, cost of expenses referred above is being borne by the HO. The cost of such supply of maintenance services including assurance plus mark-up thereon is charged by the HO to the BOs. A consolidated lump sum is charged based on turnover of each BO to the turnover of the Company as a whole.

Decision

The Applicant *vide* this application intends to understand whether the maintenance service charges recovered by HO from BO qualifies to be a supply in terms of Section 7 of the CGST Act. While answering the said question, the AAR ruled that the provisions of Section 7 read with Section 25 and Entry 2 of the Schedule I under the CGST Act prescribes that the transactions involving the transfer of goods or provision of services amount to supply and are leviable for GST.

The Applicant further seeks clarity with respect to obtaining a separate registration as Input Service Distributor ("ISD") to distribute the ITC from HO to BO on inward supplies of goods and services. On perusal of the provisions of Section 16 of the CGST Act and relevant provisions relating to ISD; AAR ruled that ITC pertaining to services on the procurements made by HO towards the maintenance of aircraft (including lease thereof) shall be distributed by way of ISD mechanism and the credit pertaining to goods (including capital goods) shall be distributed by way of normal registration mechanism.

[TATA SIA Airlines Limited - HAR/HAAR/R/2019-20/16 dated 13 November 2019]

Nangia Andersen LLP's Take

The AAR resonates the view that allocation of common expenses qualifies as a supply, the view which is also taken by AAR in the case of Columbia Asia Hospitals Private Limited and Cummins India Limited.

With regard to of need of obtaining registration as ISD for distribution of credit on input services, the decision seems to be incorrect to the extent that the Applicant need to mandatorily take ISD registration where it intent to distribute common credit. It has also been clarified by the CBIC through FAQs on Banking, Insurance and Stock Brokers wherein it clarified that HO has an option to either cross charge (allocation of expenses) the services or raise an ISD invoice. Therefore, it can be observed that HO is not obligated to obtain registration as ISD if it is already doing cross charge.

III. Karnataka AAAR reversed the order of AAR and held activities of a liaison office of a foreign entity cannot be considered as supply of service.

Brief Facts

The Appellant, M/s Fraunhofer-Gesellschaft, Germany, is engaged in promoting applied research and development. The Appellant had established a liaison office ('LO') in India to carry out activities as permitted by the Reserve Bank of India ('RBI'). The LO only receives reimbursement of expenses from the head office in order to meet its expenses.

The Appellant approached the AAR seeking a ruling whether the activities of a LO amounts to supply of services, further whether it is liable to be registered under GST and accordingly liable to pay GST. The AAR ruled in the affirmative.

Aggrieved by the ruling of the AAR, the Appellant filed an appeal with the AAAR. The Appellant submitted that the LO is established as a communication channel between the company and the business in India and does not undertake any business activity.

Decision

The AAAR, referring to section 7 of the CGST Act, observed that for an activity to be termed as supply it must be done by a person, for consideration and the activity should be in the course or furtherance of business. Further, it observed that the RBI regulations do not permit a LO to undertake any business activity. The AAAR also referred to the RBI permission granted to LO and related conditions. The AAAR confirmed that the inward remittance received by the LO from its head office for maintaining the office cannot be termed as a consideration for the liaison activity, thus removes the coverage of activities of LO from the scope of supply [Section 7 of the CGST Act] whereas clause 2 of Schedule I covers activities treated as supply even if made without consideration, it includes supply of goods or services between related persons.

It was observed that there must be two persons who can be considered as related persons. The authority concluded that though the foreign company is a person as per section 2 of the CGST Act, LO is not recognised as a separate legal entity in India. Thus, in this case, there is only one legal entity i.e. the Company in Germany and service rendered to oneself does not come within the purview of the Supply under GST.

Accordingly, as per section 22, it is mandatory for a supplier who makes a taxable supply exceeding the threshold limit to be registered under the Act. The AAAR ruled that since there is no supply, there is no requirement for obtaining a GST registration, consequently no liability to pay GST.

[M/s Fraunhofer-Gesellschaft ZurForderung der angewandten Forschunge, Germany-LO - Order No. KAR/ AAAR/04/2021 dated 23 November 2020]

Nangia Andersen LLP's Take

AAR's ruling for obtaining the registration by LO had created confusion in the industry and was contrary to the regulations set by RBI and rulings pronounced by various other authorities. Now, AAAR ruling of non-requirement of registration by LO should rest the confusion amongst the foreign entities having/ setting up a LO in India.

IV. Hon'ble Madras High Court directs the CBIC to decide Uber India's representation on taxability of Motor Cycle transportation

Brief Facts

The Petitioner, Uber India Systems Private Limited, is a technology company, engaged in the business of operating and managing a software application (Uber App) used for providing ride-hailing services to consumers/customers by connecting them with the drivers. The Petitioner filed a representation seeking clarity from the Central Board of Indirect Taxes and Customs ("CBIC") with respect to taxability of motorcycle transportation activities, whereas due to non-responsive approach of CBIC, it has filed writ petition under article 14 of the Constitution of India.

The Petitioner contended that companies engaged in the similar trade have adopted a tax position whereby they claim exemption under entry 15(b) of the Notification No. 12/2017 – Central Tax (Rate). The Petitioner further informed that since they are not claiming such exemption, the price charged by them is higher as compared to the competitors. This results in loss of business to the assessee.
Further, referring to various provisions of the law, several representations were filed seeking clarity from the CBIC on taxability of supply of 'transport of passenger by motorcycle service', however, the Petitioner received no response from the Board.

Decision

Considering the above difficulty faced by the Petitioner, Hon'ble Madras High Court directed the CBIC to decide on the representation within a period of 6 weeks, further, to grant an opportunity of hearing to the Petitioner and the competitor companies, since the Board's decision would affect the competitors as well.

[Uber India System India Private Limited V. UoI]

V. Hon'ble Delhi High Court held it is not mandatory for CBIC to reply to representation filed

Brief Facts

The Petitioner, Maa Laxmi Associates, filed a representation with the CBIC seeking clarification on Section 168 of the CGST Act, 2017 on issue arising out of interception / detention and seizure/ confiscation proceedings under Section 129 and 130 of the CGST Act by the Karnataka Authorities. Due to non-receipt of response from CBIC, the Petitioner filed a writ petition before the Hon'ble Delhi High Court.

Decision

The High Court while hearing the matter observed that the representation sought is for legal opinion on the provision of CGST Act and held that there is no obligation on the CBIC. The petitioner, if in doubt shall seek legal opinion from its advisors / advocates and cannot seek the same from CBIC. There is no mandate in law for the CBIC to revert to each and every representation.

[MAA Laxmi Associates V. Union of India & Others – Writ Petition No. 1867/2021 and order dated 11 February 2021]

Nangia Andersen LLP's Take

On various issues, taxpayers file representation with the CBIC seeking clarity on the matters or insisting for issuance of circular to trade on particular subject. On perusal of the above judgements, it can be observed that assesses have been seeking direction from the Hon'ble High Court to CBIC for providing clarity on various matters, whereas, two different High Court have pronounced contrary judgements on the same matter and can be expected many such writ petition with various High Court in India. Nonetheless, it would be important to see in coming days whether seeking clarity from CBIC to be considered as a right of the assessees or its mere clarificatory route without any legal obligation.

3

Customs Updates

I. Relaxation in Pending IGST Refund due to mismatch between GSTR-1 and GSTR-3B

- The Central Board of Indirect Taxes and Customs has extended the procedure for IGST refund claims where records were not transmitted to ICEGATE due to GSTR-1 and GSTR- 3B mismatch error in respect of the Shipping Bills filed after 31.03.2019.
- The solution provided vide Circular No. 12/2018-Customs read with Circular No. 25/2019-Customs would be applicable mutatis mutandis for the Shipping Bills filed during the financial year 2019- 20 and 2020-21 (i.e. in respect of all Shipping Bills filed/to be filed up to 31.03.2021).
- The comparison between the cumulative IGST payments in GSTR-1 and GSTR 3B would now be for the period April 2019 to March 2021.
- The corresponding CA certificate evidencing that there is no discrepancy between the IGST amount refunded on exports in terms of this Circular and the actual IGST amount paid on exports of goods for the period April 2019 to March 2020 and April 2020 to March 2021 shall be furnished by 31st March 2021 and 30th October 2021, respectively.

(Circular No. 04/2021- Customs (N.T.) dated 16 February 2021)

II. IGST refunds on exports - extension in SB005 alternate mechanism

- CBIC had issued Circulars in 2018, 2019 and 2020 wherein an alternative mechanism with officer interface to resolve invoice mismatches (i.e. non-refund of IGST on account of mismatch of invoice details mentioned in the shipping bill and in the GST returns) was provided for the shipping bills.
- As per this alternate mechanism, the exporter concerned has to provide details of such GST Invoices where there is mismatch as per format prescribed in Annexure A of Customs Circular No. 5/2018 to the concerned Customs Department.
- Although the cases having SB005 error have now reduced due to continuous outreach done by the Board and increased awareness amongst the trade, however, some exporters nevertheless, continue to make errors in filing invoice details in the shipping bill and the GST returns.
- Therefore, keeping in view the difficulties faced by the exporters in respect of SB005 errors, Board has decided to keep the officer interface available on permanent basis, subject to payment of Rs. 1,000/- as fee towards such rendering of service by Customs Officers for correlation and verification of the claim.

(Circular No. 05/2021-Customs dated 17 February 2021)

4

Foreign Trade Policy Updates

I. Amendment of Importer-Exporter Code ('IEC') related provision

- Process to update IEC is now completely online. IEC holder has to ensure that details in IEC are updated electronically every year during April-June period to avoid deactivation.
- In cases where there is no change, the same needs to be confirmed online.
- IEC will be deactivated if the details are not updated within prescribed time. IEC so deactivated can be activated upon its successful updation.
- IEC may also be flagged for scrutiny. IEC holders are required to ensure that any risk flagged by the system is timely addressed; failing which IEC shall be deactivated.

(Notification No. 15/2015-2020 dated 12 February 2021)

Compliance Calendar

Direct Tax

Due Date	Particulars
2nd March 2021	Payment and furnishing of challan-cum- statement (Form 26QB) in respect of tax deducted under section 194-IA in the month of Jan 2021
	Payment and furnishing of challan-cum-statement (Form 26QC) in respect of tax deducted under section 194-IB in the month of Jan 2021
	Payment and furnishing of challan-cum-statement (Form 26QD) in respect of tax deducted under section 194-M in the month of Jan 2021
7th March 2021	Payment of TDS - For the period 1st Feb 2021 to 28th Feb 2021
	Payment of TCS - For the period 1st Feb 2021 to 28th Feb 2021
	Payment of Equalisation Levy on online advertisement and other specified services, to be discharged by Indian payers- For the period 1st Feb 2021 to 28th Feb 2021
15th March 2021	Due date of payment of fourth instalment of advance tax for F.Y. 2020-21
17th March 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 Jan 2021 - tax deduction in Jan 2021
	Issuance of TDS certificate in Form 16C for tax deposited u/s 194-IB (TDS on rent of immovable property) in the month of Jan 2021 - tax deduction in Jan 2021
	Issuance of TDS certificate in Form 16D for tax deposited u/s 194-M (TDS on payment made by individuals/ HUF to contractors, agents, service providers, etc. exceeding INR 50 lakhs) in the month of Jan 2021 - tax deduction in Jan 2021
30th March 2021	Payment and furnishing of challan-cum- statement (Form 26QB) in respect of tax deducted under section 194-IA in the month of Feb 2021
	Payment and furnishing of challan-cum-statement (Form 26QC) in respect of tax deducted under section 194-IB in the month of Feb 2021
	Payment and furnishing of challan-cum-statement (Form 26QD) in respect of tax deducted under section 194-M in the month of Feb 2021
31st March 2021	Extended due date for filing of quarterly statement of TDS and TCS deposited for Q1 and Q2 of FY 2020-21
	Due date of filing belated and revised Income Tax Return for AY 2020-21 in case of all Assessee
	Due date of linking PAN with Aadhaar
	Due date for filing of the declaration for opting of amnesty Direct Tax Vivad se Vishwas Scheme
	Due date of complying with all pending compliances having due dates falling within the period of 20th March, 2020 to 31st December, 2020
	Payment of Equalisation Levy on e-commerce supply of services - for the quarter ending on 31st March, 2021
	Last date of issuance of notice for selection of cases for scrutiny by Income-tax department for A.Y. 2019-20

Compliance Category	Compliance Description	Frequency	Due date	Due Date falling in March 2021
Form GSTR-1 (Details of outward supplies)	• Registered person having aggregate turnover more than INR 5 crores and registered person having aggregate turnover up to INR 5 crores who have not opted for Quarterly Returns Monthly Payment ('QRMP') Scheme	Monthly	11th day of succeeding month	• February - 11 March 2021
Form GSTR-3B (Monthly return)	• Registered person having turnover more than INR 5 crores	Monthly	20th of next month	• February - 20 March 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	• February - 22 March 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	• February - 24 March 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	• February - 1 to 13 March 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 March 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	• February - 25 March 2021
Form GSTR-1 (Details of outward supplies)	• Registered person having aggregate turnover up to INR 5 crores who have 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	• February - 13 March 2021
Form GSTR-9 (Annual Return)	• Annual Return if aggregate turnover is INR 2 crore or more • GST Audit if aggregate turnover is INR 5 crore or more	Yearly	On or before the 31st December following the end of FY	Annual Return and reconciliation statement for FY 2019-20: 31 March 2021

Regulatory

Segment	Particulars	Due Dates
Monthly ECB Return	ECB-2 (Monthly Return of ECBs for the month of February)	March 07, 2021

NOIDA
(Delhi NCR - Corporate
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