Nangia Andersen LLP

NEWSLETTER

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01

Direct Tax

ITAT- Software-sale not 'royalty', rendering back-office services not 'FTS'

Issue: Royalty and FTS
Outcome: In favor of the Assessee

Background

In case of QlikTech International AB (the assessee), the Bangalore ITAT ruled that receipts from sale of software are not taxable as royalty and consideration received from rendering back-office support services are not taxable as FTS.

Brief facts and contentions

- The assessee company is a tax resident of Sweden and is engaged in the business of software materialization, marketing and support of the software material Qlikview. All intellectual property rights are the exclusive property of the assessee.
- The assessee entered into an agreement with its subsidiary QlikTech India Private Limited (QIPL) for onward sale of shrink-wrapped software to the end users/ customers in India. As per the distribution agreement, QIPL was supposed to promote the assessee's products to the end users within the prescribed territory.
- Further, as per the agreement the distributor was entitled to "non-exclusive and non-transferable license" to resell computer software. Further, there was no transfer of copyright in the computer program to the distributor or to the ultimate end-user. The end-user could not reproduce the computer program for sale or transfer.
- The assessee filed its return of income for the AY 2017-18 declaring NIL income. However, the AO held that the receipts from sale of software products were subject to taxation as Royalty under Article 12(3) of the India-Sweden Tax Treaty and section 9(1)(vi) of the Income Tax Act (the Act). The CIT (A) upheld the order of the AO.
- Before the Bangalore ITAT, the assessee pointed out that in assessee's own case for a preceding Assessment Year, the Delhi ITAT had held that QILP did not provide copyright in the software or the use of the copyright in the software to the end users. It merely provided right to use the copyrighted material or article which is distinct from the rights in a copyright.

- Further, it was pointed out that the reliance of the CIT(A) on the decision of Karnataka High Court in the case of Samsung Electronics Ltd.[1] and Lucent Technologies[2] was misplaced as both these decisions have been overruled by the Supreme Court's verdict in the case of Engineering Analysis Centre of Excellence (P) Ltd.[3]

- Separately, the assessee also entered into an agreement with QIPL, wherein the assessee agreed to provide assistance to QILP in respect of certain back office support operations, through its shared services center. While the AO contended that the services were in the nature of FTS, the assessee argued against the stance, stating that the rendering such services did not 'make available' technical knowledge. Further, the services were rendered and the payments were received outside India, accordingly, such income would not form a part 'income' under section 5(2) of the Act.

ITAT's Judgement

- **Sale of software**

  Placing reliance on the decision of the Supreme Court[3], the ITAT held that the sale of software products by the assessee to its Indian distributors for further sale to end users is not in the nature of transfer of "copyright" and therefore consideration received for sale of software cannot be taxed as "royalty" under the provision of section 9(1)(vi) of the Act as well as Article 12 of the India-Sweden DTAA.

- **Back-end services**

  The assessee was entitled to apply the restricted scope of FTS in the India-Portuguese/USA DTAA, by virtue of the MFN clause in the Protocol to India-Sweden DTAA. Accordingly, the receipts shall be taxed only if the services provided 'make available' technical knowledge or skill to the recipient of services.

  Mere rendering of services is not sufficient for attracting 'make available' clause, the technical knowledge, skill, etc. must remain with the user for own benefit, without recourse to the performer of the services in future. Rendering corporate back office services to QILP did not 'make available' any technical knowledge or skill or experience.

Nangia Andersen LLP's Take

It has been established by the Supreme Court[3] that where there is no transfer of any interest in the copyright of the software, the consideration in question would not qualify as 'royalty'. The decision of the ITAT is in accordance with the Supreme Court judgement, which is binding on all tax authorities and subordinate courts in India. Further, ITAT has categorically reiterated that taxation of income as FTS is contingent upon the 'making available' of technical knowledge, skill or experience. The fruits of the services should remain available to the person utilizing the services, in future, in some concrete shape..

Accordingly, the consideration received for these services was not taxable as FTS. Further, such receipts could not be attributed to PE under the terms of Article 7(1) of DTAA and hence could not be taxed as business profits either

Past Precedents

In the case of Sandvik AB[4], the ITAT held that as the services provided by the assessee did not 'make available' any technical knowledge, experience or skill, the consideration could not be taxed as FTS within the meaning of Article 12 of the India-Portuguese DTAA.

[Source: ITA No. 173/Bang/2021]

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[1] 345 ITR 494
[2] ITA No 168/2004
[3] (2021) 125 Taxmann.com 42 (SC)
[4] Sandvik AB vs DCIT(ITA No. 2524/PUN/2017)

Bangalore ITAT holds that Product Development Expenditure is in the nature of Capital Expenditure on which depreciation can be claimed

Issue: Classification of R&D expenditure

Outcome: In favor of the Revenue

Background

In case of Sogefi Engine Systems India Private Limited (the assessee), the Bangalore ITAT ruled that entire R&D expenditure should be capitalized as an intangible asset on which depreciation can be claimed.

Brief facts and contentions

- The assessee company is engaged in the business of manufacturing automotive filters for two and four-wheelers and other filtration products and systems.
- For the assessment years 2012-13 to 2016-17, the assessee incurred R&D expenditure and in order to meet the requirements of matching principle, capitalized 70% of it in its balance sheet and charged remaining 30% to P&L account. However, while filing the return of income, the assessee placed reliance on the judgment of Supreme Court in the case of Empire Jute Co. Ltd[1]. and claimed the entire R&D expenditure as revenue expenditure.
- The assessee submitted that the expenditure was incurred for technical services and assistance from Sogefi SAS, France and consideration in this respect was in the nature of Fee for Technical Services (FTS) on which TDS had been deducted u/s 195.
- The Revenue argued that technical assistance from Associated Enterprise (AE) situated in foreign country resulted in enduring benefit and increase in fixed capital.
- The AO disallowed the product development expenditure (being capital in nature) and allowed depreciation thereon. However, the assessee argued that the expenditure incurred did not result in any enduring benefit and even if it was enduring benefit, the said expenditure was in the nature of revenue and deduction should be allowed.
- On appeal, the CIT (A) confirmed the order of AO. The assessee therefore plead his case before the ITAT.

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[1]Empire Jute Co. Ltd. v. CIT (1980) 124 ITR 1 (SC)

ITAT's Judgement

- The ITAT dismissed assessee's contentions as the assessee itself had treated the expenditure as 'capital expenditure' in its books of account and annual report.
- The ITAT observed that the expenditure was not incurred in the conduct of day-to-day affairs. It was rather incurred for securing enduring benefit in the capital field.
- Further, the assessee had not established that the expenditure was incurred to face severe competition or carry out constant upgradation, therefore, the ruling of the Karnataka High Court in the case of Tejas Networks[2] could not be applied, wherein such expenses were allowed as revenue expenditure.
- The ITAT explained that in the case of Empire Jute Co. Ltd[1]., it was held that if the advantage merely results in facilitation of the assessee's trading operations or enables the management to conduct the business more efficiently or profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. However, in the instant case, this principle does not hold good as the assessee was unable to establish that the expenditure was incurred out of circulating capital.
- The ITAT found that the Director's report specified the expenditure was incurred for improving existing products as well as developing new products. Accordingly, it was held that the expenditure was not 'revenue expenditure' incurred in the ordinary course of carrying day-to-day business. The assessee, however, was entitled to claim depreciation at applicable rates
- It was also held that the authorities can draw a different conclusion if there is adequate justification to depart from earlier view i.e. where subsequent new or more facts come into light.

[Source: ITA Nos.1696 to 1698/Bang/2019, 2089/Bang/2019 & 757/Bang/2016]

Nangia Andersen LLP's Take

There are no explicit and concrete principles guiding classification of an expenditure as revenue or capital and the categorization depends upon the factual matrix of each case. Generally, an expenditure resulting in enduring benefit should be accounted for as capital expenditure unless the advantage secured is for facilitating the conduct of day-to-day business efficiently.

Interestingly, in this case the ITAT rejected the assessee's reliance on the ruling of the Supreme Court in case of Radhasoami Satsang[3] wherein the principle of consistency in judicial orders was upheld. The ITAT stipulated that the decision shall not apply where there is qualitative difference of facts, events and materials considered by authorities in different assessment years

Past Precedents

In case of Arvind Products Ltd[4], it was held that if expenditure was incurred on product development but the same did not involve development of a new product or a new technique or technology to manufacture existing product more efficiently and was merely aimed at improving quality of existing products, then deduction as revenue expenditure should be allowed.

[2] CIT v. Tejas Networks India (P) Ltd. (2014) 52 taxmann.com 513 (Kar)
[3] CIT (1992) 193 ITR 321 (SC)
[4] CIT v. Arvind Products Ltd. (2018) 93 taxmann.com 454 (Guj)

Retrospective amendment of Section 195 cannot be applied to disallow expenditure retrospectively under section 40(a)(i)

Issue: TDS under section 195

Outcome: In favour of the assessee

Background

The Delhi Bench of the Income Tax Appellate Tribunal (ITAT) in the case of McCann Erickson (India) Pvt. Ltd. deleted the disallowance under section 40(a) (i) for non-deduction of tax at source stating that a retrospective amendment in law does change the tax liability in respect of an income, with retrospective effect, but it cannot change the tax withholding tax liability with retrospective effect.

Brief facts and contentions

- The case of the assessee was reopened for and assessment wherein the Assessing Officer (AO) made addition to income on account of non-deduction of tax at source in respect of global account coordination cost.
- The CIT(A) upheld the order of the AO by observing that the amount paid by the assessee came under the purview of section 195 of the Act after the insertion of a provision that was added with retrospective effect from 1976[1].
- It was held that the AO was justified in disallowing the payment under section 40(a)(i) of the Income Tax Act as the assessee had failed to deduct tax at source under section 195.
- Aggrieved, the assessee appealed before the ITAT contending that the CIT (A) had failed to consider that retrospective amendment in law cannot change the tax withholding liability with retrospective effect unless services were rendered in India..

ITAT's Judgement

- The ITAT relied on the judgement of the coordinate bench in the case of Ashapura Minichem Ltd[2] wherein it was held that a tax deductor cannot be expected to have clairvoyance of knowing how the law will change in future.

Source: [ITA No 2252/ Del/ 2016]

Nangia Andersen LLP's Take

The ITAT in the instant case has established that since withholding tax obligations are to be discharged at the point of time when payment is made or credited, such compliance can be made as per the law that stands at that point of time. Therefore, retrospective amendments cannot be the basis of imposing the withholding tax liability and therefore disallowance on this account is unjustified.

- A retrospective amendment in law does change the tax liability in respect of an income, with retrospective effect, but it cannot change the tax withholding liability, with retrospective effect. Withholding tax obligations are to be discharged at the point of time when payment is made or credited, whichever is earlier and thus, such obligations can only be discharged in the light of the law as it stands at that point of time.
- Accordingly, it was held that AO was not justified in fastening the liability of tax deduction in AY 2008-09, by relying on the amendment, which was inserted in 2010, with retrospective effect from 1976. Hence, provisions of section 40(a)(i) of the Act ought not to have been invoked.

Past Precedents

In the case of WNS Capital Investment Ltd[3]. a non-resident company purchased shares of another non-resident company having assets in India. ITAT Mumbai noted that it could not be said to have defaulted in not withholding taxes from payments made to non-resident as, while transaction for purchase of shares in question took place in 2008, Explanation 2 to section 195 which imposes tax withholding obligations on non-residents in respect of payments involving income taxable in India, was introduced by Finance Act 2012, therefore, assessee, could not be faulted for not deducting tax at source from payments so made.

[1] Explanation 2 to Section 195 was added retrospectively to clarify that obligation to deduct tax at source applies in all the cases where interest or other sum is paid or credited in the books of accounts of the person liable to pay such income, whether or not the non-resident person has:
(i) a residence or place of business or business connection in India; or
(ii) any other presence in any manner whatsoever in India
[2] 131 TTJ 291
[3] [2021] 127 taxmann.com 128 (Mumbai - Trib.)

02

Transfer Pricing

ITAT: Deletes Section 271BA penalty for failure to report international transactions; cites retrospective amendment in section 92B not applicable in instant case

Issue: Penalty for non-reporting of certain international transactions under Section 92E of the Act; applicability of amendment in Section 92B of the Act

Outcome: In favour of the assessee

Brief facts and contentions

- Batronics India Limited ("the taxpayer") filed its form 3CEB pertaining to Assessment Year ("AY") 2013-14. During the course of assessment proceedings, the Assessing Officer ("AO") made reference to the Transfer Pricing Officer ("TPO") under section 92CA of the Income Tax Act, 1961 ("the Act").
- Further, penalty under section 271BA of the Act was imposed on the taxpayer for its alleged failure in reporting international transactions as required under section 92E of the Act.
- The Revenue was of the view that the taxpayer had not reported its international transactions including receivables, corporate guarantee etc. as required under section 92E of the Act.
- Aggrieved by the same, the taxpayer filed an appeal before the Hyderabad Bench of Income Tax Appellant Tribunal ("ITAT"/ "the Tribunal").

ITAT's Judgement

ITAT made the following observations:

- ITAT observed that there was no dispute that the taxpayer had duly filed its form 3CEB for AY 2013-14 owing to which reference to TPO was made by the AO.
- Further, the ITAT observed that the Revenue's contention of non-reporting in relation to international transactions including receivables, corporate guarantee etc. in the taxpayer's Form 3CEB was in fact prescribed vide amendment in section 92B of the Act by the Finance Act, 2012 (effective retrospectively from 01-04-2002), whereas the AY under consideration was only the immediate AY i.e. AY 2013-2014
- ITAT further observed that the taxpayer had already succeeded on the very issues before the Tribunal in AY 2012-2013 proceedings regarding the corresponding adjustments.
- Thus, ITAT deleted the penalty imposed by the Revenue under section 271BA of the Act on the taxpayer citing the issue to be very condonable.

Source: Batronics India Limited [TS-294-ITAT-2021(HYD)-TP]

Nangia Andersen LLP's Take

In the Instant case, ITAT has considered non-reporting of international transactions in Form 3CEB as a condonable issue owing to the applicability of retrospective amendment in section 92B of the Act as provided by Finance Act 2012, thereby providing clarity regarding the applicability of the aforesaid amendment.

Further, the ruling reiterates the principle that even though Explanation was introduced vide Finance Act 2012 clarifying that certain transactions including capital financing qualifies as international transaction retrospectively, the liability to report such transactions on the taxpayer (which occurred before the aforesaid amendment) cannot be fastened.

03
Regulatory

Company Law Updates

1. New norms with respect to change in name of existing companies:

Ministry of Corporate Affairs ('MCA'), vide notification dated 22 July 2021 has issued Companies (Incorporation) Fifth Amendment Rules, 2021, thereby inserting Rule 33A under Companies (Incorporation) Rules, 2014.

In the said rules, changes have been made with respect to allotment of a new name to an existing company under Section 16 of the Companies Act 2013

Section 16 relates to rectification of a company name subject to various conditions, including that the Central government may direct changing a Company's name if it is identical with or too nearly resembles with the name of an existing Company.

As per the new rules, if a Company fails to change its name in accordance with direction from the Regional Director ('RD') within a period of 3 months, the letters 'Order of Regional Director Not Complied' "ORDNC", the year of passing of the direction, the serial number and the existing Corporate Identity Number (CIN) of the company shall in itself become the new name of the company!

Further, the Registrar shall accordingly make an entry of the new name in the register of companies and issue a fresh certificate of incorporation.

This move of the Government to tighten the norms relating to naming of Companies will reduce the number of trademark infringements and will prove to be in favour of the trademark holders.

Micro, Small and Medium Enterprises (MSMEs) updates

A. New definition of Micro, Small and Medium Enterprises - addition of retail and wholesale trade.

Ministry of Micro, Small and Medium Enterprises vide **Office Memorandum No. 5/2(2)/2021-E/P & G/Policy** dated 2 July, 2021, has decided to include retail and wholesale trade as MSMEs for the limited purpose of Priority Sector Lending.

The new activities would be allowed to get registered on Udyam Registration Portal.

On June 26, the ministry issued a notification changing the definition of MSMEs and introduced a new process for the registration of MSME i.e. Udyam Registration.

Further, the Enterprises having Udyog Aadhaar Memorandum (which was the earlier process of registration of MSMEs), under above three NIC Codes are now allowed to migrate to Udyam Registration Portal or file Udyam Registration afresh.

The said inclusion of wholesale and retail trade under the ambit of MSMEs will benefit these sectors in availing the benefits granted to MSMEs, including the government subsidies.

Securities and Exchange Board of India (SEBI) updates

1. Extension in timelines for holding Annual General Meeting ('AGM')

SEBI, vide circular no. **SEBI/HO/CFD/CMD1/P/CIR/2021/602** dated 23 July 2021, has extended the timeline for conducting AGM by top 100 listed entities by market capitalization after taking into account the difficulties faced by Companies due to the ongoing pandemic.

Regulation 44(5) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015 ('SEBI LODR'/ 'LODR') requires top 100 listed entities by market capitalization to hold their AGM within a period of five months from the date of closing of the financial year.

Further to the extension granted, such entities shall hold their AGM within a period of six months from the date of closing of the financial year for 2020-21.

2. Review of SEBI (Share Based Employee Benefit ('SBEB')) Regulations, 2014 and SEBI (Issue of Sweat Equity) Regulations, 2002

SEBI, vide its discussion paper dated 8 July 2021 had sought comments from general public on proposals to amend SEBI (Share Based Employee Benefits) Regulations, 2014 and SEBI (Issue Of Sweat Equity) Regulations, 2002.

The objective behind publication of the consultation paper is to streamline and rationalize the provisions of the regulations and make them more robust, in-sync with best global practices and ease of doing business.

A seven-member committee appointed by SEBI, in its 141-page discussion paper, has made the following recommendations:

i. The lock-in period for sweat equity shares and its pricing formula should be consistent with the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018.

ii. Non-permanent employees be considered to receive share-based employee benefits falling under SBEB Regulations. Accordingly, "employees" as defined by companies should be eligible under the SBEB Regulations, as opposed to earlier position of only "permanent employees".

iii. Flexibility be accorded to the companies to switch routes from trust to direct route or vice versa, subject to the approval of the shareholders by special resolution and provided that such switch is not prejudicial to the interests of the employees.

iv. Upon winding up of schemes/trust, transfer of shares or monies held by a trust should be permitted to be transferred to one or more existing share-based employee benefit schemes under the SBEB Regulations, subject to approval of shareholders.

The recommendations are aimed at improving ease of doing business from a regulatory perspective.

3. Standard Operating Procedure for listed subsidiary company desirous of getting delisted through a scheme of arrangement

SEBI, vide circular dated 6 July, 2021[4], has notified the amendments made to the SEBI (Delisting of Equity Shares) Regulations, 2021 wherein Chapter VI, Part C, and Regulation 37 have been modified to include special provisions for a listed subsidiary company getting delisted through a scheme of arrangement where the listed holding company and the listed subsidiary company are in the 'same line of business'.

For the purpose of defining "same line of business" the following criteria has been notified which must be fulfilled by the listed holding company and its listed subsidiary:

i. The principal economic activities of both Holding and Subsidiary should be under the same Group (3-digit numeric code) under the National Industrial Classification (NIC) Code 2008

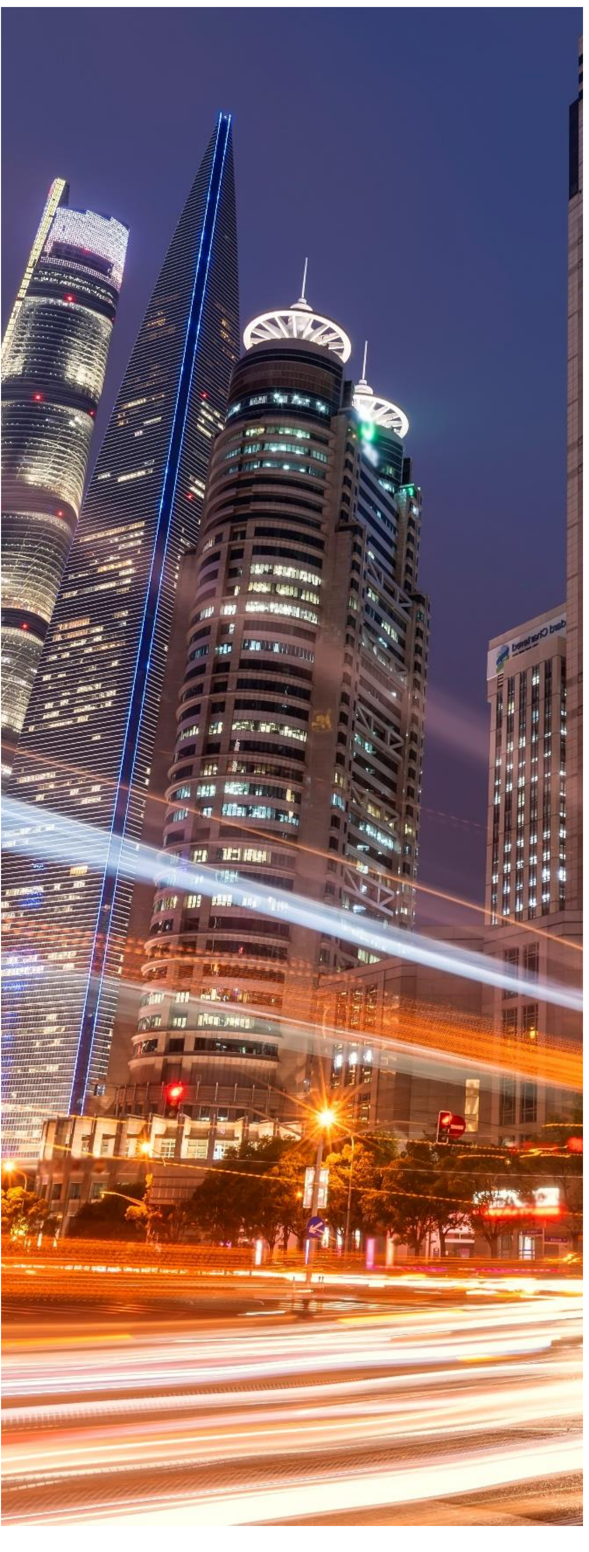
ii. At least 50% of revenue from the operations of the listed holding and listed subsidiary company must come from the same line of business and at least 50% of the net tangible assets of the listed holding company and the listed subsidiary must be invested in the same line of business.

iii. Further in case of change of name of the listed entities, within the last one year, at least fifty percent of the revenue, calculated on a restated and consolidated basis, for the preceding one full year has to be earned by it from the activity indicated by its new name.

iv. The listed holding company and the listed subsidiary have to provide self-certification with respect to both the companies being in the same line of business.

It has been further provided that all of the above mentioned criteria shall be certified by the Statutory Auditor and SEBI Registered Merchant Banker.

In terms of the SEBI (Delisting of Equity Shares) Regulations, 2021, the shares of the listed holding company and the subsidiary company shall be listed for at least 3 years and the subsidiary company shall be a listed subsidiary of the listed holding company for a period of 3 years.



[4] SEBI/HO/CFD/DIL1/ CIR/P/2021/0585

Production-Linked Incentive ('PLI') Updates

1. Cabinet approval granted for PLI scheme for Specialty Steel Sector

The Union cabinet accorded its approval for PLI Scheme for Speciality Steel Sector on 22 July 2021.

Duration of the scheme has been reserved for five years, starting from 2023-24 upto 2027-28. The Scheme has been introduced with a budgetary outlay of INR 6322 crores and is expected to bring in investment of Rs. 40,000 crores approximately with a capacity addition of 25 MT for speciality steel

Key highlights of the Scheme are as follows:

- 5 Product Categories covered under the scheme are as follows:
    - i. Coated and Plated Steel Products
    - ii. High Strength wear resistant
    - iii. Speciality rails
    - iv. Alloy steel products and steel wires
    - v. Electrical steel
- Incentives capped to Rs. 200 crore, per group, per year.
- Selection shall be based on 'Minimum year on year incremental production commitment' and 'Minimum investment commitment for the product/category', having a weightage of 50% each.
- Selected companies to sign a MoU with the Ministry.
- The Project Management Agency shall be proposed by Ministry of Steel

2. Corrigendum to PLI scheme for Pharmaceuticals

Department of Pharmaceuticals ('DoP') released a corrigendum/ amendment to the Operational Guidelines dated 1 June 2021.

Further to the amendment, Drug Master File ('DMF') and Certificate of suitability ('CEP') have been included as selection parameters.

Additionally, certain IT related expenditure incurred for Quality Assurance/ certification/ manufacturing have been included for determining eligible expenditure to achieve minimum investment targets.

The DoP also released FAQs providing clarity on a number of issues.

Furthermore, the last date of filing applications under the PLI Scheme has also been extended to **15 August 2021.**

04

Compliance Calendar

Direct Tax

Due Date	Particulars
7th August 2021	Payment of TDS/TCS - For the period 1st July 2021 to 31st July 2021
	Payment of Equalisation Levy on online advertisement and other specified services, referred to in Section 165 of Finance Act, 2016 - For the period 1st July 2021 to 31st July 2021
14th August 2021	Due date for issuance of TDS Certificate for tax deducted under section 194-IA in the month of June, 2021
	Due date for issuance of TDS Certificate for tax deducted under section 194-IB in the month of June, 2021
	Due date for issuance of TDS Certificate for tax deducted under section 194M in the month of June, 2021
15th August 2021	Due date for furnishing of Form 24G by an office of the Government where TDS/TCS for the month of July, 2021 has been paid without the production of a challan
	Due date for furnishing statement in Form no. 3BB by a stock exchange in respect of transactions in which client codes been modified after registering in the system for the month of July, 202
	Due date for issuance of quarterly TDS certificate (in respect of tax deducted for payments other than salary) for the quarter ending June 30, 2021
30th August 2021	Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IA for the month of July, 2021
	Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IB in the month of July, 2021
	Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194M in the month of July, 2021
Extension of due date in statutory and regulatory compliance matters (Vide Circular No. 12/2021, dated June 25, 2021)	
31st August 2021	Extended due date of payment of tax under the Direct Tax Vivad se Vishwas Act, 2020 without additional charge
	Extended due date of furnishing Form No. 10A/ Form No. 10AB for obtaining registration under section 10(23C), 12AB, Section 35(1)(ii)/(iia)/(iii) and 80G of the Income-tax Act, 1961.
	Extended due date of furnishing Form No. 15G/15H for the quarter ending 30th June 2021.

Regulatory

Segment	Particulars	Due Dates
Monthly ECB Return	ECB-2 (Monthly Return of ECBs for the month of July)	August 07, 2021
Annual Return of LLPs	Form-11	*August 31, 2021
Reconciliation of Share Capital Audit Report	PAS-6	*August 31, 2021
Return of Deposits	DPT-3	*August 31, 2021
Half yearly MSME Return	MSME	*August 31, 2021
Quarterly Report under Regulation 32 & 33 of SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015	Financial Results & Statement of deviation	August 14, 2021
*MCA, vide notification dated 30 June 2021 extended the timeline till 31 August 2021 for filing all e-forms under Companies Act, 2013 and LLP Act, 2008 which were due for filing during 1 April 2021 to 31 July 2021.		

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