Nangia Andersen LLP

Tax & Regulatory Newsletter

September 2022

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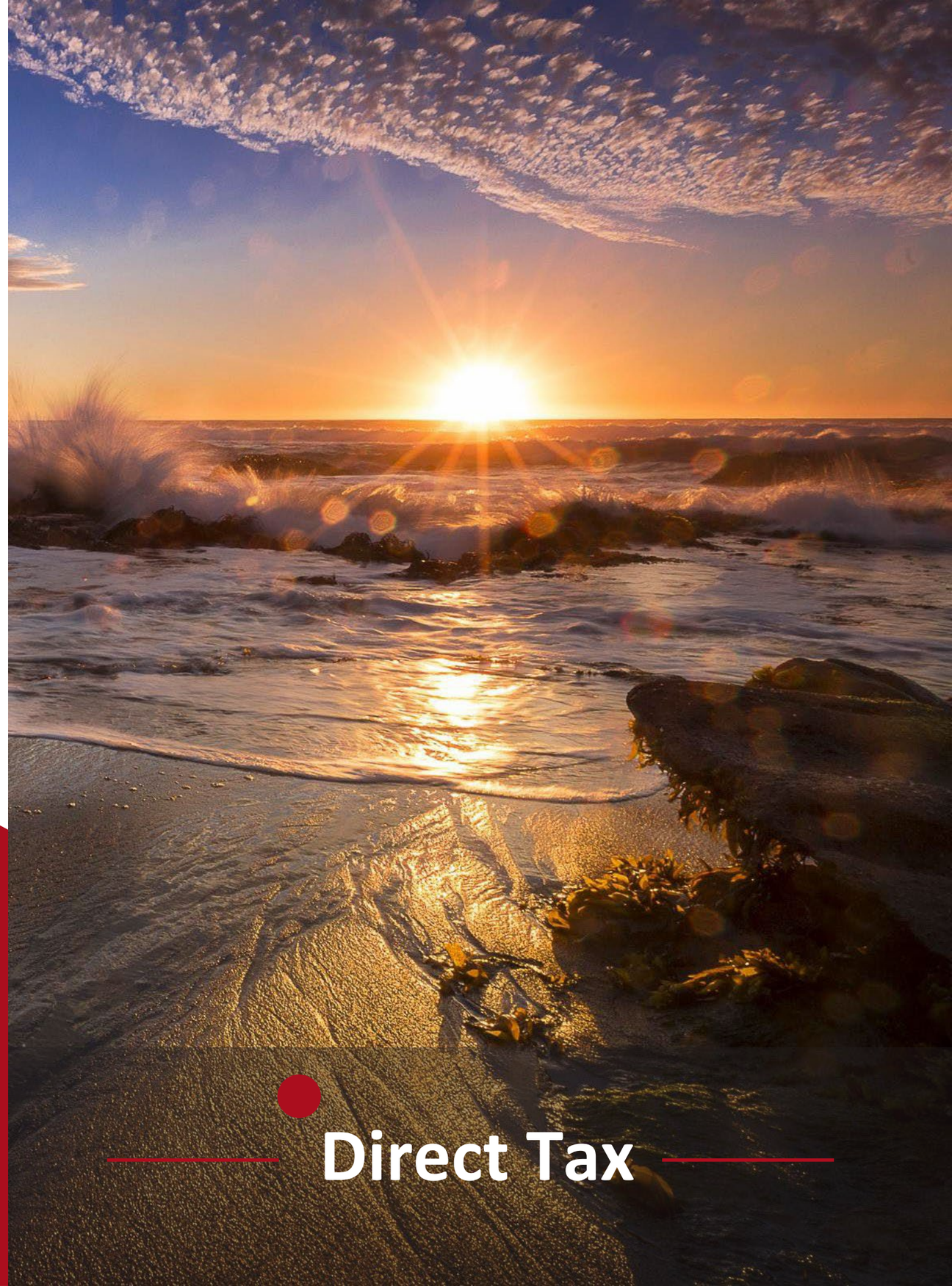
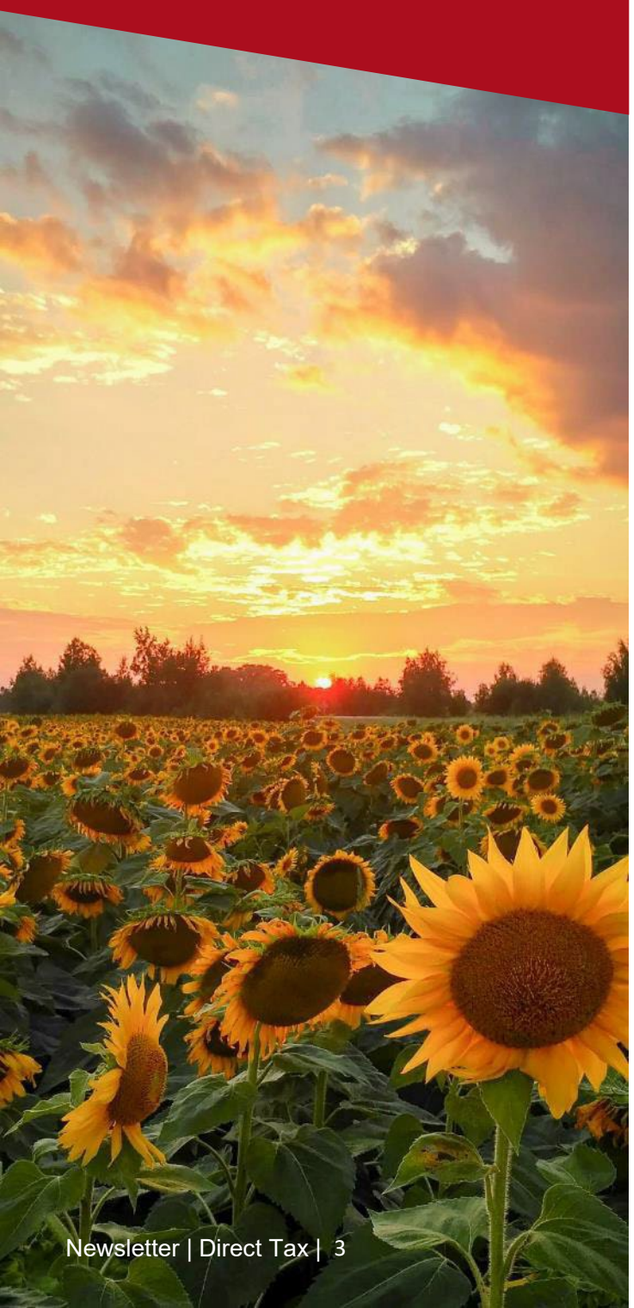
What's Inside?



Deduction of advance not allowed where the sum is not written-off in the books as “irrecoverable”



Khyati Realtors Pvt. Ltd Vs. Commissioner of Income Tax
ITA Nos. SLP 622 of 2020 (SC)
Issue(s) - Advance written off
Outcome - In Favour of Revenue

Background

In a recent verdict, Hon’ble Supreme Court examined the allowability of amount deposited by the Assessee for acquisition of the commercial property which was forfeited by the vendor as bad debt and held that same was not allowed as deduction since the Assessee failed to satisfy requisite conditions of both section 36(1)(vii) as well as section 36(2) of the Income Tax Act, 1961 (‘the Act’).

Brief Facts and Contentions

- The Assessee was inter alia engaged in the business of real estate development, trading in transferable development rights (TDR) and finance. It had deposited an amount of INR 10 crore with a vendor, M/s C. Bhansali Developers Pvt. Ltd., towards acquisition of commercial premises on 06.03.2007. However, such project did not appear to make any progress. The Assessee sought refund of deposit but the builder did not respond, and said sum was written-off as bad debts by the Assessee.
- AO disallowed the amount written off as bad debt for AY 2009-10 and CIT(A) confirmed such disallowance.

Revenue’s Contention

- It is obligatory for the Assessee to prove to AO that case satisfies both the sections i.e. section 36(1)(vii) and 36(2) of the Act and also Assessee’s contention was not supported by any material and/or document. In particular, the Assessee’s claim of disbursing INR 10 crores to the developer was not supported by any material.
- The amount given was not treated as a ‘loan’ to the developer as the terms and conditions including interest, period of loan, etc. did not exist at the time of giving such advance to the developer. In this respect, reliance was placed on the coordinate bench’s ruling in the case of Catholic Syrian Bank Ltd. vs Commissioner of Income Tax, Thrissur [(2010) 38 SOT 553 (Cochin) (06-08-2009)].

HC’s Judgement

The Hon’ble Bombay High Court dismissed Revenue’s appeal as no question of law requiring a decision arose in that appeal.

Hon’ble Supreme Court’s Judgement

- There is nothing on record to suggest that bad debt was written-off as irrecoverable in Assessee’s books of accounts for the previous year
- Relying upon division bench ruling in case of Southern Technologies (Civil Appeal Nos. 1337 of 2003 and 154 of 2010), if an item falls under section 30 to 36 of the Act but is excluded by section 36(1)(vii) of the Act, then section 37 of the Act cannot come in. Section 37 of the Act applies only to the items that do not fall in the section 30 to 36. If provision for doubtful debt is expressly excluded from section 36(1)(vii) of the Act, then the same cannot be claimed as deduction under section 37 of the Act.
- The amount has been deposited with M/s C. Bhansali Developers Pvt. Ltd. for acquisition of immovable property, thus was capital in nature, and same could not be allowed as deduction under section 37 of the Act.

Nangia Andersen LLP’s Take

This judgement cautions taxpayers for satisfying the pre-conditions laid down under the Act for any of their claims. The Assessee cannot simply make a claim under the residuary section 37 of the Act if it has failed to satisfy the conditions laid down under the specific sections, viz. 30 to 36 of the Act.

Use of technology by service recipient without recourse to the service provider is the main test for “make available” clause.

Oil and Natural Gas Corporation Limited Vs Income Tax Officer-2 (International Taxation)
ITA Nos. 1881-1882/AHD/2019 (Ahmedabad Tribunal)
Issue(s) - Make available clause
Outcome - In Favour of Assessee

Background

In a recent verdict, Ahmedabad Tribunal examined the taxability of payments made by ONGC (“the Assessee”) to the University of Texas at Austin, USA (“the University”) for conducting research activity in development of suitable chemical Enhanced Oil Recovery (EOR) formulations for 5 of its reservoirs.

It was held that basis the agreement entered between the Assessee and the University that no technical knowledge was received by the Assessee and thus giving the benefit of “make available clause” payments made by the Assessee cannot be brought under the definition of ‘Fees for Included Services (FIS)’ under Article 12 of the India-USA DTAA and their liability to deduct TDS under section 195 of the Income-tax Act, 1961 (the Act) shall not arise.

Brief Facts and Contentions

- The Assessee is a Central Public Sector Undertaking. It entered into an agreement with the University to conduct research activity and agreed to pay USD 4.95 million in aggregate for the services received.
- With a view that the University was a tax resident of USA and did not have a Permanent Establishment (PE) in India, the Assessee applied for an order under section 195(2) of the Act to determine the proportion that shall be chargeable to tax.
- The Assessing Officer (AO), observed that payments made to the University were in the nature of royalties/fees for technical services and thus, directed the Assessee to deduct t TDS@10% on gross payment.
- Aggrieved of the order of AO, the Assessee filed appeal before Ld. CIT(A) claiming that in pursuance of provisions of section 90(2) of the Act, provisions of DTAA being more beneficial to the Assessee shall apply and as per Article 12 of India-USA DTAA payment made to the University was neither on account of royalties nor FIS.
- The Ld. CIT(A) disregarding contentions of the Assessee confirmed the order of AO.

ITAT’s Judgement

- As per Article 12 of DTAA fees for technical services means the payment of any amount to any person in consideration for rendering of any technical services, only if such services make available technical knowledge, expertise, skill, know-how or processes. If the technical knowledge expertise, skill, know how or process is not *made available* by the service provider, who has rendered technical service for the purpose of Article 12 of DTAA it would not constitute fees for technical services. .
- The ITAT reiterated the position specified in the latest agreement between India and Singapore wherein the meaning of the word 'make available' has been explained to be defined as payment of any kind to any person in consideration for services of technical nature if such services make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the service to apply technology contained therein.
- It was further held that the crux of the matter is after rendering of the technical service by the service provider, whether the recipient is enabled to use the technology which the service provider has used. Therefore, unless the service provider makes available his technical knowledge, experience, skill, know-how or process to the recipient of the technical service, in view of the clauses in the DTAA, the liability to tax is not attracted

Nangia Andersen LLP’s Take

From the aforesaid discussion it is clear that test is whether the recipient of the service is equipped to carry on his business without reference to the service provider. If he is able to carry on his business in future without the technical service of the service provider in respect of services rendered then, it would be said that technical knowledge is made available.

Carry forward and Set-off of losses not permissible under section 72A for losses not allowed to be carried forward under section 79

Asst. Commissioner of Income Tax Vs. M/s Hotel Leela Venture Ltd.
ITA No. 4453/MUM/2013 (Mumbai Tribunal)
Issue(s) - Set-off of carried forward losses pursuant to amalgamation
Outcome - In Favour of Revenue

Background

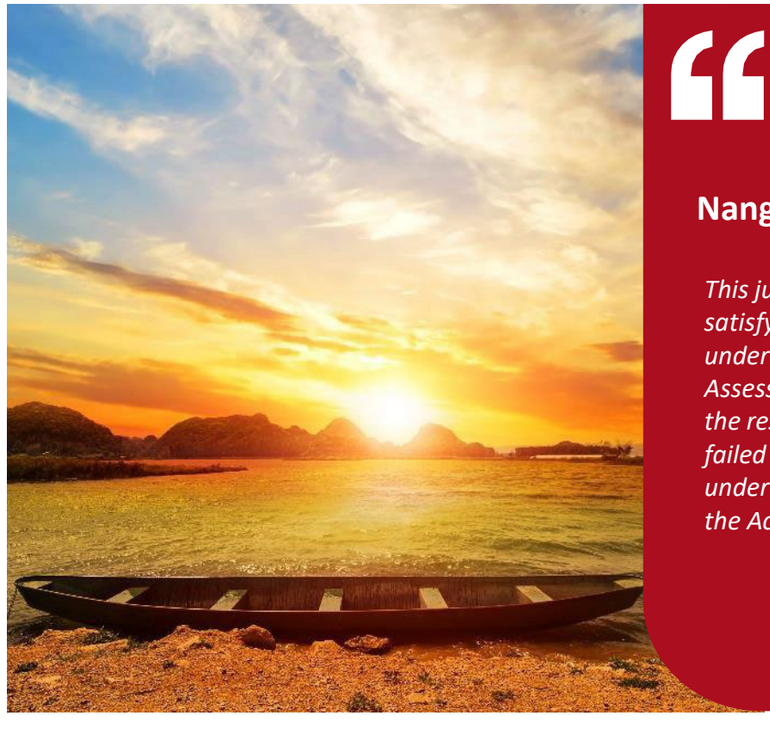
The Mumbai Tribunal while examining the allowability of set-off of brought forward losses in the case of Hotel Leela Ventured Ltd. ("Assessee"), rejected its claim of losses under section 72A of the Income Tax Act, 1961 (the Act) where the same were not allowed to be carried forward in terms of section 79 of the Act.

Brief Facts and Contentions

- The Assessee, a listed company filed it return of income for AY 2007-08 declaring losses to the tune of INR 68.58 crores. The return of income was revised to claim set off of brought forward losses and unabsorbed depreciation in respect of Kovalam Hotels Ltd. (KHL) which amalgamated with the Assessee.
- In AY 2006-07 (FY 2005-06), the Assessee company, acquired more than 51% shareholding of KHL. In AY 2007-08 (FY 2006-07), by way of order the Hon'ble Bombay High Court, KHL amalgamated with the Assessee.
- KHL had carried forward business losses amounting to INR 13,43,71,999 and unabsorbed depreciation of INR 8,26,32,781 upto AY 2005-06 which were declined by the AO on account of applicability of section 79 of the Act.
- Giving effect to the amalgamation, the Assessee filed a revised return of income for AY 2007-08, claiming set off of brought forward business losses and unabsorbed depreciation of KHL including those upto AY 2005-06 which were disallowed by AO in the case of KHL.
- The Assessee while claiming such losses stated that the provisions of section 72A of the Act will override the applicability of section 79 of the Act.
- On further appeal against the decision of the AO, the Ld. CIT(A) passed the order in favour of the Assessee holding that section 72A of the Act being a specific provision has to be preferred over the general provision of section 79 of the Act, and accordingly allowed carry forward of losses in hands of the Assessee.
- The Revenue filed an appeal before the Mumbai ITAT against the order of Ld. CIT(A).

ITAT's Judgement

- There are two events that happened in case of the Assessee. First, change in shareholding of KHL during AY 2006-07 where section 79 of the Act was attracted and Second, amalgamation of KHL with Assessee in AY 2007-08 where section 72A of the Act comes into picture.
- Once the AO in case of KHL for AY 2006-07 has already rejected the claim of the claim of carry forward of the said business loss in terms of section 79 of the Act, the same cannot be available to the Assessee for set off under section 72A of the Act until and unless the said finding of the AO is reversed by the higher appellate authorities.
- The said business loss shall become eligible for set off in the year under consideration only in favour of the Assessee.
- The issue of set off of business loss in AY 2007-08 under section 72 of the Act is consequent to the issue of carry forward of loss in AY 2006-7 in KHL in term of section 79 of the Act. Thus, the CIT(A) is not justified in invoking section 72A of the Act as that issue is yet to be adjudicated by appellate authorities in the case of KHL for AY 2006-07.
- Accordingly, the finding of the Ld. CIT(A) was set-aside and the AO was directed to allow losses consequent to finding of the appellate authorities in the case of KHL.
- subsequent to decision of allowability of carry forward in case of KHL under section 79 of the Act



Nangia Andersen LLP's Take

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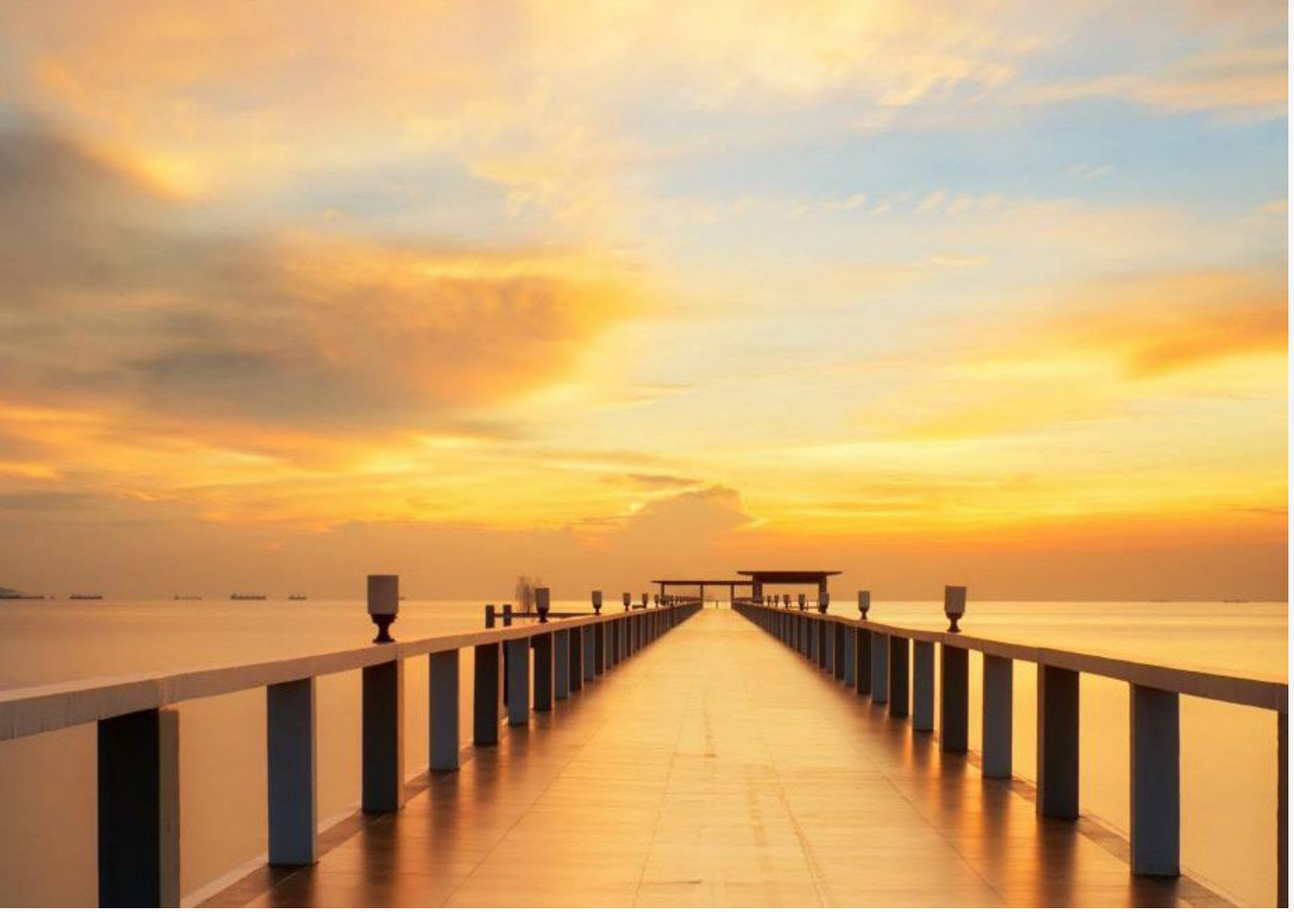


Notification 90 of 2022

CBDT issued notification 90 of 2022 listing down the following documents required to be submitted to the employer by the employee to claim exemption of perquisite arising out of help extended by the employer for medical care due to COVID-19 of employee or their family members:

- COVID-19 positive report of the employee/family member.
- Medical report if clinically determined COVID-19 positive through investigations in a hospital/ in-patient facility by a doctor/treating physician.
- Necessary documents of medical diagnosis/treatment of the employee/family member for COVID-19/illness related to COVID-19 suffered within 3 months of being COVID-19 positive.
- Certificate to determine all expenditures incurred for the treatment of employee/family member related to COVID-19/illness related to COVID-19.

The above notification will deemed to be in effect from April 01, 2020 and will be applicable to all subsequent years.

Notification 91 of 2022 and 92 of 2022

CBDT issued notifications 91 of 2022 and 92 of 2022 as per powers conferred by clause (XII) and (XIII) respectively of the first proviso under section 56 of the Act on August 05, 2022. As per the respective notifications, following documents are required to be maintained by an individual/ employee or his family members to claim exemption for any amount received from the employer or any other person due to COVID-19 or death due to COVID-19:

- COVID-19 positive report of individual/family member.
- Medical report if clinically determined COVID-19 positive through investigations in a hospital/ in-patient facility by a doctor/treating physician
- Medical report/death certificate (if deceased) issued by medical practitioner/government civil registration office in which it is stated that death of the person is related to COVID-19.
- Necessary documents of medical diagnosis of individual/family related to COVID-19/illness related to COVID-19 suffered within six months from date of determination as COVID-19 positive.
- Statement of any sum of money received by family member of the **deceased** from employer/any other persons related to death due to COVID-19, shall be verified and furnished in Form A, within nine months from end of Financial Year in which amount received or December 31, 2022, whichever is later along with a declaration for the same.
- Statement of amount received as expenditure incurred by the individual for **medical treatment** for illness related to COVID-19, shall be verified and furnished in Form No. 1, within nine months from end of Financial Year in which amount received or December 31, 2022, whichever is later along with a declaration for the same.

The above notification will deemed to be in effect from April 01, 2020 and will be applicable to all subsequent years.

Nangia Andersen LLP's Take

CBDT has come up with this one-time compliance to gather information of exemption claims made by the Individuals pertaining to expenditure on medical treatment and any amount received on by the family of deceased individual.

Extension of time limit for furnishing Form No. 67

Notification No. 100/2022

CBDT vide Notification No. 100 of 2022 dt. Aug 18, 2022, amends Rule 128(9) and extends the time limit for furnishing Form No. 67 till the end of the assessment year relevant to the previous year in which the foreign source income is assessed to tax in India and the return for such assessment year has been furnished within the specified time under Section 139(1)/139(4).

Where the return has been furnished under section 139(8A), Form No. 67 shall be furnished on or before the date on which updated return is furnished to the extent it relates to the income included in the updated return.

Nangia Andersen LLP's Take

This step by CBDT has provided much-needed relief to taxpayers who can now claim FTC by furnishing Form- 67 along with necessary documents before the end of the assessment year if the return is filed within the original due date or date of filing belated tax return.

Indirect Tax

Hon'ble Supreme Court directs Union of India / GST Council to issue advisory to states for implementation of electronic DIN system

Brief Facts

Mr. Pradeep Goyal ('the Petitioner') a Chartered Accountant, had filed Public Interest Ligation ('PIL') before the Hon'ble Supreme Court to direct Union of India / Goods and Services Tax ('GST') Council to issue advisory to States for implementation of electronic generation of document identification number (e-DIN) system to bring transparency and accountability in the indirect tax administration.

Decision

- The generation of e-DIN would help in maintaining digital directory for all the correspondences with the tax department and would bring transparency and accountability in the system.
- The Central Board of Indirect Tax and Customs ('CBIC') in year 2019 had taken decision to quote e-DIN in every notice and communication, which led to transparency and accountability and avert honest taxpayers from harassment.
- Writ disposed off by issuing directions to the Union of India / GST Council to issue advisory/instructions/recommendations to the respective States regarding implementation of e-DIN system and the same should be followed for all the communication by the State tax officers to taxpayers and concern persons to bring transparency and accountability in indirect tax administration.

Other observations of the court

- e-DIN system has so far been successfully implemented by the States of Kerala and Karnataka only.
- In terms of Article 279A of the Constitution, the GST Council is empowered to make recommendations to the States on any matter relating to GST.
- It cannot be disputed that implementing the system for electronic (digital) generation of a Document Identification Number (DIN) for all communications sent by the State Tax Officers to taxpayers and other concerned persons would be in the larger public interest and enhance good governance. It will bring in transparency and accountability in the indirect tax administration, which are so vital to efficient governance.

Pradeep Goyal vs UOI & ors. [TS-396-SC-2022-GST]

Nangia Andersen LLP's Take

This is a welcome judgement and will have far reaching impact on the indirect tax administration. An identical system is already implemented by the Central tax authorities and implementation of such system by individual State tax authorities can bring about transparency and accountability in the system of communication between the tax authorities and the taxpayers.

It may be noted that the CBIC circular No. 19/2019 dated 14 August 2019 inter alia mandates that all official communication be mandatorily generated or issued electronically with DIN when communicated to the taxpayer. Only under exceptional circumstances and requiring post facto approval from the competent authority. It would be interesting to see the level of transparency and the level of standardisation agreed/ adopted by individual States, most importantly, the consequences if the States do not adopt a uniform practice given the diversity of the registered persons in their jurisdiction. The twin objectives of 'One Nation One Tax' and 'ease of doing business' should prevail over all other challenges.

Hon'ble Supreme Court held that indicating HSN Code in tender is not the responsibility of the State

Brief Facts of the case

The tender issuing authority, Diesel Locomotive Works, in Varanasi sought bids through Notice Inviting Tender ('NIT') from various vendors with respect to supply of turbo-wheel impeller balance assembly and provided ranks based on the price quoted by the bidders.

Bharat Forge Limited ('the Company'), one of the bidder for aforementioned tender was not selected on the ground of differential GST rate by the Company [at 18%] vs its fellow bidders [at 5%]. Upon perusal of the tenders filed, the tendering authority awarded the tender to the bidder who quoted lowest bidding price inclusive of GST. Aggrieved with this, the Company alleged tender issuing authority for not providing Harmonised System of Nomenclature (HSN Code) in the bidding documents.

Accordingly, the Company filed a petition before the Allahabad High Court, wherein the Court held that provisioning of GST rate is an essential component for giving rank to a bidder. As non-disclosure of HSN Code in the public tender violates the doctrine of "level playing field" exemplified in Article 19(1)(g) of the Constitution.

Consequently, the High Court held that it is mandatory for the tender issuing authority to mention the relevant HSN Code in tenders so that the bidders can offer appropriate GST rate while quoting prices. Further, the Court ordered that the tender issuing authority may seek clarification from the GST authorities in relation to applicability of correct HSN Code (if required) and incorporate the same under NIT.

Being aggrieved with the decision of Allahabad High Court, the Union of India ('the Appellant') filed an appeal before the Hon'ble Supreme Court to ascertain the statutory obligation to indicate the HSN Code along with GST rate while floating the tender.

Observation of supreme court

The Hon'ble Supreme Court contended correctness of writ of Mandamus on the ground that there was no breach of a statutory duty by the Central Government. *Prima facie* it is the responsibility of the bidder to quote the correct HSN Code and the corresponding GST rate.

The Hon'ble Supreme Court opined that the scope of judicial review remains limited with respect to contracts that are entered with the state. *The court can intervene only when the State acts arbitrarily, goes against the public interest, or has whimsical motives*. The Hon'ble Supreme Court emphasised that it was the duty of the Company to enquire about the HSN Code and applicable tax rates.

In order to produce a 'level-playing field', the State is not responsible to quote appropriate HSN Code along with taxes on the applicable product. Hence, the Hon'ble Supreme Court quashed the writ of Mandamus issued by Allahabad High Court and stated that there is no obligation on the State / purchaser to specify HSN Code in the tender document.

Union of India and Others vs Bharat Forge Limited and Another [TS-412-SC-2022-GST]

Nangia Andersen LLP's Take

This judgement has clarified the position with respect to responsibility of providing the correct HSN Code and GST rates while quoting for any tender document and tender issuing authority should not have role in this activity. Further, tender issuing authority have limited role to issue tender based on various pre-defined criteria such as pricing, quality, etc. Accordingly, all the bidders shall carefully evaluate the nature of supplies and quote the applicable HSN/ SAC Code before applying for any tender.

This matter has brought to fore the omnipresent debate between transparency vs ease of doing business vs provision of level playing field. Generally. the NIT commonly provide various terms and conditions (restrictions) that purchaser dictates in the form of various terms and conditions inter alia including whether the supply will be treated as local or inter-State, classification, etc. In some case the bone of contention is whether input tax credit will be available or not. While these issues appear trivial, these are make or break decisions in turnkey contracts where a lumpsum price is to be tendered given that a difference of opinion or dispute between the tax authorities and the successful bidder will result in the supplier being left to his own wherewithal.

A fine balance between the buyer thrusting its view regarding classification or availability of input tax credit vs the supplier seeking transparency and uniformity before tendering and taking on the obligation of discharging the appropriate tax in all circumstances, inter alia including situations where the supplier is forced to go out of pocket.

It is quite a common practice amongst the bidders, at least in high value / long duration turnkey contracts, to seek clarity from the buyer as to how the buyer will treat / account for the transaction, knowing fully that a variance in the interpretation can make or break the project for it, being aware that already the project has 'wafer' thin margins – since only to the lowest cost bidder is awarded the contract and all the risk and taxes are on the awardee.

The buyers are generally take protection under the terms of the tender / contract because they solicit an 'all-inclusive price' whereas the suppliers have to face the music in form of prolonged disputes, demands for interest and penalties, etc.

A direction/ opinion from the Apex Court would have been helpful, however, the issues involved are factual and subject to interpretation. One would have expected some consistency in the Apex Courts approach vis-a vis the issue of level playing filed and transparency but its easier said than done.

ITAT: Factors assessee's risky BBB credit rating to determaine interest ALP qua NCDs and based thereon, deletes TP-adjustment

Outcome: In favor of taxpayer

Category: ALP Computation; Selection of MAM

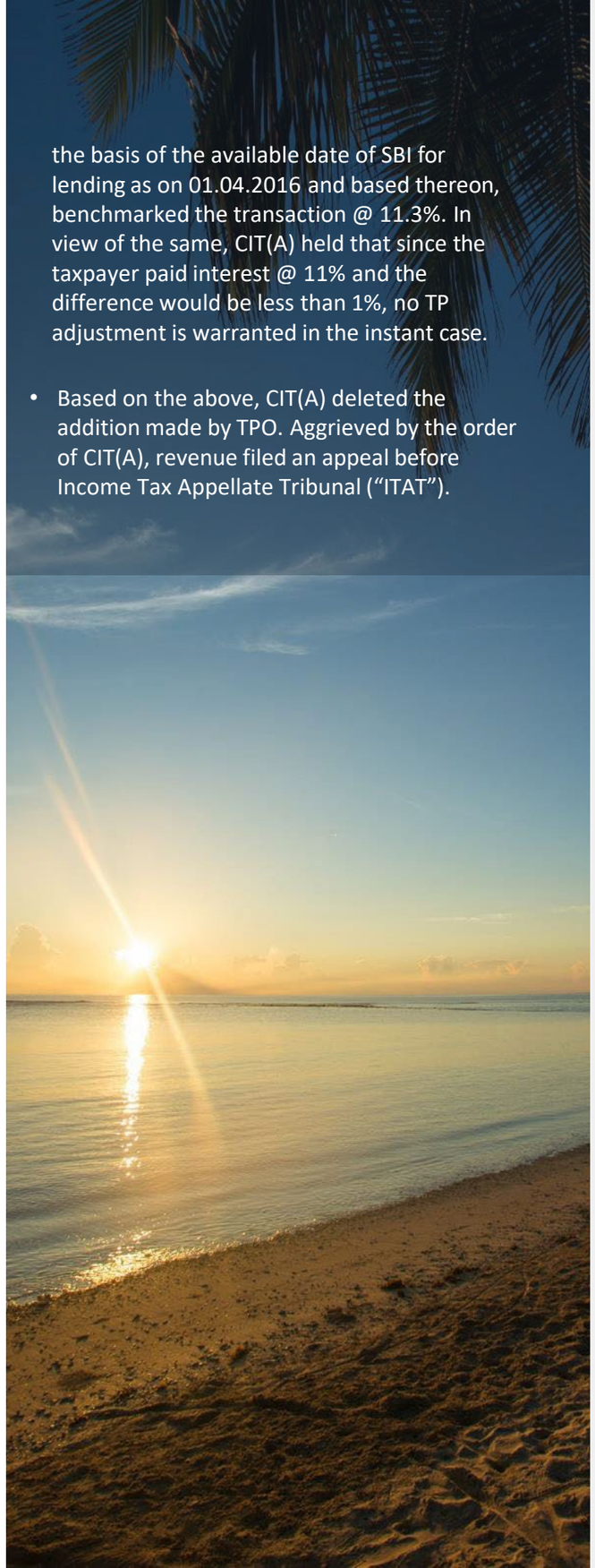
Facts of the case

- Greenko Rayala Wind Power Private Limited ("the taxpayer") is engaged in the business of generation of wind power in India. During the year under consideration, the taxpayer has entered into international transactions with its Associated Enterprises ("AEs") in the nature of issue of nonconvertible debentures ("NCDs") and interest @ 11% thereon. The taxpayer had adopted any other method ("AOM") and Comparable Uncontrolled Method ("CUP") respectively for benchmarking the transactions of issue of NCD and interest thereon.

- During the course of the proceedings, Transfer pricing officer ("TPO") rejected the selection of CUP to benchmark the transaction of interest on NCDs and treated the transaction on par with loan and determined ALP by applying LIBOR + 200 basis points to benchmark the interest payment

- Aggrieved by the same, the taxpayer filed an appeal before Commissioner of Income Tax (Appeals) ["CIT(A)"]. CIT(A) considered interest rates of corporates above Rs. 5 Crores with BBB rating and MCLR rate on the basis of the available date of SBI for lending as on 01.04.2016 and based thereon, benchmarked the transaction @ 11.3%. In view of the same, CIT(A) held that since the taxpayer paid interest @ 11% and the difference would be less than 1%, no TP adjustment is warranted in the instant case.

- Based on the above, CIT(A) deleted the addition made by TPO. Aggrieved by the order of CIT(A), revenue filed an appeal before Income Tax Appellate Tribunal ("ITAT").



ITAT Ruling

ITAT made the following observations:

- CIT(A) examined the interest rates of corporate above Rs.5 Crores with BBA rating and other ratings of Union Bank of India and noted the banks charge a premium at certain percentage to the MCLR rate. CIT(A) also observed that all the banks provide for a premium and in the case of the best rating with AAA the premium would be 2.4% over and above MCLR rate.

- Further ITAT noted that the credit rating of taxpayer is BBB as per CARE, BBB category indicates that **"instruments with this rating are considered to have moderate degree of safety regarding timely servicing of financial obligations and such instruments carry moderate credit risk".** Basing same, CIT(A) implied that the credit rating of BBB the premium would be a minimum of 3.4% above the MCLR rate (i.e., 1% more than in case of rating with AAA)

- Basing on these facts and figures, ITAT uphold that Ld. CIT(A) rightly concluded that **to consider only the base rate and to ignore the credit rating would be fatal in benchmarking of the transaction** and uphold CIT(A) decision of considering interest @11.3% for benchmarking the transaction and there is a small difference between 11.3% and interest rate adopted by the taxpayer. Hence, the no TP adjustment is warranted in the instant case.

Nangia Andersen LLP's Take

With increased focus on financial transactions (FT) from Transfer Pricing (TP) viewpoint, there has been an increased scrutiny by Indian tax authorities in this context.

The present ruling puts light on the arm's length pricing for interest on NCD and in this regard, it clearly highlights the fact that credit rating plays an important role in determining the arm's length interest rate of securities like NCDs.

In light of the instant ruling, the taxpayers are recommended to follow a wholistic approach of considering various factors like nature of security, credit rating of taxpayer, data availability on public domain etc. while benchmarking such securities

Source: Greenko Rayala Wind Power Private Limited [TS-486-ITAT-2022(HYD)-TP]

Regulatory

Updates under companies act, 2013

Companies (accounts) fourth amendment rules, 2022

The Ministry of Corporate Affairs on 5th August, 2022, released Companies (Accounts) Fourth Amendment Rules, 2022. As per the amendment, the books of account and other books and papers of a Company maintained in electronic mode, must remain accessible in India at all times and their back- up must be kept in servers physically located in India on a daily basis.

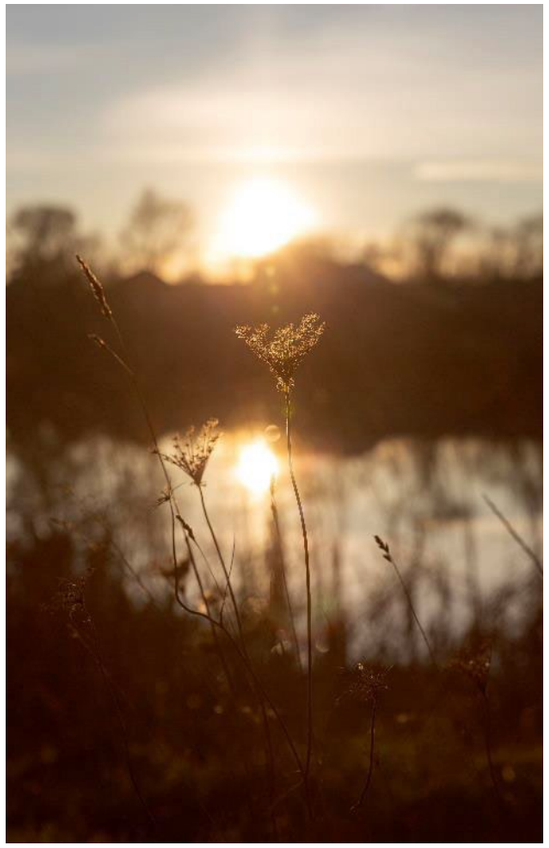
Further, in case where the service provider is located outside India, Companies will be required to intimate the ROC, on an annual basis at the time of filing of financial statements, the name and address of the person having control of the books of accounts and other books and papers in India.

Amendment under companies (incorporation) rules, 2014

The Ministry of Corporate Affairs on 18th August, 2022, released Companies (Incorporation) Third Amendment Rules, 2022. As per the amendment, a new Rule 25B is inserted in the Companies (Incorporation) Rules, 2014 which has granted power to Registrar of Companies (ROC) to conduct physical verification of the registered office of the Company.

The method of physical verification of a Company's registered office is now specifically outlined stating that physical verification shall be done in the presence of two independent witnesses domiciled in the locality in which such registered office is situated. The Registrar shall take photograph of the registered office while carrying out the physical verification and shall prepare the report in the prescribed format based upon such verification.

Further, where the registered office of the company is found to be not capable of receiving and acknowledging all communications and notices, the Registrar shall send a notice to the Company and all the directors of the company, of his intention to remove the name of the company from the register of companies and requesting them to send their representations along with copies of relevant documents, if any, within a period of thirty days from the date of the notice before taking any further actions in accordance with the provisions of Section 248 of the Companies Act, 2013.



Updates under FEMA

Introduction of Foreign Exchange Management (Overseas Investment) Rules, 2022

Central Government vide notification dated 22nd August, 2022 has notified the Foreign Exchange Management (Overseas Investment) Rules, 2022 (ODI Rules). The new norms aim to simplify the existing framework for overseas investment by a person resident in India and to promote ease of doing business. The Reserve Bank of India has simultaneously issued the Foreign Exchange Management (Overseas Investment) Regulations, 2022 (ODI Regulations) and the Foreign Exchange Management (Overseas Investment) Directions, 2022 (ODI Directions which together with the ODI Rules & ODI Regulations are referred to as "ODI Guidelines").

Key Changes brought about under the ODI Guidelines are set out below:

- Concept of Joint Venture (JV) and Wholly owned subsidiary (WOS) is now substituted by a foreign entity.
- The Erstwhile Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004 permitted Indian parties to make direct investment in a JV or WOS outside India and to extend loan or guarantee to or on behalf of such JV/WOS abroad. Under the new ODI Guidelines, the concept of a JV/WOS stands replaced with a foreign entity which is an entity formed or registered or incorporated outside India, including IFSC in India that has a limited liability. However, the restriction of limited liability does not apply to a foreign entity with core activity in a strategic sector (i.e sector including energy and natural resources sector).
- Overseas Direct Investment (ODI) is now defined as investment by way of acquisition of unlisted equity capital of a foreign entity or subscription as a part of the memorandum of association of a foreign entity or in case of a listed foreign entity, investment in 10% or more of the paid-up equity capital of the listed foreign entity or investment with control where investment is less than 10% of the paid-up equity capital of the listed foreign entity. By redefining the ODI definition, an ODI in a foreign entity shall be continued to be treated as ODI even if such investment falls below 10% of the paid-up equity capital or the investor losses control in the foreign entity.
- Overseas Portfolio Investment (OPI) is now defined as Investment, other than ODI, in foreign securities, but not in any unlisted debt instruments or any security issued by a person resident in India who is not in an IFSC.
- Control has been defined to mean the right to appoint majority of the directors or control management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders' agreements or voting agreements that entitle them to ten per cent or more of voting rights or in any other manner in the entity.

- The concept of Indian party ('IP') where all the investors from India in a foreign entity were together considered as IP, has been substituted with the concept of Indian entity where each investor entity shall be separately considered as an Indian entity.
- The definition of Net-worth has been aligned with clause (57) of section 2 of the Companies Act, 2013 which includes securities premium. Clarity has also been provided as to computation of Net-worth in respect of OI by registered partnership firms and LLP.
- Subsidiary or step-down subsidiary ('SDS') of a foreign entity now means an entity in which the foreign entity has 'control'. Hence, the investee entities of the foreign entity where such foreign entity does not have control or stipulated voting rights shall not be treated as Subsidiary or SDSs and hence, reporting requirement would not trigger.
- Person resident in India has now been permitted to invest in a foreign entity that has invested or invests into India, directly or indirectly, up to 2 layers of subsidiaries, without RBI approval.
- Any person resident in India whose account is classified as non-performing assets, or as a wilful defaulter by any bank, or is under investigation by a financial service regulator or investigative agency, will have to obtain a NOC from the lender bank or regulatory body or investigative agency, before making any such financial commitment or undertaking disinvestment. By virtue of this, the requirement of seeking RBI approval where the entity is under investigation may no longer be required.
- A person resident in India who has made ODI in a foreign entity which has been incurring losses for 2 years, is now permitted to restructure its balance sheet without RBI approval.
- Deferred Payment option is now permissible for acquiring and transferring foreign securities without RBI approval.
- A person resident in India may now, without the permission of the RBI, acquire immovable property outside India on a lease not exceeding five years. Earlier, a person resident in India was permitted to acquire immovable property outside India from a person resident outside India jointly with a relative who is a person resident outside India, provided there was no outflow of funds from India. The proviso, restricting outflow of funds from India, now stands deleted.
- A person resident in India is prohibited to make ODI in a foreign entity engaged in real estate, gambling business and dealing with financial products liked to the Indian rupee without specific approval of RBI.
- Form FC has now replaced Form ODI and a separate form, Form OPI has been introduced for a person resident in India other than a resident individual, making OPI.

Updates under FCRA

The Ministry of Home Affairs ('MHA') has issued an order dated 12 August 2022, w.r.t setting out the procedure for making an application for revision of order passed in electronic form under Section 32 of the Foreign Contribution (Regulation) Act, 2010 ('Act').

The order which comes into effect from 01-09-2022 also includes 'Frequently asked questions ('FAQs')' regarding online submission of application for revision of an order passed by the competent authority under section 32 of the Act. As per the FAQs, any person registered under the Act and rules made thereunder who is aggrieved by an order of the Central Government may prefer revision of application in terms of section 32 of the FCRA 2010 and rule 20 of the Foreign Contribution (Regulation) Rules, 2011 ('Rules').

Any organization which intends to file an application for revision of an order passed by the competent authority may upload a scanned copy of its application on the FCRA web portal (https://fcraonline.nic.in/) along with a fee of Rs.3000/-. The application must be made within one year from the date on which the order in question was communicated or the date on which the entity, otherwise came to know of it, whichever is earlier.

Updates under FSSAI

Extension of the timeline for mandatory compliance of the food safety and standards (vegan foods) regulation, 2022

The FSSAI on 26th July, 2022 extended the timeline for mandatory compliance of the Food Safety and Standards (Vegan Foods) Regulations, 2022 by 6 months from the date of uploading of the Guidelines for submission of applications for endorsement of Vegan Logo and formats thereof on the FSSAI website i.e. up to 26th January, 2023.

Updates under PLI

Centre extends PLI scheme application deadline for specialty steel

The Government has for the fifth time extended the deadline to submit applications under the production-linked incentive scheme for specialty steel till 15 September, 2022. The previous deadline to submit applications under the production-linked incentive scheme was 31 July, 2022.

Initially, the last date for manufacturers to apply for the benefits under the PLI (Production-Linked Incentive) scheme for speciality steel was 29 March, 2022. It was later extended till 30 April, and again to 31 May, 2022. It was further extended till 30 June and 31 July.

Updates under Metrology

Legal metrology (packed commodities) (third amendment) rules, 2022

The Ministry of Consumer Affairs, Food and Public Distribution has vide notification dated 22nd August, 2022, released the Legal Metrology (Packaged Commodities) (Third Amendment) Rules, 2022 which shall come into force w.e.f., 1st January, 2023.

The Ministry inserted a new clause in rule 26 of Legal Metrology (Packaged Commodities) Rules, 2011 which pertains to exemptions available in respect of certain packages. As per the amendment, garment or hosiery sold in loose or open are exempt from the Packaged Commodities Rules. However, in order to avail such exemption, the product shall contain the following declarations so that the consumers can ascertain the necessary product details while inspecting the product before buying:

- Name and address of the manufacturer or marketer or brand owner or importer with country of origin or manufacture in case of imported products;
- Consumer care email ID and phone number;
- Sizes with internationally recognizable size indicators such as S, M, L, XL, XXL and XXXL along with details in metric notation in terms of cm or m, as the case may be;
- MRP of the package inclusive of all taxes in Indian currency.

The above information is also required to be displayed on e-commerce website if such product is sold through e-commerce. It is pertinent to note that the exemption is available only on sale of finished products.

Further, any manufacturer or packer or importer may, notwithstanding the date of this provision coming into effect, declare the information as mentioned above with an immediate effect.

Orders/Judgement

Registrar of companies (ROC)

ROC Puducherry on 16th August, 2022 issued an order under Section 454 read with Section 12 of the Companies Act 2013 in the matter of **ETA General Private Limited**.

As per Section 12(1) of the Companies Act 2013 ('Act'), a company shall, within 30 days of its incorporation and at all times thereafter, have a registered office capable of receiving and acknowledging all communications and notices as may be addressed to it. Further, as per Section 12(8) of the Act, if any default is made in complying with the requirements of Section 12, the company and every officer who is in default shall be liable to a penalty of Rs. 1,000 for every day during which the default continues but not exceeding Rs. 1 lakh.

- ROC issued Show Cause Notice dated 15.03.2022 to the company and its directors u/s 12 of the Act at its registered office;
- The letter sent at the registered office was received back undelivered with postal remarks "No such addressee";
- Reply was received on 25.03.2022 from the directors stating that due to covid situation, employees were working from home, and due to unavailability of watchmen/ guard in the office, the letter was undelivered;
- Thereafter, notice for hearing dated 19.04.2022 was issued to the company and its officer in default under Section 12(8) of the Act;
- Hearing was held on 22.04.2022 wherein offence was admitted and pleading done for lesser penalty;
- Penalty of Rs 20,000 was imposed for a period of 10 days on the company & officer in default.

Competition commission of India

CCI approves proposed combination involving amalgamation of HDFC limited, HDFC bank, HDFC investments and HDFC holdings

The Competition Commission of India (CCI) has approved the proposed combination involving amalgamation of HDFC Limited, HDFC Bank, HDFC Investments and HDFC Holdings.

HDFC Limited is a housing finance company registered with the National Housing Bank and is engaged in the business of providing finance for the purchase, construction, development and repair of houses, apartments and commercial properties in India. HDFC Bank is registered with Reserve Bank of India (RBI) as a banking company and is engaged in the business of providing banking and financial services. HDFC Investments Limited and HDFC Holdings Limited are registered with the RBI as a systematically important Non-Deposit Taking Non- Banking Financial Company and is engaged in the business of making investments in equity shares, preference shares, venture funds, mutual funds and other securities.

The proposed combination involves a two-step amalgamation process:

Step 1: Amalgamation of HDFC Investments and HDFC Holdings into and with HDFC Limited, such that HDFC Limited will be the surviving entity post this step, and

Step 2: Amalgamation of the amalgamated HDFC Limited into HDFC Bank, such that HDFC Bank will be the surviving entity post this step.

CCI approves acquisition of the stake in holderind investments limited, ambuja cements limited and ACC limited by endevour trade and investment limited

The Competition Commission of India (CCI) approves acquisition of the stake in Holderind Investments Limited, Ambuja Cements Limited and ACC Limited by Endeavour Trade and Investment Limited where Endeavour is a newly incorporated company and belongs to Adani group whereas Holderind is a holding company of Ambuja and ACC.

The proposed combination involves acquisition of the entire share capital of Holderind Investments Limited by Endeavour Trade and Investment Limited. Holderind holds 63.11% of equity share capital of Ambuja Cements Limited and 4.48% of the equity share capital of ACC Limited. Further, Ambuja holds 50.05% of the paid up equity share capital of ACC. In terms of SEBI (Substantial Acquisition of Shares and Takeovers) Regulation, 2011, Endeavour is required to give open offer for further acquisition of up to 26% of the expanded share capital of each of Ambuja and ACC.

Reserve bank of India (RBI)

RBI cancels the license of rupee co-operative bank ltd, Pune

RBI vide order dated August 08, 2022 has cancelled the license of Rupee Co-operative Bank Ltd., Pune. The order shall become effective after six weeks from the date of order. Consequently, the bank will cease to carry on banking business, with effect from September 22, 2022.

The Rupee Co-operative Bank Ltd has failed to comply with the requirements of Section 22(3)(a) to Section 22(3)(e) of the Banking Regulation act, 1949. Thus, the Reserve Bank cancelled the license of the bank as:

- The bank does not have adequate capital and earning prospects.
- The continuance of the bank is prejudicial to the interests of its depositors;
- The bank with its present financial position would be unable to pay its present depositors in full; and
- Public interest would be adversely affected if the bank is allowed to carry on its banking business any further.

RBI vide order dated August 08, 2022 has cancelled the license of Rupee Co-operative Bank Ltd., Pune. The order shall become effective after six weeks from the date of order. Consequently, the bank will cease to carry on banking business, with effect from September 22, 2022.

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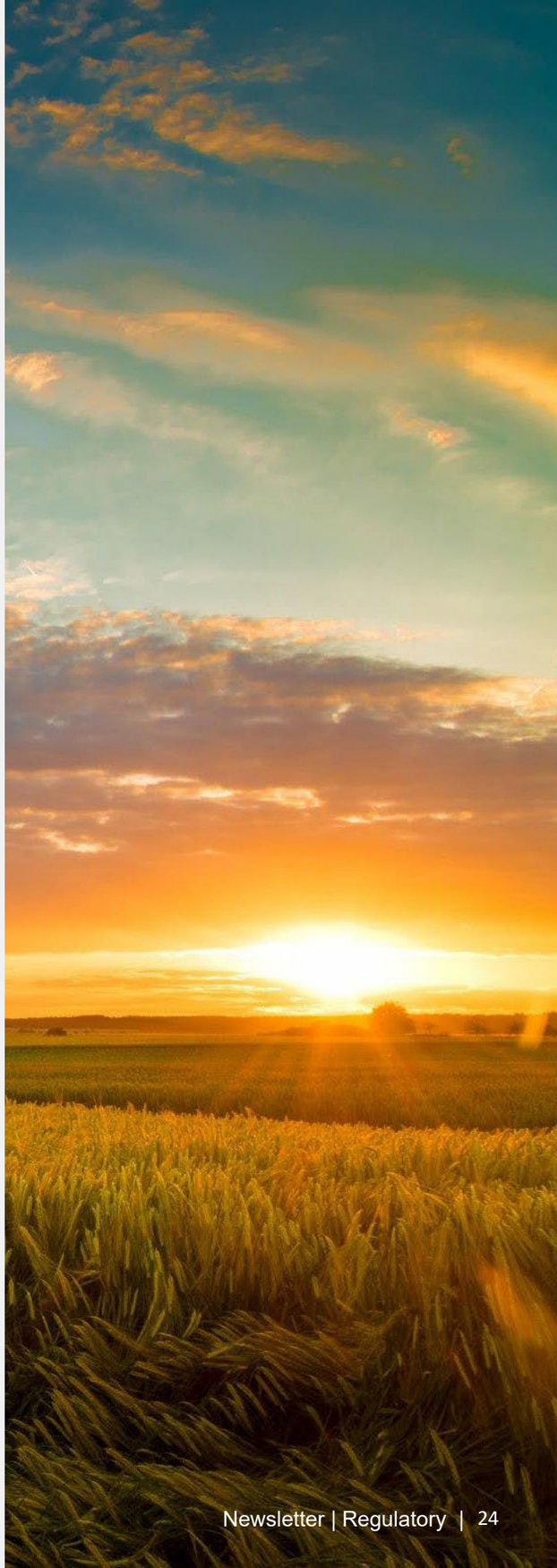

Compliance Calendar

Direct Tax

Due dates	Particulars
7th September 2022	Due date for deposit of Tax deducted/collected for the month of August 2022
	Due date for payment of Equalisation Levy on online advertisement and other specified services, referred to in Section 165 of Finance Act, 2016 for the month of August 2022
14th September 2022	Due date for issue of TDS Certificate for tax deducted under section 194-IA in the month of July 2022
	Due date for issue of TDS Certificate for tax deducted under section 194-IB in the month of July 2022
	Due date for issue of TDS Certificate for tax deducted under section 194-M in the month of July 2022
15th September 2022	Due date for payment of second instalment of advance tax for the assessment year 2023-24
30th September 2022	Due date for filing of audit report under section 44AB for the assessment year 2022-23 in case of the assessee required submit his/its return of income on October 31, 2022
	Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IA in the month of August 2022
	Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IB in the month of August 2022
	Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194M in the month of August 2022

S. No.	Compliance Category	Compliance Description	Frequency	Due Date	Due Date falling In September 2022
1	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	August – 11 September 2022
2	Form GSTR-3B (Monthly return)	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	20th day of succeeding month	August – 20 September 2022
3	QRMP Scheme Invoice furnishing facility ('IFF') Form GST PMT-06 (Monthly payment of tax) Form GSTR-1 (Details of outward supplies)	• Optional facility to furnish the details of outward supplies under QRMP Scheme • Payment of tax in each of the first two months of the quarter under QRMP Scheme • Registered person having aggregate turnover up to INR 5 crores who have opted for QRMP Scheme	Monthly Monthly Quarterly	1st day to 13th day of succeeding month 25th of the succeeding month 13th day of the subsequent month following the end of quarter	• August – 1 to 13 September2022 • August - 25 September 2022 • July to September 2022 – 13 October 2022

	Form GSTR-3B Form GSTR-3B	• 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 • 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 Quarterly	22nd day of the subsequent month following the end of quarter 24th day of the subsequent month following the end of quarter	• July to September 2022 – 22 October 2022 • July to September 2022 – 24 October 2022
4	Form GSTR-6 (Return for input service distributor)	• Return for input service distributor	Monthly	13th of the succeeding month	August - 13 September 2022
5 6	Form GSTR-9 (Annual Return) Form GSTR-9C (Reconciliation Statement)	• Annual Return if aggregate turnover is more than INR 2 crore • GST reconciliation statement 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 2021-22: 31 December 2022

Regulatory

Particulars	Applicant	Form No.	Due Dates
ECB Return	ECB Borrower	ECB-2	7th September
DIR-3 KYC	Every Director holding valid DIN	DIR-3 KYC E-Form or DIR-3 KYC web	30th September
Foreign Assets and Liabilities Revised return	All Companies having Foreign investment received or Foreign investment made abroad	FLA	30th September
Filing of Financial statement with ROC by LO/BO/PO	Every Foreign Company (With Financial year ending March 2022)	FC-3	30th September

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