Nangia Andersen LLP

Tax & Regulatory Newsletter

February 2023

What's Inside?

01

Direct Tax

Liaison office does not constitute a PE in India where employees provided auxiliary services only

S.R. Technics Switzerland Limited. vs. Assistant Commissioner of Income Tax Range- 4(2) (2)
ITA No. 6616/Mum/2018 (A.Y. 2015-16)
Issue(s) – Liaison office constitutes a PE or not
Outcome - In Favour of Assessee

Background

In a recent verdict, ITAT Mumbai examined the activities conducted by the Liaison office of swiss based subsidiary of the Assessee and held that the Assessee does not carry any activity through LO other than routine communication and client coordination, which can be called to constitute a PE in India. Therefore, in absence of any PE of the Assessee in India, the business income earned by the Assessee is not taxable under Article 7 of the India Switzerland DTAA.

Brief Facts and Contentions

- The swiss based Assessee is engaged in business of maintenance, repair and overhaul for aircrafts, engines and components. Assessee also provides components and spare engines on lease. Assessee has a subsidiary in Switzerland, i.e. SR Techniques Management Ltd. ("SRT ML"). This subsidiary has a Liaison Office ("LO") in India which was permitted to be set up by the RBI. The activities carried out by the employees of LO are communication/coordination function.
- Assessee had following three lines of revenues stream: Lease Charges, Repairs and Maintenance and Integrated component services. Assessee offered only lease charges to tax in India as royalty @10% on gross basis as per Article 12(2) of the India Switzerland DTAA. Rest of the streams of revenue have not been offered to tax, by virtue of beneficial provisions of DTAA as the remaining services are not in the nature of technical services and hence neither taxable under section 9(1) (vii) of the Income Tax Act, 1961 nor Article 12 the DTAA. Assessee claims that there is no Permanent Establishment ('PE') in India.
- The AO held that the LO of subsidiary company constitutes a PE of the assessee in India in terms of Article 5(2) (1) (Service PE) and Article 5(5) (Agency PE of the India-Switzerland DTAA) and accordingly computed Assessee's income under Rule 10 of the Income Tax Rules, by attributing 50% of income to the PE in India.
- Assessee preferred this present appeal before ITAT and submitted that the LO is not of the Assessee, but of its subsidiary company, SRT ML. The LO is neither authorized nor has negotiated contracts and is merely a communication channel.

ITAT's Judgement

- The fact that the LO was adhering to the conditions imposed by the RBI and the RBI had accepted the functioning of the LO for quite some time establishes that the LO has complied with the condition *inter-alia* that it could not carry on any business or trading activity. Once an activity is construed as being subsidiary or in aid or support of the main activity, it would fall within the category of preparatory or often auxiliary character.
- In addition to this, LO did not have any infrastructure, facilities and relevant stocks of spare parts to carry out repairs and maintenance and also that the staff existing in India were not of that level who can negotiate with the customers, sign and finalize the contracts and run the office of the Assessee at their own.
- Further, it was noted that sample engine repair and maintenance agreement and invoices thereto evidenced that the Assessee does not carry any activity through LO other than routine communication and client coordination.
- Thus, ITAT holds that in absence of any PE, the business income earned by the Assessee is not taxable under Article 7 of the India Switzerland DTAA and also rejects the alternative contention of department for treating Assessee's Indian subsidiary as its PE. Further, ITAT holds that "merely because an Indian company is controlled by a Switzerland company or fact that Switzerland Company carries business in India, does not result in Indian company being considered as a PE of Switzerland Company in India.

Nangia Andersen LLP's Take

In addition to the fact that the LO was only carrying out activities as per the approval of RBI, a further check on the veracity of the functioning of LO was done and tribunal observed that there was no infrastructure / facilities or stock of spare parts to carry out repair and maintenance and no commercial activity viz. negotiation, signing or finalizing the contracts had taken place. The tribunal has further mentioned that the department was not able to bring on record if LO has not complied with any conditions imposed.

Agreement with words 'make available' alone not decisive for taxability as Fee for Technical Service ('FTS')

TSYS Card Tech Ltd. v. Deputy Commissioner of Income Tax

IT Appeal Nos. 2006 of 2022 (Delhi Tribunal)

Issue(s) – Sale of software including inextricably linked services not taxable as FTS

Outcome - In Favour of Assessee

Background

Delhi ITAT holds that fees received for providing services in relation to software license is not in the nature of FTS where software payments are not taxable. ITAT observes that the services were in respect of training programme and updations in connection with utilization of the software and states that by "simply latching on to use of words "Make Available" in the agreement, it cannot be said that conditions of Article 13(4)(c) are satisfied."

Brief Facts and Contentions

- The Assessee is a foreign company incorporated in UK. During the year under consideration, the Assessee had earned revenue from Indian Customers primarily for delivery of software license (referred to as 'PRIME') and provision of software related services including implementation services, enhancement services, annual maintenance services and consultancy services as per the request of the Customers.
- The Assessee received the consideration from its Indian Customers on the account of software License fee (Prime), provision of other related services and reimbursement of expenses.
- The Ld. AO in the final Assessment order held the above mentioned receipts as FTS and therefore liable to tax under the provisions of the Income Tax Act, 1961 ('the Act') and also as per the provisions of India-UK Double Taxation Avoidance Agreement ('DTAA').

- DRP directed the Ld. AO that receipts on account of software license fee (Prime) will constitute as business income under Article 7 of the India-UK DTAA and will not be taxable in India because undisputedly, the Assessee does not have any PE in India by relying on the judgement of **Hon'ble Supreme Court** in the case of **Engineering Analysis Centre of Excellence Private Ltd. Vs. CIT (Civil Appeal Nos. 8733- 8734 of 2018)**.
- However, for the receipts on account of provision of other related services, DRP held that it is well settled that such services needs to be examined independently in terms of their taxability or otherwise under specific Article 13 (Royalty/FTS) and cannot be clubbed as business income under Article 7 of the DTAA and treated the same in the nature of FTS being the make available clause under Article 13 are also stand satisfied.
- Further, the DRP for the receipts on account of reimbursement remanded the matter back to the Ld. AO to examine travelling and lodging expenses reimbursed. However, the Ld. AO in the final Assessment Order held the same as FTS as per the Act read with the India-UK DTAA.

The Assessee then approached Hon'ble ITAT against the Final Assessment order passed by the Ld. AO.

ITAT's Judgement

- The Hon'ble ITAT held that by going through the agreement, since the user has no right to make copies or commercially exploit the right in the copyright of such software, the Ld. DRP by following the ratio laid down by **Hon'ble Supreme Court** in the context of Business Income/Royalty in **Engineering Analysis Centre of Excellence Private Ltd. Vs. CIT** had rightfully directed to exclude receipts relating to sale of software licenses in accordance with and to the extent covered under the applicable categories contained in Hon'ble Supreme Court decision.
- However, for the second set of receipts on account of provision of other related services, the Hon'ble ITAT held that the other related services provided are in connection with utilization of the software (PRIME) which are intricately and extricably associated.
- Further, the Hon'ble ITAT held that the services are in respect of training programme and updations in connection with utilization of the software (PRIME) and also when software itself is not taxable, the training and the related activities concerned with utilization and installation cannot be held to be FTS.
- Further, the Hon'ble ITAT held that simply latching on to use of words "Make Available" in the agreement, it cannot be said that conditions of Article 13(4)(c) are satisfied and burden is on the Revenue to demonstrate that make available condition is satisfied.

Nangia Andersen LLP's Take

*The Hon'ble ITAT has objectively relied on judgment of the Hon'ble Supreme Court in the case of **Engineering Analysis Centre of Excellence Private Ltd. Vs. CIT** for treating the software sale receipts as non-taxable. Further, the Hon'ble ITAT has categorically held that use of words "Make Available" in the agreement does not itself satisfy the Make Available clause.*

Provisions of DTAA shall override the provisions of Section 206AA of the Act

CIT, (International Taxation) & Income-tax Officer, (International Taxation) vs M/S Wipro Ltd.
INCOME TAX APPEAL NO. 181 to 184 OF 2019
Issue(s) – Rate of TDS where PAN is not furnished and provisions of DTAA are applicable
Outcome - In Favour of Assessee

Background

In a recent verdict, Karnataka High Court ('Hon'ble HC') examined the applicability of Section 206AA of the Income-tax Act, 1961 (the 'Act') where rate of tax deduction at source is prescribed at 20% in case the deductee has not furnished its PAN at the time of deduction. Wipro Ltd. (the 'Assessee') paid fee for technical services to various entities in the AY 2011-12. Hon'ble HC concluded that tax shall be deducted at the rate consistent with the provisions of DTAA.

High Court's Judgement

- The Assessee has paid fee for technical services to various entities on which the provisions of DTAA are applicable, therefore restricting the tax payable on such income at the rate of 10%. The Assessee accordingly deducted tax at the rate of 10% even when PAN was not furnished by such entities.
- Revenue contended that the said payment was liable to tax deduction at the rate of 20% following the provisions of Section 206AA of the Act and raised a demand for remaining 10%. Further, it contended that if the rate provided in DTAA is followed, the provisions of Section 206AA of the Act will be rendered redundant.

Nangia Andersen LLP's Take

This is a welcome judgement for foreign taxpayers who do not have a PAN in India and are eligible to obtain benefit under the relevant DTAAs.

Provisions for expenses made at year end on *ad hoc* basis, subsequently reversed at the beginning of the next year does not entail deduction of tax at source where details of payee and exact amount is not identified.

M/s. Subex Ltd vs. Deputy Commissioner of Income Tax Circle 12(3)

ITA Nos. 787/2017 (Karnataka High Court)

Issue(s) - TDS liability on ad-hoc year-end provisions

Outcome - In Favour of Assessee

Background

In a recent verdict, Karnataka High Court examined the taxability of the year-end provisions made towards legal and professional charges and held that the Assessee was not liable for TDS on the provisions which were reversed at the beginning of the next year since the payees were not identified when such provision was made.

Brief Facts and Contentions

- Assessee is a Public Limited Company engaged in the business of providing software services and development of various products for Telecommunication Industry. At the year end assessee made the provision for legal and professional charges on ad hoc basis whereon no tax was deducted.
- In certain instances, the invoices for services are not received by 31st March of the relevant year. In such cases, year-end, provisions are made on 'estimate basis'. The same are subsequently reversed in the books of account on the first day of next year. In the subsequent year, as and when the party's account is credited, TDS has been deducted and deposited to the government.
- The Assessing Officer ("AO") disallowed the said provision for expenses under Section 40(a)(ia) for non-deduction of tax at source. Assessee filed its objections against the draft order passed by the Assessing Officer ("AO") before the DRP. DRP issue the direction to the A.O for deletion of addition made by the AO under section 40(a)(ia).
- The Revenue challenged the said order before the ITAT. On Revenue's appeal, ITAT held that the Assessee was liable to deduct tax on the provision made for legal and professional charges in the books of accounts on accrual basis when credited, even if not paid. Aggrieved by the order of ITAT present appeal before the Karnataka High Court.

High Court Order

- It is not in dispute that the provisions made at the end of the accounting year were reversed in the beginning of the next year and no payees were identified nor the exact amount payable. High Court has held that if no income is attributable to the payee, there is no liability to deduct tax at source in the hands of the payer.

Nangia Andersen LLP's Take

This judgement deals with the issue where practical applicability of TDS provisions fail owing to non-identification of the payee and the respective amount payable. The court has further emphasized on the fact that if no income accrues to the payee, there is no liability to deduct tax at source in the hands of payer.

02

Indirect Tax

Advance Rulings & Judgements

Gujarat Appellate Authority for Advance Ruling held that artificial splitting of the contract into two separate orders to circumvent the provisions of law is not allowed and treated as one single contract

Brief Facts

- M/s. Shilchar Technologies Limited ('Appellant') are manufactures of Electronics and Telecom and Power & Distribution Transformers. The Appellant supplied 'Aluminum Foil Type Winding Inverter Duty Transformer' (herein referred to as 'IDT') for setting-up the Solar Power Generating System ('SPGS') to Adani Green Energy Ltd ('AGEL');
- The appellant further submitted that as per the technical specification for 'Aluminum Winding Inverter Duty Transformers' issued by M/s. AGEL services are also included therefore they got a separate contract with regard to Supervision of Erection, Testing and Commissioning charges for the said project and actual erection, commissioning and installation is not supposed to be carried out by them;
- The Gujarat Authority for Advance Ruling held that the appellant is liable for payment of GST on the total value of both the purchase order;
- Aggrieved by the above Appellate preferred appeal before the Appellate Authority to provide solution for "Whether supply of Aluminum Foil Type Winding Inverter Duty Transformer classifiable under Chapter Heading 8504 and parts of Transformer supplied/to be supplied for initial setting up of solar project falls under Sr. no. 234 in Schedule-I to Notification No. 01/2017-Central Tax (Rate) dated 28 June 2017 and liable to Central GST 2.5% along with State GST at the rate of 2.5%".

Observations

- Appellate Authority observed that supply of goods and supply of services are single and connected and to be used for same purpose viz. for supply and effective functioning of the IDT and trouble free operation of Solar Power Plant.
- It was observed that artificial splitting of the contract into two separate orders being placed by two different entities is merely an afterthought so as to circumvent the explanation inserted in entry No 234 of Notification No 01/2017 CT according to which, of the value of gross consideration 70% shall be deemed to be on account of goods and 30% deemed to be on account of service.

Decisions

- Appellate Authority concluded that the activities relating to supply of the transformers and the supervision of the erection, testing and commissioning of the transformers supplied by the appellant are inextricable and for the purpose of supply of transformer which would be used in initial setting up of the Solar Power Plant. The activities to be performed based on the two contracts discussed herein are interdependent and contribute to setting up of the Solar Power Generating System as per the Project Requirements.
- The appellant is liable for payment of GST on the total value of both the Purchase Order i.e. supply of goods and supply of services.

(Appellate Authority Advance Ruling (Appeal) No. GUJ/GAAAR/APPEAL/2023/01, dated 13 January 2023)

Maharashtra Appellate Authority for Advance ruling ('AAAR Maharashtra'): Services provided by M/s Worley Services India Private Limited to Vedanta Limited ('VL') are covered under SAC 998349 bearing description "Other technical and scientific services nowhere else classified" and will attract GST @18%.

Brief Facts

- M/s Worley Services India Private Limited is a part of Worley Parsons Limited, which is a global engineering company providing project delivery and consulting services to the resources and energy sectors and other complex process industry
- The Appellant is providing Project Management Consultancy ('PMC') services and Engineering, procurement, and construction management ('EPCM') services to local and international customers.
- The Appellant entered into an agreement with VL to provide PMC services where Appellant was required to continuously review, monitor, manage and control all aspects of the execution of the Projects on behalf of VL to complete it with quality, on time and within the approved cost. The Appellant is appointed to manage the Project, right from details to designing to commissioning and close out of Projects with VL.
- The Appellant has sought advance ruling on the following questions:
    - Whether the services provided by the appellant are classified under S. no. 24(ii) of heading 9986 of the Rate notification as 'Support services to exploration, mining or drilling of petroleum crude or natural gas or both' under SAC 998621 and attracts GST @ 12% in terms of S. no. 24(ii) of Rate notification.
    - Alternatively, whether the services provided by the appellant are classified under S. no. 21(ia) of heading 9983 of the Rate notification as 'Other professional, technical, and business services relating to exploration, mining or drilling of petroleum crude or natural gas or both' and attracts GST @ 12% in terms of S. no. 21(ia) of Rate notification.
    - Further if the services are not classifiable under the aforesaid entry, what would be the appropriate classification for the same and at what rate GST would be imposable?
- The Maharashtra Authority for Advance Ruling ('MAAR') ruled that professional, technical and business service supplied by the Appellant to VL are clearly covered under the residual entry no at S. no. 21(ii) of the Rate notification attracting tax at the rate of 18%.
- Dissatisfied with the ruling of MAAR, the Appellant further filed an appeal with the AAAR, Maharashtra.

Observations and Ruling

- Entry under SI. No. 24 (ii) of the Rate Notification covers only such activities or services which are used directly in the mining operations and which essentially entails the excavation of the land or sea to extract the valuable substances therefrom
- Activities covered under SAC 998621, are in the nature of physical performance or activities which are being directly used in the mining and extraction operations whereas the services provided by the Appellant are not so as the said services are in the nature of review, monitoring, management and supervision of the project works which are done towards realization of mining activities
- AAAR, Maharashtra agreed the observation made by MAAR wherein it was held that the services provided by the EPC company who are undertaking the actual infrastructural work for increasing the production capacity of their client, VL, would be classified under the entry at SI. No. 24(ii) of the Rate Notification, and not the Project Management Consultancy services provided by the Appellant which are not directly concerned with the mining operation.

- Services provided by the Appellant through their professionals are in the nature of professional and technical services as the said impugned services provided by them in deed require technically qualified and trained professionals and staffs.
- AAAR, Maharashtra held that the services of project management consultancy services provided by the Appellant would merit classification under the SAC 998349 bearing description “Other technical and scientific services nowhere else classified, attracting GST at the rate of 18% (CGST @9%+SGST @9%).

[M/s Worley Services India Pvt. Ltd.- MAH/AAAR/DS-RM/14/2022-23 dated 03 January 2023]

03

Transfer Pricing

ITAT remits the benchmarking of interest on NCDs and directs AO/TPO to prefer internal comparables and verify the currency denomination.

Category: Benchmarking of interest on Non-Convertible Debentures ("NCDs")

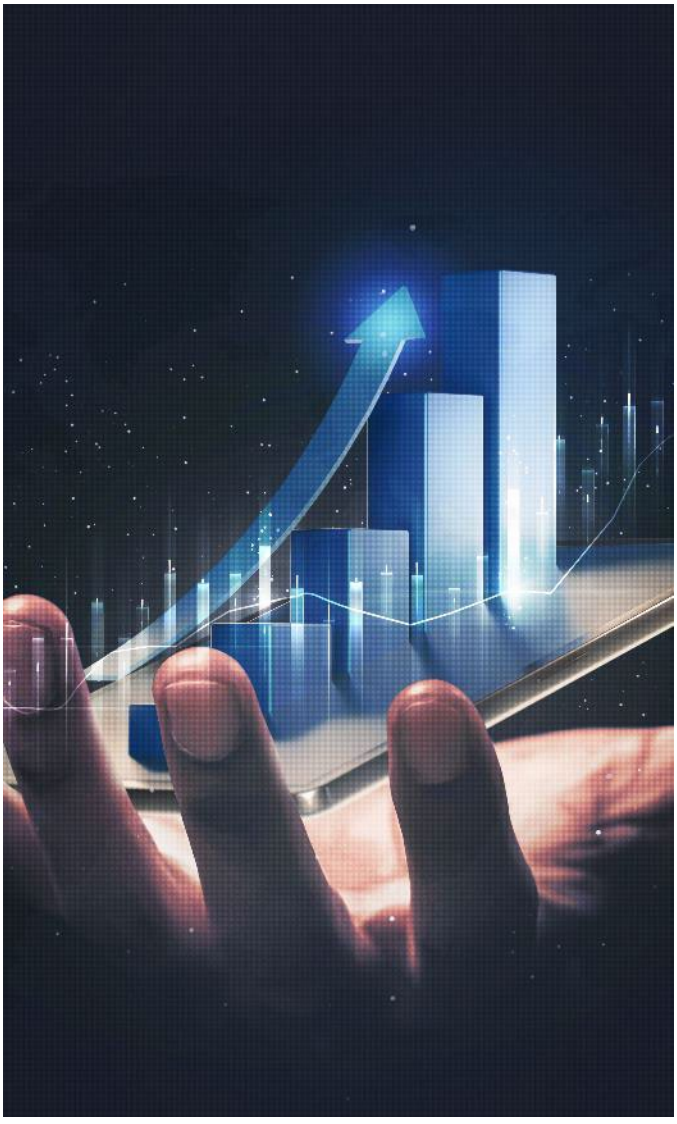
Facts of the Case

- Dans Energy Private Limited ("the taxpayer") is a private limited company, engaged in development of 96 MW Jorethang Loop Hydro Electric Product in the State of Sikkim. The main business of the taxpayer is identification of hydropower projects and making investment in them.
- During the year under consideration, the taxpayer has issued Non-Convertible Debentures ("NCDs") to its Associated Enterprise ("AE") i.e., Hydreq Pte. Ltd. on private placement basis which are unlisted, unrated, unsecured, redeemable and non-convertible.
- The taxpayer has paid interest on such debentures at the rate of 14.27% for FY 2017-18 and 13.93% for AY 2018-19. The interest rates were calculated at SBI rate + 5% subject to a maximum of 15%. The Assessing Officer ("AO") has referred Transfer Pricing Officer ("TPO") under section 92CA of Income Tax Act, 1961 ("the Act") for the determining the Arm's Length Price ("ALP").
- For the purpose of benchmarking the above interest, the taxpayer selected comparables which has also issued NCD's at the rate of 15% during the years under consideration. As the interest rate paid to AE was less accordingly, it is considered to be at ALP.
- Further, the taxpayer also benchmarked the transaction using internal CUP while making comparison of interest rate paid to the AE as opposed to the interest rate paid on secured loans taken by the taxpayer from unrelated parties such as PFC, REC and PNB. Since, the said loans were secured loans, the taxpayer made an adjustment of 300 bps and arrived at the interest rates of 16.75% for AY 2017-18 and 18.39% for AY 2018-19. The taxpayer has paid lower interest to its AE during the years under consideration accordingly, the transactions were considered to be at ALP. Further, the said benchmarking method was also accepted by the Dispute Resolution Panel ("DRP") in the taxpayer's own case in AY 2015-16.

ITAT Ruling

- ITAT observes that the ALP of interest on loan depends on various factors like nature, purpose, currency in which loan is provided and interest is paid, security or guarantee offered by borrower, amount & duration of loan and credit rating of the borrower.
- ITAT perused all the material on record and also relied upon the case of ***Tecnimont ICB Private Limited vs ACIT*** and based thereon ITAT held that first the internal comparables should be evaluated and only in case the internal comparables fail, then external comparables may be accepted for the purpose of ALP determination.
- ITAT opined that if the loan taken by the taxpayer from AE and third party are denominated in the same currency, internal comparables can be adopted for computation of ALP, irrespective of the geographical difference. Further the ITAT opined that consideration of internal comparables will also take care of other factors such as credit rating of borrowers and nature and purpose of loan.
- ITAT further opined that if currency is different then, it should be analysed whether any adjustment is required to be made as mandated by Rule 10B (3) of Income Tax Rules, 1962 ("the Rules") and, if the internal comparables fails then external comparables can be adopted but the borrowers in external comparables should have similar credit rating as that of the Taxpayer. Further, the ITAT held that the interest on NCDs cannot be compared with interest on CCDs as CCDs fetch lower interest as compared to NCDs.

- In the instant case, the ITAT held that the NCDs issued to AE is unsecured and the loans taken from third parties are secured loans and accordingly the adjustment for this difference should be made, which was also directed by the DRP in taxpayer's own case in AY 2015-16. Further, based on the details available on record it is also not clear if the NCDs issued to AE are denominated in Indian Currency.
- Thus, the ITAT remand back the matter to AO/TPO for fresh benchmarking of ALP of interest on NCD's and to verify the currency denomination.



[Source: Dans Energy Pvt. Ltd. [TS-906-ITAT-2022(Bang)-TP]

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 NCDs. In this regard, The ITAT has emphasised on the significance of adoption of internal comparables over external comparables post making suitable adjustments for computation of ALP for interest on financial instruments such as NCDs, since it also accounts for factors such as credit rating of borrowers and nature & purpose of loan. Further, The ITAT in this ruling has rejected Revenue's contention of rejecting internal comparables on account of geographical differences and held that in case the currency of instruments i.e., NCD and Loan is same, such factors like geographical differences do not hold good for rejection of internal comparables.

This ruling further adds to the bunch of rulings that the taxpayer can rely on against the actions of transfer pricing authorities on TP issues pertaining to benchmarking of financial instruments. The present judgement is useful for taxpayers, as it provides virtuous guidance on the arm's length pricing of interest on financial instruments such as NCDs. In light of the same, the taxpayers are recommended to follow a wholistic approach of considering various factors like currency of instruments, nature of security, credit rating of taxpayer, nature & purpose of loan etc. while benchmarking such securities and evaluate that in case of any differences, whether suitable adjustments can be made as mandated by Rule 10B(3).

04

Regulatory

Updates under companies act, 2013

Companies to file forms gnl-2, mgt-14 in physical mode

Ministry of Corporate Affairs ('MCA' or 'the Ministry') permits companies to file Form GNL-2 (filing of prospectus related documents) and MGT-14 (filing of Resolutions relating to prospectus related documents) in physical mode, due to migration from V2 version to V3 version in MCA-21 Portal from 7 January to 22 January, 2023 when such Forms will not be available for filing under V2 version.

The Ministry specifies that the same shall be duly signed by the persons concerned as per the requirements of the relevant forms, along with a copy thereof in electronic media with the concerned Registrar of Companies, without payment of fee. MCA further states that such filing will be accompanied by an undertaking from the company that once the filing of such form is enabled on the portal, the company shall file the relevant form in electronic form on MCA-21 portal, along with fees payable as per the Companies (Registration Offices and Fees) Rules, 2014. Lastly, the Ministry clarifies that no additional fees will be levied for the period during which the filing was disabled.

Transition of 56 company forms from v2 to v3 portal

The MCA released the second set of Company Forms comprising of 56 Forms to be rolled out on V3 portal in two separate lots. The first lot consisted of 10 forms with respect to Incorporation services and were released on 9 January 2023, and the second lot consisted of 46 forms and were made available to the stakeholders for filing on 23 January 2023.

The V2 Portal for company filing will continue to be available for all forms except the 56 mentioned above.

Companies (appointment and qualification of directors) amendment rules, 2023

Amendment in Rule 14

- Every director shall inform the company concerned about her company related disqualifications under section 164(2) of the Act as well as personal disqualifications u/s 164(1), if any, in Form DIR-8 before he is appointed or re-appointed. *(Before amendment only disqualification under section 164(2) was required to be informed by the Director).*
- Any application for removal of disqualification of directors u/s 164(1) as well as 164(2) shall be made in DIR-10 and filed before the regional director.

Insertion of Rule 14(1A)

Whenever a company receives the information in Form DIR-8, company shall, within thirty days of such receipts, file Form DIR-9 with the Registrar.

Before amendment DIR-9 was filed only when the director defaulted and disqualified in instances of not filing financial statements, Annual returns etc. that was covered in 164(2) but now same has also to be filed in regards to 164(1).

Companies (prospectus and allotment of shares) amendment rules, 2023

PAS-2 (Information Memorandum), PAS-3 (Return of Allotment), PAS-6 (Reconciliation of Share Capital Audit report - Half yearly) is substituted.

In PAS-2, format of disclosure relating to charges has been amended.

In PAS-3, the amended rules require more specific information about valuations rather than just confirming whether valuation is done or not.

In PAS-6, greater disclosures of details of shares as per class is to be given.

Companies (share capital and debentures) amendment rules, 2023

The Companies (Share Capital and Debentures) Amendment Rules, 2023, which governs the buying back of shares and securities, has changed the requirement for a certificate in Form No. SH.15. This certificate, previously required as an attachment to SH-11, confirmed the compliance of the buyback with the act and rules, and was signed by two directors including the managing director if applicable. Now, it has been replaced with a declaration and is no longer attached.

Additionally, Forms SH-7, SH-8, and SH-9 have been updated to include more disclosures. The Ministry now requires additional information on meetings where share capital was altered and details on cancelled shares. There are also enhanced disclosures on existing defaults required in SH-8.

Companies (incorporation) amendment rules, 2023 and faq's on incorporation and allied matters

Main aspects covered

- In Rule 4, name of person nominated shall be mentioned in MOA and such nomination details along with consent shall be filed in form Spice+ as a declaration and no longer required as attachment in INC-3.
- Rule 6 of the Rules covers the conversion of a One Person Company into either a Public or a Private Company. An electronic version of the Memorandum of Association (e-MOA) and the Articles of Association (e-AOA) has been introduced for Section 8 companies. When a company applies in e-Form No. INC-6 for its conversion into a Private or Public Company, other than a Section 8 company, it only needs to include altered MOA and AOA as attachments. The requirement for additional attachments, such as a copy of the resolution, a list of proposed members and directors with their consent, and a list of creditors, has been eliminated.
- In Rule 19 (License Under Section 8 for New Companies with Charitable Objects etc.), the requirement to provide INC-14 as an attachment is done away with by adding it in the Declaration by professional and INC-15 is also done away with by adding it in Declaration by subscribers and directors.
- Attachments such as Consent of majority of members/ Consent of three fourth members agreeing for registration/ declaration from all members regarding compliance under Section 8(1)(b) and (c) have been removed and added as a declaration in INC-9 form.
- NIC Codes 2008 introduced with option of selecting business activities with 5-digit code.
- Several checks / Business rules/ Trademark Validations are put in place at FO level to check compliance with the rules.
- E-MOA is added in Form MGT-14 in changing Registered office from one state to another. Moreover, section pertaining to IBC is also added.

- In case of filing of INC-22 (Change in Registered office), form can't be filed in case any other form is pending for approval. Also, photograph of registered office premises and directors in their office building is required to be attached.
- Form size is increased to 10 MB as earlier it was restricted to 6 MB.
- The form INC-28 has been changed from a non-STP form to a conditional STP form.

Updates under securities and exchange board of India ('SEBI')

Facility of conducting meetings of unit holders of INVITs and REITs through video conferencing or other audio-visual means

SEBI allows the Investment manager/Manager of INVITS/REITs to conduct meetings of unit holders through Video Conferencing or Other Audio Visual means.

As per Regulation 22(3) of SEBI (Real Estate Investment Trusts) Regulations, 2014 and Regulation 22(3)(a) of SEBI (Infrastructure Investment Trusts) Regulations, 2014, an annual meeting of all unit holders of INVITS and REITs respectively must be held at least once a year within 120 days of the end of the financial year. The maximum time between two meetings cannot exceed 15 months.

Following are some of the stipulated points which the manager is required to adopt while conducting the aforesaid meetings in addition to any other requirements specified under the INVITS/REITs Regulations and Circulars issued thereunder:

- The recorded transcript of the meeting shall be maintained in safe custody of the Manager and shall also be uploaded on the website of the INVIT/REIT after the conclusion of the meeting.
- All care must be taken to ensure that such meetings conducted allows two-way teleconferencing for the ease of participation of the unitholders and the participants are allowed to pose questions concurrently or given time to submit questions in advance on the respective email address.
- The facility for joining the meeting shall be kept open at least fifteen minutes before the time scheduled to start the meeting and shall not be closed until the expiry of fifteen minutes after such scheduled time.
- Only those unitholders that are present in the meeting and have not cast their vote on resolutions through remote e-voting and are otherwise not barred from doing so, shall be allowed to vote through the e-voting system at the meeting.
- At least one independent director of Manager of INVIT/REIT and the auditor shall attend such meeting.
- The notice for the meetings of unit holder shall make disclosures with regard to the manner in which framework provided in this circular shall be available for use by the unit holders and shall also contain clear instructions on how to access and participate in the meeting.
- The notice to the unit holders may be given through emails registered with the INVIT/REIT or with depositories.
- Manager of INVIT/REIT shall contact all unit holders respectively whose email addresses are not registered with the depositories, over possible / available mode of communication for registration of their email addresses.

The Manager INVIT/REIT shall disclose to the Stock Exchange and Trustee that the meeting of unit holders will be conducted through Video Conferencing or Other Audio Visual means. Further, the trustee of the INVIT/REIT shall attend the meeting of unit holders and monitor the meetings conducted through Video Conferencing or Other Audio Visual means.

Updates under reserve bank of India (RBI)

Reserve Bank of India (Acquisition and Holding of Shares or Voting Rights in Banking Companies) Directions, 2023

The Reserve Bank of India (RBI) on 16th January, 2023 issued the 'Master Directions – Acquisition and Holding of Shares or Voting Rights in Banking Companies' in order to ensure that the ultimate ownership and control of banking companies are well diversified and the major shareholders of banking companies are 'fit and proper' on a continual basis. The Directions have been issued with the intent of ensuring that the shareholders of banking companies are fit and proper to remain in control of the banking companies.

- Any person intending to acquire major shareholding in a banking company must submit an application to RBI seeking prior approval. On receipt of the application, RBI will seek comments from the banking company on the proposed acquisition.
- The board of directors (the board) of the banking company will assess the 'fit and proper' status of the person, based on the information provided as well as due diligence undertaken, and furnish its comments along with a copy of the relevant board resolution and information in Form A1 to RBI within 30 days.
- RBI will undertake due diligence to assess the 'fit and proper' status of the applicant and may impose conditions on both the applicant and the banking company.
- Persons from FATF-Financial Action Task Force non-compliant jurisdictions will not be permitted to acquire major shareholding in a banking company. Existing major shareholders from such FATF non-compliant jurisdictions will be allowed to continue with their investment, but without any further acquisition without prior approval from the Reserve Bank.
- If at any point in time the aggregate holding falls below five percent, the person will be required to seek fresh approval from the Reserve bank if the person intends to again raise the aggregate holding to five percent or more of the paid-up share capital or total voting rights of the banking company.

Banking companies are required to continuously monitor the 'fit and proper' status of their

a) major shareholders,
b) applicants for major shareholding, and
c) applicants who have been approved by the RBI but have yet to complete the approved acquisition

To do this, they must have a mechanism to obtain information on any changes in the information provided in Form A, any concerns or information regarding the major shareholders/applicants, and any changes in Significant Beneficial Owners or acquisition by a person to the extent of 10 per cent or more of paid–up equity share capital of the major shareholder. Banking companies must also assess the 'fit and proper' status of the major shareholders/applicants and submit a report with a board note and resolution to the Department of Regulation, Reserve Bank of India, within 30 days of receipt of the information.

Banking companies are required to establish a continuous monitoring mechanism to ensure that major shareholders obtain prior approval from the Reserve Bank for their shareholding/voting rights in accordance with Section 12B (1) of the B R Act, 1949.

If it is suspected that the methods adopted to acquire or aggregate the holding is to circumvent the statutory requirements, the banking company must make a reference to the Reserve Bank along with the necessary documents and a copy of the board resolution.

The banking company must also submit periodical reports on the continuous monitoring arrangements to its board, assessing whether it complies with Section 12B (5) of the B R Act, 1949. Banking companies must submit a plan for diluting their shareholding to comply with the Guidelines within six months from the date of issue of the Directions. Payments Banks are excluded. Banking companies are required to report the details of issue and allotment of shares in Form A2 within 14 days of completion of the allotment process. They must also ensure that the limits approved by the Reserve Bank for a person are not breached. Additionally, they must report the details on encumbrance of shares reported by promoters and promoter group in Form B to the Department of Supervision within one working day and submit a report to the Department of Regulation, Reserve Bank of India within 30 days.

Updates under production linked incentive scheme ('PLI')

PLI – Bulk Drug

Around 21 Indian pharmaceutical companies have established capacity to produce key active pharmaceutical ingredients (APIs) under the government's Production-Linked Incentive (PLI) scheme, with a total capacity of 33,895 tons. These companies are making various drugs including paracetamol, cholesterol drugs, antibiotics, vitamins, hypertension drugs, and antivirals.

However, Indian formulation makers still depend on China for imports of key APIs, causing Indian API makers to struggle to find buyers for their products. The Indian government has invested Rs 620 crore in the PLI scheme with the aim of reducing dependence on Chinese imports.

Meanwhile, Indian API players are seeing growth in export markets as multinationals look to diversify their supply chain. However, Chinese prices have been increasing, making it imperative for India to have a fully integrated supply chain for essential drugs.

Updates under food safety & standards of India (FSSAI)

Introduction of standards for basmati rice in food safety and standards (food products standards and food additives) first amendment regulations, 2023

The Food Safety and Standards Authority of India ('Food Authority') vide notification dated 11th January, 2023, released Food Safety and Standards (Food Products Standards and Food Additives) First Amendment Regulations, 2023 which shall come into force w.e.f. 1st August, 2023.

Through these regulations, the Food Authority has for the first time specified the identity standards for Basmati rice, which shall include Brown Basmati Rice, Parboiled Basmati Rice and Milled Parboiled Basmati Rice). These regulations are aimed at protecting the interests of consumers, both domestically and internationally.

As per the amended regulations, Basmati rice shall be rice which possess natural fragrance characteristic of basmati rice and be free from artificial colouring, polishing agents and artificial fragrances. The regulations also specify certain standards (such as average size of grain, maximum limit of moisture, presence of uric acid, etc.) which are required to be conformed to in order to qualify as basmati rice.

Instant renewal of FSSAI license/ registration

The Food Safety and Standards Authority of India vide order dated 11.01.2023 has introduced new provisions for instant renewal of FSSAI license/registration under FSS (Licensing and Registration of Food Business) Regulations, 2011.

Prior to this order, the applications of renewal of FSSAI license/registration were treated the same way as applications for initial license/registration by the same Food Business Provider ('FBOs') which led to wastage of time of the FBO as well as the concerned Licensing and Registering Authority.

In order to ease the process of renewal of license/registration, the Food Authority has decided upon instant grant of FSSAI license/registration to the FBO on an application made by him if the following conditions are satisfied:

- There is no change in the existing details of the license/registration.
- The license/registration of the FBO making the application has not been suspended/cancelled.
- The declaration to the effect that:
    - all the permissible rules which are applicable to business of the FBO are compiled to, and
    - the FBO does not possess more than one active license/ registration for any other food business(es) at the same premises, is made by the FBO at the time of filing of the application for renewal.

Other regulatory updates

Department of telecommunications

Indian Telegraph (Infrastructure Safety) Rules 2022

The Department of Telecommunications under the Ministry of Communications has formulated the Indian Telegraph (Infrastructure Safety) Rules 2022 with an objective to minimize the loss caused to various digital infrastructure assets such as optical fiber cable due to various excavation activities and digging. These rules have been published in the Gazette of India on 3 January, 2023.

Various agencies often undertake excavation activities wherein underground utility assets get damaged wither due to lack of knowledge of agencies about existing utilities or lack of coordination with utility asset owner agencies. These damages cause economic loss to utility asset owners as well as business loss and inconvenience to the public. In Telecom Sector alone, there are nearly 10 lakh OFC cuts per year causing an economic loss of approx. INR 3000 crore/year.

Accordingly, the need for rules/ regulation/ policy to address the issues of safety to the existing telecom infrastructure has arisen for which the Government has formulated the Indian Telegraph (Infrastructure Safety) Rules, 2022.

The salient features of these rules and App are:

- Any person wishes to exercise a legal right to dig or excavate any property which is likely to cause damage to a telegraph infrastructure shall give notice to the licensee, prior to commencement, through common portal.
- The licensee shall, as expeditiously as possible, provide through the common portal, the details of telegraph infrastructure owned/ controlled/ managed by them, falling under/ over/ along the property with which the person intends to deal.
- In case no licensee provides details within the prescribed time, the person having legal right to dig or excavate shall be free to dig or excavate the property thereafter.
- Further, any person, who has dug/excavated any property causing damage to a telegraph infrastructure, shall be liable to pay the damage charges to the telegraph authority.
- Once the asset owner agencies map their underlying assets with GIS coordinates on PM GatiShakti NMP platform, it will also be possible to know the presence of underlying utility assets, at the point of interest, before start of excavation.

Trai releases consultation paper on 'license fee and policy matters of dth services'

The Telecom Regulatory Authority of India (TRAI) under Ministry of Communications released a Consultation Paper (CP) on 'License Fee and Policy matters of DTH Services'.

The License fee is a non-tax fee levied on a service provider against the privilege of being permitted to carry out a licensed activity. In India, currently, the DTH operators are required to pay a license fee of 8% of Adjusted Gross Revenue (AGR) on a quarterly basis to Ministry of Information & Broadcasting (MIB), where AGR is calculated by excluding Good and Services Tax (GST) from Gross Revenue (GR).

The Department of Telecommunications (DoT), on 25th October 2022, carried out amendments in the Unified License (UL) Agreement for AGR. As per the amendment, Applicable Gross Revenue (ApGR) shall be equal to GR of the licensee by reducing certain revenue components as mentioned in the amendment. Further, the definition of AGR is also amended and shall be arrived by excluding some components from ApGR.

The extant DTH guidelines prescribe a Bank Guarantee (BG) for an amount of Rs. 5 crores for the first two quarters, and, thereafter, for an amount equivalent to License fee for two quarters and other dues not otherwise securitized. DoT has also carried out certain out amendments for rationalization of BGs on 06th October 2021.

In view of the aforesaid amendments carried out by DoT, and on the request of DTH association and DTH operators, MIB has sent a reference to TRAI on 02nd February 2022, requesting TRAI to examine the following issues from policy angle and furnish its recommendations under section 11(1)(a) of the TRAI Act, 1997:

- Issue of exclusion of non-licensed activities from definition of Gross Revenue in respect of DTH License fee as in case of recent amendments carried out by Department of Telecommunications (DoT) and/or identify any other base for levy of the license fee. Accordingly, the format of Form-D in DTH sector as per GR/AGR criteria may also be provided;
- Percentage/amount of Bank Guarantees (BGs) in respect of private DTH services as in case of recent amendments carried out by Department of Telecommunications (DOT); and
- Issue of Uniform License Fee (Level playing field) in respect of all Distribution Platform Operators (DPOs).

Accordingly, this Consultation Paper has been prepared to seek the comments/ views of the stakeholders on issues related to License Fee payable and Bank Guarantee furnished by DTH operators. Written comments on the consultation paper are invited from the stakeholders by 13th February 2023.

Ministry of Electronics and Information Technology (MEITY)

Draft Amendments to the IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 in relation to Online Gaming

Ministry of Electronics and Information Technology has published draft amendments to the IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ("IT Rules 2021") in relation to online gaming on 02nd January 2023.

The draft rules, purports to safeguard users against potential harm from online games, which has been introduced as an amendment to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. It endeavors to regulate online gaming platforms as intermediaries and place due diligence requirements on them.

A self-regulatory body, mandatory know-your-customer norms for verification, and a grievance redressal mechanism are among the key proposals in the draft rules for online gaming. Online Games will have to register with a self-regulatory body, and only games cleared by the body will be allowed to legally operate in India as well as Online gaming companies will not be allowed to engage in betting on the outcome of games.

Similar to social media and e-commerce companies, online gaming platforms will also have to appoint a compliance officer to ensure that the platform is following norms, a nodal officer who will act as a liaison official with the government and assist law enforcement agencies, and a grievance officer who will resolve user complaints.

Orders/judgements

Registrar of companies (roc)

RoC, Gujarat issued an order dated 19 January, 2023 under Section 454 read with Companies (Adjudication of Penalties) Rules, 2014 for violation of Section 64 of the Companies Act 2013 in the matter of M/s **Herboaatman Healthcare Private Limited.**

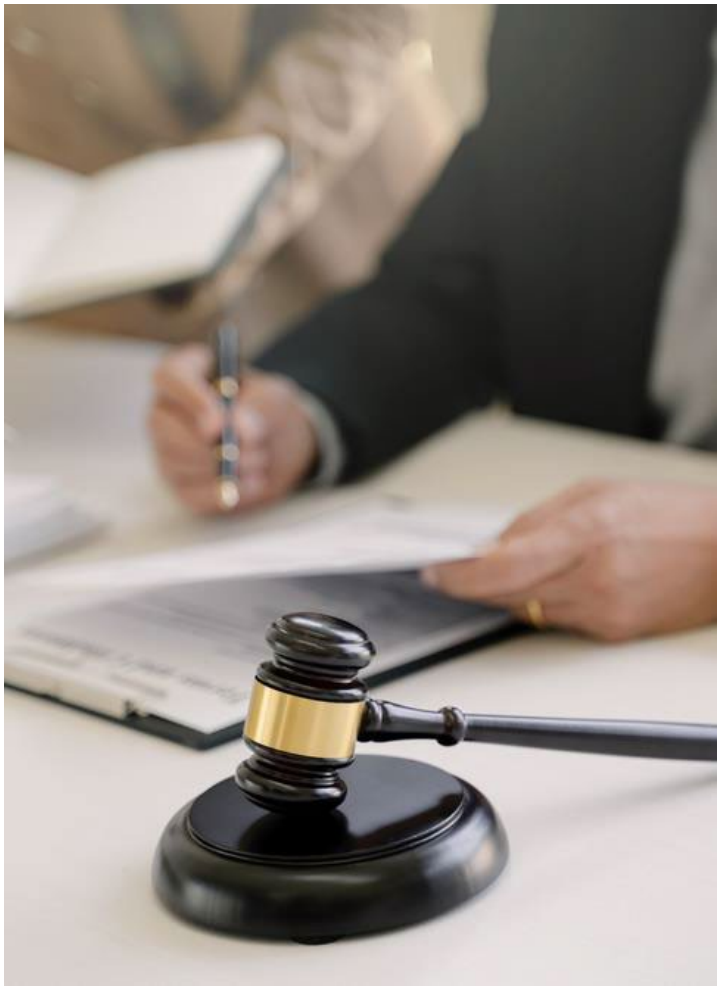
As per section 64(1) of the Companies Act, 2013, where—

- a company alters its share capital in any manner specified in sub-section (1) of section 61;
- an order made by the Government under sub-section (4) read with sub-section (6) of section 62 has the effect of increasing authorised capital of a company; or
- a company redeems any redeemable preference shares,

the company shall file a notice in the prescribed form (SH-7) with the Registrar within a period of thirty days of such alteration or increase or redemption, as the case may be, along with an altered memorandum. Further, as per Section 64(2), where any company fails to comply with the provisions of sub-section (1), such company and every officer who is in default shall be liable to a penalty of INR 500 for each day during which such default continues, subject to a maximum of INR 5,00,000 rupees in case of a company and INR 1,00,000 rupees in case of an officer who is in default.

Further, Section 446B states that, if penalty is payable for non-compliance of any of the provisions of this Act by a One Person Company**, small company**, start-up company or Producer Company, or by any of its officer in default, or any other person in respect of such company, then such company, its officer in default or any other person, as the case may be, shall be liable to a penalty which shall not be more than one-half of the penalty specified in such provisions subject to a maximum of Rs. 2 Lakh in case of a company and Rs. 1 lakh in case of an officer who is in default or any other person, as the case may be.

- The company has increased its authorized share capital from 2,00,000 to 1,00,00,000 by way of meeting of members held on 29.09.2022.
- However, the notice of increase in authorized capital has been filed with the Registrar with a delay of 15 days i.e. on 12.11.2022
- ROC issued adjudication Notice on 16.12.2022 to the company and its officer in default to rectify the default and remit the penalty imposed.
- Reply was received on 12.01.2023 from the company stating that inadvertently the e-form SH-7 could not be filed in time frame as prescribed in under the provisions of section 64 of the Companies Act, 2013.
- Penalty imposed for the period of **15 days:**
    - Company: 15*500 = 7500/2 = 3750/-
    - Officers in default: 15*500 = 7500/2 = 3750/- each.



04

Compliance Calendar

Direct Tax

Due dates	Particulars
7th February 2023	Due date for deposit of Tax deducted/collected for the month of January 2023.
	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 January 2023.
14th February 2023	Due date for issue of TDS Certificate for tax deducted under section 194-IA in the month of December 2022.
	Due date for issue of TDS Certificate for tax deducted under section 194-IB in the month of December 2022.
	Due date for issue of TDS Certificate for tax deducted under section 194M in the month of December 2022.
15th February 2023	Due date for issuance of quarterly TDS certificate (in respect of tax deducted for payments other than salary) for the quarter ending December 31, 2022.

Indirect Tax

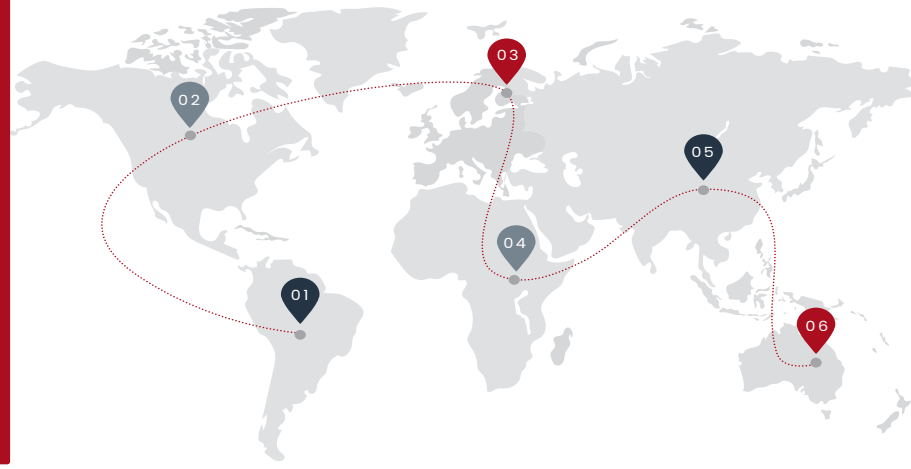
S. No.	Compliance Category	Compliance Description	Frequency	Due Date	Due Date falling In September 2022
1	Form GSTR-1 (Details of outward supplies)	Registered person having aggregate turnover more than INR 5 crores and registered person having aggregate turnover up to INR 5 crores who have not opted for Quarterly Returns Monthly Payment ('QRMP') Scheme	Monthly	11th day of succeeding month	For Tax Period January 2022 - 11 February 2023
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 next month	For Tax Period January 2022 - 20 February 2023
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	For Tax Period January 2022 – 1 to 13 February 2023 For Tax Period January 2022 – 25 February 2023 For the quarter January 2022 to March 2022 – 13 April 2023

	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[1] and union territories	Quarterly	22nd day of the subsequent month following the end of quarter	For the quarter January 2022 to March 2022 – 22 April 2023
		• Registered person with aggregate turnover up to INR 5 crore (opted for QRMP Scheme) having place of business in Group 2 states[2] and union territories		24th day of the subsequent month following the end of quarter	For the quarter January 2022 to March 2022 – 24 April 2023
4	Form GSTR-6 (Return for input service distributor)	• Return for input service distributor	Monthly	13th of the succeedin g month	For Tax Period January - 13 February 2022

Regulatory

Segment	Particulars	Due dates
ECB Borrowers	ECB Return (ECB-2)	7th February, 2023
R33(3)(a) of SEBI (LODR) Reg. 2015	Submission of half yearly financial results (Unaudited + Limited Review Report / Audited) and Statement of Assets and Liabilities	14th February, 2023
R32(1) of SEBI (LODR) Reg. 2015	Submission of Statement of deviation(s) or variation(s)	14th February, 2023

Our Locations



NOIDA
Delhi NCR - corporate office A-109,
Sector - 136,
Noida - 201304, India
T: +91 120 5123000

DELHI
Registered office B-27, Soami Nagar, New
Delhi - 110017, India
T: +91 0120 5123000

GURUGRAM
001-005, 10th Floor Tower A, Emaar Digital
Greens, Golf Course Extension Road, Sector 61,
Gurgaon-122102, India
T: +91 0124 430 1551

MUMBAI
11th Floor, B Wing, Peninsula Business Park,
Ganpatrao Kadam Marg, Lower Parel,
Mumbai - 400013, India
T: +91 22 61737000

CHENNAI
Prestige Palladium Bayan,
Level 5, 129-140, Greams Road, Thousand Lights,
Chennai - 600006 T: +91 44 46549201

BENGALURU
Prestige Obelisk, Level 4 No 3 Kasturba Road,
Bengaluru - 560 001, Karnataka, India
T: +91 80 2248 4555

PUNE
3rd Floor, Park Plaza, CTS 1085, Ganeshkhind
Road, Next to Pune Central Mall, Shivajinagar,
Pune - 411005, India

DEHRADUN
1st Floor, "IDA" 46 E.C. Road, Dehradun -
248001, Uttarakhand, IndiaT: +91 135 271
6300

www.nangia-andersen.com | query@nangia-andersen.com

Follow us at :

A member firm of ANDERSENGLOBAL