# Newsletter

## Tax & Regulatory

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Nangia Andersen LLP

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# What's *Inside ?*

# 01
## Direct Tax

## Supreme Court interprets MFN clause in certain DTAAs; rules that a notification is a pre-requisite and also discusses the juncture of OECD membership for claiming benefit of MFN clause

AO CIRCLE (INTERNATIONAL TAXATION) 2(2)(2), NEW DELHI vs M/S NESTLE SA along with batch of appeals

Civil Appeal No. 1420/2023

Issue(s) - Whether benefit of MFN clause under Indian Tax Treaties is automatically enforceable or a specific notification under section 90 of the Act is required

Outcome - In Favour of Revenue

### Background

In a recent verdict, Supreme Court ('Hon'ble SC') has held that in order to avail benefit of MFN clause under Double Taxation Avoidance Agreement ('DTAA'), a notification under 90(1) is necessary and a mandatory condition for a Court, Tribunal or an authority to give effect to a DTAA, or any protocol changing its terms that has the effect of altering the existing provisions of law. Further, Hon'ble SC clarified that relevant date to claim benefit of MFN clause is the date of entering the treaty with India, and not at a later date. The court also held that benefit granted under a subsequent treaty with a country which is not an OECD member on the date of entering into the treaty, but subsequently becomes an OECD member, cannot be claimed under a MFN clause.

## Brief Facts and Contentions

- Amongst others, DTAAs entered by India with countries viz. the Netherlands, France and Switzerland, have a Most Favored Nation ('MFN') clause as a part of protocol agreed between two countries
- The MFN clause extends the benefit of a lower rate or restricted scope with respect to certain specified incomes such as, interest, dividend, royalty, fees for technical services, if after the signature/entry into force of the treaty containing MFN clause, India enters into a treaty with an OECD member state which provides for a lower rate or restricted scope.
- MFN clause is entered to warrant "same treatment" to the OECD members
- The tax treaties under consideration in appeal before the SC were India-Netherlands, India-France, and India-Switzerland and the issues arising in appeal were as follows:
    - Whether there is any right to invoke the MFN clause when the third country with which India has entered into a tax treaty was not an OECD member at the time of entering into such tax treaty?
    - Whether the MFN clause applies automatically, or is it to be given effect by the government?
- Various High Courts (Hon'ble HCs) had given a favorable verdict and the Revenue was in appeal before the Hon'ble SC. We have discussed below such ruling in brief:
    - **Concentrix Services Netherlands B.V.** - Article 10 of India-Netherlands DTAA would show that when dividends are paid by an Indian Company to a resident of Netherlands, it may be taxed in Netherlands, however, such dividend can also be taxed in India provided recipients are beneficial owners of dividends and tax rate does not exceed 10 per cent of gross amount of such dividends. Protocol which incorporates principal of parity between India-Netherlands DTAA and tax treaties executed thereafter form an integral part of DTAA, therefore, no separate notification is required, in so far as applicability of provisions of Protocol is concerned. Also, principle of parity kicks-in only if third State with whom India

enters into a DTAA is an OECD member. Netherlands having interpreted protocol appended to subject DTAA in a manner that lower rate of tax set forth in India-Slovenia Convention/DTAA will be applicable on date when Slovenia became a member of OECD, *i.e.,* from 21-8-2010, although, Convention/DTAA between India and Slovenia came into force on 17-2-2005, therefore, participation dividend paid by companies resident in Netherlands to a body resident in India will bear a lower withholding tax rate of 5 per cent.

  - Delhi HC followed the above judgment to extend a similar benefit to Nestle SA under India-Switzerland DTAA
  - Delhi HC ruling in case of Steria India invoked the MFN Clause in the Protocol to India-France DTAA to grant the benefit of make-available contained in India-UK DTAA by virtue of the

- Aggrieved, the Revenue filed appeals before the Hon'ble SC against these Hon'ble HC rulings.

## Supreme Court's Judgement

- Hon'ble SC primarily concluded the following:
  - Notification under section 90(1) of the Act is necessary and a mandatory condition to give effect to a DTAA or any Protocol changing its terms or conditions which has the effect of altering the existing provisions of law
  - The fact that a stipulation in a DTAA or a Protocol with one nation, requires same treatment in respect to a matter covered by its terms, subsequent to its being entered into when another nation (which is member of a multilateral organization such as OECD), is given better treatment, does not automatically lead to integration of such term extending the same benefit in regard to a matter covered in the DTAA of the first nation, which entered into DTAA with India. In such event, the terms of the earlier DTAA require to be amended through a separate notification under Section 90.
  - The interpretation of the expression "is" has present signification. Therefore, for a party to claim benefit of a "same treatment" clause, based on entry of DTAA between India and another state which is member of OECD, the relevant date is entering into treaty with India and not a later date, when, after entering into DTAA with India, such country becomes an OECD member, in terms of India's practice.

**Nangia Andersen LLP's take**

SC has finally put to ground the long pending litigation in respect of availing of the MFN benefit, however, has favored revenue for want of technical and procedural aspects. Non-residents would now have to check if MFN clauses in their respective DTAAs have been notified by India and their countries are an existing member of OECD as clearly laid out under this Judgement.

## Supreme Court held the payment of variable license fees as capital expenditure since the same was traceable to acquiring license despite staggered payment schedule

C.I.T., New Delhi vs Bharti Hexacom Ltd. & others

Appeal No. 11128/2016

Issue(s) – Whether annual variable license fees paid by the Assessee under the New Telecom Policy, 1999 ('New Policy') is capital expenditure or revenue expenditure

Outcome - In Favour of Revenue

### Background

In a recent verdict, Supreme Court ('Hon'ble SC') has reversed the judgment of various High Courts and held that annual variable license fees paid under the New Policy is a capital expenditure and not deductible as a revenue expenditure under the Act. Further, Hon'ble SC held that such variable license fees paid may be amortized over the balance license period in accordance with section 35ABB of the Act.

### Brief Facts and Contentions

- The respondents are engaged in the business of providing telecommunication services. Since 1994, they were granted a non-transferable and non-assignable license to establish, maintain and operate cellular mobile services for a period of 10 years.

- The respondents migrated to the New Policy wherein the licensee was required to pay one-time entry fee and additionally an annual variable fee calculated as a percentage of revenue. In the books of accounts, the Assessee capitalized the "one-time entry fee" whereas the annual variable fee was claimed as revenue expenditure.
- During the assessment proceedings, the Assessee was required to explain as to why the the variable license fee should not be treated as capital expenditure and amortized over the remaining license period.
- Consequently, the final Assessment Order was passed observing the variable license fee, which was claimed as a revenue expense, ought to have been amortized over the remainder life of license.
- The Commissioner of Income Tax (Appeal) ['CIT(A)'] in its order affirmed the contentions of the Assessee and allowed the annual variable license fee as revenue expenditure deductible under Section 37 of the Act.
- The Hon'ble Delhi Income Tax Appellate Tribunal ('ITAT') and Hon'ble High Court of Delhi upheld the order of CIT(A).
- Aggrieved by the order of Hon'ble HC, the Revenue filed an appeal before the Hon'ble SC.

## Supreme Court's Judgement

- Hon'ble SC held in determining the question as to whether a payment is a capital or a revenue expenditure, one must consider the nature of the concern and objective of incurring the expenditure.
- Hon'ble SC also upheld the principle of substance over form, highlighting that the nature of the right sought is material and the payment schedule is not very suggestive of nature of transaction.
- Thus, basis the above principle, the annual payment of variable license fee is towards acquisition of license and merely because it is paid in annual installments based on the gross revenue, such expenditure cannot be construed as revenue in nature.

- Hon’ble SC also held that the Hon’ble HC(s) were not right in apportioning the license fee as partly revenue & partly capital and observed that the license fee paid is towards a single license to establish, maintain and operate telecommunication services.
- The Apex Court also held that since the entry fee and the variable license fees were traceable to the same purpose and source, i.e., acquisition of a license, they both would have to be held to be capital in nature.
- In conclusion, Hon’ble SC observed the Assessee’s contention that both components, fixed & variable, of the license fee under the 1994 Policy must be duly amortized and held that there was no basis to reclassify the same under the New Policy as revenue expenditure.

**Nangia Andersen LLP’s take**

The judgement enunciates views with respect to classification of an expense as capital or revenue. The Hon’ble SC has clarified that the manner of payment i.e., lump-sum or staggered is not conclusive of nature of the expenditure. Classification of an expense is a factual exercise which depends upon the nature and purpose of expenditure.

## Receipts cannot be claimed as reimbursement without providing basis of allocation or actual cost incurred for affiliates. Furnishing of evidence to support the claim must

Kraft Foods Group Brands LLC Vs Assistant Commissioner of Income Tax

ITA NO. 2495/Mum/2022

Issue(s) - Whether reimbursement of cost incurred on behalf of affiliate(s) would qualify as Fee for technical services

Outcome - In Favour of Revenue

### Background

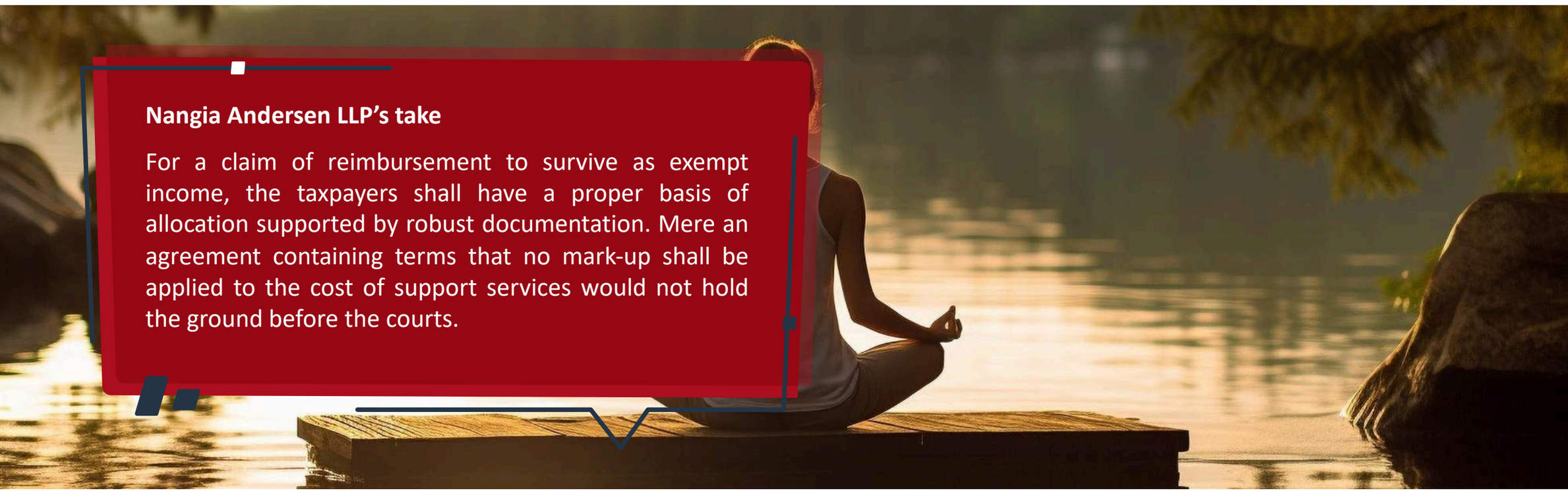
In a recent verdict, Mumbai Tribunal ('Hon'ble ITAT') examined whether payment received on account of reimbursement for providing support services can be claimed as exempt from Income Tax, concluded that reimbursement of expenses are not taxable provided there is a basis of allocation or actual cost incurred for affiliate(s) along with corroborating evidence to support the claim. Held that the Assessee has entered into a support services agreement to provide support services through the various cost centers but failed to submit any details or proper factors or allocations basis to classify the various support service charges provided/collected from the various affiliates, in particular Heinz India"

## Brief Facts and Contentions

- Kraft foods Group Brands LLC ('Assessee') is a tax resident of USA. The Assessee had entered in an agreement with its Affiliate(s) i.e. Heinz India to provide support services in the areas of general management, internal audit, communications, human resources, finance and treasury, data processing and information technology, food safety and quality control, supply chain and manufacturing, business development, legal and other related areas. In the same agreement, Heinz India agreed to reimburse for various services offered by the assessee without charging any mark up on cost of support service.
- The assessee filed Income Tax Return and reported that it received ₹ 8.82 crores from Heinz India which includes ₹ 96,715 for royalty, ₹ 3.62 crores for support services and offered the same to taxation and claimed the balance amount of ₹ 5.18 crore as exempt, being in the nature of reimbursement for expenses.
- During the assessment proceedings, the assessing officer ('AO') taxed such amount under both Income Tax Act as well as India-USA Tax Treaty.
- Aggrieved of draft assessment order, the Assessee filed objections before the Dispute Resolution Panel ('DRP') which upheld the findings of Ld. AO in the draft assessment order and the final Assessment order was passed.
- As a result, aggrieved of final assessment order, the Assessee filed objections before the Income Tax Appellate Tribunal.

## ITAT's Judgement

- Upon perusal of the agreement entered between the Assessee and Heinz India, it was observed that each category of support service were provided by different cost centers and assessee was to allocate various cost to different cost centers by adopting suitable factors, but assessee failed to submit such details before any tax authority.
- Hon'ble ITAT held that various cost were recovered from Heinz India without clarity/ breakup of support services which are taxable and the expenses which were claimed as reimbursements by the Assessee. In absence and non-submission of any documents in support of allocation, the claim of Assessee is unacceptable.



**Nangia Andersen LLP's take**

For a claim of reimbursement to survive as exempt income, the taxpayers shall have a proper basis of allocation supported by robust documentation. Mere an agreement containing terms that no mark-up shall be applied to the cost of support services would not hold the ground before the courts.

# 02
# Indirect Tax

## Judgements & Rulings

### Tribunal held that marketing, administrative and technical support services provided to Parent Company do not qualify as intermediary services

**Brief Facts**

- Thyssenkrupp System Engineering India Pvt. Ltd. ('Appellant') is a wholly-owned subsidiary of M/s ThyssenKrupp System Engineering GmbH, Germany ('Parent Company'), and is engaged in provision of business and marketing-related support services to its Parent Company.
- In relation to services provided by Appellant to its Parent Company, Service Tax Department initiated an inquiry and concluded in its adjudication order that the Appellant acted as an intermediary between the parent company and its customers in India and proposed levy of service tax on business and market-related support services treating Appellant as intermediary.

  Consequently, Appellant filed an appeal, which was rejected by the learned Commissioner (Appeals) in its order.
- Aggrieved by the decision of Commissioner (Appeals), the Appellant preferred the present appeal before the Tribunal.

**Observations**

- Tribunal observed that the agreement between the Appellant and its foreign Parent Company specifies Appellant's role to handle tasks like customer relations, customer visits, gathering market information about products, and identifying new business opportunities on behalf of the Parent Company in India. Appellant's scope of work is confined to promoting the parent company in India by way of providing marketing, administrative, technical support services;

- Tribunal further noted that the Appellant's responsibilities are focused on promoting the parent company in India and Appellant did not assist the Parent Company in facilitating the exchange of goods or services and accordingly Appellant's services do not qualify as intermediary services (since they lack the necessary prerequisites);
- Tribunal while deciding the matter also relied on **Circular No. 159/15/2021-GST** dated 20 September 2021 which clarifies that to classify as an intermediary service, certain conditions must be met, including the involvement of at least three parties, the presence of two distinct supplies (main and ancillary), and the intermediary service provider having the character of an agent, broker, or similar entity. In the instant case, the Appellant does not meet the criteria for intermediary services, as it does not act as a facilitator between the parent company and its customers in India regarding the supply of goods or provision of services.

**Decision**

- Transaction do not qualify as intermediary services and accordingly considered as the export of services.
- Impugned order is set aside and appeal allowed in favour of the Appellant.

[M/s Thyssenkrupp System Engineering India Pvt. Ltd. - TS-563-CESTAT-2023-ST, Dated 11 May, 2023]

## GST Clarifications and Updates

### Notifies Central Goods and Services Tax ('CGST') (Fourth Amendment) Rules 2017 (effective from 26 October 2023)

- CBIC has notified CGST (Fourth Amendment) Rules 2017 w.e.f. 26 October 2023;
- The said notification inter alia brings out the following changes:
  - Existing Rule 28 is renumbered as sub-rule (1) and sub-rule (2) has been inserted which states that where supplier supplies services by way of corporate guarantee to any bank or financial institution on behalf of a recipient and both parties are related person, then value of such services shall be deemed to be 1% of guaranteed amount offered or actual consideration, whichever is higher;
  - Amendment in Rule 159(2) for release of property attached provisionally by the Commissioner. Now, any property provisionally attached by the Commissioner shall be released by him after he passes a writing order instructing to do so or on expiry of 1 year from the date of such provisional attachment, whichever is earlier;
  - Form GST REG-01 has been amended to include registration by One Person Company;
  - Form GST REG-08: Order of Cancellation of Registration as Tax Deductor at source (TDS) or Tax Collector at source (TCS) has been changed completely.

[Notification No. 52/2023-Central Tax, dated 26 October 2023]

## Additional condition inserted for the supplier supplying passenger transport services and charges outward GST @2.5%.

An additional condition has been inserted for a supplier of passenger transport services which states that If the input services received from vendor are in the same line of business and such vendor charges CGST at a rate higher than 2.5%, then credit of input tax charged on such input service shall not be taken in excess of the tax paid or payable @ 2.5%.

## Additional condition inserted for supplier providing the motor vehicle on rent for carrying passengers where the cost of fuel is included in the consideration charged from the service recipient.

An additional condition has been inserted for a supplier providing motor vehicle on rent for carrying passengers (where cost of fuel is included in consideration charged from service recipient) that if the input services received from vendor are in the same line of business and such vendor charges CGST at a rate higher than 2.5%, then credit of input tax charged on such input service shall not be taken in excess of the tax paid or payable @ 2.5%.

[Notification No. 12/2023-Central Tax (Rate), dated 19 October 2023]

## Exempts following supplies from levy of GST (effective from 20 October 2023)

- CBIC has exempted the following services provided to a Governmental Authority by way of:
  - Water supply;
  - Public health;
  - Sanitation conservancy;
  - Solid waste management; and
  - Slum improvement and upgradation.

- Services provided by Indian Railways are no longer exempt from GST:
  - Services to a business entity which has not exceeded the threshold limit for registration under CGST Act in previous financial year;
  - Services provided to another Central government, State government, Union Territory or local authority;
  - Services supplied where consideration for such services does not exceed INR 5,000.

[Notification No. 13/2023-Central Tax (Rate), dated 19 October 2023]

## Applicability of reverse charge mechanism on services supplied by government (effective from 20 October 2023)

- Services supplied by the Central Government, State Government, Union territory or local authority to a business entity by the way of services by the Ministry of Railways (Indian Railways) are excluded from the applicability of reverse charge mechanism;
- Services supplied by The Ministry of Railways (Indian Railways) by way of renting of immovable property to a person registered under the CGST Act are no longer taxable under reverse charge mechanism.

[Notification No. 14/2023-Central Tax (Rate), dated 19 October 2023]

## Notifies the category of supply not eligible for refund of unutilized ITC under CGST Act (effective from 20 October 2023)

The refund of unutilised ITC shall not be allowed under CGST Act, in case of supply of services by way of construction of a complex, building or a part thereof, intended for sale to a buyer, wholly or partly, where the amount charged from the recipient of service includes the value of land or undivided share of land, except where the entire consideration has been received after issuance of completion certificate by the competent authority or after its first occupation, whichever is earlier.

[Notification No. 15/2023-Central Tax (Rate), dated 19 October 2023]

## Notifies the category of services on which tax shall be paid by e-commerce operator on intra-state supplies (effective from 20 October 2023)

CBIC has notified that on services supplied by the way of transportation of passengers by an omnibus, tax is to be paid by the e-commerce operator except where the person supplying such service through electronic commerce operator is a company.

[Notification No. 16/2023-Central Tax (Rate), dated 19 October 2023]

## Notifies applicability of reverse charge mechanism on supply of certain goods (effective from 20 October 2023)

Supply of used vehicles, seized and confiscated goods, old and used goods, waste and scrap by Central Government, State Government, Union territory or a local authority are taxable under reverse charge mechanism (except if such supplies are rendered by Indian Railways).

[Notification No. 19/2023-Central Tax (Rate), dated 19 October 2023]

## Notifies supplies and class of persons eligible for refund under IGST route (effective from 1 October 2023)

CBIC has notified that all goods and services (except those specified in the notification) can be exported on payment of IGST and such supplier is eligible for refund of IGST so paid;

Further, all suppliers supplying goods or services (except those specified) to a Developer or a unit in SEZ undertaking authorised operations on payment of IGST can claim refund of IGST so paid.

[Notification No. 05/2023-Integrated Tax, dated 26 October 2023]

## Clarification W.R.T. remittances received by Indian exporters in INR in their Special Rupee Vostro Account shall be treated as consideration to qualify as 'export of services'

- For any service transaction to qualify as export of services, one of the main condition is that 'payment has been received by supplier (i.e. Indian exporter) in convertible foreign exchange or in INR wherever permitted by RBI';
- For the words 'wherever permitted by RBI', dispute regarding whether export proceeds received in Special Rupee Vostro Account would qualify as consideration for export of services remained;
- Now, CBIC has clarified that payment condition would be considered as fulfilled when Indian exporters, undertaking export of services, shall be paid the export proceeds in INR from the balances in the designated Special Rupee Vostro Accounts of the correspondent bank(s) of the partner country, opened by the Authorised Dealer Banks (subject to conditions of Foreign Trade Policy 2023, scope of RBI circulars and without prejudice to permissions required under any other law);
- The above clarification has been provided by examination of RBI circular **'A.P. (DIR Series) Circular No. 10 dated 11th July 2022 regarding International Trade Settlement in INR'** and para 2.52(d) of 'General provisions regarding import and exports' of Foreign Trade Policy 2023.

[Circular No. 202/14/2023-GST, dated 27 October 2023]

## Clarification W.R.T. place of supply in different cases

- Place of supply in case of supply of service of transportation of goods (including through mail and courier) in case the location of supplier of services or location of recipient of services is outside India

  - CBIC has clarified the position regarding place of supply in case of supply of service of transportation of goods (including through mail and courier) where the supplier or the recipient is located outside India;
  - Earlier as per the IGST Act, place of supply of transport of goods (other than by mail or courier) was ultimate destination of such goods (section 13(9) of IGST Act). But this provision was deleted via a notification which created ambiguity regarding place of supply of such services;
  - Now, CBIC has clarified that place of supply of goods transport services (other than through mail and courier) will be determined as per section 13(2) of the IGST Act by default;
  - Hence, if the location of recipient is available, the place of supply will be location of recipient and if location of recipient is not available, place of supply of such services shall be location of supplier of services;
  - For goods transported through mail and courier, it will continue to be governed by section 13(2) of the IGST Act.

# 03

## Transfer Pricing

## ITAT: upholds parties as deemed AE; Determines ALP of NCD interest and issue expenses.

**Outcome:** In favour of both, partially

**Category:** Associated Enterprise

**Facts of the Case**

- Neovantage Innovation Park Private Limited ("the assessee") is engaged in the business of developing, building and leasing of life sciences and bio-technology parks in India and also provides managerial services.
- During the year under consideration, M/s DB International (Asia) Limited ("DB Asia") had made an investment in the assessee company in the form of Rupee denominated Non-Convertible Debentures ("NCD"), which is more than 51% of the total book value of assets of the assessee. Further, the assessee has booked Interest on the NCD at the rate of 13.13% *(including grossing up cost arising on account of TDS).*
- During the course of assessment proceedings, the Ld. AO/Hon'ble DRP made an upward transfer pricing adjustment of INR 2.86 crore (Approx.) by determining the Arm's length Price ("ALP") of the interest on NCD paid to DB Asia by considering arm's length rate at SBI base rate plus 50 basis points. Further, the Ld. AO/Hon'ble DRP also made an upward transfer pricing adjustment of INR 3.37 crores by determining the ALP of payment of debenture issue expenses by the Assessee to Deutsche Bank AG (Mumbai Branch) at 0.5% of face value of NCDs.
- Aggrieved, the taxpayer filed an appeal before the Income Tax Appellate Tribunal ("ITAT"/ "the Tribunal").

## ITAT Ruling

The Hon'ble ITAT made observations against each contention of the assessee as hereunder:

- With respect to assessee's contention that when the negotiations and transactions were transacted between the assessee and DB Asia, they were not AEs and accordingly the transaction under consideration does not fall under the purview of Indian Transfer Pricing Regulations, **the Hon'ble ITAT** held that **"Section 92A(2) provides that two enterprises shall be deemed to be associated enterprises if at any time during the previous year any condition mentioned in sub-clause (2) is fulfilled".** Accordingly, ITAT opines that "it makes no difference whether the condition of 51% of the book value of total assets is not fulfilled prior to advancing the loan or subsequent thereto", and based thereon rejected the assessee's contention.
- Regarding the assessee's contention that the AO/ DRP has erred in rejecting the TP study of the assessee on grounds of applying incorrect credit rating filter, and tenor of the NCDs of comparables selected by the assessee, **the Hon'ble ITAT** relied on the judgement in the case of "**DCIT v JSW Energy Ltd 180 ITD 598 (Mum)"** and held that credit rating and terms of the NCD are an important factor for quantifying the spread and benchmarking the interest on loan from AEs.
- Regarding, assessee's contention of arm's length interest rate of 13.13% by relying on safe Harbour Rule, Sec. 194LD of the Act and RBI Circulars on Rupee Denominated Loans, **ITAT refers to Safe Harbour Rule and Sec.194LD and holds 12.275% interest rate (SBI base rate+300 bps) as appropriate ALP for purpose of benchmarking the interest paid by assessee on NCD to DB Asia.**
- Further, in respect of the payment of debenture issue expenses by assessee to Deutsche Bank AG, **ITAT held that Deutsche Bank AG (Mumbai branch) is a deemed AE of the assessee as its head office – Deutsche Bank AG – is also a holding company of DB Asia** and restricts ALP determination of the payment of debenture issue expense at 1.5% as against 2.5% paid by the assessee and DRP's restriction to 0.5% on estimate basis stating **"no person can earn the profit from himself".**

## Nangia's Take-

- With increased focus on financial transactions from Transfer Pricing (TP) viewpoint, there has been an increased scrutiny by Indian tax authorities in this context.
- **The present ruling puts light on a peculiar question that *"when two enterprises shall be deemed to be associated enterprises"* wherein Hon'ble ITAT clearly held that two enterprises shall be deemed to be associated enterprises if at any time during the previous year any condition mentioned in sub-clause (2) of Section 92A is fulfilled.** Also, present ruling discusses the arm's length pricing for interest on NCD and in this regard, it clearly highlights the fact that credit rating, tenor and reference rates available in safe harbour rules 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 analyse international transactions in detail to determine whether the same falls under the purview of deemed associated enterprises and thus requires determination of arm's length pricing as per Indian transfer pricing regulations.** Also, the taxpayers are recommended follow a wholistic approach of considering various factors like nature of security, credit rating of taxpayer, data availability on public domain etc., reference rates as given in safe harbour rules, while benchmarking such securities.

*[Source: Neovantage Innovation Park Private Limited [TS-576-ITAT-2023(HYD)-TP]]*

# 04

## Regulatory

# Updates under companies act, 2013

## Companies (incorporation) third amendment rules, 2023

The Ministry of Corporate Affairs ('MCA') issued a notification on 20 October, 2023 issued the Companies (Incorporation) Third Amendment Rules, 2023 ('Incorporation Amendment Rules'), amending the Companies (Incorporation) Rules, 2014 with effect from 21 October, 2023.

Highlights of the Amendment Rules are as follows:

- Regional Director shall not levy discretionary cost upon shifting of the registered office of a company from one state or union territory to another.
- The Regional Director is permitted to allow the shifting of a registered office from one state or union territory to another in matters pertaining to the acquisition of a company by a new management subject to the following conditions:
  - Such acquisition is carried out through a resolution plan approved under section 31 of the Insolvency and Bankruptcy Code, 2016;
  - There are no pending appeals against the resolution plan in any Court or Tribunal, and no inquiries, inspections, or investigations have been initiated after the approval of the resolution plan;

## Integration of MCA portal with the national single window system (NSWS)

MCA vide announcement dated 23rd October, 2023, notified the stakeholders about integration of the MCA portal with the NSWS, for the incorporation of Companies and Limited Liability Partnerships. This integration enables stakeholders to access incorporation services through the NSWS Portal as well.

## Designation of designated person pursuant to companies (management and administration) second amendment rules, 2023

On the 27th of October, 2023, MCA issued the Companies (Management and Administration) Second Amendment Rules, 2023 ('Amendment Rules') which have been implemented with immediate effect. These Amendment Rules modifies Rule 9 of the Companies (Management and Administration) Rules, 2014. The highlights of the Amendment Rules are as follows:

These Amendment Rules requires every company to designate a person who shall be responsible for furnishing, and extending co-operation for providing, information to the Registrar or any other authorised officer with respect to beneficial interest in shares of the company. For this purpose, a company may appoint:

- a Company Secretary, if there is a requirement of appointment of such Company Secretary under the Act and the rules made thereunder; or
- a Key Managerial Personnel, other than the Company Secretary; or
- every Director, if there is no company secretary or key managerial personnel.

Further, if no such person is designated, the deeming provision of Rule 9 sub rule 6 shall apply wherein again Company Secretary; or Managing Director or Manager, in case a Company Secretary has not been appointed or every director, if there is no Company Secretary or a Managing Director or Manager shall be deemed to be designated person.

The appointment of the designated person is to be disclosed in the Annual Return filed by the company and any change thereof is to be reported to the MCA.

# Mandatory dematrialisation of securities pursuant to companies (prospectus and allotment of securities) second amendment rules, 2023

MCA vide notification dated 27th October 2023 issued the Companies (Prospectus and Allotment of Securities) Second Amendment Rules, 2023 ('Amendment Rules'), which have come into immediate effect. The Amendment Rules leads to insertion of Rule 9B in the Companies (Prospectus and Allotment of Securities) Rules, 2014 ('PAS Rules').

Pursuant to the Amendment Rules, every private company, other than a small company ('Concerned Private Company') shall issue the securities only in dematerialised form and facilitate dematerialisation of all its securities.

Further, every Concerned Private Company making any offer for issue of any securities/buyback of securities/issue of bonus shares/rights offer, after the date when it is required to comply with this rule, shall ensure that before making such offer, entire holding of securities of its promoters, directors, key managerial personnel has been dematerialised.

Further, every holder of securities of Concerned Private Company who intends to transfer such securities or subscribes to any securities of the concerned private company, whether by way of private placement/bonus issue/ rights offer, on or after the date when the company is required to comply with the Amendment Rule, shall ensure that all his securities are held in dematerialised form before such transfer or subscription.

For this purpose, the private company, which, as of the last day of a financial year ending on or after March 31, 2023, does not qualify as a small company according to the audited financial statements for that financial year, must ensure compliance with the aforementioned provisions within eighteen months of the conclusion of that financial year, i.e., by September 30, 2024.

It is noteworthy that going forward, every Concerned Private Company is mandated to submit Form PAS 6 to the Registrar within sixty days from the conclusion of each half-year duly certified by a company secretary in practice or chartered accountant in practice.

## Updates under Reserve Bank of India (RBI)

### Extension of prompt corrective action framework for non-banking financial companies to government NBFCS

The RBI, *vide* notification dated 10th October, 2023 extended the Prompt Corrective Action Framework to Government NBFCs (except those in Base Layer) with effect from 1st October, 2024.

### Notification of master direction – Reserve Bank of India (non-banking financial company – scale based regulation) directions, 2023 (SBR directions)

The RBI, vide notification dated 19th October, 2023 notified the SBR Directions. The much-awaited Master Directions come after two years of notification of the Scale-Based criteria and almost one year after the application of the same. Scale-Based Regulations were introduced by the RBI to classify NBFCs based on their risk profile in order to focus on high risk systemically significant entities.

The scale based regulatory framework repeals the erstwhile criteria of classification of NBFCs based on their asset size. The entities are classified under the following categories:

- Base Layer NBFCs;
- Middle Layer NBFCs;
- Upper Layer NBFCs;
- Top Layer NBFCs;

## Regulation of payment aggregator – cross border under the payment and settlement system

Keeping in view the developments that have taken place in the area of cross-border payments, the RBI vide circular dated 31st October, 2023, brought in payment aggregators facilitating cross border transactions, within the ambit of payment and settlement framework put in place by the RBI. Such entities shall be treated as Payment Aggregator-Cross Border (PA-CB).

The highlights of the notification are as follows:

- AD Category-I banks do not require separate approval from the RBI for undertaking PA-CB activity;
- Non-banks which provide PA-CB services as on the date of the circular, shall apply to the RBI for authorisation by April 30, 2024. Authorisation for PA-CB activity may be sought for export only or import only or both, i.e. export and import.
- Entities currently carrying out PA-CB activity are required to comply with the circular within 3 months from the date of the circular;
- A single authorisation will be required by a non-bank to undertake PA and PA-CB activity;
- All non-bank PAs are also required to seek registration with the FIU-IND prior to application to the RBI;
- PA-CBs undertaking the aforesaid shall comply with the following minimum net worth requirements:
  - Non-banks providing PA-CB services as on the date of this circular –
    - minimum networth of ₹15 crore at the time of submitting application to the RBI for authorisation;
    - minimum networth of ₹25 crore by March 31, 2026.
  - New non-bank PA-CBs (i.e. entities which have not commenced operations before the date of this circular)-
    - minimum networth of ₹15 crore at the time of submitting application to the RBI for authorisation;
    - minimum networth of ₹25 crore by end of the third financial year of grant of authorisation.

- All existing non-bank PA-CBs which are not able to comply with the networth requirement or do not apply for authorisation within the stipulated time frame, shall wind-up PA-CB activity by July 31, 2024.

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

### Amendment in the ambit of beneficial owners pursuat to amendment to the guidelines on anti-money laundering standards and combating the financing of terrorism /obligations of securities market intermediaries under the prevention of money-laundering act, 2002 and rules framed there under.

Following amendment in the Prevention of Money Laundering (Maintenance of Records) Rules in September. The SEBI vide circular dated 13th October, 2023 has revised guidelines related to anti-money laundering standards. Now, partners owning a 10 percent stake in a firm are considered beneficial owners, reduced from the previous requirement of 15 percent.

In the case of trusts, the reporting entity must ensure that trustees disclose their status when establishing an account-based relationship or conducting specified transactions. These changes reflect the government's recent efforts to strengthen various anti-money laundering provisions in anticipation of an assessment by the global watchdog, the Financial Action Task Force.

## Issue of master circular on KYC norms for securities market

The SEBI has released a Master Circular dated 12th October, 2023 on Know Your Client norms for the securities market.

The circular incorporates specific changes to align with the Prevention of Money Laundering (Maintenance of Records) Rules, 2005, and the Securities and Exchange Board of India (KYC Registration Agency) Regulations, 2011.

## Amendment to LODR regulations W.R.T. Market rumours verification by companies

SEBI vide notification dated 9th October, 2023 notified Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Fifth Amendment) Regulations, 2023, making amendments to Regulation 30, sub-regulation (11) of the LODR Regulations concerning the verification of market rumours by listed entities.

Pursuant to this Amendment, for top 250 listed entities, the provisions of the sub-regulation shall be applicable with effect from the date specified by the SEBI. Prior to the Amendment, the provisions for top 250 listed entities were applicable with effect from 1st April, 2024.

## Updates under competition commission of India ('CCI')

### CCI brings draft leniency plus rules for cartels, invites comments

Recently, the Competition (Amendment) Act, 2023 introduced new provisions: 'lesser penalty plus' and the withdrawal of applications related to 'lesser penalty' or 'lesser penalty plus' under Section 46 of the Act.

The 'lesser penalty plus' mechanism incentivizes an applicant previously applying for a Lesser Penalty in the case of the first cartel to provide complete and crucial disclosures about a second cartel unknown to the CCI. The benefit for the applicant includes an additional reduction in penalty for the first cartel, on top of the penalty reduction based on priority status for the first cartel. This benefit is subject to meeting specified terms and conditions, in addition to the penalty reduction specified in the regulations for the second cartel.

Given the substantial changes introduced by the Amendment Act, the CCI is proposing the Competition Commission of India (Lesser Penalty) Regulations, 2023 (Draft CCI (Lesser Penalty) Regulations 2023). These regulations will replace the existing Competition Commission of India (Lesser Penalty) Regulations, 2009. The Draft CCI (Lesser Penalty) Regulations 2023 cover various aspects, including the format and content of applications for lesser penalty and lesser penalty plus, the procedure for granting these benefits, and the process for withdrawing applications for lesser penalty and lesser penalty plus.

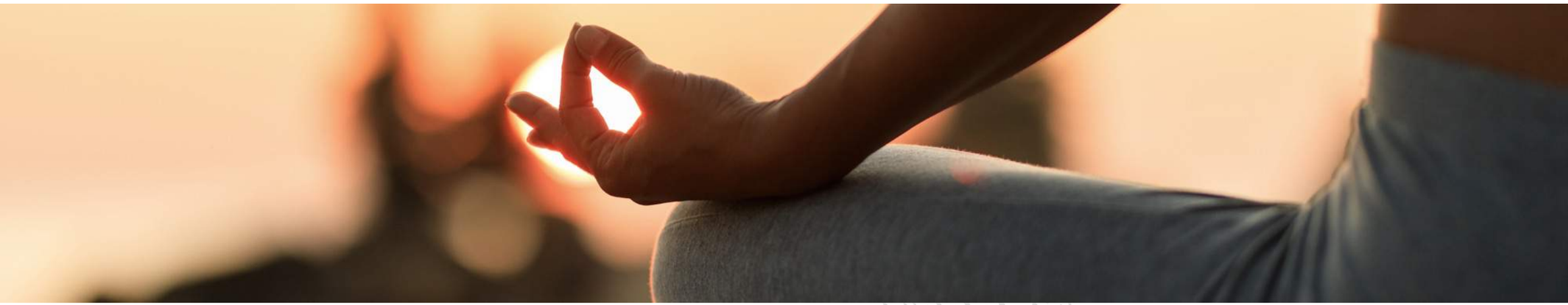
Stakeholders are invited to submit their written comments on the Draft CCI (Lesser Penalty) Regulations 2023 within 21 days, starting from 16th October, 2023, until 6th November, 2023.

## CCI approves proposed combination involving re-balancing of existing cross-shareholdings between RENAULT and NISSAN

CCI has given approval to a proposed arrangement involving the re-adjustment of existing cross-shareholdings between Renault and Nissan.

This proposed arrangement primarily concerns the re-adjustment of the existing cross-shareholdings between Renault S.A. (Renault) and Nissan Motor Co. Ltd. (Nissan) (Rebalancing), as well as certain alterations to the shareholding of their joint ventures in India: Renault Nissan Automotive India Private Limited (RNAIPL) and Renault Nissan Technology & Business Centre India Private Limited (RNTBCI).

As part of this re-adjustment, Nissan, represented by Nissan Finance Co. Ltd. (NFC), will maintain its 15% shareholding in Renault. Renault will transfer 28.4% of its Nissan shares to a trust estate managed by a trustee governed by French law. These entrusted shares will be voted neutrally, with limited exceptions. Renault will continue to enjoy full economic rights from these entrusted shares until they are sold. Consequently, both Renault and Nissan will have a cross-shareholding of 15% of the total issued share capital and voting rights in each other.



## Updates under food safety and standards of India (FSSAI)

### FSSAI Clarifies addition of protein binders not permitted in milk products

The FSSAI on 5th October, 2023 clarified that the use of protein binders in milk and its derivatives is not allowed. Only additives specified for these products in Appendix A of the Food Safety and Standards (Food Products Standards and Food Additives) Regulation, 2011, can be employed.

### Advisory issued by FSSAI In relation to import of goods meant to re-export

The FSSAI has vide advisory dated 16th October, 2023 clarified that the food items imported by the manufacturers or processors for their captive use or production of value added products for 100% Export/Re-export need not seek clearance from FSSAI and are just required to make a declaration to the Customs stating that the imported food are not meant for domestic consumption. The said declaration is to be made in Form 8 as specified in the Food Safety and Standards (Import) Regulations, 2017 at the time of filing of Bill of Entry in ICEGATE.

In case, the BOE is transmitted by ICEGATE to FSSAI's Food Import Clearance System, the concerned FSSAI may issue "Not in Scope" Certificate following the verification of the necessary documents.

## Updates under production linked incentive scheme ('PLI')

### Centre extends date for inviting fresh applications under PLI scheme for textiles

Due to requests from industry stakeholders, the Ministry of Textiles had previously reopened the PLI Portal until 31st August, 2023, to accept new applications from companies interested in the PLI scheme for MMF Apparel, MMF Fabrics, and Technical Textile products. Now, the Ministry has decided to further extend the deadline for submitting fresh applications under the scheme until 31st December, 2023.

## Other regulatory updates

### Telecom regulatory authority of India (TRAI)

### Extension of further time for receiving comments on "consultation paper on 'review of quality-of-service standards for access services (wireless and wireline) and broadband (wireless and wireline) services

The TRAI released a Consultation Paper titled 'Review of Quality-of-Service Standards for Access Services (Wireless and Wireline) and Broadband (Wireless and Wireline) Services' on 18th August, 2023. Initially, stakeholders were requested to provide written comments by 11th October, 2023, and any counter comments by 20th October, 2023.

However, in response to stakeholder requests for an extension due to the comprehensive and detailed nature of the paper, the deadline for submitting written comments has been further extended to 22nd November, 2023, and counter comments can now be submitted until 6th December, 2023.

## Orders/judgements

### Registrar of companies (ROC)

### Order of penalty for the violation of section 203 of the companies act, 2013

ROC, Mumbai has passed an order dated 16th October, 2023 for the violation of Section 203 of Companies Act, 2013 in the matter of M/s Misys Trade and Risk Management India Private Limited.

As per section 203, every Company belonging to such class or classes of Companies shall have the whole time key managerial personnel.

Herein, the Key Managerial Personnel are: Managing Director, or Chief Executive Officer and in their absence, a Whole-Time Director; Company Secretary; Chief Financial Officer. Further, if the chair of Key Managerial Personnel is vacated, it shall be filed by the Board within a period of 6 months from the date of vacancy.

Further Section 203 of Companies Act, 2013 states that if a Company makes a defaults in compliance of the section, the Company shall be liable to a penalty of Rs.5,00,000/- and every officer in default shall be liable to a penalty of Rs. 50,000/-.

In the given situation, M/s Misys Trade and Risk Management India Private Limited failed to appoint whole time company secretary w.e.f 6th July, 2012, however it met this compliance on 23rd April, 2019.

The representative of the Company made a plea that though the Company is under the default, the Companies (Amendment) Ordinance, 2019 came into effect on 2nd November, 2018 thus making the period of default from 6th July, 2012 to 1st November, 2018 compoundable in nature.

ROC, Mumbai agreed on the plea that period of default from 6th July,, 2012 to 1st November, 2018 is compoundable and is not taken up. Accordingly, the ROC levied the below mentioned penalty under Section 203 for the period 2nd November, 2018 to 22nd April, 2019:

| S. No. | Name of the Defaulters | No. Days Default | First default penalty | Continuing Default Penalty | Total Penalty | Maximum Penalty |
|---|---|---|---|---|---|---|
| **1.** | Misys Trade and Risk Management Private Limited | 171 | 5,00,000 | 171*1000 | 6,71,000 | 6,71,000 |
| **2.** | Manikandan Ganesan | 171 | 50,000 | 171*1000 | 2,21,000 | 2,21,000 |
| **3.** | Vinod Patrick Noronha | 160 | 50,000 | 160*1000 | 2,10,000 | 2,21,000 |
| **4.** | Mehjabeen Esmail Poonawala | 171 | 50,000 | 171*1000 | 2,21,000 | 2,21,000 |
| | **Total** | | | | | **13,23,000** |

## Order of penalty for the violation of Section 10A of the Companies Act, 2013

ROC, Chandigarh has passed order dated 31st October, 2023 for the violation of Section 10A of Companies Act, 2013 in the matter of M/s Pearce Services Global Private Limited.

As per section 10A a Company incorporated after the commencement of the Companies (Amendment) Act, 2019 and having a share capital shall not commence any business or exercise any borrowing powers unless a declaration through its Director is filed within 180 days of the incorporation stating that every subscriber to memorandum has duly paid the share value agreed to be taken up by them and the Company has filed with the Registrar a verification of its registered office as provided in Sub Section (2) of Section 12.

Further Section 10 (2) of Companies Act, 2013 states that if a Company is in default in complying with this Section, the Company shall be liable to a penalty of Rs.50,000/- and every officer in default shall be liable for the penalty of Rs. 1,000/- for each day till the default continues maximum penalty being Rs. 1,00,000/- .

In the given situation a complaint against M/s Pearce Services Global Private Limited was made specifying that the Company is in non-compliance of various sections of Companies Act, 2013.The complaint also revealed that the Company in question commenced its business even before filing declaration under Section 10A.

M/s. Pearce at first replied that there is no bar on commencing the business prior to filing the said declaration, later on moved ahead to file suo moto application in Form GNL-1 for the adjudication of penalty.

Company justified the default by saying that it was not aware of the law and the default is caused inadvertently and pleaded for the minimum penalty.

ROC, Chandigarh imposed the maximum penalty of Rs. 50,000/- on the Company and Rs. 1,00,000/- each on its 3 officer in default upholding that “ignorance of law is no excuse”.

# 05

# Compliance Calendar

| Due dates | Particulars |
|---|---|
| 7th October2023 | Due date for deposit of Tax deducted/collected for the month of October, 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 October, 2023. |
| 14th November 2023 | Due date for issue of TDS Certificate for tax deducted under section 194-IA in the month of September, 2023. |
| | Due date for issue of TDS Certificate for tax deducted under section 194-IB in the month of September, 2023 |
| | Due date for issue of TDS Certificate for tax deducted under section 194M in the month of September, 2023 |
| | Due date for issue of TDS Certificate for tax deducted under section 194S in the month of September, 2023 (in case of specified person) |

| | |
|---|---|
| 15th November 2023 | Quarterly TDS certificate in respect of tax deducted for payments other than salary for the quarter ending September 30, 2023. |
| 30th November 2023 | Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IA for the month of October, 2023 |
| | Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IB for the month of October, 2023 |
| | Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194M for the month of October, 2023 |
| | Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194S for the month of October, 2023 (in case of specified person) |
| | Due date for furnishing of Return of Income for the assessment year 2023-24 in the case of an Assessee if he/it is required to submit a report under section 92E pertaining to international or specified domestic transaction(s). |
| | Due date of furnishing of Return of Income in Form ITR-7 for the Assessment Year 2023-24 has been extended from October 31, 2023 to November 30, 2023 vide Circular no. 16/2023, dated 18-09-2023. |

| S. No. | Compliance Category | Compliance Description | Frequency | Due Date | Due Date falling in November 2023 |
|---|---|---|---|---|---|
| 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 October 2023- 11th November 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 succeeding month | For Tax Period October 2023- 20th November 2023 |
| 3 | Invoice furnishing facility ('IFF') (QRMP Scheme) | Optional facility to furnish the details of outward supplies under QRMP Scheme | Monthly | 1st day to 13th day of succeeding month | For Tax Period October 2023 – 1 to 13 November 2023 |

| | | | | | |
|---|---|---|---|---|---|
| 4 | Form GST PMT-06 (Monthly payment of tax) | Payment of tax in each of the first two months of the quarter under QRMP Scheme | Monthly | 25th of the succeeding month | For Tax Period October 2023 – 25th November 2023 |
| 5 | Form GSTR-1 (Details of outward supplies) (QRMP | Registered person having aggregate turnover up to INR 5 crores who have opted for QRMP Scheme | Quarterly | 13th day of the subsequent month follow-ing the end of quarter | For the quarter October 2023 to December 2023- 13th January 2023 |
| 6 | Form GSTR-3B (QRMP Scheme) | 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<br><br>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<br><br>Quarterly | 22nd day of the subsequent month following the end of quarter of quarter<br><br>24th day of the subsequent month following the end of quarter | For the quarter October 2023 to December 2023- 22nd January 2023<br><br>For the quarter October 2023 to December 2023- 24th January 2023 |

| | | | | | |
|---|---|---|---|---|---|
| 7 | Form GSTR-6 (Return for Input Service distributor) | Return for input service distributor | Monthly | 13th of the succeeding month | For Tax Period October 2023- 13th November 2023 |
| 8 | Form GSTR-7 (Return for Tax Deducted at Source) | Return filed by individuals who deduct tax at source. | Monthly | 10th of the succeeding month | For Tax Period October 2023- 10th November 2023 |
| 9 | Form GSTR-8 (Statement of Tax collection at source) | Return to be filed by e-commerce operators who are required to collect tax at source under GST. | Monthly | 10th of the succeeding month | For Tax Period October 2023- 10th November 2023 |

| Segment | Particulars | Due dates |
|---|---|---|
| ECB Borrowers | ECB Return (ECB-2) | 7th November, 2023 |
| MGT-7 | Annual Return of the company | Within 60 days from AGM |
| MGT-7 | Reconciliation of Share Capital Audit Report to be filed after 60 days from the end of each half-year by unlisted public companies. | 29th November, 2023 |

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