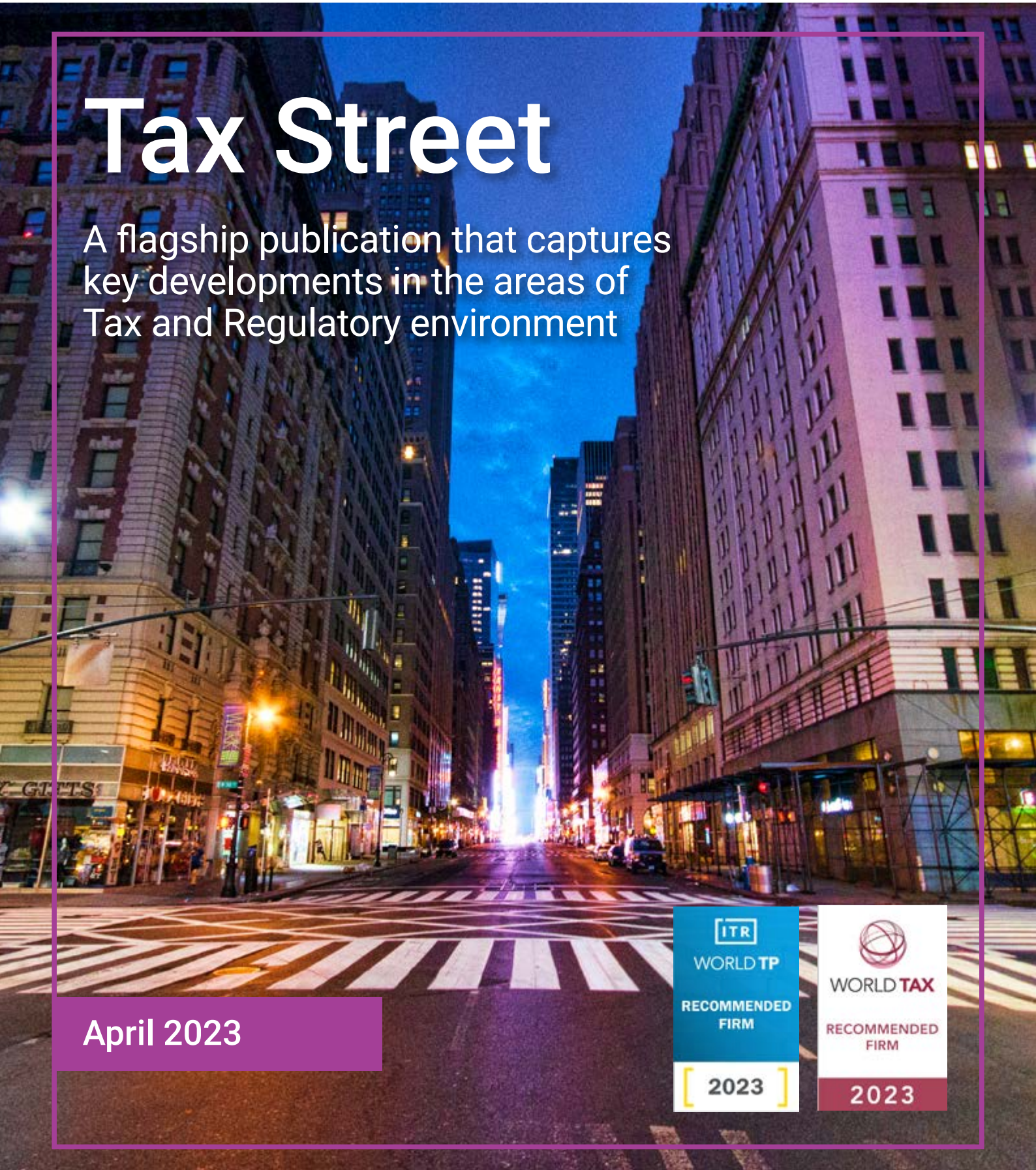
Tax Street

A flagship publication that captures key developments in the areas of Tax and Regulatory environment



April 2023

ITR WORLD TP RECOMMENDED FIRM 2023

WORLD TAX RECOMMENDED FIRM 2023

Introduction

Tax Street

We are pleased to present the latest edition of Tax Street – our newsletter that covers all the key developments and updates in the realm of taxation in India and across the globe for the month of April 2023.

- The **'Focus Point'** covers an overview of the regulations relating to the FTC claim in India and the related key tax issues.
- Under the **'From the Judiciary'** section, we provide in brief, the key rulings on important cases, and our take on the same.
- Our **'Tax Talk'** provides key updates on the important tax-related news from India and across the globe.
- Under **'Compliance Calendar'**, we list down the important due dates with regard to direct tax, transfer pricing and indirect tax in the month.

We hope you find our newsletter useful and we look forward to your feedback.
You can write to us at **taxstreet@nexdigm.com**. We would be happy to hear your thoughts on what more can we include in our newsletter and incorporate your feedback in our future editions.

Warm regards,
The Nexdigm Team

Focus Point

Foreign Tax Credit - Overview and related issues

Foreign Tax Credit (FTC) is allowed to a resident of India in respect of the tax paid by him in a source country or specified territory outside India either by way of deduction or otherwise. The overview of the regulations relating to the claim of FTC in India and the related key tax issues are as under:

- FTC is allowed in respect of tax paid outside India irrespective of whether India has entered into a Double Taxation Avoidance Agreement (DTAA) with such country or specified territories or not. FTC is allowed in the year in which the corresponding income is offered to tax in India.
- FTC is restricted to the amount of tax payable in India on the corresponding income. FTC can be claimed only against the tax, surcharge and cess payable on the corresponding income in India.
- For claiming the FTC, the taxpayer is required to file the prescribed form online - Form 67 by the end of the relevant assessment year in which the corresponding income is offered to tax.

Over the years, there have been various issues relating to the eligibility to claim FTC, the amount that can be claimed as a credit, relating to filing of Form 67, which we have covered in the ensuing paragraphs.

Relief against State Taxes

In certain countries (for example, the USA), income taxes are levied by the State as well as the Central Government. The eligibility to claim FTC for State taxes is a subject matter of dispute.

In the case of Wipro Ltd[1], the Karnataka High Court has held that where DTAA does not cover taxes like state taxes payable on income, FTC can be availed under Section 91 of the ITA. In the case of Tata Sons Ltd[2], the Mumbai Tribunal has held that Section 91 of ITA does not discriminate between State and Federal taxes and, in effect, provides for both types of Income-taxes to be considered for the purpose of tax credits against Indian Income-tax liability.

Hence, the taxpayer is, in principle, entitled to tax credits in respect of the State as well as Central tax payable outside India.

Allowability of FTC where income is exempt from tax in India

Where an income is subject to profit-linked deduction and no tax is payable on the same in India, a question arises whether the taxpayer shall be eligible to claim FTC in respect of such income. Here the language of the DTAA Article on the elimination of double taxation is very important.

In this context, the decision of the Karnataka High Court in the case of Wipro Ltd (supra) is relevant. The taxpayer had claimed a deduction under Section 10A of the ITA and claimed FTC for the taxes paid in USA and Canada. The FTC claim was disputed as to whether the taxpayer is eligible to claim FTC where no tax is paid on the income in India. The Hon'ble High Court relying on the double tax treaty between India and USA, held that the income derived by an Indian resident, which is taxable in the USA (directly or by deductions), would get FTC in India for the entire amount of income tax paid in the USA. The Revenue's appeal against the Karnataka High Court's ruling in Wipro (Supra) has been granted a Special Leave for Appeal[3], leaving the decision of the High Court to be adjudicated upon by the Supreme Court.

It will be interesting to see how the Apex Court interprets India-USA DTAA.

1. [2015] 62 taxmann.com 26, [2016] 382 ITR 179
2. [2011] 10 taxmann.com 87 (Mum.)
3. [2018] 95 taxmann.com 107 (SC)

Whether FTC can be claimed as a business deduction

Section 40(a)(ii) of the ITA states that any sum paid on account of any rate or tax levied on the profits or gains of any business is not allowed as a deduction. Explanation to Section 40(a)(ii) of the ITA clarifies that any sum paid on account of any rate or tax levied includes any sum eligible for relief of tax under Section 90 of the ITA or, as the case under Section 91 of the ITA. In view of the above, it appears that the taxes paid abroad are not eligible for deduction under Section 40(a)(ii) of ITA, where relief under Section 90 or 91 is claimed.

In the case of Reliance Infrastructure v CIT[4], the Hon'ble Bombay HC held that where the taxpayer is not entitled to claim FTC, it is entitled to claim a deduction of such expense while computing its income from business and profession. Similarly, in the case of the Bank of India[5], the Mumbai Tribunal denied a refund of foreign taxes but allowed it as a business expense deduction in the absence of Indian tax liability on foreign incomes.

Filing of Form 67

For claiming FTC, the taxpayer is required to file online Form 67. The Hon'ble Bangalore Tribunal in the case of Hertz Software India (P.) Ltd[6] and Mumbai Tribunal, in the case of Sonakshi Sinha[7] held that FTC cannot be denied merely on delay in filing Form 67. The Tribunals held that submission of Form No. 67 before the filing of returns is not mandatory, but a directory requirement and there is no condition prescribed in DTAA that the FTC can be disallowed for non-compliance of any procedural provision.

Based on the above judicial decisions, FTC should be available even if there is a delay in filing Form 67.

The Centralized Processing Center (CPC) processes the tax return and where there is a delay in filing Form 67, the FTC is denied. The taxpayer has the option to file an application for rectification or file an appeal against the CPC order. Given the litigation costs, it is recommended that the taxpayer files Form 67 within the prescribed timelines.

Concluding Remarks

The taxpayers need to be vigilant while claiming FTC and ensure that the language of the Treaty is examined carefully, where DTAA covers FTC. In case of no DTAA, the FTC claim may be considered as per the provisions of Section 91 of the ITA. On the amount of FTC to be claimed, the treaty wordings would be relevant and it may be possible to claim credit for full taxes paid outside India. Reliance in this regard may be placed on the Karnataka High Court decision in the case of Wipro (supra). However, it may be noted that the tax department has preferred an appeal against the Karnataka High Court decision in the Supreme Court. It would be interesting to see the verdict of the Apex Court in the case of Wipro (supra), especially after the introduction of Rule 128 of the Income tax Rules, 1962. Furthermore, where FTC is not available, there is a possibility to claim the foreign taxes as a deduction. However, such a claim shall not be free from litigation. While FTC should not be denied merely because Form 67 has been filed late, given the litigation costs, it is recommended that the taxpayer files Form 67 within the prescribed timelines.

Webinars and Events

USIBC Webinar on Foreign Trade Policy 2023
12 May 2023
Saket Patawari

DMCC Made For Trade Live - Mumbai in Focus
12 May 2023
Maulik Doshi

Impact of the Finance Bill 2023 on French Companies in India
10 May 2023
Maulik Doshi

Impact on foreign companies - recent change in withholding tax rate
5 April 2023
Maulik Doshi, Nishit Parikh

4. 390 ITR 271
5. ITA 869/Mum/2018
6. [2022] 139 taxmann.com 448
7. [2022] 197 ITD 263

From the Judiciary

Direct Tax

Whether DTAA beneficial rate can be availed for Dividend Distribution Tax(DDT) payable by the domestic company?

Total Oil India Pvt. Ltd. & Others
TS-197-ITAT-2023(Mum)

Facts

The taxpayer, a domestic company, declared/paid dividends during FY 2015-16 to its shareholders, one of whom was a French resident and a non-resident for Indian tax purposes.

The taxpayer was obligated to pay Dividend Distribution Tax (DDT) on the dividends payable by it to all of its shareholders as per the provisions of Section 115-O.

It was contented by the taxpayer that since its French shareholder was eligible for a beneficial rate of dividend under the India-French tax treaty, this beneficial rate ought to apply to the DDT payable by the taxpayer.

The Revenue did not agree with assessee's contention and the matter reached the division bench of the Mumbai Tribunal. The division bench ruled in favor of Revenue, and the matter was put forth for consideration before the Special Bench of the Mumbai Tribunal.

Held

The Special Bench ruled the following:

- The tax rates for the purposes of DDT shall be at the rate mentioned under the Indian domestic tax laws and not under the relevant DTAA applicable to the non-resident shareholders as DDT is a tax levied on the profits of the company distributing dividend - being on that part of the profit which is declared, distributed or paid by way of dividend.
- DDT is not a tax paid by the domestic company on behalf of the shareholders receiving a dividend.
- As the domestic company does not enter the domain of DTAA at all, DDT rate is not subject to Treaty obligation.
- If a domestic company has to enter the domain of tax treaties, the countries should specifically agree to the Treaty to that effect. (The Special Bench cited the India-Hungary Treaty here).
- The Special Bench rebutted the reliance on various judicial precedents relied on by the taxpayer and the bench cited the Supreme Court's decision in the case of Godrej & Boyce TS-176-SC-2017 to argue that DDT is a tax on the dividend (i.e., the profits of the company) and not on the shareholder.

Our Comments

Mumbai Tribunal held that the domestic resident companies cannot leverage the DTAA to mitigate their liability towards DDT.

Kindly note that from FY 2021, the DDT has been abolished, and dividends are now taxed in the hands of the shareholders. As a result, non-residents can choose beneficial rates under the Income tax act or the relevant DTAA.

Does a Permanent Establishment (PE) exist for all contracts conducted in a contracting state by virtue of a pre-existing PE for an unrelated contract?

Lahmeyer International GmbH
TS-181-ITAT-2023(DEL)

Facts

The taxpayer is a non-resident company incorporated under the laws of Germany and is in the business of engineering consulting, offering plans, designs and consultancy in relation to complex infrastructure projects.

For the year under consideration, the taxpayer had undertaken contract work with certain government/ semi-government projects. For one of the projects, the taxpayer suo moto accepted the presence of a PE and paid taxes accordingly. For the other projects, the taxpayer paid taxes by claiming that the contract receipts were Fees for Technical Services (FTS).

The Revenue contended that since the taxpayer had a PE in India and since the office space in relation to one of the projects was being made available to the taxpayer, it also constituted a PE in India. For the 3rd project, the Revenue contended that by virtue of the force of attraction rules, this project too was liable to be taxed as PE.

Aggrieved by the order of the Assessing Officer (AO) and the Dispute Resolution Panel's (DRP) directions, the taxpayer appealed to the Tribunal.

Held

The Delhi Tribunal observed that as per the contract between the taxpayer and government entity, the taxpayer was entrusted to provide services as a design review consultant related to the project undertaken by the government within a period of three months from the date of commencement of work, which was not contradicted by the Revenue. These services were in the nature of technical/consultancy services.

The Tribunal further held that the Force of Attraction Rule merely does not apply since the PE in relation to one project exists, where the activities are not related to such project.

Our Comments

The Delhi Tribunal deletes the addition under Section 44DA and directs the Revenue to compute the taxpayer's Income under Article 12 (i.e., FTS) of India Germany DTAA.

Transfer Pricing

Interest Savings Approach upheld to benchmark Corporate Guarantee Commission

Macrotech Developers Limited[8]
TS-237-ITAT-2023(Mum)-TP

Facts

The taxpayer was in the real estate and construction business and issued a corporate guarantee on behalf of its Associated Enterprise(AE) towards the issuance of bonds to be used for real estate projects. It did not charge any commission from the AE, claiming it to be a shareholders' activity. During the assessment, the transaction was classified as an international transaction. The taxpayer carried out a benchmarking search on the DealScan database based on the credit rating of the AE's as follows:

Average Rate Charged on Guaranteed Transactions (A)	399.67* bps
Average Rate Charged on Non-Guaranteed Transactions (B)	470.13* bps
Interest Savings (B-A)	70.46 bps

**after making tenor adjustment*

The taxpayer contended that the interest savings should be distributed equally and that the Arm's Length Price (ALP) of the guarantee fee could not exceed 0.35%.

The Transfer Pricing Officer (TPO) rejected benchmarking done by the taxpayer and suggested the use of internal interest savings as follows:

Interest Rate Charged on Guaranteed Bonds (A)	12.73%*
Interest Rate Charged on Non-Guaranteed Bonds (B)	14%
Interest Savings (B-A)	1.27%

**after making tenor & currency adjustment*

The TPO contended that the interest savings should be distributed in an 80:20 ratio the ALP of the guarantee fee should be 1%. However, this was rejected by the DRP, as it relied on the 0.50% rate as per the decision by Hon'ble Bombay High Court in the case of CIT vs. Everest Kanto Cylinders Ltd (2015) 378 ITR 57 (Bom.)

Held by the ITAT

The Income Tax Appellate Tribunal (ITAT) observed that the DRP failed to look at transfer pricing as more of an economic concept than a judicial one. While judicial precedents may be applied provided they pertain to a similar assessment year and economic conditions and have a proper benchmarking methodology. The ITAT went on to suggest that corporate guarantee commission can be benchmarked by employing: (a) Comparable Uncontrolled Price (CUP) method (b) yield/interest savings method and (c) cost to guarantor with the yield and cost approach ostensibly providing the highest and lowest guarantee commission rates. In the instant case, it was noted that the taxpayer, as well as the TPO used the interest savings approach, with the only difference being tenor adjustment, currency swap and % attribution to the taxpayer of the interest saved.

The ITAT viewed that in light of the DRP's directions, they could either uphold the benchmarking carried out by the taxpayer at 0.35% or the guarantee commission at 0.50%. It went ahead with the taxpayer's approach considering it was more scientific and derived after the proper credit rating on a database.

Our Comments

The provision of a corporate guarantee has been upheld as an international transaction. This judgment has dissuaded the ad-hoc use of judicial precedents to impose uniform rates without giving emphasis to the economic circumstances. The

8. Mumbai Income Tax Appellate Tribunal ITA No. 2266 & 2239/Mum/2022 (AY 2017-18 & 2018-19)

taxpayers should develop a scientific benchmarking approach for the transaction based on sound economic models and maintain adequate documentation for the same.

Advance to AE for a special purpose to be treated as separate and distinct from regular loans

Tata Chemicals Limited[9]
TS-200-ITAT-2023(Mum)-TP

Facts

The taxpayer was bidding to acquire an Egyptian Fertiliser Company through its AE. In order to fulfill the pre-bid condition, the taxpayer lent an interest-free amount of USD 110 million (special purpose loan) to its AE to show the availability of funds with them. The AE parked this amount as a short-term fixed deposit with a bank. Since the bid was unsuccessful, the amount, along with interest earned on it (which was at approx. 3%), was returned by the AE on the day of the bid result itself. However, in Form No. 3CEB, the taxpayer erroneously included this amount as a loan advanced to the AE and stated that all loans were benchmarked by applying an interest rate of LIBOR+200 bps.

TPO's order

The TPO concluded that LIBOR+200 bps, the interest rate charged for regular loans, can be considered as an available CUP. Basis this, the TPO applied this rate on the special purpose loan and adjusted accordingly, which the DRP upheld.

Held by ITAT

The ITAT observed that since the AE could not utilize the monies received for any purpose other than participating in the bid, this loan should be construed as a special purpose loan separate and distinct from loan simpliciter. The ITAT relies on the coordinate bench ruling in the case of Bennett Coleman and Co.[10] where all the facts were identical except that the bid therein was successful. It was held in this case that: (i) the transaction between the entity and a Special Purpose Vehicle (SPV) created by the entity for the aforementioned purpose is inherently incapable of taking place between independent enterprises since the entity and its SPV are inherently associated enterprises. Hence, for such transactions, the CUP method cannot be used. (ii) Since the borrower has no discretion of using the funds gainfully, commercial interest rates cannot be considered and therefore, the arm's length interest would be 'nil'. (iii) If there has to be an arm's length consideration for such a transaction under the CUP method, other than interest, it would be the net effective gains to the SPV. In the case under consideration, there was no economic gain to the SPV in the relevant financial period and hence, the arm's length price of lending funds to the SPV, under the CUP method, would again be 'nil'. Accordingly, the ITAT directed the TPO/AO to delete the adjustment.

Our Comments

Transfer of Funds for a specific purpose must be given cognizance and should always be treated separately and distinct from routine loan transactions.

Ad-hoc price penetration adjustment not warranted without any cogent reasons

Mitsui Prime Advanced Composites India Pvt. Ltd[11]
TS-209-ITAT-2023(DEL)-TP

Facts

The taxpayer was engaged in manufacturing polypropylene compound resins. Its international transactions with AE include the import of raw materials, availing services, etc., for which it used an aggregated approach by comparing the net margin earned from its manufacturing business with margins earned by comparable companies. In addition to the above, in the documentation, the taxpayer made a price penetration adjustment to its margins on account of the fact that the sales to unrelated parties were at reduced price. The TPO disputed the rationale behind making the 'price penetration adjustment' and proceeded to make an adjustment equivalent to the amount of 'price penetration agreement.' This was upheld by the Commissioner of Income Tax (Appeals) [CIT(A)].

Held by the ITAT

The ITAT observed that the TPO had not disputed the taxpayer's method or margin for benchmarking the international transaction. The ITAT referred to a table submitted by the taxpayer showing that the margin of the assessee is at Arm's Length with or without the 'Price Penetration Adjustment.' Furthermore, the ITAT held that the adjustment made by the TPO appeared ad-hoc, which would be unsustainable in law and deleted the adjustment.

Our Comments

While the taxpayer explained the price penetration adjustment in its documentation, the onus was on the TPO to justify the adjustment to the taxpayer's income. Ad-hoc adjustments have consistently been struck down.

9. Mumbai Income Tax Appellate Tribunal ITA No. 9057 & 6900/Mum/2021/2012 (AY 2006-07 & 2007-08)
10. 129 taxmann.com 398 (Mumbai Trib)
11. Delhi Income Tax Appellate Tribunal ITA No. 6944/Del/2019 (AY 2013-2014)

Indirect Tax

Whether 'mens rea' or 'bona fide intention' on the part of the assessee-dealer is significant while imposing penalty and interest for underpayment of tax, under Section 45(6) and Section 47(4A) of the Gujarat Sales Tax Act, 1969?

State of Gujarat and Anr. vs. Saw Pipes Ltd.
TS-158-SC-2023-VAT

Facts

- Revenue filed an appeal before the Supreme Court assailing the order of the Gujarat High Court, which had set aside the penalty and interest imposed under the Gujarat Sales Tax Act on the ground that the assessee-dealer was under bona fide opinion that the indivisible works contract of coating of pipes would attract sales tax of 2% instead of 12%.
- Revenue argued that the penalty and interest were statutorily mandated, and the Court could not fill in the gaps and purport the requirement of the assessee-dealer's intention or guilty mind for such imposition when the legislature did not prescribe the same.

Ruling

- Accepting the stand of Revenue, SC observed that the language used in the statute is precise, plain, and unambiguous. The intention of the legislature is very clear that the moment any eventuality mentioned in the said provision occurs, the penalty shall be leviable.
- No other word like mens rea and/or satisfaction of the Assessing Officer and/or other language is used, like in Section 11AC of the Central Excise Act.
- Given the use of the phrase "shall be levied", it is an integral part of the assessment/reassessment that the penalty be levied on the difference between the amount of tax paid and the amount of tax payable, and the same shall be automatic.
- It is a well-settled principle in law that the Court cannot read anything into a statutory provision that is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent.
- Under the circumstances, on strict interpretation of Sections 45 and 47, the only conclusion would be that the penalty and interest leviable are statutory and mandatory and there is no discretion vested in the Commissioner/AO to levy or not to levy the penalty and interest other than as mentioned therein.

Our Comments

In the context of GST, the legislature has been quite clear about the quantum of penalty leviable vis-à-vis short or non-payment of tax or erroneous refund of tax or wrongful availment or utilization of ITC, depending on the presence of mens rea. However, interest is mandatory irrespective of mens rea.

Hence, it would be imperative for the taxpayers to prove their bona fides to mitigate the probability of attracting a higher penalty equivalent to 100% of tax amount.

Moreover, the GST authorities may rely on the said Supreme Court judgment to substantiate the levy of penalty.

Whether Section 13(8)(b) of the IGST Act, which prescribes the place of supply of intermediary services to be the service provider's location, is constitutionally valid or not?

Dharmendra M. Jani & Anr. vs. UOI & Ors.
TS-138-HC(BOM)-2023-GST

Facts

- Pursuant to the difference of opinion in the Division Bench of the High Court, the matter was placed before the Chief Justice, who referred the proceedings to the 3rd Judge bench.
- One of the Judges had struck down Section 13(8)(b) as ultra vires the IGST Act besides being unconstitutional, whereas the companion Judge upheld the validity on all counts.

Ruling

- Noting that GST is a destination-based tax, High Court observed that intermediary services provided in the present case qualify as "export of services" since the recipient is a foreign principal and consumption of said services takes place outside India.
- As per the Court, such intermediary services would necessarily fall within the framework of the IGST Act only. It would be too far-fetched to consider that certain IGST Act provisions are not relevant to the IGST Act but to CGST Act and State GST Acts.
- The CGST Act and State GST Act do not indicate any express incorporation of any provision regarding the "export of services" and/or place of supply where the supplier or the recipient is outside India.

- In this context, High Court perused the Constitutional scheme as envisaged under Articles 246-A, 269-A and 286 and observed that the fiction created by Section 13(8)(b) cannot travel beyond the provisions of the IGST Act to the CGST and the SGST Acts, as neither the Constitution would permit taxing of export of service under the said enactments, nor these legislations would accept taxing such transaction.
- Hence, Sections 13(8)(b) and 8(2) cannot be struck down as unconstitutional provided they are confined in their operation to the said Act only, concluded the High Court.

Our Comments

The dilemma in the scope and taxability of intermediary services under the GST law appears to have spiraled further as three judges have given divergent opinions.

While it is ruled that IGST shall be applicable to such intermediary supplies, it is worth noting that the Gujarat High Court had previously ruled that intermediary services are liable to CGST and SGST as intra-state supplies and not IGST.

Hence, a verdict by the Full Bench or the Supreme Court or a clarification by way of a Circular may be necessary to clarify the ambiguity surrounding the taxation of intermediary supplies.

M&A Tax Update

Transfer of assets pursuant to a scheme of arrangement approved by the jurisdictional High Court held not to result in any benefit/ perquisite

Vodafone Idea Ltd. V. ACIT (Mumbai-Trib) [2023] 149 taxmann.com 169 (Mumbai - Trib.)

Mumbai Income Tax Appellate Tribunal (ITAT) held that a scheme of arrangement pursuant to initiatives issued by the Government of India (GOI) for the purpose of sharing economies of scale amongst telecom companies and which is duly approved by High Courts cannot be held as a colorable device to evade taxes.

In the given case, Vodafone Idea Ltd (taxpayer) transferred by way of demerger its Passive Infrastructure Assets (PIA), with a book value of INR 16.2277 billion, to ICTIL (100% subsidiary of ABTL, ATBL being 100% subsidiary of the taxpayer) at Nil value. Subsequently, ICTIL amalgamated in Indus Towers Ltd. (Indus), transferring PIAs to Indus. The investment of ABTL in shares of Indus (pursuant to amalgamation and demerger) was revalued at INR 73.3075 billion. The AO considered this as a transfer of PIA to an entity outside the Group and that ICTIL was only an intermediary through which the assets were being routed to avoid taxes that would otherwise be attracted. Hence, the entire transaction of arrangement was a colorable device offering difference in fair value of shares and the book value of PIA transferred to tax as benefit/perquisite under Section 28(iv) of the ITA.

ITAT noted that the Schemes of Arrangement had been duly sanctioned by the High Courts, wherein the rationale was duly explained. The Scheme, as approved, will have to be accepted. As the arrangement provides for transfer at nil consideration, the same cannot be substituted by any notional consideration. It accepted the taxpayer's contention that Indus is a separate independent entity assessable to tax, and no transaction was routed to avoid taxes.

Our Comments

In the decision, while deciding in favor of the taxpayer, due cognizance has been given to the fact that Court has approved the arrangements and the purpose behind these arrangements being in line with GOI initiatives.

While the General Anti-Avoidance Rule (GAAR) provisions are applicable at the stage of assessment, the tax officers are indirectly applying the principles of GAAR even at the stage when the National Company Law Tribunal (NCLT) seeks objections. Furthermore, during the course of the assessment proceedings, merely a scheme being approved by NCLT cannot be a sufficient defense and the tax officers can certainly examine the Scheme in depth. Thus, the Schemes must be closely scrutinized internally from the perspective of ensuring commercial rationale and appropriately detailing/ explaining the same in the Scheme and filings made from time to time.

Regulatory Updates

Company Law Regulations

Starting this FY 2023-24, companies must maintain an audit trail

Starting this FY 2023-24, all companies that use accounting software for maintaining their books of account must maintain an unbroken record of all edits in their books of accounts and not disable the audit trail feature in their accounting software, marking a significant change in accounting regulations. The Companies (Accounts) Amendment Rules, 2021, requires all companies to record an audit trail of all transactions in their accounting software and capture the edit log of all changes along with the date of the change. The Ministry of Corporate Affairs (MCA) has twice extended the applicability of these regulations, giving extra time for businesses to comply with this new requirement. The last extension required companies to comply with these regulations starting from the financial year commencing on or after the 1st day of April 2023. However, no fresh relaxation has been granted by MCA to date to defer this requirement any further.

Accordingly, all Companies using accounting software are advised to ensure compliance with the above requirements while maintaining books of account and other relevant books and papers maintained in electronic mode starting 1 April 2023.

Alerts

Hyderabad ITAT upholds applicability of Section 56(2)(viia) on receipt of shares in scheme of amalgamation

4 May 2023
https://bit.ly/3VUTFHF

Economic Principles are relevant while performing Transfer Pricing Analysis of Corporate Guarantee Transactions

4 May 2023
https://bit.ly/44OGcVP

Key Highlights of GST Notification and Clarification Circulars in April 2023

3 May 2023
https://bit.ly/3MeGhuI

Gujarat High Court seeks to settle stamp duty conundrum on the scheme of amalgamation

2 May 2023
https://bit.ly/3Mcc2oo

DDT vs DTAA 'tax-rate controversy'- Mumbai Tribunal Special Bench ruling

25 April 2023
https://bit.ly/3LUOxPr

Apex Court holds selection of comparable companies as 'substantial question of law'

20 April 2023
https://bit.ly/3N1MxXz

MCA sets up C-PACE to speed up closure of companies

19 April 2023
https://bit.ly/3nWci1j

Restrictions on generating IRN & QR codes while raising e-invoices on IRP Portal(s)

14 April 2023
https://bit.ly/3LQd0Fh

Tax Talk

Indian Developments

Direct Tax

Last date for linking of PAN Aadhaar extended

Press Release
dated 28 March 2023

- The last date for linking PAN and Aadhaar number has been extended to 30 June 2023, which means persons can still intimate their Aadhaar to the prescribed authority for linking without facing repercussions till this extended date.
- Earlier, the provisions of the ITA mandated that every person having PAN as on 1 July 2017 and eligible to have Aadhaar was required to link PAN and Aadhaar on or before 31 March 2023 on payment of a prescribed fee. However, this date has now been extended to 30 June 2023.
- From 1 July 2023, the PAN of taxpayers who have failed to intimate their Aadhaar shall become inoperative and may lead to no issuance of refund (if any) or interest receivable on such refund for the period during which the PAN remains inoperative.
- TDS/TCS shall also be deducted/ collected at a higher rate as provided by the ITA.
- However, the PAN can be made operative again in 30 days upon intimation of Aadhaar to the prescribed authority after payment of fee of INR 1000.
- A person exempted from linking the PAN and Aadhaar Number includes any individual who is 80 years or more, non-resident as per the Act and individuals residing in states of Assam, Jammu and Kashmir and Meghalaya.

Cost of inflation index notified by the central governmnent

Notification S.O. 1692 (E)
NO. 21/2023/F.NO. 370142/5/2023-TPL
dated 10 April 2023

- To calculate capital gains under Section 48, the cost of inflation index is notified by the Central Government at the beginning of every financial year.
- For FY 23-24, the provisional cost of inflation index is 348, which shall be effective from 1 April 2023.

Clarification regarding the deduction of tds on salary for the upcoming financial year

Circular no. 4 OF 2023
F.NO. 370142/06/2023-TPL
dated 5 April 2023

- In Budget 2023, the new tax regime was made as the default tax regime for FY 23-24 and onwards. However, under sub-section (6) of Section 115BAC, a person may exercise an option to opt out of it. A person not having income from business and profession can exercise this option every year.
- Concerns have been raised regarding tax to be deducted at source on salary income u/s 192. The employer (deductor) would not know if the employee would opt out of the new regime or not.
- In order to avoid genuine hardship in such cases, the Central Board of Direct Taxes (CBDT) directs that the employer shall seek information from each of its employees having income from salary regarding their intended tax regime and each employee shall intimate the same to the employer.
- If the employee does not make an intimation, it shall be presumed that the employee continues to be in the default tax regime (115BAC) and has not exercised the option to opt out of new tax regime.
- Accordingly, the employer shall compute his total income and deduct the TDS under Section 192 in accordance with the rates prescribed in the Act.
- It is also clarified that the intimation alone would not amount to exercising the option and the person shall be required to exercise this option separately in his/her return of income.

Indirect Tax

Customs

Waiver of interest on import duty paid through ECL till resolution of technical difficulties

Customs (Waiver of Interest) Third Order, 2023 – Order No. 3/2023-Cus (NT)
dated 17 April 2023

To address the concern of delayed import duty payments through Electronic Cash Ledger (ECL) due to technical difficulties faced on the Common Portal, the CBIC has waived the whole of the interest leviable thereon from 14 April 2023 till such time the technical difficulties are removed. Such waiver is subject to the following conditions: (a) duty and interest have been paid within three days (including holidays) from the date of removal of such system inability at the Common Portal, which shall be certified by the DG systems, (b) the importer undertakes at the port of import to not pass on the incidence of interest paid, and (c) provisions of Section 27 of Customs Act shall govern the consequential refund of such interest paid.

Note: The Central Board of Indirect Taxes and Customs (CBIC) had granted the first waiver of interest for the period 1 April 2023 to 10 April 2023, vide Office Order No. 1/2023-Cus (NT) dated 6 April 2023. The same was subsequently extended for the period 11 April to 13 April vide Office Order No. 2/2023-Cus (NT) dated 11 April 2023]

CBIC extends an exemption to deposits into ECL for Customs purpose

Notification No. 31/2023-Cus (NT)
dated 26 April 2023

The CBIC has extended the exemption to deposits into ECL till 30 June 2023, thereby amending Notification No. 18/2023-Cus (NT). As per the said Notification, deposits – (i) with respect to goods imported or exported in Customs stations where a customs automation system is not in place, (ii) with respect to goods imported or exported in International Courier Terminals, (iii) with respect to accompanied baggage, (iv) other than those used for making electronic payment of any duty of customs including surcharges and cesses, IGST, GST Compensation Cess, interest, penalty, fees or any other amount payable under Customs Act or Customs Tariff Act, are exempt from all provisions of Section 51A of Customs Act, i.e., payment through ECL.

Foreign Trade Policy

One-time Amnesty for Advance Authorization and EPCG schemes

Public Notice No. 2/2023 dated 1 April 2023 r/w Public Notice 7/2023 dated 18 April 2023

The Directorate General of Foreign Trade (DGFT) has notified "Amnesty Scheme for one-time settlement of default in export obligation by Advance and Export Promotion Capital Goods (EPCG) Authorization holders". The Scheme covers: (i) authorizations issued under the two schemes (all variants) under the Foreign Trade Policy 2009-2014 till 31 March 2015, and (ii) authorizations issued under the two schemes (all variants) under the Foreign Trade Policy 2004-2009 whose export obligation period (original or extended) was valid beyond 12 August 2013.

Any authorization holder choosing to avail this benefit must complete the online registration process on or before 30 June 2023 and payment of customs duty plus interest with the jurisdictional Customs authorities shall be completed by 30 September 2023.

It has further been clarified that all pending cases of default in meeting export obligations can be regularized on payment of proportionate exempted customs duties and interest payable is capped at a maximum of 100% of such exempted duties. However, no interest is payable on the portion of additional customs duty and special additional customs duty.

Articles

SC Ruling in SAP Labs Case - Significance and Implications
21 April 2023
https://bit.ly/3poiRKx

Secondment of employees - the tax controversy continues
20 April 2023
https://bit.ly/3LTBJbM

Tax Talk

Global Developments

Direct Tax

OECD and Nigeria Meet on Two-Pillar Tax Solution; Stakeholders resolve for 'continued participation

Excerpts from taxsutra.com, 17 April 2023

OECD organizes workshop with Federal Inland Revenue Services (FIRS) of Nigeria, to discuss the maximization of benefits of the two-pillar solution for Nigeria, which has not been endorsed by Nigeria so far; The workshop held on Apr 4 and 5, was attended by key stakeholders, led by the Executive Chairman of FIRS, Mr. Muhammad Nami represented by coordinating director, representatives of Office of Vice President, the Federal Ministry of Finance, Budget and National Planning, the Federal Ministry of Justice, the Federal Ministry of Industry, Trade and Investment, Nigerian Investment Promotion Commission (NIPC), Nigeria Export Processing Zone Authority (NEPZA), Oil and Gas Free Zone Authority (OGFZA), Nigeria Export Promotion Council (NEPC), Joint Tax Board (JTB), and some States' tax authorities; After a critical review of the rules and Nigeria's participation in their development, stakeholders at the meeting resolved that "there is the need for Nigeria's continued participation in the rule development, as a member of the Inclusive Framework, to ensure that the interest of the country and Africa is factored into the design and development of the rules."; The Outcome Statement noted that whether or not Nigeria endorsed the statement of October 2021, and the detailed rules to be released later, to address challenges arising from the digitalisation of the economy, the country's tax base and fiscal policy options will be impacted by the implementation of the Two-Pillar solution, especially the Pillar 2 Global Minimum Tax Rules of 15% effective tax rate (the GloBE rules); The Stakeholders also observed that Nigeria could implement and reap the benefits of Pillar 2, even where it does not wish to implement Pillar 1, noting that effective implementation of Pillar 2 rules holds significant potential for increased tax revenue to fund government programme, boost the economy and keep Nigeria as an attractive investment location; As part of its recommendations, the OECD-Nigeria Meeting urged stakeholders within the country to commence internal engagements and draw up a national strategy for immediate streamlining of its tax incentives, to avoid ceding its tax base to other jurisdictions, owing to the implementation of Pillar 2 rules.

Transfer Pricing

Saudi Arabia: Amendments to Transfer Pricing Bylaws[12]

Saudi Arabia has amended its Transfer Pricing Bylaws which will be effective for financial years' starting on or after 1 January 2024 to include:

- Zakat payers within the scope of Saudi Arabian Transfer Pricing Bylaws; and
- Introduce advance pricing provisions for tax and Zakat payers.

Compliance Requirements

The latest requirements for Zakat payers will be implemented in two phases and will depend on the aggregate value of the related party transaction during the year. Zakat payers with an aggregate value of related party transactions less than SAR 48 million will be exempted from the Transfer Pricing documentation requirement.

12. https://uqn.gov.sa/?p=22752

The Master File and Local File requirements will apply to Zakat payers based on the following thresholds:

Phase 1: FY 2024 to FY 2026*	
Value of Related Party Transactions	**Local File and Master File requirements**
Less than SAR 48 million	Not Applicable
SAR 48 million or more but less than SAR 100 million	Optional
SAR 100 million or more	Mandatory

**The first stage includes all taxpayers subject to zakat collection, with the exception of financing funds*

Phase 2: FY 2027 onward*	
Value of Related Party Transactions	**Local File and Master File requirements**
Less than SAR 48 million	Not Applicable
SAR 48 million or more	Mandatory

**The second stage includes financing funds*

Serbia: Rulebook on arm's length interest rates for 2023[13]

The Ministry of Finance adopted the rulebook for arm's length interest rates for related party loans in 2023, which entered into force on 6 April 2023. The rulebook prescribes separate interest rates for long-term and for short-term loans for all non-finance entities and a single interest rate for banks and financial leasing companies (except for RSD denominated).

Arm's length interest rates for 2023				
Credit/Loan Currency	**Banks and Financial leasing companies**		**Other companies**	
	Short term loans	**Long term loans**	**Short term loans**	**Long term loans**
RSD(Serbian Dinar)	1.48%	4.47%	3.88%	4.74%
EUR (Euro)	3.25%		2.98%s	3.22%
United States Dollar	4.43%		3.18s	4.28%
Swiss Franc	2.63%		-	7.84%
Swedish Krona	3.70%		-	-
British Pound Sterling	1.88%		-	-
Russian Ruble	1.91%		-	-
Chinese Yuan	4.01%		-	-

United States: Announcement and report concerning Advance Pricing Agreement[14]

The Internal Revenue Service released its 24th annual Advance Pricing Agreement (APA) report, which discusses the experience, structure, and activities of the Advance Pricing and Mutual Agreement (APMA) program. The highlights of the report are as under:

- The total APAs executed in 2022 was 77 as against 183 applications that were filed
- The % of APA renewals executed in 2022 was 55% as compared to 63% in 2021.
- At year end, 564 APA requests were pending (480 bilateral, 30 multilateral and 54 unilateral).
- The median time required to complete an APA increased from 35.1 months in 2021 to 43.4 months in 2022.
- As in prior years, more than half of the APAs executed in 2022 involved transactions between non-U.S. parents and US subsidiaries.
- In 2022, the most used transfer pricing method for the sale of tangible property and use of intangible property continued to be the comparable profits method/ transactional net margin method. It was used for 77% of these types of transactions.
- The operating margin continued to be the most common profit level indicator (PLI) used to benchmark results. It was used in 73% of the cases.

13. "Official Gazette of RS", number 24/23 – Click Here
14. https://www.irs.gov/pub/irs-drop/a-23-10.pdf

Indirect Tax

Four new SEZs unveiled in Saudi Arabia

Excerpts from site.ecza.gov.sa

Saudi Arabia's Economic Cities and Special Zones Authority has launched four new SEZs focusing on key growth sectors, including advanced manufacturing, cloud computing, and medical technology. The details of these SEZs are as follows:

SEZ	Location	Main focus areas
King Abdullah Economic City (KAEC) SEZ	Makkah Province	Automobile supply chain and assembly lines, consumer goods, information and communication technology, pharmaceutical industries, medical tech, and logistics
Ras Al-Khair SEZ	Eastern Province	Ship building - maintenance, repair and operation, offshore drilling rigs - maintenance, repair, and operation
Jizan SEZ	Jizan Province	Food Processing, metal conversion, and logistics
Cloud Computing SEZ	King Abdulaziz City for Science and Technology in Riyadh	Cloud computing

Portugal temporarily zero-rates VAT on Food Staples to combat inflation

Excerpts from news.bloombergtax.com

Due to increased food prices, the Portuguese Government has temporarily zero-rated VAT on specified food staples. The law includes measures for applying 0% VAT with the right to deduct input VAT to the import or sale of food staples like milk, eggs, bread, and specified fruits and vegetables. The law, implemented from 18 April 2023, shall remain in force until 31 October 2023.

Poland introduces temporary reverse charge VAT on energy trading

Excerpts from various sources

Poland has introduced a temporary reverse charge for exchange-traded supplies of gas, electricity, and emission allowances. This measure, which applies between April 2023 and February 2025, has been introduced to counter VAT fraud and to improve the competitiveness of Poland's energy trading system.

Kenya updates VAT Regulations on digital supplies

Excerpts from various sources

The Kenyan Cabinet Secretary for National Treasury and Economic Planning has issued VAT (Electronic, Internet, and Digital Marketplace Supply) Regulations, 2023, with effect from 15 March 2023.

The updated Regulations inter alia provide no distinction between B2C and B2B supplies, and non-residents supplying taxable electronic, internet or digital marketplace supplies in Kenya shall be required to register and pay VAT in Kenya, regardless of the nature of the recipient. Furthermore, the scope of taxable supplies has been expanded to now include the sale/licensing/ monetizing data from users' activities, as well as the facilitation of online payment for the exchange or transfer of digital assets.

Quotes and Coverage

Foreign companies may be compelled to file Income Tax Returns in India on earning royalty or FTS
3 May 2023 | Financial Express
Maulik Doshi
https://bit.ly/3McJQ4C

GSTN to INR 100 crore Plus Businesses - Upload e-invoices within 7 days
14 April 2023 | Financial Express
Saket Patawari
https://bit.ly/3pwDVhP

Compliance Calendar

Direct Tax
Indirect Tax

7 May 2023

Due date for deposit of tax deducted/collected for April 2023. However, all sum deducted/collected by an office of the government shall be paid to the credit of the Central Government on the same day when tax is paid without the production of an Income tax Challan.

11 May 2023

GSTR-1 to be filed by registered taxpayers for April 2023 by all registered taxpayers, not under the QRMP scheme.

15 May 2023

- Due date for issue of TDS Certificate for tax deducted under Section 194-IA/194-IB/194M/194S for March 2023.
- Due date for furnishing of Form 24G by an office of the government where TDS/TCS for April 2023 has been paid without production of a Challan.
- Quarterly statement of TCS deposited for the quarter ending 31 March 2023.
- Due date for furnishing statement in Form no.3BB by a stock exchange in respect of transactions in which client codes have been modified after registering in the system for April 2023.

Note: Applicable in case of a specified person as mentioned under Section 194S.

20 May 2023

- GSTR-5A for April 2023 to be filed by a non-resident service provider of Online Database Access and Retrieval (OIDAR) services.
- GSTR-3B for April 2023 to be filed by all registered taxpayers, not under the QRMP scheme.

25 May 2023

Payment of tax through GST PMT-06 by taxpayers under the QRMP scheme for April 2023.

30 May 2023

- Submission of a statement (in Form No. 49C) by a non-resident having a liaison office in India for the FY 2022-23.
- Due date for furnishing of Challan-cum-statement in respect of tax deducted under Section 194-IA/194M/194-IB/194S in April 2023.

Note: Applicable in case of a specified person as mentioned under Section 194S.

- Issue of TCS certificates for the 4th Quarter of the Financial Year 2022-23.

10 May 2023

- GSTR-7 for April 2023 to be filed by taxpayer liable for TDS.
- GSTR-8 for April 2023 to be filed by taxpayer liable for TCS.

13 May 2023

- GSTR-6 for April 2023 to be filed by Input Service Distributor (ISD).
- Uploading B2B invoices using Invoice Furnishing Facility under QRMP scheme for April 2023 by taxpayers with aggregate turnover of up to INR 50 million.
- GSTR-5 for April 2023 to be filed by a non-resident foreign taxpayer.

31 May 2023

- Quarterly statement of TDS deposited for the quarter ending 31 March 2023.
- Return of tax deduction from contributions paid by the trustees of an approved superannuation fund.
- Due date for furnishing of statement of financial transaction (in Form No. 61A) as required to be furnished under sub-section (1) of Section 285BA of the Act with respect for FY 2022-23.
- Due date for e-filing of annual statement of reportable accounts as required to be furnished under Section 285BA(1)(k) (in Form No. 61B) for calendar year 2022 by reporting financial institutions.
- Application for allotment of PAN in case of a non-individual resident person, which enters into a financial transaction of INR 250,000 or more during FY 2022-23 and hasn't been allotted any PAN.
- Application for allotment of PAN in case of a person being managing director, director, partner, trustee, author, founder, karta, chief executive officer, principal officer or office bearer of the person referred to in Rule 114(3)(v) or any person competent to act on behalf of the person referred to in Rule 114(3)(v) and who hasn't allotted any PAN.
- Application in Form 9A for exercising the option available under Explanation to Section 11(1) to apply income of previous year in the next year or in future (if the taxpayer is required to submit return of income on or before 31 July 2023).
- Statement in Form no. 10 to be furnished to accumulate income for future application under Section 10(21) or Section 11(1) (if the taxpayer is required to submit return of income on or before 31 July 2023).

Compliance Calendar

Direct Tax
Indirect Tax

7 June 2023

Due date for deposit of Tax deducted/collected for the month of May 2023. However, all sum deducted/ collected by an office of the government shall be paid to the credit of the Central Government on the same day where tax is paid without production of an Income tax Challan.

10 June 2023

- GSTR-7 for May 2023 to be filed by the taxpayer liable for Tax Deducted at Source (TDS).
- GSTR-8 for May 2023 to be filed by the taxpayer liable for Tax Collected at Source (TCS).

11 June 2023

GSTR-1 is to be filed by registered taxpayers for May 2023 by all registered taxpayers, not under the QRMP scheme.

13 June 2023

- GSTR-6 for May 2023 to be filed by ISD
- Uploading B2B invoices using Invoice Furnishing Facility under the QRMP scheme for May 2022 by taxpayers with aggregate turnover of up to INR 50 million.

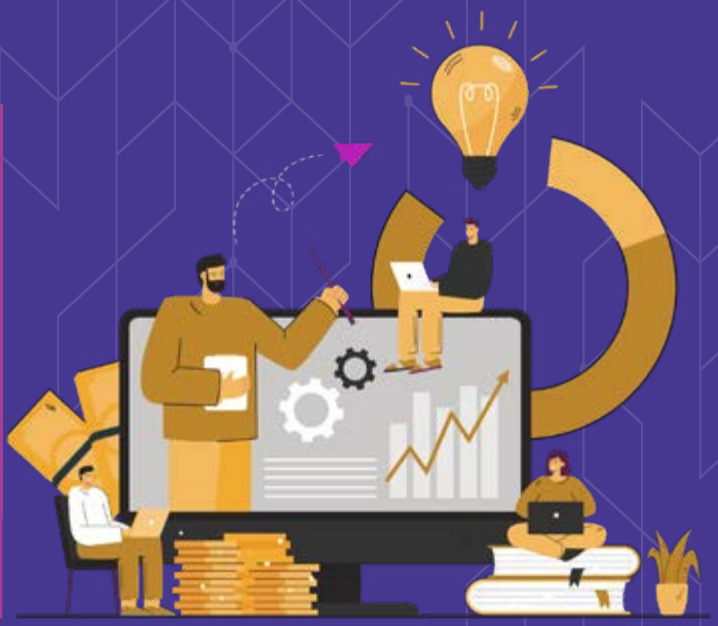
Notes:

Category 1 states - Chhattisgarh, Madhya Pradesh, Gujarat, Maharashtra, Karnataka, Goa, Kerala, Tamil Nadu, Telangana, Andhra Pradesh, the Union territories of Daman and Diu and Dadra and Nagar Haveli, Puducherry, Andaman and Nicobar Islands or Lakshadweep

Category 2 states - Himachal Pradesh, Punjab, Uttarakhand, Haryana, Rajasthan, Uttar Pradesh, Bihar, Sikkim, Arunachal Pradesh, Nagaland, Manipur, Mizoram, Tripura, Meghalaya, Assam, West Bengal, Jharkhand or Odisha, the Union territories of Jammu and Kashmir, Ladakh, Chandigarh or Delhi

Easy Remittance Tool

by Nexdigm



Form 15CA/CB Automation

- Review of tax position by experts
- Issuance of bulk certificates through Automated tool
- Repository - Access to entire set of documents
- Access to Detailed transaction wise reports
- Representation Support
- Generation 15CA bulk files & utility to generate Form A2

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