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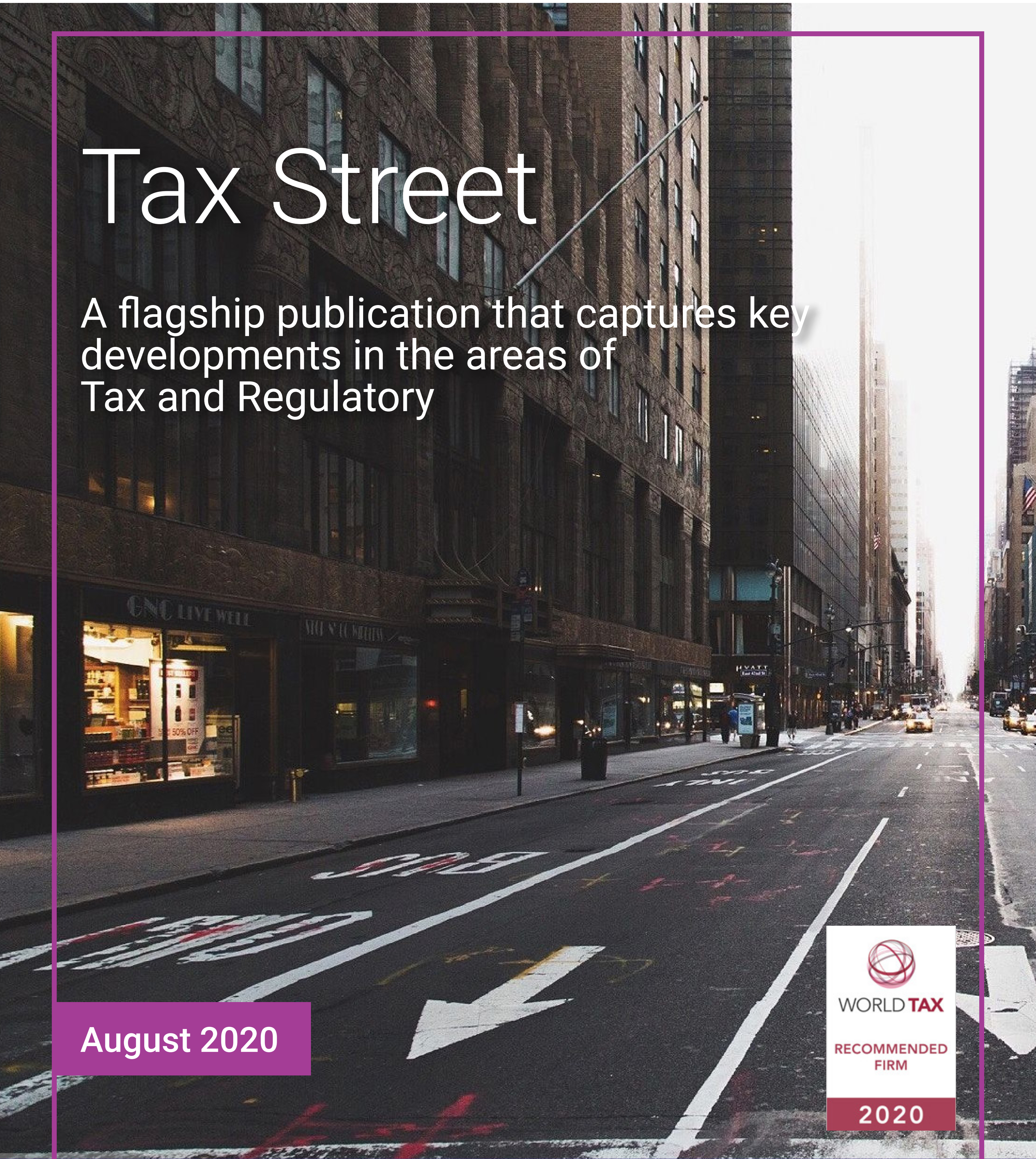
Tax Street

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



August 2020

WORLD TAX
RECOMMENDED FIRM
2020

Tax Street

Stay Safe. Stay Healthy.

Introduction

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 August 2020.

- The **'Focus Point'** covers a deep dive into the Faceless Assessment Scheme 2020.
- 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@skpgroup.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 (SKP) Team

Focus Point

Faceless Assessment Scheme 2020

On 13 August 2020, Hon'ble Prime Minister, Mr. Narendra Modi, launched the campaign 'Transparent Taxation: Honouring the Honest.' Under the campaign, below mentioned three schemes were introduced in relation to 'Direct Taxes':

a. Faceless Assessment Scheme, 2020 (effective from 13 August 2020);

b. Faceless Appeal (effective from 25 September 2020); and

c. Taxpayer's Charter (effective from 13 August 2020) containing revenue authorities' commitments towards taxpayers and duties of/expectations from taxpayers.

Necessary guidelines for 'Faceless Appeals' are yet to be issued.

Scheme

The Faceless Assessment scheme has been re-introduced by amending the existing notifications of the electronic assessment scheme launched in September 2019. All assessment orders to be passed after 13 August 2020 would need to be issued under Faceless Assessment Scheme 2020, and any order passed outside the scheme (except for the exclusions mentioned hereunder) will be considered as 'non-est,' i.e., never in existence.

The scheme is summarized in brief as under:

Key Features

- Assessment will be a unit-based assessment headed by National E-Assessment Centre (NeAC) and conducted by Assessment Unit (AU) with appropriate assistance from Technical Unit (TU), Verification Unit (VU), and Review Unit (RU);
- Each unit shall have its independent functioning, headed by the Chief Commissioner of Income Tax (CCIT). However, TU has been structured to report directly to Principal Chief Commissioner of Income Tax (Pr CCIT), NeAC;
- There will be no interaction between the taxpayers and the four units. Every communication will be between the taxpayer and National E-Assessment Centre (NeAC) and that too electronically;
- The NeAC may send notices via email, SMS, or the registered account of the taxpayers' e-filing portal (www.incometaxindiaefiling.gov.in). The only mode of communication available to the taxpayers is filing of responses to the notices issued by NeAC via e-filing portal (www.incometaxindiaefiling.gov.in);
- Similarly, all four units cannot communicate amongst themselves. Any communication amongst them would be via the NeAC;
- All communications by NeAC would carry a Document Identification Number (DIN);
- Similarly, all responses filed by taxpayers must be electronically signed either by way of Digital Signatures or by way of Electronic Verification Code (EVC).

Coverage

- Assessment under the Scheme will commence subsequent to the selection of the cases for assessment electronically. It is yet to be seen as to whether such selection would continue to be by existing Computer-Aided Selection Scrutiny (CASS) criteria or there would be the use of artificial intelligence/ machine learning in the selection of cases as well;
- Assessments to be covered by the scheme are assessments initiated:

- Pursuant to issuance of a notice under section 143(2) of the Act, viz:-
  - Scrutiny assessments under section 143(3) of the Act;
  - Best Judgment Assessments under section 144 of the Act;
  - Scrutiny Assessments under section 143(3) of the Act subsequent to the filing of return of income in response to a notice issued under section 148 of the Act for income escaping assessment;
- By way of an intimation by NeAC, where no tax return has been furnished by the taxpayer in response to the notices issued section 142(1) and 148 of the Act.

Exclusion

At present, the Faceless Assessment Scheme is not applicable to the following cases of assessment:

- Assessments in cases assigned to Central Charges, mostly in search and seizure cases; and
- Assessments in cases assigned to International Tax Charges.

Procedure

- Upon selection of the case for assessment, NeAC shall assign the case to an AU selected via an automated allocation system, which may employ artificial intelligence or machine learning;
- Upon receipt of the case for assessment, AU shall intimate the details which it may require from the taxpayers, upon which NeAC shall issue the notice to the taxpayers;
- The taxpayer needs to respond within the time specified in the notice or such extended time as it may request. Failure to respond to such notice may result in the initiation of penalty proceedings or issuance of a notice for the conclusion of assessment under the best judgment in terms of section 144 of the Act;
- In case AU opines that an inquiry or verification needs to be conducted, it shall intimate NeAC, who shall intimate to a VU selected through an automated allocation system. The VU shall conduct the verification and submit its report to NeAC for onward forwarding to the AU from which request for verification was received;
- Similarly, AU may seek technical assistance from TU via NeAC at any point of time of the proceeding;
- Upon receipt of the information/ reports, AU shall prepare the Draft Assessment Order (DAO) based on the information available on records and forward the same to NeAC;
- NeAC shall examine the DAO using risk management strategy (using AI) to either finalize the DAO or grant an opportunity to the taxpayer or to send it to RU for review;
- NeAC shall finalize the assessment order based on DAO, in case no modification has been proposed from the returned income;
- Where any modification has been proposed, NeAC shall grant an opportunity to the taxpayer by issuing a show-cause notice (SCN). In response to the SCN, the taxpayer may file its written submissions as well as seek an opportunity for 'hearing' to present its case. Upon receipt of the request of hearing, NeAC shall forward such request for hearing to CCIT of the ReAC under which AU has framed the DAO. CCIT may grant the request for hearing in accordance with guidelines to be laid down by NeAC. Hearing granted, if any, shall be conducted virtually;
- NeAC may also share DAO to RU for the purposes of review of the DAO, inter-alia for the inclusion of various points of facts and law/ judicial precedents, etc.;
- Where RU has made some suggestions for the purposes of modifications to the DAO, NeAC shall reassign the case to any AU, other than the one which has framed DAO, through the automated allocation system;
- NeAC shall follow the above procedure of issuance of SCN etc. again, in all probability, till no further modification is to be proposed, or the taxpayer has no further explanations, as the case may be;
- Upon the finalization of the order, NeAC shall serve the final order along with a notice for initiation of penalty and notice of demand;
- Upon completion of the assessment, all the electronic records shall be transferred to the jurisdictional officer.

NeAC may transfer the case to the jurisdictional officer for completion of the assessment, at any stage of the proceedings, with prior approval of CBDT.

Conclusion

The scheme would bring a paradigm shift in the manner in which the assessments have been framed so far. While it may require extensive training on the part of the revenue officials, taxpayers would also need to ensure:-

- Updated contact details on the e-filing portal (www.incometaxindiaefiling.gov.in);
- Timely compliance with the notices as no physical hearings to explain the issues;
- Appropriate finance staff to support the tax teams for timely compliance as no window for face to face discussion;
- Maintain exhaustive documentation for each and every transaction, detailing the complete sequence of events/trail, depicting the intention clearly;
- Clear and detailed submissions on each and every point;
- Appropriate articulation, wherever necessary so that it could be easily understood by the tax officers;
- Maintain documentary evidence explaining the reasons as to why these could not be furnished at the time of assessment.

Industry Insights

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The Faceless Assessment is a positive initiative by the government. Particularly, the aspect that the assessment will go through verification, technical and review mechanism. We are likely to see the quality of assessment to improve significantly. However, we would need to see how the practical difficulties of e-assessments, e.g. – Abrupt closure of the submission portal near the last dates of assessments, etc. going to be tackled in a time-bound faceless assessment scenario.

Mr. Nilesh Bhagat

Vice President – Head of Tax
Essar

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Faceless Assessment as a concept is extremely good wherein ReAC will have four units, and the assessments would be selected by AI and Machine learning by NeAC. However, the following concerns need to be addressed:

- Complete re-orientation of the tax team and the Consultants as written submissions will be the only way to explain the company's model and claims made in Return;
- No clarity on conflicting decisions between 2 HC, assuming favorable decision at Jurisdiction AO level and adverse decision in the state of the Assessing Officer;
- Whether the Jurisdiction AO has to transfer the past records every time to different AO's each year and will there be a mechanism to send back the file to the jurisdiction AO once the assessment is completed.

I think there seem to a number of issues that need to be addressed and clarified, and I think large companies' faceless assessments could have been taken up at a later point in time, given the complexity of issues. They should have done it in a phased manner.

Mr. Vishwanath Kini

Vice President – Global Tax Head,
Tech Mahindra Limited

From the Judiciary

Direct Tax

Whether the draft assessment order passed in the name of a non-existing company can be rectified in the final order, or the order stands to be Void ab initio?

Whether reimbursement of the salary of the seconded employees is subject to withholding under Section 195?

Boeing India Pvt. Ltd. (ITA No. 9765/DEL/2019)

Facts

As a part of the business combination, BICIPL was merged in the taxpayer company. Despite being informed by the taxpayer, the Assessing Officer (AO) passed a draft assessment order in the name of a non-existing company, i.e., BICIPL. The taxpayer raised an objection to the DRP but was of no avail. Instead, the DRP directed the AO to rectify the mistake in the final order.

The AO in the draft assessment order made a TP adjustment and also disallowed reimbursement of salary expense of expatriate employees on the ground of failure to deduct tax at source. The AO placed reliance on the High Court's decision in the case of Centrica India Offshore Pvt. Ltd.. The taxpayer, before the DRP, had clarified that it had borne the salary expenses of the expatriates, and appropriate taxes were duly deducted and deposited u/s 192 of the Act. The DRP upheld the actions of the AO.

Aggrieved by the final assessment order, the taxpayer filed an appeal with the Delhi Tribunal.

Held

Ruling in favor of the taxpayer, the Delhi tribunal held that the draft assessment order has legal connotations as it lays the foundation of any prospective reduction in the income of the taxpayer or creates a tax liability over and above the returned income. Thus, in that sense, it is not merely a procedural step in the assessment proceedings. Rather it is a core component of assessment. Failure to pass a valid draft assessment order amounts to a jurisdictional defect, which cannot be cured under Section 292B of the Act or corrected by passing the final assessment order in the correct name as canvassed by the Ld. DR. Thus, the draft assessment order in the name of non-existent assessee was considered to *void ab initio*

For the sake of completeness, the tribunal has decided on the other grievance. With respect to the reimbursement of the salary cost, the tribunal noticed that the facts of the case were different from the Centrica India Offshore Pvt. Ltd.. It was observed from the reimbursement agreement that the secondees shall be working for the taxpayer and will be under the supervision, control, and management of the taxpayer as an employee of its company. Further, since due taxes were deducted and deposited u/s 192, Section 195 would not apply.

Our Comments

With the ongoing debate on taxation of salary reimbursement of the seconded employees, the Delhi tribunal has again backed the fact that the subject matter cannot be standardized. A deep dive into the case and a close examination fo the facts is a must to arrive at a just ruling.

Can an agent, performing all or substantial activities of film production in India, under the direct supervision of the non-resident principal constitute a Permanent Establishment (PE) of the non-resident principal?

Next Gen Films Private Ltd. (ITA No. 3782/Mum/2016 and ITA No. 3783/Mum/2016)

Facts

The taxpayer is a resident corporate entity. It entered into a commissioning agreement with another UK based non-resident corporate entity, namely M/s Desi Boyz Production Ltd (M/s DBPL).

As per the terms of the agreement, the taxpayer is a commissioning party engaged M/s DBPL to produce and deliver a fully complete feature film provisionally named Desi Boyz based on a certain storyline. M/s DBPL was to undertake filming primarily in the UK as well as India and procure the services of all necessary creative and technical service providers and engage all personnel for the shooting of the film. M/s DBPL was to consult and take consent of the assessee over important aspects like the identity of all key cast, budget, production schedule, etc. Every agreement entered into by M/s DBPL with any principal contributor or other cast and crew would require the approval of the taxpayer, but the same was to be entered into by M/s DBPL in his own name. For this activity, M/s DBPL was entitled to 100% of the budget less an amount equal to the UK Tax Credit Advance as full and sufficient consideration. All the rights, title, and interest in and to the film, all underlying literary material relating thereto, all original music, lyrics, physical material of any kind, etc. would be owned and solely and exclusively by the taxpayer and would vest in the taxpayer.

M/s DBPL engaged Eros International Films Pvt. Ltd. (M/s EIFPL) to avail certain production services for the film. M/s EIFPL was to provide production services, which would, inter alia, include identifying and negotiating with the appropriate lead cast, the appointment of contributors (crew members) for the shooting of the film in the UK, travel arrangement for contributors, complete co-ordination and arrangement for producer's India shoot, making payments for India shoot, production co-ordination, etc. The AO alleged that the entire film production of film Desi Boyz was being managed and carried on by M/s EIFPL. In the notice, attention was drawn to the fact that another Indian entity, namely Eros International Media Ltd. (EIML), was the co-producer of the film in association with the taxpayer. M/s EIFPL & M/s EIML were subsidiaries of M/s Eros International PLC and hence, sister concerns.

Therefore, all these three entities, as well as M/s DBPL, would be Associated Enterprises (AE) within the meaning of Article-10 of India-UK Double Taxation Avoidance Agreement (DTAA/Treaty). Since M/s EIFPL was carrying on the entire film production activities of the film in India and UK locations, M/s EIFPL would be Permanent Establishment (PE) of M/s DBPL in India. Further, since the taxpayer has control over the management and budgeting of the film production activities of M/s DBPL and being its AE, the taxpayer becomes PE of M/s DBPL in India.

The CIT(A) upheld the order of the AO. Aggrieved by the same, the taxpayer has approached the Mumbai Tribunal.

Held

After considering the facts on record and contentions of both the parties, the tribunal held that the agreement between the taxpayer and M/s DBPL was primarily on principal to principal basis. The entire responsibility to produce the film was on M/s DBPL against a certain lump sum consideration. M/s DBPL acted as an independent service provider having the entire responsibility to produce the film. It was free to take its own decisions for the same and could enter into independent contracts. Thus, the taxpayer could not be said as a PE of that entity in India.

Further, the contract between M/s DBPL and M/s EIFPL was primarily that of a principal and agent. M/s EIFPL, acting on behalf of the producer, was required to provide limited production services against a lump sum fee of INR 300 Lakhs. The said services were to be provided under the control, supervision as well as the direction of the producer. However, the tribunal highlighted the fact that the proportion of fees vis-àvis total turnover would be quite minuscule. On the basis of the same, it could be said that the status of M/s EIFPL would be that of an independent agent. Therefore, The taxpayer could not be treated as PE of M/s DBPL in India.

Our Comments

The tribunal has appreciated the fact that merely because the activities of an agent are supervised by the principal, it would not make the agent dependent on constituting a PE. This decision affirms the fact that where the contract between the parties is on a principal to principal basis, DAPE should not be triggered.

Transfer Pricing

Whether APA has persuasive value for years not covered under APA?

FIS Global Business Solutions India - ITA No.422 and 423 of Del/2019 and ITA No. 3087 and 579 of Del/2019 – AY 2010-11

Facts

The taxpayer is engaged in the business of providing software development and Business Process Outsourcing (BPO) services to its Associated Enterprises (AEs).

The taxpayer benchmarked both the transactions by adopting the Transactional Net Margin Method (TNMM) and compared the margin with comparable companies. The taxpayer has earned a margin of 21.20% is the software development segment and 18.39% in the BPO segment, with a consolidated margin of 19.26%. TPO modified the comparable list in both the segments and made Transfer Pricing adjustments.

For future years, the taxpayer has entered into the Advance Pricing Agreement (APA) with the Central Board of Direct Tax for the covered years FY 2020-11 to FY 2018-19 with an agreed mark-up of 16.60% in both international transactions, mentioned above.

CIT(A) has granted partial relief to the taxpayer (for the comparable issue), and for the remaining adjustment, the taxpayer filed an appeal before ITAT.

ITAT held as under

- The taxpayer has demonstrated that FAR of the year under consideration is similar to that agreed in APA for covered years.
- While APA is not applicable to the year under consideration, it has persuasive value for another year if the facts remain the same.
- ITAT has relied on the Delhi High court ruling of Ameriprise India Private Ltd (ITA 206/ 2016), ITAT ruling of Spencer Stuart (India) Pvt Ltd (ITA 7117/Mum/2012), and 3I India Private Ltd (ITA 581/Mum/2015) on a similar matter.
- Since the taxpayer has earned a higher margin as compared to the margin agreed in APA (16.60%), ITAT accepted the arm's length price of international transactions for the year under consideration.

Therefore, ITAT deleted the adjustment.

Our Comments

The APA program of India has been very successful since its introduction in 2015.

With the completion of more than five years of the APA regime, many of them applied for the renewal of APA, whereas few taxpayers continue to adopt a similar pricing policy/methodology without a new agreement in place.

This ruling emphasized that the APA agreement has persuasive value for future or past years not covered under APA if the fact pattern of intra-group transactions remained the same.

Whether Berry Ratio can be adopted as PLI for benchmarking logistics/ freight services.

M/s. DHL Logistics Pvt. Ltd.- ITA No. 1923, 159 and 1385/ Mum/ 2016 – AY 2011-12

Facts

The taxpayer is engaged in the business of logistics services and offering a comprehensive portfolio of international, domestic, and specialized freight handling services. During FY 2010-11, the taxpayer has entered in international transactions of freight receipt and freight expenses with its related parties.

The taxpayer adopted TNMM with PLI as Operating Profit/Value Added Expenses (OP/ VAE) – often referred to as the Berry ratio. Since the margin of the taxpayer (41.64%) was higher as compared to the average margin of comparables (31.46%), transactions were considered at arm's length.

During the course of assessment, TPO has

a. Rejected OP/VAE as PLI and instead adopted operating profit/ Total cost (OP/TC) as appropriate PLI for determining arm's length price and also accepted/ rejected certain comparables while making adjustment of INR 154 crores;

b. Challenged the pass-through cost claimed by the taxpayer and made an addition of INR 486 crore for recovery of freight on inbound shipments and INR 115 crores for recovery of back to back third party charges.

Aggrieved, the taxpayer filed an objection before DRP.

While DRP rejected the contention of the taxpayer for adopting OP/VAE as the PLI, it granted partial relief to the extent of accepting the pass-through costs such as the recovery of freight costs and third party charges.

Aggrieved, the taxpayer filed an appeal before ITAT.

ITAT held as under

- It is observed that costs pertaining to services availed by the taxpayer from third parties such as shippers/ airliners, clearing and forwarding agent, transport service providers neither involved any service element of the taxpayer nor the taxpayer carried any risk or employed assets for the same
- ITAT concluded that net margins earned by the taxpayer are to be determined only with respect to the cost incurred directly by the taxpayer in its international transactions with AEs. Profit margin cannot be computed basis of the total costs, which include third party costs.
- ITAT relied on preceding year order of taxpayer (ITA 1030/Mum/2015), FedEx Express Transportation and

Supply Chain Services India Pvt Ltd (ITA No 435/Mum/2014) and upheld the Berry Ratio

Therefore, ITAT deleted the adjustment.

Our Comments

While the Indian Transfer Pricing Regulation does not provide much guidance on the Berry Ratio, it has been recognized in OECD guidelines for certain scenarios.

We have often witnessed that many Indian logistics/ freight service providers have adopted the Berry Ratio.

This ruling could set a much-needed precedent on the issue of using Berry Ratio.

Can future year profitability of the taxpayer be relied upon by the TPO to determine arm's length price for the current year?

Powernetics Equipments India Pvt Ltd (ITA No. 3078/Mum/2016) – AY 2011-12

Facts

The taxpayer is engaged in the business of UPS manufacture, primarily for Indian railways. He has sold UPS and also provided related services to its AE, based in the UK. The taxpayer has determined cost plus 10% for these transactions and concluded the same at arm's length.

During the course of assessment proceedings, TPO relied on the future year (AY 2012-13) profitability of the taxpayer, which worked out to 15% and thereby made the transfer pricing adjustment.

ITAT held as under

- Principally, ITAT disregarded the action of TPO for relying on the future profitability of the taxpayer and held that only the current year's profitability needs to be tested, having regard to the arm's length principle.
- ITAT also noted that future year profitability computed by TPO include certain non-operating income element and in fact, by removing such element, the taxpayer has incurred losses in the future.
- Therefore, ITAT accepted the contention of the taxpayer and remitted the matter back to TPO to decide the issue afresh.

Our Comments

This ruling emphasizes that the arm's length principle needs to be adopted every year on an independent basis. Future profitability cannot be taken as a base to apply the arm's length principle for the current year.

Indirect Tax

Whether services like installation and commissioning rendered in conjunction with the supply of equipment in relation to setting up a data center shall be treated as 'works contract' in the purview of GST?

Prasa Infocom & Power Solutions Private Limited - Authority for Advance Rulings (AAR), Maharashtra [2020 (8) TMI 54]

Facts

- The applicant is appointed by its clients to undertake installation, testing, commissioning, the supply of equipment as well as services in the course of setting up the data center.
- The supply of goods constituted a major portion of the contract, and the services rendered were in conjunction with them.
- The data center constructed by the applicant cannot be shifted to another location by dismantling and then re-erecting at another site without damaging it.

Based on the above, the AAR ruled as follows:

- On reviewing the details of the contract, there was a clear demarcation of the value of goods from the value of services.
- The major portion of the contract involves the supply of equipment.
- Further, the machine/equipment are all replaceable and hence cannot be said to be of 'immovable' nature.
- Hence, the activities undertaken by the applicant did not constitute a works contract.

Our Comments

The AAR relied heavily on the contractual agreement between the parties and noted that the value of equipment formed a substantial part of the total contract value, and the value of civil construction was considerably less.

Interestingly, activity in relation to setting up a data center was ruled to be a works contract by AAR, Karnataka in the case of Hewlett Packard Enterprise India Private Limited [2019 (11) TMI 1145].

The divergent rulings on the issue are bound to create confusion in the industry.

Whether Rule 89(5) of the CGST Rules, 2017 is *ultra vires* the GST law, and therefore can an applicant be allowed refund of Input Tax Credit (ITC) on input services in case of supplies under inverted duty structure?

[Background: As per Rule 89(5) of CGST Rules, 2017, refund on account of inverted duty structure is available only for ITC on inputs and not for input services.]

VKC Footsteps India Pvt. Ltd. Vs. Union of India [2020 (7) TMI 726 – Gujarat HC]

Facts

- The petitioner claims refund of ITC on account of inverted duty structure as per Section 54(3) of the CGST Act, 2017.
- Notification No. 21/2018-CT dated 18 April 2018 amended the said Rule to deny refund on the ITC availed on input services and allowed relief of refund of ITC availed on inputs alone.
- This amendment was later given a retrospective effect from 1 July 2017.

Based on the above facts, the Hon'ble Gujarat HC ruled as follows:

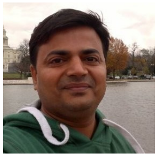
- From the conjoint reading of the provisions of Act and Rules, it appears that prescribing the formula in Rule 89(5) to exclude refund of tax paid on 'input service' is contrary to the provisions of Section 54(3).
- The intent of the government by framing the Rule restricting the statutory provision cannot be the intent of the law.
- The said Explanation (a) of Rule 89(5) is held to be contrary to the provisions of Section 54(3). In fact, the Net ITC should mean 'input tax credit' availed on 'inputs' and 'input services' as defined under the Act.

Our Comments

This is yet another landmark judgment under the GST regime, and given the importance of the issue, the government will surely want to prefer an appeal before the Supreme Court. Therefore, we may have to wait for the Supreme Court to rule on the matter before it can attain finality.

Industry Insights

It's a welcome judgment. The judgment, in this case, confirms the view that inverted duty structure refunds will also include refunds related to input services, thereby resulting in substantial cash flow benefit in situations where input service credits have been accumulated but there is no immediate utilization window. Another important aspect is that this is a judgment of the Hon'ble Gujarat High Court, although applicable to the whole of India, it remains to be seen how the jurisprudence evolves when the issue is put forth for consideration before the High Courts of other states.



Mr. Jaideep Tak
GM Commercial and Indirect Taxes, Serum Institute

Tax Talk

Indian Developments

Direct Tax

Income Tax Department can share PAN data with Financial Intelligence Unit: 5 points

[Excerpts from Livemint, 22 July 2020]

Financial Intelligence Unit is a unit set up by the Government of India in 2004 as the central national agency responsible for receiving, processing, analyzing, and disseminating information relating to suspect financial transactions. The CBDT has announced that they will now be sharing the PAN data of persons with the FIU in order to allow the FIU to dig deeper into large cash/suspicious transactions at the bank. The CBDT discussed a few key points - A bank has to furnish a cash transaction report to the FIU over a certain monetary limit. The FIU has this right under the Prevention of Money Laundering Act. While sharing such information, the respective tax authority will have to form an opinion that the sharing of such information is, in fact, necessary for the purposes of enabling the FIU to perform its function.

Google tax 'very clear,' no need for FAQs: Finance secretary A B Pandey

[Excerpts from The Business Standard, 23 July 2020]

The Finance Act 2020 further expanded the scope of equalization levy to non-resident e-commerce operators by introducing a new levy of 2%. Since the introduction of the levy, major non-resident e-commerce firms have expressed their discomfort regarding such tax. Such firms were eagerly waiting for FAQs and clarifications from the government. The Finance Secretary has expressed that the law is very clear, and there is no need to issue a separate set of FAQs. With regard to revenue position, the Secretary said that tax collections from such tax were encouraging in the first quarter of FY 20-21.

Government extends the income tax return filing deadline till 30 September for FY 19

[Excerpts from Hindustan Times, 30 July 2020]

The taxpayers are facing hardships to comply with the due dates in light of the pandemic. Considering the current situation, the CBDT has published a new notification, further extending the due date for filing original or revised income tax returns for the financial year 2018-19. The due date has now been extended by another two months, i.e., to 30 September from 31 July.

CBDT provides relief to senior citizens on Self-assessment Tax

[Excerpts from The Business Standard, 30 July 2020]

Earlier, a relaxation was provided to individual taxpayers by extending the due date of filing their returns by 30 November this year against the earlier requirement of 31 July. However, the individual taxpayers having self-assessment tax liability exceeding INR one lakh in 2019-20 were required to pay the tax by 31 July to avoid interest at the rate of 1% per month. Now, the CBDT has provided relief to senior citizens, and they can pay part of their taxes by 31 July so that their remaining tax liability is not more than INR one lakh. Interest will not be charged if they pay the remaining tax by 30 November.

Now, foreign investors allowed to invest in 'Alternative Investment Fund' without PAN

[Excerpts from Financial Express, 12 August 2020]

Normally, under the Indian income tax provision, any person who has earned taxable income in the previous financial year must apply for the Permanent Account Number (PAN). The income tax department has amended rules to exempt non-residents investing in Category I and II alternate investment funds (AIFs), located in IFSCs, from obtaining PAN on a mandatory basis. The non-resident investors would have to provide declaration-containing name, address, country of residence, and tax identification number of the country or specified territory of their residence. Additionally, these funds are also required to deduct TDS on such income. Experts feel that this will ease compliance and make foreign investment more attractive. Also, the relevant rules with regards to TDS compliance have been amended accordingly (Rule 37BC).

Search and Seizure, International Tax cases out of Faceless Assessment Ambit: CBDT

[Excerpts from Economic Times, 13 August 2020]

The Prime Minister launched the 'Transparent Taxation – Honoring the Honest' platform via video conferencing recently, which is intended to further the journey of direct tax reforms in the country. The faceless assessment scheme introduced by the government is enabled for all assessments except the cases pertaining to central charges (i.e., matters dealing with search and seizure) cases and international tax cases. This exception is made merely because of the sheer complexity of issues generally involved in these cases, for which in-person interaction may still be required.

Indirect Tax

Businesses can now get GST registration in just three days

[Notification No. 62/2020 - Central Tax dated 20 August 2020]

Businesses applying for a new GST registration can now get the same within three days of application if they opt for authenticating their credentials using the Aadhar number. Further, businesses who fail to, or do not opt for Aadhar authentication will be granted GST registration only after physical verification of their place of business.

CBIC notifies amendment to Section 50 of the CGST Act limiting payment of interest on net cash liability

[Notification No. 63/2020 - Central Tax dated 25 August 2020]

The government, *vide* Section 100 of the Finance (No. 2) Act, 2019, inserted a proviso in Section 50(1) of the CGST Act, 2017. The proviso was added to provide that in case of belated filing of returns, interest shall be levied only on the tax liability paid in cash, i.e., the net tax liability after adjusting ITC available with the taxpayer. However, the said proviso was to be made effective from a notified date, but CBIC has notified that the said proviso will be in effect from 1 September 2020.

It is worth noting that the amendment has been notified prospectively, and not retrospectively as recommended in the 39th GST Council meeting held on 14 March 2020. However, the CBIC has issued a press release clarifying that the notification has been issued prospectively due to a technical limitation, and no recoveries would be made for the past period.

Tax Talk

Global Developments

Direct Tax

Amendments to the tax regime of Russian Federation for IT companies

[Excerpts from Mondaq, 17 August 2020]

In order to make the IT industry more attractive and encourage carrying out activities for the design and development of electronic component base products and electronic (radio-electronic) products, the president of the Russian Federation has signed a federal law. The law proposes the following amendments to the current tax code:

- Reduction of insurance premium rate from 14% to 7.6% from 2021
- Reduced income tax rate from 20% to 3% from 2021
- Exemption from value added tax (VAT) for IT and Digital Companies

The above benefits would be available to IT companies subject to a set of conditions, one of them being that the proportion of proceeds from the sale of services for the development and adaptation of computer programs is at least 90% of the total income of the company for the specified period.

These amendments would support the IT industry of Russia and help leave behind recognized countries such as India and Ireland, which are considered the most loyal to the IT industry in the world's community.

Spain mulls to introduce Digital Services Tax and Financial Transaction Tax

[Excerpts from JD Supra, 19 August 2020]

Recently the Spanish Congress tabled two new tax bills, namely Financial Transactions Tax (commonly referred to as the 'Tobin Tax') and the Digital Services Tax (commonly referred to as the 'Google Tax'), which are awaiting approval from Senate in September 2020.

Tobin Tax: it will be an indirect tax of 0.2% on the amount of the purchase and sale of shares in Spanish companies with a market capitalization of more than EUR 1 billion as of 1 December of the year prior to the acquisition. However, this tax may not be levied on the acquisition of one's own shares, primary market operations (IPOs), transactions necessary for the operation of market infrastructure, etc.

Google Tax: It is a 3% tax on digital services (including online advertising, intermediation between companies and individuals, and the sale of user data) involving users located in Spain, provided the turnover of that entity in the previous calendar year exceeded EUR 750 million, of which at least EUR 3 million corresponds to digital services provided in Spain. However, there is a set of digital services to which the Google Tax would not apply.

If both the bills pending before the Senate are passed, the same would be effective post three months its publication in the Official State Gazette of Spain.

Singapore's Finance Ministry proposes introduction of Tax Avoidance Surcharge and strengthening GAAR

[Excerpts from Withersworldwide, 22 July 2020]

Singapore's Finance Ministry had published the draft Income Tax (Amendment) Bill 2020 with the main objective of introducing a surcharge on tax avoidance arrangements and strengthening general anti-avoidance provisions (GAAR).

The draft bill proposed a new Section 33A to the Income Tax Act with an intention to deter tax avoidance arrangements. Such an amendment would increase the number of tax audits and additional assessments as well as bring more companies under the scanner of Singapore Tax Authorities engaged in such tax avoidance activities.

Further, the draft bill also proposes a surcharge equal to 50% of the amount of tax imposed on the person u/s 33A, which would be payable within one month to the Tax Authorities irrespective of any appeal or objection filed in that regard.

Transfer Pricing

Australia: Finalized rules on thin capitalization and draft rules on outbound interest-free loan between related parties

ATO released final rules and guidelines for the Arm's Length Debt Test for thin capitalization

[TR 2020/ 4 and PCG 2020/7, August 2020]

On 12 August 2020, the ATO released the final Taxation Ruling TR 2020/4 (Income tax: thin capitalization – the Arm's Length Debt Test) and Practical Compliance Guideline PCG 2020/7 (replacing the draft PCG 2019/ 03) in relation to the Arm's Length Debt Test for thin capitalization purposes.

The final guidance on thin capitalization is retrospectively applicable to income years commencing on or after 1 January 2019. The final guidance has emphasized the following:

- Arm's Length Debt Test is one of the tests available to establish an entity's maximum allowable debt amount for thin capitalization;
- Further, this test focuses on identifying the notional amount of debt a business would reasonably be expected to have, and an independent commercial lender would reasonably be expected to lend.

Some of the important points for Arm's Length Debt Test are as under:

- The taxpayers are required to determine the Arm's Length Debt Test (ALDT) basis for the commercially reasonable position of stand-alone Australian business.
- The taxpayer may use the fair market value of assets for performing ALDT analysis.
- Further, taxpayers are expected to maintain appropriate documentation to justify as to how they arrived at arm's length debt amount
- While rules are required to conduct ALDT, it could be different from arm's length capital structure for transfer pricing purposes.
- Additionally, Practical Compliance guidance provides ATO's approach to Arm's Length Debt Test and risk assessment framework for the taxpayer to self assess its level of risk.

ATO released draft rules on outbound interest-free loans between related parties

[PCG 2017/4DC2, August 2020]

On 12 August 2020, the ATO released draft rules PCG 2017/4DC2 on the interest-free loans between related parties, which provides key factors to be considered when determining transfer pricing risk for the outbound interest-free loans by the Australian taxpayer to its foreign related parties.

Draft rules stated that an interest-free outbound loan would be considered 'high risk' from a transfer pricing perspective. To prove otherwise, evidence of one of the following shall be needed:

- A zero-interest rate is an **arm' s-length** condition of the loan.
- The loan is **in substance**, an equity contribution.
- Independent entities would not have entered into the actual loan and would have entered into **an equity funding arrangement.**

The ATO has recommended undertaking the following preliminary analysis to conclude whether an interest-free loan is akin to equity contribution such as:

- Rights of the lender (voting rights, contingent returns, or other rights);
- No set repayment date;
- Degree of subordination to existing debt;
- The borrower's ability to borrow interest-free loans from third-party lenders on commercial terms.

Basis the above factors/analysis, ATO may indicate a pricing risk scoring table to rate the interest-free loan out of a 10 scoring system (10 being the highest risk). To reduce the score of 10 points, the taxpayer needs to demonstrate certain factors.

Tanzania: Tanzania Revenue Authority published a new Transfer Pricing Guidelines

[Tanzania Transfer Pricing Guidelines, July 2020]

Tanzania Revenue Authority (TRA) published the Transfer Pricing Guidelines, 2020 (the Guidelines) in line with the Tax Administration (Transfer Pricing) Regulations (2018) (TP Regulations). The Guidelines contain illustrations and simplified examples of the procedures to be followed in the determination of arm' s-length prices.

Some of the important discussions covered in the guidelines are:

Functional analysis – A comprehensive guidance on Functional, Assets and Risk (FAR) Analysis for intra-group transactions has been provided along with guidance on a few specific functions such as procurement, financing, management, and sales and marketing. Further, guidance has mentioned that FAR analysis needs to be tabulated and summarized, indicating responsible entity, performance score (High/Medium/Low) against such function or risk.

Tested Party – The guidelines have confirmed a selection of a foreign tested party where sufficient and reliable data is available. Such significant data may comprise of financial statements, employee profile, registration information of intangibles, organization chart, etc. of the foreign tested party.

Transfer Pricing Methods and corresponding adjustments – The guidelines have provided various illustrations for the adoption and application of transfer pricing methods.

Time limit to file TP documents – TP Regulation provides that where the transactions with associates exceed 10 billion Tanzanian shillings, Transfer Pricing documents are required to be submitted at the time of filing income tax returns. The guidelines have allowed such a person to seek an extension to submit transfer pricing documentation for not more than 30 days.

Intra-group services – In relation to intra-group services, the guidelines dealt with three questions to be analyzed in detail viz (1) Whether intra-group services have been rendered (2) Whether provision/availing of such service has conferred an economic benefit or commercial value to the business that enhances its commercial positions (3) Whether intra-group charges are at arm's length.

Intra-group financing – The guidelines recognize intra-group financial transactions issues such as whether the transaction gives rise to a loan (accurate delineation and recognition of the actual transaction), size of the loan as well as nature/extent of interest deduction that are allowed. In determining the arm's length rate of interest for an inbound or outbound loan transaction, the guidelines provide that certain factors relating to loan transactions need to be analyzed such as quantum, currency, security/ guarantee (if any), creditworthiness of a borrower, actual delivery/ utilization of loan, etc.

Our Comments

Tanzania Revenue Authority has attempted to provide extensive guidance on complex issues (including intra-group services and financing, DEMPE, etc.) and is also aggressive in scrutinizing the intra-group transactions of taxpayers. In fact, it also provides the taxpayer with an option to enter into an Advance Pricing Agreement (unilateral/ bilateral/ multilateral) with tax authorities. However, the practical implementation of this guidance by taxpayers as well as tax authority remains to be seen. At the same time, Tanzania's authority is yet to evolve on certain other transfer pricing issues such as outstanding receivable/ payable, guarantee, etc.

France: Annual transfer pricing return filing deadline extended

[General Directorate of Public Finance, June 2020]

On account of the COVID-19 pandemic, the French tax administration has extended the deadline to file the corporate tax return. In line with the same, the tax authority has indicated to extend the deadline to file an annual transfer pricing return since which is due within six months from the deadline of filing the corporate tax return.

Therefore, the revised deadline for tax and transfer pricing return is as under:

Financial year ending	Revised Tax Return deadline	Revised Annual Transfer Pricing Return deadline
Financial year ending on 31 December 2019, 31 January 2020, and 29 February 2020	31 December 2020	30 June 2021
Financial year ending on 31 March 2020	31 January 2021	31 July 2021

Notably, France's tax administration requires the companies with an annual gross turnover or gross assets to or exceeding EU 50 million or that hold or are held by a legal entity that satisfies the EU 50 million threshold to mandatorily file an annual transfer pricing return, which includes element typically included in documentation report such as information about group and taxpayer, intra-group transactions crossing a certain threshold, etc.

Philippines: Requires Transfer Pricing information return from the taxpayer

Revenue Memorandum Circular (RMC) 76-2020, July 2020

Philippine Bureau of Internal Revenue (BIR) issued Revenue Regulations No. 19-2020, which requires taxpayers to submit transfer pricing return and certain other information along with their annual corporate tax return. This mainly aims to implement disclosure of related party transactions and achieve the application of the arm's length principle.

The regulation is effective from 25 July 2020 and will apply to the current and subsequent taxable years. This reporting requirement applies to both domestic and foreign transactions and to both a reporting entity and a related party.

The following information is required to be submitted:

- Name, address and Tax Identification Number of the related party;
- Nature and amount of transactions, amount of outstanding balance at year-end, terms and conditions of transactions, whether secured/guaranteed, provision of doubtful debts;
- Business overview of group and taxpayer along with the name, legal status, and country of tax residence of each related party, functional profile;
- Separately categorized into transactions with the parent, entities with joint control or significant influence over the entity, subsidiaries, associates, joint ventures in which the entity is a partner, key management personnel of the entity or its parent, and other related parties;
- Certified true copies of relevant contract/agreement or proof of transaction;
- Certified true copy of Advance Pricing Agreement, if any;
- Withholding tax details and proof of payment;
- Any other documentation.

The failure to comply with the above requirements regulation may result in penalties (including fines and/or imprisonment).

Indirect Tax

Call for UK government to extend VAT cut to the sports industry

[excerpts from The Telegraph UK]

The sports and physical activity sector in the United Kingdom has asked the government to extend the benefit of reduced VAT granted to the tourism and hospitality industry. The lockdown imposed in view of the COVID-19 pandemic has impacted the sector significantly with a substantial reduction in revenues, even down to zero in some cases.

Compliance Calendar

Direct Tax | Indirect Tax

7 September 2020

Payment of TDS and TCS deducted/collected in August 2020

15 September 2020

Payment of the second installment of advance tax for the assessment year 2021-22 (45% of estimated tax liability to be deposited on a cumulative basis)

30 September 2020

- Filing of return of income and tax audit report for a corporate assessee and another assessee who are required to get audited, other than the assessee referred to in Section 92E
- Due date for claiming the foreign tax credit, upload statement of foreign income offered for tax for the previous year 2019-20 and of foreign tax deducted or paid on such income in Form no. 67
- Due date for filing original or revised income tax returns for the financial year 2018-19
- Due date for furnishing of challan-cum-statement in respect of tax deducted under Section 194-IA for the month of August 2020
- Due date for furnishing of challan-cum-statement in respect of tax deducted under Section 194-IB for the month of August 2020

1 October 2020

Extended due date for filing GSTR-3B for the month of August 2020 without any interest or penalty, for registered taxpayers in Category 1 states with aggregate turnover of up to INR 50 million in the previous financial year

10 September 2020

- GSTR-7 for the month of August 2020 to be filed by taxpayer liable for Tax Deducted at Source (TDS)
- GSTR-8 for the month of August 2020 to be filed by taxpayer liable for Tax Collected at Source (TCS)

13 September 2020

GSTR-6 for the month of August 2020 to be filed by Input Service Distributor (ISD)

20 September 2020

- GSTR-5A for the month of August 2020 to be filed by Non-Resident Online Database Access and Retrieval services (OIDAR)
- GSTR-5 for the month of August 2020 to be filed by Non-Resident Taxpayers (NRTP)
- GSTR-3B for the month of August 2020 to be filed by all registered taxpayers having turnover of more than INR 50 million in the previous financial year

30 September 2020

- Extended due date for filing of GSTR-9 for the period April 2018 to March 2019 to be filed by the regular taxpayers
- Extended due date for filing of GSTR-9A for the period April 2018 to March 2019 to be filed by the persons registered under composition scheme
- Extended due date for filing of GSTR-9C for the period April 2018 to March 2019 to be filed by taxpayers with an aggregate turnover of more than INR 20 million

3 October 2020

Extended due date for filing GSTR-3B for the month of July 2020 without any interest or penalty, for registered taxpayers in Category 2 states with aggregate turnover of up to INR 50 million in the previous financial year

Notes

However, it must be noted that the CBDT vide the Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 dated 31 March 2020 read with the notification dated 24 June 2020, has extended all respective due dates, falling during the period from 20 March 2020 to 31 December 2020, **except the ones mentioned below** till 31 March 2021.

- Due date for filing quarterly TDS/TCS statement for the quarter ending 31 March 2020 is extended to 31 July 2020
- Due date for filing of return of income for non-corporate assessees who are not required to be audited for the financial year 2019-20, is extended to 30 November 2020
- Due date for filing of original or revised return of income for the financial year 2018-19 is extended to 30 September 2020

The benefit of the extended due date shall not be available in respect of payment of tax. However, any delay in payment of tax, which is due for payment from 20 March 2020 to 31 December 2020, shall attract interest at the lower rate of 0.75% for every month or part thereof if the same is paid after the due date but on or before 31 December 2020.

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

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27 August 2020

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Principal Commissioner of Income-tax (ReAC)

Ramesh Khaitan
Sr. Vice President, Global Tax Head - Lupin

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