Tax Street

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

WORLD TAX
RECOMMENDED FIRM
2021

August 2021

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 August 2021.

- The **'Focus Point'** covers an overview of the new re-assessment proceedings under the provisions of the Finance Act, 2021.
- 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 (SKP) Team

Focus Point

Finance Act 2021: New Procedure of Re-assessment Proceedings

Re-assessment proceedings generally empower the Revenue Authorities to tax the income which has escaped assessment. The proceedings also cover the assessments where income is being assessed for the first time under the provisions of the Income Tax Act, 1961 (Act). The Finance Act 2021 has revamped the provisions of re-assessment proceedings with effect from 1 April 2021. With the amendment by Finance Act 2021, the procedure prescribed under the Apex Court Judgment, in the case of GKN Driveshafts (India) Limited vs ITO [(2003) 259 ITR 19 (SC)], has been codified in law to a larger extent. Read ahead for an overview of the new re-assessment proceedings under the provisions of the Act.

Information - A prerequisite

Under the new provisions, possession of information with the Assessing Officer (AO) is a prerequisite for initiating the assessment/re-assessment proceedings. Information has been defined to mean:

- Information flagged in accordance with risk management strategy
- Audit Objection by Comptroller and Auditor General

Furthermore, under the following cases, AO shall be deemed to have information with him for the three years immediately preceding the year in which search is initiated/books of accounts or other documents are requisitioned, or survey is conducted in the case of the taxpayer/money, bullion or jewelry or any other article or thing or books of accounts, etc. are seized in case of any other taxpayer:

- Search is initiated under Section 132 or books of accounts, other documents or other assets are requisitioned under Section 132A in the case of the assessee, on or after 1 April 2021;
- A survey is conducted under Section 133A on or after 1 April 2021 other than TDS survey or survey in respect of expenses on account of any function/ceremony/event;
- AO is satisfied, with prior approval of PCIT/CIT, that money, bullion, jewelry, or other valuable article or thing, seized under Section 132 or requisitioned under Section 132A in the case of any other person on or after 1 April 2021, belongs to the taxpayer;
- With prior approval of PCIT/CIT, that any books of accounts or documents seized under Section 132 or requisitioned under Section 132A in the case of any other person on or after 1 April 2021 belong to the taxpayer.

In common parlance, the term 'information' is very expansive and would include almost any data/ document/asset/ observation available.

Inquiry before issuance of Notice for Re-assessment- Section 148A

Upon having such information, the AO shall:

- conduct the inquiry with respect to the information in his possession, which suggests the escapement of income, with prior approval;
- issue show-cause notice, with prior approval, to the taxpayer as to why a notice initiating the assessment/ re-assessment proceedings under Section 148 be not issued, basis the information and inquiry conducted;
- consider the reply furnished by the taxpayer;
- pass the order, with prior approval, deciding as to whether it is a fit case for re-assessment or not.

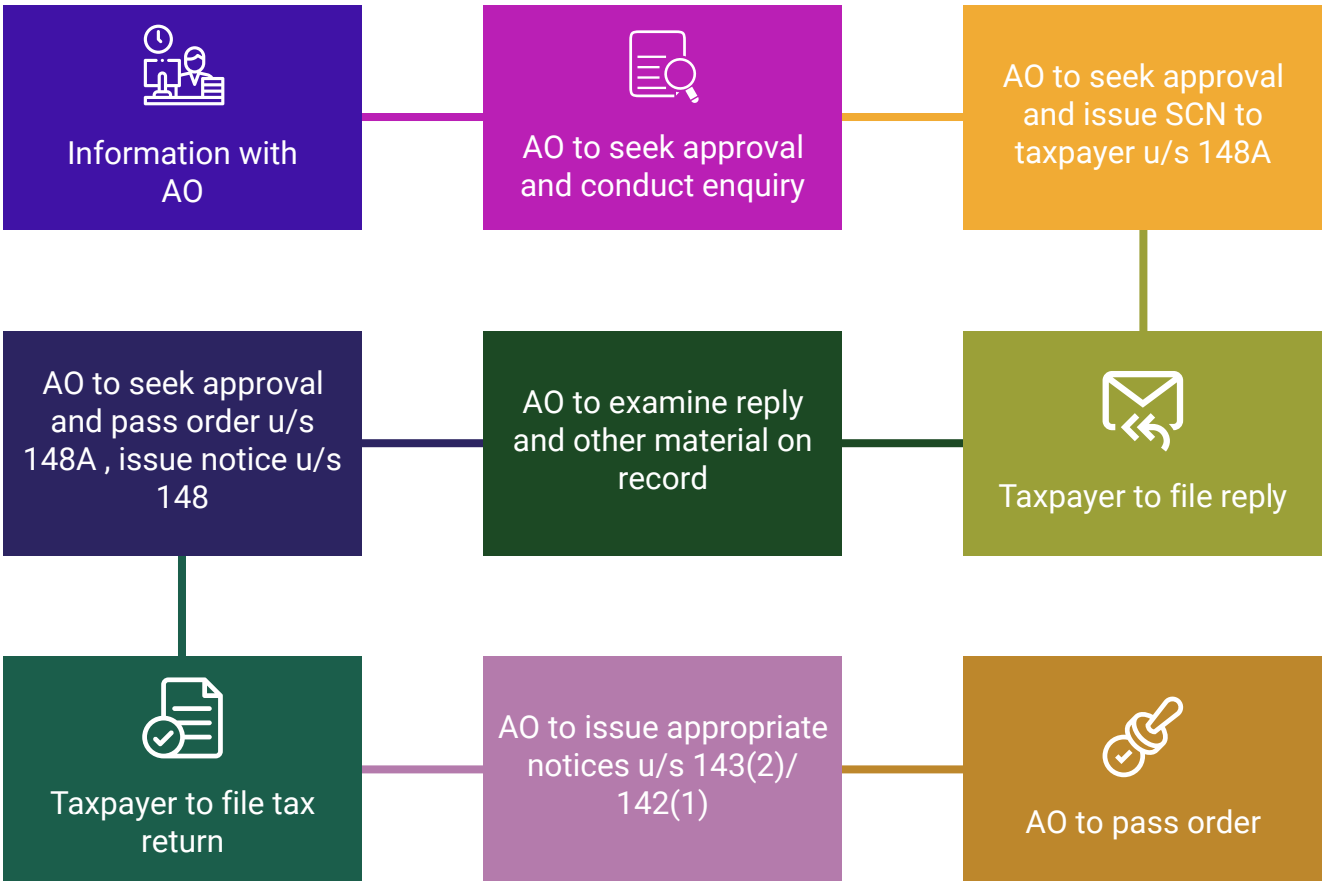
The above procedure of pre-inquiry will not be applicable in the following cases:

- Search is initiated under Section 132 or books of accounts, other documents or other assets are requisitioned under Section 132A in the case of the assessee, on or after 1 April 2021;
- AO is satisfied, with prior approval of PCIT/CIT, that money, bullion, jewelry or other valuable article or thing, seized under Section 132 or requisitioned under Section 132A in the case of any other person on or after 1 April 2021, belongs to the taxpayer;
- AO is satisfied, with prior approval of PCIT/CIT, that any books of accounts or documents seized under Section 132 or requisitioned under Section 132A in the case of any other person on or after 1 April 2021 belong to the taxpayer.

Assessment/Re-assessment Proceedings

Post the above procedure, the assessment would be initiated and/or completed under Section 147 of the Act. New provisions of Section 147 are sans most of the provisos/ explanations provided under the erstwhile provisions of Section 147 of the Act.

A brief snapshot of the new re-assessment regime is given hereunder:



Notice Thresholds

Notice under Section 148 of the Act for initiation of assessment/re-assessment proceedings under Section 147 of the Act will not be issued after expiry of:

- Three years under all the situations;
- 10 years, if AO has in his possession books of accounts/ other documents which suggest that escaped income as represented by an asset exceed INR 50 million.

No notice under the new regime could be issued for assessment years up to AY 2021-22 – if it could not be issued under a six-year threshold (i.e., escaped Income >= INR 0.1 million) of the erstwhile regime.

Re-assessment Proceedings-Old vs New Regime

A brief contra-distinction between the two regimes is highlighted hereunder:

Old Regime	New Regime
Reason to believe essential	No reason to believe - 'information' is must
Procedure as per GKN Driveshaft	Procedure codified in Section 148A
4 years, 6 years and 16 Years - notice threshold	3 years and 10 Years - notice threshold
Sanctioning Authority- JCIT, PCCIT/CCIT/PCIT/ CIT	Sanctioning Authority- PCCIT/CCIT/PCIT/CIT

Our Comments

The new procedure seems to have been introduced to incorporate the principles established via judicial precedents into the law. This should bring down the litigation around the assumption of jurisdiction/grounds for issuing notice under Section 148 of the Act. Litigation could be further brought down if the below-mentioned issues could also be clarified:

- Re-opening of assessment where issue already examined under scrutiny assessment;
- Whether AO may take refuge of the relief provided under the old regime, wherein it was provided that the AO may be entitled to carry out re-assessment, in a case where he may have to conduct due diligence, even if the information was disclosed to him;
- Issues arising around the authenticity of the information available/collected by the AO, especially during search/ survey/seizure operations.

From the Judiciary

Direct Tax

Whether Interconnected services under a unified agreement constitute a Permanent Establishment (PE) in India?

Telenor ASA Vs. DCIT
ITA No. 1307/Del/2015

Facts

The taxpayer is a company incorporated in Norway and entered into Business Service Agreement with Unitech Wireless (Tamil Nadu) India P. Ltd. The taxpayer provided services to Unitech Wireless through different Service Order Form (SOF) under various nature of activities such a Sourcing, Marketing, IT/IS, HR and other contracts for UNINOR group entities. As per Article 12 of the India-Norway Double Taxation Avoidance Agreement (DTAA), such income was offered to tax at 10% on a gross basis, being in the nature of 'Fees for Technical Services' (FTS).

The taxpayer's employees stayed in India for a period of 260 days (which is more than the threshold prescribed under Article 5 of the India-Norway DTAA) in total for all the SOFs.

The AO held that the taxpayer had a PE in India since it was a single project and fees received from Unitech Wireless was in the nature of FTS being effectively connected with PE of the taxpayer and in terms of Article 12(5) of India-Norway DTAA, was liable to tax under Article 7 of the India-Norway DTAA, read with Section 44DA of the IT Act.

Held

The Delhi Income Tax Appellate Tribunal (ITAT) considered the facts and observed that invoices were raised on a quarterly basis, and consolidated invoices were raised irrespective of the SOFs under which the services were rendered. ITAT noted that the common billing by the recipient and the common payments give rise to a conclusion that it was one single contract.

ITAT further observed on perusal of SOFs, that it was continuously mentioned that contracts are performed in accordance with the service agreement between UNINOR and Telenor where the taxpayer was referred to as a contractor and UNINOR as a recipient for all the services.

ITAT referred to Organisation for Economic Cooperation and Development (OECD)'s Commentary on 'enterprise' and the 'connected projects' and concluded that the taxpayer's activities were inter-connected, interlaced and sequential technical services. Thus, taxpayer's activities could not be said to be unrelated to each other as none of the activities could stand in isolation and no single activity could give rise to performance and achieving the purpose of the recipient. Based on the unified agreement, consolidated billing pattern and the inter-relation amongst the activities, ITAT held the existence of the taxpayer's PE. On attributability of income to the PE, ITAT concurred with the taxpayer's plea that services provided from Norway cannot be attributable to taxpayer's PE in India and thus remanded the matter back to the tax officer's file.

Our Comments

This ruling emphasizes that the time period of the enterprise in case of defragmented contracts can be aggregated for same or interconnected projects for PE determination. Accordingly, taxpayers may have to examine the actual fact pattern in detail for determining whether time spent for various interlacing or interconnected projects can be consolidated to determine whether PE is constituted or not.

Whether payments to Facebook, Amazon Web Services for advertising, marketing is taxable as royalty?

Urban Ladder Home Décor Solutions Pvt. Ltd Vs. ACIT IT(IT)A No.615 to 620/Bang/2020

Facts

The taxpayer is a company incorporated in India, dealing in home décor products and sells its products mainly through online marketing. To facilitate such a sale, the taxpayer has placed advertisements on the platform of Facebook, Ireland, it used the bulk mail facility offered by M/s Rocket Science Group, USA and further availed of Amazon's Web Services (AWS) offered by Amazon Inc., USA. The AO held the payments in the nature of royalty u/s 9(1)(vi) of Act and hence liable for tax deduction at source u/s 195.

Held

ITAT relied on the Supreme Court ruling in the case of Engineering Analysis (125 taxmann.com 42) and observed that the relevant DTAA provisions should also be considered for determining whether the nature of payments is royalty or not.

ITAT observed that Facebook and M/s Rocket Science Group allowed the taxpayer to use facilities provided in their sites, including software facilities. ITAT referred to its Kolkata bench ruling in Right Florists (32 taxmann.com 99), wherein it was held that receipts in respect of online advertising on Google and Yahoo cannot be brought to tax in India under the Income-tax law or the India-Ireland DTAA.

With respect to web hosting charges paid to AWS, ITAT observed that taxpayer is allowed to use IT infrastructure facilities. ITAT referred to the Pune bench ruling in EPRSS Prepaid Recharge Services (100 taxmann.com 52), wherein it was held that mere usage of a facility does not give rise to a provision of any technical service. ITAT observed, under the same analogy, the mere usage of facilities provided by non-residents does not render the payments as 'royalty' since the core point of a parting of any copyright attached to the said facilities does not arise at all.

ITAT held that payments made to non-residents cannot be treated as royalty, and thus, there was no requirement to deduct tax at source u/s 195.

Our Comments

Whether a payment constitutes royalty or not is a long standing debate. The Bangalore tribunal has reiterated the principle that mere use of facility would not be considered as royalty. However, one will have to look at the agreements thoroughly for determining whether a payment would be considered as Royalty or not.

Transfer Pricing

Whether Foreign Associated Enterprise can be selected as a tested party?

Onward Technologies Limited - I.T.A. No.266/Mum/2014 [AY 2008-09] and I.T.A. No.1785/Mum/2014 [AY 2009-10]

Facts

The taxpayer is engaged in providing offshore mechanical Engineering Design Services (EDC) in India for its USA and Germany-based clients. Its Associated Enterprises (AEs) in the USA and Germany act as marketing arm in respective countries and enter into contracts with clients on behalf of the taxpayer. Such AEs act merely as contracting entities on behalf of the taxpayer, wherein the taxpayer bears all underlying risks and obligations. The AEs issue invoices to the third-party clients, retain fees for their marketing activities and pass on balance receipts to the taxpayer.

The Transfer Pricing Officer (TPO) proposed an adjustment in respect of such services by classifying the services rendered by the taxpayer as ITeS and taking ITeS companies as comparables. Also, the TPO recalculated the Profit Level Indicator (PLI) of the taxpayer by reallocating certain indirect costs to the relevant segments.

The taxpayer conducted a separate benchmarking search, taking foreign AE as the tested party as a corroborative approach.

Furthermore, the taxpayer made an equity investment in its AE in the USA. The TPO re-characterized such investment in equity as debt and proposed a TP adjustment in respect of notional interest income on such debt provided.

The taxpayer reimbursed its AE towards software purchase expenses incurred by AE on behalf of the taxpayer.

The TPO proposed adjustment on such expenses on the grounds that it could not verify actual receipt of services.

Ruling by ITAT

ITAT relied on Tribunal's judgment in the taxpayer's own case in previous years and rejected the acceptance of foreign AE as a tested party and held that EDC services are considered to be part of the ITeS segment.

However, ITAT ruled in favor of the taxpayer considering the PLI and allocation of expenses as determined by the taxpayer. It also accepted the taxpayer's plea to exclude certain comparables accepted by TPO. The proposed TP adjustment was deleted as the taxpayer's PLI is better than the average PLI of comparable companies.

In relation to the re-characterization of equity investment, ITAT observed that the taxpayer infused funds in its AE with a long-term objective. The TPO failed to distinguish loan and capital contribution by way of equity. Therefore, the action of TPO to re-characterize equity as debt was rejected.

In respect of reimbursement of software expenses to AE, ITAT held that the transactions are duly supported by agreement, invoices and consequent debit notes, and thus, TPO's argument that receipt of services could not be validated was rejected, and accordingly, the adjustment was deleted.

Our Comments

The selection of a foreign AE as a tested party is a litigious issue, with judicial precedents giving both views on the said issue. The identification and selection of a tested party should be based on undertaking a detailed FAR analysis with the least complex entity being characterized as the tested party.

Whether prior years' data can be used for a comparability purpose?

Hapag Lloyd India Private Limited - ITA No. 6877/MUM/2019 [AY 2011-12]

Facts

The taxpayer runs a shipping agency and had rendered support services to its AE and had benchmarked the said transaction by using Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM). However, the TPO disregarded the taxpayer's use of TNMM as MAM and considered Comparable Uncontrolled Price (CUP) as the MAM by comparing the fee charged to the AE by the German Express Shipping Agency (GESA) who was a prior agent of the AE in the earlier years. (i.e., the rate which was determined between the AE and GESA basis the service agreement which was subsequently terminated).

The Dispute Resolution Panel (DRP) partly accepted the benchmarking undertaken by the taxpayer and made an adjustment by using CUP data which was available for one month, thereby scaling down the adjustment made by the TPO.

Ruling by ITAT

The ITAT observed that an identical issue relating to benchmarking of the international transaction had come up for consideration before the Co-ordinate Bench in the taxpayer's own case for the earlier year, i.e., AY 2010-11.

The Co-ordinate Bench had clearly and categorically held that the price charged by GESA to the AE cannot be considered as an internal CUP. Furthermore, there was no external CUP data available as well to benchmark the transaction under consideration.

Accordingly, in view of the above, the ITAT held that in the absence of CUP data and taking recourse to the Co-ordinate Bench's ruling in the case of the taxpayer for the earlier year, TNMM should be considered as the MAM to benchmark the international transaction and thereby the adjustment proposed by the lower Tax Authorities was deleted.

Our Comments

Ordinarily, only current year/ contemporaneous data can be used for CUP with the controlled price. Only in the case of exceptional circumstances, the data relating to earlier years but not more than two years prior to the current year can be used if such data reveals facts that can influence the determination of arm's length price in relation to the international transaction.

Once GESA ceases to be an agent of the AE w.e.f. 31 December 2006, then in the absence of current/contemporary data/uncontrolled price, the price of the prior year cannot be considered for the determination of ALP in relation to the international transaction entered in the current year.

Whether the arm's length price determination in relation to the international transactions can be done on an ad hoc/estimate basis?

Sanofi India Limited (formerly Aventis Pharma Limited) - I.T.A. No.3092/Mum/2006 [AY 2002-03]

Facts

The taxpayer is engaged in the manufacture and marketing of formulations across the therapeutic segment of anti-infective, arthritis, cardiology, central nervous system, etc.

The taxpayer has entered into various international transactions with its AE, which inter-alia included the transaction pertaining to payment of export commission at 12.5 % to its AE. The taxpayer aggregated all the international transactions and benchmarked the same using TNMM as the MAM.

However, the TPO, during the course of assessment proceedings, treated the transaction pertaining to payment of export commission as a separate transaction and, citing the lack of any direct documentary evidence, computed the ALP in relation to the said transaction at 3% on an ad hoc basis.

The Commissioner of Income-Tax (Appeals) [CIT(A)] also proceeded to determine the ALP of the transaction at 5% on an ad hoc basis without following any of the prescribed methods.

Ruling by ITAT

The ITAT held that the taxpayer had benchmarked the subject transaction by adopting one of the methods prescribed under the statute and furnished supporting evidence to demonstrate that the taxpayer's payment towards export commission at 12.5% vis-à-vis the comparable companies at 34.06% was at arm's length.

The CIT(A) and the TPO proceeded to determine the ALP on an ad hoc/ estimate basis without following any of the prescribed methods as mandated under the transfer pricing provisions.

The ITAT observed that the Tax Authorities in the subsequent years had also accepted payment of export commission by the taxpayer at 12.5% to be at arms' length.

Furthermore, the ITAT opined that even applying the rule of consistency and past history relating to similar transactions, the export commission paid at 12.5% has to be accepted to be at arm's length.

Our Comments

The arm's length price in relation to the international transactions undertaken by the taxpayer with its AE has to be determined basis one of the prescribed methods as per the transfer pricing provisions and not by applying any quantitative methods or on an ad hoc/ estimate basis.

Indirect Tax

i. Whether vouchers or the act of supplying them is taxable?

ii. If the answer to the above question is in the affirmative, what would be the tax rate?

M/s. Premier Sales Promotion Pvt. Ltd., [2021 (8) TMI 350 - AAR, Karnataka]

Facts

- The taxpayer sources e-vouchers for its customers per the orders received and acts as a trader for buying and supplying e-vouchers.
- The taxpayer is a third-party issuer of vouchers, which are redeemable by the beneficiaries for goods/services from the specified merchants from whom the taxpayer has obtained the vouchers.

Ruling

- The taxpayer is only supplying the payment instruments to their clients, and they are not settling any obligation by treating this as a consideration.
- Therefore, the act of supplying vouchers by the taxpayer cannot be termed as 'money' at the time of supplying them.
- They would take the color of money only when they are used for payment of consideration for the supply of goods or services procured by the end-user.
- Vouchers are also not covered under 'actionable claim' as they are not debt. They have an expiry period.
- Trading of vouchers for a consideration in the course or furtherance of business would amount to 'supply' in terms of Section 7 of the CGST Act.
- Furthermore, e-vouchers are intangible, but they still have the capabilities [they can be transmitted, transferred, delivered, stored, possessed, etc.] to be termed as 'goods.'
- Therefore, the taxpayer is obliged to pay 18% GST for supplying vouchers [residual entry].

Our Comments

Earlier, Appellate AAR, Tamil Nadu in Kalyan Jewellers [2021 (4) TMI 885-AAAR] had held that 'voucher' itself is neither 'goods' nor 'services.' However, in the present case, given that 'voucher' itself is being sold by the taxpayer, it has been termed as 'goods'. It would be interesting to see how the jurisprudence develops on the matter.

Also, interestingly, the AAR, in this case, has held that the rate of GST should be as per the residual entry in case of goods, i.e., 18%, and not as per the underlying goods/services.

Whether 'carried interest' in case of Venture Capital Fund (VCF) is liable to service tax?

M/s. ICICI Econet Internet And Technology Fund And Others Versus Commissioner Of Central Tax, Bangalore North [2021 (7) TMI 216 – CESTAT, Bangalore]

Facts

- VCF is established as a 'Trust' under the Indian Trusts Act, 1882 and registered with the Securities and Exchange Board of India (SEBI) as a VCF.
- The appellant allotted various classes of units to investors.
- Certain class of investors is entitled to additional returns on their investments in the form of 'carried interest.'

Ruling

- The principal liability and responsibility of managing the Trust/ Fund rest with the appellants.
- Any amount retained out of income distributable to subscribers is nothing but a charge or a fee for the services rendered. It is nothing but gross consideration in service tax parlance.
- 'Carried interest' is a portion of the consideration retained by the Funds for services rendered by them to the investors and passed on, in the disguise of return on investments, to the so-called 'special class of investors' who are none other than the Asset Management Company (AMC) and or its nominees.
- The appellants have devised the structure of the fund in such a manner that the AMC and/or their nominees would get huge sums of money in the guise of a Performance fee, carried interest, with the twin motives of benefitting the AMC and/or their nominees at the expense of the subscribers and avoiding the taxes.

Our Comments

The Tribunal's present ruling can result in a flurry of notices from the department under the service tax as well as GST laws.

The stakes involved in the matter are huge as the ruling is not only relevant for VCFs, but also for other types of funds, asset reconstruction companies, etc., who earn similar nature of returns on their investments.

Given the complexities involved, the matter is expected to be ultimately decided before the Higher Courts

Whether research and development (R&D) services provided to foreign customers on the goods provided by such customers are eligible to be treated as 'export of services'?

Hilti Manufacturing India Pvt. Ltd. [2021 (8) TMI 781 - AAR, Gujarat]

Facts

- The taxpayer was providing R&D services on the product samples provided by the foreign customer.
- It would conduct tests on various products, providing product development and engineering services such as benchmark testing and feasibility studies, analyzing data and targets, designing the products, making prototypes, verifying and validating the process and product.
- The results of these activities are then provided to the foreign customer comprising in the form of a report.

Ruling

- The sample goods have to be made physically available by the recipient to the taxpayer in order to enable the taxpayer to provide R&D services.
- Therefore, the place of supply of service in the present case will be the location where the services are actually performed i.e. Gujarat [Section 13(3)(a) of IGST Act].
- IGST Act stipulates that for 'export of service' to be satisfied, one of the conditions is that the place of supply should be outside India. This condition is not satisfied in subject case.
- The subject services are, therefore, liable to CGST and SGST.

Our Comments

The taxpayer had placed reliance on Tribunal's judgment in **Principal Commissioner of Central Excise, Pune-I Versus Advinus Therapeutics Ltd**. under the Service Tax law wherein a similar issue pertaining to the provision of scientific or technical consultancy service to foreign clients, it was held that even if some of the activities are carried out in India, by no stretch can it be asserted that the fulfilment of the activity is in India.

However, the AAR has disregarded the said decision stating that the same would not have relevance under the GST law.

Merger & Acquisition Tax

Mumbai ITAT: Directs CIT(A) to re-examine colorable share transactions with dubious valuation

Concord Enviro Systems Pvt. Ltd [TS-611-ITAT-2021(Mum)]

The assessee, a private company, had issued equity shares and Compulsorily Convertible Preference Shares (CCPS) to a Mauritius-based private equity firm at a premium of INR 63,233 and at par, i.e., at INR 1,000 per share respectively. The AO observed that the market value of equity share was INR 1806.75 and that of CCPS was INR 47.24 as per the valuation reports. The AO found this transaction as suspicious and, in view of the unreasonable premium quantum, made an addition of INR 40.20 crore as unexplained credit (Section 68 of Income-tax Act (ITA)). CIT(A) disagreed with AO's contention and deleted the addition.

Separately, the assessee had also acquired equity shares of a company at INR 1,203 per share, whereas the share was valued at INR 6,875. The AO held that it was a sham transaction and the differential valuation was taxed under Section 56 of ITA. CIT(A) deleted the same, citing that Section 56 had no applicability for the year.

On the second appeal, the Tribunal has redirected the case back to CIT(A) for further examination laying down the below observations:

- The CIT(A) had erred in not verifying the information on the source of funds himself but merely relying on the AO's observations. This is a complete dereliction of duty on CIT(A)'s part.
- However, in connection to the assessee's claim that the valuation report was only for the purpose of obtaining permission for the issue of shares to a non-resident from the RBI, no party can be permitted to shift stands on the same transaction.
- The issue under consideration is clearly assessee applying opaque devices and should be analyzed from the purview of Section 68 of ITA.
- With respect to the acquisition of shares, the assessee itself has agreed that shares were acquired at a price lower than the fair value. Hence assessee is using opaque colorable device and subterfuge. The transaction shall be analyzed as per Section 69B (investment not fully disclosed in books) and not Section 56. It is settled law that putting a wrong Section is not fatal to the assessment. The valuation aspect needs to be examined, therefore this matter is also remitted back to CIT(A).

Our Comments

The above decision re-emphasizes taking cognizance of the valuation provisions and maintaining a proper basis for the same. Furthermore, it also becomes pertinent to maintain proper documentation for the source of funds. The onus here now lies on the assessee to substantiate the basis for undertaking transactions at a price varying substantially from the valuation.

Delhi ITAT: 2(22)(e) provisions applicable only in the hands of 'shareholder' of the company having substantial interest

Vardhaman Buildtech Pvt. Ltd. [TS-782-ITAT-2021(Del)]

The assessee has received an unsecured loan of INR 1,18,42,505/- from M/s. Vardhaman Estates and Developers Pvt. Ltd. which has common shareholders having 25% shareholding in both these companies.

While the assessee contended that the provisions shall not be applicable to it but the shareholders, the AO proceeded to make an addition of the said sum as deemed dividend in the hands of the assessee. The CIT(A) upheld the addition citing that the reliance placed by the assessee in the case of Ankitech Pvt. Ltd.[1] is no more tenable in view of the decision of Hon'ble SC in the case of National Travel Services[2].

The Tribunal deleted the addition based on the following observations:

- The decision in the case of Ankitech has held that deemed dividend is chargeable to tax in the hands of the shareholders and not the recipient of loan and advance in which the shareholder holds a substantial interest. Whereas, the decision of National Travel Services has held that the deemed dividend taxability should be in the hands of beneficial shareholders and not registered shareholders.
- Deemed dividend is always chargeable to tax in the hands of the shareholder of the company having substantial interest. The decision in National Travel Services does not disturb the position that the dividend is always taxable in the hands of the shareholder.

Our Comments

The decision further affirms the settled position that the deemed dividend has to be levied in the hands of the shareholder and not in the hands of the borrower entity in which the shareholder holds a substantial interest.

1. CIT v. Ankitech Pvt. Ltd. (340 ITR 14)
2. National Travel Services v. CIT (401 ITR 154)

Tax Talk

Indian Developments

Direct Tax

Extension of time limits of certain compliances to provide relief to taxpayers in view of a severe pandemic

[Circular No. 15, 3 August 2021]

The due date for filing of Equalisation Levy statement for FY 2020-21, statement of foreign remittances to be filed by Authorised Dealers for Q1 of FY 2021-22 have been extended to 31 August 2021. The due date for Pension Funds and Sovereign Wealth Funds for intimation of investment made in India for Q1 for FY 2021-22 have been extended to 30 September 2021.

CBDT notifies rules for computation of exempt income and income taxable at concessional rates of a Specified Fund

[Notification No. 90/2021, 9 August 2021]

Provisions of Section 10(4D)/115AD(1A) provide exemptions/ concessions to certain specified funds located in the International Financial Services Centers (IFSC). New rules 21AI and 21AJ provide the mechanism for the following:

- Computation of exempt income under Section 10(4D) of a specified fund located in IFSC;
- Determination of income which is taxable at concessional rates under Section 115AD of a specified fund located in IFSC

The new rules further prescribe filing of annual statement of exempt income in Form 10IG and annual statement for income taxable at concessional rates in Form 10IH.

CBDT notifies rules for computation of relief under MAT on account of APA or secondary adjustment

[Notification No. 92/2021, 10 August 2021]

Recent Union Budget had amended MAT provisions to provide relief in cases where the past year's income is included in the current financial year due to APA or secondary adjustment provisions. The income tax department has now introduced a new rule providing detailed guidelines for the computation of such relief. The new provisions allow discretion to the taxpayer to opt-in and shall apply only where the taxpayer has not availed MAT credit in any subsequent financial year. The rule prescribes that the claim of relief, if any, has to be made in Form 3CEEA.

Finance Minister meeting with Infosys on glitches in e-filing portal of Income Tax Department

[Press Release dated 23 August 2021]

The Hon'ble Finance Minister took a meeting with Mr. Salil Parekh, MD & CEO Infosys, to convey the government and taxpayers' deep disappointment and concerns about the continuing glitches in the e-filing portal. Hon'ble Finance Minister demanded that the issues faced by taxpayers on the current functionalities of the portal should be resolved by the team by 15 September 2021 so that taxpayers and professionals can work seamlessly on the portal.

Indirect Tax

Government notifies RoDTEP scheme guidelines and rebate rates

After nearly two years of anticipation, the scheme guidelines of the Remission of Duties or Taxes on Export Products (RoDTEP) scheme and rates for 8555 tariff items under the same have been notified.

Key aspects of RoDTEP scheme

- The RoDTEP rates and the value cap per unit have been notified under Appendix 4R of FTP for the 8-digit export HS code. The currently notified rebate rate ranges from 0.01% to 4.3%.
- The rebate would be available to the eligible exporters at the notified rate as a % of the FOB value of the exported product (subject to value cap per unit).
- The e-scrips issued under this scheme can be used for payment of Basic Customs Duty only, and are expected to be freely transferrable.
- Exporters in Special Economic Zone, 100% Export Oriented Units, exports under Advance Authorization scheme, etc., have been kept outside the purview of RoDTEP. It has been clarified that their inclusion under this scheme is still under review.

It is pertinent to note that the year-on-year RoDTEP rebate will be decided basis the budget outlay for the scheme. Currently, nearly INR 130 billion has been set aside for FY 2022 (and another INR 60 billion for Rebate of State and Central Levies and Taxes [RoSCTL]), which is nearly half the budget of its predecessor viz., MEIS.

Blocking of E-Way Bill (EWB) generation facility

In terms of Rule 138E of the CGST Rules, the taxpayers who have not filed returns in GSTR-3B for two or more consecutive tax periods up to June 2021 have now been blocked from the EWB generation facility on the EWB portal [with effect from 15 August 2021]. The government has decided to resume the blocking of EWB generation on non-filing of GST returns, which was temporarily suspended due to the pandemic.

New Functionalities made available for taxpayers on GST Portal

- Quarterly Return Monthly Payment (QRMP) taxpayers can now file Nil GSTR-1 through SMS. They can now file it by sending a message in the specified format to 14409.
- If the registration of a taxpayer under the QRMP Scheme is canceled, with the effective date of cancellation being any date after 1st day of Month 1 of a quarter, they would be required to file GSTR-1 for the complete quarter, as the last applicable return.
- Taxpayers can now place a request on the GST portal for extending the due date for filing of reply or for adjourning the personal hearing after an SCN has been issued by the tax officer in a refund case and the date of personal hearing has been fixed.

Tax Talk

Global Developments

Direct Tax

Barbados joins OECD/G20 BEPS Inclusive Framework on BEPS on a Two–Pillar Solution on the digital economy

[Excerpts from the OECD, 12 August 2021]

Barbados joins the two-pillar plan formulated by OECD/G20 BEPS Inclusive Framework addressing the tax challenges arising from digitalization of the economy to reform the international taxation rules and ensure that multinational enterprises pay a fair share of tax wherever they operate, bringing the number of jurisdictions participating in the agreement to 133. The Statement, released on the 1 July 2021 and agreed by Barbados on 12 August 2021, establishes a new proposal for international tax reform based on a two-pillar package. The deal will be finalized in October 2021, complete with an implementation plan to develop model legislation, guidance and a multilateral treaty in 2022, with implementation from 2023.

OECD updates Transfer Pricing Country Profiles to reflect new kinds of financial transactions

[Excerpts from the OECD, 3 August 2021]

The OECD has published updated Transfer Pricing Country Profiles, reflecting the current transfer pricing legislation and practices of 20 jurisdictions-Angola, Argentina, Australia, Colombia, Costa Rica, Czech Republic, Denmark, India, Japan, Netherlands, New Zealand, Nigeria, Norway, Romania, Russian Federation, Slovak Republic, Spain, Switzerland, Tunisia and Turkey. These updated profiles also contain new information on countries' legislation and practices regarding the transfer pricing treatment of financial transactions and the application of the Authorised OECD Approach (AOA) to attribute profits to PEs. Updates to the Transfer Pricing Country Profiles will be conducted in batches throughout the second half of 2021 and the first half of 2022. With this first batch, the profiles for 20 jurisdictions have been updated, including three new country profiles from Inclusive Framework members (Angola, Romania and Tunisia), bringing the total number of countries covered to 60.

New EU Single Corporate Tax Rulebook (BEFIT) WillFollow OECD's Proposals for the Digitalized Economy

[Excerpts from Answer given by Mr. Gentiloni on behalf of the European Commission, 3 August 2021]

The European Commission will propose a new framework for income taxation for businesses in Europe (Business in Europe: Framework for Income Taxation or BEFIT). BEFIT will build on some of the fundamental elements of the envisaged OECD/G20 global agreement on the two pillars. The OECD reforms involve the taxation of multinational enterprises and address cases with an exclusively cross-border dimension. BEFIT will also operate in a similar context. It will address cross-border issues linked to the taxation of groups of companies. As a result, coordinated EU action, rather than disparate national measures, is an inherent element of BEFIT. The Commission will carry out broad consultations with the Member States, the European Parliament and the business in order to produce this proposal.

Kenya Enacts Direct Taxation Amendments Aimed at Widening Tax Base

[Report from IBFD correspondent Ann Ng'ang'a- Tax Consultant, Kenya, 27 August 2021]

The Kenyan government enacted several tax amendments related to direct taxation, including deeming family trust income as chargeable income, exempting the transfer of property to a family trust from capital gains tax, etc. This income will, however, be exempt if the family trust is registered. More details of the various amendments, which unless otherwise indicated, will apply from 1 July 2022 relating to direct taxation.

Transfer Pricing

Hong Kong IRD issues guidance for Transfer Pricing on account of COVID-19

The Inland Revenue Department (IRD) of Hong Kong has recently issued guidance on Transfer Pricing related issues arising from COVID-19, which is principally in line with the guidance on the Transfer Pricing Implications of the COVID-19 Pandemic (the COVID-19 Transfer Pricing Guidance) released by the Organisation for Economic Co-operation and Development (OECD).

IRD Guidance for Tax Payers concerning Transfer Pricing[3]

1. Limited risk-bearing entities may incur certain COVID-19 losses

The OECD guidelines recognize the possibility of limited risk-bearing entities incurring losses caused by the pandemic or being allocated specific pandemic costs, as long as these approaches are supported by an accurate delineation of the controlled transaction and a robust comparability analysis. To the extent that the risk assumed by a limited risk entity is consistent with the realization of a hazard risk caused by the pandemic (for example, the marketplace risk), the limited risk entity may be allocated a loss associated with the playing out of this risk. However, if before the pandemic a limited risk entity did not assume any particular risk, say credit risk, it may not be appropriate for it to bear the realization of such a risk during the pandemic.

2. Testing periods

Considering the divergent economic conditions in the pre or post-pandemic period and its effects on economic conditions, as a pragmatic approach, it may be appropriate to have separate testing periods vis-a-vis periods considered for price setting.

In other fact patterns, it may also be appropriate to use combined testing periods (i.e., including years impacted by the pandemic and years not affected) to improve comparability. This may be appropriate so long as the data from independent comparables can be consistently measured over a similar period.

3. Treatment of loss-making comparable companies

The use of loss-making comparable companies may be appropriate where reliability can be demonstrated (i.e., the comparable companies should assume similar levels of risk and be similarly impacted by the pandemic). Thus, loss-making comparables that satisfy the comparability criteria in a particular case should not be rejected on the sole basis that they suffer losses in periods affected by the pandemic.

4. Impact of government assistance on controlled transactions

The receipt of government assistance in itself cannot be presumed to have an impact on the price of controlled transactions. Relevant comparability analysis needs to be performed, considering economically relevant characteristics –such as the conditions imposed by the government assistance, the impact of the pandemic on the outcome of the economically significant risks, and the linkage between the type of government assistance and those risks.

5. Outcome of economically significant risks

The interplay between the COVID-19 hazard risk and other economically significant risks should be evaluated when considering risk assumptions in a particular controlled transaction. In undertaking this analysis, it may be determined that the taxpayer to a controlled transaction cannot influence the hazard risk associated with a pandemic but nevertheless assumes other risks that have materialized because of COVID-19.

3. IRD : Tax Issues arising from the COVID-19 Pandemic and The Guidance on the transfer pricing implications of the Covid-19 pandemic issued by the OECD on 18 December 2020

6. Advance Pricing Agreement

The IRD will uphold existing Advance Pricing Agreements(APAs) unless a condition leading to the revocation, cancellation or revision of the APA has occurred. In a scenario wherein material changes in economic conditions lead to the breach of the critical assumptions, taxpayers should notify the IRD not later than one month after the breach occurs.

Our Comments

The unprecedented situation due to COVID-19 has raised many taxation issues. The Hong Kong IRD taking recourse to the Transfer Pricing Guidelines as issued by the OECD for COVID-19, has provided relevant guidance on various aspects that a taxpayer may encounter while undertaking the transfer pricing analysis in respect of the inter-company transactions and for APAs.

It is in the MNE's interest to be proactive and start collating relevant qualitative and quantitative points that can assist them in justifying any changes in the inter-company pricing policy considering the COVID-19 pandemic. Special emphasis is required for aspects like Functional and Risk analysis, Impact on Benchmarking and APA.

Indirect Tax

Changes in Texas sales tax law

[Excerpt from The Dallas News]

The Texas sales tax law will be undergoing a sweeping change from 31 October 2021, whereby municipal sales taxes on online purchases will be remitted to the city where the buyer resides rather than where the seller operates.

Compliance Calendar

Direct Tax
Indirect Tax

7 September 2021

Payment of TDS and TCS deducted/collected in August 2021

10 September 2021

- GSTR-7 for the month of August 2021 to be filed by taxpayer liable for Tax Deducted at Source (TDS)
- GSTR-8 for the month of August 2021 to be filed by taxpayer liable for Tax Collected at Source (TCS)

11 September 2021

GSTR-1 to be filed by registered taxpayers for the month of August 2021 by all registered taxpayers, not under the QRMP scheme

13 September 2021

- GSTR-6 for the month of August 2021 to be filed by Input Service Distributor (ISD)
- Uploading B2B invoices using Invoice Furnishing Facility under QRMP scheme for the month of August 2021 by taxpayers with aggregate turnover of up to INR 50 million

15 September 2021

Payment of the second installment of advance tax for the Assessment Year 2022-23 (45% of estimated tax liability to be deposited on a cumulative basis)

20 September 2021

- GSTR-5 for the month of August 2021 to be filed by Non-Resident Foreign Taxpayer
- GSTR-5A for the month of August 2021 to be filed by Non-Resident service provider of Online Database Access and Retrieval (OIDAR) services
- GSTR-3B for the month of August 2021 to be filed by all registered taxpayers, not under the QRMP scheme

25 September 2021

Payment of tax through GST PMT-06 by taxpayers under QRMP scheme for the month of August 2021

30 September 2021

- Due date for furnishing of challan-cum-statement in respect of tax deducted under Section 194-IA for the month of August 2021
- Due date for furnishing of challan-cum-statement in respect of tax deducted under Section 194-IB for the month of August 2021

7 October 2021

Due date for deposit of tax deducted/collected for the month of September 2021

10 October 2021

- GSTR-7 for the month of September 2021 to be filed by taxpayer liable for Tax Deducted at Source (TDS)
- GSTR-8 for the month of September 2021 to be filed by taxpayer liable for Tax Collected at Source (TCS)

11 October 2021

GSTR-1 to be filed by registered taxpayers for the month of September 2021 by all registered taxpayers, not under the QRMP scheme

13 October 2021

- GSTR-6 for the month of September 2021 to be filed by Input Service Distributor (ISD)
- GSTR-1 for the quarter of July 2021 to September 2021 to be filed by all registered taxpayers under the QRMP scheme

15 October 2021

Quarterly statement of TCS deposited for the quarter ending 30 September 2021

Insights

Alerts

Hong Kong IRD issues guidance for Transfer Pricing on account of COVID-19

24 August 2021

Read Here https://bit.ly/3nbAOsK

Government notifies RoDTEP Scheme guidelines and rebate rates

18 August 2021

Read Here https://bit.ly/3ha0LVs

Rationalization of the MAT provisions to align for transfer pricing adjustments - CBDT notifies rules with a formula-based mechanism for computing MAT relief

14 August 2021

Read Here https://bit.ly/3jYCNgR

Articles

Did Tribunal get 'carried away' while deciding on Carried Interest?

16 September 2021

Read Here https://bit.ly/3hFKSql

Supreme Court's Restraint on 'Ideal GST Law' - Upholds Inverted Duty Structure Refund Restriction

- Saket Patawari

15 September 2021

Read Here https://bit.ly/3Au3EbH

Indirect transfer tax provision to apply prospectively as govt withdraws infamous retrospective amendment

- Maulik Doshi

27 August 2021, CNBCTV 18

Read Here https://bit.ly/3tjv2Gm

RoDTEP Scheme Gaining Pace

- Saket Patawari

23 August 2021, Taxsutra

Read Here https://bit.ly/3ySLpuy

Comprehensive Review of GST Laws - A Much Needed Shot in the Arm

- Saket Patawari

20 August 2021, Taxsutra

Read Here https://bit.ly/3yQoKPJ

Webinars & News

Webinars

GST - Practical Insights into Audit and Investigation

Organizer - Nexdigm (SKP)

17 September 2021

Indian Expats in Gulf – How would new Indian Residency rules affect you?

Organizer - ICAI-Muscat Chapter

21 August 2021

Watch Here https://bit.ly/3sb30w5

Virtual Training Course on Transfer Pricing and Related Compliances

Organizer - Achromic point

11 August 2021

News

E-way bill generation to be blocked from Aug 15 for GST return non-filers

- Saket Patawari

6 August 2021, Livemint

Read Here https://bit.ly/3AEBZo7

Packed agenda for GST Council

-Saket Patawari

16 September 2021, The Hindu

Read Here https://bit.ly/2XCQWZE

About Nexdigm (SKP)

Nexdigm (SKP) is an employee-owned, privately held, independent global business advisory provider that helps organizations across geographies meet the needs of a dynamic business environment. Our focus on problem-solving, supported by our multifunctional expertise enables us to provide customized solutions for our clients.

We provide integrated, digitally driven solutions encompassing Business Services and Professional Services, that help businesses navigate challenges across all stages of their life-cycle. Through our direct operations in the USA, India, and UAE, we serve a diverse range of clients, spanning multinationals, listed companies, privately-owned companies, and family-owned businesses from over 50 countries.

Our multidisciplinary teams serve a wide range of industries, with a specific focus on healthcare, food processing, and banking and financial services. Over the last decade, we have built and leveraged capabilities across key global markets to provide transnational support to numerous clients.

From inception, our founders have propagated a culture that values professional standards and personalized service. An emphasis on collaboration and ethical conduct drives us to serve our clients with integrity while delivering high quality, innovative results. We act as partners to our clients, and take a proactive stance in understanding their needs and constraints, to provide integrated solutions. Quality at Nexdigm (SKP) is of utmost importance, and we are ISO/ISE 27001 certified for information security and ISO 9001 certified for quality management.

We have been recognized over the years by global organizations, like the International Accounting Bulletin and Euro Money Publications.

Nexdigm resonates with our plunge into a new paradigm of business; it is our commitment to ***Think Next.***

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