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Tax Street

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

August 2023

ITR WORLD TAX
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2023

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Introduction

Tax Street

- Focus Point 3
- From the Judiciary 5
- Events and Webinars 10
- Tax Talk 11
- In The News 14
- Insights 14
- Compliance Calendar 15

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 2023.

- The 'Focus Point' examines the highly contentious and litigated issue of taxability of reimbursement.
- Under the 'From the Judiciary' section, we provide in brief, the key rulings on important cases, and our take on the same.
- Our 'Tax Talk' provides key updates on the important tax-related news from India and across the globe.
- Under 'Compliance Calendar', we list down the important due dates with regard to direct tax, transfer pricing and indirect tax in the month.

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

Warm regards,
The Nexdigm Team

Focus Point

Synopsis of Reimbursements of Cost's Taxability

In the current era of globalization of businesses, interdependence among group companies has become more common. Companies within the same group share costs relating to businesses to achieve cost efficiency and streamline operations. These practices are prevalent in multinational corporations and conglomerates where different group entities collaborate closely. Some prevalent practices include allocating common costs such as information technology, procurement, personnel cross-charge, and other cost-sharing arrangements. Such recoupment of expenses is commonly known as 'reimbursement.'

Reimbursement of costs is a widely used concept and an equally debated one in India, especially in the case of payment to overseas group entities. From a corporate tax perspective, the controversy revolves around the taxability of reimbursement in the hands of the recipient, whether it is taxable as income and consequent withholding tax obligation in the hands of the payer. There are conflicting judicial decisions on this aspect, adding to the complexities of the taxability of reimbursement of cost.

The term 'reimbursement' has not been defined in the Income-tax Act, 1961 (the Act). However, it has been defined in various dictionaries like Black's Law Dictionary and Oxford Dictionary. According to these dictionary meanings, reimbursement can be described as repayment of what has already been spent or incurred. Therefore, it should not be considered a reward or compensation for a service rendered.

Taxability under the Act

Under the Act, there is an obligation on the payer to withhold tax while making payment to a non-resident of any sum chargeable to tax under the provisions of the Act. The Act seeks to levy income tax in respect of the 'income' of every person. The term' income' has been exhaustively defined to include various types of gains, accretion, value addition, etc. In the absence of any profit-related element, a receipt cannot be classified as income and, therefore, should not be subject to income tax.

In the landmark judgment in the case of GE India Technology Center Pvt. Ltd. v. CIT[1], the Hon'ble Supreme Court of India held that the obligation to withhold tax should be limited to the appropriate proportion of such income chargeable to income tax under the Act. According to the Court, it cannot be said that the obligation to withhold tax arises the moment there is a remittance. If we were to accept such a contention, it would mean that on mere payment, income would be said to accrue or arise in India. Such an interpretation would mean the obliteration of the expression 'sum chargeable under the provisions of the Act.'

Accordingly, so far, the payment is a 'mere reimbursement of cost and does not include any profit element', it may not be subject to withholding tax under the Act. The crucial factors to consider are: (a) 'the nature of services being provided' in relation to the incurrence of cost for which reimbursement has been made and (b) the supporting documentation.

We have broadly discussed the various typical categories of reimbursements to understand the taxability in light of judicial pronouncements.

Reimbursements to and through a non-resident

As reiterated above and as per the rulings of various authorities[2], it has been held that the amount received by the taxpayer by way of reimbursement cannot be regarded as income, particularly if it was found that the taxpayer had received no money in excess of the expenses it had incurred.

1. [2010] 7 taxmann.com 18/193 Taxman 234/327 ITR 456
2. CIT vs Siemens Aktiongesellschaft 177 taxman 81 (Bombay High Court); CIT vs IDFC Investment Advisors Ltd ITA No. 968/2014(Bombay High Court)

In the absence of the profit element, the Courts have been of the view that such payments are reimbursements that are not taxable in India. Consequently, no withholding tax needs to be applied to such payments.

However, a contrary view has been adopted by the Tribunals in some cases[3], wherein it was found that the Indian companies were availing services from a third party overseas, but payment for these services was being routed through their foreign group companies, which claimed such receipts to be plain reimbursements. In such cases, it was observed that had the Indian companies directly incurred such expenses, there would have been a requirement to withhold tax. Therefore, merely the transaction is routed through a foreign group company; it cannot alter the nature of the payment made as "reimbursement". In such cases, the Indian companies were held to be liable to withhold tax on the payments to be made to their foreign group companies.

The responsibility of proving to the satisfaction of tax authorities that the amount payable is pure reimbursement, without any provision of taxable services, will be on the Deductor.

Reimbursements under cost-sharing arrangements

Under these arrangements, the costs are incurred at a group level and thereafter allocated amongst the companies of the group on some reasonable basis or pre-agreed allocation key. The practice is widely prevalent across industries and worldwide and helps companies achieve cost efficiencies.

From the perspective of Income Tax, the issue that arises is whether the allocation or sharing of costs is taxable in the hands of the recipient entity.

The Supreme Court of India, in the case of A.P. Moller Maersk AS[4], while analyzing the taxability of pro-rata IT costs recharged to Indian agents by a foreign shipping company, held that once the character of the payment was found to be in the nature of reimbursement of expenses, it could not be charged to tax in India. In this case, the foreign shipping company had furnished its calculation of total costs and their pro-rata division among the agents (which was done without any markup).

In another case, ABB Ltd (AAR)[5], held that reimbursement received by the applicant was not taxable in India and noted that the resources were pooled by all the group entities for common benefit (and not for conferment of any right on the applicant). It also held that since all the participating group entities had the right to reap the benefits of research, the payment made towards their own share of costs could not be taxed in India. Tribunals have expressed similar views in other judgments[6].

It is clear that taxability depends on the facts and circumstances of each arrangement and there is a need to evaluate various underlying factors such as the basis of allocation, the value addition by the entity pooling the costs and the benefits derived by the participating entities. It is also important to maintain strong documentary evidence to demonstrate that the amount paid is in the nature of reimbursement.

Our Comments

The issue of taxability of reimbursement is highly contentious and litigated. Considering the penal consequences for not withholding, the company needs to be extremely cautious while making payment of reimbursement of cost. Needless to say, it is imperative for the company to maintain proper documentation to support and substantiate the true nature of the transaction while claiming that the payment made is only reimbursement of cost.

3. C.U. Inspection (I) P Ltd vs DCIT 34 taxmann.com 75 (Mumbai Tribunal); DCIT (TDS) vs Kodak India P Ltd 58 taxmann.com 113 (Mumbai Tribunal); Ershisanye Construction Group India P Ltd vs DCIT 84 taxmann.com 108 (Kolkata Tribunal)
4. 293 CTR 1
5. [2010] 189 Taxmann 422 (AAR - NEW DELHI)
6. Asst. CIT vs Modicon Network P Ltd 14 SOT 204 (Delhi Tribunal), Emersons Process Management India P Ltd vs Addl. CIT 13 taxmann.com 149 (Mumbai Tribunal)

From the Judiciary

Direct Tax

Can exemption be given to a Mauritius-based investment company on the disposal of shares that arose from the Conversion of Cumulative Convertible Preference shares (CCPS), which took place after 1 April 2017?

Sarva Capital LLC
TS-467-ITAT-2023(DEL)

Facts

The taxpayer, a resident of Mauritius, was incorporated for making investments in India in education, agriculture, healthcare, etc. The taxpayer had made certain investments in India before 1 April 2017 in equity shares and CCPS of certain companies in India. In its return of income, the taxpayer claimed exemption from capital gains under Article 13(4) of the India-Mauritius tax treaty.

The Revenue contended that the taxpayer is a conduit company and since it has been incurring losses in Mauritius and its income is not being taxed there, it cannot be regarded as a resident as per Article 4, and thus, the tax treaty benefit cannot be provided.

For its income from the sale of CCPS, the taxpayer filed a revised return and offered the capital gains to tax as per Article 13(3B) of the tax treaty. However, it claimed before the Tribunal that the capital gains should be exempt as per Article 13(4) as the CCPS were acquired prior to 1 April 2017.

Held

The Delhi Tribunal allowed exemption under the India-Mauritius tax treaty to the taxpayer on disposal of shares that arose from conversion of CCPS where CCPS was issued prior to 1 April 2017, but conversion took place after the said date as there was no substantial change in the rights of the taxpayer.

The Tribunal relied on the Supreme Court ruling in Azadi Bachao[7], the jurisdictional High Court ruling in Blackstone[8] and the Co-ordinate Bench ruling in MIH India[9] upholding the validity of Circular No. 789 of 2000 and observing that Tax Residency Certificate (TRC) is sufficient evidence to claim not only the tax residency and legal ownership but also treaty eligibility. It also observes that SC in Azadi Bachao held that 'liable to taxation' and 'actual payment of tax' are two different aspects, and merely because tax exemption is granted under the domestic tax laws of Mauritius, it cannot lead to the conclusion that the entities availing such exemption are not liable to tax.

The Tribunal also opined that Article 13(4) of the tax treaty speaks about 'shares' and shares here are to be construed in a broader sense, and it will take within its ambit all types of shares, including preference shares. Thus, the tax treaty benefit was granted to the taxpayer.

Our Comments

Despite the taxpayer revising its return to offer the capital gains to tax as per Article 13(3B) of the tax treaty, the Tribunal held that this should not stop the Revenue from granting tax treaty benefits to the taxpayer under Article 13(4) of the treaty as the shares were acquired prior to 1 April 2013.

Whether reimbursement of software license fee from Indian AEs is taxable as "Income from other sources" or "business income?"

GE Precision Healthcare LLC
TS-456-ITAT-2023(DEL)

Facts

The taxpayer, a tax resident of US, operates in the healthcare sector as a global medical device provider under the General Electric (GE).

The taxpayer purchased certain standard commercial software licenses from third party and sublicensed to its affiliates in India to aid in their smooth business operations. The same was sublicensed on cost to cost basis.

7. 263 ITR 706
8. TS-67-ITAT-2023(DEL)
9. S.A No. 138/Del/2022

The taxpayer treated such sub-licensed fee as business income under Article 7 of India-USA Double Taxation Avoidance Agreement (DTAA), since there is no Permanent Establishment (PE), and did not offer the same to tax in India. However, the Revenue disregarded this approach and considered such income as income from other sources under the Act and Article 23(3) of the Treaty as the same was not taxable as per Article 12 of the tax treaty.

Held

The Delhi Tribunal quashed the Revenue's approach of addition of reimbursement of software license fee received by a taxpayer from its Indian AEs and held that receipt by way of sublicensed amount could have been characterized either as royalty income or business income, not as other income under Article 23(3) of the Treaty.

The Tribunal opined that the taxability of a particular income falling under any Article of a tax treaty is subject to fulfillment of the conditions laid down in the applicable Article. However, if the income is not taxed due to non-fulfillment of such conditions, the same cannot automatically be re-characterized as other income.

Our Comments

The Tribunal held that since the reimbursement of software fee can be classified under other Articles of the tax treaty (i.e., Article 7 and 12), it cannot be treated as a residuary income as per Article 23 of the tax treaty.

Transfer Pricing

Transfer Pricing provisions are not applicable in the absence of income from a transaction

WNS Global Services Pvt Ltd
ITA No. 2450 & 2451/Mum/2022

Facts

The taxpayer is engaged in providing ITeS services. During the years under appeal, the taxpayer acquired equity shares from its AE at the value determined based on a valuation report issued by an independent valuer [weighted average of two approaches, namely, Markets Multiple Method (MMM) and Discounted Cash Flow method (DCF)].

The Transfer Pricing Officer

The Transfer Pricing Officer (TPO) rejected the benchmarking done by the taxpayer and reworked the Fair Value using DCF Method by replacing the projections with actuals. Furthermore, the TPO proceeded to treat the securities premium over and above the value determined by the TPO as deemed loan and proposed TP adjustment imputing interest at the rate of 2.74% on the said deemed loan. The Dispute Resolution Panel (DRP) partially upheld the adjustment made by the TPO by applying an interest rate at six months LIBOR (+) 100 bps and, accordingly, reduced the TP adjustment.

Held by the ITAT

On perusal of the material on record and hearing submission from both sides, the ITAT noted that an identical issue of purchase of equity shares had come up for consideration before the Co-ordinate Bench in the taxpayer's own case for an earlier year wherein it was clarified by the Tribunal that 'projections can't be substituted by actuals and hindsight ought not to affect a valuation report'. The Co-ordinate Bench further opined that reference to TPO in this case is bad in law as the transaction of purchase of shares, in the absence of income, does not constitute an international transaction.

Our Comments

The judgment reiterates and confirms the earlier pronounced decisions of Hon'ble High Court[10] that TP provisions cannot be invoked in the absence of an income element in a transaction. The decision also highlights the importance of the rule of consistency, which should not be overlooked.

PLI of assessee qua PLI of comparable – Berry ratio or OP/OC

ADM Agro Industries Kota & Akola P. Ltd
TS-355-ITAT-2023(DEL)-TP

Facts

The assessee is engaged in trading activity (physical trading of agricultural commodities, such as sorghum, barley, wheat, oilseeds, yellow peas, etc.) and merchanting trades [in agricultural commodities under the Foreign Exchange Management Act and guidelines issued by the Director General of Foreign Trade (DGFT)].

The TPO accepted the Arm's Length Price (ALP) of the trading segment but rejected the ALP of the merchanting trades segment on the basis that Profit Level Indicator (PLI) selected for a tested party,i.e., Operating profit (OP)/ Value added Cost (VAC) (Berry Ratio) is different from the PLI of the comparable companies,i.e., OP/Operating Costs (OC). TPO held that the PLI adopted by the assessee is not in conformity with Rule 10(B)(1)(e).

Held by the ITAT

ITAT reiterated the relevant rules and explained the following:

- If operating expenses are considered as a relevant base, there would be no difficulty in using the Berry Ratio as a PLI in terms of Rule 10(B)(1)(e).

10. Vodafone Services (P) Ltd vs UOI (WP No.871 of 2014) and Shell India Market Pvt Ltd vs ACIT (WP No.1205 of 2013)

- That Berry Ratio can be applied only in case of stripped-down distributors with no financial exposure and risk, placing reliance on High Court Judgement[11].
- Berry ratio is not appropriate PLI where the assessee has substantial fixed assets or uses intangible assets as part of its business.
- Rejected the TPO contention of adding the cost of goods to the denominator as the comparable companies are business auxiliary service providers.

Our Comments

ITAT clarifies that if the functionalities of the assessee are comparable to that of the comparable service providers earning fixed margins basis the limited functions and risks, the Berry Ratio can be adopted as the appropriate PLI to determine the ALP.

Indirect Tax

Whether the purchasing dealer can be denied the benefit of Input Tax Credit (ITC) in cases where the supplier fails to pay the tax so collected?

Astha Enterprises vs. State of Bihar and Another
TS-407-HC(PAT)-2023-GST

Facts

- The petitioner was denied ITC on the purchase of goods on the ground that the supplier had defaulted in payment of tax liability.
- Having failed to file an appeal within the prescribed due date, the petitioner assailed the assessment order under the writ jurisdiction of Patna HC.
- As per the petitioner, the recovery sought now had the character of double taxation. Instead, the Department should have proceeded against the selling dealer to recover the collected amount of tax.

Ruling

- HC observed that the conditions of Section 16(2) of the Bihar GST/CGST Act are to be satisfied together and not separately or in isolation.
- ITC, by the very nomenclature, contemplates credit being available to the purchasing dealer by way of payment of tax by the supplier to the government.
- Referring to the SC judgment in the case of Ecom Gill Coffee Trading Pvt. Ltd. [TS-99-SC-2023-VAT], HC added that even if the petitioner had produced invoices, account details and documents evidencing transportation of goods, this did not absolve them from the rigor provided under Section 16(2)(c) of the Bihar GST/CGST Act.
- The benefit (of ITC) is one conferred by the statute and if the conditions prescribed therein are not complied with, no benefit flows to the claimant, held the Court.
- It rejected the petitioner's contention of double taxation while also refusing to absolve the liability of the recipient in the presence of statutory measures to recover tax from the selling dealer.
- HC remarked the government could use its machinery to recover the amounts from the selling dealer and the purchasing dealer could possibly seek a refund; however, *"as long as the tax paid by the purchaser to the supplier, is not paid up…the purchaser cannot raise a claim of Input Tax Credit under the statute."*
- Moreover, HC found that Madras HC's decision in DY Beathel Enterprises had ignored the provision of Section 16(2)(c).

Our Comments

This decision should further tighten the noose for taxpayers as they would now be required to verify the GST registration as well as GST returns, viz. GSTR-1 and GSTR-3B filing status of all suppliers/ vendors since the inception of GST regime to enable smooth ITC availment.

Going forward, the businesses may revisit their vendor agreement clauses to provide for indemnity against loss of ITC in the event of failure on the supplier's part to comply with GST provisions.

11. Sumitomo Corporation India Pvt Ltd [TS-493-HC-2016(DEL)-TP]

Whether the GST Department could initiate audit of a prior period after the closure of business and cancellation of GST registration?

Tvl. Raja Stores vs. The Assistant Commissioner (ST)
TS-421-HC(MAD)-2023-GST

Facts

- Audit proceedings under Section 65 of the CGST Act were sought to be initiated against the petitioner after the closure of business and cancellation of GST registration on the ground that the petitioner had failed to pay the collected tax during the period FY 2017-18 to FY 2021-22.
- The petitioner challenged the show cause notice before the Madras HC.

Ruling

- Perusing the said Section, HC observed, *"When the Section specifically states 'any registered person,' then it ought to be construed as existence concern, and the unregistered person is exempted from the purview of the said Section."*
- When a Section provides for a periodical audit, the Revenue, having failed to conduct an audit for all these years, suddenly cannot wake up and conduct an audit.
- However, it clarified that this will not preclude the Revenue from initiating assessment proceedings for the said concern under Sections 73 and 74.
- Accordingly, it quashed the impugned notice while granting liberty to the Revenue to initiate assessment proceedings against the petitioner.

Our Comments

In recent times, we have witnessed a surge in notices being issued to taxpayers seeking to initiate scrutiny of returns/assessments/audits for the first five years of the GST regime.

While cancellation of GST registration may not absolve any person from the liabilities for the past period and action can be taken against him at a future date, it would be a good trade facilitation measure to have a proper verification process in place at the Department's end to ascertain any possible liabilities before approving the surrender application.

As a corollary, it would be equally imperative for the taxpayers to look at all probable risks and applicable compliances before applying for cancellation of registration.

M&A Tax Update

Mumbai ITAT allows set off of brought forward losses pursuant to change in shareholding inter-se shareholders

Hiranandani Healthcare Private limited
TS-434-ITAT-2023(Mum)

The Mumbai Bench of the Income Tax Appellate Tribunal (ITAT) has held that Section 79 would not restrict setting off of brought forward losses if the shares of the company carrying not less than 51% of the voting power were beneficially held by the "very same persons" in the years in which the losses were incurred and the years in which the said loss was sought to be set off.

In the given case, taxpayer's shareholding pattern underwent a change due to the fresh issue of shares, prior to which the shareholding pattern stood at 40:60. After the issue, the shareholding pattern changed to 85:15, while the shareholders remained unchanged. The taxpayer claimed set off of brought forward losses. The tax authority rejected taxpayer's claim of set-off of brought forward losses by invoking Section 79 on the premise that the shareholding of the individual who was holding 85% fell below 51%.

However, ruling in favor of the taxpayer, ITAT has observed that after the issue of fresh equity shares, there were only two shareholders, which forms a group having 51% of the voting power in the year in which loss was incurred and the year in which the loss was sought to be set off, i.e., there was no change in the shareholding pattern of the group even though there is an increase in shareholding of one of the shareholders.

Our Comments

Section 79 of the Act prohibits the carry forward of losses in case the shareholding pattern of the persons who beneficially held the company falls

below 51% vis-à-vis the shareholding pattern in the relevant previous year in which such business loss is incurred.

The object of this provision is to curb the practice of profitable companies acquiring loss-making companies for the sole purpose of utilizing tax losses through the set-off of such losses against the profits. Considering the shareholding continued to remain with the same set of shareholders, the eligibility to continue to carry forward the loss was upheld.

This decision would be pertinent in the case of corporate restructuring exercises amongst group companies with common shareholders and family-owned businesses, wherein change in shareholding takes place as part of management strategies and appropriation of family wealth *inter-se* family members.

Supreme Court holds classification of item as stock in trade in books of accounts is not indicative of tax treatment

Commissioner of Income-tax v. Glowshine Builders & Developers (P.) Ltd. [2023] 150 taxmann.com 111 (SC)

The taxpayer was engaged in the business of building and developing properties. During the year, the taxpayer Development Rights (TDR). The taxpayer offered the sale income as business income. However, the tax authority treated the same as short-term capital gains. The Tribunal held the sale to be considered as business income.

Remanding the matter back to Tribunal for fresh examination, the Supreme Court has held that all relevant aspects/ relevant factors need consideration while considering a transaction as the sale of stock-in-trade/ business income or sale of capital asset. The Court observed that the tax authority had specifically recorded the findings on examining the balance sheet that there was not even a single sale during preceding previous years, there were negligible expenses, and the transaction in question was the only transaction, i.e., transfer of development rights in respect of
land and consequently. It was held that the transaction was one of transfer of capital assets and not one of transfer of stock-in-trade. Merely based on the recording of the inventory in the books of accounts, the transaction in question would not become transfer of stock-in-trade. As per the settled position of law, to examine whether a particular transaction is the sale of capital assets or of stock in trade, multiple factors like frequency of trade and volume of trade, nature of transaction over the years, etc., are required to be examined.

Our Comments

This decision reiterates the position that mere disclosure of an item in the books of accounts does not determine its tax treatment. Classification in books of accounts is not conclusive but could be one of the factors. While the classification of items in the books of accounts is generally in line with the principal business objectives of the entity, several factors are to be examined in conjunction to assess the treatment.

Regulatory Updates

SEBI Listing Regulations

SEBI introduces a stricter delisting framework for voluntary delisting of non-convertible debt securities and non-convertible redeemable preference shares

The SEBI has notified the SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2023, which has come into force from 23 August 2023. Vide this notification, a new Chapter VIA has been inserted, which provides the framework for voluntary delisting of non-convertible debt securities or non-convertible redeemable preference shares and obligations of the listed entity on such delisting. The provisions of this Chapter VIA shall be applicable to the voluntary delisting of all listed non-convertible debt securities or non-convertible redeemable preference shares from all or any of the stock exchanges where such non-convertible debt securities or non-convertible redeemable preference shares.

As per the revised regulations, listed entities with more than 200 non-QIB (qualified institutional buyers) holders of non-convertible debt securities will not be allowed to delist voluntarily. Unlike equity, wherein approval by a threshold majority is sufficient for approval of delisting, in the new framework, approval of 100% of the debt security holders has been mandated for the delisting of debt securities. Further, the delisting proposal shall be considered to have failed if non-receipt of in-principle approval from the stock exchange, non-receipt of no-objection certificate from the debenture trustee, and non-receipt of approval from all the holders of non-convertible debt securities.

Our Comments

In a bid to protect investors, market regulator SEBI has proposed tighter norms for the delisting of non-convertible debt securities. It has specified a well-defined framework for the delisting of non-convertible debt securities by listed entities, which will augment the ease of doing business for listed entities proposing to delist their non-convertible debt securities.

LLP Regulations

MCA introduces new LLP Amnesty Scheme

The Ministry of Corporate Affairs (MCA) has issued a general circular no. 8/2023 dated 23 August 2023 and granted one-time relaxation in additional fees to those LLPs who could not file Form 3, Form 4 and Form 11 within the due date and provided an opportunity to update their filings and details in Master-data for future compliances.

Salient features are mentioned below:

- Form 3 and Form 4 will be processed under the Straight Through Process (STP) mode, except for cases involving changes in business activities. Furthermore, stakeholders are advised to file these forms sequentially.
- These forms will provide the facility to edit the pre-filled master data, which is available as the existing master database of the LLP. However, the onus of filing the correct data would be on the stakeholders.
- The filing of Form 3 and Form 4 without additional fees shall be applicable for the event dates 1 January 2021 onwards. For the events prior to the aforesaid period, these forms can be filed with two times and four times the normal fees as additional fees for small LLPs and other than small LLPs, respectively.
- The filing of Form 11 without additional fees shall be applicable for the FY 2021-22 onwards.
- These forms shall be available for filing from 1 September 2023 onwards till 30 November 2023.
- The LLPs availing the Scheme shall not be liable for any action for the delayed filing of aforesaid forms.

Our Comments

The introduction of the LLP Amnesty Scheme by the Ministry of Corporate Affairs marks a significant step towards easing compliance for LLPs. By offering condonation of delay and simplifying the filing process for form-3, form-4, and form-11, the Scheme aims to enhance the ease of doing business and promote timely regulatory adherence. LLPs now have the opportunity to rectify past delays and ensure accurate filings, contributing to a more transparent and compliant corporate ecosystem.

Upcoming Event

Investment funds – Special Considerations on FATCA, Corporate Tax and Transfer Pricing
26 September 2023
Lokesh Gupta and Mihir Shah
https://bit.ly/3OVHxEq

Events and Webinars

One Day Tax Colloquium 2.0
14 September 2023
Sneha Pai and Sanjay Chhabria

Masterclass on GST, Customs and Foreign Trade Policy
6 September 2023
Sanjay Chhabria

UAE Corporate Tax
23 August 2023
Lokesh Gupta

UAE Corporate Tax – Taxation of Non-Residents and Permanent Establishments
22 August 2023
Lokesh Gupta and Trupti Mehta

Articles

Navigating the Credit Distribution Saga
23 August 2023 | Taxsutra
Saket Patawari and Ankit Bakiwala
https://bit.ly/3r7G4lu

Tax Talk

Indian Developments

Direct Tax

CBDT notifies rule for determination of value of perquisite in respect of residential accomodation provided by employer

Press release
dated 19 August 2023

- The Central Board of Direct Taxes has modified Rule 3 (Valuation of perquisites) of the Income –Tax Rules, 1961 for amending the calculation of perquisite with regard to the value of rent-free or concessional accommodation provided by an employer to its employees.
- The categorization and limits of the population are now based on the 2011 census as against the 2001 census.
- The revised limits of population are now less than 15 lakhs, 15 to 40 lakhs and more than INR 4 million. The perquisite rates against these limits are 5%, 7.5% and 10%, respectively.
- There has been a reduction in the perquisite rates, which earlier were 7.5%, 10% and 15% against population limits of less than INR 1 million, 1 million to 2.5 million and more than 2.5 million, respectively.

Rule inserted for calculation of amount of income chargeable to tax in case of sum received under a life insurance policy

Notification G.S.R. 604(E)
NO. 61/2023/
F.NO.370142/28/2023-TPL
dated 16 August 2023

- Rule 11UACA has been inserted for tax calculation on life insurance policy amount under clause (xiii) of subsection (2) of Section 56, i.e., where any person receives any sum under a life insurance policy other than a unit–linked insurance plan (ULIP) where aggregate premium paid exceeds Rs. 5 lakhs then the sum received will be chargeable to tax in the year when such sum is received and shall be computed based on the method given in the rule.
- If this amount is received for the first time under the life insurance policy, income to be offered to tax shall be the difference between the amount received and the aggregate of premium paid during the term of the policy till the date on which such amount is received.
- If any amount from the life insurance policy is received subsequent to the case discussed above, the chargeable income will be the difference between the amount received and the aggregate of premium paid during this period,i.e., the period after receiving the amount of the first time.
- The aggregate of premium paid shall not be claimed as a deduction under any other provision of the Act.
- This income shall be offered under the head “Income from Other Sources.”

Indirect Tax

Goods and Services Tax

GST Council's nail in the coffin for online gaming industry

Excerpts from various sources

During its 51st meeting held in the first week of August, the GST Council stuck to its decision to levy a 28% tax on the face value of entry-level bets placed on online gaming, horse racing, and casinos w.e.f. 1 October 2023. Following this, the Parliament passed the Bills to amend the central GST legislation to specifically define online gaming, online money gaming, virtual digital assets used to play online games and suppliers in case of online gaming, thus paving the way for implementation of higher taxation of online gaming industry.

CBIC notifies the recommendations of 50th GST Council meeting

Excerpts from various sources

The CBIC issued various Notifications to implement the decisions of GST Council's 50th meeting, the key highlights of these updates can be viewed here.

Foreign Trade Policy

Import of laptops, tablets, all-in-one PCs, and servers to be 'restricted' from 1 November 2023

Notification No. 23/2023 dated 3 August 2023 r/w Notification No. 26/2023
dated 4 August 2023

The Central Government has notified restrictions on the import of Laptops, Tablets, All-in-one Personal Computers, Ultra Small Form Factor Computers and Servers falling under HSN 8471, w.e.f. 1 November 2023. Accordingly, their imports would be allowed against a valid License for Restricted Imports, except in the following cases:

- Imports under Personal Baggage Rules, as amended from time to time.
- Import of 1 Laptop, Tablet, All-in-one Personal Computer, or Ultra Small Form Factor Computers, including those purchased from e-commerce portals, through post or courier.
- Import of up to 20 such items per consignment for the purpose of R&D, Testing, Benchmarking and Evaluation, Repair and Re-export, Product Development purposes. After the intended purpose, the products would either be destroyed beyond use or re-exported.
- Re-import of goods repaired abroad.
- Said products are an essential part of a Capital Good.

As a liberal transitional arrangement, the import consignments can be cleared till 30 October 2023 without a License for Restricted Imports.

Implementation of Track and Trace system for export of Pharmaceuticals and drug consignments extended

Public Notice No. 26/2023
dated 4 August 2023

The date for implementation of Track and Trace system for the export of drug formulations with respect to maintaining the Parent-Child relationship in packaging levels and it's uploading on the Central Portal has been extended up to 1 February 2024 for both SSI and non-SSI manufactured drugs.

Revision in registration fees under Steel Import Monitoring System (SIMS)

Notification No. 28/2023
dated 28 August 2023

The Directorate General of Foreign Trade (DGFT) has simplified the fee structure for registration under SIMS with immediate effect. Accordingly, instead of the erstwhile registration fee of INR 1 per thousand of CIF value, subject to a minimum of INR 500 and a maximum of INR 0.1 million, the importer would now be required to pay a flat fee of INR 500.

Customs

CBIC amends the Deferred Payment of Import Duty Rules

Notification No. 58/2023-Cus (N.T.)
dated 3 August 2023

The Central Board of Indirect Taxes and Customs (CBIC) has amended the Deferred Payment of Import Duty Rules, 2016, to allow the Central Government to allow deferred payment to be made a different due date under exceptional circumstances, as well as to permit the eligible importer to make deferred payment if he has:

- Paid the duty for a bill of entry within the due date in terms of Rule 4; and
- Paid the differential duty for the same bill of entry along with interest on account of reassessment within one day (excluding holidays).

Tax Talk

Global Developments

Direct Tax

Tunisia deposits its instrument for the ratification of the Multilateral BEPS Convention

Excerpts from OECD.org, dated 23 August 2023

Tunisia deposited its instrument of ratification for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS Convention), which now covers around 1850 bilateral tax treaties, underlining its strong commitment to prevent the abuse of tax treaties and BEPS by multinational enterprises. The BEPS Convention will enter into force on 1 November 2023 for Tunisia.

On 1 August 2023, around 1200 treaties concluded among the 82 jurisdictions that have ratified, accepted or approved the BEPS Convention have already been modified by the BEPS Convention. Around 650 additional treaties will be modified once all Signatories have ratified the BEPS Convention.

Transfer Pricing

OECD: Public Consultation Document on Baseline Distribution[12]

The Organisation for Economic Co-operation and Development (OECD) released an updated public consultation document (the document) on 17 July 2023 that reflects further development of the first consultation document released in December 2022. The document simplifies the transfer pricing mechanism of certain baseline marketing and distribution activities.

Scope of Amount B

Amount B will affect the companies selling tangible goods in a wholesale model to unrelated parties characterized as a routine or limited risk distributor. It does not include transactions in nature of the distribution of services or commodities, retail sales and non-distribution activities. The document provides that a distributor carrying both wholesale and retail distribution is deemed to carry out solely wholesale distribution if its annual net retail sales do not exceed 20% of total annual net sales.

Transactions in Scope

According to the Consultation Document ('document'), a qualifying transaction will be subject to Amount B if it satisfies the specified scoping criteria:

- Economically relevant characteristics must enable reliable pricing using a one-sided transfer pricing method with the distributor, sales agent, or commissionaire as the tested party.
- The tested party's ratio of operating expenses to annual net sales should fall within a range of 3% to 30%, or 50% under Alternative B.
- Non-distribution activities are excluded unless they can be separately evaluated and priced.

The document proposes Alternative A and Alternative B as scoping criteria. Alternative B is more stringent than Alternative A, by focusing more on "baseline" distributors without making "non-baseline contributions" that cannot be priced.

Distributors engaged in non-distribution transactions can be part of Amount B's scope provided they can be separately priced by maintaining segmentation provided the proportion operating expenses (non-distribution activities) does not exceed 30% of the total costs.

Pricing Mechanism

The best and most appropriate method (MAM) suggested for pricing under Amount B is the Transaction Net Margin Method considering industry, geography, and functional and assets of company. The CUP method using internal

12. Public Consultation Document, Pillar One - Amount B (July 2023 - September 2023)

comparable is considered as MAM over TNMM in exceptional circumstances. Return on sales is selected as net profit indicator for pricing the transactions.

OECD has set forth a pricing matrix for generally applicable pricing model based on three industry classification and five bands of operating expenses and assets. The range of arm's-length results derived from the pricing matrix is between 1.50% and 5.50%. Outliers are adjusted to the midpoint of this range.

Geographic variations are addressed through a modified approach, classifying jurisdictions based on data availability and risks. The three-step process in Amount B uses a Berry ratio cap-and-collar approach (range of 1.05 -1.50) to rectify ROS discrepancies for fair remuneration.

Documentation

The documentation for Amount B can be relied on the existing local file and master file framework.

Taxpayers seeking to apply Amount B for the first time should include in its documentation, a consent to apply Amount B for a minimum of three years, unless transactions are no longer in-scope during that period or there is a significant change in the taxpayer's business.

Our Comments

In comparison to the earlier version of the consultation document, this document provides technical clarity on Amount B with respect to scoping criteria, pricing method along with different parameters, and many more. It is more pertinent to monitor ongoing developments of Pillar One and Pillar Two in the coming months for reasons not limited to that Amount B is not subject to revenue threshold resulting in applicability to majority of the business transactions qualifying as in-scope transactions. OECD shall approve and publish final Amount B report for incorporation in OECD guidelines by January 2024.

Indirect Tax

Saudi Arabia confirms eighth wave of e-invoicing from 1 March to 30 June

Excerpts from various sources

Zakat, Tax and Customs Authority (ZATCA) has confirmed the eighth wave of taxpayers to join Phase 2 (Integration Phase) of mandatory e-invoicing in Saudi Arabia between March to June 2024. These would be taxpayers with an annual income between SAR 40 million and SAR 50 million in either 2021 or 2022.

Poland enacts mandatory e-invoicing legislation

Excerpts from various sources

The Polish President has signed the law amending the VAT Act for mandatory use of the National Electronic Invoicing System (KSeF) from 1 July 2024 onwards. Accordingly, businesses with a seat or fixed establishment in Poland will be obliged to issue VAT e-invoices for B2B transactions.

Increase in VAT audits of non-resident digital service providers by the Danish Tax Agency

Excerpts from various sources

There has been a rise in the VAT audits initiated by the Danish Tax Agency (DTA) aimed at non-resident digital service providers. To identify non-compliant taxpayers, the DTA has been gathering information from credit card providers, banks, and other financial institutions about online purchases made by Danish B2C consumers using their personal credit cards.

Luxembourg enacts new reporting requirements for Payment Service Providers

Excerpts from various sources

The law introducing certain record-keeping and reporting requirements for Payment Service Providers (PSPs) has been published in the Official Journal of the Grand-Duchy of Luxembourg. With this law, from 1 January 2024 onwards, all PSPs providing payment services in the EU shall be required to record and disclose transactional data on cross-border payments on a quarterly basis.

Quotes and Coverage

28 percent GST on online gaming: Industry cites ambiguities even as clarity emerges
3 August 2023 | Forbes
Saket Patawari
https://bit.ly/3sFrNwD

GST on deposit versus net deposit: Skill gaming industry divided on taxation
2 August 2023 | Money Control
Sanjay Chhabria
https://bit.ly/3PB6CVL

Compliance Calendar

Direct Tax
Indirect Tax

7 September 2023

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

10 September 2023

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

11 September 2023

- GSTR-1 for August 2023 to be filed by all registered taxpayers not under the QRMP Scheme.

13 September 2023

- GSTR-6 for August 2023 to be filed by Input Service Distributors (ISDs).
- Uploading B2B invoices using Invoice Furnishing Facility (IFF) under the QRMP Scheme for August 2023 by taxpayers with aggregate turnover of up to INR 50 million.
- GSTR-5 for August 2023 to be filed by Non-Resident Foreign Taxpayers.

14 September 2023

- Due date for issue of TDS Certificate for tax deducted under Section 194-IA/ Section 194-IB/Section 194M/ Section 194S in July 2023.
  Note: Applicable in case of a specified person as mentioned under Section 194S.

15 September 2023

- Due date for furnishing of Form 24G by an office of the government where TDS/TCS for August 2023 has been paid without the production of a Challan.
- Second instalment of advance tax for the AY 2024-25.
- Due date for furnishing statement in Form no. 3BB by a stock exchange in respect of transactions in which client codes been modified after registering in the system for August 2023.

20 September 2023

- GSTR-5A for August 2023 to be filed by Non-Resident Service Providers of Online Database Access and Retrieval (OIDAR) services.
- GSTR-3B for August 2023 to be filed by all registered taxpayers not under the QRMP Scheme.

25 September 2023

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

30 September 2023

- Due date for furnishing of challan-cum-statement in respect of tax deducted under Section 194-IA/194-IB/194M/194S in August 2023.
  Note: Applicable in case of specified person as mentioned under Section 194S.
- Due date for filing of audit report under Section 44AB for the assessment year 2023-24 in the case of a corporate-assessee or non-corporate assessee (who is required to submit his/its return of income on 31 October 2023).
- Application in Form 9A for exercising the option available under Explanation to Section 11(1) to apply income of previous year in the next year or in future (if the assessee is required to submit a return of income on 30 November 2023).
- Statement in Form no.10 to be furnished to accumulate income for future application under Section 10(21) or Section 11(1) (if the assessee is required to submit return of income on 30 November 2023).
- Quarterly statement of TDS/ TCS deposited for the quarter ending 30 June 2023.
  Note: The due date of furnishing TDS/TCS statement has been extended from 30 June 2023 to 30 September 2023 vide Circular no. 9/2023, dated 28 June 2023.

Compliance Calendar

Direct Tax
Indirect Tax

7 October 2023

- Due date for deposit of tax deducted/collected for September 2023. However, all sum deducted/ collected by an office of the government shall be paid to the credit of the Central Government on the same day when tax is paid without production of an Income-tax Challan.
- Due date for deposit of TDS for the period July 2023 to September 2023 when Assessing Officer (AO) has permitted quarterly deposit of TDS under Section 192, 194A, 194D or 194H.

10 October 2023

- GSTR-7 for September 2023 to be filed by taxpayers liable for TDS.
- GSTR-8 for September 2023 to be filed by taxpayers liable for TCS.

11 October 2023

- GSTR-1 for September 2023 by all registered taxpayers not under the QRMP Scheme.

13 October 2023

- GSTR-6 for September 2023 to be filed by ISDs.
- GSTR-1 for the quarter of July 2023 to September 2023 to be filed by all registered taxpayers under the QRMP Scheme.
- GSTR-5 for the month of August 2023 to be filed by Non-Resident Foreign Taxpayers.

Alerts

Highlights of CBDT's 4th and 5th Annual Report on APA Program
4 September 2023
https://bit.ly/463Yke9

Key Highlights of GST Notifications and Clarification Circulars August 2023
1 September 2023
https://bit.ly/3qN9PYJ

An Overview of Small Business Relief under Corporate Tax in UAE
1 September 2023
https://bit.ly/44EnGye

Extension of Applicability of Safe Harbour Rules to AY 2023-24
10 August 2023
https://bit.ly/47GdGrd

Updates in Executive Regulations related to Tax Procedures Law
10 August 2023
https://bit.ly/3YLt81b

Bombay High Court validates that Section 153 prevails over Section 144C for time limit for passing Final Assessment Order
7 August 2023
https://bit.ly/3KBrE3n

Easy Remittance Tool

by Nexdigm

Form 15CA/CB Automation

Review of tax position by experts

Issuance of bulk certificates through Automated tool

Repository - Access to entire set of documents

Access to Detailed transaction wise reports

Representation Support

Generation 15CA bulk files & utility to generate Form A2

About Nexdigm

Nexdigm is an employee-owned, privately held, independent global organization that helps companies 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 and Professional Services, that help companies navigate challenges across all stages of their life-cycle. Through our direct operations in the USA, Poland, UAE, and India, 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 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, World Commerce and Contracting, Everest Group Peak Matrix® Assessment 2022, for Procurement Outsourcing (PO) and Finance and Accounting Outsourcing (FAO), ISG Provider Lens™ Quadrant 2023 for Procurement BPO and Transformation Services and Global Sourcing Association (GSA) UK.

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

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