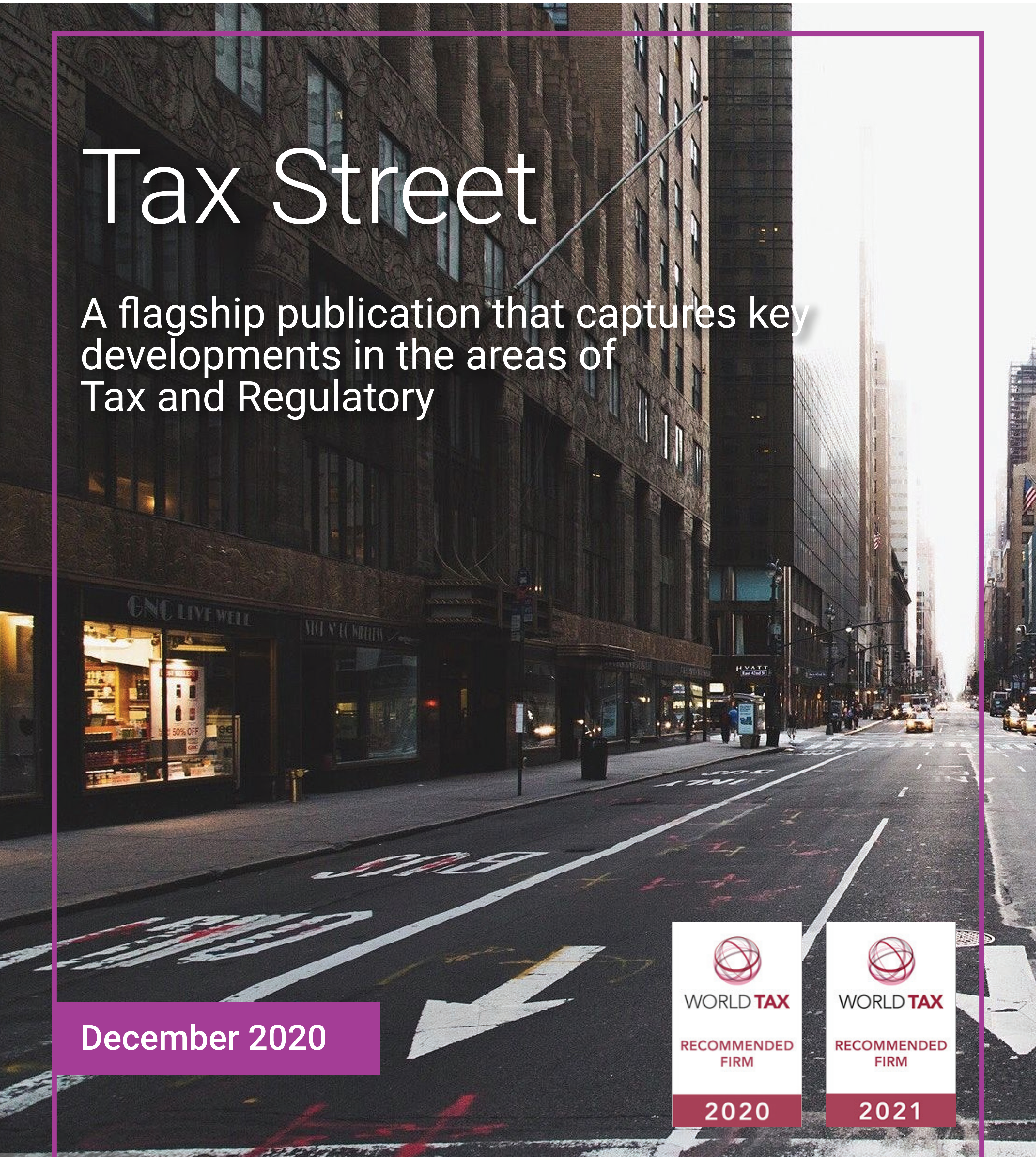
Tax Street

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



December 2020

WORLD TAX RECOMMENDED FIRM 2020

WORLD TAX RECOMMENDED FIRM 2021

Tax Street

Stay Safe. Stay Healthy.

Introduction

We are pleased to present the latest edition of Tax Street – our newsletter that covers all the key developments and updates in the realm of taxation in India and across the globe for the month of December 2020.

- The **'Focus Point'** captures the significant movements in the taxation arena in 2020 and the expectations from the 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@skpgroup.com**. We would be happy to hear your thoughts on what more can we include in our newsletter and incorporate your feedback in our future editions.

Warm regards,
The Nexdigm (SKP) Team

Focus Point

Moving from 2020 - A Year of Challenges to 2021 - A Year of Hope and Revival

"There is a past which is gone forever, but there is a future which is still our own"
Fredrick William Robertson

2020 will go down as a challenging year that shaped the economy for years to come. Set against the backdrop of a pandemic that encouraged social distance, the businesses were lead on a difficult path dotted with economic strain and financial troubles. The global economy crawled as the supply chain was interrupted due to the lockdowns. India has also borne the brunt of this pandemic, and while the situation may improve, the after-effects on the economy are still unprecedented. As it is rightly said, "it is the destruction after the storm, which is more difficult to revive than surviving the storm."

While presenting the previous budget, the government had a vision of turning India into a USD 5 trillion economy. However, the pandemic seems to have made that goal even harder to achieve. All eyes are set on the finance minister as we head towards union budget 2021, which will set the tone for the economic revival for the decade to come. The budget is not just expected to provide new opportunities but also to handhold those who have suffered due to the pandemic.

Even before the pandemic struck us, India's economy was slowing down, and the government had implemented a few unprecedented changes in the law for the Make in India project and taxing the digital economy. There were also a few key amendments in the GST and Customs law.

We have discussed below some of the major tax changes in 2020:

Changes made in 2020

Direct Tax

Concessional new corporate tax regime:

- The corporate tax rate for manufacturing company was reduced to 15% whereas for other domestic companies was reduced to 22%;
- The companies opting for the new regime have to give up on certain deductions/incentives.

This change would have a huge impact on the Make in India campaign as many MNC/Indian corporates would look at setting up a manufacturing facility in India.

Dividend Distribution Tax (DDT) was abolished:

- DDT on the dividend distributed by domestic companies was abolished, shifting the tax onus on the shareholder;
- Foreign companies/Non-residents liable to be taxed at 20% or the treaty provision for dividend

This move would help especially foreign promoters/ companies to avail concessional rate for dividend taxation under the Tax Treaty as against the DDT of 20%.

The scope of equalization levy was widened:

- With effect from 1 April 2020, 2% equalization levy shall be paid by the e-commerce operator on considerations received or receivable by an e-commerce operator from e-commerce supply or services made, provided, or facilitated by it to:
  - An Indian resident
  - A non-resident in specified circumstances; or
  - A person who buys such goods, services, or both via an IP address located in India.

The digital tax was originally introduced to target tech giants operating in India. However, the law has been very widely worded and would cover a large base of taxpayers.

Vivaad se Vishwas Scheme:

- The Vivaad se Vishwas Scheme was introduced to settle direct tax litigations pending before the Commissioner of Income Tax (Appeals), Income-tax Appellate Tribunal, High Court, or Supreme Court as of 31 January 2020, subject to certain exceptions prescribed for search cases, matters where prosecutions have been initiated, etc.;
- The scheme allows the taxpayer to pay the amount in dispute without any litigation. The saving on penalty can be significant;
- In light of the pandemic, the last date for making a declaration under the Vivaad se Vishwas Scheme has been extended to 31 January 2021, whereas the last date for making payment without an additional amount is extended to 31 March 2021.

As per media reports, it is estimated that INR 1 lakh crore disputed tax would be settled under this scheme.

Faceless Assessment

- In 2020, the government had implemented the faceless assessment, where the revenue audit would be completed without physical hearings and in a faceless manner. The tax authorities in India have developed detailed guidelines for the same;
- This could be a game-changer as the entire faceless litigation framework would have the potential for eliminating corruption, as special cells would ensure fair revenue audit.

Tax Collected at Source (TCS) on sale of goods:

- Seller of goods liable to collect TCS at the rate of 0.1% (1% in cases where there is No PAN/Aadhaar), on the consideration received from a buyer in a previous year in excess of INR 5 million;
- The exemption provided to sellers whose total sales/gross receipts/turnover does not exceed INR 100 million in the financial year immediately preceding the financial year
- Applicability was deferred and implemented from 1 October 2020.

Withholding tax on e-commerce transaction:

- Withholding tax of 1% (5% rate applicable in case of no PAN) on e-commerce transaction;
- Withholding tax to be paid by e-commerce operator – a person who owns, operates or manages digital portal for goods and services facilitated online;
- Exemption granted to e-commerce participant (being individual or HUF) whose turnover during the year does not exceed INR 5 lakhs and PAN/Aadhaar Number

Indirect Tax

Customs law/Foreign Trade Policy

Introduction of CAROTAR provisions

- The Customs (Administration of Rules of Origin under Trade Agreement) Rules, 2020 (CAROTAR) were notified vide Notification No. 81/2020- Customs (N.T.) and made effective from 21 September 2020 for importers claiming a preferential rate of duty under any trade agreement;
- The CAROTAR are in addition to the Rules of Origin, which have been already notified under various PTAs/FTAs, and intend to provide further powers to the Customs officials to inquire into imports where they have a reason to believe that the origin criteria has not been met.

Roll out of Faceless Assessment by Custom Authorities

- CBIC rolled out the faceless assessment under Customs law, which allows assessing officer who is physically located in a particular jurisdiction to assess a Bill of Entry pertaining to imports made at a different Customs station, whenever such a Bill of Entry has been assigned to him in the Customs Automated System.

RoDTEP scheme to be made applicable on shipping bills filed from 1 January 2021

- CBIC recently issued a press note announcing the implementation of the Remission of Duties and Taxes on Exported Products (RoDTEP) scheme on the export of goods, which will replace the existing Merchandise Exports from India Scheme (MEIS);
- Although the government is yet to notify the incentive rates under RoDTEP, exporters will be eligible for benefits in respect of shipping bills filed on or after 1 January 2021.

Goods and Services tax

Interest on delayed payment of tax payable only on net cash liability

- The government in August 2020 notified the much awaited amendment to Section 50 of CGST Act, whereby interest shall be payable only on the tax liability paid in cash, i.e., the net tax liability after adjusting input tax credit (ITC) available with the taxpayer;
- It was further clarified that the amendment was made prospectively only in view of technical limitations, and no recoveries would be made for the past period to ensure retrospective relief as decided by the GST Council.

Introduction of e-invoicing under GST

- E-invoicing was made applicable to all businesses whose annual aggregate turnover exceeds INR 500 crore from 1 October 2020 [subject to certain exclusions]. Now, with effect from 1 January 2021, it has extended to businesses whose annual aggregate turnover exceeds INR 100 crore.

Shelving of new GST return filing mechanism

- The government initially deferred the implementation of the new return filing system and has now turned its attention to instead transition towards an advanced version of the existing returns. This includes the introduction of GSTR-2B, and auto-population of outward supplies data as per GSTR-1 into GSTR-3B. This is expected to meet the dual objectives of the simplicity of returns for taxpayers as well as the elimination of fake invoicing and excess claims of the input tax credit.

Introduction of Quarterly Return Monthly Payment (QRMP) for small taxpayers

- The QRMP scheme shall be applicable to taxpayers having an aggregate turnover of up to INR 50 million, with effect from 1 January 2021;
- Under the QRMP scheme, the taxpayer is required to make a monthly payment before the 25th of the succeeding month for the first two months of the quarter through PMT-06. The taxpayers should select 'Monthly payment for the quarterly taxpayer' as the reason for generating the payment challan. There are two methods for making the monthly payment of tax during the first two months – Fixed Sum Method and Self Assessment Method;
- The taxpayers are required to pay monthly GST liability via GST payment challan, and file both GSTR-1 and GSTR-3B on a quarterly basis;

Compulsory payment of at least 1% of outward tax liability in cash

- With effect from 1 January 2021, Rule 86B has been inserted to restrict the utilization of ITC to the extent of 99% of tax liability for the relevant period for specified taxpayers having taxable supply (other than exempt supply and zero-rated supply) in a month exceeding INR 5 million.

Tightening of restrictions on availing ITC by taxpayers

- Now, the claim of ITC cannot exceed 105% of the eligible ITC available in respect of invoices furnished by the vendors in their GSTR-1 [earlier this limit was 110%];
- Also, now only the invoices 'furnished' by the vendors would be eligible to calculate the revised limit of 105%, i.e., if the invoices have been 'uploaded' by the vendors but the GSTR-1 is not filed, then such invoices cannot be considered for determination of the ITC limit under Rule 36(4).

Expectations in 2021

The taxpayers are expecting the government to pull the country out of the pandemic's clutches and revive the economy. The government may consider certain amendments to the law or introduce certain provisions that could provide relief to the taxpayers. We have captured certain expectations that may help stabilize the economy and help the nation recover from the current economic situation.

Direct Tax

Tax incentives for the Healthcare sector:

- Given that budget is said to have been focused on the Healthcare sector, we expect the introduction of certain incentives may be in the form or a lower tax rate or higher deduction of expenses for the pharma companies.

Tax cut for individuals:

- To boost liquidity in the hands of the salaried class of the society, we expect that there may be a reduction in the tax burden on the employees;
- It may be by increasing the income not chargeable to tax or slashing down the tax rate;
- The center may also look at increasing the standard deduction.

Tax incentive for corporate:

- To encourage the Indian corporates to support the government with their contribution to society in the current situation of COVID-19, the government may look at allowing deduction of COVID-19 related CSR expenditure.

Employment generation incentives:

- Given that the unemployment rate has increased, the government may look at incentivizing the companies for creating job opportunities;
- This may be done by extending the benefit of Section 80JJAA to the employee group earning more than INR 25,000 as compared to the current limit of up to INR 25,000.

Revised threshold for deductions:

- Employees are entitled to claim certain monthly deductions as well as special exemptions under the head 'Income from Salaries' (e.g., children's education/hostel allowance, value of gift, perquisite for lunch, etc.). Citing that some of the thresholds for allowable deductions or exemptions have not been revised since the last two decades

Apart from the budget changes, we can expect the Supreme Court's judgment on software payments. The taxability of software has been a matter of debate, which has affected many corporations, especially multinationals. The debate is surrounding the characterization of revenue received from the supply of software as 'royalty' or 'business income.

Transfer Pricing

Safe Harbour Rules

After the revision in 2017, which was applicable till FY 2018-19, the Central Board of Direct Taxes (CBDT) further notified that the safe harbour provisions for a single year, i.e., FY 2019-20. In the coming budget, it is expected that the said provisions are notified for a longer period, considering the current situation and the impact of COVID-19 on the businesses and the economy. Further, it would be a welcoming step if the safe harbour applications can be made online instead of manual filings.

Guidelines from the government for assessing the economic impact of COVID-19 on transfer pricing arrangements

Guidance should be provided on how the taxpayers should approach transfer pricing arrangements entered into during FY 2019-2020 and FY 2020-2021. This can be more specific pertaining to:

- Usage of weighted average financial data points of the comparable companies for the latest three FYs against the weighted average result of the taxpayer for three FYs;
- Usage of single year financial data of the comparable companies for the current year against the result of the taxpayer for the current year;
- Guidance on how economic adjustments, albeit downturn adjustments in COVID-19 scenario (e.g., capacity utilization, working capital, overall industry movement, etc.) should be made on the comparable companies;
- How to treat the outlier comparable companies in the comparability analysis, especially high loss-making companies, to even out the impact of COVID-19;
- The inter-quartile range should be broadened to 25th to 75th percentile. This will be in line with the internationally prescribed range, which would provide better results and eliminate the outliers.
- Guidance on how a situation would be dealt with where APA is breached due to COVID-19 /the taxpayer is significantly affected by COVID-19.

It will be helpful if the said guidelines are in line with the recent guidance issued by the OECD on the transfer pricing implications of the COVID-19 pandemic.

Cascading effect of Secondary adjustment

The secondary adjustment is made in the books of account of the assessee and its associate enterprise (AE) to reflect that the actual allocation of profits between the assessee and its AE are consistent with the transfer price determined as a result of the primary adjustment. If the secondary adjustment amount is not repatriated to India within 90 days, a notional interest is levied and offered to tax. However, the provisions have not yet clarified the application of interest on interest levied, which may lead to a cascading effect. A suitable clarification is expected in the upcoming budget.

Introduction of Simplified Transfer Pricing Documentation (STPD)

The introduction of STPD is expected for taxpayers following safe harbour provisions or undertaking similar arrangements with related parties year on year as it will reduce the cost of compliance burden. STPD will also benefit the tax authorities in better managing risks associated with international related-party dealings by directing resources to transactions and activities that are deemed high risk.

Indirect Tax

Announcement of incentive rates under RoDTEP

- The much awaited RoDTEP scheme has been introduced with effect from 1 January 2021. However, the government is yet to release crucial details such as the incentive rates and clarity on the applicability to various exporters and the goods exported. We expect the government to provide these details in the Union Budget 2021.

Exemption in the Customs duty rate on import of COVID-19 vaccine

- Levy of Customs duty on import of COVID-19 vaccine (currently around 16.50%) would result in an increase in the cost of vaccines and, in turn, contradict the measures being taken by the government to prevent the widespread of the pandemic. It is expected that the government would announce an exemption/reduction in rate to ensure the vaccines are affordable for the public at large.

Concluding Remarks

In addition to the above mentioned tax measures, the government would look at various other measures to improve the fiscal situation, including looking at disinvestment of public sector undertaking, currency monitoring, etc. It would be important to see if we get a bold and path-breaking budget to address the challenges faced by the economy and taxpayers at large.

From the Judiciary

Direct Tax

Whether income from offshore supplies should be attributed to the Indian PE in case, the buyer holds the right to reject the product?

M/s Huawei Technologies Co. Ltd Vs. The ADIT [TS-638-ITAT-2020(Del)]

Facts

The appellant is a company incorporated in China and is primarily engaged in the business of supplying non-terminal products. The products include advanced telecommunication network equipment, namely, core and access network equipment, mobile network equipment and data communications equipment, etc., for use in fixed and mobile phone networks and terminal products, that is, mobile phone handsets to various customers (including customers in India).

The appellant company (Huawei China) has a subsidiary in India, namely Huawei Telecommunications India Company Private Ltd. (Huawei India). During the year under consideration, Huawei China provided services to Huawei India under the terms of the Technical Service Agreement (TSA). Huawei India is involved in the provision of integration, installation, and commissioning services in relation to telecom network equipment supplied from outside India by Huawei China.

The appellant offered revenues accrued from the provision of technical services but did not offer the revenue on account of the sale of telecom network equipment and terminal equipment/ mobile handsets.

Survey operation u/s 133A of the Income-tax Act was conducted in the office premises of Huawei India. After examining the documents impounded during survey proceedings and considering them in the light of the statements of the key employees, the Assessing Officer (AO) proceeded to decide that the taxpayer has a business connection in India u/s 9(1)(i) of the Act as well as the 'Service Permanent Establishment (PE)' and 'Installation PE' in India.

Held

After considering the arguments laid down by both the parties, the Delhi tribunal had held that the evidence on record clearly shows that Indian resource was involved in deal negotiations on behalf of the taxpayers. The facts on record show that a real and intimate relationship exists between both the companies, as the sale of telecommunication network equipment would serve no purpose for a buyer unless the telecommunication network equipment is installed and commissioned in India by Huawei India.

Further, the contract clearly states that the owner shall have the right to reject the entire shipment/goods or part thereof. Hence, the taxpayer continued to undertake the risk of rejection for the supplies to India, and therefore, the activities of Huawei China continue till the telecommunication network equipment are installed and commissioned in India. This entire sequence contributes directly to the earning of income of Huawei China in its business even if the sale transaction has been concluded outside India and hence sale consideration should be taxed in India.

Facts on record show that the foreign expat experts in the technology behind the equipment were present in India on-site in order to supervise the installation and commissioning process. In taxpayer's own contention, Huawei India was not technically equipped for the installation and commissioning on its own and thus requisitioned the expats to supervise the installation process on-site in India. Therefore, considering the facts on record, it is a wrong claim that the Indian entity was independent to carry out the installation and commissioning of the equipment.

Considering the facts in totality, in light of the various judicial decisions, the Delhi tribunal held that Huawei India constitutes not only dependent agent PE of Huawei China but also Service PE and fixed place PE within Article 5 of Indo China DTAA.

Our Comments

The taxability of the offshore supply of goods has been a topic of debate for ages. Determination of taxability is very case-specific. A similar judgment was also pronounced recently by the Delhi Tribunal in the case of Voith Paper GmbH.

Whether income derived by professionals shall be taxed under Article 12 or Article 14 of India-Japanese DTAA? And whether it would impact the Foreign Tax Credit (FTC) claim?

Amarchand & Mangaldas & Suresh A Shroff & Co. Vs. ACIT

Facts

The taxpayer is a renowned law firm in India. In its return of income for the year under consideration, it had claimed a foreign tax credit of INR 8.055 million in respect of taxes withheld by its clients in Japan. The taxes so withheld were at the rate of 10% on gross billing amounts, by treating the professional fees earned by the taxpayer in Japan as taxable in Japan, i.e., the source country, under article 12 of the Indo-Japanese tax treaty.

The tax officer, however, was of the view that credit for such taxes withheld in Japan was not admissible to the taxpayer, as the income so earned could only have been taxable under Article 14 for the 'independent personnel services' but then since taxpayer admittedly did not have any fixed place in Japan, the condition precedent for taxability even under Article 14 was not at all satisfied. Accordingly, taxes are wrongly withheld in Japan and the credit for the same should not be available in India.

Aggrieved by the order, the appellant is in appeal before the Mumbai tribunal.

Held

On perusal of the material on record and provision of Article 12 and 14 of Indo Japan DTAA, the Mumbai tribunal was of the opinion that undoubtedly, there are overlapping areas in the definition of fees for technical services under article 12(4), which covers technical, management and consultancy services vis-à-vis the definition of professional services income which can be taxed under article 14 as 'income from independent personnel services.'

The treaty approach is in consonance with the well-settled principle of law contained in the latin maxim **generalia specialibus non derogant**, i.e., general provisions do not override the specific provisions. Quite clearly, therefore, when a particular type of income is specifically covered by a treaty provision, the taxability of that type of income is governed by the specific provisions so contained in the treaty. However, it is an equally well settled legal position that a treaty is to be read as a whole and, therefore, different articles cannot be read on a standalone basis dehors the scheme of the tax treaty. There is a valid school of thought that in the scheme of the Indo Japanese tax treaty, article 14 for independent personal services holds the field for the individuals only- particularly in the light of the exclusion clause under article 12(4) being restricted to payment of fees for professional services to individuals alone. Sufficient to say, judging by the facts of this case, the conclusions arrived at by the Japanese tax authorities, directing tax withholdings from the payments made to the taxpayer by its Japanese clients, cannot be said to be unreasonable or incorrect.

Our Comments

The judgment has highlighted the principle that although a specific article will override a general article in a tax treaty but at the same time, one needs to understand that each article cannot be read in isolation; rather, the treaty must be read as a whole. Also, it further confirms the position that Article 14 is for an individual taxpayer, and the firm of an individual would not be covered under the same.

Transfer pricing

Whether borrowing funds from related parties through debentures can be the sole reason for determining it as a 'shareholder activity?'

Kolte Patil Developers Ltd. –ITA No. 2111/PUN/2017 – AY 2013-14

Facts

The taxpayer is engaged in the business of development of real estate. Amongst the international transactions reported, transaction pertaining to 'interest on debentures' and specified domestic transaction of 'interest on debentures' is under appeal which had been benchmarked using the CUP method. During the year, the taxpayer issued Compulsory Convertible Debentures (CCDs) and Optionally Convertible Debentures (OCDs) to its AE, in respect to which interest was claimed as a deduction.

The TPO relying on the definition of 'shareholder activity' as per OECD Guidelines, contended that transaction of funding through issue of debentures should be considered as issue of shares., TPO held that a group company held the taxpayer's 50% share capital and it was in dire need of funds in respect to its large ongoing project. Thus, the taxpayer was funded by the AEs through hybrid instruments, which were convertible into shares. The capital to borrowing ratio of the taxpayer was 1:23 as compared to 1:4 debt-equity ratio stipulated in the RBI Master Circular, and thus, no independent party would have invested in convertible debentures. Basis the above understanding, the TPO re-characterized the transaction as an issue of shares and determined the ALP as Nil on the basis that the economic substance of the transaction differed from its form. CIT(A) reversed the finding of the TPO and proposed a TP adjustment of 1.25% of the value of the transaction by applying CUP and determining the ALP at 13.75% as against the payment by the taxpayer at 15%.

ITAT held as under

- Based on the facts, it was observed that debentures issued to the AEs were redeemed and never converted into equity shares. Thus, the intention of the taxpayer was never to issue debentures in order to claim interest deduction and erode the tax base;
- Though the TPO relied on the thin capitalization rule basis the RBI circular, it is pertinent to note that after the insertion of Section 94B, it does not prescribe any debt-equity ratio as a thin capitalization rule;
- In order to avoid thin capitalization, the government introduced a limit of 30% of earnings before interest, tax and depreciation as a cap for deductible interest wherein interest exceeds INR 10 million. Further, ITAT pointed that as per the Impermissible Avoidance Agreement (IAA), defined in Section 96(1), wherein the main purpose of the arrangement is to obtain a tax benefit, and the form differs from a substance, it can be declared as IAA. However, the TPO cannot just characterize the transaction into equity but has to abide by the strict procedure under IAA;
- ITAT noted that the TP provisions are an anti-avoidance tax measure requiring computing income from transactions with related parties at arm's length. It does not require a re-characterization of the nature of the transactions from which it was actually entered;
- Though the TPO emphasized the nature of the transaction to be a 'shareholder activity' reflecting the act done to perform activity solely for the ownership activity as per the OECD Guidelines, this was not the scenario for the taxpayer.

Our Comments

Under the Transfer Pricing Regulations, the purpose is to compute income from the transactions with the related party at arm's length. The businessman has the full right to choose either way of financing. However, the form and substance of the transaction should not differ, and the intention should not be to avoid tax. Provision of re-construction of a transaction should be applied by the tax authorities only after the exceptions outlined in the law are reasonably and appropriately satisfied.

Whether determining the ALP of the 'availing of regional management services' at NIL is justifiable basis insufficient documentary evidence?

Henkel Chembond Surface Technologies Limited – ITA No. 1049/Mum/2016 – AY 2011-12

Facts

The taxpayer is engaged in the business of manufacturing/trading chemicals. During the year into consideration, the taxpayer had entered into an international transaction pertaining to 'availing of regional management services' amounting to INR 26.1 million. The TPO made a TP adjustment of INR 26.1 million by determining the ALP of the transaction pertaining to 'availing of regional management services' at NIL on the basis of inadequate documentation.

ITAT held as under

- The taxpayer had submitted various documentary evidence such as the copy of the regional management services 'agreement' dated 23 November 2010, details of regional management charges, and copies of 'debit notes' raised on the taxpayer by the AE. Apart from that, the cost benefit analysis along with the details of the requirements to avail regional management services, description of services, the information in relation to visits by overseas employees for rendering services, and back up documentation substantiating the benefits received by the taxpayer were also submitted by the taxpayer;
- Further, it was quite evident from the documents submitted by the taxpayer that availing of regional management services had resulted into a better market position for the taxpayer and an ultimate increase in sales. Thus, the contention of the TPO was not regarded as a valid basis that the taxpayer had actually received the services and reaped benefits out of the same, for which enough documentation was on the record;
- As these services are intangible in nature, reliance is required to be placed on demonstrations by narrations, descriptions and documentary evidence and the way the business is being conducted;
- ITAT further contended that the TPO had divested of his jurisdiction and assessed ALP at Nil instead of following any one of the prescribed methods.

Thus, TP adjustment was deleted by the ITAT

Our Comments

Availing of regional management services from the group companies is a highly contentious transfer pricing issue. The said ruling has laid down the **importance of robust documentary evidence to support** the cost benefit analysis for availing of management services and determining the ALP of transaction. The ruling has reiterated that the role of the TPO is to determine the ALP by applying the correct transfer pricing method instead of challenging the commercial rationale of the decisions taken by the taxpayer.

Indirect Tax

Whether service tax is payable on liquidated damages/penalty paid on breach of a contract?

[Background: As per Section 66E of the Finance Act, 1994, 'Declared services' include service by way of agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act.

The GST law has an identical provision under Schedule II to the CGST Act.]

Southern Eastern Coalfields Ltd. v/s Commissioner of Central Excise and Service Tax, Raipur - CESTAT, New Delhi [2020 (12) TMI 912]

Facts

- Appellant entered into several commercial contracts, containing certain clauses that provide for penalty for non-observance/ breach of terms of the contract;
- The appellant pointed out that penalty is charged from the vendors only if there was a delay in supply of goods ordered by the appellant, and the contractor also does not execute the terms of the contract in time;
- The penal clauses are in the nature of providing a safeguard to the commercial interest of the appellant.

Based on the above, the CESTAT ruled as follows:

- 'Consideration' must flow from the service recipient to the service provider and should accrue to the benefit of the service provider and that the amount charged has to be necessarily a consideration for the taxable service;
- Any amount charged which has no nexus with the taxable service and is not a consideration for the service provided does not become part of the value which is taxable;
- It should also be remembered that there is a distinction between 'conditions to a contract' and 'considerations for the contract;'
- The consideration contemplated under the agreements was for the supply of coal, materials, or for availing various types of services. The intention of the parties certainly was not for flouting the terms of the agreement so that the penal clauses get attracted;
- The activities that are contemplated under Section 66E(e) are activities where the agreement specifically refers to such an activity, and there is a flow of consideration for this activity;
- Therefore, penalty amount, forfeiture of an earnest money deposit, and liquidated damages received by the appellant cannot be said to be 'consideration' for 'tolerating an act' and therefore are not leviable to service tax.

Our Comments

The taxability of liquidated damages and forfeiture of deposits under indirect tax laws has been a subject of various litigations. Under the GST regime, various AARs have consistently held that such payments are chargeable to GST.

However, this CESTAT ruling, which discusses the issue comprehensively in the context of various judgments of Indian and foreign courts, should help taxpayers to substantiate their case before GST authorities and obtain favorable rulings.

Whether services of a foreign holding company in relation to providing credit cards to employees of the applicant can be treated as intermediary services?

ICU Medical LLP - AAR, Tamil Nadu [2020 (10) TMI 764]

Facts

- The ultimate holding company of the applicant has entered into a contract with Wells Fargo Bank (located in the USA) through which certain employees of the applicant are extended with the credit card issued by the said bank;
- The credit card is used by the employees of the applicant for incurring various expenses towards tickets, food, and accommodation, etc. during their official travel;
- The holding company settles these transactions with the bank and in turn, raises an invoice for 'credit card expenses' on the applicant and collects the charges.

Based on the above facts, the AAR observed as follows:

- For the privilege of using the cards, the applicant has to pay ICU Medical Inc. all the relevant expenses and charges made by its employees;
- It is evident that this is a separate transaction between the applicant and ICU Medical Inc. for the services of providing the credit cards to the employees of the applicant, which are to be used only for business-related activities;
- ICU Medical Inc. is making the supply of the credit cards to the applicant, for the use of its employees, on its own account and not as an 'intermediary;'
- Therefore, the applicant is liable to pay IGST under the reverse charge mechanism on account of the import of services from the ultimate holding company.

Our Comments

The transaction model in the present case is common in the case of MNCs, and therefore this ruling should be a guide on the GST implications to taxpayers entering into similar arrangements with their foreign associate entities.

Tax Talk

Indian Developments

Direct Tax

Income Tax department to validate UDIN given by chartered accountants in tax audit reports

[Excerpts from Economic Times, 26 November 2020]

In line with the ongoing initiatives of the income tax department for integrating with other government agencies and bodies, the income tax e-filing portal has completed its integration with the ICAI portal with respect to validation of UDIN generated from the ICAI portal by the chartered accountants for documents certified/attested by them. With effect from 27 April 2020, the Income-tax e-filing portal had already factored mandatory quoting of UDIN for documents certified/attested in compliance with the Income Tax Act, 1961 by a chartered accountant. This would help in weeding out fake or incorrect tax audit reports not duly authenticated with the ICAI.

Circle Rate and Stamp Duty: Income tax relief for real estate developers, home buyers

[Excerpts from Financial Express, 26 November 2020]

Up to 2018, Section 43CA of the Income-tax Act, 1961 provided for deeming the stamp duty value (circle rate) as sale consideration for the transfer of real-estate inventory if the circle rate exceeded the declared consideration. Consequentially, such stamp duty value was deemed as purchase consideration in the case of a buyer under Section 56(2)(x) of the Act. The Finance Act 2018 provided a safe harbor of 5%, i.e., these deeming provisions triggered only where the difference between the consideration and the circle rate was more than 5%. Further, the Finance Act, 2020 increased this safe harbor from 5% to 10%. As part of the Aatma Nirbhar Bharat Package 3.0, to provide certain income tax relief measures for real-estate developers and homebuyers. It has been decided to further increase the safe harbor from 10% to 20% under Section 43CA of the Act for the period from 12 November 2020 to 30 June 2021 in respect of only primary sale of residential units of value up to INR 2 crore. Consequential relief shall also be allowed to buyers of these residential units under Section 56(2)(x) of the Act for the said period. The intent is to boost demand in the real estate sector and give benefit to the homebuyers.

Faceless Income Tax appeals deter participation in Vivad Se Vishwas scheme

[Excerpts from Business Standard, 11 December 2020]

The faceless assessment scheme is operational and in full swing. However, taxpayers who wish to withdraw their appeals ad settle cases under the Vivad se Vishwas Scheme are facing a problem due to the absence of jurisdictional tax officers to approve the withdrawal requests. The process of withdrawal of appeals which are under the faceless assessment scheme, is not quite clear to the taxpayer. The department is now toying with the idea of releasing a clarification asking taxpayers to upload withdrawal request letters on the national faceless appeals system. As of now, several CIT(A)'s are getting requests for withdrawal of numerous cases, but they no longer hold any jurisdiction to act upon the same. Moreover, the cases have not yet been allocated under the faceless regime. A circular/clarification is expected to be issued soon considering the fast-approaching due date of filing the declaration under Vivad se Vishwas Scheme.

Income tax dept introduces 'Jhatpat Processing' feature; here's all you need to know

[Excerpts from CNBC TV18, 22 December 2020]

The income tax department has introduced the 'Jhatpat Processing' feature for ease in processing the income tax returns. It has already started for taxpayers who need to file ITR-1 or ITR-4. The benefits of the feature are possible only when the below conditions are satisfied:

- Taxpayers' ITRs are verified
- Bank accounts are pre-validated
- There are no income discrepancies
- There is no TDS/challan mismatch

To e-verify returns, taxpayers can select one of these modes -- registered mobile number, net banking, demat account number, bank ATM, bank account number, Aadhaar OTP and e-mail id.

Indirect Tax

Extension of due dates of GSTR-9 and GSTR-9C for FY 2019-20

[Notification No. 95/2020-Central tax dated 30 December 2020]

In view of the business disruption caused by the pandemic, the government has extended the due date for filing of GSTR-9 (Annual Return) and GSTR-9C (reconciliation statement) for the financial year 2019-20 to 28 February 2021.

Key amendments to the GST law [w.e.f 1 January 2021]

The government has notified various amendments in the GST law through Notification No. 92/2020 and 94/2020 dated 22 December 2020. Some of the key amendments are as follows:

- The utilization of ITC available is restricted to the extent of 99% of the monthly outward tax liability [subject to certain exclusions];
- Reduction in claiming ITC to the extent of 105% of the invoices furnished in GST returns by the suppliers [from the earlier limit of 110%];
- The procedure for the verification at the time of new GST registration is amended to provide for biometric-based Aadhar authentication along with a photograph or KYC documents based registration;
- A taxpayer shall not be allowed to file GSTR-1 if he fails to file GSTR-3B for two subsequent months;
- An e-way bill will be valid for 1 day for every 200 kilometers distance or part thereof, instead of the erstwhile limit of 100 kilometers per day;

GSTN launches 'communication between taxpayer' facility on portal

[Excerpts from Business Standard]

The GST Network (GSTN) has launched the 'communication between taxpayer' feature on its portal. Businesses can now communicate with their supplier on the GSTN portal in relation to invoice uploading or any deficiency therein. The suppliers can also send replies to the recipient through the same facility. Similarly, the supplier can also send a notification to the recipient about any document uploaded in the outward supply statement filed in GSTR-1.

Tax Talk

Global Developments

Direct Tax

Germany and Pakistan deposit their instrument of ratification for the Multilateral BEPS Convention

[Excerpts from OECD, 18 December 2020]

With 95 jurisdictions currently covered by the MLI, Germany and Pakistan have deposited their instrument of ratification for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (Multilateral Convention or MLI).

Ratification by Germany and Pakistan now brings to 59 jurisdictions that have ratified, accepted or approved it. The Multilateral Convention will become effective on 1 January 2021 for over 600 treaties concluded among the 59 jurisdictions, with an additional 1200 treaties to become effectively modified once the MLI will have been ratified by all Signatories.

EU member states agree on new tax transparency rules on digital platforms

[Excerpt from European Union, 4 December 2020]

The European Commission welcomes the recent compromise reached by the Member States to extend EU tax transparency rules to digital platforms, making sure that those who make money through the sale of goods or services on platforms also pay their fair share of tax. This follows the proposal made by the Commission in July as part of the Action Plan for fair and simple Taxation Supporting the Recovery Search. The agreed proposal on administrative cooperation (DAC 7) will ensure that the Member States automatically exchange information on the revenues generated by sellers on digital platforms, whether the platform is located in the EU or not. This will not only allow national authorities to identify situations where tax should be paid but will also reduce the administrative burden placed on platforms, which often have to deal with several different national reporting requirements. The proposal also strengthens and clarifies the rules in other areas in which the Member States work together to fight tax abuse, for example, through joint tax audits.

Argentina Senate passes ‘Millionaire tax’ for COVID-19 relief

[Excerpt from the economic times, 5 December 2020]

Argentina’s Senate passed a tax on about 12,000 of the country’s richest people to pay for coronavirus measures, including medical supplies and relief for the poor and small businesses. The government of President Alberto Fernandez hopes to raise 300 billion pesos (USD 3.75 billion) with the one-off levy, which earlier passed the Chamber of Deputies with 133 for votes to 115 against

Under the scheme -- also dubbed the ‘millionaire’s tax’ - people with declared assets greater than 200 million pesos will pay a progressive rate of up to 3.5% on wealth in Argentina and up to 5.25% on wealth outside the country. Of the proceeds, 20% will go to medical supplies for the pandemic, another 20% to small and medium-sized businesses, 15% to social developments, 20% to student scholarships and 25% to natural gas ventures.

Transfer Pricing

OECD TP Guidance: Impact of COVID -19 pandemic on Transfer Pricing

Facts

OECD issued TP guidance providing clarification and support to both taxpayers and tax administrations as they evaluate and administer the application of transfer pricing rules for periods affected by the COVID-19 pandemic. The priority issues identified and covered under guidance are as follows:

Comparability analysis: The impact on the pandemic would vary depending on the economically relevant characteristics of the accurately delineated transaction. Industry reports assessing the effect of the pandemic on respective industries may be relied upon in ascertaining the arm's length nature of an enterprise's TP policy implemented for FY 2020. The taxpayer could also compare the budgeted financial results to those actually achieved to approximate the specific effects of COVID-19 on revenues, costs, and margins in order to set their transfer price. Other alternate approaches could include price adjustment mechanisms in controlled transactions, which may provide for flexibility while maintaining an arm's length outcome, the inclusion of loss-making companies that suffered losses particularly in periods affected by COVID-19, addressing economic conditions as pre and post-pandemic period in order to assess the material effects of the pandemic that were evident in a particular period.

Losses and allocation of COVID-19 specific cost: Allocation of non-recurring/extraordinary losses to an AE could prove to be a point of dispute. The taxpayers need to delineate such costs from the transaction based on the risks assumed by the parties to the intercompany agreement.

One also needs to understand as to how such costs would be treated by independent parties while determining the arm's length price. Allocation of losses in case of limited risk distributor would be a point for consideration. A limited risk distributor is averse to market risk or bears limited risk as compared to a full-fledged or normal risk distributor. However, post-pandemic, one needs to assess whether any market risk was assumed on account of a change in risk management functions and hence should be allocated losses. Caution also needs to be exercised while modifying arrangements under these conditions, particularly in the absence of clear evidence that independent parties in comparable circumstances would have revised their existing agreements or commercial relations. Lastly, invoking of force majeure clause would depend on the conduct of parties and economic circumstances of the commercial arrangement in determining whether, at arm's length, a party would decide to invoke a force majeure clause.

Government assistance programs: Impact of government assistance programs related to COVID-19 need to be evaluated w.r.t. controlled transactions while comparing their effects with those of other pre-existing assistance programs. In a case where the government assistance is an economically relevant characteristic, the said information should be included as a part of the documentation to support the transfer pricing analysis. Caution needs to be exercised on how independent parties would allocate government assistance and how it would impact the arm's length outcome.

Accounting treatment of government assistance especially w.r.t the tested party and comparables applying different accounting standards, should be considered while performing a comparability analysis under Resale Price Method (RPM), Cost Plus Method (CPM), or Transactional Net Margin Method (TNMM).

Advance Pricing Agreement (APA): Taxpayers would face challenges while negotiating APAs under current economic conditions resulting from COVID-19. It is recommended that existing APA terms should be upheld and maintained unless cancellation or revision of APA is warranted on account of breach of critical assumption. Considering the effect that the pandemic has had on the operational, economic and market conditions (which forms the basis of critical assumption), breach of the critical assumptions is likely to occur. It is encouraged that taxpayers and tax administrators should adopt a flexible and collaborative approach to minimize delay while negotiating APAs that cover FY 2020, taking into account the current economic conditions.

Our Comments

Undertaking relevant adjustments while undertaking economic analysis as a consequence of COVID-19 will not be an easy task at hand for the taxpayers due to the unique nature of problems faced by different industries. The guidance provided by OECD will help avoid undue transfer pricing litigation between the taxpayer and Indian tax authorities. On the APA front, the guidance will help the tax authorities to adopt a more flexible approach while dealing with the taxpayers concerning re-negotiating of concluded APAs already or ones that are in process.

Australia: An updated guidance on Advance Pricing Agreements (APA) released by the Australian Tax Office (ATO)

On 3 December 2020, the ATO released an updated Practice Statement Law Administration (PSLA) 2015/4 on APAs. The guidance aids ATO staff who handle and review APAs. It also enables taxpayers to understand the internal review and approval process followed by the ATO. Some of the key updates that will interest the taxpayers evaluating the APA program is listed below:

- As per the 'Mutual expectations' stated in Section 5 of the PSLA, ATO expects the taxpayers to be transparent in their dealings and furnish the requisite information in a timely manner. In case the mutual expectations are not met, the ATO will consider withdrawal from the APA;
- The updated guidance indicates an entry for profit-makers whose transfer pricing risk has been assessed as low in accordance with Practical Compliance Guidelines (PCG) 2019/1 on the transfer pricing issues related to inbound distribution arrangements;
- Along with APA, the ATO shall concurrently deal with collateral issues (i.e., issues separate to transfer pricing) such as potential application of Part IVA, the Multinational Anti-Avoidance Law[1] (MAAL) and the Diverted Profits Tax[2] (DPT). In the absence of the collateral issued being resolved, the ATO shall not proceed with APA. Application of DPT to covered transactions shall be specifically looked into by the APA team. The APA team shall also consider inserting a clause addressing the DPT into the final APA agreement in case requested by the taxpayer;
- Further clarity is provided on the various internal ATO workshops and Quality Assurance (QA) panels that are held during the APA process, including clarification of the roles of the meeting participants.

Any disagreement between the APA team leader and the QA panel's recommendation during the negotiation of the APA can be escalated to the APA team's Assistant Commissioner for resolution by the APA team leader. Thus, the APA team has autonomy in the negotiation of APAs, which may help taxpayers obtain a quicker resolution to the negotiations.

Our Comments

Issuance of such guidance will be welcomed by the taxpayers in Australia who are already in the APA process or planning to file an APA application. This will bring out certainty on the timeframe within which the APA process can be concluded and also transparency in the process adopted by the tax authorities at all the levels of APA negotiations. It will be helpful if the Indian tax authorities can issue a similar guideline. This will significantly reduce the turnaround time for finalizing of APA and in turn, foster confidence amongst the taxpayers.

Malaysia: Introduction of Transfer Pricing measures in Finance Bill 2020

The Minister of Finance tabled the 2021 Budget on 6 November 2020. This was followed by the release of the Finance Bill 2020 that has proposed to include the following transfer pricing related amendments to the Income Tax Act (ITA), 1967. The proposed measures shall be effective from 1 January 2021.

- **Penalties for failure to furnish transfer pricing documentation (new Section 113B):** The proposed amendment recommends introducing a penal provision for failure to furnish the contemporaneous transfer pricing documentation in a timely manner (typically within 30 days of a written notice of request from the Inland Revenue Board).
- **Authority to disregard structures in a controlled transaction (Section 140A):**
  Rule 8 of Income Tax (Transfer Pricing) Rules 2012 proposed to be inserted in the ITA authorizes Director General of Inland Revenue (DGIR) to disregard and re-characterize any structure adopted w.r.t. controlled transaction if:

  a. The economic substance of the transaction differs from its form; or

  b. The form and substance are the same, but the arrangement differs in entirety when compared to independent players operating in similar commercial constraints. The actual structure deters the DGIR from determining an appropriate transfer price.In case where the DGIR has disregarded the structure, an appropriate adjustment shall be made (by DGIR) to the structure, which reflects arm's length dealing by independent parties having regard to the economic and commercial reality.
- **Surcharge on transfer pricing adjustment:** The subsection 140A(3C) inserted in ITA allows Internal Revenue Board (IRB) to impose a surcharge of not more than 5% on any transfer pricing adjustment made on all tax audit and investigation cases, whether taxable or not.

1. The MAAL is part of the government's efforts to combat tax avoidance by multinational companies operating in Australia. The MAAL has been established to ensure that multinationals pay their fair share of tax on the profits earned in Australia.
2. The DPT aims to ensure that tax paid by significant global entities reflects their activities in Australia and prevent the diversion of profits offshore.

Vietnam: Update in Transfer Pricing rules

On 5 November 2020, the government issued a new TP Decree No. 132/2020/ND-CP (Decree 132) to replace the existing Decree No. 20/2017/ND-CP (Decree 20) and Decree No. 68/2020/ND-CP (Decree 68). Decree 132 took effect from 20 December 2020 and is applicable for the tax year 2020 onwards.

Key highlights of Decree 132 are listed as follows:

Applicability: Transfer Pricing provisions shall apply to taxpayers paying Corporate Income Tax (CIT) that have related party transactions (RPTs). The application of revised provisions could be extended to foreign contractors as well.

Arm's length range re-defined: The standard arm's length range is 35th to 75th percentile derived from a set of at least five independent comparable companies (as per Decree 20, the lower bound of the range was 25Th percentile). The proposed transfer pricing adjustments are to be made to the median value where the results of the taxpayer fall outside the arm's length range. Thus, taxpayers need to revisit their transfer pricing policies/positions for the tax year 2020 onwards in order to align their benchmarking analysis and mitigate transfer pricing risks.

Use of database: Decree 132 validates the use of commercial and public databases for performing benchmarking analysis by both taxpayers and tax authorities. However, the Decree allows the tax authority to use secret comparables (internal database of the government) to make a TP adjustment where the taxpayer is not compliant with the relevant requirements of the Decree.

Enhanced Country-by-Country Report (CbCR):

a. Vietnamese ultimate parent company having group consolidated turnover of VND 18,000 billion shall file CBCR within 12 months from the end of the relevant fiscal year;

b. Vietnamese tax authorities shall obtain CbCR from the respective overseas jurisdiction through automatic exchange of information (AEOI) where the foreign ultimate parent entity of Vietnamese subsidiary is obligated to file CbCR in its jurisdiction, or the foreign ultimate parent entity nominates another entity (surrogate entity) to file the report on its behalf in the surrogate entity's jurisdiction. However, local filing is requested in case there is no competent authority agreement between Vietnam and the respective jurisdiction or there being a systematic failure of the exchange mechanism.

c. Taxpayers shall notify the Vietnamese tax authorities on or before the fiscal year-end date of the ultimate parent company in advance where:

   i. One entity is designated by the ultimate parent company to undertake local filing in case of multiple subsidiaries in Vietnam; or

   ii. Provide information viz. name, tax code, the jurisdiction of the ultimate parent or the surrogate parent, if applicable.

Relaxation of interest deductibility cap rules:

a. The cap is increased to 30% (from 20% under Decree 20) of total net operating profit before interest, tax, depreciation, and amortization;

b. The cap calculation for interest expense is on the net amount, i.e., after offsetting interest expense with interest income. The offset of interest income against interest expense was not addressed in Decree 20;

c. Non-deductible interest expense can be carried forward for a period of five (5) years provided that the interest expense of the future years does not exceed the 30% cap;

d. Certain government assistance loans are exempt from this interest limitation rule. Decree 132 akin to decree 20 does not provide clarity for applicability of interest deductibility cap for the interest that has been capitalized and not expensed out.

Other updates:

a. Definition of related parties is broadened to include cases related to capital transfers and loans between enterprises and individuals that manage and control such enterprises or individuals under one of the relationships as prescribed in the Decree. Since the said transactions qualify as related party transactions, the transactions will have to be meet the arm's length principle;

b. The Decree allows an overseas entity to be selected as a 'tested party' for benchmarking purposes, depending on the facts of the case;

c. Decree 132 does not specify the deadline for submitting the TP documentation at the request of the tax authority in the event of a tax/transfer pricing audit shall be in accordance with the Law on Inspection;

d. Decree provides relief to taxpayers from preparing the TP documentation who are engaged in related party transactions with domestic entities provided the taxpayer and related parties have the same CIT rates, and none of the parties enjoy tax incentives.

Australian Federal Court in Glencore's case lays down approach on 're-construction' of transaction

Facts

Cobar Management Pty Ltd (CMPL), an Australian company, owned and operated a mine in Australia. CMPL was acquired by Glencore International AG (GIAG) in late 1990s. CMPL entered into its first contract to sell all of its copper concentrates to GIAG in 1999. The pricing was based on a market-related arrangement wherein the Treatment and Copper Refining Charges (TCRC) deduction was based on 50% benchmark/50% spot TCRC. A new agreement was entered in February 2007 (for the years 2007 to 2009) wherein the pricing was based on price sharing agreement/quotational period optionality with back pricing. The TCRC deduction was fixed @23%, along with the deduction for freight and insurance costs. These changes were significant, involving the introduction of a new methodology for pricing. In particular, the alterations affected significant changes to the respective risks of the parties.

Contentions of the Commissioner: Commissioner was of the view that CMPL has received less compensation from the sale of its copper concentrate for the period 2007 to 2009 as a result of the amended terms agreed in February 2007. The Commissioner's contention was that the original intercompany agreement between Glencore and its Swiss distribution affiliate should be considered instead of the amended contract in 2007. The Commissioner argued that the key terms agreed under the amended agreement cannot be considered at arm's length and therefore, alleged that the excess profits were shifted to GIAG.

Decision by Single Judge Federal Court: Federal Court furnished the ruling in favor of the taxpayer, stating that the arm's length price shall be determined based on the form of the actual transaction entered into rather than re-structuring the transaction. The Federal Court also stated that the Commissioner erred in establishing the missing link between arm's length conditions and profit outcome before computing the adjustment. The Commissioner also erred in questioning the motive of the taxpayer basis, which the transaction was undertaken by applying laws of General Anti Avoidance Rules (GAAR). The Federal Court further stated that the Commissioner erred in presuming that the different pricing mechanism with the AE would have been a profitable proposition.

Decision by Full Federal Court: The matter was further contested in Full Federal Court by the Commissioner of Taxation. The Full Federal Court dismissed the appeal and upheld the decision on the Federal Court. It highlighted that the Commissioner is empowered to substitute a different methodology to determine the arm's length price of the transaction. However, the Commissioner has no power or authority to substitute terms of a contract where those terms are not seen as defining the consideration received. The Commissioner focused on retaining the contractual terms and did not seek additional information on comparable third party contracts entered into by CMPL. Further, the taxpayer also succeeded in demonstrating the reliability and reasonableness of the pricing mechanism adopted. While doing so, the taxpayer evaluated and made rational judgments while determining the terms of the arrangement. The Court held that while comparable contracts identified by the Commissioner cannot be ruled out completely and could be referred to while establishing the arm's length nature of the transaction.

However, the Court was also cognizant of the practical difficulties faced by both the taxpayer and the Commissioner in finding evidence and predicting how arm's length dealings shall be undertaken by independent parties.

The Court further held that re-structuring of a transaction could be undertaken only if the economic substance of the transaction differs from its form or in a case where the form and substance of the transaction are the same, the arrangements made in relation to the transaction differ significantly from those which would have been adopted by independent enterprises behaving in a commercially rational manner. Apart from the aforementioned, it must also be noted that OECD guidelines should be referred to in order to obtain more clarity rather than narrowing down its interpretation.

Our Comments

The key learnings from this case law and the way forward in the context of the re-construction of the transaction have been summarized below:

1. Provisions of re-construction/re-characterization of the transaction should be applied by the tax authorities only after the exceptions outlined in the law are reasonably and appropriately satisfied.
2. It is critical for the taxpayers to lay importance on the substance and form of the transaction while entering into inter-company arrangements as well as preparing transfer pricing study reports.
3. OECD guidelines should be used as a reference point by the taxpayers and tax authorities and should not be interpreted too strictly/narrowly.
4. Appropriate fact-finding by the tax authorities at lower levels will significantly improve the quality of transfer pricing assessment and appeals on issues that are complex and subjective in nature.

Indirect Tax

Supply chain disruption in the UK due to Brexit

[excerpts from Independent]

With the end of the transition agreement of Brexit with effect from 31 December 2020, the EU businesses are now required to register under the UK VAT law. Many EU businesses have expressed their unwillingness to undertake the said registration, which will result in increased compliance costs for them. This has resulted in disruption in supply chains with transport vehicles stuck on border posts due to inadequate paperwork.

Compliance Calendar

Direct Tax | Transfer Pricing

7 January 2021

Payment of TDS and TCS deducted/collected in December 2020

10 January 2021

Return of income for the assessment year 2020-21 for all assessee other than

a. Corporate-assessee; or
b. Non-corporate assessee (whose books of account are required to be audited); or
c. Partner of a firm whose accounts are required to be audited; or
d. An assessee who is required to furnish a report under Section 92E

15 January 2021

- Form No. 3CEB (FY 2019-20) Transfer Pricing Certificate/Report
- Maintenance of transfer pricing documentation FY 2019-20

15 January 2021

- Filing of TCS Statements for the period from October to December 2020
- Filing of Tax Audit Report under in form 3CD
- Filing of Transfer Pricing Report in form 3CEB

30 January 2021

- Issuance of TCS certificates (Form 27D) for TCS collected for the period October to December 2020
- Due date for furnishing of challan-cum-statement in respect of tax deducted under Section 194-IA for the month of December 2020
- Due date for furnishing of challan-cum-statement in respect of tax deducted under Section 194-IB for the month of December 2020.

31 January 2021

Filing of TDS Statements for the period from October to December 2020

Compliance Calendar

Indirect Tax

1 January 2021

Implement e-invoicing for the taxpayers having aggregate turnover exceeding INR 100 crore

10 January 2021

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

11 January 2021

GSTR-1 to be filed for the month of December 2020 by registered taxpayers with an annual aggregate turnover of more than INR 15 million

13 January 2021

- GSTR-1 to be filed for the period October to December 2020 by registered taxpayers with an annual aggregate turnover of less than INR 15 million
- GSTR-6 for the month of December 2020 to be filed by Input Service Distributor (ISD)

18 January 2021

CMP-08 to be filed by composition taxpayers for the period October to December 2020

20 January 2021

- GSTR-5 for the month of December 2020 to be filed by Non-Resident Foreign Taxpayer
- GSTR-5A for the month of December 2020 to be filed by Non-Resident Online Database Access and Retrieval services (OIDAR)

22 January 2021

Due date for filing GSTR-3B for the month of December 2020, for registered taxpayers having principal place of business in Category 1 states and having aggregate turnover of up to INR 50 million in the previous financial year

24 January 2021

Due date for filing GSTR-3B for the month of December 2020, for registered taxpayers having principal place of business in Category 2 states and having aggregate turnover of up to INR 50 million in the previous financial year

25 January 2021

ITC-04 to be filed by taxpayers sending/ receiving material from job-workers for the period October 2020 to December 2020

Notes

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

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

Alerts

AAR, Haryana rules liaison office not required to register under GST

14 December 2020

Read Here https://bit.ly/3s9Ez1H

Government brings in various amendments to the GST law

24 December 2020

Read Here https://bit.ly/3q3Lvf5

Extension in Due Dates for various filings under Income Tax and Goods and Services Tax (GST) for AY 2020-21 (FY 2019-20)

31 December 2020

Read Here https://bit.ly/35qokU8

Articles

Should COVID-19 vaccine be taxed? Here’s what may advocate for its tax exemption

Financial Express

Read Here http://bit.ly/38mlYI8

Taxsutra TP Special : Nexdigm (SKP)'s 360° on 'Intra-Group Financing - Unraveling Transfer Pricing Expectations'

Taxsutra

Read Here http://bit.ly/3pYaS1S

Webinars

7th Transfer Pricing Asia Summit

Organizer - Inventicon

10 - 11 December 2020

Easy Remittance Tool

The Easy Remittance tool by Nexdigm (SKP) simplifies the mandatory compliance procedure for foreign remittances by automation of Form 15 CB certifications. Through its simple retrieval mechanism for documents and reduced turn around time, the tool has helped us serve large corporates with numerous foreign remittances, enabling our clients to maintain the right tax position, at all times.

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Our cross-functional 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.

We provide an array of solutions encompassing Consulting, Business Services, and Professional Services. Our solutions help businesses navigate challenges across all stages of their life-cycle. Through our direct operations in 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.

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