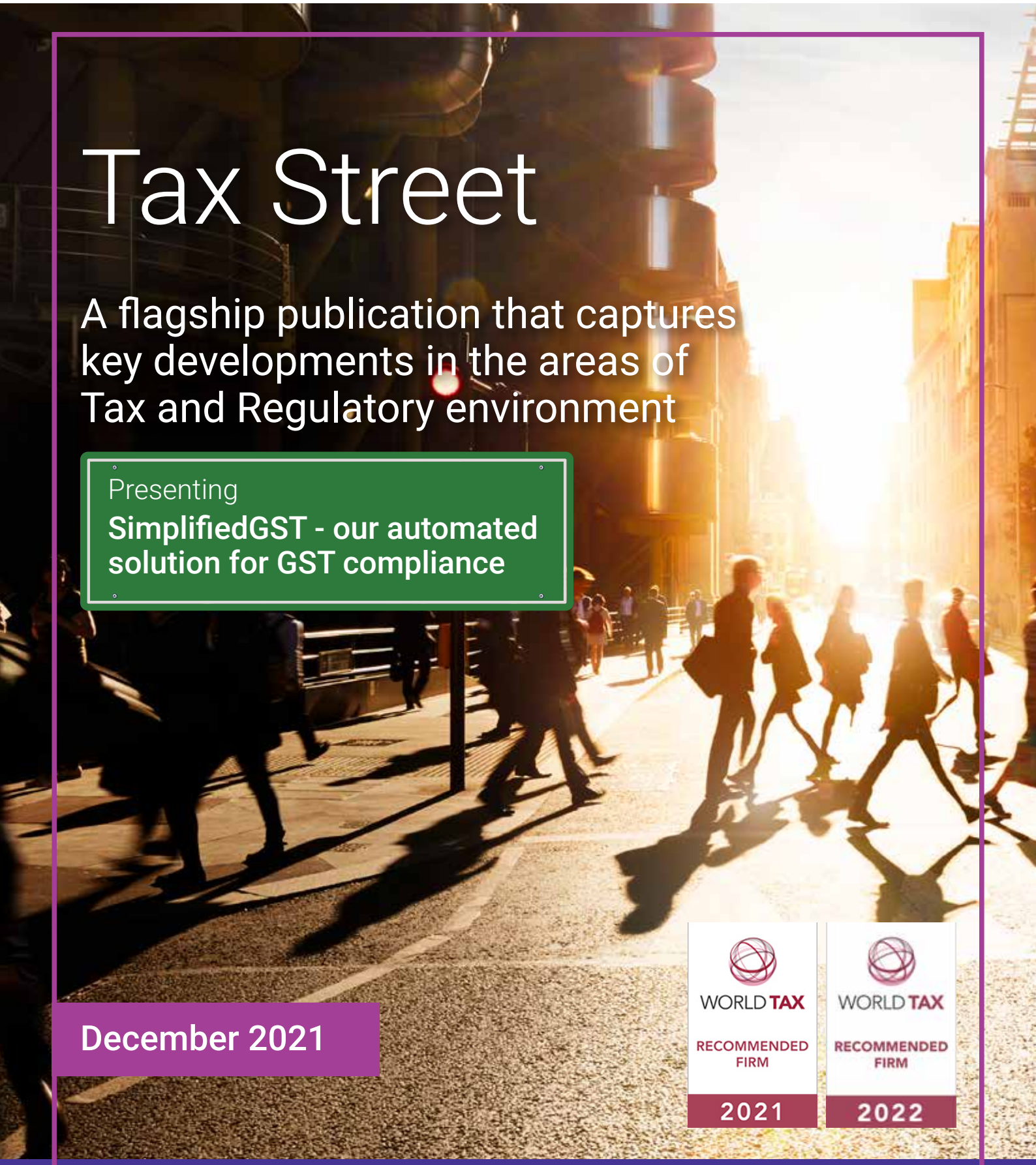

Tax Street

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

Presenting

SimplifiedGST - our automated solution for GST compliance

WORLD TAX RECOMMENDED FIRM 2021

WORLD TAX RECOMMENDED FIRM 2022

December 2021

Introduction

Tax Street

We are pleased to present the latest edition of Tax Street – our newsletter that covers all the key developments and updates in the realm of taxation in India and across the globe for the month of December 2021.

- The **'Focus Point'** covers an overview of the New Faceless Appeal Scheme, 2021.
- Under the **'From the Judiciary'** section, we provide in brief, the key rulings on important cases, and our take on the same.
- Our **'Tax Talk'** provides key updates on the important tax-related news from India and across the globe.
- Under **'Compliance Calendar'**, we list down the important due dates with regard to direct tax, transfer pricing and indirect tax in the month.

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

Warm regards,
The Nexdigm (SKP) Team

Focus Point

An Overview of the New Faceless Appeal Scheme, 2021

The new Faceless Appeal Scheme 2021 was launched by the Central Board of Direct Taxes (CBDT) to overcome certain drawbacks in the Faceless Appeal Scheme, 2020, which was launched last year in September 2020. The highlights of the new Scheme are as under

1. A National Faceless Appeal Centre(Centre) is set up to conduct e-appeal in a centralized manner. This Centre will set up Appeal units, as it deems fit, to facilitate the conduct of appeals.
2. All communication between Commissioner(Appeals), taxpayer, and any other person for details/information, etc., will be through the Faceless Appeal Centre.
3. The Faceless Appeal Centre will assign the appeal to a Commissioner(Appeals) of a particular appeal unit through an automated allocation system.
4. On assignment of the appeal, the Commissioner(Appeals) can
   a. Can condone a delay, in case if any, in filing an appeal;
   b. Send notice fixing hearing and calling for details/ information;
   c. Obtain information from any other person through the Centre ;
   d. Call for the report from the Assessing Officer(AO) in connection with the appeal;
   e. Request for further inquiry to the AO;
5. The information/details/report called for from the appellant/AO/third person needs to be submitted by them electronically through the Centre.
6. The appellant can also file additional grounds through the Centre.
7. Where additional grounds are received, the Commissioner(Appeals) will need to decide on the admission or otherwise of the same for which it will need to:
   a. Send the additional grounds to the AO through the Centre;
   b. The response received from the AO/Faceless Assessment Centre will need to be considered
8. The appellant can also file additional evidence. Where additional evidence is filed, the Commissioner(Appeals) will need to:
   a. Send the same to the AO for comments and verification in accordance with Rule 46A;
   b. The response by the AO will be submitted to the Centre, which will, in turn, be forwarded to the Commissioner(Appeals);
   c. Ongoing through the same, the Commissioner(Appeals) may admit or reject the additional evidence.
9. In case the Commissioner(Appeals) intends to enhance an assessment or penalty or reduce refund, it will need to prepare a show cause notice containing the reasons for the same.
10. The same will be served on the appellant through the Centre.
11. The response received will be passed on to the Commissioner(Appeals) by the Centre.
12. The Commissioner(Appeals) will then prepare an order in writing and send the same to the Centre after digitally signing it.
13. The order will then be communicated to the appellant, Pr. Chief Commissioner/Chief Commissioner and AO.

14. Where initiation of penalty has been recommended, a notice requiring the appellant to show cause why penalty should not be imposed needs to be served by the Commissioner (Appeals).
15. The Commissioner(Appeals) may, through the Centre, issue notice for initiating penalty for non-compliance.
16. After considering the response received, the Commissioner(Appeals) may levy the penalty by passing the order or dropping the penalty. The communication of the same needs to be made to the appellant through the Centre.
17. The Commissioner(Appeals) can pass an order of rectification based on an application made by:
    a. The appellant;
    b. The Commissioner(Appeals) who has passed the order; or
    c. The AO.
18. The rectification application so received by the Centre will be assigned to a Commissioner(Appeals) through the automated allocation system.
19. After examining facts, calling for information, etc., the Commissioner(Appeals) will pass an order either rectifying the mistake or rejecting the application.
20. The will then be communicated to the appellant and AO through the Centre.
21. The appeal against the order of Commissioner(Appeals) will lie with the Income Tax Appellate Tribunal (ITAT).
22. In the event the order under appeal before ITAT is set aside or remanded back to Commissioner Appeals, the same will be assigned to a Commissioner(Appeals) by the Centre.
23. The Scheme does not require a personal appearance by the appellant or their Authorised Representatives. However, the appellant can request a personal hearing conducted through video conferencing or video telephony.
24. In the erstwhile Faceless Appeal Scheme 2020, providing the opportunity of personal hearing was at the Centre's discretion. However, in the New Faceless Appeal Scheme Commissioner (Appeals) has to mandatory allow a personal hearing if the taxpayer requests it during e-proceedings.

The new Scheme has done with the duplicity of work with respect to the passing of draft order which was the case in the old Scheme where the appeal unit first passes the draft order and is sent to another unit for review.

As compared to the earlier structure, there is a rationalization of the appeal unit, which consists only of the National Faceless Appeal Centre, which assigns all the appeals to the Commissioner (Appeals) of a specific appeal unit.

Under the new Scheme, the Commissioner(Appeals) can directly initiate penalty proceedings in case of any non-compliance with notice or direction, or order which had to be routed through National Faceless Appeal Centre in the old Scheme.

Furthermore, under the new Scheme, the same Commissioner(Appeals) who has completed the appeal proceedings is also authorized to initiate penalty proceedings. However, in the erstwhile Scheme, NFAC assigns the initiation of penalty proceedings to any Regional Faceless Appeal Centres (RFAC) that might be the same or different who conducted the appeal proceedings.

Under the new Faceless Appeal Scheme, all the orders (appeal order, penalty order, or rectification order) shall be signed digitally by the Commissioner(Appeals) before sending to the Centre. There were no such provisions of signing orders digitally by the Appeal Units in the previous Scheme.

From the Judiciary

Direct Tax

Whether payment made for IT support services can be construed as Royalty?

M/s. Bekaert Industries Private Limited vs DCIT
ITA No.1003/PUN/2017

Facts

The taxpayer is an Indian company engaged in the business of manufacturing and dealing in Steel Tyre Cord, Hose Reinforcement Wire. It had paid its share of allocation for the group IT support services received from its group company, N.V. Bekaert SA. The IT support service included an integrated SAP system, its platform, V-server and its connectivity. The taxpayer did not deduct any tax on the said payment. The tax officer treated the payment as both Royalty and Fees for Technical Service (FTS) and disallowed the expenses.

The Dispute Resolution Panel (DRP) upheld the taxpayer's draft order, and the taxpayer filed an appeal before the Pune Tribunal.

Held

On considering the material on record, the Tribunal was of the opinion that N.V Bekaert SA is not rendering any service. Instead, it has created a full-fledged IT Infrastructure facility in the nature of equipment with the help of ERP system (SAP), SAP platforms, hardware, software, servers, network, domain structures and security. The payment was regarded as consideration for the use of or right to use industrial, commercial or scientific equipment, and accordingly, it would qualify as Royalty under the Income Tax Act (the Act) and India-France Tax Treaty.

The Tribunal was of the view that the ratio of the decision in Engineering Analysis Centre of Excellence has application only on copyright Royalty cases and not on industrial Royalty cases as the Hon'ble Apex Court dealt only with copyright Royalty on the software payment and ratio of the said decision is not applicable in the given case.

Our Comments

The discussion over Royalty has always been controversial. One needs to thoroughly go through the various aspects of the payment for classifying any payment as Royalty. One should not apply the Apex court decision on software payment for all IT-related payments.

Whether consideration for the database would be considered as Royalty?

M/s Dow Jones & Company Inc. Vs. ACIT
ITA No. 7364/DEL/2018 [A.Y 2015-16]

Facts

The taxpayer is a company incorporated in the USA and engaged in the business of providing information products and services containing global business and financial news to organizations worldwide. It offers information via newspapers, newswires, websites, applications, newsletters, magazines, proprietary databases, conferences and radio.

The taxpayer company appointed Dow Jones Consulting India Pvt Ltd [DJCIPL] on a principal to principal basis for distributing its products in the Indian market. Accordingly, the taxpayer company receives a purchase price from DJCIPL at an arm's length price (ALP).

The tax officer was of the opinion that the receipts from DJCIPL should be taxed in India as 'Royalty Income' under the provisions of the Act and the India-USA Tax Treaty. On the contrary, the taxpayer contended that no copyright was given for the database, and the same should not be tantamount to Royalty.

Held

After considering the submissions from both the parties, the Delhi Tribunal, concluded that as per Article 12 of the India-USA Tax Treaty, only those payments that allow a payer to use/ acquire a right to use copyright in a literary, artistic, or scientific work are covered within the definition of Royalty. In the current case, there is no transfer of legal title in the copyrighted article as the same rests with the applicant. All rights, title, and interest in the licensed software, which is being claimed to be a copyrighted article, are the exclusive property of the applicant. Thus, the payment cannot be classified as Royalty.

Our Comments

This is a welcome decision, clarifying that access to the database shall not be Royalty unless copyright of such data is provided to the recipient. However, the said decision did not discuss why such payment shall not fall within the ambit of information concerning the industrial, commercial or scientific experience. Accordingly, one will also have to consider the other contrary rulings while relying on this decision.

Transfer Pricing

Under the Faceless Scheme, whether the objections filed before the DRP shall be separately communicated to the AO?

Sulzer Pumps India Private Limited [WRIT PETITION (L) NO. 15811 OF 2021]

Facts

The taxpayer had filed objections before the DRP within 30 days from receipt of the draft Assessment Order for AY 2017-18 under Section 144C(2) of the Income Tax Act, 1961 (the Act). Since the objections were filed electronically under the Faceless Appeal Scheme, the taxpayer presumed that the reference filed before DRP would be automatically communicated to the AO by DRP. However, the AO, being unaware of objections filed by the taxpayer before DRP, proceeded to pass the Final Assessment Order under Section 144C(4) of the Act, after the expiry of the 30 days from the end of the month in which the period of filing of objections before DRP and AO expired.

Aggrieved, the taxpayer filed a writ petition before the Bombay High Court HC against the impugned final assessment order passed by the AO and the consequential notice of demand and show cause notice for the penalty.

Held by HC

Section 144C (2) (b) of the Act, specifically requires the taxpayer to file his objections to the draft order with (i) the DRP and (ii) the AO.

Furthermore, it was not disputed that the taxpayer had a reasonable belief that with the assessments being faceless and completely electronic, the reference filed by it would be automatically communicated by the DRP to AO.

The reference before DRP was still pending and in such case, Section 144C (4) of the Act requires the AO to pass the final order, including the directions of the DRP.

While stating that the AO cannot be faulted for passing the impugned order, HC set aside the impugned order and directed AO to pass a fresh one after considering the views of the DRP and allowed the writ petition in favor of the taxpayer.

Our Comments

The CBDT vide Notification No. 6 and 7 of 2021 dated 17 February 2021 integrated faceless assessment proceedings under Faceless Scheme with DRP proceedings. Under the Faceless Scheme, taxpayers can file objections before the DRP, and the AO shall pass the final assessment order in a faceless manner through the National Faceless Assessment Centre post completion of the proceedings before the DRP in conformity with the directions of the DRP.

The scheme does not specifically mention that the taxpayer needs to inform the AO separately. However, in light of the above ruling, it would be necessary for the taxpayers to file a copy of the objections (filed with the DRP under the Faceless Scheme) with the AO having the jurisdiction over the said case.

Whether subsidy/grant received from the government be treated as a revenue receipt and included as an operating item while computing the operating margins?

Hyundai Construction Equipment India Pvt Ltd [ITA No.1766/PUN/2018]

Facts

The taxpayer is a wholly-owned subsidiary of Hyundai Korea and is engaged in the manufacturing and trading of excavators and spares. International transactions pertaining to the manufacturing and trading segment were reported in Form 3CEB, of which transactions pertaining to the manufacturing segment were under appeal for AY 14-15. The taxpayer considered the subsidy received[1] as an operating revenue to compute the operating margin in order to benchmark the international transactions under Transactional Net Margin Method (TNMM). The taxpayer also offered for taxation by treating it as a revenue receipt for the year under consideration.

The Transfer Pricing Officer (TPO) treated the subsidy as an extraordinary item and excluded it from the operating income and reworked the operating margin of the taxpayer. The taxpayer contended before the DRP that the subsidy received by it ought to have been considered as operating revenue. At the same time, it was also submitted that the subsidy should be considered as a capital receipt not liable to tax. The DRP rejected the taxpayer's contentions on the ground that it was received after setting up of the unit and was in the form of VAT refund and Central Sales Tax (CST) and treated the subsidy as a revenue receipt and also upheld its exclusion from the operating revenue. Aggrieved by the action of the AO, TPO, and DRP, the taxpayer preferred an appeal before the Tribunal.

Ruling by the Tribunal

The Tribunal was of the opinion that the decisive factor for considering the nature of subsidy as a capital or revenue receipt is the 'purpose' for which the subsidy has been granted and not the manner of its disbursal. Simply because the subsidy has been disbursed in the form of a refund of VAT and CST, it will not alter the purpose of granting the subsidy, which is nothing but the establishment of new industrial units in less developed areas of the State.

- The Tribunal observed that the purpose of the subsidy is industrial growth, linked to the setting up of industrial units; and the amount of subsidy depends on the amount of investment made in the eligible unit. Testing the factual panorama, the Tribunal considered the subsidy as a capital receipt not chargeable to tax and also held that it can not form part of the operating revenue for the determination of ALP under TNMM.
- Reference was also made to the newly inserted clause (xviii) to Section 2(24) in Finance Act, 2015 w.e.f. 1 April 2016, providing that the assistance in the form of subsidy or grant of cash incentives, etc., other than the subsidy which has been taken into consideration in determining the actual cost of the asset in terms of Explanation 10 to Section 43(1) of the Act, shall be considered as an item of income chargeable to tax. However, the Tribunal held that, since the amended provision of Section 2 (24) (xviii) of the Act was not applicable to the year under consideration, the conclusion of the inference was that the subsidy received by the taxpayer would not form part of its total income.

Our Comments

With the introduction of clause (xviii) to Section 2(24) of the Act w.e.f. 1 April 2016, it is a settled law that the assistance in the form of subsidy or grant of cash incentives, etc., other than the subsidy which has been taken into consideration in determining the actual cost of the asset shall be considered as an item of income chargeable to tax. It is paramount to evaluate the 'purpose' of the grants received. The focus should not only be on the source or mode of payment of the subsidy but determining the treatment of the subsidy in computing the operating margins for determining the ALP. While post amendment, the subsidy would be considered as a taxable receipt. However, there is ambiguity on treating the same as operating income, and clarity on the same would be welcome.

1. under Package Scheme of Incentives (PSI) from the Government to promote new industrial units in less developed areas

Indirect Tax

Whether the appellant is entitled to CENVAT credit and consequential refund of service tax paid under reverse charge mechanism (RCM) pursuant to audit objection, post-implementation of GST regime?

Note: The Hon'ble Delhi CESTAT has adopted a similar view in the case of Jagannath Polymers Pvt Ltd vs. Commissioner, CGST – Jaipur 1 [2021 (12) TMI 736 – CESTAT Delhi].

Terex India Pvt Ltd vs. Commissioner of GST & CE, Salem [2021 (10) TMI 531 – CESTAT Chennai]

Facts

- The appellant is engaged in the manufacture and export of mining machinery. They also provide business support services on which service tax was being duly paid.
- During the audit, it was noticed that the appellant had received services from their foreign parent entity, which was liable to service tax on a reverse charge basis.
- The appellant agreed and deposited the service tax amount along with interest.
- Though the appellant was eligible for credit, they could not follow the procedure to carry forward the CENVAT credit to the GST regime since the time limit for the same had expired on 27 December 2017. Consequently, they applied for a refund thereof.
- However, resorting to Section 142(8)(a) of the CGST Act, the refund was rejected by holding that input tax credit was not eligible as the amount was paid as the recovery of arrears. Such rejection was upheld by the Commissioner(Appeals).

Decision

- Perusing the ingredients of Section 142(8)(a), Tribunal remarked, "The sub-section states that input tax credit will not be available under GST Act. It does not say that credit is not eligible under existing law (erstwhile law)."
- The provision only means that after assessment or adjudication proceedings, if an assessee pays the tax so determined, he cannot claim the benefit of credit under the CGST Act.
- In the present case, there is no assessment/adjudication as contemplated under the provisions of erstwhile law. The payment made by the appellant (when pointed out by Audit officers) does not fall under recovery of tax arrears by an assessment or adjudication proceedings.
- Section 142(3) is the transitional provision for the claim of refund after introducing the CGST Act, which says that any amount paid under erstwhile law must be disposed of according to the provisions of erstwhile law, and the amount has to be paid in cash.
- Since the appellant has paid tax under erstwhile law, only sub-section (3) of Section 142 would be attracted.
- Accordingly, the appeal was allowed and the order of Commissioner(Appeals) was set aside.

Our Comments

The distinction brought out by the Hon'ble Tribunal between the tax paid pursuant to audit objection vis-a-vis recovery of arrears of tax pursuant to an assessment or adjudication proceedings would certainly provide relief to the taxpayers who are contesting the rejection of claims for refund of taxes paid under erstwhile provisions, before various forums.

Whether GST is applicable on recovery from employees towards -

a. notice pay;

b. the premium of Group Medical Insurance Policy of non-dependent parents/retired employees;

c. nominal amount for availing canteen facility at the refinery;

d. telephone charges over and above the fixed rental charges payable to BSNL;

Whether free-of-cost canteen services to all the employees would fall under para 1 of Schedule III of CGST Act and not be subjected to GST?

In Re: Bharat Oman Refineries Limited [2021 (12) TMI 999 – Appellate Authority for Advance Ruling, Madhya Pradesh]

Facts

- The appellant is a deemed Public Sector Undertaking, with M/s Bharat Petroleum Corporation Limited holding 51% paid-up capital in the company.
- The appellant carries on the business of refining crude oil in the refinery located in Madhya Pradesh.

Ruling

- Notice pay:
  Applying the ratio of Hon'ble Madras HC in GE T&D India Ltd vs. Deputy Commissioner of Central Excise, LTU, Chennai [W.P. Nos. 35728 to 35734 of 2016], it was held that merely because the employer is being compensated does not mean that he has provided any services or has 'tolerated' any employee's act for a premature exit. Hence, GST is not applicable under clause 5(e) of Schedule II to CGST Act.

- Premium paid towards Group Medical Insurance Policy and Telephone charges:
  The activities undertaken by the appellant, like providing medi-claim policy for the employees' non-dependent parents/retired employees through the insurance company and providing telephone facility to employees through BSNL, neither satisfy the conditions of Section 7 to be held as "supply of service" nor are they covered under the term "business" of Section 2(17) of CGST Act.
- Nominal amount for availing canteen facility at the refinery:
  The appellant, who is mandated to run a canteen under the Factories Act, is collecting the portion of employees' share and paying to Canteen Service Provider, a third party, which is nothing but the facility provided to employees without making any profit, and working as a mediator between employees and the contractor/ canteen service provider.
  Under these circumstances, GST is not applicable on the collection of employees' portion of the amount without making any supply of goods or services to the employees.
- Free of cost canteen services to all employees:
  This is not a case where the employee has provided some services to the employer. Also, nothing on record shows that said facility provided to employees is part of the wage structure.
  Therefore, canteen facilities would not fall under paragraph 1 of Schedule III to CGST Act. However, they would not be leviable to GST at the hands of the appellant-employer inasmuch as they are merely a facilitator between the canteen service provider and the employees.

Our Comments

This ruling reinforces the stand that mere recovery of amounts/receipt of payments without a quid pro quo service would per se not qualify as a 'supply.'

While the advance rulings are binding only to the parties therein, businesses can resort to the same to defend their positions before the GST authorities, who have already started questioning the taxability of such recoveries.

Merger & Acquisition Tax

Mumbai ITAT: Gift of Brand to a private irrevocable trust held to be a non-taxable capital receipt

Balaji Trust [TS-1092-ITAT-2021(Mum)]

During the AY 2013-14, Balaji Trust (assessee), a private and irrevocable discretionary trust, was settled by Shri Shashikant Ruia for the sole and exclusive benefit of the members of the Ruia family. Essar Investments Limited (EIL) voluntarily gifted the 'Essar' brand to the corpus of the assessee on the same day without any consideration. Thereafter, the assessee entered into brand licensing agreements with Essar group entities and granted a non-exclusive license to use the brand in India for license fees which were duly offered to tax. The AO held that the receipt of brand would be a taxable event citing that the definition of 'income' under Section 2(24) of the Act is wide enough to include the receipt of trademark and copyright and held it taxable as under the head 'Income from Other Sources' under Section 56(1). On appeal, CIT(A) decided in favor of the assessee by holding the receipt to be a capital receipt.

The Tribunal upheld the CIT(A)'s decision and held the receipt to be a non-taxable capital receipt laying down the below observations:

- The assessee has received the brand as a gift which constituted its profit-making apparatus and thus was in the nature of fixed asset/capital.
- The brand received by the assessee neither carries any element of profit, nor falls under any category of income specified under Section 2(24), 56(1) or 56(2) of the Act.
- The brand 'Essar' does not fall within the scope of "any work of art" as contemplated in Sec. 56(2)(vii) of the Act. Merely because it was registered under the Copyright Act, 1957 as "an artistic work" it could not be held to be in the nature of "a work of art."

Our Comments

This is a very interesting ruling where the gift of a brand by a Corporate entity to a Trust has been held non-taxable transaction. It appears that the validity of corporate gifting was not an issue under consideration which aspect has otherwise also been a matter of litigation. It will be interesting to see the courts' stand in such transactions post the General Anti-Avoidance Rule (GAAR) regime.

Mumbai ITAT allows a deduction under Section 80-IA to the amalgamated entity holding that sub-section 12A is not a disentitling provision

Ultratech Cement Ltd [TS-1133-ITAT-2021(Mum)]

Grasim Industries Limited is the holding company of Ultratech Ltd. (assessee, amalgamated company). During the FY 2010-11, Samruddhi Cement Ltd. (SCL), a wholly-owned subsidiary of Grasim Industries, amalgamated with Ultratech Ltd. on 1 July 2010 under the scheme of amalgamation sanctioned by the Bombay and Gujrat HC. Upon amalgamation of SCL and vesting of its Railway undertakings and its power-generating eligible undertakings into the assessee, the assessee claimed a deduction under Section 80IA of INR 1.0153 billion. The Ld. AO disallowed the claim of deduction by the assessee invoking the provisions of sub-section (12A) of Section 80-IA. The CIT(A) approved the order of the AO.

On further appeal the ITAT ruled in favor of the assessee by observing as under:

CIT(A) confirmed the disallowance made by the AO. On further appeal by the assessee, the ITAT observed as under:

- ITAT relied on the below and held that the benefit of deduction was attached to an enterprise or undertaking and not to the owner:
  - Madras HC ruling in case of Madras Machines Tools Manufacturers (1975) (98 ITR 119).
  - Delhi HC ruling in case of Tata Communications Internet Services (2012) (251 CTR 290).
- ITAT further observed that prior to the insertion of sub-section (12), the deduction was allowed by courts to the successor entity to which the undertaking was transferred.
- ITAT thus did not agree with the Revenue's contention that 80-IA(12) is enabling the provision that entitles the successor entity to claim the benefit relating to undertaking transferred in the scheme of amalgamation/ demerger and observed that deduction was available to the successor even prior to insertion of sub-section (12).
- ITAT observed that Section 80-IA(12) only made explicit that was implicit in the provision and therefore, withdrawal of sub-section 12 by sub-section 12A cannot withdraw what was already implicitly available to the assesse.
- ITAT observed that if the legislature intended to curtail the rights of the new owner of the undertaking to claim the tax holiday for a residual period, it could have simply stated that benefit u/s 80IA will not be available to the successor.
- With respect to CBDT Circular No. 3/ 2008, relied upon by the Revenue, ITAT observes that the CBDT tried to clarify something which is nowhere stated either in the language of newly inserted sub-section (12A) or in the Memorandum to Finance Bill, 2007. Furthermore, if the intention of tax holiday u/s 80-IA was to provide an incentive to only original investors, the legislature would have never inserted sub-section (12) in the statute.
- ITAT further observed that Grasim made an initial investment and the eligible undertakings were demerged by ***Grasim to its wholly-owned subsidiary SCL, which got amalgamated with the assessee. Thus, there was no change in the entity making the initial investment and the conditions prescribed by the CBDT in the aforesaid Circular for denial of the deduction are not fulfilled in the present case.***

Our Comments

The ruling lays an important precedent for business re-organizations extending the benefit of deduction of section 80-IA for the residual period of tax holiday to the amalgamated entity.

Tax Talk

Indian Developments

Direct Tax

CBDT issues additional guidelines TDS on the sale and purchase of goods and e-commerce platforms

[Circular No. 20/2021 dated 26 November 2021]

In order to remove difficulties being faced by stakeholders for provisions relating to TDS on purchase of goods (Section 194Q), TDS on e-commerce operators (Section 194-O), and TCS on sale of goods [Section 206C(1H)], the CBDT has provided the following clarifications:

- E-Auction service providers are not subject to the withholding tax provisions on 'e-commerce transactions.'However, buyers/sellers of goods, i.e., e-auction participants, would continue to be subject to the tax withholding/collection provisions.
- Non-GST levies (like VAT/Excise/ Sales Tax/CST) have been accorded similar treatment as GST with respect to withholding tax on the purchase of goods.
- Withholding tax on the purchase of certain specified goods would continue to be applicable even if such goods have been utilized for the purposes of generation of power, for tax is not collectible on them.
- Any department of the government would not be subject to withholding tax provisions. However, PSUs or corporations would continue to be subject to withholding tax provisions.

CBDT notifies e-Verification Scheme, 2021 for faceless collection of information

[Notification No. 137/2021 dated 13 December 2021]

CBDT has notified e-Verification Scheme, 2021. The scope of the said Scheme covers the following:

- Calling of information under Section 133;
- Collecting certain information under Section 133B;
- Calling for information by the prescribed income-tax authority under Section 133C;
- Exercise of power to inspect registers of companies under Section 134;
- Exercise of power of AO under Section 135.

Furthermore, the said Scheme provides that all issue and service of notices shall be issued under the digital signature of the prescribed authority. Also, the taxpayers shall be required to appear personally or through an authorized representative before the prescribed authority in connection with any proceedings. In exceptional cases, where the taxpayer requests personal appearance, the prescribed authority may allow personal appearance through video conferencing or video telephony, to the extent technologically feasible.

The Scheme further provides that all communications between the tax department and the persons from whom information is sought will be conducted electronically.

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Indirect Tax

Latest developments in GST

[Notification Nos. 38/2021–Central Tax and 39/2021–Central Tax both dated 21 December 2021 and 40/2021-Central Tax dated 29 December 2021]

The government has notified some significant amendments to the provisions of GST law w.e.f. 1 January 2022. The same is explained hereunder.

Requirement of Aadhaar authentication

Aadhaar authentication has been made mandatory for the purpose of:

- Filing of refund application in Form RFD-01 under Rule 89 of CGST Rules, 2017.
- Filing of refund of IGST paid on goods exported out of India under Rule 96 of CGST Rules, 2017.
- Filing application for revocation of cancellation of GST registration in Form GST REG-21.

Amendment to CGST Act, 2017 read with CGST Rules, 2017 vide Finance Act, 2021

Section 7: Scope of supply

- Activities or transactions involving supply of goods and/or services by any person other than an individual, to its members or constituents or vice-versa, for cash, deferred payment or other valuable consideration, shall be deemed to be 'supply' between separate persons.
- Accordingly, Entry 7 of Schedule II specifying supply of goods by any unincorporated association or body of persons to a member thereof as a "supply of goods" stands omitted retrospectively from 1 July 2017.

Section 16 read with Rule 36(4): Entitlement to Input Tax Credit (ITC)

ITC in respect of invoices and debit notes shall be available only to the extent they are furnished in FORM GSTR-1 by the supplier and further reflected in Form GSTR-2B of the recipient.

Section 74 read with Rules 142 and 144: Recovery of tax under fraud, willful misstatement, or suppression of facts

- Detention, seizure, and confiscation of goods or conveyances shall have separate proceedings for recovery of tax and penalty. If the concerned person makes the payment of penalty as specified in the notice issued within a period of 7 days from the date of issuance of notice but before the issuance of the order and intimates the officer in Form DRC-03, then the officer shall issue an order in FORM DRC-05 concluding the proceedings in respect of the given notice.
- Recovery of the penalty imposed under Section 129 can be initiated if not paid voluntarily within 15 days from the receipt of the order.

Section 75: Recovery of interest on self-assessed tax

The explanation has been inserted to clarify that "self-assessed tax" shall include only the tax payable in respect of details of outward supplies furnished in Form GSTR-1, but not included in FORM GSTR-3B.

Section 83: Provisional attachment

Any property, including bank account, can be attached provisionally to protect the interest of Government revenue, where any proceeding under Chapter XII (assessment), XIV (inspection, search, seizure and arrest), or XV (demands and recovery) has been initiated against a taxable person.

Section 107: Appeal to Appellate Authority

An appeal against an order of detention or seizure of goods or conveyance can be filed only upon payment of 25% of the penalty.

Section 129 and 130: Detention, seizure and confiscation of goods and conveyances

Delinking of the proceedings for detention/seizure and confiscation of goods and conveyances.

Rule 80: Due date of filing GSTR 9 and 9C

For FY 2020-21, the due date for furnishing the Annual Return in Form GSTR-9 and the self-certified Reconciliation Statement in Form GSTR-9C have been extended until 28 February 2022.

GST Council defers rate hike on textiles

[Excerpts from News18.com]

In the 46th GST Council Meeting held on 31 December 2021, the GST Council has decided to defer the rate hike on textiles from 5% to 12%. Furthermore, Hon'ble Finance Minister Nirmala Sitharaman has stated that this issue will be sent to the Tax Rationalization Committee, which will submit its report regarding the same by February.

Latest developments in Customs

[Notification Nos. 55/2021-Customs, 56/2021-Customs, 57/2021-Customs, 58/2021-Customs, 59/2021-Customs, and 60/2021-Customs all dated 29 December 2021]

The World Customs Organization (WCO) Convention on Harmonized Commodity Description and Coding System (the HS Convention) came out with the Harmonized System Nomenclature (HSN) 2022 in order to facilitate the standardization of trade documentation and the transmission of data.

In line with this change, Customs authorities have updated the existing HSNs given under Customs Tariff Act, 1975 w.e.f. 1 January 2022 and issued guidance document on the correlation of Customs Tariff between HSN 2021 and HSN 2022.

Latest developments in FTP

[Notification No. 48/2015-2020 dated 31 December 2021]

The government has extended the last date for submitting applications for Scrip-based FTP schemes.

Accordingly, the last date for submitting online applications stand revised to 31 January 2022 for the following schemes, i.e.,

Schemes	Exports Eligibility
Merchandise Exports from India Scheme (MEIS)	Exports made in the period(s) 1 July 2018 to 31 March 2019, 1 April 2019 to 31 March 2020 and 1 April 2020 to 31 December 2020
Service Exports from India Scheme (SEIS)	Service exports rendered for FYs 2018-19 and 2019-20
2% additional ad hoc incentive (under paragraph 3.25 of FTP)	Exports made in the period 1 January 2020 to 31 March 2020 only
Rebate of State and Central Levies and Taxes (RoSCTL)	Exports made from 7 March 2019 to 31 December 2020
ROSL (Rebate of State Levies)	Exports made up to 6 March 2019 for which claims have not been disbursed under the Scrip mechanism

Furthermore, the applicable late cuts stand amended vis-à-vis the new application date.

Tax Talk

Global Developments

Direct Tax

OECD Releases Pillar two model rules for domestic implementation of 15% global minimum tax

[Excerpts from OECD, 20 December 2021]

The OECD published detailed rules to assist in the implementation of a landmark reform to the international tax system, which will ensure Multinational Enterprises (MNEs) will be subject to a minimum 15% tax rate from 2023. The Pillar Two model rules provide governments a precise template for taking forward the two-pillar solution to address the tax challenges arising from digitalization and globalization of the economy agreed in October 2021 by 137 countries and jurisdictions under the OECD/G20 Inclusive Framework on BEPS.

The rules define the scope and set out the mechanism for the so-called Global Anti-Base Erosion (GloBE) rules under Pillar Two, which will introduce a global minimum corporate tax rate set at 15%. The minimum tax will apply to MNEs with a revenue above EUR 750 million and is estimated to generate around USD 150 billion in additional global tax revenues annually.

Canada advances digital service tax bill despite OECD pact

[Excerpts from MNE Tax, 15 December 2021]

On 14 December 2021, Canada introduced draft legislation to implement its planned digital services tax – with a built-in delay and contingency deferring to implementing the OECD multilateral agreement. However, if the OECD agreement under Pillar 1 is not timely implemented, Canada's digital services tax would be imposed in 2024 with retroactive application to 2022.

Transfer Pricing

Denmark eases transfer pricing documentation requirements w.r.t. domestic controlled transactions & provides guidance of application of benchmarking

On 23 June 2021, the Danish Ministry of Taxation had proposed draft amendments, to the Danish Tax Control Act (Act) recommending relaxations in transfer pricing documentation requirements for domestic transactions. On 25 November 2021, the Danish Parliament adopted Bill No. 7 (Bill), providing relief to the taxpayers for preparing transfer pricing documentation (TPD) substantiating the arm's length principle for domestic controlled transactions. The Bill also specifies the requirement for applying appropriate benchmarking at the time of comparability analysis, notwithstanding the materiality.

The Bill will be effective for income years starting 1 January 2021 or later.

TPD for domestic controlled transactions

Basis the erstwhile provisions of the Act, the taxpayer (i.e., company) domiciled in Denmark is required to prepare TPD (for both international and domestic controlled transactions) if the group (i) employs 250 or more employees; or (ii) has revenue exceeding DKK 250 million;

and (iii) balance sheet amount exceeding DKK 125 million. Further, in light of the enactment of law (L28/2020) on 3 December 2020, the taxpayer is required to file Master File and Local File with the Danish Tax Agency within 60 days after the deadline for filing the annual corporate income tax return.

The consequences of failing to submit a timely and otherwise compliant TPD include the risk of penalties and a discretionary assessment. Failure to comply with the submission deadline and/or TPD requirements could attract a penalty of DKK 250,000 per company per year, plus 10% of any income adjustment. Additionally, the burden of proof would shift to the taxpayer in transfer pricing-related tax disputes.

As per the Bill, for transactions entered between Danish group entities (domiciled in Denmark), the need to maintain TPD ceases as the said entities are subject to ordinary company taxation regulations.

It is worthwhile to note that though domestic transactions are exempt for preparation of TPD, the arm's length principle incorporated in the Danish Tax Assessment Act, shall continue to apply to all domestic controlled transactions. Thus, associated domestic group companies subject to ordinary company taxation will still have to ensure that their intra-group transactions are priced in accordance with the arm's length principle.

Comparability analysis

The Bill also introduces an amendment, which specifies the Danish requirements to support intercompany transactions by benchmarking. Thus, for income years starting from 1 January 2021, all intercompany transactions entered into by the taxpayer will have to be documented and supported by a benchmark, regardless of the materiality.

Failure to document appropriate benchmarking while conducting comparability analysis shall pose a potential risk of being challenged wherein the burden of proof shifts to the taxpayer along with the probability of being fined.

Conclusion

While the Bill provides relief to the taxpayers from the preparation of TPD for domestic controlled transactions, it does not absolve them from maintaining adequate documentation (prepared written documentation, calculations, etc.) for the pricing of the controlled transactions to demonstrate that it complies with the arm's length principle. Subsequently, during tax audits, the taxpayer may be required to reproduce the same upon request by the Danish Tax Agency.

Indirect Tax

FM Rishi Sunak plans to slash taxes

[Excerpts from Reuters.com]

UK Finance Minister Rishi Sunak is planning to cut down income tax by 2 pence to the pound or slash VAT rates before the next elections. However, it has been reported that Mr. Sunak's preference is an income tax cut over the next three years as part of a 'retail' offer before 2024, when the next general election is expected. Another proposal could see the VAT cut to be at the headline rate of 20%, along with more targeted reductions to the regime. Furthermore, it is being considered that households using green energy could pay lower rates.

Collection of sales tax on internet sales

[Excerpts from Myleaderpaper.com]

Certain US cities will ask their voters in April of this year to approve sales tax collection on internet sales. If it is approved, the City of Arnold will collect its current 1.25% sales tax and the City of Pevely would collect 2.65% sales tax on internet purchases, similar to the purchasers at retail businesses in the city.

Compliance Calendar

Direct Tax
Indirect Tax

7 January 2022

- Payment Tax Deducted/Collected in the month of December 2021.
- Payment of equalisation levy for the quarter ending December 2021.

10 January 2022

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

11 January 2022

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

13 January 2022

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

15 January 2022

- Filing of TCS Statements for the period from October to December 2021.
- Due date for furnishing of Form 15G/15H declarations received during the quarter ending December, 2021.

20 January 2022

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

22 January 2022

GSTR-3B for the quarter of October 2021 to December 2021 to be filed by registered taxpayers under QRMP scheme and having principal place of business in Category 1 states.

24 January 2022

GSTR-3B for the quarter of October 2021 to December 2021 to be filed by registered taxpayers under QRMP scheme and having principal place of business in Category 2 states.

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 or the Union territories of Jammu and Kashmir, Ladakh, Chandigarh and Delhi.

Direct Tax
Indirect Tax

30 January 2022

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

31 January 2022

Filing of TDS Statements for the period from October to December 2021.

7 February 2022

Payment Tax Deducted/Collected in the month of January 2022.

10 February 2022

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

11 February 2022

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

13 February 2022

- GSTR-6 for the month of January 2021 to be filed by ISD.
- GSTR-1 for the month of January 2021 to be filed by all registered taxpayers under QRMP scheme.

15 February 2022

- Filing of Tax Audit Report under in form 3CD.
- Filing of Transfer Pricing Report in form 3CEB.

Webinars & News

Webinars

Evolution of Tax related transparency in GCC : Nitty-gritty and safeguards

Organizer - Nexdigm (SKP)

6 December 2021

Noteworthy VAT implications on non-residents for doing business in Europe

Organizer - Avlara

9 December 2021

M&A masterclass-Corporate Restructuring

Organizer - Achromic Point

10 December 2021

News

Fitment panel's GST recommendations may cause an immediate spike in inflation

https://bit.ly/3pLFlSc

9 December 2021, Business Standard

What the weakness in e-way bills foretells

https://bit.ly/31X155e

13 December 2021, Livemint

About Nexdigm (SKP)

Nexdigm (SKP) 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 (SKP) is of utmost importance, and we are ISO/ISE 27001 certified for information security and ISO 9001 certified for quality management.

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

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

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