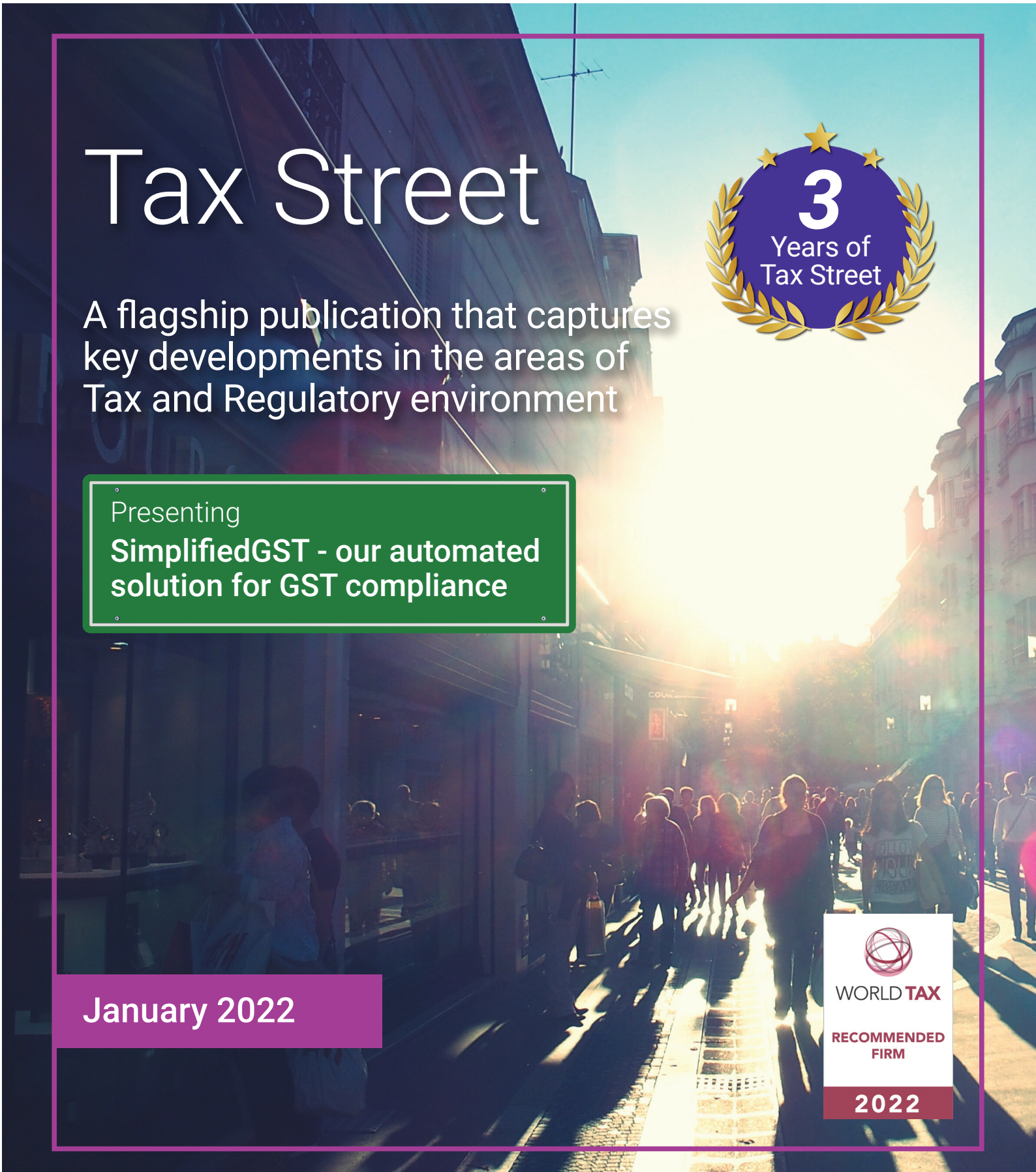

Tax Street

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Presenting

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WORLD TAX RECOMMENDED FIRM 2022

January 2022

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 January 2022.

- The **'Focus Point'** covers an overview of tax highlights from Union Budget 2022.
- Under the **'From the Judiciary'** section, we provide in brief, the key rulings on important cases, and our take on the same.
- Our **'Tax Talk'** provides key updates on the important tax-related news from India and across the globe.
- Under **'Compliance Calendar'**, we list down the important due dates with regard to direct tax, transfer pricing and indirect tax in the month.

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

Warm regards,
The Nexdigm Team

Focus Point

Indian Union Budget 2022: A Snapshot of Tax Highlights

The Union Budget 2022-23 provides a vision to transform India into a resilient economy. Overall, Budget 2022 can be considered as a balanced one that would bolster growth. Some of the standout proposals from Budget 2022 include setting up of Centre for Processing Accelerated Corporate Exit (C-PACE) for the reduction in timelines for winding up of companies, cross-border insolvency resolution process, replacement of Special Economic Zones Law with new legislation, introduction of a Digital Rupee, new regulatory regime for private equity and venture capital, etc. On the direct tax front as well, some changes would impact corporates and individuals. We have discussed a few important changes that may impact your business.

Direct Tax

Tax Rates

- Income-tax rates (including surcharge, health and education cess) for companies (domestic and foreign), firms, LLPs, and individuals remain unchanged. This includes rates for MAT and alternative minimum tax.
- For Individuals - Surcharge on the transfer of all long-term capital gains has been capped at 15%. This would primarily boost promoters and investors looking at selling shares of unlisted companies as the effective tax rate has been reduced to 23.92% against 28.50%.
- Beneficial lower tax rate (currently 15%) on dividend received by an Indian company from a foreign subsidiary/ joint venture is to be withdrawn from 1 April 2022. Accordingly, the foreign dividend would be charged at corporate tax rates. This would discourage Indian multinational corporations from repatriating profits earned abroad.

These provisions apply from 1 April 2022, and hence a small window would be available for companies looking to repatriate the accumulated reserves from outside India.

New Taxation Regime Introduced for Virtual Digital Assets

- Virtual Digital Asset is defined widely, which may include various digital assets like cryptocurrencies, NFTs, etc.
- Income from transfer of Virtual Digital Asset to be taxed at a flat rate of 30%. No deduction while computing income except the cost of acquisition of the asset.
- Loss from the transfer of Virtual Digital Asset cannot be set- off against any other income or carried forward to future years for set-off against future income from Virtual Assets.
- Withholding tax at the rate of 1% on payment to resident towards purchase consideration for transfer of Virtual Digital Asset.
- Gift of Virtual Digital Asset also to be taxed in the hands of the recipient. This may lead to double taxation as the recipient of the gift would not be able to take the cost of acquisition.

Ease of Doing Business

- Relaxation in condition for availing concessional tax regime for manufacturing companies. The companies can commence manufacturing till 31 March 2024 as against 31 March 2023.
- Tax Holiday extended for startups incorporated till 31 March 2023.

M&A Transactions Clarifications

- Any proceedings made on predecessor entity during the pendency of business re-organization to be deemed to be made on the successor.
- Enabling provision introduced to enable Successor entity to file the modified return within six months from the end of the month of issuance of the order.

Providing Tax Certainty

- Surcharge and cess are not to be allowed as business expenditure. This will be effective retrospectively from 1 April 2005; however, this overturns various recent jurisprudence. Companies need to evaluate the tax position adopted in light of retrospectivity of the amendment.
- No set-off allowed for any brought forward loss against any undisclosed income detected during search and survey operations.
- Dividend stripping provisions to apply for InvITs, REITs and AIF. Bonus stripping provisions extended to cover securities as well.

Addressing COVID-19 Impact

- COVID-19 related tax exemption for the amount received for medical expenses for self and family without limit.
- Ex-gratia received by a family member of the deceased person:
  - No limit if received from the employer.
  - Up to INR 1 million from any other person.

Tax Compliance and Procedural Changes

- Withholding tax at 10% is being introduced on any benefits or perquisites given to business associates. Given that provisions are very wide, it would be interesting to see whether volume discounts, turnover discounts, free goods, etc., would get captured in the tax net or not.
- Updated tax returns are allowed to be filed in certain situations up to two years from the end of the relevant assessment year, subject to payment of additional taxes (25% to 50% of income tax and interest). This is different than the filing of a revised tax return.
- A number of changes were introduced for rationalizing re-assessment provisions.
- Revenue's appeal can be deferred until an identical question of law is decided by the jurisdictional High Court or the Supreme Court.
- Existing provisions of the Faceless Scheme to be streamlined in order to address various legal and procedural problems being faced in the implementation of the said Section.
- The date for issuing direction for faceless proceedings before Dispute Resolution Panel (DRP) and the Tribunal has been deferred to 31 March 2024.

Indirect Tax

Changes in the Manner and Conditions of Availing Input Tax Credit (ITC)

- The conditions for availing ITC are proposed to be amended to allow ITC only if the same is not restricted in the details communicated to the taxpayer under GSTR-2B.
- The time limit for availment of ITC has been extended from the existing due date of filing GSTR-3B for the month of September of the subsequent financial year to 30 November of the subsequent financial year.
- The manner, as well as the conditions and restrictions for communicating ITC details to be availed by a taxpayer, have been prescribed.

Stricter Registration Provisions

The GST registration is liable to be canceled where:

- A person paying tax under the composition scheme has not furnished the return for a financial year beyond three months from the due date of furnishing the said return,
- A person, other than composition dealer, has not furnished returns for such continuous tax period as may be prescribed.

GST Compliance and Procedural Changes

- The non-resident taxable person shall furnish the return for a month by the thirteenth day of the subsequent month instead of the twentieth day of the subsequent month,
- Persons furnishing return under QRMP scheme have been permitted to pay either the self-assessed tax or an amount that may be prescribed,
- The time limit for rectifying errors in GST returns has been extended to 30 November of the following financial year,
- Furnishing of GSTR-1 has been mandated to file GSTR-3B for a tax period,
- The time limit for rectifying any error or omission from a return filed by e-commerce operators has been extended from 20 October to 30 November of the following financial year.
- In line with the proposed amendment to ITC provisions, the time limit for issuing credit notes has also been extended up to 30 November of the following financial year.

Clarity on Claiming a Refund

Clarity has been provided regarding the relevant date for filing a refund claim in respect of supplies to SEZ developer /unit. According to the new explanation, the relevant date would be the date of furnishing return in GSTR-3B.

SEZ Reform

- The SEZ Act, 2005 will be replaced with a new legislation that will enable the States to become partners in 'Development of Enterprise and Service Hubs'. This would cover existing and new industrial enclaves to utilize the infrastructure optimally and enhance export competitiveness.
- The Customs administration shall be fully IT-driven and function on Customs National Portal, focusing on higher facilitation and with only risk-based checks.

Legislative Amendments in Customs

- The Board, Principal Commissioner, and Commissioner of Customs have been explicitly empowered to delegate necessary functions to other Customs officers.
- The officers of Director General of Revenue Intelligence (DRI), Audit and Preventive formations would be empowered to initiate proceedings for recovery of customs duty unpaid / short-paid or not levied / short-levied, as "proper officers."
- Concurrent empowerment of two or more Customs officers has been introduced for the first time, and accordingly, faceless proceedings under the Customs legislation may be initiated by two or more officers jointly. The criteria for selecting such officers are no longer restricted to territorial jurisdiction but can be based on a class of goods, nature of the case at hand, industry expertise, etc.
- Upon completion of any investigation or audit, the original jurisdictional authority shall undertake further proceedings like re-assessment, adjudication, etc.
- Advance rulings shall now be applicable for three years from the date of pronouncement or till there is a change in law or facts, whichever is earlier. The existing advance rulings shall be valid for three years from the date of Presidential assent to the Finance Bill, 2022.
- The time limit of 30 days to withdraw an advance ruling application has been done away with. Now, the same can be withdrawn any time before the pronouncement.
- Customs (Import of Goods at Concessional Rates of Duty) Rules, 2017 have been comprehensively amended to - (i) simplify and automate the entire process of importation, (ii) standardize forms, (iii) eliminate the need for transaction-based permissions, and intimations, (iv) propose a monthly statement for effective monitoring of the use of goods, and (iv) provide an option to pay voluntary duties and interest through a common portal.
- The importer shall submit a one-time statement in Form IGCR-1 on the common portal for seeking Import Identification Number (IIN), which shall be relevant for - (i) mentioning on Bill of Entry for availing exemption, (ii) filing of IGCR-2 for non-receipt of goods imported, (iii) reporting in the monthly statement IGCR-3.

Other Key Proposals

- Provisions relating to matching, reversal and reclaim of ITC and reduction in output tax liability, to be omitted in their entirety. Furthermore, reconciliatory changes are being introduced in other sections which have references to the now omitted provisions.
- Late fees shall be applicable for delay in furnishing GST TCS returns.
- The amount available in the CGST head of electronic cash ledger of the taxpayer can be transferred to the CGST or IGST head of electronic cash ledger of distinct person, in a manner that would be prescribed. However, no such transfer shall be permissible if the said taxpayer has unpaid liability in his electronic liability ledger.
- Provision has been proposed to prescribe the maximum proportion of GST liability that can be discharged using the balance available in electronic credit ledger by a prescribed class of registered persons.
- It is proposed to prescribe the form and manner for claiming a refund of any excess balance lying in the electronic cash ledger.

The government has continued to support the Make in India initiative and create an ease of doing business in India.

From a tax perspective, too, the objective of providing a stable and predictable tax regime has been maintained by not tinkering with tax rates.

While the Budget may echo a theme of strategic intent and carry provisions that may bolster and further boost the economy, some of the amendments may require businesses to re-examine their tax position and processes.

From the Judiciary

Direct Tax

Whether payment made for market research of foreign territory will be considered taxable in India?

M/s Orkla Asia Pacific Pte Ltd vs The DCIT
ITA No. 193/Bang/2019

Facts

The taxpayer is a company incorporated in Singapore and is a tax resident of that country. The company is organized as a support and business development center for all Orkla moved companies in the Southeast Asia region. The company rendered advice, support, and assistance in marketing and sales in the Southeast Asia region to Orkla group companies through experienced personnel. The taxpayer has a 100% subsidiary in India, namely MTR Foods Pvt. Ltd., Bangalore, and it also renders such marketing services to the Indian company for the benefit of the Indian company in Southeast Asian country.

MTR Foods Pvt Ltd did not deduct tax on the fees paid to the taxpayer with a view that it does not qualify to be considered as Fees for Technical Services (FTS) under India-Singapore DTAA by virtue of the make available clause. Thus, in the absence of a Permanent Establishment (PE), the fees shall not be taxable in India.

The Assessing Officer (AO) passed a draft assessment order by considering the amount paid to the taxpayer as FTS. The DRP upheld the draft assessment order of the AO.

Aggrieved by the order, the taxpayer filed an appeal before the Bangalore Tribunal.

Held

After considering the data on record, the Bangalore tribunal observed that the services rendered by taxpayer were utilized in a business carried on by MTR Foods outside India. Thus, the services rendered by a taxpayer cannot be deemed to have been accrued or arisen in the hands of the taxpayer in India and, accordingly, shall not be taxable in India under the Income Tax Act. Even under the India-Singapore DTAA, income shall not qualify to be considered as FTS by virtue of the make available clause in the treaty.

Our Comments

This is a welcome decision. However, one will have to evaluate the other contrary ruling as well while relying on the argument that the expenses utilized for the development of a business outside India.

Whether the purchase of application software providing enduring benefits should be considered as capital expenditure?

M/s Kotak Mahindra Bank Ltd Vs DCIT.
748/Bang/2011 2001-02, 733/Bang/2011 2001-02

Facts

The taxpayer is a company engaged in the business of banking. The taxpayer purchased an application software, Core Banking Solution (CBS), for networking 125 bank branches with a centralized processing solution. The taxpayer bank was granted a license to use the 'Profile' and other software solely for processing the bank's data. The bank was granted a 'non-exclusive, non-transferable license' to use the integrated 'Profile' Software system to process a specified number of loan accounts and deposit accounts of the bank's customers. The assessee also incurred expenses towards the purchase of computer systems from IBM. The assessee claimed the expense towards the purchase of software as a revenue expense.

According to the AO, the taxpayer acquired a capital asset that would deliver tangible benefits of an enduring nature and accordingly should be considered capital expenditure.

The Commissioner of Income-tax (Appeals) CIT(A) confirmed the order of the AO. Aggrieved by the order, the taxpayer has raised the aforesaid grounds before the Tribunal.

Held

In order to treat any expenditure as capital expenditure, the same should result in accrual of advantage of enduring benefit and such benefit should accrue to the assesses in the capital field. Such accrual of benefit in the capital field would mean that the said benefit should form part of the profit-making apparatus of the taxpayer's business. The expenditure in question only facilitates carrying on the business of the taxpayer more profitably without touching the profit making apparatus of the bank which is receiving deposits and lending/investing them for profit. Therefore, the expenditure in question has to be regarded as revenue expenditure.

Our Comments

The Bangalore Tribunal has appreciated the fact that every expense providing enduring benefit shall not be considered as capital expenditure. Enduring a benefit test cannot be an exclusive test for classifying the nature of the expenditure.

Transfer Pricing

In the absence of application of a prescribed method, the ALP cannot be determined as Nil – for shared services & reimbursement of expenses. Documentation is key!

PPG Coatings India Private Limited[1]

Facts

The taxpayer was engaged in the trading of paints and had entered into international transactions in the nature of cost sharing expenses and reimbursement of costs. The taxpayer stated that the transactions were at arm's length being allocations and on a cost-to-cost basis. However, the Transfer Pricing Officer (TPO) alleged that the taxpayer had failed to demonstrate the benefits derived from the payments made and failed to submit the requisite supporting evidences, thereon determined the Arm's Length Price (ALP) of the transactions to be at "Nil." The DRP upheld the adjustment proposed by the TPO. Aggrieved, the taxpayer filed an appeal before Income Tax Appellant Tribunal (ITAT).

Held by the ITAT

Without resorting to the methodology of determining ALP as prescribed, the TPO cannot determinate the ALP as NIL by applying the benefit test. Furthermore, ITAT also admonishes lower authorities' failure to consider various evidences produced by the taxpayer (agreements, email correspondences, allocation key, benefits derived, etc.). Accordingly, the ITAT rejected the NIL determination of ALP for the international transactions under dispute. The ITAT also acknowledges that the taxpayer's profit margins after considering the international transactions were higher than comparables.

Our Comments

Taxpayers may be advised to maintain a complete trail of documentation, especially in case of payments to Associated Enterprise (AE), to help demonstrate the arm's length nature of the dealings. While various rulings have upheld that the TPO neither has jurisdiction to question commercial expediency of a transaction nor to examine the necessity of transactions, however in the absence of relevant documentation, it is still seen that the TPOs choose to evaluate benefits derived therefrom.

Penalty u/s 271G, not sustainable without the satisfaction of default u/s 92D – Invocation of 92C invalid for Section 271G

Enhance Ambient Communication Pvt Ltd[2]

Facts

The taxpayer had filed responses against a notice issued u/s 92CA(2) vide letter stating it had enclosed a compact disc (CD) that included audited financials, the Form No—3CEB, a copy of transfer pricing report, etc. However, the taxpayer had failed to enclose the CD in its submission with the letter. Consequently, the TPO passed an order u/s 92CA(3) and initiated a penalty proceeding u/s 271G noting the taxpayer's failure to furnish a copy of the transfer pricing study report and other details. The Commissioner of Income Tax (Appeals) (CIT(A)) allowed the taxpayer's appeal and deleted the penalty. Aggrieved, the revenue filed an appeal before ITAT.

Held by the ITAT

ITAT holds that issue of the validity of penalty proceedings was the actual subject matter of examination and not delay in compliance with the penalty notice.

1. Mumbai Income Tax Appellate Tribunal (ITAT) Appeal No. 7624 / Mum / 2012 – AY 2008-09
2. Mumbai Income Tax Appellate Tribunal (ITAT) Appeal No. 6285 / Mum / 2019 – AY 2013-14

ITAT noted that the CIT(A), in his order, had pinpointed that the notice of penalty dated was tilted "Request for submission of documents" for the purpose of Section 92C, and there was no reference to Section 92D (which was the relevant Section of non-compliance/ default for invoking penalty under Section 271G).

Furthermore, ITAT also noted that the CIT(A) had held that the AO's initiation of penalty u/s 271G was not valid as the same could not be imposed on account of any alleged default under Section 92CA(3) (which stipulated the computation of ALP and procedure for the TPO to be followed in relation to the same) but should have been issued for default under Section 92D;

"when valid satisfaction has not been recorded, and valid notice has not been issued, very initiation of penalty proceedings are not sustainable in the eyes of law."

Our Comments

The taxpayers should remain vigilant in timely and correct responses to notices issued to them. Furthermore, understanding of the specific Section under which the notice was issued is key, especially when penalty proceedings are initiated.

Indirect Tax

Whether there is any prohibition in the CGST or SGST Act on the consolidation of multiple investigations being carried out at various jurisdictional levels under one umbrella of zonal DGGI considering a common thread between all the entities?

Indo International Tobacco Ltd. and Anr. vs. Shri Vivek Prasad, Additional Director General, DGGI & Ors. [2022 (1) TMI 554 – Delhi High Court]

Facts and Contentions

- Multiple investigations were initiated by various jurisdictional GST authorities and zonal DGGIs against different entities, including the petitioners, as they all appeared to have a common link involving fake ITC.
- However, the petitioners challenged the issuance of multiple summonses and parallel investigations conducted by various agencies on the ground that the proceedings violated the mandate of Section 6(2)(b) of the CGST Act, 2017 r/w Circular bearing D.O.F. No. CBEC/20/43/01/2017-GST (Pt.) dated 5 October 2018.
- According to the petitioners, since the jurisdictional SGST Commissionerate(s) had initiated the proceedings, no other officer of CGST had the jurisdiction to proceed against them.
- On the other hand, Respondents submitted that to address the petitioners' grievances that multiple agencies were carrying out the investigations, the same was now sought to be centralized at zonal DGGI.

Judgment

- To achieve the goal of harmonized GST structure and in the spirit of cooperative federalism, Section 6(1) of the CGST Act, 2017 and pari materia provisions in the SGST Act, 2017 provide for cross-empowerment of the Central Tax officers and the State Tax officers.
- Section 6 aims to provide protection to the taxpayers against being subjected to multiple agencies for the same set of transactions, at the same time empowering the officers under the CGST Act/the SGST Act/the UTGST Act to pass a comprehensive order and take action keeping in view and extending to the other Acts. There should, therefore, be only one order insofar as the tax entity is concerned.
- While the Circular clarifies that the Central Tax and the State Tax Officers are authorized to initiate 'intelligence-based enforcement action' on the entire taxpayer's base "irrespective of the administrative assignment of the taxpayer to any authority," it cannot be extended to cover all and myriad situations that may arise in the administration and functioning of the GST structure.
- Neither Section 6 nor the Circular is intended to nor can it be given an overarching effect to cover all the situations that may arise in the GST implementation. They have a limited application to ensure that there is no overlapping exercise of jurisdiction by the Central and the State Tax officers.
- They are also not intended to answer a situation where due to complexity or vastness of the inquiry/proceedings or involvement of a number of taxpayers or otherwise, one authority willingly cedes jurisdiction to the other which also has jurisdiction over such inquiry/proceedings/taxpayers.
- Therefore, both Section 6 and the Circular do not apply to the facts and the circumstances of the present case.

- As there is no prohibition under the CGST Act, the multiple investigations initiated against the petitioners were allowed to be transferred to the zonal Directorate General of GST Intelligence (DGGI) to bring them all under one umbrella.
- Regarding Notification No. 14/2017-Central Tax, it cannot be said that in every such case, the 'proper officer' with limited territorial jurisdiction must transfer the investigation to the 'proper officer' having pan India jurisdiction. It would depend on the facts of each case as to whether such transfer is warranted or not. To lay down the undefeatable rule in this regard may not be feasible or advisable and certainly not acceptable.

Our Comments

While delivering the judgment, the Hon'ble Delhi High Court has relied on the settled principle of interpretation of the statute that the Court must adopt a construction which will ensure the smooth and harmonious working of the statute and eschew the other, which will lead to absurdity or give rise to practical inconvenience or friction or confusion in the working of the system.

The judgment seeks to clearly bring out the intent of the GST law to bring a harmonious convergence of the States and the Union to tax the same event.

It may be pertinent to note that the issue of jurisdiction vis-à-vis investigations has hitherto been a subject matter of litigation even under the Customs legislation.

i. Whether full ITC can be availed of GST charged on invoices or a proportionate reversal is required in case of post-purchase cash discount for early payment, provided through commercial credit notes?

ii. Whether GST is applicable on cash discount/schemes offered by suppliers through credit notes without GST adjustment?

In re Rajesh Kumar Gupta of M/s. Mahveer Prasad Mohanlal [Order No. 01/2022 dated 6 January 2022 – Madhya Pradesh AAR]

Facts

- The applicant is a wholesale trader of rice and pulses.
- The supplier would offer him a cash discount for early payments as well as target incentives without adjustment of GST.

Ruling

- As per Section 15(3)(b) of the CGST Act, 2017, there are two conditions to satisfy – firstly, discount given after supply of goods shall be in terms of the prior agreement; and secondly, it should be linked to the relevant invoices.
- In the present case, the commercial credit notes issued by the supplier do not satisfy the conditions laid down in Section 15(3)(b) and therefore, the supplier is not eligible to reduce the output tax liability.
- Hence, the applicant, being the recipient, can avail ITC on such supply and no proportionate reversal is required.
- Furthermore, since the amount received in the form of a credit note is actually a discount and not a supply by the applicant to the supplier, no GST is leviable on the recipient on cash discount/incentive schemes offered by the supplier through credit notes against supply, without adjustment of GST.

Our Comments

This ruling is contrary to the verdict of Kerala AAR in the case of Santosh Distributor, wherein it was held that GST is applicable on the amount received by the distributor as reimbursement of discount/rebate from the principal company. This has been upheld by the Kerala Appellate AAR.

This ruling seems to have rightfully negated the logic that amounts received as incentives are to be treated as consideration for the supply of service.

As issuance of commercial credit notes is an industry-wide practice, it would help taxpayers defend their stand against the jurisdictional GST officers.

Merger & Acquisition Tax

Mumbai ITAT: Receipt of Shares as Gift not to come under the purview of Section 68 of the Act

Humuza Consultants Vs PCIT [ITA No. 726/Mum/2021 / TS-27-ITAT-2022(Mum)]

Humuza Consultants (assessee) engaged in the business of investment, consultant, received 65.9 million shares of Wockhardt Ltd of the face value of INR 5 each amounting to a total INR 329,488,785/- as a gift from three different companies. The assessee's case of AY 2015-16 was selected for scrutiny by AO, and a scrutiny order was passed subsequently. The Principal Commissioner of Income Tax (PCIT) invoked its revisionary powers u/s 263 of the Income-tax Act, 1961 (Act) and held that claim of the gift of shares should have been assessed in accordance with: (i) willingness of owner, (ii) acceptance of the gift and (iii) transfer of assets and further held that the condition of proper transfer of asset was not fulfilled; PCIT, thus, directed to make a fresh assessment and to examine the issue of the receipt of the gift of shares in the context of the provisions of Section 68, against which the assessee preferred the appeal before Tribunal.

The Tribunal quashed the exercise of revision for the order passed by the AO by laying down the below observations:

- The provisions of section 68 are inapplicable for the case since Section 68 specifies "any sum" credited and not receipt of shares.
- The shares were received without consideration and accounted in books of the assessee as "Investment" further dividend from such shares was credited to Profit and Loss A/c.
- It dismissed PCIT's contention that the company cannot make the gift relying on the Mumbai Tribunal decisions in the case of DP World[3] and KDA Enterprises[4], wherein it has been held that the company can give a gift and that such a gift is a capital receipt not taxable under the alleged provisions of the Act. It further observed that Section 56(2)(viia) provides for taxability of receipts of assets without consideration or with inadequate consideration and that there is no bar for a company to give shares as a gift.

Our Comments

The decision provides a couple of key observations. The first is the non-applicability of Section 68 on the gift of shares in the hands of the recipient as the said provision applies to the credit of any sum in the books and not to receipt of shares. Secondly, the decision has affirmed the principle that the company can also give a gift of shares and that there is no bar on the company to do so.

Hyderabad ITAT: Alternative differential addition u/s 68 not tenable once addition made u/s 56(2)(viib) stands deleted

Autozilla Solutions Pvt. Ltd vs Income-tax Officer [ITA No. 1568/Hyd/2019 / TS-27-ITAT-2022(Mum)]

The company(assessee), engaged in the business of automobiles and auto parts, was subjected to scrutiny assessment for AY 2016-17, whereby the addition of INR 7.991 million was made under Section 68 of the Act. Alternatively, applying provisions of Section 56(2)(viib), an addition of INR 7.972 million was made.

Aggrieved by the order, an appeal was preferred before CIT(A), who deleted the addition of INR 7,972,460 u/s 56(2)(viib) by holding that the Discounted Cash Flow (DCF) method followed by the assessee is correct. However, the addition made under Section 68 was not adjudicated by him. Thus, the appeal was preferred before the Tribunal.

Hyderabad ITAT allowed the assessee's appeal by holding that once the addition of share capital u/s 56(2)(viib) is set aside, sustaining any addition u/s 68 is not tenable. Also, it observed that once an addition was made under one provision, the same addition could not be made under another Section.

Our Comments

It is observed that during the course of the assessment proceedings, additions are invariably proposed under both the above-discussed provisions in case of issuance of shares. This could be from the perspective that in case addition under one provision stands deleted, the other provision still holds ground. In such a scenario, the observation of this decision that once addition stands deleted under one provision, the addition cannot be sustained under other provision as well is expected to come as a relief to the taxpayers.

3. TS-767-ITAT-2012(Mum)
4. TS-310-ITAT-2015(Mum)

Tax Talk

Indian Developments

Transfer Pricing

Amendment of Section 92CA of the Income Tax Act | Reference to TPO

In section 92CA of the Income-tax Act, in sub-section (9), in the proviso, for the figures "2022", the figures "2024" shall be substituted.

Sub-section (8) to (1) of Section 92CA was inserted by the Act. No. 38 of 2020, w.e.f. 1 November 2020.
Sub-section (8) of Section 92CA provided that the Central Government may make a scheme, by notification in the Official Gazette, for the purposes of determination of the ALP to impart greater efficiency, transparency and accountability by:

a. Eliminating the interface between the Transfer Pricing Officer and the assessee or any other person to the extent technologically feasible;

b. Optimizing utilization of the resources through economies of scale and functional specialization;

c. Introducing a team-based determination of ALP with dynamic jurisdiction.

In this regard sub-section (9) of Section 92CA provided that the Central Government may, for the purpose of giving effect to the above may, direct that any of the provisions of this Act shall not apply or shall apply with such exceptions, modifications and adaptations as may be specified in the notification, provided that no direction shall be issued after the 31 March 2022.

Pursuant to the Finance Bill of 2022, this date of 31 March 2022 has been extended to 31 March 2024. Thereby extending the due date by which the Central Government may provide relevant directions to give effect to the above.

Amendment of Section 153 r.w. 263 of the Income Tax Act | Time limit for completion of the assessment, re-assessment and re-computation r.w. Revision of orders prejudicial to revenue

As per Section 263 of the Act, *"the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner may call for and examine the record of any proceeding. If he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment."*

Pursuant to the Finance Bill of 2022, para 48, it is intended to include the order passed by a TPO as well. It is also stated "(5A) Where the Transfer Pricing Officer gives effect to an order or direction under section 263 by an order under section 92CA and forwards such order to the Assessing Officer, the Assessing Officer shall proceed to modify the order of assessment or re-assessment or re-computation, in conformity with such order of the Transfer Pricing Officer, within two months from the end of the month in which such order of the Transfer Pricing Officer is received by him."

The amendment has the effect of overturning a recent ruling reported in JCB India Ltd[5]. The amendments will take effect from 1 April 2022.

5. Delhi Income Tax Appellate Tribunal (ITAT) Appeal No. 518 & 519 / Del / 2021 (AY 2014 -15 & 2015-16)

Indirect Tax

CBIC issues guidelines for recovery of 'self-assessed tax' on account of GSTR-1 vs. GSTR-3B mismatch

[Instruction No. 01/2022-GST dated 7 January 2022]

If the tax payable in respect of details of outward supplies furnished in GSTR-1 has not been paid through GSTR-3B, whether wholly or partly, or any amount of interest payable on such tax remains unpaid, then the tax short paid on such self-assessed and thus, self-admitted liability along with interest thereon, are liable to be recovered under the provisions of Section 79 of CGST Act.

However, in cases where there is a genuine reason for the difference between the details of outward supplies declared in both the returns, an opportunity needs to be provided by the proper officer, by way of communication (with DIN) either to pay or to explain the said difference before any action under Section 79 is taken for recovery of the said amount.

If a registered person fails to reply to the communication or fails to make the payment of such amount within the prescribed time or fails to explain the reasons for the difference to the satisfaction of the proper officer, then the proceedings for recovery may be initiated by the proper officer.

Maharashtra Government's guidance on GST scrutiny parameters and system or data related difficulties faced by field officers

[Internal Circular No. 1A of 2022 dated 17 January 2022]

In continuation to the earlier guidelines[6] issued to standardize and streamline the procedural aspect of scrutiny of GST returns as per Section 61 of the CGST/MGST Act, the Maharashtra Government has issued further clarifications addressing the difficulties faced by field officers relating to scrutiny parameters and system or data-related issues. Some of the key clarifications are as follows:

- In case of mismatch of ITC claimed on account of IGST paid on imports by courier, where the courier company has paid the duty on behalf of importers before taking delivery of parcels, the submission of taxpayer containing the details viz., airway bill or any other document stating details of transport by air, courier bill of entry evidencing payment of IGST, assessment note containing the details of imported goods, etc. may be accepted if found proper.
- Where the BoE wise details have not been provided in respect of excess ITC claimed on account of IGST paid on import of goods in GSTR-3B/GSTR-9 vis-à-vis actual payment, the tax officers are advised to refer to Part D (under the heading "tax paid on overseas import of goods and import of goods from SEZ") of the GSTR-2A/2B which is to be downloaded for the entire period covered under scrutiny.
- In cases of ITC on purchase invoices uploaded by the supplier in GSTR-1 filed after the last date of availment (Parameter 79), the proper officers are advised to download the GSTR-2A/2B of all periods under scrutiny where the date of filing of GSTR-1 by the supplier is available against the invoices appearing therein.
- Where the ITC claim of GSTR-3B appears to be in excess of that available in GSTR-2A, but while filing of GSTR-9 the taxpayer has reconciled the differences in Table 8 thereof, the proper officers are also advised to consider ITC shown in column 6M of GSTR-9, i.e., any other ITC availed but not specified in 6B to 6L, as well as ITC claimed in the subsequent financial year in column 8C for the purpose of reconciliation.
- Where for the purpose of verification of ITC, the invoice numbers are not available with respect to suppliers who have filed GSTR-1 after the due date of March 2019, the tax officers are advised to refer to the guidelines of Internal Circular No. 6A of 2021 and accordingly, refer to the details like invoice number, invoice date, upload date, etc. available in GSTR-2A.
- The information available in the GST BO system is more updated and accurate in terms of data. Hence, the officers are advised to refer to the BO report in lieu of the difference in GST-3B vs. GSTR-2A communicated by the Economist Intelligence Unit (EIU).

6. Internal Circular No. 6A of 2021 dated 11 June 2021

The mechanism for filing GST refunds by taxpayers registered in erstwhile UT of Daman & Diu for the period prior to the merger with UT of Dadra and Nagar Haveli

[Circular No. 168/24/2021-GST dated 30 December 2021]

Due to the transfer of ITC balance from ECrL of old GSTINs to new GSTINs, the taxpayers are unable to apply for a refund on account of zero-rated supplies and inverted rated structure for the period prior to the merger of Union Territories. Also, due to system validations, such taxpayers are unable to claim refunds from the new GSTIN as all the invoices bear the old GSTIN.

In this regard, CBIC has notified the mechanism for filing refund claims by such taxpayers under "Any Other" category using their new GSTIN. After filing the application, no debit from the Electronic Credit Ledger (ECrL) is required.

If the proper officer is satisfied that the whole or any part of the amount claimed is payable as a refund, he shall request the applicant to debit the said amount from the ECrL through Form DRC-03. Once the proof of such debit is received, he shall proceed to issue the refund order in Form GST RFD-06 and the payment order in Form GST RFD-05.

No refund claim requiring debit from the ECrL or where the refund would result in re-credit of the amount sanctioned in the ECrL, shall be filed using old GSTIN.

Tax Talk

Global Developments

Direct Tax

CBDT issues clarification on the applicability of the Most Favoured Nation (MFN) clause in the tax treaties

[Excerpts from the economic times, 3 February 2022]

The Central Board of Direct Taxes (CBDT), in a circular, said that Lituania and Columbia became members of the Organisation for Economic Co-operation and Development (OECD) after signing the tax treaty with India, and therefore, these treaties could not be applied to all countries. It said unilateral decrees issued by these countries (France, Switzerland and the Netherlands), stating that they could avail low tax applicable due to the MFN was merely a reflection of the understanding of the respective countries and did not affirm India's position in this matter. The CBDT said that India reserves its right to apply withholding tax at the rates prescribed under the respective tax treaties and treaties with Columbia, Slovenia and could be subject to common interpretation.

UAE announces corporate tax rate of 9%, to be effective from 2023

[Excerpts from the New Indian Express, 31 January 2022]

The United Arab Emirates will be introducing a federal corporate tax on business profits for the first time, the Ministry of Finance announced. The news represents a significant shift for a country that's long attracted businesses from around the world thanks to its status as a tax-free commerce hub. Businesses will be subject to the tax from 1 June 2023.

The country's statutory tax rate will be 9% for taxable income exceeding AED 375,000 ($102,000), and zero for taxable income up to that amount "to support small businesses and startups," the ministry said, adding that "the UAE corporate tax regime will be amongst the most competitive in the world."

Transfer Pricing

OECD releases the latest edition of the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations[7]

On 20 January 2022, the OECD released the 2022 edition of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (TP Guidelines).

In the new TP Guidelines, released after a span of five years, the OECD has consolidated the following three reports developed over the last couple of years to the 2017 TP Guidelines.

- The report, Revised Guidance on the Transactional Profit Split Method, was approved on 4 June 2018. This report has replaced the Guidance in Chapter II, Section C (paragraphs 2.114-2.151) found in the 2017 TP Guidelines and Annexes II and III to Chapter II. This Guidance aims to clarify when the Transactional Profit Split Method is the Most Appropriate Method (MAM) to apply. It also explains how the Profit Split Method should be applied and includes several examples illustrating the principles discussed.
- The report Guidance for Tax Administrations on the Application of the Approach to Hard-to-Value Intangibles, approved on 4 June 2018, has been incorporated as Annex II to Chapter VI. This Guidance is intended

7. OECD Transfer Pricing Guidelines & Tax Alert

to help tax administrations in applying the approach to Hard-to-value Intangibles (HTVI) under the Base Erosion and Profit Shifting (BEPS) Action 8. The Guidance contains three main components: (i) an outline of principles underlying the application of the HTVI approach; (ii) a number of examples clarifying the application of the HTVI approach; and (iii) specifics on the interaction between the HTVI approach and access to the mutual agreement procedure.

- The report Transfer Pricing Guidance on Financial Transactions, adopted on 20 January 2020, has been incorporated into Chapter I (new Section D.1.2.2) and in a new Chapter X. This was the first specific Guidance from the OECD focused on transfer pricing aspects of financial transactions, and it includes illustrative examples. The Guidance covers the accurate delineation of financial transactions, in particular with respect to capital structures of multinational enterprises. The Guidance also addresses specific issues related to the pricing of financial transactions such as treasury functions, intra-group loans, cash pooling, hedging, guarantees, and captive insurance.

Apart from the above consolidation, the OECD has made consistency changes to the rest of the TP Guidelines to align with the added reports.

Our Comments

In a global economy where MNEs play a prominent role, Transfer Pricing continues to be high on the agenda of the taxpayers and country's tax administrations.

The OECD transfer pricing guidelines, first issued in 1995, analyze and illustrate various methods and principles for satisfying the arm's length requirements and are intended to guide the resolution of transfer pricing issues.

The OECD, since then, has been updating the TP Guidelines to align with the global business and economic scenarios. The previous update to the TP Guidelines in the 2017 edition included substantial changes related to the 2015 OECD BEPS action plans, including aligning transfer pricing outcomes with value creation and transfer pricing documentation and country-by-country reporting.

Indirect Tax

1% cut in retail sales-and-use tax in Washington state

[Excerpts from Redmond Reporter]

Kent Democratic Senator Mona Das, has proposed a bill that would reduce the sales tax by 1% across the Washington state. The state sales-and-use tax would be reduced from 6.5% to 5.5% under the proposed Senate Bill 5932. Furthermore, the said tax cut is expected to go into effect on 1 January 2023 and would apply to the sales-and-use tax currently levied on items and services categorized under the state constitution's definition of retail sale. It would not affect the local government's sale-and-use tax.

HMRC urges VAT registered businesses to sign-up for Making Tax Digital for VAT before 1 April 2022

[Excerpts from HMRC Press Release]

Businesses have been reminded to take steps to prepare for Making Tax Digital for VAT before it becomes mandatory for all VAT registered businesses from 1 April 2022. Part of the overall digitalization of UK Tax, Making Tax Digital for VAT, is designed to help businesses eliminate common errors and save time managing their tax affairs.

UK VAT cut on energy bills

[Excerpts from Bloomberg]

In a bid to defuse the growing cost-of-living crisis in Britain, Prime Minister Boris Johnson's government is resurrecting the proposal to eliminate VAT from energy bills. Eliminating the 5% VAT could save a typical household almost 100 pounds ($134) a year from April. Prime Minister Johnson had previously dismissed the move as a "blunt instrument" .

Compliance Calendar

Direct Tax
Indirect Tax
Transfer Pricing

7 February 2022

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

10 February 2022

- GSTR-7 for the month of January 2022 to be filed by taxpayers liable for Tax Deducted at Source (TDS).
- GSTR-8 for the month of January 2022 to be filed by taxpayers liable for Tax Collected at Source (TCS).

11 February 2022

GSTR-1 to be filed by registered taxpayers for the month of January 2022 by all registered taxpayers not under QRMP scheme.

13 February 2022

- GSTR-6 for the month of January 2022 to be filed by Input Service Distributor (ISD)
- Uploading B2B invoices using Invoice Furnishing Facility under QRMP scheme for the month of January 2022 by taxpayers with aggregate turnover of up to INR 50 million.

13 February 2022

Master File Designation in Form No. 3CEAB for AY 20-21– in cases where there are multiple constituent entities in India that would be required to comply with the Master File Compliances in Form No. 3CEAA, the group may designate any one entity by that designated entity filing the Form No 3CEAB

15 February 2022

Extensions vide Circular No. 01/2022, dated 11 January 2022[8] Form No. 3CEB for AY 20-21 (Transfer Pricing Accountants Report u/s 92E)

15 February 2022

Due date for filing of audit report under Section 44AB for the assessment year 2021-22.

20 February 2022

- GSTR-5 for the month of January 2022 to be filed by Non-Resident Foreign Taxpayer
- GSTR-5A for the month of January 2022 to be filed by Non-Resident service provider of Online Database Access and Retrieval (OIDAR) services
- GSTR-3B for the month of January 2022 to be filed by all registered taxpayers not under QRMP scheme

25 February 2022

Payment of tax through GST PMT-06 by taxpayers under QRMP scheme for the month of January 2022.

8. Circular No. 01/2022 Extension of Timelines for filing of Income Tax Returns for AY 21-22

Direct Tax
Indirect Tax
Transfer Pricing

7 March 2022

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

10 March 2022

- GSTR-7 for the month of February 2022 to be filed by taxpayer liable for Tax Deducted at Source (TDS)
- GSTR-8 for the month of February 2022 to be filed by taxpayer liable for Tax Collected at Source (TCS).

11 March 2022

GSTR-1 to be filed by registered taxpayers for the month of February 2022 by all registered taxpayers not under QRMP scheme

13 March 2022

- GSTR-6 for the month of February 2022 to be filed by ISD
- Uploading B2B invoices using Invoice Furnishing Facility under QRMP scheme for the month of February 2022 by taxpayers with aggregate turnover of up to INR 50 million

15 March 2022

- Exercise option of Safe Harbour by filing Application in Form No. 3CEFA/B for AY 20-21
- Master File in Form No. 3CEAA (Part A) or (Part A and Part B) for AY 20-21.

15 March 2022

- Fourth installment of advance tax for the assessment year 2022-23
- Return of income for the assessment year 2020-21 for all taxpayer other than
  a. Corporate-taxpayer; or
  b. Non-corporate taxpayer (whose books of account are required to be audited); or
  c. Partner of a firm whose accounts are required to be audited; or
  d. A taxpayer who is required to furnish a report under Section 92E
- Return of income for the assessment year 2021-22 in the case of a taxpayer required to submit a report under Section 92E.

31 March 2022

Country-by-Country Reporting in Form No. 3CEAC for AY 20-21– in a case where the Indian taxpayer is required to comply having the accounting year-end of 31 March 2021.

Webinars & Insights

Webinars

4 February 2022

Insights on Union Budget 2022-23

Organizer - IEEMA

Unbundling India Budget 2022

Organizer - DBS

3 February 2022

Post Budget Session on Service Exports

Organizer - SEPC

2 February 2022

Decoding Union Budget 2022-23

Organizer - FICCI

Union Budget 2022

Organizer - IGCC

Analyzing Budget 2022

Organizer - ICBC

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Insights

CBDT clarifies the legal interpretation of the MFN clause

8 February 2022 | https://bit.ly/3GHUEBS

Digital Assets Special Tax Law for Cryptocurrency and Non-fungible Tokens

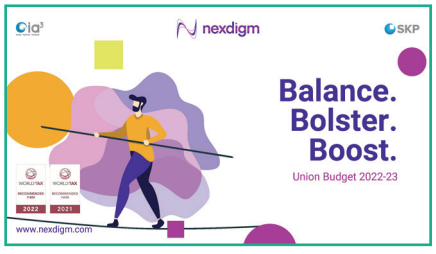
8 February 2022 | https://bit.ly/34UYo5E

OECD releases the latest edition of the Transfer Pricing Guidelines

25 January 2022 | https://bit.ly/3uPjkGq

An in-depth evaluation that captures various aspects of **Union Budget 2022-23**

Read More



From the Press

Articles

GST Article - To be or not 2B
10 February 2022, Taxsutra
https://bit.ly/3JuP5Z9

Government walks the tight rope with key indirect tax announcements
9 February 2022, Business Today
https://bit.ly/3gF05GZ

Government's appetite for more GST giving stomach-ache to food aggregators
3 February 2022, ET Retail
https://bit.ly/3oMAT5W

Budget 2022 Highlights: Key Direct Tax Takeaways
1 February 2022, Bloomberg Quint
https://bit.ly/3BjM2QM

Budget 2022 Should Build Confidence In New Manufacturing Firms
29 January 2022, IPF Online
https://bit.ly/3oRWZ74

What CFOs expect from Budget 2022?
29 January 2022, ET CFO
https://bit.ly/3oO6iFg

Quotes

Surcharge capped at 15%: 10 key direct tax changes from Budget 2022 that you need to know
Maulik Doshi, Times of India
1 February 2022 | https://bit.ly/366PMcN

Budget 2022: Every crypto transaction to be subjected to TDS, says FM
Maulik Doshi, Times of India
1 February 2022 | https://bit.ly/36f3uur

Budget 2022: Govt to double down on reducing compliance burden for firms, public
Maulik Doshi, Hindustan Times
1 February 2022 | https://bit.ly/3oNWs65

Food aggregators to collect 5% GST beginning Jan 1
Saket Patawari, The Financial Express
1 January 2022 | https://bit.ly/3gLRySY

Budget 2022 News, Expectations LIVE: High hopes pinned on Modi government, FM Nirmala Sitharaman - Check who wants what
Maulik Doshi, Zee Business
28 January 2022 | https://bit.ly/3HRpKse

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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.

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