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Tax Street

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

July 2020

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Stay Safe. Stay Healthy.

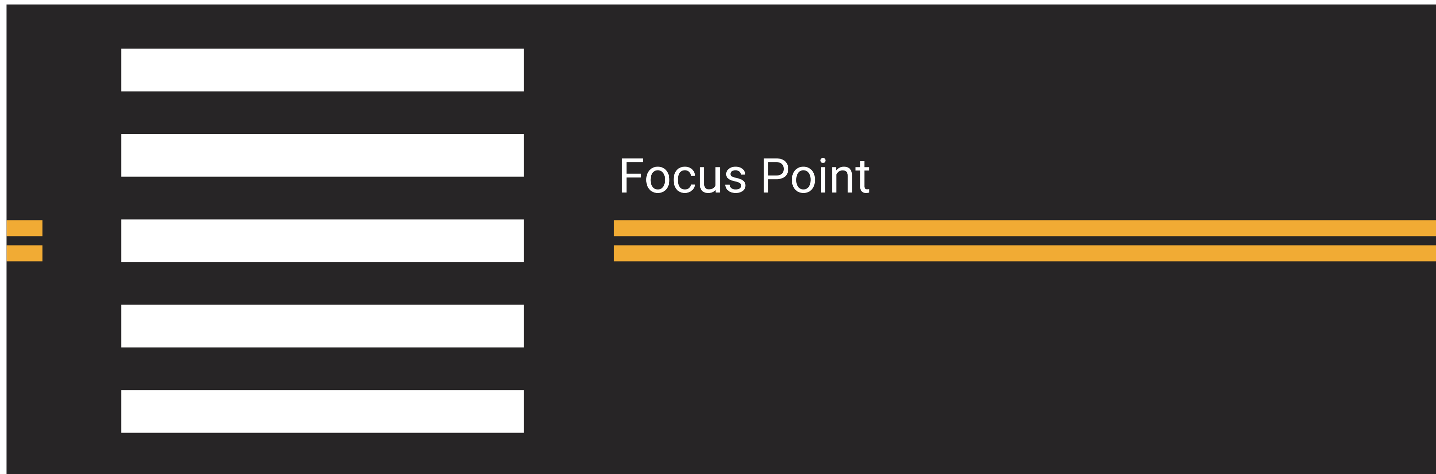
Introduction

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

- The **'Focus Point'** covers aspects and impacts of Section 301 of the US Trade Act, 1974.
- Under the **'From the Judiciary'** section, we provide in brief, the key rulings on important cases, and our take on the same.
- Our **'Tax Talk'** provides key updates on the important tax-related news from India and across the globe.
- Under **'Compliance Calendar'**, we list down the important due dates with regard to direct tax, transfer pricing and indirect tax in the month.

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

Warm regards,
The Nexdigm (SKP) Team



Deep dive into the investigation under Section 301 of US Trade Act 1974

The US retaliation on the global digital tax developments has become a subject of intense scrutiny. After the trade war with China and France, the United States has now initiated an investigation on various countries for adopting the OECD recommended digital taxation. Amongst various nations, India, Australia, and the European Union are at the forefront. This investigation has not only led to unrest in global trade relations but has also raised serious doubts on the international trade rules and principles. In the ensuing paragraphs, we have attempted to decode the complex aspects of Section 301.

Deciphering Section 301

Section 301 of the Trade Act, 1974 grants the US Tax Representatives (USTR) a right to investigate and take action against the foreign acts, policies or practices that violate US rights under trade agreements, or when these actions may not violate any trade agreements but are considered **'unreasonable or discriminatory and that burden or restrict US commerce.'**

The USTR can self-initiate a case or act upon cases petitioned under Section 301. The Section 301 investigations are conducted by a subordinate, staff-level body of the USTR-led, interagency Trade Policy Staff Committee (TPSC).

The Section 301 Committee reviews the relevant petitions, conducts public hearings, and makes recommendations to the TPSC regarding potential actions under Section 301. The final decision from USTR is based on the recommendations from the TPSC.

Where the findings of the investigation are positive, the US under the Trade Act can impose unilateral actions, including any permutation and combination of the following:

- Imposition of import duties and other import restrictions, with a preference for import duties;
- Imposition of restrictions on services, including access authorization;
- Suspension of unilateral trade preferences;
- Entering into binding agreements with foreign countries to either eliminate the conduct in question or compensate the United States with satisfactory trade benefits.

Once the USTR initiates a Section 301 investigation, it seeks to negotiate a settlement with the concerned foreign country through either compensation or elimination of the particular barrier or practice.

How fair is such a Unilateral Measure under the International Norms?

The WTO agreements, negotiated and signed by a majority of the world's trading nations including, the US, provide legal ground-rules for international commerce. They are essentially contracts that bind these governments to keep their trade policies within agreed limits. A country can change its bindings, post a negotiation with its trading partners, which could include compensation for their loss of trade.

In order to combat unilateral actions by the nations, article 23 of WTO's Dispute Settlement Understanding (DSU) was specially designed. The verbatim of the said article is as follows:

'When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall ***have recourse to, and abide by,*** *the rules and procedures of this Understanding.'*

Basis the above, it was alleged that unilateral measures of the US under section 301 is clearly a violation of the WTO rules. In fact, in 1999, various members of the WTO represented by the European Communities made a representation before the Dispute Settlement Body (DSB) in this regard. In its justification, the US authorities made its case by providing that-

'Section 301 investigation is a tool that the United States is using both to address matters that fall within the scope of the WTO agreements and matters that fall outside the scope of the WTO agreements. The United States retains the flexibility to determine whether to seek recourse for foreign unfair trade practices in the WTO and/or act unilaterally. The United States Trade Representatives (USTR) will invoke the dispute settlement procedures of the WTO DSU for investigations that involve an alleged violation of (or the impairment of US benefits under) WTO Agreements.'

The US authorities definitively, formally, and again unconditionally reiterated its commitment that the US government would implement Section 301 in a way consistent with its WTO obligations, **the panel eventually ruled that Section 301 did not violate WTO rules.**

Recent Action

China

The trade investigation was launched under Section 301 of the Trade Act, 1974, and an additional 25% tariff on USD 50 billion worth of imports from China was imposed in 2018. The Unilateral trade sanctions imposed on China in March 2018 triggered a trade war between the world's two largest economies.

France

On 2 December 2019, the USTR completed the first segment of investigation with the conclusion that Digital Services Taxes under consideration by France are unreasonable, discriminatory, and burden the US commerce.

Based on this investigation, the USTR announced its determination to impose a 25% additional duty on products of France that fall into certain tariff subheadings having an estimated trade value of USD 1.3 billion. However, such additional duty is not be imposed until at least 6 January 2021. During January 2020, France agreed to suspend the imposition of its Digital Services Tax until the end of 2020 in order to bypass the increased tariffs from the US government.

Current hustle around Section 301

Various economies, including India, have acknowledged the fact that tech giants do not pay their fair share of taxes. Given that there is no consensus at the OECD, countries are forced to adopt unilateral measures to curb this practice. Implementing Digital Service Tax (DST) is one of these measures.

However, as per the Federal Register Notice issued by the USTR, the US views DST as

- Discrimination against US companies;
- Retroactivity; and
- Possibly unreasonable tax policy.

The USTR has launched an investigation on such nations, including India, and has called for public comments on the same. However, considering that the world has been struck hard by the deadly pandemic, the USTR has not yet scheduled for any hearing whereby the concerned countries would build their case.

India has been undeterred by the investigation launched by the US right from the inception. It has believed that digital taxation has become a necessity not just for developing countries but also for developed nations. In the upcoming years, it expects new economies to join the league.

The international trade policies encompass two types of obligations under the General Agreement in Trade Services (GATS), i.e., General obligation and Specific Commitments. In a nutshell, national treatment is one of the three specific commitments. It refers to a commitment to treat one's nationals and foreigners equally. A country only has to apply this principle when it has made a specific commitment. In response to the investigation, the center has made it clear that India **has not taken any separate commitment** in the service sector at WTO, and thus, it is not required to give a national treatment in that sector.

Although the US has been insisting that the investigation intends to provide fairground for everyone, the nitty-gritty of the matter is that the US is concerned about the adverse impact on its tech giants that includes Google, Amazon, Netflix, Facebook, etc. It would be interesting to see what measures the concerned nations would take to make such tech giants pay their share of taxes.

At the core of WTO and international trade, there is multilateralism. The ethos of multilateralism, even if far from perfect in practice, is about cooperation. Such unilateral actions not only distort the trade peace but could also have major consequences on multilateralism. Economics professor John McMillan had characterized multilateralism this way: ***'If you help me, I'll help you.'*** However, under Section 301, it is ***'Unless you help me, I'll hurt you.'***

From the Judiciary

Direct Tax

Whether cost to cost salary reimbursement of deputed employee triggers Fees for Technical Services (FTS)?

M/s Yum! Restaurants (Asia) Pte. Ltd. Vs DDIT [ITA No.6018/Del/2012]

Background

The taxpayer is a non-resident company incorporated in Singapore. It is engaged in the business of franchising KFC, Pizza Hut, and Taco Bell for several territories in the Asia Pacific region including, India. The taxpayer entered into Technology License Agreement (TLA) with Yum! Restaurants (India) Private Limited (YRIPL), which in turn appoints various franchisees for operating restaurants in India under the brand name KFC and Pizza Hut. YRIPL also operated company-owned KFC restaurants in India.

Under the TLA, the taxpayer has deputed its Vice President to YRIPL. The employee has actively participated in the day to day activities of YRIPL, including attending the board meetings and signing the financial statements. The salary of the employee was paid by the assessee and reimbursed by YRIPL.

Relying on the jurisdictional Delhi High Court decision in the case of Centrica India Offshore Pvt. Ltd, the Assessing Officer (AO), was of the view that the reimbursement of the salary by YRIPL was taxable in the hands of the taxpayer as FTS.

On appeal to the CIT(A), the taxpayer in its justification has referred to various clauses of the agreement whereby it was clear that the employee was under direct control and superintendence of YRIPL and the appellant discharged the employee from all obligations and rights whatsoever, **including a lien on employment.** Further, the employee was deputed to India as a replacement for a former employee, and once his deputation period expired, he was permanently moved to the payroll of YRIPL to continue his employment with YRIPL. Considering all the arguments, CIT(A) passed an order favoring the taxpayer. Aggrieved by the decision of the CIT appeals, the Revenue filed an appeal before the New Delhi ITAT.

Held

Upholding the findings of the CIT(A), the Delhi ITAT opined that the facts in the case of Centrica India Offshore Pvt. Ltd was very different than the facts of the present case. The agreement made it clear that the assessee was working as an employee of YRIPL and as an employee of the assessee company. In any case, in the absence of fulfillment of the 'make available' clause, it is not possible to hold that there is any taxability of FTS under Article 12 of the India-Singapore. Further, the reimbursement of salary had no element of income and was not taxable.

Also, since the employee has already paid taxes in India on the aforesaid salary, the same amount being taxed as FTS in the hands of the assessee company, would amount to double taxation.

Our Comments

The case of Centrica India Offshore Pvt. Ltd was a turning point for taxation in the deputation arrangements. However, the tax treatment for such an arrangement cannot be standardized as it would be dependent on the facts of each of the cases.

Whether payment of fees to a non-resident for web hosting services, on-site promotion activities, etc. could be treated as FTS?

M/s. Esm Sys Pvt. Ltd. Vs ITO [ITA No. 350/Ahd/2018]

Background

The taxpayer is an Indian Company engaged in the business of web designing, web advertising services and had made a payment to one of its group companies residing in the US for obtaining the services of data promotion, social media management, and general consulting. According to the assessee, the US Company was paid for managing and overseeing the various on-page and off-page activities that drove traffic to a specific website, and accordingly, services were provided for site promotion activities.

The Revenue was of the view that hiring a server and the provision of web hosting services came under the technical services, thereby regarding it as Fees for Technical Services as per Section 9(1)(vii) of the Act. He was also of the view that payment made to the US company was in the nature of Royalty as per Section 9(1)(vi) of the Act and thus passed an order holding the assessee as an assessee in default for failure to withhold taxes. On appeal, the CIT(A) affirmed that such services would qualify to be FTS.

Aggrieved by the decision of the CIT(A), the taxpayer filed an appeal before the Ahmedabad Tribunal.

Held

On hearing the contentions of both the parties, the ITAT was of the view that the taxpayer had obtained the services of web promotion, social media management from the US Company. The said company had used various techniques including web content development, search engine optimization, to increase the website traffic. It was emphasized that the entire transaction took place over the internet through virtual servers, which were 'located across the world and were not under the control of payer.' It was used for hiring space for domain hosting and display of advertisement on the server located worldwide.

Thus, upholding the contentions of the taxpayer, the ITAT held thnat since there was no sharing of knowledge or know-how or any technology to the taxpayer during the provision of Web Hosting Services the said payment cannot be considered as fees for included services as per Article 12 of India-USA DTAA as technical knowledge or know-how are not made available to the taxpayer.

The tribunal placed reliance on following judicial precedents ***Pinstorm Technologies (P.) Ltd. vs. ITO [2012] 24 taxman.com 345 (Mumbai) and ITO vs. Right Florists (P.) Ltd. [2013] 32 taxman.com 99 (Kolkata-Trib)***

Our Comments

It has always been a debatable issue whether a particular service is covered under FTS. This decision is certainly welcome in the context.

Whether providing access to the market research report, generated based on the data and information collected for a specific sector, provided for a predetermined subscription price be categorized as Royalty?

IMS AG Vs DCIT [ITA No.6445/Mum/2016]

Background

The taxpayer is a company incorporated and fiscally domiciled in Switzerland. It is engaged in the business of providing market research reports on the pharmaceutical sector to its customers across the world at a predetermined subscription price. The license access so granted is a non-exclusive and non-transferable right. It is consideration received, as allowing this non-exclusive, non-transferable access to the database, and IMS reports. In essence, the IMS reports, based on the module selected, are statistical database compilations, providing geo-economical data, about a pharma molecule, providing insight into the connected issues related to information and development.

The Revenue has held that the aforesaid receipts were taxable as Royalty as per section 9(1)(vi) of ITA as well as under Article 12(3) of the Indo Swiss DTAA. Aggrieved by the decision of the Revenue, the taxpayer filed an appeal before the Mumbai ITAT.

Held

The ITAT placed reliance on AAR ruling (subsequently approved by the jurisdictional High Court) in case of **Dun and Bradstreet Information Services India Pvt. Ltd. (D&B)** whereby on the similar facts, it was held that the sale of standard business information reports derived out of publicly available data by the subsidiaries of Dun and Bradstreet US in Spain, Europe and V. K. to the assessee did not attract the provisions of section 195 of the Act.

The tribunal has appreciated the fact that the ruling of AAR is binding only on the concerned appellant. However, where the Hon'ble jurisdictional High Court has approved the same, it cannot be open for the tribunal to be swayed by a contrary view.

Our Comments

There are a plethora of decisions over the taxability of consideration received for access to standardized data. This judgment is an addition to the group.

Transfer Pricing

Whether management charges paid to AE can be disallowed in the absence of specific need and benefit reasoning?

Michelin India Pvt. Ltd. - ITA No.2415/Del/2014

Ruling

The taxpayer was engaged in manufacturing and trading of tires and tubes and had availed certain management support services from its Associated Enterprise (AE).

The Assessing Officer (AO) observed an increase in personnel and establishment cost and that the taxpayer had a full team of management staff performing similar functions as availed from the AE. Hence, AO claimed that management support was not genuine and should be disallowed, citing diversion of income.

The taxpayer stated before the Commissioner of Income Tax (Appeals) CIT(A) that the management support services constitute genuine business assistance needed to conduct its business operations efficiently. Further, the financial profits and condition of the taxpayer have improved as a result of these expenses, which can be said as benefits derived from such support services availed. However, CIT(A) rejected the taxpayer's contention stating the documentation was not sufficient to justify actual receipt of services.

Income Tax Appellate Tribunal (ITAT) observed the taxpayer's need to avail such services to carry on its business operations with a global presence and maintain international standards for providing services to its customers. It was a necessity to avail of management support from its AE. The fact that the taxpayer was increasing expenditure on its personnel and other management teams cannot be a factor in deciding the need for services availed from AE. Further, it is outside the AO's domain to decide the need for availing such a service. Considering the improvement in the financial state of the taxpayer, it was viewed as a result of benefits reaped by the taxpayer. Hence, the disallowance made by the officer was unfounded.

Our Comments

Indian courts, in various rulings, have stated that need and benefit are not the only relevant parameters to determine the arm's length nature of intra-group service transactions. While it has been reiterated that the tax officer cannot question the need for an expense and fill the shoes of a businessman, practical analysis of the transaction coupled with the maintenance of robust documentation helps in justifying the presence and need of such payments.

Whether notional interest is to be charged on outstanding AE receivables?

ValueLabs LLP - ITA No. 1909/HYD/2017

Ruling

The taxpayer was engaged in rendering software development services, and the Transfer Pricing Officer (TPO) had observed that there were outstanding trade receivables. However, the taxpayer contended that the effects of outstanding receivables were considered in the working capital adjustment for benchmarking. The TPO rejected the taxpayer's argument and made an adjustment on account of interest on overdue receivables considering interest rate at 14.45% for the period beyond the due date. The DRP upheld the contention of TPO.

The taxpayer pointed out the following before the ITAT:

- Outstanding receivables cannot be termed as an international transaction;
- The margins of the taxpayer were higher than that of the comparables;
- The working capital adjustment that considers the effect of receivables should be allowed;
- The credit period allowed to AE was 72 days as against 90 days for comparables.

Hence, no transfer pricing adjustment should be made;

However, the tax authorities contended that working capital adjustment takes care of the period within the financial year but does not cover outstanding receivables. Further, the agreement between the taxpayer and the AEs states the terms of payment and the prescribed number of credit days to be allowed. Hence, the master agreement should be concerned about determining the ALP of outstanding receivables and not the comparables.

The ITAT, relying on the case of M/s. Global Logic India Ltd. and Pr. CIT-V vs Kusum Health Care Pvt. Ltd. stated this is a covered matter wherein it was held that no adjustment is to be made on account of notional interest on receivables by treating continued debit balance as an international transaction. Moreover, when the taxpayer is a debt-free company, there is no question of charging any interest on receivables.

1. *Mumbai High Court ruling in Everest Kanto Cylinders Ltd. and Mumbai ITAT ruling in case of Glenmark Pharmaceuticals (ITA No. 5031/Mum/2012 dated 13/11/2013)*

The taxpayer, during the year under consideration, had not availed any loan from AEs or unrelated third parties and has not incurred any interest cost. The master agreement stipulated to allow 90 days of credit, and this in itself cannot form a basis for an international transaction. Further, it has been settled in the above case that receivables adjustment is not warranted if they are commensurate with the comparables. Hence, the ground of appeal raised by the taxpayer was allowed.

Our Comments

The inter-company agreement stipulating credit period in itself cannot form the basis of warranting a notional interest charge. Other factors such as terms followed by comparables, debt structure of the taxpayer, working capital adjusted profit margins, etc. should be taken into consideration.

Can advertisement, marketing, and promotion expenses (AMP) incurred by the Indian group be construed as a brand-building exercise to benefit AE if the shares of AE are listed at a premium on the stock exchange.

MakeMy Trip (India) Pvt. Ltd – ITA No.2307 & 4757/Del/2013

Ruling

The taxpayer is engaged in the online sale of travel products and solutions and had entered into certain service transactions with its AE. The taxpayer had adopted an aggregate benchmarking approach using the Transactional Net Margin Method (TNMM).

The TPO observed that the taxpayer had incurred certain expenses in the nature of AMP, which was partially recovered from the AE. The TPO held that the expenses provided an endearing benefit to a multinational group and had to be capitalized, as the expenses were not incurred exclusively for the taxpayer's business and had to be fully recovered from the AE. Accordingly, the TPO adopted the Bright Line Test (comparing taxpayer's AMP expense percent to sales at 50% with a similar ratio of comparable companies that was 40%) and made a TP adjustment on account of the development of the brand, which benefits AE outside India.

Additionally, the TPO also observed that the AE had been recently listed on a stock exchange (at a premium), while the taxpayer was incurring losses. The TPO viewed this as the AE benefiting from brand building exercise incurred by the taxpayer.

The CIT(A) observed that the brand was owned by the taxpayer, and the Bright Line Test was generally to be adopted in case of marketing of an overseas brand. Further, judicial precedent in the taxpayer's case has accepted AMP expense as 'not an international transaction.' Accordingly, CIT(A) deleted the AMP adjustment.

The ITAT observed that TPO had not considered the AMP expense as international transactions during the tax period 2010-11 to 2016-17. In respect of the nature of the expense, ITAT recognized the taxpayer's reliance on settled case laws[1] stating that advertisement expenditure incurred for launching products is necessary to address the competition in the market for selling that product. Such nature of expenses to increase the sales of products are allowable as revenue expenditure as no permanent character or advantage is achieved via the same, and such expenses are a part of the process of profit earning and not in the nature of capital outlay.

Our Comments

The Indian courts have divergent views in relation to construing AMP to be an international transaction. Expenses incurred are in the nature of product promotion, and not brand promotion. Thus, the same can be considered as revenue expenditure.

[1] CIT vs. Salora International Ltd., 308 ITR 199, CIT vs. Monto Motors Ltd., vide ITA No.978/2011

Whether outstanding receivables can be justified citing consistent losses and cash crunch faced by AE.

Techbooks International Pvt. Ltd – ITA No.6102/Del/2016

The taxpayer is a wholly-owned subsidiary of the US-based entity engaged in the provision of IT-enabled data conversion service to its AE and adopting TNMM as a benchmarking approach.

The TPO observed that the taxpayer's credit period allowance was agreed for 60 days with the AE as opposed to extra credit period that had been allowed to the AE. The TPO made an adjustment characterizing overdue receivables as an unsecured loan applying the SBI base rate plus 300 bps as an interest charge. The aggrieved taxpayer filed an appeal to the DRP.

The DRP noted that outstanding receivables are international transactions, and the TPO was correct in his contention for the interest charge. However, the interest could only be applied for receivables beyond 150 days, as held in taxpayer's earlier rulings. Further, LIBOR should be used as opposed to the SBI base rate as held by majority High Court rulings in relation to foreign currency based invoices.

During the ITAT appeal, the taxpayer differentiated financial and operational creditors, contending that the receivable/payable is the outcome of the transaction of services provided. Hence, trade receivable per se is not an independent international transaction. Further, it submitted the financials of the AE, depicting consistent losses while pleading genuine hardship and cash crunch faced by AE for payment of receivables. The taxpayer proposed an additional ground during ITAT appeal aggregating receivables with the provision of service transaction.

Additionally, the taxpayer claimed a working capital adjustment on the service transaction, contending that the impact of receivables would subside within it.

The ITAT relying on taxpayer's ruling for earlier years held receivables as separate international transactions citing retrospective amendment to section 92B of the Act. Further, it observed a change in facts vis-à-vis in the previous years. **The total value of receivables due from AE had exceeded the amount of shareholder funds employed by the taxpayer. This implies that the total profit earned by the taxpayer over the years (reflected in reserves) is enjoyed by its AE outside India.** Hence, the whole of shareholder funds was loaned to AE in the form of receivables. With respect to the working capital argument, it's devoid of any merit in the present case where receivables are more than shareholder's fund. Further, The TP documentation nowhere proposes a working capital adjustment.

Hence, the contention and adjustment effected by TPO and DRP are upheld for charging interest on re-characterized receivables as an unsecured loan for a period beyond 150 days.

Our Comments

The court rulings have consistently decided in favor of the taxpayers by allowing working capital adjustment over the years. However, in this particular scenario, the fund flow structure of the taxpayer was given a high degree of importance for allowing the charge of interest on outstanding receivables.

Indirect Tax

Whether GST is applicable to the accounting entry made in the books of accounts of Project Office (PO) for the salary cost of Expat employees?

[Background: As per Para 1 of Schedule III of the CGST Act, 2017, Services provided by an employee to the employer in course or in relation to employment, shall be treated neither as a supply of goods nor services.]

Ruling

Hitachi Power Europe GmbH - Authority for Advance Rulings (AAR), Maharashtra [2020 (7) TMI 79]

- The applicant is a PO in India of Hitachi Power Europe GmbH;
- It is established to undertake an activity of executing power projects awarded to it by an Indian company;
- Many employees of the Head Office (HO) (i.e., expat employees) work in the PO in India, and statutory obligations like Form 16 under the Income Tax Act are fulfilled by the PO;
- In order to comply with the accounting guidelines and Companies Act, the PO records the salary cost for the expat employees at the PO.

Based on the above, the AAR ruled as follows:

- The Indian PO is a branch office of the foreign company set up in India for the limited purpose of executing a specific project;
- Hence, there is an employer-employee relationship between the PO and the expat employees;
- The services provided by the expat employees to the PO are covered under Schedule III and are not to be construed as a supply under the GST law.

Our Comments

This ruling is in line with the earlier ruling by the AAR, Rajasthan, in the case of Habufa Meubelen B.V [2018 (7) TMI 883], where a similar arrangement was present in case of a Liaison Office established in India.

However, implications on salaries of foreign expat employees paid by Indian-subsidiaries where they are deputed is open to debate.

Whether transfer of business unit from one state to another state would amount to supply of goods or supply of services or supply of goods and services?

Whether in the above case, GST ITC-02 can be filed for the transfer of unutilized ITC from a business unit in one state to a business unit in another state?

Ruling

Shilpa Medicare Limited - AAR, Andhra Pradesh [2020 (7) TMI 345]

- The applicant has its R&D unit in Andhra Pradesh (AP) and business unit in Karnataka (KR).
- The applicant has shifted its AP unit, as a whole along with the capital assets as a going concern to the KR unit for a monetary consideration.

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

- In the instant case, the business in its entirety was transferred along with capital assets;
- Therefore, the said transaction being a transfer of going concern is exempt from GST in accordance with Notification No. 12/2017 - Central Tax (Rate) dated 28 June 2017;
- Furthermore, the transferor can transfer unutilized input tax credit (ITC) to the transferee unit located in another state, by filing GST ITC-02.

Our Comments

As per Circular No. 133/03/2020-GST dated 23 March 2020, GST ITC-02 has to be filed in the state in which both the transferor and transferee are registered. Even from a practical standpoint, the GSTN portal does not allow the filing of GST ITC-02, when parties are located in different states.

Thus, it appears that the ruling of the AAR is not viable from a practical standpoint, and further clarity is awaited from the government.

Tax Talk

Indian Developments

Direct Tax

SEZs seek an extension of Tax Holiday for new units beyond 30 June 2020

[Excerpts from The Hindu Business Line, 22 June 2020]

Special Economic Zones (SEZ) are notified zones, wherein the companies are offered tax holidays for certain years. Currently, many such zones are given a three-month extension on their tax holidays due to the coronavirus outbreak, for the new units. The Export Promotion Council for EOUs and SEZs (EPCES), have appealed to the commerce ministry to extend this tax holiday period by one year or more to attract investment and to increase proposed employment in the zones. It was also mentioned that the 111 SEZs, which are not yet functional, would also benefit from this move.

Good news for taxpayers! CBDT exempts certain allowances in New Tax Regime

[Excerpts from Financial Express, 29 June 2020]

The finance budget of 2020, introduced a new regime of lower tax rates for individuals and HUFs according to section 115BAC, most the deductions and exemptions allowed under the old regime, would now be disallowed. But, the provision also enables the CBDT with the power to certain exemptions under section 10, which can be availed by employees. Exercising such powers, the CBDT has revised Rule 2BB allowing exemption on allowances paid on tour, transfer, daily travel, conveyance, and transport allowance for handicapped.

New Stamp Duty turns out to be a Double Tax on Fund Houses

[Excerpts from The Hindu Business Line, 30 June 2020]

The government had introduced changes to the Stamp Duty Act last year by introducing a uniform rate of stamp duty on the trading of shares and commodities, which were earlier being charged at different rates in each State. The tax will have a major impact on short-term mutual fund schemes, such as overnight and liquid funds, and the SIP investors, as their monthly installments, would now be dutiable. However, this will turn out to be a double tax on the investor, as it would be levied while the fund collects the amounts and also when it actually invests it in various instruments.

Broad-based criteria for the Safe Harbour to apply to Category-II FPIs

[Excerpts from Business Standard, 2 July 2020]

The government has recently notified, that the requirement to meet the broad-based conditions to qualify for a safe harbour under Indian tax laws, will also apply to Category-II FPIs, even though the Category-I investors remain exempt. Less than 20% of FPIs fall in Category-II, and they were already at a disadvantage for abiding by indirect transfer provisions, which apply to funds that have deployed over 50% of their portfolio investments in India. This notification may further discourage Category-II FPIs, especially funds from the Cayman Islands, British Virgin Islands, and West Asia, from delegating fund management responsibilities to Indian fund managers.

CBDT notifies amendment on Tax Exemption for Sovereign Wealth Funds for Investment in Infrastructure

[Excerpts from The Economic Times, 7 July 2020]

Income from dividend, interest, and long term capital gains of sovereign wealth funds, the Abu Dhabi Investment Authority, and pension funds, through the investments made in infrastructure companies via debt or equity in India, will be exempt from income tax. The notification would incentivize foreign investors to invest in thirty-four defined infrastructure sectors directly or through vehicles such as Alternate investment funds or Infrastructure Investment Trusts. The notification shall come into force from 1 April 2021, and shall be applicable for AY 2021-22 and subsequent assessment years.

Central Board of Direct Taxes restarts proceedings under the Faceless Scheme

[Excerpts from The Economic Times, 13 July 2020]

In the wake of the pandemic and its detrimental effect on the economy, the CBDT, in a circular dated 8 May 2020, had asked its officers not to have any adverse communication with the assesses. By issuing a circular, the CBDT has now asked its officers to reach out to assessees and start proceedings in all pending cases. It has set a target of completing 5,000 assessments a week. According to the circular issued by the office of the National e-Assessment Centre, Delhi, the cases where a partial response is on record may be prioritized.

Indirect Tax

CBDT and CBIC sign a MoU for facilitating an Exchange of Information on automatic and regular basis

[Excerpts from the Business Standard]

The Ministry of Finance (MoF) has announced that the two principal tax authorities in the country, namely Central Board of Direct Taxes (CBDT) and Central Board of Indirect Taxes and Customs (CBIC) have signed a MoU, to facilitate the sharing of data and information between the authorities.

This MoU supersedes the MoU signed between the CBDT and the erstwhile CBEC in 2015; this MoU takes into account the significant developments that have taken place since then, such as the introduction of GST, incorporation of GSTN and change of CBEC to CBIC.

In addition to regular exchange of data, CBDT and CBIC will also exchange with each other, on request and spontaneous basis, any information available in their respective databases, which may have utility for the other organization.

Higher turnover threshold notified for e-invoicing

[Notification No. 61/2020-Central Tax dated 30 July 2020]

The annual turnover limit for applicability of e-invoicing has been increased to INR 500 crores (from earlier limit of INR 100 crores). Also, units in Special Economic Zone have been excluded from the applicability of e-invoicing.

New GST return filing mechanism may be shelved

[Excerpts from The Economic Times, Business Today and Financial Express]

As per news reports, the plans for implementation of the new GST return filing mechanism, which was one of the most important reforms announced since the inception of GST more than 3 years ago, have been shelved.

It appears that the government has instead turned its attention to an advanced version of the existing returns with a phased implementation from October 2020 to January 2021. The advanced version is expected to contain feature such as:

- GSTR-2B feature - Auto drafted Input Tax Credit (ITC) statement to guide on the ITC to be availed or reversed (similar to earlier envisaged GSTR-2);
- A more detailed GSTR-1
- GSTR-3B to be auto-populated based on data furnished in GSTR-1 (similar to earlier envisaged GSTR-3)
- GSTR-2A to populate return filing status of both GSTR-1 and GSTR-3B;
- Linking GSTR-1 and GSTR-2A with GSTR-3B;
- A matching tool for comparison of GSTR-2A with purchase register;
- A communication channel between the supplier and the recipient;
- Improved comparison table for tax liability and ITC.

Direct Tax

Chinese citizens start getting taxed for their Global Income

China has started summoning its citizens residing abroad, asking them to disclose and declare their overseas income in order to pay taxes on the same at home. Such a move to tax the global income of its citizens could highly impact Chinese expats working outside China since it is the largest expat community in the world. The new rules would also subject income from dividends and property sales to tax in China. It would be a big blow to citizens working in low tax jurisdictions such as Hong Kong, where the maximum tax paid was around 15% of their salaries compared to a tax rate as high as 45% levied by the Chinese Government.

The United Kingdom to have Access to Ownership details of Companies Domiciled in Tax Havens with a linkage to the UK

In a move to detect and tackle money laundering and financial crimes, eight of UK's overseas territories have committed to providing public access to ownership details of companies that have a link to the UK by 2023. These eight territories comprise of Anguilla, Bermuda, Cayman Islands, the Falkland Islands, Montserrat, the Pitcairn Islands, St Helena, Ascension Island and Tristan da Cunha, and the Turks and Caicos Islands. The only territory left to make such a commitment are the British Virgin Islands.

Apple wins major tax battle against EU

The American tech giant, Apple Inc., won a major battle against the European Union antitrust officials, who claimed that the company owed a tax bill of EUR 13 billion (approximately USD 14.8 billion) to Ireland.

The said case dates back to 2016 when the European Commission ('the Commission') asked Ireland to recover EUR 13 billion in allegedly unpaid taxes since the same constituted an illegal subsidy under the jurisdiction's state-aid rules.

In 2020, the aforesaid decision was overturned by the General Court on the pretext that the commission had failed to meet the legal standards in proving that the tech giant was given special treatment. This decision has emboldened Margarethe Vestager, the Executive Vice President of the European Union Commission, to create new regulations for tech companies such as imposing the new digital tax to ensure that each company paid its fair share of tax.

Saudi Arabia mulls Income Tax and Asset Sales to bolster its Finances

Due to the disruption and financial instability caused by the pandemic and falling crude oil prices Saudi Arabia's economy is set to contract by 6.8% and is accordingly accelerating the plans to sell off state assets and mulling the introduction of Income Tax.

In order to address this growing instability and shortfall in finances, the government has already taken unprecedented measures such as tripling the current VAT (value-added tax) as well as increasing import fees.

This move could be a major blow to its citizens because traditionally, the Arabic Country has been tax-free for individuals with revenue from crude oil, supporting a wide range of subsidies for its citizens.

Transfer Pricing

Australia - Guidance on the treatment of JobKeeper Payments[2]

The ATO had released a JobKeeper Payment scheme, which is a temporary subsidy for businesses significantly affected by COVID-19. Eligible employers, sole traders, and other entities can apply to receive AUD1,500 per eligible employee per fortnight. The ATO, on 15 July 2020, issued a statement providing guidance on the treatment of JobKeeper payments. The ATO will assess the impact of the JobKeeper payment on transfer pricing arrangements, by reviewing arrangements in situations when the JobKeeper payment-

- Has resulted in a change to the transfer price paid or received by the Australian entity
- Was shown to effectively shift the benefit of the government assistance to offshore related parties.

A considerable number of businesses with different transfer pricing arrangements are potentially affected by the JobKeeper program. The authorities have also provided certain examples of how JobKeeper payments should be treated in transfer pricing arrangements. The statement indicates that the ATO expects Australian entities to retain the benefit of the JobKeeper payment received and not transfer the same to any overseas group companies.

The JobKeeper payments should not result in a reduction of the price of the service provided to the offshore related party. No reduction should be made to the cost of the service on which profit mark-up should be charged. The independent parties acting in a commercially rational manner would not be expected to share the benefit of the government's assistance.

Malaysia released FAQs on APA treatment due to COVID-19 Pandemic[3]

i. **New APA application -**
Inland Revenue Board of Malaysia (IRBM) is currently not accepting any new APA application from businesses affected by COVID-19 until further notice since the outlook of the pandemic is highly uncertain. For businesses that remain unaffected by COVID-19, such taxpayers can still proceed with APA application.

ii. **Treatment of Ongoing APA -**

- The review process of an ongoing APA application request is based on the information previously submitted to the IRBM. The proposed arm's length range will be based on the benchmarking analysis of normal economic and market conditions, i.e., the pre-COVID-19 period.
- IRBM does not allow any amendment or substantial updates on material changes to the ongoing application as the full impact of COVID- 19 cannot be gauged, presently.
- Depending on the facts and circumstances of the case, the term test may be applied in order to consider the impact of COVID-19 on the proposed covered transaction. The Annual Compliance Report (ACR) will be required to be submitted annually, notwithstanding the application of the term test. Any compensating adjustment shall be made at the end of the APA covered period.
- A taxpayer that had withdrawn an APA application may file a new APA application subject to conditions stated above.

iii. **Treatment of Concluded APA -**
In case of breach of critical assumptions in the APA agreement in force due to COVID-19, IRBM states that the taxpayer can either revise or apply for the cancellation of the APA within a prescribed period. Further, it highlights that in the case of Bilateral APA/ Multilateral APA, any application for a revision or cancellation will be subject to further negotiation with treaty partner(s), taking into account all relevant tax jurisdictions' APA regulations and procedure.

iv. **Renewal of APA -**
IRBM also states that a taxpayer does not qualify for renewal if the critical assumptions in the expiring APA are no longer valid or relevant due to material changes on taxpayer's business as a result of COVID-19 and under such circumstances it may file a new APA application or choose not to submit a new APA application.

Our Comments

In the current situation, guidance provided for MNEs looking for tax certainty is still in a grey area due to the unprecedented times amidst a pandemic. It will be interesting to observe whether other jurisdictions also release similar approaches.

[2] https://www.ato.gov.au/Business/International-tax-for-business/In-detail/Transfer-pricing/Transfer-pricing-arrangements-and-JobKeeper-payments/
[3] http://lampiran1.hasil.gov.my/pdf/pdfam/FAQ_APA_Treatment_Due_To_COVID19.pdf

Belgium releases transfer pricing circular for statutory reporting[4]

On 30 June 2020, the Belgian tax administration published a transfer pricing 'circular' setting out commentaries on selective topics or questions arising to taxpayers while preparing their statutory transfer pricing reporting. In this respect, a reference is made to the Belgian taxpayers' obligation to prepare and file the transfer pricing notification Forms, Master File, Local file, Country by Country Report as implemented in the Belgian tax law based on the OECD's BEPS Action 13. The main issues addressed by the circular include:

i. Obligation to file, deadlines and thresholds

ii. Reporting obligations for a consortium, joint venture and partnership

iii. Reporting obligations for non-profit organizations: although not subject to corporate tax, are still obliged to prepare and file Belgian BEPS 13 forms (if the relevant thresholds are exceeded)

iv. Reporting obligations for permanent establishments: both the activities and the transactions of the head office and the permanent establishment(s) are to be reported in the Local file form (if relevant thresholds are exceeded), as these 'dealings' are also cross-border transactions.

v. Selected questions related to credit institutions and insurance companies

vi. Reporting obligations for business restructuring, only restructurings involving the Belgian entity are subject to the reporting, while the reorganizations of the organizational or shareholding structure beyond the Belgian entity are not to be mentioned in the reporting.

Specific guidance on the content, details, and format of the information to be presented in the forms.

Our Comments

The circular appears to be aligned with the common approaches followed by professionals in tax practice and OECD guidance. The new circular also provides insight and clarity on certain topics and addresses specific questions related to different aspects of the BEPS 13 forms in particular cases. It will provide adequate guidance to complicated structures and ease reporting requirements.

Hong Kong issues Guidance on APA Procedures - releases updated regulations on APA[5]

The Inland Revenue Department (IRD) on 15 July 2020 under the Departmental Interpretation and Practice Notes No. 48 (DIPN 48) provided legislative changes in relation to the APA to streamline the APA process. Key revisions in the DIPN 48:

i. **Acceptance of Unilateral APA -** Hong Kong will now start to accept unilateral advance pricing agreements for intra-group transactions involving tax jurisdictions where Hong Kong does not have any treaty (i.e., double tax avoidance agreements).

ii. **Rollback Considered -** Hong Kong will now consider requests for even rollback periods for not just unilateral cases but also bilateral and multilateral APAs. This step attempts to settle recurring issues and provide faster closure of the APA process as well.

iii. **Streamlined APA process -** The current process is being replaced into a three-stage process along with reduced early stage documentation requirements. These overall revisions have been introduced to improve the timelines and efficiency in processing APA applications.

- *Stage 1 (six months):* Early engagement: The submission of a request for APA early engagement six months before the proposed commencement date, setting up the APA team, preliminary discussion, submission of APA application, payment of the deposit.
- *Stage 2 (18 months):* APA application: The analysis and evaluation, further information gathering and interviews, negotiation mutual agreement with competent authorities, signing of APA, settlement of fees payable.
- *Stage 3 (ongoing)*: Monitoring and compliance: Disclosure, submission of the annual compliance report, recordkeeping.

iv. **The coverage of APAs has been extended to include -**

- The attribution of profits to a PE in Hong Kong- a threshold of HKD 20 million business profits per year.
- Any transactions other than the sale or purchase of goods, provision of services, and use of intangible properties- a threshold of HKD 20 million per year.

v. **Fees -** An APA fee would include a provision fee estimate by an independent expert that would work with Hong Kong APA office to quantify potential costs and enable better decision making.

[4] https://eservices.minfin.fgov.be/myminfin-web/pages/fisconet#!/document/ea99e5c1-8ab9-4ebd-8a4e-d3229a1585ef
[5] https://www.ird.gov.hk/eng/pdf/dipn48.pdf

Extended deadlines for filing of Transfer Pricing Returns in light of COVID-19[6]

Extended due dates and details of some countries are mentioned below:

Argentina

The July 2020 general resolution revises the deadlines for submitting transfer pricing studies to be filed by taxpayers or responsible parties according to the following schedule for tax periods closing:

Period	Extended deadline in May	Further extension announced in July
December 2018 to May 2019	July 2020	August 2020
June 2019 to November 2019	August 2020	
December 2019 to April 2020	October 2020	October 2020

Further, the above general resolution provides that the deadline for submitting Master files corresponding to past fiscal years (years that close in the period beginning after December 2018 and ending through August 2019 (inclusive)) are due in August 2020. Both the transfer pricing studies and Master File is based on the last digits of the taxpayer identification number.

Additionally, apart from the above special deadlines, the due date for filing the transfer pricing report is the 6th month after the end of the fiscal year. However, the Master File needs to be filed by the 12th month after the end of the fiscal year.

Dominican Republic

The due date for filing the transfer pricing return has been extended until 29 July 2020 as compared to the earlier date of 30 April 2020.

Poland

The deadline for submitting a statement that the transfer pricing documentation has been prepared and for providing transfer pricing information (forms TPR-C and TPR-P) stands extended pursuant **to article 31z of the Anti-Crisis Shield 4.0:**

I. **Until 31 December 2020** – in those cases where this deadline was to expire between 31 March 2020 and 30 September 2020;

II. **By 3 months** - in those cases, where this deadline was to expire between 1 October 2020 and 31 January 2021.

In addition to the above, the Anti-Crisis Shield 4.0 also covers a postponement of the deadline for preparing (or attaching) to the local file a Master file until the end of the 3rd month from the day following the day, when the extended deadline expired for submitting a statement that a local transfer pricing documentation has been prepared. Thus, in the case of taxpayers, whose tax year ended is on 31 December 2019 – deadline for local file and transfer pricing documentation will be 31 December 2020, and **the deadline for preparing or attaching to the Local File the master file is 31 March 2021.**

Portugal

The due date for filing the transfer pricing return has been extended until 31 August 2020 as compared to the earlier due date of 15 July 2020.

Ecuador

Ecuador taxpayers can file their transfer pricing returns anytime between 10 to 28 October 2020.

Panama

The due date for filing the transfer pricing report has been extended until 30 September 2020.

[6] https://regfollower.com/2020/08/06/extension-of-tax-compliance-due-dates-amid-covid-19-pandemic/

New OECD country-by-country (CbC) reporting statistics offer insight into multinational group potential tax avoidance behavior

The OECD provided data of up to 4,000 multinational enterprise groups headquartered in 26 jurisdictions, operating across more than 100 jurisdictions worldwide. The corporate tax statistics are based on the CbC reporting by MNEs for 2016. The CbC reporting requires large MNEs to are required to publish crucial information regarding their profits, employees, locations, and tangible assets, where they pay their taxes and mention every country of operation. Thus, the CbC reports provide the tax authorities with information about MNEs to allow for risk assessment purposes.

This new dataset includes aggregated data on the global tax and economic activities of MNEs, including profit before income tax, income tax paid (on a cash basis), current year income tax accrued, unrelated and related-party revenues, the number of employees, tangible assets, and the main business activity (or activities) of MNEs.

Preliminary insights from the above mentioned, new statistics suggest the following:

- One of the main findings of the report is that there is a distinct mismatch between the location of reported profits and the location of economic activities, like jobs, assets, and sales;
- The revenues per employee tend to be higher where statutory corporate income tax rates are zero and in investment hubs;
- On an average, MNEs in investment hubs report a higher share of related-party revenues in total revenues;
- The composition of business activity differs across jurisdiction groups, with the predominant business activity in investment hubs being 'holding shares and other equity instruments.'

While respecting the limitations of the data and duly noting that these observations could also reflect some commercial considerations, there are indications of BEPS behavior. Ultimately this finding reinforces the debate on a need to continue the work in progress in the Inclusive Framework on Pillar 2 of the effort to address the tax challenges arising from digitalization.

Indirect Tax

The UK announces a major cut in VAT rates for Tourism and Hospitality sectors

[Excerpts from the online edition of Mirror UK]

Tourism and hospitality are one of the worst affected sectors by the COVID-19 pandemic and the subsequent lockdowns announced by most countries. Now, as the United Kingdom slowly returns to normalcy, the UK government has slashed the VAT rates applicable in these sectors from 20% to 5%. It has been announced that the reduction in rate will be applicable for up to 6 months (until January 2021) with a view to give a boost to these sectors and kick start the economy. The reduced VAT rate of 5% will be applicable to the following:

- Food and non-alcoholic drinks served by eat-in as well as takeaways restaurants, cafes, pubs, etc.
- Accommodation in hotels, B&Bs, etc.
- Cinemas, theme parks and zoos.

[7] http://www.oecd.org/tax/new-corporate-tax-statistics-provide-fresh-insights-into-the-activities-of-multinational-enterprises.htm

Compliance Calendar

Direct Tax
Indirect Tax

3 August 2020

Extended due date for filing of GSTR-1 for the quarter of January 2020 to March 2020 to be filed by registered taxpayers with an annual aggregate turnover of up to INR 15 million

5 August 2020

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

7 August 2020

Payment of TDS and TCS deducted/ collected in July 2020

11 August 2020

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

15 August 2020

Quarterly TDS Certificate (in respect of tax deducted for payments other than salary) for the quarter ending 30 June 2020

20 August 2020

- GSTR-3B for the month of July 2020 to be filed by all registered taxpayers having turnover of more than INR 50 million in the previous financial year
- GSTR-5A for the month of July 2020 to be filed by Non-Resident Online Database Access and Retrieval services (OIDAR)

30 August 2020

- The due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IA for the month of July 2020
- The due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IB for the month of July 2020

31 August 2020

- Extended due date for filing of GSTR-4 for the financial year 2019-2020 for taxpayers registered under the composition scheme of GST
- Extended due date for filing of GSTR-5 for the months of March 2020 to July 2020 to be filed by Non-Resident Taxpayers (NRTP)
- Extended due date for filing of GSTR-6 for the months of March 2020 to July 2020 to be filed by Input Service Distributor (ISD)
- Extended due date for filing of GSTR-7 for the months of March 2020 to July 2020 to be filed by taxpayer liable for Tax Deducted at Source (TDS)
- Extended due date for filing of GSTR-8 for the months of March 2020 to July 2020 to be filed by taxpayer liable for Tax Collected at Source (TCS)

Notes

However, it must be noted that the CBDT vide the Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 dated 31 March 2020 read with the notification dated 24 June 2020 has extended all respective due dates, falling during the period from 20 March 2020 to 31 December 2020, **except the ones mentioned below** till 31 March 2021.

- The due date for filing quarterly TDS/TCS statement for the quarter ending 31 March 2020 is extended to 31 July 2020. Accordingly, the due date for issuing the TDS certificate for the quarter ending 31 March 2020 would be 15 August 2020.
- The due date for filing of return of income for a non-corporate taxpayer who is not required to be audited for the financial year 2019-20, is extended to 30 November 2020
- The due date for all other compliances (including TDS return of Q1 and Q2 of the financial year 2020-21, is due for filing by 31 March 2021.

The benefit of the extended due date shall not be available in respect of payment of tax. However, any delay in payment of tax, which is due for payment from 20 March 2020 to 31 December 2020, shall attract interest at the lower rate of 0.75% for every month or part thereof, if same is paid after the due date but on or before 31 December 2020.

News

Listing of Unlisted Indian Companies overseas –Impact and Way Forward

Yashesh Ashar

Read Here https://bit.ly/33sistw

Alerts

Key highlights of the second edition of KSA Transfer Pricing Guidelines

1 July 2020

Read Here https://bit.ly/2XVjpH7

The Government may shelve new GST returns and increase the turnover limit for e-invoicing

24 July 2020

Read Here https://bit.ly/3fUGHD3

Webinar - Recent Tax Amendments and COVID-19 Relief Measures

Organizer - Taiwan Chamber

3 July 2020

Watch it here https://bit.ly/31OpgPC

Webinar - Foreign Remittance – Tax Technology Solution

Organizer - IGCC

4 August 2020

Easy Remittance Tool

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

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Easy retrieval of documents to aid in tax scrutiny

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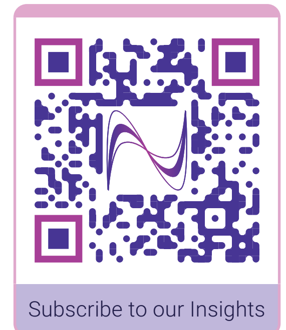
We provide an array of solutions encompassing Consulting, Business Services, and Professional Services. Our solutions help businesses navigate challenges across all stages of their life-cycle. Through our direct operations in USA, India, and UAE, we serve a diverse range of clients, spanning multinationals,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

Our team provides you with solutions for tomorrow; we help you *Think Next*.



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