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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 May 2021.

- The **'Focus Point'** explores the implications of the retrospective amendment to the scope of 'Supply' in the Finance Act, 2021.
- Under the **'From the Judiciary'** section, we provide in brief, the key rulings on important cases, and our take on the same.
- Our **'Tax Talk'** provides key updates on the important tax-related news from India and across the globe.
- In the **'M&A Tax and Regulatory'** section we highlight the critical rulings and significant updates in the M&A tax and regulatory arena.
- Under **'Compliance Calendar'**, we list down the important due dates with regard to direct tax, transfer pricing and indirect tax in the month.

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

Warm regards,
The Nexdigm (SKP) Team

Focus Point

Retrospective amendment to the scope of 'Supply' in Finance Act, 2021: Unsettling the settled?

"The health of our economy will not improve until we inject the 'S' factor into our fiscal laws, and make them Sane, Simple and Stable."

- Nani Palkhivala

The amendment to Section 7 of the CGST Act, 2017[1] with retrospective effect from 1 July 2017, seeks to levy tax on activities or transactions involving supply of goods and/or services by any person, other than an individual, to its members or constituents or vice-versa, for cash, deferred payment or other valuable consideration.

Further, with the aid of an Explanation, it has been clarified that the person and its members or constituents shall be deemed as separate persons notwithstanding anything contained in any other law for the time being in force, any judgment, decree or order of the Court, Tribunal, or authority. Simultaneously, entry 7 of Schedule II to the CGST Act which classified *"Supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration"* as 'supply of goods' for the purpose of GST, stands omitted with retrospective effect.

Before delving into the implications of the above provision, let us look at the legislative background and judicial history of taxation of such transactions.

Legislative and judicial background

Over the years, the 'doctrine of mutuality' has been invoked in a myriad of cases, both under the Income-tax as well as erstwhile indirect tax laws, viz. Service tax and VAT laws.

Pre-GST regime

The doctrine stems from the common law principle that a person cannot make a profit from himself. In the context of Indian law, some Hon'ble High Courts had upheld the doctrine of mutuality vis-à-vis levy of sales tax by following the English cases of Graff vs. Evans[2] and Trebanog Working Men's Club and Institute Ltd. vs. Macdonald[3]. However, a 3-Judge Bench of Hon'ble Apex Court overruled this view in Enfield India Ltd[4] on the ground that said doctrine had no application vis-à-vis taxing statute.

This issue once again came up before the Hon'ble Supreme Court's Constitution Bench in CTO vs. Young Men's India Association[5] wherein this time, and it was held that the club (although a distinct entity) was only an agent of its members and there was no 'sale' involved in the supply of various preparations to them since the element of 'transfer' was absent.

1. To be notified by way of separate Notification
2. [(1882) 8 Q.B. 373]
3. [(1940) 1 K.B. 576]
4. [(1968) 2 SCR 421]
5. [(1970) 1 SCC 462]

The judgment in Enfield India Ltd (supra) was distinguished on the grounds that the English cases had applied the doctrine of mutuality even in tax matters.

Subsequently, the 46th amendment to the Constitution in 1982 inserted clause (29-A) in Article 366 to inter alia tax – *"supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration."*

As a result, the larger bench of Apex Court, in the matter of Calcutta Club Limited/Ranchi Club Limited[6], was called upon to decide whether the 'doctrine of mutuality' was done away with by Article 366(29-A)(e) and whether the ratio of Young Men's Indian Association (supra) would continue to operate. While deciding the levy of sales tax, the Hon'ble Court referred to the Statement of Objects and Reasons for the 46th amendment and held that as the club or association has no separate existence from its members, Article 366(29-A) did not overcome the decision in the Young Men's Indian Association and the doctrine of mutuality remains applicable even after the amendment.

As per the Hon'ble Court, for the supply of goods by incorporated and unincorporated associations or body of persons to its members, the requirement of consideration was not fulfilled in terms of the Contract Act, 1872. Further, there was no transfer in the supply of food and hence, there is no "seller" or "buyer" relationship in the passing of consideration.

Insofar as the levy of Service tax is concerned, it was observed that the Service tax law requires the provision of services by one person to another, and the doctrine of mutuality, which is applicable to clubs qua sales tax for supplies to members, was equally applicable *"on all fours to services."* Consequently, services by a members' club to its members amount to 'services to self' and would not qualify as taxable service. This position was validated for both the pre and post-negative list periods of the Service Tax regime.

GST regime

Interestingly, the advance rulings under the GST regime have been a mixed bag so far. On the one hand, the Maharashtra Appellate Authority for Advance Ruling (AAR) has, in the case of Rotary Club of Mumbai Queens Necklace[7], held that subscription/membership/admission fee collected by the appellant is not liable to GST in the absence of provision of any specific facility or benefits to its members; but on the other hand, the West Bengal AAR[8] has ruled on the tax rate applicable to various services provided to club members such as the supply of food at its restaurant or social events organized in the club premises, and other facilities like swimming.

In the context of a co-operative housing society, the Maharashtra AAR[9] has held that the activities of obtaining conveyance from the promoter (Builder), managing, maintaining and administering the society's property, raising fund for achieving the society's objectives, undertaking and providing any social, cultural or recreation activities, etc. for its members qualify as "supply" under the GST law. It rejected applicant's reliance on the principle of mutuality, holding that *"it is not tenable in so far as taxability in the GST regime is concerned."*

Karnataka AAAR, too, has ruled on similar lines in the case of Vaishnavi Splendor Homeowners Welfare Association[10], holding that service supplied by an association to its members is a taxable service under GST law, and therefore, contribution received from members is liable to GST.

Implications

From the above background, it is amply clear that although taxability of supplies by a club/association/ society, etc., to its members was fairly settled under the erstwhile era, the levy of GST on such supplies and applicability of the doctrine of mutuality is still a bone of contention.

One must note that the amendment to Section 7 is not the first instance where the legislature has sought to nullify the effects of judgments pronounced by the Apex Court. The 2012 Vodafone decision under the Income-tax law and consequent amendment is a classic case of retrospective taxation. The Apex Court has been consistently holding that enacting amendments, which nullify the law declared by it, would amount to encroaching upon the domain of the judiciary. However, it has also recognized that the legislature can fundamentally amend or alter the statute's provisions to remove the basis/condition of the judgment.

Given the above, questions can be raised on whether the amendment fundamentally alters the very condition on which the Apex Court decision in Calcutta Club Limited (supra) is based and whether the clarification that the members and constituents are separate from the person per se, would render the principle of mutuality redundant in the context of GST.

6. [2019 (10) TMI 160 – SC]
7. [TS(DB)-GST-AAAR(MAH)-2019-823]
8. The Bengal Rowing Club [TS(DB)-GST-AAR(WB)-2019-402]
9. Apsara Co-operative Housing Society Limited [TS(DB)-GST-AAR(MAH)-2020-319]
10. Order No. KAR/AAAR-10/2019-20 and dated 21 October 2020

One could still argue that a fee/amount collected by the person is utilized for meeting various administrative expenditures, and therefore, there is no 'consideration' vis-à-vis facilities or benefits to members which can constitute a business. Insofar as co-operative society is concerned, one could contend that it is an incorporated body where the contributors are the members themselves and that they contribute by way of society maintenance as reimbursement of common expenses.

Further, it may be worthy to note that under the GST law, the term "person" has been defined in an inclusive manner, covering not only a company and a firm but also a HUF, LLP, body corporate incorporated by or under the laws of a foreign country, trust and even association of persons whether incorporated or not outside India. Hence, the amendment unequivocally expands the ambit for taxing transactions/activities which hitherto were not qualifying as 'supply.' To illustrate, profit share given to a Partner of the LLP could come within the GST net consequent to said provision, which clearly does not seem to be the intention of the legislature.

Moreover, while it has now become a trend to introduce changes in the GST legislation through the Finance Bill subject to the recommendations of the GST Council, one could also challenge the amendment on the contours of Article 279A of the Constitution.

Conclusion

Given the wide implications and unsettling nature of the proposed amendment, there is a high likelihood that the doors of the judiciary will be knocked yet again.

From the Judiciary

Direct Tax

Whether payment for reimbursement of obligatory payments for an expatriate can be taxable as Fees for Technical Services (FTS)?

CTBT Pvt.Ltd
AAR No. 1366 of 2012

Facts

CTBT Pvt.Ltd is a company incorporated under the laws of India. It is a wholly-owned subsidiary of M/s. PMK, Switzerland, which is part of K Group. The applicant has signed a Memorandum of Understanding (MoU) with the State Government of a certain Indian state for establishing the K tire manufacturing plant. Considering the large-scale FDI investment in India and ensuring consistent application of K quality and safety standards, the applicant requested KRP, a wholly-owned subsidiary of PMK, for the supply of experienced expatriate personnel.

The applicant entered into an Intercompany Agreement with KRP for disbursing social security contribution, insurance and relocation expenses payable by the applicant to expatriate personnel in their home country, which is proposed to be disbursed by KRP and subsequently reimbursed by the applicant. KRP act as payroll disbursement agency portion of salary and other social security obligations of the expatriate in their home country on behalf of the applicant for which an administration fee would be charged. Appropriate taxes were deducted on the administrative charges under Section 195 by the applicant.

The Revenue was of the opinion that the amount reimbursed should be considered as FTS. Heavy reliance was placed on Hon'ble Delhi High Court's judgment in the case of Centrica India Offshore (P.) Ltd. V. Commissioner of Income Tax (1) (2014) 364 ITR 336.

On the aforementioned facts, the applicant has sought an advance ruling for taxability of the cost to cost reimbursement of the social security contribution paid by KRP in the home country of the expatriate on behalf of the applicant.

Ruling

On perusal of the agreements on record, the AAR noted that there is no lien on employment of the seconded employees with the applicant and also the applicant has the power to terminate the employment, and the employee is forbidden to supply his capacity to work to someone else during the period of employment. The applicant is exercising full operational control and the employee is required to abide by policy regulations and guidelines of the applicant company. It is also seen that to meet the obligation of the expatriate personnel abroad, social security contribution, insurance, relocation cost, etc., were deposited by KRP on behalf of the personnel and the said contribution, which forms part of the salary, is reimbursed on cost to cost basis by the applicant to KRP.

The AAR distinguished the ruling of Centrica on the basis that the expatriate personnel in the current case were indeed employees of the applicant, and there does exist an employee-employer relationship between the personnel and the application company. It exercises control and issues directions to the employees who are required to supply their complete time and labor to the applicant. The applicant also has the power to terminate the employment.

Thus, reimbursement of obligated payment shall not be considered as FTS.

Our Comments

In the case of expatriates, reimbursement of obligatory payments by another group entity or original employer of the employee is a common industrial practice. Yet, the taxability of the reimbursement has been a common everlasting debate. The taxability of such payments cannot be given a standard treatment and would depend on the intricacies of the agreement.

Whether treaty benefit can be denied to a non-resident company pursuant to the "limitation of benefit" clause merely because the major shareholder is a non-resident of both the contracting state?

Interworld Shipping Agency LLC
Vs. DCIT
ITA No. 7805/Mum/19

Facts

The taxpayer is a limited company incorporated and tax resident of the UAE and is engaged in the business of services like ship chartering, freight forwarding, sea cargo services, shipping line agents. The taxpayer charters the ships to transport goods and containers in international waters, including Kandla and Mundra ports and other ports in India and elsewhere. During the relevant year, the taxpayer earned freight from India. Pursuant to Article 8, the same was not offered to tax in India.

The Assessing Officer (AO) did not agree with the contentions of the taxpayer. He noted that as much as 80% of the profits of the taxpayer entity were to go to one Dimosthenis Lalagiannis, a Greek national. The AO was of the view that the person receiving 80% of the profits was a Greek national, and there is no evidence that Mr. Dimosthenis Lalagiannis has operated the company wholly and exclusively from the UAE.

Thus, in light of Article 29 "Limitation of Benefits" of the India — UAE Treaty, it could be safely concluded that the business was not managed or controlled wholly from the UAE. He was of the view that the only purpose of the taxpayer company was to avail of the benefits of the India-UAE tax treaty. He then referred to the 'look at' principle in the Vodafone judgment and noted that even the tax residency certificates of the partners were not provided to the AO. He further noted that it was a clear case of abuse of the organization as the owner and manager of the entity is a Greek national. He also believed that the taxpayer company is a colorable device for the avoidance of taxes, and thus the benefit of the India-UAE treaty was denied.

The Dispute Resolution Panel (DRP) confirmed the actions of the AO. Aggrieved by the final assessment order, the taxpayer approached the Mumbai Tribunal.

Held

After due consideration of the argument from both the parties and material on record, the Tribunal noted that the taxpayer had fourteen expatriate employees who were issued work permits by the UAE Government for working with the taxpayer. Thus, clearly, the taxpayer was being run from UAE itself. Further, the partner Dimosthenis Lalagiannis was in UAE for 300 days during the relevant previous year.

The UAE is a major financial center in which not only a large number of foreigners work but also from where a large number of foreigners conduct their business. When a person lives in a country for 300 days, it would be reasonable to assume that he would be running a business from that country. Even if we are to keep aside his actual stay in UAE for 300 days aside, whether the main director stays in UAE for 180 days or even less is immaterial as long as there is nothing to show, or even indicate, that business was not carried from UAE. The requirement for presence in UAE for 183 days, for residence status under the India-UAE tax treaty, is for the individual and not the directors of the companies which claim such a residence status. As for the companies, the only test for a company being termed as 'resident of UAE' is that it should be incorporated in UAE and wholly managed and controlled in the UAE. The taxpayer company has its office in UAE, it is in business there since 2000, it has expatriate employees who have been given a work permit to work in UAE for the taxpayer company, the main driving force of the company and its director is an expatriate resident in the UAE.

Further, when an entity was established in 2000, and the relevance of the India-UAE tax treaty comes into play only in 2015, it cannot be said that the "main purpose of creation of such an entity was to obtain the benefits" of the India-UAE tax treaty. Unless the purpose of creating the entity in question is to avail the India-UAE tax treaty benefits, the "limitation of benefit" clause in article 29 cannot come into play.

Our Comments

This is a welcome decision.

Transfer Pricing

Whether Identification of tested-party is mandatory despite Comparable Uncontrolled Price (CUP) being the Most Appropriate Method (MAM) for Specified Domestic Transactions (SDT) of inter-unit power-transfer and acceptance of the 'market value' as the purchase price of electricity is an uncontrolled transaction for the purpose of determining the Arm's Length Price (ALP)

Balarampur Chini Mills Ltd [TS-200-ITAT-2021(Kol)-TP]

Facts

The taxpayer is engaged in the business of manufacturing and sale of sugar, molasses and generation and distribution of power in the form of steam and electricity. The taxpayer claimed deduction u/s 80IA for the generation and distribution of power. It had considered the rate of electricity at INR 8.30 per Kwh, which was as per tariff orders issued by the Uttar Pradesh Electricity Regulatory Commission for the sale of electricity in that area. The taxpayer considered the said rate as a benchmark for selling electricity to other manufacturing units of the taxpayer company.

The Transfer Pricing Officer (TPO) alleged that the rate of electricity for claiming deduction shall be at INR 4.90 per Kwh, which was the 'average rate' at which the companies can sell electricity to the distribution licensees as governed by Electricity Act 2003 and the rate at which the taxpayer had sold electricity to other distributing third parties under the Power Purchase Agreement (PPA). The TPO disregarded the use of 'market rate,' which was considered by the taxpayer to benchmark its said inter-company transaction.

The Commissioner of Income-Tax Appeals [CIT(A)] agreed with the taxpayer's contention and granted relief to it.

Aggrieved, the Revenue contended before the ITAT (Income-tax Appellate Tribunal) that the TPO was right in adopting the 'average rate.'

In addition to the above, the Revenue also submitted that there is no concept of the tested party when the CUP method is the MAM for determining the ALP.

The taxpayer further referred to the Electricity Act of Uttar Pradesh and submitted that it was legally eligible to sell power in the open market. The Revenue was factually and legally incorrect in stating that the taxpayer should not supply power in the open market.

Furthermore, the taxpayer contended that the sale of electricity under the PPA to the distribution companies could not be considered an uncontrolled transaction. Hence the 'market rate' as determined by the taxpayer was the correct comparable data that ought to be considered.

Ruling by (ITAT)

The ITAT placed its reliance on various judicial precedents wherein it was held that the 'market value' should be the rate at which the State Electricity Boards supply electricity to its industrial customers.

In relation to the selection of the tested party, the ITAT observed that since the ALP is the 'market value', there is no dispute that the MAM is CUP.

In addition to the above, the ITAT held that the Revenue's contention that since CUP was the MAM, there was no need to select a tested party is erroneous by placing reliance on the ICAI Guidance note.

In view of the above, the ITAT held that while determining the ALP under the Transfer Pricing provisions, the taxpayer had correctly identified the manufacturing unit as the tested party and CUP as the MAM and the purchase price of electricity in the open market from the State Electricity Board (SEB) to the manufacturing units in uncontrolled conditions as the ALP.

Our Comments

It is rightly adjudicated by the ITAT that the selection of the tested party is mandatory and the same has to be identified even when the CUP is the MAM. The ITAT in the present case has relied on the ICAI Guidance Note. Also, to conclude, the benchmarking analysis selection of a tested party becomes pivotal.

Resale Price Method (RPM) as MAM for benchmarking import of dental products and reselling to third party customers

Dentsply India Pvt Ltd
[TS-205-ITAT-2021(DEL)-TP]

Facts

The taxpayer is engaged in the manufacturing and trading of dental products. The trading activities of the taxpayer constitute 95% of its business activities, and the remaining 5% is from manufacturing activities.

The taxpayer has imported dental products from its Associated Enterprises (AE) for the purpose of resale, which is the internal transaction under discussion.

In its transfer pricing study report, the taxpayer benchmarked the said transaction (purchase) by adopting the Transactional Net Margin Method (TNMM) as the MAM and the same was followed in the subsequent years as well. Subsequently, during the audit proceedings, the taxpayer submitted to the TPO that RPM is the most appropriate method with Gross Margin on sale as the appropriate Profit Level Indicator (PLI) to benchmark the said transaction.

The TPO argued that TNMM should be adopted as the MAM with net operating margin as the PLI. The TPO concluded that since the net operating margin of the taxpayer is less than that of the comparable companies, the transaction is not at arm's length.

The taxpayer challenged the said action of the TPO before CIT(A). The taxpayer submitted that it had incurred a significant administrative cost due to the initial year of business, which had impacted the profit at the net level.

The CIT(A) disregarded the contentions of the taxpayer by citing the following:

i. taxpayer was in its first year of operations and it thus incurred significant administrative costs

ii. gross profit margin in the year under consideration is lower than the prior-year which disregards the taxpayer's contention that it was in the initial year of its business

iii. taxpayer has given a detailed explanation in its Transfer Pricing Study Report as to why RPM should not be considered as the MAM and accepted TNMM as the MAM.

iv. taxpayer did not make the required adjustment to its profit (i.e., on account of the advertisement expenses) and left it to the TPO to make the same.

The Authorized Representative (AR) of the taxpayer, during the proceedings before the ITAT, submitted that the reasons as to why RPM should be considered as the MAM over TNMM. The AR held that the taxpayer was a distributor of goods and in the case of distribution, RPM should be considered as the MAM. In support of his contention, he referred to the Guidance Note issued by ICAI and relied on various judicial precedents.

In addition to the above, the taxpayer's AR held that what is important while considering RPM as the MAM is the 'functional comparability' and not 'product comparability.' He relied upon the contents of the Organisation for Economic Co-operation and Development (OECD) guidelines and the guidelines issued by the ICAI.

Ruling by (ITAT)

The ITAT observed that considering the facts of the case and the functional profile of the taxpayer with respect to the transaction under litigation held that RPM was the MAM to benchmark the said transaction. The ITAT emphasized that while selecting RPM as the MAM, the focus should be on the same or similar nature of properties or services rather than the similarity of products.

The ITAT held that if it's found that a particular method will not result in a correct determination of the ALP, then the taxpayer can adopt an alternate method to determine the ALP. The matter was remanded back to the TPO for fresh analysis considering RPM.

Our Comments

The said ruling has re-iterated the use of RPM as the MAM when a taxpayer procures goods/services from its AE and resells the same to an independent third party without physically altering them and adding and intangible assets to add substantial value.

Also, an important factor while considering RPM as the MAM would be 'functional similarity' and not 'product similarity.'

Further, acceptance of a revised method to determine the ALP should be considered if the adoption of the revised method helps in the correct determination of the ALP.

Bright Line Test (BLT) not sustainable for Advertising, Marketing and Promotional (AMP) expenses. RPM as the MAM for import transaction

Luxottica India Eyewear Pvt Ltd
[TS-193-ITAT-2021(DEL)-TP]
AY (2013-14)

Facts

The taxpayer is primarily engaged in the business of trading sunglasses and spectacles frames in India. The taxpayer had incurred AMP expenses during the year under consideration.

The TPO, during the course of the assessment proceeding, made an adjustment on account of the AMP expenses incurred by the taxpayer in the regular course of its business on the ground that the said expenses were excessive and should be compensated by the respective AE.

The TPO held that the intensity of AMP expenses expressed as an 'AMP/Sales' ratio is much higher than that of the comparables, but the taxpayer is not suitably compensated for this additional function.

Further, the TPO considered TNMM as the MAM to benchmark the transaction pertaining to the import and ignored the ITAT's ruling in the case of the taxpayer in one of the prior years wherein the said transaction was benchmarked by considering RPM as the MAM.

The DRP upheld the order of the TPO.

Ruling by (ITAT)

The ITAT accepted the RPM as the MAM, relying on the Tribunal's judgment in taxpayer's own case in the prior year.

Regarding the AMP adjustment, the ITAT held that the TPO instead of making any AMP intensity adjustment in the profit rate of comparables considered AMP expenses as a separate international transaction and determined its ALP independent of the purchase transaction.

Since the facts of the case for the year under consideration were covered by the previous judicial precedents in case of the taxpayer itself, the ITAT directed the adjustment to be made considering RPM as MAM

In relation to the application of the BLT approach proposed by the Revenue (on a protective basis) for computing the transfer pricing adjustment towards AMP, the ITAT relied upon the various judicial precedents wherein the application of BLT was rejected.

Our Comments

The Revenue's attempts to bring in AMP expenses within the ambit of transfer pricing stems from an understanding that incurring such expenses necessarily entails a benefit to the foreign AE in terms of enhancement of brand value. The need for making a transfer pricing adjustment arises because of the absence of an adequate compensation in exchange for the benefit.

However, the said issue of marketing intangible/brand development has been subjected to intense litigation. Therefore, it is only a matter of time when the Revenue in this case would again challenge the order of the ITAT before the High Court.

Indirect Tax

(i) Whether books supplied by the applicant from a warehouse located in the USA to the customers located in USA, UK and Canada without such books entering in India constitute as 'supply' under GST?

(ii) Can GST be levied on shipping charges collected by the applicant from the customers located outside India for delivering the books?

(iii) Whether printing charges collected by the printer located in the USA, where only content is supplied by the applicant, taxable under RCM?

(iv) Whether warehousing services provided by the foreign service provider to the applicant taxable under Reverse Charge Mechanism (RCM)? and

(v) Can Input Tax Credit (ITC) be availed to the extent of input and input services on the transactions covered under Question 1?

M/s. Guitar Head Publishing LLP [2021 (4) TMI 929- AAR, Karnataka]

Facts

- The applicant is engaged in selling guitar training books to customers located in USA, UK and Canada.
- The applicant would send a soft copy of the books to the printer in USA, which would in turn print and ship the paper books to the customers in USA, UK and Canada without bringing the same to India.

Based on the above, the AAR ruled as follows:

Question (i)

The supply of books from the warehouse to the customers will not be treated as a supply under GST in view of Clause 7 of Schedule III, i.e., *"Supply of goods from a place in the non-taxable territory to another place in the non-taxable territory without such goods entering into India."*

Question (ii)

- The applicant, though collects the shipping charges from the customers, actual shipping of the books happens outside India, a non-taxable territory, by the agent of the applicant.
- Thus, the shipping charges collected by the applicant from the customers located outside India for delivery of books from the warehouse located outside India are not exigible to GST.
- The charges paid by the applicant for receiving shipping services from the warehouse agent in the non-taxable territory should be treated as 'import of services' and would be liable to GST under RCM.

Question (iii)

- The supplier of printing services is located outside India, the recipient, i.e., the applicant, is in India and the place of supply of service is India.
- Consequently, printing charges collected by the printer from the applicant are taxable under RCM.

Question (iv)

- Though the supplier is located outside India and the recipient is located in India, the place of supply of service is outside India, in terms of Section 13 of IGST Act 2017.
- Therefore, the warehousing services of printed books would not constitute as 'import of services' and hence, would not be exigible to GST on a reverse charge basis.

Question (v)

Lastly, as the supply of books from the warehouse to the customer is not chargeable under GST, the applicant is not entitled to avail ITC on inputs and inputs services on the said transactions.

Our Comments

The ruling in respect of Question nos. (i) to (iv) is in line with the prevalent understanding in the industry.

However, Section 17, while restricting the ITC in respect of effecting exempt supplies specifically excludes transactions covered under Schedule III from the expression 'value of exempt supply'. Therefore, the ruling in respect of question no. (v) restricting the claim of ITC may not stand scrutiny by appellate authorities.

Whether the issue and supply of own closed Pre-Paid Instrument's (PPIs) by the appellant to its customers will be treated as supply of goods or supply of services?

M/S. Kalyan Jewellers India Limited [2021 (4) TMI 885- AAAR, Tamil Nadu]

Facts

- The appellant is engaged in the manufacturing and trading of jewelry.
- The appellant provides PPIs to their customers as a part of sales promotion activity. These PPIs are called 'gift vouchers/cards.'
- According to the appellant, the vouchers are not marketable as they have a redeemable value and have no intrinsic value.
- The vouchers are issued to the customers in cards and in digital formats; they are not sold to them.

Based on the above, the AAAR ruled as follows:

- Both, Sections 12 and 13 of the CGST Act, 2017, which deal with determining the time of supply for goods and services, respectively, use the term 'voucher.' This indicates that the voucher relates to both goods as well as services.
- A voucher is a means for advance payment of consideration for the future supply of goods or services.
- When a voucher is issued, though it is just a means of advance payment of consideration for a future supply, Sections 12 and 13 determine the time of supply of the underlying goods or services.
- Voucher per se is neither goods nor service.
- It, therefore, follows that where a voucher identifies the goods or service that can be received on redeeming, the supply of the underlying goods or service takes place at the time of issue of the voucher.
- Therefore, the gold voucher (representing the underlying future supply of gold jewelry) would be taxable at the time of issue of the voucher.
- It must be emphasized that this interpretation does not result in double taxation as transfer of gold subsequently will not be subject to tax at the time of redeeming the voucher for gold, as the supply is deemed to have been done at the time of issue of the voucher itself.

Our Comments

On one end, the GST law defines a voucher as an instrument creating an obligation to accept it as consideration for the supply of goods or services, while the time of supply provisions refer to 'supply of vouchers by a supplier' thereby equating it with goods/services. This has created complexities in the taxability of vouchers.

The question of whether 'voucher' can be treated as an 'actionable claim' creates an additional layer of complexity.

The present ruling by the AAAR clearly states that a 'voucher' itself is neither goods nor service but simply a form of consideration for the actual supply of goods or services. The ruling brings in much-needed clarity to taxpayers with a similar business model.

However, the question of taxability in scenarios such as where a voucher is sold by a different party and ultimate goods/services are supplied by a different party remains unanswered.

Tax Talk

Indian Developments

Direct Tax

Microsoft nets USD 620 million benefit on top court withholding tax verdict

[Excerpts from Business Standard, 27 April 2021]

As per the recent Supreme Court ruling, companies that distribute software of overseas entities in India are not liable to withhold tax as the money being paid is not payment of royalty for the user of the copyright in computer software. As per the recent regulatory filings made by Microsoft, it recorded an income tax benefit of USD 620 million in the March quarter based on the principle laid by the Supreme Court in the above ruling.

India's fiscal deficit likely to fall short of the budgeted figure

[Excerpts from Live Mint, 19 May 2021]

The fiscal deficit predicted in the budget of FY21 may lesser than 9.5% of GDP, with revenue and expenditure both expected to increase.

Gem and jewelry industry in Rajasthan worry over import tariffs by US

[Excerpts from Bloomberg Tax, 29 April 2021]

The United States Trade Representative (USTR) has proposed to impose tariffs to retaliate on digital taxes. 41 Indian products, including 17 items in the gem and jewelry category, have been identified for the imposition of tariffs. As per the industry specialist in Rajasthan, many products made or processed in Rajasthan like semiprecious stones, silver jewelry, gold necklaces, and base metal chains clad with gold form part of the mentioned.

Income-tax refunds worth INR 154.38 billion issued in 1 month

[Excerpts from The Economic Times, 5 May 2021]

As per the recent data released by the income-tax department, Income-tax refunds of over INR 154.38 billion were issued to 1.173 million taxpayers in the last month. Out of this, personal income tax refunds were INR 50.47 billion in 1.151 million cases and corporate tax refunds were INR 103.92 billion to 21,487 taxpayers.

Government eases income tax norms for cash received by hospitals providing COVID-19 treatment

[Excerpts from Live Mint, 8 May 2021]

Vide a recent notification, the Ministry of Finance announced relaxation for the COVID-19 care hospitals under Section 269ST of the Income-tax Act, 1961. The central government has eased income tax norms for the COVID-19 care hospitals, dispensaries, nursing homes and COVID-19 care centers of similar facilities for receiving cash of INR 0.2 million or above from the patients.

Indirect Tax

Key amendments in the CGST (Fourth Amendment) Rules, 2021

[Notification No. 15 /2021–Central Tax dated 18 May 2021]]

Additional Commissioner granted powers to extend the time limit for filing of the application for revocation of cancellation of registration

Power has been granted to the Additional/Joint Commissioner to extend the time limit available for filing an application for revocation of cancellation of registration in terms of proviso to Section 30(1) of CGST Act, 2017.

Refund related amendments

A refund application is required to be filed within a period of 2 years from the relevant date. Through this notification, the time limitation of the said period of 2 years has been amended to exclude the period from the date of filing of refund claim till the date of communication of the deficiencies by the officer.

Further, the applicant is now allowed to withdraw his application for refund by filing an application in FORM GST RFD-01W any time before the issuance of provisional refund sanction order or final refund sanction order or payment order or refund withhold order. Once the said application for withdrawal is submitted, the amount which was debited from the electronic credit/cash ledger at the time of filing the refund application shall be credited back to the ledger from which such debit was made.

Decisions in the 43rd GST Council Meeting

The key decisions of the 43rd GST Council meeting have been captured below:

Wider ambit of IGST exemption on import of key medical supplies

a. Hitherto, IGST exemption was granted to 'free of cost' imports of essential medical items such as medical oxygen, oxygen concentrators, and other oxygen storage and transportation equipment, certain diagnostic markers test kits, and COVID-19 vaccines, etc., for free distribution. This exemption has now been extended till 31 August 2021.

b. It has been further decided to grant the IGST exemption on imports of these products even if made on a 'payment' basis up to 31 August 2021, provided such imports are for donating to the government or on the recommendation of state authority to any relief agency.

c. The aforesaid IGST exemptions have also been extended to the import of Amphotericin B [a drug used in the treatment of Black Fungus].

Amnesty scheme by capping late fee in case of delayed filing of old returns, and rationalization of late fee under CGST Act

a. To provide relief to the taxpayers, an amnesty scheme has been announced whereby the late fee has been reduced for pending GST returns of the period from July 2017 to April 2021, provided if GSTR-3B returns for these tax periods are furnished between 1 June 2021 to 31 August 2021.

b. To reduce the burden of late fee on smaller taxpayers, the upper cap of late fee is being rationalized to align the late fee with the tax liability/ turnover of the taxpayers on a prospective basis.

Announcements in relation to GSTR-9 and GSTR-9C for FY 2020-21

a. The filing of GSTR-9 (annual return) for FY 2020-21 shall be optional for taxpayers having aggregate annual turnover up to INR 20 million. GSTR-9C (reconciliation statement) for FY 2020-21 will be mandatory only for taxpayers with annual aggregate turnover above INR 50 million.

b. Further, the requirement to self-certify GSTR-9C (instead of certification from a Chartered Accountant) would be made applicable from FY 2020-21.

Extension in compliance due dates and other measures

a. In view of the COVID-19 pandemic, in addition to the extension in compliance with due dates notified earlier, further extensions have been granted to the taxpayers (especially small taxpayers).

b. Rule 36(4) for availing ITC for tax periods April, May and June 2021 will be applied cumulatively in return for the period June 2021.

c. Companies will be allowed to file returns using Electronic Verification Code (EVC), instead of Digital Signature Certificate (DSC) till 31 August 2021.

d. The time limit for completion of various actions by any authority or by any person, under the GST Act, which falls during the period from 15 April 2021 to 29 June 2021, to be extended up to 30 June 2021 subject to some exceptions. [*Wherever the timelines for actions have been extended by the Hon'ble Supreme Court, the same would apply*].

Tax Talk

Global Developments

Direct Tax

Treasury refuses to back Biden push for minimum corporation tax

[Excerpts from The Telegraph, 24 May 2021]

Ministers are refusing to back a global overhaul of corporation tax championed by Joe Biden unless the White House supports their demands to crack down on US tech titans. It is feared that if Whitehall backs the Biden minimum rate too soon, it will lose leverage for action on big tech.

The high-stakes gambit threatens ambitions to agree on major changes to the international tax system ahead of next month's G7 summit, to be hosted in Cornwall. A Treasury source said: "A minimum tax that means tax is paid elsewhere that ought to be paid in the UK will not fund the UK's schools and hospitals."

Experts at the Paris-based Organisation for Economic Cooperation and Development have been working for almost a decade on plans to establish a minimum corporate tax and force firms to pay more taxes in countries where they earn revenues.

A G7 agreement is seen as a crucial step towards a wider OECD deal, which could raise an extra $100bn (£71bn) in global revenues. But the Treasury is hunting more assurances over the tax treatment of major US companies like Facebook, Amazon and Google.

The Revised Cyprus – Russia Double Tax Treaty

[Excerpts from Mondaq, 24 May 2021]

The Republic of Cyprus and Russia had entered into a Double Tax Treaty (DTT) in 1998 in a joint effort to avoid the double taxing of income and capital generated in Cyprus. This was an effort to promote economic cooperation between the two countries.

Through its Finance Minister Mr. Constantinos Petrides, Cyprus has managed to secure the continuation of the DTT by signing on 10 August 2020 an amendment to the Cyprus-Russia double-tax treaty. The Cypriot side ensured the exemption from a 15% withholding tax on dividends for regulated entities, such as pension funds and insurance companies, as well as listed companies. In addition, interest payments from corporate and government bonds as well as Eurobonds are excluded from the 15% withholding tax in the new Cyprus Russia Double Tax Treaty. Any other type of Cyprus-based entities will still be able to avoid double taxation but at a higher rate of 15%.

In advance, the Russian side had assured the withdrawal of the termination procedures of the Convention. Furthermore, it assured that the same regulations would apply to other countries that maintain similar agreements from the same date that will apply to Cyprus, since it is a single fiscal policy. The signing will probably coincide with the arrival on the island of Foreign Minister Sergey Lavrov in September or October 2020.

OECD Tax Negotiations Offer Chance for New Approach

[Excerpts from Bloomberg Tax, 21 May 2021]

As the Biden administration begins to engage with other countries in the OECD tax discussions, some viable proposals are starting to take form. Pillar One finally has a possible path forward. And Pillar Two has become even more understandable now that the administration's domestic tax proposals overlap with the OECD negotiations. However, Pillar One steps outside transfer pricing rules.

Previously, Europe and emerging markets tailored Pillar One for digital companies and 'consumer-facing' corporations. The Pillar One proposal is not without concern. Despite being one of the most prominent digital companies, Amazon's tax structure could be unaffected by potential profitability thresholds as its profitability is too low. Current proposals on the domestic front regarding global intangible low-tax income (GILTI) and other Tax Cuts and Jobs Act international provisions create an intelligent path forward.

The White House has included several tax proposals to pay for the American Jobs Plan. The 'Made in America' tax plan has seven major proposals, half of which deal with international corporate taxes or profit shifting. Domestically, the critical international corporate tax proposals in the 'Made in America' tax plan revolve around altering the (TCJA). The overlap is quite clear since GILTI rules inspired Pillar Two's global minimum tax proposals.

The Biden administration's domestic proposals depend on a robust Pillar Two system (GILTI/SHIELD). But domestic companies believe the complexity and function of transfer pricing creates a short shelf-life for tax policy. The tax morale of these domestic companies depends on the idea that their greatest competitors will not be able to game the tax system in the long term.

Transfer Pricing

Tanzania: Rendering of intra-group services and transfer pricing audits

On 1 July 2020, the Commissioner-General of the Tanzania Revenue Authority (TRA), published the Transfer Pricing Guidelines, 2020. The Guidelines provide illustrations and simplified examples about the steps to be followed in the determination of arm's length prices, amongst others.

Tanzania's transfer pricing guidelines help taxpayers determine whether their related-party transactions—especially intra-group services—conform to the arm's length principle.

The aforesaid transfer pricing guidelines provide clarity and examples of information that taxpayers must submit to the tax authority to satisfy the "rendering test." With this clarity, taxpayers can engage in intra-group services with their related parties, being fully aware of the information that will be needed when the time comes for a transfer pricing audit.

Intra-group services

Over the years, inter-group (or intercompany) services have been among the most challenging related-party transactions for taxpayers audited by the Tanzania Revenue Authority. The type of intra-group services rendered among related parties is highly dependent on the structure adopted by the group of companies, with a majority of intercompany services conducted under centralized group structures. Common services provided among related parties are management and support, procurement and logistics, IT, human resources, strategy and planning, marketing, and advertisement services.

During a transfer pricing audit, the main issues in the analyzing of transfer pricing for intra-group services are:-

a. Whether intra-group services have been rendered?

b. Whether the provision of such services has conferred an economic benefit or commercial value to the business that enhances its commercial position?

   The Revenue Authorities generally disregard Intra-group services of the following nature during the audit:

   - Shareholders or custodial in nature
   - On Call
   - Providing incidental or passive association benefits
   - Duplicative in nature

c. Whether the intra-group charges are at arm's length prices?

Our comments

If a taxpayer does not provide the necessary evidence or provides only limited evidence, it may be concluded that no services were rendered or that only limited services were rendered. This fact is considered in the determination of the fees paid to compensate the related party rendering the services.

Therefore, as the tax authority makes efforts to reduce the ambiguity that comes with the transfer pricing audit requirements, the taxpayers need to consider how to be proactive and prepare for such audits by maintaining information that will provide clear justification for the arrangements and transfer prices applied in their transactions for those engagements with their related parties

Qatar: FAQs addressed in relation to the transfer pricing documentation

Background

While the requirement for transactions between related parties to be undertaken at arm's length existed in accordance with the OECD accepted pricing method, there was no specific provision with regards to filing the transfer pricing documentation (TPD) with Qatar's General Tax Authority (GTA). By way of a webinar, the GTA introduced additional clarification regarding the TPD requirements. The said requirements are applicable from 1 January 2020 for taxpayers with financial year-end as 31 December 2020, where the first submission deadline was due on 30 April 2021. The Qatar transfer pricing requirements are in line with OECD three-tiered approach.

In this regard, the GTA issued a set of 'frequently asked questions' (FAQs) to clarify TPD rules, including clarifications for the preparation of the Master file and Local file as. The key FAQs in this regard are as under:

Applicability of Transfer Pricing Declaration requirement

- The annual tax-free turnover of the entities or the gross assets appearing on their balance sheet should be greater than or equal to QAR10 million; and
- The entities are associated with other entities established in Qatar or abroad.

Due-date of filing the Transfer Pricing Declaration

The Transfer Pricing Declaration must be filed with the income tax return.

Substance of the Transfer Pricing Declaration

The Transfer Pricing Declaration is a lighter version of the Master File and Local File that some entities must file with the GTA.

In this regard, the following type of information must be declared:

- General information on the group of related entities
- Specific information on the reporting entity

Criteria for submitting the Master File and Local file

The entities resident in Qatar must submit a Master File and Local File when the following conditions are met:

- The annual tax-free turnover is greater than or equal to QAR 50 million and
- These entities are associated with other entities established abroad.

Information to be provided in a Master File

The information to be provided in the Master File inter-alia includes:

- The Master File should provide an overview of the multinational enterprise group (MNE) business, including the nature of its global business operations, its overall Transfer Pricing policies, and its global allocation of income and economic activity in order to assist the GTA in evaluating the presence of significant Transfer Pricing risk.
- In general, the Master File is intended to provide a high-level overview in order to place the MNE group's Transfer Pricing practices in their global economic, legal, financial and tax context.

Information to be provided in a Local File

The information to be provided in the Local File inter-alia includes:

- The Local File focuses on information relevant to the Transfer Pricing Analysis related to transactions taking place between a Qatari affiliate and associated enterprises in different countries and which are material in the context of the Qatari's tax system.
- The information would include relevant financial information regarding those specific transactions, a comparability analysis, and the selection and application of the most appropriate TP method.

Timing for preparing the transfer pricing documentation and for filling the Master File and Local File

A 30-day period is given to taxpayers to respond to specific GTA's requests for documentation and other audit-related information requests.

The taxpayers must submit their master files and local files no later than 30 June of the year following the fiscal year in question.

Indirect Tax

End of sales tax on gold and silver

[Excerpts from Yahoo! Finance]

Arkansas Governor Asa Hutchinson signed a legislation that has ended the sales tax on gold, silver, platinum, palladium bullion, and coins, making them easier to use as money in the state. In total, 40 US States have fully or partially exempted the sales tax on gold and silver, with more states expected to follow. In the opinion of these states, taxing precious metals is not fair as metals like gold and silver are held as a form of savings and investments by certain investors. The Arkansas sales tax exemption will take effect from 1 October 2021.

'Freedom week' tax holiday in Florida

Florida Governor Ron DeSantis announced a tax-free sales period in the first week of July to eliminate sales tax on museums, movie and music tickets, fishing and camping gear, bicycles, etc. Further, from 31 July 2021 to 9 August 2021 sales tax will be exempted on back-to-school supplies, clothing, shoes, etc.

Merger & Acquisition Tax and Regulatory Updates

Taxation Updates

From the Judiciary

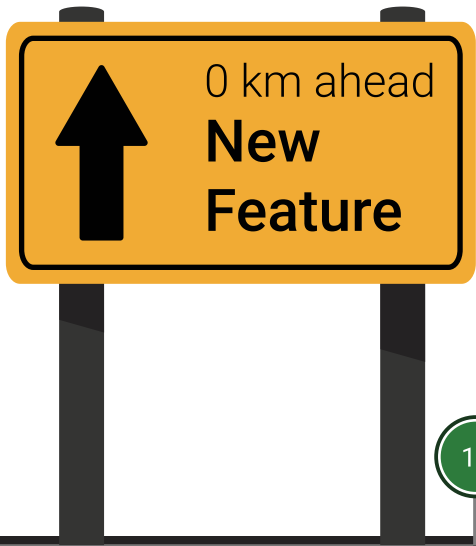
Pune ITAT: Deletes addition for share premium under Section 68 for a non-operational company in view of justified business plans

Citation: Mahalaxmi TMT Pvt. Ltd [TS-323-ITAT-2021(PUN)]

During AY 2010-11, Assessee, Mahalaxmi TMT Pvt. Ltd, issued 4 million equity shares of face value of INR 10 for a share premium of INR 90 per share. The assessee received a sum of INR 370 million through banking channels. The AO noted that while the assessee company was established in FY 2004-05, it did not carry on business activities until the relevant year. The AO also observed that the investor of the assessee company was either showing meager income or losses and the source of funds that were invested in the assessee company was not satisfactorily explained by the Investing companies. Accordingly, the AO dissatisfied with the genuineness of money received by the assessee treated the sum of INR 360 million as unexplained cash credit under Section 68 of the Income-tax Act, 1961 (the Act).

The Pune bench of ITAT upheld the decision of CIT(A) and deleted the impugned addition made by the AO on the following grounds:

- The initial onus is upon the assessee to establish three things necessary to obviate the mischief of Section 68:
  - i. identity of the investors;
  - ii. their creditworthiness/ investments; and
  - iii. genuineness of the transaction.
- The assessee has discharged its onus by furnishing the necessary details in support of the identity and creditworthiness of the parties and genuineness of the transaction.
- The details filed by the assessee were cross verified by the Revenue from the respective parties and no infirmity was pointed out in the same except doubting the creditworthiness of the parties.
- Conversely, the AO has not brought anything on record suggesting the amount credited in the books of the assessee does not belong to respective parties, but the same belongs to the assessee.
- The Revenue has accepted part of the amount shown as share application money pending for allotment as correct with respect to the identity/ creditworthiness of the party as well as genuineness of the transaction. The AO has erred in accepting part of the amount as genuine and at the same time denying part of the amount as not genuine.
- ITAT also held it is the subscriber's wisdom to acquire the shares at a premium. Thus the AO has no role to play in questioning the shares issued at the premium, particularly in the circumstances where the assessee has discharged its onus cast under Section 68 of the Act.



- Basis the documents submitted by the assessee, it cannot be said that there was no business activity carried out in the year under consideration. The assessee was in the process of setting up the plant.
- The Revenue's allegation stated that the assessee had inflated its project cost, the cost which the assessee has shown in its books of accounts has been compared with the data obtained by the AO from the Internet, which is not viable.

Our Comments

By virtue of amendment in Section 68 w.e.f. from A.Y. 2013-14, the onus on the companies receiving the funds is expanded to prove the source of source of funds, i.e., the source in the hands of the shareholder. In the post-amendment era, the above decision may not hold relevance and can fall under the ambit of Section 68 if the assessee is not able to substantiate the source of funds of the shareholders. However, once the assessee submits these necessary details, the onus shifts to the tax authority to substantiate the addition if he refutes or is dissatisfied with the details received. Furthermore, this decision once again manifests that the tax authorities questioning the viability of a business or prudence of an investor is beyond its jurisdiction

AAR rejects application over taxability of share transfer by holding that the transaction was designed prima facie for the avoidance of tax

Citation: Capex Com Ltd [AAR. No. 1373 & 1374 of 2012]

The applicants, Capex Com Ltd. (CCOM) and Capex Communications Ltd. (CCLM) are Mauritius-based companies forming part of Capex group. CCOM and CCLM held 6.19% and 15.85% stake, respectively, in Vortex Capital Limited (VCL), an Indian company. CCOM and CCLM hold TRCs issued by the Mauritius Revenue Authority and do not have any tax presence or Permanent Establishment (PE) in India.

The applicants made the investment in shares of VCL by utilizing the funds received from Capex group entities. Subsequently, such shares of VCL were pledged against the loan taken for the benefit of the Capex group entitles. In 2011, the applicants sold their stake in VCL to Aura Atlantic Sec. Ltd. (AASL), a non-resident company and the sales proceeds from the transfer of such shares were utilized to repay the aforementioned loans.

The applicants received the consideration from AASL after withholding tax at 21.012%. Prior to the above transaction, AASL had moved to the AAR to seek a ruling on the withholding liability on the amount payable to the applicants, which was admitted by AAR. Notably, the Applicants joined the proceedings as intervenors. The application was "dismissed as withdrawn" in July 2011 on the command of AASL in the presence of the Applicants' representatives. No liberty was given to file a fresh application on the same subject matter.

After the dismissal of AASL's application, the applicants moved to the AAR without seeking liberty to file a fresh application before the AAR on the same issue. The issues raised by the applicants were as under:

- Whether the gains arising from the transfer of VCL shares in the hands of the applicants is chargeable to tax in India; and
- Whether the Revenue Authorities should refund to the applicants the tax deducted at source by Aura Atlantic Sec. Ltd. from payments made to the applicants.

The AAR declined to comment on the merits of the questions posed before them and held that applications are not maintainable and liable to be dismissed based on the following observations:

- The transaction, prima facie, is meant for tax avoidance
  - The acquisition of shares of VCL was made by Capex group by routing the funds through the applicants. Shares were bought, pledged, sold by Capex group and the applicants merely lent their name to seek treaty benefits;
  - Certain loans were raised by Capex Group by pledging shares of VCL held by the applicant for Capex group's benefit;
  - Consideration received for the sale of shares was immediately utilized for the repayment of the loans availed by Capex Group; and
  - The sole purpose, it seemed, was to transfer the situs of ownership of 15.85 % in VCL to Mauritius in order to avoid capital gains tax in India
- While filing the application before the AAR, the applicants did not disclose the fact that that they were intervenors in AASL's application and thus, the applicant suppressed material facts

- No liberty was sought and granted to applicants to file a fresh application on the same subject matter, which formed a part of AASL's application. AAR had granted permission to the Interveners to put forward whatever contentions they have at an appropriate stage in 'other proceedings,' but this does not include filing of fresh application.

In view of the above, AAR rejected the application under clause (iii) of the first proviso to Section 245R (2) where the question relates to a transaction or an issue that is designed prima facie for the avoidance of tax.

Our Comments

The decision retouches upon the highly litigated issue of taxability of transfer of shares of Indian companies by the Non-resident entities, not having PE India, where the transaction is so designed that it leads to avoidance of tax in India.

Regulatory Updates

Securities Law and Compliances Corner

Amendment to SEBI (Listing Obligations and Disclosure Requirements) Regulations, 20215 (Regulations)

Following key amendments were made to the SEBI LODR vide notification dated 5 May 2021:

Business Responsibility and Sustainability Reporting (BRSR)

Regulation 34(2) of Regulations introduced new reporting requirements in respect of top 1000 listed companies on ESG (Economic, Social and Governance) parameters called BRSR.

The BRSR seeks disclosures from listed entities on their performance against the nine principles of the 'National Guidelines on Responsible Business Conduct', and reporting under each principle is divided into essential and leadership indicators. The BRSR is intended towards having quantitative and standardized disclosures on ESG parameters to enable comparability across companies, sectors and time. Such disclosures will be helpful for investors to make better investment decisions.

Applicability of Regulations

The amendment provides that certain provisions of Regulations that become applicable to entities on the basis of market capitalization will continue to apply even where the entities fall below the prescribed threshold.

Furthermore, certain regulations relating to corporate governance viz. 17, 17A, 18, 19, 20, 21, 23, 24, 24A, 25, 26, 27 and clauses (b) to (i) of sub-regulation (2) of regulation 46 and para C, D and E of Schedule V of the Regulations which are at present exempt to a listed entity having net worth below prescribed minimum. Once such listed qualifies prescribed net worth, the above regulations shall have to be complied with within six months therefrom.

It is also provided that once the above regulations attract, it will continue to be applicable to the listed entity even if their net worth again falls below the prescribed minimum unless it remains as such for three consecutive years.

Alignment with Companies Act, 2013 (Act)

The requirement of having a separate meeting of independent directors is aligned with provisions of the Act to provide that such meeting will be held in 'financial year' in place of 'a year.'

A new clause has been inserted to make it compulsory for the listed company to publish Annual Rerun, consolidated financial on its website in line with the provision of the Act.

A new subclause has been inserted to mandate listed entities to obtain secretarial audit reports in line with the provision of the Act, in addition to the existing requirement of obtaining compliance reports.

Risk management Committee (RMC)

The amendment inter alia seeks to change the following requirements w.r.t. RMC:

- The provisions of RCM shall be applicable to top 1000 listed companies (previously top 500);
- Specifies that RCM shall have a minimum of three members and majority shall be board members;
- Stipulates that at least one independent director in RCM;
- RCM to meet minimum twice in a year and time gap between two meetings shall not exceed 180 days;

The roles and responsibilities have been elaborated to include formulating risk management policy, overseeing the implementation of the same, monitoring and evaluating risks basis appropriate, methodology, processes and systems, appointment, removal and terms of remuneration of Chief Risk Officer.

Disclosure of shareholding

As per the amendment, all entities falling under promoter and promoter group shall be disclosed separately in the shareholding pattern appearing on the website of all stock exchanges. Whereas, earlier, the holding of promoter and promoter group could be disclosed on a consolidated basis.

Re-classification of any person as promoter/public

The amendment regulations have brought in certain changes to the conditions basis which the stock exchanges permit re-classification of promoter/promoter group to the public. The changes are as below:

- The time gap meeting the Board Meeting approving the re-classification and putting it up for approval of shareholders has been reduced from three to six months to one to three months;
- An exemption has been granted to a person seeking re-classification (a) where the promoter(s) seeking re-classification and persons related to the promoter(s) seeking re-classification, together, do not hold more than one percent of the total voting rights in the listed entity; (b) where re-classification is pursuant to a divorce;
- The process does not apply if re-classification is in pursuance of resolution plan approved under Section 31 of the Insolvency Code or pursuant to an order of a Regulator under any law subject to the condition that such promoter(s) seeking re-classification shall not remain in control of the listed entity

Our Comments

These amendments consolidate various circulars as well as bring provisions in line with the Act. The amendments also modified the language of the Regulations to bring more clarity and bring gender neutrality which was lacking in the regulations.

Relaxation in timelines for compliance with regulatory requirements by Debenture Trustees due to COVID-19

SEBI, in the wake of the surge in COVID-19 cases, decided to extend the timelines for the following regulatory requirements of the SEBI circular dated 12 November 2020 for the quarter/half year/ year ending 31 March 2021 (hereinafter referred to as Circular), which were required to be performed by debenture trustees periodically:

Regulatory requirements of SEBI circular dated 12 November 2020	Extended Timeline
Submission of reports/ certifications to Stock Exchanges as per clause 2.1 of Circular	15 July 2021
Various disclosures on the website as per clause 2.1 of Circular	15 July 2021
Reporting of regulatory compliance as per clause 5 of Circular	31 May 2021

Our Comments

The said relaxations would bring much-required relief to the Debenture Trustees in these difficult times.

Companies Act, 2013

The Ministry of Corporate Affairs (MCA) has provided various relaxations to ease the compliance burden on corporate during the COVID-19 situation. Following are key relaxations provided by the MCA

Relaxation in the timeline to file forms and additional fees [General Circular No.06/2021 dated 3 May 2021]

Granted relaxation to companies and LLP's in timeline to file certain forms (due for filing during 1 April to 31 May 2021) and additional fees payable on such forms till 31 July 2021.

Relaxation of time in filing forms relating to charges [General Circular No. 07/2021 dated 3 May 2021]

Provided relaxation in delay in filing forms relating to creation/modification of charges on the companies. Accordingly, the timeline from 1 April to 31 May 2021 shall not be reckoned while counting days for filing of the form.

However, the said Circular shall not apply in the following cases:

- The filing of e-Forms CHG-1 and/or CHG-9 is done **before the issue of Circular, i.e., 3 May 2021;**
- The timeline for filing of e-Forms CHG-1 and/or CHG-9 has already expired prior to 1 April 2021 (that is 120 days from the date of creation or modification of charge);
- If the filing of e-Forms CHG-1 and/ or CHG-9 is delayed beyond 120 days from 1 June 2021, despite the relaxation given of time till 31 May 2021;
- Filing of e-Form No. CHG -4, for the Satisfaction of Charge.

Gap between two Board Meetings [General Circular No. 07/2021 dated 3 May 2021]

Relaxed the mandatory requirement of having an interval of not less than 120 days between two board meetings as per Section 173 of the Companies Act, 2013. The same stands extended as 180 days for the next two quarters for the Financial Year 2021-22.

Accordingly, the gap between two consecutive Board Meetings may extend to maximum 180 days during the quarter- from April to June 2021 and from July to September 2021, instead of 120 days.

Clarification on the spending of CSR funds for 'creating health infrastructure for COVID care', 'establishment of medical oxygen generation and storage plants' etc. [General Circular No. 09/2021 dated 5 May 2021]

MCA issued a circular in continuation to Circular No. 10/2020 dated 23 March 2020, wherein it was clarified that spending of CSR funds for COVID-19 is an eligible CSR activity.

It further clarified that spending of CSR funds for 'creating health infrastructure for COVID care', 'establishment of medical oxygen generation and storage plants', 'manufacturing and supply of oxygen concentrators, ventilators, cylinders and other medical equipment for countering COVID-19' or similar such activities are eligible CSR activities under item nos. (i) and (xii) of Schedule VII of the Companies Act, 2013 relating to the promotion of health care, including preventive healthcare and, disaster management respectively. The companies, including Government companies, may undertake the activities or projects or programs using CSR funds, directly by themselves or in collaboration as a shared responsibility with other companies, subject to fulfillment of Companies (CSR Policy) Rules, 2014 and the guidelines issued by this Ministry.

Clarification on offsetting the excess CSR spent for FY 2019-20 [Circular dated 20 May 2021]

MCA had made an appeal on 30 March 2020 to MDs/CEOs of top 1000 companies in terms of market capitalization to contribute generously to "Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund" (PM CARES Fund). It was stated that such contribution to 'PM CARES Fund' may include unspent CSR amount, if any, and any amount over and above the minimum prescribed CSR amount for FY 2019-20, which can later be offset against the CSR obligation arising in subsequent financial years.

In relation to that, it is now clarified that where a company has contributed any amount to 'PM CARES Fund' on 31 March 2020, which is over and above the minimum amount as prescribed under Section 135(5) of the Companies Act, 2013 (Act) for FY 2019-20, and such excess amount or part thereof is offset against the requirement to spend under Section 135(5) for FY 2020-21 in terms of MCA's aforesaid appeal, subject to the conditions that:

- the amount offset as such shall have factored the unspent CSR amount for previous financial years, if any;
- the Chief Financial Officer shall certify that the contribution to 'PM CARES Fund' was indeed made on 31 March 2020 in pursuance of the appeal and the same shall also be so certified by the statutory auditor of the company; and
- the details of such contribution shall be disclosed separately in the Annual Report on CSR as well as in the Board's Report for FY 2020-21 in terms of Section 134 (3) (o) of the Act

Our Comments

The relaxations are helpful as, due to the COVID-19 situation administratively, it becomes difficult and painful to meet the compliance timelines. Also, clarifications on CSR give much-needed clarity, especially during pandemic where helping hand from corporates plays an important role.

Compliance Calendar

Direct Tax
Indirect Tax

4 June 2021

GSTR-3B for the month of April 2021 by taxpayers with an aggregate turnover of up to INR 50 million.

7 June 2021

Payment of Tax Deducted at Source (TDS) and Tax Collected at Source (TCS) in May 2021

9 June 2021

Payment of tax through GST PMT-06 for the month of April 2021 by taxpayers under Quarterly Return Monthly Payment (QRMP) scheme

10 June 2021

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

13 June 2021

GSTR-6 for the month of May 2021 to be filed by Input Service Distributor (ISD)

15 June 2021

- Payment of first installment of advance tax for all taxpayers other than taxpayers opting for presumptive taxation for the assessment year 2022-23 (15% of estimated tax liability to be deposited on a cumulative basis)
- Issuance of TDS certificates for the quarter of January to March 2021

20 June 2021

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

26 June 2021

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

28 June 2021

Uploading B2B invoices using Invoice Furnishing Facility under QRMP scheme for the month of May 2021 (optional)

30 June 2021

- Furnishing of the statement of equalization levy in Form 1 for FY 2020-21
- Due date for furnishing of challan-cum-statement in respect of tax deducted under Section 194-IA, 194-IB in the month of May, 2021
- Filing of Statement of Financial Transaction

30 June 2021

GST ITC-04 for the period from January 2021 to March 2021 to be filed by taxpayers sending/ receiving material to/from job-worker

Alerts

COVID-19 Second Wave Impact: Recent Direct and Indirect Tax Relaxations

13 May 2021

Read Here https://bit.ly/3x4C3eT

Mumbai ITAT allows the claim of a non-resident taxpayer to reduce its taxable royalty income, pursuant to an Unilateral APA, to which it was not a party!

18 May 2021

Read Here https://bit.ly/3v2rs3l

Central Board of Direct Taxes (CBDT) notifies rules for computing FMV for a 'Slump sale'

26 May 2021

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

GST Council recommends Amnesty Scheme, extends import exemptions on COVID-19 supplies

30 May 2021

Read Here https://bit.ly/3icD93Q

Revised Tax Penalties for various defaults under UAE VAT Law and amendments in Executive Regulations

3 June 2021

Read Here https://bit.ly/34MqrBi

Webinars

Diversify to differentiate: Indian Tax and Legal Landscape

Organizer - Tricor Japan/One Asia Lawyers

26 May 2021

Watch Here https://bit.ly/3gaBhHP

Direct Tax Summit

Organizer - Achromic point

28 May 2021

TDS/TCS Declaration Management Solution

Recent amendments on Tax Deduction at Source (TDS) and Tax Collection at Source (TCS) requires companies to ensure that the appropriate declarations from the vendors, customers, and shareholders are obtained. Considering the volume of vendors, customers, and shareholders, it might be a challenging and cumbersome activity for large organizations to manage the entire process manually.

Nexdigm (SKP)'s TDS/TCS Declaration Management Solution helps organizations in managing this compliance by automating the entire process of collecting declarations from customers/vendors/shareholders.

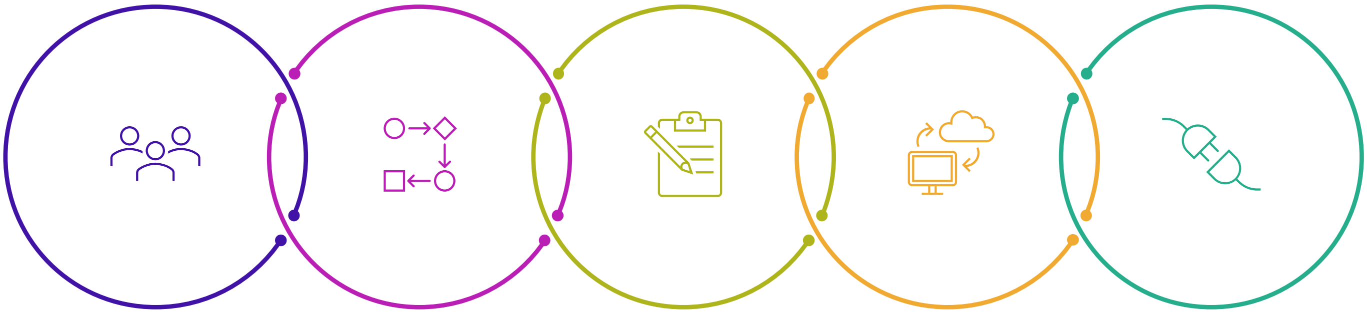
Challenges

- Identifying customer withholding taxes on purchase of goods, to ensure companies don't charge TCS
- Informing material vendor on Company's position on TDS deduction on purchase, so vendors don't charge TCS
- Identify vendors who are non compliant in terms of filing tax returns
- Tracking declaration cumbersome
- Application of penal rate required

Nexdigm's Automated Solution for Managing Declarations

Entering Vendor/Customer masters in system → Profiling and sending out automated e-mails with link → Customers/Vendors to fill declaration online → Detailed Report for ERP integration

Benefits



- Bulk Processing Capabilities for large number of Vendors/Customers
- Automized process for collection and management of declaration
- Facility to upload physical declaration
- Real-time Dashboard and Repository
- Detailed reports to integrate with accounting system

Schedule A Demo

About Nexdigm (SKP)

Nexdigm (SKP) is a multidisciplinary group that helps global organizations meet the needs of a dynamic business environment. Our focus on problem-solving, supported by our multifunctional expertise enables us to provide customized solutions for our clients.

Our cross-functional teams serve a wide range of industries, with a specific focus on healthcare, food processing, and banking and financial services. Over the last decade, we have built and leveraged capabilities across key global markets to provide transnational support to numerous clients.

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

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

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