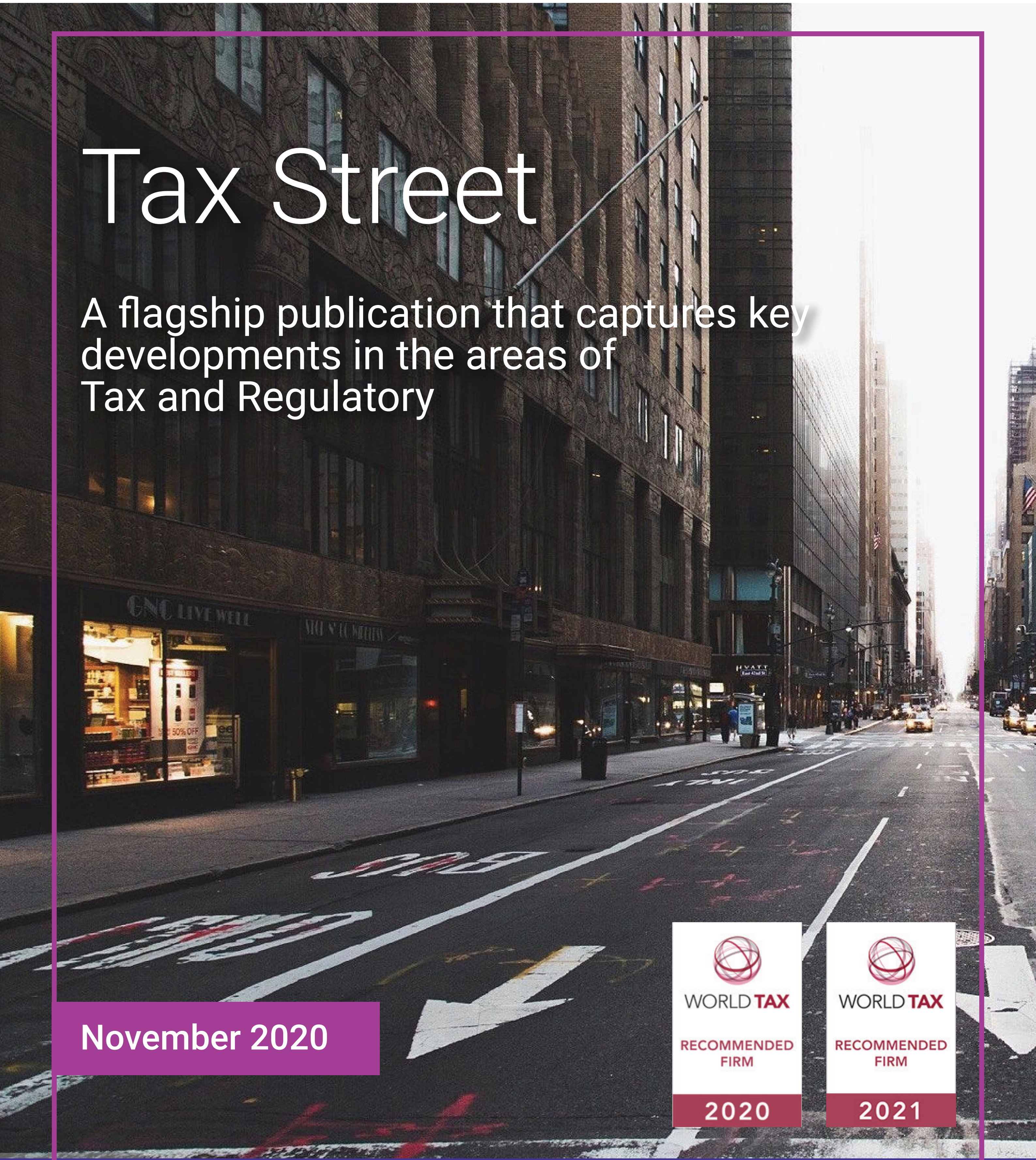

Tax Street

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

November 2020

WORLD TAX
RECOMMENDED FIRM
2020

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2021

Tax Street

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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 November 2020.

- The **'Focus Point'** covers an insight into the significance of the Customs (Administration of Rules of Origin under Trade Agreement) Rules, 2020.
- Under the **'From the Judiciary'** section, we provide in brief, the key rulings on important cases, and our take on the same.
- Our **'Tax Talk'** provides key updates on the important tax-related news from India and across the globe.
- Under **'Compliance Calendar'**, we list down the important due dates with regard to direct tax, transfer pricing and indirect tax in the month.

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

Warm regards,
The Nexdigm (SKP) Team

Focus Point

An insight into the significance of the Customs (Administration of Rules of Origin under Trade Agreement) Rules, 2020

As part of its commercial, strategic and diplomatic endeavors over the decades, India has entered into various Preferential Trade Agreements (PTAs) and Free Trade Agreements (FTAs) with different countries and trade blocs. The countries/ trade blocs with which India has such trade agreements include ASEAN, Mercosur, Malaysia, South Korea, etc. As part of such PTAs and FTAs, India provides complete or partial exemptions from Customs duty on import of specified commodities from these countries.

Such concessional imports require adherence to certain conditions such as the fulfillment of the 'Regional Value Content' (RVC) or the 'origin criteria.' The origin criteria intend to ensure that the partial or full Customs duty exemption benefits are provided only for goods originating from countries/trade blocs with which India has entered into PTAs/FTAs.

In recent times, certain Indian manufacturers have raised apprehensions with the government that the Customs duty exemption benefits under these trade agreements are misused by some importers by claiming benefit in respect of goods which do not originate from the specified countries, thereby hampering domestic manufacturing as well as resulting in a disadvantage to non-FTA importers. In certain cases, even the Indian Customs authorities were seeking to deny Customs duty exemption benefits to importers by disputing the regional value content mentioned in the Certificate of Origin. However, such action on the part of the Customs authorities was struck down by the courts in several cases.

Introduction of CAROTAR

A need was felt for Indian Customs officials to have wider powers to deny Customs duty exemption benefits to importers in case of inadequate information. Therefore, Hon'ble Finance Minister, in her Budget speech on 1 February 2020, announced the insertion of Chapter VAA - Administration of Rules of Origin Under Trade Agreement, in the Customs Act, 1962. Thereafter, the Customs (Administration of Rules of Origin under Trade Agreement) Rules, 2020 [CAROTAR] were notified vide Notification No. 81/2020- Customs (N.T.) and made effective from 21 September 2020 for importers making claim of a preferential rate of duty under any trade agreement.

The CAROTAR are in addition to the Rules of Origin, which have been already notified under various PTAs/FTAs, and intend to provide further powers to the Customs officials to inquire into imports where they have a reason to believe that the origin criteria has not been met.

Responsibilities of the importer under CAROTAR

The CAROTAR casts additional responsibilities on the importer vis-a-vis the Origin Rules. A snapshot of these changes has been captured below:

*Under Origin Rules**		*Under CAROTAR**		*Additional responsibilities of importer*
• Submit copy of Certificate of Origin (COO) at the port of importation; • Provide information/ documents as may be asked for by the Indian Customs authority in accordance with the Indian Customs law. [however, earlier the Indian Customs law did not have any such specific provision] **Origin Rules issued under the India-ASEAN FTA have been considered*	+	• Declare that goods qualify as originating goods; • Possess sufficient information on country of origin; • Furnish information in prescribed manner (i.e. Form I); • Exercise reasonable care as to the accuracy and truthfulness of the information. **Importer is not absolved of its responsibility by simply submitting COO*	〉	• Go beyond the COO and obtain additional information about the imported goods; [maintain this information for five years] • Exercise reasonable care in obtaining information + ensure accuracy of information; • Obtain and verify the information to avoid denial of Customs duty benefits at the time of clearance of goods; • Deal only with compliant foreign suppliers to avoid any hindrance in availing exemption benefits.

It can be seen that the CAROTAR casts the responsibility on the importer to go beyond the COO and 'exercise reasonable care' that the imported goods qualify under the origin criteria under the respective trade agreement. As a result, the Indian Customs officials can ask the Indian importer to provide additional information in relation to the origin of the goods, and such importer cannot shed responsibility by simply submitting the COO.

Powers granted to Indian Customs authorities

The CAROTAR has granted additional powers to the Indian Customs authorities, which have been captured in the below graphic:

*Under Origin Rules**		*Under CAROTAR*		*Additional responsibilities of importer*
• Verifying authenticity of COO; • Request retroactive check by the foreign issuing authority on the cost statement's based on current cost and prices; • Suspend preferential treatment pending completion of the check; • In exceptional circumstances, request verification visits at the premises of the foreign supplier. *[Origin rules also empower the Customs officer for requesting information from importer as per the Customs law, but earlier the Customs law did not contain any such specific provisions]*	+	• Requisition further information and supporting documents from the importer; • In case of failure to furnish information/documents, request for verification visit at the premises of the foreign supplier; • Suspend preferential treatment if information/documents provided by importer provides sufficient evidence that the goods do not meet the origin criteria. Such suspension may also be effected during pendency of the verification.	〉	• Deny preferential duty claim if: - Verification authority (VA) fails to respond/provide information; - During pendency of such verification process; - Information provided by VA provides sufficient evidence that goods do not meet the origin criteria. • Deny claim of preferential duty in case of identical goods imported from the same exporter/producer.

Thus, the CAROTAR grants significant powers to the Customs authorities by allowing them to ask the Indian importer to provide crucial information such as:

- The manufacturing process is undertaken in the country of origin;
- Originating criterion fulfilled by the manufacturing process – e.g., minimum regional value content, change in tariff classification, etc.;
- Following details of originating material/components used in the production of imported goods:
  - Whether manufactured by the producer of final goods?
  - Whether procured locally from a third party?
  - In the case of third party procurement, whether the producer has confirmation and documentary proof of origin?
- Certain additional details in relation to criteria applied to determine that import goods qualify as originating goods.

Conclusion

The government's step to regulate the imports claiming preferential benefits will no doubt give a boost to Indian manufacturing by making the cost of the indigenous products competitive with the foreign imports. However, there are certain sectors where the domestic manufacturing capabilities may not be fully developed, and the importers would still rely on foreign suppliers to meet their demands. In such cases, the introduction of CAROTAR can result in various practical challenges, such as:

- Can Indian importers make their foreign suppliers understand the necessity to obtain the additional documentation/information?
- Will the foreign suppliers agree to provide sensitive data of their costing/local procurements etc., to the Indian importer to justify the originating criteria?
- Whether the Customs officers at the port have the expertise to understand the cost structure data of the foreign supplier? *[Usually, such valuation aspects in case of related party imports are handled by the Special Valuation Branch]*
- The term 'reasonable care' is subjective and can trigger avoidable litigation.

Therefore, the successful implementation of CAROTAR will require close monitoring by the Indian Government to ensure that genuine importers under various PTAs/FTAs are not burdened with cumbersome and onerous requirements by the jurisdictional Customs authorities.

From the Judiciary

Direct Tax

When a Dependent Agent of the assessee is remunerated at arm's length basis, then whether any further attribution of profits can be made in the hands of the assessee in India?

ESPN Star Sports Mauritius Vs. ACIT
ITA Nos. 3760 & 4542/Del/2016

Facts

The taxpayer is a partnership firm established under the laws of Mauritius on 29 March 2002, and is engaged in the business of acquiring and allotting advertisement time (Airtime) and programme sponsorship in connection with programming via non-standard television from Mauritius on ESPN, Star Sports and Star Cricket Programming services. The taxpayer had entered into an agreement with ESPN Software India (P) Ltd., India, which was engaged in the business of acquiring the airtime from the taxpayer and allotting it to various Indian advertisers and advertising agencies. The sale of airtime by Taxpayer to ESPN India is outside India. Further, it has no office in India and/or any operations in India.

The taxpayer claimed that the income arising from advertisement airtime is business income, and in the absence of a Permanent Establishment (PE) in India, the same is not taxable.

The Assessing Officer (AO), relying upon the orders of assessment years 2003-04 and 2004-05 held the transaction to be principal to the agent and not on a principal to principal basis. It was further held by the AO that ESPN India constitutes PE of the taxpayer under Article 5(4) of the India-Mauritius DTAA. The AO attributed part of the gross profits to the PE.

Aggrieved by the attribution of the AO, the taxpayer pleaded before the Delhi Tribunal irrespective of whether Dependent Agent PE is constituted or not when ESPN India is remunerated at an arm's length basis, then no further attribution of profits can be made in the hands of the assessee in India.

Held

While deciding the matter in the taxpayer case, the Delhi Tribunal noted that the factual aspects in the years 2003-04 and 2004-05 were at variance; the taxpayer had appointed the Indian company as an agent to sell air time for advertising. Subsequently, it changed the agreements and made the Indian company as the principal, which purchased air time and sold it to different customers.

The Delhi Tribunal held that where ESPN India was remunerated at an arm's length by taxpayer, which has been accepted by the AO/TPO of ESPN India and also the taxpayer, then no further attribution of profits is to be made in the hands of the assessee. A similar proposition has also been laid down by the Delhi Tribunal in the assessee's own case for assessment years 2003-04 and 2004- 05.

The tribunal relied on the following judgment:

- Honda Motors Co. Ltd. vs ADIT [2018] 92 taxmann.com 353 (SC)
- Asstt. DIT vs E-funds IT Solutions Inc. [2017] 86 taxmann.com 240/251 Taxman 280/399 ITR 34 (SC);
- BBC Worldwide Limited [2011] 203 taxman 54 (Del. HC)s.

Our Comments

The judgment has reiterated the principle that where remuneration of an agent is at arm's length, no further attribution has to be done on account of PE laid down by various courts in the past.

However, this may lead to a tax arbitrage, as an Indian company would have taxed at 30% (plus applicable surcharge and cess), whereas the PE of a foreign company is taxable at 40%(plus surcharge and cess). The judicial precedents have not provided observation/comment on this aspect.

Whether fees for intermediary services paid to the HUB entity be considered as FTS?

Can a foreign company constitute a PE in India without a place of disposal?

Bombardier Transportation Sweden AB Vs. The DCIT
ITA No. 859/Del/2016

Facts

The taxpayer is engaged in the business of manufacture of train control and signaling systems for the mass transit system. The taxpayer is a HUB entity for the Rail Control Solutions [RCS] businesses of Bombardier Group, and it houses functional heads for various functional areas like administration, procurement, engineering, quality, program management, and marketing, each catering to worldwide RCS business.

During the year, the taxpayer entered into international transactions with Bombardier Transportation India Ltd [BTIN] and received fees for intermediary services. Such income from intermediary services was not offered to tax by the taxpayer. It was of the opinion that as per protocol 7 of India Sweden DTAA, the scope of FTS is restricted on account of agreement between India and a third state, which is a member of OECD. In the light of this, reliance was placed on the Portuguese Treaty, wherein the scope of FTS is restricted on account of the requirement of the 'Make Available' clause.

However, the AO disregarded the position adopted by the taxpayer and made additions considering the income from intermediary services as FTS.

Objections were raised before the DRP but were of no avail. Instead, DRP enhanced the income of the taxpayer on account of PE in India. DRP examined the agreement between the taxpayer, BTIN and DMRC and concluded that taxpayer has PE in India in the form of BTIN and accordingly attributed the income earned by the taxpayer from an offshore supply of goods and equipment to the PE.

Held

The House of Lords was of the opinion that as far as the taxability of Intermediary services is concerned since the appellant is a tax resident of Sweden, it is entitled to benefits of Indo-Sweden DTAA and protocols thereof, and Protocol 7 of the Treaty provides the scope of taxability of FTS which is restricted on account of agreement between India and a third state, i.e., Portuguese Treaty in this case. The fact that the provision of the service may require technical knowledge, skills, etc., does not mean that technology is made available to the person purchasing the service. Thus, it was held that intermediary services cannot be considered as FTS failing the 'Make Available' test as envisaged in India-Portuguese DTAA.

Further, with respect to the enhancements made on account of PE, the Delhi Tribunal held that the undisputed fact is that the supplies made under the BS-02 agreement were offshore supplies. Relying on the Hon'ble Supreme Court's ruling in the case of Ishikawajima HarimaHeavy Industries Ltd, only such part of the income as is attributable to the operations carried out in India can be taxed in India. Further, for the operation carried out in India, the tribunal considered the agreement between the taxpayer and BTIN and found that as per the MOU, the scope of work between the appellant and BTIN are clearly bifurcated.

It was found that the entire findings of the DRP are based on an erroneous appreciation of the wrong facts. It has considered the contract RS 02. This contract is between BTIN, Bombardier Transportation, Germany, and DMRC, for which Bombardier Transportation Germany has raised invoices to BTIN for offshore manufacture and supply of equipment, whereas the contract under consideration is between DMRC and Consortium taxpayer and BTIN towards offshore supply train control and signalling equipment.

The tribunal also highlighted that taxpayer does not have any place of business in India and the DRP held that BTIN is the PE of the appellant in India without appreciating the true facts that the appellant has no place of disposal in India in the office of BTIN from where the appellant could have conducted its business in India.

Our Comments

Determination of PE is a factual exercise. However, the judgment has highlighted the relevance of place of disposal for constituting PE of the taxpayer.

Transfer pricing

Whether capacity utilization adjustment is allowed during the first year of operations?

Colwell & Salmon Communications [I] Ltd - ITA No. 3054/DEL/2011 [A.Y 2004-05] and ITA No. 1117/DEL/2012 [A.Y 2005-06]

Facts

The taxpayer, a 100% subsidiary company of Gujrat Heavy Chemicals Limited (GHCL), commenced operations from July 2003 being its first year of operation. The taxpayer provided back-office services to GHCL's subsidiary in the US (AE). The taxpayer has applied the Transactional Net Margin Method (TNMM) as most appropriate method to benchmark the said transaction for transfer pricing (TP) purposes.

The tax authorities proposed a TP adjustment rejecting the taxpayer's claim of taking AE as the tested party. The tax authorities did a benchmarking search taking the taxpayer as the tested party.

When the matter reached the first appellate authority, the taxpayer submitted an analysis justifying ALP even if the taxpayer is taken as the tested party. However, the taxpayer claimed capacity utilization adjustment under this approach (being the first year of operation), which was accepted by the first-level appellate authority.

Ruling by ITAT

ITAT observed that the taxpayer was in its first year of business operations and had operated only for nine months in the year under consideration and that it has not achieved an optimum level of capacity utilization. ITAT stated that the taxpayer has to absorb certain start-up costs and fixed operating costs and observed that it had an unutilized capacity of 47.35%.

Also, In the subsequent years, capacity utilization has been increased from 50% to 100%, thereby having no reason to not consider the unutilized capacity adjustment as upheld by the first appellate authority.

ITAT further held that the alternative TP study prepared by the taxpayer, taking itself as the tested party, fulfills the requirements of TP regulations. The operating margins of the taxpayer being higher than the comparables adopted by the taxpayer as well as by the TPO justify that the taxpayer's transactions are at arm's length.

In the result, the appeal of the revenue is dismissed, and the appeal is ruled in favor of the taxpayer.

Our Comments

Capacity underutilization in initial years is certainly an important factor affecting net profit margin in the open market.

Thus such adjustment is necessary in in initial years of operations to help taxpayer absorb various start-up costs.

However, the business reason for underutilization should be well documented in the transfer pricing study report.

Can a protective adjustment be sustained even if transactions are upheld at arm's length?

Sumitomo Corporation India - ITA No.8932/Del/2019

The taxpayer is engaged in the business of facilitating import and export activities both directly and indirectly on behalf of various customers in India and overseas and earns commission income. While international transactions of the taxpayer with one of the AE is covered by Bilateral APA, a transaction with this AE was held at arm's length as per APA, and no adjustment was proposed.

The taxpayer had entered into similar transactions with AEs other than the one covered under APA. The TPO held that since profitability in respect of transaction with such other AEs is the same as that of margins earned by an AE covered under Bilateral APA, also since the functional profile is the same, such transactions are also considered at arm's length.

However, based on segmental data available, the TPO observed that commission income earned by the taxpayer as a percentage on FOB value of goods from its AE segment is 2.49% as compared to 3.03% earned from a non-AE segment. Considering that higher functions were performed for the AE segment, TPO adjusted commission from non-AEs at 5% on an ad-hoc basis and proposed TP adjustment on a protective basis.

ITAT rejected the CUP analysis adopted by tax authorities, based on the fact that various dissimilarities existed in the transaction with AE vis-à-vis non-AE. The differences were majorly on account of-

a. Huge differences in volume on a FOB basis;

b. Different geographies dealt with AE and non-AE segment;

c. Dissimilarity in products involved in controlled and uncontrolled transactions.

ITAT thus remanded the issue back to the TPO to examine and benchmark international transactions by adopting TNMM as the most appropriate method and taking the Berry ratio as PLI, as adopted in previous assessment years and accepted by Hon'ble High Court.

ITAT also stated that once TPO has held the transactions entered into by taxpayer with its AEs are at arm's length, there arises no justification to make any protective adjustment under the regime of TP adjustment.

Our Comments

Protective adjustment cannot be applied as long as transactions are concluded at arm's length.

The principle of consistency applies when there is no change in the functional profile.

CUP can be applied as the most appropriate method only when there is a very high degree of similarity between the control and uncontrolled transactions.

Can domestic sales be considered as CUP for export sales?

Dow Chemical International Pvt Ltd. - ITA No. 3054/DEL/2011 [A.Y 2004-05] and ITA No. 1117/DEL/2012 [A.Y 2005-06]

Facts

The taxpayer is engaged in the business of manufacturing and distributing silicon-based specialty chemicals and lubricants. The taxpayer has entered into the following intra-group transactions:

a. Export of finished goods

b. Payment towards services availed amongst others.

The taxpayer benchmarked export sales using TNMM as the most appropriate method aggregating with imports and royalty.

The TPO applied CUP as the most appropriate method for export sales and proposed an adjustment comparing prices with domestic third party sales. Further, in respect of payment made towards services availed, TPO rejected benchmarking done by the taxpayer and determined the arm's length price on an ad-hoc basis.

Ruling by ITAT

ITAT confirmed the taxpayer's contention that the CUP method requires strict product comparability and that price of the product varies basis the geographical location. As a result, the price of the products sold in domestic markets cannot be compared to export sales, and thus CUP method cannot be applied if sufficient comparable export sales transactions are not available. The matter was restored back for the tax officer to conduct a fresh analysis.

Further, the ITAT also deleted the adjustment made towards payment of services availed, noting that instead of applying any prescribed methods or CUP and bringing on record comparable uncontrolled transactions, TPO benchmarked the transaction on estimate basis. Further, it held that if TPO was not satisfied by the taxpayer's benchmarking under TNMM, it should have independently benchmarked the transaction by applying one of the prescribed methods.

Our Comments

While considering whether controlled and uncontrolled transactions are comparable, regard should be given to broader business functions rather than just product comparability.

Application of CUP needs elimination of differences.

Indirect Tax

Whether a company located outside India that has entered into a Maintenance and Repair Contract (MARC) with an Indian customer required to obtain GST registration and discharge GST liability?

[Background: As per Notification No.10/2017-Integrated Tax (Rate) dated 28.06.2017, the recipient of service is liable to pay IGST under reverse charge mechanism (RCM) on 'import of services.']

IZ Kartex – Appellate Authority for Advance Ruling (AAAR), West Bengal [2020 (11) TMI 528]

Facts

- The appellant is a company incorporated in Russia and has entered into a MARC with an Indian customer;
- The appellant has deployed an Indian company as the sub-contractor who issues invoices to it. In turn, the appellant is issuing invoices on the customer against the supply of service;
- Certain issues in payment channel necessitated the appellant to open a branch and bank account in India, and they also obtained a GST registration;
- However, the customer contended that it is liable to pay GST under RCM and asked the appellant to revise its invoices by reducing the GST element;
- On an application, the AAR ruled that the appellant is liable to pay GST under the forward charge, which is the subject matter of the appeal;

Given the above facts, the AAAR ruled as follows:

- While going through the impugned ruling, it is seen that the AAR has not considered the fact that the entire control of the activities would rest with the foreign entity, which had entered into an agreement with the customer;
- The AAR has not adduced any finding to draw the conclusion that the appellant registered in India maintains suitable structures in terms of human and technical resources to provide the service for which the MARC has been entered into between the parties;
- Therefore, the criteria for 'fixed establishment' are not met;
- It is amply clear that the appellant's foreign entity is providing the service;
- Therefore, the supply of service by the appellant to the customer qualifies as 'import of service,' and the customer is liable to pay GST under RCM.

Our Comments

The GST implications on the foreign service provider in such tripartite arrangements is a grey area given the possibility of varied interpretation of concepts such as 'Fixed Establishment.' The interplay of 'Fixed Establishment' under GST vis-à-vis 'Permanent Establishment' under the direct tax laws also adds to the complexities and requires a comprehensive analysis of the contractual terms to determine the GST implications.

This ruling should serve as an important reference point for foreign companies operating under a similar model in India and should help them to understand the GST implications on their business.

Whether the 'Type 3' tests/exams conducted by the Respondent company qualify as Online Information and Database Access or Retrieval (OIDAR) Services on which it is required to pay GST?

[Background: As per Section 2(17) of IGST Act, OIDAR services means services whose delivery is mediated by information technology over the internet and the nature of which renders their supply essentially automated and involving minimal human intervention.]

NCS Pearson Inc. – AAAR, Karnataka [2020 (11) TMI 956]

Facts

- The Type 3 test contains MCQs as well as essay-based questions;
- The candidate has to physically visit a test center;
- The computer-based algorithm provides a final result for MCQs and indicative score for essay-based questions;
- The essay-based questions are then sent to a human evaluator, after which a final score is provided over the email;
- The AAR held that since Type 3 tests are scored after the human intervention, it should be outside the purview of OIDAR, and therefore exempt from GST;
- The ruling of the AAR was challenged by the department before the AAAR.

Given the above facts, the AAAR observed as follows:

- An essay is given to a human scorer as well as to the Automated Essay Scoring (AES) program;
- A machine-human score correlation serves as a good indicator of whether the AES is returning a stable consensus score of the essay. Therefore, the role of the human scorer is in effect a means to ensure the reliability of the AES program;
- For this reason, we hold that the involvement of the human element in the assessment of essay responses is well within the realm of 'minimum human intervention;'
- Further, even from the perspective of the candidate, the human involvement is minimum in the entire process of the Type-3 test starting from the manner of registering for the test, the actual test-process and the outcome of the test, as all stages are automated;
- We hold that the service provided for the Type-3 test is classifiable as an OIDAR service.

Our Comments

The tests for determining whether an activity qualifies as an OIDAR service are being widely debated upon under the Indian GST law as well as the EU VAT law, which contain similar provisions for OIDAR services. The CBIC has also issued a flyer on OIDAR services wherein it has laid down various illustrations of what does or does not qualify as an OIDAR service.

The post COVID-19 era may witness an increase in litigations on OIDAR provisions, with many foreign universities and institutes providing distance coaching and educational content to Indian students.

Tax Talk

Indian Developments

Direct Tax

Government stands defiant, rules out rollback of digital tax

[Excerpts from Money Control, 26 October 2020]

India introduced a digital tax called equalization levy in 2016 at the rate of 6%, which was payable by Indian residents on online advertisement services purchased from non-resident companies. From 1 April 2020, the scope of equalization levy has been expanded to include a 2% levy on all online sales of goods or services into India by non-resident e-commerce operators. As a response, the US initiated an investigation under section 301 of the Trade Act, 1974 into the digital services taxes that had been adopted, mentioning that the countries are unfairly targeting American tech companies by a levy of such taxes. Also, the Indian Government has received multiple requests for a rollback on digital tax by the industry, however, it has confirmed that it will not be re-considering any variations in the current provisions.

Recognized PFs can invest in 'A' or higher rated securities: CBDT

[Excerpts from Money Control, 25 October 2020]

In order to be treated as recognized employee provident funds, such funds are required to invest 45-55% of its funds in Government securities, 35-45% in debt (bonds and term deposits), 0-5% in short term debt (money market, liquid funds), 5-15% in equity, asset-backed securities (units of REITS, InVITs) 0-5%. The CBDT has recently diluted norms for investment purposes to bonds with a minimum 'A' rating, as against the earlier requirement of 'AA' rating. This gives such funds the flexibility to hold their current investments in bonds, even where such papers have been downgraded.

People opting for lower tax regime not eligible for LTC stimulus: Government

[Excerpts from Business Standard, 30 October 2020]

Recently, the government extended the Leave Travel Concession (LTC) Cash Voucher Scheme to private sector employees, the public sector units, and state governments as well with the motive of providing tax benefits to the employee and boost his spending power. The Finance Ministry has clarified that people who are opting for the lower tax regime provided in the Budget for 2020-21 are not eligible for the new incentive package through leave travel concession. For the private sector employees who are not opting in for a lower tax regime would be eligible to get tax exemption under the Scheme (similar to benefits for central government employees subject to a few modifications).

Government makes it mandatory for foreign companies operating e-commerce platforms in India to have PAN

[Excerpts from Economic Times, 28 October 2020]

It would be mandatory for foreign entities operating e-commerce platforms in India or having access to the Indian market to have permanent account numbers (PAN) for paying up equalization levy. The CBDT has amended existing forms for such levy to create separate sections for reporting of the payments of a levy by e-commerce operators. The changes also include the option of keying in Aadhaar in place of PAN while filing the details. Such changes have been made to align the annual statement and forms with the new e-commerce equalization levy introduced. The annual statement and appeal documents mandate quoting the PAN / Aadhar of non-residents, thereby supporting the view that non-resident e-commerce entities may need to obtain PAN in India.

ITAT disposes of 7,251 cases during the COVID-19 pandemic via virtual hearings

[Excerpts from Financial Express, 10 November 2020]

During the COVID-19 pandemic, the ITAT has set up virtual benches across the country, which are extensively for case hearings used during the Pandemic period. The ITAT President Justice P P Bhatt announced that the tribunal has disposed off 7,251 cases against the 3,378 new cases filed during the pandemic period. The total pendency of ITAT as on 1 November 2020 is 83,546. Further, physical requirements are now replaced by a portal that facilitates e-filing of appeals, documents, and other documents by the litigants.

Indirect Tax

Waiver of penalty on non-compliance of QR code provisions

[Notification No. 89/2020–Central Tax dated 29 November 2020]

The government has waived off the penalty applicable on non-compliance of Quick Response (QR) code provisions between 1 December 2020 to 31 March 2021, applicable to businesses with a turnover of more than INR 500 crores, provided that such businesses comply with the said provisions from 1 April 2021.

E-invoicing provisions to be made applicable to more businesses from 1 January 2021

[Notification No. 88/2020–Central Tax dated 10 November 2020]

E-invoicing provisions under Rule 48(4) of the CGST Rules will be made applicable to businesses with turnover exceeding INR 100 crores in any preceding financial year from 2017-18 onwards, with effect from 1 January 2021.

Tax Talk

Global Developments

Direct Tax

The US will soon issue the results of 301 investigations

[Excerpts from Business Standard, 20 November 2020]

The U.S. Trade Representative in June started investigations into the moves of at least 10 countries, citing Section 301 of the U.S. Trade Act of 1974, which allows it to retaliate for trade practices it deems unfair. The U.S. will soon issue the results of probes into Austria, Italy, and India's decisions to tax local revenue of internet companies such as Facebook Inc., which could pave the way for retaliatory tariffs, people familiar with the situation said. Determinations on the three countries are due because all of them have instituted so-called digital services taxes -- or levies on local sales of companies such as Alphabet Inc.'s Google.

Plans for an international digital-tax agreement brokered by the Organization for Economic Cooperation and Development have been delayed until at least summer 2021 after it became clear the initial deadline of reaching a deal this year wouldn't be met. The goal had been to replace an individual country's digital taxes with a global plan, but it's unclear how quickly a deal can be reached.

Argentina's 'Wealth tax' bill approved in the lower house

[Excerpts from Buenos Aires times, 19 November 2020]

Lawmakers in Argentina's lower house approved a bill that will see the nation's wealthy citizens slapped with a one-off capital levy on assets.

The so-called 'wealth tax,' backed by President Alberto Fernández's government, will see individuals with more than USD 2.3 million in assets make an 'Extraordinary Solidarity Contribution.' State coffers are running low amid the coronavirus pandemic, and officials are hoping the tax could rake in upwards of USD 3 billion.

According to estimates, the levy will affect between 9,000 and 12,000 of Argentina's richest citizens. The one-time contribution will affect individuals whose declared assets exceed 200 million pesos and runs at a progressive rate of up to 3.5% for assets in Argentina and up to 5.25% on assets and goods outside the country.

Swiss government approves new law governing tax treaties

[Excerpts from MNE Tax, 11 November 2020]

Switzerland's Federal Council, agreed to significant amendments to the laws relating to tax treaties. The new legislation would apply provided the applicable tax treaty does not contain any deviating provisions. The new law would stipulate how mutual agreement procedures in tax treaties are to be carried out at the national level.

Moreover, the new law contains the key points on withholding tax relief based on international agreements, as well as criminal provisions in connection with relief from withholding taxes on capital income.

Transfer Pricing

Denmark: High Court re-emphasizes the importance of detailed documentation analysis while rejecting discretionary adjustment made by the tax authority[1]

Facts

- Ecco Sko A/S (the taxpayer) was a holding company of Ecco Group involved in a shoe manufacturing business and undertaking all phases of shoe production;
- The taxpayer has purchased as well as sold goods from/ to group entities;
- The taxpayer has prepared documentation and benchmarked inter-company sale transactions using the Comparable Uncontrolled Price (CUP) Method by comparing the prices charged to the related party vis-à-vis unrelated party. Further, inter-company purchase transaction was benchmarked by adopting the Resale Price Method (RPM) wherein gross profit margin was compared;
- Additionally, the taxpayer has submitted another documentation to the tax authority (SKAT) in response to various questions raised under Transfer Pricing scrutiny;
- Tax authority disregarded the documentation of taxpayer and made the adjustment as under:
  - For a purchase transaction, tax authority adopted a higher price of the unrelated party as CUP;
  - For sale transaction, the tax authority adopted the Transactional Net Margin Method using the subsidiary as the tested party
- The National Tax Court upheld the judgment of lower authorities.

The decision of the Danish Western High Court (High Court)

- On the inadequacy of Transfer Pricing Documentation, High Court verified the facts and held that documentation submitted by the taxpayer is sufficient as a basis for assessing whether the arm's length principle is complied with or not. Therefore, it cannot be equated with a lack of documentation.
- In relation to the purchase of goods transaction, the High Court observed that the taxpayer has already documented the fact to justify higher prices from a related party. The taxpayer has mentioned that the group entity applied the 'injection method' to manufacture the shoe whereas third party manufacturers used the 'cemented method' in which the upper part of the shoe is glued to the sole. Since 'cemented method' requires much lesser investment, prices are quite lower. Therefore, the High Court upheld the purchase transaction of the taxpayer at arm's length.
- In relation to the sale of goods transaction, High Court observed the differences in functions performed, risks assumed, and assets owned by the tested party and external entities and held that tax authority has not taken into consideration such analysis, quality assurance factor, local conditions and business strategies. Moreover, the tax authority has wrongly included few cloth manufacturing entities in comparable companies set to compare the margin with the tested party (shoe manufacturer).
- Therefore, the High Court rejected the addition made by the tax authority and deleted the adjustment

USA: Tax Court ruled in favor of IRS by allowing the adoption of comparable profit method over comparable uncontrolled transaction method in case of royalty payment[2]

On 18 November 2020, the United States Tax Court partly ruled in favor of the Internal Revenue Service (IRS) and confirmed the USD 9 Billion reallocation of income to Coca-Cola from its foreign manufacturing affiliates for the period 2007-09.

Facts

- Coca-Cola US (the taxpayer) owned the logo, brand name, secret formulas, and other necessary Intellectual Property (collectively known as IP) to manufacture and distribute the beverage;
- The taxpayer has licensed its foreign manufacturing affiliates (supply points) the right to use this IP to produce concentrate in order to sell it to third party bottlers. Subsequently, these third party bottlers produce finished beverages for sale to distributors throughout the world.
- Supply points compensated the taxpayer under the formulary apportionment method agreed in 1996 while settling the taxpayer's case for the period 1987-1995.
- The tax authority observed that 1996 agreement did not cover the transfer pricing methodology to be used post-1995. Therefore, it held that the inter-company transaction did not reflect the arm's length principle.

1. https://skat.dk/skat.aspx?oid=2297293&lang=da (SKM Number – SKP2020.397.VLR and Case Number – BS-714/2016)
2. https://www.ustaxcourt.gov/InternetOrders2/OrdersSearch.aspx (155 T.C. No. 10)

- The tax authority adopted the Comparable Profit Method (CPM) to determine how much the supply points should have paid the taxpayer for using its IP. Further, the tax authority concluded that supply points were essentially wholly-owned contract manufacturers executing the steps in the beverage production process, and therefore, independent bottlers were appropriate comparables for CPM analysis.
- Applying CPM, IRS determined the ratio of operating profit to operating assets for six supply points of taxpayer between 94% to 215%. Against this, the interquartile range of independent bottlers were 7.4% to 31.8%. Therefore, IRS re-allocated the excess income of supply points to the taxpayer.

The taxpayer's proposed approach and views of the tax authority

- Against the above addition, the taxpayer proposed three alternate Transfer Pricing methods to justify the arm's length nature of the transaction. We have summarized these alternative methods and rejection reasons of the tax authority as under:

Approach	Analysis by taxpayer	Reason of rejection by the tax authority
Alternative 1 – Comparable Uncontrolled Transaction Method	In this method, operations of Supply points were compared with fast-food franchisee companies.	Tax authority rejected the proposed method basis following reasons: • Fast-food franchisee companies cannot be compared with beverages company; • There were differences on account of a long term supply contract, territorial exclusivity, management's responsibility of fast food master franchisee, etc.; • Analysis of taxpayer did not include data of unrelated party involving the transfer of trademark, secret formula and other IP.
Alternative 2 – Residual Profit Split Method	• In this method, the taxpayer estimated the value of non-routine intangibles of supply points; • The estimate was based on capitalized advertising costs less amortization, rather than on external market bench-marks	Tax authority rejected the proposed method basis following reasons: • Lack of consensus on whether the costs of advertising can be capitalized into an intangible asset and asset's useful life; • Such an asset would have no value to an unrelated party because an unrelated party could not use the asset without infringing taxpayer's trademarks; • The taxpayer owned all important IPs and not the supply points.
Alternative 3 – Unspecified Method	It was based on a fee structure mainly used to compensate hedge fund managers.	Tax authority found that this method compensates taxpayers only for asset management services and not for the use of taxpayer's IP by supply points.

In view of the above, the Court ruled in favor of IRS and upheld the adjustment after allowing certain adjustment.

Sri Lanka: Issues Transfer Pricing disclosure form and its corresponding guide for AY 19-20[3]

In accordance with Regulation 6 of the Transfer Pricing Regulation introduced in December 2018, taxpayers who have entered into a controlled transaction with an AE exceeding LKR 200 million are required to submit a Transfer Pricing Disclosure Form along with Return of Income.

With this background, the Inland Revenue Department has published the transfer pricing disclosure form to be used for the assessment year 2019/2020. The form is also accompanied by a guide that aims to address FAQs and provides illustrative guidance regarding the contents of the form.

The Form requires the taxpayers to provide information in the following format:

Column I Transaction	Column II Associated Enterprise	Column III TP Methodology	Column IV Arm's Length Price
Category of Transaction	Name of Associated Enterprise	TP Method	Comparable Price/Range
Amount of Transaction (in LKR)	Associated Enterprise's Tax Identification Number (TIN)	Profit Level Indicator	AL Range - Max
(In case of loans) Amount of principal	Country of Residence	Price/Profit Margin/Rate	AL Range - Med
(In case of loans) ending balance	Criteria of Associated En-terprise	Tested Enterprise	AL Range - Low

Indirect Tax

Spain to slash VAT on health masks to 4%

Amidst the COVID-19 pandemic, Spain is the latest country to announce a reduction in the sales tax rate on masks, with a substantial reduction in the VAT rate from 21% to 4%. The Budget Minister also announced that the Spanish government will ensure that such VAT reduction results in a lower price for the consumer and not higher profits for businesses.

[excerpts from the online edition of Reuters]

The UK publishes guidance on the movement of goods between Great Britain and Northern Ireland

In view of Northern Ireland remaining under the UK VAT regime but the EU-VAT rules on goods applicable to it under the Northern Ireland Protocol, the UK's Her Majesty's Revenue and Customs (HMRC) has published guidance on the movement of goods between Great Britain and Northern Ireland from 1 January 2021. Under the obligations in the Protocol, import VAT will be due on goods that enter Northern Ireland from Great Britain (England, Scotland and Wales). The same will also broadly apply to goods entering Great Britain from Northern Ireland. A few key guidances have been captured below:

VAT on goods sold between Great Britain and Northern Ireland

VAT will continue to be accounted as it is currently on goods sold between Great Britain and Northern Ireland. This means that the seller of goods will continue to charge its customers VAT and should show this on its invoices. However, the seller will not be able to claim this back as input VAT.

If the customer receives an invoice from the seller showing that VAT has been charged, it may use this as evidence in order to reclaim the VAT as input VAT, subject to the normal rules.

VAT on goods sold from Great Britain, transported via Northern Ireland, to an EU member state

The seller will be liable to account for the import VAT and zero-rating the goods on export to the EU. The VAT charged will be accounted for as output VAT on the UK VAT return by the seller. The seller will not be able to claim this back as input VAT.

VAT on goods sold to Great Britain from an EU member state via Northern Ireland

Where goods are sold and moved via Northern Ireland to Great Britain from a VAT-registered business in an EU member state, including the Republic of Ireland, the seller will be liable to account for the import VAT to HMRC. The EU business will have to register with HMRC and account for the VAT on a UK VAT return. The UK customer will be able to reclaim the VAT as input VAT, subject to the normal rules.

3. http://www.ird.gov.lk/en/Downloads/IT_Corporate_Doc/Asmt_TPDF_01_2019_2020_E.pdf

Compliance Calendar

Direct Tax

7 December 2020

Payment of TDS and TCS deducted/collected in November 2020

15 December 2020

Payment of third instalment of advance tax for FY 2020-21 (75 percent of the estimated tax liability to be deposited on a cumulative basis)

30 December 2020

- Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IA for the month of November 2020.
- Due date for furnishing of challan-cum-statement in respect of tax de-ducted under section 194-IB for the month of November 2020.

31 December 2020

- Due date for furnishing return of income for non-corporate assessees who are not required to be audited for AY 2020-21
- The date for furnishing of various audit reports under the Act, including tax audit report and report in respect of international/specified domestic transaction for AY 2020-21.

Notes

However, it must be noted that in September 2020, the Taxation and Other Laws (Relaxation of Certain Provisions) Bill, 2020 was passed in parliament to incorporate the effect of Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 dated 31 March 2020 read with the notification dated 24 June 2020. The said bill 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. However, the benefit of the extended due date shall not be available in respect of payment of taxes (including equalization levy). 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 the same is paid after the due date but on or before 31 December 2020.

The government by virtue of a press release dated 24 October 2020 has extended the due date of furnishing the Income Tax Returns and Audit reports

- The due date for furnishing return of income for taxpayers required to get their accounts audited [for whom the due date (i.e. before the extension by the said notification) as per the Act is 31 October 2020] has been extended to 31 January 2021.
- The due date for furnishing return of income for taxpayers who are required to furnish report in respect of international/specified domestic transactions [for whom the due date (i.e., before the extension by the said notification) as per the Act is 30 November 2020] has been extended to 31 January 2021.

Though the due date for filing the income tax return for AY 2020-21 has been extended, no relief has been provided for payment of interest under section 234A if the self-assessment tax liability exceeds INR 1 Lakh.

Compliance Calendar

Indirect Tax   Transfer Pricing

10 December 2020

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

11 December 2020

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

13 December 2020

GSTR-6 for the month of November 2020 to be filed by Input Service Distributor (ISD)

20 December 2020

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

22 December 2020

GSTR-3B for the month of November 2020 to be filed by all registered taxpayers having turnover of up to INR 50 million in the previous financial year and located in Category A states

24 December 2020

GSTR-3B for the month of November 2020 to be filed by all registered taxpayers having turnover of up to INR 50 million in the previous financial year and located in Category B states

31 December 2020

- Extended due date for filing of GSTR-9 for the period April 2018 to March 2019 to be filed by the regular taxpayers
- Extended due date for filing of GSTR-9A for the period April 2018 to March 2019 to be filed by the persons registered under composition scheme
- Extended due date for filing of GSTR-9C for the period April 2018 to March 2019 to be filed by taxpayers with an aggregate turnover of more than INR 20 million

31 December 2020

- Form No. 3CEB (FY 2019-20) Transfer Pricing Certificate / Re-port
- Maintenance of transfer pricing documentation FY 2019-20
- Master file Designation in Form No. 3CEAB

Notes

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

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

Alerts

Regulatory

Alignment of the HFC's regulatory framework with NBFC's

2 November 2020
Read Here https://bit.ly/325cGfI

SEBI Amends Circular on Schemes of Arrangement by Listed Entities

5 November 2020
Read Here https://bit.ly/3eq8QD6

Webinars

Equip your Business for the Oman VAT

Organizer - Nexdigm (SKP)
3 November 2020
Watch it here https://youtu.be/VlpbSFZn6DI

Direct Tax Summit - Virtual Conference

Organizer - Achromic Point
6 November 2020

Economic Substance Regulations – Preparing first Annual Return and Revised Notification

Organizer - Nexdigm (SKP)
9 November 2020
Watch it here https://youtu.be/MJYCY9Gn0LE

Upcoming Webinar

7th Transfer Pricing Asia Summit

Organizer - Inventicon
10 - 11 December 2020

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Easy Remittance Tool

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

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

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

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