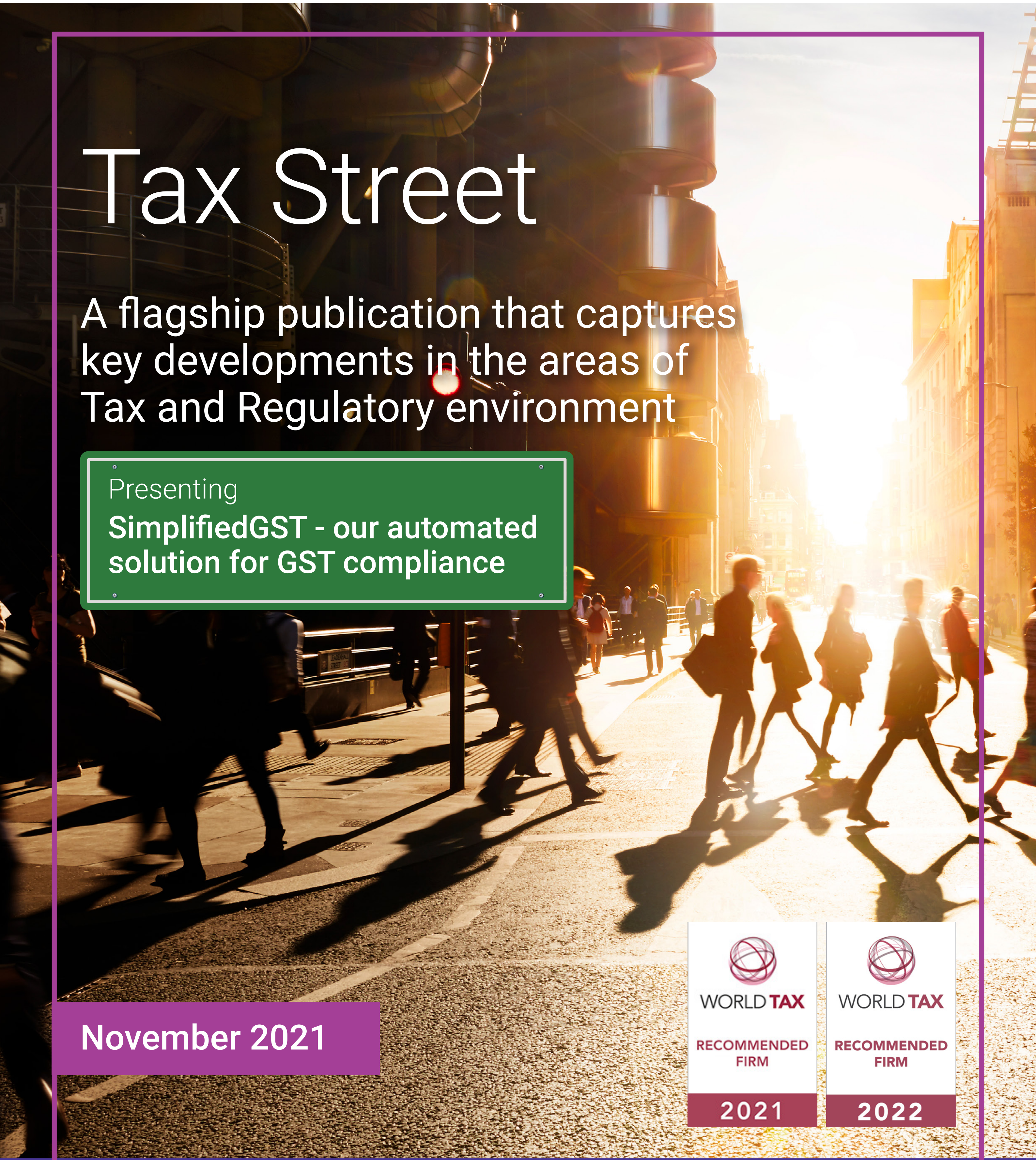
Tax Street

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

Presenting
SimplifiedGST - our automated solution for GST compliance



WORLD TAX RECOMMENDED FIRM 2021

WORLD TAX RECOMMENDED FIRM 2022

November 2021

www.nexdigm.com

Introduction

Tax Street

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

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

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

Warm regards,
The Nexdigm (SKP) Team

Focus Point

Transfer Pricing Impact on the New Dividend Tax Regime of India

The taxation aspect when it comes to dividends has undergone many changes over the years. The Dividend Distribution Tax (DDT) was introduced in 1977 in India, wherein dividend income was not taxed in the shareholders' hands. Instead, the company paying dividends used to pay DDT at a flat rate. The incidence of tax payable on the dividend income was shifted to the shareholders in 2002 and thereafter again in the hands of the company in 2003.

With the aim of making the Indian capital market more attractive and increasing the flow of foreign investments, the Indian government proposed changes to the existing dividend DDT regime through the Union Budget for the fiscal year 2020-2021, wherein the burden of taxability has once again moved in the hands of the shareholders.

A. Inter-play with Transfer Pricing (TP) provisions

In an ideal scenario, dividends are considered as an appropriation of profits (current or previous years). Such profits are after-tax profits, and therefore, while DDT was in force, all taxes were paid on net profits, the applicability of TP on dividends from a practical point of view had no or little relevance.

The implications of the payment of dividends between two Associated Enterprises (AE) as per Section 92A of the Income-tax Act (the Act) have been a much-debated affair under the Indian TP Regulations.

We have encapsulated below the interplay between the payment of dividends and its implication from an Indian TP standpoint:

- To apply the TP provisions in relation to the transaction pertaining to payment of dividends, it must first qualify as an international transaction. There should be a way to compute the Arm's Length Price(ALP) of the said transaction as mandated under the Indian TP Regulations.
- For a transaction to qualify as 'International transaction' as per Section 92B, it should have the following minimum characteristics:
  1. To begin with, there has to be a 'transaction.'
  2. The transaction has to be with two or more AEs, of which at least one AE has to be a non-resident entity.
  3. The transaction is in the nature of purchase, sale or lease of tangible/intangible property, provision of services, lending or borrowing of money or any other transaction having a bearing on the profits, income, losses or assets, etc. [read with explanation to Section 92B inserted by the Finance Act 2012].

Read ahead to understand if the payment of dividends qualifies the definition of 'transaction' as given under the Act.

Definition of Transaction as per Section 92F (v) of the Act

(v) "transaction" includes an arrangement, understanding, or action in concert,

(A) whether or not such arrangement, understanding or action is formal or in writing; or

(B) whether or not such arrangement, understanding, or action is intended to be enforceable by legal proceeding.

- For TP provisions to apply, it is imperative to analyze whether the payment of dividends qualifies under the definition of a transaction as per Section 92F (v) of the Act. It is essential to establish whether the payment of dividends can be construed as an arrangement, understanding, or action in concert, say between the company and its shareholders at the time the shareholders invest in the company.

- In relation to whether a particular inter-company arrangement falls under the definition of transaction and consequent international transaction, recourse can be taken to the various judicial precedents, which provide useful guidance on what can constitute a 'transaction.' For example, Maruti Suzuki India Ltd.[1] has elaborately discussed various interpretations to the definition of 'transaction' in the context of TP adjustment involving marketing intangible.
- All in all, one may infer that payment of dividends is not a result of any contractual arrangement or obligation (either oral or in writing) with the company's shareholders.
- Accordingly, ' a view can be taken that the payment of dividends doesn't fall under the definition of a 'transaction.'

Other important consideration

- Additionally, it is pertinent to note that the declaration of dividends is not mandatory for the company, and there is no law compelling the Board of Directors to declare a dividend. The payment of the dividend is at the sole discretion of the Management of the company.
- Though a dividend is a return on capital invested in the company, its declaration and distribution are discretionary on the Management of the company as per the Companies Act 2013.
- Recently, the Polish authorities issued guidance on whether a dividend payment among associated companies falls within the scope of the definition of a 'controlled transaction' for TP purposes. In lieu of the guidance provided, we understand that payment of dividends should not be considered as a controlled transaction. Dividends are remuneration for capital, and their allocation and payment are the results of economic activity, not an activity of economic nature. Thus, there is no requirement from a TP perspective to document the payment of dividends.
- Since the payment of a dividend is an unilateral act and does not get covered under the definition of transaction and consequently the definition of international transaction, there is no requirement to determine the arm's length price as well as per the Indian TP Regulations.

Should disclosure be made to avoid any penalty exposure?

- With the abolition of the DDT and the taxability now being transferred to the shareholders, the companies are now required to comply with Withholding Tax and Double Taxation Avoidance Agreement (DTAA) provisions. It is certain that the perception regarding dividend treatment from an Indian TP viewpoint will change.
- Although the interpretation of the 'transaction' as discussed above still holds true, however, on a prudent basis and keeping in mind the penal provisions for non-disclosure/non-reporting of transactions, the payment of dividends may be reported in Form No. 3CEB.
- At the same time, the challenge may arise on selecting the Most Appropriate Method (MAM) to benchmark the payment of dividends. In a scenario, even if we try to obtain and compare third-party comparable data, the data obtained will be volatile in nature as different companies have different criteria while determining the frequency, rate, quantum, etc.

B. Taxation impact on companies and shareholders post 1 April 2020

Dividend income received from India company

- **Taxability in the hands of resident shareholders:** The exemption benefit available to the shareholders under Section 10(34) of the Act in respect of dividend income is withdrawn w.e.f. 1 April 2020.
- **Taxability in the hands of non-resident shareholders:** The dividend income is taxable at the rate of 20% (plus applicable surcharge and cess) with no provisions of claiming any deductions under the Act or at the rate provided under the relevant DTAA (subject to availability of documents for claiming tax treaty benefit).
- **Taxability in the hands of the domestic company paying the dividends:** No liability to pay DDT, however, the companies will be liable to deduct tax under Section 194.
- **Withholding tax:** **(i) Resident shareholders:** The withholding tax rate is 10% on dividend income paid. With regard to individuals, there is a monetary threshold of INR 5000 **(ii) Non-resident shareholders:** The withholding tax rate is 20%, or the rate as per DTAA, whichever is lower.
- **Deduction of expenses from dividend income:** If the dividend is assessable to tax as business income, the taxpayer can claim a deduction of all expenses incurred to earn that dividend income.

Conclusion

With the abolition of the DDT regime and the taxability being shifted in the hands of the shareholders, there could be a consequential shift from a TP standpoint wherein the company declaring and paying dividends to its shareholders would need to ensure certain factors, i.e., rate, frequency, necessary approvals pertaining to dividends are documented well.

Additionally, keeping in mind the penal provisions pertaining to non-reporting and non-maintenance of documentation concerning the inter-company transactions, it would be prudent for the taxpayer to disclose the same and maintain adequate documentation while undertaking TP compliance.

1. ITA–710/2015. Case: MARUTI SUZUKI INDIA LTD. Vs. COMMISSIONER OF INCOME TAX. High Court of Delhi (India)

From the Judiciary

Direct Tax

Whether an income derived by a determinable trust should be subject to tax as an income in the hands of the settlor?

Abu Dhabi Investment Authority
Vs AAR/DCIT
Writ Petition No: 770 of 2021

Facts

The taxpayer, Abu Dhabi Investment Authority (ADIA), is a public institution owned by and subject to the supervision of the Emirate of Abu Dhabi. Article 4 (2) (d) of the India-UAE DTAA expressly provides that ADIA is a resident of UAE for the purposes of Article 4 thereof and, accordingly, ADIA is entitled to invoke the beneficial provisions of the India-UAE DTAA.

ADIA has settled a trust in Jersey to make investments in India. As per the deed of settlement, it is a revocable and determinable trust, i.e., ADIA is its sole beneficiary. According to ADIA, the income derived from making investment and debt securities in India was not assessable to tax in India for the trust or ADIA having regard to the provisions Article 24 of the India-UAE DTAA.

With the aforementioned view, ADIA applied an application before the Authority for Advance Ruling (AAR), however, the AAR did not accept the taxpayer's contentions.

Aggrieved by the ruling, the taxpayer has filed a writ before the Bombay High Court (HC).

Held

Ruling in favor of the taxpayer, the Hon'ble HC has held that Section 61 of the Income-tax Act (ITA) provides that any income arising to any person by virtue of revocable transfer shall be chargeable to tax as the income of the transferor. The deed of settlement shows that there is a revocable transfer by the settlor, and as such, any income arising to the trustee should be chargeable in the hands of ADIA. Furthermore, it was noted that the investment has been routed through a trust in Jersey solely for commercial expediency and not to avoid tax. Given that ADIA has right to re-assume power over the entire Trust's income as per the Deed of Settlement, it has to be assessed in terms of Section 61 in the hands of ADIA and the exemption under Article 24 of India-UAE DTAA would be attracted.

Our Comments

This is a welcome decision. The Hon'ble Bombay HC has taken into account the substance of the structure over form to determine the taxability and granting the DTAA benefit.

Whether software embedded in hardware would tantamount to Royalty?

M/s. Synamedia Limited
Vs. The ACIT
363/Bang/2017 2006-07, 504/Bang/2017 2012-13, 505/Bang/2017 2013-14 and 255/Bang/2014 2010-11

Facts

The taxpayer is a non-resident foreign company incorporated in the UK. It is in the business of supply of open digital technology and services to digital pay television (pay-TV) platform operators and content providers. The taxpayer entered into an agreement with its customers to supply integrated hardware systems along with embedded software. The hardware is primarily in the form of viewing cards, Set-top-Box (STB) and other connected components usually used in viewing television through satellite. The embedded software is required to run the hardware components.

The Assessing Officer (AO) treated the payment received by the taxpayer from the sale of embedded software as Royalty under the ITA. The Dispute Resolution Panel (DRP) upheld the draft assessment order of the AO. Aggrieved by the final assessment order, the taxpayer filed an appeal before the Tribunal.

Held

After considering, the facts on records, the Bangalore Tribunal has held that the software is only licensed for use without granting any license over the copyrights. The viewing card, STB, and the software to run it are compiled as an integrated system. While determining the tax implications, one has to look at the real nature of the transaction upon reading the agreement as a whole. Furthermore, as per the agreement no license whatsoever is granted over using the IPR in the software. License is to only use software to enable using the accompanying hardware as part of an integrated system.

Thus, the supply of software and hardware as an integrated system is akin to a supply of goods and not Royalty. The Tribunal has placed reliance on the Hon'ble Supreme Court's judgments in the case of Engineering Analysis, Ericsson and Nokia.

Our Comments

The Bangalore Tribunal, while deciding on the matter, has appreciated the fact that while deciding on taxability considering the real nature of the transaction basis, the holistic reading of the agreement is of paramount importance.

Transfer Pricing

Whether payment of Royalty to an AE be benchmarked on an aggregation or standalone basis?

Johnson Matthey Chemicals India Private Limited [TS-541-ITAT-2021(PUN)-TP]

Facts

The taxpayer is engaged in the business of manufacturing catalysts. During the course of the TP assessment proceedings for AY 2013-14, the taxpayer made payment to its AE in the UK against receipt of various intra-group services in the nature of Strategy, Finance, Human resources, IT support, etc.). Furthermore, the taxpayer made a payment towards Royalty for the technology license, which it availed from its AE. The taxpayer, during the assessment proceedings, had provided documentary evidence in the form of e-mail correspondence between local and regional personnel in order to substantiate receipt of the said services from AE.

However, the Transfer Pricing Officer (TPO) did not find the said evidence submitted by the taxpayer as sufficiently acceptable and disallowed the entire payment in relation to the intra-group services availed by the taxpayer from its AE. Furthermore, the TPO disallowed the taxpayer's payment towards Royalty as no separate benchmarking was undertaken (it was aggregated with the transaction pertaining to purchase of raw material), and no inter-company agreement was submitted.

Aggrieved by the TPO's order, the taxpayer filed an appeal before the Commissioner of Income-tax [CIT(A)] wherein CIT(A) was not in agreement with the approach adopted by the TPO in relation to the intra-group services the taxpayer had availed from its AE and also the transaction pertaining to payment of Royalty.

Aggrieved by the CIT(A)'s order, the Department filed an appeal before the Income Tax Appellate Tribunal (ITAT).

Ruling by ITAT

The ITAT acknowledged that the taxpayer had provided sufficient documentary evidences (e-mails, agreement, etc.) to support the payment made towards the intra-group the taxpayer has availed and hence was in agreement with the approach adopted by the CIT(A).

In relation to the determination of ALP for the payment of Royalty, the ITAT observed that the said Royalty payment has to be benchmarked separately and cannot be aggregated with the payment for the purchase of raw materials. Accordingly, the ITAT restored the matter back to TPO to determine the ALP.

Our Comments

From a judicial standpoint, there are a plethora of tax judgments wherein the Tax Authorities at various levels have insisted on the benefit test to be applied on all significant intra-group service payments and have asked for supporting evidence in relation to the said transaction. Thus, it is vital for the taxpayer to maintain the necessary documentation.

Furthermore, as a common practice, it is observed that for transactions pertaining to payment of Royalty, benchmarking is usually undertaken by conducting an internal or external comparability analysis and not by aggregating it with other inter-company transactions.

Whether ALP can be determined by comparing two controlled transactions and be determined by any method that is not covered u/s 92CA?

Atlas Copco (India) Limited [TS-565-ITAT-2021(PUN)-TP]

Facts

The taxpayer is engaged in manufacturing and sale of Air & Gas Compressors, Construction and Mining Equipment & Industrial. During the year under consideration, the taxpayer paid Royalty at 5% of domestic sales and 8% on export sales to its AE in consideration of receipt of technology in the form of know-how, technical training and technical assistance for the purpose of manufacturing compressors. The taxpayer aggregated the said royalty payment with other international transactions and benchmarked the same using Transactional Net Margin Method (TNMM).

However, the TPO did not accept the said approach of the taxpayer in relation to the royalty transaction and proceeded to determine the ALP by considering the royalty rate by another AE at 3% on the net sales price. However, the CIT(A), taking into account similar facts in the case of the taxpayer for earlier years, deleted the adjustment made by the TPO.

Furthermore, the taxpayer also received sales commission for rendering indenting/marketing services to AE during the year under consideration. The TPO recomputed the ALP for sales commission basis percentage of marketing cost to the total cost, wherein the TPO deducted the cost of materials and depreciation from the total cost with the rationale that the said costs do not contribute to the profits.

However, the CIT(A), taking into account similar facts in the case of the taxpayer for earlier years, deleted the adjustment made by the TPO.

Aggrieved by the decision of CIT(A), the Department filed an appeal before the ITAT.

Rulings of ITAT

Payment of Royalty

The taxpayer had relied on the Indian govevrnment's policy regarding the payment of Royalty under Foreign Technology Collaboration Agreement. The taxpayer also submitted a copy of the Press Note No.8 dated 16 December 2009, according to which the terms of which payment of Royalty at 5% domestic sales and 8% of exports is permitted under automatic approval. Furthermore, the taxpayer also placed emphasis on its own case for earlier assessment years wherein the Tribunal had held that comparison of one controlled transaction could not be made with another controlled transaction.

The Tribunal, while passing the order, relied on the above findings and dismissed the appeal filed by the Department in this regard.

Receipt of sales commission

The Tribunal further relied on the judgment of its Co-ordinate bench in the taxpayer's own case wherein the Tribunal observed that the TPO had not adopted any of the methods prescribed under Rule 10B. The Tribunal also applied the ratio of the decision of Bombay HC in the case of CIT Vs. Kodak India (P) Ltd., wherein it was observed that the method adopted by the TPO to compute the ALP was not in line with the provisions under the India Transfer Pricing regime. In view of the same, the Tribunal, while passing the order, relied on the above findings and dismissed the appeal filed by the Department in this regard.

Our Comments

ITAT has specifically placed significance on the methods prescribed by law for the determination of ALP. ALP should be determined only by using the methods prescribed by the TP provisions. Also, the ITAT emphasized the fact that for the purpose of comparability analysis, one can only compare a controlled transaction with an uncontrolled transaction.

Indirect Tax

Whether the assessee was entitled to refund of output tax liability paid in cash owing to non-operationalization of Form GSTR-2A and Circular No. 26/26/2017-GST dated 29 December 2017?

Note: Delhi HC had allowed the assessee to claim a GST refund of INR 923 Cr. upon rectification of returns. As per the HC, the non-operability of Form GSTR-2A resulted in a payment of double tax and unfair advantage to the tax authorities because of their failure to operationalize the statutory forms.

Union of India vs. Bharti Airtel Limited [TS-555-SC-2021-GST]

Facts

- Due to the non-functionality of Form GSTR-2A during the period July 2017 to September 2017, the assessee had to discharge its output tax liability in cash.
- After Form GSTR-2A became operational in September 2018, the assessee realized that it had sufficient ITC balance in Electronic Credit Ledger during the relevant period.
- According to the assessee, had Form GSTR-2A been functional, there would have been no need to pay the amount in cash, and therefore, it urged to be allowed to rectify Form GSTR-3B so as to avail ITC for the relevant period in terms of Circular No. 7/7/2017-GST dated 1 September 2017. However, Circular No. 26/26/2017-GST (impugned Circular) came in the way of the assessee in doing so.
- Therefore, the assessee approached Delhi HC, which did not set aside the impugned Circular but read down only Para 4 therein to the extent it restricted the rectification of Form GSTR-3B in respect of the period in which the error had occurred.
- Challenging the same, the Revenue approached the Supreme Court.

Judgment

- The assessee cannot be fully dependent on the auto-generated information on the common electronic portal for discharging its obligation to pay the output tax liability.
- A registered person is obliged to do a self-assessment of ITC and output tax liability basis the books of accounts and records. The position of self-assessment in the pre-GST realm, when no such auto-populated electronic data was in vogue, needs to be carried in the post-GST realm too.
- For ascertaining output tax liability, the primary source is agreements, invoices/challans, receipts of goods and services and books of accounts maintained manually/electronically and not the information in the common portal, which only acts as a facilitator to feed or retrieve information.
- Section 39(9) allows rectification of omission and incorrect particulars in the period in which these omissions, etc., are noticed. This very position has been restated in the impugned Circular.
- Paying output tax liability in cash is an option exercised by the assessee which cannot be reversed unless the law permits such reversal and swapping of entries. No provision exists in GST law to permit swapping of entries effected in Electronic Cash Ledger vis-à-vis Electronic Credit Ledger or vice versa.
- The assessee cannot be permitted to unilaterally carry out rectification of his returns submitted electronically in the Form GSTR-3B. This would inevitably affect the obligations and liabilities of other stakeholders because of cascading effect in their electronic records, which would lead to uncertainty and chaos.
- Apex Court set aside the HC judgment and upheld the validity of the impugned Circular.

Our Comments

While the Apex Court is not completely incorrect, the judgment could have wider ramifications.

On the one hand, the judiciary has invalidated the reliance on GSTR-2A treating the same as a mere 'facilitator'; however, on the other hand, availment of ITC basis the supplies appearing in GSTR-2A is being mandated through Rule 36(4) of CGST Rules, 2017 and the proposed amendment to Section 16(2) of CGST Act, 2017.

Notices are being issued to taxpayers on mismatches between ITC as per GSTR-2A vs. GSTR-3B, credit is being blocked if the same does not reflect in the GSTR-2A statement.

This judgment could now allow taxpayers to litigate the notices, basis the noting that the primary source of self-assessment should be the books of accounts and records.

Whether 'procurement operations' and 'procurement transformation & central services' undertaken by the appellant in India for its foreign holding company would constitute a supply of "intermediary services" under the GST law?

Note: Karnataka AAR had held that the activities performed by the applicant satisfy the definition of "intermediary", as specified under Section 2(13) of the IGST Act.

M/s Airbus Group India Pvt. Ltd. [2021 (11) TMI 816 –AAAR, Karnataka]

Facts

- The appellant has entered into an Intra-Group Services Agreement with its parent entity, viz. Airbus Invest SAS, France, which essentially entails procurement of raw materials from Indian vendors and facilitating a supply abroad.
  For said services, the appellant is remunerated on a cost-plus mark-up basis.
- As per the appellant, it provided 'export of services' since its role is limited to information gathering and identification of potential suppliers of aircraft parts and doesn't amount to 'arrangement' or 'facilitation' of main supply.
- Applying the principle of 'ejusdem generis' to interpret the phrase "any other person, by whatever name called," the appellant argued that the scope of "intermediary" would be limited to only such persons who act similar to an 'agent' or a 'broker' or such class of individuals.

Ruling

- The definition of "intermediary" in Section 2(13) of the IGST Act does not limit its coverage to a 'broker' and a 'agent', which are fundamentally different. Although the terms broker, agent, and intermediary may seem to be in proximity in common parlance, they do not form any category or class, nor do they constitute a genus under the GST law and, thus, the principle of ejusdem generis would not apply. The definition is to be interpreted to include persons who are not necessarily similar to 'broker' or 'agent.'
- As per the Agreement, the appellant is responsible for providing Airbus, France, with complete information about potential Indian suppliers and therefore, the said activity amounts to arranging the main supply between two principals, viz. Indian supplier and Airbus, France.
- The illustrations in Circular No. 159/15/2021-GST are not exhaustive but only indicative, and determination of whether a particular activity is "intermediary service" would depend upon the facts of the case and the nature of the contract/agreement entered into.
- The phrase "such goods or services" in the last limb of the definition implies that the person should not be supplying on his risk and reward entirely, the very goods or services whose supply he is arranging or facilitating.
- The basic characteristics of "intermediary" as laid down in the said Circular exist in the present case, and since the appellant is only arranging and facilitating the main supply of goods between the principal and the Indian supplier without undertaking the main supply on its own account, it is clearly paying the role of 'intermediary.'

Our Comments

While the Central Board of Indirect Taxes and Customs (CBIC) has clarified the scope of "intermediary services," the ruling re-emphasizes the importance of facts and nature of contract/agreement between the parties to determine whether a particular activity indeed falls within the ambit of "arranging" or "facilitating" the main supply.

With business complexities warranting an assortment of work to be undertaken, it would be imperative to have an agreement clearly detailing the precise scope of services.

Merger & Acquisition Tax

Gujarat HC: Pursuant to the National Company Law Tribunal's (NCLT) approval of the scheme, the revised return can be filed even if the due date for filing has surpassed

Deep Industries Limited [TS-1056-HC-2021(GUJ)]

The assessee, Deep Industries Limited, decided to demerge its Oil and Gas services business. Thus, a scheme of arrangement was formulated, and a company application was moved before NCLT. The assessee filed its return of income for AY 2018-19 on 30 March 2019. The scheme of arrangement was sanctioned on 17 March 2020 with an appointed date 1 April 2017. Pursuant to NCLT's order, the assessee physically filed a revised return of income on 28 July 2021. The Revenue did not consider the revised return filed by the assessee and made a protective assessment by making an addition of ~ INR 1.02 billion

The HC ruled in favor of the assessee, laying down the following observations:

- Delay in the filing of return was not due to an error or omission made by the assessee. As the order of NCLT came after the due date of furnishing the revised return, the assessee was not in a position to file the revised return, and hence the grievance of the assessee was genuine. The principal has been well settled by the Apex court in the case of Dalmia Power[2].
- The assessee had also raised a grievance via e- Nivaran facility, which was not addressed by the income tax portal, and therefore the assessee filed the return physically.
- When the Revenue is desirous of operating in the regimes of electronic mode and faceless assessment, it shall need to improvise the software and allow the revised return more particularly, when the law has been made quite clear by virtue of the direction of the Apex Court.

Our Comments

This is clearly a case of uncalled litigation for settled matters. It is high time that the ITA is amended to permit the filing of revised returns beyond the due date in such instances and put a necessary platform in place.

Mumbai ITAT: Allows set-off of accumulated losses under Section 79 on change in shareholding since the beneficial ownership remains uninterrupted

Bechtel France SAS [TS-1057-ITAT-2021(Mum)]

The brief facts of the case are that during the FY 2013-14, there has been a change in shareholding of the assessee company Bechtel France SAS. Post completion of assessment proceedings, CIT observed that the loss was erroneously allowed to be set off in view of a change in shareholding. It observed that prior to 1 January 2014, all the shares of the assessee company were held by BNT International Corporation, whereas w.e.f. 1 January 2014, all the shares were held by Bechtel Limited, which is the subsidiary company of BNT International Corporation.

The CIT, therefore, issued a show cause notice u/s 263, disallowing the set off of the brought forward losses amounting to ~INR 270 million under Section 79 of the Act.

The Tribunal ruled that Section 79 shall not be applicable in the present case citing the following observations:

- As held in the case of Amco Power Systems[3], a shareholding pattern is distinct from voting power in the company. In this case, though the shareholding of the assessee company has changed in form, but in substance, the voting power in the assessee company, which lies with Bechtel Limited (new shareholder), ultimately vests with its holding company BNT International Corporation.
- The ultimate control over the assessee company remained with the same shareholders post transfer of the shares as it was a mere case of an internal restructuring.
- Reliance is placed on the decision of Siemens India Ltd[4] to hold that Revenue is obliged to take the view that is favorable to the assessee and not adverse. Accordingly, following the decision of the Karnataka HC in the case of Amco Power Systems as against the decision of Delhi High Court in the case of Yum Restaurants[5], the proceedings initiated by CIT u/s 263 were quashed.

Our Comments

Mumbai ITAT, once again, has upheld the non-applicability of provisions of Section 79 where the ultimate shareholding remains the same.

2. Dalmia Power Limited [TS-785-SC-2019]
3. Amco Power Systems Ltd. (2015) 379 ITR 375 (Kar)
4. K. Subramanian & Anr. Vs. Siemens India Ltd. & Anr. (1985) 156 ITR 11 (Bom)
5. Yum Restaurants (India) Pvt. Ltd. [TS 5118-HC-2016 (New Delhi)-O]

Tax Talk

Indian Developments

Direct Tax

CBDT guidelines on loans and borrowings taken by sovereign wealth funds/pension funds for making tax-free investments in India

[Circular No. 19/2021 dated 26 October 2021]

Section 10(23FE) provides for exemption to sovereign wealth funds and pension funds on their income in the nature of dividend, interest and long-term capital gains arising from investment in infrastructure in India made between 1 April 2020 and 31 March 2024 subject to fulfillment of certain conditions. The said Section also provides that such funds having loans or borrowings, directly or indirectly, for making investments in India shall not be eligible for such exemption.

In order to provide further clarity to the term 'indirectly,' the CBDT, through this Circular has clarified that where loans and borrowings have been taken by the entities eligible for exemption under Section 10(23FE) as well as their holding entity or any entity in the chain of holding or an associate concern, with the purpose of making an investment in India, such entities shall not be eligible for exemption under the aforementioned Section.

However, it is further clarified that where such loans and borrowings have not been specifically taken for making an investment in India, it shall not be presumed that the investment in India has been made out of such loans and borrowings and such fund shall be eligible for exemption under the aforementioned Section.

Introduction of new Annual Information Statement (AIS)

[Press Release dated 1 November 2021]

Income Tax Department has rolled out the new Annual Information Statement (AIS) on the Compliance Portal. The new AIS includes additional information relating to interest, dividend, securities transactions, mutual fund transactions, foreign remittance information, etc.

A simplified Taxpayer Information Summary (TIS) has also been generated for each taxpayer, which shows the aggregated value for the taxpayer for ease of filing returns. The information in TIS will be used for pre-filling of return (pre-filling will be enabled in a phased manner). In case the ITR has already been filed and some information has not been included in the ITR, the return may be revised to reflect the correct information.

In case there is a variation between the TDS/TCS information or the details of tax paid as displayed in Form26AS on the TRACES portal and the TDS/TCS information or the information relating to tax payment as displayed in AIS on Compliance Portal, the taxpayer may rely on the information displayed on TRACES portal for the purpose of filing of ITR and for other tax compliance purposes.

Indirect Tax

Clarification on applicability of Dynamic Quick Response (QR) Code on B2C invoices

[Circular No. 165/21/2021-GST dated 17 November 2021]

The CBIC has clarified that wherever an invoice is issued to a recipient located outside India towards the supply of services, whose place of supply falls in India, and the payment is received by such supplier in convertible foreign exchange or in Indian Rupees (as permitted by the RBI), such invoice may be issued without a Dynamic QR Code. This is so because such a Code cannot be used by the recipient outside India to make payment to the supplier.

Clarification on certain refund related issues

[Circular No. 166/22/2021-GST dated 17 November 2021]

The following clarifications have been issued regarding certain refund-related issues:

- The time limit of two years, within which an application for refund should be filed, would not be applicable in cases of refund of excess balance in electronic cash ledger.
- There is no requirement of furnishing a certificate/declaration of not passing the incidence of tax to any other person (unjust enrichment) in cases of refund of excess balance in electronic cash ledger.
- The TDS/TCS amount, which remains unutilized in the electronic cash ledger after discharge of tax dues, can be refunded to the registered person as an excess balance in the electronic cash ledger.
- The relevant date for filing a refund claim for refund of tax paid on supplies regarded as deemed exports would be the date of filing of return related to such supplies by the supplier.

Guidelines for disallowing debit of electronic credit ledger

[CBEC-20/16/05/2021-GST/1552 dated 2 November 2021]

Rule 86A of the CGST Act, 2017 provides for conditions of use of amount available in electronic credit ledger (ECrL). In certain circumstances, if the Commissioner or an officer authorized by him, not below the rank of Assistant Commissioner, has “reasons to believe” that credit of input tax available in the ECrL has been fraudulently availed or is ineligible, he may disallow debit of an amount equivalent to such credit in the ECrL. The government has issued certain guidelines for implementation of the Rule as under:

- “Reasons to believe" shall be duly recorded by the concerned officer in writing on file before he proceeds to disallow debit of amount from ECrL of the said person.
- Such power of disallowing debit of amount must not be exercised in a mechanical manner and all the facts of the case must be carefully examined.
- Monetary limits have been issued for exercise of power under this rule by the officers.
- Amount disallowed should not be more than the amount of input tax credit that is believed to have been fraudulently availed or is ineligible.
- Since the action of restricting the debit of the electronic ledger has a bearing on the working capital of the registered person, the investigation and adjudication should be completed at the earliest.

Tax Talk

Global Developments

Direct Tax

India and USA agree on a transitional approach on Equalisation Levy 2020

[Excerpts from Press release by Ministry of Finance, 24 November 2021]

On 21 October 2021, the United States, Austria, France, Italy, Spain, and the United Kingdom reached an agreement on a transitional approach to existing Unilateral Measures while implementing Pillar 1.

India and United States have agreed that the same terms that apply under the 21 October Joint Statement shall apply between the United States and India with respect to India's charge of 2% Equalisation Levy on e-commerce supply of services and the United States' trade action regarding the said Equalisation Levy. However, the interim period that will be applicable will be from 1 April 2022 till the implementation of Pillar One or 31 March 2024, whichever is earlier.

The final terms of the Agreement shall be finalized by 1 February 2022.

USA and Turkey reach a compromise on transitional approach on Digital Service Tax

[Excerpts from US department of Treasury press release, 22 November 2021]

On 21 October 2021, the United States, Austria, France, Italy, Spain, and the United Kingdom reached a political compromise on a transitional approach to existing Unilateral Measures while implementing Pillar 1 (Unilateral Measures Compromise).

The United States and Turkey have agreed that the same terms that apply under the Unilateral Measures Compromise shall apply as between the United States and Turkey with respect to Turkey's Digital Service Tax and the United States' trade actions regarding the Digital Service Tax. Accordingly, the Unilateral Measures Compromise described in the 21 October 2021 Joint Statement is incorporated by reference into this joint statement between the United States and Turkey.

South Korea to delay crypto taxation by one year

[Excerpts from Reuters, 30 November 2023]

South Korea's finance ministry said that the National Assembly passed a bill on pushing back the planned taxation of capital gains from cryptocurrency trading by one year. South Korea had earlier said it will start taxing capital gains from cryptocurrencies starting January next year.

Transfer Pricing

Ireland adopts Transfer Pricing

Irish Finance Bill 2021

The Finance Bill 2021 released by the Irish government on 21 October sets out legislative changes related to TP, anti-tax avoidance measures, planned tax treaty ratifications and various other previously announced corporate and international tax measures.

Transfer Pricing updates

Prior to the above Finance bill, Ireland's TP rules only applied to certain trading transactions. With effect for accounting periods commencing on or after 1 January 2020, the majority of intra-group transactions are now required to be entered into on arm's length terms and documented appropriately. The expanded rules now apply to:

- all trading and non-trading transactions;
- capital transactions between associated entities where the market value of the asset is in excess of €25 million; and
- previously 'grandfathered arrangements' (which are transactions entered into pre 1 July 2010 and which were previously excluded from TP rules).

Transfer Pricing exemptions

There is an exemption from the TP rules for certain domestic Irish-to-Irish transactions together with certain robust anti-abuse provisions. However, the law does not specify the monetary limit of the transactions that are applicable for exemption.

Transfer Pricing legislation definition of "relevant person":

The bill further amended the transfer pricing definition of "relevant person" to specify that the term includes, in relation to an arrangement, "a supplier or acquirer, whose profits or gains or losses within the charge to tax would take account of any results of the arrangement."

Profit Attribution

The bill adopts the authorized the Organisation for Economic Co-operation and Development's (OECD) approach for the attribution of income to a branch of a non - resident company operating in Ireland, i.e., the profit allocation approach under Pillar 1. The bill inserts a new Section 25A TCA to provide for the application of the authorized OECD approach to the attribution of income to branches of non-resident companies in Ireland. In accordance with the OECD guidance, the relevant branch income which is attributable to a branch is the amount of income it would have earned if it were an independent and separate enterprise, that is to say, in an arm's length scenario. This amendment essentially codifies the requirement to comply with OECD guidance and introduces prescribed documentation requirements to ensure relevant branch income has been computed in line with such guidance. Penalties will apply for taxpayers who fail to provide relevant branch records to the Revenue. This new Section will come into effect for accounting periods commencing on or after 1 January 2022. SMEs will come within the scope of the new provision subject to Ministerial Order.

Indirect Tax

Implementation of UK VAT rules in free zones

[Excerpts from GOV.UK]

Free zones are secure customs zones located within a Freeport where business can be carried out inside of the UK's land border, but where different customs, VAT and excise rules apply. In order to maintain a level playing field, goods that are benefitted from a zero-rated supply in a free zone are subject to VAT if they are not sold to a customer outside the free zone within a time limit or if the rules relating to the free zone procedure are breached. The measure is expected to take effect after the Autumn Budget 2021.

UK VAT rise warning due to price hikes

[Excerpts from express.co.uk]

Sacha Lord, Greater Manchester's night-time economy expert, has warned that businesses strained by labor shortages and supply chain expenses may go bankrupt next year when VAT rises. Following a temporary pandemic cut to 5%, currently, VAT is 12.5% for the hospitality industry. Furthermore, it is expected to return to 20% in April next year under current plans.

Compliance Calendar

Direct Tax
Indirect Tax

10 December 2021

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

13 December 2021

- GSTR-6 for the month of November 2021 to be filed by Input Service Distributor (ISD)
- Uploading B2B invoices using Invoice Furnishing Facility under QRMP scheme for the month of November 2021 by taxpayers with aggregate turnover of up to INR 50 million

25 December 2021

Payment of tax through GST PMT-06 by taxpayers under QRMP scheme for the month of November 2021

30 December 2021

Due date for furnishing of challan-cum-statement in respect of tax deducted under Section 194-IB, 194-IA in the month of November 2021

31 December 2021

- Return of income for the assessment year 2021-22 for all assessee other than (a) corporate-assessee or (b) non-corporate assessee (whose books of account are required to be audited) or (c) partner of a firm whose accounts are required to be audited or the spouse of such partner if the provisions of Section 5A applies or (d) an assessee who is required to furnish a report under Section 92E.
- Furnishing of Equalisation Levy statement for the Financial Year 2020-21

11 January 2022

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

15 January 2022

The due date of furnishing of Report of Audit under any provision of the Act for the Previous Year 2020-21

7 December 2021

Payment Tax Deducted/Collected in the month of November 2021

11 December 2021

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

15 December 2021

Third instalment of Advance tax for AY 2022-23

20 December 2021

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

31 December 2021

GSTR 9 and GSTR 9C for the Financial Year 2020-21 to be filed by all applicable taxpayers

7 January 2022

Payment Tax Deducted/Collected in the month of December 2021

10 January 2022

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

13 January 2022

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

Insights

Alerts

SEBI tightens processing of schemes of arrangement

19 November 2021

https://bit.ly/3dGF3Gz

IBBI clarifies that 'no objection' from Income Tax department is not required in voluntary liquidation

17 November 2021

https://bit.ly/3DKHliK

Article

Taxation and Disclosure Requirements for Investment in AIF – An Investor's Perspective

16 November 2021

https://bit.ly/3oHaHds

Webinars & News

Webinars

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

Organizer - Nexdigm (SKP)

6 December 2021

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

Organizer - Avlara

9 December 2021

M&A masterclass-Corporate Restructuring

Organizer - Achromic Point

10 December 2021

News

Robust GST collections likely in November, uncertainty about December

https://bit.ly/3cmnYRx

18 November 2021, Business Standard

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

https://bit.ly/3pLFlSc

8 December 2021, Business Standard

What the weakness in the e-way bills foretells

https://bit.ly/31X155e

13 December 2021, Livemint

About Nexdigm (SKP)

Nexdigm (SKP) is an employee-owned, privately held, independent global business advisory provider that helps organizations across geographies meet the needs of a dynamic business environment. Our focus on problem-solving, supported by our multifunctional expertise enables us to provide customized solutions for our clients.

We provide integrated, digitally driven solutions encompassing Business Services and Professional Services, that help businesses navigate challenges across all stages of their life-cycle. Through our direct operations in the 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 multidisciplinary teams serve a wide range of industries, with a specific focus on healthcare, food processing, and banking and financial services. Over the last decade, we have built and leveraged capabilities across key global markets to provide transnational support to numerous clients.

From inception, our founders have propagated a culture that values professional standards and personalized service. An emphasis on collaboration and ethical conduct drives us to serve our clients with integrity while delivering high quality, innovative results. We act as partners to our clients, and take a proactive stance in understanding their needs and constraints, to provide integrated solutions. Quality at Nexdigm (SKP) is of utmost importance, and we are ISO/ISE 27001 certified for information security and ISO 9001 certified for quality management.

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

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

@nexdigm

*@nexdigm_*

@NexdigmThinkNext

@Nexdigm

USA Canada Poland UAE India Hong Kong Japan

Reach out to us at ***ThinkNext@nexdigm.com***

www.nexdigm.com