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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 October 2021.

- The **'Focus Point'** covers the evolving Regulatory and Tax aspects of Cryptocurrencies.
- 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

Cryptocurrencies – Evolving Regulatory and Tax aspects

India has become one of the largest markets for Cryptocurrencies. Indians have parked nearly USD 6.6 billion[1] in cryptocurrencies until May this year, as compared to USD 923 million until April 2020. India ranks 11 out of 154 nations in terms of cryptocurrency adoption, as per blockchain data firm Chainalysis. While this growth has given Indian cryptocurrency exchanges a reason to celebrate and attract global investors, the regulatory framework around the same has always remained unclear and ambiguous. The Reserve Bank of India (RBI), in its Financial Stability Report 2013, warned the public against banking on Cryptocurrencies as they posed a challenge to the economy in the form of regulatory, operational, and legal risks. Later, the RBI, in its **circular 'Prohibition on dealing in Virtual Currencies' dated 6 April 2018,**[2] prohibited the entities regulated by it from dealing in/providing any services w.r.t virtual currencies, with a 3-month ultimatum to those already engaged in such services.

However, on 4 March 2020, the Supreme Court (SC) issued its landmark judgment on the said issue ***reviving the market of Cryptocurrencies by holding them valid under the constitution, thereby giving a new lease of life to crypto companies, dealers and exchanges.*** However, in its judgment, the SC nowhere justified or determined the legal status of Cryptocurrencies in India. Currently, despite the above case, which sheds some light on the legal characteristics of virtual currencies, there is no law that expressly classifies virtual currencies as assets or goods or commodities, services, securities, derivatives or currencies. The categorization of virtual currencies into one or more of these stated classes is important, as the existing law would apply differently based on the categorization of the cryptocurrency.

On its face, cryptocurrencies could be thought of as meeting all of these 'money' roles. However, in order to be classified as money, cryptocurrencies need to satisfy the four functions of money:

- A unit of account;
- A medium of exchange;
- A store of value; and
- A standard of deferred payment.

It is important to note that cryptocurrency does not fall within the definition of currency/coin provided under the Reserve Bank of India Act, 1934, the Banking Regulation Act, 1949, the Payment and Settlement Systems Act, 2007, or the Coinage Act, 2011. Thus, what is not a currency in the first place cannot be a foreign currency under the same law. However, this question has become even more curious recently as El Salvador has recognized Cryptocurrencies as its legal tender.

The definition of 'Securities' of 'Foreign Securities' under the Securities Contract Regulation Act, 1956 is a non-exhaustive definition and does not include cryptocurrencies. Furthermore, cryptocurrencies do not derive their value from the prices or index of prices of underlying securities and hence cannot be termed as derivatives. Inconsistent with its recognition as a valid mode of payment and legal currency, the virtual currency will have to be tested as "goods." Given that cryptocurrencies are both movable and intangible, they can be considered as property in India. Based on Indian jurisprudence, such intangible movable properties may fall within the ambit of goods. A similar view was held by SC in the case of **Tata Consultancy Services**[3]**.**

1. https://scroll.in/article/999433/why-indias-cryptocurrency-boom-is-problematic
2. RBI/2017-18/154 DBR No.BP.BC.104/08.13.102/2017-18
3. Tata Consultancy Services [2001] 115 Taxman 478 (SC)

Apart from regulatory contradictions on digital currencies, it is also pertinent to understand the provisions of the Income-tax Act, 1961 (ITA) determining its taxability. The taxable events in relation to cryptocurrencies can be broadly divided into two categories—events that lead to the creation or generation of a cryptocurrency and events that relate to the secondary disposal of a cryptocurrency. A plain reading of the ITA shows that cryptocurrencies can be taxable both as capital gains tax or business tax. The ITA provides that any income arising through or from any property, asset or source in India or through the transfer of a capital asset situated in India, would be taxable in India under the head 'capital gain.' Accordingly, for a transaction to be charged to tax under the head capital gains, the following conditions should be satisfied:

- There must be a transfer of an asset; and
- The asset transferred must fall under the definition of a capital asset.

While 'capital asset' has been defined to include all kinds of fixed, movable or immovable, tangible or intangible, the property would qualify as a capital asset. However, the term 'property,' has no statutory meaning, yet it signifies every possible interest that a person can acquire, hold or enjoy. Thus, if the currencies are made for the purpose of investment, and the object of the investment is to derive dividends, then they should be treated as capital assets.

The sale of such capital asset would be liable for Indian Capital Gain tax, where such capital asset is situated in India. However, an intangible capital asset (like virtual currency), by its very nature, does not have any physical form, it does not exist at any particular location. Accordingly, it is difficult to identify the situs of such property. It is pertinent to note that the Delhi High Court(HC), in the case of **CUB Pty. Ltd.**[4] has followed the well-accepted principle of **"mobilia sequuntur personam"** which stated that the situs of the owner of an intangible asset would be the closest approximation of the situs of an intangible asset. Accordingly, the sale of cryptocurrency by Indian residents would be liable for Capital Gain Tax in India. As per ITA, capital gains on the sale of cryptocurrencies are taxed based on their period of holding. It is qualifying as long-term capital gains if cryptocurrencies are held for more than 36 months, else short-term capital gains.

Furthermore, it should be important to note that where a series of transactions have taken place for buying and selling a property, then such activity could be classified as business income rather than capital gain. There are many judicial precedents in India that serve as a guide to determine if the income from buying and selling of property (like shares of a company) would be considered as business income or capital gains. Drawing an inference from the same, when a series of cryptocurrency transactions are undertaken on a regular basis with an intention to earn profits, the cryptocurrencies are held as stock in trade, thus the income should be classified as business income. Although the above parameters can also be applied to cryptocurrencies to determine whether they should be taxed as an investment or trade asset, there is a need for explicit regulations to propound clarity to investors of the future contingencies.

Also, cryptocurrencies generated during the 'mining' process can be classified as self-generated capital assets. In such a case of self-generated assets, if the cost of acquisition of an asset cannot be ascertained, the machinery provision for computation of capital gains will fail. Therefore, no capital gains can be levied on the transfer of such assets. This view was upheld by the SC in the case of **B.C. Srinivasa Setty**[5]**.**

Despite the growing acceptance of cryptocurrencies, the Indian regulatory framework (including tax laws) have provided no guidance on the same. Also, it would be important to note that the Indian government has proposed to place the Cryptocurrency and Regulation of Official Digital Currency Bill, 2021, before the parliament, which would provide a regulatory framework on cryptocurrencies soon. If the bill does in effect pass and codifies into statutory law, it could prove to be very useful for digital transactions as it would provide more comfort to the Investors as well as exchanges facilitating the transactions. With the world inching towards digitization and growing technological innovation, India needs to acquire a dynamic approach and a vibrant cryptocurrency segment could add value to India's financial sector.

4. CUB Pty. Ltd [2016] 71 taxmann.com 315
5. B.C. Srinivasa Setty [1981] 5 Taxman 1 (SC)

From the Judiciary

Direct Tax

Whether Poland LLP shall be eligible to claim the benefit of India-Poland Double Taxation Avoidance Agreement (DTAA)?

M/s Infosys BPO Ltd. Vs. The DCIT
IT(IT)A No. 986/Bang/2017, 990/Bang/2017

Facts

The taxpayer is an Indian company engaged in the business of providing business process outsourcing services. During the year under consideration, the taxpayer made payment to the non-resident in the USA towards a retainership and site license subscription fee and to the non-resident LLP in Poland for legal service rendered. The law firm is a fiscally transparent entity as per the tax law of Poland. The taxpayer grossed up the invoices and deposited tax under protest.

The issue under consideration was whether the partnership firm would be eligible for benefit under India Poland DTAA.

Held

The Bangalore Tribunal held that the India-Poland DTAA applies only to a 'person' who is a resident of one or both of the contracting states. Therefore, in view of the provisions of Article 4(1) read with Article (1) and Article 3(1)(e), unless the payee is taxable under domestic laws of Poland, treaty benefits cannot be extended. The Tribunal was of the view that the law firm is a non-taxable entity as per the domestic laws and therefore, treaty benefit cannot be extended to the firm. However, given that income of the partnership is taxable in the hands of the partners and such partners have provided valid TRC partners shall be eligible to India-Poland treaty benefit and no tax shall be levied under Article 15: Independent Personal Services (IPS).

The Tribunal followed the Mumbai Tribunal's judgment in the case of Linklaters LLP.

Our Comments

After the judgment of Linklaters LLP, the India-UK DTAA was modified to provide a specific clause that the provision of the treaty in case of a partnership shall apply only to the tune of income taxable in the hands of a partner in the UK. India-Poland DTAA does not include such a specific clause.

Furthermore, Article 15 (IPS) of India-UK DTAA specifically covers individuals who are partners of a firm. However, IPS clause under the India-Poland DTAA covers only professional individuals. So, this decision could be a welcome decision for the fiscally transparent entities outside India, which are receiving payment from India.

Whether web-based database service and access to e-journals can be considered as Royalty?

American Chemical Society Vs. ACIT
I.T.A. No.1030/Mum/2021

Facts

The taxpayer is a US-based non-resident entity engaged in the promotion and development of knowledge in the field of chemistry. The company is organized in two divisions as follows:

- Chemical Abstracts Service (CAS) Division: It identified, aggregated, and organized publicly disclosed scientific information and offered online, web-based access to its customers to databases with scientific content.
- Publications (PUBS) Division: It reviews research work submitted by scientists worldwide and offers a subscription of web-based and printed copies of research journals/e-journals.

The taxpayer earned revenue of INR 624.8 million as a fee for providing access by subscription to online chemistry databases (CAS division) and revenue of INR 401.8 million as subscription revenue from the sale of online journals (PUBS division).

The tax officer considered both payments as Royalty and taxed at the rate of 15% under India-USA DTAA.

Held

It was held that customers of the taxpayer only enjoy the benefits of using SciFinder and STN and do not acquire the right to exploit any copyright in this software. Thus, the income earned by the taxpayer from the Indian Customers with respect to the subscription fees for CAS cannot be taxed as Royalty as per Section 9(1)(vi) of the Act as well as Article 12(3) of the India-USA DTAA.

Furthermore, the journal provided by the PUBS division did not provide any information arising from taxpayer's previous experience. The taxpayer's experience lies in creating/maintaining such information online. By granting access to the journals, the taxpayer neither shares its experiences, techniques, or methodology employed in evolving databases with the users nor imparts any information related to them. The customers don't get any rights to the journal or articles therein. Thus, no 'use or right to use' in any copyright or any other intellectual property of any kind is provided by the taxpayer to its customers.

Our Comments

This is a welcome decision, which clarifies that providing access to a database created by aggregating and organizing publicly available data would not be a Royalty unless the copyright of such database is provided to the subscriber.

Transfer Pricing

Whether notional interest can be charged on overdue receivables when the taxpayer has received more advance than the overdue receivables?

McKinsey Knowledge Centre India (P) Ltd [TS-518-HC-2021(DEL)-TP][6]

Facts

The taxpayer was engaged in research and information services and adopted the Transactional Net Margin Method (TNMM) as the most appropriate method. The Transfer Pricing Officer (TPO) observed that certain receivables were outstanding beyond 60 days and, thereon, made adjustments for notional interest. However, the TPO ignored the payments received in advance for other receivables. This position was upheld by the Dispute resolution Panel (DRP) as well. However, the Income Tax Appellate Tribunal (ITAT) placed reliance on Pegasystems Worldwide India Pvt. Ltd.[7], wherein it stated that in the case of a debt-free company, there is no requirement for making adjustments on account of the interest on outstanding receivables. The ITAT also stated that the taxpayer had not borrowed any fund for its business activity and thus deleted the said TP adjustment.

Before the HC

The HC held that on a factual basis, there can be no notional computation of 'delayed receivables' by ignoring the receivables received in advance - as the amount received in advance far outweigh the amount received late. The appeal was upheld in favor of the taxpayer.

Our Comments

When the advances received outweigh the overdue receivables, notional interest cannot be charged as this would amount to a one-sided adjustment.

Whether data procured from external sources can be applied as a valid Comparable Uncontrolled Price for generic products?

TRL Riceland Pvt. Ltd (formerly known as M/s. Tilda Riceland P Ltd)[8], [TS-521-ITAT-2021(DEL)-TP]

Facts

The taxpayer purchases paddy and exports rice after milling and had benchmarked its international transactions of sale of rice by relying on the daily export data procured from customs and compiled in TIPSS database (i.e., using the Comparable Uncontrolled Price (CUP) Method). The taxpayer stated that the database provides quantum, price, date, quantity, and the type of rice exported by parties in India to parties in the European Union, Middle East, and North America. Furthermore, the transfer pricing study has given due consideration for the product and geographic differences to ascertain comparability.

However, the TPO observed that the taxpayer was incurring losses. He rejected the CUP method adopted by the taxpayer and sought to adopt the Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM), thereby leading to an adjustment. The DRP upheld the said adjustment. The TPO and DRP were of the view that CUP requires a high degree of comparability between the controlled and uncontrolled transactions. Furthermore, the product data compiled in the TIPS database, even after making some adjustments, did not give reliable results, and therefore, it would not be appropriate to compare the adjusted CUP data with the controlled transaction.

6. Delhi High Court – Income Tax Appeal No. 146/2020
7. Hyderabad Income Tax Appellate Tribunal - Income Tax Appeal No. 1758 and 1936/Hyd/2014 & (AY 2010-11) | TS-488-ITAT-2015(HYD)-TP
8. Delhi Income Tax Appellate Tribunal – Income Tax Appeal No. 441 and 5508/Del/2017 (AY 2012-13 & 2013-14)

Before the ITAT

The information so furnished by the database used by the taxpayer is comprehensive and went on to state that the product comparability does not require the comparables to be exactly the same. The product categorization has been done based on a reasonable generic description, and the product being generic in nature, such categorization is reasonable and sufficient. Generic goods, even under different brand names, do not cease to be comparable with each other unless the impact of brand or other intangibles is so substantial that it distorts the comparison altogether. In any event, even if there are minor variations in prices of generic goods, such factors are adequately taken care of by average in the case of large sizes of comparables.

In the prior year as well, the CUP was upheld as the MAM in the taxpayer's own case, and hence the ITAT deleted the adjustment.

Our Comments

Under the CUP method, product comparability for generic goods does not require the products to be exactly same, comparability could be established even with minor variations.

Amendment in agreement does not validate if costs can be considered as pass-through

Parexel International Clinical Research Private Limited[9], [TS-506-ITAT-2021(Bang)-TP]

Facts

The taxpayer is a subsidiary of the Netherlands entity and is engaged in providing clinical research services in India (that was outsourced by the Associated Enterprises (AE's)). While acting as an intermediary, the taxpayer had made payments to investigators, which were subsequently reimbursed by the AEs on a cost-to-cost basis for the year under consideration.

The TPO observed that the taxpayer had considered these costs as part of its cost base in prior years and charged a mark-up of 15%. However, for this year, placing reliance on an addendum of an agreement, the taxpayer claimed that no mark-up was warranted. However, the TPO, considering the nature of the activities performed by the taxpayer, held that it was engaged in an agency function as an intermediary. Accordingly, a mark-up on the reimbursement of expenses was made, which was upheld by the DRP as well.

Before the ITAT

The ITAT observed that the agreement provided to state the payments to investigators were pass-through was a make-believe story and held that the AO has the right to go beyond this document to find out the real intention of the parties. ITAT upheld the TPO's order and said that the costs incurred by the taxpayer for the AE cannot be considered as reimbursement of expenses or pass-through costs as it is a separate service for which the taxpayer needs to determine the Arm's Length Pricing (ALP).

Our Comments

Where the AE is deriving economic or commercial benefits from the services offered by the taxpayer company, such services cannot be treated as pass-through costs and are to be treated as intra-group services that warrant a mark-up.

Indirect Tax

i. Whether the supply of sales promotion goods such as gold coins, refrigerator, split AC, etc., at a nominal price to retailers against the purchase of specified units of hosiery goods (main product) qualify as individual supplies or mixed supply?

ii. Whether Input Tax Credit (ITC) paid on the items being sales promotion items sold at nominal prices would be available to the applicant?

Kanahiya Realty Private Limited [2021-VIL-371-AAR, West Bengal]

Facts

- The applicant intends to manufacture and supply hosiery goods such as Vests, Briefs, etc.
- The applicant proposes to implement a sales promotion scheme whereby it would offer unconnected goods, such as gold coins, refrigerator, mixer grinder, cooler, split AC, etc. (hereinafter referred to as the said goods), for sale at a discounted price to such retailers who have bought a certain unit of hosiery product from it as would be prescribed in its retail scheme circular.
- However, the retailers will be at liberty not to purchase the goods offered under the said promotional schemes.

Ruling

- To qualify any supply as "Mixed supply" as per Section 2(74) of CGST Act, 2017, there has to be:
  - Two or more individual supplies or combination of such supplies made in conjunction to each other.
  - The said supplies must be made for a single price.
  - The said supplies must not qualify as a composite supply.

9. https://scroll.in/article/999433/why-indias-cryptocurrency-boom-is-problematic

- In the present case, the supply of hosiery goods followed by the supply of the said goods would not be made 'in conjunction with' each other as a supply of the said goods would be contingent upon the supply of hosiery goods, and the retailer would have the option not to purchase the said goods.
- As the applicant would be raising separate invoices, the two supplies shall not take place for a single price.
- Furthermore, the supply shall also not fall under the category of 'composite supply' since the supply of hosiery goods and the said goods cannot be considered as naturally bundled and supplied in conjunction with each other in the ordinary course of business.
- Hence, they are separate supplies, and tax shall be charged at the rate of each such item as per Section 9 of the GST Act.
- Moreover, since 'gift' is something which is given completely out of one's volition and without being linked to any condition or any concomitant charge, the goods under the promotional scheme cannot be termed as the same.
- Hence, ITC paid on the items sold at nominal prices would be available to the applicant.
- Furthermore, on the valuation aspect, the ruling authorities pronounced that the value of the said goods shall be required to be determined as per provision of Section 15 read with Rule 27 of the CGST/ WBGST Rules, 2017 as authorities found that here price is not the sole consideration for the supply.

Our Comments

This ruling is peculiar as the same deals with the supply of goods for sales promotion on completion of a target which is an extensively followed practice in the industry.

Furthermore, the ruling has clarified the term “gift” which has been widely debated as it is not defined under the GST law. The ruling also throws light on the scope of eligibility of ITC on procurement of goods for sales promotion.

However, there are contrary rulings too on the similar matter wherein ITC has been disallowed on the grounds of personal use.

i. Whether GST is payable on management fee /administrative charges only or otherwise on the entire billing amount?

ii. Whether employer portion of EPF and ESI amount of the bill are exempted for paying GST?

Ex-servicemen Resettlement Society [2021-VIL-372-AAR, West Bengal]

Facts

- The applicant is a registered society providing security and scavenging services to different Medical Colleges, District Hospitals and West Bengal govenrment’s hospitals.
- As per labor laws of West Bengal, the applicant claims Minimum Wage + Employer Portion of EPF @13% + ESI @3.25% and charges GST @18% on gross bill amount every month from the government hospitals.
- However, the Audit Authority(Indian Audit and Accounts Department, West Bengal) has raised an objection of excess payment of GST upon the observation that GST is payable only on management fees/services charges.
- The applicant further submits that few hospitals have raised an objection that since the Employer portion of EPF and ESI are deposited to the respective authority, both the amounts should be exempted from GST.

Ruling

- The claim that only management fees/service charges should be the taxable value is merely a presumption and is not backed by any law.
- Furthermore, the objection of Audit also fails to refer to any legal provision to justify the same.
- The only point of the argument is the presence of a clause on management fees /administrative charges in the e-tender, which cannot be the basis of determining the assessable value under any Tax Law.
- Section 15 of the CGST Act, 2017, categorically clarifies that each and every component of the invoice, except GST taxes, must form a part of the taxable value.
- Additionally, the said section also clearly excludes the elements that are not to be included in the value of supply.
- Therefore, this leaves no room to deduct any amount like management fee, employer portion of EPF and ESI to determine the value of supply under the GST law.
- Thereby in the instant case, tax should be charged under Section 9 of the Act on the entire billing amount.

Our Comments

This ruling is not in favor of the applicant as it completely relied on the audit objection, and has failed to provide any legal provisions for excluding the ESI and EPF portion from the gross transaction value.

Instead, it can be explored whether a collection of such charges will qualify under the ambit of ‘pure agent’ under the GST law.

Merger & Acquisition Tax

Mumbai ITAT: Holds that allotment of shares on the right issue shall fall outside the purview of Section 56(2)(vii)

Rajeev Ratanlal Tulshyan [TS-950-ITAT-2021(Mum)]

The assessee, a resident individual, is a director and major shareholder in Kennington Fabrics Pvt. Ltd. (KFPL). During the relevant year, KFPL offered the right issue, and the assessee was allotted INR 39.5 million shares of KFPL at face value of INR 1 per share. During the course of the assessment, the Assessing Officer (AO) alleged that the consideration was less than the Fair Market Value (FMV) and proposed addition u/s 56(2)(vii). While the assessee relied on the jurisdictional Tribunal decision in the case of Sudhir Menon HUF, wherein it was held that in the case of proportionate allotment of shares, there would be no taxability u/s. 56(2)(vii), the AO held that there was a disproportionate allotment of shares in the said case and hence, the decision would not apply. Accordingly, the AO worked out the intrinsic FMV at INR 11.85 per share and proceeded to make an addition of INR 428.7 million under Section 56(2)(vii) of the Act.

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

- Tribunal's decision in case of Sudhir Menon HUF is applicable wherein on similar facts, shares being allotted on pro-rata basis to the shareholders, based on existing shareholding there is no scope for any property being received by them on the said allotment of shares; there being only an apportionment of the value of their existing holding over a larger number of shares. In such a case, the provisions of Section 56(2)(vii) would not get attracted.
- Considering the intent of the introduction of provisions, the aforesaid transaction, since carried out in the normal course of business, would not attract rigors of provisions of Section 56(2)(vii).
- The provisions are a counter evasion mechanism to prevent the laundering of unaccounted income. Therefore, the same do not apply to the genuine issue of shares to existing shareholders.

Our Comments

The ITAT has reconfirmed the non-applicability of Section 56 (gift tax provisions) on the rights issue offered to all shareholders. It will be interesting to wait and watch the ruling of the Bombay HC on the pending appeal in the case of Sudhir Menon HUF.

Delhi HC: Disregards internal arrangement with regards to income tax liability, holds director liable for dues of company u/s 179 of the Act

Rajeev Behl [TS-904-HC-2021(Del)]

The petitioner was a co-founder and promoter of the Realtech group of companies. In 2011, due to some disputes, the petitioner resigned as director and stopped participating in the management. He also entered into a Memorandum of Understanding (MoU) with the other two promoters that income tax liability for certain group companies shall be borne and paid by Mr. Pankaj, another co-founder. To implement the MoU, an arbitration proceeding was undertaken and an arbitration award dated 28 January 2018 upheld the terms of MoU. Meanwhile, the petitioner was served with the impugned order dated 29 January 2018 under Section 179 of the Act, wherein it was held that tax dues of a private limited company that cannot be recovered from the company. However, the same can be recovered from a Director of the said company as the director is jointly and severely liable for payment of outstanding tax demands of the company. The petitioner's revision petition under Section 246 of the Act was also dismissed vide order dated 1 April 2021.

The petitioner filed a writ application, and the HC has decided in favor of revenue, citing the following observations:

- While the AO has to give a finding that the tax dues could not be recovered from the company before proceeding against the director, the onus is on the director to prove that the non-recovery can not be attributed to his gross neglect, misfeasance, or breach of any duty on his part in relations to the affairs of a company.
- Considering various steps taken by the department,, including attachment of the company's bank account, the petitioner's contention that no action is taken to recover the demand from the company is incorrect.
- Private parties can not apportion income tax liability by private agreements as the petitioner has sought to do in the present case. It is settled law that while rights in personam are arbitrable, rights in rem are unsuited for private arbitration and can only be adjudicated by the courts or tribunals.

Our Comments

This is a crucial decision that rejects private arrangements against the payment of taxes. This could have a major impact on M&A deal space, especially while agreeing on indemnity and warranties. Also, the decision reiterates that the onus to prove is on the directors.

Tax Talk

Indian Developments

Direct Tax

CBDT directs to exclude set-aside and reassessment/assessment proceedings from faceless assessments

[Order F No. 187/3/2020-ITA-I dated 22 September 2021]

The Central Board of Direct Taxes (CBDT) had earlier directed exclusion of assessment order in cases assigned to central charges/international tax charges or cases where pendency could not be created on Income Tax Business Application (ITBA) portal or cases with no PAN from faceless assessment.

It has now been further directed to exclude assessment of cases set aside to be done de novo or reassessment proceedings from the faceless assessment. The said exclusion is restricted to cases where the proceeding is pending with the Jurisdictional AO as of 11 September 2021 or thereafter. The time limit for completion of such proceedings expires on 30 September 2021.

CBDT extends due dates for processing of return of income

[Order F No. 225/98/2020-ITA-I dated 30 September 2021]

The CBDT had earlier directed that all validly filed returns up to Assessment Year 2017-18 with refund claims, which could not be processed under Section 143(1) of the Act and which had become time-barred, should be processed by 30 September 2021.

In view of pending taxpayer's grievances related to the issue of refund and to mitigate the genuine hardship being faced by the taxpayers on this issue, CBDT has further extended the time frame from 30 September 2021 to 30 November 2021.

CBDT exempts return filing requirements for certain non-residents investing in the IFSC in India

[Notification No. 119/2021, 11 October 2021]

The CBDT has provided an exemption from the requirement of filing return of income to the following:

a. A non-resident does not have any other income other than income from investment in CAT III AIF funds and is not required to obtain a PAN in India as per Rule 114AAB of the Income-tax Rules, 1962.

b. A non-resident does not have any other income other than income from transactions carried out only in specified securities listed on a recognized stock exchange and is not required to obtain a PAN in India as per Rule 114AAB of the Income-tax Rules, 1962.

Transfer Pricing

Extension of applicability of Safe Harbour Rules to Assessment Year 2021-22

[Circular No. 159/15/2021 dated 20 September 2021]

The CBDT vide Notification[10] dated 24 September 2021 has extended the applicability of the Safe Harbour Rules under Rule 10TD of the Income-tax Rules, 1962 (the Rules) to AY 2021-22 with effect from 1 April 2021.

The CBDT has notified that sub-rule (1) and (2A) under Rule 10TD of the Rules will also apply to AY 2021-22. These sub-rules were initially applicable from AY 2017-18 to AY 2019-20, which were then extended to AY 2020-21.

Safe harbour provisions currently provide for circumstances in which certain transactions like IT/ITeS/KPO, contract R&D services, manufacture of automobile components, financial transactions such as loans and guarantees, and intragroup transactions viz receipt of low value-added intragroup services are covered. If safe harbour provisions are opted for, subject to the fulfillment of certain conditions, the Indian tax authorities would automatically accept the transfer prices declared.

Indirect Tax

Clarification in relation to refund of GST

[Circular No. 162/18/2021-GST dated 25 September 2021]

Pursuant to the GST Council recommendations, the Central Board of Indirect Taxes and Customs (CBIC) has issued a clarification in respect of procedure and time limit for filing of refund claim of tax wrongfully collected and paid to the Central or State Government, as specified in Section 77(1) of the CGST Act and Section 19(1) of the IGST Act.

- In cases where the inter-state or intra-state supply made by a taxpayer is either subsequently found/ held as intra-state or inter-state respectively, either by the taxpayer himself or by the tax officer in any proceeding, a refund shall be allowed in both cases.
- Refund can be claimed within two years from the date of payment of tax under the correct head.
- In a case where the taxpayer has made the payment in the correct head before 24 September 2021, then the refund application can be filed within two years from the said date.
- However, a refund would not be available where the taxpayer has made tax adjustment by issuing a credit note in respect of such transaction.

Clarifications regarding applicable GST rates and exemptions on certain services

[Circular No. 164/20/2021-GST dated 6 October 2021]

While services provided by way of cooking and supply of food by cloud kitchens/central kitchens are covered under ‘restaurant service’ as defined in Notification No. 11/2017-Central Tax (Rate) and attract 5% GST [without ITC], ice cream sold by a parlor our any similar outlet would attract GST at 18% in as much as their activity entails supply of ice cream as goods (a manufactured item) and not as a service, even if certain ingredients of service are present.

Services by way of job work in relation to the manufacture of alcoholic liquor for human consumption are not eligible for a GST rate of 5% prescribed under Sr. No. 26 of Notification No. 11/2017-Central Tax (Rate). Instead, they would attract 18% GST.

Overloading charges at toll plazas would get the same treatment as toll charges and stand exempt from GST. On the other hand, the supply of services by way of granting mineral exploration and mining rights during the period from 1 July 2017 to 31 December 2018 attracted a GST rate of 18% in view of the principle laid down by the GST Council for residuary GST rate.

10. Notification No. 117/2021/F. No. 370142/44/2021-TPL

Tax Talk

Global Developments

Direct Tax

European countries agree to withdraw Digital Service Tax in compromise

[Excerpts from Mondaq, 25 October 2021]

The Office of the US Trade Representative (USTR) announced an agreement reached with five countries – Austria, France, Italy, Spain, and the United Kingdom – on Digital Services Tax (DST) measures that had been subject to recent investigations by USTR under Section 301 of the Trade Act of 1974. These countries will avoid 25% duties on certain imports into the US due to the deal.

This 'political compromise' reached does not require the five countries involved to withdraw their existing DST measures. Instead, those countries have agreed that to the extent US companies accrue any DST liability before implementing Pillar 1 of the Organization for Economic Co-operation and Development (OECD)'s Pillar 1, such liability will be creditable against future income taxes as determined under Pillar 1.

South Korea to levy 20% digital currency tax in 2022

[Excerpts from Coingeek, 11 October 2021]

The South Korean administration has issued a message that the government will levy taxes on digital currency gains starting next year as planned. The taxation has become the subject of heated debate between the government and the opposition, with the latter seeking to postpone it for one more year.

This month, the taxation law was meant to come into effect, imposing a 20% tax on digital currency gains above USD 2125. After cries of a lack of preparedness by exchanges and traders, the government pushed it to 1 January 2022. The opposition to People's Power Party has been making a concerted effort to push it further by a year, but the government is standing its ground on the set date.

Ireland joins OECD Two Pillar solution

[Excerpts from Lexology, 11 October 2021]

On 8 October 2021, an agreement was reached between 136 countries, including Ireland, on a revised agreement of OECD's two-pillar approach. Amongst other things, Pillar One proposes a re-allocation of a proportion of tax to market jurisdictions, while Pillar Two seeks to apply a global minimum effective tax rate of 15%.

Ireland had previously indicated its support for Pillar One (which will initially apply to groups with global turnover above €20 billion and profitability above 10%) but had reservations in respect of Pillar Two and, in particular, the phrase "at least 15%" in the context of the minimum effective tax rate. Having secured the removal of "at least" in the text, Ireland confirmed its agreement to the proposal.

Transfer Pricing

Thailand: Transfer pricing documentation requirements[11]

Thai Revenue Department (TRD) published a Notification from the Director-General of the TRD regarding Corporate Income Tax no. 407 dated 30 September 2021. It provides a list of information to be included in the transfer pricing documentation, which is as follows:

- Nature of business, Management Structure, key trading partners, key competitors, business strategy and economic situation
- Description of any business restructuring
- Description of any transfer of intangible assets as well as the impact on operating results
- Related party transactions, their type and value
- List of all contracts related to each type of transaction with a summary of the key terms of the contracts
- Functions, assets, and risk analysis
- Financial information used to implement the pricing method
- Price determination method for each transaction type along with the reasons for the choice of such method and the non-option of the specified method.
- Transactions and descriptions of comparable unregulated transactions
- Any other document or evidence showing information necessary for analysis.

Taxpayer is not required to submit the benchmarking documentation if it meets the following criteria:

- Has income from the business in the accounting period not exceeding 500 million baht
- No controlled transactions with related parties paying a different corporate income tax rate from the taxpayer
- No controlled transactions with related parties
- No brought forward losses.

OECD releases Country-by-Country Report(CbCR) – Compilation of 2021 Peer Review Reports[12]

OECD has released its fourth annual peer review for the Base Erosion Profit Shifting (BEPS) Action 13 minimum standard covering 132 jurisdictions. For each jurisdiction, the review covers the domestic legal and administrative framework, the exchange of information framework and measures in place to ensure the confidentiality and appropriate use of CbCR. The key findings included the following:

- Over 100 jurisdictions have a domestic legal framework for CbCR in place.
- 83 jurisdictions have multilateral or bilateral competent authority agreements in place.
- 89 jurisdictions have undergone an assessment by the Global Forum on Transparency and Exchange of Information for Tax Purposes concerning confidentiality and data safeguards in the context of implementing the AEOI standard and did not receive any action plan.
- 84 jurisdictions have provided detailed information, enabling the Inclusive Framework to obtain sufficient assurance that measures are in place to ensure the appropriate use of CbCR.

The report provided recommendations for improvement around the domestic, legal and administrative framework for India, which are as follows:

- To amend or otherwise clarify that the annual consolidated group revenue threshold calculation rule applies in a manner consistent with the OECD.
- Guidance on currency fluctuations in respect of an MNE Group whose Ultimate Parent Entity is in a jurisdiction other than India.
- To amend its legislation or otherwise takes steps to ensure that local filing is only required in the circumstances contained in terms of reference.

Indirect Tax

VAT cut on household energy bills

[Excerpts from Bloomberg]

In view of the rising home heating costs, the UK Finance Minister Rishi Sunak has proposed a 5% VAT cut on the household energy bills to help the citizens over the winter. Although no final conclusions have been drawn regarding the same.

Change in rate of VAT

[Excerpts from Forbes]

The Bahrain government is considering a hike in the VAT rate from 5% to 10% with the intention of restraining its large budget deficit. Previously, a similar change was noticed in July 2020, when Saudi Arabia had tripled its VAT rate to 15%.

11. dg407.pdf (rd.go.th)
12. https://www.oecd-ilibrary.org/taxation/country-by-country-reporting-compilation-of-2021-peer-review-reports_73dc97a6-en;jsessionid=sI5741YCBMFlOdLsTrQiUBe0.ip-10-240-5-167

Compliance Calendar

Direct Tax
Indirect Tax

7 November 2021

Payment of TDS and TCS deducted/collected in October 2021

11 November 2021

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

15 November 2021

Issuance of TDS certificates (Form 16A) for TDS deducted for the period July to September 2021

25 November 2021

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

30 November 2021

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

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)

15 December 2021

Third installment of Advance tax for AY 2022-23

10 November 2021

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

13 November 2021

- GSTR-6 for the month of October 2021 to be filed by ISD
- Uploading B2B invoices using Invoice Furnishing Facility for the month of October 2021 by taxpayers under QRMP scheme

20 November 2021

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

7 December 2021

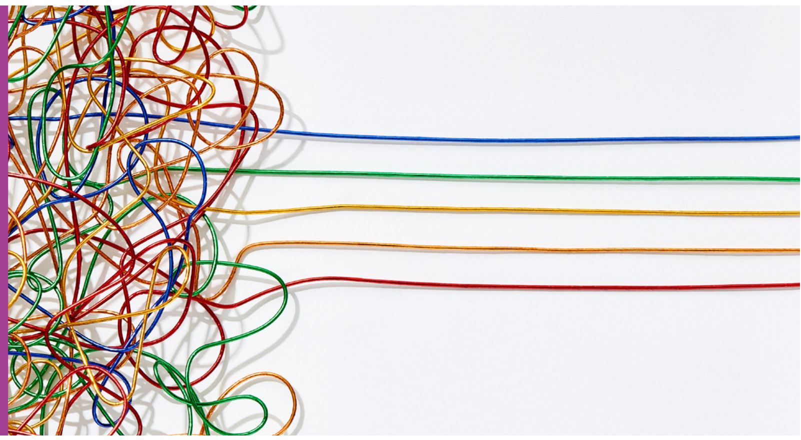
Payment Tax Deducted/Collected in the month of November 2021

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

13 December 2021

- GSTR-6 for the month of November 2021 to be filed by 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



Insights

Articles

Dealing with the shareholders' democracy

14 October 2021, LawStreetIndia

Read Here https://bit.ly/3pZuSV3

Recent NCLT Ruling on Conversion of Equity into Preference Shares: Analysing the Implications

1 October 2021, LawStreetIndia

https://bit.ly/2YAH5nB

Webinars, Events & News

Webinars

TP Asia Summit 2021

Organizer - Inventicon

21 and 22 October 2021

Watch Here https://bit.ly/3Hf2mEW

Virtual Masterclass on GST

Organizer - Achromic Point

26 and 27 October 2021

2-Day Tax Conference

Organizer - CII

27 and 28 October 2021

Day 1 - Watch Here
https://youtu.be/HVfE9GWb7Fo

Day 2 - Watch Here
https://youtu.be/ifROuiGTzfw

Hamburg week

Organizer - Indo german (IGCC)

8 November 2021

How the DIFC can be used as a platform to tap into the Middle East market

Organizer - DIFC and Vistra

16 November 2021

Register Now

Events

Recent changes affecting cross border transactions

Organizer - European Business Group (EBG)

24 November 2021

RSVP
events@nexdigm.com

News

GST systems to periodically check monthly return filing compliance for e-way bill blocking

- Saket Patawari

https://bit.ly/3qoK4ez

5 October 2021, BW Business World

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.***

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