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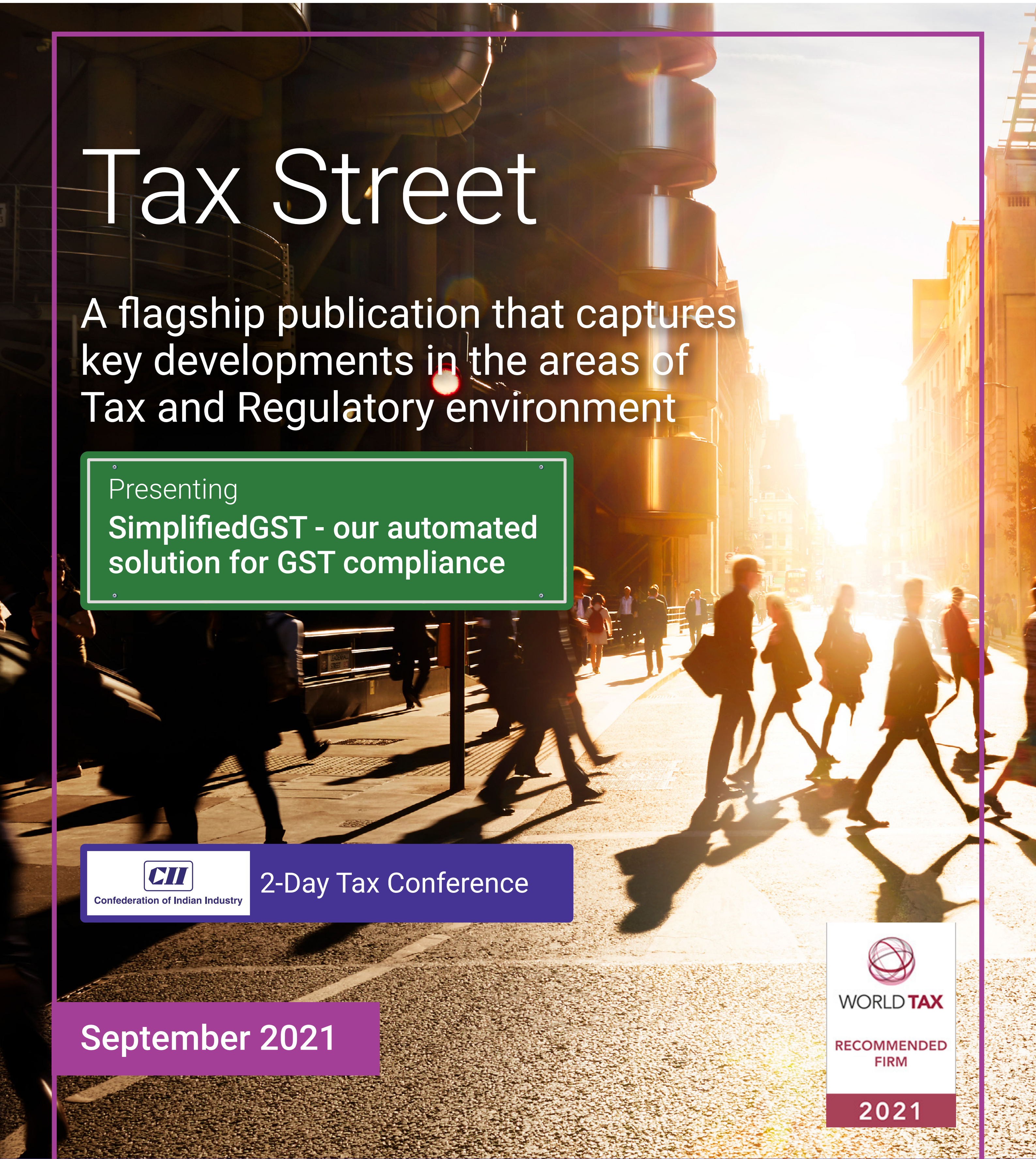

Tax Street

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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 September 2021.

- The **'Focus Point'** explores the taxability of liaison offices under the GST 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

Taxability of Liaison Offices under the GST regime – A double whammy for Foreign Companies?

The last decade has witnessed an exponential growth in globalization, barring the past two years owing to the COVID pandemic. As clichéd as it may sound, such has been the impact of globalization on international trade that the world has virtually become a single marketplace. Businesses have deemed it expedient to have a multinational presence to penetrate the global markets and strengthen their operations.

In the Indian context, setting up a 'subsidiary' has been the most preferred way for many foreign players; but the same entails significant costs and may be suitable only for businesses looking to have a strong foothold in the country.

On the other hand, foreign companies looking to have limited operations in India seem to adopt the more cost-effective and quicker route of setting up a Liaison Office or Project Office or Branch Office, with prior approval of the Reserve Bank of India under the provisions of Foreign Exchange Management (FEMA) Act, 1999. A Liaison Office (LO) represents the Head Office (HO) and acts as a link between the HO and business connections in India. However, its activities are restricted, and only the following can be undertaken in India[1]:

i. Representing the parent company/group companies in India.

ii. Promoting export/import from/to India.

iii. Promoting technical/financial collaborations between parent/group companies and companies in India.

iv. Acting as a communication channel between the parent company and Indian companies.

It may be noted that the FEMA Regulations prohibit an LO from carrying out any business or commercial activity in India, and it is required to maintain itself out of the inward remittances received from abroad through normal banking channels.

Therefore, the following moot questions arise in relation to the taxability of LO under the GST law:

- Whether the activities performed by the LO constitute a 'supply' exigible to GST?
- Whether the LO would be required to obtain registration in India?

What does the GST law say about LO?

The concept of LO has not been directly dealt with by the GST law. The implications of GST on LO would depend on one's interpretation of Section 7 of the CGST Act, 2017, which lays down the 'scope of supply.' Broadly, it can be said that for an activity/transaction to qualify as 'supply', two conditions should be fulfilled, viz. i) it has to be in the course or furtherance of business, and ii) it has to be for consideration.

In the case of LO, FEMA Regulations prohibit conducting of any 'business' and it is also not allowed to charge any 'consideration,' including commission and fees, to any party (as it has to maintain itself out of the funds received from abroad). Moreover, although the term 'business' is inclusively defined in the GST law, it essentially involves commercial activities involving the exchange of goods and/or services with or without any monetary consideration.

1. Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016

Hence, while one school of thought suggests that GST registration is not required since LO is merely an extended arm of the foreign HO, acting as a communication channel between the HO and entities in India and with no authority to undertake any commercial/trading activity whether directly or indirectly, the second school of thought propagates that for the purposes of GST, such activities would qualify as 'supply' and in turn, constitute 'business' of such LO. A view is also being adopted that LO and HO qualify as establishments of distinct persons, and therefore, the supply would be taxable even if made without consideration.

Advance rulings on LO

While most of the advance rulings have accepted the applicants' view and ruled that GST registration is not required, there have been some instances where contrary rulings have confirmed that the activities of LO are commercial in nature, qualifying as 'intermediary services,' liable to GST.

In the case of **Takko Holding GmbH**[2], the Tamil Nadu AAR ruled that liaison activities undertaken by the applicant while acting as a communication channel between the parent company and Indian supplier of goods in line with the condition specified by the RBI permission letter do not constitute 'supply' under GST law. Referring to the definition of 'supply' given under Section 7 and Schedule I of the CGST Act, 2017, the AAR stated that although the supply of services between related parties or distinct persons constitutes a 'supply' as per Section 25, even without consideration, the applicant is acting as an extension of German Office in its procurement activities and therefore, they are neither related nor distinct persons but working as employees of the foreign office.

Similar view has also been adopted by Karnataka Appellate AAR in **Fraunhofer - Gesellschaftzurforderung Der Angewandtenforschunge**[3] (overturning the ruling of AAR), as well as by various AARs in the cases of **Wilhelm Fricke SE**[4], **Habufa Meubelen B.V.**[5] and **World Economic Forum**[6].

However, the Maharashtra AAR seems to have unsettled the industry sentiments vide its ruling in the case of the **Dubai Chamber of Commerce and Industry (DCCI)**[7]. It has ruled that by connecting businesses in India with business partners in Dubai, the applicant is acting as an 'intermediary' as defined in Section 2(13) of the IGST Act, 2017, and since they are a liaison office of Dubai HO, there are no services being provided on own account. Disregarding the prohibition under FEMA Regulations, the authority has held that the reimbursement of expenses received from the HO is, in fact, 'consideration' for services and that the conditions of pure agent reimbursements are not satisfied. In view thereof, activities undertaken by the applicant are nothing but 'business' under Section 2(17) of the CGST Act, 2017 and, accordingly, covered under the scope of 'supply,' has ruled the AAR.

Conclusion

It may be worth noting that advance rulings do not set any judicial precedent, but they do have a persuasive impact in similar cases. Hence, the ruling in the case of DCCI, LO could open Pandora's box for other similarly placed LOs of foreign governments and industry chambers involved in promoting trade relationships between businesses in India and their respective countries.

Even if the LO and HO were treated as establishments of distinct persons, it would be imperative to evaluate the precise nature of activities undertaken by the LO on a case-to-case basis to ascertain the requirement of GST registration. This is considering the GST exemption granted vis-à-vis services supplied by an establishment of a person in India to any establishment of that person outside India, subject to the place of supply of service being outside India.

Also, it would be equally important to evaluate the implications of treating activities of LO as 'business' under GST law vis-à-vis the FEMA Regulations, as it could otherwise prove to be a double whammy for foreign companies looking to set up operations in India.

2. TS(DB)-GST-AAR(TN)-2018-316
3. 2021(2) TMI 1164
4. 2020 (1) TMI 690 - AAR, Haryana
5. 2018 (7) TMI 883 - AAR, Rajasthan
6. 2021 (8) TMI 1020 - AAR, Maharashtra
7. TS(DB)-GST-AAR(MAH)-2021-293

From the Judiciary

Direct Tax

Whether transfer of shares of company holding land can be equated to the transfer of land held by the said company?

DCIT Vs. M/s Venus Infrastructure & Developers (P) Ltd.
ITA No. 1582/AHD/2019

Facts

The taxpayer, a real estate private limited company, held shares ARGHPL company for 34 months. The taxpayer had acquired the share in ARGHPL in AY 2008-09 for INR 280 million and sold its stake in ARGHPL for INR 340 million in AY 2012-13. However, due to the indexation benefit, the taxpayer claimed a Long Term Capital Loss (LTCL) of INR 60 million. Furthermore, ARGHPL only owned one asset, i.e., a piece of land. The Assessing Officer (AO) was of the view that the assessee had transferred the immovable property in the garb of transferring the shares, i.e., used shares of ARGHPL as a colorable device in order to declare an LTCL instead of Short Term Capital Gain (STCG) on the sale of a property. Accordingly, the AO proposed to tax STCG of INR 60 million for the aforesaid transfer since the shares in ARGHPL were held for a period less than 36 months.

The Commissioner of Income-tax(Appeals) [CIT(A)] confirmed the order of the AO. Aggrieved by the order, the taxpayer filed an appeal before the Ahmedabad Tribunal.

Held

After consideration of the data on record, the Tribunal held that the taxpayer had two legal courses available to dispose of the land held by ARGHPL. One option was to directly transfer the land and pay capital gains tax in the hands of ARGHPL. The second option available would be by way of selling the shares of ARGHPL so that control over the company as a whole was transferred. Thus, the Tribunal held that the assessee chose one of the two legally permissible options which it deemed most tax-effective or viable. It further held that there was no inserting of any device and, therefore, it could not be said that any colorable device was used to reduce the tax liability.

Moreover, it also upheld the taxpayer's contention that a shareholder and company are two separate legal persons capable of holding property of any kind in their name. The land in question was held by ARGHPL and not by the shareholder, i.e., the taxpayer. By being a shareholder, the taxpayer cannot be said to be the owner of the aforesaid land. Accordingly, the Tribunal held that the transfer of shares by the assessee could not be equated with a transfer of land which is not held by it

Our Comments

The Tribunal has clarified that companies are individual and distinct persons. Furthermore, choosing a tax-effective option is not akin to tax avoidance.

Whether entity not working exclusively for the non-resident can be regarded as its Agency Permanent Establishment (PE) in India?

Integrated Container Feeder Service Vs. Joint Director of Income-tax (Intl.tax) [I.T.A. No.5083/Mum/2003, I.T.A. No.7720 /Mum/2010, I.T.A. No.7721/Mum/2010, I.T.A. No.7022/Mum/2010]

Facts

The taxpayer is a shipping company incorporated in and tax resident of Mauritius. During the assessment years under consideration, the taxpayer received certain receipts from freight. The taxpayer submitted that its Place Of Effective Management (POEM) is in Mauritius. Thus, as per Article 8 of the India-Mauritius Double Tax Avoidance Agreement (DTAA), its income from shipping operations shall be taxable only in Mauritius. The AO, however, observed that two of the shareholders of the assessee company are located in the UAE. These shareholders have also attended Board meetings. Thus, AO concluded that the taxpayers' POEM is in UAE, and the benefit of Article 8 of India-Mauritius DTAA was denied. Furthermore, the AO also held that the company has a PE in India as two Indian parties work exclusively for the taxpayer and, accordingly, brought the entire receipts from shipping activities to tax.

Held

The Tribunal accepted the Revenue's view that Article 8 of India-Mauritius DTAA would not apply in the taxpayer's case. However, while deciding whether the taxpayer has a PE in India, the Tribunal observed that the two Indian parties that provide services to various companies relating to shipping activities had earned income by providing such service to a number of shipping companies. Not only are they agents of an independent status, but their services to various shipping companies, including the assessee, are in the course of their ordinary business as per Article 5(5) of the DTAA. Therefore, it has to be held that the Indian parties do not constitute Agency PE of the assessee in India. Thus, in the absence of a PE in India, the business profits of the assessee would not be taxable in view of Article 7 of the DTAA.

Our Comments

Determination of Agency PE requires factoring of various aspects. One needs to study the inter-company arrangements for determining PE.

Transfer Pricing

Licensor-Licensee relationship is of essence to determine whether any royalty can be attributed, the Income Tax Appellate Tribunal (ITAT) placing reliance on Base Erosion and Profit Shifting (BEPS) Action Plan 8-10 remitted the issue back to the files of Transfer Pricing Officer (TPO)

Sasken Technologies Ltd [TS-403-ITAT-2021(Bang)-TP]

Facts

The taxpayer, a telecom software solutions company with multiple subsidiaries worldwide, offers software services, development consultancy, and wireless software products to companies in the communications space. During the course of the Transfer Pricing (TP) assessment proceedings for AY 2013-14, the TPO made the adjustments to the international transactions of recovery of brand royalty and provision of invoices and collection services (fact-specific issue by applying Profit Split Method[PSM] as the Most Appropriate Method[MAM])[8].

The TPO carried out an upward adjustment on account of royalty chargeable at 2% of Associated Enterprises (AEs) turnover for using taxpayer's brand name 'Sasken' stating that the AEs have been using the trademark and the brand name, originally owned by the taxpayer against which the subsidiaries paid no royalty. The Dispute Resolution Panel (DRP) upheld the addition of 2% royalty on AEs turnover. Aggrieved by the final assessment order, the taxpayer filed an appeal before the ITAT.

Contentions of taxpayer before the ITAT:

- Organization for Economic Co-operation and Development (OECD)'s BEPS Action Plan 8-10[9] states that royalty payment is not payable basis the membership or use of the group name to reflect group membership.

8. This alert captures the detailed analysis of the brand royalty adjustment.
9. Organization for Economic Cooperation and Development (OECD) Base Erosion and Profit Shifting ('BEPS') Action Plan 8-10

The financial benefit attributed to the use of the name, cost, and benefits associated with other alternatives and relative contributions to the value of the name made by the legal owner and the functional analysis of the user in its jurisdiction is an integral part in determining the royalty payment towards a trade name.

- The AEs were already in operation and already had a base revenue. It was submitted that these AEs did not derive any commercial success out of using the group's name during the year under consideration. The TPO failed to demonstrate that the AEs have derived any financial or commercial benefits from the brand 'Sasken' during the assessment proceedings.
- TPO made contradicting remarks by saying that the subsidiaries were full-fledged entrepreneurs and also stating that subsidiaries cannot stand on their own legs without using the brand name 'Sasken.'

Ruling by ITAT

The ITAT observed that the TPO contradicted itself in concluding that the subsidiaries were not able to stand on their own legs without the use of brand name Sasken, ignoring the facts that the AEs were entrepreneurs and already in operation having revenue base before becoming a part of the group and that the group name did not add any significant value to the AEs operations. While there had been an increase in profits/reduction in loss of the AEs during the year, as per the ITAT, this alone ipso facto couldn't conclude that subsidiaries were able to get premium price benefit due to the use of the brand name.

The ITAT witnessed that the TPO had not established that -

- Financial benefit was derived to the members of the group.
- There was a legal contract between the brand owner and licensee, agreeing on the terms and scope of licensing agreement determining how the brand can be used, how long can they be used, in what market can they be used, and what remuneration is required.
- There was any actual transfer of technical know-how and any outcome of Research and Development undertaken by the taxpayer, which was transferred to the subsidiaries.

As per provisions of Section 9 of the Income-tax Act, 1961 (IT Act), consideration for transfer of rights (including granting of license) in respect of a trademark or similar property or for the use of a trademark or transfer of rights (including granting of a license) in respect of any copyright, literary, artistic or scientific work, falls under the definition of 'royalty.'

The ITAT remanded the case to the TPO, directing him to verify the agreements and evaluate the matter as per the guidance provided under the OECD BEPS Action Plan 8-10 and to evaluate whether there exists a licensor-licensee relationship between the taxpayer and its subsidiaries and analyze the brand name's impact on the subsidiaries' profits.

Our Comments

The ITAT emphasized the financial benefits accrued to an entity, which is critical in an analysis to determine whether a third party would agree to pay such royalty in an arm's length scenario. There may be some implicit benefit but whether this would require the group entity to pay royalty is a question, which needs to be answered based on the detailed analysis of the facts of each case. The ITAT has given significant importance to the principles laid down in OECD BEPS Action Plan 8-10 for evaluating such situations.

Whether DRP has the power to condone the delay in filing objections by the taxpayer?

Lam Research (India) Private Limited [TS-431-ITAT-2021(Bang)-TP]

Facts

The taxpayer is engaged in providing computer development services and Information Technology Enabled Services(ITeS) to its AEs on a cost-plus mark basis. While determining the arm's length price of the international transactions for AY 2012-13, the TPO proposed an adjustment which was incorporated in the draft assessment order passed on 23 February 2016 by the AO.

Aggrieved by the order, the taxpayer filed an objection before the DRP on 30 March 2016. The DRP rejected the objection of the taxpayer in limine on account of the belated filing of the objections (by three days), stating that the DRP does not have the power to condone the delay. Pursuant to this, the final assessment order was passed on 30 September 2016, retaining the original adjustment.

Aggrieved by the final assessment order, the taxpayer filed an appeal before the ITAT. The taxpayer also raised the following two additional grounds on legal issues:

- The DRP dismissed the objections of the taxpayer without condoning the delay; and
- The final assessment order was time-barred since it was not passed within 30 days from the date of the draft assessment order.

Rulings of ITAT

In relation to the delay in the filing by the taxpayer, the ITAT held that as per the provisions of Section 144C of the IT Act and as per the procedures governed by Income Tax Rules, 2009, the DRP had not been explicitly given the powers to condone the delay in filing the objections by the taxpayer.

In relation to the contention of the taxpayer that the final assessment order was time-barred, the ITAT held that it has powers to entertain an appeal in two situations, i.e. (i) when an order of assessment impugned is an order pursuant to directions of DRP under Section253(1)(d) of the IT Act; or (ii) from an order of the CIT(A). In the instant case, the DRP rejected the objections on the ground of limitation, and it provided no directions on the merits of the issue. In view of the above, the final assessment order was not pursuant to the direction of the DRP. The ITAT suggested that the correct course of action for the taxpayer would have been to appeal before the CIT(A) since the ITAT does not have jurisdiction to hear plea against final assessment order barred by limitation.

Our Comments

It has now been a settled issue with rulings from various ITAT across the country that DRP has no power to condone the delay in filing of the objections by the taxpayers. Thus, it lays down the basic principle of timely filings of the objections before the DRP. Also, in cases wherein the DRP rejects the objections of the taxpayers on the ground of limitation, and no directions are issued by the DRP pursuant to Section 144C(5) of the IT Act, the taxpayer may contemplate a recourse to file an appeal before the CIT(A) against the final assessment order passed by the AO.

Indirect Tax

Whether the amended Rule 89(5) of CGST Rules is valid to the extent, it denies refund of unutilized Input Tax Credit (ITC) relatable to input services in case of Inverted Duty Structure (IDS)?

Union of India vs. VKC Footsteps India Pvt. Ltd. [Civil Appeal No. 4809 of 2021 - Supreme Court of India]

Facts

- Section 54(3) of the CGST Act provides for a refund of unutilized ITC where the credit is accumulated on the tax rate on inputs being higher than the tax rate on output supplies (viz. IDS).
- Input tax is defined in Section 2(62) as tax charged on the supply of goods or services or both.
- The refund amount is computed as per the formula laid down in Rule 89(5) of the CGST Rules.
- Notification No. 21/2018-CT dated 18 April 2018 amended the said Rule to deny a refund of ITC availed on 'input services' and restricted the refund to ITC of inputs alone.
- This amendment was later given a retrospective effect from 1 July 2017 vide Notification No. 26/2018-CT dated 13 June 2018.
- Earlier, the Gujarat HC had held that the amended Rule is contrary to Section 54(3), whereas the Madras HC had upheld the validity of the amended Rule.

Ruling

Powers of the Court

- The Court cannot redraw legislative boundaries on the basis of an ideal that the law was intended to pursue.
- The doctrines emphasized during the course of the arguments furnish the underlying rationale for the enactment of the law but cannot furnish either a valid basis for judicial review of the legislation or make out a ground for invalidating a validly enacted law unless it infringes constitutional parameters.

Statutory provision cannot visualize every eventuality

- The absence of a specific rule-making provision in Section 54 and its existence in some other Sections of the same legislation does not lead to an automatic inference that the Central Government (CG) does not have rule-making power.
- Furthermore, Section 164(1) confers express rule-making powers on the CG.

Whether Rule 89(5) overrides Section 54(3)?

- The Court held that clause (ii) of the first proviso is not merely a condition of eligibility but provides a substantive restriction wherein refund of unutilized ITC can be availed only when the accumulation is relatable to an IDS, viz. the tax on input goods is higher than the rate of the tax rate of tax on output supplies.
- Therefore, there is no disharmony between Rule 89(5) which restricts the IDS refund to only ITC pertaining to 'inputs' (and not 'input services') and Section 54(3).

Anomaly in the formula cannot result in invalidation

- The Court agreed that there is an anomaly in the prescribed formula. However, held that it cannot result in the invalidation of a fiscal rule framed in exercise of the power of delegated legislation.

- By referring to its past judgments, the Court held that in the exercise of its powers of 'judicial review,' it could not allow itself to become a 'one-time arbiter' of any and every anomaly of a fiscal regime.

Our Comments

The Court has refused to walk in the shoes of the executive or the legislature and urged the GST Council to reconsider the formula and take a policy decision regarding the same.

Said judgment, although rendered in the context of IDS refund, has wider implications. It would be interesting to see whether other issues such as the validity of place of supply of intermediary services, the validity of ITC pertaining to goods/services procured for construction of immovable property, etc., will meet a similar fate before the Apex Court.

Whether managerial and leadership services provided by the Corporate Office to its site offices in various States and Group Companies can be considered as 'supply of service' in terms of Section 7 of the CGGT Act?

If yes, whether the applicant can charge a certain lump sum amount in terms of the second proviso to Rule 28 of CGST Rules as most of the recipients of such services are eligible for ITC at their respective ends?

B. G. Shirke Construction Technology Pvt. Ltd. [2021 (9) TMI 949 - AAR, Maharashtra]

Facts

- The applicant, a Corporate Office, supplies managerial and leadership services in finance, operation, etc., to its site offices and Group companies, whereby it receives fixed monthly charges on a lump sum basis.
- The services rendered by employees of the Corporate Office still retain the character of 'services by an employee to the employer in the course of or in relation to his employment.'
- The employment relationship exists between the employee and employer, i.e., legal entity as a whole and not confined to the location of the registered person from where the said employee renders services.
- Hence, such services shall not be treated as supply of services as per Schedule III, and GST is not payable on the lump sum amount.

Ruling

- Upon referring to the dictionary meaning of 'Employee,' the site offices/group companies cannot be treated as persons who the applicant employs.
- The site offices as well as Group companies are independent and separately registered under the GST law, and hence, the applicant cannot get the benefit of Entry 1 to Schedule III.
- As per the CGST Act, branch offices and head offices are distinct persons and all transactions between them are to be brought under the GST net.
- Therefore, the impugned services provided by the applicant to its distinct and related entities can be considered as 'supply of service,' and GST will be leviable on the lump sum amount charged on them.
- Furthermore, since full ITC is admissible to the recipients, the value declared in the invoice would be deemed to be the open market value of the services.
- Therefore, the applicant may resort to valuation under Rule 28 of the CGST Rules.

Our Comments

The ruling has once again brought to fore the question of whether employees based in Head/Corporate Office can also be considered as employees of various branches located across different States, for the purpose of GST. The issue has arisen mainly because the GST law considers branch offices in different States as 'distinct persons.'

However, whether such a deeming fiction created by the statute will override the employment contracts, which are usually at an organization level, is expected to be an area prone to litigation.

It would be an opportune time for the GST Council to clarify this aspect and restrict the levy to specified transactions, if any, for such supplies are generally revenue neutral.

Merger & Acquisition Tax

Mumbai ITAT: Tribunal allows the benefit of India-Mauritius DTAA on re-domiciliation of a company to Mauritius

Asia Today Limited [TS-620-ITAT-2021(Mum)]

The assessee, Asia Today Limited (ATL), an erstwhile company registered in the British Virgin Islands (BVI), is now re-domiciled to Mauritius. On re-domiciliation, the company's registration was canceled by the Registrar of Company in BVI, and simultaneously, the Mauritian Revenue Authorities issued Tax Residency Certificate (TRC) to the company. The assessee, now registered in Mauritius, claimed the treaty benefits as per India – Mauritius DTAA. However, the AO, contending that the company was originally a BVI registered company, disallowed the benefits as per India-Mauritian DTAA.

The Tribunal decided in the favor of the assessee company laying down the following observations:

- Corporate re-domiciliation also referred to as 'continuation', is a process by which a company moves its 'domicile' from one jurisdiction to another by changing the country under whose laws it is registered and incorporated whilst maintaining the same legal identity
- Once a tax residency certificate is issued, it is not up to the tax authorities even to make such investigations
- Re-domiciliation of the company by itself cannot lead to denial of treaty entitlements of the jurisdiction in which the company is re-domiciled, though, of course, the fact of re-domiciliation of the company could at best trigger detailed examination or the re-domiciled company being actually fiscally domiciled in that jurisdiction.

Our Comments

The Mumbai Tribunal has recognized re-domiciliation as an authentic and convenient procedure from a business perspective and has allowed treaty relief of new jurisdiction.

Mumbai ITAT: Allows set-off of losses under Section 79 of the Act despite a change in immediate holding observing no effective change in voting rights

Tril Roads Private Limited [TS-843-ITAT-2021(Mum)]

The assessee, Trill Road Pvt. Ltd. (TRPL), has claimed set-off of brought forward losses for AY 2014-15. The assessee's shares as on 1 April 2013 were held in the proportion of 24%, 24% & 52% by Tata Realty and Infrastructure Ltd. (TRIL), Actis Infrastructure Roads Ltd. (Actis) and TRIL Highway Project Ltd. (THPL), respectively. TRIL and Acits held THPL's shares in the proportion of 78.85% and 21.15%. Subsequently, in 2013, THPL merged into TRIL, and TRPL became a subsidiary of TRIL. Subsequently, at the time of set-off, TRPL was a wholly-owned subsidiary of TRIL.

The AO strictly interpreted the provisions of Section 79 of the Act and observed that there was a change in shareholding by 51%. Accordingly, he rejected the claim of set-off of brought forward losses. The assessee contended that there is no change in control and management as even pre-merger, TRIL held 24% directly and 41% indirectly (78.85% of 52%). CIT(A) accepted the assessee's contention that more than 51% of voting power continued to be held by the same beneficial owners.

The Tribunal allowed the set-off of losses under Section 79 of the Act basis the following observations:

- Effectively, there is no change as far as the voting pattern and beneficial ownership of the assessee company.
- TRIL controlled the whole management directly as well as indirectly at the time of incurring loss and was controlling directly after the merger. The whole group is managed by the same set of directors and shareholders.
- With reference to the Department's reliance on the decision of Yum Restaurants India Pvt. Ltd.[10], the same was distinguished by facts.

Our Comments

The ruling re-signifies that provisions of Section 79 cannot trigger where the beneficial ownership (control and management of the company through voting power) remains the same.

10. Yum Restaurants India Pvt. Ltd. (ITA No. 349/2015)

Tax Talk

Indian Developments

Direct Tax

Extension Of Time Limits Of Certain Compliances To Provide Relief To Taxpayers In View Of Difficulties Reported By Taxpayers

[Circular No. 16, 29 August 2021]

The due date for filing of Equalization Levy statement for FY 2020-21, statement of Foreign Remittances to be filed by authorized dealers for Q1 of FY 2021-22 have been extended to 30 November 2021. The due date for Pension Funds and Sovereign Wealth Funds for intimation of investment made in India for Q1 for FY 2021-22 have been extended to 30 November 2021.

Central Board of Direct Taxes (CBDT) extends due date under Section 3 of Vivad se Vishwas Act (VSV Act)

[Press Release dated 29 August 2021]

Considering the difficulties being faced in issuing Form 3, which is a pre-requisite for making payment of disputed tax, the due date for payment of disputed tax under the VSV Act (without any additional amount) has been extended from 31 August 2021 to 30 September 2021.

The CBDT further clarified that there is no proposal to change the last date for payment (with additional amount) under VSV Act, and it remains as 31 October 2021.

CBDT notifies new rule for computation of taxable interest on employees contribution to the provident fund in excess of a prescribed threshold

[Notification No. 95/2021, 31 August 2021]

The Finance Act, 2021 had amended the provisions exempting payments from recognized provident funds to withdraw exemption on interest on employee's contribution in excess of the INR 0.25 million. The computation of taxable interest on excess employees' contributions has now been prescribed by inserting a new Rule 9D. The new rule requires the individual to maintain separate accounts for taxable contribution and non-taxable contribution within the provident fund accounts from FY 2021-22 onwards. It further states that the interest accrued on the taxable contribution account shall not qualify for an exemption.

CBDT provides a procedure for handling assessment/penalty proceedings by Jurisdictional AO transferred out of Faceless Assessment

[Circular No. F. No. 225/97/2021/ ITA-II dated 6 September 2021]

Jurisdictional AO shall complete the assessment/penalty following broad contours:

- Conduct proceedings electronically, except in certain specified cases.
- The request for personal hearings (through video conference) shall generally be allowed to the taxpayers, mainly after the taxpayers have filed written submission to the show cause notice. If video conference is not technically feasible, personal hearings may be conducted in a designated area in Income-tax Offices.
- Jurisdictional AO may use faceless processes, such as verification units for online verification or specialized units for technical inputs, etc. while conducting the proceedings.
- The superior authority to Jurisdictional AO is compulsorily required to finalize the assessment or penalty.

CBDT extends timelines for filing income-tax returns and various audit reports for AY 2021-22

[Circular No. 17, 17 September 2021]

On consideration of the various difficulties faced by taxpayers and other stakeholders, the circular provides an extension of the following due dates:

Particulars	Original Due Date	Revised Due Date
Taxpayers who are required to furnish transfer pricing report	30 November 2021	28 February 2022
Taxpayers who are required to get their accounts audited and not covered in Sr. No. 1 above	31 October 2021	15 February 2022
Other taxpayers not covered in Sr. No. 1 or 2 above	31 July 2021	31 December 2021
Belated/revised tax returns	31 December 2021	31 March 2022
Tax Audit Report	30 September 2021	15 January 2022
Transfer pricing report in respect of international/ specified domestic transactions	31 October 2021	31 January 2022

Indirect Tax

Clarification issued on the scope of 'intermediary'

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

The government has issued much-awaited clarifications on the scope of 'intermediary' under the GST law. It has laid down certain pre-requisites/conditions, which are summarized as follows:

- There should be a minimum of three parties, two of them transacting in the supply of goods or services or securities and one arranging or facilitating the said main supply.
- There are two distinct supplies in the case of intermediary services;
  - i. Main Supply - between the two principals, which can be a supply of goods or services or securities; and
  - ii. Ancillary Supply - which is the service of facilitating or arranging the main supply between the two principals.
- The intermediary service provider should have the character of an agent, broker, or any other similar person. The use of the expression 'arranges or facilitates' in the definition of 'intermediary' suggests a subsidiary role for the intermediary.
- A person involved in the main supply on principal to principal basis to another person cannot be considered a supplier of intermediary service.
- Sub-contracting for a service is not an intermediary service. In such services, the sub-contractor provides the main supply, either fully or partly, and does not merely arrange or facilitate the main supply between the principal supplier and his customers.

Clarification relating to the export of services

[Circular No. 161/17/2021 dated the 20 September 2021]

The government has clarified that any supply of services by a subsidiary/sister concern/group concern of a foreign company in India to establishments of the said foreign company incorporated outside India will not be barred by condition (v) of Section 2(6) of the IGST Act. It would not be treated as a supply between mere establishments of distinct persons under Explanation 1 of Section 8 of the IGST Act. Such supplies, therefore, would qualify as 'export of services, subject to fulfillment of other conditions as provided under Section 2(6) of the IGST Act.

Key recommendations in the 45th GST Council Meeting

The 45th GST Council meeting was held on 17 September 2021. Apart from the rate changes on various goods and services, the following key decisions were taken in the meeting:

- Relaxation in requirement of filing GST ITC-04 (job-work details) from quarterly to six monthly for taxpayers having turnover above INR 50 million and annual for taxpayers having turnover below INR 50 million.
- Ability to transfer unutilized balance in GST cash ledger on the GST portal between 'distinct persons' without going through the refund procedure.
- Aadhaar authentication of registration to be made mandatory for being eligible for filing refund claim and application for revocation of cancellation of registration.
- From 1 January 2022, the taxpayer who has not furnished Form GSTR-3B for the preceding month would be restricted from the furnishing of Form GSTR-1.
- Late fee for delayed filing of GSTR-1 to be auto-populated and collected in next GSTR-3B return.
- Rule 36(4) of CGST Rules to be amended once the proposed clause (aa) to Section 16(2) to restrict availment of ITC in respect of invoices/debit notes to the extent the details thereof are furnished by the supplier in GSTR-1/IFF and communicated to the recipient in Form GSTR-2B, is notified.
- From 1 January 2022, e-commerce operators shall be made liable to pay tax on the following services provided through them -

  i. Transport of passengers through any type of motor vehicle, and

  ii. Restaurant services are provided with some exceptions.

Extension of Foreign Trade Policy

[Notification no. 33/2015-2020 dated 28 September 2021]

In view of the pandemic, the government had previously extended the Foreign Trade Policy 2015-20 till 30 September 2021. Now, the policy has been further extended up to 31 March 2022.

Extension in the Export Obligation period of specified Advance and EPCG Authorisations

[Notification no. 28/2015-2020 dated 23 September 2021]

The Directorate General of Foreign Trade (DGFT) has notified the following:

- The Export Obligations period of specified Advance and Export Promotion Capital Goods (EPCG) Authorizations, where original or extended Export Obligation is expiring during the period 1 August 2020 to 31 July 2021, has been extended till 31 December 2021. However, this extension is subject to 5% additional Export Obligation on the balance of original or extended Export Obligation.
- The option to avail Export Obligation extension with payment of composition fees would remain available.
- Where AA Holder or EPCG Holder has already obtained Export Obligation extension upon payment of composition fee, the refund of composition fee will not be permitted.

Tax Talk

Global Developments

Direct Tax

Important tax-related measures introduced in Sweden's Budget Bill for 2022

[Excerpts from orbitax, 23 September 2021]

On 20 September 2021 Budget Bill for 2022 was introduced in Riksdag. Some of the important tax-related measures discussed were as follows:

- The introduction of a specific limitation rule that would disallow the offset of prior-year losses, following a change in ownership, where it can be assumed that the primary reason for the change in ownership was to take advantage of the losses. This will enter into force from 1 May 2022 but apply retroactively for changes in ownership from 11 June 2021.
- The introduction of a modernized withholding tax on dividends paid to foreign persons, including a standard rate of 30% and rules to prevent fraud and abuse, which will replace the current coupon tax with effect from 1 January 2024, although rules regarding approved intermediaries would apply from 1 July 2023.
- The repeal of the advertising tax from 1 January 2022.

Brazil Temporarily Increases Financial Transactions Tax Rates to Fund Welfare Program for COVID-19

[Excerpts from orbitax, 20 September 2021]

- The Brazilian government has announced that President Jair Bolsonaro issued Decree No. 10,797 on 16 September 2021, which provides a temporary increase in the financial transactions tax (IOF) rate to fund the expansion of the Auxílio Brasil welfare program.
- The program provides aid for Brazilians impacted by the COVID-19 pandemic. With effect from 20 September to 31 December 2021, the decree increases the IOF daily rates on credit transactions from 0.0041% to 0.00559% for legal entities, which equates to an increase in the annual rate from approximately 1.50% to 2.04%.
- For individuals, the decree increases the IOF daily rates from 0.0082% to 0.01118%, which equates to an increase in the annual rates from approximately 3.0% to 4.08%.

Algeria joins Global Forum on Transparency and Exchange of Information for Tax Purposes

[Excerpts from OECD, 1 September 2021]

- Algeria joins the international fight against tax evasion by becoming the 163rd member of the Global Forum on Transparency and Exchange of Information for Tax Purposes.
- Like all other members, Algeria will participate on an equal footing and is committed to combatting tax evasion through the implementation of the internationally agreed standards of transparency and exchange of information for tax purposes – both exchange of information on request and automatic exchange of information.
- As a member of the Global Forum, Algeria will also participate in the Africa Initiative, a program of work launched in 2014 to support domestic revenue mobilization and the fight against illicit financial flows in Africa through enhanced tax transparency and the exchange of information.

Transfer Pricing

Singapore releases 6th edition of its Transfer Pricing Guidelines

The Inland Revenue Authority of Singapore (IRAS) has issued its 6th edition of Transfer Pricing Guidelines (TPG) on 10 August 2021. There are significant updates in relation to the guidance on the TP documentation including, detailed explanation relating to guidance on Advance Pricing Agreement (APA) and Mutual Agreement Procedures (MAP) for preventing and resolving TP disputes, clarifications on financial transactions and transactions relating to services and guidance on the application of the arm's length principle and TP documentation requirement under Cost Contribution Arrangements (CCA), etc.

Though there is no significant deviation from the previous edition, the 6th edition includes various updates and guidance in additional areas as listed in the table below

Part I – Transfer Pricing Principles and Fundamentals

Section 5 - The Arm's Length Principle

Berry Ratio and Value-added cost – Introduced value-added cost plus mark-up as a Profit Level Indicator (PLI) while enhancing the guidance on the application of Berry Ratio. Similar to the Berry Ratio, value-added cost plus mark-up relies on the presumption that the value of the functions performed is proportional to the operating expenses and not to sales.

Section 6 - Transfer Pricing Documentation

In Appendix B of this section, IRAS has compiled the **frequently asked questions** (FAQs) regarding the preparation of TP documentation and provided guidance to help taxpayers comply with the TP documentation requirements. The guidance is largely in relation to the following key areas:

- Date of disclosure of documentation to substantiate if it is maintained on a contemporaneous basis.
- Guidance on preparing organizational holding structure along with the guidance on business description disclosure (along with business structure, business model and strategy, industry and economic conditions and contribution of business in overall value chain).
- The manner in which the description of the transactions between the taxpayer and its related party shall be disclosed.
- TP analysis shall include reasons and basis for selecting the transfer pricing method, tested party or tested transactions and comparable companies, etc.
- Documentation of events that affected the business performance significantly, for instance, if the business made a loss or suffered a lower profit margin compared to the comparable companies or competitors.

Part II – Transfer Pricing Compliance (erstwhile II- Transfer Pricing Administration)

Section 7 - Transfer Pricing Audit by IRAS

Renamed 'Transfer Pricing **Consultation**' to 'Transfer Pricing **Audit**', this reflects a more focused approach that IRAS will adopt to ensure TP compliance.

Section 8 - Surcharge and Penalty

The new update conveys additional clarifications on the rigorous compliances pertaining to the arm's length standard for the application of upward TP adjustment and imposition of penalties and surcharges by the IRAS. The new section lays down circumstances in which **IRAS may grant partial or full remission of 5% TP surcharge on tax adjustments**.

The update also encourages taxpayers to be cooperative; demonstrate responsive behavior with a good compliance record; and initiate voluntary disclosure of transactions, which are not at arm's length, with the possibility of full or partial remission of the surcharge on such voluntary adjustments.

Furthermore, full remission may be granted to taxpayers making self-initiated retrospective upward adjustments within two years from the filing due date of tax returns and before the receipt of the IRAS' query, audit or investigation.

Part III – Dispute Prevention and Resolution (erstwhile II- Transfer Pricing Administration)

Section 10 - Preventing and resolving transfer pricing disputes

This section explains MAP and APAs in greater detail and sets out the benefits, expectations and compliance rules. Additional guidance on arbitration and circumstances under which IRAS will not accept an APA application have been provided.

IRAS will not accept an APA application where the proposed transaction is not carried out for bona fide commercial reasons or involves a scheme that has the avoidance or reduction of tax as one of its main purposes.

IRAS may also reject the MAP or APA application in certain circumstances wherein the taxpayer has inadequate TP documentation, or the taxpayer does not comply with the arm's length principle, or related party transaction is under ongoing audit or investigation. If the MAP or APA application is rejected, then the IRAS will explain the reasons to the taxpayer, and the taxpayer may seek alternative remedies under the relevant domestic tax law or other options to manage its TP risks. IRAS has also compiled the FAQs regarding the APA application.

The IRAS provides an option to the taxpayer to resolve the dispute through 'arbitration' (subject to availability of such provisions under the DTAA) in cases where the IRAS and relevant foreign tax administration are unable to resolve the TP dispute under a MAP within a certain period of time (typically two to three years).

Part IV- Other Matters (erstwhile Part III – Other Issues)

Section 14 - Related party services

Guidance on the benefit test and shareholder activities – In using the benefit test, additional guidance is provided on the treatment of cost for shareholder activities and duplicate services, which is in line with the OECD TPG[11].

Mark-up on low value-added services - Further, 5% profit mark-up under the **OECD simplified approach[12] for low value-adding intra-group services** will also be considered to be at arm's length in addition to the existing list of routine support services (i.e., Annexure C of Singapore TPG). However, taxpayers applying the OECD simplified approach are not exempt from preparing TP documentation, unlike the exemption available for preparing TP documentation for routine support services listed in Annexure C.

Section 15 - Related party financial transactions

The update provided guidance on the arm's length principle for the related party financial transactions relating to loans, cash pooling, hedging, and transaction relating to the guarantee and directs the taxpayers to take guidance from Chapter X of the OECD TPG[13].

The IRAS emphasized various economic relevant characteristics, which shall be analyzed and may serve as pivotal indicators in determining whether a purported loan shall be considered a loan.

Furthermore, in order to reduce the compliance burden for taxpayers with multiple related party loans, taxpayers can choose to determine the arm's length **interest rate** for comparable loans on an **aggregate basis** using the comparability factors listed in the guidance.

Section 17 - Cost Contribution Arrangements(CCA)

Introduced guidance on how to apply the arm's length principle to a CCA, which is parallel with the **OECD TPG four-step framework**:

- Determine participants in the CCA
- Determine a participant's share of expected benefits from the CCA
- Determine the arm's length value of each participant's contribution to the CCA
- Determine the allocation of CCA contributions to each participant according to its share of expected benefits.

Furthermore, it also lays out the tax treatment and TP documentation requirement for a CCA.

Our Comments

Since its first edition published in 2006, IRAS has periodically revised its TP guidelines to keep up with the ever-evolving global TP landscape and international tax developments. The revised guidelines clearly showcase IRAS' focus on enforcing compliances with much more rigor by providing better clarity and reference to the taxpayers.

Indirect Tax

Imposition of VAT on digital transactions

[Excerpt from The Economic Times]

The Philippines' lower house of Congress has approved the imposition of 12% VAT on digital transactions in the country. This will require foreign-based digital service providers to assess, collect and remit VAT on the transactions that go through their platform.

11. Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations published by the Organisation for Economic Cooperation and Development (OECD)
12. The specific guidance relating to the OECD simplified approach for low value-adding intragroup services is provided in Chapter VII of the 2017 OECD TPG.
13. The specific guidance relating to financial transactions are included in OECD TPG 2017 as Chapter X.

Compliance Calendar

Direct Tax
Indirect Tax

7 October 2021

Payment of TDS and TCS deducted/collected in September 2021

10 October 2021

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

11 October 2021

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

13 October 2021

- GSTR-6 for the month of September 2021 to be filed by Input Service Distributor (ISD)
- GSTR-1 for the quarter of July 2021 to September 2021 to be filed by all registered taxpayers under the QRMP scheme

15 October 2021

Quarterly statement of TCS deposited for the quarter ending 30 September 2021

20 October 2021

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

22 October 2021

GSTR-3B for the quarter of July 2021 to September 2021 to be filed by registered taxpayers under QRMP scheme and having principal place of business in Category 1 states

24 October 2021

GSTR-3B for the quarter of July 2021 to September 2021 to be filed by registered taxpayers under QRMP scheme and having principal place of business in Category 2 states

30 October 2021

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

31 October 2021

Quarterly statement of TDS deposited for the quarter ending 30 September 2021

7 November 2021

Payment of TDS and TCS deducted/collected in October 2021

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)

11 November 2021

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

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

Notes

Category 1 states - Chhattisgarh, Madhya Pradesh, Gujarat, Maharashtra, Karnataka, Goa, Kerala, Tamil Nadu, Telangana, Andhra Pradesh, the Union territories of Daman and Diu and Dadra and Nagar Haveli, Puducherry, Andaman and Nicobar Islands or Lakshadweep.

Category 2 states - Himachal Pradesh, Punjab, Uttarakhand, Haryana, Rajasthan, Uttar Pradesh, Bihar, Sikkim, Arunachal Pradesh, Nagaland, Manipur, Mizoram, Tripura, Meghalaya, Assam, West Bengal, Jharkhand or Odisha, the Union territories of Jammu and Kashmir, Ladakh, Chandigarh or Delhi.

Insights

Alerts

Government notifies SEIS for FY 2019-20; prunes list of eligible services and reduces rates

24 September 2021

Read Here https://bit.ly/3ludOE7

GST Council addresses longstanding GST issues; Seeks to streamline compliances, correct duty inversion

22 September 2021

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

CBDT announces relaxations to facilitate strategic disinvestment in PSUs

21 September 2021

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

Notional interest to be subjected to Indian Transfer pricing provisions? Special Bench asks Tribunal to decide

17 September 2021

Read Here https://bit.ly/3Dx5Fof

Government notifies due date and validity period for scrip based FTP scheme

17 September 2021

Read Here https://bit.ly/3AGx5Xj

Articles

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

1 October 2021, LawStreetIndia

https://bit.ly/2YAH5nB

Government's Clarification on 'Intermediary Services' & 'Distinct Persons' – A Respite for Service Exporters?

29 September 2021, Taxsutra

https://bit.ly/3lpIq9z

Did Tribunal get 'carried away' while deciding on Carried Interest?

16 September 2021

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

Supreme Court's Restraint on 'Ideal GST Law' - Upholds Inverted Duty Structure Refund Restriction

15 September 2021, Taxsutra

https://bit.ly/3Au3EbH

Tax Podcast

Remission of Duties and Taxes on Export Products (RoDTEP) Scheme

Watch Here https://bit.ly/39YHBhr

Webinars & News

Webinars

GST Inquiry, Investigation, Audit, Assessments

Organizer - Nexdigm (SKP)

17 September 2021

Watch Here https://youtu.be/UwCHzEVD0G0

TP Asia Summit 2021

Organizer - Inventicon

21 and 22 October 2021

Register Now

Virtual Masterclass on GST

Organizer - Achromic Point

26 and 27 October 2021

Register Now

2-Day Tax Conference (Day 1)

Organizer - CII

27 October 2021

Register Now

2-Day Tax Conference (Day 2)

Organizer - CII

28 October 2021

Register Now

News

Expectations from the upcoming 45th GST Council meeting

- Saket Patawari

16 September 2021, The Hindu

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.

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