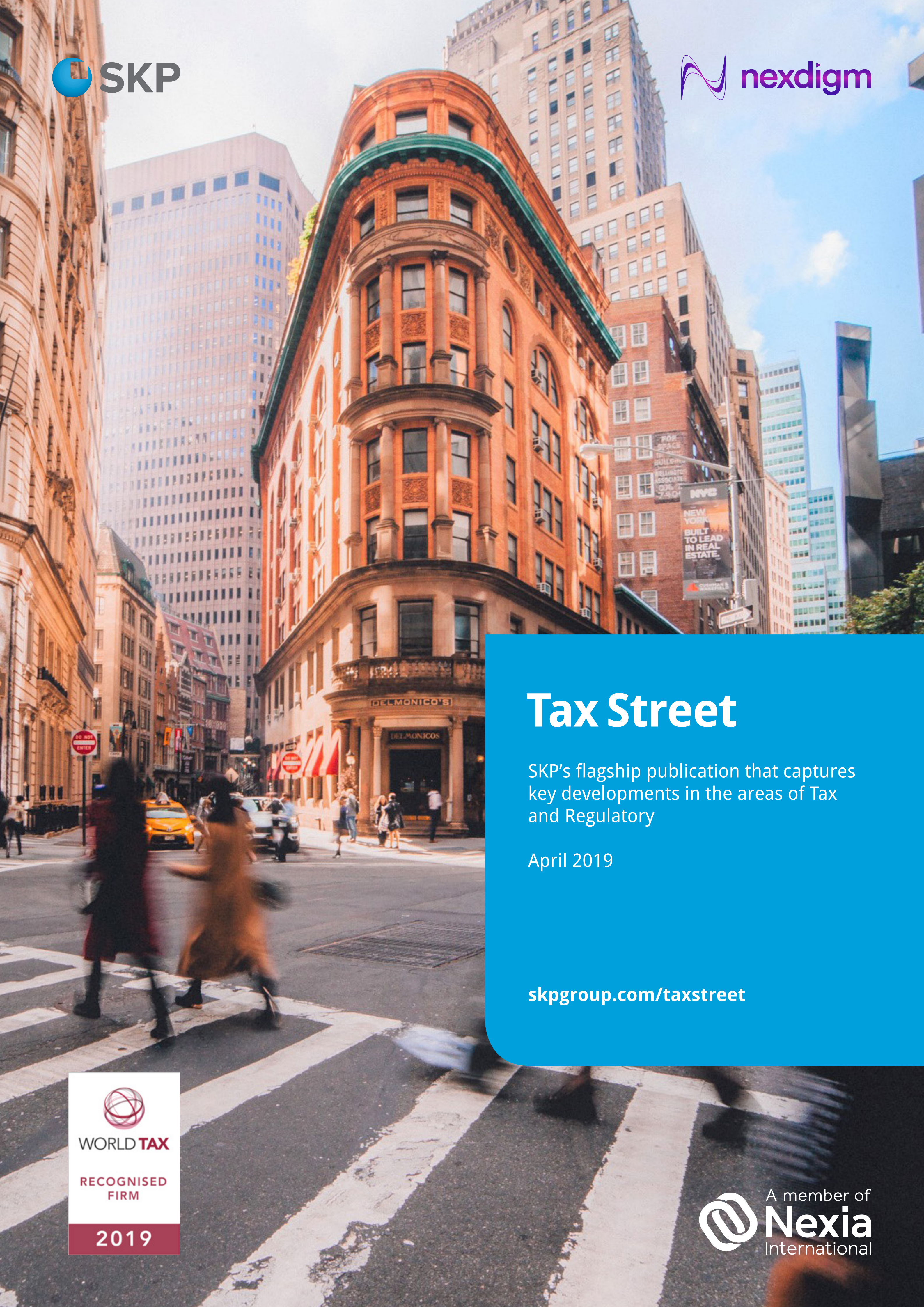


SKP

nexdigm

Tax Street

SKP's flagship publication that captures key developments in the areas of Tax and Regulatory

April 2019

skpgroup.com/taxstreet

WORLD TAX
RECOGNISED FIRM
2019

A member of Nexia International

SKP TAX STREET

INTRODUCTION

We are pleased to present the latest edition of Tax Street – our newsletter that covers all the key developments and updates in the realm of taxation in India and across the globe for the month of April 2019.

CBDT issued draft profit attribution rules which would impact foreign companies having business connection/ PE in India and new tax return forms were notified. Apart from this, a string of crucial announcements and rulings in the realms of direct tax, transfer pricing and indirect tax have taken place. In this issue of Tax Street, we have tried to collect and synthesize all these significant developments to draw a holistic picture of the current tax landscape in India for your understanding.

- The **'Focus Point'** section talks about the Draft CBDT guidelines on Profit Attribution to Permanent Establishment to ensure certainty on profit attribution.
- Under the **'From the Judiciary'** section, we provide in brief, the key rulings on important cases and our take on them.
- Our **'Tax Talk'** provides key updates on the important tax-related news from India and across the globe.
- **'Compliance Calendar'** – we list down the important due dates with regard to direct tax, transfer pricing and indirect tax in the coming weeks.

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

Warm regards,
The SKP Team

FOCUS POINT

Draft CBDT guidelines on Profit Attribution to Permanent Establishment

Permanent Establishment (PE) and attribution of profits to a PE is a very complex subject. From an Indian tax standpoint, there has been a fair amount of litigation on the said issue. Indian tax laws provided little guidance on profit attribution in the form of Rule 10 and provided unlimited powers to the tax officer for attributing the profits in India. Accordingly, there was a dire need to have appropriate attribution rules which provides certainty and remove arbitrary approach that was being followed.

Draft guidelines on profit attribution to permanent establishments, issued by Central Board of Direct Taxes (CBDT), is a welcome move and step in the right direction to have certainty on profit attribution.

Current Profit Attribution Rules

As per the Indian tax laws, the income of a non-resident, which accrues or is deemed to accrue in India (i.e., by having a Business Connection/PE), is taxable in India. Once a Business Connection/PE is established, the income attributable to such Business Connection/PE is taxed in India. As per current rules, if a tax officer is of the opinion that the actual income, accruing/arising through a Business Connection/PE, cannot be ascertained, then the tax officer can follow any of the following methods:

- The percentage of turnover as the Tax Officer considers reasonable;
- A proportionate approach, i.e., by considering the ratio of the profit/ receipts to the total profit/receipts; or
- Any other method deemed suitable.

Existing rules provide discretionary powers to the tax officer in profit attribution. This often results in high profits being attributed to the Indian Business Connection/PE, which sometimes lead to high-pitched tax assessments for foreign companies. In light of this, there was a dire need to have certain standard rules to avoid uncertainty.

Accordingly, Draft guidelines on profit attribution to permanent establishments issued by CBDT would be helpful to achieve certainty.

Current Profit Attribution Rules

CBDT had set-up a committee to examine the existing profit attribution rules, examine the contribution of demand and supply side in profit attribution, and recommend changes to profit attribution rules. The committee rejected the authorized Organisation for Economic Co-operation and Development (OECD) approach, which is based on Functions Assets and Risks performed as provided under transfer pricing guidelines. The OECD approach provides for greater taxing rights to the country of the resident taxpayer. The committee was of the view that the Indian treaties are based on UN-model convention and hence rejected the authorized approach of OECD. Furthermore, the committee also highlighted that India had expressed its reservations with respect to the same on an international diaspora. Moreover, the current method of profit attribution under Rule 10 is inconsistent with international practices and results in prolonged litigation.

In view of the above, in its report, the Committee has considered three methods for profit attribution to the PE which are as follows:

Formulary Apportionment

This is one of the most talked about option for attributing profits basis a three formula factor. This method considers aggregate sales (first factor), manpower, wages or payroll (second factor) and assets or property (third factor) in relation to Indian operations.

It was discussed that the said approach will require complete information about the country-wise sales revenue as well as the deployment of manpower and assets, which are not easily available. Although it was discussed that these details would be provided in MNC's Country by Country Report (CbCr), however, since the threshold for CbCr reporting is Euro 750 million, the details of many MNC's with small turnover may still not be available. Also, the usage of data collected under CbCr has its own challenges.

Fractional Apportionment

This method looks at apportionment of profits derived from India and does not require consolidation of profits of the enterprise from different tax jurisdiction. This method is currently prescribed under rule 10 of the income tax rules and has also been applied and upheld in many judicial precedents.

This method takes into account the demand-side- and supply-side factors. This method allocates one third to sales and two third to the supply side. Thus, it equally distributes taxing rights between demand and supply jurisdiction.

Attribution based on demand and supply factors

This method looks at apportioning profits from Indian operations (in and outside India) based on sales (representing the demand factors, 33% weight), manpower and assets (being supply factors, together 67% weight).

Recommendations

Considering the above, the committee has provided following mechanism for attribution profit to the PE:

Computing the Profit to be Attributed

The profit derived from India shall be the revenue derived from India multiplied by the global profit margin (generally the EBITDA margin). However, globally if an entity results in a loss, a minimum profit margin at 2% of the gross revenue would have to be applied.

The committee provides for a minimum profit attribution of 2% in the case where global operations are loss-making under the assumption that Indian business would be profitable. Thus, India should not be deprived of its fair share of taxes merely because global operations are loss making.

Manner of Attributing the Profit Computed (as per 'A' above)

The profit derived shall be attributed in the following manner:

> Profit Derived (as per A) X (33% of Sales + 17% of No. of Employees + 17% of Wages + 33% of Assets)

In the above formula, sales shall mean the proportion of sales derived by Indian operations from sales in India to total sales revenue derived by Indian operations from sales in India and outside India.

Employees shall mean the proportion of employees employed with respect to Indian operations and located in India to total employees employed with respect to Indian operations and located in India and outside India.

The quantum of wages and assets shall be determined on the similar basis.

In cases where entities, having Significant Economic Presence (SEP) in India, the profit shall be attributed by considering the above factors (i.e., sales, employees, wages) and 'users'. Furthermore, it recommends that users should be assigned weight of 10% (along with sales at 30%, employees and wages at 15% each and assets at 30%) in cases of low- and medium-intensity users and 20% (along with sales at 30%, employees and wages at 12.5% each and assets at 25%) in cases of high-intensity users.

Associated Enterprises

In cases where a Business Connection/ PE is constituted in India via an associated enterprise (AE), which receives payments for sale/services in excess of INR 10,00,000, then profits shall be attributed as per above scenarios. However, such profits would be reduced by the profits already subjected to tax in the hands of AE. Alternatively, in cases where the AE receives payments less than INR 10,00,000 and remunerated at arm's length, no further attribution would be required.

SKP's Comments

While having a set of uniform profit-attribution rules is the need of the hour, the current rules may have some challenges. This approach may pose many challenges for the multinationals, constituting a PE in India, as the standard arm's length approach that is determined based on the FAR analysis may no longer be relevant. This approach assumes that the Indian PE would be involved in the sales function and hence attribution based on sale-side factor would be required in all cases. This approach may lead to absurd results in cases where the Indian PE does not have much role in sales due to the brand of the foreign enterprise. Ideally, the arm's length approach should cover all the profits derived by an Indian PE and unless the transfer pricing study is not appropriate, resorting to other methods may not give a fair result. The only exception provided under the approach is the constitution of a PE in cases where revenues are not generated in India (or are less than INR 1 million from India), and the Indian entity is remunerated at arm's length. In all other cases, the revenues to be attributed to India would have to be considered based on the three factors of sales, supply, and assets.

Furthermore, as per the current formulae provided, there could be issues in gathering data, determining low-, medium-, and high-intensity users. Also, minimum profit attribution of 2%, in case of global losses, can pose challenges for Foreign Companies to claim a tax credit in the home country, which may lead to double taxation.

Currently, these rules are open for modifications vide suggestions from various stakeholders. As a result, it is still possible that the said rules could be further tweaked after considering the challenges posed by the said rules.

FROM THE JUDICIARY

Direct Tax

Whether the presence of equipment in India for grouting activities constituted a fixed place PE of the taxpayer in India under India-UAE DTAA?

M/s ULO Systems LLC vs. DCIT [TS-164-ITAT-2019(Delhi)]

Held

The taxpayer is a UAE company engaged in the business of undertaking grouting work for companies in the oil and gas industry. It had also made some offshore supplies to the Indian companies. The tax officer treated the presence of equipment for grouting activity as a Fixed Place PE in India and attributed profits from offshore supplies to PE in India.

The tax tribunal observed that the taxpayer's work involved laying out cement layer on underwater structure, pipeline and cable stabilization, pipeline cable protection, stabilization and protection of various sub-sea structures, etc. These activities (collectively known as grouting) carried on by taxpayer cannot be construed as "construction activity" and hence cannot be held as constituting construction PE in India under Article 5(2)(h) of the DTAA.

The tax tribunal observed that for a fixed place PE to be constituted, the taxpayer should have a place of business in India available at its disposal for carrying on its business. In the said case, the equipment along with the personnel of the taxpayer were stationed on the vessel provided by the main contractor, which constituted a fixed place of business through which the taxpayer carried on its business. Furthermore, the taxpayer enjoyed a fair amount of permanence through its personnel and equipment within territorial limits of India. Hence, the tax tribunal placed reliance on the decision of SC in the case of Formula One and held that the equipment along with its personnel constituted a fixed place PE in India.

SKP's Comments

In recent years, India has witnessed spurt in PE-related disputes, particularly fixed place PE. The courts at various judicial levels are applying the principles laid down in the landmark SC decision in the case of Formula One (pertaining to fixed place PE) to every similar situation. In the present case, the equipment and personnel are treated as being at the disposal of the taxpayer.

Taxpayers carrying on business in India should evaluate the PE exposure in India and tax risks associated with the same. It would be important that the business structure are compliant and appropriate measures are taken to ensure that there is no PE risk in India.

Whether payments for salaries and travel expenses made to Foreign Nationals are in the nature of salary reimbursements or fees for technical services (FTS)?

M/s Nippon Paint (India) Pvt Ltd vs. DCIT [(TS-171-ITAT-2019 (Chennai)]

Held

The taxpayer made payments for salaries and travel expenses to Foreign Nationals who were seconded to the taxpayer by its group company in Japan without deducting taxes on the same as they were not liable to tax in India. However, the tax officer held that such payments are in the nature of FTS and the taxpayer was required to deduct taxes on the same.

The tax tribunal held that pursuant to the technical services agreement, the payments made to the group company in Japan is in the nature of FTS. Also, expenses incurred towards salaries and in relation to the airfare, food expenses, local conveyance, etc., had a clear nexus with the technical services rendered, which form part and parcel of the scope of services to be rendered by them.

The tax tribunal also held that seconded employees were not employees of the taxpayer and hence it becomes income of the group company and not reimbursement of salaries.

Hence, payments made to the group company are taxable as FTS and not merely reimbursements.

SKP's Comments

Deputation of employees has been a controversial issue in India. All the recent decisions in India have been in favor of revenue either holding services to be in the nature of FTS or holding a PE in India.

It becomes imperative that tax implications on deputation structures are examined appropriately in order to avoid any tax risks in India.

Also, taxpayers should exercise caution while taking any tax position based on the argument of reimbursement of expenses, especially where expenses are linked to the services.

Whether multiple counting of employees on a single day would be allowed to determine the service PE threshold under India-UK DTAA?

Linklaters vs. Dy. DIT [TS-210-ITAT-2019(Mum)]

Held

The taxpayer, a tax resident of UK, was engaged in the practice of law. He was appointed as a legal advisor for providing services in India for which it received certain fees. Considering the India-UK DTAA, the taxpayer did not offer the same to tax in India in the absence of a PE. However, the tax officer held that employees of taxpayer rendered services in India for a period exceeding 90 days and hence constituted a service PE under the India-UK DTAA.

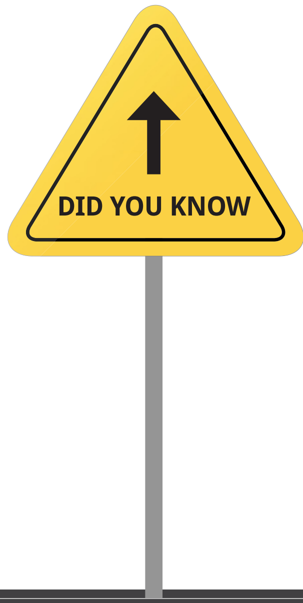
However, the tax tribunal observed that one of the employees was on study leave and hence he did not render any service to the clients in India. This fact was evidenced by the daily log kept by the taxpayer wherein no chargeable hours have been shown in respect of this employee. Hence, it was held that the period for which the employee was availing study leave has to be excluded from the service PE threshold.

Furthermore, the tax tribunal also observed that the employees of the taxpayer would constitute a service PE in India only if they rendered services exceeding 90 days during any twelve-month period as per Article 5 of the India-UK DTAA. Accordingly, the visits of the employees in India on a particular day had to be considered on a cumulative basis and not independently. Accordingly, the tax tribunal held that multiple counting of employees in India on a single day was inconsistent with the legal provisions.

SKP's Comments

The decision once again upholds the view that solar days are to be considered and not man days for the determination of service PE threshold. There are few court decisions, on similar lines, wherein it has been held that solar days has to be considered and not man days as the same may lead to absurd results. For instance, if 20 employees were present in India for 25 days then due to multiple counting of man days, presence in India would tally up to 500 days. This is clearly not the intention as the service PE threshold would become redundant in practice. Accordingly, this judgment provides much-needed clarity.

Generally, the foreign investments in start-ups are not liable to angel tax in India. However, the source of funding can still be questioned by the Revenue Authorities under the provisions of the Domestic Tax Law.



Transfer Pricing

Can high advertising, marketing and promotion (AMP) expenditure per se, be a ground for inferring the presence of an international transaction?

Moet Hennessy India Private Ltd [ITA No.85/Del/2015-AY 2010-11]

Held

The taxpayer engages in distribution. The taxpayer undertakes marketing and sales promotion of products, with assistance of its Associated Enterprises (AE). The taxpayer imports advertising and promotional material from its AE to be given as complimentary products to its customers.

The Transfer Pricing Officer (TPO) disputed that the huge AMP expenses have created marketing intangibles in favour of the AE; thereby making an adjustment on excess AMP expenditure incurred as compared to the comparable companies engaged in similar industry as the taxpayer's, plus a mark-up of 15% on the same. The Dispute Resolution Panel (DRP) upheld the order of the TPO.

The Income Tax Appellate Tribunal (ITAT) held that:

- Bright Line Test (BLT) is not a valid basis for determining the existence of an international transaction
- The Revenue has not been able to produce any cogent material to treat the incurring of AMP expenses as an international transaction between the taxpayer and its AE, except stating that the taxpayer has incurred high AMP/Sales expenses as compared to the comparable companies, i.e., BLT, which is unsustainable.

Consequently adjustments made on account of high AMP expenses were deleted.

SKP's Comments

The Tribunals and Courts have repeatedly pronounced in various rulings that the application of 'Bright Line Test' is not sustainable to prove the presence of AMP expenditure as an international transaction.

It order to determine whether there exists an International transaction pertaining to AMP, contractual relationships between the taxpayer and the AE, economic rational and beneficiary from the incurrence of expenses, etc., are some important aspects to be studied.

Is charging guarantee commission necessary in case of issuance of Corporate guarantee?

Adani Ports and Special Economic Zone Ltd [ITA No: 3481 and 3482/Ahd/14 AY 2009-10 & 2010-11

The taxpayer had extended a corporate guarantee to the State Bank of India, for acquisition of an aircraft by its AE, for which the taxpayer did not charge a commission. The taxpayer explained that the guarantee given by the taxpayer is a generic and non-explicit guarantee which binds the principal shareholders in general anyway, and that it did not lower the credit risk to the AE, since the AE derives the same benefit by affiliation with the group. It was also submitted that SBI Hong Kong has granted a loan to the AE at LIBOR plus 145 bps which is as per market norms, and that the AE was required to ensure that the value of security does not fall below 1.33 times the borrowings by the AE. As a result, the guarantee did not confer any benefits to the AE.

In spite of the above explanations, the TPO went ahead and made an adjustment at the rate of - 3% of guarantee amount as guarantee commission. CIT upheld the observations of the TPO, however, reduced the rate of the guarantee commission to 2%.

ITAT held that

Relying on Micro ink co-ordinate bench ruling, the ITAT noted the following points:

- The guarantees do not have any impact on income, profits, losses or assets of the taxpayer.
- No bank would be willing to issue guarantee without underlying asset/guarantee, to taxpayer's subsidiaries. Such a guarantee transaction is and can only be, motivated by the shareholder or owner considerations and may be considered to be the Shareholder's activity.
- The taxpayer did not incur any cost and the taxpayer could not have realized money by giving it to someone else.

Basis the above, ITAT held that the issuance of guarantees, without incurring any specific costs, does not constitute an international transaction, and, accordingly, no arm's length price adjustment can be made in respect of the same.

SKP's Comments

The taxpayers should analyze the following points to determine whether the issuance of Corporate guarantee warrants a guarantee commission:

Whether the guarantee provided has an impact on income, profits, losses or assets of the taxpayer i.e. whether the taxpayer has actually incurred any costs.

Whether the said guarantee can be considered as a Shareholder's activity or not.

Whether the existence of guarantee has actually helped the AE in material way.

Is the TP adjustment made by TPO in relation to a Specified Domestic Transaction (SDT) sustainable in the absence of a specific reference by AO for that particular SDT, under Section 92CA of the Income Tax Act, 1961?

Times Global Broadcasting Company Ltd [WRIT PETITION NO. 3386 of 2018 AY 2015-16]

The taxpayer, engaged in the business of distribution of television channels, had reported the transaction of payment made to AEs in relation to distribution services in Form 3CEB.

The AO made a reference to the TPO for determining the ALP of the SDT reported in Form 3CEB. During the assessment, apart from the reported transaction, the TPO also observed another transaction of payment to creditors in a demerger process, which was not reported in Form 3CEB, on which he made an adjustment amongst other adjustments.

Aggrieved against TPO's order, the taxpayer filed a writ petition before the Bombay HC stating that there was no specific reference by the AO to the TPO for the said transaction.

HC held that:

- HC elaborated that sub-sections (2A) and (2B) of Section 92CA were introduced in the Act to overcome the limitation and expand the scope of TPO to examine an international transaction which has either not been reported by the AO under sub-section (1) or which the assessee has omitted to report as required u/s 92E. However, the section makes a reference to only an international transaction and not to any specified domestic transaction.
- HC opined that *"We must, therefore, presume that the legislature consciously decided not to include a reference to a specified domestic transaction under subsection (2A) and (2B) of Section 92CA."*

HC held that the requirement of the AO for obtaining an approval from a senior revenue Authority (Principal Commissioner or Commissioner) before a reference to the TPO cannot be jettisoned by the TPO exercising sue motu jurisdiction over the transaction not reported to him and accordingly dismissed the contentions of the respondent and deleted the adjustment pertaining to the transaction under consideration.

SKP's Comments

The Hon'ble Bombay HC has categorically stated that *'When a statute that too, fiscal statute makes detail provisions for assessment, appeals and revisions, ordinarily the Court would not examine the issues on merits bypassing such statutory remedies'*. Drawing a positive reference from this ruling, for the taxpayers, it becomes imperative to check all the corners of statutory framework while rebutting against the tax adjustments proposed by the AO/TPO.

Indirect Tax

Whether interest under Section 50 of CGST Act, 2017 is payable on the net tax liability or the gross tax liability including the portion which can be set-off against Input Tax Credit (ITC)?

[Background: In view of Section 50(1) of the CGST Act, 2017, interest is payable at prescribed rates on delayed payment of tax.]

M/s Megha Engineering and Infrastructures Limited, Hon'ble High Court of Telangana [2019-VIL-175-TEL]

The High Court observed that:

- The petitioner paid interest on the net tax liability after deducting ITC from the total tax liability whereas the Department demanded interest on the total tax liability.
- The GST portal is designed in such a way that a return cannot be filed unless the entire tax liability is discharged by the assessee.
- As per the GST law, interest is compensatory in nature and imposed for non-filing of return within the period prescribed.
- Under Section 41(1) of the CGST Act, 2017 a person gets credited with input tax, in his electronic credit ledger, only upon filing of the return on a self-assessment basis. Till a return is filed, no credit becomes available to his electronic credit ledger.
- Hence, until a return is filed, no entitlement to credit and no actual entry of credit in the electronic credit ledger takes place. Consequently, no payment can be made from such credit entry.

In view of the above observations, the High Court dismissed the Writ petition and held that interest under Section 50(1) of the CGST Act is to be calculated on the gross tax liability, without considering the ITC available to be set off.

SKP's Comments

There have always been divergent opinions on whether interest under section 50(1) of CGST Act is to be computed on the gross tax liability, or the net tax liability after claiming set-off of ITC. Interestingly, the GST Council in its 31st meeting accepted the proposal by the Law Committee to amend Section 50 and allow payment of interest on net cash liability. However, the GST law is yet to be amended to give effect to this decision of the Council. Consequently, it can be inferred that presently interest under Section 50 should be calculated on the gross tax liability.

Whether GST is applicable on interest free security deposit and notional interest, if any?

M/s E-Square Leisure Private Limited - Authority for Advance Ruling (AAR), Maharashtra [2019 (4) TMI 805]

The AAR observed that:

- The applicant has engaged in renting out of immovable property to business entities for commercial purpose.
- The applicant collected an interest free security deposit from the lessee on account of security against any damages caused by the lessee.
- As per proviso to Section 2(31) of the CGST Act [definition of 'consideration'], a deposit would not form part of payment for the supply unless the supplier has applied such deposit as consideration for the supply.

In view of the above observations, the AAR held that the applicant had taken a security deposit as a guarantee, which was returnable on the completion of the lease tenure, and hence not liable to GST. However, if any portion of the deposit is withheld as a charge against damages, etc., the amount so withheld will be liable to GST.

SKP's Comments

Even under the erstwhile service tax law, the appellate authorities had the opportunity to determine the validity of charging service tax on notional interest on security deposit received by a service provider. The Customs, Excise and Service Tax Appellate Tribunal (CESTAT) in many cases had held that unless there is evidence to show that the security deposit has influenced the consideration for renting of property, no service tax can be levied on notional interest on such deposit.

Whether GST is levied on reimbursement of expenses such as electricity, water charges, property tax and cooking fuel incurred by the lessor and reimbursed by the lessee at actuals?

M/s E-Square Leisure Private Limited – AAR, Maharashtra [2019 (4) TMI 421]

The AAR observed that:

- The applicant is engaged in renting out of immovable property to the lessee and collects the expenses from the lessee at actuals as per their agreement.
- There are a plethora of judgements in the pre-GST regime wherein reimbursement of expenses, without any value addition or without the character of revenue were not taxed.

The applicant submitted that:

- It is acting as a pure agent and that it fulfilled all the conditions prescribed under Rule 33 of the CGST Rules, 2017 [valuation in case of pure agent].
- Reimbursement of expenses was nothing but repayment of certain expenses incurred by the applicant.

The AAR ruled that electricity and water were not provided by a third party and were provided by the applicant himself. Hence, the applicant is not a pure agent, but is providing a separate taxable supply. Therefore, GST is leviable on reimbursement of expenses from the lessee by the lessor on actuals. Further, reimbursement of expenses constitute composite supply and GST would be payable at a rate as applicable to the principal supply.

SKP's Comments

Under the CGST Rule, one of the conditions for qualifying as a pure agent is that the payment of expenditure is made on an authorization from the recipient (i.e., the lessee in this case). In the instant case, the lessee was never liable to make the payment of electricity, water charges, etc., to the third party and hence there is no question of seeking its authorization. Therefore, since the lessor was liable to pay these charges on its own account, it cannot claim to be a 'pure agent' for the lessee merely because such expenses were reimbursed by the lessee as per their contractual agreement. Businesses should carefully evaluate the nature of expenditure incurred by them before qualifying the same under 'pure agent' services.

TAX TALK
INDIAN DEVELOPMENTS

Direct Tax

Changes in Income Tax Returns for AY 2019-20

[Notification No. 32/2019, dated 1 April 2019]

Recently, the Central Board of Direct Taxes (CBDT) amended the Income-tax Rules, 1962 and released the Income Tax Returns for Assessment Year (AY) 2019-20. There are many notable changes in the ITR forms for all taxpayers (Individuals, Companies, Trusts, etc). The key changes are as follows:

Applicability of ITR Forms for various assessees

ITR 1 (For Resident Individuals) shall not apply to:

- The taxpayer who has claimed deduction u/s 57 (i.e., deductions claimed under the heading "Income from Other Sources"
- The taxpayer who is the director in any company
- The taxpayer who has held any unlisted equity shares at any time during the previous year

ITR 4 (for resident individuals, partnership firms, excluding LLP and HUFs having opted for presumptive taxation) shall not apply to:

- HUF and Partnership Firms being Non-Resident
- The taxpayer who is a director in any company
- The taxpayer who has held any unlisted Equity Shares at any time during the pervious year
- The taxpayer having total income more than INR 50 lakhs
- The taxpayer owing more than one house property

For Companies – following additional reporting requirements introduced

- Date of commencement of business needs to be mentioned
- Details pertaining to start-up companies (start-up recognition number, certificate number, etc) in General Information and inserted a New Schedule for a shareholding of start-ups
- In case of a foreign company, reporting of details of the immediate and ultimate parent company (country of residence, taxpayer's registration number or any unique identification number)
- Details of gross receipts/turnover and net profit in case of foreign companies engaged solely in the business of shipping (s.44B), exploration, etc., of mineral oils (s.44BB), operation of aircraft (s.44BBB) and civil construction, etc., in certain turnkey power projects (s.44BBB)
- Details of capital gains in case of transfer of immovable property (name, PAN, address of the buyer, percentage share, pass through income in case of REITs, AIF, etc)
- To report a section under which dividend is being declared
- Reporting of details of foreign bank accounts (including any beneficial interest) at any time during the previous year deleted

- Reporting details of foreign depository accounts, foreign custodial accounts held (including any beneficial interest) at any time during the relevant accounting period
- Reporting details of foreign equity and debt interest held (including any beneficial interest) at any time during the relevant accounting period
- New Schedule inserted for reporting details of shareholding of the unlisted company (name, residential status, PAN, type of shares, face value, issue price, equity share application money pending allotment, etc.)
- The new ITR forms require the representative assessee to provide the 'capacity' under which the return is filed.

For Individuals

- New ITR Forms seek separate reporting of all allowances, perquisites, exempt allowances, etc.
- The new ITR forms require the representative assessee to provide the 'capacity' under which the return is filed
- Insertion of "Deemed let-out" under the category "type of property"
- Insertion of PAN/TAN of tenant mandated if taxes are withheld
- Detailed reporting of interest income from various sources required (e.g., saving bank interest, FD interest, etc.)

The revised ITR forms have brought about many changes with the intention to curb tax evasion. However, while doing so, reporting requirements have increased a great deal which is more time-consuming.

CBDT releases draft rules for amendment of Rules for Profit Attribution to Permanent Establishment

[F.No. 500/33/2017-FTD]

CBDT releases draft rules for amendment of rules for Profit attribution to Permanent Establishment. These rules have been kept open for public consultation, and suggestions have to be submitted within 30 days from publication of this document on the website of the Income Tax Department.

Indian resident entities whose Ultimate parent entities had appointed an Alternate reporting entity for e-filing of CbCR, in a jurisdiction with whom India has an existing CbCR Information exchange agreement, would not be required to file CbCR in India, even though the Ultimate parent entity is in a Jurisdiction with whom India does not have a CbCR Information Exchange agreement.

Transfer Pricing

CbCR Filing in India

In connection with the filing of the Country-By-Country Reports (CbCR) in India for the constituent entities having ultimate parent companies in the USA there has been considerable ambiguity due to delay in activation of the automatic exchange between India and USA governments.

Time Limit for Filing of CbCR in India extended to 30 April 2019

The Central Board of Direct Taxes (CBDT) vide the press release dated 15 March 2019, had stated that India and USA would be signing the Bilateral Competent Authority Arrangement for automatic exchange of CbC Reports before 31 March 2019 due to which the CbCR would not be required to be filed in India. However, on 8 April 2019, the CBDT notified an extension to the due date to 30 April 2019 (it was 31 March 2019 earlier) for the Indian constituent entities whose parent entities are resident in USA, in respect of reporting accounting years ending up to 29 April 2018. The circular also mentioned that an exchange agreement between India and USA had been signed, however it would come into effect only after both the countries notify each other about the completion of all the internal procedures. Accordingly, it implied that such USA headquartered Indian entities are now not required to file CbCR in India till 30 April 2019.

Central Government notifies the signing of the Inter-Governmental Agreement for Exchange of Country-by-Country Reports the India

On 25 April 2019 the Central Government of India has formally notified the signing of the agreement for exchange of CbCR between India and USA as well as provided the copy of the agreement. While the agreement stated to be in place, it is also mentioned that the agreement shall come into force *on the date on which the second of the two Parties has provided a written notification to the government of the other jurisdiction that the necessary internal procedures for entry into force of this agreement have been completed*. However, exchange of information under this Agreement shall not commence until the Arrangement is operative by its terms.

SKP's Comments

These are important developments for the Indian subsidiaries of US headquartered companies. It would be useful if the CBDT provides clarification of certain contradictory statements in the circulars to give relief to aggrieved taxpayers which ensure and avoid duplicate compliance burdens. The automatic exchange mechanism between India and USA if in place, should not warrant Indian entities to file the CbCR if the same is filed in USA.

Transfer Pricing

Delhi High Court Recalls own order in relation to characterization of taxpayer as KPO

The Delhi High Court had characterized Mckinsey Knowledge Centre India Pvt Ltd as a KPO[1]. It was noted that the research and information services rendered by the taxpayer were high-end knowledge-based research services (KPO) and were specialized and require specific skill based analysis and research" that is beyond the more rudimentary nature of services rendered by a BPO. However, a review petition was filed by the taxpayer on this issue of characterization which has been allowed by the Delhi High Court.

Resolution of over 10 Bilateral APAs and 30 MAP cases between India and USA

India and USA recently conducted a week-long meeting and held discussions on Bilateral Competent Authority Mutual Agreement Procedure (MAP) and Advance Pricing Agreement (APA). During the course of the meeting, agreement was reached on the terms and conditions of over 10 Bilateral APAs (BAPAs) primarily in the IT sector, which will provide tax certainty to taxpayers for nine years (including a four year rollback period), encouraging taxpayers to opt for Bilateral APA route.

In addition to the above, India and USA also achieved the resolution of over 30 MAP cases, predominantly in the IT/ ITeS space.

Indirect Tax

Barring generation of e-way bill

A taxpayer who has not furnished GST returns for two consecutive months would be barred from generating E-way bills (with effect from 21 June 2019).

[Notification No.22/2019 - Central Tax dated 23 April 2019]

Procedure for composition taxpayers

The GST Council has notified the procedure for quarterly tax payment and annual filing of return for composition taxpayers, including service providers paying tax under composition scheme.

- Furnish a statement every quarter containing details of payment of self-assessed tax in FORM GST CMP-08 - To be furnished till the 18th day of the month succeeding the quarter.
- Such taxpayers shall furnish a return annually in FORM GSTR-4 on or before the 30 April following the end of the financial year.

[Notification No.21/2019 – Central Tax dated 23 April 2019]

Clarification in respect of utilization of ITC

The new manner of utilization of ITC provided by Notification No. 16/2019 - Central Tax dated 29 March 2019 has been clarified by issuance of a circular. The new order of utilization of ITC is summarized in the table below:

ITC on account of	Output liability on account of IGST	Output liability on account of CGST	Output liability on account of SGST/UTGST
IGST	(1)	(2) - In any order and any proportion	
(3) ITC on account of IGST to be completely exhausted mandatorily			
CGST	(5)	(4)	Not permitted
SGST / UTGST	(7)	Not permitted	(6)

Hence, from the above table it can be construed as follows:

- First, ITC of IGST should be set-off against liability of IGST and then against CGST/SGST until it is completely exhausted.
- Then, ITC of CGST/SGST should be set-off against their respective heads.
- In case there is any excess ITC of CGST, then it shall be utilized against any IGST liability, and only then excess ITC of SGST shall be utilized for discharging any balance IGST liability.
- Similar to the previous manner of utilization, ITC of CGST is not permitted to be set-off against SGST, and vice versa

[Circular No. 98/17/2019 - GST dated 23 April 2019]

1 Delhi High Court Order dated 9th August 2018 in the case of Mckinsey Knowledge Centre India Pvt. Ltd. - ITA 461 and 526 and respective cross appeals - AY 2011-12 and AY 2012-13

TAX TALK
GLOBAL DEVELOPMENTS

Direct Tax

Mauritius, Singapore Investments now fully taxable for Capital Gains

FY 2019-20 will be the first year after a two-year transition period since India amended its double tax avoidance agreements (DTAA) with Mauritius and Singapore. From 1 April 2019, the capital gains on investments made in India through companies in Mauritius and Singapore will become fully taxable.

India in talks with the Netherlands to amend Bilateral Tax Treaty

The Indian government wants to widen its tax base by ensuring that share transactions involving Indian entities do not escape taxation in India. After successfully plugging the loopholes in tax treaties with Mauritius and Singapore, India is now negotiating with the Netherlands to amend the bilateral tax treaty to tax sale of shares of Indian companies by the Dutch taxpayers.

The move comes after a surge in investment in Indian companies by Dutch corporates. In the first nine months of 2018-19, India had received $2.95 billion foreign direct investment from the Netherlands, topping the $2.8 billion investment in 2017-18.

OECD Crackdown on Corporate Tax Gaming Hits Roadblock (Corrected)

Most countries are opting out of adopting the new OECD standards aimed at shutting down a favorite tax planning maneuver of the multinationals. The reason for the rejection seems to be the likelihood of more disputes that would arise between tax authorities in light of the new standards. These standards aim to discourage companies from using "commissionaire arrangements" to avoid creating a permanent establishment (PE), which is subject to tax in that jurisdiction.

Companies use these structures to sell locally without creating a PE. Under the new standards, commissionaire arrangements would create a taxable presence. Countries like the Netherlands are choosing not to adopt some of the OECD's new permanent establishment standards in their bilateral tax treaties via the multilateral instrument.

Transfer Pricing

Canada | Canadian Federal Court of Appeal (FCA) ruled that the Canada Revenue Agency (CRA) cannot compel oral interviews of taxpayers during audit.

The CRA has increasingly requested oral interviews during audits, particularly those related to transfer pricing. In a landmark tax ruling, between the Minister of National Revenue v. Cameco Corporation, the CRA sought an order compelling employees to attend oral interviews. The FCA dismissed the CRA's appeal and held that the general power to inspect, audit or examine the books and records of a taxpayer does not extend to compelling a taxpayer to submit to oral interviews. While, the FCA distinguished between a taxpayer's knowledge of location and maintenance of the documents and probing the taxpayer to understand potential tax liability, they also stated that if the requirement to answer the questions was implied, then the obligation and express powers to compel answers would be unnecessary.

The decision can be viewed as a positive development for the taxpayers as it sets the limit on CRA's power to seek information and provide a reasonable framework on conduct of audits.

Australia | Australian Tax Office (ATO) issued guidelines on the Arm's Length Debt Test (ALDT)

On 5 April 2019, the ATO released a draft ruling (TR 2019/D2) which provided an updated guidance on the ALDT for thin capitalization rules. When finalized, this ruling will apply both retrospectively and prospectively and would replace the existing ruling (TR 2003/1). This ruling applies to entities that seek to apply the arm's length debt test for outward investing and inward investing entities. This draft ruling has provided certain clarification which is as follows:

- In determining a notional debt capital, the lower of the two amounts is to be considered:
  - Borrower Test: The notional debt capital the entity would reasonably be expected to have throughout the income year.
  - Lender Test: Arrangements that unrelated commercial lending institutions would reasonably be expected to have lent

The draft ruling clarifies that the ALDT is required to satisfy both the borrower and lender tests. While the notional lender test may determine the maximum amount a notional lender would lend, it does not mean that the notional borrower would necessarily borrow this maximum amount.

- Although the financial statements would generally be expected to form the starting point of an ALDT analysis, a taxpayer is not prohibited from relying on alternate asset values for application of relevant factors to the notional Australian business.
- A subjective capital structure and leverage preferences of the shareholders are not relevant in applying the ALDT as it requires an objective assessment.
- The debt amount should be assessed "throughout the income year" and should exclude the credit support (both explicit and implicit). However while applying the ALDT, there is no single approach or method that will result in an amount that would reasonably be expected to exist throughout the year, accordingly the appropriate approach will depend on the specific facts and circumstances of the taxpayer for the relevant year.
- Where a taxpayer is within their prescribed amendment period in relation to a prior income year, they are not prohibited from amending the income tax return for that income year to rely on the debt amount as their maximum allowable debt amount.
- An entity must keep records that contain particulars about the factual assumptions and relevant factors taken into account, for the arm's length debt account.

Latin America | Inter-American Centre of Tax Administrations preparing the "Sixth Transfer Pricing Method"

The Inter-American Centre of Tax Administrations is preparing a transfer pricing database for the application of the "sixth transfer pricing method." The sixth transfer pricing method is an offshoot of the first transfer pricing method – the comparable uncontrolled price (CUP) method and would primarily be applicable to developing countries. The method is designed to record and reflect commodity prices from a database that includes agricultural and non agricultural products such as corn, wheat, soybeans, oil, banana, barley, malt, and hake, depending on the jurisdiction involved. Ten Latin American counties are participating in this module: Argentina, Bolivia, Brazil, Costa Rica, the Dominican Republic, Ecuador, Guatemala, Paraguay, Peru, and Uruguay.

Morocco | Introduction of Transfer Pricing Documentation requirements

Morocco's 2019 Finance Bill introduced the obligation for certain Moroccan taxpayers to prepare specific documentation to justify their transfer pricing policies before tax authorities. This new provision is intended to align the Moroccan transfer pricing legislation with international practices and comes after the introduction of an Advance Pricing Agreement program between tax authorities and companies, which came into effect in 2018. The broad requirement introduced were as follows:

- The TP documentation requirement will be applicable for the tax audits open after 1 January 2020. There is no annual obligation to prepare or transmit the documentation, but it must be provided **electronically** to the tax administration, upon request.
- No specific language for drafting TP documentation.
- The documentation obligation is applicable for companies that have direct or indirect relationships with companies located outside Morocco.
- The documentation requirement covers all intra-group cross-border transactions carried out by the taxpayer, without any minimum materiality threshold.
- The TP documentation must contain the information on all related companies' activities, the overall transfer pricing policy of the group and the worldwide repartition of profits and activities.
- Failure to provide the transfer pricing documentation during audit would lead the taxpayer to lose the right to defend and justify its transfer pricing policy before tax commissions. However, penalty for failure to provide transfer pricing documentation or submission of incomplete documentation is not foreseen.
- Furthermore, Morocco is also likely to implement the CbCR declaration.

The introduction of the transfer pricing documentation requirement will increase the compliance and reporting burden for companies, but it also will allow multinational groups to have greater tax certainty due to the implementation of a standardized transfer pricing documentation framework.

Japan: Transfer Pricing Tax reforms 2019

The 2019 tax reform outline proposes to amend Japan's transfer pricing rules to align with the BEPS Action Plan 8 (Intangibles). A list of amendments that would be applicable for taxable years beginning on or after 1 April 2020 and beginning 2021 for corporations and individuals respectively are as follows:

- Clarifications - intangibles have been stated as property other than tangible property or financial assets & investments and consideration paid for transfer or lease of property if such transfer/lease is carried out between unrelated parties.
- Discounted cash flow method is proposed to be included in the transfer pricing methods recognized by the OECD TP guidelines which describe that the DCF method may be useful to reach an arm's length price for intangibles where comparable transactions cannot be identified.
- Japanese tax authority has been authorized to make an assessment if the discrepancy is 20% or more without proper documentation between the outcome and projected value.
- Six years statue of limitations under the transfer pricing rules will be extended from six years to seven years.

Implications due to Discontinuance of LIBOR

In July 2017, the Chief Executive of the UK Financial Conduct Authority (FCA) announced that firms should discontinue the use of the London Interbank Offered Rate (LIBOR) in favour of overnight risk-free rates (RFRs). The transition must be completed by the end of 2021, as the continuation of LIBOR will not be guaranteed to market participants after that date. In several countries, alternative rates have been introduced such as SOFR (Secured Overnight Financing Rate); reformed Sterling Overnight Index Average (SONIA); The Euro Short term rate (ESTER).

Various MNE's have inter-company financing transactions or structures which would be impacted by the move to an alternative rate instead of LIBOR. A list of key transfer pricing pieces that would need to be relooked before LIBOR is discontinued is as follows:

Intercompany agreements - The existing intercompany loans that apply LIBOR as a base rate, which are going to mature after 2021 should consider amending their inter-company agreements to include fall-back clauses along with agreed actions and timelines by the parties to adjust the pricing to determine the interest rate considering the alternative base rate.

TP Policy - The differences in information contained in LIBOR and the new proposed rates may create comparability differences with the benchmarks applied to price intercompany financing arrangements that currently apply LIBOR as a base rate. MNEs should re-asses their transfer pricing policies to evaluate consistency and produce arm's length results.

Debt Capacity – If the MNEs make amendments to the pricing or terms of the agreements that trigger a significant modification and a new debt instrument, MNEs should document that prior conclusions remain applicable in the current market environment.

Hedging – Hedging contracts often considered LIBOR as a reference rate and accordingly treasury groups and in-house banks should plan for the discontinuance of LIBOR and the resulting impact on their existing intercompany funding and hedging structures.

Indirect Tax

US states in favor of removing transaction threshold limits

[Excerpts from online issue of Bloomberg Tax, 12 April 2019]

Most US states have turnover and transaction volume based threshold limits to determine whether a business is liable to register under the state sales tax law. However, in an emerging trend, states are working towards having only a monetary limit to determine applicability of state tax laws. The transaction volume threshold limit is being considered as an obsolete criteria resulting in small taxpayers attracting attention of state authorities, where the cost of targeting such taxpayers can exceed the possible tax revenue from them.

Malaysian parliament approves bill to levy its new Sales and Service Tax (SST) on Foreign Service providers of digital services to local Malaysian customers

In 2018, Malaysia scrapped the Goods and Services Tax (GST) and switched back to the SST regime. Now, the Malaysian parliament has approved a bill to levy 6% SST on digital services such as gaming, e-books, etc., provided by foreign service providers to Malaysian consumers.

Compliance Calendar

30 April 2019

- Filing of Form No. 3CEAC (CbCR Intimation) where the groups accounting year ends on 30 June 2018
- Filing of Form No. 3CEAD (CbCR) u/s 286(4)(a) and 286(4)(aa) – for groups accounting years ending upto 30 April 2018*

7 May 2019

- Payment of Tax Deducted at Source (TDS) and Tax collected at source (TCS) collected in April 2019

10 May 2019

- GSTR-7 for the month of April 2019 to be filed by taxpayers required to deduct tax at source (TDS)
- GSTR-8 for the month of April 2019 to be filed by taxpayers required to collect tax at source (TCS)

11 May 2019

- GSTR-1 for the month of April 2019 to be filed by registered taxpayers with an annual aggregate turnover of more than INR 15 million

13 May 2019

- GSTR-6 for the month of April 2019 to be filed by Input service distributors

15 May 2019

- Furnishing quarterly statement of TCS deposited for the quarter ending 31 March 2019

20 May 2019

- GSTR-3B for the month of April 2019 to be filed by all registered taxpayers
- GSTR-5 for the month of April 2019 to be filed by Non-resident taxable person
- GSTR-5A for the month of April 2019 to be filed by persons providing Online Information and Database Access or Retrieval (OIDAR) services

30 May 2019

- Submission of a statement (in Form No. 49C) by non-resident having a liaison office in India for the financial year 2018-19
- Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IA in April, 2019
- Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IB in April, 2019
- GSTR-5A for the month of April 2019 to be filed by persons providing Online Information and Database Access or Retrieval (OIDAR) services

31 May 2019

- Furnishing quarterly statement of TDS deposited for the quarter ending 31 March 2019
- Furnishing of statement of financial transaction (in Form No. 61A) as required to be furnished under sub-section (1) of section 285BA of the Act respect of the financial year 2018-19
- Due date for e-filing of annual statement of reportable accounts as required to be furnished under section 285BA(1)(k) (in Form No. 61B) for the calendar year 2018 by reporting financial institutions.
- Filing of Form No. 3CEAC (CbCR Intimation) where the groups accounting year ends on 31 July 2018.

30 June 2019

- Filing of Form No. 3CEAC (CbCR Intimation) where the groups accounting year ends on 31 August 2018
- Filing of Form No. 3CEAD (CbCR) u/s 286(4)(a) and 286(4)(aa) – for groups accounting years ending on 30 June 2018

*Considering that the India – USA intergovernmental agreement for automatic exchange is not active, but that the agreement was signed on 27 March 2019, there is a view that this may not be needed for constituent entities whose parent entities are in USA.

The compliance due dates have been stated with the assumption that the MNE group satisfies the thresholds prescribed for filing of CbCR for the relevant accounting year.

SKP IN THE NEWS

GST On Real Estate: A Real Roller Coaster

BloombergQuint - 6 April 2019

"The Indian real estate sector has boomed in the last two decades or so with the rise in demand for office as well as residential space. This sector is expected to contribute 13 percent to the country's gross domestic product by 2025." - **Jigar Doshi**

Read more at https://lnkd.in/f9BfsP2

GST on promotional schemes – A quandary for pharma sector

ExpressPharma - 17 April 2019

"India saw a monumental alteration in its tax regime on July 1, 2017 when the government implemented GST that effectively replaced a range of taxes including excise duty, service tax, sales tax etc. While there are still mixed reactions on whether the reform has brought about positive changes in the economy, the impact of GST on the pharma sector has been largely optimistic and constructive." - **Jigar Doshi**

Read more at https://bit.ly/2VRiapl

UPCOMING EVENTS

Conclave on Practical aspects of GST Audit Report (GSTR-9C) and how to fill up the Form clause by clause

17 May 2019, New Delhi

By PHD Chamber

About **SKP**

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

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

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

Our team provides you with solutions for tomorrow; we help you think next.

Contact **Us**

India - Mumbai
Urmi Axis, 7th Floor
Famous Studio Lane, Dr. E. Moses Road
Mahalaxmi, Mumbai 400 011
India
T: +91 22 6730 9000
E: IndiaSales@skpgroup.com

www.skpgroup.com

Subscribe to our insights

linkedin.com/company/skp-group

twitter.com/SKPGroup

facebook.com/SKPGroupIndia

youtube.com/c/SKPGroup

A member of Nexia International