Tax Street

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

April 2020

WORLD TAX
RECOMMENDED FIRM
2020

Tax Street

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Introduction

We are pleased to present the latest edition of Tax Street – our newsletter that covers all the key developments and updates in the realm of taxation in India and across the globe for the month of April 2020.

- The **'Focus Point'** covers the recent amendment to the Finance Act, 2020 that expands the scope of Equalization levy and the aspects of its practical application.
- Under the **'From the Judiciary'** section, we provide in brief, the key rulings on important cases, and our take on the same.
- Our **'Tax Talk'** provides key updates on the important tax-related news from India and across the globe.
- Under **'Compliance Calendar'**, we list down the important due dates with regard to direct tax, transfer pricing and indirect tax in the month.

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

Warm regards,
The Nexdigm (SKP) Team

Focus Point

Equalization levy — a fair regime of taxation

The digital transformation in the economy has opened gates for various tax challenges in terms of nexus, characterization, and valuation of data and user contribution. Even though the companies manage to generate huge revenue from a country, they pay none or negligible taxes in the country. The OECD, in its action plan, has tried to provide ways to circumvent these challenges. One of the recommendations given in Action Plan 1, was to levy 'Equalization Levy' on e-commerce transactions. India was one of the front liners to implement this suggestion and levy such charge on specified transactions vide Finance Act 2016.

As per the provisions introduced in Finance Act 2016, the resident payer is liable to withhold **6% equalization levy** on the consideration payable to the non-resident for specified payments (mainly online advertisement). It would be important to note that 'equalization levy' was charged as a separate levy and was not a part of Income Tax law. Accordingly, in order to avoid double taxation, the Indian Government has exempted such income from payment Income Tax, through specific exemption.

Amendment vide Finance Act, 2020

Considering the increasing scope of e-commerce practices in India, the Government of India vide Finance Act, 2020, has now expanded the scope of such Equalization Levy. Earlier, the equalization levy was only charged on a transaction involving advertising on digital platforms.

However, with effect from 1 April 2020, 2% equalization levy shall be paid by the e-commerce operator on considerations received or receivable by an e-commerce operator from e-commerce supply or services made, provided, or facilitated by it to:

- An Indian resident
- A non-resident in 'specified circumstances,' namely:
  - Sale of advertising that targets Indian customers. The 'Indian Customer' is a person who is resident in India, or access the advertisement through an IP address located in India; and
  - Sale of data collected from Indian customers; or
- A person who buys such goods, services, or both via an IP address located in India.

'E-commerce operator' in this case is defined as a non-resident who owns, operates, or manages a digital or electronic facility or platform for online sales of goods, online provision of services, or both.

Further, it has been clarified that 'E-commerce supply or service' shall cover –

- Online Sale of goods owned by the e-commerce operator;
- Online provision of services by the e-commerce operator;
- Sales of good, provisions of services, or both, facilitated by the e-commerce operator; or
- Any combination of the above.

Irrespective of e-commerce operators being an inventory-based model or a marketplace based model, all types of e-commerce operator shall be liable to pay equalization levy.

However, no equalization levy shall be levied if:

- The gross turnover of the e-commerce operator from the e-commerce supply or services made, provided, or facilitated in India is less than INR 20 million during the financial year;
- If the e-commerce operator constitutes a PE in India and such e-commerce supply or service is effectively connected to such PE.

It would be important to note that unlike earlier provisions, the equalization levy for e-commerce operator is payable by the non-resident e-commerce operator on a quarterly basis and it is not in the form of withholding by resident payer -

Quarter Ended	Due Date
30 June	7 July
30 September	7 October
31 December	7 January
31 March	31 March

Simple interest at the rate of 1% per month or part month will be imposed on late payments, and failure to pay the levy will incur a penalty equivalent to the amount of the levy.

Further, similar to Income Tax exemption for online advertisement, e-commerce operators are also given an Income Tax exemption once they are liable for the equalization levy.

Our Comments

There are many ambiguities on the application of these provisions, and this may present certain practical challenges.

1. For the online advertisement service, the service recipient was required to deduct the equalization levy and deposit the same with the government. However, the amendment brought in the Finance Act 2020 poses an obligation to pay the equalization levy in e-commerce supply or service on the e-commerce operator and not on the service recipient/ customer. It would significantly increase the compliances for foreign companies in India. Besides, it remains to be seen, the manner in which the government tracks the compliance from these companies.
2. Based on the current wordings of the law, there is a possibility that certain payments would fall under the equalization levy as well as covered under normal income tax provisions (like Royalty, Fees for Technical Services, etc.). Currently, there is no clarity on how these provisions would have to be applied, and there could be issues whereby the payer may insist on withholding taxes, whereas the payee may want to pay only equalization levy.

   Equalization levy provisions provide that any payments covered under these provisions would be exempt from Income tax. In order to facilitate the same, a separate section has been introduced under the Income Tax Law. However, based on the current law, the equalization levy has been made applicable from April 1, 2020, whereas the exemption from income tax has been made applicable from April 1, 2021. It appears that the same may be a typographical error and may be corrected, but the authorities have not issued any communication regarding the same till date.
3. The 2% levy is on the gross revenue of the e-commerce operators, without considering the profitability/actual income of the e-commerce operator. It would be interesting to see how the non-resident e-commerce operators cope with such provisions, specifically, who are facing losses or have limited profits.

From the Judiciary

Direct Tax

Merely because the activities carried out by Liaison Office (LO) are important for the completion of the contract, will it take away the auxiliary and preparatory nature of the activity?

UAE Exchange Centre vs Union of India & Anr
[Supreme Court of India (SC) – Civil Appellate Jurisdiction – Civil Appeal No. 9775 of 2011]

Background

UAE Exchange Centre LLC is a UAE based limited company engaged in offering, among others, remittance services from UAE to India. The taxpayer obtained the approval u/s 29(1)(a) of Foreign Exchange Regulation Act, 1973 (FERA), and established a LO at Cochin, Chennai, New Delhi, Mumbai and Jalandhar. The taxpayer asserted that the remittance services are offered to NRI's in UAE. After collecting the funds and one time fees from the NRI remitter, the taxpayer remits the funds to India in two ways:

a. by telegraphic transfer through bank channels; or

b. by sending the cheques through its LO to the beneficiaries in India, as designated by the NRI.

As some doubts with regards to whether any part of the income accrues/deemed to accrue in India were entertained, the assessee applied for obtaining an advance ruling with the Authority for Advance ruling (AAR).

The AAR ruled in affirmative. In its opinion, the commission which the applicant receives for remitting the amount covers not only the business activities carried on in UAE but also the activity of remittance of the amount to the beneficiary in India by cheques/ drafts through courier which is being attended to by the liaison offices. Further, there is also a continuity between the business of the applicant in the UAE and the activities carried on by the liaison offices. Therefore, it follows that income shall be deemed to accrue/arise to the applicant in UAE from 'business connection' in India.

Further, while analyzing the provisions of DTAA, the AAR was of the opinion that since the activity of the LO is a significant part of the main work of UAE establishment, it cannot be considered as auxiliary and preparatory in nature. Thus, the exclusion in Article 5 of India UAE DTAA shall not apply, and the LO would constitute a Permanent Establishment (PE) of the UAE Entity in India. Aggrieved by the same, the taxpayer had filed an appeal before the High Court, which ruled the appeal in favor of the taxpayer. The revenue had filed an appeal against the said order in Supreme Court (SC).

Held

The SC dismissed the appeal of the revenue by upholding the conclusions reached by the HC. In the opinion of the HC, "to say that a particular activity was necessary for the completion of the contract is, in a sense saying the obvious as every other activity which an enterprise undertakes in earning profits is with the ultimate view of giving effect to the obligations undertaken by an enterprise vis-a-vis its customer. If looked at from that point of view, then, no activity could be construed as preparatory or of an 'auxiliary' character."

The SC also went a step ahead to hold that, the activities carried out by the LO do not fall under the definition of business activity as the LO does not undertake any activity of trading, commercial or industrial. It was observed that the assessee was not carrying out any business activity in India as such, but was only dispensing with the remittances by downloading information from the main server of the respondent in UAE and printing cheques or drafts drawn on the banks in India as per the instructions given by the NRI remitters in UAE.

However, even if the stated activity(activities) of the liaison office of the respondent in India is regarded as business activity, as noted earlier, the same being 'of preparatory or auxiliary character'; by virtue of Article 5(3)(e) of the DTAA would fall out of the scope of PE, and thus, no income shall be chargeable to tax in India.

Our Comments

There are a plethora of decisions crystalizing the interpretation of the terms 'preparatory and auxiliary.'

The SC in this decision has appreciated the fact that an activity considered as important for any contract can still retain preparatory and auxiliary nature.

Whether payment made by an Indian company to its group entity based in Switzerland towards recharge of social security, insurance, and relocation expenses of expatriate personnel, liable to tax in India as Fees for Technical Service?

The information contained herein is source-based.

Background

The applicant, an Indian company, was in the process of setting up a manufacturing plant in India. It has entered into an inter-company agreement with its group company based in Switzerland for the supply of experienced personnel.

The arrangement was such that no part of the salary of the expatriate employees would be paid outside India except for disbursing social security contribution, insurance, and relocation expenses by the Swiss company to expatriate employees in their home country. The assessee was to recharge these expenses on a cost to cost basis. The applicant deducted TDS u/s. 192 for entire salary payment to expatriate employees, including the amount towards reimbursements towards social security, insurance, and relocation expenses.

The assessee approached the Authority for Advance Ruling (AAR) for determining the taxability of this cost recharge.

Held

Referring to the intercompany agreement, AAR observed that –

- The assessee was exercising full operational control, and the employee is required to abide by the policy regulations and guidelines of the applicant company;
- The assessee had the power to terminate the employment, and the employee is forbidden to supply his capacity to work to someone else during the period of employment;
- There was no lien on the employment of the seconded employees;
- The assessee was solely responsible for all payment to expatriate personnel and that no salary payments are made by the applicant outside India;
- The employees offered their entire salary, including the social security/ insurance/relocation expenses receipts to tax in India.

Considering the above, the AAR was of the opinion that the reimbursement towards social security, insurance, and relocation expenses should not be considered as FTS.

Our Comments

The debate over taxability of cost recharge of the salary of deputed employees has been going on for decades.

However, unlike other situations, in the current scenario, where only the contribution part of the salary was reimbursed, considering the facts of the case, the AAR has ruled favorable, which is a welcome decision.

Transfer Pricing

Benefit test vs prescribed rules for benchmarking technical fees

UPS Express Private Ltd[1]

Ruling

The taxpayer had entered into a technology license agreement with its Associated Enterprise (AE) for availing exclusive rights to use technical information for which the taxpayer was required to pay a technical know-how fee at 2% of gross export revenue. The taxpayer had benchmarked the said transaction using the Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM). Before the Transfer Pricing Officer (TPO), the taxpayer had not furnished any document to establish receipt of so-called technology, training, etc. during the year. The TPO also observed that the said technology is available for the world for more than 15–20 years, and nothing new was provided to the AE during the year. Accordingly, the TPO concluded that the taxpayer failed to prove its benefit test, and therefore, ALP is determined as Nil. The Dispute Resolution Panel (DRP) upheld the order of the TPO by also placing reliance on the order for AY 2013-14.

Income Tax Appellate Tribunal (ITAT) noted that the TPO's application of benefit test is not as per the rules prescribed under Rule 10B and 10AB or a method as per section 92C.

The ITAT concluded that even as the transaction was never benchmarked in the earlier years and in light of the fact that the TPO has not applied appropriate principles as prescribed, the matter was remitted for fresh benchmarking.

Our Comments

Benchmarking of an international transaction should follow the principles prescribed in relevant sections and rules. Also, ad-hoc methods (such as benefit test) cannot be applied as a blanket method to consider ALP of technical fees as Nil.

[1] ITA No. 7320/Mum/2018 – AY 2014-2015

Characterization of 'distribution fee' whether it is in the nature of royalty or not; and selection of comparables for the distribution fee

Sony Pictures Networks India Pvt. Ltd. [Successor of MSM Discovery (P.) Ltd.] - ITA No.971/Mum/2016

Ruling

The taxpayer was engaged in the business of channel distribution and had paid 'license fee' to AE's for the distribution of content. It had adopted the TNMM as MAM, however stating that information regarding the companies carrying on the same function was not available in the public domain. Accordingly, it adopted companies engaged as software distributors/selling intangible products as comparable.

The TPO held that the distribution fee paid by the taxpayer was in the nature of royalty, and accordingly, it should be benchmarked using the Royalty-stat database, thereby suggesting an upward TP adjustment.

The DRP upheld TPO's view as the taxpayer itself had used the word' license fee' to describe the distribution fee paid to its AE. While upholding the TPO's approach, the DRP also carried out alternative benchmarking by applying internal TNMM comparing AE and Non-AE Segment and made an upward adjustment.

The ITAT observed that the taxpayer only acts as an intermediary between the broadcaster and the ultimate customer who views the channel. It neither holds any right in the content that is broadcasted over the channel nor any right to make any changes in the content to be broadcasted on the channel. Accordingly, it concluded that the distribution fee was not in the nature of royalty u/s 9(1)(vi). Hence, the royalty search undertaken by TPO was not appropriate. Accordingly, even the royalty benchmarking was void. ITAT also relied on the decision of jurisdictional High Court in the case of SET India Pvt Ltd, wherein it held that 'the distribution fee paid was not in the nature of royalty.'

With regards to the benchmarking approach, taking software distributors as comparable companies, ITAT upheld the approach considering the functional similarities, and also reliance was placed on prior years.

Our Comments

In the case of inter-company transactions, it is pertinent to peruse the covenants of the agreement to confirm the actual conduct of parties. In this instant case, whether the licensee has access to the right to use, i.e., modify, add, amend, etc. and use without restriction was apparent from the contractual obligations that helped to conclude the characterization.

If there are conditions attached to actual use which does not give the right to the taxpayer for actual use, the payment for such transaction may not be said to be royalty.

Further, taxpayers may be prudent before filing any compliance forms in relation to the nomenclature of the transaction.

Whether PSM or TNMM should be used to benchmark royalty payment

Toyota Kirloskar Auto Parts Pvt. Ltd. - ITA No.1915/Bang/2017 & ITA No.3377/Bang/2018

Ruling

The taxpayer was engaged in manufacturing auto components using AE's technology. The taxpayer paid a royalty to its AE and benchmarked the transaction using TNMM as MAM.

The TPO was of the view that the technology provided by AE included generic and proprietary technology; it had to be regarded as technology only for setting up of business. The economic life of such technology had eroded as the taxpayer was using the same technology for a period of more than 5 years. Thus, TPO felt that there was no necessity to pay a royalty of 5% on the sales, thereby rejecting TNMM and adopted Profit Split Method (PSM) as MAM. The TPO, while applying PSM, determined the ratio of profit split as 1:1 on the basis of a detailed FAR analysis of the taxpayer, and an adjustment was made.

DRP upheld the order of the TPO and stated that the earlier orders of Tribunal holding TNMM as MAM could not be applied in AY 2013-14 because the useful economic life of the technology does not exist in AY 2013-14.

ITAT rejected TPO/DRP's contention on taxpayer being a start-up and economic life of the technology as baseless and further states that "In any event, the passage of time cannot be the basis to discard TNMM."

ITAT went on to add, in order to apply PSM, there should be a contribution by each of the parties to a transaction for earning profits. The contribution of each of the parties is identified, and the profit is split between those parties. In the said case, the use of technology in the manufacturing and sale of the product contributed to the profit of the taxpayer. However, the AE had nothing to do with that, the ITAT stated that "There is, therefore, an absence of the first condition for the application of PSM as MAM."

Noting that the taxpayer only leverages on the use of technology from the AE and does not contribute any unique intangibles to the transaction, accordingly, the ITAT rejected the application of PSM.

Our Comments

PSM can be used only in a case involving the transfer of unique intangible or in multiple inter-related international transactions that cannot be valued separately.

Whether it is appropriate to club royalty payments made to two different AE providing benefits independent of each other

Vesuvius India Ltd.,- ITA No.1333/Kol/2017, ITA No.1289/Kol/2017 & ITA No. 206 & 207/Kol/2018

The taxpayer is engaged in the business of manufacturing and trading of refractories. The taxpayer was granted a license to use the technical information to manufacture and service the product, for which the taxpayer was to make royalty payments as follows -

Rate % Sales	Domestic	Export
Refractory License	3%	5%
Systems License	2%	3%

The taxpayer had adopted the CUP method to justify the ALP.

The TPO opined that for benchmarking purposes, the rates for both the rights to use were to be clubbed, i.e., 5% and 8%, respectively. Further, the TPO relied on royalty payment data relating to certain companies extracted from 'Royaltystats.com' database and arrived at the average rate of royalty at 4.25% on net sales, thereby concluding that the royalty payments were excessive.

The CIT(A) did not agree with the TPO's approach, and hence, the Revenue was in appeal before the ITAT.

ITAT noted that:

- the taxpayer had received substantial benefits by paying a royalty to its AEs, which outweighs the quantum of royalty payable;
- the royalty rates were within the limits prescribed by the Government. vide its Press Note 2 (2003 Series) dated 24 June 2003 (5% on domestic sales and 8% on export sales);
- the two royalty payments against should not be clubbed as each of the two agreements have separate identifiable deliverables and should be compared individually for benchmarking.

ITAT also observed that AEs have their own R&D, and whenever the taxpayer receives a new product inquiry, the specifications are sent to refractory licensor who provide technical details to the taxpayer to enable it to manufacture the requisite product as per the group's standards. The aforesaid services are available as and when needed by the taxpayer. By providing the benefits on a continuous basis, independent of each other, each of the two agreements have separate identifiable deliverables. So, both must be compared individually for benchmarking.

Hence, ITAT concluded that royalty data of various companies obtained and used by TPO for applying the CUP method are different from products, terms and scope of royalty payments made by the appellant and accordingly, application of CUP method by the TPO for determining ALP is not as per the law. The appeal of the Revenue is dismissed.

Our Comments

In cases where taxpayers have royalties for multiple products, which are separately identifiable, an individual transaction based benchmarking is preferred. Further, documentation and governmental regulations are also key in providing support for the fact that the payments are reasonable.

Indirect Tax

Whether salary paid to directors of the company is liable to GST under the reverse charge mechanism (RCM)?

[Background: Services provided by an employee to his employer in the course of employment are covered in Schedule III to the CGST Act, i.e., they shall be treated neither as a supply of goods nor a supply of services. However, services supplied by a director of a company to the said company are chargeable to GST under RCM as per Notification No. 13/2017-Central Tax (Rate) dated 28 June 2017.]

Clay Craft India Pvt. Ltd. - Authority for Advance Ruling (AAR), Rajasthan [2020 (4) TMI 228]

Applicant's contentions

- Under the Companies Act, the definition of 'director' includes a 'director' in the employment of the company.
- The applicant is paying GST under RCM on the commission being paid to the directors in lieu of their services.
- The directors are treated as full-time employees of the applicant company and are being paid salary accordingly.
- The directors are also considered as employees for the purpose of policies, benefits, and provident fund laws applicable to the applicant.
- Therefore, the remuneration paid to the director in the form of salary should be covered under Schedule III, and hence, not liable to GST.

The AAR held as follows:

- The consideration in the form of salary and commission paid to the directors by the company is against the services provided by them to the company, and the company is a recipient of such service, and directors are the suppliers.
- The directors are not the employees of the company.
- The RCM notification has given a distinct identity to the services provided by a director, and hence the entire consideration paid to directors should be chargeable to GST under RCM.

Our Comments

It is the general industry view that the RCM notification intends to tax directorship services provided by non-executive/part-time directors whose remuneration is in the form of commission, sitting fees, etc. The view that salary paid to full-time directors is not liable to tax under RCM has also been upheld by the Tribunal under the erstwhile service tax law, where similar provisions exist. This view has also been upheld under a recent GST AAR, Karnataka ruling in the case of Anil Kumar Agrawal.

Given the contradictory nature of the rulings, and the significance of the issue which can virtually impact a large number of businesses, the government should come up with a clarificatory circular to avoid protracted GST litigations.

Which rate of exchange (import or export) should be applicable for valuation in the case where goods are supplied within India, but the billing is done in foreign currency?

Bharat Heavy Electrical Limited – AAR, Uttarakhand [2020 (4) TMI 66]

Facts

- The applicant entered into an EPC contract, wherein the prices are in three currencies viz. INR, Euros and USD.
- Certain supplies involved in the contract will be made by the applicant in foreign currencies.
- Exchange rates by Customs are declared under two categories, viz. import and exports.
- The applicant submits that normally the foreign currency pricing is adopted in the contract to cover the cost of imported content used in the project.

Based on the above facts, the AAR ruled as follows:

- Under the GST law, the transaction value is the price actually paid or payable for the supply of goods and/or services.
- Therefore, in the present case, the rate of exchange of imported goods shall be applicable in as much as the foreign currency price in the contract is to cover imported content of the material used for the intended purpose.

Our Comments

This was a peculiar scenario wherein prices for certain supplies to be made in India were agreed in foreign currencies. In view of a lack of clarity in the valuation provisions of the GST law to deal with such a scenario, the AAR relied on the underlying intention of the parties to determine the appropriate Customs rate.

Tax Talk

Indian Developments

Direct Tax

Coronavirus outbreak: Direct tax shortfall likely to touch a 20-year high

[Excerpts from Business Standard, 31 March 2020]

COVID-19 has transformed into a catastrophe for the world economy and has severely affected the Indian economy. The tax revenue estimates were low even before the pandemic struck, and now the experts have predicted a steep decline in the direct tax collections. The shortfall is said to a 20 year high, totaling up to a large sum of INR 1.5 trillion. Other than the pandemic, this shortfall can also be attributed to the fact that businesses and corporates witnessed a significant decline in demand, leading to investment cut-downs and even job losses.

For TDS from salary, you will have to choose your tax regime now, says CBDT circular

[Excerpts from Economic Times, 31 March 2020]

The CBDT, on 13 April 2020, issued a circular regarding the TDS implications for the FY 2020-21. The Finance Ministry has clarified that an employer will have to deduct tax for FY 2020-21, from an employee's salary on the basis of the new lower tax regime if the employee opts for it and informs the employer of the same. The circular also clarified that once the regime is opted by an individual at the start of the FY, then such an option cannot be changed during the financial year as far as TDS by the employer is concerned. However, the option can be changed at the time of filing the income tax return.

India Inc pays INR 360,000 million as dividend before tax kicks in

[Excerpts from The Economic Times, 2 April 2020]

Private Indian companies paid INR 360,000 million as dividends between 1 February 2020 and 31 March 2020 to avoid extra tax following the change in dividend tax treatment. About 480 companies, including PSUs, have declared a total dividend of INR 760,000 million after the budget. The urgency to pay such dividends to shareholders before the commencement of the new budget helped several promoters of smaller companies as well as some of the affluent investors to increase their stake or to give additional margin for their pledged shares.

CBDT issues clarification on short TDS deduction owing to enhanced surcharge rates vide Finance (No.2) Act, 2019

[Excerpts from Taxsutra, 13 April 2020]

CBDT issues clarification regarding the short deduction of TDS/TCS due to an increase in surcharge rates (a highest of 37%), which received Presidential assent on August 1, 2019. It acknowledges few genuine instances wherein deductors/collectors were held to be assessees in default for short TDS/TCS deduction in cases where final transactions were done before the Bill was tabled. Thus, to mitigate genuine hardships, CBDT now lays down 4-point conditions, upon fulfillment of which the deductor shall not be held as an assessee in default. Further, it also provides for interest waiver subject to conditions. The 4 conditions are given below:

- The transaction should have been completed, and entire payment should be made to the deductee/ payee on or before 5 July 2019, there should be no subsequent transaction between both parties in FY 2019-20 to adjust such shortfall
- The TDS/TCS should be deducted/ collected as per rates in force
- Such TDS/TCS should be deposited in the account of the Central Government by adhering to the applicable due date
- The TDS/TCS statement should have been furnished on or before the due date

Government to give income tax refunds up to INR 0.5 million immediately due to coronavirus impact

[Excerpts from Economic Times, 9 April 2020]

The Income Tax Department announced that it will issue all pending income tax refunds up to INR 0.5 million immediately to individuals and business entities to help out due to hardships caused by the coronavirus lockdown in the country. According to the Press Note of the department, this decision would benefit around 1.4 million taxpayers. In the context of the COVID-19 pandemic scenario, the Government of India has decided to issue all pending income tax refunds and GST custom refunds with immediate effect.

Transfer Pricing

Expansion in the scope of Safe Harbor by Finance Act, 2020

The Safe Harbor rules in place in India provided protection to small taxpayers from the litigative transfer pricing environment for covered transactions. It is now proposed to extend the benefit of APA and safe harbor to profit attribution to PE of non-residents in India.

On 27 March 2020, the Finance Bill, 2020, has been approved by the parliament and has received the President's assent to be in effect in the Income-tax Act,1961, from 1 April 2020. One of the provisions approved pertains to expansion in the scope of Safe Harbor regulations.

Section	Provision	Amendments made/passed
Section 92CB of the Income-tax Act, 1961	The Finance Bill, 2020 proposed substitution of section 92CB(1) with effect from the AY 2020-21 to provide that apart from the determination of arm's length price, the determination of the income referred to in section 9(1)(i), shall also be subject to Safe Harbour Rules.	The definition of the safe harbor has been amended to include the income, deemed to accrue or arise to a business connection under section 9(1)(i) of the Act.

This is a welcome move that is likely to provide much-needed tax certainty to non-residents having a PE and had to face litigation on the attribution of profits in India. This amendment is effective from April 2020. It is important to note that the existing Safe Harbor rules are applicable only until FY 2018-19. Therefore, the new rules for the period FY 2019-20 and onwards are yet to be prescribed by the authority.

Transfer Pricing compliance due dates are preponed

Presently, the transfer pricing compliance in India (Furnishing accountants report in Form 3CEB and maintaining contemporaneous transfer pricing documentation, etc.) are due on the same day as the day for filing the tax returns viz. 30 November of the Assessment Year.

It is now proposed to prepone the due date from 30 November to 31 October. This amendment is effective from FY 19-20, which implies that the due date for transfer pricing compliances for March 2020 would be 31 October 2020.

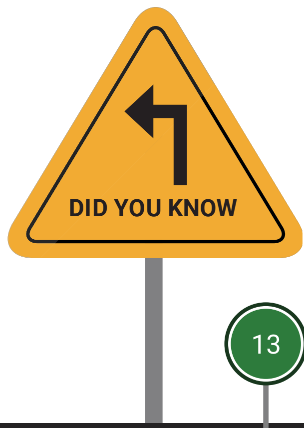
It would be worthwhile to wait for additional guidance from the CBDT in light of the unprecedented COVID-19 situation, for any extension to these timelines.

The OECD Transfer Pricing guidelines stipulate that under certain circumstances, taxpayers are allowed to adjust their arm's length prices to account for government interventions such as quarantine and travel ban that are currently in place across the globe. As a general rule, these government interventions should be treated as conditions of the market, and in the ordinary course, they should be taken into account in evaluating the taxpayer's transfer price in that market.

An extract from the guidelines of Para 1.134 of the OECD Transfer Pricing Guidelines, 2017 is provided below:

"As a general rule, where the government intervention applies equally to transactions between associated enterprises and transactions between independent enterprises (both in law and in fact), the approach to this problem where it occurs between associated enterprises should be the same for tax purposes as that adopted for transactions between independent enterprises."

Based on the above principle, MNEs may re-evaluate their transfer pricing policies taking into consideration the COVID-19 crisis.



Indirect Tax

Facility for inter-head transfer of balance in electronic cash ledger activated

In the 35th GST Council meeting held on 21 June 2019, it was decided to provide a facility to registered persons to transfer any amount available under any head of the electronic cash ledger to other heads viz. integrated tax, central tax, State tax or Union territory tax or cess through form GST PMT-09. This facility has now been notified by the government with effect from 21 April 2020 and has also been made available on the GST portal.

[Notification No. 37/2020-Central Tax dated 28 April 2020]

Temporary lifting of restriction on claiming ITC to the extent of 110% of that appearing in GSTR-2A

With businesses facing cash crunch due to the COVID-19 pandemic, the government has eased the restriction requiring businesses to limit their claim of input tax credit (ITC) to 110% of that appearing in GSTR-2A for the respective period. The businesses are now free to claim ITC as per their records for the period from February 2020 to August 2020, and reconcile the same with ITC as per GSTR-2A on a cumulative basis at the time of filing GSTR-3B for the month of September 2020.

[Notification No. 30/2020-Central Tax dated 3 April 2020]

Government rejects demand for GST exemption on ventilators, PPEs, etc.

The government has rejected the demands made for granting GST exemption on the sale of ventilators, personal protective equipment (PPE), and other medical equipment required to fight the COVID-19 pandemic. The government officials have stated such an exemption will put the local manufacturers at a disadvantage against foreign suppliers due to accumulation of GST credit, resulting in an increase in costs.

[Excerpts from livemint]

Relaxation to furnish an undertaking in lieu of bonds under the Customs law

To ease the compliance burden during the nation-wide lockdown, the Central Board of Indirect Taxes (CBIC), has relaxed the requirements to furnish following bonds at the time of import/ export till 15 May 2020, and instead decided to accept an undertaking in lieu of the same:

- Bond for provisional duty assessment (Section 18 of the Customs Act, 1962)
- Warehousing Bond (Section 59 of the Customs Act, 1962)
- Bonds required to be furnished under Section 143 of the Customs Act 1962
- Bonds required to be furnished for availing exemptions under notifications issued under Section 25 of the Customs Act, 1962

[Circular No. 17/2020-Customs dated 3 April 2020 read with Circular No. 21/2020-Customs dated 21 April 2020]

Tax Talk

Global Developments

Direct Tax

US treasury offers relaxations with respect to tax residency rules amidst COVID-19 international travel restrictions

The IRS (Inland Revenue Services) as a relief offers some relaxations as regards its tax residency rules due to travel disruptions caused by the coronavirus pandemic.

The relaxations allow individuals to choose a period of 60 uninterrupted calendar days beginning from 1 February 2020 to 1 April 2020, which would not be taken into account for the purpose of determining the residency of such individuals or foreign corporations under domestic laws.

It further provides that certain US business activities conducted by a non-resident alien or foreign corporation will not be counted for up to 60 consecutive calendar days in determining whether the individual or entity is engaged in a US trade or business or has a US permanent establishment.

It must be noted that the aforementioned relaxation shall apply only if those activities would not have been conducted in the United States but for travel disruptions arising from the COVID-19 emergency.

Russia approaches Cyprus seeking amendments to certain articles in their Tax Treaty

Amidst various measures taken by countries across the globe for addressing tax-base erosion and profit shifting practices, the Russian Ministry of Finance has sent an official request to the Finance Ministry of Cyprus for amending withholding tax rate on dividends as well as interest income for non-residents. The proposed amendments to the tax treaty are as follows:

- The withholding taxation rate on dividends under Article 10 of the tax treaty will be increased to 15% (which is the equivalent of the withholding tax rate applicable to dividends under Russian domestic law). Currently, applicable DTT rates vary from 5% to 10%, depending on the fulfillment of investment criteria.
- Article 11 of the tax treaty will be amended to introduce withholding taxation of outbound interest payments at a 15% rate. Currently, such cross-border interest payments are exempt from withholding taxation under the DTT.

Cyprus is expected to reply by 15 June 2020. However, should Cyprus refuse to introduce the requested changes, the tax treaty will be terminated unilaterally, and outbound payments made from Russia will be subject to domestic law regulations

Pakistan Stock Exchange has announced the abolition of Capital Value Tax

Capital Value Tax (CVT) is a tax levied on the capital value of specified assets such as Modaraba Certificates, shares of listed companies, etc. which is payable on the acquisition by every individual, association of persons, firm or company acquiring such an asset.

Previously, a CVT of 0.02% was payable on the purchase value of the Modaraba certificates, any instrument of redeemable capital, and a CVT of 0.01% was payable on shares of listed companies.

However, the Pakistan Stock Exchange announced the abolition of such CVT vide notification, stating that from 19 April 2020, CVT would not be payable to the Federal Government on the purchase of the aforesaid assets.

Thailand on greylist of non-cooperative tax jurisdictions of EU

Thailand, along with twelve other countries are on the watch-list of the European Union (EU) for not having formally signed and submitted the related instruments of ratification of the Convention on Mutual Administrative Assistance (MAC). MAC provides for both exchanges of taxpayer information, either upon request or automatically, and for assistance in the collection of monies or assets that happen to be within the supporting country's jurisdiction for the settlement of taxes due in other cooperative jurisdictions.

All states, whether members or non-members having trade and economic relations with EU member states, are expected to provide mutual support and assistance in the cross-border administration and collection of taxes by signing and ratifying the said convention on MAC before 31 August 2020 and 31 August 2021, respectively.

Countries failing to sign and ratify the MAC before the deadlines would be placed on the EU blacklist and labeled as a 'non-cooperative jurisdiction for tax purposes.' Accordingly, it may face serious investment implications between non-compliant countries and their EU counterparts, and companies and investors residing in EU member states would also incur substantial reputational risks for investing in such countries.

Transfer Pricing

Hong Kong: Revised guidance, taxation of the digital economy and intersection with transfer pricing

On 27 March 2020, Hong Kong released revised guidance on the taxation of the digital economy. The highlights are summarized below:

- It sets out about the key-value creators of an e-commerce business, confirms that data generated and gathered in the course of an e-commerce transaction, as well as direct and indirect network effects, shall be understood as key-value creators.
- It also provides practical guidance on how to determine the locality of profits in the context of e-commerce transactions, i.e., the location of core operations as a test of the source.
- Regarding the question of whether a non-Hong Kong resident person has a PE in Hong Kong, the guidance provides that, in the context of e-commerce, the decisive criterion may be whether the activities of a fixed place of business form a significant part of the e-commerce business as a whole or whether they go beyond preparatory or auxiliary activities.

Further, the guidance has mentioned that the Authorized OECD Approach will be adopted in attributing profit to a PE in the context of e-commerce. The guidance provides for a two-step analysis, i.e., 1) use functional and factual analysis to hypothesize the PE as a distinct and separate enterprise; and 2) apply the arm's length principle to the hypothetical enterprise in accordance with the OECD Transfer Pricing Guidelines.

Since intangible assets would be an important profit driver, it would be essential to identify which entity economically owns the intangibles.

US IRS releases FAQs on Best Practices on Transfer Pricing Documentation

The IRS has published new FAQs describing best practices and common mistakes in preparing transfer pricing documentation to help taxpayers to prepare improved documentation and to decrease the number of issues selected for examination and improve the examination efficiency for issues selected.

The US transfer pricing documentation rules [IRC § 6662(e)] provide for three types of penalties in the event of a substantial or gross valuation misstatement. The FAQs focus only on the net adjustment penalty [§ 6662(e)(1)(B)(ii)] levied when net transfer pricing adjustment exceeds relevant dollar thresholds.

Under '6662(e) documentation' requirements, the taxpayer is required to select and apply a method in a reasonable manner, maintain sufficient documentation thereof, and promptly provide such documentation to the IRS. The documentation must also be assessed for adequacy and reasonableness to avoid any penalty implications.

The FAQs are summarized below:

Additional benefit(s) that taxpayers will derive on maintaining robust documentation

It will allow the examining agent to rely on the taxpayer's analysis of functions, risks, intangibles, value drivers, etc., saving both the taxpayer and the IRS' time in examining low-risk transfer pricing issues thereby facilitating more efficient transfer pricing risk assessments and examinations for both taxpayers and examiners.

How can 'self-assessment' help to anticipate questions and prepare better 6662(e) documentation?

IRS encourages taxpayers to conduct a 'self-assessment' of the potential indicators of transfer pricing non-compliance so that they can anticipate and proactively address concerns the IRS might raise. The assessment can include an analysis of the parameters used (e.g., comparable companies), comparison of PLI, and address potential inconsistencies, proactively evaluating how system profits are shared between related parties and addressing whether such allocations are reasonable based on each party's contributions.

What is IRS's guiding principle in establishing arm's prices were charged in intercompany transactions:

The guiding principle, according to the IRS, is to ensure taxpayers are complying with § 482 and the regulations thereunder. The IRS also recognizes that it may be difficult to find direct and close comparables in all situations. In such cases, the IRS recommends making adjustments to compensate for the imperfect comparability.

What are some areas the IRS has identified in transfer pricing documentation reports that could benefit from improvement

The IRS has provided some indicative areas; however, the IRS also highlights that these areas do not provide a safe harbor for further examination and a more complex transaction will require greater detailed analysis. The indicative areas provided by the IRS are:

- Industry and company analysis sections of the report should be clear and provide context for related party transactions
- Functional analysis narratives should be robust and link facts to analysis
- Risk analysis should be consistent with intercompany agreements
- Support for best method selection must be provided, as well as the reason for rejecting specified methods
- Analysis should be provided to support the PLI conclusion
- Complete comparability analysis should be provided
- The impact of differences in risks or functions between the tested party and the comparable companies should be provided
- Detailed well-reasoned support for proposed adjustments to the application of a specified method should be provided

What are some features of useful transfer pricing documentation reports?

The IRS highlights various features such as an explanation of the data used, general business risks of the transaction, detailed descriptions of how these risks are allocated, allocation of profit, analysis of special business circumstances that may have affected profitability, and description of challenges faced, etc.

Can you provide an example of a presentation of a company's intercompany transactions that would be a helpful summary for examiners to use in risk assessment?

The IRS recommends making transfer pricing documentation more user-friendly, which will help in the IRS's review and assessment. e.g., providing a summary of information about intercompany transactions at the beginning.

Our Comments

The FAQs released by the IRS reflect their experience during the transfer pricing examination wherein the transfer pricing documentation maintained by the taxpayers was found to be inadequate. The FAQs also provide an insight into the expectations of the IRS from taxpayers, which would help the taxpayers in preparing improved and consistent documentation.

The IRS has emphasized certain qualitative aspects that would be expected in the documentation. In light of the above, taxpayers who prepare standard documentation merely from a compliance perspective would be at a higher risk of a detailed examination.

These FAQs would serve as a reference in light of the current COVID-19 situation wherein taxpayers may not be able to comply with their transfer pricing policies, and therefore, maintaining robust documentation would be crucial.

New Zealand Tax Authority grants relief relating to APAs in light of COVID-19

Under the present APA regulations in New Zealand, companies are expected to discuss the APA breaches with the Inland Revenue of New Zealand and to disclose the implication of these breaches on the validity of the APA prior to filing an annual compliance report. In light of the COVID-19 pandemic, the Inland Revenue of New Zealand has permitted companies to undertake commercial business decisions that may have arm's length implications, which are different than the outcome agreed in the APA without having to notify of any such deviation to the Inland Revenue. These breaches (or potential breaches) would be addressed in the annual compliance report when it is filed. Under this relief, Inland Revenue will review the annual compliance reports in due course and keeping in mind the implications of COVID-19 for the business.

Our Comments

In the current situation, the pricing of transactions according to the ordinary circumstances may not be possible, and intimating each deviation would have been administratively inconvenient. It will be important to see whether the other jurisdictions also release similar guidance.

Indonesia releases updated regulations on APA

Indonesia has released new APA regulations, which would be effective from 18 March 2020.

Simplification of the application process

The taxpayer can file the application for APA directly without filing extensive information during the pre-filing process.

Validity of APA

Bilateral and unilateral APAs will both be viable for a period of five years instead of three / four years under the old regime. Further, rollback has also been made applicable, provided the facts and conditions remain the same, and certain other conditions are met.

Annual compliance

Annual compliance reports are no longer necessary, however, the authorities can evaluate the APA and discuss the implementation of the APA, obtain further information, and review the business activities of the taxpayer.

Extension process

APAs can be extended for one consecutive period if the facts and circumstances remain the same, and if other conditions are met. The new regulations also reflect additional administrative requirements and deadlines as well as guidance on the application of transfer pricing methodologies.

Our Comments

With the introduction of rollback and extension of validity of the APA, the new regulations will get the Indonesian APA regime in line with the regulations prevalent in the majority of the jurisdictions. It will enable more companies to opt for APA in Indonesia. However, no annual compliance may lead to a risk on the certainty of the APA since adverse remarks on the evaluation of the APA by the authorities may lead to tax exposure for multiple years.

Extended deadlines for filing of Transfer Pricing Returns in light of COVID-19

Some of the countries which have extended due dates are provided below -

Country	Extension Details
Bermuda	The Country-by-Country (CbC) reports for periods ending between 26 March 2019 – 31 May 2019 are to be submitted no later than 31 May 2020. The submission deadlines for reporting periods ending after 31 May 2019 have not been changed.
Hong Kong	A reportable group required to file a notification in relation to CbC reporting for an accounting period ended between 31 December 2019 and 29 February 2020 (that were earlier due within 3 months of the accounting period end), may file the notification on the portal on or before 1 June 2020.
Malaysia	CbC reports that were due on 31 March 2020 or 30 April 2020 are now due 15 May 2020. The same deadline will apply for CbC notifications.
Denmark	The Danish transfer pricing rules require companies to prepare transfer pricing documentation contemporaneously, which must be ready no later than at the time for submission of the tax return. With the extension for the due date of filing of the tax return, the deadline for preparing the transfer pricing documentation for FY 2019 for most companies is 1 September 2020.
Poland	The due date for filing transfer pricing return has been extended until September 2020 for tax years started after 31 December 2018 and ended before 31 December 2019.
Thailand	The due date for filing Transfer Pricing disclosure form for the accounting period ended between 3 November 2019 to 03 April 2020 is extended to 31 August 2020.

Indirect Tax

UK's HMRC announces VAT deferment plan for businesses

Given the cash crunch being faced by most businesses due to the disruptions caused by the COVID-19 pandemic, United Kingdom's Her Majesty's Revenue and Customs (HMRC) has announced a VAT deferment plan for VAT payments due between 20 March 2020 and 30 June 2020. Businesses opting for this plan have time till 31 March 2021 to pay their VAT dues for the said period without any interest and penalty. However, this plan does not cover VAT payable on imports, and businesses still need to file their returns on time.

Compliance Calender

Direct Tax | Indirect Tax

5 May 2020

- Extended time limit to make payment of GST dues for the month of March 2020 without any interest or penalty, for registered taxpayers with aggregate turnover of more than INR 50 million in the previous financial year

7 May 2020

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

10 May 2020

- GSTR-7 for the month of April 2020 to be filed by taxpayers required to deduct tax deducted at source (TDS)
- GSTR-8 for the month of April 2020 to be filed by e-commerce operators required to collect tax at source (TCS)

11 May 2020

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

13 May 2020

- GSTR-6 for the month of April 2020 to be filed by Input service distributors

15 May 2020

- Furnishing quarterly statement of TCS deposited for the quarter ending 31 March 2020

20 May 2020

- GSTR-3B for the month of April 2020 to be filed by all registered taxpayers having turnover of more than INR 50 million
- GSTR-5 for the month of April 2020 to be filed by Non-resident taxable person
- GSTR-5A for the month of April 2020 to be filed by persons providing Online Information and Database Access or Retrieval (OIDAR) services

22 May 2020

- GSTR-3B for the month of April 2020 to be filed by registered taxpayers having a turnover less than INR 50 million and belonging to *Category 1 states

24 May 2020

- GSTR-3B for the month of April 2020 to be filed by registered taxpayers having a turnover less than INR 50 million and belonging to *Category 2 states

30 May 2020

- 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 the month of April 2019
- Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IB in the month of April 2019

31 May 2020

- 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 2019-20
- 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 2019 by reporting financial institutions

However, it must be noted that the CBDT vide the Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 dated 31 March 2020, has extended all respective due dates, falling during the period from 20 March 2020 to 29 June 2020 till 30 June 2020.

The benefit of the extended due date shall not be available in respect of payment of tax. However, any delay in payment of tax, which is due for payment from 20 March 2020 to 29 June 2020, shall attract interest at the lower rate of 0.75% for every month or part thereof if the same is paid after the due date but on or before 30 June 2020.

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

Category 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 or the Union territories of Jammu and Kashmir, Ladakh, Chandigarh and Delhi.*

Note - *The government has announced that taxpayers will be allowed to file their GST returns for the months of February, March, and April 2020 by the end of June 2020 without any interest, late fee and penalty. However, in the case of taxpayers with an aggregate turnover of more than INR 50 million, there will be a levy of interest at the reduced rate of 9% p.a. (as against the actual interest rate of 18% p.a.), in case of delay of more than 15 days in payment of tax, from the due dates applicable presently.*

Nexdigm (SKP) in the News

COVID -19- Need to Restructure?

– Neeraj Sharma

Business World

Read more at https://bit.ly/2Vc7VOo

Government's new tool to double-check refund for exporter of goods – Rule 89 (4)

– Deepti Ahuja

India Infoline

Read more https://bit.ly/2KTXd9s

Events

Webinar - Foreign Remittances Compliance

Organizer - Exito

13 April 2020

Webinar - Foreign Remittances and MLI Impact

Organizer - European Business Group (EBG)

21 April 2020

Webinar - GST and Transfer Pricing - Inter-play

Organizer - Nexdigm (SKP)

24 April 2020

Watch it here https://bit.ly/3fHB3pa

Webinar - Remission of Duties & Taxes on Export Products

Organizer - IEEMA

08 May 2020

Watch it here https://bit.ly/2SXs35z

Easy Remittance Tool

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

Tax position vetted by specialists

Easy retrieval of documents to aid in tax scrutiny

Ability to upload Form 15 CA on the same platform

ThinkNext@nexdigm.com

Request a Demo

About Nexdigm (SKP)

Nexdigm (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, we have built and leveraged capabilities across key global markets to provide transnational support to numerous clients.

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

Our team provides you with solutions for tomorrow; we help you *Think Next*.

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