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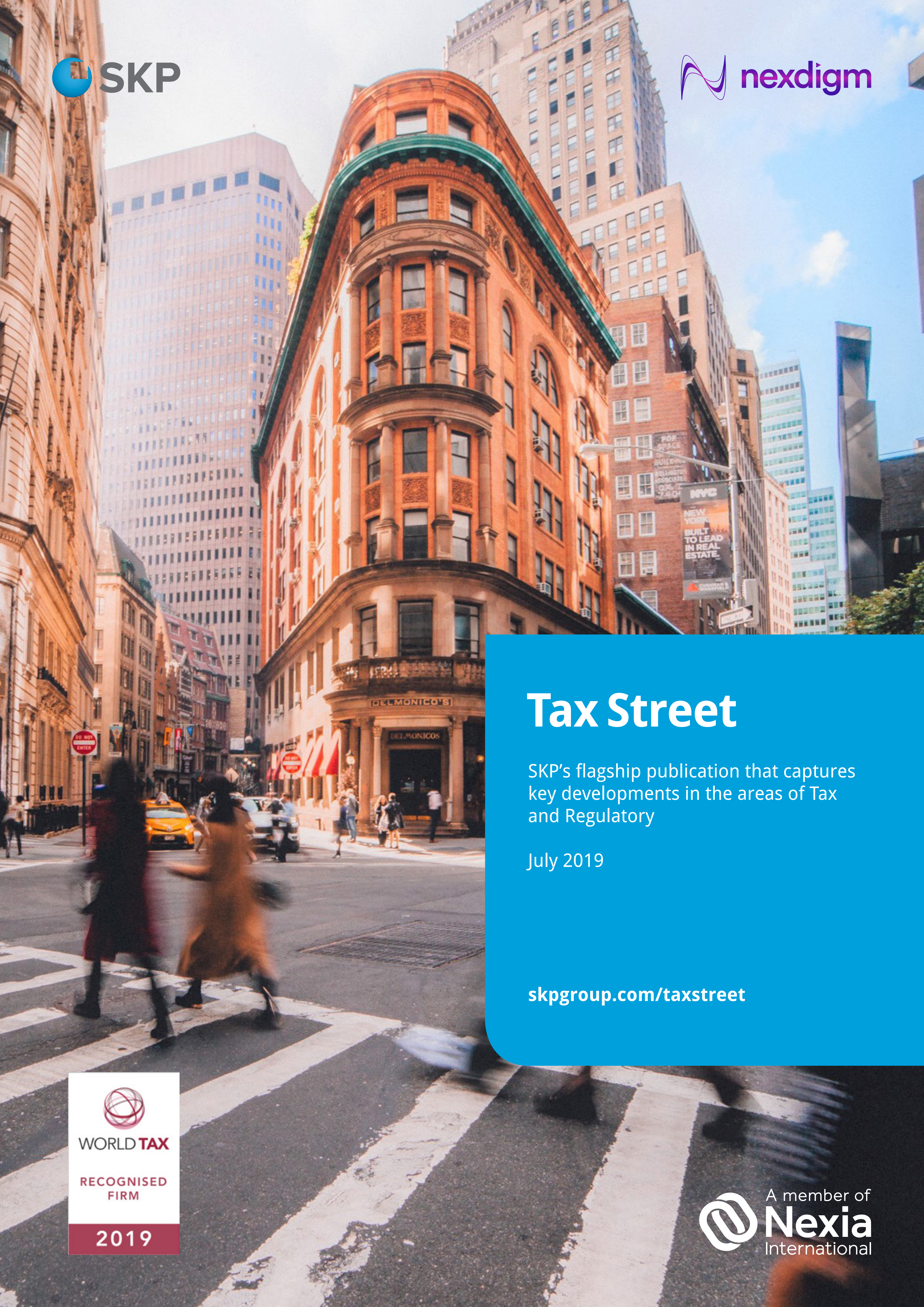

Tax Street

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

July 2019

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WORLD TAX
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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 July 2019.

The Indian taxation system has always witnessed a high volume of litigations. With the transition to GST, a need was felt to remove the burden of protracted litigation under the erstwhile indirect tax laws and to migrate to the GST regime in a complete sense.

- The **'Focus Point'** section explains the nitty-gritty of the Sabka Vishwas Legacy Dispute Resolution Scheme announced in the Union Budget 2019 to do away with indirect tax litigations of the pre-GST regime.
- Under the **'From the Judiciary'** section, we provide in brief, the key rulings on important cases, and our take on the same.
- Our **'Tax Talk'** provides key updates on the important tax-related news from India and across the globe.
- Under **'Compliance Calendar'**, we list down the important due dates with regard to direct tax, transfer pricing and indirect tax in the month.

We hope you find our newsletter useful and we look forward to your feedback. You can write to us at **taxstreet@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

Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019

An opportunity to end protracted litigations

The Finance Minister vide Union Budget 2019 has proposed a dispute resolution cum amnesty scheme called the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 ('the Scheme') for resolution and settlement of legacy cases of Central Excise, Service Tax and other indirect taxes subsumed under GST. The Scheme is a significant step by the Government to put an end to protracted litigation under the erstwhile indirect tax laws, which may otherwise take substantial time for closure.

The relief under the Scheme varies from 40% to 70% of tax dues, plus waiver from interest and penalty, providing taxpayers a lucrative alternative for quick closure of litigation. The Scheme will become applicable from a date to be notified by the government. The procedural details and rules regarding the Scheme will be notified in due course.

Nirmala Sitharaman
Finance Minister

"GST has just completed two years. An area that concerns me is that we have huge pending litigations from the pre-GST regime. More than 3.75 lakh crore is blocked in litigations in service tax and excise. There is a need to unload this baggage and allow a business to move on. I, therefore, propose a Legacy Dispute Resolution Scheme that will allow quick closure of these litigations. I would urge the trade and business to avail this opportunity and be free from legacy litigations."

Relief available under the Scheme

The relief under the Scheme varies from 40% to 70% of tax dues based on the varied circumstances:

Scenario	Up to INR 5 million	More than INR 5 million
Tax dispute at Show Cause Notice (SCN) stage or appellate stage	Waiver of 70% dues	Waiver of 50% dues
Only late fee and/or penalty disputed	100% waiver of dues	100% waiver of dues
Tax arrears declared as payable in returns	Waiver of 60% dues	Waiver of 40% of dues
Tax dues are related to inquiry, investigation, audit against the assessee	Waiver of 70% dues	Waiver of 50% dues
Voluntary disclosure of tax dues	*100% waiver of interest and penalty (No waiver of tax amount)	

*Clarity is awaited whether full interest and penalty waiver would be available.

Eligibility under the Scheme

All persons are eligible to opt for the Scheme, except:

Sr.No.	Exceptions
1	Who have filed an appeal and final hearing of such an appeal is completed on or before 30 June 2019.
2	Who have been convicted for any offense punishable under the enactments to which this scheme is applicable.
3	Who have been issued a Show Cause Notice (SCN) and the final hearing has taken place on or before 30 June 2019.
4	Who have been issued SCN for an erroneous refund or refund
5	Who have been subjected to an enquiry or investigation or audit and the amount of duty involved has not been quantified on or before 30 June 2019.
6	A person making voluntary disclosure: • After being subjected to any inquiry or investigation or audit; • Having filed a return under the enactment wherein he has indicated an amount of duty payable but has not paid it.
7	Who have filed an application in the settlement commission for the settlement of the case
8	Person making a declaration with respect to excisable goods in the Fourth Schedule to the Central Excise Act, 1944.

Steps to claim relief under the Scheme

The steps for availing benefit under the Scheme are as follows:

- File a declaration of disputed tax online.
- Designated committee verifies the correctness of the declaration made.
- If satisfied, the designated committee issues a statement in an electronic form indicating the amount payable by the declarant, within a period of sixty days.
- If the amount estimated by the committee exceeds the amount declared by the declarant, it shall issue a statement indicating the amount payable within thirty days of the date of receipt of the declaration.
- An opportunity of being heard may be provided, and after that, an online statement indicating the amount payable shall be issued within a period of sixty days from the date of receipt of the declaration.
- Taxpayer shall pay the amount online within a period of thirty days from the date of issue of such a statement.

Restrictions under the Scheme

- The amount payable under the Scheme cannot be paid through the utilization of input tax credit and cannot be claimed as an input tax credit.
- The declaration under the Scheme has to be made to a 'designated committee' that will verify the correctness of the declaration and estimate the amount to be paid by the declarant. In case any pre-deposit or other deposit already paid by the declarant exceeds the amount payable as determined by the designated committee, the difference will not be refunded to the declarant.

Open Points

Waiver of interest and penalty

The Scheme in its present form is silent on whether the tax dues to be waived would include the amount of interest and penalty. However, in the annexure to the budget speech of the Union Finance Minister, it has been specifically stated that the Scheme will provide relief from interest and penalty as well. Therefore, it is expected that further clarity would be provided after the enactment of the Scheme, or through the Rules issued under the Scheme.

Refund of tax deposited under protest

The Scheme states that the declarant can claim a deduction of the pre-deposit paid at any stage of appeal proceedings, or any deposit paid during inquiry, investigation or audit. Further, in case such pre-deposit or any other deposit exceeds the amount payable under the Scheme, then the declarant is not entitled to the refund of such an excess deposit paid. However, the Scheme is silent on whether any amount deposited 'under protest' by the declarant will be refunded if such an amount exceeds the tax payable under the Scheme.

Key Question

Should the taxpayer avail this scheme?

In order to assess whether this scheme should be availed by the taxpayers, it is recommended to do the following:

- Take stock of all the pending litigations under the Excise and Service Tax.
- Review the strength of the position and do an exercise to evaluate the likely outcome of the case.
- In case the grounds are strong, and the likelihood of the final decree being in the taxpayers' favour is high, then availing the scheme would not be recommended.
- In case the grounds of appeal appear weak and litigation costs are high, then availing the scheme would be recommended to eliminate the uncertainty.

Conclusion

The introduction of the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 is a major step taken by the Government to reduce pending litigations under the erstwhile indirect tax enactments. This scheme is on similar lines to the recently introduced amnesty schemes under VAT laws in the states of Maharashtra, Karnataka, West Bengal, and Gujarat.

The Scheme should also contribute to the Government's "Ease of Doing Business in India" initiative by reducing litigations and allowing taxpayers to focus on their businesses and migrate to GST in the true sense without worrying about protracted litigations under legacy laws.

FROM THE JUDICIARY

Direct Tax

Whether capital gains arising from the sale of units of mutual funds would be treated at par with that of shares and be taxable in India as per Article 13(4) of India–UAE Tax Treaty

Dy. CIT vs Sri. K. E. Faizal [TS-389-ITAT-2019(Cochin)]

Held

Taxpayer, a UAE resident individual, had sold units of equity-oriented mutual funds from which he derived short-term capital gains. He filed the tax return in India claiming that the said gains are taxable in UAE and not in India pursuant to Article 13(5) of India-UAE Tax Treaty. However, the tax officer treated the said units at par with shares and held the gains to be taxable in India pursuant to Article 13(4) of the tax treaty.

The tax tribunal observed that Article 13(4) of the tax treaty covers within its purview capital gains arising from the transfer of shares while Article 13(5) covers capital gains arising from any other property i.e., except shares. Hence, Article 13(4) cannot be applied to the sale of units unless the same qualifies as shares for the purpose of the tax treaty.

Further, the tax tribunal observed from the term securities under the Securities Contract (Regulation) Act that "securities" include shares and units of a mutual fund. This implies that shares and units are distinct and cannot be considered at par. Hence, capital gains arising from the sale of units would not be taxable in India as per Article 13(5) of the tax treaty.

SKP's Comments

Post introduction of long-term Capital Gains Tax in India, it is imperative for the taxpayers to examine the tax treaties for other asset classes like units, bonds, etc. as the tax treaty may provide for favorable tax treatment. This ruling emphasises the fact that under India-UAE Tax Treaty capital gains on only shares are taxable in India and capital gains on other assets would be taxable only in UAE.

Whether payments made for cloud hosting services are taxable as royalty under the Income Tax Act or the India-US Tax Treaty?

Rackspace vs Dy. CIT [TS-398-ITAT-2019 (Mumbai)]

Held

The taxpayer is a dedicated cloud computing and hosting services company incorporated in the USA. The taxpayer claimed that the income from cloud hosting services is business income, and in the absence of permanent establishment in India, the said income is not taxable in India. However, the tax officer held that the said income is in the nature of royalty under the Income Tax Act as well as the India-US Tax Treaty and hence the same is taxable in India.

The tax tribunal observed that the definition of royalty under explanation 2 to section 9(1)(vi) includes payment for use or right to use an industrial, commercial, or scientific equipment. The tax tribunal noted that the customers of the taxpayer were merely availing hosting services and were not using or having control over the equipment. However, Finance Act 2012 retrospectively clarified that such payment would be royalty whether or not possession or control of the equipment was with the taxpayer. In light of the above, such payments would be taxable as royalty under the Act.

Pursuant to the India-US Tax Treaty, the definition of royalty is exhaustive and not inclusive in nature. Further, the term "use" or "right to use" implies possession/ control over the property. However, in the instant case, there is no privilege or right granted to the Indian customers over the servers and other equipment used to provide cloud hosting services, which are nothing but standard services. Furthermore, the equipment is used by the taxpayer for providing these services to the customers and not vice-versa. Also, the agreement entered into between the taxpayer and the customers are limited to the provision of cloud hosting services only and not hiring or leasing of the underlying equipment. In light of the above, the payments are not taxable as royalty under the India-USA Tax Treaty.

SKP's Comments

This is the first decision that discusses the taxability of cloud hosting services. There are many decisions on web hosting services having divergent views on taxability. However, this decision provides a great deal of clarity on the taxability of cloud hosting services under the tax treaties. It is pertinent to note that the language employed by the India-US Tax Treaty is mostly similar to other tax treaties and hence the observations made thereunder can be imported to other tax treaties as well.

It is to be seen whether the Revenue Authorities would appeal before the Bombay High Court as this decision would have far-reaching impact on many digital companies.

Whether salary cost recharge be taxable as fees for technical services (FTS) under the Income Tax Act and the India-France Tax Treaty?

Whether payments for technical and managerial services are taxable as FTS under the Income Tax Act or India-France Tax Treaty?

M/s. Faurecia Automotive Holding vs DCIT [TS-417-ITAT-2019 (Pune)]

Held

Taxpayer, a tax resident of France, is engaged in designing and building dashboards, door panels, soundproofing, etc. for passenger car interiors.

Salary cost re-charge

While filing the tax return in India, the taxpayer did not offer salary cost recharge to tax in India. However, the tax officer considered salary cost recharge as FTS and held the same to be taxable in India.

The tax tribunal observed that the expat employed by the Indian subsidiary was in receipt of salary and other emoluments like any other employee would be. Further, the said expat was working under the control, supervision, or direction of the Indian subsidiary only. Also, the income earned by the expat was offered to tax in India as salaries including the amount paid by the taxpayer which is duly supported by Form 26AS and computation of income produced before the tax authorities. Further, the definition of FTS under the Act provides an exception that income taxable as salaries would come out of the purview of FTS. In light of the above, salary cost re-charge would not be taxable as FTS under the Act. Hence, analyzing the taxability under the tax treaty is not relevant.

Payments for technical/ managerial services

Pursuant to a services agreement, the taxpayer also received consideration for the provision of global information support services to its Indian subsidiary which was also not offered to tax in India since the same did not make available any technical knowledge, skills, etc. However, the tax officer held that the payment received for support services is royalty/FTS as per the Act as well as the tax treaty.

The tax tribunal noted that the taxpayer provided services in fields such as management, marketing, accounting, legal, human resources, purchasing, etc., all of which fall within the purview of managerial services. In addition to the above, the taxpayer also renders technical services in the form of IT support services in 3 fields i.e., operations, technical support, and technical studies. Hence, it is clear that the support services are actually in the nature of technical and managerial services. Accordingly, payment for such services would be taxable as FTS under the Act. However, the same is not taxable as FTS under the India-France Tax Treaty since the services do not make available technical skills, knowledge, etc. to the service recipient. In arriving at the said conclusion, the tax tribunal noted that the India-France tax treaty does not have make available clause, but it contains "most favored nation" (MFN) clause which enables the taxpayer to import the beneficial provisions of a tax treaty entered into after the India-France Tax Treaty came into force. In light of the above facts, the tax tribunal held that the payments, though FTS in nature, are not liable to tax in India under the India-France Tax Treaty.

SKP's Comments

Yet another decision on the taxability of cost recharge for employee cost. However, it is pertinent to note that this decision distinguishes the Delhi High Court decision in the case of Centrica Offshore. This is a good development for taxpayers and would help companies who have entered into similar deputation arrangements.

Furthermore, it is imperative that the tax treaty is read in conjunction with the protocol so that in cases where taxability arises under a tax treaty as well, the protocol may provide for some relief by virtue of the MFN clause.

Transfer Pricing

Whether the TPO was right in

(1) determining the ALP of payment of Fees for Management services in a segregated manner and

(2) determining ALP at NIL?

INA Bearings India Pvt Ltd [ITA No.150/PUN/2017 & ITA No.282/PUN/2017] – AY 2011-12

Held

The taxpayer is engaged in manufacturing & distribution of roller and linear bearings system and engine components. The taxpayer adopted TNMM as MAM and aggregated the transaction of Management services with other international transactions under manufacturing and trading segments.

The Transfer Pricing Officer ('TPO') rejected the benchmarking approach adopted by taxpayer and segregated the transaction of Management fees without applying any specific method and determined its ALP at Nil thereby making an upward TP adjustment. The Commissioner of Income Tax 'CIT(A)' upheld the adjustment made by TPO.

The Income Tax Appellate Tribunal ('ITAT') held that:

- Referring to sections 92(1), 92B and 92C(1) of income tax act and also placing reliance on HC ruling in case of Knorr-Bremse India Pvt Ltd[1] and Magnetic Marelli Powertrain India Pvt Ltd[2], ITAT held that although purchase of goods and the services lead to manufacturing of final product however it doesn't mean that they are interdependent on each other. Also, both the transactions were carried out with different AE's, hence there is no question of any inextricable link between these transactions. Accordingly ITAT upheld TPO's segregation approach.
- On perusal of various supporting documents such as agreements, invoices, service wise benefit analysis submitted by the taxpayer, ITAT held that the services were in nature of normal business services and not in the nature of stewardship activities. Accordingly rejected the contention of TPO.
- ITAT noted that taxpayer has entered into a service level agreement with its AE for receipt of management services wherein the pricing was based on hourly rates plus a mark up of 5%. Basis the documents submitted, ITAT observed that there was no ad-hoc cost charged by the AE. Also even if it is to be assumed that the mark-up of 5% is not at ALP and should be as low as 1% or even less than that, still the difference of such mark up in comparable uncontrolled transactions would be within the arm's length range. Accordingly the actual cost incurred in providing such services are at ALP. Basis the above, ITAT deleted the adjustment.

SKP's Comments

Approach of aggregation of separate transactions only to adopt the TNMM is not tenable, However, the ITAT has given due cognisance to the commercial reality of the pricing of the intra-group services to not warrant any adjustment. It demonstrates the need to maintain appropriate transactional evidenced and supporting details with respect to intra-group services.

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1 TS-558-HC-2015 (P&H)-TP

2 TS-869-HC-2016(DEL)-TP

Whether an entity that is non-existent after its amalgamation can be assessed?

Maruti Suzuki India Limited – Civil Appeal no 5409 of 2019 (Arising out of SLP(C) No 4298 of 2019)- AY 2012-13

The erstwhile entity i.e. M/s Suzuki Powertrain India Limited was amalgamated with M/s Maruti Suzuki India Limited with effect from April 2012, which was duly approved by the order of the High Court (HC) dated 29th January 2013. It was also taken on record by the registrar of Companies (ROC) on 17th March 2013.

The taxpayer contended that the assessment proceedings undertaken by the AO (notice issued after the amalgamation) is in the name of the non-existent earlier entity. Accordingly, taxpayer filed an appeal before Income Tax Appellate Tribunal (ITAT) wherein, the ITAT held that assessment made in the name of Suzuki Powertrain India Limited for AY 12-13 is a nullity since the entity was not in existence.

The High Court (HC), while affirming this view of the ITAT followed its own decision in taxpayer's case for previous AY 11-12. Holding that no question of law arose, the HC dismissed the appeal under Section 260A of the Income Tax Act 1961.

Aggrieved, the revenue filed an appeal before Honourable Supreme Court (SC).

SC observations and conclusion:

- Hon'ble SC noted in case of Saraswati Industrial Syndicate Ltd, it was held that when two companies are merged and form a third company or one is blended with another, the amalgamated company loses its entity. Also, the amalgamating company ceasing to exist, it cannot be regarded as a person u/s 2(31) of the Act 1961.
- Further, SC noted that in Delhi HC ruling in the case of Spice Entertainment it held that an assessment framed in the name of the amalgamating company, which ceased to exist in the eyes of law, is invalid and untenable in law. Such a defect would not be cured in terms of Section 292B of the Act. Further, the fact that the amalgamated company participated in the assessment proceedings would not operate as estoppel. Following the above decisions Delhi HC quashed assessment orders which were framed in the name of an amalgamating company.
- SC also observed that the assessment order in taxpayer's own case for AY 11-12 was set aside on the same ground which resulted in SLP which was dismissed by the Supreme Court.
- SC noted that the in the present case, despite the fact that the AO was informed of the amalgamating company having ceased to exist the jurisdictional notice was issued only in its name. SC opined that "the basis on which jurisdiction was invoked was fundamentally at odds with the legal principle that the amalgamating entity ceases to exist upon the approved scheme of amalgamation." SC further remarked that "participation in the proceedings by the appellant in the circumstances cannot operate as an estoppel against law." Basis the similar finding, revenue contention was dismissed in the case of the taxpayer while dismissing the SLP for AY 2011-2012.

Based on the above facts, SC dismissed revenue appeal and stated that we find no reason to take a different view and also that the court must abide by promoting the interest of certainty in tax litigation.

SKP's Comments

In amalgamation / merger and other similar cases, an assessment proceeding initiated for the non-existent amalgamating company can be strongly challenged by taxpayers.

Whether an AMP adjustment should be made if taxpayer recovers expenses by way of subvention income?

Edward Lifesciences (India) Private Limited - ITA No.1189/Mum/2017 (AY 2012-13) & ITA No.7198/Mum/2017 (AY 2013-14)

The taxpayer is engaged in distribution of cardiovascular products to hospitals and other medical institutions. During the year the taxpayer has incurred certain Advertising, Marketing and Promotion (AMP) expenses for distributing its products in India.

TPO's Comments: On perusal of the documents submitted by the taxpayer (i.e. agreement and FAR analysis), the Transfer Pricing Officer (TPO) observed that the taxpayer was merely a low risk distributor and was not supposed to carry out the aforesaid functions as it lead to creation of marketing intangibles; thereby considering the AMP expenses as international transaction and computed an AMP adjustment based on OP/OC earned by comparable companies. The Dispute Resolution Panel ('DRP') upheld the order of the TPO.

The Income Tax Appellate Tribunal ('ITAT') held that:

- The nature of expenditure incurred by taxpayer were in nature of scientific meetings, medical advice, campaign, training etc. which help in creating awareness among doctors, new technology and product benefits.

- Further, the ITAT was of the view that the TPO /DRP /AO had ignored a crucial aspect of the receipt of subvention income, wherein the associated enterprise (AE) had agreed to compensate the taxpayer by way of subvention income in order to achieve an arm's length margin in India, which effectively tantamount to compensating the taxpayer for all the expenses relating to its distribution activity. This subvention income was duly offered to tax by the taxpayer.
- It further stated that considering the subvention income, the taxpayers operating margin would be much higher than the margins earned by the comparable distributors and accordingly there could not be any adjustment to ALP thereon.

Basis the above, ITAT granted relief to taxpayer.

SKP's Comments

The ITAT in this decision has granted relief on the adjustment pertaining to AMP expenses basis the existence of operational subvention arrangement.

In intra group distribution arrangements, it is recommended that the operational arrangement is framed well considering the functional/ risk profile of Indian company and it is also documented clearly in the inter-company agreement so as to justify/ support the AMP expenses incurred by the Indian company.

Whether the TPO has power to to determine 'Place of Effective Management" (POEM) of a taxpayer?

M/s. Sava Healthcare Ltd. v/s The Asst. Commissioner of Income Tax ITA Nos.1062 to 1068 / PUN / 2017 (AY 2007-08 to 2013-14)

The taxpayer was engaged in business of trading and export of medicines. During the year, the taxpayer had sold finished goods to its AEs and benchmarked the transactions using Transactional Net margin method ('TNMM') showing at 16.72% margins as against average margins of the comparables at 2.77%.

TPO: Basis the functional profiles of group entities in Mauritius, Dubai, Singapore etc., the TPO had noted that, the major functions, assets, resources, etc. of the group are situated in India and the AEs in Dubai and Mauritius were not doing any functions other than receiving and sending money (which is also being undertaken in India and by employees of taxpayer). Further, the TPO also viewed that goods were dispatched to Singapore godown, but the bills were made in the name of AEs in Mauritius and Dubai. The entire global purchases were routed through AEs at Mauritius and Dubai, which was subsequently brought back to India, by way of dividend and salary to the group promoter (which was claimed as exempt by the promoter). Accordingly, TPO stated that the control and management of the affairs of taxpayer group was wholly in India.

Separately, he rejected TNMM applied by the taxpayer and invoked Profit Split Method ('PSM') and proposed to allocate 97% of profits to the taxpayer. Wherein, the taxpayer went in appeal with the DRP.

DRP: With respect to the TPOs direction that control and management of the affairs of taxpayer group was wholly in India, the DRP did not interfere with the same. However, regarding application of PSM, the DRP upheld the same, however, recalculated the allocation to 70%. Accordingly, the taxpayer went in appeal with the ITAT.

ITAT: ITAT held that the AO should have determined the control and management of affairs of taxpayer group and the TPO does not have any jurisdiction for determining POEM of the taxpayer.

Regarding application of PSM, the rules for applying PSM are completely overlooked and no comparables are selected and the DRP, on its own, has made allocation of profits. The said exercise carried out by DRP is beyond its jurisdiction. The DRP has also failed to consider the aspect that no such transaction (of control and management) was reported in Form No.3CEB.

The taxpayer had objected to the exercise of powers by TPO alleging that no international transaction arises on the premise of benchmarking transaction of control and management of AE parties from India. The said objection has not been dealt with by TPO/DRP. Accordingly, the ITAT held that the entire TP proceedings were in violation of the TP regulations and accordingly quashed.

SKP's Comments

Before adjudicating a case, the departmental authorities are expected to ensure that basic principles are followed such as

- whether principles of natural justice are followed,
- conditions to be satisfied for making TPO reference
- jurisdiction available to respective authorities, etc

In case any of the above essential checks are missing, taxpayers can challenge the validity of the assessment proceedings.

Indirect Tax

Where the claim of transition credit has been rejected, can the department demand interest even if such transition credit has not been utilized for payment of GST liability by the taxpayer?

M/s Commercial Steel Engineering Corporation - Hon'ble High Court of Patna [Writ Petition No. 2125 of 2019]

Facts of the case

- The petitioner claimed transition credit under GST of ITC pertaining to the VAT regime by filing TRAN-1, and accordingly the same was credited to his electronic credit ledger.
- Later, this claim was rejected by the department on the grounds that it was wrongly availed by the petitioner and tax along with interest was demanded.

Petitioner's contention

- The transition credit has been lying in the electronic credit ledger and is not utilized for the payment of GST liability.
- The mere filing of TRAN-1 would not amount to either availing or utilizing the transition credit until the department can demonstrate that such credit has been availed or utilized by the petitioner.

Department's contention

- The petitioner had filed an application in TRAN-1, and the credit balance was reflected in the electronic credit ledger. Thus, it amounts to availing of credit, and hence interest is applicable.

Judgment

- An availment of a credit is a positive act, and unless carried out for reducing any tax liability by its reflection in the return filed, it cannot be a case of either availment or utilization.
- On a plain reading of section 73, it can be said that only on availing or utilizing the disputed input tax credit, it would be recoverable.
- The Court while distinguishing the decision of the Hon'ble Supreme Court in Union of India & Ors. vs Ind. Swift Laboratories Ltd. observed that in the said case, ITC was utilized by the dealer, unlike in the case on hand.

SKP's Comments

The principle laid down by the court would be beneficial to the taxpayers as it will eliminate the interest liability in cases where any ITC has been wrongfully claimed in the returns but has not been utilized for payment of the liability.

However, it would be interesting to see if the department prefers an appeal against this decision in view of the precedence laid down by the Supreme Court in Ind. Swift Laboratories.

Whether GST under Reverse Charge Mechanism (RCM) is payable on ocean freight in case of imports?

M/s E-DP Marketing Private Limited - Authority of Advance Ruling (AAR), Madhya Pradesh [2019 (7) TMI 44]

Facts of the case

- The applicant imported crude soybean oil into India on a CIF basis (Cost + Insurance + Freight).
- At the time of import of goods into India, the applicant is required to pay Customs Duty (including IGST) on the CIF value of imported goods.
- Further, by virtue of Notification No. 10/2017 - Integrated Tax (Rate) dated 28 June 2017, IGST is payable on ocean freight at 5% by the importer on an RCM basis.

Applicant's contention

- As per the aforesaid notification, the applicant/importer is again required to pay IGST on the component of ocean freight under RCM.
- Hence, it leads to double taxation of IGST on the ocean freight component, which is illegal and against the basic principles of GST law.

Ruling

In view of the notifications under GST, there is no ambiguity in regard to the payment of IGST on ocean freight. IGST on ocean freight has to be paid by the importer under RCM, irrespective of the fact that such freight charges are included in the intrinsic CIF value on which Customs Duty (including IGST) has been already paid by the importer.

SKP's Comments

The issue of double taxation of ocean freight has been a bone of contention between the government and the importers. The issue relates to the constitutional validity of the notification levying IGST on ocean freight on the following grounds:

- The notification levies IGST on service rendered by a foreign service provider to a foreign recipient.
- The notification levies IGST twice on ocean freight which is outside the jurisdiction of the AAR.

This matter is currently pending before various High Courts by way of writ petitions filed by importers and will attain finality only once a decision is given by the courts.

TAX TALK
INDIAN DEVELOPMENTS

Direct Tax

India ratifies OECD's convention to check tax evasion

The multilateral convention is an outcome of the OECD/G20 Project to tackle base erosion and profit shifting [BEPS], which is resorted to by multinational corporations through tax planning strategies by exploiting gaps and mismatches in tax rules. The convention enables all signatories to meet treaty-related minimum standards that were agreed as part of the BEPS package. India has now deposited the instrument of ratification to OECD, Paris, along with its final position in terms of covered tax agreements (CTAs). The Cabinet last month approved ratification of the convention, which will modify India's treaties in order to curb revenue loss through treaty abuse and BEPS strategies by ensuring that profits are taxed where substantive economic activities generating the profits are carried out and where value is created.

Under this global tax framework, investors from tax heavens including Singapore and Cyprus who have availed the benefit of exemption or concessional rate of taxation for investments made prior to this financial year may have to face tax scrutiny by Indian tax authorities.

NRIs' residential status comes under I-T lens

As per Indian tax laws, a resident can attain NRI status by staying overseas for more than 182 days. The law also states that a person is a 'resident' if he has been in India for more than 60 days in the year in question and 365 days during the four years prior to that year. While an NRI is spared tax on income from outside India, a resident is required to pay tax on global earnings. Due to severe tax implications, many Indians carefully divide their time between India and abroad. To look into this issue, the department has issued notices to several NRIs for reopening tax assessments of the past five to six years and were also told to share photocopies of their passports. Under the circumstances, persons who claimed NRI status (without fulfilling the norms on the period of stay) are being pulled up for tax evasion and may be in for lengthy litigation.

Task force on Direct Tax Code to submit report by 31 July 2019

The Finance Minister, Nirmala Sitharaman, has stated that the task force shall submit a report on the Direct Tax Code by 31st July. The existing Income Tax Act shall be replaced by the new direct tax code which aims to reform the complex Income Tax laws into simpler tax codes with reduced rates, fewer exemptions, and tax slabs.

Transfer Pricing

On 5th July 2019, the Union Minister for Finance and Corporate Affairs Smt. Nirmala Sitharaman made her maiden Budget Speech and presented the Union Budget 2019-20 before the Parliament. Key transfer pricing highlights of Union Budget 2019 are as follows:

Secondary Adjustments (SA) simplified: To address concerns regarding the provisions of Section 92CE, following amendments have been proposed:

- Clarification that these provisions shall not apply if the primary adjustment does not exceed INR 10 million or the same pertains to AY 2016-17 and earlier years. These two conditions are not cumulative.
- Further, the amount of primary adjustment can be repatriated from any associated enterprise not resident in India
- The taxpayer may choose not to make secondary adjustment by a one-time tax payment at 18% on amount to be repatriated plus 12% surcharge on such tax. The taxpayer will have to pay due interest till the date of payment of such onetime tax as per the existing provisions. However, the additional tax is not deductible nor any credit can be claimed for such tax.

The first two amendments mentioned above are clarificatory in nature and will retrospective take effect from 1st April 2018. The last amendment is effective from 1 September 2019.

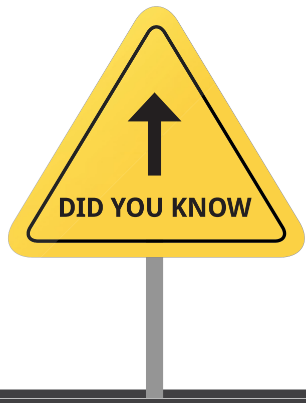
Master file compliance (Part A of Form No. 3CEAA) applicable even when no international transaction: It is proposed to clarify that master file related compliance (only Part A of Form No. 3CEAA) needs to be filed even when there is no international transaction.

Clarification regarding definition of the 'Accounting Year': It is proposed to amend Section 286 of the act so as to provide clarification with respect to definition of "accounting year" wherein in case of a constituent entity of an international group, the parent entity of which is not resident in India, the reporting accounting year shall be the one applicable to such parent entity. The said amendment will take effect retrospectively from the 1 April 2017 (from AY 2017-18 & onwards).

Advance Pricing Agreement (APA): Effective 1st September 2019, it is proposed to amend Section 92CD(3) to clarify that once an advance pricing agreement has been signed and modified return is filed by the taxpayer, the assessing officer shall pass an order only to modify the total income for the relevant AY in accordance with the APA. Accordingly, he shall not have the power to initiate fresh assessments/ re-assessments for such AYs.

Group Level Changes needs to be examined by the Indian subsidiary while determining the CbCR related compliance requirements in India

In India, the due date for Country-by-Country Reporting (CbCR) Intimation Compliances (Form No. 3CEAC) are based on the accounting year of the overseas MNE group. An MNE group (say 'Group A') whose accounting year end is normally 31-Dec, the constituent entity in India would be required to file the Form No. 3CEAC in India in the following 31-Oct. However, during the accounting year of Group A, it is possible that the group would have faced two reporting accounting years due to reconstruction, merger etc. i.e. one in the name of Group A (till 30-Sep-2018 the cut-off date) and the second in the name of a new entity (say Group B till 31-Dec-2018). In such case, the constituent entity in India should be mindful of such group changes as it would impact the compliance in India in terms of number of forms and the due dates. In the example provided; the constituent entity in India may be required to file 2 intimations of the CbCR in Form No. 3CEAC in India – (1) considering Group A as the parent for the accounting period ending on 30-Sep-2018; whose due date would be 31-Jul-2019, (2) considering Group B as the parent for the accounting period ending on 31-Dec-2018; whose due date in India would be 31-Oct-2019.



Indirect Tax

Extension in the tax periods for which exporter despite an error in GSTR-3B can claim refund

Certain registered persons, while filing the return in FORM GSTR-3B, committed errors in declaring the export of services on payment of IGST or zero-rated supplies made to a SEZ unit/developer on payment of IGST. They showed such supplies in the Table under column 3.1(a) (outward taxable supplies) instead of showing them in column 3.1(b) (zero-rated supplies) of FORM GSTR-3B.

The above error prevented registered persons from claiming a refund as there is an in-built validation check on the common portal which restricted the refund amount to the amount mentioned under column 3.1(b) of FORM GSTR-3B filed for the corresponding tax period.

Earlier, in order to give relief to such registered persons, it was decided that for the tax periods from 1 July 2017 to 31 March 2018, they shall be allowed to file the refund application to the extent of aggregate amount of IGST mentioned in 3.1(a), 3.1(b) and 3.1(c) of GSTR-3B. Now, by issuing corrigendum, this relief has been extended to the tax periods till 30 June 2019.

[Corrigendum dated 18 July 2019 to Circular No. 45/19/2018-GST dated 30 May 2018]

Clarification in respect of goods taken out of India for exhibition or on a consignment basis for export promotion

In respect of goods taken out of India for exhibition, the government vide a Circular has clarified the following:

- The activity of taking goods out of India on a consignment basis for the exhibition would not in itself constitute a supply under GST since there is no consideration received. Under the GST law, this activity shall be considered in the nature of "sale on approval."
- A registered person involved in the said activity is required to maintain records in the prescribed format provided as an annexure to the said Circular.
- The movement of these goods out of India shall be accompanied by a delivery challan issued in accordance with rule 55 of the CGST Rules.
- The goods so taken out of India are required to be either sold or brought back within a period of six months from the date of removal. In case such goods are not brought back within six months from the date of removal then it shall be deemed to have been sold, and the sender is required to issue a tax invoice.

[Circular No. 108/27/2019-GST dated 18 July 2019]

Clarification on doubts related to the supply of Information Technology enabled Services (ITeS)

The government has issued a Circular to clarify what qualifies as an 'intermediary' in relation to ITeS services.

The Circular provides various scenarios when a supplier of ITeS services located in India has supplied services for and on behalf of a client located abroad –

Sr. No.	Scenario	Clarification issued
1	Supplier of ITeS services supplies services on his own account to a client located abroad. E.g., back-office operations, data processing, payroll, revenue accounting etc.	Such supplier shall not be categorized as an 'intermediary'.
2	Supplier of backend services arranges or facilitates for the supply of goods or services by the client located abroad to the customers of such client. E.g., pre-delivery, delivery and post-delivery logistical support, obtaining government clearances, post-sales support, etc.	Such a supplier shall qualify as an 'intermediary' under the GST law.
3	Supplier of ITeS services on his own account also supplies various support services (as mentioned in Scenario 2 above) on behalf of the client located abroad.	The determination of whether the supplier is an 'intermediary' or not shall depend on the facts and circumstances of the case.

[Circular No. 107/26/2019-GST dated 18 July 2019]

TAX TALK
GLOBAL DEVELOPMENTS

Direct Tax

Mauritian Leaks – Another data leak after Paradise Papers and Panama Papers

Post-Swiss Leaks, Panama Papers and Paradise Papers, comes the Mauritian leaks of over 200,000 emails, contracts and bank statements that show how the island nation has been used by corporates to facilitate their partnerships with multinational companies while remitting profits as a foreign direct investment to India without paying any tax on the same. This data leak belongs to a Bahamas based firm called Conyers Dill & Pearman, an offshore specialist firm, having commenced operations way back in the year 1928. The firm started operations in Mauritius in the year 2009 to cater to investments being routed to Africa and Asia.

In the coming days, the investigation would open up more and more Indian names which include the following:

- How Religare Enterprises Ltd. routed funds into a Jersey firm owned by Malvinder Singh and Shivinder Singh
- The deal between Pune based real estate company Kolte-Patil Developers Limited and US based real estate company Portman Holdings LLC wherein Conyers Dill acted as a legal facilitator
- Dealings between a commodity trading giant and Jindal Steel and Power Ltd. relating to ownership of four bulk carrier vessels through a Mauritian company Pancore
- The curious case of iYogi Ltd, Mauritian holding company of its Indian and US operations on its unsuccessful NASDAQ listing in 2011 for whom Conyers was a special legal counsel
- US-based Mayo clinic and its subsidiary used the Mauritian route to enter into a partnership with Apollo Hospitals and GMR to set up a high-end hospital near Hyderabad Airport which subsequently did not take-off

It is to be seen what steps the government would take pursuant to Indian names being revealed in the data and whether this would be yet another smoke screen like Panama and Paradise papers.

Netherlands draft law mandates disclosure of cross-border transactions to tax authorities

On 12 July 2019, Netherlands published a draft legislative proposal which requires all intermediaries and taxpayers in some cases, to report cross-border arrangements that meet certain thresholds to the EU tax authorities. The term "intermediaries" has been defined as any person that designs, markets, organizes, or makes available for implementation or manages the implementation of a reportable cross-border arrangement. Cross-border arrangements with certain thresholds are reportable if main, or one of the main benefits is obtaining a tax advantage.

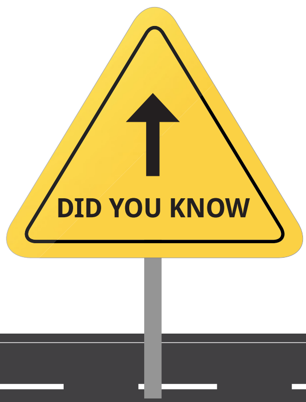
The information obtained by the Dutch tax authorities is automatically exchanged with other EU member states. This legislation enters into force in its entirety on 1 July 2020 but applies to any and all reportable cross-border arrangements implemented between 25 June 2018, and 30 June 2020. The deadline for reporting is 31 August 2020.

Inclusive Framework on BEPS – Tax laws of 12 low-tax countries not harmful for other countries

Recently, the OECD announced that 12 low/ nil tax countries do not have harmful tax regimes. These countries are Anguilla, the Bahamas, Bahrain, Barbados, Bermuda, British Virgin Islands, Cayman Islands, Guernsey, Isle of Man, Jersey, Turks and Caicos Islands.

For a country to be labeled as not having harmful tax regime, it must meet a substantial activities standard as determined by the Forum of Harmful Tax Practices (FHTP). The standard requires that for certain highly mobile sectors of business activity other than Intellectual Property (IP), the core income-generating activities must be conducted with qualified employees and operating expenditure in the jurisdiction. For IP, the standard requires that already agreed "nexus" rules are complied with.

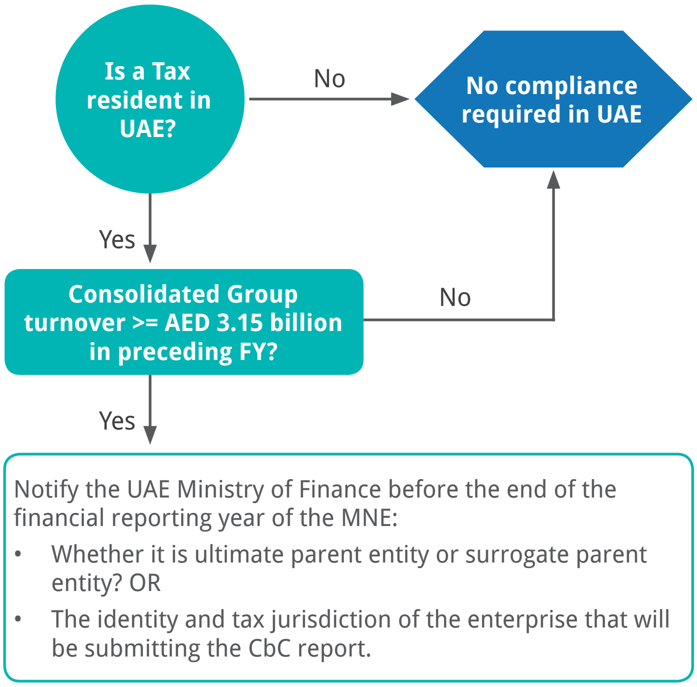
Recently, the Government of India deposited the Instrument of Ratification (MLI) on 25 June 2019. Accordingly, the MLI would enter into force from 1 October 2019 onwards. However, MLI would be effectively applied in the Indian context from Financial Year 2020-21 i.e., 1 April 2020.



Transfer Pricing

United Arab Emirates | Country-by-Country Reporting requirements introduced

The United Arab Emirates ('UAE') has introduced country-by-country ('CbC') reporting requirements in its jurisdiction effective from financial reporting period beginning 1 January 2019 - following its 2 neighbouring Gulf Cooperation Council ('GCC') member states i.e. Saudi Arabia and Qatar. The chart below depicts the applicability and compliance requirements for CbCR:



a. In cases where the UAE based entity is the Ultimate parent entity of the MNE group or is serving as a surrogate parent entity of the MNE group: The CbC report, which is mostly in line with the guidance issued by the OECD in terms of the content and format) must be filed within 12 months from the end of the financial reporting year of the MNE group. For eg: If the financial reporting period begins 1 January 2019 and ending on 31 December 2019, then the CbC filing due date would be 31 December 2020.

b. In cases where the UAE based entity is a part of an MNE group whose Ultimate parent entity/reporting entity is incorporated outside UAE: The UAE entity would be required to notify the UAE Ministry of Finance about the identity and tax jurisdiction of the enterprise that will be submitting the CbC report. The notification is to be submitted before the end of the financial reporting year of the MNE group.

Failure to comply with the CbC rules may result in the imposition of penalties.

Czech Republic | Amendment to transfer pricing guidelines

The General Financial Directorate (GFD) published Instruction D-034, which replaces the existing Instruction D-332 in relation to the transaction between associated enterprises, following the OECD TP guidelines. The New Instruction D034 addresses the following major issues, among others:

- Any business relationship between related parties; including a parent company's instruction resulting in a taxpayer's loss, will be considered a related-party transaction.
- Arm's length principle, benchmarking analyses and factors determining comparability recommendations, comparative analysis, description of methods to determine transfer prices and their use in practice, etc.
- The basis for application of the arm's length principles is the comparison of conditions in a related-party transaction to those in an unrelated (independent) transaction.
- Special attention is given to the value chain and to risk and functional analysis in determining the profile of the enterprise under review, and subsequently the distribution of profits depending on where in the chain of enterprises, the value is created.
- The instruction also includes detailed recommendations on preparing comparative analyses (to be prepared every three years), while a review of the independence and profitability of selected unrelated enterprises would be on an annual basis. Multiple-year data (for three to five years) would be used to determine market ranges.

Poland | Issues guidance on transfer pricing comparability for multinationals

Poland's Ministry of Finance recently released an explanatory note addressing transfer pricing comparability analyses. This is applicable to comparability analyses for transactions between related parties conducted until the end of 2018. The key highlights of the guidance are as under:

- Selection of appropriate comparables: Referring to the OECD transfer pricing guidelines, the Polish Ministry states that the comparables can be local, regional, or global, which should be decided on the basis of all comparability factors, including proper identification of a suitable market. While the guidance states that the use of comparables from other regions is accepted, Polish market comparables shouldn't be artificially excluded or omitted in the selection process. Use of secret comparables is strictly not allowed. Selection of proper comparables requires taking into consideration the quantity and quality of comparables, priority being the quality. Data from entities with ongoing losses or extraordinary profitability are not comparable with entities that have a limited risk profile.
- Approach in case of Inadequate comparables: In case satisfactory results are not achieved in terms of adequate comparables, taxpayers can prepare an arm's length compliance description of the transaction. In such case, the taxpayer must prove that controlled transaction conditions meet arm's length principle in another way than by use of comparables, Eg: Commercial rationality. The taxpayer may include expert opinion, market analyses, proper application of valuation technics, and options realistically available in its analyses.
- Use of Interquartile Range for lower level of comparability: When comparables have a lower level of comparability, it is feasible to use interquartile range. All comparables from the range should be of equal value. If significant discrepancies in the range are identified, then the median or arithmetic average or weighted average should be vital. The order of priority, however, is not addressed in the guidance.
- Use of Associated Company Data: If it is not possible to prepare the compliance description, taxpayers can use data from associated companies. Such an approach is not fully aligned with the OECD transfer pricing guidelines. The ministry states that taxpayers should prove that data of the controlled transaction between associated companies are not affected by associated companies (as an example, if there is a formal association even though no transaction with the associated company). While this is not fully aligned with the OECD transfer pricing guidelines, such an approach would be difficult to prove thereby paving way for triggering a litigation.

Indirect Tax

France approves Digital Services Tax on tech giants

[Excerpts from BBC.com]

France has approved a Digital Services Tax of 3% on multinational firms headquartered outside the country. Digital companies with revenue of more than EUR 750 million, of which at least EUR 25 million is generated in France, would be subject to the levy of Digital Services Tax which will be retroactively applied from early 2019.

SKP IN THE NEWS

Qualitative Review - The Crux of Transfer Pricing Comparability Analysis – **Maulik Doshi**

Tax Sutra - July 15, 2019

Read more at https://bit.ly/2JJ121y

Budget 2019 - Resolving Primary Concerns of Secondary Adjustment – **Maulik Doshi**

Tax Sutra - July 08,2019

Read more at https://bit.ly/32glcap

Rules tweaked to get offshore fund managers to move to India

Times of India - July 07, 2019

'The amendments provide that the minimum corpus amount can be met by a new fund, either within six months of it being set up or by the end of the financial year, whichever is later.'
– **Maulik Doshi**

Read more at https://bit.ly/32hKBjM

Budget 2019: Has The Angel Tax Ghost Been Buried For Good? – **Maulik Doshi**

Bloomberg Quint - July 07 2019

Read more at https://bit.ly/2LCl5jD

Budget 2019: Cleaning Up The Mound Of Pre-GST Litigation – **Jigar Doshi**

Bloomberg Quint - July 06 2019

Read more at https://bit.ly/2YJj4WE

Budget 2019: More Protectionism Via Customs Duty Moves? – **Jigar Doshi**

Bloomberg Quint - July 07 2019

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

Budget 2019: Buybacks No Longer An Option To Avoid Dividend Distribution Tax

Bloomberg Quint - July 07 2019

Maulik Doshi, partner at SKP Group, explained how the proposal would take effect with an example. "For instance, if an investor purchases a share for Rs 200 in the open market and the company offers buyback of share at Rs. 300. The gain of Rs 100 was earlier taxed at 10 percent." But with the budget proposal, while the investor will be exempted from paying tax, the company will be required 20 percent tax on the difference between the buyback price and the issue price, which could be as low as Rs 10, he said. While the budget proposal may have made buybacks costlier, there will be instances of double taxation, Doshi said. "An investor selling the share at Rs 200 to another investor, would have already paid tax on his gains," he said. "Now, with buyback tax, the same income will be charged to tax from companies.'
– **Maulik Doshi**

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

Sitharaman's new tax may make share buyback a thing of the past, and how!
– **Maulik Doshi**

Economic Times – July 07, 2019

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

Market's thumbs down to Budget: Here are 5 factors that dragged Sensex 400 pts

Money Control – July 05, 2019

'With buyback tax on listed companies, a lot of companies would be discouraged to give back the accumulated profits to its shareholders.' – **Maulik Doshi**

Read more at https://bit.ly/32ev6JN

Budget 2019: Buyback tax of 20% extended to listed companies

Money Control – July 05, 2019

'With buyback tax on listed companies, a lot of companies would be discouraged to give back the accumulated profits to its shareholders.' – **Maulik Doshi**

Read more at https://bit.ly/32ev6JN

Union Budget 2019 Wishlist for Indirect Tax
– **Jigar Doshi**

Deccan Herald – July 04, 2019

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

Budget 2019: Many benefits of Inheritance Tax; here's why India needs one more tax
– **Maulik Doshi**

Financial Express – July 04, 2019

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

Budget 2019: Issuance of certificate in Form 16A should be done away with

– **Neeraj Sharma**

Financial Express – July 03, 2019

Read more at https://bit.ly/2NtF729

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.

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