SKP

Tax Street

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

March 2019

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WORLD TAX
RECOGNISED FIRM
2019

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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 March 2019.

The GST Council in its 28th meeting had approved the key features and the broad format of the new GST returns. Now, the government has released the draft return formats based on the features approved by the GST Council. Apart from this, a string of crucial announcements and rulings in the realms of direct tax, transfer pricing, and indirect tax have taken place. In this issue of Tax Street, we have tried to collect and synthesize all these significant developments to draw a holistic picture of the current tax landscape in India for your understanding.

- The **'Focus Point'** section talks about the key features of the draft formats of the new GST returns recently released on the GST portal. It also discusses the core objectives of the new return filing mechanism.
- Under the **'From the Judiciary'** section, we provide in brief, the key rulings on important cases and our take on them.
- Our **'Tax Talk'** provides key updates on the important tax-related news from India and across the globe.
- Under **'Compliance Calendar',** we list down the important due dates with regard to direct tax, transfer pricing and indirect tax in the coming weeks.

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

Warm regards,
The SKP Team

FOCUS POINT

GST Returns 2.0 – New return filing mechanism

The GST Council in its 27th meeting, held on 4 May 2018, had approved the basic principles of GST return design. Later in the 28th meeting, held on 21 July 2018, the GST council approved the key features and the broad format of the GST returns. The proposed returns have now been made available on the GSTN portal for feedback and recommendations.

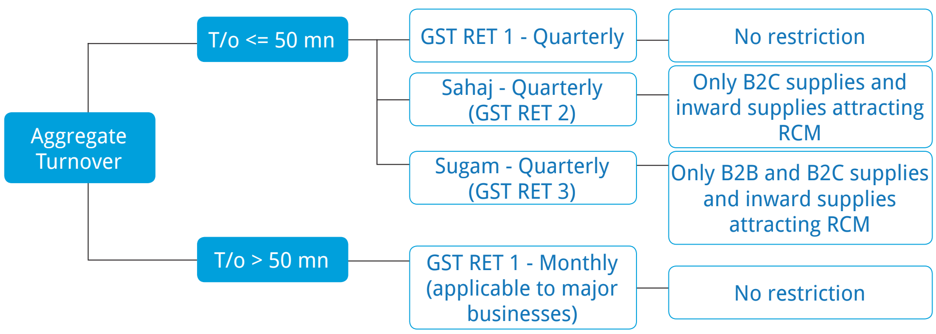
The core objectives of the new return filing system are as follows:

- Linking the recipient's Input Tax Credit (ITC) with the supplies declared by the supplier
- Simpler compliances for small taxpayers
- Consolidating GSTR-1 and GSTR-3B into a single return
- Making GST returns user-friendly

Earlier, the new GST return filing system was expected to be made available on a voluntary basis from April 2019, and mandatory from July 2019. However, the government has not announced any timeline while releasing the draft formats.

Types of returns

The periodicity of the return filing is based on the aggregate turnover of the preceding financial year. However, the type of return to be filed quarterly by the taxpayers is based on the types of supplies they can disclose in the returns. The same has been explained in the below illustration:



Key points to note

- Filing of quarterly returns is an option available with the small taxpayers, i.e., they can choose to file GST RET-1 on a monthly basis
- Taxpayers filing 'Sahaj' and 'Sugam' returns can make nil-rated, exempt or non-GST supplies
- Taxpayers filing 'Sahaj' and 'Sugam' returns are not allowed to claim ITC in respect of missing invoices, i.e., invoices not uploaded by the supplier.

Parts of the new return filing process (Normal)

FORM GST ANX-1

Annexure of outward supplies, imports and inward supplies attracting reverse charge [to be updated continuously]

What will it cover?
Details of all outward and inward supplies attracting reverse charge and import of goods and services are required to be disclosed in this form. This is similar to GSTR-1.

When to file?
The supplier can upload details in the documents of outward supplies on a real-time basis.

How is the supplier's liability calculated?
The documents of outward supplies uploaded by the supplier are accounted for towards the tax liability of the supplier.

What are the implications if a document is rejected by the recipient?
A rejected document may be edited before filing any subsequent return by the supplier. ITC in respect of the document so edited or uploaded shall be made available through the next GST ANX-2 to the recipient. However, the liability for such edited documents will be accounted for in the tax period in which the documents have been uploaded by the supplier.

Till when can the details be edited?
Editing/amending the details of an uploaded invoice is allowed till the 10th of the following month.

How the recipients ITC is linked?
Recipients will get Input Tax Credit (ITC) in a particular month/quarter on the basis of the documents uploaded by the supplier up till the 10th of the month in which the return is being filed.

FORM GST ANX-2

Annexure of inward supplies [auto-populated continuously based on details updated by suppliers in GST ANX-1]

What does it contain?
Details of documents uploaded by the suppliers will be auto-populated on a near real-time basis, and can be accepted or reset/unlocked by the recipient.

What action has to be taken by the recipient?
The recipient should 'accept,' 'reject' or 'keep pending' the documents uploaded by the supplier. This facility would be available to the recipient on a continuous basis. GST ANX-2 will be considered as filed, upon filing of the main return, i.e., GST RET-1.

What is the impact of acceptance?
The invoices accepted by the recipient would determine his ITC. Furthermore, a document once accepted by the recipient would not be available for amendment to the supplier. However, a separate facility for the same would be provided.

Which invoices should be rejected?
Any invoice with an error that cannot be corrected through a financial debit/credit note shall be rejected by the recipient. Example:

- The recipient does not agree with some of the details, such as HSN, tax rate, etc.
- GSTIN of the recipient is erroneous, and therefore it is visible in the GST ANX-2 of a registered person who is not concerned with the supply.

What is deemed acceptance?
Any document, which has not been either accepted, rejected or kept pending by the recipient shall be deemed to have been accepted when the recipient files its return.

FORM GST RET-1

Monthly/Quarterly (Normal) return [most fields are auto-populated from GST ANX-1 and GST ANX-2]

What is GST RET-1?
GST RET-1 is essentially a consolidation of GST ANX-1 and GST ANX-2. Most of the items will be auto-populated from GST ANX-1 and GST ANX-2.

Is there a one-step NIL return process?
The facility to file nil return through SMS will be made available if no supplies have been made or received.

Can a recipient claim ITC of invoices that are not uploaded by the supplier?
Provisional ITC in relation to documents not uploaded by the suppliers can be disclosed and availed through GST RET-1.

The illustrative process under the new return filing system

Our illustration is based on invoices issued by a supplier in July 2019, wherein both the supplier and the recipient are filing GST RET-1 on a monthly basis.

1 July to 10 August 2019	After 10 August 2019	18 to 20 August 2019	20 August 2019
• Invoice details to be uploaded by the supplier by this date • The uploaded invoice details can be edited by the supplier • The ITC would be available to recipients in the return of July 2019 • Recipient can accept or reset/unlock the invoice	• Recipient can 'accept', 'reject' or 'keep pending' the invoice details uploaded by the supplier in July 2019 • However, if the invoice is accepted after 10 August 2019, the corresponding ITC would be available in the return for the month of August 2019	• The facility to upload invoice details will not be available	• Due date to file GST RET-1 and pay self-assessed taxes • If invoice is neither rejected nor kept pending by the recipient, then it would be deemed to have been accepted on filing GST RET-1

Amendment to GST Returns

- The new return filing system provides for amendment of GST ANX-1 through GST ANX-1A and GST RET-1 through GST RET-1A.
- The amendments to GST ANX-1 can be filed before the due date for furnishing of return for the month of September following the end of the financial year or the actual date of furnishing a relevant annual return, whichever is earlier.
- The amendment will be based on the tax period and for invoices/ documents reported therein earlier. E.g. If missing details of a document pertaining to July 2019 have been reported in the return of August 2019, then the amendment of such documents shall be made by amending return of July 2019.

FROM THE JUDICIARY

Direct Tax

Whether advertisement expenditure incurred post production of films can be claimed as deductible expenditure under section 37 of the Income Tax Act (the Act)?

CIT vs Dharma Productions Pvt Ltd [TS-147-HC-2019 (Bom)]

Held

The taxpayer is a company engaged in the business of production and distribution of films. It incurred certain advertisement expenditure in relation to two films, which was claimed as business expenditure under section 37(1) of the Act.

It was held that Rule 9A (deduction of expenditure on production of feature films) would not have any applicability if such expenditure has been claimed by the taxpayer as business expenditure not forming part of the cost of production of feature film. Thus, if the expenditure meets the requirements of section 37 of the Act, it is ought to be allowed as a deductible business expenditure. The High Court (HC) observed that the cost of publicity and advertisement (incurred in the post production stage) did not form part of cost of production of feature film and in any case, such expenditure was specifically excluded from the scope of Rule 9A. Hence, the HC overruled the order of CIT (A).

SKP's Comments

This decision applies to film production companies. It brings the much-needed relief to film production houses as major expenditure (advertisement and promotion) is incurred post production of a film. There are divergent views on the same, where the revenue is more inclined towards disallowing post production expenditure, basis the literal interpretation of the provisions of the Act. This decision also once again highlights the significance of understanding the intention behind the introduction of any provision in the Act or the related rules to determine the correct stand on the same.

Whether stamp duty value under section 50C (deemed consideration) can be considered while claiming exemption under section 54EC?

Jagdish C. Dhabalia vs ITO TS-143-HC-2019 (Bom)

Held

The taxpayer is a joint owner of a plot of land, with 25% undivided share in the plot. The taxpayer transferred the plot and invested the entire sales consideration (INR 2.5 million) in RECL Bonds on which he claimed capital gains exemption under section 54EC. The tax officer adopted the stamp duty value (INR 7.617 million) as the sale consideration under section 50C (deemed consideration) while determining capital gains exemption under section 54EC.

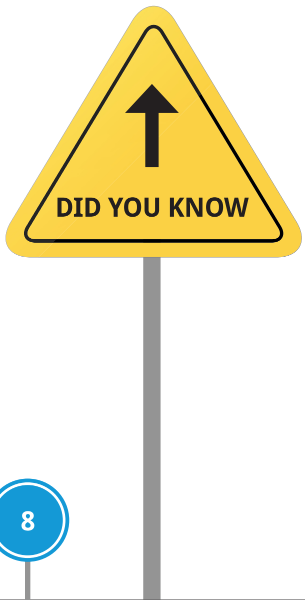
It was held that while determining capital gains as per the computation mechanism provided under section 48, provisions of deemed consideration would apply. Further, there is no conflict or any contrasting consequences of applying the provisions of deemed consideration for computing Capital Gain Tax post claiming exemption under section 54EC.

The HC rejected the contention of the taxpayer that deeming fiction must be applied only in situations for which it has been enacted. The HC observed that the provisions of deemed consideration would have to be compulsorily adhered to while determining capital gains exemption and any interpretation to the contrary would render the provisions of deemed consideration redundant.

SKP's Comments

This decision highlights a very important point that deeming provision have to be compulsorily applied and cannot be challenged.

Even though the tax incentives are provided, there will always be tax liability cast upon all taxpayers. Corporate Tax payers will have to compute and discharge their tax liability under Minimum Alternate Tax and non-corporate tax payers under Alternate Minimum Tax subject to certain conditions.



Transfer Pricing

Whether royalty below the prescribed rate under Press Note No. 9 (2000 series) be considered at Arm's length Price (ALP)?

Carraro India Private Limited [ITA No.1260/PUN/2018] Held

Income Tax Appellate Tribunal (ITAT) accepted taxpayer's royalty payment of 0.5% for use of brand/trademark to be at arm's length, since it was below the rate prescribed under Press Note No. 9 (2000 series) issued by the Ministry of Commerce and Industry, Govt. of India. Under the press note, payments of royalty up to 2% for exports and 1% for domestic sales are allowed under automatic route for use of trademark and brand name of the foreign collaborator without technology transfer.

In this regard, the ITAT relied on the Bombay High Court ruling in the case of SGS India Pvt Ltd (ITA No. 1807 OF 2013), wherein the Transfer Pricing Officer (TPO)had relied on the aforementioned press note to benchmark royalty payment. Furthermore, noting that the taxpayer had made royalty payments twice, pursuant to the two overlapping license agreements, the ITAT directed the TPO to work out and disallow the duplicate amount of royalty paid for the use of brand/logo. The ITAT also rejected the action of the Assessing Officer (AO) in holding brand royalty as capital expenditure.

SKP's Comments

The said ruling can be relied upon wherein it has been held that the FIPB/ RBI approvals cannot be equated to the ALP, and thus emphasizes on the persuasive value of FIPB/RBI approvals for benchmarking royalty payments.

Can foreign AE be considered as a tested party to benchmark international transaction of payment of corporate/management services fee by a taxpayer?

At the outset, the ITAT rejected the TPO's observation that the corporate/ management services were in the nature of shareholder services, and that no benefit was derived by the taxpayer. The ITAT examined the intra-group services agreement and other voluminous documents, including e-mails exchanged between the taxpayer and AEs on a wide spectrum of the matters, and established that the services were actually availed. The ITAT held that the TPO cannot determine "NIL" ALP by concluding that no benefit was received by the taxpayer, and highlighted that once it is proved that such services were availed by the taxpayer, the TPO's jurisdiction becomes restricted to determining the ALP of such a transaction only.

The ITAT rejected the taxpayer's selection of foreign AE as a tested partyholding that it has no statutory sanction as a general principle of law. In this regard, the ITAT made the following observations:

- Provisions of Chapter X of the Act "Special Provisions Relating to Avoidance of Tax" deal with computation of income from international transaction, which needs to be at ALP
- The profit margin of the Indian enterprise, and not that of the foreign AE, should be compared with the comparables to see if any increase in the total income of the enterprise, chargeable to tax in India, is warranted on account of transfer pricing adjustment.

- If the foreign AE had charged more, then its profit rate would shoot up and the corresponding profit of the Indian enterprise would be squeezed. In that scenario, a comparison of the profit rate of the foreign/AE will run contrary to the rule and spirit of transfer pricing provisions.
- The exercise of considering foreign AE as the tested party renders the substantive section 92 otiose and the definition of 'international transaction' u/s 92B and rule 10B becoming redundant. This is patently an unacceptable proposition having no sanction under the Indian transfer pricing law.

Thus, ITAT held that there is an overt obligation under the Indian law that foreign AE cannot be considered as a tested party for determining the ALP of the international transaction.

SKP's Comments

The ruling could have an adverse impact on cases where foreign tested parties have been selected. It is pertinent to note here that despite the above ruling, the India Country Chapter to the UN TP Manual acknowledges the selection of foreign associated enterprise as the tested party, in case it is the least complex party.

Whether payment for corporate/managerial services can be aggregated with other international transactions and benchmarked applying TNMM at an entity level?

In this regard, the ITAT viewed that two or more closely linked transactions can be aggregated for the determination of ALP. However, the onus is on the taxpayer to establish that such transactions are part of an international transaction pursuant to an understanding between various members of the group. ITAT noted that the payment for corporate/managerial services by taxpayer did not fall in any of the three cases wherein the aggregation of transactions for purposes of benchmarking is permissible:

1. Transactions should be part of a package deal with a composite price instead of each item being valued separately
2. Transactions that are priced differently but are accepted by assessee together (i.e., either take-all or leave-all)
3. Transactions, though priced differently, are inextricably linked such that one cannot survive without other.
4. Merely because purchase of goods and acceptance of services lead to the manufacture of final product, it does not follow that they are dependent transactions

Thus, the ITAT held that the managerial service fees paid by taxpayer was not closely linked to the other international transactions, and should not be aggregated for benchmarking under TNMM.

SKP's Comments

In this case, the Tribunal has restored the matter back to the TPO for determination of the most appropriate method and ALP. However, the ruling could have an adverse impact on cases where entity level TNMM, using a foreign AE as tested party, has been considered for benchmarking payment of intra-group services.

Whether common un-allocable costs can be apportioned on headcount basis instead of proportionate turnover basis?

Fujitsu India Pvt Ltd [ITA 604/2017] Held

The Delhi HC has ruled in favour of the taxpayer and accepted a headcount based allocation of un-allocable costs among its segments, while benchmarking the international transaction of receipt for online marketing support services.

Earlier the taxpayer's arguments with respect to the application of the "headcount" basis were rejected by the TPO as well as by the Dispute Resolution Panel (DRP), and later by the ITAT in the impugned order. The ITAT had held that the headcount principle was irrational given the disparity of salaries of the employees of the different segments.

The HC placed reliance on co-ordinate bench ruling in the case of EHTP India, wherein it was observed that headcount basis is an acceptable principle for proportionate allocation of costs, and that there was no objection or illegality about it, and that it was being consistently followed. The HC also distinguished the present case with the HC judgement in case of Continental Carriers (2016) 384 ITR 102 citing that rejection of the headcount principle was on account of the same not being consistently applied by the taxpayer in the past, and was also in the context of section 80(4) deduction.

In the present case, the HC opined that there were two possible choices, i.e., turnover method as well as the headcount method. Even though tax authorities broadly agreed to allocate common costs on the basis of proportionate turnover of the concerned segment, HC viewed that the alternative was left open to the taxpayer to accept one or the other principle. Consequently, HC held that the choice of the taxpayer in relying upon the headcount principle per se could not have been rejected.

SKP's Comments

The ruling provides relief to the taxpayers opting for allocation of common costs on headcount basis rather than turnover basis, and highlights that despite there being multiple allocation basis, the taxpayer has the choice to opt for the appropriate allocation key, while preparing segmental accounts.

Whether the TP provisions are applicable to buy-back of equity shares from associated enterprise? Can the TPO re-characterize the transaction of buy-back of equity shares as a deemed loan?

Earnest Towers Pvt Ltd [I.T.A. No. 2530/ Kol/2017] Held

The taxpayer during the year undertook buy-back of fully paid up equity shares at Rs. 70 per share (Face value of Rs. 10 at a premium at Rs. 60) from its Mauritius based holding company. The TPO valued the shares at Net Asset Value, rejecting the Discounted Cash Flow method adopted by the valuer, and the excess amount paid to AE was treated as deemed loan on which the notional interest was computed as TP adjustment.

The ITAT placed reliance on the judgement of Bombay HC in case of Vodafone India Services Pvt Ltd and CBDT circular No. 2/ 2015 accepting the judgement of the Bombay HC for the proposition that the share premium issued was on account of the capital transaction not giving rise to any income, and thereby not liable to transfer pricing adjustment. The ITAT held that the issue was covered in case of Topsgroup ruling ITA No. 2115/Mum/2015, which had upheld the principles laid down in the case of Vodafone India Services Pvt Ltd for inbound transactions that were applicable to outbound investments as well. The ITAT held that the said transaction of equity buyback was an outbound transaction, which is also in nature of a capital transaction, and since it does not give rise to income chargeable to tax in India, Chapter X of theAct is not applicable.

SKP's Comments

This ruling further strengthens the principle that though issue/buy-back of equity shares may qualify as an international transaction, transfer pricing provisions will not be applicable in the absence of any income arising from them.

Whether Resale Price method (RPM) can be adopted over Transactional Net Margin Method (TNMM) for a routine distributor incurring substantial AMP expenses?

Celio Future Fashion Pvt Ltd [ITA No. 1928/Mum/2016] Held

The ITAT accepted the taxpayer's approach to consider RPM over TNMM as the most appropriate method to benchmark its import transactions despite incurring heavy expenses for advertisement, marketing and promotion. Revenue authorities had taken the view that since the taxpayer incurred high AMP expenses, benchmarking trading function using TNMM would factor the AMP, and hence should be considered as the most appropriate method. It is pertinent to note that the taxpayer had also adopted TNMM (based on single year data) in its TP study to justify the transaction of import of goods to be at arm's length, albeit proposed RPM as the most appropriate method before the DRP. The ITAT observed that a taxpayer is a mere distributor of men's wear, imported from its AE and did not carry out any value addition. Also, pursuant to the Burberry India ITA No.-758/Del/2017 and other rulings (relied upon by taxpayer), the ITAT noted that the RPM is the most appropriate method to benchmark the international transactions, when finished goods in ready-to-sell condition are purchased from its AE, and sold in the market, without any value addition.

The ITAT opined that though the taxpayer is alleged to have incurred huge expenses on **advertisement and market promotion**, the same **would not increase the inherent value of the products**. ITAT held that RPM profits are compared at gross margin level, in which case the AMP expenses will not be deducted while arriving at the gross margins. Stating that the taxpayer's case is that of a simple distributor of products, wherein the RPM has been consistently applied by the courts, the ITAT rejected the TNMM method adopted, and restored the file to the TPO/ AO to for examining the issue afresh.

SKP's Comments

Benchmarking of trading function for routine distributors incurring heavy AMP expenditure under TNMM/RPM has been a litigated issue. This ruling supports adoption of RPM in case of simple distributor of products on the premise that heavy AMP does not increase the inherent value of the products and thus need not be factored while benchmarking the trading function.

Whether AE invoices form sufficient information to demonstrate technical fees reimbursed by assessee?

During TP assessment proceedings, the taxpayer had merely furnished copies of invoices raised by the AE and had not furnished any information to demonstrate the nature of services received by the taxpayer. Consequently, the TPO determined the ALP of the reimbursement as "Nil," which was also confirmed by the DRP.

ITAT noted that the TPO had not questioned the genuineness of the transaction, and agreed with the TPO's view that mere copies of invoices from AE would not demonstrate the details of services received by the taxpayer. Noting that the taxpayer had submitted additional evidence by way of a detailed note on the nature of services rendered by the AE, ITAT admitted the evidence and restored the matter to the file of AO/TPO to provide the taxpayer with one more opportunity in this matter.

SKP's Comments

The ruling throws some light on the kind of documentation required by Indian tax authorities for reimbursement of expenses to AEs.

Indirect Tax

Whether ITC is admissible on an ambulance, i.e., a motor vehicle, purchased for the benefit of the employees under legal requirement of the Factories Act, 1948?

[Background: The CGST Act as amended with effect from 1 February 2019 allows admissibility of ITC in relation to, inter alia, motor vehicles, provided it is obligatory for the employer to provide the same to its employees under any law.]

Nipha Exports Private Limited- Authority for Advance Ruling (AAR), West Bengal [2019 (2) TMI 1604]

The AAR observed that:

- The applicant had purchased an ambulance for the benefit of the employees as mandated by the Factories Act.
- The CGST Amendment Act, 2018 w.e.f. 1 February 2019 allowed taxpayers to claim ITC on certain inward supplies, which is otherwise restricted under Section 17(5), provided it is obligatory for an employer to provide the same to employee under any law.
- In the present case, the applicant had purchased the ambulance on 22 November 2018.

In view of the above observations, the AAR held that the ITC was not admissible as the ambulance was purchased before the amendment was made applicable.

SKP's Comments

The confusion regarding the date of applicability of the amendments to the CGST law seems to stem from the fact that the amendments were passed by the Parliament in August 2018.

However, there are judicial precedents under the erstwhile service tax law, wherein the ITC, in respect of expenses mandated by any law, were held as eligible irrespective of a restriction under the service tax law. Therefore, in view of the existing principle laid under the service tax law, it can be argued that such ITC was allowable under GST even before the amendment of the GST law.

Whether accommodation, food, beverages and other services supplied by a hotel located in Special Economic Zone (SEZ) to visitors not located in SEZ are liable to GST?

M/s Sapthagiri Hospitality Pvt Ltd- Appellate Authority for Advance Ruling (AAAR), Gujarat [2019-VIL-19-AAAR]

The appellant contended as follows:

- Since the services were provided in direct relation to an immovable property located in the SEZ, and such services were part of the authorized operation of the SEZ, IGST should not be applicable as the said services are received within the SEZ, which is deemed to be a territory outside India.
- It was further submitted that in view of Section 53 of the SEZ Act, 2005, the provisions of the IGST Act would not apply to the services rendered in the SEZ.

The AAAR observed that:

- Under section 16 of the IGST Act, to qualify as 'zero rated' supply, the law specifically refers the supply 'to' SEZ developer/unit and not 'to or by' SEZ developer/unit.
- Section 53 (1) of the SEZ Act creates a deeming fiction whereby an SEZ shall be deemed to be outside the customs' territory of India, and that too for the specific purposes of undertaking the authorized operations. Furthermore, the interpretation advanced by the appellant would lead to a situation where a Special Economic Zone would not be subject to any laws of India whatsoever.

In view of the above observations, the AAAR rejected the appeal and held that the services provided by it to non-SEZ visitors would be liable to GST.

SKP's Comments

The AAAR has held that for the purpose of obtaining the benefit of zero-rating under Section 16 of the IGST Act, the services have to be provided 'to' an SEZ developer/unit. Merely because the services have been provided 'by' an SEZ developer/unit would not automatically make such services zero-rated.

Whether an advance ruling is admissible if it pertains to a supply already effected prior to the date of filing an advance ruling?

[Background: The appeal before the AAAR pertained to the ruling pronounced by the AAR on merits in relation to the eligibility of exemption in accordance with Notification No. 3/2017]

Kei Industries Limited - Appellate Authority for Advance Ruling (AAAR), Rajasthan [2019-VIL-16-AAAR]

The AAAR had raised question on the validity of the advance ruling application as it was filed in respect of past transactions. In this regard, the appellant contended as follows:

- Supply was not complete on the date of filing the advance ruling application as the period of warranty services had not expired.
- There were similar purchase orders pending on the date of the advance ruling application as well.
- Maintainability of the advance ruling application cannot be re-considered at the appellate stage.

The AAAR rejecting the contentions of the appellant held that:

- AAAR is an independent forum, and is at a higher pedestal than the AAR.
- The continued existence of the warranty does not put the transaction under the category of 'supplies being undertaken.'
- The appellant has asked for advance ruling with respect to particular transactions, and hence we are bound to pronounce our verdict on these transactions only, irrespective of the pending purchase orders.

Therefore, as the question posed by the appellant is related to the supplies undertaken by them, prior to the date of filing of the application for advance ruling, no ruling can be given on the question.

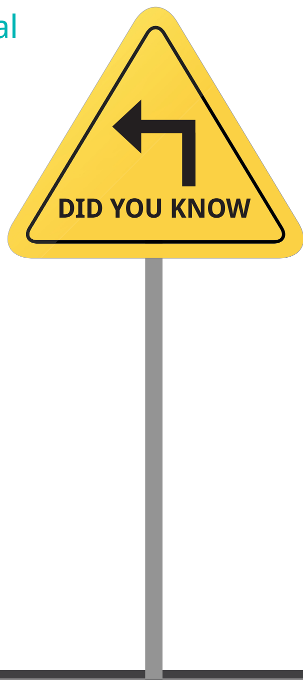
SKP's Comments

The ruling of the AAAR has laid down that merely because an advance ruling application is ruled on its merits by the AAR, it will not mean that the AAAR is bound to assume that the advance ruling application fulfils the criteria given in the CGST law.

However, the rejection of the application, even after the appellant produced the purchase orders to prove that it was entering into similar transactions on the date of filing of the application, should be a warning to the other taxpayers to file the initial advance ruling application based on the documents relating to transaction being undertaken or proposed to be undertaken on the date of filing the application.

The reduced GST rates of 1% (without ITC) and 5% (without ITC) on affordable residential housing and on other than affordable residential housing respectively are applicable with effect from 1 April 2019.

Interestingly, commercial apartments, located in a residential real estate project, would also be eligible for the reduced rate of 5% without ITC, provided that the carpet area of commercial apartments is not more than 15% of the total carpet area of all the apartments.



TAX TALK
INDIAN DEVELOPMENTS

Direct Tax

Government's Angel Tax fix gives VCs, angel groups edge over HNIs

[Excerpts from The Economic Times, 20 February 2019]

The government notification on the so-called Angel Tax could force startups to approach venture capital funds and angel groups for investment over wealthy individuals. New rules that were made formal by the notification from the Department for Promotion of Industry and Internal Trade exempt investments of up to INR 250 million made by Category I of Alternative Investment Funds from the provisions of the tax, compared with INR 100 million earlier. Venture Capitalists (VCs) and angel groups come under this category of investors, giving them an undue advantage over individual investors who are not part of this.

CBDT seeks details of start-ups with pending appeals

[Excerpts from Tech Economic Times, 23 February 2019]

The Central Board of Direct Taxes (CBDT) has asked community social media platform LocalCircles to furnish details, including names, PAN and income tax notices, on behalf of start-ups that have pending appeals or orders under the so-called Angel Tax. The regulatory authority will use the information to fast-track the resolution of these cases.

Income Tax department to issue only e-refunds from 1 March 2019; bank account-PAN linking must

[Excerpts from The Economic Times, 26 February 2019]

Come 1st March, 2019 Income Tax department will only issue only e-refunds that will only be credited to bank accounts linked with PAN. In addition to that, you are also required to pre-validate your bank account with the Income Tax department's e-filing portal to receive tax refund. The Income Tax refunds will be credited only to those bank accounts (savings/current/cash/OD) that are linked to PAN w.e.f. 1 March 2019. If your PAN is not yet linked with your bank account, you must provide the details of the same to your bank branch to get an Income Tax refund.

Income Tax exemption limit on gratuity doubled to INR 200 million: Labour Min

[Excerpts from The Economic Times, 7 March 2019]

The Labour Ministry said on Thursday that the Income Tax exemption limit on gratuity has been doubled to INR 2 million from the existing INR 1 million, a move that will benefit employees who are not covered by the Payment of Gratuity Act, 1972.

Transfer Pricing

Signing of Bilateral Competent Authority Agreement (BCAA) for the exchange of CbC Reports between India and USA

India and USA have signed an Inter-Governmental Agreement for Exchange of Country-by-Country Reports (CbCR), which will enable both the countries to automatically exchange CbC Reports filed by the ultimate parent entities of Multinational Enterprises (MNE") for years commencing on or after 1 January 2016.

Background

Pursuant to India's CbCR provisions applicable from FY 2016-17, a parent entity, resident in India, is mandated to file the CbC Report in India within a period of twelve months from the end of the reporting accounting year.

Furthermore, under subsection (4) of section 286, an inbound constituent entity (i.e., a constituent entity that is resident in India and is a part of an international group, the parent entity of which is not resident in India) is also required to file CbCR in India if any of the following conditions are met:

i. The parent entity of the international group is a resident of a country with which India **does not have an agreement providing for the exchange of CbC Report**

ii. There is an exchange framework with that country but there has been a systemic failure in exchanging information

Thus, in absence of an agreement between India and US, inbound constituent entities with parent entities resident in the US, were entailed to file CbCR in India and the due date for undertaking such compliance was not yet prescribed.

Signing of BCAA between India and the US

The due date for filing CbCR in India for inbound constituent entities, which fell under Section 286 (4), is 12 months from the end of the reporting accounting year. However, as a one-time measure, vide Circular 9/ 2018, this due date was extended to 31 March 2019 for reporting accounting years ending up to 28 February 2018.

Thus, for FY 2016 and FY 2017 (reporting accounting years ending up to 28 February 2018) the due date for local filing of CbCR by inbound constituent entities of the US-headquartered groups was 31 March 2019. However, with the signing of the BCAA between India and the US, inbound constituent entities of international groups headquartered in the US, who have already filed CbCR in USA, would not be required to do local filing of CbCR in India.

Furthermore, it has been stated that the exchange of CbCR Reports shall be effective from financial years commencing on or after 1 January 2016.

Implication

Inbound constituent entities of the US-based parent entity will no longer fall under the exception set out u/s 286(4) of the Act. Therefore, the Indian subsidiaries of US-based companies are relieved from CbCR filing obligation in India. However, it is pertinent to note that CbCR filing provisions became mandatory in US only from FY 2017. Thus for FY 2016 (voluntary filing of CbCR in US), if the US parent entity had not undertaken any voluntary filing of CbCR in the US, then CbCR filing in India would need to be undertaken by the inbound Constituent entities by 31 March 2019.

SKP's Comments

The press note provides much-needed clarity and relief to the Indian subsidiaries of the US-based multinational groups, which were apprehensive of local filing of CbCR rather than through an international exchange mechanism.

Indirect Tax

Clarification on the eligibility of ITC in relation to the Sales Promotion Schemes

The government vide Circular No. 92/11/2019-GST dated 7 March 2019 clarified the levy of GST and the eligibility of ITC in case of various sales promotion schemes operated by the business.

Type of Scheme	Applicability of GST	Availability of ITC to Supplier	Availability of ITC to Recipient
Free samples or gifts – For unrelated parties	Not liable to GST	No – under section 17(5)	NA
Free samples or gifts – For related parties or distinct persons	Liable to GST under Schedule 1	Yes – provided the other conditions are fulfilled	Yes – provided the other conditions are fulfilled
Buy one - get one offer	GST will be chargeable on the actual consideration. It is not a free supply. The consideration received is construed to be for both the supplies.	Yes – provided the other conditions are fulfilled	Yes – provided the other conditions are fulfilled
Post-Sale Discount - Credit note for volume and staggered discounts	If pre-agreed and documented as per Section 15(3), GST credit note can be issued to adjust the value of supply.	Yes – provided the other conditions are fulfilled, outward GST liability should be reduced in the month of issuance of a credit note.	No - The recipient is required to reverse the ITC, which was availed earlier.
Post-Sale Discount – Not known at the time of supply	The tax liability cannot be adjusted as it does not fulfil conditions prescribed in section 15(3)	The outward GST liability cannot be adjusted for such credit note.	Yes – provided the other conditions are fulfilled.

Upcoming changes in E-Way bill systems

[Excerpts from the updates announced on the E-Way bill portal]

The E-Way Bill (EWB) System will be undergoing some major changes as follows:

- Auto calculation of route distance based on PIN code for generation of EWB;
- Blocking of generation of multiple e-way bills on one invoice/document;
- Extension of e-way bill in case a consignment is in transit;
- Blocking of interstate transactions for composition dealers.

TAX TALK
GLOBAL DEVELOPMENTS

Direct Tax

US FDII rules under review as potentially harmful tax regime, Treasury official says

[Excerpts from MNE Tax, 19 February 2019]

The US's Foreign-Derived Intangibles Income (FDII) tax rules are being scrutinized by the Organisation for Economic Cooperation and Development's (OECD) Forum on Harmful Tax Practices (FHTP) to determine if it is a harmful tax regime, the US delegate has confirmed to the FHTP. Speaking in Washington, on 14 February, at a Tax Council Policy Institute conference, Gary Scanlon, an Attorney-Advisor in Treasury's Office of the International Tax Counsel, said that the US FDII regime, enacted in the 2017 US tax reform, has been identified as a preferential tax regime triggering the FHTP review process.

As one of the 128 member countries of the "Inclusive Framework on BEPS," the US has agreed to be bound by the OECD/G20 Base Erosion profit shifting (BEPS) Action five minimum standards relating to preferential tax regimes that can facilitate BEPS. As a Framework member, the US has also agreed to be peer-reviewed on whether the agreed-to BEPS minimum standards are actually being implemented in the US. These peer reviews are carried out by the FHTP.

Global Minimum Tax Proposal may be premature, companies tell OECD

[Excerpts from Bloomberg Law News, 18 March 2019]

OECD is considering four proposals to address where and how multinationals are taxed. A global minimum tax proposal to rewrite international tax rules for the modern economy may be unnecessary, companies and practitioners told the OECD at a public consultation in Paris. But if the OECD does move forward with the plan, it must be simple if it is to work, according to a range of speakers from businesses, non-governmental organizations, and academia. Speakers at the 14 March event disagreed on whether a minimum tax is still needed after the advances of the Base Erosion and Profit Shifting (BEPS) project and whether the proposal would achieve its aims. The OECD is considering four ideas as it seeks a globally agreed-upon solution by 2020 to address some countries' concerns that multinationals aren't paying their fair share of tax, or aren't paying it in the right places. One proposal would set a minimum global tax rate for multinationals, drawing on the Global Intangible Low Taxed Income (GILTI) regime the U.S. enacted in its 2017 tax overhaul, the OECD's 13 February consultation paper said. If a company has subsidiaries in a jurisdiction with a tax rate below the agreed minimum rate, it would pay more tax in the jurisdiction where it is based to make up the difference.

While the other proposals being considered by the OECD would shift taxing rights to different jurisdictions, in response to concerns from some countries that they aren't getting enough tax revenue from multinationals, this one could change how much tax companies pay—a concern that has driven the OECD's year -long project to combat BEPS.

Transfer Pricing

Slovakia: Issues new guidelines for transfer pricing documentation[1]

Ministry of Finance of Slovak Republic issued the new guidelines (no. MF/019153/2018-74), with regard to the transfer pricing documentation, replacing the guidelines issued in 2016.

The new transfer pricing documentation guidelines are effective for the tax period beginning after 31 December 2017. In respect of tax period 2018, the tax authorities may request the documentation only after 1 April 2019. However, in case the documents are submitted before 30 June 2019, i.e., within the transitional period, the taxpayer has an option to decide whether to follow the guidelines issued in 2016 or the new guidelines. After 30 June 2019, the taxpayer is required to submit the documentation in line with the guidelines 2018.

Though the Guidelines 2018 recognizes three types of documentations – simplified, basic and full-scope as mentioned in the guidelines 2016, significant changes were made in respect of the criteria for determining the type of documentation that each taxpayer is required to maintain, along with the content of each type of documentation. Thus, the guidelines introduced place reliance on the documentation recommendations forming part of the OECD's BEPS Action Plan 13.

Sweden: Administrative guidance on relationship between TP documentation and tax penalties[2]

Swedish Tax Authorities (STA) issued administrative guidance on the relationship between transfer pricing documentation and tax penalties.

As per Swedish tax law, tax penalties are levied on transfer pricing adjustment at the rate of 40% of the additional tax (10% of the reduced losses). STA has clarified that maintenance of appropriate transfer pricing documentation will result in relief of potential tax penalties by half.

The said relief can be granted by the tax authorities if the following requirements in respect of transfer pricing documentation are fulfilled:

- The documentation must comply with the provisions on content as stated in the Swedish Tax laws
- The taxpayer must have applied the documented methods and policies in practice
- The transfer pricing policy documented should not materially deviate from the accepted perceptions or methods for correct pricing according to the OECD TP guidelines

Furthermore, the guidance also remarked that in the situation of an incorrect assessment of correct pricing, where there is sufficient documentation, the STA will grant full exemption from the tax penalties.

US IRS publishes statistics on the CbCR filed by US corporations and partnerships for 2016[4]

US IRS (Internal Revenue Service) recently published statistics of Country-by-Country Reports (CbCR) filed for 2016 based on data from Form 8975CbC Report and Form 8975 Schedule A, Tax Jurisdiction and Constituent Entity Information filed by US Corporations and partnerships. The data is divided into five tables of which the first three are classified as a major geographic region and selected tax jurisdiction; the fourth table is classified as a major industry group, geographic region and selected tax jurisdiction; the fifth table is related to an effective tax rate of multinational enterprise sub-groups. The data presented in the tables is based on the number of filers, revenues, profit, income taxes, earnings, number of employees and tangible assets in different jurisdictions. However, no specific information of a particular MNE can be inferred from the published data.

Following table shows the overall number of MNE groups and sub-groups along with the statistics:

Particulars	Number of reporting MNE groups and sub-groups
Reporting Entities with Positive Profit Before Income Tax by Major Geographic Region	1093
Reporting Entities with negative Profit Before Income Tax by Major Geographic Region	1027
MNE sub-groups with negative income tax accrued and positive profit	391

With respect to India, the statistics show 593 reporting MNE groups (with 273 entities in the manufacturing sector) and 1714 constituent entities resident in the tax jurisdiction.

1. https://www.finance.gov.sk/sk/financie/financny-spravodajca/2018/post no 34 -MF/019153/2018-74

2. https://www4.skatteverket.se/rattsligvagledning/373216.html

Australia releases final Practical Compliance Guideline on inbound distribution arrangements[3]

The Australian Taxation Office (ATO) released Practical Compliance Guideline (PCG 2019/1) on 13 March 2019.

Applicability

The guideline will apply to existing and new inbound distribution arrangements. This guideline outlines compliance approach to the transfer pricing outcomes associated with the following activities of inbound distributors:

- Distributing goods purchased from related foreign entities for resale, and
- Distributing digital products or services where the intellectual property in those products or services is owned by related foreign entities.

Assessment of Risk

The guideline outlines the ATO's approach to assessing the risk of inbound distribution arrangements by comparing the profit outcome of taxpayer's arrangements against profit markers, set out by the ATO for inbound distributors. The Guideline sets out a high-, medium- and low-risk-coloured zoning classification based on the Earnings Before Interest and Tax (EBIT) to sales margin achieved by the inbound distributor. The guideline has divided inbound distributors into four key industry categories:

1. Life Sciences (including Pharmaceuticals);
2. Information and Communication Technology (ICT);
3. Motor Vehicles; and
4. A General Distributor category.

Furthermore, the Life Sciences industry is divided into three sub-categories, whilst the ICT industry is divided into two sub-categories. The sub-categories are driven by the functions/activities undertaken by the inbound distributor, which the ATO considers 'incrementally generate value'. The guideline has prescribed profit markers for each category for assessing transfer pricing risk indicating that ATO will likely contact taxpayers that are considered to fall in the high- or medium-risk zones.

The guideline also clarifies that ATO's profit markers should not be relied on to determine arm's length conditions, and that the Guideline will not limit the operation of law or create any safe harbour administrative concessions. Furthermore, the Advance Pricing Agreement (APA) has been suggested as a constructive way to reach agreement on the transfer pricing of inbound distribution arrangements for a fixed period of time.

3. https://www.ato.gov.au/law/view/document?docid=COG/PCG20191/NAT/ATO/00001

4. https://www.irs.gov/statistics/soi-tax-stats-country-by-country-report

Indirect Tax

UK MTD to be implemented despite failure of Brexit talks

[Excerpts from The Telegraph, 13 March 2019]

UK's Chancellor of the Exchequer, Phillip Hammond, in his spring statement confirmed that the Making Tax Digital (MTD) measures for VAT will be implemented as scheduled with effect from 1 April 2019, even in the event of a no-deal Brexit.

[Under the MTD initiative, Her Majesty's Revenue and Customs (HMRC) will link its system with the digital books of accounts of the taxpayers using an Application Program Interface (API) to record the ongoing and accurate projections of tax dues.]

Compliance Calendar

7 April 2019

Payment of Tax Collected at Source (TCS) collected in March 2019

10 April 2019

- GSTR-7 for the period for March 2019 to be filed by persons who are required to deduct TDS under GST
- GSTR-8 for the month of March 2019 to be filed by e-commerce operators required to deduct TCS under GST

11 April 2019

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

13 April 2019

GSTR-6 for the month of March 2019 to be filed by Input Service Distributors

14 April 2019

Issue Tax Deducted at Source (TDS) certificates under section 194IA and 194IB

18 April 2019

GSTR-4 for the period for January 2019 to March 2019 to be filed by taxpayers registered under composition scheme

20 April 2019

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

30 April 2019

- Payment of TDS deducted in March 2019 by non-government deductors on salary and non-salary payments
- GSTR-1 for the period of January 2019 to March 2019 to be filed by registered taxpayers with an annual aggregate turnover of up to INR 15 million
- Challan-cum-statement for TDS under section 194IA and 194IB for the month of March 2019

UPCOMING EVENTS

SKP IN THE NEWS

GST: Real estate sector needs to make significant changes, and fast

The Economic Times - 20 March 2019

"Realtors can evaluate and choose the best scheme which minimises the tax cost on each building of the project. Those who opt for the reduced rates would invariably be required to reverse credits on proportionate basis the full impact of which will be known once the rules are notified." - **Jigar Doshi**

Read more at https://bit.ly/2HITV8H

GST on promotional schemes – A continuing conundrum for Pharma sector

GSTSutra - 20 March 2019

"The Government of India seems to have left no stones unturned to ease the transition of specific sectors like financial services, gems & jewellery, IT & ITES, handicrafts, e-commerce, textiles, and drugs & pharmaceutical into the new tax regime, as is evident from several FAQs and clarifications issued to address the concerns raised by the stakeholders." - **Jigar Doshi**

Read more at https://bit.ly/2FH4BSD

Beware April 1 – Foreign Investors and Local Companies

Bloomberg Quint - 22 March 2019

"Since the amendments in the Singapore and Mauritius treaties, investors have preferred to come to India either directly or through jurisdictions like Netherlands." - **Maulik Doshi**

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

GST Compliances 2.0 and GST Reconciliation

Webinar, 15 April 2019

Register at https://bit.ly/2Vyipp8

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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