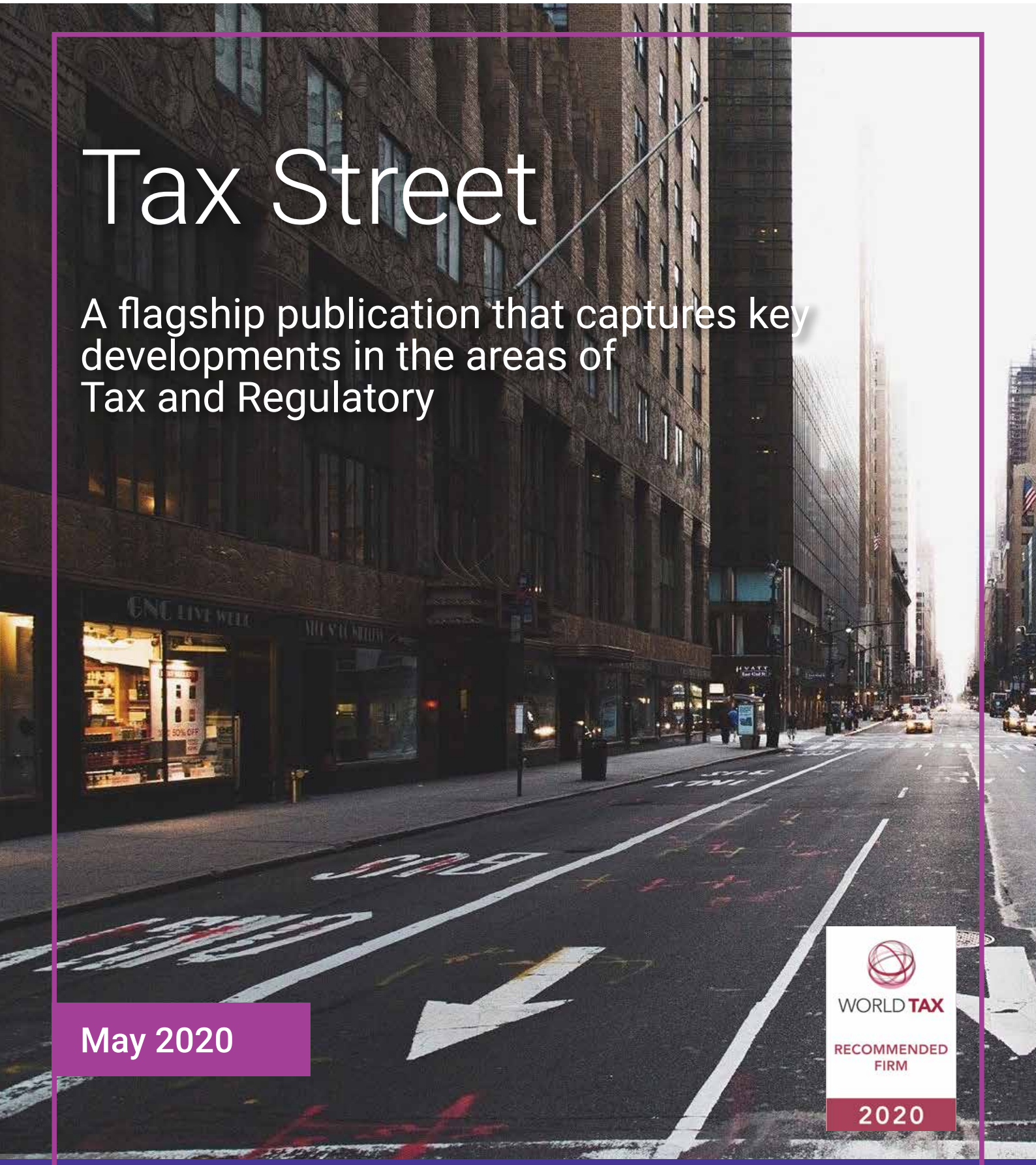
Tax Street

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



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Tax Street

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Introduction

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

- The **'Focus Point'** covers the recent updates for GST refunds made by the Indian Government, its aspects and impact.
- Under the **'From the Judiciary'** section, we provide in brief, the key rulings on important cases, and our take on the same.
- Our **'Tax Talk'** provides key updates on the important tax-related news from India and across the globe.
- Under **'Compliance Calendar'**, we list down the important due dates with regard to direct tax, transfer pricing and indirect tax in the month.

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

Warm regards,
The Nexdigm (SKP) Team

Focus Point

GST refunds — A silver lining for exporters amidst the dark clouds of COVID-19?

The onset of the COVID-19 pandemic and the resulting nation-wide lockdown forced upon by the situation has led to severe business disruption. The complete shut down of operations and the unprecedented fall in domestic as well as global demand has been a bitter pill to swallow for all businesses, whether large, medium or small scale. One of the key measures announced by the government to help businesses to tide over this situation was the fast-tracking of the pending GST refund claims of exporters. The government was quick to identify that exporters are a crucial part of the Indian economy, and expediting refund claims can go a long way in helping them meet their immediate working capital requirements.

In this month's focus point, we delve into the recent updates and changes introduced by the government in relation to refunds under the GST regime, analyze the hits and misses amongst these changes, and provide our suggestions which you may explore to ensure timely processing of your GST refunds.

The hits!

Speedy clearance of GST refund claims

The Ministry of Finance, in a press release dated 8 April 2020[1] announced its decisions to clear all pending GST and Customs refunds providing benefit to up to 1 lakh businesses. It was announced that the total refund to be granted would be approximately INR 18,000 crores.

Recently, the Central Board of Indirect Taxes and Customs (CBIC) through its Twitter handle informed that 29,230 GST refund claims worth INR 11,052 crores[2] and 6.76 lakh Customs refund claims worth INR 8,656 crores[3] have been disbursed in the period from 8 April 2020 to 25 May 2020.

Based on our practical experience, a duly filed online GST refund claim is now being processed within a period of 15 days [including credit of the refund amount to the claimant's bank account], whereas earlier the said process could take anywhere up to 60 days. The process of submission and processing of GST refund applications going completely online a few months ago has also been a major reason for the speeding up of GST refund claims.

Our suggestion

In light of the government's commitment to speedily dispose of GST refund claims, this is an opportune time for exporters to undertake the following:

- Expedite refund applications
  - Exporters should consider expediting the filing of all their pending GST refund claims, without waiting for the time limit of 2 years from the relevant date.
  - Quick processing and disbursal of GST refunds can help businesses meet their working capital requirements in these difficult times.
  - Follow-ups for pending refund claims
  - This may also be a good time to follow-up with the GST officers for disposal of refund claims filed earlier, which

1. *https://pib.gov.in/PressReleasePage.aspx?PRID=1612291*
2. *https://twitter.com/cbic_india/status/1264797167408910336?s=09*
3. *https://twitter.com/cbic_india/status/1265152585217921025?s=09*

are stuck or pending for disposal.

– Recently, the GST portal has also enabled a link for online follow-ups of refund claims, which can be used by the taxpayers for this purpose.

Extension in the time limit for furnishing LUT

The government *vide* Circular No. 137/07/2020-GST dated 13 April 2020 has clarified that exporters can furnish their Letter of Undertaking (LUT) for the purpose of zero-rated supplies without payment of tax for the financial year 2020-21 by 30 June 2020.

This is a major relief to exporters who may find it difficult to comply with this procedural requirement given the lockdown situation.

The misses!

Restricting the value of exported products to 1.5 times the value of domestic sales of the same product

Based on the decision taken in the 39th GST Council meeting, the government *vide* Notification No. 16/2020-Central Tax dated 23 March 2020 amended the definition of 'turnover of zero-rated supply of goods' so as to provide that such value cannot exceed 1.5 times the value of similar goods sold domestically by the same supplier.

This can have a major impact on the quantum of GST refund claim of exporters, especially exporters who charge a considerable premium on their exports, as due to this amendment, their refund claim will be restricted to 1.5 times the value of similar products sold domestically.

This amendment is also problematic as it gives rise to many questions and issues such as:

- The Rule *prima facie* appears contrary to Section 54 of the CGST Act, which does not grant any power to restrict the refund claim in such a manner.
- Whether such restriction of 1.5 times is on the price of every product, sales turnover of every product for a given period, or on the total turnover for a given period is an unanswered question.
- In the case of no comparable domestic sales (e.g., in case of Export Oriented Units), the Rule provides for comparison of the price of like goods by the similar supplier. However, obtaining such a comparable price, and convincing the GST officer about its relevance may pose a challenge for exporters.

Our suggestion

Exporters should immediately analyze the impact of this amendment on their future GST refund claims and prepare accordingly by way of suitable changes to business processes to ensure such comparable pricing data is readily available, forecasting any shortfall in working capital requirements, etc.

Given that the said amendment is only applicable to the export of goods without payment of tax, exporters can look into the possibility of undertaking exports with payment of tax.

Refund restricted to invoices appearing in GSTR-2A

The government vide Circular No. 135/05/2020-GST dated 31 March 2020 (the new Circular) clarified that GST refund pertaining to ITC is to be restricted to the invoices appearing in GSTR-2A of the applicant. *[This restriction will also be applicable to taxpayers claiming GST refund of accumulated ITC on account of inverted duty structure.]*

Considering the current situation, the government has already provided relaxation in the return filing due dates to taxpayers. Further, for the period from February 2020 till August 2020, relaxation has also been provided from the provisions of Rule 36(4) of CGST Rules, 2017, which restricts the ITC that can be claimed by the taxpayer to 110% of the ITC pertaining to invoices appearing in GSTR-2A. *[Note that the recipient has to ensure that suppliers/vendors disclose all invoices till September 2020 and conduct a cumulative reconciliation of ITC in compliance with Rule 36(4).]*

In such circumstances, restricting the GST refund claim to invoices appearing in GSTR-2A seems to be an excessive burden imposed on the taxpayers and may lead to litigation especially given that such a change in government's stance has come by way of a clarificatory circular.

Our suggestions

As a way forward, businesses may take the following steps to ensure their refund claims are not adversely affected;

- Monthly reconciliation of GSTR-3B and GSTR-2A;
- Regular follow up with suppliers to ensure they file their GSTR-1 on a timely basis;
- Utilizing the link provided on the GST portal to verify the return filing status of suppliers;
- It appears that this restriction will not be applicable to exports of goods with payment of tax as in such cases, the shipping bill itself is considered as refund application. Therefore, goods exporters can evaluate this alternative.

Requirement to reply to deficiency memo within the original due date of filing GST refunds

As per the Master Circular No. 125/44/2019-GST dated 18 November 2019, if the GST officer issues a deficiency memo in respect of a GST refund application, the applicant is required to file its reply to such deficiency memo within the original time limit of filing of GST refund claim viz. 2 years from the relevant date.

This becomes very critical in case of refund applications filed towards the end of such a due date of 2 years. In such cases, if a deficiency memo is issued by the officer [even for minor reasons such as unavailability of some documents, maybe due to the upload limit on GST portal], the GST refund application may become time-barred, resulting in the taxpayer to approach appellate authorities and undertake protracted litigation.

Our suggestion

The applicants should expedite the process of filing their refund claims to ensure that sufficient time is available to respond to deficiency memos.

Other aspects

New requirement of disclosure of input invoice-wise HSN in applying for GST refund

As per the new Circular, now the applicant is compulsorily required to mention the input invoice wise HSN/SAC in the GST refund application.

The government is well aware of the difficulties faced by businesses in preparing a HSN-wise summary of their inputs as earlier required for GSTR-9 (annual return). In fact, the government had to make this requirement optional to ensure more businesses file their GSTR-9.

Therefore, this step taken by the government is surprising and will result in additional compliance burden on the applicants.

Our suggestion

Businesses should make recording of input HSN/SAC at the time of the initial booking of invoices a part of their business process. Accounting software/ERP systems should be updated to ensure input invoices are not recorded without the HSN/SAC break-up.

Genuine difficulties in obtaining export remittances affecting GST refund claims

Considering the global scale of the pandemic, it is likely that the foreign clients may delay the payment of goods/services exported to them. This can result in additional challenges to Indian exporters.

Services exporters

- As per Rule 96A of the Rules, services exporter involved in exporting services without payment of tax (i.e., under LUT) should realize the foreign remittance in convertible foreign exchange within one year [or such other period allowed by the Commissioner]. On failure to do so, the exporter is liable to pay tax along with applicable interest.
- Further, in case of the export of services, the GST refund formula links the amount of refund to the receipt of foreign exchange against the service provided.
- Therefore, the government should look into the possibility of providing appropriate relief to deal with cases of delay in obtaining remittances by service exporters.

Our suggestion

Exporters can look into the possibility of bunching their monthly GST refund claims into quarterly/annually etc. to account for delays in remittances/or non-receipt of remittance in a particular month to ensure they do not lose out on their GST refund.

Goods exporters

As per Rule 96B of the Rules, in case of exporter of goods, refund received from the authorities is required to be re-paid along with interest in case the sale proceeds have not been realized in India within the period allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), including any extension of such period.

Recently, the Reserve Bank of India announced that in case of exports made on or up to 31 July 2020, the exporter's time limit to realize the remittance has been extended from 9 months to 15 months[4]. The government should immediately clarify the applicability of this decision of the RBI to the requirements imposed under Rules 96A and Rule 96B.

Non-availability of the functionality of bunching of GST refund claims across financial years

- In the new Circular, the CBIC provided a facility to allow exporter for filing their refund claims by bunching of the claims across different financial years.
- This is a welcome move for an exporter in cases where, majority of the ITC is availed in one particular financial year; however, supply is made in a different financial year.
- However, currently, this facility has not been made functional on the GST portal, resulting in confusion amongst the exporters.

Conclusion

On one hand, the government is facilitating quick disbursal of GST refunds while, on the other hand, it is observed that refund claims of genuine businesses are being affected due to additions in the compliance burden. Some of the government's decisions, such as restricting the GST refund claim to invoices appearing in GSTR-2A, may be well-intended to prevent frauds such as refund claims based on fake invoices, but the timing of such decisions appears to be ill-advised. Further, the decision of the GST Council restricting the export value of goods to 1.5 times the domestic value of like goods for the purpose of GST refunds is also surprising. The government and the GST Council should re-evaluate their strategies and provide appropriate provisions to ensure that the relief measures are not over-shadowed by restrictions imposed in these difficult times.

4. *https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=49844*

From the Judiciary

Direct Tax

Whether payments made to Cricket Control Boards/Associations of the different Member countries of ICC from foreign bank account liable to withholding tax in India?

PILCOM vs CIT West Bengal-VII

[Supreme Court of India (SC) – Civil Appellate Jurisdiction – Civil Appeal No. 5749 of 2012]

Background

PILCOM (PAK-INDO-LANKA, JOINT MANAGEMENT COMMITTEE) is a committee formed by the Cricket Control Boards/Associations of three countries viz. Pakistan, India and Sri Lanka, for the purpose of conducting the World Cup Cricket tournament for the year 1996 in these three countries. Basis the competitive bids, these three nations were selected in the meeting of the International Cricket Council (ICC) to have the privilege of jointly hosting the 1996 World Cup Cricket Tournament.

PILCOM had opened two bank accounts in London operated jointly by the Indian and Pakistani representatives. It was required to pay varying amounts to the Cricket Control Boards/Associations of different countries as well as to ICC in connection with conducting the preliminary phases of the tournament and also for the purpose of promotion of the game in their respective countries. The payments made represented the following categories:

i. Payment for disbursement of prize money;
ii. Payment to ICC;
iii. Payment for ICC Trophy;
iv. Guarantee money paid to 17 countries which did not participate in the World Cup matches;
v. Guarantee money paid to countries who did not play any match in India;
vi. Guarantee money paid to countries with whom DTAA exist;
vii. Guarantee money paid to other participating countries.

The revenue's contention was that PILCOM has failed to deduct taxes under section 194E.

After taking into consideration, the contentions of both the parties and the tribunal, the High Court held the following:

- The payment for disbursement of price appears to be mere reimbursement of cost and accordingly shall not be subject to any tax.
- For payments under points ii to v, it cannot be held that the cricket associations of these countries earned money through any Source of income in India and hence cannot be subjected to tax.
- Unlike section 195, section 194E nowhere mentions if the income is chargeable to tax or not. Thus, for payments under point vi and vii, it was held that such payment shall be subject to tax in India under section 115BBA r.w.s 9(1)(1), but only to the proportion of matches played in India.

Aggrieved by order of the High Court, the taxpayer filed an SLP with the Supreme Court

Held

The Supreme Court has upheld the order of the High Court. Further, despite not being the ground of appeal, the High court and the Supreme Court has provided for the following interpretation of section 194E:

Sec 194E is not affected by the DTAA since such a deduction is not the final payment of tax, nor can it be said to be an assessment of tax. Thus, irrespective of the existence of DTAA, the obligation under Section 195E has to be discharged once the income accrues under Section 115BBA.

Further, the advantage of the DTAA can be pleaded and taken by the real taxpayer on whose account the deduction is made, not by the payer. In case the eligibility to tax is disputed by the assessee on whose account the

deduction is made, the benefit of DTAA can be pleaded, and if the case is made out, the amount in question will always be refunded with interest. But, that by itself, cannot absolve the liability under Section 194E of the Act.

Our Comments

Though the discussion of the applicability of section 194E is case-specific, the High court and the Supreme Court has provided a unique interpretational dimension to the provision.

The judicial precedent has indeed opened gates for numerous questions such as:

- Where the act provides for specific withholding tax provisions for certain income of non-residents like 194E, 196D, etc., whether the beneficial rate of DTAA can be applied? If not, can it be said that the government would collect the taxes more than bilateral DTAA?
- Is it only for the payee to dispute such deduction of tax and not for the payer to raise this contention by relying on DTAA?

Whether services provided to non-pool members are eligible for the benefit of Article 8 under India France DTAA?

Air France Vs. Addl. CIT

I.T.A. No. 5008/DEL/2011 (A.Y 2004-05) AND I.T.A. No. 5009/Del/2011(A. Y 2005-06)

Background

The taxpayer is a foreign company, engaged in the operation of aircraft in international traffic.

It is a tax resident of France and is liable for taxation in France. It is a member of the International Airline Technical Pool (IATP). It has incorporated a branch office in India.

During the year under consideration, the taxpayer had serviced only one airline, i.e., Iberworld, who was not a member airline but was of the status of a guest airline covered under the IATP pool. The taxpayer filed a nil return claiming the entire income earned by the assessee in India is exempt pursuant to section 90 read with Article 8 of India France DTAA.

Disregarding the taxpayer's contention, the revenue contended that the benefit of Article 8 cannot be extended to non-IATP members and accordingly should be taxable in India as Fees for Technical Service (FTS). Also, given that the Indian branch of the company constitutes a Permanent Establishment in India, the income derived from permanent establishment should be taxable in India.

Aggrieved by the order, the assessee file an appeal with the ITAT.

Held

Considering the contentions of both the parties, the Delhi tribunal held the following:

- There are no specific services referred to between the head office and the branch office. The entire receipts collected by the branch office are remitted to the head office after meeting the local expenditure, and the said receipts of the branch office are from the public at large and not from the rendering of services to the head office. Thus, the assessee company does not have a Permanent establishment in India
- Further, Annexure A of the IATP manual evidently provides that there is no bar on member airlines to provide service to non-IATP Pool members and, in fact, even if non-IATP Pool members take such service from a pool, it would be considered as a pool service to them. Article 8(2) specifically mentions that the DTAA will apply to the profits derived by an enterprise of a Contracting State from the operation of aircraft in international traffic from the participation in a pool, a joint business or an international operating agency and shall be taxable only in that Contracting States. Thus, even though under domestic law the assessee has to pay tax in India while deriving income from Indian territory, yet because of Article 8(2) of the DTAA agreement, Air France is exempted from paying any tax in India as its services/activities, and profit thereof derives from pool participation.

The tribunal has grossly relied on jurisdictional HC decision in the case of **Lufthansa German Airlines.**

Our Comments

There were few decisions earlier that have accepted the principle that if the taxpayer is principally in the business of Airlines/Shipping, then the income from the pooling arrangement would be considered as a part of the income from Shipping /Airline business. In this decision, the court has accepted that even if the income is from servicing non-pooling partners, but the principal business of the taxpayer is of Airline/Shipping the benefit of Article 8 of DTAA shall be available to the taxpayer.

Transfer Pricing

Whether comparable must be selected basis the quantitative filters (without analyzing functional characteristics)?

Open Solutions Software Services Pvt Ltd – ITA No.201/DEL/2018

Ruling

The taxpayer is engaged in the business of development of computer software and related services to its AE.

The taxpayer has benchmarked the aforesaid transaction using the Transactional Net Margin Method (TNMM).

TPO rejected the transfer pricing analysis of the taxpayer and introduced new filter criteria to identify comparable companies. The new comparable companies introduced were viz., Wipro Technology Services Ltd, Infosys Ltd, Persistent Systems and Thirdware Solution Ltd. The Dispute Resolution Panel (DRP) affirmed this action of TPO.

However, ITAT deleted the TP adjustment on the ground that comparables introduced by TPO are not functionally similar.

High Court dismissed revenue's appeal on following grounds:

- If distinguishing functional factors are substantial, it cannot be ignored while selecting the comparable.
- Comparables cannot be picked on the basis of broad classification under various heads, and that the actual functional profile of the comparable must be similar.

Our Comments

High Court has re-emphasized the importance of functional similarity while selecting comparable companies. While the application of filters merely narrows down the search, the functional profile cannot be ignored to select the comparables.

Could Royalty payments to an Associated Enterprise (AE) be justified for an entity having losses at the operational plant/facility level?

Asahi India Glass Limited – ITA No.2501/DEL/2014 – AY 2008-09

Ruling

The taxpayer is engaged in two manufacturing segments viz., automotive glass (comprising of auto and architectural glass) and float glass. The taxpayer has entered into transactions with its AE viz., purchase of raw material, stores and spare parts, capital goods, payment of royalty for technical know-how, payment for technical services, receipt of commission income. For the purpose of benchmarking, the taxpayer followed an aggregated approach and adopted TNMM at the entity level.

During the course of assessment proceedings, TPO analyzed segmental results of both plant/facility separately. While TPO agreed that the benefit of know-how had been passed on to one plant, it denied the benefit to another plant on account of segmental operating losses. Thus, TPO determined the arm's length price of royalty at Nil by concluding that no economic benefit has been passed on to this plant and made TP addition.

The Commissioner of Income-tax (Appeals) [CIT(A)] observed that the brand and associated technology are quintessential for continued existence. Thus, CIT(A) deleted the TP addition.

Income Tax Appellate Tribunal (ITAT) ruled in favor of the taxpayer on the following grounds:

- It was observed that royalty paid by the taxpayer amounted to only 1.71% of sales.
- Turnover depicted an increasing trend from the year 2005 to 2008.
- The Tax authority has accepted royalty transactions in earlier years.
- Relying on Delhi High Court ruling in EKL Appliances Ltd, it is held that once it is established that know-how and technical information was provided, payment of royalty cannot be challenged on the basis of profitability or earnings of the taxpayer.

Our Comments

Time and again, the tax authorities have alleged that benefit test is required to be demonstrated by the taxpayer while justifying payment for royalty. On the other hand, courts in India in most of the cases have held that availing of such service is a commercial/business decision of the taxpayers, which cannot be questioned. Additionally, profitability/ earning is not a parameter to conclude whether any benefit is derived or not from the use of intangible.

Whether the aggregation approach should be adopted for benchmarking transaction of maintenance services and software license distribution activity?

M/s Parametrics Technology Private Limited - ITA No.359(Bang)/2016 – AY 2011-12

Ruling

The taxpayer has entered into following transactions with its AE: (1) purchase of software licenses for resale in India; and (2) payment of maintenance services to AE.

For the purpose of benchmarking, the taxpayer has aggregated both these transactions and adopted TNMM.

During the course of transfer pricing proceedings, while the TPO accepted the TNMM for purchase of software license transaction, he re-characterized maintenance service as technical services.

TPO upheld that revenue from maintenance services should be allocated between the taxpayer and AE in the ratio of 90:10. Thus, TPO determined arm's length price of this service as only 10% (as against 40% paid by the taxpayer) and made TP addition. The DRP upheld the TPO's view and proposed to use Profit Split Method PSM instead of TNMM.

Income Tax Appellate Tribunal (ITAT) held as under:

- ITAT observed that the taxpayer is a distributor of software licenses and, thus, agreed that core technical problems could only be resolved by AE (and not the taxpayer).
- ITAT also agreed that unless proper and appropriate maintenance services are provided to its customers, it would be difficult for the taxpayer to market the software licenses. Accordingly, ITAT held that maintenance service is inter-linked with distribution activity.
- It was also observed that the pricing policy, as well as the benchmarking approach adopted by the taxpayer, was accepted by TPO in preceding years.

Hence, the appeal of the taxpayer is allowed.

Our Comments

This ruling has re-emphasized the importance of demonstrating the inter-linking of transactions in order to adopt the aggregation principle. This ruling would also be helpful to taxpayers engaged in the software distributor industry where they often make payment for maintenance service in addition to software.

Indirect Tax

Whether drawings and specifications pertaining to post-importation activities can be automatically added to the transaction value of imported machinery for computation of Customs duty?

[Background: As per Rule 9(1)(e) of Customs Import Valuations Rules, 1988 corresponding to Rule 10(1)(e) of Customs Import Valuations Rules, 2007 provide that all payments made as a 'condition of sale' of imported goods are to be added while determining the transaction value.]

Commissioner of Customs (Port), Kolkata versus Steel Authority of India Limited - Hon'ble Supreme Court of India [2020 (4) TMI 774]

Company's contentions

- The payments related to drawings, designs, etc. were not pertaining to the imported goods but were made in connection with modernization, expansion, and modification of the Indian plant.
- Thus, these payments pertain to post-importation activities.
- Further, the Company submitted that it was not a condition for them to take design and engineering (relating to such post importation activities) from the supplier only.
- Therefore, the said payments cannot be included in the assessable value for Customs duty.

Based on the above contentions, the Supreme Court, while ruling in favor of the Company/Respondent held as follows:

- An importer of equipment of a plant could always choose to obtain drawings and designs for undertaking post importation activities from an overseas consortium supplying such equipment.
- This may confer on such arrangement attributes of a turnkey contract, but that fact by itself would not automatically attract the 'condition' clause contained in the Valuation Rules.
- The Revenue sought to emphasize their case on the basis that as it was a turnkey project, importation of equipment's and post-importation project implementation exercise were mutually dependent.
- In our opinion, reading such implied condition into the contracts would be impermissible in the absence of any other material to demonstrate subsistence of such conditions.

Our Comments

In recent years, many companies have started setting up their manufacturing plants in India, which usually involve the import of foreign machinery and technical expertise. It is the Revenue's tendency to include all payments in relation to such projects in the assessable value of imported machinery for computation of Customs duty.

This Supreme Court judgment, although based heavily on the facts of the given case, provides important guidance on the limitations imposed by the Customs Valuations Rules, including certain payments in relation to post-importation activities in determining the assessable value of imported goods.

Whether the sale of online publications such as digital law journals qualify as 'e-books' on which GST is chargeable at the reduced rate of 5%?

Venbakkam Commandur Janardhan - Authority for Advance Ruling (AAR), Tamil Nadu

Facts

- The digital law journals are electronic versions of printed law journals sold by the applicant.
- The digital version consists of a DVD and a dongle. The subscription is valid for 1 year, and the updates are provided weekly when the user connects to the internet.
- The renewal is charged separately after one year without needing any more supply of DVDs etc.
- There is also an online version available through a website that can be accessed through user id and password.

In view of the above facts, while answering the question in negative, the AAR ruled as follows:

- The software is updated with new content, updates of cases when connected to the internet. Thus, it is seen that the DVD in effect contains software that requires an End User License Agreement to be accepted by the user.
- The DVD is not an electronic version of the print journals. If it was an electronic version of the print journals, the DVD would have machine readable files in any format such as .doc, .txt, .pdf or any other readable files and not the executable file (setup application) which it has.
- In the case at hand, the supply involves access to an online database hosted on the website of the applicant.
- Thus, it is evident that the above are not 'e-books' but the supply of access to an online database text-based information.

Our Comments

In the current scenario, when the technology is developing at a rapid pace, there are occasions when the applicability of the GST law to a technological innovation is unclear, such as the present case. Therefore, the AAR relied on the facts of the case to determine the applicability of the definition of 'e-books' to the product being sold by the applicant.

Tax Talk

Indian Developments

Direct Tax

Eligible individuals can submit Form 15G, Form 15H to avoid TDS on dividend income too

[Excerpts from The Economic Times, 22 April 2020]

The finance bill 2020, has brought in changes in various provisions of the Income-tax Act. One of which is the taxability of dividend income in the hands of unitholders/shareholders. Owing to this, such income would now be liable to tax deduction at source at 10%. The tax will be deducted from the dividend at the time of payment by the company/mutual fund house if the total amount of the dividend being paid to the individual during the FY is more than INR 5,000. The shareholders or unitholders should remember to submit Form 15G or 15H to avoid such TDS if they are eligible to do so.

GST, GAAR reporting delayed till March 2021 amid coronavirus outbreak

[Excerpts from The Business Standard, 28 April 2020]

In 2018, the tax department had changed the tax audit Form-3CD, seeking details under GST as well as GAAR, which seeks to prevent firms from routing transactions through other countries to avoid taxes. The requirement for firms to include details of GST and GAAR in their tax audit report has been deferred for the third time in view of the pandemic. The same has been kept in abeyance till 31 March 2021, suggesting that audit reports need not include details on GST and GAAR till then.

Coronavirus lockdown 3.0: States up taxes on auto fuels, liquor for income

[Excerpts from Financial Express, 6 May 2020]

The State governments are increasing taxes on the two principal income-generating tools at their disposal – Value Added Tax on auto fuels and Excise on liquor. At least 13 states, including Maharashtra, Tamil Nadu, Karnataka, Rajasthan, and West Bengal, have increased the value added tax/ sales tax on the fuels by rates that correspond to retail price increases. Haryana, Assam, Goa, Tripura, Nagaland, Arunachal Pradesh, and Meghalaya are the other states that have recently raised fuel taxes to find resources for combating COVID-19. In a nutshell, the states were budgeted to collect INR 2.69 lakh crore from petroleum taxes in FY 2020 and INR 1.75 lakh crore from excise/other levies on alcohol.

Lockdown period not to be counted for determining the residency status of NRIs, foreign nationals: CBDT

[Excerpts from The Economic Times, 9 May 2020]

Finance Minister, Nirmala Sitharaman allowed discounting of prolonged stay period in the country for determining the residency status, to provide relief to people who may have technically become residents as per income tax rules due to travel restrictions and are forced to offer their global income to tax here. For FY 2019-20, the days would be discounted where an individual who had not been able to leave India from 22 March 2020, when international flights were suspended, up to 31 March 2020. In a case where an individual who has been quarantined in India on or after 1 March 2020, and has departed on an evacuation flight on or before 31 March 2020, or has been unable to leave India, the period of stay from the beginning of quarantine to the date of departure, or 31 March 2020, shall not be taken into account. In the case where an individual has departed on an evacuation flight on or before 31 March 2020, his period of stay in India from 22 March 2020 till the date of departure shall not be taken into account. The above is for FY 2019-20.

Equalization levy on e-commerce companies may be deferred to the second half of FY 2020-21

[Excerpts from The Business Line, 13 May 2020]

After representations made by industries and trade bodies, representing a wide range of companies, from multi-nationals to infant start-ups in India and across the globe, the Finance Ministry is considering the deferment of the 'Google Tax' on e-commerce companies by up to six months as against the current effective date of 1 April 2020. The representations acknowledged that the priority of the Indian government and of governments around the world must be to build the strongest possible economic and public health in response to the outbreak of COVID-19. Accordingly, the government may extend the applicability of such a tax.

Transfer Pricing

Safe Harbour Rules notified for FY 2019-2020

On 20 May 2020, the Central Board of Direct Tax (CBDT) had released a notification to provide that safe harbour rates applicable from AY 2017-18 to AY 2019-20 will continue to apply for AY 2020-21 (for a single year) as well.

The taxpayers who wish to opt for safe harbour regulation are required to furnish an application in Form No. 3CEFA for FY 2019-20.

A summary of the former Safe Harbour Rates that would be applicable for the FY 2019-20 are:

Eligible transaction	Safe Harbour Rates
Provision of software development services or Information Technology (IT) enabled services	**17%** - if the transaction **does not exceed INR 1 billion** **18%** - if the transaction is between **INR 1 to INR 2 billion**
Provision of Knowledge Process Outsourcing (KPO) services	For a transaction that **does not exceed INR 2 billion:** **24%** - where employee cost is at least 60% of operating expense; or **21%** - where employee cost is at least 40% but less than 60% of operating expense; or **18%** - where employee cost is less than 40% of operating expense.
Providing corporate guarantee	**1% per annum** of the amount guaranteed.
Provision of contract Research and Development (R&D) services (relating to software development or generic pharmaceutical drugs)	**24%** - if the transaction does not exceed INR 2 billion
Manufacture and export of auto components	For core auto components - **12%**; For non-core auto components - **8.5%**
Advancing of intra-group loans	Arm's length rate would depend upon credit raring of taxpayer and currency of the loan
Receipt of low value adding intra-group services	**5% - If the transaction does not exceed a sum of INR 100 million**

Our Comments

While most of the companies were eagerly waiting for safe harbour rates to get notified before they close the books of accounts for FY 2019-20, this shall continue to help them to opt for transfer pricing certainty in this uncertain economic situation. At the same time, the industry expects that safe harbour rates for AY 2021-22 should be announced soon, keeping in mind the slowdown in the economy.

Indirect Tax

FORM GST ITC-02A activated on the GST portal

The GST portal has activated FORM GST-ITC-02A on the GST portal, which allows a taxpayer who has obtained separate registration for multiple places of business in the same state to transfer the balance of unutilized ITC lying in the electronic credit ledger to the newly obtained registration. This facility was awaited by businesses for a long time as the enabling Rule 41A had been inserted a while back vide Notification No. 3/2019-Central Tax dated 29 January 2019.

Finance Ministry denies levy of the purported calamity cess

Earlier, various news reports had suggested that in view of the declining tax collections due to the COVID-19 situation, the government is considering the imposition of a calamity cess over and above GST. However, in what is music to the ears of the industry, Finance Ministry sources have strongly denied the possibility of imposing any such cess, stating that such a levy will negatively affect the already low consumer demand.

[excerpts from The Economic Times]

Tax Talk

Global Developments

Direct Tax

Switzerland and France signed an agreement on the taxation of frontier workers

Amongst a series of measures ushered by the French government, France has reached new agreements with Switzerland that deal with the issues revolving around frontier workers. On 13 May 2020, both countries signed an agreement with regards to taxation of frontier workers who are currently working from home due to the disruption caused by the COVID-19 pandemic.

The agreement lays down that the days spent working from home due to the pandemic measures would be deemed to be spent in the state (i.e., France or Switzerland) where the frontier workers would have actually carried out the work had such measures not been imposed.

The agreement shall be applicable to working days beginning from 14 May 2020 to 31 May 2020 and would automatically get extended until the end of the following calendar month until such measures are relaxed in either of the states or if such an agreement is jointly terminated by both the countries.

Brazil proposes new digital tax on revenue

In line with the other European nations and OECD CEPS Action plan 1, Brazil, on 4 May 2020, proposed a Progressive Digital Tax. The revenue from the following activities will be subject to digital tax:

- Advertising to Brazilian users;
- Making available a digital platform that permits users to interact with the objective of the sale of goods or services directly between such users if one user is located in Brazil;
- Sale of advertisements targeted on users located in Brazil collected from a digital platform or generated by such users.

Such tax would apply to entities domiciled in Brazil as well as abroad (provided global revenues exceed BRL 3 billion, and its gross revenue in Brazil exceeds US$ 100 million). The rate of tax varies from 1%, 3% and 5% depending on the revenue.

The Brazilian Authorities have proposed to apply the revenue from these taxes towards the national fund for technological and scientific development.

Mauritius government introduces new COVID-19 levy

On 15 May 2020, the Mauritius government passed COVID-19 (Miscellaneous Provisions) Bill. Amongst various measures enacted in the legislation, COVID-19 Levy was imposed to be paid by profitable employers who have benefitted from the Wage Assistance Scheme (WAS) during the COVID-19 period, from 23 March 2020 to 1 June 2020.

It would be imposed on companies, individuals, and resident societies that have benefitted from the Wage Assistance Scheme (WAS) during the COVID-19 period, from 23 March 2020 to 1 June 2020. It is payable over a period of 2 years. Such a levy would be calculated and limited to the lower of:

- 15% of the employer's tax adjusted income; or
- Amount of financial support received

New progressive tax rates for individual income tax purposes introduced by the Egyptian government

On 7 May 2020, law 26 of 2020 was announced by the Egyptian government to introduce new progressive tax rates for individual income tax purposes. The new law would be applicable from 1 July 2020 with respect to income related to employment income. For other types of income such as business income, income from independent professional activities, income from immovable properties, etc., it would be applicable from 1 July 2021 onwards.

The amended income tax rates range from 0%-25% depending on the slab/ range of income an individual falls in. Moreover, the Egyptian government also increased the annual personal exemption from EGP 7,000 to EGP 9,000.

Republic of Korea and the Czech Republic deposit their instrument of ratification for the multilateral BEPS convention

On 13 May 2020, the Czech Republic and Republic of Korea (South Korea) deposited their instruments of ratification for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) with the OECD's Secretary-General.

The MLI for both these countries would come into force on 1 September 2020. With 94 jurisdictions currently covered by the MLI, the above ratification by the Czech Republic and South Korea would now bring the number of jurisdictions that have been ratified, accepted or approved to 47.

Transfer Pricing

Sweden – Administrative Court of Appeal ruled for transfer pricing treatment of Intellectual Property

Recently, Sweden Administrative Court (The Court) issued a transfer pricing ruling. We have provided a summary of the ruling as under:

A Swedish company was involved in the development and sales of real-time visualization tools and held significant Intellectual Property (IP), which was acquired by a US company in 2013. The tax authority alleged that after the acquisition of the Swedish company, the US company also transferred the right to return from exploiting IP. Therefore, the Swedish company should be remunerated for such a transfer of IP.

Contentions by the tax authority

- The US company was responsible for decision making for marking, sales strategies, contracts with customers, pricing and product development, etc. and therefore, the US company borne all material risks related to IP.
- Post-acquisition, the Swedish company's role was restricted to product development on behalf of the US company.
- Placing reliance on press releases, interviews with the company representative, messages to shareholders, the group consolidated reports, etc. the tax authority contended that the US company decided the strategic direction of IP.

Contentions by the Swedish company

- The US company had only been given a license to use and sell the IP developed for which the Swedish company had been remunerated at arm's length royalty.
- Importantly, it was argued that key employees (including the previous owner) who were involved in product development (before acquisition) were still the employees of the Swedish company (post-acquisition). Thus, there was no transfer of IP to the US company.

Ruling by Court

- Transfer of IP was neither apparent from agreement nor from the actions of companies.
- Considering the role of the previous owner of Swedish company (who had a key role in IP development) and the fact that they are still the employees of Swedish company post-acquisition, it is unlikely that IP could be transferred without the owner.
- Only limited importance could be given to press releases, interviews, and messages to shareholders since such documents generally exaggerate to generate positive market effects.
- Therefore, basis the agreement entered into between companies and arguments put forth by the taxpayer, the court concluded that the right to IP was not transferred to US company.

Finland's Supreme Administrative Court adjudges transfer pricing ruling, in favor of the taxpayer

Recently, Finland Supreme Administrative Court (The Court) issued a transfer pricing ruling in the case of Finland vs A Oy (Case No. KHO:2020:34). We have provided a summary of the ruling as under:

A Finnish subsidiary operated as the marketing and sales company of a multinational group in Finland. The company's operations had been unprofitable every year between 2003 to 2011, while the overall group figures were profitable. Finnish subsidiary purchased products directly from intra-group contract manufacturers wherein the group adopted modified cost-plus TNMM considering contract manufacturers as the tested party.

Finland tax authority considered sales company (instead of the contract manufacturer) as a tested party and made an adjustment on the following grounds:

- In an independent transaction, the sales company would have agreed to continue only upon receiving related pricing aid or other equivalent support, such as subsidy, or credit, as an adjustment.
- Benchmarked profitability for manufacturing companies could not be used with sufficient reliability to assess the situation of the sales company in relation to the long-term losses of the sales company's operations

While deciding the matter, the court held the following:

- The loss incurring nature of the sales company did not in itself indicate that the company had failed to collect a service fee or other consideration from another group company.
- The tested party is a company for which reliable data can be found for the most closely comparable transactions. After considering the functional analysis by both the sales company and the group's contract manufacturers, the court concluded that the appropriate tested party was the contract manufacturer (which the group had selected as the tested party in its transfer pricing documentation) and not the sales company.
- The court held that tax authorities could not prove that the taxpayer's transfer pricing diverged from the group's transfer pricing documentation or that the independent companies referred to in the group's transfer pricing documentation were not comparable.

Therefore, the court ruled in favor of the taxpayer.

Turkey - A Draft Communique providing details on updated transfer pricing documentation requirements

On 24 February 2020, Turkey had published a Presidential Decree whereby it amended the country's Transfer Pricing Regulations. The Draft indicated that Turkey would follow requirements of OECD BEPS Action 13, i.e., three-tier documentation as under:

- **Local File** – A transfer pricing report as per the existing transfer pricing documentation requirements in Turkey, which must be prepared by the tax return deadline and submitted upon request. While 'large' corporates are required to prepare documentation for both international as well as domestic transactions, companies operating in the free zone are required to prepare a report for its domestic transactions. Contents are broadly in line with OECD requirements.
- **Master File** – Applicable to the entities that are part of multinational groups with net sales and assets greater than TRY 500 million (i.e., approximately USD 73 million). The contents of the Master File is in line with the OECD master file. The first Master file compliance would be required to file for the tax period of 2019.
- **Country-by-Country (CbC) report** – All the entities that are part of multinational groups with consolidated annual revenue of at least EUR 750 million in the previous fiscal year are required to file CbCR. The format is substantially similar to the OECD format. The first CbC report would be required to be filed for the tax year 2019, and the deadline for that will be 31 December 2020.

Poland's new tool for Transfer Pricing Risk Assessment

A new transfer pricing risk assessment tool has been introduced by the Polish Government, which requires the taxpayers to provide relevant information for 2019 to Poland Transfer Pricing Tax Authority by the end of September 2020. This tool will further help the tax authority to have a bundle of information on controlled transactions. The form will include general information about the taxpayer, including financial indicators (such as operational margin, gross profit margin, return on assets, and return on capital, etc). We have summarized key features of this tool as under:

A. Categorization of controlled transaction:

- The taxpayer should **categorize the controlled transaction** as per the list provided by the Ministry of Finance, which includes different categories/ sub-categories of manufacturers, distributors and service providers.
- The taxpayers are required to provide information on financial transactions, intangible transactions, and business restructuring transactions, including but not limited to the nature of the transaction, quantum, etc.
- Importantly, **transactions that are below threshold** (for Polish Transfer Pricing Documentation requirement) should also be categorized. Further, companies who are exempt from the Transfer Pricing Documentation requirement are also required to provide this information.

B. Compliance with arm's length principle:

- The taxpayers are required to provide a summary of the transfer pricing methods used and the resulting analysis of the comparable transaction.
- Importantly, when the tested party is not a Polish taxpayer, the above information should be provided for a foreign tested party.

The Swedish Tax Agency has updated its tax guidance on financial transactions by adopting guidelines published by the OECD.

In February 2020, the OECD published final guidelines on financial transactions. The detailed guideline carries instructions for the application of transfer pricing principles for financial transactions.

While adopting these, it stated that prior to the OECD guidance, there was no specific guidance determining the arm's length price for financial transactions. Thus, the OECD report shall be considered as clarification, and the same may be considered for transactions entered into prior to this guidance as well.

However, the Swedish Tax Agency has clarified that OECD's guidance on guarantee transactions will not be applied retrospectively owing to the position taken by Swedish case law previously

Indirect Tax

EC proposes deferring the implementation of new EU VAT rules for e-commerce

The new VAT rules for e-commerce trade between the European Union (EU) nations was to be implemented from 1 January 2021. However, in view of the difficulties being faced by businesses due to the COVID-19 pandemic, the European Commission (EC) has proposed their deferral to 1 July 2021. These new rules include mechanisms such as One-Stop-Shop (OSS) VAT returns for B2C e-commerce sellers, the online marketplace to be deemed as a supplier, etc. for facilitating cross border e-commerce between the EU nations and simplifying the compliance burden in relation to such transactions

Compliance Calendar

Direct Tax
Transfer Pricing
Indirect Tax

5 June 2020

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

7 June 2020

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

10 June 2020

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

11 June 2020

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

13 June 2020

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

15 June 2020

- Payment of the first installment of advance tax for all taxpayers other than taxpayers opting for presumptive taxation for the assessment year 2021-22 (15% of estimated tax liability to be deposited on a cumulative basis)
- Issuance of TDS certificates for the quarter of January to March 2019

20 June 2020

- GSTR-5 for the month of May 2020 to be filed by Non-resident taxable person
- GSTR-5A for the month of May 2020 to be filed by persons providing Online Information and Database Access or Retrieval (OIDAR) services

27 June 2020

- GSTR-3B for the month of May 2020 to be filed by all registered taxpayers having turnover of more than INR 50 million in the previous financial year

30 June 2020

- Furnishing of the statement of equalization levy in Form 1 for FY 2017-18
- The due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IA, 194-IB in May 2020

30 June 2020

- The due date for filing the notification for Economic Substance Regulation in United Arab Emirates (UAE)

Notes

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

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

The government vide Notification No. 35/2020 dated 3 April 2020 has announced the extension of various compliance due dates falling between the period from 20 March 2020 to 29 June 2020, to 30 June 2020. Further, vide Notification No. 36/2020 dated 3 April 2020, the government has also notified various extended due dates for furnishing of GSTR-3B for the month of May 2020, based on the aggregate turnover in the previous financial year, and the state in which the principal place of business is located.

Vivad Se Vishwas Scheme in a limbo as COVID-19 looms

– Neeraj Sharma

India Infoline

Read more https://bit.ly/2A1FeeX

and

Financial Express

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

Webinar - Relief measure by Government in the wake of COVID-19

Organizer - Tricor Japan

20 May 2020

Webinar - Recent Tax Amendments and COVID-19 Relief Measures

Organizer - Indo-American Chamber of Commerce (IACC)

22 May 2020

Watch it here https://bit.ly/2UdnF2P

Webinar - COVID impact on Transfer Pricing – A 360 degree view

Organizer - Nexia International

10 June 2020

Register here https://adobe.ly/3czM4WI

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