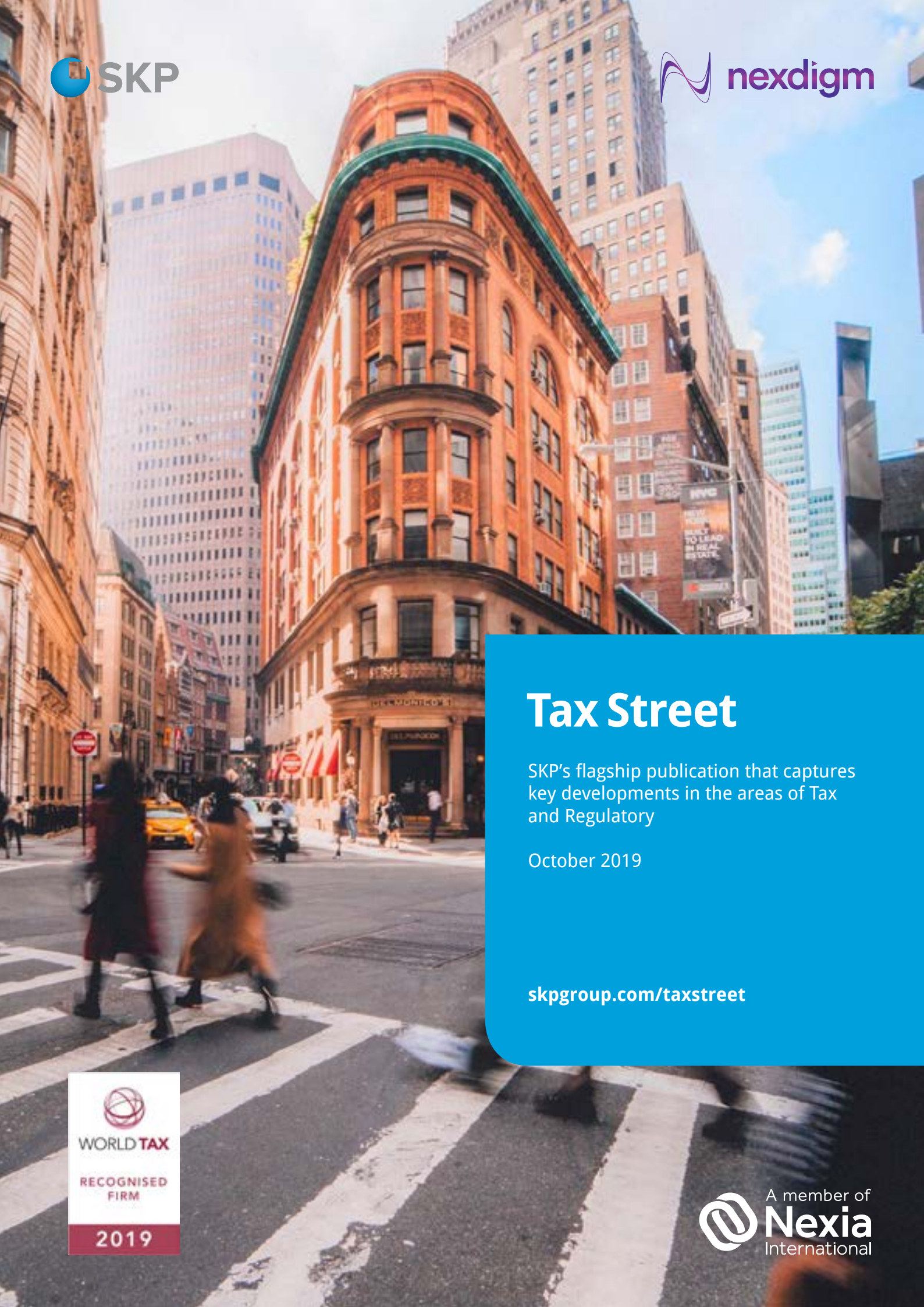

SKP

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Tax Street

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

October 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 the month of October 2019.

There have been various developments in the Gulf Cooperation Council to improve tax related transparency and substance. In this light -

- The **'Focus Point'** point in this issue elucidates the reforms of Country-by-Country Reporting and Economic Substance Regulations in the United Arab Emirates (UAE).
- Under the **'From the Judiciary'** section, we provide in brief, the key rulings on important cases, and our take on the same.
- Our **'Tax Talk'** provides key updates on the important tax-related news from India and across the globe.
- Under **'Compliance Calendar'**, we list down the important due dates with regard to direct tax, transfer pricing and indirect tax in the month.

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

Warm regards,
The SKP Team

FOCUS POINT

UAE introduces measures to improve transparency and substance

Following the developments in the GCC region over the last year or so, it would be fair to state that the GCC has been 'BEPS'ed! Oman, Qatar, Bahrain, Saudi Arabia, and the UAE have all signed the Base Erosion through Profit Shifting (BEPS) Inclusive Framework (IF). Thereby, they are committing to the implementation of minimum standards that include Action Plan 13 relating to transfer pricing documentation (TPD) and Country by Country Reporting (CbCR).

The UAE has issued Cabinet Resolution No. 32 of 2019 on CbCR on 30 April 2019. Subsequently, it also published FAQs on General CbC reporting considerations. Additionally, the UAE also passed a resolution requiring all license holders in the Country to fulfill certain substance-related requirements. For example, businesses shall perform core income-generating activities depending upon the type of businesses.

It may be recalled that the UAE was blacklisted until recently by the European Union i.e. the EU list of non-co-operative jurisdictions for tax purposes. However, given the steps that the UAE has been taking to improve the substance and transparency-related requirements, on 10 October 2019, the EU has removed the UAE from its blacklist. This article provides an overview of the above compliance requirements and how the companies in the UAE are impacted.

Country-by-Country-Reporting (CbCR) in the UAE

Threshold for applicability

Consolidated turnover of group >= AED 3.15 billion (approx. Euro 750 million) in preceding reporting fiscal year

Filing obligation including deadline

Form to be submitted	Who needs to submit	Timeline to submit
Detailed CbCR	Ultimate parent entity/Surrogate parent entity*	12 months from reporting fiscal year of Group
Notification	Ultimate parent entity/Surrogate parent entity/ Constituent entity	Last day of the reporting fiscal year of Group

*In certain conditions as provided in the Resolution, Constituent entity resident in UAE may also be required to submit detailed CbCR in UAE instead of Ultimate Parent Entity/ Surrogate Parent Entity.

Contents of CbCR

Largely modeled on the BEPS Action Plan 13 format

Administrative Offences and Penalties

Administrative Offences	Quantum of penalty
Failure to maintain documents for less than 5 years	AED 100,000
Failure to provide information to Competent Authority	AED 100,000
Failure to report information or failure to submit notification by due date*	AED 1,000,000 + AED 10,000 per day of failure (subject to maximum of AED 250,000)
Failure to report information accurately	AED 50,000 to AED 500,000

* Except this penalty, the total penalty for an entity for one reporting fiscal year shall not exceed AED 1,000,000.

What will the information provided on a CbC report be used for?

The BEPS Action 13 Report sets out three permitted uses for information contained in CbC Reports:

- To assess high-level transfer pricing risk;
- To assess other BEPS-related risks; and
- For economic and statistical analysis.

What sources of information should be used for the preparation of the CbC report?

The FAQ suggests that the sources should be consistent. Most common sources are:

- Consolidation reporting packages; or
- Separate entity statutory financial statements; or
- Internal management accounts.

It is further suggested that the CbC report must describe the source of information and in case of inconsistency, the reason for inconsistency may also be highlighted.

Economic Substance Regulations (ESR) in UAE

Applicability

ESR applies to all UAE entities who have obtained trade licenses or permits to carry out relevant business activity. Government companies are exempted.

Relevant business activity

- Shipping
- Holding Company/Headquarter
- Banking and Insurance
- Investment Fund Management
- Distribution and Service Centre
- Lease-Finance
- Intellectual Property (IP)

Further, there are illustrative core income-generating activities against each of the above business that are provided – **Refer to our Tax Alert**.

Economic substance test

- The Licensees must conduct core income-generating activities for the respective business lines referred to above.
- Managed and directed in UAE. Adequate frequency of Board of Directors meeting, knowledge and expertise of directors are certain key parameters under this test.
- Adequate number of employees
- Adequate assets to run the business activity.

Compliance requirement

Notification to be submitted: Whether or not it is carrying on Relevant Activity. If yes, details such as gross income, etc.

Report to be submitted: Annually within 12 months from the end of Financial Year, containing various operations related information.

Penal consequences for non-compliances

Failure to meet Economic Substance Test - AED 10,000 – AED 50,000 (First Year) thereafter, AED 50,000 to AED 3,00,000.

Failure to provide information or inaccurate information – AED 10,000 to AED 50,000.

Way forward

It is recommended for multinationals with their presence in the UAE to review their existing operating structure and also transfer pricing policy in order to mitigate/avoid risk emanating from the above substance and transparency-related regulations.

Given the penal consequences for non-compliances, it would be important to conduct an economic study and risk analysis in advance.

FROM THE JUDICIARY

Direct Tax

Is the payment for business support services taxable as royalty under the India-Netherlands tax treaty in the absence of imparting of any know-how?

Van Oord Dredging and Marine Contractors BV vs Dy. CIT [TS-596-ITAT-2019 (Mumbai)]

The taxpayer, a tax resident of Netherlands, was engaged in the business of dredging activities. It filed its tax return in India declaring loss for tax year 2009-10. Pursuant to management support agreement, the taxpayer had rendered business support services to VOIPL (Indian affiliate) for a consideration.

The taxpayer did not offer to tax such consideration on the basis that they were provided from outside India. Further, the same would not be taxable as FTS in the absence of not making available any technical know-how, skills, etc. as per the tax treaty. However, the tax officer held that such payment was for the use of information concerning industrial, commercial or scientific experience and hence taxable as royalty under the tax treaty.

Held

The tax tribunal inferred that a person must provide know-how to the recipient so that the recipient can use or has right to use such know-how. Further, the tax tribunal observed that imparting of "know-how" envisions the recipient to make use of such know-how independently on its own account without recourse to the provider of such know-how in the future. The tax tribunal also inferred that it is imperative that there is alienation or use of or right to use any know-how and in the absence of knowledge, skill or experience, such payments cannot be construed as royalty.

In the instant case, there was no element of imparting any know-how or there was no transfer of any knowledge, skill, or experience. Hence, the business support services provided by the taxpayer does not fall under the ambit of Article 12 of the India-Netherlands tax treaty.

SKP's Comments

The issue of taxability of business support services as royalty has been a subject matter of debate before various levels of judicial authorities. There have been divergent views on this issue. However, the Mumbai tax tribunal has made some interesting observation on what can be considered "imparting of know-how" for a payment to be construed as royalty.

Can the offshore supply of equipment contracts be taxable in India under the India-Japan tax treaty?

Nippon Steel Engineering Co. Ltd. [TS-634-AAR-2019]

The taxpayer, a tax resident of Japan, was engaged in the business of steel and environmental plants [mainly Coke Dry Quenching Units (CDQ)]. The taxpayer entered into 2 contracts with JSW for supplying CDQ equipment to Japan and China. The contract also provided that JSW would be responsible for the carriage of equipment from the port of shipment to the Indian port. Further, the taxpayer had also entered into a separate contract for the supply of drawings and documents, offshore training and supervision services.

Held

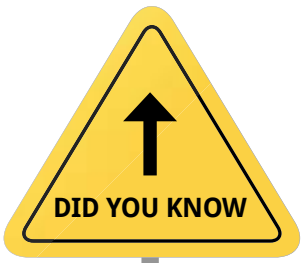
On perusal of CDQ equipment contract agreements, the AAR observed that under FOB, transfer of title along with the associated risks and rewards takes place at the port of shipment itself i.e. the foreign port. Further, the invoice as well as the bill of entry was generated in the name of JSW and not the taxpayer. Further, the payment for the said equipment was also received in foreign currency outside India. Hence, by placing reliance on several judicial precedents, the AAR inferred that the supply of equipment was concluded outside India.

The AAR also observed that the taxpayer had entered into two separate contracts, one for supply of equipment and the other for provision of off-shore services as the same were from different countries. Thus, the AAR placed reliance on the decision of Alstom Transport SA while accepting the contention of the taxpayer that the contracts were independent from each other and hence did not form part of a single composite contract. In light of the above, off-shore supply of CDQ units was not taxable in India since the entire business was conducted outside India.

SKP's Comments

Evaluating the taxability of off-shore supply has always been a contentious issue in India having divergent views by the tax authorities at various levels. In this background, this ruling assumes significant importance since it reiterates some of the key factors for determining whether sales have been conducted outside India. Further, this decision is also very important for EPC contracts since it brings out the key differences between composite contracts and independent contracts.

Recently, the government announced corporate tax cuts for all domestic companies subject to the condition that the companies would have to give up certain tax incentives/ deductions. It is pertinent to note that the companies would have to give up only income-tax related incentives/ deductions and not other incentives/ deductions.



Transfer Pricing

Acceptance of Comparable data from commercial database for Export-Imports as Comparable Uncontrolled Price (CUP)?

M/s Rohm and Haas India Pvt Ltd – ITA No. 2199/Mum/2015 and ITA No. 6577/Mum/2018 and SA No. 261/Mum/2019

The taxpayer was engaged in the manufacturing & distribution of chemicals and undertaking sales promotion activities. During Assessment Year (AY) 2010-11, the taxpayer benchmarked its imports using Cost Plus Method (CPM) after aggregating it with the export of goods transactions. This approach was accepted by the Transfer Pricing Officer (TPO) under prior years as well.

The TPO rejected CPM as the most appropriate method (MAM) as the taxpayer has incurred loss from its manufacturing business; and instead adopted Transaction Net Margin Method (TNMM) as the MAM by selected operating margin (Operating Profit/Operating Income) as the Profit Level Indicator (PLI). The TPO further rejected the comparables chosen by the taxpayer and adopted a set of fresh comparables. The DRP principally upheld the order of the TPO.

The Income Tax Appellate Tribunal (ITAT) Proceedings:

1. ITAT dismissed such rejection of CPM noting that the losses were incurred on account of commercial reasons by having lower sales price realization from a third party customer pursuant to a memorandum of understanding and not on account of import transactions from its AEs.

2. ITAT accepted the claim of adoption of CUP method of the taxpayer (which was pleaded by the taxpayer at the DRP level) and confirmed that "When the CUP method using ICIS software covers 68% of the total transactions that too being a direct method and a traditional transaction method, the ld. DRP ought to have accepted the same."

3. ITAT also accepted taxpayer's additional ground of appeal for using TIPS database under CUP method. ITAT noted that, basis the taxpayer, the TIPS database covers 94.69% of the import transaction value, which according to the DR covers only 70%. ITAT held that since substantial amount of transactions gets covered using TIPS Database, it can be used for benchmarking under CUP method.

4. Thus, the ITAT accepted the additional evidence and restored the matter to the AO/TPO and directed that "While comparing the data at or near to the relevant date of transactions with the comparable prices using TIPS Data Base, the TPO is directed to adopt portfolio approach to take both the prices that are favourable to the taxpayer as well as that are adverse to the taxpayer in view of a categorical finding of fluctuating prices for the same product already given by the DR."

SKP's Comments

- Comparable information available for commercial purposes can serve the purpose of benchmarking International transactions of imports/exports, depending upon the facts of the matter.
- The revenue cannot cherry-pick the transactions favoring one way and ignore transactions that are detrimental.

Are transfer pricing provisions applicable to insurance companies?

Max New York Life Insurance Company Ltd (Delhi High Court ITA 818/2019)

The Delhi High Court (HC) recently admitted the taxpayer's appeal against ITAT order, which held that the transfer pricing provisions were applicable to Insurance companies.

The taxpayer is engaged in the business of life insurance and made certain payments to its AEs which were benchmarked using CUP as the MAM and the AE as the tested party.

The TPO rejected CUP and applied TNMM as the MAM and proposed an adjustment of INR 20.2 million. The CIT(A) deleted the entire addition.

The revenue appealed against the order of the CIT(A), to which the taxpayer filed a legal ground contending that TP provisions should not be applicable to insurance companies. Instead the income for such companies be computed basis Section 44 of the Income Tax Act ("Act") read with Schedule 2 of the Act.

The ITAT, while referring to Section 14 of the IT Act, stated that there are two computations made in determining the total income, viz. **first is the computation of income under respective heads** (i.e. Business Income, House property, Capital gains, etc.) and **second is the computation of income from international transaction by determining its ALP**, which exercise is done by the TPO.

"Section 44 of the IT Act reads as **'Notwithstanding anything to the contrary contained in the provisions of this Act relating to the computation of income chargeable under the head "Interest on securities", "Income from house property", "Capital gains" or "Income from other sources", or in section 199 or in sections 28 to 43B**, the profits and gains of any business of insurance, including any such business carried on by a mutual insurance company or by a co-operative society, shall be computed in accordance with the rules contained in the First Schedule."

As seen above, Section 44 of the Act starts with a non-obstante clause

(clause that specifically overrides consideration of other provisions stated therein). The ITAT held that, "Since there is no specific reference to section 92 in section 44..., we cannot infer the omission of the second computation of income envisaged under section 92 of the IT Act."

The ITAT thus held that in case of International transactions entered into by an insurance company, the income shall be first computed in accordance with the First Schedule to the Act, subsequent to which the arm's length is to be determined basis the application of the provisions of section 92 of the IT Act.

SKP's Comments

The ITAT has made specific references to the provisions of the IT Act in terms of applicability of TP regulations to Insurance companies.

It would be worthwhile to see the High Court's views on the impugned issue, since that would have far reaching TP implications for specific Industry sectors.

Is AMP an International transaction? And other issues.

India Medtronics Pvt Ltd – ITA No.7263/Mum/2018 – AY 2014-15

The taxpayer is engaged in the business of marketing and distribution of medical life-saving devices. The TPO proposed adjustments on account of AMP expenses, reimbursement and recovery of expenses from AE, and adjustment on account of the import of finished goods.

The DRP in its order allowed partial relief to the taxpayer viz. (i) Recovery of expenses (ii) partial relief for reimbursement of expenses and (iii) direction to the AO to exclude the TP adjustment on account of import of finished goods.

The Income Tax Appellate Tribunal (ITAT) principally decided on the following:

- Whether incurrence of advertising, marketing and promotion (AMP) can be construed as an 'International transaction'?

Held:

- Relying on previous years order in the case of the taxpayer where a similar issue was adjudicated, the Tribunal had observed that i) in the agreements between the taxpayer and its AE there was no condition of sharing of AMP; (ii) the agreements only referred to using best efforts to distribute the products or promote products in a commercially reasonable manner; and (iii) the terms of the agreement did not provide that the taxpayer had to share AMP expenses; (iv) even if the AE was benefitted indirectly by the AMP expenditure incurred by the taxpayer, it could not be inferred that it had entered into an agreement for sharing AMP expenses; and (v) the "Bright Line Test" should not have been applied by the TPO.
- Relying on the above, the ITAT held that the AMP is not an International transaction.
- Whether the DRP was correct in upholding the alternate adjustment (i.e. convention expense)?
- The taxpayer submitted that the "convention expenses" were incurred in the normal course of its business as selling expenses and could not have been considered as part of its AMP expenses.
- The ITAT, following the past years judgement of the taxpayer, allowed the ground of the taxpayer and deleted the proposed adjustment.

Import of finished goods:

The Taxpayer had benchmarked the transaction adopting TNMM taking OP/OR as the PLI and using multiple year data.

Whether the TPO was correct in rejecting the use of Multiple Year data?

The ITAT upheld TPO's rejection of multiple year data referring to the exception carved out in proviso to Rule 10B(4) to hold that the taxpayer failed to establish as to how the financial data for earlier two years of its comparables had influenced the determination of the transfer prices.

Whether the TPO was correct in treating forex gain/loss as non-operating

ITAT held forex gain/loss to be operating in nature, since this was directly attributable to the taxpayer's business and the forex risk is borne by the taxpayer.

Indirect Tax

Whether GST paid on procurement of chillers, air handling units, lift etc. for installation in a commercial property regarded as blocked credits under section 17(5) of CGST Act, 2017?

[In view of Section 17(5)(d) of the CGST Act, ITC pertaining to goods or services received for construction of an immovable property is not eligible for set-off against the outward tax liability. However, plant or machinery have been specifically excluded from the ambit of such blocked credit.]

M/s Tarun Realtors Private Limited - Authority of Advance Ruling (AAR), Karnataka [2019 (10) TMI 1021]

Facts of the case

- The applicant is involved in the development of shopping mall and enters into various lease agreements with their tenants.
- To undertake development of the mall, the applicant procured goods and services. These procurements were made for the installation of chillers, air handling unit, escalator, CCTV system, etc.

Applicant's contention

The installations qualify as 'plant and machinery' and hence the GST paid in relation to their procurement cannot be regarded as blocked credit in view of the specific exclusion under section 17(5)(d) of the CGST Act.

Ruling

- The AAR observed that the goods/ services procured by the applicant were capitalized in the books of accounts and were not considered separate from the immovable property.
- The provision of facilities like transformers, sewage treatment plant etc. are essential for a commercial mall and hence cannot be considered separate from the building or civil structure.
- Accordingly, the GST paid on procurement of goods/services for installation was to be regarded as blocked credit under section 17(5)(d) of the CGST Act.

SKP's Comments

Interestingly, while dealing with similar facts in a writ petition filed by M/s Safari Retreats, the Hon'ble Orissa High Court read down section 17(5)(d) of the CGST Act and held that if the assessee is required to pay GST on the rental income arising out of the investment in immovable property, he should be allowed ITC on GST paid on inputs.

It appears that the said judgement has not been considered by the AAR in the present case.

Given the above, eligibility of ITC in relation to construction of immovable property may remain an area prone to litigation under the GST regime.

Whether renting of immovable property can be treated as continuous supply of services for the purpose of determining the time of supply (TOS), even after the license agreement has expired but the licensee continues to be in the possession of such immovable property?

[Section 31(5) of the CGST Act contain special provision in relation to time limit for issuance of invoice in case of continuous supply of services, and the TOS in such cases has to be determined accordingly.]

M/s Chennai Port Trust - AAR, Tamil Nadu [2019 (10) TMI 1204]

Facts of the case

- The applicant owns rentable land and building in the port area. As a part of the port activity, these land and buildings are rented/licensed out to the port users.
- Such licensing activity was covered under the purview of continuous supply of services (CSS).
- There were situations when the license agreement was expired but the licensee continued to occupy the licensed premises.
- In such cases, the applicant would not issue a tax invoice, but instead Rent Claim Advice (RCA) were issued.

Ruling

- The RCA issued by the applicant fulfil all the requirements of a valid tax invoice prescribed by the CGST Rules.
- In the absence of a valid agreement, the supply can no longer qualify as CSS, and should be treated as a normal supply of services.
- Given the above, the RCA should be treated as a valid tax invoice and the time of supply (TOS) should be the date of such RCA, provided it is issued within 30 days from the end of the relevant month. [Section 13(2)(a) read with Section 31(2)]
- In cases where the RCA is not issued within 30 days, the TOS should be the end of the relevant month. [Section 13(2)(b) read with Section 31(2)].

SKP's Comments

The time limit for issuance of invoice for CSS under Section 31(5) revolves mainly around the due date of payment as per the contract. In the present case, the AAR held that in the absence of a contract (i.e. a valid lease agreement), the renting of immovable property cannot be treated as a CSS.

Interestingly, the AAR also ruled that an RCA document should be treated as a valid tax invoice provided it contains all the particulars prescribed for a tax invoice under the CGST Rules.

TAX TALK
INDIAN DEVELOPMENTS

Direct Tax

Minimum alternate tax credit dilemma grips India Inc.

MAT credit is the difference between the tax the company pays under MAT and the regular tax, and is allowed to be carried forward for a period of 15 financial years. By utilizing MAT credit, many companies will be able to bring down their effective tax cost to 17.47% from 25.17% (under the new regime), leading to substantial tax savings of about 8%. Whereas, companies paying the highest effective tax rate of 34.94%— including banks, NBFCs and FMCG majors — would move to the new regime as they would get 9% benefit. Those from sectors such as auto, chemicals, textiles, gems & jewellery, and retail are also likely to shift. The Central Board of Direct Taxes (CBDT) clarified earlier this month that companies would not be allowed to adjust the MAT credit against their tax liabilities if they opted for lower corporation tax rates. They will also have to let go of incentives under special economic and tax-free zones. Companies opting for the new regime can't go back to the old one. Hence, Indian companies have been in a dilemma for selecting the new regime of MAT regulations. The way forward should be to carry out tax benefit analysis and evaluate the pro's and con's.

Govt. notifies Sec. 194N TDS inapplicable to withdrawals by Money Changers for foreign currency purchase

According to the latest notification, CBDT has exempted, from Sec.194N, cash withdrawal by the authorized dealer and its franchise agent and sub-agent; and Full-Fledged Money Changer (FFMC) licensed by the Reserve Bank of India and its franchise agent from TDS under Section 194N subject to conditions specified in Notification No. 80/2019-Income Tax dated 15 October, 2019. This exemption can only be availed if the withdrawals are made for the purposes of (i) purchase of foreign currency from foreign tourists or non-residents visiting India or from resident Indians on their return to India, in cash as per the directions or guidelines issued by Reserve Bank of India; or (ii) disbursement of inward remittances to the recipient beneficiaries in India in cash under Money Transfer Service Scheme (MTSS) of the Reserve Bank of India.

FM promises more reforms before the end of the fiscal

Finance minister Nirmala Sitharaman said more reforms are on the anvil this fiscal to boost growth as fresh economic data and subdued corporate earnings point to a deeper economic downturn. The government has targeted to generate INR1.05 trillion in 2019-20 through asset sales, including that of Air India. Sitharaman said disinvestment in 25 public sector enterprises is underway to facilitate creation of fiscal space and improve the efficient allocation of public resources. Many financial investors across the world are hoping for the long-term capital gains to be excluded from tax. The common man, at large, is also expecting relaxation on the personal taxes front.

Transfer Pricing

The Central Board of Direct Tax (CBDT) vide notification No. 76/2019 dated 30 September 2019, amended Rule 10CB which provides for computation of interest income pursuant to secondary adjustments. The said notification is applicable with immediate effect and will be applicable from AY 2019-20 and onwards. **Click Here** for the amendments in the notification sets.

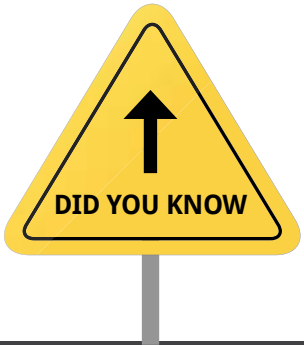
The time limit for repatriation of excess money or part thereof according to erstwhile rules have now been rationalized in certain cases wherein earlier time limit did not seem to be practical (such as in cases of APA and MAP), eliminating hardships faced by taxpayers.

At the same time, the clarity in respect of the period from when the interest shall be chargeable in case of failure to repatriate funds within prescribed time limits has now been appropriately aligned with the time limits for repatriation.

Filing of Form 3CEAB, i.e., the intimation of designated entity in case of multiple constituents in India is not mandatory but optional

In case of multinational groups who have multiple constituent entities operating in India, the group has an option to designate one constituent entity operating in India to undertake Master File compliances in India for the group in Form 3CEAA. The said intimation has to be e-filed in Form No. 3CEAB with the Income tax authorities by 31 October 2019. However, a group may choose not to designate one particular entity to undertake Master File compliances in India, and instead have all the constituent entities operating in India file Form 3CEAA separately.

While the above may not be sensible from a compliance burden perspective, this may help an MNE group in case the group has missed the deadline of filing the Intimation of designated entity by 31 October 2019. In such situation, all the constituent entities in India need to file Master files in Form 3CEAA separately and that would help ensuring no compliance failure for the group in India.



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Indirect Tax

Committee to look into measures to increase GST revenues

In view of the below par GST collections, the government has formed a committee of officers to suggest measures to increase GST revenue. The committee is expected to look into a wide range of reforms and provide comprehensive suggestions on various aspects of the GST regime such as administration, improving compliance etc.

[Excerpts from the Economic Times]

Clarification regarding duty drawback allowed in cases of short realization of export proceeds due to bank charges deducted by foreign banks

In view of various industry representations, the government has clarified that reduction in exports realization on account of bank charges should not be treated as short-realization and duty drawback should be granted on the FoB value without deducting foreign bank charges.

[Circular No. 33/2019 - Customs dated 19 September 2019]

Restriction on the availment of ITC not appearing in GSTR-2A

The government has introduced a new sub-rule (4) in Rule 36 to provide that ITC in respect of invoices / debit notes not uploaded by suppliers cannot exceed 20% of the eligible ITC pertaining to invoices / debit notes uploaded by the supplier.

This rule can be understood with the following illustrative example –

Particulars	Actual ITC	Eligible ITC as per amendment
Eligible ITC in respect of invoices/debit notes uploaded by the supplier i.e. appearing in GSTR-2A	100	100 [No change]
Eligible ITC in respect of invoices/debit notes not uploaded by the supplier i.e. not appearing in GSTR-2A	200	100*20% = 20; or 200, whichever is lower i.e. 20
Total eligible ITC to be claimed in GSTR-3B		120
Restricted ITC under Rule 36(4)		**200-20 =180**

[Notification No. 49/2019 - Central Tax dated 9 October 2019]

TAX TALK
GLOBAL DEVELOPMENTS

Direct Tax

OECD – Unanimous thinking not required for amending global rules for taxing multinational groups

The global minimum tax proposal under Pillar II does not mandate specific number of countries to arrive on the same page for it to work, hence this approach can be implemented even if few countries have raised objections against it.

The OECD Director, Pascal Saint-Amans opined that any BEPS member country may block consensus on amended international tax framework, thus, legally speaking all member countries have an equal say on this. However, this does not imply that unanimity is required amongst all member countries for the new international tax framework to move forward. To elucidate this, Amans stated that if all the member countries were to be grouped into different constituencies having similar interests in global international tax framework and transfer pricing system and one of the constituencies object this, then it could be difficult for this scheme to move forward. However, if one country of a constituency does not agree with the scheme, the same would still be implemented.

While concluding his thoughts on the global international tax framework, Amans pointed out that while many countries would benefit if unified approach under pillar one is adopted, small exporting countries, such as Ireland, the Netherlands, Luxembourg, and Bermuda, may be significantly affected. If the investment hubs team up with some wealthy countries to oppose this, the plan might be defeated.

Airbnb, the rental giant is under pressure from HMRC, the UK tax authorities over taxes and application of tax law

Like so many other tech giants, Airbnb's tax structure was under increasing pressure from the HMRC. A new international digital tax standard for the largest tech companies was a major point of contention at the G7 summit which took place this year. Airbnb had paid GBP449,802 in corporation tax in 2018, vis-à-vis GBP477,284 in the year 2017 – the same year in which HMRC had begun questioning the company. The rental giant channels the majority of its profits through Ireland, although its UK entities take care of operational costs and marketing.

The European Union may introduce 'digital tax' next year

The EU Officials have made it very clear that the EU shall introduce "digital tax" by next year if the global arrangement for taxing tech giants does not see the light of day. To put things in perspective, until now the efforts to overhaul corporate taxation to reflect the profits made by tech giants in a fair and just manner have failed to produce desired results. This is mainly due to the fact that all the countries have differential international tax regimes. Further, the EU Officials who are supposed to take over office later this year, added that they will make an attempt to prevent individual EU governments from the ability to veto tax related decisions – currently appears to be an obstacle.

Transfer Pricing

Qatar: Additional Country by Country Reporting requirements introduced by the General Tax Authority of Qatar

On 9 September 2018, Qatar published Decision No. 21 of 2018 by the Ministry of Finance in its Official Gazette which outlined the CbCR requirements for entities that are registered under the State system.

Further, recently the GTA issued a circular providing additional updates and clarifications for CbC reporting obligations.

- A Qatar tax resident entity is required to file a CbC report or notification if it is a member of a multinational group having at least QAR 3 billion (approximately EUR 700 million or USD 824 million) consolidated group revenue in the preceding financial year.
- Any constituent entity resident in Qatar for tax purposes where the ultimate parent entity is resident outside Qatar (i.e. non Qatari ultimate parent) is not required to file CbC reports in Qatar until further notice, and is neither required to submit a CbC notification about the identity of the reporting entity or its place of residence.
- Further, it also provides updates on the content of CbCR, submission method, and penalty which are as follows:
  - **CbCR Content:** The CbCR should be submitted using the XML schema format as per the guidance provided by the OECD. Also, the Notification should be submitted using the form which was attached to Circular 6/2018, issued last year.
  - **Submission Mode:** The CbCR should be submitted using the XML schema format as per the guidance provided by the OECD. Also, the General Tax Authority will issue an announcement that will include the electronic link for submission of the report.
  - **Penalty:** In case there is any non-compliance of filing of CbC notification or CbC report, a penalty would be imposed as per Article 24(8) of the Income Tax Law (which may extend upto QR 5,00,000).

The notification and CbCR filing requirements are effective for the financial years beginning on or after 1 January 2018. The CbCR notification and the CbCR should be submitted within 12 months as of the last day of the reporting financial period. Thus, for the financial year ending 31 December 2018, the due date will be 31 December 2019.

Argentina: The Argentine tax authorities (AFIP) issues draft resolution on transfer pricing compliance procedures for public comments

On 2 October 2019, AFIP announced a public consultation on proposed guidance that includes significant changes in the transfer pricing requirements that local taxpayers comply with. This would replace the existing transfer pricing rules in General Resolution 1122/2017. The proposed guidelines provided various draft resolutions in relation to applicability, compliance, and guidance.

While the present deadline extension would be maintained up to December 2019 for taxpayers having fiscal year-ends during the period from December 2018 to May 2019, the future deadlines for the submission of the transfer pricing documentation, including the transfer pricing report, the disclosure form F2668 and the master file, is six months after the end of the financial year (i.e. June 2020 for fiscal years ending December 2019).

Spain: Spanish National Appellate Court rules on use of multiple year data and inter quartile range

The Spanish High Court ("Audiencia Nacional") no 1072/2019, in the case of IKEA distribution services (a wholesale distribution company engaged in selling products to related party retail companies) has pronounced its judgement on two relevant aspects in the practical application of the Transactional Net Margin Method (TNMM):

- The use of multi-year averages in both the comparable entities and the tested party; and
- The most suitable point in the interquartile range at which to make an adjustment, if any.

Regarding the first area of concern, the selection of a multiple year analysis, the court concluded that while the market interquartile range can be calculated on a multiple year basis, the taxpayer must compare the former to its financial position within the individual year subject to adjustment on a year-by-year basis. Further, with regards to the issue of selection of a point in the range, the court of Appeal (in line with the OECD guidelines) determined that where the range comprises results of relatively equal and high reliability, any point in the range can satisfy the arm's length principle, whereas, if comparability defects remain, the use of measures of central tendency can be more appropriate. In the above case, the court confirmed the lower court's observation against the tax authorities that a difference in economy of sales volume can standalone not be considered sufficient reason for defect in comparability, hence rejecting the reports provided by tax authorities for their contention on the same.

Accordingly, since there were no comparability defects in the company's sample, the transfer pricing adjustment if any, should be on the basis of lower side of the interquartile range i.e. in the above case 2.1% (Inter quartile range being 2.1% -7.6% with a median of 4.1%) and not towards the median, i.e., 4.1%.

Greece: Requirement of online submission of Country by Country Report notification and update on due date of filing of such notifications

The Greek Independent Public Revenue Authority (AADE), amending decision POL.1184/2017 "Procedures for the submission of the Country by Country Reporting by Multinational Enterprises in Greece," Country-by-Country Reporting (CbCR) Notifications must be made online via the AADE website starting 15 October 2019 instead of submitting notifications via email. The deadline for submitting the CbC report is 12 months after the closing date of the fiscal year to which the CbC report refers. Accordingly, for the tax year ending on 31 October 2018, legal entities subject to CbCR should submit the CbC report for tax year 2018, no later than 31 October 2019.

In case of non-filing of the required CbC report, a penalty of EUR 20,000 will be imposed, while in the case of a late or inaccurate submission, a penalty of EUR 10,000 will be imposed. Further, the Greek tax resident entities forming part of an MNE group (i.e., Ultimate Parent Entity, Surrogate Parent Entity or Constituent Entity), which are subject to CbCR requirements, must notify the AADE of the identity and tax residence of the Reporting Entity no later than the last day of the reporting fiscal year (i.e. for a reporting fiscal year ending on 31 October 2019, the notification for this fiscal year is required to be filed by 31 October 2019).

Indirect Tax

Turkey proposes Digital Services Tax

The Turkish government has proposed a law which intends to implement a 7.5% digital services tax. The law would cover the following services within its ambit:

- Online advertising services;
- Sale of audio, video or any digital content through digital environment;
- Services for provision and operation of digital media allowing the users to interact with each other;
- Intermediary services performed in the digital environment in relation to aforementioned services.

Compliance Calendar

7 November 2019

- Payment of TDS and TCS deducted/collected in October 2019

10 November 2019

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

11 November 2019

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

13 November 2019

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

15 November 2019

- Issuance of TDS certificates (Form 16A) for TDS deducted for the period July to September 2019

20 November 2019

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

30 November 2019

- Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IA for the month of August 2019
- Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IB for the month of August 2019
- Filing of tax audit report and tax return for the financial year 2018-19, in cases where transfer pricing provisions are applicable for the month of August 2019
- Filing of annual information with the DSIR for approved R&D facilities, for cases where transfer pricing provisions are applicable
- E-filing of Accountant's report in Form No. 3CEB for a taxpayer in respect of international transactions for FY 18-19.*
- E-Filing of Master File in Form No. 3CEAA by a designated constituent entity operating in India** #
- E-Filing of Country-By-Country Report in Form No. 3CEAD in case of International group whose accounting year ends on 30 November 2018.#
- Annual compliance report in Form No. Form 3CEF in case of a taxpayer who has entered into an Advance pricing agreement (APA) and who has filed its Return of Income on 31 October 2019
- Exercise option of safe harbour rules by furnishing the Form No. 3CEFA / B.
- GSTR-7 for the month of October 2019 to be filed by taxpayers required to deduct tax at source (TDS)
- GSTR-9 for the period July 2017 to March 2018 to be filed by the regular taxpayers (voluntary if aggregate turnover is less than INR 20 million)
- GSTR-9A for the period July 2017 to March 2018 to be filed by the persons registered under composition scheme
- GSTR-9C for the period July 2017 to March 2018 to be filed by taxpayers with an aggregate turnover of more than INR 20 million.

***** In case of Foreign entities who have earned tax-deductible income in India, they would also need to file a Form 3CEB in India by the same date. Further, TP documentation according to Rule 10D of the Income Tax Rules, 1962 is required to be maintained on a contemporaneous basis in support of the Form No. 3CEB.

****** Part B of the master file is only to be filed in case the consolidated group turnover of the group exceeds INR 500 crores and the amount of all the international transactions of the taxpayer exceeds INR 50 crores or the value of international transactions in relation to intangibles exceeds INR 10 crores.

The foreign entities who are undertaking tax and transfer pricing compliances in India are also advised to file Form 3CEAA in India by 30 November 2019 (irrespective of whether a designated entity is chosen in India or not in Form 3CEAB).

SEZs remain attractive even as time ticks down for sunset clause

"Considering that March 2020 sunset clause has a meagre impact on the direct tax benefits and substantial benefits continue to remain available from the indirect tax perspective, setting up an SEZ still remains attractive." – **Maulik Doshi**

The Hindu Business Line - October 20, 2019

Read more at https://bit.ly/2qxJw9l

Govt Springs Up Retrospective Surprise

Bloomberg Quint (TV Interview) – **Jigar Doshi**

https://bit.ly/2VAZnPL

Jigar Doshi recognized as a Young Accountant of the year by The Accountant and International Accounting Bulletin - 8th Digital Accountancy Forum and Awards 2019.

Recent Developments under GST Regime

Assocham

Chennai, 29 November 2019

Bhadresh Vyas

Visit https://www.assocham.org/eventdetail.php?id=1779 for more details

Recent Developments under GST Regime

Assocham

Bengaluru, 6 December 2019

Jigar Doshi / Rebecca Pinto

Visit https://www.assocham.org/eventdetail.php?id=1779for more details

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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