# Tax Street

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

October 2020

WORLD TAX RECOMMENDED FIRM 2020

WORLD TAX RECOMMENDED FIRM 2021

# Tax Street



Stay Safe. Stay Healthy.

# 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 2020.

- The **'Focus Point'** covers an in-depth analysis of how Dividend distribution tax rate cannot exceed tax treaty rate.
- 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

# Dividend distribution tax rate cannot exceed tax treaty rate - The new buzz in the town

A dividend is a classic mode of repatriation of profits of the company to its shareholders and remunerating them. Many multinational groups, amongst other factors, also consider the country's dividend taxation policy before setting up a company in a particular jurisdiction (especially holding company structures).

Ideally, the dividend is the income of the shareholder, and hence the primary liability of the tax on dividend is that of the shareholder. However, India had shifted the burden of dividend tax onto the companies by charging Dividend Distribution Tax (DDT) on amounts distributed as dividends and exempting the dividend income in the hands of shareholders way back in 1997. Later on, in 2016, India also introduced tax at 10% on individual shareholders earning dividend income of more than INR 1 million.

DDT was to be paid by the company at an effective rate of 20.56%[1]. However, this was unfavorable for foreign investors, mainly on account of the following:

i. DDT paid by the Indian company was not allowed as a tax credit in the home country resulted in double taxation;

ii. The benefit of the beneficial dividend tax rate provided under the tax treaties was disregarded.

Recently, w.e.f. 1 April 2020, we have reverted to the classical regime of taxing dividends in the hands of shareholders, and it is an interesting coincidence that the first major and direct ruling on DDT is out just after this reversal.

There were always some intermittent litigations at different levels but it was always perceived that a tax treaty could not reduce DDT, and thus, no treaty benefit was to be given for dividends paid to foreign companies/non-residents. However, recently the Delhi ITAT in the case of Giesecke & Devrient [India] Pvt Ltd. pronounced a path-breaking judgment favoring the taxpayer that beneficial rate of tax on dividend under DTAA shall prevail over the DDT rate under the domestic law. The ruling follows DDT's journey to the Finance Act, 2020, and concludes that it was a tax on shareholders, the levy of which was shifted upon dividend-paying companies for administrative convenience. The other key observations of the tax tribunal were as follows:

- The tribunal emphasized on the fact that economically the burden of DDT falls on the shareholders rather than on the company, as the amount of distributed profits in the hands of shareholders is reduced as DDT is levied.
- In the Delhi Tribunal's opinion, it is absurd to hold that the liability of the DDT falls on the company, and thus rates of dividend tax set out in the tax treaties shall not be applicable. In fact, in light of the generally accepted principles relating to the interpretation of treaties with the object of eliminating double taxation, the mere responsibility of collecting tax on the company does not bar the application of tax treaties to DDT.
- Lastly, it was held that the government, under the disguise of DDT, has made an attempt to unilaterally amend the dividend taxation. Such a unilateral action is a disregard to the general rule under Article 39 of The Vienna Convention on the law of treaties, 1969 (VCLT) regarding the amendment of treaties, which provides that a treaty may be amended only by an agreement between the parties.

1. During Financial Year 2019-20

- Thus, no amendment, either retrospective or prospective that can be read in a manner so as to extend in operation to the terms of an existing international treaty unless it has been renegotiated between the contracting states.

There was always buzz in the industry about the government's action on imposing an additional tax on dividends under the garb of tax on distributed income of the company. The Delhi Tribunal's decision would pave the way for many other additional claims from taxpayers across the industry. By accepting the applicability of the tax treaty rates to DDT, it has opened a floodgate of claims, which many companies will now want to exploit. This move will potential increase financial implications for the government - perhaps more substantial than any other tax dispute India has witnessed.

Companies seeking to claim a refund of additional taxes collected on account of DDT may have to evaluate all legal and procedural options primarily amongst them are:

- Additional claim in all earlier years where the matter is pending under litigation before any forum with tax/appellate authorities;
- Make an additional claim in the tax assessment proceedings;
- Revision of tax return for the financial year 2018-2019 (time available up to 30 November 2020)
- Making a claim for the financial year 2019-2020 in the tax return to be file by 31 January 2021
- Application to tax authorities for revision of order (Section 264 of the Income Tax Act, 1961)
- Application to Authority for Advance Ruling

Each of these options would have to be evaluated on a case to case to basis by the companies.

While this decision would be welcomed by the taxpayers, it is expected that tax authorities would fight tooth and nail on this matter to the highest level. The taxpayers adopting this position while relying on the above decision may also have to consider the following aspects:

- The judgment clearly highlights that it would be unfair to read the unilateral amendment into the treaties signed before the introduction of the DDT regime to restrict the advantage of beneficial provisions. This also poses a question on the availability of benefits in respect of the Treaty signed post the introduction of DDT.
- Refund by virtue of lower rate under the tax treaty can be claimed by the company only when the shareholder receiving the dividend is a tax resident of the respective country, and it is Beneficial Owner (BO) of the dividend. The company would have to ensure that relevant documentation like Tax Residency Certificate (TRC), BO declaration, etc. is available.
- Even though the decision favors the taxpayers, several important aspects have been left untouched by the tribunal. The companies should consider the following arguments while deciding on the tax position it wants to adopt:

  i. It would be interesting to note that the India-Hungary tax treaty is a single salutary treaty that was amended through a protocol in 2003 (post re-introduction of DDT) to provide that even where a resident company pays tax on dividend on distributed profits, the same would be considered as tax in the hands of the shareholder and hence the rate cannot exceed treaty rate. To some extent, the benefit of India-Hungary tax treaties can be extended to countries having an MFN clause like the Netherlands, France, Belgium, Spain, etc.
  For the other tax treaties, this can be interpreted adversely since no specific amendment was made in other treaties after DDT, the treaty rate is not applicable. Nearly all the tax treaties provide that the agreement shall apply to any identical or substantially similar taxes which are imposed after the date of signature in addition to, or in place of, the existing taxes.

  ii. In the majority of the tax treaties, the dividend article specifically provides that ***"This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid."*** In cases where DDT is deemed as a tax on distributed profits, the beneficial rate mentioned in the tax treaty for dividend taxation may not be applicable based on the language of the tax treaty itself.

  iii. Treaties with certain countries (like India-Cyprus) also clarify that the dividend is exempt in India and thus a lower tax rate is not relevant. This also indicates that the DDT tax does not impact shareholders. It may be difficult to claim an exemption in case of such treaties.

In our view, it would be worthwhile for companies to carry out a cost-benefit analysis before lodging a claim with the tax authorities and also evaluate the litigation risks considering the above aspects. While the taxpayers are rejoicing this decision, the tax authorities would have begun their preparation to take this to the next level. It is expected to be an interesting battle until the authorities reach a final decision.

# From the Judiciary

## Direct Tax

### Whether the amounts received by a non-resident company for granting distribution rights to an Indian Company can be brought to tax as royalty or not?

Turner Broadcasting System Asia Pacific Inc. vs DDIT
ITA Nos. 1343/Del/2014, 631/Del/2015, 4087/Del/2016, 2610/Del/2017

***Background***

The taxpayer is a tax resident of the USA. During the year, it has derived advertisement and distribution revenue from the grant of exclusive rights to Turner International India Private Limited (TIIPL) to sell advertisements on the products such as Cartoon Network, POGO TV, etc. This distribution agreement allowed the TIIPL to distribute the products to various cable operators and ultimately to several consumers in India.

The distribution revenue collected by the TIIPL was to be shared between the appellant and TIIPL. For the Assessment Years (AYs) 2001-02 to 2004-05, the competent authorities of India and the USA reached an agreement and held that 10% of the advertising and subscription revenue received from Indian sources during the relevant year(s) was deemed to be the net profit chargeable to tax in India.

Subsequently, for AY 2007-08 and 2008-09, the taxpayer filed a return on similar lines, and the same was accepted by the department.

However, for the AYs 2009-10 to 2013-14, the Assessing Officer (AO) alleged that that subscription/distribution fees received by assessee relates to 'content' protected by the Copyright Act in the form of 'Copyright,' 'Broadcast Right' and/or 'Rebroadcast Rights/Broadcast Reproduction Rights' and therefore, such subscription fees are in the nature of royalty.

The draft orders were confirmed by the Dispute Resolution Panel (DRP), and in pursuant thereof, final assessment orders were passed by the AO. Aggrieved by the final assessment order, the taxpayer filed an appeal with the Delhi tribunal.

***Held***

Ruling in the favor of the taxpayer, the tribunal held that in the earlier years, the department has considered the advertisement revenue to be the business income following the MAP order. When this fundamental aspect is permeating through all the impugned AYs, then as a rule of consistency, the same position should not be altered or should be allowed to be changed in the absence of any material change in the facts.

However, the tribunal has also independently evaluated the merits of the claim of the department.

Considering the material on record, the tribunal held that the taxpayer company has only granted commercial rights in the nature of 'broadcast reproduction right' to the TIIPL. The Term 'Copyright' is defined in Section 14, and 'broadcast reproduction right' has been defined in Section 37, and both are two distinctive and separate rights. 'Broadcast reproduction right' is not reckoned as copyright. Therefore, it cannot be held that revenue derived by the assessee for distribution of products is taxable as 'royalty' albeit it is a business income of the assessee.

Reliance was placed on MSM Satellite (Singapore) Pte Limited v. Dy DIT [ITA No. 2523/Mum/2010]

**Our Comments**

There are various judicial precedents available on a similar footing distinguishing the broadcasting rights from copyright. This decision of the Delhi tribunal is certainly a welcome one.

### Whether explanation 6 and 7 to section 9(1)(i) has to be given a retrospective effect or prospective effect?

Augustus Capital PTE Ltd vs DCIT
ITA No 8084/Del/2018

***Background***

The taxpayer is in the business of incubation of companies, i.e., providing new businesses with necessary financial support and technical services. During the course of its business, the taxpayer made investments in Accelyst Pte Ltd, a tax resident of Singapore. In the year under consideration, the taxpayer sold its entire holding to an Indian company.

In light of the amended provisions of section 9(1)(i) of the Act, read with Explanations 5, 6, and 7, the taxpayer was of the firm belief that the transaction involving the sale of shares of a foreign company, which held an investment in India, was not taxable. Explanation 7 carves out' exemption' from the applicability of Explanation 5 to small investors holding no right of management or control of such company/entity and holding less than 5% of the total voting power, share capital, the interest of the company/ entity that directly or indirectly owns the assets situated in India.

However, the AO disregarded the submissions of the taxpayer on the ground that operation of Explanation 7 to section 9(1)(i) of the Act is prospective since it has been inserted by the Finance Act, 2015 and made effective from 1 April 2016 and, therefore, not applicable in the year under consideration.

The DRP confirmed the draft assessment order of the AO. Aggrieved by this, the assessee appealed before the Delhi tribunal.

***Held***

While deciding on the matter, the Delhi tribunal took into consideration the judgment of the Hon'ble Delhi High Court (HC) pronounced before the insertion of explanation 6 and 7. The judgment held that expression 'substantially' occurring in Explanation 5 would necessarily have to be read as synonymous to 'principally', 'mainly' or at least' majority.' Thus, the HC was of the view that gains arising from the sale of a share of a company incorporated overseas can be taxed in India only if it derives more than 50% of its value from the assets situated in India.

Pursuant to the decision, explanation 6 and 7 to section 9(1)(i) were incorporated in the Act. Further, the tribunal highlighted that both Explanations 6 and 7 start with 'For the purposes of this clause,' and accordingly, they have to be read with Explanation 5 to understand the provisions of Section 9(1)(i) of the Act. Since Explanation 5 has been given retrospective effect and Explanations 6 and 7 have been inserted in furtherance of the object of insertion of Explanation 5, these two explanations cannot be read in isolation but have to be tagged along with Explanation 5 so that both the Explanations have to be given a retrospective effect.

Basis the aforementioned findings, the tribunal held the ruling in favor of the taxpayer.

**Our Comments**

The decision lays down the legal interpretation that any explanation introduced in furtherance of any existing provision has to be tagged along with the existing provision even if it is introduced at the later stage. Reading the provisions in isolation would make the law absurd.

## Transfer Pricing

### Whether mark-up should be charged on 'pass-through costs'?

Vedanta Ltd.
ITA No. 12/DEL/2020 AY 2014-15

***Facts***

The taxpayer had entered into various international transactions, including 'recovery of costs for SAP maintenance and other expenses.' The taxpayer had stated that it had entered into a service agreement with a service provider for maintenance of the SAP accounting system that was used by the group entities as well. However, the TPO viewed the arrangement as a provision of IT-enabled services by the taxpayer on which mark-up should have been levied, which was upheld by the DRP as well.

The taxpayer had explained that the arrangement was undertaken for commercial expediency and not intended for any expectation of a return and that it had not provided any service/ value addition on which mark-up should be warranted. The SAP maintenance charges paid by the taxpayer were allocated among the group entities using the respective licenses on a cost-to-cost basis, depending on the number of licenses taken by each AE. Accordingly, the ITAT has recognized that the taxpayer was merely a facilitator, and these reimbursements are 'pass-through costs,' which cannot be compared with ITES. Placing reliance on the OECD guidelines and UN TP Manual and back to back supporting submitted; the ITAT deleted the adjustment.

**Our Comments**

Arrangements are to be seen in the light of the supporting documentation and value chain to assess if there exists an element of services or value-add that warrants a mark-up.

Pass-through costs incurred for commercial expediency are reimbursement of primary third party expenses that do not warrant any mark-up.

### Whether management services can be treated as shareholder services?

Danisco India Pvt. Ltd.
ITA No. 2846 /DEL/2016 AY 2009-10

***Facts***

The taxpayer is engaged in the manufacturing and marketing of food ingredients and entered into various transactions with its AE, including availing intra-group services. The taxpayer stated that in order to avail the services of internal skills and experience, they had a centralized entity with identified employees that provided services to other AEs. Sample documentary evidence was also filed by the taxpayer and adopted TNMM as the most appropriate method on an aggregate basis.

The TPO, however, opined that the taxpayer had failed to provide service wise details and substantiate that services were actually rendered and benefit actually derived via appropriate documentary evidence. The TPO felt that in comparable circumstances, the independent enterprise would not have paid any third party without ascertaining a cost base and corroborating facts. Anyone not being able to demonstrate these facets can only be assumed not to have received these services. Further, TPO also observed that the taxpayer had availed corporate tax advice and legal service, indicating duplication of work as it did not specify how these services were different than the related party services availed. Accordingly, the TPO adopted the CUP method and determined the ALP of the transaction at NIL, and the same was also upheld by CIT(A), stating that it was a shareholder activity.

The taxpayer pointed out that there is no merit in shifting the profits to Denmark as the rates of taxation in Denmark were higher. He stressed that extensive details of the services received were filed, giving references to the paper book filed with the number of people involved, cost allocation, and nature into 'administrative services,' sales support service, technical services & support, and benefits thereon, etc. He was of the view that where expenses were intrinsically part of the trading and manufacturing segment, the same has to be aggregated with other international transactions placing reliance on the Delhi High Court Case of Sony Ericson Mobile Communication India Pvt. Ltd.

The ITAT, based on the documents brought on record, recognized that services were highly technical in nature and were actually rendered by the AE and used by the taxpayer. It is not the jurisdiction of the TPO to question the business decision as the same was outside the scope of transfer pricing provision. Further, relying on EKL Appliances Ltd., the ITAT held that benchmarking of cost to cost reimbursement of the services was not within the TPO's jurisdiction while computing the ALP of international transactions.

**Our Comments**

In the context of availing intra-group services, taxpayers should maintain:

- Service-wise details;
- Evidence to showcase that services were availed;
- Evidence to showcase benefits and usage by the taxpayer.

It is not the jurisdiction of the TPO to question the business decision as the same was outside the scope of transfer pricing provision.

## Indirect Tax

### Whether the assessee is entitled to utilize and set off the accumulated unutilized amount of Education Cess (EC), Secondary and Higher Education Cess (SHEC), and Krishi Kalyan Cess (KKC) against the output GST liability?

Assistant Commissioner of CGST and Central Excise versus Sutherland Global Services Private Limited [2020 (10) TMI 804 – Madras HC]

***Facts***

- Earlier, a Single Judge Bench of the Madras HC had decided the matter in favor of the assessee, holding that the cesses should be allowed to be transitioned and utilized under the GST regime;
- The government made retrospective amendments in Section 140 of the CGST Act to clarify that cesses are not to be considered as 'eligible duties' for carrying forward to the GST regime.

Now, the Division Bench has set aside the decision of the Single Judge Bench and ruled the appeal in favor of the Revenue and observed as follows:

- Even though the imposition and collection of Cess may be loosely termed as Tax or Duty, the collection of Cess remains distinct, in as much as Cess amount collected by the government is liable to be spent for a dedicated purpose;
- Since the cross-utilization of EC and SHEC was not allowed against Excise Duty and other duties under erstwhile laws, once the levy itself ceased and dropped in 2015, the question of their carry forward and utilization becomes only academic;
- It is clear that CENVAT credit or Input Tax Credit under the GST Regime is a concession and a facility and not a vested right;
- The three types of Cesses involved before us were not subsumed in the new GST laws. Therefore, the question of transitioning them into the GST regime and utilizing them against output GST liability cannot arise.

**Our Comments**

The judgment is a big blow to taxpayers who had availed the CENVAT credit of cesses under the transitional provisions under the GST law. However, though the judgment pronounced by the Division Bench is detailed and well-reasoned, the issues of interpretation of the provisions of the GST law and validity of the retrospective amendment remains subjective. Therefore, it is highly likely that the matter will attain finality only once it is ruled upon by the Supreme Court.

Also, the judgment is restricted to the availment and utilization of cesses under the GST regime. However, the question of whether taxpayers can alternatively claim a refund of the unutilized balance of such cesses remains unanswered.

### Whether a liaison office is required to obtain registration under GST?

Fraunhofer-Gesellschaft Zur Forderung Der Angewwandten Forschung – Authority for Advance Ruling (AAR), Karnataka [2020 (10) TMI 809]

***Facts***

- The applicant has a Liaison Office(LO), which is acting as an extended arm of the Head Office(HO) to carry out activities as permitted by the Reserve Bank of India (RBI);
- As per the permission granted by RBI, the liaison office will not generate income in India and will not engage in any trade/commercial activity;
- The liaison office does not account for any form of income, with the only source of income being remittance from the Head office, which is purely to meet the working of the liaison office.

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

- The liaison activity of the applicant falls within the ambit of 'business' as defined under Section 2(17)(b) of the CGST Act;
- The applicant themselves have admitted that they are involved in promoting the business of the HO in India, and they act on behalf of the HO for its customers in India. Thus the applicant (LO) and their head office (HO) are deemed to be related persons;
- The applicant's head office is outside India, and hence the applicant's head office has an establishment outside India. Thus the applicant (LO) and their head office (HO) shall be treated as establishments of distinct persons in terms of Section 8, and the activities performed by them can't be called export of services;
- Thus, the applicant is required to obtain GST registration in India and is liable to pay GST as its activities do not qualify as 'export of services.'

**Our Comments**

Previously, AAR Tamil Nadu in Takko Holding Gmbh and AAR Rajasthan in Habufa Meubelen B.V. had ruled that a Liaison Office does not undertake any 'business' and therefore is not required to obtain GST registration. In this backdrop, the present ruling comes as a huge shock to the industry and once again brings to the fore the need for a Centralized AAR to provide finality in case of such contrary rulings.

# Tax Talk

Indian Developments

## Direct Tax

### CBDT lays out Guidelines for Compulsory Selection of Returns for Complete Scrutiny under Faceless Assessment for FY 2020-21

[Excerpts from The Economic Times, 18 September 2020]

The government has made its intention clear and emphasized its vision for scrutinizing various matters through the recently introduced faceless assessment scheme. In order to have control over the selection of cases under the scheme, the CBDT has issued broad parameters for compulsory selection of returns for complete scrutiny under faceless assessment for FY 2020-21. The parameters are:

- Survey, search and seizure cases;
- Cases where a notice under Section 148 has been issued;
- Cases relating to revocation of registration or approval by authorities under Sections 12A/10(23C);
- Cases where notices under section 142(1) have been issued calling for a return.

The above parameters are captured by way of CBDT Notification F. No. 225/126/2020/ITA-II dated 17 September 2020.

It instructed that the exercise of a selection of cases for compulsory scrutiny on the basis of the guidelines shall be completed by 30 September 2020

### Piyush Goyal rolls out the red carpet for American investors, woos USA businesses with low corporate tax reforms

[Excerpts from Financial Express, 8 October 2020]

While addressing the India Chamber of Commerce USA's Summit on global financial and investment leadership, Piyush Goyal (Commerce and industry minister) called upon American businesses to look at India as their next investment destination. He mentioned that the bilateral trade target of USD 500 billion looks eminently doable in the next five years. The bilateral trade between India and the USA has grown from USD 126 billion in 2017 to USD 145 billion in 2019. He also added that India is moving out of the shackles of the past into a more open and liberal foreign investment destination with added benefits such as low corporate tax rates. The Ministry is working on building a genuine single-window system, which makes it easy for companies and businesses to work in India.

### Indian companies with foreign units fear domestic tax implications

[Excerpts from The Economic Times, 29 September 2020]

The pandemic and lockdown scenario has restricted the movement of many directors/senior executives employed with the foreign subsidiaries of Indian companies. Such people who are stranded in India are worried that they may have domestic tax implications under the Place of Effective Management (POEM) rule. Under the POEM regulations, foreign subsidiaries could be treated as domestic entities for tax purposes if they are controlled and managed from India. Considering that the senior executives may be working from India due to travel restrictions/ safety measures, it may result in a situation where tax officials could construe that the decisions concerning the companies were made from India. While the Organization for Economic Co-operation and Development (OECD) categorically states that this exceptional period should not be considered while determining POEM, the CBDT is yet to issue a notification to address the issue. The tax applicable on the global income of such companies could be as high as 42%.

### Government launches tax-exempt LTC cash voucher scheme to boost consumer spending

[Excerpts from The Economic Times, 13 October 2020]

Since people may not be able to travel and utilize their leave travel allowance (LTA) amidst the pandemic, the government announced a relief scheme offering tax-exempt payment of leave travel concession/allowance to the central government employees without the need for them to travel. This is a one-time scheme, and payment will be only in lieu of one LTC during the block of four years 2018-2021. Further, clarifications were issued by way of an office memorandum dated 20 October 2020.

- Buy goods and services worth three times the tax-exempt amount paid before 31 March 2021;
- Spend the money on buying items attracting GST of 12% or more from GST registered vendor and purchase must be in digital mode;
- GST invoice will have to be produced;
- Scheme open to the private sector wherever the employers currently offer LTC. Scheme also open to PSUs, PSBs and state government employees;
- Payment of LTC fare in 3 flat-rate slabs depending on class of entitlement of government employees.

While the scheme has been announced for central government employees, private companies could evaluate their Leave Travel guidelines and concessions and amend them as per the stipulations of the LTC Cash Voucher scheme in order to roll out the benefit to their employees too

## Transfer Pricing

### Amendments in Form No. 3CEB

The Central Board of Direct Taxes (CBDT) vide notification No. 82/2020 on 1 October 2020 has notified amendments in Part-C of the Form No. 3CEB (that deals with Specified Domestic Transactions disclosures).

- **Omitting Clause 22:** The Finance Act, 2012 had introduced section 92BA to provide for a mechanism to determine the arm's length nature in cases of 'Specified Domestic Transactions (SDT),' that covered, amongst others, the payments made to related parties stated under section 40A(2)(b) of the Act as well. However, sub-clause (1) of section 92BA, which referred to the payments made to related parties covered under section 40A(2)(b), was omitted by the Finance Act, 2017, w.e.f. 1 April 2017. Despite the removal from the legislative intent, practically the annual transfer pricing compliance in Form No. 3CEB still contained the clause (in No. 22) related to disclosure of such transactions. Accordingly, the amendment has sought to omit clause 22 formally.
- **Insertion of New Clause 24:** The Taxation Laws (Amendment) Ordinance, 2019, passed on 20 September 2019, had introduced a low effective corporate tax rate of 17.16% for new manufacturing companies vide new section 115BAB. Pursuant to this new section, in the event taxpayers entered into transactions with such new domestic companies that constitute a SDT, it would be relevant to assess if 'the course of business is so arranged that the business transacted produces more than the ordinary profits which might be expected to arise in such business.' The profits and gains of such business would then be expected to be determined having regard to arm's length price as defined in section 92F(ii).

**Accordingly, the amendment has sought to include new disclosures of such SDT's with persons referred to in sub-section (6) of section 115BAB, which has resulted in more than ordinary profits expected to arise in such business.**

### CBDT notifies tolerance range under transfer pricing rules for AY 2020-21

The Central Board of Direct Taxes (CBDT) vide notification No. 83/2020 on 19 October 2020 has notified the tolerance range of 1% for wholesale trading and 3% for all other transactions undertaken during the financial year ending 31 March 2020.

Further, it has defined the transaction considered as 'wholesale trading' would be those:

- Where the purchase cost of finished goods is at least 80% of the total cost of such trades;
- The average monthly closing inventory of such goods must be 10% or less of sales on such trading activities.

### Extension on e-filing of Income Tax returns and Audit reports

Considering the hassles and hardships faced by the taxpayers, the government has again extended the due dates for filing return of income, including filing the tax audit report and transfer pricing report. The Central Board of Direct Taxes (CBDT) vide Press Release 24 October 2020 r.w. notification No. 88/2020 on 29 October 2020 has extended the deadline for filing Income Tax returns and various audit reports, including Form No. 3CEB. The due dates for annual transfer pricing compliances for the FY 2019-20 are as follows:

| Forms | Erstwhile Dates | Revised Dates |
|---|---|---|
| Form No 3CEB | 31 October 2020 | 31 December 2020 |
| Master File Form No. 3CEAB | 31 October 2020 | 31 December 2020 |
| Master File Form No. 3CEAA | 30 November 2020 | 31 January 2021 |

This is a welcome move, which would provide much-needed relief to the taxpayers who are mostly working with limited resources amidst these challenging times.

## Indirect Tax

### The due date of GSTR-9 and GSTR-9C for FY 2018-19 extended further

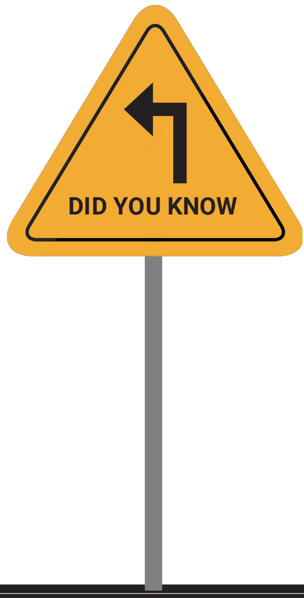
[Notification No. 80/2020-Central Tax dated 28 October 2020]

In view of the severe disruption in business operations caused by the COVID-19 pandemic, the government has once again extended the due date for filing of GSTR-9 (annual return) and GSTR-9C (reconciliation statement) for the financial year 2018-19 to 31 December 2020 (earlier 31 October 2020).

### Government to prepare a list of 'risky' businesses

[excerpts from the online edition of Hindustan Times]

The government has formulated a plan using Artificial Intelligence (AI) and Aadhar registration to identify 'risky' businesses that may be involved in the evasion of GST. The government will monitor such businesses closely to identify if any fraudulent activities are carried out. The government will take steps to block GST refunds of such businesses and initiate other legal actions as may be necessary to curb such practices in the future.




Non-resident taxpayers that are required to comply with transfer pricing disclosures in India are required to prepare separate Transfer Pricing documentation and cannot rely on documentation prepared by its Indian counterpart. The Indian Transfer Pricing Regulation does not carve out an exception to applicable non-resident taxpayers, and their documentation requirements remain at par with that of Indian entity despite the fact that TP analysis done by Indian counterpart can be substantially leveraged for the TP compliance of its overseas counterpart. While the documentation done by the Indian subsidiary can be a base for this purpose; however, it cannot be a substitute for maintaining TP document by the non-resident entity, and the absence of such separate documentation could expose non-resident taxpayers to penal consequences.
Click Here for the Tax Alert on a recent Delhi Income-tax Tribunal on the same issue in the case of Convergys Customer Management Group Plc[2]

2. ITA No. 3529/Del/2015 (AY 2006-07) and ITA No. 3530/Del/2015 (AY 2007-08)

# Tax Talk

Global Developments

## Direct Tax

### The UN approach to digital taxation

[Excerpts from The Tax Foundation, 22 October 2020]

The OECD's approach shall be determined by mid-2021, but many countries have been unilaterally adopting digital services taxes and equalization levies. The UN seeks to change tax treaty language with special provisions for digital companies. A special approach to digital businesses is likely to introduce new distortions into an already complex system of cross-border tax rules. The UN Tax Committee will be considering a change to the UN's model tax treaty that could result in more taxing rights to countries where customers of digital platforms are located.

If multiple countries adopt the new language into their bilateral tax treaties, digital companies could end up paying tax on 30% of their profits using the new UN approach. However, it is unlikely that the OECD countries could change their tax treaties to reflect the UN proposal.

### OECD draft seeks GILTI exemption from global minimum tax

Global Intangible Low Taxed Income (GILTI) is a new provision enacted by the US Government as a part of tax reform legislation and made significant changes to the way USA multinationals' foreign profits are taxed. Mechanically, it functioned as a global minimum tax and was introduced as an outbound anti-base erosion provision. GILTI heavily impacts USA residents' foreign business where profit is high, relative to the fixed asset base like Services companies, Procurement and Distribution companies, or Software and Technology companies. The primary purpose of GILTI is to reduce the incentive for USA-based multinational corporations to shift profits out of the USA into low- or zero-tax jurisdictions.

GILTI is a newly-defined category of foreign income and is a tax on earnings that exceed a 10% return on a company's invested foreign assets. It is subject to a worldwide minimum tax of between 10.5% and 13.125% on an annual basis.

With GILTI, USA companies fear having to comply with both the 2017 GILTI law and a global minimum rate under the OECD's plan to rewrite international tax rules. The OECD has asked countries to provide feedback on the draft before the meeting this month.

# Transfer Pricing

## Oman: Introduces rules for Country-by-Country Reporting to assess BEPS risk[3]

As per the Ministerial Decision No. 79/2020, Country by Country Reporting (CbCR) has been introduced in Oman that applies to:

a. Multinational Enterprise (MNE) headquartered or operating in Oman, effective for fiscal years commencing on or after 1 January 2020; and

b. MNE groups having consolidated revenue of at least OMR 300 million in the fiscal year immediately preceding the reporting period reflected in the consolidated financial statements for such preceding year;

The rules define relevant terminologies and require the ultimate parent entity of MNE Groups that are residents in the Sultanate of Oman (for tax purposes) to file a CbCR to the Authority with respect to its Reporting Fiscal Year. The report shall be filed no later than 12 months after the last day of the Reporting Fiscal Year of the MNE Group. Further, the notifications state that the Authority shall use the CbCR for the purpose of assessing high-level transfer pricing risks and other base erosion and profit shifting(BEPS) related risks in the Sultanate of Oman.

It is being announced that the Council of Ministers of Oman has referred two draft laws to the Shura Council related to the VAT regime and amendments to the income tax law that would implement CbCR.

### Our Comments

These measures signify Oman's commitment regarding BEPS standards of the OECD and that the regulators are taking an active role in formulating the policies.

## Zambia: Issues 2021 budget; amends Transfer Pricing documentation requirements

The Zambian Minister of Finance announced the 2021 budget to the National Assembly on 25 September 2020. There were few changes relating to current transfer pricing documentation requirements. Following are the key highlights:

1. Amend regulations for automatic exchange of the relevant CbCR with other tax jurisdictions for entities operating in Zambia that are part of the Multinational Enterprises group. The measure is one of the requirements under the Inclusive Framework on BEPs to which Zambia is a member;

2. Increase the threshold for preparing transfer pricing documentation from K20 million to K50 million for local companies. This is a relief measure for small and medium-sized businesses.

### Our Comments

Exchange of CbCR information between tax jurisdictions will allow transparent income and profit allocation. In recent years, Zambia has aligned its transfer pricing regulations with the OECD for ease and effective tax compliance for its taxpayers.

## United States of America: Internal Revenue Service (IRS) issues audit considerations for IRS agents in relation to Cost Sharing Arrangement (CSA) With Stock Based Compensation[4]

Under the USA cost sharing rules, taxpayers under common control may enter into a CSA, which allows the group to share the costs and risks of developing one or more intangibles in proportion to each entity's share of reasonably anticipated benefits.

The IRS Large Business and International (LB&I) division released a transaction unit named 'Cost Sharing Arrangement With Stock Based Compensation' as part of the evaluation of costs in costs pools chapter. This public issued document would aid the IRS agents in considering the tax impact of CSA between the group entities. The highlights of the document are as follows:

1. To identify whether the group has any stock based compensation plan with CSA in place for intangible development. This can be done with the help of various tax compliance forms filed by the taxpayer;

2. To confirm if entities participating in intangible development have reimbursed intangible owners for its share of reasonably anticipated benefits. This would be considered as an income for the owner entity and should increase the effective tax rate;

3. Considerations for scenario where owner entity claims that participating entities have incurred own costs in respect of their share of intangibles development.

### Our Comments

This document provides taxpayers with an opportunity to develop and maintain a proactive response mechanism in case of audits by IRS agents. The questions mentioned therein can form part of the transfer pricing policy and documentation for ease in facilitating audits. The document lays down various consideration in respect of the above-mentioned assertions providing insights for relevant documents, audit questions, Potential issues, and arguments expected from the IRS agents.

3. https://www.mola.gov.om/eng/legislation/decisions/details.aspx?Id=1534&type=D
4. https://www.irs.gov/pub/irs-utl/int_t_226.pdf

## UAE: Ministry calls for action time on the New Economic Substance Regulations

### Why the UAE introduced ESR

Economic Substance is an economic activity to earn corresponding income/ profit in a particular jurisdiction. The United Arab Emirates (UAE) introduced 'Economic Substance Regulations' (ESR or the Regulation) in April 2019. The Regulation's primary objective is to restrict the operation of shell/ paper companies in UAE who earn significant profit without carrying out any corresponding activity. In other words, covered licensees are required to demonstrate/explain that they are genuinely undertaking a certain economic activity, which resulted in income/ profits in the UAE.

Interestingly, this step of UAE was to honor the commitment as a member of the Organisation of Economic Co-operation and Development's (OECD) Inclusive Framework on Base Erosion and Profit Shifting (BEPS) as well as in response to the European Union's (EU) review of UAE tax framework. This also led to the removal of UAE's name from the EU's blacklist of non-cooperative jurisdiction for tax.

In August 2020, the UAE amended the Regulation retrospectively (to be applicable from 1st financial year commencing on or after 1 January 2019) wherein significant changes were made to the erstwhile Regulations such as a change in governance mechanism, scope and applicability, and also enhanced quantum of administrative penalties.

### Which businesses are covered under the regulation?

Primarily, the UAE licensees (a juridical person on incorporated partnership) who have obtained the trade license (or permits of similar nature) to undertake certain prescribed activities need to evaluate the Regulation's applicability. Relaxation is provided to a natural person, sole proprietorship, trust, foundation, etc. from complying with the Regulation.

Similarly, licensees that are tax resident outside the UAE or wholly owned by UAE residents are exempted.

Coverage of Regulation is very wide to include most of the business activities, explicitly covering the following:

a. Banking business

b. Investment fund management business

c. Headquarters business

d. Holding company business

e. Distribution and Service center business

f. Insurance business

g. Lease-Finance business

h. Shipping business

i. Intellectual property business

### What are the compliance requirements?

Firstly, businesses are required to re-assess the applicability of Regulation owing to the extended coverage enunciated in the amended Regulation. Consequently, businesses need to undertake two-fold compliances:

a. Furnish notification in the prescribed form, indicating whether the regulation is applicable and other factual details. The New ESR law mandates the filing of revised notification, regardless of the fact whether the notification is already filed.

b. If it is determined the licensee is engaged in the relevant activity and has also earned income from such Relevant Activity during the reportable period, then the licensee is required to file ESR annual return. For the accounting year ended on 31 December 2019, the due date to file the annual return is 31 December 2020.

The template form for ESR annual return was published just last week. It appears to be very comprehensive with the kind of information that has been asked in the return. These tests are quite subjective in nature, and the licensee may need to consider their professional judgment to demonstrate the reasonableness of this aspect. Again, one business may vary from another in terms of business/operational model, size, functions, etc. Thus, it is crucial to adopt a pragmatic approach while assessing the substance test.

### Penalties for non-compliance

Authorities have prescribed rigorous penalties in the range from AED 20,000 to AED 400,000 for non-compliance of Regulation. At the same time, non-compliance may entail cancellation or suspension of license in UAE.

Additionally, the Ministry may also notify the failure of a licensee to the competent Authority in the trading country, leading to larger consequences at the group level.

### Way forward

The inaugural year of Economic Substance Regulation has already seen major changes in the last three months to the law that was introduced almost a year and a half ago. Pertinently, the due date for the first ESR annual return is 31 December 2020; the template forms for the annual return were released on 22 October 2020. The first year of any regulations (especially a regulation of this kind) always brings lots of uncertainties in business owners' minds. The first year of compliance also holds importance from the perspective of setting the right precedent.

The information required in the ESR annual return appears to be very comprehensive, calling for financial information, employee details, and also information on the economic activity, risks, etc. This is likely to consume additional time in preparation of the return than what was originally anticipated on the basis of regulations.

Given the penal consequences for inaccurate data/information provided in the ESR filings, it would be prudent to carefully validate all the data after a thorough analysis before it is furnished to the authorities. While the ESR portal is yet to be launched on the Ministry's website, it is recommended to start the preparation of ESR return based on template form, given the time on hand.

## Indirect Tax

### Postponement of certain EU regulations

In view of the COVID-19 pandemic, the implementation of the European Union (EU) regulations in relation to the VAT treatment of goods and services supplied to non-taxable persons has been postponed to 1 July 2021. These regulations essentially aim to ensure that tax is paid in the member-state in which the consumption of goods/ services takes place. The regulations also impose obligations on electronic platforms and extend the concept of the One-Stop-Shop (OSS) scheme for VAT payments.

# Compliance Calendar

Direct Tax

**7 November 2020**

Payment of TDS and TCS deducted/collected in October 2020

**15 November 2020**

Issuance of TDS certificates (Form 16A) for TDS deducted for the period July to September 2020

**30 November 2020**

- Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IA for the month of October 2020
- Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IB for the month of October 2020
- Filing of tax audit report and tax return for the financial year 2019-20, in cases where transfer pricing provisions are applicable
- Filing of annual information with the DSIR for approved R&D facilities, for cases where transfer pricing provisions are applicable

***Notes***

However, it must be noted that in September 2020, the Taxation and Other Laws (Relaxation of Certain Provisions) Bill, 2020 was passed in parliament to incorporate the effect of Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 dated 31 March 2020 read with the notification dated 24 June 2020. The said bill has extended all respective due dates, falling during the period from 20 March 2020 to 31 December 2020, except the ones mentioned below till 31 March 2021.

However, the benefit of the extended due date shall not be available in respect of payment of taxes (including equalization levy). However, any delay in payment of tax, which is due for payment from 20 March 2020 to 31 December 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 31 December 2020.

By virtue of a press release dated 24 October 2020, the government has extended the due date of furnishing the Income Tax Returns and Audit reports

- Due date for furnishing return of income for non-corporate taxpayer, whose due date for file tax return was 31 July 2020, is extended to 31 December 2020
- Due date for furnishing return of income for corporate taxpayers, whose due date for filing tax return was 31 October 2020, has been extended to 31 January 2021.
- The due date for furnishing return of income for taxpayers to whom transfer pricing provisions are applicable, and whose due date for filing tax return was 30 November 2020 has been extended to 31 January 2021. **Consequently the relevant due date for furnishing the Form No. 3CEB (Transfer Pricing) is 31 Dec 2020.**
- The date for furnishing of various audit reports under the Act, including tax audit report and report in respect of international/specified domestic transaction, has also been extended to 31 December 2020

Though the due date for filing the income tax return for AY 2020-21 has been extended, no relief has been provided for payment of interest under section 234A if the self-assessment tax liability exceeds INR 1 Lakh.

# Compliance Calendar

Indirect Tax    Transfer Pricing

**10 November 2020**

- GSTR-7 for the month of October 2020 to be filed by taxpayer liable for Tax Deducted at Source (TDS)
- GSTR-8 for the month of October 2020 to be filed by taxpayer liable for Tax Collected at Source (TCS)

**11 November 2020**

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

**13 November 2020**

GSTR-6 for the month of October 2020 to be filed by Input Service Distributor (ISD)

**20 November 2020**

- GSTR-5A for the month of October 2020 to be filed by Non-Resident Online Database Access and Retrieval services (OIDAR)
- GSTR-5 for the month of October 2020 to be filed by Non-Resident Taxpayers (NRTP)
- GSTR-3B for the month of October 2020 to be filed by all registered taxpayers having turnover of more than INR 50 million in the previous financial year

**22 November 2020**

GSTR-3B for the month of October 2020 to be filed by all registered taxpayers having turnover of up to INR 50 million in the previous financial year and located in Category A states

**24 November 2020**

GSTR-3B for the month of October 2020 to be filed by all registered taxpayers having turnover of up to INR 50 million in the previous financial year and located in Category B states

**31 December 2020**

- Form No. 3CEB (FY 2019-20) Transfer Pricing Certificate / Report
- Maintenance of transfer pricing documentation FY 2019-20
- Master file Designation in Form No. 3CEAB
- CbCr Intimation in Form No. 3CEAC – for Indian Company of an international group where accounting year is 1 January 2019 to 31 December 2019)

***Notes***

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

Category B states - Himachal Pradesh, Punjab, Uttarakhand, Haryana, Rajasthan, Uttar Pradesh, Bihar, Sikkim, Arunachal Pradesh, Nagaland, Manipur, Mizoram, Tripura, Meghalaya, Assam, West Bengal, Jharkhand or Odisha or the Union territories of Jammu and Kashmir, Ladakh, Chandigarh and Delhi.

Insights

## Alerts

Direct Tax

### Extension in due date for filing Belated/Revised Tax Returns for AY 2019-20 (FY 2018-19)

**5 October 2020**

Read Here https://bit.ly/2JT0HvL

### CBDT issues guidelines and clarifications for applicability of provisions for TCS on sale of goods

**8 October 2020**

Read Here https://bit.ly/2U8fB38

### Dividend Distribution Tax to be restricted to Dividend Tax Rate provided under the Tax Treaty

**15 Octotber 2020**

Read Here https://bit.ly/2IndUMm

### Extension in Due Date for filing Income Tax Returns including Tax Audit Report and Transfer Pricing Report for A.Y. 2020-21 (FY 2019-20)

**26 October 2020**

Read Here https://bit.ly/32tOVy9

Transfer Pricing

### Outstanding receivable, a separate international transaction; confirms Delhi ITAT

**9 October 2020**

Read Here https://bit.ly/38rEb7j

### Non-resident taxpayers to prepare separate Transfer Pricing documentation; cannot rely on documentation prepared by its Indian counterpart: Delhi Income-tax Tribunal

**23 October 2020**

Read Here https://bit.ly/3kyDhJp

Indirect Tax

### Decisions of the 42nd GST Council meeting

**6 October 2020**

Read Here https://bit.ly/3noGxJn

Regulatory

### SEBI amends conditions for investment team and investment committee of AIFs

**22 October 2020**

Read Here https://bit.ly/3koTiBy

# News & Events

## News

### Dividend taxation puts India in quandary; is it justified to impose additional tax on dividends?

**Financial Express**

Read Here https://bit.ly/3eIrlmk

### Faceless Appeal Scheme 2020

**APK Magazine**

Read Here https://bit.ly/2SOKybV

## Webinars

### Tax Conference (2 Day)

**Organizer - CII**

15-16 October 2020

### Equip your Business for the Oman VAT

**Organizer - Nexdigm (SKP)**

3 November 2020

Watch it here https://bit.ly/32Pnbob

### Direct Tax Summit - Virtual Conference

**Organizer - Achromic Point**

6 November 2020

### Economic Substance Regulations – Preparing first Annual Return and Revised Notification

**Organizer - Nexdigm (SKP)**

9 November 2020

Watch it here https://bit.ly/3nexLg8

## Upcoming Webinar

### 7th Transfer Pricing Asia Summit

**Organizer - Inventicon**

10 - 11 December 2020

**Register Now**

# Easy Remittance Tool

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

Tax position vetted by specialists

Easy retrieval of documents to aid in tax scrutiny

Ability to upload Form 15 CA on the same platform

ThinkNext@nexdigm.com

Request a Demo

# About Nexdigm (SKP)

Nexdigm (SKP) is a multidisciplinary group that helps global organizations meet the needs of a dynamic business environment. Our focus on problem-solving, supported by our multifunctional expertise enables us to provide customized solutions for our clients.

Our cross-functional teams serve a wide range of industries, with a specific focus on healthcare, food processing, and banking and financial services. Over the last decade, we have built and leveraged capabilities across key global markets to provide transnational support to numerous clients.

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

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

*@nexdigm*

*@nexdigm_*

*@NexdigmThinkNext*

*@Nexdigm*

Subscribe to our Insights

**USA  Canada  India  UAE  Japan  Hong Kong**

Reach out to us at ***ThinkNext@nexdigm.com***

www.nexdigm.com
www.skpgroup.com