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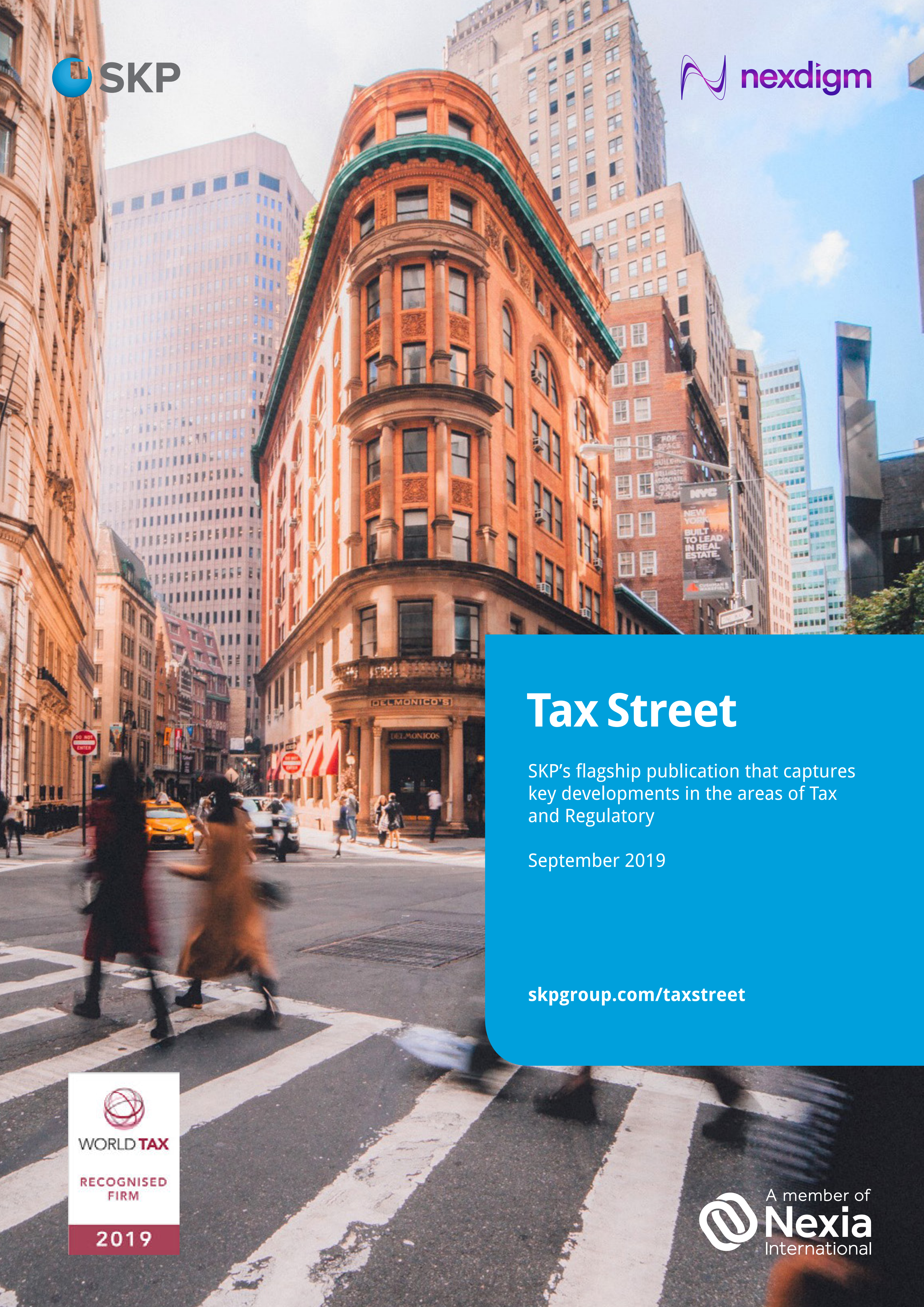

Tax Street

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

September 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 September 2019.

The 37th GST Council meeting held in Goa on 20 September 2019 announced major tax reforms for the corporate sector in general and the manufacturing industry in particular. Following the announcements, Indian Government passed Taxation Laws (Amendment) Ordinance, signifying a major shift in the Indian tax Scenario. In this light -

- The **'Focus Point'** section elucidates various reforms introduced by the council meeting, while sharing the expected impact it will have on the corporates, the industry and the economy overall.
- 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

India's Tax Reforms – Will India come out as the new manufacturing hub of the world?

India's economy grew at its slowest pace in the first quarter of the current fiscal year accompanied by a severe dip in consumer demand and investment. The slowdown in GDP derailed investments in sectors like automobile, manufacturing, real estate, etc. and these sectors are witnessing a slump never seen before. The Indian Government was aware of the crisis the economy has been facing and gave a few doses of economic booster a couple of weeks back.

The Government announced some major tax reforms for the corporate sector on 20 September 2019, such as a reduction in corporate taxes for certain domestic companies, special corporate tax rates for new manufacturing companies subject to conditions, reduction in the minimum alternate tax rate, etc. Shortly afterward, on 20 September 2019, the Indian Government passed Taxation Laws (Amendment) Ordinance, 2019 for giving effect to the corporate tax cuts, removal of super-rich surcharge on capital gains tax, etc. The Key Takeaways from the announcement as well as the ordinance are as follows:

Reduction in Corporate Tax to 22% for certain domestic companies

- Reduction in corporate tax to 22% (effective tax rate of 25.17% after surcharge and cess) **for all domestic companies** from Financial Year (FY) 2019-20 subject to the following conditions:
  - the company does not avail any exemption or incentives, which inter-alia includes the following:
    - SEZ benefits
    - Additional depreciation allowance
    - Deduction for investment in new plant and machinery in notified backward states
    - Deduction for tea/coffee/rubber development allowance or site restoration fund
    - Expenditure on scientific research, agricultural extension project, skill development project, etc.
    - Specific Tax Holidays provided in Part C of Chapter VI (like profit link deduction for SEZ development, housing projects, undertakings in specified states/ areas, etc.). **However, deduction in respect of employment of new employees provided u/s 80JJAA would continue to be available. This is a great thought in the sense that although the profits linked deductions have been taken away, the incentive for generating additional employment still continues.**
- The company shall not set off any loss carried forward from the preceding year if such loss is attributable to any of the exemption or incentives specified above in the current or subsequent year.
- Tax return is filed by the company within the due date prescribed.

- It may be noted that the above concessional tax rate is at an option of the taxpayer i.e. it can either opt for the concessional tax rate of 22% or continue with the current tax rate of 25%/30% along with the tax incentives/exemptions provided above. Once the option of concessional tax rate of 22% has been exercised in any year, it cannot be subsequently withdrawn.
- Companies who do not opt to apply the concessional tax rate may continue to pay at existing corporate tax rate and continue to claim the exemption/incentive. Once the period of tax holiday/exemption expires, the companies can opt for the concessional rate.
- The company opting for 22% shall not be liable for Minimum Alternate Tax (MAT).

Reduction in Corporate Tax to 15% for specified manufacturing companies

- The concessional corporate tax rate for new manufacturing companies has been reduced to 15% (effective tax rate of 17.01%), subject to the following conditions:
    - The company is incorporated after 1 October 2019 and commences production on or before 31 March 2023.
    - The company would be engaged in manufacturing/ production/research in relation to such an article produced.
    - All the conditions specified for availing 22% rate (mentioned in point 1) to apply.
    - Such companies should not be formed by splitting up of already existing business or by use of previously used machinery/plant or use any building formerly used as a hotel/convention center.
- Further, Domestic Transfer Pricing provisions shall be applicable for the transaction between the new manufacturing company and related parties.
- It may be noted that the above concessional tax rate is at an option of the taxpayer and once the option has been exercised in any year, it cannot be subsequently withdrawn.
- The company opting for 15% tax rate, shall not be liable for Minimum Alternate Tax (MAT).

Reduction in MAT rates

MAT has been reduced from 18.5% to 15%, in case of companies that do not opt to pay tax under concessional tax rates.

Relief from Buy-back tax

Listed companies that announced buy-back of shares prior to 5 July 2019, will not be charged with buyback tax.

Corporate Social Responsibility spending extended to other areas

The scope of Corporate Social Responsibility (CSR) spending of 2% has been extended to other useful areas such as incubators funded by central/ state governments, or any agency or PSU of central/state government, and publicly funded universities, IITs, National Laboratories and Autonomous bodies engaged in conducting research in science, technology, engineering and medicine.

Concluding Thoughts

These reforms are path-breaking and would lead to improvement in sentiment of capital markets and strengthen the economy. Reduction in corporate tax rate by almost 10% for the existing corporates would leave such companies with a lot of disposable surplus in their hands which would stimulate much needed investment in other sectors, thus bolstering by such corporates which in turn would generate new employment and revive economy. Encouraging setting up of manufacturing units would give a great stimulus to ‘Make in India’ initiative of Government, promote the ease of doing business in India, boost overall profitability of corporate India and promote more employment. Now, Indian Corporate tax rate would be comparable to many developed countries, which would lead to increase in Foreign Direct Investment (FDI) in India.

It would be important to note that all the benefits are provided to a Company structure, which would mean that Limited Liability Partnership (LLP) would continue to be taxed at higher rates. This may dilute the LLP structure, as the benefit of no Dividend Distribution Tax (DDT) may be offset against the higher tax rates for LLP. However, one will have to evaluate the entire cost benefit before taking any decision. Also, these amendments further increase the gap between the corporate tax rates of domestic companies vis-à-vis foreign companies (i.e. 25.17% vs 43.68%). This may be something that can be looked at by the government. It would become imperative for companies availing the tax incentives to carry out a cost-benefit analysis for opting for new rates vis-à-vis continuing with old rates.

It would become imperative for companies claiming tax exemption to carry out a tax benefit analysis to determine whether they should opt for the new tax rates or not. Also the impact on MAT tax credit should be evaluated.

To sum up it’s early Diwali for the corporates and the Capital Market and soon it would have a rubbing effect on the overall economy. It should definitely have a positive impact on the taxpayers and would infuse confidence of the foreign investors in the economy.

FROM THE JUDICIARY

Direct Tax

Whether genuine back-to-back arrangement entered into by taxpayer involving loan from immediate shareholder followed by investment in a group company would result in denying tax treaty benefits to the taxpayer

M/s. Golden Bella vs Dy. CIT [TS-523-ITAT-2019 (Mumbai)]

The taxpayer, a tax resident of Cyprus was engaged in the business of an investment holding company. The taxpayer applied for 5,000 CCDs in an Indian Company at premium, carrying interest at the rate of 15% on the face value of CCD. The said transaction was funded partly by the taxpayer's capital and partly by shareholder's loan availed from its immediate shareholder, M/s. GWDL (Mauritius). The taxpayer offered interest income earned from such CCDs in India at the rate of 10% according to the India-Cyprus tax treaty. However, the tax officer denied treaty benefits to the taxpayer in the absence of beneficial ownership of such income.

The Mumbai Tribunal observed that the taxpayer had invested in Indian Company via the CCD route for its personal and exclusive benefit and not for or on behalf of any other entity. Merely because investment was funded partly by capital and partly by interest-free debt, the taxpayer's status as beneficial owner of such interest income does not get affected since the same was the sole property of the taxpayer. In this regard, the tax tribunal placed reliance on the OECD Commentary of 2017 and held that the taxpayer had the right to use and enjoy the interest income without having any legal or contractual obligation to pass on the same to another person. Hence, the taxpayer was the beneficial owner of the interest income and treaty benefits could be availed on such income.

SKP's Comments

There is always a thin line of distinction between genuine transactions and sham transactions. The tax tribunal has made an attempt in drawing out distinction between genuine and sham transactions.

This decision assumes importance as it brings out a very important principle that having established an entity in a tax haven does not automatically make a particular transaction a sham transaction. The substance of the transaction has to be clearly analyzed before characterizing the said transaction as a sham transaction or else even a genuine business transaction would be identified as a sham transaction resulting in unnecessary litigation.

Whether LO constituted PE of the taxpayer in India

Hitachi High Technologies Singapore Pte. Ltd. vs Dy. CIT [TS-558-ITAT-2019 (Delhi)]

The taxpayer, a tax resident of Singapore and a wholly owned subsidiary of Hitachi Japan, had established a liaison office (LO) in India in 1988 for rendering preparatory and auxiliary services including market research and liaison activities. The tax officer carried out survey on the premises of liaison office of the taxpayer wherein they found out that the LO was engaged in executing/ negotiating contracts for the taxpayer in India and hence, constituted PE in India.

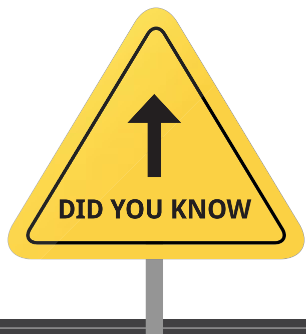
The tax tribunal relied on the internal email exchanges and inferred that at least six employees were working in LO which included Japanese expats, key personnel and one senior personnel and all of them were engaged in sales function. Further, these employees were not only involved in LO activities but also trading business of the taxpayer including price negotiation, obtaining purchasing orders, follow-up jobs, etc. Hence, LO was involved in commercial activities which was not permitted to it under the Indian Exchange Control Regulations. Further, the activities carried out by LO utilized time, attention and labor of "men". Thus, it was very clear that LO was performing core activities of trading business of the taxpayer.

The tax tribunal negated the contention of the taxpayer that LO was performing auxiliary and preparatory activities by placing reliance on the India-Singapore DTAA wherein it was mentioned that unless LO was engaged in advertisement, supplying information, scientific research, or similar activities having preparatory or auxiliary character, the same would constitute fixed place PE of the taxpayer in India. Hence, with regard to the nature of the activities performed by LO, the tax tribunal held that the LO constituted PE of the taxpayer in India.

SKP's Comments

TThis ruling once again brings out the importance of functions performed by a liaison office. It is important for taxpayers to ensure that function performed by liaison office are compliant with the tax and exchange control laws in India. In case of any divergence, there could be huge tax risks in India.

There is a reduction in the corporate tax rate from 30% to 22% for all companies. However, an option has been given to **new manufacturing companies** to tax profits at the rate of 15% subject to certain conditions. Hence, **new trading or service companies** may not be able to avail this beneficial corporate rate of tax.



Transfer Pricing

Whether TP adjustment made without reference to the Transfer Pricing Officer (TPO) hold good in law?

S.G Asia Holdings (India) Pvt. Ltd. – SLP (C) No. 12126 of 2019

The taxpayer was engaged in providing broking and clearing services to Associated Enterprises as well as third parties. During the relevant year, the taxpayer received brokerage from its parent company at the rate of 0.06%.

The Assessing Officer (AO) during the assessment proceedings contended the brokerage rate to be lower than the prevalent market rate and made an addition on the brokerage charged by the taxpayer to its parent entity. The TP addition of the AO was confirmed by Commissioner of Income Tax (Appeals) (CIT(A)).

During Tribunal proceedings, the Tribunal observed that by not making any reference to the TPO for the TP adjustment, AO had breached the mandatory instructions of the Central Board of Direct Taxes (CBDT). Instruction No. 3/2003 dated 20.05.2003, which contains guidelines for AOs and TPOs to operationalize TP provisions and have procedural uniformity. The instruction mandated the AO to refer the case to the TPO where the related party transaction value exceeded INR 50 million. The Tribunal also refused to set aside the matter to AO, quoting that any administrative lapse made by AO cannot be made good by the Tribunal. The High Court upheld the ITAT's decision.

Aggrieved, the revenue filed a Special Leave Petition before the Supreme Court (SC.) On examining the expressions given in the guideline, SC negated the view taken by the Revenue authorities that the discretion for reference to the TPO was vested on the AO and it is not mandatory to refer the issue of computation of Arm's Length Price to the TPO in every single case. SC upheld the view of the Tribunal that AO had breached the mandatory Instruction No. 3/2003 issued by the CBDT by not making any reference to the TPO.

Further, SC also opined that Tribunal should have accepted Revenue's plea to restore the matter to the file of AO for making the appropriate reference to the TPO. Accordingly, SC directed AO to take appropriate steps in terms of Instruction No. 3/ 2003.

SKP's Comments

CBDT Instruction 3/2003 was replaced by Instruction no. 15 of 2015 which was again replaced by CBDT Instruction No. 3/2016.

The latest instruction lays down comprehensive conditions for the AO to refer the case to the TPO which is based on risk-based parameters rather than monetary thresholds. It is important to note that adherence to the CBDT instruction is mandatory on the part of the AO and a default on this account can be one of the grounds for challenging the action.

Whether AO justified in disregarding the intra-group charges and computing the ALP as NIL?

Goodyear South Asia Tyres Pvt Ltd – ITA No. 1068/PUN/2016

The taxpayer was engaged in the manufacturing of tires. During Assessment Year (AY) 2010-11, the taxpayer had paid Regional Service Charges (RSC) to its associated enterprise (AE) for the services relating to general administration, HR services, SAP modules and solutions, and formulation of policies. Barring IT support services (i.e charges for SAP modules and solutions), TPO disregarded the supporting documents presented by the taxpayer and determined the arm's length price (ALP) of the intra-group service charges at Nil, commenting that the voluminous documents were in the nature of exchange of information and did not prove receipt of services. Thus the TPO made a TP adjustment to that extent.

During Tribunal proceedings, ITAT made the following observations:

- The payment for intra-group charges was made in earlier years for which no adjustment was done by the AO, given the fact that there was no change in the terms and conditions of the inter-company service agreement.
- Similar services were provided to all participating Goodyear affiliates and based on appropriate allocation key, in turn, depending on the nature of services availed by each of them, allocation of cost was made. Further the taxpayer was raising monthly service-wise invoices and the quantum of payment was varied.
- The taxpayer had submitted voluminous documentary evidence in the form of e-mails, presentations which clearly demonstrated that services were being availed.
- The taxpayer had submitted an auditor's certificate by an Independent accounting firm for entity-wise allocation of service charges.
- TPO contended that certain payments under the service agreement for Production and Tire Performance/Product Resolution were similar/duplicative to the royalty payments made by the taxpayer under technical assistance and license agreement.

In light of the above facts, Tribunal held that:

- Evidences submitted by taxpayer establish the availment of services under different heads and there is no merit in the TPO order brushing aside the same and holding that there was no rendition of services.
- The analysis done by the TPO is regarding the nature and benefits derived from the intra-group

services rather than what an independent enterprise would have paid for similar services. Since the payments for intra-group service charges were accepted to be at ALP in earlier years, there is no merit in the TP adjustment by taking ALP at Nil.

- The Tribunal drew distinction between payments towards reimbursement of cost incurred by regional entities in providing assistance for engineering, quality assurance, safety, etc. as against royalty payments which are towards technology, know-how being made available to the taxpayer by the AE.
- Noting that the intra-group service charges are interlinked to the other transactions undertaken by the taxpayer such as import and sale of raw materials and machineries, the Tribunal accepted taxpayer's aggregated benchmarking.

SKP's Comments

In line with OECD Guidelines, most Intra-group service agreements refer to rendering of need-based services and billing of these services on the basis of quantum of service. This ruling is a welcome move in cases where there is a blanket rejection of all evidences by the TPO for intra-group services.

Whether cash Profit Margin be used as Profit Level Indicator for software developer?

Can segmental data prepared exclusively for transfer pricing be rejected on the ground that the same do not form a part of audited financials statements?

Net Guru Ltd – ITA No. 2162/Kol/2017

TThe taxpayer was engaged in provision of software development services and adopted cash profit margin as profit level indicator (PLI) to benchmark the international transaction using Transactional Net Margin Method (TNMM). For AY 2010-11, Revenue authorities argued that the taxpayer was not operating in a capital intensive industry and therefore using cash PLI is not justified. In addition to this, the TPO rejected the segmental prepared by the taxpayer and made modifications to the list of comparable companies selected.

The additions made by the TPO were quashed by the CIT(A). Aggrieved by the order of the CIT(A), the Revenue filed an appeal before the ITAT.

Tribunal observed that "net profit" under TNMM has not been defined in the Act. There were judicial precedents wherein the Tribunal had approved the use of cash profit margin for placing the tested party and comparable companies on equal footing. These rulings include Delhi Tribunal in case of Schefenacker Motherson Ltd, Bombay High Court in case of Reuters India (P) Ltd, Kolkata Tribunal in cases of AT&S India Private Ltd and EPCOS Ferrites Ltd. Further, nowhere is it stated that cash profit margin ratio is only restricted to capital intensive industries. It was observed that for application of TNMM, the best way of computing operating profit would be to compute profit before depreciation in respect of each of the comparable companies, as it would take out the inconformity or the variation in the profit level of the comparables arising due to adoption of different method of charging depreciation. Further, noting that Revenue authorities had accepted the cash profit margin ration as PLI for AY 2011-12, Tribunal opined that there was no reason to reject it for AY 2010-11 following the rule of consistency.

Revenue authorities disputed the veracity of the segmental profitability statement produced by the taxpayer since the same did not form a part of the audited financial statements. In absence of sufficient working notes and improper allocation key, the Revenue authorities viewed that the segment report prepared by the taxpayer was an arbitrary exercise.

The Tribunal stated that since the taxpayer belonged to "Small and Medium Sized company", the Accounting Standard -17 was not mandatory, hence it did not form part of the audited financials. The segmental results were prepared by the management exclusively for TP analysis. Further, the Tribunal observed that the segment report which was used for ALP analysis under TNMM was duly verified by the statutory auditor. The Tribunal noted that the statutory auditor verified and certified in the segment report the headcount of employees (manpower) for AE and non-AE sales. Following Bangalore Tribunal's decision in case of Cisco Systems (India) (P.)Ltd, the Tribunal observed that segmental accounts were accepted for determining ALP under TNMM where the functions performed by the taxpayer are different under the AE-segment and non-AE segment, though the segmental accounts do not form part of the audit report.

SKP's Comments

There are significant differences of opinion among appellate forums on the appropriateness of using Cash PLI. The rulings provide a divergent view on cases where Cash PLI is considered suitable for manufacturing and other capital or asset-intensive industries. This ruling clarifies that the use of Cash PLI is not restricted to capita-intensive industries and can also be adopted for service industries.

The ruling clarifies that segmental prepared for benchmarking under transfer pricing cannot be disregarded merely because the same does not form a part of the audited financial statements.

Can Sec 263-proceedings be rendered as invalid in case the final assessment order is passed without draft order?

WSP Consultants India Private Limited – W.P (C) 9636/2019

The Delhi High Court has admitted the writ petition filed by WSP Consultants India Pvt. Ltd. on this litigated issue as to whether the Principal Commissioner of Income Tax ('PCIT) can exercise jurisdiction vested under Section 263 of the Income Tax Act, 1961 **(Revision of orders prejudicial to revenue)** in cases where an assessment order has been passed by the Assessing Officer (AO) without passing a draft assessment order for an 'Eligible Assessee'. Since the taxpayer has issued a jurisdictional issue vide the subject writ, the HC entertained the writ and categorically held that **"since it is a legal issue, we are also inclined to examine the same in these proceedings".**

Generally, in cases of assessment of a foreign company or where a reference is made to a TPO, Section 144C (1) mandates the Assessing Officer (AO) to issue a 'draft assessment order' to the assessee after receipt of the report from the Transfer Pricing Officer (TPO), thereby affording the assessee the choice of further action. If the assessee chooses to file an objection before the Dispute Resolution Panel (DRP), then the AO shall wait for directions from DRP and incorporate the same in the final assessment order. On the other hand, if the assessee chooses to file an objection before the CIT(A), the AO may proceed to pass the final assessment order. However, on many occasions, it has been seen that the AO passes a final assessment order without issuing a draft assessment order. In other words, AO issues a demand notice u/s. 156 and/or a penalty notice u/s. 274 along with the draft assessment order, which raises questions about the validity of the assessment proceedings. Many taxpayers have challenged the validity of such assessment orders and in most cases, Courts have held that passing of final assessment order sans a draft order is an incurable defect thereby invalidating such assessment order.

However, there are a few cases in favor of Revenue authorities on this subject, wherein Tribunals have viewed that the character of the assessment order is that of the draft assessment order and therefore there is no violation of Section 144C. However, passing the assessment order straightway without passing the draft assessment order would take away the enforceable right of the taxpayer company to approach the DRP. Therefore, such a defect is a curable one and the assessment proceedings will remain valid.

SKP's Comments

Since the HC has admitted the writ petition, the order of the HC could have material bearing on cases where an assessment order sans a draft order has previously been considered null and void by Tribunals.

Indirect Tax

An exporter (petitioner) initially claimed a higher rate of duty drawback. Later, on realizing that IGST refund can be availed only if drawback is claimed at the lower rate, the exporter paid back the differential drawback amount along with interest, and claimed IGST refund. Can IGST refund be granted in such a case?

Amit Cotton Industries vs Principal Commissioner of Customs - High Court of Gujarat [2019-VIL-315-GUJ]

Department's contentions

- The law clearly provides that IGST refund cannot be claimed by the exporter if he has claimed a higher drawback.
- There is no procedure prescribed under any law/notification that if the differential amount of drawback has been paid, the exporter would be eligible for IGST refund.
- The petitioner has invented a new procedure in order to try to obtain the benefit which has already been forgone while claiming a higher drawback.

Ruling

- Rule 96(4) of the CGST Rules makes it clear that a refund can be withheld only in two circumstances. The present situation is not covered under these exclusions.
- The Circular relied upon by the department explains the provisions of drawback and it has nothing to do with IGST refund.
- Given the above, the department should immediately sanction the refund of IGST along with simple interest of 7%.

SKP's Comments

In this case, the exports pertained to the month of July 2017. The Customs drawback notification has since been amended and the concept of higher and lower rate of drawback has been removed. Now, there is only one rate of drawback for each product and the IGST refund can be availed if drawback has been claimed at such rate.

Nevertheless, this ruling should provide relief to exporters who have inadvertently claimed duty drawback at a higher rate prior to the amendment.

Can CENVAT credit of service tax paid on staff health insurance policies be claimed by the appellant?

[Under the erstwhile CENVAT credit rules, CENVAT credit of health insurance is not available. A similar provision is also contained in the GST law.]

ITZ Cash Card Ltd. vs Commissioner, GST & C. Excise, Thane Rural – Customs, Excise and Service Tax Appellate Tribunal (CESTAT), Mumbai – Appeal No. ST/88317/2018

Appellant's contentions

- CENVAT credit can be excluded only when health insurance services are used primarily for personal use or consumption of any employee.
- The word "employee" (singular) does not include the plural. Thus, when the benefit is provided to employees as a group, the employer is entitled to CENVAT credit.

Ruling

- The CESTAT accepted the contentions of the appellant and held that the CENVAT credit of employee's health insurance policy should be available to the appellant.
- The CESTAT also observed that the CENVAT credit on health insurance policy was also allowed by the Hon'ble Madras High Court in Ganesan Builders Ltd. Vs. CST [2018 (10) TMI 269].

SKP's Comments

The CESTAT judgement can have huge implications as even under the GST law, GST paid in respect of health insurance is not allowable as input tax credit.

However, although CESTAT while arriving at its decision has relied on the judgement in Ganesan Builders, it has failed to analyze the fact that in the said case CENVAT credit of health insurance policies was allowed as obtaining such policy was mandatory under the applicable labor laws. Therefore, the decision of CESTAT may be challenged before the higher fora by the Revenue.

Is the interest charged to customers for delayed payment exempt from GST?

[According to Notification No. 12/2017-CGST (Rate) dated 28 June 2017, services by way of extending loans or advances in so far as the consideration is represented by way of interest is exempt from GST.]

Indo Thai Securities Limited – Authority for Advance Ruling (AAR), Madhya Pradesh [2019 (9) TMI 693]

Facts of the case

- The applicant is a registered stock broker dealing in the purchase/sale of securities for and on behalf of its clients and charges brokerage for its activities.
- Applicant charges interest from customers for delayed payment.
- The amount on which interest is charged consists of two components – the cost of securities and brokerage.

Ruling

- The additional amount being charged is in the nature of penalty for failure of the customers to make the payments within the stipulated time.

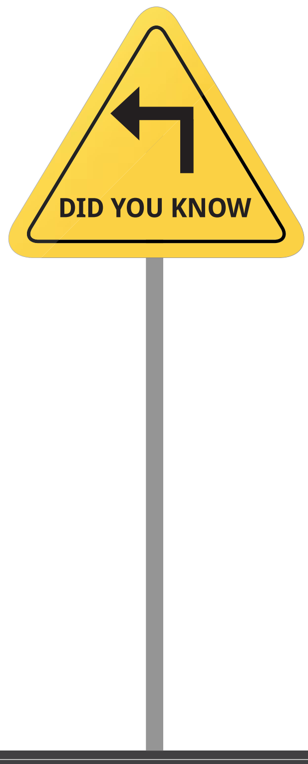
- According to Section 15 of the CGST Act, the value of supply should include interest or late fee or penalty for delayed payment of consideration.
- In the present case, it cannot be said that the broker has extended any loan or advance to the customer.
- Given the above, exemption should not be available and the amount being charged should be taxed according to the original supply i.e. supply of stock broking services.

SKP's Comments

The ruling is in line with the Circular issued by the government wherein it was clarified that the amount of penal interest should be included in the value of original supply.

The interest can be said to be exempt from GST only when the supplier is engaged in the activity of extending loans or advances as provided in the exemption notification.

The government has amended the CGST Rules to partially restrict the input tax credit in relation to invoices not appearing in GSTR-2A. However, there is an ambiguity on certain aspects of the amendment, such as the periodicity for which such restricted ITC needs to be calculated. Pending clarification, businesses should begin amending their processes to undertake monthly reconciliation of the ITC register with GSTR-2A and communicate discrepancies with their vendors, to avoid delays in availing ITC which can result in working capital blockage.



TAX TALK
INDIAN DEVELOPMENTS

Direct Tax

DTC Panel – Certain measures the Government should adopt

The idea behind removal of the Dividend Distribution tax is to provide a relief to the investors from the cascading impact of taxation. It was highlighted that the triple taxation effect in the form of corporate Tax, DDT, and the Taxation at the individual investor level was making the Indian capital markets very unattractive on the global stage. The panel appointed for this discussion has recommended that the companies shall be taxed for any dividend not distributed to the shareholders.

To maintain neutrality, LTCG will not be removed. Whereas, STT will be retained as it helps in better tracking of transactions. The panel has also recommended new tax brackets at 5%, 10%, and 20% by scrapping the prevailing slab rates at 5%, 20%, and 30%. This will impact the government coffers for 2-3 years, but ease in filing returns and removal of ambiguous language will increase the overall tax compliance.

CBDT launches one-time facility for compounding of income tax offences

To mitigate the unintended hardships, the CBDT has launched a one-time facility to apply for compounding of income tax offences. This facility can be availed only up to 31 December 2019. Compounding in income-tax parlance means that the taxman does not file a prosecution case against the tax evader in the court in lieu of payment of due taxes and surcharges. This facility will be provided in normal cases only and not in offences of serious tax evasion, financial crime, terror financing, illegal foreign assets, or money laundering.

It is pertinent to note that compounding of offence is not a matter of right and the department can extend such relief to certain cases, viewing various factors like conduct of the person, the nature and magnitude of the offence on the context.

Reporting of Foreign Assets in Income Tax Return

CBDT has clarified that only foreign assets that are acquired as per the relevant accounting year of the foreign country will have to be reported in the ITR. Foreign assets are to be reported if one has held it as beneficial owner, or signing authority in any account located outside India, or received income from any source outside India. The problem was occurring mainly while reporting the assets acquired in January, February and March, as countries like France, Denmark, UAE, Saudi-Arabia follow calendar year as their financial year. The taxpayer shall be required to report the foreign assets held by him at the time during the “previous year” (in India) as also such assets held at the time during the “relevant accounting period” (in Foreign jurisdiction), and fill the schedule FA accordingly.

For instance, a foreign asset acquired and held in May 2018 shall be reported while filing ITR for FY 2018-19. However, if the foreign asset was acquired in January 2019, then same will not be required to be reported at the time of filing ITR for FY 2018-19.

Transfer Pricing

The Central Bureau of Direct Taxes (CBDT) vide notification no. 64/2019 dated 13 September 2019 notified the continuation of the erstwhile tolerance range for arriving at the arm's length price. Accordingly, the tolerance ranges of 1% for wholesale trading and 3% in all other cases would be applicable for AY 2019-20.

It has also been sought to retain the explanation of "wholesale trading" for this notification to mean trading in goods, which fulfils the following conditions, namely:

i. purchase cost of finished goods is 80% or more of the total cost pertaining to such trading activities; and

ii. average monthly closing inventory of such goods is 10% or less of sales pertaining to such trading activities.

It is also clarified that none of the taxpayers will be adversely affected by the retrospective effect being given to the notification.

14

Indirect Tax

Amendment in import policy of iron and steel

The import policy for iron and steel has been amended from 'free' to 'free subject to compulsory registration under Steel Import Monitoring System (SIMS)' with effect from 1 November 2019. The requirement under SIMS are as follows:

- Importers have to submit advance information in an online system for the import of specified items and obtain an automatic registration number.
- Registration fee of INR 1 per thousands of CIF value subject to a minimum of INR 500 and maximum of INR 1 lakh would have to be paid.
- Registration can be applied for not earlier than the 60th day and not later than the 15th day before the expected date of arrival of import consignment.
- The registration number shall remain valid for a period of 75 days.

[DGFT Notifications No. 17/2015-2020 dated 5 September 2019]

Decisions of the 37th GST Council meeting

The 37th GST Council meeting was held on 20 September 2019 in Goa. The Council deliberated on a host of issues and devised various steps to provide relief to the industry.

- Filing of annual return in GSTR-9 has been made optional for businesses with an aggregate turnover of up to INR 20 million.
- The new return filing system earlier proposed to be implemented in a phased manner from October 2019 has been postponed to April 2020.
- Earlier, the government had issued a clarificatory Circular on post-sales discounts. In the said Circular it was clarified that discounts provided by original supplier of goods to his dealers, to enable the dealers to offer a special reduced price to the customers, should be chargeable to GST in the hands of the dealer. The said Circular has been now rescinded ab initio.

Rationalization of GST rates

Goods	Old rate	Revised rate
Caffeinated beverages	18%	28% + 12% Compensation cess
Import of specified defense goods not being manufactured indigenously	Various rates	Exempt
Exclusive parts and accessories for use with a medical device (specific Chapter headings)	Various rates	12%

Services	Old rate	Revised rate
Hotel accommodation – Daily tariff above INR 7500	28%	18%
Hotel accommodation – Daily tariff of more than INR 1000 but up to INR 7500	18%/12% (based on tariff)	12%
Machine job work in the engineering industry (other than bus body building)	18%	12%
Intermediary services when both supplier and recipient of goods are located outside the taxable territory	18%	Exempt

Implementation of online GST refund mechanism

The Goods and Services Tax Network (GSTN) has announced the implementation of the online processing of refund application and single authority disbursement through the GST common portal with effect from 26 September 2019. The entire process of application, processing, and acceptance/rejection will now happen online as originally envisaged under the GST regime. Further, the GST refund applications will now be processed by a single integrated system for quick disbursal of claims.

TAX TALK
GLOBAL DEVELOPMENTS

Direct Tax

Italy planning to levy penalty on cash withdrawals for tackling tax evasion

After India imposed tax on cash withdrawals, it seems that Italy is also following suit. Italy is considering a proposal to impose penalty on cash withdrawals to discourage cash payments while tackling the menace of tax evasion which constitutes approximately 12% of Italy's Gross Domestic Product (GDP). Fascinatingly, the cap and penalty proposal is the work of in-house business lobby of Italy.

Italy would offer consumers tax credits for settling their debts electronically while imposing penalty on cash withdrawals in excess of a monthly threshold. Small business owners along with certain politicians did not waste any time in criticizing the proposal, naming the same as a Soviet Style Proposal. Further, to intensify the war against cash withdrawals, money lenders must notify the Bank of Italy's anti-money laundering unit of any monthly movement in excess of EUR 10,000starting from the month of September 2019.

Apple's Win over EU's USD 14 Billion tax bill may clear the road for overhauling global tech tax rules

In 2016, EU Competition Commissioner Vestager imposed a EUR 13 billion bill on Apple for unpaid taxes in Ireland alleging claiming illegal state aid. While, this case is pending before the European Court of Justice, it is a win-win situation for the EU Competition Commissioner. If the Court rules in the favour in her favour then Ireland may enjoy a good boost to its coffers and if the Court rules in the favour of Apple, then the question of overhauling global tech tax firms would take the centre stage and stakeholders would be compelled to aggressively push forward the global tech tax rules.

Digital Economy Saga – no major shift may be seen from existing taxing rights of the countries

Pascal Saint-Amans, the Direct of the Centre for tax policy and administration at the OECD, observed that, on a preliminary impact assessment, the countries' existing taxing rights may not witness a significant shift on account of proposals advanced by the OECD to amend global rules for taxing digital businesses. Further, the final results of impact assessment may not see the light of the day before the end of 2019 as the stakes are too high. In the meanwhile, he requested that the countries should relax as the objective of rewriting global digital economy tax rules is not to create winners or losers.

Transfer Pricing

Australian Taxation Office releases draft guidance on arm's-length debt test for purposes of Australia's thin capitalization regime[1]

OnOn 28 August 2019, the Australian Taxation Office (ATO) released draft guidance, (PCG 2019/D3), outlining the ATO's compliance approach for the use of the arm's-length debt test (ALDT) with respect to Australia's thin capitalization regime.

The draft guidance will have an effective date of 1 July 2019. The ATO clarifies that it assumes 'limited circumstances' when entities would gear in excess of 60% of net assets, and as such, it will generally view the ALDT as posing a 'moderate' to 'high risk' of non-compliance with the requirements of the thin capitalization rules. In view of the above, the draft practical compliance guidance considers that much more rigorous analysis is required when applying the ALDT as compared to the other thin capitalization tests.

Thus the draft guidance:

- Increases the analysis and documentation required to apply the ALDT.
- Specifies a more rigorous analysis than the safe harbor and worldwide gearing tests on the basis that Australian businesses outside regulated utilities would not be expected to have debt at levels greater than 60% of their net assets.
- Contains "risk zones" as white, low, and medium-high which unlike other guidance are not based on bright-line financial ratios/metrics and provide very limited opportunity for low-risk ratings.

The draft guidance has specified the below-mentioned scenarios as low-risk wherein limited analysis would be required:

1. Inbound investors: borrowing from non-associated and purely non-related parties, without any form of parental/associate credit support in situations where the business is purely an Australian domestic.
2. Outbound investors: the taxpayers are widely held ASX-listed entities which are outward investing entities (and which are not also an inward investing entity) with a publicly issued credit rating for the entire global group, and where it can be shown that the same credit rating applies to the Australian business.
3. Regulated utility providers in electricity and gas industries: entities with 70% or more assets with relevant Regulated Asset Base (RAB), net debt to RAB equal to or less than 70%, and cash flow from operations interest cover ratio equal to, or greater than 2.7 times.

For taxpayers falling outside the 'low risk' zone, a detailed approach is expected by the ATO while applying the ALDT unless ATO "white zone" sign-off has been obtained. Taxpayers are expected to invest significant time and resources to comply with the new documentation requirements outlined within the draft guidance.

SKP's Comments

The draft practical guidance builds on the earlier guidance (TR 2019/ D2) and highlights the ATO's views regarding the key issues of ALDT and it has outlined, in detail, ATO expectations for documentation and analysis to support the application of the ALDT. Although the draft guidance is in the form of a clarification of the existing thin capitalization legislation, it will be relevant for taxpayers with current disputes and discussions with the ATO in relation to ALDTs for prior years as well.

Federal Court of Australia rejects agreement restructuring of Glencore's agreement for copper-concentrate sale between AEs[2]

Name of the taxpayer: **Glencore Investment Pty Ltd**

Income years under consideration: **2007, 2008, and 2009**

The taxpayer's Australian group entity [Cobar Management Pty Ltd (CMPL)] is engaged in supplying copper concentrate to its Swiss group entity [Glencore International AG (GIAG)]. Up until February 2007, the offtake agreements between CMPL and GIAG were structured as "market-related" agreements. However, in February 2007, CMPL and GIAG entered into a fundamentally different form of offtake agreement, known in the copper concentrate industry as a "price sharing agreement". The copper concentrate which CMPL sold to GIAG in the relevant years was priced by using, the official London Metal Exchange cash settlement price for copper grade "A", averaged over "the quotational period". A deduction was then made from the aforementioned copper reference price for treatment and copper refining charges ("TCRCs") which, for the calendar years 2007, 2008, and 2009, were fixed at 23% of the copper reference price (as calculated) for the payable copper content of the copper concentrate.

Australian Tax Office (ATO) made TP-adjustment in respect of supply of copper concentrate by CMPL to GIAG on the premise that the "price sharing" agreement entered between the parties (agreement) differed from those which would have been adopted by independent enterprises behaving in a commercially rational manner and the price paid by Swiss group entity did not correspond to market prices.

1. https://www.ato.gov.au/law/view/document?docid=DPC/PCG2019D3/NAT/ATO/00001#P44
2. Glencore Investment Pty Ltd v Commissioner of Taxation of the Commonwealth of Australia [2019] FCA 1432

In appeal, the Federal Court of Australia (Court) considered the taxpayer's submission that CMPL received a benefit by receiving payments on production, rather than having to wait to be paid until shipment of the concentrate. Thus from a cash flow and risk perspective, the adjustments made by ATO based on the hypothesis of market-related contract was incorrect. Referring to Canadian Tax Court ruling in case of Cameco Corporation[3] Court stated that "...it is irrelevant to compare the extent to which the results achieved under the price sharing contract entered differed from those that would have been achieved under an alternative agreement..."

The court opined that the taxpayer had established that the prices paid by GIAG for the copper concentrate were within an arm's length range and accordingly the taxpayer has discharged its onus by providing sufficient proof. The Court, taking cognizance of Chevron Australia[4] ruling and OECD Guidelines Court, further opined that "It cannot be said that the entry into a price sharing contract was irrational, having regard to the benefits of such contracts and the market circumstances."

SKP's Comments

This judgement emphasizes the fact that re-characterisation of the transaction/arrangement by tax authorities for the purpose of applying TP provisions is not warranted as long as related party transactions comply with arm's length principle in the form and substance that were agreed between the said parties.

US appeals court sides with Amazon in $1.5 billion transfer pricing dispute[5]

Name of the taxpayer: **Amazon.com, Inc.**

Income years under consideration: **2005 and 2006**

Amazon.com, Inc (taxpayer)., is a US-based online retailer with highly profitable intangible assets. In 2005 and 2006, Amazon restructured its European businesses in a way that shifted a substantial amount of its income from US-based entities to newly created European subsidiaries. In the course of restructuring, the taxpayer entered into a cost sharing arrangement in which a holding company for the European subsidiaries made a "buy-in" payment for Amazon's assets. Amazon used the comparable uncontrolled transaction (CUT) method to separately value three groups of assets transferred to the European subsidiary.

During the course of assessment, the Commissioner of Internal Revenue (tax authorities) concluded that the buy-in payment had not been determined at arm's length in accordance with the transfer pricing regulations. Accordingly, the tax authorities performed their own calculation for the valuation of intangibles using discounted cash flow method.

The tax authorities sought to include all intangible assets having a value, including "residual-business assets" such as Amazon's culture of innovation, the value of workforce in place, going concern value, goodwill, and growth options.

Aggrieved, the taxpayer filed a petition in the Tax Court challenging the valuation adopted. The tax court sided primarily with Amazon, and subsequently the Commissioner filed an appeal.

In appeal before US Court of Appeals (Ninth Circuit), the Court affirmed Tax Court's decision in Amazon, ruling that cost sharing buy-in payments made by its European subsidiaries during 2005 & 2006 in exchange for Amazon's transfer of intangible property, met the pre 2009 regulatory definition of an "intangible". Thus it can be inferred that such an arrangement should not include compensation for transferred residual business assets such as workforce in place, goodwill, and going concern value.

The Court noted that the language of the (now-superseded) regulatory definition of an "intangible" is ambiguous and could be construed as including residual-business assets, however the drafting history of the regulations and other indicators of Treasury's contemporaneous intent strongly favor taxpayer's proffered meaning that intangibles were limited to independently transferrable assets and did not include residual business assets. Accordingly, the Court concluded that definition of "intangible" pre-2009 does not include residual business assets and is limited to independently transferrable assets.

However, in a footnote the Court has also clarified that "If this case were governed by the 2009 regulations or by the 2017 statutory amendment, there is no doubt the Commissioner's position would be correct".

SKP's Comments

The taxpayer, in the course of transferring its intangible assets to the group entities, had valued its assets in accordance with the definition of 'intangibles' as provided in the pre-2009 regulations in the USA. However, tax authorities sought to include all intangible assets having a value, including "residual-business assets".

The said ruling emphasized on the implementation date of amendments of TP regulations. At the same time, it highlights the risk of coverage under widened definition of 'Intangible', which is a matter of complexity and dispute across the globe.

3. Cameco Corporation v The Queen (2018 TCC 195)
4. Chevron Australia Holdings Pty Ltd v Federal Commissioner of Taxation (No 4) (2015) 102 ATR 13;
5. No. 17-72922 Tax Ct. No.31197-12

Portugal approves new transfer pricing rules[6]

On 18 September 2019 Portugal introduced tax changes in various tax codes, which included significant amendment to its transfer pricing regulations. The new rules will apply as from 1 October 2019.

The changes made to the transfer pricing legislations include the below:

1. The new law emphasizes that the terms and conditions of all commercial or financial transactions carried out between related parties (both resident and non-resident) must be in line with the arm's length principle. The definition of international transaction has been broadened to restructuring activities, which would include the below:
    b. Business restructurings;
    c. Renegotiations/terminations of intragroup agreements;
    d. Sales/transfers of assets;
    e. Transfers of rights to intangibles; and
    f. Compensation for loss of profits or damages.
2. No hierarchy shall apply for selecting a transfer pricing method, aligning the regulation with OECD TP guidelines;
3. Reference of 'other method or techniques of analysis' was introduced in case where transfer pricing methods cannot be used due to the unique character of the transactions or due to lack or scarcity of reliable data;
4. 'Large taxpayers' are now required to prepare and submit transfer pricing documentation to the Portuguese tax authorities by the 15th day of the seventh month after the tax year end (i.e. by 15 July of the following year for taxpayers with a 31 December tax year);
5. Validity of Advance pricing agreements (APAs) (unilateral or bilateral) has been increased to four years (currently three years). Additionally, the terms and conditions of an APA will be exchanged with other countries under Portugal's tax cooperation agreements;
6. The penalty upto EUR 20,000 has been introduced (plus 5% for each day that the failure continues) in case of failures to timely submit the Country by Country Reporting notification form.

SKP's Comments

The amendments to Portugal's transfer pricing rules are made in light of the recent international developments in the area (e.g. BEPS). The amendment in the law emphasizes the importance that Portuguese Tax Authorities are placing on transfer pricing.

Indirect Tax

Netherlands introduces VAT on e-publications

The Dutch government's tax proposals for the calendar year 2020 have included a reduced VAT rate of 9% on electronic publications, such as books, newspapers, magazines, etc. This would remove the difference in taxation between digital and physical publications.

6. https://dre.pt/web/guest/home/-/dre/124793094/details/maximized?serie=I&day=2019-09-18&date=2019-09-01

Compliance Calendar

7 October 2019

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

10 October 2019

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

11 October 2019

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

13 October 2019

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

15 October 2019

- Filing of TCS statement for the period from July to September 2019

20 October 2019

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

30 October 2019

- Issuance of TCS Certificates (Form 27D) for TCS collected for the period July to September 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

31 October 2019

- Filing of TDS Statements for the period July to September 2019
- GSTR-1 for the quarter of July 2019 to September 2019 to be filed by registered taxpayers with an annual aggregate turnover of up to INR 15 million
- Filing of annual information with the Department of Scientific and Industrial Research (DSIR) for approved R&D facilities, for cases where transfer pricing provisions are not applicable
- GSTR-7 for the month of September 2019 to be filed by taxpayers required to deduct tax at source (TDS)
- Notification regarding the entity filing CbCR in case the annual accounting period of the group ended on 31 December 2018
- Intimation by a designated constituent entity, resident in India, of an international group (where there are multiple constituent entities resident in India)

31 October 2019 (Extended from 30 September 2019)

- Tax return and tax audit filing for specified tax payers

SKP IN THE NEWS

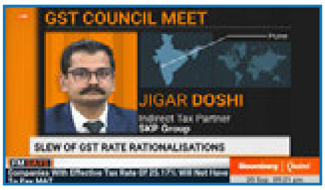
Finance Minister Gifts Mid-Year Tax Bonanza to India Inc.

"While the list of what such incentives and exemptions are is not clear, it appears based on a similar provision, entities availing incentives under SEZ, sec 80-IB [deductions for industrial undertakings] , sec 35AC [deduction in business income of the amount paid to a local authority, PSU for a project], sec 35AD [deduction in respect of expenditure on specified business] etc would not be eligible for such lower rate if they wish to avail the exemption, Maulik Doshi, partner at SKP explained." – **Maulik Doshi**

Bloomberg Quint - September 20, 2019

Read more at https://bit.ly/2ksSp1b

Finance Minister Nirmala Sitharaman Addresses the Media after GST Council Meeting



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

https://bit.ly/2m00ACK

Maulik Doshi recognized as a Highly Ranked Practitioner by Transfer Pricing - Expert Guides.

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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