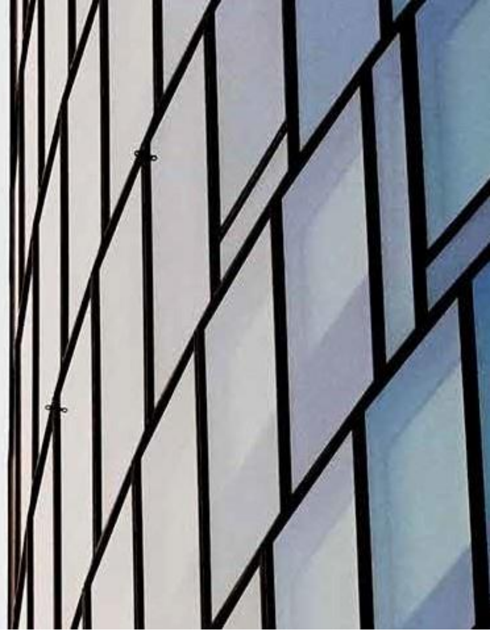
India Tax Konnect

July 2017



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Editorial

Government of India (GOI) launched one of the biggest tax reforms, Goods and Services Tax (GST), on 30 June midnight at Parliament's historic Central Hall. With the stroke of the gong, current indirect taxes are replaced by GST rates. The government said that the rollout of the country's most comprehensive indirect tax reform has been positive and largely hassle-free, with no checks on state borders, smooth customs operations and no major problems reported since its implementation. The government is now looking at a massive outreach to consumers as well as industry to clarify all issues and highlight the benefits of the tax regime. Further it plans to educate consumers about the comparative incidence on key commodities between GST and the previous tax regime.

The Finance Ministry said that 2.23 lakh new dealers have entered the GST network system since 25 June by filing draft applications. Of these, 63,000 have also submitted full details and among them, 32,000 dealers have been granted fresh registrations.

The Central Board of Direct Taxes (CBDT) notified multiple options for intimating Aadhar number for existing Permanent Account Number (PAN) holders and provided operational guidelines for quoting Aadhar number for new PAN holders. Government clarifies that Aadhar shall be linked to PAN after due authentication of Aadhar details through the available modes such as demographic, biometric, One Time Password (OTP), e-KYC or multi-factor or as specified by the Unique Identification Authority of India (UIDAI). The CBDT notification also states that PAN applications or requests for linking of Aadhaar with PAN may be rejected if mismatches in Aadhaar and PAN data are observed. The CBDT cautions PAN and e-Filing service providers that they shall ensure that the identity information of Aadhaar holder, demographic as well as bio-metric, is only used for submission to the Central Identities Data Repository of the UIDAI for Aadhaar authentication purpose.

Recently, the Finance Minister held an inter-ministerial meeting to examine risks related to virtual currencies (VCs) such as bitcoins. The government has been debating over issues concerning bitcoins and during the last month sought public opinion on allowing virtual currencies. The circulation of VCs has been a cause of concern among central bankers the world over for quite a while now. The Reserve Bank of India (RBI) had also cautioned the users, holders and traders of VCs, including bitcoins.

The Ahmedabad Tribunal in the case of Oncology Services India Pvt Ltd held that the payment for ‘standard operating procedure’ (SOP) is taxable as royalty under India-Germany tax treaty. The sharing of SOPs amounts to sharing of information concerning industrial, commercial or scientific experience which comes in the ambit of ‘royalty’ under the tax treaty.

We at KPMG in India would like to keep you informed of the developments on the tax and regulatory front and its implications on the way you do business in India. We would be delighted to receive your suggestions on ways to make this Konnect more relevant.

International tax

Decisions

Payment for 'standard operating procedure' amounts to sharing of information concerning industrial, commercial or scientific experience and therefore taxable as royalty under India-Germany tax treaty

During the year, the taxpayer (Indian company) made payments, aggregating to EUR45,000, to a Germany based entity by the name of OSE Oncology Services Europe (OSE) without any tax deduction at source (TDS). The Assessing Officer (AO) was of the view that these payments are made for 'using the name, goodwill and market reputation' of OSE and, therefore, taxable in India as royalties under Section 9(1)(vi) of the Income-tax Act, 1961 (the Act).

It was explained by the taxpayer that OSE did not have any Permanent Establishment (PE) in India, and since the payments made to OSE were only for the purpose of sharing SOPs, access to database, e-mail server, hardware and software, these payments, in the absence of the PE of OSE in India, were not taxable in India. These receipts by the OSE were required to be treated as business profits in the hands of the OSE, and taxability could arise only if the OSE had a PE in India. The taxpayer also explained that OSE permitted the use of brand name, logo and website without any cost or financial obligation. These arguments were rejected by AO holding that the taxpayer has made payments for the use of technology, patent, trademark and accordingly the same is treated as royalty under Section 9(1)(vi) of the Act.

The Ahmedabad Tribunal in the instant case observed that the taxpayer has made payments for SOPs which 'matured validated standard procedures' developed by OSE over a period of time and approved by the regulatory bodies. Such SOPs were non-transferable and the taxpayer is not allowed to make any changes in it, it is only sharing of the information about the scientific experiences by the OSE. Therefore, payments for SOPs were for sharing of scientific, industrial and commercial experiences and taxable as royalty under Article 13(3) of India-Germany tax treaty.

Oncology Services India Pvt Ltd v. ADIT (ITA No. 2990/Ahd/2013) (Ahd) – Taxsutra.com

Notifications/Circulars/Press Releases

India signs the Multilateral Convention

India is now among the 67 countries signing the Multilateral Convention (the Convention/MLI) in Paris on 7 June, 2017 to implement tax treaty related measures to prevent Base Erosion and Profit Shifting (BEPS). More countries are expected to sign the Convention in coming days. The Convention is an outcome of the Organisation for Economic Co-operation and Development (OECD)/G20 Project to tackle BEPS i.e., tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity, resulting in little or no overall corporate tax being paid.

The MLI was developed by a group of over 100 countries and jurisdictions. Various developing countries have also shown great interest in signing the MLI and have started their technical preparations to sign. The Convention enables all signatories, inter alia, to meet treaty related minimum standards that were agreed as part of the Final BEPS package. The Convention will operate to modify tax treaties between two or more parties to the Convention. It will not function in the same way as an amending protocol to a single existing treaty, which would directly amend the text of the Covered Tax Agreement (CTA). Instead, it will be applied alongside existing tax treaties, modifying their application in order to implement the BEPS measures.

The provisional MLI position of each signatory indicates the tax treaties it intends to cover, the options it has chosen and the reservations it has made. Signatories can amend their MLI positions until ratification. Even after ratification, parties can choose to opt in with respect to optional provisions or to withdraw reservations. For example, while 25 Signatories have chosen to apply the MLI arbitration provisions, additional signatories can choose to apply those provisions later.

Source: www.occd.org, dated 7 June 2017

Corporate tax

Decisions

Taxpayer is eligible for interest on tax refund but it is not eligible for interest on interest

The taxpayer is engaged in the business of banking and claimed to be exempt from the payment of income tax on the income derived from the interest on securities as per the provisions of Section 80P(2)(a)(i) of the Act. During the Financial Years (FY) 1999-2000 to 2002-2003, the taxpayer made huge investments in the Central, State and Trustee Securities and earned interest income over such deposits. During the year under consideration, the taxpayer had received interest income on which tax is deducted at source but the taxpayer was not liable for tax over the income derived from the interest on securities. The taxpayer made repeated requests for processing the claim of refund to the AO. However, the AO held that the belated refund claim exceeded a sum of INR1 lakh and by virtue of CBDT's Circular No. 670 dated 26 October 1993, such a claim was not admissible. The Chief Commissioner of Income Tax (CCIT) has also held that the prayer had to be made to the CBDT. Subsequently, the taxpayer filed a petition before the CBDT for admitting the claim for refund of excess tax paid along with interest. The CBDT directed the AO to allow the tax refund subject to verification but also directed that no interest should be paid on these refund claims.

High Court's decision

Interest on TDS refund

Section 244A(2) of the Act provides a restriction on payment of interest but only to the extent that if the proceedings resulting in refund are delayed for the reasons attributable to the taxpayer. There was an initial delay on the part of the taxpayers in as much as the claim tax refund and deposited in the Assessment Years (AY) 2000-2001, 2001-2002, 2002-2003 and 2003-2004. The delay in claiming refund is attributable to the taxpayers alone and the taxpayers cannot be held entitled to interest until the date of making the petition before the CBDT. Accordingly, they are not entitled to claim interest on refund until the date of making the petition before the CBDT but the delay thereafter had essentially been on the part of the tax department. Therefore, the taxpayer is to be allowed interest on the refundable amount of tax with effect from the date when the petition is filed before the CBDT.

Compensation for delayed payment of interest in the form of interest over interest

There had been a considerable delay on the part of the taxpayers themselves in making the claim for refund and then, in making the petition for condonation of delay. In Sandvik Asia Ltd. v. CIT [2006] 280 ITR 643 (SC), the Supreme Court awarded interest over interest in the case where the taxpayer was made to wait for refund of interest for decades and it was found that the taxpayer had been greatly prejudice for inordinate delay on the part of the tax department. In the present case the initial long delay is attributable to the taxpayers themselves. The other part of delay in ordering and making refund is adequately taken care of by the amount of interest, which the taxpayers are held entitled to with effect from the date when the petition is filed before CBDT. Though accepting the claim for refund in the assessment orders but issuing refund cheque in the month of May 2014 cannot be appreciated but it has been found no reason to award any further interest over the statutory interest to the petitioners. Accordingly, the claim of the taxpayer is declined.

The Meghalaya Co-operative Apex Bank Ltd v. The Chairman CBDT (WP(C) No. 317 of 2014, dated 31 May 2017) – Taxsutra.com

Marked to market losses arises on account of foreign exchange forward contract cannot be allowed as deduction under the Act

During AY 2009-10, the taxpayer provided engineering and design service to its Associated Enterprise (AE). In order to safeguard any foreign exchange fluctuation losses in sales invoices raised, the taxpayer entered into nine forward contracts with the Bank of America. The taxpayer re-measured its forward contract on 31 March at the prevalent forward market exchange rate and computed total loss of INR21.80 crore debiting it to the profit and loss account. The AO held that the marked to market (MTM) loss being notional loss would not be deductible as a business loss for income tax purposes. The Dispute Resolution Panel (DRP) observed that out of nine forward contracts, the taxpayer has only used four forward contracts fully. However, the taxpayer had not used those forward contracts immediately but it started using them against the sale invoices after the lapse of time of few months. The DRP held that there was no underlying assets in respect of the forward contract transactions undertaken by taxpayer and thus these transactions were in the nature of speculative transactions. Thus, the DRP held that corresponding loss was not allowable to be adjusted against business profit. Aggrieved, the taxpayer filed an appeal before the Delhi Tribunal.

The Tribunal observed that in view of the ratio of Supreme Court's decision in the case of Woodward Governor India (P.) Ltd. [2009] 294 ITR 451 (SC), the taxpayer was having option of measuring its exports receivables at exchange rate of US dollar on the balance sheet date, and any gain or loss on the same would have been allowable to the taxpayer. However, the taxpayer did not do so. The taxpayer, on the other hand entered into forward contracts with banks at predetermined exchange rate of foreign currency and thereby hedged its receivables and immune itself from effect of any change in exchange rate of foreign currency. The taxpayer instead of measuring the receivables on balance sheet date at foreign exchange rate contracted, measured the pending forward contracts on balance sheet date at a value of foreign currency in the forward market. The taxpayer treated the forward contract as its liability to pay to the bank and claimed the same as loss. The Tribunal distinguished the decision of Woodward Governor India (P.) Ltd. observing that, the taxpayer was neither dealing in forward contracts nor it was a part of a stock in trade. Therefore, the question of trading liability did not arise.

The Tribunal held that hedging forward contracts of foreign currency couldn't be MTM as already there was an underlying asset without any extra outgo for settlement of the forward contract other than the contractual terms. Once there is no liability or benefit on the settlement date, there is no possibility of liability or benefit to the taxpayer on balance sheet date also. Therefore, the loss claimed by taxpayer on account of fluctuation in foreign currency in respect of hedging forward contract was not allowable.

Bechtel India Pvt. Ltd. v. ACIT (ITA No. 1224/Del/2017, dated 29 May 2017) – Taxsutra.com

Section 139AA of the Act is constitutionally valid but it cannot apply retrospectively

As per Section 139AA of the Act (inserted by the Finance Act 2017) in the application forms for allotment of PAN as well as income-tax returns, the taxpayer is obliged to quote his/her Aadhar number on or after 1 July 2017. The provisions of Section 139AA(1) of the Act provides relaxation from quoting Aadhar number to those who do not possess Aadhar number but already applied for issuance of Aadhar card. In their cases, the enrolment ID of Aadhar application form is to be quoted. Proviso to sub-section (2) of Section 139AA of the Act stipulates the consequences of failure to intimate the Aadhaar number. In those cases, PAN allotted to such persons would become invalid not only from 1 July 2017, but from its inception as the deeming provision in this proviso mentions that PAN would be invalid as if the person had not applied for allotment of PAN. Section 139AA(3) of the Act, however, gives discretion to the central government to exempt such person or class or classes of persons or any State or part of any State from the requirement of quoting Aadhaar number in the application form for PAN or in the return of income.

The taxpayer filed appeal before the Supreme Court challenging the constitutional validity of Section 139AA of the Act.

The Supreme Court observed that the present case falls within the basket of 'hard cases'. A law made by Parliament/Legislature can be struck down only on two grounds, namely (i) The Parliament/Legislature lacks legislative competence to enact such a law (ii) It violates fundamental rights enshrined under the Constitution. The Supreme Court rejected arguments of the taxpayer that the provision has been 'mandatory' under the Act while the same is 'directory' under the Aadhaar Act. It has been held that it is the prerogative of the Parliament to make a particular provision directory in one statute and mandatory/compulsory in other. Merely because a section of persons opposes the law, would not mean that it has become a separate class by itself. Article 14 of the Constitution of India prohibits class legislation and not reasonable classification for the purpose of legislation. All taxpayers constitute one class and they are treated alike by the impugned provision. The Supreme Court accepted that to crack down on over 10 lakh duplicate PANs, Parliament embarked on the 'duplication' exercise by legislating Section 139AA of the Act with the objective of ensuring 'One PAN to one person'. The menace of black money and corruption has reached 'alarming' proportions, quotes from SIT Report on Black Money as also a CBDT committee which suggested that one singular proof of identity of a person for entering into business transactions may help in curbing this menace. Therefore, the Supreme Court upheld the constitutional validity of Section 139AA of the Act vis-a-vis Article 14 and Article 19(1)(g), subject however to the outcome of Constitution bench case where the more stringent tests of whether Aadhaar violates the Right to Privacy and Right to Dignity, shall be decided.

The Supreme Court enforces Section 139AA of the Act for those taxpayers who possess an Aadhaar card but grants partial relief to non-Aadhaar holders by staying the operation of the provision for them. Also reads down proviso to Section 139AA of the Act by making its operation prospective. However, at the same time, it has been observed that proviso to Section 139AA(2) cannot be read retrospectively. If failure to intimate the Aadhaar number renders PAN void ab initio with the deeming provision that the PAN allotted would be invalid as if the person had not applied for allotment of PAN would have rippling effect of unsettling settled rights of the parties. It has the effect of undoing all the acts done by a person on the basis of such a PAN. It may have even the effect of incurring other penal consequences under the Act for earlier period on the ground that there was no PAN registration by a particular taxpayer. The rights which are already accrued to a person in law cannot be taken away. Therefore, this provision needs to be read down by making it clear that it would operate prospectively.

Binoy Viswam v. Union of India [Writ Petition (Civil) No. 247 of 2017] – Taxsutra.com

Notifications/Circulars/Press Releases

CBDT issues press release and draft notification on special transitional provisions for a foreign company said to be resident in India on account of POEM

The Finance Act, 2016, inter alia, introduced special provisions in respect of foreign company said to be resident in India on account of Place of Effective Management (POEM) by way of insertion of a new Chapter XII-BC consisting of Section 115JH in the Act with effect from 1 April 2017.

Section 115JH of the Act, inter alia, provides that the central government may notify exception, modification and adaptation subject to which, provisions of the Act relating to computation of total income, treatment of unabsorbed depreciation, set off or carry forward and set off of losses, collection and recovery and special provisions relating to avoidance of tax shall apply in a case where a foreign company is said to be resident in India due to its POEM being in India for the first time and the said company has never been resident in India before. It has been further provided that these transitional provisions would also cover any subsequent previous year upto the date of determination of POEM in an assessment proceedings.

Recently, the CBDT issued a press release and draft notification providing for said exception, modification and adaptation for application of provisions of the Act in case where a foreign company is said to be a resident in India on account of POEM.

The draft notification states that the foreign company will be eligible for depreciation, brought forward and unabsorbed depreciation as per tax records in the foreign country or as per books of accounts maintained in accordance with the laws of the foreign country, as the case may be. It provides clarity with respect to accounting year to be taken. Further it provides that where more than one TDS related provisions of Chapter XVII-B of the Act apply to the foreign company as resident as well as foreign company, the provisions applicable to the foreign company shall apply. Also, it is proposed to allow foreign tax credit under Section 90/91 of the Act. Section 195(2) (relating to application to AO for lower TDS) shall apply in such manner so as to include payment to the foreign company.

However, it has been provided that the rate of tax in case of a foreign company shall remain the same even though residency status of the foreign company changes from non-resident to resident on the basis of POEM.

CBDT press release and draft notification, dated 15 June 2017 – Source: Taxsutra.com

CBDT clarifies that TDS provisions under Section 194-I of the Act is not applicable to remittance of Passenger Service Fees by an Airline to an Airport Operator

Under the provisions of Section 194-I of the Act, tax is required to be deducted on payment of rent. The term rent is defined under the Explanation to the said section.

Dispute arose on applicability of the provisions of Section 194-I of the Act, on payment of Passenger Service Fees (PSF) by an airline to an airport operator. The Bombay High Court in CIT v. Jet Airways (India) Ltd.(ITA No.1181of 2014, dated 4 January 2017) declined to admit the ground relating to applicability of provisions of Section 194-I of the Act on PSF charges holding that no substantial question of law arises. While doing so it relied on the decision of the Supreme Court in the case of Japan Airlines and Singapore Airlines [2015] 377 ITR 372 (SC) where the Supreme Court held that in view of Explanation to Section 194-I of the Act, though, the normal meaning of the word 'rent' stood expanded, however, the primary requirement is that the payment must be for the use of land and building and mere incidental/minor/insignificant use of the same while providing other facilities and service would not make it a payment for use of land and buildings so as to attract Section 194-I of the Act.

Recently, the Central Board of Direct Taxes (CBDT) has issued a Circular No. 21/2017, dated 12 June 2017 accepting the above view of the Bombay High Court. Accordingly, it is now a settled position that the provisions of Section 194-I of the Act, will not apply on PSF.

In view of the above, henceforth, appeals may not be filed by the tax department on the above settled issue, and those already filed may be withdrawn/not pressed upon.

CBDT Circular No. 21/2017, dated 12 June 2017

CBDT clarifies that trade advances which are in the nature of commercial transactions would not fall within the ambit of the word 'advance' in Section 2(22)(e) of the Act

The CBDT observed that various Courts[1] in the recent past have held that trade advances in the nature of commercial transactions would not fall within the ambit of the provisions of Section 2(22)(e) of the Act and such views of the Courts have attained finality.

The CBDT issued a circular stating that in view of various decisions, it is a settled position that trade advances, which are in the nature of commercial transactions would not fall within the ambit of the word 'advance' in Section 2(22)(e) of the Act. Accordingly, henceforth, appeals may not be filed on this ground by tax officers of the tax department and those already filed, in Courts/Tribunal may be withdrawn/not pressed upon.

CBDT Notification No. 19/2017, dated 12 June 2017

CBDT notifies rules with respect to TDS under Section 194-IB of the Act

Section 194-IB of the Act introduced by the Finance Act, 2017 provides that individual and Hindu Undivided Family (HUF) responsible for paying to a resident any income by way of rent exceeding INR50,000 for a month or part of month during the previous year, shall deduct an amount equal to 5 per cent of such income as income-tax thereon.

The CBDT issued a notification prescribing rules with respect to TDS under Section 194-IB of the Act. It is prescribed that TDS under Section 194-IB of the Act shall be paid within a period of 30 days from the end of the month in which deduction is made and shall be accompanied by challan-cum-statement in Form No. 26QC. The tax shall be paid electronically within prescribed time. The person deducting TDS under Section 194-IB shall furnish certificate in Form No. 16C to the payee within 15 days from the due date of furnishing challan-cum-statement in Form No. 26QC. Further, Form No. 16C i.e. certificate for tax deducted at source and Form No. 26QC i.e. challan-cum-statement of deduction of tax under Section 194-IB of the Act have been prescribed.

Notification No. 48/2017, dated 8 June 2017

1. CIT v. Creative Dyeing & Printing Pvt. Ltd. [2009] 318 ITR 476 (Del)
CIT v. Amrik Singh [2015] 231 Taxman 731 (P&H)
CIT v. Atul Engineering Udyog [2014] 228 Taxman 295 (All)
Sony Ericson Mobile Communications (India) Pvt. Ltd. vs CIT [2015] 374 ITR 118 (Del).

Transfer pricing

Decisions

Transfer pricing adjustment on account of marketing intangibles by factoring AMP intensity in the profit rates of comparables upheld

- The taxpayer is part of the Luxottica Group, a leader in design, manufacture and distribution of sun glasses and prescription frames in mid and premium price categories.
- Transfer Pricing Officer (TPO) proposed adjustment for AY 2010-11 and AY 2011-12 in respect of Advertisement, Marketing and Promotion (AMP) expenses incurred by the taxpayer by applying bright line test (BLT), which was largely approved by the Dispute Resolution Panel (DRP). Aggrieved, the taxpayer filed an appeal before Tribunal for both the years. TPO also proposed adjustment for AY 2012-13 for AMP expenses by carrying out AMP Intensity Adjustment (AIA) in profit margins of comparable companies. The taxpayer advanced proposition regarding use of denominator as 'total operating cost' instead of 'total cost of material purchased' for AIA.

Tribunal's ruling

AY 2010-11 and AY 2011-12

- Noting that the TPO treated AMP as a separate transaction and benchmarked the same using BLT, Tribunal followed the taxpayer's own case for preceding AY 2009-10 and remitted the issue to the files of AO/TPO for fresh determination by applying principles laid down in the case of Sony Ericsson[2].
- Tribunal also struck down the taxpayer's alternate proposition to carry out AIA (similar to TPO's action in AY 2012-13) instead of restoring the matter to the AO/TPO. In this context, Tribunal cited that if the taxpayer's alternate proposition was accepted, it would amount to setting up of an altogether different case.

AY 2012-13

- Tribunal sanctioned TPO's action of undertaking AIA and rejected the taxpayer's proposition regarding the use of denominator as 'total operating cost' instead of 'total cost of material purchased' stating that there cannot be any item wise difference between composition of numerator and denominator and in case taxpayer's contention to expand denominator to 'total operating cost' was accepted, it would only lead to distorted results.
- However, Tribunal approved the taxpayer's application of Resale Price Method (RPM) over Transactional Net Margin Method (TNMM). Tribunal strongly stressed on carrying out AIA and held that if such an adjustment cannot be done due to any reason, a different suitable method may be adopted to encompass AIA. In this context, Tribunal observed that application of RPM as Most Appropriate Method (MAM) was sanctioned by Tribunal and High Court in the taxpayer's own case for preceding AY 2009-10 and this view is also fortified in the case of Sony Ericsson.

Delhi Tribunal in the case of Luxottica India Eyewear Pvt. Ltd. vs ACIT (ITA No.1492/Del/2015, ITA No.1205/Del/2016 and ITA No.344/Del/2017)

Notifications/Circulars/Press Releases

CBDT notifies the much awaited revised Safe Harbour Rules

To curb the increasing number of transfer pricing audits and prolonged disputes, the CBDT issued the Safe Harbour Rules (SHRs) in September 2013. However, the safe harbour programme received a tepid response from taxpayers in India, due to perceived high margins and ambiguity in the classification of services. The CBDT has now revised the existing safe harbour rules in India.

Key highlights

- The revised SHRs apply for AY 2017-18 and two immediately following AYs i.e. upto AY 2019-20. The earlier SHRs were applicable from AY 2013-14 and four immediately following AYs i.e. upto AY 2017-18. For AY 2017-18, the taxpayer can choose from old or new rules whichever are more beneficial.
- Upper turnover threshold of INR200 crore has been introduced for all contract service providers [IT, (ITeS), KPO, R&D for IT and generic pharmaceutical drugs]. For AY 2017-18, since the taxpayers have an option to choose from old or new rules, even the taxpayers with relevant international transactions of more than INR200 crore can opt for safe harbour as per the old rules.
- The SHRs for receipt of low value-adding intra-group services (LVIGS) have been introduced which are largely in line with the guidelines issued by Organisation for Economic Co-operation and Development's (OECD) under BEPS Action Plans 8-10. However, in definition of LVIGS, there are certain deviations. To be covered by SHRs, such services should:
  - be in the nature of support services
  - not be a part of the core business of the multinational enterprise (MNE) group
  - not be in the nature of shareholder services or duplicate services
  - neither require the use of unique and valuable intangibles nor lead to the creation of unique and valuable intangibles
  - neither involve the assumption or control of significant risk by the service provider nor give rise to the creation of significant risk for the service provider and
  - be services which do not have reliable external comparable services that can be used for determining their arm's length price (ALP).

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2. Sony Ericson Mobile Communications (India) Pvt. Ltd. vs CIT [2015] 374 ITR 118 (Del).

- A prescribed list of ten categories of services have been specifically excluded from the ambit of LVIGS i.e. services such as IT (software development), KPO, BPO services. The revised SHRs also require applicants to get the method of cost pooling, exclusion of shareholder costs and duplicate costs from cost pool and the reasonableness of the allocation keys used for allocation of costs, certified by an accountant.
- The revised SHRs have introduced safe harbour rates based on London Inter-bank Offer Rate (LIBOR) for loans advanced to AEs denominated in foreign currency.
- The revised safe harbour rates are as follows:

Categories of international transactions	Safe harbour rates - old rules [as per sub Rule (2) of rule 10TD of Income-tax Rules, 1962] applicable from AY 2013-14 to AY 2017-18	Safe Harbour rates - revised rules [as per sub Rule (2A) of rule 10TD] applicable from AY 2017-18 to AY 2019-20
Provision of Software development services (IT services) and Information Technology Enabled services (ITeS), with insignificant risks	Operating profit margin to operating expense • where the aggregate value of such transactions ≤ INR500 crore – not less than 20 per cent • where the aggregate value of such transactions > INR500 crore – not less than 22 per cent.	Operating profit margin to operating expense • where the aggregate value of such transactions < INR100 crore – not less than 17 per cent • where the aggregate value of such transactions > INR100 crore but < INR200 crore - not less than 18 per cent.
Provision of KPO services, with insignificant risks	Operating profit margin to operating expense not less than 25 per cent	The value of international transaction < INR200 crore and the operating profit margin to operating expense is – • Not less than 24 per cent, if the employee cost to operating expense is at least 60 per cent • Not less than 21 per cent, if the employee cost to operating expense is greater than 40 per cent or more but less than 60 per cent or • Not less than 18 per cent, if the employee cost to operating expense does not exceed 40 per cent.
Provision of Intra-group loan to Wholly Owned Subsidiary (WOS)	Interest rate equal to or greater than the base rate of State Bank of India (SBI) as on 30th June of the relevant previous year: • plus 150 basis points where the amount of loan is < INR50 crore • plus 300 basis points where amount of loan is > INR50 crore	***The threshold of INR50 crore has been removed*** Different safe harbour rates have been prescribed for • **Loan denominated in Indian Rupees (INR)** Refer table 1 below • **Loan denominated in foreign currency** Refer table 1 below
Provision of Corporate guarantee to WOS	• where the amount guaranteed < INR100 crore - Commission or fee of 2 per cent or more per annum • where the amount guaranteed > INR100 crore, and the credit rating of the borrower, by a Securities and Exchange Board of India (SEBI) registered agency is of the adequate to highest safety - Commission or fee of 1.75 per cent or more per annum	The differential rates of 2 per cent and 1.75 per cent have been moderated down to a standard rate of 1 per cent irrespective of the amount guaranteed. However the requirement for the credit rating of the borrower to be certified by a SEBI registered agency and such credit rating to be of adequate to highest safety still remains for amount guaranteed exceeding INR100 crore

Categories of international transactions	Safe harbour rates - old rules [as per sub Rule (2) of rule 10TD of Income-tax Rules, 1962] applicable from AY 2013-14 to AY 2017-18	Safe Harbour rates - revised rules [as per sub Rule (2A) of rule 10TD] applicable from AY 2017-18 to AY 2019-20
Provision of specified contract research and development services (Contract R&D services), with insignificant risks, wholly or partly relating to software development	Operating profit margin to operating expense not less than 30 per cent	The operating profit margin to operating expense not less than 24 per cent, where the value of the international transaction is < INR200 crore.
Provision of contract R&D services, with insignificant risks, wholly or partly relating to generic pharmaceutical drugs	Operating profit margin to operating expense not less than 29 per cent	The operating profit margin to operating expense not less than 24 per cent, where the value of the international transaction is < INR200 crore.
Manufacture and export of: • core auto components • non-core auto components where 90 per cent or more of total turnover relates to Original Equipment Manufacturer sales	Operating profit margin to operating expense: • not less than 12 per cent • not less than 8.5 per cent	Operating profit margin to operating expense: • not less than 12 per cent • not less than 8.5 per cent
Receipt of low value-adding intra-group services		Aggregate value of such transactions (including a mark-up not exceeding 5 per cent), does not exceed INR10 crore. Method of cost pooling, exclusion of shareholder costs and duplicate costs from cost pool and the reasonableness of the allocation keys used for allocation of costs to be certified by an accountant.

Table 1 – Safe harbour rates prescribed for loans advanced to AE

CRISIL credit rating of AE	**Loan in INR -** Interest rate > one-year marginal cost of funds lending rate of State Bank of India as on 1 April of the relevant previous year plus basis points as below	**Loan in Foreign currency -** Interest rate > six-month LIBOR of the relevant foreign currency as on 30 September of the relevant previous year plus basis points as below
between AAA to A or its equivalent	175 basis points	150 basis points
BBB-, BBB or BBB+ or its equivalent	325 basis points	300 basis points
between BB to B or its equivalent	475 basis points	450 basis points
between C to D or its equivalent	625 basis points	600 basis points
Credit rating not available and aggregate amount of loan advanced to all AEs as on 31 March of the relevant previous year < INR100 crore	425 basis points	400 basis points

CBDT Notification No. 46/2017/ F. No. 370142/6/2017-TPL dated 7 June 2017

CBDT notifies rules for the computation mechanism of interest income pursuant to secondary adjustments

The Finance Act, 2017 introduced provisions of secondary adjustment in the Act under Section 92CE. 'Secondary adjustment' has been explained as an adjustment in the books of accounts of the taxpayer and its AE to reflect that the actual allocation of profits between the taxpayer and its AE are consistent with the transfer price determined as a result of primary adjustment (i.e. based on the arm's length price as may be determined) thereby removing the imbalance between the cash account and actual profit of the taxpayer.

The provisions explain that when there is enhancement of taxable profits or reduction in losses due to adjustment to transfer prices charged to AE, the additional amount receivable from the AE should be repatriated by the taxpayer and offered for tax in the country of the taxpayer (in this case India). If the same is not received by the taxpayer, then a notional interest on the outstanding amount receivable from the AE (deemed as an advance) should also be offered to tax as an income of the taxpayer. The manner of computation of the notional interest on the amount deemed as advance made by the taxpayer to the AE was to be prescribed by the CBDT. The CBDT has now, inserted rule 10CB in the Income-tax Rules, 1962 (Rules) to provide for computation mechanism of notional interest income pursuant to these secondary adjustments.

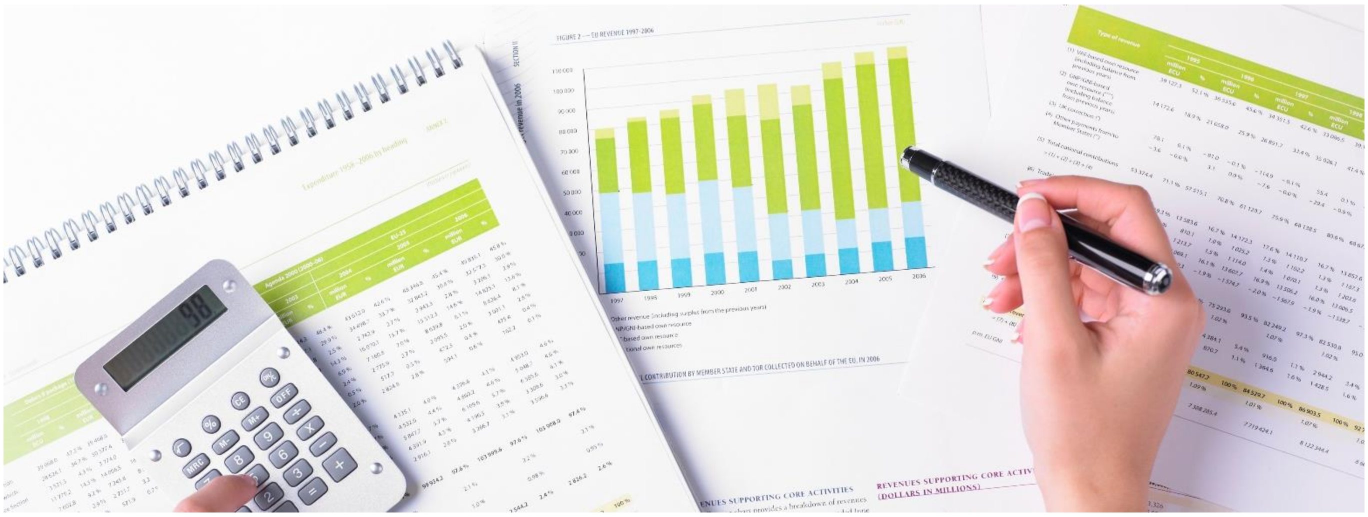
Time limit for the repatriation of excess money

Situations where the primary adjustment has been made	Time limit for repatriation pursuant to secondary adjustment is set at 90 days:
Suo-moto adjustment to transfer price made by the taxpayer in the return of income	from the due date of filing return of income under section 139(1) of the Act
Adjustment made by the AO and accepted by the taxpayer	from the date of the order of AO or the appellate authority, as the case may be
Adjustment due to APA entered into by the taxpayer	from the due date of filing return of income under Section 139(1) of the Act
Adjustment made as per SHRs	from the due date of filing return of income under section 139(1) of the Act
Adjustment due to resolution of an assessment by way MAP under an agreement entered into for avoidance of double taxation.	from the due date of filing return of income under section 139(1) of the Act

Rate of interest - The rate of interest to be charged on the excess money which is not repatriated into India within the prescribed time limit of 90 days as explained above shall be computed as under:

- **International transaction in INR -** at the one year marginal cost of funds lending rate (MCLR) of State Bank of India as on 1 April of the relevant previous year plus **325 basis points.**
- **International transaction in foreign currency -** at six-month LIBOR as on 30 September of the relevant previous year in the relevant foreign currency plus **300 basis points.**

CBDT Notification No. 52/2017, F.No.370142/12/2017 -TPL dated 15 June 2017



Indirect tax

Service tax

Notifications/Circulars/Press Releases

Due date for filing last Service tax return for April to June 2017 notified as 15 August 2017

It has been notified that Service tax return for the period 1 April 2017 to 30 June 2017 should be filed latest by 15 August 2017. Further, the said return can be revised within a period of 45 days from the date of submission of the return.

Notification No. 18/2017 - Service tax dated 22 June 2017

Central Excise

Decisions

Penalty cannot be imposed if CENVAT credit is reversed before issue of SCN

The taxpayer is engaged in the manufacture of electric wires and cables, falling under chapter heading 8544 of the Central Excise Tariff and also, is in possession of Export Promotion Capital Goods (EPCG) license. On the basis of the EPCG license, the taxpayer has imported eligible capital goods for manufacture of the final product.

In terms of the letter of invalidation issued by the Directorate General Foreign Trade (DGFT), New Delhi, the taxpayer was entitled to procure plant and machinery without payment of Central Excise duty. However, while procuring the impugned capital goods, the appellant had paid the Central Excise duty claimed by the suppliers on the invoices and availed CENVAT credit of such duty paid on procurement of goods.

The credit so availed was reversed by the appellant for obtaining the Terminal Excise Duty (TED) benefit from the DGFT. Subsequent to reversal of CENVAT credit, the department issued the Show Cause Notice, proposing for recovery of interest, appropriation of CENVAT reversal and for penalty.

The taxpayer against the impugned order stated that the imposition of penalty is not legal and proper inasmuch as payment of Central Excise duty on procurement of capital goods and taking of CENVAT credit was due to the bona-fide mistake and not by reason of fraud, collusion or any willful mis-statement or suppression of facts.

In this background, the Delhi Tribunal observed that, in terms of conditions contained in the EPCG license, the taxpayer was entitled for the benefit of Terminal Excise Duty and there was no requirement of payment of Central Excise Duty on procurement of capital goods on the basis of invalidation letters issued by the DGFT.

However, the taxpayer had purchased the goods on payment of Central Excise Duty and availed CENVAT credit of such duty paid on the capital goods. Since the taxpayer has reversed the CENVAT credit before issuance of Show Cause Notice and also paid interest attributable to such late reversal of CENVAT credit, penalty cannot be imposed. Further, there was no element of suppression, fraud, collusion etc., with intent to avail wrong CENVAT credit. Accordingly, the impugned order was set aside allowing the appeal of the taxpayer to the extent of imposition of penalty.

Cords Cable Industries Ltd vs CCE (2017-TIOL-1969-CESTAT-DEL)

Notifications/Circulars/Press Releases

Amendment in Rule 4 of Cenvat Credit Rules, 2004 to allow availment of un-availed CENVAT credit

Central Government has allowed to avail the un-availed CENVAT Credit in respect of services provided by the Government, local authority or any other person by way of assignment of the right to use any natural resource on the day immediately preceding the appointed day in full on that very day.

For this purpose, 'un-availed CENVAT credit' means the amount that remains after subtracting the amount of CENVAT credit already availed in respect of any service from the aggregate amount of CENVAT credit to which the recipient of such service was entitled to in respect of such service. Further, 'appointed day' means the date on which the provisions of the Central GST Act, 2017 (12 of 2017) shall come into force'.

Notification No. 15/2017-Central Excise (N.T) dated 12 June 2017

DGFT- Trade Notice

Changes in IEC with the introduction of GST

With the introduction of GST, changes have been made in Importer Exporter Code (IEC). Since, Goods and Services Tax Identification Number (GSTIN) would be used for purposes of credit flow of IGST on import of goods and refund or rebate of Integrated Goods and Service Tax (IGST) related to export of goods, it has been decided that the importer/exporter would need to declare only GSTIN (wherever registered) at the time of import and export of goods. Usage of IEC would continue for importer/exporter not registered under GST.

Further, with a view to keep the identity of an entity uniform across Ministries/Departments, it has been decided that PAN of an entity will be used for the purpose of IEC. Accordingly, for new applicants, PAN will be authorised as IEC. For existing IEC holders, necessary changes are being made in the system, so that their PAN becomes their IEC. IEC holders are required to quote their PAN in all future documentation with effect from implementation date of GST.

Trade Notice 9/2017, dated 12 June 2017

Customs duty

Decisions

'Nil' rate is also a rate of tax, which is payable on sale, but for the exemption

Notification No. 102/2007 – Customs grants exemption to additional duty of customs (SAD), subject to fulfilment of prescribed conditions. One of the requisite conditions for claiming refund of SAD is that 'the importer shall pay on, appropriate sales tax or value added tax, as the case may be', sale of the said goods.

In this regard, a refund claim was filed by the taxpayer in respect of 4 per cent of SAD under Notification No. 102/2007. However such refund claim was denied by the Revenue on the ground that the imported goods were sold goods at Nil rate of VAT/ ST. The taxpayer preferred an appeal against such denial.

The Delhi Tribunal held that, sale of footwear attracts payment of VAT, however, the said goods are exempted from payment of VAT. Since, the goods imported by the appellant attract 'Nil' rate of VAT and the appellant did not pay VAT in view of the exemption Notification, accordingly, it cannot be said that the appellant had violated the conditions mentioned in the Notification inasmuch as, 'Nil' rate is also a rate of tax, which is payable on sale of subject goods, but for the exemption.

Therefore, 'Nil' rate should not dis-qualify the phrase 'appropriate sales tax or VAT' as contained in the Notification. Further, it was held that the case is no more res integra in view of the decision of the Tribunal in the case of Gazal Overseas vs. CC, New Delhi - 2016 (332) E.L.T. 767 (Tri. - Del.) = 2015-TIOL-2454-CESTAT-DEL. Accordingly, appeal was allowed in favour of the taxpayer.

A P Traders vs CC (2017-TIOL-1976-CESTAT-DEL)

VAT

Decisions

Absence of collection of tax cannot be construed as absence of levy or liability

In the present case, the taxpayer, a registered dealer under the Assam Value Added Tax (Assam VAT Act) is engaged in the business of purchase and sale of 'supari'. The same is purchased from local dealers within Assam state and subsequently dispatched outside Assam by way of stock transfer.

The taxpayer did not pay any tax on gross turnover of purchase under Section 12 (Levy of tax on purchases) of the Assam VAT Act. Basis the said section, every dealer who purchases any taxable goods in the course of his business and where no tax under Section 10 is leviable on the sale price of such goods, such person shall be liable to pay tax on the gross turnover of purchase of such goods. The Superintendent of Taxes, Barpeta passed an Order against the taxpayer demanding tax under Section 12 of the Act on the purchase value of supari, for the AY 2009-10.

Aggrieved by the same, the taxpayer preferred an Appeal before the Deputy Commissioner of Taxes (Appeals), but it was dismissed. Further, the taxpayer filed another appeal, before the Assam Board of Revenue, but, it too got dismissed and an order was passed demanding tax and interest thereon. Thereafter, taxpayer filed a revision petition before Gauhati High Court and argued that the lower level authorities have misread the provisions of Section 12 and failed to appreciate the distinction between 'leviable' and 'payable'. A conjoint reading of Sections 10 and 12 of the Act makes it clear that under Section 10 tax is leviable on 'supari' and under Section 12 tax can be levied on purchases only when no tax under Section 10 is leviable on the sale price on such taxable goods. Admittedly, when the petitioner purchased 'supari', tax under Section 10 was leviable on its sale price.

Therefore, the pre-condition for the applicability of Section 12 is entirely absent in the case at hand and merely because the Department could not collect tax on the sale of 'supari' under Section 10 (being a stock transfer), would not mean absence of 'levy' or 'liability' conferring right to levy tax under Section 12. Further, in support of the above argument, learned council of the petitioner relied on various Supreme Court decisions wherein it was held that 'collection' and 'levy' are distinct and that collection is not an essential facet of levy.

In view of the above, the High Court of Gauhati quashed the orders passed by lower authorities.

Jai Kumar Shyam Sukha v. The State of Assam and others (TS-139-HC-2017(GAUH)-VAT)

Notifications/Circulars/Press Release/Order

Telangana

In view of GST implementation from 1 July 2017 onwards, the Commissioner of Telangana issued a circular directing the assessing/revisional authorities not to postpone assessment proceedings under Central Sales Tax Act, 1956 (CST Act), for non-filing of statutory forms by the dealer, without sufficient reason. In all such cases, all assessment shall be completed before the prescribed time and the demand raised thereon shall be collected immediately, so that burden of finalisation of assessments under CST Act, 1956 is not carried to the GST regime. Accordingly, Deputy Commissioners are requested to communicate the same with the concerned authorities and furnish the action report every fortnightly.

Circular CCT's Ref No. A(1)/53/2017 dated 4 May 2017

Delhi

A circular has been issued for speedy grant of registration certificate under Delhi VAT Act, 2004 (DVAT Act) and CST Act, to the dealers to whom provisional registration has been granted earlier but registration certificate was not issued due to pending physical inspection. Further, such registration to be granted subject to verification of documents submitted by the dealer.

Circular No. 7 of 2017-18
No.F.3(521)/Policy/VAT/2015/308-15 dated 26 May 2017

Circular has been issued to resolve cases where multiple Assessment Orders overlapping for the same tax period under the same Act have been issued on one pretext or the other, either under DVAT Act or CST Act. If the dealer approaches the Assessing Authority with details of such overlapping orders, then necessary remedies/measures as prescribed under Section 74B of DVAT Act, 2004 read with Rule 36B of DVAT Rules, 2005 relating to the review/rectification would be exercised as per the provisions of law. Accordingly, Commissioner shall not review any assessment or reassessment or an order where an objection or an appeal against such assessment or reassessment or order in pending for decision.

Circular No. 6 of 2017-18 No.F.3(767)/Policy/VAT/285-92 dated 24 May 2017

Maharashtra

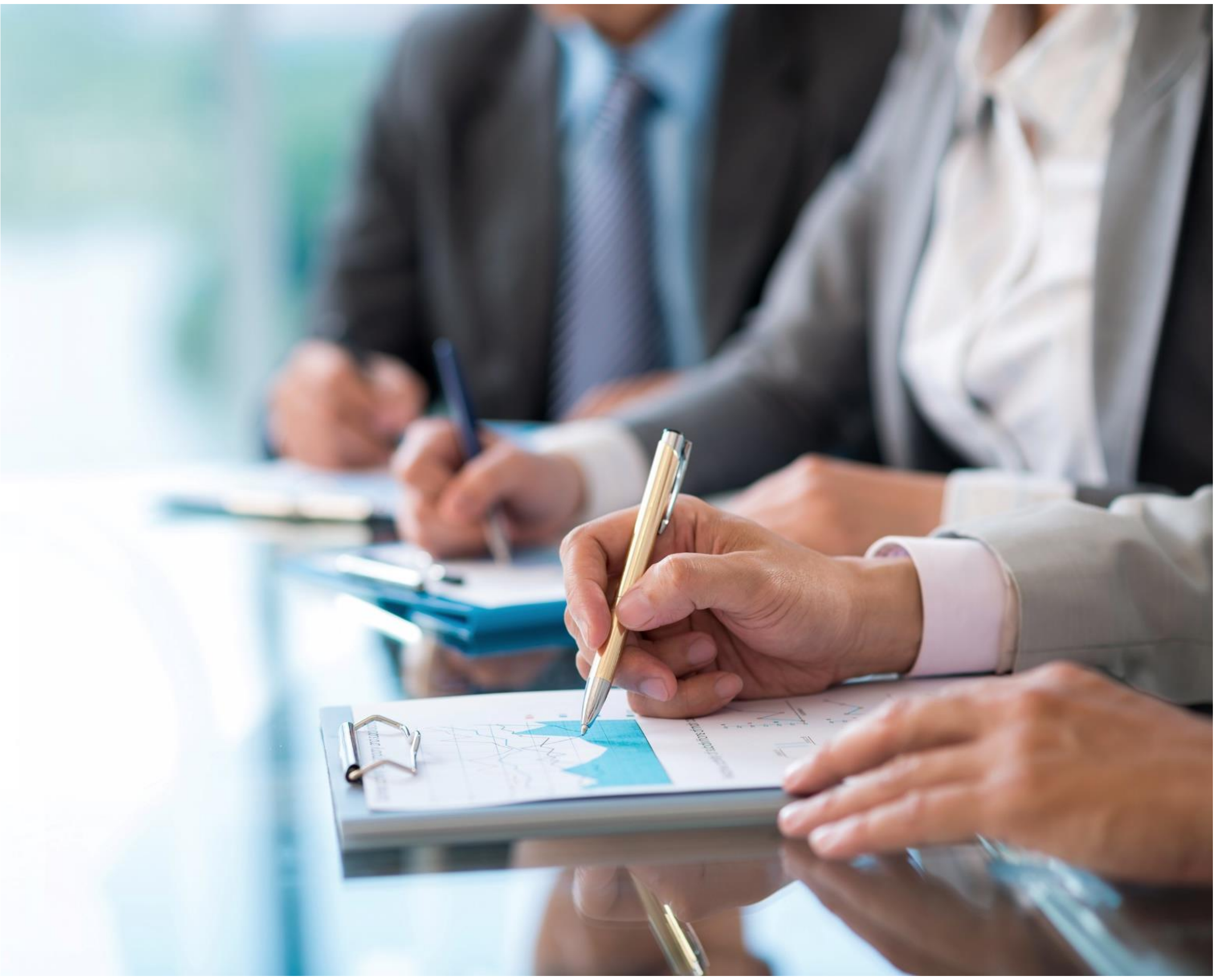
The Maharashtra VAT department has generated Computerized Desk Audit (CDA) reports for the FY 2014-15 after analysis e-returns and audit reports uploaded by the dealers on VAT website and list of parties selected is available at the department's website. However, CDA compliance is not applicable for the dealers selected for comprehensive assessment for the FY 2014-15. Further, the last date for compliance to CDA is 31 July 2017.

Trade Circular No. 19T of 2017 dated 8 June 2017

New composition scheme introduced for works-contract 'Developers'

- With effect from 1 June 2017, Maharashtra government vide circular has amended the existing composition scheme for works contract developers. Consequently, instead of paying 1 per cent VAT on the agreement value or the value determined for the payment of stamp duty whichever is higher, dealers are now required to pay 1 per cent VAT on amount received as advance or otherwise.
- Further, the developers who have not registered sale agreements before 31 May 2017, are liable to pay 1 per cent VAT on or before 30 June 2017 on the amounts already received as advance or otherwise. In this regard, dealers shall be eligible for the credit of 1 per cent VAT paid under current provisions at the time of registration of sale agreement. This is applicable only for the contracts which will continue on or after commencement of SGST Act and in respect of which the developer has already paid VAT as per the current provisions.

Trade Circular No. 18T of 2017 dated 31 May 2017



Personal tax

Notifications/Circulars/Press Releases

Exempted establishments have to file online monthly return through new updated software launched by Employees' Provident Fund Organisation

In 1952, the Indian Government introduced a mandatory savings scheme, for non-government employees, known as the Employees' Provident Fund Scheme (EPFS). In this scheme, both the employee and the employer are required to make a contribution to the Employees' Provident Fund (EPF).

The government also permitted employers to establish and manage their own private PF trusts, subject to the conditions prescribed under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act) and the Act. Such establishments are known as exempted establishments under the EPF Act.

As part of the e-governance programme of Employees' Provident Fund Organisation (EPFO), an online e-Return format was launched on 12 January 2014 for the establishments having relaxation or exemption from the provisions of the EPFS under the EPF Act. The salient features of the return were highlighted in the circular1 issued by EPFO on 27 March 2014.

Recently, EPFO has issued another circular in this regard which states that in order to streamline the monitoring and supervision of the performance of exempted Trusts under the EPF Act and various Schemes framed thereunder, a new software has been launched on 27 May 2017.

Highlights of the circular

- All the exempted Trusts have been advised to submit the pending online returns from October 2016 till date
- The returns for every wage month are to be filed by 15th of the month following the month of payment of contributions for the wage month. Hence all returns pending upto the wage month of April 2017 may be filed online latest by 15 June 2017
- The performance of all the exempted Trusts/Establishments will be monitored on regular basis and ranks will be assigned and the same shall be published periodically on the EPFO website
- Non filing of returns for three consecutive months will result in cancellation of exemption granted to the establishment

EPFO Circular
http://www.epfindia.com/site_docs/PDFs/Circulars/Y2017

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