India Tax Konnect

February 2017

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Editorial

The Union Finance Minister presented the Union Budget 2017-18 before the Parliament on 1 February 2017. The Budget has been marked by historic economic policy developments. On the domestic side, initiating structural reforms notably, the passage of Bankruptcy and Insolvency Act and the Constitutional amendment paving the way for implementing the Goods and Services Tax (GST) while demonetising large denomination currency notes signals a regime shift to punitively raising the costs of illicit activities. Globally, the economic climate is grappling with the uncertainty created by Brexit and the waves of protectionism engulfing many developed countries which threatens world trade.

On the direct tax front, start-ups get a longer period within which to claim tax holiday. For companies whose annual turnover for March 2016 is upto INR50 crore, the tax rate reduces to 25 per cent even as the reduction in the general corporate tax rate has been deferred. However, there are sops to lower income earners and the capital gains tax regime remains unchanged. In addition, there is a reduction in the holding period for computing long-term capital gains from transfer of immovable property from three years to two years. The base year of indexation for long-term capital gains is proposed to be shifted to 1 April 2001 for all classes of assets. Domestic Transfer Pricing (DTP) provisions have been correctly curtailed to only apply in case one of the entities involved in related party transactions enjoys specified profit linked deductions. However introduction of secondary adjustment provisions could add to the complexity and compliance burden.

In line with the recommendations of Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Shifting (BEPS) project, thin capitalisation provisions have been introduced. As a measure of rationalisation, Minimum Alternate Tax (MAT) provisions are proposed to be amended to provide a framework for computation of book profit for Indian Accounting Standards (IND AS) compliant companies in the year of adoption and thereafter. Greater accountability for revenue officers for specific acts of commission and omission has also been noted.

On the indirect tax front, the Finance Minister re-affirmed the commitment to implement GST within the stipulated timeline and highlighted that the progress, including Information Technology (IT) preparedness, is well on track. Further, the Finance Minister announced that post 1 April 2017, extensive reach-out efforts would be made to trade and industry to make them aware of the forthcoming GST regime. On expected lines, no major changes have been introduced in the existing regime with introduction of GST in the backdrop. Peak duty rates remain unchanged. The limited tax proposals introduced appear to be focussed on moving towards 'cashless economy' by introducing duty exemptions on technology products. Proposal to abolish Research and Development (R&D) cess was highly overdue and should make import of technology cheaper.

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.

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Tax article

OECD BEPS Action Plan 7 - Impact of changes to the definition of the term 'Permanent Establishment'

Background

Increased integration of national economies and markets caused strain on the international tax framework designed a century ago. The current rules on international tax revealed weaknesses that created opportunities for BEPS, the outcome of which lead to shifting of profits to no or low-tax jurisdictions. BEPS has resulted in huge losses to governments which arise from a variety of causes, including aggressive tax planning by some Multinational Enterprises (MNEs), the interaction of domestic tax rules, lack of transparency and coordination between tax administrations, limited country enforcement resources and harmful tax practices. This required a bold move by policy makers to restore confidence in the system and ensure that profits are taxed where economic activities take place and value is created.

In September 2013, G20 leaders endorsed the ambitious and comprehensive Action Plan on BEPS. This package of 13 reports, delivered just two years later, includes new or reinforced international standards as well as concrete measures to help countries tackle BEPS. It has represented the results of a significant and unparalleled effort by OECD and G20 countries working together on an equal footing with the participation of an increasing number of developing countries.

The BEPS package represents the first substantial and overdue renovation of the international tax standards in almost a century. This renovation is necessary not only to tackle BEPS, but also to ensure the sustainability of the current international framework for the taxation of cross-border activities and the elimination of double taxation.

A comprehensive package of measures has been agreed upon. Countries are committed to this comprehensive package and its consistent implementation. These measures range from new minimum standards to the revision of existing standards, common approaches which can facilitate the convergence of national practices and guidance drawing on best practices.

Impact of BEPS Action Plan on the scope of Permanent Establishment

In an era where non-resident taxpayers derived substantial profits from transactions with customers located in another country, questions were being raised as to whether the current rules ensured a fair allocation of taxing rights on business profits, especially where the profits from such transactions go untaxed anywhere.

In this backdrop, the definition of Permanent Establishment (PE) included in Model Convention and the tax treaties assumed significance in determining whether a non-resident enterprise must pay tax in another State.

The BEPS Action Plan 7[1] called for a review of that definition to prevent the use of certain common tax avoidance strategies that are currently used to circumvent the existing PE definition.

As the digital economy gains momentum, it would be difficult to ring-fence the digital economy from the rest of the economy for tax purposes.

The digital economy and its business models[2] present however some key features[3] which are potentially relevant from a tax perspective. The digital economy has also accelerated and changed the spread of global value chains in which MNEs integrate their worldwide operations.

The work done with respect to Action Plan 7 was identified by the Task Force on the Digital Economy (TFDE[4]) as a key area of focus in order to ensure that BEPS risks in the digital economy could be addressed as well. The work, therefore, took into account the key features of the digital economy in developing changes to the definition of PE to ensure that artificial arrangements cannot be used to circumvent the threshold for exercising taxing rights.

After having released an initial discussion draft in October 2014, OECD issued a revised discussion draft in May 2015. The revised discussion draft, built on the 14 options presented in the first discussion draft set out specific proposed changes to PE definition in OECD model treaty, accompanied by corresponding changes to the Commentary. These drafts culminated into the final report, where OECD has recommended the proposed changes to PE definition, and related Commentary contained in the revised discussion draft to prevent the use of certain common tax avoidance strategies that are currently used to circumvent the existing PE definition.

The key recommendations of the Action Plan 7, dealing with splitting up of contracts and the specific activity exemptions[5] dealing with preparatory and auxiliary activities are discussed below. It also deals with the consequential impact they would have on the contractual arrangements vis-à-vis the recommendations made while determining the status of a PE of a non-resident in India.

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1. Preventing the artificial avoidance of PE status
2. The type business models include several varieties of e-commerce, app store, online advertising, cloud computing, participative networked platforms, etc.
3. The features that are increasingly prominent in the digital economy and which are potentially relevant from a tax perspective are mobility; reliance on data and user participation; network effects; multi-sided business models; tendency towards monopoly or oligopoly and volatility
4. The TFDE, a subsidiary body of the Committee on Fiscal Affairs (CFA) in which non-OECD G20 countries participate as associates on an equal footing with OECD countries, to develop a report identifying issues raised by the digital economy and detailed options to address them in context of Action Plan 1- Addressing the tax challenges of the digital economy
5. The Action Plan 7 has made certain other recommendation as well, however this article analyses only two recommendations

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Artificial avoidance of PE status through specific activity exemptions

Article 5(4) of OECD Model Tax Convention includes a list of exceptions (the 'specific activity exemptions') according to which a PE is deemed not to exist where a place of business is used solely for activities that are listed in that paragraph. The activities listed in paragraphs a to d of Article 5(4), are exempt from being classified as PE even if the activities were carried on at a fixed place where the scope of the activities was preparatory and auxiliary in nature.

On account of the evolving ways of doing trade and business across borders, activities that were earlier preparatory or auxiliary in nature are no longer as such as they now constitute the core activities of the business. The work on Action Plan 7 also echoed this view, particularly in the digital economy. This can be illustrated in case of a large local warehouse where significant number of employees work for purposes of storing and delivering goods sold online to customers by an online seller of physical products whose business model relies on the proximity to customers and the need for quick delivery to clients would no longer be entitled to PE exception status.

Whether certain activities that were previously considered preparatory or auxiliary (and hence benefit from the exceptions to the definition of PE) may be increasingly significant components of businesses in the digital economy. For example, where the success of a high-frequency trading company depends so heavily on the ability to be faster than competitors that the server must be located close to the relevant exchange, question may arise whether the automated processes carried out by that server can be considered mere preparatory or auxiliary activities.

In order to ensure that profits derived from core activities performed in a country can be taxed in that country, the Action Plan recommended modification to Article 5(4) of the Convention so that each of the exceptions included in that provision is restricted to activities that are otherwise of a preparatory or auxiliary character. It is also recommended to provide the additional Commentary guidance which clarifies the meaning of the phrase 'preparatory or auxiliary' using a number of examples.

A new anti-fragmentation rule is introduced to ensure that it is not possible to benefit from the specific activity exceptions through the fragmentation of business activities among closely related enterprises. This rule seeks to deny the preparatory and auxiliary exception if the foreign enterprise or a related enterprise carries on related activities in the same jurisdiction and those activities, taken as a whole, go beyond preparatory and auxiliary.

The Indian Courts have also dealt with these issues vis-à-vis determination of the existence of a PE in case of substantial activities undertaken by the Indian entity on behalf of a non-resident in India:

The Karnataka High Court in the case of Columbia Sportswear Company[6] held that in spite of certain activities[7] being undertaken by the Indian entity for the purchase of goods exported on behalf of the foreign enterprise, the activities were covered under the exclusion clause of the definition of PE and thus, it did not result into a PE of the foreign entity in India.

In the case of Nike Inc.[8], the Karnataka High Court held that once the entire operations performed by the liaison office is as per permission granted by the Reserve Bank of India (RBI) which was for the purchase of goods in India for the purpose of export, the income shall not be deemed to accrue or arise in India.

These changes to the definition of PE of OECD Model Tax Convention are now expected to be implemented across the existing tax treaty network via the conclusion of the multilateral instrument that seeks to modify bilateral tax treaties under Action Plan 15. Thus the recommendations made to Article 5(4) of OECD Model Convention that would be negotiated in the multilateral tax treaties would need to be considered having regard to the dynamics of the specific business/industry of a specific country and the outcome may still be litigated in the Courts considering the path the Indian judiciary may adopt keeping in mind the reconciliation of business needs of a country and the international tax laws.

The implication of the amendment proposed in OECD Model Convention may require further evaluation in light of the above referred judicial precedents.

Splitting up of contracts

Article 5(3) of OECD Model Convention applies the time threshold test of 12 months for a building site or construction or installation project to constitute a PE.

The exception in Article 5(3), which applies to construction sites, has given rise to abuses through the practice of splitting-up contracts between closely related enterprises. In certain cases, enterprises (mainly contractors or subcontractors working on the continental shelf or engaged in activities connected with the same) divided their contracts up into several parts, each covering a period less than 12 months and attributed to a different company which was, however, owned by the same group.

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6. Columbia Sportswear Company v. DIT [2015] 62 taxmann.com 240 (Kar)
7. Activities of identifying a competent manufacturer, negotiating a competitive price, helping in choosing the material to be used, ensuring compliance with the quality of the material, etc., along with ensuring compliance with its policies and the relevant laws of India by the suppliers
8. CIT v. Nike Inc. [2013] 34 taxmann.com 170 (Kar)

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The Action Plan 7 does not suggest any change in the existing Article 5(3). It proposes to address the issue arising on account of the splitting up of contracts through the Principal Purpose Test (PPT) rule under Action Plan 6 - Preventing the granting of treaty benefits in inappropriate circumstances, with associated changes to OECD Commentary to Article 5 of the Model treaty.

While Action Plan 7 attempts to address the abuses which the enterprises attempt to achieve through the alleged practice of splitting up of contracts, the Indian judiciary has dealt with the issue of splitting up of contracts in a manner that may not necessarily be in sync with the recommendations of the Action Plan 7.

In the case of J.Ray McDerrmott Eastern Hemisphere Limited[9] , the Mumbai Tribunal held that the Mauritian company (engaged in providing services in the Indian continental shelf) would not constitute a construction PE since duration of each contract is less than the prescribed limit of nine months. It was observed that the very conceptual foundation of this approach rests on the assumption that various business activities of the enterprise in different locations are not so inextricably interconnected that these are essentially required to be viewed as a coherent whole.

The Mumbai Tribunal discussed scenarios where the language of the India-Australia tax treaty are so worded that there is a specific mention for application of aggregation principle on all, or even connected, sites projects or activities for computation of threshold duration test, where it was observed that even such an aggregation, when applicable, would require exclusion of double counting of day when more than one site or project exists on a day, or when work is carried out at two or more different places on a day, as multiple counting of common days would lead to an absurdity in as much as when work is carried on five sites together for one hundred days each, such a computation will lead to five hundred days in a year which is an impossibility.

Further, in the case of Sumitomo Corporation[10], where the taxpayer had secured various contracts for the supply of equipment, the responsibility to carry out the installation vested with the taxpayer as well as the other entity under different contracts. It was observed that since the period of supervision under each contract was less than the period of 180 days as contemplated under Article 5(4) of the India-Japan tax treaty, where supervision is going on at several sites in a country, the rule is that the test of minimum period should be determined for each individual site or installation project.

While Action Plan 7 recommends aggregating of the time spent on all the contracts/projects for the purpose of determining the time threshold, the contracts which have different conditions attached to it may not warrant aggregation merely on the assumption that they were segregated to abuse the threshold by splitting up of contracts.

While India's observations with regard to OECD Commentary 2014 with respect to PE related issues state that a series of consecutive short-term sites or projects operated by a contractor would give rise to the existence of a PE in the country concerned, this issue vis-à-vis the judicial precedents may require a deeper introspection while incorporating the recommendations made by Action plan 7. The splitting-up of contracts may depend on factual matrix of each case and treating all separate and distinct contracts as one for the purpose of duration test would require further dissection depending on the nature of contracts basis its substance.

Summing-up

These proposed changes to PE definition may get implemented as a part of the multilateral instrument adopted under the work on Action Plan 15. Recently as a measure of follow-up work, the OECD has issued additional guidance on the attribution of profits to a PE which discusses the manner of attribution of profits once a PE is deemed to have been constituted in the source country.

In the backdrop of the Indian judiciary having taken different views with respect to the above-referred issues, it would be interesting to see how the recommendations would be incorporated in the tax treaties, post implementation of the results of the work mandated by the BEPS Action Plan.

9. ADIT v. J.Ray McDerrmott Eastern Hemisphere Limited [2016] 69 taxmann.com 429 (Mum) Reliance was placed on an earlier decision of the Tribunal in the taxpayers' own case
10. Sumitomo Corporation v. DCIT [2014] 162 TTJ 46 (Del)

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International tax

Decisions

Payments towards information system support services do not amount to royalty

The taxpayer is a wholly owned subsidiary of Bombardier Transportation (Holdings) Singapore Pte Ltd, a part of Bombardier Group, and is engaged in the business of manufacturing and supply of rail transportation system, which includes traction, auxiliary converters, vacuum circuit breakers, control electronics, signaling equipment, coaches and bogies for metro trains. During the course of scrutiny of Tax Deducted at Source (TDS) returns, the Assessing Officer (AO) noticed that the taxpayer has made payments, aggregating to INR9,19,96,649 to Bombardier Transportation Canada Inc (BT Canada).

Such payments were towards information system support services at a group level and has been charged from the taxpayer based on costs incurred towards consumption of various service elements by the taxpayer. The cost for each service element is determined by (a) applying an explicitly given price to the number of units of service consumed, or (b) calculating the share of globally incurred cost based on defined keys. The stand of the taxpayer was that these payments were in the nature of reimbursements and cannot partake the character of income in the hands of the recipient concerned. It was also contended that unless there is a transfer of all or any of the rights (including granting of any licence) in respect of copyright of a literary, artistic or scientific work, taxability under Section 9(1)(vi) of the Income-tax Act, 1961 (the Act) could not be invoked and there was no such transfer of right in this case.

The taxpayer further clarified that in the context of India-Canada tax treaty, only such payments as have an element for use of Intellectual Property Rights (IPRs) could be considered as royalties, but then the present payments are for standard facilities. It was also explained that the BT Canada has not received any payments for commercial exploitation of copyright embedded in the applications.

The AO, however, rejected this stand and proceeded to hold that these amounts are taxable as royalties under Section 9(1)(vi) of the Act as also under article 12(3) of the India-Canada tax treaty.

The Tribunal observed that payments made by the taxpayer to BT Canada were in the nature of reimbursements and there were specific cost allocations which were borne by the taxpayer. Such payments have no element of income. These payments, by no stretch of logic, could be viewed as payments for right to use the equipment. The taxpayer was entitled to certain services, during rendition of which even if certain equipment were to be used, but that by itself did not result in any use of or right to use the equipment by the taxpayer. The service may involve use of equipment but that does not vest right in the taxpayer to use the equipment.

CIT v. Bombardier Transportation India Pvt. Ltd. (ITA No.555/Ahd/2016)

Foreign tax credit allowed on the basis of 'gross receipts'

The taxpayer, a wholly owned subsidiary of a U.S-based company, engaged in the business of software development and products. During the relevant previous year, the taxpayer did not have any income taxable under the normal provisions of the Act. The taxpayer computed the book profits under Section 115JB at INR4,77,79,500 and accordingly, tax liability, under Minimum Alternate Tax (MAT) provisions, was computed at INR54,13,417. During the course of the scrutiny assessment proceedings, the AO noted that the taxpayer has claimed a Foreign Tax Credit (FTC) of INR11,12,907. This credit was in respect of the taxes withheld abroad, i.e. in Singapore and Indonesia. The taxpayer had received certain amount, after TDS at the rate of 10 per cent i.e. INR5,41,029, from a Singapore based concern by the name of IBM Corporation. The taxpayer had also received certain amounts, after TDS at the rate of 15 per cent i.e. INR5,71,878, from an Indonesia based company by the name of P T Tech Mahindra. It was the aggregate of these tax deductions, which comes to INR11,12,907, that the taxpayer had claimed as FTC.

The AO, however, did not approve the claim of the taxpayer. The AO was of the view that the tax credit is to be allowed only to the extent corresponding income (profit after deduction of all allowable expenditure) has suffered tax in India, and that the extent to which income has suffered tax in India in respect of these receipts is to be computed by reference to the actual MAT liability being divided in the same ratio as the ratio of corresponding foreign receipts to the overall turnover of the taxpayer. The amount of eligible tax credit was thus worked out to INR75,935.

The taxpayer contended that the gross receipts, which is what are material for the purpose of computing the tax credit even if the ratio of foreign receipts to the overall receipts are to be taken into account

The Tribunal held that the India-Singapore and India-Indonesia tax treaties state that the FTC shall not exceed the part of the income tax as computed before the deduction is given, 'which is attributable as the case may be, to the income which may be taxed in that other State' but there is little guidance on how to compute such income. However, quite clearly, as the expression used is 'income', which is essentially implied 'income' embedded in the gross receipt, and not the 'gross receipt' itself. It is, therefore, not really the right approach to take into account the gross receipts, as was contended by the taxpayer, for the purpose of computing admissible tax credit.

However, based on the unique facts of the instant case, the Tribunal has given relief to the taxpayer by allowing computation of the FTC on the basis of 'gross receipts'.

Elitecore Technologies Private Limited v. DCIT (ITA No.623/Ahd/2015)

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Tax credit is allowed on the interest income based on the tax sparing clause under India-Cyprus tax treaty

The taxpayer granted a loan to its subsidiary in Cyprus, and the subsidiary paid interest to the taxpayer. As per Article 11 of the India-Cyprus tax treaty, 10 per cent of the gross amount of interest is chargeable to tax in Cyprus. The taxpayer submitted that the domestic law at Cyprus provides the tax incentives for the promotion of economic development in Cyprus and therefore, there was no withholding of tax on interest amount remitted to the taxpayer in India. Article 25 of the India-Cyprus tax treaty provides for the tax credit in India with respect to taxes withheld/levied in Cyprus on the interest amount, and not withstanding that no tax has in fact, been withheld as mentioned above. Accordingly, the taxpayer claimed a tax credit at 10 percent of the gross amount received from Cyprus. The Dispute Resolution Panel (DRP) observed that Cyprus did not levy any tax and therefore, the claim for credit of tax payable in Cyprus was rejected.

The DRP in relation to earlier Assessment Year (AY) held that AO has to compute the tax on interest income and allow the tax attributable to interest income under the India-Cyprus tax treaty. The AO is directed to verify whether the taxpayer has paid tax on interest income, and if the tax is paid then allows the deduction for tax deemed to have been paid.

The Tribunal held that since the facts in the above case are similar to that in the present case, the issue is remanded to the file of the AO to verify whether the taxpayer has paid tax on interest income in India, and if so, to allow the deduction of the tax admitted to have been paid under Article 25(2) read with Article 25(4) of the tax treaty.

Dr. Reddy's Laboratories Ltd. v. ACIT [ITA Nos.2229/Hyd/2011, 85/Hyd/2013 - Assessment Years: 2007-08 & 2008-09]

Notifications/Circulars/Press Releases

India and Singapore sign a protocol amending the tax treaty

The Government of India signed the third protocol with Singapore to amend the India-Singapore tax treaty which is in line with India's treaty policy to prevent double non-taxation, curb revenue loss and check the menace of black money through Automatic Exchange of Information (AEOI) as reflected in India's recently revised tax treaties with Mauritius and Cyprus and the joint declaration signed with Switzerland. Key aspects of the press release are as follows:

- The Third Protocol amends the tax treaty with effect from 1 April 2017 to provide for source based taxation of capital gains arising on transfer of shares in a company.
- In order to provide certainty to investors, investments in shares made before 1 April 2017 have been grandfathered subject to fulfilment of conditions in Limit-of-Benefit (LOB) clause as per 2005 Protocol. Further, a two year transition period from 1 April 2017 to 31 March 2019 has been provided during which capital gains on shares will be taxed in source country at half of normal tax rate, subject to fulfilment of conditions in LOB clause.
- The Third Protocol also introduces provisions to facilitate relieving of economic double taxation in transfer pricing cases which is in line with India's commitments under BEPS Action Plan to meet the minimum standard of providing Mutual Agreement Procedure (MAP) access in transfer pricing cases.
- The Protocol also updates Article 9 on Associated Enterprises to provide for both countries to enter into bilateral discussions for elimination of double taxation arising from transfer pricing or pricing of related party transactions.
- The Protocol also enables application of domestic law and measures concerning prevention of tax avoidance or tax evasion.

Source: Taxsutra.com

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Corporate tax

Decisions

Brand promotion expenditure is an allowable expenditure despite parent company ownership

The taxpayer was set up as a 100 per cent subsidiary of Seagram India Ltd. The taxpayer was engaged in the business of blending, bottling and trading of Indian Made Foreign Liquor (IMFL). The liquor was bottled and sold within India through government agencies and private distributors and was also exported out of India. The taxpayer claimed sales and marketing expenses as brand expenses while the brand was owned by its parent company. The taxpayer claimed that the expenditure on brands did not provide enduring benefit to the company and thus was allowable as revenue expenditure. However, AO held that the expenditure incurred by the taxpayer for increasing the brand popularity of the parent company was not its business expenditure and was thus inadmissible. The CIT(A) and the Tribunal held the decision in favour of the taxpayer.

High Court's ruling

The High Court observed that the expenditure were incurred by the taxpayer pursuant to an arrangement with the brand proprietor as per which specified brands were made available to the taxpayer. No doubt that the profits reported were put through the recourse of transfer pricing exercise for the purpose of Arm's Length Price (ALP) determination, yet the fact remained that the overseas owner did not set up any other licensee as a rival at least in the area where taxpayer operated. The High Court referred to Section 48 of the Trade Mark Act and held that as long as the arrangement existed, the taxpayer, who was a licensee of the products, was entitled to claim them as business expenditure though in the ultimate analysis they might have enhanced the brand of the overseas owner. No doubt, if the arrangements were terminated, the brand presence of the overseas owner of the articles/IPR would have subsisted. But that would nevertheless subsist in any event on the theory of trans-national reputation of the IPR owner. The High Court held that disallowing a certain proportion on an entirely artificial and notional basis from the expense otherwise deductible, was unjustified.

CIT v. Seagram Manufacturing Private Ltd (ITA No. 885/2016, dated 9 December 2016) (Del)

Where interest free funds are available to the taxpayer to meet its investment, disallowance under Section 14A of the Act cannot be made in respect of interest payment

The taxpayer is engaged in the business of manufacturing glassware items, machinery required for glass and other industries. During the year under consideration the taxpayer had earned dividend income which was claimed as exempt under Section 10(34) of the Act. The taxpayer on his own disallowed INR1 lakh under Section 14A of the Act towards administrative expenses. However, the AO applied Rule 8D of the Income-tax Rules, 1962 (the Rules) and made additional disallowance of INR79.30 lakhs. On appeal CIT(A) upheld AO's order.

The Tribunal observed that recording a specific satisfaction by the AO before resorting to disallowance under Section 14A read with Rule 8D is a settled position. Resorting to method prescribed under Rule 8D is not automatic. The AO invoked Rule 8D only because the taxpayer made disallowance on an adhoc basis. This disallowance on an adhoc basis did not imply that it was incorrect inasmuch as it was inadequate. Adhoc disallowance might not be on a scientific basis but unless it was short of what was actually required, it could not be treated as incorrect from AO's perspective. The Gujarat High Court in the case of CIT v. UTI Bank Limited [2013] 32 taxmann.com 370 (Guj) held if there are interest free funds available to the taxpayer sufficient to meet its investments and at the same time the taxpayer has raised a loan, it can be presumed that the investments were from interest free funds available, and, accordingly, no disallowance under section 14A in respect of interest payment can be made in such a situation. Accordingly, reasons recorded by the AO for rejecting the disallowance offered by the taxpayer suo motu is clearly incorrect and unsustainable in law.

In the present case the taxpayer furnished evidences of the purposes for which the loans were obtained, showing one to one linkage wherever possible and a detailed statement about these advances and the end use. However, it failed to show one to one linkage where there were numerous transactions. The taxpayer has given reasonable evidence, as would be normally possible in such a situation. Thus, the Tribunal deleted addition made on account of disallowance under Section 14A of the Act.

Shreno Ltd v. ACIT (ITA No. 1452/Ahd/2012) (Ahmedabad Tribunal)

Deduction under Section 80JJAA of the Act is not allowable since the workmen employed by the taxpayer cannot be included in the definition of regular workman

The taxpayer is engaged in the business of design, manufacturing and export of computer software. During AYs 2001-02 and 2002-03, the taxpayer claimed deduction under Section 80JJAA of the Act. The AO denied the claim of deduction under Section 80JJAA of the Act on the ground that the new workmen have not been employed for a period of 300 days during the previous year. The Commissioner of Income-tax (Appeal) [CIT(A)] allowed taxpayer's claim.

The Tribunal observed that the language of the memorandum explaining the provision of Section 80JJAA of the Act and definition of workmen as given under clause (ii) of explanation to Section 80JJAA of the Act were not identical. The words 'previous year' was not used in the memorandum but was provided under Section 80JJAA

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of the Act. In order to fulfill the condition, workmen ought to join before June 5 of the previous year and not thereafter. The definition of workmen under Section 80JJAA of the Act was not an inclusive one and certain categories of workmen such as casual workmen etc. were excluded. The condition of 300 days of employment during the previous year should be read as 300 days in a year from the date of employment. Once a workman is employed as a regular workman, then in the absence of any ambiguity regarding the nature of employment, other three categories of the workmen being casual employment through contract labour and employed for less than 300 days were not relevant.

The Tribunal observed that even though the language used in the provision appears to militate with the intention of the legislature as expressed in the memorandum as well as against the very object and scheme of the provision, there might be an omission which could be supplied only by an act of legislature through a proper amendment. As per the existing provisions of Section 80JJAA of the Act, the additional wages paid to regular workmen who have been employed for a period of not less than 300 days during the previous year is eligible for deduction under this section.

Accordingly, it has been held that the taxpayer does not satisfy the condition as prescribed under the provisions of Section 80JJAA of the Act since the workmen employed by the taxpayer cannot be included in the definition of regular workman as per explanation to this section

ACIT v. Texas Instruments (India) P. Ltd. (ITA No. 273 & 274/ Bang/2005) – Taxsutra.com

Payment to the HUF shall constitute deemed dividend under Section 2(22)(e) of the Act

During the AY 2006-07, the taxpayer, an Hindu Undivided Family (HUF) received certain advance from a company. The AO observed that in the said company, Karta of HUF held more than 10 per cent shareholding and was a beneficial shareholder. Accordingly, the AO held that the advance received by the taxpayer is taxable as deemed dividend in taxpayer's hands. The CIT(A) also upheld additions made by the AO. However, Tribunal reversed AO's order and deleted the addition on the ground that the taxpayer cannot be a shareholder in the company. Hence, Section 2(22)(e) conditions were not met. The High Court set-aside Tribunal's order and upheld addition made by AO.

The Supreme Court referred to Section 2(22)(e) of the Act and observed that the said section is a deeming provision and hence to be construed strictly. In the instant case the Karta is the member of HUF and has substantial interest in the HUF. It is not disputed that he was entitled to not less than 20 per cent of the income of HUF. In view of the aforesaid position, provisions of Section 2(22)(e) of the Act get attracted and it is not even necessary to determine as to whether HUF can be beneficial shareholder or registered shareholder in a company. The Supreme Court referred to company's audited annual return filed with the Registrar of Companies (ROC). The money towards shareholding in the company was given by taxpayer/HUF. Though, the share certificates were issued in the name of the Karta, but in the annual returns, it is HUF which was shown as registered and beneficial shareholder.

Even if it is assumed that it is not a registered shareholder, as per the provisions of Section 2(22)(e) of the Act, once the payment is received by HUF and shareholder is a member of the said HUF and he has substantial interest in HUF, the payment made to the HUF shall constitute deemed dividend within the meaning of Section 2(22)(e) of the Act.

Gopal and sons (HUF) v. CIT (Civil Appeal No. 12274/2016, dated 4 January 2017) – Taxsutra.com

Higher withholding of tax under Section 194J inapplicable on EPC-contract payments. Human intervention didn't constitute 'technical service'

During the year under consideration, the taxpayer made payment to 5 contractors in respect of various contracts and deducted tax under Section 194C of the Act. However, AO observed that such contracts involved the provision of professional and technical services and hence provisions of Section 194J of the Act shall apply. The CIT(A) and the Tribunal ruled in favour of the taxpayer and held that merely because technical personnel are employed in the execution of the contract, it does not follow that the contract is one for technical services.

On perusal of the agreement, the High Court observed that the contract was for the purposes of erecting and commissioning, testing and trial operation of the said equipment in accordance with and subject to the terms and conditions of the contract. Even though there was a requirement of deployment of manpower, it was for 'timely completion of work', to 'carry out the works as per the specifications' and for 'proper out-turn of work and discipline on the part of the labour put on the job by the contractor'. Thus, the deployment of the personnel is not under a contract for the supply of services/technical services, but to ensure the due and proper execution of the work by the contractor. The High Court held that indeed, this entire exercise would require the deployment of technical personnel, but what is important to note is that the technical personnel are deployed not for and on behalf of the customer, but for and on behalf of the contractor itself with a view to ensuring that the contractor has supplied the equipment as per the contractual specifications. Everything done in this regard is to this end and not to supply technical services to the customer. The supply of labour, material and equipment is for the satisfactory site transportation, handling, stacking, storing, erecting, testing and commissioning of the equipment to the respondent's satisfaction. Accordingly, the High Court held that the contract entered into between the taxpayer and contractors did not involve the supply of professional or technical services within the meaning of Section 194J of the Act and the consideration paid was therefore not for professional or technical services.

CIT v. Senior Manager (Finance), Bharat Heavy Electricals Ltd. (ITA No. 242/2016 (O&M), dated 9 December 2016)

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Writ petition is maintainable against initiation of reassessment proceedings – Supreme Court

The AO recording reasons to believe that income of the taxpayer had escaped assessment, issued notice under Section 148 of the Act for reopening the assessment. The taxpayers filed a writ petition before High Court challenging the notice issued under Section 148 of the Act. The High Courts dismissed the writ petitions preferred by the taxpayers challenging the issuance of notice under Section 148 of the Act as not maintainable.

Supreme Court's decision

The view taken by the High Courts in the batch of appeals dismissing the writ petition as not maintainable is contrary to the law laid down by the Supreme Court in the case of Calcutta Discount[11]. Thus the rulings of High Courts are set aside, and the cases are remitted to the High Courts to decide the same on merits.

The High Courts are directed to examine each case on its merits keeping in view the scope of judicial review while entertaining such matters. The principle laid down in case of Chhabil Dass Agarwal[12] does not apply to the facts of the present cases. The stay of re-assessment granted during the pendency of appeal shall continue till the disposal of writ petitions before the High Courts.

Jeans Knit Private Limited v. DCIT (CIVIL APPEAL NO(S).11189/2016) – Taxsutra.com

11. Calcutta Discount Limited Company v. ITO [1961] 41 ITR 191 (SC)
12. Chhabil Dass Agarwal v. CIT [2013] 357 ITR 357 (SC)

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Transfer pricing

Decisions

'De Facto' or 'De Jure' participation in the management, capital or control by itself is not relevant in establishing AE relationship in terms of Section 92A of the Act

The taxpayer, is a partnership firm, wherein the partners were three brothers (say Mr. A, Mr. B and Mr. C) along with their respective wife and children. During the relevant assessment year (AY), the taxpayer had entered into certain international transactions with a Belgian entity, which was owned and controlled by another brother (say, Mr. D), along with his family (brother of Mr. A, Mr. B and Mr. C).

The AO contended that since the Belgian entity is controlled by another brother i.e. Mr. D (along with his family), it falls under the definition of an AE in terms of Section 92A(2)(j) of the Act and accordingly, made a reference to the Transfer Pricing officer (TPO), who made an adjustment.

The CIT(A) without discussing the primary issue of existence of an AE relationship in terms of Section 92A of the Act, proceeded to examine the correctness of the arm's length price adjustment and deleted the impugned adjustment. Aggrieved by the CIT(A)'s order, both the revenue authority and taxpayer (through cross-appeals) appealed before the Tribunal.

Tribunal's ruling

- Sub-section (1) to Section 92A of the Act decides the principle on the basis of which one has to examine the existence of an AE relationship between the transacting entities. The principal condition required to be fulfilled is the expression 'participation in management or capital or control' which is not a defined expression in the Act. To ascertain its meaning, sub-section (2) to Section 92A of the Act is to be referred, which gives practical illustrations, which are exhaustive and not simply illustrative. Therefore, sub-section (2) governs the operation of sub-section (1) to Section 92A of the Act.
- Sub-section (1) and (2) to Section 92A of the Act have to be read together, and unless the provisions of one of the clauses listed under Section 92A(2) of the Act are satisfied, even if one enterprise ends up having a de facto or even de jure participation in the management, capital, or control of the other enterprises, the two enterprises cannot be said to be AEs.
- As per the tax department's argument, clause (j) of sub-section (2) to Section 92A of the Act is to be invoked. The said clause provides "where one enterprise is controlled by an individual, the other enterprise is also controlled by such individual or his relative or jointly by such individual and relative of such individual". In the present case, taxpayer is a partnership concern, therefore, it cannot be said to be controlled by 'an individual'.
- With regards to the department's references of clauses (k) and (m) of Section 92A(2) of the Act, the Tribunal observed that clause (k) refers to an enterprise controlled by an HUF, but an HUF has nothing to do with either of the enterprise. Similarly, clause (m) is only an enabling provision for prescribing any other relationship of mutual interest that can lead to the enterprises being treated as AEs but then no such relationship has been prescribed yet.
- While a certain degree of control may actually be exercised by these enterprises over each other due to relationships of the persons owning these enterprises, that itself is not sufficient to hold the two enterprises as AEs. Thus, the Tribunal held that the taxpayer and the Belgian entity are not AEs in terms of Section 92A of the Act and consequently deleted the impugned additions

ACIT v. Veer Gems (ITA No. 1514/Ahd/2012 - AY 2008-09); Veer Gems vs ACIT (C.O. No. 184/Ahd/2012 - AY 2008-09)]

Consistent loss making companies cannot be rejected unless functional profile is different; allows comparability adjustments including capacity adjustment, volume adjustment and warranty cost adjustment

The following issues were discussed and decided in the consolidated hearing for two consecutive AYs:

Consistent loss making companies can be selected as comparable

- The Transfer Pricing Officer (TPO) rejected two comparable entities on the ground that these entities were making consistent losses since past many years.
- The Tribunal held that the tax department has not considered the Functional Analysis (FAR) profile of these two entities. Further, according to Rule 10B(4) of the Income-tax Rules, 1962 (the Rules), the data relevant for a time period of two preceding years may be considered only if it reveals any influence thereof in the relevant AY, whereas the tax department has not conducted any such exercise. It further cited a coordinate special bench ruling[13], wherein it was held that the consistently loss making entities cannot be solely rejected for the fact that they have incurred consistent losses. Hence, such action of tax department was outrightly rejected.

Impact of substantial depreciation to be considered

- The TPO adopted Profit Level Indicator (PLI) as Profit Before Interest and Taxes (PBIT/Sales) after rejecting the taxpayer's plea to rather take its PLI as Profit Before Depreciation,

13. DCIT v. Quark Systems Pvt. Ltd. (2010) 132 TTJ 001 (SB)

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Interest and Taxes (PBDIT)/Sales since it had made substantial additions in fixed assets in the relevant AY.

- The Tribunal held that as per the stated facts, net profit of taxpayer has declined due to depreciation claim arising from substantial increase in fixed assets. It further cited a coordinate bench ruling[14], wherein the Tribunal had held that such incremental depreciation has to be excluded before computing the corresponding PLI. Thus, PLI (PBDIT/Sales) adopted by the taxpayer was upheld.

Adjustment on account of capacity underutilisation

- The taxpayer sought to seek capacity underutilisation adjustment. The TPO as well as DRP declined this relief. Tribunal held that, in one of the judicial precedent[15], it was held that as per Rule 10B(1)(e)(iii), such capacity underutilisation adjustment has to be made in the hands of comparable companies and not the tested party. Accordingly, taxpayer's argument was accepted.

Ahmedabad Tribunal in the case of Erhardt+Leimer (India) Private Limited vs ACIT (ITA Nos. 3298/Ahd/2011 & 2880/Ahd/2012 - AYs: 2007-08 & 2008-09)

14. BA Continuum India Pvt. Ltd. v. ACIT (ITA No.1154/Hyd/2011)
15. DCIT v. EDAG Engineers & Design India Pvt. Ltd. (ITA No.549/Del/2011)

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Indirect tax

Service tax - Decisions

Leasing of cabs is in nature of rendering services and cannot be considered as 'deemed sale'

The issue in the instant case was whether the activity of lease of motor vehicles would be construed as 'deemed sale' or as a 'service' and become liable to Service Tax.

The Delhi Tribunal held that since the ownership of such motor vehicles would never be transferred to its customers and they could use the vehicles as long as they were paying rent for such usage, the dominant intention of the transaction was that of renting/hiring motor vehicles and not transfer of control or possession. Therefore, while the Tribunal mentioned that nature of arrangement may vary from party to party, in the present case, the activity of leasing motor vehicles would not constitute 'deemed sale' and thus become liable to Service Tax.

M/s. Carzonrent (India) Pvt. Ltd. v. CST, Delhi-I, 2017-VIL-10-CESTAT-DEL-ST

Notifications/Circulars/Press Releases

Amendments in Service Tax exemptions

With effect from 22 January 2017, the service tax exemption for following services has been withdrawn:

- Services by way of transportation of goods by a vessel from outside India up to customs station of clearance in India. Accordingly, the person liable to pay Service Tax would be the person in India who complies with relevant provisions of the Customs Law i.e. the person-in-charge of a vessel or an agent appointed, in this regard.
- Services of a business facilitator or correspondent to a banking company with respect to accounts in its rural area branch.

Notification No. 1/2017 - Service Tax dated 12 January 2017, Notification No. 2/2017 - Service Tax dated 12 January 2017 and Notification No. 3/2017 - Service Tax dated 12 January 2017

Exclusions carved out in the definition of 'aggregator'

With effect from 22 January 2017, the definition of 'aggregator' under the Service Tax law has been amended to exclude such persons who enable a potential customer to connect with persons providing services by way of renting of hotels, inns, etc. subject to fulfillment of certain conditions.

Notification No. 2/2017 - Service Tax dated 12 January 2017

Rationalisation of abatement for tour operator services

With effect from 22 January 2017, the rate of abatement for services by a tour operator has been amended to 40 per cent, subject to the condition that CENVAT credit on inputs and capital goods shall not be allowed and the gross amount charged includes accommodation and transportation required for such tour.

.Notification No. 4/2017 - Service Tax dated 12 January 2017

Central Excise - Decisions

Activity cannot be construed as 'manufacture' by assembling three items CPU, monitor and keyboard

The fact of the case is that taxpayer purchases and sells computer CPU, monitor and key boards. The taxpayer supplied these goods at the site of the consumer. While installing all the three items they used cord for connection.

Department's contention is that the said activity amounts to 'manufacture' of a computer and accordingly, excise duty demand was confirmed. In the appeal, before the Commissioner (A), the demand was upheld.

The taxpayer submitted that they undisputedly are purchasing CPU, monitor and key boards. They are selling the same as such, at the most, while installation of the computer, when cord of each other are connected. Therefore while clearing, right from purchasing of these three items and clearance from their premises no manufacture activity is carried out. All these three items are sold as such, the only activity at the customer's site is connecting the cord of monitor and key board into CPU, which cannot be termed as manufacture.

In this regard, the Mumbai Tribunal held that since, the said goods are being sold as such and entire computer has already been manufactured earlier, hence, the aforesaid activity does not amount to manufacture, accordingly the appeals were allowed.

Info Expert Computer System vs CCE (2017-TIOL-97-CESTAT-MUM)

Credit taken on the strength of photocopy copy of invoices or invoices, where serial number of the invoices were either not printed or handwritten, cannot be denied

In the present case, the taxpayer availed credit on the invoices, wherein serial number of the invoices were either not printed or hand written. In one of the instances, the credit was taken on the basis of the photocopy of the invoice.

For the above reasons, the adjudicating authority denied the CENVAT credit. Being aggrieved by the Order-in-Original, the taxpayer had filed appeal before the Commissioner (A) which was rejected, hence the present appeal was being filed.

The taxpayer submitted that as regard to the printed serial number on the invoices, the Mumbai Tribunal in one of their own earlier case, has held that as per the Rule 11 of CENVAT Credit Rules, 2002 the only requirement is that invoice should

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be serially numbered, therefore allegation of not having printed serial number is not correct. As regard the credit availed on photocopy copy, it was submitted that substantial compliance for availing the credit are met and accordingly, the benefit should be extended. The taxpayer also, relied on various judicial precedents.

Considering the arguments, the Mumbai Tribunal held that for such procedural lapse, substantial benefit of CENVAT credit cannot be denied.

Pepsico India Holding Pvt Ltd vs CCE (2017-TIOL-26-CESTAT-MUM)

EOU is entitled for credit at the time of conversion from DTA unit to EOU

The taxpayer, a 100 per cent Export Oriented Unit (EOU), engaged in the manufacture of parts and accessories for Automatic Teller Machine (ATM) machine, classifiable under Chapter Heading 84 of Central Excise Tariff Act, 1984. The taxpayer obtained Central Excise registration as a Domestic Tariff Area (DTA) unit and converted their DTA unit into a 100 per cent EOU. During the period prior to conversion of DTA unit as an EOU, taxpayer was undertaking the physical and deemed exports in addition to DTA clearances. Consequently, taxpayer accumulated CENVAT credit balance and on conversion from DTA unit to EOU, taxpayer carried forward/ transferred the unutilized CENVAT credit balance from DTA unit to EOU.

Thereafter a show-cause notice was issued, which culminated into passing of Order-in-Original confirming the demand and the appeal of the taxpayer was also rejected by the Commissioner (A) and hence the present appeal.

The taxpayer submitted that the issue involved is no more res integra and are covered by the decisions of the Hon'ble High Court as well as various decisions of the Hon'ble Tribunal. The Hon'ble Tribunal in the case of Sandoz Pvt. Ltd. in 2012 (278) E.L.T. 259 observed that the EOU is entitled for CENVAT credit available in the books of accounts at the time of conversion from DTA unit to EOU. Further, the taxpayer submitted that there is no provision under the CENVAT Credit Rules, which provides lapsing of CENVAT Credit on conversion of DTA unit to EOU. They further submitted that as per new scheme even 100 per cent EOU can procure the goods on payment of duty and avail the CENVAT credit. Therefore, the 100 per cent EOU are not debarred from availing the CENVAT credit and under any circumstances they cannot be denied the unutilized CENVAT credit.

In this background, the Bangalore Tribunal relying on judgments cited above held that the taxpayer is entitled to transfer the unutilized CENVAT credit on conversion from DTA to 100 per cent EOU.

Carclo Technical Plastics Private Limited v. CCE (2017-TIOL-119-CESTAT-BANG)

VAT - Decisions

Renting of earthmoving equipments considered as 'transfer of right to use' and hence, taxable as 'deemed sale' and not Service Tax under 'supply of tangible goods for use'

The taxpayer in the present case, is engaged in the business of renting of earthmoving equipment. Revenue considered such activity taxable under service category of Business Auxiliary Service (BAS) for the period prior to 16 May 2008 and with effect from 16 May 2008, under the category of 'supply of tangible goods for use' and accordingly, issued a notice demanding service tax on such activity for both the periods. Subsequently, the Commissioner adjudicated the show cause notice and confirmed the demand of service tax under the category of 'supply of tangible goods for use' for the period post 16 May 2008 and dropped the demand for the period prior to 16 May 2008 under BAS. Aggrieved by the same, the taxpayer filed an appeal before the Customs Excise and Service Tax Tribunal (CESTAT) in relation to demand confirmed and the department filed an appeal for the demand dropped.

The taxpayer submitted that the activity undertaken by him is in nature of leasing of machinery/equipment and shall be considered as 'deemed sales'. Accordingly, taxpayer was discharging VAT under Maharashtra Value Added Tax Act, 2002 (MVAT Act) considering the same as 'transfer of right to use'. Further, it contented that in the Budget Speech of FY 2008-09 and TRU, it was clarified that the 'supply of tangible goods for use' shall not cover the cases of 'deemed sales' where VAT is leviable. Hence, service tax shall not be applicable on the same.

On the other hand, the revenue contented that the transaction is one of supply of tangible goods for use, since the effective possession and control of equipment lies with the taxpayer as per agreement entered with the customers. Further, it cited the reference to Central Board of Excise and Customs (CBEC) circular, wherein it has been stated that the transaction of allowing another person to use the goods without giving legal right of possession and effective control, shall be treated as a service. Further, in connection to Revenue's appeal for the period prior to 16 May 2008, it submitted that activity of the taxpayer is not only limited to renting of equipment's but the taxpayer is also under obligation to provide erection, installation and commissioning of the machines free of cost etc. Therefore, combining all the activities, the service clearly falls under BAS.

The CESTAT, noted that the revenue's contention was based on the restrictions placed on the lessee (customers). Merely because of restrictions, it cannot be said that there is no right to use by lessee. CESTAT also, stated that the responsibilities casted under clauses mentioned in the agreement, clearly show that right of possession and effective control was lying

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with the customers and the agreement also stated that VAT shall be leviable on such transactions.

In view of the above, it was held that the activity of giving various equipments on hire does not fall under the category of 'supply of tangible goods for use' and hence, the same was not liable to service tax for the period post 16 May 2008 and allowed the appeal filed by the taxpayer. Further, in relation to revenue's appeal for the period prior to 16 May 2008, CESTAT held that even though the Commissioner has dropped the demand on the ground that the service is of 'supply of tangible goods for use' and does not fall under the BAS, the activity in itself is not a service at all. Accordingly, the same was remanded back to the original adjudicating authority for passing fresh order in relation to demand prior to 16 May 2008.

M/s Gimmco Ltd. v. Commissioner of Central Excise and Service Tax, Nagpur and Commissioner of Central Excise and Service Tax, Nagpur v. M/s Gimmco Ltd. - [TS-552-CESTAT-2016(Mum)

Notifications/Circulars/Press Releases

Maharashtra

The MVAT department notified full/partial exemption from payment of late fee for delayed filing of returns upto the period ended 31 March 2016.

A registered dealer who uploads the pending returns for any period upto 31 March 2016, during the period 1 January 2017 to 31 January 2017, shall not be liable to pay any late fee. However, if the returns are filed during the period 1 February 2017 to 28 February 2017, late fee of INR2000 shall be applicable and for returns uploaded on or after 1 March 2017, late fees of INR5000 shall be imposed.

Notification no. VAT 1516/C.R.178/Taxation – 1 dated 28 December, 2016 and Trade circular no. 1T of 2017 dated 2 January 2017

Gujarat

The due date for submission of Audit Report and Annual Return for the FY2015-16 has been extended from 31 December 2016 to 28 February 2017.

Circular No. VAT – 17C/16-17/ No. 193-158 Dated 20 December 2016

With effect from 19 December 2016, the Point of Sale (POS) terminal machine (swipe machine for cashless transaction) has been exempted from whole of tax leviable under the Gujarat Value Added Tax Act, 2003.

Notification No. (GHN- 72) VAT-2016-S.5 (2) (52)-TH dated 19 December 2016

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Personal tax

Decisions/Notifications/ Circulars/Press Releases

Determination of consideration in case of sale at less than stamp duty value and for computing exemption from Capital Gains Tax

The Act provides for determination of full value of consideration in certain cases of sale of immovable property. The Act also allows the tax exemption of capital gains arising from sale of a capital assets other than a house property upon investment in a house property. The Vishakhapatnam Tribunal held that in case of sale of house property under an unpossessory sale-cum-General Power of Attorney (GPA) for a value less than that considered for stamp duty and registration, the full value of consideration shall be the value as adopted for the purpose of stamp duty and registration of the property. The Tribunal also held that for computation of tax exemption as per the Act, net consideration received would be applicable and not the value adopted for stamp duty/ registration of the property.

DIT v. Chalasani Mallikarjuna Rao [2016] 75 taxmann.com 270 (Vis)

Relief proposed for late enrolments and delayed contributions under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952

The Central Board of Trustees (CBT) is a statutory body constituted by the Government of India under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act). On 19 December 2016, the CBT in its 215th meeting have made certain proposals to the Government of India.

Key proposals made by CBT

Provident Fund (PF) interest rate

The CBT recommended 8.65 per cent interest to its subscribers for FY2016-17. Nearly 17 crore members' accounts will be credited with this interest rate if the proposal is accepted by the Government of India.

Relief for past defaults

The relief is proposed to be available between 01 January 2017 and 31 March 2017. The following recommendation will be made to the government:

- Nominal damages for payment of past contribution will be levied at the rate of INR1 per annum.
- Employers may declare their employees who were required to become members under the EPF Act from 01 April 2009 to 31 December 2016.
- The employer shall be responsible to pay the contributions and interest payable in accordance with the provisions of the EPF Act read with special provisions notified by the central government.
- No administrative charges will be leviable for the past period in respect of the employees enrolled during the campaign i.e. from 1 January 2017 to 31 March 2017.

Guidelines for streamlining surrender of exemption

The CBT approved a set of guidelines for streamlining the process of surrender of exemption granted to establishments. Surrender of exemption entails a scenario where an establishment wants to discontinue the exemption granted to its in-house scheme for their employees.

Reduction of administrative charges

For meeting the expenses to administer, the Schemes framed under EPF Act, the central government in consultation with CBT, EPF regulates the administrative charges from time to time. The Central Board recommended reduction of administrative charges to 0.65 per cent. It also recommended to abolish administrative charges for EDLI Scheme.

The recommendations made by CBT will need to be approved by the Government of India for implementation.

Source: www.epfindia.gov.in

Employees' Enrolment Campaign, 2017 starts from 1 January 2017 to 31 March 2017 under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952

The Ministry of Labour and Employment, Government of India issued a press release[16] dated 19 December, 2016 relating to Employees' Enrolment Campaign, 2017. The Government of India has implemented the Employees' Enrolment Campaign, 2017 through various notifications[17].

Key changes in the Schemes framed under the Employees' Provident Funds & Miscellaneous Provisions Act, 1952

- The Employees' Enrolment Campaign, 2017 has come into force on the 1 January, 2017 and end on the 31 March, 2017.
- Employers are required to make declaration in a specified Form for their employees who were required to become members under the EPF Act from 01 April 2009 to 31 December 2016 but were not enrolled as members for any reason.
- Employers will be responsible to pay the contributions and interest payable in accordance with the provisions of the EPF Act.
- The employer will not be required to deposit employees' contribution if the same has not been deducted from the employees' salary.
- The employer will be required to pay damages at the rate of INR1 per annum for contributions made during the Employees' Enrolment Campaign in respect of the

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16. Press Release by Ministry of Labour & Employment dated 19 December 2016 - (Release ID: 155641)
17. Notification No. S.O. 4250 (E), G.S.R. 1190 (E), G.S.R. 1191 (E), G.S.R. 1192 (E), dated 30 December, 2016, published in the Gazette of India.

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employees enrolled during the campaign i.e. from 1 January 2017 to 31 March 2017.

- No administrative charges will be leviable for the past periods in respect of the employees enrolled during the campaign i.e. from 1 January 2017 to 31 March 2017.

Employers should review their compliance processes to assess potential cases of non-enrolment of eligible employees to avail the benefits under the relief measures implemented by the Government of India.

Source: www.epfindia.gov.in

Employees' Provident Fund Organisation issues FAQs on Employees' Enrolment Campaign, 2017

Government of India implemented the Employees' Enrolment Campaign, 2017 (the Campaign) through various notifications. These changes have also been communicated by the Employees' Provident Fund Organisation (EPFO) to its officials through circulars. The EPFO issued Frequently Asked Questions (FAQs) through its circular[18] with regard to the Employees' Enrolment Campaign, 2017.

The FAQs issued by EPFO Headquarters will help simplify the process of implementation of this voluntary disclosure scheme. It has been clarified by EPFO that this incentive scheme is available for Indian nationals only and not applicable to International Workers.

Source: www.epfindia.gov.in

Extension of deadline for conversion of Person of Indian Origin (PIO) card into Overseas Citizen of India (OCI) card

In January 2015, the Indian government had merged PIO and OCI Schemes through the Citizenship (Amendment) Act, 2015. Under the merged Scheme, existing PIO cardholders could enjoy the same benefits as that of OCI cardholders, and the issuance of new PIO cards was restricted.

Accordingly, the government recommended that all PIO cardholders apply for OCI cards in lieu of their existing PIO cards. The last date for submission of such applications was earlier declared as 31 December 2016.

However, as per a recent announcement3 from the government, the due date for the submission of applications for conversion of PIO card to OCI card has been extended by six months to 30 June 2017.

While the government has been quite liberal with timelines until now, it is advisable that existing PIO cardholders make the maximum use of this extended window and apply for the conversion of their PIO cards to OCI cards.

Government of India issues a notification for changing the regulation of inoperative accounts under the Employees' Provident Funds Scheme, 1952

In accordance with the regulation of Employees' Provident Funds Scheme, 1952 (EPFS), interest is not credited to the account of a member from the date on which the account has become an 'Inoperative Account'.

Paragraph 72(6) of EPFS regulates the classification of an 'Inoperative Account'. As per amendments made in the EPFS on 1 April 2011, interest shall not be credited to the account of a member from the date on which it has become an inoperative account.

The Ministry of Labour and Employment, Government of India, issued a notification (Notification no. G.S.R 1065 (E), published in the Gazette of India) dated 11 November 2016 to amend the provisions relating to Inoperative Accounts. This notification is effective from 11 November 2016.

Key amendments

Relevant regulation before the amendment

Accumulation in respect of any member:

i. who has either ceased to be employed or died and

ii. no application for withdrawal under paragraphs 69 or 70 or transfer, as the case may be, has been preferred

within a period of 36 months from the date it becomes payable, or if any amount remitted to a person, is received back undelivered, and is not claimed again within a period of 36 months from the date it becomes payable, shall be transferred to an account to be called the 'Inoperative Account'.

Relevant regulation after the amendment

Accumulation in respect of any member:

i. who has either 'retired from service after attaining age of 55 years or migrated abroad permanently' or died; and

ii. no application for withdrawal under paragraphs 69 or 70 has been preferred;

within a period of 36 months from the date it becomes payable, or if any amount remitted to a person, is received back undelivered, and is not claimed again within a period of 36 months from the date it becomes payable, shall be transferred to an account to be called the 'Inoperative Account'.

In addition, the current notification has also inserted a new provison:

Provided further that if any amount becoming due to a member, as a result of supplementary contributions on account of litigation or default by the establishment or a claim, which has been settled but is received back undelivered not attributable to the member, shall not be transferred to the 'Inoperative Account'.

18. Circular Dated 4 January 2017 (No. Coord/3(1) 2016/ EPF Member Enrolment Scheme, 2017)

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Therefore, this is an important notification which can have significant benefit for the employees who do not apply for withdrawal after cessation of employment. This is expected to encourage employees not to withdraw the accumulated PF balance before retirement. Therefore, this move from the government may help augment income security in retirement.

Establishments that have set-up in-house PF Schemes under the ambit of EPF Act should revise their schemes to incorporate these changes. The new regulation on inoperative accounts in the statutory PF schemes, pending revision of the rules of in-house PF trusts.

The PF authorities have clarified in the past that the provision of 'Inoperative Accounts' is not applicable in case of International Workers (IWs). Therefore, this amendment should not impact IWs and they should continue to earn interest on their accumulated PF balance till the time of actual withdrawal.

Source: www.epfindia.gov.in

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