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Tax Highlights

Tax Highlights 2021

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OECD BEPS 2.0

Inclusive Framework BEPS Agreement - Update on Pillar 2 agreement

On 20 December 2021, the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting, involving 137 countries, released Model Globe Rules under Pillar 21 for a Global Minimum Tax at 15% for Multi-national Enterprises (MNEs) with a turnover of more than €750 million. It is anticipated that a document providing further commentary on the rules will be released early next year.

The rules are due to be brought into law in each participating jurisdiction through domestic law changes in 2022, to be effective in 2023 for the Income Inclusion Rule (IIR), and 2024 for the Under-Taxed Payments Rule (UTPR).

The IIR imposes top-up tax on a parent entity with respect to low taxed income of a Constituent Entity. The UTPR denies deductions or provides for a similar adjustment for group entities to the extent that there is top-up tax that has not been taxed under the IIR.

The determination of whether top-up tax is required, either through the IIR or the UTPR, is based on a complex calculation of the Effective Tax Rate (ETR) for a jurisdiction.

There is an elective substance based carve-out which may reduce the profits that are subject to top-up tax. This is based on the level of payroll and the carrying value of certain tangible assets, within a jurisdiction. The rules also provide for a Domestic Top-up Tax where countries can impose a specific tax in their own jurisdiction to lift the ETR on certain profits, excluding those that are subject to a substance-based exclusion, to the minimum rate of 15%.

There are exclusions for Pension Funds, Government, International and Non-Profit Organizations as well as Investment Funds and Real Estate Investment Vehicles that are Ultimate Parent Entities.

It is proposed that there will be certain Safe Harbor rules, although these have yet to be developed.

Also excluded from this Pillar 2 package are the proposals for a Subject to Tax Rule which is proposed to apply to certain payments including interest and royalties where the nominal tax rate on a payment falls below a minimum rate of 9%. The final scope of these rules is yet to be determined and expected in early 2022.

Model Rules provide that “consideration will be given to the conditions under which the US GILTI regime will co-exist with the GloBE Rules, to ensure a level playing field”.

Work on Pillar 1, which deals with new rules on the allocation of a portion of residual profit of MNEs with initially a turnover of greater than €20 billion and profit before tax margins above 10% of revenue to market jurisdictions is progressing and announcements are expected in 2022..

Source: OECD Website

For further details, please refer to our Flash News dated 22 December 2021 available at this link

OECD/G20 Inclusive Framework agreement on BEPS 2.0

On 8 October 2021, 136 out of the 140 member countries of the OECD/G20 Inclusive Framework (IF) on Base Erosion and Profit Shifting (BEPS) approved a statement finalising a framework for a major international tax reform. The reform focuses on prevention of tax avoidance by Multinational Enterprises (MNEs), through a two-pillar approach, by addressing the gap in the existing tax rules. Pillar One provides

[1] https://www.oecd.org/tax/beps/tax-challenges-arising-from-the-digitalisation-of-the-economy-global-anti-base-erosion-model-rules-pillar-two.htm

for a new nexus rule to align the evolving digital economy and Pillar Two ensures that MNEs will pay a minimum tax in the each of the jurisdictions that they operate.

The statement updates the earlier IF statements to finalise certain previously unsettled quantitative parameters of the two-pillar approach.

- Pillar One – Under Amount A, taxing rights over 25 percent of the residual profit of the MNEs would be re-allocated to market jurisdictions subject to specified conditions. Only the world's largest and most profitable MNE's would be within the scope of Amount A. Tax certainty will be provided through mandatory and binding dispute resolution. Further a provision under Amount B is intended to simplify and streamline the application of the arm's length principle to in-country baseline marketing and distribution activities. Pillar One demands removal and standstill of Digital Services Taxes and other relevant similar measures.
- Pillar Two secures an unprecedented agreement on a global minimum tax regime. The agreed global minimum tax rate is 15 per cent. The regime will apply to MNEs with annual revenue over 750 million euros. The other aspect of Pillar Two is the 'Subject to Tax Rule' which envisages an additional tax under tax treaties on certain related party payments that are not adequately taxed in the recipient's jurisdiction. The jurisdictions that apply a nominal corporate income tax rate below 9% to interest, royalties and a defined set of other payments will have to agree to implement the rule into their bilateral treaties with developing IF members when requested to do so.

The implementation plan targets a 2023 effective date for most aspects of both Pillar One and Pillar Two, with detailed rules to be developed over the coming months.

Source: OECD Website

For further details, please refer to our Flash News dated 9 October 2021 available at this link

India and US agree on a transitional approach on Equalisation Levy 2020

To address the tax challenges posed by the increased digitalisation of the economy, an Equalisation Levy (EL) was introduced in India. Various other countries had also introduced digital services taxes (DST) to tackle the challenges of the digitised economy. Introduction of these unilateral measures impacted the multi-national US technology companies. The USA found such unilateral measures unreasonable or discriminatory which burdens or restricts their commerce. The USA was planning to introduce various trade actions under Section 301 of the Trade Act, 1974 against the countries which have introduced such unilateral measures, including India.

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In line with this statement, on 21 October 2021, the USA, Austria, France, Italy, Spain, and the UK reached an agreement on a transitional approach to existing unilateral measures while implementing Pillar one. The agreement is reflected in the joint statement that was issued by those six countries. The joint statement describes a compromise reached by the countries on a transitional approach to the treatment of existing DSTs and other relevant similar measures during the interim period before new Pillar One rules come into effect.

On 24 November 2021, the Ministry of Finance of India has issued a press release[2] where India and the USA have agreed that terms of Joint Statement issued on 21 October 2021 shall apply between the USA

[2] Press release issued by the Ministry of Finance of India, dated 24 November 2021

and India with respect to India's charge of 2 per cent EL on e-commerce supply of services. The interim period in case of India will be from 1 April 2022 till the implementation of Pillar one or 31 March 2024, whichever is earlier. The final terms of the agreement shall be finalised by 1 February 2022.

Source: Press release issued by Ministry of Finance, dated 24 November 2021

For further details, please refer to our Flash News dated 25 November 2021 available at this link

Permanent establishment

Training centres of a Canadian entity do not constitute an agency PE in India

The ITAT (Mumbai Bench) held that the activities of training centres in India cannot constitute a Dependent Agent Permanent Establishment (PE) as it was not devoted wholly or almost wholly to the activities of the Canadian entity. These Centres were independent agents, acting in the ordinary course of their business. Further, the ITAT held that income received in the form of accredited training centre fees, sale of physical publications (i.e. DGR manuals), provision of advertising space, etc. cannot be taxed as royalty.

International Air Transport Association (Canada) v. ACIT (ITA No.587/Mum/2016)

For further details, please refer to our Flash News dated 05 February 2021 available at this link

Foreign employees deputed to the Indian associated enterprise do not constitute agency PE in India

The ITAT (Ahmedabad Bench) dealt with the issue of constitution of an Agency PE and attribution of salary of the employees working under the supervision of an Associated Enterprise (AE) to a supervisory PE under the India-U.S. tax treaty. The ITAT held that the foreign employees working with the Indian subsidiary do not constitute an agency PE in India since there was no connection between such employees and the taxpayer. Further, the deputed personnel were employees of the AE and worked under the supervision and guidance of AE in India. Merely displaying information on the website does not lead to the conclusion that these are employees of the foreign taxpayer. Therefore, salary of the employees of the AE cannot be attributed to the supervisory PE in India.

Lubrizol Advanced Materials Inc. v. DCIT [2021] 132 taxmann.com 141 (Ahd)

For further details, please refer to our Flash News dated 15 June 2021 available at this link

Time spent on interconnected services under a unified agreement is to be aggregated to determine a Permanent Establishment in India

The ITAT (Delhi Bench) dealt with the issue of constitution of PE under the India-Norway tax treaty (tax treaty) for interconnected services under the unified agreement. The ITAT observed that different services under the Service Order Form (SOFs) involve various activities like sourcing, marketing, ITeS, network, project, etc. These activities consist of inter-connected projects and no single activity can give rise to performance and achieving of the purpose of the recipient. Therefore, the duration threshold of the employees who perform such services would fall within the provisions of Article 5(2)(l) of the tax treaty. It is required to be aggregated together and it exceeds threshold prescribed under such provisions. Therefore, the taxpayer constitutes a PE in India under the tax treaty.

Telenor ASA v. DCIT [2021] 129 taxmann.com 198 (Del)

For further details, please refer to our Flash News dated 17 August 2021 available at this link

Royalty and fees for technical services

Payment by Indian resident end-users/distributors to non-resident computer software manufacturers/ suppliers for the resale/use of the software is not payment of royalty under various tax treaties - Supreme Court

The Supreme Court held that the amounts paid by resident Indian end users/ distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through End User Licensing Agreement (EULAs)/distribution agreements, is not royalty for the use of copyright in the computer software under various tax treaties. The Supreme Court held that on reference to the definition of 'royalty' contained in Article 12 of various tax treaties, it is clear that there was no obligation on the persons mentioned in Section 195 to deduct tax at source, as the distribution agreements/EULAs do not create any interest or right that would amount to the use of or right to use any copyright.

Engineering Analysis Centre of Excellence Private Limited v. CIT and ANR [2021] 432 ITR 471 (SC)

For further details, please refer to our Flash News dated 03 March 2021 available at this link

Payments for grant of distribution rights of channels are not taxable as royalty or FTS under the India-USA tax treaty

The ITAT (Mumbai Bench) held that the distribution rights granted by the taxpayer to the Indian entity is only a commercial right/broadcast reproduction right and not a copyright and consequently consideration for the same cannot be treated as royalty or Fees for Included Services (FIS) or Fees for Technical Services (FTS) under Article 12 of the India-USA tax treaty. The ITAT observed that the technical explanation of the India-USA tax treaty issued by the tax authorities of USA was not an official protocol or clarification which has been mutually agreed upon between the two countries. Hence, the said technical explanation would not bind the ITAT.

NGC Network Asia LLC v. DDIT (ITA No. 8671/Mum/2004)

For further details, please refer to our Flash News dated 07 January 2021 available at this link

Consultancy services do not satisfy 'make available' conditions and hence are not taxable as FTS under the India-US tax treaty

The ITAT (Delhi Bench) dealt with the issue of taxability of consultancy services in relation to scenario planning exercise initiated by the taxpayer for two-wheeler industry. The ITAT held that the consultancy services in relation to scenario planning exercise are not taxable as FTS within the meaning of Article 12(4) of India-US tax treaty as it did not 'make available' any technology or technical knowledge to the taxpayer. Therefore, the payment was not liable for deduction of tax at source under Section 195.

Hero Motocorp Ltd. v. ACIT (ITA No. 6282 & 6302/Del/2015)

For further details, please refer to our Flash News dated 22 April 2021 available at this link

Payments for online advertising, marketing and IT facilities to non-resident entities are not taxable as royalty

The ITAT (Bangalore Bench) dealt with the issue of taxability of payments for online advertising, marketing and information technology (IT) facilities to non-resident entities under India-Ireland and India-US tax treaties. The ITAT observed that non-resident entities only allow the taxpayer to use their facilities for the purpose of creating advertisement content. Further, the payment made to another non-resident

entity was only for using the IT facilities provided by it. These non-resident entities do not give any specific license for use or right of any of the facilities (which include software). Hence, the question of transferring the copyright over those facilities did not arise at all. Therefore, the payments made to such non-resident entities do not fall within the meaning of term 'royalty' as defined under the relevant tax treaties.

Urban Ladder Home Decor Solutions Pvt. Ltd. v. ACIT (ITA No.615 to 620/Bang/2020)

For further details, please refer to our Flash News dated 20 August 2021 available at this link

Management support services are not taxable as FTS under the India-Singapore tax treaty

The ITAT (Delhi Bench) dealt with the issue of taxability of management support services provided to an Indian company under the India-Singapore tax treaty (tax treaty). The ITAT held that receipt from management support services in terms of hotel management operations are not taxable as FTS under the tax treaty since such services do not make available technical knowledge, experience, skill, know-how or processes, etc.

Inter-Continental Hotels Group (Asia Pacific) Pte. Ltd., v. ACIT (ITA No. 4524/Del/2017)

For further details, please refer to our Flash News dated 11 October 2021 available at this link

Subscription fees for online databases and journals are not taxable as royalty under the India-USA tax treaty as well as under the Income-tax Act

The ITAT (Mumbai Bench) dealt with the issue of taxability of income from providing access by subscription to online databases and subscription revenue from online journals. The ITAT held that such services does not result into transfer of copyright and thus income from such services are not taxable as royalty under Article 12 of India-USA tax treaty as well as under Section 9(1)(vi) of the Act.

American Chemical Society v. ACIT (ITA No.1030/Mum/2021)

For further details, please refer to our Flash News dated 28 October 2021 available at this link

Tax Treaty Benefit

Income from Indian investment by UAE based settlor through a Jersey based Trust is not taxable under the India-UAE tax treaty

Under the trust deed, the UAE settlor was provided right to re-assume power over the entire income arising on the investments made by the trust in the Indian portfolio companies. There was a revocable transfer by settlor. Thus, the entire income arising therefrom was assessed in the hands of UAE based settlor considering the provisions of revocable transfer of asset under the Act.

The High Court held that as per the provisions of the Act read with the India-UAE tax treaty, even if, the trust is based out and settled in Jersey, the income which arises to UAE based settlor by virtue of investment in Indian portfolio companies will be governed by the beneficial provisions of the tax treaty as UAE based entity was the settlor and sole beneficiary of the trust and resident of UAE. There was no attempt to reduce the tax liability by using the trust structure.

Even if the provisions of revocable transfer of asset are not applicable, the trustee will be assessed in a representative capacity and, accordingly the provisions of representative assessee will be applicable.

Consequently, as per the provisions of the Act and Article 24 of the tax treaty, income arising on the investments in Indian Portfolio companies is not taxable in India.

Abu Dhabi Investment Authority and Others v. AAR [2021] 132 taxmann.com 18 (Bom)

For further details, please refer to our Flash News dated 02 November 2021 available at this link

Delay in furnishing a Tax Residency Certificate cannot be a ground to reject a tax treaty benefit

The ITAT (Mumbai Bench) dealt with the issue of eligibility of India-US tax treaty benefit on the interest income where there was a delay in furnishing a Tax Residency Certificate (TRC) and Form 10F. The ITAT allowed the benefit of the tax treaty since there were justifiable reasons with the taxpayer for delay in furnishing the TRC.

Haresh C. Sheth v. ITO (ITA Nos. 1380 /Mum/2020)

For further details, please refer to our Flash News dated 20 August 2021 available at this link

Re-domiciliation of the company does not affect tax treaty entitlement

The ITAT (Mumbai Bench) held that a re-domiciliation of the company by itself could not lead to the denial of tax treaty entitlements of the jurisdiction in which the company is re-domiciled. The re-domiciliation could at best trigger a detailed examination of the re-domiciled company being fiscally domiciled in that jurisdiction.

ADIT v. Asia Today Limited [2021] 129 taxmann.com 35 (Mum)

For further details, please refer to our Flash News dated 11 August 2021 available at this link

The Mumbai Bench of ITAT refers an issue of eligibility of lower tax treaty rate on dividend over DDT rate to the Special Bench

The ITAT (Mumbai Bench) dealt with the issue of eligibility of lower tax treaty rate on dividend for Dividend Distribution Tax (DDT) under Section 115-O. The ITAT did not agree with the earlier decisions of the other benches of the ITAT where the benefit of lower tax rate on dividend has been granted as against the DDT rate. The ITAT, based on various observations, referred the matter to the President of the ITAT to consider the setting up of a Special Bench to deal with this issue.

DCIT v. Total Oil India Pvt Ltd [2021] 190 ITD 312 (Mum)

For further details, please refer to our Flash News dated 26 June 2021 available at this link

The benefit of India-Netherlands tax treaty is not available to the Netherlands based fiscally transparent fund

The AAR held that the income arising to funds from investment made in securities in India out of the contributions made by participants will be assessed in the hands of funds and such funds being fiscally transparent non-taxable entities in Netherlands are not eligible for the benefit of Article 13 of tax treaty.

ABC [2021] [2021] 434 ITR 441 (AAR)

For further details, please refer to our Flash News dated 26 March 2021 available at this link

Most Favoured Nation clause

Tax is to be deducted at a concessional rate of 5 per cent on dividends in view of the MFN clause under the India-Switzerland tax treaty

The Delhi High Court dealt with the issue of eligibility of lower rate of tax on payment of dividend in view of the Most Favoured Nation (MFN) clause contained in the protocol to the India-Netherlands tax treaty. The High Court held that lower tax rate at 5 per cent on dividend provided in the subsequent Indian tax treaties with Slovenia, Colombia and Lithuania would apply in view of the MFN clause under the India-Netherlands tax treaty. The High Court referred to the decree issued by the Kingdom of Netherlands which was published on 13 March 2012. The Netherlands interpreted the protocol to the tax treaty in a manner that the lower rate of tax in the India-Slovenia tax treaty will be applicable on the date when Slovenia became a member of the OECD, although, such tax treaty came into force on 17 February 2005.

Concentrix Services Netherlands BV v. ITO [2021] 434 ITR 516 (Delhi) and Optum Global Solutions International BV v. DCIT [2021] 434 ITR 516 (Del)

For further details please refer to our Flash News dated 26 April 2021 available at this link

Tax is to be deducted at a concessional rate of 5 per cent on dividends in view of the MFN clause under the India-Switzerland tax treaty

The Delhi High Court dealt with the issue of eligibility of lower rate of tax on payment of dividend (available in subsequent Indian tax treaties with OECD country) in view of the MFN clause under the India-Switzerland tax treaty. The High Court held that the lower tax rate at 5 per cent on dividend would apply to the taxpayer in view of the MFN clause under the tax treaty. The High Court relied on its earlier decision in the case of Concentrix Services Netherlands BV[3].

Nestle SA v. Assessing Officer Circle (W.P.(C) 3243/2021) (Del)

For further details please refer to our Flash News dated 16 June 2021 available at this link

Export commission is not taxable as FTS by invoking MFN clause under the India-France tax treaty

The ITAT (Delhi Bench) in the case of Rajinder Kumar Aggarwal (HUF) dealt with the issue of taxability of export commission paid to non-resident agent in France. The ITAT held that export commission paid to agent in France is not taxable as FTS under the India-France tax treaty by invoking the MFN clause and due to non-fulfillment of 'make available' clause read into India-France tax treaty from India-U.K. tax treaty.

Rajinder Kumar Agarwal (HUF) v. DCIT [2021] 131 taxmann.com 252 (Del)

For further details please refer to our Flash News dated 25 October 2021 available at this link

Training fees are not taxable as FTS in view of the MFN clause under the India-Sweden tax treaty

The ITAT (Pune Bench) held that in view of the MFN clause under the India-Sweden tax treaty, the restricted scope i.e. make available clause provided under Article 12(4)(b) of the India-Portuguese tax treaty would apply to the India-Sweden tax treaty. Therefore, the consideration for training services provided by the taxpayer to its associate company cannot be taxed as FTS. The ITAT observed that once two sovereign states have added Protocol to the India-Sweden tax treaty which contains the MFN

[3] Concentrix Services Netherlands BV v. ITO and Optum Global Solutions International BV v. DCIT [2021] 127 taxmann.com 439 (Del)

clause, the inference could be drawn is that the beneficial provisions contained in the India-Portuguese tax treaty is to be read in the tax treaty.

Sandvik Ab v. DCIT [2021] 85 ITR(T) 593 (Pune)

For further details please refer to our Flash News dated 15 January 2021 available at this link

Foreign Tax Credit

Taxpayer is eligible for foreign tax credit in India on taxes paid in various foreign countries

The ITAT (Bangalore Bench) held that the taxpayer is eligible for full credit of FTC, amounting to taxes paid in USA, Japan and Germany under respective tax treaties. However, in the case of Korea, FTC is limited to taxes paid in Korea or India, whichever is less. With Taiwan, India does not have a tax treaty. Therefore, FTC is to be computed based on rate of tax applicable in India or Taiwan, whichever is less, on such doubly taxable income.

ITTIAM Systems Pvt. Ltd. v. ITO [2021] 86 ITR(T) 611 (Bang)

For further details please refer to our Flash News dated 22 January 2021 available at this link

FTC is available on lower of tax paid outside India or tax payable in India on such doubly taxable income under the India-Tanzania tax treaty

The ITAT (Bangalore Bench) held that as per Article 23 of India-Tanzania tax treaty, FTC is to be given on the amount of tax paid on income outside India or payable in India on such doubly taxable income, whichever is lower. The ITAT relied on the decision of Ittiam Systems Pvt. Ltd where a similar conclusion was drawn by the ITAT under the India-Korea tax treaty. The ITAT observed that Article 23 of India-Tanzania tax treaty is pari materia with Article 23 of India-Korea tax treaty.

Promac Engineering Industries Ltd. v. ACIT (ITA No. 501/Bang/2018)

For further details please refer to our Flash News dated 25 August 2021 available at this link

Unutilised foreign tax credit is not allowed as business expenditure

The ITAT (Hyderabad Bench) held that the foreign taxes against which credit is not allowable under Section 91(1) are not deductible as business expenditure under Section 37(1). Section 91 is a specific provision dealing with FTC. If certain part of FTC is allowed as business deduction, it would be contrary to the principle that a specific provision prevails over the general provision.

Infor (India) Private Limited v. DCIT (ITA TP. No. 198/Hyd/2021)

For further details please refer to our Flash News dated 12 October 2021 available at this link

Taxpayer is eligible for Foreign Tax Credit relating to exempt income in India under the India-Japan tax treaty

The ITAT (Delhi Bench) held that the taxpayer is eligible for FTC on the entire amount of taxes withheld in Japan under the India-Japan tax treaty even though taxpayer's income was exempt under Section 10A in India. Merely because the exemption had been granted in respect of the taxability of particular source of income, it cannot be postulated that the taxpayer was not liable to tax in respect of such income. Taxpayer's income was chargeable to tax under Section 4 and includible in the total income under

Section 5, but no tax was charged because of the exemption given under Section 10A. The ITAT relied on the decision of its Coordinate Bench in the case of HCL Comet[4].

Canon India Pvt. Ltd. V. ACIT (ITA No. 468/Del/2021)

For further details please refer to our Flash News dated 26 October 2021 available at this link

Limitation of benefits

Since LOB conditions are fulfilled, the exemption of capital gain tax under the India-Singapore tax treaty is available

The AAR held that the Limitation of Benefit (LOB) conditions prescribed under the Protocol to the India-Singapore tax treaty are satisfied and hence the capital gains arising on sale of shares of an Indian company will be liable to tax in Singapore in accordance with the provisions of Article 13(4) of the tax treaty.

BG Asia Pacific Holdings Pte Limited [2021] 432 ITR 430 (AAR)

For further details please refer to our Flash News dated 01 March 2021 available at this link

Tax avoidance

Sale of shares of an Indian company by a foreign company is not a sham transaction and therefore long-term capital loss on such transaction is eligible to set off and carry forward

The ITAT (Mumbai Bench) dealt with the issue of eligibility of set-off and carry forward of long-term capital loss resulting from sale of shares of an Indian company by a foreign company. The purchase and sale of shares of the Indian company by the taxpayer are within the legal framework. There was no justification on the part of the tax authorities in imputing motive and alleging that the transaction has been arranged to create an artificial loss. Accordingly, it was concluded that the transaction was not a sham transaction and long-term capital loss on such transaction was eligible for set-off and carry forward.

Swiss Reinsurance Company Ltd v. DCIT [2021] 190 ITD 690 (Mum)

For further details please refer to our Flash News dated 29 July 2021 available at this link

Even though UAE based subsidiary was a paper/shell company, its profits are not taxable in India because it did not violate any provisions of the law

The profit earned by the UAE subsidiary company was predominantly on account of the import from the downstream subsidiary based in Democratic Republic of Congo (DRC) which was sold to a party based in China. Thus, the transaction was amongst the parties based outside India. Accordingly, such profit cannot be attributed to the taxpayer merely on the reasoning that the taxpayer is the holding company. The substance of the transaction shows that the profit was belonging to such foreign subsidiary companies.

The substance of the transaction shows that the profit was either belonging to the subsidiary in DRC or subsidiary in UAE. Even if the existence of the subsidiary in UAE is denied, such profit has to be attributed to the subsidiary in DRC. No doubt was raised by the tax department on the existence of the subsidiary

[4] ACIT v. HCL Comet (ITA No. 5555/Del/2014, 6162/Del/2013)

in DRC which implies that the subsidiary company in DRC was functioning properly. Therefore, the profit related to the subsidiary company in DRC cannot be clubbed with the taxpayer company on the reasoning that the taxpayer had diverted the profit by using the colourable device.

Rubamin Ltd v. DCIT (ITA No. 2929/Ahd/2014)

For further details please refer to our Flash News dated 10 November 2021 available at this link

Business expenditure and losses

No disallowance under Section 14A where investments are made out of common funds and interest-free funds are higher than the amount invested in tax-free securities

The Supreme Court dealt with the issue of disallowance of proportionate interest expenditure where tax-free investments are made out of mixed funds (partly of interest-free funds and partly of interest-bearing funds). The Supreme Court held that disallowance of expenditure incurred in relation to exempt income is not attracted where the tax-free investments are made from mixed funds and the interest-free funds of the taxpayer are higher than the amount of tax-free investment.

South India Bank Ltd v. CIT [2021] 438 ITR 1 (SC)

For further details, please refer to our Flash News dated 16 September 2021 available at this link

Write-off of investment in loss making overseas subsidiaries is allowed as business loss

The ITAT (Mumbai Bench) held that the write-off of investment in loss making overseas subsidiaries is allowed as a business loss since the investments were made out of commercial expediency and in furtherance of the taxpayer's business. The investments had a direct nexus with the taxpayer's business and any loss arising therefrom is allowable as deduction.

The ITAT also held that the write-off of advance made to an Indian entity is eligible for business deduction since these advances were lost during the course of business. The advances were given in the normal course of business out of commercial expediency which would have improved the profit-making apparatus without disturbing the capital set-up of the taxpayer. Hence, it was allowed as a business deduction.

DCIT v. Maneesh Pharmaceuticals Ltd. (ITA No. 4024/Mum/2019)

For further details, please refer to our Flash News dated 24 June 2021 available at this link

Depreciation is allowed on the WDV of the block of machinery at the gross value without reducing the waiver of loan

The ITAT (Pune Bench) dealt with the issue of eligibility of depreciation on the Written Down Value (WDV) of the block of machinery at the gross value without reducing the waiver of loan therefrom. The ITAT held that the waiver of loan in the earlier year has no impact either on the actual cost of assets under Section 43(1) or the WDV under Section 43(6) of the Act. Accordingly, depreciation should be allowed on the WDV of the block of machinery at the gross value without reducing the waiver of loan therefrom. Consequently, the disallowance of depreciation was deleted.

Shapers India Private Limited v. DCIT [2021] 130 taxmann.com 409 (Pune)

For further details, please refer to our Flash News dated 01 October 2021 available at this link

Capital Gain

Carry forward of capital loss on sale of shares is allowed to a Singapore entity under the Income-tax Act even though such capital gains are not taxable in India under the tax treaty

The ITAT (Mumbai Bench) held that the capital losses incurred from transactions in the Indian capital markets should be construed as income accruing or arising in India falling within the scope of Section 5 of the Act. Therefore, such short-term capital losses are eligible to be carried forward to subsequent years. If provisions of the Act are more beneficial as compared to the India-Singapore tax treaty, then the beneficial provisions of the Act will apply in determining the taxability of such income. The ITAT rejected the tax department's argument that since the capital gains earned by the taxpayer was exempt under the provisions of the tax treaty, capital losses are to be ignored.

Goldman Sachs India Investments (Singapore) Pte Ltd v. DCIT (ITA No. 6619/Mum/2016)

For further details please refer to our Flash News dated 28 April 2021 available at this link

Gift taxation

Provisions of Section 56(2)(vii) of the Income-tax Act are not applicable on receipt of bonus shares

The Karnataka High Court dealt with the issue of applicability of Section 56(2)(vii) on receipt of bonus shares by the taxpayer as a shareholder of a private limited company. The High Court held that the issuance of bonus shares does not involve any inflow of funds or increase in the capital structure of the company. It merely involves capitalisation of existing reserves. Further bonus shares do not enrich the shareholder. Profit derived by the taxpayer on account of receipt of bonus shares is adjusted by depreciation in value of equity shares held by him. Therefore, the provisions of Section 56(2)(vii) are not applicable on receipt of bonus shares by the taxpayer. The High Court also observed that the bonus shares were not issued in order to evade any tax.

PCIT v. Dr. Ranjan Pai [2021] 431 ITR 250 (Kar)

For further details, please refer to our Flash News dated 4 January 2021 available at this link

Provisions of Section 56(2)(viib) are not applicable when shares are issued at face value pursuant to the scheme of amalgamation

The ITAT (Ahmedabad Bench) in the case of Ozone India Ltd dealt with the applicability of provisions of Section 56(2)(viib) where the shares are issued pursuant to a scheme of amalgamation. The ITAT held that such anti-abuse provisions under Section 56(2)(viib) are not applicable where the issue of shares are at 'face value' by the amalgamated company to the shareholders of the amalgamating company pursuant to the Scheme approved by the Court.

DCIT v. Ozone India Ltd. [2021] 189 ITD 476 (Ahd)

For further details please refer to our Flash News dated 22 April 2021 available at this link

Higher TDS for non-PAN cases

PAN is mandatory under Section 206AA even if the income of a person is below the taxable limit

The Karnataka High Court held that Permanent Account Number (PAN) is mandatory under Section 206AA even if the income of a person is below the taxable limit. The provisions of Section 206AA were not unworkable or inconsistent with the other provisions of the Act, therefore, the principle of reading down could not be applied merely on the basis of hardship or equity which are not relevant in interpretation of tax laws.

Union of India v. Smt. A. Kowsalya Bai [2021] 280 Taxman 175 (Kar)

For further details, please refer to our Flash News dated 15 April 2021 available at this link

Year End Provisions

Since income is not accrued, TDS provisions are not appliable on the provision for expenses

The Karnataka High Court held that the taxpayer is not liable to deduct tax at source in the absence of accrual of any income under the Act. The provisions were created during the course of the year and reversal of entry was made in the same accounting year. Consequently, the proceedings under Section 201 and 201(1A) could not be initiated.

Toyota Kirloskar Motor (p) Ltd. v. ITO [2021] 281 Taxman 527 (Kar)

For further details please refer to our Flash News dated 12 April 2021 available at this link

TDS provisions are not applicable on the 'provisions for expenditure' since the payee is not identifiable, and liability is not ascertained

The ITAT (Mumbai Bench) in the case of Sonata Information Technology Ltd dealt with the issue of applicability of TDS on the 'provisions for expenditure' created in the book of account. The ITAT held that TDS provisions are not applicable on the 'provisions for expenditure' since the taxpayer had not credited the amount to any specific account. Further the payee is not identifiable, and liability is not ascertained.

DCIT v. Sonata Information Technology Ltd (ITA No. 3244 and 3245/Mum/2018)

For further details please refer to our Flash News dated 13 January 2021 available at this link

ESOP

Employment Stock Option Plan exercised by non-resident, if granted for employment in India, not eligible for treaty benefits

The ITAT (Mumbai Bench) held that for taxpayer being a Non Resident of India, claim of benefits (as available under the relevant Treaty) for the Employment Stock Option Plan (ESOPs) exercised by him would not be available, if the same granted for his employment in India.

Unnikrishnan v. v. ITO [2021] 123 taxmann.com 238 (Mum)

For further details please refer to our Flash News dated 19 January 2021 available at this link

Tax is not required to be deducted on ESOP discount in the year of vesting

The ITAT (Bengaluru Bench) dealt with the issue of allowability of ESOP related expenditure where tax has not been deducted on discount component of such ESOP. The ITAT observed that the taxpayer was liable to deduct tax at source when the discount amount becomes perquisite in the hands of the concerned employee. Discount will be considered as perquisite in the year in which the option is exercised by the concerned employee and tax would be deducted at that point of time. Hence, the AO was not justified in holding that the taxpayer should have deducted tax at source from the discount amount by assessing the same as perquisite in the hands of the taxpayer in the year in which ESOP was vested. However, the AO is entitled to satisfy himself that the taxpayer has either deducted tax at source when the option is exercised by the employee or has reversed the expenditure when the concerned employee did not exercise the option.

Northern Operating Services Pvt. Ltd. v. JCIT (IT(TP)A No. 759/Bang/2017)

For further details please refer to our Flash News dated 08 September 2021 available at this link

GST

Supreme Court affirms no refund of unutilized ITC on input services under inverted duty structure

Hon'ble High Court of Gujarat and High Court of Judicature of Madras had given a contrary judgement with regards to refund of unutilized input tax credit (ITC) on input services under inverted duty structure. This dispute has been laid to rest by the Hon'ble Supreme Court which has held that refund of unutilized ITC on account of inverted duty structure does not cover input services.

Union of India & Ors. vs VKC Footsteps India Pvt Ltd. & Ors [SC Civil Appeal No. 4810 of 2021, dated 13 September 2021]

For further details, please refer to our Flash News dated 15 September 2021 available at this link.

Supreme Court affirms GST common portal is only a facilitator to feed or retrieve information and need not be the primary source for doing self-assessment

Hon'ble Delhi High Court vide its judgement dated 5 May 2020 had held that there was no reason to restrict rectification of GST returns and accordingly permitted to rectify Form GSTR-3B. This was not accepted by Hon'ble Supreme Court of India which held that not making Form GSTR-2A operational cannot be a ground to allow revision of the returns.

Union of India vs Bharti Airtel Ltd & Ors. [2021-VIL-87-SC]

For further details, please refer to our Flash News dated 8 November 2021 available at this link.

Contribution to Resident Welfare Associations (RWA) in excess of INR 7500 would only be taxable under GST – Madras High Court

Members of RWA and other housing societies are exempted from payment of GST on account of entry 77(c) of Notification No. 12/2017-Central Tax (Rate) dated 28 June 2017.

In this regard, the Hon'ble High Court of Madras has quashed Circular No. 109/28/2019-GST dated 22 July 2019 and held that contribution to RWA in excess of INR 7,500 per month per member would only be taxable under GST.

Greenwood Owners Association, Oceanic Owners Association, M/S TVH Lumbini Square Owners Association, Sanjay Kumar Gupta Vs The Union of India And Others [2021-TIOL-1505-HC-MAD-GST]

For further details, please refer to our Flash News dated 14 July 2021 available at this link.

SEZ allowed to claim refund of GST paid on inputs and input services

Hon'ble Madras High Court has allowed refund claim to SEZ unit on GST paid on procurement of inputs and input services and held that reference to a supplier of a SEZ in Rule 89 of CGST Rules, 2017 will not exclude other applicants.

Platinum Holdings Private Limited vs (1) Additional commissioner of GST & Central Excise (Appeals-II), Chennai (2) Assistant Commissioner of GST & Central Excise Tambaram Division, Chennai [2021-VIL-719-MAD]

For further details, please refer to our Flash News dated 14 October 2021 available at this link.

Pre-deposit for an appeal can be paid only through Electronic Cash Ledger

Hon'ble Orissa High Court has held that the mandatory pre-deposit to file an appeal can be made only through electronic cash ledger and not through electronic credit ledger.

Jyoti Construction vs Deputy Commissioner of CT & GST, Barbil Circle, Jajpur And Another [2021-VIL-715-ORI]

For further details, please refer to our Flash News dated 14 October 2021 available at this link.

Interest receivable even if not mentioned by Proper Officer in Form GST PMT-03 and not applied by registered person in Form GST PMT-04

'Petitioner' had filed a writ petition challenging refund rejection order for refund of ITC for the period August 2017 to January 2018. It prayed for grant of refund or, direct the 'Proper Officer' to re-credit the amount in its electronic credit ledger. During the pendency of the writ petition, the 'Proper Officer' recredited the amount but without any interest.

The grievance of the 'Petitioner' is that interest accruing on recredited amount should be payable. It further submitted that, although Form GST PMT-03 (Order for re-credit of the amount to cash or credit ledger on rejection of refund claim) was issued on 28 June 2018, the amount was credited only on the intervention of the Court. 'Respondent', representing the 'Proper Officer' contended that if the 'Petitioner' had any grievance, it should have raised grievance in Form GST PMT-04 (Application for intimation of discrepancy in Electronic Credit Ledger/Cash Ledger/ Liability Register).

Hon'ble High Court of Jharkhand held that the contention of the 'Respondent' is devoid of any merit as the cause of action for claiming interest has arisen only after the amount has been recredited to electronic credit ledger.

Prakash Mica Exports Private Limited, Giridih vs The State of Jharkhand and 4 Ors [2021-VIL-600-JHR]

Notice pay recovery liable to GST at 18% – Gujarat AAR

The Gujarat Authority for Advance Ruling (AAR) has held that notice pay is a sum mutually agreed between the employer and the employee for breach of contract. It can be regarded as a consideration to the employer for 'tolerating the act' of the employee to not serve the notice period which was the employee's agreed contractual obligation.

Amneal Pharmaceuticals Pvt. Ltd. [Advance Ruling no. GUJ/GAAR/R/51/2020 dated 30 July 2020]

For further details, please refer to our Flash News dated 13 January 2021 available at this link.

Expenses incurred to comply with the requirements of CSR are incurred in the course of business - AAR

Uttar Pradesh AAR has held that the expenses incurred by company to comply with the requirements of Corporate Social Responsibility (CSR) under the Companies Act, 2013 are incurred in the course of business and thus, the Company shall be eligible to claim input tax credit on such expenses.

Dwarikesh Sugar Industries Limited, AAR Uttar Pradesh Order no. 2 dated 22 January 2020

For further details, please refer to our Flash News dated 18 March 2021 available at this link.

Society and members are distinct persons and will fall under the ambit of GST

Union Budget for the year 2021-22 amended the scope of "supply" under section 7 of the CGST Act, 2017 retrospectively with effect from 1 July 2017.

In this regard, Maharashtra Authority for Advance Ruling (AAR) has held that the issues surrounding the doctrine of mutuality is settled on account of insertion of clause (aa) to sub-section (1) of section 7.

Emerald Court Co-Operative Housing Society Limited [2021-VIL-264-AAR]

For further details, please refer to our Flash News dated 16 July 2021 available at this link.

GST applicable on reimbursement of discount / rebate by supplier to distributor

Appellate Authority for Advance Ruling (AAAR), Kerala has held that additional discount reimbursed by the supplier to the distributor is to be added to the consideration payable by the customer of the distributor and thus liable to GST.

Santhosh Distributors [2021-VIL-32-AAAR]

For further details, please refer to our Flash News dated 20 July 2021 available at this link.

E-invoice mandatory for turnover in excess of INR 50 crore

Central Board of Indirect Taxes and Customs (CBIC) had earlier issued notification requiring taxpayers having a turnover in excess of INR 500 crore to issue e-invoice for all B2B supplies. The said notification came into effect from 1 October 2020. Subsequently, with effect from 1 January 2021 the requirement for issuing e-invoice was made mandatory for taxpayers having a turnover in excess of INR 100 crore. Now in the next phase of mandating issuance e-invoice, CBIC has notified 1 April 2021 as the date from when taxpayer having an aggregate turnover in excess of INR 50 crore shall be required to issue e-invoice for all B2B supplies made including exports.

Notification No. 5/2021-Central Tax dated 8 March 2021

For further details, please refer to our Flash News dated 9 March 2021 available at this link.

Amendment to the Central Goods and Services Tax Rules, 2017 (CGST Rules)

CBIC has issued a notification to amend rules pertaining to refund procedures and generation of e-way bill prescribed under the CGST Rules.

Notification No. 15/2021-Central Tax dated 18 May 2021

For further details, please refer to our Flash News dated 20 May 2021 available at this link.

Update of the 43rd GST Council Meeting

In the backdrop of the second wave of the pandemic COVID-19, GST Council on 28 May 2021 held its 43rd Council meeting. The council had recommended various measures primarily focusing on relaxing compliance related burden. In addition, the Council also announced constituting a Group of Ministers to deliberate on the recommendation made by the fitment committee on GST rates for certain COVID-19 related relief items such vaccine, medical supplies, etc.

Ministry of Finance, Press Release dated 28 May 2021

For further details, please refer to our Flash News dated 31 May 2021 available at this link.

Update of the 45th GST Council Meeting

45th GST Council meeting was held physically at Lucknow, Uttar Pradesh on 17 September 2021. At this meeting, significant recommendations were made by the GST Council relating to GST rates, correction in anomaly in inverted duty structure, compensation cess and measures for trade facilitation and streamlining GST compliances.

Ministry of Finance, Press Release dated 17 September 2021

For further details, please refer to our Flash News dated 18 September 2021 available at this link.

Customs and foreign trade policy

Supreme Court affirms that activity of advertisement and sales promotion is a post import activity incurred suo-motu by the importer and thus not liable to be included in assessable value of imports

Rule 10(1)(e) of the Customs Valuation (Determination of Value of Imported Goods), 2007 states that in determining the transaction value, 'Importer' should include all other payments made as a condition of sale of the imported goods to the transaction value.

In this regard, Supreme Court has affirmed that the activity of advertisement and sales promotion is a post import activity incurred by the importer on its own account and not for discharge for any obligation of the seller under the terms of sale.

The Commissioner of Customs vs M/s Indo Rubber and Plastic Works [2021-VIL-68-SC-CU]

For further details, please refer to our Flash News dated 16 July 2021 available at this link.

Auto-renewal for AEO-T1 entities subject to submission of annual declaration

Circular No. 33/2016-Customs dated 22 July 2016 as amended by subsequent circulars state that the validity of AEO-T1 is three years. This validity can be renewed by submitting an application for renewal 30 days prior to the expiry date. With a view to reduce compliance burden, CBIC has issued a circular on 31 July 2021 to allow the facility of continuous AEO certification / auto renewal for AEO-T1 entities.

CBIC Circular No. 18/2021-Customs dated 31 July 2021

For further details, please refer to our Flash News dated 3 August 2021 available at this link.

Revised guidelines issued for continuation and implementation of RoSCTL scheme

On 14 July 2021, Union Cabinet had approved the continuation of Rebate of State and Central Taxes and Levies (RoSCTL) on exports of Apparel/Garments (Chapters 61 and 62) and Made-ups (Chapter 63) till 31 March 2024 in exclusion of Remission of Duties and Taxes on Export Products (RoDTEP).

In this regard, Ministry of Textile has issued revised guidelines for continuation and implementation of the RoSCTL scheme.

Ministry of Textiles, Press Release dated 13 August 2021

For further details, please refer to our Flash News dated 17 August 2021 available at this link.

RoDTEP scheme guidelines and rates notified

Central Government has amended Foreign Trade Policy 2015-20 to notify the scheme for Remission of Duties and Taxes on Exported Goods (RoDTEP) with immediate effect.

The objective of the scheme is to refund the indirect tax levies on exported product which are not refunded. This includes prior stage cumulative indirect taxes on goods and services used in production and distribution of exported products.

Ministry of Commerce and Industry, Notification No. 19/2015-2020 dated 17 August 2021

For further details, please refer to our Flash News dated 18 August 2021 available at this link.

Revised Transport and Marketing Assistance for Specified Agriculture Products Scheme notified

In order to mitigate the higher cost of transportation of export of specified agricultural products due to transshipment and to promote brand recognition for Indian agricultural goods in specified overseas markets, Central Government had added chapter 7(A) in the Foreign Trade Policy 2015-2020 to incorporate the Transport and Marketing Assistance (TMA) Scheme. This scheme was applicable for exports effected upto 31 March 2021.

Central Government has now notified 'Revised Transport and Marketing Assistance (TMA) for Specified Agriculture Products Scheme' for exports made after 1 April 2021.

Ministry of Commerce and Industry, Notification No. F. No. 17/2/2021-EP (Agri.IV) dated 9 September 2021

For further details, please refer to our Flash News dated 14 September 2021 available at this link.

Foreign Trade Policy 2015-2020 extended

Duration of Foreign Trade Policy (FTP) and Handbook of Procedures (HBP) 2015-2020 has been extended further till 31 March 2022. Extension of other durations is as follows:

- Imports against Advance Authorisations are exempted from integrated tax and compensation cess till 31 March 2022.
- Capital goods imported under EPCG Authorisation for physical exports are exempted from integrated tax and compensation cess till 31 March 2022.
- Imports / procurement by EOU / EHTP / STP / BTP unit from bonded warehouse in DTA or from international exhibition held in India are exempted from payment of customs duty, additional duty, integrated tax and compensation cess till 31 March 2022.

Ministry of Commerce and Industry, DGFT, Notification No. 33/2015-2020 dated 28 September 2021 read with Public Notice No. 25/2015-2020 dated 28 September 2021

Services and rates notified for SEIS

Central Government has notified services and rates for Service Exports from India Scheme (SEIS) benefit on services rendered in FY 2019-20. Other aspects are as follows:

- Rates notified is 3% and 5% respectively.
- Limit of INR 5 crores per IEC on total entitlement imposed.
- Facility to claim benefits under SEIS on payment in Indian Rupees will not be available for services rendered in FY 2019-20.

- Deadline for submission of SEIS application for FY 2019-20 is 31 December 2021. Late cut will not apply, which means that application will be time barred after 31 December 2021.

Ministry of Commerce and Industry, Department of Commerce, Notification No. 29/2015-2020 dated 23 September 2021

Service Tax

Service tax is not payable on the portion of TDS borne by recipient

Customs, Excise and Service Tax Appellate Tribunal, Chennai has held that TDS under Income Tax Act, 1961 is a statutory obligation and cannot be treated as consideration for the purpose of service tax under Finance Act, 1994. Thus, service tax is not payable on the gross amount on account of TDS.

T.V.S. Motor Company Limited vs. The Commissioner of Central Excise & Service Tax, Chennai- [2021-VIL-412-CESTAT-CHE-ST]

For further details, please refer to our Flash News dated 3 September 2021 available at this link.

Production Linked Incentive (PLI) Scheme

During the year Government announced PLI schemes for various product categories

Snapshot of Open PLI Schemes

Particulars	Automobiles and Auto Components	Drone and Drone Components	Textile Products: MMF segment and technical textiles	Specialty Steel	Advance Chemistry Cell (ACC) Battery
Financial Outlay	INR 25,938 crore (USD 3,458 million)	INR 120 crore (USD 16 million)	INR 10,683 crore (USD 1,424 million)	INR 6,322 crore (USD 843 million)	INR 18,100 crore (USD 2,413 million)
Notification/ guidelines	Notification and guidelines issued	Notification issued; guidelines awaited	Notification issued; guidelines awaited	Notification issued; guidelines awaited	Notification issued; guidelines awaited

Application window	Last date for online application is 9 January 2022	Yet to be notified	Yet to be notified	Yet to be notified	Last date for RFP (Bid due date) is 31 December 2021

Snapshot of Closed PLI Schemes

Particulars	Electronic/ Technology Products	Pharmaceuticals drugs	Telecom and Networking Products	Food Products	High Efficiency Solar PV Modules	White Goods (ACs & LED)	Medical devices
Financial Outlay	INR 5,000 crore (USD 667 million)	INR 15,000 crore (USD 2,000 million)	INR 12,195 crore (USD 1,626 million)	INR 10,900 crore (USD 1,453 million)	INR 4,500 crore (USD 600 million)	INR 6,238 crore (USD 832 million)	INR 3,420 crore (USD 456 million)

Source – PIB website, Egazette website

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