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Permanent Establishment

Multiple counting and period of leave is to be excluded from the period of stay of an employee to determine Service PE threshold

The taxpayer, a partnership firm, is a tax resident of United Kingdom (U.K.) and is engaged in the practice of law. Apart from its head office in the U.K., the taxpayer has offices in various other countries around the world. The taxpayer does not have any branch office in India. The taxpayer was appointed as a legal advisor for some of the projects in India and provided legal consultancy services to them. In connection with rendering such legal consultancy services, the taxpayer received fees from the clients in India. The statement accompanying the return of income stated that since the taxpayer had no branch office in India, the fee received is not chargeable to tax in India in the absence of a Permanent Establishment (PE) in India. The Assessing Officer (AO) observed that the employees/other personnel of the taxpayer have rendered services in India for more than 90 days during the relevant Financial Year (FY), hence, the taxpayer had a PE in India in terms of Article 5(2)(k)(i) of the India–UK tax treaty (tax treaty). Therefore, income earned from rendering legal consultancy services in India is taxable in India.

The Mumbai Tribunal held that the stay of employees in India on a particular day has to be taken cumulatively and not independently. The Tribunal referred to the decision of the Mumbai Tribunal in the case of Clifford Chance v. DCIT [2002] 82 ITD 106 (Mum), relied upon by the taxpayer. Thus, if the period during which the said employee was on leave is excluded and the multiple counting of employees in a single day is avoided, the aggregate period of stay of taxpayer's employees' in India during the relevant FY is 87 days. Therefore, there was no PE of the taxpayer in India during relevant Assessment Year (AY). That being the case, the fees received by the taxpayer from legal consultancy services rendered in India is not taxable in India.

Linklaters v. DDIT [2019] 106 taxmann.com 195 (Mum)

For further details, please refer to our Flash News dated 26 April 2019 available at this link

Indian subsidiary of a U.S. company does not constitute a PE in India under the India-U.S. tax treaty

The taxpayer, a non-resident company, engaged in the business of diamond grading and preparation diamond dossiers. Prior to the setting up of the subsidiary, the taxpayer entered into a contract with a third party 'consolidator'. Under the consolidator arrangement, the consolidator coordinated the collection of diamonds from India, and the taxpayer graded the diamonds and issued grading reports. It was agreed between the parties to the consolidator arrangement that the cost to the consumers would be divided in the ratio of 90:10. This arrangement existed even after formation of subsidiary in India. Whenever Indian subsidiary faces capacity and/or technical constraints, it sends stones for grading to other entities of the taxpayer's group across the globe, including the taxpayer. This was done in terms of a 'GIA Gem Grading Services Agreement' which had been entered into by the various entities of the group including the taxpayer and Indian subsidiary. Indian subsidiary only had the technical capacity to grade the diamonds below 2 carats only and hence larger diamonds were being sent to other taxpayer's group entities for grading. Subsequently, with the increase in technical capacities, Indian subsidiary itself started grading diamonds up to 3.99 carats. In terms of the aforesaid agreement, there was a uniform pricing mechanism of 90:10 for grading services i.e. the entity of the group which was requesting for the grading services retains 10 per cent of the fees it collects from its customer and 90 per cent of the said fees was paid to the entity which provides the grading activity.

In the background of such an arrangement, the AO held that the taxpayer has a PE in India in the name of Indian subsidiary through which it carries on its business in India. Accordingly, 50 per cent of the gem grading fees received by the taxpayer from Indian subsidiary has been held to be attributable to the Indian PE, and a profit percentage of 20.31 per cent has been applied thereon to determine the total income of the taxpayer, which has been held to be taxable in India.

Tribunal Decision

Fixed place PE

The economic risks of the gem grading services rendered by the taxpayer vis-à-vis stones/diamonds of customers of Indian subsidiary shipped to it were borne by Indian subsidiary and hence, there was no joint venture arrangement whatsoever between the taxpayer and Indian subsidiary. Mere fact that a company has controlling interest in the other company does not by itself construe the other company to be its PE. Accordingly, the taxpayer does not have a 'fixed place' PE in India.

Service PE

The taxpayer renders 'grading services' and 'management services to Indian subsidiary. In fact, 2 graders who were earlier employed with the taxpayer were employed with the Indian subsidiary and were on the payrolls of Indian subsidiary. They were working under control and supervisions of Indian subsidiary and therefore, no Service PE was created in India under the tax treaty.

Agency PE

Considering the functions and the risks assumed by Indian subsidiary vis-à- vis its business activities in India (as has been recorded in the transfer pricing study report. Functional and risk analysis has been accepted by the Transfer Pricing Officer (TPO) both in the case of Indian and in the case of the taxpayer), Indian subsidiary was an independent entity which was rendering grading services to its clients in India. Indian subsidiary also bears service risk and all client facing risks vis-à-vis the stones sent to the taxpayer for grading purposes (as has been recorded in the Transfer Pricing Study Report). Hence, Indian subsidiary was not acting in India on behalf of the taxpayer. Further, Indian subsidiary was not having any authority to conclude contracts and has neither concluded any contracts on behalf of the taxpayer nor has it secured any orders for the taxpayer in India. Thus, Indian subsidiary cannot be regarded as 'agency PE' of the taxpayer in India.

Gemological Institute of America v. DCIT [2019] 178 ITD 620 (Mum)

For further details, please refer to our Flash News dated 28 June 2019 available at this link

To determine a threshold for Service PE under the India-UK tax treaty 'any 12 month period' is to be construed as previous/financial year

The taxpayer, a Limited Liability Partnership, is a tax resident of U.K. and it offers legal consultancy services to its clients all over the world including India. During the AY 2013-14, the taxpayer provided professional services to its Indian clients. The taxpayer contended that it did not have PE in India in terms of Article 5(2)(k)(i) of the tax treaty as its employees did not stay in India more than 90 days during the relevant year. The expression 'any twelve months period' as used in Article-5(2)(k)(i) of the India-U.K. tax treaty has to be construed as previous year relevant to AY under consideration. The aforesaid ratio has been laid down by the Tribunal while deciding its own case. The taxpayer contended that the total number of days spent by the employees in India was 42 days. Therefore, in terms of Article 5(2)(k)(i) of the tax treaty, the taxpayer did not have PE in India during the year.

The tax department contended that the expression 'any twelve months period' as used in Article-5(2)(k)(i) of the tax treaty would not mean the previous year as defined in Section 3 of the Income-tax Act, 1961 (the Act). The tax department contended that, had it been the case, then, like Article-5(2)(k)(i) of the tax treaty, fiscal year which has been defined to be the previous year would have been used in Article 5(2)(k)(i) of the tax treaty. Thus, the meaning ascribed to fiscal year cannot be ascribed to the term 'any twelve months period'.

The Mumbai Tribunal observed that if the provisions of Service PE clause of the tax treaty is read harmoniously with the provisions of the Act, it would be fair and reasonable to conclude that the expression 'any 12 month period' has to be construed to mean the 'previous year' or 'FY'. Accordingly, the Tribunal directed the AO to verify as to whether the employees of the taxpayer were situated in

India for rendering services for a period not exceeding ninety days during the previous year and if it is found to be so, then, it has to be held that the taxpayer did not have a PE in India under the tax treaty.

Linklaters LLP v. DCIT (2019-TII-172-ITAT-MUM-INTL)

For further details, please refer to our Flash News dated 23 July 2019 available at this link

German company does not have a PE or business connection in India for sale of cars on a principal to principal basis to its associated enterprise in India

The taxpayer, a German company, is one of the world's leading Car manufacturers. The taxpayer is a part of Volkswagen Group Sales India private Limited (VGS) and is engaged in the business activities i.e. export of cars, export of parts and accessories, export of tools and machinery and export of sales promotion material. It also provides service to its India Group Companies for grant of right to use information technology system, provision of training outside India, consultancy/management and other support services. The taxpayer had appointed VGS as a sole distributor of Audi brand cars in India. The taxpayer also sold part and accessories to Skoda Auto India Private Ltd (SAIPL/Skoda India), pursuant to which Skoda India manufactures/assembled Audi brand cars in India in its manufacturing unit at Aurangabad, India. VGS is engaged in wholesale trading of Audi and Volkswagon brand car. VGS purchases fully built-up cars from the taxpayer, Volkswagon Group (AG) and Skoda India and sales the same to the dealers/distributor. During the AY's 2009-10 and 2010-11, the taxpayer sold fully built-up cars and accessories to its Associated Enterprises (AEs) in India. The AO observed that VGS is the exclusive distributor whose only source of income was from Audi business. The business activities of VGS were devoted wholly on behalf of the taxpayer. Further, the activities of the taxpayer and VGS completed each other and VGS was functioning as an extended arm and replacement of the taxpayer in India. The AO held that the taxpayer had business connection in India and had a PE in India in the form of VGS as per Article 5(1) and 5(5) of the tax treaty. Accordingly, it was held that income attributable to the PE was taxable in India. Consequently, the AO attributed 35 per cent of total income of the taxpayer in India. The Dispute Resolution Panel (DRP) upheld the order of the AO.

The Mumbai Tribunal held that the income arising on the sales of car by VGS to dealers in India was income accruing or arising in India and was taxed separately in the hands of VGS. The Tribunal observed that merely acting for non-resident principal would not itself render an agent to be considered PE for the purpose of allocating profit. The taxpayer was not undertaking any definite activity to which profit can be attributed. Accordingly, it was held that the VGS was an independent and separate entity, which was engaged in selling of fully built up cars imported from the taxpayer, Volkswagen AG and Skoda India to dealers and distributors. Thus, it cannot be regarded as a PE of taxpayer in India. The Mumbai Tribunal also held that the transaction of sale of cars by a foreign company in India on a principal to principal basis to its AE [a sole distributor of its cars in India) did not result into a business connection under the Act or a PE under Article 5 of the tax treaty.

Audi AG v. ADIT (ITA No. 7335/Mum/2012)

For further details, please refer to our Flash News dated 18 September 2019 available at this link

Royalty and fees for technical services

Distribution charges received for telecasting of TV channels in India are not taxable as 'royalty' under the Income-tax Act as well as under the India-Singapore tax treaty

The taxpayer, a Singapore based company, operates TV channels for the exhibition of various programmes i.e. entertainment, educational, etc. The taxpayer was having an Indian group company. The Indian group company through layers of multi-system operators and cable operators collects subscription charges to enable individual customers to view several channels and programmes telecasted on such channels. The revenue so collected from a large number of customers would eventually reach the taxpayer after adjustment of intermediary charges paid to the different agencies.

The AO held that these payments were in the nature of royalty for the use of copyright. However, the taxpayer contended that the same were taxable as business income. The Commissioner of Income-tax (Appeals) [CIT(A)] and the Tribunal held in favour of the taxpayer.

The High Court observed the taxpayer had not created any literary, dramatic, musical or artistic work or cinematograph film and a sound recording. Therefore, it could not fall within the definition of royalty under Section 9(1)(vi) of the Act as well as under the tax treaty. Section 37 of Copyright Act separately defines broadcast reproduction right. It provides that every broadcasting organisation shall have special rights to be known as 'broadcast reproduction right' in respect of its broadcasts. The High Court held that even going by the definition of Article 12 of the India-Singapore tax treaty, the income of the taxpayer cannot be categorised as royalty.

CIT v. MSM Satellite (Singapore) Pte Ltd [2019] 265 Taxman 376 (Bom)

For further details, please refer to our Flash News dated 4 May 2019 available at this link

Payments for availing bandwidth services are not taxable as royalty under the India-Singapore tax treaty

The taxpayer is engaged in the business of providing telecom services in India. During the AY 2016-17, the taxpayer entered into a 'bandwidth service agreement' (agreement) with a Singapore based entity. The Singapore entity was holding a facility-based operator licence in Singapore which enabled it to establish, install, maintain, operate and provide telecommunication services in Singapore and also provide bandwidth services to the service recipients across the globe. As per the terms of the agreement, the taxpayer remained under an obligation to withhold tax, if any, on the payments made to the Singapore entity for provision of bandwidth services. In pursuance of the aforesaid terms, the taxpayer remitted payment to the Singapore entity for provision of bandwidth services and deposited taxes at the rate of 11.11 percent in terms of Section 195 of the Act. However, the taxpayer thereafter took a stand that it was not obligated to deduct tax at source under Section 195 of the Act from the aforesaid payment made to Singapore entity. The taxpayer carried the matter to the CIT(A) under Section 248 of the Act claiming that no tax was required to be deducted on the amount paid to the Singapore entity. The CIT(A) observed that the taxpayer had only received access to service and not to any equipment that was deployed by the Singapore entity for providing the bandwidth services. Therefore, CIT(A) concluded that the payments made for provision of bandwidth services were in the nature of business profits and could not be classified as royalty or Fees for Technical Services.

The Mumbai Tribunal agreed with CIT(A) that as the process involved to provide the bandwidth services was not a 'secret,' but was a standard commercial process that was followed by the industry. Therefore, the same could not be classified as a 'secret process' to treat the payment as 'royalty' under the tax treaty. Though the term 'royalty' as used in Article 12 of India-Hungary tax treaty takes within its sweep transmission by satellite, cable, optic fibre or similar technology, the definition of 'royalty' in the India-Singapore tax treaty has a narrow meaning. It has been observed that despite the fact that the India-Singapore tax treaty was amended, however, the definition of 'royalty' therein has not been tinkered with and remained as such. Accordingly, the Tribunal held that the amount received by the Singapore entity from the taxpayer for providing standard bandwidth services could not be characterised as 'royalty' as per the tax treaty and was taxable as 'business profits'. Further, the Singapore entity did not have any business connection or a PE in India. Therefore, the business profits were not taxable in India.

DCIT v. Reliance Jio Infocomm Ltd [2019] 73 ITR(T) 194 (Mum)

For further details, please refer to our Flash News dated 6 June 2019 available at this link

Income from testing and other services is taxable as FTS under the India-Finland tax treaty

The taxpayer, a Finland based entity, is a worldwide leader in providing innovative and environmentally sound solutions for a wide range of customers in metal processing industries. The taxpayer earned four types of revenue, i.e., technical services, royalty income, design and drawings, testing and other services. The taxpayer offered to tax income from the rendition of technical services and income from royalty (licence fees) but did not offer to tax income received from the sale of designs and drawings and income from testing and other services. The taxpayer contended that income from the sale of designs and drawings was a business income and since the taxpayer did not have PE in India, the business profit was not taxable in India. On the issue of income from rendering of testing and other services, the taxpayer relied on Article 12(5) of the India-Finland tax treaty and as the services had been rendered outside India, it claimed that the same was not taxable in India. The AO held that income earned from the sale of designs and drawings was taxable in India as the same was in nature of royalty under the tax treaty and under the Act. On the issue of taxability of income from rendering of testing and other services, the AO held that the same is taxable as royalty/FTS, both under the Act as well as under the tax treaty. The DRP upheld the order of the AO. Aggrieved, the taxpayer filed an appeal before the Tribunal.

The Kolkata Tribunal relied on various judicial precedents Outotec Gmbh v. DCIT [2015] 172 ITJ 337 (Kol), Outotec Gmbh v. DCIT (ITA No. 160 & 193/Kol/2016) wherein it was held that income earned from the sale of designs and drawings was treated as business income and it was not liable to tax in India under the Act as well as under the tax treaty. The sale was made outside India, and the consideration was also received outside India in foreign currency. Accordingly, it has been held that income from the sale of designs and drawings cannot be classified either as royalty or as FTS. The income had to be considered as business income, and as the taxpayer did not have PE in India, it cannot be brought to tax in India.

The Tribunal also held that the income from testing and other services was taxable in India even if technical services of testing were performed outside the country. The Tribunal observed that though the process of testing was conducted outside India, the payment in question was not for the process but was for the results of testing which were used in India. Therefore, the services provided by the taxpayer was taxable FTS under Article 12(5) of the tax treaty.

Outotec (Finland) Oy v. DCIT [2019] 109 taxmann.com 69 (Kol)

For further details, please refer to our Flash News dated 8 June 2019 available at this link

Supply of certain engineering technical design/drawings/plans is not taxable as FTS because it does not satisfy ‘make available’ test under the India–U.K. tax treaty

The taxpayer is a tax resident of the U.K. It is engaged in the business of providing engineering design and consultancy services. As a part of such services, the taxpayer provides structural and MEP (Mechanical, Electrical and Public Health) engineering for various buildings. During the AY 2012-13, the taxpayer has earned income from the provision of consulting engineering services to its Indian affiliate. The AO observed that as per Article 13(4)(c) of the India-U.K. tax treaty, payment received for development and transfer of a technical plan or technical design would be in the nature of FTS, irrespective of the fact, whether it also ‘makes available’ technical knowledge, experience, skill, know-how, etc. The AO observed that the words ‘make available’ go with technical knowledge, experience, skill, know-how, etc., but do not go with ‘the development and transfer of a technical plan or a technical design’.

The Mumbai Tribunal held that the amount received by the taxpayer from its affiliate towards consulting engineering services was not taxable as FTS under Article 13(4)(c) of India-U.K. tax treaty since the taxpayer did not ‘make available’ technical knowledge, experience, skill, know-how, process to the service recipient, through the development and supply of a technical plan or a technical design. The amount received by the taxpayer was business profits and in the absence of a PE in India, it could not be taxed in India.

Buro Happold Limited v. DCIT [2019] 103 taxmann.com 344 (Mum)

For further details, please refer to our Flash News dated 27 February 2019 available at this link

Capital gains

Short term capital gains arising to a non-resident on sale of units of equity oriented mutual funds are not taxable in India under India-UAE treaty

The taxpayer, a non-resident in India for the AY 2012-13, had obtained a Tax Residency Certificate (TRC) from the revenue authorities of the UAE for the relevant period. During the AY 2012-13, the taxpayer had sold equity oriented mutual funds in India and earned short term capital gains (STCG) from such sale amounting to INR13,499,407. While filing the India tax return for the said AY, the taxpayer had claimed such STCG as exempt by virtue of Article 13(5) of the Treaty. During the scrutiny assessment, the AO held that the underlying instrument of an equity oriented mutual fund is a share and consequently, as per Article 13(4) of the tax treaty, STCG should be taxable in India. Accordingly, the AO denied such exemption claimed by the taxpayer.

The CIT(A) relying on certain judicial precedent held that STCG would not be taxable in India as the equity oriented mutual funds were not shares and therefore Article 13(5) of the tax treaty would be applicable. The tax department contented that the underlying instrument of any equity oriented mutual fund is nothing but a share and hence the gains arising from the sale of equity oriented mutual fund would result in sale of shares. Accordingly, such gains from sale of shares (units of mutual funds in the instant case) was taxable under Article 13(4) of the tax treaty which provides that income arising to a resident of UAE from transfer of shares (and not any other property) in India, may be taxed in India.

The Cochin Tribunal relied on certain judicial precedents [ITO v. Satish Beharilal Raheja [2013] 37 taxmann.com 296, Apollo Tyres Ltd v. CIT [2002] 122 Taxman 562 (SC)] wherein it was held that units of mutual funds cannot be regarded as shares. The Tribunal held that for a taxpayer who is a resident of UAE, STCG arising from sale of units of equity oriented mutual funds are not liable to tax in India in accordance with the provisions of the tax treaty as such STCG would be taxable in the country of residence on the basis that shares, and equity oriented mutual funds are two separate types of securities.

DCIT v. Sri. K. E. Faizal [2019] 178 ITD 383 (Coch)

For further details, please refer to our Flash News dated 19 July 2019 available at this link

Conversion of a company into LLP amounts to ‘transfer’ under the Income-tax Act and shareholders are liable to capital gains tax on receipt of partnership interest upon such conversion

The applicant is a U.K. based company having its subsidiary in India. Out of total 40,80,000 equity shares issued by Domino India, 40,79,998 equity shares were held by the applicant and the balance were held by another foreign company. The Indian company proposed to be converted into an LLP as per the provisions of the LLP Act, 2008 and accordingly an application was filed with the Foreign Investment Promotion Board (FIPB) to obtain the requisite approval for conversion of Indian entity to an LLP. Upon conversion, the equity shares held by the applicant in Indian entity would be converted into partnership interest in the Limited Liability Partnership (LLP). As one of the conditions specified in the exemption provision was not satisfied such conversion was not covered by the exemption provisions.

AAR Ruling

The AAR held that the conversion of the company into LLP amounts to transfer within the meaning of Section 2(47) of the Act. On conversion of the company into an LLP, the computation provision under Section 48 of the Act are workable and capable of being implemented for working out capital gain arising in the hands of the shareholder. The value of interest in the LLP is to be considered as the full value of consideration received on the transfer of shares for the purpose of computation of capital gains. Further even if the partner’s interest in the LLP is equal to the value of shareholder’s interest in the company, it does give rise to taxable capital gain in the hands of the applicant shareholder. The key observation of the AAR are as follows:

Conversion of company into LLP

The exemption provision under Section 47(xiiib) of the Act indicates that any transfer of share in the company as a result of conversion of company into an LLP as per the LLP Act amounts to transfer and the same is specifically exempted from tax under the Act. This is also supported by the memorandum explaining the intent behind providing a specific exemption for transfer resulting pursuant to conversion. The AAR held that in the instant case the cumulative fulfilment of the prescribed conditions has not been satisfied. Therefore, the transactions is a ‘transfer’ liable for capital gain tax under the provisions of Section 45 of the Act.

Computation mechanism under Section 48 of the Act

The applicant’s interest in the share capital of Indian entity has been extinguished and in return it has got partnership interest in LLP. So the full value of consideration of the shares foregone will be equivalent to the value of partnership interest in LLP. Even if the assets of the company were transferred to LLP at their book value, the value of partnership interest in LLP will be certainly more than the face value of the shares foregone by the applicant considering the reserves and surpluses transferred. If the value of partnership interest cannot be ascertained or determined for any reasons, then the fair market value of the same has to be taken as stipulated under Section 50D of the Act. The AAR relied on the decision of Mumbai Tribunal in the case of ACIT v. Celerity Power LLP [2018] 100 taxmann.com 129 (Mum) and the Kolkata Tribunal decision in the case of Aravali Polymers LLP v. JCIT [2014] 47 taxmann.com 335 (Kol). Simply because in a case there is no gain or loss due to full value of consideration being equal to the cost of acquisition, it cannot be said that the computation mechanism fails. The computation mechanism encompasses a situation which may be tax neutral. Accordingly, AAR held that the computation mechanism under Section 45 read with Section 48 of the Act is workable and capable of being implemented in the present case.

Cost of acquisition of extinguished shares

The value of total shareholder’s fund as appearing in the books of the company might be equal to the value of total partnership right and interest in the LLP. However, this factor is not relevant for working out the capital gains in the hand of the shareholder. Further, even if the value of total shareholders fund in the company equal to the value of total partnership interest in the LLP, it does not have an impact on the capital gain arising in the hands of the shareholder. Therefore, even if the value of partner’s interest in the LLP is equal to the value of shareholder’s interest in the company, it does give rise to taxable capital gain in the hands of the shareholder.

Domino Printing Services Plc (AAR No. 1290 of 2012)

For further details, please refer to our Flash News dated 30 August 2019 available at this link

Multilateral Convention

The Union Cabinet approves ratification of Multilateral Convention (MLI)

In October 2015, the Organisation for Economic Co-operation and Development (OECD) released Base Erosion and Profit Shifting (BEPS) final reports on the 15 Action Plans. To enable jurisdictions to swiftly implement the BEPS recommendations, on 24 November 2016, the OECD released the text of the Multilateral Convention (MLI/Convention) to implement tax treaty related measures to prevent BEPS. The MLI was developed and agreed by approximately 100 jurisdictions, including OECD member countries, G20 countries and other developed and developing countries.

India, amongst 67 countries, has signed the MLI in Paris on 7 June 2017. The Convention enables all signatories, inter alia, to meet treaty related minimum standards that were agreed as a part of the Final BEPS package. The Convention will operate to modify tax treaties between two or more parties to the

Convention. It will not function in the same way as an amending protocol to a single existing treaty, which would directly amend the text of the Covered Tax Agreement (CTA). Instead, it will be applied alongside existing tax treaties, modifying their application in order to implement the BEPS measures.

The provisional MLI position of each signatory indicates the tax treaties it intends to cover, the options it has chosen and the reservations it has made. Signatories can amend their MLI positions until ratification. Even after ratification, parties can choose to opt in with respect to optional provisions or to withdraw reservations.

PIB release

For further details, please refer to our Flash News dated 13 June 2019 available at this link

India deposits instrument of ratification for MLI with OECD

India, amongst 67 countries, had signed the MLI in Paris on 7 June 2017 to implement tax treaty related measures to prevent BEPS. The Convention is an outcome of the OECD/ G20 Project to tackle BEPS i.e., tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity, resulting in little or no overall corporate tax being paid.

The Convention enables all signatories, inter alia, to meet treaty related minimum standards that were agreed as a part of the final BEPS package. The Convention will operate to modify tax treaties between two or more parties to the Convention. It will not function in the same way as an amending protocol to a single existing treaty, which would directly amend the text of the CTA. Instead, it will be applied alongside existing tax treaties, modifying their application in order to implement the BEPS measures.

At the time of signature, India has submitted the provisional MLI position indicating the tax treaties it intends to cover, the options it has chosen and the reservations it has made. Signatories had the option to amend their MLI positions until ratification. Even after ratification, parties can choose to opt in with respect to optional provisions or to withdraw reservations. On 25 June 2019, India has deposited its instrument of ratification for MLI.

Source: www.oecd.org, dated 27 June 2019

For further details, please refer to our Flash News dated 27 June 2019 available at this link

India releases synthesised text for the application of the India-UAE tax treaty

The Government of India has released the synthesised text for the application of the tax treaty between India and the United Arab Emirates (UAE) as modified by the MLI to implement tax treaty related measures to prevent BEPS. This document was prepared on the basis of the reservations and notifications submitted to OECD by India on 25 June 2019 and UAE on 29 May 2019 respectively.

Applicability of MLI provisions

The MLI enters into force for India on 1 October 2019 and thus has effect as follows:

- With respect to deduction of tax at source on amounts paid or credited to non-residents, where the event giving rise to such taxes occurs on or after first day of the next taxable period that begins on or after 1 October 2019 i.e. for transaction on or after 1 April 2020.
- With respect to all other taxes levied by India, for taxes levied with respect to taxable periods beginning on or after 1 April 2020.

The MLI has come into force for UAE on 1 September 2019

- With respect to taxes withheld at sources on amounts paid or credited to non-residents, where the event giving rise to such taxes occurs on or before 1 January 2020

- With respect to all other taxes levied by UAE, for taxes levied with respect to taxable periods beginning on or after 1 April 2020.

By virtue of synthesised text the scope of the existing preamble is expanded to include MLI minimum standard (Article 6 – Purpose of CTA).

Further, Article 29 of limitation of benefit (LOB) has been replaced by paragraph 1 of Article 7 (prevention of treaty abuse) of the MLI. The new article provides that the benefit under the tax treaty shall not be granted in respect of an item of income if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the tax treaty.

With respect to MAP it has been provided that the MAP must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the tax treaty.

Source: www.taxmann.com

For further details, please refer to our Flash News dated 11 September 2019 available at this link

Japan releases synthesised text for the application of the Japan-India tax treaty as modified by the MLI

The Government of Japan has released the synthesised text for the application of the tax treaty between of Japan and India as modified by the MLI to implement tax treaty related measures to prevent BEPS. This document was prepared on the basis of the reservations and notifications submitted to OECD under MLI by Japan on 26 September 2018 and by India on 25 June 2019 respectively.

Applicability of MLI provisions

The MLI has come into force for Japan on 1 January 2019

- With respect to taxes withheld at source on amounts paid or credited to non-residents, where the event giving rise to such taxes occurs on or before 1 January 2020; and
- With respect to all other taxes levied by Japan, for taxes levied with respect to taxable periods beginning on or after 1 April 2020

The MLI enters into force for India on 1 October 2019 and thus has effect as follows:

- With respect to deduction of tax at source on amounts paid or credited to non-residents, where the event giving rise to such taxes occurs on or after the first day of the next taxable period that begins on or after 1 October 2019 i.e. for transaction on or after 1 April 2020.
- With respect to all other taxes levied by India, for taxes levied with respect to taxable periods beginning on or after 1 April 2020.

By virtue of synthesised text the scope of the existing preamble is expanded to include MLI minimum standard (Article 6 – Purpose of CTA).

The synthesised text provides to expand agency PE scope. Also, the synthesised text provides that the provisions shall not apply where the person acting in a state carries on business in the other state as an independent agent and acts for the enterprise in the ordinary course of that business. However, if a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person shall not be considered to be an independent agent.

The synthesised text provides that the specific activity exemptions that deem a fixed place of business to not amount to a PE shall not apply where the relevant enterprise, or a closely related enterprise, carries on business activities at the same fixed place or a different place in the same contracting state and:

- such place constitutes a PE; or
- the overall activity resulting from the combined business activities of either
- one enterprise or two closely related enterprises operating in two fixed places; or
- two enterprises operating in one fixed place, is not of a preparatory or auxiliary character.

Provided that the business activities conducted by the enterprise or the two closely related enterprises must constitute complementary functions that are part of a cohesive business operation.

The synthesised text also provides that benefits under the tax treaty will not be available in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit. However, the benefits under the tax treaty will be available if it can be established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the treaty.

Source - www.taxmann.com

For further details, please refer to our Flash News dated 30 August 2019 available at this link

The Protocol amending the India-China tax treaty notified

The Government has notified the Protocol amending the tax treaty. The Protocol was signed on 26 November 2018 and it comes into effect in India in respect of income derived in any fiscal year beginning on or after 1 April 2020. The amendments vide Protocol are mainly in line with the India's positions on MLI.

The amended Protocol included a preamble which states that parties intend to eliminate double taxation with respect to taxes on income without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including treaty-shopping arrangements aimed at obtaining reliefs provided in the treaty for the indirect benefit of residents of third states). The Protocol also to include the additional preamble clause which states that the desire of India and China is to further develop their economic relationship and to enhance their cooperation in tax matters. This is in line with the preamble as mandated by MLI as minimum standard.

The Protocol to the tax treaty amended certain clauses with respect to the PE.

The Protocol also inserted a new article to provide that a benefit under the tax treaty shall not be granted in respect of an item of income if it is reasonable to conclude that obtaining treaty benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the treaty. This is in line with the PPT clause in the MLI.

Notification No. 54/2019, dated 17 July 2019

For further details, please refer to our Flash News dated 22 July 2019 available at this link

Note – India has also released a synthesised text for MLI modified Indian tax treaties like Australia, Austria, Ireland, Lithuania, Poland, etc. Further certain countries like Australia, Poland, the U.K., etc. have also issued synthesised text relating to India.

GAAR

CBDT notifies rules and form with respect to functioning of the Approving Panel for the purpose of the GAAR provisions

On 17 September 2019, CBDT issued a Notification amending the Rules to introduce new rules and form with respect to functioning of the Approving Panel.

New Rule 10UD prescribes the procedure for making reference to the Approving Panel. A reference to the Approving Panel shall be made in the new Form No. 3CEIA along with a copy of Form No. 3CEI and such other documents which the Principal Commissioner or the Commissioner deems fit. It should be submitted in four sets. Rule 10UE prescribes the procedure before Approving Panel. A reference received under Rule 10UD of the Rules shall be circulated by the chairperson of the said Panel among the other members within seven days from the date of receipt of such reference. The Chairperson of the Approving Panel shall be issued the notice to the AO and the taxpayer affording an opportunity of being heard specifying therein the date and place of hearing. The meetings of the Approving Panel shall take place at such place as the Approving Panel may decide. Rule 10UF prescribes remuranration for attending the meeting of an Approving Panel, the Chairperson and other members. Rules will come into force from 17 September 2019.

CBDT Notification No. 67/2019, 17 September 2019

For further details, please refer to our Flash News dated 18 September 2019 available at this link

E-Assessment

CBDT notifies E-assessment Scheme, 2019

The CBDT has notified E-assessment Scheme, 2019 (the Scheme) under Section 143(3A) of the Act. Further in exercise of the powers conferred by Section 143(3B) of the Act to give effect to the Scheme, CBDT has also notified the relevant directions. The scheme shall come into force on the date of its publication in the Official Gazette.

For the purpose of the scheme, the CBDT may set up units/centre for smooth conduct of e-assessment proceedings and specify their respective jurisdiction i.e. Regional e-assessment centres (REC), Assessment units,Verification units, Technical units, Review units. Further, all communication among the Assessment unit, Review unit, Verification unit or Technical unit or with the taxpayer or any other person with respect to the information or documents or evidence or any other details under the Scheme shall be done through the National e-assessment Centre. CBDT also states that the Assessment units, Verification units, Technical units, Review units shall have designated tax authorities. The assessment under the Scheme shall be made as per prescribed procedure. CBDT notification also states penalty proceedings for non-compliance, Appellate Proceedings, Delivery of electronic record etc.

Notification No. 61/2019, dated 12 September 2019

For further details, please refer to our Flash News 13 September dated 2019 available at this link

CBDT issues circular for the conduct of assessment proceedings through 'E-Proceeding' facility during FY 2019-20

On 12 September 2019, the CBDT notified E-assessment Scheme 2019 (the Scheme) under Section 143(3A) of the Act. Further in exercise of the powers conferred by Section 143(3B) of the Act to give effect to the Scheme, CBDT notified the relevant directions.

On 26 September 2019, CBDT issued a Circular providing directions with respect to the conduct of assessment proceedings through 'E-Proceeding' facility during FY 2019-20. CBDT directed that in all cases (other than the cases covered under the 'E-Assessment Scheme, 2019), where assessment is to be framed under Section 143(3) of the Act during the FY 2019-20, assessment proceedings shall be conducted electronically. Further, CBDT states that the taxpayer is required to produce/cause to produce their response/ evidence to any notice/ communication/ show-cause issued by the AO electronically (unless specified otherwise) through their 'E-filing' account on the 'E-filing' portal. For smooth conduct of assessment proceedings through 'E-Proceeding', CBDT directed that requisition of information in cases under 'E-Proceeding' should be sought after a careful scrutiny of case records. CBDT clarified that issue of notices and departmental communications in above exceptional cases shall be strictly governed by the guidelines issued by CBDT Circular regarding generation/allotment/quoting of Document Identification Number (DIN).

Circular No. 27/2019, dated 26 September 2019

For further details, please refer to our Flash News dated 28 September 2019 available at this link

Foreign Tax Credit (FTC)

Tax sparing credit is allowed under the India-Thailand tax treaty with respect to 'dividend' income

The taxpayer, an Indian company, is having a wholly owned subsidiary in Thailand. During the AY's 2010-11 to 2013-14, Thailand based declared dividend which was received by the taxpayer. By virtue of the Investment Promotion Act in Thailand, such dividend income was exempt in the hands of Thailand Company. However, the taxpayer claimed that as per Article 23(3) of the tax treaty it is entitled to claim tax sparing credit of deemed tax payable in Thailand against Indian tax payable. The AO held that the taxpayer had not paid actual tax in Thailand on such dividend income. It was exempt in Thailand by virtue of Investment Promotion Act of Thailand. The tax treaty provisions did not provide for tax benefit for tax which was not paid at all. Article 23(2) specifically allows relief against income which has been subjected to tax in both the countries. Since the tax was only paid in India, the question of double taxation of income did not arise. The CIT(A) upheld the order of the AO.

The Delhi Tribunal while relying on Commentary on UN Model Convention and Klaus Vogel Commentary observed that concept of 'tax sparing credit' shall be applicable to the taxpayer, only if dividend income received by the taxpayer was taxable in the hands of taxpayer as per the 'Thai tax laws' and exemption is available to the taxpayer either as per the 'Revenue Code of Thailandor as per the 'Investment Promotion Act' in order to avail credit of such taxes spared in Thailand. From a co-joint reading of the taxability of dividend income under Thailand Revenue Code and Investment Promotion Act, it has been observed that the exemption was available to the taxpayer on such dividend income under Investment Promotion Act, which would have been otherwise taxable as per the Thailand Revenue Code at 10 per cent. Therefore, as per Article 23(3) of the tax treaty, the taxpayer would be entitled to a credit of such taxes which were deemed to have been payable in Thailand. The taxpayer sought credit at 10 per cent on such dividend, which is the tax that would have been otherwise payable by the taxpayer in Thailand as per the provisions of the Thailand Revenue Code. The tax paid by the taxpayer on dividend income in India is at 30 per cent, which was more than tax payable in Thailand and therefore, there is no violation of provisions of Article 23(2) of the tax treaty.

Polyplex Corporation Ltd v. DCIT [2019] 103 taxmann.com 71 (Del)

For further details, please refer to our Flash News dated 30 January 2019 available at this link

R&D – Weighted deduction

Scientific research expenditure for the period prior to the approval under Section 35(2AB) of the Income-tax Act is eligible for weighted deduction

The taxpayer made an application for an approval of Research and Development (R&D) facility under Section 35(2AB) of the Act. With this application, the taxpayer also enclosed Form 3CK along with a detailed note of R&D facility and activity. Further, during the assessment, the taxpayer furnished Form 3CM approving the in-house R&D facility under Section 35(2AB) of the Act. This approval was dated 19 February 2004 under which reference to the taxpayer's application dated 15 December 2003 was mentioned. It was also mentioned that the approval was from 1 April 2003 to 31 March 2005. However, in the present case, the relevant AY was 2003-04. The taxpayer contended that the projects in connection with which the expenditure had been incurred require a longer period. Under such circumstances, it was not possible that a part of the same project duration will get weighted deduction while some part will not get the necessary deduction. The taxpayer relied on the decision of Ahmedabad Tribunal in the case of Claris Lifesciences Ltd v. ACIT [2008] 111 TTJ 902 (Ahd) for the proposition that once the facility is approved, the entire expenditure incurred on development of R&D facility has to be allowed for weighted deduction. The deduction cannot be restricted only to the expenditure incurred after the date of approval.

The High Court allowed the weighted deduction under Section 35(2AB) of the Act on the scientific research expenditure relating to the period prior to the approval granted by the prescribed authority under Section 35(2AB) of the Act. The High Court observed that the taxpayer cannot be punished for the bureaucratic delay in giving such approval for the year in question, which was in the hands of the department concerned of the Central Government itself. For the prior as well as the post period to the year in question, such approval was very well on the record of the tax department. Therefore, the weighted deduction for the expenditure incurred on the scientific research could not be disallowed by the tax department. Accordingly, the Tribunal rightly held that such scientific research expenditure was allowed under Section 35(2AB) of the Act

CIT v. TVS Electronics Ltd [2019] 263 taxmann.com 164 (Mad)

For further details, please refer to our Flash News dated 17 May 2019 available at this link

Deduction/Exemption

100 per cent deduction under Section 80-IC of the Income-tax Act can be claimed on the substantial expansion for fresh five years subject to a total period of deduction not exceeding 10 years

The taxpayer established new units in specified areas of Himachal Pradesh and Uttaranchal within the qualifying period. For such a new unit, the taxpayer treated the year of manufacture or production of articles of things as the 'initial AY'. The taxpayer claimed 100 per cent deduction for the first five years. However, in the sixth year, the taxpayer carried out 'substantial expansion' and claimed that it was entitled to a deduction from profits and gains for another five years at 100 per cent instead of 25 per cent from 6th to 10th year. The AO disallowed the claim holding that the taxpayer had already claimed a deduction of 100 per cent of profits for the first five years from the initial AY and, hence restricted the deduction to 25 per cent of eligible profits. The AO held that the taxpayer was entitled to only 25 per cent deduction from the sixth year to the tenth year and cannot avail a fresh five year tax holiday on account of substantial expansion. The CIT(A) and the Tribunal held against the taxpayer restricting the deduction to 25 per cent from the sixth year onwards. The Himachal Pradesh High Court held the decision in favour of the taxpayer allowing claim of 100 per cent deduction from the year of substantial expansion subject to a total period of exemption not exceeding 10 years from the date of commencement of manufacture.

The Larger Bench of the Supreme Court held the decision in favour of the taxpayer allowing the claim of deduction of 100 per cent of profits from the year of completion of the substantial expansion, subject to a total period of deduction under Section 80-IC of the Act not exceeding 10 years. The decision of the Division Bench in the case of CIT v. Classic Binding Industries [2018] 257 Taxman 324 (SC) omitted to take note of the definition 'initial AY' contained in Section 80-IC itself and instead based its conclusion on the definition contained in Section 80-IB of the Act, which does not apply in these cases. Therefore, the Larger Bench of the Supreme Court has recalled the decision of the Division Bench in the case of Classic Binding Industries.

Pr.CIT v. Aarham Softronics [2019] 261 Taxman 529 (SC)

For further details, please refer to our Flash News dated 25 February 2019 available at this link

CBDT issues press release clarifying eligibility of small start-ups to avail deduction under Section 80-IAC of the Income-tax Act

On 22 August 2019, the CBDT issued a press release stating that small start-ups with turnover upto INR25 crore will continue to get the promised tax holiday as prescribed in Section 80-IAC, which provides deduction for 100 per cent of income of an eligible start-up for three years out of seven years from the year of its incorporation. CBDT further clarified that all the start-ups recognised by DPIIT which fulfilled the conditions specified in the DPIIT Notification did not automatically become eligible for deduction under Section 80-IAC. A start-up has to fulfil the conditions specified in Section 80-IAC for claiming the deduction. Therefore, the turnover limit for small start-ups claiming deduction should be determined by the provisions of Section 80-IAC and not from the DPIIT Notification.

CBDT states that there was no contradiction in DPIIT's Notification and Section 80-IAC. Para 3 of the said Notification clearly states that a start-up shall be eligible to apply for the certificate from the IMBC for claiming deduction under Section 80-IAC, only if the start-up fulfills the required conditions mentioned in the notification. CBDT states that Section 80-IAC was inserted vide Finance Act, 2016 as an exception to the Government's stated policy of phasing out profit-linked deduction for promoting small start-ups during their initial year of operation. Since the intention was to support the small start-ups, the turnover limit of INR25 crore was considered reasonable for granting profit-linked deduction.

CBDT press release, dated 22 August 2019

For further details, please refer to our Flash News dated 23 August 2019 available at this link

Other direct tax developments

Tax is not required to be deducted under Section 195 of the Income-tax Act on salary paid by an Indian entity to an overseas deputed employee

The taxpayer is a sole proprietor of Radiant Services. The taxpayer entered into an agreement with a Kuwait based company for providing manpower. In terms of the agreement, the Kuwaiti company paid a consideration to the taxpayer but of which the taxpayer paid remuneration to the deputed employee. The AO observed that while making the payment to the employee, the taxpayer failed to deduct the tax at source under Section 195 of the Act. The taxpayer contended that the persons so employed worked in the employment of the taxpayer and were only loaned to the Kuwaiti company for carrying out the work as per the requirement of the said company. The CIT(A) and the Tribunal held the decision in the favor of taxpayer.

The Bombay High Court held that the Kuwaiti company would enjoy considerable supervising powers and control over the employee as long as the employee is working for it. However, the taxpayer continued to enjoy the employer-employee relationship with the said person. Also, if the work of such person was found to be wanting or if there was any complaint against him, as per the agreement, it would only be the employer company (i.e. the taxpayer) who could terminate the service. Therefore, the High Court held that there was no requirement of deducting tax at source under Section 195 of the Act.

CIT v. Supriya Suhas Joshi [2019] 264 Taxman 25 (Bom)

For further details, please refer to our Flash News dated 24 April 2019 available at this link

Supreme Court decision on the allowability of interest on capital borrowed

The taxpayer is engaged in the business of oil exploration, petrochemicals, polyester, fibre intermediate textiles, generation and distribution of power, operation of jetties, investments, etc. Key issues raised before the High Court were as follows :

- Whether the Tribunal was right in holding that interest referable to funds given to subsidiaries is allowable, when this interest would not have been payable to banks, if funds were not provided to subsidiaries?
- Whether the Tribunal was right in deleting the disallowance made by the AO under Section 14A of the Act of interest on funds utilised for exempt investment on the basis that own funds are more than investments made?

The High Court observed that the view of the AO is *ex facie* contrary to the settled principle that a presumption would arise that the investment would be out of the interest free funds generated or available with the company. Then, interest expenditure was deductible under Section 36(1)(iii) of the Act. The Tribunal held that the interest free fund available to the taxpayer is sufficient to meet its investment. It can be presumed that investments were made from interest free funds available with the taxpayer. This position clearly emerges from the records. The High Court also observed that the Tribunal had followed the earlier view and there was nothing contrary in the factual material brought on record by the tax department. In such circumstances, the concurrent view on the disallowance of interest was reversed and the appeal of the taxpayer to that extent was partly allowed. However, the High Court observed that no substantial question of law was arising from such a view of the Tribunal.

The Supreme Court dealt with various issues including the allowability of interest on capital borrowed under Section 36(1)(iii) of the Act. The Supreme Court observed that the said issue was a pure question of fact. The High Court observed the findings of the Tribunal that the interest-free funds available to the taxpayer were sufficient to meet its investment. Hence, it could be presumed that the investments were made from the interest-free funds available with the taxpayer. The Tribunal had also followed its own order for AY 2002-03. Accordingly, the Supreme Court did not find any reason to interfere with the decision of the High Court on this issue. With respect to the issues on option to claim depreciation, allowability of pre-operative expenditure, deduction under Section 80M of the Act and transfer pricing, the Supreme Court set aside the High Court decision and restored back these matters to the High Court to facilitate a fresh exercise.

CIT v. Reliance Industries Ltd [2019] 410 ITR 466 (SC)

For further details, please refer to our Flash News dated 16 May 2019 available at this link

TDS credit is allowed in the year in which the corresponding income is assessable and not in the year of TDS deposit

The taxpayer is engaged in the business of providing software services. During the AY 2011-12, the taxpayer raised an invoice (in March 2011) on which tax was deducted by the party. However, tax on the invoice amount was deposited in the succeeding year. The taxpayer claimed credit for TDS which was not appearing in Form No. 26AS. The AO rejected the claim of the taxpayer relying on Rule 37BA(1) of the Income-tax Rules, 1962 (the Rules). The CIT(A) upheld the order of the AO. The claim of the taxpayer was that the benefit of TDS should be allowed in the year in which the taxpayer has recorded the corresponding income. However, the tax department was contending that such benefit can be given only in the year of deposit of TDS.

The Pune Tribunal allowed the credit of TDS in the year in which the corresponding income is assessable in the hands of the taxpayer. The Tribunal observed that since the income on which tax was deducted at source was assessable in the year under consideration, the benefit of the TDS should be allowed in the same year. The Tribunal observed that the point of time at which the benefit of TDS is to be given, is governed by Rule 37BA(3), which unequivocally provides that the credit for TDS shall be given for the AY for which such income is assessable. Thus, it is clear from the mandate of Rule 37BA(3)(i) of the Rules that the benefit of TDS is to be given for the AY for which the corresponding income is assessable.

Mahesh Systems Pvt. Ltd. v. ACIT (ITA No. 1288/Pun/2017)

For further details, please refer to our Flash News dated 26 September 2019 available at this link

Loans given to a shareholder from an open current account are taxable as 'deemed dividend' under Section 2(22)(e) of the Income-tax Act

The taxpayer is a dealer in edible/non-edible oils. During the FY 2013-14, the taxpayer received unsecured loan/s from another company (GAPL) in which it held shares with 34.40 per cent voting power. The loan, which was interest-bearing, was not for any particular amount, but in the form of an open current account with regular debits and credits during the year. During the FY 2013-14, the opening balance as on 1 April 2013 at a debit (i.e. receivable) of INR 279.48 lacs, was liquidated by 15 April 2013, turning into a credit (payable) balance of INR 304.91 lacs on that date. The peak balance for the year was at INR3266.12 lacs on 6 November 2013. GAPL was a company in which public are not substantially interested. The AO held that to the extent of its accumulated profit, the loan or advance made by GAPL to the taxpayer was liable to be assessed as 'deemed dividend' under Section 2(22)(e) of the Act. The accumulated profit up to 31 March 2013, i.e., immediately prior to the current year, was of INR 67.36 lacs. The profit for the year, as per the audited accounts, was at INR150 lacs. Pro-rata basis profit (i.e., up to 6 November 2013), worked to INR49.81 lacs. Accordingly, the total accumulated profit up to that date, i.e., INR 117.17 lacs was brought to tax by the AO under Section 2(22)(e) read with Section 56 of the Act. The CIT(A) upheld the order of the AO.

The taxpayer contended that the transfer of funds from one company to another was on need basis. While the taxpayer was the beneficiary of the sums received from GAPL, the payer company, was also the beneficiary of the sums paid by the taxpayer thereto. The same therefore could not be regarded as either a loan or an advance, for the purpose of Section 2(22)(e) of the Act. The taxpayer contended that credit obtained only for a period of 82 days during the relevant year. Distinguishing various decisions of the Supreme Court, it was contended that in those cases there were only one-way transactions i.e. the payment by the payer-company to the taxpayer-shareholder. However, in the instant case there were transactions in both ways. The taxpayer was also making payment to the payer-company (GAPL).

The Tribunal observed that the length of the time for which the loan or advance obtained would be of no significance for taxation purposes. The taxpayer's argument of having retained the credit (sum borrowed), which is on interest, for only 82 days during the year, would not be relevant consideration. The subsequent discharge of the credit, as by repayment, where it was described as a loan or advance, was of no relevance. Accordingly, temporary loan/advance(s) were held as falling within the mischief of Section 2(22)(e) of the Act. The transactions between the two companies in the present case were purely financial transactions, i.e., receipt and payment of money, either directly or indirectly (i.e., where the amount is paid – which is by the payer-company, to another for and on behalf of the payee and, accordingly, debited to its account or, correspondingly, credited to the account of GAPL by the taxpayer in its' books of account). No business purpose of GAPL, which was not in the business of money lending, was shown. The amounts paid and received in the instant case were clearly in the nature of a loan/s, i.e., sums borrowed, which though was not at a fixed amount or for a fixed period of time. A reduction or even a closure of liability (on account of loan/advance) by the year-end was not relevant. The Amritsar Tribunal held that loan given to a shareholder from ‘open current account’ is taxable as ‘deemed dividend’ under the provisions of Section 2(22)(e) of the Act.

G.G. Oil & Fats Pvt Ltd v. DCIT [2019] 178 ITD 573 (Amritsar)

For further details, please refer to our Flash News dated 23 August 2019 available at this link

Transfer pricing

Companies for which data is not available in the public domain can be selected by the Transfer Pricing Officer as comparables by using their power to call for information under Section 133(6) of the Income-tax Act

The taxpayer is a distributor and commission agent for medical equipment in India. During the year it had imported equipment and spares for distribution from its AE. It had also received commission income from its AE. The taxpayer justified the arm’s length nature of transactions by application of TNMM at entity level. The taxpayer used 10 comparable companies and operating profit to sales as the profit level indicator. However, the TPO rejected all the comparable companies selected by the taxpayer (providing reasons such as substantial related party transactions, functional comparability, low turnover, etc.). The TPO selected two comparable companies for which data was not available in the public domain.

The CIT(A), while reducing the adjustment by accepting 5 out of 10 comparable companies of the taxpayer held that restriction to use publicly available data does not apply to the AO. Further the two comparable companies selected by the TPO were also accepted resulting in selection of seven comparable companies including two selected by the TPO.

The Kolkata Tribunal rejected a comparable engaged in both manufacturing as well as trading activity in the absence of segmental details as it is not functionally comparable to the taxpayer which is mainly engaged in trading activity..

The Tribunal disallowed the ground raised by the taxpayer that comparables whose results were not available in the public domain should not be considered.

Further, the Tribunal upheld the order of the CIT(A) that the restriction stipulated in Rule 10D is applicable only to the auditor and not to the TPO, who had an inherent power to make enquiry and collect and use the information and material which is found to be relevant for the purpose of transfer pricing analysis in order to determine the arm's length price of the relevant international transactions between the AE.

Philips Medical Systems (P.) Ltd. v. ITO [2019] 102 taxmann.com 441 (Kol)

For further details, please refer to our Flash News dated 14 March 2019 available at this link

Report on proposed amendments of rules for profit attribution to PE in India open for public consultation

A Committee was formed by the Central Board of Direct Taxes (CBDT) to examine the existing scheme of profit attribution to PE and recommend changes in current domestic tax law (Rule 10 of the Rules). The report submitted by the Committee was released by CBDT for public consultation on 18 April 2019

Key recommendations :

The Committee recommends a mixed approach that allocated profits partly to the jurisdiction where the consumers are located and partly to the jurisdiction where supply activities are undertaken. The Committee recommends a fractional apportionment approach that determines profit attribution based on a three-factor method, assigning equal weights to sales (representing demand) and manpower and assets (representing supply including marketing activities). Further, in cases of profit attribution for Significant Economic Presence (SEP), the Committee has recommended a four factor approach wherein 'Users' be considered as the fourth factor. Different weightages for the four factors are also recommended for businesses involving low and medium intensity versus those involving high user intensity. The Committee also recommends that the profits derived from Indian operations (on which the three-factor method would apply) can be arrived by multiplying the revenue derived from India with the global operational profit margin. To protect India's revenue interest in situations where an enterprise is having global operating losses, the Committee recommends that profits derived from India be subject to a floor rate of 2 per cent.

Key observations of the Committee :

Need for clarity in India's approach on PE attribution

The Committee observed that very diverse methodologies seem to have been adopted by AOs under Rule 10 in different cases. This may be a result of the wide scope of discretion accorded under Rule 10 in terms of methodology for attribution of profits. Since lack of a universal rule can create uncertainties for taxpayers as well as result in more tax disputes, there appears to be a case for providing a simple and universally applicable rule to bring in greater certainty and predictability among the stakeholders and prevent avoidable tax litigation on this account.

Both demand and supply factors are relevant for PE attribution

The Committee observed that business profits are contributed by both demand and supply of goods. Accordingly, a jurisdiction that contributes to the profits of an enterprise either by facilitating the demand for goods or facilitating their supply would be reasonably justified in taxing such profits.

Article 7 of the OECD MTC and the AOA ignores sales and the demand side factors

The Committee observed that the AOA approach may be favourable to the interests of certain countries that are net exporter of capital and technology, it is likely to have significant adverse impact on developing economies like India, which are primarily importers of capital and technology. It restricts the taxing rights of the jurisdiction that contributes to business profits by facilitating demand.

Option of formulary apportionment not considered feasible

The application of formulary apportionment requires availability of complete information about the country-wise sales revenue as well as the deployment of manpower and assets, which is not easily available. While such information for large MNEs (whose turnover exceeds the threshold limit set for County-by-Country Reporting) may be available, it is not fully clear whether the information received under CbCR can be used for attribution of profits.

Profit attribution in Significant Economic Presence nexus

The Committee observed that the user data and activities contribute to the profits of the multidimensional enterprises, and there is a strong case of taking them into account, once the minimum nexus threshold of taxable presence by SEP or otherwise, as required by the Income Tax Act and the relevant tax treaties, is satisfied.

CBDT Notification (F. No. 500/33/2017-FTD.I, 18 April 2019)

For further details, please refer to our Flash News dated 25 April 2019 available at this link

Personal taxation

Period of 182 days to be considered for residential status of an Indian citizen, coming to India for visits

The taxpayer, an individual, was born in India in the year 1960 and later went to a Soviet Union for higher education during the period 1978 to 1984. From 1984 to 1986, he worked in various trading pharma companies in the USSR. Later, he had set up a trading house at Ukraine, acquired immovable properties in Ukraine in 1990s and was a permanent resident of Ukraine till 2002. The taxpayer then shifted to England, but continued his business interest in Ukraine, Russia and CIS countries. During the relevant FY 2005-06, the taxpayer was in India for 173 days on account of his visits to India and had filed his income tax return for the said FY as not an ordinary resident. Consequently, the taxpayer had not offered the amounts deposited in his foreign bank accounts as only his India sourced income was taxable in India.

The AO, had held that the taxpayer was a resident of India and had made the following additions on the ground that the taxpayer was an ordinary resident:

- INR417,189,1662 in respect of the amounts deposited in his foreign bank account; and

- INR56,000,0003 in respect of the money earned outside India.

The CIT(A) and the Tribunal had deleted the addition made by the AO on grounds that the taxpayer would qualify as not an ordinary resident and accordingly money earned/deposited overseas are not taxable in India

The Bombay High Court observed that the residency triggers at 182 days stay in India and not at 60 days stay in India for a citizen of India, being outside India and coming on visits to India during a relevant FY. The High Court also negated the need for reference of Section 6(6) of the Act, as in the present case the issue is about the number of days of stay in the relevant FY. Further, the High Court upheld the order of the Tribunal and deleted the addition made by the AO on grounds that the taxpayer is not an ordinary resident and accordingly money earned/deposited overseas is not taxable in India.

PCIT v. Binod Kumar Singh [2019] 264 Taxman 335 (Bom)

For further details, please refer to our Flash News dated 15 July 2019 available at this link

Supreme Court ruling on the applicability of Provident Fund contributions on allowances

Multiple appeals before the Supreme Court raised a common question of law whether the other allowances (such as travel allowance, canteen allowance, special allowance, management allowance and conveyance allowance, etc.) paid by an establishment to its employees would fall within the expression ‘basic wages’ for computation of contribution towards Provident Fund.

The petitioner contended that the term ‘basic wages’ contains exceptions and will not include what would ordinarily not be earned in accordance with the terms of the contract of employment. Further, whatever is payable in all concerns and is earned by all permanent employees is included for the purpose of contribution but, whatever is not payable by all concerns or may not be earned by all employees of a concern are excluded for the purposes of contribution.

The Supreme Court held that if any amount is to be excluded from the basic wages, it has to be shown that the employee had become eligible to get this extra amount beyond the normal work which he/she was otherwise required to put in. No material had been placed by the establishments to demonstrate that the allowances in question being paid to its employees were either variable or were linked to any incentive for production resulting in greater output by an employee and that the allowances in question were not paid across the board to all employees in a particular category or were being paid especially to those who avail the opportunity. The wage structure and the components of salary had been examined on facts, both by the authority and the appellate authority under the EPF Act, who had arrived at a conclusion that the allowances in question were essentially a part of the basic wage camouflaged as part of an allowance so as to avoid deduction and contribution. Hence, appeals by the establishments merit no interference.

https://www.epfindia.gov.in/site_docs/PDFs/Circulars/Y2018-2019/LC-2(578)2007_WB_18855.pdf

For further details, please refer to our Flash News dated 1 March 2019 available at this link

Housing loan interest deductible while computing capital gains and income from house property

During the FY 2013-14, the taxpayer, sold a residential house which was purchased during the FY 2006-07. While computing the cost of acquisition for calculating the capital gains on sale of such property, the taxpayer claimed such interest paid on housing loan as a deduction while computing income from house property. While filing the India tax return for the said FY, the taxpayer had disclosed income from business or profession, income from capital gains and income from other sources. During the scrutiny assessment, the AO observed that taxpayer had already claimed a deduction on the interest paid on housing loan from house property income. AO observed that such interest expenditure should be claimed as a deduction against house property income alone. Accordingly, AO disallowed such interest expense for computation of capital gains, as allowing interest expenses as cost of acquisition while calculating capital gain and as deduction from income from house property would tantamount to allowing double deduction for the same expense. The CIT(A) upheld the order of the AO.

The Delhi Tribunal held that a taxpayer is eligible to claim deduction on interest paid towards housing loan under the heads Capital Gains and Income from house property as both are covered under different heads of income and neither of the Sections excludes operation of the other.

Ashok Kumar Sahi v. ACIT (ITA No. 5155/ Del/2018) Taxsutra.com

For further details, please refer to our Flash News dated 8 November 2019 available at this link

Supreme Court decision on higher pension benefit to employees under the Employees' Pension Scheme, 1995

The following amendments were made under EPS, with effect from 1 September 2014.

- Wage ceiling for the purpose of contribution was revised from INR6,500 to INR15,000 per month
- New membership to the EPS would be applicable to employees whose pay is less than or equal to INR15,000 per month on the date of membership
- Maximum pensionable salary for the purpose of calculating monthly pension, earlier limited to wages of INR6,500 was increased to INR15,000
- The proviso in relation to higher contribution towards pension scheme was deleted. The option to contribute to pension on higher wages had to be exercised within six months from 1 September 2014 (extensible by the Employees' Provident Fund Organisation (EPFO) by an additional six months). If the option was not so exercised, the contribution to the pension fund would be calculated only on the wage ceiling.
- The member can contribute towards pension fund over and above the wage ceiling, provided that the Government's share of contribution i.e. 1.16 per cent per month on the salary exceeding the statutory limit is also paid by such a member.

The Ministry of Labour and Employment, Government of India, had issued a notification. Where by it has amended the wage ceiling from INR6,500 to INR15,000 per month and omitted the proviso for a higher contribution towards pension scheme, i.e., EPS. The Kerala High Court had set aside the notification and held that any employee who is a member of the EPF may avail of the option to contribute towards EPS on a higher salary and thereby, become eligible for a higher monthly pension benefit post retirement.

Recently, the Supreme Court dismissed the Special Leave Petition (SLP) filed by the Employees' Provident Fund Organisation (EPFO) against the above Kerala High Court ruling.

https://www.epfindia.gov.in/site_docs/PDFs/Circulars/Y2018-2019/LC-2(578)2007_WB_18855.pdf

For further details, please refer to our Flash News dated 25 April 2019 available at this link

Property held by a Not Ordinarily Resident outside India not to be included for determining the eligibility for deduction under Section 54F of the Income-tax Act

The taxpayer, an individual, had received equity shares of Nephrolife valued at INR28 lakh in 2011, as a gift from ROI Capital Advisors Pvt Ltd (ROI). ROI had acquired such shares in the year 2009. In the same year, the taxpayer sold a portion of such shares amounting to INR17 lakh, and on such sale, the taxpayer computed Long Term Capital Gains (LTCG) by including the period for which such shares were held by the previous owner (ROI in this case).The taxpayer invested money for the construction of a new residential house in India prior to the date of sale of such shares and the entire construction of the new residential house was completed within two years after the date of sale of shares. Separately, the taxpayer sold a painting in the U.K. and such sale incurred a long-term capital loss. The taxpayer while filing India tax return for the FY) 2011-12 had offered the following:

- The aggregate fair market value of shares received as gift
- LTCG after considering deduction on account of an investment in a residential house within two years after the date of transfer
- Long term capital loss on sale of a painting in the U.K. was set off against the LTCG.

The AO held that gain on sale of shares as short-term capital gains instead of LTCG, by disregarding the gift. The AO observed that the taxpayer held 99.9 per cent of the shares of ROI. The Articles of Association of ROI did not have any clause to make gifts. Interest free loan given by the taxpayer to ROI was used for acquiring the shares of Nephrolife. The gift by ROI to the taxpayer was not voluntary; ROI being an artificial person cannot make gift out of love and affection. The AO denied the deduction claimed by the taxpayer from LTCG, as the capital gains was in the nature of short terms capital gains, and as the taxpayer owned more than one residential house (one in Bengaluru and one in the U.K.). The AO denied the claim for set-off of long-term capital loss against the LTCG, as such loss did not accrue or arise in India. The CIT(A) upheld the order of the AO.

The Bangalore Tribunal held that the taxpayer had qualified to be a NOR in India, the income from property held outside India in the U.K. cannot be the taxed as income under the head, 'income from house property'. Consequently, the said house property cannot be included for the number of properties owned by the taxpayer. The taxpayer had incurred a part of the expenses for the construction of the new house one year before the sale of shares. Further, the construction of the new house was also completed within two years of the sale of shares. Accordingly, based on a judicial precedent, the Tribunal held that the taxpayer is entitled to deduction. With respect to long term capital loss, the Tribunal held that since the loss accrued or arose to the taxpayer (who had qualified to be NOR) outside India, the same should not be included in the total income.

Accordingly, the Tribunal held that for an individual qualifying to be a NOR in India, income from a house property held outside India cannot be assessable to tax under head 'income from house property', and accordingly the same cannot be regarded as house property held for the purpose of determining eligibility under Section 54F of the Act. Expenses incurred on investment in a new residential house property, one year before the transfer of the old asset is entitled for benefit under Section 54F.

Dev Kumar Roy v. ITO (ITA No. 2350/Bang/2018, dated 8 February 2019) – Taxsutra.com

For further details, please refer to our Flash News dated 18 February 2019 available at this link

Circulars/Notifications/Press Releases

India's e-Visa regime gets more liberalised

The e-Visa regime was introduced in 2014 and the facility is currently available to the nationals of 166 countries. There are five sub-categories of e-Visa currently. The Government of India (GOI) has made a series of amendments in the Recently, e-Visa guidelines with an intent to make India a more tourism and business friendly destination. GOI issued a press release which further liberalises e-Visa guidelines.

e-Business visa and e-Tourist visa may be granted multiple times in a year for a maximum period of one year with multiple entry facility (earlier thrice in a calendar year for a maximum of 60 days with triple entry facility).

In case of an e-Business visa, the continuous stay in India cannot exceed 180 days during each visit. (earlier 60 days). In case of an e-Tourist visa, the continuous stay cannot exceed 90 days during each visit. However, nationals of USA, U.K., Canada and apan, can continuously stay in India for 180 days. (earlier 60 days)

GOI Press Release http://pib.nic.in/newsite/PrintRelease.aspx?relid=188642

For further details, please refer to our Flash News dated 5 March 2019 available at this link

Pension Fund Regulatory and Development Authority (PFRDA) has decided to permit Overseas Citizen of India (OCI) to enroll in National Pension System at par with Non- Resident Indian (NRIs)

Recently, the PFRDA issued a circular with regards to permit the enrolment of OCI category in NPS at par with Non- Resident Indians (NRIs). The Authority vide Circular dated 28 May 2015 had instructed the Point of Presence (POP) not to open NPS account for the ineligible category of subscriber's viz. Hindu Undivided Family (HUFs), Overseas Citizen of India (OCIs), and Persons of Indian Origin (PIOs). The Authority has decided to permit Overseas Citizen of India to enrol in National Pension System at par with Non- Resident Indians (NRIs) subscribing to NPS. However, the option of NPS Tier II account will not be available for both NRI and OCI subscribers.

Recently, the Government vide S.O. 3732(E) dated 17 October 2019 has notified that 'An OCI or NRI may subscribe to the National Pension System governed and administered by Pension Fund regulatory and Development Authority provided such person is eligible to invest as per the provisions of the PFRDA Act. The annuity/accumulated saving will be repatriable' (Schedule III (4) of Foreign Exchange Management (Non- debt Instruments) Rule, 2019 dated 17 October 2019). All other instructions of the aforesaid Circular no-PFRDA/2015/14/POP/03 dated 28 May 2015 shall remain in force.

Circular No – PFRDA/ 2015/ 14/ POP/ 03 dated 28 May 2015

For further details, please refer to our Flash News dated 5 November 2019 available at this link

Key takeaways on the Code on Wages Bill, 2019

The Code on Wages Bill, 2019 (hereinafter referred to as 'the Code') was passed by the Lok Sabha on 30 July 2019 and by the Rajya Sabha on 02 August 2019. The Code on Wages Bill, 2017 was introduced before the last Lok Sabha on 10 August 2017 and was referred to Parliamentary Standing Committee, which submitted its report on 18 December 2018. Out of 24 recommendations made by the standing committee, 17 were accepted by the Government.
The Code intends to amalgamate, simplify and rationalise the relevant provisions of the following four central labour enactments relating to wages, namely:–

- The Payment of Wages Act, 1936
- The Minimum Wages Act, 1948

- The Payment of Bonus Act, 1965
- The Equal Remuneration Act, 1976

The Code shall be effective from the date of publication in the Official Gazette. The Code universalises the provisions of minimum wages and timely payment of wages to all employees irrespective of the sector and wage ceiling. Further, the definitions of wages in the different Labour Law statutes have been consolidated into single definition. This is expected to reduce litigation and cost of compliance.

The Code proposes a floor wage to be set by the Central Government after taking into account the minimum living standards of the workers.

PIB dated 2 August 2019

For further details, please refer to our Flash News dated 3 August 2019 available at this link

Indirect Taxes

GST Amendment Act

CBIC have issued notifications to make effective the provisions contained in the Central Goods and Services Tax (Amendment) Act, 2018 and Integrated Goods and Services Tax (Amendment) Act, 2018. The amendment act was made effective from 1 February 2019.

The notification announcing the date of implementation of Amendment Act was recommended by the GST Council in its 32 meeting held on 10 January 2019.

Notification no. 1/2019-Central Tax (Rate) 29 January 2019

For further details please refer to our Flash News dated 31 January 2019 link

E-way bill, process for filing of returns by specified persons

CBIC have issued various notifications to insert provisions for restricting the generation of e-way bills by a registered person in certain cases, prescribe filing process of returns where order of cancellation of registration has been revoked and notifying due date for filing statement and returns by dealers opting for composition scheme.

Notification nos. 20/2019-Central Tax (Rate), 21/2019-Central Tax (Rate), 22/2019-Central Tax (Rate), and order no. 5/2019-GST dated 23 April 2019

For further details please refer to our Flash News dated 26 April 2019 link

Notification giving effect to recommendation made in the 37th GST Council meeting

Pursuant to the recommendations made by the GST council in its 37th Meeting held on 20 September 2019, Central Board of Indirect Taxes and Customs has released relevant notifications, giving effect to the recommendations.

Recommendation were with respect to amendment to the place of supply provision for pharma sector, revision of compensation cess rate, rationalisation of GST rate on specific services, increased coverage of reverse charge provisions, exemption granted for specific intermediary services.

All the notification was made effective from 1 October 2019

Notification nos. 4/2019-Integrated Tax, 2/2019-Compensation Cess (Rate), 20/2019-Central Tax (Rate), 21/2019-Central Tax (Rate), 22/2019-Central Tax (Rate), 19/2019-Integrated Tax (Rate), 20/2019-Integrated Tax (Rate) dated 30 September 2019

For further details please refer to our Flash News dated 1 October 2019 link

Annual Returns and Reconciliation Statement

Central Board of Indirect Taxes and Customs (CBIC) have issued order no. 8/2019 – Central Tax dated 14 November 2019, extending the due date of filing Annual Return (GSTR-9) and Reconciliation Statement (GSTR-9C).

The due date for filing of annual return and audit report has been extended for FY 2017-18 from 30 November 2019 to 31 December 2019 and for FY 2018-19 from 31 December 2019 to 31 March 2020. In addition to the above order, CBIC have also issued notification, with the intend to simplify the filing of annual return and reconciliation statement.

Order no. 8/2019-Central Tax and notification no. 56/2019-Central Tax dated 14 November 2019

For further details please refer to our Flash News dated 15 November 2019 link

Supply between Related Party / Distinct persons

Recovery of parent's health insurance expenses from employee is not supply of services – AAR, Maharashtra

Authority for Advance Ruling, Maharashtra in case of Posco India Pune Processing Centre Pvt. Ltd., have held that since the applicant is not in the business of providing insurance services, the reimbursement of expenses attributable to the health insurance of employees' parents is not a supply of services.

Further, the ruling has also held that ITC of the GST paid on hotel accommodation for providing residential accommodation of the Managing Director / General Manager shall not be available as the same is used for personal consumption.

Posco India Pune Processing Centre Pvt. Ltd. [Advance ruling no. GST-ARA-36/2018-19/B-110 dated 7 September 2018]

For further details please refer to our Flash News dated 4 February 2019 link

ITC will not be available for supplies made between distinct persons, when consideration as mentioned in the invoice has not been paid - AAR, Tamil Nadu

Authority for Advance Ruling, Tamil Nadu, have held that for supplies between distinct persons, the proviso exempting payment within 180 days, for availing ITC, shall only apply where the supplies are being made without consideration.

Where on the basis of an MOU, consideration is required to be paid and the consideration is specified in the invoices, supplies cannot be treated as 'supplies made without consideration'.

Accordingly, the benefit of non-payment of value of supply for the purpose of claiming the ITC shall not be available.

Sanghvi Motors Limited, Tamil Nadu Branch [2019-VIL-234-AAR]

For further details please refer to our Flash News dated 10 August 2019 link

Recovery of mediclaim insurance premium from employee, not subject to levy of GST – AAR, Maharashtra

Authority for Advance Ruling, Maharashtra, have held in case of Jotun India Pvt. Ltd., that since the applicant is not in the business of providing insurance services, the activity of recovery of 50 per cent of the cost of insurance premium, for the Medical insurance cover of employees' parents, cannot be treated as an activity done in the course of furtherance of business. Accordingly, the said activity cannot be treated as a supply of services between an employer and an employee.

Jotun India Pvt. Ltd. [2019-VIL-296-AAR]

For further details please refer to our Flash News dated 14 October 2019 link

Intermediary Services
Survey on Indian market trends are not intermediary services – AAR, Maharashtra Authority for Advance Ruling, Maharashtra in the case of Asahi Kasei India Pvt. Ltd., have held that survey of market trends not involving conclusion of contracts, acceptance of sales orders, invoicing, determination of sales prices, rebate, discounts, resolution of customer's complaints or settlement of disputes with customers are not intermediary services. ***Asahi Kasei India Pvt. Ltd. [2019-VIL-10-AAR]*** For further details please refer to our Flash News dated 22 January 2019 link **Circular update – Clarification of supply of ITeS vis-à-vis intermediary services** Central Board Indirect Taxes and Customs (CBIC) have issued a circular to provide a clarification on whether the supply of Information Technology enable services (ITeS) on behalf of clients would qualify as intermediary services and also to clarify whether these services would qualify as exports. It may however be noted that the said clarificatory circular were subsequently withdrawn ab-initio. ****Circular no. 107/26/2019-GST dated 18 July 2019*** ***(*Please note the circular has been withdrawn ab-initio vide circular no. F.No. CBEC – 20/06/03/2019-GST dated 4 December 2019)*** For further details please refer to our Flash News dated 19 July 2019 link

Input Tax Credit
Input tax credit on post-supply discounts cannot be availed – AAR, Tamil Nadu The Authority for Advance Ruling, Tamil Nadu have in case of MRF Ltd. held that input tax credit (ITC) can be availed only to the extent of payments made by the recipient to the supplier. Accordingly, ITC attributable to post supply discounts cannot be availed irrespective of the fact the supplier has discharged tax on the full value of the supply. ***MRF Ltd. [2019-TIOL-AAR-GST]*** For further details please refer to our Flash News dated 19 March 2019 link **Notification update – Order of Utilisation of Input tax credit** Central Board of Indirect Taxes and Customs (CBIC) has introduced new rule 88A in the Central Goods and Services Tax (CGST) Rules, 2017. The new rule provides relaxation in the sequence prescribed for utilisation of integrated tax credit against the output tax liability in section 49A of the CGST Act. The inserted Rule 88A has clarified that input tax credit (ITC) of IGST shall first be utilised against output liability of IGST and thereafter balance in IGST credit can be utilised for payment of CGST and SGST/UTGST output tax liability, as the case may be in any order. The relaxation in the order is subject to condition that credit on account of IGST is utilised in full. In addition, a circular has been issued to provide clarification with respect to the order of utilisation of the integrated goods and services tax credit.

Notification no. 16/2019-Central Tax dated 29 March 2019 and circular no. 98/17/2019-GST

For further details please refer to our Flash News dated 5 April 2019 link

Reduction in book debt is a valid consideration – AAR, West Bengal

Authority for Advance Ruling, West Bengal have held that where a payee owes the payer a debt and accepts reduction in such debt liability as a valid form of payment, such reduction in debt liability should also be regarded as a valid consideration.

Senco Gold Ltd. [2019-VIL-133-AAR]

For further details please refer to our Flash News dated 10 May 2019 link

ITC on construction services available against tax payable on lease income from such constructed property – Orissa High Court

Orissa High Court have allowed input tax credit on inputs and input services used for construction of a shopping mall, to be availed against GST payable on the rent income receivable from tenants of such constructed shopping mall.

Safari Retreats Pvt. Ltd. [TS-350-HC-2019(ORI)-NT]

For further details please refer to our Flash News dated 21 May 2019 link

CBIC circular, linking last date for claiming ITC with due date of filing GSTR-3B, 'illegal' – High Court, Gujarat

High Court of Gujarat have observed in case of AAP Company, Chartered Accountants case, that form GSTR-3B was not introduced as a return in lieu of form GSTR-3 and was merely a stop gap arrangement till the time due date for filing of return in GSTR-3 is notified.

Accordingly, press release dated 18 October 2018 issued, clarifying that the last date for availing input tax credit (July 2017 to March 2018), is the due date for filing form GSTR-3B, is said to be illegal, as it would be contrary to the provisions of the GST Act.

AAP Company, Chartered Accountants [2019-VIL-314-GUJ]

For further details please refer to our Flash News dated 9 July 2019 link

Notification updates – CGST Rules amended to restrict availment of ITC

As announced in the 37th GST council meeting, the Government in order to tackle the menace of fake invoices, have amended certain provisions of input tax credit to regulate the availment of ITC. CGST Rules, have been to restrict availment of credit, on invoices or debit notes, the details of which has not been uploaded by the supplier in GSTR-1. By virtue of the amended rule, the claim of ITC by the recipient shall be restricted to 20 per cent of the eligible credit available in respect of invoices or debit notes, the details of which have been uploaded by the supplier in their respective GSTR-1.

Notification no. 49/2019-Central Tax dated 9 October 2019 and Circular no. 123/42/2019-GST dated 11 November 2019

For further details please refer to our Flash News dated 10 October 2019 link

For further details please refer to our Flash News dated 13 November 2019 link

Transition of Education cess, Secondary & Higher education cess and Krishi Kalyan Cess into GST in allowed – Madras High Court

Madras High Court in case of Sutherland Global Services Pvt. Ltd., have held that accumulated credits of cesses cannot be said to have been wiped out unless there is a specific order under which it lapses. Accordingly, transition of accumulated credit of cesses into GST regime is allowed.

Sutherland Global Services Pvt. Ltd. [TS-938-HC-2019(MAD)-NT]

For further details please refer to our Flash News dated 6 November 2019 link

Calamity Cess – Kerala Flood Cess

Kerala Flood Cess

State Finance Minister of Kerala had announced the levy of Kerala flood cess (cess), to raise funds after devastating flood occurred in the state in August 2018. The levy of cess was made effective from 1 August 2019 and are required to be levied on all intra-state B2C supplies. FAQs in this regard were also issued by the State Government.

For further details please refer to our Flash News dated 31 January 2019 and 31 July 2019 link

Amnesty schemes under the erstwhile Indirect tax laws

Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019

With the intention to reduce approximately INR3.75 lakh crore worth of demand locked up in litigation under the erstwhile service tax and excise law, the Hon'ble Finance Minister had announced a scheme title 'Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 in the Finance (No. 2) Act, 2019.

The scheme provides a one-time measure to settle disputes under the erstwhile indirect tax laws and was made effective from 1 September 2019.

The scheme offers complete waiver of penalty, interest and prosecution, substantial waiver of disputed tax in the range of 40 per cent to 70 per cent of tax dues.

For further details please refer to our Flash News dated 23 August 2019 link

For further details please refer to our Flash News dated 29 August 2019 link

For further details please refer to our Flash News dated 27 September 2019 link

For further details please refer to our Flash News dated 31 October 2019 link

Ordinance for amnesty scheme to settle pre-GST regime disputes – Maharashtra

With an aim to reduce litigation and collect state revenue, state of Maharashtra in its cabinet meeting had approved and amnesty scheme to settle pre-GST regime state tax disputes. Latter an Ordinance in this regards was passed.

For further details please refer to our Flash News dated 25 February 2019 link

For further details please refer to our Flash News dated 7 March 2019 link

For further details please refer to our Flash News dated 25 July 2019 link

Kerala Amnesty scheme

Similar to the State of Maharashtra, Kerala had also announced amnesty scheme with the intention to settle pre-GST regime tax disputes.

For further details please refer to our Flash News dated 5 April 2019 link

Erstwhile Indirect Tax law update

No reversal of CENVAT credit requited for statutory investments mandated under IRDA – CESTAT Hyderabad

Customs, Excise and Service Tax Appellate Tribunal, Regional Bench at Hyderabad have in case Shriram Life Insurance held that the activity of mandatory investment in securities is not exempt service for the purpose of determining reversal under the CENVAT Credit Rules.

Shriram Life Insurance Company Limited [Order no. A/30168-30169/2019 dated 7 February 2019]

For further details please refer to our Flash News dated 11 February 2019 link

Sales Tax – Bond to bond sale does not qualify as High seas sale, hence liable to tax – Bombay High Court

The Bombay High Court, while determining what constitutes the term 'crossing the customs frontiers of India' have held that presenting of a bill of entry for home consumption or for warehousing would denote that goods which are imported have been cleared and accordingly have crossed the customs frontiers. Thus, execution of an agreement for sale before the goods was cleared for Home consumption, but after the bill of entry (BOE) for warehousing has been filed, such sale shall be treated as local sales and hence would be subjected to levy of sales tax.

Radhasons International [2019-VIL-62-BOM]

For further details please refer to our Flash News dated 14 February 2019 link

VAT Circular update – Inter-state purchases against C form for the period starting from 1 July 2017

Maharashtra State VAT department have withdrawn it earlier circular no. 47T of 2017 dated 17 November 2017, which restricted the issuance of C form for the period commencing after 1 July 2017.

For further details please refer to our Flash News dated 19 February 2019 link

Service Tax – Payment towards the salary of employee deputed from parent company not liable to tax – Supreme Court

Dismissing the appeal filed by revenue against the order of the CESTAT, New Delhi, the Hon'ble Supreme Court, in case of Nissin Brake India Pvt. Ltd. have held that, since the relationship between the assessee and the manpower deployed by the foreign parent company is of an employer and employee, no service tax shall be payable on the salary paid to such deployed employee.

Nissin Brake India Pvt. Ltd. [TS-230-SC-2019-ST]

For further details please refer to our Flash News dated 12 April 2019 link

CENVAT Credit of services sold to employees can be availed by the employer – CESTAT, Hyderabad

CESTAT, Hyderabad in case of Ultra Tech Cement Ltd., have held that, the employer shall be eligible to avail CENVAT credit on input services which are sold by the employer to its employees for a consideration.

Ultra Tech Cement Ltd. [2019-VIL-603-CESTAT-HYD-ST]

For further details please refer to our Flash News dated 25 September 2019 link

Service tax audit under GST regime is permissible – High Court

The Calcutta High Court in case of Gitanjali Vacantionvile, have held that, if any, of the provisions of the CGST Act, 2017 allows applicability of the Chapter V of the Finance Act, 1994, then, notwithstanding the omission of the Chapter V of the Finance Act, 1994 under section 173, the same shall continue to apply. Accordingly, an inquiry or an investigation or even a legal proceeding under the service tax provision shall be permissible even under the GST regime.

Gitanjali Vacationville Pvt. Ltd. [2019-VIL-17-CAL]

For further details please refer to our Flash News dated 23 January 2019 link

Customs and Foreign Trade Policy

Pre-import condition to avail IGST exemption on imports under advance authorisation of FTP is ultra-vires – Gujarat High Court

The Gujarat High Court in case of Maxim Tubes Company Pvt. Ltd. have held that the pre-import condition for availing exemption from payment of IGST and compensation under the Advance Authorisation (AA) Scheme inserted vide para 4.4. of the Foreign Trade Policy 2019-20 and in para (xii) of the customs notification no. 18/2015-Customs is ultra vires the AA scheme.

Maxim Tubes Company Pvt. Ltd. [TS-79-HC-2019(GUJ)-NT]

For further details please refer to our Flash News dated 4 March 2019 link

India-USA Trade Dispute on Export Subsidies

In a significant setback to exports from India, World Trade Organisation (WTO) dispute settlement panel has held that India's export subsidy schemes prescribed under the Foreign Trade Policy, violate WTO rules.

This is a significant update for exporters from India availing benefits under export promotion schemes. Exporters would need to be cognizant of potential changes in duty/tax neutralization schemes for export, arising out of the latest WTO disputes panel decision, which could affect their margins and pricing in the medium to long term.

It may however be noted that India have filed an appeal against the panel report on 19 November 2019.

For further details please refer to our Flash News dated 5 November 2019 link

For further details please refer to our Flash News dated 21 November 2019 link

Other significant updates

Interest is payable on the gross liability – High Court, Telangana

The High Court of Telangana have dismissed a writ petition filed against the interest demand raised by the revenue authorities on the gross tax liability. The court held that tax paid on inputs becomes an input tax credit only when a claim is made in the returns filed as self-assessed. In case of a delay in filing of returns, the payment of tax liability, party in cash and partly in the form of claim of input tax credit also happens belatedly. Thus, liability to pay interest arised automatically on the gross amount.

Megha Engineering & Infrastrutures Ltd. [Writ Petition no. 44517 of 2018]

For further details please refer to our Flash News dated 23 April 2019 link

Circular update – Treatment of goods taken out of India for 'sale on approval basis'

CBIC have issued a circular to provide a clarification on the issues concerning the maintenance of records, issuance of delivery challan or the raising of invoices in cases where goods are being taken out of India for an exhibition or on a consignment basis for export promotion.

Circular no. 108/27/2019-GST dated 18 July 2019

For further details please refer to our Flash News dated 22 July 2019 link

Non-speaking order passed by the adjudication authority set-aside – Bombay High Court

The High Court of Bombay had set aside an assessment order passed by the adjudicating authority under the erstwhile VAT law on the grounds that no reason was recorded by the authorities while rejecting the submission made by the petitioner.
The court in its order observed that it is necessary that the order passed by the adjudicating authority should deal with the submission made by the parties, by giving reasons in support of its conclusion, particularly when it does not accept the submission made.

Minkart India Pvt. Ltd. [TS-HC-2019(BOM)-VAT]

For further details please refer to our Flash News dated 29 July 2019 link

Pre-fabricated warehouse structure is immovable property – AAR West Bengal

Authority for Advance Ruling, West Bengal have held that pre-fabricated warehouse cannot be conceived without the beneficial enjoyment of the civil structure embedded on earth and thus the same is an immovable property.

This, input tax credit attributable to the construction of such warehouse is not admissible.

Tewari Warehousing Co. Pvt. Ltd. [2019-VIL-47-AAR-SGST]

For further details please refer to our Flash News dated 25 February 2019 link

Maharashtra New Industrial Policy, 2019

With an intent to make Maharashtra, USD1 trillion economy in the country, the Government of Maharashtra has released 'Maharashtra New Industrial Policy, 2019', which shall be valid for a period of five years from 1 April 2019. The incentives in the industrial policy are in the form of power subsidies, interest subsidies, stamp duty exemption, electricity duty exemption and subsidy on state GST paid.

Maharashtra New Industrial Policy, 2019 dated 7 March 2019

For further details please refer to our Flash News dated 25 April 2019 link

Real Estate sector

GST amendment – Residential segment of real estate sector

GST council, in its thirty-fourth meeting had approved a transition plan for the residential segment. In line with the same, notification giving effect to the same have been issued.

The builders/developers shall have an option for all the ongoing residential projects to either opt to pay tax at new rates (i.e. concessional rate of GST, with a condition that tax credit shall not be available) or continue with the earlier rate of GST, along with input tax credit.

An application choosing the option needs to be filed on or before 10 May 2019. In the event of not filing the application, it shall be deemed that the project is liable to the new rates of GST. The application shall be required to be made for each project separately.

Further with an objective to clarify doubts arisen after the introduction of the new rate of GST, CBIC issued FAQ's to provide a general guideline.

Notification nos. 3/2019-Central Tax (Rate), 4/2019-Central Tax (Rate), 5/2019-Central Tax (Rate), 7/2019-Central Tax (Rate), 3/2019-Integrated Tax (Rate), 4/2019-Integrated Tax (Rate), 5/2019-Integrated Tax (Rate), 7/2019-Integrated Tax (Rate), 16/2019-Central Tax dated 29 March 2019

F. no. 354/32/2019-TRU dated 7 May 2019 and 14 May 2019

For further details please refer to our Flash News dated 14 May 2019 link

For further details please refer to our Flash News dated 17 May 2019 link

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Mahalaxmi,
Mumbai – 400 011.
Tel: +91 22 3989 6000

Noida
Unit No. 501, 5th Floor,
Advant Navis Business Park,
Tower-A, Plot# 7, Sector 142,
Expressway Noida,
Gautam Budh Nagar,
Noida – 201 305.
Tel: +91 0120 386 8000

Pune
9th floor, Business Plaza,
Westin Hotel Campus, 36/3-B,
Koregaon Park Annex,
Mundhwa Road, Ghorpadi,
Pune – 411 001.
Tel: +91 20 6747 7000

Vadodara
Ocean Building, 303, 3rd Floor,
Beside Center Square Mall,
Opp. Vadodara Central Mall,
Dr. Vikram Sarabhai Marg,
Vadodara – 390 023.
Tel: +91 265 619 4200

Vijayawada
Door No. 54-15-18E,
Sai Odyssey,
Gurunanak Nagar Road, NH 5,
Opp. Executive Club, Vijayawada,
Krishna District,
Andhra Pradesh – 520 008.
Tel: +91 0866 669 1000