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Inclusive Framework BEPS Agreement - Update on Pillar 2 agreement

On 20 December 2021, the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting, involving 137 countries, released Model Globe Rules under Pillar 2[1] for a Global Minimum Tax at 15% for Multi-national Enterprises (MNEs) with a turnover of more than €750 million. It is anticipated that a document providing further commentary on the rules will be released early next year.

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

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

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

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

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

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

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

Model Rules provide that "consideration will be given to the conditions under which the US GILTI regime will co-exist with the

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

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GloBE Rules, to ensure a level playing field".

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

Decisions - International Tax

Employee should be given credit of TDS even though employer has not deposited it with the government: Gujarat High Court[2]

The High Court held that the tax department cannot deny the benefit of tax deducted at source (TDS) to the employee, even if such tax has not been deposited to the credit of central government by the employer. The responsibility to deposit the amount of TDS was of the person who was responsible to deduct the tax at source. The High Court relied on the decisions of Devarsh Pravinbhai Patel[3] and Om Prakash Gattani[4].

Payment for services related to architectural drawings and designs is not taxable as FTS under the India-Singapore tax treaty: ITAT Mumbai[5]

The ITAT held that services related to architectural drawings and designs are not taxable as 'Fees for Technical Services' (FTS) under Article 12(4) of the India-Singapore tax treaty as neither technical knowledge, skill, etc. nor developed drawings or designs were provided to the taxpayer, which could be independently applied by the taxpayer in future. The services provided were project specific and could not be used for any other project by the taxpayer. The terms of the agreement were clear that the designs, drawings, including database and other derivations remained the intellectual property (IP) of the service provider, and they were intended for use solely with respect to the project. It restrained the taxpayer from utilising such IP for any other project or for completion of the project by any other entity.

Decisions - Domestic Tax

Delhi High Court rejected reassessment notices issued by the tax department under old provisions of reassessments after 31 March 2021: Delhi High Court[6]

The High Court quashed reassessment notices issued after 31 March 2021 under the old reassessment provisions as the Finance Act, 2021 has introduced new assessment provisions with effect from 1 April 2021. The High Court observed that the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act 2020 [the Amendment Act] does not empower the government to extend the erstwhile reassessment provisions beyond 31 March 2021 and /or defer the operation of new reassessment provisions enacted by the Finance Act, 2021. The Amendment Act and notifications issued thereunder can only change the timelines applicable to the issuance of a reassessment notice; however, they cannot change the statutory provisions applicable thereto which are required to be strictly complied with.

Delhi High Court's directions and tax department's report on

[2] Kartik Vijaysinh Sonavane v. DCIT (Special Civil Application No. 6193 of 2021) (Guj)
[3] Devarsh Pravinbhai Patel v. ACIT (SCA No. 12965/2018 with SCA No. 12966/2018, dated 24 September 2018) (Guj)
[4] Om Prakash Gattani v. ACIT [1996] 222 ITR 489 (Gau)
[5] DCIT v. Forum Homes Pvt. Ltd. [2021] 132 taxmann.com 223 (Mum)
[6] Mon Mohan Kohli v. ACIT [W.P.(C) 6176/2021] (Del)

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standard operating system on refunds: Delhi High Court[7]

The High Court dealt with the issue of lack of co-ordination between the Assessing officer (AO) and Centralized Processing Centre (CPC) in refund cases and empowerment of AO at the highest level. The High Court directed the AO to place the entire matter before the Chairman, Central Board of Direct Taxes (CBDT), so that proper Standard Operating Procedures (SOPs) are put in place and orders passed by the AO are given effect to within a time frame and no inconvenience is caused to the taxpayer as well as to the High Court. The tax department responded that the existing SOPs for working on the system and for co-ordination and feedback between AO and CPC/Systems Directorate ensure consistent and systematic work throughout the department in most of the cases. Further strengthening of existing mechanisms and additional SOPs are being undertaken by the department, in pursuance of the High Court's directives.

Gift of brand to corpus of a Trust is not taxable under the Income-tax Act: ITAT Mumbai[8]

A private discretionary Trust was settled by the settlor for the sole and exclusive benefit of taxpayer's family members. Essar Investments Limited (EIL) voluntarily gifted the 'Essar' brand (including all registered and unregistered trademarks, copyrights, service marks, certification marks, design, trade names relating to the logo and slogans) to the corpus of the taxpayer trust without any consideration. Subsequently, the taxpayer entered into brand licensing agreements with Essar group entities and granted a non-exclusive license to use the Brand in India for a license fee. The AO held that the receipt of brand by the taxpayer trust was taxable as 'Income from Other Sources' under Section 56(1). Alternatively, the receipt of brand was chargeable to tax under Sections 56(2)(vii) and 28(iv).

The ITAT held that the transaction of contribution of a brand as a gift by an Indian company to the corpus of the taxpayer's trust, did not involve any profit element which could be brought within the meaning of the term income under Section 2(24). Thus it was not taxable in the hands of the trust under Section 56(1). It was not 'any work of art' as contemplated in the definition of 'property' in Explanation to Section 56(2)(vii) and thus, could not be taxed under these provisions. Further it was contributed on the same day as on which the taxpayer had commenced its operations and thus, it could not be considered that the brands were the benefit which arose from the business carried on by the taxpayer. The receipt of the brand by the taxpayer was categorised as a profit-making apparatus i.e., a capital asset and thus not taxable as business income under Section 28(iv).

Notifications /Circulars/Press Release

CBDT prescribes conditions for exemption of income earned by a non-resident on transfer of non-deliverable forward contracts entered into with an offshore banking unit located in IFSC

With a view to incentivise execution of non-deliverable forward (NDF) contracts in India, the Finance Act, 2021 introduced Section 10(4E) that provides an exemption for the income earned by a non-resident from transfer of non-deliverable forward contracts entered into with an offshore banking unit located in the International Financial Services Centre (IFSC) subject to prescribed conditions.

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[7] Intertek India Private Limited v. ACIT [W.P.(C) 6361/2021] (Del)

[8] ACIT v. Balaji Trust (ITA no.5139/Mum/2017 (Mum)

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CBDT has issued a Notification[9] introducing a new Rule 21AK under the Income-tax Rules, 1962. The new rule prescribes the conditions for availing the exemption under Section 10(4E). Under the new rule income accrued or arisen to, or received by, a non-resident as a result of transfer of non-deliverable forward contracts under Section 10(4E) shall be exempt subject to fulfillment of the following conditions:

- The non-deliverable forward contract is entered into by the non-resident with an offshore banking unit of an IFSC which holds a valid certificate of registration granted under IFSC Authority (Banking) Regulations, 2020 by the IFSC Authority2; and

- Such contract is not entered into by the non-resident through or on behalf of its Permanent Establishment (PE) in India.

CBDT notifies e-Verification Scheme, 2021 for collection of information of the taxpayer by the AO

The Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 introduced a new set of provisions under Section 135A to widen the scope of the faceless mechanism. The central government was empowered to make an e-scheme for faceless collection of information, by notification in the official gazette so as to impart greater efficiency, transparency and accountability.

CBDT has notified[10] the e-Verification Scheme, 2021 for faceless collection of information of the taxpayer by the AO. It shall come into force with effect from 13 December 2021. The scope of the Scheme shall be in respect of:

- Calling for information under Section 133;
- Collecting certain information under Section 133B;
- Calling for information by the prescribed income-tax authority under Section 133C;
- Exercise of power to inspect registers of companies under Section 134; and
- Exercise of power of AO under Section 135.

CBDT issues guidelines on the applicability of TDS provisions on purchase of goods, on e-commerce operators and TCS provisions on certain payments

From time to time, CBDT has issued guidelines to remove difficulties arising from the application of various TDS provisions like Section 194-O, Section 206C(1H) and Section 194Q. On 25 November 2021, CBDT has issued further guidelines[11] to remove difficulties under these TDS provisions. The guidelines provides clarity on various issues like e-auction services carried out through electronic portal, adjustment of various indirect tax levies other than GST, applicability of Section 194Q in cases where exemption has been provided under Section 206C(1A) and applicability of Section 194Q to a department of government which is not a public sector undertaking or corporation.

[9] CBDT Notification No. 136/2021, dated 10 December 2021

[10] CBDT Notification No. 137/2021, dated 13 December 2021

[11] CBDT Circular No. 20/2021, dated 25 November 2021

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Notification / Circular

CGST Rules pertaining to tenure of Anti-profiteering Authority and Form GST DRC-03 amended[12]

Gist of the amendments to the CGST Rules is as follows:

i. Tenure of Anti-profiteering Authority has been extended to 5 years i.e. upto 30 November 2022. Original tenure was 2 years which further got extended to 4 years. Tenure of the Anti-profiteering Authority commenced from the day the Chairman of the Authority entered office (i.e. 1 December 2017) of Anti-profiteering Authority. (Rule 137)

ii. Certain amendments to Form GST DRC-03 (Intimation of payment made voluntarily or made against the show cause notice (SCN) or statement) has been made.

Clarification issued on certain issues with respect to GST payment on services supplied by restaurants through e-commerce operators[13]

In view of the decision of the 45th GST Council meeting, Notification No. 17/2021 dated 18 November 2021 was issued to notify 'Restaurant Service' under section 9(5) of the CGST Act. The implication of this notification is that the tax on supplies of restaurant service supplied through e-commerce operators (ECO) shall be paid by such ECO. In this regard, CBIC has issued clarification on certain issues. Gist of the clarifications is provided below:

- ECO will no longer be required to collect TCS and file Form GSTR 8 in respect of restaurant services on which it pays tax in terms of section 9(5). However, ECO will continue to pay TCS on other goods or services not notified under section 9(5).
- There is no mandatory requirement of taking separate registration by ECO for payment of tax on restaurant service under section 9(5).
- ECO will be liable to pay GST on any restaurant service supplied through them including by an unregistered person.
- Aggregate turnover of person supplying restaurant service through ECO shall be computed as defined in section 2(6) of the CGST Act, 2017 and shall include the aggregate value of supplies made by the restaurant through ECO.
- Supplies of restaurant service made through ECO are not to be recorded as inward supply of ECO liable to reverse charge in Form GSTR-3B.
- ECO shall not be required to reverse ITC on account of restaurant services on which it pays GST in terms of section 9(5) of the Act.
- ECO shall pay the entire GST liability in cash on restaurant service.
- Invoice in respect of restaurant service supplied through ECO is to be issued by ECO.
- For other goods or services sold to a customer under the same order, it is advisable that ECO raises separate bill on restaurant service in such cases where ECO provides other supplies to a customer under the same order.

[12] Ministry of Finance Notification No. 37/2021-Cenral Tax dated 1 December 2021

[13] Ministry of Finance, CBIC Circular No. 167 / 23 /2021 – GST dated 17 December 2021

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- ECO should furnish the details of restaurant service in Form GSTR-3B as outward taxable supplies in Table 7A(1) or Table 4A of GSTR-1, as the case maybe.

- Registered persons supplying restaurant service through ECO should report such supplies made through ECO in Form GSTR-1 and Table 3.1 (c) of GSTR-3B.

Advance Rulings

Decision of AAR with regards to applicable of GST on recovery from employees overruled by AAAR[14]

Madhya Pradesh Authority for Advance Ruling (AAR) had held that various employee recoveries such as notice pay, Group Medical Insurance for non-dependent parents, canteen charges, telephone charges will be liable to GST at value determined under rule 28 of GST Rules and ITC will be available when recovery is in connection with or incidental to the business of the Applicant. This ruling has been overruled by Madhya Pradesh Appellate Authority for Advance Ruling (AAAR).

Gist of the ruling of the AAAR on various transactions involving recoveries from employees is as follows:

- GST is not applicable on notice pay recoveries. Merely because the employer is being compensated does not mean any service has been provided to employer or, employer has tolerated any act of the employee for premature exit.

- GST is not applicable on collection of insurance premium at actuals. Facilitating medical insurance services to non-dependent parents and retired employees upon recovery of premium amount on actuals cannot be considered as 'supply of service' as the same is not mandated by any law. ITC in respect of health insurance will not be available to Applicant as health insurance is in excluded category under section 17(5) of the CGST Act and it is not an outward supply of the Applicant.

- GST is not applicable on the collection of the employees' portion of amount towards foodstuff supplied by Canteen Service Provider as Applicant is just working as a mediator. ITC in respect of canteen facility will not be available to the Applicant in view of proviso under section 17(5)(b) which states that ITC in respect of goods or services or both shall be only available where it is obligatory for an employer to provide the same to its employee under any law.

- Facilitating telephone connection to employees upon recovery of usage charges on actuals cannot be considered as supply of service. ITC in respect of telephone charges would not be available as Applicant it is not providing any outward supply of telephone services and the facility is also not attributable to the purposes of business in terms of section 17(1) of CGST Act.

SEZ Unit procuring renting of immovable property services from SEZ Developer (Local Authority) is not import of services and accordingly SEZ Unit is liable to pay GST under reverse charge[15]

'Applicant' is a SEZ Unit. It procures renting of immovable property services from SEZ Developer which is also a Local Authority.

[14] Bharat Oman Refineries Limited [2021-VIL-429-AAR] read with Madhya Pradesh Appellate Authority for Advance Ruling (AAAR) Order No. MP/AAAR/07/2021 dated 8 November 2021

[15] M/s Portescap India Private Limited [2021-VIL-464-AAR]

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The immovable property which is taken on lease is within SEZ area.

'Applicant' contends that it is not liable to pay GST under reverse charge mechanism on procuring renting of immovable property. It has cited Notification No. 18/2017-Integrated Tax (Rate) to state that renting of immovable property services are imported by them and are therefore exempted from IGST. It also relied on section 7 of SEZ Act, 2005 (which deals with exemption to all goods or services procured from a Domestic Tariff Area or foreign suppliers); section 51 of SEZ Act, 2005 (which states that provisions of SEZ Act shall have overriding effect); and section 26 of the SEZ Act, 2005 (which deals with exemption from tax on services provided to a developer or unit to carry out authorized operations).

Referring to the definition of 'India' under section 2(56) of the CGST Act, Maharashtra Authority for Advance Ruling held that, in the given case, as the recipient and supplier of services are situated in India, Notification No. 18/2017 - Integrated Tax (Rate) is not applicable. It also ruled that section 26 of SEZ Act, 2005 has not yet been aligned with the CGST Act, 2017 and/or IGST Act, 2017 and the list of taxes under section 26 of SEZ Act, 2005 for exemption, does not cover IGST/CGST/SGST. Accordingly, 'Applicant' would be liable to pay GST under reverse charge on renting of immovable property.

High Court

Dealer needs to pay only for fine for release of the goods or conveyances. Tax, penalty and charges thereon are to be paid after adjudication[16]

Kerala State GST Department conducted inspection of the godowns of the Dealer, seized the goods (i.e. beedis) and issued order of prohibition. Dealer filed writ petition for release of goods. By an interim order dated 26 August 2021, the Kerala High Court observed that the Dealer is free to approach the Tax Officer for release of goods. Meanwhile, Tax Officer issued show cause notices (SCN) dated 25 August 2021 proposing to confiscate the goods and the conveyance and levied penalty under section 130 of the CGST Act. The notice specified, apart from tax and penalty, the quantum to be paid as fine in lieu of confiscation of the goods.

Dealer filed another writ petition challenging the SCN contending that the Tax Officer is refusing to release the goods even when the Dealer is offering to pay the amounts in lieu of confiscation. This writ petition was allowed in favour of the Dealer.

Tax Officer filed a review petition against the said order.

Hon'ble High Court of Kerala held that the review petition has no merit and dismissed it on the following grounds:

a) Section 130 of the CGST Act contemplate release of goods on payment of fine in lieu of confiscation at two stages :

- during the process of adjudication, under section 130(2) and,
- post-adjudication under section 130(3) of the Act.

b) At the time of release of goods under section 130(2) of the CGST Act, the owner of the goods is required to pay the fine in lieu of confiscation alone, while penalty tax and other charges can be paid after adjudication.

c) Basis for calculating the fine in lieu of confiscation under section 130 of the CGST Act is only the market value as defined under section 2(73) of the Act and not the maximum retail price.

[16] State Tax Officer, Investigation Branch-I, State GST Department, Ashramam, Kollam & Ors vs Y. Balakrishnan [2021-VIL-828-KER]

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Supreme Court

Supreme Court delivers split verdict on applicability of service tax on interchange fees[17]

In a typical credit card transaction, a credit card is issued to a customer by an 'Issuing Bank'. When a customer uses credit card to pay to 'Merchant Establishments', it is the 'Acquiring Bank' who pay to such 'Merchant Establishments' and charges them a precontracted rate known as Merchant Discount Rate (MDR). At the backend, 'Acquiring Bank' submits transaction settled by the 'Merchant Establishment' to the 'Issuing Bank' through 'Card Association'. 'Issuing Bank' in-turn bills the customer for gross amount and pays the gross amount less interchange fees by remitting the same through Card Association who in-turn remit it to 'Acquiring Bank'. MDR paid by 'Merchant Establishments' to the 'Acquiring Bank' includes a portion known as 'interchange fees' which is shared by the 'Acquiring Bank' with the 'Issuing Bank'. Department contended that the 'Issuing Bank' (i.e. Assessee) receives 'interchange fees' for services rendered to Credit Association on which service tax is not paid. Chennai Tribunal[18] set aside the impugned order relying upon the decision of Allahabad Tribunal[19] which held that that since the 'Acquiring Bank' has paid service tax on whole of the amount (MDF and interchange fees) out of which only some amount has been shared with the 'Issuing Bank', no service tax is payable by the 'Issuing Bank'.

Coram of the Supreme Court is divided on applicability of service tax on interchange fees. According to the first view, 'Issuing Bank' and 'Acquiring Bank' are rendering separate and different services. 'Issuing Bank' will be liable to pay service tax on interchange fees as its funds are utilized to effect payment and it also undertakes risk and approval of the transaction.

Dissenting judgment notes that the services of the 'Issuing Bank' are subsumed into the services of the 'Acquiring Bank' to make it a unified service to the 'Merchant Establishment' who does not have any contractual liability to pay interchange fees to the 'Issuing Bank'. MDR is the consideration for such unified service which includes interchange fees, and it cannot be taxed again separately.

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[17] Commissioner of GST and Central Excise vs M/s Citi Bank N.A. [2021-VIL-91-SC-ST]

[18] 2018-VIL-1110-CESTAT-CHE-ST

[19] 2018-VIL-894-CESTAT-ALH-ST

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