



India tax konnect

March 2020



home.kpmg/in

Contents

Direct Tax

'Vivaad se Vishwas' Scheme

Decisions

Notification/Circular/ Press Release

BEPS/MLI

Indirect Tax

Amnesty Scheme – pre-GST regime

Decisions

will also get immunity from prosecution under the Income-tax Act. If payments are made after 31 March 2020 the taxpayer will have to pay 110% of the disputed tax¹. The scheme is expected to remain open until 30 June 2020.

The scheme applies to appeals filed by taxpayers or the government, which are pending with the Commissioner (Appeals), Income tax Appellate Tribunal, High Court or the Supreme Court as on 31 January 2020.

In appeals relating to disputed penalty/ interest/fee (i.e. where the tax is not in dispute), the amount payable by the declarant will be 25 per cent of such penalty/interest/fee, if the payment is made on or before 31 March 2020. If the payment is made after 31 March 2020, the amount payable will be increased to 30 per cent.

Further amendments / clarifications to the scheme are likely.

Direct Tax

'Vivaad se Vishwas' scheme

The Finance Minister announced a new Dispute Resolution Scheme (Vivad se Vishwas Scheme) in her Budget speech for 2020-21 with a view to reduce litigation. Following this, on 5 February 2020, the government introduced the 'Direct Tax Vivad se Vishwas Bill, 2020' in the Lok Sabha. Under the scheme, in case of pending appeals, a taxpayer is given the option of resolving the dispute by only paying the amount of the disputed tax (if payment is made before 31 March 2020). The taxpayer will be entitled to a full waiver of interest and penalty in such cases and

Decisions

FTS can be taxed on a gross basis even if there is a service PE in India (India-Switzerland treaty)

The Mumbai Tribunal² held that FTS can be taxed on gross basis even though the taxpayer company had a Service PE in India. The Tribunal relied on the Protocol to the India-Switzerland tax treaty which specifically provides an option for taxation of FTS on gross basis where taxpayer has a service PE in the source country.

Income not taxable under a treaty cannot be excluded from book profits for MAT

Adjustments to book profits which are not specifically dealt with in the MAT provisions is a contentious issue. The Delhi

¹ However, where 10 per cent of disputed tax exceeds the aggregate amount of interest and penalty on such disputed tax, the excess need not be paid.

The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

© 2019 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.

The KPMG name and logo are registered trademarks or trademarks of KPMG International.

This document is meant for e-communication only

² AGT International GmbH v. DCIT (ITA No. 7465/Mum/18)

Tribunal³ observed that MAT provisions do not provide for exclusion of non-taxable income under a tax treaty and held that a taxpayer could not claim a deduction on this account while computing book profits under the MAT provisions.

TDS required on year-end provisions which are ascertained and where payees are identifiable

The Delhi Tribunal⁴ held that a taxpayer is liable to deduct tax at source on the year-end provisions which are for ascertained liabilities and where the payees are identifiable. This decision reiterates the principle that this issue is fact-specific and would depend on whether these specific requirements are met.

Income from providing cloud services not taxable as royalty or fees for included services

A foreign company⁵ earned income from providing cloud services including cloud hosting and other supporting and ancillary services to Indian customers.

The Tribunal held that the services provided by the taxpayer to Indian customers were not covered by the definition of 'royalties' under the India-US tax treaty since the taxpayer was only providing hosting services to the Indian customers and not giving any control over any equipment. Though the definition of 'royalty' under the Income-tax Act was amended to include payments for use of equipment in certain situations, the definition under the treaty remains unchanged. The Tribunal also held that such services would not be taxable as 'Fees for included services' under the India-US tax treaty.

Notification/Circular/ Press Release

- The Union Cabinet approved the signing and ratification of the Protocol amending the India-Sri Lanka tax treaty. Amendments include an updation of the preamble and inclusion of a Principal Purpose Test in the tax treaty (on the same lines as under the MLI). These are intended to curb of tax planning strategies which exploit gaps and mismatches in tax rules. These changes will come into force when the Protocol is formally notified.
- CBDT has notified new rules and forms for exercising the option to avail lower corporate tax rate under the concessional tax regime of 22/15 per cent introduced last year. The taxpayer is required to file such forms electronically either under digital signature or electronic verification code.

BEPS/MLI

- On 31 January 2020, the OECD presented the outline of the architecture on a Unified Approach on Pillar One, confirming that both automated digital businesses and consumer facing businesses would be in scope. In addition to the note on the Pillar One architecture, an updated programme of work for Pillar One and a revised progress report on Pillar Two were also released. OECD aims to release the final report on Pillar One by the end of 2020.
- India has published synthesised text for MLI modified Indian tax treaty with Luxembourg during last month.

³ IRCON International Ltd v. DCIT [ITA No. 977/Del/2010 (AY 2004-05)]

⁴ Inter Globe Aviation Ltd v. ACIT (ITA No. 5347/Del/2012) (ITA No. 4449/Del/2013)

⁵ Rackspace, US Inc v. DCIT [2020] 113 taxmann.com 382 (Mum)

During last few months India has released synthesized texts of its treaties with Finland, Japan, UAE, Singapore, Serbia, Slovak Republic, Australia, Austria, Ireland, Lithuania, Poland, and the UK.

- Uruguay, Cyprus, Qatar, Czech Republic, and Saudi Arabia have deposited their instrument of ratification for MLI in last one month

Indirect Tax

Amnesty Scheme to settle pre-GST regime indirect tax dispute

States of Kerala, West Bengal and Himachal Pradesh have announced an Amnesty Scheme to settle pre-GST regime indirect tax disputes.

The Scheme aims to provide benefit to the taxpayer and settle the disputes which were not settled in the earlier announced Amnesty Scheme (if any).

The Scheme proposes to cover within its ambit various erstwhile state levies viz. Value Added Tax, Central Sales Tax, Entry Tax, etc.

Decisions

Refund against wrong deposit is available even if it is claimed beyond the statutory period

The CESTAT⁶ held⁷ that where the refund is attributable towards a wrong deposit, it cannot be denied on the ground that the

refund application was made beyond the statutory period.

The limitation period for filing an application shall apply only with respect to specified cases viz. inverted duty structure, rebate, etc. The restriction shall not apply in cases where the tax has been paid erroneously.

Refund cannot be denied due to technical glitches in the GST system

The Delhi High Court held⁸ that a taxpayer shall not be denied the substantive benefit of the IGST paid by them on exports made during the GST transition period.

Though the taxpayer has inadvertently claimed benefit of duty drawback, due to lack of clarity with respect to the refund of IGST during the transition period, one cannot be immune to the fact that the taxpayer had faced difficulties in understanding the complexity of the GST procedures. The taxpayer has been a victim of technical glitches on account of confusion during the transition phase.

Refund available to SEZ unit cannot be denied based on technical discrepancy

The CESTAT Kolkata held⁹ that mere technical discrepancy in the invoices i.e. supplier invoices is in the name of appellant's corporate office, cannot be a ground to deny a substantive benefit of refund available to SEZ unit.

It is neither disputed that the appellant is an SEZ unit, nor is it disputed that the services are received, nor the payment of tax to the service provider is being disputed, the appellant is eligible for claiming the refund.

'Consideration' for transaction between distinct persons, shall

⁶ Customs, Excise and Service Tax Appellate Tribunal
⁷ Oriental Insurance Company Ltd. v. Commissioner of Central Excise & Service Tax, LTU, New Delhi [Order No. 50011/2020]

⁸ TMA International Pvt. Ltd. [WP (C) 2694/2019]
⁹ Vedanta Limited (SEZ unit) [Order no. 75203/2020]

include net-settlement by way of book entry

The AAAR¹⁰, while modifying the AAR's¹¹ order, held¹² that where supplies between distinct persons require payment of consideration, net settlement by way of book entry shall also be considered as a valid form of payment.

The AAR had held¹³ that where the memorandum of understanding between distinct persons requires payment of consideration for the transaction, the recipient of such supplies shall be mandatorily required to make such payments, within the prescribed period of 180 days for the purpose of claiming input tax credit.

Compensation paid for vacating claim qualifies as 'supply' under the GST law

The AAR held¹⁴ that compensation paid for vacating the claim to set-up SEZ unit, by the parties would fall within the ambit of the term 'supply' and thus shall be subject to levy of GST.

Recovery proceedings cannot be initiated within the statutory time prescribed for filing an appeal

The Calcutta High Court held¹⁵ that when an appeal provision has been provided under the statute, the authorities are not allowed to recover the disputed amount, unless there are justifiable circumstances.

The authorities have a right to recover a sum up to 20 per cent, i.e. the amount prescribed under the statute to be deposited for filing an appeal, anything over and above that tantamount to an excessive recovery.

Goods concealed and not declared in a bill of entry can only be confiscated

The Delhi CESTAT held¹⁶ that only goods which have been concealed and not declared in a bill of entry can be confiscated and not the entire import consignment.

The exemption benefit from payment of duty, granted under SAFTA¹⁷, cannot be denied on the entire quantity of goods, when the bulk quantity of imported goods is covered by the SAFTA certificate.

Notice pay recovery not liable to service tax

The Madras High Court held¹⁸ that recovery of notice pay, in lieu of sudden termination of employment does not give rise to rendition of any service either by the employer or by the employee.

In case of premature termination of contract of employment, the employer does not tolerate any act of the employee but merely permits sudden exit upon being compensated by the employee. Thus, there is no service and accordingly no tax is payable.

¹⁰ Appellate Authority for Advance Ruling

¹¹ Authority for Advance Ruling

¹² Sanghvi Movers Limited [AAAR/08/2019(AR)]

¹³ Order No. 26/AAR/2019

¹⁴ Goa Industrial Development Corporation [GOA/GAAR/01 of 2019-20/1875]

¹⁵ H. M. Leisure [WP. 22281 (w) of 2019]

¹⁶ Bishal Export [Customs Appeal no. 77302 of 2019]

¹⁷ South Asia Free Trade Agreement

¹⁸ GE T&D India Limited [W.P. No. 35728 to 35734 of 2016 and WMP. No. 30704 to 30710 of 2016]

KPMG in India contacts:

Hitesh D. Gajaria
Partner and Co-Head
Tax
T: +91 22 3090 2110
E: hgajaria@kpmg.com

Rajeev Dimri
Partner and Co-Head
Tax
T: +91 124 307 4077
E: rajeevdimri@kpmg.com

home.kpmg/in



Follow us on:

home.kpmg/in/socialmedia



The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

© 2020 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.

The KPMG name and logo are registered trademarks or trademarks of KPMG International.

This document is meant for e-communication only.