MOHINDER PURI & CO.
CHARTERED ACCOUNTANTS

Corporate Update

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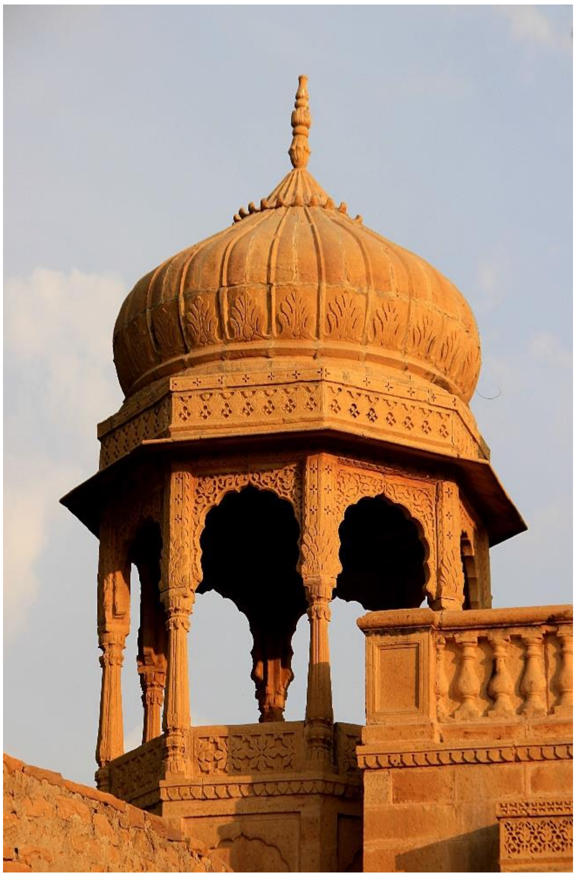

FOREWORD

Dear Reader,

The Annual Union Budget which will be presented by the Finance Minister on February 1, 2020 is now eagerly awaited.

As the country is grappling with an economic slowdown, it is expected that various measures would be announced to give the much-needed push to the Indian economy.

The Government of India had slashed the tax rates for domestic companies in the later part of 2019. It is now being speculated that Government will announce further changes to boost investment, especially in the Infrastructure sector. Changes are also expected in the personal tax front, especially considering the need to provide impetus in personal investment and consumption. Such measures could include tweaking of income tax slabs, enhancing tax saving investment limits etc.

Facing a declining trend in GST collections, the Government has now tweaked input tax credit rules. In terms of such amendment, the amount of claimable input tax credit in respect of which, vendors/ suppliers have not uploaded requisite details on the GST portal, shall now be capped at 10%.

The tax department is showing aggressive approach in collection of taxes by early fixation and disposal of tax assessments and appeals, thus requiring taxpayers to prepare well in advance for tax assessments and other proceedings.

C.S. Mathur
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International Taxation

AAR rules that revenue from offshore supply of equipment is not liable to tax in India

Nippon Steel Engineering Co. Ltd [TS-634-AAR-2019]

The Authority for Advance Ruling, Delhi in the case of Nippon Steel Engineering Co. Ltd ("the assessee") ruled that receipts from off-shore supply of equipment are not liable to tax in India under the provisions of the Act and the DTAA between India and Japan.

On facts, the assessee is incorporated in Japan and is engaged in the business of steel and environmental plants. The assessee entered into separate contracts with JSW Project Ltd. (JSW) for offshore supply of equipment, drawings, off-shore training and supervision services for Coke Dry Quenching Units.

The assessee sought a ruling from the AAR on taxability of receipts from offshore supply of equipments to JSW.

Before the AAR, the assessee contended that title and risk in goods passed to JSW outside India and consideration was also received outside India. No business operations were carried out in India in relation to supply of goods. As such, receipts from off-shore supply of equipment were not liable to tax in India.

However, the Revenue argued that all these contracts are related and offshore supply was a part of composite supply linked to the supervisory Permanent Establishment (PE) of the assessee in India and hence it was liable to tax in India. The Revenue further contended that employees of assessee, who visited India several times for site survey, inspection, negotiation, signing of contracts, constituted Dependent Agent PE (DAPE) and Fixed Place PE of assessee in India. The Revenue also alleged that the assessee had artificially loaded the revenue from onshore services on to the revenue from offshore supply contract, while relying on the judgment of the Madras High Court in the case of Ansaldo Energia SPA. It also argued that supervisory PE was also involved in off-shore supply contract for equipment.

The AAR observed as under:

- the transfer of title to goods was on FOB basis. JSW was stated as consignee of goods in the Bill of Lading. JSW was responsible for marine insurance and carriage of goods from port of shipment to Indian port. The consideration for supply of goods was received outside India.

- the contract price for each contract was specifically mentioned in the Letter of Intent (LOI) issued by JSW before signing of contracts.

- the condition that the assessee shall provide the performance guarantee was in the nature of warranty provision and it could not be deemed that the transfer of title of the property has taken place in India on satisfactory performance guarantee test.

- the Revenue could not produce any evidence for constitution of fixed place PE or for its allegation that supervisory PE had a role in offshore supply of the equipment.

In view the above and the decision of the Apex Court in the case of Ishikawajima-Harima Heavy Industries Ltd [TS-30-SC-2007], the AAR ruled that no income arising from offshore supply of equipments could be held to be chargeable to tax in India.

The AAR stated that the decision of Madras High Court in the case of Ansaldo Energia SPA (310 ITR 239), as relied upon by the Revenue, was distinguishable on facts.

The AAR also rejected reliance placed by the Revenue on the rulings in the case of Roxar Maximum Reservoir Performance WLL (21 taxmann.com 128) and Alstom Transport SA (22 taxmann.com 304) as in both these cases installation work was also carried out by the applicants, however in the given case, installation was the responsibility of JSW.

As regards fixed place PE, the AAR ruled that the assessee did not have any fixed place of business through which business was wholly or partly carried on and the business did not commence at the bidding stage or before award of contract. The AAR further held that the employees of the assessee who had signed the contracts could not be held as a dependent agent of the assessee. The AAR also observed that supervisory PE commenced after supply of equipments and there was no evidence to establish its role in offshore supply of equipments.

Accordingly, the AAR concluded that revenue from offshore supply of equipments by the assessee to JSW was not liable to tax in India.

Tax Tribunal holds Cyprus based entity as beneficial owner of interest income, grants treaty benefit

Golden Bella Holdings Ltd [TS-523-ITAT-2019(Mum)]

Recently, the Hon'ble Tax Tribunal, Mumbai bench, in the case of Golden Bella Holdings Ltd ("the assessee") held that the assessee was the beneficial owner of interest income on Compulsorily Convertible Debentures (CCDs) of an Indian company and the same were taxable at the rate of 10% as per Article 11 of India-Cyprus tax treaty.

On facts, the assessee is an investment holding company based in Cyprus and a 100% subsidiary of M/s Green World Development Ltd (GWDL) based in Mauritius. The assessee was issued a Tax Residency Certificate by the tax authorities in Cyprus. The assessee invested in CCDs of an Indian company which was 99.5% subsidiary of GWDL and interest income on these CCDs was offered to tax at 10% in accordance with the provisions of Article 11 of India-Cyprus tax treaty. As per Article 11 of the treaty, interest income is taxable at the rate 10% if the recipient is the beneficial owner of such interest.

The AO observed that GWDL remitted funds to the assessee which were further invested by the assessee in the Indian company and considered such investment as mere back-to-back loan. The AO alleged that the assessee was mere conduit for passage of funds and could not be regarded as beneficial owner of interest income. The AO thus denied the benefit of India-Cyprus tax treaty and taxed the interest income at 40%.

On appeal, the Tribunal observed as under:

1. The mere fact that the investment was funded using interest-free shareholder loan and share capital did not affect the assessee's status as the "beneficial owner" of interest income, as the interest income was the sole property of the assessee.

2. The assessee bore foreign exchange risk and counter party risk on interest payments arising on the CCDs.

3. The AO had failed to prove that (i) the assessee did not have exclusive control over interest income received, (ii) the assessee was required to seek approval from GWDL to invest (iii) the assessee was not free to utilize the interest income received at its sole and absolute discretion, unconstrained by any contractual, legal, or economic arrangements with any other third party.

The Tribunal relied on Para 10.2 of the OECD Commentary (2017) on Article 11 (Interest) of the 'Model Tax Convention' wherein it is stated that where the recipient of interest does have the right to use and enjoy the interest unconstrained by a contractual or legal obligation to pass on the payment received to another person, the recipient is the 'beneficial owner' of that interest. Accordingly, the Tribunal held that the transaction between the assessee and Indian company could not be considered a mere back-to-back transaction lacking economic substance.

In view of the aforesaid, it was concluded that the assessee was correct in offering interest income to tax at 10%.

Indian sole distributor does not constitute PE of foreign company in India on sale of fully built-up cars on principal to principal basis

Audi AG [TS-548-ITAT-2019(Mum)]

The Hon'ble Tax Tribunal, Mumbai bench, in the case of Audi AG ('the assessee') held that a sole distributor of the assessee in India did not constitute PE under Article 5 of India-Germany tax treaty.

The assessee is a tax resident of Germany and engaged in the manufacture of cars. The assessee exports cars, parts, tools and accessories to India.

The assessee had appointed its Indian group company, Volkswagen Group Sales India Pvt. Ltd. (VW India) as sole distributor of Audi brand cars in India. The assessee also sold part/ accessories to Skoda India, pursuant to which Skoda India manufactured/assembled Audi Brand Cars in India. VW India purchased fully built-up cars from assessee and Skoda India and sold the same to the dealers/distributor on principal to principal basis.

The AO observed that only source of income of VW India was from Audi business and held that VW India constituted business connection under the Act and fixed place PE and Dependent Agent PE of the assessee in India under Article 5(1) and 5(5) the tax treaty. The AO attributed 35% of profits from sale of cars to India. The DRP also upheld the order of the AO.

On appeal, the Tribunal observed that the activities of manufacturing of car was completed by the assessee outside India and constituted a separate and independent activity. The assessee sold the cars to VW India on principle to principle basis and thereafter, VW India sold them on principle to principle basis to the dealers. VW India had no authority to conclude contract on behalf of the assessee. The sale was concluded outside India and the payment was also received by assessee outside India. The risk/title to goods passed outside India. Customs clearance and import duty payment was made by VW India.

The Tribunal relied on decision in the case of Daimler Chrysler AG (52 SOT 93) wherein despite the fact that the associated entity was performing more activities as compared to activities performed by VW India in the present case, it was held that the associated entity neither created a fixed place PE nor dependent agent PE.

The Tribunal observed that the assessee was not undertaking any definite activity in India to which profit could be attributed. The Tribunal held that VW India was an independent and separate entity and was not selling cars to dealers on behalf of the assessee. The Tribunal concluded that VW India could not be regarded as a PE or business connection of the assessee in India. The Tribunal, thus, held that no part of profit on sales derived by the assessee was liable to be taxed in India.

Union Cabinet approves signing of DTAA and Protocol between India and Chile and Protocol amending Indo-Brazil DTAA

Press Release posted by PIB on November 06, 2019 and November 27, 2019

The protocol amending India-Brazil DTAA has been approved for signing by Union Cabinet on November 06, 2019. Further, the Union Cabinet, on November 27, 2019, also approved signing of the DTAA and Protocol between India and Chile for elimination of double taxation and prevention of fiscal evasion and avoidance with respect to taxes on income. The amended Indo-Brazil DTAA and the new treaty between India and Chile would implement minimum standards as well as other recommendations of G-20 OECD Base Erosion Profit Shifting (BEPS) Project including Principal Purpose Test, general anti-abuse provision, simplified limitation of benefits clause, etc.

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Transfer Pricing

High Court dismissed revenue's appeal – adjustment for quality allowed under CUP method

Merck Ltd [TS-973-HC-2019(BOM)-TP]

In a recent decision, Hon'ble High Court of Bombay, upheld the decision of the Tribunal, allowing adjustment to the comparable prices on account of product quality under Comparable Uncontrolled Price ('CUP') Method.

During the year under consideration, Assessee imported an active pharmaceutical ingredient ('API') from its AE in Switzerland and applied Transactional Net Margin Method (TNMM) as most appropriate method ('MAM') to benchmark the said transaction. The Transfer Pricing Officer ('TPO') held that CUP method is the MAM to benchmark the transaction of generic API. He collected information by issuing notice under section 133(6) and based on such information made adjustment under CUP method. Such adjustments were also upheld by Dispute Resolution Panel.

Aggrieved by the order, the Assessee filed an appeal before the Tribunal, wherein the Assessee explained that the products imported were manufactured in a German plant where quality control requirements are much more stringent than in India, and as such the quality of the product is physically superior, as evidenced by the independent laboratory test. In view of the same, the Assessee contended that adjustment on account quality should be provided to arrive at comparable prices.

The Tribunal accepted the contention of the Assessee and held that in view of the provisions of Rule 10B(1)(a)(ii), which require that the price of the comparable uncontrolled transaction should be adjusted to account for differences, which could materially affect the price in the open market. Therefore, adjustment on account of quality should be provided to the Assessee. Relying on the TPO order for the subsequent year wherein adjustment of 10% was allowed in respect of quality, the Tribunal allowed 10% quality adjustment.

Before the High Court, the tax authorities, amongst other issues, disputed the allowance of quality adjustment allowed by the Tribunal. The same which was dismissed by the High Court.

CBDT Notification dated September 30, 2019 in relation to amendments in provisions of Rule 10CB

[Notification no. 76/2019/F.No.370142/12/ 2017-TPL dated 30.09.2019]

Rule 10CB relates to computation of interest income pursuant to secondary adjustments made in terms of provisions of Section 92CE of the Income Tax Act. The amendment provides clarifications regarding time limit of 90 days for repatriation of "excess money or part thereof" outstanding as a result of secondary adjustment in the following two cases:

a) In case where primary adjustment is determined by Advance Pricing Agreement ('APA'), time limit shall be on or before 90 days:-

- from the date of filing of return under section 139(1) of the Income-tax Act, if the APA has been entered into on/ before the due date of filing of return for the relevant previous year,
- from the end of the month in which the APA has been entered into if the said agreement has been entered into after the due date of filing of return for the relevant previous year.

b) In case where primary adjustment is arising as a result of resolution of an assessment by way of the Mutual Agreement Procedure ('MAP'), time limit shall be on or before 90 days from the date of giving effect by the AO under rule 44H to the resolution arrived under MAP.

Furthermore, a new sub rule 3 has been inserted to Rule 10CB to provide clarity with respect to the period for computation of interest to be charged on the excess money or part thereof not repatriated within the time limit of ninety days. For this purpose, CBDT has clarified that in case, the excess money or part thereof is not repatriated within 90 days period allowed, interest will be charged from the day when repatriation of money becomes due and not from the day when such 90 days period expire.

Further, in the explanations, clause (B) has been added to provide that for the calculation of value in rupees of the international transaction denominated in foreign currency, telegraphic transfer buying rate of such currency on the last day of the previous year in which such international transaction was undertaken will be considered.

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Goods and Services Tax

E-Invoicing

- GST Council has proposed to introduce the Electronic Invoicing (e-invoicing) system in phased manner from April 2, 2020 on B2B invoices including Export invoices.

- In this regard, council has clarified that a registered person whose aggregate turnover in a financial year ***exceeds one hundred crores***, is required to raise Electronic Invoice.

- In addition, a registered person, whose aggregate turnover in a financial year exceeds ***five hundred crores***, shall be required to mention QR code (Quick Response code) on the Invoices issued to unregistered person.

- E-Invoice would be in standard format so that e-invoice generated by one software/system can be read by any other software/system.

- E-Invoice would not be issued from the Government Portal. Invoice would be issued from the ERP of the Supplier only but would be subsequently validated by Government Portal.

- E-Invoicing is the validation of invoices, generated as per the standard format, by a central system/portal called the Invoice Registration Portal (IRP). The IRP will generate a unique Invoice Reference Number (IRN), followed by digital signing of the invoice and the generation of a QR code. The QR code will contain the vital parameters of the invoice. The validated invoice would be sent back by IRP to the original taxpayer who generated the invoice as well as the recipient of supply.

- E-Invoicing would assist in avoiding duplication of invoices and elimination of fake invoices.

- E-Invoicing would be helpful in generating E-Way bill directly.

Reconciliation of GSTR-2A for availment of Input Tax Credit (ITC)

- Central Board of Indirect Tax and Customs vide Notification No 49/2019-Central Tax, Dated October 9, 2019, has placed a cap on availment of ITC while filing GSTR-3B by inserting Rule 36(4) in the CGST Rules, 2017. As per such notification, taxpayer could avail maximum ITC upto eligible ITC reflecting in the GSTR-2A plus 20%.

- Vide Notification No. 75/2019, dated December 26, 2019, effective from January 1, 2020, limit of 20% has been reduced to 10% i.e. Taxpayer can avail maximum ITC upto eligible ITC reflecting in the GSTR-2A plus 10%.

- The Restriction imposed is not Supplier-wise, the available credit is to be computed as per total eligible credit reflecting in GSTR-2A.

- The said limit does not apply in case of Import of goods/services, credit availed under reverse charge mechanism and credit received through ISD (Input Service Distributor).

Restriction on generation of E-Way Bill in case of continuous Non-compliance

- The government has introduced an important change with respect to e-way bill generation with an aim to crack down on GST non-filers and evaders.

- With effect from 2nd December, 2019, the blocking and unblocking of the e-way bill generation facility has been implemented on the e-way bill portal.

- When a taxpayer fails to file it's GST returns (GSTR-3B) for two continuous months, it will be blocked from generating e-way bill. A GSTIN which is blocked cannot be used for generating an e-way bill neither as a consignor nor as consignee. Post filing of pending GST 3B returns for the default period(s), the restriction would be lifted automatically.

- For GSTINs whose e-way bill generation facility is blocked, e-waybill cannot be generated by the taxpayer, by their counterparty (whether as supplier or recipient of the transaction) nor by the transporter for the said taxpayer.

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Corporate Law

Related Party Transactions

Section 188 of the Companies Act, 2013, contains certain regulatory provisions which govern specified related party transactions.

Some of the transactions may relate to the following:

(a) sale, purchase or supply of any goods or materials;
(b) selling or otherwise disposing of, or buying, property of any kind;
(c) leasing of property of any kind;
(d) availing or rendering of any services;
(e) appointment of any agent for purchase or sale of goods, materials, services or property.

Section 188 stipulates that any contract or arrangement with respect to related party transactions would require consent of the Board, to be obtained in a Board meeting, provided the value/ amount of transactions is less than the prescribed limits. And, in case the value/ amount of transactions meets or exceeds the prescribed limits, prior approval of the company by way of shareholders' resolution would be required. These prescribed limits have been laid down in The Companies (Meetings of Board and its Powers) Rules, 2014, for related party transactions, and now, these limits have been rationalised by changes recently introduced by the Government with effect from November 18, 2019.

A comparative table showing the earlier limit and the revised limit has been provided as Appendix A.

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MCA amends Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014

The Ministry of Corporate Affairs (MCA) vide its notification dated January 3, 2020 has amended the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 and they shall be applicable in respect of financial years commencing on or after April 1, 2020.

A. This amendment has increased the threshold limit of paid up capital for mandatory appointment of whole-time company secretary in a private company from the existing limit of Rupees 5 (Five) Crores to Rupees 10 (Ten) Crores.
   Now, all private companies having a paid-up capital of Rs.10 crores or more shall have a whole-time company secretary.

B. Further, this amendment has also extended the applicability of Secretarial Audit to all companies having outstanding loans or borrowings from banks or public financial institutions of one hundred crore rupees or more, by insertion of clause (c) in Rule 9 (1) of the above Rules.

The effect of this amendment is that now every company (including a private company) having outstanding loans or borrowings from banks or public financial institutions of one hundred crore rupees or more is required to have Secretarial Audit done by a company secretary in practice.

Before the above amendment, the Secretarial Audit was applicable only to the following companies-

a) Every public company having a paid-up share capital of fifty crore rupees or more; or

b) Every public company having a turnover of two hundred fifty crore rupees or more.

Thus, effective April 1, 2020, the applicability of secretarial audit has been extended to all companies (including private companies) in case they have outstanding loans or borrowings from banks or public financial institutions of one hundred crore rupees or more.

For the purpose of the above, the paid-up share capital, turnover, or outstanding loans or borrowings, as the case may be, existing on the last date of latest audited financial statements shall be taken into account.

Amendments to Indian Stamp Act notified

In exercise of the powers conferred by Section 11 of the Finance Act, 2019, the amendment made to the Indian Stamp Act, 1899, which was introduced as a part of the Finance Act, 2019, has been notified by the Central Government to be effective from April 1, 2020.

Consequent to the said amendment to the Indian Stamp Act, 1899, the existing Article 62 items (a) and (b) of Schedule I to the Indian Stamp Act, 1899, and entries relating thereto [relating to transfer of shares and debentures] shall stand omitted with effect from April 1, 2020.

The key changes introduced in the rates of stamp duty as a result of the abovementioned amendment were already reported by us in our Corporate Update issue of March, 2019 and are being reproduced as Appendix B for easy reference.

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Important dates to remember

Particulars	Date
Deposit of TDS for the month of January 2020	07.02.2020
Filing of GSTR I for the month of January 2020	11.02.2020
Filing of GSTR 3B for the month of January 2020	20.02.2020

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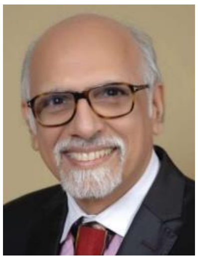

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APPENDIX A

Particulars	Earlier Limit	Revised Limit
Sale, purchase or supply of any goods or materials, directly or through appointment of agent as mentioned u/s (188) (1) (a) & (e)	10 % or more of turnover of the Company or Rs. 100 Crores, whichever is lower	10 % or more of turnover of the Company
Selling or otherwise disposing of or buying property of any kind, directly or through appointment of agent as mentioned u/s (188) (1) (b) & (e)	10 % or more of Net worth of the Company or Rs. 100 Crores, whichever is lower	10 % or more of Net worth of the Company
Leasing of property of any kind as mentioned u/s (188) (1) (c)	10 % or more of Net worth or 10 % or more of turnover of the Company or Rs. 100 Crores, whichever is lower	10% or more of turnover of the Company
Availing or rendering of any services, directly or through appointment of agent as mentioned u/s (188) (1) (d) & (e)	10% or more of the turnover of the Company or Rs. 50 Crores, whichever is lower	10% or more of turnover of the Company

APPENDIX B

Article 27 - Debentures

Rate of Duty		
	After Amendment	**Before Amendment**
In case of Issue of debenture	0.005% of the total market value [Note: market value of traded security is the value at which it is traded in stock exchange; in respect of others, it is the consideration shown in the instrument]	0.05% per year of the face value of debentures, subject to a maximum of 0.25% or Rs.25 lakhs, whichever is lower
In case of Transfer and re-issue of debenture	0.0001% of the consideration shown in the instrument of transfer	½ of the duty payable on conveyance (Art. 23) for a consideration equal to face value of debenture

As a consequence, debentures, whether marketable or otherwise shall attract duty at the above rates.

Article 56A - Security (including shares) Other than Debentures

A new Article 56A inserted after existing Article 56, which provides as under:-

Rate of Duty		
	After Amendment	**Before Amendment**
Issue of security other than debenture	0.005% of the market value [Note: market value of traded security is the value at which it is traded in stock exchange; in respect of others, it is the consideration shown in the instrument]	Charged as per State Schedule; duty was 0.1% in Delhi
Transfer of security other than debenture on delivery basis	0.015% of the consideration shown in the instrument of transfer	0.25% of the value of share
Transfer of security other than debenture on non-delivery basis	0.003% of the consideration shown in the instrument of transfer	