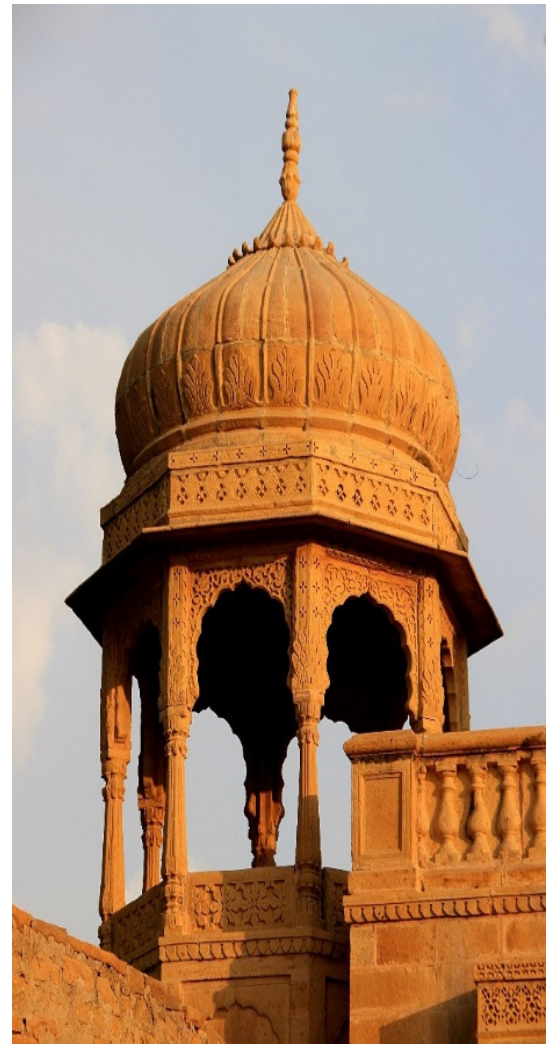


Corporate Update

May | 2020

CONTENTS

International Tax	3
AAR denies Indo-Mauritius tax treaty benefit on capital gains earned by Mauritius company on transfer of Singapore company's shares deriving substantial value from India	3
Domestic Taxation	5
Changes in Income Tax Return Forms for AY 2020-21	5
Revised Form 26AS notified	6
Transfer Pricing	7
Geographical location, unless affecting the market conditions and having bearing on profit margin, is not relevant for comparable selection	7
Safe Harbour rules for AY 2020-21 notified	8
Goods and Services Tax	8
Facility of filling form PMT-09	8
Other Updates/ Facility on GST Portal	8
Allied Laws	9
Recent changes in certain allied laws notified by the Government as part of the Economic Package for revival of Economy	9



FOREWORD



Dear Reader,

The Government of India is now taking steps to gradually lift the lockdown as had been in force. The Unlock-1 announced by the Government removed various restrictions on opening of offices, factories subject to strict following of guidelines issued by the Ministry of Health to control the Virus, which however continues to show increase in number of cases on daily basis. It is expected beginning of the next month more relaxations will follow.

The pace of economic activity is now picking up though it will take few months before normalcy is reached.

The Government administration is operating on partial capacity. The Courts in India are now taking hearings of urgent matters through Video conferencing, which is likely to become new normal for next few months.

In view of the recent border clash between India and China, there is increased scrutiny of the trade with China and investments coming from China. Some of the state governments have put on hold award of contracts to Chinese companies even where the Chinese companies were selected for the same. These changes would promote 'Make in India' policy of the Government and in particular reduce dependence on Chinese goods especially raw-materials for certain key industries.

Considering the difficulties faced in meeting various compliance requirements, the Government has again extended various deadlines, such as deadline for completion of assessments, extension of last date for filing tax return of Financial Year 2018-19, extension of time limit for making tax saving investments etc.

Furthermore, the GST Council has also addressed certain compliance related concerns faced by taxpayers under the GST law on account of the pandemic, such as extension of due dates of certain returns, waiver/ capping of fee etc.

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Partner

International Tax

AAR denies Indo-Mauritius tax treaty benefit on capital gains earned by Mauritius company on transfer of Singapore company's shares deriving substantial value from India

Tiger Global International II Holdings, In re [2020] 116 taxmann.com 878 (AAR - New Delhi)

Recently, the Authority for Advance Rulings ('AAR') rejected the applications filed by Tiger Global International Holdings II and two other applicants, all three tax residents of Mauritius, in respect of capital gains arising on sale of shares of a Singapore company which derived its value substantially from India. The AAR denied benefit of India-Mauritius Double Taxation Avoidance Agreement (Indo-Mauritius tax treaty) holding that the transaction was designed prima facie for the avoidance of tax.

On facts, the applicants were private limited companies incorporated in Mauritius for undertaking investment activities and earning long-term capital appreciation and investment income. These applicants were tax residents of Mauritius. The applicants acquired shares of Flipkart Private Limited ('Flipkart'), a Singapore company on various dates between October 2011 to April 2015. Flipkart had invested into multiple companies in India. The value of shares of Flipkart was derived substantially from assets located in India.

The applicants transferred certain shares of Flipkart to Fit Holdings S.A.R.L., a company incorporated in Luxembourg. These transfers were undertaken as part of a broader transaction involving the majority acquisition of Flipkart by Walmart Inc., USA, from several shareholders, including the applicants.

The applicants filed applications for an advance ruling before the AAR on the question whether gains arising to the

applicants from the sale of Flipkart shares would be chargeable to tax in India under the Income-tax Act read with Indo-Mauritius Tax Treaty.

The Revenue raised objections on the admissibility of the applications as filed before the AAR on various grounds including the ground that the application related to a transaction/ issue, designed prima facie for the avoidance of tax.

On this issue, contentions of the Revenue and the applicants and observations of the AAR have been summarized below:

Ownership Structure and Control

The Revenue contended that the applicants were not acting independently but only as a conduit for the real beneficial owners based out of USA. As per notes to the financial statements, the applicants were held by Tiger Global Management LLC ('TGM, USA'), a USA based investment entity that invested across the world through web of entities based out of low tax jurisdictions in Cayman Islands and Mauritius. The founder member and partner of TGM, USA is Mr. Charles P. Coleman.

The Revenue stated that the ownership structure involved several Limited Partnerships which were flow through entities and General Partners (and not Limited Partners) were involved in the day to day affairs of shareholders of the applicants. The General Partners were ultimately controlled by Mr. Charles P. Coleman. Thus, the real control of the applicant companies did not lie within Mauritius. As per the business plan of the applicants, they were set up for making the investment in India and the funds for making investments were provided by the promoter.

The applicants contended that a transaction could not be held to be designed for prima facie avoidance of tax if there was a business rationale surrounding the transaction. The Board minute extract specifically noted that Mauritius' comprehensive tax treaty network

with various countries (and not just India) facilitated efficient asset management and achieved a competitive return for the Applicant's investors.

The applicants further contended that the applicants were neither sham entities nor conduit companies and the mere fact that the applicants applied for a TRC in order to avail treaty benefits did not mean that a colourable device for tax avoidance was resorted to. The holding structure of the applicants was of no relevance and it must be proven that the transaction itself and not the structure of the entity undertaking the transaction was designed for the avoidance of income tax.

The AAR observed that though the holding-sub subsidiary structure might not be a conclusive proof for tax avoidance, the purpose for which the subsidiaries were set up did indicate the real intention behind the structure. None of the three applicants had made any investment other than in the shares of Flipkart. The AAR, thus, concluded that the applicants were set up for making investment in order to derive benefit under the Indo-Mauritius tax treaty.

Decision Making

The Revenue contended that Mr. Steven Boyd, non-resident USA Director (who was also General Counsel of TGM USA) had attended all the board meetings in which crucial decisions were taken and that the Mauritius Directors were in effect mere spectators or took advice from Mr. Steven Boyd. Mr. Steven Boyd or one of the representatives of TGM USA was always present to advise the board of the applicants.

The applicants argued that the decision to invest into and ultimately sell the shares of Flipkart was taken by the Directors of the applicants in Mauritius after proper discussions and deliberations.

The AAR held that the control and management of applicants did not mean the day-to-day affairs of their business but would mean the head and brain of the companies,

which in the given case was in the USA.

Mr. Charles P. Coleman was controlling the decision of the board of directors of the applicants through the non-resident Director Mr. Steven Boyd who was accountable to him. The head and brain of the companies and consequently their control and management were situated not in Mauritius but rather in the USA.

Financial Control

The Revenue stated that till November 2014, the authority to operate the bank accounts for transactions above USD 250,000 was with Mr. Charles P. Coleman, though he was not director in any of the applicants' companies. The other non-Mauritius based signatories included all senior management personnel of TGM, USA, of which only Mr. Steven Boyd was director in the Applicant companies.

The Revenue further argued that post November 2014, the Applicant's bank signatory group included Mr. Charles P. Coleman and Mr. Anil Castro, COO of TGM, USA. Neither of them was on Board of the applicants. Both were key personnel of TGM, USA and any transactions above USD 250,000 required approval of either of them. Thus, the ultimate control over the funds of the applicants' companies was with TGM personnel based out of the USA. Mr. Charles P. Coleman was also the authorized signatory for the immediate parent companies of the applicants. He was also the sole director of the ultimate holding company. Hence, the funds were controlled by Mr. Charles P. Coleman.

The applicants contended that the mere fact that the board of directors of the applicants had given a limited authorization to certain persons to operate the Applicant's bank account did not ipso facto mean that the applicants did not have control over their funds.

The AAR observed that the applicants had not explained as to why Mr. Charles P. Coleman, who was not based in Mauritius was appointed

to sign the cheques of Mauritius bank account. Considering the fact that Mr. Charles P. Coleman was the authorized signatory for the immediate parent company and ultimate holding company, his appointment as authorized signatory of bank cheques above a limit could not be considered as a mere coincidence. The AAR concluded that the real control over the decision of any transaction over USD 2,50,000 was exercised by Mr. Charles P. Coleman only.

Beneficial Ownership

The Revenue contended that one of the applicants had mentioned that its beneficial owner was Mr. Charles P. Coleman in documents filed with Mauritius Financial Services Commission for obtaining Category 1 Global Business License. The decisions of the applicants were taken by persons located in the USA. The Applicant companies were see-through entities, which were designed prima facie for avoidance of tax. The beneficial ownership of Flipkart shares was with Mr. Charles P. Coleman of TGM USA. Had TGM USA directly held the shares in Flipkart, it would have been liable to pay tax on gain on sale of those shares as per the provisions of Indo-US DTAA.

The applicants contended that they beneficially held shares of Flipkart. The mere fact that certain disclosures were made and maintained for Mauritius corporate law purposes did not ipso facto mean that the legal owner did not enjoy the benefits of the shares in its independent capacity for income tax purposes, unless clear facts are brought on record to demonstrate otherwise.

The AAR held that Mr. Charles P. Coleman was the beneficial owner of the entire group structure. The applicant companies were only "see-through entities" to avail the benefits of Indo-Mauritius DTAA. The Supreme Court in the case of Vodafone International Holding BV (341 ITR 1) held that Tax Treaty and Circular No. 789 dated April 13, 2000 would not preclude the Income Tax Department from denying the tax treaty benefits in suitable

cases.

The AAR stated that in the present case, the capital gains had arisen on alienation of shares of a Singapore company and not an Indian company. The object of Indo-Mauritius Tax Treaty (even after amendment) is to grant exemption in respect of shares of an Indian Company only and exemption on transfer of shares of the company not resident in India, was never intended by the legislation.

Accordingly, the AAR held that the entire arrangement made by the applicants was with an intention to claim benefit under Indo-Mauritius tax treaty, which was not intended by the lawmakers, and such an arrangement was nothing but an arrangement for avoidance of tax in India. Therefore, the applications as filed by the applicants were not admitted by the AAR in terms of powers vested in it by the Act.



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Domestic Taxation

Changes in Income Tax Return Forms for AY 2020-21

[Notification No. 31/2020/F. No. 370142/32/2019-TPL dated May 29, 2020]

The Central Board of Direct Taxes ('CBDT') has recently re-notified the Income Tax Return ('ITR') forms for Assessment Year 2020-21, due to COVID-19 lockdown necessitating extension of several statutory due dates and other measures required to sustain and revive the economy. The present notification has notified all the forms for filing return, viz. ITR 1

to ITR 7. The CBDT had earlier notified ITR 1 and 4 only vide notification dated January 3, 2020. Such forms have also been modified by the present notification.

Primarily, the major change is due to extension of the time limit for making investments by 3 months for financial year 2019-20. A new Schedule DI has been inserted in ITR 1 to 6 to furnish details of investments, deposits, payments etc. during the extended period, i.e. until June 30, 2020 for claiming deduction under Chapter VI-A, section 10AA and sections 54 to 54GB.

Further, Rule 12 has been amended to confirm the position that persons liable to file return under seventh proviso to section 139(1) can use simplified Form ITR 1 and ITR 4 (subject to fulfilment of relevant criteria prescribed under the Rules) for filing the return. The CBDT vide notification dated January 3, 2020 had earlier made an amendment to Rule 12 restricting every person whose income is below the exemption limit but had entered into transactions covered under the seventh proviso to section 139(1) (i.e. had deposited more than Rs. 1 crore in current account or incurred more than 2 lakhs and 1 lakh on foreign travel and towards payment of electricity bill, respectively) from using ITR 1 and ITR 4. The recent amendment has however withdrawn the earlier amendment.

A detailed note on the applicability of the ITR Forms and key changes shall follow.

Revised Form 26AS notified

[Notification No. G.S.R. 329(E) [NO. 30/2020/F. NO. 370142/20/2020-TPL], Dated May 28, 2020]

The Finance Act, 2020 inserted Section 285BB to make available to taxpayers advanced information (such as sale/ purchase of immovable property, share transactions, etc.) which are being captured by the authorities, to ensure better compliance. Consequently, section 203AA has been

omitted with effect from June 1, 2020. In order to give effect to the same, the CBDT vide Notification dated May 28, 2020 has omitted Rule 31AB (under which power was granted to tax authorities to provide annual statement of tax deducted or collected or paid in Form 26AS to assessee) and inserted Rule 114-I in Income Tax Rules to notify new Form 26AS ('Annual Information Statement') as per Section 285BB of the Income Tax Act with effect from June 1, 2020, to share wide spectrum of information with taxpayers.

The Principal Director General of Income-tax (Systems) or the Director General of Income-tax (Systems) or any person authorised by him shall upload in the registered account of the taxpayer an annual information statement in Form 26AS within three months from the end of the month in which the information is received by him.

New Form 26AS will include following information:

1. Information relating to tax deducted or collected at source
2. Information relating to specified financial transaction
3. Information relating to payment of taxes
4. Information relating to demand and refund
5. Information relating to pending proceedings
6. Information relating to completed proceedings
7. Any other information in relation to sub-rule (2) of Rule 114-I which may include information received from any officer, authority or body performing any function under any law or the information received under an agreement referred to in Section 90 or Section 90A of the Income Tax Act or the information received from any other person to the

extent as it may deem fit in the interest of the revenue.

This form will also have mobile number, email ID and aadhaar number of the taxpayer.

As such, new Form 26AS will now be a complete profile of the taxpayer for that particular year as against earlier Form 26AS which provided the information about taxes paid by way of TDS/ TCS or self-assessment tax only.



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Transfer Pricing

Geographical location, unless affecting the market conditions and having bearing on profit margin, is not relevant for comparable selection

*Mott MacDonald Pvt Ltd (Successor to Mott MacDonald Consultants India Private Ltd)
[TS-291-ITAT-2020(Mum)-TP]*

In a recent decision, the Hon'ble ITAT, Mumbai Bench, disregarded TPO's reasoning of taking geographical location differences as a basis for rejecting cost plus method ('CPM') for benchmarking international transaction of provision of engineering consultancy services to its AE ('Associated Enterprise').

On the facts of the case, the assessee is engaged in the business of, inter alia, providing engineering consultancy services relating to oil and gas sector. The assessee provided such consultancy services to its AE and applied CPM to benchmark such transaction by comparing the margin earned

from non-AE transaction. The TPO rejected the method applied by the assessee for the following reasons: a) volume difference between AE and non-AE transactions, b) difference in functions performed, assets deployed and risks undertaken ('FAR'), c) geographical difference, as the services to AE were for projects outside India whereas some projects of non-AEs were in India. The TPO applied Transaction Net Margin Method ('TNMM') as the most appropriate method ('MAM') and proposed transfer pricing adjustment.

The assessee raised objections before the Dispute Resolution Panel ('DRP') wherein the rejection of CPM was upheld. The assessee filed an appeal before the ITAT.

The ITAT held that the TPO needs to demonstrate not only that the method selected by the assessee is not MAM but also that the proposed method is better for ascertaining the arm's length price. Further, with respect to the reasons for rejection of non-AE comparable data by TPO it held that: a) the difference in volume of transactions was not material to affect the degree of comparability, b) the TPO needs to demonstrate the differences in FAR rather than making a general statement regarding such differences, and c) unless geographical location is one of the factors affecting the market conditions, thereby having a bearing on profit margin, the location of the client at one place or another is not relevant. Also, the market for consultancy services as against the market for physical products is unlikely to be restricted to national boundaries, as such, the location would not matter. Accordingly, appeal of the revenue was dismissed.

Further, on account of the procedural delay of pronouncing the order after 90 days {breach of Rule 34(5)}, the ITAT considers period of lockdown due to COVID-19 not to be treated as ordinary period and hence, the period of lockdown was excluded for the purpose of time limits set out in Rule 34(5).

Safe Harbour rules for AY 2020-21 notified

CBDT vide notification no. 25/2020 dated May 20, 2020 notified Safe Harbour Rules for AY 2020-21. As per the notification, the rates applicable from AY 2017-18 to 2019-20 as per the Safe Harbour Rule will continue to apply for AY 2020-21.



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Goods and Services Tax

Facility of filling form PMT-09

The Central Board of Indirect Taxes and Customs ('CBIC') has recently enabled filling of **Form PMT-09** on GST Portal. Said facility has been announced in 35th GST Council Meeting held on June 21, 2019 and subsequently CBIC vide Notification No. 31/2019 (Central Tax) dated June 28, 2019 also notified the same. However, it has been made live on GST portal on April 21, 2020.

It enables a taxpayer to make intra-head or inter-head transfer of amount available in Electronic Cash Ledger.

Form GST PMT-09 provides flexibility to taxpayers to make multiple transfers from more than one Major/ Minor head to another Major/ Minor head if the amount is available in the Electronic Cash Ledger.

- Major head are Integrated tax, Central tax, State/UT Tax and Cess.
- Minor head are Tax, Interest, Penalty, Fee and others.

To file Form GST PMT-09, taxpayers are required to login on GST portal with valid credentials and navigate to **Services > Ledgers > Electronic Cash Ledger > File GST PMT-09 For Transfer of Amount** option.

A detailed FAQ and User Manual to guide taxpayer on Form PMT-09 has been provided on the GST Portal under the 'Help' section.

Sample Form PMT-09 is attached along with this publication.

Other Updates/ Facility on GST Portal

The government has vide *Notification No. 39/2020 Central Tax*, dated May 5, 2020, enabled the facility for registration of IRPs/ RPs on GST portal. Guidelines/ clarifications have also been issued for ease of registration process.

In order to safeguard taxpayers from fake messages on GST refund, the government has advised taxpayers to remain cautious of such messages and in this regard, has issued DO's and DON'Ts on GST portal.



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Allied Laws

Recent changes in certain allied laws notified by the Government as part of the Economic Package for revival of Economy

Following is the gist of such changes:

Reduction in Provident Fund ('PF') Contribution

The Ministry of Labour and Employment has issued Gazette Notification No. S.O. 1513(E) dated May 18, 2020 to reduce the statutory rates of PF contributions, of both employers and employees from the existing 12% to 10%, for the months of May, June and July, 2020. This is applicable to all establishments covered by the Employees Provident Fund and Miscellaneous Provisions Act, 1952 ('EPF Act'), other than the Central and State Public Sector Enterprises or any other establishment owned or controlled by or under control of the Central Government or State Government.

A detailed FAQs issued by Employees Provident Fund Organization ('EPFO') on the above subject mentions under Question 12 that *the reduced rate of contribution (10%) is minimum rate of contribution during period of the package. The employer, employee or both can contribute at higher rate also.* It is to be noted that under Section 6 of the EPF Act, an employee may contribute at a rate higher than the statutory rate. However, this is subject to the condition that the employer shall not be under an obligation to contribute at an equal rate as that of the employee.

Keeping in view that the statutory PF Contribution rate for the months of May, June and July, 2020 is 10%, in case the employee chooses to contribute above 10% as mentioned in the FAQs, the employer may restrict his contribution to 10% during the said period.

Further, as per a Press Brief dated May 19, 2020 issued by EPFO and the above-

mentioned FAQs, in case of establishments following Cost-to-Company ('CTC') Model, the employers will have to compensate their employees by paying an amount equivalent to 2% of the contribution if they are opting for a reduced contribution of 10% instead of 12%.

Revision in Criteria for Classification of MSMEs

The Ministry of Micro, Small and Medium Enterprises vide Gazette Notification No. S.O. 1702(E) dated June 1, 2020 has notified revision in criteria for classification of Micro, Small and Medium Enterprises ('MSME') covered by the Micro, Small and Medium Enterprises Development Act, 2006 ('MSMED Act'). The said notification which is stated to come into effect from July 1, 2020, has been issued by the Government under Section 7(1) read with Section 7(9) of the MSMED Act, which gives the government the power to classify any class or classes of enterprises inter alia on the basis of their investment and turnover.

Presently, MSMEs are classified on the basis of their sectors (manufacturing and service) and their investment in Plant and Machinery/ Equipment. With effect from July 1, 2020, classification on the basis of manufacturing and service sector shall be done away with and MSMEs shall be classified only on the basis of their investment and turnover.

A table showing the existing and proposed classification of MSMEs is given in **Annexure A**.

Temporary Suspension of the Insolvency and Bankruptcy Code, 2016

The Finance Minister on May 17, 2020, had announced temporary suspension of insolvency resolution proceedings under the Insolvency and Bankruptcy Code, 2016 ('Code') for a period of one year depending on the pandemic Covid-19 situation. An ordinance dated June 5, 2020 has been issued in this respect.

As per the said ordinance, no application for initiation of corporate insolvency resolution process ('CIRP') under Section 7, 9 and 10 of the Code shall be filed for any default arising on or after March 25, 2020 for a period of six months or such further period, not exceeding one year from such date, as may be notified. Sections 7 and 9 of the Code provide for initiation of CIRP by financial and operational creditors of the company respectively and section 10 of the Code provides for initiation of CIRP of the company by the company itself.

The Finance Minister has also indicated that there would be separate regulations framed which would be applicable to MSMEs. However, the said ordinance does not contain any such proposal.



Kunal Juneja
Of counsel

Important dates to remember

Particulars	Date
Deposit of TDS for the month of June 2020	July 07, 2020
Filing of GSTR I for the month of June 2020	August 05, 2020
Filing of GSTR 3B for the month of June 2020 (turnover more than INR 5 Crore)	July 20, 2020

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ANNEXURE – A

	Existing Basis for Classification		New Basis for Classification (w.e.f. 1 st July, 2020)
	Manufacturing Sector	Service Sector	
Micro Enterprise	Investment in plant and machinery upto INR 25 Lakhs	Investment in equipment upto INR 10 Lakhs	Investment in plant and machinery/ equipment upto INR 1 Crore and turnover upto INR 5 Crores
Small Enterprise	Investment in plant and machinery between INR 25 Lakhs and INR 5 Crores	Investment in equipment between INR 10 Lakhs and INR 2 Crores	Investment in plant and machinery/ equipment upto INR 10 Crores and turnover upto INR 50 Crores
Medium Enterprise	Investment in plant and machinery between INR 5 Crores and INR 10 Crores	Investment in equipment between INR 2 Crores and INR 5 Crores	Investment in plant and machinery/ equipment upto INR 50 Crores and turnover upto INR 250 Crores