MOHINDER PURI & CO.
CHARTERED ACCOUNTANTS

Corporate Update

July | 2021

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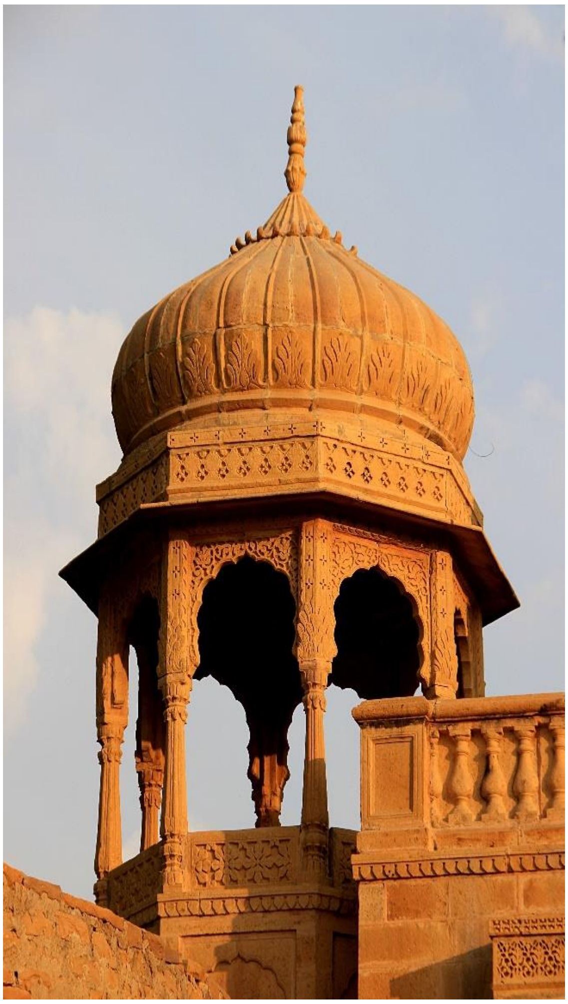

FOREWORD

Dear Reader,

The Government of India took a very bold step to withdraw one of the most controversial retrospective amendments brought about in 2012 to nullify a favourable judgement of a Supreme Court on taxability of indirect transfer of majority interest in an Indian company by Vodafone. The retrospective amendment resulted in taxation in India of capital gain income arising to foreign companies from sale of shares of entities situated outside India. This withdrawal it is hoped will pave the way for settlement of tax disputes on this issue raised on various forums including international arbitration proceedings initiated by various foreign companies.

The Indian economy is now picking up after having suffered badly due to second wave of COVID-19 in India. There is considerable improvement in the pandemic situation in the country.

C.S. Mathur
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DIRECT TAX

International Taxation

Adjudication of Tribunal in respect of exchange fluctuation and customs duty adjustment under transfer pricing

In a recent judgement, in the case of Hyundai Construction Equipment India Pvt Ltd [TS-262-ITAT-2021(PUN)-TP], the Tax Tribunal, Pune Bench adjudicated, amongst other issues, in respect of foreign exchange fluctuation and excess customs duty adjustment under transfer pricing.

On the facts of the case, the assessee is engaged in the business of manufacturing and distribution of heavy earthmoving equipments and parts. For the relevant year, it entered into various international transactions which were accepted to be at arm's length by the Transfer Pricing Officer (TPO) except for the transactions under Manufacturing Activity segment. The assessee had applied TNMM as the most appropriate method for benchmarking such transactions and offered voluntary TP adjustment. However, the TPO selected additional comparable and made transfer pricing adjustment.

Aggrieved, the assessee raised objections before the Dispute Resolution Panel (DRP). The DRP allowed the appeal partially. Subsequently, the assessee filed an appeal before the Tribunal.

Before the Tribunal, the assessee claimed for allowance of adjustment towards foreign exchange fluctuation contending that there was an extraordinary movement in the rate of US dollar against Indian rupees during the year under consideration vis-à-vis the preceding year. The Tribunal did not find any rationale in comparing the exchange rate of previous year and also said that the exchange rate impacted the comparable in the same way as assessee. Further, observed that the assessee has treated foreign exchange as non-operating item for comparability analysis, as such, any further adjustment is not warranted.

The assessee also sought adjustment on account of excess customs duty on imports paid by it owing to higher imports vis-à-vis comparables. The Tribunal stated that since there is no difference in the customs duty rates paid by the assessee and its comparables no reduction in the profit margin can be allowed on mere difference of the import percentage.

The next ground raised was on inclusion of two more comparables by the TPO i.e, Bharat Earth Movers Private Limited (BEML) and JCB India Limited. The assessee objected to the inclusion of BEML stating that the same was functionally different and also it was a government company with fixed customer base, citing ThyssenKrupp Industries India Private Limited vs. Addl. CIT [(ITA No.6460/Mum/2012)]. The Tribunal relying on the decision passed by the coordinated bench in the assessee's case itself for AY 2010-11 allowed such exclusion.

For JCB India Limited the assessee contended on grounds of functional dissimilarity stating that same cannot be applied for benchmarking the manufacturing segment as the comparable is engaged in the business of Manufacturing, Trading & Design services and its accounts were maintained on a consolidated basis. However, following its decision of earlier year in assessee's case, Tribunal rejected the claim observing the proportion of trading activities to be miniscule vis-à-vis the manufacturing segment.

Further additional grounds were raised on account of improper computation of working capital adjustment which was remanded back to the TPO for recomputing by taking correct figures. In respect of ground that transfer pricing adjustment should be made at entity level or restricting to the AE, the Tribunal placing reliance upon Hon'ble High court judgement in case of CIT Vs. Phoenix

Mecano (India) Pvt. Ltd. [(2019) 414 ITR 704 (Bom.),] held that transfer pricing adjustment made at entity level should be restricted to the international transactions only.

In view of the aforesaid, the matter was restored to the file of the TPO for recomputing ALP as per the directions of Tribunal.

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AO is not empowered to drop the disallowances/ additions proposed in the draft assessment order, while finalising the order, when no reference is made to the Dispute Resolution Panel by the assessee

In a recent decision in case of Galaxy Surfactants Limited Vs Assistant commissioner of Income Tax [TS-383-ITAT-2021(Mum)], the Income Tax Appellate Tribunal ('ITAT') Mumbai Bench held that the AO cannot revisit his conclusions made in the draft order, at the stage of passing the final order under section 144C(3).

In the instant case, the Transfer Pricing Officer proposed an addition of Rs. 4,04,566. Besides the above, the Assessing Officer ('AO') also proposed addition/ disallowance aggregating to Rs. 15,31,56,037 on account of various disallowances in the draft assessment order.

The AO served the draft assessment order on the assessee. The assessee informed the AO that no objections are filed before the Dispute Resolution Panel ('DRP').

While passing the final assessment order under section 143(3) r.w.s.144C(3), the AO suo motu dropped most of the disallowances made in the draft assessment order.

The Principal Commissioner of Income Tax ('PCIT') invoked his revisionary powers under section 263 and directed the AO to pass a fresh assessment order, holding that the review of draft order was erroneous as law did not empower the AO to review the draft order in the absence of DRP's directions. Further, the draft order should have been the final order u/s 144C(3) and reducing the disallowances has made the order prejudicial to the interest of the revenue.

Aggrieved, the assessee filed an appeal before ITAT. The assessee contended that as per section 144C(3), AO is supposed to complete the assessment "on the basis of" the draft order which gives AO the liberty to finalise the assessment as long as the income is not enhanced i.e. by making the additions or disallowances which are not part of the draft assessment order. The assessee further argued that most of the issues are decided in favour of the assessee in the earlier years by the Tribunal.

The ITAT rejecting the assessee's submission stated that once the AO has prepared a draft assessment order, and served the same upon the assessee, it is not open to him to revisit the draft assessment order so prepared except to give effect to the directions of the DRP. Once an AO prepares a draft assessment order, that is the end of his domain of powers so far as framing of assessment is concerned- unless there are any directions from the DRP which are required to be implemented by the AO.

Accepting the line of reasoning adopted by the PCIT, the ITAT stated that when a draft order is finalized by the AO, no further hearings take place on the issues raised therein, no directions are received by the AO to make any variations from the stand so taken, there is no occasion for making any variations from such a draft assessment order. When the AO does not have an obligation to hear the assessee to review the draft orders or any specific powers enabling such a review, it is a natural corollary that the AO does not have the discretion to review the draft order. The change of heart on the part of the AO, howsoever well-meaning and justified as it may be, is not permissible at the stage of passing the final assessment order. It thus held that an AO cannot revisit his conclusions at the stage of passing the final order under section 144C(3).

As regards the grievance raised by the assessee to the effect that some of the proposed disallowances, on merits, are covered in favour of the assessee, the ITAT held that these issues cannot be raised at this stage.

As such, the appeal was dismissed.

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Government nullifies retrospective effect of capital gains tax on indirect transfer of Indian assets

The Government of India took a bold step by introducing the Taxation Laws (Amendment) Bill, 2021 to end the retrospective effect of the capital gains tax on indirect transfer, which was brought into the Income tax statute by the Finance Act, 2012 and which had led to filing of several court cases by certain foreign companies including international arbitration proceedings. In terms of such amendment, transfers made prior to May 28, 2012 shall not be assessed to tax under the indirect transfer regime.

In 2012, the Government of India had introduced one of the most controversial amendments in the history of Indian tax legislation. Earlier that year, the Supreme Court of India, in a landmark decision in the case of Vodafone International Holdings BV [2012] 19 taxmann.com 217 (SC), held that capital gains arising from indirect transfer of assets located in India by virtue of sale of shares of a foreign company would not be liable to tax in India.

However, by the Finance Act, 2012, the Government of India, neutralized the said decision of the Supreme Court by amending the provisions of the Indian income tax with retrospective effect from April 01, 1962 (i.e. date of inception of the Indian Income tax Act). In terms of such amendment, an Explanation was inserted to 'clarify' that gains arising from sale of share of a foreign company is taxable in India if such share, directly or indirectly, derives its value substantially from the assets located in India.

This amendment drew criticism from all corners, more particularly from foreign stakeholders. The amendment had an effect of damaging investor sentiment and was questioned on the grounds of reasonableness and tax certainty.

The Government, armed with the retrospective amendment, enforced huge tax demands in seventeen cases, including major conglomerates like Cairn Energy. Moreover, the tax demand on Vodafone, which was earlier quashed by the verdict of the Supreme Court, was also revived. However, in four cases, the taxpayer had initiated arbitration proceedings against retrospective amendment, under the Bilateral Investment Protection Treaty entered by India. The Arbitration Tribunal under Bilateral Investment Protection Treaty overturned the retrospective tax, yielding favourable awards for Vodafone and Cairn Energy.

In the case of Cairn Energy, the Arbitration Tribunal in The Hague had awarded the Company $1.2 billion (over INR 880 billion) plus costs and interest, which totals $1.725 billion (INR 1260 billion) as of December

2020. With the Indian Government refusing to honour the award, Cairn Energy even moved Courts in multiple countries to seize assets of Indian Government located abroad.

With the Indian economy already under tremendous stress on account of the prevailing pandemic, the need of the hour was to bring the country on the path of quick recovery by assuaging potential foreign investors. With this objective in mind, the Indian Government has introduced this amendment.

A key feature of this amendment is that the demands already fastened on taxpayers, wherein the transfer occurred prior to May 28, 2012, shall be refunded to such taxpayers, albeit without any interest. Such refund shall be subject to fulfilment of specified conditions, such as withdrawal of pending litigation and furnishing of an undertaking to the effect that no claim for cost, damages, interest, etc., shall be filed.

The said Bill has now been passed by both houses of Parliament and is awaiting assent of the President of India. The said step of the Government of India will go a long way in sending a positive message to the foreign investors.

It is pertinent to note that in respect of indirect transfers that took place on or after May 28, 2012, tax on capital gains would continue to apply under the Indian income tax law.

At this juncture, it is to be highlighted that most of the tax treaties entered into by India do not provide for taxation of gains arising from indirect transfer of capital assets located in India. As such, where the shares of foreign company are transferred and the transferor is eligible for treaty benefits, the incidence of capital gain tax on indirect transfer shall not arise in India. However, one needs to be mindful that the Multilateral Convention to Implement Tax Treaty related Measures to Prevent Base Erosion and Profit Shifting (MLI) does envisage capital gains tax on certain indirect transfers. As such, relevant tax treaty has to be read with the provisions of the MLI, where applicable.

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INDIRECT TAX
Goods and Services Tax

Some Important Updates

1. **Waiver of penalty in case of non-compliance of QR code on B2C invoices:**

   Vide Notification No. 28/2021-Central Tax dated June 30, 2021, CBIC waives the amount of penalty payable by registered person under Section 125 of the CGST Act, 2017, for non-compliance of the provisions of Notification No. 14/2020-Central Tax dated March 21, 2020, which mandates to have dynamic QR code on B2C invoices, for a period between December 01, 2020 to September 30, 2021.

   In other words, one can infer that the implementation of QR Code on B2C Invoices has been deferred and would now be applicable from October 01, 2021.

2. **No more physical visit for seeking adjournments of personal hearings:**

   A new functionality has been introduced by the GSTN on the common GST online portal through which both adjournment as well as extension of time for furnishing replies can be sought online itself without physical visit to department.

3. **End of Kerala Flood Cess:**

   The commissioner of Kerala GST department has announced that the levy of Kerala Flood Cess would be discontinued w.e.f. August 01, 2021.

   The Kerala Flood Cess was introduced w.e.f. August 2019 for a period of two years only.

4. **Extension of limitation under GST law in terms of Hon'ble Supreme Court's order:**

   Vide Circular No. 157/13/2021-GST dated July 20, 2021, CBIC has clarified that, the recent order of the Hon'ble Apex court of India dated April 27, 2021, for extension of limitation period in respect of all judicial and quasi-judicial proceedings, is only with reference to judicial and quasi-judicial proceedings in the nature of appeals/suits/petitions etc. and is not applicable in case of every action or proceedings under CGST Act.

   As a welcome step, it has been clarified that Departmental actions such as scrutiny of returns, issuance of summons, search, inquiry or investigation and even consequential arrest in accordance to GST law, would not be covered by the judgement and hence, there is no extension of limitation period for department in such cases.

   Further, compliances that needs to be undertaken by Taxpayers would also continue to be governed as per the statutory provisions under GST law and there is no benefit of extension for Taxpayers in such cases as well.

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CORPORATE LAW

Corporate Law Compliance

Relaxation on levy of additional fees in filing of certain Forms under the Companies Act, 2013 and LLP Act, 2008 – Extension of time and certain other changes

Earlier, the Ministry of Corporate Affairs [MCA] vide General Circular No. 06/2021 dated May 03, 2021, had granted an additional time up to July 31, 2021 to companies to file various forms [excluding charge related forms] which were due for filing from April 01, 2021 to May 31, 2021, without levy of any additional fees.

Taking into account the requests for further extension of timelines as specified in above referred Circular, now the MCA, vide General Circular No. 11/2021 dated June 30, 2021, has further extended the timeline for companies for filing of various forms [excluding charge related forms] from July 31, 2021 to August 31, 2021.

Further, the ambit of this relaxation has also been extended, as it now applies to forms which were due for filing from April 01, 2021 to July 31, 2021.

Accordingly, for forms, which were due for filing during April 01, 2021 to July 31, 2021, no additional fees shall be levied up to August 31, 2021 and only normal fees shall be payable by the company.

A similar type of relaxation has also been granted to Limited Liability Partnerships (LLPs).

Relaxation of time for filing of forms related to creation or modification of charges under the Companies Act, 2013 – Extension of time

Earlier, the Ministry of Corporate Affairs

[MCA] vide General Circular No. 07/2021 dated May 03, 2021, had allowed relaxation of time and condoned the delay in filing of forms related to creation / modification of charges under the Companies Act, 2013, in the manner, as specified in the said Circular.

Taking into account the requests received from stakeholders, now the MCA, vide General Circular No. 12/2021 dated June 30, 2021, has further extended the timeline for companies for filing of forms for creation / modification of charge, and accordingly, the dates May 31, 2021 and June 01, 2021, wherever they appear in the circular dated May 03, 2021 have been substituted with July 31, 2021 and August 01, 2021 respectively.

The manner of relaxation as per the latest Circular is as under:

Relaxation of time:

a. *If the date of creation or modification of charge is before April 01, 2021 but the timeline for filing such form had not expired under Section 77 of the Companies Act, 2013 as on April 01, 2021:*

   The period beginning from April 01, 2021 and ending on July 31, 2021 shall not be reckoned for the purpose of counting the period of 30 days, as prescribed under the Act for a company to file form for creation / modification of charge.

   In case, the form is not filed within such period, the first day after March 31, 2021 shall be reckoned as August 01, 2021 for the purpose of counting the prescribed number of thirty days, as mentioned above.

b. *If the date of creation or modification of charge falls on any date between April 01, 2021 to July 31, 2021 (both days inclusive):*

   The period beginning from the date of creation/modification of charge to July 31, 2021, shall not be reckoned for the purpose of counting of period of 30 days, as prescribed under the Act for a company, to file form for creation / modification of charge.

   In case, the form is not filed within such period, the first day after the date of creation/modification of charge shall be reckoned as August 01, 2021 for the purpose of counting prescribed number of thirty days, as mentioned above.

   It may be noted that the above referred relaxation has only been provided for filing of forms with respect to creation / modification of charge, and no such relaxation has been provided for filing of form for satisfaction of charge, and they will continue to be filed within the period prescribed under the Act.

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Important dates to remember

Particulars	Date
Direct Taxes	
Issuance of Quarterly TDS Certificate (other than Salaries) for Quarter ended June, 2021	15.08.2021
Payment of tax under Direct tax Vivad se Vishwas Act, 2020 (without additional amount)	31.08.2021
Due date for deposit of TDS and TCS for the month of August 2021	07.09.2021
Due date for deposit of second instalment of Advance Tax for Financial Year 2021-22	15.09.2021
Indirect Taxes	
Submission of Form GSTR – 3B for July 2021	20.08.2021
Due date for payment of tax for the month of July 2021	20.08.2021

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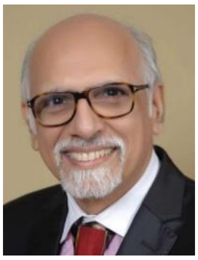

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