MOHINDER PURI & CO.
CHARTERED ACCOUNTANTS

Corporate Update

October | 2021

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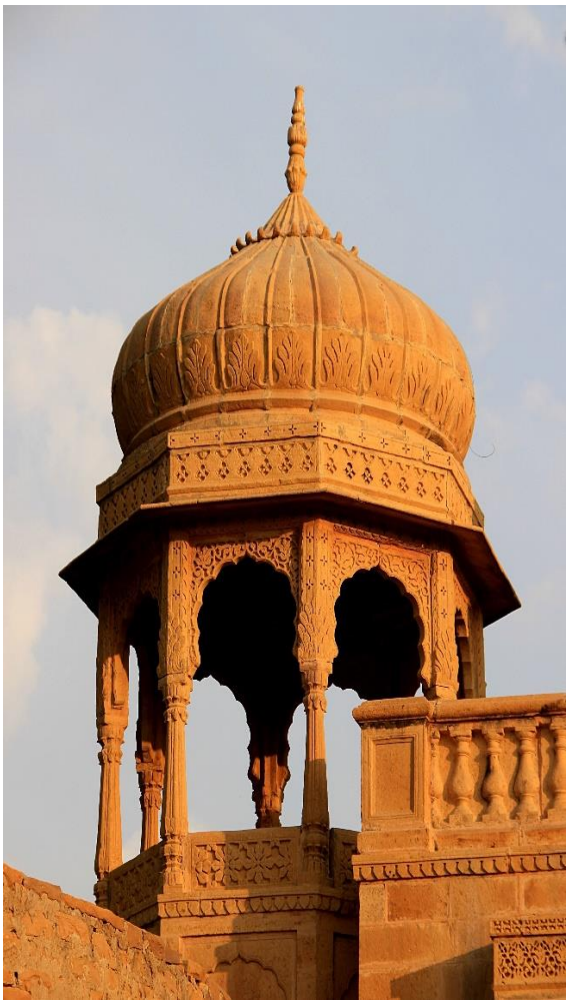


FOREWORD

Dear Reader,

We are happy to enclose our October 2021 edition of Corporate Update.

This Update covers a few important judgements of High Court (Transfer Pricing Regulations) and Tribunal, on International Taxation.

In addition, a few recent changes in GST Regulations are also covered.

Further, recent changes made in regulations relating to Foreign Direct Investment (FDI) in the Telecom Sector are also reported.

C.S. Mathur
Partner

DIRECT TAX

INTERNATIONAL TAXATION

Delhi HC – Adjustment for interest on outstanding receivable cannot be made by ignoring the payments received in advance

Mckinsey Knowledge Centre India Pvt Ltd [TS-518-HC-2021(DEL)-TP]

In a recent judgement the Hon'ble High Court of Delhi (HC) upheld the decision of ITAT that adjustment on account of interest on outstanding receivables cannot be made where the assessee had received significantly more advance than the outstanding receivable.

The revenue had challenged, amongst other issue, the order of ITAT before Hon'ble HC against the deletion of adjustment made on account of interest on outstanding receivables.

The revenue submitted that ITAT has failed to appreciate that payment or receivable or any other debt arising during the course of business money is held to be an 'international transaction'. The assessee, however, contended that the Transfer Pricing Officer while making the adjustment on account of the delay in receiving the outstanding has only considered invoices/receivables paid beyond sixty days ignoring payments/receivables made in advance. The assessee stated that if the adjustment is to be computed for interest, the same should be computed considering the weighted average of all receivables. The assessee further pointed out that the weighted average period of recovery days works out to negative twenty-two days.

The Hon'ble HC based on the perusal of the documents placed on record held that the assessee has received significantly more advance rather than outstanding receivable beyond sixty days. The HC further held that under no transfer pricing norm, principle or evaluation of any "benefit" can there be a one-sided adjustment taking into account delayed invoices while at the same time ignoring invoices/payment received in advance. The Hon'ble HC dismissed the appeal of the department since the amount received in advance outweighed the amount received late.

Shweta Kapoor
Deputy Director
Tax Advisory
☎ +91 11 4710 2253
✉ shwetakapoor@mpco.in

Fiscally transparent non-resident partnership firm entitled to treaty benefits where partners are taxable in the resident country

Infosys BPO Ltd vs. DCIT, International Taxation [TS-983-ITAT-2021(Bang) dated October 11, 2021]

Recently, the Tax Tribunal, Bangalore Bench, inter-alia held that a fiscally transparent law firm, which is not liable to tax in Poland, is entitled to treaty benefits where its partners are taxable in Poland in respect of their shares of income in Partnership Firm. The Tribunal, therefore, held that payments made to such firm for legal services were not taxable in India in terms of Article 15 - "Independent Personal Services" of India-Poland tax treaty in absence of physical stay or fixed base in India.

Under Polish tax law, partnership firms are

treated as fiscally transparent, i.e. such partnerships are not taxable as per domestic tax laws of Poland. However, the income of the partnership is taxable in the hands of partners. Furthermore, it may be mentioned

that under the Indian tax law, partnership firms are treated as taxable entities.

On facts of the instant case, the assessee is an Indian company engaged in the business of providing business process outsourcing services. During the year under consideration, the assessee made certain payments to a limited liability partnership firm in Poland engaged in the field of law. As the agreement was on net of tax basis, the liability of withholding tax, if any, was on the assessee. The assessee was of the view that the transaction was not liable to withholding tax (WHT) as partnership firm was not liable to tax under Article 15 of the tax treaty. However, the assessee proceeded to deposit WHT under protest. Thereafter, the assessee filed an appeal before the CIT(A) under section 248 of the Income-tax Act, seeking declaration that no tax was deductible on such payments made to the non-resident partnership firm in Poland. The CIT(A) held that the payments to non-resident in Poland was chargeable to tax in India as fees for technical services (FTS) under the Act as well as Article 13 “Royalties and Fee for technical services” of the tax treaty between India and Poland.

On appeal before the Tribunal, the assessee contended that the law firm was a limited partnership and fiscally transparent entity as per tax law of Poland and the partners were taxable in respect of their shares of income in Poland and were, thus, entitled to the treaty benefit. As such, the payments made to the law firm were to be dealt with in accordance with Article 15 as against Article 13. The assessee had furnished tax residency certificate of all the shareholders of the law firm before the CIT(A). The assessee submitted that neither the law firm nor the partners had a permanent establishment or fixed base in India. Consequently, the assessee claimed that payments made to the non-resident firm in

Poland for legal services were not taxable in India.

The Tribunal, while examining the applicability of treaty benefits to a Polish partnership firm, noted that in view of Article 4(1) read with Article (1) and Article 3(1)(e) of the treaty, the provisions of treaty are applicable to ‘persons’ who are taxable under the domestic taxation laws of the Contracting States and who are resident of one or both the Contracting States. The Tribunal opined that the law firm was a non-taxable entity as per the domestic laws of Poland and therefore treaty benefit could not be extended to the firm. However, the Tribunal also observed that it would be the partners of the fiscally transparent firm who represent the partnership in Poland.

The Tribunal referred to the OECD commentary wherein it is stated that in case of fiscally transparent entity where the income of the partnership "flows through" to the partners, the partners are the persons who are liable to tax on that income and are thus the appropriate persons to claim the treaty benefits.

The Tribunal relied on the decision of Linklaters LLP v. ITO (2010) 40 SOT 51 and subsequent decision in case of Linklaters vs. DCIT (2017) 79 taxman.com 12 wherein it was held that M/s. Linklaters was eligible for the benefits of India-UK DTAA so long as entire profits of the partnership firm were taxed in UK, whether the taxable income was determined in relation to personal characteristics of the partners or in the hands of the firm directly.

In view of the above, the Tribunal concluded

that since partners are taxable in Poland, Article 15 is to be looked into to determine taxability of income of the firm. The Tribunal observed that Article 13(4) excludes services mentioned in Article 15 and held that services rendered by the non-resident law firm could not be treated as FTS under Article 13(4). The Tribunal further held that in terms of provisions of Article 15, the income of non-resident firm was not taxable in India in absence of fixed base or physical stay in India.

Ritu Theraja
Deputy Director
Tax Advisory
☏ +91 11 4710 2272
✉ therajaritu@mpco.in

INDIRECT TAX

Goods and Services Tax

Changes in GST Laws

A. Change of GST rate from 12% to 18% on permanent transfer of Intellectual Property Right ("IPR") in respect of goods

Vide Notification No. 13/2021-Central Tax (Rate) dated October 27, 2021, CBIC has further amended Notification No. 01/2017- Central Tax (Rate) dated June 28, 2017 to bring the change in GST tax rates on permanent transfer of Intellectual Property Right ("IPR") in respect of goods from 12% to 18%.

B. Taxability of Intermediary Services in Education Sector- M/S IDP Education India Private Ltd. vs ADG CEI, CESTAT, New Delhi (2021(10) TMI 1174 – CESTAT NEW DELHI – SERVICE TAX)

Hon'ble tribunal, New Delhi in the case of M/S IDP Education India Private Ltd. vs ADG CEI, New Delhi has held that IDP Education India (Appellant) is not required to pay Service Tax for recruiting Students to Australian Universities as Department failed to establish that such services were rendered acting in the capacity of an intermediary between M/s IDP Australia and the foreign universities.

In the present case, M/s IDP, Australia entered into an agreement with the foreign universities as per which, they pay a percentage of the tuition fee which they receive from the students to IDP Australia for its services. IDP Australia, in turn, has entered into "Student Recruitment Services Agreement" with the appellant-Company to help recruit students from India.

The department alleged that the appellant shall pay service tax on the commission received from IDP Australia since they are providing the service of arranging and facilitating recruitment of student in India, as an intermediary between Foreign Education Service Providers, M/s IDP Australia and the students.

The Tribunal observed that the appellant recruits or facilitates students in India, but does not get any remuneration from Australian universities and held that consideration received by appellant from IDP Australia is not liable to Service Tax. Relevant extract of order is reproduced as under:

"The appellant recruits or facilitates students in India, but does not get any remuneration from Australian universities. For the students who are recruited or admitted by the university in

Foreign Country, recommended by appellant in India, IDP Australia gets paid by the Australian/Foreign universities. A share of that commission is given to the appellant by IDP Australia. This scheme of arrangement clearly shows that the IDP Australia is providing services to the foreign universities and is receiving consideration for the same. Insofar as recruitment of students in India is concerned, IDP Australia has created the appellant as a fully owned subsidiary, and has sub- contracted this work to the appellant. Nothing has been brought on record in the show cause notice or in the order to show that the appellant has a direct contract with the foreign universities.

There is nothing on record to show that the appellant is liasioning or acting as intermediary between the foreign universities and IDP Australia. All that is evident from the records is that the appellant is providing the services which have been sub- contracted to it by M/s IDP Australia. As a sub-contractor, it is receiving commission from the main contractor for its services. The main contractor - IDP Australia, in turn, is receiving commission from the foreign universities who pay a percentage of the tuition fee to IDP Australia. From the records, we find that Revenue has not established that the appellant is acting as an intermediary between M/s IDP Australia and the foreign universities, as alleged or held in the impugned order and the show cause notice. Hence, we find in favour of the appellant on merits."

It's a welcome judgement wherein it has been clearly held that sub-contracting of a service is not an intermediary service as long as the Service provider is rendering services on its own account.

C. Supreme Court has held that rectification of errors in GSTR 1 & 3/3B allowed only at initial stages that too in the specified manner only and can't be rectified subsequently- Union of India Vs Bharti Airtel Ltd & Ors, 2021 SC 601, dated October 28, 2021

Brief facts of the case are that Bharti Airtel was facing problems while filing their GSTR Form 3B due to glitches in the Online GST Portal. Amidst these glitches and non-availability of GSTR 2A, Bharti Airtel filed their GST returns for the period of July, 2017 to September, 2017 without claiming any input tax credit and paid its outward tax liability through cash vide debiting electronic cash ledger. Form GSTR-2A was not operational during the error period. Therefore, Bharti Airtel has sought relief that it should be allowed to rectify its GSTR 3B so as to avail the ITC for the relevant period and the amount of output tax liability (INR 923 Crore) paid through cash should be credited to its cash ledger/refunded.

Supreme Court of India, while rejecting the plea of Bharti Airtel to rectify its GSTR 3B for the period July-September 2017 and seeking refund of input tax credit (ITC) of INR 923 Crore, held that Assessee cannot be permitted to unilaterally amend/rectify its GSTR 3B filed electronically as it would affect cascading effect on the recipients and suppliers associated with the concerned transactions.

Hon'ble Supreme Court also observed that Form GSTR2A is only a facilitator for taking an informed decision while doing self-assessment. Non-performance or non-operability of Form GSTR2A or for that matter, other forms, will be of no avail because the dispensation stipulated at the relevant time obliged the

registered person to submit returns on the basis of such self-assessment in Form GSTR3B manually on electronic platform.

Significantly, the registered person is not denied of the opportunity to rectify omission or incorrect particulars, which he could do in the return to be furnished for the month or quarter in which such omission or incorrect particulars are noticed. Thus, it is not a case of denial of availment of ITC as such. If at all, it is only a postponement of availment of ITC. The ITC amount remains intact in the electronic credit ledger, which can be availed in the subsequent returns including the next financial year. It is a different matter that despite the availability of funds in the electronic credit ledger, the registered person opts to discharge OTL by paying cash. That is a matter of option exercised by the registered person on which the tax authorities have no control, whatsoever, nor do they have any role to play in that regard. Further, there is no express provision permitting swapping of entries effected in the electronic cash ledger *vis-a-vis* the electronic credit ledger or *vice versa.*

Shashank Goel
Director
Indirect Tax
☏ +91 11 4710 3908
✉ shashank.goel@mpco.in

CORPORATE LAW

CORPORATE LAW COMPLIANCE

Extension of last date of filing of Cost Audit Report to the Board of Directors

Due to the impact of COVID-19 pandemic, the Ministry of Corporate Affairs, vide its circular dated September 27, 2021, has granted an extension of one month with respect to filing of Cost Audit Report, for the

financial year 2020-21, by the cost auditor, to the Board of Directors of the Company, in accordance with Rule 6(5) of the Companies (Cost Records and Audit) Rules, 2014.

Accordingly, the cost audit report which is required to be submitted to the Board of Directors of the company, by the cost auditor, within a period of 180 days from the closure of the financial year i.e. till September 30, 2021, can now be submitted till October 31, 2021.

However, it may be noted that there is no change in time period for filing of cost audit report by the Company with the Central Govt., and the cost audit report for the financial year ended on March 31, 2021 shall be filed by the company in e-form CRA-4 within 30 days from the date of receipt of the copy of the cost audit report from the cost auditor.

Further, in case a company has got an extension of time for holding Annual General Meeting under section 96(1) of the Act, in that event form CRA-4 may be filed within the resultant extended period of filing financial statements, as per proviso to Rule 6(6) of the Companies (Cost Records and Audit) Rules, 2014.

Relaxation on levy of additional fees

The Ministry of Corporate Affairs, vide its general circular dated October 29, 2021, has extended the due date for filing annual filing e-Forms up to December 31, 2021 without paying any additional fees for the e-forms

AOC-4, AOC-4 (CFS) AOC-4 XBRL, AOC-4 Non-XBRL and MGT- 7/MGT-7A in respect of financial year ended on March 31, 2021.

Shikha Nagpal
Deputy Director
Corporate Secretarial Services
☏ +91 11 4710 2325
✉ shikha@mpco.in

REGULATORY

FOREIGN EXCHANGE MANAGEMENT ACT

Foreign Direct Investment (FDI) Policy on Telecom Sector

The Government of India has reviewed the extant FDI policy on Telecom sector (which earlier required Government approval for FDI beyond 49%) and has allowed up to 100% FDI in this sector under the automatic route i.e. without any Government approval.

Accordingly, Para 5.2.14 of the Consolidated FDI Policy stands amended as under:

Sector/ Activity	% of Equity/ FDI Cap	Entry Route
5.2.14.1 Telecom Services (including Telecom Infrastructure Providers Category-I) All telecom services including Telecom Infrastructure Providers Category-I, viz. Basic, Cellular, United Access Services, Unified license (Access services), Unified License, National/International Long Distance, Commercial V-Sat, Public Mobile Radio Trunked Services (PMRTS), Global Mobile Personal Communications Services (GMPCS), all types of ISP licenses, Voice Mail/Audiotex/UMS, Resale of IPLC, Mobile Number Portability services, Infrastructure Provider Category-I (providing dark fibre, right of way, duct space, tower), Other Service Providers and such other services as may be permitted by the Department of Telecommunications (DoT).	100%	Automatic
5.2.14.2 Other Conditions: The licensing, security and any other terms and conditions as specified by Department of Telecommunications from time to time, shall be observed by licensee/entities providing services as referred in Para 5.2.14.1 above, as well as investors.		

[Source: Press Note No. 4 (2021 Series) dated October 6, 2021 issued by Department of Promotion of Industry and Internal Trade, Ministry of Commerce & Industry, Government of India and Foreign Exchange Management (Non-debt Instruments) (Fourth Amendment) Rules, 2021 issued by the Department of Economic Affairs, Ministry of Finance, Government of India vide Notification No. S.O. 4242(E) dated October 12, 2021]

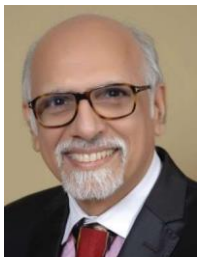
Divya Ashta
Director
Transaction Advisory Services
☏ +91 11 4710 2372
✉ divya@mpco.in

Important dates to remember

Particulars	Date
Indirect Taxes	
Goods and Services Tax:	
Submission of Form GSTR-3B and due date for payment of tax for October, 2021.	20-11-2021
Others	
ESI contribution for the month of October, 2021	30-11-2021 (instead of 15-11-2021)
Filing of Return of ESI contribution for the period April, 2021 to September, 2021.	15-12-2021 (instead of 11-11-2021)

For further information, please contact:

C. S. Mathur
Partner
☏ +91 11 4710 2200
✉ csm@mpco.in



Vikas Vig
Partner
☏ +91 11 4710 3300
✉ vvig@mpco.in

Surbhi Vig Anand
Partner
☏ +91 11 4710 2250
✉ surbhivig@mpco.in

Mohinder Puri & Co.

New Delhi
1 A-D, Vandhna,
11, Tolstoy Marg,
New Delhi – 110 001

MPC & Co. LLP

New Delhi
Pune
Vadodara

Associates

Ahmedabad
Bangalore
Chennai
Hyderabad
Mumbai