December | 2021

MOHINDER PURI & CO.
CHARTERED ACCOUNTANTS

Corporate Update

December | 2021

CONTENTS

FOREWORD 2

INTERNATIONAL TAXATION

- Payment made by Indian entity to foreign group company providing IT infrastructure facility constitutes royalty, not covered by Engineering Analysis referred to in Supreme Court decision 3
- GLoBE Rules under Pillar Two released by the OECD 4
- Assessee to justify actual rendition of management services by AE and benefit derived from such services 4
- Appointment of engineers cannot be the sole reason for re-classification of earlier accepted business profile 5

DOMESTIC TAXATION

Direct Taxes

- Expenditure incurred on raising floor height of warehouse is revenue in nature 6
- Delhi HC quashes reassessment notice issued post March 31, 2021, in over 1300 writ petitions, being non-compliant with the new reassessment procedure enacted by Finance Act 2021 7

Indirect Tax

- Changes in GST Laws 12

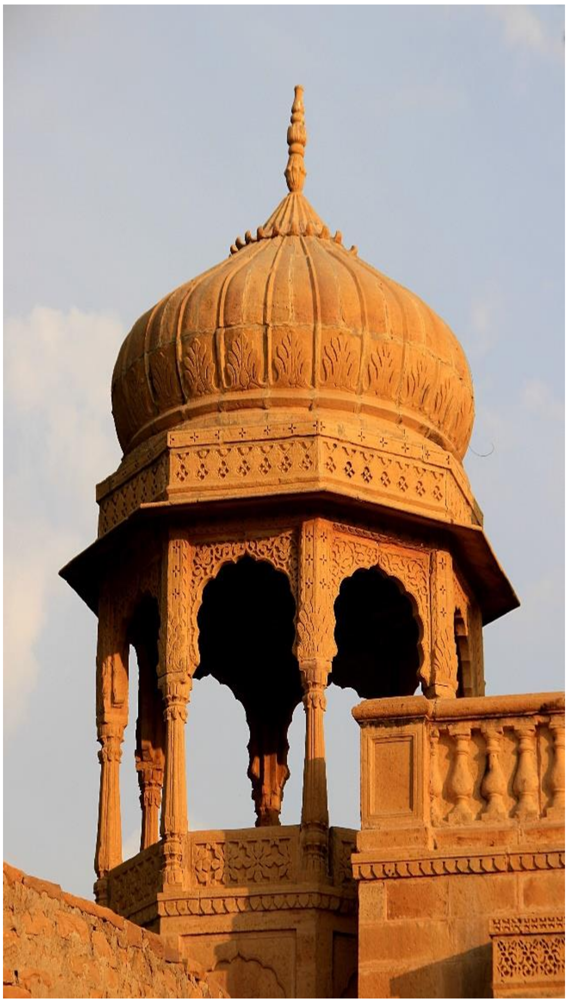
CORPORATE LAWS

- Holding of AGM/EGM through VC or OAVM and relaxation in additional fees 13

REGULATORY (FEMA)

- External Commercial Borrowings (ECB) and Trade Credits (TC) Policy – Changes due to LIBOR transition 14
- Introduction of Legal Entity Identifier for Cross-border Transaction 15

IMPORTANT DATES TO REMEMBER 16



FOREWORD

Dear Reader,

The Annual Budget of the Government of India will be presented in the Parliament by the Finance Minister on February 01, 2022.

The Indian Economy which had been showing strong signs of recovery till December 2021 is likely to be impacted in the last quarter of the Financial Year ending on March 31, 2022 by the growing number of Covid 19 (OMICRON) cases in India since the last two weeks. Various State Governments have imposed restrictions on the movement of people, working in offices to contain the fast multiplying number of cases.

A few changes in Regulations relating to Foreign Exchange Management Act ('FEMA'), Goods and Services Tax, Corporate Law and Reports on some important tax cases on International, Domestic Taxation form part of this Update.

C.S. Mathur
Partner

DIRECT TAX

INTERNATIONAL TAXATION

Payment made by Indian entity to foreign group company providing IT infrastructure facility constitutes royalty, not covered by Engineering Analysis referred to in Supreme Court decision

Bekaert Industries Private Limited [TS-1135-ITAT-2021(PUN)] vs. DCIT, dated December 13, 2021

Recently, the Tax Tribunal, Pune Bench, inter-alia held that payment made by an Indian company to a Belgium group company for using IT Infrastructure facility falls within the ambit of royalty under Section 9(1)(vi) of the Act as well as under Article 12 of India-Belgium tax treaty.

On facts of the instant case, the assessee, Bekaert Industries Private Limited entered into an agreement with its group company in Belgium, NV Bekaert SA relating to provision of software, IT and support services in the nature of SAP License, implementation related services, maintenance of SAP, support to SAP, operation related services, structural IT services, project related IT services and infrastructure facilities management.

The assessee did not withhold tax on payment made to NV Bekaert SA on the reasoning that the payment was in the nature of reimbursement and that N.V. Bekaert SA did not have any Permanent Establishment in India.

However, in the assessment proceedings, the Income tax Officer treated the payment as software royalty. The Income tax officer further held that the payment could also be categorized as Fees for Technical Services (FTS).

On appeal, the Tax Tribunal observed that in the transfer pricing proceedings, the assessee had itself submitted that the major components included in the IT support services were integrated ERP system (SAP), development of SAP platforms, office environment (e.g. hardware, software, etc), servers (e.g. office servers, application servers, etc.) and connectivity (e.g. Communication network LAN and WAN, domain structures, security, etc).

The Tax Tribunal noted that the allocated key used for by NV Bekaert SA for distribution of cost amongst group entities was based on 'usage'. Moreover, the Tax Tribunal also observed that there was no payment for any specific IT related services and that the assessee could not substantiate that services were actually provided.

In light of the aforesaid, the Tribunal concluded that the payments made by the assessee were for the use of the IT Infrastructure facility rather than for availing any particular IT service. The Tribunal opined that using a facility as one unit was different from using individual components of the facility.

Thereafter, the tax Tribunal characterized such 'IT Infrastructure facility' as 'equipment' which is covered under clause (iva) of Explanation 2 to section 9(1)(vi) of the Act (the use or right to use any industrial, commercial or scientific equipment). The Tribunal also took cognizance of Explanation 5 to Section 9(1)(vi) of the Act in terms of which, the physical possession and the location of the property is immaterial.
The Tribunal also held that there was no material difference in the definition of the term `Royalty' under section 9(1)(vi) of the Act and the DTAA. As such, the payments made by

the assessee were characterized as Royalty under Section 9(1)(vi) as well as under the DTAA.

As regards provision of SAP licenses by NV Bekaert SA to its Indian group entity, the assessee argued that such payments are for the use of a copyrighted article, and not for the use of a copyright. The assessee relied on the recent Supreme Court decision of *Engineering Analysis Centre of Excellence Pvt. Ltd. Vs. CIT (2021) 432 ITR 472 (SC)*, wherein, it was held that payment for such licenses cannot be characterised as Royalty.

However, the Tax Tribunal distinguished the aforesaid Apex Court decision, on the premise that the corresponding payments are not for the use of any software simplicitor but rather, for the access of the IT Infrastructure facility only. As such, the position of taxability (i.e. as Industrial Royalty) shall equally apply to payments for SAP licenses as well.

GLoBE Rules under Pillar Two released by the OECD

On December 20, 2021, the Organisation for Economic Co-operation and Development (OECD) released global anti-base erosion (GloBE) Model Rules under the 'Pillar Two', as approved by the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS).

Earlier in July 2021, the OECD had released a statement on Two-Pillar solution to address the tax challenges arising from the digitalisation of the economy (July Statement). In October 2021, the OECD published a statement indicating that the Inclusive Framework had agreed on a two-pillar solution and provided a timeline for implementation. As on date, 137 jurisdictions of the Inclusive Framework have agreed to the Statement.

Pillar Two requires large multinational enterprises (MNEs) to pay minimum level of tax, agreed at 15%, on income arising in a jurisdiction.
The Model Rules provides the scope and key mechanics of global minimum tax rules including the Income Inclusion Rule (IIR) and the Under Taxed Payments Rule (UTPR). The GLoBE rules cover large multinational enterprise groups with consolidated revenues over EUR 750 million.

The OECD also expects to release the Commentary relating to the Model Rules in early 2022. In addition, the Inclusive Framework is developing the model treaty provision for the Subject to Tax Rule (STTR), which is the third element of the Pillar Two global minimum tax framework, and a multilateral instrument for its implementation.

The Indian Government will take necessary steps to give legislative effect to these Model Rules. According to the timeline released in October 2021 by the OECD, the Pillar Two rules need to be brought into domestic law in 2022, to come into force from 2023.

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

Assessee to justify actual rendition of management services by AE and benefit derived from such services

Tupperware India Pvt. Ltd. [TS-628-ITAT-2021(DEL)-TP]

In a recent judgement the Hon'ble Tribunal, Delhi Bench remitted the matter to Transfer Pricing Officer (TPO) directing the assessee to show that the services availed from

Associated Enterprises (AE) actually benefitted it and that a 3rd party would also pay for such services.

On the facts of the case, the assessee is a company engaged in the business of trading and manufacturing of plastic kitchenware. During the year, the assessee had availed management services in the nature of environment and safety/ quality audits, human resources, finance, accounting, insurance and IT, new product marketing and related strategic planning, etc. from its AE. It applied Transaction Net Margin Method (TNMM) as most appropriate method (MAM) for determination of arm's length price (ALP). The TPO, however, held that no third party, under uncontrolled situation, would pay for such services and determined the ALP at Nil as assessee failed to satisfy need test, benefit test, rendition test, etc. The CIT(A) confirmed the order of TPO.

Before the Tribunal, the assessee referred to the documents placed on record where the details of service rendered, basis of allocation, manner of services rendered, benefits derived and bills were given.

The revenue submitted that if under uncontrolled transaction a 3rd party would make a payment then such services should satisfy the following test. Firstly, the services should be required. The services should be actually rendered and beneficial. Also, the services should not be duplicative in nature. It submitted that in the absence of actual performance by the AE according to agreement, the ALP is correctly determined at Nil.

The Tribunal held that agreement as well as mere production of the bill does not show that services have been rendered to the assessee. With respect to the bills raised by the assessee the Tribunal observed that it merely shows the names of the certain persons who have been deputed and have allegedly performed certain services. It has also failed to establish as to wherefrom these services has been rendered as rates are different for the countries.

Accordingly, the Tribunal set aside the whole issue to the file of TPO with a direction to the assessee to show actual data, person involved, actual rate as per agreement, rate paid by the assessee as per invoices, technological competence of the persons rendering services to show that services were actually rendered and benefit derived by the assessee. Further, the assessee was directed to show that third party would pay for such services and they were not duplicative in nature.

Appointment of engineers cannot be the sole reason for re-classification of earlier accepted business profile

Parametric Technology (India) Pvt Ltd [TS-608-ITAT-2021(Bang)-TP]

In a recent judgement the Hon'ble Tax Tribunal, Bangalore Bench held that merely because the assessee has appointed engineers to do marketing services the business profile of the assessee cannot be re-classified from marketing support services to technical support services, which was accepted consistently in the earlier years for the same agreement.

On the facts of the case, the assessee entered into international transaction of marketing and sales support services which was benchmarked under Transaction Net Margin Method (TNMM). However, considering the transfer pricing study report filed by the assessee, the TPO opined that the assessee also performed certain technical functions involving work of engineers. The assessee submitted that only marketing and support services were provided by its employees. However, in the absence of any evidence filed by the assessee to support its claim, the TPO held that the assessee provided full-fledged technical/ support services to its AE and accordingly, benchmarked the services making additions under transfer pricing.

Before the Tribunal, the assessee submitted that in the earlier as well as subsequent assessment years the business profile of the assessee has been accepted as marketing service provider. As such, in this assessment year also, business profile cannot be changed to technical/business support service provider.

The revenue submitted that since the assessee has not provided bifurcation of employees involved in the two activities, appropriate / separate benchmarking cannot be conducted by the assessee.

The Tribunal observed that the business profile of the assessee was accepted in the earlier years for the same agreement. Also, the non-availability of bifurcation of employees involved in the two activities cannot be the reason to reclassify the business profile as engineers could be appointed to carry out marketing functions as there is no prohibition on this count. Further, as the judicial discipline requires consistency in its proceedings from year to year, the business profile of the assessee cannot be changed from year to year wherein all the international transactions of the assessee are based on the same agreement. Thus, the ground was allowed and matter was remitted back to the TPO to carry out fresh benchmarking treating the business profile of the assessee as full-fledged marketing.

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

Expenditure incurred on raising floor height of warehouse is revenue in nature

Jetha Properties Pvt. Ltd. v. CIT (TS-1128-HC-2021) (Bom HC)

Recently, the Bombay High Court held that expenditure incurred by the Appellant on raising floor height of the warehouse to secure goods from damage caused by water logging is revenue in nature.

Brief facts of the case are that the Appellant was a warehouse-keeper whose warehouse situated in Mumbai, Maharashtra was prone to severe water logging during monsoon season which damaged the goods in the warehouse. One of the customers of the Appellant who was occupying nearly 90% of the space in the warehouse, cautioned the Appellant to rectify the aforesaid defect in the warehouse, else it would change the business arrangement with the Appellant. The customer also offered to enhance the warehousing charges if the said defect was rectified. The Appellant for remedying the aforesaid defect, incurred an expenditure of Rs. 10,70,000/- and raised the floor height of the warehouse. The Appellant claimed the said expenditure as revenue expenditure in its return of income filed for Assessment Year 1991-92.

As an outcome of the tax scrutiny proceedings and appellate proceedings, the Assessing Officer, Commissioner (Appeals) and Tax Tribunal decided the matter in favour of Tax Authorities by contending that the expenditure incurred by the Appellant is capital in nature.

On appeal before the High Court, the Court held the expenditure was revenue in nature since the Appellant in the instant case did not bring into existence any new asset. Further, the Court held that the Appellant had incurred the expenditure wholly and solely to ensure that the existing business with the Customer ran uninterrupted and offered an increased compensation to the Appellant.

Based on the aforesaid facts, the Court came to a conclusion that the expenditure incurred by the Appellant was an integral part of the profit earning process.

As such, the Hon'ble Court held that the expenditure incurred by the taxpayer was admissible as revenue expenditure.

Ankit Nanda
Senior Manager
Tax Advisory
☏ +91 11 4710 2274
🖂 ankitnanda@mpco.in

Delhi HC quashes reassessment notice issued post March 31, 2021, in over 1300 writ petitions, being non-compliant with the new reassessment procedure enacted by Finance Act 2021

The High Court of Delhi in a recent decision in the case of Mon Mohan Kohli v. ACIT & Anr. W.P.(C) 6176/2021 has held that reassessment notices issued during the period April 01, 2021 to June 30, 2021, based on the notifications issued by the Central Government under Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 ("TOLA") for extending the time limits prescribed under the Income-tax Act, are invalid.

The petitioners-assessees sought a declaration that Explanations to the Notification No.20 [S.O.1432(E)] dated March 31, 2021 and Notification No. 38 [S.O.1703(E)] dated April 27, 2021 to the extent that the same extended the applicability of the *provisions of Section 148, Section 149 and Section 151 of the Act, as the case may be, as they stood as on the 31st day of March, 2021 before the commencement of the Finance Act, 2021*" to the period beyond March 31, 2021 as *ultra vires* the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020.

The issue before the High Court, in essence, was whether the Government/Executive can make or change law of the land by way of Explanations to Notifications without specific Authority from the Legislature to do so and whether the Government/Executive can impede the implementation of law made by the Legislature.

Procedure for initiation of reassessment

The procedure governing initiation of reassessment proceedings prior to coming into force of the Finance Act, 2021 was governed by section 147 of the Act which provided that if the Assessing Officer (AO) has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings.

Where an assessment under section 143(3)/147 has been made for the relevant assessment year, no action shall be taken after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under section 142(1) or 148 or to disclose fully and truly all material facts necessary for his assessment, in which case action can be taken up to six years from the end of the relevant assessment year.

Relaxations by the Government

With the advent of Covid 19 pandemic, the Government of India announced various relaxations by enacting the TOLA in September, 2020. By way of TOLA, various due dates/time limits/limitations prescribed in different Central Acts, including the Income Tax Act, 1961, were relaxed.

Pursuant to the aforesaid Act, the Central Government issued a notification [NO.20/2021/F.NO.370142/35/2020-TPL] dated March 31, 2021 extending the timelines prescribed under section 149 for issuance of reassessment notices from March 31, 2021 to April 30, 2021, stating that the provisions as existed prior to amendment by Finance Act, 2021 shall apply to the reassessment proceedings initiated thereunder. Furthermore, another notification S.O. 1703 (E) [NO. 38 /2021/ F. NO. 370142/35/2020-TPL], dated 27-4-2021 was issued further extending the time-limit specified in section 149 or sanction under section 151 of the Act from April 30, 2021 to June 30, 2021.

Introduction of section 148A (new procedure for reassessment) by the Finance Act, 2021

In the Finance Act, 2021, Parliament introduced reformative changes to Sections 147 to 151 of the Income Tax Act, 1961 governing reassessment proceedings . Section 148 of the Act was substituted by a new section 148A, which provides that before issuance of notice under section 148, the AO shall conduct enquiries and provide an opportunity of being heard to the assessee, and only thereafter, if he finds that it is a fit case for issue of notice under section 148, serve a copy of the order of his finding along with notice under section 148 on the assessee. The AO shall before conducting any such enquiries or providing opportunity to the assessee or passing such order obtain the approval of specified authority. The aforesaid provision is applicable from April 01, 2021.

Facts of the cases in dispute

Despite the substituted sections 147 to 151 of the Act coming into force on April 01, 2021, the department issued reassessment notices under old provisions of the Act to the petitioners- assessees under Section 148 to 151 of the Act relying on Explanations in the Notifications dated March 31, 2021 and April 27, 2021.

The assessees filed the present writ petitions challenging the legality and validity of the said Explanations as well as the reassessment notices issued pursuant thereto. The petitioners submitted that as the Finance Act, 2021 had substituted / replaced the earlier provisions, being Sections 147, 148, 149 & 151 of the Income Tax Act, 1961, with the new provisions, the same would result in repeal of the earlier provisions and, therefore, the earlier provisions could not be relied upon or referred to. It was also submitted that the impugned Notifications were subservient to the substituted Sections 147 to 151 by the Finance Act, 2021 and the Notifications to the extent they contradicted Section 149 were deemed to have been impliedly repealed by operation of the Finance Act, 2021.

The assessees further submitted that Notifications dated 31st March, 2021 and 27th April, 2021 were *ultra vires* the Income Tax Act, 1961 as amended by Finance Act, 2021 and in excess of the enabling powers prescribed under Section 3 of TOLA. Section 3(1) of the TOLA had bestowed upon the Central Government very specific and limited power to issue Notifications extending time limits which fell during the period specified therein and the department cannot extend the operation of the old provisions of the Act beyond 31st March in guise of a clarification.

Thus, the impugned reassessment notices issued between 1st April, 2021 and 30th June, 2021 had been issued in violation of the mandatory procedure prescribed under Section 148A of the Act. The impugned Explanations had attempted to revive and keep in existence two different schemes governing the initiation of reassessment proceedings, which were substantially different from each other and thus could not co-exist at the same time.

In the alternative, learned counsel for the petitioners submitted that Sections 147 to 151 were procedural provisions, inasmuch as, they primarily amended limitation period and therefore applied retrospectively i.e. to reassessment notices deemed to have been issued within the limitation period.

The department submitted that Section 3(1) of TOLA was an example of conditional legislation and not delegated legislation, and thus should be treated at par with plenary legislation. They further submitted that Section 3(1) of TOLA creates a legal fiction by virtue of which the Revenue was entitled to invoke Section 148 of the Income Tax Act, 1961, as it existed prior to 31st March, 2021, during the extended period between 1st April, 2021 and 30th June, 2021.

In the alternative, they submitted that if there was a conflict between the Income-tax Act and TOLA, TOLA would override the Finance Act, 2021, not only on ground of being a special Act but also for the reason that Section 3(1) of TOLA contains a non-obstante clause giving the enacting part of Section 3(1) an overriding effect over the Income Tax Act, 1961.

They also submitted that the Finance Act, 2021 did not apply to the substituted Sections 147 to 151 of the Income Tax Act, 1961 retrospectively and was applicable only with effect from 1st April, 2021.

In the alternative, they submitted that Section 3(1) of TOLA is a 'stop-the-clock' provision somewhat similar to the U.S. legal doctrine known as 'Tolling' which allows for the pausing or delaying of the running of the period of time set forth by a statute containing limitation.

Without prejudice and in the alternative to all of the above, they submitted that even Section 6 of the General Clauses Act, 1897 would allow notices to be issued and proceedings to be instituted, since a right had accrued as per TOLA in favour of the Revenue to re-open the assessment within an extended time period.

Various judicial precedents were relied upon by the assessee and revenue and were countered during rejoinder and Sur-rejoinder.

Decision of High Court

The High Court stated that had the intention of the Legislature been to keep the erstwhile provisions alive, it would have introduced the new provisions with effect from 1st July, 2021, which has not been done. Accordingly, the notices relating to any assessment year issued under Section 148 on or after 1st April, 2021 have to comply with the provisions of Sections 147, 148, 148A, 149 and 151 of the Income Tax Act, 1961 as specifically substituted by the Finance Act, 2021 with effect from 1st April, 2021. The Legislature has permitted re-assessment to be made in this manner only, it can be done in this manner, or not at all. It is settled law that the law prevailing on the date of issuance of the notice under Section 148 has to be applied.

Upon perusal of Section 3(1) of TOLA, the High Court was of the view that it extends only the time lines. There is a difference between extension of time of an action which is getting time barred and applicability of a provision which has been enacted and notified by the Legislature. TOLA nowhere delegates power to the Central Government to postpone the date of applicability of a new law enacted by the Legislature. TOLA also does not put any embargo on the power of the Legislature to legislate. The Revenue cannot change the statutory provisions applicable thereto which are required to be strictly complied with. Just as the Executive cannot legislate, it cannot impede the implementation of law made by the Legislature.

Also, the impugned Explanations in the Notifications dated 31st March, 2021 and 27th April, 2021 are beyond the power delegated to the Government, as the TOLA does not give power to Government to extend the erstwhile Sections 147 to 151 beyond 31st March, 2021 and/or defer the operation of substituted provisions enacted by the Finance Act, 2021. Accordingly, the provisions of Section 148A had to be complied with before issuing notices under Section 147 of the Income Tax Act, 1961 and the submission of the respondents-Revenue based on the judgment passed by Chhattisgarh High Court in *Palak Khatuja Vs. UOI W.P.(T) No. 149 of 2021* does not find favour with this Court.

The High Court held that the distinction between conditional legislation or delegated legislation is irrelevant to the controversy at hand, as the person to whom the power is entrusted in either situation can do nothing beyond the limits which circumscribe the power.

Regarding the department's argument of having vested right under TOLA, the High Court held that the time limit to issue notices for re-assessment under the Income Tax Act, 1961 stood expired long time ago. Therefore, extending the time limit or giving power to issue Notification to extend the time cannot be taken to be a vested right of the respondents.

The High Court opined that the new provisions are remedial and benevolent provisions which are meant and intended to protect the rights and interests of assessees as well as promote public interest and accordingly, the benefit of the new provisions must necessarily be made available even in respect of proceedings relating to past Assessment Years provided, of course, Section 148 notice has been issued on or after 1st April, 2021. The High Court stated that on one hand, the department is contending that the amendment made by the Finance Act, 2021 shall not be applicable to the past assessment years, while on the other hand, they are contending that from 1st July, 2021, the amendments made by the Finance Act, 2021 will be applicable. If the argument of the department that the Explanation in notification no. 20 dated 31st March, 2021 extended the applicability of old procedure of reassessment beyond 31st March, 2021 is accepted, the same shall lead to manifest arbitrariness and conflict. The High Court thus held that keeping in view its own submission and past precedent to treat Sections 147 to 152 of the Income Tax Act, 1961 as procedural, the respondents are estopped from contending to the contrary.

As regards the non-obstante clause contained in TOLA, the High Court held that the non-obstante clause has to be construed strictly and has an overriding effect over the other statutes only to the limited extent that it expressly so provides. Consequently, this non-obstante provision only operates to prevail over the timelines laid down in the specified Act. Apart from these timelines, no other provision of any specified Act is suspended or overridden.

With regard to the argument of TOLA being a Special Act, it was held that the principle that a special Act overrides a general Act has no application to the present case because TOLA and the Finance Act operate in distinct and separate spheres.

Further, the "legal fiction" argument is also without any foundation. A statute can be said to enact a legal fiction when it assumes the existence of something which is known not to exist. The extension of time for completing an assessment or issuing a Section 148 notice has no element of legal fiction in it. The only effect and consequence of this extension of the time limit is that if the act in question is performed within the extended time limit, it will be considered to be legally compliant. However, there is no assumption that the act in question is deemed to have been performed within the original time limit, as wrongly contended by the learned counsel for the Respondents.

Apropos the submission of the Revenue that Section 3 of the TOLA is a 'stop the clock' provision, the High Court held that Section 3 of the TOLA is not a 'stop the clock' provision, as it only relaxes the time limit, so as to facilitate the cases in which the Revenue/assessee has not been able to take the specified action within the statutory timelines. The essential condition for a provision to be termed as stop the clock provision is that the time during which such clock is stopped, such period has to be excluded. In the present instance, time limit is extended, not excluded or stopped.

Wherever the Legislature intended that the old procedure is to be followed in respect of any assessment year as against the new procedure post the amendment, then it has specifically provided so.

The High Court also held that the submission of the revenue that Section 6 of the General Clauses Act saves notices issued under Section 148 of the Income Tax Act, 1961 is untenable in law, as in the present case, the repeal is followed by a fresh legislation on the same subject and the new Act manifests an intention to destroy the old procedure.

The High Court thus held that TOLA did not give power to Government to extend the erstwhile Sections 147 to 151 beyond 31st March, 2021 and/or defer the operation of substituted provisions enacted by the Finance Act, 2021.

The High Court following the interim orders passed by the learned Division Bench in Mon Mohan Kohli vs. Assistant Commissioner of Income Tax & Anr., W.P. (C) 6176/2021 dated 07th July, 2021 as well as similar interim order passed by the Bombay High Court, as well as the order of the Allahabad High Court and Rajasthan High Court, quashed the impugned reassessment notices stating that the impugned notices are invalid and void from inception as they were issued without following the process of issuance of prior notice u/s 148A of the Act. The High Court however gave liberty to the department that if the law (new) permits the respondents/revenue to take further steps in the matter, they can do so.

Ankita Mehra
Senior Manager
Tax Advisory
☎ +91 11 4710 2378
✉ ankitamehra@mpco.in

INDIRECT TAX

GOODS AND SERVICES TAX

Changes in GST Law

A. **AMENDMENT IN CGST RULES, 2017 VIDE NOTIFICATION NO 40/2021-CENTRAL TAX, DATED DECEMBER 29, 20021 (EFFECTIVE FROM JANUARY 01, 2022)**

- **Availment of ITC basis GSTR 2B w.e.f. January 01, 2022**: Rule 36 of CGST Rules 2017 has been amended to provide that the Input tax credit would be available to Recipient of goods/services only when the Supplier of goods/services has paid the tax, filed its GSTR 1 and the details of which duly reflects in GSTR 2B of the Recipient of goods/services.
- **Extension of Due Date of GSTR 9/9C**: The due date of filing of GSTR 9 & GSTR 9C for FY 2020-2021 has been extended from December 31, 2021 to February 28, 2022.

- Other important changes effective from January 01, 2022:

    - In case of difference of tax liability declared in GSTR 1 and GSTR 3B, the same would be deemed as self-assessed tax and would be recovered by Department without issuance of show-cause notice.

    - Assessee would not be able to file its GSTR 1, in case it has not filed its GSTR 3B for the previous month.

    - Authentication of Aadhar Number has been made mandatory under GST for filing refund claims and for filing application for revocation of cancellation of registration.

B. **ELECTRONIC COMMERCE OPERATOR (ECO) ENGAGED AS RESTAURANT SERVICE AGGREGATOR WOULD BE LIABLE TO DISCHARGE GST ON RESTAURANT SERVICES W.E.F. JANUARY 01, 2022 *(Vide Notification No 17/2021-Central Tax (Rate) dated November 18, 2021)***:

Section 9(5) of CGST Act has been amended to provide that Electronic Commerce Operator are required to discharge GST on the intra-state supply of restaurant services, other than the services supplied by restaurant, eating joints etc., located at specified premises.

In other words, wherein ECO are acting in capacity of aggregator of restaurant services (such as Swiggy, Zomato etc.), would be required to discharge GST, instead of Restaurants, on such restaurant services.

However, the restaurants located in specified premises providing hotel accommodation services having declared tariff of any unit of accommodation above INR 7,500/- per unit per day or equivalent, would not be covered by the above rule. In such cases, the liability to discharge GST would continue to be on the Restaurants itself.
CBIC has issued further Clarification vide Circular No 167/23/2021-GST, dated December 17, 2021 with respect to supply of Restaurant services through ECO. Some of the important clarifications are summarised herein under:

- ECO would be required to raise Invoice on ultimate consumers, both in the case of GST registered restaurants as well as unregistered restaurants. In other words, GST registered restaurants are not required to raise invoice on ultimate consumers.

- ECO would charge GST on its invoice @5% to consumers and would discharge the same with the Government in cash.

- ECO would charge GST on its invoice @5% to consumers and would discharge the same with the Government in cash.

- With respect to other supplies "other than restaurant services", provided by restaurants through ECO, all the compliances including invoicing and tax payment would continue to be same as was being followed earlier i.e., the same would be undertaken by respective registered restaurants only.

C. CHANGE IN TAX RATE OF SUPPLY OF FOOTWEAR WITH EFFECT FROM JANUARY 01, 2022 *(Vide Notification No 14/2021-Central Tax (Rate) dated November 18, 2021)*:

<u>Footwear (covered under Chapter 64)</u>: GST rate on "footwear of sale value not exceeding INR 1000 per pair" has been increased from **5% to 12%.**

Therefore, all Footwears falling under (Chapter 64) irrespective of their sale price shall be taxable at 12% under GST w.e.f. January 01, 2022.

The above change in tax rate has been brought-forth in order to correct the problems being faced by the Footwear industry due to inverted duty tax structure.

Similar amendments proposed and declared by the Government for textile industry has been kept in abeyance for the time being.

Shashank Goel
Director
Indirect Tax
☏ +91 11 4710 2357
🖂 shashank.goel@mpco.in

CORPORATE LAW

CORPORATE LAW COMPLIANCE

Holding of AGM/EGM through VC or OAVM and relaxation in additional fees

AGM through VC

The Ministry of Corporate Affairs [MCA] had earlier issued circulars dated May 05, 2020 and January 13, 2021, for allowing the companies to conduct their Annual General Meeting (AGM) or on before December 31, 2021, through Video Conferencing (VC) or other audio-visual means (OAVM) OAVM, without requiring the shareholders to physically assemble at a common venue. The said circulars applied for AGM which were due to be held in the year 2020 or are due in the year 2021.

Subsequently, the MCA, vide General Circular No. 19/2021 dated December 08, 2021 has extended this time limit till June 30, 2022. Accordingly, the companies are allowed to conduct their AGM or on before June 30, 2022 through VC or OAVM. However, it may be noted that this circular applies only for AGMs which were due in the year 2021.

Further, in continuation to the above referred circulars, now the MCA, vide General Circular No. 21/2021 dated December 14, 2021, has allowed the companies to conduct their AGM through VC or OAVM, on or before June 30, 2022, for the F/Y ending on or before March 31, 2022 also. Accordingly, now the AGM for F/Y 2021-22 can also be held through VC or OAVM, on or before June 30, 2022.

Note:

In either case, it has been clarified by MCA that above extensions shall not be construed as conferring extension of time for holding AGM.

EGM through VC

The Ministry of Corporate Affairs [MCA] had earlier issued circulars dated April 08, 2020, April 13, 2020, June 15, 2020 and September 28, 2020 for allowing the companies to hold Extraordinary General Meetings (EGMs) for the period up to December 31, 2020, through Video Conferencing (VC) or other audio-visual means (OAVM) OAVM complemented with e-Voting facility/simplified voting through registered emails, without requiring the shareholders to physically assemble at a common venue. Subsequently, this time limit was extended till June 30, 2021 and was further extended till December 31, 2021.

Now the MCA, vide its General Circular no. 20/2021 dated December 08, 2021, has further extended the time limit till June 30, 2022. Accordingly, the companies are allowed to conduct their EGM or on before June 30, 2022 through VC or OAVM.

Relaxation on levy of additional fees

The Ministry of Corporate Affairs, vide its general circular dated October 29, 2021, had earlier provided relaxation on levy of additional fees upto December 31, 2021, with respect to filing of annual filing e-Forms for the F/Y ended March 31, 2021. Accordingly, 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 were allowed to be filed till December 31, 2021, without payment of any additional fees.

Now, keeping in view various requests received from stakeholders, the MCA, vide its General Circular no. 22/2021 dated December 29, 2021, has further extended the time limit till February 15, 2022, for filing of e-forms AOC-4, AOC-4 (CFS) AOC-4 XBRL, AOC-4 Non-XBRL for the F/Y ended March 31, 2021.

Further, the time limit has been extended till February 28, 2022 for filing of e-forms MGT-7/MGT-7A for the F/Y ended March 31, 2021.

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

REGULATORY

FOREIGN EXCHANGE MANAGEMENT ACT

External Commercial Borrowings (ECB) and Trade Credits (TC) Policy – Changes due to LIBOR transition

[A.P. (DIR Series) Circular No 19 dated December 8, 2021, issued by Reserve Bank of India]

In view of the discontinuance of LIBOR as a benchmark rate, Reserve Bank of India ("RBI") has made following changes to the all-in-cost benchmark and ceiling for Foreign Currency Denominated ("FCY") External Commercial Borrowings ("ECBs") and Trade Credits ("TCs"):

a) *Redefining 'Benchmark Rate'*: Currently, the 'benchmark rate' in case of FCY ECB/TC refers to 6-months LIBOR rate of different currencies or any other 6-month interbank interest rate applicable to the currency of borrowing, e.g., EURIBOR. Henceforth, benchmark rate in case of FCY ECB/TC shall refer to any widely accepted interbank rate or Alternative Reference Rate ("ARR") of 6-month tenor, applicable to the currency of borrowing.

b) *Change in all-in-cost ceiling for new ECBs/ TCs:* In order to account for the differences in credit risk and term premia between LIBOR and the ARRs, the all-in-cost ceiling for new FCY ECBs and TCs has been increased by 50 basis points ("bps") from 450 bps and 250 bps to 500 bps and 300 bps, respectively, over the benchmark rates.

c) *One Time Adjustment in all-in-cost ceiling for existing ECBs/ TCs:* In order to enable smooth transition of existing ECBs and TCs linked to LIBOR whose benchmarks are changed to ARRs, the all-in-cost ceiling for existing FCY ECBs and TCs has been increased by 100 bps from 450 bps and 250 bps to 550 bps and 350 bps, respectively, over the benchmark rates.

Introduction of Legal Entity Identifier for Cross-border Transaction

[A.P. (DIR Series) Circular No 20 dated December 10, 2021, issued by Reserve Bank of India]

The Legal Entity Identifier (LEI) is a 20-digit number used to uniquely identify parties to financial transactions worldwide to improve the quality and accuracy of financial data systems. LEI has been introduced by the Reserve Bank in a phased manner for participants in the over the counter (OTC) derivative, non-derivative markets, large corporate borrowers and large value transactions in centralised payment systems.

In order to further harness the benefits of LEI, it has been decided that AD Category I banks ("AD Banks"), with effect from October 01, 2022, shall obtain the LEI number from the resident entities (non-individuals) undertaking capital or current account transactions of ₹50 crore and above (per transaction) under FEMA, 1999. As regards non-resident counterparts/ overseas entities, in case of non-availability of LEI information, AD Banks may process the transactions to avoid disruptions.

Further, AD Banks may encourage concerned entities to voluntarily furnish LEI while undertaking transactions even before October 1, 2022. Once an entity has obtained an LEI number, it must be reported in all transactions of that entity, irrespective of transaction size. AD Banks shall have the required systems in place to capture the LEI information and ensure that any LEI captured is validated against the global LEI database available on the website of the Global Legal Entity Identifier Foundation ("GLEIF").

Entities can obtain LEI from any of the Local Operating Units accredited by the GLEIF, the body tasked to support the implementation and use of LEI. In India, LEI can be obtained from Legal Entity Identifier India Ltd. ("LEIL") (https://www.ccilindia-lei.co.in), which is also recognised as an issuer of LEI by the RBI under the Payment and Settlement Systems Act, 2007. The rules, procedures and documentation requirements may be ascertained from LEIL.

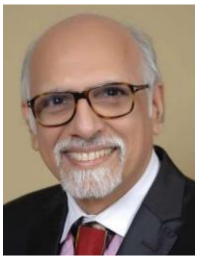
Divya Ashta
Director
Transaction Advisory Services
☏ +91 11 4710 2372
✉ divya@mpco.in

Important dates to remember

Particulars	Date
Goods and Services Tax	
Submission of Form GSTR–1 for December 2021	11.01.2022
Submission of Form GSTR – 3B and due date for payment of tax for December 2021	20.01.2022
Submission of Form GSTR 9 & GSTR 9C for 2020-2021	28.02.2022 (extended from 31.12.2021)

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