MOHINDER PURI & CO.
CHARTERED ACCOUNTANTS

Corporate Update

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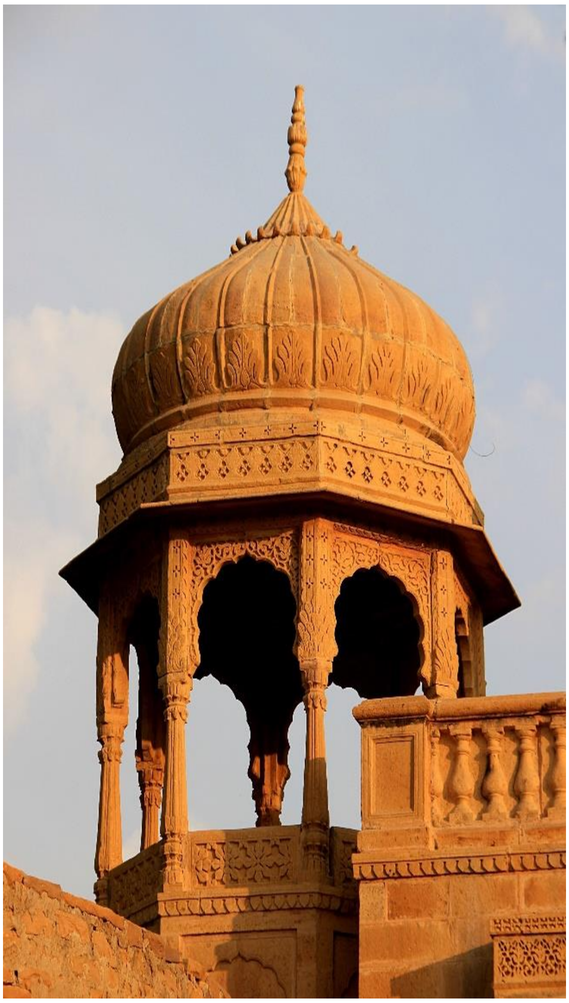

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FOREWORD

Dear Reader,

In the last few weeks, the Reserve Bank of India has taken various steps to control the rising inflation rate which is now forecast to touch 6.7% in the current fiscal year, due to various reasons impacting the economy. The GDP growth rate in the fiscal year ending March 31, 2023 is now projected at 7.2% by the Reserve Bank of India (7.5% by World Bank).

In the last month a few, very important judicial pronouncements were made by the Supreme Court of India on Indirect-tax regulations, which may have an impact on the tax exposure on Corporate Income-tax liability as well (Refer our articles on Indirect Taxes and International Taxation).

In addition to the above analysis, a few other important judgements form part of this Update.

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Partner

DIRECT TAX

INTERNATIONAL TAXATION

Adjustment can be made to the tested party price in the absence of accurate and reliable data for making adjustment to comparable companies

Marlabs Innovations Pvt Ltd [TS-220-ITAT-2022(Bang)-TP]

In a recent judgement the Tax Tribunal, Bangalore Bench held that adjustment under Transaction Net Margin method (TNMM) method for comparability analysis can be made to the net profit margin of the tested party in case accurate and reliable data to make adjustment to the margin of comparable companies is not available.

On the facts of the case the assessee is engaged in the business of software development services and IT enable services. It provided such services to its Associated Enterprise (AE) and used TNMM as appropriate method for benchmarking. The TPO during the assessment proceedings rejected the comparable selected by the assessee and selected a fresh set of comparable companies. The TPO treated foreign exchange to be operating in nature against the claim of the assessee.

On the basis of the above, adjustment under transfer pricing was made. Aggrieved, the assessee preferred objections before DRP which upheld the adjustments.

Before the Tribunal the assessee submitted that it is a captive service provider and is compensated for the services on cost plus basis excluding forex exchange fluctuation component. It submitted that it has incurred abnormal and extraordinary foreign exchange loss towards foreign exchange forward contracts as compared to the comparable companies and an adjustment for such loss should accordingly be allowed for comparability purposes. The Tribunal agreed with the contentions of the assessee and allowed such adjustment to be non-operative in nature.

Further, with regard to the availability of accurate and reliable data for adjustment to the comparable price, the Tribunal relying on Rule 10B(1)(e), 10B(2) and 10B(3), OECD guidelines and US Transfer Pricing guidelines held that the purpose and intent of comparability analysis, is to examine as to whether, or not, the values stated for the international transactions are at arm's length. Therefore, it was held that in case accurate and reliable data is not available in public domain for comparable companies, the adjustment is to be made in the hands of the tested party as the regulations do not cast any restrictions to provide adjustment to be made on the tested party. Based on such observations of the Tribunal the matter was remanded back to the AO for reconsideration of the claim made by the assessee.

The Tribunal also decided on the selection of various comparable rejected and selected by the TPO. The ground taken by the assessee against exclusion/ rejection of the companies by the TPO was allowed by the Tribunal whereas the matter relating to companies included was remanded back to the TPO to be considered in accordance with the correct data available in public domain.

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Benefit of +/-5% range benefit available on transaction-to-transaction basis under CUP method

L T Foods Ltd [TS-221-ITAT-2022(DEL)-TP]

The Tax Tribunal, New Delhi in its recent judgement allowed the benefit of +/-5% to the assessee on transaction-to-transaction basis under CUP method.

On the facts of the case, the assessee exported rice to its two AEs and used CUP and TNMM for benchmarking said international transaction with its AEs. Under CUP method price charged on sale of rice to AE is higher/within range +/- 5% of the price charged from un-related third parties and under TNMM the margin earned by the assessee from sales to AE is higher than margin from sales made to unrelated third parties in export and domestic market. The TPO asked the assessee to provide comparison of price of goods on daily basis under CUP method and made addition on three transactions wherein the price charged by the assessee from the AE was found lower than the price charged in the sales made to non-AEs. The TPO did not grant the benefit of range of +/- 5% as claimed by the assessee on the grounds that the same is not available in case comparison is made on transaction-to-transaction basis. Aggrieved the assessee raised objections before DRP which was dismissed.

The Tribunal referring to the amended provisions of section 92C(2) by Finance Act No. 2 Act, 2009 with effect from 1.10.2009 held that benefit of +/-5% is available on transaction to transaction basis post amendment whereas earlier it was only available where ALP was determined by considering arithmetical mean of number of uncontrolled transactions. The Tribunal also placed reliance on decision in the case of **DDIT Vs. Development Bank of Singapore 155 TTJ 265** wherein it was held that benefit of range of +/- 5% is available not only to a situation where more than one price is determined as ALP by the most appropriate method but also where only one price is determined as ALP the benefit is applicable to the assessee. Further, it held that, since, similar to subsequent assessment year, wherein the TPO himself accepted ALP under TNMM, the transaction entered by the assessee for the relevant year is at ALP under TNMM, the adjustment made by TPO is to be deleted.

Regarding adjustment on account of interest on foreign currency loans to AEs, the Tribunal relying on the decision of Hon'ble High Court in the case of Cotton Naturals (I) Pvt Ltd ITA No. 233/2014 held LIBOR rate of interest to be used for comparability, thereby deleting the adjustment made by the TPO.

Regarding adjustment on account of interest on delayed payment by the AEs, the Hon'ble Tribunal based on the observation of the facts of the case that no interest has been charged from non-AEs on similar delay and relying on the Hon'ble Jurisdictional High Court of Delhi in the case of Kusum Healthcare Pvt Ltd deleted the adjustment made by the TPO.

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Supply of equipment by non-resident company not taxable in India where entire manufacturing took place outside and sale concluded outside India

DCIT, International Taxation vs. Solar Turbines International Company (Singapore Branch of Solar Turbines International Company, USA) [TS-387-ITAT-2022(DDN) dated April 29, 2022

Recently, the Tax Tribunal Dehradun Bench, inter-alia, held the receipts on account of supply of equipment were not taxable in India as all the activities in relation to manufacturing of the equipment took place outside India, sale was concluded outside India on a principal to principal basis and the consideration was also received outside India in foreign currency.

On facts, during the year under consideration, the taxpayer filed its income-tax return showing certain receipts as towards overhauling services. One such receipt was from one SI Group India Ltd. The taxpayer had supplied turbine/gas producer assembly Taurus 60 and gearbox to SI Group India Ltd. for power generation set. This equipment was provided in exchange of similar equipment and the net price (price of new equipment minus price of old equipment) was treated as income from overhauling services by the taxpayer. The taxpayer had also supervised turbine change out for SI group and the receipts from such supervision service were offered to tax as troubleshooting services on gross basis at the rate of 10.506%.

In the assessment proceedings, the taxpayer contended that the receipts from alleged overhauling services from SI Group India Ltd were not taxable in India as per Article 12 of India-USA tax treaty as these services did not "make available" any technical knowledge, experience or expertise to the customers. Alternatively, the taxpayer contended that even if the receipt was treated as towards sale of goods, the same shall not be taxable in India since the delivery of equipment had taken place in USA on ex-works basis and thereby the risk to the equipment passes to the buyer in USA.

The Assessing Officer held that the receipts pertained to the equipment supplied by the taxpayer. He did not accept the claim of the taxpayer that the sale was concluded outside India on the premise that the installation, commissioning and start-up of power generator set as supplied was carried out in India. As such, the Assessing Officer concluded that the revenues earned on such sale were chargeable to tax in India under Section 9(1) of the Income-tax Act. 25% of gross receipts in respect of such sale was considered as profit and the same was subjected to tax in India.

On appeal, the Commissioner of Income Tax (Appeals) ['CIT(A)'] agreed with the Assessing Officer's observation that the impugned receipt was in the nature of sale of equipment only. However, regarding taxability of such receipt, the CIT(A) held that the receipts on account of supply of equipment could not be taxed in India as the entire production work and also delivery took place outside India, consideration was received outside India and the transaction was undertaken on principal-to-principal basis.

On further appeal before the Tax Tribunal, the Revenue contended that the sale of equipment and the supervision services provided by the taxpayer were inextricably related and formed integral part of composite services and that the dominant intent of the parties was to set up the turbine rotor/gas producer assembly for power generation.

The Tribunal observed that the purchase

order for equipment did not mention about any services and no separate price for services was quoted therein. The Tribunal noted that the only basis on which the Assessing Officer held that the sale of equipment was concluded in India was that the Taxpayer had admittedly supervised the turbine change out in India. In this regard, the Tribunal relied on the decision of Hon'ble Supreme Court in the case of Ishikawajima Harima [2007] 288 ITR 408 (SC) and, applying the doctrine of Territorial Nexus, held that only that part of the work which was attributable to business operations carried out by the taxpayer in India was taxable in India. The Tribunal observed that in the instant case, supervisory services for installation and commissioning etc. were provided in India at the premises of the buyer and only receipts therefrom could be considered to be taxable in India which the taxpayer had duly offered to tax.

The Tribunal, thus, affirmed the decision of the CIT(A) that the receipts on account of supply/sale of equipment could not be taxed in India.

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Taxability of reimbursement of salaries of seconded employees – The Saga may Continue

The issue of taxability of reimbursement of salaries of seconded employees to the non-resident employer company has always been contentious. While the tax authorities contend that such payment partake the nature of 'service' and characterize the same as fees for technical services (FTS), the taxpayers argue that the said payments do not have any service element and are pure reimbursements.

The argument of the taxpayer is based on the reasoning that upon secondment to Indian sister concerns, the personnel operate under the control and supervision of the Indian company and as such, the Indian company becomes the 'economic employer' of the personnel. The Indian company deducts tax at source on salary of seconded employees. Thus, what is paid to the foreign sister concern is only reimbursement of the salary discharged by foreign companies out of administrative convenience.

While the aforesaid view of the taxpayer has been upheld in various judicial precedents, certain courts have deviated from this stand. In the case of Centrica India Offshore (P.) Ltd. vs CIT [TS-237-HC-2014(DEL)], the Delhi High Court had held that reimbursement of salary costs to an overseas entity was liable to be taxed in India as FTS, since the overseas entity was providing technical knowledge and skills to the Indian company through seconded personnel. In this decision, the Delhi High Court has treated the legal employment, right to terminate employment contract and right of employees to enforce salary payment being with the foreign company as guiding factors to determine the employer of the secondees. The Special Leave Petition filed before the Supreme Court was also dismissed.

Subsequent to the decision of the High Court of Delhi, various other Tribunals and Courts have decided in favour of the taxpayers and have distinguished the decision in the case of Centrica (supra) on various grounds.

The High Court of Karnataka in the case of Director of Income Tax, (International Taxation) *v.* Abbey Business Services India (P.) Ltd. [2020] 122 taxmann.com 174

(Karnataka), while deciding the issue in favour of the taxpayer, distinguished the decision in the case of Centrica on the premise that the Centrica decision dealt with the permanent establishment issue (PE) which was absent in the case under consideration before the Court.

More recently, the Tax Tribunal, Bangalore Bench in the case of Goldman Sachs Services Pvt. Ltd [TS-341-ITAT-2022(Bang)] ruled in favour of the assessee and held that the Indian company was the economic and de facto employer of the seconded employees. Since salaries as reimbursed by the taxpayer were already subjected to tax under section 192 of the Act and the reimbursement was on cost-to -cost basis without any income element, the Tribunal concluded that the reimbursement made by the Indian entity to overseas entity could not be regarded as FTS. It has further been held that merely supplying technical, managerial or personnel with managerial skills cannot be regarded as rendering technical services. The decision in the case of Centrica (supra) was distinguished on the ground that in the case of Centrica, the money paid by the Indian entity accrued only to the overseas entity and may or may not have been paid to the secondees depending upon the terms of the contract. In this regard, reliance was placed on the decision of M/s. Faurecia Automative Holding vs.DCIT in ITA No.784/Pun/2015 dated 08/07/2019.

On identical facts, the same bench of the Tax Tribunal in the case of Toyota Boshoku Automotive India Pvt. Ltd [TS-315-ITAT-2022(Bang), analysed various aspects of secondment and delivered judgement in favour of the taxpayer.

It may be noted that in the decision of Marks and Spencer Reliance India P. Ltd. [TS-178-HC-2017] rendered by the Bombay High Court, it was held that payment towards reimbursement of salary expenditure without any element of profit, would not be taxable under the provisions of the Act. The Hon'ble Court also held that, when the entire salary has been subjected to tax in India, the Indian company could not held to be in default for not deducting tax on such reimbursement. However, the Centrica decision was not considered therein.

Recently, the Apex Court has delivered a decision on May 19, 2022, in the case of ***C.C., C.E. & S.T.- Bangalore (Adj) Vs M/s Northern Operating Systems Pvt Ltd*** *[2022] 138 taxmann.com 359 (SC)* on the service tax regime (pre-GST). In the said decision, the Court has held that Service Tax under reverse charge on secondment of employees by foreign group company to its Indian subsidiary shall be applicable. While holding so, the Apex Court held that secondment arrangements ought to be characterized as manpower supply service. On facts, the overseas entity first secured projects and then outsourced the work for execution to the Indian company. The overseas entity then seconded its employees to the Indian company for the purposes of such outsourced work, the secondees continued to be on the payrolls of overseas entity. The Court has held that the foreign group company is the actual employer of the Secondee, and the deployment itself is for a limited period in relation to its own business. The Supreme Court observed that control test is not necessarily determinative to discern the real employer.

The observations of the Supreme Court, even though relate to service tax law, may be binding on taxpayers, authorities as well as Courts. Thus, this decision may indeed have ramifications on how secondment arrangements are treated under Indian tax law. This is because the very basis of taxpayers treating Indian sister companies as the 'economic employer' applying the 'control test' has been dislodged by the Supreme Court.

As such, the issue of taxability of secondment arrangements continues to be a grey area in the field of international taxation.

Therefore, taxpayers must revisit their existing secondment arrangements in light of this Supreme Court decision, not only with regard to the exposure under current GST regime but also the impact it may have on FTS/ PE situation.

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DOMESTIC TAXATION

Activation of updated functionality for Compliance Check for Sections 206AB & 206CCA- of the Income-tax Act, for higher withholding tax on non-filers of tax return

The Finance Act, 2021 inserted new Sections 206AB and 206CCA which deal with the deduction and collection of tax at source respectively at higher rate (5% or twice the applicable rate, whichever is higher) in the case of a person (being recipient of the sum) who has not filed the return of income for two immediate previous years and the aggregate of tax deducted and tax collected at source in his case is Rs 50,000 in each of these two years.
The Finance Act, 2022 made this provision more stringent by providing that the default in filing of return for even one preceding year, for which the due date for filing of tax return has expired, would attract higher withholding tax as aforesaid.

In order to check the applicability of this section by the deductor in the case of recipient of income, the income tax department made available a new functionality through its reporting portal (https://report.insight.gov.in).

Due to change in the statutory provision contained in section 206AB & 206CCA, the Income tax department has issued Circular 10 dated May 17, 2022 communicating the modification made in the functionality for Compliance Check for Sections 206AB & 206CCA by implementing the new reduced limit of one year of non-filing which would attract TDS /TCS at higher rates.

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Once an amount is disallowed under section 40(a)(i)/(ia) for non-deduction of tax, the assessee cannot be held as in default to pay interest under section 201(1A)

[(2022) 137 taxmann.com 150]

Tax Tribunal, [Bangalore bench] in case of Robert Bosch Engineering and Business Solutions (P.) Ltd. held that where TDS had been deducted by an assessee at the time of making payment in respect of provision made last year, and same had been deposited to Government account, assessee could not be treated to be an 'assessee in default' to the extent TDS had been deposited though in subsequent financial year

Brief facts of the case are that the assessee made a provision of Rs. 70.8 million on which TDS was not deducted. The assessee made *suo motto* disallowance of the entire Rs. 70.8 million under section 40(a)(i)/(ia) while filing return of income. The assessee deducted TDS on Rs. 24.4 million at the time of payment in next year and the balance of Rs. 46.4 million of the provision was reversed subsequently.

The assessing officer with respect to Rs. 24.4 million observed that details produced by the assessee were virtually impossible to verify the accuracy of the amounts booked, subsequent payments and TDS details made in subsequent years. Further with respect to balance amount of Rs. 46.4 million, as the assessee has not furnished the party-wise details, the assessing officer passed an order under section 201 (1)/201(1A) for the default of non-deduction of tax at source and levied interest on the entire amount of Rs. 70.8 million.

On appeal, the Commissioner (Appeals) restricted the levy to such amount on which neither TDS was deducted nor invoices were received and the amounts were reversed. The Commissioner (Appeals) thus directed the assessing officer to exclude those amounts in respect of which TDS had been deducted in subsequent year.

On appeal to the Tax Tribunal, the Tribunal held that the provisions of section 201(1) seek to make good any loss of revenue, from an assessee who is the payee, on account of any lapse by the recipient of such income.

In the present case the assessee filed details of bifurcation of amount estimated in respect of each payee, the month in which the actual invoice was received and the TDS deducted coupled with details of it being deposited with the Government account. The AO did not consider the same by observing that it is voluminous and impossible to be verified. The Tax Tribunal held that the assessee (deductor) gets exonerated from the applicability of TDS provisions on disallowance of expenditure under section 40(a)(i)/(ia) of the Act.

Relying on case of IBM India (P.) Ltd. v. ITO [Bang Trib] it held that in the present case assessee cannot be treated to be an 'assessee in default' to the extent TDS has been deducted and deposited though in subsequent financial year. However, with respect to issue of levy of interest under section 201(1A) on the amount on which TDS was not deposited due to non-receipt of invoices and provisions were reversed, the Tribunal following the decision of Hon'ble Supreme court in *Shree* Choudhary Transport Co. v. ITO and Hon'ble Karnataka High Court in case of Volvo India (P.) Ltd did not follow the case of IBM India (P.) Ltd. v. ITO [Bang Trib] in which the assessee was held liable to interest under section 201(1A). The Tribunal in the present case directed the assessing officer to verify the payment of tax by the recipient (payee) before charging any interest, under section 201(1A), which is a pre-condition to levy interest under section 201(1A).

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CBDT made return filing mandatory where Turnover, TDS/TCS or deposit in saving bank account exceeds certain limit

Seventh-proviso to section 139(1), as inserted by the Finance (No. 2) Act, 2019, requires any person other than a company or a firm, who is not required to furnish return of income, to furnish a return if he incurs expenditure on foreign travel, electricity consumption or make deposits in one or more current accounts maintained with a bank, exceeding the prescribed threshold. The proviso also delegates power to the Central Board of Direct Taxes (CBDT) to prescribe such other conditions upon fulfilment of which the filing of return would be mandatory.

The CBDT, in terms of the power delegated under seventh-proviso to section 139(1), has prescribed a new rule 12AB vide Notification No. 37/2022/F.NO. 370142/01/2020-TPL(PART1) dated 21.04.2022. The Notification prescribes the following four conditions for furnishing return of income by a person (other than a company or firm) under the seventh proviso:

a) if the total sales, turnover or gross receipts in the business exceeds Rs 60,00,000 during the financial year; or

b) if the total gross receipts in profession exceeds Rs 10,00,000 during the financial year; or

c) if the aggregate of tax deducted at source and tax collected at source during the financial year, is Rs 25,000 or more; for individual resident in India who is of the age of sixty years or more, at any time during the relevant financial year the limit is Rs 50,000; or

d) the deposit in one or more savings bank account of the person, in aggregate, is Rs 50,00,000 or more during the financial year.

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INDIRECT TAX

CHANGES IN GST LAW

Supreme Court confirms Service Tax on Secondment of Employees following the test of `Substance Over Form'

C.C., C.E. & S.T. - Bangalore (Adj) Vs M/s Northern Operating Systems Pvt Ltd [2022] 138 taxmann.com 359 (SC)

Supreme Court in its recent judgement has confirmed the applicability of Service Tax under reverse charge on secondment of employees by foreign group company to its Indian subsidiary.

Supreme Court observed that the taxability of secondment of employee is primarily based on who should be reckoned as the actual employer of the secondee. If Indian subsidiary is treated as employer, then there could be no levy of service tax on secondment of employees from foreign group companies to Indian subsidiary. However, if the foreign group company is treated as the employer, the arrangement would be treated as service by the overseas entity to Indian subsidiary, chargeable to service tax under reverse charge mechanism.

There have been multiple judicial pronouncements in the past, such as *Honeywell Technology (2020-TIOL-1277-CESTAT-BANG), Volkswagen India (2016 (42) STR J145 (SC)), Computer sciences*

Corp. (2014-TIOL-434-CESTAT DEL) which have laid down different criteria to determine the employer-employee relationship in case of secondment.

Supreme Court while disagreeing from the above decisions by observing that those Orders are unreasoned and of no precedential value, held that it is not feasible to have a single determinative factor to decide the employer-employee relationship. The court must follow the test of '*Substance over Form*', which has been consistently applied by Supreme Court, which requires a close look at the terms of contracts between foreign group company, Indian subsidiary and Secondee. Supreme Court on facts of the case held that the foreign group company is the actual employer of the Secondee on the following grounds:

- The foreign group company in relation to its business deploys secondee to the Indian subsidiary on secondment.
- The foreign group company, for whatever reason, be it social security benefits or administrative convenience, pays the salary to secondees. During the secondment, the secondees continue to be on the payrolls of foreign group company.
- The Supreme Court observed that control test is not necessarily determinative to discern the real employer. The operational and functional control may lie with the Indian company, but that is only to ensure performance of the duties entrusted to them.
- The terms of employment, even during the secondment, are in accordance with the policy of the foreign group company.
- Upon the termination of period of secondment, the secondee returns to their original place ie., with foreign group company and must await secondment or extension of secondment. The letter issued to the Secondee by the foreign group company specifies that the tenure with the Indian subsidiary is an assignment.
- The *quid pro quo* for the secondment agreement, where the Indian subsidiary has the benefit of experts for a limited period, is implicit in the scheme of things.
- The Court further observed that there are substantial allowances paid to Secondees, such as hardship allowance for working in India, monthly housing allowances, annual utility allowances etc., which could only be paid by resorting to a standardized policy of the foreign group company.

The Hon'ble Supreme Court disregarded the fact, as not determinative, that the Indian subsidiary is deducting the applicable income tax from the Secondees, and Secondees are filing their income tax returns. Also, that Indian subsidiary is remitting the contribution, on actuals, to be paid towards social security and other benefits on account of Secondees, to the group company.

Supreme Court observed that the payment of social security and salary by foreign group company and later reimbursing the same from Indian subsidiary is nothing unusual, given that the seconded employees were performing the tasks of the Indian subsidiary. Therefore, it can be inferred from the judgement that the total consideration paid to the seconded employees as well as reimbursements made to the foreign group company would form part of consideration for the purpose of levy of service tax/GST under reverse charge.

Though the Judgment pertains to pre-GST regime, however, the *ratio decidendi* of the judgement would have ramification in the GST regime also.

GST Authorities may seek to levy tax on all secondment agreements w.e.f. July 2017 as this tax period is still not time barred. It would be advisable that the Indian Subsidiaries may take a decision to start discharging GST with effect from FY 2021-2022, as the tax paid for the said period would be available as input tax credit before November 2022 and thus not adding cost to the Company. However, tax payment for the period prior to FY 2021-2022, if required to be paid, would be a tax cost in the hands of Indian Subsidiary, as claiming ITC may be litigative as GST Authorities may challenge the same as being time barred.

In our view, the ratio of the present SC judgment would also apply where there is similar contractual relationship between any non-resident company and an Indian Company.

Therefore, it is advisable to revisit all secondment agreements considering the above judicial pronouncement.

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Supreme Court sets-aside GST under reverse charge on Ocean Freight in CIF contracts

Union of India & Ans Vs M/s Mohit Minerals Pvt Ltd
(Civil Appeal No 1390/2022, Supreme Court, Order dated May 19, 2022)

The question before Supreme Court of India was whether an Indian importer, importing goods under Cost-Insurance-Freight (CIF) contract, can be subject to the levy of IGST (on reverse charge basis) on the component of ocean freight paid by the foreign seller to a foreign shipping line.

The Hon'ble Supreme Court held that in a CIF contract, supply of goods is accompanied by supply of services of transportation & insurance, the responsibility of which lies on the foreign seller. The supply of transportation service by the foreign shipper forms part of the bundle of supplies between the foreign seller and the Indian importer, wherein the principal supply is supply of imported goods by the foreign seller, on which IGST is payable under the Customs law read with IGST Act.

To levy IGST on supply of service component of transaction would contradict the principle of composite supply enriched in Section 8 of CGST Act. Since the Indian importer is liable to pay IGST on the 'Composite supply', comprising of supply of goods as well as services of transportation, insurance etc., in CIF contract; separate levy on the Indian importer for supply of services by the foreign shipping line would be in violation of the scheme of the GST legislation.

Therefore, Hon'ble Supreme Court held that they agree with the High Court to the extent that the tax on supply of service, which has already been included by the legislation as a tax on the composite supply of goods, cannot be allowed.

Post Supreme Court Judgement, the taxability of Ocean Freight under GST law, in different scenarios, could be summed-up as under:

Transaction	INCOTERM	Seller	Buyer	Shipping line	Legal provisions	Taxability
Import	CIF	Foreign Entity	Indian Entity	Foreign Entity	Composite supply contract consisting of import of Goods as well as transportation & insurance services.	No GST payable by Importer of goods separately on Ocean Freight.
	FOB	Foreign Entity	Indian Entity	Foreign Entity	Indian importer would avail the services of transportation from foreign shipping line and pay Ocean freight to the foreign shipping line	Yes, GST would be paid by Indian importer under reverse charge mechanism
	FOB	Foreign Entity	Indian Entity	Indian Entity	Indian importer would avail services and make payment to Indian shipping line	Yes, GST would be charged by Indian shipping line
Export	CIF/FOB	Indian Entity	Foreign Entity	Indian Entity	Place of supply would be destination of goods ie., outside India	Exempt, vide Notification No 9/2017-IGST (Rate), dated 28/06/2017 (Entry No 20B)
	CIF	Indian Entity	Foreign Entity	Foreign Entity	As per Section 13(9) of IGST Act, the place of supply would be destination of goods ie., outside India	

Points to Deliberate

While both the Supreme Court as well as the Gujarat High Court, in their judgements have held that the importer of goods would not be liable to pay GST on ocean freight under reverse charge mechanism in case of import of goods under CIF contract, however, the rationale of their decisions is different. Supreme Court has differed from High Court on the following important counts:

- High Court had held that in case of CIF contract, the contract for transportation is entered into by the foreign seller with the foreign shipping line and not the Indian importer i.e. buyer. Further, payment of consideration towards the transportation services is also paid by the foreign seller to foreign shipping line. Therefore, Indian importer would not qualify as recipient of service of transportation of goods and hence, would not be liable to pay tax under reverse charge.

Supreme Court on the other hand while interpreting the provisions pertaining to *'Place of supply of services'* (Section 13(9) of IGST Act) and *'Recipient of supply of goods or services or both'* (Section 2(93)(c) of CGST Act) held that GST law inherently creates a deeming fiction of the importer of goods to be the recipient of shipping service. The import of goods by a CIF contract constitutes an "inter-state" supply which can be subject to IGST where the importer of such goods would be the recipient of shipping service.

The effect of the above interpretation by Supreme Court is that it widens the definition of *'Recipient of Services'* to include the ultimate beneficiary of services as well. This may have a far-reaching impact in many cases and needs careful examination in cases involving multiple parties.

- Also, the High Court held that the impugned Notifications *(ie., Entry No 9(ii), Notification No 8/2017-IGST (rate) dated June 28, 2019 and Entry No 10, Notification No 10/2017-IGST (Rate) dated June 28, 2017)* through which the GST was being levied on ocean freight in case of CIF contracts, as ultra vires the IGST Act, 2017 as they lack legislative competency. Both the Notifications were declared to be unconstitutional.

  Supreme Court on the other hand has held that the Notifications are not ultra vires the IGST Act, and that Section 5(3) and Section 5(4) of IGST Act do confer the power of creating deeming fiction on the delegated legislation.

- The Supreme Court has further held that the recommendations of GST Council are not binding on the Union and States. They are recommendatory in nature. The Government while exercising its rule making power under the provisions of GST law is bound by the recommendations of the GST Council. However, that does not mean that all the recommendations of the GST Council are binding on the legislature's power to enact primary legislations.

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CORPORATE LAW

CORPORATE LAW COMPLIANCE

Recent Changes in Corporate Law

1. **The Companies (Share Capital and debentures) Amendment Rules, 2014**

   The Ministry of Corporate Affairs, vide its Notification dated May 04, 2022, has amended the Companies (Share Capital and Debenture) Rules, 2014, by inserting a "Declaration" as under:

   "Declaration:
   - Transferee is not required to obtain the Government approval under the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 prior to transfer of shares; or

   - Transferee is required to obtain the Government approval under the Foreign Exchange Management (non-debt Instruments) Rules, 2019 prior to transfer of shares and the same has been obtained and is enclosed herewith."

2. **The Companies (Prospectus and Allotment of Securities) Amendment Rules, 2022**

   In line with the above referred amendment, the Ministry of Corporate Affairs, vide its Notification dated May 05, 2022, has also amended the Companies (Prospectus and Allotment of Securities) Rules, 2014 by notifying Companies (Prospectus and Allotment of Securities) Amendment Rules, 2022. Through the amendment rules, the relevant rule, dealing with issue of securities by way of private placement, prohibits a company to make an offer or invitation of any securities to a body corporate which is incorporated in any country which shares a land border with India, (Afghanistan, Bangladesh, Bhutan, China, Myanmar, Nepal and Pakistan) or to a national of any such country, unless such body corporate or the national, have obtained Government approval under the Foreign Exchange Management (Non-debt Instruments) Rules, 2019, and have attached a copy of said approval letter along with the private placement offer cum application letter.

   Further, to give effect to the above, suitable changes have also been made in Form PAS-4 [private placement offer letter].

3. **Companies (Incorporation) Second Amendment Rules, 2022**

   The Ministry of Corporate Affairs, vide Notification dated May 20, 2022, has amended the Companies (Incorporation) Rules, 2014 by notifying Companies (Incorporation) Second Amendment Rules, 2022. The amendment rules have substituted the existing Form INC-9 [Declaration by subscribers and first directors] by a new Form INC-9. The revised Form INC-9 contains a declaration regarding the requirement to obtain the Government approval under the Foreign Exchange Management (Non-debt Instruments) Rules, 2019, [NDI Rules] and in case, the aforesaid approval is required, whether the same has been obtained, prior to subscription of shares.

   Further, a new declaration has been inserted in Form No.INC-32 (SPICe+) [Form to be filed for incorporating a company], to the effect that if any proposed director seeking appointment is a national of a country, which shares land border with India, necessary security clearance has been obtained from Ministry of Home Affairs, Government of India, and a copy of said approval shall be attached along with the consent letter of that particular director.

   It may be noted that this Notification is in force with effect from June 01, 2022.

4. **Companies (Appointment and Qualification of Directors) Amendment Rules, 2022**

   The Ministry of Corporate Affairs, vide Notification dated June 01, 2022, has amended the Companies (Appointment and Qualification of Directors) Rules, 2014 by notifying Companies (Appointment and Qualification of Directors) Amendment Rules, 2022. Similar to above Notifications, the amendment rules contain the requirement of obtaining security clearance from Ministry of Home Affairs, Government of India, before applying for DIN, in case the applicant is a national of a country which shares land border with India. Copy of such security clearance shall be attached along with DIN application and director's consent letter. To give effect to this, suitable changes have also been made in Form DIR-2 and DIR-3.

5. **Extension of time period for holding of AGM/EGM through VC or OAVM**

AGM through VC

The Ministry of Corporate Affairs [MCA] had earlier issued various circulars dated May 05, 2020, January 13, 2021, December 8, 2021 and December 14, 2021 for allowing the companies to conduct their Annual General Meeting (AGM) or on before June 30, 2022, through Video Conferencing (VC) or other audio-visual means (OAVM) OAVM, in accordance with the requirements laid down in aforesaid circulars.

In continuation to the above referred circulars, now the MCA, vide General Circular no. 2/2022 dated May 05,2022 has allowed the companies to conduct their AGM through VC or OAVM, on or before December 31, 2022. Accordingly, now the companies whose AGMs are due in the year 2022 are allowed to hold AGM through VC or OAVM till December 31, 2022.

It may be noted that in the above referred circular, the MCA has also clarified this circular shall not be construed as conferring extension of time for holding of 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, December 31, 2020, June 23, 2021 and December 08, 2021, for allowing the companies to hold Extraordinary General Meetings (EGMs) through Video Conferencing (VC) or other audio-visual means (OAVM) OAVM, for the period up to June 30, 2022.

Now in continuation to the above referred circulars, the MCA, vide its General Circular no. 03/2022 dated May 05, 2022, has further extended the time limit till December 31, 2022. Accordingly, the companies are allowed to conduct their EGM through VC or OAVM up to December 31, 2022.

6. **Relaxation on levy of additional fees in filing of Annual Return and all event based forms by LLPs**

Taking into account the representation received in respect of seeking an extension of time for filing Annual Return (form 11) and various event based forms by LLPs without paying additional fees , and in view of transition from version 2 to version 3 of MCA 21 and in order to promote Compliance on part of LLPs, the Ministry of Corporate Affairs vide its General Circular no. 04/2022 dated May 27, 2022 has extended the time limit from May 30, 2022 till June 30, 2022, for filing of e-form 11 (Annual Return of LLP) for the F/Y 2021-2022.

Similar to above, the MCA, vide General Circular no 06/2022 dated 31.05.2022, has also allowed the LLPs to file various event-based forms, up to June 30, 2022, due dates of which were falling between February 25, 2022 and May 31, 2022, without payment of any additional fees.

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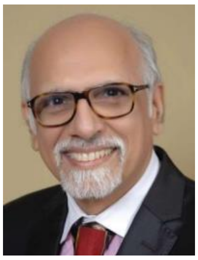

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