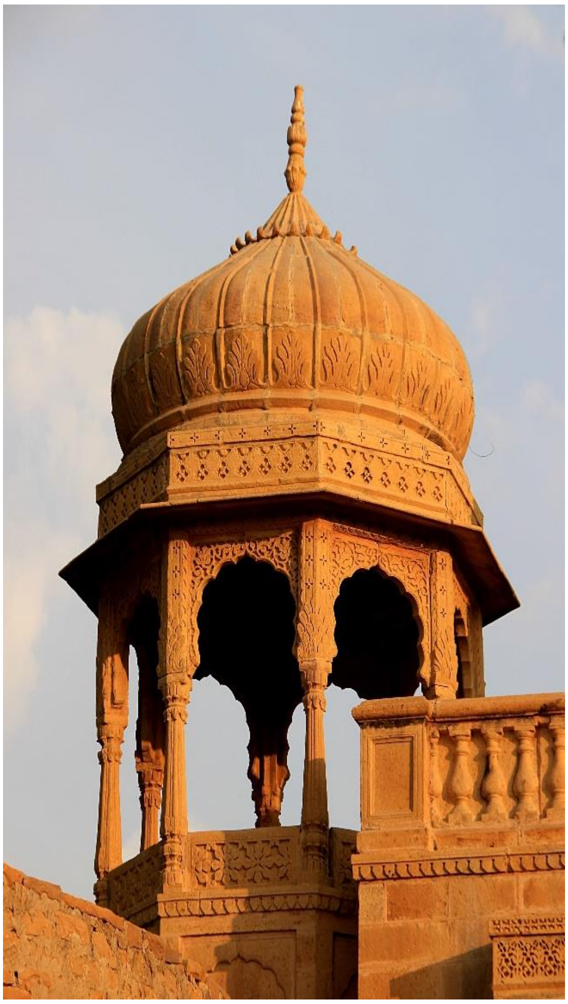
MOHINDER PURI & CO.
CHARTERED ACCOUNTANTS

Corporate Update

February | 2023

CONTENTS



FOREWORD

Dear Reader,

This Update contains an analysis of recent important judgments of Supreme Court of India and Income-tax Appellate Tribunal on the subjects of International Taxation and Transfer Pricing Regulations.

A few changes notified in relation to filing of tax return as may become due for filing for the current financial year ending on March 31, 2023 are covered in this Update.

In addition, a Note on recent Amendment to Companies Rules, 2023 is also included in the Update.

C.S. Mathur
Partner

DIRECT TAX

INTERNATIONAL TAXATION

Supreme Court dismisses tax department's SLP in the absence of reason to interfere with High Court order

Evalueserve.com Pvt Ltd [TS-102-SC-20230TP]

In a recent judgement the Hon'ble Supreme Court upheld the order of Hon'ble High Court dealing with the issue of exclusion of four companies as comparable companies to the taxpayer. On the facts of the case, the Hon'ble ITAT rejected four companies used by the TPO based on functional dissimilarities and other facts / circumstances. Against such order, the tax department filed an appeal before Hon'ble High Court of Delhi. The appeal was dismissed by High Court holding that the reasoning given by ITAT is factual, which is not doubted nor challenged on the ground of perversity. Subsequently, the tax department filed Special Leave Petition before the Supreme Court, which was also dismissed as Supreme Court found no reason to interfere with the order passed by Hon'ble High Court.

Shweta Kapoor
Director
Tax Advisory
☏ +91 11 4710 2200
✉ shwetakapoor@mpco.in

ITAT rejects Revenue's DCF method for valuation of share sale given uncertain income/future cash-flow projections

Aaradhana Realties Limited [(2022) 145 taxmann.com 628 (Mumbai-Trib)]

In a recent judgement the Hon'ble Tribunal, Mumbai bench rejected the Discounted Cash Flow method ('DCF') adopted by the TPO/DRP for determining the ALP of sale of shares and accepted the Net Asset Value ('NAV') method as adopted by the assessee.

On the facts of the case, the assessee is an investment company which undertook International transaction of sale of equity shares to its Associated Enterprise ('AE'). The assessee benchmarked said transaction by applying Comparable Uncontrolled Price ('CUP') Method based upon the valuation certificate obtained from external valuer following the NAV method. The assessee submitted that the valuation undertaken was also as per the guidelines issued by Comptroller of Capital Issues ('CCI').

The TPO/DRP however rejected the valuation as per NAV and computed ALP using ('Discounted Cash Flow') DCF Method. The TPO also rejected the CCI guidelines stating that the same were not binding and have been prescribed for a different purpose. The difference between the value as per DCF and transaction price was treated as a loan/credit facility provided by the assessee to its AEs and transfer pricing adjustment was made.

Before the ITAT, the assessee contended that the TPO has changed the method adopted by the assessee without pointing out any infirmity in the data or information used for valuation used by the assessee. The assessee contended that the TPO adopted actual figures for determining value as per DCF whereas, DCF requires business projections as on the date of sale of shares and not actual cash flow.

The tax department relied upon the case of Ascendas India Private Ltd vs. DCIT [ITA No.1736/MDS/2011] wherein the Tribunal had preferred use of DCF method over the use of CCI Guidelines for arriving at the value of shares for the purpose of determining ALP. The assessee also submitted that DCF cannot be adopted on the facts of the case as the assessee is an Investment Company with inconsistent and unpredictable stream of revenue.

The Hon'ble Tribunal accepted the contention of the assessee that DCF method (Income approach) cannot be adopted where there was significant uncertainty about the amount and timing of income/future cash flows. Reference was made to the Valuation Standard 2018 issued by ICAI and the decision of DQ International Ltd vs. DCIT [(2022) 141 Taxmann.com 188 (Hyderabad-Trib)] wherein it was held that for the purpose of DCF method actual figures cannot be substituted for future projections as used.

Shweta Kapoor
Director
Tax Advisory
☏ +91 11 4710 2200
🖂 shwetakapoor@mpco.in

ITAT holds 5% mark-up in availing IT Support Services as acceptable under international guidelines

BMW India Financial Services Pvt. Ltd [TS-68-ITAT-2023(DEL)-TP]

In a recent judgement the Hon'ble Tribunal, Delhi bench held that the 5% mark-up on IT Support services rendered by the AE is justified as mark-up on such services is an accepted international practice.

On the facts of the case, the assessee, BMW India Financial Services Pvt. Ltd obtained IT support services from its Associated Enterprise ('AE'), BMW AG for assessment year ('AY') 2017-18 and 2018-19, at cost plus 7% overhead and 5% mark-up. The assessee also procured external licenses from the AE at cost.

The TPO disallowed 7% overhead cost and 5% mark-up charged over the IT support service costs. It was held that since the third-party costs, which constitutes 88% of total IT Support services, already includes profit/mark-up charged from third party, further mark-up charged by AE is not justified and since the AE is not providing any value adding services but merely providing coordination services.

The Dispute Resolution Panel upheld the order of TPO.

Before ITAT, the assessee submitted that the assumption of TPO that 88% of IT cost is third party cost is not correct. Factually, 98% of the cost is In-house cost of IT staff and IT infrastructure cost and only 2% cost is in relation to third party license cost. The assessee relied on the EU joint transfer pricing forum which suggests mark-up of 5% for low value adding services including IT services. Reliance was also placed on Para 7.49 and 7.61 of BEPS Action Plan 8-10:2015 final report, which suggests 5% mark-up as appropriate for such services.

The Hon'ble ITAT observed that the AE has allocated appropriate amount for the IT services to the assessee. Also, that the AE has not charged any mark-up in relation to the third-party cost. With respect to the IT Support services, the ITAT held that such services are critical for achieving global standardization of processes, economies of scale, efficiency etc. In view of the same, 5%

mark-up, which is also accepted internationally was held to be sufficient to recoup the expenditure incurred by the AE. Accordingly, the ITAT directed that no expense other than 5% markup be allowed on the support services rendered by the AE.

Shweta Kapoor
Director
Tax Advisory
☏ +91 11 4710 2200
✉ shwetakapoor@mpco.in

Entitlement to concessional tax rate benefit for FTS under India-USA treaty to US entity

CIT v Fujitsu America Inc. [ITA 530/2022] dated December 15, 2022

In a recent judgment, the Delhi High Court has held that where US entity, a subsidiary of Japanese entity was playing the role of service provider and had the dominion over fees for technical services received from Indian entity, it was a beneficial owner of FTS.

On the facts of the case, Fujitsu America Inc ('US entity'), a subsidiary of Futijsu Limited, Japan rendered branding and management services to an Indian entity, Futijsu Consulting India Pvt. Ltd. The service fee received was offered to tax at concessional rate of 15% in terms of provisions of Article 12 of India-USA treaty. The tax officer denied the benefit of treaty by holding that US entity transferred the service fee to its holding company on back-to-back basis and was merely serving as a conduit. The tax officer went on to hold that beneficial owner was the holding company and not an US entity and accordingly, taxed the service fee at 25% on gross basis.

On appeal, the Commissioner (Appeals) decided the matter in favour of US entity. The Commissioner (Appeals) arrived at a finding of the fact that there was no back-to-back arrangement between US entity and its holding company. Thereafter, Commissioner (Appeals), went through evidentiary documents being email correspondences which demonstrated the facts that US entity was actually providing services and not acting as an agent/conduit company and had the dominion over the service fees received from an Indian entity. Based on these facts, Commissioner (Appeals) came to the conclusion that US entity was the beneficial owner of service fee and therefore, it was entitled to provisions of Article 12 of India-USA treaty. The order of Commissioner (Appeals) was confirmed by the Tax Tribunal.

When the matter travelled to the High Court of Delhi, the Hon'ble High Court reiterated the observations of Commissioner (Appeals) to hold the fact that US entity was indeed the beneficial owner of service fee received from Indian entity. In particular, while arriving at this conclusion, the High Court observed as under:

- There was no back-to-back arrangement between US entity and its holding company.
- The beneficial owner status can be denied only to the agent/conduit company which was proved otherwise in the present case.
- US entity was actually playing role of service provider and it had dominion over the service fees received.

In light of the aforesaid, US entity was eligible for the benefit of concessional tax rate of 15% provided in Article 12 of India-USA treaty.

Jyoti Jain
Manager
Tax Advisory
☏ +91 11 4710 2200
🖂 jyoti@mpco.in

No profits could be attributed to PE in India where the foreign company incurred net losses at the global level

CIT (International Taxation) vs. Nokia Solutions and Networks OY [2023] 147 taxmann.com 165 (Delhi)

Recently, the High Court of Delhi held that where the non-resident taxpayer recorded a global net loss, no profit/income could be attributed to permanent establishment (PE) in India.

On facts, the taxpayer, Nokia Solutions and Networks OY is a company based in Finland and is engaged in the manufacture and supply of telecom equipment to various Indian Companies and also to its group company Nokia Solutions and Networks India Private Limited. In the course of assessment, the Revenue held that the taxpayer had PE in India and attributed profits liable to tax to India in respect of supplies from Finland on gross profit basis.

Before the Tax Tribunal, the taxpayer contended that without any prejudice to its basic contention that it did not have PE in India, no profit or income could be attributed to the PE as the taxpayer incurred a loss at a global level and hence no profits were liable for attribution. The Tax Tribunal relied on the Special Bench decision in the case of Nokia Corpn. (Formerly Nokia Networks Oy) v. Asstt. DIT (International Taxation) [2007] 17 SOT 25/112 TTJ 627 (Delhi) (involving same business as carried out by the taxpayer) wherein it was held that the Appellant Company's worldwide Net Profit margins as per its audited accounts were to be applied for determining the quantum of income to be attributed to the PE. The Tribunal, thus, accepted the plea that if the taxpayer had incurred losses at net level, in effect, there would be no profit or income attributable to the PE. The Tax Tribunal also observed that on plain reading of Article 7(1) of the DTAA between India and Finland, the question of attributing profits to PE arises only if the foreign enterprise is making a profit which is the condition precedent. As such the Tribunal, decided the matter in favour of the taxpayer and deleted the addition.

On appeal filed by the Revenue before the High Court, the High Court held that in view of finding of facts returned by the tribunal, no question of law arises. It is further held that the issue of taxability would arise qua the taxpayer only if profits accrue to the taxpayer, and that too only to the extent they can be attributed to its PE in India.

Ritu Theraja
Director
Tax Advisory
☏ +91 11 4710 2200
🖂 therajaritu@mpco.in

Reimbursement to non-resident entity in respect of salary paid to seconded employees is not taxable as Fees for Included Service

Google LLC [TS-73-ITAT-2023 (Bangalore)]

Relying on the ruling of Flipkart Internet Private Limited, Bangalore ITAT held that cost of seconded employees reimbursed by Indian entity to its overseas entity does not fall under the ambit of Fees for Included Service (FIS) under Article 12 of India-USA DTAA.

On the facts of the case, Google LLC USA, (Assessee) received certain payments from Google India Pvt. Ltd. (GPIL) on account of reimbursement of salaries of expatriates seconded to GIPL.

The Assessing officer (AO) has issued notice u/s 148 of the Act, for non-filing of return of Income in respect of said amount as received. The AO observed that there was no Employer-Employee relationship between GIPL and Seconded employees and thus services rendered by the Seconded employee was in the nature of technical, managerial, consultancy services (FIS) as the employees were imparting expert skill and technical knowledge to GIPL. Hence, by relying on a judgment of Delhi High court in the case of Centrica India Offshore Pvt. Ltd, AO held the receipts to be taxable in India as Fees for Included Services (FIS) under Article 12 of India USA DTAA.

Objections raised before DRP against the draft order of AO were dismissed by DRP.

Upon appeal before Appellate Tribunal, it was noted that Assessee had issued assignment letter to the Seconded employees who stated that the Assessee has no right to recall the employees without GIPL request/consent and also no employment guarantee would be provided to the Seconded employee upon returning to US after the secondment period. It was also noted that salary was reimbursed on cost-to-cost basis without any markup and that all withholding tax compliances against salary/ allowances paid to seconded employees were undertaken by GIPL. Appellate Tribunal rejected the AO's assumption of existence of service contract between the Assessee and GIPL.

Relying on the decision of Karnataka High court in the case of Flipkart Internet Private Limited **[TS-503-HC2022],** and Bangalore Tribunal in the case of Biesse Manufacturing Company (P.) Ltd **[146 taxmann.com 242]** ITAT held that the payments by GIPL to the Assessee cannot held to be FIS as the Seconded employees were solely under the control and supervision of GIPL and the Assessee was merely facilitating the payment of salary on behalf of GIPL which was subsequently reimbursed by GIPL on cost-to-cost basis, without any element of profit margin.

Accordingly, the appeal of the assessee was allowed.

Richa Agarwal
Deputy Director
Tax Advisory
☏ +91 11 4710 2200
🖂 richaagarwal@mpco.in

Tie Breaker rule is "important" in determining the residency of an individual but cannot be solely used for deciding the residency

Sameer Malhotra [TS-1010-ITAT-2022(DEL)]

Delhi ITAT holds that Tie breaker rule is important but cannot be exclusive factor for determining the residency of an individual.

On the facts of the case, the assessee was under employment with DBOI Global services Pvt. Ltd. in India for the period April 01, 2014 to November 25, 2014 and with J.P. Morgan Chase & Co. Singapore for the period December 15, 2014 to March 31, 2015. For the Assessment Year 2015-16 assessee filed its return of Income declaring its global income. Subsequently, the assessee has revised its return of Income reducing its income to salary from Indian company and claimed that income earned in Singapore was not taxable in India.

During the course of assessment proceedings, the assessee filed copy of Tax Residency Certificate (TRC) and claimed that salary paid in Singapore was not taxable in India.

The Assessing officer (AO) determined the assessee to be a "Resident & ordinarily resident of India" on the basis that the assessee was physically present in India for more than 182 days during the year and rejected the contention of the assessee that he is a tax resident of Singapore and held him to be liable for Global Taxation in India only.

Upon appeal CIT(A) also treated him as a resident of India on the basis that the assessee had a permanent home available in India, though the same was rented while he was working in Singapore and noted that the assessee's centre of Vital Interest and Habitual abode also falls in India.

Before Hon'ble ITAT Delhi, the assessee submitted, that he holds TRC of Singapore for the calendar year 2014-15 and as per Section 6(6) of the Act, he also qualifies to be a resident of India and thus his residency is required to be determined as per Tie Breaker Rule given in Article 4(2) of the DTAA between India and Singapore.

The Hon'ble Tribunal held that as the assessee had home available in the country of employment i.e., in Singapore on the start of his employment, whereas the home in India was no longer available as the same was let out, the assessee is qualified to be the tax resident of Singapore under Article 4(2) of the DTAA on "Permanent Home" test.

It was also noted that Centre of vital interest of the assessee was also in Singapore as the assessee has shifted along with his family and started employment and saving in Singapore.

It was also noted that the term 'Habitual abode' does not mean the place of permanent residence, but in fact it means the place where one normally resides. During the period under consideration, the assessee resided in Singapore and had habitual abode in Singapore only.

Hon'ble ITAT noted that tie breaker ruler is important in determining the residency of a person, but it cannot be exclusively taken into consideration as the base for deciding the residency.

Accordingly, it was held that the assessee was a tax resident of Singapore and income earned therein was liable to be taxed in Singapore and not in India.

Richa Agarwal
Deputy Director
Tax Advisory
☏ +91 11 4710 2200
✉ richaagarwal@mpco.in

DOMESTIC TAXATION

Changes in Form 26AS statement from Assessment Year 2023-24 onwards

Indian tax authorities have recently announced changes in certain forms and Income-tax return formats for Assessment Year 2023-24 (i.e. Indian fiscal year 2022-23) including Form 26AS/ Annual Tax Statement.

Form 26AS is an annual statement available on TRACES portal of Indian tax department, reflecting details of tax deducted/ collected from the taxpayer and deposited in the treasury of Indian Government. Apart from above, various additional information is available in Form 26AS including Statement of Financial Transactions (‘SFT’), details of advance tax/ self-assessment tax deposited by the taxpayer, details of tax refund paid to the taxpayer etc.

Since November 2021, Indian tax department had launched a new feature know as Annual Information Statement (‘AIS’) which provided a comprehensive detail of various transactions undertaken by the taxpayer during a particular year. Even those transactions that are reflected in Form 26AS, are covered by AIS in detail.

To avoid repetition of data, Indian tax department has now decided to curtail the disclosures in Form 26AS statement from Assessment Year 2023-24 onwards. Form 26AS statement would now reflect following information only –

- Details of Tax deducted at source (‘TDS’) and Tax collected at source (‘TCS’);
- Details of TDS defaults and TDS refunds;
- Details of TDS under Section 194B, 194R and 194S (certain transactions where consideration is paid fully/ partly in kind);
- Details of TDS under Section 194IA and 194IB (for buyer/ seller/ payer of rent); and
- Details of TDS under Section 194M and 194S (for payer of resident contractors and professionals/ payer of Virtual Digital Asset).

As such, other information such as details of taxes paid (other than TDS/ TCS), SFT etc. would be available in AIS statement from Assessment Year 2023-24 onwards. However, there will be no change in disclosure for transactions pertaining to earlier years up to Assessment Year 2022-23.

Prabhjot Singh
Manager
Tax Advisory
☏ +91 11 4710 2200
✉ prabhjot@mpco.in

Disallowance on debatable issue does not attract penalty where source of receipt is disclosed based on opinion of a chartered accountant

Recently, the High Court of Madhya Pradesh in the case of **S. Kumar Tyre Manufacturing Co. Ltd. [2023] 147 taxmann.com 49** has held that disclosure of a revenue receipt as ‘capital receipt’ in the return of income, based on the opinion of a tax consultant/chartered accountant on a debatable issue would not attract penalty under section 271(1)(c) of the Act.

Facts of the case are that the assessee is engaged in the business of manufacture of tyres and entered into collaboration agreement with a foreign company viz. Michelin France. The agreement granted assessee right to use the technical know-how to manufacture and sell tyres. Due to disputes between the assessee and Michelin France in relation to implementation of the agreements, a termination agreement dated November 22, 1991 was entered into fixing a certain sum to be paid to the assessee.

The assessee received Rs. 2,88,51,613 on 5 December 1991 and disclosed the same as capital receipt in return for AY 1992-93 and received Rs. 2,29,50,582 on 30 November 1992 which was disclosed as capital receipt in return for AY 1993-94. During scrutiny proceedings, the AO held that these two sums were revenue receipts as compensation towards business loss on termination of agreement and should have been offered to tax in AY 1992-93 alone, being the year of accrual. Appellate authorities as well as the High Court upheld the order of the AO. AO imposed penalty under section 271(1)(*c*) of the Act. ITAT granted relief by setting aside the penalty order.

In the appeal before the High Court, the High Court noted that the issue was debatable which was decided by the High Court. The High Court observed that the receipt to the extent of Rs. 2,29,50,582 accrued in AY 1992-93 but was disclosed in AY 1993-94, therefore, there was no occasion to disclose the receipt in the return in AY 1992-93. Further, the High Court held that the source of whole of the receipt of Rs. 5,18,02,936 from Michelin France was correctly disclosed in the return as capital receipt based on the advice of a tax consultant/chartered accountant and that the issue was debatable. Therefore, the High Court, following the decisions of the Reliance Petroproducts (2010 332 ITR 158) and Price Waterhouse Coopers (P) Ltd (2012 348 ITR 306), held that no penalty under section 271(1)(c) can be levied.

The provisions of section 271(1)(c) were applicable till AY 2016-17. The concept of levy of penalty based on 'concealment of particulars of income' or 'furnishing inaccurate particulars of income' has been substituted with under-reporting and mis-reporting of income as per section 270A, which is applicable from AY 2017-18 onwards. In our view, the ratio decidendi of this decision shall apply to the provisions of penalty contained in section 270A.

Anjali Kukreja
Senior Manager
Tax Advisory
☎ +91 11 4710 2200
✉ anjali@mpco.in

CORPORATE LAW

CORPORATE LAW COMPLIANCE

The Companies (Incorporation) Amendment Rules, 2023

The Ministry of Corporate Affairs (MCA), vide its notification dated January 19, 2023, has made amendments to the Companies (Incorporation) Rules, 2014 [hereinafter referred to as "the rules"] by notifying Companies (Incorporation) Amendment Rules, 2023 [hereinafter referred to as "the amendment rules"].

As per the existing rules, for shifting of registered office from one state or union territory to another, the Company is required to file an application in Form GNL-1 with the concerned Registrar of Companies (ROC), and acknowledgement of such filing needs to be attached with the application to be filed with the Regional Director. The amendment rules have dispensed with the requirement of filing a separate application with the ROC, and only an intimation of filing the application with Regional Director in Form INC 23 shall be shared with ROC through the MCA system.

It may be noted that these rules have come into force w.e.f. January 23, 2023.

The Companies (Registration Offices and Fees) Amendment Rules, 2023

The Ministry of Corporate Affairs (MCA) vide its notification dated January 20, 2023, has made amendments to the Companies (Registration Offices and Fees) Rules, 2014, by notifying Companies (Registration Offices and Fees) Amendment Rules, 2023. The amendment rules have provided for the digital signing of e-forms, wherever applicable, by an insolvency resolution professional or resolution professional or liquidator of Companies, in those cases, where the concerned company is under insolvency or liquidation, as the case may be.

It may be noted that these rules have come into force w.e.f. January 23, 2023.

The Companies (Share Capital and Debentures) Amendment Rules, 2023

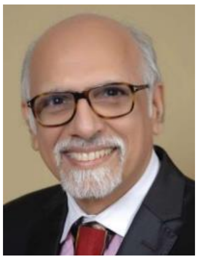
The Ministry of Corporate Affairs (MCA), vide its notification dated January 21, 2023, has made amendments to the Companies (Share Capital and Debentures) Rules, 2014 by notifying Companies (Share Capital and Debentures) Amendment Rules, 2023. As per the existing rules, upon completion of buy back, the company needs to file a return in Form SH-11 with the ROC, and a certificate signed by any two directors of the company, including the managing director [MD] if any, is required to be annexed separately to the said return [Form SH-11], certifying that buy back has been made in compliance with applicable provisions of the Act.

Now, as per the amendment rules, instead of a certificate, a declaration has been included in the return [Form SH-11] itself which states that the company has complied with applicable provisions of the Act with respect to buy back of shares, and no additional document is required to be annexed with the return in this regard. Accordingly, the amendment rules have also revised Form SH-11. Earlier the form could be filed with the Digital Signature Certificate (DSC) of any one director of the company; however, the revised form requires DSC of any two directors, including MD if any.

Shikha Nagpal
Deputy Director
Corporate Secretarial Services
☏ +91 11 4710 2200
✉ shikha@mpco.in

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

Disclaimer

The contents of this document are for information purposes and general guidance only and do not constitute professional advice. You should not act upon the information contained in this publication without obtaining professional advice.

No representation or warranty (express or implied) is given as to the accuracy or completeness of the information contained in this publication and Mohinder Puri & Co. disclaims all responsibility for any loss or damage caused by errors/ omissions whether arising from negligence, accident or any other cause to any person acting or refraining from action as a result of any material in this publication.