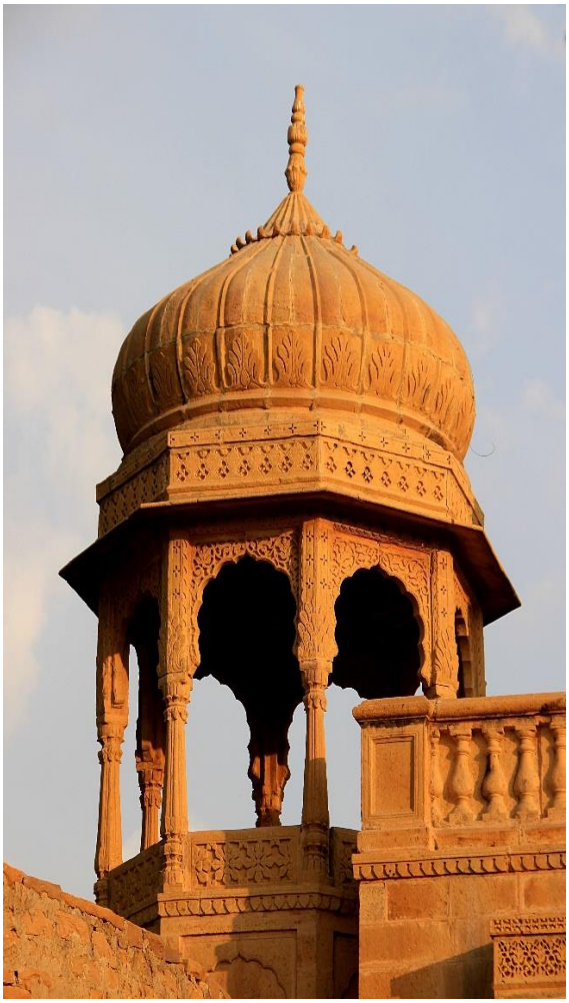
MOHINDER PURI & CO.
CHARTERED ACCOUNTANTS

Corporate Update

May | 2024

CONTENTS



FOREWORD

Dear Reader,

The new Government of India, led by Prime Minister Mr. Narendra Modi and members of his cabinet, as announced, many of whom occupy the important portfolios previously held by them like finance, commerce, foreign affairs, indicates likely continuity of Government's economic and other major policies pursued by the erstwhile Government. This will be reflected in the announcements to be made in the forthcoming Budget of Government of India, expected to be announced in the month of July 2024.

In this Update we have covered certain important decisions of Courts, Tribunals on direct tax - domestic and international tax, a note on certain announcements made by the GST Council post its 53rd meeting, recommending tax reliefs on certain products, services and regulatory aspects.

C.S. Mathur
Partner

DIRECT TAXES

INTERNATIONAL TAXATION

Annual Maintenance Contract Services being inextricably linked to the software license, the AMC charges do not amount to Fee for Technical/Included Services

Openwave Mobility Inc v DCIT [2024] 162 taxmann.com 434(Del-Trib)

In a recent judgment, the Tax Tribunal, Delhi bench held that annual maintenance contract services provided in relation to software licence are not taxable under Article 12 of India-USA DTAA.

On the facts of the case, the Assessee, a US based company entered into software licencing agreement with an Indian company for supply of software licence as well as provision of annual maintenance contract services ('AMC services') under the same contract. The Indian company had an option to renew the AMC after completion of one year. The scope of the AMC services was as under:

- Providing of patches, updates, upgrades etc;
- 24 x 7 support on phone, email, web based, remote access;
- Option available to licensee to create unlimited support Portal login IDs etc.
- Any onsite support on need basis.
- Training for use of software.

The Assessee characterized licence fee and AMC fee as business profits, which was not chargeable to tax in India in the absence of a Permanent Establishment ('PE') in India in term of Article 5 of India-USA DTAA ('DTAA'). The tax return of the assessee was scrutinised by the tax authorities.

In the draft assessment order, the tax officer proposed that the license fee should be regarded as Royalty under Article 12 of DTAA, while the fee from AMC services should be characterized as Fee for Included Services ('FIS') under Article 12 of DTAA. The matter was contested before the Dispute Resolution Panel ('DRP') which held that the license fee is not royalty in view of the decision of the Supreme Court in the case of *Centre of Excellence Pvt. Ltd. v. CIT (2022) 3 SCC 321*. However, DRP characterised the AMC services as FIS under Article 12 of DTAA rejecting the arguments of the Assessee.

Thereafter, the matter travelled to the Tax Tribunal. As regards the issue of taxability of license fee, the Tribunal upheld the order of the DRP and held that license fee is outside the scope of 'Royalty' as per Article 12 of DTAA and hence, not liable to tax in India.

On the issue of taxation of AMC fee, the Assessee argued before the Tax Tribunal that the same is ancillary and subsidiary to the licensing of the software and thus, ought to be characterized in the same manner as license fee. The Assessee also raised an alternate plea that the AMC services did not satisfy the make available test as no technical knowledge is being made available to employees of Indian company.

The Tax Tribunal noted that the service agreement for AMC services formed part of the software license agreement (as an Annexure). It was also noted that the tax officer himself had accepted that AMC services were inextricably linked to the supply of software licence. As such, the Tax Tribunal concluded that the AMC services are ancillary and subsidiary to the licensing of software and hence, should be characterized in the same manner as that of

the predominant transaction, i.e. license of software and accordingly held that both the licence fee and the AMC charges are treated as business profit and are not taxable in India, in the absence of PE in India.

As regards the alternate plea of the make available test, the Tax Tribunal noted the following:

- The service recipient was not able to apply any expertise / technology contained therein;
- The service recipient could not use the knowledge on its own without recourse to the service provider;
- The service recipient is not at the liberty to use the technical knowledge, skill, know-how and process of the Assessee in its own right; and
- The service recipient is unable to perform the services on its own and have to necessarily seek services of the Assessee time and again.

Furthermore, as regards training, the Tax Tribunal observed that the tax authorities were not able to substantiate that any technical knowledge was provided to the employees of the Indian company. It went on to hold that training a person with regard to attributes and functionality of a software cannot be regarded as a technical service under the DTAA.

Based on the above reasoning, the Tax Tribunal held that AMC services (including training) would fall outside the scope of FIS under Article 12 of DTAA and therefore, not liable to tax in India.

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

ITAT empowered to remit the matter directly to TPO and no additional timeline available to AO to pass Assessment Order in remand proceedings by ITAT to TPO

In a recent Writ Petition filed in the case of **New Delhi Television Limited v/s. Dispute Resolution Panel 2& ANR [TS-197-HC-2024(DEL)-TP],** the Delhi High Court has allowed the writ petition holding that once the ITAT has chosen to remit the matter directly to the Transfer Pricing Officer (TPO), the said authority was legally obliged to proceed in accordance therewith and did not need to derive any authority from a reference being independently made by the Assessing Officer (AO). Accordingly, the additional time limit of 12 months available to the AO where a reference is made by the AO to TPO shall not be applicable in the present case.

In the instant case, the assessee filed its return of income for AY 2009-10 on 30.09.2009 declaring a loss of Rs. 64 crore (648 million). The case of the assessee was referred to the TPO by the AO during the assessment proceedings. The TPO passed an order dated 30.01.2013 making transfer pricing adjustments. Based on the same, a draft assessment order was issued on 30.03.2013 by the AO in accordance with section 144C of the Income Tax Act ("the Act").

Aggrieved by the aforesaid adjustment, the assessee filed objections before the Dispute Resolution Panel (DRP) on 31.12.2013. The DRP disposed off the objections allowing partial relief to the assessee. Subsequently, a final assessment order was passed by the AO on 21.02.2014 inter alia making the Transfer Pricing adjustments.

Aggrieved by the aforesaid order, both the assessee as well as the tax department instituted appeals before the Income Tax Appellate Tribunal (ITAT). The ITAT passed an order dated 14.07.2017 setting aside the Transfer Pricing issue and remitted it to the TPO besides remitting the other issues directly to the AO.

Following the ITAT's order dated 14.07.2017, TPO issued notices on 22.08.2017, 05.09.2017 and 15.09.2017 which were duly complied by the assessee, and subsequently passed an order on 17.10.2017. No order was passed by the AO consequent to this order of the TPO.

However, on 27.12.2018, the AO drew up a fresh reference for consideration of the TPO. Based on the aforesaid reference, the TPO proceeded to undertake fresh proceedings and in purported compliance of the ITAT order dated 14.07.2017. Acting in terms of the aforesaid, the AO framed a draft order on 27.12.2019.

In respect of this order, the assessee filed its objections before DRP wherein one of the principal objections was with respect to the legality of the subsequent reference made by the AO to the TPO and framing of the consequential draft assessment order being barred by the limitation as per section 153 of the Act. The DRP passed its order on 29.5.2021 rejecting the aforesaid contention/ objection of the assessee, which order was impugned by the assessee in the present writ petition.

Before the High Court, the assessee submitted that once the ITAT had itself remanded the matter to the TPO, there existed no justification or requirement in law for a reference being made by the AO on 27.12.2018. As such, the limitation period of 9 months as prescribed under section 153(3) of the Act for drawing up a draft appeal effect order would have expired on 31.12.2018. It was further submitted that the tax department did not assail or question the correctness of the action of the ITAT in remitting the matter to the TPO. It was also submitted that once the TPO acting in compliance with the direction of the ITAT had proceeded to pass an order on 17.10.2017, it clearly stood divested of any authority or jurisdiction to undertake an identical exercise while purporting to act in terms of the reference which came to be subsequently made by the AO on 27.12.2018. There was thus no occasion or justification for an independent reference being made by the AO.

The tax department relying upon the decision of the jurisdictional High Court in case of **Sabic India Private Limited vs. Union of India and Ors,** decision of High Court of Madras in case of **Hyundai Motor Lt. vs. Secretary, Income Tax Department & Ors.** and certain other decided cases contended that writ petition cannot be accepted against the directions of DRP as once the DRP disposes off the objections, the matter stands placed before the AO for passing an assessment order. It is only when a final assessment order in accordance with the directions of DRP is framed that an assessee could be recognised to have a legal remedy. It was submitted that the role of the TPO begins only once a reference is made by the AO and the TPO could not have undertaken a transfer pricing assessment in the absence of a reference having been made by the AO. It was also submitted that the order of the ITAT may be construed as a "deemed reference" to TPO referable to section 153(4) of the Act, if assumed for the sake of argument to be valid. That is, section 153(4) would also apply to those cases where a reference is made to the TPO by the ITAT. In such cases, Section 153(4)

provides additional time limit of 12 months to the AO to pass assessment order in conformity with the order of the TPO.

The High Court held that the challenge raised on the ground of limitation would strike at the very foundation at the right to assess. Therefore, the preliminary objection of the tax department that the writ petition be not entertained till a consequential order of the assessment has been framed is rejected.

The High Court on conjoint reading of Section 92CA (3) and Section 153(3) of the Act stated that it is within the authority of the ITAT to remit a matter directly to the TPO. There would be no justification for the ITAT being compelled or required to first remit the matter to the AO for a consequential reference being framed if issues pertaining to an international transaction itself constituted the subject matter of an appeal.

The High Court further stated that once the ITAT had chosen to remit the matter directly to the TPO, the said authority was legally obliged to proceed in accordance therewith and did not need to derive any authority from a reference being independently made by the AO. Since TPO had passed the order on 17.10.2017, all that the AO was obliged to do was to pass a consequential assessment order as per Section 92CA(4) of the Act. As such, no fresh reference as the AO chose to make was warranted.

The High Court expounded that the power to make reference under section 92CA(1) to TPO by the AO is available to be exercised in the course of assessment. Section 153(3) of the Act speaks of assessments as well as orders under Section 92CA that may be required to be made pursuant to an order passed by an ITAT in exercise of its appellate jurisdiction comprised in Section 254 of the Ac, whereas section 153(4) is clearly confined to a reference that the AO may choose to make in the course of assessment.

The High Court also took notice of the amendment introduced by the Finance Act, 2022 in section 153(3) of the Act, which were relied on by counsels of both sides. The High Court held that section 153 of the Act as it exists in the present form is a reiteration and at best a clearer exposition on the various steps that may be involved in assessment and be viewed as steps in aid thereof. The Section thus makes appropriate provision for all contingencies including those which would ensue when an assessment were to follow the Section 92CA route. The amendments which came to be introduced in section 153 by virtue of Finance Act, 2022 are essentially clarificatory and would, therefore, be applicable to the issue under consideration.

The High Court also rejected the argument of ‘deemed reference’ advanced by the tax department based on the above interpretation.

The High Court, therefore, held that the fresh reference which the AO proceeded to frame on 27.12.2018 was superfluous and accordingly, the writ petition was allowed and department was barred from passing any further orders on final assessment.

Ankita Mehra
Deputy Director
Tax Advisory
☏ +91 11 4710 2200
✉ ankitamehra@mpco.in

DOMESTIC TAXATION

Sufficient opportunity of being heard is to be allowed through Video Conferencing in a faceless assessment, if request for the same is placed by the assessee

In a recent decision in case of **Global Vectra Helicorp Limited v. Assessment Unit, National Faceless Assessment Centre [TS-303-HC-2024(DEL)]**, the High Court of Delhi ("HC") has set aside the assessment order passed by the National Faceless Assessment Centre ("NFAC"), without affording a reasonable opportunity of being heard to the assessee as is required in terms of Section 144B(6)(viii) of the Income Tax Act (hereinafter "the Act").

In the instant case, the assessee was issued a show cause notice dated March 5, 2024 during the course of assessment proceedings proposing certain additions to the income. The show cause notice spanning over several pages and raising various grounds called upon the assessee to submit its response by March 9, 2024 thereby providing a very short time to file response, which included two holidays. The assessee notwithstanding the limited time available for filing the response, submitted its reply by filing the maximum information available with it within the stipulated time and requested for additional time to furnish any further information and an opportunity to represent the matter through video conferencing/ personal hearing in the said response. Also, an attempt to upload such request was made online on March 11, 2024 but the portal did not accept the same.

On March 27, 2024 the AO passed an adverse order stating that no request for personal hearing was received 'online' u/s 143(3) read with Section 144B of the Act.

The assessee filed a writ petition before the HC of Delhi challenging the assessment order on the ground that no sufficient opportunity of being heard was allowed to the assessee. The assessee submitted that as per the Standard Operating Procedure dated August 3, 2022 framed by the NFAC, at least seven days' time is to be provided to the assessee for responding to a show cause notice.

The HC observed that Section 144B(6)(viii) indicates that where a request for personal hearing is received, the Income Tax Authority of the relevant unit shall allow a hearing through NFAC, which shall be effected exclusively through a video conferencing or video telephone. The HC held that since the request for video conferencing was made by the petitioner, it was mandatory for the NFAC to accede to the same in terms of Section 144B(6)(viii) of the Act.

The HC relying on the judgement of the Supreme Court in case of **C.B Gautam v. Union of India & Ors [(1993) 1 SCC 78]** stated that even in a case where statute does not provide for an opportunity to be heard, the same is one of the principles of natural justice and set aside the impugned assessment order to be considered afresh after affording a reasonable opportunity to be heard in terms of the requirements of Section 144B(6)(viii) of the Act.

Ankita Mehra
Deputy Director
Tax Advisory
☏ +91 11 4710 2200
✉ ankitamehra@mpco.in

No requirement to withhold tax on 'Transit' rent paid by a developer to property owner

Sarfaraz S. Furniturewalla [TS-362-HC-2024(BOM)]

Recently, the Bombay High Court has held that 'Transit' rent paid by the builders/ developers to the property owner who suffer hardship due to dispossession is a capital receipt. Therefore, the question of withholding tax under Section 194-I of the Income-tax Act, 1961 on such payment does not arise in the hands of the builders/ developers.

Generally, a property owner looking to rebuild their property has to relocate temporarily in a separate accommodation till such rebuilding/ improvement work is completed. As a commercial norm, builders/ developers do compensate the property owner for such displacement. Such compensation may be in the form of rental payment of temporary accommodation taken by the property owner, which is commonly known as 'Transit' rent.

The issue of applicability of withholding tax, under Section 194-I of the Act, on 'Transit' rent came up before the Bombay High Court in a Writ Petition. During the course of arguments, the petitioner relied upon certain decisions of the Mumbai bench of Tax Tribunal on the issue of taxability of 'Transit' rent, wherein, it was held that the compensation normally paid by the builder on account of hardship faced by the property owner upon displacement is in the nature of hardship allowance/ rehabilitation allowance. As such, the Tax Tribunal held that the 'Transit' rent is not a revenue receipt and hence, not liable to tax.

The Hon'ble Court, agreeing with the aforesaid decisions of the Tax Tribunal, observed that ordinarily rent, as per Section 194-I of the Act, would refer to an amount which a tenant pays to a landlord, or a licensee pays to a licensor. Therefore, the Court held that the 'Transit' rent paid by builders/ developers to compensate for displacement of property owner is not a revenue receipt and therefore, not liable to tax.

In view of the aforesaid, the Court held that the builders/ developers are not liable to withhold tax under the Act while making payment of 'Transit' rent to the property owner.

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

INDIRECT TAXES

CHANGES IN GST LAWS

Key Highlights of 53rd GST Council Metting

Measures for Trade Facilitation

Waiver of Interest and Penalties: It is proposed to waive off interest and penalty on demands raised under Section 73 for F.Y. 2017-18 to F.Y. 2019-20, provided full tax amount is paid by March 31, 2025. This would be beneficial for a large section of taxpayers having unpaid demands for the said periods and would sufficiently reduce litigations at national level.

Ease in Pre-deposit Requirements: The pre-deposit amounts for filing appeals under

GST are proposed to be reduced as under. This would help in reducing blockage of working capital of taxpayers preferring to file appeals before respective forums:

Forum	Existing limits of Pre-deposit	Proposed limits of pre-deposit
First appellate authority, i.e., Commissioner (Appeals)	10% (subject to a maximum amount of INR 25 crore each under CGST and SGST)	10% (subject to maximum amount of **INR 20 crore each under CGST and SGST**)
Second appellate authority i.e., GST Appellate Tribunal	Additional 10% (subject to a maximum of INR 50 crore each under CGST and SGST)	**No-Additional Pre-deposit required**

Reduction in rate of TCS: In a move aimed at reducing the financial burden on suppliers, it is proposed that Electronic Commerce Operators (ECOs) will now collect a reduced TCS at the rate of 0.5% (0.25% CGST + 0.25% SGST/UTGST or 0.5% IGST), down from 1%

Extension for filing appeal before GST Appellate Tribunal: It is proposed that the time limit of 3 months for filing appeals before the GST Appellate Tribunal shall commence only from a date to be notified in this regard.

Extension in time limit to avail ITC for F.Y. 2017-18 to F.Y. 2020-21: For the financial years 2017-18 to 2020-21, the GST Council has proposed retrospective amendment to Section 16(4) of the CGST Act. It proposes November 30, 2021 to be the time limit to avail input tax credit (ITC) in respect of any invoice/debit note through returns in Form GSTR 3B which were filed up to November 30, 2021.

Constitutionality of Section 16(4) was under challenge before various High Courts in India as well as before the Hon'ble Supreme Court. This relaxation is a welcome step and should resolve many cases.

Time limit to avail ITC on supplies received under RCM from unregistered suppliers: It is proposed to be clarified that where supplies are received from unregistered suppliers under RCM, the relevant financial year for calculating the time limit to avail ITC thereon shall be the financial year in which the recipient issues self-invoice under RCM. This should squarely cover various cases of cross-border services received by domestic entities, including the service of secondment of foreign expats by their related foreign entities. This provides the much-needed clarification on availment of ITC against import of secondment services.

No Interest on delayed filing of GSTR-3B if cash is available in Electronic Cash Ledger: The GST Council has recommended that in cases of delayed filing of GSTR-3B, interest would not be applicable on the amount available in the electronic cash ledger on the due date of filing GSTR-3B and is debited while filing the said return.

This has been a long-standing demand of trade & industry. While the benefit of unutilised balance of ITC ledger was already provided some time back, now providing

relief with respect to unutilised balance of Cash ledger for the purpose of computing interest liability is a welcome step and would be useful for all taxpayers.

Valuation of Import of services: Where a domestic entity procures services from its related foreign entity and is eligible for full ITC thereon, the value declared in the invoice shall be deemed to be the Open market value. Further, if no invoice is issued in such cases, the Open market value of such services may be deemed to be Nil. This proposal may be helpful in cases of cross-border transactions such as use of trademarks by domestic entities of their foreign counterparts.

Amendment in GSTR-1: The Council has proposed a new Form GSTR-1A to allow taxpayers to amend or add details in Form GSTR-1 before filing Form GSTR-3B. This will help to correct errors, include missed supplies, and ensure accurate auto-population of tax liabilities in GSTR-3B.

Common time limit for issuance of demand notices and orders: From the F.Y. 2024-25 onwards, a common time limit is to be introduced for issuing demand notices and orders, regardless of whether the case involves fraud, suppression, wilful misstatement, etc. Additionally, the time limit to avail benefit of reduced penalties by paying the tax demanded along with interest is proposed to be extended from the current 30 days to 60 days.

Sunset date for Anti-profiteering Cases: It is proposed that sunset date for receipt of any new application regarding anti-profiteering would be April 01, 2025.

Reporting of B2C transactions: The threshold for reporting invoice-wise Business-to-Consumers (B2C) interstate supplies in Table 5 of Form GSTR-1 is proposed to be reduced from Rs.2.5 lakh to Rs.1 lakh.

Filing of Annual Return: It is proposed to exempt taxpayers having aggregate annual turnover up to INR 2 crores from filing of annual return in Form GSTR-9/9A for F.Y. 2023-24.

Clarification proposed to be issued

It is proposed to issue suitable clarification through separate circular is respect of the following.

- Warranty/ Extended Warranty provided by Manufacturers to the end customers.
- Taxability of loans granted between related person or between group companies.
- Place of supply of goods supplied to unregistered persons, where delivery address is different from the billing address.
- Mechanism for providing evidence by the suppliers for compliance of the conditions of Section 15(3)(b)(ii) of CGST Act, 2017 in respect of post-sale discounts, to the effect that input tax credit has been reversed by the recipient on the said amount.
- To prescribe a mechanism for adjustment of amounts paid in respect of a demand through FORM GST DRC-03 against the amount to be paid as pre-deposit for filing appeal.
- Further, various clarifications are proposed on issues such as ITC eligibility, time of supply for specific transactions, and valuation of corporate

guarantee provided between related persons

Changes in GST Tax Rates and Taxability under GST Laws

The GST Council has recommended several amendments to GST rates on goods and services in order to simplify tax structures and promote specific sectors:

- **Goods:** It is proposed to change GST rates for various goods such as milk cans (proposed to be taxed at 12% GST uniformly), solar cookers (proposed to be taxed at 12% GST uniformly), and cartons, boxes and cases of both corrugated and non-corrugated paper or paper-board (GST rate proposed to be reduced from 18% to 12%). Additionally, exemptions and extensions have been proposed for defence imports and research equipment under specific programs.

- **Services:** Significant proposals by the GST Council are provided hereunder:

- Exemptions for services provided by Indian Railways to general public (e.g. sale of platform tickets, facility of retiring rooms/waiting rooms/cloak rooms, etc.);

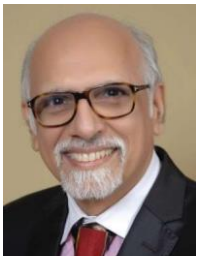
- Exemption on accommodation services having value up to INR 20,000 per month per person provided such accommodation service is supplied for a minimum continuous period of 90 days.

Please note that the above highlights are only recommendations of GST Council, which would come into effect post issuance of appropriate Notifications and Circulars.

Karan Chandna
Deputy DIrector
Indirect Tax
☏ +91 11 4710 2200
✉ karan.chandna@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