India Tax Konnect

September 2017

Contents	

Editorial

Goods and Services Tax (GST) collections have exceeded estimates in the first month of its rollout despite a significant number of taxpayers not having filed returns yet. The total collection under GST for July is at INR92,283 crore. Total number of taxpayers having to file returns for July stood at 5.96 million excluding those who are opting for the composition scheme. Of these, 3.84 million returns have been filed which is 64.42 per cent of the total. This suggests that by the time all returns are filed, the tax collection could swell further.

Recently, the Income tax department cautioned people against cash dealings of INR2 lakh and more, stating that any violation of this cap will invite strict penalty under the Income-tax Act, 1961 (the Act). The tax department has also asked the public to report such violations or those pertaining to black money to their jurisdictional principal commissioner or email the same to blackmoneyinfo@incometax.gov.in.

The Finance Ministry has asked the income-tax department to submit a note on all the 'high-pitched' tax assessments or unfair scrutiny cases along with details of the opportunity given to the taxpayer to represent his case. The move is part of the government's attempt to address taxpayer grievances. Last year, the Central Board of Direct Taxes (CBDT) had set up 'local committees' comprising senior officers in each region to dispose such grievance and complaint petitions within a short period of time.

Recently, CBDT revised Form 29B i.e. accountant's report on computation of book profits under Section 115JB of the Income-tax Act, 1961 (the Act). The amended form includes modification to Part A and introduction of new part B and part C in Annexure to Form 29B seeking various details regarding the amount required to be increased or decreased in accordance with amended Section 115JB applicable to companies preparing financial statements under Ind AS.

The Delhi High Court in the case of Mitsui & Co. Ltd. held that Liason Office (LO) of the taxpayer in India is solely for the purpose of search or display or solely for the purchases of goods or collecting information or for any other activity. Therefore, it does not constitute a Permanent Establishment (PE) in India. In order to constitute PE within the meaning of Article 5(2) of India-Japan tax treaty, it was not enough to have an office, factory or a workshop etc., but it is required that such place was a fixed place of business through which the business of an enterprise is wholly or partly carried out as per Article 5(1) of the tax treaty.

We at KPMG in India would like to keep you informed of the developments on the tax and regulatory front and its implications on the way you do business in India. We would be delighted to receive your suggestions on ways to make this Konnect more relevant.

International tax

Decisions

Liaison and project offices do not constitute a PE in India

The taxpayer is a non-resident company having its headquarters in Japan. The taxpayer had two projects in India. During the years under consideration the taxpayer filed income-tax return declaring income which was subsequently revised. The Assessing Officer (AO) made an addition holding that the taxpayer had a PE in India under the tax treaty. The AO observed that the taxpayer had a LO in India which helped the taxpayer in finding new purchasers and sellers of goods and merchandise. However, the taxpayer contended that the conditions imposed upon it by the Reserve Bank of India (RBI) permitting it to have an LO in India i.e. to not carry on any trading, commercial or industrial activity from such LO, was fully complied by it. The LOs merely provided information to the overseas offices and, therefore, the taxpayer had declared nil income in respect of its liaison activity in India.

The AO observed that the details of the telephone expenses of the project operations indicate that some part thereof pertained to the LO. The AO therefore concluded that it is very difficult to say that the LO is totally separated from the project operations, the imports and exports done by the taxpayer. The Commissioner of Income-tax (Appeals) [CIT(A)] held that LO cannot be treated as having PE in India. Subsequently, the Income-tax Appellate Tribunal (the Tribunal) also held that the taxpayer is not having a PE in India and therefore exempt under the tax treaty.

The Delhi High Court held that offices of the taxpayer and its activities cannot be regarded as its PE in India and the income directly or indirectly attributable to the said offices was not taxable in India. In order to constitute a PE within the meaning of Article 5(2) of India-Japan tax treaty, it was not enough to have a office, factory or a workshop etc., but it is required that such place was a fixed place of business through which the business of an enterprise is wholly or partly carried out under Article 5(1) of the tax treaty. The LO of the taxpayer was not in fact used for the purpose of business. The LO is solely for the purpose of search or display or solely for the purchases of goods or collecting information or for any other activity. Therefore, it does not constitute a PE in India.

DIT v. Mitsui & Co. Ltd [2017] 84 taxmann.com 3 (Del)

Capital gain on transfer of shares by a Mauritian company under the group reorganisation is not taxable under the India-Mauritius tax treaty and it is not tax avoidance transactions

The taxpayer was incorporated in Mauritius on 4 April 1996. It is engaged in the business of investment and financing activities. The taxpayer does not have any business presence or PE in India. The taxpayer is holding a Category 1 global business company licence issued by the Financial Services Authority of Mauritius. The Mauritius revenue authority has issued Tax Residency Certificate (TRC) to the taxpayer evidencing that it is a tax resident in Mauritius and it is renewed from time to time.

The taxpayer had made investment in shares of TIL, Indian company in June 1996 after obtaining government approval including approval in May 1996 from Department of Industrial Policy & Promotion (DIPP). The investment in shares of TIL was made with an intention of long-term investment. Subsequently, the shares which were held for a period of 13 years in TIL transferred in June 2009. Post transfer of shares of TIL, the entire sale proceeds have been reinvested by the taxpayer in another group company of TIL in 10 July 2009.

The taxpayer has filed its advance return in Mauritius offering its income to tax and also paid taxes in Mauritius. It is a resident under Article 4(1) of the tax treaty and is eligible to claim the benefits under the tax treaty. The taxpayer filed an application before Authority for Advance Rulings (AAR) contending that as per the provisions of Article 13(4) of the tax treaty, the long-term capital gain arising on transfer of shares in an Indian company is not chargeable to tax in India. However, the tax department contended that the taxpayer is a shell company since it had not incurred expenses of wages, salaries to staff, electricity, etc. It states that the taxpayer was not having business/commercial substance of its own. The taxpayer was created only for the purpose of taking advantage of the tax treaty benefit. Therefore, it is eligible for tax treaty benefit.

The AAR held that the taxpayer is entitled to tax treaty benefits. Therefore, capital gains arising from transfer of shares would not be liable to tax in India under the tax treaty. In the absence of a PE in India, it could not be charged to tax under Section 115JB of the Act. The AAR observed that the taxpayer is not a shell or fly by night-company and has not indulged in tax avoidance.

The Bombay High Court held that capital gain in respect of transfer of shares of an Indian company by a Mauritian company is not taxable in India under the India-Mauritius tax treaty. The High Court observed that the shares were purchased and held by the taxpayer for a long period of 13 years. This suggests that it is a bona fide transaction. The said shares were again invested in another company of the same group in India and the same are being held by the taxpayer. Therefore, the taxpayer cannot be treated as fly by night or a shell company.

CIT vs JSH (Mauritius) Ltd. (Writ Petition No. 3070 of 2016) – Taxsutra.com

Corporate tax

Decisions

Undisclosed stock is taxable as business income. The taxpayer is eligible to set-off the business losses against such undisclosed business income

The taxpayer was engaged in the business of export, import and manufacture of precious and semi-precious stones and jewellery. A survey was conducted at the business premises of the taxpayer which was converted into search. During the survey, the taxpayer admitted excess stock seized during search operation and offered the same in the income-tax return filed. The AO accepted the value of excess stock surrendered in search but assessed the income on account excess stock as undisclosed income under Section 69B of the Act. He further did not allow the set off of business loss against the excess stock by applying the provisions of Section 115BBE of the Act. The CIT(A) held that, excess stock was as a result of suppression of profit and being part of overall physical stock found has to be treated as business income. With respect to amendment to proviso under Section 115BBE of the Act, set off of business loss during the year against the excess stock found in the search operation was allowable. Aggrieved, the tax department filed an appeal before Jaipur Tribunal.

Tribunal's decision

Excess stock to be treated as undeclared business income

The Tribunal held that any credit in the books of accounts not satisfactorily explained or otherwise explained and taxed under Section 68, 69, 69A, 69B or 69C has to be taxed under any one of the above five heads. If such income cannot be linked to any of the first four heads as provided in Section 14 it has to be assessed under the head income from other sources. Therefore, the Tribunal held that, excess stock/investment is a business stock/investment which has arisen out of the unrecorded business activity of the taxpayer and therefore the same needs to be assessed under the head profit and gain of business. The Tribunal relying on the decision of Ramnarayan Birla (ITA 482/JP/2015, 20 September 2016) observed that in the taxpayer's case the excess stock was part of the business stock. The excess stock offered in survey was part of business income which was determined by valuing the business stock at current price instead of the purchase price.

Provisions of Section 115BBE of the Act

As per Section 115BBE of the Act, deduction shall not be allowed in respect of any expenditure or allowance. However, provisions does not state that set off of the loss with any other income will not be allowed. The Tribunal observed that Section 115BBE(2) was amended by the Finance Act, 2016 with effect from 1 April 2017 to include therein the words 'set off of loss' reading as 'no deduction in respect of any expenditure or allowance or set off of any loss shall be allowed to the taxpayer under any provision of the Act in computing his income referred to therein. The amendment will be effective from 1 April 2017 and will apply from assessment year 2017-18 onwards. The Tribunal observed that the intent of such an amendment has been provided in the memorandum. Thus, the Tribunal held that for the year under consideration, there was no restriction to set off of business losses against income brought to tax under Section 69B of the Act. In the absence of any provisions in Section 71 falling under Chapter-VI which restricts such set off, set off of business losses against income brought to tax under Section 69B cannot be denied.

ACIT vs Sanjay Bairathi Gems Ltd (ITA No.157/JP/17) – Taxsutra.com

Film artists' non-compete arrangement is a colourable device, payment taxable as revenue receipt. Brand equity constituted an intangible asset in terms of Section 32(1)(ii) and eligible for depreciation

The taxpayer had entered into a succession agreement in March 2000 with Radaan Pictures Private Limited. providing for the succession of the company to the business of the individual as a going concern, taking over all the assets and liabilities for a consideration of INR4.37 crore by way of allotment of INR4,37,389 equity shares of a face value of INR100 each. Thus, entire business of 'Radaan T.V.' stood transferred by the individual to the company on 30 March 2000.

The taxpayer is an artist and film director with a significant presence entered into an agreement with Radaan Pictures Private Limited. The agreement was entered in recognition of her expertise and skill in the area of film making in order to utilise her services and intellectual capacity for the purpose of its business. As per the agreement, the taxpayer would spend minimum of four hours a day in providing her expertise in film making, tele-serials and discussions to the company, she would not compete with the business of the company in India or elsewhere. She agreed to take the consent of the company prior to accepting an engagement as an actor by any other film director and she would remit 5 per cent of her individual earnings to the company. The agreement was agreed for a consideration of INR75 lakh by way of allotment of 75,000 equity shares of a nominal value of INR100 each.

The AO held that, the amount of INR75 lakh was in the nature of a remuneration paid to the individual for loss of business suffered by her by virtue of the terms of non-compete. The AO held that non-compete fee was on revenue account. The AO observed that the individual retained control over the business even after the succession as she continued in the position of a director in the company holding more than 99.99 per cent voting rights thus concluding that the arrangement of payment of non-compete fee was itself a farce and a colourable exercise. The AO made an addition of the non-compete

fee of an amount of INR75 lakh and disallowed depreciation claimed on the non-compete fee paid as well as the brand equity since AO was of the view that the assets were not in the nature of intangible assets. The CIT(A) and the Tribunal allowed the claim of the taxpayer. Aggrieved, the tax department filed an appeal before the Madras High Court.

High Court's decision

Non-compete fee payment, a colourable device

The High Court observed that the rationale behind the payment of non-compete fee was the company wanting to capitalise talents and expertise of Ms. Radhikaa. The sole proprietary was succeeded by the company in March 2000 and an agreement was entered into between the parties in April 2000 to provide for a more systematic utilisation of the creative talents of the artist. The artist was managing the proprietary concern continued to be part of the corporate structure employing the same skill sets. The fact that services were available to third parties subject to consent by, and receipt of 5 per cent of the income therefrom by the company showed that the arrangement between parties is only a smokescreen.

The High Court held that Ms. Radhikaa continues to be the face of the business and as proprietary and thereafter a director with substantial shareholding she retained decision making. The taxpayer's argument that the agreements should be viewed as part of a sequence of events and not in isolation cannot be accepted. The company went public three years after the date of agreement between the parties and this factor would hardly come to the aid of the taxpayer. The High Court observed that between 2000 when the agreements were executed and 2003 when the company went public have not seen any momentous developments as indicated by the taxpayer. The High Court held that the agreements entered into in March and April 2000 were standalone incidents and not part of a scheme of business organisation as projected. Accordingly, the High Court ruled in favour of the tax department.

Eligibility of depreciation on brand equity - an intangible asset

The High Court observed that the tax department had admitted that the brand equity of INR75 lakh would be an intangible within the purview of 'business or commercial rights' of a similar nature. Therefore, it has been held that brand equity constituted an intangible asset in terms of Section 32(1)(ii) eligible for depreciation. The High Court thus ruled in favour of the taxpayer.

CIT v. R. Radikaa and Radaan Media Works India Ltd (TCA Nos. 1365 of 2007 and 1175 of 2008) – Taxsutra.com

The date on which the appellate authority set aside the decision of the AO is relevant for the payment of court fee – Supreme Court

By amendment in the Act in the year 1998, Section 260A of the Act was inserted providing for statutory appeal against the orders passed by the Tribunal. In this Section, court fees on such appeals was also prescribed which was fixed at INR2,000. However, sub-section (2)(b) of Section 260A prescribing the aforesaid fee was omitted by amendment carried out in the Act, with effect from 1 June 1999. With respect to court fee payable on such appeals which are to be filed in the High Court, the State Legislature is competent to legislate on this behalf.

In the State of Kerala, the law of court fee is governed by the Kerala Court Fees and Suits Valuation Act, 1959 (1959 Act). Thus, the fee became payable on such appeals as per Section 52 of the 1959 Act. The state legislature thereafter amended the 1959 Act in 2003 and inserted Section 52A therein which was passed on 6 March 2003. In fact, before that an Ordinance was promulgated on 25 October 2002 which was replaced by the aforesaid amendment Act, the Act categorically provided that Section 52A is deemed to have come into force on 26 October 2002. As per the amended provision, the fee on memorandum of appeals against the order of the Tribunal is to be paid at the specified rates.

The question which arises for a consideration before the High Court was with respect to payment of fee on the appeals that are filed on or after 26 October 2002. As per the State of Kerala, on all appeals which are filed against the order of Tribunal on or after 26 October 2002, a fee is payable as per the aforesaid amended provisions.

The taxpayer contended that cases pending before the lower authorities, and orders passed even before 1 October 1998, the right to appeal had accrued with effect from 1 October 1998 and, therefore, such cases would be governed as on the date when the orders were passed by the lower authorities and the court fee would be payable as per the unamended provisions. The Kerala High Court had not accepted this plea and held that any appeal 'filed' on or after 26 October 2002 shall be governed by Section 52A of the 1959 Act.

Supreme Court's decision

The Supreme Court held that it was accepted that the right of appeal is not a matter of procedure and that it is a substantive right and it gets vested in the litigants at the commencement of the list and, therefore, such a vested right cannot be taken away or be impaired or imperiled or made more stringent or onerous by any subsequent legislation unless the subsequent legislation said so either expressly or by necessary intendment. No doubt, before 1 October 1998, in the absence of any statutory right of appeal to the High Court, there was no such vested right. At the same time, the moment Section 260A was added to the statute, right to appeal was recognised statutorily. Therefore, in respect of those proceedings where assessment orders were passed after 1 October 1998, vested right of appeal in the High Court had accrued. Same was the position qua department in respect of those cases where the demand raised by the tax department stood negated by the appellate authority after 1 October 1998.

The Supreme Court dismissed the High Court's decision and held as under:

- Wherever the taxpayer has an appeal in the High Court which is filed under Section 260A of the Act, if the date of assessment is prior to 6 March 2003, Section 52A of the 1959 Act shall not apply and the court fee payable shall be the one which was payable on the date of such assessment order.

- In those cases where the tax department files an appeal in the High Court under Section 260A, the date on which the appellate authority set aside the decision of the AO would be the relevant date for payment of court fee. If that happens to be before 6 March 2003, then the court fee shall not be payable as per Section 260A on such appeals. Accordingly, the Supreme Court allowed the taxpayer's appeal.

K. Raveendranathan Nair vs CIT (Civil Appeal No. 3131 of 2006) – Taxsutra.com

Notifications/Circulars/Press Releases

CBDT revises Form 29B (accountant's report on computation of book profits under Section 115JB of the Act) consequent to Ind AS amendments

The CBDT has issued a Notification No.90/2017, dated 18 August 2017, revising Form 29B i.e. accountant's report on computation of book profits under Section 115JB of the Act. The amended form includes modification to Part A and introduction of new part B and part C in Annexure to Form 29B seeking various details regarding the amount required to be increased or decreased in accordance with amended Section 115JB applicable to companies preparing financial statements under Ind AS.

The revised form also requires disclosure of whether the accounting year followed is same as relevant previous year. Where the accounting year is different, the new form requires an accountant to state whether profit and loss statement for computing book profit under Section 115JB is prepared following same accounting policies/accounting standards/depreciation rates as adopted for preparing accounts 'for the respective parts of the financial year laid or to be laid before the company at its annual general meeting' and extent and nature of variations if any.

CBDT Notification No.90/2017, dated 18 August 2017

CBDT relaxes eligibility conditions to investment funds set-up by Category I or II FPIs under Section 9A of the Act

The CBDT has issued a notification relaxing eligibility conditions for an investment fund set up by a Category I or Category II foreign portfolio investor (FPI) registered under the SEBI (Foreign Portfolio Investors) Regulations, 2014. The notification has come into effect from 3 August 2017.

The CBDT vide Notification No. 78/2017, has also notified 121 countries and territories under clause (b) of Section 9A(3) of the Act. The list of 121 countries include jurisdictions like Mauritius, Singapore, Switzerland, and Netherlands but does not include Hong Kong.

Notification No. 77/2017 and 78/2017, dated 3 August 2017

CBDT modifies rate of payment for stay of demand before CIT(A) from 15 per cent to 20 per cent

On 21 March 1996, the CBDT issued Instruction No. 1914 containing guidelines regarding procedure to be followed for recovery of outstanding demand, including procedure for grant of stay of demand. In February 2016, CBDT issued guidelines (Office Memorandum) revising Instruction No. 1914, stating that when an outstanding demand is disputed before the CIT(A), the AO shall grant stay of demand till disposal of first appeal on payment of 15 per cent of the disputed demand, unless the case falls in the specified category.

Recently, CBDT issued an Office Memorandum, dated 31 July 2017 stating that the standard rate prescribed in the office memorandum is to be revised to 20 per cent of the disputed demand, where the demand is contested before CIT(A). Thus, all references to 15 per cent of the disputed demand in the office memorandum dated 29 February 2016 stands modified to 20 per cent of the disputed demand.

CBDT Office Memorandum F No. 404/72/93-ITCC, dated 31 July 2017

.

Transfer pricing

Decisions

Location savings is relevant for investigating the transaction, cannot be a sole basis for ALP determination

The taxpayer is engaged in providing clinical research services in India. The taxpayer has been compensated at cost plus 15 per cent mark-up for the services provided to Associated Enterprises (AEs). The taxpayer used Transactional Net Margin Method (TNMM) as the most appropriate method to benchmark its transaction with AEs.

During the course of transfer pricing assessment, the Transfer Pricing Officer (TPO) observed that conducting clinical trial in India through the taxpayer has resulted in location savings to the AEs as the regulatory, compliance and investigatory costs are significantly lower in India in comparison to other developed countries. TPO opined that benchmarking study conducted by the taxpayer using local comparables does not take into account the benefit of location savings. Relying on some journals and websites, TPO arrived at location savings and applying profit split method allocated the same on ad-hoc basis i.e. by dividing the location savings equally (50:50) between the taxpayer and its AEs. The Dispute Resolution Panel (DRP) agreed with the TPO's view. Aggrieved, the taxpayer preferred an appeal before the Tribunal.

Tribunal's ruling

- The Tribunal stated that location saving is one of the primary factors of all cross border trade activities which includes exports and imports of articles, goods and services. The Tribunal opined that the benefit of low cost of regulatory and other compliances are relevant factors which lead to location saving for a particular region.
- The Tribunal also appreciated that, the benefits of location savings are available to all the independent parties operating in that location irrespective of the fact whether the transaction is between a related party or unrelated party.
- Further, location savings can be a relevant factor for conducting a proper enquiry for determination of Arm's Length Price (ALP) of international transactions.
- The Tribunal agreed with the Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Shifting (BEPS) concept that location saving and advantage are universally accepted in cross border transactions so far as they are not entered into solely for the purpose of avoiding tax. Particularly location saving is relevant where the transactions are entered between the related parties with an intention of avoiding tax and treaty shopping.
- The Tribunal placed reliance on the ruling of Mumbai Tribunal in the case of Watson Pharma Pvt. Ltd.[1] and Syngenta India Ltd.[2]
- Thus, the Tribunal concluded that where comparable uncontrolled price is available, then the location saving or condition cannot itself be the basis for determination of ALP and consequential adjustment cannot be made.
- The Tribunal also disregarded the basis for arriving at location savings as adopted by the TPO stating that the same is based on assumptions and not in accordance with the provisions of the Income-tax Act, 1961 (the Act).
- Considering the fact that TPO/AO have not examined the functional comparability of the companies selected by the taxpayer and no steps were taken to identify the comparables, the Tribunal sets aside the matter to TPO/AO for fresh adjudication.

Bangalore Tribunal in the case of Parexel International Clinical Research Pvt. Ltd. vs DCIT (IT(TP)A No. 254/Bang/2016 and 292/Bang/2017)

Unconnected windmill revenue to be treated as non-operating and forex fluctuation as operating in nature

- The taxpayer had installed windmill(s) for generating wind power and thereafter had entered into a wheeling agreement with the state electricity undertaking to sell the above generated wind power to its manufacturing division in lieu of payment of transmission cost, computed at the rate as is charged by the state undertaking.
- During the year under consideration, the taxpayer had entered into various international transactions with its AEs, namely, purchase of raw materials, return of packaging material and sale of finished goods pertaining to its steel manufacturing division. The taxpayer adopted TNMM to benchmark these transactions and included the windmill income as an operating item for the purpose of determining ALP.
- The TPO considered the above windmill income as a non-operating income for the purpose of determining ALP. The same was upheld by the Commissioner of Income-tax (Appeals) [CIT(A)]. Aggrieved by the order of CIT(A), the taxpayer appealed before the Tribunal.
- Further, the TPO also treated certain foreign exchange gain/loss as non-operating in nature and excluded the same while determining ALP. The taxpayer quoted a plethora of case laws arguing that foreign exchange fluctuation gain/loss should be treated as operating in nature for the purpose of computing ALP.

[1] Watson Pharma Pvt Ltd vs DCIT [2015] 168 TTJ 281 (Mum)
[2] Syngenta India Limited vs DCIT [2017] 77 taxmann.com 220 (Mum)

Tribunal's ruling

Windmill income

The Tribunal observed that both the above stated divisions of windmill and steel manufacturing are altogether separate without having any interwoven element embedded therein and the mere fact that the windmill income has been accepted under the head of business income would not make it as income derived from manufacturing division. Hence, the Tribunal held that the windmill income should be excluded from the operating income while computing the ALP.

The Tribunal placed reliance on a materially identical situation in the case of Marubeni India Private Limited[3] (Marubeni Ruling), wherein the interest income arising out of investment of surplus funds which were not required for the core business of the taxpayer was not considered to be its operating income.

Without prejudice, the taxpayer then drew the Tribunal's attention towards clause (g) of Marubeni Ruling wherein not only the interest income but also the corresponding interest expenditure was excluded for calculation of ALP. This alternate plea of the taxpayer that both windmill income and expenditure should be treated as non-operating for computing the ALP was accepted by the Tribunal and accordingly, the TPO was directed to re-finalise the consequential ALP computation.

Foreign exchange fluctuation gain/loss

The Tribunal upheld the CIT(A)'s decision in treating the foreign exchange fluctuation gain/loss as an operating item to be included for the purpose of computing ALP since the tax department could not present rebuttal to the judicial pronouncements relied upon by the taxpayer.

Ahmedabad Tribunal in the case of ACIT vs Rajratna Metal Industries Ltd. (ITA No. 1050/Ahd/2015 with CO No. 91/Ahd/2015, AY: 2010-11)

Notifications/Circulars/Press Releases

OECD releases Updated Guidance on the Implementation of Country by Country Reporting

The OECD and G20 countries have committed to implement Country by Country (CbC) reporting, as set out in Action Plan 13 of the BEPS project. In this regard, OECD has been striving to provide guidelines that could be referred to by countries for their regulations. In continuation of the implementation guidelines issued by OECD from time to time, it has released additional guidance on implementation of CbC reporting dated July 2017[4], addressing some more issues relating to (a) definition of items and (b) entities to be reported.

[3] Marubeni India Private Limited vs DIT [2013] 354 ITR 638 (Del)
[4] KPMG Flash news dated 31 July 2017 - OECD releases Updated Guidance on the Implementation of Country by Country Reporting on the July 2017 Guidance

Highlights of the additional July 2017 guidance

Whether aggregated data or consolidated data to be reported per jurisdiction?

Clarification - Reporting to occur on an aggregate basis, at a jurisdictional level, regardless of whether the transactions occurred cross-border or within the jurisdiction, or between related parties or unrelated parties.

The Guidance has clarified that, if a jurisdiction of the Ultimate Parent Entity has a system of taxation for corporate groups which includes consolidated reporting for tax purposes, (whereby, intra-group transactions are eliminated at the level of individual line items), that jurisdiction may allow taxpayers an option to complete the CbC report using consolidated data at the jurisdictional level. However, in this case consolidated data has to be reported for each jurisdiction in Table 1 of the CbC report and consolidation should be used consistently across the years.

It is further clarified that where consolidated data is used, necessary clarification (as mentioned hereunder) is provided in Table 3 (Additional information) of the CbC Report.

"This report uses consolidated data at the jurisdictional level for reporting the data in Table 1".

The above note should also specify the columns in Table 1, in which the consolidated data is different from the aggregated data.

It is pertinent to note that the Guidance has clarified that the member countries of the Inclusive Framework are expected to implement this guidance i.e. reporting on an aggregated basis, at the earliest (with the only exception to report consolidated revenue with a note in Table 3, as described above).

Acknowledging that MNE groups may need more time to make necessary adjustments, to comply with aggregated reporting, the Guidance has suggested jurisdictions to allow some flexibility during the short transitional phase (viz. fiscal starting in 2016), stating that the clarification ought to be provided in Table 3 (as above).

How is an entity owned and/or operated by more than one unrelated MNE groups to be treated?

Clarification - The Guidance clarifies that the treatment of an entity for CbC reporting purposes shall follow the accounting treatment. In case of joint ownership/operation of an entity by more than one unrelated MNE groups, treatment of the entity for CbC reporting purposes shall be determined under the accounting rules applicable to each of the unrelated MNE Groups separately.

BEPS Action 13: Guidance on the Implementation of CbC reporting dated July 2017

Indirect tax

Central Excise and Service tax

Decisions

CENVAT credit on services of erection, commission and installation for constructing temporary shed within factory premises for storage of final product admissible as covered within the definition of input services

The taxpayer claimed CENVAT credit of service tax paid on the services of erection, commission and installation received for the purpose of making a temporary shed which was constructed to store the final products.

The Revenue denied the CENVAT credit on the said services on the ground that the service of erection, commission and installation is not used in or in relation to the manufacture of final product. The taxpayer preferred an appeal with the CESTAT and contended that the erection, commission and installation service received in respect of setting up of temporary shed was used for storage of final product of the taxpayers during the rainy season and thus the said services are rightly covered within the definition of 'input services' under rule 2(l) of the Cenvat Credit Rules (CCR), 2002.

In this background the CESTAT held that, the services of setting up, modernisation, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage up to the place of removal, are in the inclusion category of definition of 'input service'. The setting up of the factory also includes the storage place in the factory premises. Therefore, in the said case the service received for setting up of storage was held as admissible input service.

Balmer Lawrie & Co Ltd, 2017-TIOL-2723-CESTAT-MUM

CENVAT credit of service tax paid on freight charges from the depot to the customer's premises was allowable when delivered on FOR basis

The taxpayer was a manufacturer of cement and claimed CENVAT credit of service tax paid on freight charges from the depot to the customer's premises. The taxpayer claimed that they are eligible for such CENVAT credit as their sales are on FOR destination basis.

The Tax Department was of the view that such CENVAT credit will not be allowable after the amendment of the definition of input services under Rule 2(l) of the CENVAT Credit Rules 2004, wherein after the amendment of the definition on 1 April 2008, the credit for the input services would be allowable only up to the place of removal.

The taxpayer submitted that, they were required to cover the risk of loss or damage of the goods upto the premises of the customer, hence the CENVAT credit was eligible. The revenue authorities contested that from the copies of documents in the record, it was not evident that the goods are being supplied on for destination basis.

CESTAT on perusal of the purchase orders submitted as part of the appeal, observed that the goods were delivered on FOR basis by the taxpayer. Further, the amended definition on input services with effect from 1 April 2008 allows CENVAT credit on input services only upto the place of removal. In the present case, since the delivery was on FOR basis, the place of removal is to be considered as the customer's premises. Consequently, the service tax paid on freight up to the customer's premises was eligible for CENVAT credit. In this case, the reliance was also placed on the judgement of the High Court and Tribunal in the case of Madras Cements Ltd [2015-TIOL-1682-HC-KAR-CX]. Accordingly, the benefit of CENVAT credit of service tax paid on freight charges from the depot to the customer's premises was allowed.

Mangalam Cement Ltd [2017-TIOL-2782-CESTAT-DEL]

Customs

Notifications/Circulars/Press Release

Guidelines for re-testing of samples

World Trade Organisation (WTO) negotiated Trade Facilitation Agreement (TFA), which aims at simplifying the trade processes and bringing down barriers to trade has come into force w.e.f. 22 February 2017. India is a signatory to this agreement.

Accordingly, detailed guidelines have been issued for re-testing of samples, in case the first test result of a sample taken upon arrival of goods declared for importation shows an adverse finding.

Circular No 30/2017, dated 18 July 2017

Dispensation of the requirement of a certificate to be obtained from the jurisdictional GST officer to claim higher All Industry Rate under Duty Drawback scheme

Note and condition 12A of Notification 131/2016-Cus (N.T.) dated 31 October 2016 as amended by Notification 59/2017-Cus (N.T.) dated 29 June 2017 lays down the requirement of a certificate to be obtained from the jurisdictional GST officer with respect to higher All Industry Rates (AIRs) under Duty Drawback scheme to ensure that there was no double neutralisation of taxes by way of credit/refund and drawback. However, in view of factors such as absence of clarity about jurisdictional GST officer, time lag between exports and the requisite returns to be filed under GST laws, etc., the said certificate from GST officer may not be available immediately at the time of export.

Keeping in mind the above difficulties, the government has amended Note and Condition 12A of Notification 131/2016-Cus (N.T.) dated 31 October 2016 by Notification 73/2017- Cus (N.T.) dated 26 July 2017 and dispensed with the requirement of the certificate from GST officer to claim higher rate of drawback and introduced self-declaration to be provided by the exporter in terms of revised Note and Condition 12A of aforesaid Notification for claiming higher rate of drawback.

The changes made in Note and Condition 12A shall be applicable with effect from 1 July 2017. However, this change will not be applicable where export goods have been cleared from the factory prior to 1 July 2017.

Circular No. 32/2017, dated 27 July 2017

IGST on high sea sale(s) transactions of imported goods, whether one or multiple, to be levied and collected only at the time of importation

The issue of whether the high sea sales of imported goods would be chargeable to IGST twice i.e. at the time of Customs clearance under sub-section (7) of Section 3 of Customs Tariff Act, 1975 and also separately under Section 5 of the Integrated GST Act, 2017.

The GST council has decided that IGST on high sea sale transactions of imported goods, whether one or multiple, shall be levied and collected only at the time of importation i.e. when the import declarations are filed before the Customs authorities for the customs clearance purposes for the first time. Further, value addition accruing in each such high sea sale shall form part of the value on which IGST is collected at the time of clearance.

Accordingly, the importer (last buyer in the chain) would be required to furnish the entire chain of documents, such as original invoice, high-seas sales-contract, details of service charges/commission paid, etc. to establish a link between the first contracted price of the goods and the last transaction.

CBEC CIRCULAR NO -33/2017-Customs, dated 1 August 2017

VAT

Decisions

The sale of a demo car purchased by the taxpayer in his name and used for the purpose of business was exempt from VAT under Section 6 (3) of the DVAT Act

Taxpayer was engaged in trading of new cars and their spares. The Value Added Tax Officer (VATO) found that taxpayer sold a car, which was used as a demo car, without paying any VAT. The VATO issued a notice of default of tax and interest under Section 32 of the DVAT Act

The taxpayer contended that the sale of the demo car was exempt from VAT under Section 6 (3). The Objection Hearing Authority (OHA) dismissed the taxpayer's objections. The taxpayer filed an appeal with the Appellate Tribunal (AT). The AT affirmed the OHA's order.

The taxpayer filed an appeal with the Court. The Court noted that Section 9 of the DVAT Act makes no distinction whether the main business of the taxpayer is dealing in cars or some other business in order for goods purchased in the taxpayer's own name and used for the purposes of the taxpayer's business to be treated as capital goods. The fact that the cars were purchased by the taxpayer in its own name clearly indicated that the taxpayer intended to use the cars as 'demo cars'. Therefore, the Court stated that the taxpayer was entitled to treat the cars as its capital goods.

The Court noted that the capital goods had not been exclusively used for making sale of non-taxable goods, and no input tax credit was claimed by the taxpayer in respect of the VAT paid by it at the time of purchase of the cars. The Court determined that the taxpayer would be entitled to the benefit under Section 6(3) because it satisfied all the four conditions spelt out in Anand Decors vs Commissioner of Trade and Taxes, New Delhi.

The Department of Trade and Taxes was unable to produce any credible material to show that in selling any of the demo cars in either 2009-10 or 2010-11, the taxpayer was seeking to camouflage regular sale transactions as sale of capital goods in order to claim the benefit under Section 6(3).

Therefore, the Court set aside the OHA and the AT's orders, and held that the taxpayer was entitled to claim an exemption under Section 6(3).

Triumph Motors v. Commissioner of Value Added Tax - TS-211-HC-2017(DEL)

The Bombay High Court determined that designing and tooling cost, reimbursed to the manufacturer by its customers, would form part of the 'sale price' as defined under Section 2(29) of the Bombay Sales Tax Act

Two Reference Applications were filed under Section 61(1) of the Bombay Sales Tax Act, 1959 to refer certain questions of law to the Court.

The taxpayers were manufacturers and traders of seating systems and components thereof. The taxpayers developed/rectified moulds, which were exclusively used to manufacture the products. The moulds were not delivered to the customers, but the Tax payers raised debit notes to the customers for making/rectifying the moulds as development charges.

The AO taxed the cost of designing and tooling received from the customers, which was for the purpose of getting the moulds manufactured from the suppliers, as an amount of sale price. The Commissioner of Sales Tax and the Tribunal confirmed the AO's order.

The Tax payers raised a question of law whether the Tribunal was justified in holding that designing charges and tooling cost formed part of sale price as defined under Section 2(29).

The Court noted that the sale price was not statutorily fixed; it was a part of the contract between Tax payers and their customers. As the Tax payers would not deliver/sale the products without recovering the cost of designing and moulds, the cost paid towards designing and tooling was a part of the same series of transaction and could not be segregated.

The Court determined that designing charges and tooling cost were part of the sale price because they had an inescapable bearing on the delivery of final product. Considering the definition of the 'sale price' and 'purchase price' in conjunction, the Court held that designing and tooling cost incurred by the Tax payers would be a part of the "sale price" of the final product.

M/s. Tata Johnson Controls Automotive Limited v. The State of Maharashtra [TS-216-HC-2017(BOM)]

Notifications/Circulars/Press Release/Order

Maharashtra

With the introduction of GST, Maharashtra VAT department has come up with the procedures for refund of security deposit amounting to INR25,000 collected at the time of registration under Maharashtra Value Added Tax Act, 2002 (MVAT Act) . Accordingly, if a dealer has not sold any goods as prescribed under Schedule A or Schedule B of MVAT Act during the F.Y 2016-17, the registration of such dealer shall be deemed to be cancelled with effect from 1 July 2017. For the purpose of refund following procedures shall be followed:-

- If deemed cancellation of registration is within 36 months of registration, then refund application is required to be made within six months from the date of such cancellation i.e. 31 December 2017

- If deemed cancellation of registration is after 36 months of registration taken, then refund application is required to be made after 36 months, but before 48 months of such cancellation

Further, such dealers will have to file all the pending returns up to the date of deemed cancellation of registration certificate along with payment of taxes, if any. Such refund shall be granted within 60 days from the date of application of refund.

Trade Circular No. 34 T of 2017

Goa

Goa VAT Department has amended the Rule 6(7) of Goa Value Added Tax Rules, 2005 by inserting a proviso that the dealer (other than the one dealing in alcoholic liquor for human consumption) registered under composition scheme and whose total turnover does not exceed INR25 lakh during the financial year immediately before commencement of the Goa Goods and Service Tax Act, 2017 (Goa GST Act) shall file a single return for the period 1 April 2017 up to the date of commencement Goa GST Act, within 30 days within thirty days from the last day of the period to which the such return relates.

Notification 4/5/2005-Fin(R&C) (149)

Rule 23 of the Goa VAT Rules, 2005, has been amended to insert sub-rule (1A) wherein it has been prescribed that the dealer (other than the one dealing in alcoholic liquor for human consumption) who is required to file annual return of sales, shall file a single return of sales for the period from for the period 1 April 2017 up to the date of commencement of Goa GST Act, within 30 days from the last day of the period to which the such return relates.

Notification 4/5/2005-Fin(R&C) (149)

Section 70 Goa Value Added Act, 2005, (Goa VAT Act) has been amended to insert sub-section (1A), wherein dealers whose gross sales for the period 1 April 2017 up to the date of commencement of Goa GST Act, exceeds INR25 lakh or the amount of ITC claimed during such period exceeds INR3 lakh, shall get his accounts audited by an accountant within such period and manner as may be prescribed. Further this Section is not applicable to dealers engaged in the business of petroleum crude, high speed diesel, motor spirit, natural gas, aviation turbine fuel and alcoholic liquor for human consumption.

Ordinance No. 4 of 2017

Rule 42 of Goa VAT Rules, 2005, has been amended to insert sub-rule (1A) wherein the dealer who is liable to get his account audited under Section 70(1A) of the Goa VAT Act, shall be required to submit audited statement of accounts to the assessing authority on or before the last day of the tenth month, from the commencement of the relevant year. The dealer who transmits such audited statement of accounts to the Appropriate Assessing Authority shall not be liable to furnish final accounts under Rule 42A of the said Rules.

Notification 4/5/2005-Fin(R&C) (149)

GST

Notifications/Circulars/Press Releases

On the recommendations of the Council, for the month of July and August 2017, new return in Form GSTR-3B has been introduced which shall be furnished electronically through the common portal on or before 20 August 2017 and 20 September 2017 for respective months.

Notification No. 21/2017 – Central Tax New Delhi, 8 August 2017

Simultaneously, the time period for filing GSTR 1, GSTR 2 and GSTR 3 has been extended for the month of July and August 2017 as per table given below:-

Month	GSTR-1	GSTR-2	GSTR-3
July 2017	1to 5 September 2017	6 to 10 September 2017	11 to 15 September 2017
August 2017	16 to 20 September 2017	21 to 25 September 2017	26 to 30 September 2017

Notifications No. 18/2017, 19/2017 and 20/2017 – Central Tax New Delhi, 8 August 2017

A large number of communications have been received from the field formations and exporters citing variation in the interpretation of Notification No. 16/2017 – GST dated 7 July 2017 and Circular No. 2/2/2017 – GST dated 5 July 2017 and Circular No. 4/4/2017 – GST dated 7 July 2017. Therefore, for the purpose of uniformity in the implementation of the Act, clarification has been issued on issues related to furnishing of a Bond/Letter of Undertaking for Exports.

Circular No. 5/5/2017 – GST dated 11 August 2017

Personal tax

Notifications/Circulars/Press Releases

Employees' Provident Fund Organisation launches new software for online generation of Certificate of Coverage

The Government of India (GOI) made fundamental changes in the Employees' Provident Funds Scheme, 1952 (EPFS) and Employees' Pension Scheme, 1995 (EPS) in October 2008 by bringing International Workers (IWs) under the purview of the Indian social security regime.

India has signed several Social Security Agreements (SSAs) with other countries with a view to obtain an exemption from a contribution towards social security in the host countries for outbound employees, provided that they contribute to social security in India. To obtain this exemption, an outbound employee requires a Certificate of Coverage (COC) from the designated agency, the Employees' Provident Fund Organisation.

The EPFO recently issued a circular in this regard announcing the launch of a new application software on 20 July 2017 for online generation of COC and the same is available on the 'International Workers Portal' of EPFO's website.

Highlights of the circular

- In view of the launch of the online system for generation of COC, the physical application for COC has been discontinued.
- EPFO field offices have been asked to advise employees to use the online system only to obtain COC for their assignment abroad.

EPFO Circular - http://www.epfindia.com/site_docs/PDFs/Circulars/Y2017-2018/IWU_COC_ Generation_1708.pdf

Employees' Provident Fund Organisation issues fresh circular on the implications of non-filing of online returns by exempted Provident Fund Trusts

In 1952, the Government of India introduced a mandatory savings scheme, for non-government employees, known as the Employees' Provident Funds Scheme (EPFS). In this scheme, both the employee and the employer are required to make a contribution to the Employees' Provident Fund (EPF).

The government also permitted employers to establish and manage their own in-house PF trusts, subject to the conditions prescribed under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act) and the Income Tax Act, 1961 (IT Act). Such establishments are known as exempted establishments under the EPF Act.

The Employees' Provident Fund Organisation (EPFO) issued a circular[6] to direct all the exempted establishments to ensure online filing of e-returns through the portal before 15 June 2017 to streamline the monitoring and supervision of the performance of exempted Trusts under the EPF Act and various Schemes framed thereunder.

The EPFO has issued another circular to its field offices on the due date of filing prescribed returns as well as the implications of not filing the online returns.

Key highlights of the circular

- The Regional Provident Fund Commissioner (RPFC)/Officer in- charge of the field offices shall ensure due filing of prescribed returns by 25 July 2017.
- If any establishment is found not complying with the due date, then such establishments should be immediately inspected.
- Subsequent to the inspection, necessary action for cancellation of exemption should be initiated against the defaulting establishments after giving an opportunity of hearing.

EPFO Circular http://www.epfindia.com/site_docs/PDFs/Circulars/Y2017-2018/ExemOnlineReturn_7247.pdf

[6] EPFO Circular http://www.epfindia.com/site_docs/PDFs/Circulars/Y2017-2018/Exem_OnlineFilingReturn_ExEstt_29052017.pdf

KPMG in India

Ahmedabad
Commerce House V, 9th Floor,
902 & 903, Near Vodafone House,
Corporate Road, Prahlad Nagar,
Ahmedabad – 380 051
Tel: +91 79 4040 2200
Fax: +91 79 4040 2244

Bengaluru
Maruthi Info-Tech Centre
11-12/1, Inner Ring Road
Koramangala,
Bengaluru – 560 071
Tel: +91 80 3980 6000
Fax: +91 80 3980 6999

Chandigarh
SCO 22-23 (Ist Floor)
Sector 8C, Madhya Marg
Chandigarh – 160 009
Tel: +91 172 393 5777/781
Fax: +91 172 393 5780

Chennai
No.10, Mahatma Gandhi Road
Nungambakkam
Chennai – 600 034
Tel: +91 44 3914 5000
Fax: +91 44 3914 5999

Gurugram
Building No.10, 8th Floor
DLF Cyber City, Phase II
Gurugram, Haryana – 122 002
Tel: +91 124 307 4000
Fax: +91 124 254 9101

Hyderabad
Reliance Humsafar, 4th Floor
8-2-618/2, Road No.11,
Banjara Hills
Hyderabad – 500 034
Tel: +91 40 3046 5000
Fax: +91 40 3046 5299

Jaipur
Regus Radiant Centres Pvt Ltd.,
Level 6, Jaipur Centre Mall,
B2 By pass Tonk Road
Jaipur, Rajasthan – 302018.
Tel: +91 141 - 7103224

Kochi
Syama Business Center
3rd Floor, NH By Pass Road,
Vytilla, Kochi – 682019
Tel: +91 484 302 7000
Fax: +91 484 302 7001

Kolkata
Unit No. 603 – 604,
6th Floor, Tower – 1,
Godrej Waterside,
Sector – V, Salt Lake,
Kolkata – 700 091
Tel: +91 33 4403 4000
Fax: +91 33 4403 4199

Mumbai
Lodha Excelus, Apollo Mills
N. M. Joshi Marg
Mahalaxmi, Mumbai – 400 011
Tel: +91 22 3989 6000
Fax: +91 22 3983 6000

Noida
Unit No. 501, 5th Floor,
Advant Navis Business park
Tower-B, Plot# 7, Sector 142,
Expressway Noida, Gautam Budh Nagar,
Noida – 201305
Tel: +91 0120 386 8000
Fax: +91 0120 386 8999

Pune
9th floor, Business Plaza,
Westin Hotel Campus, 36/3-B,
Koregaon Park Annex, Mundhwa Road,
Ghorpadi, Pune – 411001
Tel: +91 20 6747 7000
Fax: +91 20 6747 7100

Vadodara
iPlex India Private Limited,
1st floor office space, No. 1004,
Vadodara Hyper, Dr. V S Marg
Alkapuri, Vadodara – 390 007
Tel: +91 0265 235 1085/232 2607/232 2672

KPMG in India contact

Girish Vanvari
Partner and Head
Tax
T: +91 (22) 3090 1910
E: gvanvari@kpmg.com

Follow us on
kpmg.com/in/socialmedia