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PRIVILEGED AND CONFIDENTIAL

YEARLY ROUND-UP

2021

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From the Desk of the Managing Partner

V. Lakshmikumaran,

FOUNDER AND MANAGING PARTNER

Dear All,

Lakshmikumaran & Sridharan (LKS) has developed specialisation in various branches of law over a period of above 35 years. Our core practice verticals continue to be Tax, International Trade, Corporate and M&A, Intellectual Property, Dispute Resolution, Regulatory and Competition. LKS has delivered several lectures and published many articles on different subjects highlighting important legislations and judicial pronouncements. We have been receiving encouraging comments and compliments for the knowledge management initiatives by our team.

India has emerged as one of the fastest growing large economies in the world. Despite the recent contraction in GDP largely due to COVID-19, the fundamentals of the Indian economy suggest promising long-term growth. The first half of 2021 year saw a slowdown in the M&A activity due to the second wave of COVID-19. However, there was a rapid surge in the latter half of the year, with the total number of deals exceeding 2,100 valued at USD 91.1 billion. Public listings saw a 2.7 x jump over the 2020 issue size, with 65 companies raising USD 17.7 billion.

The India-China dispute and its geo-political implications further fuelled global investors' interest towards Indian new age enterprises and start-ups. Today, 1 out every 10 unicorns globally have been born in India. Overall, 2021 is experienced an exponential boom when it comes to start-ups entering the unicorn club. Currently, India is home to 88 unicorns with a total valuation of ~ USD 296 billion. Out of the total number of unicorns, 44 unicorns with a total valuation of ~ USD 94 billion were born in 2021.

The government has recently closed privatization of Air India to the Tatas and is also targeting listing of India's largest insurer LIC in this year. This is in line with the government's long drawn strategy for divestment of various public sector undertakings.

On the income-tax front, the year saw a number of amendments that were brought to curb the possible tax planning opportunities, increase the base of taxpayers and streamline the provisions relating to tax assessments and appeals. These included denial of depreciation on goodwill, bringing of slump exchanges within the ambit of capital gain taxation, revamping of scheme of taxation in the case of dissolution and reconstitution of partnership firms, new tax withholding and collection provisions. This year also witnessed rollback of retrospective levy on indirect transfers, which is a long-awaited confidence booster for foreign investors.

The international taxation regime relating to digital economy has also seen significant development this year. A two-pillar approach proposed by OECD/ G20 has been accepted by all major countries including India to deal with the increasingly digitalised economy. This is likely to revolutionise the international tax landscape.

On the corporate front, the year saw several amendments which seeks to streamline processes and regulations in order to promote ease of doing business in India. These include increase in FDI ceiling in insurance sector, norms for direct overseas listing by Indian companies, decriminalizing penal provisions under Companies Act and removal of restrictions on board meetings via video conferencing. The changes in legal framework this year including leverage to start-ups to raise capital without the burden of an open offer, reduction in minimum lock-in period for promoter's investment post an IPO and fast track merger of start-ups gives more room to foreign investors.

The labour law regime has also seen significant development this year. The new labour codes introduce employer-centric aspects such as single registration and licensing provision on a unified portal, allowing maintenance of registers in electronic form, disqualification for receiving statutory bonus in case of dismissal from service for conviction for sexual harassment etc. These should have a long-term positive impact on the industry.

Our team has developed this publication with the intent of giving stakeholders an overview of the key tax & regulatory updates that had a bearing on Indian businesses, investors, other stakeholders and consequential future impact. We hope that this publication will help you to clear your obstacles & hindrances and navigate through the ever-changing Indian tax & regulatory framework. To this end, we would like to extend our best wishes to every reader and wish them all the success. Do reach out to us with your feedback and/or suggestions.

Regards and best wishes,

V. Lakshmikumaran
MANAGING PARTNER

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1 Corporate & Regulatory

Corporate Laws

1. RULES ON PURCHASE OF SHARES HELD BY MINORITY SHAREHOLDERS IN DEMAT FORM

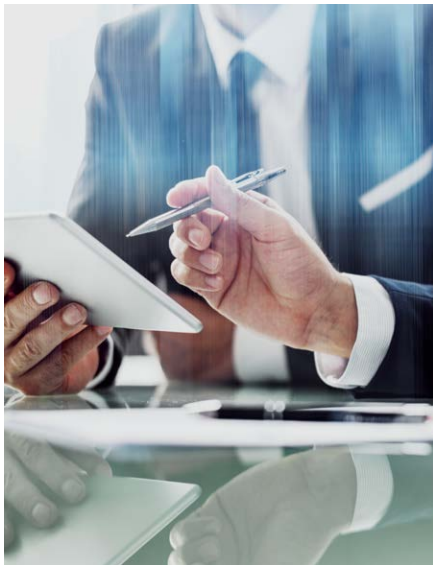
For minority squeeze out, procedural steps for purchasing shares of the minority shareholders held in demat form, have been prescribed. The steps involve a concept of cut-off date i.e. date on which shares of minority shareholders shall be automatically credited to the demat account of the company from where the same will be subsequently, transferred to demat account of majority shareholder.

Earlier, only process of acquiring minority's shares held in physical form was clearly specified. New rules will ease the squeeze out of foreign minority shareholders, holding shares in demat form, from an Indian company.

2. FAST TRACK MERGER OF STARTUPS

MCA has allowed fast track merger of (a) two or more start-up companies; or (b) one or more start-up company with one or more small company.

This amendment will create more room for mergers and acquisitions between start-ups or small companies in India by making the merger process simplified and shorter. Further, fast track merger can also be made a part of a larger restructuring or acquisition exercise.



3. COMPANIES EXCLUDED FROM THE DEFINITION OF 'LISTED COMPANIES'

(i) Public companies with listed non-convertible debt securities (NCDs) and/or non-convertible redeemable preference shares issued on private placement basis; (ii) private companies with listed NCDs; and (iii) public companies with equity shares exclusively listed on stock exchanges in permissible foreign jurisdictions, have been excluded from definition of 'listed company'.

The liberalisation in the definition of listed companies gives compliance relief to public limited companies and private limited companies having listed debt securities.

4. COMPANIES ACCOUNTS – RECORDING AUDIT TRAIL OF TRANSACTIONS TO BE MANDATORY

From FY 2022-23 onwards, the statutory auditors shall be required to record in its auditor's report that the company is using accounting software, for maintaining its books of accounts, which allows an audit trail to be recorded and the same has been operated throughout the year, retained as per statutory requirements and not been tampered with.

Through disclosure of the audit trails, any person including foreign investor scrutinizing the books of accounts of the company can very easily track what changes have been made to the accounts and can require the company to explain the reasons thereof. This may also assist in conducting due diligence of a potential target company.

5. REMOVAL OF RESTRICTIONS ON BOARD MEETINGS VIA VIDEO CONFERENCING

Government has allowed board meeting through video conferencing or other audio-visual means for the following agenda items- (i) approval of the annual financial statements, board reports and prospectus; (ii) audit committee meetings for approval of financial statement; and (iii) approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

Earlier the above matters were restricted to be transacted through the digital medium.

This will reduce the hurdle faced by foreign directors in attending the board meetings of the Indian company for the aforesaid matters during the Covid-19 pandemic and in future the same can be appropriately deal with in transaction documents such as shareholder agreements.

6. ALLOTMENT OF A NEW NAME TO THE EXISTING COMPANY

In case company does not comply with the direction of Central Government to change its name within 3 months from the issuance of such direction, where company's name is identical with or too nearly resembles the name of an existing company, then Company's name would be changed to 'ORDNC ("Order of Regional Director Not Complied"), year of passing the direction, serial number and existing CIN of the Company'.

This change will ensure that company, within the specified period, comply with the directions of the Government and also deter from choosing a name which is similar to the name of other company.

7. EXTENDING COVERAGE OF PERSONS WHO CAN BE APPOINTED AS INDEPENDENT DIRECTOR

Experienced advocates, chartered accountants, cost accountants and company secretaries are exempt from the requirement of a proficiency test in order to qualify for appointment as independent directors on the board of companies, if they have been practising for ten years in the field. Further, officials of central and state governments with expertise can also be appointed as independent directors.

The change in norms aim to make more experienced persons available to be appointed as independent directors on the board of companies. This will also assist foreign investors because a larger pool of independent directors will be available and assist in corporate governance.

8. AGMS AND EGMS VIA VIDEO CONFERENCE AND OTHER AUDIO-VISUAL MEANS TILL 30 JUNE 2022

Government has decided to allow companies to convene and conduct annual general meeting (due in the year 2021) and extra-ordinary general meeting through video conferencing or other audio-visual means or transact through the postal ballot up to June 30, 2022.

This measure has been taken by MCA keeping in view the pandemic risk.

Commercial Laws

1. DISTINCT TRANSACTIONS – MAHARASHTRA STAMP (AMENDMENT AND VALIDATION) ORDINANCE, 2021

The law now explicitly provides that in case of a common instrument consisting of multiple transactions, each such transactions should be levied with separate stamp duty.

This measure aims to stamp the underlying transactions in an instrument instead of the instrument. Investor should keep in mind the stamp duty implications while concluding transaction related to Maharashtra.

2. CREATION OF CENTRAL ADVISORY BOARD FOR FIXATION OR REVISION OF MINIMUM WAGES

The newly notified Code on Wages (Central Advisory Board) Rules, 2021 provides for constitution of the Central Advisory Board which will advise the Central Government on issues relating to fixation or revision of minimum wages and other connected matters.

These Rules will pave the way for the government to initiate work on a national floor-level minimum wage. This will have an impact on operating business in India and accordingly, the foreign investors will be required to consider the same.

3. GOVERNMENT NOTIFIES DRAFT RULES RELATED TO TRADE UNIONS

The rules provide for criteria for recognising a registered trade union of workers as the sole negotiating union of workers and also provide for the matters on which trade unions will negotiate. Once the rules are notified, the negotiating council will be responsible to negotiate with the employer on issues pertaining to wages, hours of work, leave entitlement, classification of grades, categories of workers and other safety and health related matters.

The Rules will pave way for faster resolution of disputes between employees and employers though a council comprising one major trade union instead of multiple trade unions.

4. FOOD IMPORTS – MANDATORY REGISTRATION AND INSPECTION OF FOREIGN FOOD MANUFACTURING FACILITIES

The notified regulations has provided that, the FSSAI may from time to time, based on the risk, specify the categories of food products intended for export to India for further regulating control and foreign food manufacturing facilities falling under such categories and desirous to export such article of food to India shall register with the Food Authority before exporting to India.

The new amendment is in line with regulations adopted by other international food safety agencies like FDA. The regulations also come at a time with leading experts in India pointing to the increase in consumption of ultra-processed packaging food leading to obesity and health risks in children.

5. REGULATION ON DIRECT SELLING IN INDIA

New rules have been introduced which apply to all goods and services bought or sold through direct selling, all models of direct selling, all direct selling entities offering goods and services to consumers in India, all forms of unfair trade practices across all models of direct selling and also to a direct selling entity which is not established in India but offers goods or services to consumers in India.

The new rules hold direct selling entities accountable for any complaints stemming from the sale of products or services by its direct sellers. Accordingly, these need to be considered for entities engaged in direct selling business model.

FEMA

1. FDI CEILING IN INSURANCE SECTOR TO BE RAISED TO 74 PER CENT

The definition of an Indian insurance company was modified to increase the permissible foreign shareholding to 74% (comprises foreign direct investment as well as indirect foreign investment). A higher FDI limit will also help insurance companies access to foreign capital to meet their growth requirements since insurance is a capital-intensive business.

2. NORMS RELATED TO FDI IN THE BANKING SECTOR

Applications for FDI in private banks having a joint venture or subsidiary in the insurance sector may be addressed to the RBI for consideration in consultation with the IRDAI to ensure that the limit of foreign investment of 74% for the insurance sector is not breached.

3. 100% FDI IN TELECOM SECTOR VIA AUTOMATIC ROUTE ALLOWED

The Government allows 100% FDI in the telecom sector under the automatic route. Prior to this, FDI in the telecom sector was permitted up to 100%, but government approval was required beyond 49%. However, entity of a country sharing land border with India, or where the beneficial owner of an investment in India is located in or a citizen of such a country, may only invest in telecom sector via the

government route.

This will benefit telecom sector companies in India for raising foreign capital.

4. INTRODUCTION OF LEGAL ENTITY IDENTIFIER FOR CROSS-BORDER TRANSACTIONS

From October 1, 2022, AD Category I banks, shall obtain the LEI number from the resident entities (non-individuals) undertaking capital or current account transactions of 50 crores and above per transaction under FEMA, 1999. LEI is a 20-digit number used to uniquely identify parties to financial transactions worldwide to improve the quality and accuracy of financial data systems.

LEI will not only enhance transparency but will also contribute to ease in doing business encouraging foreign entities to invest more in Indian markets. In cross border transactions, while planning an investment in India, this requirement to be appropriately considered.

SEBI

1. SCHEME OF ARRANGEMENT BY LISTED ENTITIES

Before submission of scheme to NCLT, the listed entity to submit to the stock exchange (SE) (a) an undertaking specifying that, no material event has occurred during the intervening period of filing the scheme documents with SE and period under consideration for valuation, (b) declaration on past default of listed debt obligations of the entity forming part of the scheme and (c) NOC via-a-vis the arrangement from lending financial institutions.

The amendments will ensure that SE refer the draft schemes to SEBI only upon being fully convinced that the listed entity complies with law. The measures will also protect and promote the interests of shareholders of listed entities.

2. NEW REQUIREMENT OF QUARTERLY FINANCIAL RESULTS ON DEBT LISTED ENTITIES

Compliance burden on the debt listed entity has been significantly increased. One such compliance is that companies whose debt securities are listed, are required to publish their financial result on

quarterly basis as against the earlier requirement of publishing the same on half yearly basis.

Change in the periodicity of submission of financial results aims to strengthen the existing regulatory framework for debt listed entities and will increase corporate governance in such entities.

3. MINIMUM LOCK-IN PERIOD FOR PROMOTER'S INVESTMENT POST AN IPO HAS BEEN REDUCED

The lock-in period of specified securities (i.e. minimum promoters' contribution including contribution made by alternative investment funds or foreign venture capital investors or scheduled commercial banks or public financial institutions or insurance companies) held by promoters post an IPO (i.e. post listing on stock exchange) have been reduced to 18 months from a period of three years from the date of commencement of commercial production or date of allotment in the initial public offer, whichever is later.

This change in legal framework is a boost to the start-up companies and will give more room to foreign investors for planning their exit strategy.

4. RELAXATIONS ON NORMS FOR BOOSTING START-UPS

The institutional trading platform of a recognised stock exchange will now be known as Innovators Growth platform. Further, for the company i.e. start-ups listed on the Innovators Growth Platform, the open offer trigger limit has been changed from 25% to 49% of share or voting rights.

This will give leverage to start-ups to raise capital without the burden of an open offer as it is a costly and time-taking affair and will be at the same time impart flexibility to foreign investors without the requirement of open offer considering an increased threshold. Further, promoters will be given more flexibility while structuring investments.

5. INTRODUCTION OF NEW REPORTING REQUIREMENTS FOR BUSINESS SUSTAINABILITY REPORTING BY LISTED ENTITIES

Under business responsibility and sustainability report, listed entities need to disclose an overview of entity's material ESG (environmental, social and governance) risks and opportunities, approach to mitigate or adapt to risks along with financial implications of the same. In addition,

sustainability related goals and targets and performance against the same need to be mentioned in the report.

In current scenario, company's performance on sustainability related factors is as important as company's financial and operational performance. This will help (a) entities in assessing sustainability-related risks and opportunities and (b) investors in making an informed investment decision.

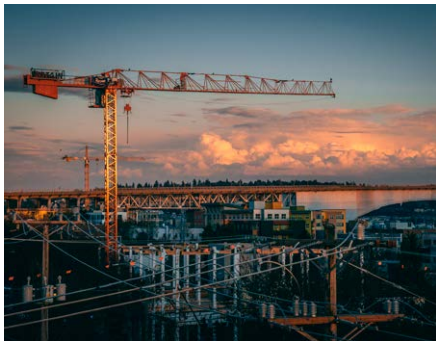
6. PRIOR APPROVAL OF SEBI FOR CHANGE IN CONTROL

Procedure for seeking prior approval of SEBI for change in control of certain intermediaries such as stock brokers, merchant bankers, debenture trustees, underwriters, depository participants and credit rating agencies, has been specified. Other scenarios in which transfer and transmission of shareholding of an intermediary will not construe as change in control such as in case of unlisted body corporate intermediary, are also clarified.

7. INCREMENTAL CHANGES FOR STREAMLINING DELISTING PROCESS

New provisions have been introduced for delisting of the subsidiary company by the listed holding company through a scheme of arrangement, provided the listed holding company and the subsidiary company are in the same line of business. Special provisions have also been provided for delisting of companies listed on the innovators growth platform. Further, acquirers need to disclose their intention to delist through an initial public announcement.

New provisions will make merger and acquisition transaction more rational and convenient exercise, balancing the interest of all investors in the process.



8. REVISION IN MINIMUM APPLICATION VALUE FOR INFRASTRUCTURE INVESTMENT TRUSTS (IITS)

The provisions related to minimum application value for the retail investor in IITs has been changed from INR 1 lakhs to the range of Rs 10,000-15,000 for IITs.

This move will lead to better liquidity and efficient price discovery and will provide an attractive opportunity for retail investors to earn stable yields with growth potential.

9. CERTAIN LISTED COMPANIES ARE EXEMPTED FROM MAINTAINING MINIMUM PUBLIC SHAREHOLDING THRESHOLD

The Central Government has been empowered to, in public interest, exempt any listed public sector company from maintaining minimum public shareholding threshold of 25%.

Maintenance of minimum public float by listed companies helps attract higher foreign capital and ensure liquidity through dispersed shareholding. Non-maintenance of minimum threshold could result in reduced inflow of foreign capital.

10. DISCLOSURE OF SHAREHOLDING PATTERN OF PROMOTERS AND PROMOTER GROUP

All the listed entities will be required to disclose promoter and promoter group separately in the shareholding pattern on the website of stock exchanges. Earlier, there was no such segregation and the shareholding of promoter and promoter group were disclosed collectively.

This will bring more transparency to the investors.

11. RELAXATIONS RELATED TO DISCLOSURE REQUIREMENTS UNDER TAKEOVER CODE

Pursuant to the amendment, Takeover Code requires disclosure of change in shareholding or voting rights of the acquirer if such change exceeds 5% of total shareholding /voting rights from the erstwhile 2%. SEBI has also done away with the requirement of disclosing (a) annual shareholding as of March 31 of every year imposed on the promoters of the target company and (b) aggregate shareholding and voting rights, if the same exceed 25% threshold in target company, imposed on person along with person acting in concert with him.

Relaxing of Takeover Regulations to some extent will give more leverage to any acquirer vis-a-vis procedural formality of public disclosures and infusion of capital in cash strapped companies.

Corporate & Regulatory Judgements

1. AN ARBITRATION AGREEMENT NOT INVALIDATED BY NON-PAYMENT OF STAMP DUTY ON AGREEMENT

Parties entered into a MOU, which prohibited each party from soliciting employees of the other party. Pursuant to breach of obligation by MSD Telematics, IMZ invoked the arbitration clause and approached Delhi High Court for appointment of arbitrator. MSD Telematics contended that the said MOU was an unstamped document hence not enforceable as a contract by law.

The Delhi High Court applied the doctrine of separability and held that the arbitration agreement is a separate and distinct agreement and will survive independently of the substantive/definitive agreement having arbitration clause.

M/S IMZ CORPORATE PVT. LTD. V. MSD TELEMATICS PVT. LTD.

2. PRIOR APPROVAL OF CENTRAL GOVERNMENT NOT REQUIRED TO ENFORCE AN ARBITRAL AWARD AGAINST A FOREIGN STATE

Petitioners approached the Delhi High Court for seeking enforcement of arbitral awards against the Respondents (foreign state). The Court also directed the Central Government to examine whether its consent would be required for enforcement of an arbitral award against the Respondents.

The Delhi High Court held that for the enforcement of an arbitral award against a foreign state, prior approval of the Central Government is not required because an arbitral award is a "decree" to the extent it upholds the essence of the arbitration laws i.e., speedy, binding and legally enforceable and sovereign immunity against its enforcement in case of a commercial transaction cannot be claimed by a foreign state.

MATRIX GLOBAL PVT. LTD. V. MINISTRY OF EDUCATION, FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA

3. EXISTENCE OF ALTERNATIVE REMEDY PROVISION WILL NOT DEBAR COURT TO ENTERTAIN A WRIT PETITION

Allahabad High Court allowed a writ petition in a matter where

contract between the parties contained arbitration clause. The High Court order was challenged before the Supreme Court on the grounds that the High Court does not have jurisdiction to adjudicate contractual matter which has provisions for alternative remedy i.e., arbitration. The Supreme Court clarified that a court is not debarred from entertaining a writ petition in an appropriate matter due to the existence of an arbitration clause or any alternative remedy provision in the contract, more particularly in cases (i) where the writ petition seeks enforcement of a fundamental right; (ii) where there is failure of principles of natural justice or (iii) where the impugned orders or proceedings are wholly without jurisdiction or (iv) where the vires of an Act is under challenge.

UTTAR PRADESH POWER TRANSMISSION CORPORATION LTD. AND ANR. VS. CG POWER AND INDUSTRIAL SOLUTIONS LIMITED AND ANR.

4. WHATSAPP'S NEW PRIVACY POLICY PERMITTING SHARING OF USER'S DATA WITH FACEBOOK IS AN ABUSE OF DOMINANCE.

Competition Commission of India (CCI) held that the 2021 privacy policy update which requires sharing of user information by WhatsApp with Facebook and group companies is a case of abuse of dominance under competition laws by WhatsApp which is a market leader in India in OTT messaging platform and amounted to imposition of unfair terms and conditions upon the users. CCI also directed its Director General to conduct an enquiry into the matter to ascertain the full extent, scope and impact of data sharing through involuntary consent of users.

The said Order was challenged by WhatsApp and Facebook Inc. before Delhi High Court on the grounds that there are pending cases challenging the 2021 update therefore the Order issued by CCI directing a probe into the 2021 privacy policy update of WhatsApp for being anti-competitive must be stayed. The Court refused to stay the Order passed by CCI on the grounds that it was only an administrative order passed by CCI and only deals with anti-competitive issues and not with data privacy issues.

CCI-SUO MOTO CASE NO. 1 OF 2021 AGAINST WHATSAPP LLC AND FACEBOOK INC.

5. SEAT OF ARBITRATION CAN BE CHANGED BY MUTUAL CONSENT

Gujarat Fluorochemicals Ltd. executed a purchase order with Jayesh Electricals having an arbitration clause with the seat at Jaipur,

Rajasthan. The entire business of GFL was sold (slump sale) to Inox Renewables where the agreement had an arbitration clause with the seat at Vadodara, Gujarat and courts at Vadodara had exclusive jurisdiction over disputes arising under the said business transfer agreement. On account of the dispute under the purchase order the parties approached Gujarat High Court for appointment of arbitrator. An arbitral award was passed, and the arbitrator recorded that the parties mutually agreed to change the venue of arbitration as agreed under the purchase order from Jaipur to Ahmedabad.

The award was challenged before Ahmedabad court which was opposed by Respondent stating that Vadodara has the rightful Jurisdiction. The order was challenged before Gujarat High Court which stated that courts at Rajasthan has the rightful jurisdiction as per the terms of purchase order. The said order was challenged before the Supreme Court.

The Supreme Court held that, such a change in the venue/ place/ seat of arbitration from what was originally agreed purchase order can be made vide mutual agreement between the parties recorded by the arbitrator in his award, and a specific written agreement is not required to implement the change.

INOX RENEWABLES VS JAYESH ELECTRICALS

6. 'SOLE PROPRIETORSHIP' FALLS UNDER THE SCOPE OF INTERNATIONAL COMMERCIAL ARBITRATION IF THE PROPRIETOR IS A HABITUAL FOREIGN RESIDENT.

An arbitrator was appointed by the Delhi High Court to resolve a dispute between the Parties (including a sole proprietorship). It was challenged by the Appellant on the contention that since the Respondents were habitual foreign residents, the matter had constituted international commercial arbitration. The Delhi High Court turned down this contention citing that the central ownership and management of the Respondents' business was in India.

On an appeal, the Supreme Court allowed the contention of the Appellant that if any individual involved in the business transaction in India was a national of or habitual resident of any country other than India, then the arbitration becomes an international commercial arbitration under the Indian Arbitration laws and held that the Delhi High Court had no jurisdiction to appoint an arbitrator.

AMWAY INDIA ENTERPRISES PVT. LTD. V. RAVINDRANATH RAO SINDHIA AND ANR.

7. A THIRD-PARTY CAN BE COMPELLED TO ARBITRATE IF NECESSARY AND PROPER.

While deciding if a non-signatory/third-party can be compelled to arbitrate, Delhi High Court applied doctrine of group companies and theory of alter-ego and held that since, the third-party being a group company of one of the parties is a direct beneficiary of the contract entered between two parties, thus can be compelled to arbitrate.

Elena, a wholly-owned subsidiary of Indiabulls Power Limited, issued Shapoorji Pallonji with a letter of award (on the letter head of Indiabulls) and executed a contract with Shapoorji Pallonji, for construction of civil and structural work in a boiler turbine generator package. The Court held that Indiabulls was a direct beneficiary of the contract between Elena and Shapoorji Pallonji as it participated in execution and negotiation of the contract and also made payments on behalf of Elena to Shapoorji Pallonji making Elena the alter-ego of Indiabulls', thus Indiabulls can be compelled to arbitrate.

SHAPOORJI PALLONJI AND CO. PVT. LTD. V. RATTAN INDIA POWER LTD. & ANR.,

8. TWO INDIAN PARTIES CAN CHOOSE A FOREIGN SEAT FOR ARBITRATION

Parties (both Indian) to the dispute agreed in the arbitration clause of settlement agreement for Zurich, Switzerland as the seat of arbitration. When the Appellant had begun to initiate arbitration by the International Chamber of Commerce (ICC), the respondent questioned arbitrator's jurisdiction on the ground that two Indian parties could not choose a foreign seat of arbitration. The arbitrator had nevertheless passed the award and the Respondent approached the Gujarat High Court for enforcement of the arbitral award. The Court upheld the arbitral award. Order of Gujarat High Court was challenged before the Supreme Court by PASL Wind Solutions Pvt. Ltd. on the ground that two Indian parties cannot designate a seat of arbitration outside India as doing so would defeat the provisions under arbitration laws and be contrary to Indian public policy.

The Supreme Court while discussing the party autonomy under the arbitration laws held that two Indian parties are free to choose a seat of arbitration outside India and that there is no restriction under the law against choosing a foreign law as the governing law of the contract. The Court also clarified that the resultant award would be a foreign award and will be accordingly enforceable in India.

PASL WIND SOLUTIONS PVT. LTD. V. GE POWER CONVERSION INDIA PVT. LTD., 2021

9. NON-SIGNATORIES TO AN ARBITRATION AGREEMENT CAN BE BOUND BY FOREIGN ARBITRAL AWARDS, WHICH CAN BE ENFORCED AGAINST THEM

In a dispute between Integrated Sales Service Ltd. (ISS) and DMC Management Consultants Ltd. ISS initiated arbitration proceedings and claimed that DMC transferred the commission due and payable to ISS to another entity Gemini Bay Transcriptions Pvt Ltd. which was controlled by the chairman of DMC. The arbitrator directed all the group entities of DMC and the chairman to pay the commission to ISS. ISS approached Bombay High Court for enforcement of the arbitral award, where the Court held that the award was only enforceable against DMC and not the group companies and chairman of DMC as they were not the signatories to the arbitration agreement between ISS and DMC. ISS challenged the same before Supreme Court.

The Supreme Court overruled the Order passed by Division Bench of Bombay High Court and held that provisions pertaining to instances when a foreign award is binding under the Indian arbitration laws includes the term "persons" and not "parties" therefore an arbitral award can be enforced against non-signatories (non-parties) to the arbitration agreement.

GEMINI BAY TRANSCRIPTION PVT. LTD. V. INTEGRATED SALES SERVICE LTD. AND ANR.

10. MADRAS HIGH COURT STRUCK DOWN AMENDMENT TO THE TAMIL NADU GAMING ACT THAT PROHIBITED BETTING AND WAGERING ON ALL FORMS OF ONLINE GAMING

The Madras High Court held that, blanket ban on all forms of games of skill or chance for money by Tamil Nadu Government is unreasonable, excessive, and manifestly arbitrary, thereby failing the test of reasonableness and proportionality under Article 19(1)(g) of the Indian Constitution. It also observed that skilled players have a right to exploit their skill and make a living out of it. The Madras High Court case struck down the provisions under Part II of the Tamil Nadu Gaming and Police Laws (Amendment) Act, 2021, holding them to be unconstitutional and inconsistent with judicial precedents.

JUNGLEE GAMES INDIA PVT. LTD. V. STATE OF TAMIL NADU

11. EMERGENCY ARBITRAL AWARDS ARE ENFORCEABLE IN INDIA

In an ongoing dispute between the parties, Amazon initiated arbitration

proceedings against Future Retail. The agreement between the parties provided that the arbitration would be governed by Indian laws, the courts at New Delhi would have the exclusive jurisdiction, seat of arbitration would be New Delhi and arbitration proceedings would be as per the Singapore International Arbitration Centre (SIAC) Rules. Amazon simultaneously filed an application seeking emergency interim relief under the said Rules retraining Future Retail from going ahead on the disputed transaction. SIAC appointed an emergency arbitrator which passed an interim order restricting Future Retail.

Aggrieved by the order, Future Retail approached Delhi High Court on the ground that the Emergency Arbitrator is not an 'arbitrator' under Indian laws and the award passed by it is not enforceable in India. The Delhi High Court decided against Future Retail.

In the appeal, the Supreme Court discussed party autonomy granted under arbitration laws to settle disputes through the rules of arbitration institutions. The Court held that, Parties agreed for SIAC Rules to govern the arbitration, an 'award' passed by Emergency Arbitrator under the said rules can be enforced under the Indian arbitration laws and the term "arbitral tribunal" would include Emergency Arbitrator appointed under institutional rules.

AMAZON.COM NV INVESTMENT HOLDINGS LLC VS. FUTURE RETAIL LIMITED & ORS.

2 Direct Tax

Amendements

1. TAXATION OF INTEREST ON EMPLOYEE'S CONTRIBUTION TO PROVIDENT FUND (PF)

Interest accruing on employee's contribution to recognized PF was earlier fully exempt from tax. Such interest has been made taxable with effect from 1st April 2021 to the extent it is relatable to contributions made in excess of INR 0.25 million in any Financial Year. In case of a fund where no contribution is made by the employer, benefit of higher annual employee contribution threshold of INR 0.5 million is available. In effect, any contribution made by employee beyond these thresholds will be treated as "taxable contribution" and interest accruing thereon will be taxable.

From financial year 2021-22, the fund is required to maintain separate accounts for taxable and non-taxable contribution. Interest, as calculated in accordance with the prescribed rules, in relation to taxable contribution account will be taxable in the hands of account-holder.[1]

2. WITHHOLDING TAX OBLIGATION ON PURCHASE OF GOODS

A new withholding tax provision has been introduced as per which the buyer of goods shall be required to deduct tax at source (TDS) @ 0.1% of the sale consideration exceeding INR 5 million in a year to a resident seller. TDS @ 5% is applicable if the resident seller does not provide its PAN or Aadhar. Only buyers whose gross receipts/ turnover exceed INR 100 million in the previous financial year have to comply with this TDS provision.

This TDS is not required if tax is deductible under any other provision of the Act. Also, securities and commodities traded through recognised stock exchanges, clearing corporations and power exchanges have been exempt from this TDS.[2]

3. DISCONTINUANCE OF INCOME TAX SETTLEMENT COMMISSION (ITSC)

The ITSC provided for settlement of cases on the basis of application made by a taxpayer disclosing its full and complete income which was not disclosed before the Income-tax officer. The ITSC has now ceased to operate with effect from 01st February 2021. In its place, a new Interim Board of Settlement has been constituted. All the applications pending before ITSC, by default, would stand transferred to the Interim Board of Settlement.[3]

4. AUTHORITY FOR ADVANCE RULINGS (AAR) REPLACED BY BOARD FOR ADVANCED RULING

Earlier, eligible taxpayers could apply before the AAR to avoid disputes with respect to the assessment of their tax liability. Rulings of AAR were binding on applicant-taxpayer, transaction on which ruling was sought and the tax department. With effect from 01st September 2021, AAR has ceased to operate and has been replaced by Boards for Advance Rulings (BAR) to give advance rulings from the said date. While a ruling given by AAR was non-appealable, a ruling by BAR will be appealable before the High Court.

5. TRANSFER PRICING ADJUSTMENTS AND MAT LIABILITY

If there is increase in book profits by income of past years being included in the current financial year on account of Advance Pricing Agreement or secondary adjustment, the taxpayer can make an application in Form 3CEAA to the assessing officer to exclude such profits from the current financial year and include the same in the book profits of respective years to which such adjustment relates to. Rules have been prescribed for the assessing officer to re-compute the book profits and determine the tax liability.[4]

6. EQUALISATION LEVY 2.0

'Equalisation Levy 2.0' is a new levy introduced with effect from 1st April 2020 on the consideration received by a non-resident e-commerce operator from an e-commerce supply or service made or facilitated or provided by it. The levy is applicable if turnover from e-commerce supply or service is INR 20 million or more in a financial year. It has also been clarified that the levy is applicable on the entire sale/ service consideration and not merely on the facilitation fee/ commission retained by the e-commerce operator.

Further it has been clarified that "Online sale of goods" and "Online provision of services" will cover transactions wherein any of these activities are carried out online: (i) acceptance of offer for sale; (ii) placing of purchase order; (iii) acceptance of the purchase order; (iv) payment of consideration; (v) supply of goods or provision of services, either partly or wholly.

Also, if the income of non-resident e-commerce operator, is chargeable to income-tax as royalty or fees for technical services then equalisation levy will not apply on such amounts. In other cases,

where a transaction is subject to the equalization levy, the same will be exempt from income-tax. Thus, now it stands clarified that both equalization levy and income-tax will not apply on the same amount.

7. OECD PILLAR 1 AND 2

India has agreed for the two-pillar solution (Pillar 1 and Pillar 2) of OECD Inclusive Framework on Base Erosion and Profit Shifting to address the tax challenges arising from digital economy. Pillar 1 seeks to grant or redistribute taxing rights to the source jurisdiction, i.e. where the user/ market is based. Pillar 2 seeks to levy a minimum level of tax on the large multinational companies.

Further, as per the OECD statement dated 08th October 2021, it has been agreed by the members that the digital services tax and other similar measures adopted by countries will be removed. India has reached a compromise with USA (on 24th November 2021) in relation to the unilaterally levied equalisation levy for the interim period till the implementation of Pillar 1. As per the compromise, India has agreed in principle to provide credit of the excess unilateral equalization levy paid during the interim period over the liability under Pillar 1, after its implementation.

8. REVAMP OF RE-ASSESSMENT AND SEARCH PROVISIONS

The scheme of re-assessment has been completely revamped with effect from 1st April 2021. The new scheme requires the assessing officer to conduct an enquiry by issuing a notice to the taxpayer showing-cause as to why re-assessment proceedings should not be initiated. The time limit for issuing re-assessment notice has been curtailed to three years from the end of the relevant assessment year, as compared to four to six years under the earlier provisions.

However, an extended time limit of ten years from the end of the relevant assessment year will be available in certain extreme situations, including cases involving search and seizure proceedings, if income escaping assessment, represented in the form of an asset, is INR 5 million or more.

9. WITHHOLDING TAX ON PAYMENTS TO FOREIGN INSTITUTIONAL INVESTORS (FIIs)

TDS was required to be deducted on payment of income from

securities to FIIs at the rate of 20%. With effect from 01st April 2021, TDS is to be deducted either at 20% or at the rate under tax treaty, whichever is lower.

10. TAX INCENTIVES TO PROMOTE INTERNATIONAL FINANCIAL SERVICES CENTRE (IFSC)

Various additional tax deductions and incentives have been granted to units located in the IFSC.

Offshore Investment Fund is deemed to not have the business connection in India even if the manager of fund is situated in India, subject to certain conditions. Thus, business income of the fund is not taxed in India. The Central Government is now empowered to further relax or modify the conditions to be fulfilled by the fund and the manager to claim this tax exemption.

Profit-linked deduction is available to the units of Offshore banks which obtained permission under the Banking Regulation Act, 1949. Deduction would now also be available to banks which obtain registration under International Financial Services Authority Act, 2019.

Tax exemption extended to investment division of offshore banking unit located in IFSC, which has been granted certificate as Category III Alternative Investment Funds (AIFs) located in IFSCs.

Further, deduction of 100% of the capital gains earned by an IFSC unit from transfer of aircraft or aircraft engines that were leased to a domestic company engaged in the business of operation of aircraft would be available for a period of 10 out of 15 years.

Royalty income of non-residents on account of lease of aircraft is now exempt provided such income is paid by a unit in IFSC.

Income accruing to or arising to or received by a non-resident from the transfer of non-deliverable forward contract entered into with an offshore banking unit in IFSC has been exempted, subject to certain conditions which are[5]:

- contract is entered into by the non-resident with an offshore banking unit of an IFSC which holds a valid certificate of registration granted under International Financial Services Centres Authority (Banking) Regulations, 2020 by the International Financial Services Centres Authority; and
- such contract is not entered into by the non-resident through or on behalf of its PE in India.

Transfer of capital asset situated in India by an Offshore fund to a fund located in IFSC will not be regarded as 'transfer' and thus, will not attract capital gains tax. Similarly, transfer of units by unitholder of Offshore fund in exchange of units of fund located in IFSC will not attract capital gains tax. This is subject to the fund located in IFSC being registered as Category I or II or III AIF. Mode of computation of exempt income attributable to units held by non-resident (not being a PE in India) has been specified along with the compliances in relation thereto.[6]

11. SOVEREIGN WEALTH FUNDS (SWFs) AND PENSION FUNDS (PFs)

Tax exemption is available to SWFs and PFs on dividend, interest and long-term capital gains arising from eligible investments in infrastructure sector in India.

Earlier, for investments made in Category I or II AIFs, the AIFs were required to have 100% investment in companies in infrastructure sector or facility. Now, the investment required is reduced to 50% and the same can also be made in Real Estate Investment Trusts (REITs) and Infrastructure Investment Trusts (InvITs).

Investments in domestic holding companies set up post 31st March 2021, having minimum 75% investments in infrastructure companies or facility, and investments in NBFC registered as Infrastructure Finance Company or Infrastructure Debt Fund, having minimum 90% lending to one or more infrastructure companies or facility, are also eligible investments.

SWFs and PFs are not allowed to take loan or have borrowings for the purposes of making investments in India, either directly or indirectly. In view of concerns regarding 'indirectly', clarification[7] has been issued that if the loans and borrowings have been taken by the fund or any of its group concern, not specifically for the purposes of making investment in India, it shall not be presumed that the investment in India has been made out of such loans and borrowings.

Rules

1. ONLINE APPLICATION FOR LOWER WITHHOLDING ON PAYMENTS TO NON-RESIDENTS[8]

For making an application for lower deduction of tax on payments to

non-residents, now Form No. 15E is required to be filed electronically under digital signature or through electronic verification code. This form requires furnishing of elaborate details of the payer, non-resident payee, nature of payment, previous year for which certificate is requested, estimated tax payable on such payment, details of advance tax paid and any existing tax liabilities under the Act of the payee in India, and taxability under the Act as well as under the applicable tax treaty, along with copies of transaction documents.

2. FORMATS, PROCEDURES AND GUIDELINES FOR SUBMISSION OF STATEMENT OF FINANCIAL TRANSACTIONS[9]

Specified reporting persons are required to furnish statement of financial transaction (SFT). The guidelines for the preparation and submission of SFT by Registrars and Share Transfer Agents, including the data structure and validation rules, for the following incomes/ transactions have been notified: dividend, interest, depository transactions and mutual fund transactions.

3. CHANGE IN CONDITIONS TO BE SATISFIED BY PENSION FUNDS TO AVAIL EXEMPTION[10]

For a Pension Fund to avail the exemption under the Income Tax Act, it must be notified by the Government in the Official Gazette. In order to apply for such notification, a Pension Fund is required to furnish Form 10BBA before the competent authority.

4. DETERMINATION OF INCOME OF CATEGORY III AIFS[11]

Methods for the computation of income of a Category III AIF located in IFSC which is attributable to the units held by non-residents (not having a PE in India), has now been prescribed. The AIF would be required to furnish annual statements of exempt income in Form 10-IG, and income for concessional rate of taxation in Form 10-IH.

5. SAFE HARBOUR RULES TO APPLY FOR ASSESSMENT YEARS 2020-21 AND 2021-22[12]

In respect of an eligible international transaction, Safe Harbour Rules (SHR) provided that the transfer price declared by an eligible assessee is to be accepted by the tax department, subject to prescribed

conditions. SHR earlier notified for Financial Year 2019-20, have now been extended to Financial Year 2020-21 as well.

6. RELAXATION IN MASTER FILE AND COUNTRY-BY-COUNTRY REPORT (CBCR) COMPLIANCES[13]

In order to ease the compliance burden on MNE groups, it has now been provided that regardless of its residential status, any constituent entity of an MNE group can be designated for filing master file with the Indian Authorities on behalf of the entire group.

Earlier, it was provided that designated constituent entity would be required to file CbCR if the consolidated revenue of the group exceeds INR 55,000 million. The threshold has now been increased to INR 64,000 million.

7. THRESHOLD FOR SIGNIFICANT ECONOMIC PRESENCE DEFINED[14]

Based on the OECD BEPS Action Plan – 1, the Indian legislature had introduced the concept of "Significant Economic Presence". The significant economic presence of a non-resident shall create a business connection in India and income accruing therefrom shall be subject to tax. Significant Economic Presence would be triggered if (a) the aggregate of payments arising from transactions in respect of any goods, services, property, provision of download of data or software in India carried out by a non-resident with any person in India during a year, is INR 20 million or more; or (b) the number of users with whom systematic and continuous business activities are solicited or who are engaged in interaction are 0.3 million.

In cases where the non-resident exporter has sold goods to a resident importer worth INR 20 Million or more during a year, such non-resident shall have a significant economic presence and income may be subject to tax in India. However, the chargeability shall also be decided in accordance with the provisions of relevant DTAAs.

8. NO PAN REQUIRED BY ELIGIBLE FOREIGN INVESTORS[15]

Requirement to obtain PAN would not apply to those non-residents who are eligible foreign investors and have made transaction only in a capital asset, in the nature of bond or Global Depository Receipt, rupee denominated bond of an Indian company, derivative; or such other securities as specified, listed on a recognised stock exchange

located in any IFSC and the consideration on transfer of such capital asset is paid or payable in foreign currency, subject to the fulfillment of the conditions specified therein.

9. ROLLBACK OF RETROSPECTIVE LEVY ON INDIRECT TRANSFERS: PROCEDURE FOR AVAILING RELIEF FROM OLD/EXISTING ORDERS[16]

Levy on indirect transfers was introduced in 2012 with retrospective effect from 01st April 1962 post ruling of the Supreme Court in Vodafone case. In wake of certain arbitral awards in the arbitration challenging the retrospective levy, the Government decided to roll back the retrospective effect given to the levy and made it applicable only on indirect transfers made on or after 28th May 2012.

In furtherance of this, procedure of withdrawal of appeals/writs, etc. in relation to the orders already passed (which shall be deemed to have not passed) has been prescribed. The conditions impose a variety of obligations and restrictions on the taxpayer, including the waiver of all sorts of rights/claims in relation to any award /relief against India.

10. EXEMPTION TO RECEIPT OF EQUITY SHARES OF PUBLIC SECTOR COMPANY UNDER STRATEGIC DISINVESTMENT[17]

Receipt of equity shares of a public-sector company by a person from the Central Government or any State Government, pursuant to strategic disinvestment, has now been exempted from tax under the head 'Income from other sources'.

11. NO WITHHOLDING TAX IN RELATION TO E-AUCTION SERVICES[18]

An e-commerce operator facilitating online sale of goods or services is required to deduct tax @ 1% from the consideration payable to the seller or service provider. It has been clarified that e-auctioneers shall not be liable to deduct tax in relation to e-auction activities, subject to certain conditions. The buyer and the seller availing such e-auction are, however, still liable to deduct/ collect tax as per the applicable provisions.

Notifications and Circulars

1. FACELESS APPEAL SCHEME, 2021[19]

In the past few years, the Indian government has made substantial efforts to implement the faceless procedure of assessment and appeals pertaining to income-tax. These efforts have ultimately resulted in Faceless Assessment Scheme, 2020 and Faceless Appeal Scheme, 2021.

The Faceless Appeal Scheme, 2021 seeks to facilitate the conduct of e-appeal proceedings in a centralised manner. In case of a request for personal hearing, the appellate authority is now obligated to grant an opportunity of being heard virtually, which was discretionary in the erstwhile Faceless Appeal Scheme, 2020.

2. GUIDELINES ON CROSS-APPLICATION OF CERTAIN TDS AND TCS PROVISIONS[20]

The Indian income-tax requires tax deduction (TDS) and collection (TCS) @ 0.1% in relation to both purchase and sale of goods. Further, an e-commerce operator facilitating online sale of goods or services is required to deduct tax @ 1% from the consideration payable to the seller or service provider.

In order to remove the overlapping effect of these obligations, it is now clarified that if tax has been deducted under section 194-O by e-commerce operator, then the buyer of goods shall not be required to deduct tax from seller and seller of the goods need not collect tax from buyer with respect to the same transaction.

Further, primary responsibility to deduct tax is that of the buyer and if the buyer has deducted TDS from the seller, then the seller need not collect TCS from the buyer. However, considering that the rate of tax is same under both the provisions, an exemption has been granted to the buyer from deducting TDS where the seller, for any reason, has already collected TCS from the buyer.

Case Laws

1. A CAB AGGREGATOR NOT LIABLE TO DEDUCT TAX U/S 194C FROM PAYMENTS MADE TO DRIVERS[21]

The non-resident was only acting as a cab aggregator. Payments were made by the Indian group company of the non-resident to drivers on behalf of the non-resident. In such a case, the Indian company cannot be treated as the 'person responsible for paying' to hold it liable for TDS under section 194C of the IT Act. Furthermore, TDS under section 194C was not applicable even for the reason that drivers did not carry out any work for cab aggregator/ Indian company pursuant to a contract between them.

2. PAYMENTS MADE FOR THE USE OF SOFTWARE TO NON-RESIDENT ARE NOT IN THE NATURE OF ROYALTY[22]

Where the foreign entity merely granted the right to resell/ use the software, including the right to store a copy for the purpose of supply, it cannot be treated as having parted with the copyright itself. Definition of 'royalty' as appearing in the relevant DTAA alone, being more beneficial, is to be applied and since the payment made is not for any right in the copyright but for the copyrighted article, the consideration paid by Indian entities is not royalty.

3. PAYMENTS MADE TOWARDS ADVERTISING AND MARKETING SERVICES AND RENTAL USE OF IT INFRASTRUCTURE TO NON-RESIDENT ARE NOT IN THE NATURE OF 'ROYALTY'[23]

Where the foreign entity was merely providing the services relating to advertising and marketing and IT infrastructure whereby no copyright was parted with by the entity to the resident-assessee, the payments in lieu of the same are not in the nature of royalty.

4. NO LIABILITY TO WITHHOLD TAX ON A TRANSACTION PRIOR TO INSERTION OF EXPLANATION 2 TO SECTION 195[24]

Explanation 2 to section 195 (introduced retrospectively by Finance Act 2012), which imposes TDS obligations on non-residents in respect of payments being taxable in India, cannot be made applicable to past transactions as the payer cannot be fastened with an obligation

to withhold tax on the basis of a law, which was not present in the statute as on the date of payment.

5. TAX TREATY BENEFIT IN RESPECT OF DIVIDEND DISTRIBUTION TAX (DDT) PAYABLE BY DOMESTIC COMPANY: ISSUE REFERRED TO SPECIAL BENCH OF ITAT[25]

In *Giesecke & Devrient India*[26] and *Indian Oil Petronas*[27], it was held that the lower tax rate specified in Treaty in respect of dividend income of a non-resident shareholder must prevail over rate of DDT payable by Indian company under domestic law, as DDT is essentially a tax on dividend income of the shareholders. However, the correctness of these decisions was doubted in a subsequent case and matter has now been referred to the Special Bench of ITAT.

6. CARRY FORWARD OF CAPITAL LOSS UNDER THE ACT, BEING MORE BENEFICIAL TO THE ASSESSEE, ALLOWED OVER THE TREATY[28]

Where the assessee chose to carry forward the capital loss under the Act as against the provisions of the Treaty, the provisions of the Act alone, being more beneficial to the Assessee, would apply in view of section 90(2) of the Act.

7. RE-ASSESSMENT PROCEEDINGS INITIATED ON OR AFTER 1ST APRIL 2021 NOT IN ACCORDANCE WITH NEW SCHEME OF REASSESSMENT HELD TO BE INVALID[29]

A new scheme of reassessment was introduced in the Income Tax Act with effect from 1st April 2021 in place of the earlier scheme. Numerous re-assessment proceedings initiated on or after 1st April 2021 under the old scheme, without following the procedure under the new scheme, have been held to be invalid and without jurisdiction. This is inspite of the fact that such proceedings were initiated within the time limit under the old provisions as extended by a delegated legislation.

8. MERE SIGNING OF CONTRACT WITHOUT ANY OTHER ACTIVITY IN INDIA CANNOT BE SAID TO CONSTITUTE A PE IN INDIA[30]

Where only the contract was signed, and the acceptance test was performed in India while all other activities in relation to the offshore supplies were carried outside India, the assessee cannot be said to

have business connection or PE in any form in India.

9. IN ABSENCE OF ANY PAYMENT BEING MADE BY THE ASSESSEE, IT CANNOT BE HELD LIABLE TO WITHHOLD TAX[31]

The assessee engaged in the business of providing pathological testing services had appointed various collection centres, which collected samples from customers and also the payment for services. Thereafter, the collection centres retained their commission/ remuneration and passed on the balance amount to the assessee. As the assessee did not make any payment to the collection centres, but only received payment from the latter, there was no obligation on assessee to deduct tax at source under section 194H on such commission/remuneration.

10. EXEMPTION FROM INCOME-TAX PROVIDED TO THE ASSESSEE EXTENDS TO DIVIDEND DISTRIBUTION TAX (DDT) AS WELL[32]

Where the assessee-company was exempted from the payment of income-tax by way of a non-obstante clause, the same would have over-riding effect over all the provisions of Income-tax Act, 1961, including the provisions relating to DDT payable on dividend distributed by the assessee-company.

11. INITIATION OF RE-ASSESSMENT PROCEEDINGS SUBSEQUENT TO THE APPROVAL OF RESOLUTION PLAN IS INVALID[33]

When the Resolution Plan is approved by NCLT, the claims comprised thereunder attain finality and no new claim which does not form part of the Plan can be subsequently raised. Therefore, the notice re-opening the assessment of the assessee, having been issued after the approval of the Plan, is invalid even though the claim crystalized post the approval.

12. ROYALTY/ INTEREST INCOME TO BE TAXED ONLY ON ACTUAL PAYMENT BASIS AS PER THE TREATY: REFERRED TO SPECIAL BENCH OF ITAT[34]

The Delhi Bench of the ITAT has earlier held that under the Indo-German DTAA, royalty has to be 'paid' by a resident and royalty has to be 'received' as a consideration by the non resident for the same to be brought to tax in India.[35] On a similar question with respect to the point of taxability of interest income, the Mumbai Bench of the ITAT

has referred the issue to a Special Bench for adjudication.

13. MANAGEMENT SUPPORT SERVICES ARE NOT TAXABLE AS FTS UNDER THE INDIA-SINGAPORE TAX TREATY[36]

Where the assessee availed management support services on an on-going basis, there being no 'make available' of any technology, knowledge, skill or experience to the assessee, the payment thereof will not be taxable as FTS under the Treaty.

14. PROVISION OF SERVICES UNDER SEPARATE SERVICE ORDER FORMS, GOVERNED BY SINGLE AGREEMENT, WILL NOT BE TREATED AS SEPARATE PROJECTS[37]

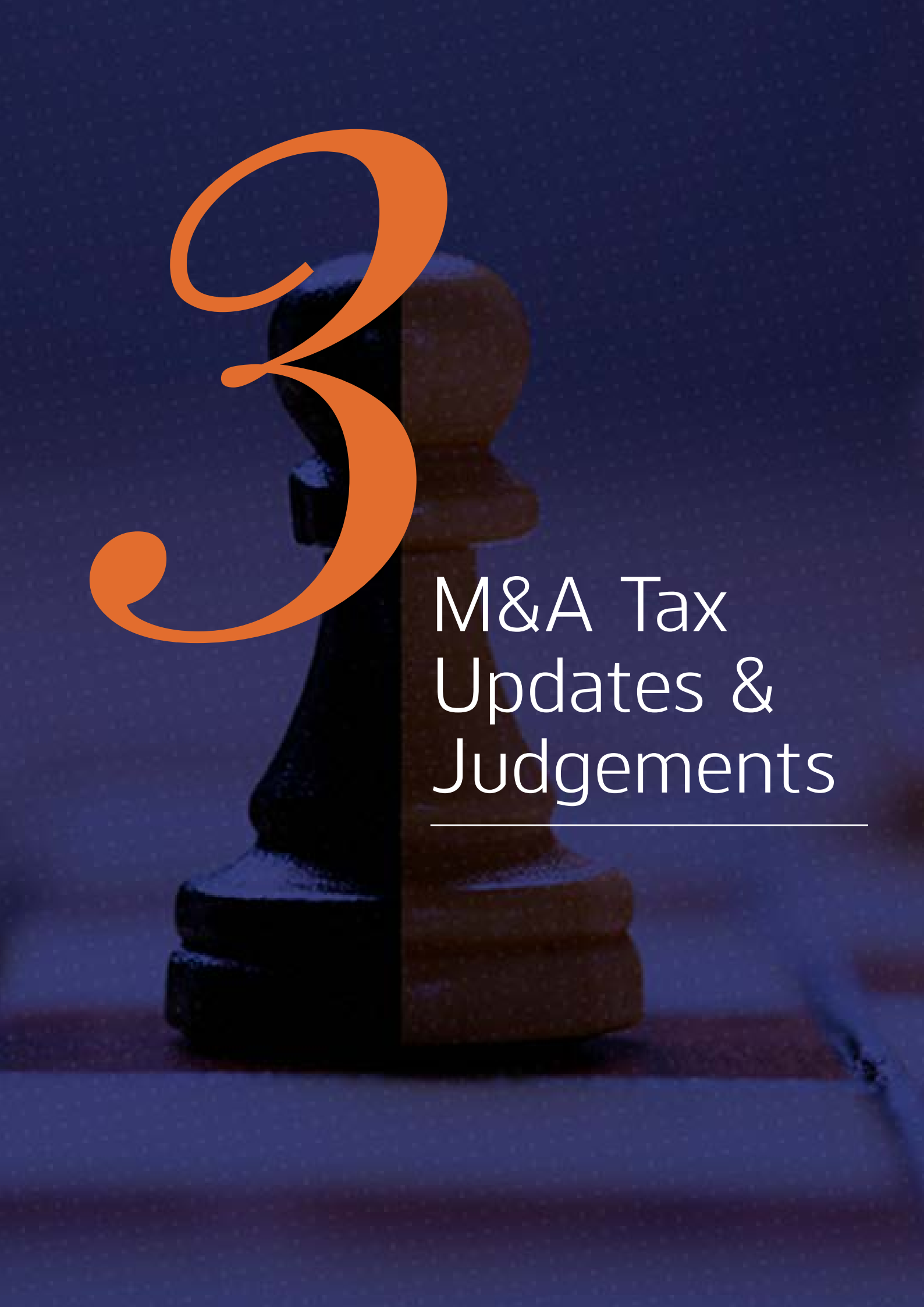
Where the assessee provided inter-connected services under separate service order forms but under a unified agreement with consolidated billing, the time spent by the employees of the assessee in India in relation to provision of services under such agreement has to be aggregated in order to determine the existence of PE in India and attribution of profits thereto.

15. EVEN THOUGH UAE BASED SUBSIDIARY WAS A PAPER/SHELL COMPANY, ITS PROFITS ARE NOT TAXABLE IN INDIA[38]

While the subsidiary set up in UAE was a paper/ shell company, the same cannot be taxed in India as Place of Effective Management (PoEM) was not a criterion to determine the residency during the year under consideration. Further, the subsidiary was set up as the assessee could not have undertaken transactions directly from Congo, which was under economic and political unrest, to ultimate customer. If at all the profits of the UAE company are attributable, then the same belong to the company in Congo and not to the assessee.

16. TRAINING CENTRES OF A CANADIAN ENTITY DO NOT CONSTITUTE AN AGENCY PE IN INDIA[39]

Where the training centres of the assessee did not exclusively carry out activities devoted wholly or almost wholly on behalf of the assessee, the centres cannot be said to constitute Dependent Agency PE in India in view of the India-Canada Treaty.



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M&A Tax Updates & Judgements

1. RESTRICTION OF DEPRECIATION ON GOODWILL EFFECTIVE FROM APRIL 1, 2021

The existing provisions does not provide depreciation on self-generated goodwill explicitly. The taxpayers used to rely on the landmark ruling by the Supreme Court in the case of Smif Securities Ltd. (2012) and claim depreciation on purchase/ acquired goodwill.

However, the amendment in Budget 2021 clarified that 'goodwill from business or profession' must be excluded from the definition of depreciable assets stating that goodwill may not depreciation and may see appreciation as the business runs. Further, there is no grand-fathering provide for this amendment.

The amendment will have a significant impact on written down value of the block of asset and capital gain implications will arise.

2. RATIONALIZING PROVISION OF SLUMP SALE (CLARITY OF SLUMP EXCHANGE)

The current law does not provide for any computation mechanism for transfer of an undertaking on a non-monetary (other than cash) consideration. This created ambiguity in computation of capital gain in case of slump sale and lead to a debate on whether the said computation mechanism applies in case of slump exchange as well.

Various High Courts have recently concluded that slump exchange transactions shall not be taxable as no monetary consideration is involved and same shall 'not be regarded as sale'.

The modified definition brings slump exchanges within the purview of the definition of slump sale. With this change many promoter groups who are exploring internal restructurings such as spin-offs may prefer demerger rather than slump exchange.

3. REDESIGNING TAXATION ON RECONSTITUTION/ DISSOLUTION OF PARTNERSHIP

The existing law provides for taxation in the hands of firm in a situation where any capital asset is distributed to a partner at the time of dissolution or otherwise. The law does not provide for taxation on distribution of money to a partner and therefore, there is no tax liability either in the hands of firm or in the hands of the partner.

The changes introduced in the tax law has prescribed fresh provisions for taxation in the hands of the firm at two stages. The amendment provides capital gains tax in the hands of firm on distribution of money

or any other asset and further provides deemed taxation in the hands of firm on transfer of capital assets to the partner.

4. CBDT INTRODUCED RULES FOR COMPUTATION OF FAIR MARKET VALUE OF CAPITAL ASSETS IN THE CASE OF SLUMP SALE

New Rule provides a hybrid formula, where the value of all assets of the business undertaking should be based on their respective book values other than five specific categories of assets namely, immovable property, jewellery, shares, securities and artistic work (which are to be valued on a fair market basis). As per the new rule, the fair market value ('FMV') of the capital assets transferred by way of slump sale shall be higher of FMV1 or FMV2.

Earlier, there were no specific provisions or mechanism prescribed for linking the value of consideration to fair market value for capital assets.

5. ABOLISHMENT OF RETROSPECTIVE TAX ON INDIRECT TRANSFERS INTRODUCED IN 2012

SC in the year 2012 in the case of Vodafone International holdings BV ruled that income from transfer of shares of a foreign company deriving their value substantially from assets/ shares located in India would not be taxable in India.

Immediately after the SC Judgement, a retrospective amendment was introduced imposing a deeming fiction on such transfers, considering such transfer as taxable in India. (with both retrospective and prospective effect).

An amendment in the Act was recently introduced to not apply levy of indirect transfers introduced in 2012 to transactions that took place before May 28, 2012, subject to fulfilment of certain conditions by the taxpayer.

6. CARRY FORWARD AND SET-OFF OF BUSINESS LOSSES ON ACCOUNT OF CHANGE IN MAJORITY SHAREHOLDING (SECTION 79 OF THE ACT)

In a recent judgement before the Mumbai ITAT, the issue under contention was whether benefit of carry forward and set-off of losses should be denied where there is no effective change on voting rights and the management of the company.

In the instant case, there was a change in the immediate shareholding of the assessee company however the effective pre-structuring and post-structuring shareholding remains the same (i.e., more than 51% of the beneficial ownership is held by the same shareholder). The ITAT held that the benefit of carry forward and set-off should not be denied.

Different High Courts (such as Delhi HC and Karnataka HC) have shared conflicting views on this section and till date it has not been cleared on whether beneficially held means immediate shareholding or ultimate shareholding.

Dy. CIT v. Tril Roads Private Limited (ITA No. 3914/MUM/2019)

7. RIGOUR OF SECTION 56(2)(VIIB) WILL NOT BE APPLICABLE TO SHARES ISSUED PURSUANT TO A SCHEME OF AMALGAMATION

Section 56(2)(viib) of Act was introduced to tax issue of shares by a closely held company at high premium. The provision was intended to target inappropriate/ high premium infusion of capital into companies which are not backed by sustainable valuations.

In the instant case, the difference between the value of shares issued and the value of net assets (Capital Reserve) was considered taxable as deemed income under section 56(2)(viib) by the assessing officer.

The Ahmedabad ITAT overruled the AO's observations and emphasized that issuance of shares upon amalgamation is an obligation and does not trigger any consideration. Further, rigours of the section only apply to a bilateral transaction (shareholder and issuer) having a strict interpretation and must not be stretched beyond limited purpose.

The Hon'ble ITAT further held that issuance of shares at face value pursuant to a Scheme duly approved by the Jurisdictional HC cannot be equated with transactions specified in Section 56(2)(viib).

DCIT v. Ozone India Ltd.; (2021) 126 taxmann.com 192 (Ahd ITAT)

8. KARNATAKA HC OVERTURNED SPECIAL BENCH AND ALLOWS SET OFF OF PAST BUSINESS LOSS AGAINST GAIN ARISING FROM SALE OF CAPITAL ASSET USED FOR BUSINESS

Section 72 provides for set-off of brought forward business loss against the profits and gains, if any, of any business or profession carried on by the assessee.

The assessee claimed set off of past business losses against the

gains arising from sale of capital assets which were used for business purposes. The tax authority denied set-off claiming that past business losses cannot be set off against capital gains. The matter was referred to the Special Bench which further ruled against the assessee.

The HC held that brought forward business loss can be set-off against profits and gains of business & profession irrespective of 'the head' under which the same is classified as per the provisions of the Act.

Nandi Steels Limited [TS-483-HC-2021(KAR)]

9. BENEFIT UNDER MFN CLAUSE IS AVAILABLE FROM THE DATE ON WHICH SOURCE TAXATION IS TRIGGERED, NOT WHEN THE TREATY WAS ENTERED

The India-Netherlands DTAA (entered in the year 1989) provided for a 10% WHT on remittance made as dividend. Further, the DTAA protocol also has MFN clause to provide beneficial tax rate where any benefit is extended to a country which is an OECD member. Countries like Slovenia, Lithuania and Columbia provided for a beneficial rate of 5% and became OECD members in the year 2010. Tax authorities denied the benefit of lower rate of 5% stating that these countries were not OECD members at the time of execution of India-Netherlands DTAA additionally no notification was introduced to give effect to the MFN benefit.

The Delhi HC applied the principle of parity concluding that the word 'is a member of OECD' in the MFN clause requires countries to be OECD members at the time of taxation and not on the date of execution of DTAA. Additionally, the HC clarified that MFN clause is an integral part of the DTAA and requires no specific notification for its application.

Concentrix Services Netherlands B.V. [[2021] 434 ITR 516 (Delhi)/[2021] 127 taxmann.com 43 (Delhi)]

10. TAX TREATY BENEFIT CANNOT BE DENIED DUE TO RE-DOMICILIATION OF CORPORATE ENTITY

The taxpayer was a company originally incorporated as an international business company in 'British Virgin Islands'. The taxpayer was redomiciled to Mauritius and upon re-domiciliation, a certificate stating discontinuation of business was issued in BVI. The taxpayer also obtained a TRC from the Mauritian authority. The revenue authorities denied India-Mauritius Treaty benefit to the company stating that the company was originally incorporated in BVI, even though the company

was registered in Mauritius at the time of claiming the India-Mauritius treaty benefits.

The Mumbai tribunal concluded that re-domiciliation ought not to be a ground for denial of treaty benefits however, the fact of re-domiciliation could trigger a detailed examination into the rationale of such exercise. The Tribunal also observed that corporate re-domiciliation is also referred to as continuation and is not uncommon in offshore holding structures. Re-domiciliation is only adopted where the current domicile rules and regulations are restrictive or no longer aligned with the company's objectives.

Asia Today Limited [[2021] 129 taxmann.com 35 (Mumbai - Trib.)]

11. INCOME FROM AN INVESTMENT TRUST (BASED IN JERSEY) BY ABU DHABI INVESTMENT AUTHORITY (ADIA) IS NOT TAXABLE IN INDIA UNDER INDIA-UAE TAX TREATY

A revocable trust (in Jersey) was set-up by ADIA as its sole beneficiary for making investments into Indian debt securities. The trust was registered with SEBI as a foreign portfolio investor. Under the India-UAE tax treaty, ADIA is recognised as a government institution and thus any income derived from India is exempt from tax in India as per India-UAE treaty.

ADIA filed an application before the AAR seeking confirmation on taxability of income earned by the Jersey trust from the Indian debt securities. ADIA believed that income derived from a revocable trust should be taxable as if the same was derived by its sole beneficiary, ADIA and hence should not be taxable. However, these claims were denied by AAR stating that the income is received by Jersey trust and shall be taxable in India as there is no tax treaty between India and Jersey. The AAR also quoted multiple arguments including that provisions of Indian trust law are not applicable on foreign trusts and hence cannot avail benefits relating to revocable transfers.

The Bombay HC accepted ADIA's contentions and quashed the AAR's order stating that:

- Income would be exempt in case of direct investment by ADIA and it is due to certain commercial considerations that ADIA has made investment through Jersey.
- Benefits under Income tax laws extends to foreign trusts as well and accordingly the argument of trustee paying taxes as a representative of the trust is acceptable.

Accordingly, the same would be taxable in the hands of ADIA (which is provided specific exemption in the India-UAE Tax Treaty).

Abu Dhabi Investment Authority vs. Authority for Advance Ruling, Mumbai [2021] Writ Petition No. 770 of 2021 (Bombay-HC)

12. SHIPPING INCOME OF COMPANY INCORPORATED, CONTROLLED AND MANAGED IN UAE NOT TAXABLE

The taxpayer is a company incorporated in UAE and is engaged in the business of ship catering, freight forwarding, sea cargo services, ship line agent, etc. The taxpayer provided its services to Indian ports. The amount received for the above services was considered as taxable by the AO.

The AO contended that since 80% of the profits comes from a Greek national, the control & management of the taxpayer was not wholly in UAE. Further, there is no taxation in UAE which provides an opportunity to do treaty shopping. The revenue also argued that TRC may eb ignored however the control & management should be proved to be wholly in UAE to claim treaty benefits.

The ITAT ruled that no income was liable to tax in India as per the Treaty stating that the taxpayer cannot be asked to prove a negative and the burden of proof is on the department to show that the control & management of the taxpayer was not in UAE. The main purpose of incorporating the entity could not have been to obtain Treaty benefits as the company was incorporated in the year 2000 whereas the tax year under consideration is 2015-2016. Additionally, the LOB provision could not be pressed into service.

Interworld Shipping Agency LLC v. DCIT (ITA No.7805/Mum/19) (Mumbai ITAT)

13. ELIGIBILITY OF FOREIGN TAX CREDIT ON THE AMOUNT WITHHELD ON INCOME WHICH WAS EXEMPT IN INDIA UNDER INDIA-JAPAN TREATY

The taxpayer rendered software related services to its AE in Japan, the same was subject to tax @20% in Japan as per India-Japan tax treaty. The taxpayer also claimed deduction under section 10A of the Income-tax Act against income earned from Software Technology Park unit.

On services rendered to Japan AE, the taxpayer claimed the entire amount withheld as tax credit. The claim was made in view of the Karnataka HC's judgement in the case of Wipro Limited *[Wipro Limited v. DCIT, Bangalore [2016] 382 ITR 179 (Kar-HC)].* However,

the AO rejected the contention made by the taxpayer stating that the Karnataka HC case is pending before the Hon'ble Supreme Court.

The Tribunal relied on various cases wherein it was held that merely because exemption was granted in respect of taxability of certain income source does not concludes that the taxpayer is not liable to tax. The exemption is only available for a defined period (only for a period of 10 years) and the same will be taxed after completion of the said period.

This issue of availability of foreign tax credit on the entire amount of tax paid where the income is exempt in India has been a matter of debate and still awaits final verdict from the Apex Court.

Canon India Pvt. Ltd. V. ACIT (ITA No. 468/Del/2021) – Taxsutra.com

ENDNOTES

i. Notification No. 95 dated 31st August 2021.
ii. CBDT Circular No. 13 dated 30th June 2021.
iii. Notification No. 96 and 97 dated 01st September 2021.
iv. Notification No. 92 dated 10th August 2021.
v. Notification No. 136 dated 10th December 2021.
vi. Notification No. 138 dated 27th December 2021.
vii. CBDT Circular No. 19 dated 26th October 2021.
viii. Notification No. 18 dated 16th March 2021.
ix. Notification No. 1, 2, 3 & 4 of 2021 dated 06th January 2021, 20th April 2021 and 30th April 2021.
x. Notification No. 32 dated 15th April 2021 and Notification No. 37 dated 26th April 2021.
xi. Notification No. 90 dated 9th August 2021.
xii. Notification No. 117 dated 24th September 2021.
xiii. Notification No. 31 dated 05th April 2021.
xiv. Notification No. 41 dated 03rd May 2021.
xv. Notification No. 42 dated 04th April 2021.
xvi. Notification No. 118 dated 01st October 2021.
xvii. Notification No. 104, 105, 106, 107 and 108 dated 10th September 2021.
xviii. CBDT Circular No. 20 dated 25th November 2021.
xix. Notification No. 139 dated 28th December 2021.
xx. CBDT Circular No. 13 dated 30th June 2021.
xxi. Uber India Systems (P) Limited v. JCIT, Judgment dated 04th March 2021 in ITA Nos. 5862 & 5863 of 2018 (ITAT Mumbai).
xxii. Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT, Judgment dated 02nd March 2021 in Civil Appeal Nos. 8733-8734 of 2018 (Supreme Court).
xxiii. Urban Ladder Home Décor Solutions Pvt. Ltd. v ACIT, Judgment dated 17th August 2021 in IT(IT) A No. 615 to 620 of 2020 (ITAT Bangalore).
xxiv. DCIT v. WNS Capital Investment Limited, Judgment dated 30th April 2021 in ITA No. 3851 of 2018 (ITAT Mumbai); McCANN Erickson (India) Pvt. Ltd. v. ACIT, Judgment dated 02nd July 2021 in ITA No. 2252 of 2016 (ITAT Delhi).
xxv. DCIT v. Total Oil India (P.) Ltd., Judgment dated 23rd June 2021 in ITA No. 6997 of 2019 (ITAT Mumbai).
xxvi. Giesecke & Devrient India P. Ltd v. Addl. CIT, Judgment dated 13th October 2020 in ITA No. 7075 of 2017 (ITAT Delhi).
xxvii. DCIT v. Indian Oil Petronas Pvt. Ltd., Judgment dated 30th April 2021 in ITA Nos. 1884 & 1885 of 2019 (ITAT Kolkata).
xxviii. Goldman Sachs India Investments (Singapore) PTE Limited v. DCIT (IT), ITA No. 6619/Mum/2016 (ITAT Mumbai).
xxix. Ashok Kumar Agarwal v. Union of India, Judgment dated 30th September 2021 in Writ Tax No. 524 of 2021 (Allahabad HC); Mon Mohan Kohli v. ACIT, Judgment dated 15th December 2021 in W.P. (C) Nos. 6176 of 2021 & Ors. (Delhi HC).
xxx. Ericsson AB, Sweden v. ACIT, Judgment dated 27th October 2021 in ITA No. 1735 to 1737 of 2018 (ITAT Delhi).
xxxi. CIT v. Super Religare Laboratories Ltd, Judgment dated 21st October 2021 in ITXA Nos. 1628 & 1629 of 2017 (Bombay HC).
xxxii. Small Industries Development Bank of India v. CBDT, Judgment dated 02nd December 2021 in Writ Petition No. 1994 of 2003 (Bombay HC).
xxxiii. Murli Industries Limited v. ACIT, Judgment dated 23rd December 2021 in Writ Petition No. 2948 of 2021 (Bombay HC).
xxxiv. Ampacet Cyprus Ltd v. DCIT, Judgment dated 13th August 2020 in ITA No. 1518 of 2016 (ITAT Mumbai).
xxxv. Faber Castell v. ACIT, Judgment dated 09th December 2021 in ITA No. 7619 of 2017 (ITAT Delhi).
xxxvi. Inter-Continental Hotels Group (Asia Pacific) Pte. Ltd v. ACIT, Judgment dated 24th September 2021 in ITA No. 4524 of 2017 (ITAT Delhi).
xxxvii. Telenor ASA v. DCIT, Judgment dated 12th August 2021 in ITA No. 1307 of 2015 (ITAT Delhi).
xxxviii. Rubamin Ltd v. DCIT, Judgment dated 05th October 2021 in ITA No. 2929 of 2014 (ITAT Ahmedabad).
xxxix. International Air Transport Association (Canada) v. ACIT, Judgment dated 08th January 2021 in ITA No. 587 of 2016 (ITAT Mumbai).

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