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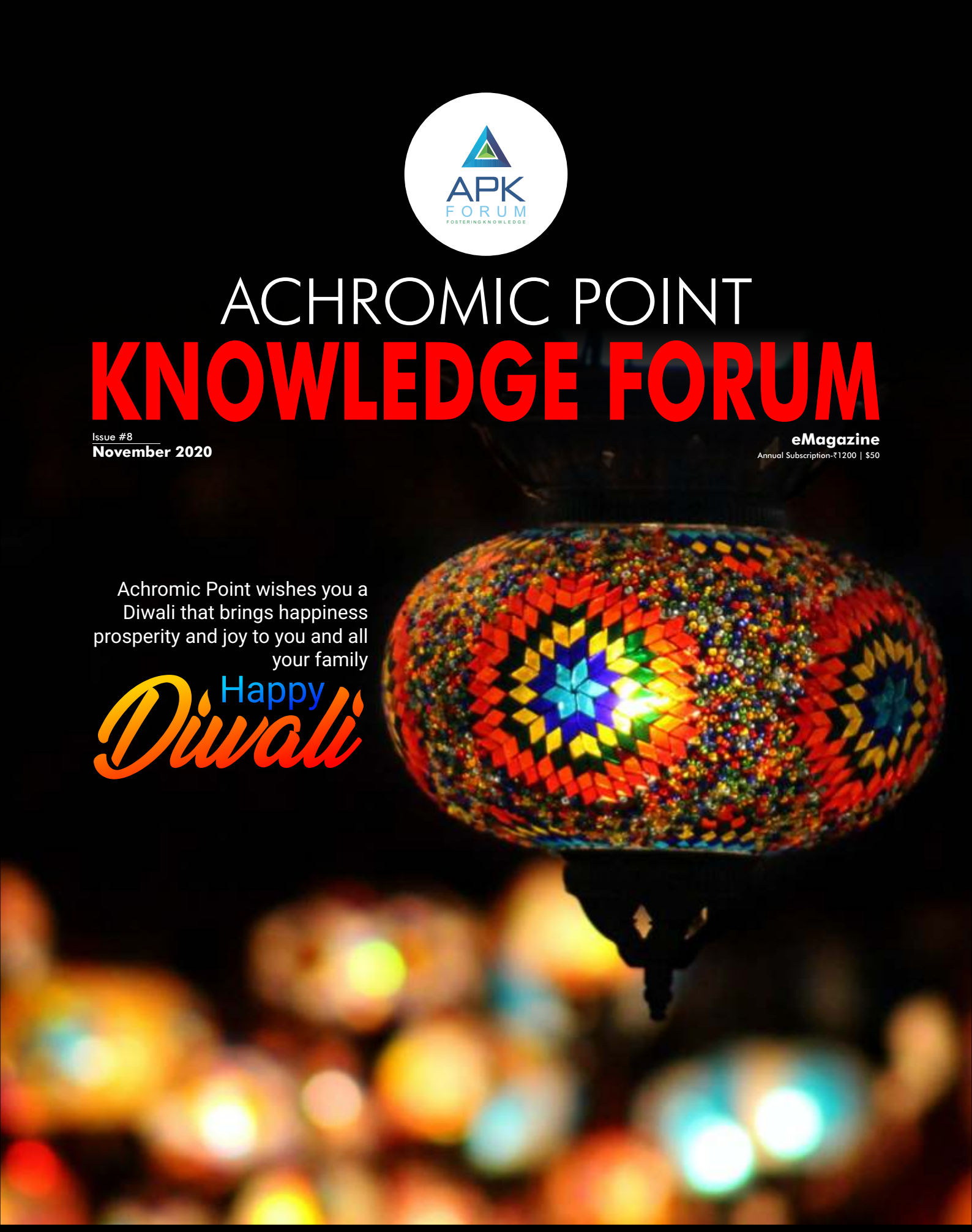
Achromic Point wishes you a Diwali that brings happiness prosperity and joy to you and all your family

Happy Diwali

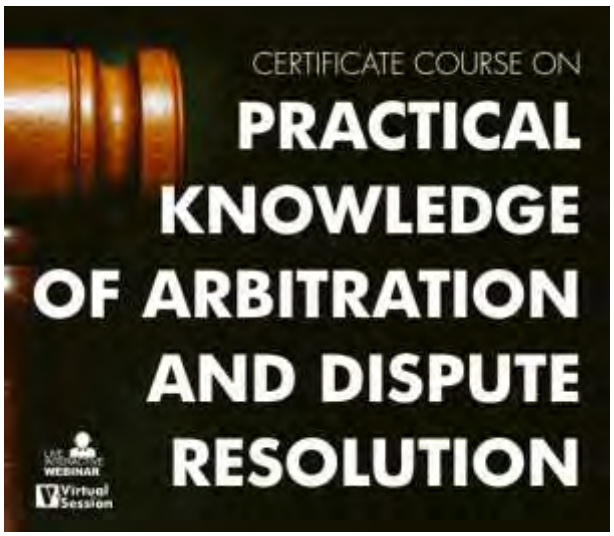


BY THE **PROFESSIONALS** FOR THE **PROFESSIONALS**

Virtual Training Course on Transfer Pricing and Related Compliances

In this Virtual conference on Transfer Pricing and Related Compliances conducted on 5th, 7th, 12th, 14th, 16th, 19th, 21st & 23rd October, 2020. Introduction on Transfer Pricing was given by Pranshu Goel, Mentor at Aorakii Advisors, Rajneesh Verma Executive Director at Global Transfer Pricing Services BSR & Co. LLP, Vibhor Goyal Associate Director at Global Transfer Pricing Services BSR & Co. LLP & Bhawna Gupta Director at Global Transfer Pricing Services BSR & Co. LLP shared their insights on Transfer Pricing Policy – Design and Implementation, it's Practical Aspects, Controversy Management & Types of Inter-Company Transactions and much more that received a good response from the audience.

Certificate Course on Practical Knowledge of Arbitration and Dispute Resolution



Certificate Course on Practical Knowledge of Arbitration and Dispute Resolution conducted on 6th, 7th, 8th & 9th October 2020, Welcome address was given by George Pothan Poothicote Advocate, Supreme Court of India Legal Consultant, Ministry of External Affairs, whereas Fundamentals of Arbitration as Dispute Resolution & Claiming and Proving Damages was discussed by Gaurav Varma Principal Associate at Vaish Associates Advocates & Surekh Baxy Associate at Vaish Associates Advocates.

Sujoy Datta Senior Associate at Vaish Associates Advocates, Allan Massey Senior Associate at Vaish Associates Advocates & N.P.S.Chawla Associate Partner at Vaish Associates Advocates shared their insights on Drafting and Understanding Arbitration Clauses and Practical Aspect of Arbitration Law.

Workshop on Mitigating Corporate Frauds and Cyber Crime

In this Workshop on Mitigating Corporate Frauds and Cyber Crime conducted on 13th, 14th, 15th & 16th October, 2020, where Ankoosh Mehta Partner at Cyril Amarchand Mangaldas shared his insights on White Collar Crimes & Investigation & Cyber Laws, Crimes, and Investigations.

The next day Darshan Patel Partner, Forensic Services at PwC India & Moushumi Vaidya Director, Forensic Services at Pricewater house Coopers Private Limited shed light upon the Fraud Schemes and controls. Panel Discussion on Steering White Collar Crimes and Investigations was conducted by Parveen Kumar National Head - Assurance / Director at ASA & Associates LLP (Moderator) with his co-panelists Ankoosh Mehta Partner at Cyril Amarchand Mangaldas, Varun Wadhwa Country Compliance Officer – India at CBRE South Asia Pvt. Ltd Ethics & Compliance, Ashish Jain Chief Internal Audit Officer at Nayara Energy Limited & Zameer Naithani Senior Vice President and General Counsel at UFO Moviez India Limited.

Overall the workshop was very interactive.

Virtual Workshop on Mergers and Acquisitions

Virtual Workshop on Mergers and Acquisitions was conducted with Vaish Associates Advocates & MHA Legal as our knowledge partners from 19th to 22nd October, 2020.

Where Fundamentals of Mergers & Acquisitions and Corporate restructuring were scrutinized by Manish Tyagi Partner at MHA Legal, Yatin Narang Associate Partner, Priyanka Jain Principal Associate at Vaish Associates Advocates, Pranay Chandran Partner at Cyril Amarchand Mangaldas at whereas Aditi Singhvi Partner at Cyril Amarchand Mangaldas discussed some important terms used during the transaction at the last day.

Virtual Session

LIVE INTERACTIVE WEBINAR

DIRECT TAX SUMMIT 2020 | Virtual Conference | 2020

November 06, 2020

Orgnizers

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Spliced Knot

Pranshu Goel
F.C.A, LL.B

Preface

In last couple of years, many changes were introduced under the Direct Tax front, Domestically as well as Internationally. The tables have now turned for MNEs with the Introduction of GAAR, SAAR and with Multilateral Instrument coming into force.

India, in an initiative towards a friendly tax regime, has unveiled the Tax payers' Charter. The path for Tax payers' Charter was laid keeping in consideration the motive of building trust between the tax payers and tax administration. However, the form and manner in which the Tax payers' Charter is introduced, prima facie does not serve the purpose. Tax payers' Charter in the form it is introduced, is nothing but an executive summary of some action points with no guidance and clarity around the same.

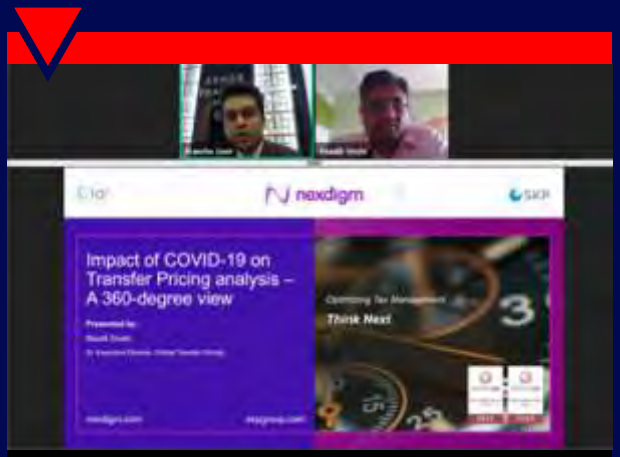
Along with Tax payers' Charter, the Government has rehauled the procedural aspect of the Income tax laws and have laid down the foundation for going faceless. Not only assessments and appeals would be faceless but many other compliances under the Act would become faceless thereby restricting any sort of face to face interaction with the Income tax department and officers.

Adoption of Tax payers' Charter and applicability of the faceless assessment scheme could be a game changer, however, the government has to make burgeoning efforts to gain the confidence of the tax-payer and at the same time inculcate essence of the charter in the tax administrator, for effective administration.

May the Tax payers' Charter and faceless assessment and appeal scheme serve the purpose, else instead of curbing litigation, it would lead to meaningless litigation, like it is happening in GST.

DIRECT TAX SUMMIT 2020

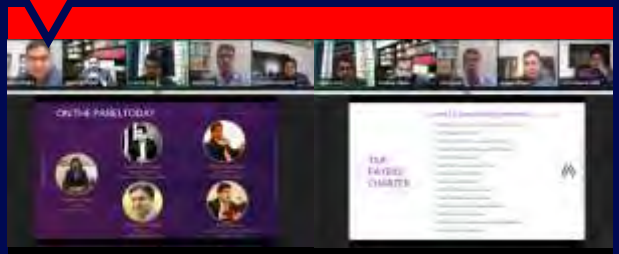
Virtual Conference



Achromic Point along with BRICS Chamber of Commerce & Industry brought its Direct Tax Summit 2020 - Virtual Conference on 6th November, 2020. The programme commenced with a very warm welcome by Pranshu Goel F.C.A, LLB & Convener Direct Tax Committee at BRICS CCI and inviting Maulik Doshi, Sr. Executive Director at Nexdigm (Formerly SKP) to share his insights on Transfer Pricing Implications of COVID- 19.

Rethinking tax for the digital economy post Covid-19 was discussed by Aakanksha Goel, Partner at TR Chadha & Co LLP.

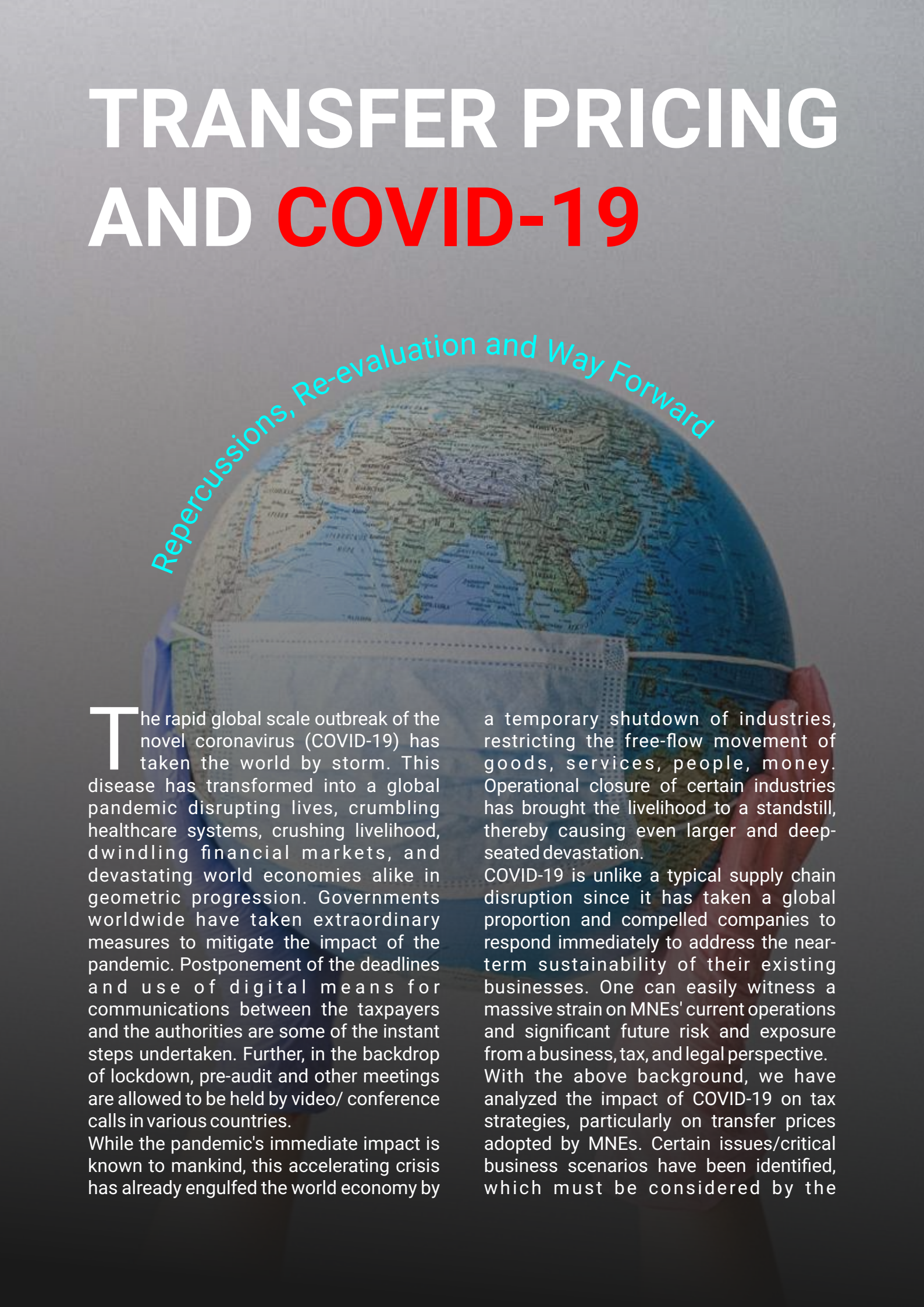
Session on Mutual Agreement Procedure guidelines issued by FT&TR division of CBDT was taken by Rajneesh Verma, Executive Director Global Transfer Pricing Services at BSR & Co. LLP.



During the day Panel Discussion on E-Assessments and Appeals & Make In India, Aatma Nirbhar, FDI and Indian Income Tax Act, 1961. What MNEs want from CBDT conducted by Pranshu Goel F.C.A, LLB & Convener Direct Tax Committee at BRICS CCI (Moderator) with his co-panelists CA Pushpendra Dixit, Global Tax Head at PVR Cinemas Group, Sandeep Chilana, Managing Partner at Chilana & Chilana Law Offices, Umang Dhingra, Head of Tax at GlaxoSmithKline Asia & Alok Pareek, Associate Director Head of Tax at Discovery India.

TRANSFER PRICING AND COVID-19

Repercussions, Re-evaluation and Way Forward



The rapid global scale outbreak of the novel coronavirus (COVID-19) has taken the world by storm. This disease has transformed into a global pandemic disrupting lives, crumbling healthcare systems, crushing livelihood, dwindling financial markets, and devastating world economies alike in geometric progression. Governments worldwide have taken extraordinary measures to mitigate the impact of the pandemic. Postponement of the deadlines and use of digital means for communications between the taxpayers and the authorities are some of the instant steps undertaken. Further, in the backdrop of lockdown, pre-audit and other meetings are allowed to be held by video/ conference calls in various countries.

While the pandemic's immediate impact is known to mankind, this accelerating crisis has already engulfed the world economy by a temporary shutdown of industries, restricting the free-flow movement of goods, services, people, money. Operational closure of certain industries has brought the livelihood to a standstill, thereby causing even larger and deep-seated devastation.

COVID-19 is unlike a typical supply chain disruption since it has taken a global proportion and compelled companies to respond immediately to address the near-term sustainability of their existing businesses. One can easily witness a massive strain on MNEs' current operations and significant future risk and exposure from a business, tax, and legal perspective.

With the above background, we have analyzed the impact of COVID-19 on tax strategies, particularly on transfer prices adopted by MNEs. Certain issues/critical business scenarios have been identified, which must be considered by the

businesses and a way forward in which MNEs can deal with the same.

A Glimpse of COVID-19's Business Impact

COVID-19 has forced governments to take significant measures to protect their citizens and economies, including measures to support employment, bringing about trade and tax relaxations, etc. to dampen the pandemic's adverse effects on their ecosystem.

Global tax authorities have come forward to address the repercussions of COVID-19 on transfer pricing. On 29 July 2020, the ATO published guidance on thin-capitalization and simplified arm's length debt test against the COVID-19 backdrop. In August 2020, New Zealand's Inland Revenue Department (IRD) issued additional guidelines to combat practical difficulties in applying the arm's length principle. Likewise, on 8 September 2020, the Inland Revenue Authority of Singapore (IRAS) updated its webpage on COVID-19.

- We expect to witness major business impact areas:
- A prolonged shut down of commercial operations;
- A drastic change in customer priorities and a resultant lack of demand;
- A disruption in the traditional distribution channel;
- Inventory obsolescence;
- A considerable reduction in people's productivity and
- Tightened cash flow and liquidity with a stretched working capital.

Consequent Impact on Transfer Pricing

In light of these new business realities, MNEs will need to address the following transfer pricing considerations immediately.

<u>The existing transfer pricing structure will be under pressure</u>

With lockdowns imposed by various countries, restrictions on people's movement, hounding market pressure, and economic crisis emerging from the outbreak, MNEs would be forced to take drastic measures.

In such a scenario, MNEs may consider re-examining their global structures and functional profiles of entities, reallocating significant functions, risks, and assets to lesser affected jurisdictions, and bring about business restructuring to mitigate the overall loss.

The transfer pricing impact of such business restructuring will need to be assessed and taken into consideration while realigning the transfer pricing structure.

Certain low-risk entities such as captive service providers within the group may continue to operate under the parent company's financial garb. However, the support erstwhile provided to them may not be available in a situation where the group is struggling with limited means to keep the business running. Thus, it becomes important to evaluate whether a reduction in margins for such risk insulated entities in this unprecedented time can be justified.

Similarly, in cases where affected subsidiaries generate losses with routine functions (contract manufactures, limited risk distributors), due to low productivity and slack in the market demand; it needs to be evaluated if the principal entity should bear the same, and whether it will stand good from arm's length principle standpoint.

It is also possible that group losses may be allocated amongst entities, even the low-risk entities cited above.

Apart from the above, inter-company arrangements may have to be renegotiated, especially where compensation is fixed, such as management fees and royalty transactions. This must be done on the mere basis (i.e., projections) on which the same was calculated/arrived at erstwhile may not hold good in the current economic scenario.

<u>Questions on the appropriateness of Transfer Pricing benchmarking methods</u>

One of the issues brimming before MNEs

from a compliance perspective would be the struggle in justifying their transfer price before the tax authorities. It would be crucial to determine whether erstwhile transactional transfer pricing methods continue to be appropriate in the current scenario to conclude inter-company transactions to be at arm's length.

There could be a widespread application of the Profit Split method/Loss allocation method, which was erstwhile not preferred in performing transfer pricing analysis. Considering the advantage of making use of an array of assumptions, assigning weightage to entities basis the amount of contribution in the value chain and the subsequent allocation of corresponding profit/loss arising from transactions amongst the entities could now emerge as one of the relevant methods in transfer pricing analysis during this challenging time for the group as a whole.

Irrespective of the method used, it would be critical to distinguish the losses caused at different stages of the business operations (e.g., during the pandemic period and the recovery period post the pandemic) and prepare corresponding documentation to arrive at assumptions, explaining which party should bear the losses and accordingly quantify the losses caused by the pandemic. Thus, it is also important to consider that only the pandemic induced losses are reallocated, and usual business losses (that may have occurred in normal circumstances) are not reallocated.

The inevitable need for economic adjustments

While applying the methods for determining arm's length price, adequate economic adjustments would be needed to address capacity disruption, working capital positions, exchange fluctuations, extraordinary expenses (higher input costs, severance payments, interest payments on defaults, penalties, etc.), differences in inventory valuations, depreciation and various market-related issues in order to arrive at proper comparability.

Availability of comparable data

Typically, entities would prepare their transfer pricing documentation on an ex-post basis, whereby they evaluate the results achieved based on the whole year's financial results against what comparable companies/transactions have earned. Such an approach may need reconsideration since the sufficient financial data of the comparable companies for the current year, and especially the COVID-19 impact period, may not be likely to be available by the time the tax return filing is due. Thus, by going on an ex-post approach, taxpayers would end up evaluating their profitability wounded by the pandemic with financial results of comparable companies spanning over a period that has not been impacted by COVID-19.

To a certain extent, internal comparability could prove to be a better yardstick than external comparability since the variable factors affecting a particular entity while dealing with related and unrelated transactions would remain relatively similar.

The approach towards Advance Pricing Agreements (APAs)

While entering into an APA, the tax authorities and taxpayers lay down critical assumptions that pave the way for negotiations undertaken during the proceedings. Certain factors like force majeure, market disruption, and change in FAR, revamp of transfer pricing policies could have a major impact on the transfer price agreed between the parties. Even the budget forecasts and projections laid before finalizing the APA terms would become unreliable in such disruptive economic scenarios. Thus, dialogues for renegotiating the APA terms could be initiated to re-evaluate COVID-19's impact and reassess the assumptions on which the agreed pricing was finalized between the taxpayer and tax authorities.

Further, the restriction on physical movement during the current pandemic has

meant that the entire APA process relating to the site visit has ground to a complete halt since March 2020. Future challenges in the movement are likely to continue for some more time. The APA authorities have already shown their proactiveness by using e-mails to ask and receive information in those cases where the application is at an advanced stage of conclusion. Recently, some APAs were also e-signed remotely – these are positive confidence building moves by the APA authorities, also showing their aptitude for embracing technology.

Way forward

This challenging situation has brought in an array of uncertainties that could set the stage for innovative solutions from MNEs and business consultants to address the critical situation at hand. The governments are advancing different ways to curtail the economic situation in respective countries by introducing tax relief measures and risk mitigation to aid MNEs in substantiating business positions.

MNEs need to chart out their path for aligning transfer pricing considerations arising from this exceptional situation. An integrated approach covering group-level assessment as well as country-specific work, will facilitate this process in an effective manner, as mentioned below:

Group level work

Assess the business impact areas and the magnitude of such impact for the group

- Analyzing key value drivers within the business;
- A high-level assessment of key profit drivers;
- Interviews with key operational personnel to understand the disruption in the value chain due to COVID-19;
- Evaluate potential losses due to the global lockdown and financial exposure in terms of changes in working capital position;
- Research and review on how the relevant industry has been impacted.

Evaluate solutions to address the impact for the group

- Analyze the business need of making changes in the supply chain model of the group from a transfer pricing perspective;
- Revisit pricing policies prevalent in the group for various functional and risk profiles, such as inter-company financing, captive service providers, contract manufacturers, limited risk distributors, R&D services, strategic management services, etc. in light of the COVID-19 impact;
- Examine other terms of intercompany agreement(s) to assess the potential requirement for re-negotiation, amendment;
- Assess the potential consequences of business restructuring on account of the crisis;
- Evaluate the possibility of economic adjustments to reflect the pandemic's impact;
- Conduct a benchmarking analysis to identify appropriate comparable companies and adjust their results, taking into consideration the COVID-19's effect;
- Determine the nature of documentation to be maintained to substantiate the changes in functional/risk profile and pricing policies.

Implementation of decisions

- Draft inter-company agreements in accordance with the realigned supply chain model and pricing policies;
- Compute economic adjustments and state its effect on the inter-company pricing structure;
- Document transfer pricing positions to ensure substantial audit defense post-COVID-19;
- Synchronize the Global TP documentation, Master File and Local files;
- Re-validate the results of the changes in transfer pricing policies and economic adjustments after a year to ensure

adherence to arm's length standards.

Country specific (subsidiary level) work

Realignment of Cost-plus margin for captive service arrangement

Review the current cost-plus model and evaluate the need for realignment of cost-plus margin using various alternatives, such as: lowering the overall cost-plus margin based on comparable margin range, recharging certain costs without mark-up, recovering only variable expenses during COVID-19 impact period, etc. depending on the facts of each case.

Re-visiting profit margin of contract manufacturer, limited risk distributor arrangement

- Analyze adverse business consequences of COVID-19 which would turn into potential losses for these entities;
- Evaluate economic adjustments to ensure that entities with routine functions could receive reasonable profits, while the principal could obtain residual profits or losses.

Amendment in Intercompany agreement

Give effect to the changes in the functional and risk profile, pricing, and other terms and conditions between the transacting entities in the inter-company agreement.

Preparation of strategically defensible TP report

- Preparation and maintenance of a robust strategic transfer pricing report to justify the adjustments being made in the inter-company arrangements and the business rationale behind it;
- The documentation to include the impact on the industry, pre and post COVID-19 FAR, details of decision-making entities in light of COVID-19, certain pieces of evidence for substantial differences in profitability, etc. The IRAS has also specified certain documentation requirements that can be used as a reference;
- This documented analysis will help support the view that any adverse result may be produced due to commercial/ business reasons rather than transfer pricing.

To conclude, the need for proactively acting on transfer pricing considerations must not be downplayed while MNEs are focused on making timely business decisions to ensure business continuity.

The Indian Tax Authorities have not yet issued any specific guidelines to discuss the impact of transfer pricing in COVID-19 times. However, considering the tax authorities' tax reviews and tax audit actions, it would be prudent for Indian taxpayers to refer to the global guidelines that provide insight into tax authorities' expectations.

An apt saying, especially during this challenging time -

'It is not the strongest or the most intelligent who will survive from the crisis, but those who can take actions to best manage the change.'

Maulik Doshi
Sr Executive Director
Nexdigm (SKP)

VIRTUAL CURRENCY AND FEMA ISSUES

Virtual Currencies (also called digital currencies/cryptocurrencies) attracted the attention of several investors across the world including in India. Several exchange platforms erupted in India and a huge number of Persons Resident in India started buying, selling, and trading Virtual Currencies.

On December 24, 2013, the Reserve Bank of India through a Press Release cautioned users of Virtual Currencies against Risks. Again, on February 01, 2017, and December 05, 2017, the Reserve Bank of India advised that it has not given any licence / authorisation to any entity/company to operate platforms or schemes to deal with any virtual currency. As such any issuer, holder, investor, trader, etc., dealing with Virtual Currencies will be doing so at their own risk.

On April 6, 2018, the Reserve Bank of India issued a notification directing all its regulated entities (Banks, NBFCs and Payment System Providers, etc.,) not to deal in Virtual Currencies or provide services for any entity or person dealing with or setting up Virtual Currencies. The notification further stated that regulated entities, which already provide such services shall exit the relationship on or before May 5, 2018. Internet and Mobile Association of India (IAMAI) went to the Supreme Court challenging the Notification dated April 6, 2018, issued by the Reserve Bank of India.

On 4th March 2020, Supreme Court has ruled on the case against the banking ban by the Reserve Bank of India and held that the Reserve Bank of India Circular dated April 6, 2018, is unconstitutional. 4th March 2020 has become a historic day for the Indian Crypto Community. Several Virtual Currency exchange platforms started functioning and trade volumes are growing at a geometric progression.

However, as per the media reports, the Reserve Bank of India is planning to file a review petition in the Supreme Court. On the other hand, the Government plans to introduce a new law banning completely the Virtual Currencies by the name "Banning of Crypto Currency and Regulation of Official Digital Currency Bill, 2019".

In this confusing state of affairs, is it legal or compliant with extant Regulations of the Foreign Exchange Management Act, 1999 (FEMA) to deal, buy, sell or trade Virtual Currencies in India by a Person Resident in India? In this paper, an attempt is made to critically analyse the FEMA issues that need to be taken into consideration while dealing with Virtual Currencies in India by a Person Resident in India. The impact of FEMA Regulations analysed are illustrative only and not exhaustive.

Basic definitions dealing with currency under FEMA 1999:

Definitions under FEMA, 1999:-

a) Sec. 2(h): "currency" includes all currency notes, postal notes, postal orders, money orders, cheques, drafts, traveler's cheques, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments, as may be notified by the Reserve Bank;

b) Sec. 2(m): "foreign currency" means any currency other than Indian currency;

c) Sec. 2(n): "foreign exchange" means foreign currency and includes, —

(i) deposits, credits and balances payable in any foreign currency,

(ii) drafts, traveler's cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency,

(iii) drafts, traveler's cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency;

d) Sec. 2(o): "foreign security" means any security, in the form of shares, stocks, bonds, debentures or any other instrument denominated or expressed in foreign currency and includes securities expressed in foreign currency, but where redemption or any form of return such as interest or dividends is payable in Indian currency;

e) Sec.2 (q): "Indian currency" means currency which is expressed or drawn in Indian rupees but does not include special bank notes and special one-rupee notes issued under section 28A of the Reserve Bank of India Act, 1934 (2 of 1934);

Whether Virtual Currency (VC) is a 'foreign currency', 'foreign exchange', 'foreign security' or 'Indian currency'?

As per the definition of 'Indian Currency', any VC is not an 'Indian Currency' as it is not expressed or drawn in Indian rupees and not notified as currency by the Reserve Bank of India. Further, till to date, RBI has not recognized VC as a legal tender in India on par with Indian Rupees.

As per the definition of 'foreign currency', any currency other than Indian currency is a foreign currency. Hence, when VC is not recognized on par with Indian currency, then automatically as per definition under FEMA, VCs fall under the definition of 'foreign currency'.

As per the definition of 'foreign exchange', foreign exchange includes foreign currency and accordingly virtual currencies qualify as 'foreign exchange'. Hence, all VCs are also foreign exchange.

As per the definition of 'foreign security', VCs fall under the category of 'any other instrument denominated or expressed in 'foreign currency'. Hence, VC qualifies not only as foreign currency and foreign exchange but also as foreign security.

Hence, it can be concluded that VC can be treated as 'foreign currency or foreign exchange or foreign security' as it satisfies all the definitions. Hence all the provisions

relating to 'foreign currency, foreign exchange, and foreign security' get attracted in respect of transactions relating to VC.

Let us look at the impact of FEMA by a Person Resident in India, who is buying, selling, or dealing in VCs:

1. Dealing in Foreign Exchange:
Section 3: Save as otherwise provided in this Act, rules or regulations made thereunder or with the general or special permission **no person shall**

3(a) deal in or transfer any foreign exchange or foreign security to any person not being an authorized person.

3(d) enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person.
Explanation. — For the purpose of this clause, "financial transaction" means making any payment to, or for the credit of any person, or receiving any payment for, by order or on behalf of any person, or drawing, issuing or negotiating any bill of exchange or promissory note, or transferring any security or acknowledging any debt.

Impact: Unless RBI gives general permission or special permission any dealings of VCs by Persons Resident in India other than through Authorized Person (RBI Licensed Banks/entities) will be a contravention under Section 3(a) and such contraventions cannot be compounded by RBI and will be investigated and adjudicated by Enforcement Directorate.

In addition to the above, if the VC transactions are happening on peer to peer basis without any remittances of fiat currency into or outside India, even then Section 3(d) will be impacted and there could be a contravention of Section 3(d) unless a general or special permission given by RBI.

2. Export and Import of Foreign Currency:
As per Regulation 5 of Foreign Exchange Management (Export and Import of Currency) Regulations, 2000, no person shall, without the general or special permission of RBI, export or send out of India or import or bring into India, any foreign currency.

Impact: All virtual currencies which were mined outside India and purchased by Persons Resident in India will be construed as an import of Foreign Currency into India and when sold to a person outside India will be construed as an Export of foreign currency out of India. In both scenarios, it

will be a contravention of Regulation 5 of Foreign Exchange Management (Export and Import of Currency) Regulations, 2000.

3. Purchase of Foreign Security by Resident Indians:

As per Regulation 3 of Foreign Exchange Management (Transfer or Issue of any Foreign Security), Regulations 2004, unless specifically permitted by the Reserve Bank of India, no person resident in India shall issue or **transfer** any foreign security. As per Regulation 4 of the said Regulations, a person resident in India may purchase foreign security out of funds held in Resident Foreign Currency (RFC) account maintained in accordance with Foreign Exchange Management (Foreign Currency Accounts) Regulations, 2000 and not from any other accounts. As per the definition of the term **"transfer"** under Section 2(ze), the transfer includes a sale, purchase, exchange, mortgage, pledge, gift, a loan, or any other form of transfer of right, title, possession, or lien.

Impact: It is generally observed that persons resident in India are purchasing virtual currencies by sending remittances through credit cards or bank transfers from their Savings Bank accounts or Current Accounts. These remittance methods are not permitted for the purchase of foreign security (VCs) unless prior approval of RBI is obtained.

As per the above-cited RBI Notification, no person Resident in India is permitted to buy or hold any foreign security which is not permitted in the said Notification. The purchase of VCs (Foreign Security) is not permitted in the Notification.

4. Foreign Currency Accounts:

As per Regulation 3 of Foreign Exchange Management (Foreign Currency Accounts by a Person Resident in India) Regulations, 2000, unless permitted by RBI, no person resident in India shall open or hold or maintain a Foreign Currency Account. By definition, 'Foreign Currency Account' means the account held or maintained in currency other than the currency of India. Virtual Currency is a foreign currency under FEMA as discussed elsewhere.

Impact: The edifice on which the virtual currencies are developed is Distributed Ledger Technology (DLT) or Block Chain Technology. Each investor is given a private key and the details of the Digital asset is maintained in a hack free Ledger. Virtual Currency holdings fall squarely within the provisions of Regulation 3 of the above-cited RBI Notification and it is not permitted unless specific permission is obtained from RBI.

5. Duty of persons to realise foreign exchange due:

A person resident in India to whom any amount of foreign exchange is due or has accrued shall take all reasonable steps to realise and repatriate to India such foreign exchange, and shall in no case do or refrain from doing anything, or take or refrain from taking any action, which has the effect of securing —

(a) that the receipt by him of the whole or part of that foreign exchange is delayed; or

(b) that the foreign exchange ceases in whole or in part to be receivable by him.

On realisation of foreign exchange due, a person shall repatriate the same to India, namely, bring into, or receive in, India and sell it to an authorised person in India in exchange for rupees.

A person not being an individual resident in India shall sell the realised foreign exchange to an authorised person within the period:-

(1) foreign exchange due or accrued as remuneration for services rendered, whether in or outside India, or in settlement of any lawful obligation, or an income on assets held outside India, or as inheritance, settlement or gift, **within seven days from the date of its receipt;**

(2) in all other cases **within a period of ninety days from the date of its receipt.**

A person being an individual resident in India shall surrender the foreign exchange to an authorised person **within a period of 180 days from the date of such realisation/purchase/acquisition.**

Impact: Section 8 of the Foreign Exchange Management Act, 1999 makes it obligatory for all Persons Resident in India to realise foreign exchange and surrender it to authorised persons (Banks). Non realization or surrender to any Authorized Person (RBI Licensed Banks/entities) is a contravention of Section 8 of FEMA.

6. Holding foreign exchange and foreign security:

Section 4 of FEMA makes it obligatory that no person resident in India shall acquire, hold, own, possess, or transfer any foreign exchange or foreign security unless specifically permitted by the Reserve Bank of India either through general permission or specific permission.

Impact: As discussed, all Virtual Currencies are either a foreign exchange or foreign security. Since RBI has not given any general or specific permission for Virtual Currencies acquisition, holding, owning, possessing or transferring by Persons Resident India, Section 4 of FEMA will be attracted if any person deals in Virtual Currencies. In case of contraventions of Section 4 by any Person Resident in India, Section 37A gives power to Enforcement Directorate to confiscate equivalent assets in India if such foreign exchange or foreign security is above Rs.1 Crore. In addition to confiscation of equivalent property in India, a penalty upto three times the sum involved in such contraventions can be imposed and further punishable with imprisonment for a term which may extend upto 5 years.

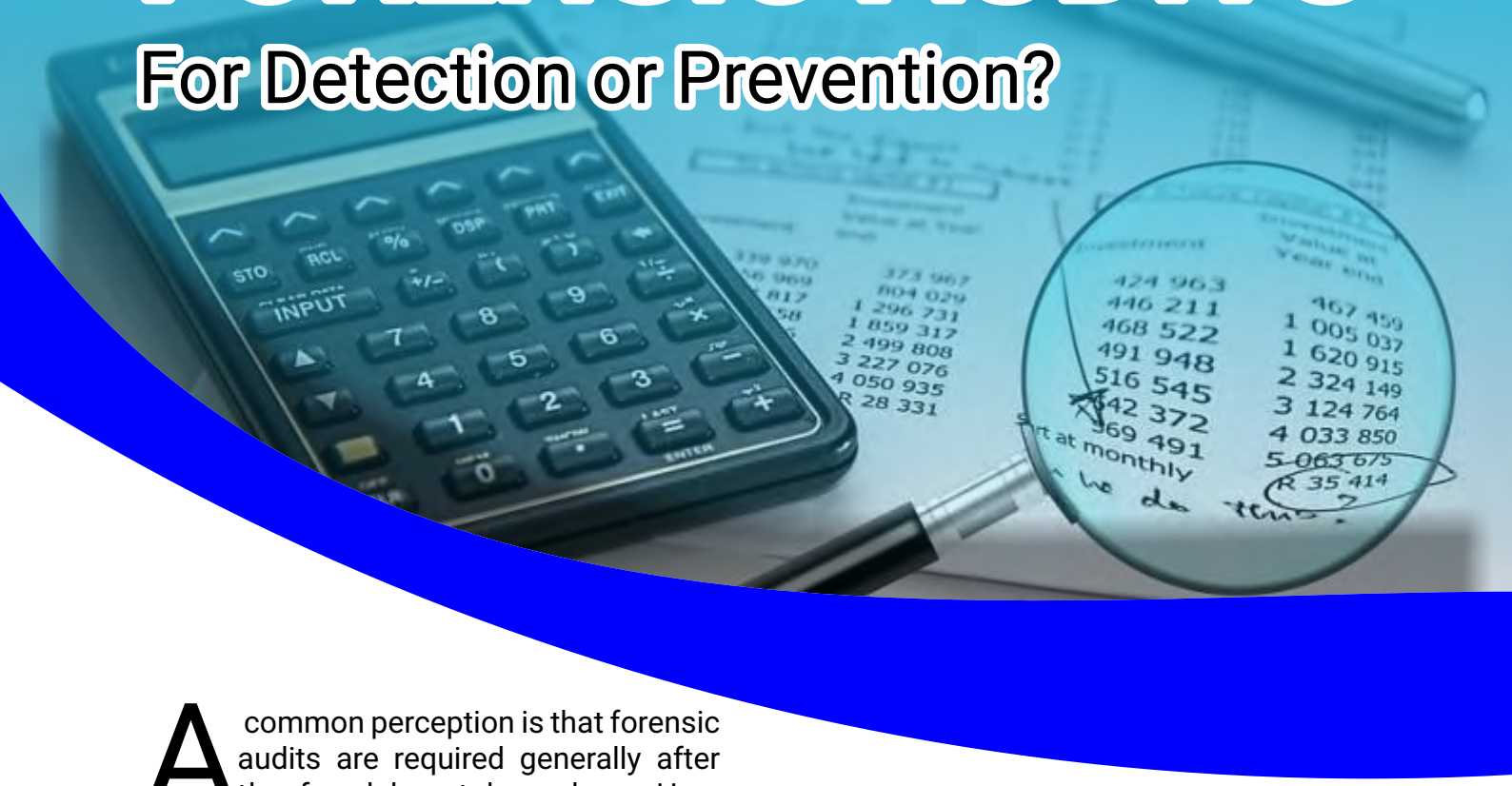
Conclusion:

Unless RBI and Government make changes in the FEMA Regulations to allow dealing in and trading of Virtual Currencies, it can be viewed that the above discussed contraventions of FEMA will be impacted if any person Resident in India deals with Virtual Currencies. One interesting argument is taking rounds in the social media that "RBI has not prohibited Virtual Currencies in India" as cited in the above referred Supreme Court Order. Indeed, RBI has not prohibited any foreign currency including Virtual Currencies, but FEMA Regulates and restricts Persons Resident in India from dealing with foreign currency including Virtual Currency. Unless the Regulators come out with clear guidelines on dealing with Virtual Currencies by Persons Resident in India, they will be doing so at their own risk.

PVR Rajendra Prasad, FCA
PnP consulting

FORENSIC AUDITS

For Detection or Prevention?



A common perception is that forensic audits are required generally after the fraud has taken place. How about using this technique to prevent corporate frauds? Let us first understand fraud. ACFE defines fraud as "the use of one's occupation for personal enrichment through the deliberate misuse or application of the employing organization's resources or assets."

The first 'Reports to the Nations on Occupational Frauds and Abuse' published in 1996 reported a loss of approx. USD 15 billion in America due to frauds. The 2018 survey by ACFE estimated average loss due to frauds is in the range of 5% of revenue and potential global fraud loss was projected at nearly USD 4 trillion. It may be financial reporting fraud or misappropriation of assets.

Goes without saying, of late forensic audits have gained much importance. The regulators and corporate, both sides are keen to have it.

Looking back

Sherlock Holmes is considered as one of prominent Forensic investigators. In India, Kautilya was the first person to mention the famous 'forty ways of embezzlement' in his famous Kautilya Arthashastra during the ancient Mauryan Times. Birbal was the Scholar in the time of King Akbar. He used various tricks to investigate a variety of crimes. Some of his stories give the fraud examiner a brief idea about the Litmus test and other such unconventional techniques of fraud detection.

Enron, Worldcom, Satyam, Lehman Brothers, Tyco, IL&FS are more contemporary corporate frauds involving financial reporting and misappropriation causing millions of dollars loss to the stakeholders. To bring awareness and realizing popularity of the matter, Netflix has also started showing a series based on corporate frauds like Kingfisher, Neerav Modi and Sahara case.

A Growing Trend

Term 'Forensic audit' is not strictly defined in regulatory guidance and it covers a broad spectrum of activities. "Forensic" means "*suitable for use as evidence in a court of*

law", and the term 'forensic auditing' is generally used to describe the wide range of investigative work performed by the experts. Forensic auditing requires a unique combination of Accounting, Auditing and Investigation skills. It also encompasses Litigation Support. The investigators collect information (both qualitative through interviews & quantitative using data mining etc.) and draw detailed analysis producing irrefutable evidence in a Court of Law.

Instances of growing global trend of forensic audits are given below-

- Forensic Accountants are also Certified Fraud Examiners, or Certified Public Accountants with AICPA's Certified in Financial Forensics (CFF) Credentials.

- The Serious Fraud Investigation Office (SFIO), a fraud investigating agency in India under the jurisdiction of the Government of India has been involved in carrying out some eminent investigations like Satyam and many others. In fact, The Companies Act 2013 has given a statutory recognition to SFIO.

- Both the Central Bureau of Investigation (CBI) and Criminal Investigation Department (CID) are involved in one way or another in forensic auditing.

- The strict requirements of Basel norms for banking and financial institutions, Sarbanes-Oxley Act, SEBI regulations, Master Circular of RBI etc. are focused on the reduction of accounting scams and financial collapse on account of fraudulent transactions.

- Newly evolved Insolvency regulations in India have also created lot of demand for forensic auditors.

Various Audits

Where Forensic Auditor is assigned a job to collect evidence, Statutory Auditor primarily provides opinion on fairness of financial statements. The roles and responsibilities are different. However, approach remains same including a planning, field work,

review process and preparation of a report. **Forensic auditors may be required to present findings in the court of law and also appear as an expert witness.**

Forensic investigation is a highly specialist kind of assignment and requires highly skilled team equipped with the extensive knowledge of accounting, auditing and legal framework coupled with specialist knowledge and training, ability to pay attention to the details, an eye to identify inconsistencies & discrepancies and a particularly sharp sense to smell foul in stereotypical financial accounts, to unravel the fraud.

Role of Information Technology

"White collar" crimes have increased many folds with the introduction of technology & globalization of companies, therefore auditing requirements need to be sharpened with forensic techniques to establish evidences to book the financial criminal.

Forensic investigators receive many benefits from technology used in an investigation. A lot of advanced investigative techniques, analytical tools, Computer Aided Audit Techniques (CAAT), data mining and data analysis are used to uncover the fraud.

Methods

Forensic Accountants use some unconventional tools besides the various techniques of auditing. Some special techniques which are used nowadays to uncover frauds are Benford's Law, theory or relative size factor, ratio analysis, theory or inverse logic, digital forensic etc. Besides some other tests like Juxtaposition, reasonableness, absurdity, replication, impossibility, suspicious documents are also performed.

Prevention

Many corporates are using forensic audits to prevent frauds these days. During lockdown more focus is on cyber-crime and a large number of corporate are carrying IT investigations and upgrading their processes to prevent frauds.

Many techniques can be used to prevent frauds and forensic audits is one of the tools in the hands of management. For example, strengthening whistle blowing policy, regular training, continuous secret reserve searches, surprise checks are quite effective in prevention of frauds.

As forensic accountants, services in following areas are generally provided by chartered accountants –

- Investigating and analyzing financial evidence
- Developing or assisting in development of specialized software for forensic accounting
- Assisting in legal proceedings as expert witness
- Risk prevention by making recommendations to avoid future lapses and frauds due to professional negligence
- Preventing fraud by employees
- Investigating crimes, involving money laundering, kick-backs and misuse of public funds
- Arbitration, mediation and other such forms of alternative dispute resolution

Professionals with knowledge and experience of forensic audit are currently in great demand. However, as the incidence of white-collar crime (fraud, bribery, corruption, money laundering, etc.) continues to increase, demand for the services set to grow.

Parveen Kumar
Partner – National Head Assurance
ASA & Associates LLP

TAX TREATY RATE BENEFIT INSTEAD OF DIVIDEND DISTRIBUTION TAX

DELHI TRIBUNAL SAYS AN EMPHATIC YES!

In what could be termed as ruling of the year 2020 – certainly going by the amount that could get under litigation, the Delhi Tribunal held that in years when DDT was applicable, the tax payer in respect of dividends paid to non resident shareholders can take benefit of the lower rates of tax under the respective tax treaties. If this is further affirmed by other Tribunal / Courts and if more taxpayers make similar claim this could snowball into perhaps the biggest tax dispute India would witness.

Dividend is a classical mode of repatriation of profits of the company to its shareholders and remunerating them. Many multinational groups amongst other factors also consider country's dividend taxation policy before setting up a company in a particular jurisdiction (especially holding company structures).

Ideally, dividend is income of the shareholder and hence the primary liability of the tax on dividend is that of the shareholder. However, India had shifted the burden of dividend tax onto the companies by charging Dividend Distribution Tax (DDT) on amounts distributed as dividends and exempting the dividend income in hands of shareholders way back in 1997. Later on in year 2016, India also introduced tax @ 10% on individual shareholder earning dividend income of more than INR 1 million.

DDT was to be paid by the company at an effective rate of 20.56%[1]. However, this was unfavorable for foreign investors, mainly on account of the following:

- DDT paid by Indian company was not allowed as tax credit in home country resulted in double taxation.
- Benefit of the beneficial dividend tax rate provided under the tax treaties was disregarded.

Recently, w.e.f. April 1, 2020 the Indian government has abolished DDT and have gone back to the conventional method of dividend taxation whereby dividend is taxed in the hands of the shareholders.

However, with respect to DDT regime, there was a battle going on between corporates and Indian tax authorities. Companies like Maruti Suzuki, SGS India had lodged an interesting claim before the tax tribunal for claiming refund of DDT to the extent the

1 During Financial Year 2019-20

same was paid in excess in respect of non-resident shareholders where the lower rate under the tax treaty was applicable for dividend taxation. The tax tribunal had admitted the additional claim made but directed the matter to the lower level tax authorities for fresh examination. However, no legal finding on the matter was pronounced. Recently the Delhi tribunal in the case of Giesecke & Devrient [India] Pvt Ltd pronounced a path breaking judgment favoring the tax payer and considering the intent of introduction of DDT and ruling that the DDT rate would be restricted to the tax treaty rate provided for dividend taxation. The key observations of the tax tribunal were as follow:

- The tribunal referred the memorandum to Finance Bill 1997, 2003 to establish that the intent of the DDT on the company was driven by administrative considerations rather than legal necessity.
- The tribunal emphasized on the fact that economically the burden of DDT falls on the shareholders rather than on the company, as the amount of distributed profits available for shareholders stands reduced to the extent of DDT levied.
- In Delhi tribunal's opinion, it is absurd to hold that the liability of the DDT falls on the company and thus rates of dividend tax set out in the tax treaties shall not be applicable. In fact, in light of the generally accepted principles relating to interpretation of treaties with the object of eliminating double taxation, mere responsibility of collecting tax on the company does not bar the application of tax treaties to DDT.
- Lastly, it was held that the Government under the disguise of DDT has made an attempt to unilaterally amend the dividend taxation. Such a unilateral act is a disregard to the general rule under Article 39 of The Vienna convention on the law of treaties, 1969 ("VCLT") regarding the amendment of treaties which provides that a treaty may be amended only by an agreement between the parties.
- Thus, no amendment whether retrospective or prospective can be read in a manner so as to extend in operation to the terms of an existing international treaty unless it has been renegotiated between the contracting states.

Although the Government by the Finance Act 2020 has abolished the DDT regime, the Delhi tribunal's judgment would result in corporates lining up for refunds of DDT for the past years. This would result in substantial financial implications for the government - perhaps more substantial than any other tax dispute India has witnessed. It is thus expected that tax authorities would fight tooth and nail on this matter till the highest level.

Companies seeking to claim refund of additional taxes collected on account of DDT may have to evaluate all legal and procedural options primarily amongst them are:

- Additional claim in all earlier years where the matter is pending under litigation before any forum with tax / appellate authorities;
- Make an additional claim in the tax assessment proceedings;
- Revision of tax return for financial year 2018-2019 (time available up to November 30, 2020)
- Making a claim for the financial year 2019-2020 in the tax return to be file by 31 Jan 2021
- Application to tax authorities for revision of order (Section 264 of the Income Tax Act, 1961)
- Application before the Authority for Advance Ruling (AAR)

Each of these options would have to be evaluated on a case to case to basis by the companies.

It would be important to note that tax treaty

rate on dividend varies from 5-25% range (majority coming under 5-15% range), whereas the DDT in past years have increased from 17% to 20.56%. Accordingly, the impact of this decision would be huge, especially on Indian companies having substantial foreign shareholding.

These companies should evaluate their case in detail before lodging the claim with authority. Following aspects could be considered while doing the analysis:

- Refund by virtue of lower rate under the tax treaty can be claimed by the company only when the shareholder receiving the dividend is a tax resident of the respective country and it is Beneficial Owner (BO) of the dividend. The company would have to ensure that relevant documentation like Tax Residency Certificate (TRC), BO declaration, etc. is available.

- Even though the decision favors the taxpayers, several important aspects have been left untouched by the tribunal. The companies should factor the following arguments while deciding onto the tax position it wants to adopt:

  i. It would be interesting to note that India-Hungary tax treaty is a single salutary treaty that was amended through a protocol in 2003 (post re-introduction of DDT) to provide that even where tax on dividend is paid by a resident company on distributed profits the same would be considered as tax in the hands of the shareholder and hence the rate cannot exceed treaty rate. To some extent benefit of India Hungary tax treaties can be extended to countries having MFN clause like Netherlands, France, Belgium, Spain etc.

  For the other tax treaties, this can be interpreted adversely that since no specific amendment was made in other treaties after DDT, the treaty rate cannot be applied. Nearly all the tax treaties provide that the agreement shall apply to any identical or substantially similar taxes which are imposed after the date of signature in addition to, or in place of, the existing taxes.

  ii. In majority of the tax treaties, the dividend article specifically provides that **"This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid".** Where DDT is considered as tax on distributed profits, the beneficial rate provided for taxation of dividend in the tax treaty may not apply based on language of tax treaty itself.

  iii. Treaties with few countries (like India-Cyprus) also clarify that dividend is exempt in India and hence lower rate of tax is not relevant. This also indicates that shareholders are not impacted by the DDT tax. It may be difficult to claim exemption in case of such treaties.

In our view, it would be worthwhile for companies to carry out a cost benefit analysis before lodging a claim with the tax authorities and also evaluate the litigation risks considering the above aspects. We are pretty sure that while taxpayers are rejoicing this decision, the tax authorities would have started their preparation to take this to the next level. It would be an interesting battle.

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Sr Executive Director
Nexdigm (SKP)

IMPACT OF COVID-19 ON SUPPLY CHAIN

Responding with Resilience - the Indian Pharma Sector

This article is part one of a series of three articles that looks at the Supply Chain of the Pharmaceutical industry in the context of the COVID-19 pandemic. Here, we examine the crisis, the challenges that emerged, and the industry response in the short term. Part 2 of the series will outline the 'Learnings from the Crisis for Supply Chain Management', and part 3 will ideate on the 'Supply Chain Management Strategy for the New Normal'

The COVID-19 pandemic that has swept through the world this year has caused unprecedented health and economic distress globally. To curb the rapid spread of infection through their populations, several countries imposed and continue to impose widespread lockdowns. This has caused significant disruption in demand and supply around the world.

These lockdowns, naturally, created considerable challenges for businesses providing 'essential' goods and services, such as the pharmaceutical (pharma) industry. The rapid response of internal teams, industry associations, and governments enabled these industries to minimize disruption.

This article uses the Indian pharmaceutical sector as a case study, to examine the challenges faced due to the lockdown, and outlines the measures that helped get the supply chains back on track. We believe that the learnings from this experience are relevant and valuable to companies around the world.

Tracking the Timeline

COVID-19, a disease that was first reported in China in Dec 2019, spread rapidly to other parts of the world soon, reaching pandemic proportions. As showcased in Figure 1, the first case in India was recorded in late January 2020.

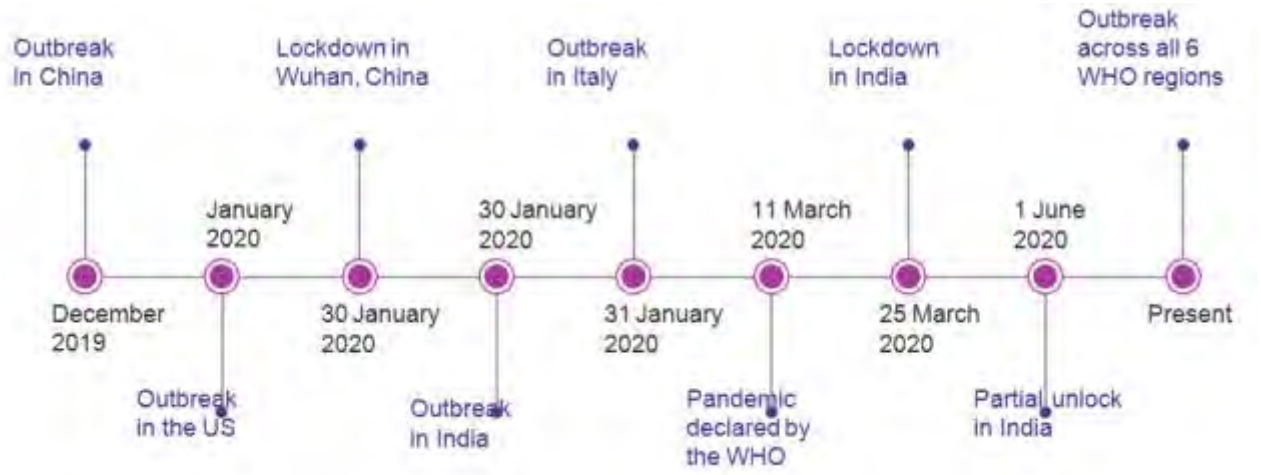


Figure 1: A Brief Timeline of Milestones related to COVID-19

In general, the national and state-level lockdowns imposed severe restrictions on the mobility of people, suspending all commercial and social activities that require people to come together, except for those defined as essential services. Several private and public enterprises initiated 'Work From Home arrangements' (WFH), a format that is still widely prevalent today.

The Lockdown in India

In India too, offices, factories, educational establishments, large markets, shopping malls, etc., were asked to stay shut. However,
the Government wanted to ensure that essential services and supplies, which included food and grocery, pharmaceutical and medical goods, and healthcare services, among others, continued operations, to maintain public well-being. Since, the
government and businesses had limited time to prepare for the lockdown, the challenges faced by supply chains in general and essential services in particular were compounded.

Figure 2: First-wave of challenges after the imposition of the national lockdown.

Managing the Crisis

The common objective of the industry, society, as well as the government was to ensure continuity in the supply of critical, life-saving medicines that are essential for maintaining good health and minimizing other health problems during the pandemic.

Today supply chains are complex globally interlinked systems requiring consonance of various stakeholders.

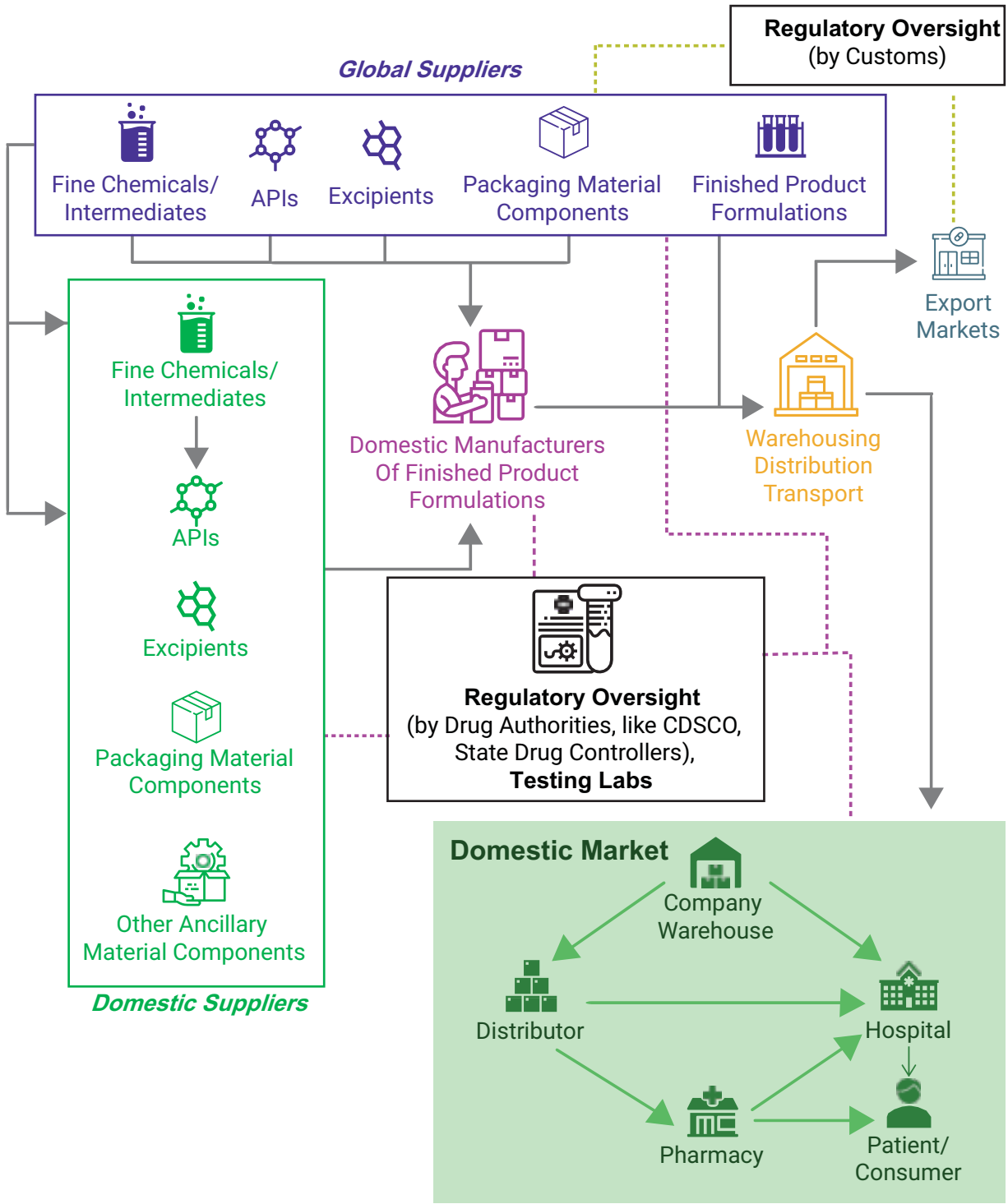


Figure 3: The Indian pharma supply chain

To meet the common objective, the challenges faced by all four elements of supply chain management, viz. plan, procure, make, and deliver, needed to be addressed.

Figure 4: Challenges to the four key processes of Supply Chain

Operational Complexity - Implementing the National Lockdown

The process of imposing and managing the lockdown is complex, involving a number of Government ministries, departments at the central and state levels, as well as civic bodies and local law enforcement bodies. The network of stakeholders is indicated in Figure 5.

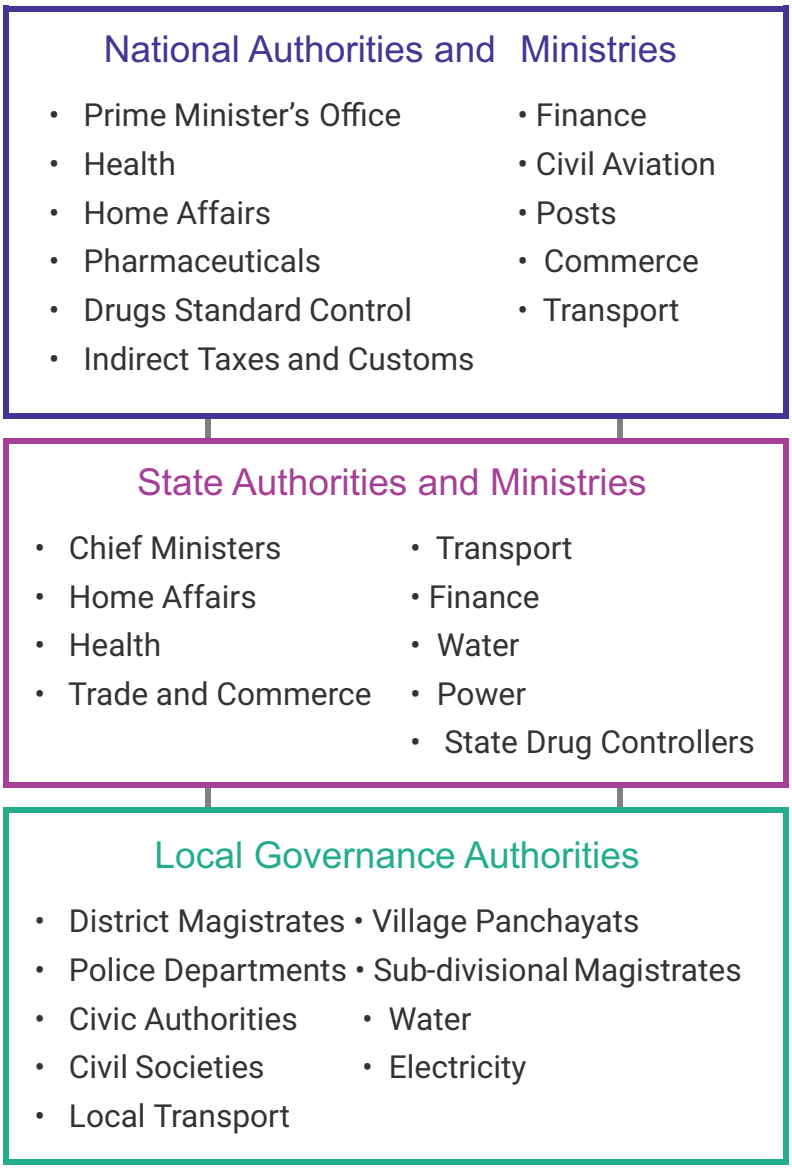
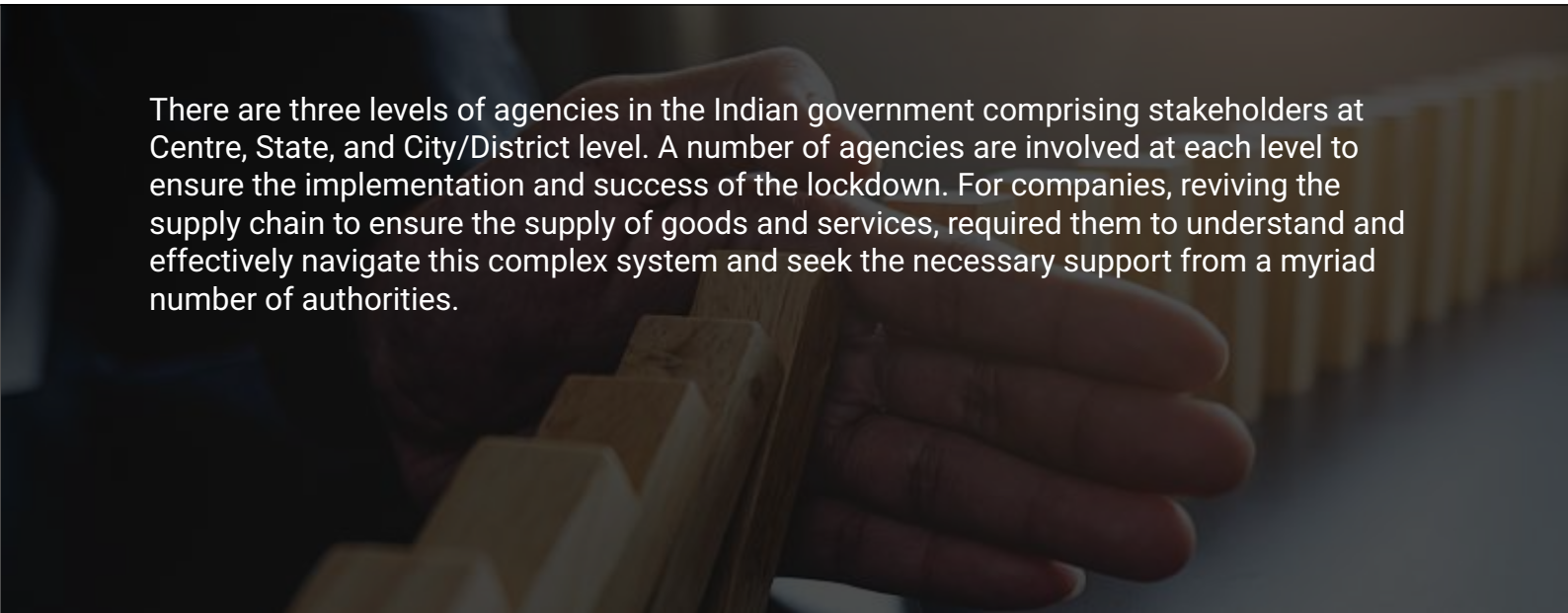


Figure 5: Network of Government stakeholders managing the lockdown



There are three levels of agencies in the Indian government comprising stakeholders at Centre, State, and City/District level. A number of agencies are involved at each level to ensure the implementation and success of the lockdown. For companies, reviving the supply chain to ensure the supply of goods and services, required them to understand and effectively navigate this complex system and seek the necessary support from a myriad number of authorities.

Swift Execution of Corrective Actions

At the onset of lockdown, pharma companies came together quickly to identify key priorities and tasks required to keep the supply chain functioning. Industry and other stakeholders' associations collaborated to collate and represent on issues with the government/civic agencies and seek required support and interventions. The Government worked with agility and transparency with industry to find quick and practical solutions. Figure 6 shows some of the crisis management initiatives that were implemented across the phases of the Supply Chain.

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Nexdigm Comments:

- Today's supply chains are complex systems with numerous domestic and global stakeholders. It is essential to map and build a good understanding of the critical components well.
- A system view is required to evolve a management plan that is comprehensive and effective. Piecemeal interventions merely shift bottlenecks, resulting in the loss of precious time and resources.
- The resolution of issues during the lockdown requires coordination among various government agencies. It is essential to build a good understanding of the various authorities/agencies involved and the hierarchy and communication flow within the government.
- Creating effective war rooms at the of company and industry association levels is critical. These help track real-time progress and issues, and enable prompt escalation.

Nodal points of contact need to be established to facilitate effective communication and minimize confusion. The pandemic has demonstrated how a black swan event can derail and disrupt business, corporate strategy plans.

In the next article, we will synthesize and discuss in greater detail, key learnings from the management of the supply chain challenges caused by COVID-19 that can help companies prepare better for future disruptions.

BALASORE ALLOYS LIMITED V. MEDIMA LLC:

HARMONISING DISSIMILAR ARBITRATION CLAUSES

The Supreme Court in the case of Balasore Alloys Limited vs. Medima LLC (16.09.2020 - SC): MANU/SC/0691/2020 took note of the arbitration clause existing in two different set of documents between the same parties relating to the same transaction, and ruled in favour of harmonising the two different arbitration clauses.

FACTUAL BACKGROUND:

The case before the court concerned arbitration clauses in agreements between Balasore Alloys Ltd. ("Balasore") and Medima LLC ("Medima"). The Purchase Orders issued regularly provided for arbitration in accordance with and Conciliation Act, 1996 ("the Act") in Kolkata while the Agreement entered into in 2018 provided for an International Chamber of Commerce ("ICC") Arbitration in London. Eventually, a dispute arose between the parties regarding these transactions. Medima had invoked the arbitration clause under the Pricing Agreement and an arbitral tribunal was constituted as per the ICC Rules, however, it was the case of the Applicant, Balasore that the constitution of the Arbitral Tribunal and conduct of arbitration proceeding must be in accordance with the arbitration clause provided in the Purchase Orders. Thus, the Applicant had approached the Supreme Court under Section 11(6) read with 11(12)(a) of the Arbitration and Conciliation Act for appointment of sole arbitrator under the arbitration clause of the first agreement.

ISSUES

Whether the arbitration clause contained in the Purchase Orders or the arbitration clause contained in the 2018 Agreement will be applicable for resolving the disputes between the parties?

LEGAL PROVISION INVOLVED:

Section 11(6) in the Arbitration and Conciliation Act, 1996 is produced below for ease of reference.

"11 Appointment of arbitrators. —

(6) Where, under an appointment procedure agreed upon by the parties,—

(a) A party fails to act as required under that procedure; or
(b) The parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
© A person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

OBSERVATIONS OF THE COURT:

The Court observed that to determine which of the two arbitration clauses was applicable it was crucial to determine the manner in which the arbitration clause was invoked and the nature of the dispute between the parties.

It was observed that,

"Having taken note of the Arbitration Clause existing in two different set of documents between the same parties relating to the same transaction, in order to harmonize or reconcile and arrive at a conclusion as to which of the Arbitration Clauses would be relevant in the instant fact, it would be necessary for us to refer to the manner in which the Arbitration Clause was invoked and the nature of the dispute that was sought to be resolved through Arbitration."

It is important to appreciate the fact that the arbitration clause was not invoked by Balasore but, in fact by the Respondent, Medima that had issued a notice to the petitioner referring to the breach of the 2018 Agreement and invoked the arbitration clause contained in the said agreement giving Balasore an opportunity to resolve the matter within 30 days, failing which Medima would approach the ICC. Later the Arbitral Tribunal was also constituted in terms of the 2018 Agreement.

The Supreme Court while dealing with the abovementioned issue referred to its own judgment in the case of Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan and Ors. (1991) 5 SCC 651 ("Olympus") wherein it had dealt with a similar issue of two different arbitration clauses in two related agreements between the same parties. In Olympus the Supreme Court had read both the clauses in harmony and held that the parties should resort to the arbitration clause contained in the principal agreement.

The Supreme Court based its judgment on the following understanding of the two agreement between the parties –

1. 2018 Agreement makes provision for regarding purchase and sale, final price, payment of provisional price and adjustment of advance, determination of final sales price and monthly accounting and payment, whereas the purchase order only provides for the price of the quantity ordered for and special terms relating to provisional price, etc.

2. Nature of the dispute indicate that the disputes can be determined according to the terms of the 2018 Agreement and the Arbitral Tribunal constituted under the clause contained in the 2018 Agreement can also adjudicate on any other issues arising out of the terms of the individual Purchase Orders.

The transaction between the parties started in 2017 and 21 Purchase Orders were placed before the execution of the 2018 Agreement. The terms of the 2018 Agreement show that the parties had made the Agreement applicable from 2017, i.e. the time of issuance of the Purchase Orders showing that the intention of the parties was to make the 2018 Agreement superseding on the Purchase Orders also.

JUDGMENT

The Supreme Court held that,

"14. In that view of the matter, when admittedly the parties had entered into the agreement dated 31.03.2018 and there was consensus ad-idem to the terms and conditions contained therein which is comprehensive and encompassing all terms of the transaction and such agreement also contains an arbitration Clause which is different from the arbitration Clause provided in the purchase order which is for the limited purpose of supply of the produce with more specific details which arises out of Agreement dated 31.03.2018; the arbitration Clause contained in Clause-23 in the main agreement dated 31.03.2018 would govern the parties insofar as the present nature of dispute that has been raised by them with regard to the price and the terms of payment including recovery etc."

In this judgment the Supreme Court has dissected the facts of the present case to arrive at the harmonious reading of the two different arbitration clauses in two different agreements between the same parties. However, the one aspect of judicial interpretation that the judgment highlights is that there cannot be one straight jacket formula for interpreting relationship between the parties and each case has a unique factual matrix that needs to be appreciated by the courts.

Sujoy Datta
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Vaish Associates Advocates

Sakshi Singh
Junior Associate
Vaish Associates Advocates

Tax Court Speaks!

An insight into the recent key judicial rulings

Income Tax				
S No	**Tax Issue**	**Legal take away**	**Judicial Body**	**In the case of**
1	Transfer of case u/s 127	SLP challenging transferring of case u/s 127 of the ITA dismissed. The SLP was filed challenging Madras HC order which had also dismissed writ filed before it. HC had held transfer of case to be valid.	Supreme Court of India	V.V. MINERALS Vs The Principal Commissioner Of Income Tax & Ors Special Leave to Appeal (C) No(s). 8831/2020
2	PE on satisfaction of disposal test under India-Sweden FTS - India – Sweden tax treaty	No PE of AE for nonsatisfaction of 'disposal test' Provision of the service that may require technical knowledge, skills, etc., does not mean that technology is made available to the person purchasing the service.	ITAT Delhi	Bombardier Transportation Sweden AB Vs DCIT ITA No. 859/DEL/2016
3	PE determination when transaction at ALP	No question of determination of DAPE when AE already remunerated at ALP	ITAT Delhi	ESPN Star Sports Mauritius S.N.C et Compagnie VS ACIT
4	Doctrine of 'Law of the Case' for reconsidering a substantial question of law	HC dismissed MA filed for 'Law of the Case' for reconsidering a substantial question of law on the ground that Law of the case fetters a later Bench in the same case from taking a contrary stand to that taken earlier by the previous Bench	High Court of Bombay	CIT Vs V. M. SALGAONKAR BROTHERS PRIVATE LIMITED

Income Tax				
S No	**Tax Issue**	**Legal take away**	**Judicial Body**	**In the case of**
5	Depreciation on goodwill arising on amalgamation	ITAT allows depreciation claim on the goodwill arising out amalgamation of group companies. Rejects revenues stand that since amalgamating and amalgamated company belong to the same group of companies having same registered address, there should not be any question of goodwill	ITAT Ahmedabad	Urmin Marketing P.Ltd Vs DCIT ITA.No.1806/Ahd/2019
6	Deduction of HO expenditure of a PE – Section 44C – Interplay between tax under treat and Act	No deduction of HO expenditure u/s 44C as the taxpayer had opted for taxability under the tax treaty No mandate that an assessee can opt for lower taxes as per DTAA and claim expenses as per Domestic tax laws	ITAT Delhi	MUFG Bank Ltd vs ACIT ITA No. 7895/Del/2019
7	Brand promotion expenses	Sample expenses are brand promotion expenses hence disallowed. Held that sample expenses are related to brand promotion and marketing initiatives of the parent company of the assessee and such expenditure is not meant for the assessee business	ITAT Bangalore	Nike India Private Limited Vs DCIT
8	DDT and tax rate under India Germany DTAA	DDT levied on taxpayer should not exceed the rate specified in Article 10 of tax treaty	ITAT Delhi	DIT Vs IBM World Trade Corporation
9	Distribution revenue business income or Royalty	Distribution revenue earned by a US broadcasting company is business income earned in India and not is not in the nature of Royalty	ITAT Delhi	Turner Broadcasting System Asia Pacific Inc. Vs DDIT
10	TDS proceedings Vs section 40 disallowance	Once issues u/s 201 have been concluded in TDS proceedings (revenue accepting position of taxpayer as correct), it cannot attract disallowance u/s 40	High Court of Madras	Sutherland Global Services Pvt. Ltd Vs CIT

Income Tax				
S No	**Tax Issue**	**Legal take away**	**Judicial Body**	**In the case of**
11	Interest u/s 234B	No 234B interest liability on non resident on short deduction of tax by Indian resident payer	High Court of Karnataka	DIT Vs TEXAS INSTRUMENTS INCORPORATED I.T.A. NO.171 OF 2011
12	Substituted tax rate in India-Singapore Tax Treaty	Benefit of reduced tax rate granted for whole year in place of the substituted tax rate, when substitution was made in August basis reason that when a new rule in place of an old rule is substituted, the old one is never intended to keep alive and the substitution has the effect of deleting the old rule and making the new rule operative	High Court of Karnataka	DIT Vs AUTODESK ASIA PVT. LTD I.T.A. NO.133 OF 2013

Indirect Tax				
S No	**Tax Issue**	**Legal take away**	**Judicial Body**	**In the case of**
1	Section 98(2) of CGST Act restricts an Advance Rulings Authority from admitting an application if the question raised is already pending or decided in any proceedings in the case of the applicant – meaning of 'proceeding'?	'Proceeding' is of comprehensive connotation; it means a prescribed course of action for enforcing a legal right and the process of investigation is a step towards the same. Thus, 'proceeding' will include commencement of investigation under Section 67 (provision dealing with search, summons, etc.) In this case, the GST intelligence officers had summoned the officials of the appellant-company and recorded statements – basis that, the AAAR held that the appellant was ineligible to apply for advance ruling and the ruling obtained from AAR was void ab initio as the appellant did not disclose the fact of investigations being conducted.	Appellate Authority for Advance Rulings	ID Fresh Foods – 2020-VIL-61-AAAR

Indirect Tax				
S No	**Tax Issue**	**Legal take away**	**Judicial Body**	**In the case of**
2	Appellant had surrendered his rights in land in favour of a municipal corporation and the consideration received was in the form of transferable development rights (TDR) and floor space index (FSI). Such TDR / FSI was later sold to another party. GST on sale of TDR/FSI?	AAAR upheld levy of GST on TDR/FSI. AAAR distinguished various judgments relied upon by Appellants to establish that TDR/FSI would be immoveable property since the exclusion in GST is only for 'sale of land' and not 'immoveable property' at large. AAAR relied upon an ITAT ruling in an income tax matter (where the value of land alone, to the exclusion of TDR / FSI, was held as relevant), to conclude that TDR is not land but merely rights arising out of land. AAAR also held that Schedule – III of CGST Act has to be interpreted like an exemption notification ie., using strict interpretation. Further, since TDR/FSI, while not qualifying as 'land' qualify as 'immoveable property', for the purpose of GST, they will qualify as 'services' (since they can't be 'goods', being immoveable).	Appellate Authority for Advance Rulings	Vilas Chandanmal Gandhi – 2020-VIL-55-AAAR
3	Availability of input tax credit (ITC) of GST paid on installation charges paid for new lift by a group housing society	AAAR held that ITC will not be available. AAAR relied upon old central excise cases to conclude that lifts are immoveable property and held that since they become integral part of the building, they cannot be covered under the exception of 'plant and machinery'. Also, the argument that the society was charging GST from its members was held to be irrelevant since the society could not qualify as a works contract service provider (the only exception envisaged under law).	Appellate Authority for Advance Rulings	Las Palmas Co-op Housing Society – 2020-VIL-59-AAAR

Indirect Tax				
S No	**Tax Issue**	**Legal take away**	**Judicial Body**	**In the case of**
4	Whether adoption of processes (like heating) on waste / used sand received from various foundries and then supplying the reclaimed / usable sand back to such foundries will qualify as one of job work (and thus supply of services) or as supply of goods	The AAR concluded that the process is not covered under job work but qualifies as supply of goods on the basis of the following reasoning: Ø What the foundries are sending to the Applicant is only waste and not a by-product – the intention of foundries is not to treat such waste sand as semi-finished goods Ø The reclaimed sand is not sold by applicant to the foundries based on any fixed ratio vis-à-vis sand received Ø The applicant doesn't receive any processing charge for such activity Ø There is no significant difference in price of reclaimed sand supplied by the applicant and freshly mined sand Ø In light of the foregoing, this appears to be a case where the applicant uses their own consumables during the course of various processes to bring into existence a new product – a 'manufacturing' activity – and these new 'manufactured goods' are being supplied to foundries	Authority for Advance Rulings	Kolhapur Foundry and Engineering Cluster – 2020-VIL-280-AAR
5	Education Cess and Secondary and Higher Education Cess were discontinued in 2015. But many taxpayers in the pre-GST regime had Cenvat credit of such balance lying in their books. Can such credit be transitioned to GST?	A Single Judge Bench of the Madras High Court had earlier held that since there was no lapsing provision for credit of such cesses, such credits became vested rights and thus, transition to GST was permissible. The Division Bench (DB) overturned the foregoing judgment in this case and held that such credit cannot be transitioned to GST. Key reasons: Ø These cesses were abolished from 2015 and therefore, whatever credit was lying in the books became a dead claim which could not be revived in 2017 when GST was introduced Ø Even pre-GST, there was a statutory restriction on cross-utilisation of such cesses' credit for payment of excise duty or service tax Ø Cenvat credit as well as input tax credit under GST is a concession and not a vested right. Ø Transition of credit was allowed only in respect of taxes subsumed in GST - Education Cess, SHE Cess and Krishi Kalyan Cess were not subsumed in GST	Madras High Court, Division bench	Assistant Commissioner v. Sutherland Global Services – 2020-VIL-500-MAD

Indirect Tax				
S No	**Tax Issue**	**Legal take away**	**Judicial Body**	**In the case of**
6	Contract for Cross-border pipeline construction – export of services?	MoU between India and Bangladesh Governments for construction of oil pipeline from India to Bangladesh – the responsibility for such construction was assigned to an Indian public sector company (PSU) which in turn contracted the work to the applicant. It was held not to be export but liable to GST at 18% since it was the Indian PSU which was responsible to pay the consideration to the applicant and thus qualified as 'recipient of service'. AAR also relied upon proviso to Section 12(3)(a) of IGST Act as per which if immovable property is intended to be located outside India, then place of supply will be location of the recipient.	Authority for Advance Rulings	Maninder Singh (Mideast Pipeline Products) – 2020-VIL-282-AAR
7	Whether milk, fortified with vitamins A and D, turmeric powder and black pepper extracts, would be classifiable under HSN 0401 and entitled to exemption under Notification No. 2/2017-Central Tax (Rate)	AAR ruled in favor of exemption being available. Explanatory notes to Chapter 4 were relied upon which covers milk with small quantities of stabilising agents, anti-oxidants and vitamins - turmeric contains curcumin having anti-oxidising potential. The AAR also took note of an earlier CBIC circular clarifying that milk fortified with vitamins A and D was classifiable under Heading 0401 and held that while nutritional value changes with addition of Turmeric etc, the product still remains milk.	Authority for Advance Rulings	ITC Ltd. – 2020-VIL-283-AAR

Indirect Tax				
S No	**Tax Issue**	**Legal take away**	**Judicial Body**	**In the case of**
8	GST on various types of supplies in hotels	AAR held: (i) When a guest (whether a non-resident guest or someone ordering room service) orders from the menu card, a naturally bundled supply of the ordered items (goods) and supply of service (use of facilities / staff) are involved and these would qualify as a composite supply of service. Based on rate notification entries relating to restaurant service by hotels based on declared tariff, GST will apply at 18% (ii) sale of cigarettes is not naturally bundled with restaurant service and therefore, it is liable to 28% GST along with applicable rate of compensation cess (iii) Supply of liquor whether in the restaurant or in the room (on which VAT is paid) – not liable to GST (iv) Supply of free food in a separate canteen by the hotel to employees – liable to GST. Surprisingly, this conclusion was reached on the basis of employer-employees being deemed to be 'related parties' under GST despite producing employment contracts with clear clauses including provision of such free food to employees as a feature of such employment contracts.	Authority for Advance Rulings	MFAR Hotels and Resorts Pvt. Ltd. – 2020-VIL-296-AAR

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2020 Upcoming Events |

Topic	Date
Certificate Course on Cyber- Readiness (Business, legal and Financial Risks)	18th November – Session 1 20th November – Session 2 25th November – Session 3 27th November – Session 4 2nd December – Session 5 4th December – Session 6
Digital Workshop on Data Analytics for Internal Auditors	24th November – Session 1 26th November – Session 2 1st December – Session 3 3rd December – Session 4
Certificate Course on Detecting and Preventing Internal and External Fraud	7th December – Session 1 8th December – Session 2 9th December – Session 3 10th December – Session 4 11th December – Session 5
Virtual Session on Labour Codes - Key Issues and recent Amendments	8th December – Session 1 9th December – Session 2 10th December – Session 3 11th December – Session 4
Seminar on Claims Management	14th December – Session 1 15th December – Session 2
Digital Training on Goods and Services Tax (GST)	11th January 2021 – Session 1 12th January 2021 – Session 2 15th January 2021– Session 3 18th January 2021– Session 4 19th January 2021– Session 5 22nd January 2021– Session 6
Hands on Digital Training on Drafting Commercial Contracts	12th January 2021– Session 1 15th January 2021– Session 2 19th January 2021– Session 3 20th January 2021– Session 4 22nd January 2021– Session 5 27th January 2021– Session 6 29th January 2021– Session 7
Digital Training on FEMA- Legal, Compliance and Tax Issues	20th January 2021– Session 1 21st January 2021– Session 2 27th January 2021– Session 3 28th January 2021– Session 4 29th January 2021– Session 5 30th January 2021– Session 6
Certificate Course on Practical Knowledge of Arbitration and Dispute Resolution	2nd February 2021– Session 1 3th February 2021– Session 2 4th February 2021– Session 3 5th February 2021– Session 4
Virtual Training on Mergers and Acquisitions	2nd February 2021– Session 1 3th February 2021– Session 2 4th February 2021– Session 3 5th February 2021– Session 4
4th Annual GST Summit and Awards- Virtual Conference & Awards	26th February 2021

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