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BY THE PROFESSIONALS FOR THE PROFESSIONALS

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eDiscovery and White-Collar Crimes

White-collar crime investigations are becoming more and more reliant on electronic discovery (eDiscovery) to identify and analyze digital evidence. Fraud, embezzlement, and insider trading have evolved as technology has advanced; emails replace letters, laptops supplant paper files - the list goes on. eDiscovery presents itself then as an invaluable tool for investigators in understanding the underlying complexities of these crimes that, with their abundance of digital data would otherwise be difficult to uncover.

What is eDiscovery?

Through eDiscovery, legal teams can identify and access digital evidence that is pertinent to a criminal investigation. This includes uncovering electronic communications - like emails, text messages, and chat logs - as well as accounting data (bank statements) related to possible white-collar crime activity. By parsing through this information with precision, lawyers are better equipped to fulfill their investigative responsibilities in an informed manner.

The eDiscovery process requires several specific steps to be properly conducted. Initially, investigators must pinpoint pertinent sources of evidence including emails, social media accounts, and banking information. They must then capture the data in a legally valid way that safeguards its legitimacy within court proceedings - this includes creating digital replicas of devices as well as making copies without changing the integrity of the authentic records.

After collecting all available data, investigators must then analyze it to uncover any pertinent evidence. Using advanced analytics tools such as keywords and phrase recognition, pattern detection for behavior analysis, and financial records examination can provide a great deal of information that would be much harder - if not impossible - to acquire with manual investigative methods. The comprehensive analysis of digital data boosts the chances of successful investigations exponentially compared to traditional approaches.

Why eDiscovery is critical in white-collar crime investigations

In order to uncover evidence of white-collar crime, investigators must be highly adept at identifying and analyzing digital data. The complexity of investigations is amplified by the utilization of digital communication as well as a rise in devices used for criminal activity, making it more arduous for authorities to expose wrongdoing. Gathering copious amounts of information is necessary in these cases; therefore, having an effective strategy and analysis methods will improve the chances of obtaining crucial evidence needed for prosecution.

Moreover, without the implementation of sophisticated analytics tools, it can be difficult to evaluate financial records. For example, criminals may obscure their activities by using shell companies or other accounting strategies. However, investigators are able to utilize eDiscovery tools that help reveal these techniques and track money through several accounts with ease.

eDiscovery is critical in white-collar crime investigations because of the massive amount of information that needs to be examined. For instance, when conducting a fraud case study, investigators may have to examine thousands upon thousands of emails and texts alongside financial records. The usage of eDiscovery tools can aid investigators in quickly spotting relevant material and filtering out useless data which ultimately saves resources and precious time. Investigators can also leverage the power of eDiscovery tools to catch criminals using code words and other techniques to dissemble the true meaning of their electronic communications by pinpointing these tactics and deciphering the underlying message behind them.

Real-world examples

There are many examples of white-collar crime investigations where eDiscovery played a critical role in uncovering evidence. One high-profile example is the investigation into the Madoff Ponzi scheme, which was one of the largest financial frauds in history. In this case, eDiscovery played a critical role in uncovering evidence of wrongdoing.

The investigation into the Madoff scheme

involved the analysis of millions of pages of financial records and thousands of emails. The use of eDiscovery tools helped investigators quickly identify relevant evidence and filter out irrelevant data. For example, investigators were able to use advanced analytics tools to identify a pattern of suspicious financial transactions that had been overlooked by traditional investigative techniques.

Another example is the investigation into the FIFA corruption scandal. In this case, eDiscovery played a critical role in uncovering evidence of bribery and corruption within the organization. The investigation involved the analysis of millions of pages of financial records and electronic communications.

Investigators were able to identify a pattern of payments that had been made to various individuals and organizations, which led them to uncover evidence of bribery and corruption. Without the use of eDiscovery tools, it would have been much more difficult to identify these patterns of behavior and trace the flow of money through multiple accounts.

In another case, the investigation into the Enron scandal involved the analysis of thousands of emails and financial records. eDiscovery played a critical role in uncovering evidence of fraud and financial wrongdoing within the company. For example, investigators were able to identify a pattern of behavior in which Enron executives had used off-balance-

sheet transactions to conceal the company's debt and artificially inflate its stock price.

eDiscovery tools were also used in the investigation into the Wells Fargo scandal, which involved the creation of millions of fake accounts by bank employees. The investigation involved the analysis of thousands of emails and other electronic communications. eDiscovery tools helped investigators identify a pattern of behavior in which employees had been incentivized to create fake accounts in order to meet aggressive sales targets.

The growing importance of eDiscovery in white-collar crime investigations

As the volume of digital data continues to grow, the importance of eDiscovery in white-collar crime investigations will only continue to increase. eDiscovery has become a critical tool for investigators to identify and analyze digital evidence, and its use is likely to become even more widespread in the future.

In addition, the use of advanced analytics tools and artificial intelligence is likely to make eDiscovery even more powerful in the coming years. These tools can help investigators identify patterns of behavior, detect anomalies in financial records, and uncover evidence that may have been hidden or obscured.

However, the use of eDiscovery in white-collar crime investigations also raises important ethical and legal questions. For example, the collection and analysis of digital data must be done in a manner that protects the privacy of individuals and ensures that the data is admissible in court. In addition, the use of eDiscovery tools can create challenges for defense attorneys, who must be able to effectively challenge the validity of the evidence presented by prosecutors.

Conclusion

In conclusion, eDiscovery has become a critical tool in white-collar crime investigations, allowing investigators to uncover evidence that may have been hidden or obscured. The use of eDiscovery tools has become even more important as the volume of digital data continues to grow. While eDiscovery presents many challenges and ethical considerations, its use is likely to become even more widespread in the future, as investigators continue to search for new and innovative ways to uncover evidence of white-collar crime.

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RETROSPECTIVE APPLICABILITY OF **RERA?**

WHERE COURTS STAND?

INTRODUCTION

The Real Estate (Regulation and Development) Act, 2016 (*hereinafter*, the "**Act**") is the primary law governing infrastructure and real estate in the country, with the primary objective of protecting the interests of home buyers and promoting investments in the sector.

This article explores the retrospective applicability of the Act, particularly in relation to registration of development projects and the jurisdiction/applicability of the Act within the diverse interpretations of what constitutes 'ongoing' and 'completed' projects. Such an exploration is based on an examination of the case of *M/s Provident Housing Ltd. v. Karnataka Real Estate Regulation Authority & Shyama Shetty*[1], and the diverse views taken by the Karnataka Real Estate Regulatory Authority Tribunal (the "**Tribunal**"/"**KRERA**")) and the High Court of Karnataka. This article concludes that the existing ambiguity and varying jurisprudence in relation to the interpretation of the terms 'ongoing' and 'completed' projects requires settlement by the Supreme Court in order to ensure greater clarity, transparency and faith amongst all stakeholders concerned.

BACKGROUND: NEED AND SCOPE OF THE ACT

The Act was enacted primarily to protect the interests of consumers against perils such as defective transfer of property titles, delayed deliveries, breach of agreed terms, defects in the quality of amenities, and so on. The Act achieves this through the inclusion of provisions relating to increasing the accountability of authorities, enabling home buyers to file complaints relating to builder/developer wrongdoing, mandating the registration of projects, ensuring quality and timely delivery of projects to buyers and consequently reducing real estate malpractice.

The Act is applicable to all 'ongoing' and new projects and includes both residential and commercial developments within its ambit. The Act mandates that the Promoters/Builders/Developers register projects with the Real Estate Regulatory Authority ("**RERA**"), prior to initiation of work and such registration requires specification of details of the project and deadlines in relation to its completion. Further, such registration requirements ensure greater accountability for the home buyer, guaranteeing that necessary penalties and subsequent criminal charges can be imposed in case of delays or non-compliance with the orders of the Tribunal and home buyers can be adequately compensated for the same. However, given the newness of

[1] Writ Petition No.18448/2021 before the High Court of Karnataka.

the legislation and the lack of jurisprudence in the area, several aspects of the Act remain ambiguous and are subject to diverse legal opinion. We will further explore one such aspect of retrospectivity in the section below.

ANALYSIS OF THE RETROSPECTIVE APPLICATION OF THE ACT AND THE TERMS 'ONGOING' AND 'COMPLETED' PROJECTS

This is an analysis of a primary controversy which was highlighted in the case of **M/s Provident Housing Ltd v. Karnataka Real Estate Regulation Authority & Shyama Shetty**.

In this case, the parties entered into an agreement of sale and construction on 10th September, 2014, following which on 18th November, 2015, a partial occupancy certificate[2] was granted to the Petitioner/Developer. In 2017 however, the Respondent/Customer sought to cancel the agreement of sale and construction.

The Petitioner agreed to the termination/cancellation and refunded the amount paid by the Respondent until that point after deduction of certain cancellation charges. The Respondent challenged this by filing a complaint with the KRERA in 2020 seeking a refund of the remaining amount. The KRERA allowed the same, directing the Petitioner to make the payment through an Order dated September 30, 2020[3], which was challenged through a Writ Petition before the Karnataka High Court in 2021. In 2023, the High Court passed its judgement[4] on the same.

The primary questions dealt with by the Tribunal and the High Court were: (i) whether the Act has retrospective effect; and (ii) what constitutes as 'ongoing' stages of a project? In this regard, whether 'ongoing' projects include projects for which a completion certificate[5] has not been issued?

The Respondent's contention was based on **Section 3** of the Act, which states that ongoing projects for which completion certificates have not been issued can make an application to the RERA for registration within three months of the commencement of the Act. However, the Section also provides that where the Promoter has received completion certificate for a real estate project prior to such commencement, no such registration would be necessary. Further, in the present case, the Respondent contended that since no 'completion certificate' was issued in favour of the Petitioners, the project would be considered as an 'ongoing project'.

The Petitioner contended, that owing to the fact that a partial occupancy certificate was issued in its favour before the commencement of the Act, the project must not be considered an 'ongoing project' but rather a 'completed project'. Further, the Petitioner argued that where the project was completed before the Act came into force, the Act would not have retrospective applicability as was in the present case and thus the Respondent's complaint would not be maintainable or fall under the purview of the Act.

The KRERA Order directed the Petitioner to refund the remaining amount, stating that Section 3 mandates that those projects for which a completion certificate is not issued will be considered as an 'ongoing project' and must

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2 A certificate of occupancy is a document issued by a local government agency or building department certifying a building's compliance with applicable building codes and other laws, and indicating it to be in a condition suitable for occupancy.

3 Order, Karnataka RERA, September 30, 2020.

4 Order, Karnataka High Court, January 2, 2023.

5 A completion certification is a mandatory legal document attesting that a new building has been constructed and completed according to all the safety norms and regulations of applicable building codes and other laws.

be retrospectively registered under the Act within 3 months from its commencement.

However, the KRERA Order was set aside by the High Court of Karnataka through its Order dated January 2, 2023. The High Court of Karnataka begins its reasoning by pointing to Section 84 of the Act that empowers the appropriate Government to make rules under the Act, pursuant to which the Karnataka Government notified the Real Estate Regulatory Authority Rules (the "**Rules**") in 2017. **Rule 4 of the Rules** provides for exceptions to the rule of retrospective registration of 'ongoing projects' (meaning projects for which completion certificates have not been issued), including where "*partial occupancy certificate is obtained, to the extent of the portion for which the partial occupancy certificate is obtained*" under **Rule 4(v)**.

Therefore, the High Court of Karnataka held that whilst the Act only exempts completed projects from retrospective registration, Rule 4(v) of the Rules read with Section 3 of the Act acts as an exception, exempting cases where a partial occupancy certificate is granted. The High Court in effect thus stated that a Partial Occupancy Certificate constitutes 'completion' of the project to the extent for which the Partial Occupancy Certificate has been issued. It was thus held that the Order of the KRERA was passed without any jurisdiction and thus in nullity, since the project did not fall within the scope of the Act and since it was a 'completed project' that did not require retrospective registration under the Act.

CONCLUDING REMARKS

While the High Court of Karnataka established its position on the question of retrospective application of the Act and the meaning of the terms 'ongoing' and 'completed projects' with regard to the issue of a partial occupancy certificate, the Act continues to be silent on the issue thus allowing for ambiguity and lack of consensus on this ratio. Further, it is pertinent to note that such ambiguity exists because the Act does not define the concept of partial occupancy certificate, and one must turn to the BBMP Bye-Laws to gain some meaning in this regard. There have been several divergent views to the decision of the High Court regarding partial occupancy certificates through various RERA Tribunal orders and with differing ratios being upheld by other Courts. Owing to the differing views of various courts, the position of law on the matter remains unsettled and can only be resolved with time through the Apex Court establishing the law on the matter and clarifying necessary ambiguities.

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Let's take a quiz to make this article interesting. Answer the questions below in simple ***yes or no.***

- Do you intend to take or have ever taken online courses to upskill yourself?
- Want to watch your favorite movies and TV shows without the hassle of cable? Is Netflix your Answer?
- Are you planning to reach your target audience effectively with online ads?

Well, if the answers to the above questions are a yes, you may have to re-check the taxability of such activities under Indian GST laws.

Do you realize that all of the above questions are intricately linked, leading to the pivotal point being that all of the above are service categories which are delivered through the medium of internet. Therefore, internet is the most vital element involved in the above services.

Let's dive deeper and uncover more fascinating insights about the services where internet is of utmost importance and the GST implications on the same.

OIDAR- Background and history

OIDAR stands for Online Information and Database Access or Retrieval Services.

Before the introduction of the service tax levy on OIDAR services in India, many online service providers were able to operate in India without paying any taxes. This was because the traditional tax laws in India were not designed to cover digital transactions, which allowed online service providers to operate in a tax-free environment.

For example, a foreign-based online service provider, such as a video streaming platform could provide its services to Indian customers without having a physical presence in India. Since they did not have a physical presence in India, they were not subject to Indian taxes. This put domestic service providers at a disadvantage because they were subject to these taxes, which made it harder for them to compete with their tax-free overseas counterparts. Additionally, the government was losing out on a significant amount of revenue due to the lack of taxation on online services.

In a bid to increase its tax base and to increase revenues from Indirect taxes, the government of India decided to levy service tax on the provision of online services like Software as A Service (SAAS) or services that extensively use the internet for delivery of services. The levy of tax on Online information and Database Access Service (OIDAR) was then introduced in India in 2001 under the erstwhile service tax regime and in 2016 the ambit of services was widened to include several digital services into the tax fold. This service without much modification was brought into the GST regime as well.

OIDAR services are defined u/s 2(17) of the Integrated Goods and Services Act, 2017 (IGST Act) as "*services whose delivery is mediated by information technology over the internet or an electronic network and the nature of which renders their supply ~~essentially automated and involving minimal human intervention and~~ impossible to ensure in the absence of information technology and includes electronic services such as, --*

(i) advertising on the internet;

(ii) providing cloud services;

(iii) provision of e-books, movie, music, software and other intangibles through telecommunication networks or internet;

(iv) providing data or information, retrievable or otherwise, to any person in electronic form through a computer network;

(v) online supplies of digital content (movies, television shows, music and the like);

(vi) digital data storage; and

(vii) online gaming;"

Further, a related definition to OIDAR is Non-Taxable Online Recipient (NTOR) which is defined u/s 2(16) of the IGST Act, 2017 as "*any ~~Government, local authority, governmental authority, an individual or any other~~ person not registered and receiving online information and database access or retrieval services ~~in relation to any purpose other than commerce, industry or any other business or profession,~~ located in taxable territory.*

~~Explanation. --For the purposes of this clause, the expression "governmental authority" means an authority or a board or any other body, --~~

~~(i) set up by an Act of Parliament or a State Legislature; or~~

~~(ii) established by any Government,~~

~~with ninety per cent. or more participation by way of equity or control, to carry out any function entrusted 2[to a Panchayat under article 243G or] to a municipality under article 243W of the Constitution;~~"

(Struck off portion represents the proposed retraction by Union Budget 2023)

Furthermore, the place of supply of OIDAR services has been defined as the location of the recipient of services. To avoid any ambiguities, the person receiving such services shall be deemed to be located in the taxable territory if the prescribed conditions are fulfilled.

To summarize, once the amendment is notified, any services which are rendered with the help of internet or electronic network shall be OIDAR services. If the service recipient is taxable, the recipient shall be the person liable to pay GST under Reverse Charge Mechanism. However, if the recipient is unregistered, then Section 14 of the IGST Act, 2017 has prescribed the supplier of service to be the person liable to pay tax. This has been represented by way of a diagram below:

Registered recipient

Place of supply - Defined by Section 13(12) of IGST Act, 2017

Recipient to pay GST under RCM

Unregistered recipient or NTOR

Place of supply - Defined by Section 13(12) of IGST Act, 2017

Supplier (located outside the taxable territory) to pay tax

Proposed amendment - What and Why?

The Government as a part of the amendment proposed in the Union budget 2023-24 has broadened the scope of OIDAR services, by removing the term 'essentially automated and involving minimal human intervention' from the definition of OIDAR services. This would mean that even if the services are not totally automated and involve some level of human intervention for the rendition of services, the services will get qualified as OIDAR services. Thus, the omission of the qualitative criteria of human-centric digital services would significantly widen the scope of GST on digital services. To cite an example here, in one of the AARs[1], the Company was engaged in providing computer-based test administration solutions. One level of such tests required candidates to visit test centers in India and give test on computes which was physically administered and supervised by an invigilator. The AAR held that the service involves human intervention and hence the same would not be covered in the definition of OIDAR. The department preferred an appeal before the AAAR which upheld the AARs order. Interestingly, in this AAR the opinion of the VAT Committee of the European Commission was also discussed in reference to online education courses. The committee had prescribed that courses where the lectures or seminars are delivered by tutors and streamed in real-time, such that the internet is merely a means of transmission, these features are not sufficient to constitute more than minimal human intervention. The level of human intervention should be regarded as more than minimal only if the students have the option to ask questions to the tutor, even if the option is not exercised. Therefore, similar issues are being deliberated by the EU VAT committee as well.

The amendment to the Indian GST was recommended by the GST Council in its 48th meeting wherein it was suggested that an amendment is required in OIDAR services to mitigate the likelihood of interpretational issues and legal disputes over the taxation of OIDAR services.

Let's now delve into the underlying factors that drove the government to reconsider the current provisions and propose the above amendment-

- Interpretation of the term "essentially automated and involving minimum human intervention" was a wide term and was being a subject matter of litigation. For eg. In a pre-recorded lecture, some might argue that they involve minimal human intervention during playback. However, it's important to note that there is still a significant amount of human intervention required during the creation of the recording. The question then becomes, what level of human intervention is considered "minimal"?

- Another issue pertained to the definition of NTOR, which is currently defined as any entity or individual not registered to receive

[1] *2020-VIL-71-AAAR*

online information and database access or retrieval services for purposes other than commerce, industry, business, or profession and located in a taxable territory. The definition mentioned above created confusion regarding the liability of a non-resident service provider when an NTOR is utilizing OIDAR services for business or commerce purposes but remains unregistered under GST. While the non-resident service provider is technically not liable in such cases (Section 14 of IGST Act, 2017), it becomes difficult for both the provider and GST authorities to determine whether the services are being used for personal or business purposes by the recipient.

Does the proposed amendment clear the air??

"Can the forthcoming change bring clarity or shall it sow further seeds of perplexity?" pondered an inquisitive mind.

This amendment would put the NTOR in a spot wherein even though the supplier would be the person liable to pay tax, in a situation of default, the liability may fall upon the recipient since it will be an arduous task for the Government to track the supplier in such cases. Moreover, such default may be an ignorant mistake as there is a likelihood that the supplier would not be even aware of existence of such Indian laws. The quantum of NTORs using internet-based services from service providers is humongous today and it is almost unachievable to track all such service recipients and providers to tax such services. However, the recent multilateral agreements being signed by India with various countries to promote international co-operation while respecting the rights of taxpayers to check tax evasion, may help CBIC to retrieve some bit of data to tax such service providers. However, this may not be an infallible solution and the Board may have to think for a solution to make it a surefire. Well, for now it can just be said that the mist of ambiguity still hovers maybe lesser than earlier, and only the passage of time can reveal whether the Government will be able to encompass the entire gamut of OIDAR industry.

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TAXATION OF NON-RESIDENTS UNDER THE UAE CORPORATE TAX REGIME

The UAE has introduced Corporate Tax (CT Law), which would be effective in the UAE from financial years beginning on or after 1 June 2023. Accordingly, it is imperative for foreign entities/ non-residents doing business in the UAE to evaluate the impact of CT on their operations and cash flows.

A non-resident in the UAE is subject to UAE CT on income attributable to its Permanent Establishment (PE) in the UAE or on UAE-sourced income not attributable to the PE or taxable income attributable to the nexus in the UAE. While the CT Law provides guidance on PE rules and UAE-sourced income, nexus rules are yet to be notified.

Furthermore, a non-resident entity having a Place of Effective Management (POEM) in the UAE would be considered as a resident of the UAE and would be liable to UAE CT.

In the next paragraphs, we have discussed the taxability of non-residents in the UAE.

Permanent Establishment in the UAE

The concept of PE under the UAE CT Law is largely based on the Organization for Economic Cooperation and Development (OECD) model tax convention. As per the UAE CT Law, a non-resident shall be considered to have PE in the UAE if:

· It has a fixed place of business which would inter-alia include a branch, office, factory, workshop, etc.

· Has a building or construction site or place of assembly or installation or supervisory activities in connection therewith which exceeds six months

· It has a dependent agent in the UAE who habitually exercises an authority to conclude or negotiate contracts without any material modification on behalf of the non-resident person

· A fixed place PE would not be constituted if only preparatory and auxiliary activities are conducted in the UAE

· A natural person will not be considered to constitute a PE for the foreign entity in the UAE if:

– their presence is a consequence of a temporary or exceptional situation; or

– where the natural person is employed by a non-resident; or

– the activities being conducted in the UAE are not part of the core income-generating activities of the non-resident or its related parties; or

– the non-resident does not derive UAE-sourced income.

If a non-resident constitutes a PE in the UAE, income attributable to such PE will be subject to tax at 9% (if the profits exceed AED 375,000). Currently, the UAE CT Law does not provide any specific guidance on attributing income to a PE. Accordingly, normal principles of attribution, including the use of transfer pricing methods, would have to be adopted for attribution of profits.

UAE-sourced income and the Nexus Rule

Income shall be considered as sourced from UAE if it is derived from:

- A resident person
- PE of a non-resident
- Derived from activities performed, assets located, capital invested, rights used, or services performed or benefitted in the UAE.

It would be pertinent to note that UAE-sourced income is widely defined, and it effectively covers any activity with the slightest link to the country. An illustrative list of activities that may be considered as UAE-sourced income is also provided under the law. The same is subject to certain conditions as may be determined by the Federal Tax Authorities (FTA). A few activites included in the said list are indicated below:

- Income from the sale of goods in the UAE
- Income from movable or immovable property in the UAE
- Interest on loans given to a resident in the UAE or secured by any property located in the UAE
- Insurance premiums where the insured or insured asset is located in the UAE
- Income from contracts wholly or partly performed in the UAE.

Even transactions between two non-resident persons will be covered if it involves any asset such as land, building, shares, or any event in

the UAE.

In light of the above, non-residents earning UAE-sourced income may be liable to tax in the UAE. However, there appears to be a contradiction as per the FAQs issued with the final law in regarding taxation of foreign persons in the UAE. The FAQ's answer states that "*foreign entities that operate in the UAE through a permanent establishment or that are considered resident in the UAE for CT purposes will be subject to UAE CT. Merely earning UAE-sourced income would not trigger CT payable or require the foreign entity to register and file for UAE CT*". However, no such specific exemption has been provided under the law. Considering the contradictory wordings within the FAQs and the law, clarity on treatment of UAE-sourced income is required.

At present a 0% withholding tax rate is prescribed on payment to non-residents towards UAE-sourced income. Furthermore, there are no withholding tax compliances as per the law today. However, since the withholding tax rate has been prescribed at 0%, we may see withholding tax rates increased in the future.

Also, it has been provided that the FTA would issue a cabinet decision shortly prescribing the nexus rules.

UAE CT laws specifically provide that all international agreements would prevail over local laws. Thus, where the UAE has entered

[1] Foreign Exchange Management (Overseas Investment) Rules, 2022

[2] Liberalized Remittance Scheme

[3] RBI data release on overseas investment - https://www.rbi.org.in/Scripts/Statistics.aspx

into a Double Tax Avoidance Agreements (DTAAs) with any other country, the taxability of income of the non-resident from the UAE perspective would be governed under such agreement; the same is quite beneficial. It is pertinent to note that the UAE still does not have a DTAA with some of its neighboring countries such as Kuwait, Qatar, and other prominent countries, namely the US and Australia, amongst others. Thus, companies doing business in the UAE from these countries would have to be extra careful, especially in light of the UAE-sourced income rules and the nexus rules.

Place of Effective Management (POEM)

The CT Law states that a non-resident entity effectively managed and controlled in the UAE shall be treated as a resident person for the purpose of CT and be taxable on its global income in UAE.

While the term POEM is not defined under the law, the FAQs released alongside the law state that POEM will have to be assessed on a case-to-case basis, and that the location where key managerial and strategic decisions (relevant to the non-resident entity) are made shall determine POEM.

Currently, no monetary limit/threshold has been provided for the applicability of POEM regulations. Accordingly, UAE companies with subsidiaries outside of the UAE or Key Managerial Persons located in the UAE for overseas entities needs to carefully conduct a thorough evaluation of POEM regulations.

While no specific guidelines have been provided for POEM, it could be relevant to refer to the criteria provided in OECD commentary which may help determine POEM of non-residents:

- The place where meetings of the Board of Directors or equivalent body of the company are usually held
- The place where the Chief Executive Officer and other senior executives usually carry on their activities
- The place where the senior day-to-day management of the entity is carried on
- The place where the entity headquarters are located
- The place where country laws govern the legal status of the entity
- The place where accounting records are kept

Taxation of investment income in the hands of non-residents

Dividends

UAE CT Law provides for an exemption with respect to dividends earned from UAE domestic companies. Thus, non-residents earning dividend income from investments in UAE corporates shall not be subject to tax in the UAE.

Capital Gains

Based on a strict interpretation of the law, capital gains earned by non-residents on the sale of shares held in a UAE corporate shall be taxable in the UAE. Currently, the exemption is granted only with respect to capital gains earned by UAE corporate shareholders from the sale of investments held outside the UAE, subject to meeting participation exemption conditions.

It is pertinent to note here that since the introduction of the UAE CT Law, the Federal Tax Authoirties have specified that non-residents earning investment income in the form of dividends, capital gains, interest, royalties, and other investment returns will not be subject to UAE CT. This is also specified in the FAQs. However, the same is not categorically coming out of the law. Considering the significant amount of foreign investments in the jurisdiction, a clarification on this front would be welcome for relevant stakeholders.

Indian Investments in UAE – Impact Assessment

Investment by Indian Companies/Limited Liability Partnerships (LLPs)

Indian companies/LLPs can invest in UAE companies/LLCs under the Overseas Investment Rules[1]. Investment is permitted up to 400% of the investor's net worth as on the date of the last audited balance sheet. Investment is permitted in all sectors except for real estate activities, gambling, and dealings in financial products linked to the Indian Rupee, where RBI approval will be required. Furthermore, certain additional conditions exist for investment in the financial services sector.

Individuals can invest in the UAE within their Liberalized Remittance Scheme[2] limits. However, individuals cannot invest in the financial services sector or have a step-down subsidiary.

Furthermore, portfolio investment (investment in less than 10% of the paid-up capital with no management control) in listed securities is permitted for Indian individuals as well as companies to the extent of 50% of the net worth on the date of the last audited balance sheet.

Latest trends suggest that Indian investors have invested either by way of equity contribution or loans close to USD 2,700 million in subsidiaries and joint ventures in the UAE in calendar year 2022. This is 1.5 times the investment made in calendar year 2021[3]. These statistics indicate that India is viewing the UAE as a promising investment and growth destination. Thus, Indian investors must thoroughly evaluate the UAE CT Law and transfer pricing law. Indian companies should evaluate the structure, availability, and conditions for claiming tax exemption for a Free Zone entity, the capital structure of the UAE entity, need for restructuring of operations, etc.

In addition to the same, there could be requirements for re-alignment of transfer pricing policies between the Indian companies and UAE companies, meeting substance requirements in the UAE, creating tax efficiency in the UAE, evaluation of the availability of tax credit in India of taxes paid in the UAE, accounting aspects, etc.

While the law would develop over the coming months as various cabinet decisions and notifications are released, companies should prepare for the CT Law and transfer pricing implementation in advance.

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Decoding the intricacies of the Angel Tax Provisions

In the recently presented Union Budget 2023, it has been proposed to expand the applicability of Section 56(2)(viib) of the Income-Tax Act, 1961 (the Act), commonly referred to as Angel Tax Provisions, to the issue of shares by a closely-held company to non-resident investors. Thus, the provisions of Section 56(2)(viib) of the Act are intended to apply to the receipt of consideration from any person, irrespective of their residential status. Expectedly, there has been a lot of discussion on the impact that this change would have on the flow of Foreign Direct Investments in India, the start-up ecosystem, and the investment fraternity in general. In this article, we have delved into the various nuances of these provisions.

Section 56(2)(viib) was introduced to combat the generation and circulation of unaccounted money received by a closely-held company through share premium without being backed by appropriate valuations justifying the same. Where a closely-held company issues shares at a premium, the consideration exceeding fair market value is deemed as income in the hands of the company. The mechanisms for computing the Fair Market Value (FMV) have been prescribed under Rule 11UA of the Income Tax Rules, 1962 (the Rules). It is pertinent to note that the section covers all types of shares and is not limited to the issuance of equity shares. Thus, the issue of preference shares would also get covered under this provision irrespective of the fact as to whether the shares are convertible or not.

While this provision was introduced as an Anti-Tax Avoidance tool and applicable to all closely-held companies, it became widely known as 'Angel Tax Provisions' with the growth of start-ups in India. It was called Angel Tax as it impacted investment by Indian angel investors– HNIs and family offices who invested in start-ups. This tax was applicable on start-ups who raised funds from angel investors in cases where share issue prices exceeded the value determined as per the valuation method prescribed under the Rules. Hence, start-ups often found themselves in the middle of tax litigations with revenue authorities over disputes on share valuations. In other words, the Angel Tax proved to be a major deterrent to start-up investments.

In its attempt to rationalize the inflow of investments in start-ups, the government extended relief from Angel Tax Provisions to eligible start-ups on the satisfaction of certain conditions[1]. A start-up is eligible for exemption from Section 56(2)(viib) of the Act if it is recognized by the Department for Promotion

1 The conditions were laid down in DPIIT notification G.S.R 127(E) dated 19 February 2019

of Industry and Internal Trade (DPIIT) and the aggregate paid-up capital and share premium after issue/proposed issue does not exceed INR 25crores.

To be recognized by the DPITT, an entity must satisfy several conditions, one of which is to obtain a certificate of an eligible business from the Inter-Ministerial Board of Certification as constituted by the DPIIT from time to time. The eligibility conditions were severely restrictive in terms of the turnover (not exceeding INR 100 crores in any preceding year), and the nature of business of the start-ups (working towards innovation, development or improvement of products, processes, or services, or a scalable business model with a high potential of employment generation or wealth creation), among others.

As a result, start-ups that may not satisfy the above conditions continued to fall within the ambit of the Angel Tax provisions. Moreover, since the valuation of start-ups is based on future growth prospects, this basis is often rejected by tax authorities. As per a survey performed by the community-based social network Local Circles in 2019, 73% of the 2500 start-ups that participated in the survey said they had received income tax notices since inception. 70% of those notices were in relation to Section 56(2)(viib). Various News reports, including the Economic Times, have covered issues in terms of tax notices and questions faced by start-ups on valuations. The main area of concern for start-up entrepreneurs and angel investors was the manner in which the fair valuation of the start-up was assessed by income tax officials. It was reported that in most cases, the valuations were worked out by the officers at their discretion in a completely arbitrary manner.

This leads us to the question as to whether **valuations can be called into question by tax authorities?**

The Act prescribes that the valuation of shares for Section 56(2)(viib) shall be the value:

(a) As may be determined in accordance with Rule 11UA of the Rules (which provides an option of either the Net Asset Value (NAV) method or Discounted Cash Flow (DCF) valuation (by category/merchant bankers) **or**
As may be substantiated by the company to the satisfaction of the tax authorities based on the value of its asset, including intangible assets, **whichever is higher**.

Earlier, various judicial forums have acknowledged and upheld the professional competency and expertise of valuers in undertaking the valuation exercise[2]. However, in the recent past, the approach adopted by the Courts and Tribunals suggests that the tax authorities may not accept the valuation reports at face value, and they would have to be justified by the taxpayers.

The said issue came up for the first time before the Kolkata Bench of the Tribunal in the case of Microfirm Capital (P) Ltd[3]. In this case, the Tribunal rejected the contention that if an Assessing Officer (AO) is not satisfied with the value determined by the expert valuer, then the only option is to get it done by another expert valuer. The Tribunal held that the AO not only has a right but is also duty-bound to examine the valuation report and record their findings.

Such findings should be based on relevant material and the rational view taken in a judicious manner. Thus, this decision gave powers to the AO to examine the valuation report submitted by the taxpayer.

This was followed by the Delhi Tribunal judgment[4] wherein it was held that fair valuation by a merchant banker could only be verified if the taxpayer provided **sufficient evidence to substantiate the basis of cash flow projections and to establish reasonable connectivity between projections and reality.** It also emerged that a valuer cannot solely rely on information provided by management. Valuers are required to independently verify the data. Due diligence on the part of the valuer in verifying the truthfulness, accuracy, and completeness of the information provided is a pre-requisite. **In the absence of sufficient evidence to substantiate projections for the DCF valuation, the officer is justified in rejecting the DCF valuation and adopting the NAV method.**

Although the tide seemed to be against taxpayers, a slight relief came in the form of the below rulings that tried to draw boundaries on the powers of revenue authorities with respect to valuation:

In one of the rulings before the Bangalore ITAT in the case of Town Essential Pvt Ltd[5], the taxpayer had adopted the DCF method for valuing fresh issue of shares. However, the taxpayer failed to prove the correctness of the projections used in this regard to the satisfaction of the AO. Accordingly, the AO adopted the NAV method to determine the share value. **The Bangalore Tribunal noted that, while the AO may determine fresh valuation if not satisfied with the value adopted by the taxpayer, the basis of the same must be DCF and cannot be another method. Furthermore, the basis of valuation can only be the facts and data available on the date of valuation rather than the actual results of the future.**

Another ruling in this context was rendered by the Ahmedabad Tribunal in the case of Gaurav Hotels (P) Ltd[1][6]. In the said case, the taxpayer had used an NAV-based valuation by adopting the market value for land and building. The said valuation was backed by a Chartered Accountant's report justifying the same. The AO rejected such a valuation holding that the book value approach needs to be considered. However, the Tribunal rejected the AO's contention. It ruled that where the taxpayer has clearly adopted the second method prescribed in Section 56 (asset-based value) and the AO finds no infirmity in the supporting valuation reports, such share valuation is justified.

Considering the above rulings, it would be difficult to say that the valuation is an expert's domain in the current times. The judicial precedents indicate that the AO has the power to look into the valuation report and if he or she

finds gross irregularities, then they can undertake a fresh valuation. Although there are minor restrictions on the exercise of these powers, as noted in the Bangalore and Ahmedabad Tribunal rulings, the topic of valuation remains highly critical. It is of utmost importance that the valuers maintain robust documentation and sound reasoning for each of the factors/ basis/ assumptions made while making the projections. The valuer's role has become more important than ever, and documentation would be key to challenging the findings of the AO.

While the start-ups are already on their toes with respect to valuations, fresh challenges await them in the wake of the recent Budget amendments. With the government proposing to expand angel taxation to the issue of shares to non-residents in the recent budget, greater scrutiny is expected for start-ups that are funded by overseas investors.

What the recent budget implies for investments into India?

Finance Bill 2023 proposes to expand Angel Tax Provisions to the issue of shares by a closely-held company to non-resident investors. Thus, the provisions of Section 56(2)(viib) of the Act are intended to apply to the receipt of consideration from any person, irrespective of their residential status.

While the rationale for the amendment does not explicitly come out from the memorandum to the budget, the heading to the clause mentions it to eliminate the possibility of tax avoidance. Thus, now the issue of shares will have to be at a consideration that does not exceed its fair market value. Any excess of the consideration over the FMV shall be taxable as income in the hands of the company. Since the valuation aspect in the case of issuance of shares to a non-resident is governed only by the provisions of the Companies Act and the Foreign Exchange Management Act (FEMA), bringing it within the purview of even income tax valuation requirements will certainly have far-reaching effects.

Under the erstwhile FEMA regulations relating to overseas investment, reinvestment of funds to India was permissible with specific prior approval from the Reserve Bank of India (RBI). Thus, cases involving round-tripping were handled on a case-to-case basis with much scrutiny. However, under the amended framework, the RBI has permitted round-tripping for genuine business reasons, subject to restrictions on the number of layers. Thus, such cases may not require undergoing the rigors of obtaining RBI approval.

While the requirement of having a genuine business reason has been retained, there may be a practical challenge in identifying cases involving tax avoidances/leakages and tracing

the source of funds. This could be one of the possible reasons to have an anti-abuse provision as a safeguard under the tax legislation.

However, this amendment may pose a challenge in meeting the valuation requirement. It is pertinent to note that as per the provisions of FEMA, the issue of shares has to be at least at FMV. Thus, issue of shares at a consideration below the FMV is not permissible as per FEMA. On the contrary, the income tax provisions would require the issue of shares to be at a consideration at or below the FMV. Generally, the methodologies under both laws would be the same (internationally accepted methodology of valuation basis discounted free cash flows). This results in a dichotomy and the only way out would be to issue the shares at exactly the FMV. On the other hand, the extension of Angel Tax to non-residents may also negatively impact FDI into India and the start-up ecosystem which primarily relies on investors' money to funnel growth.

Thus, it would be interesting to see how these issues get addressed before the passage of the Bill to become an Act.

Conclusion

Given the current market scenario, successful fundraising is the key not only for start-ups but also for all companies in general to realize their expansion plans. However, the Angel Tax Provisions, along with other market-driven factors, serve as an impediment for investments in start-ups. The restrictive nature of eligibility conditions for availing tax exemptions add to the woes of start-ups. Furthermore, the uncertainty with respect to valuations also creates hassles at the tax assessment stage. In this context, the new amendment extending the Angel Tax Provisions to the issue of shares to non-residents is not a welcome move. We must keenly watch the developments on any reliefs that may be extended from the new Angel Tax Provisions over the coming months.

2 T.D. Venkata Rao v Union of India [1999] 237 ITR 315 (SC), Sarma (A.S.) v. Union of India [1989] 175 ITR 254 (AP) Nataraj (T.S.) v. Union of India [1985] 155 ITR 81(Kar.) Rajkot Engineering Association v. Union of India [1986] 162 ITR 28(Guj.), Miheer H. Mafatlal vs Mafatlal Industries Ltd {JT 1996 (8) 205}

3 Microfirm capital (P) Ltd v DCIT (2018) 89 taxmann.com 23 (Kolkata-Trib)

4 Agro Portfolio (P.) Ltd. v. ITO [2018] 94 taxmann.com 112 (Delhi - Trib.)]

5 Town Essential (P) Ltd v CIT(A) [2021] 130 taxmann.com 263 [Bangalore Tribunal]

6 Gaurav Hotels (P) Ltd v ITO [2022] 137 taxmann.com 409 [Ahmedabad Tribunal]

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Amendments to IAS 8

The International Accounting Standards Board (IASB) has issued amendments to Internal Accounting Standard (IAS) 8: Accounting Policies, Changes in Accounting Estimates and Errors. These amendments come as a result of the key concept of "*accounting estimate*" not finding a verbatim or substance-driven definition within the framework. In the course of this article, we discuss the newly-prescribed definition of the term "accounting estimate" by throwing light on the following matters:

- Need for guidance and impact on Indian reporting
- Maintaining consistency with standards on auditing and assurance
- Responsibilities of the management while making and reporting accounting estimates
- Responsibilities of the auditor while auditing accounting estimates

The need for Guidance and Impact on Indian Reporting

IAS 8 prescribes guidance on accounting policies, changes in accounting estimates, and errors. While IAS 8 prescribes guidance on these standards, the standard does not define "accounting estimates." Interestingly, IAS 8 defines changes in accounting estimates but does not define the core term "accounting estimates."

This gap in the standard leads to application issues, as reporting entities find it challenging to demarcate changes in accounting policies from changes in accounting estimates. Here, it is imperative to distinguish between changes in accounting policies and estimates due to the methodology of their application, which has been summarized below:

Changes in accounting estimates	Changes in accounting policies	Impact of not being able to distinguish between accounting policies and estimates
Prospectively applied	Retrospectively applied	Inconsistent financial reporting leads to misleading financial statements.

Hence, the IASB issued a clarification on the definition of the term "accounting estimates" to iron out the challenge of distinguishing between accounting estimates and policies.

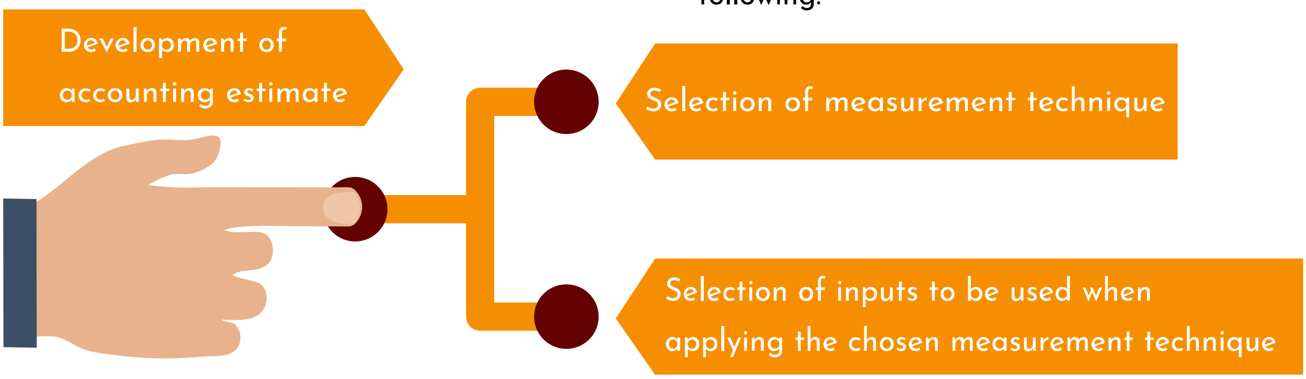
Indian Accounting Standards (Ind AS) draw direct guidance from the International Financial Reporting Standards (IFRS). The Institute of Chartered Accountants of India (ICAI) issued an exposure draft containing corresponding amendments to Ind AS 8, the Ind AS counterpart of IAS 8. This exposure draft is effective from 1 April 2023.

Link to ICAI exposure draft: https://resource.cdn.icai.org/64954asb52213.pdf

The new definition of "accounting estimates" under IAS 8 is given below:

"Accounting estimates are monetary amounts in financial statements that are subject to measurement uncertainty."

This now clarifies that accounting estimates are developed to achieve the objectives of the accounting policy. The process of developing an accounting estimate is driven by management judgment that encompasses the following:



The amendments to IAS 8 now list examples of estimates that can be made by the management. This prescribed list covers:

- The net realizable value of an item of inventory, applying IAS 2: Inventories
- Loss allowance for expected credit losses, applying IFRS 9: Financial Instruments
- The fair value of an asset or liability, applying IFRS 13: Fair Value Measurement
- The depreciation expense for an item of property, plant, and equipment, applying IAS 16: Property, Plant, and Equipment.

The erstwhile definition of accounting policies mentioned as "The specific principles, bases, conventions, rules, and practices applied by an entity in preparing and presenting financial statements" stays unchanged under the amended IAS 8.

Consistency of New Definition with International Standards on Audit (ISA)

International Standard on Auditing (ISA) 540

ISA 540: Auditing Accounting Estimates and Related Disclosures, including fair value accounting estimates, defines accounting estimates as "An approximation of a monetary amount in the absence of a precise means of measurement. This term is used for an amount measured at fair value where there is estimation uncertainty, as well as for other amounts that require estimation."

IAS 8

The amended IAS 8 defines an accounting estimate as "Accounting estimates are monetary amounts in financial statements that are subject to measurement uncertainty."

Our Comments

The revised definition of accounting estimates in the amended IAS 8 is on similar lines as that of ISA 540, thereby maintaining consistency between the definition for both reporting as well as assurance purposes.

ISA 540 uses the term accounting estimates in the following light:

- As an approximation of a monetary sum of money in the absence of a precise means of measurement
- For amounts to be measured at fair value where there is an estimation uncertainty.
- For other amounts that need estimation.

From an Indian assurance perspective, SA 540 (the Indian counterpart of ISA 540) has adopted the word-for-word definition from ISA 540. Hence, from 1 April 2023 onwards, the definition of "accounting estimate" under Ind AS 8 and SA 540 will be synonymous.

Reporting accounting estimates are subject to "estimation uncertainty" and this will result in inherent limitations while auditing the information based on such estimates.

The application of ISA 540/SA 540 clearly prescribes the management's responsibility while making and reporting accounting estimates as well as the auditor's responsibility while auditing the same. This has been discussed in the next section.

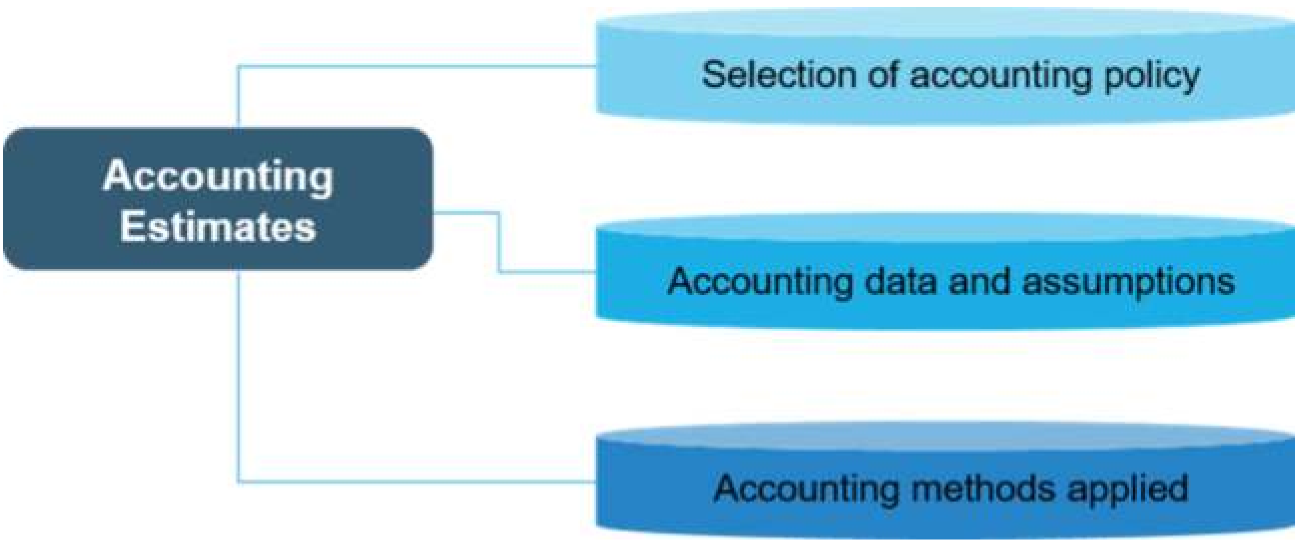
Responsibilities of the Management while Making and Reporting Accounting Estimates

Financial statements are a structured accumulation of management assertions, generally made on an annual basis. While reporting sums are based on an estimate, the foremost step is to identify all those events and transactions that would require an estimate to be used.

A balanced combination of the following factors will play a crucial role in reporting and presenting accounting estimates in the financial statements:

- Prior experience on the part of the management while reporting events and transactions that require estimates
- The management's understanding of the nature of reporting and business of the entity, along with the industry in which it operates.

Accounting estimates are based on three fundamental aspects illustrated below:



Here, it must be appreciated that internal controls play a key role in making appropriate assumptions.

The management is required to establish a robust process that acts as a filter to ensure that estimates are made in a fair manner that clearly reflects accuracy. Financial statements are at risk of being grossly misleading if estimates are inaccurately based. The management has to install appropriate measures to avert this risk of misstatement.

This can be achieved by:

Selection of appropriate accounting policies

Developing or identifying relevant data and assumptions that affect accounting estimates

The assumptions used to base the estimates must be supported by purported sources of information, which could be both internal as well as external to the entity. Internal information can be drawn from the entity's accounting data and trends, while external information can be based on industry trends and practices. Estimates for one-off events, complicated technical issues, and unusual transactions are better supported by expert inputs.

Selecting appropriate accounting policies and prescribing an appropriate estimation process

Developing and identifying relevant data and assumptions

Periodic monitoring and review

The management will have to stay true to the prescriptions of the applicable GAAPs in developing estimates. Guidance will have to be drawn from how GAAP prescribes estimates to be presented in the case of items such as expected credit losses.

Periodic monitoring and review

Re-estimation of existing estimates, re-examination of conditions on which estimates were based, and a technical review of reported figures help ensure sound and fair reporting on the part of the management. Estimates will

always be prone to risk and questionable precision. Here, the account controllers have to holistically evaluate alternate assumptions as per the circumstances and situation at hand.

Auditor's Responsibility

Both ISA 540 and SA 540 require the auditor to perform audit procedures that enable a thorough understanding of the management's process of developing estimates and reporting based on those estimates. This would require the auditor to examine whether controls monitoring the construction of these estimates are:

- Sufficient overall
- Effectively operating with zero or minimal exceptions such as a management over-ride in special cases

The process of assurance is primarily driven by the auditor's professional judgment, and this plays a key role in the auditor assessing how the management has evaluated the impact of estimation uncertainty. All data, up to the date of the audit report, has to be carefully subjected to audit procedures in order to minimize audit risk, which inherently exists while dealing with accounting estimates.

Also, communicating with those charged with governance regarding the following matters would be essential to:

- The qualitative aspect of estimates
- Any indications of bias on the part of the management while building estimates and reporting based on the same
- Deficiencies in internal controls, especially with respect to processes that are applied in reporting based on estimates
- Auditor's reservations about the estimates reported

The synonymity between SA 540 and ISA 540 ensures that Indian assurance meets globally required levels of quality.

Conclusion

The ICAI adopting international amendments in its guidance to accounting framework in India ensures that Indian accounting qualitatively navigates the tides of international changes. Ind AS is not just an accounting framework but rather a means to ensure uniformity with global practices. These timely changes ensure that Indian reporting and assurance match global developments in the sphere. It is needless to say that this immensely benefits reporting and communication of financial information with global audiences who have an interest in Indian markets.

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Understanding the Complicated World of Transfer Pricing *in the* Software Business

Introduction

Setting prices for commodities, services, or intangible property transferred between affiliated businesses within a multinational corporation (MNE) is a crucial and complicated component of international taxation known as transfer pricing. The rise of digitization and globalisation has made it possible for businesses to build, and distribute software products and services across borders. This practice has grown particularly important in the software industry. To maintain compliance with tax laws and prevent future disputes, it is crucial to comprehend the complexities of transfer pricing as the industry develops further.

I. The Importance of pricing the products and services right in the Software industry

For various reasons, transfer pricing or pricing as a component has gained significance in the software industry.

Some of the reasons are as follows:

A. **Global Expansion:** As the software sector has grown, multinational enterprises (MNEs) with several subsidiaries operating in numerous countries have proliferated. The complexity of transactions has risen as a result of this expansion, necessitating the use of suitable transfer pricing techniques. From the service provision country point of view, the software industry majorly contributes to the increase in forex earnings through the export of software, further adds to the GDP of the country, and generates employment opportunities, thereby increasing the standard of living of people and most importantly boosts the Start-up Ecosystem.

B. **Ownership of Intellectual Property (IP):** Software products frequently contain valuable IP rights like patents, copyrights, or trademarks. The allocation of income from these Intellectual rights among MNEs' subsidiaries in various tax jurisdictions is facilitated by proper transfer pricing. As IPs ideally represent more than 80% value of the MNE, such placements and valuation of IPs become important from a global business point of view.

C. **Tax Compliance and Risk Management:** Transfer pricing aids MNEs in ensuring that their international business is conducted on an arms-length basis, reducing the possibility of double taxation or tax disputes with taxing authorities.

II. Transfer Pricing Challenges faced by the Software industry.

When it comes to transferring pricing, the software sector confronts unique challenges:

i. **Valuation of intangible assets:** Intangible resources like algorithms, data, and software code account for a major portion of the value of software products. It might be challenging to value these assets since their value may not be adequately captured by conventional valuation techniques. Most of the time, the cost-based methods and even income-based methods might fail to arrive at the right value of the intangible assets. Undervaluing the intangible assets might carry risks and challenges on the Hard-to-Value- Intangibles (HTVI), and might be open to scrutiny and valuations even with time.

ii. **Technological Advances:** The software business is known for its ongoing innovation and quick technical advancements, which can cause changes over time in the value of intangible assets. It is therefore difficult to establish suitable transfer pricing for software items, especially the IPs. A comparable third-party data being available for the same or similar technology would be another hurdle in terms of transfer pricing analysis.

iii. **Licensing and Royalty Agreements:** To benefit from their intellectual property, many MNEs in the software sector rely on license and royalty agreements. While these agreements frequently contain several intangible assets and different payment mechanisms, determining arm's length values for them can be difficult. Often after undertaking a detailed transfer pricing analysis under CUP or AOM, the taxpayer must resort to derived TNMM to defend the expenditure undertaken on royalty payment. Further, the test of the benefit accrued to the taxpayer from a payment perspective also needs to be proven.

iv. **Operating costs in cost plus method**: If the service provider company has set prices under a Cost plus method. Often litigation and challenges may arise in the definition, allocation and identification of operational costs to arrive at operational profits. This may include positions to be taken on costs like foreign exchange costs, ESOP costs, goodwill amortisation, free-of-cost assets, provision of bad and doubtful debts, One-time costs and certain internal re-charges.

v. **Substance Test - Actual Conduct over Form: The tax authorities have focused on the FAR analysis over the period**. As a result, they have started analysing the actual conduct of the people on the ground rather than the conduct provided in the inter-corporate agreement. The questions by the tax authority may revolve around the provision of e-mail trails on decision-making with the customer, LinkedIn profiles, Job descriptions of the employees etc. If the profiling goes beyond limited risk service provision, the tax authorities might want to re-characterise the operations of the service provider to a high-risk service provider, wanting higher profit attribution or as an entrepreneur. Therefore, appropriate screening of the operations should be undertaken before setting the transfer prices.

III. General approaches followed in Transfer Pricing in the Software industry:

The Organization for Economic Cooperation and Development (OECD) offers recommendations for choosing transfer pricing techniques that can be used in software industry transactions:

A. Conventional Transaction Approaches, such as the Cost Plus Method, the Resale Price Method, and the Comparable Uncontrolled Price Method (CPM) are technically and practically the most used method to determine the arm's length price. These techniques compare the terms and conditions of a controlled transaction against those of equivalent uncontrolled ones.

B. Transactional Profit Methods: This method consists of the Profit Split Method (PSM)and Transactional Net Margin Method (TNMM). According to the respective contributions of each participant to the transaction, namely a FAR analysis, these methods divide earnings among the related parties or associated enterprises after analysing the profitability of regulated transactions.

While the above-mentioned methods could give a good glimpse into the applicability of the same for general software service and development transactions, the challenge is faced while using transfer prices by the entrepreneur entity that is the holder of the intangible and undertakes the risk.

IV. Documentation of Transfer Price and Compliance

To prove compliance with tax laws in numerous jurisdictions, MNEs operating in the software sector must maintain thorough transfer pricing documentation. This documentation ought to contain:

A. A thorough transfer pricing policy explains the company's approach to pricing intercompany transactions.

B. A thorough functional study of each party participating in an intercompany transaction to determine the roles, risks, and responsibilities that apply to each.

C. The choice and use of the best transfer pricing method for every transaction, together with the data and analysis that support it.

D. Often reviewing transfer pricing policies and supporting paperwork to make sure they fit with corporate operations and any modifications to tax law.

E. Inter Corporate Agreements showcase the legal arrangement of the transactions between the related party. This may act as the starting point for the transfer pricing analysis.

V. Conclusion:

The intricacy of licencing and royalty agreements, the nature of intangible assets, and the speed at which technology advances make transfer pricing in the software sector particularly difficult. MNEs must create thorough transfer pricing procedures and keep thorough paperwork to assure compliance with tax laws in multiple jurisdictions to handle these concerns. To modify their transfer pricing plans appropriately, they should also keep abreast of changes to tax regulations and developments in the business. MNEs in the software sector can reduce tax disputes, maximise their global tax payments, and promote their future expansion in an increasingly linked world by properly managing transfer pricing risks.

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CURIOUS CASE OF TAXABILITY OF SECONDMENT AGREEMENTS UNDER GST AND SERVICE TAX

Brief overview of the issue

The Indian economy today is today dominated by businesses having global footprint, propelled by Indian establishments of foreign multinational enterprises as well as the Indian multinational companies. The execution of operations at global level is dependent on transfer of knowledge, expertise and technology between group entities. One way to facilitate flow of knowledge and technical expertise is through the secondment of employees.

Secondment is essentially a tripartite arrangement where the employee of one company is deployed with another for a specific duration. The seconded employee works for and under the control of the transferee company. The transferor company retains the right to recall or dismiss the seconded employee from the employment. The economic burden of salary of the seconded employee is borne by the transferee company for the duration of the secondment. The salary is either directly remitted by the transferee company to the seconded employee, or the transferor company remits the salary to the seconded employee and is then reimbursed by the transferee company for the same. Several foreign nationals of advanced economies enjoy social security benefits by virtue of their nationality. In these cases, the transferor company pays salary and other perquisites to the seconded employee and the same is reimbursed by the transferee company in India on actuals basis.

The jurisprudence regarding taxation of secondment agreements was fairly settled under both the income-tax law and *erstwhile* service tax law. However, the arrangement was

thrust into limelight in 2022 by the Hon'ble Supreme Court's decision in the case of ***CCE v. Northern Operating Systems Limited*, *2022 (61) GSTL 129 (SC)*** ('Northern Operating Systems'). The Apex Court held that secondment does not give rise to employer-employee relationship between the seconded personnel and the transferee company. The secondment of employee amounts to provision of a taxable service by the transferor company, more specifically import of manpower supply service by the transferee company. The transferee company is accordingly required to deposit service tax thereon at applicable rate under the reverse charge mechanism.

Treatment under income-tax law

Where salaries were directly remitted to the seconded employees, the Indian entities deducted tax at source ('TDS') under Section 192 of the Income-tax Act, 1961 ('Income-tax Act'). However, no such deductions were made for reimbursement of salaries to the transferor company. The industry argued that these pay-outs did not form salary in the absence of employer-employee relationship between the transferee company and the seconded employee. The Hon'ble Supreme Court in the case of ***CIT v. Eli Lily & Company India (P) Limited*, *(2009) 15 SCC 1***, held that as long as the pay-outs were rendered in consideration for work undertaken by the seconded employee for the transferee, they would qualify as 'salary'. In effect, the secondment arrangement resulted in the formation of employer-employee relation between transferee company and seconded employee. It is irrelevant whether such pay-outs were made directly to the seconded employee or by way of reimbursements to the transferor company. The transferee company accordingly became liable to deduct TDS under Section 192 of the Income-tax Act, irrespective of the mode of payment.

Over the years, the revenue has sought to tax secondment arrangements as service permanent establishments[1] as well as under the head of fee for technical services[2], but to little avail. These proposals were negated by the Courts *inter alia* on the ground that the employment of seconded employee remains with both the transferor company and the transferee company. The former forms the *de jure* employer, whereas the latter forms the *de facto* employer[3]. As a result, the income-tax law treats secondment arrangements as one creating a *de facto* employee-employer relation between the transferee company and the seconded employee, which is subject to TDS under Section 192 of the Income-tax Act.

Treatment under service tax law

Under the *erstwhile* service tax law, the tax authorities contended that secondment of employees tantamount to supply of service, more specifically manpower supply and recruitment agency service. Whereas taxpayers claimed that such arrangements were within the scope of employer-employee relationship which was excluded from the scope of taxable service. The Customs, Excise and Service Tax Appellate Tribunals ('Appellate Tribunal') however routinely struck down the levy of service tax on secondment pay-outs by treating

[1] DIT (International Taxation) v. Morgan Stanley and Company Inc., (2007) 7 SCC 1
[2] DIT v. Abbey Business Services India (P) Limited
[3] Toyota Boshoku Automotive India (P) Limited v. ACIT; Goldman Sachs Services (P) Limited v. DCIT, [1] TS-341-ITAT-2022(Bang)

them as consideration in lieu of activities rendered by an employee to its employer.[4] Interestingly, the Appellate Tribunals too appreciated the concepts of dual employment or shared employment. This dispute attained a degree of finality when the Apex Court dismissed the revenue's appeal in **2019 (24) GSTL J171 (SC)** against the order of the Appellate Tribunal in ***Nissin Brake India (P) Limited v. CCE*, 2019 (24) GSTL 563 (Tri-Del.)**.

Given the well-settled jurisprudence, the decision of the Hon'ble Supreme Court in the case of *Northern Operating Systems* has upset the *status quo*. The beating heart of the issue before the Apex Court was the existence of employer-employee relationship between Northern Operating Systems ('NOS India') and the seconded employees. The Apex Court did not lay down any determinative tests to conclude the existence of employer-employee relationship, but observed that a holistic view needs to be formed by application of various tests, *viz.* effective control, manner of performance, ownership of assets, power to dismiss, shall suffice to prove the same.

It is interesting to point out that the Apex Court does not equate secondment arrangement with service of manpower supply. The Apex Court conspicuously records that the decision is restricted to the fact pattern present in the case of Northern Operating Systems. A thorough examination of the Apex Court's decision will reveal that judges were primarily influenced by the nature of the activity undertaken by NOS India, the manner of computation of consideration of supplies rendered by NOS India and the purpose of secondment arrangement. Interestingly, NOS India merely provided backend support services, general back office and operation support to its group companies, *viz.* information technology, bank, inventory etc. The secondment arrangement was brought into effect to supervise the activities of employees at NOS India and ensure quality of backend operations. Notably, NOS India was entitled to a fixed consideration equal to 115 per cent. of the costs incurred. Effectively, the employees of overseas group entities of NOS India were placed in India to undertake the work of overseas group entities. Therefore, the apprehension of a device to circumvent the formation of a service PE loomed large in the mind of the Court. In light of these specific features of the secondment arrangement, the Apex Court held that the same was in effect a contract for service.

It is important to note that the Apex Court did not discuss the concept of dual employment or *de facto* employer versus *de jure* employer. The concept of dual employment can be understood as explained in the Commentary to Article 15 of the ***OECD Model Tax Convention on Income and on Capital*, 2017**. Article 15 *inter alia* deals with the taxation of salaries, wages and other similar remuneration of a resident of one country from exercise of employment in another country. The Commentary lays down several criteria including substantive control, right to instruct the employee, payment of salary, right to dismiss. The Commentary also recognises the concept of 'dual employment' and explains the same in the following manner:

> *"Even of the employer in the residence state does not release the secondee from his duties the entity to which the employee is seconded could qualify as an employer and, thus, the*

[4] Franco Indian Pharmaceutical (P) Limited v. CST, 2016 (42) STR 1057 (Tri-Mum.); Volkswagen India Private Limited v. CCE, 2014 (34) STR 135;

employee may have two employers. This could be, for instance, the case if the employee has two distinct functions for which he reports to each group enterprise separately"

Such entities are said to form the economic employer or *de facto* employer as against the de jure employer which is the transferor company. These concepts are blatantly absent from the Apex Court's discussion in Northern Operating Systems.

The Appellate Tribunal in its recent decision in the case of ***Dell International Services India Private Limited v. CCE*, 2023-VIL-171-CESTAT-BLR-ST** made no attempt to discern the facts in the case of Dell International, and instead proceeded to indiscriminately apply the ratio of *Northern Operating Systems*. Based on the above set of decisions upsetting the law, the Directorate General of GST Intelligence has issued a slew of notices to various taxpayers demanding details of remittances and directing deposit of service tax.

Conclusion

Even though the Apex Court has clarified that its decision is only applicable to the facts at hand, this decision is susceptible to ubiquitous application by tax authorities. The doctrine of *stare decisis* binds the authorities to stand by the decisions of superior Courts. However, where the facts of the matter at hand differ, dutiful adherence to a former decision is a nonsensical exercise. The field of indirect taxes is no stranger to the dogmatic application of Apex Court decision: Ultra Tech Cement (cenvat credit on outward transportation of goods), Matsushita Television & Audio (loading of royalty in assessable value of imported goods).

The issue is not merely restricted to erstwhile service tax regime, but will indeed have a bearing on treatment being meted to secondment arrangement under the GST regime. It is imperative that the industry does not fall prey to the demands being raised by the tax authorities, but contemplates its options, weighs in the risks, gauges the strength of its matter and then decide its course of action. The industry might as well be required to carefully structure its transactions and strengthen its agreements, so that it serves the needful purpose as and when the matter goes for litigation.

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Foreign Tax Credit

Overview and Related issues

Introduction:

The era of globalization and digitalization has brought a revolution in the way businesses are conducted, bringing the economies/geographies closer. While the businesses are evolving, the tax challenges relating to the right to tax the income between the Source and Residence Country are equally evolving.

Tax Treaties play a very crucial role to ensure that the taxes on income are distributed between the sovereigns while eliminating/ minimizing double taxation in the hands of the person earning the income. In this article, we are giving an overview of the regulations relating to the claim of Foreign Tax Credit (FTC) in India and the related tax issues.

Foreign Tax Credit:

FTC is allowed to be a resident of India in respect of the tax paid by him in a source country or specified territory outside India either by deduction or otherwise. FTC is allowed in the year in which the corresponding income has been offered to tax in India. Where the income is offered to tax in multiple years, FTC is allowed on a proportionate basis corresponding to the income offered in relevant years.

The key provisions relating to FTC in the Income-Tax Act, 1961 (ITA) read with the rules thereunder[1] are as follows:

1. FTC is allowed in respect of tax paid outside India irrespective of whether India has entered into a Double Taxation

[1] Section 90, 91 of the Income tax Act, 1961(ITA) read with Rule 128 of the Income tax Rules 1962.

Avoidance Agreement (DTA) with such country or specified territories or not. Where DTA is entered, the FTC is allowed for the taxes covered under the DTA. The provision of the DTA has an overriding effect over the provisions in ITA to the extent they are more beneficial. In case of no DTA, the FTC claim may be considered as per the provisions of section 91 of the ITA.

2. FTC is restricted to the amount of tax payable in India on the corresponding income. Excess foreign tax paid over the taxes payable in India will not be allowed as credit. FTC can be claimed only against the tax, surcharge, and cess payable on the corresponding income in India. As such, it cannot be claimed against any interest or penalty payable under the provisions of the ITA.

3. FTC is allowed where the taxes are payable in India on the corresponding income under the normal provisions of ITA as well as where Minimum Alternate Tax (MAT) is payable. Where the FTC is claimed against MAT, the excess of FTC over the FTC allowable against tax payable under the normal provisions of ITA will be ignored while computing the MAT credit carried forward.

4. For claiming the FTC, the taxpayer is required to file the prescribed form - Form 67 by the end of the relevant assessment year in which the corresponding income is offered to tax and where the return of income has been furnished within the due date of filing an original tax return or belated tax return. The form is required to be filed online and needs to be accompanied by the relevant proofs substantiating the payment of taxes in a foreign country,

Over the years, there have been various issues relating to the eligibility to claim FTC, the amount that can be claimed as a credit, relating to filing of Form 67, which we have covered in the ensuing paragraphs.

(i) Eligible persons for claiming FTC in India

The taxpayer is eligible to claim the FTC paid in the source country in the country of residence. Where a taxpayer qualifies as a tax resident in both the countries i.e., in the Source and Residence country, then his tax residency is determined by the tie-breaker rule provided in the DTA or may be determined by the competent authorities as specified in the DTA.

In India, a person who qualifies as a "tax resident" is further categorized as Resident and Ordinarily Resident (ROR) or Resident but not ordinarily resident (RNOR), depending on their number of days of stay in India. Irrespective of the residential status, i.e., ROR or RNOR, the taxpayer should be eligible to claim credit for the taxes paid in the source country once he qualifies as Resident. Reference in this regard can be made to the decision of the Hon'ble Delhi Tribunal in the case of Aditya Khanna[2] wherein it was held

[2] [2019] 105 taxmann.com 323

that RNOR is also eligible to claim FTC in India in respect of taxes paid abroad on doubly taxed income.

(ii) Relief against State Taxes

In certain countries (for example the USA), income taxes are levied by the State as well as the Central Government. The eligibility to claim FTC for State taxes is a subject matter of dispute, especially where there is a DTA with that respective Country and the taxes under the DTA do not cover state taxes.

For instance, in the USA, the tax is levied by the Federal Government as well as State Government. The DTA between India and USA covers only federal taxes. A question arises whether the state taxes paid in the USA can be claimed as FTC.

The Karnataka High Court, in the case of Wipro Ltd[3], has held that where DTA does not cover taxes like state taxes payable on income, FTC can be availed under Section 91 of the ITA. The DTA between India and USA does not cover state taxes payable in the USA. The High Court held that taxes on income paid to the state of a country like the USA should be allowed as a credit under section 91 of the ITA.

The Mumbai Tribunal, in the case of Tata Sons Ltd[4] has held that Section 91 of ITA does not discriminate between State and Federal taxes and, in effect, provides for both types of Income-taxes to be considered for the purpose of tax credits against Indian Income-tax liability. Hence, the taxpayer is, in principle entitled, to tax credits in respect of the State as well as Central tax payable outside India.

The Ahmedabad Tribunal, in the case of Dr. Rajiv I. Modi[5] allowed credit for state taxes paid in the USA.

As such, the judiciary has held that FTC is eligible for both State as well as Central taxes.

(iii) Allowability of FTC where income is exempt from tax in India:

Where an income is subject to profit-linked deduction and no tax is payable in India, a question arises whether the taxpayer shall be eligible to claim FTC in respect of such income. Here the language of the DTA Article on the elimination of Double taxation is very important.

In this context, the decision of the Karnataka HC in the case of Wipro Ltd *(supra)* is relevant. The taxpayer had claimed a deduction under Section 10A of the ITA and claimed FTC for the taxes paid in USA and Canada. The FTC claim was disputed as to whether the taxpayer is eligible to claim FTC where there is no tax paid on the income in India. The Hon'ble HC held that the income is chargeable to tax and is includible in the total income of the

[3] [2015] 62 taxmann.com 26, [2016] 382 ITR 179
[4] [2011] 10 taxmann.com 87 (Mum.)
[5] [2017] 86 taxmann.com 253

taxpayer, but no tax is paid because of the deduction/ exemption given under Section 10A of the ITA for a period of 10 years. The said deduction/ exemption granted under the statute has the effect of suspending the collection of income tax for a period of 10 years. It does not make the said income not leviable to income tax. Merely because the deduction/ exemption has been granted, it cannot be assumed that the taxpayer is not liable to tax,and therefore, the assessee is eligible for FTC under Section 90(i)(a)(ii) of the ITA.

Further, the Hon'ble HC held that the income derived by an Indian resident, which is taxable in the USA (directly or by deductions), would get FTC in India for the entire amount of income tax paid in the USA under India-USA DTA.

In this connection, the India-USA Tax Treaty is relevant:

India-USA [Article 25(2)(a)]

> 'Where a resident of India derives income which, by the provisions of this Convention, may be taxed in the United States, India shall allow as a deduction from the tax on the income of that resident an amount equal to the income-tax paid in the United States, whether directly or by deduction. **Such deduction shall not, however, exceed that part of the income-tax (as computed before the deduction is given) which is attributable to the income which may be taxed in the United States.**'

The Court held that the India-USA DTA does not make the payment of income tax in India as a condition precedent to claim FTC and that the only embargo prescribed is that the FTC will be available to an assessee only in respect of that income, which is taxed in the USA. The reading of the Hon'ble HC had the effect of allowing FTC even in a case where the income of the Indian resident is not taxable in India and only taxable in the USA.

The decision of the Wipro case was followed by the Bangalore Tribunal in the case of Ittiam Systems Private Limited[6], where full credit of FTC paid in USA, Germany, and Japan, having similar double taxation articles, were allowed.

Similarly, the Delhi Tribunal in the case of Canon India Private Limited[7] allowed FTC on the entire amount of taxes paid in Japan following the Wipro case (supra). A similar finding has been made in the case of HCL Comnet Systems and Services Ltd[8]. and by the Mumbai Tribunal in the case of Tata Consultancy Services Ltd[9]..

However, the Mumbai Tribunal, in the case of Digital Equipments India Ltd[10]. analyzed the India-USA DTA and held that the India-USA DTA in the last sentence of Article 25(2)(a) states unambiguously and beyond any controversy that the deduction on

[6] ITA No. 2464 & 2465/Bang/2017
[7] ITA No. 468/Del/2021
[8] ITA No. 5555/Del/2014
[9] ITA No. 5713/Mum/2016 & ITA No. 1650/Mum/2016
[10] 94 ITD 340

account of income tax paid in the USA, from income tax payable in India, cannot exceed Indian income tax liability in respect of such income. The Tribunal further held that the India-USA DTA, and other DTAs as well, does stipulate that the FTC cannot exceed the income tax leviable in respect of that income in the country of which the assessee is resident.

The Revenue's appeal against the ruling of the HC of Karnataka in Wipro (Supra) has been granted a Special Leave for Appeal[11], leaving the decision of the HC to be adjudicated upon by the Supreme Court. It will be interesting to see how the Apex Court interprets India-USA DTA.

(iv) Whether FTC can be claimed as business deduction

Section 40(a)(ii) of the ITA states that any sum paid on account of any rate or tax levied on the profits or gains of any business is not allowed as a deduction. Explanation to Section 40(a)(ii) of the ITA clarifies that any sum paid on account of any rate or tax levied includes and shall always be deemed to have included any sum eligible for relief of tax under section 90 of the ITA or as the case may be, deduction from the Indian Income tax payable under Section 91 of the ITA.

In view of the above, it appears that the taxes paid abroad are not eligible for deduction under Section 40(a)(ii) of ITA, where relief under Section 90 or 91 is claimed.

The Hon'ble Bombay HC, in the case of Reliance Infrastructure v CIT[12] held that where the taxpayer is not entitled to claim FTC, it is entitled to claim a deduction of such expense which computing its income from Business and profession.

Similarly, the Mumbai Tribunal in the case of Bank of India[13], denied a refund of foreign taxes but allowed it as a business expense deduction in the absence of Indian tax liability on foreign incomes. In the present case, the taxpayer had earned income from foreign jurisdiction on which the taxes were paid outside India. There was no tax liability in India on account of the set off of the losses. The Mumbai Tribunal did not follow the Wipro case and denied the claim of refund but allowed the claim of the taxpayer to allow taxes paid as a deduction. The Mumbai Tribunal observed that the explanation to Section 40(a)(ii) was introduced to cover the cases where the taxpayers were claiming FTC and business deductions. As such, where FTC is not available, deduction under Section 40(a)(ii) should be allowable to the taxpayer.

(v) Filing of Form 67:

For claiming FTC, the taxpayer is required to file online Form 67. Earlier,

[11] [2018] 95 taxmann.com 107 (SC)

Form 67 was required to be filed at the time of filing the original return of income. The said provisions got amended from 1 April 2022[14], where the window to file Form 67 has been extended till the end of the relevant assessment year in which the income is offered to tax.

Delay in filing Form 67 – whether deduction will be allowed:

The Hon'ble Bangalore Tribunal in the case of Hertz Software India (P.) Ltd[15], where the taxpayer is a company, failed to furnish Form 67 at the time of filing an original tax return, and the same was furnished during the ongoing assessment proceedings. The Hon'ble Tribunal allowed the credit of the FTC to the taxpayer and observed as under:

(i) Submission of Form No. 67 before the filing of returns is not mandatory but a directory requirement because rule 128(9) does not provide for disallowance of FTC in case of delay in filing of Form No. 67.

(ii) There is no condition prescribed in DTA that the FTC can be disallowed for non-compliance with any procedural provision. As the provisions of DTA override the provisions of the ITA, the taxpayer has a vested right to claim the FTC under the tax treaty, and the same cannot be disallowed for the mere delay in compliance with a procedural provision.

A similar view was taken by the Mumbai Tribunal in the case of Sonakshi Sinha[16] where it was held that rule 128(9) provides that the statement in Form No 67 shall be furnished on or before the due date specified for furnishing the return of income under section 139(1). It further explained while laying down a particular procedure, if no negative or adverse consequences are contemplated for non adherence to such procedure, the relevant provision is considered to be not mandatory but purely directory.

Based on the above judicial decisions, FTC should be available even if there is a delay in filing Form 67.

Processing of Return – Delay in filing of Form 67:

The tax return is processed by the CPC, and where there is a delay in filing Form 67, the FTC is denied. The taxpayer has the option to file an application for

[12] 390 ITR 271
[13] ITA 869/Mum/2018
[14] Amendment in Rule 128 vide notification no. 100/2022, dated 18-08-2022
[15] [2022] 139 taxmann.com 448
[16] [2022] 197 ITD 263

rectification or file an appeal against the CPC order. Given the litigation costs, it is recommended that the taxpayer files Form 67 within the prescribed timelines.

Concluding Remarks:

The taxpayers need to be vigilant while making a claim of FTC and ensure that the wording of the Treaty are examined, where FTC is covered by DTA. In case of no DTA, the FTC claim may be considered as per the provisions of section 91 of the ITA.

On the amount of FTC to be claimed, the treaty wordings would be relevant, and it may be possible to claim credit for full taxes paid outside India. Reliance in this regard may be placed on the Karnataka High Court decision in the case of Wipro *(supra). However, it may be noted that the tax department has preferred an appeal against this decision of Karnataka HC in the Supreme Court.*It would be interesting to see the verdict of the Apex Court in the case of Wipro *(supra)*, especially after the introduction of Rule 128 of the Income-Tax Rules, 1962. Until the Apex courts put this controversy to rest, the FTC claim of full taxes paid outside India is likely to be a subject matter of litigation.

Further, where FTC is not available, there is a possibility to claim the foreign taxes as a deduction. However, such a claim shall not be free from litigation.

The extension of the timeline to file form 67, considering the practical challenges faced by the taxpayer, is a welcome move. While FTC should not be denied merely because form 67 has been filed late, given the litigation costs, it is recommended that the taxpayer files Form 67 within the prescribed timelines.

Sneha P. Pai

Senior Director

Nexdigm

Mital Patel

Associate Director, Direct Tax

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One Day Tax Colloquium - New Delhi

One Day Tax Colloquium on 11th October 2022 in New Delhi (Hybrid Event) organized brought to you by Achromic Point at Hotel Eros where The Panel Discussion on International Taxation & Transfer Pricing was taken by Vidur Puri, Senior Partner at SCV & Co. LLP as a moderator along with co - panelists Maulik Doshi, Deputy Managing Director - Transfer Pricing and International Tax at Nexdigm, Pushpendra Dixit, AVP & Global Tax Head at PVR Group and Rajneesh Verma, Associate Partner at BSR & CO LLP.

Virtual Training Course on Transfer Pricing and Related Compliances

Digital Training on Virtual Training Course on Transfer Pricing and Related Compliances conducted on 12th & 13th October 2022, In this Anuj Gupta, Assistant Manager Transfer Pricing at B S R & Co. LLP gave introduction on Transferon Transfer Pricing. Transfer Pricing Policy & Compliance was taken by Abhay Saboo, Director – Transfer Pricing at Sudit K Parekh & Co.

Transfer Pricing Controversy Management was explained by Upendra Tewari, Partner at Transaction Square. Nidhi Daurani, Assistant Manager at Transfer Pricing BSR & Co LLP spoke upon Transfer Pricing of intangibles. Session on Business Restructuring (BR) and Valuation was taken by Sayli Chemburkar, Manager at Transaction Square. Last session on Transfer Pricing – Interplay with other taxes was discussed by Rahul Charkha, Partner, Direct Tax at Economic Laws Practice.

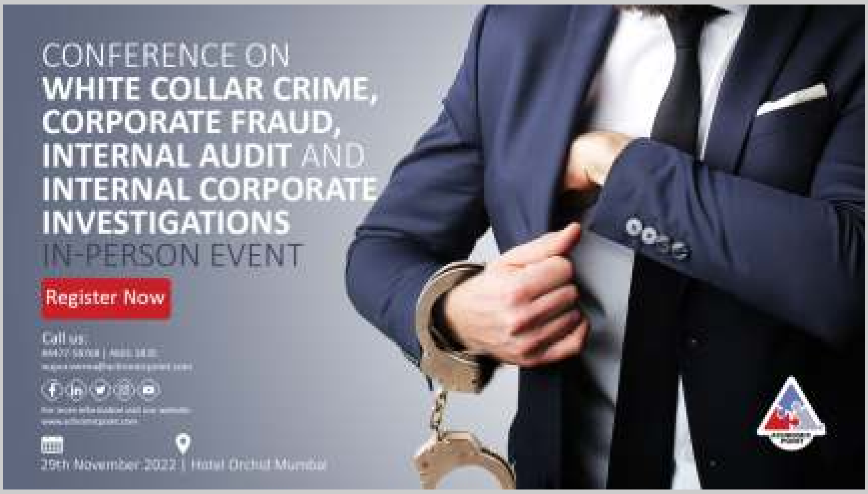
Masterclass on Companies Act- Key Issues and Recent Amendments

In this Virtual Event on Masterclass on Companies Act- Key Issues and Recent Amendments conducted on 19th October 2022. In this Overview of recent changes in Companies Act 2013 was given by Ekta Bahl, Partner at SAMVĀD: PARTNERS; Lokesh Dhyani, Partner at Aekom Legal shared his insights on Inter-Corporate Transactions and Related Party Transactions & SEBI Regulations

Anup Vijay Kulkarni, Partner at J Sagar Associates shared his insights on Corporate Social Responsibility (CSR). Session on Frauds under Companies Act 2013 was taken by Moushumi Vaidya, Executive Director, Forensic Services at PricewaterhouseCoopers Private Limited.

"Interactive Webinar" on Cyber safety for today's executive - Protecting yourself against emerging threats

In this "Interactive Webinar" on Cyber safety for today's executive – Protecting yourself against emerging threats conducted on 18th October 2022, where Amit Jaju, Senior Managing Director India at Ankura shared his insights on Cyber safety for today's executive – Protecting yourself against emerging threats.



White Collar Crime, Corporate Fraud, Internal Audit and Internal Corporate Investigations

Conference on White Collar Crime, Corporate Fraud, Internal Audit and Internal Corporate Investigations in New Delhi at Hotel Eros on 16th November 2022 brought to you by Achromic Point along with Ankura as Gold Partner & Nexdigm & PWC as Bronze Partners where The Panel Discussion on Emerging Trends in Fraud and Corruption was taken by Mayank Arya, Founding Partner at Ashwathh Partners as a moderator along with co-panelists Sanjeev Sood, EVP Internal Assurance and Chief Audit Executive at Max Life Insurance Company Ltd, Amit Jaju, Senior Managing Director India at Ankura, Sahil Kanuga, Co-Head, International Dispute Resolution & Investigations Practice at Nishith Desai Associates & Somit Chitrey, Global Head Fraud Risk- Lending, Digital Assets and Partnerships at Standard Chartered Bank.

The Panel Discussion on Every Audit Is a Fraud Audit was taken by Varun Wadhwa, Country Compliance Officer, South Asia & APAC Regional Program Office at CBRE South Asia Pvt. Ltd | Ethics & Compliance as a moderator along with co- his panellists Ghanshyam Singla, Group Head of Internal Audit and Forensic at (PayTm), Praveen Khanna, Vice President-Alliances at ScoreMe Solutions Pvt. Ltd. & Deepak Bansal, Vice President and Group Head – Internal Audit at Somany Impresa Group.

The Panel Discussion on Conducting Internal Investigations: Latest Best Practices for Companies and Their Counsel was taken by Atul Luthra, Director - Forensic Services at PWC India as a moderator along with co-panelists CA Niraj Kumar, Vice President & Group Head of Internal Audit, Forensic and Risk at OYO Hotels, Rahul Kaushik Head - Internal Audit at O2 Power Pvt Ltd & Bhupinder Singh, Senior Executive Director - Assurance and Risk Advisory at Nexdigm.

White Collar Crime, Corporate Fraud, Internal Audit and Internal Corporate Investigations

Achromic Point along with Alvarez & Marsal as Knowledge Partner, Ankura as Gold Partner & PWC as Bronze Partner present the Conference on White Collar Crime, Corporate Fraud, Internal Audit and Internal Corporate Investigations in Mumbai at Hotel Orchid on 29th November 2022 where The Panel Discussion on Emerging Trends in Fraud and Corruption was taken by Zameer Nathani, Senior Vice President and General Counsel at UFO Moviez India Limited as a moderator along with his co- panelists Amol Pitale, Managing Director at Ankura, Supriya Verma, Director- Forensic Services at PWC India & Srinivas Chatti, Principal Associate at Cyril Amarchand Mangaldas where they discussed about the Identify emerging issues and trends in bribery and corruption Global Enforcement Trends, Data theft.

The Panel Discussion on Every Audit Is a Fraud Audit was taken by Hardik Sheth, Head – Risk Assurance at Tech Mahindra Business Services as a moderator along with co- his panelists Nagesh Pinge, Ethics, Risk Management & Internal Audit, Nirmal Paul, Vice President & Head – Fraud Prevention Unit & Claims Investigation at Bajaj Allianz Life Insurance Company, Nilesh Likhite, Chief Internal Auditor at Arcelor Mittal Nippon Steel India where they discussed about how to Identify fraud schemes, Challenges of Auditing for Fraud, risk assessment processes.

The Panel Discussion on Conducting Internal Investigations: Latest Best Practices for Companies and Their Counsel was taken by Tejveer Singh, Partner
DMD Advocates as a moderator along with co-panelists Sahil Kanuga, Co-Head, International Dispute Resolution & Investigations Practice at Nishith Desai Associates, Ashish Jain, Chief Internal Audit Officer at Nayara Energy Limited & Sahil Gupta, Senior Director at Alvarez & Marsal where they discussed about the Investigations, Audits, whistle blowing, When to call in the forensic accountants

Digital Training on Arbitration and Dispute Resolution

Digital Training on Arbitration and Dispute Resolution scheduled on 2nd & 3rd December 2022. In this Fundamentals of Arbitration as Dispute Resolution, Drafting and Understanding Arbitration Clauses, Appointment of arbitrator, constitution of arbitral tribunal and practical aspect of arbitration & Remedies against an arbitral order, arbitral award, execution and enforcement proceedings was taken by Sujoy Datta, Partner at Aekom Legal, Surekh Kant Baxy, Principal Associate at Aekom Legal & Nishtha Khurana, Senior Associate at Aekom Legal.

Cross Border Remittances - A FEMA Perspective

In this Digital Training on Cross Border Remittances - A FEMA Perspective scheduled on 9th December 2022, where the FEMA and FDI Policy was taken by Archana Balasubramanian, Partner at Agama Law. External Commercial Borrowings / Outbound Investments were discussed by Mital Patel, Associate Director - Direct Tax at Nexdigm.

Session on Investigations by Enforcement Directorate / Compounding by RBI was taken by PVR Rajendra Prasad, Managing Director at PnP Consulting Private Limited; Arnab Roy, Associate Partner at Vaish Associates Advocates & Abhishek Agarwal, Associate Partner at Vaish Associates Advocates shared their insights on Contemporary Tax Dynamics.

UAE Tax Strategy and Recent VAT Updates - 13th December 2022

Virtual Training on Mergers & Acquisitions and Business Valuation

In this Virtual Training on Mergers & Acquisitions and Business Valuation scheduled on 15th December 2022, where Unlocking Key Factors that Influence Valuation was discussed by Jayasimha Pasumarti, Director - Investment Banking at JPR Capital, whereas, M&A Deal Documentation & Legal Issues was taken by Archana, Balasubramanian- Partner at Agama Law. Shraddha Shah, Associate Director, Direct Tax at Nexdigm shared her insights on Tax Issues M&A Transactions for Buyers. Amandeep Singh, Virk Principal Associate at J. Sagar Associates spoke upon Corporate Restructuring. Last session on Negotiation techniques from the M&A World was taken by Shrinivas Sankaran, Associate Partner at Vaish Associates Advocates.

GST and Customs- Contemporary Issues

GST and Customs- Contemporary Issues scheduled on 24th January 2023 in New Delhi at Hotel Eros brought to you by Achromic Point, commenced with the welcome address given by Aashish Verma, Director of Achromic point; whereas, Neha Jain, Managing Associate at NITYA Tax Associates shared her insights on Refunds under GST & Intricacies of ITC.

Critical Issues in GST Audit was taken by Yogesh Gaba, Managing Partner - Indirect Tax at GABA & Co. Lalitendra Gulani, Partner at ANANTHAM LEGAL spoke upon the session on Emerging Issues in GST instigating Litigation Writ petitions including Anti-Profiteering and credits where he discussed about the Transitional credit, Anti-Profiteering & Input Tax Credit.

Lucrative Customs Schemes was taken by Jatin Arora, Partner / Lawyer - Indirect Tax at Phoenix Legal in this he shared insights on Bonded Manufacturing, Authorized Economic Operators, Import of Goods at Concessional Rate of Duty & Free Trade Agreements and Rules of Origins. Session on Controversial issues in GST was discussed by Saket Patawari, Executive Director, Indirect Tax at Nexdigm. Sandeep Chilana, Managing partner at Chilana & Chilana Law Offices shared his insights on Appeal, Revision, Offence, Penalty, Inspection, Search, Seizure, and Arrest in GST.

Digital Training on Contracts Drafting, Negotiation, Contractual Fraud and Dispute Resolution

In this Hands on Digital Training on Drafting Commercial Contracts scheduledContracts scheduled on 24th, 25th & 26th August 2022, here, Elements in Drafting Commercial Contracts was discussed by Prashant Jain, Co- Founder & Managing Partner at Samisti Legal, whereas, Archana Balasubramanian, Partner at Agama Law & Nitin Jain, Partner at Agama Law jointly shared insights on Breach Remedies/Damages/Indemnities.

Arti Narsana, Of – Counsel at Vaish Associates Advocates spoke upon Key clauses on Joint Ventures & Negotiation Skills and Techniques. Term and Termination; Entire Agreement Clauses; Governing Law, Jurisdiction and Dispute Resolution Clauses was taken by Sai Srujan Tayi, Partner at Giridhar & Sai, Advocates. Isha Sinha, Chief Legal & Compliance Officer at Medicover Hospitals spoke upon Understanding the Arbitration Process as an Alternative Dispute Resolution Mechanism.

4th Annual Conference on Fintech Disputes, Regulatory and Compliance

Conference on Fintech Disputes, Regulatory and Compliance on 17th February 2023 in Bengaluru at Hotel Radisson Blu brought to you by Achromic Point, commenced with the welcome address given by Aashish Verma, Director of Achromic point; Panel 1 on Regulatory Landscape of Fintech in India was moderated by Vikas Sarda, Chief Financial Officer at Unitus Ventures along with co -panelists Lomesh Kiran Nidumuri, Partner (Head - Disputes, South India) at Cyril Amarchand Mangaldas, Vishal Narula, Managing Director at Alvarez & Marsal & Manorama Kulkarni, Director at Deutsche Bank.

Vishal Narula, Managing Director at Alvarez & Marsal as Moderator along with co-his Panellist Sankalpa Sarkar, Product & Strategy Lead at Walmart Global Tech India & Apoorva Guruprasad at Aarna Law discussed about Trust and Safety in the Fintech sector in Panel 2.

Panel 3 on Data protection and Security was taken by Kush Wadhwa, Senior Director – Disputes and Investigations at Alvarez and Marsal as Moderator along with co -his Panellist Sahil Kanuga, Co-Head, International Dispute Resolution & Investigations Practice at Nishith Desai Associates & Satish Kumar Dwibhashi, Senior Vice President & CISO at InMobi Group.

4th Annual Conference on Fintech Disputes, Regulatory and Compliance

Conference on Fintech Disputes, Regulatory and Compliance on 22nd February 2023 in Mumbai at Hotel Orchid brought to you by Achromic Point, commenced with the welcome address given by Aashish Verma, Director of Achromic point; Panel 1 on Regulatory Landscape of Fintech in India was moderated by Ankoosh Mehta, Partner at Cyril Amarchand Mangaldas along with co -his panellist Gaurav Sharma, VP – Operations at Bajaj Allianz General Insurance Company & Sandeep Kumar, CFO and Management Consultant at S K Consulting.

Session 2 Panel discussion Moderated by Vishal Narula, Managing Director at Alvarez & Marsal along with co-his Panellist Anirban Banerjee, TCS BFSI – Global Head Service Delivery Excellence BFSI Cognitive Business & Operations at Tata Consultancy Services, Ankoosh Mehta, Partner at Cyril Amarchand Mangaldas along & S V Sunderkrishnan, Chief Risk Officer at Reliance Nippon Life Insurance Company Limited where they discussed about the Trust and Safety in the Fintech sector.

Panel 3 on Data protection and Security was taken by Sahil Kanuga, Co-Head, International Dispute Resolution & Investigations Practice at Nishith Desai Associates as Moderator along with co-his Panellist Adv. (Dr) Prashant Mali, President - Cyber Law Consulting (Advocates & Attorneys), Vishal Narula, Managing Director at Alvarez & Marsal, Sandeep Kumar, CFO and Management Consultant at S K Consulting & Hardik Sheth, Head – Risk Assurance at Tech Mahindra Business Services.

Masterclass on Companies Act- Key Issues and Recent Amendments

In this Virtual Event on Masterclass on Companies Act- Key Issues and Recent Amendments conducted on 10th February 2023. In this Overview of recent changes in Companies Act 2013 & Corporate Social Responsibility (CSR) was discussed by Anup Vijay Kulkarni, Partner at J Sagar Associates; Lokesh Dhyani, Partner at Aekom Legal shared his insights on Inter-Corporate Transactions and Related Party Transactions. SEBI Regulations was taken by Prasanna Bedi, Founder & Managing Partner at Bedi & Sons Corporate Solutions LLP.onsulting & Hardik Sheth, Head – Risk Assurance at Tech Mahindra Business Services.

Labour Codes - Key Issues and recent Amendments- 6.0

In this Webinar on Virtual Session on Labour Codes - Key Issues and recent Amendments- 3rd Edition conducted on 16th & 17th February 2023. Here, Sessions on Wages, Social Security, Industrial Relations & Health & Working Conditions was discussed by Savitha kesav Jagadeesan, Senior Resident Partner at Kochhar and Co. & Gaurav Chatterjee, Partner at Kochhar and Co.

6th Annual GST Conference & Awards

Achromic Point along with Nexdigm as Gold Partner, Phoenix Legal as Bronze Partner, Clarico as Corporate Partner, CFO Mantra as Supporting Partner, GKCM as Associate Partner & GABA & CO., Anantham Legal, Chilana & Chilana Law Offices, TRC & NITYA Tax Associates as Other Partners presents the 6th Annual GST - Conference & Awards on 15th March 2023 in New Delhi at Hotel Eros- Nehru Place. In this Welcome Address was given by Aashish Verma-Director, Achromic Point whereas; Keynote Address on (Recent Developments and Issues in GST) was given by Sujit Ghosh - Advocate, Chambers of Sujit Ghosh. Session on Emerging issues in customs litigation was taken by Jatin Arora-Partner/Lawyer-Indirect Tax, Phoenix Legal, Refunds under GST & Intricacies of ITC was discussed by Sanjay Chhabria-Director-Indirect Tax, Nexdigm. Panel discussion on Emerging Litigation Areas in GST was Moderated by Jatin Arora-Partner/Lawyer-Indirect Tax, Phoenix Legal along with co-his Panelists Lalitendra Gulani - Partner, ANANTHAM LEGAL, Sandeep Chilana - Managing Partner, Chilana & Chilana Law Offices & Sourabh Kumar - Managing Associate, NITYA Tax Associates. Himanshu Goel - Partner, TR Chadha & Co LLP as Moderator along with co-Panelists Haroon Qureshi - Vice President–Taxes, Genpact; Pushpendra Dixit - AVP & Global Tax Head, PVR Group, Yogesh Gaba - Managing Partner-Indirect Tax, GABA & CO. & Sudeep Manek - Chief Manager Tax, PPG Asian Paints Private Limited shared insights on Assessment and Audit of GST.

Last was the Awards Distribution below is the Winners List:

Award Categories	Winners
Indirect Tax Law Firm of the Year	NITYA Tax Associates
Best Employer in Indirect Tax	NITYA Tax Associates
Indirect Taxation's Rising Star (Male)	Prem Daksh
Indirect Taxation's Rising Star (Male)	Nikhil Nagpal
Indirect Taxation's Rising Star (Female)	Simran Arora
Best Independent Indirect Tax Law Firm	Chilana & Chilana Law offices
Best In-House Tax Team of the Year	Max Life Insurance Company Limited
Leading Tax Director of the Year (In-House)	Subhash Aggarwal
Best Indirect Tax Disputes/Investigations Team	Tattvam Advisors

6th Annual Direct Tax Summit and Awards 2023

Achromic Point along with Nexdigm as Gold Partner, TransPrice Tax as an Associate Partner & Vahura as Supporting Partner takes immense pride to announce its 6th Annual Direct Tax Summit and Awards 2023 scheduled on 23rd March 2023 in Mumbai, Hotel Orchid. In this Welcome Address was given by Aashish Verma-Director, Achromic Point. `In Panel Discussion on Taxation of Digital Economy, Pillar One & Pillar Two was discussed by Moderator - Rahul Barve - Executive Vice President, Zee Entertainment Enterprises Limited along with co- his Panelists Maulik Doshi-Deputy Managing Director-Transfer Pricing and International Tax, Nexdigm & Divyang Thakker - Country Tax Head - India, Dow Chemicals. Panel on Dilution of Concept of Permanent Establishment (PE) was moderated by Mihir Vora - Director, Deloitte Haskins & Sells LLP along with co -Panelists Rachesh Kotak - Vice President-International Tax and Regulatory, Vinmar Group & Priyanka Jain - Associate Partner, Vaish Associates Advocates, whereas; the session on Transfer Pricing was taken by Abhay Saboo - Director–Transfer Pricing, Sudit K Parekh & Co. Panel Discussion on Current issues and way forward in Litigation Management was discussed by
Tejveer Singh-Independent Legal Counsel as Moderator along with co -his Panelists Rahul Barve - Executive Vice President, Zee Entertainment Enterprises Limited, Rajeev Newar - Group Chief Financial Officer, RK Swamy Hansa Group & Priyanka Jain - Associate Partner, Vaish Associates Advocates.

Last was the Awards Distribution below is the Winners List:

Award Categories	Winners
Direct Tax Consulting Firm of the Year	Sachin Saxena & Co.
Transfer Pricing Firm of the Year	TransPrice Tax Advisors LLP
Best Transfer Pricing Advisor (Male)	Akshay Kenkre
Best Rising star in Direct tax (Male)	Sumit Lalchandani
Best Transfer Pricing Advisor (Female)	Ananya Kapoor

Upcoming Events – 2023

Events Name	Venue	Events Date
5th Annual Anti-Fraud Conclave	In-Person Event - Mumbai	12th April 2023
Data Analytics- Remodel your Internal Audit Function	Virtual Event	26th April 2023
Commercial Litigation & Disputes: Current Trends, Developments	In-Person Event - Mumbai	4th May 2023
Demystify the Ind AS /IFRS - A digital training on practical aspects 5.0	Virtual Event	4th & 5th May 2023
Certificate Course on International Tax	Virtual Event	11th & 12th May 2023
Commercial Litigation & Disputes: Current Trends, Developments	In-Person Event - Delhi	19th May 2023
5th Annual Insolvency and Bankruptcy Code - Conference and Awards 2023	In-Person Event - Delhi	2nd June 2023
Virtual Training Course on Transfer Pricing and Related Compliances	Virtual Event	15th & 16th June 2023
Drafting and Negotiating Commercial Contracts	Virtual Event	21st, 22nd & 23rd June 2023
Virtual Training on Mergers & Acquisitions and Business Valuation	Virtual Event	6th & 7th July 2023
GST and Customs- Contemporary Issues- Bengaluru	In-Person Event - Bengaluru	19th July 2023
Fraud Prevention, Detection and Investigation Training Program	Virtual Event	20th & 21st July 2023
Webinar on Customs Law and Regulations	Virtual Event	28th July 2023

Events Name	Venue	Events Date
Cross Border Remittances - A FEMA Perspective	Virtual Event	24th August 2023
Conference on White Collar Crime, Corporate Fraud, Internal Audit and Internal Corporate Investigations- Delhi	In-Person Event - Delhi	25th August 2023
GST and Customs- Contemporary Issues – Mumbai	In-Person Event - Mumbai	6th September 2023
One Day Tax Colloquium- Delhi	In-Person Event - Delhi	15th September 2023
Certificate Course on International Tax	Virtual Event	20th & 21st September 2023
Masterclass on Companies Act- Key Issues and Recent Amendments	Virtual Event	5th October 2023
Certificate Course on Detecting and Preventing Internal and External Fraud	Virtual Event	6th & 7th October 2023
Arbitration and Disputes Summit 2023- Delhi	In-Person Event - Delhi	12th October 2023
Conference on White Collar Crime, Corporate Fraud, Internal Audit and Internal Corporate Investigations- Mumbai	In-Person Event - Mumbai	23rd November 2023
Hands on Digital Training on Drafting Commercial Contracts	Virtual Event	23rd, 24th & 25th November 2023
Conference on White Collar Crime, Corporate Fraud, Internal Audit and Internal Corporate Investigations- Bengaluru	In-Person Event - Bengaluru	29th November 2023
Arbitration and Disputes Summit 2023- Mumbai	In-Person Event - Mumbai	7th December 2023
Masterclass on Due Diligence for M&A, Cross Border Transactions and Joint Ventures	Virtual Event	8th December 2023
Workshop on Data Privacy, Digital Forensics and Cyber Investigations	Virtual Event	15th December 2023
Internal Auditing - A Virtual Training Course	Virtual Event	20th December 2023

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