Tax & Regulatory Newsletter

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A. Domestic Tax Updates and Rulings

Direct Tax Updates

- CBDT vide notification no. 3/2022 dated December 12, 2022, has granted partial relaxation from filing of form 10F by a Non-resident who does not have PAN issued in India till March 31, 2023. Form 10F is required to be filed by Non-Residents to claim tax relief under a tax treaty for India sourced Income. It has been clarified that such non-residents may make statutory compliance by providing form 10F manually till March 31, 2023.

- CBDT vide circular no. 22/2022 dated November 1, 2022, extended the due date of filing Form 10A electronically from September 30, 2022, to November 25, 2022, on consideration of difficulties faced by the taxpayers and other stakeholders. Form 10A is required to be filed for Registration of Trust u/s 12A of the Income-tax Act, 1961 ('IT Act'), to claim exemption, donation and expenditure, u/s 10(23C), u/s 80G and u/s 35 of the IT Act for funds set up by the government, for donation and for expenditure on scientific research respectively.
- CBDT vide circular no. 370133/16/2022 dated November 1, 2022, introduced a Common Income Tax Return (ITR) and invited stakeholders' comments which is expected to reduce the time taken to file ITR and burden faced by taxpayers with regard to choosing the appropriate ITR. All the existing ITR except ITR 7 have been merged into a common ITR. Once the common ITR Form is notified, the online utility will be released by the Income-tax Department.
- CBDT has issued Circular No. 24/2022 regarding the deduction of taxes under section 192 of the IT Act, which provides clarification on the aspects of computation of tax under the head salary, documentations to be collected and maintained by the employer etc.
- CBDT on October 5, 2022, released FAQ in relation to electronic filing of Form 27C in the income tax portal. Form 27C is a declaration provided by the Buyer to the seller not to collect taxes at source, subject to fulfilment of certain conditions. FAQ sets out the procedure to be followed for submitting Form 27C by the buyer to the seller and electronic filing of the same by Seller.

Domestic Tax rulings

A. Equalisation levy not applicable on advertising charges targeted at overseas audience

DCIT vs Mr Prakash Chandra Mishra [2022] ITA NO.305/JPR/2022 (Jaipur ITAT)

Facts:

- Prakash Chandra Mishra ("the Assessee") is the proprietor of M/s. Oan Media and Web solutions which is engaged in the business of providing support services to online advertisement, digital marketing and web designing. It receives consultancy fees for such services rendered.
- During the Assessment proceedings, the Assessing Officer ('AO') noticed that the Assessee had debited a sum on online advertisement charges paid to M/s. Google Asia Pacific Pte. Ltd, a Non-resident not having Permanent Establishment ('PE') in India.

- The AO proposed to disallow the above expenditure on the grounds that the Assessee has not deducted and deposited Equalisation levy under section 40(a)(ib) of the IT Act.
- As the assessee is engaged in support services to the online advertisement, the role of the assessee was to act as a conduit between the entity carrying out the advertisement and Google. Further, Assessee contended that the target audience of the advertisement and the person carrying out the advertisement are both outside India, resultantly Tax Authorities in India do not have the jurisdiction to tax such transactions.
- However, the above claim of the Assessee has been rejected by the AO and the expenses paid for online advertisement was disallowed.
- The Assessee preferred an appeal before the learned CIT(A) and it was held in Assessee's favour. The aggrieved Revenue preferred an appeal before the ITAT.

Issue:

- Whether Equalisation Levy is applicable on the advertising fees paid to Online advertisers where both the target audience and the advertiser are outside India?

Held:

- Drawing support from the Hon'ble Apex Court's decision in the case of M/s. Ishikawajma-Harima Heavy Industries Limited [2007] Appeal (civil) 9 of 2007, the income must have sufficient territorial nexus with India so as to furnish a basis for imposition of tax.
- In the given case, both advertisers and target audience were located outside India. From the analysis of the notes to Finance Act, 2016, the main objective of Equalisation Levy on specified services is to tax the specified service rendered to Indian Residents.
- Considering the above, the Equalisation levy is not attracted where the service receiver as well as the target audience are outside India and hence, in the given facts of the case, the disallowance under section 40(a)(ib) is not warranted.

TAX & REGULATORY

B. Employees working for an overseas subsidiary constitute a Permanent Establishment in India

M/s Redington Distributions Pte. Ltd.Vs DCIT [2022] IT Appeal No. 14/CHNY/2020 (Chennai ITAT)

Facts:

- M/s. Redington Distribution Pte Limited ('the Assessee') is a tax resident of Singapore. The Assessee is subsidiary of M/s. Redington India Limited ('REDIL').
- The main business of the assessee group is providing end-to-end supply chain solutions for all categories of IT products. The group has presence in various geographies viz., India, Middle East, turkey, Africa, Singapore and South Asian countries.
- The Assessee acts as a fulfilment center between REDIL and the end customer. The Assessee sells the products and services directly to the end customer (medium and large enterprises situated in SEZs/STPs). In order to cater for these customers, Assessee sought help from the employees of its holding Company M/s. REDIL.
- A TDS survey was conducted in the premises of REDIL where a team of employees 'Dollar Team' was identified by the Revenue. The following were the key observations:
  - Dollar Business pertains to USD business of Indian Customers like Cognizant, Sify etc.
  - The Statements recorded from the employees of 'Dollar Team' and corresponding evidences which shows that the entire sales process from identification of customers through granting of credit till collection of receivables in this 'Dollar Business' was happening from India and was being performed by the 'Dollar Team' of M/s. REDIL.
- Based on the above, facts, the Learned AO concluded that all the functions relating to the USD business of Indian customers are effectively undertaken by 'Dollar Team' of REDIL and therefore, the Assessee has a fixed place Permanent Establishment ('PE') as well as Dependent Agent Permanent Establishment ('DAPE') in India.
- Assessee contented that certain companies which set their unit up in SEZ approached the REDIL, India for getting duty benefit on their goods imported from foreign countries. Therefore, the Assessee was formed in Singapore to cater to these clients.
- After considering the total employee cost in REDIL and the assessee, the learned AO arrived at conclusion that Assessee has 89.65% of the profits attributable to Indian operations.
- DRP upheld the action of the AO and the aggrieved assessee has filed an appeal before the ITAT.

Issue:

- Based on the above facts, whether employees working for the overseas assessee contribute a fixed place PE and DAPE in India?

Held:

- The Indian holding company REDIL, supplies various products to companies like Cognizant Technology, Sify Technology, Zoho Corporation, etc., and such business is carried out in the name of M/s. RDPL.. Further, as and when the very same customers require import duty benefit, the same business was routed through the assessee company from its Singapore Office.
- It was further noted that the 'Dollar Team' of the Indian holding company exclusively works for Assessee Company right from identifying the customers, negotiating the price, follow-up of outstanding receivables, etc.

- In this case, the facts brought out by the AO in light of information gathered during survey clearly indicates the existence of a fixed place of business for the assessee, because the 'Dollar Team' of Indian holding company carried out business operations of the assessee in India. It is evident from various facts including the sworn statement.
- It is very clear that right from seeking orders, requesting for quote from the customer, vendor discussions, negotiations and conclusion of terms of sales, sending proforma invoices, shipment plans from the customer, payment follow-up, etc., were carried out by 'Dollar Team'. Whereas only documents like packing list, airway bill, have been prepared by Singapore Office.
- As per Hon'ble Apex Court Ruling in the case of M/s. E-funds IT Solutions Inc. [2017] 399 ITR 34 (SC), in order to constitute a fixed place of PE, **it is essential that the premise of the Indian subsidiary must be at the disposal of the foreign holding company and the business of the foreign company must be carried on through that place. In the given facts, it is clear that the activities of the Assessee constitute a 'Fixed Place' PE in India.**
- 'Dollar Team' of the Indian holding company acts as an agent of the assessee for Indian customers and further, they have authority to conclude contracts and such authority has been habitually exercised to conclude contracts on behalf of the assessee company. Therefore, the Assessee also has DAPE in India.
- With regard to the attribution of the profits, the matter was remanded to the AO for re-determination of the profits attributable in India due to absence of appropriate evidence viz. profits etc.

C. Mark-to-market losses on forwards contracts is neither speculative nor notional

PCIT vs M/s. Simon India ltd [2022] ITA no 67/2018 (Delhi High court)

Facts:

- M/s Simon India Ltd ("the Assessee") is engaged in the business of providing engineering consultancy and related services like engineering, designing, construction and commissioning of plants and installations. The Assessee claimed INR 9.20 crores as loss from a forward contract it entered to hedge the risk against foreign exchange fluctuations.
- A portion of loss on forward contract was due to cancellation of a forward contract and other portion was due to reinstatement of the values at the year-end (mark-to-market).
- AO held that the loss arising due to cancellation of forward contract is a speculative loss and was liable to be disallowed by placing reliance on CBDT instruction No.3/2010. Further, losses on the unmatured forward contract are notional in nature and the same is also liable to be disallowed.

Issue:

- Whether the losses on account of foreign exchange fluctuations on forward contracts is allowable under section 37(1) of the IT Act or should it be disallowed as speculation losses under Section 43(5) of the IT Act in view of the CBDT Instruction No. 3/2010?

Held:

- The Assessee is engaged in the business of engineering consultancy. The forward contracts were entered into by the Assessee to hedge its risk against the foreign exchange fluctuations, concededly,

the Assessee is not dealing in foreign exchange. Therefore, the said transactions fall within the exceptions of proviso (a) to Section 43(5) of the IT Act (definition of Speculative losses).

- With regard to mark-to-market loss, the Assessee reinstated its debits and credits from the underlying transactions on the value of the foreign exchange on balance sheet date. The corresponding losses/gains under the Forward Contracts should also be accounted for to arrive at the real profit. Hence, the mark-to-market losses cannot be stated as notional losses.
- It is a well-settled position that CBDT Instructions and circulars which are contrary to law are not binding.
- In light of the above, the loss arising on cancellation of the forward contract and reinstatement of foreign exchange losses are eligible for deduction under section 37 of the IT Act.

  [Note: The issues in the above case pertain to the year prior to the introduction of Income computation and Disclosure Standard ('ICDS'). As per ICDS – VI the effect of changes in Foreign exchange rates, the mark-to-market losses are ineligible for tax deduction.]

D. Share transaction undertaken by a Mauritian Company with Payu India exempted based on pre-amended DTAA

M/s. MIH India Mauritius ltd vs ACIT (ITA no .1023/del/2022 AY 2017-18) (Delhi ITAT)

Facts:

- MIH India Mauritius Ltd ("Assessee") is a non-resident entity incorporated under the laws of Mauritius and is a tax resident of Mauritius. The Assessee has been issued a valid tax residency certificate by Mauritian Tax authorities entitling the assessee to claim benefit under India-Mauritius Double Taxation Avoidance Agreement (DTAA). The Assessee has no Permanent establishment in India and it holds the equity shares of Citrus Payment Solutions Private ltd (Citrus India).
- In September 2016, the Assessee purchased Equity & Compulsorily Convertible Preference Shares of Citrus India from Mr. Jitendar Gupta and from White Pay Pte. Ltd.
- Assessee company sold shares of Citrus India to Payu payments Private limited (Payu India) another group company for 223.5 crores that resulted in short term capital gains of Rs 4.77 crores which was claimed as exempt under Article 13(4) of India – Mauritius DTAA.
- During the Assessment proceeding, the AO after examining the details of share transaction found that both Citrus India and PayU India are Associated Enterprises (AEs). Jitendra Gupta, from whom the Assessee had purchased equity shares of Citrus India, is a key management personnel of PayU India.
- The AO observed that the holding company of the Assessee is PayU Global B.V., a company incorporated in Netherlands. Further, the holding company PayU Global B.V had advanced money to Assessee to purchase of shares of Citrus India. Thus, PayU Global B.V. is the beneficial owner of the Assessee.
- Therefore, the AO stated that the entire share purchase agreement was structured to claim treaty benefits and that the

Assessee had no economic or commercial substance. Further, the beneficial provisions of India – Mauritius DTAA would not be applicable as the beneficial owner of short-term capital gain is the holding company located in Netherlands. Hence, the provisions of India - Netherlands DTAA would be applicable.

Issue:

- Whether Substance over form can be invoked for a transaction which lacks commercial substance prior to April 1, 2017 (where beneficial ownership was not the criteria to claim benefit India-Mauritius DTAA)?

Held:

- The Assessee is a Mauritius based company having a valid TRC issued by Mauritian Tax Authorities.
- The Assessee submitted that while purchasing shares of Citrus India the Assessee had made inbound investments and had subsequently sold the shares to PayU India, wherein, the Assessee is having substantial interest, as, it holds 82% of the shares.
- As per CBDT Circular No. 789 dated April 13, 2000, TRC issued by the Mauritian Tax Authorities would constitute sufficient evidence for accepting the status of residence as well as the beneficial ownership. Further, the validity of the Circular has been upheld by the Hon'ble Supreme court in the case of Azadi Bachao Andolan [2003] Civil Appeal 8161-8162 of 2003
- Thus, the Assessee is eligible for exemption under India-Mauritius DTAA prior to the protocol for amendment of India-Mauritius DTAA which comes into effect from April 1, 2017.

Other Key Rulings

- Bangalore ITAT held that **cost of seconded employees** reimbursed to the Assessee by its Indian counterparts is **not taxable as fee for technical services** ("FTS") under Article 12 of India-Japan DTAA. Bangalore ITAT emphasized that reimbursement paid to assessee was on cost-to-cost basis and no element of profit was involved. **M/s Toyoda Gosei Company vs DCIT [2022] (ITA no 800/Ban/2022(Bangalore ITAT).**
- Hon'ble Supreme Court held that **education cess is not an allowable expenditure** under Section 37 of IT Act based on the retrospective amendment in Finance Act, 2022. – **JCIT vs. M/s Chambal Fertilizers &Chemicals [2022] arising out of SLP(C)No.7379 of 2019 (Supreme court of India).**
- Delhi ITAT allows the Assessee's appeal that the benefit of **deduction** under **Section 35(2AB)** of IT Act on scientific research expenditure cannot be merely denied due to non-receipt of form 3CL. - **M/s. Curadev Pharma Pvt Ltd vs ITO [2022] ITA no.1418/del/2020AY 2016-17 (Delhi ITAT).**
- Merely raising the dispute before any authority cannot be a ground not to levy the interest and/or waiver of interest under Section 220(2A) of the IT Act. Otherwise, each and every Assessee may raise a dispute and thereafter may contend that as the assessee was bonafidely litigating, no interest should be leviable. Mere fact that the interest was 1.5 times the tax by itself was irrelevant for determining whether assessee was suffering from any genuine hardship. Section 220(2), the levy of simple interest on non-payment of the tax is mandatory - **M/s. Pioneer Overseas Corporation USA vs CIT [2022] SLP (C)no 21488/2017(Supreme Court of India)**

- Supreme Court set aside Delhi High Court's judgment quashing the reassessment that merely on change of Assessing officer fresh assessment notice is unwarranted. It upholds the validity of the proceedings and clarifies that **Assessee** shall **not be permitted** to reagitate the issue of reopening the assessment. – **DCIT vs M/s. Master Technologies Private Limited [2022] Civil Appeal No.8077 of 2022 (Supreme Court of India)**
- Supreme Court held that the reassessment proceedings shall be invalid when the subject matter of litigation is pending for rectification before the Appellate forum. - **M/s S.M. Overseas Pvt Ltd vs CIT [2022] Civil Appeal no 3612-3613 of 2012 (Supreme Court of India).**
- The proper way of reading reference to the term "incidental" in Section 11(4A) is to interpret it in the light of the sub-clause (i) of proviso to Section 2(15), i.e., that the activity in the nature of business, trade, commerce or service in relation to such activities should be conducted actually in the course of achieving the General Public Utility. - ACIT VS **M/s. Ahmedabad Urban development [2022] Civil appeal no.21762 of 2017 (Supreme court of India).**

Transfer Pricing

Rulings:

A. ITAT duly accepted the method of net asset value method employed by assessee and deletes secondary adjustment imposed by transfer

M/s. Aaradhana Realities Limited vs DCIT (ITA no 2195/Mum/2014/AY 2009-10) (Mumbai ITAT)

Facts:

- Aaradhana Realities Limited is an investment entity and has entered into **international transaction** i.e, sale of equity shares of its associated enterprise Essar Capital Limited ("ECL") to its Associated enterprise (Essar Capital holding limited Mauritius referred as ECHL, Mauritius)
- The transfer pricing officer observed that the Appellant has benchmarked the international transaction by applying a **Comparable Uncontrolled Price method ("CUP")** based on valuation certificate from an external valuer who valued ECL under Net Asset Value ('NAV') method under Rule 11UA.
- Discounted Cash flow method has not been applied due to inconsistencies in the projected cash inflows as ECL is an investment Company.
- However, TPO/AO had rejected the contention of the Assessee and applied discounted cash flow method and valued ECL at a higher valuation based on the actual cash flows earned.

Issue:

- Whether rule 11UA valuation could be considered as the most appropriate method for justifying Arm's Length Price of sale of shares?

Held:

- In view of the aforesaid facts, the contention of the Assessee is acceptable that DCF Method cannot be applied in the facts and circumstances of the present case given the uncertainty regarding income/future cash flow projections.
- In paragraph 52 of the Indian Valuation Standard 2018 it has been recommended that use of other valuation approaches instead of income approach be adopted in cases where there was significant uncertainty about the timing of income/future cash flows.
- Therefore, the Assessee's consideration of the valuation under Rule 11UA to Arms' Length Price for the transfer of Shares shall be accepted for justification of Arms' Length Price.

B. International Tax Updates and Rulings

International Tax Updates

- On October 04, 2022, the Colombian Tax Authority has extended the due date to report on ultimate beneficial owners' information to July 31, 2023.
- On October 6, 2022, the Mexican Senate's joint committee of the Ministries of Foreign Affairs and Treasury has approved the deposit of Multi-lateral Instrument (MLI).
- On October 17, 2022, the Argentine Government issued new tax exemptions in relation to exports of knowledge-based economic activities.
- OECD on October 17, 2022, published final Crypto-Assets Reporting Framework and amendments to Common Reporting Standard. The report covers two main areas: The introduction of a Crypto-Asset Reporting Framework and revisions to the existing Common Reporting standards.
- On November 25, 2022, the US government proposed foreign tax credit regulations to offer relief from cost recovery and source-based attribution rules and includes other key changes. The Proposed Regulations can generally be applied to all tax years to which the 2022 Final Regulations would have otherwise applied. The US Treasury Department addresses the definition of foreign income tax and the allocation and apportionment of foreign taxes on disregarded payments.
- On November 28, 2022, the Spanish Tax Authority has announced the immediate opening of the registration website for the new plastic packaging tax and has provided clarifications on the formal and compliance obligations associated with the tax. As the tax is effective as of 1 January 2023 and no extension is expected, businesses should become familiar with the new requirements.
- OECD on December 14, 2022 released the latest peer review assessments for 131 jurisdictions in relation to the compulsory spontaneous exchange of information. This is sixth annual peer review of the implementation of the base erosion profit shifting plan ("BEPS") Action plan 5 minimum standard on tax rulings which aims to provide tax administration with the necessary information concerning taxpayers to efficiently tackle tax avoidance and other BEPS risk. The new peer review results shows that 73 jurisdictions are fully in line with the BEPS action 5 minimum standard with the remaining 58 jurisdictions receiving a total of 61 recommendations to improve their legal or operational framework to identify their tax ruling and exchange information.
- Based on report from OECD dated December 16, 2022, Azerbaijan joins the inclusive framework on BEPS and participates on agreement to address the tax challenge arising from the digitalisation of the economy.

- On December 16, 2022, the Swiss Parliament has approved the constitutional amendment to implement the Pillar Two rules into Swiss domestic law. This amendment is now subject to a public vote on 18 June 2023, where a majority of the elective citizens as well as a majority of the Cantons (result of the popular vote per Canton) must approve the change to the Constitution.
- OECD released consultation document on December 20, 2022 on the withdrawal of digital service taxes and other relevant similar measures under pillar one and an implementation package for pillar two. The inclusive framework is expected to release administrative guidance on the interpretation or administration of the global minimum tax on rolling basis with the first package of administrative guidance to be released in early 2023.
- OECD has released guidance on safe harbours and penalty relief approved by the OECD/G20 Inclusive Framework dated December 21, 2022. The guidance includes a transitional Country-by-Country Reporting safe harbour, the framework for the development of permanent safe harbours based on simplified calculations and a common understanding as to a transitional penalty relief regime.

Rulings

A. Exploitation of Interest Deduction Provision would cover under GAAR:

Commissioner Of Inland Revenue vs Frucor Suntory New Zealand Limited SC 92/2020 [2022] NZSC 113

Facts:

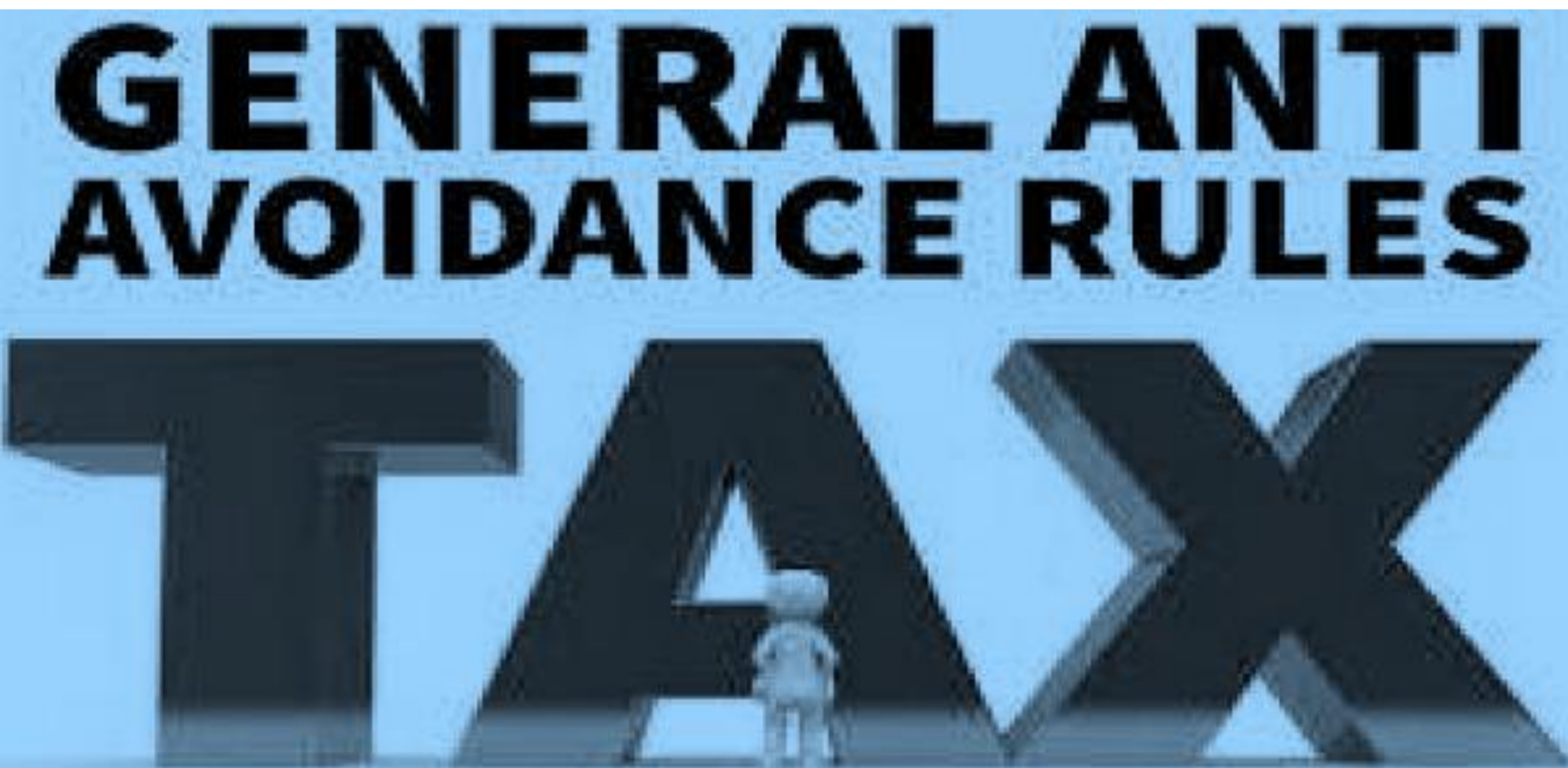
- DAP is a Singapore-based wholly-owned subsidiary of Groupe Danone SA (Groupe Danone). DAP formed Danone Holdings NZ Ltd (DHNZ) as an acquisition vehicle to acquire the Frucor Beverages Group Ltd (FBGL).
- The proposal was that Deutsche Bank would advance $204 million to DHNZ against a convertible note carrying interest over a five-year term. This advance would be repaid by the issue of 1025 shares by the DHNZ to Deutsche Bank. DAP would enter into a forward purchase agreement with Deutsche Bank under which it would pay $149 million to acquire the shares at the termination of the funding arrangement.
- Over the five-year duration of the note, Interest amounted to $66 million and was paid by DHNZ to Deutsche Bank. DHNZ claimed deductions in respect of the interest payments for the same.
- Commissioner of Inland Revenue observed that the net economic effect of funding arrangement was Deutsche Bank's advance of $55 million to DHNZ (being the difference between the $204 million advance and the $149 million paid by DAP under the forward purchase agreement). The $66 million paid by DHNZ to Deutsche Bank represents principal repayment of $55 million and an interest payment of $11 million.

Issue:

- In light of the above funding arrangement, could GAAR be invoked?

Held:

- The funding arrangement purported to alter the tax incidence of DHNZ by facilitating interest deductions.
- The purpose and effect of the tax avoidance arrangements were to provide deductibility for what in economic substance were repayments of principal.
- Deutsche Bank's net injection of funds was 55 million. The payment of 66 million is to be treated as repayment of Loan with interest of 11 million. The effect of the arrangement was that DHNZ sought to obtain deductions in relation to entire $66 million which were in nature of principal repayments. These Deductions are provided in the regulations to meet financing expenses and not repayments of principal.
- New Zealand Supreme Court upholds Court of Appeal's judgment that restricted interest deduction to $11 million as against $66 million claimed by the Frucor, thus confirms invocation of GAAR provisions.



C. Mergers and Acquisition

Key Rulings

A. Shares allotted as a consideration for demerger does not tantamount to Deemed Dividend

M/s. Grasim Industries Limited vs DCIT [2022] ITA No 1935/MUM/2020 2018-19 (Mumbai ITAT)

Facts:

- M/S Grasim Industries Limited ("the Assessee") a flagship company of the global conglomerate Aditya Birla group was involved in a merger with M/s. Aditya Birla Nuvo limited ('ABNL').
- ABNL is a company which is engaged in financial services business and it acquired financial services business of Birla Global Finance Ltd, a nonbanking finance company by amalgamation with effect from September 1, 2005
- ABNL has a wholly owned subsidiary M/s. Aditya Birla Financial Services Limited ('ABFSL'), which in turn holds 90.23% of Equity shares in M/s. Aditya Birla Finance Limited ('ABFL'). Balance of 9.77% in ABFL is held by ABNL.
- ABNL offloaded 3.93% holding in the ABFL to an investor PI opportunity fund.
- A composite scheme of arrangement was approved by NCLT wherein ABNL is merged with the Assessee with effect from July 1, 2017. Subsequently, 'Financial services business' of the Assessee (mainly consisted of investment in ABFL) was demerged into Aditya Birla Capital Limited ('ABCL').
- Consideration for the above merger is settled in the following manner:

Transaction	Consideration
Merger of ABNL with Assessee	Issued 19,04,62,665 equity shares to the shareholders of ABNL.
Demerger into ABCL from Assessee	ABCL issued 92,02,66,951 equity shares to the shareholders of the Assessee

- The AO held that the demerger is not in compliance with section 2(19AA) of the IT Act, as the "financial services business" mostly derives its value from the investment in ABFL. Further, AO observed that financial services business was not disclosed separately as a business in the Income-tax Return. AO opined that the investment in "financial service business" does not satisfy the definition of undertaking. Accordingly, the shares allotted against the demerger of ABCL should be treated as Deemed Dividend in the hands of the shareholders of the company.
- Subsequently, the AO held that it was dividend distributed by the Assessee to its shareholders and therefore provision of section 115-O of the IT Act (dividend distribution tax as existed earlier) would be applicable.

Issue:

- Whether allotment of shares for consideration of Demerger could be treated as "Deemed Dividend"?

Held:

- It has been observed that provisions relating to the taxation of the companies involved in the demerger and their shareholders are applicable only if the demerger fulfils the conditions provided u/s 2 (19 AA) of the IT Act. Mere sanction of the scheme by the High Court under the Companies Act by itself is not sufficient.
- The crux of the issue is that the undertaking being demerged should constitute a separate business activity itself. If individual assets or liabilities or any combination thereof is transferred, if it does not constitute a business activity, it cannot be considered as an undertaking.
- Past history of the Assessee of its merger with Birla Global Finance Ltd shows that it was carrying on Financial services Business. Therefore, out of the many business segments of Aditya Birla Nuvo limited one of the segment was of financial services. Merely because in the return of income separate business of financial services has not been disclosed, it does not go against the assessee.
- The scheme of demerger as approved by NCLT was duly carried out by the respective entities. Further, mere non-disclosure of Financial Services as a separate line of business in the return of income would not go against the context of demerger.
- CIRCULAR: NO. 5-P, DATED 9-10-1967 it is categorically held that where a company transferred assets/another company in a scheme of amalgamation, such transfer may not be regarded as a distribution by the company of its accumulated profits to shareholders even though its accumulated profits are embedded in the assets transferred by it. This is specifically with reference to the provisions of Section 2 (22) (a) of the IT Act dealing with deemed dividend. Though the circular specifically deals with the issues of amalgamation however the principle laid down in this circular equally applies to the issue of demerger.
- Therefore, in substance, in case of corporate reorganization, if it is otherwise compliant with the law, the provisions of deemed dividend does not apply. This is also one of the reasons why the issue of demerger was kept out of deemed dividend u/s 2 (22) of the Act by subclause (v) of Section 2 (22) which provides that the dividend does not include any distribution of shares pursuant to a demerger by the resulting company to the shareholders of the demerged company.
- Considering the above, shares allotted to the shareholders of the Assessee cannot be treated as deemed dividend.

Other Key Rulings:

- Property received by the Assessee from the Company, (closely held by family) pursuant to the family settlement/oral will of the father falls within the exemption provided under section 56(2)(vii)[Currently section 56(2)(x)] of the IT Act. Hon'ble ITAT rejected the Revenue's contention that Company is separate legal person and the transfer of property from Company to an individual cannot be considered as Settlement. – **Ms. Anitha Kumaran vs. ACIT [2022] ITA 1164/CHNY/2019 (Chennai ITAT)**

D. Indirect Tax and Foreign Trade Policy Updates

- GST council's 48th meeting was held on December 17, 2022 through a press release whereby it was decided that -
  - **E-Commerce operators** can allow micro-enterprises to use the e-commerce facility as unregistered suppliers or suppliers registered under the **composition scheme**.
  - Clarification was provided on GST applicable to equipment used by petroleum companies for exploration and methods to deal with **mismatches** of invoices in **GSTR-1 vs GSTR-3B.**
  - **No GST** is applicable on the residential dwellings rented to a registered person if it is rented in his/her personal capacity for use as his/her own residence and on his own account and not on account of his business.
- CBIC vide circular no 186/18/2022 dated December 27, 2022, clarified that GST is not applicable on insurance on the no-claim bonus offered by insurance companies, therefore, it is deductible from the premium without GST aspect.
- CBIC vide press release no 559 dated October 21, 2022 notified that the Central government has amended Section 37, 39 of Central Goods &Service Tax Act (CGST), 2017 with effect from October 1, 2022 that the tax payer shall not be allowed to file GSTR-1 if previous GSTR-1 is not filed and as per Section 39(10) a taxpayer shall not be allowed to file GSTR-3B if GSTR-1 for the same tax period is not filed.
- GST Council on October 06, 2022, has introduced various new functionalities on the GST Portal, pertaining to different modules such as Registration, Returns, Advance Ruling, Payment, Refund and other miscellaneous topics.

Foreign Trade Policy

- DGFT vide notification no. 39/2015-2020 dated October 14, 2022, has allowed export of wheat flour (Atta) against Advance Authorization. Export Oriented Units (EOUs) and units in SEZs, can import wheat for production without procurement of domestic wheat subject to conditions as specified.
- DGFT vide notification no. 43/2015-2020 dated November 9, 2022, that the Central Government makes the following amendments in FTP –
  - Import for export (In Para 2.46)
  - Applicability of FTP Schemes for Export Realisations in Indian Rupees (In Para 2.53)
  - Status Holder (In Para 3.20)
  - Currency for Realisation of Export Proceeds (In Para 4.21)
- DGFT vide trade notice no. 23/2022-23 dated December 22, 2022, informed that the electronic platform for Certificates of Origin (eCoO) is being expanded to facilitate issuance of Preferential CoO for exports to Australia under India-Australia Economic Cooperation and Trade Agreement (Ind-Aus ECTA) with effect from December 29, 2022.

Customs Act, 1962

- CBIC vide circular no. 25/2022-Customs dated December 09, 2022, has amended the Postal Export (Electronic Declaration and Processing) Regulation, 2022 to introduce the dedicated Postal Bill of Exports Automated System for postal exports. This is developed by CBIC in collaboration with the Department of Posts in order to leverage the vast network of post offices across the country.
- CBIC vide notification no. 65/2022-Customs dated December 29, 2022, has extended the existing concessional import duties on specified edible oils and lentils from March 31, 2023 to March 31, 2024.

E. Companies Act, 2013

- MCA vide notification no. G.S.R 831(E) dated November 21, 2022 notified that the Central Government hereby makes further rules to amend the Companies (Registered Valuers and Valuation) Rules, 2017.
- MCA is launching second set of Company Forms covering 56 forms in two different lots on MCA21 V3 portal. 10 out of 56 forms will be launched on 09th January 2023 at 12:00 AM and the remaining 46 forms on 23rd January 2023.
- MCA had notified that foreign nationals from border-sharing countries need security clearance from Home Ministry to obtain the Director's Identification Number (DIN).

F. SEBI Updates

- SEBI vide circular no SEBI/HO/DDHS/RACPOD1/CIR/P/2022/136 dated October 03, 2022, had extended the timeline for entering the details of the existing outstanding non-convertible securities in the 'Security and Covenant Monitoring' system hosted by Depositories. This circular is issued to be in line with the various disclosure requirements.
- SEBI vide circular no SEBI/HO/MIRSD/MIRSD-PoD-1/P/CIR/2022/137 dated October 06, 2022, in order to make the process more transparent and similar, the following conditions have been made part of a separate document viz. 'Demand Debit and Pledge Instruction' (DDPI) –
  - Transfer of securities held in the beneficial owner accounts of the client towards Stock Exchange related deliveries / settlement obligations arising out of trades executed by clients on the Stock Exchange through the same stockbroker,
  - Pledging / re-pledging of securities in favour of trading member (TM) / Clearing member (CM),
  - Mutual Funds transactions executed on stock exchange order entry platforms, and which shall be in compliance with SEBI guidelines.
  - Tendering shares in open offers which shall be in compliance with SEBI guidelines.
- SEBI vide circular no SEBI/HO/DDHS/P/CIR/2022/00144 - October 28, 2022, that Chapter V (Denomination of issuance and trading of Non-Convertible Securities) of the Operational Circular replaced the following –
  - The Face value of each debt security or non-convertible redeemable preference share issued on private placement basis shall be INR 1 Lakh.
  - The face value of the listed debt security and non-convertible redeemable preference share issued on private placement basis traded on a stock exchange or OTC basis shall be INR 1 lakh.
- SEBI vide circular no. SEBI/HO/AFD-1/PoD/P/CIR/2022/155 dated November 17, 2022, notified the guidelines for Alternate Investment Funds (AIFs) for declaration of first close (The First Close of a scheme shall be declared not later than 12 months from the date of SEBI communication), calculation of tenure of close ended schemes of AIF (The Tenure of close ended schemes of AIFs shall be calculated from the date of declaration of the First Close) and change of sponsor/manager or change in control of sponsor/manager.
- SEBI vide circular no. SEBI/HO/DDHS/DDHS-RACPOD1/P/CIR/2022/154 dated November 14, 2022, introduced registration and regulatory framework for entities operating or desirous of operating as Online Bond Platform Providers (OBPPs) under regulation 51A of the SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021.

- SEBI vide circular no. SEBI/HO/DDHS/DDHS_Div1/P/CIR/2022/159 dated November 24, 2022, replaced the format in which entities investing in over-the-counter (OTC) trade in non-convertible securities to regularize the discrepancies in reporting of OTC trades by investors.
- SEBI vide circular no. SEBI/HO/IMD/IMD-I DOF2/P/CIR/2022/161 dated November 25, 2022, notified the timelines for the transfer of dividend and redemption proceeds to unitholders:
  - Payment of dividend to unitholders shall be made within seven working days from the record date.
  - The transfer of redemption or repurchase proceeds to the unitholders shall be made within three working days from the date of redemption or repurchase.
  - Interest for the period of delay in transfer of redemption or repurchase or dividend shall be payable to unitholders at the rate of 15% per annum along with the proceeds of redemption or repurchase or dividend, as the case may be.
- SEBI vide circular no. SEBI/HO/IMD/IMD-I DOF2/P/CIR/2022/164 dated November 29, 2022, notified that the limits of investment made by mutual fund schemes in debt and money market instrument issued by a single issuer:
  - A mutual fund scheme shall not invest more than:
    - 10% of its Net Asset Value (NAV) in debt and money market securities rated AAA; or
    - 8% of its NAV in debt and money market securities rated AA; or
    - 6% of its NAV in debt and money market securities rated A and below issued by a single issuer.
  - The above investment limit may be extended by up to 2% of the NAV of the scheme with prior approval of the Board of Trustees and Board of Directors of the AMC, subject to compliance with the overall 12% limit specified in clause 1 of Seventh Schedule of MF Regulation.
- SEBI vide circular no. SEBI/HO/DDHS/DDHS_Div1/P/CIR/2022/167 dated November 30, 2022, notified that the timeline for listing of securities issued on a private placement basis is being reduced from T+4 days to T+3 days (wherein T refers to issue closure date). The provision shall come into effect from January 1, 2023.
- SEBI vide Notification no. SEBI/HO/AFD-1/PoD/CIR/2022/171 dated December 09, 2022, notified that all the Alternative Investment Funds (AIFs) may raise funds from any investor whether Indian, foreign or non-resident Indians, by way of issue of units. At the time of on boarding investors, the manager of an AIFs shall fulfil the conditions prescribed to foreign Investment in AIFs.

G. FEMA Updates

- RBI vide notification RBI/2022-23/127 dated October 11, 2022, has laid down guidelines to be followed by standalone primary dealers (For NBFC's). The capital charge for market risk in foreign exchange exposure shall be higher of the charges worked out by the standardised approach and the internal risk management framework-based value at risk model. Standalone Primary Dealers ('SPD') shall maintain a market risk capital charge of 15% for net open positions arising out of foreign business with a risk weight of 100%. The net open position for foreign exchange exposures shall be calculated as per methodology prescribed in the master circular. Additionally, to the foreign exchange exposure limits prescribed under the capital charge for market risk for all the permissible non-core activities, including foreign exchange activities, shall not be more than 20% of the Net Owned Fund of the SPD as per last audited balance sheet.

H. Financial Services (NBFC, AIF & FPI)

- RBI vide notification RBI/2022-23/124/ dated October 06, 2022 has introduced the appointment of Internal Ombudsman by the credit information companies. These directions are issued with a view to strengthen the internal grievance redress mechanism within the credit information company by enabling a review of customer complaints before being rejected by Company's independent apex level authority.
- RBI vide notification RBI/2022-23/126 dated October 11, 2022, has bought a change whereby standalone primary dealers are permitted to offer foreign exchange products as allowed from time to time to their foreign portfolio clients. As laid down in the statement on development and regulatory policies it has been decided to allow Standalone primary dealers to offer all foreign exchange market-making facilities to users, as currently permitted to category-I authorized dealers, subject to adherence to prudential regulations and other guidelines to be issued separately.
- RBI vide notification RBI/2022-23/129 dated October 11, 2022 delineated the four layered regulatory structure for NBFC under scale based regulatory framework. If the consolidated asset size of the group is INR1000 crores or more each investment and credit company, microfinance institution, mortgage guarantee company in the group shall be classified as Non-banking finance company ("NBFC") in the middle layer. The provisions mentioned are not applicable for upper layer. Statutory auditors have a role to certify the asset size of all NBFC in the group every year.
- RBI vide notification RBI/2022-23/151 dated December 12, 2022, has allowed qualified organisations to use exchanges in the International Financial Services Centre (IFSC) authorised by the International Financial Services Centres Authority (IFSCA) to hedge their exposure to gold price risk.

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Thank you

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