

Corporate Update

March | 2019

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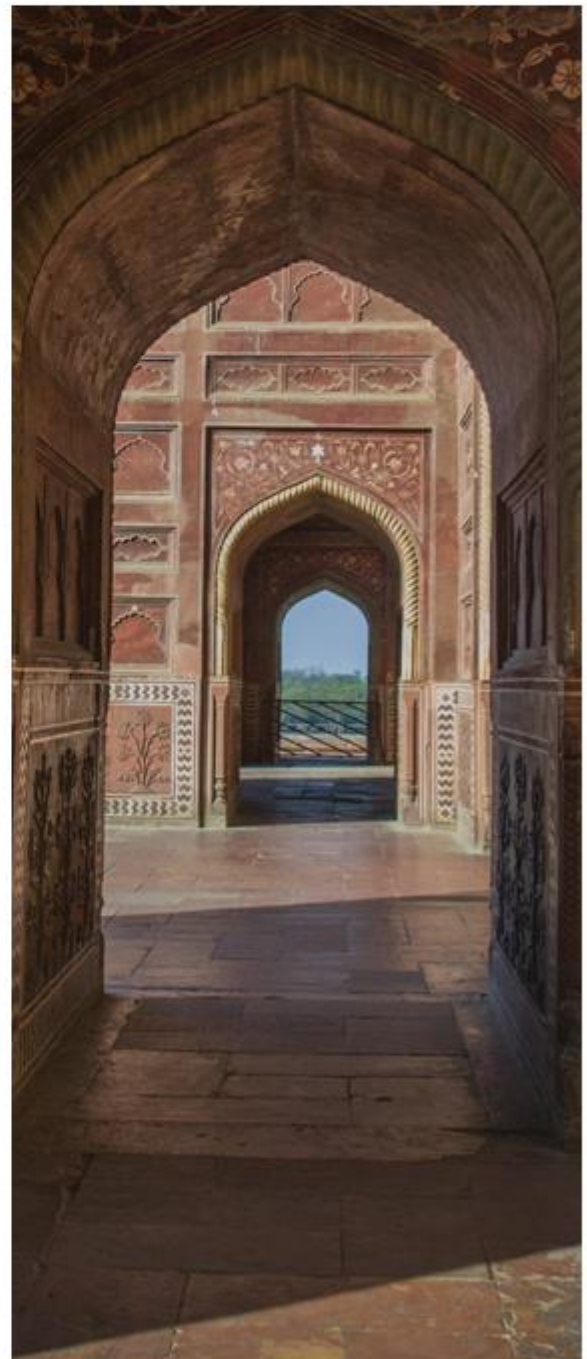
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FOREWORD



Dear Reader,

The first quarter of the year 2019 has marked important developments in the corporate law arena to improve transparency. For instance, the Ministry of Corporate Affairs ('MCA') has introduced an electronic filing requirement for all companies registered on or before December 31, 2017, under which, key information such as details of directors, auditors, registered office, key managerial personnel etc gets reflected in the form. Such information shall be available for access to the common public.

The rampant practice of creation of shell / conduit companies has always been a matter of concern for the Government. To ensure genuineness of companies on record of the MCA, it has been stipulated that this electronic form shall be accompanied by evidence such as geographic coordinates of the registered office, photograph of the exteriors and interiors of the registered office showing therein, at least a director / Key Management Personnel.

At the same time, the Government has not lost sight of its objective of 'Ease of Doing Business'. To facilitate a single window clearance, the MCA had developed a framework under which, registrations of an Indian company under other legislations, such as Permanent Account Number and Tax Deduction Account Number, could be obtained at the time of incorporation itself. Such facility has now been extended to other critical registrations also, such as Goods and Service Tax, Employee Provident Fund etc.

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Transfer Pricing

Delhi High Court holds that no adjustment warranted for salary of seconded employees reimbursed at cost if corresponding income offered to tax

*Blue Scope Steel India Pvt. Ltd.
[TS-123-HC-2019(DEL)-TP]*

In a recent decision, the High Court of Delhi, upheld the order of the Tax Tribunal and CIT(A), rejecting determination of Arm's Length Price ('ALP') at Nil in respect of amount paid towards salary reimbursement of seconded employees by the Assessee at cost.

On the facts of the case, the Assessee, subsidiary of Australian Company, was engaged in rendering Business Support Services to its Associate Enterprise ('AE'). During an earlier year, the Assessee had undertaken to setup a project which due to commercial constraints was sold to a Joint Venture ('JV') between Tata Steel Ltd. and Blue Scope Steel Ltd., Australia. However, even post sale of project, the Assessee continued to provide project management services and received income thereon, which was credited to its Profit and Loss (P&L) account.

Such project management services and support services were provided by the employee seconded to the Assessee by the Australian AE. The Indian portion of the salary of seconded employees was paid by the Assessee and the foreign portion was paid by the AE and later reimbursed by the Assessee at cost.

For the relevant year, the case of the Assessee was referred to Transfer Pricing Officer ('TPO') who accepted the transaction of Business Support Services to be at Arm's length. However, ALP of salary reimbursed by the Assessee to its AE was determined at Nil, holding the same to be unwarranted. The Assessee went to appeal before the CIT(A) who deleted the addition made by TPO, which was subsequently challenged by the tax department before Tax Tribunal. The Tax Tribunal upheld the order of CIT(A) deleting the addition.

Subsequently, the department filed appeal before High Court. Before High Court, the department contended that the real beneficiary of the seconded employees was not the Assessee rather the AE. Moreover, neither JV agreement nor agreement between the Assessee and the third party indicated that employees of AE were necessary to discharge the functions.

With regard to above contention of the department, the High Court took note of the order of CIT(A), who observed that the seconded employees were responsible for providing both project management and Business Support Services and income from both the activities was credited to the P&L account of the Assessee. He held that since the Assessing Officer had accepted the receipt of income he is duty bound to provide deduction on account of the expenses incurred towards earning such income. Further, even though the Assessing Officer had used Comparable Uncontrolled Price Method to determine ALP at Nil, he had not used any independent comparable transaction to benchmark the same.

The High Court upheld the view of CIT(A) which was upheld by Tax Tribunal as well and accordingly, the appeal of the department was dismissed.

Valuation of shares under DCF method by Assessee upheld by the Tax Tribunal

*M/s Technip Italy S.P.A.
[TS-122-ITAT-2019(DEL)-TP]*

In a recent decision, Tax Tribunal, Delhi Bench deleted the addition made by Assessing Officer/TPO, in respect of value of shares transferred by AE. The Tax Tribunal rejected Discounted Cash Flow ('DCF') valuation done by TPO and accepted the valuation report of Independent Valuer.

On the facts of the case, the Assessee, a company incorporated under the laws of Italy was engaged in the business of construction, design and engineering and implementation services to Oil & Gas, power, Pharmaceuticals and infrastructure industries. Technip India was the wholly-owned subsidiary of the Assessee. During the year under consideration, the Assessee

entered into a Share Purchase Agreement (SPA) with Technip France SAS, for the transfer of its entire shareholding in Technip India, at an agreed price and, accordingly, Technip India became 100% subsidiary of Technip France.

The sale consideration for such transfer was determined based on fair valuation of shares of Technip India undertaken by an independent valuer following DCF method. The Assessee offered the income arising from sale of such shares representing long term capital gain in terms of Section 45 of the Income-tax Act.

The matter of the Assessee was referred to the TPO. The TPO rejected the share valuation report furnished by the Assessee and proposed adjustment on account of a) Weighted Average Cost of Capital by adopting different Market Risk Premium ('MRP'), b) Goodwill, and c) Difference in Exchange Rate.

Against such adjustment, the Assessee raised objections before the DRP wherein the additions proposed by TPO were confirmed. Aggrieved the Assessee filed an appeal before the Tax Tribunal against the final assessment order and also raised an additional ground.

The additional ground raised for inapplicability of transfer pricing provisions on the impugned transaction, with reference to the Non-Discrimination clause (Article-25) of India-Italy Double Taxation Avoidance Agreement, was dismissed by the Tax Tribunal.

With respect to the main grounds, the Tax Tribunal observed that the TPO had primarily rejected the share valuation report obtained by the Assessee adopting different MRP for computing Fair Market Value (FMV) per share. The TPO took the MRP of Indian Stock exchange index since the year of incorporation of the company i.e. 1998 whereas the independent valuers took the MRP based on performance of Indian Stock exchange index over past 32 years i.e. 1979 to 2011. The Tax Tribunal observed that the market return over a longer time frame would neutralize the impact of any abnormalities on the MRP and as such, MRP as adopted

by the valuer is correct. Considering such MRP no adjustment in respect of share price would be warranted. The TPO also did not allow ill-liquidity rebate, since the shares of company do not have liquidity in the open market, which the Tax Tribunal held should have been allowed to the Assessee.

With regard to addition of value of Goodwill, which appeared in the balance sheet of the Assessee, to arrive at FMV of its share in Indian company, the Tax Tribunal held that DCF method, used to compute FMV of shares, subsumes value of all kinds of assets, including intangible asset being Goodwill. As such, no separate addition of Goodwill is warranted. Further, since the Goodwill was not appearing in the balance sheet of the Indian Company, whose shares were being valued, Tax Tribunal held that question of including the same while determining FMV do not arise.

Lastly, regarding adjustment on account of exchange difference, since the transaction was undertaken in Indian currency, the Tax Tribunal held that such adjustment is uncalled for and was thereby deleted.

Accordingly, the TP adjustment made by TPO was deleted.



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India and the USA sign agreement for exchange of Country-by-Country reports (CbC Reports)

*CBDT Press Release dated March 27, 2019
and Circular No. 7/2019 dated April 08, 2019*

The OECD in its BEPS (Base Erosion and Profit Shifting) Action Plan 13 had prescribed filing of CbC reports by the parent entity of an international group to the tax jurisdiction of which it is a resident and exchange of such reports between countries, as a minimum standard requirement.

A CbC report aggregates country-by-country information relating to the global allocation of income, taxes paid, and certain other indicators of the international group. It also contains a list of all the group companies and the nature of the main business activity of each such constituent entity.

As per Indian income tax provisions, where the turnover threshold as prescribed for the international group is met, the Indian constituent entity is required to file an intimation to tax authorities providing details of parent entity or alternate reporting entity filing the CbC report. However, the Indian constituent entity of international group is required to locally file the CbC report in India, if the parent entity is resident of a country or territory

- where the parent entity is 'not obligated' to file a CbC report;
- with which India does not have an agreement for the exchange of CbC report; or
- where there has been a systemic failure of such country or territory to exchange CbC reports and the failure is intimated by the prescribed authority to the Indian constituent entity.

India has already signed the Multilateral Competent Authority Agreement (MCAA) for exchange of CbC reports, which has enabled exchange with 62 jurisdictions.

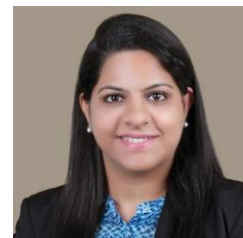
However, USA was one of the countries with which India did not have an agreement for exchange of CbC reports.

On March 27, 2019, India and the USA signed an agreement for automatic exchange of Country-by-Country (CbC) reports of multinational enterprises. The agreement for exchange of CbC reports along with the Bilateral Competent Authority Arrangement between India and the US would enable both the countries to automatically exchange CbC reports filed by the parent entities of multinational groups in the respective jurisdictions, pertaining to the years commencing on or after January 1, 2016. This information would enable enhanced level of assessment of tax risk by both tax

administrations.

With the signing of agreement for automatic exchange of CbC reports between India and the US, Indian constituent entities of international groups headquartered in US would not be required to do local filing of the CbC Reports of their international groups in India where the CbC report has already been filed by the parent entity or alternate reporting entity in the USA.

However, the agreement and the exchange mechanism would come into effect only after both the countries notify each other about the completion of all internal procedures for exchange which is underway. In order to remove the genuine hardship faced by the constituent entities whose parent entities are resident in USA, the CBDT has extended the period for furnishing of CbC report by such constituent entities, in respect of reporting accounting years ending upto April 29, 2018, to April 30, 2019.



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Domestic Taxation

Income-tax exemption limit for gratuity enhanced upto INR 20 lakhs

Notification no. 16/2019

CBDT has increased the income-tax exemption limit for gratuity under section 10(10)(iii) of the Income Tax Act, 1961 to INR 20 lakhs vide Notification no. 16/2019 dated 08.03.2019, from INR 10 lakhs w.e.f. 29.03.2018. This notification is issued in pursuance of Notification S.O. 1420(E) dated 29.03.2018 issued by Ministry of Labour and Employment, which increased the gratuity amount payable limit from INR 10 lakhs to INR 20 lakhs under Payment of Gratuity Act, 1972 w.e.f. 29.03.2018.



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Goods And Services Tax

General Updates

CBIC vide Circular No 92/11/2019-GST, dated March 7, 2019 has issued clarification on treatment of sales promotional schemes under GST. In brief, the Circular clarifies:

- **Free Samples & Gifts:** Free samples and gifts provided without consideration would not qualify as 'Supply' u/s 7 of CGST Act, 2017 ("the act"), except when supplied to related person (on account of entry contained in Schedule I of the act). Further, Section 17(5) of the CGST Act specifically disallows the Input Tax Credit (ITC) with respect to inputs, input services and capital goods to the extent they are used in relation to such gifts or free samples distributed without any consideration.

However, where the activity of distribution of gifts or free samples falls within the scope of 'Supply' e.g., on account of the provisions contained in Schedule I of the Act, the supplier would be eligible to avail Input Tax Credit.

- **Buy one get one free offer:** It has been clarified that such Supply would be treated as supply of two goods for the price of one, therefore it will be either classified under composite supply or mixed supply u/s 8 of the Act. Further, ITC would be available to the supplier for the inputs, input services and capital goods used in relation to supply of such goods or services or both as part of such offers.

In other words, ITC reversal is not required in this case.

- **Discount including buy more save more offer:** These discounts are generally established in terms of an agreement entered into at or before the

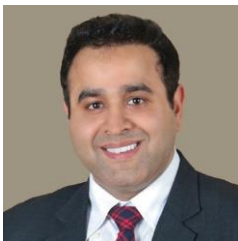
time of supply, however exact quantum of discount is ascertained at the end of the year. Being periodic/year-end or staggered discounts, such discounts are allowed to be reduced from the value of supply, provided the conditions as prescribed under Section 15 of CGST Act are satisfied. The conditions under Section 15 are as under:

- Such discounts are established by an agreement entered into at or before the time of supply;
- Discount is specifically linked to relevant invoices;
- Input tax credit as is attributable to the discount on the basis of the document issued by the supplier is reversed by the recipient of supply;

Furthermore, Supplier would be eligible to avail input tax credit for such inputs, input services and capital goods used in relation to supply of such goods and/or services. In other words, ITC reversal is not required in this case.

- **Secondary Discounts:** These discounts are not known at the time of supply, but are offered or availed after the supply is over. Since such discounts are not known at the time of or before Supply, the same would not be allowed to be reduced from the value of Supply for the purpose of levy of GST. However, Supplier may issue financial credit notes to offer such discounts, without reduction in GST liability of the Supplier. Since, the output GST liability of Supplier would not be reduced by such financial credit notes, there would be no impact on availability of input tax credit.

Summary			
S.No.	Supply Type	Eligibility of ITC to Supplier	Eligibility of ITC to Recipient
1	Free Samples & Gifts	Not Available	Not Applicable
2	Buy one get one free offer	Available	Available
3	Discounts including 'buy more save more' offers	Available (subject to conditions)	Available
4	Secondary Discounts	No Impact on ITC	No Impact on ITC



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Corporate Law

MCA introduces E-Form AGILE

Ministry of Corporate Affairs vide notification dated 29th March, 2019 has amended the Companies (Incorporation) Rules, 2014 by notifying Companies (Incorporation) Third Amendment Rules, 2019 (hereinafter referred to as the Amended Rules). The Amended Rules shall come into force on the date of publication in the official gazette.

As per the Amended Rules, a new Rule 38A has been inserted after the existing Rule 38 which provides as under-

The application for incorporation of a company under Rule 38 shall be accompanied by e-form AGILE (INC-35) containing an application for registration of the following numbers, if required by the company-

1. Goods and Service Tax Identification Number (GSTIN) with effect from 31st March, 2019

2. Employee's Provident Fund Organisation (EPFO) with effect from 8th April, 2019
3. Employees State Insurance Corporation (ESIC) with effect from 15th April, 2019

Amendment in Indian Stamp Act

The President of India, has given his assent to the Amendments to the Indian Stamp Act, 1899, which were introduced as part of the Finance Act 2019.

The key changes introduced in the rates of stamp duty are as under-

(a) Article 27 - Debentures

Particulars	Rate of Duty	
	After Amendment	Before Amendment
In case of Issue of debenture	0.005% of the market value [Note: market value of traded security is the value at which it is traded in stock exchange; in respect of others, it is the consideration shown in the instrument]	0.05% per year of the face value of debentures, subject to a maximum of 0.25% or Rs.25 lakhs, whichever is lower.
In case of Transfer and re-issue of debenture	0.0001% of the consideration shown in the instrument of transfer	½ of the duty payable on conveyance (Art. 23) for a consideration equal to face value of debenture.

(b) Article 56A -Security Other than Debentures

A new Article 56A inserted after existing Article 56, which provides as under-

Particulars	Rate of Duty	
	After Amendment	Before Amendment
Issue of security other than debenture	0.005% of the market value [Note: market value of traded security is the value at which it is traded in stock exchange; in respect of others, it is the consideration shown in the instrument]	Charged as per State Schedule; duty was 0.1% in Delhi.
Transfer of security other than debenture on delivery basis	0.015% of the consideration shown in the instrument of transfer	0.25% of the value of share
Transfer of security other than debenture on non-delivery basis	0.003% of the consideration shown in the instrument of transfer	

The existing Article 62 items (a) and (b) of and entries relating thereto [relating to transfer of shares and debentures] shall be omitted. As a consequence, debentures, whether marketable or otherwise shall attract duty at the above rates.

Note- The above provisions will be effective from the date to be notified by the Govt. of India. The notification is awaited as on date.



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Important dates to remember

Particulars	Date
Deposit of TDS for the month of April 2019	07.05.2019
Filing of GSTR I for the month of April 2019	20.05.2019
Filing of GSTR IIIB for the month of April 2019	11.05.2019

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