MPC & CO LLP
CHARTERED ACCOUNTANTS

Corporate Update

October | 2022

CONTENTS

FOREWORD 2

DIRECT TAXES

INTERNATIONAL TAXATION

- Arm's length price of reimbursement of expenses cannot be determined as Nil 3

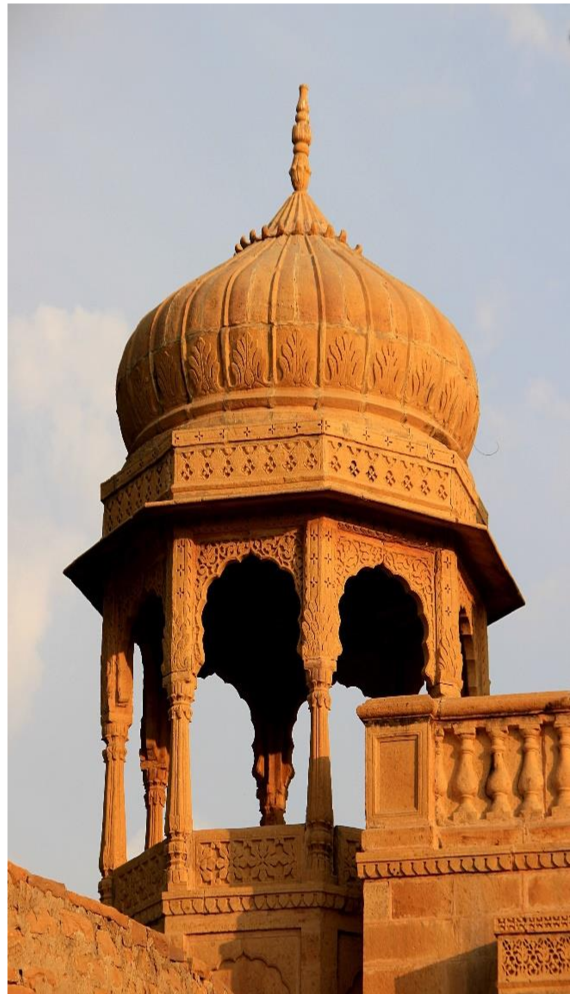
DOMESTIC TAXATION

- Revised Guidelines for compounding of offences under the Income Tax Act 4
- Exemption of TDS on Leave Travel Concession (LTC) paid for travel with a foreign leg is not permissible 6
- No Deduction of Employees' Contribution to Provident Fund, Employees State Insurance under Section 36(1)(va) as per time limit prescribed in Section 43B 6

REGULATORY

- Late Submission Fee for reporting delays under Foreign Exchange Management Act, 1999 8

IMPORTANT DATE TO REMEMBER 10



FOREWORD

Dear Reader,

India assumes G20 Presidency with effect from December 01, 2022 and hopes to play an effective role in this position. Prime Minister, Mr. Narendra Modi has said "India's G20 presidency wil lbe inclusive, ambitious, decisive, and action-oriented".

Indian economy continues to do well and GDP growth is now expected around 6.5% for the current financial year.

In this Update, we deal with certain important Judgements of Supreme Court, Appellate Tribunal and changes in certain regulations under Foreign Exchange Management Act, 1999.

C.S. Mathur
Partner

DIRECT TAXES

INTERNATIONAL TAXATION

Arm's length price of reimbursement of expenses cannot be determined as Nil

ThyssenKrupp Industrial Solutions (India) Private Limited [TS-474-ITAT-2022(Mum)-TP]

The ITAT, Mumbai in its recent judgement held that arm's length price of the reimbursement of expenses paid cannot be determined to be Nil on the basis of benefit test or commercial expediency of expenditure.

On the facts of the case, the assessee is engaged in the business of design, construction, installation and commissioning of industrial plants for chemical, petrochemical, fertiliser and related industries. For the AY 2011-12, transfer pricing addition was made amongst other corporate tax disallowances.

The assessee has reimbursed expenses such as salary, software expenses, travel, telephone, insurance, courier charges, training expenses, accommodation, etc. incurred by the associated enterprise (AE) on behalf of the assessee. Such expenses were reimbursed on the actual basis without any mark-up. Since the third-party cost was initially incurred by the AE and later reimbursed by the assessee, Comparable Uncontrolled Price ('CUP') was adopted as the most appropriate method for benchmarking the transactions.

The Transfer Pricing Officer (TPO) noted that the assessee has failed to establish necessity, receipt, request, rendition and benefit of the services in respect of cost reimbursed to the AE, and held the arm's length price of the same to be Nil.

The assessee filed objection before Dispute Resolution Panel (DRP) wherein the addition made by TPO was upheld on the basis that the assessee has failed to satisfy 'benefit test' and the 'willingness to pay test'. Aggrieved, the assessee filed an appeal before ITAT.

Before ITAT, the assessee submitted that these arrangements for reimbursement were made purely from an administrative convenience and the primary liability was towards third party only. Further, the assessee submitted that these expenses were paid on actual basis without any mark-up and back-to-back invoices for these reimbursements were filed with the lower tax authorities.

The ITAT based on the facts and documents placed on record noted that – (a) the TPO did not conduct a search to find out the independent comparable transaction, and (b) accrual of benefit to the assessee or the commercial expediency of any expenditure incurred by the assessee cannot be the basis for disallowance. Further, the ITAT relying upon the judgement(s) of Hon'ble High Court of Delhi in the case of Cushman and Wakefield (India) Pvt. Ltd. [2014] 367 ITR 730 (Del.), EKL Appliances Ltd. [2012] 345 ITR 241 (Del.) and CIT v/s Lever India Exports Ltd. [2017] 246 Taxmann 133 (Bombay) held that the reimbursement of expenditure cannot be determined as Nil.

Shweta Kapoor
Director
Tax Advisory
☏ +91 11 4710 2253

DOMESTIC TAXATION

Revised Guidelines for compounding of offences under the Income Tax Act

Offences that are liable for prosecution are listed under Chapter XXII of the Income Tax Act, 1961 ("Act"). Section 279 of the Act enlists various offences which can be compounded by the Pr CCIT/CCIT/Pr DGIT/DGIT.

In respect of compounding of offences, CBDT issues guidelines from time to time for proper administration of the provision.

On 16 September 2022, CBDT has issued New Guidelines ('New Guidelines') in supersession of all earlier guidelines including the last guidelines dated 14 June 2019 ('2019 Guidelines'). The key changes made in the New Guidelines are highlighted below:-

1) Date of applicability

The New Guidelines are applicable to all compounding applications received on or after date of its issue i.e. September 16, 2022.

A specific reference to the applicability of these guidelines to the offenses under other Direct Tax laws has been removed.

2) Categorisation Rationale

Similar to the earlier guidelines, the New Guidelines classify the offences into two categories; category A offences, which are, offences of technical nature caused by an act of omission, and category B offences which are non-technical offences attributed to an act of commission.

3) Competent Authority to compound an offence

The New Guidelines provide that the jurisdictional PrCCIT/ CCIT/ PrDGIT/ DGIT shall be the Competent Authority for compounding of offences covered under category A and category B. The earlier threshold of Rs. 10,00,000 compounding charges, above which the approval from a committee comprising of chief commissioner rank officers was required, has been removed.

4) Reclassification of offence

Offences under section 276 of the Act (removal, concealment, transfer or delivery of property to thwart tax recovery), as applicable from 01.04.1989, has been classified as category B offence under the New Guidelines. The same was not compoundable in the 2019 guidelines.

5) Time-limit Extension Criteria

New Guidelines (para 7 – conditions) permit filing of compounding application beyond 12 months but up to 24 months from the end of the month of filing of prosecution complaint in court, upon payment of increased compounding charges @ 1.25 times of the normal compounding charges.

6) Additional Extension for filing compounding application

New Guidelines provide for relaxation in extension period beyond 24 months but up to 36 months in deserving cases by the jurisdictional Principal Commissioner of Income Tax ('Pr CIT') subject to payment of compounding charges @ 1.5 times the normal compounding charges. In 2019 guidelines, the extension was available

up to the period of 24 months subject to the payment of compounding charges @ 1.25 times if the delay was found attributable to reasons beyond applicant's control.

7) **Offences normally not compoundable**

New Guidelines provide that offence under section 276, where the outstanding amount in recovery has not been deposited before filing the Compounding application is not normally compoundable.

8) **Exceptional Case Approval simplified**

2019 Guidelines provided that compounding can be done for offences normally not compoundable for a deserving case on approval from the finance minister as per the CBDT report received. Under the New Guidelines, this power has been given to the CBDT to decide basis report received from jurisdictional Pr CIT.

9) **Extended time-limit for payment of compounding charges**

2019 Guidelines provided extension of time for payment up to 3 months, which has been doubled and is provided up to 6 months under the New Guidelines. For extension up to 12 months, 2019 guidelines provided for approval of Committee whereas the New Guidelines requires previous approval in writing of the Pr. CCIT of the region concerned.

10) **Lower interest rate for payment of compounding charges during the extended period**

New Guidelines reduce the interest rate from 2% to 1% for first 3 months and from 3% to 2% beyond 3 months.

11) **Compounding fee for offence under section 276**

New Guidelines provide for calculation of compounding fee @ 75% of outstanding recovery amount sought to be thwarted through the removal/concealment/transfer/delivery of property.

12) **Maximum Compounding charges specified**

Unlike the 2019 guidelines, the New Guidelines specify the maximum amount of compounding charges that can be levied (for various offences like under section 276B/BB/C/CC), broadly, being the amount in default (like TDS/ tax/ interest/penalty).

Conclusion

The New Guidelines aim at providing more time to taxpayers to avail compounding opportunity, albeit at an increased interest rate. Further, the committee required under the earlier guidelines for offences involving compounding charges above the prescribed threshold, has now been done away with.

Jatinder Singh
Senior Director
Tax Advisory
☏ +91 11 4710 2272

Exemption of TDS on Leave Travel Concession (LTC) paid for travel with a foreign leg is not permissible

State Bank of India Vs. Assistant Commissioner of Income Tax [2022] 144 taxmann.com 131 (SC)

On the facts of the case State Bank of India (assessee) is engaged in the banking business. The assessee was making payments to its employees for LTC facility, which were considered exempt from tax u/s 10(5) of the Act and thus the assessee did not make any Tax Deducted at Source (TDS) on payment of LTC to its employees.

The Assessing Officer (AO) during verification proceedings examined the exemption claimed by the assessee and held the assessee to be an "Assessee in Default" for not deducting TDS on payment of LTC to its employees. The exemption was denied by the AO for the following reasons:

a. Amount paid towards LTC is exempt from TDS only if the travel is made within India with the possible shortest route and not for travel with a foreign leg;

b. The employee did not travel only to a domestic destination but also to a foreign country as well;

c. The employees had admittedly not taken the shortest possible route between the two destinations as required under the Rules.

The decision of the AO was upheld by the CIT (A) and ITAT. Hon'ble High Court of Delhi also dismissed the appeal by holding that there was no question of law arising for adjudication.

Upon appeal before the Hon'ble Supreme Court (SC) the assessee contended that there is no specific bar u/s 10(5) of the Act for a foreign travel as long as the starting and destination points are within India.

The SC held that LTC is allowed for travel from one place to another place within India and the moment employee undertakes travel with a foreign leg it is not travel within India and hence not covered by the exemption provision of section10(5) of the Act.

SC also pointed out that the basic objective of the LTC is to boost the Indian culture/ tourism amongst the people of India and the legislature had no intention to include foreign travel within the ambit of section 10(5) of the Act.

The SC also rejected the contention of the assessee that there may be a bonafide mistake in calculating the estimated income of its employees, as complete relevant documents /records were available with the assessee and the assessee ought to have applied his mind in proper deduction of TDS.

Accordingly, the appeal of the assessee was dismissed.

Richa Agarwal
Deputy Director
Tax Advisory
☏ +91 11 4710 3300

No Deduction of Employees' Contribution to Provident Fund, Employees State Insurance under Section 36(1)(va) as per time limit prescribed in Section 43B

Checkmate Services Pvt. Ltd. vs. CIT [(2022) 143 Taxmann.com 178 (SC)]

Recently, the Supreme Court has held that

deduction of employees' contribution to PF; ESI etc. shall be allowed only if the same is paid within the due date mentioned in respective governing laws rather than the due date for filing of tax return.

Related Provisions of the Income-Tax Act

As per provisions of Section 36(1)(va) of the Act, an Assessee shall be allowed deduction of any sum received from its employees to which provisions of Section 2(24)(x) are applicable if such sum is credited to the employee's account in relevant fund(s) on or before due date. Further, Finance Act, 2021 inserted following explanations in the Act:

- Explanation 1 in Section 36(1)(va) w.e.f. April 01, 2021, which explained that 'due date' for purpose of above section means the date by which the Assessee is required to deposit employees' contribution to relevant fund under any act, rule, order etc. applicable to such fund.

- Explanation 2 in Section 36(1)(va) w.e.f. April 01, 2021, which clarified that provisions of Section 43B shall not be applicable for determining due date for the purpose of Section 36(1)(va).

As per provisions of Section 2(24)(x) of the Act, the term 'income' shall include any sum received by the Assessee from its employees as contribution to PF, ESI etc.

As per provisions of Section 36(1)(iv) of the Act, the Assessee shall be allowed deduction of any sum paid as an employers' contribution to recognized PF etc.

As per *non-obstante* provisions of Section 43B(b) of the Act, a deduction of any sum paid by the Assessee as an employer by way of contribution to any PF, ESI etc. shall be allowed in the previous year in which such sum is actually paid by the Assessee. However, as per first proviso to Section 43B, the Assessee shall be allowed deduction in the year in which the liability is incurred if it makes payment of such sum before due date of furnishing return under Section 139(1) of the Act.

Litigation History

Prior to introduction of above-mentioned amendments by Finance Act, 2021, various Assessees had belatedly deposited employees' contribution to PF, ESI etc. after the due date for depositing such amounts prescribed under relevant acts and regulations and had claimed deduction under Section 36(1)(va). It may be worthwhile to mention here that the Finance Act, 2021 had brought in amendment in Section 36(1)(va) w.e.f., April 01, 2021 which has settled the controversy of claiming deduction of belated contributions under Section 36(1)(va).

In one such case of the Appellant, the Tax Officer had ruled that by virtue of Section 36(1)(va) read with Section 2(24)(x) of the Act, sums received by the Appellant as employees' contribution to PF, ESI etc. constituted 'income' in the hands of Appellant. Accordingly, the Tax Officer had denied the Appellant deduction under Section 36(1)(va) when the payments were made beyond the due dates prescribed under respective governing laws. On appeal before Tax Tribunal, the Tax Tribunal decided the matter in favour of the Revenue. Thereafter, the Gujarat High Court too rejected the pleas of the Appellant.

Considering the divided opinion on various High Courts on the issue, the matter was taken up before the Supreme Court.

Supreme Court Decision

Various principles arose from the decision of the Supreme Court which have been

enunciated as under:

- The legislative intent behind introducing Section 43B as well as Section 36(1)(va) are quite different. Section 43B was inserted by Finance Act, 1983 w.e.f., April 01, 1984, to primarily ensure that deductions otherwise permissible and claimed on mercantile basis would be allowed only upon their actual payment. However, Section 2(24)(x) was inserted by Finance Act, 1987 w.e.f., April 01, 1988, by the Legislature to specify that amounts not earned by the Assessee but received by it as employees' contribution to PF, ESI etc. were to be treated as income of the Assessee.

- The rationale behind introduction of Section 36(1)(va) was to ensure that only if employees' contribution to PF, ESI etc. were deposited in related fund accounts of the employees, they could be treated as deductions. However, the additional condition of deposit of employer contributions before due date prescribed under governing laws has not been enacted under Section 36(1)(iv) which meant that the Legislature treated employees' contribution under Section 36(1)(va) different from employer's contribution under Section 36(1)(iv).

- The Supreme Court noted that the employees' contribution dealt with income of employees held in trust by employers whereas, employer's contribution related to employer's own income. This specific characterization led to separate provisions of employees' contribution vis-à-vis employer's contribution under different clauses of Section 36(1).

- Provision of Section 43B are distinct from Section 36(1)(va) in as much as they relate to timely payment of certain prescribed liabilities and does not in any manner override or dilute provisions of Section 36(1)(va). Further, it was held that Section 43B cannot be extended to employees' contribution to PF, ESI etc. as such sums are held in the capacity of a trustee by the employers.

Thus, based on the above reasoning, Supreme Court opined that for claiming deduction under Section 36(1)(va) read with Section 2(24)(x), employees' contribution to PF, ESI etc. ought to be deposited by the employer within the due date prescribed under laws governing respective funds. In the light of the above decision of Supreme Court, various contrary High Court decisions shall no longer hold good in law.

Ankit Nanda
Deputy Director
Tax Advisory
☏ +91 11 4710 2274

REGULATORY

Late Submission Fee for reporting delays under Foreign Exchange Management Act, 1999

The Late Submission Fee (LSF) was introduced for reporting delays in Foreign Investment (FI), External Commercial Borrowings (ECBs) and Overseas Investment related transactions with effect from November 07, 2017, January 16, 2019 and August 22, 2022 respectively. It has now been decided to bring uniformity in imposition of LSF across functions and accordingly the following matrix shall be used henceforth for calculation of LSF, wherever applicable:

S. No.	Type of Reporting delays	LSF Amount (INR)
1	Form ODI Part-II/ APR, FCGPR (B)*, FLA Returns, Form OPI, evidence of investment or any other return which does not capture flows or any other periodical reporting	7500
2	FC-GPR, FCTRS, Form ESOP, Form LLP(I), Form LLP(II), Form CN, Form DI, Form InVi, Form ODI-Part I, Form ODI-Part III, Form FC, Form ECB, Form ECB-2, Revised Form ECB or any other return which captures flows or returns which capture reporting of non-fund transactions or any other transactional reporting	[7500 + (0.025% × A × n)]

Notes:

a) "n" is the number of years of delay in submission rounded-upwards to the nearest month and expressed up to 2 decimal points.

b) "A" is the amount involved in the delayed reporting.

c) LSF amount is per return. However, for any number of Form ECB-2 returns, delayed submission for each LRN will be treated as one instance for the fixed component. Further, 'A' for any ECB-2 return will be the gross inflow or outflow (including interest and other charges), whichever is more.

d) Maximum LSF amount will be limited to 100 per cent of 'A' and will be rounded upwards to the nearest hundred.

e) Where an advice has been issued for payment of LSF and such LSF is not paid within 30 days, such advice shall be considered as null and void and any LSF received beyond this period shall not be accepted. If the applicant subsequently approaches for payment of LSF for the same delayed reporting, the date of receipt of such application shall be treated as the reference date for the purpose of calculation of "n".

f) The facility for opting for LSF shall be available up to three years from the due date of reporting/ submission.

g) In case a person responsible for any submission or filing under the provisions of FEMA, neither makes such submission/filing within the specified time nor makes such submission/filing along with LSF, such person shall be liable for penal action under the provisions of FEMA, 1999.

** in terms of AP (DIR Series) Circular 40 dated April 20, 2007, Part B of Form FCGPR was the annual report to be submitted by the Indian Company pertaining to all investments by way of direct/portfolio/re-invested earnings/others in the Indian company made during the preceding financial year (April to March). Subsequently, in terms of AP (DIR Series) Circular No. 45 dated March 15, 2011, it was decided to replace Part B of the Form FCGPR by the separate 'Annual Return on Foreign Liabilities and Assets'.*

(Source: A.P. (DIR Series) Circular No. 16 dated September 30, 2022 issued by Reserve Bank of India)

Divya Ashta
Senior Director
Transaction Advisory Services
☏ +91 11 4710 2372

Important date to remember

Particulars	Date
Direct Taxes	
Payment of monthly TDS and TCS for the month of November 2022	07.12.2022

Disclaimer

The contents of this document are for information purposes and general guidance only and do not constitute professional advice. You should not act upon the information contained in this publication without obtaining professional advice.

No representation or warranty (express or implied) is given as to the accuracy or completeness of the information contained in this publication and MPC & CO LLP disclaims all responsibility for any loss or damage caused by errors/ omissions whether arising from negligence, accident or any other cause to any person acting or refraining from action as a result of any material in this publication.