EY Tax and Regulatory Alert

March 2021

Prepared for ACMA

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INDIRECT TAX

Part A - Key Indirect Tax updates

Goods and Services Tax

This section summarizes the regulatory updates under GST for the month of March 2021

- **Notification No. 03/2021, dated 23.02.2021** issued by CBIC, to exempt certain class of persons from requirements of section 25 (6B, 6C) for the purpose of GST Registration.

- **Notification No. 04/2021, dated 28.02.2021** issued by CBIC, to further extend due date for furnishing of GSTR-9 and GSTR-9C for the financial year 2019-20 to 31.03.2021 with the approval of Election Commission of India. This is the second extension of due dates for financial year 2019-20.

- **Notification No. 05/2021, dated 08.03.2021** issued by CBIC, to implement e-invoicing for the taxpayers having aggregate turnover (from FY 2017-18) of fifty crores with effect from the 01st day of April, 2021.

- **Circular No. 147/02/2021, dated 12.03.2021** issued by CBIC for clarification on various refund related issues :

  - Inter-alia clarifies that there is no restriction under 3rd proviso to Rule 89(1) of CGST Rules, 2017 on recipient of deemed export supply, claiming refund of tax paid on such deemed export supply, on availment of ITC on the tax paid on such supply;

  - Accordingly, modifies para 41 of Circular No. 125/44/2019-GST dated November 18, 2019 to remove the restriction of non-availment of ITC by recipient of deemed export supplies on the invoices, for which refund has been claimed by such recipient;

  - Explains that whenever the recipient of deemed export supplies files an application for refund, the portal requires debit of the equivalent amount from the electronic credit ledger of the claimant in order to ensure that there is no dual benefit to the claimant;

  - Decides to extend period of relaxation for filing refund claim in FORM GST RFD-01 where the taxpayer inadvertently entered the details of export of services or zero-rated supplies to a SEZ Unit/Developer in table 3.1(a) instead of table 3.1(b) of FORM GSTR-3B till March 31, 2021,

  - Modifies Circular No. 125/44/2019-GST dated November 18, 2019 to this extent; Also, clarifies that for the purpose of Rule 89(4), value of export/zero-rated supply of goods to be included while calculating “adjusted total turnover” will be same as being determined as per amended definition of “Turnover of zero-rated supply of goods” in the said sub-rule;

  - The restriction of 150% of the value of like goods domestically supplied, as applied in “turnover of zero-rated supply of goods”, would also apply to the value of “Adjusted Total Turnover” in Rule 89 (4).

Customs and Foreign Trade Policy (FTP)

This section summarizes the regulatory updates under Customs and FTP for the month of March 2021

- **Instruction No. 01/2021-CX dated 17th March, 2021** issued by CBIC to issue instructions for manual processing of declaration filed under SVLDRS, 2019
    - Pursuant to HC rulings in favour the declarants where matters were remanded back to the Designated Committees (DC), O/o DG (Systems) have expressed inability in providing electronic processing facility of the subject declaration;
    - Clarifies that all references for grant of approval of manual processing of the declarations need not be made to the Board and such cases can be processed manually by the concerned DCs upon fulfillment of the conditions;
    - Enumerates such conditions viz:- (i) DC has accepted the HC order, and (ii) the counsel (ASG or Sd. Counsel) who had represented the case before the HC has opined to accept such order; Provides reporting of all those declarations that were processed manually may be reported to the O/o DG (Systems) by July 15th day of the succeeding month for record purpose.
- **Press Release dated 25th February 2021** MCA and Central Board of Indirect Taxes and Customs (CBIC) sign MoU for data exchange between the two organisations, to further their vision of harnessing data capabilities to ensure effective enforcement;
    - The data sharing arrangement gains significance in light of development of MCA21 Version 3 which will utilise state of the art technology for enhancing ease of doing business in India and improve the regulatory enforcement and similar steps by CBIC like the launch of ADVAIT (Advanced Analytics in Indirect Taxation) a 360-degree taxpayer profiling tool;
    - MCA apprises that the MoU will facilitate the sharing of data and information between MCA and CBIC on an automatic and regular basis, viz. Bill of Entry (Imports), Shipping Bill (Exports), Summary from CBIC and financial statements filed with the Registrar by corporates and returns of allotment of shares;
    - In addition to regular data exchange, the two authorities will also exchange with each other, on request, any information available in their respective databases, for the purpose of carrying out scrutiny, inspection, investigation and prosecution;
    - Technology and data will play a critical role going forward in fulfilling the Government's vision of minimum government, maximum governance and both MCA and CBIC are well placed to fulfill this vision.

Direct Tax

Part-A Key Direct Tax updates

1) Key amendments to Finance Bill, 2021 at enactment stage

(a) Amendment to the definition of "liable to tax"

- Hitherto, while the Indian Tax Laws (ITL) used the term "liable to tax" in various provisions, it remained undefined.

- FB 2021 proposed to introduce definition of term "liable to tax" under the ITL with effect from TY 2020-21 to mean that there is a liability of tax on a person under any law for the time being in force in any country. Further, it included a case where subsequent to the imposition of tax liability, an exemption would be provided to such person.

- The above definition which referred to "a liability of tax under any law for the time being in force in any country", raised an ambiguity on the nature of taxes to be considered i.e. whether liability in respect of indirect taxes or any other taxes (other than income tax) would also result in the satisfaction of the "liable to tax" definition as proposed by FB 2021. It also raised an ambiguity on the country to be referred for the purposes of application of the definition.

- Amended FB 2021 proposes to address this ambiguity by specifically providing that the person is required to have "an income- tax liability...under the law of that country for the time being in force". Thus, if the person is liable to taxes other than income tax, then such person would not be considered as satisfying the definition of "liable to tax". Further, the definition is to be applied with reference to a particular country. Hence, liability to income-tax in a particular country will meet the test of "liable to tax" only for that country and not for any other country.

(b) Threshold for taxation of interest income on employee contribution to Provident Fund

- FB 2021 proposed to withdraw exemption available to interest accruing on employees' contribution to specified provident fund schemes, on the contributions in excess of INR0.25m per annum made on or after 1 April 2021.

- Amended FB 2021 proposes to increase the threshold of employees' contribution, beyond which interest on such excess contribution will be taxable, to INR0.5m per annum where there is no contribution by employer to such fund.

(c) Existing goodwill to be reduced from tax written down value (WDV) of intangible block of asset

- FB 2021 proposed to amend the definition of "intangible asset" to exclude goodwill of business or profession thereby making the goodwill ineligible for depreciation from TY 2020-21 onwards - both for existing goodwill as on 31 March 2020 and new goodwill acquired on or after 1 April 2020. FB 2021 also proposed to amend capital gains provisions to provide that cost of acquisition of self-generated goodwill acquired in tax neutral transfer will be NIL.

- However, FB 2021 inadvertently missed to provide for similar amendment to the definition of "written down value" of block of assets to deny depreciation on goodwill acquired prior to 1 April 2020 and forming part of block of "intangible assets" on that date.

- Amended FB 2021 now proposes to adjust closing WDV of intangible asset as on 31 March 2020 by reducing the standalone tax WDV of goodwill computed as difference between actual cost of goodwill and depreciation allowable on such goodwill till 31 March 2020. The reduction shall, however, not exceed the closing WDV of intangible assets as on 31 March 2020.

(d) Amendment to the computation mechanism of capital gains in case of slump sale

- As per the extant provisions of the ITL, profits or gains arising to transferor for transfer of undertaking under a slump sale is chargeable to tax as capital gains. For this purpose, the "net worth" of the undertaking is considered as the cost of acquisition of the undertaking transferred. The "net worth" is the aggregate value of total assets of the undertaking as reduced by the value of liabilities of such undertaking as appearing in the books of account. Furthermore, the aggregate value of total assets is taken as the sum of (a) tax WDV of depreciable assets (b) NIL value for capital assets in respect of which full deduction has been allowed under investment-linked tax holiday provision and (c) book value of other assets.

- FB 2021 proposed to expand the definition of "slump sale" to include within its scope all types of transfers, such as sale, exchange, relinquishment of asset etc. This was with a view to overcome the ratios of certain judicial rulings which held that "slump exchange" (as distinguished from "slump sale") of undertaking is not liable to tax.

- Amended FB 2021 proposes to provide that FMV of the undertaking, as on date of transfer, to be computed in a manner to be prescribed by rules, shall be deemed to be the full value of consideration received or accruing to taxpayer as a result of the transfer of such undertaking by slump sale. The language of amended provision raises an ambiguity whether it applies only to "slump exchange" or all types of "slump sale" including sale for monetary consideration.

- Amended FB 2021 further provides that, for the purpose of calculation of net-worth, the value of goodwill of business or profession acquired otherwise than by a purchase from previous owner will be considered as NIL.

(e) MAT relief for secondary adjustment or APA

- FB 2021 proposed to insert w.e.f. 1 April 2021, a new provision providing that where there is an increase in the book profit of a financial year on account of secondary adjustment or APA entered by the taxpayer for past years, the tax authority shall re-compute the book profit and tax payable of the past years in the prescribed manner.

- For this purpose, the taxpayer has to make an application to the tax authority and the procedure and time periods as applicable for the rectification of an assessment will be applicable.

Amended FB 2021 now proposes the following:

- The amendment shall apply only if taxpayer has not utilized MAT credit in any subsequent TYs.

- The new provision shall also apply to TYs beginning on or before 1 April 2020

- But no interest will be payable on account of refund arising under the new provision.

(f) Meaning of "asset" for applicability of extended time limitation period under the new reassessment regime

- FB 2021 proposed to introduce a new regime for reopening of cases w.e.f. 1 April 2021 based on certain objective criteria, viz. information flagged in accordance with the risk management strategy formulated by the CBDT and final objections raised by Comptroller and Auditor General of India (CAG) that assessment of taxpayer has not been made in accordance with the provisions of the ITL.
- Furthermore, FB 2021 also proposed a revised time limit for reopening of assessment as follows:
  - In a normal case – four years from the end of the relevant TY sought to be reopened
  - In cases where tax authority is in possession of evidence which reveals that income escaping assessment is more than INR5m and such income is represented in the form of an "asset" – 11 years from the end of the relevant TY sought to be reopened
- However, FB 2021 did not define the term "asset" leading to ambiguity on the jurisdictional condition for extended time limit.
- Amended FB 2021 now proposes to define the term "asset" to specifically include immovable property, shares and securities, loans and advances and deposits in bank account.

(g) Cash payments or receipt for computing 5% threshold for tax audit to include non-account payee cheque or bank draft:

- Finance Act 2020 increased the threshold for tax audit from INR10m to INR50m for taxpayers carrying on business, provided cash receipts and payments do not exceed 5% of total receipts and payments respectively.
- FB 2021 proposed to further increase the threshold limit of INR50m to INR100m for applicability of tax audit to taxpayer with cash receipts and payments not exceeding 5% of total receipts and payments respectively.
- Amended FB 2021 now proposes to provide that payment or receipt by way of cheque or bank draft, which is not account payee, shall be deemed to be cash payments or receipts for computing the 5% threshold.

(h) Reduction in fees for delayed filing of tax return:

- Presently, the ITL provides for levy of fee on a taxpayer for belated filing of tax return at INR 5,000 if return is furnished by 31 December following the tax year and INR 10,000 if return is furnished beyond 31 December. But, if the total income of taxpayer does not exceed INR0.5M, the fee is reduced to INR1,000.
- Amended FB 2021 proposes to cap fees for delayed furnishing of tax return to INR5,000 even if tax return is furnished beyond 31 December. The cap of INR1,000 for taxpayer whose total income does not exceed INR0.5M continues as it is.

(i) Mandatory fee for not intimating Aadhaar number to tax authority:

- Presently, all taxpayers who are holding PAN as on 1 July 2017 and are eligible to obtain Aadhaar number are required to intimate their Aadhaar number to tax authority on or before 31 March 2021 (as per the extant law after granting several extensions from time to time). In case of default, their PAN will become inoperative for all purposes under the ITL.

- Amended FB 2021 proposes to levy fees as may be prescribed by the CBDT but not exceeding INR1,000 at the time of intimation of Aadhaar number to tax authority on or after 1 April 2021 (unless the last date is further extended beyond 31 March 2021).

(j) Extension of time limit for completion of assessment if application filed before Income-Tax Settlement Commission (ITSC) is withdrawn:

- FB 2021 proposes to discontinue ITSC w.e.f. 1 February 2021 (closure date) and constitute an Interim Board for settlement of pending cases.

- Further, the applicants shall be given an option to withdraw the pending application within three months from date of commencement of Finance Act 2021 and intimate the jurisdictional tax authority about the withdrawal. In such case, the tax authority is required to complete the assessment of the taxpayer as per the provisions of the ITL.

- Amended FB 2021 provides that where application before ITSC is withdrawn by the applicant and time limit available for completion of assessment, reassessment or re-computation by tax authority is less than one year, it shall be extended to one year.

- The period for limitation for reassessment, rectification or amendment and for payment of interest on refund of taxes shall also be modified accordingly.

(k) Rationalization of EL provisions

- With effect from 1 April 2020, the scope of EL was extended to charge a 2% levy (ESS EL) on the gross consideration received or receivable from making or providing or facilitating online sale of goods or provision of services by an NR e-commerce operator (EOP) of a digital facility or platform.

- FB 2021 proposed to clarify that consideration received/receivable shall include consideration for sale of goods and provision of services, regardless of whether the EOP owns the goods or provides the service.

- Ambiguity arose whether sale or service made or provided by residents or NR having PE in India which are already taxable in India under the ITL provisions will also be liable to ESS EL and consequently whether they will be exempt from tax under the ITL in view of applicability of ESS EL.

- Amended FB 2021 proposes to clarify that, for the purposes of ESS EL, consideration shall not include consideration for sale of goods owned by, or provision of services rendered by a resident in India or PE of NR in India where such sale/service is effectively connected to PE in India.

(I) Miscellaneous amendments

(i) Minimum equity component for non-qualifying ULIP for concessional long-term capital gains (LTCG) tax rate

- FB 2021 proposed to change taxation regime of ULIPs to make ULIPs with high premium (> INR 0.25m) taxable as capital gains. The LTCG rate will be 10% at par with equity instruments like listed equity shares and equity oriented mutual funds, if equity component of the investment under ULIP is minimum 65% in case of direct investment in listed equity shares of domestic companies and 90% in case of indirect investment through fund of funds.

- Amended FB 2021 proposes to provide that the minimum equity component of 65% or 90% as the case may be, is required to be satisfied throughout the term of such ULIP in order to be eligible for concessional LTCG rate of 10%.

(ii) Extension of revisionary powers to Principal Chief Commissioner of Income Tax and the Chief Commissioner of Income Tax

- Hitherto, the ITL provided powers to the Principal Commissioner of Income Tax and Commissioner of Income Tax to call for and examine any records of any tax proceedings, and where the order passed in such proceedings was prejudicial to the interest of revenue, such tax authority could then modify or enhance the assessment. Amended FB 2021 now proposes to extend such powers even to the Principal Chief Commissioner of Income Tax and the Chief Commissioner of Income Tax.

2) CBDT introduces new rule for making online application for lower withholding on payments to non-residents

Notification

- The Notification prescribes the Rule which sets out the procedure for electronic filing of application for lower withholding and contains the Form for making such application.

- The Rule comes into effect from 1 April 2021.

- Brief aspects of the Rule are enumerated below:

  - **Mode of application**: The application for determination of appropriate proportion of sum chargeable under ITL in case of an NR shall be made electronically, either under digital signature or through electronic verification code.

  - **Determination of appropriate proportion of sum chargeable to tax**: The tax authority shall determine the appropriate proportion of sum chargeable to tax after confirming that the sum paid or credited is chargeable to tax under the ITL read with the relevant DTAA.

  - **Issuance of lower withholding order**: The tax authority, on being satisfied that the whole of such sum would not be chargeable to tax, may issue a certificate determining appropriate proportion of such sum chargeable under the ITL, for the purpose of tax deduction.

  - **Examination of recipient's information:** The following information of the recipient shall be examined by the tax authority before issuing the order:

    - Tax payable on estimated income of the tax year.

- Tax payable on the assessed or returned or estimated income of four preceding tax years.
- Existing liability under the ITL or Wealth Tax Act, 1957.
- Advance tax payment, tax deducted at source and tax collected at source for the tax year under consideration till the date of making application.

- **Validity of certificate**: The certificate shall be valid only for the payment to the NR named therein and for such period of the year as may be specified in the certificate, unless it is cancelled by the tax authority at any time before the expiry of the specified period.

- **Fresh application for renewing the certificate**: An application for a fresh certificate may be made on expiry of the validity period of such certificate or within three months before expiry.

- **Procedures**: The Principal Director General of Income Tax (Systems) or the Director General of Income Tax (Systems) shall lay down the procedures, formats and standards for ensuring secure capture and transmission of data and uploading of documents etc.

- **Brief outline of the Form**

  - The Form seeks comprehensive information on the payment proposed to be made to NR.

    Broadly, the Form contains six parts:

  - Parts 1 and 2: Details of the payer and NR recipient of the income.
  - Part 3: Details of the transaction.
  - Part 4: Taxability under the provisions of the ITL without considering the DTAA).
  - Part 5: Taxability under the DTAA.
  - Part 6: List of documents to be uploaded.

- The other incremental changes in the Form vis-à-vis the draft form are as follows:

  - The information sought in the Form is logically sequenced and seeks additional information relevant for determining tax liability of NR recipient.
  - The transaction amount payable in INR under Part 3 can now be provided on an estimated basis.
  - It is clarified that if the DTAA is applicable, Part 5 needs to be filled and if the DTAA is not applicable, Part 4 needs to be filled.
  - Part 4, that deals with taxability of the transactions under the ITL without applying the DTAA, is further bifurcated into different types of payment like business income, capital gains, royalty, fees for technical services (FTS), interest and other payments.
  - With respect to Part 5 that deals with taxability of a transactions where the DTAA is applicable, it must be specified under each head of income whether the income is liable to tax in India as per the DTAA.
  - Under Part 5, if a transaction is of the nature of FTS/fees for included services (FIS), a justification must be given as to why the transaction does not qualify as FTS in the absence of a “make available” clause under the DTAA.

- All documentary evidence to be uploaded has been collated under Part 6 that deals with the list of documents, instead of under the respective parts.

3) **CBDT notifies additional classes of reportable persons to furnish investment returns of taxpayer for facilitating pre-filling of tax returns**

Background

- Presently, the Income Tax Laws (ITL) cast an obligation upon specified taxpayers, including government agencies, banks and other institutions, to submit a "Statement of Financial Transactions" (SFT) to the tax authority containing information of certain financial transactions undertaken during the tax year, within two months from the end of the said tax year.

- This reporting acts as a valuable source of information for the tax authority so that the same can be utilized for widening the tax base and plugging revenue leakage. As a part of the e-governance drive, the Finance Minister, during her speech while presenting Finance Bill, 2021, announced that pre-filled tax returns will be made available to taxpayers, which will contain details of salary income (from Form 16), capital gains from securities, bank interests and dividends etc., and tax deductions.

- In furtherance, in order to facilitate pre-filling of tax returns, the CBDT has issued the present Notification.

Notification

- The Notification casts a reporting obligation on specified taxpayers in relation to specified transactions, as summarized below:

S.No.	Nature of transactions	Reporting obligation casts on
1	Capital gains on transfer of listed securities or units of mutual funds	▸ Recognized stock exchange ▸ Depositories ▸ Recognized clearing corporation ▸ Registrar to an issue and share transfer agent
2	Dividend Income	▸ Corporate taxpayer
3	Interest Income	▸ A banking company or a co-operative bank ▸ Postmaster General ▸ Non-banking financial company

- The form, due date and manner of furnishing the said statement will be prescribed by the tax authority with prior approval of the CBDT.

- The other procedure, which is presently applicable to furnish SFT, will equally apply for filing statement under the new rule. In other words, the aforesaid reportable entities are required to forward details of their designated director and the principal officer to the tax authority, obtain a registration number and observe the procedure and the manner of maintaining information as specified by its regulator and ensure compliance under other related rules.

- The Notification is effective from 12 March 2021.

4) CBDT notifies rules for computation of taxable value of annual accretions to excess contributions by employer to specified funds

Background

- FA 2020 introduced a new s17(2)(viia) with effect from tax year 2020-21 to provide that the annual accretion by way of interest, dividend or any other amount of similar nature during the tax year to the balance of the credit of the specified funds to the extent it relates to excess contributions taxed as perquisite under s.17(2)(via), shall also be treated as taxable perquisite in the year of accretion. The value of perquisite shall be computed in a manner to be prescribed by the CBDT.

- While the provisions came into effect from current tax year 2020-21 (assessment year 2021-22), the rule for computing the annual accretion on excess contribution was awaited. The CBDT has now notified a new Rule 3B (Rule) on 5 March 2021 with effect from 1 April 2021. The Rule prescribes a formulary approach for computing the value of annual accretion on excess contributions.

The formulary approach for computing annual accretion on excess contributions

The Rule prescribes the following formula:
TP = (PC/2)*R + (PC1+TP1)*R
Where,

  - TP = taxable perquisite under s.17(2)(viia) for the current tax year

  - TP1 = Aggregate of taxable perquisite under s.17(2)(viia) for the tax year or years commencing on or after 1 April 2020 other than the current tax year

  - PC = Amount or aggregate of amounts of principal contribution made by the employer in excess of INR 750,000 to the specified funds during the current tax year

  - PC1 = Amount or aggregate of amounts of principal contribution made by the employer in excess of INR 750,000 to the specified funds for the tax year or years commencing on or after 1 April 2020 other than the current tax year (See note below)

  - R = I/ Favg

  - I = Amount or aggregate of amounts of income accrued during the current tax year in the specified funds

  - Favg = (Amount or aggregate of amounts of balance to the credit of the specified funds on the first day of the current tax year + Amount or aggregate of amounts of balance to the credit of the specified funds on the last day of the current tax year)/2.

- Note – Where the amount or aggregate of amounts of TP1 and PC1 exceeds the amount or aggregate of amounts of balance to the credit of the specified funds on the first day of the current previous year, then such excess shall be ignored for the purpose of computing the amount or aggregate of amounts of TP1 and PC1.

Salient features of the Rule 3B

- The Rule considers the annual accretion to the specified funds and then computes the following amounts for inclusion in taxable income:

  - Accretion on current tax year's contributions in excess of INR 750,000

  - Accretion on past tax years' contributions in excess of INR 750,000

- Accretion on income taxed under s.17(2)(viia) in past years

- Since the contributions may be made throughout the year, the Rule brings in proportionality by considering 50% of excess contributions for current tax year and average of opening and closing balance of past years' excess contributions and accretions thereon.

- Further, considering that there may be withdrawals from the specified funds, the Rule considers a situation where the opening balance may be less than past years' excess contributions and accretions thereon. In such situation, the Rule requires ignoring of such shortfall. In other words, in case of withdrawals, it is presumed that the withdrawals are first made out of exempt contributions (including accretions thereon) and the continuing balance represents the excess taxable contributions (including accretions thereon).

5) CBDT provides clarification on the passing of consequential orders under Income-tax Laws upon settlement of direct tax disputes under Vivad Se Vishwas Act

Background

VSV specifies following procedure to settle a dispute:

- Taxpayer shall file a declaration on or before 31 March 2021.

- Upon receipt of the declaration, the DA shall, within a period of 15 days from the date of receipt of the declaration, by order, determine the amount payable to settle the dispute and grant a certificate to the taxpayer specifying such amount.

- Taxpayer shall pay the amount so specified in such certificate and intimate the details of such payment to the DA. For settlement at 100% of the disputed tax, payment is to be made up to 30 April 2021. For settlement at 110% of the disputed tax, payment is to be made on or after 1 May 2021 but before a date yet to be notified.

- The DA shall pass another order stating that the taxpayer has paid the amount, marking the conclusion of the dispute.

- VSV empowers the Government of India to remove, by order, any difficulty that arises in giving effect to the provisions of VSV.

- Tax Authority had represented to the CBDT that the aforesaid orders passed by the DA under VSV for conclusion of the dispute have a consequential effect under the ITL, but there is no provision under the ITL which enables the tax authority to give such consequential effect. Hence, a request was made to issue suitable clarifications to enable the tax authority to pass consequential orders under the ITL.

CBDT's clarification:

- In deference to the aforesaid representation, the Circular states that where the DA has passed orders under VSV for settlement of the dispute, the tax authority shall pass consequential orders under the ITL.

6) CBDT to examine cases of double taxation to provide relief to individuals stranded in India during the COVID-19 pandemic

Considerations for COVID-19 residency relief for tax year 2020-21

- As the COVID-19 outbreak continues even for the tax year 2020-21, the CBDT received various representations from individuals requesting for relaxation in determination of residential status for those who had come on a visit to India during the tax year 2019-20 and intended to leave but could not do so due to suspension of international flights.

- However, in light of the changed circumstances of prolonged disruption, the CBDT has deviated from its earlier announcement of blanket exclusion of period of forced stay in India. The CBDT has issued Circular 2/2021 dated 3 March 2021 (accompanied with a press release) which explains how there are lesser chances of double taxation risk for such individuals in view of the interplay of Indian domestic tax rules with DTAA entered with other countries. But it also provides opportunity to impacted individuals to provide relevant information to the CBDT by 31 March 2021 on the risk of double taxation faced by them in order to enable the CBDT to announce a general or case-by-case individual relief. The factors analyzed by CBDT are explained below:

Factors mitigating risk of double taxation for stranded individuals

Based on the examination of provisions of domestic tax rules, DTAA and international literature, the Circular explains that there are less likely chances of double taxation for stranded individuals.

- **Individual likely to be resident of only one country due to domestic tax rules and tie breaker rules under treaty**

  - Short stay in India on account of COVID-19 may not result in an individual qualifying as resident in India because, generally a person will become Resident in India only if his/her stay in India is for a period of 182 days or more.

  - The exceptions to the above rule are as follows:

    - In case of individual being citizen of India or person of Indian origin, if his/her income from Indian sources exceeds INR 1.5m in tax year 2020-21 and he/she stays in India for 120 days or more and has also stayed in India for 365 days or more in preceding four tax years.

    - In case of other individuals, if he/she stays in India for 60 days or more during tax year 2020-21 and has also stayed in India for 365 days or more in preceding four tax years.

  - Due to 182-day rule (out of 365 days), which is also prevalent in most of other countries, the individual is likely to be resident in only one country and may not be regarded as resident of more than one country. On the contrary, if a general relaxation for stay exceeding 182 days in India is provided, there are chances of individual not being resident of any country (double non-residency) resulting in double non-taxation or non-payment of tax in any country.

  - However, in certain exceptional scenarios, where a shorter duration of less than 182 days can also result in an individual being resident of India, it is quite possible that such individual will also be resident in other country which has DTAA with India.

- Such dual residency is addressed by the "tie breaker test" in the DTAAs, due to which such person shall qualify as resident in only one of the countries. The tie breaker test provides certain objective tests to determine the stronger connect of individual between the two countries in terms of his/her permanent home, centre of vital interest, habitual abode, nationality or as last resort, resolution through Mutual Agreement Procedure (MAP).

- **No double taxation of income and income is taxable subject to DTAA benefit:**

  - Where the individual becomes resident on account of exceptional cases, it is most likely that such person will qualify as NOR, and his/her foreign-sourced income would not be subjected to tax in India unless it is derived from business controlled in or profession set up in India.

  - In case of employees visiting India, who are stranded in India, the DTAA provides adequate conditions for taxation of income. Income from employment exercised in India is taxable in the hands of person resident of other country only if he/she is present in India for more than 183 days or the foreign employer is a resident of India or foreign employer has a permanent establishment (PE) in India which bears such remuneration.

  - Illustratively, if a US resident under employment of US corporation has got stranded in India and performs employment from India, his/her salary will not be taxable in India during tax year 2020-21 unless he/she is present in India for 183 days or more during tax year 2020-21 or if his/her salary is borne by Indian PE of such US corporation.

  - In any case, the person qualifying as Resident in India shall be entitled to credit of taxes paid in other countries in accordance with the foreign tax credit (FTC) rules in this regard.

- **International experience on COVID-19 residency relief:**

  - International literature and country experiences portray that relaxations for COVID-19 stranded stay are not required as DTAA relieves the double taxation, if any. Illustratively:

    - The Organization for Economic Co-operation and Development (OECD) in its report states that temporary dislocation in host country is unlikely to render a person resident of host country due to the inbuilt tie breaker rules in DTAA.

    - The study of world-wide COVID-19 reliefs provided in different countries reveal that while some countries have gone ahead to extend the relaxation to its taxpayers, some countries have not provided for any such relaxations in the absence of any double taxation or granted limited relaxations.

Window for availing relief from double taxation

- Despite the above considerations, the CBDT acknowledges that there may be possible scenarios of double taxation. Hence, the Circular provides that those individuals who are facing double taxation even after considering the relief provided by the relevant DTAA can furnish the specified information in Form – NR electronically by 31 March 2021. Thereafter, the CBDT will examine:

- Whether the particular instance warrants any relaxation

- If yes, whether a general relaxation is required to be issued for class of individuals or specific relaxations to be provided in individual cases

- Form - NR requires basic information about the taxpayer, his/her stay in India, whether he/she will become resident in India or dual resident in India and other country, nature and amount of income being subjected to double taxation and reasons for double taxation inspite of DTAA.

7) CBDT further extends timeline for completion of proceedings under Income Tax Laws and Benami Property Law

- The Relaxation Act also granted similar extensions to authorities/commissions/ tribunals (hereinafter referred as Tax Authority) for completion of any proceeding or passing of any order or issuance of any notice, intimation, notification, sanction or approval or any other action under the specified laws, including ITL and Benami Law, which is due between 20 March 2020 and 31 December 2020 (disruption period). The Relaxation Act provided that such action/compliance falling under the disruption period can be completed on or before 31 March 2021 and the same shall be considered as valid compliance.

- Pursuant to the powers granted under the Relaxation Act, the Central Board of Direct Taxes (CBDT), vide Notification No. 10/2021 dated 27 February 2021 (CBDT Notification), has now granted further extension to the Tax Authority under the ITL and Benami Law.

CBDT Notification

The CBDT Notification has granted further extension to the Tax Authority, limited to specified compliances under the ITL and Benami Law, as follows:

Compliance pertaining to	Erstwhile disruption period	Erstwhile compliance date	Extended disruption period	Extended compliance date
Passing of penalty order under Chapter XXI of ITL	20 March 2020 to 30 March 2021	31 March 2021	20 March 2020 to 29 June 2021	30 June 2021
Passing of assessment or reassessment order under ITL	20 March 2020 to 30 March 2021	31 March 2021	No change	30 April 2021
	Not covered in disruption period above but is due on 31 March 2021	31 March 2021	Not Applicable	30 September 2021
Issuance of notice and passing of order under Benami Law	20 March 2020 to 30 March 2021	31 March 2021	20 March 2020 to 30 June 2021	30 September 2021

Key Regulatory amendments

This section summarizes the regulatory updates for the month of March 2021

Department for Promotion of Industry and Internal Trade ("DPIIT") reviews the Foreign Direct Investment Policy (FDI Policy") on downstream investment by Indian companies held by non-resident Indians ("NRI")

- DPIIT has inserted a new clause in the extant FDI Policy 2020 dated 15 October 2020, clarifying that investment made in an Indian company by NRIs on a non-repatriation basis will not be considered as indirect foreign investment.

- The above clarification is in line with Schedule IV of Foreign Exchange Management (Non-debt Instruments) Rules, 2019 which stipulates that any investment made by NRIs on non-repatriation basis is considered as domestic investment, at par with investment made by resident individuals.

- The above will take effect from the date of notification under Foreign Exchange Management Act, 1999.

Source: Press Note No.1 (2021 Series) dated 19 March 2021

Part B- Case Laws

Goods and Service Tax

1. **M/s Sunchirin Auto Parts India Private Limited (Order No 47 dated 20.12.2019- GST- UP AAR)**

Subject Matter: Ruling wherein the "Air Conditioner Hose Assembly" will merit classification under chapter Heading 4009 of the GST Tariff and would be chargeable to GST at applicable rate under the said tariff entry

Background and Facts of the case

- The Appellant is engaged in manufacture of parts & accessories for motor vehicles. It is engaged in manufacturing of Air Conditioner Hose Assembly used for transfer of gas from air conditioner compressor to air conditioner condenser in Heat Ventilation & Air Conditioning System.

- The applicant had submitted that prior to the GST regime, the product was classified under chapter 4009 of Central Excise Act, 1985. The product is used as a part of gas compressor in heat ventilation and air conditioning system and be classified under CSH 84149011.

- The Following Questions are raised by the applicant before the Authority:
- Classification of Air Conditioner Hose Assembly used as a part of Air Conditioner Compressor

- Applicable tax rate for the classification

Discussion and findings of the case

- The AAR had observed Chapter heading 4009 of Customs Tariff Act,1975, which read as "Tubes, pipes and hoses of vulcanized rubber other than hard rubber, with or without their fittings (for example joints, elbows, flanges)"

- It also referred to chapter heading 8415 of Customs Tariff Act, 1975 which read as "Air Conditioning Machines comprising a motor-driven fan and elements for changing the temperature and humidity, including those machines in which the humidity cannot be separately regulated"

- The Authority also referred to Rule 2(a) & Rule 3(a) of General Rules of Interpretation. Rule 2(a) states "any reference in a heading to an article shall be taken to include a reference to that Article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of complete or finished article.."

- Moreover, Rule 3a states heading having a more specific description shall be preferred to a heading having more general description.

- The AAR observed that the hoses are made up of vulcanized rubber other than hard rubber. Further, the product is a part of gas compressor and not of air conditioners. Further, prior to the GST regime, the applicant was classifying the said product under Chapter Heading 4009.

Ruling

- Given above, the Authority has classified the product "Air Conditioner Hose Assembly" under chapter heading 4009 of GST Tariff and would be chargeable to GST under applicable rate under the said tariff entry presently read with Notification No 01/2017- Central Tax (rate) dated 28.06.2017 (Sl. No. 119 of Schedule III)

2. M/s Premier Car Sales Limited [Order No 29 dated 11.03.2019- GST- UP AAR]

Subject Matter: Ruling wherein repair services carried out by the applicant under dealership agreement with HMIL, to fulfill the warranty obligation of HMIL should be classified as a composite supply of services under Section 2(30) of CGST Act, 2017

Background and Facts of the case

- The applicant is engaged in the sale of motor vehicle parts & accessories.

- The applicant has entered into an agreement with Hyundai Motors India Limited(“HMIL”) for providing repair services to the customer on behalf of HMIL during warranty period. The applicant receives consideration towards labour charges for repair & also cost of parts replaced.

- The Questions in respect of which Advance Ruling was sought by the applicant were:

- Whether the repair services carried out by the applicant under Dealership Agreement with HMIL, to fulfill the warranty obligation of HMIL which also involves supply of parts should be classified as composite supply of services under Section 2(30) of CGST Act/ Section 2(30) of SGST Act 2017?

- Whether the entire repair services including supply of spares can be classified under S.No 25 in Notification 11/2017 Central Tax (Rate) dated 28th June, 2017/ parallel Notification issued under SGSTAct subjected to tax at the rate of 9% under CGST?

Discussion and findings of the case

- The applicant states that HMIL provides “Warranty Repair Services” to its customers in respect of vehicles purchased by them under “Warranty Policy” free of cost which is carried out bythem being an authorized dealer of HMIL. They undertake repair services along with replacement of defective parts and HMIL reimburses them for repairing services along with replaced parts.

- The applicant has also mentioned that there could be senarios where “Warranty Repair Services” involve only labour charges without replacement of defective parts. The supply of parts/components is only incidental or ancillary to the main activity of “Repairing Services”. Thus, supply of Labour Services and Parts/components are together considered as “Warranty Repair Services” and the same are naturally bundled in the ordinary course of business.

- The applicant also referred to the definition of Composite Supply under Section 2(30) of CGST/SGST Act, 2017 which states that composite supply is “…a supply consisting of 2 or more taxable supplies of goods or services or both or any combination thereof, which are naturally bundled & supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply”.

- It also referred to Section 2(90) of CGST/SGST Act, 2017 which defines the principal supply as “…predominant element of composite supply & to which any other supply forming part of that composite supply is ancillary.”

- The Authority has observed that the repairing activity is the principal activity carried out by the applicant. The defective part/component is required to be replaced only as per requirement and thus, such supply of parts/ components are incidental/ ancillary to the main activity of “Repairing Services”. It was also observed that the supply of services is naturally bundled with supply of parts and such contracts are to be treated as ‘Composite Supply’ of services.

- The Authority had also specified that the following ruling will apply only in the following conditions are satisfied:
- Primarily repair services are provided under warranty period.
- Parts are replaced as incidental to repair service under warranty period in ordinary course of business &
- PSCL is being reimbursed by HMIL for labour charges and parts under warranty period.

Ruling

- The repair services carried out by the Applicant under dealership Agreement with HMIL, to fulfill warranty obligation of HMIL which also involves 'supply of parts' can be classified as composite supply of services under Section 2(30) of CGST/SGST Act, 2017

- The entire 'repair services' including supply of parts can be classified under heading having description "Repair & Maintenance Service" & be subjected to tax in terms of S.No 25 in Notification No 11/2017- Central Tax(rate).

Customs and Foreign Trade Policy

1. M/s BMW India Private Limited (CESTAT- Order No- 40714/2021)

Subject Matter: Ruling wherein the Commissioner of Customs set aside order passed by Commissioner (Appeals) stating that the applicant is not entitled to refund of Customs duty for they have not passed the test of unjust enrichment and hence, it had ordered to recover the alleged erroneously refunded amount from the appellant by allowing appeal to be filed by the department.

Background and Facts of the case

- The Appellant had imported 78 BMW cars, from their Parent company in Germany, BMW AG, in May 2009, under 7 Bills of Entry. After Import was affected & goods were cleared for home consumption, during the internal audit, the Appellant discovered that for 2 models (70 cars) the overseas supplier had charged higher price to them in the import invoice.

- The Bills of Entry were filed based on such erroneous import invoices with higher price and customs duty was paid at such higher value incorrectly shown in import invoice.

- The Appellant brought this error to the notice of BMW AG. BMW AG acknowledged the error and issued credit notes & corrected invoices to the Appellant.

- The Appellant then requested for re-assessment of Bills of Entry based on credit notes & corrected invoices, under section 149 of Customs Act, 1962.

- The Commissioner (Appeals) vide order dated 23.02.2010 directed to verify the authenticity of all the documents and pass a fresh order.

- Pursuant to the above, the Assistant Commissioner of Customs (Group 5B & C) after verifying all the documents and finding them in order, finally re-assessed the Bills of Entry and made endorsement on the face of the Bills of Entry.

- The Group also confirmed that the Appellant is entitled to net refund of INR. 9,24,35,784 (after deducting the SAD refund already granted). On 23.06.2010, the Appellant filed a refund claim of excess duty paid as per re-assessment Order. On 21.07.2010 ,the Assistant Commissioner of Customs held the refund claim to be within time and after examining the records and documents, held that the Appellant shall be sanctioned the refund.

- The Department challenged the order of the Assistant Commissioner before the Commissioner (Appeals). The Commissioner (Appeals) allowed the Revenue's appeal and reject the refund sanctioned to the appellant. Hence, the present appeal.

Discussion and findings of the case

- The Commissioner (Appeals) had rejected the refund on the ground that the Appellant had not shown the Customs duty separately on the sales Invoice as required under Section 28C of Customs Act, 1962 & thus, presumption under Section 28D od Customs Act, 1962, of having passed on incidence of duty will operate against the appellant.

- The Appellant had submitted that the sale is effected much after goods were cleared for home consumption & thus, the Appellant could not have shown Customs duty on sales invoices at stage of import. The Appellant had also rebutted the presumption under section 28D by submitting credit notes, revised invoices, sales invoices to the dealers, accounting the refund as receivable and Chartered Accountants Certificate. Hence, the onus was shifted on the Department to prove it otherwise.

- The Appellant had also contested that the present case was not of reduction of price but where the overseas supplier had indicted a higher price in his invoice raised on the appellant and the same higher price was offered for Customs assessment on which consequently higher customs duty was paid. The Appellants sale price to the dealers remained same throughout and thus, it is the Appellant's case that since their sale price before and after the error remained the same, they could not have passed on excess duty paid to the customers/ dealers.

- The Appellant stated that customers are always charged correct price (and duty) as per the standard price list and mistake was only in the Customs assessment due to incorrect supplier invoice. The SAD refund claimed(includes the excess duty paid element) by the appellant was also granted and not challenged by the department. Hence, grant of refund of the other part cannot be challenged by the department.

- The respondent (Commissioner – Appeals) further contended that only the details of the car, price and CST is mentioned on the sales invoice. As per Section 28C of Customs Act, 1962, the sales invoice has to contain customs duties separately. It also assumed that incidence of duty has been passed on (As per Section 28D of Customs Act, 1962).

- The documents- Invoices, credit notes, CA Certificate submitted by the Appellant, were discussed. The Certificate of Chartered Accountant also indicated that he had examined the records and verified the details of refund claim of the applicant.

- The order passed by Assistant Commissioner of Customs on 21.07.2010 & the order passed by the original authority was scrutinized.

- The Commissioner of Customs further stated, that after observing the discussions made by the original authority and after perusing all the submitted documents, it agrees with the decision of refund sanctioning authority and incidence of customs duty is not passed on to another.

- The Commissioner of Customs also cited the case of CC New Delhi vs Organon (India) Ltd, 2008 where a similar issue had come up. In the above case, the Hon'able Apex Court had held that the assesse had not passed the burden of customs duty to its customers.

Ruling

- Given above, the Commissioner of Customs had set aside the order of Commissioner (Appeals) and allowed the appeal and consequential relief if any, as per law.

Part B – Case Laws

Direct Tax

1. Engineering Analysis Centre Of Excellence Pvt. Ltd [TS-106-SC-2021]

Subject matter: SC rules that payment for use of shrink-wrapped computer software by end user or distributor does not constitute "royalty" under the Double Taxation Avoidance Agreement

Controversy around software transaction

- Taxation of income from computer software programs in international transactions has been a contentious issue in India since many years. The debate principally has focused on characterizing transactions as generating either "royalty" or "sales" income.

- The tax authorities have generally taken a position that income arising from transactions involving grant of software program/license should be characterized as "royalty", irrespective of the nature of rights acquired by the end user or a reseller. The taxpayer's position, on the other hand, generally has been that characterization as royalty or business profits, especially under an applicable DTAA, should be based on the nature and extent of rights granted to the end user.

- There have been divergent rulings of various Indian courts on taxability of software payments. Illustratively:

- The Karnataka High Court (HC) has ruled that software payments amount to "royalty" in cases of payments made by end users of the computer program, who are granted a license to make copies of the computer program for back-up or archival purpose.

- Similarly, the Authority for Advance Rulings (AAR) has held that payment towards software in a distribution arrangement can result in "royalty" since it is not possible to divorce software from the intellectual property right of the creator of the software embedded therein and sale or licensing for use of a copyrighted software amounts to the grant of a right to use a copyright. These rulings were followed in various other rulings.

- On the other hand, the Delhi HC, in various cases, and the AAR ruled in favor of taxpayers by emphasizing on the distinction between acquisition of a "copyright right" and a "copyrighted" article. It was held that the license granted by the taxpayer was limited to those rights that are necessary to enable the licensee to operate the program. Hence, there is no transfer of copyright or right to use the copyright to characterize the same as royalty under the ITA or the DTAA. It is a case of mere transfer of a copyrighted article and income therefrom should be characterized as business income, not taxable in the absence of a taxable presence (permanent establishment) of an NR income recipient in India.

- Considering the divergent views of judicial authorities spanning over two decades, the cases travelled to the SC. The SC has rendered its decision in a batch of 103 appeals.

Facts considered by the SC

- The SC adjudicated on the appeal in the following four categories of software payments:

- Category 1 – Sale of software directly to an end user by an NR

- Category 2 – Sale of Software by an NR to Indian distributors for resale to end customers in India

- Category 3 – Sale of software by an NR to a foreign distributor for resale to end customers in India

- Category 4 – Software bundled with hardware and sold by foreign suppliers to Indian distributors or end users

SC's Ruling

The SC gave a common ruling for all the four categories of software payments, as below:

Whether software payments amount to use of copyright under the ICA

- Meaning of "copyright" in the definition of royalty should be understood as per the ICA, and not otherwise.

- **Relevant provisions of the ICA:**

  - A copyright means an exclusive right to do or to authorize to do certain acts in respect of a "work", including an exclusive right, inter alia, to reproduce the copyright in the work in any material form and exploit the same by way of sale, transfer or license etc.

  - A computer program (software) qualifies as a "literary work" for the purposes of the ICA. As per Section 30 of the ICA, the owner of copyright in a "literary work" is entitled to grant any interest in his rights by way of a license in return for a royalty payment.

  - In cases where a license is granted, an infringement of copyright under the ICA would take place only when there is any use of the rights contrary to the license so granted.

- Copyright is an exclusive right, which is negative in nature, being a right to restrict others from doing certain acts. Copyright is an intangible, incorporeal right, in the nature of a privilege, which is quite independent of any material substance. Ownership of copyright in a work is different from the ownership of the physical material in which the copyrighted work may happen to be embodied.

- Terms of some sample agreements with the distributor and end users of the software are indicated as follows:

  - Distributors were granted a non-exclusive, non-transferable license to resell computer software to end users.

  - Distributors did not have a right to use the software.

  - The agreement specifically stated that the copyright in the software was not transferred, either to the distributor or to the ultimate end user.

  - End users were allowed only to use the software and they were restricted from sub-licensing, transferring, reverse engineering, modifying, or reproducing the software.

- The past judicial decisions rendered by the AAR and the Delhi HC held as follows:

  - Parting with copyright entails parting with the right to do any of the specified acts conferred under the ICA (such as reproduction, issue of copies, commercial exploitation etc).

  - A non-exclusive, non-transferable license merely enabling the use of a copyrighted product, which is subject to restrictive conditions, cannot be construed as a license to enjoy all or any of rights of the copyright owner, or to create any interest in any such rights. Such license granted does not qualify

as license of the nature specified in Section 30 of the ICA (supra).

- The use of the software is different from the right to reproduce granted under the ICA. Reliance in this regard was placed on the SC ruling in the case of State Bank of India (SBI) v. Collector of Customs10, which held that mere use of a software, subject to restrictions, does not result in parting of a copyright in the software.

- In case of license, the end user only gets a right to use computer software and not any of the rights conferred on the owner of a copyright under the ICA. There is a difference between the ownership of a physical item in which the software is embedded and ownership of the copyright. For e.g., in a case where a publisher sells books to an Indian distributor who then resells the same at a profit, it would not involve transfer of any rights to the Indian distributor. On the other hand, if the publisher sells the book to an Indian publisher, with the right to reproduce and make copies of the book, it would result in grant of copyrights to the Indian publisher and payment made by the Indian publisher would qualify as royalty. The adverse rulings of the Karnataka HC and the AAR (supra) were distinguished to this extent.

- Making a copy or adaptation of a computer program in order to utilize it for the purpose for which it was supplied, making back-up copies as a protection against loss, does not result in infringement of copyright under the ICA. Even storage of computer program, per se, would not result in infringement.

- The nomenclature of the agreement does not matter. What is relevant to be considered is the real nature of the transaction, having regard to the overall terms of the agreement and surrounding circumstances.

- What is "licensed" by the foreign, NR supplier to the distributor and resold to the resident end user or directly supplied to the resident end user is, in fact, the sale of a physical object which contains an embedded computer program. This is sale of goods, which does not involve transfer of a copyright in the software. Reliance in this regard was placed on the decision of SC in the case of Tata Consultancy Services.

- **Doctrine of first sale or principle of exhaustion**

  - As per the doctrine of first sale, once a copyrighted article is sold by the owner of the copyright, then the owner exhausts all rights to control that particular article/copy, although the copyright continues to vest with the owner.

  - The ICA provides an exclusive right to the owner of a copyright to sell or rent a copy of software to the extent such copies are not copies already in circulation. Thus, it prevents a person other than an owner from reproducing the software and transferring them to a subsequent user. This suggests that the ICA intends to apply the doctrine of first sale/principle of exhaustion.

  - The tax authority argued that the ICA was amended in 1994 and 1999 and it no longer recognizes the principle of exhaustion. Accordingly, when distributors sell computer software or copyrighted software license to end users, there would be parting of a right or interest in the copyright itself, as per the ICA. Furthermore, reliance was placed on the decision of the US Court of Appeals in the case of Timothy S. Vernor v. Autodesk Inc., to contend that the doctrine of first sale cannot be invoked by the distributor/licensee who are not the owner of copyright.

- The intent of the ICA is not to prevent a distributor from selling the software which is licenced to be sold by the distributor, but to prevent reproduction of copies of software already sold and sale thereof. A distributor cannot use the software at all and it merely resells the product to end users. Thus, it is incorrect to suggest that distribution of software by the distributor constitutes grant of an interest in the copyright or infringement of the copyrights.

Royalty definition under the ITA v. DTAA

- The DTAA contains an exhaustive definition of the term "royalty". It includes payment made for the use or right to use any copyright in a literary work. The royalty definition under the ITA is different and wider as compared to the royalty definition under the DTAA. The ITA refers to consideration paid for transfer of all or any rights, including by way of a license, in respect of any copyright.

- As the license granted to distributors and end users does not create any interest or right in the software, grant of such license would not amount to the "use of or right to use" of copyright and, hence, it would not qualify as royalty under the DTAA.

- The phrase "in respect of" used in the ITA means "in" or "attributable to". Thus, in order to qualify as royalty even under the ITA, it is a sine qua non that there has to be transfer of all or any rights in a copyright by way of license or otherwise. In a case where there is payment for grant of license, such payment would qualify as royalty only if such license results in transfer of rights in the copyright granted to the owner of a copyright under the ICA.

- Since the license granted to the distributors and end users did not involve granting of any interest in the rights of an owner of a copyright, payment made for such license does not qualify as royalty both under the ITA provisions, as subsisted till 2012, as well as the DTAA.

- The ITA was amended in 2012 to provide that transfer of all or any rights includes transfer of all or any rights for use of a computer software. This amendment expands the royalty definition and may not be considered as clarificatory in nature. However, such payments would not qualify as royalty for the purposes of the DTAA.

<u>Relevance of OECD Commentaries and India's positions on the OECD Commentary</u>

- Definition of "royalty" under all the relevant DTAAs under consideration is identical or similar to the definition of royalty under the OECD MC. Hence, the OECD Commentary on the same becomes relevant.

- The OECD Commentary supports that making a copy or adaptation of a computer program to enable the use of the software for which it was supplied does not constitute royalty. This also supports that the payment made by distributors and end users does not qualify as royalty.

- Although India has stated its position on the above OECD Commentary that, in some cases, such use may also qualify as royalty, the positions are vague and do not alter the DTAA's provisions, unless it is actually amended by way of bilateral renegotiation. Reliance in this regard was placed on the Delhi HC decision in the case of New Skies Satellite BV.

- Also, India has not amended the DTAAs under consideration post expressing the positions on the OECD MC/Commentary to modify the definition therein. Moreover, even the DTAAs signed post expressing the positions on the OECD MC/ Commentary contain a similar definition as contained in DTAAs signed prior to expressing India's positions on the OECD MC/ Commentary. Hence, the guidance provided by the OECD would continue to have persuasive value for interpretation of the DTAA.

- For clarity and certainty, the DTAA provisions that are aligned to the OECD MC may be interpreted in light of the OECD Commentary.

Retrospective amendment and obligation to withhold taxes

- The definition of "royalty" under the ITA was amended in 2012 by way of insertion of Explanation 4 (with retrospective effect from 1 June 1976), purportedly to clarify that the transfer of all or any rights in respect of any right, property or information includes right for use/to use a computer software (including the granting of a license), regardless of the medium through which such right is transferred (Explanation 4).

- Explanation 4 expands the royalty definition. A person who made a payment prior to 2012 cannot be expected to apply the expanded definition of royalty which was not in existence at the time of making payments to determine withholding obligations under Section 195. The substantive amendment to the ITA does not compel a person to do the impossible (lex non cogit ad impossibilia i.e., the law does not demand the impossible and impotentia excusat legem i.e., when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused).

Whether treaty benefits, if any, can be considered while determining withholding obligation under Section 195

- Section 195 of the ITA confers a withholding obligation on the person paying any sum to an NR, which is chargeable to tax under the ITA. Thus, the machinery provisions of Section 195 are interlinked with the charging provisions of the ITA.
- Total income of an NR chargeable to tax in India includes income which accrues, arises or is deemed to accrue or arise in India. This, however, is subject to the provisions of a DTAA. In a case where an item of income is not chargeable to tax as per the DTAA, then such income would not be chargeable to tax even under the ITA.

- A person referred to in Section 195 is required to withhold tax only if the amount is chargeable to tax under the ITA as well as the DTAA. This is upheld by the SC in the case of GE India Technology Centre (P) Ltd.

- The tax authority's argument basis the date of entry into force article under the India-US DTAA was rejected on the ground that the distinction between withholding taxes and other taxes is made in the DTAA only to indicate different date of applicability of DTAA provisions and that does not affect the chargeability of income under the DTAA and, consequently, under the ITA.

- In any case, acceptance of the tax authorities' contention would result in absurd results, where the taxes would be withheld even where the income is not chargeable to tax in India and withholding would be done at a rate much higher than the DTAA than the tax that is ultimately payable by the NR taxpayer.

- The SC decision in the case of PILCOM (supra) was concerned with a case of payments to NR sportspersons, which was governed by other provisions of the ITA which were not linked with the chargeability under the ITA, unlike Section 195. Hence, the SC decision in the case of PILCOM is not applicable to cases where Section 195 applies.

2. Bank of India [TS-118-ITAT-2021(Mum)]

Subject matter: Mumbai Tribunal denies refund of foreign taxes but allows business expense deduction in absence of Indian tax liability on foreign incomes

Background and facts

- The Taxpayer, a public sector banking company in India, has several branches in foreign jurisdictions. During tax year 2011-12, the Taxpayer earned business profits from its branches outside India viz., in UK, US, France, Belgium, Kenya, Japan, Singapore, China, Hong Kong, Cambodia and Jersey. It also earned dividend income from investment in foreign banks.
- Section (S.) 90 of the Income Tax Laws (ITL)provides that the Government of India (GOI) may enter into an agreement (DTAA) with any other country, inter alia, to grant relief in respect of:
  - Income on which income tax is paid in both the countries.
  - Income tax chargeable under the ITL and under the foreign tax laws.
- Article 24 (elimination of double taxation) of the DTAA usually provides the mechanism to grant FTC. However, the language of Article 24 can vary between different DTAAS. The three variants (amongst others) considered by the Tribunal in the present case are the DTAAs with Namibia, UK and US. The relevant portions of the Articles in these DTAAs, with reference to FTC available to Indian residents, are reproduced below:
- Article 24(2) of the India-UK DTAA states that, "Subject to the provisions of the law of India regarding the allowance as a credit against Indian tax of tax paid in a territory outside India (which shall not affect the general principle hereof), the amount of the United Kingdom tax paid, under the laws of the United Kingdom and in accordance with the provisions of this Convention, whether directly or by deduction, by a resident of India, in respect of income from sources within the United Kingdom which has been subjected to tax both in India and the United Kingdom shall be allowed as a credit against the Indian tax payable in respect of such income but in an amount not exceeding that proportion of Indian tax which such income bears to the entire income chargeable to Indian tax."
- Article 25(2) of the India-US DTAA states that, "Where a resident of India derives income which, in accordance with 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."
- Article 23(2) of the India-Namibia DTAA states that, "In India, double taxation shall be eliminated as follows : Where a resident of India derives income or capital gains from Namibia, which, in accordance with the provisions of this Convention may be taxed in Namibia, then India shall allow as a deduction from the tax on the income of that resident an amount equal to the tax on income or capital gains paid in Namibia, whether directly or by deduction."

As can be seen from the above, FTC under the India-Namibia DTAA is available under the "full credit" method i.e., full deduction is available to the extent of taxes paid in Namibia in accordance with the DTAA. On the other hand, FTC under the India-UK DTAA is available under the "ordinary credit" method i.e., FTC is available against Indian tax payable in an amount not exceeding the proportion of Indian tax which such income bears to the entire income chargeable to Indian tax. The India-US DTAA represents a variant of ordinary credit where deduction is available from Indian tax to the extent of Indian tax payable on the income which may be taxed in US.

- In respect of countries with which India does not have a DTAA, like Jersey in the present case, S. 91 of the ITL provides for FTC by the "ordinary credit" method. The FTC under this method is available on "doubly-taxed income" (i.e., income which is taxed both in India and the foreign country) to the extent of the lower of Indian tax rate or foreign tax rate on such income. However, no FTC is available on foreign incomes which are deemed to accrue or arise in India.

- In the case of Wipro Ltd., the Karnataka High Court (HC) was concerned with the DTAAs with Canada and US. FTC under the India-Canada DTAA is on the lines of the India-UK DTAA (ordinary credit method). The taxpayer earned business income from Canada and US on which it paid taxes in those countries. But, in India, such income was entitled to profit-linked deduction. Yet, the Karnataka HC granted FTC on the interpretation of the Canada and US DTAAs, which reduced the Indian tax liability of the taxpayer on other incomes.

- In the case of Reliance Infrastructure v CIT, the taxpayer paid taxes in Saudi Arabia on income which was deemed to accrue or arise in India and was also entitled to profit-linked deduction in India for tax year 1982-83 when India did not have a DTAA with Saudi Arabia.

  The Bombay HC held that since the taxpayer is not entitled to claim FTC on such income under S. 91 of the ITL, it is entitled to claim business expense deduction for such expense.

- The Taxpayer, in the present case, relied upon Wipro's case (supra) to claim FTC for taxes paid in foreign countries, even though it had incurred loss on an overall basis. This had the effect of the Taxpayer claiming refund of such foreign taxes from the Indian tax authority. The Taxpayer fell within the jurisdiction of the Bombay HC and, hence, the Wipro ruling was a non-jurisdictional HC ruling for it. As an alternative claim, the Taxpayer put forth the contention that if FTC is not allowed in respect of such foreign taxes, then they should be allowed as business expense deduction in line with the Reliance Infrastructure ruling (supra) which was a jurisdictional HC ruling for the Taxpayer.

- The Taxpayer's claims were rejected by the tax authority and the first appellate authority. Hence, the Taxpayer filed further appeal before the Tribunal.

Tribunal's Ruling

- The Tribunal rejected the Taxpayer's claim for refund of foreign taxes but allowed claim for business expense deduction for reasons that are briefly discussed in the following paragraphs.

- **Distinction between "liable to tax" and "subject to tax"**

  - The Taxpayer's contention was that the foreign incomes were "liable to tax" in India. The mere fact that there was no final Indian tax liability due to overall losses, is not relevant. The foreign incomes had the effect of reducing the losses incurred in India. Hence, it is entitled to FTC on foreign incomes.

- But the Tribunal held that what is relevant for FTC, as per Article 24, is that the Taxpayer should be “subject to tax” on such incomes both in India and the tax treaty country. The terms “liable to tax” and “subject to tax” have different meanings and connotations.

- The term “liable to tax” is relevant for gaining access to tax treaty benefits. It means comprehensive liability to tax based on connect factors like residence, domicile, place of effective management etc. As per judicial precedents in India, the test is satisfied even if there is no income tax in the tax treaty country (like the Middle East countries). But the taxpayer is within the scope of jurisdiction of such countries in the event that such country exercises its sovereign right to tax.

- On the other hand, the term “subject to tax” has a narrower meaning and means actual liability to tax. The Tribunal took support from various Indian and foreign rulings for this proposition.

- In the present case, the Taxpayer did not satisfy the test of “subject to tax” since the foreign incomes were not subjected to tax in India in view of the overall loss incurred by the Taxpayer.

Distinction between “full credit” and “ordinary credit”

- In the present case, the foreign incomes were earned by the Taxpayer from countries which either had a DTAA based on the “ordinary credit” method (or variant thereof like the US) or from countries with which India had no DTAA (and, hence, governed by the ”ordinary credit” method as per S. 91 of the ITL).

- The Tribunal discussed exposition of the FTC under different methods by referring to views of international tax experts, the OECD and the United Nations model convention commentaries and Indian literature to conclude that FTC does not envisage any situation in which excess FTC can result in a scenario where the taxpayer can claim refund from the exchequer of the resident jurisdiction.

- At best, subject to domestic tax rules, excess FTC can be permitted to be carried forward or backward. But the Tribunal clarified that it was not required to adjudicate upon this issue in the present case.

No double jeopardy due to denial of credit/refund

- The Taxpayer contended that if credit/refund is not allowed for foreign taxes, it will face double jeopardy since the foreign incomes reduce the Indian losses which, otherwise, could have been carried forward and set off against future incomes. But no credit is granted for foreign taxes paid on such incomes.

- The Tribunal rejected this contention on two grounds: (a.) Such difficulty does not arise in the current year but in future years in which the taxpayer is unable to set off the loss which it, otherwise, could have done. (b.) Carry forward of unutilized FTC is subject to domestic tax rules. The Indian domestic tax rules do not currently permit such carry forward. However, the Tribunal clarified that while the Taxpayer’s claim is premature for the current year, it is leaving the issue open for adjudication in future years.

- **Wipro ruling is distinguishable and not binding, being non-jurisdictional HC ruling**

  - The Karnataka HC ruling in Wipro's case (supra) is applicable only in a situation where the foreign source income is eligible for profit-linked deduction, but the taxpayer has sufficient taxable income against which it can claim FTC of foreign taxes paid on such income. It is not an authority for granting refund of foreign taxes by the Indian exchequer.

  - The Karnataka HC interpreted the Canada and US DTAAs as granting full credit like the India-Namibia DTAA, which the Tribunal found difficult to accept having regard to peculiarities of interpretation of DTAAs as per principles laid down in several Supreme Court (SC) rulings. Unlike statutory provisions, the DTAAs are to be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the DTAA in their context, having regard to their object and purpose rather than a purely literal or legalistic interpretation.

  - In any case, it being a non-jurisdictional HC ruling, it may only have a persuasive effect, unlike the binding effect of a jurisdictional HC ruling. Amongst others, the Tribunal relied on the Bombay HC ruling in the case of CIT v. Thana Electricity Co. Ltd.10 for this proposition.

  - It is also not possible to give the benefit of doubt in interpretation to the Taxpayer since it is well-settled that such principle is not applicable in the context of deduction, exemptions and exceptions, which can be granted only if clearly authorized by the law.

  - The Tribunal preferred to follow its own coordinate bench ruling in the case of JCIT v. Digital Equipment India Pvt. Ltd. in which it had ruled that the India-US DTAA merely grants FTC to the extent of Indian tax liability on the income taxed in US and does not permit grant of refund of US taxes from the Indian exchequer.

  - The Tribunal applied similar conclusion to FTC claimed in respect of taxes paid in UK, Singapore, US, Belgium, Japan, Kenya, China and France.

- **Refund of taxes not possible even under unilateral FTC for non-treaty countries**

  - The Tribunal also applied similar reasoning to deny refund in respect of FTC claimed in respect of non-DTAA countries like Jersey. S. 91 of the ITL grants FTC in respect of "doubly-taxed income". If there is no tax liability in India due to loss at an overall level, the condition is not satisfied.

  - The Tribunal placed reliance on two HC rulings which denied FTC under S. 91 to the extent the foreign incomes were allowed as deduction from the Indian income under the profit-linked incentive provision.

- **Expense deduction allowable in view of jurisdictional HC ruling**

  - While the Tribunal denied the Taxpayer's primary claim of refund of foreign taxes, it allowed secondary claim of business expense deduction. For this conclusion, it followed the jurisdictional Bombay HC ruling in Reliance Infrastructure (supra).

- The Tribunal did take note of the Ahmedabad Tribunal ruling in the case of DCIT v. Elitecore Technologies Pvt. Ltd. where the Ahmedabad Tribunal did not follow the Reliance Infrastructure ruling (supra). But it held that the Ahmedabad Tribunal, in that case, had made it clear that it was not following the Reliance Infrastructure ruling because it was not a binding jurisdictional HC ruling. However, in the present case, the Reliance Infrastructure ruling was a binding jurisdictional HC ruling.

3. BG Asia Pacific Holdings Pte. Limited [TS-95-AAR-2021]

Subject matter: AAR holds that the investment holding company satisfies LOB conditions and is eligible to claim exemption in relation to capital gains arising from transfer of Indian company shares

Background and facts

- Capital gains article of India-Singapore DTAA of 1994 was amended in 2005 by way of a protocol. The protocol inserted Article 13(4) which provided that the gains from the alienation of shares of an Indian company by a resident of Singapore was taxable only in Singapore and hence, exempt from tax in India. Such exemption from tax in India was however subject to fulfilment of the LOB clause.

- The LOB clause provided that the exemption under Article 13(4) would be available only if:

  - The affairs of the resident of Singapore were not arranged with the primary purpose of taking advantage of Article 13(4) (Motive Test); and

  - Singapore resident was not a shell or conduit company with negligible business operations with no real and continuous business activities (Bonafide business activity test).

- The protocol also provided that a Singapore company would be treated as a shell or conduit entity if its total annual expenditure on operations in Singapore was less than S$ 0.2million in the 24 months period immediately preceding the date of transfer (Expenditure test).

- The applicant was a company registered and incorporated in Singapore in 1995. The applicant was a wholly owned subsidiary (WOS) of a UK company and functioned as regional headquarters for its group entities.

- The applicant had made investments in various companies situated in India, Singapore, Egypt, Thailand and Trinidad. Investment in the relevant Indian Company (I Co) was made in multiple tranches from the year 1997 to 1999. Thereafter, there was further acquisition of shares in I Co by means of share splits and bonus issues.

- Total investment by Applicant in I Co was 65.12% of total paid-up equity share capital of I Co. Total value of investments made by the Applicant exceeded S$4.5billion.

- Applicant furnished a Tax residency Certificate (TRC) issued by Singapore tax authorities which specifically indicated that the principal business of the Applicant was that of an investment holding company, the Applicant was not a dormant company and it incurred expenditure in excess of S$ 0.2million as specified in the LOB clause.

- Pursuant to a group restructuring exercise, Applicant transferred its shares in I Co to a third-party buyer on 12 June 2013. There was no dispute that the capital gains arising on such transfer was covered by Article 13(4) of the DTAA. The limited issue for consideration before the AAR was, whether the Applicant was eligible to claim the benefits of Article 13(4) of the erstwhile DTAA.

Tax authority contention

Tax authority contended that the applicant was not eligible to avail the benefits of article 13(4) of the DTAA basis the following arguments:

- The applicant company cannot be treated as tax resident of Singapore since its control and management was located in the country where its parent was located and not in Singapore.
- The TRC was issued by the Singapore tax authority basis the assurance given by the Applicant that its control and management would be exercised in Singapore and hence, it cannot be considered as an evidence of the fact that the control and management of the Applicant was in Singapore.
- Investment holding activity cannot be treated as carrying on of active business operations. Applicant was earning only dividend income and was not involved in any other substantial business activity in Singapore.
- The applicant company did not have any employees in Singapore, and it did not incur any payroll expenditure on its own. The payroll expenditure was incurred by its subsidiary and was then cross charged to the applicant. The expenses cross charged were administrative in nature expenses and not "operational" in nature.
- The expenses incurred by other group entities cannot be considered as expenses incurred by the applicant for evaluating the satisfaction of expenditure test. Further Applicant incurred very minimal operating expenditure.
- The TRC indicated the quantum of the annual expenditure and not the quantum of annual "operating" expenditure and hence, it cannot be relied upon to suggest that the "expenditure test" is satisfied.
- The expenses incurred on statutory compliances cannot be considered as expenses incurred on operational activities.
- The fact that the Applicant had no employees, did not incur its own administrative expenditure and earned only dividend income, suggests that the Applicant had negligible business operations and was a shell or a conduit company set up to take advantage of the provisions of Article 13(4) of the DTAA.

Applicant's contentions:

- The applicant contended that the capital gains arising on alienation of I Co's shares was taxable only in Singapore by virtue of Article 13(4) of the DTAA.
- Further, basis the following, it was also contended that the LOB clause of DTAA was satisfied and hence, Applicant was eligible to claim the benefits of Article 13(4) of the DTAA.
- The control and management of the applicant company was located in Singapore and its board meetings as well as day to day strategic decisions were taken in Singapore.
- Applicant acquired shares of I Co in multiple tranches from the year 1997 to 1999 i.e. prior to the insertion of Article 13(4) to the DTAA. Further, applicant held shares in I Co even after the insertion of Article 13(4) of the DTAA. Thus, it cannot be suggested that the affairs of the applicant were arranged for availing the benefits of favourable capital gains article of the DTAA.
- The decision to divest the shares in I Co was taken pursuant to a general policy decision to exit from the non-core business. Applicant sold its non-core investments in Brazil and Italy as well. Hence, the divestment decision was not specific to India. Further, the policy was made in 2012 i.e. much later than the

insertion of Article 13(4) to the DTAA. Therefore, decision to sell the shares in I Co was non-India specific and was undertaken pursuant to a bonafide business restructuring.

- The applicant company had made significant investments in various companies including in India. Further, the applicant employed a number of personnel in Singapore for its operations and also leased significant office space in Singapore which supports that the applicant had significant business operations in Singapore.

- Total investment made by Applicant was S$ 4.5 billion. Investment of such quantum requires continuous monitoring which necessarily requires skills, expertise and management of high order and it may not be correct to suggest that such activities do not constitute bonafide business operations.

- Since the applicant was engaged in active business operations, entire expenditure including administrative expenses cross charged and statutory compliance cost incurred by it for carrying on such operations is to be considered while determining the satisfaction of expenditure test.

- Applicant's group was following uniform business model wherein a particular group entity provided the required services to other group entities by employing the employees and cost incurred thereon was cross charged to other group entities including the Applicant based on a cost allocation key. The cross charge of expenses was not undertaken merely to satisfy the LOB clause.

- The TRC issued by Singapore Tax authorities and specific disclosure made thereunder suggests that the Applicant satisfies the LOB conditions. The tax department cannot question or dispute any statement or declaration contained in the TRC.

Ruling of the AAR

- Gains arising on transfer of I Co shares is governed by Article 13(4) of the DTAA. In order to avail the benefits of Article 13(4), Applicant is required to satisfy the LOB conditions.

  Following factors suggest that the applicant is eligible to claim exemption from capital gains tax on transfer of I Co shares by virtue of Article 13(4) of the DTAA

Control and Management of the applicant company

- The TRC was issued in the mid of the year and hence, it was imperative to be issued basis the assurance of the Applicant that its Control and Management for whole of the year would be exercised in Singapore. In any case, Applicant had also furnished a new TRC which suggested that Applicant was a resident of Singapore for the relevant period.

- The copy of the board minutes furnished by the Applicant as well as the return of income filed by the Applicant in Singapore suggested that the control and management of Applicant was in Singapore. Thus, the contention of the tax authority that the control and Management of Applicant is not in Singapore is incorrect.

Satisfaction of "Motive test"

- Basis the following factors AAR concluded that the affairs of the Applicant were not arranged with the primary purpose of taking benefit of Article 13(4) of the DTAA:

  - Applicant made its investment in I Co in the year 1997. Subsequent acquisition of shares were made in the year 2007 and 2009 by way of spilt up of shares and bonus issue which were involuntary in nature. Thus, the investment in I Co was made by the Applicant much prior to the introduction of Article 13(4) to the DTAA.

- The divestment of shares in I Co was also not made immediately after the introduction of Article 13(4) of the DTAA.

- The decision to divest shares in I Co was taken pursuant to a general policy decision to exit from non-core business. Applicant had also divested its investments in the non-core holdings in Brazil and Italy. Thus, the decision to divest I Co shares was not India specific and was pursuant to a bonafide business restructuring decision. Applicant had not divested all its share holding in all the companies but continued to hold the investment in core businesses.

Whether Applicant carried on bonafide business activities?

- The applicant was set-up in 1995 with primary purpose to hold investment in group companies. The aggregate value of investment of the applicant was S$ 4.5billion. Managing investments of such magnitude requires skill, expertise and management of high order and hence, such activity is to be considered as active business operation.

- A portfolio management firm with customer's investment of such a magnitude would certainly be considered as carrying on bonafide business operations. This conclusion would not change merely because the investments belongs to group companies and not to a third-party customers.

- The reliance placed by Tax Authorities on India-USA tax treaty wherein the investment making business is not considered as substantive business operations is not applicable for the purpose of India-Singapore DTAA.

- SC in the case of Vodafone as well as Andhra Pradesh HC in the case of Sanofi Pasteur Holding SA has also acknowledged that investment holding activities of investment holding company is a bonafide business activity. Establishing an intermediary company for holding investments is accepted as a legitimate structure even under Indian regulatory laws.

- Thus, it is incorrect to suggest that the activity of group investment holding does not qualify as carrying on of bonafide business activity.

Whether Applicant is a shell/conduit company?

- The applicant was set-up in 1995 and was continuously engaged in the business activity of holding the investments. The quantum of investment made by the applicant was significant and therefore, it is not a case of negligible or nil business operations.

- Applicant had disclosed considerable amount of dividend income on a regular basis in all the years. Hence, the business activity carried on by the applicant was not only continuous but was also real. Thus, Applicant does not qualify as a shell or a conduit company.

Satisfaction of Expenditure test

- The TRC issued by the Singapore Tax Authorities specified that the annual expenditure of the applicant in the 24 months satisfied the threshold prescribed in the "expenditure test".

- Judicial precedents support that a TRC is to be considered as a conclusive evidence of residence. However, the same conclusion does not apply to certificates issued in respect of interpretation of any clause of DTAA. Therefore, it is open for the Tax Authority to independently verify whether the expenditure test is met.

- The audited financial statement of the applicant indicated that the Applicant did not have any employees on its payroll. The employee cost was incurred by a subsidiary of Applicant and then recharged to the applicant. Such expenditure was accounted as administrative expenses. The administrative expenses incurred exceeded the prescribed limit of S$0.2million.

- The nature of business of the Applicant was holding investments. The expenses incurred in relation to such businesses would generally be "administrative" in nature. Payroll expenses are also accounted as administrative expenditure. Thus, such administrative expenditure has to be considered as expenditure incurred on "operations in Singapore". It is not relevant whether such expenditure was incurred directly or through a subsidiary.

- In addition, the return of income filed by the applicant indicated that the Applicant had incurred statutory expenses such as directors fees, audit fees, filing fee, etc. Applicant could not have continued to operate in Singapore without incurring such expenditure and hence such expenditure is to be included for evaluating the satisfaction of the "expenditure test".

- The TRC furnished by the Applicant also suggested that the Applicant was not a dormant company and it satisfied the expenditure test. The fact that the "expenditure test" is satisfied is supported both by the TRC as well as the other independent evidence such as tax return and audited statements.

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