



Quarterly India tax updates

April - June 2020

15 July 2020

India**TaxHour**

Subject Matter Experts



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We will discuss...

- **Economy updates**
 - Covid-19
 - Growth initiatives
- **Indirect tax updates**
 - Make in India initiatives
 - Updates - Extensions, simplifications, and clarifications
- **Direct tax updates**
- **Recent judicial pronouncements**
 - Teradata Operations Inc. (2020) 116 taxmann.com 404 – ITAT Delhi
 - Ericsson India Private Limited v. ACIT (2020) 117 taxmann.com 381 – Delhi High Court, Vodafone Idea Ltd. vs ACIT (2020) 116 taxmann.com 393 - Supreme Court
 - Voith Paper GmbH Vs DDIT, New Delhi (2020) (116 taxmann.com 127) (Delhi - ITAT)
 - Union of India Vs U.A.E Exchange Center (2020) (116 taxmann.com 379) - Supreme Court
- **Annexures**





Economy updates

Covid-19 and Growth initiatives



Covid-19:

Latest growth estimates point to severe growth contraction - globally and for India



Growth initiatives:

Production Linked Incentives

Creating a Common Agricultural Commodities Market

Pan-India Securities Market-Stamp Duty



Indirect tax updates

Make in India initiatives

Scheme for Large Scale Electronics Manufacturing



Scheme for Large Scale Electronics Manufacturing

Effective from 1 August 2020

- Production Linked Incentive (PLI) scheme to provide financial boost and aid growth of domestic manufacturing in electronics value chain
- **Target sectors:** Manufacturers of mobile phones and specific electronic components (viz. SMT components, semiconductor devices, PCBs, System-in-Package, ATMP units, etc.)
- **Incentive:** 4% to 6% incentives on incremental sales of goods manufactured in India, with FY 2019-20 as base year
- Incentives would be available for a 5 year period
- Expected incentive outlay over the duration of scheme to exceed **USD 5.4 billion** / INR 40,000 crores
- **Eligibility:** Companies engaged in manufacturing of target segments in India. This shall include contract manufacturers as defined in the FDI Policy Circular of 2017. New companies covered?
- Thresholds of incremental investment **and** incremental sales of manufactured goods to be met are as follows

Segment	Proposed Incentive Rate	Incremental investment over base year in crores / Mn USD	Incremental Sales of Manufactured Goods in crores / Mn USD																											
Mobile Phones (Invoice value of INR 15,000 and above)	Year 1: 6% Year 2: 6% Year 3: 5% Year 4: 5% Year 5: 4%	INR 1000 crore over 4 years Cumulative minimum (Crore): <table><tr><th>Year 1</th><th>Year 2</th><th>Year 3</th><th>Year 4</th></tr><tr><td>250</td><td>500</td><td>750</td><td>1000</td></tr><tr><td>33</td><td>67</td><td>100</td><td>133</td></tr></table>	Year 1	Year 2	Year 3	Year 4	250	500	750	1000	33	67	100	133	<table><tr><th>Year 1</th><th>Year 2</th><th>Year 3</th><th>Year 4</th><th>Year 5</th></tr><tr><td>4000</td><td>8000</td><td>15000</td><td>20000</td><td>25000</td></tr><tr><td>533</td><td>1067</td><td>2000</td><td>2667</td><td>333</td></tr></table>	Year 1	Year 2	Year 3	Year 4	Year 5	4000	8000	15000	20000	25000	533	1067	2000	2667	333
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Mobile Phones (Domestic Companies)	INR 200 crore over 4 years Cumulative minimum (Crore): <table><tr><th>Year 1</th><th>Year 2</th><th>Year 3</th><th>Year 4</th></tr><tr><td>50</td><td>100</td><td>150</td><td>200</td></tr><tr><td>7</td><td>13</td><td>27</td><td>80</td></tr></table>	Year 1	Year 2	Year 3	Year 4	50	100	150	200	7	13	27	80	<table><tr><th>Year 1</th><th>Year 2</th><th>Year 3</th><th>Year 4</th><th>Year 5</th></tr><tr><td>500</td><td>1000</td><td>2000</td><td>3500</td><td>5000</td></tr><tr><td>67</td><td>133</td><td>267</td><td>467</td><td>667</td></tr></table>	Year 1	Year 2	Year 3	Year 4	Year 5	500	1000	2000	3500	5000	67	133	267	467	667	
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Specified Electronic Components	INR 100 crore over 4 years Cumulative minimum (Crore): <table><tr><th>Year 1</th><th>Year 2</th><th>Year 3</th><th>Year 4</th></tr><tr><td>25</td><td>50</td><td>75</td><td>100</td></tr><tr><td>5</td><td>7</td><td>13</td><td>80</td></tr></table>	Year 1	Year 2	Year 3	Year 4	25	50	75	100	5	7	13	80	<table><tr><th>Year 1</th><th>Year 2</th><th>Year 3</th><th>Year 4</th><th>Year 5</th></tr><tr><td>100</td><td>200</td><td>350</td><td>450</td><td>600</td></tr><tr><td>13</td><td>27</td><td>47</td><td>60</td><td>80</td></tr></table>	Year 1	Year 2	Year 3	Year 4	Year 5	100	200	350	450	600	13	27	47	60	80	
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Electronics Manufacturing Clusters Scheme



Modified Electronics Manufacturing Clusters (EMC 2.0) Scheme

Effective from 1 April 2020

- Scheme notified to aid Electronics System Design and Manufacturing (ESDM) sector
- **Who can apply:** The application under the EMC 2.0 Scheme can be submitted by a State Government, State Implementation Agency (SIA) or Central Public Sector Unit to Project Management Agency along with the details of the Anchor unit(s) clearly mentioning the roles and responsibilities of PIA and the relevant Anchor Unit(s)
- Electronic manufacturing companies required to commit purchase/ lease of minimum 20% of saleable/ leasable land for setting up manufacturing facility with a minimum investment outlay of USD 40 million/ INR 300 crores with a land parcel not less than 200 acres, except for North East regions
- **Financial assistance for project would be available up to 50% in the case of EMC projects and up to 75% in the case of Common Facility Centre available with prescribed ceiling of benefits**
- **Time limit:** Applications can be filed within 3 years from the date of notification of scheme, whereas funds would be disbursed for a further period of 5 years
- Illustrative list of eligible activities

Eligible activities	What is covered
Vital services	Boundary wall, internal roads, storm water drains, electric sub-station/ distribution network
Essential services	Waste Disposal/Recycling, Water Recycling/Water Treatment Plant, Effluent Treatment Plant, Sewage Lines, e-waste Management, Street Lighting, Backup Power Plant, Warehousing, Ready Built Factory sheds (RBF)/Plug & Play Facility, Fire Fighting and Safety service
Desirable services	Welfare services, support services, manufacturing support

Promotion of bulk drugs

Scheme for promotion of domestic manufacturing of critical KSMs/ Drug Intermediates and APIs

- Financial incentive will be given to eligible manufacturers of identified 53 critical bulk drugs on their incremental sales over the base year (2019-20) for a period of 6 years
- Out of 53 identified bulk drugs, 26 are fermentation based bulk drugs and 27 are chemical synthesis based bulk drugs
- Rate of incentive will be 20 % (of incremental sales value) for fermentation based bulk drugs and 10% for chemical synthesis based bulk drugs
- A sum of Rs. 6,940 crore has been approved for next 8 years

Particulars	Description
Quantum of incentive	<ul style="list-style-type: none">• Support under the scheme shall be provided for six years in case of fermentation based products and five years of chemically synthesized products• For fermentation based eligible products, incentive for first four years (2022- 2023 to 2025-2026) would be 20%, for fifth year (2026-27) incentive would be 15% and the sixth year (2027-2028) incentive would be 5%; on incremental sale Of KSMs/Drug Intermediates/APIs• For chemically synthesis eligible products, incentive for five years (2021-2022 to 2025-2026) would be 10% on incremental sales of KSMs/Drug Intermediates/APIs
Target segments	<ul style="list-style-type: none">• The Scheme shall only be applicable for target segments of critical KSMs/Drug Intermediates and APIs as detailed in Annexure B
Eligibility	<ul style="list-style-type: none">• Support under the scheme shall be provided only to manufacturers of critical KSMs(Drug Intermediates and APIs in India• Eligibility shall be subject to threshold of incremental investment for manufacturing critical KSMs/Drug Intermediates and APIs (as distinct from traded critical KSMs/Drug Intermediates and API)• The scheme is applicable only for greenfield projects
Tenure of the scheme	<ul style="list-style-type: none">• The tenure of the scheme will be for a period of eight years from 2020-21 to 2027-28 subsequent to the base year
Application window	<ul style="list-style-type: none">• 4 months. May be reopened depending on applications received
Base year	<ul style="list-style-type: none">• 2019-20 for computation of incremental sales

Production linked incentive schemes for medical devices



Incentives overview

- Incentives at rate of 5% on incremental sales of goods manufactured in India
- Incentives for 5 years subsequent to base year 2019-20
- Sales of traded goods not eligible for incentives



Proposed Incentive Rate (on incremental sales of manufactured Goods)

FY 2020-21: 5%
FY 2021-22: 5%
FY 2022-23: 5%
FY 2023-24: 5%
FY 2024-25: 5%

Incremental Investment

INR 180 cr over 3 years
Cumulative Minimum

- Year 1: INR 60 cr
- Year 2: INR 120 cr
- Year 3: INR 180 cr

Incremental Sales of Manufactured Goods

Year 1: INR 120 cr
Year 2: INR 240 cr
Year 3: INR 360 cr
Year 4: INR 460 cr
Year 5: INR 560 cr



Eligibility

- Specified segments of medical devices
- Incremental investment of INR 1.8 Bn over 3 years period
- 5 percent of incremental sales threshold. Per company cap to be decided by Empowered Committee

Medical
devices



- Cancer care/ Radiotherapy medical devices
- Radiology & Imaging devices (both ionizing & non-ionizing radiation products) and Nuclear imaging devices
- Anesthetics & Cardio-Respiratory medical devices including Catheters of Cardio Respiratory Category & Renal Care Medical Devices
- All implants including implantable electronic devices like Cochlear implant and Pacemakers



Tenure and Application

- Scheme Tenure: 2020-21 to 2025-26
- **Application window of 4 months (i.e. up to September 2020)**
- Second window may be opened (if considered necessary) – however benefits limited to remaining tenure

Pharma specific schemes for development of parks



Pharma specific schemes for assisting State Government

- Schemes have been notified which provide assistance to State Governments to set up Bulk drug parks and medical devices park
- The financial assistance and incentive outlay envisaged in the schemes is tabulated below:

Particulars	Scheme on promotion of bulk drug parks	Scheme for promotion of medical devices park
Financial assistance	Least of the following: <ul style="list-style-type: none">• INR 1000 Crore per Bulk Drug Park; or• 70% of the project cost of Common Infrastructure Facilities	Least of the following: <ul style="list-style-type: none">• INR 100 Crore per park; or• 70% of the project cost of Common Infrastructure Facilities
Incentive outlay	The incentive outlay is INR 3000 Crore for providing financial assistance for construction of Common Infrastructure facilities in 3 Bulk Drug Parks with a maximum limit of INR 1000 Crores	The incentive outlay is INR 400 Crore for providing financial assistance for construction of Common Infrastructure Facilities in 4 medical device parks

Updates - Extensions, simplifications, and clarifications

Relevant changes pursuant to 40th GST Council Meet



Reduction in late fee for past returns

- Reduction in late fee on filing of returns in Form GSTR-3B for July 2017 to January 2020, in the following manner:
 - Taxpayers having NIL liability - no late fee [Earlier the late fee was INR 20/day]
 - Taxpayers having liability - late fee capped to a maximum of INR 500 [earlier the late fee was INR 50/day]
- The above concession is available for GSTR-3B filed between 1 July 2020 and 30 September 2020.



Relief for small taxpayers

- For taxpayers having turnover upto INR 5 Crores:
 - Reduction in interest from 18% to 9% on delayed payment of GST for returns pertaining to February 2020 to April 2020 till 30 September 2020
 - Waiver of late fees and interest on returns for May 2020 to July 2020 if the same is filed by September 2020



Certain clauses of Finance Act, 2020 to be brought into force

- Sections 118, 125, 129 & 130 of Finance Act, 2020 amending CGST Act 2017 and IGST Act, 2017 to be brought into force from 30.06.2020
- The amendments dealt with inclusion of Ladakh as a UT; appellate bench to be allowed for J&K; removal of difficulty order to be issued for upto 5 years from 01 July etc.

The aforesaid changes would be given effect through relevant Circulars/ Notifications which alone shall have the force of law

Extensions, simplifications, and clarifications



Extension in filing Annual Return

- Due date for furnishing the annual returns in FORM GSTR-9, FORM GSTR-9C for the Financial Year 2018 – 2019 has been further extended from 30 June 2020 till 30 September 2020



E-invoice API version 1.02 released

- The Government has released e invoice API version 1.02 for testing on Sandbox.
- More changes expected to align the schema from GSTN-NIC perspective and FAQs expected from CBIC around reverse charge, transition e-invoices for CN/ DNs etc.
- Key validation changes:
 - Generation of E-Way Bill as part of IRN generation API enabled
 - In case of export, port details are mandatory



Nil return in Form GSTR 3B can now be filed through SMS

- The functionality of filing Nil FORM GSTR-3B through SMS has been made available on the GSTN portal
- This would substantially improve ease of GST compliance for over 22 lakh registered taxpayers who had to otherwise log into their account on the common portal and then file their returns every month



Personal hearing through WhatsApp video conferencing

- In view of the current situation of COVID 19, suitable guidelines have been issued for conduct of personal hearing through video conferencing using 'WhatsApp' application



Clarification on refund

- CBIC has clarified that the condition of reflection of invoices in Form GSTR 2A is not applicable for refund of ITC relating to imports, ISD invoices and RCM supplies



Extension in due dates for compliances and actions

- Due date for compliance or any action under GST law has been further extended to 31 August 2020 as against the earlier extension of 30 June 2020
- Extension where due date falls between 20 March 2020 to 30 August 2020
- Typically covers appeals, furnishing of statements etc.

For exporters

Compliance relaxations



- Ministry of Commerce has directed the SEZ authorities to ensure that no hardship is caused to Developers / Co-Developer / Units and no punitive action is taken in cases where any compliance (returns, SOFTEX, renewal) is not met during this period impacted by COVID-19
- Ad-hoc interim extension/ deferment of the expiry date may be granted without prejudice till 30 June 2020

Following relaxations are worth noting in this regard:

- Due date of APR for FY 19-20 is extended to 30 September 2020
- Due date of MPR for the months of February 2020 to June 2020 have been extended to 31 July 2020

Work from home



- Cochin SEZ has issued a circular for relaxing the conditions for work from home - Circular clarifies that SEZ Units opting for work from home can do so under intimation to the Development Commissioner, Cochin SEZ
- In addition, the Department of Telecommunication has relaxed the conditions for Other Service Providers for “work from home”. The relaxations include:
 - No requirement of security deposit and “work from home” agreement
 - Static IP can be used for VPN as against the required Authorised Service Providers Provisioned secured VPN
 - Prior permission for work from home is not required
- Areas to watch out for:
 - For what duration can WFH option be provided to employees
 - Can WFH be extended to all employees
 - What proportion of employees can WFH permanently

Faceless assessment under Customs



Objective:

- The scheme of faceless assessment has been introduced to bring anonymity in assessment and further cut down the physical interface between the Assessing Officer and the importer or broker to the extent technologically feasible.
- To bring consistency in the assessment at pan India level i.e. same classification/assessment is made for imports throughout India.

Features:

- Restructuring of existing Commissionerates into two distinct categories namely:-
 - National Assessment Commissionerates (NACs); and
 - Jurisdictional Port Commissionerates (JPCs)
- The NACs would be the “Virtual Commissionerates” or “Nodal Commissionerates” and would have an all India jurisdiction & comprise of a cluster of “Faceless Assessments Groups” (FAG). The FAGs shall perform the assessment of the BOEs.
- Assessment of the products shall be based on Chapter under which the products falls irrespective of the port the goods have arrived.
- Hearing if any shall be conducted exclusively through video conferencing.

Recent updates:

- Faceless assessment scheme to be rolled out all across India in a phased manner.
- To start with CBIC has implemented the faceless assessment vide its recent notifications with effect from 8 June 2020. **The non-facilitated BOEs for import of articles falling under Chapter 84 & Chapter 85 at any Customs Stations falling under the jurisdiction of Bengaluru or Chennai Customs zone shall be assigned to FAG for assessment at Bangalore/ Chennai.**

What's next:

- The concept of faceless assessment shall be implemented all across India by December 2020.

Taxability of Director's remuneration

Rajasthan AAR-M/s Clay Craft India Private Limited



- Directors are not employees of the Company.
- Consideration paid to the Directors is against the services provided by them to the Company.
- Therefore consideration paid to the Directors will attract GST under RCM.

Karnataka AAR-M/s Anil Kumar Agarwal



- Remuneration received by a Director in the capacity of an employee of the Company is outside the purview of GST.
- Any remuneration received by a non-executive Director, not being an employee of the Company, would be subject to GST under RCM.

Clarification by CBIC



In view of the contradictory AAR rulings, CBIC has clarified as follows:

- That part of Director's remuneration which are declared as "Salaries" in the books of a company and subjected to TDS under Section 192 of the IT Act, are not taxable being consideration for services by an employee to the employer in the course of or in relation to his employment in terms of Schedule III of the CGST Act, 2017.
- That part of employee Director's remuneration which is declared separately other than "salaries" in the Company's accounts and subjected to TDS under Section 194J of the IT Act as Fees for professional or Technical Services should be treated as consideration for providing services which are outside the scope of Schedule III of the CGST Act, and is therefore, taxable under RCM.



Direct tax updates

The Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 dated 31 March 2020 and Notification/ Press release dated 24 June 2020

The Ordinance 2020 provided for relaxations in the compliances required under various laws and subsequently the notification dated 24 Jun provides further extensions. Below is a brief glance of the extensions provided:

Particulars	Ordinance 2020 dated 31 March 2020	Notification/ Press Release dated 24 June 2020
Due date for income tax returns for FY 18-19	30 June 2020	31 July 2020
Aadhaar-PAN linking date	30 June 2020	31 March 2021
Vivaad se Vishwas scheme	30 June 2020	31 December 2020 (as announced by the FM on 13 May 2020)
Delayed payments of advance tax, SA tax, regular tax, TDS, TCS, equalization levy, STT, CTT made between 20th March 2020 and 30th June 2020	Reduced interest rate at 9% instead of 12 %/ 18 % per annum	Not applicable for payment after 30 June 2020. Where date for payment of SA tax only in the case of a taxpayer whose SA tax liability is up to Rs. 1 lakh has been extended to 30 November, 2020 without payment of interest u/s 234A
Due dates for issue of notice, intimation, notification, approval order, sanction order, filing of appeal, furnishing of return, statements, applications, reports, any other documents & time limit for completion of proceedings by the authority and any compliance	Time limit falling between 20 March 2020 to 29 June 2020 is extended to 30 June 2020	Time limit falling between 20 March 2020 to 31 December 2020 is extended to 31 March 2021 except for compliances where due dates have been specifically mentioned
Investment/ construction/ purchase for claiming roll over benefit/ deduction in respect of capital gains under sections 54 to 54GB	30 June 2020	30 September 2020
TDS/TCS returns for Q4 of FY 2019-20	30 June 2020	31 July 2020 for TDS/TCS return 15 August 2020 for TDS certificates

The Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 dated 31 March 2020 and Notification/ Press release dated 24 June 2020

Particulars	Ordinance 2020 dated 31 March 2020	Notification/ Press Release dated 24 June 2020
Investment/ payment for claiming deduction under Chapter-VIA-B of the IT Act which includes section 80C (LIC, PPF, NSC etc.), 80D (Mediclaime), 80G (Donations) etc.	30 June 2020	31 July 2020
Date for commencement of operation for the SEZ units for claiming deduction under section 10AA of the IT Act which has received necessary approval by 31 March 2020	30 June 2020	30 September 2020

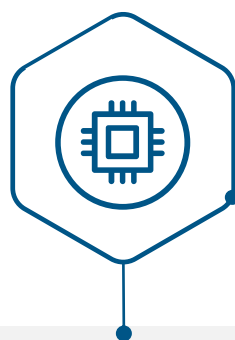
Vide Press Release dated 24 June 2020, due date for tax returns for the FY 2019-20 which were due on 31 July 2020 or 31 October 2020 have been extended to 30 November 2020. Consequently, the date for furnishing any audit report under the Income-tax law has also been extended to 31 October 2020

Recent Circulars / Clarifications issued by CBDT



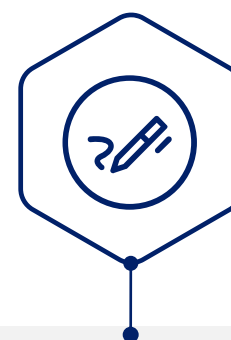
Clarification on option under 115BAC: Circular C1/2020 dated 13 April 2020

- Finance Act, 2020 introduced section 115BAC to enable individual or HUF to opt for simplified tax regime (STR) with lower tax rates. However, corresponding amendments were not made in TDS provisions
- CBDT, vide above circular, has allowed consideration of STR at the time of tax withholding by the employer



CBDT Press Release on reduction in TDS/TCS rates dated 13 May 2020

- CBDT vide Press Release dated 13 May 2020 reduced rates of TDS and TCS by 25% on non-salary resident payments for the period from 14 May 2020 to 31 March 2021
- This reduction in TCS rates is applicable to sections 206C(1), 206C(1C), 206C(1F) and 206C(1H)



CBDT defers GAAR & GST reporting in Tax Audit Report (i.e. "TAR") till 31 March 21 – Circular 10/2020 dated 24 April 2020

- TAR form was modified vide notification no. GSR 666(E) dated 20th July, 2018 w.e.f. 20th August, 2018 wherein among others, clause 30C and 44 on GAAR and GST were introduced
- Due to COVID-19 pandemic across the country, the reporting under clause 30C and Clause 44 of the TAR are further kept in abeyance till 31 March 2021

CBDT relaxed residency conditions due to COVID-19 lockdown – Circular No.11/2020 read with Press Release dated 8 May 2020

- Due to Covid-19 pandemic, many individuals who visited India during the previous year 2019-20 were unable to leave before 31 March 2020. The CBDT thus issued circular to provide relaxation for determining residential status in case of individuals who came to India on visit before 22 March 2020

Situation for FY 2019-20	Period of stay in India to be excluded
Unable to leave India on or before 31 March 2020	22 March 2020 to 31 March 2020
Quarantined in India due to COVID-19 on or after 1 March 2020 and either departed by evacuation flight or unable to leave India on or before 31 March 2020	Date of quarantine to date of departure or 31 March 2020 as the case may be
Departed on evacuation flight on or before 31 March 2020	22nd March, 2020 to his date of departure

CBDT revising ITR forms to enable taxpayers to avail benefits of timeline extension due to Covid-19 – Press Release dated 19 April 2020

- Due to Covid-19 pandemic situation, the CBDT initiated necessary changes in return forms for FY 2019-20. This will allow taxpayers to avail benefits of investments/transactions made for period between April to June, 2020
- The new ITR forms for FY 2019-20 were notified on 29 May 2020. However, in light of the Notification and Press Release dated 24 June 2020 wherein various timelines have been further extended, the return forms shall undergo a further revision

CBDT notifies revised Indian regulations for Mutual Agreement Procedure (“MAP”) – Notification 23/2020



CBDT has prescribed a new Rule, 44G which provides a detailed process covering all aspects relating to MAP. This revised procedure is seen as an outcome of OECD’s peer review report, where it was pointed out that India had not issued guidance on the governance and administration of MAPs



One of the key highlights of the new rules is to put a timeline (on a best endeavor basis) to conclude MAPs within 24 months



Rule provides that MAP resolution would provide relief only to the extent that it does not reduce the taxable income or increase the taxable loss as reported in the income tax return in India. This restriction is not applicable where the dispute is on account of actions taken by the tax authority of other country



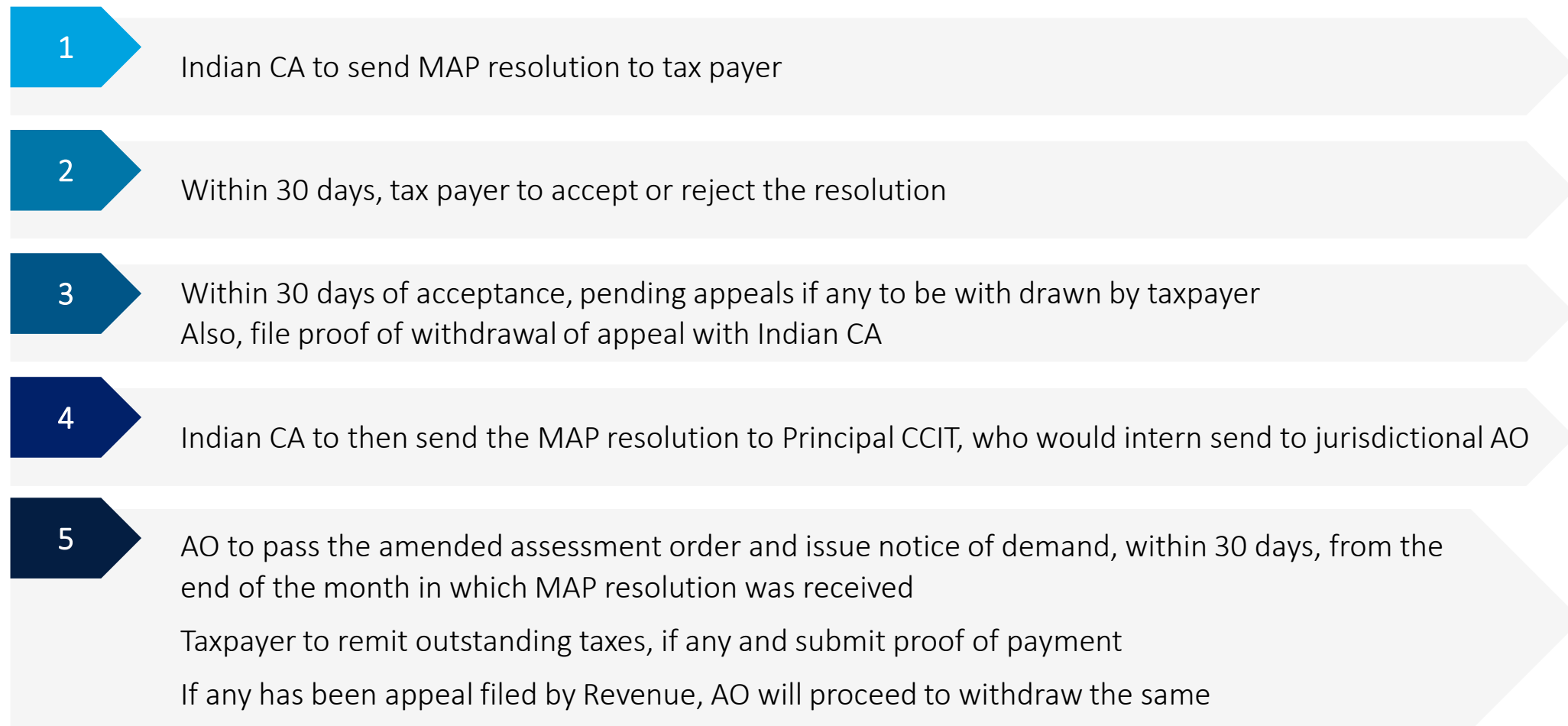
Application for MAP to be made in Form 34F in India

MAP application made outside India - once reference received, Indian authority shall convey its acceptance or otherwise for taking up the case in MAP

It also now allows Indian Competent Authority to call for documents or hold discussions with the income tax authorities/ tax payer/ authorized representatives, to understand the facts of the case and how the action of the tax authorities is not in accordance with the tax treaty

CBDT notifies revised Indian regulations for MAP – Notification 23/2020

Giving effect to MAP resolution



CBDT clarifies on compulsory usage of electronic payment modes – Circular 12/2020

1

To encourage digital economy and move towards a less-cash economy, the Government had inserted Section 269SU

2

The provisions of Section 269SU read with Rule 119AA applies to every person carrying on business having total sales, turnover or gross-receipts in excess of INR 500 million during the immediately preceding year

3

Rule 119AA inserted to provide that businesses which fall under Section 269SU have to compulsorily provide options to their customers to pay through prescribed modes. These compulsory modes were applicable to both B2B and B2C businesses

4

Modes prescribed by CBDT are:

- Debit card powered by RuPay
- Unified Payments Interface (UPI)
- Unified Payments Interface Quick Response Code (UPI QR Code)

5

Stringent penalty applies in cases of non-compliance; Section 271DB provides for levy of penalty of five thousand rupees per day in case of failure by the specified person to comply with the provisions of Section 269SU

Circular No 12/2020 dated 20 May 2020 has been issued by CBDT to clarify that the aforesaid modes of electronic payment would not apply to a person having only B2B transactions, if at least 95 percent of aggregate of amount received during the previous year are by any mode other than cash



Recent judicial pronouncements

Teradata Operations Inc. (2020) 116
taxmann.com 404 – ITAT Delhi

Teradata Operations Inc. Vs Deputy Commissioner of Income Tax

Secondment arrangement constitutes a permanent establishment

Tax payer's facts and arguments:

- Teradata Operations Inc. ("Taxpayer") is a tax resident of the USA engaged in the business of providing data warehousing services.
- Taxpayer seconded certain employees to its Indian group company ("TIPL") under a secondment agreement, as per which they worked as employees and under control and supervision of TIPL.
- The salary was disbursed by the taxpayer in the USA only for administrative purposes and was reimbursed by TIPL on actual cost basis.
- Reimbursements received from TIPL in respect of employees seconded were not taxable in India.

Tax officer's conclusions:

- AO disregarded the taxpayer contention alleging:
 - There was no employment agreement between TIPL and the seconded employees. In the absence of employer-employee relationship with TIPL, the employees could not be said to be under the control and supervision of TIPL.
 - The secondees continued to be employees of the taxpayer as:
 - The employees continued to make social security contribution in the USA;
 - The salary was disbursed in the USA bank account of the employees;
 - The employees continued under the taxpayer's employment and / or had lien on employment with the taxpayer
- AO held that the taxpayer had a fixed place permanent establishment (PE) as well as a service PE in India.
- In the absence of details of global profit, AO had considered markup at the rate of 25% on the cost base of the seconded employees to determine the taxability

DRP upheld the order of the AO

Teradata Operations Inc. Vs Deputy Commissioner of Income Tax

Secondment arrangement constitutes a permanent establishment

Whether the secondment arrangement constitutes a PE in India?



Following *Centrica India Offshore Private Limited (2014) 44 taxmann.com 300 (Delhi High Court)*, the ITAT held that:

- The taxpayer had seconded its employees to manage the affairs of the Indian subsidiary (TIPL) and to provide technical knowledge;
- the employees for all practical purposes remained employees of the taxpayer, even though they were stationed at TIPL's premises;
- The employees continued to make social security contributions in the USA and their salaries were distributed to their USA bank accounts;
- There was no agreement between TIPL and the employees;
- Accordingly, the ITAT upheld that the taxpayer had a PE in India as per the provisions of the India-USA tax treaty.

Profit attribution to PE?



- The ITAT rejected the taxpayer contention that the cost should be first deducted from reimbursement and then a mark-up should be charged;
- The ITAT held the income which accrued to the PE was the market value of the services reduced by the cost of the services;
- The ITAT however referred the matter back to the AO with respect to re-verification of profit attribution to the PE, on re-verification of facts.

There have been rulings (at both ITAT and HC level) with different conclusions on the aspects of secondment arrangement. To resolve the conflicting ITAT rulings, the ITAT has set up a Special Bench at Bengaluru.

Ericsson India Private Limited v. ACIT (2020)
117 taxmann.com 381 – Delhi High Court

Vodafone Idea Ltd. vs ACIT (2020) 116
taxmann.com 393 - Supreme Court

Ericsson India Private Limited Vs ACIT – Delhi HC | Vodafone Idea Ltd. vs CIT - Supreme Court

Whether tax refunds claimed in the income-tax return can be withheld, if return is selected for audit

Decision	<i>Ericsson India Private Limited Vs ACIT (HC)</i>	<i>Vodafone Idea Ltd. vs CIT (SC)</i>
Upto AY 2016-17 (up to FY 2015-16)	<ul style="list-style-type: none"> • Mere issuance of audit initiation notice u/s 143(2) does not entitle the assessing officer to withhold the refunds claimed in the tax return (CBDT instruction No. 1 of 2015 has been quashed – CBDT had directed that refunds ought not to be issued where audit was initiated) • It is necessary for the assessing officer to apply his mind and decide the withholding of refund objectively; audit initiation cannot itself be a ground to deny refund 	<ul style="list-style-type: none"> • It is not necessary to issue refund claimed in the tax return, once an audit initiation notice is issued u/s 143(2): <ol style="list-style-type: none"> i. This is backed with the legislative intent of section 143(1D); and ii. Section 143(1D) beings with non-obstante clause, <i>providing AO discretion to not process the ROI on issue of scrutiny notice</i> • Issue of audit initiation notice u/s 143(2) sufficient to withhold refund. No requirement to issue any further intimation for non-grant of refund (CBDT Instruction No 1 of 2015 upheld)
AY 2017-18 and onwards (FY 2016-17 onwards)	<ul style="list-style-type: none"> • Observes that law has changed from this year onwards; new procedure u/s 241A applies (where the assessing officer has to come to a reasoned view that issuing refunds will adversely affect the Revenue); again 	<ul style="list-style-type: none"> • Acknowledges changes in law for issuing refunds - requirement of section 241A is to be satisfied for withholding of refunds • In the facts of the case, SC upheld the withholding of refund by the AO : <ul style="list-style-type: none"> – Statutory time lines have been complied; – An appropriate order has been issued u/s 241A laying out the reasons for holding back the refunds on “adverse impact to Revenue”; the tax payer has not challenged these reasons

Ericsson India Private Limited Vs ACIT – Delhi HC | Vodafone Idea Ltd. vs CIT - Supreme Court

Whether tax refunds claimed in the income-tax return can be withheld if return is selected for audit

Principles	<p>“Adversely affects the Revenue” – what are the factors?</p> <p>AO should arrive at a satisfaction that grant of refund is likely to adversely affect the Revenue by examining the following:</p> <ul style="list-style-type: none">• Firstly, with reasons, make a prima facie Assessment of the probability that additions would be made in the Scrutiny Assessment (regular audit) Proceedings,• Secondly, he shall make an assessment of the quantum of additions, if any, that may be made to the income returned, and the likely tax effect that such additions may have,• Thirdly, he should assess the financials and financial standing of the petitioner with regard to its ability to meet and service any demand for tax that may be raised as a result of the Scrutiny Proceedings; and also take into consideration such other factors eg. past demands, any outstanding litigation and the past conduct of the Assessee etc.	<p>SC did not comment on parameters required to satisfy the phrase “adversely impact Revenue”</p> <p>Parameters laid out by the Del HC in the Ericsson case would hold good.</p>
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Voith Paper GmbH Vs DDIT, New Delhi
(2020) (116 taxmann.com 127) (Delhi - ITAT)

M/s Voith Paper Gmbh Vs DDIT, New Delhi (2020) (Delhi ITAT)

Facts:

- Voith Paper Gmbh (“Taxpayer”), company incorporated in Austria, is engaged in ‘board and packaging paper’ machines
- It entered into two separate contracts with Indian customer for equipment supply and service for commissioning of plant
- Taxpayer admitted having service PE in its tax return since activity of commissioning and erection exceeded 6 months and income was recognized under completed contract method
- However, taxpayer considered income from supply as being non-taxable in India considering sale of machinery was made outside India and payment was also received outside India
- Tax return was selected for scrutiny and tax officer held income from offshore supply taxable in India
- Tax officer observed contract of supply and service is one single composite contract and taxpayer has a PE in the form of Project office. It was further stated since supply of equipment was concluded in India and PE played a role in marketing, income from supply part of the agreement was held to be taxable in India
- Tax officer assumed profit of 9.75% on supply and 35% of profit was attributed to Indian PE
- Aggrieved with the final assessment order, the assessee preferred an appeal before the Hon’ble Delhi Tribunal

M/s Voith Paper Gmbh Vs DDIT, New Delhi (2020) (Delhi ITAT)

Composite Contract



- Tribunal observed both supply and service contracts, though segregated on paper, is one single composite contract
- The buyer was interested in having the complete installation of plant under the supervision of the taxpayer
- Even service contract had termination clause that in case of failure of performance, machinery supplied will be returned and the money will be refunded
- Reliance on SC decision in the case of Ishikawajima-Harima Heavy Industries Limited distinguished since supply and service were carried out by different parties in that case
- Tribunal distinguished Delhi HC decision in the case of Ericsson AB wherein property in the goods is transferred outside India

PE



- Machinery parts were assembled in India to bring them in deliverable state and property in goods passed on the buyer in India
- Since substantial part of business activity was carried out in taxable territory and supply was incidental to the service contract, profit is directly attributable to Indian PE
- Existence of service PE was admitted by taxpayer. Since employees of taxpayer were in India at the time of entry of part of machinery
- Employees were instrumental in supervising entire activity of inspection and bringing machinery into deliverable state

Attribution



- Based on Delhi High Court decision in case of Rolls Royce Plc. wherein 50% profits were attributed towards manufacturing activity, 15% towards research and development activity and balance 35% was attributed to marketing activity, Tribunal upheld attribution of 35% of profits from offshore supply to PE in India
- Despite suffering global loss, Tribunal upheld attribution assuming profit margin of 9.75% based on global profit and loss account comprised of various subsidiaries and profit margin applied by AO to benchmarked companies

Union of India Vs U.A.E Exchange Center (2020) (116 taxmann.com 379) - Supreme Court

M/s Union of India Vs U.A.E. Exchange Center (2020) (Supreme Court)

Facts:

- U.A.E Exchange Center (“Taxpayer”), incorporated in UAE, is engaged in provision of remittance services to NRI customers
- Taxpayer set up LO in India with RBI approval and activities undertaken are within the conditions laid down by RBI
- The funds were transferred in two ways:
 - By telegraphic transfer through bank channels or
 - By sending instruments or cheques through LOs in favor of beneficiaries in India
- Taxpayer filed nil return considering no income is taxable in India. Even the tax returns for few years were accepted by the department on this basis
- Taxpayer thereafter filed an application with the Authority for Advance Ruling (i.e. “AAR”) seeking clarification whether income from the activities rendered in India will be taxable or not
- The AAR held income of taxpayer to be taxable in India since activities of LO are significant part of the main activity and cannot be termed to be preparatory and auxiliary. Thus, activities undertaken by LO constitute PE in India under Article 5 of tax treaty
- The taxpayer filed Writ Petition before Hon’ble Delhi HC wherein it was observed activities carried on by LO did not contribute to earnings of the taxpayer in UAE since they are only supportive in nature and hence, LO cannot be treated as PE in India under tax treaty (*discussed in detail in subsequent slide*)
- Aggrieved by the High Court judgement, revenue filed an SLP before the Supreme Court (*discussed in detail in subsequent slide*)

M/s Union of India Vs U.A.E. Exchange Center (2020) (Supreme Court)

High Court's Ruling



- High Court observed that taxpayer was not liable to tax in India because no income had accrued or deemed to have been accrued from the activities of the LO in India
- Nature of activities carried on by taxpayer in these LOs were only of preparatory and auxiliary character and therefore, clearly excluded under Article 5(3)(e) of the tax treaty
- It was observed that activities carried on by LO did not contribute to earnings of the taxpayer in UAE as the activities were only supportive in nature and hence, LO cannot be treated as PE in India under the tax treaty

High Court reversed the AAR's ruling and held in favor of assessee

Supreme Court's Ruling






- Supreme Court held that activities carried on by the taxpayer were of preparatory or auxiliary character and hence, same would fall in the exception in Article 5(3)(e) of the tax treaty
- It was observed that the RBI had permitted the LO to carry out limited activity of delivery of cheques / drafts which was considered as preparatory or auxiliary in nature and not the main business activity of the taxpayer
- Supreme Court upheld the order of the High Court and held that the services rendered were covered by Article 5(3)(e) of the tax treaty. Hence, the LO would not constitute as PE of the taxpayer in India

Supreme Court confirmed the High Court's order and dismissed the SLP filed by the revenue



Annexures

CBDT notifies minimum remuneration payable to India Fund Managers, for exemption u/s Section 9A – Notification 29/2020

 Section 9A	 Category-I Foreign Portfolio Investor (FPI)	 All other offshore funds
<ul style="list-style-type: none">• In order to incentivise Offshore Funds to have their Fund Managers in India, Section 9A provides that Offshore Funds (on satisfying certain conditions) carrying out fund management activity through an India-based fund manager (IM) would neither be considered to be resident of India nor be regarded as having a business connection (equivalent of “permanent establishment”) in India.• One of the conditions relates to payment of minimum remuneration to such India Fund Manager	<ul style="list-style-type: none">• 0.10% of the “assets under management”• “Assets under management” means the annual average of the monthly average of the opening and closing balances of the value of such part of the fund, which is managed by the fund manager <p>Category-1 FPIs</p> <p>Foreign Government and related investors, sovereign wealth funds, pension funds, university funds, other regulated entities such as insurance companies, etc.</p>	<ul style="list-style-type: none">• 0.30% of the “assets under management”; or• 10% of profits derived by the fund in excess of the specified “hurdle rate” where the remuneration to the IM is only profit / income linked; or• 50% of the management fee reduced by amount incurred towards operational expenses including distribution expenses. Applicable only in cases where offshore fund is making payment to another fund manager.

Other aspects:

- The offshore fund could pay lower amount of remuneration to the Indian IM by obtaining prior approval from the CBDT
- Deletion of deeming provisions (in Rule 10V) deeming the offshore fund manager and Indian fund manager as “associated enterprises” for transfer pricing purposes, unless they already come within the Indian transfer pricing compliance requirements
- The Indian IM to obtain a report from an accountant in Form 3CEJA certifying that the management fee received is in accordance with these rules
- By a separate Notification (Notification 41/2020), the CBDT has exempted the category-1 FPIs from complying with conditions related to broad-basing of membership in the overseas Funds (ie, minimum 25 members, each member not having > 10% investment in the Fund, etc)

Recent notifications

Exemption for taxpayers opting to be governed by Simplified Tax Regime: Notification No. 38/2020 dated 26 June 2020



- Taxpayers opting for STR have to forego various deductions and exemptions
- However, the CBDT recently provided the exemptions available under this regime as under:
 - Allowance to meet cost of travel on tour or transfer
 - Allowance granted on tour or for the period of journey in connection with the transfer, to meet the ordinary daily charges incurred by employee due to absence from normal place of duty
 - Allowance granted to meet conveyance expenditure incurred for performance of duties of an office or employment of profit if free conveyance is not provided by employer);
 - Transport allowance up to INR 3,200 per month, granted to an employee who is blind or deaf or dumb or orthopedically handicapped with disability of lower extremities, to meet the expenditure of commute between the place of residence and the place of duty
- It was further clarified that exemption available on food coupons, would be taxable

Recent notifications

CBDT excluded persons from applicability of provisions relating to income from other sources and full value of consideration: Notification No. 40 dated 29 June 2020 and Notification No. 42 dated 30 June 2020



- Where consideration on transfer of unlisted shares is less than its Fair Market Value (i.e. FMV), FMV is deemed to be sale consideration as per section 50CA
- Where sum of money or property is received without or for inadequate consideration, shortfall is taxable in the hands of recipient as income from other sources as per 56(2)(x)
- CBDT has now notified class of persons excluded from the applicability of above provisions i.e. shareholder who receives unlisted shares of a company, or its subsidiary or its step down subsidiary, where:
 - NCLT on an application (for relief in cases of oppression, mismanagement, etc.) moved by CG under section 241 of the Cos Act, 2013, suspended the existing Board of such company and appointed new directors nominated by the CG; and
 - unlisted shares have been received pursuant to resolution plan approved by NCLT under section 242 of Cos Act, after affording reasonable opportunity of being heard to the jurisdictional Principal Commissioner or Commissioner
- Additionally, provisions of sec 56(2)(x) would not apply to following persons:
 - The investor bank (viz. SBI) or
 - Any investor other than SBI who is willing to invest in the reconstructed Yes Bankwho is allotted shares of reconstructed Yes Bank Ltd at a price of INR 10 (face value of INR 2 and share premium of INR 8) under the Yes Bank Limited Reconstruction Scheme, 2020

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