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By

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Dear Readers,

In this 97hedition, we bring you articles on interesting overlapping issues and other items. The article on 'Remittance of Assets vs LRS – Comparative Study under FEMA and IT' deals about various issues that we face on day to day from our NRI and resident clients. The recent introduction of TCS on LRS has created an additional layer of complexity for the residents transferring money using the LRS route. Also, there are certain stark differences between the remittance of asset regulations and LRS both under FEMA and IT Act. Hence, we thought to contribute an article around those aspects with FAQs.

The next article is on the recent Karnataka High Court judgment wherein the Circular 150 under GST laws was struck down. The Circular tried to tax the annuities received by concessionaire naming them as deferred payments for construction and those are not the payments which were referred to Entry 23A of Notification No 12/2017 – CT (R). However, the High Court stated that a circular cannot override the Entry in the notification and accordingly struck down the Circular. The High Court stated that there is nothing in law which prohibits the executive to collect tax on the annuity payment aka deferred payments for construction but that should be stipulated in the law. Though the judgment is favourable to the concessionaries, how the GST Council sees this and try to restrict the benefit of Entry 23A to annuity payments aka deferred payments for construction must be observed in days to come. The ideology behind Entry 23A was to grant exemption for annuities which are paid instead of toll. However, the said intention seems to be put on the back burner by the GST Council after 43rd GST Council meeting which was evident from the issuance of Circular 150. Interestingly, without waiting for the above judgment or contesting before any Courts, the NHAI started sending letters to concessionaries stating that they will the pay the tax on the annuities which were earlier stated by NHAI as exempted at the time of bidding.

The next article is finale in the part of the series of various facets of taxability of management support services. In this part, we have analysed the impact of arm's length principle qua the management support services.

The final article is on the contours as to which the Income Tax Department can expand to when the NCLT is dealing with a scheme (compromise or arrangement) proposed by a group of companies. The Income Tax Department under the powers under conferred under Section 230(5) of Companies Act raise objections qua each scheme stating that the objective of the said scheme is tax evasion. NCLT in certain cases have rejected the scheme considering the objections raised by Income Tax Department. However, in certain cases, the NCLT stated that unless the entire objective of scheme is to avoid tax, the Income Tax Department cannot make its way at the time of sanction of scheme.

I hope that you will have good time reading this edition and please do share your feedback. I will also urge clients to mail us topics or issues on which you want us to deliberate in our future editions, so that we can contribute to the same.

Thanking You,

Suresh Babu S
Founder & Chairman

GST

STRIKING DOWN OF CIRCULAR – TAXABILITY ON ANNUITIES – HAM PROJECTS

Contributed by CA Sri Harsha

In our earlier article [1], we have discussed the issue on taxability of annuities received in a Hybrid Annuity Model. This is the update to the earlier article after the recent judgment of Honourable Karnataka High Court in the matter of DPJ Bidar – Chincholi (Annuity) Road Project Private Limited has quashed the impugned circular which tried to levy the tax on annuity payments. In this article, we deal with the issue involved and the analyse the judgment of High Court.

Introduction:

The construction of road is quintessentially a primary infrastructure and boost to the national infrastructure. The construction of road and maintenance thereof, is one of the important factors to boost the national income and economic productivity. The taxation of construction of road under the service tax regime was completely exempted from tax. Though, there was a lot of confusion on the taxation of maintenance of roads under the service tax regime, the ambiguity was put into rest by creating a specific entry for exemption. This was a huge relief to the sector and the service providers, considering the huge stakes of demands.

After the introduction of goods and service tax (for brevity 'GST') in India, the construction of roads was brought under tax net attracting rate of tax of 12% with the benefit of input tax credit. The tax on construction of roads under GST regime is to essentially with a view to minimise the number of exemptions to the extent possible, thereby reducing the probability of purchases without taxes in the grey market[2] . Further, the taxation of amounts collected from consumers for accessing the road, which is colloquially referred as toll, is exempted in the service tax and GST regime. Hence, in a normal scenario, where the contract for road is given to service provider with a right to collect toll and there are no other payments from the service receiver except in the form of toll to be paid by the consumers, the services provided by allowing the access to road by paying toll is exempted under the GST regime.

However, with the change in time, the nature of contracts change and as an obvious reason, the taxation would also undergo change. National Highway Authority of India (for brevity 'NHAI') is the nodal agency for overseeing the construction of highway roads and incidental activities thereof. One of the models in which the construction of highways/roads is called for tenders is Hybrid Annuity Model, colloquially known as 'HAM Project'. Under HAM, the construction shall be partly financed by Concessionaire (service provider), who shall recover its investment and costs through payments to be made by NHAI, in accordance with the terms and conditions mentioned in the contract.

The standard contract contains numerous clauses. The ones which are important for the current article are discussed. The scope of the project is normally laid, wherein the Concessionaire is obliged for construction of project as specified in terms of the contract under respective schedules. The Concessionaire is also responsible for operation and maintenance of the project and required to perform and fulfil all other obligations in accordance with the contract.

[1] Taxability on Annuities - HAM Projects | SBS and Company LLP

[2] exemption on output always comes with condition of non-availment of credit which would encourage service provider to buy goods where there is no burden of input tax

A concession in form of an exclusive right, license and authority to construct, operate and maintain the project during the construction period of 730 days[3] and operation period of 15 years commencing from commercial operation day is being granted to Concessionaire. A concession granted shall oblige or entitle the Concessionaire to, right of Way, access and license to the site for purposes of and to the extent conferred by provisions of the agreement, finance and construct the project, manage, operate and maintain the project, perform and fulfil all of the Concessionaire's obligations.

NHAI grants the Concessionaire, commencing from the appointed date, leave and license rights in respect of all land comprising the site which is described, delineated and shown in the respective schedule to the agreement, on an 'as is where is' basis, free of any encumbrances, to develop, operate and maintain together with all and singular rights, liberties, privileges, easements and appurtenances whatsoever, for duration of concession period and, for the purposes permitted under the agreement, and for no other purpose whatsoever.

The project shall be deemed to be complete when the completion certificate or the provisional certificate, as the case may be, is issued under the provisions of agreement, and accordingly the commercial operation date (for brevity 'COD') of the Project shall be the date on which such completion certificate or provisional certificate is issued. The project shall enter into commercial service on completion date whereupon the Concessionaire shall be entitled to demand and collect Annuity Payments in accordance with provisions of agreement.

The project bid cost is agreed at a price selected in tender and it is agreed that the Bid Project Cost specified is for the payment to the Concessionaire shall be inclusive of cost of construction, interest during construction, working capital, physical contingencies and all other costs, expenses and charges for and in respect of construction of project, save and expect as otherwise provided in the agreement.

The agreement also states that 40% of Bid Project Cost, adjusted for Price Index Multiple, shall be due and payable to Concessionaire in 10 equal instalments of 4% each during construction period.The remaining Bid Project Cost, adjusted for Price Index Multiple, shall be due and payable in 30 bi-annual instalments commencing from 180th day of completion day in accordance with the provisions of the agreement. The Completion cost remaining to be paid, shall be due and payable in bi-annual instalments over a period of 15 years commencing from completion date referred as to 'Annuity Payments'. The first instalment of Annuity Payments shall be due and payable within 15 days of 180th day of completion date and remaining instalments shall be due and payable within 15 days of completion of each of successive six months referred as 'Annuity Payment Date'.

Each of the annuity payments due and payable during the years following the CODwill be specified. The annuities are split into 30, as stated earlier and a percentage of balance cost is specified against each such annuity. The Concessionaire and NHAI agrees that all operation and maintenance expenses shall be borne by Concessionaire and in lieu thereof, a lump sum financial support in form of bi-annual payments shall be due and payable by NHAI.

[3]may vary from contract to contract.

Setting the Context:

In simple words, let us assume the cost for construction of road, let us say, is INR 1000 Crore. Out of the INR 1000 Crore, the Concessionaire (service provider) will be paid 40%, that is, INR 400 Crore, over a period of 730 days, in a pre-defined milestone. The balance INR 600 Crores will be paid toConcessionaire (service provider) over a period of 15 years in bi-annual instalments, known as annuities. The Concessionaire (service provider) will be eligible for the said annuity once in 180 days.

Issue:

The issue for consideration in this article is, the taxability of the above annuity payment. It is clear that the INR 400 Crores, which is received for construction of roads is taxable at 12%. The issue that requires deliberation is the taxability of the INR 600 Crores, the annuity. Let us proceed to deliberate on the same.

Discussion:

The taxation of annuities was not clear from day one unlike the taxability of construction of roads. As stated earlier, the service by way of access to a road on payment of toll charges is exempted vide Entry 23 of Notification No 12/2017 – CT (R). Though, the annuity is in the nature of toll, paid by NHAI instead of end consumers, the annuity was not covered clearly in the said Entry 23. The matter was taken in 22nd GST Council meeting and the press release note stated at Para 7 as 'Exemption to annuity paid by NHAI (and State Authorities or State-Owned development corporations for construction of roads) to concessionaires for construction of public roads'. Further, the detailed signed minutes of 22nd GST Council meeting vide Agenda Item 13 (iv) at Para 61 on Page 68 states as under:

61. Introducing this Agenda item, the Joint Secretary (TRU-II), CBEC stated that while toll is payment made by users of roads to concessionaires for usage of road, annuity is an amount paid by National Highway Authorities of India (NHAI) to concessionaires for construction of roads in order that the concessionaire did not charge toll for access to a road or a bridge. In other words, annuity is a consideration for the service provided by concessionaires to NHAI. He stated that construction of roads was now subject to tax at the rate of 12% and due to this, there was free flow of input tax credit from EPC (Engineering, Procurement and Construction) contractor to the concessionaires and thereafter to NHAI. He stated that as a result, tax at the rate of 12% leviable on the service of road construction provided by concessionaire to NHAI would be paid partly from the input tax credit available with them. He stated that council may take a view for grant of exemption to annuity paid by NHAI/State Highways Construction Authority to concessionaires during construction of roads. He added that access to a road or bridge on payment of toll was already exempted from tax. The Hon'ble Minister from Haryana suggested to also cover under this provision annuity paid by State – Owned corporations. After discussions, the Council decided to treat annuity at par with toll and to exempt from tax, services by way of access to a road or bridge on payment of annuity'.

As a result, a new Entry 23A, 'services by way of access to a road or bridge on payment of annuity' was inserted in Notification No 12/2017 – CT (R) with effective from 13th October 17. Accordingly, the annuities which are in the nature of services by way of access to a road are made tax free. Post this, NHAI has issued a Circular 3.3.17 dated 23.10.2017 by making reference to the above newly inserted Entry 23A, stated that there will be no GST payments on annuities. The above position was accepted by the GST

Council, the NHAI and the Concessionaire (service provider). The service provider in light of the exemption granted to 60% of the bid project cost, also reversed the credits pertaining such exempted supplies in light of Section 17(2) of Central Goods and Services Tax Act, 2017.

Years passed by and to the utter shock of everyone, post 43rd GST Council meeting,which was held on 28th May 2021,a circular vide 150/06/2021 – GST dated 17th June 2021 has been issued clarifying as under:

2.2 Services by way of construction of road fall under heading 9954. This heading inter alia covers general construction services of highways, streets, roads railways, airfield runways, bridges and tunnels. Consideration for construction of road service may be paid partially upfront and partially in deferred annual payments (and may be called annuities). ***Said entry 23A does not apply to services falling under heading 9954 (it specifically covers heading 9967 only). Therefore, plain reading of entry 23A makes it clear that it does not cover construction of road services (falling under heading 9954), even if deferred payment is made by way of instalments (annuities).***

The above circular has reversed the position that the annuities which were received over a period of time were exempted. In our view, since the annuities are paid in lieu of toll, we believe that the exemption under Entry 23A shall be applicable. Further, a circular cannot lay down a proposition which is contrary to the notification and the circular should give way to notification to prevail. However, post issuance of the above circular, despite of the fact, it is not capturing the true intention of the notification, it is difficult to take a stand that the said annuities are exempted considering the stakes involved. Hence, NHAI has to make a representation to GST Council to bring more clarity on the said exemption. When the NHAI and service provider are very much aware of the business model and the nature of annuities, the Circular 150/06/2021 (for brevity 'Circular 150') putting the clock back and stating that exemption is not available is clearly uncalled for. The desperate tax authorities, taking clue from the above circular would come on to the service providers demanding tax on the annuities.

Decision of Karnataka High Court in DPJ Bidar – Chincholi (Annuity) Road Project Private Limited[4]:

In the previous article (supra), we have argued that the Circular should give way to the exemption notification and accordingly the circular should be set aside. The Circular was challenged before the Honourable Karnataka High Court in WP 22250 of 2021. The matters involved before High Court were the classic toll and the modern hybrid annuity contracts. The Revenue relied upon the minutes of 43rd GST Council meeting and Circular 150to state that what was being clarified in the Circular is what was exempted by virtue of Entry 23A and argued that service by way of access to a road or bridge on payment of annuity is only exempted and not the annuity (deferred payments) paid for construction of roads.

The Court stated that toll charges which are collected by the concessionaire for construction, maintenance, operation and providing road access to the vehicle which ply on the road were exempted by virtue of Entry 23 of Notification No 12/2017 – CT (R). It was stated that though what was exempted is mentioned as services by way of access to a road or a bridge on payment of toll charges, **the said toll charges is collected as consideration by the concessionaire towards construction and maintenance of road. In short, the Court held that the entire consideration for construction and maintenance of road by concessionaries which is collected as toll charges is exempt from tax from 01st July 2017.**

[4]WP 22250 of 2021

The Court stated that the annuity is paid to concessionaire in lieu of toll charges and accordingly GST Council in its 22nd GST Council meeting took note of the same and as entire toll charges were being exempted from tax has decided to recommend exemption of annuity also, which is clear from the recordings made in minute book. The Court stated that said recording make it clear that it recommended treating annuity on par with the toll charges. The result of Entry 23A was a conscious deliberation of 22nd GST Council meeting. The Court stated that for the reasons best known to GST Council, it has clarified that the annuity paid as deferred payment for constructions of roads was not exempted vide Entry 23A.

The Court held that it is a settled proposition of law that a Circular which clarifies the notification cannot have the effect of overruling the notification. The Court after tracing back to the deliberations of GST Council in its 22nd meeting and the notifications issued pursuant to the above, has held that it is clear that the exemption covers the annuity being paid to the petitioners towards construction and maintenance of roads. The Court held that it cannot be construed to have not exempted the annuity (deferred payments) towards construction of roads. The Court stated that the impugned Circular has the effect of the overriding the notifications (which inserted Entry 23A) and accordingly it has to be held bad in law. The Court further held that if the Revenue wants to collect tax on those annuity payments, the notifications have to be amended and cannot by way of a circular. Accordingly, the Circular was struck down.

This article is contributed by CA Sri Harsha. The author can be reached at harsha@sbsandco.com

MISC

GAAR VIS-À-VIS COMPROMISES OR ARRANGEMENTS UNDER COMPANIES ACT

Contributed by CA Sri Harsha & CS D V K Phanindra

Introduction:

A survey It is observed from the of recent judgments of National Company Law Tribunals (for brevity 'NCLT'/'Tribunal') reveal that there is an ambiguity as to the extent the objections raised by Income Tax Department should be taken into consideration while the Tribunals sanction a scheme under the provisions of Section 230 – 232 of Companies Act (for brevity 'Companies Act').

Section 230(5) of Companies Act for instance stipulates that a notice with all the documents in the prescribed format has to be sent to the Central Government, the income tax authorities, the Reserve Bank of India, the Securities and Exchange Board of India, the Registrar of Companies, the respective stock exchanges, the official liquidator, the competition commission, if necessary, and such other sector regulators or authorities which are likely to be affected by the compromise or arrangement and shall require the representations to be made on the proposed scheme.

When the documents and other information are is shared to the above authorities, the representations received from them, are taken on record before proceeding with the sanction or rejection of the scheme. In certain cases, it is observed that the Income Tax Department raises objections stating that there is a loss to the exchequer if the Tribunal sanctions the scheme and accordingly contends that such a scheme should not be sanctioned. This has increased after the advent of General Anti-Avoidance Regulations (for brevity 'GAAR').

Chapter XA of Income Tax Act deals with GAAR. The said chapter contains anti-avoidance measures which give power to tax authorities to declare an arrangement to be an 'impermissible avoidance arrangement' and decide the consequence of tax arising therefrom. In other words, if an arrangement falls under the ambit of 'impermissible avoidance arrangement' as specified in Section 96 of Act, then notwithstanding to anything contained under the other provisions of Act, such arrangement will be declared as impermissible and the tax consequence would be determined as if such arrangement has not taken place. The said provisions are applicable from Financial Year 2017-18.

Resorting to GAAR, the income tax department in certain cases have raised objections to the proposed schemes before the Tribunal. The Tribunals have agreed to the contentions raised by the Income Tax Department and have rejected the scheme. However, in certain matters, the scheme was approved though the department claimed that there is a tax avoidance and the scheme cannot be sanctioned. The real question that arises for determination is, to what extent the Tribunal is required to consider the objections raised by the Income Tax Department and in what circumstances, such objections can be based upon and the proposed scheme can be rejected. This is the aspect which we intend to deal in this article. Let us take two recent cases of Tribunals dealing with the scheme and bearing of the Income Tax Department objections on such scheme.

In Gabs Investments Private Limited vs. Ajanta Pharma Limited[1]:

An application for sanction of National Company Law Tribunal (for brevity 'NCLT'/'Tribunal') is sought under Section 230 to Section 232 of Companies Act, 2013 (for brevity 'Companies Act') to the Scheme of amalgamation and arrangement

[1] 2018 (12) TMI 739 – NCLT, Mumbai

between the Gabs Investment Private Limited (for brevity 'transferor company'/Gabs') and Ajanta Pharma Limited (for brevity 'Transferee Company'/'Ajanta') and their respective shareholders.

Gabs is the group holding company and primarily holds shares in transferee company that is Ajanta, which is a speciality pharmaceutical company engaged in development, production and marketing of branded and generic formulations. The philosophy for the subject scheme as canvassed by Gabs is that, the merger will result in direct holding of promoter shares in the transferee company instead of through Gabs. This will lead not only to simplification of the shareholding structure and reduction of shareholding tiers but also demonstrate the promoter's group direct commitment to and engagement with the transferee company. The promoters would continue to hold the same percentage of shares in the transferee company, pre and post-merger and there would also be no change in financial position of the transferee company. Gabs stated that the scheme was approved by 99.99% shareholders of transferee company and unanimously consented by all its shareholders.

The Regional Director, the Official Liquidator and the Registrar of Companies have given their clearances for the scheme proposed by Gabs. However, the Income Tax Department has raised certain objections which became a reason for cancellation of the proposed scheme by Gabs. The objections of the Income Tax Department (for brevity 'ITD') were as under.

The ITD stated that the 61.17% of shares are held by Agrawal Family Members in transferee company and shareholding of Gabs is controlled by Agrawal Family Members only. ITD after considering the family tree of Agrawal Family, background of the scheme, salient features of the scheme, consideration payable, accounting treatments in the books of transferee company, financials of Gabs, financial implications of the scheme has articulated that Gabs being a private limited company has to be considered as separate entity and any 'assets' of private limited cannot be transferred and distributed directly. Hence, the Gabs has to pay the dividend distribution tax[2] at 20% amounting to Rs 134.16 Crores which will be a loss to the exchequer, if the scheme is approved. Further, if the scheme is approved, the ITD stated that it would also be a loss to the exchequer on the tax which the Gabs should have paid if the merger has not taken place and a normal route is adopted. In such vein, the ITD claimed that there would be a loss of Rs 421.66 Crores if the merger is approved by NCLT. The ITD further argued before NCLT that in view of GAAR provisions, the scheme of amalgamation is a deliberate measure to avoid tax burden by using the medium of NCLT and this scheme is purely impermissible avoidance arrangement and should not be allowed by NCLT. The ITD concluded by stating that the proposed scheme of arrangement is nothing but round trip financing which includes transfer of funds among the parties to the arrangements through the series of transactions.

The NCLT after going through all the objections of ITD has stated vide Para 37 that the rationale presented by Gabs is without any justification. By the scheme of amalgamation and arrangement Gabs/shareholders of Gabs are avoiding full tax liability which is strenuously objected by the ITD. Accordingly, the NCLT has held the scheme can be sanctioned/approved only if it complies with all provisions of the Act, Rules and if the scheme is in the public interest, shareholder etc. Since, Gabs did not provide any details with regard to compliance of tax liability raised by ITD, their

[2]This judgment of NCLT Mumbai was during the period, where dividend was taxable in the hands of company instead of current model where it is taxable in the hands of shareholder.

undertaking to pay the huge tax liability as pointed by ITD, the bench was of the opinion that it would be advisable to settle the important/crucial issue of huge tax liability before sanctioning the scheme rather than disputing the same at a later stage. NCLT stated that it is mandatory under Section 230(5) of Companies Act, a notice in prescribed form shall be sent to central government, income tax authorities and other notified regulators or authorities to receive their representations. Basis that, ITD has raised objections and the bench is inclined to agree with them.

In Panasonic India (P) Limited[3]:

Panasonic India Private Limited (for brevity 'transferor company') and Panasonic Life Solutions India Private Limited (for brevity 'transferee company') has applied for sanction of amalgamation under Section 230 to Section 232 of the Companies Act before the NCLT. The Tribunal has received representations from various authorities on the proposed scheme by transferor company. The Income Tax Department (for brevity 'ITD') has aired certain objections. The ITD states that the ownership of both the transferor and transferee is held by M/s Panasonic Corporation, Japan and the accumulated losses of transferor company for Assessment Year (for brevity 'AY') 20-21 is Rs 14,375 million, which is intended to be transferred to the transferee company under the guise of amalgamation. Hence, the ITD contended that the scheme is not at arm's length and could not be termed as a prudent acquisition on any commercial or business terms and the entire benefit accrued to one company, that is the M/s Panasonic Corporation, Japan. The ITD contended that the main objective of the scheme of amalgamation is to take benefit of accumulated losses which are eligible for set off in the future periods in the hands of transferee company. The total benefit that would arise to the transferee company and thereby loss to the exchequer is approximately to the tune of Rs 3,594 Million (25% of Rs 14,375 million). Apart from the above loss to the exchequer, the ITD contended that the revenue shall be deprived of the possible capital gain that would be accrued if the shareholders of transferor company sell shares to the transferee company but for this scheme. The ITD further contended that it appears that by issuing 25,91,034 shares of transferee company, the shareholders of transferor company will bebenefitted inspite of having negative net worth. Finally, ITD by placing reliance on Gabs Investments (P) Limited (supra) has stated that the above scheme should be cancelled in light of the GAAR provisions.

The transferor and transferee (collectively called as 'petitioners') by referring to the provisions of Section 47(vi) and Section 47(vii) pleaded that the tax neutrality in the hands of the amalgamating company and the shares of the amalgamating company is conferred by the provisions of the Income tax Act and therefore no case can be made out of prejudice to revenue if compliances with the conditions mentioned in the above act are complied with. The petitioner further submitted before NCLT that the view taken by ITD that the transferor company has been allotted 25.91 million shares of transferee company as against the negative net worth of the transferor company is patently incorrect for the reason that the determination of swap ratio was on the basis of the share entitlement ratio issued by a registered valuer and it had duly captured the basis of computation of such valuation. The petitioners further contended that there are strict conditions under Section 72A of Income Tax Act and also rules therein and only on such satisfaction of the conditions, the unabsorbed business losses and unabsorbed depreciation of the amalgamating company in the hands of the amalgamated company. The petitioners contend that the compliance with the conditions laid down under

[3][2022] 138 taxmann.com 570 (NCLT- Chd)

Section 72A can always be verified by the Assessing Officer at the time of completing the assessment of petitioners. Regarding the allegation that the loss of probable capital gain in the hands of shareholders of transferor company, the petitioner contended that there would be no tax liability even if the shares are independently sold because of the shareholders enjoy the benefit of respective Double Taxation Avoidance Arrangements (for brevity 'DTAA') and further the value with the shareholders of the transferor company remains the same both pre and post-merger transaction.

The petitioners contended that the provisions of GAAR cannot be invoked qua the scheme because the scheme cannot be called as impermissible avoidance arrangement and its main purpose is not to obtain a tax benefit. Further, relying on the decision of Supreme Court in matter of Vodafone International Holdings BV[4] , the petitioners contended that if the arrangement, re-organization, restructuring, etc are undertaken for sound commercial and legitimate tax planning reasons, then the same could not be disregarded by Revenue. The petitioners tried to distinguish their matter from the facts of Gabs Investment (P) Limited (supra) by stating that Gabs did not have any business activity and was merely holding shares of a listed company and there was no commercial rationale for the proposed merger in Gabs case except for simplification of the shareholding of listed company which did not benefit the other public shareholders at large. After hearing the contentions of the petitioners, the tribunal has asked the petitioners to submit the pre and post shareholding and valuation reports to the ITD. The ITD has stated that after going through the additional information, there is nothing to add than what was stated earlier.

The Tribunal after considering the arguments stated that this matter is different from the facts of Gabs (supra), since the objective of the scheme under Gabs, was for simplification of shareholding structure. However, in the present case, the petitioner companies has clearly made out of a case of operational synergy between the amalgamating companies. The Tribunal also stated that the ITD cannot could notpoint out in concrete terms any adverse issue relating to the valuation of shares made by petitioner companies after furnishing of the valuation report by the petitioners.

The Tribunal emphasized that the treatment of carrying forward and set off of accumulated loss and unabsorbed depreciation allowance in amalgamation or demerger etc of companies are clearly spelt out in the provisions of Income Tax Act and these provisions in their opinion are sufficient to protect the interest of ITD in any case of amalgamation or demerger etc. The Tribunal further stated that the provisions of income tax law does not override the scheme and ITD is at liberty to invoke the provisions of GAAR during the course of assessment proceedings after seeking requisite approvals. Accordingly, the Tribunal has held that there is no merit in the objections raised by ITD. It is important to note that in a recent decision in the matter of Cummins Sales & Services (I) Limited[5] has rejected the set off of brought forward loss and depreciation that vested with the assessee as a result of demerger. The assessee contended that since the scheme is sanctioned by the High Court, the same cannot be tested by any other authority including income tax authority. However, the Income Tax Appellate Tribunal has held that the sole motive behind the demerger being tax set off, the same cannot be allowed, though the scheme is sanctioned by the High Court.

[4][2012] 17 taxmann.com 202

[5]TS – 523 – ITAT – 2022 (Pun)

Point of View:

From the above two judgments, we can infer that there exists ambiguity as to what is the role of ITD and to what extent the Tribunal/NCLT should consider their representations, while sanctioning the scheme. Whether ITD can raise objection against every scheme stating that if the tribunal allows the scheme, there would be a loss to the exchequer and ask not to sanction? If yes, to what extent the tribunal is supposed to take into the consideration of ITD to decide upon the scheme. The answer to the above is not easy to reckon. However, let us try to examine the said question based on the other previous judgments in this context.

In the matter of AVM Capital Services Private Limited& Others[6] , the Bombay High Court has an occasion to deal with a similar situation that we are occupied with. The facts of the case are that five companies (for brevity 'transferors') have sought to merger with one company (for brevity 'transferee'). Pursuant to the scheme, the entire undertaking of transferor companies would stand vested with the transferee company on obtaining the sanction from the High Court. There was an objection from a person (for brevity 'objector') who holds 750 shares in transferee company constitutes 0.001% of total share capital. The objector has raised an objection that the whole objective of scheme is to avoid capital gains tax that would have arisen if the transferor companies would have directly transferred their shares to the Promoters. It is alleged that the object of the scheme is not to help transferee company but to transfer shares to the promoter. The scheme is a colourable device to evade tax, since such a transfer could well have been effected through the stock market. The objector contended that the scheme in question involves pure transfer of shares without any benefit to the transferee company. The objector relied on the judgment of Honourable Supreme Court in the matter of McDowell and Company Limited[7] and contended that avoidance of tax was unethical and if a transaction is a device to avoid tax, it should not be permitted and since the current transaction is a device to avoid tax, the same should not be permitted. The Objector further contended that the judgment of Supreme Court in Azadi Bachao Andolan and Anr[8] *is per in curiumas* it is contrary to the decision of Constitutional Bench in McDowell's (supra).

The Bombay High Court has rejected the arguments of the Objector by adopting the reasoning below. The High Court stated that the ratio of McDowell's (supra) has been considered by the Supreme Court in Azadi Bachao Andolan (supra), wherein the Supreme Court has reached a conclusion that McDowell's case cannot be read as laying down that every attempt at tax planning is illegitimate, or that every transaction or arrangement which is perfectly permissible under the law, but has the effect of reducing the burden of the assessee must be looked upon with disfavour. The Supreme Court in Azadi Bachao Andolan (supra) stated that there is nothing in the McDowell's judgment to infer that the majority has accepted the view of minority (the one canvassed by the objector) and hence the judgment in Azadi Bachao Andolan (supra) is in accordance with the law and not in per in curium as canvassed by the objector. The High Court held that grievance that the shares of the transferee company held by transferor companies which are purely tradeable and transferable without any restrictions cannot be transferred through the present scheme of arrangement is not right, since the promoters are not looking for an exit from the transferee company through divestment and have adopted one of the available methods for reorganizing their shareholding. The Court held that the purpose of the scheme is to provide long term stability and transparency in the transferee company. The

[6][2012] 23 taxmann.com 222 (Bombay)

[7][1977] 154 ITR 148 SC

[8]2004 10 SCC 1 (SC)

scheme allows to hold the shares in transferee company directly instead of current mode of holding through transferor company. The Court held that the object of the scheme is no to avoid any tax and there is nothing illegal or dubious or colourful in the scheme and same is a perfectly legitimate scheme and permissible by law and therefore the objection of the objector has to be rejected.

In the matter of PIPL Business Advisors and Investment Private Limited[9] (petitioner), the Delhi Tribunal has rejected the objections of ITD, wherein it has raised the scheme proposed therein was with an intent to avoid tax and to be out of the ambit of provisions of Section 56(2)(x). The petitioner pleaded that in case where more than one option is available to tax payer to structure its transactions, it shall be free to choose that option which is more beneficial and tax efficient and that where tax planning is legitimate and permitted it cannot be looked into with suspicion as a tax evasion by placing reliance on Vodafone International Holdings[10] and Azadi Bachao Andolan (supra). The Tribunal has stated that before going into the merits of the contentions raised by ITD, it has to be definite as to the contours within which it is required to exercise its jurisdiction when considering a scheme coming before it for sanction, particularly when objections are put forth by revenue. The Tribunal referring to the decision of Vodafone Essar Limited[11] stated that the scheme can be struck down only being a situation where the scheme itself has only one purpose, which is to create a vehicle to evade the payment of tax, rather than mere avoidance of tax. Hence, as long as the scheme is not being a situation covered above and not against the framework of law and public policy, the scheme should be sanctioned. The Tribunal held that the since in the instant case the ITD has not proved that the entire essence of the scheme is to evade tax, the scheme needs to be sanctioned.

From the above, it is evident the scheme can be rejected by the Tribunal only in case where the Income Tax Department can prove that the entire purpose of scheme is to evade tax. In cases where the Income Tax Department fails to prove the same, the Tribunal is required to sanction the scheme. This was what the Tribunal has done in Panasonic India (P) Limited (supra). However, in Gabs (supra), we opine that the Tribunal has failed to examine the litmus test, whether the entire object of the scheme therein is to evade tax or not. They have just gone by the objections raised by the Income Tax Department. If one sees the facts in Gabs (supra) and AVM Capital Services Private Limited & Others (supra), they appear to be same and hence the Tribunal should have sanctioned the scheme in Gabs. As rightly pointed out by the Tribunal in the matter of Panasonic India (P) Limited (supra), though the scheme is sanctioned by the Tribunal, it does not override the provisions of Income Tax Act and therefore it will be open for the authorities to invoke the provisions during the assessment or reassessment. Hence, the provisions of GAAR cannot be straight away applied at the time of proposal for sanction of scheme unless the entire objective of the scheme is tax evasion. It is open to the tax authorities to reject the proposed scheme during the course of assessment or re-assessment if they find that the scheme fits into the definition of 'impressible avoidance arrangement' and the main purpose is to obtain tax benefit. There can be tax benefits qua a scheme and that cannot be sole reason to invoke the provisions of GAAR and reject the scheme.

[9] 2018 SCC Online NCLT 30762
[10] (2012) 341 ITR 1 (SC)
[11] CP No 334 of 2009

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INTERNATIONAL TAX

MANAGEMENT SUPPORT SERVICES VIS-À-VIS INTRA GROUP SERVICES

Contributed by CA Sri Harsha & CA Narendra

Introduction:

In previous parts of Article (Part I[1] and Part II[2]), the concept of taxability of management support services under treaty and Income Tax Act ('IT Act') has been analysed in detail. Previous Parts of Article deal with taxability of such services in India in the hands of recipient.

However, the issue may not be said completely analyzed, without analyzing the deductibility of such expenses in the hands of the payer from the standpoint of transfer pricing.

Let us proceed to continue with the same example considered in the previous parts.

ABC Inc a company incorporated in USA has entered into license agreement with ABC India Private Limited for manufacturing of goods in India. Subsequent to such license agreement, ABC Inc has entered into another agreement for providing various MSS.

Now, let us proceed, to understand computation of Arm's Length Price under the Indian TP Regulations.

The above services are termed as 'intra group services' under the TP Regulations. Section 92 of IT Act provides that any income or expense arising from international transaction shall be computed having regard to the Arm's Length Price ('ALP'). Section 92 further provides that allocation, apportionment or contribution of any allowance, expenses between the AE shall be computed having regard to the ALP. However, such computation of Income or allocation of expense or allowance shall not reduce the total Income or Increase in loss computed by the assessee under normal provisions of the IT Act.

The issue arises with regard to intra group services is substantiating the fact that services are actually provided by the AE and bench marking the payment made for such services under arm's length principle.

i. Whether intra group services are actually provided?

ii. Whether payment to such services is at ALP?

Whether intra group services are actuallyprovided?:

As discussed above, services provided by AE would be termed as 'intra group'services. As payment would be paid to AE for those services, the question arises is whether the AE has actually provided services, or it is merely a fictitious entry to remit the amount to AE to avoid other taxes. Hence, it is required to establish that services are actually received by the entity.

OECD has in its TP Guidelines[3] provided detailed guidelines with regard to intra-group services. OECD has stated that the 'benefit test' has to be applied for determining whether the services are actually received from the AE.

[1]Management Support Services vis-à-vis Ancillary and Subsidiary Clause–An Analysis on position under Treaties - Taxmann

[2]Management Support Services vis-à-vis Other Income – An Analysis on position under Treaties – Part II - Taxmann

[3]OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 2017

Benefit Test:

Under the arm's length principle, the question whether an intra-group service has been rendered would depend on whether the activity provides the assessee with economic or commercial value to enhance or maintain it business position.

This can be determined by considering whether an independent enterprise in comparable circumstances would have been willing to pay for the activity if performed for it by an independent enterprise or would have performed the activity in house for itself.

If the answer to the aforementioned is not affirmative then, such services may not be considered to be intra group services at ALP.

Some intra group services are performed to meet an identified need of one or more enterprises of MNE group. Ex - an intra group services to repair an equipment used in the manufacturing. In such a situation, it is a straightforward case to identify the intra group services.

OCED has further stated that it is essential to provide reliable documentation to the tax administrations to verify that the costs have been incurred by the service provider.

It further stated that mere description of payment as, for example, management fee should not be expected to be treated prima facie evidence that such services have been rendered. In other words, the assessee has to bring in record to substantiate the claim of services are actually utilised by the assessee exclusively for the purpose of its business.

In order to establish that the intra group services are actually received by the entity, it is required to satisfy the benefit test. However, this concept has to be interpreted from the standpoint of business expediency to incur a particular expense.

The Hon'ble Delhi High Court of in the case of EKL Appliances Ltd[4] , while interpreting OECD guidelines, has held that ***it is not for the revenue authorities to dictate to the assessee as to how he should conduct his business and it is not for them to tell the assessee as to what expenditure the assessee can incur.*** The High Court further held that it is not necessary for the assessee to show that any legitimate expenditure incurred by him was also incurred out of necessity. It is also not necessary for the assessee to show that any expenditure incurred by him for the purpose of business carried on by him has actually resulted in profit or income either in the same year or in any of the subsequent years. The only condition is that the expenditure should have been Incurred 'wholly and exclusively' for the purpose of business and nothing more.

The Hyderabad Tribunal in the case Air Liquide Engineering India Private Limited[5] has relied on the High Court decision in the case of EKL Appliances Ltd (supra) and held that TPO sitting on judgment on business and commercial expediency of the assessee is erroneous as per the provisions of IT Act.

The Delhi High Court in the case of Cushman and Wakefield (India) (P.) Ltd.[6] has held that the power of TPO is limited to conduct a transfer pricing analysis to determine ALP and not to determine whether there is a service or not from which assessee benefits.

The Bangalore Tribunal in the case of Volvo India (P.) Ltd.[7] has relied on the Delhi Court decision in the case of EKL Appliances Ltd (Supra) and held that ALP cannot be determined as NIL. However, the Tribunal has pointed out that onus lies on the assessee to prove that the services are actually

[4][2012] 24 taxmann.com 199 (Delhi)
[5][2014] 43 taxmann.com 299 (Hyderabad - Trib.)
[6][2014] 46 taxmann.com 317 (Delhi)
[7][2017] 77 taxmann.com 207 (Bangalore - Trib.)

rendered by the AE. The failure by the assessee to discharge the onus can be presumed that the assessee had no evidence to establish that services of management support are rendered by its AE. Same view has been upheld by the Bangalore Tribunal in the case of Taegu Tec India (P.) Ltd. [8].

The Bangalore Tribunal in the case of Adcock Ingram Ltd[9]. has outlined the concept of benefits test as provided in OECD TP Guidelines. The Tribunal has held that while OECD guidelines seem to indicate the "Benefit test" to be actual rendition of services which provides economic or commercial value, the Indian TPOs insist on positive demonstration of actual benefit accruing to the service recipient from the services rendered. The tribunal stated that in their considered opinion the Revenue could not decide what was necessary for a taxpayer and what was not. The requirement of services should have been judged from the viewpoint of the taxpayer as a businessman.

Accordingly, the Tribunal has held that the 'benefit' needed to be identified from the taxpayer's viewpoint, which could be potential, reasonable, foreseeable, may not be quantifiable in money alone, and may be strategic, but could not be incidental. The benefit also could not have qualifications such as "substantial", "direct" and "tangible" because these qualifications were not given in section 92(2) of the Act. There are several non-monetary terms other than profitability, like usefulness, enhancement in value, sustainability and enhancement of business interest, which were required to be seen while judging the benefit test.

Further, Bangalore Tribunal in the case of United Breweries Ltd [10]has held that in the matter of coming to the conclusion on the benefit that the assessee received, clear evidence cannot be insisted upon and the overall business scenario and type of services rendered have to be looked into.

Given the above analysis, the burden of proof lies with the assessee to establish that the services are actually rendered by the AE. However, once it is established that services are actually rendered, TPO cannot sit on the position of the assessee to determine whether a particular service is required for its business or not. The benefit need not be established on monetary terms as held by the Bangalore Tribunal in the case of Adcock Ingram Ltd (Supra).

Further, OECD has stated that services which are in the nature of shareholder activities, duplication of services, incidental benefits cannot be considered as intra-group services and provided illustrative list of services which are not covered under intra group services and for which no amount is allowed to be paid by the recipient.

S***hareholder Activities:***

An intra group activity may be performed relating to group members even though those group members do not need the activity (and would not be willing to pay for it were they independent enterprises). Such an activity would be one that a group member performs solely because of its ownership interest in one or more other group members. This type of Shareholder Activities:
An intra group activity may be performed relating to group members even though those group members do not need the activity (and would not be willing to pay for it were they independent enterprises). Such an activity would be one that a group member performs solely because of its ownership interest in one or more other group members. This type of activity would not be considered to be an 'intra group' services and would not justify a charge to other group members. Following activities may be considered as shareholder activities:

[8][2017] 83 taxmann.com 81 (Bangalore - Trib.)
[9][2018] 90 taxmann.com 298 (Bengaluru – Trib)
[10]TS-353-ITAT-2022(Bang)-TP

- Activities relating to juridical structure of the parent company viz. meetings of shareholder, issue of shares of parent company, listing shares of parent company.
- Activities relating to reporting requirements of the parent company viz. consolidated financials.
- Activities of parent company relating to raising of funds for the acquisition of shares in subsidiary.
- Activity relating to compliance of the parent company with the relevant tax laws.
- Activities which are ancillary to the corporate governance of the MNE Group.

However, if parent company performed activities other than solely because of an ownership interest in group members then, such activities may not be considered as shareholder activities.

The Mumbai Tribunal in the case of Ipsos Research (P.) Ltd.[11] has held that support services from AE under shared resources allocation agreement in the field of commercial, financial, accounting cannot be categorized as shareholder activities.

Same view has been upheld by the Pune Tribunal in the case of Carraro India (P.) Ltd .[12]

Duplication:

When a group member merely duplicates a service that another group member is performing for itself, or that is being performed for such other group member by a third party cannot be considered an intra group services to charge a fee. However, OECD provides some exceptions to duplicate services:

- When an activity (duplicate services) is performed to reduce the risk of a wrong business decision.
- When regulated sectors require control function to be performed locally as well as on a consolidated basis by the parent.
- When an activity is performed at different levels.
- When additional benefits are received on such duplicate services by applying the benefit test.

If services provided AE are in duplicate in nature, amount paid against such services may be disallowed. Hence, it required to establish that no such duplication of activity is involved in management support services.

In this regard, the Delhi High Court in the case of Mitsui Prime Advanced Composites India (P.) Ltd.[13] has held that services received from the AE in relation to acquiring of 'business' (securing business) cannot be considered as duplication of services. SLP filed against the HC has been dismissed by the Supreme Court .[14]

the Delhi Tribunal in the case of Metalsa India (P.) Ltd. [15] has held that management support services provided by AE cannot be considered as duplicate in nature. Similar view has been expressed by the Delhi Tribunal in the case of Cargill Global Trading India (P.) Ltd[16].

[11][2020] 114 taxmann.com 732 (Mumbai - Trib.)
[12][2020] 113 taxmann.com 257 (Pune - Trib.)
[13][2017] 79 taxmann.com 283 (Delhi)
[14][2017] 79 taxmann.com 283 (Delhi)
[15][2022] 134 taxmann.com 160 (Delhi - Trib.)
[16][2020] 113 taxmann.com 389 (Delhi - Trib.)

The Mumbai Tribunal in the case of L'Oreal India (P.) Ltd.[17] has held that the jurisdiction of TPO is limited to ascertain whether the international transaction carried out by the assessee with its AE is at arm's length by applying most appropriate method as specified under section 92C(1) of the Act. The TPO can neither question commercial expediency of the transaction nor examine whether service was needed or is duplicate in nature. Further, the TPO cannot question the quantum of benefit derived by the assessee from the payment made for international transaction. The TPO has no authority to disallow the expenditure for any extraneous reasons. The jurisdiction of the TPO is only to examine international transaction and make suitable adjustment after benchmarking the transaction in line with the provisions of section 92C of the Act.

Incidental benefits:

In certain situations, where an intra group services performed by a group member such as a shareholder or co-ordinate center relates only some group members but incidentally provides benefits to other group members.

The incidental benefits ordinarily would not cause entity to be treated as receiving intra group services because the activities producing the benefits would not be ones for which an independent enterprise ordinarily would be willing to pay.

Similarly, when an entity receives incidental benefits solely because of such entity is a part of large concern (incidental benefits from passive association with large concern), such benefits shall not be considered receipt of intra group services.

On reading the above analysis, the question that arises is whether management support services would satisfy the above three tests?

OECD in para 7.14 of TP Guidelines has stated that in certain situations, parent company may provide centralised services viz. planning, coordination, budgetary control, financial advice, accounting, auditing, legal, factoring, computer services, financial services such as supervision of cash flows and solvency, capital increases, loan contracts, management of interest and exchange rate risks, and refinancing; assistance in the filed of production, buying, distribution and marketing; and services staff matters such as recruitment and training, order management, customer service and call center, research and development or administer and protect intangible property.

In respect of above services, OECD has stated that these types of services ordinarily will be considered intra group services because they are the type of services for which independent enterprise would be willing to pay.

If above mentioned conditions are satisfied, amount paid by the assessee for administrative, management, consultancy service shall not be disallowed merely because such services are availed from AE.

The Delhi Tribunal in the case of GE Money Financial Services (P.) Ltd[18]. has explained the concept of intra group services in depth. In this case, the assessee has availed various services consulting and administrative services from AEs. The Tribunal after discussing each issue in detail, held as under:

- **Need Test:** The Tribunal by noting the size and volume of the business operations of the assessee and accepting the fact that assessee is part of MNE, held the assessee is required various services for its operations and same were acquired from its group companies.

[17][2021] 133 taxmann.com 487 (Mumbai - Trib.)

[18][2016] 69 taxmann.com 420 (Delhi - Trib.)

- **Test of rendition:** The Tribunal has accepted the evidence produced by the assessee viz. emails exchanged in day-to-day operations, correspondences, documents received, planning studies conducted, strategies developed by the AE and held that merely because the assessee has availed those services from AE, it shall not be held responsible for providing more evidence.

- **Benefit Test:** After the detailed analysis, the Tribunal considering the complexity of business operations held that assessee requires such services. Meaning thereby that the "benefit" needs to be identified from the viewpoint of the assessee which can be potential, reasonably foreseeable, may not be quantifiable in money alone, may be strategic but it cannot be incidental.

- **Shareholder's Activities:** In this context Tribunal has rightly noted that shareholders activities are those activities which are not required by the assessee, but the parent company has provided the same for safeguarding its ownership interest.

- **Test of duplicative:** The Tribunal has held that in absence of any instances of services provided by the AE and services availed by the assessee from independent parties are similar in nature and it creates any redundancy, such services availed from AE shall not be considered as duplicative in nature.

The above view is upheld by various judicial fora wherein, it is held that assessee has to prove the genuineness of the service received by the assessee from its AE. Once the assessee has proved the genuineness of the transactions and paid the amount for such transaction, TPO has to accept the transaction and proceed to benchmark the transaction under TP regulations.

In other words, if above mentioned conditions are satisfied, amount paid by the assessee for administrative, management, consultancy service shall not be disallowed merely because such services are availed from AE.

Once it is established that the entity has received intra group services, the next step is determination of remuneration for such services at ALP. This aspect will be discussed in the next part.

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FEMA & INCOME TAX

REMITTANCE OF ASSETS REGULATIONS VS LIBERALISED REMITTANCE SCHEME

Contributed by CA Sri Harsha & CS D V K Phanindra & CA Narendra

A person in India may remit amount to outside India under various situations. In order to regulate such remittances, various regulations have been inserted under Foreign Exchange Management Act, 1999 ('FEMA') and Income Tax Act, 1961 ('ITA').In this article, the concept of remittance of amount to outside India by Individual has been discussed in detail.

An Individual may remit amount to outside India for various purposes viz. foreign trip, foreign education, medical facilities, investment in abroad, sale proceeds of investments in India, income earned in India etc.,.

Before proceeding to understanding the provisions relating to remittance of amount to outside India, it is required to understand the residential status under FEMA and ITA. This is because, an individual being a resident in India may remit the amount to outside for above mentioned purposes under Liberalized Remittance Scheme ('LRS'). However, non-residents in India are not permitted to remit the amount under LRS but they may remit the amount to abroad under remittance of assets regulations subject to other conditions.

Under FEMA, concept of resident in India has been defined under section 2(v) of FEMA and such residential status has to be determined based on the intention and purpose of leaving India/coming to India. However, residential status under section 6 of ITA has to be determined based on number of days of stay in India.

Further, once number of days of stay in India has been determined, individual may become resident/non-resident for entire year under ITA, whereas under FEMA, such person may be treated as resident/non-resident from the date of coming to India/leaving India, as the case may be. This drives home a point that determination of residential status under FEMA and ITA are independent to each other, and such person has to be considered as resident/non-resident according to provisions of respective Acts.

If such person is considered as a non-resident in India under the provisions of ITA, amount paid to such person may be chargeable to tax in India and tax may have to be withheld on such payment under Section 195 of ITA. Further, through the Finance Act, 2020, a new sub section has been inserted in section 206C(1G) in order to make tax collection at source (for brevity 'TCS') provisions applicable to foreign remittances under LRS. In this article, a comparative analysis has been made between remittance of assets regulations and LRS under the provisions of FEMA and ITA.

Particulars	Remittance of Assets Regulations	Liberalised Remittance Scheme ('LRS')
	Position under Foreign Exchange Management Act,1999	
Governing Regulations	Foreign Exchange Management (Remittance of Assets) Regulations, 2016 [Notification No. FEMA 13 (R)/2016-RB April 01, 2016]	A.P. (DIR Series) Circular No. 64 dated February 4, 2004,andMaster Direction - Liberalised Remittance Scheme (LRS) dated 01.01.2016
Persons covered	• Individual being a Foreign Citizen, NRI and PIO[1] . • Indian Company • Indian Entity • Branch or Liaison Office.	A resident Individual (Not available to other persons)
Permissible Remittances	**a. Foreign Citizen (not being a PIO):** • who retired from an employment in India, • who has inherited assets from person specified in section 6(5)[2] , • who is a widow/widower (resident outside India) and has inherited assets of deceased spouse (Indian citizen resident in India), ***can remit up to USD 1 million[3] per year*** **b. Foreign Citizen (not being a PIO) who had to come to India for studies/training:** • can remit balance available in his account (if such funds received from abroad or stipend/scholarship received from the Govt or any Organisation in India.)	A resident individual may make remittance up to USD 2,50,000/- per financial year for any permitted capital/current account transactions or a combination of both. **Permissible Capital Account Transactions:** • Opening of foreign currency account abroad. • Purchase of property abroad. • Making investment abroad including mutual funds, VCF, unrated debt securities or promissory notes. • Setting up of WOS /JV . • Extending loans including rupee loans to NRI who are relatives4

[1]Person of Indian Origin

[2]Section 6(5) of FEMA states that a person resident outside India may hold, own, transfer or invest in assets in India if such assets were acquired when such person was a resident in India or inherited from who was a resident in India.

[3]Limit should be computed without considering the investment made on repatriation basis. Which means that investments made under repatriation basis shall not come under the limit of USD 1 million.

	c. NRI or PIO can remit up to USD 1 million: • Out of balance held in NRO account[4] /sale proceeds of assets/assets acquired by him by way of inheritance/legacy, • Under deed of settlement made by his father or relative[5] and the settlement taking effect on the death of the settler. **d. Liquidation of Indian Companies:** • Remittance out of assets of Indian companies under liquidation is allowed subject to following: I. Such remittance is in compliance with the order issued by the court/official liquidator. ii. Applicant has to submit the Auditor's certificate confirming all liabilities in India are either paid in full or adequately provided for, such winding up is in accordance with the provisions of Companies Act,2013 and there areno legal proceedings pending in any court.	• Opening of foreign currency account abroad. • Purchase of property abroad. • Making investment abroad including mutual funds, VCF, unrated debt securities or promissory notes. • Setting up of WOS [6]/JV[7] . • Extending loans including rupee loans to NRI who are relatives4 • **Rupee loan to NRI/PIO:** Loan shall be given to relative4 through crossed cheque or electronic transfer, subject to the below conditions. a. Loan is free of interest and with 1-year minimum maturity period. b. The Loan amount is within the overall limit of LRS, including all remittances during a given Financial year. c. Loan shall be utilized for borrower's personal purposes or business purposes in India. d. The loan shall not be utilized for prohibited investments in India.

[4]Remitter has to provide an undertaking that balance in NRO account represents legitimate receivables in India and not by borrowing from other person or transferring from other NRO account.

[5]Relative as defined under section 2(77) of the Companies Act,2013 is to be considered.

[6]Wholly Owned Subsidiary

[7]Joint Venture

	e. Contribution to PF/Pension: • An entity in India may remit the amount being its contribution to PF/SAF/pension fund in respect of foreign expatriate employees (who are not permanently resident in India). **f. Closure of branch office/liaison office:** • A branch established by a person resident outside India may make remittances to outside India subject to other conditions. Applicant has to obtain RBI permission if remittance by foreign citizen exceeds USD 1 million for specified transactions above. Any remittance of assets under these regulations subject to tax clearance in India.	e. Loan shall be credited to NRO account. f. Loan shall not be remitted outside India. g. Repayment of such loan shall be made by way of inward remittance, by debiting NRO/NRE/FCNR account or out of sale proceeds of investments against which loans is granted. **Permitted Current Account Transactions:** • Private Visits (other than Nepal/Bhutan) including transportation, overseas hotel/lodging etc. • Gift to a person resident outside India /Donation to an organization outside India.A resident Individual can make rupee gif to NRI/PIO who is a relative4and such amount shall be credited to NRO account. • Going abroad for employment. • Emigration. Amount exceeding the limit is allowed only for incidental expenses in the country of immigration and not for earning points/credit to become eligible for such immigration. • Maintenance of close relative4 abroad

		• Business trip. If employee is deputed by an entity for such business trip and the expenses are borne by the employer, such remittances are outside the limit of LRS. • Medical treatment abroad. An Individual may remit the amount exceeding the limit subject to obtaining estimate from the hospital/doctor. • For education. An individual may remit the amount exceeding the limit subject to obtaining estimate from the foreign university/institute. **Prohibited Remittances:** • Transaction which are covered under schedule I and Schedule II of FEM (Current Account Transaction) Regulations, 2000. • Capital account remittances to FATF non-co-operative countries. • Bank shall not provide any credit facilities to capital account transactions. Which means capital account transactions shall not be made out of loan funds.

Author's Comments:

- While there are many differences between both the regulations, the common connecting factor between the two regulations is 'remittance outside India'. However, both the regulations deal with different type of persons. While remittance of assets regulations are applicable to non-resident individual (foreign citizen/NRI), specified companies/entities in special circumstances, the LRS scheme is applicable only with respect to resident individual.

- Even though the transfer of immovable property is covered under 'remittance of assets regulations' above, there are certain transactions which are not specifically dealt with by such regulations.

- Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 also needs to be analysed in order to understand repatriation of amount when foreign currency is brought-in for the purpose of acquisition of immovable property in India.

FAQs

1. **A person being an Individual went abroad from India for the purpose of employment outside India long back, can such individual utilize LRS provisions for remittance of fund?**

   No, LRS provisions are available only to resident Individual. A person who has gone outside India for the purpose of employment may be considered as non-resident under section 2(v) of FEMA. However, a resident leaving India for the purpose of employment outside India may remit amount LRS.

2. **The above person after a long term returned to India for the purpose of employment and continued to stay in India for such employment. Can such individual remit the sale proceeds of immovable property in India which was acquired by way of inheritance?**

   No, as such person returned to India for the purpose of employment, he may be considered as resident in India and provisions of remittance of assets regulations may not be applicable.

3. If such person acquires such immovable property, while such person was an NRI, with an inward remittance from outside India. Now, being a resident, can the said individual, repatriate/remit the sale proceeds?

Remittance of asset regulations may not be applicable in the present situation as such regulations are not applicable to resident in India.

4.3. A person resident in India has gone outside for the purpose of site visit and amount has been spent via debit/credit card. Whether such amount should be reckoned for the purpose of limit under LRS?

Yes, as spending money via card involves foreign exchange outgo, same may be considered for the purpose of computation of limit under LRS.

5.4. A student has gone outside India for the purpose of education. Can his father send him money borrowed from banks in India?

Yes, LRS provisions provides restrictions only on obtaining loans for the purpose of capital account transactions. As remittance of money for the purpose of education is not considered as capital account transaction, he can remit the amount to outside India.

Particulars	Remittance of Assets Regulations	LRS
	Position under Income Tax Act, 1961	
Deduction of tax at source (TDS) /Collection of tax at source (TCS)	• Section 195 of ITA states that any person responsible for paying to a non-resident, not being a company or foreign company, any interest (excluding certain kinds of specified interest) or any other sum chargeable under the provisions of the ITA (not being the income under salaries) shall at the time of credit of such income to the payee in any specified mode, deduct income tax thereon at the rates in force. • Section 195 is applicable only when payment to non-resident involves income chargeable to tax in India. • TDS under section 195 has to deducted at the rates in forces. (For rates in force, one may refer to Part II to First Schedule to Finance Act). • In respect of capital gains, tax need not be deducted on gross amount. However, it may be advisable to obtain lower deduction certificate from the AO. • TDS on salaries (irrespective of residential status) has been covered under section 192.	• Section 206C(1G) of ITA provides TCS obligations on remittance of amount under LRS. **Liability on AD Bank:** • AD Bank has to collect TCS at the rate of 5% from the person remitting the amount under LRS. • AD bank is not required to collect TCS if amount/aggregate of amounts of remittance is less than Rs.7,00,000/- in a financial year. • AD Banker has to collect TCS on amount which is in excess of Rs.7,00,000/-. • AD bank has to collect TCS at the rate of 0.5% if the amount being remitted is a loan obtained from any educational institution for perusing any education. **Liability on Seller of overseas tour package:** • Seller of overseas tour packagehas to collect TCS at the rate of 5% from the buyer of such package. • Seller of overseas tour package has to collect TCS without considering any limit. • Once seller of overseas tour package collects TCS, AD bank is not required to collect TCS.

	Section 206AA (Failure to furnish PAN): Provisions of section 206AA (higher rate for non-furnishing of PAN) are not applicable in respect of passive incomes i.e., interest, royalty, FTS, dividend and payment on transfer of capital asset subject to furnishing of: • Name, email and contact number, • Address in the Country of residence. • Tax residency certificate. • Tax identification number in the country of residence. **Section 206AB (Failure to file ITR):** Provisions of section 206AB (higher rate for non-furnishing of ITR by a specified person) are not applicable to non-resident unless such person has PE in India. Once PE exists, provisions of section 206AB are applicable whether or not	Provisions of section 206C(1G) are not applicable if buyer of foreign exchange (remitter) is liable to deduct tax at source and has deducted such tax. **Section 206CC (Failure to furnish PAN):** A person being a collectee has to furnish PAN to the collector (AD Bank or Seller of overseas tour package). Failure to furnish PAN attracts TCS at the rate 10% (twice the normal rate). **Section 206CCA (Failure to file ITR):** Failure to file ITR by a specified person under section 206CCA
Form 15CA-CB	Section 195 read withs Rule 37BB states that any person responsible for paying to a non-resident, not being a company, or to a foreign company, **if such payment is subject to tax in India:** • shall file Part A of Form 15CA, if aggregate amount does not exceed Rs.5,00,000/-. • shall file Part B of Form 15CA, if lower deduction certificate is obtained under section 197/195(2)/195(3).	

	• shall file Part C of Form 15CA, if benefits of treaty are claimed subject to obtaining Form 15CB from a chartered accountant. **if such payment is not subject to tax in India, shall file Part D of Form 15CA.**	

Author's Comments:

The definition of non-resident under the ITA is different from the definition of non-resident under FEMA. A person may be a non-resident under FEMA, but such person may become resident under the ITA. In such a situation, provisions of section 195 may not be applicable but other provisions of the ITA may be applicable.

Further, requirement to furnish Form 15CA/CB arises only when a person making any payment to non-resident under ITA. However, Rule 37BB provides relaxation from submitting Form 15CA/CB in a case transaction is covered under Schedule III to the Foreign Exchange (Current Account Transaction) Rules, 2000 or transactions specified under Rule 37BB.

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FAQs:

1. **A person being a non-resident under FEMA has acquired immovable property in India when such person was a resident. Now such person wishes to transfer such immovable property in India. whether TDS under section 195 is applicable for such transaction?**

   If such person is a non-resident also under the provisions of ITA then, provisions of section 195 is applicable and tax has to be withheld at 20%. Otherwise, provisions of section 194-IA are applicable subject to threshold specified therein, and tax has to be deducted at the rate of 1%.

2. If the above person become resident under FEMA and non-resident under ITA, how to comply with TDS provisions and how to remit the amount to outside India?

As such person is a non-resident under ITA, tax has to be withheld under section 195 of the ITA at the rate of 20%. However, as such person is a resident under FEMA, remittance of asset regulations may not be applicable. As such person is a resident in India under FEMA, such person may remit the amount under LRS.

3. A person being a resident remitting the amount to outside India for his family maintenance. Whether TCS under section 206C(1G) is applicable?

As such person is remitting the amount under LRS, TCS provisions under section 206C(1G) are applicable if amount of remittance exceeds Rs.7,00,000/-.

4. **The above person has remitted Rs.5,00,000/- in the month of April. During the month of July, such person is remitting another Rs.6,00,000/- to outside India under LRS. Whether TCS is applicable?**

Yes, TCS under section 206C(1G) is applicable if aggregate amount of remittance exceeds Rs.7,00,000/- during the financial year. However, TCS will be collected on Rs.4,00,000/- (Rs11 lakhs- Rs.7 lakhs).

5. **A person is going outside India for holiday trip and arranged his trip under a package and the price of the package is Rs.3,00,000/-. Whether TCS is required?**

Yes, the limit of Rs.7,00,000/- is not applicable for purchase of overseas tour package. Hence, seller of such tour package has to collect TCS under section 206C(1G).

6. In the above case, instead of purchasing tour package, the person him self has bought flights tickets and arranged his hotel stay on his own. Whether TCS is applicable.

No, as the person is not purchasing any overseas tour package, limit of Rs.7,00,000/- would be applicable and as the amount of remittance is Rs.3,00,000/-, TCS provisions under section 206C(1G) may not be applicable.

7. A person has gone abroad and spent amount through debit/credit card, whether TCS is applicable on such transaction?

As such amount is considered as remittance of money under LRS, provisions of section 206C(1G) are applicable subject to limit of Rs.7,00,000/-

8. A person is receiving pension income and is earning interest from fixed deposits on which tax is deducted by bank amounting to Rs.60,000/- and such person has not filed return of income for the year. What is the rate of TCS under section 206C(1G)?

As the person is considered as 'specified person' under section 206CCA for default in filing return of income for which time limit under section 139(1) has expired, TCS has to be collected at the rate of 10% while remitting the amount to outside India.

9. If the above person is at the age of 76 years and does not have another income. what is the rate of TCS under section 206C(1G)?

Section 206CCA defines the term 'specified person' to mean a person who has not furnished the return of income for the assessment year relevant to the previous year immediately preceding the financial year in which tax is required to be collected, for which the time limit for furnishing the return of income under sub-section (1) of section 139 has expired and the aggregate of tax deducted at source and tax collected at source in his case is rupees fifty thousand or more in the said previous year.

As per the above definition, a person is treated as specified person if such person fails to file return of income in India. As per section 194P specified senior citizen is not required to file ITR subject to other conditions. However, section 206CCA does not provide any relaxation for persons covered under section 194P.

10. A person has purchased overseas tour package worth Rs.5,00,000/- during the month of April and TCS has been collected on such package. During the month of July, he is going abroad for another trip, but such person has arranged tickets and stay on his own and amount incurred for such trip is Rs.3,50,000/-. Whether TCS is applicable for such transaction.

Section 206C(1G) states that authorised dealer shall not collect the sum, if the amount or aggregate of the amounts being remitted by a buyer is less than Rs.7,00,000/- in a financial year and is for a purpose other than purchase of overseas tour program package. In the second trip, as there is no remittance of money for purchase of overseas tour package, limit of Rs.7,00,000/- would be applicable.

11. A person is purchasing overseas tour package from non-resident who does not have any business connection in India, who is required to collect TCS?

In such situation, as such non-resident does not have business connection in India, TCS provisions may not be applicable on such non-resident. The next question that arises is whether the AD bank is required to collect TCS on such remittance. On plain reading of section 206C(1G), as amount is being remitted for the purpose of purchase of overseas tour package, provisions of TCS under section 206C(1G) may not applicable to AD Bank.

12. A person being a Citizen of India is going abroad during the year 2020-21 (in December 2020) for the purpose of employment. In January 2021, such person has sold immovable property in India (which is acquired by inheritance) and wishes to remit the sale proceeds to outside India. Whether TCS provisions under section 206C(1G) are applicable?

As such person stayed in India for period more than 182 days, he would be considered as resident in India under the provisions of ITA. However, as such person left India for the purpose of employment, he may be considered as non-resident from December 2020. As such person is considered as non-residentunder FEMA, sale proceeds can be remitted to Ooutside India under remittance of assets regulations (to the extent of USD 1 million).

As such person is not remitting the amount under LRS, provisions of section 206C(1G) may not be applicable. Further, such person is considered as resident under the provisions of ITA, provisions of section 195 also may not applicable. In such a situation provisions of section 194-IA of ITA may be applicable if value of such property is Rs.50 lakhs or more.

13.A person being a citizen of India has gone abroad long back and returned to India for the purpose of employment during the FY 2020-21 (in December 2020). In January 2021, such person has sold immovable property in India and wishes toremit the sale proceeds of immovable property to outside India. whether TCS provisions under section 206C(1G) are applicable?

Even though such person is considered as resident under FEMA (residential status is determined based on intention of such person), such person may become non-resident in Indiaas stay in India during the year is less than 182 days) under ITA.

As such person is a non-resident under ITA, provisions of section 195 are applicable, and tax has to be deducted by the buyer. Further, as such person is a resident in India under FEMA, remittance of assets regulations may not be applicable to such person. Accordingly, such person may utilize LRS route for remittance of amount. As such person is remitting the amount to outside India under LRS, provisions of section 206C(1G) of ITA may also be applicable.

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