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By

SBS and Company LLP
Chartered Accountants

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INTERNATIONAL TAXATION

TP UPDATES 2018

Contributed by CA Suresh Babu S

1. Amendment in Computation Mechanism of Secondary adjustment

F. No. 370142/12/2017-TPLdated 19thJune, 2018

Background - Rule 10CB of the Income-tax Rules, 1962 ('the Rules') was inserted vide Notification No. GSR 590(E) dated 15th June, 2017. Under sub-rule (1) of the said rule 10CB, a uniform time limit of 90 days, starting from different dates, is prescribed for repatriation of excess money. This is done in order to provide uniform treatment in respect of the different types/situations of primary adjustments specified under sub-section (1) of section 92CE.

The CBDT has clarified the computation mechanism (the date from which the interest has to be calculated) in scenarios where APA (advance Pricing Agreement) and MAP (Mutual Agreement Procedure) are in place and there are requirements of repatriation of the excess TP adjustments accepted over and above the operating revenues or expenditures with the associate enterprises.

- **APA Cases -** from the date on which the **APA** has been entered into by the assessee under section 92CC, where the primary adjustment to transfer price is determined by such agreement;"

- **MAP Cases -** from the date of giving effect by the Assessing Officer under Rule 44H to the resolution arrived at under **MAP,** where the primary adjustment to transfer price is determined by such resolution, under a Double Taxation Avoidance Agreement entered into under section 90 or 90A.

2. Appropriate use of CbC Report (Notification No: F. No. 500/13/2016-APA-I dated 27th June, 2018) Introduction to CbC Reporting

Base Erosion and Profit Shifting (the BEPS Project) as framed by OECD, along with G20 Countries, is adopted by India. According to Action 13 of the BEPS Project, Country by Country (CbC) Report is to be filed in the jurisdiction of its tax residence by the ultimate parent entity of the International Group while the master file and local file are prepared and submitted by the constituents of the International group in their respective tax jurisdictions.

Along with the Form 3CEAE which relates to CbC Reporting, Form 3CEAC, 3CEAD and other similar forms that are also required to be filed in India to comply with the three tier documentation and the master file requirements. There are many litigations and concerns regarding the confidentiality of the information and as to how the information furnished in the CbC Report will be used and maintained by the Government.

In order to resolve the concerns and litigations, CBDT issued a notification regarding the appropriate use of CbC Report with the following elements:

A**ppropriate use of CbC Reporting**

A. Access to CbC Reports

1. Once the case of a constituent entity has been selected for scrutiny based on risk assessment, the jurisdictional TPO will have access to the information relating to that constituent entity.

2. All the Filed and exchanged CbC Reports shall be accessed by Indian competent authority(Joint Secretary, FT & TR-I and Joint Secretary, FT & TR-II in CBDT) and DGRA in accordance with the treaties and Act.

3. The jurisdictional TPO for which the SOP will be formulated by Centralised Risk Assessment Unit (CRAU) can access the constituent entity information, after being selected for scrutiny based on Risk assessment.

B. Appropriate Use of CbC Reports

Information in CbC reports can be used for

a. **High Level TP Assessment:** Based on potential risks indicated by initial evaluation of CbC Reports, TPOs may undertake further examination of the TP arrangements. For that purpose, a tax audit may be planned and TPO may call for further information. The further probe does not restrict the TPO to be confined to the potential risks identified.

b. **Assessment of Other BEPS related Risks:** CbC Reports may be used to identify possible BEPS related risks which may not be related to transfer pricing matters.

c. **Economic and Statistical Analyses:**

   i. The information in CbC Reports may be used for economic and statistical analysis for better understanding and identification of features, benefits and risks of the said reports and tax system.
   ii. The use of CbC Report would be inappropriate if it is used as a substitute to TP analysis based on detailed functional and comparability analysis or it is used as a sole material to propose TP adjustment.

d. **Planning a tax audit**

e. **Making enquiries regarding the Transfer Pricing arrangements made within the group.**

C. Ensuring Confidentiality of CbC Report

a. Admitting the legal requirement and importance to maintain 'confidentiality', the instruction requires the tax officers to strictly follow the detailed guidelines on maintaining confidentiality as provided in Chapter VII of Manual on Exchange of Information.

b. All the CbC Reports filed with DGRA by the reporting/ alternate reporting entity u/s 286(2) or by a constituent entity u/s 286(4) received from other jurisdictions through exchange of information are subject to the requirements of confidentiality under the provisions of the Act.

D. Monitoring, control and supervision of the use of CbC Report

a. In order to prevent misuse of information contained in CbC Report, a monitoring and control mechanism has been put in place wherein prescribed quarterly reports would be submitted to the CBDT. In case there is any breach regarding appropriate use, the Indian tax authorities shall disclose the same to OECD.

b. The adjustments made to income of taxpayer based on inappropriate use of CbC Reports information will be promptly conceded by Competent Authority in MAP proceedings

c. The appropriate use of CbC report would be reviewed by the Board through the quarterly report submitted by the Principal CIT(International Taxation & Transfer Pricing) which is a consolidated report of all the quarterly reports prepared and submitted by CsIT(Transfer Pricing) in the Country.

d. The above mentioned quarterly report should reach the Board within 30 days from the end of each quarter commencing from 1stJanuary, 2019 and this issues u/s 119 of Income Tax Act.

Concluding Remarks

1. During the process of resolving the concerns raised by the tax payers on inappropriate use of information furnished in CbC Report by Competent Authority of India(if not resolved by jurisdictional CIT), litigation may be faced by the tax payer in the interim stage. So, a time frame is to be prescribed for the competent authority to resolve the issues and concerns of the Tax Payer.

2. The intention of this guidance is that the information provided in the CbC report is to be used solely in assessing the various risks involved like risks in TP Arrangements made within the group, other BEPS related risks etc., and to perform Economic and Statistical Analysis. And, such information cannot be used for analyzing the arm's length nature. But considering the aggressive approach of the tax authorities, it is very interesting to see how this guidance would be implemented in the upcoming TP Audits involving review of CbC and Master File documentations.

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DIRECT TAX

FILING OF APPEAL BY THE INCOME- TAX DEPARTMENT- LATEST

Contributed by CA Ramprasad T

Sec 268A of the Income-tax Act ('IT Act') empowers Central Board of Direct Taxes ('CBDT') to issue instructions, orders/ directions to the income-tax authorities for fixing monetary limits as it deem fit for regulating filing of appeal by any income-tax authority.

These instructions have to be complied with by income-tax authorities in the matters of filing of appeal before ITAT/High Court/Supreme Court.

In this article attempt has been made to compare the instruction issued under Section 268A in last four occasions in the years- 2018/2015/2014/2011.

The appeals/SLP should not be filed by the income-tax authority unless tax effect exceed monetary limits mentioned. These limits are not applicable to writ matters/Section 12A registration and direct tax matters other than income-tax.

Monetary Limits in Rs: -

Appeal before Authority	2018	2015	2014	2011
ITAT[1]	20,00,000/-	10,00,000/-	4,00,000/-	3,00,000/-
High Court	50,00,000/-	20,00,000/-	10,00,000/-	10,00,000/-
Supreme Court	1,00,00,000/-	25,00,000/-	25,00,000/-	25,00,000/-

*Filing of appeals should be filed on the **merits** of the cases even in case where the tax effect exceeds the monetary limit mentioned above. In other words, the filing appeal should be on **issue** basis and not just only on the basis of meeting monetary criteria.*

"Tax effect" refers to tax payable along with surcharge and cess[2] on disputed issues. Interest is should not be included unless dispute itself is interest. If the dispute arises on levy of penalty, the amount of penalty is the tax effect.

Tax effect shall be computed even in case assessee is liable to pay tax as per the provisions of Section 115JB/115JC.

The tax effect shall be calculated separately for every assessment year in respect of disputed issues in case of assessee.

If the dispute arises in more than one assessment year, appeal can be filed in respect of such assessment year or years in which tax effect exceeds monetary limit. In other words, tax effect is assessment year specific.

[1]This limit would apply to filing of cross objections- Circular 3/2018

[2]Circular 3/2018

In case of composite order of High Court or appellate authority which involves more than one assessment year in case of an assessee on common issues arise in more than one-year appeal shall be filed in respect of all assessment years even if the tax effect is less than monetary limit in any particular assessment year(s) when it is decided to file appeal in respect of the year in which tax effect exceeds the monetary limit.

In the composite order involves more than one assessee each assessee shall be dealt with separately.

Non-filing of appeal by the income-tax authority due to monetary limits will not result in acceptance of the decision by it on the disputed issues.

In case non-filing the Pr. CIT/CIT [3]***shall specifically record that fact that though decision is not acceptable, appeal is not being filed for the reason being that the tax effect is less than monetary limit specified.***

The income-tax authority should bring to the notice of Tribunal / Court the instructions, orders issued under Section 268A (1).

Appeal should be filed on merit basis without regard to monetary limits of tax effect in the following cases:

(1) Where constitutional validity of provisions of the Act or Rules are challenged;
(2) Where the CBDT order, notification, instruction, circular has been held to be illegal or ultra vires;
(3) Where Revenue Audit objection has been accepted by the department;
(4) Where additions relating to undisclosed foreign assets or bank accounts.

Applicability of Instruction/ Circular: -

Year	Applicability	Status of Existing Appeal
2018	Retrospectively	Pending appeals be withdrawn/not pressed
2015	Retrospectively	Pending appeals be withdrawn/not pressed
2014	Will apply prospectively	Appeal file before being governed by the instructions on the date of filing of appeal.
2011	Will apply prospectively	Appeal file before being governed by the instructions on the date of filing of appeal.

[3]Circular 3/2018/Inst. 5/2014/Circular 21/2015

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GST

SECTION 7 V SECTION 12 OF IGST ACT

Contributed by CA Sri Harsha & CA Manindar

By this time, the entire trade has understood the concept of inter and intra state supplies and happily charging the applicable taxes. Needless to say, if a supply is an intra-state, Central Goods & Services Tax (CT) and State Goods & Services Tax (ST) shall be applicable and if the supply is inter-state, then integrated tax (IT) shall be applicable. Arithmetically, IT is nothing but a summation of CT and ST.

There are sections which determines the nature of supply as inter and intra. Section 7 of Integrated Goods & Services Tax Act, 17 (IGST Act) deals with the inter-state supply, where in it states, if the location of supplier and place of supply are in two different states, two different union territories and a state and a union territory, then such supply is to be treated as inter-state supply. Apart from the above, the section also lays down specific transactions which are to be treated as inter-state supply, which we shall discuss in the later part of this article.

In similar way, Section 8 of IGST Act deals with intra-state supply, where in it states, if the location of supplier and place of supply are in the same state or union territory then such supplies shall be treated as intra-state supplies. Further, Section 8 also lays down certain specific instances, where in such transactions are not to be treated as intra-state supply.

From the above, it is evident that two aspects are important for determination of nature of supply being intra or inter. One being the location of supplier and the other is place of supply. The phrase 'location of supplier' has been defined only for services and not for goods. Hence, for goods, it has to be understood that the place of business of supplier is to be treated as location of supplier. For determination of 'place of supply', there are four sections, namely Section 10, Section 11, Section 12 and Section 13. Section 10 and Section 11 deals with place of supply of goods and Section 12 and Section 13 deals with place of supply of services.

Section 10 deals with place of supply of goods in cases other than exports or imports, Section 11 deals with place of supply of goods in case of exports or imports. Section 12 deals with place of supply of services where the location of service recipient and location of service provider are located in India and Section 13 deals with place of supply where either the location of service recipient or service provider is outside India.

The above is the general legislation available to determine the nature of supply as either inter or intra. Coming to specific instances as stated earlier, Section 7(5) and proviso to Section 8(1), one of such instance is the supplies made to or by SEZ unit or SEZ developer. Section 7(5)(b) specifically states that supply of goods or services or both to or by a SEZ developer or SEZ unit shall be treated as supply of goods or services or both in the course of ***inter-state trade or commerce.*** Further, proviso to Section 8(1) specifically states, supply of goods to or by a SEZ developer or a SEZ unit ***shall not be treated as intra-state supply.*** The proviso to Section 8(2) lays restriction for services provided to SEZ unit or developer as not to be treated as intra-state supply.

Hence, from the above, what transpires is, any supply of goods or services or both to a SEZ unit or developer by express terms of Section 7(5) to be treated as inter-state supply and by express restrictions through provisos to Section 8(1) and 8(2), they are not be treated as intra-state supplies. Further, Section 16 of IGST Act states that supplies to a SEZ unit or developer shall be treated as 'zero rated supplies'.

With this above background, let us try to solve the following question "***Whether the Hotel Accommodation & Restaurant services provided by them, within the premises of the Hotel, to the employees & guests of SEZ units, be treated as supply of goods & services to SEZ units in Karnataka or not?''***

This is exactly the question before the Authority for Advance Ruling (AAR) of Maharashtra in the case of M/s Gogte Infrastructure Development Corporation Limited. The relevant paras of the judgment are as under:

7. Supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit are treated as 'Zero Rated Supply' in terms of Section 16(1)(b) of IGST Act' 2017. Further Rule 46 of CGST Rules 2017 stipulates that the invoice shall carry an endorsement "Supply meant for export / Supply to SEZ unit or SEZ Developer for authorised operations on payment of Integrated Tax" or "Supply meant for Export / Supply to SEZ unit or SEZ Developer for authorised operations under Bond or Letter of Undertaking without payment of Integrated Tax" as the case may be.

8. Therefore on reading Section 16(1)(b) of IGST Act' 2017 & Rule 46 of CGST Rules 2017 together it is clearly evident that the supplies of goods or services or both towards the authorised operations only shall be treated as Supplies to SEZ Developer /SEZ Unit.

9. The place of supply of the services by way of lodging accommodation by a hotel, shall be the location at which the immovable property (hotel) is located or intended to be located, as per Section 12 (3)(b) of the Integrated Goods and Services Tax Act, 2017. Also, the place of supply of restaurant and catering services shall be the location where the services are actually performed, as per Section 12 (4) of the Integrated Goods and Services Tax Act, 2017. ***In the instant case, admittedly, the applicant is located outside the SEZ. Therefore, the services rendered by the applicant are neither the part of authorised operations nor consumed inside the SEZ.***

*10. S**ince place of provision of services in case of Hotel has been prescribed under the Act 'location of the Hotel' the rendition of services of restaurant, short term accommodation and Banqueting/conferencing cannot be said to have been 'imported or procured' into SEZ Unit/ Developer. Hence, by no stretch of imagination and therefore, in the instant case, the supply is intra state supply.***

The judgment has referred to provisions of Section 16 of IGST Act, Rule 46 of CGST Rules and Section 12 of IGST Act and has arrived at a conclusion that since Section 12(3) and (4) states the place of supply as the location of hotel, the supply is to be treated as intra-state.

However, the judgment has failed to examine the specific provisions of Section 7(5) and proviso to Section 8(1) and (2), which deal with supplies of goods or services to SEZ unit/developer to be treated as inter-state supplies and not intra-state supplies. Further, the role of Section 12 is only to determine the place of supply and not to decide whether the nature of supply is intra or inter. The role to determine whether a supply is intra or inter is vested with Section 7 and Section 8 and not Section 12 and hence the judgment passed by placing huge reliance on text of Section 12 might not stand before the higher forums.

Further, the judgment stated that the hotel/accommodation services were not used for authorised operations and hence cannot be treated as zero rated supplies in terms of Section 16 read with Rule 46 of CGST Rules. In our opinion, this aspect of judgment also suffers from vice because the judgment puts an additional condition that such services should be used for authorised operations which was not at all spelt in Section 16 of IGST Act. Section 16 states that supplies made to SEZ unit or developer shall be treated as zero rated supplies and does not put any condition that such services should be used only for authorised operations.

Hence, in our opinion the judgment delivered by AAR suffers from completeness and hence cannot be relied upon and we suggest that in terms of express provisions under Section 7(5) and Section 8(1) the supplies to SEZ units/developers shall still be treated as Inter-State supply and not Intra-State supply. Further, our view is also supported by CBIC Circular 48/22/2018-GST dated 14th June 2018 confirms our view.

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GST

AAR SUMMARY-EMC LIMITED

Contributed by Sai Ram & Vetted by CA Manindar

Sl. No	Case Number 07 of 2018
Name of Ruling	EMC LTD.
TMI Citation	2018 (5) TMI 964 - AUTHORITY FOR ADVANCE RULINGS, WEST BENGAL
AAR State	WEST BENGAL
Macro Issue	Whether freight charged by the applicant is subjected to GST or Not?
Facts	1. Applicant is stated to be a supplier of materials and allied services for erection of towers, testing and commissioning of transmission lines and setting up sub-stations collectively called the Tower Package. 2. Contractee awards the Applicant contracts for supply, erection and commission of Towers which was split up into two separate sets of contracts – one for supply of materials at exfactory price (hereinafter the First Contract), and the other for supply of allied services like survey and erection of towers, testing and commissioning of transmission lines etc (Second Contract), which also includes inland/local transportation, in-transit insurance, loading/unloading for delivery of materials and storage of them at the contractee's site. 3. The contractee agrees to reimburse the actual GST payable, except on the price component for inland/local transportation, in-transit insurance and loading/unloading. The applicant raises separate freight bills on the contractee as per the rate schedule annexed to the Second Contract.
Applicant Stand	Applicant is not a goods transport agency (hereinafter the GTA) or engaged in insurance business. He will, according to the application, arrange such services and pay the GST as applicable on the consideration paid to the suppliers of such services. His service to the contractee for inland/local transportation, the applicant argues, is exempt under the GST Act. He refers to Notification No. 9/2017 – IT (Rate) dated 28/06/2017, which, according to him, grants exemption on transportation service provided by an entity other than GTA. Since the applicant is not a GTA, he claims that his services are exempt vide the above notification.

Department Stand	1. the First Contract cannot be executed independent of the Second Contract. There cannot be any 'supply of goods' without a place of supply. As the goods to be supplied under the First Contract involve movement and/or installation at the site, the place of supply shall be the location of the goods at the time when movement of the goods terminates for delivery to the recipient or moved to the site for assembly or installation. 2. The First Contract, however, does not include the provision and cost of such transportation and delivery. It, therefore, does not amount to a contract for 'supply of goods' unless tied up with the Second Contract. In other words, the First Contract has "no leg' unless supported by the Second Contract. It is no contract at all unless tied up with the Second Contract.
Ruling with reasons	The applicant supplies works contract service, of which freight and transportation is merely a component and not a separate and independent identity, and GST is to be paid at 18% on the entire value of the composite supply, including supply of materials, freight and transportation, erection, commissioning etc. **Reasons** 1. Two contracts are linked by a ***cross fall breach*** clause that specifies that breach of one contract will be deemed to be a breach of the other contract, and thereby turn them into a single source responsibility contract. Black's Law Dictionary defines that "a severable contract, also termed as divisible contract, is a contract that includes two or more promises each of which can be enforced separately, so that failure to perform one of the promises does not necessarily put the promises in breach of the entire contract". In terms of this definition, the 'cross fall breach clause', in the present context, settles unambiguously that supply of goods, their transportation to the contractee's site, delivery and installation, erection of towers and testing and commissioning transmission lines and related services are not separate contracts, but form only parts of an indivisible composite works contract supply, as defined under Section 2(119) of the GST Act, with 'single source responsibility'. 2. Composite nature of the contract is clear from the clause that defines satisfactory performance of the First Contract (supply of goods) as the time when the goods so supplied are installed and finally commissioned in terms of the Second Contract. In other words, the First Contract cannot be performed satisfactorily unless the goods have been transported and delivered to the contractee's site, applied for erection of towers, the transmission lines laid, tested and commissioned in terms of the Second Contract. The two promises – supply of the goods and the allied services – are not separately enforceable in the present context. The recipient has not contracted for ex-factory supply of materials, but for the composite

Discussion Outcome	1. The AAR has concluded that the contract is of indivisible nature on the basis of cross fall breach clause. 2. Having said this, the Supreme Court in the case of State of Madras v. Gannon Dunkerley& Co. - IX STC 353 (SC) has held that if there is an instrument of contract which may be composite in form, unless the transaction in truth represents two distinct and separate contracts and is discernible as such, then the State would not have the power to separate the agreement to sell from the agreement to render service,and impose tax on the sale. This implies that in cases where contract is separable, each of the divisible component of the contract can be subjected to tax independently. 3. Whether a contract is divisible or indivisible must be construed on the basis of the intention of parties. The fact that a single tender document issued for whole project would be of no relevance. In this regard, the following judgments of Income Tax are referred viz. a) M/s. Caterpillar Global Mining Europe GmbH India Project Office Versus Asstt. Director of Income Tax b) Ishikawajima-Harima Heavy Industries Ltd. versus Director of Income-Tax

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