



Quarterly India Tax updates

April – June 2019

7 August 2019

Presenters

Subject matter experts



Sunil Shah

Kamlesh Chainani

Subramanian Krishnamani

Saloni Roy

We will discuss...



Recent changes in tax laws

- Ratification of Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting Instrument (MLI) by the Indian Government
- Recent developments in customs
- E-invoicing system under Goods and Service Tax (GST)
- Key changes in the new GST returns format and the return filing system
- Clarification on Information Technology Enabled Services (ITeS)
- State Amnesty Schemes



Recent direct tax rulings

- Tax treaty exemption
- Fees for Technical Services (FTS)



Business restructuring

- Deductibility of goodwill amortisation
 - Tax issues around non-compete fees
 - Beneficial ownership of shares and impact on carry forward of tax losses
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Recent changes in tax laws

Ratification of Multilateral Instrument (MLI)

Ratification of Multilateral Instrument (MLI)

Signing and implementing the MLI - Aims at restoring tax sovereignty



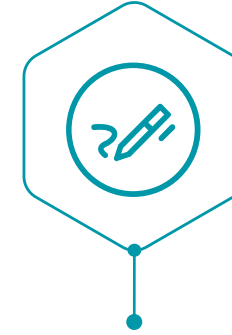
Promotes greater certainty, flexibility and increases transparency



Over 2000 tax treaties amended with 89 jurisdictions signing



Approximately up to USD 240 billion i.e. 10% of global corporate tax revenues lost to BEPS



Aims at fast rewriting of tax rules in a jurisdiction

The Union Cabinet has approved ratification of the MLI to implement Tax Treaty related measures and deposited the instrument with the General Secretary of OECD (depository) on **25 June 2019**

1 April 2021 – Other treaties to be impacted

The extent to which the provisions of tax treaty would get impacted would depend on “matching” of the reservations made by India and treaty partner

Treaties that may be impacted from 1 April 2020:

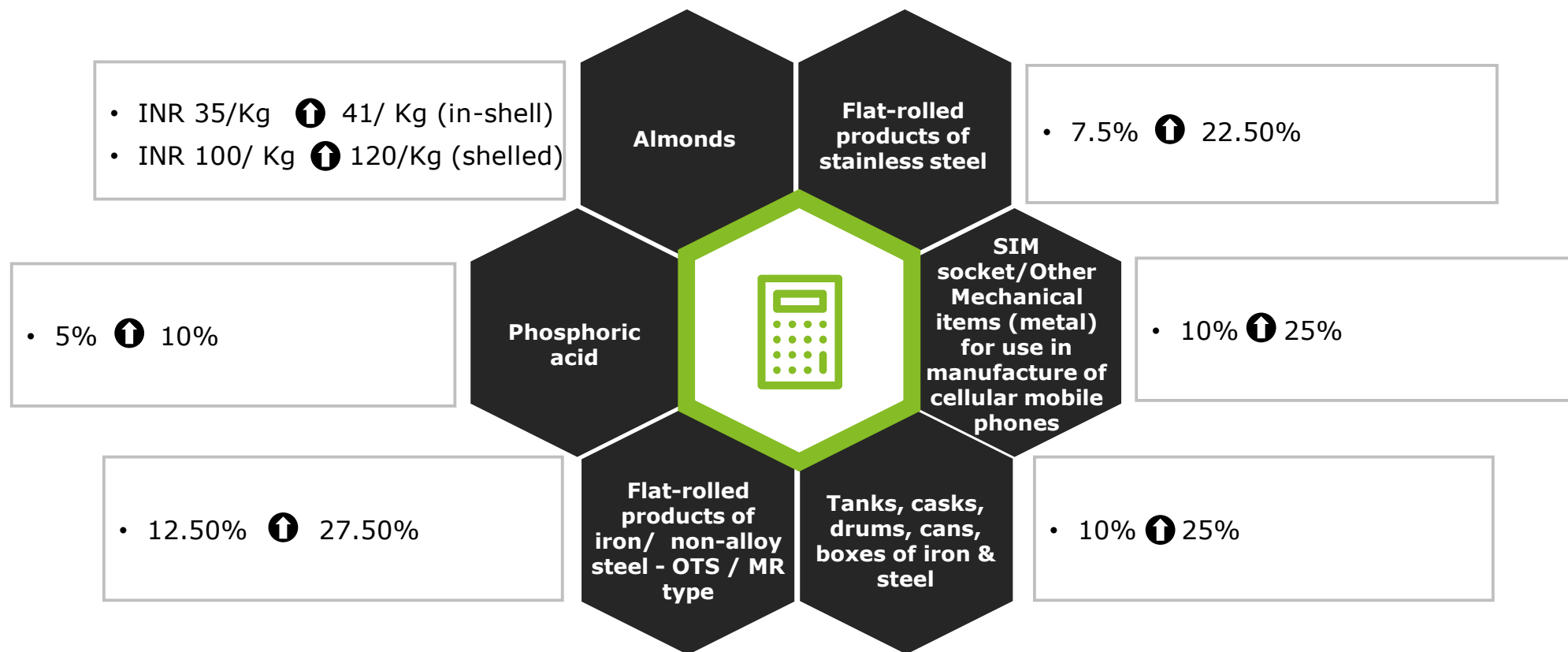
Australia, Austria, Belgium, Finland, France, Georgia, Ireland, Israel, Japan, Lithuania, Luxembourg, Malta, Netherlands, New Zealand, Poland, Russia, Serbia, Singapore, Slovak Republic, Slovenia, Sweden, United Kingdom and United Arab Emirates

1 April 2020 - provisions of several bilateral tax treaties signed to be read along with the provisions of MLI

Recent developments in Customs

Customs duty

Rate movement for US origin goods



- The increase in basic customs duty on import of above goods has been made effective from 16 June 2019
- India no longer receives benefits under the Generalized System of Preferences (GSP), which was set up to promote trade from developing countries

E-invoicing under GST

Status and features

E-invoicing system

Implementation, a step away

Working groups

- GST council has constituted separate working sub-groups for policy and technical issues for generation of e-invoice.



Objective

- Requires all B2B invoices to be uploaded on the central portal, generating a unique Invoice Reference Number ('IRN') for every invoice.
- Implementation to be made effective from January 2020 on voluntary basis and shall be carried out in phased manner.



E-invoicing for certain sectors

- Optional treatment for certain sectors such as banking, telecom, tentative time line for execution to be evaluated.



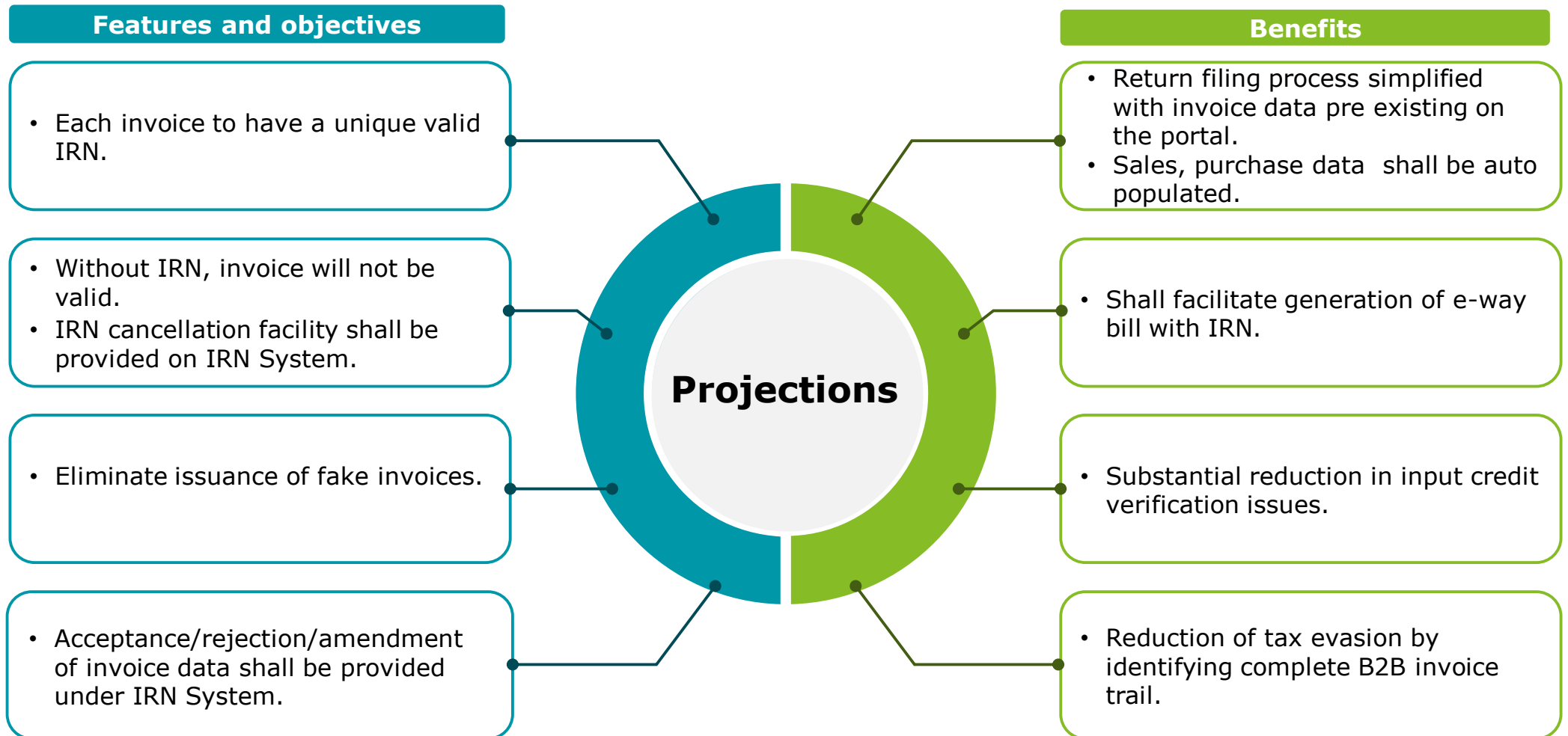
E-invoicing generation

- Mode of generation of e-invoicing whether 'app' based, SMS, off line, online invoice integration with portal is being examined.



E-invoicing system

Features and benefits



New GST return formats

Status

New GST return formats

Current status

July-September 2019

- Trial of new return system for tax payers
- Users would be able to upload invoices using the FORM GST ANX- 1 offline tool
- Users would also be able to view and download, the inward supply of invoices using the FORM GST ANX-2
- GSTR1 and GSTR3B to be continued to be filed

October – December 2019 (GSTR3B)

Large tax payers

- For October and November 2019 tax period, to continue filing GSTR-3B on monthly basis
- From December 2019, to file monthly Form GST RET -01, replacing GSTR 3B in January 2020

Small tax payers

- From October 2019, would file monthly GSTPMT-08, replacing GST 3B
- For October – December 2019 tax period, to file quarterly Form GST RET-01, replacing GSTR 3B in January 2020



October – December 2019 (GSTR-1)

- From October 2019, GSTR1 shall be mandatorily replaced by GST ANX -1
- **Large tax payers** with an aggregate turnover above INR 5 crore (USD 0.71 million approx) to upload monthly GST ANX-1
- **Small tax payers** with aggregate turnover upto INR 5 crore (USD 0.71 million approx) shall file quarterly GST ANX1 by January 2020
- Invoices can be uploaded in GST ANX-1 from October 2019 by both large and small tax payers
- GST ANX 2 can be viewed however no action shall be allowed

GSTR 3B to be completely phased out from January 2020

Clarification on Information Technology enabled Services (ITeS)

Taxability of ITeS

Whether supply of ITeS* to overseas entities, subject to GST

Scenario	Nature of supply	Clarification
I	Where the supplier provides services on his own account to the client/customer of the client on clients' behalf	Such services would not be treated as intermediary services
II	Where the supplier of backend services only arranges or facilitates supply of goods/services or both by the client located outside India to the customers of the client	Such arranging/facilitation between the client and its customer would qualify as intermediary services
III	Where the supplier supplies ITeS services on his own account and arranges or facilitates the supply of various support services during pre-delivery, delivery and post-delivery of supply for and on behalf of the client located outside India	Tax treatment of such supply would be dependent on the determination of principal supply

*ITeS to mean services provided with the assistance or use of information technology, namely, back office operations, call centres or contact centre services, payroll, remote assistance, revenue accounting, etc. However, these services exclude research and development services whether or not in the nature of contract research and development services

State amnesty schemes

State amnesty schemes

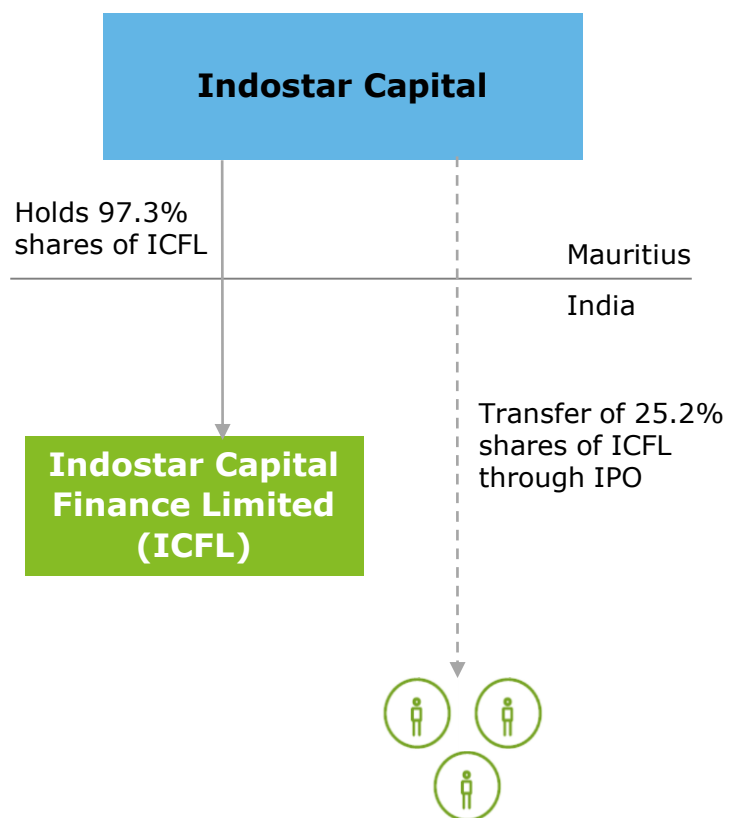
S. No.	Scheme	Payment to be made	Key benefits	Due date to file application
1	Karnataka – Karasamadhana Scheme, 2019	<ul style="list-style-type: none"> • 100% of arrears of tax 	<ul style="list-style-type: none"> • 100% waiver of: <ul style="list-style-type: none"> - Interest - Penalty <p>payable under Karnataka Sales Tax Act, VAT Act and CST Act relating to assessment completed or to be completed on or before 30 June 2019.</p>	30 September 2019
2	Kerala – Amnesty scheme for settlement of arrears	<ul style="list-style-type: none"> • 100% arrears of tax and interest in case of Kerala General Sales Tax Act, 1963 • 100% of arrears of tax in case of Kerala VAT Act and few other Acts such as Kerala Tax on Luxuries Act 	<ul style="list-style-type: none"> • 100% waiver of: <ul style="list-style-type: none"> - Penalty in case of Kerala General Sales Tax Act, 1963 - Interest and penalty in any other case 	30 September 2019
3	Maharashtra – Settlement of Arrear of Tax, Interest, Penalty or Late fees Ordinance, 2019	<p>Payment of dues depends on period to which case relates and phase in which the trader applies</p> <p>Periods covered in this scheme:</p> <p>Part-1: Up to 31 March 31 2010</p> <p>Part-2: 1 April 2010 to 30 June 2017</p>	<ul style="list-style-type: none"> • Benefits also depends on period to which case relates and phase in which the trader applies • Benefits are slightly higher in Phase-I 	<p>Phase-I: 1 April 2019 to 31 July 2019</p> <p>Phase-II: 1 August 2019 to 31 August 2019</p>



Recent direct tax rulings

Indostar Capital vs ACIT (Bombay High court)

Application for certificate u.s 197 cannot be rejected if *prima facie* the transaction is not designed to avoid tax

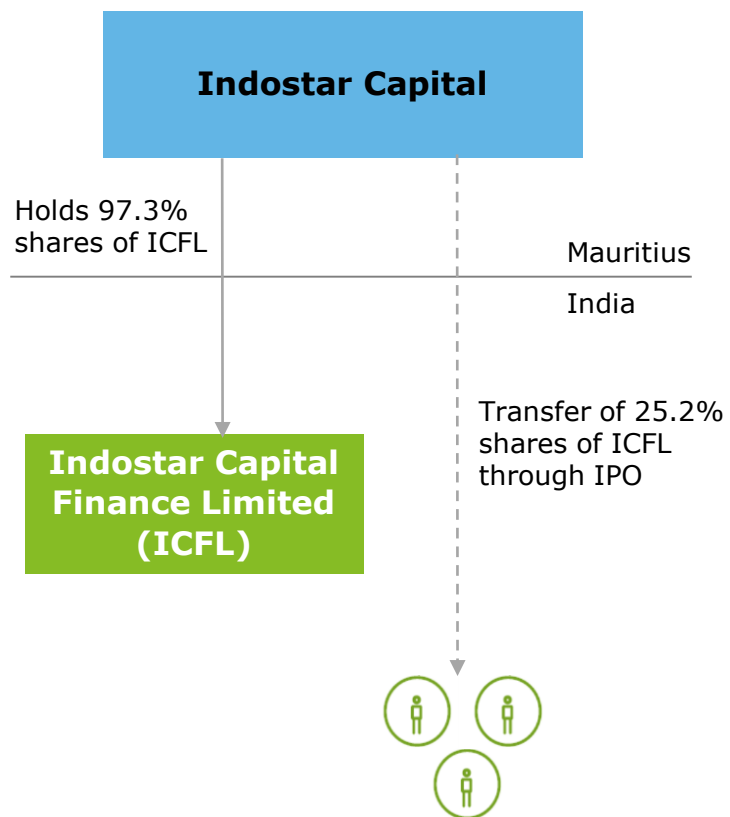


Facts:

- Indostar Capital, a Mauritius based company, had acquired 7.13 crore shares of ICFL during the period March 2011 to August 2015
- Indostar Capital desired to transfer 1.85 crore shares of ICFL through an initial public offering in India and in this regard, made an application before the tax authorities for obtaining a certificate under section 197 of the Act, confirming non-deduction of taxes on the basis of India – Mauritius DTAA.
- Several documents including copy of Tax Residency Certificate (TRC) was submitted along with the application.
- Tax authorities held the transaction as not genuine and designed for avoidance of tax as :
 - Indostar Capital had no business transaction / commercial activities / establishment / employees and had not incurred any administrative expense and
 - Shareholders of Indostar Capital were eight companies, which did not have any office or employees and Indostar Capital failed to produce TRC of such holding companies.
- Based on these findings, tax authorities held that the transaction did not appear genuine and was designed to avoid legitimate tax liability. The tax authorities rejected the 197 application and directed that the payer to deduct tax at a specified rate.

Indostar Capital vs ACIT (Bombay High court)

Application for certificate u.s 197 cannot be rejected if *prima facie* the transaction is not designed to avoid tax



Issue:

Whether the tax authorities can reject 197 certificate application by denying India-Mauritius DTAA benefit alleging that the transaction is a sham/ colorable device without having sufficient *prima-facie* evidence?

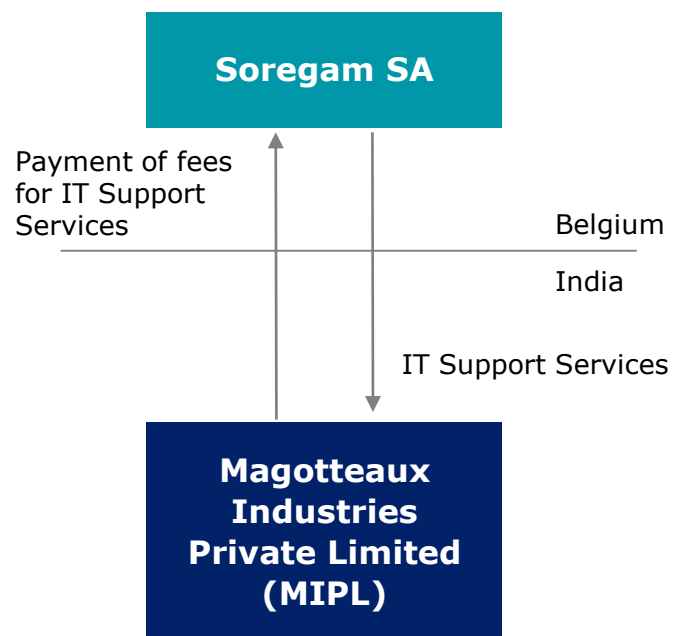
Findings:

- The mere fact that Indostar Capital had not transacted any business transaction, extent of administrative expense and employment structure, may not be sufficient to conclude that transaction is fictitious or fraudulent.
- The reference by the tax authorities of the inability of the Indostar Capital to produce TRC of the shareholder is erroneous
- Principle laid down in the case of Vodafone International Holdings B.V. (supra) was relied upon wherein the Supreme Court observed that the tax authorities may invoke the principle of "substance over form" or "piercing the corporate veil" test and deny the benefits of the tax treaty only after it is established that a transaction is designed for tax avoidance.
- Therefore, the tax authorities did not have prima facie material to demonstrate that the entire transaction was a sham and was a colorable device to avoid tax.

TRC sufficient to claim India-Mauritius tax treaty benefits - Supreme Court & High Court rulings and CBDT circular

Soregam SA vs DCIT (Delhi Tribunal)

IT support services do not 'make available' knowledge, skill, etc. and not taxable as FTS

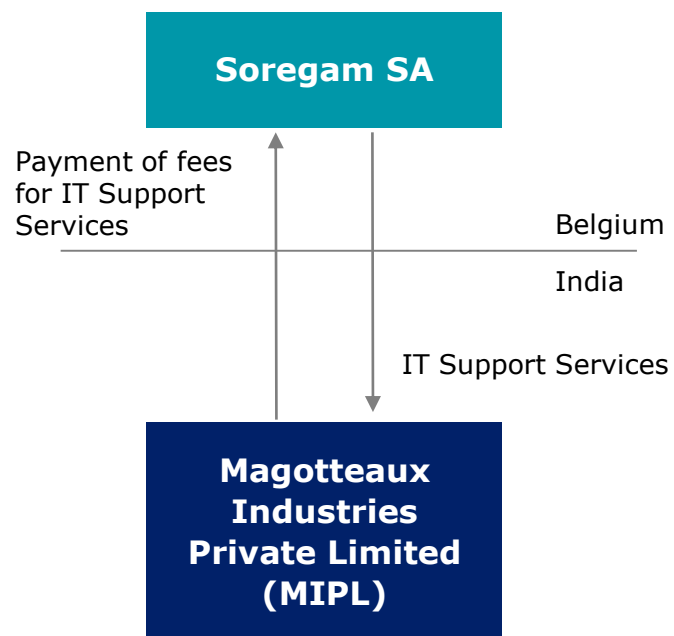


Facts:

- Soregam SA, tax resident of Belgium, was engaged in the business of providing Information Technology (IT) Support Services to various group entities.
- During the AY 2011-12, Soregam SA provided such services to MIPL and received fees for IT support services.
- Soregam SA filed its tax return considering such services to be not taxable in India.
- The tax authorities considered the entire income received by Soregam SA as taxable in India as fees for technical services (FTS).
- The first appellate authority (DRP) held that the services provided by Soregam SA satisfied the 'make-available' requirement and, therefore, the same was taxable as FTS in India in accordance with the protocol to India-Belgium DTAA read with Article 12 of India-Portugal DTAA.

Soregam SA vs DCIT (Delhi Tribunal)

IT support services do not 'make available' knowledge, skill, etc. and not taxable as FTS



Issue:

Whether the IT support services provided by Soregam SA 'make available' any know-how or skill and therefore, fall within the ambit of FTS as defined in Article 12 of the India-Belgium DTAA read with India-Portugal DTAA?

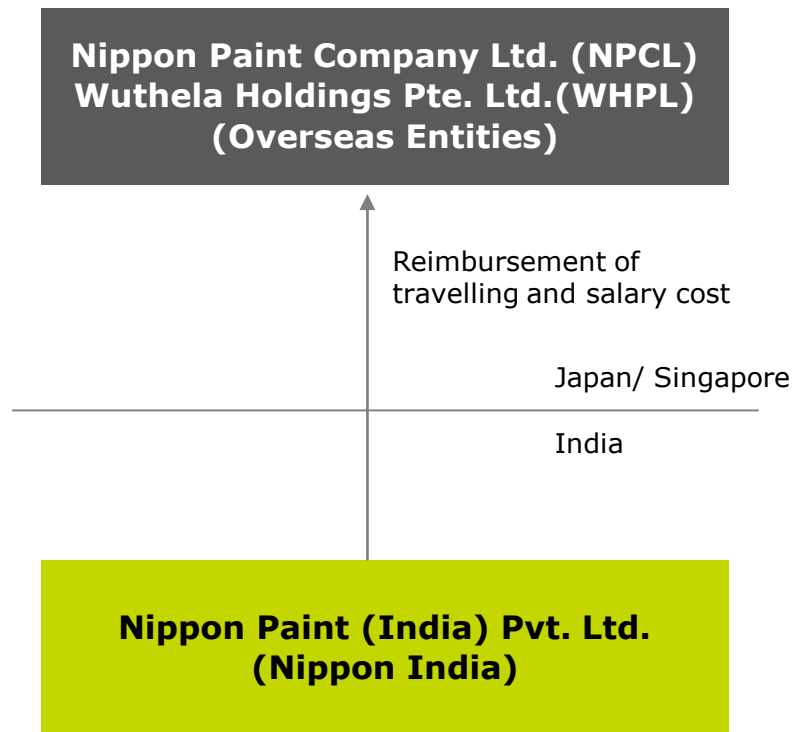
Findings:

- The IT support services were provided from outside India to MIPL.
- No employee of MIPL was being trained in the course of rendering these services to MIPL.
- The tax authorities did not specify as to how the IT support services 'make available' knowledge, experience etc. to the recipient.
- Services provided by Soregam SA are merely in the nature of routine IT support services. Availing such services in no manner has given any benefit to MIPL with technical knowledge, skill or expertise to be able to apply it in future to perform the functions independent of Soregam SA.
- In the view thereof, the IT support services are not taxable in India as the same falls outside the ambit of FTS as defined in Article 12 of the India-Belgium DTAA read with India-Portugal DTAA.

Favourable view taken in Areva T&D India Ltd (18 taxmann.com 171)(AAR) & Sandvik Australia Pty. Ltd. (31 taxmann.com 256) (Pune Tribunal)

Nippon Paint (India) Pvt. Ltd vs DCIT (Chennai Tribunal)

Reimbursement of salary cost of seconded employees considered FTS

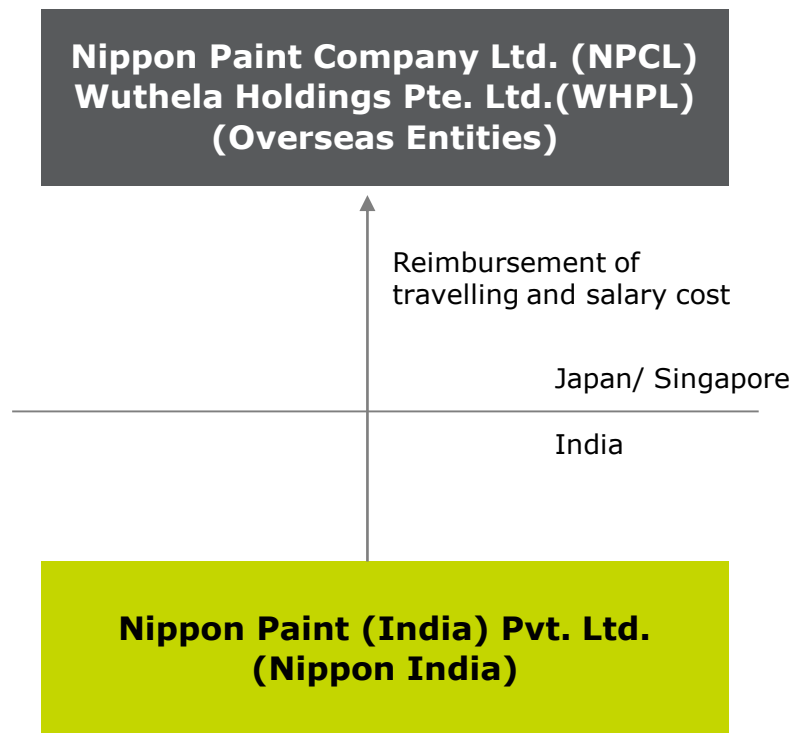


Facts:

- NPCL and WHPL (Overseas Entities) had seconded certain employees to Nippon India at managerial/executive positions.
- Nippon India had made remittance to the overseas entities towards the salary cost and travelling expenses incurred by the seconded employees during their stay in India.
- Nippon India did not withhold tax on such salary cost and related expenses paid to the overseas entities considering the same to be pure reimbursements. The salary of seconded employees had suffered withholding tax u/s 192 of the Act.
- Tax authorities considered the reimbursements as income chargeable to tax in India in the hands of overseas entities as fees for technical services (FTS).
- Since Nippon India had not withheld tax at source on the said payments, tax authorities held Nippon India as an '*assessee in default*' under section 201 of the Act and levied interest under section 201(1) and 201(1A) of the Act.
- On appeal, the first appellate authority [CIT(A)] upheld the action of lower authority to levy tax and interest.

Nippon Paint (India) Pvt. Ltd vs DCIT (Chennai Tribunal)

Reimbursement of salary cost of seconded employees considered FTS



Issue:

Whether reimbursement of salary cost and travelling expenses paid to the overseas companies is income chargeable to tax in India?

Findings:

- The seconded employees were rendering managerial and highly expertise services to Nippon India. The seconded employees exchanged experience and skill training with the taxpayer which was provided by the overseas entities.
- Once the secondment term is over, the seconded employees will return back to the original employer i.e. overseas entities and therefore, Nippon India has not become the employer of seconded employees.
- Travelling cost incurred were in connection with the technical service agreement and they bear a clear nexus with technical services rendered by seconded employees to Nippon India.
- Therefore, payment made by Nippon India to overseas entities in relation to reimbursements for salary and travelling cost of seconded employees were taxable as FTS in India.

Favourable view taken in Marks & Spencer Reliance India Pvt. Ltd. [TS-178-HC-2017](Bombay HC), HCL Infosystems Ltd. (274 ITR 261) (Delhi HC) and Faurecia Automotive Holding [ITA No.784/PUN/2015] (Pune ITAT)



Business restructuring

Deductibility of goodwill amortization

Business restructuring | Impact on Effective Tax Rate and Cash Tax Cost

Goodwill amortization



Goodwill = consideration paid for business acquisition (-) fair market value of assets (net of liabilities)



Supreme Court in Smifs Securities: Goodwill arising on amalgamation is a business or commercial right and hence qualifies for claim of depreciation



Once the Apex Court has settled the issue, why does it continue to be litigated?



Can GAAR be invoked to question goodwill amortization?

Business restructuring | Impact on Effective Tax Rate and Cash Tax Cost

Non-compete fee

What is non-compete?

Non-compete fee - consideration for not carrying any business or profession or for not sharing any know-how, patent, copyright, etc.

Tax deductibility - Payer

- Capital vs. revenue expenditure

Prior to 2002-03

- Treated as capital receipt and thus not chargeable to tax



- **Taxability – recipient**
Business income vs. capital gains

From 2002-03 onwards

- Law amended
- non-compete fees taxable as business income

Beneficial ownership of shares and impact on carry forward of tax losses

Business restructuring | Impact on Effective Tax Rate and Cash Tax Cost

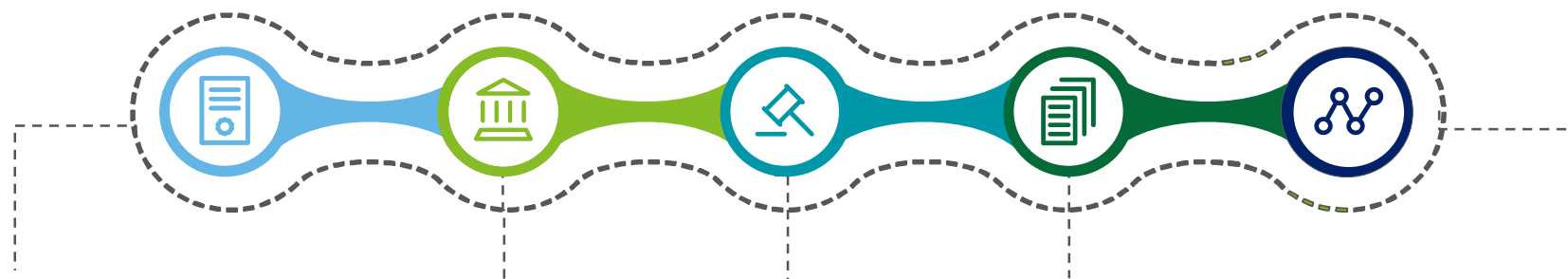
Beneficial ownership and carry forward of losses

Concept of beneficial owner vs. legal owner vs. registered owner

Legal owner: The person who holds legal title to the property.

Beneficial owner: The one who controls the asset and, also, ultimately enjoys the income from the asset.

Registered owner: The one whose name the asset is registered. eg.— A nominee shareholder.



Section 79

Change in shareholding, refers to beneficial owner, change over 51%

Karnataka High Court

Carry forward and set off of business losses permitted given 51% of control and voting power remained unchanged

Corporate law amendments

Significant Beneficial Ownership Rules introduced in February 2019

OECD update

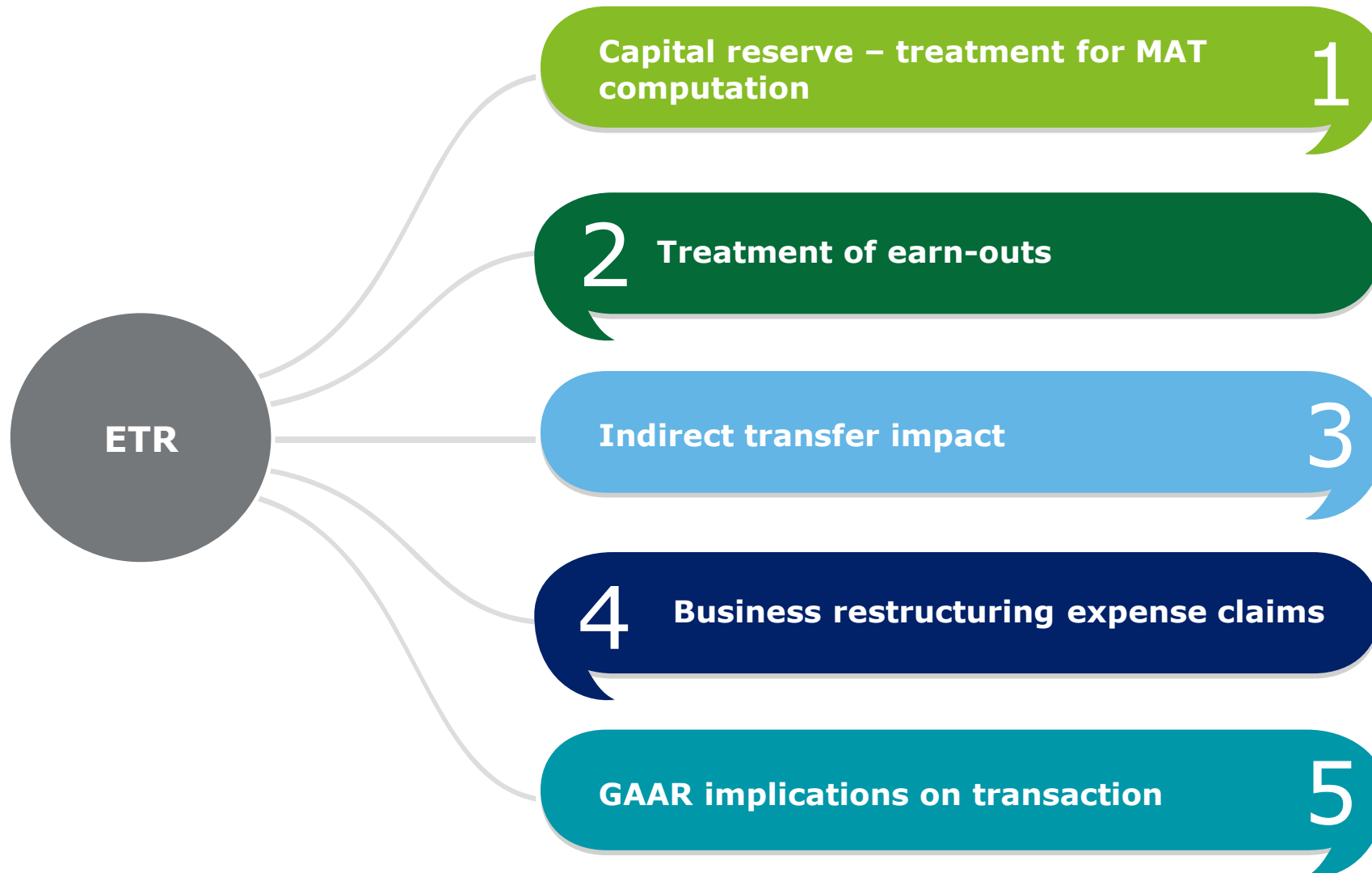
In March 2019, the OECD released a toolkit discussing various aspects of beneficial ownership

Impact on startups

Early stage startups likely to have losses. Impact of losses at each round of funding needs review.

Business restructuring | Impact on Effective Tax Rate and Cash Tax Cost

Other items to watch out for...





Q&A

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