

**Deloitte.**



India*TaxHour*

Quarterly India tax  
updates  
January – March 2021

15 April 2021

# Subject matter experts

# We will discuss...

- **Economy/Regulatory updates**
- **Direct tax updates**
  - Amendments in relation to Equalisation Levy
  - Goodwill not an intangible asset for tax depreciation
  - Slump sale to include slump exchange
  - Relocation of offshore fund to IFSC
  - Extension of timelines and other clarifications
  - Key procedural amendments vis-à-vis Advance Ruling, Tribunal and Settlement Commission
- **Indirect tax updates**
  - E-Invoicing and Dynamic QR Code requirement
  - Recent GST changes including key budget changes
  - Key Customs duty rate changes
  - Significant Customs law amendments
- **Recent judicial pronouncements**
- **Annexures**

# Economy/Regulatory updates

# Economy/Regulatory updates

- Indian economy and the Covid pandemic - GDP impact
- Production Linked Incentive (PLI) Schemes – Update
- Consultation Paper on Regulations for issue/ listing of securities in International Financial Services Centres (IFSC)

# Direct tax updates

# Equalisation Levy – further clarifications

The Finance Act 2021 further clarifies provisions relating to Equalisation Levy (EQL)

## Finance Act 2021

Definition 'Online sale of goods/ provision of services'	To include one or more of the following online activities: a) Acceptance of offer for sale b) Placing of purchase order c) Acceptance of purchase order d) Payment of consideration e) Supply of goods/services, partly or wholly
Exclusion - Royalties/ FTS	Consideration taxable as Royalty or Fees for Technical services excluded from EQL
Consideration in case of facilitating entities	To include the consideration for sale of online goods / provision of services, even when not owned by them
<b>Government amendment while passing FA 2021 - Exclusions</b>	Consideration for online sale / provision of services by: • Residents; and • Permanent Establishment of non-residents

# Goodwill no longer an intangible asset for tax depreciation

## Finance Act 2021

### Goodwill no longer eligible for depreciation

- **Block of asset & Intangible assets for the purpose of depreciation** -> to exclude goodwill of a business or profession
- If forming **part of existing block** & depreciation has been claimed -> to determine Block's WDV and compute short term capital gain in a prescribed manner
- **Cost of acquisition for goodwill** -> Purchase price (as reduced by tax depreciation obtained in past)

Government amendment while passing FA 2021 - Written down value -> not to include any goodwill acquired post 1 April 2020; and to remove the WDV of any existing goodwill



Amendment effective from AY 2021-22



# Slump sale to include slump exchange

## Erstwhile Provisions

Defined to mean transfer of undertaking **as a result of sale** for lump sum consideration without value being assigned to individual assets and liabilities in such cases

Various judicial precedents – Excluded other means of transfer such as exchange, and therefore, not subjected to tax

## Finance Act 2021

Transfer of undertakings **by any means** for lump sum consideration

- Included in Definition of 'slump sale'; and
- Capital gains arising on any such transfer is taxable

Government amendment while passing FA 2021 - Full value of consideration - Fair market value of capital assets



Amendment effective from AY 2021-22

# Incentives for IFSC units –

- **Transactions not regarded as transfer** [Section 47] - In pursuance of its relocation to such IFSC

---

Transfer of a capital asset : By Foreign investment fund ('original fund') or wholly owned special purpose vehicle of the original fund

---

- **Exemption to capital gains** [Section 10(23FF)] to non-resident investors of the resultant fund
  - Extended to **specified fund**, income arising or received by non-resident or specified fund on transfer of share of a company resident in India by the resultant fund or **specified fund**
- Original fund – fund established outside India
- Resultant fund – fund established in India and registered with SEBI/IFSC
- Specified fund - fund established in India registered as a Category III Alternative Investment Fund regulated with SEBI, located in any IFSC, of which all the units are held by non-residents other than unit held by a sponsor or manager.

Government amendment while passing FA 2021 – Transfer of capital assets of wholly owned special purpose vehicle of original fund. Capital gains exemption benefit extended to specified fund



Amendment effective from AY 2022-23

# Key amendments vis-à-vis AAR, ITAT and ITSC

## Board for Advance Ruling (BFAR)

- AAR to be replaced by one or more BFAR from a date to be notified
- Pending AAR cases, along with all records, documents will be transferred to BFAR
- Relevant provisions to be suitably modified
- Each BFAR shall comprise 2 members not below the rank of Chief Commissioner
- Advance rulings shall not be binding on the applicant or the tax department, and either party can file an appeal to High Court
- Enabling provision for faceless functioning of BFAR

## Faceless Tribunal appeals

- Faceless scheme may be notified on or before 31 March 2023 in a jurisdiction less manner
- All communication shall be electronic
- Where personal hearing is needed, it shall be done through video-conferencing
- Optimization of resources and achieve functional specialization

## Income-tax Settlement Commission (ITSC) proposed to be discontinued w. e. f. 1 February 2021:

- 1 or more Interim Boards for Settlement to be constituted to clear the pending applications
- Relevant provisions to be suitably modified
- Taxpayers will have an option to withdraw any pending application -in which case the proceedings may be restored to the relevant authority as if no application was filed
- Faceless scheme may be notified

Government amendment while passing FA 2021 - AAR to be replaced by one or more BFAR from a date to be notified

# Notifications/ Circulars

Notification(s) dated 27 February 2021 and 31 March 2021

Revised time limits under the Income-tax Act, 1961 notified.

Compliance pertaining to	Erstwhile compliance date under 'The Taxation & Other laws (Relaxation and Amendment of Certain Provisions) Act, 2020	Further extension of compliance date vide Notification dated 27 February 2021/ 31 March 2021
Passing of penalty Orders	31 March 2021	30 June 2021
Passing of – <ul style="list-style-type: none"> <li>• Assessment order (for F.Y. 2017-18/ A.Y. 2018-19); or</li> <li>• Reassessment order</li> </ul>	31 March 2021 <i>(Disruption period is 20 March 2020 to 30 March 2021)</i>	30 April 2021
	31 March 2021 (not covered in disruption period)	30 September 2021
Passing of Order consequential to DRP directions (for F.Y. 2016-17/ A.Y. 2017-18)	31 March 2021	30 April 2021
Issuance of reopening notice u/s. 148 (in the old regime)	31 March 2021	30 April 2021
Aadhar – PAN linking	31 March 2021	30 June 2021

# Notifications/ Circulars

---

Notification dated 26 February 2021	<ul style="list-style-type: none"><li>• The CBDT has clarified that certain penalty proceedings shall remain outside the purview of the Faceless Penalty Scheme, 2021</li><li>• It has further clarified that all the penalties imposable under the ITA by the officers of the rank of Addl. CIT / JCIT and below, except for the exclusions provided in the said Notification, shall remain with the National e-Assessment Scheme.</li></ul>
Circular dated 25 March 2021	<p>Reporting in Tax Audit Report has been deferred to 31 March 2022 viz.</p> <ul style="list-style-type: none"><li>• impermissible avoidance arrangement; and</li><li>• breakup of total expenditure of entities registered/ not registered under GST</li></ul>
Notification dated 01 April 2021	<ul style="list-style-type: none"><li>• Revised Tax Audit Report can be filed by the end of the relevant Assessment Year for any payment made after furnishing the Tax Audit Report which results in the reduction of the specified disallowances reported</li><li>• Changes in Tax Audit Report vis-à-vis reporting of concessional rate of income-tax, stamp duty valuation, etc., notified.</li></ul>
Notification dated 26 March 2021 and 01 April 2021	<p>Rules and Forms notified for applications for registration of charitable/ religious trusts/ institutions to be made electronically by 30 June 2021</p>

---

# Indirect tax updates

# GST Updates

# GST E-invoicing and Dynamic QR code



Dynamic QR code is not applicable to insurer or banking company, financial institution, NBFC, GTA, passenger transportation and theater tickets in multiplex screens.



Dynamic QR should contain GSTIN, UPI ID, Bank details, Invoice no. & date, Invoice value and GST breakup

In case of pre-payment providing cross-reference of payment made whether in cash or using digital mode with or without using QR code, shall be deemed to have complied the requirement of having dynamic QR code



# GST : Key Updates

## Recent updates in GST Law

### Declaration of HSN codes on invoices

- Effective 1<sup>st</sup> April 2021, mentioning 6 digit HSN codes on tax invoices made mandatory for taxpayers with aggregate annual turnover > 5 Crore in FY 20-21

### Selecting Core business activity on GST portal

- GST Network (GSTN) has enabled a new feature that requires the taxpayer to select one core business activity on the GST Portal as Manufacturer, Trader, Service Provider and Others

### Standard operating procedure (SOP) for suspension of registrations

- For suspension of registrations in case of discrepancies/anomalies observed in returns the CBEC has issued SOP
- Forms are prescribed for issuance of notices, replies to be filed by registered person and order in case of dropping of proceeding or suspension/cancellation of registration

# Important Budget Amendments under GST



## Restriction on availment of Input Tax Credit (ITC)

- Restrictions are imposed on claiming ITC by a taxpayer. Now ITC can be claimed only after it is matching with the details furnished by the supplier



## GST Audit and Annual Returns

- Getting annual accounts audited in Form GSTR 9C from a chartered accountant or a cost accountant is no more required.



## Interest on delayed GST payment

- Retrospective amendment is being made from 1 July 2017 to levy interest on late payment of GST only on the net cash liability.

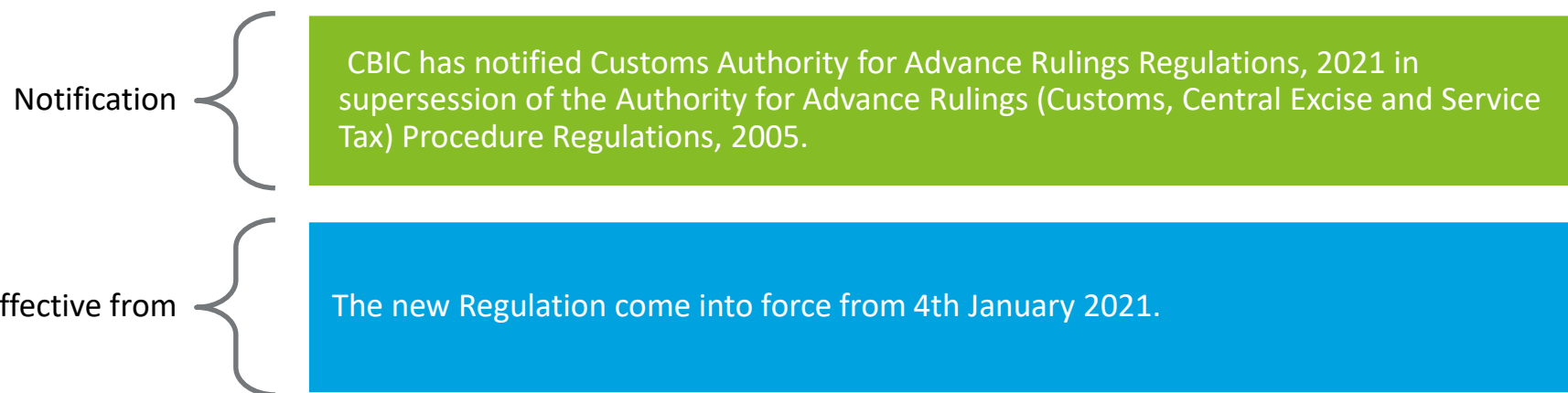


## Refund of GST on zero-rated supplies

GST refunds granted on zero-rated supplies of goods are also linked to receipt of sale proceeds.

# Customs Updates

# Customs Authority for Advance Rulings Regulations 2021



- The Authority is vested with all the powers of a civil court in regard to the discovery and inspection, enforcing the attendance of any person and examining him on oath, issuing commissions; and compelling production of books of account and other records.
- Board may appoint an officer of the rank of Principal Commissioner or Commissioner of Customs to function as advance ruling authority
- An application is to be made in Form CAAR-1 before the jurisdictional Authority either at Delhi or Mumbai.
- An appeal against advance ruling can be filed before Appellate Authority for Advance Rulings

# Customs/ FTP recent updates

## **IGST & Cess exemption**

Exemption from IGST and compensation cess on imports by EOUs, STPI units and imports made under EPCG/Advance Authorisation scheme extended upto 31.03.2022

## **Goods imported through Sea Port**

Goods consigned from (Bangladesh, Maldives, Myanmar, Pakistan and Sri Lanka) the bill of entry (BoE) is required to be filed latest by “end of the day of arrival” of the vessel of goods. And, for goods consigned from other countries, BoE is required to be filed latest by the “end of day preceding the day of arrival” of the vessel.

## **Goods imported through airport and LCS and ICD**

In respect of all imports at the airport and land customs station (LCS), BoE is required to be filed latest by “end of the day of arrival” of the aircraft/vehicle  
In respect of all imports by Inland Container Depot, BoE is required to be filed latest by the “end of day preceding the day of arrival” of the aircraft/vehicle

## **FTP**

Foreign Trade Policy 2015-20 extended by another 6 months till 30 Sept 2021

# Customs duty rate changes

Increase in customs duty rates on a majority of the products is aimed towards encouraging local manufacturing for mobile phones, electronic toys and auto parts

Description of goods	Up to 1 Feb 2021	From 2 Feb 2021
Inputs or parts of PCBA, and moulded plastics of charger or adapter of cellular mobile phones	NIL	10%
Inputs or raw materials (other than lithium-ion cell and PCBA) for use in manufacturing lithium-ion battery and battery pack	NIL	2.5%
Parts of electronics toys	5%	15%
Specified auto parts (other than bicycle parts and components)	10%	15%
Specified inputs/parts for manufacturing PCBA, camera module, connectors, wired headset, USB cable, and microphone and receiver, etc., of mobile phones	NIL	2.5%
Metal shield, camera lens, and specified inputs or raw materials for use in manufacturing cellular mobile phones	NIL	Applicable Rate
Inputs, parts, or sub-parts for use in manufacturing PCBA of lithium-ion battery and battery pack	NIL	2.5%
Inputs or raw material for use in manufacturing machines capable of connecting to an automatic data processing machine, ink cartridge, and ink spray nozzle	NIL	2.5%

# Other Customs changes

**HSN 2022** has been aligned wef. 1 January 2022 to ensure that the classification of goods is done based on the global principles of classification.

Amendment have been made in **Import of Goods under Concessional Rate Rules, 2017** to allow job work, 100% outsourcing for manufacturing of goods imported. Further, benefit of depreciated value to be given on clearing imported capital goods that have been used for the specified purpose

The Central Board of Indirect Taxes and Customs (CBIC) notified ICEGATE or Indian Customs and Central Excise Electronic Commerce/Electronic Data Interchange (EC/EDI) Gateway as the **common custom's electronic portal** for all customs related documentation and duty payments.

Comprehensive Economic Cooperation and Partnership Agreement (CECPA) signed between India and Mauritius has been notified effective from 1 April 21. The Agreement cover Trade in Goods & Services, Rules of Origin, Dispute Settlement, Movement of Natural Persons, Telecom, Financial services, Customs Procedures and Cooperation in other Areas.

A new cess called Agriculture Infrastructure and Development Cess (AIDC) is imposed on import of specified goods. Consequently, the Basic Customs Duty (BCD) rate is reduced to ensure no additional burden on the consumer. AIDC shall be calculated on a transaction value similar to BCD.

# Recent judicial pronouncements



# Direct taxes

BG Asia Pacific Holding Pte. Ltd & GSPC  
Distribution Network Ltd.

[2021] AAR/1376&1377/2012

# BG Asia Pacific Holding Pte. Ltd & GSPC Distribution Network Ltd.

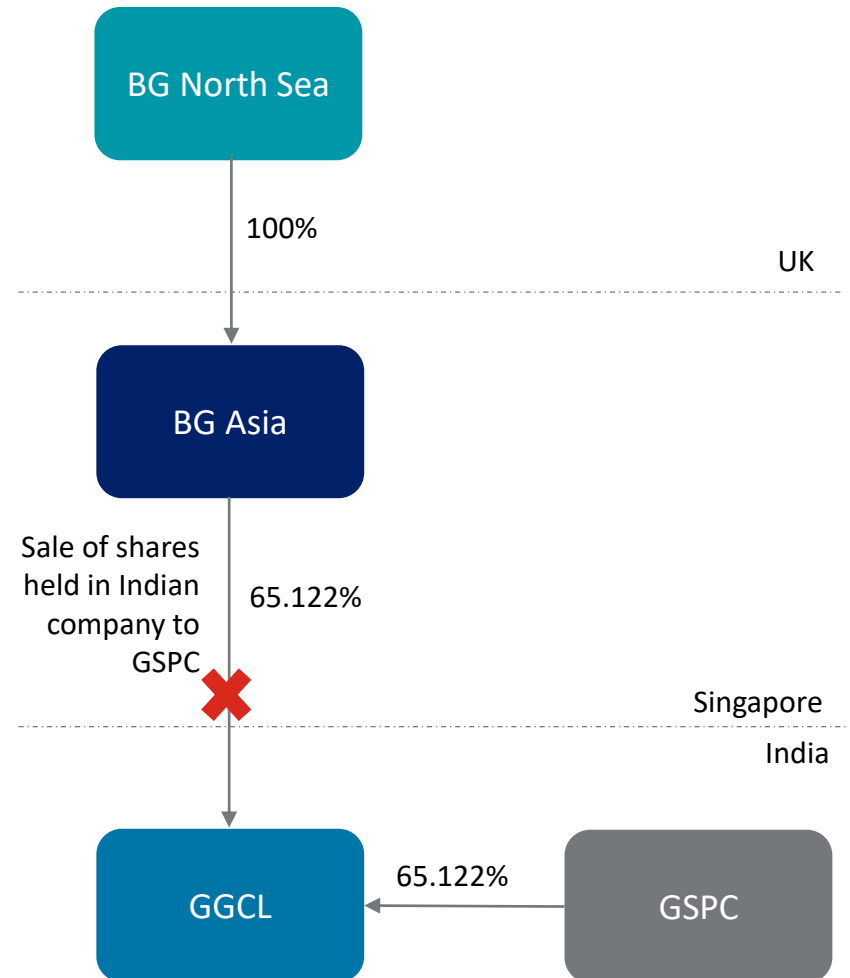
[2021] AAR/1376&1377/2012

## Facts of the case

- BG Asia, a tax resident of Singapore and a 100% subsidiary of UK based company, has made significant investments in the group companies situated in India, Singapore, Egypt, Thailand and Trinidad.
- BG Asia was holding 65.122% of total issued and paid-up equity capital of GGCL, an Indian company listed on recognised stock exchanges in India.
- BG Asia proposed to sell the shareholding in GGCL to another Indian company – GSPC (Buyer Co) in an off-market transaction

## Questions before Authority for Advance Rulings (AAR):

- Whether the taxpayer is liable to capital gains tax in India under the provisions of the Act or treaty.
- If yes, whether the long-term capital gains will be taxable at 10% as per the proviso to section 112(1) of the ITA?
- Whether Buyer Co is required to deduct tax at source under section 195 of the ITA? If yes, what shall be the appropriate rate at which tax would need to be withheld?



# BG Asia Pacific Holding Pte. Ltd & GSPC Distribution Network Ltd.

[2021] AAR/1376&1377/2012

## Contentions of the taxpayer

Capital gains on the sale of shares held in I Co was taxable only in Singapore, and that India had no right to tax such gains by virtue of Article 13(4) of the Tax Treaty.

- Key arguments:

- Tax treaty restricting the rights to tax capital gains **only in country of resident** – Singapore in this case
- **Tax Residency Certificate (TRC)**, qualifying as a tax resident of Singapore
- Conditions prescribed under the **Limitation of Benefit (LOB)** clause of the Protocol to the Tax Treaty (introduced w.e.f. 1 August 2005)
  - With regard to affairs being arranged with the primary purpose to take advantage of the Protocol - Arguments based on significance of investment, period of acquisition, Substantial time lapse between date of acquisition & proposed divestment and fact that Control and management were located in Singapore
  - With regards to conditions denying benefit in case of shell / conduit company – Arguments based on Significance of operation by taxpayer in Singapore, explicit declaration on conduct of business in the TRC, net assets & amount of expenditure incurred by the taxpayer
- No Requirement of **tax withholding** by the Buyer: consideration for sale of I Co shares would not constitute income chargeable to tax under the ITA.

## Decision of the AAR

- Capital gains arising on sale of I Co shares was taxable under the ITA, However tax treaty benefits could be claimed.
- The LOB conditions of the Treaty were satisfied and therefore exemption is available considering the following:
  - No undue benefits of Art 3(1) of the protocol – based on substantial time gap between the events
  - Business of making and managing investments qualified as a bona fide business activity
  - Huge dividends earned - ingredients of shell/conduit company is missing
  - Total annual expenditure on operations in Singapore was at least SG\$ 200,000 each year – Article 3(3) of the Protocol to the Tax Treaty was not attracted.

# Direct taxes

**Engineering Analysis Centre of Excellence Private Limited v/s. CIT & Anr.**  
**(Civil Appeal Nos. 8733-8734 of 2018) (SC)**

# Engineering Analysis Centre of Excellence Private Limited v/s. CIT & Anr. (Civil Appeal Nos. 8733-8734 of 2018) (SC)

## Supreme Court judgment on characterisation of software payments

The Supreme Court (“SC”) judgement covers 86 appeals which can be broadly grouped into the following four categories –

### Category 1

Indian end users of computer software who purchase the same directly from a foreign non-resident supplier or manufacturer

### Category 2

Indian distributors / resellers who purchase computer software from non-resident suppliers /manufacturers for the purpose of resale to other resident Indian end-users;

### Category 3

Non-resident vendors, who, after purchasing software from other foreign, non-resident sellers, resell the same to resident Indian distributors or end users

### Category 4

Non-resident suppliers who affix computer software onto hardware and then sell the same as an integrated unit/equipment to resident Indian distributors/ end users

# Engineering Analysis Centre of Excellence Private Limited v/s. CIT & Anr. (Civil Appeal Nos. 8733-8734 of 2018) (SC)

## Supreme Court judgment on characterisation of software payments - Key takeaways



The SC re-affirms the principle that at the stage of TDS under Sec 195, DTAA can be applied and distinguishes the SC ruling in the case of **PILCOM vs CIT**



Held that based on the definition of 'royalty' given in Article 12 of the DTAA, the distribution agreements/ End User License Agreements ['EULA'] do not create any interest or right which would amount to the use of or right to use any copyright



The 2012 clarificatory Explanation to the definition of 'royalty' is to be read as a prospective amendment



Distinction between Copyrighted article and Copyright upheld



The amount paid by resident Indian end users/distributors to non-resident computer software manufacturers/suppliers is neither the payment of royalty for the use of copyright in the computer software nor does it give rise to any income taxable in India

# Engineering Analysis Centre of Excellence Private Limited v/s. CIT & Anr. (Civil Appeal Nos. 8733-8734 of 2018) (SC)

## Supreme Court judgment on characterisation of software payments – Few Pointers to be considered by the Taxpayer



To review / relook at the software agreement and review the inter-company cross-charges from overseas parent/group since centrally procured software license costs are charged back to group companies.



To review / relook at the distribution agreements/ EULAs



To fast-track the appeals which are pending with various appellate authorities/ High Court/ Supreme Court



To claim refund where tax has been withheld in the preceding year(s), wherever possible.

# Indirect taxes

## M/S Canon India Private Limited vs Commissioner of Customs



# M/S Canon India Private Limited vs Commissioner of Customs

---

## Facts of the case

- Appellant imports Digital Still Image Video Cameras ('DSIC') availing benefit of exemption Not. No. 25/2005 dated 01.03.2005
- Goods were cleared by the Customs Officer considering the same as exempted
- Subsequently, Directorate of Revenue Intelligence (DRI) issued SCN alleging Customs Authorities were induced to clear the cameras by willful mis-statement and suppression of facts about the specific functionality of the camera which made them eligible for the exemption from customs duty .

## Issue

- Whether DRI have authority in law to issue a show cause notice under Section 28(4) of Customs Act for recovery of duties allegedly not levied or paid when the imported goods have already been cleared by a Deputy Commissioner of Customs who decided that the goods are exempted
  - In simple language, whether after clearance of the cameras on the basis that they were exempted from levy of Basic Customs Duty, the proceeding initiated by DRI for recovery of duty not paid are valid in law?
-

# M/S Canon India Private Limited vs Commissioner of Customs

## Ruling

The highlights of the judgement are as follows-

- Significant to note that the decision to clear the goods was taken by the appraising officer, the SCN was issued by DRI
- Law has empowered 'the proper officer' for recovery of duties allegedly not levied or paid
- Customs legislation has employed the article "the" not accidentally but with the intention to designate **the proper officer as one** who had assessed the goods at the time of clearance
- "proper officer" was the Deputy Commissioner of Customs or his successor as it was his office which had assessed the cameras initially and found them fit for exemption per the notification.
- DRI's Additional Director General was not even the "proper officer" to authorize recovery, it held.

CBIC has now issued instructions stating all the fresh SCN's under Section 28 in respect of cases presently being investigated by DRI are required to be issued by jurisdictional Commissionerate.

# Thank you!

Kindly spare a minute to help us with your valuable feedback for today's session...

For any queries, please feel free to write to us at [intax@deloitte.com](mailto:intax@deloitte.com)

# Annexure

# Employee Taxation – International Travelers

## As per Finance Act 2020:

- Indian citizens or PIO visiting India will be considered as resident if their stay in India is 120 days or more in FY 2020-21 along with a stay of 365 days or more in the 4 preceding FY's and have Indian income in India of more than INR 15 lakhs
- Indian citizens, having Indian income more than INR 15 lakhs during the PY shall be deemed to be a resident in India, if not liable to tax in any other country or territory by reason of their domicile, residence, etc.

## Circular No.2 of 2021 – Employment income taxable only subject to conditions as per DTAA

- The DTAA distributes the taxation rights between the employee's jurisdiction of residence and the place where the employment is exercised. Salaries, wages and other similar remuneration are taxable only in the country in which the employee is resident unless the employment is exercised in the other country.
- Generally, as per the DTAA's, such other country (the source jurisdiction) has taxation rights only if the employee is present in that country for more than 183 days or the employer is a resident of the source jurisdiction, or the employer has a permanent establishment in the source jurisdiction that bears the remuneration.
- Accordingly, if a USA resident under employment of a USA corporation has got stranded in India and performs employment from India, its salary will not be taxable in India unless he is present in India for 183 days or more during the PY 2020-21 or if the salary is borne by Indian permanent establishment of such USA corporation.

# Notifications/ Circulars

Notification No. 10/2021/F. No. 370142/35/2020-TPL dated 27 February 2021

Revised time limits under the Income-tax Act, 1961 [“ITA”] and Benami Property Transaction Act, 1988 (Benami Act) are as under -

Compliance pertaining to	Erstwhile disruption period	Erstwhile compliance date under the Income-tax Act, 1961	Extended disruption period	Further extension of compliance dates vide Notification dated 27 February 2021
Passing of penalty Orders	20 March 2020 to 30 March 2021	31 March 2021	20 March 2020 to 29 June 2021	30 June 2021
Passing of assessment or reassessment order including those relating to search or requisition cases	20 March 2020 to 30 March 2021	31 March 2021	No change	30 April 2021
	Not covered in disruption period above but is due on 31 March 2021	31 March 2021	Not applicable	30 September 2021
Issuance of notice and passing of order under Benami Act	20 March 2020 to 30 March 2021	31 March 2021	20 March 2020 to 30 June 2021	30 September 2021

# Notifications/ Circulars

---

Notification No. 09/2021/F. No. IT(A)/01/2020-TPL dated 26 February 2021	<p>Extension of timelines for VsV compliance –</p> <ul style="list-style-type: none"><li>• 31 March 2021 – for filing a declaration by the declarant to the Designated Authority;</li><li>• 30 April 2021 – for payment of the <b>minimum</b> amount;</li><li>• 01 May 2021 – for payment of an <b>additional</b> amount if the payment is made on or after 01 May 2021;</li></ul>
Notification No. 15/2021/ F.NO. 370142/04/2019-TPL dated 11 March 2021	<p>CBDT has amended Form 12BA which now additionally requires the employer to disclose details vis-à-vis stock options allotted or transferred incase of a start-up and also details of the contributions to employee benefit funds or scheme which are taxable, etc.</p> <p>Further, the TDS Certificate in Form No. 16 has also been amended and includes a new field to provide details on whether the employee has opted for concessional tax regime. Form 24Q which is used for preparing e-TDS returns for tax deducted on salary under section 192 of the Act has also been amended accordingly. These new forms will be applicable w.e.f. 01 April 2021.</p>
Notification No. 18/2021 F. No. 370142/24/2019-TPL dated 16 March 2021	<p>CBDT has notified a new rule 29BA for an application to be made by a person for grant of certificate for determination of tax withholding at an appropriate proportion of sum (other than Salary), payable to non-resident, chargeable in case of the recipients.</p> <p>New Form (i.e. Form No. 15E) has also been released for an application to be made for this purpose.</p>

---

# Notifications/ Circulars

---

Circular No. 5/2020 [F. NO. 370142/9/2018-TPL] dated 25 March 2021

## **Reporting under following clauses of the Tax Audit Report deferred to 31 March 2022 –**

- **Clause 30C** : Whether the assessee has entered into an impermissible avoidance arrangement, as referred to in section 96, during the previous year?
- **Clause 44** : Break-up of the total expenditure of entities registered or not registered under the GST?

---

Notification No. 20/2021/F/No. 370142/35/2020-TPL and 31 March 2021

- Aadhar PAN linking extended to 30 June 2021
- Passing of Order pursuant to DRP directions extended to 30 April 2021
- Issuance of Notice u/s. 148 of the Income-tax Act, 1961 extended to 30 April 2021
- Processing of Equalisation levy statements extended to 30 April 2021

---

Notification dated 05 April 2021

- Every constituent entity (resident in India) of an international group is required to comply with CbC reporting requirements w.e.f 1 April 2021, if the total consolidated turnover of the international group for the preceding accounting year is INR 64000 million or more.
  - Master file reporting can be done by any one constituent entity of the international group on behalf of other constituent entities.
-



# Notifications/ Circulars

---

Notification dated 26 February 2021	Extension of VsV timelines for payment of disputed tax, interest, penalty, etc. to 30 April 2021.
Notifications dated 4 March 2021 and 15 March 2021	Instructions regarding selection of cases for issue of notice for reassessment proceedings vis-à-vis income-tax (other than international tax) and international tax provided.
Circular dated 23 March 2021	Clarification provided regarding classification of a case as a 'search case' for the purpose of VsV.
Notification dated 26 February 2021	<ul style="list-style-type: none"><li>• The CBDT has clarified that following penalty proceedings shall remain outside the purview of the Faceless Penalty Scheme, 2021 –<ul style="list-style-type: none"><li>➤ Penalty proceedings arising / pending in the Investigation wing, the Directorate of Intelligence and Criminal Investigation (I&amp;CI), erstwhile DG (Risk-assessment) or by any prescribed for the purpose of specified penalties;</li><li>➤ Penalty proceedings arising out of any statute other than the ITA; and</li><li>➤ All penalties imposable by the officers of the level of Commissioner / Director / Commissioner (Appeals / Appeal Unit) and above</li></ul></li><li>• It has further been clarified that all the penalties imposable under the ITA by the officers of the rank of Addl. CIT / JCIT and below, except for the exclusions provided above, shall remain with the National e-Assessment Scheme.</li></ul>

---

# Supreme Court judgment on characterisation of software payments

## Issues dealt by Hon'ble SC

- Computer software was brought within the ambit of 'royalty' definition by the Finance (No. 2) Act, 1991 (Copyright Act, 1957 recognized computer software in 1994)
- Litigation on characterization of payments for purchase of shrink-wrapped software/off the shelf software started in late 1990s (Department view - 'royalty' vs taxpayer's view – goods)
- The matter reached the Apex Court for the first time in 2010 when the Apex Court held that payer need not approach tax authority for every payment and can make a determination on his own and remanded the case back to Karnataka High Court (KHC) to decide on merits
- SC has now decided on the divergent rulings of various courts

## Facts of the appeals covered

- The Supreme Court ("SC") judgement covers 86 appeals, broadly grouped into four categories –

<b>Category 1</b>	Indian end users of computer software who purchase the same directly from a foreign non-resident supplier or manufacturer
<b>Category 2</b>	Indian distributors / resellers who purchase computer software from non-resident suppliers /manufacturers for the purpose of resale to other resident Indian end-users;
<b>Category 3</b>	Non-resident vendors, who, after purchasing software from other foreign, non-resident sellers, resell the same to resident Indian distributors or end users
<b>Category 4</b>	Non-resident suppliers who affix computer software onto hardware and then sell the same as an integrated unit/equipment to resident Indian distributors/ end users

# Supreme Court judgment on characterisation of software payments

## Reliance of DTAA at the stage of TDS under section 195

Reaffirmed that the TDS obligation arises only when the sum is chargeable to tax under the provisions of the Act, read with the DTAA; relying on:

- Principle of **GE Technology Centre Pvt Ltd**
- **CBDT Circular No 728** dated 30 October 1995
- PILCOM decision distinguished

## Nature of agreements and End-User License Agreements (EULAs) under the four categories of Assessee's

- **In case of an Indian Distributor**
  - The distributor is only granted a non-exclusive and non transferrable license to resell computer software where no copyright is transferred to the distributor
  - The distributor does not have the right to sub-license / reverse engineer/modify/reproduce nor does the distributor have the right to use the product at all
  - The consideration paid by the distributor to the non-resident manufacturer is in effect the price of a copy of the computer programme as goods
- **In case of an End User**
  - The end user can only use the computer programme by installing it in the computer hardware and cannot reproduce the same for sale or transfer
  - The license granted vide the EULA is not a license in terms of section 30 of the Indian Copyright Act, 1957 (CA) but is a license which imposes restrictions or conditions for the use of the computer software
- Held that regardless of the terminology of “licensing” mentioned in some of the EULAs, it is settled law that the real nature of transaction must be looked at, by reading the agreement as a whole
- Accordingly, the transaction would be in the nature of sale and not licensing.

## Taxability of ‘software payments’ under the DTAA

Held that transfer of all or any rights in underlying copyright is a sine qua non for the payment to qualify as royalty.

- Definition of “royalty” in DTAA is rooted from the OECD Model Tax Convention wherein it refers to payments of any kind received as consideration for “the use of, or the right to use, any copyright” of a literary work

# Supreme Court judgment on characterisation of software payments

## Taxability under the provisions of the Act in light of the 2012 clarificatory Explanation to section 9(1)(vi) of the Act

- Noted that there is no difference in the definition as given in the provisions of Explanation 2 to section 9(1)(vi) of the Act and the DTAA's.
- Held that clarificatory Explanation to section 9(1)(vi) is not clarificatory of the position as of 1 June 1976, but, in fact, expands the definition with effect from Finance Act 2012.
- Held that beneficial provision of the DTAA to apply

## Interplay with Indian Copyright Act (CA)

SC noted the below:

- A licence from a copyright owner, conferring no proprietary interest on the licensee, does not entail parting with any copyright, and is different from a licence issued under section 30 of CA.
- A non-exclusive, non-transferable licence, merely enabling the use of a copyrighted product, is in the nature of restrictive condition which is ancillary to such use, and cannot be construed as a licence to enjoy all or any of the enumerated rights mentioned in section 14 of CA.
- The right to reproduce and the right to use computer software are distinct and separate rights, the former amounting to parting with copyright and the latter, in the context of non-exclusive EULAs, not being so.
- The language of section 14(b)(ii) of CA makes it clear that it is the exclusive right of the owner to sell or to give on commercial rental or offer for sale or for commercial rental, "any copy of the computer programme". Thus, a distributor who purchases computer software in material form and resells it to an end user cannot be said to be within the scope of the aforesaid provision.
- The object of section 14(b)(ii) of CA is to interdict reproduction of the said computer programme and consequent transfer of the reproduced computer programme to subsequent acquirers/end users. Therefore, any sale by the author of a copy of the computer software to a distributor for onward sale to an end user, cannot possibly be hit by the said provision.
- The distributor cannot use the computer software at all and has to pass on the said software, as shrink-wrapped by the owner, to the end user for a consideration. The distributor's profit margin is that of an intermediary who merely resells the same product to the end user.

## Interpretation of DTAA's and OECD commentary

- Held that the DTAA's have to be interpreted liberally with a view to implement the true intention of the parties.
- Distributing copies of the programme without the right to reproduce that programme are paying only for the acquisition of the software copies and not to exploit any right in the software copyrights.
- Held that the OECD Commentary on Article 12, incorporated in the DTAA's will continue to have persuasive value as to the interpretation of the term "royalties" contained therein.

# Supreme Court judgment on characterisation of software payments

## Key takeaways



The SC re-affirms the principle that at the stage of TDS under Sec 195, DTAA can be applied; SC ruling in **PILCOM vs CIT** distinguished since same was in the context of section 194E (not section 195) which does not have any reference to payments being chargeable to tax under the Act



The SC has held that based on the definition of 'royalty' contained in Article 12 of the DTAA's, the distribution agreements/EULAs do not create any interest or right in such distributors/end users, which would amount to the use of or right to use any copyright



The 2012 clarificatory Explanation to the definition of 'royalty' in the domestic law is to be read down as only a prospective amendment (i.e., pre-2012 transactions not subject to TDS)



Distinction between Copyrighted article and Copyright upheld



The amount paid by resident Indian end users/distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements, is not the payment of royalty for the use of copyright in the computer software, and that the same does not give rise to any income taxable in India, as a result of which the payers (in all four categories referred to in this judgement) were not liable to deduct any TDS under section 195 of the Act

# Other Indirect tax developments

- 1 A new cess called AIDC is imposed on petrol and HSD of INR 2.5 per liter and INR 4 per liter, respectively. Consequently, the rate of BED and SAED is reduced to ensure no additional burden on the consumer.
- 2 SWS shall be levied on AIDC, except in specified cases. AIDC shall be calculated on a transaction value similar to BCD. AIDC shall not be applicable on goods imported under FTAs, EOUs and advance authorisation schemes where customs duty is also exempted.
- 3 High-speed rail projects being brought under project imports
- 4 Government has also temporarily revoked levy of anti-dumping duty/CVD currently applicable on certain items of steel.
- 5 Finance Bill 2021 proposed that the proceedings initiated for detention, seizure, and confiscation of goods are de-linked with the proceedings initiated under section 73 and 74 for the recovery of tax and penalty.
- 6 The benefit of zero rating on supplies made to SEZs would be available only if the same is used for authorised operations.
- 7 CBIC, vide its twitter handle, has clarified that ITC availment in GSTR-3B is to be done on the basis of Form GSTR-2B and not GSTR-2A.
- 8 IT revamp in DGFT- Online e-PRC system, Online module for adjudication, appeal, review proceeding and an online e-certificate management system for imports is also introduced.
- 9 Activities or transactions between an association and its members for a consideration shall be treated as a supply with effect from 1 July 2017.
- 10 **A penalty of 'up to five times of the refund claim'**, in case of fraudulent use of ITC of GST, for discharging tax on export of goods under the claim of GST refund.
- 11 **Power to confiscate the goods** entered for exportation is granted in case they are under a wrong claim of remission/refund of duty/tax.



Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee (“DTTL”), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as “Deloitte Global”) does not provide services to clients. Please see [www.deloitte.com/about](http://www.deloitte.com/about) for a more detailed description of DTTL and its member firms.

This material is prepared by Deloitte Touche Tohmatsu India LLP (DTTILLP). This material (including any information contained in it) is intended to provide general information on a particular subject(s) and is not an exhaustive treatment of such subject(s) or a substitute to obtaining professional services or advice. This material may contain information sourced from publicly available information or other third party sources. DTTILLP does not independently verify any such sources and is not responsible for any loss whatsoever caused due to reliance placed on information sourced from such sources. None of DTTILLP, Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the “Deloitte Network”) is, by means of this material, rendering any kind of investment, legal or other professional advice or services. You should seek specific advice of the relevant professional(s) for these kind of services. This material or information is not intended to be relied upon as the sole basis for any decision which may affect you or your business. Before making any decision or taking any action that might affect your personal finances or business, you should consult a qualified professional adviser.

No entity in the Deloitte Network shall be responsible for any loss whatsoever sustained by any person or entity by reason of access to, use of or reliance on, this material. By using this material or any information contained in it, the user accepts this entire notice and terms of use.