

Global Tax Update

India

Deloitte Tohmatsu Tax Co.

November 2020

Important Tax and Regulatory - updates

1. Guidelines issued for compulsory selection of returns for audit, conduct

The Central Board of Direct Taxes (CBDT) has issued guidelines laying down the parameters for compulsory selection of returns for complete audit and its conduct, for financial year 2020-21. For more details on the guidelines, please refer this link.

<https://www2.deloitte.com/content/dam/Deloitte/in/Documents/tax/Global%20Business%20Tax%20Alert/in-tax-gbt-alert-guidelines-issued-for-compulsory-selection-of-returns-for-audit-conduct-noexp.pdf>

2. Expansion of coverage of faceless proceedings under the income-tax law

The government has introduced 'The Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Bill, 2020' which, inter alia, lays down the faceless tax assessment/ tax audit procedure and expands the coverage of faceless procedure to various other proceedings under the income-tax law.

The government on 13 August 2020, launched 'Transparent Taxation - Honouring the Honest' platform¹. The main features of the platform are faceless assessment; faceless appeal; and the Taxpayers' Charter.

Thereafter, the CBDT issued notifications² to align the 'E-assessment Scheme 2019', with the new 'Transparent Taxation - Honouring the Honest' platform (including renaming the 'E-assessment Scheme 2019' as 'Faceless Assessment Scheme 2019'). Further, the CBDT also issued orders to reconstitute and notify the income-tax authorities' jurisdiction under the Faceless Assessment Scheme 2019, etc.

The government has now introduced the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Bill, 2020 (Bill) on 18 September 2020 in Lok Sabha (passed by the Lok Sabha on 19 September 2020) to, inter alia, incorporate the faceless assessment scheme under the Indian domestic tax law provisions itself. Further, to bring efficiency, transparency and accountability, the scope of 'Faceless Proceedings' has been expanded to various other proceedings. Key highlights have been provided in the link below.

<https://www2.deloitte.com/content/dam/Deloitte/in/Documents/tax/Global%20Business%20Tax%20Alert/in-tax-gbt-alert-expansion-of-coverage-of-faceless-proceedings-under-the-income-tax-law-noexp.pdf>

3. CBDT notifies Faceless Appeal Scheme, 2020

The Central Board of Direct Taxes has issued notifications dated 25 September 2020, to notify the Faceless Appeal Scheme, 2020. Key highlights are available in the following link.

<https://www2.deloitte.com/content/dam/Deloitte/in/Documents/tax/Global%20Business%20Tax%20Alert/in-tax-gbt-alert-cbd-t-notifies-faceless-appeal-scheme-noexp.pdf>

1 <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/tax/Global%20Business%20Tax%20Alert/in-tax-gbt-alert-introduction-of-platform-for-transparent-taxation-noexp.pdf>

2 <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/tax/Global%20Business%20Tax%20Alert/in-tax-gbt-alert-amendment-to-e-assessment-scheme-noexp.pdf>

4. Decriminalisation of various compoundable offences under the Companies Act, 2013

The Parliament has passed a Bill to amend the Companies Act 2013 (2013 Act), in order to decriminalise various offences and relaxed certain provisions to facilitate doing business in India. The Bill aims to decriminalise various compoundable offences under the 2013 Act and relaxed certain provisions to facilitate doing business in India. These amendments to the 2013 Act are based on the recommendations of the Company Law Committee set up in September 2019. Key highlights can be accessed from the following link.

<https://www2.deloitte.com/content/dam/Deloitte/in/Documents/tax/Regulatory%20Alert/in-tax-regulatory-alert-decriminalisation-of-various-compoundable-offences-under-the-companies-act-noexp.pdf>

5. Foreign Direct Investment (FDI) Policy in Defence Sector

On May 16, 2020, the Government of India (GOI) announced policy reforms to fast-track investment efforts towards Atmanirbhar Bharat and enhance self reliance in defence production through the 'Make in India' initiative. The government also said that the FDI limit in defence manufacturing under automatic route will be raised from 49% to 74%.

Further, the Department for Promotion of Industry and Internal Trade of the Ministry of Commerce & Industry, GOI, issued a Press Note³ amending the Consolidated FDI Policy Circular of 2017 ('FDI Policy') on defence sector. This Press Note shall be effective from the date of the Foreign Exchange Management Act (FEMA) notification.

Highlights of the amendments in the FDI Policy as per the Press Note are summarised in the link below.

<https://www2.deloitte.com/content/dam/Deloitte/in/Documents/tax/Regulatory%20Alert/in-tax-regulatory-alert-foreign-direct-investment-policy-in-defence-sector-noexp.pdf>

Important Judgments

1. Taxpayer elects to litigate using International Arbitration route - Retrospective Taxation of Capital Gains from Indirect Transfer of Assets

The case relates to a dispute involving acquisition of Indian assets by a taxpayer in 2007 through acquisition of stake in a foreign entity. The deal resulted in acquisition by a Dutch entity, of all the shares of the foreign entity, a company incorporated in Hong Kong but tax resident in Cayman, resulting in the acquisition of control of Indian assets.

While the Indian apex court ruled the judgment in favour of the taxpayer, the Indian government moved for a retrospective change in law. The legislated change allowed India to tax such indirect transfers and effectively reversed the Supreme Court ruling by providing that the change apply retrospectively. The taxpayer then submitted a notice for international arbitration based on the India-Netherlands Investment Promotion and Protection Agreement. A Tribunal of the Permanent Court of Arbitration (PCA) in The Hague, Netherlands, issued its decision on 25 September 2020, in favour of the taxpayer.

2. Business transferred against allotment of shares under court/ Tribunal approved scheme is not taxable as slump sale

The High Court⁴ held that the transfer of business in exchange of allotment of equity shares under a scheme approved under the Companies Act is not taxable⁵ as slump sale⁶. Taxability of transfer of business undertaking in exchange of shares as slump sale has been a subject of litigation. The matter has not yet reached finality at the level of Supreme Court.

3. Tax deducted from non-taxable offshore supplies eligible for refund

The Tribunal⁷ held that when the offshore supply contracts are not liable to tax in India but taxes are withheld by Indian customers, the taxpayer is eligible for refund of the taxes withheld.

3 (2020 series) dated 17 September 2020 (the 'Press Note')

4 Areva T&D India Ltd (now known as GE T&D India Ltd) v. CIT (Tax case appeal no 673 of 2018) (Madras High Court)

5 under section 50B of the Income-tax Act, 1961.

6 Business transfer for lump sum consideration without assigning value to individual assets and liabilities is generally referred to as Slump sale for India tax purposes

7 In the case of ABB AB. v. DCIT (ITA No. 464/Bang/2018 and 2878/Bang/2019) (Bangalore Tribunal)

4. Reimbursement of secondees' salary cost is not taxable as fees for technical services

The Tribunal⁸ has rendered its decision that reimbursement of secondees' salary cost is not taxable as fees for technical services as per the Indian domestic tax law. Thus, such reimbursements are not subject to withholding tax in India. Taxability and applicability of withholding tax on reimbursement of secondees' salary cost has been the subject matter of litigation and judgments are purely based on facts. This ruling lays down the principle that if secondees are employees of the Indian company and the Indian company has paid the withholding tax as applicable on salary payments then, the reimbursement of salary cost of such secondees to the non-resident company (which only facilitates its payment in the home country) is not taxable in India.

5. No disallowance for failure to withhold tax at source from payments made to non-residents for purchases

The Delhi Tribunal rendered its decision that the domestic tax law provisions disallowing deduction on failure to withhold tax from payment made to non-resident (for purchase of raw material, components, etc.) are discriminatory when compared to similar payments made to residents. Thus, the same are not applicable as per the provisions of India-Japan tax treaty relating to non-discrimination⁹. The ruling affirms the principle that in view of non-discrimination provisions under the appropriate tax treaty, no disallowance can be made under Indian domestic tax law for failure to withhold tax while making payments to non-residents (having permanent establishment in India), when no disallowance applied for similar payments to residents.

6. Goodwill recorded on business acquisition is depreciable

The Tribunal¹⁰ rendered its decision that depreciation on goodwill recorded on business acquisition is allowable under provisions¹¹ of the Income-tax Act, 1961 (ITA). Please note that allowability of depreciation on goodwill recorded on business acquisition has been a subject matter of litigation and decisions are rendered by courts based on facts of each case. Therefore, it is important to consult the relevant tax experts before making such claims in the tax return.

⁸ Boeing India Pvt. Ltd. v. ACIT (ITA No. 9756/Del/2019) (Delhi Tribunal)

⁹ Article 24(3)

¹⁰ Geodis Overseas Pvt. Ltd. v. DCIT (ITA No. 2305/Del/2015) (Delhi Tribunal)

¹¹ Section 32 of the ITA

Newsletter Archives

To see past newsletters, please visit our website.

www.deloitte.com/jp/tax/nl/ao

Contacts

Deloitte Tohmatsu Tax Co.

International Tax and M&A India Practice

Hiroyuki Hayashi, Partner hiroyuki.hayashi@tohmatsu.co.jp

Deloitte India

Bhavik Timbadia, Partner btimbadia@deloitte.com

Pawankumar Kulkarni, Senior Manager pawankumar.kulkarni@tohmatsu.co.jp

Issued by

Deloitte Tohmatsu Tax Co.

Tokyo Office

Marunouchi Nijubashi Building, 3-2-3 Marunouchi, Chiyoda-ku, Tokyo 100-8362, Japan

Tel : +81 3 6213 3800

email : tax.cs@tohmatsu.co.jp

Corporate Info. : www.deloitte.com/jp/en/tax

Tax Services : www.deloitte.com/jp/tax/s/en

Deloitte Tohmatsu Group (Deloitte Japan) is a collective term that refers to Deloitte Tohmatsu LLC, which is the Member of Deloitte Asia Pacific Limited and of the Deloitte Network in Japan, and firms affiliated with Deloitte Tohmatsu LLC that include Deloitte Touche Tohmatsu LLC, Deloitte Tohmatsu Consulting LLC, Deloitte Tohmatsu Financial Advisory LLC, Deloitte Tohmatsu Tax Co., DT Legal Japan, and Deloitte Tohmatsu Corporate Solutions LLC. Deloitte Tohmatsu Group is known as one of the largest professional services groups in Japan. Through the firms in the Group, Deloitte Tohmatsu Group provides audit & assurance, risk advisory, consulting, financial advisory, tax, legal and related services in accordance with applicable laws and regulations. With more than 10,000 professionals in over 30 cities throughout Japan, Deloitte Tohmatsu Group serves a number of clients including multinational enterprises and major Japanese businesses. For more information, please visit the Group's website at www.deloitte.com/jp/en.

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited ("DTTL"), its global network of member firms, and their related entities (collectively, the "Deloitte organization"). DTTL (also referred to as "Deloitte Global") and each of its member firms and related entities are legally separate and independent entities, which cannot obligate or bind each other in respect of third parties. DTTL and each DTTL member firm and related entity is liable only for its own acts and omissions, and not those of each other. DTTL does not provide services to clients. Please see www.deloitte.com/about to learn more.

Deloitte Asia Pacific Limited is a company limited by guarantee and a member firm of DTTL. Members of Deloitte Asia Pacific Limited and their related entities, each of which are separate and independent legal entities, provide services from more than 100 cities across the region, including Auckland, Bangkok, Beijing, Hanoi, Hong Kong, Jakarta, Kuala Lumpur, Manila, Melbourne, Osaka, Seoul, Shanghai, Singapore, Sydney, Taipei and Tokyo.

Deloitte is a leading global provider of audit and assurance, consulting, financial advisory, risk advisory, tax and related services. Our global network of member firms and related entities in more than 150 countries and territories (collectively, the "Deloitte organization") serves four out of five Fortune Global 500® companies. Learn how Deloitte's approximately 312,000 people make an impact that matters at www.deloitte.com.

All of the contents of these materials are copyrighted by Deloitte Touche Tohmatsu Limited, its member firms, or their related entities including, but not limited to, Deloitte Tohmatsu Tax Co. (collectively, the "Deloitte Network") and may not be reprinted, duplicated, etc., without the prior written permission of the Deloitte Network under relevant copyright laws.

These materials describe only our general and current observations about a sample case in accordance with relevant tax laws and other effective authorities, and none of Deloitte Network is, by means of this publication, rendering professional advice or services. Before making any decision or taking any action that may affect your finances or your business, you should consult a qualified professional adviser. The opinions expressed in the materials represent the personal views of individual writers and do not represent the official views of Deloitte Network. No entity in the Deloitte Network shall be responsible for any loss whatsoever sustained by any person who relies on this publication..

Member of
Deloitte Touche Tohmatsu Limited

© 2020. For information, contact Deloitte Tohmatsu Tax Co.



IS 669126 / ISO 27001