

Global Tax Update

India

Deloitte Tohmatsu Tax Co.

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India Tax Update: India tax rulings and updates

1. Guarantee fees from subsidiary, taxable as income from other sources

The Kolkata Bench of the Income-tax Appellate Tribunal, based on the facts of the case, has held that guarantee fees earned from Indian subsidiary company, is taxable under the head income from other sources, as per Article 21 of the India-Finland tax treaty. The provisions of the India-Japan tax treaty are also similar to India-Finland tax treaty.

The tribunal also held that the activity of giving of guarantee was only a routine activity. It was an obligation to its subsidiary being the owner of the subsidiary. Hence, it was more likely to be a shareholders' obligation/service, instead of being a business activity. The tribunal while pronouncing the ruling noted that except its subsidiary, the taxpayer had not given bank guarantee to anybody else, which could establish that it was engaged in the business of providing bank guarantees. It was only safeguarding the business interest of a subsidiary.

Provision of guarantee by non-resident group company on behalf of Indian group companies is a common transaction. The taxability of guarantee fee has been a litigative issue. Taxpayers may want to evaluate the impact of this ruling to the specific facts of their cases.

For more details, please refer this link

[Tax alert : Guarantee fees from subsidiary, taxable as income from other sources](#) (Deloitte India website)

2. OECD releases global MAP statistics of seven years

OECD has released annual country-wise MAP statistics for the year ending December 2022. The MAP statistics has been released for 133 tax jurisdictions which practically cover the worldwide data of MAPs. In addition, OECD this year, has also released a consolidated country-wise and year-wise MAP statistics from the years ending December 2016 to December 2022.

Key highlights are as under:

- BEPS Action Plan 14 was implemented in 2016. All members jurisdictions of Inclusive Framework on BEPS had committed to the implementation of the Action 14 minimum standard, which includes timely and complete reporting of mutual agreement procedure (MAP) statistics.
- The member jurisdictions have been sharing the annual statistics of MAPs with the OECD from 2016. The OECD has been publishing such jurisdiction-wise MAP data for each year, on its website.
- On 14 November 2022, OECD published MAP statistics for the FYE 2022 and a consolidated year-wise and jurisdiction wise compilation of such statistics from 2016.
- India's MAP closures
 - **Filings:** More than 100 MAP applications are filed every year in India, with the most applications received in 2019. In 2019, the number of MAP applications were 206. During the year ending 2022, India received a total of 101 new MAP applications. On an average, around 70% of the new MAP applications are filed with three tax treaty partners i.e., the United States, Japan, and the United Kingdom. It is important to note that majority of the MAP applications filed with Japan were on transfer pricing disputes.

- **Closures:** In the last seven years, India has closed a total of 879 MAP cases³. India has been closing more than 100 MAP cases during the last four years - 144 in 2022, 194 in 2021, 182 in 2020 and 121 in 2019. On an average, 70% of cases have been closed with only three tax treaty partners, i.e., the United States, the United Kingdom and Japan. In the year ending 2022, 20 MAP cases were closed with Denmark, which was highest amongst all earlier years. India has an agreement for suspension of tax demand till the closure of MAP with the US, the UK, Sweden, Denmark, and Korea. This could be one of the reasons for the higher number of MAP application filings and closures with these countries. The year ending 2022 also saw some MAP closures with new treaty partners such as the Netherlands and South Korea. Two MAPs for transfer pricing cases were resolved with the Netherlands, while five MAPs with South Korea were closed. It is important to note that India has already closed 3 bilateral APAs with the Netherlands, but MAPs were closed for the first time in 2022. Article 9(2) condition was unilaterally relaxed by India in November 2017. That resulted in filing of MAP applications for closures, with Germany, France, Finland etc. The OECD MAP statistics highlight closures of 3 and 5 MAP cases, respectively, with Germany and France. However, these cases have been closed without treaty negotiations. This may mean that these cases were closed either by a unilateral relief or domestic remedy or due to withdrawal of the MAP application. Over the period of six years, starting from 2017, India has closed 228 MAP cases with the United States. This represents about 50% of all the MAP cases closed by India.
- **MAP pendency:** For the year ending Dec 2022, India had a total MAP application inventory of around 700 MAP cases. Out of these cases, maximum number, about 158 cases, are pending with the United States.
- **Time for processing:** For MAP applications filed prior to 2016, resolved in the year 2022, India took around 127 months and 88 months for transfer pricing and other treaty issues, respectively. For MAP applications filed post 2016, resolved in the year 2022, India took around 34.5 months each to close a MAP for transfer pricing and other issues. The average time for processing MAP applications in India is higher than the global average time for processing MAP applications.
- **Outcomes:** Of the MAP cases closed in 2022 for transfer pricing issues, 31% were closed with agreements fully eliminating double taxation, 15% were closed with agreements partially eliminating double taxation, 22% via domestic remedy and 20% were closed with no agreement. For other than transfer pricing issues, 55% were closed with the agreement fully eliminating double taxation, 36% were resolved via domestic remedy and the remaining 9% were withdrawn by the taxpayer.

Since 2015, MAPs have been pursued by taxpayers in India as an effective alternative dispute resolution mechanism. Implementation of BEPS Action-14 has given further impetus to this. Continuous monitoring by the OECD, of countries' performance on effective and timely dispute resolution, has helped streamline the legal and procedural framework of MAP resolutions in India. In a nutshell, taxpayers can evaluate and opt for MAP to resolve treaty related litigation and avoid double taxation.

For more details, please refer this link

[Tax alert: OECD releases global MAP, statistics for seven years](#) (Deloitte India Website)

3. Indian social security regime

Social security for the organized sector in India is primarily governed by the Employees' Provident Funds and, 1952 ('the EPF Act') applicable to establishments employing 20 or more individuals. The EPF Act comprises of schemes such as – Employees' Provident Funds Scheme ("EPF"); Employees' Pension Scheme ("EPS") and Employees' Deposit Linked Insurance Scheme ("EDLI"). Both the employer and the employee contribute 12% of the salary (as defined by the regulations) on a monthly basis as per the provisions of the respective schemes.

Concept of IW and SSA:

- In October 2008, the Government of India issued a notification, whereby a new category of workers viz. – 'International Workers' (IW) was mandatorily required to contribute towards the Indian social security. Therefore, all employees who fall within the definition of IWs¹ are required to become members of the scheme under the EPF Act unless they qualify as excluded employees¹.

¹ The term IW covers "foreign nationals" working in an establishment in India to which the EPF Act is applicable. However, IW coming to India with a Certificate of Coverage from any of the countries with which India has an effective bilateral Social Security Agreement are categorized as 'excluded employees' and thus are not required to contribute towards EPF in India.

- India and Japan entered into a Social Security Agreement (“SSA”) with effect from 01 October 2016, which enabled Japanese nationals coming to India for work from 01 October 2016 onwards with a valid Certificate of Coverage (COC) to claim exemption from contributing towards the Indian social security and vice versa.

Supreme Court Ruling:

- As a general principle, many establishments in India were making PF contributions only on “Basic Salary” and “Dearness Allowance” paid in India for all employees – domestic and IW alike. The Supreme Court of India passed a landmark ruling in February 2019² on what constitutes ‘basic wages’ (i.e., salary for the purposes of PF contributions) and had outlined the broad principles for determining which components of salary could be excluded from the purview of ‘basic wages’.

Current Scenario:

- With this ruling in place, the Indian corporates are seeing notices/ questions being raised by the EPF authorities as regards to the salary paid to the IWs and PF contributions being deposited for them. Given the statutory wage limit of INR 15000 per month is not applicable to IWs, the EPF authorities are demanding PF contributions on salaries paid to such IWs by their Japanese parent companies, pre-dating the India-Japan SSA period.
- The EPF authorities are demanding Indian corporates to deposit the shortfall/ balance PF contributions for IWs on Special Allowance and Maintenance Allowance paid in home country of Japanese expatriates & other such allowances like Employees share of EPF paid by the employer etc. (*this is only illustrative list, actual components may vary case to case*). Also, it has been observed that in numerous cases, IWs had already left India and withdrawn their funds, yet the show cause notices for additional contributions along with interest and damages are being issued to the Indian companies.

Way Forward:

In light of the recent trend being followed by the EPF authorities, it is suggested that the companies should:

- Review the notices received from EPF authorities and pending demands (if any);
- Ensure regular monitoring of mailboxes for any notice issued by EPF authorities;
- Carry out a health check exercise in relation to any past PF contributions to ascertain potential exposure (if any).

4. GST Taxability of secondment arrangements

Recent developments:

- Following the Supreme Court judgement in the Indian company case, the Goods and Services Tax (GST) department has been taking a position that all secondment agreements would attract provisions of GST and the Indian subsidiary (service recipient) responsible for the determination and payment of the applicable tax considering the reverse charge mechanism.
- GST department has issued notices to several companies regarding the payment of GST on their secondment agreements in this regard. It should be noted that the judgement in the case was given based on its own peculiar facts and is not applicable to all companies which have entered into secondment agreement.
- CBIC has now issued an instruction that the decision cannot be applied in all the cases and a careful consideration of the distinct factual matrix, including the terms of the contract is required to determine the GST taxability.
- However, said instruction has neither specified the parameters/factors basis which the decision should be applied nor clarified on the valuation of such services.
- HC have granted interim stay over adjudication proceedings in case of some companies.
- SC has listed an appeal in the case of certain company on the same subject on 12 March 2024.
- Favourable Rulings under Direct tax: Despite Supreme Court ruling on secondment arrangements under indirect tax, Income tax Authorities appreciative of the employer employee arrangement and have held that reimbursements should not be taxable as Fee for Technical Services.

Way Forward:

- Prudent to analyze the impact of Ruling on secondment arrangements on a case-to-case basis in view of the Instruction issued by CBIC
- Need to assess the valuation for discharge GST liability and ITC availability for past periods

² The Regional Provident Fund Commissioner (II) West Bengal vs Vivekananda Vidyamandir and Others, Civil Appeal No. 6221 of 2011

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