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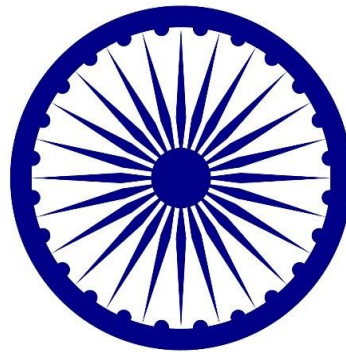
NEWSLETTER INDIA

ADDING VALUE

Issue:  
December  
2020

Latest news on compliance, tax and business  
in India

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Santhosh Tantzsch  
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### Company Law Updates

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1. Certain initiatives and continued actions taken by the Ministry of Corporate Affairs (MCA) towards the continuous efforts to provide ease of doing business in wake of the pandemic situation of Covid-19:

- In continuation to General Circular no. 11/2020 dated 24 March 2020, considering the requests received from the various stakeholders, MCA has extended relaxation pertaining to the minimum residence in India requirement of 182 days for directors for financial year 2020-21. Accordingly, via General Circular No 36/2020 dated 20 October 2020 the MCA has clarified that non-compliance of minimum residency in India for a period of at least 182 days in a year, by at least one director in every company, under section 149 of the Companies Act, 2013, shall not be treated as non-compliance for the financial year 2020-2021 as well.
- The relaxation of time line for filing Form DIR-3 KYC/DIR-3 KYC WEB for the financial year 2019-20 was limited to 31 December 2020 forming a part of the 'Companies Fresh Start Scheme, 2020' (CFSS-2020). Any director whose Form DIR-3 KYC/DIR-3 KYC WEB hasn't been filed would be deactivated shortly. The directors can reactivate their DIN by filing of the said Form DIR-3 KYC/DIR-3 KYC WEB and after payment of the applicable fees of INR 5000/-.
- MCA has issued a clarification on passing of ordinary and special resolutions by companies under the Companies Act, 2013 on account of Covid-19. The MCA has further extended the timeline to up to 30 June 2021 to allow the companies to conduct their extra ordinary general meeting (EGM) through video conferencing or other audio visual means or transact items through postal ballot in accordance with the framework provided in the MCA General Circulars No.14/2020 dated 8 April 2020, No.17/2020 dated 13 April 2020,

No.22/2020 dated 15 June 2020 and No.33/2020 dated 28 September 2020.

- MCA has notified that there is no change in the additional fee for eForms AOC-4/AOC-4 XBRL/AOC-4 CFS/AOC-4 NBFC and Form MGT-7 with respect to financial year 2019-20 with effect from 1 January 2021 as the extension was provided to companies for conducting annual general meeting (AGM) and not with respect to filing of the above mentioned eForms. Accordingly, the due date of form filing shall be computed based on the actual date of AGM or the due date/extended due date of AGM as the case may be. After 31 December 2020, additional fees shall be applicable from the actual date of AGM or due date/extended due date of AGM plus 30/60 days as the case maybe and INR 100 per day shall be charges starting from such day even if such date falls prior to 31 December 2020.
- 2. MCA has notified 17 sections of the Companies(Amendment) Act,2020 which shall come into effect from 21 December 2020
  - Amongst other sections notified under the Companies(Amendment) Act, 2020, one of the main highlights is that sections pertaining to decriminalisation of the Companies Act, 2013 have been notified. The notified sections of 6 to 10 of the Companies (Amendment Act), 2020 does away imprisonment for various offences and substitutes the imposing of fine by penalty. The amendments introduced also aim to reduce the financial penalty in respect of certain non-compliances. For example, the penalty amount for failure or delay in filing of annual return has been reduced to INR 10,000 from INR 50,000. Wherein the default continues, the maximum penalty to be imposed is restricted to INR 200,000 in case of a Company and at INR 50,000 in case of a officer in default.
  - The Companies( Amendment) Act, 2020 also provides in respect of companies that have spent an amount in excess of the requirements prescribed under the Companies Act,2013 towards corporate social responsibilities (CSR) activities (i.e., at least 2 per cent of the average net profits of the company made

during the 3 immediately preceding financial years) are now permitted to set off such excess amount in succeeding financial years as may be prescribed by the Central Government. Further, companies that are not required to spend more than INR 50,00,000 towards CSR under the provisions of the Companies Act, 2013 are now exempted from constituting a CSR committee and the Board of Directors may discharge the functions of such CSR committee.

## Company Secretarial (CS) compliances for Private Limited Company

Below is the summary of the compliances which need to be adhered to in the next quarter (January 2021 – March 2021)

Particulars	Due Date
Hold at least one Board Meeting in quarter January 2021 – 31 March 2021	31 March 2021
Form AOC-4	30 days from AGM
Form MGT-7	60 days from AGM

## Reserve Bank of India (RBI) amends its Master Directions on Know Your Customer (KYC)

Reserve Bank of India (RBI) as on 18 December 2020 issued a notification to amend the Master Direction Know Your Customer Direction dated 25 February 2016. Pursuant to this amendment, the KYC data pertaining to accounts of all legal entities opened prior to April 2021 are mandated to be uploaded onto the Central KYC Records Registry (CKYCR), pursuant to Rule 9(1A) of the Prevention of Money Laundering (Maintenance of Records) Rules, 2005.

## Arbitration and Conciliation (Amendment) Ordinance, 2020

In November, 2020 the Arbitration and Conciliation (Amendment) Ordinance, 2020 was promulgated in order to further amend the Arbitration and Conciliation Act, 1996. The new amendment imposes stay of enforcement of arbitral awards on the grounds of underlying arbitration agreement or making of the arbitral award is induced by fraud or corruption. In line of the above, a suitable amendment is made by adding a proviso to section 36 of the Arbitration and Conciliation Act, 1996.

## Employment Law Updates

1. The Aatmanirbhar Bharat 3.0 package under the Employee's Provident Fund and Miscellaneous Provisions Act, 1952 :
  - The Aatmanirbhar Bharat 3.0 package introduces a scheme to incentivize employers, registered with EPFO, for giving employment to new employees and re-employing persons from low wage bracket who lost their jobs during Covid-19 pandemic. The scheme stands commenced from 1 October 2020 and shall remain open for registration of eligible employees up to 30 June 2021. The benefit shall be available for a period of 24 months from date of registration of new employee, not later than 30 June 2023 in any case.
  - The Central Government will provide the following benefits under the scheme for the next 2 years in respect of eligible new employees:
    - a. For establishments employing up to 1000 employees (contributing EPF members with UAN) in wage month September, 2020, the employer's and employee's share of contribution as per statutory rate applicable to establishment subject to maximum of 24 per cent of wages.
    - b. For establishments employing more than 1000 employees (contributing EPF members with UAN) in wage month September 2020, employees' share of contribution as per statutory rate applicable to establishment subject to maximum of 12 per cent of wage.
  - The benefits provided under this scheme can be availed by the employers in respect of only **"eligible new employees"** falling under the wage bracket of earning less than INR 15,000/- per month. The **eligible new employees** are as given below :
    - a. Employees employed between 1 October 2020 and 30 June 2021 drawing monthly wage of less than INR 15000/-. These employees were not working in any establishment registered with the Employees' Provident Fund Organisation (EPFO) before 1 October 2020 and did not have a Universal Account Number or EPF Member account number prior to 1 October 2020. They joined employment in any establishment on or after 1 October 2020 up to

30 June 2021 and are allotted Aadhaar validated UAN.

- b. Employees already member of EPF possessing Universal Account Number (UAN) drawing monthly wage of less than INR 15000/- who made exit from employment during Covid pandemic from 1 March 2020 to 30 September 2020 and did not join employment in any EPF covered establishment up to 30 September 2020.
2. The state of Karnataka amends the Karnataka Shops and Commercial Establishments Act, 1961
    - The state government of Karnataka vide notification dated 19 October 2020, has enforced the provisions of the Karnataka Shops and Commercial Establishments (Amendment) Act, 2020.
    - One of the highlights is with respect to amending the erstwhile provision section 25 of the Karnataka Shops and Commercial Establishments Act, 1961 which prohibited the employer to require any woman to work during night shifts.
    - The recent amendment introduced under the section 25 while permitting the employment of

women during night imposes certain conditions. Some of these conditions include the employers are required to ensure consent of such women employees to be obtained in writing. Further, the employers shall provide transport facilities from the residence of the woman employee to the workplace and back free of cost and with adequate security. The employment of women employee shall be on rotation basis. Adequate number of security guards shall be posted during night shift also the establishment shall have a control room/travel desk for monitoring the movement of the vehicles arranged for pick up and drop facility for these women employees.

- It is pertinent to note that if any shops and commercial establishments do not comply with the above directions, it would lead to cancellation of certificate of registration.

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## → Tax News

### Transfer Pricing

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Guidance on the transfer pricing implications of the Covid-19 pandemic

Recently, Organisation for Economic Co-operation and Development ('OECD') has released a detailed Guidance note for the taxpayers and tax administrations, in light of the ongoing Covid-19 pandemic.

This guidance focuses on effective implementation of the arm's length principle and the OECD's existing transfer pricing guidance, on the issues that arose in the context of the Covid-19 pandemic.

In this regard, OECD identified and has provided guidance on four priority issues:

- a. comparability analysis;
- b. losses and the allocation of Covid-19 specific costs;
- c. government assistance programmes; and
- d. advance pricing agreements

On the most potent concern of the stakeholder on the issue of comparability analysis, OECD has provided necessary guidance concerning the sources of contemporaneous information that may be used to support the performance of comparability analysis, the extent of reliance that can be made on budgeted financial information to support the setting of arm's length prices, time-period for which information of uncontrolled transactions shall be used, practical approaches that can be relied upon to address

information deficiencies, use of loss-making comparables, etc.

Accordingly, the guidance shall be helpful for the taxpayers in effectively managing their transfer pricing documentation requirements for the financial periods affected by the pandemic, and the evaluation of the same by the tax administrations.

## Further extension of transfer pricing related compliance due dates

The Central Board of Direct taxes ('CBDT') vide its Notification No. 93/2020/F. No. 370142/35/2020-TPL dated 31 December 2021, has further extended time limits for various transfer pricing related compliances.

This is intended to provide some respite to the taxpayers from various challenges being faced in completing their annual transfer pricing compliances within the existing due dates, as a result of continuous Covid-19 related restrictions and its consequent impact on their business operations.

The revised timeline for undertaking various compliances has been provided below:

Particulars	Extended Due dates
Filing of Accountants Report in Form 3CEB	15 January 2021
Master File in Form 3CEAA	15 February 2021
Intimation of Master file in Form 3CEAB (where more than one entity in India)	15 January 2021
Indian Subsidiary – CbCR Intimation in Form 3CEAC for the group accounting year ended on 31 March 2020 (where the Group will file CbCR before March 2021)	31 January 2021
Indian Parent entity – Filing of detailed CbCR for accounting year ended on 31 March 2020	31 March 2021

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→ Tax News

## Indirect Tax

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### Custom and GST Updates

#### 1. Supreme Court decision on inclusion of actionable claim in the definition of 'Goods' in CGST Act:

Taxation of lottery has always been a controversial issue under the Indirect Tax Regime and the recent bench of SC ruling in case of Skill Lotto Solutions Private Ltd [2020(43)G.S.T.L.289(S.C.)] has brought this topic in limelight again.

The apex court in this case has held that inclusion of actionable claim in definition "goods" as given in Section 2(52) of CGST Act,

2017 is "not contrary to the legal meaning of goods and is neither illegal nor unconstitutional" and thereby the levy of GST on sale of Lottery has been upheld.

#### 2. Gujarat High Court upholds constitutional validity of Rule 96(10) of CGST Rules:

In case of Cosmo Films Ltd. reported at [TS-925-HC-2020(GUJ)-NT], the Hon'ble Gujarat HC has upheld the constitutional validity of Rule 96(10) as amended by Notification No.

54/2018. It was held that Advance Authorization holders are not treated unequally by denying refund of tax paid on exports, therefore the Rule does not suffer from the vice of discrimination.

### 3. Delhi Appellate Tribunal drops the demand of Service Tax on Liquidated Damages:

In case of South Eastern Coalfields Ltd. [TS-1120-CESTAT-2020-ST], the Principal Bench of Hon'ble CESTAT set aside the Service Tax demand applicable interest and penalty on the amount of Liquidated Damages / Forfeiture of EMD / Penalty recovered from the various contractors & suppliers. The said demand was raised by invoking the provisions contained in Section 66E(e) as 'Declared Service' which reads as "agreeing to an obligation or to refrain from an act or to tolerate an act or a situation or an act".

It was held that the penalty amount, forfeiture of earnest money deposit and liquidated damages received cannot be considered as "consideration" towards "tolerating an act" leviable to service tax under section 66E(e) of the Finance Act. Similar view was also upheld by Kolkata Bench of CESTAT in case of Amit Metaliks. The said judgment would also have a persuasive effect on the similar controversy ongoing under the GST regulations.

#### Important Notifications issued during the quarter

##### 1. Annual Return and Reconciliation Statement

Date Extension- Vide Notification No. 95/2020-Central Tax dated 30 December 2020, the Government has extended the due date for filing annual return and GST audit report in Form GSTR 9 and Form GSTR 9C respectively for FY 2019-2020 till 28 February 2021.

Exemption-Vide Notification No. 77/2020-Central Tax dated 15 October 2020, annual return under Section 44(1) of CGST Act, 2017 for F.Y. 2019-20 has been made optional for small taxpayers whose aggregate turnover is less than INR 20 Million.

##### 2. QRMP Scheme:

Vide Notification No 84/2020-Central Tax dated 10 November 2020, a registered person who furnishes returns in FORM GSTR-3B having an aggregate turnover of up to INR 50 Million in the preceding financial year shall be eligible for Quarterly Return Monthly Payment Scheme ('QRMP') from 1 January 2021. However, in case the aggregate turnover exceeds the prescribed limit of INR 50 million during any quarter in the current financial year, then the registered person would not be eligible for the QRMP scheme from the next quarter.

Further, the option to avail the QRMP Scheme is GSTIN wise and therefore, distinct persons as defined in Section 25 of the CGST Act i.e. different GSTINs on the same PAN have the option to avail the QRMP Scheme for one or more GSTINs.

The registered person who has opted for the QRMP Scheme would be required to pay the tax due in each of the first two months of a quarter by depositing the payable tax amount in FORM GST PMT-06 by the 25th day of the month succeeding such month. For the purpose of making the payment, the taxpayer can opt for Fixed Sum Method or Self-Assessment method. The assessee would also have the option of uploading the details of supply invoices via Invoice Furnishing Facility ('IFF') in order to enable the customer to view the said supply invoices in their GSTR 2A for taking ITC.

##### 3. Amendments in CGST Rules:

Vide Notification No. 94/2020-Central Tax (Rate) dated 22 December 2020, the Government has amended the CGST Rules, 2017 as follows:

- **Rule 36(4):** Restriction to claim ITC on account of unmatched invoices has been further reduced from 10 per cent to 5 per cent w.e.f. 1 January 2021.
- **Restriction on filing of GSTR-01:** In case a registered person has failed to furnish GSTR-3B for two preceding months/tax period, he shall not be allowed to file GSTR-01 w.e.f. 22 December 2020.
- **Restriction to utilize ITC available in electronic credit ledger:** As per new Rule 86B, the claim of credit has been restricted to 99 percent of the output tax liability where the value of taxable supplies other than exempt supply and zero rated supply in a month exceeds INR 5 Million. However, the same does not apply specified assesses such as persons paying Income Tax/ claiming GST refund exceeding specified limits.
- **Suspension of Registration:** Where a Proper Officer has reasons to believe that the registration of a person is liable to be cancelled or returns furnished by the taxpayer show significant difference or anomalies resulting into contravention of GST Act or Rules, the GST registration of such taxpayer shall be suspended. The intimation of such suspension and notice of cancellation shall be intimated in

Form GST-REG-31. Further, during the period of such suspension, no GST Refund shall be granted to such registered person. This amendment shall come into effect from 22 December 2020.

– **Cancellation of Registration:** In following cases, the registration of the taxpayer shall be cancelled:

- a. Where the taxpayer has availed ITC in violation of the provisions of Section 16 or rules made thereunder;
- b. Where the outward supplies declared in GSTR-01 for one or more tax period exceeds outward supplies declared in GSTR-3B
- c. Where the taxpayer violates the provision newly inserted in Rule 86B (restriction to utilize ITC available in electronic credit ledger as discussed above).

This amendment shall come into effect from 22 December 2020.

– **E-way Bill Provisions:** Validity period of e-way bill has been amended. The details are given in the table below:

Sr. No	Distance	Validity Period
1	Up to 200 km (earlier 100 km)	One day in cases other than over dimensional cargo or multimodal shipment in which at least one leg involves transport by ship.
2	For every 200 km (earlier 100 km) or part thereof thereafter	One additional day in cases other than over dimensional cargo or multimodal shipment in which at least one leg involves transport by ship.

**4. Certain amendments of CGST Act shall come into force from 1 January 2020 | Finance Act, 2020:**

Vide Notification 92/2020- Central Tax dated 22 December 2020, the CBIC notified 1 January 2020 as the date from which certain amendments in the CGST Act, 2017 shall come into force. These amendments include:

- a. Section 16(4) – Time limit to claim ITC on invoices/debit notes raised during the year was prescribed under this section. This

provision has been amended to delink the date of issuance of debit note from the date of issuance of related invoice.

- b. Scope of criminal offences prescribed under Section 132 expanded to include not only those who have committed the offence but also those who cause to commit and retains the benefit arising out of such offense.

## 5. Notifications related to E-Invoicing

Vide Notification 88/2020- Central Tax dated 10 November 2020, the liability to mandatorily generate E-Invoice would be applicable to taxpayers having turnover above INR 1 Billion in the last financial year. Earlier, Vide 61/2020- Central Tax dated 30 July 2020, generation of E-Invoice was made mandatory from 1 October 2020 for taxpayers having turnover above INR 5 Billion in the last financial year.

## 6. Notifications related to monthly/ quarterly compliances under GST

Vide Notification 83/2020-Central Tax dated 10 November 2020, for registered persons required to file monthly return, the outward supply details are to be furnished in Form GSTR-1 for further periods from October 2020 to March 2021 by 11<sup>th</sup> Day of subsequent month. Further, for registered persons required to furnish return every quarter, the date has been extended till 13<sup>th</sup> Day of month succeeding the tax period.

## 7. HSN digit on Tax Invoice:

Vide Notification 78/2020-Central Tax dated 15 October 2020, w.e.f. 1 April 2021, taxpayers having aggregate turnover up to INR 50 Million in the preceding Financial Year will be required to mention HSN Code up to 4 digits on the tax invoice (not required in case supply is made to unregistered person). Similarly, for taxpayers having turnover more than INR 50 Million, HSN Code up to 6 digits will be required to be mentioned. This would require a major change in the accounting systems/ product masters.

Customs and Foreign trade policy related developments

## 1. Special measures to facilitate MSME for AEO T1 & T2

In line with Prime Minister's Aatma Nirbhar Bharat Abhiyan to support MSMEs in Covid-19



pandemic, the Central Board of Indirect Taxes and Customs (CBIC) has decided to facilitate MSMEs while applying for AEO accreditation by further relaxing the current accreditation process. The detailed process can be referred to in Circular 54/2020-Customs dated 15 December 2020.

The relaxations shall be applicable to only those applicants who have a valid MSME Certificate from the line- Ministry.

## 2. Faceless Assessment- Further clarifications on the issues raised by stakeholders:

Vide Circular No 55/2020- Customs dated 17 December 2020, CBIC has provided further clarification with respect to various subjects in order to enhance the efficiency of the Faceless Assessment Process. The circular provides further clarifications on the below mentioned subjects:

- Re-assessment in accordance with the Principles of Natural Justice;
- Complete description of imported goods;
- Document codes for regular documents to be uploaded in e-Sanchit;
- Enhancement in the monetary limit for assessment by the Appraising Officers;
- Assessments in respect of Liquid Bulk Cargo.

## 3. Linking/Registration of IECs in the new revamped DGFT Online environment

Directorate General of Foreign Trade ('DGFT') is planning to introduce various revamped DGFT services with the objective of providing paperless, digital, efficient and transparent services to the exporters and importers, and to further the overall goal of Trade Facilitation and Digital India. The platform would be accessible through the existing website: <https://dgft.gov.in>.

The online processes relating to entire lifecycle of Advance Authorisation, EPCG & DFIA including their paperless Exports Obligation Discharge (EODC) shall be rolled out

soon. In addition to these processes, Norms Fixation, Free Sale & Commerce Certificate, Steel Import Monitoring System (SIMS), Import Licencing and some other processes shall also be rolled out soon. In relation to this proposed roll-out, the DGFT, vide Trade Notice 33/2020-21 dated 28 October 2020 has prescribed the process of registering on the new revamped DGFT portal.

## 4. Clarification regarding job-work process under customs bonded warehouse

In Circular No. 48/2020-Cus dated 27 October 2020, it was clarified that a unit operating under Section 65 of the Customs Act, 1962 (a customs bonded warehouse carrying out manufacturing and other operations) would be allowed to send the goods for undertaking the job-work process outside the unit subject to conditions notified therein. Further, it was also clarified that said unit can also undertake the job-work activity for other units.

## 5. Press Release on RoDTEP:

The Government of India has issued a press release dated 31 December 2020 to roll out the scheme of Remission of Duties and Taxes on Exported Products ('RoDTEP') for export of goods w.e.f. 1 January 2020. The rates of duty remission would be notified shortly by the Department of Commerce. These rates shall also be applicable w.e.f. 1 January 2020 irrespective of the date of the Notification on the eligible goods provided that at the time of export, the exporter shall declare the intention to avail such benefit in the shipping bill or bill of export.

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→ Tax News

## Direct and International Taxation

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### Further Extension of time limits under Income Tax Act, 1961 ("ITA") for Financial Year ("FY") 2019-20

Considering the problems faced by the taxpayers due to the outbreak of Covid-19, Ministry of Finance further extended the time limit for tax compliances and declaration under Direct Tax Dispute Settlement ("VsV") Scheme. Relevant extended due dates, yet to expire, are as below:

Particulars	Earlier due date	Revised due date
Income-tax return for companies	31 January 2021	<b>15 February 2021</b>
Declaration under VsV Scheme	31 December 2020	<b>31 January 2021*</b>

\*Date for payment without additional amount under the VsV Scheme was already extended to 31 March 2021 vide Notification S.O. 3847(E) dated 27 October 2020

### Clarifications issued on VsV Scheme

The Indian Government had introduced VsV Scheme to reduce pending income tax litigation (settle disputes). While the VsV Scheme generated a lot of interest amongst the taxpayers, there were doubts regarding its implementation. The Central Board of Direct Taxes ("CBDT") had earlier issued a Circular providing clarifications in the form of Frequently Asked Questions ('FAQ'). Another set of FAQs have been recently released by the CBDT vide Circular No. 21/2020 dated 4 December 2020. The latest Circular contains 34 additional FAQs on issues related to scope/eligibility, computation of tax payable, procedure and consequences when taxpayer opts for settlement under VsV Scheme.

LTC Cash Voucher Scheme ("Scheme") extended to Non-Central Government ("Non-CG") employees

Due to Covid-19 pandemic, many employees are not able to avail Leave Travel Concession ("LTC"). On 12 October 2020, with a view to boost consumption expenditure, Government of India

allowed payment of cash allowance against LTC eligibility to central government employees. Later on, the scheme was also extended to private sector employees. Certain key conditions for income-tax exemption under the scheme are as follows:

- Maximum amount of LTC fare is INR 36,000 per person (Round Trip).
- Employee spends (upto 31 March 2021) a sum equal to three times of the value of deemed LTC fare on purchase of goods / services which carry a GST rate of not less than 12 per cent.
- Employee who spends less than three times of deemed LTC fare on specified expenditure shall not be entitled to receive full amount of deemed LTC fare and related income-tax exemption, which shall be reduced proportionately.

The employee exercising option to pay income-tax at concessional rate under section 115BAC of ITA shall not be entitled to claim income-tax exemption.

No Interest liability on non-resident recipient due to short deduction of taxes by Indian payer

The tax authorities had made addition to the income of Texas Instruments Incorporated (Resident in USA) ("Texas Instruments") and raised demand in respect of such additional income along with interest under section 234B of ITA for default in making advance tax payment. The Karnataka High Court observed that in respect of non-residents, section 195 of ITA puts an obligation on the payer to deduct income-tax at source at the rates in force and thus, the entire tax is to be deducted at source. High Court upheld that since liability to withhold tax was that of the payer, the question of payment of advance tax would not arise, resulting in no interest for default in payment of advance tax.

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## International Tax Updates

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### UN Tax Committee approves Art. 12B on 'Automated Digital services' with Commentary

The UN Committee on International Co-operation in Tax Matters (UN Sub-Committee) introduced a new Article 12B on "Automated Digital Services" earlier in June 2020. The Sub-Committee in November 2020 informed that it would finalise the text of the Article and Commentary at the 22<sup>nd</sup> session in April next year.

By virtue of proposing to insert Article 12B, the UN Committee advocates gross basis taxation of Income from automated digital services at specified percentages (to be agreed through bilateral negotiations). Certain salient features of automated digital services are as follows:

- The term "income from automated digital services" is proposed to mean any payment in consideration for service provided on internet or an electronic network requiring minimal human involvement from the service provider.
- Payments qualifying as 'fees for technical services' and 'royalties' are specifically excluded under Article 12A.
- Residents of a Contracting State, carrying on business through a permanent establishment situated in that other State are sought to be excluded from gross basis taxation. The proposed Article 12B gives the beneficial owner an option to be taxed on its qualified profits for a net basis annual taxation, as against the withholding mechanism. This proposal is put forth as a simpler alternative to the ongoing discussions on reaching a consensus for taxation of digital economy.

### Germany ratifies the Multilateral Instrument ("MLI")

Germany ratified the MLI and published it in its Federal Law Gazette on 27 November 2020. Interestingly, Germany significantly reduced the number of Covered Tax Agreements ("CTA") from **35** as notified in the Provisional List published at the time of signing the MLI to **14** in the revised list of CTAs at the time of ratification. Countries like Bulgaria, China, Denmark, Finland, Ireland, Israel, Korea, Mauritius, Netherlands, New Zealand,

Russia were excluded in the revised list of CTA. India was not ratified as a CTA in the provisional list itself. On 18 December 2020, Germany deposited the Instrument of Ratification with the Organisation for Economic Co-operation and Development ("OECD") and is set to enter into force on 1 April 2021.

### Project office in India, carrying on preparatory activities, does not constitute a Fixed Place ("PE")

A company incorporated in South Korea was awarded a "turnkey" contract by a company incorporated in India for carrying out surveys, design, engineering, procurement, fabrication, installation and modification at existing facilities, start-up and commissioning of entire facilities.

The non-resident company set up a project office in Mumbai and filed its tax return in India for FY 2006-07, showing nil profit and claimed a loss of INR 2.35 million for expenses incurred in relation to the activities carried out by it in India.

Supreme court held that the conditions precedent for applicability of Article 5 of DTAA and ascertainment of PE is that there should be an establishment through which the enterprise wholly or partly carries on its business. Further, the profits of the enterprise are taxable only where the said enterprise carries on its core business through a PE which was not the case here. The project office was held to be falling under the exclusion clause of PE, since it was considered an auxiliary office, meant to act as a liaison office between the non-resident company and Indian company.

### Danish Tax Council: Employee 'working from home' - PE or not a PE?

Danish Tax Council holds that a Danish national working from his home in Denmark due to Covid-19 as Head of Sales and Business Development constitutes a PE of his German employer in Denmark.

Danish Tax Agency relied on OECD commentary on PE to arrive at its decision as under:

- home office constitutes a 'place of business' that is fixed as employee regularly carries out business activities of the enterprise from it and the German company has no office in Denmark;

- the tenure of employment is not limited but long-term in nature;
- the employee performs leading and supporting functions within sales and business development, which is considered as a core task for the company

## Tax Challenges arising from Digitalisation - OECD's report on Pillars one and two Blueprint

OECD/G20 Inclusive Framework on BEPS (Inclusive Framework) has been assigned the task of developing a solution to the tax challenges of the digitalization of the economy. On 12 October 2020, the Inclusive Framework released a package consisting of the Report on the Pillar One Blueprint and the Report on the Pillar Two Blueprint.

The Inclusive Framework welcomes stakeholder input on the Blueprints and will hold public consultation meetings on them in January 2021. In particular, comments are invited on inter-alia the following aspects of the Blueprint:

- Activity test related to Automated Digital Services and Consumer facing business
- The design of a specific amount revenue threshold (in addition to a global revenue threshold) to exclude large corporations that have a de minimis amount of foreign source in-scope revenue
- Development of a nexus/source rules

Reimbursement to Seconded employees not considered as 'Fees for Technical Services('FTS')

Abbey Business Services India Private Limited ("Abbey India") is a group company of Abbey National Plc, UK ("ANP"). ANP seconded its employees to Abbey India. In this regard, Abbey India made certain payments (towards salary and hotel and traveling expenses) to ANP. Out of the above 'salary' has been subject to withholding tax in India. Revenue Authorities sought to tax the balance amount as FTS in India.

Basis certain factors such as place of work, right to instruct, control and supervision, applicable rules and guidelines, it was held that Abbey India has to be treated as 'employer' of seconded employees.

The Karnataka High Court observed that there is no obligation in law for deduction of tax at source on payments made for reimbursement of costs incurred by a non-resident enterprise and therefore, concluded that the amount paid by Abbey India was not to suffer tax deducted at source under section 195 of ITA.

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## → Accounting/Audit News

### Business Process Outsourcing

Shubhank Zanwar  
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#### Definition of MSME

In accordance with the provision of Micro, Small and Medium Enterprises Development (MSMED) Act, 2006 the Micro, Small and Medium Enterprises (MSME) are defined according to their annual revenue (i.e. sales) of business. As approved by the Union Cabinet:

- a Micro enterprise, where the investment in Plant and Machinery or Equipment does not exceed INR 10 Million and turnover does not exceed INR 5 Million;

- a Small enterprise, where the investment in Plant and Machinery or Equipment does not exceed INR 100 Million and turnover does not exceed INR 500 Million;

- Medium enterprise, where the investment in Plant and Machinery or Equipment does not exceed INR 500 Million and turnover does not exceed INR 2.5 Billion

#### Benefits to MSMEs

- Timely payments by Customers;
- Interest on delayed payments;

- Reference to Micro and Small Enterprises Facilitation Council for recovery of Interest;
- Under GST Act, the Small and Medium Enterprises have been accorded with a lot of benefits in terms of compliance reliefs given in the form of threshold exemptions, Composition levy schemes, the Quarterly filing of the GST returns to mention a few.

Apart from the above, there are various promotional, upgradation, credit and financial support related schemes from government for MSMEs.

#### Furnishing of MSME Returns:

Companies who get their supplies of goods or services from Micro or Small Enterprises, are required to furnish half yearly return (Form MSME-1) with the registrar in respect of outstanding payments to Micro or Small Enterprises.

#### Accounting System For Companies:

Now that companies are required to extract data related to delayed payments to Micro or Small Enterprises, companies need to have some process in place to identify such transactions. For this, companies can create separate group under "Sundry Creditors - Expenses" for all the suppliers who are registered under MSME Act. Companies can even prepare "Vendor Creation Forms" for all new vendors. Such form should request for MSME registration details along with other basic details.

Treatment of "Provision for interest" is yet another challenge due to MSME Act. As prescribed in the Act, interest has to be paid, if a company fails to make payment within agreed period of time or 45 days, whichever is earlier. Some are of the view that though the supplier may not demand for interest payment after payment of invoice value but provision for such interest payable should be made in the books of accounts. There can be contrary views in this regards as

some may argue that MSMEs may not take legal action against defaulting company and lose such customers for want of interest amount. Therefore, provision for interest may or may not be created in the books of accounts.

#### MSME disclosure requirements in Annual statement of accounts

Any company who is required to get its annual accounts audited under any law for the time being in force, such company shall mention whether the company had any transaction with Micro & Small Enterprises, the principal amount and the interest due thereon remaining unpaid to such suppliers as at the end of each accounting year as an additional information in his annual statement of accounts;

As interest provisions are not applicable to Medium Enterprises, disclosure requirements are also not required.

#### Dis-allowance under Income Tax Act, 1961

Notwithstanding anything contained in the Income-tax Act, 1961, the amount of interest payable or paid by any company, under or in accordance with the provisions of MSME Act, 2006, shall not, for the purposes of computation of income under the Income-tax Act, 1961, be allowed as deduction;

The same also needs to be reported in Form 3CD of Tax audit report.

#### Contact for further information



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## → Country Introduction: Rödl & Partner in Poland

In Poland we have been open for business since 1992. In that market Rödl & Partner enjoys the reputation of a leader in foreign investment advice.

We advise businesses from all sectors and industries. Our German standards translate into reliability and quality of our services which we provide in Polish, German and English, and to some extent also in Spanish, French and Italian.

We are providing integrated professional services in the area of [Audit](#), [Business Process Outsourcing](#), [Tax & Law advisory](#), [Business Consulting](#) and [Cybersecurity](#).



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### Hot Topics

E-commerce	Legal Compliance	BPO digitalisation (R-flow)	Post-Covid support	Greenfield/ renewable energies
<ul style="list-style-type: none"> <li>- Tax &amp; legal &amp; BPO &amp; cybersecurity support in going online</li> </ul>	<ul style="list-style-type: none"> <li>- Whistleblowing (procedures, platform, tools, consulting)</li> <li>- Compliance in a broader context (e.g. MDR)</li> </ul>	<ul style="list-style-type: none"> <li>- International impact</li> <li>- Revolution in outsourcing “digitalize the paper!”</li> </ul>	<ul style="list-style-type: none"> <li>- Restructuring</li> <li>- Tax optimisation</li> <li>- “Reconstruction Fund” (Fundusz odbudowy)</li> <li>- M&amp;A</li> </ul>	<ul style="list-style-type: none"> <li>- Baltic countries</li> <li>- Increasing demand</li> </ul>

M&A	Excise and additional customs duty	Labour law	Reliefs	EU Funds
<ul style="list-style-type: none"> <li>- Due diligence</li> <li>- Transaction Services</li> <li>- Valuation Services</li> <li>- Reorganization Services</li> </ul>	<ul style="list-style-type: none"> <li>- Brexit,</li> <li>- excise duty on e-cigarettes and novelty products</li> </ul>	<ul style="list-style-type: none"> <li>- switch to home office,</li> <li>- restructuring,</li> <li>- individual and collective redundancies</li> </ul>	<ul style="list-style-type: none"> <li>- R&amp;D relief,</li> <li>- 50% tax-deductible costs for employees,</li> <li>- IP box,</li> <li>- robotization relief</li> </ul>	<ul style="list-style-type: none"> <li>- support with finding opportunities, application and selection, management and payment</li> </ul>

## Services

Audit	BPO	Tax	Legal	Cybersecurity & Newtech
<ul style="list-style-type: none"> <li>- Audit of annual and consolidated financial statements, interim reviews</li> <li>- Expert opinions, special audits and assurance services</li> <li>- Financial and performance audits</li> <li>- International accounting, reporting</li> </ul>	<ul style="list-style-type: none"> <li>- Financial accounting</li> <li>- Year-end closing</li> <li>- Regular accounting advice</li> <li>- Tax returns</li> <li>- Payroll accounting</li> </ul>	<ul style="list-style-type: none"> <li>- PIT</li> <li>- CIT</li> <li>- Tax compliance</li> <li>- Day-to-day tax advice</li> <li>- Property Taxes</li> <li>- Turnover taxes</li> <li>- Transfer pricing</li> <li>- Customs &amp; excise</li> <li>- Transaction advice, Due diligence and tax reviews</li> <li>- Special Economic Zones</li> <li>- Tax reliefs</li> <li>- International taxation</li> </ul>	<ul style="list-style-type: none"> <li>- Day-to-day legal advice</li> <li>- Transaction advice</li> <li>- Restructuring and transformations</li> <li>- Due diligence and legal review</li> <li>- Real estate and investments</li> <li>- Special economic zones</li> <li>- Renewable energy</li> <li>- Individual and collective labour law</li> <li>- Court and arbitration proceedings</li> <li>- Intellectual and industrial property law</li> </ul>	<ul style="list-style-type: none"> <li>- Application audit</li> <li>- Network and infrastructure audits</li> <li>- Social engineering testing</li> <li>- Training - IT security</li> <li>- Information security management</li> <li>- Risk and incident management</li> <li>- Penetration tests</li> <li>- GDPR (compliance audit, implementation, training, DPO)</li> <li>- Blockchain</li> </ul>

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