Financial services insight: Tax and regulatory updates

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Volume V

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Preface

The first quarter of the financial year 2020-2021 (FY 21) has been one of the most difficult and challenging phases of the Indian economy. India has seen one of the longest lockdowns in the world resulting in an unprecedented impact, both socially and economically, on people. The COVID-19 pandemic has led to the worst economic crisis of the century. Businesses are witnessing issues related to demand, supply, market and liquidity.

Considering the impact of COVID-19 on businesses and the economy as a whole, the Reserve Bank of India (RBI) provided a six-month moratorium on payments of equated monthly installment (EMI) and repayment of loans by individual borrowers, micro, small and medium enterprises (MSMEs) and corporates to commercial banks and other financial institutions.

To address the slowdown in the Indian economy due to COVID-19, Government of India (GOI) in May 2020 announced a special economic package to the tune of over INR 20 lakh crore, which is equivalent to almost 10% of the Gross Domestic Product (GDP) of India and with special emphasis on the need for going vocal for local, a call for Atmanairbhar Bharat, i.e., self-reliant India. This has assumed increased significance in the current scenario where there is a notable trend in global supply chains moving away from China.

Apart from making India self-reliant, the package also laid adequate emphasis on initiating structural reforms in the country, including making India a better investment destination than before, reforms around land and labour laws, facilitating in ease of doing business. A slew of path-breaking reforms in the crucial agriculture, mining and manufacturing sectors were all geared up towards ensuring that the economic growth becomes more entrenched and durable in nature.

As the Indian economy slowly adapts to the new normal and 'unlocks', businesses across the country have resumed and are returning to pre-COVID levels with some business seeing rising demand for goods and services. This pandemic has seen a huge change in the behavioural pattern of consumer, resulting in several businesses to re-plot, adjust and amend their operating models to adopt to the new normal. Themes, such as digitalisation, cyber security, health insurance for all, work from home, would shape the financial services industry going forward. Post April 2020, the foreign inflows in the Indian economy have seen an upward trend thus demonstrating the confidence of global investors in the Indian economy.

With the objective of making India a self-reliant economy, reforms across sectors are the need of the hour. For India, the timing of introducing reforms would be a key essence as global business across the world are making adjustment/ modification/diversion in their operating models, supply chain, distribution channels, etc., thus creating lot of opportunity for wealth creation in India. Financial sector being a pivot player in the Indian economy, would be closely monitoring the reforms/ policies of the government or the concerned regulator along with the COVID-19 situation in the country and the demand and supply pattern of the consumers.

*Note: The updates in this publication are from April-June 2020.

Direct tax updates

Central Board of Direct Taxes (CBDT) issues clarification regarding issuance of certificates for lower rate/nil deduction/collection of tax deduction at source (TDS)/tax collection at source (TCS)

(Circular No. F.No. 275/25/2020-IT(B) dated 9 April 2020)

In continuation to the order issued by the CBDT under Section 119 of the Income-tax Act, 1961 (Act) dated 31 March 2020 and 3 April 2020, pertaining to issue of certificates for lower rate/nil deduction/collection of TDS/TCS, the CBDT has issued the following clarifications:

- **Validity period of lower/nil deduction/collection of certificates:** The certificate shall be valid for the period for which they were issued for Financial Year 2019-20 (FY 20). Further, this period shall be extended from 1 April 2020 to 30 June 2020 subject to the conditions mentioned in the order dated 31 March 2020.
- **Threshold/transaction limit of lower/nil deduction/ collection of certificates:** The threshold/transaction limit mentioned in the certificates issued for FY 20 will be taken fresh for the period from 1 April 2020 to 30 June 2020. Further, the amount of threshold limit shall be the same as assigned for FY 20.
- **Application for a new/different tax deduction and collection account number (TAN) for FY 21:** In case, the payee had a lower/nil deduction/collection certificate for FY 20 and an application has been made for Financial Year 2020-21 (FY 21) for a new/different TAN, the payee shall make a fresh application as per the procedures mentioned in the order dated 31 March 2020.
- **Revision of rates mentioned in lower/nil deduction/ collection certificates of FY 20:** In case, the payee wants revision of the rates mentioned in the certificate for FY 20 in view of impact of the COVID-19 pandemic on its business, the payee shall make a fresh application as per the procedures mentioned in the order dated 31 March 2020.

Our view

Based on several representations and queries raised by the stakeholders, the CBDT has addressed certain issues through these clarifications. This will help in reducing ambiguities of taxpayers and provide relaxations in terms of procedural difficulties.

CBDT issues clarification regarding short deduction/ collection of TDS/TCS due to increase in the surcharge rates as per Finance (No.2) Act, 2019

(Notification No. 8 of 2020 dated 13 April 2020)

The Finance (No. 2) Act 2019 enhanced the surcharge rates applicable from 1 April 2019. However, the Finance (No. 2) Bill, 2019 was presented in the Lok Sabha on 5 July 2019 and was passed by both houses of the Parliament and received the President's assent on 1 August 2019. In this regard, the tax deductors and tax collectors (liable to deduct and collect tax at source, respectively) were held to be assessee-in-default for short deduction of TDS and short collection of TCS till the time the Finance Bill was passed.

In this regard, it has been clarified that a person responsible for deduction/collection of tax under any provisions of the Act will not be considered an assessee-in-default in respect of transactions where:

- Such transaction has been completed and entire payment has been made to the deductee/payee on or before 5 July 2019 and there is no subsequent transaction between the deductor/collector and the deductee/payee in FY 20 from which the shortfall of tax could have been deducted/ collected by the deductor/collector;
- TDS/TCS has been deducted/collected by such deductor/ collector on such sum as per the rates in force as per the provisions prior to the enactment of the Act;
- Such tax deducted/collected has been deposited in the account of central government by the deductor/collector on or before the due date of depositing the same;
- TDS/TCS statement has been furnished by such person on before the due date of filing of the said statement.

However, if the person fails to fulfill any of the conditions as mentioned above, such a person will, with respect to short deduction/collection, not be eligible for benefit provided.

Further, if the deductor/collector has deducted/collected shortfall of tax after 5 July 2019 from the transaction(s) made subsequently after the said date, interest, if any, for delay in deduction/collection of such tax shall not be levied.

Our view

This circular provides relief to the deductor/collector in terms of the interest and penalty to be levied under the provisions of the Act on account of short deduction of TDS/TCS due to the increase in the surcharge rates, subject to the fulfillment of certain conditions specified above. However, it is pertinent to note that the said relief provided is upto the date on which the said Finance (No 2), 2019 budget was presented in the Lok Sabha i.e. 5 July 2019 and not the date on which it received the assent of the President.

CBDT defers General Anti Avoidance Rules (GAAR) and Goods and Services Tax (GST) reporting under amended tax audit form by another year amidst COVID-19 crisis

(Circular No. 10 of 2020 dated 24 April 2020)

In view of the prevailing situation due to the COVID-19 pandemic across the country and post receiving of several representations from various stakeholders, CBDT has deferred the reporting of the following clauses of the Tax Audit Report (i.e. Form 3CD) till 31 March 2021:

- **Clause 30C:** Provide information about assessee entering impermissible avoidance arrangement (i.e. GAAR); and
- **Clause 44:** Break-up reporting of total expenditure of entities registered or not registered under the GST regime in the prescribed format.

Thus, Tax Audit report issued till 31 March 2021 for any FY (including FY 20) need not contain GAAR and GST particulars.

Our view

Relaxation in compliance and reporting obligations for businesses by the tax authorities considering the COVID-19 crisis has reduced compliance burden on the taxpayers and the tax auditors.

CBDT substitutes Mutual Agreement Procedure (MAP) Rules

(Notification No. 23/2020 dated 06 May 2020[1])

The MAP is an alternative dispute resolution process under the tax treaties, under which competent authorities of two countries enter into discussions to resolve tax-related disputes. The taxpayer of the country having to bear the incidence of double taxation can apply for assistance of competent authorities under MAP to resolve the issue of such double taxation.

The CBDT has brought certain amendments in Rule 44G of the Income-tax Rules, 1962 (the Rules) with respect to the application and procedure for giving effect to MAP. This amendment has laid down the procedure for making an application to the competent authority in India to invoke the mutual agreement procedure, in Form No. 34F.

These rules will be called Income-tax (8th Amendment) Rules, 2020 and are applicable from 6 May 2020 and apply to all MAP cases pending with the competent authority of India on 6 May 2020.

The key points of the amendment are as follows:

- The competent authority in India shall call for the relevant records and additional documents from the income-tax department to understand the actions taken by the income-tax authorities within or out of India that are not in accordance with the terms of agreement between India and the other countries or specified territories.
- The competent authority in India shall endeavour to arrive at a mutually agreeable resolution of the tax disputes, within an average time period of 24 months.
- If the resolution is arrived at, then the same shall be communicated to the taxpayer in writing. The taxpayer shall then communicate his acceptance or non-acceptance of resolution in writing to the competent authority in India within 30 days of receipt of communication. The taxpayer's acceptance of the resolution shall be accompanied by proof of withdrawal of appeal pending, if any.
- Upon acceptance of the resolution by the taxpayer, the taxpayer shall pay the tax determined by the assessing officer after giving effect to the resolution.
- Revised Form No. 34F requires details of remedy sought along with documentary evidence, if any, in addition to the taxpayer-specific information contained in the earlier form.

Further, Rule 44H of the rules dealing with action by the competent authority of India and procedure for giving effect to the decision under the agreement, has been omitted by virtue of this amendment.

Our view

MAP proceedings are increasingly becoming popular with multinational corporations (MNCs). The indicative timeframe of 24 months to resolve dispute under MAP is a highlight of the new rules that would encourage taxpayers to hope for a speedy dispute resolution mechanism. This is also in line with the sixth batch of peer review reports released by the Organization for Economic Cooperation and Development (OECD) related to Base Erosion and Profit Sharing (BEPS) minimum standard action 14 – making dispute resolution mechanisms more effective. While India remains embroiled in major international tax and transfer pricing cases, the new rules display the intent of the government to achieve certainty and endeavour to bring faster resolution in place of long-drawn traditional litigation process.

1. This amendment has been followed by the detailed guidance issued by the CBDT on 7 August 2020

Relief measures announced by the finance minister in the backdrop of the COVID-19 pandemic

In his nationwide address on 12 May 2020, Prime Minister Narendra Modi called for Atmanirbhar Bharat Abhiyan, which will focus on making the country self-reliant. He emphasised on the need for going vocal for local. Finance Minister Nirmala Sitharaman then shared the economic packages amounting to INR 20 lakh crore to boost several sectors adversely impacted by the pandemic. The following tax relief measures were introduced:

- Pending refunds to charitable trusts and non-corporate businesses and professions to be immediately issued
- Due date of return of income for all assessees for the financial year ended 31 March 2020 extended to 30 November 2020 and tax audit extended to 31 October 2020
- Date of assessments getting barred on 30 September 2020 extended to 31 December 2020 and those getting barred on 31 March 2021 extended to 30 September 2021
- Payment period for Vivad se Vishwas Scheme without additional amount extended to 31 December 2020
- In order to release liquidity, FM announced reduction in the rate of TDS by 25% on non-salaried payments made to residents (i.e., payment made on account of professional fees, contract, interest, rent, dividend, etc.) for the period starting 14 May 2020 up to 31 March 2021.

CBDT relaxes residency rule for individuals unable to leave India due to COVID-19 lockdown

(Circular No. 11 of 2020 dated 8 May 2020)

The CBDT has issued a circular providing relief to individuals who came to India in FY 20 for a visit and had to extend their stay in India due to the lockdown and consequent suspension of international flights in view of the COVID 19 situation.

Under the Indian tax laws, taxability of an individual is based on his or her residential status in India during the year. The residential status for a particular FY is determined based on the number of days of physical presence in India. In this regard, the CBDT received various representations highlighting the concern that the prolonged stay in India due to the lockdown could result in an individual qualifying as a resident for FY 20 instead of a non-resident or not an ordinary resident.

The relief is applicable to individuals who came to India on a visit before 22 March 2020. In case of such individuals, the CBDT has announced exclusion of a certain number of days while determining the residential status for FY 20:

- **Individuals unable to leave India before 31 March 2020:** The physical presence in India from 22 March 2020 till 31 March 2020 to be excluded.
- **Individuals quarantined in India on or after 1 March 2020:** The physical presence in India from the date of quarantine to the date of departure or till 31 March 2020 shall not be considered.
- **Individuals who have departed on evacuation flight on or before 31 March 2020:** The physical presence from 22 March 2020 till date of departure shall not be considered.

Our view

This much-awaited circular acknowledges the concerns of non-resident Indians and other foreigners who arrived in India but could not return due to the nationwide lockdown announced in view of the COVID-19 crisis. Though, the circular provides relief in the calculation of number of days for FY 20, the concern remains for determining the residential status for FY 21. The Ministry of Finance has, in an announcement, indicated that a similar clarification will be issued in due course for FY 21 based on resumption of international flights. Meanwhile, it is important for individuals to evaluate their residential status for FY 20 as per the applicable tax provisions, above clarifications and determine their tax liability in India, accordingly.

CBDT issues press release relating to reduction in rate of TDS & TCS

(Press Release dated 13 May 2020)

As part of the Atmanirbhar Bharat Abhiyan, Finance Minister on 13 May 2020 announced certain tax relief measures which inter alia includes reduction in the rate of TDS by 25% on certain non-salaried payments made to residents for the period 14 May 2020 to 31 March 2021. The said measure was intended to provide more funds at disposal for the taxpayers dealing with economic situation arising out of the pandemic.

In view of the above, CBDT, vide its press release, provided a table of the reduced rates of TDS and TCS after taking into consideration the proposal of the Finance Minister. Further, it has been clarified that the said reduction in rates of TDS or TCS shall not be applicable in cases where a higher rate of tax is deducted/collected on account of non-furnishing of PAN/ Aadhaar i.e., where taxes are required to be deducted at source at the rate of 20% under Section 206AA of the Act, the reduced rate of 15% shall not be applicable. Consequent legislative amendments under the Act shall be announced in the due course.

Our view

The said relief under the Atmanirbhar Bharat Abhiyan was intended to help people manage the cashflows and provide more liquidity in the market. However, this relief of lower TDS and TCS has not been extended to salaried individuals and payments made to non-residents.

CBDT issues clarifications in respect of prescribed electronic modes under Section 269SU of the Act

(Circular No. 12 of 2020 dated 20 May 2020)

As part of the Atmanirbhar Bharat Abhiyan, Finance Minister With an intention to promote cashless economy and digital mode of accepting payment, the CBDT had introduced Section 269SU of the Act read with Rule 119AA of the Rules which required every person carrying on business and having a sales/ turnover/gross receipts from business of more than INR 50 crore to provide facility for accepting payment in the following prescribed electronic mode:

- Debit card powered by RuPay;
- Unified Payments Interface (UPI) (BHIM-UPI);
- Unified Payments Interface Quick Response Code (UPI QR code) (BHIM-UPI QR code).

This had led to various questions from stakeholders (majorly operating on a B2B model and captive units of foreign entities) on the blanket applicability of the notification. This is because most of the B2B transaction payments are made by banking channels like RTGS/NEFT rather than by debit cards or BHIM/ UPI. Further, there are restrictions on amount and number of transactions on cards and UPI and other prescribed modes of payments. Thus, the requirement of introducing the new electronic mode creates an unnecessary burden.

In this regard, the CBDT has now clarified that Section 269SU of the Act shall not apply to a taxpayer having only B2B transactions (i.e. no transaction with retail customer/ consumer), if at least 95% of aggregate of all amounts received during the previous year, including amount received for sales, turnover or gross receipts, are by any mode other than cash.

Accordingly, the exception from the applicability of installation of prescribed modes of payments from Section 269SU is available in the following cases:

- The exception is applicable only to a specified person having only B2B transactions; and
- At least 95% of the aggregate of all amounts received during the previous year, including the amount received for sales, turnover or gross receipts, are by other than cash.

Our view

Mandating such businesses to provide the facility for accepting payments through prescribed electronic modes would cause administrative inconvenience and impose additional costs. The CBDT has issued much required clarification and this has exempted the B2B businesses, which have no transaction with retail customers, saving them from unnecessary compliance. However, a B2B entity also carrying on retail business has to implement and install the prescribed mode of payments.

CBDT notifies provisions relating remuneration to fund managers

(Notification No. 29 of 2020 dated 27 May 2020)

The CBDT notified the Income-tax (10th Amendment) Rules, 2020 to amend Rule 10V of the Rules to provide clarity on the remuneration paid to an eligible offshore investment fund manager to be considered for the purposes of Section 9A of the Act.

der to encourage the fund management activities of the offshore funds from India, a safe harbour regime for onshore management of offshore funds was introduced by way of insertion of Section 9A of the Act, provided that the presence of an eligible fund manager (EFM) in India would not constitute business connection, permanent establishment or a tax residence for the offshore funds in India, subject to fulfillment of the prescribed conditions. One of these conditions includes a minimum remuneration to be paid by the funds to its fund managers situated in India, in accordance with the mechanism prescribed under Rule 10V of the Rules.

The CBDT had issued a draft notification in December 2019 inviting comments on the manner for calculation of such a remuneration. The draft notification provided a methodology for computing the minimum remuneration which would take away the ambiguity surrounding the method to be used for the purpose of determining the arm's length prices as prescribed under the erstwhile Rule 10V of the Rules.

The CBDT has now amended the provisions of Rule 10V of the Rules, thereby providing a methodology for calculating the minimum remuneration to be paid to the EFMs under the safe harbour regime. The same has been explained as under:

Fund category	Manner of computation
Category I – FPI which has obtained such registration due to its status as an endowment fund, a sovereign wealth fund, a government, a university, an appropriately regulated entity (banks, insurers, managers, advisers etc.)	0.1% of the assets under management (AUM) of the said fund which is managed by the fund manager
In any other case	• 0.3% of the AUM of the said fund which is managed by the fund manager; or • 10% of the profits derived by the fund in excess of the specified hurdle rate from the fund management activity undertaken by the fund manager, where it is entitled only to remuneration linked to the income or profits derived by the fund; or • 50% of the management fee (fixed charge or linked to the income or profits derived by the fund from the management activity undertaken by the fund manager) received by such fund in respect of the fund management activity undertaken by the fund manager as reduced by the amount incurred towards operational expenses including distribution expenses, if any. This provision shall apply only in case the fund is making payment of management fee to any other fund manager.

In cases where the remuneration to be paid to the EFM is lower than the minimum remuneration determined in accordance with the methodology provided under Rule 10V of the Rules, the eligible funds have an option to make an application with the CBDT to approve such lower amount of remuneration to be paid to the EFM.

The CBDT has also notified the revised forms in accordance with the amended provisions under Rule 10V of the Rules:

- Form No. 3CEJA - Report from an accountant to be furnished for purpose of Section 9A regarding fulfilment of certain conditions by an eligible investment fund
- Annexure to Form No. 3CEJA – Particulars relating to fund management activity required to be furnished for the purposes of Section 9A of the Act
- Form No 3CEK - Statement to be furnished by an eligible investment fund to the assessing officer

Our view

The fund management industry has not been able to take advantage of the safe harbour provisions in Section 9A due to the requirements being too onerous or impractical for investment funds generally. The amendment to Rule 10V is another welcome step towards moving more fund managers to take advantage of the safe harbour provisions under Section 9A, which are currently grossly under-utilised. The amendment also provides for fund structures where two fund managers are appointed by the eligible fund. Replacement of the transfer pricing requirements under Rule 10V with the prescribed remuneration thresholds will also go a long way in reducing tax litigation and providing certainty to eligible funds in relation to the safe harbour provisions. However, there is also a need to liberalise certain other conditions prescribed under Section 9A of the Act to make the safe harbour regime operational in India.

CBDT notifies new Form 26AS

(Notification No. 30 of 2020 dated 28 May 2020)

Section 285BB of the Act has been introduced by the Finance Act 2020 pursuant to the deletion of Section 203AA of the Act to rationalise the provisions relating to Form 26AS. The erstwhile provisions under section 203AA of the Act read with Rule 31AB of the Rules required the tax authorities to furnish information regarding the taxes deducted and collected at source from the income of a person in Form 26AS.

However, the new section was introduced to expand the scope of Form 26AS to include annual financial statement that would include information beyond the details of taxes deducted and collected at source.

In this regard, the CBDT vide a notification deleted erstwhile Rule 31AB and a new Rule 114-I has been notified which provides for the following details/information (in addition to the details of taxes deducted and collected at source) to be furnished by the tax authorities.

- Information related to specified financial transaction
- Information related to payment of taxes
- Information related to demand/refund
- Information related to pending/completed proceedings
- Information received under an agreement referred to in Section 90 or Section 90A of the Act; or
- Information received from any other person to the extent as it may deem fit in the interest of the revenue.

The aforesaid information is required to be furnished by the tax authorities in Form 26AS within three months from the end of the month in which information is received by them as against the prescribed date of 31 July under the erstwhile provisions under Rule 31AB of the Rules.

Our view

The new Form 26AS shall seek to provide much more comprehensive information that would entail the assessee to file their return of income and assess the tax liability correctly. With all the information/details available at one place, it will also assist tax authorities doing e-assessment and have no/limited interaction with taxpayers. Tax authorities will be able to easily compare information available in Form 26AS vis-a-vis information reported by taxpayer in the return of income and any mismatch may be flagged by the systems to tax authorities.

Government extends various time limits under the Act

(Notification No. 35/2020 and Press Release dated 24 June 2020)

In view of the challenges faced by taxpayers in meeting their statutory and regulatory compliance requirements across various sectors due to the COVID-19 crisis, the Ministry of Law and Justice (Legislative department) had issued the Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 (the Ordinance) on 31 March 2020 to extend various timelines to 30 June 2020.

Considering that taxpayers continue to face difficulties due to COVID-19, the government provided further relief to taxpayers for undertaking compliances, by extending various timelines under various laws, including the Act by way of a Press Release dated 24 June 2020 followed by a notification amending the Ordinance (the Notification).

This notification and press release has now further extended the due dates of various compliance discussed as under:

Sr. No.	Compliances	Extended due date as per the Ordinance	Extended due date as per the notification and press release
1.	Time limit for filing original as well as revised income-tax returns for FY 19 (AY 2019-20)	30 June 2020	31 July 2020[2]
2.	Time limit for filing original income-tax returns for FY 20 (AY 2020-21)	-	30 November 2020
3.	Time limit for furnishing tax audit report for FY 20 (AY 2020-21)	-	31 October 2020
4.	Due date for payment of self-assessment tax for FY 20, where the tax liability is up to INR 1 lakh There will be no extension of date for the payment of self-assessment tax for the taxpayers having self-assessment tax liability exceeding INR 1 lakh. In such cases, the whole of the self-assessment tax shall be payable by the due dates specified in the Act and delayed payment would attract interest under Section 234A of the Act.		30 November 2020
5.	Due date for making various investment/payment under Chapter-VIA-B, for FY 20 (AY 2020-21) including: • Section 80C like life insurance premium, Public Provident Fund, National Savings Certificate, etc. • Section 80D for mediclaim • Section 80G for donations	30 June 2020	31 July 2020
6.	For claiming deduction from capital gains arising during FY 20 (AY 2020-21), investment/construction/purchase for claiming the rollover benefits, under Section 54 to 54GB of the Act	30 June 2020	30 September 2020
7.	Date for commencement of operation for the SEZ units (which have received necessary approval by 31 March 2020) for the purpose of claiming tax deduction under Section 10AA of the Act	30 June 2020	30 September 2020
8.	Date for furnishing of statements and issuance of certificates for TDS and TCS for the months of February 2020 or March 2020 or for the quarter ending 31 March 2020: • By the specified person in the government office • By others	30 June 2020 30 June 2020	15 July 2020 31 July 2020
9.	Date of furnishing TDS certificate (pertaining to TDS deducted on salary payments) [Form 16] for FY 20	30 June 2020	15 August 2020
10.	Date for completion or compliance of the action under 'Vivad se Vishwas' Scheme (date of furnishing of declaration, passing of order, etc.)	30 June 2020	31 December 2020
11.	Date for all the orders and notices required to be passed/issued by the authorities and various compliances under various direct taxes	31 December 2020	31 March 2021
12.	Timeline for linking Aadhaar with PAN	30 June 2020	31 March 2021

2. CBDT has vide Notification No 56/ 2020 dated 29 July 2020 has further extended the due date to 30 September 2020.

The Ordinance had reduced the rate of interest of 9% for delayed payments of taxes, levies, etc., made up to 30 June 2020. In this regard, it has been clarified that the said reduced rate of 9% shall not be applicable for payments made after 30 June 2020.

Also, it has been clarified that the old procedure for approval/registration/notification of certain entities under Sections 10(23C), 12AA, 35 and 80G of the Act would continue to be followed up to 30 September 2020.

Our view

In view of the present crisis arising due to the COVID-19 pandemic, the notification read with the press release dated 24 June 2020 shall provide relief to the taxpayers for undertaking regulatory and tax compliances. The government has displayed a bold move by extending deadlines by nine months in some cases in one go. Considering that the government is finding it difficult to mop up revenue and is falling short of collections, the government has not extended the benefit of concessional rate of interest of 9% to tax payments made after 30 June 2020.

CBDT notifies YES Bank restructuring and other class of person's under clause (XI) of the proviso to clause (x) of sub-section (2) of Section 56 of the Act i.e. class of person's to be exempt from notional taxation in hands of recipients of shares

(Notification No. 40/2020 dated 29 June 2020)

In order to exclude transactions where the consideration for transfer of shares is approved by certain authorities, the provisions of gift taxation under Section 56(2)(x) of the Act were amended by the Finance Act (No. 2), 2019 whereby the transactions prescribed by the CBDT shall be excluded.

In this regard, the CBDT vide Notification No. 96/2019 dated 11 November 2019, notified Rule 11UAC to exempt receipt of immovable property by residents of unauthorised colonies in National Capital Territory of Delhi, as part of the central government's (CG) policy to regularise ownership rights over such immovable property.

The CBDT has now amended Rule 11UAC to cover the following additional transactions:

- Receipt of unquoted shares of a company and its subsidiary and the subsidiary of such subsidiary, by the shareholder, in cases where:
  - The Tribunal, on an application moved by the central government under section 241 of the Companies Act, 2013, has suspended the board of directors of such company and has appointed new directors nominated by the central government under Section 242 of the said Act; and
  - Share of company and its subsidiary and the subsidiary of such subsidiary has been received pursuant to a resolution plan approved by the Tribunal under Section 242 of the Companies Act, 2013 after affording a reasonable opportunity of being heard to the jurisdictional principal commissioner or commissioner.

This exemption is currently applicable in case of the IL&FS group and would also be available to shareholders of any such company in respect of which similar action may be taken in future. Consequently, Rule 11UAD has been inserted to exempt the aforesaid transaction from the provisions of Section 50CA of the Act vide notification dated 30 June 2020.

- Receipt of shares of a reconstructed bank, by investor or any investor bank where such shares have been allotted under a scheme.

In this regard, the scheme has been defined to include Yes Bank Limited Reconstruction Scheme, 2020.

These Rules shall be applicable from AY 2020-21.

Our view

CBDT has made its intentions clear of keeping away the genuine transactions from the applicability of anti-abuse provisions under Section 56(2)(x) of the Act Section 50CA of the Act. Accordingly, certain approved transactions similar to that of IL&FS have been specifically exempted by CBDT. Additionally, specific exemption provided for the reconstruction scheme for YES Bank would benefit State Bank of India, ICICI Bank, Axis Bank, among others who were part of the said arrangement. However, the said exemption shall not be applicable to any other scheme of a reconstructed bank in future.

CBDT relaxes eligibility conditions under Section 9A for investment funds set-up by Category-I Foreign Portfolio Investors (FPI) under Securities and Exchange Board of India (SEBI) 2019 regulations

(Notification No. 41/2020 dated 30 June 2020)

The CBDT vide its notification No. 77 of 2017 (dated 3 August 2017) had exempted the FPIs registered as Category I and Category II under the SEBI (FPI) Regulations 2014 from fulfilling the following conditions for the purpose of taking benefit of the safe harbour regime for onshore management of the offshore funds under Section 9A of the Act:

- Requirement of minimum 25 members who are, directly or indirectly, not connected persons
- Requirement of not having any participation interest in fund exceeding 10%, either directly or indirectly, by any member of fund along with connected persons
- Requirement of having less than 50% aggregate participation interest in the fund by 10 or less members, along with their connected persons, either directly or indirectly

However, the SEBI has replaced the SEBI (FPI) Regulations 2014 with new Regulations whereby the FPIs have been re-categorised into two categories as against three categories under the erstwhile regime.

Accordingly, the CBDT vide notification has now restricted the aforesaid exemption to FPIs registered as Category I under the new SEBI (FPI) Regulations 2019.

This amendment shall be applicable with retrospective effect from the date of the issuance of new FPI Regulations, 2019 (i.e. with effect from 23 September 2019).

Our view

In view of the said notification, the benefit under the provisions of Section 9A will have to be revisited by the investment funds who were registered as Category II FPIs under the erstwhile regime and have not been re-categorised into Category I under the new FPI Regulations 2019. These FPIs would broadly include regulated funds from the non-Financial Action Task Force (FATF) jurisdictions (except Mauritius).

Key tax jurisprudence

Tiger Global International II Holdings, In re[3]

Summary

Facts

- Tiger Global International II Holdings, Tiger Global International III Holdings and Tiger Global International IV Holdings (applicants), a private company limited by shares, was set up in Mauritius with the primary objective of undertaking investment activities with the intention of earning long-term capital appreciation and investment income.
- The applicants had been granted a Category 1 Global Business Licence and were tax residents of Mauritius.
- The applicants transferred certain shares of Flipkart Private Limited (Flipkart), a Singapore Company to Fit Holdings S.A.R.L., a Luxembourg based company.
- Walmart Inc., a company incorporated in the US, undertook the transfers as part of a broader transaction involving the majority acquisition of Flipkart from several shareholders, including the applicants.
- Prior to the transfer of shares, the applicants approached the Indian tax authorities seeking a Nil tax withholding certificate.
- The authorities held that the applicants were not eligible to avail benefit under the tax treaty as the control over the decision-making of the purchase and sale of the shares did not lie with them.
- The tax authorities, accordingly, did not grant the Nil withholding tax certificate. However, the tax authorities passed an order allowing tax deduction at 6.05%, 6.92% and 8.47% to the applicants, respectively.
- The applicants filed an application before the Authority for Advance Ruling (AAR) for an advance ruling on the question that whether gains arising to the applicants (i.e. private company incorporated in Mauritius) from the sale of shares held by it in Flipkart would be chargeable to tax in India under the Act read with India-Mauritius tax treaty.
- The tax department objected to the admissibility of the application on three grounds, i.e.
  - proceedings were pending before the income-tax authority or appellate tribunal or court;
  - it involved determination of fair market value (FMV);
  - transaction or issue was designed prima facie for avoidance of tax.

Held by AAR

- The AAR rejected tax department's contentions on pendency of proceedings and determination of FMV.
- Further, the AAR examined the ownership, holding structure and the financial control of the Mauritius entities (the transferor) and held that the same was controlled by the ultimate beneficial shareholder based in the US.
- On the facts of the case, it opined that the head and brain of the Mauritius entities was situated in the USA and the Mauritius entities were only a "see-through entity" created for the purpose of availing the benefits under the India-Mauritius tax treaty.
- The AAR also held that since the transaction involved transfer of shares of a Singapore company (deriving value from India assets) by a group of Mauritius entities to a Luxembourg company, the benefit, if any, under the provisions of India-Mauritius tax treaty was not available to such a transaction.

The key considerations held by the AAR are as under:

Pendency of proceedings

- Proceedings under Section 197 of the Act get concluded on the date on which the certificates are issued by the tax department.

Transaction designed for avoidance of tax

- Although a holding-subsidiary structure might not be a conclusive proof for tax avoidance, the purpose for which the subsidiaries were set up indicates the real intention behind the structure
- To ascertain the control and management of the applicants, it is necessary to understand where the head and brain of the applicants is situated. In the present case, given the facts of the case, the AAR concluded all the strategic decisions were taken in the USA and accordingly, the control and management was situated in the USA and not Mauritius.

3. [2020] 116 taxmann.com 878 (AAR - New Delhi) APPLICATION NOS. AAR/4, 5 & 7 OF 2019

- Accordingly, the applicants were held to be a 'see through entity' to avail the benefits of India-Mauritius tax treaty and the application was rejected as the same is designed for avoidance of tax.

Indirect transfer provisions

- A tax treaty should be interpreted in good faith. Accordingly, the benefit under India-Mauritius tax treaty (both under amended as well as unamended treaty) was available to a resident of Mauritius earning capital gains from sale of shares of Indian company. However, in the present case, capital gain is arising on the sale of shares of Singapore company.
- Since exemption from capital gains tax on sale of shares of foreign company was never intended under the original or the amended tax treaty, the applicant were not entitled to claim benefit of capital gain tax exemption on the sale of shares of Singapore company.

Our view

The observations of the AAR highlight the need to examine and evaluate multi-tier structures and transactions in the light of the substance over form doctrine. It is also interesting to note the AAR's observation of non-availability of treaty benefit in case of indirect transfers. However, there have been other judicial precedents in the past, which have upheld the eligibility to claim treaty benefits in respect of indirect transfer transactions.

PILCOM vs. CIT, West Bengal (Civil Appeal 5749 of 2012)[4]

Summary

Guarantee payment made to non-resident sports associations in connection with matches played in India can be said to be earned from a source in India and hence was subject to withholding tax under special provision of the Act (i.e. Section 194E, in the instant case) stating that such rate of withholding taxes is not affected by the DTAA benefit.

4. TS-219-SC-2020

Facts

- Pak-Indo-Lanka Joint Management Committee (PILCOM the taxpayer) was a committee formed by the Cricket Control Boards/Associations of three countries (viz., Pakistan, India and Sri Lanka), for hosting/conducting the 1996 World Cup Cricket tournament.
- The taxpayer had opened two bank accounts in London and made certain payments from these bank accounts without any deduction of taxes, to various cricket control boards/ associations of the different member countries (Boards) who took part in Tournament which was held in India, Pakistan and Sri Lanka.
- The Assessing Officer (AO) in his order held that the taxpayer had failed to withhold tax from the payments made to ICC and the Boards under Section 194E of the Act. Thus, the taxpayer was required to pay the applicable withholding tax along with interest.
- Aggrieved by the order of the AO, the taxpayer filed an appeal before the Commissioner of Income-tax Appeals [CIT(A)]. On appeal, CIT(A) provided partial relief to the taxpayer by proportionately disallowing the expenses based on number of matches played in India and on which taxes were not deducted.
- Aggrieved by the order of the CIT(A), both, the taxpayer and the tax department filed appeals before the Income-tax Appellate Tribunal (ITAT).
- The ITAT upheld the ruling of the CIT(A). Additionally, ITAT held that certain payments which were considered by CIT(A) for disallowance purpose had no connection to matches played in India and thus, it held that only those payments which are 'in relation' to matches played in India and on which taxes were not deducted should be disallowed.

- Aggrieved by the order of the ITAT, both, the parties filed appeals before the High Court (HC). The HC dismissed Revenue's petition and with respect to taxpayer's appeal upheld the decision of the ITAT. The HC observed that Section 194E of the Act does not consider whether income is chargeable to tax or not. Hence, once income accrues, the withholding tax provisions shall be applied.
- Further, the HC held that obligation to withhold tax under Section 194E of the Act was not affected by the DTAA as withholding tax was not final payment of tax. Thus, irrespective of the existence of DTAA, the withholding tax obligation under Section 194E of the Act was applicable once income accrued under Section 115BBA of the Act.
- Aggrieved by the order of the HC, the taxpayer filed an appeal before the Supreme Court (SC). The taxpayer contended that the payment was for grant of privilege and had nothing to do with the matches played in India. Further, the taxpayer relied on various cases to contend that the income did not accrue in India and hence, was not subject to withholding tax.

Held

- As per Section 115BBA of the Act, amount paid to non-resident sports association or institution for game or sport played in India is liable to tax at a concessional rate of 20% (the tax rate was increased from 10%.
- Section 194E of the Act provides for withholding of tax at the rate of 10% on amounts covered under Section 115BBA of the Act.
- The SC observed that the principal issue was whether any income accrued or arose or was deemed to have been accrued or arisen to the non-resident sports associations (Associations) in India. If yes, then, whether tax was required to be withheld under Section 194E of the Act.
- About whether any income accrued or arose or was deemed to have accrued or arisen to the Associations in India:
  - The SC observed that the Associations had participated in the World Cup cricket tournament, where cricket teams of these Associations had played various matches in India.
  - Though termed as guarantee money, the payments were intricately connected with the event where various cricket teams were scheduled to play and did participate in the event.
  - Thus, the SC held that the source of income was from playing matches in India and the payments made to the Associations accrued and arose or deemed to have accrued or arisen in India.
- About whether tax was required to be withheld under Section 194E of the Act,
  - The SC held that, if guaranteed amount paid or payable to Associations was in relation to any game or sports played in India, then the income-tax calculated as per Section 115BBA(1)(b) of the Act is payable.
  - The expression 'in relation to' in Section 115BBA emphasised the connection between the game or sport played in India and the guarantee money paid or payable to the non-resident sports association. Once the connection was established, the tax liability under Section 115BBA of the Act arose.
  - The SC upheld the decision of the HC and held that withholding tax obligation under Section 194E of the Act was not affected by the DTAA.
  - The benefit of the DTAA could be pleaded by the deductee and if the case was made out, the amount would be refunded with interest.
  - Thus, the SC held that payments made to the Associations were subject to withholding tax under Section 194E of the Act.

Our view

The ruling lays down the principle that withholding tax obligation under special provision of the Act (i.e. Section 194E of the Act, in the instant case) is not affected by taxability under the DTAA. As the question of law before the SC was limited to Section 115BBA and Section 194E of the Act, the SC ruling did not discuss the provision of Section 4 of the Act which is the 'chargeable' provision under the Act. Based on the decision of SC, the cashflows arising on account of dividend income to such non-residents like foreign portfolio investors may be impacted and hence, taxpayers should consider impact of the same while making payment to non-residents.

Jayesh T Kotak vs DCIT [5]

Summary

Loan transaction between companies wherein the taxpayer held substantial interest (holding more than 10% shares) cannot be deemed as dividend under Section 2(22)(e) of the Act when the taxpayer neither received any amount nor derived any benefit from such transaction.

Facts

- The taxpayer is an individual and for AY 2008-09 duly filed its income-tax return.
- The Assessing Officer concluded the assessment proceedings under Section 143(3) of the Act for AY 2008-09, wherein six additions were made. Aggrieved by the assessment order, the taxpayer filed an appeal with the CIT(A) who concluded the hearing in November 2011 and no further appeal was preferred by any of the parties.
- After four years, the taxpayer received a notice under Section 148 whereby the tax officer wants to open the assessment for AY 2008-09.
- In response to the notice under Section 148 of the Act, the taxpayer gave his reply making certain legal submissions and requested the respondent to provide the reasons recorded for reopening the assessment.
- The taxpayer was holding 27.49% shares in M/s. J.P. Infrastructure Private Limited [JPIPL] (now known as M/s. J.P. Iscon Limited). JPIPL had extended loans to its sister concerns, Gujarat Mall Management Company Pvt. Ltd. and Aryan Arcade Pvt. Ltd. The taxpayer held beneficial interests of 50% and 29% in both the companies, respectively. The tax officer was of the view, that the same shall be treated as deemed dividends in the hands of taxpayer under Section 2(22)(e) of the Act.
- On receipt of the reasons recorded by the tax officer, the taxpayer submitted his objections making certain points on merits as well as reiterating the fact that the taxpayer had disclosed fully and truly all material facts for the purpose of assessment under Section 143(3) of the Act. However, the tax officer disposed of the taxpayer's submissions and accordingly passed an order under Section 148 of the Act against the taxpayer.
- Aggrieved by the above, the taxpayer filed a writ petition before the Gujarat High Court.
- The taxpayer was of the view that the issue pertaining to Section 2(22)(e) had been specifically addressed in the assessment proceedings under Section 143(3) of the Act and it is not permissible for the tax officer to reopen the assessment in respect of the same issue.
- The taxpayer contended that the amount given by M/s. J. P. Infrastructure Pvt. Ltd. to Gujarat Malls Management Pvt. Ltd. and Aryan Arcade Pvt. Ltd. were inter-corporate deposits. Further, the taxpayer highlighted that the two essential ingredients for invoking Section 2(22)(e) of the Act are missing:
  - that the lending company has accumulated profits; and
  - that the loan has been advanced to concerns for the benefit of the assessee.
- Relying on the ruling of the SC in the case of Mukundray K. Shah vs CIT[5] , the taxpayer contended that receiving of a benefit is a sine qua non for application of Section 2(22)(e) of the Act. In the present case, no benefit was accrued to taxpayer out of the transaction and hence, there question of taxing the taxpayer shall not arise.

4. Special Civil Application No. 15992 of 2015 / TS-206-HC-2020(GUJ)
5. [(2007) 290 ITR 433 SC]

Held

- Section 2(22)(e) of the Act postulates two factors, firstly, whether the payment by the company in which the shareholding of the assessee is more than 10% of the voting power is a loan; and whether on the date of payment there existed "accumulated profits".
- In the facts of the present case, the taxpayer held beneficial interests of 50% and 29% in Gujarat Mall Management Company Pvt. Ltd. and Aryan Arcade Pvt. Ltd., respectively. However, the taxpayer has neither received any loan from JPIPL, nor any amount advanced by JPIPL to the two sister concerns in which the taxpayer had substantial interest, was out of the accumulated profits of that company. Therefore, in absence of either of the two factors being satisfied in the reasons recorded, the reopening of assessment is without due application of mind on the part of the Assessing Officer.
- Further, the taxpayer had disclosed all the primary facts pertaining to this issue before the assessing officer during the assessment proceedings and there was no failure to disclose any material facts.
- Further, HC accepted the taxpayer's submission that as per Accounting Standard 18 – Related Party, there was no specific requirement for the taxpayer to disclose such transaction.
- The notice under Section 148 was issued beyond a period of four years from the end of the assessment year. Further, no action can be taken under Section 148 unless any income chargeable to tax has escaped assessment for such assessment year due to the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment.
- The taxpayer had shown the extent of his shareholding in the three concerns in which he had substantial interest. However, he had failed to disclose the loans advanced by JPIPL to Gujarat Mall Management Co. Pvt. Ltd. and Aryan Arcade Pvt. Ltd. In this regard, the Gujarat High Court is of the view that unless the taxpayer had received any benefit from the loan transactions referred to in the reasons recorded, there was no obligation cast upon him to disclose the same.
- Basis the above, the notice issued to the taxpayer and the re-assessment proceedings were quashed and set aside by the Gujarat High Court.

Our view

While passing the order, the HC has considered, the principles of 'substance over form' by considering if any, benefit was derived by the taxpayer even though it was a substantial shareholder in the loan transaction between investee companies. Further, the requirement of 'accumulated profit' at the time of payment was considered absolute. The decision also enumerated an important aspect that the obligation to cast full disclosure arises when the taxpayer has derived from benefit from the loan transaction. Where no benefit derived non-disclosure of such transaction may not result into non-furnishing of true and full disclosure of facts.

M/s. Kemfin Services Pvt. Ltd.[6]

Summary

Prior to the amendment vide the Finance Act, 2018, the income arising on sale of shares held as capital asset after their conversion from stock in trade shall be treated as capital gains.

Facts

- The taxpayer is a non-banking financial company (NBFC) engaged in the activity of investment in shares.
- On 1 April 2004, the board of directors of the taxpayer passed a resolution to stop its trading activities in shares and securities under the portfolio management scheme and to convert the stock in trade worth into investment.
- The taxpayer duly filed its return of income for AY 2005-06 declaring an income comprising of a short-term capital gains claim on sale of shares held as capital assets (converted from stock-in-trade to capital asset as mentioned above).
- During the assessment proceedings, the tax officer held that mere interchange of heads in books of accounts as investment or stock-in-trade does not alter the nature of the transaction. Accordingly, it was held by the tax officer that the transactions of the taxpayer fall within the ambit of business income and not short-term capital gain.

6. ITA No. 149 of 2011 C/W ITA No. 70 of 2011

- Aggrieved by the order of the tax officer, the taxpayer filed an appeal with the CIT(A), who affirmed AO's order. Further, aggrieved by the order of the CIT(A), the taxpayer preferred an appeal before the ITAT. The appeal was dismissed by the ITAT as well.
- Aggrieved by the decision of the ITAT, the taxpayer filed an appeal before the Karnataka HC.

Held

- The HC admitted the fact that the taxpayer converted the shares held from stock-in-trade to capital asset and the surplus arising during the year did not arise due to this conversion but on the sale of the said shares.
- The Court relied on the decision of the Supreme Court in the case of Shri Kikabhai Premchand vs. CIT[7] , where the apex court had held that the business and its owner cannot be treated separately as if they were separate entities trading with each other and then by means of a fictional sale introduce a fictional profit which include and in fact, is non-existent. In other words, a person cannot be supposed to sell some things to himself and making a profit out of the transaction.
- As per the provisions of Section 45 of the Act, capital gains arising from a conversion of capital asset into stock-in-trade shall be chargeable to tax. However, the Act did not contain any provision about the taxability where the stock-in-trade is converted into or treated as a capital asset. In this regard, the Finance Act, 2018, in order to provide symmetrical treatment and discourage the practice of deferring the tax payment by converting the inventory into capital asset, amended the provisions of the Act to provide that any profits or gains arising from conversion of inventory into capital asset shall be charged to tax as income under the head 'profits and gains from business or profession'. Also, the fair market value of the inventory on the date of conversion or treatment shall be deemed to be the full value of the consideration received or accruing because of such conversion or treatment.
- Accordingly, prior to the above amendment which came into force w.e.f. 1 April 2019, there was no provision to provide for taxability in cases where stock-in-trade is converted into a capital asset.
- In absence of any such provision, it was held by the HC that the said transaction shall not be subject to tax. Placing reliance on various judicial precedents, the HC held that prior to the above amendment vide the Finance Act, 2018, the income arising on sale of shares held as capital asset after their conversion from stock in trade was treated as capital gains.
- The HC held that the substantial question of law framed in the appeals is in favour of the taxpayer and against the revenue. Accordingly, the order of the ITAT was quashed.

7. [1953] 24 ITR 506 (SC)

Our view

Once again, the Courts have held that it is settled position that statutory constructions under the Act should be considered prospective unless it is stated to have retrospective effect. The ruling of the HC also clarifies that prior to amendment of 2018, gains arising from sale of assets, which were converted from stock-in-trade to capital assets, will be taxed as capital gains under the Act as there was no specific provision under the Act to treat such gains from conversion as income from business and profession.

Transfer pricing updates

Indian Safe Harbour Rules extended to cover FY 20

The Indian Safe harbour rules are an optional dispute avoidance mechanism that prescribe the minimum cost plus mark-up/transfer price that the eligible tax payer has to maintain in relation to eligible categories of international transactions for a specified block of FYs. The previous block of covered years was FY 17, FY 18 and FY 19. The CBDT vide its notification dated 20 May 2020 has extended the applicability of current safe harbour rules to FY 20 as well. Thus, there are no changes made in the safe harbour thresholds. Please refer to our alert[8] on extension of Safe Harbour Rules for further details.

Our view

Unlike 2017 where safe harbour coverage was given for three FYs up to FY 19, the coverage this time has been extended only for one FY, i.e., FY 20. This may be due to the widespread economic uncertainty caused by the COVID-19 pandemic. The CBDT has an opportunity to use this mechanism for FY 21 to further assuage concerns of the MNCs that are struggling to keep up their operations amidst widespread disruption of their global supply chains. Specifically, it may consider further reduction of safe harbour thresholds in line with the forecasted global and Indian GDP growth decline to support captives and encourage job retention while attracting more investments. The taxpayers should conduct a cost benefit analysis and decide on adoption of safe harbour option for FY 20.

Extension of due dates for compliance and assessment

In view of the COVID-19 pandemic, (GOI) issued Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 (the Ordinance) on 31 March 2020 to provide relief to taxpayers by extending due dates for compliances under tax laws. With a view to provide further relief to taxpayers for making various compliances and tax authorities for completing audits, the CBDT issued a notification dated 24 June 2020 providing extension in timelines for various compliances and completion of assessments. From a transfer pricing (TP) regulation perspective, the notification has resulted in the following revisions:

8. http://gtw3.grantthornton.in/assets/T/Tax_Alert_India_extends_Safe_Harbour_Rules_to_cover_FY20.pdf

assessments. From a transfer pricing (TP) regulation perspective, the notification has resulted in the following revisions:

Sr. No.	Compliances	Extended due date as per the notification and press release
Filing of APA application for FY 2020-21	31 March 2020	31 March 2021
Filing of CbCR - Form 3CEAD for FY ended 31 March 2019 by Parent entity or alternate reporting entity resident in India	31 March 2020	31 March 2021
Time limit for completion of transfer pricing audit by revenue authorities for AY 2017-18	31 October 2020	30 January 2021

Our view

The extension in due dates for meeting compliance requirements and completion of assessments is a welcome measure considering the challenges faced by taxpayers due to the COVID-19 pandemic. The notification does not extend the due date for filing Accountant's Report in Form 3CEB (Due date for FY 20 is 31 October 2020) and Master file in Form 3CEAA (due date for FY 2019-20 is 30 November 2020) and therefore, the TP documentation for FY 20 needs to be prepared and be available by 31 October 2020.

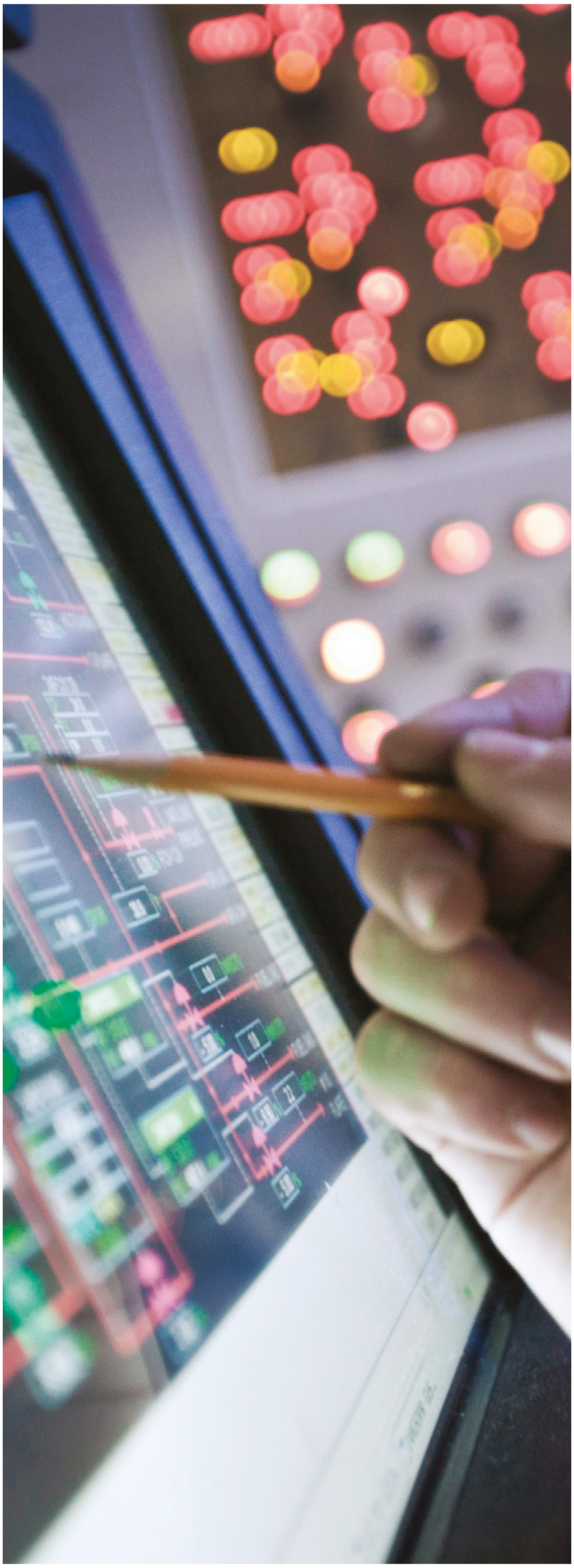
ICAI releases exposure draft of Transfer Pricing Guidance Note – 2020 version

The Institute of Chartered Accountants of India (ICAI), on 2 June 2020, has released an exposure draft of Guidance Note on report under Section 92E of the Income-tax Act, 1961 (the Act) relating to Indian TP regulations. The Guidance Note serves as a guiding framework for accountants to carry out examination and certification of international transactions with associated entities and specified domestic transactions, from an arm's length standard perspective.

The additions proposed in the exposure include amendments made in the Finance Act 2020 related to revision in the due date for filing Form 3CEB, extension in the scope of Safe Harbour and Advance Pricing Agreement provisions to include profit attribution to a permanent establishment in India. Amendment in the Finance Act, 2019 in secondary adjustment provisions (Section 92CE of the Act) has also been incorporated in exposure draft. The amendment allows assessees to repatriate excess money arising out of a primary TP adjustment from any of its associated entities. Alternatively, the assessee can pay 18% additional tax on the amount not repatriated and get relief from repatriation requirements.

Our view

It is expected that in the final version of 2020 update to the Guidance Note (based on the amendments brought in by the Finance Act 2020), the ICAI would include amendments related to extension of Safe Harbour Rules to AY 2020-21, elaborate on the due date for electronic filing of Form 3CEB for AY 2020-21 and update information relating to third APA annual report of the CBDT. Additionally, the ICAI may consider providing elaborate guidance on matters, including giving effect to secondary adjustment provisions with illustrations, guidance on disclosure and arm's length analysis of certain transactions including financial transactions, guidance on TP matters related to profit attribution to private equities, etc.

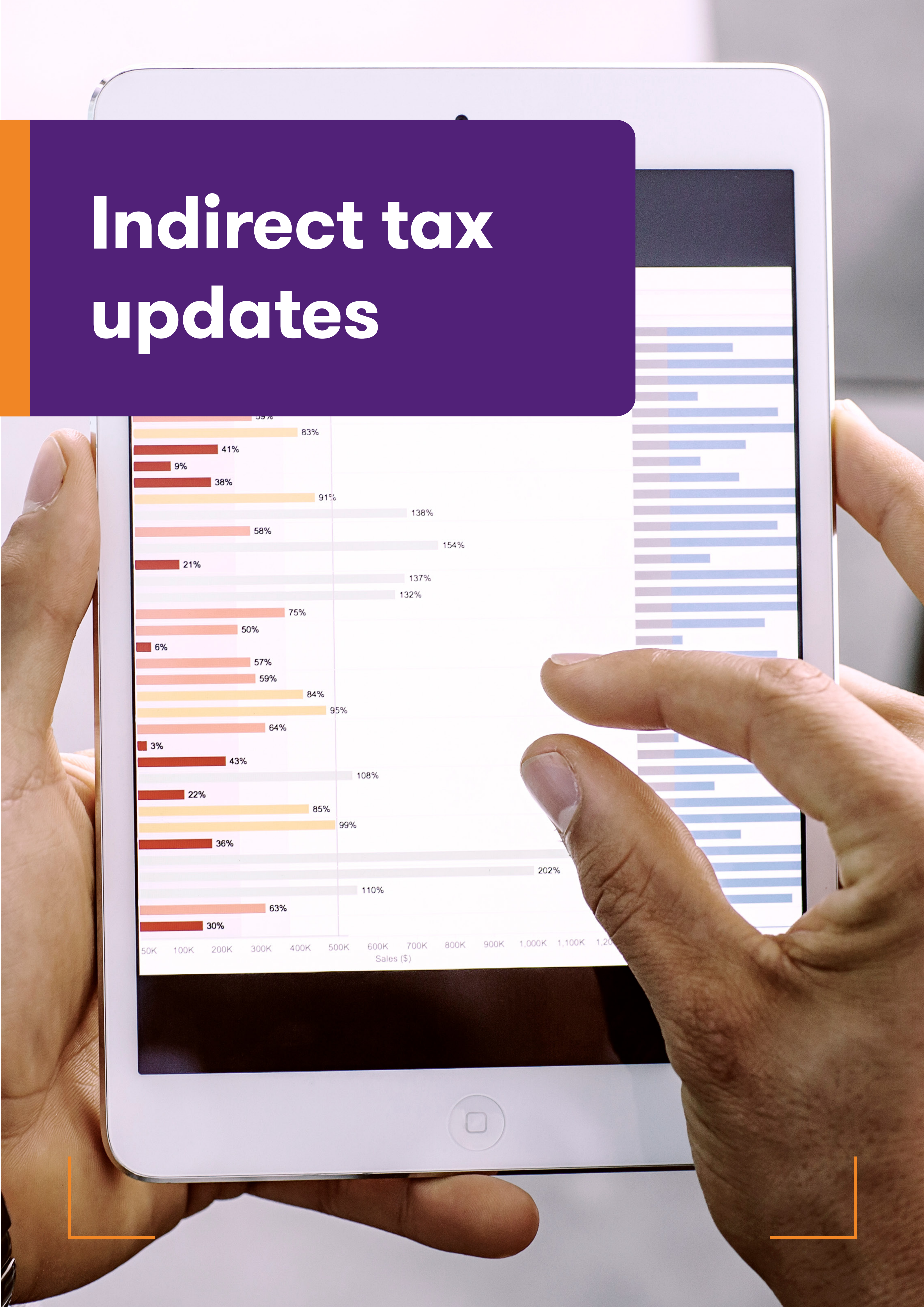


Key tax jurisprudence

There is wide ranging jurisprudence available in Indian TP landscape for a range of financial transactions. Here are a few key transfer rulings published during the last quarter encompassing financial transactions.

S.No.	Citation	Summary
1	DCIT vs. M/s. Mercerator Limited (ITA No. 2190/ Mum/2012) and M/s. Mercerator Limited vs. DCIT (ITA No. 2286/Mum/2012)	The assessee granted loan to its Singapore associated entity (AE) for purchase of vessel. No interest was charged to the AE as the AE's commercial operations had not started and it suffered losses. The Transfer Pricing Officer (TPO) made interest adjustment by adopting SBI PLR rate and an additional 0.5% adjustment on account of loan processing fee. On an appeal, the CIT(A) granted partial relief by directing use of Reserve Bank of India's (RBI's) External Commercial Borrowing (ECB) rates (LIBOR based) for making interest adjustment and restricted loan processing fee adjustment to 0.25%. The ITAT rejected the use of RBI's ECB rates which were in relation to trade credit and noted that ALP of interest is to be determined based on rate of interest prevailing in the country where loan is received or consumed. The ITAT accepted assessee's alternate plea to consider the interest rate charged by DBS Bank Singapore to the AE as the basis for making ALP adjustment on the loan advanced by the assessee to its AE. On the matter of loan processing fee or administrative charge, the ITAT ruled that the revenue authorities could not bring any evidence on record to show the assessee had incurred any expense while granting loan to its AE and it deleted entire adjustment towards loan processing fee or administrative charges.
2	Astral Poly Technik Pvt Ltd (I.T.A. No. 1775/Ahd/2018)	The assessee infused share application in its AE. The shares were allotted by the AE after 260 days of receiving share application money. The TPO considered the share application money as loan advanced to the AE and charged interest for a period of 260 days. On an appeal, the ITAT relied on the ruling of the Bombay High Court in the case of PCIT vs. M/s. Sterling Oil Resources Ltd. (ITA No. 341 of 2017), wherein it was held that the TPO cannot question the commercial expediency and recharacterise the transaction itself without bringing on record relevant evidence in this regard. Thus, the ITAT rejected the treatment of share application money as loan. The ITAT accepted the alternate plea of the assessee wherein it had submitted that if at all an adjustment has to be made, interest has to be computed only for the delay in allotment beyond 180 days which is the time allowed under RBI Master Circular No. 15/2014-15 dated 01.07.2014.
3	Omni Active Health Technologies Ltd [TS-300-ITAT-2020 (Mum)-TP]	Separately, about TP adjustment on corporate guarantee, the ITAT dismisses assessee's plea and upholds Dispute Resolution Panel's application of guarantee fee adjustment of 1.25% to gross amount of guarantee given by the assessee instead of guarantee fee limited to actual loan availed by AE highlighting the importance of substance over form (i.e. AE had access to gross amount if required).

Indirect tax updates



Waiver of interest and late fees for filing Form GSTR-3B

The Central Board of Indirect Taxes and Customs (CBIC) vide Notification No 51/2020 and 52/2020 CT dated 24 June 2020 has waived interest and late fee when the Form GSTR-3B is furnished after the due date for a given class of registered person subject to the condition that the return has to be filed within the stipulated date as follows:

Class of person whose turnover is	Tax period	Full waiver of interest and late fees if GSTR-3B filed before	Interest at reduced rate of 9% thereafter
More than INR 5 crore	February 2020 March 2020 April 2020	Within 15 days from the due date	From respective specified date in previous column till 24 June 2020
Up to INR 5 crore whose principal place of business is in any states mentioned in State list 1**	February 2020 March 2020 April 2020 May 2020 June 2020 July 2020	30 June 2020 3 July 2020 6 July 2020 12 September 2020 23 September 2020 27 September 2020	From respective specified date in previous column till 30 September 2020
Up to INR 5 crore whose principal place of business is in any states mentioned in State list 2**	February 2020 March 2020 April 2020 May 2020 June 2020 July 2020	30 June 2020 5 July 2020 9 July 2020 15 September 2020 25 September 2020 29 September 2020	From respective specified date in previous column till 30 September 2020

** Due dates for filing GSTR-3B are state specific which are classified below in two categories.

State List 1: Chhattisgarh, Madhya Pradesh, Gujarat, Maharashtra, Karnataka, Goa, Kerala, Tamil Nadu, Telangana, Andhra Pradesh, Daman and Diu and Dadra and Nagar Haveli, Puducherry, Andaman and Nicobar Islands and Lakshadweep.

State List 2: Himachal Pradesh, Punjab, Uttarakhand, Haryana, Rajasthan, Uttar Pradesh, Bihar, Sikkim, Arunachal Pradesh, Nagaland, Manipur, Mizoram, Tripura, Meghalaya, Assam, West Bengal, Jharkhand, Odisha, Jammu, Kashmir, Ladakh, Chandigarh and Delhi.

- **If GSTR-3B are filed after the date in the below mentioned table**
  - Interest at 18% p.a. – From the date mentioned in the column till the date of payment
  - Late fees – From the due date of return till the date of filing the return

Class of persons whose turnover in preceding FY is	GSTR-3B filed after
More than INR 5 crore	24 June 2020
Up to INR 5 crore	30 September 2020

Other relief provided

- Maximum late fee capping for furnishing GST-3B from July 2017 to January 2020 – INR 500 per tax period (CGST – INR 250 and SGST – INR 250). No late fees in case NIL GSTR-3B. However, returns should be furnished between the period 1 July 2020 to 30 September 2020

Waiver of late fees for filing Form GSTR-1

CBIC vide Notification No 53/2020-CT dated 24 June 2020 has waived the late fee payable on filing of Form GSTR-1 after the due date for all registered persons. Condition - Form GSTR-1 to be filed within the stipulated date as follows:

Late fee	Tax period	GSTR-1 to be filed before
Nil	March 2020 April 2020 May 2020 June 2020 January to March 2020 quarter April to June 2020 quarter	10 July 2020 24 July 2020 28 July 2020 5 August 2020 17 July 2020 3 August 2020

Extension in filing GSTR-3B for August 2020

CBIC vide Notification No 54/2020-CT dated 24 June 2020 has provided state specific extension for filing Form GSTR-3B for person having an aggregate turnover of up to INR 5 crore in the previous FY for August 2020 till

State	Due date
State list 1*	1 October 2020
State list 2*	3 October 2020

* Refer to page 27

Applicability of certain provisions under the Finance Act, 2020

The CBIC vide Notification No 49/2020-Central Tax has notified certain provisions of the Finance Act, 2020 which shall come into force from 30 June 2020.

Section 118: Union territory definition under the CGST Act, 2017 has been amended [Section 2(114) of CGST Act]

Section 125: Amendment in section of constitution of appellate tribunal and benches (Section 109 of CGST Act)

Section 129: Amendment in power to issue instructions or directions (Section 168 of CGST Act)

Section 130: Amendment in removal of difficulty order (Section 172 of CGST Act)

Filing of Nil return

The CBIC vide Notification No 44/2020-CT dated 8 June 2020 has provided that a registered person may furnish a Nil return in Form GSTR-3B through short messaging service using a registered mobile number from 8 June 2020 onwards.

Time limit for passing refund order

The CBIC vide Notification No 56/2020-CT dated 27 June 2020 has extended the time limit for passing refund order under Section 54(5) read with Section 54(7) for the period 20 March 2020 to 30 August 2020 till 31 August 2020.

Transfer of tax, interest and penalty under any head

The CBIC vide Notification No 37/2020-CT dated 28 April 2020 has provided that any a registered person may transfer any amount of tax, interest, penalty, fee or any other amount available in the electronic cash ledger to the electronic cash ledger for integrated tax, central tax, state tax or union territory tax or cess in FORM GST PMT-09 on the common portal.

Extension in time limit for furnishing GST annual return

The CBIC vide Notification No 41/2020-CT dated 5 May 2020 has extended the time limit for furnishing of the annual return under GST, electronically through the common portal, for the FY 19 till the 30 September 2020.

Power to prescribe time limit for availing transitional credit

The Delhi High Court in case of Brand Equity Treaties Limited [2020 (5) TMI 171] held that petitioners are permitted to file TRAN-1 Form on or before 30 June 2020. However, the SC vide Order dated 19 June 2020 [2020(6) TMI 517] had put a stay on the Delhi High Court order.

GOI inserted a new Section 128 in the Finance Act, 2020 to provide retrospective amendment from 1 July 2017 for granting powers to prescribe time limit for availing transitional credit.

The CBIC vide Notification No 43/2020-Central Tax dated 16 May 2020 appointed 18 May 2020 as the date on which aforesaid provision shall come into effect.

Circular No 138/08/2020-GST dated 6 May 2020

The COVID-19 crisis has thrown open certain challenges for the corporate debtors in adhering to the compliance requirements under the GST Act. The government has provided certain clarifications regarding the same as below:

Sr. No.	Issue	Clarification
1	Difficulties are being faced by the IRP/RP in getting registration within 30 days of the issuance of the notification no. 11/2020 and have requested to increase the time limit.	• Time limit for the registration has been increased vide notification no. 39/2020. • Accordingly, IRP/RP shall now be required to obtain registration within thirty days of the appointment of the IRP/RP or by 30 June 2020 whichever is later.
2	Whether IRP/RP is required to take a fresh registration even when they are complying with all the provisions of the GST Law under the registration of corporate debtor (earlier GSTIN) i.e. all the GSTR-3Bs have been filed by the corporate debtor/IRP prior to the period of appointment of IRPs and they have not been defaulted in return filing.	• Notification no. 11/2020 required IRP/RP to take fresh registration which had been further amended via Notification no. 39/2020. • Accordingly, IRP/RP would not be required to take a fresh registration in those cases where statements in FORM GSTR-1 and returns in FORM GSTR-3B for all the tax periods prior to the appointment of IRP/RP, have been furnished under the registration of corporate debtor (earlier GSTIN).
3	Another doubt has been raised that the notification has used the terms IRP and RP interchangeably, and in cases where an appointed IRP is not ratified and a separate RP is appointed, whether the same new GSTIN shall be transferred from the IRP to RP or both will need to take fresh registration	• Where an RP is not the same person as the IRP or where IRP/RP is changed in middle of the insolvency process, amendment can be made under non-core amendment field by changing the authorised signatory in the registration form on GST portal. • If the newly appointed person does not get the credentials from his predecessor, he can get his details added through jurisdictional authority. • The new registration is not required with the change in IRP/RP, change would be deemed as a change in authorised signatory and it would not be considered as distinct person on every such change after initial appointment and such change can be amended in registration form.

Circular No 140/10/2020-GST dated 10 June 2020

The CBIC has issued a circular for clarifying levy of GST on director's remuneration. Key clarifications provided in the circular are as follows:

- GST on remuneration paid by companies to the independent directors or those directors who are not the employee of the said company
  - Directors who are not the employees of the company, the services provided by them to the Company, in lieu of remuneration, are clearly outside the scope of Schedule III of the CGST Act.
  - Therefore, the said remuneration shall be taxable under reverse charge basis. [Notification No. 13/2017 – CT (Rate)]
- GST on remuneration paid by companies to the directors, who are also an employee of the said company
  - The director may be functioning in dual capacities, one as a director of the company (contract for service) and the other during employer-employee relation (contract of service).
  - It is clarified that the part of Director's remuneration which are declared as 'salaries' in the books of a company and subjected to TDS (192 of IT Act) are not taxable being consideration for services in the course of employment. [Schedule III of the CGST Act, 2017.]
  - However, where remuneration is in nature of professional fees subject to TDS (194J of IT Act). The said remuneration shall be taxable under reverse charge basis. [Notification No. 13/2017-CT(Rate)]

Circular No 139/09/2020-GST dated 10 June 2020

The CBIC has issued a circular for clarification on refund related issues. The same has been summarised as under

- Earlier the refund was being granted on strength of missing invoices (not reflecting in GSTR-2A) which were uploaded by the applicant along with refund application. [Circular No. 125/44/2019-GST].
- After the issuance of Circular No.135/05/2020 - GST, the refund of accumulated ITC would be restricted to the ITC available on those invoices, which are reflecting in Form GSTR-2A of the applicant.
- The aforesaid circular does not in any way impact the refund of ITC availed on the invoices / documents relating to imports, ISD invoices and the inward supplies liable to RCM etc.
- Thus, it is clarified that the treatment of refund of ITC pertaining to imports, ISD invoices and the inward supplies liable to RCM would be available on the strength of invoices.

Key tax jurisprudence

CMS Info Systems Limited [2020 (6) TMI 643]

The company is mainly engaged in the business of ATM cash replenishment services, cash delivery and pick up services, management consultancy services etc.

The company had purchased motor vehicles and had done fabrication/designing of the same as per the guidelines issued by the RBI. The said motor vehicles are then used to transport the cash/bullions to their clients as per the terms of the agreement entered with them. The AAR held that cash transported by the company does not fall under the definition of goods provided under GST law and therefore ITC shall not be available for purchase and fabrication of motor vehicles.

Aggrieved by the order passed by AAR, the company filed an appeal with the Appellate Authority for Advance Ruling (AAAR). The AAAR referred the definition of money provided under GST, which states that money means Indian legal tender or any foreign currency recognised by the RBI and used as consideration to settle an obligation.

In the instant case, the company has not used the money as legal tender for settling an obligation at any stage of the transaction. Therefore, money transported by the company in motor vehicles should be considered as goods under GST and ITC in respect of motor vehicles shall be available to the company.

Bharat Reinsurance Brokers PVT Ltd [2020-TIOL-909-CESTAT-HYD]

The company is a reinsurance broker. They arrange, identify and negotiate the terms of contract for reinsurance of Indian insurance companies with overseas reinsurers. The company deducts reinsurance brokerage on the payments made by Indian insurance companies to foreign reinsurance companies through them. The revenue contended that the company is providing service to Indian insurance companies for which consideration is received in Indian currency. Therefore, the said transaction should not qualify as export of service.

The CESTAT placed reliance on Judgement passed by Madras High Court in case of Suprasesh General Insurance Services & Brokers Pvt. Ltd. vs. CST, Chennai [2015-TIOL-2225-HC-MAD-ST] wherein on perusal of appellant's role provided in the agreement it was held that they are providing service to overseas reinsurers and therefore the said service shall be qualified as export of service.

Therefore, in the instant case, the CESTAT held that the aforesaid judgement is binding on them and therefore the order passed by department is set aside.

ICICI Bank Limited [2020-TIOL-370-CESTAT-Mum]

The appellant, a licenced banking company, provides 'banking and other financial services' one of which is securitisation of such consumer loans.

Securitisation is the pooling of assets underlying the loans for transfer to special purpose vehicles (SPV) which is then securitised by the latter as pass through certificates (PTC) to participant investors who are compensated by returns, generated from the contracted recoveries, at fixed intervals.

The appellant receives the collections due from the original borrowers and handles the transfer to the SPV for which a fee is charged and the same incorporates liquidity facility. The CESTAT held that the said arrangement is nothing but overdraft facility and an attempt to levy tax on the consideration earned by the bank would breach the exemption afforded to interest.

The primary purpose of providing such liquidity is to make the derivative issued by special purpose vehicles more attractive to investors to enhance the value to be realized by the bank on sale of the securitised asset. Further the beneficiary of the facility is not the SPV but the appellant themselves. This clearly does not conform to the concept of service which must, necessarily, be rendered to another person. Thus, the bank is merely fulfilling such obligation and not rendering service to any other person.

TVS Finances and Services Limited [2020-TIOL-CESTAT-MAD]

The appellant is engaged in business of providing financial services and loans. For recovery of loans, the appellant collects post-dated cheques.

Sometimes, these post-dated cheques get dishonored for which charges are paid by the company. The company recovers the said charges from their customers. The department contended that such charges should be included in the assessable value for levy of service tax as per sub-rule 5 of Service Tax (Determination of Value Rules), 2006.

The company contended that they have collected as much charges as paid by them to the bank and therefore the said reimbursable expenses should not be considered in assessable value for computing service tax.

Further, the company relied on the SC judgment in case of M/s Intercontinental Consultants and Technocrats Pvt Ltd [2018-TIOL-76-SC-ST] wherein it held that provisions of sub-rule (5) being ultra vires of Section 67 of Finance Act,1994 and hence bad in law. The CESTAT held that the said expenses are reimbursement expenses and therefore service tax shall not be levied.

M/s South Indian Bank [2020-VIL-271-CESTAT-BLR-ST-LB] (Obligation case law)

The appellant is a banking company registered under Banking Regulation Act, 1949. The Deposit Insurance Corporation (DIC) is a subsidiary of the RBI. The DIC transacts the business of insuring the deposits accepted by the bank and registers every banking company as an insured bank. The insured bank shall pay premium as per the rates notified by DIC. The appellant pays service tax on premium paid to DIC and availed CENVAT credit of such service tax.

The revenue contended that activity of 'accepting deposits' is not a service defined under the Finance Act and so the deposit insurance received in relation to accepting of deposit would not be an 'input service' under Rule 2(l) of CENVAT Credit Rules, 2004. CESTAT held that main activity of a bank is to mobilise the resources received by the banks in the form of deposits from the public for the purpose of lending or investment.

Further as per the Banking Regulation Act,1949 license granted may be cancelled by RBI, if the bank ceases to carry on banking business in India. Therefore, banks must accept deposits for the purpose of lending and it is mandatory for all banks to obtain insurance of deposit accepted from DIC.

Insurance service received by the banks from the DIC is not only mandatory but is also commercially expedient. In fact, without this service the banks may not be able to function at all.

Further the company has placed reliance on Delhi CESTAT judgment in case of State Bank of Bikaner [2019-VIL-422-CESTAT-DEL-ST] wherein it was held that Insurance of deposit is mandatory in terms of DICGE and therefore insurance cover shall definitely form part of input service for output service being rendered by them.

Thus, the service rendered by the DIC to the banks would fall in the main part of the definition of 'input service', which is any service used by a provider of output service for providing an output service.

Service by way of extending deposits fall under negative list of service tax and therefore CENVAT credit shall not be admissible. However, in the instant case, banks have provided service by way of accepting deposit which does not fall under negative list of service tax.

In view of the above, insurance service provided by the DIC to the banks is an 'input service' and CENVAT credit of service tax paid for this service received by the banks from the DIC can be availed by the banks for rendering 'output services'.

Key regulatory updates

RBI updates

FPI Investment limit in government securities remains unchanged under the Medium Term Framework

(RBI/2019-20/214 A.P. (DIR Series) Circular No. 30 dated 15 April 2020)

The investment limit for FPI in Government (G-secs) and State Development Loans (SDLs) shall remain unchanged at 6% and 2%, respectively, of outstanding stocks of securities for FY 20. These are unchanged from the previous FY 20.

All existing FPI investments in the specified securities as identified under the Fully Accessible Route (FAR) will be reckoned only under the FAR and the calculation of outstanding stock of G-secs and utilization levels of limits under the Medium Term Framework (MTF) has been accordingly adjusted by the RBI.

For FY 21, the allocation of incremental changes in the G-sec limit over the two sub-categories, i.e. 'General' and 'Long-term' is being retained at 50:50. Also, there has been an increase for SDLs in the sub-category 'General' of SDLs.

All the Investment limits (in crores rupees) for FY 21 in different categories are as follows:

Particulars	G-Sec-general	G-sec-long-term	SDL-general	SDL-long-term	Corporate bonds
Currents limits	2,46,100	1,15,100	61,200	7,100	3,17,000
Revised limits for April 2020-September 2020	2,34,531	1,03,531	64,415	7,100	4,29,244
Revised limits for October 2020-March 2021	2,34,531	1,03,531	67,630	7,100	5,41,488

Our view

The limits of FPI investment in G-sec securities and SDLs shall remain unchanged for FY 21. However, the absolute investment limits will be higher as bond sales every year increases the outstanding stock of securities.

Additional Reporting Compliances for the Banking Units operating in IFSC (International Financial services center)

(Circular No. RBI/2019-20/233 FMRD. FMID.26/02.05.002/2019-20 dated 18 May 2020)

The Reserve Bank of India has issued a notification mandating thatall over-the-counter (OTC) foreign exchange, interest rate and credit derivative transactions, both inter-bank and client, undertaken by IFSC banking units (IBUs) shall be reported to CCIL's (Clearing Corporation of India Limited) reporting platform from 01 June 2020. In addition, all matured and outstanding transactions as on 31 May 2020, shall be reported by the IBUs by 31July 2020 to ensure completeness of data.

Banks operating as IBUs have been permitted, with effect from 1 June 2020, to offer non-deliverable derivative contracts (NDDCs) involving the rupee, or otherwise, to persons not resident in India. Banks can undertake such transactions through their IBUs or through their branches in India or through their foreign branches. All foreign exchange non-deliverable derivative contracts (involving Rupee or otherwise) undertaken shall also be reported to CCIL's reporting platform with effect from 1 June 2020.

Our view

The reporting compliances will increase transparency into the system due to this reporting as OTC deals are conducted directly between two parties without involving any exchange.

Extension of term period for FPIs under Voluntary Retention Route (VRR)

(Circular No. 32 A.P. (DIR Series) RBI/2019-20/239 dated 22 May 2020)

The Voluntary Retention Route (VRR) was introduced by the RBI to enable FPIs to invest in debt markets in India.

Investments through the VRR will be free of the macro-prudential and other regulatory norms applicable to FPI investments in debt markets, provided FPIs voluntarily commit to retain a required minimum percentage of their investments in India for a period.

Given the above, the FPIs are required to retain a minimum of 75% of its allocated investments (called the Committed Portfolio Size or CPS) for a minimum period of 3 years. However, such 75% of CPS should be invested within 3 months from the date of allotment of investment limits.

Recognizing the disruption posed by the COVID-19 pandemic, RBI has granted additional 3 months relaxation to FPIs for making the required investments. FPIs that have been allotted investment limits, between 24 January 2020 (the date of reopening of allotment of investment limits) and 30 April 2020 are eligible to claim the relaxation of additional 3 months.

Further, the retention period of 3 years commence from the date of allotment of investment limit and not from date of investments by FPIs. However, post above relaxation granted, the retention period for the FPIs opting the relaxation shall be reckoned from the date the FPI invests 75% of CPS.

Our view

The COVID-19 disruption has adversely affected the Indian markets where investors are dealing with the market volatility. Given this, FPIs are pulling out their investments from the Indian markets (both equity and debt). Thus, relaxing investments rules of VRR Scheme during such financial distress will help the foreign investors manage their investments appropriately.

RBI extends the timeline compliance with various Payment System Requirements

(RBI/2019-20/251 DPSS.CO. PD. No.1897/02.14.003/2019-20 dated 04 June 2020)

RBI has extended the timelines for compliance with various Payment System Requirements keeping in view the present pandemic situation. The following are the extensions:

Sr. No.	Instruction/Circular	Present Timeline	Revised Timeline
1	Master Direction on Issuance and Operation of Prepaid Payment Instruments (PPI-MD) dated 11 October 2017 (as updated from time to time):		
	(i) All existing non-bank PPI issuers (at the time of issuance of PPI-MD) to comply with the minimum positive net-worth requirement of Rs. 15 crore for the financial position as on 31 March 2020 (audited balance sheet).	Financial position as on 30 June 2020	Financial position as on 30 September 2020
	(ii) Authorised non-bank entities shall submit the System Audit Report, including cyber security audit conducted by CERT-IN empaneled auditors, within two months of the close of their financial year to the respective Regional Office of DPSS, RBI.	By 31 August 2020	By 31 October 2020
2	Implementing provisions of circular on "Enhancing Security of Card Transactions" dated 15 January 2020	w.e.f. 16 June 2020	By 30 September 2020
3	"Harmonisation of Turn Around Time (TAT) and customer compensation for failed transactions using authorised Payment Systems", "calendar days" to be read as "working days" dated 20 September 2019.	w.e.f. 24 March 2020	Until 31 December 2020
4	"Guidelines on Regulation of Payment Aggregators and Payment Gateways" dated 17 March 2020, the activities for which specific timelines are not mentioned and were supposed to come into effect from 01 April 2020.	w.e.f. 01 June 2020	By 30 September 2020

Our view

This extension in timeline will reduce the stress in the working environment to comply with the reporting requirements and develop a healthy environment to work.

FEMA Act, 1999, updates

The Ministry of Finance notifies changes in Foreign Direct Investment (FDI) policy by issuing Foreign Exchange Management (Non-Debt Instruments) Amendment Rules, 2020 to prevent opportunistic takeover of domestic firms

(F. No. 01/05/EM/2019-Part (1) dated 22 April 2020 and Notification No. S.O. 1374(E) dated 27 April 2020)

Keeping in backdrop the Covid 19 pandemic and the diplomatic setback with neighboring countries, Ministry of Finance vide notifications dated 22 April 2020 and 27 April 2020 have amended the non-debt regulations. The key amendments have been discussed as under:

- **Amendment in Rule 6 governing the conditions relating to investments made by person resident outside India**
  - Under the erstwhile regulations, investments made by person resident outside India belonging to Pakistan and Bangladesh was subject to government approval except in cases where investment was prohibited. These regulations have now been amended by virtue of which, in addition to the restrictions under the aforesaid regulations, investments made by countries sharing a land border with India would also be subject to government approval. These countries would include China, Bhutan, Afghanistan, Myanmar and Nepal.
  - The investments whose beneficial owner is an entity or a citizen of any of the aforesaid jurisdictions would also require a prior government approval.
  - This restriction will also cover the transfer of ownership of existing or future, FDI directly or indirectly in any entity in India, resulting in beneficial ownership held by the investors of the jurisdictions specified above.
- Consequent amendments were also made under Schedule II whereby the divestment of holdings by Foreign Portfolio Investors (FPIs) and reclassification of FPI investment as FDI shall be subject to the conditions specified by the SEBI and RBI, in this regard.

The following amendments in the non-debt regulations notified certain specific sector amendments introduced by the Press Note 4 (2019 series) and Press Note 1 (2020 series) issued by the Department for Promotion of Industry and Internal Trade (DPIIT):

- **Single Brand Retail Trading**
  - For the purpose of evaluating the applicability of sourcing norms for entities undertaking single brand retail trading of products having 'state-of-art' and 'cutting-edge' technology and where local sourcing is not possible, it has now been clarified that sourcing norms shall not be applicable up to three years from commencement of the business i.e. opening of the first store or start of online retail, whichever is earlier.
- **FDI policy in insurance sector**
  - 100% FDI was permitted for insurance intermediaries under the automatic route vide DPIIT press Note 1 (2020 series). These changes have now been implemented in the Non-debt Regulations. Other conditions related to ownership and control of insurance company resident Indian entities and operational aspects of insurance intermediaries such as prior IRDAI approval for repatriating dividend, no payments to the foreign group or promoter or subsidiary or interconnected or associate entities beyond the limits prescribed by IRDAI, brought in by the government has also been incorporated under the Non-Debt Regulations.
- **Valuation necessary in case of acquisition through renunciation of rights**
  - The erstwhile non-debt Regulations prescribed pricing guidelines for issue or transfer of shares by a person resident in India to a person resident outside India. These non-debt Regulations have been amended by way of introduction of a new Rule whereby a person resident outside India who has acquired a right from a person resident in India (who has renounced it) may acquire equity instruments (other than share warrants) against the said rights as per the general pricing guidelines applicable in case of issue or transfer of shares.

Our view

The government has amended the FDI policy to curb opportunistic takeovers/acquisitions of Indian companies in times of COVID-19 and to regulate investments (direct/indirect) from entities or residents/ citizens of a country sharing land border with India and whose beneficial owner is situated in or is a citizen of any such country. This may have adverse implication on private equity deals as large number of investors/ beneficial owners in Indian start-up companies are from countries with whom India shares land border.

RBI notifies Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) (Amendment) Regulations, 2020 amending regulation w.r.t Mode of Payment and Remittance of sale proceeds in case of investment in investment vehicles.

(Notification No. FEMA. 395(1)/2020-RB dated 15 June 2020)

RBI has recently amended the regulation pursuant to which FPIs and FVCIs are now allowed to use Special Non-Resident Rupee (SNRR) account with respect to mode of payment and remittance of sale proceeds in case of investment in investment vehicles.

As per the erstwhile provisions governing investment, as per Schedule II, FPIs were allowed to invest only in units of domestic mutual fund and use of SNRR account balance was restricted for making investments in investment vehicles. Because of such restriction, FPIs had to opt for other investment vehicles such as REITs, and InViTs. Under the amended regulations, SNRR account balance can now be utilised for making investments in investment vehicles.

Further, the erstwhile provisions allowed only the sale proceeds (net of taxes) in connection with units of investment vehicles other than domestic mutual fund to be remitted outside India. Now, the sale proceeds (net of taxes) of equity instruments and units of REITs, InViTs and domestic mutual fund are allowed to be remitted outside India or credited to the foreign currency account or a SNRR account of the FPI.

Additionally, SNNR account can be used for trading in units of listed and to be listed units of investment vehicles and the sale/ maturity proceeds arising from the same can be credited into such account.

Our view

The said amendment may be directed towards increasing the inflow of foreign investment.

SEBI updates

SEBI relaxes FPI Regulations for investments through Non-Foreign Action Task Force (FATF) member countries

(F No.10/06/2019-EM dated 13 April 2020 and Notification No. SEBI/LAD- NRO/GN/2020/09 dated 07 April 2020)

Under the amended SEBI (FPI) Regulations 2019, FPIs were re-categorised into 2 categories as against the erstwhile 3 categories, whereby all the entities from Non-FATF member countries (which includes Mauritius) were re-categorised into Category II FPIs under the new Regulations.

However, SEBI amended these Regulations thereby allowing certain Non-FATF member countries specified by the Central Government (by an order or by way of an agreement or treaty with other Sovereign Governments), to be eligible for category I FPI license under the new Regulations.

Consequently, pursuant to the Central Government issuing an order by the Ministry of Finance, Mauritius, a non-FTAF member country has now been notified to be eligible for Category I registration, subject to the other specified conditions in the Regulations.

Our view

This is a welcome move and has come as a breather to the numerous Mauritius-based FPIs. It is expected to restore the flow of FPI funds from Mauritius to the pre-FPI Regulations 2019 phase and can be a blessing in these turbulent times. Through this order from the ministry, funds from Mauritius, registering as Category I, would get benefits, such as eligibility for investment in offshore derivative instruments, relaxation from indirect transfer provisions under the Income Tax Act, 1961, lesser KYC documentation etc.

Temporary relaxation in cooling period for further buyback of securities

(SEBI/HO/CFD/DCR2/CIR/P/2020/69 dated 23 April 2020)

Currently, regulation 24(i)(f) of SEBI (Buy-back of Securities) Regulations, 2018 ("Buy-back Regulations") provides a restriction that the companies shall not raise further capital for a period of one year from the expiry of buyback period, except in discharge of their subsisting obligations. It has been represented that the said period of one year may be reduced to six months, which would be in line with section 68(8) of the Companies Act, 2013.

To enable relatively quicker access to capital, it has been decided to temporarily relax the period of restriction provided in Regulation 24(i)(f) of the Buy-back Regulations. Accordingly, the words ;'one year' shall be read as 'six months' in the said regulation.

This relaxation will be applicable till 31 December 2020.

Our view

Due to COVID-19 there has been immense volatility in the capital markets causing the prices of securities to fall. This relaxation allows the companies to take advantage of the fall in prices, helps the promoter increase his stake and provides support to the stock price.

SEBI relaxes compliance timelines for various SEBI registered entities

In view of the COVID-19 pandemic, the SEBI has extended timelines for various compliances, which are listed as under:

Sr. No.	Particulars	Revised timeline
1	Due date for regulatory filings of Alternative Investment Fund ('AIF'), Venture Capital Fund ('VCF') for the month of March, April, May and June extended	7 August 2020
2	Regulatory filings by Real Estate Investment Trusts ('REITs') and Infrastructure Investment Trusts ('INvITS') for the period ending 31 March 2020	Extended by 2 months from the original filing date prescribed under the Regulations
3	Implementation of revised guidelines for Portfolio Managers deferred	These Guidelines shall be applicable with effect from 1 October 2020

Our view

The above relaxations will enable the AIFs and VCFs in meeting their regulatory compliances and ease their compliance burden.

SEBI approves regulatory sandbox framework for stock market ecosystem

(SEBI/HO/MRD-1/CIR/P/2020/95 dated 05 June 2020)

With a view to develop an efficient ecosystem in the fin-tech space, SEBI earlier had set-up a committee to discuss about regulating companies and start-ups in fin-tech space. The Committee included the expert members from the startup industry, FinTech community and academicians.

Based on the recommendation provided by them, SEBI had stipulated the framework for Innovation Sandbox vide circular dated 20 May 2019, wherein the unregulated FinTech startups and entities would be made accessible to market-related data to help them test their innovations on actual customers effectively before their introduction in a life environment and without falling into any hassles of registering in a controlled environment.

SEBI, based on the recommendations of the said committee, have now introduced a framework for 'Regulatory Sandbox'. A regulatory sandbox usually refers to live testing of new products or services in a controlled regulatory environment, wherein the regulators may permit regulatory relaxations for testing purposes.

The Regulatory Sandbox framework shall be applicable to all the SEBI registered entities under section 12 of the Securities and Exchange of India Act, 1992 [SEBI Act] (including FinTech start-ups). Section 12 of the SEBI Act deals with registration of stock broker, sub-broker, share transfer agent, banker to an issue, trustee of trust deed, registrar to an issue, merchant banker, underwriter, portfolio manager, investment adviser and such other intermediaries who may be associated with the securities market.

Under the said framework, SEBI-regulated entities shall be granted certain facilities and flexibilities to experiment with FinTech solutions in a live environment on limited set of real customers for a limited period. However, this shall be implemented with necessary safeguards for investor protection and risk mitigation. All SEBI-registered entities would be eligible for testing within the regulatory sandbox on its own or use the services of a FinTech firm.

Our view

The underlying objective behind setting-up a regulatory sandbox is to allow the regulator, innovators, financial service providers and customers to conduct field tests. They can collect evidence on the benefits and risks of new financial innovations, while carefully monitoring and containing inherent risks. This shall pave the way for entrepreneurs working on innovative financial products.

SEBI clarifies on the earlier circular relating on Disclosure Standards for the Alternative Investment Funds ('AIFs')

(SEBI/HO/IMD/DF6/CIR/P/2020/99 dated 12 June 2020)

SEBI had issued a circular dated 5 February 2020 and provided disclosure standards for AIFs. The said Circular introduced template for Private Placement Memorandum (PPM) issued by AIFs and provided for mandatory performance benchmarking for AIFs.

In addition to this, the said Circular also provided that AIFs would be required to undertake a mandatory annual audit to ensure compliance with the terms of PPM and the findings of such audit were required to be submitted to (i) Trustee/Board/ Designated Partners of the AIF, (ii) Board of the Manager and (iii) SEBI (collectively referred as 'relevant parties').

However, the timelines for carrying out such audit, applicability of the audit to existing AIFs and the due date by which the audit findings were to be submitted to relevant parties were not prescribed in the said Circular.

SEBI has now clarified that the aforesaid audit shall be conducted at the end of each financial year and the findings of such audit, along with corrective steps, if any, shall be communicated to the relevant parties within 6 months from end of the financial year. AIFs that have not raised any funds from their investors are exempted from this audit, but such AIFs are required to submit a certificate from a Chartered Accountant that no funds have been raised, within 6 months from the end of the financial year.

It has also been clarified that the aforesaid audit compliances for FY 20 shall be completed on or before 31 December 2020.

Also, earlier the association of AIFs (Association) had to represent at least 51% of the number of AIFs, in terms of membership, in order to notify one or more benchmarking agencies (with whom each AIF shall enter into an agreement to carry out the benchmarking process). The said threshold of 51% has now been reduced to 33%.

Further, in the wake of COVID-19 pandemic, the timeline for making available the first industry benchmark and AIF level performance versus benchmark reports is extended till 1 October 2020, which earlier was 01 July 2020.

Our view

The above clarifications issued by SEBI shall improve the working efficiency of the AIFs and will make the compliance consistent with the requirements.

SEBI extends the temporary relaxations in processing of documents pertaining to FPIs

(Circular No. SEBI/HO/FPI&C/CIR/P/2020/104 dated 23 June 2020)

In terms of the operational guidelines for FPIs and Designated Depository Participants (DDPs) issued under the SEBI FPI Regulations, 2019, a FPI applicant needs to submit duly signed application form including Know Your Customer ('KYC') details and supporting documents and applicable fees for registration as an FPI. Further, copies of all the documents submitted by the applicant should be accompanied by originals for verification.

On account of the situation of COVID-19 pandemic, SEBI had issued a circular dated 30 March 2020 and introduced the following relaxations:

- DDPs and Custodians shall consider and process the requests for registration/continuance KYC/KYC review and any other material change on the basis of scanned version of signed documents (instead of originals) and copies of documents which are not certified, received from:
  - e-mail IDs of their Global Custodians/existing clients where these details are already captured in records; or
  - e-mail IDs of new clients received from domains which are duly encrypted.
- These documents may be uploaded on KYC Registration Agencies (KRAs) and other intermediaries may rely on these documents.

The DDPs and Custodians shall obtain the original and/or certified documents (as applicable normally) within 30 days from the aforesaid deadline. Otherwise, the accounts of such FPIs shall be blocked for any fresh purchase.

In case documents are not received within 3 months of said deadline, DDPs and Custodians shall report these cases to SEBI for appropriate action.

The temporary relaxations were granted up to 30 June 2020 which have further been extended up to 31 August 2020 by SEBI vide this circular.

Our view

In light of the current situation of the COVID-19 pandemic, a need was felt for extending the benefit of temporary relaxations with respect to compliance requirements for FPIs. Thus, the relaxations provided by SEBI in this regard will help in reducing the hardship faced by the FPI applicants.

Stamp duty to be applicable to Alternative Investment Fund

(SEBI/HO/IMD/DF6/CIR/P/2020/113 date 30 June 2020)

The Finance Act, 2020 amended the provisions of Indian Stamp Act 1989, whereby the issue, sale or transfer of securities defined under section 2(h) of the Securities Contracts (Regulation) Act, 1956 (Securities Act) shall be subject to stamp duty. The said amendment is applicable from 1 July 2020.

Having said the above, there was ambiguity around the applicability of the stamp duty on the units of AIFs as they are not specifically included in the definition of securities under section 2(h) of the Securities Act. However. units of AIFs may fall within the purview of other marketable securities in the nature of shares, scripts, stock of any incorporated entity or other body corporate.

In this regard, SEBI vide its circular dated 30 June 2020 clarified that the stamp duty shall be applicable on issuance and transfer of the units of AIF as a 'security' under the Securities Act. Accordingly, the stamp duty applicable on issue, sale or transfer of units of AIF as per the amended provisions of Stamp Duty Act is as under:

Particulars	Rate of stamp duty
Issue of units of AIF	0.005%
Transfer of units of AIF	0.015%

The key considerations discussed in the Circular as under:

- **Appointment of Registrars to an issue and share transfer agents (RTAs)**

  AIFs are required to appoint an RTA by 15 July 2020 to enable collection of applicable stamp duty on issue, transfer and sale of units of AIF. This shall be in accordance with the notification by government for appointment of such RTAs (vide Gazette Notification dated 8th January, 2020)

- **Interim measures till appointment of RTAs**

  As an interim measure, the AIF are required to keep the collected stamp duty in a designated bank account till the appointment of the RTA. After their appointment, the stamp duty collected shall be discharged to the State Government by such RTAs.

- **AIF transactions through recognized stock exchanges (sale, transfer or issue of units in demat mode)**

  In such cases, the amended Stamp duty regulations provides that the clearing corporation or the depository or the recognised stock exchange, shall be responsible for collecting stamp duty

Our view

This will be a pertinent compliance requirement in relation to execution of contribution agreements and issuance of unit certificates to investors by AIFs. Appointment of RTAs for collection of stamp duty in relation to AIF units would also need to be adhered to by fund managers.

IRDAI updates

Insurance Regulatory and Development Authority of India (IRDAI) issued a circular addressing all the Insurance intermediaries to comply all the Norms in accordance with Foreign Exchange Management (Non-Debt Instruments) (Second Amendment) Rules, 2020.

(Circular no. IRDAI/INT/CIR/MISC/119/05/20 dated 18 May 2020)

IRDAI issued a circular to draw the attention of all the Insurance intermediaries to the following notifications:

- Press note No. 3 (series 2020) dated 17 April 2020 issued by FDI Policy Section, Department for Promotion of Industry and Internal Trade, Ministry of Commerce, GOI
- Notification of Foreign Exchange Management (Non –Debt Instruments) (Second Amendment) Rules, 2020 issued by Department of Economic Affairs, Ministry of Finance, GOI.

Further, in accordance with the above notifications, the intermediaries are supposed to submit an undertaking to IRDAI, duly signed by the Principal Officer and the compliance officer confirming the compliance of the both the notifications. The undertaking shall be accompanied by the following:

- A certificate copy of Resolution passed by the Board of Directors of the Insurance intermediary confirming the above compliances
- Approval of GOI, in case of compliance with Press note 3, wherever required.

Also, all the Insurance intermediaries are required to Comply with all the Rules, Regulations, and guidelines issued therein by IRDAI.

Our view

All these compliances will lead to better work level management that will ultimately improve the transparency of the system.

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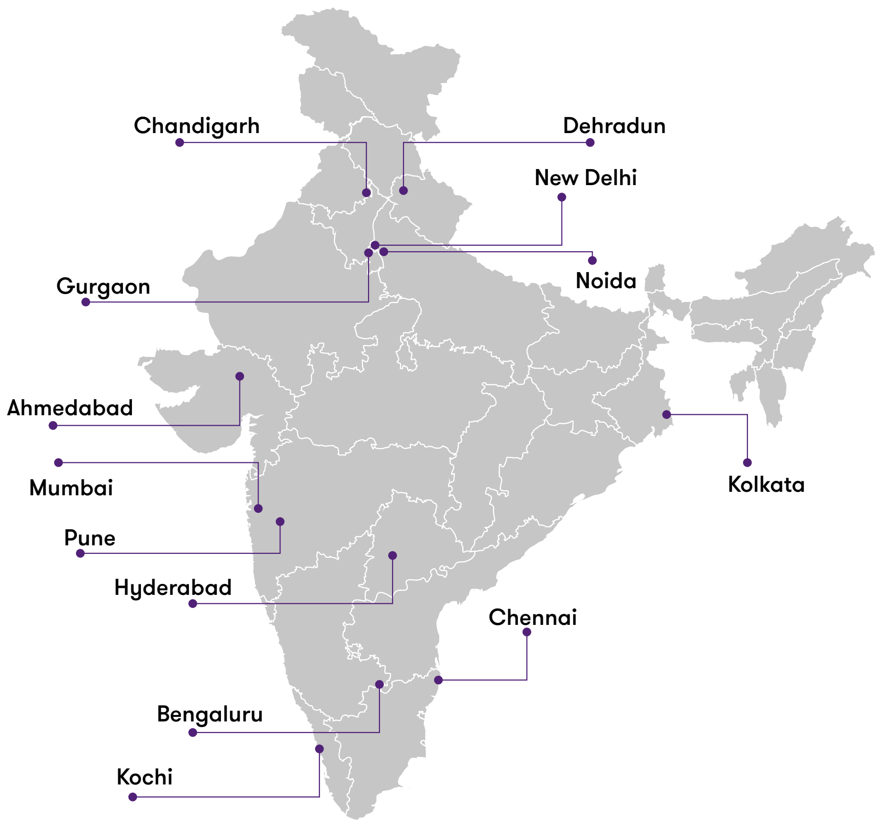

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