Newsflash

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Revision of CBDT Circular No. 21 of 2015 dated 10.12.2015 wherein monetary limits and other conditions for filing departmental appeals (in Income-tax matters) before Income Tax Appellate Tribunal, High Courts and SLPs/ appeals before Supreme Court were specified.

It has been decided by the CBDT (Board) that departmental appeals may be filed on merits before Income Tax Appellate Tribunal and High Courts and SLPs/ appeals before Supreme Court keeping in view the monetary limits and conditions specified below.

Henceforth, all appeals/ SLPs shall not be filed in cases where the **tax effect does not exceed** the monetary limits given hereunder:

Before Appellate Tribunal	INR 2 Million
Before High Court	INR 5 Million
Before Supreme Court	INR 10 Million

It is clarified that an appeal should not be filed merely because the tax effect in a case exceeds the monetary limits prescribed above. Filing of appeal in such cases is to be decided on merits of the case.

Tax Effect means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of the issues against which appeal is intended to be filed (hereinafter referred to as 'disputed issues). Further, 'tax effect 'shall be tax including applicable surcharge and cess. However, the tax will not include any interest thereon, except where chargeability of interest itself is in dispute. In case the chargeability of interest is the issue under dispute, the amount of interest shall be the tax effect. In cases where returned loss is reduced or assessed as income, the tax effect would include notional tax on disputed additions. In case of penalty orders, the tax effect will mean quantum of penalty deleted or reduced in the order to be appealed against.

Proposed Amendment in Rule 10CB of Income-tax Rules, 1962 in respect of computation of interest income pursuant to secondary adjustment made under section 92CE of Income-tax Act, 1961

In order to make the actual allocation of funds consistent with that of the primary adjustment, section 92CE was inserted in the Income-tax Act, 1961 ('the Act') vide Finance Act, 2017 with effect from 1st April, 2018 to provide for secondary adjustment by attributing income to the excess money lying in the hands of the associated enterprise (AE).

Sub-section (2) of section 92CE empowers the Central Board of Direct Taxes (CBDT) to prescribe the time within which the excess money, which is available with the associated enterprise of an assessee as a result of primary adjustment to the transfer price which leads to an increase in the total income or reduction in the loss of the assessee, shall be repatriated to India.

Accordingly, rule 10CB of the Income-tax Rules, 1962 ('the Rules') was inserted vide Notification No. GSR 590(E) dated 15th June, 2017.

Under sub-rule (1) of the said rule 10CB, a uniform time limit of 90 days, starting from different dates, is prescribed for repatriation of excess money. This is done in order to provide for uniform treatment in respect of the different types/situations of primary adjustments specified under sub-section (1) of section 92CE.

Certain difficulties have been noted in the implementing the provisions of sub-rule (1) of rule 10CB in respect of primary adjustment that arises on account of agreement for advance pricing (APA) entered into by the assessee, or on account of an agreement reached under the mutual agreement procedure (MAP). In order to remove these difficulties, it is proposed to amend rule 10CB as under :

2. In the Principal Rules, in rule 10CB, in sub-rule (1),-

(A) for clause (iii), the following shall be substituted, namely:-

"(iii) from the date on which the advance pricing agreement has been entered into by the assessee under section 92CC, where the primary adjustment to transfer price is determined by such agreement;"

(B) for clause (v), the following shall be substituted, namely:-

"(v) from the date of giving effect by the Assessing Officer under Rule 44H to the resolution arrived at under mutual agreement procedure, where the primary adjustment to transfer price is determined by such resolution, under a Double Taxation Avoidance Agreement entered into under section 90 or 90A."

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Appropriate use of Country by Country (CbC) Reports

Country by Country (CbC) Reports containing various financial and other information about international groups, i.e., Multinational Enterprises (MNEs), country by country in which they have business operations, would be available to certain authorities working in the field formation of the CBDT.

As part of the Base Erosion and Profit Shifting (BEPS) Project of the OECD and G20 countries, India is committed to ensuring appropriate use of the CbC Reports. CBDT has issued guidelines for appropriate use of CbC reports data. The same need to be referred and adhered to so as to ensure appropriate use of CbC Reports.

Access to the CbC Reports:

All the CbC Reports filed in India as well as exchanged by other jurisdictions shall be primarily accessed by the Competent Authority of India (Joint Secretary, FT & TR-1 and Joint Secretary, FT & TR-11 in CBDT) and DGRA in accordance with the provisions of the treaties and the Act, 1961.Once the case of a constituent entity has been selected for scrutiny based on Risk Assessment, the jurisdictional Transfer Pricing Officer (the "TPO") will have access to the information relating to that constituent The standard operating procedure for the TPO will be formulated by the Centralized Risk Assessment Unit (the "CRAU") set up in the office of DGRA.

Appropriate Use of CbC Reports

The information obtained through CbC Reports shall be appropriately used by the TPOs during Transfer Pricing The information shall be used for the following purposes:

- High level transfer pricing risk assessment;
- Assessment of other BEPS related risks; and
- Economic and statistical
- Further, the information may also be used:
- for planning a tax audit; and as the basis for making further enquiries, into the group's transfer pricing arrangements and tax matters, in the course of an audit.

High Level Transfer Pricing Risk Assessment

The evaluation of CbC Reports by the CRAU may provide perspectives of potential risks on the transfer pricing arrangements between the Indian taxpayer with its Associated Enterprises, which may necessitate further examination by the For that purpose, a tax audit may be planned through selection of the case of the Indian taxpayer for scrutiny for the relevant assessment year. Using the information as a basis, the TPO shall make further enquiries on the transfer pricing arrangements in the course of the audit. There is no restriction that these enquiries must relate only to the potential risks identified by the CRAU.

Further, the information contained in CbC Reports may also be used as a basis for making enquiries into tax matters identified using other data sources or arising during the course of a tax audit.

The information contained in CbC Reports shall not be used as the only material to propose transfer pricing Transfer pricing adjustments shall be made in accordance with the provisions of the Act and the Rules.

Assessment of other BEPS related risks

CbC Reports may be used to identify indicators of possible tax risks unrelated to transfer pricing, which will lead to examination of such risks through further enquiries during assessment and for closer analysis to arrive at a conclusion on potential tax base erosion and profit shifting.

However, the information gathered from CbC Reports cannot constitute conclusive evidence that an international group is engaged in other forms of BEPS.

Economic and statistical analysis

The information obtained from CbC Reports may be used for economic and statistical analysis for the purpose of better understanding of the use of CbC Reports and to identify the features, benefits and risks of the CbC Reports and tax systems. Using the information for such economic and statistical analysis shall be consistent with the provisions of the tax treaties.

The use of information contained in CbC Reports shall be considered as inappropriate under the following circumstances:

- If the information is used as a substitute for a detailed transfer pricing analysis of international transactions and determination of

Arm's Length Price based on a detailed functional and comparability analysis; and

- If the information is used as the only material to propose a transfer pricing adjustment.

Confidentiality of the CbC Report

Maintaining the confidentiality of information received under the provisions of tax treaties is a legal requirement under the said tax maintaining confidentiality is also an international obligation and any breach may seriously impact ability to receive information in other cases. All CbC Reports received from the other jurisdictions through exchange of information are subject to the requirements of confidentiality under the tax treaties with the respective jurisdictions.

All CbC Reports filed with the DGRA either by a reporting/alternate reporting entity under 286(2) of the Act or by a constituent entity under 286(4) of the Act are subject to the requirements of confidentiality under the provisions of the Act.

The CCIT/DGIT concerned must sensitize the officers in their region on the requirements of maintaining detailed guidelines on maintaining confidentiality provided in Chapter-VII of Manual on Exchange of Information should be strictly followed by all the officers who handle the information contained in CbC Reports exchanged under the tax treaties.

Monitoring, Control and Review

The use of information by the TPO in transfer pricing audits shall be monitored by the jurisdictional CIT (Transfer Pricing) and breach of appropriate use, if any, may be brought to the notice of the Competent Authority of India through proper channel.

The Competent Authority of India is committed to disclose such breaches of appropriate use to the Coordinating Body Secretariat of the OCED.

Concerns raised by the taxpayers on breach of appropriate use shall be reported to the jurisdictional CIT (Transfer Pricing) by the respective TPOs and in case of the issue not being resolved by the CIT, the same shall be brought to the notice of the Competent Authority of India immediately.

In case of adjustments made to the income of a taxpayer based on inappropriate use of information contained in the CbC Reports, the Competent Authority is committed to promptly concede such adjustments in competent authority proceedings (Mutual Agreement Procedure- MAP).

The appropriate use of the CbC Reports, or otherwise, would be reviewed regularly by the Board through the Competent Authority of India.

Principal CCIT (International Taxation & Transfer Pricing) shall submit a quarterly report to the Board through the Competent Authority of India.

Quarterly report would be a consolidated report of all the quarterly reports prepared and submitted to the Principal CCIT (International Taxation & Transfer Pricing) by all the CCIT (Transfer Pricing) in the country. The quarterly report should reach the Board within 30 days from the end of each quarter. This review shall commence from the quarter beginning on 1st January, 2019 and ending on 31st March, 2019. Thus, the first report would be due in the Board by 30th April, 2019. Thereafter, the reports have to be submitted for every succeeding quarter.

Even though the taxpayer has not furnished TRC, the benefit of a tax treaty cannot be denied

In a latest judgment, Ahmedabad Bench of the Income-tax Appellate Tribunal (ITAT) in the case of Skaps Industries India Pvt Ltd (SIIPL) held that SIIPL cannot be denied the benefit under the India-U.S. tax treaty, on the ground that it has not furnished a Tax Residency Certificate (TRC). However, the SIIPL has to satisfy the eligibility for the DTAA benefit. The onus is on the SIIPL to give sufficient and reasonable evidence in support of his residential status so as to satisfy the conditions laid down under Article 4(1) of the DTAA.

CBDT issues a final notification on special transitional provisions for a foreign company said to be resident in India on account of POEM

Section 115JH of the Income-tax Act, 1961, provides that the Indian government may notify exception, modification and adaptation subject to which, provisions of the Act relating to computation of total income, treatment of unabsorbed depreciation, set off or carry forward and set off of losses, collection and recovery and special provisions relating to avoidance of tax shall apply.

In 2017, the Central Board of Direct Taxes (CBDT) has issued draft notification providing such exception, modification and adaptation for application of provisions of the Act. Recently, CBDT has issued final notification dealing with special transitional provisions for a foreign

company said to be a resident in India on account of Place of Effective Management. The notification shall deemed to come into force from 1 April 2017.

Authority for Advance Ruling (AAR) in case of Saudi Arabian Oil Company, Saudi Arabia.

The question before AAR was that **whether based on the nature of business support/ marketing support activities proposed to be undertaken by the Indian affiliate entity viz. Aramco Asia India Private Limited (hereinafter "Aramco India"),would Aramco India create a Permanent Establishment ("PE") for the Applicant in India under Article 5 of Double Taxation Avoidance Agreement between India and Kingdom of Saudi Arabia (hereinafter "India-Saudi Arabia DTAA"), where such activities of Aramco India are duly compensated on an Arm's Length basis in accordance with the Indian transfer pricing laws and regulations?**

The AAR rules that based on the nature of business support / marketing support activities proposed to be undertaken by the Indian affiliate entity viz. Aramco Asia India Private Limited (Aramco India), Aramco India would not create a Permanent Establishment (PE) for the Applicant in India under Article 5 of Double Taxation Avoidance Agreement between India and Kingdom of Saudi Arabia, where such activities of Aramco India are duly compensated on an Arm's Length basis in accordance with the Indian transfer pricing laws and regulations.

Authority for Advance Ruling (AAR) in case HM Publishers Holdings Limited Brunel Rod, UK

The question before AAR was **whether on the facts and circumstances of the case the non-compete fees received by the Applicant from ADI BPO Services Private Ltd., an Indian Company, as a part of the 4 AAR/ 1238 / 2012 HM Publishers Holdings Limited consideration for transfer of the shares held in MPS Ltd. an Indian Company, shall be chargeable under the head "Profits and gains of business or profession" as provided under Section 28(va) of the Income-tax Act read with Article 7 of the Double Tax Avoidance Agreement ('DTAA') between India and United Kingdom, in absence of any Permanent Establishment of the Applicant in India?**

The AAR In view of the above facts and circumstances and case law of Hon'ble Supreme Court in the case of Guffic Chem (P.) Ltd., supra, held that the above said non-compete premium received by assessee is a business receipt assessable u/s. 28(va) of the Act but in terms of Article 7 of DTAA any business income arising to the enterprise of a contracting state is taxable only in that state, assessee being a nonresident company and does not have a permanent establishment in India, liable to tax in UK only.

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About Us

Habibullah & Co. (HCO) is a professional services firm providing audit, assurance, tax, financial advisory and consulting services to a wide range of publicly traded and privately held companies, guided by core values including competence, honesty and integrity, professionalism, dedication, responsibility and accountability.

At HCO, the interests of our clients are paramount. Our focus on the mid-market means we have a real understanding of the environment in which our clients operate and are ideally placed to help them grow and prosper.

Who we are and what we stand for

- Established 1962
- 9 Partners
- 100 + staff
- 6 offices across India
- International Representation through "Antea-Alliance of Independent Firms"
- Member Firm of The Institute of Chartered Accountants of India since 1962
- Registered with all major Government Regulators in India

Our Services

- Accounting and Auditing
- Business Setups in India
- Tax Compliance, Planning and Management
- Transfer Pricing Advisory
- Business Advisory

Member of Antea Alliance of independent firms

Let's talk

For a deeper discussion of how this issue might affect your business, please contact, Managing Partner for International Relations:

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