

LUTHRA & LUTHRA LLP

CHARTERED ACCOUNTANTS



International Taxation
ISSUE APRIL 2023

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News Highlights



CBDT clarified employer's TDS obligation under new 'default' personal tax regime

CBDT vide Circular No. 4/2023, provided for the employer's TDS liability on the salary income of a person under section 192 in the new tax regime. According to the notification, employers shall obtain information regarding the intended tax regime of the employees (whether to opt under 115 BAC or not). Further, every employee shall notify the same to their employer and upon intimation, employer shall compute their total income and deduct TDS as per the option exercised.

If employee fails to inform employer, it will be assumed that employee has opted for default new tax regime (opted for 115BAC) and has not opted out, accordingly employer shall deduct TDS under section 192 on income under head Salary as per rate under section 115BAC

The said circular will be applicable from FY 2023-24 onwards.

CBDT signed Advance Pricing Agreements in FY 2021-22

CBDT through press release dated March 31, 2023 announced that it has signed 95 Advance Pricing Agreements (**APAs**) for FY 2022-23, out of which 63 are Unilateral APAs (**UAPAs**) and 32 are Bilateral APAs (**BAPAs**) which records highest APA and BAPAs signing ever since the launch of APA programs.

APA for four preceding years, as a result of which, tax certainty is provided for nine years. The signing of bilateral APAs additionally provides the taxpayers with protection from any anticipated or actual double taxation.

India entered into mutual agreements with partners such as Finland, the UK, the US, Denmark, Singapore,



and Japan, consequently resulting into BAPAs signings.

CBDT notified 21 jurisdictions under passive non-financial entity definition

CBDT, vide Notification No. 17/2023, exercised powers under Section 285BA, thereby amended Rule 114F and notified new list of 21 jurisdictions such as Israel, Turkey, Hong Kong, Oman and Qatar for the purpose of 'passive non-financial entity' definition.

CBDT notified exemption u/s 10(46) to Central Board of Secondary Education and Greater Noida Industrial Development Authority

CBDT vide notification No. 9 of 2023 provided income tax exemption under Section 10(46) to Central Board of Secondary Education, Delhi (CBSE) and Greater Noida Industrial Development Authority. The exemption is provided for the specified incomes only, provided that the CBSE and Development board shall

not be engaged in any commercial activity and the nature of the specified income shall remain unchanged throughout the financial years.

CBDT notified amendment to section 10(26AAA) of the Income-tax Act, 1961

CBDT has made amendment to section 10(26AAA) of Income Tax Act 1961, after following decisions of Hon'ble Supreme court in the case of Association of Old settlers of Sikkim and ORS where the term "Sikkimese" has been defined.

CBDT by amendment has clarified that the term "Sikkimese" defined by the Hon'ble Supreme Court, is only for the purposes of the Income-tax Act, 1961, and not for any other purpose.



Indian/Global Updates



UAE to support start-ups notified Small Business Relief

UAE specified annual revenue threshold of AED 3,000,000 (three million dirhams) for residents for the purpose of small business relief referred to in Article 21 of the Corporate Tax Law. The threshold will be applicable for tax periods starting on or after Jun 1, 2023 but ending on or before Dec 31, 2026.

Small Business Relief will not be available to Qualifying Free Zone Persons or members of Multinational Enterprises Groups (MNE Groups) as defined in Cabinet Decision No. 44 of 2020. Where businesses do not elect to apply for Small Business Relief, they will be able to carry forward any incurred Tax Losses and any disallowed Net Interest Expenditure from such tax periods, for use in future tax periods in which the Small Business Relief is not elected.

UAE's Ministry of Finance stipulated that an artificial separation of business for taking Small Business Relief would amount to an abusive tax practice.

Viet Nam signed BEPS MLI as 147th jurisdiction

Viet Nam signed the Multilateral Convention (MLI) on Mutual Administrative Assistance in Tax Matters and joined the international efforts towards greater tax co-operation and exchange of information. This signing brought the total number of jurisdictions that participate in the Convention to 147 and enabled Viet Nam to engage in the exchange of information with 146 other jurisdictions, including all major financial centers.

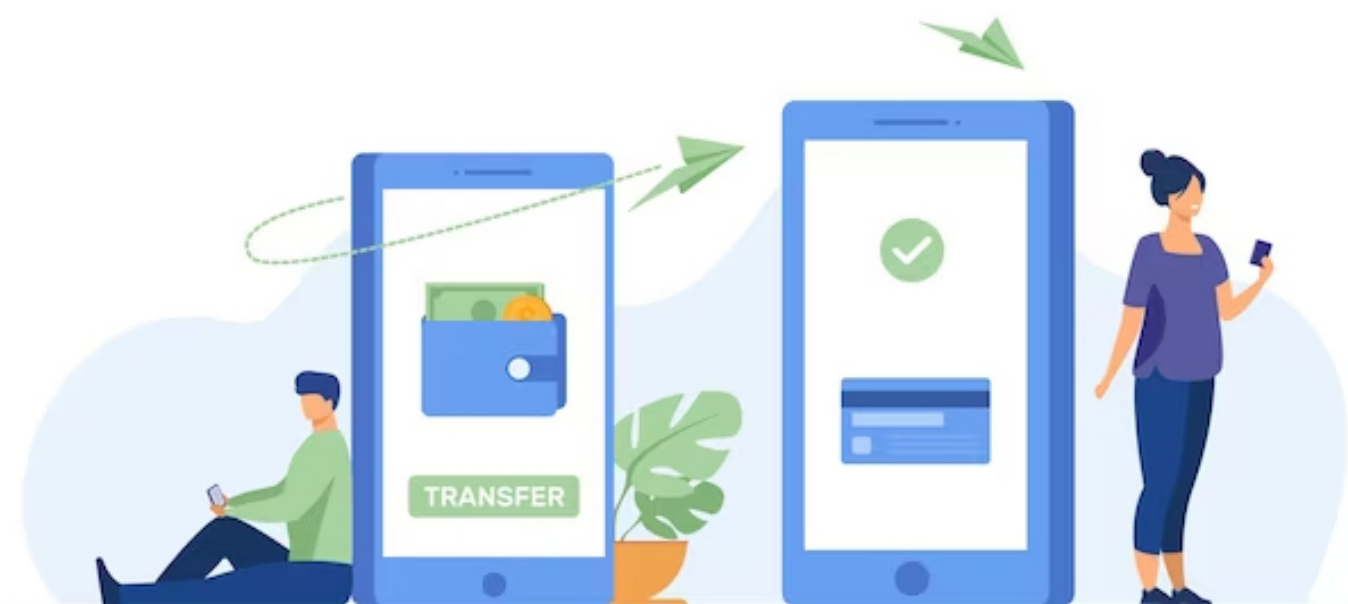
Zimbabwe joined the Global Forum as 167th member

Zimbabwe became the 167th member of the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum).



Zimbabwe will participate on an equal footing and is committed to combatting offshore tax evasion through the implementation of the internationally agreed standards of exchange of information on request (EOIR) and automatic exchange of financial account information (AEOI).

Zimbabwe will also join the Africa Initiative, a programme of work launched in 2014 to support domestic revenue mobilisation and the fight against illicit financial flows in Africa through enhanced tax transparency and exchange of information.



Transfer Pricing / BEPS



Sustained progress demonstrated in the latest OECD peer review results on the prevention of tax treaty shopping

The OECD released the latest peer review results assessing the actions taken by jurisdictions to prevent tax treaty shopping and other treaty abuse under Action 6 of the OECD/G20 BEPS Project.

The Fifth Peer Review Report on Treaty Shopping formed the basis for assessment of the implementation of the BEPS Action 6 minimum standard. The report provided that members of the OECD were respecting their commitment in implementing the minimum standard on treaty shopping. Also confirmed the importance of BEPS Multinational Instrument (MLI) as a tool used by vast majority of jurisdictions that had started to implement the BEPS Action 6 minimum standard.

The MLI had significantly expand the implementation of minimum standard and to date, covered 100 jurisdictions and around 1 850 bilateral tax treaties. The BEPS Action 6 minimum standard identified treaty abuse and in particular treaty shopping as one of the principal sources of BEPS concerns.

UN ECOSOC calls for 'inclusive & effective' international tax cooperation, eyeing sustainable development

United Nations' Economic and Social Council (ECOSOC) recently convened a special meeting on International Cooperation in Tax Matters. The special meeting was focused on critical international tax topics in the context of the recovery from the COVID-19 pandemic and current global economic crises.

The sessions addressed some major topics relating to promotion of effective and inclusive international tax cooperation at the United Nations and taxation as a policy lever to advance the transition from fossil fuels to renewable energy sources.

The session witnessed strong participation from UN Member States, including senior officials of national tax authorities and ministries of finance, members of the UN Tax Committee, and senior representatives of



international organizations, civil society, business, and academia dealing with international tax cooperation, financing for development and the wider global sustainable development agenda.



Issue of the month



Taxation on Virtual Digital Assets

Introduction

The digital economy is expanding rapidly, which has virtually transformed the way in which businesses are carried out, across the globe including in India. It is the power of “*The Digital*” that has made it possible for the businesses to develop new ways of doing business that did not exist before, and has given rise to new business models that has the ability to do business in any market without having a physical presence.

To keep pace with the aforesaid rapid expansion of digital economy in India and the Government of India’s (‘GOI’) steps to tax digital transactions, including expansion of the scope of equalisation levy to non-resident e-commerce operator not having permanent establishment in India, tax deduction at source (‘TDS’) on payment by e-commerce operators vide introduction of section 194O in the Income Act, 1961 (‘the Act’), GOI brought in taxation of virtual digital assets (‘VDA’) vide Finance Act 2022.

The Budget 2022, dealt with the emerging market and popularity of investments in cryptocurrencies, Non-fungible tokens (‘NFT’) and other digital assets in India by seeking to tax the VDA.

Meaning of VDA

The Finance Act 2022, inserted a new clause namely clause (47A) in section 2 of the Act. As per section 2(47A) of the Act, the term VDA “means:

- any information or code or number or token (not being Indian currency or any foreign currency), generated through cryptographic means or otherwise, by whatever name called, providing a digital representation of value which is exchanged with or without consideration, with the promise or representation of having inherent value, or functions as a store of value or a unit of account and includes its use in any financial transaction or investment, but not limited to, investment schemes and can be transferred, stored or traded electronically.
- non-fungible token or any other token of similar nature by whatever named called are included in the definition.”



Further, following VDA are excluded from the afore-said definition of VDAs:

- i. *“Gift card or vouchers, being a record that may be used to obtain goods or services or a discount on goods or services*
- ii. *Mileage points, reward points or loyalty card, being a record given without direct monetary consideration under an award, reward, benefit, loyalty, incentive, rebate or promotional program that may be used or redeemed only to obtain goods or services or a discount on goods or services*
- iii. *Subscription to websites or platforms or application.”*

The aforementioned definition of VDA is very generic and wide enough to cover all kinds of digital assets, which could bring into tax net all kinds of digital currencies traded in markets, like Bitcoin, Ethereum, DOGE, etc. Further, NFTs are covered within the scope of VDA.

However, it is provided that the central government may notify such categories of digital assets which shall not be considered as VDAs.

Applicable Tax Rate

As per section 115BBH of the Act, income on transfer of VDAs is subject to tax @ 30% plus applicable surcharge and cess on gross basis i.e. without any claim of deduction of any expenditure other than the cost of acquisition of such VDA. Further, no set-off of any loss arising from the transfer of VDA is allowed against any other income under the Act. Further, unlike the case of taxation of shares and securities or speculative transactions, such loss is not even be allowed to be carried forward to subsequent assessment years. In other

words, loss on transfer of VDAs in any year may only be set-off against income from transfer of other VDAs in the same year itself, and the losses remaining to be set-off, would have to be foregone by the taxpayers.

Gift of VDA

Further, as per 56(2)(x) of the Act, gifting of VDA between unrelated parties over the threshold of INR 50,000 is subject to tax in the hands of recipient.

Withholding tax on VDAs

In order to maintain and collect the details in respect VDA transactions, as per section 194S of the Act, tax @ 1% is required to be withheld by the person paying consideration for transfer of VDA.

However, tax would not be required to be withheld by following persons:

Payer	Value of transaction not exceeding during the FY
Individual or HUF having business / professional income, but turnover does not exceed INR 1 crores / 50 lakhs, respectively, during the FY immediately preceding the FY in which VDA is transferred	50,000
Individual or HUF having income other than business / professional income	50,000
Any other case	10,000

Further, it may be noted that in case the payment for transfer is wholly in kind or in exchange of another virtual digital asset where there is no part in cash or partly in cash and partly in kind but the part in cash is not sufficient to meet the liability of deduction of tax in respect of whole of such transfer, the buyer of such VDA should ensure that tax has been paid in respect of such consideration, before making the payment

Further, it may also be noted that in case of a transaction where tax is deductible under section 194O of the Act, as well as section 194S of the Act, then the tax shall be deducted u/s 194S of the Act and not section 194O of the Act.

Distinction between taxability on transfer of shares / securities vis-à-vis VDA:

Basis of distinction	Shares / Securities	VDAs
Classification of gain as short term and long term	There are different tax rates if the gain on transfer of shares / securities is short-term / long-term gain	Gain on transfer of VDA is to subject to tax at a flat rate of tax irrespective of the period of holding
Exemption	Exemption of long-term capital gain up to INR 1 lakh in a FY on transfer of equity shares u/s 112A of the Act	No such exemption provided
Set-off of loss against other income	Allowed, subject to certain prescribed conditions	No set-off of any loss arising from the transfer of VDA is allowed against any other nature of income
Carry forward of loss	Allowed, subject to certain prescribed conditions	Not allowed

Conclusion

GOI is beginning to recognize crypto as an emerging asset class, and thereby introduction of tax on VDAs is a milestone in Indian income tax laws. However, the high rate of tax along with no ability to set-off and carry forward the losses appears to be little harsh.

Although, the investment and manner of trading of VDAs may be somewhat similar to dematerialized shares / securities by the investors, however, the manner of computation and levy of tax on income from transfer of these assets are not alike. Some of the difference are in the table below:

Under the current laws, in situations where the buyer and the seller are unknown to each other and are trading through an Exchange, would require further analysis on who shall be liable to deduct the TDS.

Legal Corner

In the Supreme Court of India
SAP Labs India Pvt. Ltd. & Others

Introduction

A batch of appeals was filed by revenue as well as by the taxpayer against the judgment passed by the Hon'ble Karnataka High Court in the case Softbrant India (P) Ltd, wherein the Hon'ble Karnataka held that the determination of arm's length price ('ALP') does not involve any 'substantial question of law'. Therefore, as Hon'ble ITAT is a final fact finding authority, the issue of determination of ALP cannot be subject to scrutiny in an appeal before the Hon'ble HC u/s 260A of the Income Tax Act, 1961 ('the Act').

Contentions of the Revenue

Ld. Counsels for the Revenue contented that there cannot be any absolute proposition of law which cannot be interfered by the Hon'ble HC in an appeal u/s 260A of the Act, against the decision of Tribunal determining the ALP. Further, the Ld. Counsel for the Revenue contented that the ALP is required to be determined in line with the guidelines prescribed u/s 92 of the Act in line with Rule 10A to 10E of the Income-tax Rules, 1962 ('the Rules'). Thus, it is always

open for the Hon'ble HC to examine as to whether the guidelines stipulated under the Act and the Rules is followed by the Tribunal while determining the ALP.

Contentions of the taxpayers

Ld. Counsels for the taxpayers submitted that it is a settled proposition that jurisdiction u/s 260A of the Act cannot be invoked unless there arise a '*substantial question of law*' which is fairly arguable or may arise where there is a difference of opinion on it, for example issue as to whether the transaction will fall within the definition of '*international transaction*' or if two enterprises are '*associate enterprises*'.

Ld. Counsel for the taxpayer further contended that an issue which involves inclusion and exclusion of few comparables and selection of filters are basically question of facts that should not be questioned before Hon'ble HC.



Further, Ld. Counsel for the taxpayer contented that unless perversity in the findings of the Tribunal is pleaded and demonstrated by placing material on record, no substantial question of law can arise and therefore there can be no interference by the Hon'ble HC.

Hon'ble Supreme Court

After hearing contentions of the both the parties, Hon'ble Supreme Court ('Hon'ble SC') explained that the any determination of ALP under the guidelines laid under the Act can be considered as perverse and it may be considered as 'substantial question of law' as perversity itself can be said to be a '*substantial question of law*' i.e. determination of ALP contrary to the prescribed statutory guidelines can be a perversity warranting intervention by the Hon'ble HC.

Therefore, the Hon'ble SC held that determination of ALP, choice of comparable companies and filters shall be construed as '*substantial question of law*' before the Hon'ble HC u/s 260A of the Act

In view of the above reasons the Hon'ble SC quashed and set aside the judgements of Hon'ble HCs and directed the respective Hon'ble HCs to decide and dispose of the respective appeals afresh in the light of aforesaid judgement of Hon'ble SC within a period of nine months from the date of receipt of the order by respective HCs.

Conclusion

This ruling may increase the time-frame to resolve Transfer Pricing disputes and more litigation as generally the taxpayer and Revenue are likely to file appeal against unfavorable Hon'ble ITAT's order before the Hon'ble HC. Further, on appeal, Hon'ble HCs are may remand such matters to the ITAT for adjudication, instead of passing a speaking order on merits.

Further, one will have to see how the HCs are equipped to deal with the volume of cases, especially given the huge pendency of non-tax cases before them.



Glossary



Act	Income Tax Act, 1961
A.Y.	Assessment Year
AE	Associated Enterprises
ALP	Arm's Length Price
AO	Assessing Officer
BEPS	Base Erosion and Profit Shifting
CBDT	Central Board of Direct Taxes
TDS	Tax Deducted at Source
ITO	Income Tax Office
ROI	Return Of Income
TP	Transfer Pricing
TPO	Transfer Pricing officer
TDS	Tax Deducted at source
APAs	Advance Pricing Agreements
UAPAs	Unilateral APAs
BAPAs	Bilateral APAs
AEOI	Automatic Exchange of Financial Account Information
EOIR	Exchange of Information On Request
GOI	Government of India's
VDA	virtual digital assets
SC	Supreme Court
HC	High Court

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Do write us back your Feedback/Queries/Comments, if any at taxhelpdesk@llca.net

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