

LUTHRA & LUTHRA LLP

CHARTERED ACCOUNTANTS



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News Highlights



CBDT amends notification exempting ITR-filing for NRs pursuant to 'Investment Fund' definition amendment

The CBDT amended the notification related to the exemption of filing ITR to non-residents and foreign companies, earning income from investment funds.

Pursuant to this amendment, the definition of 'investment fund' has been expanded to include any fund established or incorporated in India, which was regulated under the International Financial Services Centres Authority (Fund Management) Regulations, 2022.

CBDT amends Rule 21AK to include NRs income from offshore derivatives

CBDT, Vide Notification No. 50/2023, has introduced amendments to Rules 21AK, 114AAB, and Form 10CCF. The amendment to Rule 21AK pertains to the conditions for exemption under Section 10(4E) of the

Income Tax Act 1962 ("The Act"). The amended rule now includes income that has accrued, arisen to, or received by a non-resident as a result of the distribution of income on offshore derivative instruments, subject to certain conditions.

In addition to the above amendments, CBDT has also substituted Form 10CCF, which is the Report filed under Section 80LA of the Income Tax Act.

CBDT clarifies on TCS on LRS & overseas tour package with Guidelines

CBDT issued a clarification regarding the implementation of changes pertaining to Tax Collected at Source (**TCS**) on the Liberalised Remittance Scheme



(LRS) and on the purchase of overseas tour program packages. The circular aims to address various concerns and queries related to the new TCS regime. The clarification provides detailed answers to different scenarios and questions.

CBDT notifies Yamuna Expressway Industrial Development Authority for Sec.10(46) exemption

CBDT vide notification No. 48 of 2023 provided income tax exemption under Section 10(46) to Yamuna Expressway Industrial Development Authority. The exemption was provided for the specified incomes only, provided that it shall not be engaged in any commercial activity and the nature of the specified income shall remain unchanged throughout the financial years.



Indian/Global Updates



OECD reported progress of Latin America in tackling tax-evasion

Report of Tax Transparency in Latin America 2023 (The Report) was released by OECD, presenting the latest progress achieved by 16 Latin American countries in tackling tax evasion and other illicit financial flows (IFFs) through transparency and exchange of information (EOI) for tax purposes.

Considering that the Latin American countries' average tax-to-GDP ratio remains low in international comparison, the report suggested practical strategies and action-oriented recommendations to address the multiple challenges of tax evasion. The report underlines the crucial role of transparency and international co-operation in helping Latin American governments increase domestic resource mobilization for the benefits of their citizens.

The report clearly demonstrates how Latin American jurisdictions that have developed and implemented a strategy to increase the use of EOI as a tool to support their audits and investigations gain tangible results.

Australia allowed temporary relief from Accounting of Deferred Taxes arising from Pillar 2

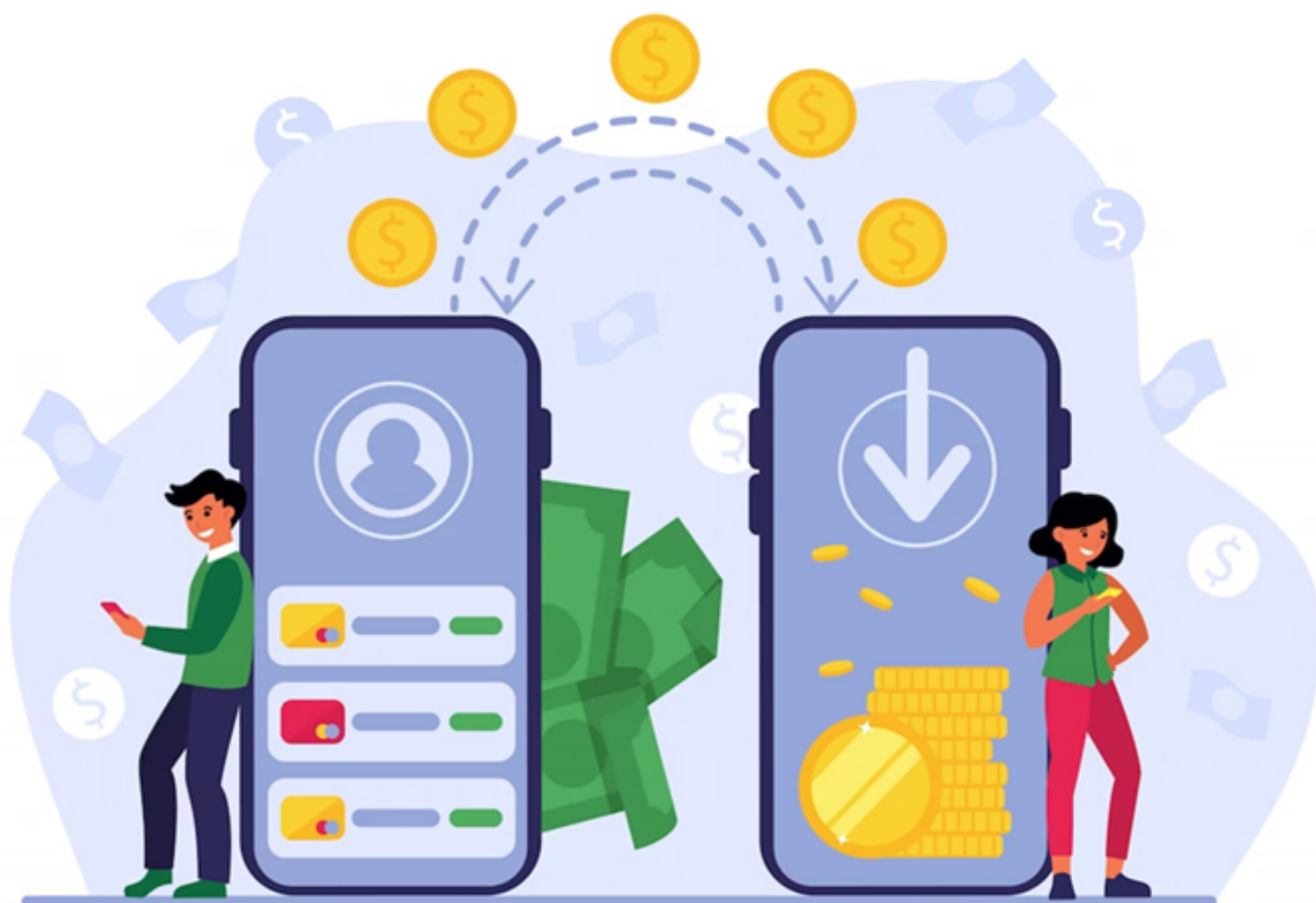
The Australian Accounting Standards Board (AASB) had released amendments to Australian Accounting Standards which offer temporary exemptions for accounting for deferred taxes resulting from Pillar 2 of the OECD's international tax reform.

The amendments will introduce:

- (a) A mandatory temporary exemption for accounting of deferred taxes arising from the implementation of the Pillar Two model rules published by the OECD; and
- (b) Targeted disclosure requirements to help financial statement users better understand an entity's exposure to income taxes arising from the reform.



This Standard applies to annual periods beginning on or after January 01, 2023 that end on or after June 30 2023.



Transfer Pricing / B E P S



OECD released updated version of BEPS MLI Matching Database

OECD launched the improved version of the database supporting the application of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the "BEPS MLI"). The database will allow tax authorities and other interested parties to make projections on how the MLI modifies a specific tax treaty.

The BEPS MLI Matching Database presents detailed up-to-date information on the application of the BEPS MLI to tax treaties, particularly presenting "matching results" under the BEPS MLI in respect of each covered tax treaty.

The updated database includes significant improvements including incorporation of historical data, which allows users to view the application of the BEPS MLI at specific points in time. The upgrade also offers a more intuitive interface that makes it easier for users to search for and access information.

138 countries agreed on Outcome Statement for Two Pillars

In a historic development, 138 countries in OECD G20 BEPS Inclusive Framework agreed on an Outcome Statement recognizing the significant progress made and allowing countries and jurisdictions in reforming the international tax system by Two Pillar Solution.

138 countries and jurisdictions had also agreed in the Outcome Statement to refrain from imposing newly enacted digital services taxes or relevant similar measures on any company before 31 December 2024, or the entry into force of the MLC (Multilateral Convention) if earlier, provided the signature of the MLC had made sufficient progress by the end of the year. This commitment is made in recognition of the progress made to date and the need to prevent disruption or delay of the ratification of the MLC.



Issue of the month



Issue of the month

Intra group services

Introduction

Intra-group services (**'IGS'**) refer to the provision of various administrative and support functions and specialized services by one entity within a corporate group to another associated enterprises (**'AE'**). These services are typically shared among members of the same group to streamline operations, enhance efficiency, and foster collaboration within the organization.

IGS play a crucial role in optimizing resources, minimizing costs, and maintaining a cohesive corporate structure. However, their complexity and potential impact on transfer pricing have drawn increased scrutiny from tax authorities worldwide, making them a significant area of focus in international taxation.

Guidance related to IGS

The OECD Transfer Pricing Guidelines and UN Practice Manual provide guidance related to IGS, including

discussion on various issues involved in and benchmarking of IGS.

From transfer pricing perspective, there are 2 major issues which are discussed in the aforesaid commentary:

- Whether IGS have actually been provided
- Determination of ALP or benchmarking of IGS

Guidance to deal with the issues

Determining whether IGS have been rendered

There are 6 parameters (as discussed in the OECD Guidelines) to determine whether IGS have been rendered by the service provider which are briefly discussed hereunder:



The benefit test refers to the economic and commercial value derived by the recipient of the service to enhance or maintain its business position. To meet this criterion, we must determine whether an independent enterprise in comparable circumstances would have been willing to pay for the activity if performed for it by an independent enterprise or would have performed the activity in-house for itself.

Furthermore, if the IGS is provided to meet an identified need, it can be concluded that the IGS has been rendered by the AE. For instance, when the IGS is related to repair of equipment used in the manufacturing activities.

2. Shareholder activities:

If the activities performed by a group member are solely due to its ownership interest, they would not be considered as IGS. As a result, payment for such activities would not be justified. Examples of such activities include compliance with laws, reporting requirements, and fundraising.

However, if these activities satisfy the benefit test, they may be considered as IGS.

3. Duplication:

If any activities or services are merely duplicated within the group, they cannot be considered as IGS. In other words, if one entity undertakes IGS that duplicate a service another group member is already performing for itself, they would not qualify as IGS.

However, it is important to note that temporary duplication or duplication undertaken to reduce risk would still constitute IGS.

Furthermore, non-duplicative elements of the services need to satisfy the benefit test to be classified as IGS.

4. Incidental benefits:

If IGS performed for some of the group members but incidentally it provides benefits to other group members then it could constitute IGS for particular members involved only.

5. Centralised services:

Administrative services are generally centralized at the group level and made available to the group members. These services are ordinarily considered as IGS since, in most cases, they satisfy the benefit test.

6. Form of the remuneration:

In considering whether a charge for the provision of services would be made between independent enterprises, it would also be relevant to consider the form that an arm's length consideration would take had the transaction occurred between independent enterprises dealing at arm's length.

On the basis of above discussed parameters Hon'ble ITAT, in the case of Lintas India Private Limited , held that these tests are required to be satisfied every year irrespective of decisions rendered in earlier years.

Determination of ALP or benchmarking of IGS

Once it is established that the IGS have been rendered, it is important to determine the ALP of such services.

For determining the ALP, there are two methods i.e. direct charge method and indirect charge method.

Direct charge method:

In some cases, IGS charges are easily identifiable through the direct-charge method. This method allows AE to be charged for specific services, making it convenient for tax

administrations to determine if the charges comply with the arm's length principle.

MNEs are encouraged to adopt this method in case internal CUP is applicable i.e. same services are also rendered to independent parties. However, this method may not be appropriate in case services rendered to independent parties are merely occasional or marginal.

Indirect charge method:

The direct charge method can be challenging to apply in practice, leading to the development of other methods known as indirect charge methods.

Indirect charge methods, for cost allocation and apportionment, require estimation or approximation to calculate arm's length charges. They are acceptable if they consider the value of services and comparability to independent enterprises. However, if the direct charge method can be applied, these indirect methods may not be suitable.

The indirect charge method is appropriate when the value of services provided cannot be readily quantified, or separate records are not maintained for each beneficiary. Additionally, when using this method, the allocation should be based on an appropriate measure of service usage, such as turnover or staff employed, etc.

Selection of MAM for benchmarking

After determination of the IGS and amount charged / paid for said services, it is important to benchmark the transaction using MAM.

Usually CUP and CPM is used for such transactions. However, sometimes when CUP and CPM is not applicable then TNMM is used. Also, in case of high value added services PSM is used.

Guidance related to low value adding IGS

Under the OECD guidelines, an elective simplified approach has been provided for determining the ALP, while the UN Manual prescribes the use of safe harbor rules. Both guidelines essentially address the same concept under different names.

The purpose of these approaches is to reduce compliance efforts, provide greater certainty, and enable efficient review of compliance risk by tax authorities through targeted documentation.

To qualify as low value-adding IGS, the following conditions must be satisfied:

- IGS are of supportive nature
- IT is not part of core business activities of MNE group
- Do not require the use of or create unique and valuable intangibles
- Do not involve or give rise to significant risk

The elective simplified approach is not applicable where internal CUP is available as same can be used to benchmark the IGS.

Steps in applying the simplified approach:

Step 1: Determination of cost pools

This is the first step where all the costs related to low value adding IGS is added to make a cost pool for allocation. However, it should not include cost solely attributable to company performing the activity.

Step 2: Exclusion from cost pools

The costs that are solely attributable to activities performed on behalf of any other enterprise should be excluded from the cost pool.

Step 3: Allocation of costs

The third step is to allocate the costs among members of the group on the basis of appropriate allocation keys. The basis for selection of any specific allocation key must be described in the documentation.

Step 4: Profit mark up

The service provider shall charge a profit mark up on all the cost in the pool except any pass through cost. The mark up shall be 5% of the cost in cost pool and same mark-up shall be applied for all the categories of low value adding IGS. Further, it is not required to be justified by a benchmarking study.

The tax administration may set a threshold limit up to which the simplified approach can be availed. If value of IGS exceeds the threshold then simplified approach shall not be applicable and other approach including benefit test shall apply accordingly.

Further, proper documentation shall be maintained by the MNE electing for the application of the simplified approach.

Furthermore, withholding tax may be levied on mark-up component by the tax authorities.

Comments

Transactions of IGS are frequently undertaken by MNEs to achieve synergy benefits through optimal resource utilization and cost reduction. However, it is essential to acknowledge that IGS transactions are also utilized by MNEs as a means of tax planning, enabling them to shift profits to low-tax jurisdictions.

In the case of bonafide transactions, maintaining proper documentation to evidence the provision or receipt of services and ensuring compliance with parameters outlined by OECD guidelines become crucial. By adhering to these practices, potential tax litigations can be avoided, and the process can be carried out seamlessly and transparently.

Legal Corner



In the High Court of Delhi

**CIT (International Taxation) Vs Springer Nature
Customer Services Centre GMBH**

Introduction And Brief Facts

Springer Nature Customer Services Centre GMBH (**'the Assessee'**) was incorporated in Germany, and was a part of Springer Group which was engaged in the business of publishing books, and academic journals, in the field of natural sciences, technology and medicine.

The Assessee functioned as non-exclusive sales representative globally of Springer Group's affiliated publisher, which included Springer India Pvt. Ltd. (**"SIPL"**).

The assessee has entered into the Commissionaire Agreement with SIPL according to which it was required to promote, sell, distribute books and journals published by SIPL in print and electronic format. Besides this agreement, The Assessee also provided sales and marketing services, customer services, order handling, delivery invoicing, debtor and subscription management, and processing of return copies.

For the AY 2013-14 the case of the Assessee was selected for scrutiny wherein the Assessing Officer (**"the AO"**) made additions for Rs.22,89,835 on account of commission received against services rendered and another addition amounting to Rs. 16,67,83,110 was made which represent the subscription fees received by the Assessee for supplying e-journals. The AO treated these services as royalty as the Assessee invoked the provision of Section 9(1)(vi) of the Income Tax Act, 1962 (**"The Act"**) and Article 12 of India- Germany Double taxation avoidance agreement (**"DTAA"**).

Aggrieved with the order the AO, the appeal was filed with the Commissioner of Income Tax (**"Ld. CIT"**). The Ld. CIT in its order categorized the commission received against services as a fee for technical services (**"FTS"**) instead of royalty.



Later on, the Income Tax Appellate Tribunal (**"Hon'ble ITAT"**) in the order stated that subscription fee could not be treated as royalty based on the judgement of Hon'ble Supreme Court in **Engineering Analysis Center of Excellence (P.) Ltd. v CIT**, [2021] 432 ITR 471 (SC).

The revenue being aggrieved with the order of the Hon'ble ITAT presented the appeal before Hon'ble High Court ("HC").

Submissions of Department

The Ld. Counsel made addition in respect of commission received against services rendered as FTS under Article 12 of the DTAA and Section 9 of the Act.

For justifying the commission received against services provided as FTS following contentions were presented by the Ld. Counsel: -

- As per the terms of the Commissionaire Agreement, the services such as promotion, sale and distribution of products globally could be categorized as consultancy services. Likewise, services such as order handling, inventory management, debtor management and subscription management could be categorized as managerial services.
- The services provided by the Assessee under the Commissionaire Agreement, which include order handling, inventory management, debtor management and subscription management, involve human effort and hence can be categorized as technical/-consultancy service. Similarly, marketing and sale

services also involve an element of managerial function.

In sum, the services provided would qualify as FTS, as they were in the nature of managerial, technical, and so-called consultancy services, as defined under Article 12 of the DTAA and Section 9 of the Act. Ld. Counsel in respect of second condition contented that the subscription fees received by the Assessee for supplying e-journals would also chargeable to tax as FTS, since the scope of the service is similar to those provided under the Commissionaire Agreement.

Arguments of Assessee

Ld. Senior Advocate of the Assessee contented that payments to be construed as FTS, one would have to conclude that the payments were received for rendering managerial, consultancy or technical services. The Ld. CIT had not indicated the head under which the services rendered by the Assessee would fall.

To support the contention, the Ld. Senior Advocate briefly described each and every aspect.

- For a service to qualify as managerial, it must bear an element of management. The service provider must manage the business of the recipient of service by formulating policy, and/or exercising control and supervision of the personnel. A service rendered with human intervention must partake the character and role of a manager, merely providing support qua business operations involving sales, audit or finance cannot be treated as managerial

services, either within the meaning of the Act, or the DTAA.

- For a service to be construed as a technical service, it should involve the application of some special skill or knowledge concerning the technical field.

- Consultancy service involves offering advice, or extending advisory services by a professional. In some cases, consultancy services may involve entering a technical field.

The Ld. Senior Advocate contented that the business model of the Assessee was to further sales and to promote and distribute books published by SIPL, in electronic form or otherwise. Besides this, the Assessee also rendered support services for business operations. Thus, none of the services offered by the Assessee involved an element of technical expertise or advice. Therefore, the services rendered by the Assessee could not be characterized as FTS under the DTAA, or the Act.

Decision of Hon'ble High Court

After considering the facts and contentions of both the parties, Hon'ble HC observed that to conclude service as FTS the service has to fall under one or more of the following categories, i.e., managerial, technical or consultancy services as per the provisions of Section 9(1)(vii)(b) read with explanation 2 of the Act and Article 12(4) of the DTAA.

The Hon'ble HC analyzed each of the above criteria: -

- As per Commissionaire Agreement the Assessee was not required to discover, develop, or define/evaluate the goals that SIPL, or even frame policies that led to these goals, or supervise or execute or change policies that were already adopted. The Assessee was not performing, as it were, executive or supervisory functions. All that the Assessee was obliged to do was render support to the business operations. Thus, the services provided could not be classified as managerial service.

- Technical services are generally connected with applied and industrial sciences or craftsmanship, involving special skills or knowledge, excluding fields such as art, or human sciences. Likewise, consultancy services involve rendering professional advice or service in a specialized field. In the case of the Assessee, there was no reference to any special skill or knowledge that the Assessee personnel brought to bear in rendering the services mentioned in the Commissionaire Agreement.

- Promotion, sale, or distribution of SIPL's publications, or rendering support services as per the Commissionaire Agreement, although involving human intervention, do not, fall in the category of technical and/or consultancy services as there were no special skills or knowledge that the Assessee's personnel were required to possess to render the services that were contemplated under the Commissionaire Agreement. The Assessee also did not render any professional advice, or service concerning a specialised field. As indicated above, for a service to be categorised as a technical service, it had to be concerned with applied

science, i.e., using scientific knowledge for practical applications, or industrial science concerning, relating to or derived from industry.

Therefore, the contention of revenue that service should be classified as technical service only if service involves human intervention was erroneous. Further, subscription fees for e-journal cannot be treated as royalty having regard to the fact that there is nothing on record to suggest that the Assessee had granted the right in respect of copyright to the concerned subscribers of the e-journals.

Comments

Section 9 of the Act, as well as Article 12 of the DTAA, contains the definition of FTS. Upon analyzing the aforementioned provisions, it becomes evident that managerial, technical, or consultancy services fall under the classification of FTS. Any service that is not covered by this definition would be outside the scope of FTS.

Hence, for a service to be classified as a technical service, it must involve special skills or knowledge in a particular field. Simply having human intervention in providing the service does not automatically make it FTS unless such service incorporates specialized skills or knowledge.



Glossary



Act	Income Tax Act, 1961
A.Y.	Assessment Year
AE	Associated Enterprises
ALP	Arm's Length Price
AO	Assessing Officer
AIIB	The Asian Infrastructure Investment Bank
BEPS	Base Erosion and Profit Shifting
CBDT	Central Board of Direct Taxes
TDS	Tax Deducted at Source
GFS	Global Forum Secretariat
ITO	Income Tax Office
TP	Transfer Pricing
TPO	Transfer Pricing officer
PCCIT	Principal Chief Commissioner of Income Tax
JCIT	Joint Commissioner of Income Tax
MTC	Model Tax Convention
EOIR	Exchange of Information on request
AEOI	Automatic Exchange of Financial Account Information
IIR	Income Inclusion Rule
NR	Non Resident
CIT	Commissioner of Income Tax
FSSAI	Food Safety and Standards Authority of India
SC	Supreme Court
LRS	Liberalised Remittance Scheme
HC	High Court
NADT	National Academy of Direct Taxes
TRC	Tax Residence Certificate
DTAA	Double Taxation Avoidance Agreement

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

DELHI

A-16/9 & A-16/4, Vasant Vihar, New Delhi – 110 057.

+91-11-42591800, 42591818

delhi@llca.net

www.llca.net

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