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CHARTERED
ACCOUNTANTS


# BSC BEACON

## Tax & Regulatory Insights

JULY 2023

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# Glossary

| ABBREVIATION | FULL FORM |
|---|---|
| ACIT | Assistant Commissioner of Income Tax |
| AE | Associated Enterprise |
| AO | Assessing officer |
| AY | Assessment Year |
| AMP | Advertisement, Marketing and Promotion Expenses |
| ALP | Arm's Length Price |
| CBDT | Central Board of Direct Taxes |
| CIT | Commissioner of Income-tax |
| CCIT | Chief Commissioner of Income Tax |
| CIT(Appeals) / CIT(A) | Commissioner of Income-tax (Appeals) |
| CII | Cost Inflation Index |
| CUP | Comparable Uncontrolled Transaction |
| DTAA | Double taxation avoidance agreement |
| DRP | Dispute Resolution Panel |
| HC | High Court |
| Hon | Hon'ble |
| ITAT | Income Tax Appellate Tribunal |
| MCA | Ministry of Corporate Affairs |
| NCLT | National Company Law Tribunal |
| NBFC | Non-Banking Financial Company |
| PE | Permanent Establishment |
| PY | Previous Year |
| PLI | Profit Level Indicator |
| PCIT | Principal Commissioner of Income Tax |
| SC | Supreme Court |
| SEBI | Securities Exchange Board of India |
| TDS | Tax Deducted at Source |
| The act | Income-tax Act, 1961 |
| TRC | Tax Residency Certificate |
| TPO | Transfer Pricing Officer |

# Direct Taxes

## A. Corporate Taxes

### 1. *Gujarat High Court[1]: What is meant by 'Substantial Question of Law' for purposes of filing appeal to High Court under section 260A?*

In this case Hon. Gujarat High Court relied upon the judgement of Hon. Supreme Court in ***M. Janardhana Rao v. JCIT***[2] to rule what is meant by 'Substantial Question of Law' for purposes of filing appeal to High Court under section 260A of the Act. In case of ***M. Janardhana Rao v. JCIT*** (supra), while dealing with the scope of section [260]A, the Hon. Supreme Court observed as under:

> *An appeal under section 260A can be only in respect of a 'substantial question of law'. The expression 'substantial question of law' has not been defined anywhere in the statute. But it has acquired a definite connotation through various judicial pronouncements.*
>
> *In **Sir Chunilal V Mehta & Sons Ltd v. Century Spinning & Mfg. Co. Ltd**[3] the Hon. Supreme Court laid down the following tests to determine whether a substantial question of law is involved -*
>
> 1. *whether directly or indirectly it affects substantial rights of the parties, or*
> 2. *the question is of general public importance, or*
> 3. *whether it is an open question in the sense that issue is not settled by pronouncement of this Court, or*
> 4. *the issue is not free from difficulty, and*
> 5. *it calls for a discussion of alternative view.*

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[1] Prabodhchandra Jayantilal Patel [TS-370-HC-2023(GUJ)]

[2] (2005) 2 SCC 324

[3] AIR (1962) SC 1314

Next, the Hon. Gujarat High Court relied upon ***Vijay Kumar Talwar v. CIT***[4] where Hon. Supreme Court considered the issue of substantial question of law in context of section 260A of the Act and observed as under:

> *The proper test for determining whether a question of law raised in the case is substantial would be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or is not free from difficulty or calls for discussion of alternative views.*

In ***Vijay Kumar Talwar v. CIT (supra)*** Hon. Supreme Court also observed that a finding of fact may give rise to a substantial question of law, inter alia, in the event the findings are based on no evidence and/or while arriving at the said finding, relevant admissible evidence has not been taken into consideration or inadmissible evidence has been taken into consideration or legal principles have not been applied in appreciating the evidence, or when the evidence has been misread.

**Our Comments:**

Against orders of ITAT, the Revenue frequently files appeal to High Court under section 260A of the Act. The Taxpayers must check, on touch stone of the decisions rendered by the Hon. Supreme Court as mentioned hereinabove, whether any substantial question of law arises out of the order of ITAT.

## 2. ***Delhi High Court[5]:*** *A Firm cannot invoke Micro, Small and Medium Enterprises Development Act (MSMED Act) for resolution of Special Audit Fee dispute with IT Dept.*

**Background**

- This case presents interesting legal issues relating to the interplay between the Income Tax Act, 1961 (hereinafter 'IT Act') and the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter 'MSMED Act') for deciding fee payable to CA Firms, for Special Audits directed under Section 142(2A) of the IT Act.

[4] (2011) 330 ITR 1

[5] Micro and Small Enterprise Facilitation Council [TS-371-HC-2023(DEL)]

- A CA Firm, being on the panel of the Income Tax Department (hereinafter 'IT Department'), was nominated as a Special Auditor by the IT Department in four cases for carrying out Special Audit in terms of Section 142(2A) of the IT Act.
- After completing the said Special Audit assignments, the CA Firm raised four invoices in respect of the said audits. The grievance of the Special Auditor-CA Firm was that qua the invoices raised, full payment was not made by the IT Department.
- Under such circumstances, the CA Firm invoked the provisions of the MSMED Act and approached the Micro & Small Enterprise Facilitation Council (hereinafter 'MSEFC'), because the CA Firm was also registered as a `Micro Enterprise' under the provisions of the MSMED Act.
- The IT Department filed writ petitions before the Hon. Delhi High Court contending that the MSEFC, under the MSMED Act, lacks jurisdiction to deal with claims raised by Special Auditors under Section 142(2A) in respect of the fee payable for Special Audits.

**Judgement of Hon. Delhi High Court**

i. The purpose of Special Audit is to help and assist the AO for the purpose of facilitating the assessment and for proper determination of the tax liability after arriving at the correct taxable income.

ii. After completion of the Special Audit, the Chief Commissioner or the Commissioner plays a very crucial role in the determination of remuneration of Special Auditor. Thus, the determination of the remuneration is a task, which is

of a specialized nature, which only the Income Tax Department would be able to undertake; MSEFC does not possess domain expertise to undertake such task.

iii. The IT Department cannot be termed as a 'buyer' when it is nominating the accountant for conducting a Special Audit and neither can the CA Firm be termed as a 'supplier'.

iv. The invocation of the provisions of the MSMED Act under such circumstances, in respect of Special Audit remuneration would, therefore, not be tenable and is completely misplaced.

v. Thus, in the facts and circumstances as discussed above, the Income Tax Act would prevail over the MSMED Act.

vi. Because the MSMED Act would have no applicability, the impugned references by the MSEFC, of the claims raised by the CA Firm, to arbitration are not sustainable.

vii. The remedies of the CA Firm, if any, to challenge the orders passed by the IT Department in respect of determination of remuneration, are left open.

## 3. ***ITAT Mumbai[6]:*** *Appeal filed under section 248, by Deductor of TDS under section 195, seeking that Rate of Tax should be as per DTAA and not as per Section 206AA, is maintainable.*

Section 248 of the Act reads as under:

> *"248. Where under an agreement or other arrangement the tax deductible on any income, other than interest, under section 195 is to be borne by the person by whom the income is payable, and such person having paid such tax to the credit of the Central Government, claims that no tax was required to be deducted on such income, he may appeal to the Commissioner (Appeals) for a declaration that no tax was deductible on such income."*

**Issue**

Whether appeal under section 248, by a section 195 TDS Deductor, is maintainable only when such Deductor claims that no tax was required to be deducted on such income and not when such Deductor seeks to get relief for reduced rate of TDS?

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[6] Reliance Commercial Dealers Limited [TS-374-ITAT-2023(Mum)]

**Decision of Hon. ITAT**

i. From a conjoint reading of sections 195 and 248, it can be clearly inferred that the term ***"no tax was required to be deducted"*** will mean tax in excess of the tax deductible under section 195, at the rates in force.

ii. Section 248 does not curtail power of the Ld. CIT(A) to decide about the applicable tax rates because the tax has to be levied according to the provisions of the Act (as per applicable tax rates), and Section 90 clearly provides that benefit of DTAA has to be provided.

iii. Accordingly, we hold that the deductor can challenge excess deduction under section 248 seeking that the rate of tax should be as per DTAA and not as per the Act (section 206AA).

iv. Thus, in our view, the word ***"no tax was required to be deducted"*** in section 248 should be interpreted in such a manner so as to include claim of the deductor that no tax was required to be deducted ***in excess of*** the tax deductible at rates in force.

Thus, the issue pointed out above was decided by the ITAT in the negative i.e. in favour of the deductor.

# B. International Tax

## 1. *Bombay High Court[7]: 'Alibaba Singapore' is eligible for DTAA benefits; Payments made by Indian subscribers for e-commerce website are not taxable as Fees for Technical Services.*

The assessee, 'Alibaba.com Singapore E-Commerce Private Ltd', is a company incorporated under the laws of Singapore and operates the Alibaba website (www.alibaba.com).

Indian subscribers subscribe to the assessee's website for a subscription fee. Through this subscription, the Indian subscribers place their storefront and have their products advertised and listed when visitors go to the website for search of products required by them.

**Issue**

Whether the subscription fee received by the assessee (a Singapore Company) is taxable in India?

**Findings of the AO**

i. According to the assessee the subscription fee was its business income and was not taxable in India, because the assessee had no Permanent Establishment (PE), as defined in Article 5 of the India-Singapore DTAA. The assessee produced Tax Residency Certificate (TRC) issued by the Singapore Government.

ii. The AO, however, ignored the TRC and denied benefits of India-Singapore DTAA observing that –

The assessee (Alibaba Singapore) is not eligible to avail the benefits of the India-Singapore Tax Treaty on the grounds that, firstly, the assessee has no presence in Singapore and that the entire management of the assessee is based in Hong Kong; secondly, the services to the Indian Subscribers are provided by Alibaba Hong Kong, since it is the owner of the Website; and lastly, the website is a trade mark of Alibaba Hong Kong.

The AO thus held that the assessee is a non-existent entity and a conduit of Alibaba Hong Kong.

iii. In the alternative, the AO held that the subscription fee was also taxable in India

[7] Alibaba.Com Singapore E-Commerce Private Ltd [TS-361-HC-2023(BOM)]

as Fees for Technical Services (FTS) within the meaning of the Act as well as the DTAA.

**Findings of the Hon. ITAT**

i. The ITAT considered various documentary evidences, including the TRC of assessee, and came to a factual finding that the assessee is neither a non-existent entity nor a conduit of Alibaba Hong Kong.

ii. The ITAT has also held that the TRC is sufficient to determine the proof of residency and the Tax Authorities cannot ignore the valid TRC issued by the Singapore Government.

iii. Regarding taxability of subscription fee as FTS, the ITAT relied upon the judgment of the Apex Court in the case of ***Kotak Securities Ltd***[8] and held that constant human endeavour or human intervention is essential requirement for treating the rendering of services as "technical".

iv. The ITAT observed that if any technology or a process has been put to operation automatically, such that it operates without much human interface or intervention, then such technology per se cannot be held as rendering of technical services by human skills.

**Judgement of Hon. Bombay High Court**

Hon. Bombay High Court held that the entire subject matter of Revenue's appeal was fact based and no substantial question of law arose. Accordingly, the Hon. High Court dismissed the appeal filed by the Revenue against the order of ITAT.

**Our Comments:**

In absence of PE, the Tax Authorities attempt to tax Business Income as FTS. To defend their cases against such attempt the Taxpayers should be ready with supporting documentation to establish that the impugned Business Income is beyond the scope of FTS as defined in the Act as well as in the DTAA.

[8] CIT v. Kotak Securities Ltd [2016] 67 taxmann.com 356 (SC)

## 2. ***Delhi High Court[9]:*** *Foreign Tax Credit is available even if tax is not actually paid, but is only payable, in the Foreign Country.*

The assessee received dividend from its subsidiary in Thailand. The assessee claimed foreign tax credit even though tax on dividend income was not paid - but was only payable - in Thailand because of the statutory regime operating there. For such claim the assessee placed reliance on Article 23 of the India-Thailand DTAA.

The AO and the CIT (A) disagreed with the stand taken by the assessee and thus, declined the foreign tax credit on the ground that tax was not paid by the assessee in Thailand on dividend received from its Thai subsidiary.

In the Tribunal, however, the assessee was successful.

**Judgement of Hon. Bombay High Court**

i. Paragraph 2 of Article 23 of the Indo-Thai DTAA allows tax credit against tax payable in India under the Indian Income Tax Act, qua ***"Thai Tax Payable"*** under the laws of Thailand.

ii. Paragraph 3 of Article 23 of the Indo-Thai DTAA defines the term "Thai Tax Payable". The said paragraph provides that the said term shall deem to include any amount which will have to be payable as Thai Tax for any year, but for exemption or reduction of tax, for that year or any part thereof, under the provisions of the Investment Promotion Act, or of the Thai Revenue Code, which are designed to promote economic development in Thailand.

iii. Clearly, the provision is configured to incentivize investments in Thailand, by granting tax credit for that amount which, otherwise, would have been payable as tax to the Thai state, but was not paid due to exemption or reduction granted under the Thailand Investment Promotion Act, or Thai Revenue Code.

[9] Polyplex Corporation Ltd [TS-396-HC-2023(DEL)]

iv. Ordinarily the term “Tax Payable” would mean tax, which is owed or due, although not paid. However, the meaning of the expression has to be found in the DTAA executed between two Contracting States. The DTAAs often (as in the instant case) define the term “Tax Payable”. The intent of the Contracting States has to be, thus, ascertained from the term, as contained in the DTAA, and not what would ordinarily be the meaning of a given expression or term.

v. Therefore, the meaning of the expression “Thai tax payable” or “Indian tax payable” has to be found in the definition embedded in the DTAA.

vi. The revenue's appeals are based on the proposition that tax credit as claimed, could not be extended to the assessee, because it had not paid tax in Thailand, i.e., benefit under Article 23 of the Indo-Thai DTAA could only be extended in a situation where the tax had actually been paid. In view of the rationale provided by us hereinabove, this argument is completely misconceived.

**Our Comments:**

The concept of tax sparing is embedded in several DTAAs which have been executed by India, such as with France, Jordan and Oman, apart from Thailand. So, this judgement of High Court will enable several other Taxpayers, deriving income from those countries, to claim foreign tax credit even when tax is not paid but is only payable in those countries.

## 3. ***Bombay High Court[10]****: Colgate Palmolive Malaysia's receipt from allowing SAP access to Indian Entity is not Royalty Income.*

The assessee, a Malaysian company entered into an agreement with Colgate Palmolive (India) Limited (CPI) for use of the assessee's SAP system.

The AO held that the payment received by the assessee company, on account of use of the SAP system by CPI, was covered under the definition of 'Royalty' under Section 9 (1) (vi) of the Act. Accordingly, the AO taxed those payments as Royalty income.

The ITAT held that the impugned payment was not covered within the definition of 'Royalty' under Section 9 (1) (vi) of the Act.

The Hon. Bombay High Court has upheld the decision of ITAT, for the following reasons:

i. Under section 90(2) of the Act, the assessee can take advantage of the narrower definition of Royalty as laid down in section 9 (1) (vi) of the Act instead of the wider definition under the Indo-Malaysian DTAA.

ii. Under section 9 (1) (vi) of the Act the impugned payment is not taxable as Royalty because -

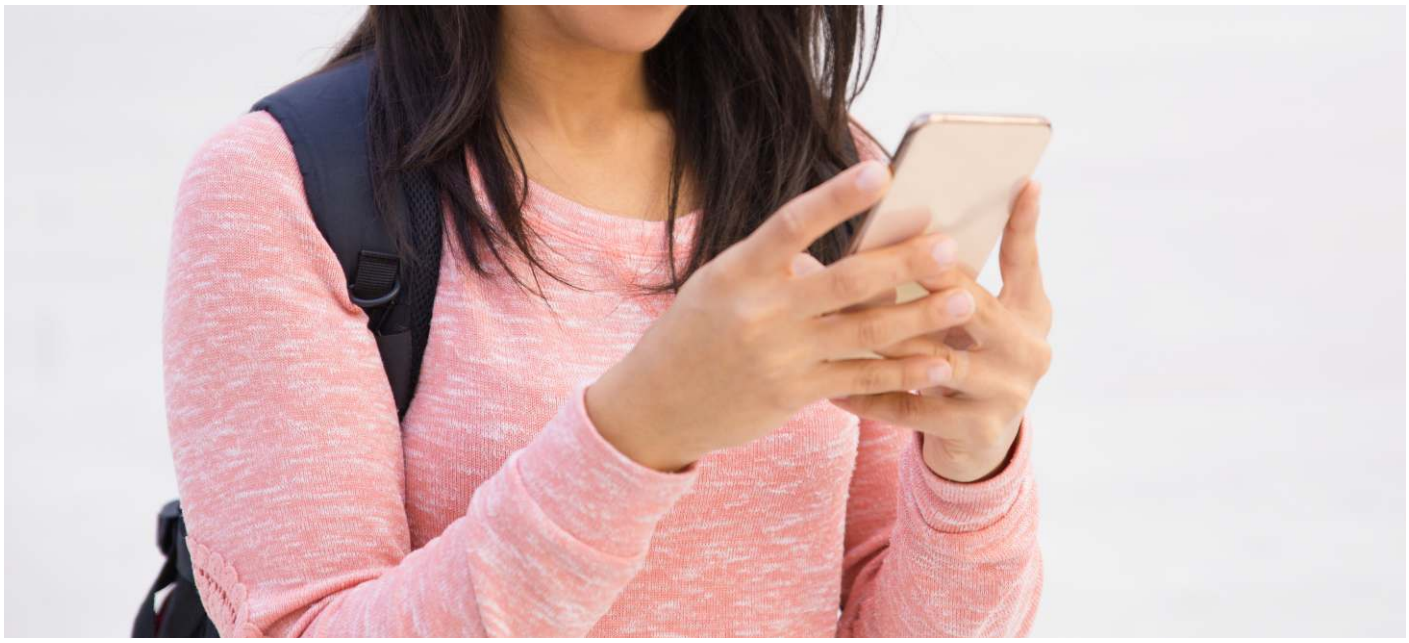
- The payment made by CPI for accessing the SAP system hosted by the assessee does not qualify as equipment royalty.
- The assessee only provided access to the SAP system to CPI. There is ***no transfer*** of any right in respect of a patent, invention, model, design, secret formula or process or trademark or similar property.
- the Assessee has ***not imparted any information*** to CPI concerning the working of, or the use of a patent, invention, model, design, secret formula or process or trademark or similar property.
- The payment made by CPI to the Assessee is not process royalty.
- The payment made by CPI cannot be regarded as payment for use of the SAP system.
- The assessee has not transferred any right in respect of any copyright of any literary or artistic or scientific work to CPI. The Assessee has only given access

[10] Colgate Palmolive Marketing SDN BHD [TS-362-HC-2023(BOM)]

of the SAP system to CPI. So, the judgment of the Hon. Supreme Court in ***Engineering Analysis Centre of Excellence Private Limited***[11] will apply in favour of the assessee.

**Our Comments:**

On definition of Royalty, as laid down in section 9 (1) (vi) of the Act, this is an important judgement delivered by Hon. Bombay High Court following the judgment of the Hon. Supreme Court in ***Engineering Analysis Centre of Excellence Private Limited (supra).***



## 4. *Karnataka High Court*[12]*: Vodafone not liable for TDS on connectivity & bandwidth charges.*

In this case following issues were dealt with by the Hon. Karnataka High Court:

i. Whether application of the Double Taxation Avoidance Agreement (DTAA) cannot be considered in TDS proceedings under Section 201 of the Act and Whether it is not open to the payer to take benefit of the DTAA when he is making payment to a non-resident?

ii. Whether amendment to the definition of royalty under Section 9(1)(vi) of the Act will also result in amendment to the definition of royalty under the DTAAs?

iii. Whether payments made to Non-Resident Telecom Operators (NTOs) for providing interconnect services and transfer of capacity in foreign countries is chargeable to tax as royalty?

[11] Engineering Analysis Centre of Excellence Private Limited v. CIT (2022) 3 Supreme Court Cases 321

[12] Vodafone Idea Limited (Formerly Known As M/S Vodafone Mobile Services Ltd) [TS-406-HC-2023(KAR)]

iv. Whether the income tax authorities in India have jurisdiction to bring to tax income arising from extra-territorial source, that is outside India, in respect of business carried on by foreign companies outside India just because Indian residents use and pay for the facilities provided by these foreign companies?

v. Whether the withholding tax liability should be levied at a higher rate at 20% in accordance with section 206AA of the Act disregarding the DTAA?

***The above-mentioned issues were answered by the Hon. High Court in the following manner:***

**Issue 1:** A DTAA is a sovereign document between two countries. In ***GE Technology[13],*** the Apex Court has held that apart from Section 9(1), Sections 4, 5, 9, 90, 91 as well as the provisions of DTAA are also relevant, while applying TDS provisions. This holding was noted in ***Engineering Analysis[14]***. Thus, it is clear that an assessee is entitled to take the benefit under a DTAA between two countries, in proceedings under Section 201 of the Act.

**Issue 2:** Amendment to definition of royalty under Section 9(1)(vi) will not result in amendment of definition of royalty under the DTAA.

**Issue 3:** Payments made to Non-Resident Telecom Operators (NTOs) for providing interconnect services and transfer of capacity in foreign countries is not chargeable to tax as royalty.

**Issue 4:** Admittedly, the NTOs have no presence in India. Assessee's contract is with Belgacom, a Belgium entity which had made certain arrangement with Omantel for utilisation of bandwidth. In substance, Belgacom has permitted utilisation of a portion of the bandwidth which it has acquired from Omantel. The facilities are situated outside India and the agreement is with a Belgium entity which does not have any presence in India. Therefore, the Tax authorities in India shall have no jurisdiction to bring to tax the income arising from extra-territorial source.

**Issue 5:** As decided in ***Wipro Ltd[15]*** DTAA rate overrides Sec.206AA TDS rate of 20%.

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[13] EGE India Technology Cen. P. Ltd. v. CIT [2010] 327 ITR 456 (SC)

[14] Engineering Analysis Centre of Excellence Private Limited [2021] 432 ITR 471 (SC)

[15] Wipro Ltd [TS-1016-HC-2022(KAR)]

# C. Transfer Pricing

## 1. ***Delhi High Court[16]:*** *Advance Pricing Agreement (APA) for an APA year can be used to benchmark similar transaction for a Non-APA year.*

The CBDT and the assessee had executed an APA for AYrs 2013-13 to 2021-22.

The ITAT decided that the impugned APA should form the basis for benchmarking similar transactions in AY 2012-13.

The Hon. Delhi High Court has upheld the ITAT's decision noting that the ITAT's decision is ring-fenced with the caveat that the TPO will have to determine whether the Functions, Assets and Risks (FAR) in the preceding AY are the same as those which are covered in the APA for the subsequent years.

**Our Comments:**

The Hon. Delhi High Court's judgement is welcome. The High Court has ruled that if the FAR in a Non-APA year is same as that in the APA years, then the Transfer Pricing Method (TPM) adopted for the APA years ought to be replicated in a Non-APA year.

The Indian APA program had imbibed this principle right from the beginning. The CBDT always held the view that if the FAR in a renewal application remains the same as that in the original APA, then the TPM should not be changed. This has been followed consistently and the High Court's judgement is in sync with this principle.

Further, the High Court's judgement reinforces the importance of FAR in transfer pricing analysis.

## 2. ***ITAT Mumbai[17]:*** *Foreign AE cannot be taken as Tested Party without disclosing names of comparable companies to the assessee.*

- The assessee is engaged in the business of providing Information Technology Solutions to Banks and Financial Institutions worldwide, and has appointed its overseas subsidiaries (AEs) as distributors.
- For benchmarking the transaction of sales of Information Technology Solutions

[16] Springer India Pvt Ltd [TS-403-HC-2023(DEL)-TP]

[17] Oracle Finance Services Software Limited [TS-414-ITAT-2023(Mum)-TP]

to the distributor AEs, the assessee selected itself as Tested Party and adopted Transaction Net Margin Method (TNMM) as the Most Appropriate Method.

- The TPO, however, selected the Foreign AEs as Tested Parties on the ground that the assessee is performing more complex functions, while the Foreign AEs are performing least complex functions. But the TPO selected comparable companies without disclosing their names either to the assessee or in the order passed by him.
- The Hon. ITAT has rejected the approach of the TPO in selecting Foreign AEs as Tested Parties without disclosing the names of comparable companies to the assessee, and held that such approach of the TPO is against the Transfer Pricing provisions and in gross violation of Principles of Natural Justice.

## 3. ***ITAT Delhi[18]:*** *Upholds Transactional Net Margin Method (TNMM) as Most Appropriate Method (MAM) for Royalty.*

In this case Hon. ITAT Delhi decided the following issue:

> *Whether Royalty paid to Associated Enterprises (AEs) should be benchmarked under Transactional Net Margin Method (TNMM) by aggregating Royalty with other international transactions, or under Comparable Uncontrolled Price (CUP) method by segregating the Royalty?*

Purchase of raw materials, payment of royalty, and sale of finished goods were the three significant independent international transactions undertaken by the assessee with its Aes.

The assessee aggregated all transactions i.e., combined the payment of royalty with purchase of raw materials and sale of finished goods, and benchmarked all transactions together under TNMM on entity level.

As against such aggregated benchmarking at entity level TNMM, the TPO and DRP held that payment of royalty should be benchmarked separately for the following reasons:

- Under TNMM, arm's length price (ALP) is to be determined on basis of profit realized from each international transaction separately, and not at entity level.
- TNMM requires comparison of net margin realized from an international transaction and not comparison of operating margin of the enterprise as a whole.

[18] Gruner India Private Limited [TS-440-ITAT-2023(DEL)-TP]

So, transaction - by - transaction approach has to be adopted.

- Different transactions cannot be clubbed together for determining ALP under TNMM.
- So, benchmarking under TNMM is to be done at segmental level and not at entity level.

**Decision of Hon. ITAT**

i. In the specific facts of this case and export of goods to AE, the TNMM is the MAM.

ii. The Hon'ble High Court of Delhi in ***Magneti Marelli Powertrain India Pvt Ltd***[19] held that if segregation approach is permissible, TNMM shall apply.

iii. In ***Magneti Marelli Powertrain India Pvt Ltd (supra)*** the Hon. Delhi High Court noted that the TPO accepted TNMM applied by the assessee, as the most appropriate method in respect of all the international transactions, including payment of royalty. The TPO, however, disputed application of TNMM as the most appropriate method for the payment of technical assistance fee for which CUP method was sought to be applied. On these facts the High Court concurred with the assessee that having accepted the TNMM as the most appropriate method, it was not open to the TPO to subject only one element, i.e. payment of technical assistance fee, to an entirely different (CUP) method. The TNMM had to be applied by the TPO in respect of the technical fee payment too. Thus, the TPO s rejection of the TNMM method at entity level was undoubtedly not correct.

**Our Comments:**

- Rule 10A (d) defines "transaction" as including a number of closely linked transactions.
- In case of **Sony Ericsson Mobile Communications India (P) Ltd**[20] the Hon. Delhi High Court held that aggregation of transactions is desirable and not merely permissible, if the nature of transactions taken as a whole is so inter-related and linked up that aggregation will be more reliable means of determining the arm's length price of the controlled transactions taken together.
- Thus, if data of CUP is not available, payment of royalty and fees for technical services can be benchmarked by combining them together with other international transactions and applying TNMM at entity level.

[19] Magneti Marelli Powertrain India Pvt Ltd v. DCIT [2016] 389 ITR 469 (Delhi)

[20] Sony Ericsson Mobile Communications India (P) Ltd v. CIT (2015) 374 ITR 118 (Del)

# Goods and Services Tax

The GST Council in its 50th meeting has taken decisions on certain issues with respect to GST and accordingly made certain recommendations to Central and State Governments. We have enumerated below the gist of the major recommendations and details of Notifications/Circulars issued in this regard.

## A. Notifications issued based on recommendation of GST council

### 1. Extension of specified Amnesty Schemes till 31-08-2023 as below:

The Government had issued certain notifications granting one-time relaxation from late filing of certain returns (viz., GSTR 4, GSTR 9, GSTR 9C and GSTR 10) and certain compliances to be made in respect of deemed withdrawal of assessment orders and revocation of cancelled registration subject to certain conditions to be complied with by 30 June 2023. Now, the last date to comply with the said conditions is extended to **31 August 2023** vide Notifications mentioned in column (3) of the below table:

| Sr No. | Particulars | Notification extending benefit to 31 August 2023 |
|---|---|---|
| i. | Form GSTR-4 | Notification- 22/2023-Central Tax dated 17 July 2023 |
| ii. | Deemed withdrawal of assessment orders | Notification- 24/2023-Central Tax dated 17 July 2023 |
| iii. | Revocation of cancelled registration | Notification-23/2023-Central Tax dated 17 July 2023 |
| iv. | Form GSTR10 | Notification 26/2023-Central Tax dated 17 July 2023 |
| v. | Form GSTR-9 & Form GSTR9C | Notification 25/2023-Central Tax dated 17 July 2023 |

2. **Rate changes in goods:**
    - GST rate reduced on uncooked/unfried snack pallets to 5% **[Notification No. 09/2023- Central Tax (Rate) dated 26 July 2023]**
    - GST rate on imitation Zari thread or yarn known by any name in trade parlance reduced from 12% to 5% **[Notification No. 09/2023- Central Tax (Rate) dated 26 July 2023]**
    - MUVs treated at par with SUVs for levy of 22% Compensation Cess **[Notification No. 03 /2023-Compensation Cess (Rate) dated 26 July 2023]**
    - GST rate reduced on LD slag from 18% to 5% **[Notification No. 09/2023- Central Tax (Rate) dated 26 July 2023]**
    - GST rate on fish soluble paste reduced from 18% to 5% **[Notification No. 09/2023- Central Tax (Rate) dated 26 July 2023]**
    - Compensation cess levied on pan masala, tobacco products, etc. at ad valorem rate where retail sale price is not required to be declared **[Notification No. 03/2023- Compensation Cess (Rate) dated 26 July 2023]**
3. **Goods Transport Agency (GTA) not required to file declaration in Annexure V on yearly basis:**

    Now GTAs will not be required to file declaration on yearly basis for paying GST under forward charge mechanism. If they have exercised this option for a particular financial year, it shall be deemed that they have exercised the option for the next and future financial years unless they file a declaration that they want to revert to payment of GST under Reverse Charge Mechanism (RCM).

    **[Notification No. 6/2023 – Central Tax (Rate) dated 26 July 2023] &**

    **[Notification No. 8/2023 – Central Tax (Rate) dated 26 July 2023]**

## B. Circulars issued based on recommendation of GST council

**4. Clarification on Interest calculation (Circular 192/04/2023-GST):**

- The issue was that in the cases of wrong availment of IGST credit by a registered person and reversal thereof, for the calculation of interest under rule 88B of CGST Rules, whether the balance of input tax credit available in electronic credit ledger under the head of IGST only needs to be considered or total input tax credit available in electronic credit ledger, under the heads of IGST, CGST and SGST taken together, has to be considered.
- It is clarified that, since the amount of input tax credit available in electronic credit ledger, under any of the heads of IGST, CGST or SGST, can be utilized for payment of liability of IGST, it is the total input tax credit available in electronic credit ledger, under the heads of IGST, CGST and SGST taken together, that has to be considered for calculation of interest under rule 88B of CGST Rules.

**5. Manner of verification of differences in ITC in Form GSTR-3B and GSTR-2A for the period 01-04-2019 to 31-12-2021 (Circular 193/05/2023-GST):**

- A Circular was issued to outline the process for verifying ITC in situations where there is a mismatch of the ITC as per Form GSTR-3B and Form GSTR-2A for the Financial Years ('FY') 2017–18 and FY 2018–19. It is clarified that the same procedure will also be applicable for the differences between ITC claimed in Form GSTR 3B Vis-à-vis ITC reflected in GSTR 2A for the period from 01-04-2019 to 31-12-2021.
- However, as per Rule 36(4) of the CGST Rules 2017 the credit shall be restricted as mentioned below:

| Period | Amount Restricted |
|---|---|
| 09.10.2019 to 31.12.2019 | Restricted in excess of 20% of eligible credit reflected |
| 01.01.2020 to 31.12.2020 | Restricted in excess of 10% of eligible credit reflected |
| 01.01.2021 to 31.12.2021 | Restricted in excess of 5% of eligible credit reflected |

6. **TCS clarification (Circular 194/06/2023-GST):**

   Clarification issued for determining TCS liability under Section 52 of the Central Goods and Services Tax Act 2017 ('CGST Act'), in transaction where multiple E-commerce operators are involved.

7. **No GST is payable in case of warranty period replacement and no ITC reversal in the hands of manufacturer (Circular 195/07/2023-GST):**

   It is clarified that no GST is payable on repair services and replacement of parts during warranty period provided by manufacturer in cases where there is no additional consideration is charged by the said manufacturer. Also, it is clarified that reversal of ITC availed on parts by manufacturer is not required for parts replaced during warranty obligations in such cases.

8. **Clarification that holding of securities of subsidiary company is not a service (Circular 196/08/2023-GST):**

   It is clarified that mere holding of securities of a subsidiary company by a holding company cannot be treated as a supply of service and therefore, cannot be taxed under GST.

9. **Clarifications related to Refund (Circular 197/09/2023-GST):**

   - It is clarified that effective 01-01-2022, for the calculation of refund of accumulated ITC, the ITC is allowed to the extent of supplies reflected in Form GSTR-2B of the said tax period or any previous tax period. Prior to 01-01-2022, the refund was allowed on the supplies reflected in Form GSTR-2A.
   - It is clarified that effective 05-07-2022, for calculation of refund on zero rated supply under LUT, the adjusted total turnover should include the value of export of goods as per the explanation inserted via notification no 14/2022- Central Tax, Dated 05-07-2022.

- It is clarified that refund may be admissible to the exporter even if the export is made or payment is received after the expiry of time limit mentioned in Rule 96A of the Central Goods and Services Tax Rules, 2017 ('CGST Rules').

**10. E-invoice clarification (Circular 198/10/2023-GST):**

It is clarified that registered person liable to issue e-invoice are required to issue e-invoices for supplies made to Government Departments or establishments / Government agencies / local authorities / PSUs, etc. which are registered solely for the purpose of TDS.

**11. ISD mechanism for distribution of common input tax credit on third-party invoices and self generated services (Circular No. 199/11/2023-GST):**

- It is clarified that in cases where, HO has not issued invoices for services supplied to Branch office, then the value of such services should be deemed to be "NIL" if full input tax credit is available to the recipient of such services (viz., branch office).
- The Council has clarified that Input Service Distributor (ISD) mechanism for distribution of common credit is not mandatory at present in case of third party invoices. However, it has been recommended to make it mandatory with prospective effect.

## C. Other GST council recommendation yet to be clarified/notified

**12. Recovery of tax and interest where tax liability in Form GSTR-1 exceeds the tax liability as per Form GSTR-3B:**

Introduction of Rule 142B and to introduce Form GST DRC-01D for recovery of tax and interest as per Rule 88C where the tax has not been paid and no satisfactory explanation received.

**13. Mechanism to send System-based intimation where ITC availed in Form GSTR-3B exceeds ITC as per Form GSTR-2B:**

Introduction of Rule 88D and Form DRC-01C in the CGST Rules along with an amendment in Rule 59(6) of CGST Rules to provide for the mechanism for system-based intimation to the taxpayers in respect of the excess availment of ITC in Form GSTR-3B vis-à-vis Form GSTR-2B above a certain threshold.


**14. Taxability of online gaming, race courses and casinos:**

A uniform tax rate of 28% has been recommended to all three namely Casino, Horse Racing and Online gaming on transaction value as mentioned below:

| Description | Taxable Value |
|---|---|
| Casino | face value of the chips purchased |
| Horse Racing | full value of the bets placed |
| Online gaming | full value of the bets placed |

**15. Implementation of E-way bill requirement for intra-state movement of gold/ precious stones:**

It is recommended to insert Rule 138F in CGST Rules to mandatorily require generation of e-way bills for intra-state movement of gold and precious stones under Chapter 71.

**16. Separate provision for place of supply of goods to unregistered person:**

It is recommended to insert clause (ca) in section 10(1) of the IGST Act to clarify the place of supply in respect of supply of goods to unregistered persons.

**17. Amendments proposed to strengthen registration process under GST:**

To strengthen and streamline the registration process under GST certain Amendments are proposed.

**18. Issuance of Notices under Section 46 in Form GSTR-3A for non-filing of Form GSTR-9 and GSTR-9A:**

It is recommended to amend Form GSTR-3A to provide for the issuance of

notice to the registered taxpayers for their failure to furnish Annual Return in Form GSTR-9 or Form GSTR-9A by the due date.

19. **New requirement for OIDAR service provider to furnish details of registered recipients in India in Form GSTR-5A:**

    It is recommended to amend Rule 64 and Form GSTR-5A of the CGST Rules to require OIDAR service providers to provide the details of supplies made to registered persons in India in return in Form GSTR-5A.

20. **Rate changes in goods:**

    IGST exemption to be granted on import of cancer-related drugs, medicines for rare diseases and Food for Special Medical Purposes (FSMP) used in treatment of rare diseases.

21. **Clarification for GST on Supply of food and beverages in cinema hall:**

    Restaurant services are taxable @ 5% without ITC where they are supplied independently in the cinema exhibition service. However, where the supply of food and beverage is clubbed with the service of exhibition of cinema, and satisfy the test of composite supply, it would be taxable as a service of exhibition of cinema. Exhibition of cinema would be the principal supply in this case.

22. **Clarification in respect of services provided by director in his personal or private capacity to the company:**

    It is to be clarified that RCM is not applicable to the services provided by a director of a company to the company in his personal or private capacity. Only those services which are performed by director in his capacity as director to the company is taxable under RCM in the hands of company.

# Securities and Exchange Board of India (SEBI) Regulations

## 1. *SEBI's LODR Amendment Regulations[21]: Disclosure requirements under Regulations 30 and 30A of the LODR Regulations*

SEBI vide circular no. CIR/CFD/CMD/4/2015 dated September 9, 2015 specified the details that need to be provided while disclosing events given in Part A of Schedule III of Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("LODR Regulations") and guidance on when an event / information can be said to have occurred. The aforesaid circular has now become part of Section V-A of Chapter V of Master Circular issued vide circular no. SEBI/HO/CFD/PoD2/CIR/P/2023/120 dated July 11, 2023 ("Master Circular").

Subsequently, through the SEBI Circular No. SEBI/HO/CFD/CFD-PoD-1/P/CIR/2023/123 dated 13 July 2023, the SEBI has outlined a comprehensive set of details that companies must provide while disclosing events mentioned in Part A of Schedule III of the LODR regulations.

Additionally, SEBI has now provided explicit guidance on determining the occurrence of an event or information for disclosures under regulation 30 of the LODR, as well as defining the criteria for considering a transaction as material. These regulatory changes, implemented on July 15, 2023, aim to enhance transparency and accountability in the securities market.

Accordingly, this circular dated July 13, 2023 consists of four annexures with respect to disclosure requirements under regulations 30 and 30A (inserted by the aforesaid

[21] Circular No. SEBI/HO/CFD/CFD-PoD-1/P/CIR/2023/123 of the SEBI LODR Regulations 2015, dated 13 July 2023

amendment) of the LODR Regulations which are given below:

- ANNEXURE I specifies the details that need to be provided while disclosing events given in Part A of Schedule III (Annexure 18 to the Master Circular).
- ANNEXURE II specifies the timeline for disclosing events given in Part A of Schedule III.
- ANNEXURE III provides guidance on when an event / information can be said to have occurred (Annexure 19 to the Master Circular).
- ANNEXURE IV provides guidance on the criteria for determination of materiality of events /information.

## 2. *SEBI Framework on BRSR Core and Value Chain[22]: Framework prescribing disclosure and assurance requirements for BRSR Core, ESG disclosures for value chain, and assurance requirements.*

In May 2021, the Securities Exchange Board of India (SEBI) introduced Business Responsibility and Sustainability Reporting (BRSR) format which requires top 1,000 listed entities (by market capitalisation) to file BRSR as part of the Annual Report with SEBI from FY 2022-23 onwards.

Based on recommendations of the Environmental, Social and Governance (ESG) Advisory Committee and the consultation paper, SEBI through a notification dated 14 June 2023 amended the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (Listing Regulations) to introduce the BRSR Core for assurance by listed entities, and disclosures and assurance for the value chain of listed entities, as per the BRSR Core. Subsequently, on 12 July 2023, SEBI issued the framework (the framework) prescribing the disclosure and assurance requirements for BRSR Core, ESG disclosures for value chain, and assurance requirements.

BRSR Core is a sub-set of the SEBI BRSR format. The BRSR Core consists of a set of Key Performance Indicators (KPIs)/metrics under nine ESG attributes as given below. The framework also specifies the methodology to facilitate reporting by corporates and requirement for assurance of the reported data. It clarifies that the approach specified in the framework is only a base methodology. Any changes or industry specific adjustments/estimations should be disclosed in the report. Refer to Annexure I for a list of the nine BRSR Core attributes and parameters to be disclosed by the specified listed entities.

[22] SEBI circular no. SEBI/HO/CFD/CFD-SEC-2/P/CIR/2023/122, dated 12 July 2023

## Annexure 1

## BRSR Core - Attributes and parameters

| Sr No. | Attribute | Parameter |
|---|---|---|
| 1. | Green-house gas (GHG) footprint (Greenhouse gas emissions may be measured in accordance with the Greenhouse Gas Protocol: A Corporate Accounting and Reporting Standard) | • Total Scope 1 emissions (Break-up of the GHG into CO2, CH4, N2O, HFCs, PFCs, SF6, NF3, if available)<br>• Total Scope 2 emissions (Break-up of the GHG (CO2e) into CO2, CH4, N2O, HFCs, PFCs, SF6, NF3, if available)<br>• GHG Emission Intensity (Scope 1 +2) |
| 2. | Water footprint | • Total water consumption<br>• Water consumption intensity<br>• Water Discharge by destination and levels of Treatment |
| 3. | Energy footprint | • Total energy consumed.<br>• Per centage of energy consumed from renewable sources<br>• Energy intensity |
| 4. | Embracing circularity - details related to waste management by the entity | • Plastic waste (A)<br>• E-waste (B)<br>• Bio-medical waste ©<br>• Construction and demolition waste (D)<br>• Battery waste (E)<br>• Radioactive waste (F)<br>• Other Hazardous waste. Please specify, if any. (G)<br>• Other Non-hazardous waste generated (H). Please specify, if any. (Break-up by composition i.e., by materials relevant to the sector)<br>• Total waste generated (A+B + C + D + E + F + G + H)<br>• Waste intensity<br>• Each category of waste generated, total waste recovered through recycling, re-using or other recovery operations.<br>• For each category of waste generated, total waste disposed by nature of disposal method |

| Sr No. | Attribute | Parameter |
|---|---|---|
| 5. | Enhancing Employee Wellbeing and Safety | • Spending on measures towards well-being of employees and workers – cost incurred as a per centage of total revenue of the company.<br>• Details of safety related incidents for employees and workers (including contract-workforce e.g., workers in the company's construction sites) |
| 6. | Enabling Gender Diversity in Business | • Gross wages paid to females as % of wages paid.<br>• Complaints on POSH |
| 7. | Enabling Inclusive Development | • Input material sourced from following sources as per centage of total purchases Directly sourced from MSMEs/ small producers and from within India.<br>• Job creation in smaller towns<br>• Wages paid to persons employed in smaller towns (permanent or non-permanent/on contract) as per centage of total wage cost |
| 8. | Fairness in Engaging with Customers and Suppliers | • Instances involving loss / breach of data of customers as a percentage of total data breaches or cyber security events.<br>• Number of days of accounts payable |
| 9. | Open-ness of business | • Concentration of purchases & sales done with trading houses, dealers, and related parties<br>• Loans and advances & investments with related parties |

# Market Outlook

## Is the future of Dark Store really dark?

Hyperlocal delivery platforms such as Dunzo and Zepto serve as intermediaries, bridging the gap between consumers and local businesses by facilitating seamless ordering of diverse products and services from nearby establishments. These orders encompass daily essentials like groceries, meals, medicines, and other similar necessities. The primary advantage of hyperlocal delivery lies in its unparalleled delivery speed and convenience, fulfilling last-mile doorstep deliveries within minutes through its robust networks and optimized routes.

The **Inventory-led model (Dark store model)** in hyperlocal businesses entails the company taking responsibility for its own product supply or directly procuring items from sellers to maintain a dedicated inventory. Control over inventory allows hyperlocal players to optimize product availability, quality, and pricing.

The companies in this industry utilize various other well-known business models such as:

The **Aggregator or Zero inventory model,** where the hyperlocal businesses function as intermediaries, connecting customers with retailers who offer products or services under their own brand. Irrespective of the sourcing, the aggregator maintains standardized prices and quality, ensuring a consistent experience for consumers.

The **Marketplace model,** where hyperlocal businesses act as a facilitator, offering a platform where multiple retailers can sell similar items at their preferred prices. Unlike an aggregator, this model offers flexibility on pricing and quality standards.

These business models can be adeptly blended to cater to the unique needs and demands of the enterprise.

**Let us see some recent trends in the industry:**

*"Zomato-owned Blinkit to expand dark store count by around 40% in next 12 months."*

*"Dunzo plans to double its footprint to 15 cities and increase dark stores count to 200 from 75."*

Looks like companies are reaping benefits of control over product availability, quality and pricing and believes to grow exponentially using dark store model. Some other benefits of Dark store model are:

- Inventory Control
- Reduces reliance on external suppliers
- Fast delivery
- Improved data-driven decision making

**But!!**

*"Zomato-owned Blinkit shut down 100 dark stores in Delhi-NCR."*

*"Dunzo had shut down half its dark stores before the April financing. People in the know said this has gone up to about 70% now."*

Despite having such benefits what makes companies to shut down their dark stores? Let's take a deep dive into this matter.

One of the biggest challenges faced is the **Unit Economics** of this model. Let us understand the unit economics of the model. Assumptions:

- Establishing a dark store typically entails a significant investment, ranging from INR 25 Lacs to 45 Lacs. These stores are typically sized between 2000 sq ft to 2500 sq ft, providing ample space for product storage and order processing.
- Cost of Products is 80% of the revenue.
- On average, it is assumed that the company has 34 Employees, having a salary of ~18,000 per month, who ensure smooth operations and timely deliveries.

| Unit Economics Cost | | Particulars |
|---|---|---|
| Average Order Value | (A) | 400 |
| Average No of Orders per day | (B) | 600 |
| No Of Orders Per month | (C) = [(B) x 30] | 18,000 |
| Revenue | (D) = [© x (A)] | 72,00,000 |
| Cost of Goods & Services | (E) = 80% of (D) | (57,60,000) |
| GP (excluding Delivery costs) | (F) = [(D) – (E)] | 14,40,000 |
| Delivery cost INR 40 per order | (G) | (7,20,000) |
| GP (including Delivery cost) | (H) = [(F) – (G)] | 7,20,000 |
| Employee Expenses | (I) = 34 x 18000 | (6,12,000) |
| Amount left to cover other costs | (J) = [(H) – (I)] | 1,08,000 |

The company still needs to cover expenses related to electricity, rent, maintenance, marketing out of balance of only INR 1,08,000. This situation forces companies to burn cash heavily. It seems like the companies still are not able to manage cashflows and profitability under this model. While the other challenges faced are:

- Fleet Management
- High operational complexity
- Risk of inventory inefficiencies
- Limited Geographical Coverage

On the other hand, in the marketplace model or aggregator model, the company can cut down their expenses by ~15% to 20% by saving up on infrastructure cost, rent and manpower costs. However, these models also come with their own shortcomings and challenges like increased complexity, quality control, seller competition and platform reputation.

The challenges faced in the dark store model are yet to be resolved. Time will tell whether the companies will come up with a solution that will help them operate in a profitable manner or they will eventually pivot into different models to cater to the needs of the enterprise.

# Compliance Calendar for August 2023

## A. Income Tax

| Sr No. | Due Dates | Concerned (reporting) Period | Compliance Detail | Applicable to |
|---|---|---|---|---|
| 1. | 7th Aug | July 2023 | TDS / TCS Payment | Non-Government Deductors |
| 2. | 15th Aug | July 2023 | Provident Fund (PF) and Employee State Insurance Corporation (ESIC) Returns and Payment | All deductors |
| 3. | 30th Aug | July 2023 | TDS Payment in Form 26QB (Property), Form 26QC (Rent), Form 26QD (Contractor Payment) | Non-Government deductors |

**Notes:**

CBDT extends vide Circular No 9/2023 the due dates:

A. TDS statement in Form 26Q & 27Q for the period Apr-June 23 is extended from 31st July 2023 to 30th September 2023

B. TCS statement in Form 27EQ for the period Apr-June 23 is extended from 15th July 2023 to 30th September 2023

## B. Goods and Service Tax

| Sr No. | Due Dates | Concerned (reporting) Period | Compliance Detail | Applicable to |
|---|---|---|---|---|
| 1. | 10th Aug | July 2023 | GSTR – 7 (TDS) | Person required to deduct TDS under GST |
| 2. | 10th Aug | July 2023 | GSTR – 8 (TCS) | Person required to collect TCS under GST |
| 3. | 11th Aug | July 2023 | GSTR - 5A (OIDAR) | a) Taxable persons having annual turnover > Rs. 5 crore in FY 2022-23<br>b) Taxable persons having annual turnover ≤ Rs. 5 crore in FY 2022-23 and not opted for Quarterly Return Monthly Payment (QRMP) Scheme |

| Sr No. | Due Dates | Concerned (reporting) Period | Compliance Detail | Applicable to |
|---|---|---|---|---|
| 4. | 13th Aug | July 2023 | GSTR – 1 (IFF)- QRMP | Aggregate Turnover is up to Rs. 5 crores |
| 5. | 13th Aug | July 2023 | GSTR – 6 (ISD) | Person registered as ISD |
| 6. | 20th Aug | July 2023 | GSTR – 3B | a) Taxable persons having annual turnover > Rs. 5 crore in FY 2022-23<br>b) Taxable persons having annual turnover ≤ Rs. 5 crore in FY 2022-23 and not opted for QRMP scheme |
| 7. | 13th Aug | July 2023 | GSTR - 5 (NRTP) | Non-resident taxable person (NRTP) |
| 8. | 20th Aug | July 2023 | GSTR - 5A (OIDAR) | OIDAR services provider |
| 9. | 25th Aug | July 2023 | GSTR – 3B - QRMP scheme- Monthly payment* | Aggregate Turnover is up to Rs. 5 crores |

* Taxpayers who have availed the Quarterly Return Monthly Payment (QRMP) option, having Aggregate Turnover up to INR 5 crores in Previous FY, and whose principal place of business is in Category -1 States

Source: GST Portal

## C. FEMA Compliance

| Sr No. | Due Dates | Particulars | Applicable to |
|---|---|---|---|
| 1. | 7th Aug | ECB 2 Return (External Commercial Borrowing) | All Indian Borrowers who have non-resident lenders |

BHUTA SHAH & CO LLP
CHARTERED ACCOUNTANTS

# About us

Bhuta Shah & Co LLP (BSC) is a dynamic professional Chartered Accountants firm with a distinctive blend of skill sets, experience and expertise. Established in the year 1986, we operate from our Head Office in Nariman Point, Mumbai while having 6 offices across India in Mumbai, Pune, Ahmedabad and New Delhi.

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We are a Member Firm of Morrison Global, a leading international association of high-quality Professional Service Firms.

# Our Locations

**MUMBAI (H.O.)**

302-304, Regent Chambers,
Nariman Point, Mumbai - 400 021.

Tel.: +91 022 4343 9191

**BRANCH OFFICES:**

3rd Floor, Solitaire Corporate Park - Bldg IV,
Chakala, Andheri, Mumbai - 400 056.
Tel.: +91 022 4141 9191

1501/1502, Oriana Business Park,
Wagle Estate, Thane (W),
Mumbai - 4000 601.

Tel.: +91 022 4604 1995

**PUNE**

1244-B, Shreeram Apt., Lane Adjacent to L.D. Bhave, Gas Agency, Apte Road,
Deccan Gymkhana, Pune - 411004.
Tel.: +91 20 2553 0144

**DELHI**

E-6, First Floor, Connought Place,
New Delhi - 110001.

Tel: +91 011 4365 6583 | 84

**AHMEDABAD**

813, Shree Balaji Heights, Besides IDBI Bank,
C.G. Road, Ahmedabad - 380006.

Tel: +91 079 4003 9647

L: +91 22 4343 9191

F: +91 22 2283 27 27

E: mail@bhutashah.com

W: www.bhutashah.com