



The key amendments introduced in statutes, policies and procedures in respect of Direct Tax, Indirect Tax, Corporate Laws & Accounting Standards, Foreign Exchange Management Act / Export Import Policy & Securities and Exchange Board of India related matters are summarized hereunder.

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### DIRECT TAX

#### 1. Subsidy - whether revenue or capital receipt.

As per the subsidy scheme introduced by the Government of Maharashtra ('GoM') newly set up Multiplex Theatre Complexes were exempted from payment of entertainment duty for a period of three years, and thereafter 25% of entertainment duty was to be paid for subsequent two years.

Since duty was collected from customers as charge on gross value of ticket and contributed towards day to-day running expenses, Assessing Officer held that it was in nature of revenue receipt. Further, the Revenue contended that the fact that subsidy came into play only after multiplexes started functioning, demonstrated that it was in the nature of a helping hand for running of the day to-day business of the multiplexes.

Relying on the principles laid down in the case of *Sahney Steel and Press Works Limited v. CIT* [(1997) 228 ITR 253 (SC)] and *CIT v. Ponni Sugars & Chemicals Limited* [(2008) 306 ITR 392 (SC)], it was held that the purpose of the subsidy was the test for finding the nature of the scheme, and not mode of computation or the form in which it was passed to the taxpayer.

In current situation it was observed that the objective of waiver of entertainment tax duty was to encourage investment and boost construction of multiplex theatres. The “purpose test” is the determinative factor for the nature of any subsidy or incentive. The statement of object for introducing the scheme by the GoM clearly stated that the grant of subsidy was to promote the construction of new cinema houses. Thus, the subsidy was held to be capital in nature.

*Source: Commissioner of Income-tax vs. M/S. Chaphalkar Brothers Pune [Civil Appeals Nos. 6513-6514 of 2012 (SC) order dated December 7, 2017]*

## 2. Advance Pricing Agreements signed by CBDT

The Central Board of Direct Taxes (‘CBDT’) has entered into two Bilateral Advance Pricing Agreements (‘APAs’) with the Netherlands during November, 2017.

These two APAs pertaining to the Electronics and Technology sectors of the economy cover various international transactions in the nature of Distribution, Provision of Marketing Support Services, Provision of Business Support Services, etc.

With the signing of these Agreements, the total number of APAs entered into by the CBDT has gone up to 186. This includes 171 Unilateral APAs and 15 Bilateral APAs.

The progress of the APA Scheme manifests the development of a non-adversarial tax regime.

*Source: CBDT Press release, dated December 1, 2017.*

## 3. Even when a capital asset is treated as application of income for charitable purpose, depreciation is still an expenditure on charitable purposes; amendment prospective

Subject to certain conditions, income of charitable institutions registered as such under the Income Tax Act, 1961 (‘the Act’) is exempt if at least 85% of income is spent for charitable purposes. Accordingly, charitable institutions are entitled to claim entire expenditure incurred on acquisition of capital asset as application of income u/s 11(1) (a) of the Act.

The Assessing Officer disallowed depreciation u/s 32 of the Act in computation of income of the assessee on the ground that once the capital expenditure is treated as application of income for charitable purposes, grant of depreciation would amount to giving double benefit to the assessee.

Relying on the principles laid down in the case of CIT vs. Institute of Banking Personnel Selection [(2003) 131 Taxman 386 (Bombay HC)] it was held that that income from the property held under trust is to be computed on commercial principles after providing for allowance of normal depreciation.

Vide Finance Act (No. 2) 2014, section 11(6) of the Act has been amended which bars depreciation on expenditure applied for charitable purposes, which means that when outlay on purchase of an asset is allowed as expenditure on objects, depreciation on the said asset cannot be considered as deductible expenditure for charitable purpose. However, this amendment is prospective in nature and applies only from AY 2015-16.

Further, once assessee is allowed depreciation, he shall be entitled to carry forward depreciation as well.

*Source: CIT vs Rajasthan and Gujarati Charitable Foundation Poona [Civil Appeal No. 7186 of 2014 (SC) order dated December 13, 2017]*

#### 4. Aadhaar linking timeline extended to March 31, 2018

Under section 139AA of the Act, with effect from July 1, 2017, all taxpayers having Aadhaar Number or Enrolment Number are required to link it with PAN for filing the tax return.

The said provision was relaxed by the Central Board of Direct Taxes ('CBDT') vide its orders dated July 31, 2017 and August 31, 2017, allowing further time till December 31, 2017 to taxpayers to link Aadhaar with PAN.

CBDT has further extended the time for linking Aadhaar with PAN till March 31, 2018.

*Source: CBDT ORDER [F.NO. 225/270/2017/ITA.II, dated December 8, 2017]*

#### 5. India's positions on Permanent Establishment in 2017 Update to OECD Model Tax Convention and Commentary.

On November 21, 2017 the Organisation for Economic Co-operation and Development ('OECD') approved the contents of the 2017 Update to the OECD Model Tax Convention and Commentary. Like the previous updates, the 2017 Update contains the positions of OECD and non-OECD member countries, including those of India, on the OECD Model Tax Convention and its Commentary.

Following are India's key positions on certain provisions of Permanent Establishment ('PE') in the 2017 Update:

- a) Electronic commerce: As per the Model Commentary, a website being intangible does not constitute a "place of business" and does not create a PE unless the enterprise carrying on business through a web site has the server at its own disposal.

India is of the view that a website may constitute a PE where it leads to significant economic presence of the foreign enterprise in India.

Accordingly, depending on facts, a foreign enterprise can be considered to have acquired a place of business through a website on any equipment, if opening the website on that equipment includes downloading of automated software, such as cookies, which use that equipment to collect data from that equipment, process it in any manner or share it with the enterprise.

- b) Low-risk distributor: The 2017 Commentary states that a buy-sell distributor (irrespective of whether it is an associated enterprise or not) may not constitute an Agency PE since it is neither acting on behalf of a non-resident enterprise nor is it selling goods that are owned by such enterprise. The goods that are sold to the customers are owned by the distributor itself. This conclusion would apply even if the distributor acted as a “low-risk distributor.”

India does not agree with the above interpretation because it considers that distribution of goods owned by an enterprise (by an associated or related enterprise) may create PE of the enterprise whose goods are being sold, particularly in a case where the risks are not borne by such distributor.

- c) Construction Work: The 2017 Update states that building site or construction or installation project constitutes a permanent establishment only if it lasts more than 12 months. It is clarified that work undertaken on a site after the construction work, pursuant to a guarantee that requires an enterprise to make repairs, would normally not be included in the original construction period.

India does not agree with the interpretation because it considers that any work undertaken on a site shortly after the construction work has been completed, including repair works undertaken pursuant to a guarantee, may be taken into account as part of the original construction period, for determining whether a permanent establishment exists.

Traditionally, India has sought to have greater source country taxation while allocating taxing rights under a tax treaty by seeking to have a broader definition of PE as compared to the OECD standard.

India's positions serve as a guide to taxpayers on the likely approach of the Indian tax administration during audits, and also as a broad outline of India's tax treaty policy to countries seeking to negotiate a tax treaty with India. Multinational enterprises should evaluate how these positions may impact their PE risk assessment in India and the potential for tax controversy if these positions are proposed by the Indian tax authority during PE audits.

*Source: 2017 Update to the OECD Model Tax Convention dated November 21, 2017.*

## INDIRECT TAX

### 1. Extension of time limit for filing FORM GST ITC -01

Time limit for filing declaration in FORM GST ITC-01, by registered persons, who have become eligible to avail input tax credit during the months of July, 2017 to November, 2017 has been extended till January 31, 2018

*Source: – Vide Notification No. 67/2017 – Central Tax dated December 21, 2017*

## 2. Extension of time limit for filing FORM GSTR-5

Time limit for furnishing return by a non-resident taxable person in FORM GSTR-5 for the months of July, 2017 to December, 2017 has been extended till January 31, 2018

Source: – Vide Notification No. 68/2017 – Central Tax dated December 21, 2017

## 3. Extension of time limit for filing FORM GSTR-5A

Time limit for furnishing return by a person supplying online information and database access or retrieval services from a place outside India to a non-taxable online recipient in FORM GSTR-5A for the months of July, 2017 to December, 2017 has been extended till January 31, 2018

Source: – Vide Notification No. 69/2017 – Central Tax dated December 21, 2017

## 4. Manual filing and processing of refund claims on account of inverted duty structure, deemed exports and excess balance in electronic cash ledger

Refund claims on account of inverted duty structure, deemed exports and excess balance in electronic cash ledger shall be filed (either monthly or quarterly) and processed manually as specified in Circular No. 17/17/2017-GST dated 15.11.2017

Source: Vide Circular No 24/24/2017-GST dated December 21, 2017

## 5. Manual filing of applications for Advance Ruling and Appeals before Appellate Authority for Advance Ruling

Clarification has been issued with respect to form and manner of manual filing of application for Advance Ruling and Appeal to Appellate Authority for Advance Ruling.

Source: Vide Circular No 25/25/2017-GST dated December 21, 2017

## FEMA & OTHER LAWS

### 1. Update on Compounding of Contraventions under FEMA, 1999

- a) The compounding powers have been delegated to the Regional Offices of the Reserve Bank of India to compound the following contraventions of FEMA 20(R)/ 2017-RB:

FEMA Regulation	Brief Description of Contravention
Regulation 13.1(1)	Delay in reporting inward remittance received for issue of shares.
Regulation 13.1(2)	Delay in filing form FC(GPR) after issue of shares.
Regulation 13.1(3)	Delay in filing the Annual Return on Foreign Liabilities and Assets (FLA).
Paragraph 2 of Schedule I	Delay in issue of shares/refund of share application money beyond 60 days, mode of receipt of funds, etc.
Regulation 11	Violation of pricing guidelines for issue/transfer of shares.

Regulation 2(v) read with Regulation 5	Issue of ineligible instruments
Regulation 16.B	Issue of shares without approval of RBI or Government, wherever required.
Regulation 13.1(4)	Delay in submission of form FC-TRS on transfer of shares from Resident to Non-Resident or from Non-resident to Resident.
Regulation 4	Receiving investment in India from non-resident or taking on record transfer of shares by investee company.

- b) The application of compounding can be submitted in the prescribed form along with the undertaking that they are not under any enquiry/investigation/adjudication by any agency such as Directorate of Enforcement, CBI etc as on the date of the application.
- c) Cases of contravention, such as, those having serious contravention suspected of money laundering, terror financing or affecting sovereignty and integrity of the nation shall be referred to the Directorate of Enforcement for further investigation and necessary action under FEMA, 1999 and in case where adjudication has been done and an appeal has been filed under section 17 or section 19 of FEMA, 1999, no contravention can be compounded in terms of Rule 11 of Foreign Exchange (Compounding Proceedings) Rules, 2000.

*Source: <https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=11187&Mode=0> dated November 14, 2017*

## 2. Update on Master Direction – Reporting under Foreign Exchange Management Act, 1999

- a) An Indian company issuing sweat equity shares/ employees' stock option/ shares issued against exercise of stock option to persons resident outside India who are its employees/ directors or employees/ directors of its holding company/ joint venture/ wholly owned overseas subsidiary/ subsidiaries shall submit Form-ESOP to the Regional Office concerned of the Reserve Bank under whose jurisdiction the registered office of the company operates, within 30 days from the date of issuing sweat equity shares/ employees' stock option/ shares against exercise of option, as the case may be. All FIRC's and KYC shall be filed as necessary documents along with form ESOP.
- b) An Indian entity making downstream investment in another Indian company or an LLP which is considered as indirect foreign investment for the investee entity in terms of FEMA 20(R), shall notify the DIPP within 30 days of such investment.

*Source: <https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=10202&fn=5&Mode=0> dated December 20, 2017*

### 3. Foreign Exchange Management (Transfer or Issue of any Foreign Security) (Amendment) Regulations, 2017

In Regulation 15, in sub-regulation (v),

(i) for the existing clause (a), the following shall be substituted, namely;

“The Statutory Auditors of the Indian Party certify that law of the host country does not mandatorily require auditing of the books of accounts of JV / WOS and the figures in the APR are as per the un-audited accounts of the overseas JV / WOS”.

(ii) after existing clause (b), the following shall be added, namely;

“(c) The above exemption from filing the APR based on unaudited balance sheet will not be available in respect of JV/WOS in a country / jurisdiction which is either under the observation of the Financial Action Task Force (FATF) or in respect of which enhanced due diligence is recommended by FATF or the any other country / jurisdiction as prescribed by Reserve Bank of India.”

*Source: <https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=11187&Mode=0> dated November 14, 2017*

## **ASA & ASSOCIATES** LLP

CHARTERED ACCOUNTANTS

[www.asa.in](http://www.asa.in)

### Head Office

Times Square, Fourth Floor, Block B Sushant Lok 1, Gurgaon 122 002 INDIA Tel : +91 124 4333 100  
Fax: +91 124 4333 101

Offices: Ahmedabad, Bengaluru, Chennai, Gurgaon, Hyderabad, Kochi, Mumbai, New Delhi

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