

# technical update

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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.

## DIRECT TAX

### Amendments, Notifications & Court Rulings

- » Mumbai Tribunal accepts applicability of “make available” condition to development and transfer of technical plan or design
- » Supreme Court reverses its earlier ruling and allows 100% deduction for new units undertaking “substantial expansion” for fresh five years
- » Government of India expands definition of “startup” and relaxes conditions for “angel tax” exemption

## INDIRECT TAX

### Amendments, Notifications & Court Rulings

- » Notification No. 01/2019 - Central Tax (Rate) dated January 29, 2019
- » Notification No. 02/2019 - Central Tax dated January 29, 2019
- » Notification No. 03/2019 - Central Tax dated January 29, 2019
- » Notification No. 01/2019 - Integrated tax dated January 29, 2019
- » Notification No. 09/2019 - Central Tax dated February 20, 2019

## COMPANY LAW

### Amendments, Notifications & Court Rulings

- » Notification on the Companies (Significant Beneficial Owners) Amendment Rules, 2019
- » Notification on the Companies (Incorporation) Amendment Rules, 2019

## MCA and RBI Notifications

- » Companies (Significant Beneficial Ownership), Amendment Rules, 2019
- » Companies (Adjudication of penalties), Amendment Rules, 2019
- » Companies (Incorporation), Amendment Rules, 2019
- » External Commercial Borrowings (ECB) Policy – ECB facility for Resolution Applicants under Corporate Insolvency Resolution Process

## DIRECT TAX

### 1. Mumbai Tribunal accepts applicability of “make available” condition to development and transfer of technical plan or design

Mumbai Tribunal in the case of Buro Happold Limited vs. DCIT has upheld that, unless the technical or consultancy services are made available to the service recipient or consist of the development and transfer of a technical plan or a technical design, the same shall not be considered as Fees for Technical Services (‘FTS’) as per the India UK Double Taxation Avoidance Agreement (‘DTAA’). Fees paid for such services shall be treated as “business profits” and in the absence of a permanent establishment (‘PE’) of the taxpayer in India, it cannot be brought to tax.

Buro Happold Limited (‘Appellant’), a company incorporated in the UK and a resident in the UK, is involved in the business of providing engineering design and consultancy services to Indian customers through its Indian affiliate, BHEI. As a part of such services, the Appellant provides structural and MEP (Mechanical, Electrical and Public Health) engineering for various buildings.

Under the Income Tax Act, 1961, FTS means any consideration for rendering managerial, technical or consultancy services. Under the DTAA, the FTS definition is restricted to those technical or consultancy services which, inter alia, make available technical knowledge, experience, skill, knowhow or processes or consist of the development and transfer of a technical plan or a technical design.

The present Tribunal ruling reiterates that the words “make available” not only apply to technical knowledge, experience, skill, knowhow, but also apply to the latter part of the FTS Article which deals with the development and transfer of a technical plan or a technical design, by applying the principles of ejusdem generis.

The Tribunal held that the amount received towards consulting engineering services is not in the nature of FTS under the DTAA. Such amount should be treated as “business profits” and in the absence of a PE of the Appellant in India, it cannot be brought to tax.

*Source: Buro Happold Limited vs. DCIT [ITA no. 1296/Mum./2017], dated February 15, 2019*

### 2. Supreme Court reverses its earlier ruling and allows 100% deduction for new units undertaking “substantial expansion” for fresh five years

In a recent decision of the Larger Bench of three judges of the Supreme Court of India, in a group of cases, with the case of Aarham Softronics (‘Taxpayer’) being the lead case upheld the decision of the Himachal Pradesh High Court and recalled the judgment of two-judge bench (‘Division Bench’) in the case of Classic Binding Industries [407 ITR 429 (SC)] dated August 20, 2018.

The legal issue before the Supreme Court (‘SC’) was whether a new industrial unit set up in specified areas on or after January 7, 2003 is entitled to a fresh five-year profit-linked incentive deduction of 100% under Section (S.) 80-IC of the Indian Tax Laws if such unit undertook “substantial expansion” on or before March 31, 2012.

S.80-IC grants a profit-linked tax holiday for two types of units (a) a new unit that commenced manufacture or production during a prescribed qualifying period in a specified area and (b) an existing unit in a specified area that undertakes “substantial expansion” during the qualifying period. The tax holiday is 100% for the first five years and 25% (30% for companies) for the next five years, starting from the “initial assessment year” for units based in northern states of Himachal Pradesh (‘HP’) and Uttaranchal with the qualifying period between January 7, 2003 and March 31, 2012, subject to the overall period limitation of 10 years. The “initial assessment year” is the year in which the unit commences manufacture or production or completes “substantial expansion”, as the case may be.

The Taxpayer had established new units in specified areas of HP and Uttaranchal within the qualifying period and claimed 100% deduction for the first five years. Subsequently, in the sixth year, the Taxpayer undertook substantial expansion of the existing and claimed 100% deduction from sixth year by contending that it became entitled to a fresh five-year tax holiday period for claiming 100% deduction by virtue of completion of substantial expansion.

The Tax Authority held that the Taxpayer had already claimed deduction of 100% for the first five years from the date of setting up of new unit and, hence, denied the claim of enhanced deduction of 100% from the year of substantial expansion and restricted the deduction to 25% of eligible profits for the tax year under consideration.

However, the HP High Court ruled in favor of the Taxpayer and held that the new units, that have undertaken “substantial expansion” before the sunset date, are entitled to a fresh tax holiday of 100% for five years from the year of substantial expansion, subject, however, to the overall period limitation of 10 years before and after the “substantial expansion”.

Aggrieved, the Tax authority appealed before the SC wherein the Division Bench ruled against the Taxpayer in the case of Classic Binding Industries and restricted the claim of deduction to 25% of profits from year of substantial expansion.

However, the Larger Bench recalled the Division Bench’s ruling and after fresh hearing of the appeals, and ruled in favor of the Taxpayer by allowing the enhanced claim of deduction of 100% from the year of completion of substantial expansion, subject to total period of exemption under S.80IC, not exceeding 10 years.

The Larger Bench further held that the Division Bench ruling, is erroneous for the reason that it was delivered by referring erroneously to the definition of “initial assessment year” as provided in another section viz. S.80-IB (14)(c) and without having regard to the definition of “initial assessment year” under S. 80-IC itself, which is materially different in its scope.

*Source: Supreme Court in Pr. CIT vs M/s Aarham Softronics [Civil Appeal No(S). 1784 of 2019] dated February 20, 2019*

### **3. Government of India expands definition of “startup” and relaxes conditions for “angel tax” exemption**

Notification No. G.S.R. 127(E) dated February 19, 2019 (‘New Notification’) issued by the Department for Promotion of Industry and Internal Trade (DPIIT) has relaxed the definition of “start-up” on two aspects: (a) Cap on annual turnover has

been raised from INR250 million to INR1000 million and (b) The tenure for which an entity can retain status as “start-up” has been increased from 7 years to 10 years from the date of incorporation or registration.

The DPIIT recognizes certain entities as ‘start-up’ based on satisfaction of qualifying conditions. Such recognition as a ‘start-up’ is relevant from the perspective of Income Tax Act, 1961 in the context of profit-linked tax holiday (Section 80-IAC) and exemption from “angel tax” provisions (Section 56(2)(viib)).

Section 80-IAC provides for 100% profit linked deduction of profits and gains derived by an eligible start-up from eligible business for a period of three consecutive years out of seven years from the date of incorporation on fulfillment of certain conditions.

Section 56(2)(viib) provides that when a closely held company (‘CHC’) issues shares to a resident at a premium and receives consideration which is in excess of the fair market value (FMV) of the shares, the amount received in excess of the FMV is assessed as “Income from other sources” in the year of issue of shares by the company.

By way of exception, provisions of section 56(2)(viib) do not apply to (a) Shares issued by a venture capital undertaking to a venture capital fund (‘VCF’) or a venture capital company (‘VCC’) and (b) Shares issued to a class or classes of persons notified by the Central Government. Accordingly, the CBDT, vide Notification No. 45/2016 dated June 14, 2016 notified that this provision shall not apply when shares are issued to a resident by a “start-up” company which is a CHC and fulfils certain conditions.

From tax perspective, the New Notification has relaxed the conditions and procedure for exemption from “angel tax” for start-up companies from an approval-based process to a “green channel” process, as under:

- a) The cap on aggregate share capital and share premium consequent to past or proposed issue of shares has been raised from INR100 million to INR 250 million. While computing the enhanced cap, shares issued to nonresidents, VCC or a VCF or a specified listed company has been excluded.
- b) The requirement of obtaining prior or post facto (for past issues) approval from the Central Board of Direct Taxes (CBDT) through DPIIT is substituted with a self-declaration by a start-up company of compliance with conditions for exemption from “angel tax”.
- c) The net worth and income criteria for resident investors as also justification for valuation of shares has been dispensed with.
- d) To ensure that the exemption is restricted to bona fide cases having regard to the anti-abuse intent of “angel tax” provisions, the exemption as per the relaxed conditions has been made conditional upon a start-up company not investing in certain non-qualifying assets for a period of up to seven years from the end of the latest financial year in which shares were issued at a premium. Breach of the condition triggers retrospective revocation of “angel tax” exemption.

The New Notification supersedes the earlier notifications issued by DIPP i.e. Notification No. G.S.R. 364(E) dated April 11, 2018 r.w. Notification No. G.S.R. 34(E) dated January 16, 2019 and is applicable from February 19, 2019. The Government of India shall carry out a review of the New Notification on or before March 31, 2021.

*Source: Notification No. G.S.R. 127(E) [F. No. 5(4)/2018-SI] dated February 19, 2019*

## INDIRECT TAX

### 1. Seeks rescind notification no. 8/2017 Central Tax (Rate) regarding RCM on supplies from unregistered persons.

The Reverse Charge on unregistered purchases shall be on hold till the Government specifies category of persons u/s 9(4) on whom reverse charge for unregistered purchase shall be applicable. Similar notification issued for IGST also.

*Source: – Vide Notification No. 01/2019 – Central Tax (Rate) dated January 29, 2019*

### 2. Seeks to bring into force the CGST (Amendment) Act, 2018.

All provisions except certain provisions were implemented from February 01, 2018. Some of the important provisions are:

- GST composition levy has been extended to the services (i.e. Composition dealers may supply services up to specified value)
- Blocked credits provision amended to bring clarity on ITC on motor vehicles
- ITC can be still availed in GSTR 3B on provisional basis irrespective of the reflection in GSTR 2A, as Section 43A of The CGST Act has been deferred

*Source: – Vide Notification No. 02/2019 – Central Tax dated January 29, 2019*

### 3. Seeks to amend the CGST Rules, 2017

Summary of important rules amended are mentioned below:

- Rule 11 & Rule 41A amended to allow multiple registrations under GST in a state for multiple places of business. Earlier, separate registration was allowed only for different business verticals in a state. The ITC shall be transferred to such new registrations vide Form ITC-02A. This Form has been notified.
- Rule 21A: Suspension of registration event is introduced before cancellation of registration till the proceedings are completed.
- Rule 53 amended to issue single credit/debit note against one or more than one corresponding tax invoices/ bill of supply(s)
- Rule 85 & 86: ITC of IGST can now be adjusted against output CGST & SGST before adjusting the corresponding ITC of CGST & SGST

*Source: – Vide Notification No. 03/2019 – Central Tax dated January 29, 2019*

### 4. Seeks to bring into force the IGST (Amendment) Act, 2018

All provisions except certain provisions were implemented from February 01, 2018. Some of the important provisions are:

- Condition for export of services that payment is received in convertible foreign exchange is relaxed to payment received in Indian currency wherever permitted by RBI.
- Place of supply for transportation of goods to a place outside India shall be the place of destination of such goods. Earlier, on similar type of transaction, the place of supply depended on whether the recipient is registered or not.

*Source: – Vide Notification number 01/2019 – Integrated tax dated January 29, 2019*

## 5. Seeks to extend the due date for furnishing FORM GSTR-3B for the month of January, 2019

Due date to file GSTR-3B for the month of January, 2019 was extended from February 20, 2019 till February 22, 2019. Further, for assessees having place of business in Jammu and Kashmir, the due date was extended till February 28, 2019.

*Source: Vide Notification No. 09/2019-Central Tax dated February 20, 2019.*

## COMPANY LAW

### 1. Companies (Significant Beneficial Owners) Amendment Rules, 2019.

The MCA vide notification dated June 13, 2018 has notified the Companies (Significant Beneficial Owners) Rules, 2018 but representation by many stakeholders/professionals expressed certain difficulties in filing a declaration in Form No. BEN-1. Further ministry has amended said rules and come up with Companies (Significant Beneficial Owners) Amendment Rules, 2019 vide notification dated February 08, 2019.

Following key changes will come into effect from this notification:

- Every Reporting Companies shall take necessary steps to find out if there is any individual who is a significant beneficial owner and such individual to make declaration in form no. BEN-1 within 90 days from publication of this notification and thereafter if there is any change in SBO within 30 days from acquiring such SBO or any change therein.
- Every reporting company shall in all cases where its member (other than individual) holds not less than 10% of its Shares / Voting rights / Right to receive or participation in the dividend, give notice in form BEN-4 to such member where reporting company having knowledge of the identity of a significant beneficial owner or another person likely to have such knowledge.
- The reporting company shall apply to the Tribunal, where the SBO failure to provide BEN-1 or where the information given is not satisfactory to give the information required by the notice in Form No. BEN-4, within the time specified therein.
- Reporting Company shall file e-Form BEN-2 within 30 days upon receipt of declaration in form BEN-1.
- Reporting Company shall maintain a register of beneficial owners holding significant beneficial interest in form no.BEN-3.

*Source: [http://www.mca.gov.in/Ministry/pdf/CompaniesOwnersAmendmentRules\\_08020219.pdf](http://www.mca.gov.in/Ministry/pdf/CompaniesOwnersAmendmentRules_08020219.pdf)*

### 2. Notification on the Companies (Incorporation) Amendment Rules, 2019.

The MCA vide notification dated 21st February 2019, notified, Companies (Incorporation) Amendment Rules, 2019 and directed every Company incorporated on or before the 31st December 2017 shall file the particulars of the Company and its registered office in e-form INC-22A.



The said e-form shall be filed on or before 25th April, 2019.

Information required for filing of e-Form INC-22A:

- Email ID and OTP generated on Email ID.
- Latitude and Longitude of registered office
- List of all Directors of the Company with Active status of DIN.
- Details of Statutory Auditor/s and their period of appointment.
- Details of Cost Auditor/s, if applicable.
- Details of CEO, CFO and CS, if any.
- Serial Request Number (SRN) of e-Form AOC-4 and MGT-7 filed for the FY 2017-18.
- Photograph of registered office showing external building and inside office also showing therein at least one director who has affixed their DSC to this form.

Source: [http://www.mca.gov.in/Ministry/pdf/CompaniesIncorporationAmendmentRules\\_21022019.pdf](http://www.mca.gov.in/Ministry/pdf/CompaniesIncorporationAmendmentRules_21022019.pdf)

## MCA and RBI Notifications

### 1. Companies (Significant Beneficial Ownership), Amendment Rules, 2019

In exercise of the powers conferred by sub-sections (1) and (2) of section 469 read with section 90 of the Companies Act, 2013 the Central Government formulated the Companies (Significant Beneficial Owners) Amendment Rules, 2019.

Source: [http://www.mca.gov.in/Ministry/pdf/CompaniesOwnersAmendmentRules\\_08020219.pdf](http://www.mca.gov.in/Ministry/pdf/CompaniesOwnersAmendmentRules_08020219.pdf) dated February 08, 2019

### 2. Companies (Adjudication of penalties), Amendment Rules, 2019

In exercise of the powers conferred by section 454 read with section 469 of the Companies Act, 2013, the Central Government hereby makes the rules, to amend the Companies (Adjudication of Penalties) Rules, 2014, namely Companies (Adjudication of Penalties) Amendment Rules, 2019.

Source: [http://www.mca.gov.in/Ministry/pdf/AdjudicatioPenalties2019\\_20022019.pdf](http://www.mca.gov.in/Ministry/pdf/AdjudicatioPenalties2019_20022019.pdf) February 19, 2019

### 3. Companies (Incorporation), Amendment Rules, 2019

The Central Government, through its notification dated the 21st February, 2019, has inserted Rule 25A in the Companies (incorporation) Rules, 2014 whereby Every company incorporated on or before the 31st December, 2017 shall file the particulars of the company and its registered office, in e-Form ACTIVE (Active Company Tagging Identities and Verification) on or before 25.04.2019.

Source: [http://www.mca.gov.in/Ministry/pdf/CompaniesIncorporationAmendmentRules\\_21022019.pdf](http://www.mca.gov.in/Ministry/pdf/CompaniesIncorporationAmendmentRules_21022019.pdf) dated February 21, 2019

#### 4. External Commercial Borrowings (ECB) Policy – ECB facility for Resolution Applicants under Corporate Insolvency Resolution Process

In terms of paragraph 2.1.(viii) of the Annex to the A.P. (DIR Series) Circular No. 17, dated January 16, 2019 on “External Commercial Borrowings (ECB) Policy – New ECB Framework”, ECB proceeds cannot be utilized for repayment of domestic Rupee loans, except when the ECB is availed from a Foreign Equity Holder as defined in the concerned framework.

Source: <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NT1214EBE20910C0B4690B1DE88F0FE8070FF.PDF> dated February 07, 2019

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