ASSOCIATION OF COMPETITIVE TELECOM OPERATORS

Pre - Budget proposals
for
Union Budget (2022-23)
to
Ministry of Finance
(Department of Revenue)

06th December 2021
New Delhi

Introduction

- ACTO is an industry association, registered under Societies Registration Act, 1860.
- Our members provide enterprise data services to multi-sited corporations, Indian BPO/KPO, outsourcing and ITES sector operating global networks under appropriate telecom licenses accorded by Government of India.
- ACTO is committed to further India's pro-competitive policies and to partner closely with Ministry of Communications & Information Technology, Ministry of Finance and other Ministries , Government Bodies to enhance the stakeholder's engagement with the specific needs of the enterprise segment.
- Our members:

ACTO's Pre-Budget Memorandum 2022-23

Issue – Domestic as well as cross-border payments made by Indian telecom operators to other telecom operators, in respect of a wide array of telecommunication services, are under litigation on account of retrospective amendment in the definition of 'Royalty' [by way of insertion of Explanation 5 and 6 to section 9(1)(vi) of the Act] made vide Finance Act, 2012, which intends to bring within the purview of royalty, use of equipment irrespective of any actual possession or control of rights, properties or information and transmission by satellite, cable, optic fibre, or similar technology.

Rationale/justification– The traditional jurisprudence has been that telecommunication services were standard services and hence, fee for same cannot be taxed as royalty under the provisions of the Act and also the DTAA signed by India with other countries. The tax authorities have now started taking a position that payments made by telecom companies, even for standard telecom services, are in the nature of royalty, resulting in protracted litigation not only in relation to taxation of the payments in the hands of the recipient foreign operators but also in relation to tax deduction at source by the paying Indian telecom operators.

Recommendation – Definition of the term 'royalty' under the provisions of the Act may be amended with retrospective effect to exclude standard service such as IUC.
Clarification should also be issued that amendments made to the definition of Royalty under section 9(1)(vi) of the Act [vide insertion of Explanation 5 and 6 to section 9(1)(vi) of the Act] shall not be read into the DTAAs, as has also been held in numerous judgments by the Indian judiciary.

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Issue – Receipt of shares by shareholders in an overseas merger (satisfying prescribed conditions) should be exempt from levy of capital gains tax in the hands of the shareholders.

Rationale/ justification – Similar to the exemption granted to shareholder(s) of an Indian merging company in a tax neutral merger of Indian entities, specific exemption from applicability of indirect transfer tax provisions should be granted to the shareholders of an overseas merged entity in case of an overseas merger.

It may be noted that transfer of shares of an overseas entity (deriving substantial value from assets located in India) held by the merging overseas entity to the merged overseas entity has been made exempt. However, similar exemption has not been provided to the shareholders.

Recommendation – Exemption should be provided to the shareholders in an overseas merger.

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Issue – Section 276B of the Act - Clarification w.r.t. initiation of prosecution proceedings where tax and interest has been paid in full.

Rationale/ justification - Prosecution proceedings under section 276B of the Act, for default in payment of taxes, should not be initiated where the assesse has made good the default by depositing the amount (along with requisite interest) and also in cases where the assesses are not repetitive defaulters. This shall encourage the compliance of law in a time bound manner and avoid litigations.

Recommendation – Prosecution proceedings should not be initiated where tax and interest has been paid in full.

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Issue– Recently amended provisions of section 115A of the Act provides exemption from filing of return of income to the non-resident shareholder in India, where such shareholder earns only dividend/ royalty/ fees for technical services/ interest income in India and appropriate tax has been withheld on such amount paid to non-resident at the rate provided under the domestic law.

However, where tax has been withheld at a beneficial income-tax rate provided under the tax treaty (as applicable to non-resident shareholder), such shareholder would be required to file the return of income in India.

Rationale/ justification – While the Indian government has tried to ease the compliance burden by providing relaxation to non-resident shareholder, such relaxation has been limited to the cases **where tax has been withheld at the rate provided under the domestic law.**

Despite the fact that tax liability stands discharged by way of tax deduction by the payer in the case where tax has been withheld in accordance with applicable tax treaty rate, non-relaxation in such cases would lead to unnecessary filing of return of income and other compliances burden for the Foreign companies in India. Further, before amendment made by Finance Act, 2020, relaxation was provided to the non-resident from filing the return of income in relation to interest income earned by such non-resident in India, where appropriate tax was withheld (i.e. whether under the provisions of the Act or tax treaty rate) on such interest paid to non-resident.

Recommendation – Relaxation from filing of tax return in India should be provided to non-resident shareholder in cases where tax has been withheld on the dividend/ royalty/ fees for technical services/ interest paid to such non-resident shareholder at the applicable tax treaty rate.

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Issue – Applicability of withholding tax provisions on year-end accruals

Rationale/ justification – Withholding tax obligations arise at the time of payment or credit to the account of the payee, whichever is earlier. Though there are judicial precedents in favour of the taxpayers, at present tax, authorities disallow entire year-end accruals (even where the parties are not identified), resulting in creation of demands and protracted litigation.

Recommendation – It should be clarified that withholding tax provisions should not be applicable to year-end provisions where the recipients are not identified. Recommended amendments would put an end to past litigation and also eliminate the risk of any future litigation on this issue.

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Issue – Initiation of withholding tax proceedings against resident payers where reasonable due diligence was exercised while making payments to non-residents.

Rationale/ justification – The present provisions do not provide any safeguard for the payers who make payments to non-residents even where reasonable due diligence was exercised (eg: collection of No PE declaration, TRC and Form 10F). This is particularly where tax department allege PE of the non-resident recipients in India.

Recommendation – Reference to No PE certificate should be incorporated in the Income-tax Rules and where the deductor is able to prove that due diligence was exercised while making the remittance, assesses should be not held as assesses in default for non-deduction of tax at source from payments made to the non-residents.

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Issue – Allowability of Corporate Social Responsibility ('CSR') expenditure. Section 115BAA of the Act provides that deduction under section 80G would not be available to a domestic company opting for the concessional tax rate from AY 2021-22.

Rationale/ justification – Presently expenditure incurred in the normal course of business towards CSR obligation of the company is not allowed as a deduction under section 37. From AY 2021-22, even the donation made under section 80G of the Act is not available where the Company opts for taxation under section 115BAA of the Act.

Expenditure incurred in the normal course of business towards CSR should be allowed as a tax deductible expense, as the expenditure is incurred for the purpose of business of the company and is also mandated by the Companies Act 2013.

Recommendation – It should be provided that CSR expenditure is fully allowed as tax deductible expenditure under section 37 to the taxpayers.

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Issue– Provisions of section 254 of the Act have been amended to provide that Tribunal will grant stay of demand only if an amount of not less than 20% of the sum payable has been paid or security has been furnished for the equivalent amount. It is further provided that Tribunal shall not have power to extend stay beyond 365 days.

Rationale/ justification – It is unreasonable and unjustified to encroach on the discretionary power of a judicial authority. It should be clearly provided that Tribunal may require the taxpayer to deposit a lower amount of demand or grant full stay without payment of any portion of disputed tax demand based on the prima-facie case of the taxpayer for e.g. where the issue is covered in favour of the taxpayer in its own case, decisions of Tribunal/ High Court on similar issue in case of some other taxpayer, high pitched demand etc. Further, the taxpayer should not be penalized where delay in disposal of appeal is not attributable to the taxpayer.

Recommendation – Amendment providing for the condition of 20% of demand should be withdrawn and Tribunal should be empowered under the provisions of the Act itself to grant stay / extension of stay of demand (ever where the stay extension is beyond 365 days) where the delay in disposal of appeal is not attributable to the taxpayers.

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Issue Rationale/ justification – Presently, additional depreciation under section 32(1)(iia) is allowed at 20 % of actual cost of new plant and machinery to a manufacturer. Such additional depreciation is currently not available to service industries.

Recommendation – The Government should extend the additional depreciation under Section 32(1)(iia) of the Act to service industries as well which is currently available to only manufacturing.

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Issue – Deemed international transaction - Guidance on kind of arrangements that should get covered as deemed international transactions.

Rationale/ justification – Currently there is no clarity on quadrangular arrangements. The present regulations only talks about triangular arrangements between associated enterprise and such other person (Resident).

Recommendation – Specific guidance should be issued on kind of arrangements that should get covered as deemed international transactions with specific directions on revenue neutral transactions.

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Issue– Range concept - Use of inter-quartile range.

Rationale/ justification – The current rules proposing narrow range does not address the concern of the tax payers. Also, use of inter-quartile range would ensure consistency with international transfer pricing principles and minimize risk of economic double taxation merely on account of difference in use of statistical tools.

Recommendation – Use of inter-quartile range could be considered instead of 35th to 65th percentile range as per current rules for computation of Arm's Length Price.

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Issue– Intra group services – Guidance on supporting documentation

Rationale/ justification – Currently there is no clarity on kind of supporting documentation to be maintained for intra group services.

Recommendation – Specific guidance should be issued on kind of documents that should be maintained by tax payers as in the absence of adequate documentation tax authorities tend to disallow such expense.

ACTO's Pre-Budget Memorandum 2022-23

Issue– Over a period of time the rate of Customs duty on import of telecom equipment has increased and the same is non creditable. Most of the Telecom equipment are imported as they are still not manufactured domestically. In line with the above objectives majority of the equipment's were at Nil BCD till July, 2014. Over the last few years BCD has been imposed and as of today almost all Telecom equipment's are subjected to BCD at 20%.

Rationale/ justification – Telecom Industry is highly capital-intensive Industry and since most of the equipment are not manufactured in India, these-equipment have to be imported which results in increased capex cost by 20%.

Recommendation – Considering the poor financial health of the telecom industry, and the huge investments in the pipeline on account of new technologies and network expansions, relaxation in import duties is required to be extended to the Telco's to expedite faster roll out of network and better quality of service. Thus, Exemption from the levy of BCD should be granted on the Telecom equipment.

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Issue– As per Customs Notification No. 24/2015 dated 08th April 2015 and Notification No. 25/2015 dated 08th April 2015, duty credit scrips (SEIS) cannot be used for the payment of IGST, SWS and Compensation Cess. At present, Duty Credit Scrips can be used only for payment of Basic Customs Duty (BCD), ADD, Safeguard duties, as applicable on import of inputs of goods, including capital goods.

Rationale/ justification – Duty Credit Scrips issued to exporters can only be utilized for payment of BCD, ADD and Safeguard duties on import of goods, including capital goods and not for payment of IGST, SWS and Compensation.

In the erstwhile regime, such scrips were allowed to be utilized for payment of BCD, excise duty (Counter Veiling Duty, CVD) and exporters were not required to resort to the refund route in respect of CVD payable on import of goods.

Recommendation – Duty credit scrips should be allowed for payment of IGST, SWS and Compensation Cess and necessary amendment should be made in Foreign Trade Policy and Customs Notification.

The above change would allow the exporters to utilize the Duty Credit scrips, which would eliminate blockage of working capital since presently payment is being made in cash.

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Issue– Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020 (CAROTAR 2020) have been made applicable with effect from 21st September 2020 under the newly inserted Section 28DA of the Customs Act to check and regulate the rise in the undue claims of Foreign Trade Agreement ('FTA') benefits

Rationale/ justification – Power has been given to the customs officer to seek information and documentation (including the cost and margin details of the supplier of goods) from the importer if he has reason to believe that origin criteria prescribed in the rules has not been met.

Rules currently lack proper guidance on the exact nature of the documents/ proof that needs to be obtained by the importer from their exporters/ suppliers to satisfy the Customs authorities in India. Though FAQ and instructions has been released to review the function at customs ports to ensure that unnecessary delays and arbitrary practices are not being resorted to during custom clearance of goods, authorities at the ground level are seeking detailed information on the entire costing statement of the exporter, the detailed production process, etc.

Further, despite submission of Form I with requisite details, provisional assessment under CAROTAR 2020 has become a norm rather than an exception causing procedural issues and financial burden due to the requirement of furnishing a bank guarantee

Further, importers are required to possess all relevant information related to country of origin criteria, **including the regional value content and submit the same to the proper officer on request** which was earlier not required.

Thus, practically importers are facing difficulty to comply with these requirements to avail the benefits, failing which there is a risk that genuine importers might have to pay-back the benefit earned.

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Recommendation – The rules should be amended in order to be in line with the FTAs entered with different countries so that the undue burden on the importers is reduced. The following points can be considered.

Procedural Changes

- Sharing of information across the ports, which will ensure easy clearance of identical goods at multiple ports for the importer.
- Requirement of furnishing of bank guarantee must be relaxed.
- Implementing regular checks and industry feed back to ensure the 100% implementation of the instructions issued at ground level.
- Digitalization of the entire verification process as per Rule 6 of the CAROTAR 2020 read with Circular No. 38/2020 – Customs, dated 21st August 2020.

Changes in CAROTAR 2020

- Necessary amendments in CAROTAR 2020 or clarification to be issued w.r.t to the supporting documents to be kept by the importer in relation to the information furnished/declared under Form I.

Thank you !!

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