Summer 2018

Kingston Smith

Your potential, our expertise

Indo-UK Patrika

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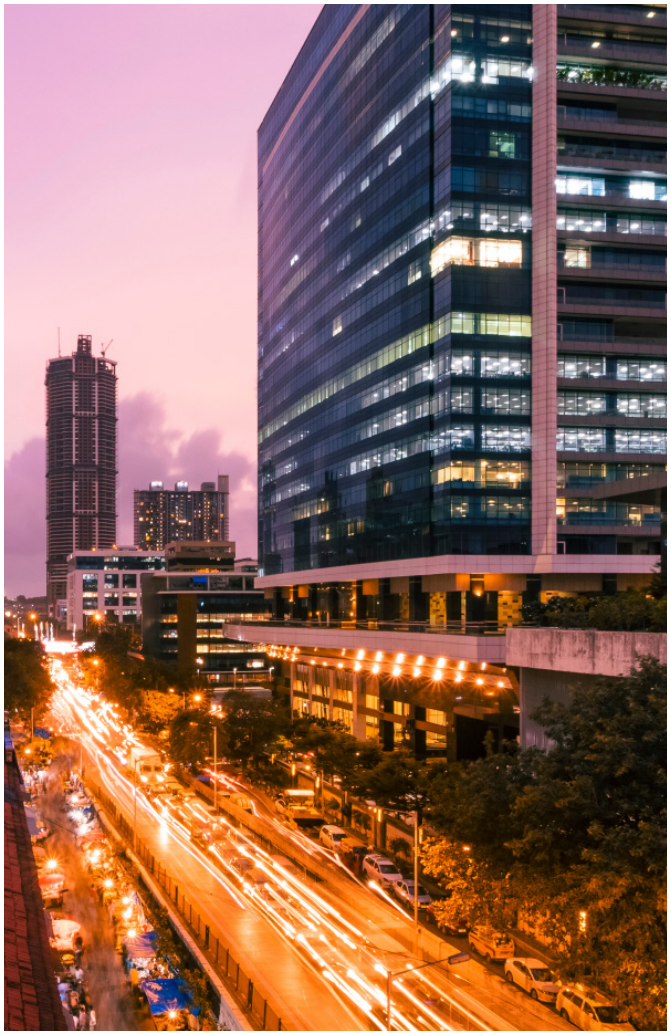


Welcome to our summer 2018 edition of Indo-UK Patrika, an informative newsletter keeping you up to date on topics of interest on the Indo-UK business corridor

Whether you are a prospective or existing inward investor from India investing in the UK or the other way around, you will find something of interest to read in this newsletter.

In this edition, our partner firm in India, B K Khare & Co, explains the main features of the secondary adjustment under Indian Transfer Pricing Regulations and why Indian taxpayers and their overseas subsidiaries and branches, including those located in the UK, need to be cautious. We explore four key topical tips that Indian inward investors should not overlook when setting up or doing business in the UK. Our tax team describes why the UK is a great location for incorporating holding company structures from a tax perspective. And make sure you don't miss out on our FAQs on General Data Protection Regulation (GDPR), which will shed some light amidst all the confusion on what companies should and shouldn't be doing!

Brexit update: Deal or no deal?

By Paul Samrah, Kingston Smith

We start this newsletter with our Brexit update. So what are the scenarios facing the UK come next March? And what does no deal look like?

1. UK Prime Minister, Theresa May wins the day: The broad outline of the Chequers White Paper is accepted by the EU27 in December. The EU27 is clear that Parliament's rejection will result in Britain leaving the EU with the hardest of Brexits. Parliament approves the deal.
2. UK exits, no deal: Mrs May accepts a deal that prevents Britain from striking its own trade arrangements, while being bound to Brussels rules. Parliament rejects it. Attempts to extend Article 50 fail. Britain leaves the EU with no deal on 29 March 2019. This has implications for trade, customs, regulations and people movement.
3. Limited trade agreement: The EU27 rejects key elements of the White Paper. Mrs May pursues a (time) limited free trade agreement with Brussels, outside both the Single Market and customs union. Parliament approves the deal.
4. Britain stays in the Single Market and customs union: Impasse continues, Mrs May pushes a limited Canada-style free trade agreement. Parliament vetoes the plan – so membership continues.
5. No Brexit: Either through i) a second referendum (before or during the transition period) or ii) an extension to Article 50, or iii) a general election where the winning party stands on a Remain platform.

On the political front, in the next year we could see a possible leadership election for Mrs May, a general election or a second referendum to get support for the deal from the country.

Either way, there's going to be some very nervous counting of votes ahead, as Britain heads for the exit.

Read more on Brexit from Kingston Smith at:

https://www.kingstonsmith.co.uk/brexit-hub/

Topical tips for inward investors

At Kingston Smith, our experience and research indicate that inward-investing companies are still missing out on some of the valuable tax benefits while also overlooking certain compliance obligations when operating their business in the UK. Below are four significant points that are regularly ignored or inadvertently missed by inward investors.

1. National Insurance exemptions for secondees
   Where individuals come to work in the UK temporarily, it is normally possible to agree a period of exemption from National Insurance for both the employer and employee, ranging from one to five years depending on the employee's home country. Failure to claim or to understand these exemptions can result in a significant and unnecessary cost to the employer, and subject them to the time-consuming process of reclaiming the overpayments from HM Revenue & Customs.

2. National Minimum Wage (NMW) and National Living Wage (NLW)
   Most allowances paid to employees on secondment will not count as salary for the purposes of the NMW and NLW. A high-earning employee who is receiving mostly living allowances could therefore be receiving a salary below the statutory minimum wage. HM Revenue & Customs understandably takes a hard line on NMW and NLW compliance and will publish the names of defaulting businesses which can be a PR disaster. Employers need to ensure that they don't get caught out here.

3. Employer's Liability Insurance
   It is a legal obligation for each UK employer to carry a minimum level of Employer's Liability Insurance of £5million. Failure to have this policy in place can give rise to large penalties.

4. VAT on services received from abroad
   Where the overseas parent company is supplying services to its UK subsidiary, the invoice will not normally include UK VAT. However, under reverse-charge VAT rules, the recipient of the services must normally charge itself the VAT and account for this on its VAT returns. For most companies this is simply an administrative task, but if the UK business is unable to fully recover its VAT, it does give rise to an additional cost of doing business in the UK.

Keep a look-out for more topical tips in our next edition of *Indo-UK Patrika*.

Secondary adjustment under Indian Transfer Pricing Regulations

By Padmini Khare-Kaicker and Chetan Daga,
B K Khare & Co., India

In the last decade, the Indian revenue authorities have become more aggressive in transfer pricing matters and India has witnessed substantial transfer pricing adjustments through novel propositions, such as excessive advertisement expenditure, over-valuation of shares and overdue receivables, etc.

India has introduced the concept of secondary adjustment[1] with effect from 1 April 2017 to cover transfer pricing adjustments made from the Indian financial year 2016-17. Indian taxpayers and their overseas subsidiaries and branches, including those located in the UK, need to be cautious of the secondary adjustment provisions for the transfer pricing compliances for the Financial Year 2017-18, which are due by 30 November 2018.

Below is a summary of the main features of the secondary adjustment provisions.

Concept

The concept of 'secondary adjustment' applies as a collateral consequence of a 'primary adjustment' under the Indian Transfer Pricing Regulations.

'Primary Adjustment' is any transfer pricing adjustment that is made:

a. by the taxpayer on his own (voluntary adjustment) in the tax return, or

b. during a revenue audit and accepted by the taxpayer, or

c. pursuant to an advance pricing agreement (APA) or mutual agreement procedure (MAP) proceedings, or

d. pursuant to application of safe harbour provisions.

The Indian Transfer Pricing Regulations require that in cases of a Primary Adjustment, the Associated Enterprise (AE) of the taxpayer should pay the amount of the adjustment (excess money) to the taxpayer within the specified time period. If the AE fails to do so, the amount of excess money shall be treated as an advance given by the taxpayer to the AE and interest thereon will be considered as an additional transfer pricing adjustment, i.e. secondary adjustment. For example, this may require UK subsidiaries of Indian groups to make a payment to their Indian parent company.

The secondary adjustment provisions apply where the primary adjustment exceeds INR 10 million (approx. GBP 110,000 or USD 150,000).

Specified time period

Under these rules[2], the non-resident AE is required to make remittance to the Indian taxpayer within 90 days from the due date of filing of tax return in cases of voluntary adjustments or adjustments pursuant to APA, MAP or safe harbour. Recently, a draft notification has been issued by the Indian Government proposing to amend the existing rules. It provides that the 90-day period would start from the date on which APA is entered into or the date of giving effect to the MAP resolution by the Revenue Authorities, as the case may be.

Where the adjustments are accepted by the taxpayer during the revenue audit or appellate proceedings, the time of 90 days starts from the date of the revenue audit order / final appellate order, as the case may be.

[1] Governed by section 92CE of the Indian Income Tax Act, 1961.

[2] Rule 10CB of the Indian Income Tax Rules, 1962.

Rate of interest

On the excess money, the interest rate is as follows:

Situations	Interest rate
Where the international transaction is denominated in Indian Rupees	One-year marginal cost of lending of State Bank of India, as on 1 April of the relevant financial year plus 325 basis points.

Some of the key considerations

Voluntary transfer pricing adjustments would require actual remittance.

A voluntary transfer pricing adjustment is not supported by actual payments by the AE to the Indian taxpayer. Such adjustments will now require the AE to make an actual remittance for the amount of the adjustment to the Indian taxpayer. Failure to do so will result in a secondary adjustment in the hands of the Indian taxpayer.

Partial retrospective effect

The secondary adjustment provisions are introduced from the Financial Year starting from 1 April, 2017, but would apply to primary adjustments made for the financial year starting from 1 April, 2016.

Implications at group level

Making an actual remittance for the excess money may not be permissible under the transfer pricing regulations of the country of the AE. This may result in taxpayers opting to have a secondary adjustment perpetually – the merits of which need to be evaluated separately.

Application of limit of INR 10 million

Secondary adjustment provisions apply where the primary adjustment exceeds INR 10 million. However, the legal provision is not clearly worded and may be interpreted to mean that the limit of INR 10 million applies only for primary adjustments made up to the financial year 2015-16.

The 90-day period is not a moratorium period

Where the excess money is not received by the Indian taxpayer within a period of 90 days, the interest shall be calculated from day one and not after the expiry of the 90-day period.

Conclusion

The secondary adjustment provisions would require the multi-national enterprises to relook at their transfer pricing policies with a specific focus on India and make suitable modifications to the inter-company pricing. These provisions need to be also seen in harmony with the country-by-country reporting (CbCR) and master file requirements.

The UK as a tax haven

By Mike Hayes, Kingston Smith

The UK is an attractive country for businesses to consider incorporating holding companies. But why is this the case?

This article considers some of the many reasons why Indian companies should choose the UK as a destination for doing business in Europe.

Corporation tax rate

A business' primary concern is the corporate tax rates in the country where they will locate their company. The current corporate tax rate in the UK is 19%. By 2020, the UK will be offering the lowest statutory corporate tax rate of 17% of any country in the G20.

Withholding tax

The UK has the largest double tax treaty network in the world, which allows UK companies to limit withholding taxes on foreign income. This vast number of double tax treaties allows UK resident companies to reduce overseas withholding taxes to a potential zero percentage.

The UK currently has the benefit of the EU parent-subsidiary directive, which allows the withholding tax rate to be zero on dividends from most EU member states.

Once Brexit has been finalised, UK companies might not have access to all the directives that are in operation pre-Brexit. However, the large network of double tax treaties will not be affected.

Foreign dividend income

Since 2009, the UK has had forgiving tax legislation in terms of dividends received from foreign subsidiaries. For a small company, all dividends received can be exempt from corporation tax. A small company is defined by meeting two out of the three criteria below:

- Turnover of €10 million or less
- Balance sheet total of €10 million of less
- 50 or fewer employees.

For medium and large companies, there are several classes of exempt dividends. These are extensive and cover most dividends received, thereby making most foreign dividend income tax-free. The main class is dividends paid by a company that is controlled by the UK recipient company.

Substantial shareholding exemption

It is common for UK holding companies to dispose of trading subsidiaries if the opportunity arises. Broadly speaking, as long as the holding company has owned 10% of the share capital for at least 12 months, the gain realised on the disposal of shares is exempt from corporation tax.

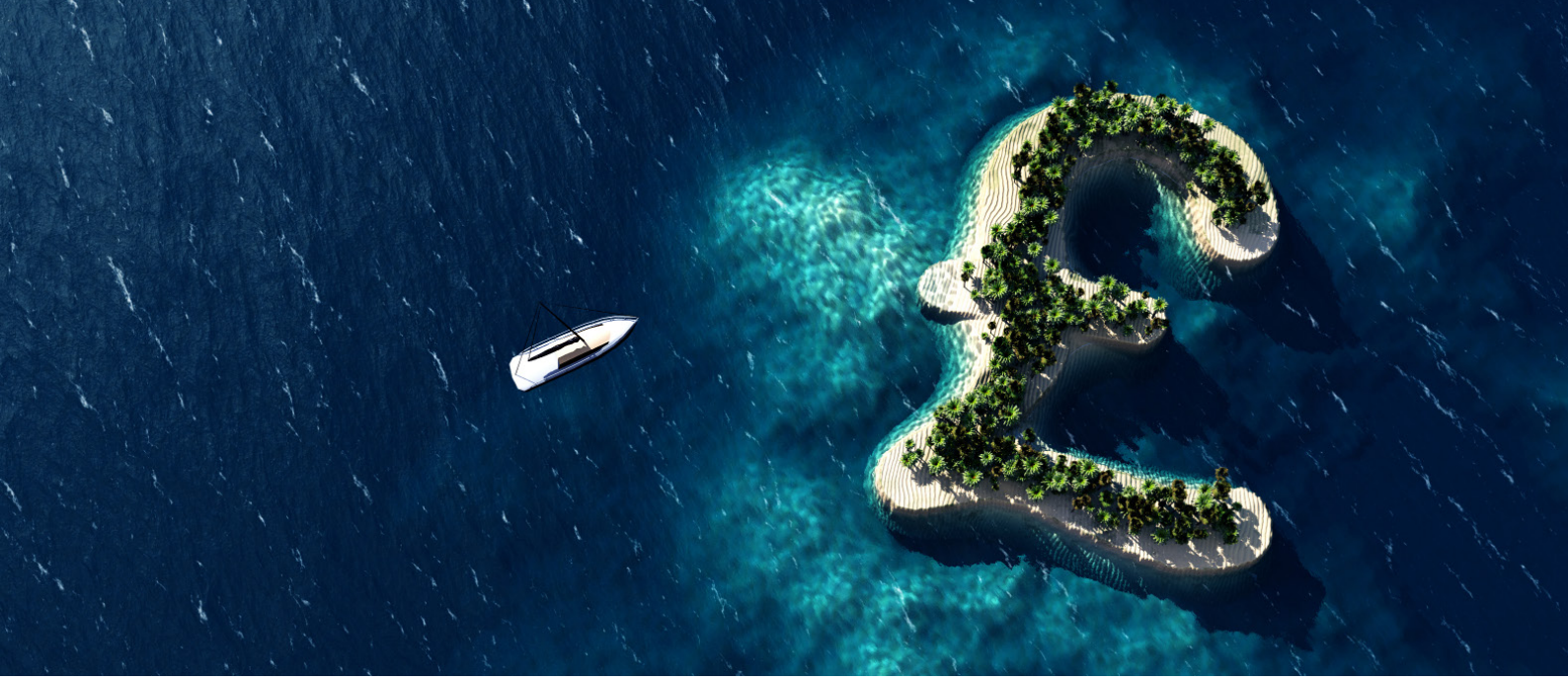
Research and development credit

SMEs can be eligible for an enhanced tax deduction of 230% on the qualifying spend on R&D. For example, expenditure of £100,000 can give rise to a corporation tax deduction of £230,000 and a corporation tax saving of £24,700 (at the current corporation tax rate of 19%). The relief is available for UK branches of overseas companies as well as UK companies.

Where this enhanced deduction creates or increases a tax loss, that part of the loss can be surrendered for a repayable credit of 14.5%.

For a large company, the R&D relief works in a different way and gives an 'above the line' credit of 12%.

Expenditure of a capital nature on assets used for R&D can benefit from 100% R&D capital allowances and be written off completely in the year the expenditure is incurred for tax purposes.



Patent box

A special reduced corporation tax rate of 10% is available on income derived from a qualifying patent (primarily UK and European patents) where the patent is developed through R&D conducted by the company making the claim.

The patent box and the UK R&D tax reliefs make the UK an attractive place for businesses of all types.

Creative industries tax reliefs

To mirror the success of the R&D relief, the UK government has introduced tax reliefs for a number of specific sectors including:

- Film
- Animation
- High-end TV
- Video games
- Theatre productions.

These reliefs work in a similar way to the R&D tax relief. There is an additional deduction of 100% on qualifying expenditure, being the lower of 80% of qualifying worldwide production costs or 100% of qualifying UK production costs (actual production costs incurred in the European Economic Area).

Where a loss is created or enhanced, the enhancement can be surrendered for a repayable credit of 25% (20% only for non-touring theatre productions).

This makes the UK an attractive location for the creative industries.

Sale of shares in holding company

Investors often want to realise their investment by selling their shareholding in the company. If a non-UK resident shareholder of a UK holding company sells their shares, the UK treats the gain on disposal as tax-exempt (except for UK property companies where the rules are changing from April 2020). Therefore there is no exposure to UK capital gains tax.

Brexit will not affect the rights of non-UK residents to sell their shares in a holding company tax-free.

Conclusion

Like all tax reliefs, the above all contain conditions which have to be met, so expert UK tax advice is always required. Nevertheless, there are many reasons why the UK is an attractive country for businesses to incorporate holding companies. Due to the extensive UK tax reliefs outlined above, foreign companies can provide income and services to the UK, while enjoying relatively low tax rates.

General Data Protection Regulation

By Benn Davis, ClearComm, part of the Kingston Smith Group

If you are looking to do business in the UK it is important you are aware of the General Data Protection Regulation (GDPR) which came into effect on 25 May 2018. It now means any organisation that does business with EU citizens must comply with the GDPR's expanded and more stringent data protection rules. It affects how organisations communicate with their audiences, how they process personal data and who they share it with. It will operate alongside the existing law called Privacy and Electronic Communications Regulations (PECR), which governs how organisations handle, specifically, their electronic communications.

We've compiled a list of our most frequently asked questions on GDPR.

1. What happens regarding GDPR in the UK after Brexit?
   Organisations in the UK will still have to be GDPR compliant post Brexit. Domestic legislation will apply not only within the UK's border but beyond them in the EU.

2. I have been receiving emails from organisations asking me to opt in. Is this illegal?
   Under the PECR, you can't send an email to someone asking for their permission to send them marketing emails. Sending an email in the first place is marketing. The Information Commissioner's Office (ICO) fined Honda and Flybe for doing just this. The fact that you are trying to obtain consent means you don't have consent for marketing excommunications.

   Conversely, if you have a contact's consent, you don't need to get their consent again.

3. Is verbal consent over the phone sufficient?
   No. You must be able to evidence when and how consent was obtained. This applies across all marketing platforms. If you can, record calls, notifying the caller upfront that the call is recorded. Alternatively, send an email afterwards confirming that the caller opted in. Save the email in the data subject's file.

4. Does consent last for a lifetime?
   No. Explicit consent lasts for the duration of the contract that consent was given for. After this period, you should refresh the data subject's consent.

5. How long should my data retention period be?
   The GDPR does not suggest a time limit for retaining personal data. You need to look at the different types of data you store and process, and where you store it. Decide if there is a legal or operational need to keep that data. If there is, fine, as long as you can justify it.

   However, when there is no longer a legal or operational need to retain it, then that is the end of the retention period. Delete the personal data from all electronic platforms including personal devices and securely destroy any hard copies. Don't be tempted to hold onto data 'just in case'. For all personal data you hold, you need a policy with hard deadlines for the retention period.

In 2017, Kingston Smith was pleased to add ClearComm to its client offering, providing a data protection consultancy to advise international organisations on GDPR compliance.

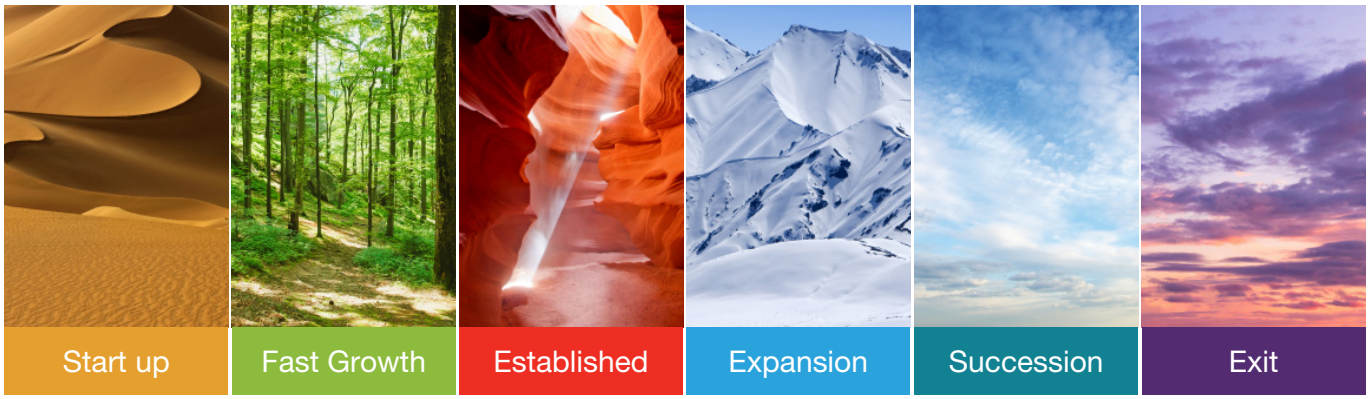
India Group

Our firm's close relationship with India started over two decades ago, when we began advising one of India's leading commercial enterprises doing business in the UK. Building on that success, our India Group today advises and assists a large number of Indian businesses on their international operations, encompassing the delivery of compliance services and advising on international business structures, taxation issues and corporate finance matters.

Updates:

We were proud to be shortlisted for Consultancy Firm of the Year at the UK-India Awards 2018 for the second year running. Our Head of International Business Development, Chandru Iyer, had a successful trip to India, visiting seven cities over two weeks, for business meetings and investor events along with the Department for International Trade and London & Partners. Kingston Smith (represented by Tim Stovold and Chandru Iyer) in collaboration with the Confederation of Indian Industries have produced a joint report on the India UK Social Security Arrangement. It suggests the introduction of a Social Security Agreement, which would help balance what the UK has to offer, by putting Indian inward investors on an equal footing with US and other international investors.

Our India Group has been further strengthened by the addition of partners, Vijay Tanna (who brings in his experience of working across West London) and Ian Matthews (who has worked extensively with international companies in the South of London and beyond). Our flagship Diwali Reception will be taking place on 1 November, so look out for more information coming soon for this very special occasion!



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