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Cutting Edge

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Editorial

Dear Readers,

Greetings for the new Financial Year 2014-15! I would like to take this opportunity to thank all our valued clients for your continued trust in PwC's A&D practice. Your support has fuelled our growth over a short period from a start up to an established and diversified practice. From initially focusing on tax and regulatory issues, we have built up a multi- disciplinary team that includes experts in regulatory , DPP and offset issues, tax, due diligence, joint ventures, strategy and operations in this complex industry.

I am pleased to present the 20th edition of PwC India's Aerospace and Defence (A&D) newsletter, "Cutting Edge" that provides information on deals, news and tax updates.

As India undertakes the largest democratic elections in history, the decision making process on a large number of critical procurement programs has slowed/ stopped. This includes the MMRCA program, 16 naval helicopters, 197 light utility helicopters, 45 ultra-light howitzers. Though the Election Commission of India has exempted all defence related decisions from the restrictions of the model Code of Conduct, it is highly unlikely that any significant decision will be taken.

It is understood that work on revisions of the offset policy is on. It is hoped that the present restrictions on services for offsets would be lifted. Services cover a broad range of activities that include design, R&D and software development – areas in which India has a competitive advantage and in which a large number of Indian companies are operating. It would indeed be counter productive to exclude the very activities in which we are doing well.

As of January 2014, the Indian defence sector has managed to attract a mere 4.94 million USD of Foreign Direct Investment (FDI). The current FDI policy is widely attributed to have de-incentivized foreign investments and transfer of advanced technologies. The negligible inflows of FDI clearly shows the need for re-evaluating the FDI policy. It is expected and hoped that the new Government will undertake a realistic review and change this policy.

The Directorate General of Civil Aviation (DGCA) has recently decided to address the problem of

frequent violation of safety norms by both scheduled and non-scheduled operators. To improve compliance, DGCA will conduct safety inspections on 44 major NSOPs who fly abroad and two aircraft each of all scheduled domestic airlines by June 2014.

This quarter brought good news for the Defence Research and Development Organization (DRDO), which is set to acquire a new flight test bed (FTB) in the form of a modified and custom-made Dornier (DO-228) aircraft. The DRDO hopes to curtail its dependence on foreign agencies to carry out tests and reduce the development time for various projects.

India has signed a deal with Russia to procure 66,000 Mango anti-tank shells to meet the shortfall of critical ammunition faced by its armored fleet including the latest T-90 tanks. Under the deal, Russia will also transfer technology for production of the specialized tank ammunition to the Ordnance Factory Board, which will produce it indigenously.

The Indian Ministry of Defence has also formally approved the Army's three-year-old proposal to upgrade more than 600 Russian-built T-90 tanks by adding new features and replace their thermal imaging sights, navigation systems and fire control systems at a cost of more than USD 250 million. The tender for the upgrade will be sent only to domestic defense companies.

With these highlights, I invite you to review our 20th newsletter dedicated to A&D.

Your feedback is important and we look forward to it.

Sincerely,

Dhiraj Mathur

Executive Director and Leader, Aerospace and Defence

In this Issue

Glossary

A&D	Aerospace & Defence
AAR	Authority for Advance Rulings
BSF	Border Security Force
CBDT	Central Board of Direct Taxes
CBEC	Central Board of Excise and Customs
CENVAT	Central Value Added Tax
CISF	Central Industrial Security Forces
CRPF	Central Reserve Police Force
DPP	Defence Procurement Procedure
DRP or the Panel	Dispute Resolution Panel
DTC	Direct Taxes Code
ECB	External Commercial Borrowings
FAQ.	Frequently Asked Questions
FBT	Fringe Benefit Tax
FDI	Foreign Direct Investment
FIPB	Foreign Investment Promotion Board
FTP	Foreign Trade Policy
GST	Goods and Services Tax
HC	High Court
IPO	Initial Public Offer
JV	Joint Ventures
MAT	Minimum Alternative Tax

Glossary

MHA	Ministry of Home Affairs
MTA	Multirole Transport Aircraft
NBFC	Non Banking Financial Company
NFE	Net Foreign Exchange Earnings
NSG	National Security Guard
OEM	Original Equipment Manufacturer
RBI	Reserve Bank of India
RFI	Request for Information
RFP	Request for Proposal
RIC	Resident Indian Citizen
Rules	Income Tax Rules, 1962
SEZ	Special Economic Zone
SQR	Services Qualitative Requirement
the Act	The Income-tax Act, 1961
the Tribunal	Income Tax Appellate Tribunal
TO	Tax Officer
ToT	Transfer of Technology
TV	Transaction Value
ULFA	United Liberation Front of Assam
VAT	Value Added Tax

Select News Items

Missile Testing on Arjun MK II May be Delayed

India's indigenous Main Battle Tank, the Arjun MK-II may have its missile testing runs delayed for up to a year with some of the LAHAT missiles procured from Isreal Aerospace Industries misfiring during the end-user test runs conducted recently.

DGCA to inspect all scheduled airlines, charter flights

Taking a grim view on the frequent violation of safety norms by scheduled as well as non-scheduled operators (NSOPs), the Directorate General of Civil Aviation (DGCA) has decided to carry out safety inspections on 44 major NSOPs who fly abroad and two aircraft each of all scheduled domestic airlines by June-end.

India test-fires BrahMos missile successfully

The Indian Army recently test fired an advanced version of 290 km range supersonic cruise missile BrahMos as part of a user trial at Pokhran test range in Rajasthan. The missile was launched by a mobile autonomous launcher deployed in full configuration with mobile command post at the ranges. Both the Army and Navy have already inducted the missile, developed by India in partnership with Russia.

DRDO Set to Acquire New Flight Test Bed

The Defence Research and Development Organisation (DRDO) is all set to acquire a new flight test bed (FTB) in the form of a modified and custom-made Dornier (DO-228) aircraft. The DRDO hopes to reduce the dependency on foreign agencies to carry out the tests, once the desi FTB is rolled out. With all modifications, the FTB is expected to cost over INR 100 crore.

India, Russia to sign deal for anti-tank ammunition

India is expected to sign a deal with Russia to procure 66,000 Mango anti-tank shells to meet the shortfall of critical ammunition faced by its armoured fleet including the latest T-90 tanks. Under the deal, Russia will also do transfer of technology on the production techniques of the specialised tank ammunition to the Ordnance Factory Board, which will produce it indigenously.

India test fires long range N-missile launched from under sea

India recently successfully test-fired a nuclear-capable ballistic missile launched from an underwater platform with a range of over 2,000 kms. This is the longest range missile in the underwater category to have been developed by India.

India successfully test-fires nuclear-capable Prithvi II missile

India recently test-fired its indigenously developed nuclear-capable surface-to-surface Prithvi II missile, with a range of 350 km, from a test range near Balasore as part of a user trial by the Army. The missile is capable of carrying 500 kg to 1,000 kg of warheads.

Jamnagar gets Mi-17 V5 helicopters

The state-of-the-art Mi-17 V5s were recently formally inducted at the Jamnagar Station base in Ahmedabad. The unit was raised almost 42 years ago on March 3, 1972, at Guwahati and has been operating the Mi-8 helicopters, the workhorse for IAF.

Consideration for offshore supply of equipment not taxable in India though service consideration in-built in offshore equipment supply price to be taxed

The taxpayer, a company incorporated in Korea, is engaged in construction, design and service work for steel mill facilities with general civil engineering, electricity and housing projects. During the year under consideration, the taxpayer undertook a turnkey project in India for Steel Authority of India Limited (SAIL) for setting up a blast furnace complex in India involving offshore supplies, offshore design and engineering, onshore supplies and onshore supervision of the installation work. Thereafter, the taxpayer received an advance against the first milestone towards offshore supplies, onshore supplies and onshore supervision. The advance received in respect of offshore supplies (including design and engineering) was not offered to tax in India by the taxpayer on the premise that the title in the supplies was transferred outside India. With respect to the onshore supplies, the advance was offered to tax in the subsequent years in which the actual activities were undertaken instead of offering it to tax in the year under consideration.

The tax officer also held that a mere title transfer in offshore supplies outside India was not relevant in determining taxability. Accordingly, it was held that since the contract was a turnkey composite contract the revenues relatable to offshore supplies were taxable in India. In regard to the advances for design and engineering services, the tax officer held that such advances were taxable in India as royalty / fees for technical services (FTS) under the Income tax Act, 1961 (the Act) and also under the Indo-Korea tax treaty (the tax treaty). Further, it was also held that the advances in respect of onshore supplies were taxable in the year under consideration. The Dispute Resolution Panel (DRP) agreed with the tax officer and confirmed the additions.

Aggrieved by the aforesaid findings of the tax officer and the subsequent confirmation by the DRP, the taxpayer reached before the Income tax Appellate Tribunal (Tribunal).

The Tribunal held as follows:

- **Income from offshore supplies:** The contract with SAIL was not a composite contract since all components of contract were distinctly identifiable with separate consideration and that only the consideration relatable to activities in India would be taxable in India. Therefore, since the title transfer in the offshore supplies took place outside India nothing could be taxed as attributable to the permanent establishment (PE) in India. However, certain onshore services such as training, testing, defect liability, liquidated damages for which no consideration had been separately identified in the contract formed part of the consideration for the offshore supplies. Hence, such services need to be taxed in India as attributable to the PE in India.
- **Income from onshore supplies and services:** Accepting the taxpayer's contention in respect of timing of the taxability, the Tribunal directed the tax officer to verify the actual dates of supplies and the rendition of services.
- Income from design and engineering: Dismissing the taxpayer's contention that design and engineering was an inseparable part of the supplies, the Tribunal held that income from design and engineering was taxable as FTS under the Act as well as under the tax treaty. However, the tax officer's action of taxing design and engineering services as attributable to the PE was disapproved holding that it would be taxable on a gross basis.

POSCO Engineering & Construction Company Ltd. V. ADIT [TS-108-ITAT-2014(Del)]

Direct Taxes

Payment to HO for data processing charges not 'royalty' under the India-Belgium tax treaty

The taxpayer, a bank incorporated in Belgium, operated through a branch in India. The taxpayer claimed head office (HO) expenses as reimbursements attributable to its banking operation in India. The expenses were classified as general administrative expenses and data processing cost. The Indian branch made reimbursements to the HO on account of data processing charges attributable to the Indian banking business for pro rata use of the banking software owned by the HO. The reimbursement by the taxpayer was made under an agreement that gave it a license for royalty-free, non-transferrable right to use software purchased by the HO. The tax officer held that the taxpayer was required to withhold taxes under section 195 of the Income-tax Act, 1961 (the Act) since the payment made by the taxpayer was towards reimbursements of cost to HO which was in the nature of royalty. Accordingly, the tax officer disallowed the entire HO expenses under section 40(a)(i) of the Act. On appeal, the Commissioner of Income-tax (Appeals) directed the tax officer to delete the disallowances. The main issue before the Income tax Appellate Tribunal (the Tribunal) was whether the payment made by the Indian branch to its HO towards cost of data processing on computer software belonging to HO was not taxable in India as 'royalty' as per Article 12(3) of the India–Belgium tax treaty (the tax treaty).

The Tribunal observed that the character of payment towards royalty depended upon the independent use or the right to use of the computer software which was a kind of copyright. In the present case, the payment made by the branch was not for 'use' or 'right to use' software which was being exclusively done by the HO installed in Belgium. The branch simply sent the data to the HO for getting it processed and did not have any independent right to use or any control over the computer software. The branch was only reimbursing the cost of processing of such data to the HO which had been allocated on pro rata basis. Such reimbursement of payment was not covered within the ambit of definition of royalty within Article 12(3)(a) of the tax treaty. To be covered within its ambit, the branch should have had exclusive and independent use or right to use the software and payment had to be made as consideration for such usage. There was no such right that had been acquired by the branch in relation to the usage of software because the HO alone had the exclusive right of the license to use the software. Thus, the reimbursement of data processing cost to the HO was not covered within the ambit of the definition of royalty under Article 12(3)(a) of the tax treaty.

Therefore, the Tribunal held that the payments made by the branch to the HO towards reimbursement of cost of data processing could not be held to be covered within the scope of the expression 'royalty' under Article 12(3)(a) of the tax treaty. Also, as the data processing cost paid by the taxpayer was not royalty there was no requirement for withholding tax on such payment. Hence section 40(a)(i) of the Act will not apply.

ADIT v. Antwerp Diamond Bank NV [TS-150-ITAT-2014(Mum)]

Personal Tax

Right to salary abroad determines 'accrual', not receipt in Indian bank a/c

For AY 2009-10, the assessee, Arvind Singh Chauhan, was in employment of Executive Ship Management Pte. Ltd., Singapore ('ESM-S'), and worked on merchant vessels and tankers plying on international routes. In addition to salary income from ESM-S, assesse also received bank interest and pension from Indian Army, his former employer. As assessee's stay in India, during AY 2009-10 was less than 182 days, residential status of

assessee was of a 'non-resident'. In the return of income ('ROI') filed by assessee, bank interest and pension were offered to tax in India as they were received in India. But salary income was not offered to tax as it related to services performed outside India. However, AO brought the salary income under ambit of taxable income in India and made addition to total income of assessee. The order of AO was further confirmed by CIT(A). Aggrieved the assessee preferred an appeal before Agra ITAT.

ITAT noted that AO himself had taken note of number of days stay of assessee, as per passport entries and given a categorical finding that assessee's residential status, u/s. 6 is of 'non-resident'. ITAT further noted that just because assessee had included interest and pension income in his taxable income, AO assumed that assessee had accepted status of 'resident', with regard to such income. Thus, it was observed that AO proceeded to treat assessee as 'resident' for all income on the basis of application of Sec. 6(5) of the Act. Sec. 6(5) provides that if a person is resident in India in a particular assessment year (AY) in respect of any source of income, he shall be deemed to be resident in India in respect of each of his other sources of income for that AY. Ruling in favour of assessee, ITAT rejected the reasoning adopted by AO to treat assessee a 'resident' u/s. 6 of the Act. ITAT held that, taxability of interest and pension received in India, does not require recipient of income to be a 'resident' u/s. 6. ITAT held that even a non-resident, by virtue of Sec. 5(2), is taxable in India in respect of income received or deemed to be received in India. ITAT further held that Sec. 6(5) is anyway a redundant legal provision which can no longer have any practical implications. ITAT pointed out that such provision was relevant before AY 1989-90 where it was possible for an assessee to have diferent previous years for different sources of income. Thus, ITAT accepted status of assessee as 'non-resident' u/s. 6 of the Act. ITAT, referring to Sec. 5(2), noted that for a 'non-resident', income received in India and income accruing / arising in India is taxable in India. ITAT observed that services were rendered by assessee outside India as a crew on merchant vessels and tankers plying on international routes. ITAT held that "A salary is compensation for the services rendered by an employee and, therefore, situs of its accrual is the situs of services, for which salary paid, being rendered." In this regard, ITAT relied on Bombay HC ruling in CIT Vs Avtar Singh Wadhwan [247 ITR 260]. Bombay HC had held that income from salary, in the case of crew of even an Indian vessel operating in international waters, is to be treated as having accrued outside India. ITAT rejected Revenue's reliance on SC ruling in CIT vs. Shri. Govardhan Ltd. wherein it was observed that by receiving the appointment letter and details of salary to be paid, assessee gets right to receive the salary. ITAT held that "an employee has to render the services to get a right to receive the salary and unless these services are rendered, no such right accrues to the employee.... and, in the present case, assessee gets his right to receive salary income when he renders the services and not when he simply receives the appointment letter." As no services were rendered in India, ITAT held that no income was accrued in India.

ITAT further rejected Revenue's stand that salary was taxable in India as salary cheques were

credited to assessee's account with HSBC, Mumbai. ITAT held that "So far as this aspect of the matter is concerned, in our considered view, the law is trite that 'receipt' of income, for this purpose, refers to the first occasion when assessee gets the money in his own control – real or constructive. What is material is the receipt of income in its character as income, and not what happens subsequently once the income, in its character as such is received by the assessee or his agent; an income cannot be received twice or on multiple occasions. As the bank statement of the assessee clearly reveals these are US dollar denominated receipts from the foreign employer and credited to non resident external account maintained by the assessee with HSBC Mumbai." ITAT noted that assessee was in lawful right to receive salary, as an employee, at the place of employment, i.e. at the location of its foreign employer. It was noted that as a matter of convenience, the amount was thereafter transferred to India. ITAT observed that "These monies were at the disposal of the assessee outside India, and, it was in exercise of his rights to so dispose of the money, that monies were transferred to India." In this regard, ITAT referred to Madras HC ruling in CIT v. AP Kalyankrishnan (195 ITR 534) and held that "once an income is received outside India, whether in reality or on constructive basis, the mere fact that it has been remitted to India would not be decisive on the question as to income is to be treated as having been received in India. The connotation of an income having been received and an amount having being received are qualitatively different." Thus it was held that in present case salary "amount" was received in India, but salary "income" was received outside India.

Arvind Singh Chauhan [TS-80-ITAT-2014(AGR)]

Assessee 'real & economic employer' of secondees; No TDS required on salary reimbursement

The assessee, AON Specialist Services Pvt. Ltd., is a company engaged in providing technology enabled analytical services as well as product research and support services. Accordingly, assessee was claiming Sec. 10A benefit. For AY 2008-09, AO noted that assessee made payments of Rs.1.38 crores to its group company, AON Ltd., UK, without deducting tax at source. These payments were towards the salary payments of employees seconded by UK Company to assessee, for performing functions of assessee. Assessee submitted that payments were in the nature of reimbursement of expenses and thus, did not constitute income in hands of UK company. Assessee further explained that no TDS u/s. 195 of the Act was to be made in respect of these payments as the seconded employees were its employees for all practical purposes. However, AO held that since the persons seconded were employees of UK Company, Payments were not in nature of reimbursement of expenses but were salary. Accordingly, AO held that payment was liable for tax deduction u/s. 195 and accordingly disallowed the amount u/s. 40(a)(ia).

On appeal, CIT(A) upheld AO's order of disallowance u/s 40(a)(ia). However, CIT(A) accepted assessee's contention to grant Sec. 10A deduction on the income enhanced by Sec 40(a)(ia) disallowance. Aggrieved by Sec. 10A deduction, Revenue preferred an appeal before the Bangalore ITAT. On the other hand, assessee filed its cross-objections on being aggrieved by CIT(A)'s confirmation of Sec. 40(a)(ia) disallowance. Referring to facts, ITAT noted that AON Ltd., UK had seconded few of its employees to assessee for working and discharging functions for assessee. It was observed that salary to these employees was given by UK Company itself and such salary charges were cross charged by UK Company to assessee. It was thus noted that assessee made payments to UK Company towards these cross charges. In this regard, ITAT discussed co-ordinate bench ruling in Abbey Business Services (India) Pvt. Ltd. [ITA No.1141/Bang/2010] which further relied on

co-ordinate bench ruling in IDS Software Solutions India P. Ltd. vs. ITO [122 TTJ 410]. Co-ordinate bench therein held that based on terms of secondment agreement which provided that secondee was under supervision and control of Indian Company and fact that tax was deducted and paid u/s. 192 in respect of salaries paid to secondees, the Indian Company should be regarded as the economic employer of secondees.

In light of above, ITAT held that co-ordinate bench ruling in IDS Software squarely applies to present case. ITAT, thus, held that "the assessee should be considered as the real and economic employer of the persons, seconded by the UK Company and working for the assessee." It was further held that assessee was responsible for payment related to services rendered by employees to assessee necessitating the reimbursement of charges. Further, ITAT noted that co-ordinate bench in Abbey Business Services, following Mumbai ITAT Special Bench ('SB') ruling in Mahindra & Mahindra Ltd. [(2009) 313 ITR (AT) 263] observed that for any payment to be brought within the scope of 'fees for technical services' u/s. 9(1)(vii), it should have atleast some element of income in it. Co-ordinate bench further noted that Sec. 9(1)(vii) of the Act is attracted if there is] 'rendering of service' for 'consideration'. In that case, it was specifically agreed by parties that Abbey National Plc, UK would only second staff to assessee as per secondment agreement and 'no services were rendered' by it to assessee. As the reimbursement to Abbey National Plc, UK did not result in any profit or gain or income, these reimbursements cannot be treated as 'consideration.' Thus, the co-ordinate bench held that reimbursements made by Indian company did not constitute income and consequently, the payment was not subject to TDS. Relying on Mumbai ITAT SB ruling in Mahindra & Mahindra Ltd., ITAT held that reimbursements of salary costs, without any profit element, by assessee did not constitute income in hands of UK Company. Ruling in favour of the assessee, ITAT held that reimbursement made by assessee to UK Company were not liable for tax deduction at source u/s. 195 of the Act and consequently the said payments were not liable for Sec. 40(a)(ia) disallowance. Thus, the question of Sec. 10A deduction did not arise and Revenue's appeal was dismissed.

AON Specialist Services Pvt. Ltd. [TS-90-ITAT-2014(Bang)]

AAR: Interprets residence condition; 182 days extension restricted to year of leaving India

The applicant Mrs. Smita Anand is an Indian citizen and a person of Indian origin. She was working with Hewitt Associates (India) Private Limited from April, 2002 till September, 2007. On September 22, 2007, the applicant left India for the purpose of employment with Hewitt Consulting (Shanghai) Company Limited, which is a company incorporated in China. The applicant's employment with Hewitt (Shanghai) commenced on October 1, 2007. During her employment in China, she visited India and her stay in India in a particular year never exceeded 182 days. She returned to India on February 12, 2011 after resigning from her employment in China with effect from January 31, 2011. During the financial year 2010-11 which is the relevant year in this application, her total stay in India was 119 days. The applicant continues to enjoy status of non-resident as per domestic tax laws of India during the financial year 2010-11.

During the financial year 2010-11 relevant for assessment year 2011-12, the applicant realized proceeds from exercise of ESOPs and RSUs which were awarded to her by her employer in China, vested and exercised by her during the tenure of her employment with Hewitt China. The entire grant, vesting the exercise of the ESOPs and RSUs happened during the course of employment with Hewitt China. The proceeds in US Dollars upon exercise of ESOPs & RSU's was credited in

applicant's name to her individual account with Morgan Stanley Smith Berne US from where the money was remitted to her Indian savings account after conversion into Indian rupees, during the financial year 2010-11 and before returning to India on 12th February, 2011. Presenting the above facts, the applicant sought ruling of this Authority on the following questions:-

Whether Ms. Smita Anand (hereinafter referred to as the "Applicant"), a non-resident Individual as per the provisions of the Income-tax Act, 1961 ("the Act"), is taxable in India in respect of amount of proceeds received in US and 3 subsequently remitted into her Indian savings bank account in the FY 2010-11, upon exercise of following options / stocks which were granted to the applicant by her employer in China and which were vested as well as exercised by her during the tenure of her employment with Hewitt China:

i. Historic Restricted Stock Units ('RSU's) awarded under an Employees Stock Incentive Scheme by her employer Hewitt Consulting (Shanghai) Co. Ltd (hereafter referred to as "Hewitt, China"); and

ii. Converted stock options of AON Corporation awarded in lieu of historic stock options of Hewitt (hereinafter referred to as 'ESOP'), as a result of global merger of Hewitt with AON Corporation.

The application was admitted under section 245R(2) and while admitting the application the Authority left the question as to whether the applicant is a resident or a non-resident, to be considered while deciding the application under section 245R(4). It was submitted that the applicant's stay in India for the financial year 2010-11 being less than 182 days and the applicant being on employment in China, her status continues to be non-resident during the financial year 2010-11 in terms of Explanation (a) to section 6 of the Income-tax Act, 1961(hereinafter referred to as the Act). The applicant has not returned to India with the intention to permanently stay or settle in India but on a visit to meet her family and friends. The residential house property owned by the applicant (jointly with her husband) has been let out till June,2011 and if the applicant's intention would have been to primarily reside in India, the applicant would have requested the tenants of such property to vacate the premises, close to the period of arrival to India. The applicant has been travelling to different locations for holiday and to meet with family and friends and relatives or at the hotels after her return from China. The applicant's alien employment permit was also valid till March 31, 2012 and she could return to China and seek employment in China within that period. During the financial year 2010-11, the applicant came to visit India and her total stay in India being less than 119 days, it was asserted that her residential status should be treated as non-resident in view of Explanation (b) to section 6(1) of the Act. Regarding the ESOPs & RSUs it was submitted that those were granted to the applicant during her employment with Hewitt China as a gesture of appreciation and motivation being a foreign employee, both the grant and exercise of the ESOPs & RSUs took place before the date of her resignation from Hewitt China and the remittance to India after first crediting to her Bank Account in USA took place before her return to India and hence the remission of the money on conversion of the ESOPs & RSUs is not taxable in India.

The Revenue on the other hand contended that provision of Explanation (a) or (b) to section 6(1) of the Act is not applicable in the case as the applicant returned to India after resigning from her employment in Hewitt China. It was submitted that the applicant's case does not fall within the ambit of Explanation (b) to section 6(1) of the Act. Relying on the Explanatory notes to the Finance Act relating to the amendments of proviso of 6 of the Act, it was argued that if the applicant is given

benefit of the said Explanation (b), it will go against the legislative intent which was to confer the benefit on the persons who are in employment and coming to India on short visits during their employment. It was submitted that if the applicant has come to India permanently after leaving his employment outside India then Explanation (b) to section 6(1) of the Act will not be applicable. Decision of the ITAT Bangalore Bench in the case of Manoj Kumar Reddy Nare vs. ITO reported in (132 TTJ 328) 2009 was cited in support of the contention, wherein it was held-

"Considering the legislative history of amendments and the purpose for which the amendments have been introduced, one has to consider the entry of the person in India during the previous year. If all the entries in India for the purpose of a visit then the period of 60 days as mentioned in section 6(1)(c) will be substituted to 182 days. However, if in the previous year, the assessee has come to India permanently after leaving his employment outside India, then the Explanation (b) will not be applicable."

The rival contentions of the applicant and the Revenue have been considered. Though the question relates to taxability of the amount of proceeds received in India on conversion of ESOPs & RSUs granted to the applicant during her employment in Hewitt China, the main issue is the residential status of the applicant as taxability of the receipt depends on the residential status of the applicant during the financial year 2010-11. The arguments of both the applicant and the Revenue are based on the provisions of section 6(1) of the Act.

There are two conditions in section 6 of the Act, when an individual is said to be resident in India in any previous year namely sub-section (a) and sub-section (c); sub-section (b) was omitted by the Finance Act 1982 w.e.f. 1.4.1983. The requirement of sub–section (a) is not met by the applicant as her stay during any of the previous year after going abroad for employment is less than 182 days. Regarding the requirement of sub-section (c), the applicant's stay in India during preceding four years i.e. financial year 2006-07 to financial year 2010-11 as tabulated by the learned counsel of the applicant is as under :-

Financial Year	Assessment Year	Total stays in India (Days)	Status	Remarks
2006-07	2007-08	337	Resident	Stay in India more than 182 days
2007-08	2008-09	178	Non-resident	Applicant left India on September 22,2007 for employment in China. Total stay in India during FY 2007-08 less than 182 days under Explanation (a) to section 6(1) of the Act
2008-09	2009-10	48	Non-resident	Stay in India during FY 2009-10 less than 60 days
2009-10	2010-11	62	Non-resident	Stay in India during FY 2010-11 less than 182 days under Explanation (b) to section 6(1) of the Act

It is seen from the tabulation that the total stay in India of the applicant for the preceding four years is 407 days which is more than 365 days. However, the total stay during the relevant assessment year 2011-12 is 119 days. Submission of the applicant is that in terms of Explanation (a) and/or (b) to section 6(1) of the Act, the period of stay in India should be 182 days or more and the applicant's total stay in India during the period is 119 days and therefore, her residential status is non-resident during the relevant previous year. The Revenue's contention is that Explanation (a) or (b) to section 6(1) of the Act is not applicable in the applicant's case and her total stay in India during the previous year being more than sixty days, the applicant's status is resident in India and the amount received during the previous year from any source is taxable in India.

We are of the view that Explanation (a) to section 6(1)(c) is applicable only in a particular year when a person leaves India. In the context of the application and the arguments made by the learned counsel of the applicant, Explanation (a) will read like this-

"Being a citizen of India, who leaves India in any previous year for the purpose of employment outside India, the provision of sub-clause (c) shall apply in relation to that year as if for the words "60 days", occurring therein, the words "182 days" had been substituted".

"In relation to that year" relates to the previous year in which a person leaves India. In effect if a person leaves India in any particular year for the purpose of employment outside India and if his/her stay in India in that particular year is for a period or periods amounting in all to 182 days, his/her status will be resident in India. This is not the case in the present applicant's case. The applicant left India on 22nd September, 2007 for the purpose of employment with Hewitt Consulting (Shanghai) Company Limited, China. The relevant FY in which the applicant left India for the purpose of employment was therefore 2007-08 which is not the subject matter in this case. Besides the applicant left India in September, 2007 and come back to India on 12th February, 2011 after resigning from her employment in China effective on 31st January, 2011. In the decision of the ITAT Bangalore Bench in the case of Manoj Kumar Reddy Nare vs. ITO (supra) it was held that the assessee has come to India after leaving his employment outside India, the Explanation (a) to section 6(1)(c) will not be applicable. That being so the total stay in India of the applicant for the preceding four years is for a period amounting to more than 365 days and total stay in India for the FY 2010-11 is for a period amounting in all to 119 days which is more than 60 days, requirements of sub-section (c) of section 6(1) is met by the applicant to become a resident in India.

Regarding the arguments relating to Explanation (b) to section 6(1)(c) of the Act, the test is whether the applicant had come on a visit to India in the previous year 2010-11 as a non-resident. There is no denying of the fact that the applicant had come to India from China after resigning from her employment. It cannot be said that the applicant is a non-resident in that particular year as this is the point in dispute now. If she is not a non-resident, one limb of the Explanation falls. The other issue is whether she came to India only for a visit. The learned counsel for the applicant argued that was so and the Revenue submitted that she did not come to India only for a visit as her return to India is after resigning from her employment in China. The facts and circumstances of the case make us to believe that the applicant did not come to India only for a visit. The learned counsel's argument that the applicant's employer card was valid upto 31.3.2012, the applicant was considerably exploring possibility of job outside India, the residential house property owned by the applicant jointly with her husband had been let out till June, 2011, the applicant visited her friends and relatives in different parts of India and also travelled different locations on holidays, the

children of the applicant were staying abroad at the time when applicant came to India etc., are not sufficient to conclude that the applicant came to India on a visit only. The applicant could very well resign even during the validity period of the employer's card and that is what she has done. The activities mentioned by the learned counsel need not be necessarily proof of a visit, even a person staying permanently in India also does those activities. If a person returns to India after a long period of absence there is all the more reason he or she will like to go to visit relatives and friends in different places. Those activities are not necessarily indicators of a visit. When the applicant resigns from her employment in China, the reason for return to India does not seem to be only for a visit. The learned counsel could not give us information whether the applicant left India thereafter for any employment. In such circumstances we do not agree with the learned counsel that the applicant came to India only for a visit. On facts and circumstances of the case we hold that Explanation (b) to section 6(1)(c) of the Act is also not applicable in the applicant's case.

The ruling of this Authority in the case of Anurag Chaudhary reported in 232 ITR 293, cited by the learned counsel for the applicant in support of his argument does not consider whether Explanation (a) to section 6(1)(c) of the Act is only for a particular year in which a person leaves India for employment, as we do now. We do not think that the said Ruling is applicable in this case. The submission of the learned counsel for the applicant based on the decision of the Bangalore Bench of ITAT in the case of Manoj Kumar Reddy Nare (supra) is also not acceptable as facts of the case in Manoj Kumar Reddy Nare were different. In that case the assessee visited India during the period when he was working in USA.

To conclude, we hold that the applicant's case does not fall under Explanation (a) or (b) to section 6(1)(c) of the Act and having fulfilled the requirements of section 6(1)(c) of the Act her status will be resident in India. Consequently, the amount of proceeds received in India on conversion of ESOPs and RSUs awarded to her by her employer in China will be taxable in India.

Smita Anand [TS-94-AAR-2014]

Indirect Taxes

CENVAT:

Case Laws

- In CCE v Owens Corning (India) Ltd (2014-TIOL-284-CESTAT-MUM), the Mumbai Tribunal held that CENVAT credit was admissible on inputs used for trial run/testing of machines.
- In Umedica Laboratories Pvt Ltd v CCE (2014-TIOL-378-CESTAT-AHM), the Ahmedabad Tribunal held that CENVAT credit is admissible on Xerox copy of the triplicate Bill of Entry (duly certified by bank) when there is no dispute relating to receipt of inputs and its use in the manufacturing activity.

SERVICE TAX:

Case Laws

- In Electromec Engineering Enterprises v CCE (2014-TIOL-205-CESTAT-DEL), the Delhi Tribunal held that in case of repair and maintenance activity, if there were two separate contracts, one for labour and second for supply of parts, service tax was payable only on the service charges and not on the supply portion.
- In Infosys Ltd v CST (2014-TIOL-409-CESTAT-BANG), the Bangalore Tribunal held that the 'information technology software services' provide by the overseas service providers and received by the overseas branches, though funded by the Indian head office, cannot be held to be received/provided in India. Accordingly, the liability under section 66A-Reverse charge does not arise in the hands of head office in India.
- In Computer Sciences Corporations Pvt Ltd v CST (2014-TIOL-434-CESTAT-DEL), the Delhi Tribunal held that in relation to hiring of overseas employees for operations in India, who were either recruited directly or were transferred from overseas group companies on permanent employment basis, merely for the fact that some applicable social security and other benefits for such employees has been paid at their home location through the concerned group companies. The reimbursement of such cost to the concerned foreign companies by the appellant cannot be held liable to service tax under 'manpower supply services'.
- The Tribunal has relied upon the decision of the Mumbai Tribunal in Volkswagen India Pvt Ltd v CCE (2013-TIOL-1640-CESTAT-MUM)

VAT:

Notifications and Circulars

Daman and Diu

- For tax periods starting 1 April, 2014, electronic issuance of F and H forms has been made mandatory for all dealers.

(Circular No. DMN/VAT/VATSoft/ 2013-14 dated 27 January, 2014)

Indirect Taxes

Delhi

- The requirement of filing audit report in Form AR-1 has been dispensed with effective 14 February, 2014.

(Notification No. F.3(384)/Policy/VAT /2013/1307-1319 dated 14 February, 2014)

Uttar Pradesh

- The due date for submission of annual return for the FY 2012-13 has been extended from 29 January, 2014 to 30 June, 2014.

(Circular No. 1314135 dated 3 March, 2014)

Customs:

Case Laws

- The Bangalore Tribunal, in CC v Regal Plywood Industries (P) Ltd (2014 (299) ELT 492), held that the transaction value of the imported goods could not be rejected for reason of excess quantity received as there was no legally permissible ground in existence warranting re-determination of valuation under the Customs Valuation (Determination of Price of Imported Goods) Rules, 2007.
- The Delhi Tribunal, in CC v Biomerieux India Pvt Ltd (2014 (299) ELT 487), held that where higher duty was paid by the importer due to incorrect value on the sale invoice by the supplier, the importer could seek re-assessment on account of clerical mistake by recourse to section 154 of the Act.
- In CC v Moonling Exim P Ltd (2014 (300) ELT 91), the Delhi Tribunal held that the benefit of notification could not be denied on ground of non-production of end-user certificate within specified time where the notification provided for further extension of time, as it was well-settled law that benefit could not be denied on technical grounds.
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- In Zuari Agro Chemicals Ltd and Ors v Union of India and Ors (2014-TIOL-107-HC-MUM), the Bombay High Court held that where the customs authorities finalized provisionally assessed Bills of Entry, contrary to the importer's claim, there was need to pass a speaking order specifying reasons of variation so as to enable the importer to file an appeal under the Act. In absence of a speaking order, the period of filing appeal did not commence.
- In Fossil India Pvt Ltd v CC (2014 (301) ELT 268), the Bangalore Tribunal held that refund of Special Additional Duty (SAD) of Customs is admissible even though declaration about non-availment of SAD is not made on sales invoice when the dealer is a non-registered dealer under excise.

Indirect Taxes

Foreign Trade Policy:

Case laws

- The High Court of Delhi, in Aval Exports v UOI (2014 (301) ELT 14), held that advance licence is to be issued only in accordance with policy in force on the date of issuance of license and not on the basis of policy as on the date of receipt of application.

Upcoming A & D Event

Date	Event	Venue
20-25 May, 2014	ILA Berlin Airshow	Berlin, Germany
14-20 July, 2014	Farnborough Airshow	Farnborough, England

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