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Cutting Edge

July 2014, Issue 21

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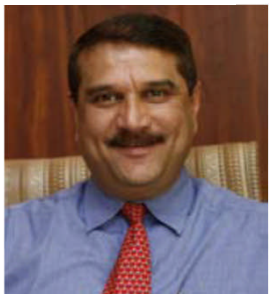

Editorial

Dear Readers,

Greetings for the Q2 of 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 regular feedback and support has fuelled our growth over a short period from a start up to an established and diversified practice.

I am pleased to present the 21st edition of PwC India's Aerospace and Defence (A&D) newsletter, "Cutting Edge" that provides information on deals, news and tax updates and aims to keep you up to date with the latest developments and trends in the industry.

After India's largest democratic elections in the history, Finance Minister Arun Jailey presented the Union Budget before the parliament on 10th July, 2014. In the attempt to open the nascent defence manufacturing sector, the cap on Foreign Direct Investment (FDI) in Defence manufacturing has been raised to 49% from 26%.

The government hopes that this increase will convert the world's largest arms importer into a heavyweight manufacturer. However, realistically speaking, the hike still fails to address the issue of ownership and control. The fact of the matter is that without building India's international standing in advanced technology, exports through the acquired-technical-know–how route and sustainable indigenization for advanced weapons will not be possible. This will only be possible when foreign firms set up manufacturing and integration in India. Thus although the latest liberalization has the most virtuous of intentions, it will probably not achieve its desired objective as it fails to ensure that the interests of both foreign companies as well as domestic firms are balanced.

Although, the capital outlay for defence modernization has been increased by Rs 5,000 crore over the amount provided for in the interim Budget, this has almost entirely gone for R&D with INR 3300 crores allocated to the capital expenditure R&D head. While, this move will give momentum to the ongoing DRDO programmes, it will also result in reducing the budget outlay for procuring equipment. However for this, it is essential to give them control over the business so as to protect their IPR.

On a more positive note, however, allowing investment by Foreign Institutional Investors (FIIs) is a pragmatic step which will help reduce uncertainty and increase liquidity, thus providing listed Indian companies with the added flexibility and opportunity to raise finances. The Minister is also holding charge of this ministry and his assurance to speed up the procurement process are also welcome.

In a welcome step to improve transparency DIPP, has released press note 3 of 2014 on June 26, 2014 listing out the products which will require an industrial license. Thus, the items not listed would not require license thereby reducing entry barriers and opening up the sector to more foreign and domestic firms.

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 and is focusing on improving compliance. The civil aviation ministry is also planning to seek Cabinet approval for both the civil aviation authority (CAA) bill and the removal of the 5/20 rule. The removal of the 5/20 rule will allow new Indian airlines to start operating on lucrative international routes without having to acquire/lease 20 aircrafts and wait the 5 years stipulated earlier and also give them an opportunity to pick up cheaper fuel overseas (fuel accounts for 50% of airline costs).

In a bid to increase India's export base. DRDO chief Avinash Chander said that the country needs a "policy mechanism" for exporting weapon systems and the defence research agency has suggested a "single window clearance" for sale of arms to friendly foreign countries in a time-bound manner.

The Indian Air Force will induct 20 more Hawk Advanced Jet Trainer (AJT) aircraft under a deal worth over Rs 1,500 crore with BAE Systems for its aerobatic team Surya Kiran. The procurement for these additional HAWKS was cleared by the Defence Acquisition council (DAC) last year. BAE systems has received a RFP from HAL for a potential order to supply products and services for the manufacture of the 20 AJTs. These aircrafts will be built by HAL in Bangalore and would increase the total Hawks on order by the IAF to 143.

India's MoD has issued a tender under the 'Make or Buy' category to local shipyards to build 16 shallow water anti-submarine warfare (ASW) vessels, a $2.25 billion program. These ASW shallow water crafts will be used for anti-submarine warfare operations in coastal waters, low intensity maritime operations and mine-laying.

Overall, it has been a quiet quarter for the A&D sector. However, the new government has listed modernization of the armed forces as a priority area and we look forward to faster progress in the procurement process and offset management.

With these highlights, I invite you to review our 21st 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

India to lay down policy for missile exports

India has the capability to export missiles and it will soon start laying down policy norms, said Avinash Chander, scientific advisor to the defence minister. Avinash, who is also the director general of Defence Research and Development Organisation (DRDO), said exports was a new area they were exploring and the new government was also very keen on building up the export potential.

Nexter, L&T, Ashok Leyland tie up for army project

Ashok Leyland Defence Systems has formed a consortium agreement with Larsen & Toubro (L&T) and Nexter Systems for the mounted gun systems (MGS) artillery programme of the Indian army.

US-Indian defense trade and technology initiative gathers pace

The United States is aiming to re-engage with India over a proposed programme to enhance collaboration in military trade and technologies. Frank Kendall, undersecretary of defense for acquisition, technology, and logistics, said in a Pentagon press briefing on 13 June that the US-India defense trade and technology initiative (DTI) will be the focus of an expected trip to New Delhi in the next few months.

Astra Missile Test Fired Successfully From Su-30MKI

On June 20th India's first indigenously developed Beyond Visual Range (BVR) air-to-air missile Astra was test-fired successfully from fighter aircraft Su-30MKI by the Air Force from a naval range off Goa. On June 9, a similar trial was conducted from the same defence base. Both the tests conducted to demonstrate the aerodynamic characteristics of the missile, have demonstrated the repeatability, robustness and endurance capability of Astra as a weapon system

India signs nuclear inspections protocol after five-year delay

India has finally ratified another element of its international nuclear safety obligations after a five-year delay. The signing of the protocol also follows an IHS Jane's report that suggested New Delhi will be able to significantly expand its uranium enrichment capabilities to bolster its nuclear submarine fleet, and potentially to develop thermonuclear weapons.

India's first indigenous anti-submarine warfare ship ready

India's first indigenously-built antisubmarine warfare corvette INS Kamorta is ready to be commissioned into the Indian Navy next month. Built by the Garden Reach Shipbuilders & Engineers Ltd (GRSE), Kolkata, it will be the first warship armed with an indigenous rocket launcher for anti submarine warfare.

Thales, L&T Technology Services form avionics joint venture

India's L&T Technology Services and Thales announced that the two companies had formed a joint venture (JV) on 26 June. L&T Technology Services, a subsidiary of Larsen & Toubro Limited, will manage and oversee the management control, operations, and delivery services of Thales Software India Pvt Ltd, with the two companies to focus on avionics technology.

India's HAL eyes commercial aerospace growth

India's Hindustan Aeronautics Limited (HAL) will expand further into the civil aviation sector and boost its investment in unmanned systems, HAL Chairman R.K. Tyagi announced on 17 June..

Regulatory

Budget Highlights

- The Union Budget 2014-15 has increased the defence allocation to Rs 2,29,000 crore for FY 15. This represents a growth rate of 12.44% over the previous year's revised estimates of Rs. 2,03,672 crore.

Key statistics of Defence Budget 2013-14 and 2014-15:

	2013-14 (Revised estimates)	2014-15 (Interim Budget)	2014-15
Defence Budget (Rs. in Crore)	2,03,672	224,000	229,000
Growth of Defence Budget (%)	----	9.98	12.44
Revenue Expenditure (Rs in Crore)	1,24,800	134,412	134,412
Growth of Revenue Expenditure (%)	---	7.70*	7.70*
Share of Revenue Expenditure in Defence Budget (%)	61.27	60.01	58.70
Capital Expenditure (Rs. in Crore)	78,872	89,588	94,588
Growth of Capital Expenditure (%)	----	13.59*	19.93*
Share of Capital Expenditure in Defence Budget (%)	38.73	39.99	41.30

**Growth rate in comparison to RE for 2013-14*

- It is proposed that the the limit of foreign direct investment in defence manufacturing will be raised to 49% from the existing cap of 26% with full Indian management and control.
- Capital outlay for defence raised by INR 5,000 crore over the amount provided in the interim budget (including INR 1,000 crore for accelerating the development of the Railway system in the border areas).
- INR 100 crore provided for setting up a Technology Development Fund to provide resources to public and private sector companies to support research and development of defence systems.

Regulatory

List of defence items requiring an Industrial License

As per Press Information Bureau (PIB) release dated 26 June 2014, Press Note 3 of 2014 has been issued by Department of Industrial Policy & Promotion (DIPP), Ministry of Commerce & Industry listing out the items which require an Industrial License (IL). The list has to be read in conjunction with Entry No. 13 of Schedule II of the Notification No. S.O.477(E) dated 25th July 1991 as amended by Notification No.S.O. 11(E) dated 3rd January 2002.

The PIB release also states that dual use items, having military as well as civilian applications, other than those specially mentioned in the list, would not require an Industrial License.

Security manual for licensed defence industries

As per Press Information Bureau (PIB) release dated 8th July 2014, the Department of Defence Production, Ministry of Defence has finalised the "Security Manual for Licensed Defence Industry". The important highlights of the Security Manual are as follows:

For new applicants:

- The manual prescribes minimum standards of security and other safeguards required to be put in place by the licensee in the interest of national safety and security. All units/ offices/ areas of licensed defence industries in the private sector dealing with any classified information/ document/ material will now be “prohibited places” in terms of the provisions of the Official Secrets Act, 1923.
- Defence products will be categorised in three categories such as A, B & C. Category A involve products which require highest level of security, category B involve a medium level of security and category C require a minimum level of security. In case any company is involved in manufacturing of Defence products which lie in more than one category, then either the company should clearly segregate the areas of operation/ manufacturing for different categories of products and apply the related security instructions or if the areas of operation/ manufacture are not possible to be segregated, the security instructions applicable to the higher level of security will be applied.
- Earlier, the applicant companies had to submit an affidavit stating that adequate safety and security procedures will be put in place. This affidavit has been done away with.

For companies which have already been issued an industrial license:

- The companies which have already been issued a licence for manufacturing defence items and have already started manufacturing defence items, will have to put in place the necessary security systems as prescribed in the manual within a period of 1 year from the date of notification of the manual.
- Intelligence Bureau (IB)/ Ministry of Home Affairs (MHA) will undertake the first security audit of all the licensed private companies in the Defence sector immediately after the manual comes into force and based on the experience/ feedback of IB/ MHA, the Security Manual may be revised, if required.

Direct Taxes

Consortium formed by the applicant with another non-resident, for bidding and execution of a turnkey contract, did not constitute an Association of Persons (AOP) under the Income tax Act, 1961 (the Act)

Linde AG, Linde Engineering division (Linde) and Samsung Engineering company Ltd. (Samsung), through a Memorandum of Understanding (MOU) had put in a bid for the tender floated by ONGC Petro Additions Ltd. (OPAL) for carrying out all activities and services required for design, engineering, etc. of the plant on a lump sum turnkey basis . The contract was awarded to the consortium. Subsequently, Linde and Samsung entered into an Internal Consortium Agreement (ICA) which specified that the scope of work of Linde and Samsung were separate and independent.

Linde filed an application before the Authority for Advance Ruling (AAR). The AAR held that the Consortium of 'Linde' and 'Samsung' constituted an Association of Persons (AOP). There was no need to differentiate between the on-shore and off-shore parts of the contract for taxability, as the AOP was entirely taxable in India. The AAR also sought to apply the 'look at' principle adopted by the Supreme Court of India in the case of Vodafone International Holdings B.V.

Aggrieved by the order of AAR, Linde thereafter filed a writ petition before the Delhi High Court (HC) against the AAR's ruling.

The High Court observed on the issue of AOP basis the following:

- Linde and Samsung had came together for (a) Bidding for the contract; (b) Present a façade of a consortium for execution of the contract and accept joint and several liability for due performance of the contract and completion of the project; and (c) Put in place a management structure for inter se coordination and execution of the project.

  However, in all other respects, both Linde and Samsung were independent of each other and were responsible for their own deliverables under the Contract, without reference to each other.
- The fact that Linde and Samsung agreed to be jointly and severally liable for due performance of the Contract only indicated that they had accepted a contractual obligation towards a third party, the same would not by itself lead to a conclusion that the said members had formed an AOP.
- In order to consider independent agencies as an AOP, it is necessary that they should form a joint enterprise with a greater level of common management. Mere obligation to exchange information between independent agencies, for co-ordinating their independent tasks would not result in an AOP.
- Linde and Samsung had neither shared costs nor the risks and both the parties had managed their own deliverables. Thus, the facts of this case did not indicate a sufficient degree of joint action between Linde and Samsung in either execution or management of the project to justify a conclusion that they had formed an AOP.

In view of the same, the consortium was not held to constitute an AOP in India.

Taxability of offshore supplies:

HC said that the contract was indivisible one but it specified the amounts payable for various activities. Relying on the judgment of Supreme Court in the case of **Ishikawajima** the HC ruled that the equipment and materials were manufactured and procured outside India and the title was also transferred outside India. Accordingly the same could not be brought to tax in India. HC further observed that the look at approach followed in **Vodafone International Holding BV** was

completely out of context.

Taxability of Offshore services:

The HC relied on the ruling of AAR in the case of Rotem Company and held that if the services relating to the design and engineering were inextricably linked to, and formed an integral part of, the manufacture and fabrication of the offshore supply, then such services rendered by the taxpayer would not be taxable as fees for technical services (FTS) under the Act. Otherwise, the income from offshore services would be taxable as FTS under the Act.

In the event the offshore services were held to be FTS under the Act, then this would be assessable as FTS under Article 12 of the DTAA, subject to determination of the PE. In case it was found that the taxpayer had a PE in India at the time the services were rendered, then income attributable to the PE would be taxable as business profits.

On the factual aspects related to the above, the High Court remanded the matter back to the AAR, to be decided based on the above principles.

Linde AG, Linde Engineering Division v. DCIT [TS-226-HC-2014 (DEL)]

Delhi High Court upholds AAR ruling on secondment agreement giving rise to Service PE and withholding tax obligations

Centrica India offshore Pvt. Ltd. (Centrica India), subsidiary of Centrica Plc. UK, provided services to other overseas group entities in relation to their back office support functions to third party vendors in India. Centrica India acted as an interface between the third party vendors in India and overseas group entities. These services were provided in terms of a Service Agreement under a cost plus arrangement. In relation to this service agreement, some managerial employees of the overseas entities with knowledge and experience of various processes were deputed to the applicant for short term assignments under a secondment agreement. The key features of the agreement were:

- Applicant has direct control and supervision of the secondees.
- Overseas entities were not responsible for work performed by secondees.
- All risks of work performed by secondees was bore by the applicant.
- Salary was paid directly by overseas entities in secondees bank accounts and claimed the same from the applicant as reimbursement.

The AAR ruled that the right of the seconded employees to seek remuneration was only against the overseas entities and not the applicant. Also, the overseas entities had the right to terminate the secondees. Further the AAR observed that the work performed by the secondees was not unconnected with the activities of the overseas entities. Finally the AAR ruled that the payments by the applicant were compensation for managerial services covered under section 9(1)(vii) of the Act. AAR also qualified the arrangement to be Service Permanent Establishment (PE) of the overseas entities as per the DTAA between India-UK and India-Canada.

Accordingly, the AAR ruled that the tax was required to be withheld by the applicant under section 195 of the Act. Thereafter, Centrica India appealed before the HC.

The Delhi HC upheld the ruling of AAR and held that :

Fees for technical services:

The services rendered by deputed employees "makes available" technical knowledge to the applicant. They were imparting their technical expertise and know-how to the local employees of Centrica India and hence payment was taxable as fees for technical services as per the respective DTAAs.

Service PE

The HC also said that the real employer of the seconded employees continued to be the overseas entity and relying on the ruling Supreme Court in the case of Morgan Stanley and OECD commentary on Article 15 of the Model Convention, the HC held that there existed a Service PE in India as the employees continued to have lien on their jobs with the overseas entities.

Payment was not reimbursement

The HC also said that the payments were not in the nature of reimbursements but were payment for services rendered through deputed employees. Also, it held that such reimbursements could not be construed as diversion of income by overriding title.

Centrica India Offshore Pvt. Ltd. v CIT & Ors. [TS-237-HC-2014(DEL)]

Mumbai Tribunal holds existence of fixed place PE on account of protracted presence of employees executing a consultancy project in India

The Taxpayer is a non resident company registered in Mauritius . It received income in India by way of a contract for services executed in India with Godrej Philips India Ltd (GPI). The services included planning and implementing performance index programme which ultimately would result in implementing and improving the management performance quotient of GPI by enhancing parameters, reducing costs, improving the work methods/services and providing efficient management control. The tax payer deputed its employees comprising consultants and principal consultants to work in India for 50 weeks.

The tax payer argued during the assessment proceedings that there was no office available for these personnel to work from in India and the hotels used by the personnel were not used as an office and therefore, there was no fixed place of business in India. Further, in absence of a service PE clause under the India-Mauritius DTAA , no PE could be construed in India. The tax payer also contended that the directions to these personnel were directly given from Mauritius and thus, the place of management was situated in Mauritius. The tax payer also argued that the employees in India were only carrying out preparatory and auxiliary services by gathering and collating the data for being transmitted to the Head office in Mauritius and then acting on instructions received from there.

The tax authorities upheld that the contract with GPI was executed and implemented in India. Furthermore, the hotel rooms in India must be regarded as their place of work for carrying out activities in India. The finding of the tax authorities was upheld by the First Appellate Authority. Aggrieved by the order, the tax payer appealed to the Tribunal.

The Tribunal held that:

- The taxpayer's claim of services being preparatory and auxiliary in nature is inconsistent with the mode of operation and the work performed by its employees in India. Also, the employees frequently visited India which would not be required in mere preparatory or auxiliary work.

- Securing GPI contract required extensive execution and regular interactions between the parties which required taxpayer's presence in India.
- The argument that there is no fixed place from where the business is carried on is devoid of substance. Even the job of salesman is shifting one but it is fixed in terms of its operating parameters.
- If the personnel deputed on the contract have not functioned from GPI's premises, the same has, of itself, no bearing on the case as it is for them to specify the place from where they have functioned over their continued stay in India.
- It is apparent from the mode of operations that regular interviews, sessions , seminars etc. were conducted at GPI's premises. Thus, the fact that some place is at the disposal of taxpayer or its employees is manifest and eminent.

Based on the work nature/ profile and the modus operandi followed, it is concluded that some place is at the disposal of the taxpayer or its employees during the entire period of the stay in India. Accordingly, there is a fixed place PE of the tax payer in India.

Renoir Consulting Ltd. (ITA No. 4323 & 4125/Mum/2011, ITA No. 5298/Mum/2009)

AAR provides a restrictive interpretation of the MFN clause provided in the India-France DTAA

The applicant, Steria (India) Ltd. (Steria India) is an Indian Company engaged in the business of rendering IT driven business services to its customers. Groupe Steria SCA (Steria France) is a partnership firm based out of France. Steria India has entered into a Management Service Agreement with Steria France whereby Steria France provides various management services to Steria India (for instance – human resource, information systems, technology and management information system services, etc.).

Steria France is non-resident in India and has no presence in India in the form of office, branch and employee base so as to constitute a PE under India-France DTAA. The services are provided through telephone, fax, e-mail, etc. and no personnel of Steria France would visit India for provision of such services. Steria France shall invoice Steria India with a mark up of 5% on cost allocable to Steria India.

Issues before Authority for Advance Ruling (AAR)

1. Whether the services rendered by Steria France are taxable in India as per India France DTAA.
2. Whether Steria India is required to withhold taxes on the payment made to Steria France.

The applicant, relying on clause 7 (Most Favored Nation clause "MFN") of Protocol to India-France DTAA, contended that since the 'make available' test is not satisfied (considering the restricted scope of fees for technical services (FTS) provided in India-UK DTAA, which was signed after the India France DTAA), hence the services do not fall under technical services as per the India-France DTAA.

The Revenue, on the other hand, submitted that services rendered by Steria France fall under the purview of wide definition of FTS as defined under the DTL and India-France DTAA. Without prejudice to the above, Steria France also satisfy the make available criterion as the employees of the applicant will get benefited from the consultancy provided by the employees of Steria France.

The AAR held that payment for the services rendered by Steria France will be covered under the definition of FTS both under the DTL and India-France DTAA. It rejected the contentions of the applicant on account of following reasons:

i) A Protocol cannot be treated same as DTAA although it may be an integral part of it.

ii) The restrictions are on the rates and 'make available' clause cannot read in the items in Protocol. Also, the notification issued by the Govt. of India does not include anything about make available provision.

iii) Protocols or Memorandums can be utilized for interpreting the provisions of DTAA. However, it will not be correct / proper to import words/ clauses, which are not available in present tax treaty, on the basis of tax treaty with other countries.

iv) Considering the above, the beneficial provisions of India – UK treaty cannot be applied in the present case.

Steria India Limited (AAR No. 1055 of 2011)

ITAT upheld that the services provided would not be covered under FTS as it does not satisfy make available test in view of the MFN clause provided in India France DTAA

The assessee, IATA India is a branch office of IATA, Canada established in India. ADP-GSI, a French entity, in pursuance of an agreement entered into by IATA, Canada (through its administrative office in Geneva, Switzerland) developed the system namely 'BSP link' as per the specific needs of the airlines and agents. The said link enabled the manual operations like issue of debit notes/credit notes, issue of refund, billing statement, etc. relating to tickets to be carried out electronically for agents as well as airlines. These BSP link services were provided to the agents and airlines operating in India, for which invoices were initially raised by ADP-GSI on Geneva office who in turn raised invoices on IATA, India. Thus, the payments against the said invoices were liable to be made by the assessee to Geneva office. The assessee made an application u/s 195(2) of the Act before the AO seeking permission to remit the said amounts to Geneva Office without deduction of tax on the ground that the Geneva office was not rendering any service to the assessee and it was only collecting the funds from various IATA offices including IATA, India for making payments to ADP-GSI. The assessee further claimed that the provisions of section 195 were also not applicable in this case as the same pre-supposes the existence of two separate entities which were absent in the case of the assessee.

AO rejected the assessee's claim and held that the actual beneficiaries of the link services were agents and airlines in India and it was a case where the ADP-GSI was paid by these entities through IATA, India and IATA, Canada. Further, the payment for the said services was in the nature of FTS chargeable to tax in India at 10% under India-France DTAA.

On appeal to CIT (A), it held that that the amount paid by IATA India to the Geneva office is not in the nature of FTS as per Article 13 of the India-France DTAA read with Clause 7 (MFN Clause) of the Protocol to the India-France DTAA, as the BSP link services provided does not satisfy the make available test. The observations of CIT(A) while rendering above judgement are:

1. Rejected assessee's contention that in the absence of two distinct entities, the provisions of section 195 were not applicable and relied on CBDT Circular No. 740 dated 17.04.1996 wherein it was clarified

that the branch of a foreign company is a separate entity for the purpose of taxation.

2. Agreed with the AO's contention that the amount paid by the assessee to the Geneva office were, in substance, payments made on behalf of the airlines and agents in India to ADP-GSI in France for providing BSP link services.

3. Accepted the alternative contention made by the assessee that the amount paid is not in the nature of FTS in view of the clause 7 of the Protocol to India France DTAA (MFN Clause) which restricts the scope of FTS.

On appeal by Revenue to ITAT, it held that the pursuant to Clause 7 of the Protocol to India France DTAA, the restricted scope provided in the India-US DTAA and India-Portuguese DTAA is also applicable to Indo-France DTAA. Since the BSP link services provided by ADP-GSI did not make available to the agents and airlines any technical knowledge, experience, skills, know-how, or processes so as to enable them to apply the technology contained therein, the payments made were not in the nature of FTS chargeable to tax in India. While rendering the judgement, ITAT also relied upon the various clauses of the agreement entered between the parties.

M/s IATA BSP India vs DDIT (ITA No. 1149/Mum/2010)

Personal Tax

Notification

- Income-Tax (Fourth Amendment) Rules, 2014 - Amendment in rule 12 and substitution of forms SAHAJ(ITR-1), ITR-2, SUGAM (ITR-4S) ,ITR-V, ITR-3, ITR-4, ITR-5 , ITR-6 AND ITR-7.

[Notification No. 24/2014/F. No. 142/2/2014-TPL, DATED 1-4- 2014], [Notification No. 28/2014][F.No.142/2/2014-TPL, DATED 30-5-2014]

- CBDT gives option to individuals to show mother's name on PAN card; notifies revised forms 49A and 49AA

[Notification No. 26/2014][F.No.142/15/2013-TPL, DATED 16-5-2014]

- Cost Inflation Index for "FY 2014-15" is notified to be "1024".

[Notification No. 31/2014 [F. NO. 142/3/2014-TPL]/SO 1498(E), DATED 11-6-2014]

- Income tax department notified new wealth tax form BB which is mandatory to be furnished electronically under digital signature except for individual and HUF not liable for tax audit. The return of net wealth required to be furnished in Form BB shall not be accompanied by a statement showing the computation of the tax payable on the basis of the return, or proof of the tax and interest paid, or any document or copy of any account or form of report of valuation by registered valuer required to be attached with the return of net wealth under any provisions of the Act.

[Notification No. 32/2014/F. No. 143/1/2014-TPL, DATED 23-6- 2014]

Case laws

ITAT : Liberally interprets residence test, treats Indian international golfer as "self-employed" professional

The assessee, Jyotinder Singh Randhawa, a world known professional golfer, participated in golf tournament in various countries and remained outside India for considerable period in AY 2009-10 and earlier years. In his return of income for AY 2009-10, he declared himself as "non-resident" and declared total income of Rs. 21.35 lakhs comprising of professional income, income from capital gains and income from other source. During the course of the assessment proceedings, AO observed that assessee was a "resident" and no income could be claimed as exempt. Assessee submitted that he was in India during the previous year for a period of 167 days and was outside India for a period of 198 days, thus, he was a non-resident for AY 2009-10. AO did not agree with assessee's explanation on the basis that assessee could not prove that he was not in India for 365 days during the four year period immediately preceding the previous year. He accordingly held the assesse as a "resident" and added the amount of Rs. 4.77 crores claimed as exempt income to the total income. CIT(A) deleted the addition and treated the assessee as a "non-resident".

Aggrieved by CIT(A)'s order, Revenue filed an appeal before Delhi ITAT. ITAT noted that CIT(A) treated assessee, being a professional golfer, as a 'self-employed' professional. He held the assessee to be entitled to the benefit of Explanation (a) to Sec 6(1)(c) of the Income-tax Act, 1961 ('the Act') as his status was "non-resident" during the subject year where his stay is India was less than 182 days (167 days). Accordingly, he held that the income of Rs. 4.77 crores accrued and received outside India was not taxable in India. CIT(A) also noted that the major receipts of assesee were from South

Personal Tax

Korea, UK, USA, France, Germany, Portugal, Singapore, Hongkong, Thailand, UAE, Malaysia, Japan, Indonesia and China where the assessee participated in golf tournament conducted by theforeign sports bodies with whom India had signed double taxation avoidance agreement (DTAA). It was observed that as per Article 17/18 of DTAA, the amount received by sports person / athlete from the foreign sports bodies could not be brought to tax in India. Section 6 of the Act provides two situations when an individual can be regarded as resident in India in any previous year, viz., first, stay in India during previous year is 182 days or more (provided by Sec 6(1)(a)) and second, where applicant's stay in India during preceding four years amounts to 365 or more days and stay in India in the previous year is 60/182 days (as provided by Sec 6(1)(c)), based on the conditions fulfilled as per the explanations to the section). Explanation (a) to Sec 6(1)(c) provides for extension of period of stay in India from 60 to 182 days for the purpose of Sec 6(1)(c) in case of an Indian citizen who leaves India in any previous year as a member of the crew of an Indian ship or for the purposes of employment outside India. ITAT noted that the issue involved in the present appeal was whether assessee could be said to have left India for the purpose of employment and if he should be entitled to the benefit of Explanation – (a) to Sec 6(1)(c) of the Act. Referring to Kerala HC ruling in CIT vs. Abdul Razak [337 ITR 267 (Kerala)] (which was relied on by the CIT(A)), ITAT observed that going abroad for the purpose of employment under Explanation (a) to Sec. 6 also meant going abroad to take up employment or any allocation which takes in self employment like business or profession. Noting that assessee, in present case, being a professional golfer was a self employed professional who carried his talent as a sportsperson by participating in golf tournaments conducted in various countries abroad. ITAT stated, "For such Indian citizen in employment outside India the requirement for being treated as resident of India is his stay of 182 days in India in the previous year, as per Explanation (a) to section 6(1)(c) of the I.T. Act 1961."

Noting that assessee had stayed in India for less than 182 days, ITAT held that he was not resident of India for AY 2009-10. Thus, upholding CIT(A)'s order, ITAT dismissed Revenue's appeal and ruled in favour of the assesse.

Jyotinder Singh Randhawa [TS-341-ITAT-2014(DEL)]

Delhi HC upholds AAR ruling on employee secondment creating PE; FTS also applicable

Overseas entity was the real employer of seconded employees when Indian entity had only the right to terminate the secondment without conferring the right to terminate the original employment. Reimbursement of salary of seconded employees to the overseas entities was to be regarded as FTS when they rendered quality control services till the necessary skills were acquired by the resident employee group.

Facts

a) The Centrica India Offshore Pvt. Ltd. ('CIOP'/'petitioner'), incorporated in India, was wholly owned subsidiary of Centrica Plc. (a company incorporated in the UK).The British Gas Trading Ltd. ('BSTL') and Director Energy Marketing Limited, Canada ('DEML') were other subsidiaries of Centrica Plc.

b) These overseas entities outsourced their back office support functions to third party vendors in India. To ensure that the Indian vendors complied with quality guidelines, the petitioner was established in India.

c) Accordingly, the petitioner entered into a secondment agreement with these overseas entities, wherein employees continued to remain on the payrolls of the overseas entities. The petitioner was required to reimburse salary costs to the overseas employers.

d) The issue which arose for the consideration in the instant case was: Whether the secondment of employees by the overseas entities, would fall within Article 12 of the India-Canada and Article 13 of the India-UK DTAAs.

The High Court held in favour of revenue as under:

1) Sums paid to the overseas entities for the seconded employees could be covered by the India-Canada DTAA, when it was established that not only technical services were performed, but the enterprise made available the skills behind that service to the other party;

2) The India-UK DTAA defines Fees for Technical Services ('FTS') as "payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel)". In this case, the overseas entities had, through the seconded employees, provided technical services to the petitioner including the provision of services of personnel;

3) The nature of the services rendered by the CIOP was in the nature of "business support services" and was covered within the fold of "technical or consultancy" services. The CIOP and seconded employees were to oversee the quality of service rendered by vendors to the overseas entities, which would fall within the scope of the technical or consultancy services.

4) It was admitted by the petitioner that the reason for entering into the secondment agreement was to provide support for the initial years of operation, till the necessary skills were acquired by the resident employee group; 5) All direct costs of such seconded employee's, social security plans, other benefits and costs were ultimately to be paid by the overseas entity. The petitioner was given the right to terminate the secondment only, excluding the right to terminate the original employment relationship (the services of the secondee vis-à-vis the overseas entities);

6) The Division Bench in DIT v. E-Funds IT solutions (2014) 42 taxmann.com 50 (Delhi) highlighted that the nature of activity undertaken by the employees was determinative of whether it constituted a service. In the present case, the overseas entities outsourced their back office support functions to third party vendors in India. The seconded employees were to oversee quality control of the work of such vendors. This work could not be characterized as mere stewardship;

7) What could have been left to the petitioner to do was, in fact, being done through the seconded employees, whose expertise and training lent quality and content to the Indian entity. Therefore, the real employer of these seconded employees continued to be the overseas entity concerned. And the payment made by the petitioner to the overseas entities was to be treated as FTS.

Centrica India Offshore Pvt. Ltd. [TS-237-HC-2014(DEL)]

Indexed cost of acquisition to be determined by providing indexation on each installment in case property is purchased under installments payment scheme

The taxpayer, an individual, became a member/ shareholder of a society to purchase a flat under a drawing-of-lots scheme and made payment through installments for purchase of the property. The taxpayer had entered into an agreement and paid the first installment during the financial year (FY) 1989-90 and also paid the subsequent installments till FY 1995-96.

The draw of lot was held on 17 March 1996 and the taxpayer finally got the possession of flat on 1 August 1997. The taxpayer disclosed LTCG qua sale. As per the TO, since possession of flat was given on 1 August 1997, indexation of cost of acquisition was to be allowed from FY 1997-98 i.e. the year of flat allotment. Accordingly, the TO recomputed LTCG. On appeal to the CIT(A), the taxpayer's plea was rejected on the grounds that mere ownership of shares did not confer the benefit to enjoy the flat, unless the same had been physically handed over, and hence the TO was correct in treating the date of possession as the date on which the house was

vested in the control of the taxpayer. Aggrieved by the CIT(A)'s order, the taxpayer preferred an appeal before the Tribunal. The taxpayer argued that indexation should be allowed from the date of first installment, on the entire cost, i.e., installments. The taxpayer submitted that by virtue of the definition of 'indexed cost of acquisition' under section 48 of the Act, indexation was to be applied from the year in which the asset was 'held' by taxpayer. It was further submitted that the taxpayer became member of cooperative society, acquired the shares and held an interest in allotment of the flat. The taxpayer argued that being a shareholder, she had the right to make a part payment for the flat as determined by the society. The taxpayer contended that the word 'held' in ordinary parlance included a right in the form of acquisition of flat. The learned counsel on behalf of the taxpayer submitted that the payments made by the taxpayer over a period were towards the right of holding the flat. Hence, these installments should have been considered for suitable indexation.

Held

The Tribunal held that there was no case to allow indexation on the entire cost of acquisition from the date of payment of first installment i.e. FY 1989-90, thus rejecting taxpayer's argument. The meaning of the word, 'held' could not be extended to the part payments which were not even paid by the taxpayer. However, there was no dispute that the taxpayer made part payment by way of installment towards the acquisition of the flat by becoming shareholder and the member of society through a recognised and bye-laws approved method,

of a co-operative housing society. The individual payments of the actual amounts for holding an asset deserved to be indexed from the date of actual payment of each installment. Thus, instead of extreme stands from the revenue and the taxpayer, the Tribunal held that indexation should have been allowed from the date of payment of each installment. The Tax Officer was directed to re-work LTCG by providing indexed cost of acquisition qua the actual payment of each installment.

Anuradha Mathur v. ACIT [TS-222-ITAT-2014 (Delhi- Tribunal)]

Indirect Taxes

CENVAT:

Case Laws

- In Hino Motors Sales India Pvt Ltd v CCE (2014 (299) ELT 49) and Bhushan Steel Ltd v CCE (2014 (299) ELT 254), the Mumbai and Delhi Tribunals held that once the duty on final products has been accepted by the department, CENVAT credit availed need not be reversed even if the activity does not amount to manufacture.
- In Midi Extrusions Ltd v CCE (2014 (302) ELT 308), the Delhi Tribunal held that CENVAT credit on laptop used for managing the functionalities of machines could not be denied for the reason that such laptop was movable and hence not capital goods.

SERVICE TAX:

Case Laws

- In Gap International Sourcing (India) Pvt Ltd v CST (2014-TIOL-465-CESTAT-DEL), the Delhi Tribunal held that services rendered to a foreign entity relating to procurement of goods, recommending manufacturing process and vendors, reporting the status of manufacture, analyzing samples, inspecting export consignments and issuing inspection certificates are 'business auxiliary services' (BAS), though provided in India are used by the foreign entity for its business outside India, hence qualify as export of services.
- In JP Transformers v CCEST (2014-TIOL-664-CESTAT-DEL), the Delhi Tribunal held that in a repair and maintenance contract, where the value of goods/ material and the value of labour/ services had been separately disclosed and the applicable excise duty/VAT charged on the value of goods, service tax would be payable only on the value of labour/ service charges.

VAT:

Case Laws

- The Constitution Bench of Supreme Court in Kone Elevators India Pvt Ltd v State of Tamilnadu (Writ Petition No 232 of 2005) held that the transaction of manufacture, supply and installation of lifts was a works contract and not a contract for sale of lifts. The Supreme Court ('SC') has reversed the principles laid down by a three member bench of the SC in the case of Kone Elevator India Pvt Ltd reported at (2005-3-SCC 389). The SC reiterated the position of law that pursuant to the 46th amendment to the Constitution of India, 'Test of dominant nature'/ 'Test of degree of intention' was not applicable in case of composite contracts involving supply of goods and provision of labour/ services, which fell within the ambit of clause 29A(b) of Article 366 of the Constitution.

Notifications & Circular

Maharashtra

Electronic filing of sales and purchase listing in annexure(s) J1 and J2 has been made mandatory along with filing of periodical returns for the tax period starting April 2014.

(Trade Circular No. 9T of 2014 dated 25 March, 2014)

Indirect Taxes

Tamil Nadu

- Effective 1 April, 2014, the time limit for filing monthly returns has been extended from 12th day of the subsequent month to 20th day of the subsequent month for dealers having taxable turnover of INR 2000 Mn or more during the preceding year.
- Effective 1 April, 2014, electronic payment of tax has been made mandatory for dealers having taxable turnover of more than INR 20 Mn during the preceding year.

(Notification No. 30 dated 25 March, 2014)

Karnataka

- Electronic filing of sales/ stock transfer and purchase/ receipt listing in various annexure(s) have been made mandatory for dealers having total turnover of INR 5 Mn or more during the FY 2013-14 or in any subsequent year, along with periodical returns for the tax period starting May 2014.

(Notification No. CCW/CR 44/2013-14 dated 29 April, 2014)

Customs:

Case Laws

- The Mumbai Tribunal, in R S Merchant v CC (2014 (302) ELT 101), held that the transaction value of wholesale importer cannot be rejected only basis comparison with the retail imports as the goods are not of same commercial value and quality as required in terms of the erstwhile Customs Valuation (Determination of Price of Imported Goods) Rules, 1988.
- In Rollwell Forge Ltd v CC (2014-TIOL-414-CESTAT-AHM), the Ahmedabad Tribunal held that duty drawback granted on re-export of imported goods cannot be demanded when goods were cleared after verification of identity of imported goods.
- In a revision application before Department of Revenue in KLT Automotive and Tabular Products Ltd (2014 (303) ELT 294), the Government of India held that duty drawback for indigenous manufacture in terms of section 75 of the Customs Act, 1962 ('the Act) was not allowable where the imported and exported goods were found to be the same and the imported goods were not subjected to any processing in India. In such case, claim would have been filed under section 74 of the Act.

Foreign Trade Policy

- The Bangalore Tribunal, in Milsoft Technologies Ltd v CC (2014 (302) ELT 110), held that liability to pay customs duty on imported capital goods along with interest arises in case of non-extension of letter of permission due to non-fulfilment of export obligation.
- In Patel Engineering Ltd v CC (2014 (301) ELT 370), the Mumbai Tribunal held that goods are liable for confiscation and benefit under exemption notification providing exemption under Export Promotion Capital Goods scheme is not eligible in case of mis-declaration of the year of manufacture of second hand machinery by the importer to overcome the restriction of import of more than 10 year old machinery.

Upcoming A & D Event

Date	Event	Venue
14-20 July, 2014	Farnborough Airshow	Farnborough, England
17-19 July, 2014	ASSOCHAM National Conference on POST BUDGET DISCUSSION	New Delhi and Mumbai, India
17^{t} July, 2014	DEFTECH 2014	New Delhi, India
5-6 October 2014	Aerospace & Defence Manufacturing Summit 2014	Las Vegas, NV

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Contact Us

Dhiraj Mathur
Aerospace & Defence Leader
+91 124 330 6837
dhiraj.mathur@in.pwc.com

New Delhi/Gurgaon

Col. Rajiv Chib
+ 91 124 330 6528
rajiv.chib@in.pwc.com

Tejasvi Gupta
+ 91 124 330 6793
tejasvi.gupta@in.pwc.com

Bangalore

Indraneel Roy Choudhary
Executive Director
+91 80 4079 6001
indraneel.r.chaudhury@in.pwc.com

Chetan Anand
+91 080 40796030
chetan.anand@in.pwc.com