Be in the know

India Spectrum

Volume 6 Issue 3
March 2013

pwc

In this issue

Editorial

We are delighted to present another issue of India Spectrum.

Setting the tone for expectations for the next financial year from the Budget, the Finance Minister (FM) P Chidambaram emphasised that the proposed fiscal consolidation roadmap aims to promote foreign investment and support the domestic economy. The FM expects that against the backdrop of a slowdown in both global as well as domestic economic growth, the Budget will lay the foundation for a sustainable re-balancing of the government finances.

On the Indian economic front, the government set up the Financial Sector Legislative Reforms Commission (FSLRC) as a proposed super-regulatory body, integrating existing financial regulators such as the Securities and Exchange Board of India, Forward Markets Commission, Insurance Regulatory and Development Authority and Pension Fund Regulatory and Development Authority into a unified agency. The FSLRC seeks to reform the financial sector regulations by introducing an Indian Financial Code Bill that will pave the way for the creation of a unified financial regulator and limit the role of the Reserve Bank of India (RBI). The gross domestic product growth forecast for FY 2013-14 has been estimated at 6% in view of the challenging domestic and international environment. The RBI lowered the repo rate by 25 basis points for the second time in the last three months and left the cash reserve ratio untouched in its monetary policy to help revive the economic growth.

On the global economic front, the Germans have been the first to pass a law on copyright tax, which will force search engines and news aggregators to pay royalties to publishers for providing news snippets. This step will compel all search engines to pay for the content they display. France is contemplating a similar law that will tax search engines, and also tax internet companies for data mining based on collating personal information of their users.

Ketan Dalal

Shyamal Mukherjee

On the regulatory front, the RBI has now permitted all entities including those under investigation by law-enforcing agencies such as the Directorate of Enforcement, to avail external commercial borrowings under the automatic route. This has been permitted irrespective of the entity having any pending investigations, adjudications or appeals before the enforcing agencies without prejudice to the outcome.

On the judicial front, the Delhi bench of the Income-Tax Appellate Tribunal (the Tribunal) in the case of Qualcomm Incorporated held that the payment of royalty by a non-resident to another non-resident for the transfer of patented technology for the manufacture of equipment sold to Indian telecom carriers was not taxable in India. In another ruling, the Andhra Pradesh High Court, in the case of Sanofi Pasteur Holding SA held that capital gains arising on the transfer of shares between two foreign companies, of a company having an underlying Indian capital asset, was not taxable in India under the India-France tax treaty. It also held that the retrospective amendments introduced by the Finance Act, 2012 do not seek to override the tax treaty. More importantly, the High Court refused to lift the corporate veil, holding that the foreign investee company was an independent operating company. See page no 7 and 9 for a detailed analysis of these rulings.

We hope you enjoy this issue. As always, we look forward to hearing from you.

Ketan Dalal and Shyamal Mukherjee
Joint Leaders, Tax and Regulatory Services

Analysing tax issues
Corporate tax

Royalty

Royalty income of a non-resident taxable on receipt basis under the India-USA tax treaty

The assessee, a tax resident of the US, had received royalty from its Indian associated enterprises (AEs) on which tax was withheld according to the rate in the India-US Double Taxation Avoidance Agreement (the tax treaty). The assessee submitted its return declaring royalty income on cash receipt basis and claimed the corresponding withholding tax credit. The tax return was accepted during the course of scrutiny proceedings. Subsequently, the TO initiated re-assessment proceedings on the basis that the accrued royalty was not offered to tax and the withholding tax rate applicable was higher than that considered by the assessee.

The Dispute Resolution Panel (DRP) confirmed the order of the TO.

The assessee appealed before the Income-tax Appellate Tribunal (the Tribunal) contending that all the facts relating to royalty income were submitted during the course of scrutiny assessment proceedings. The royalty income offered to tax on 'cash receipt basis' was accepted by the TO. The re-assessment proceedings initiated by the TO were a result of a change in opinion by the TO and were not valid.

Regarding the taxability of the royalty income, the Tribunal relied on the decision in the case of DIT *v.* Siemens Aktiengesellschaft [TS-795-HC-2012(Bom)] where it was held that royalty income received by a non-resident was taxable in the year of receipt under the India-Germany tax treaty. The words used in the tax treaty are **paid** and **received**. Hence, the royalty income would be taxable on a receipt basis and not on accrual basis.

Regarding the validity of the re-assessment proceedings, the Tribunal upheld the assessee's contention that all facts relating to the taxability of royalty income were submitted to the TO at the time of scrutiny assessment. A Commissioner of Income-tax (Appeals) (CIT(A)) order for AY 2003-04 accepting the 'cash basis of accounting' for royalty was received before the issue of the notice under section 147 of the Income-tax Act, 1961 (the Act). Therefore, re-assessment proceedings were not valid.

Johnson & Johnson *v.* ADIT(IT) [TS-39-ITAT-2013(Mum)]

Client co-ordination fees are not in the nature of royalty and hence not taxable in India

Euro RSCG Worldwide Inc, a US-based assessee company, acts as a communicating interface between multinational clients and worldwide Euro Group entities. The assessee provided assistance to Euro RSCG Advertising Pvt Ltd (Euro), an Indian entity, for which it had received creative fees, database fees and client co-ordination fees.

The assessee treated the fees relating to creative, database and client co-ordination as business income under Article 7 of the India-US tax treaty and as not taxable in India, as the assessee did not have a PE in India. The TO passed a non-speaking order treating the fees to be in the nature of royalty under Article 12 of the tax treaty.

The CIT(A) upheld the contentions of the assessee and held that as the assessee did not have a PE in India, the client co-ordination fees were not taxable as business income. The CIT(A) held that the creative and database fees were paid for technical and consultancy services and were taxable as fees for included services (FIS) according to Article 12 of the tax treaty.

The assessee appealed to the Tribunal against the additions made with respect to client co-ordination fees. However, the assessee accepted the CIT(A)'s addition with respect to the creative and database fees.

The Tribunal held that client co-ordination fees could not be considered royalty since the services rendered by the assessee did not involve the use of a plan, secret formula or process. Hence, as the assessee did not have a PE in India, the client co-ordination fees were not taxable in India as business income.

DDIT *v.* Euro RSGC Worldwide Inc. [TS-852-ITAT-2012(Mum)]

Royalty received by a foreign company from foreign OEMs not taxable in India

The assessee, Qualcomm, incorporated in the US, is engaged in the development and licensing of CDMA technology. It had entered into an agreement for the licensing of its patents with original equipment manufacturers (OEMs) based outside India that are non- resident. The OEMs used the patents to manufacture handsets and network equipment outside India which were sold to customers worldwide, including in India. The Indian carriers sold the handsets and network equipment to end-users of telecom services in India. Royalty was payable by the OEMs to Qualcomm for the use of patented technology to manufacture the products.

The TO held that the royalty income relating to the manufacture of handsets sold to customers in India would be taxable in India under section 9(1)(vi)(c) of the Act. The CIT(A) upheld the TO's additions and further made additions with respect to the royalty income received for the network equipment.

The assessee appealed before the Tribunal and contended that the patents for manufacturing the handsets and the network equipment were used outside India. The title in the goods also passed outside India and hence the royalty income on the network equipment was not taxable in India.

The Tribunal reversed the order of the CIT(A) and held that the OEMs did not carry out business operations in India. Sale to Indian customers without operations in India would result in 'business with India' and not 'business in India'. The title in the goods sold to the Indian carriers by OEMs also passed outside India. Therefore, in the absence of any manufacturing operations carried out in India, the source of royalty was the place where the patent was exploited, i.e. the place of the manufacturing activity. Accordingly, the royalty income for the licensing of patents by a foreign assessee without any manufacturing operation would not be taxable as royalty in India.

Qualcomm Incorporated *v.* ADIT [TS-35-ITAT-2013(Del)]

Fees for technical services

Consideration for laboratory testing services conducted through automatic machines not fees for technical services

The assessee, a manufacturer of circuit breakers, had availed laboratory testing services for the purpose of certification from P Ltd, a resident of Germany. It had submitted an application to the TO under section 195(2) of the Act while making payment to P Ltd without withholding tax. It contended that since the testing services were rendered and paid for, no income accrued to P Ltd in India was made outside India. Furthermore, the services availed were standard in nature without involving any technical skill or human intervention and were not fees for technical services (FTS) under section 9(1)(vii) of the Act.

The TO held that the services provided by P Ltd were highly technical in nature and hence the payment was taxable as FTS under section 9(1)(vii) of the Act.

The CIT(A) confirmed the order of the TO on the following grounds:

- As the testing of the circuit breakers was done using sophisticated equipment, the payment was covered within the meaning of FTS under section 9(1)(vii) of the Act.
- As the services received were utilised in the assessee's business in India and for earning income from a source within India, they were to be considered services rendered in India and hence taxable in India.

The Tribunal observed that the circuit breakers manufactured by the assessee were sent on a sample basis for testing. Once cleared, a certificate was issued by P Ltd.

The Tribunal held that under Explanation 2 to section 9(1)(vi) of the Act, FTS means any consideration for the rendering of any managerial, technical or consultancy services. Since the expression "technical" has not been defined in the Act, it is to be understood in the same sense of its surrounding words i.e. managerial and consultancy.

Both the expressions "managerial" and "consultancy" appearing in the definition of FTS under Explanation 2 to section 9(1)(vi) of the Act involve a human element. Therefore, the expression "technical" appearing in the same definition would also have to be construed as involving a human element.

The laboratory tests were carried out through automatic machines, under the observation of technical experts and without human intervention. Therefore, the usage of technology or machines developed by humans and put to operation automatically, without much of human interface or intervention, cannot be considered technical services.

Mere issue of certificates by humans after tests carried out by automatic machines cannot be construed as the rendering of technical services. Accordingly, the laboratory charges were not taxable as FTS and there was no requirement to withhold tax on payments made to P Ltd.

Siemens Ltd. *v.* CIT [TS-51-ITAT-2013(Mum)]

IT support service fees not taxable as FTS

The assessee is a tax resident of Australia. It was a global IT support centre for the Asia-Pacific region and was responsible for providing IT support services for group companies in the Asia-Pacific region. It provided IT support services in the nature of helpdesk support, user administration, data storage, data processing and maintenance and control of the global IT infrastructure.

During the year, the assessee received consideration from its Indian AEs for providing the services. In its tax return, the assessee treated the consideration received from its Indian AE as not taxable as it was not FTS under the tax treaty.

The TO treated the IT support fee as FTS taxable under section 9(1)(vii) of the Act as well as under Article 12(3) of the tax treaty between India and Australia. The DRP upheld the order of the TO.

The Tribunal held that the assessee was providing IT helpdesk support, back-up related services and networking-related services but had neither imparted any technical know-how, skill, process nor transferred any technical plan or design. The agreement did not suggest that the assessee had made available the required technical know-how to the Indian company.

It held that the expression "make available" in the India-Australia Tax Treaty is used in the context of "supplying or transferring technical knowledge or technology to another". Relying on the decision in the case of CIT *v.* De Beers India Minerals (P) Ltd [2012] 72 DTR 82 (Kar), it was held that the technology would be considered as 'made available' only when the person receiving the services is able to apply the technology without further assistance from the service provider.

It was noted that the assessee had only provided back-up and IT support services to solve the IT-related problems of its Indian affiliates. Hence, although the services were in the nature of technical services under section 9(1)(vii) of the Act, they were not covered by Article 12(3)(g) of the tax treaty.

Therefore, it was held that the IT-related services provided by the assessee were not FTS, and hence, not taxable in India.

Sandvik Australia Pty Ltd *v.* DDIT [TS-46-ITAT-2013(Pune)]

Indirect transfer

Capital gains on transfer of shares between two foreign companies with an underlying Indian asset not taxable under India-France treaty

SBL, an Indian company, is the 100% subsidiary of ShanH which is a French company held by two other French companies, MA and GIMD. A share purchase agreement was entered into between MA/GIMD (the sellers) and Sanofi (the assessee-buyer) for the alienation of shares of ShanH.

The revenue authorities treated the assessee as an assessee-in-default for not withholding tax on payments made to MA and GIMD on the transfer of shares in ShanH. MA and GIMD made an application to the AAR to determine the taxability arising on the transfer of ShanH shares to the assessee. The AAR ruled that capital gains were taxable in India under Article 14(5) of the India-France tax treaty.

Aggrieved by the ruling of AAR, the assessee along with MA/GIMD filed a writ petition before the high court.

The revenue authorities contended that ShanH was not an independent company but merely a nominee of MA and GIMD, the legal and beneficial owners of SBL. The alienation of shares and the transfer of controlling interest would be taxable in India as capital gains under Article 14(5) of the tax treaty.

The assessee contended that ShanH was an investment company with commercial substance of investment in SBL. It had a separate board of directors and was filing separate tax returns and hence was not introduced to serve as a tax avoidance scheme. The controlling interest by ShanH over SBL was not a separate asset and was independent of the transfer of shares. The capital gains were taxable only in France. If the controlling interest was viewed as a separate asset, it would be taxable in France and not in India.

The order of the High Court was as follows:

Lifting of corporate veil of ShanH

The court observed that ShanH was independent and not a nominee company of MA and GIMD. It was receiving dividends on its SBL shareholding. Hence, it could not be conceived as a scheme for avoiding capital gains liability and there was no case for piercing or lifting the corporate veil of ShanH.

Taxability of transaction

The transaction under consideration was for the transfer and alienation of ShanH's holding in SBL in favour of the assessee. Therefore, the value of the controlling interest of ShanH over SBL was incidental to its shareholding and was not a separate asset. Hence, it was held that the transaction was taxable in France and not in India under the provisions of the Act and the tax treaty.

Sanofi as an assessee-in-default

The transaction of the transfer of SBL's shares was taxable in France and not in India. Hence, the liability of the assessee to withhold tax on payments made to MA and GIMD for the transfer of shares does not arise. Therefore, the assessee cannot be treated as an assessee-in-default under section 201 of the Act for not withholding tax.

Retrospective amendments

The transaction was for the alienation of 100% shares of ShanH. The capital gains were taxable in France under the provisions of Article 14(5) of the tax treaty. The retrospective amendments made by Finance Act, 2012 do not seek to override the tax treaty. In the case of a conflict between the domestic law and the tax treaty, the tax treaty would prevail under section 90(2) of the Act. Therefore, in the present case, the taxability of the transaction would not be affected.

Sanofi Pasteur Holding SA *v.* The Department of Revenue [2013] 30 taxmann.com 222 (AP)

Non-compete fee

Consideration for transfer of business without any restrictive covenant on transferor to carry out similar business not taxable as a non-compete fee

The assessee company, a manufacturer of pesticides, had purchased a division of its group company Mitsu Industries Ltd (MIL). Simultaneously, a French company had acquired controlling interest of MIL by way of a Joint Venture Agreement (JVA). In addition to the consideration paid by the French company towards transfer of the controlling interest, it had also paid non-compete fees to the assessee and the promoters of the assessee's group companies.

During the relevant AY, (AY 2000-01), the assessee claimed that the non-compete fees were towards loss of a source of income and hence a capital receipt not liable to tax. However, the TO held that the non-compete fees were taxable as business income under section 28(va) of the Act.

The CIT(A) held that the non-compete fees were brought within the ambit of business income by the insertion of section 28(va) of the Act from AY 2003-04 onwards and hence would not apply to the year under consideration (i.e. AY 2000-01) in the assessee's case.

However, the CIT(A) held the non-compete fees had direct connection with the assessee's business and hence were taxable as a revenue receipt.

The Tribunal observed that non-compete fees are not an asset like a franchise, licence, goodwill, etc. It is consideration received by the transferor for abstaining from competition with respect to the business transferred in favour of the transferee. Therefore, there should be a legally binding agreement between the transferor and transferee.

It further observed that only the promoters were signatories of the JVA between the French company and MIL and hence the non-compete obligation was applicable to them. Consequently, the consideration received by the promoters being capital receipts would not be taxable.

The assessee was not a party to the JVA and there was no restrictive covenant for not carrying out the business of pesticides by the assessee. Therefore, in the absence of any loss of income on account of the existence of a restrictive covenant, the consideration received cannot be treated as non-compete fees. Therefore, the consideration was rightly taxed in the hands of the assessee as a revenue receipt.

Mitsu Ltd *v.* ACIT [TS-29-ITAT-2013(Ahd)]

Speculation loss

Loss on sale of investment in shares and securities not covered by restriction on applicable speculation loss

The assessee company was engaged in the business of manufacturing and trading. The assessee also purchased and sold shares of other companies on investment account on which it incurred a short-term capital loss for the relevant FY.

The CIT(A) and the Tribunal, after finding that the assessee was not involved in the business of sale and purchase of shares, disallowed the short-term capital loss on the basis that they were speculation losses as provided in Explanation to section 73 of the Act, which provided that if

any part of the business of a company (other than specified companies) consisted of the purchase and sale of shares of other companies, such company shall be deemed to be carrying out speculation business to the extent to which such business consisted of the purchase and sale of such shares.

The assessee preferred an appeal to the HC against the order of the Tribunal on the disallowance of short-term capital loss. On an analysis of the Explanation to section 73 of the Act, the HC noted that the condition precedent for attracting the section was that a part of the business of the assessee-company must relate to the purchase and sale of shares; and merely undertaking the purchase and sale of shares for investment was not business activity. Given that the Tribunal had factually concluded that the assessee-company was not involved in the business of purchase and sale of shares, the HC held that the condition precedent for attracting the Explanation to section 73 of the Act was absent and hence treating the loss incurred on purchase and sale of shares as speculation loss was wholly unwarranted.

Standipack Pvt Ltd *v.* CIT [2013] 350 ITR 251 (Cal)

Payments to head office or branches

Transactions of receipt, payment of interest or commission between head office and branches not assessable to tax

The assessee received interest or commission from its overseas head office (HO) and other overseas branches and paid interest or commission to them as well. The assessee did not offer the interest or commission received to tax and at the same time added it back in the computation of income. The TO held that the interest or commission received by the assessee should be charged to tax. The CIT(A) upheld the order of the TO. The assessee appealed before the Tribunal.

The revenue department relied on the Mumbai Tribunal's decision in the case of Dresdner Bank AG *v* ACIT [2007] 108 ITD 375 (Mum) and the Tribunal's order in the assessee's own case for earlier AYs. The assessee placed reliance on the Special Bench's order in the case of Sumitomo Mitsui Banking Corporation *v* DDIT [2012] 16 ITR 116 (Mum) as well as the subsequent ruling in the case of Oman International Bank SAOG *v* ACIT [2013] 55 SOT 32 (Mum), where it was held that the interest or commission received from the HO was not chargeable to tax.

The Tribunal, following the ruling of the Special Bench in the case of Sumitomo Mitsui Banking Corp (above), held that in the given case there was only one taxable entity i.e. the overseas enterprise and the permanent establishment (PE) in India was a part of the same entity. Thus, on the grounds of mutuality, interest or commission received by the Indian branch could not be charged to tax. Similarly, interest or commission paid by the Indian PE was not allowed as a deduction. The Tribunal further stated that the case of Dresdner Bank AG (above) had been considered by the Special Bench in the subsequent case of Sumitomo Mitsui Banking Corporation (above) and there could be no question of following a different view of the Division Bench in view of the Special Bench decision.

ADIT (IT) *v* Credit Agricole Indosuez [2013] 21 ITR 345 (Mum)

Personal taxes
Assessing personal tax

Case laws

Salary/perquisite

Income received by co-owners of property not to be assessed as an association of persons

There were five individuals, who had inherited agricultural land from their parents. They executed a general power of attorney in favour of one of the co-owners, appointing him to construct plinths on their joint agricultural land in the joint names of all the owners and to further lease these out to any other party on behalf of the co-owners.

All the co-owners submitted their tax returns declaring income from such co-owned property for the AY 2004-05 in the form of income from leasing out the plinth and deposited the applicable taxes. The TO issued a notice under section 148 of the Act to all the co-owners on the ground that there was an association of persons (AOP) established by the co-owners and income had escaped taxation in the hands of the AOP. The TO assessed the income from leasing out of the plinth as income from other sources in the hands of the AOP.

On appeal, the CIT(A) and the Tribunal rejected the appeal of the assessee and upheld the order of the TO.

On further appeal to the HC, the assessee claimed that they had not joined hands as an AOP for carrying out any venture. Also, there was no joint management in the form of a joint enterprise with a motive to produce income, profits or gains jointly. The assessee placed reliance on the decision in the case of CIT *v* Shiv Sagar Estate [2002] 257 ITR 59 (SC) and contended that the status of an AOP could not be fastened.

The HC, relying on the decision of the Supreme Court (SC) in case of CIT *v* Indira Balkrishna [1960] 39 ITR 546 (SC), held that in order to constitute an AOP, the individual co-owners should have joined their resources and acquired a property in the name of the AOP with common management, demonstrating a joint enterprise promoted for producing profits. Mere accrual of income jointly to more persons than one would not constitute an AOP in respect of such income. Since the co-owners had inherited the property and there was nothing to substantiate that they had acted as an AOP, the income was assessable in the hands of the individuals.

Sudhir Nagpal *v* ITO [2012] 349 ITR 636 (P&H)

Short-term capital gains on sale of shares in India by a UAE resident not taxable in India

The assessee was a resident of Dubai holding a UAE resident permit visa. The assessee earned income from interest, capital gains and house property. There were three issues in the order of the CIT(A) against which the revenue department appealed before the Tribunal.

The first issue was the taxability of interest income earned by the assessee. The assessee offered interest to tax at 12.5 % in terms of the Article 11(2)(b) of the Indo-UAE tax treaty. The TO observed that the assessee was not able to produce a tax residency certificate, and only produced a copy of his passport and driving licence, which were not sufficient evidence that he was a resident of the UAE. Accordingly, the TO held that the assessee was not eligible to claim the benefits of the tax treaty, and that the interest was liable to be taxed at 40% under the Act. The CIT(A) relied on Circular no. 728 dated 30.10 95 and decided the matter in favour of the assessee. The Tribunal upheld the order of the CIT(A).

The second issue was in respect of the taxability of short-term capital gains under the provisions of the tax treaty. The TO claimed that the benefit of the tax

treaty was not available to the assessee, as he was not liable to pay tax in the UAE on the short-term capital gains. The CIT(A) relied on the case of ADIT *v* Green Emirates Shipping and Travels [2005] 99 TTJ 988 (Mum) and Mustaq Ahmed Vakil [Tax appeal Nos. 269 of 2006-07, 104 of 2007-08 & 71 of 2008-09, order dated 24 September 2010], where it was held that the expression "liable to tax" in the contracting state does not mean that the person should actually be liable to tax in that state. It also covers cases where the state has the right to tax such persons, irrespective of whether such right is exercised or not. It was also mentioned that the provisions of the amended tax treaty were applicable in respect of income arising on or after 1 April 2008. Hence, the CIT(A) decided the matter in favour of the assessee and held that the assessee was indeed eligible to avail the benefit of the Indo–UAE tax treaty and no capital gains tax could be levied on the short-term capital gains in India. The order of the CIT(A) was upheld by the Tribunal.

Thirdly, the assessee claimed a deduction of certain maintenance and building charges paid to a co-operative society, from the rental income derived from a house property situated in India, while computing tax under section 23 of the Act. The TO rejected the claim of the assessee on the basis that deemed deduction of 30% of the net annual value under section 24 of the Act subsumed repair and maintenance expenses of all kinds, and no further deduction was to be allowed. The assessee contended that under the rental agreement with the tenant, the assessee was supposed to receive the composite rental income (including the society and maintenance charges) from the tenant and this should be reduced by the amount of service charges paid by the tenant to the assessee, for the purpose of computing income from the house property. The CIT(A) decided the matter in favour of the assessee, which was upheld by the Tribunal.

ADIT (IT) *v* Vinod Arora [2012] 139 ITD 205 (Delhi)

Structuring for companies
Mergers and acquisitions

Case laws

Brand acquisition royalty eligible for depreciation

The assessee, a pharmaceutical company, acquired three brands or trademarks from another company. In its tax return submitted for AY 2001-02, the assessee declared a loss of INR 2.75 million after claiming deduction of non-compete fees, marketing know-how fee and depreciation on royalty paid.

The TO disallowed these expenses. On appeal, the CIT(A) held the following:

- The non-compete fee was revenue expenditure since it incurred on account of commercial expediency to earn more profit, and there was no benefit of an enduring nature.
- Benefit acquired on account of marketing know-how was of an enduring nature and was capital expenditure eligible for depreciation under the Act.
- Royalty payment was incurred for acquiring a brand and hence, was eligible for depreciation.

The Tribunal upheld the order of CIT(A) with respect to the non-compete fee and depreciation on royalty payment. However, it allowed the marketing know-how fee as revenue expenditure on the basis that it enabled the assessee to facilitate and augment its profit earning capacity.

On appeal by the revenue department, the HC observed that the Tribunal passed the order on the non-compete fee without any discussion. Therefore, it remanded the matter back to the Tribunal to pass an order with reasons. Furthermore, it held that the marketing know-how would lead to improvement in the existing business and market strategy, resulting in higher sales and profitability. Hence, the marketing know-how fee was revenue expenditure. In respect of depreciation on royalty, the HC upheld the Tribunal's order and allowed it.

CIT *v* Glenmark Pharmaceutical Ltd [TS-13-HC-2013 (BOM)]

Stamp duty valuation not applicable on transfer of shares

The assessee was a shareholder in Kamala Mansion Pvt Ltd (KMPL) and owned two flats. The assessee sold shares of KMPL to a third party and offered the gains to tax as long-term capital gains. The transferee also infused an additional sum into KMPL for clearing the loans given by the assessee to KMPL.

The TO held that by transferring shares of KMPL, the assessee effectively transferred an immovable property. The TO treated the transfer as sale of land and building and held that the sale consideration should be equal to the value of immovable property adopted for stamp duty purposes under section 50C of the Act. Furthermore, the TO adjudged the infusion by the transferee into KMPL as additional consideration, and accordingly increased the sale consideration. The CIT(A) confirmed the order of the TO.

The Mumbai bench of the Tribunal held that the assessee had transferred shares of KMPL and not land and building. Furthermore, the assessee did not have full ownership of the flats, which were owned by KMPL. Considering that the provisions were deeming provisions, these had to be interpreted strictly. Since the provisions of section 50C of the Act did not apply to transfer of shares, the Tribunal upheld the computation of the assessee.

In respect of the additional consideration, the Tribunal observed that the money was infused in KMPL by the transferee to repay the liabilities towards the assessee. Accordingly, it held that there was no additional consideration for the assessee.

Irfan Abdul Kader Fazlani *v* ACIT [TS -21-ITAT-2013 (MUM)]

Conditions under section 72A of the Act to be analysed qua each amalgamating company separately in the case of multiple amalgamations

During AY 2004-05, the assessee got amalgamated with two separate companies - Bayer TPU Pvt Ltd (BTPU) and Bayer Specialty Products Pvt Ltd (BSPPL). The assessee initially claimed set off of accumulated loss of INR 125.3 million under section 72A of the Act with respect to the two amalgamating companies, but later on, it reduced the set-off of loss to INR 77.30 million on account of the amalgamation of BTPU alone.

The TO disallowed the set-off of losses on the following grounds:

- The assessee disposed of 43.79% of the assets of amalgamating company in the first year and thus, failed to hold 3/4th of the book value of fixed assets continuously for five years as required under section 72A of the Act.
- The assessee failed to achieve 50% of the installed capacity of the amalgamating company under Rule 9C(a) of the Income-tax Rules, 1962. The assessee also failed to substantiate that the amalgamation was to ensure the revival of business of the amalgamating company, or to submit a certificate of particulars of production in Form No. 62.

The CIT(A) upheld the TO's order. On an appeal filed by the assessee, the Tribunal held as follows:

1. The TO erred in calculating the percentage of assets disposed of at 43.79% by including disposal of assets of BSPPL along with BTPU. The Tribunal held that the conditions under section 72A of the Act related to the amalgamating company whose losses were sought to be set off and carried forward by the amalgamated company. If there were two or more amalgamations in a year, then the amalgamated company was required to prove satisfaction of these conditions for availing benefit under section 72A of the Act in respect of each such company separately.

2. The assessee could achieve 50% of the installed capacity in any year before the end of four years from the date of amalgamation.

3. Revival of business could only be ensured if the assessee achieved the desired level of production.

4. Furthermore, the requirement of submitting Form No. 62 arises for the first time only when the amalgamated company fulfils the condition of achieving 50% installed capacity within four years from the date of amalgamation.

Since the year under consideration was not the fourth year from the date of amalgamation and the assessee did not achieve the desired production level, both these conditions were premature and not required to be examined at this stage.

Accordingly, the Tribunal ruled in favour of the assessee and allowed set off and carry forward of the losses.

Bayer Material Science Pvt Ltd *v* ACIT [TS-55-ITAT-2013 (Mum)]

Gains arising on sale of shares, originally held as stock-in-trade, taxable as capital gains and not as business income

The assessee company was engaged in the business of investment and also dealt in shares and securities. The assessee sold some shares held as investment in AY 2006-07. These shares were originally held by the assessee as stock-in-trade and subsequently converted into investment in 2002 and 2004. The assessee declared income from sale of these shares under the head 'profits and gains of profession' as well as 'capital gains'.

The TO held that the entire gains arising from sale of shares had to be treated as business income.

The CIT(A) allowed the appeal of the assessee and held that it was reasonable and logical to treat the gains as business income until the date of conversion of the shares into investment and thereafter as capital gains until sale.

The Tribunal observed that the assessee had shown the said shares as investment in its books of account and held that it was open to a trader to hold shares as stock-in-trade as well as investments. Accordingly, the gains arising out of the sale of such shares held as investment were to be assessed under the head capital gains and not under the head business profits.

The HC held that there was no question of law for its consideration and accordingly, dismissed the appeal.

CIT *v* Yatish Trading Co Pvt Ltd [TS-38-HC-2013(Bom)]

Pricing appropriately
Transfer pricing

Prelude

With the conclusion of the eighth round of transfer pricing audits, taxpayers are faced with the question of either following the conventional litigation route before the Commissioner of Income-tax (Appeals) (CIT(A)) or objecting the draft order of the assessing officer (AO) before the Dispute Resolution Panel (DRP or Panel). The experience of the taxpayers with the DRP in the previous years has been rather disappointing. However, enabling the orders of the Panel to be appealed by the Revenue would hopefully enable the DRP to arrive at negotiated settlements without being tied down by internal constraints. The Budget 2013-14 has brought forth a new wave of anticipation for safe harbours, which the Finance Minister expects to be promulgated in April. The first batch of applications for advance pricing agreements (APA) are also due to be filed with the APA authorities by the end of March, in order to cover financial year 2013-14.

In the meanwhile, Income-tax Appellate Tribunals (the Tribunals) across India were engaged in issuing transfer pricing rulings, some of which surprisingly differed with or distinguished the observations of the Tribunals in earlier similar case proceedings. For the benefit of readers we have, in this communiqué, provided a brief of the recent rulings of the Tribunal and also our observations in the light of earlier rulings of the Tribunal in similar cases.

Delhi Tribunal – Upheld comparable uncontrolled method to be the most appropriate method for testing the arm's length price of the international transactions relating to payment of management services and professional fees.

The taxpayer was engaged in the business of manufacturing air brake sets of passenger car and wagon coaches, shock absorbers of passenger cars and locomotives, distributor valves, computer control break systems, tread break unit and brake accessories in India. The taxpayer's business was segregated into manufacturing and distribution segments. Besides other international transactions with its associated enterprises (AEs), the taxpayers' transactions included payments towards management fee, professional fee and SAP consultancy services. The taxpayer in its transfer pricing documentation had aggregated all of the above transactions under the manufacturing and distributions segments and adopted transactional net margin method (TNMM) as the most appropriate method (MAM). During the course of assessment proceedings, the transfer pricing officer (TPO) concluded that TNMM cannot be accepted as the MAM and proposed an adjustment to the transfer price of the taxpayer by adopting comparable uncontrolled price (CUP) method. On appeal, the DRP upheld the adjustments made by the TPO. Aggrieved, the taxpayer appealed before the Tribunal.

On appeal, the Tribunal ruled:

- The transactions relating of payment of management fee, professional fees and SAP consultancy fee are distinguishable and separate international transactions carried by the taxpayer with its AEs and each and every transaction was required to be benchmarked separately;
- Taxpayer had not demonstrated how these transactions were closely linked with each other nor had demonstrated how the transaction-by-transaction approach in this case was not possible;

- CUP method was the most direct method for determining arm's length price (ALP) and thus rejected the TNMM approach adopted by the tax payer in the TP documentation;
- For payment of management fee and professional consultancy fee, taxpayer had not demonstrated that there has been any tangible benefit received by carrying such international transactions with the AEs.
- Tribunal accepted the taxpayer's contention that the TPO cannot question the business expediency of expenses incurred.

Based on the evidence provided by the taxpayer, the Tribunal held that the payment of SAP consultancy fee was at arm's length and directed the TPO to delete the adjustment on this account.

Knorr-Bremse India Pvt. Ltd. *v.* ACIT [TS-700-ITAT-2012(DEL)-TP]

Editor's Note: The Tribunal in its above decision has deviated from the principles laid down by the Mumbai bench of the Tribunal in the case of Cabot India Ltd. v. DCIT [TS-242-ITAT-2011(Mum)] wherein the CUP method was not considered appropriate for benchmarking transactions involving unique services or intangibles. In the above case, the Tribunal has not discussed on the nature of services received by the taxpayer. The Tribunal has also deviated from the principles laid down by its coordinate bench in the case of McCann Erickson India Pvt. Ltd *v.* Addl. CIT [2012] 24 taxmann.com 21 (Delhi) wherein the TNMM was considered appropriate for benchmarking payment of management services fee. In questioning the benefits received from services, the Tribunal has deviated from the principles laid down by the Mumbai bench in Dresser-Rand India Pvt. Ltd. v. Addl. CIT [TS-510-ITAT-2011(Mum)] wherein it was held that benefit derived from a transaction in the form of services received is irrelevant in determining the ALP of the transaction and only the appropriateness of the price of such transaction is to be tested. However, it is to be noted that for testing the ALP, the services need to be received by the taxpayer in the first instance. Moreover, it was established in the case of McCann Erickson India Pvt. Ltd (above) that only a business expert can evaluate the true and intrinsic value of services received and value of services cannot be taken as "NIL" by the AO or the TPO.

Mumbai Tribunal – High turnover filter not a basis for eliminating companies from the comparability analysis

The taxpayer was engaged in rendering software programming services to its AEs and had adopted TNMM as the most appropriate method to test the ALP. During the assessment proceedings, the TPO proposed an adjustment to the transfer price of the taxpayer by conducting a fresh comparability analysis and rejected the exclusion of one-time employee stock option plan (ESOP) costs, which was claimed as non-operating cost by the taxpayer and sought to be amortised over a multiple-year period. On appeal, the DRP upheld the adjustment made by the TPO. Aggrieved, the taxpayer appealed before the Tribunal.

On appeal, the Tribunal ruled:

- Economies of scale is not a relevant factor to arrive at the final set of comparable for service providers and thus high turnover filter was not an appropriate filter on the basis that there was no linear relationship between the margins and the turnover of the comparables;
- Consolidated financial statements cannot be adopted for arriving at comparables, as the financial results

reflect the profit from operations of different geographies;

- Working capital adjustment was to be provided to the taxpayer even though the adjustment was not claimed at the time of preparation of transfer pricing study by the taxpayer;
- One-time payment towards ESOP was an extraordinary expense and cannot be considered as a part of operating cost while arriving at the margin of the taxpayer as the taxpayer had amortised this one-time cost over the subsequent five year period which was reduced from the profit of the taxpayer for the purpose of computation of transfer pricing adjustment

CapGemini India Pvt Ltd. *v.* ACIT [TS-45-ITAT-2013(Mum)-TP]

Editor's Note: The Tribunal in its above decision has deviated from the principles laid down by the Bangalore Tribunal in the case of Trilogy E-Business Software India Pvt. Ltd. *v.* Dy. CIT [TS-748-ITAT-2012(Bang)-TP] , Dun and Bradstreet and Genisys Integrating systems India Pvt. Ltd. *v.* DCIT [2012] 20 taxmann.com 715 (Bang.) wherein it was held that the turnover filter was an appropriate filter to eliminate companies whose scale of operations significantly differed from that of the taxpayer.

Chennai Tribunal – It is beyond the powers of the AO to make an adjustment to the transfer price of the taxpayer, whilst the transaction has been accepted to be at arm's length by the TPO

The taxpayer was engaged in the business of production and sale of pasteurised crab meat. The taxpayer had adopted cost plus method to determine the ALP of the international transactions with its AEs. During the course of assessment proceedings, the TPO did not propose any adjustment as transfer price of the taxpayer sales to its AEs was greater than the ALP of sales computed by the TPO. However, the AO was of the opinion that the transfer price to the extent it was more than ALP was in "excess" and accordingly denied exemption benefit on such excess export value and taxed the same as income from other sources. On appeal, the CIT(A) deleted the addition made by the AO. Aggrieved, the Revenue appealed before the Tribunal.

On appeal, the Tribunal ruled:

- Since the TPO had accepted the price of the international transaction of the tax payer to be at arm's length, the AO was not required to make any transfer pricing adjustment;
- Emphasis was placed on section 92(3) of the Income-tax Act, 1961 which stated that if the determination of ALP has the effect of reducing income or increasing the loss, the same has to be ignored;
- If the excess income is on account of sale to AE, it is business income and thus cannot be classified under the head income from other sources.

Handy Waterbase India Pvt. Ltd. *v.* ACIT [TS-745-ITAT-2012(CHNY)-TP]

Taxing of goods and services
Indirect taxes

Case laws

VAT, sales tax, entry tax and professional tax

Grant of right to use trade mark under a franchise arrangement is liable to value added tax as deemed sale

The Kerala HC has held that grant of the right to use a trademark under a franchise arrangement against the payment of royalty is liable to sales tax as a deemed sale under the value added tax (VAT) laws. This position remains the same irrespective of whether the assessee has paid service tax on the transaction.

Malabar Gold Ltd *v* Commercial Tax Officer [2013] 44 PHT 1 (Ker)

Notification or circular

Transfer of right to use of feature films exempted from tax under Andhra Pradesh VAT

Effective from 11 January 2013 the transfer of the right to use feature films, whether in digital form or in physical form, by film producers to distributors has been exempted from tax.

Notification GOMs no 25 dated 11 January 2013

Case laws

CENVAT

Expenses incurred up to the port of export form part of transaction value

In the revision petition filed before the revenue department, the Indian government held that when the goods are exported on a free on board (FOB) basis, all expenses incurred up to the port of export are part of the transaction value.

Nov Sara India Pvt Ltd [2012] (286) ELT (461)

Central value added tax credit admissible on input used in the exempted final product exported outside India

The Mumbai Central Excise and Service Tax Appellate tribunal (CESTAT) has held that the central value added tax (CENVAT) credit is admissible on an input used in an exempted final product which is exported outside India.

Mahindra & Mahindra Ltd *v* CCE [2012] 286 ELT 369 (Mum)

Case laws

Service tax

Payment of pre-deposit by way of debit to the CENVAT credit balance has been allowed

The Bangalore CESTAT has held that while there is no specific bar in the provisions of law, as a matter of practice payment of pre-deposit by way of debit to the CENVAT credit balance has been allowed.

VPR Mining Infrastructure Pvt Ltd *v* CCCE & ST [2012] TIOL 1914 (Bang)

Sharing of employee costs between two sister concerns does not mean that one concern is rendering services to the other

The Delhi CESTAT has held that where two sister concerns share the services of the same office personnel and the related expenses, merely because of the fact that payments to employees are made by one concern followed by an inter-company settlement of expenses does not mean that one concern is rendering services to the other. Such payments cannot be taxed as consideration for supply of manpower services.

Paramount Communication Ltd *v* CCE [2012] 287 ELT 213 (Delhi)

Case laws

Customs or foreign trade policy

Original transaction value at the time of export cannot form the basis of levy of customs duty at the time of re-import of such goods

The Delhi CESTAT has held that the original transaction value at the time of export cannot form the basis of levy

of customs duty at the time of re-import of such goods rejected as defective by the overseas buyer. This because the Customs Valuation Rules deal with only first time import of goods and not re-import of defective goods.

CC *v* Enkay (India) Rubber Co Ltd [2012] 286 ELT 699 (Delhi)

Bar of unjust enrichment is not applicable on refund claim of cash security in relation to goods imported under project import

The Mumbai CESTAT has held that the bar of unjust enrichment is not applicable on refund claim of cash security post finalisation of assessment in the case of goods imported under project import, as the test of unjust enrichment applies to duty and interest thereon but not to cash securities.

IDMC Ltd *v* CC [2012] TIOL (1969) (Mum)

Countervailing duty not payable on a maximum retail sale price basis when goods imported into India for manufacturing activity

The Mumbai CESTAT has held that the importer is not liable to pay countervailing duty based on maximum retail sale price when the goods are imported for undertaking manufacturing activity.

Phil Marketing Services Pvt Ltd *v* CC [2012] 286 ELT 582 (Mum)

Export duty not to be levied on supply of goods made from a domestic tariff area to special economic zone

The Madras HC has held that no export duty can be levied on supplies of goods from a domestic tariff area to a special economic zone as such supplies are not covered under the definition of export or export goods in the Customs Act, 1962.

Advait Steel Rolling Mills Pvt Ltd *v* UOI [2012] 286 ELT 535 (Mad)

Notifications or circulars

Clarification issued on classification of cordless infrared devices for remote control

The central government has issued the following clarification on classification of cordless infrared devices for remote control:

- When cordless infrared devices for remote control are presented in a set for retail sale, in a manner suitable for sale directly to users without repacking, along with the principal or main device with which they are to be used, they shall be classified along with the principal or main device.
- In cases where cordless infrared devices for the remote control are presented separately, they shall be classified under the customs tariff heading (CTH) 8543.70.

Circular no 01/2013 dated 1 January 2013

Incremental exports incentive scheme introduced to incentivise incremental exports made during 1 January 2013 to 31 March 2013

The central government has introduced the incremental exports incentive scheme to incentivise incremental exports. Some of the highlights are as follows:

- The exporter is entitled to duty credit scrip at 2% of the FOB value of exports on the incremental growth made during the period 1 January 2013 to 31 March 2013 as compared to the period 1 January 2012 to 31 March 2012.
- The scheme is region specific and will cover exports to the USA, Europe and Asian countries but exclude exports to Singapore, the UAE and Hong Kong.
- The scheme is available to a company which has actually exported the goods and the export performance shall not be allowed to be transferred to any other exporter.
- These scrips are freely transferable.

- These scrips can be used for the payment of excise duty on domestic procurement.
- Proofs of landing in the designated market are to be submitted to avail benefits under the scheme along with an application in the prescribed format.

Notification no. 27 (RE-2012)/2009-2014 and public notice no. 41 (RE-2012)/2009-2014 both dated 28 December 2012

Changes introduced under incentive schemes covered under chapter 3 of the foreign trade policy

The central government has introduced the changes under incentive schemes covered under chapter 3 of the foreign trade policy which include the following:

- Five new countries i.e. New Zealand, the Cayman Islands, Latvia, Lithuania and Bulgaria have been added to the Focus Market Scheme.
- Over 100 new products including engineering, rubber, textiles, drugs and pharmaceuticals products have been added under the Focus Product Scheme.
- New markets have been incorporated under the Market Linked Focus Product Scheme for different products.

The above changes are applicable for exports made from 1 January 2013.

Public notice no 42 (RE-2012) /2009-14 dated 31 December 2012

Customs duty benefit increased on specified goods imported under India-ASEAN Free Trade Agreements and others

The central government has increased the benefit of customs duty exemption on specified goods imported from 1 January 2013 onwards under the following Free Trade Agreements (FTA) :

- India-ASEAN FTA
- India-Korea Comprehensive Economic Partnership Agreement
- India-Malaysia Comprehensive Economic Cooperation Agreement
- India-South Asian Free Trade Agreement (for specified imports from Pakistan and Sri Lanka)

Customs notification no 64/2012, 66/2012, 67/2012 and 68/2012 all dated 31 December 2012

Following the rule book
Regulatory developments

FEMA

External commercial borrowing for hotel industry - approval route

Indian companies in the hotel sector having a project size of 2.5 billion INR or more (irrespective of geographical location) can now avail external commercial borrowings (ECBs) under the approval route for repayment of outstanding rupee loan(s) availed from the domestic banking system for capital expenditure incurred earlier and/or for fresh rupee capital expenditure. The key conditions under this liberalised window are as follows:

- Maximum permissible ECB shall be higher of the following:
- 75% of the average foreign exchange earnings realised during the immediate past three financial years
  - 50% of the highest foreign exchange earnings realised in any of the immediate past three financial years.
- The monetary ceiling for an individual company or group as a whole is 3 billion USD, whereas the overall ceiling for ECB under this scheme is 10 billion USD.
- The entire facility will need to be drawn down within a month after taking the loan registration number and the ECB liability needs to be repaid only out of the foreign exchange earnings of the borrowing company.

AP (DIR Series) circular no 78 dated 21 January 2013

Exchange earner's foreign currency accounts, resident foreign currency accounts or diamond dollar account

The RBI has now removed the restriction whereby exchange earners with foreign currency, resident foreign currency and diamond dollar accounts were permitted to access the foreign exchange (forex) market for purchasing foreign exchange only after utilising the available balances in these accounts.

AP (DIR Series) circular no. 79 dated 22 January 2013

Opening of non-resident ordinary rupee accounts by Bangladesh nationals

Bangladesh nationals are now permitted to open non-resident ordinary rupee account accounts in India without the RBI's approval, provided the authorised dealer banks are satisfied that the individual holds a valid visa and residential permit issued by the foreigner registration officer.

However, opening of accounts by entities of Bangladesh ownership shall continue to be under the RBI approval route.

AP (DIR Series) circular no. 82 dated 11 February 2013

Financial services

Disclosure requirements on advances restructured by banks

The working group (WG) constituted by the RBI to review the existing prudential guidelines on restructuring of advances (with its Chairman B Mahapatra) recommended that once the higher provisions and risk weights (if applicable) on restructured advances (classified as standard either from the start or on upgrade from the non-performing asset category) revert back to the normal level on account of satisfactory performance during the prescribed period, such advances should no longer be required to be disclosed by banks as restructured accounts in the 'notes on accounts' in their annual balance sheets. However, the provision for diminution in the fair value of restructured accounts on such restructured accounts should continue to be maintained by the banks under the existing instructions. The WG also recommended that banks may be required to disclose the following:

- Details of accounts restructured on a cumulative basis excluding the standard restructured accounts which cease to attract higher provision and risk weight (if applicable)
- Provision made on restructured accounts under various categories
- Details of the movement of restructured accounts

This recommendation has been accepted. Accordingly, banks should disclose in their published annual balance sheets, under 'notes to accounts', information relating to the number and amount of advances restructured, and the amount of diminution in the fair value of the restructured advances under the format prescribed by the RBI.

RBI Circular-RBI/2012-13/409 DBOD.BP.BC. No.80/21.04.132/2012-13 dated 31 January 2013

Permission to standalone primary dealers for trading in corporate bonds

The RBI has permitted standalone primary dealers (PDs) to become members of the Securities and Exchange Board of India (SEBI) approved stock exchanges for the purpose of undertaking proprietary transactions in corporate bonds. While doing so, standalone PDs should comply with all the regulatory norms laid down by the SEBI and all the eligibility criteria or rules of stock exchanges.

RBI Circular-RBI/2012-13/412 IDMD. PCD. No.2310/14.03.05/2012-13 dated 6 February 2013

Measures to enhance the role of standalone PDs in corporate bond market

The RBI has decided to do the following:

- Allow PDs a sub-limit of 50% of net-owned funds for investment in corporate bonds within the overall permitted average fortnightly limit of 225% net-owned funds (NOF) as at the end of March of the preceding financial year for call or notice money market borrowing.
- Permit PDs to invest in Tier II bonds issued by other PDs, banks and financial institutions to the extent of 10% of the investing PD's total capital funds.
- Permit PDs to borrow to the extent of 150% of NOF as at the end of March of the preceding financial year through inter-corporate deposits.

The above guidelines are effective from 30 January 2013.

RBI Circular-RBI/2012-13/405 IDMD. PCD. No. 2223 / 14.03.05 /2012-13 dated 30 January 2013

Increase in foreign institutional investor debt limit for government and corporate debt category

The following table summarises the revised positions for foreign institutional investor (FII)/ sub-account investments in government securities and corporate debt securities

	Type of instrument	Cap (bn USD)	Restrictions				
			Initial maturity	Residual maturity	Lock-in	Investor class	Comments
1	Government debt – old	10	NA	NA	Nil	FIIs	
2	Government debt – long-term	15	NA	NA	Nil	FIIs	Investments in short-term paper such as treasury bills not permitted
3	Corporate debt- old	21	Nil	Nil	Nil	20 bn USD for FIIs 1 bn USD for qualified financial investors (QFIs)	Not available for investments in certificate deposits
4	Corporate debt– long-term	5	Nil	Nil	Nil	Nil	
5	Corporate debt– long-term infra	25					
	Sub-category						
5.a	Corporate debt long-term infra	12	Nil	15 months	Nil	FIIs	
5.b	QFI in mutual fund debt scheme which invest in infrastructure debt	3	3 years	NA	Nil	QFIs	
5.c	Investment in IDF	10	Nil	15 months	Nil	FIIs	
	Total	76					

Abbreviations used: NA = not applicable; bn = Billion
SEBI Circular-CIR/IMD/FIIC/3/2013 dated 8 February 2013

Liquidity enhancement schemes for illiquid securities in equity cash market

The SEBI has decided to permit stock exchanges to introduce liquidity enhancement schemes (LES) to enhance liquidity of illiquid securities in their equity cash market.

LES may be introduced in any of the following securities:

1. Securities having a mean impact cost greater than or equal to 2% for an order size of INR 0.1 million, where mean impact cost of the security on the stock exchange is calculated over the past 60 trading days.
2. Securities introduced for trading in the 'permitted to trade' category.
3. LES may be continued until such time as the security achieves a mean impact cost of less than 2% for an order size of o.1 million INR on the stock exchange during the last 60 trading days.
4. Discontinuation of LES for any security shall be done after advance notice of 15 days.
5. Stock exchanges may re-introduce LES on a security if the criteria as announced by the SEBI are satisfied.

The other conditions as specified in the Circular should be complied with.

SEBI Circular- CIR/MRD/DP/05/2013 dated 8 February 2013

Glossary

AAR	Authority for Advance Rulings
AE	Associated enterprise
ALP	Arm's length price
AY	Assessment year
CENVAT	Central value added tax
CESTAT	Customs, Excise and Service Tax Appellate Tribunal
CIT(A)	Commissioner of Income-tax (Appeals)
DRP	Dispute Resolution Panel
FTS	Fees for technical services
FY	Financial year
HC	High Court
JVA	Joint venture agreement
OEM	Original equipment manufacturers
RBI	The Reserve Bank of India
SAD	Special Additional Duty of Customs
SC	Supreme Court
SEBI	The Securities and Exchange Board of India
The Act	The Income-tax Act, 1961
The tax treaty	Double Taxation Avoidance Agreement
The Tribunal	The Income-tax Appellate Tribunal
TNMM	Transaction net margin method
TO	Tax officer
TPO	Transfer pricing officer
VAT	Value added tax
FIS	Fees for included services

About PwC

PwC* helps organisations and individuals create the value they're looking for. We're a network of firms in 158 countries with more than 180,000 people who are committed to delivering quality in assurance, tax and advisory services.

PwC India refers to the network of PwC firms in India, having offices in: Ahmedabad, Bangalore, Chennai, Delhi NCR, Hyderabad, Kolkata, Mumbai and Pune. For more information about PwC India's service offerings, please visit www.pwc.in.

*PwC refers to PwC India and may sometimes refer to the PwC network. Each member firm is a separate legal entity. Please see www.pwc.com/structure for further details.

You can connect with us on:

facebook.com/PwCIndia

twitter.com/PwC_IN

linkedin.com/company/pwc-india

youtube.com/pwc

Contacts

Ahmedabad
President Plaza, 1st Floor
Plot No. 36, Opposite Muktidham Derasar
Thaltej Cross Roads, S G Highway
Ahmedabad 380054
Phone: +91 79 3091 7000

Bangalore
6th Floor,Tower 'D',The Millenia
1 & 2 Murphy road,Ulsoor
Bangalore 560008
Phone: +91 80 40796000

Chennai
8th Floor, Prestige Palladium Bayan
129-140 Greams Road,
Chennai 600 006, India

Hyderabad
8-2-293/82/A/113A
Road No.36, Jubilee Hills
Hyderabad 500 034
Phone: +91 40 6624 6600

Kolkata
56 & 57, Block DN.
Ground Floor, A- Wing
Sector - V, Salt Lake.
Kolkata - 700 091, West Bengal, India
Telephone: +91-033 - 2357 9101/4400 1111
Fax: (91) 033 - 2357 2754

Mumbai
PwC House, Plot No.18/A
Gurunanak Road (Station Road)
Bandra (West)
Mumbai 400 050
Phone: +91 22 6689 1000

New Delhi /Gurgaon
Building 10, 17th Floor
Tower -C, DLF Cyber City
Gurgaon 122002
Phone: +91 124 330 6000

Pune
GF-02, Tower C
Panchshil Tech Park
Don Bosco School Road
Yerwada, Pune - 411 006
Phone: +91 20 4100 4444

www.pwc.in

AK 491- April 2013 Spectrum-March.indd
Designed by: PwC Brand and Communications, India