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In this issue

Editorial

We are delighted to bring to you the latest issue of India Spectrum.

The Finance Minister (FM) proposed amendments to the Budget proposals with a view to clear the air on some controversies and retaliate the promise of a non-adversal regime to at least foreign investors. The FM amended the Finance Bill 2013 to clarify that a tax residency certificate (TRC) would be sufficient to claim benefits under the tax treaties. While the FM also relaxed the requirement that the TRC had to contain prescribed particulars, the amendments would require taxpayers to produce such documents, etc. as maybe prescribed later. Furthermore, the FM extended the concessional withholding tax rate to the payment of interest on long-term infrastructure bonds, even in cases where the non-resident payee has not obtained a permanent account number.

On the economic front, India's index of industrial production rose to 2.5% in March 2013, thanks to output at factories, utilities and mines. Annual inflation, as measured by the wholesale price index (WPI) dropped to 4.89% in April 2013, as against 5.96% in March 2013. This is the first time since November 2009 that the inflation rate had dropped below the 5% mark. The Reserve Bank of India (RBI) in its latest monetary policy review held in March warned that high current account deficit (CAD) and inflationary expectations limited the possibility of further rate cuts. Inflation has dipped while CAD is expected to decline due to a sharp drop in gold and crude oil prices in the recent months. International gold prices have declined 11% in the past one year, while crude oil prices have declined 14% in the past one year.

There is an important and seemingly inexorable trend building around the globe. More countries, such as Chile and Ecuador, are introducing legislation on transfer pricing. With the growth of automatic information exchange within Europe, and the Foreign Account Tax Compliance regime in the US, low-tax jurisdictions

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that offer their clients secrecy are now increasingly finding their positions being challenged. As a result, structures once considered common business practice are being reviewed by both tax authorities as well as taxpayers. The Vodafone case is still holding India Inc's attention, with a possible Supreme Court review of the very concept of tax avoidance. Tax planning concerns are now reaching boardrooms, with companies like Google, Apple and Amazon all coming under the scanner for tax positions adopted, in Europe as also in their home country. Tax policy and planning undoubtedly remain high on the agenda of the regulators and the taxpayers.

The RBI has eased the external commercial-borrowing (ECB) norms by permitting oil-marketing companies to finance a part of their short-term credit requirement through overseas debt, but has kept the overall limit unchanged for the fiscal year.

On the judicial front, the Madras High Court in the case of Sakthi Finance Ltd., held that mere characterisation of an account as non-performing would not by itself be sufficient to say that there was uncertainty with regard to collection of interest income thereon. The Kolkata Bench of the Tribunal, in the case of Right Florists Pvt. Ltd., held that automated online advertising services provided by non-residents through web servers located outside India do not constitute permanent establishments (PE) in India. The consideration paid for such online-advertising is therefore neither taxable as royalty nor as fees for technical services in India. See page nos 6 and 13 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/Fees for technical services

Online advertising services provided by non-residents through web servers located outside India to not constitute PE in India

Consideration for online advertising paid to non-residents not taxable as royalty or FTS

The assessee, a florist, had paid advertising charges to Google, a tax resident of Ireland and to Yahoo, a tax resident of the US, for online advertising on their web search engines. The tax officer (TO) disallowed the advertising charges under section 40(a)(i) of the Income-tax Act, 1961 (the Act) on the basis that no tax had been withheld on the foreign remittances. The Commissioner of Income-tax (Appeals) (CIT(A)) deleted the disallowance on the basis that the absence of the non-residents' PE in India there was no withholding tax liability in India.

The Income-tax Appellate Tribunal (the Tribunal) observed that a web search engine was an automated software code (i.e. working without human intervention), designed for searching any information on the internet by entering the desired keywords. Along with the search results, the assessee's online advertising was produced *de facto*.

It held that the income of the non-resident will be taxable in India as per section 5(2)(b) of the Act if the income accrued or arose to the foreign enterprise was attributable to its business carried out in India. However, if the servers where websites were hosted were not located in India, the mere presence of the website in India does not constitute a PE or a business connection in India under the Act as well as under the tax treaty.

In Pinstorm Technologies Pvt. Ltd. *v.* ITO [2012] 24 taxmann.com 345 (Mum) and in Yahoo India Pvt. Ltd. *v.* DCIT [2012] 11 taxmann.com 431 (Mum), on a similar issue, it had been held that services rendered for the uploading and displaying of banner advertisements on its portal did not involve the use or right to use of any industrial, commercial or scientific equipment. Furthermore, the assessee had no right to access the portal. Hence the income therefrom could not be treated as a royalty under section 9(1)(vi) of the Act.

For treating the advertising as fees for technical services (FTS) under section 9(1)(vii) of the Act, the services rendered by the foreign enterprise are required to be technical in nature.

The India-Ireland double taxation avoidance agreement (the tax treaty) (relevant in the case of Google) did not have a 'make available' clause. Therefore, the definition of FTS under section 9(1)(vii) included mere rendering of any managerial, technical or consultancy services. The word 'technical' had not been defined. Therefore, it had to be interpreted with reference to the accompanying words, i.e, managerial and consultancy. Both the words involved a human element. Therefore applying the rule of *noscitur a sociis*, the word, 'technical' appearing in section 9(1)(vii) of the Act had to be construed as involving a human element. The advertising services rendered by Google, though technical in nature, were wholly automated, without any human intervention and hence not taxable as FTS in Google's hands.

In Yahoo's case, the India-US tax treaty was relevant, providing for the 'make available' clause, under which mere rendition of technical services could not be taxed as FTS unless it resulted into the transfer of technology, enabling the service recipient to make use of technical knowledge

by himself or herself, without having recourse to the service provider. Since there was no transfer of technology in the case of online advertising, this was not taxable as FTS. Therefore, in the absence of any tax withholding liability in India, the disallowance under section 40(a)(i) of the Act had to be deleted.

ITO *v.* Right Florists Pvt. Ltd. [2013] 32 taxmann.com 99 (Kolkata - Tribunal)

Corporate guarantee

Amount directly paid to bank for discharge of corporate guarantee not taxable, being a capital receipt

The assessee-company, a joint venture (JV) between an Indian business group and the Indian subsidiary of an American company, was engaged in the business of manufacturing and distributing writing instruments and stationery. It had been incurring losses. The American company had given an undertaking that the JV would be its exclusive vehicle for the said business, and that its Indian subsidiary would not compete with it there. The JV had borrowed money against a corporate guarantee from the American company and had also raised a loan from the American company as an ECB.

When the American company chose to sell its business to another one, the buyer did not want to become a party to the assessee-JV. To enable a smooth transition, the American company thought it prudent to repay the assessee's outstanding loan directly to the bank and release itself from the obligation of corporate guarantee and waived its claim to repayment of the ECB. It also deposited a sum in the assessee's bank account for repayment of certain other loans.

The TO taxed the loan repaid and loan waived on the basis that these amounts were revenue receipt as subsidy or grant-in-aid.

The CIT(A) held that the sum repaid to the banks was a capital receipt not chargeable to tax. However, the sum deposited in the assessee's bank account and the amount of repayment waived were taxed as the assessee's business income.

It was held by the Tribunal that the payment to the bank for the discharge of corporate guarantee was not paid to improve the financial position of the JV, but remitted directly to banks to discharge the holding company's own obligation under the corporate guarantee. It was not a payment for breach of contract as there was no such breach. It could not be classified as compensation either, as there was no obligation under any contract to compensate the assessee. Therefore, this payment could not be taxed in the assessee's hands.

However, the sum directly deposited into the assessee's bank account was rightly treated by the CIT(A) as the assessee's income, as the assessee had put forth no contrary explanation.

The matter of taxing the waiver of loan repayment was remitted to the TO as taxability could only be decided after examining the purpose for which the loan was raised.

Luxor Writing Instruments Pvt. Ltd. *v.* DCIT [2013] 31 taxmann.com 408 (Delhi - Trib.)

Speculative business

Transactions relating to trading of shares to be considered speculative irrespective of mode of trading

The taxpayer was a private limited company engaged in the business of share-brokering and share trading. Its main source of income was from commission and share-trading. The TO, during the course of assessment proceedings, treated the share-trading business as a speculative business, by applying the Explanation to section 73(2) of the Act, which was also confirmed by the CIT(A).

Before the Tribunal, the assessee contended that its share trading business was not speculative in nature as all transactions were delivery-based.

The Tribunal relied on CIT *v.* Lokmat Newspapers Pvt. Ltd. [2010] 322 ITR 43 (Bom.), wherein it was held that Explanation to section 73(2) of the Act deemed the assessee to be carrying on the speculation business where the assessee's business consisted of the purchase and sale of other companies' shares. Accordingly, any loss or profit computed in respect of such business would be in the nature of speculative profit or loss. Any loss in respect of speculation could be set-off only against profits from speculation, and where the whole of the loss had not been set-off, it could be carried forward.

The Explanation to section 73(2) of the Act therefore applied to an assessee being a company, irrespective of the mode of transaction i.e. delivery-based or otherwise.

Nashik Capital Financial Services Pvt. Ltd. *v.* DCIT [2013] 33 taxmann.com 190 (Pune - Trib.)

Capital gains

Profit from sale of shares held as investment to be taxed as capital gain

The assessee company was engaged in the borrowing and lending of funds. In assessment year (AY) 2003-04, it had converted shares held as stock-in-trade into investments, and part thereof were sold in AY 2004-05. Income from the sale was offered to tax as long-term capital gains.

The TO taxed income from the sale of the shares as business income on the basis that stock-in-trade was converted to investment to avoid the payment of tax at higher rates.

The CIT(A) relied on CIT *v.* Kikabhai Premchand [1953] 24 ITR 506 (SC) wherein it had been held that conversion of stock-in-trade into capital assets and *vice versa* was legally permitted. In this case, the assessee had discontinued trading in shares and its entire stock was converted into investment. Therefore, income from the sale of shares had to be taxed as long-term capital gains.

The Tribunal observed that the assessee had given a clarificatory note on converting stock into investment in its notes to accounts of the AY 2003-04. Hence, the transaction could not be treated as a sham entered into merely for the avoidance of tax. Further, in Vesta Investments and Trading Co. Pvt. Ltd. *v.* CIT [1999] 70 ITD 200 (Chd), it had been held that if shares were held both as stock-in-trade and as investments, and if separate accounts were maintained for both and if the department had accepted the sale of shares held as investments in the past, income from the sale of such shares would have to be treated as capital gains. Accordingly, the profit from the sale of shares converted into investment from stock-in-trade was taxed as capital gain and not as business income.

ACIT *v.* Superior Financial Consultancy Services Pvt. Ltd. [TS-135-ITAT-2013 (Mum)]

Sale of shares of a company not considered as transfer of 'immovable property' for purpose of capital gains tax

The taxpayer, a tax resident of Netherlands, had a wholly-owned subsidiary in India (V Ltd) engaged in developing and operating industrial parks. The business of V Ltd was notified as an 'eligible business' under section 80-IA(4)(iii) of the Act and was also entitled for exemption under section 10(23G) of the Act. The taxpayer sold its entire shareholding in V Ltd to a Singapore-based company and the long-term capital gains earned therefrom were claimed as exempt from tax in India under Article 13(4)/(5) of the India-Netherland tax treaty. It also claimed that the capital gains would be exempt under section 10(23G) of the Act.

The TO treated the assessee's shareholding in V Ltd as 'immovable property' as defined in section 269UA(d) of the Act and taxed it as capital gains under Article 13(1) of the tax treaty. It further held that the capital gains exemption under section 10(23G) of the Act was not available since the business of V Ltd was not notified under section 80-IA of the Act, when the taxpayer had invested in it.

The Tribunal held that the definition of 'immovable property' provided under section 269UA(d) of the Act was applicable only for the purpose of section 2(47)(v)/(vi) of the Act which covers transactions where the shareholder is entitled to enjoy the property. The taxpayer in this case had no right to enjoy V Ltd's business property. Therefore, that definition was not applicable. Furthermore, for applying Article 13(1) of the tax treaty, the definition of 'immovable property' under Article 6 of the tax treaty had to be considered, which stated that "'immovable property' shall have the meaning given by the law of the country in which the property is situated". 'Immovable property' as defined in the General Clauses Act, 1897 and in the Registration Act, 1908, includes land and buildings, or any rights pertaining to them. However, a share in a company could not be considered as immovable property. In VNU International B.V. *v.* DIT(IT) [2011] 198 taxman 454 (AAR - New Delhi), it had been held that Article 13(1) of the India-Netherlands tax treaty could not be applied to the transfer of shares as shares were not immovable property, or rights directly attached to immovable property. Further, Article 13(4) of the tax treaty could be applied only if the shares derived their value from immovable property situated in India but not used for business purposes. Although the assets of V Ltd were immovable property, as they were used in business, Article 13(4) of the tax treaty could not be invoked. Transfer of immovable property used in business was covered by Article 13(5) of the tax treaty, as per which capital gains would be taxable only in the transferor's country of residence. Accordingly, the long-term capital gains were held as taxable in Netherlands and not in India.

As regards the alternative claim, V Ltd was already approved as an infrastructural company for allowing deduction under section 80-IA of the Act. Accordingly, all conditions under section 10(23G) of the Act had been satisfied at the time of sale of shares. Therefore, the assessee's alternative claim for exemption was also upheld.

Vanenburg Facilities B.V. *v.* ADIT(IT) [TS-120-ITAT-2013(HYD)]

Amortisation of business expenditure

Expenditure incurred on issue of bonds in connection with extension of business capital in nature, amortisable under section 35D of the Act

The taxpayer was engaged in the business of broadcasting television programmes. It had issued foreign currency convertible bonds (FCCBs) during the year, which were either convertible into shares within a period of time or redeemable. It incurred certain expenditure on the issue of FCCBs, which was treated as revenue expenditure under section 37(1) of the Act.

The TO and CIT(A) relied on the decision in Ashima Syntex Ltd. *v.* CIT [2006] 303 ITR 451 (MP) and allowed only one-fifth of the expenditure as a deduction under section 35D of the Act, treating it as expenses incurred in connection with the debenture issue for business extension.

The Tribunal held that the expenditure incurred for the issue of debentures was for extension of the assessee's business in the field of television and setting up new channels. Hence, it would result in an increase of the company's existing profit-earning capacity. Relying on the decision of Empire Jute Company *v.* CIT [2006] 124 ITR 1 (SC), it was held that any expenditure incurred in connection with addition to the profit-earning apparatus was capital in nature.

The Tribunal also referred to Ashima Syntex (above) wherein it had been held that section 35D of the Act, being a special provision, would prevail over the general provisions of the Act. Hence, expenditure incurred on the issue of debentures, covered specifically under section 35D(2)(c)(iv) of the Act, had to be amortised.

In view of the above, it was held that expenses incurred for the issue of FCCBs, proceeds of which were used for the extension of its business, were capital in nature and had to be amortised under section 35D of the Act.

Zee Telefilms Ltd. *v.* ACIT [2013] 33 taxmann.com 413 (Mumbai - Trib.)

Business expenditure

Miscellaneous income from long-term finance: Processing fee, penal interest and pre-closure charges eligible for computing deduction limit under section 36(1)(viii) of the Act

The taxpayer was involved in business of long-term finance. It transferred an amount to a special reserve and claimed it as a deduction under section 36(1)(viii) of the Act. According to this section, as applicable to the AYs 1998-99, 2000-01 and 2001-02, the taxpayer was entitled to a deduction for the special reserve not exceeding 40% of its profits derived from the business of providing long-term finance. The taxpayer had considered miscellaneous income comprising fee, penal interest and other charges as income from long-term finance. The TO disallowed the taxpayer's claim and held that such miscellaneous income could not be termed as that from long-term finance, since it includes processing fees which were derived from normal business activity. Also, the income on the pre-closure of loan, i.e. within five years, could not be treated as income from long-term finance.

The High Court (HC) observed that according to the agreement, the loaned amount had to be repaid within seven years. The taxpayer was engaged only in the business of long-term finance. Processing charges were collected for the processing loan applications and to ascertain the eligibility of the borrower; only afterwards was the loan was granted. The loan agreement stated that the borrower would have to pay penal interest, in case he or she did not repay the amount within the agreed period. If the borrower chose to foreclose the loan account, then pre-closure charges would be collected. All these categories of income had a direct nexus with long-term finance and hence were eligible for deduction under section 36(1)(viii) of the Act.

CIT *v.* Weizmann Homes Ltd. [2013] 33 taxmann.com 171 (Karnataka)

Exploration business construed as 'set up' and 'commenced' on procurement of requisite machinery, recruitment of personnel, obtaining of necessary permits and identification of block even if commercial production not begun

The taxpayer, a company, was engaged in the business of exploration.

It claimed deduction for its administrative and other expenses and set-off interest income on term deposits there against. The TO held that the business could not be considered as 'set up' and 'commenced' as a commercially viable block had not been identified and commercial production had not begun. Accordingly, the TO rejected the taxpayer's claim and capitalised the expenditure as pre-operative expenses. Also, it taxed the interest income as 'income from other sources'.

The Tribunal relied on CIT *v.* Saurashtra Cement and Chemical Industries Ltd. [1973] 91 ITR 170 (Guj.) where it was held that to decide if the business was set up or not, the date of the taxpayer's beginning the extraction of limestone, which was the first stage of its business process, constituted the time of commencement of business activity and that the taxpayer was not required to produce cement commercially to qualify for 'set up and commencement'. In the present case, the business was 'set up' for the mineral exploration for which the taxpayer had followed various business stages constituting the foundation for subsequent business activities. Therefore, commercial production was not required to describe the business as 'set up'. In this line of business, exploration commences with exploring for mineral in the crust of the earth and ends with their successful identification of such mineral-rich blocks of earth. Here, the business needs to be construed as 'set up' as soon as necessary approvals were obtained, requisite personnel recruited, requisite machinery procured, etc. The assessee had identified certain mineral-rich blocks. Therefore, the Tribunal concluded that the taxpayer had 'set up' the business which had also 'commenced' during the year. Expenditure incurred after 'setting up' was an allowable expenditure and not pre-operative in nature.

Deccan Goldmines Ltd.*v.* ACIT [2013] 31 taxmann.com 237 (Mum)

Tax withholding

Payment to third party through related entity not a reimbursement of expenses; hence liable for tax withholding

The assessee was a subsidiary company, engaged in the business of certification activities such as pre-shipment inspections and surveys. It paid its holding company, without withholding tax, for the training arranged by the latter and given by outside trainers to employees of the former. It claimed a deduction towards such a payment, treating it as a reimbursement of expenses.

The AO disallowed the payment claimed by the assessee under section 40(a)(ia) of the Act on the basis that the assessee had failed to withhold tax on the payment made to its holding company.

The Tribunal held that tax withholding provisions will be applicable on payments made by an Indian company to its related concern, where such payments were for a third person for services availed abroad.

Therefore, payment to a third party by the assessee through its holding company will not be considered as a reimbursement of expenses and would be subject to withholding tax.

C.U. Inspections (I) Pvt. Ltd. *v.* DCIT [TS-132-ITAT-2013(Mum)]

Disallowance

Disallowance for not withholding tax covers not only amounts payable as on 31 March of a particular year but also those paid at any time during the year

The TO, in his assessment order, disallowed the entire expenditure on the ground that the assessee had not withheld tax on payments made to transporters. The Tribunal relied on the Special Bench decision in the case of Merilyn Shipping and Transports *v.* ACIT [2012] 20 taxmann.com 244 (Vishakhapatnam) wherein the entire disallowance had been deleted. It concluded that the word 'payable' used in section 40(a)(ia) of the Act was applicable in respect of expenditure payable on 31 March of a particular year. Section 40(a)(ia) of the Act could not be invoked for disallowance of amounts that had already been paid during the year even though tax had not been withheld on those amounts.

The HC observed that the term, 'payable' used in section 40(a)(ia) of the Act related to interest, commission, brokerage, etc, payable to a resident. The language used therein could not be interpreted in a manner stating that such a payment should continue to remain payable till the end of the accounting year for it to be disallowed. Any other interpretation would be interpreting the words in a manner that did not reflect the intention of the legislature and was, therefore, not acceptable. Accordingly, it was held that section 40(a)(ia) of the Act will cover not only amounts payable as on 31 March of a particular year but also those that were paid any time during the year. The court held that the decision in Merilyn Shipping and Transport (above) did not lay down the law correctly.

CIT *v.* Sikandarkhan N Tunvar [2013] 33 taxmann.com 133 (Guj)

Interest on delayed refund

Taxpayer eligible for receipt of interest for delay in payment of refund even without eligibility under sections 240, 244A and 132B(4) of the Act

A search-and-seizure operation under section 132 of the Act was carried out in the business premises of the taxpayer for AY 1986-87 wherein cash and gold were seized. Tax and penalties levied exceeded the total value of the seized assets and so the tax department retained the assets. Regular assessment proceedings were started for AY 1986-87 where the demand was in excess of the seized assets. The taxpayer requested an adjustment against the seized assets, which the tax department did not accede to. The taxpayer subsequently appealed against the assessment. During the pendency of the appellate proceedings, the Kar Vivad Samadhan Scheme, 1998 (KVIS) was introduced. The taxpayer paid the demand for AY 1986-87 by taking advantage of the KVIS. Accordingly, the amount seized became refundable to the taxpayer in February 1999, but was returned only in April, 2000.

The taxpayer contended that he had urged the adjustment of demand against the seized assets, which the tax department had failed to do. Hence, it was entitled to interest under sections 240, 244A and 132B of the Act. Aggrieved, the assessee filed a writ petition.

The HC held that the taxpayer was not eligible for interest under the above sections. Section 240 of the Act dealt with the provision of refund on appeal but the refund under the present case was not consequent to an appeal. Therefore, no interest could be paid thereunder. Section 244A of the Act was introduced after 1 April 1989 and did not apply to the assessee as the assessment related to AY 1986-87. Refund under section 132B(4) of the Act was available only if the assets seized were in excess of the aggregate

amount required to meet the liabilities. In the present case, the assets seized were less than the liability determined. Therefore, interest under section 132B(4) of the Act would also not be payable.

The HC nevertheless directed the payment of interest at bank fixed-deposit rates from February 1999 till April 2000 for delay in payment of refund.

Ram Kishan Gupta *v.* UOI [TS-162-HC-2013(Del)]

Interest on non-performing asset

Mere characterisation of an account as a non-performing asset does not demonstrate uncertainty in collection of interest income thereon

The taxpayer was a Non-banking financial company (NBFC) and followed the mercantile system of accounting. For the relevant AYs, the TO added accrued interest on non-performing assets (NPA) to the taxpayer's income. The CIT(A) and the Tribunal allowed the taxpayer's appeal holding that the accrued interest on its NPAs was not assessable as income-tax.

The TO held that since the assessee was following the mercantile system of accounting, income as well as expenditure had to be accounted on an accrual basis. They placed reliance on the SC's decision in Southern Technologies Ltd. *v.* JCIT [2010] 320 ITR 577 (SC), wherein it was held that merely because, for accounting purposes, the taxpayer had to follow RBI guidelines, it would not mean that the taxpayer was not liable to show interest income that accrued which was exigible to tax under the Act. RBI guidelines were inconsequential with taxability of income under the Act.

The assessee submitted that in CIT *v.* Elgi Finance Ltd. [2007] 293 ITR 357 (Mad.), the HC had held that no interest could be said to have accrued on loans doubtful of recovery that were classified as NPAs. Reliance was also placed on CIT *v.* Vasisth Chay Vyapar Ltd. [2011] 330 ITR 440 (Del.).

Relying on the above SC's decision, the HC held that mere characterisation of an account as an NPA would not by itself be sufficient to say that there was uncertainty regarding the realisability of interest income thereon. Only when facts showed such uncertainty, was it not chargeable to tax.

CIT *v.* Sakthi Finance Ltd [2013] 31 taxmann.com 305 (Madras)

Personal taxes
Assessing personal tax

Case law

Salary or perquisite

Investment made before extended due date of return eligible for exemption under section 54F of the Act

The taxpayer sold agricultural land and a residential house and deposited the sale proceeds in a savings-cum-fixed-deposit account. The taxpayer then purchased a residential house from the sale proceeds so received and claimed exemption under section 54F of the Act. The TO contended that the taxpayer was required to deposit the sale proceeds of capital asset in its capital gains account within one year of the sale, following the terms of section 54F(4) of the Act, or was required to acquire a new asset within one year, following the terms of section 139(1) of the Act. Since the taxpayer did neither, the TO disallowed the claim and added the amount under long-term capital gains.

The Tribunal decided the matter in the taxpayer's favor, based on the fact that the taxpayer had purchased the residential house within the period prescribed under section 139 of the Act.

The HC observed that in view of CIT *v.* Rajesh Kumar Jalan [2006] 286 ITR 274 (Gauhati) and Fathima Bai *v.* ITO [2009] 32 DTR 243 (Kar.), section 54F(4) of the Act was in *pari-materia* with section 54(2) of the Act. Sub-section (4) of section 139 of the Act was, in fact, a proviso to sub-section (1) of section 139 of the Act. The HC accordingly upheld the Tribunal's order and held that since the taxpayer had paid a substantial amount of sale consideration for the purchase of a residential property within the extended period of limitation for the filing of a tax return, he was not liable to pay any tax on capital gains.

CIT *v.* Jagtar Singh Chawla [2013] 33 taxmann.com 38 (Punjab and Haryana)

Section 50C not applicable on unregistered sale deeds prior to October 2009

The taxpayer had sold a property for less than the guideline value provided by the stamp valuation authority and offered the capital gains thus computed to tax. The sale agreement was not registered. The TO invoked the provisions of section 50C of the Act while computing the long-term capital gains and adopting the guideline value given by the stamp valuation authority as the sale consideration, instead of the consideration admitted by the taxpayer.

On appeal, the CIT(A), relying on Navneet Kumar Thakkar *v.* ITO [2008] 298 ITR 42 (Jodh), held that section 50C of the Act cannot be invoked as the property was not transferred by way of a registered sale deed.

The tax department contended that the word 'assessable' introduced by the Finance (No.2) Act, 2009, though with effect from 1 October 2009, had to be treated as applicable even in the case of this taxpayer, as the intention of the legislation was to bring within the scope of section 50C of the Act, all transactions where the registration of sale had not taken place. The taxpayer contended that the word 'assessable' as inserted by the Finance (No.2) Act, 2009, that too, with effect from 1 October 2009, cannot be applied retrospectively and therefore, section 50C of the Act could be made

applicable only in a case where the registration of the sale deed had taken place. The taxpayer placed a circular issued by the board submitting that the relevant amendment made by the Finance (No.2) Act, 2009 was only prospective in nature and could not be applied retrospectively.

The HC held that the insertion of words 'or assessable' by amending section 50C of the Act, with effect from 1 October 2009 was neither a clarification nor an explanation to the existing provision. It was only an inclusion of a new class of transactions, namely, the transfer of properties without or before registration with a prospective application only. Hence, the taxpayer's transfer, made before the amendment could not be brought under section 50C of the Act. Further, the HC also re-emphasised that circulars issued by the CBDT were binding on the Department and could not be repudiated by the department contending that they are inconsistent with the statutory provisions.

CIT *v.* R. Sugantha Ravindran [2013] 32 taxmann.com 274 (Madras)

Structuring for companies
Mergers and acquisitions

Case law

Assignment of debt followed by part-discharge and part-sale of shares results in business income

In financial year (FY) 2007-08, the taxpayer acquired a debt of INR 783.9 million as an actionable claim from certain financial. The assessee recovered INR 336.7 million in cash and converted the balance into 89,42,722 equity shares of LVS Power Ltd at a fair value of INR 50. Of this, the assessee paid INR 336.7 million to the financial institutions in full settlement of their debt. Thus, the assessee made a profit of INR 42.20 million on the transaction.

In the same year, the assessee sold the subject shares to two business relations of the MD (also the majority shareholder) for INR 4 per share and INR 3.75 per share respectively, aggregating to INR 3.46 million. The assessee made a net profit of INR 9.5 million in the entire transaction. The firm offered INR 6.37 million to tax as business income after setting-off the brought-forward depreciation.

The TO contended that the tax payer had tried to avoid tax liability by suppressing the actual price of the shares. He further observed the activity of taking over a debt was natural and thus, the entire profit on debt assignment was assessable as business income under section 28 of the Act. The TO ignored the subsequent sale of shares and brought to tax INR 422 million.

The CIT(A) held that the TO was not correct in computing the taxable profits by ignoring the subsequent sale of shares. However, the CIT(A) did not accept the low sale price of shares and re-determined the sale price at INR 10 per share.

The Tribunal declined to accept the re-determined value, holding that the CIT(A) had gone beyond his jurisdiction in re-determining the value when the TO himself had not re-determined the sale price. The so-called gains brought to tax by AO in the debt assignment were nullified by the loss on the sale of shares. Accordingly, the Tribunal deleted the TO's addition.

DCIT *v.* A.S.P. Software Solutions Pvt. Ltd. [2013] 152 TTJ 739 (Hyd-Trib)

Company law

There is no requirement for initiating separate proceedings or filing separate petitions under sections 391-394 of the Companies Act, 1956 by a holding company where the application has been filed by its wholly-owned subsidiary

The transferor-company was a wholly-owned subsidiary (WOS) of the transferee, having their registered offices in Gujarat and Bombay respectively. The petition was filed before the Gujarat HC by the transferor for a scheme of amalgamation (the scheme) with the transferee.

The regional director raised the objection that the transferee was required to file a separate petition in the Bombay High Court, and that dispensation of the requirement of filing the petition before HC was without jurisdiction.

The transferor took the view that a scheme involving the amalgamation of a WOS with its holding company did not oblige the holding company to file a separate petition. Reliance was placed on Bank of India Ltd. *v.* Ahmedabad Manufacturing and Calico Printing Co. Ltd. [1972] 42 CC 211 (Bom), Sharat Hardware Industries Private Ltd. *In re*, [1978] 48 CC 23 (Bom), Mahaamba Investments Ltd *v.* IDI Ltd. [2001] 105 CC 16 (Bom). Further, the HC while dispensing the requirement of filing a separate petition by the transferee, decided an issue arising in the petition filed by the transferor.

Taking into consideration the principles laid by the aforesaid judgments that the net worth of both the transferor and the transferee was positive, that the capital structure of the transferee remained unaltered post amalgamation and that the scheme did not involve compromise or arrangement with shareholders and creditors of the transferee, HC sanctioned the scheme. The HC further upheld the contention of the transferor that while dispensing with the requirement of filing a petition, it was not exercising jurisdiction over the transferee but exercising jurisdiction in the transferor's matter.

Reliance Jamnagar Infrastructure Ltd., In re [2012] 27 taxmann.com 228 (Guj.)

Deviation from accounting standards permissible in the scheme of amalgamation, provided necessary disclosures are made in the transferee company's financial statements

In connection with a petition before the Gujarat HC seeking sanction for a scheme of amalgamation, the regional director raised an objection that the clause on accounting treatment neither referred to nor ensured compliance with accounting standard AS-14 notified by the central government. As per this clause, the amount of amalgamation reserve arising after recording all assets and liabilities of the transferor companies would be treated as free reserve available for distribution of dividend. The regional director observed that, the amalgamation reserve being capital in nature, it was unavailable for dividend distribution and asked that the HC direct strict compliance with AS-14.

As per the transferee company, deviation from AS-14 was permissible under section 211(3B) of the Companies Act, 1956 provided it made requisite disclosures in the financial statements as enumerated under the section pursuant to the sanction of scheme by the HC. Accordingly, no direction for compliance of AS-14 was required to be issued by HC. Reliance was placed on various judgements such as Adishree Tradelinks Pvt. Ltd. [2013] 176 Comp Cas 67 (Guj) wherein similar treatment was allowed.

Taking into consideration the above judgements, the fact that the transferee company would make necessary disclosures following the sanction of the scheme and that the shareholders had unanimously approved the scheme which was in their interest, the HC sanctioned it.

Milestone Tradelinks Pvt. Ltd. [2013] 176 Comp Cas 337 (Guj)

SEBI regulations

Disclosure as promoters with stock exchange for three years a pre-requisite for claiming exemption for inter-se transfer under the SEBI takeover code

Shares of the target company were listed in October, 2010. Two individuals were disclosed as promoters in filings with the stock exchange since the listings, i.e., for the last two years. One of them intended to transfer his 17.61% stake to the other.

Regulation 10(1)(a)(ii) of the SEBI (substantial acquisition of shares and takeover) regulations, 2011 (the takeover code) provides an exemption from the requirement of open offer pursuant to *inter-se* transfer among promoters provided they have been disclosed as promoters in the shareholding pattern filed with the stock exchange for not less than 3 years prior to the proposed acquisition.

The target company had sought informal guidance on whether the *inter-se* transfer from AG to KG would qualify for exemption under this regulation. The appellant submitted that both individuals had been shareholders for a period exceeding three years. Since the company was listed in two years ago, it was impossible for the company to make a disclosure for the period prior to that. Furthermore, the intent behind the three-year condition was to curb malpractice of the introduction new entities as qualifying parties.

The board held that the regulation clearly stated that exemption would be available only if the persons were named as promoters for a continuous period of three years prior to the proposed acquisition in filings with stock exchange. Since, this case, the shareholding pattern was available only for two years, *prima facie* the promoters did not qualify for exemption.

Informal guidance - Commercial Engineers and Body Builders Company Ltd

Regulatory developments

SEBI (SAST) (amendment) regulations, 2013 (takeover regulations)

SEBI issued a notification on 26 March 2013 amending the takeover regulations. The key highlights of the amendments are as under:

1. Public announcement for multiple methods of acquisition:

   Regulation 13 of the takeover code prescribes the timing for making a public announcement in case of substantial acquisition of shares or voting rights or control over the target company.

   A new clause (2A) has been inserted into regulation 13 under which a public announcement, in case of a substantial acquisition through a series of acquisitions by a combination of the following:

   - an agreement and any one or more modes of acquisition referred to in regulation 13(2) of the takeover regulations, such as acquisition pursuant to conversion of convertible securities, market purchases, preferential issue etc.; or
   - through any one or more modes of acquisition referred to in regulation 13(2) of the takeover regulations;

   shall be made on the date of first acquisition, provided the acquirer discloses in the public announcement the details of the proposed subsequent acquisition.

2. Public announcement in case of acquisition by way of preferential allotment:

   Regulation 13(2)(g) of the takeover regulations, which provides for public announcement in case of preferential issue of shares, has been amended. It is now provided that the public announcement in such a case would be made when the board of directors of the target company authorise such a resolution. The previous requirement was that a public announcement would be made on date of passing of special resolution approving the preferential issue.

3. Withdrawal of open offer:

   As per regulation 23(1) (c) of the takeover regulations, withdrawal of an open offer was permissible in case any condition stipulated in the agreement for acquisition was not met for specified reasons. The regulation has been amended by adding a proviso which provides that in the case that the acquisition through preferential issue is not successful, the open offer would not be withdrawn.

4. Acquisition during offer period:

   A new regulation 22 (2A) was inserted, providing that where the acquisition is proposed through preferential issue or through stock market settlement process other than bulk or block deals, the acquirer can acquire such shares while the open offer is in process. However, such shares would need to be kept in an escrow account and the acquirer would not be permitted to exercise voting rights on such shares. The shares in the escrow account may, however, be released 21 working days after the public announcement, if the acquirer deposits 100% of the open offer amount, assuming full acceptance as provided in regulation 22 (2).

5. Buyback of shares:

   In the previous regulations, the reference date of reducing the shareholding was ninety days from the date 'on which the voting rights would increase'. This has been amended and the ninety days will now be calculated from the closure of the buyback offer for the target company.

6. Disclosure on acquirer's holding falling below 5%:

   Regulation 29(2) of the takeover regulations has also been amended by this notification. The amendment requires disclosure to be made even when the shareholding or voting rights of the acquirer fall below 5% in the target company. This amendment clarifies the position on disclosure by the acquirer in the case of a sale of shareholding in the target company.

Pricing appropriately
Transfer pricing

Prelude

The Organisation for Economic Co-operation and Development (OECD) Council recently approved the revised section on safe harbours in the transfer pricing guidelines (TPG). The revised section endorses the simplified measures of safe harbour and provides three sample formats of the memorandum of understanding (MoU) that countries may use in order to negotiate bilateral safe harbours for specific types of transactions. These include low-risk distribution, manufacturing and R&D services.

The focus by the OECD on safe harbour is a positive step towards aligning resources relative to risk from the perspective of both, the taxpayers as well as tax administrators. These are welcome developments, as strategically designed safe harbours, when eventually complemented with a network of MoUs, will allow for a more balanced, if not necessarily arm's length, approach to compliance efforts, in a world where an increasing number of jurisdictions have adopted transfer pricing documentation requirements and multi-national enterprises in order to extend their global operations. A summary of the revised section has been stated herein.

In the meanwhile, tax tribunals across India have been engaged in issuing transfer pricing rulings, some of which surprisingly differed with or distinguished the observations of tribunals in earlier similar case proceedings. In order to assuage this situation, the Delhi Tribunal has established a special bench to deal with conflicting rulings, in relation to the turnover filter as it applies to software companies. 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.

OECD: Releases revised section on safe harbour

Recently, the OECD Council approved revision of the section on safe harbour in Chapter IV of the TPG, for multinational enterprises and tax administrations. According to the revised guidance, the historic position in Chapter IV does not accurately reflect the position of OECD member countries who have adopted transfer pricing safe harbour provisions. The revised guidance acknowledges the following benefits associated with safe harbour:

- Simplifies and offers relief from compliance burdens and provides greater certainty for situations involving smaller taxpayers or less complex transactions
- Provides certainty to eligible taxpayers that the transaction at issue will be accepted by the tax administration, with a limited audit or without

While the benefits offered by safe harbour are quite apparent, the revised chapter also deals with certain concerns associated with safe harbour:

- Safe harbour deviates from the arm's length principle, due to the requirement of the use of certain methods, while actually, another method may be the most appropriate method needed, based on the taxpayer's circumstances.
- Safe harbour may increase the risk of double taxation or double non-taxation when unilaterally adopted.
- Safe harbour may introduce tax-planning opportunities for taxpayers unanticipated by the adopting country.

Ultimately, the revised chapter recommends that in a situation where safe harbour can be negotiated on a bilateral or multilateral basis, they may offer the best of both worlds, that is, relief from compliance burdens, certainty for taxpayers and making resources available for tax administrations.

Courtesy: PwC Pricing Knowledge Network

Delhi Tribunal – Ruling on marketing intangibles

The taxpayer in this case, was primarily engaged in the distribution of digital imaging products that included photocopiers, multifunctional peripherals, fax machines, printers, scanners, digital cameras and multimedia projectors. The taxpayer also received subsidy from its associated enterprise (AE), in relation to certain advertising, marketing and promotion (AMP) related costs. The taxpayer had benchmarked its international transactions by using the resale price method (RPM). During the assessment proceedings, the transfer pricing officer (TPO) made an adjustment, questioning the adequacy of the AMP expenditure incurred by the taxpayer, thereby alleging that it resulted in the creation of marketing intangibles. Accordingly, an adjustment was made by the TPO stating that the taxpayer should have been compensated for the provision of such services. On appeal, the dispute resolution panel (DRP) upheld the adjustment made by the TPO.

On appeal, the Tribunal put forward the following rulings:

- It held that the transfer pricing adjustments in relation to the AMP expenditure incurred by the taxpayer, for creating the marketing intangible, for and on behalf of the foreign AE was permissible.
- It allowed the exclusion of trade discount and volume rebates, commission and cash discount from the AMP expenditure, thereby restricting the scope of AMP expenditure.
- It held that the exclusion of the portion of subsidy (received from its AE) from the AMP expenditure, which thereby decreases the net transfer pricing adjustment, has resulted in a move that will benefit a large number of subsidiaries in India and those receiving special subsidies from their AEs. This will significantly reduce the quantum of expenditure classified as non-routine AMP expenditure.

The Tribunal restored the matter back to the TPO for computation and benchmarking of the AMP expenditure.

Canon India Pvt Ltd *v* DCIT [TS-96-ITAT-2013(DEL)-TP]

Mumbai Tribunal – Rejects AE as tested party and held that TP additions can exceed overall group profits

The taxpayer in this case was engaged in providing IT enabled services (ITeS) to its AEs. The ITeS transactions comprised payments towards marketing fees and receipts on account of software services and technical support services. The assessee chose six comparables, considering its foreign AE as a tested party. During the assessment proceedings, the TPO, while selecting the taxpayer as a tested party, proposed an adjustment to the transfer price of the taxpayer, after carrying out fresh comparability analysis, which was confirmed by the DRP.

On appeal, the Tribunal put forward the following rulings:

- It held that the scope of the TP adjustment under the Indian taxation law is limited to the transaction between the taxpayer and its foreign AE. It can

neither call for roping in and taxing in India, the margin from the activities undertaken by the foreign AE nor can it curtail the profit arising out of the transaction between the Indian and foreign AE.

- It rejected the taxpayer's contention to compare the profit of the foreign AE with margins of foreign comparables in order to determine the arm's length price (ALP) of transaction between the assessee and its foreign AE.
- It held that the contention of the taxpayer that the authorities cannot go beyond the overall profit of the group of AEs while determining the ALP of the international transaction was not acceptable because it will then constitute a new method or a yardstick for determining the ALP. The transfer pricing adjustments made in India may result in the overall profit earned by all the AEs.
- It rejected the taxpayer's contention that since the same method of determination of the ALP adopted by the taxpayer was accepted by the TPO for the earlier years, the same ought not to have been rejected for the current year as well.

Onward Technologies Ltd *v* DCIT [TS-94-ITAT-2013(Mum)-TP]

Note: *There have been recent rulings of the Mumbai Tribunal in the case of Cybertech Systems and Software Ltd v ACIT [2013] 33 taxmann.com 371 (Mumbai - Trib.), and in the case of Aurionpro Solutions Ltd v ACIT [TS-75-ITAT-2013(Mum)-TP], where the Tribunal has held, as a general proposition, that despite the different set of facts involved in each of the said cases, t the Indian taxpayer will always need to be taken as the tested party for the purposes of transfer pricing analysis, to the exclusion of the foreign AE. However, the above decision of the Tribunal significantly deviates and runs counter to the fundamentals and canons of transfer pricing. The rejection of the foreign AE as the tested party is contrary to some of the principles upheld in a number of decisions, which requires choosing the least complex entity as the tested party and not so much as to whether it is an Indian entity or a foreign affiliate. The Tribunal in its above decision did not progress to clarify and establish the concept of 'tested party', which was necessary while considering the concept's significance and the relevance of the transfer pricing methods. While Indian regulations still do not envisage the tested party concept, the OECD guidelines which were revised in 2010, specifically allude to this point.*

Hyderabad Tribunal – Turnover filter must be applied to exclude giant companies from comparison

The taxpayer in this case, was engaged in the business of providing software development services to its AEs and third parties. The taxpayer had adopted the transactional net margin method (TNMM) in order to test the arm's length price of its international transaction. During the assessment proceedings, the TPO proposed an adjustment to the transfer price of the taxpayer, after carrying out fresh comparability analysis. The DRP upheld the adjustment proposed by the TPO.

On appeal, the Tribunal held the following rulings:

- Giant companies like Infosys and Wipro cannot be included while arriving at the final set of comparables as their turnover was many times higher than the turnover of the taxpayer (reliance placed on the coordinate bench ruling in the case of Deloitte Consulting India Pvt Ltd).

- While arriving at the arm's length price of the taxpayer, income from sales made to third parties cannot be considered as an international transaction.

Patni Telecom Solutions Pvt Ltd *v* ACIT [ITA. No.1846/ Hyd/2012]

Note: *It is to be noted that the Tribunals across the country have been taking different views on the application of turnover filter in its comparability analysis and this decision is one such example.*

Delhi Tribunal – CUP method is the most appropriate method in order to ascertain the arm's length price of the international transaction relating to interest on loan to AE

The assessee in this case, was engaged in the business of manufacture and export of readymade garments. The assessee's international transactions (with its AE) comprised of export of apparels, granting of loan and receipt of interest thereto. The assessee had advanced similar loans in the earlier years as well. The assessee was entitled to a fixed interest on the loans and had considered the comparable uncontrolled price (CUP) method in order to determine the arm's length price for its international transactions. In the case of its exports, the assessee considered the sale price (to third-party) as a comparable, and in relation to the interest, the assessee considered the export packing credit rate (obtained from independent banks in India). During the assessment proceedings the TPO accepted the assessee's analysis for export transaction but disregarded the internal CUP used for defending the interest transaction. Instead, the TPO considered the interest rate on government bonds and arrived at an interest rate making arbitrary adjustments relating to transaction cost, security and risk. The DRP held that the loan was in Indian currency and hence, the LIBOR was not relevant. On the contrary, the domestic prime lending rate (PLR) was appropriate in this case.

On appeal, the Tribunal held the following rulings:

- The CUP method is the most appropriate method in order to determine the arm's length price of the international transaction relating to interest on loan to AE.
- In a case where the transactions relate to lending money in foreign currency to the AEs, then from a comparability perspective, the foreign currency loans of unrelated parties need to be considered.
- Financial position and credit rating of the subsidiaries will be broadly the same as the holding company.
- Domestic PLR has no applicability and the LIBOR has to be considered as the benchmark rate.
- The assessee had arranged for a loan from Citibank for less than 4% and had lent the same to its AE at 4%. Hence, no TP adjustment was warranted.
- The assessee's profit was exempt under section 10B of the Act. Hence, the assessee had no incentive to shift profits out of India, that is, a lower interest rate did not result in any tax base erosion in India.

Cotton Naturals (I) Pvt Ltd *v* DCIT [2013] 32 taxmann.com 219 (Delhi - Trib.)

Taxing of goods and services
Indirect taxes

Case law

Value added tax, sales tax, entry tax and professional tax

Newspaper printing contracts are pure service and not works contracts

The Gauhati HC has held that newspaper printing contracts are not works contracts, but pure service contracts, with no element of transfer of property in goods in the form of ink. After which, it cannot be categorised as goods as it now lacks physical existence.

Dainik Janambhumi *v.* State of Assam [2013] 58 VST 519

Benefit of penultimate sale under CST Act is not available in absence of inextricable link between sale of goods and its actual export

The Haryana tax tribunal has disallowed the benefit of penultimate exports under section 5(3) of the CST Act on the ground that the goods were exported to foreign buyers other than the original foreign buyers for whom the goods were supplied to the merchant exporter. It observed that one essential condition to qualify as sale in the course of an export is an inextricable link between the sale of goods and its actual export, which was missing in this transaction.

Food Corporation of India *v.* State of Haryana [2013] 44 PHT 335 (HTT)

Notification/ circular

Electronic payment through e-GRAS made mandatory for specified dealers in state of Rajasthan

Effective 1 May 2013, electronic payments (for VAT, CST and Entry Tax) using electronic government receipt accounting system (e-GRAS) have been made mandatory for a select class of dealers.

Notifications nos S.O. 238, 239 & 241 (F.12 (11) FD/ Tax/2013-104,105 and 107) dated 6 March 2013

Case law

CENVAT

Excise duty not payable on samples that are not factory-cleared

The Madras CESTAT has held that excise duty is not payable on samples which are not factory cleared and which are retained by the appellants for in-house testing.

Lessac Research Laboratories Pvt. Ltd. *v.* CCE [2013] TIOL 30

Sale price applicable for independent sale shall be adopted for valuation of goods sold to related person

The Mumbai CESTAT has held that when the goods are sold in open market as well as to related persons, the sale price applicable for independent sale should be adopted for valuation of goods sold to related persons.

Sharda Ispat Ltd v. CC [2013] 288 ELT 547

Case law

Service tax

Providing infrastructure and amenities, layout approvals, etc as a condition of sale of plots liable to service tax

The SC held that sale of plots with an assurance by the seller to build housing sites, provide infrastructure and amenities, layout approvals, et as a package deal to customers cannot be held as a mere transfer of immovable property. Such sales were held liable to service tax.

Narne Construction Pvt. Ltd. *v.* UOI [2013] 38 STT 502/30 taxmann.com 42 (SC)

Sharing of remuneration paid to common MD cannot be treated as rendition of services

The Mumbai CESTAT has held that the managing director of the company performs the function of management, hence cannot be taxed as advisory or consultancy services under the 'management consultancy' (MC) service category. Accordingly, the sharing of remuneration paid to a common MD by

two companies cannot be held to be MC services rendered by one company to another.

Bosch Chassis Systems India Ltd. *v.* CCE [2013] TIOL 350

Case laws

Customs or foreign trade policy

Technical know-how fee not includible in the value of imported goods, in cases where there is no nexus with imported goods

The Kolkata CESTAT has held that technical know-how fee paid to process licensors for providing process design, specification, data and review of documents cannot be included in the value of goods imported under a separate agreement unless there is nexus of such fees with the imported goods.

Indian Oil *v.* CC [2013] 289 ELT 33

Penalty to be imposed on the exporter if goods are exported before passing of 'let export order'

The Mumbai CESTAT has held that that the exporter is liable to a penalty where the goods are loaded on to the vessel for export and has sailed before the 'let export order' is given by the customs authorities, as it is the responsibility of the exporter and agent to ensure that the goods are exported after completion of all customs formalities.

MSC Agency India Pvt. Ltd. *v.* CC [2013] TIOL 455

Customs duty cannot be demanded on goods destroyed in SEZ due to accidental fire

The Ahemdabad CESTAT held that customs duty cannot be demanded on goods destroyed in a special economic zone due to accidental fire on the ground that the goods have not been utilised for the authorised operations and have not been put to unauthorised use.

Jindal International *v.* CC [2013] TIOL 420

Notification/ circular

Items covered under SCOMET list amended

The central government has amended the special chemicals, organisms, materials, equipment and technologies (SCOMET) list covered under schedule 2 of the Indian trade classification (harmonised system).

Notification no. 37 (RE-2012)/2009-2014 dated 14 March 2013

Following the rule book
Regulatory developments

FEMA

Export of goods and software – realisation and repatriation of export proceeds

The RBI has reduced the period for realisation and repatriation to India, of the export proceeds of goods or software from twelve months to nine months from the date of export, with immediate effect until 30 September 2013.

The provisions in this regard for a SEZ unit (where no time limit for realisation and repatriation to India is specified) as well as exports made to warehouses established outside India (specified period of realisation is fifteen months from date of export) remain unchanged.

A.P. (DIR Series) Circular No. 105 dated 20 May 2013

Trade Credits for imports into India – review of all-in-cost ceiling

The existing all-in-cost ceiling of 350 basis points over 6 months LIBOR will continue to be applicable till 30 June 2013.

A.P. (DIR Series) Circular No. 98 dated 9 April 2013

Overseas direct investments – clarification

The RBI has clarified that any overseas entity having equity participation directly/ indirectly of Indian parties shall not offer financial products linked to Indian Rupee (e.g. non-deliverable trades involving foreign currency, rupee exchange rates, stock indices linked to Indian market, etc.) without its specific approval. This is to avoid any adverse implications these products can have for exchange rate management of the country, given that currently Indian Rupee is not fully convertible.

A.P. (DIR Series) Circular No. 100 dated 25 April 2013

Notes

Glossary

AE	Associated enterprise
ALP	Arm's length price
AY	Assessment year
AAR	Advance Ruling Authority
CBDT	Central Board of Direct Taxes
CENVAT	Central value added tax
CESTAT	Customs, Excise and Service Tax Appellate Tribunal
CIT(A)	Commissioner of Income-tax (Appeals)
The Companies Act	The Companies Act, 1956
DRP	Dispute resolution panel
ECB	External commercial borrowings
FTS	Fees for technical services
FY	Financial year
PE	Permanent establishment
RBI	The Reserve Bank of India
SC	Supreme Court
SEBI	The Securities and Exchange Board of India
The Rules	The Income tax Rules, 1962
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

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