Be in the know

India Spectrum

Volume 5 Issue 12
December 2012

pwc

In this issue

Editorial

We are delighted to present another issue of India Spectrum.

With the budget round the corner and the Finance Minister (FM) having assured the country that there will be a stable tax regime, further reforms and a commitment to fiscal discipline, the priorities for the forthcoming budget have been outlined. This will help soothe investor sentiment. The FM is also committed to ensuring that the Indian economy grows at 5.7% in the current year, and targeting a healthy 7% in 2013-14.

A significant development, which gave breathing space to foreign investors, was the deferring of the General Anti-Avoidance Rules (GAAR) by two years, making them effective from 1 April 2015. The GAAR decision will reassure foreign investors about stable tax regime.

On the global front, the US Department of Treasury and the Internal Revenue Service have released comprehensive final regulations for the Foreign Account Tax Compliance Act, in order to implement information reporting and withholding tax provisions. The provisions require time-bound compliance within the next five years by different categories of persons.

The RBI has enhanced the external commercial borrowing (ECB) limit to 75% of owned funds for non-banking financial companies that are infrastructure finance companies under the automatic route. ECB of more than 75% would require approval from the RBI.

The SEBI has clarified that it is now mandatory for all listed companies to share information regarding their performance, operations and pricing with the stock exchanges in order to enable securities holders and the public to appraise the position of the issuer and avoid creating a false market for its securities.

Ketan Dalal

Shyamal Mukherjee

On the judicial front, the Delhi Bench of the Tribunal in the case of ONGC Videsh Ltd held that subscription fees paid to a foreign website under the research agreement for access to specialised information relating to oil and gas exploration is in the nature of a royalty under the Income-tax Act, 1961 as well as under the India-UK tax treaty. In another case, the Bombay High Court in the case of Birla Global Asset Finance Co Ltd held that certain intangibles forming part of the business acquired on slump sale basis and accounted as 'business and commercial brand equity' based on the valuation report are intangible assets eligible for depreciation Please refer to page no 7 and 16 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

Fees for technical services

Fees payable to non-residents and which are subject to RBI approval constitute income only upon receipt of such approval

The assessee is a foreign partnership firm rendering managerial and technical consultancy services in India through its branch office. During the year in question, the assessee had paid fees for technical services (FTS) to its foreign group entities for these services.

The Tax Officer (TO) issued a notice under section 148 of the Income Tax Act, 1961 (the Act) treating the assessee as an agent of its foreign group entities under section 163 of the Act for the purpose of taxing the FTS.

On appeal to the Commissioner of Income Tax (Appeals) (CIT(A)), the assessee contended that as the necessary approval was not received from the Reserve Bank of India (RBI) under the Foreign Exchange Regulation Act, 1976 (FERA), the amount payable to the foreign entities did not have the character of 'income' in the year under consideration, and hence could not be taxed.

The CIT(A) held that since the assessee had claimed deduction of the FTS paid in its profit and loss account, this income had accrued during the year under consideration.

On appeal, the Income Tax Appellate Tribunal (the Tribunal) held that even though the amounts payable by the assessee to the overseas group entities were claimed as expenses in assessee's books of account, no RBI approval was obtained for remitting these amounts in foreign exchange as required by the relevant provisions of FERA.

In the case of UBS Securities India Pvt Ltd *v* DCIT [2012] 28 taxmann.com 245 (Mum) the Tribunal relied on the decisions in the cases of CIT v Kirloskar Tractors Ltd [1998] 231 ITR 849 (Bom.) and Dorr-Oliver (India) Ltd v CIT [1998] 234 ITR 723 (Bom.) and held that liability for fees payable to non-residents, payment of which was subject to approval from the RBI, could be said to have accrued only upon receipt of this approval, and that the assessee was entitled to claim the deduction of the amount only in the year in which the approval was granted by the RBI.

Therefore, the amount payable by the assessee to its foreign group entities would not constitute income chargeable to tax in the year under consideration, as there was no accrual of income in the absence of the RBI approval required by FERA. Consequently, in the absence of any taxable income, the assessee could not be treated as an agent of the foreign entity under section 163 of the Act.

Booz Allen & Hamilton (India) Ltd *v* ADIT [TS-910-ITAT-2012(Mum)]

Royalty

Payment to a non-resident for the use of a database regarded as a royalty

The assessee, ONGC Videsh Ltd, is engaged in the exploration and development of hydrocarbons. It has participating interests in oil and gas projects outside of India.

For its overseas business, the assessee subscribed to the website of Wood Mackenzie (WM) under a research agreement. WM compiles information relating to oil and gas exploration and provides the information on its website, which can be accessed upon payment of a subscription fee. The research agreement entered into between the assessee and WM was a non-transferable, exclusive licence agreement for downloading information from its website. In order to determine the withholding tax liability, an application was made under section 195/197 of the Act. The TO treated the payment as being in the nature of a royalty under the Act and Double Taxation Avoidance Agreement (tax treaty) between India and the UK, as WM had granted a

non-transferable licence for the assessee to download information from the website.

The CIT(A) upheld the order passed by the TO, and the assessee appealed to the Tribunal. The Tribunal observed that the information available to the assessee was licensed information which could be accessed only by authorised persons. It was held that the information available to the assessee through a licence agreement was covered by the definition of a royalty under section 9(1)(vi) of the Act and Article 13(3) of the UK tax treaty, and was liable to withholding tax under section 195 of the Act.

ONGC Videsh Ltd *v* ITO [TS-846-ITAT-2012(Del)]

Editor's note

The above ruling was argued by PwC's tax litigation team.

In Wipro Ltd *v* ITO [TS-701-HC-2011(Kar)] the High Court (HC) of Karnataka held that the payment by Wipro Ltd for subscription to use the database was in the nature of licence to use copyright and taxable as a 'royalty'. A similar decision was rendered by the Karnataka HC in the case of CIT *v* Infosys Technologies Ltd [2012] 204 taxman 311 (Kar).

While delivering the judgement, the Tribunal ignored the decisions of the MP HC in the case of HEG Ltd and of the Bombay HC in the case of Diamond Services International (P) Ltd, wherein the respective high courts observed that the word 'information' is qualified by industrial, commercial and scientific experience, which should be the experience of the service provider.

Carbon credits

Receipts from the sale of carbon credits not taxable being capital in nature

The assessee was engaged in the business of biomass based power generation. During the year, it received carbon emission reduction certificates (CERs or carbon credits). It sold the CERs to a non-resident company and treated the consideration as a non-taxable capital receipt.

The TO held that carbon credits are a tradable commodity quoted on a stock exchange, and hence taxed the receipt as revenue. The CIT(A) upheld the order of the TO.

Before the Tribunal, the assessee contended the following:

- The amount received from the sale of CERs had no relation to the process of production or sale of power, which was the business activity of the assessee, and hence the sale of carbon credits was not taxable under section 28 of the Act.
- CERs are issued by the United Nations Framework Convention on Climate Change (UNFCCC) under the Kyoto Protocol if a company achieves emission levels which are less than the assigned quantity of gases. These CERs do not relate to any capital or revenue expenditure incurred during the course of business.
- The sale of CERs does not give rise to income under section 2(24) of the Act as it does not represent any consideration received during the course of business activity.
- Further, the receipt was not in the nature of a subsidy from the government since it was not compensation for loss of revenue and did not relate to any business activity.

The Tribunal held that a carbon credit is an 'entitlement' received to improve the world's atmosphere and the environment by reducing carbon and gas emissions. CERs are not generated or created due to any business activity and are an entitlement awarded for reducing emissions. The Tribunal held that the CER is similar to loom hours and held that the asset is not generated in

the course of business, but is generated due to environmental concerns. The decision in the case of CIT *v* Maheshwari Devi Jute Mills Ltd [1965] 57 ITR 36 (SC) was relied upon, where the Supreme Court (SC) had held that the transfer of surplus loom hours to other mills under an agreement to control production was a capital receipt. This was because the payment received for the sale of the loom hours was due to the exploitation of capital assets, and hence was a capital receipt and not income.

Credits for reducing carbon emissions can be transferred to another party in need of a reduction in carbon emissions and do not increase business profits. Therefore, the receipts were not in the nature of profit, but rather capital receipts not chargeable to tax.

My Home Power Ltd *v* DCIT [TS-820-ITAT-2012(Hyd)]

Tax withholding

Provision for expenses at year end offered for disallowance by taxpayer not liable for withholding tax

The assessee company had submitted its tax return for the year. A survey was conducted at the premises of the assessee under section 133A of the Act, during which the TO noted that the assessee had made a *suo moto* disallowance of certain 'provision for expenses' under sections 40(a)(i) and 40(a)(ia) of the Act, on which no tax was withheld. The TO raised a tax demand under section 201(1), and also levied interest under section 201(1A) of the Act. The CIT(A) upheld the order of the TO.

Before the Tribunal, the assessee contended that the 'provision for expenses' was made on an *ad hoc* basis and no individual accounts were credited for the liability since the identity of the person was not known at the time of making the provision. It contended that no tax demand or interest demand could be raised under sections 201(1) and 201(1A) of the Act on the payment already offered for disallowance under sections 40(a)(i) and 40(a)(ia) of the Act for not withholding tax.

The Tribunal noted the decision in the case of Industrial Bank of India *v* ITO [2007] 107 ITD 45 (Mum) where it was held that if the payees were not identifiable at the time of making a 'provision' in the accounts, withholding tax provisions were not applicable. It was noted that the assessee had already offered the 'provision for expenses' for disallowance under sections 40(a)(i) and (ia) of the Act. The provision was reversed in the subsequent year and the withholding tax provisions were applied to the actual amount credited or paid.

The Tribunal held that once an amount was disallowed under section 40(a)(i)/(ia) of the Act and this was accepted by the TO, the TO could not then raise a tax and interest demand under sections 201 and 201(1A) of the Act.

The assessee's appeal was allowed, with the Tribunal holding that the payment *suo moto* disallowed could not be subject to the withholding tax provisions.

Pfizer Ltd *v* ITO [TS-812-ITAT-2012 (Mum)]

Capital losses

Derivatives losses arising to a foreign institutional investor deemed to be capital losses

The assessee is a sub-account of an Australian foreign institutional investor (FII) engaged in trading securities and derivatives in India. It had incurred loss in derivatives transactions, which were claimed as capital losses.

The TO treated the derivatives losses as business losses and held that per the provisions of the India-Australia tax treaty, such business losses, in the absence of the assessee having any permanent establishment (PE) in India, were to be ignored while computing the total income.

The CIT(A) upheld the order

of the TO on the ground that the losses from derivatives transactions were in the nature of short-selling and would amount to business losses.

The Tribunal, relying on the decision in the case of LG Asian Plus Ltd *v* ADIT (International Transaction) [2011] 46 SOT 159 (Mum) held the following:

- The central government does not allow an FII to do 'business' in securities but only to 'invest' in securities.
- section 115AD of the Act which specifically deals with income arising from transfers of securities, includes derivatives within the definition of 'securities'.
- Since income from the transfer of securities is made taxable under the head 'capital gains' per the specific provisions of section 115AD of the Act, it cannot be treated as business income under the general provisions of the Act irrespective of whether these gains are speculative or not.

Accordingly, the assessee was justified in classifying the losses on speculative transactions as capital losses.

Platinum Investment Management Ltd *v* DDIT [2012-TII-216-ITAT-MUM-INTL]

Loan guarantee income

Loan guarantee income accruing to a permanent establishment from a loan sourced from India taxable on a gross basis

The assessee is a bank registered in Japan and operates in India through its branch offices, which constitute its PE in India.

The assessee had received income from a Korean company for acting as a loan guarantor. The assessee had received net income after withholding tax under Korean law. While the assessee had reflected the gross income in its profit-and-loss account, only the net amount was offered for tax.

The TO observed that the loan for which the guarantee was provided was part of funds raised through various sources in India. Hence, the income was sourced in India and would constitute income accruing or arising from a business connection in India in terms of section 9(1)(i) of the Act. The TO further held that the credit for the tax withheld in Korea was to be availed by the assessee in its home country (i.e. Japan) and not in India, and accordingly, the entire gross amount was taxable in India.

Subsequently, the TO levied a penalty under section 271(1)(c) of the Act on the ground that the assessee had offered to tax only the net income instead of the gross income. The CIT(A) confirmed the income addition made by the TO, but cancelled the penalty under section 271(1)(c) of the Act on the ground that there was no concealment of income or furnishing of inaccurate particulars of income.

On appeal to the Tribunal, the assessee contended that in the case of CIT *v* Ambalal Kilachand [1994] 210 ITR 844 (Bom.), it was held that tax withheld outside India would not be included in the assessee's total income. Accordingly, it had offered the net income to tax under a *bona fide* belief that tax withheld outside of India was to be excluded from the total taxable income.

The Tribunal observed that the decision in the case of Ambalal Kilachand was rendered where the assessee was an 'Indian resident' to whom the provisions of the UK and Indian tax law were applicable. However, in this case, since the assessee was a 'non-resident' (i.e. a resident of Japan) having a PE in India, the taxation was governed by the India-Japan tax treaty. Hence the above decision would not apply to the assesssee. Also, in another decision in the case of Madhavarao Scindia *v* CIT [2000] 243 ITR 683 (Mum), it was held that the gross income, and not the net income, accruing to the assessee in India would be taxable in India.

The assessee had accounted for the gross income in its books of account, and had not claimed any credit for the tax withheld. It had also not provided any explanation for not claiming the tax credit in India. Further, the amount of tax excluded from income was not its expenditure, but represented the tax paid on behalf of the principal company in Korea. As per the provisions of the India-Japan tax treaty governing the accrual of income, the entire gross amount would be taxable in the hands of the assessee in India.

It further held that, as per the second limb of Explanation 1 to section 271(1)(c) of the Act, where a person offers an explanation supporting his or her claim and he or she is not able to substantiate the same or fails to prove that this explanation is *bona fide*, this would attract a penalty under section 271(1)(c) of the Act.

Since the assessee's claim was not *bona fide* nor was there any justification for excluding the tax withheld from the total income, the Tribunal confirmed the penalty under section 271(1)(c) of the Act.

DDIT *v* Sumitomo Mitsui Banking Corporation [TS-870-ITAT-2012(Mum)]

Tax holiday

Tax holiday benefit not to be denied in case of genuine reason submitting a belated tax return

The assessee, a real estate developer, had claimed a tax holiday deduction under section 80IB of the Act in respect of its business profit. It had submitted its tax return late after the statutory due date.

During the course of assessment proceedings, the assessee was required to produce details supporting its claim for the tax holiday under section 80IB of the Act.

On failure of the assessee to produce the required documents and the assessment getting time barred, the TO made a best judgement assessment under section 144 of the Act. The tax holiday was disallowed in view of the proviso ions of section 80AC of the Act which required that the tax return be submitted by the statutory due date as required by section 139(1) of the Act. The CIT(A) upheld the order of the TO.

The Tribunal relied on the decisions in the cases of ITO v Shri S Venkataiah [2012] 22 taxmann.com 2 (Hyd.) and ACIT *v* Dhir Global Industrial (P) Ltd [2011] 43 SOT 640 (Del) where it was held that the provisions of section 80AC of the Act prohibiting a tax holiday under section 80IB of the Act in case of not furnishing the tax return within the statutory due date are only 'directory' and not 'mandatory' in nature. The relief can be granted if there is a genuine and valid reason for a delay in submitting the tax return. In the assessee's case, the TO had no opportunity to verify the reasons for delay and a best judgement assessment was required.

Hence, the Tribunal remitted the matter back to the TO to consider the reasons for the delay in submitting the tax return and then allow the tax holiday under section 80IB of the Act.

Vanshee Builders & Developers Pvt Ltd *v* ITO [TS-889 -ITAT-2012 (Bang)]

Business expenditure

Payments for accessing technology to improve manufacturing processes allowable

The assessee company is engaged in manufacturing, exporting, assembling, supplying, distributing and importing air-conditioning and refrigeration equipment and accessories.

It entered into a technological collaboration agreement (the Agreement) with Daikin Industries Ltd (Daikin) for ten years. Under the agreement, Daikin granted an exclusive and non-transferable right and license to the assessee

to use Daikin's technology to manufacture, sell, install, maintain and service the products for a certain consideration which was paid as 'technical fees' and claimed as revenue expenditure by the assessee.

The TO held that the payment of technical fees was not revenue in nature, since it was paid for using technical know-how which gave an enduring benefit to the assessee, and was ths capital in nature. Hence, the claim of the assessee for deduction was not allowed.

The CIT(A) referred to the decision in the case of CIT v J.K. Synthetics [2009] 309 ITR 371 (Del) where it was held that the granting of a licence for 'access' to technical knowledge was revenue expenditure. The CIT(A) allowed the claim of the assessee and held that only a 'right' was acquired under the license agreement to 'access' the technical knowledge and as there was no 'absolute transfer' of technical knowledge, the payment made to Daikin was in the nature of revenue expenditure.

Before the Tribunal, the Revenue contended that since the payment of technical fees was for a period of ten years and gave an enduring benefit to the assessee, it was in the nature of capital expenditure.

The Tribunal held that under the licence agreement, the assessee was only entitled to 'access' technical information in order to manufacture licensed products. It was 'not a case of absolute transfer' of information since the agreement was not in perpetuity. The assessee was granted a right to 'access' the technical knowledge for only ten years, and hence the agreement was without any enduring benefit.

The Tribunal held that expenditure incurred was for 'accessing' the technical knowledge for improvements in the manufacturing process, and was not providing enduring benefit to the company. Therefore, the expenditure was allowable as revenue expenditure.

ITO v Daikin Air Conditioning (India) Pvt Ltd [TS-864-ITAT-2012 (Del)]

Charitable activity

Sovereign and regulatory functions are not charitable in nature

The assessee is a statutory body established under the Bureau of Indian Standards Act, 1986 (the BIS Act) eligible for exemption under section 10(23C)(iv) of the Act. The Director of Income Tax Exemptions (DIT(E)) withdrew the exemption granted to the assessee on the ground that the activities conducted by the assessee were in the nature of a business, since it was awarded non-transferable licences under various product certification schemes for a specified period and it had earned substantial income from product certification, gold hallmarking certification, systems certification, etc. Thus the activities of the assessee were in the nature of trade, commerce and business, covered by the proviso to section 2(15) of the Act.

The assessee made a writ to the Delhi HC contending that it had been established for the purpose of fixing standards to ensure that the public at large is assured of quality. It is a sovereign and regulatory function in terms of section 10 of the BIS Act. The charging of license fee is mandatory for a business or industry to claim conformity of its products to the standards prescribed by the central government.

The HC noted from the provisions of the BIS Act that one of the designated functions of the BIS is the 'advancement of objects of general public utility'. In this regard, reliance was placed on the decision in the case of Khoday Distilleries Ltd v State of Karnataka [1995] 1 SCC 574 (SC) where it was held that the expression 'trade' was clarified to mean exchange of goods for goods or for money, and also on the decision in the case of CIT v Lahore Electric Supply Company Ltd [1966] 60

ITR 1 (SC) where it was held that the expression 'business' under the Act contemplates activities capable of producing profit which is taxable.

The HC held that the assessee is a statutory body established for the harmonious development of the activities of standardisation, marking and quality certification of goods, and that the charging of license fees for granting marks or certifications was not done for profit. The expression 'rendering any service in relation to trade, commerce or business' under section 2(15) of the Act cannot be widely construed to include regulatory and sovereign authorities, set up under statutory enactments, and tasked to act as agencies of the state in public duties.

Therefore, it was held that the assessee had performed sovereign and regulatory functions, which were not in the nature of trade, commerce or business.

Bureau of Indian Standards *v* DGIT(E) [2012] 27 taxmann.com 127 (Del)

Depreciation

Payments for the acquisition of business and contacts are not intangible assets and hence not eligible for depreciation

The assessee-company is in the business of providing corporate advisory and merchant banking services. During AY 2001-02, the assessee entered into a transfer of business agreement (the Agreement) with Ind Global Financial Trust Ltd (the Trust) for the transfer of a merchant banking unit. The assessee paid a sum of INR 2.5 million to the trust for the sale and transfer of the business, contacts and business know-how manual relating to merchant banking. The assessee treated the expenditure for the acquisition of know-how as an intangible asset, and accordingly claimed depreciation on it. The TO disallowed the claim of the assessee on the ground that the payment had been made for goodwill and not for know-how.

The CIT(A) observed that the manual did not contain any technique or skill, but was only a compilation of rules, regulations, procedures and *pro formas* which was otherwise available on the market in book form. The payment, therefore, could not be considered as expenditure on acquiring know-how, and accordingly the CIT(A) confirmed the disallowance of depreciation made by the TO.

The Tribunal, on perusal of the agreement, observed that the payment of INR 2.5 million had been made for the sale and transfer of business and contacts. The 'business' in the agreement was defined to mean employees, customer and client relationships, customer and client lists and certain know-how related to the merchant banking business of the transferor, but did not include the excluded assets, creditors and liabilities. The payment had been made for the transfer of business and contacts, which included customers and client relationships. There was no material to show that any part of the payment was related to any know-how which could be considered as an intangible asset for the purposes of section 32(1)(ii) of the Act. Further, the assessee was in the business of merchant banking, which does not require any industrial information or technique useful in the manufacture or processing of goods and able to be termed as 'know-how' as per section 32(1)(ii) of the Act. Hence the Tribunal disallowed the claim of depreciation made by the assessee.

Ind Global Corporate Finance Pvt Ltd *v* ITO [2012] 19 ITR (Trib) 483 (Mumbai)

Reassessment

No reassessment based on material already available at the time of the original assessment

The assessee, a non-banking financial company, was in the business of investment, financial and strategic advisory services.

The assessee entered into several business support agreements with its parent

company to avail a variety of services. The assessee obtained an order under section 195(2) of the Act determining the rate of tax withholding for remittances made to the parent company for these services.

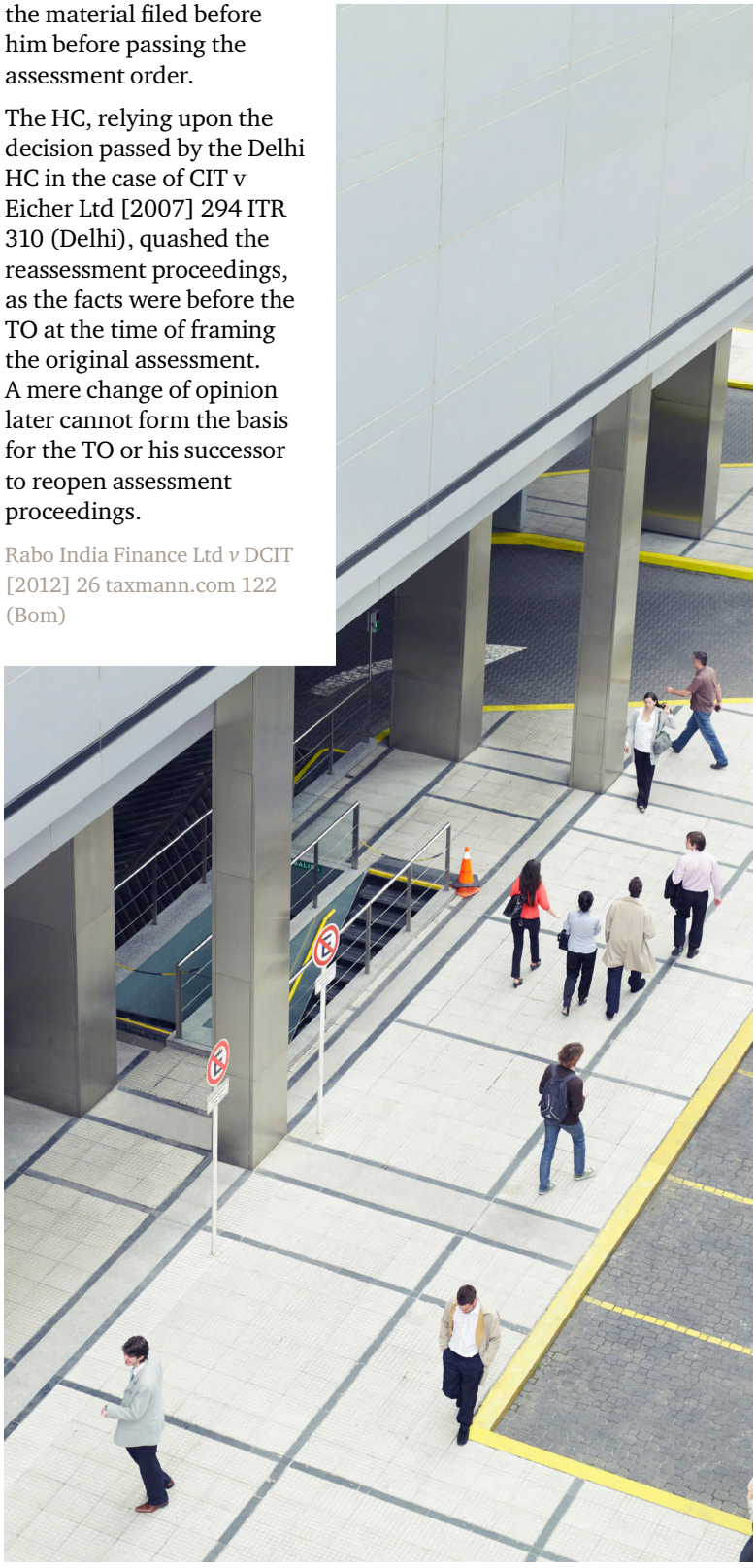
During the course of assessment proceedings for assessment year (AY) 2004-05, the TO made reference to the transfer pricing officer (TPO) in order to determine the arm's length price (ALP) for the transactions entered into by the assessee with the parent company. On receipt of the TPO's order concluding that the ALP determined by the assessee was correct, the TO passed a final assessment order.

Subsequently, while completing the assessment for AY 2007-08, the TO observed that the payments to the parent company were not made on account of business expediency. Accordingly, the TO initiated reassessment proceedings for AY 2004-05. The TO passed a reassessment order and held that the disclosure made during assessment proceedings was inadequate.

The assessee filed a writ petition challenging the reassessment proceedings for AY 2004-05. The HC observed that the revenue authorities had nowhere mentioned the nature of the inadequate disclosure. Further, the HC also observed that it was reasonable to presume that the TO had considered the material filed before him before passing the assessment order.

The HC, relying upon the decision passed by the Delhi HC in the case of CIT v Eicher Ltd [2007] 294 ITR 310 (Delhi), quashed the reassessment proceedings, as the facts were before the TO at the time of framing the original assessment. A mere change of opinion later cannot form the basis for the TO or his successor to reopen assessment proceedings.

Rabo India Finance Ltd *v* DCIT [2012] 26 taxmann.com 122 (Bom)



Personal taxes
Assessing personal tax

Case laws

Salary/perquisite

Penalty not leviable in the case of error under a bona fide belief

The assessee, an employee of Tetra Pak International S.A., was deputed to India in order to work with Tetra Pak India Ltd. During the financial years 2000-01 and 2001-02, the assessee received a certain amount of income outside India on account of reimbursements towards tax rationalisation from Tetra Pak International S.A. which he did not disclose in the original tax returns filed by him. The TO was of the view that income chargeable to tax had escaped assessment, and accordingly a notice under section 148 of the Act was served on the assessee. Tetra Pak International S.A *suo moto* and voluntarily re-computed the salary income of the assessee in India and deposited the additional taxes and interest thereon under section 201(1A) of the Act through the withholding tax route. In response to this notice under section 148 of the Act, the assessee filed new income tax returns including the income not reported in the original income tax returns.

The TO completed the assessment and initiated penalty proceedings under section 271(1)(c) of the Act, holding that the intention of the assessee was to conceal the income. The CIT(A) confirmed the penalty levied by the TO. The assessee contended that the position taken by the company and consequently by the assessee in its original tax return was *bona fide* and was based on judicial precedents. Accordingly, it did not amount to concealment of income, and the matter went to the Tribunal.

The Tribunal analysed the provisions of Explanation 1 to section 271(1)(c) of the Act and observed that the concealment of income particulars on the part of the assessee would not be lead to the levying of a penalty under section 271(1)(c) as per Explanation 1 where explanation which is *bona fide* is offered, and all of the facts relating to the same and material to the computation of his total income have been disclosed by him. Further, relying on the decisions of in the cases of CIT *v* Sidhartha Enterprises [2009] 322 ITR 80 (P&H) and the Mumbai Tribunal in the case of Glories Realty Pvt Ltd *v* ITO [2009] 29 SOT 292 (Mumbai), it was held that a penalty is not an automatic consequence of additional income, and is not leviable in cases where the assessee has made an error under a *bona fide* belief. In view of the above discussions, the appeal was decided in favour of the assessee.

Emilio Ruiz Berdejo *v* DCIT [2012] 26 taxmann.com 24 (Pune)

Granting of perpetual occupancy rights in company owned flats taxable as 'deemed dividends'

In this case, Hatane Premises Pvt Ltd (the Company) a family-owned company, purchased a property called Joshi Estates in 1992. The object of the company was to carry on its business as a builder and developer. Some of the building was given to the shareholders against their blocks of shares. The shareholders were entitled to the occupancy rights of various flats based on the shares held by them after paying an interest-free refundable deposit to the company. Further, the shareholders were also liable to pay municipal taxes and were entitled to transfer the occupancy rights in the concerned flat, by way of sale, subject to the transferee depositing the required amount of interest-free deposit.

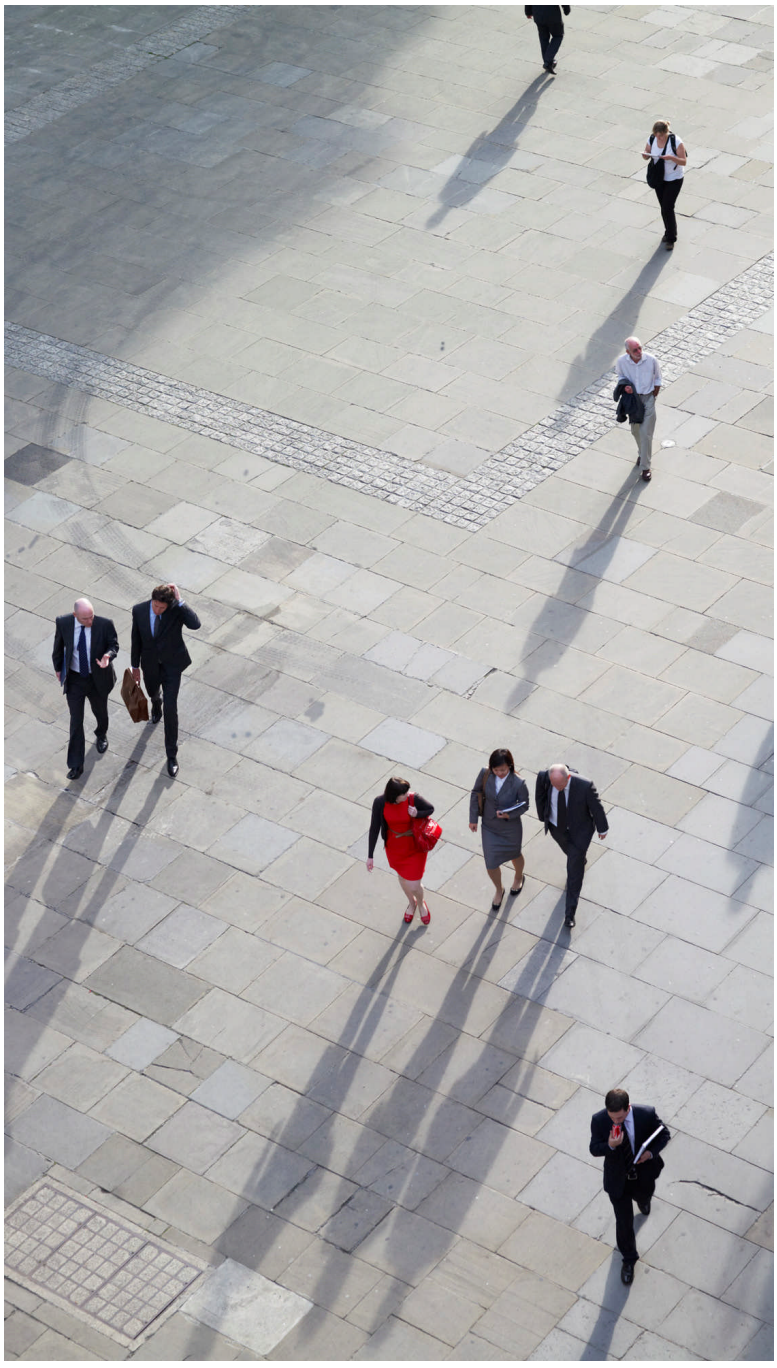
The TO treated the above distribution as 'dividends' under section 2(22)(a) of the Act, and accordingly added the market value of the property to the income of the assessee as a deemed dividend under section 2(22)(a) of the Act.

The CIT(A) did not agree with the observations made by the TO. It was held that the granting of occupancy rights cannot be considered as a 'deemed dividend' as the occupancy rights of the flats were granted to the

shareholders against the payment of an 'interest-free refundable deposit' for the proportionate cost of the land, and the development costs. Further, the company retained the ownership of the assets. Accordingly, it was held that the assessee received benefits under section 2(24)(iv) of the Act on account of obtaining occupancy rights in the building.

On appeal to the Tribunal, it was observed that the assessee had received occupancy rights in the premises on a perpetual basis on the basis of his shares in the company after the payment of an interest-free refundable deposit towards proportionate land and development costs. The Tribunal observed that the assessee could also transfer his occupancy rights to the premises by way of sale to a third party subject to the condition that the transferee was to deposit the required interest-free security deposit with the company. It was also observed that the consideration to be received by the assessee on the transfer of his occupancy rights was not to be refunded to the company. And the company had no objection to creating third-party rights in the occupancy rights granted to the assessee. On this basis, the Tribunal upheld the order of the TO stating that occupancy rights in the premises allotted by the company to the assessee amounted to deemed dividends under section 2(22)(a) of the Act.

Shantikumar D Majithia *v* DCIT [TS-805-ITAT-2012(Mum)]



Structuring for companies
Mergers and acquisitions

Case laws

Commercial brand equity eligible for depreciation as intangible assets

The assessee company is engaged in the business of retail asset financing, investment and trade financing. On 29 March 2001, it acquired the retail finance, hire purchase and consumer durables finance business of Birla Global Finance Ltd on a slump sale basis. The assessee acquired certain intangible assets as a part and parcel of the agreement. These were recorded in its accounts as 'business and commercial brand equity'. It claimed depreciation on the same as intangible assets for AYs 2002-03 to 2004-05. In AY 2004-05, the TO took the view that the depreciation could not be allowed on the business and commercial brand equity, as these were not intangible assets per section 32(1)(ii) of the Act, and disallowed the depreciation.

The CIT(A) ruled in favour of the assessee.

On appeal to the Tribunal, it was held that intangible assets in the nature of logos and trademarks were acquired by the assessee. These were used for its business purposes, and on that account huge earnings were made by the assessee, which were duly taxed. The Tribunal also noted that the valuation report considered the value of intangibles acquired by the assessee. Therefore, it was held that the depreciation on these intangible assets was allowable.

On appeal before the HC, the Revenue contended that intangible assets such as business and commercial brand equity are goodwill on which depreciation is not allowable. The HC relied on the SC ruling in the case of Smifs Securities Ltd [2012] 348 ITR 302 (SC) and held that the intangible assets also constitute goodwill on which depreciation would be allowable.

CIT *v* Birla Global Asset Finance Co Ltd [TS-791-HC-2012(Bom)]

No capital gains tax on transfers of family property under family arrangements

Pursuant to an arrangement agreed between family members, the assessee received a sum of INR 22.5 million on the transfer of his rights, title and interest in the family property to the other party under the family settlement.

The revenue department argued that the transfer of the rights, title and interest in the family property was a transfer under section 2(47) of the Act and liable to be taxed as capital gains under section 45 of the Act.

The Tribunal observed that there was a genuine dispute between the family members, and several suits were filed and judgements were pronounced. The family members finally reached a settlement under a consent decree passed by the Bombay HC.

The Tribunal held that a family settlement involves a division of property among family members. It redefines a pre-existing joint interest as several separate interests, and there is no conveyance if the arrangement is *bona fide*. Relying on the SC's decision in the case of Maturi Pullaia *v* Maturi Narasinham AIR 1966 (SC) 183, the Tribunal concluded that since there was no transfer of assets under a family arrangement, any amount received under a family arrangement is not liable to tax under section 45 of the Act.

The Bombay HC dismissed the Revenue Department's appeal on the basis that the Tribunal's ruling was based on a finding of the facts and no questions of law arose.

CIT *v* Sachin P Ambulkar [TS-792-HC-2012(Bom)]

Regulatory developments

Company law

Amendment relating to a change in the registered office of a company from one state to another

The Ministry of Corporate Affairs has amended the Companies (Central Government) General Rules and Forms, 1956 and inserted Rule 4BBB, effective 12 August 2012. It contains the procedures for changes to the registered offices of companies from one state to another under the provisions of section 17 of the Companies Act, 1956. This procedure was earlier laid down in the Company Law Board Regulations, 1991.

The important changes in the process of a change to the registered office under Rule 4BBB are summarised as follow:

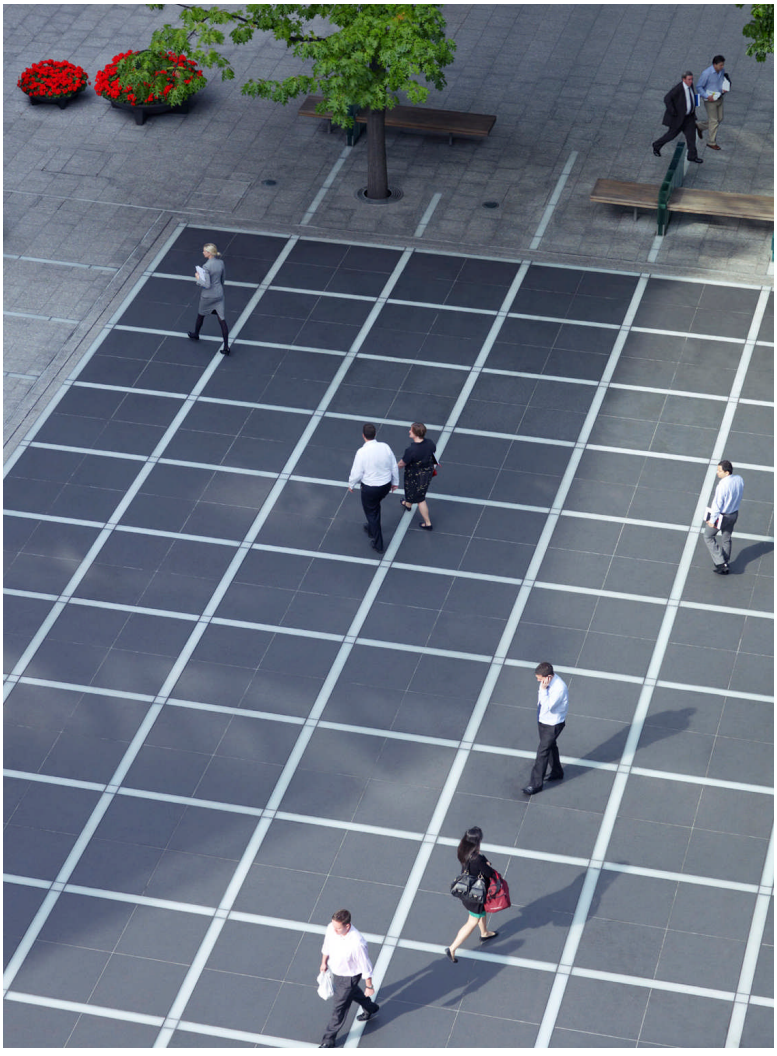
Changes relating to filing petitions

The company wishing to change its registered office from one state to another is required to file a petition before the Regional Director using Form 1 and Form 24AAA. Under the previous regulations, an application was required to be filed with the Company Law Board. Further, no specific form was prescribed for filing this application.

Changes to cut-off dates for certain documents

The cut-off dates for the lists of creditors and debenture holders which are required to be filed along with the petition, stating the name, address and the amount due to them shall not precede the date of filing of the petition by more than one month (at the earliest two months).

Notification no G S R (E) dated 10 July 2012



Pricing appropriately
Transfer pricing

Prelude

The months of November and December have been particularly hectic for taxpayers and tax professionals, as they were required to comply with various statutory documentation and certification requirements, along with ongoing assessment proceedings. The introduction of the Advance Pricing Agreement (APA) regime in India has reportedly gone smoothly, with the APA division receiving around ten pre-filing consultation requests. The taxpayers are eagerly awaiting the announcement of safe harbour rules. Whether it is safe harbour or APA, the primary objective is to attain more certainty of outcome for taxpayers undertaking transactions, in order to prevent avoidable litigation.

As in the past, this communiqué brings you a snapshot of recent transfer pricing cases at different stages of the dispute resolution process.

Case laws

Various factors to be considered while pricing guarantee commission

The taxpayer was primarily engaged in the manufacture of high pressure seamless gas cylinders, and had entered into various international transactions with its associated enterprises (AEs). During the course of assessment proceedings, the only international transaction that was in dispute was the guarantee commission charged by the taxpayer to one of its AEs. The TPO rejected the rate of 0.5% as commission charged by the taxpayer to its AE, on the basis of guarantee commission information gathered from various banks and using comparable uncontrolled price (CUP) method. On this basis the TPO considered 3% to be an arm's length guarantee charge. The CIT(A) upheld the adjustment proposed by the TPO.

On appeal, the Tribunal ruled as follows:

- In view of the amendment brought in by the Finance Act, 2012 with retrospective effect, the payment of guarantee fees is included in the expression 'international transaction'. Further, the taxpayer and the TPO both accepted that this was an international transaction and that the CUP was found to be the most appropriate method.
- The guarantee commission depends on various factors such as a mutual understanding and the relationship between the parties, the terms and conditions of the loan, the risk undertaken, the relationship between the bank and the client, and the economic and business interests. In this case, the TPO had not brought anything on the record regarding the terms and conditions and circumstances under which the various benchmark banks had charged a rate of 3%, and hence the same cannot be accepted as a comparable uncontrolled reference point.
- In an independent transaction, the taxpayer had paid 0.6% guarantee commission to ICICI Bank India for its credit arrangements. This could be a good benchmark and represents an internal comparable for the transaction between the taxpayer and the AE. The charging of 0.5% guarantee commission from the AE was quite close to 0.6%. The difference of 0.1% could be on the account of the differential rates of interest charged on the two underlying loans and could be ignored.

In view of the above the Tribunal deleted the adjustment on account of the guarantee commission.

Everest Kanto Cylinder Ltd *v* DCIT [TS-714-ITAT-2012 (Mum)]

Arm's length prices for purchases of goods from group companies-combined transaction method accepted

The taxpayer was a manufacturer and trading in automobiles. The components necessary for the manufacture and the technical and intellectual inputs were obtained from its AEs upon payment of a royalty. The taxpayer adopted the combined transaction approach and used the transactional net margin method (TNMM) to benchmark its transactions. During the course of assessment proceedings for FY 2002-03, the TPO took the view that the taxpayer's margin was low and that the purchase prices paid for the components to its AEs were overstated. The TPO excluded the excise duty in sales and materials costs, and disallowed the customs duty adjustment while computing the ALP. The TPO then proceeded to compare the operating efficiency levels of the assessee vis-à- vis the comparable companies and noted that the operating efficiency of the taxpayer was much higher than that of the comparable companies. Thus the TPO made an adjustment to reflect this difference in order to cancel out the effect. Based on this the TPO proposed an adjustment to the transfer pricing of the taxpayer. On appeal, the CIT(A) upheld the adjustments made by the TPO. Aggrieved, the taxpayer filed an appeal before the Tribunal.

On appeal, the Tribunal held as follows:

- The aggregation of transactions should be based on the nature of the transactions and must be case- and year-specific. Though the functions, assets and risks differed for the manufacturing and the trading segments, the facts and circumstances warranted a combined transaction approach, which was adopted by the taxpayer.
- On the excise duty adjustment, the Tribunal held that the actual margins on a net basis were to be considered, as the excise duty paid was a pass-through cost. Thus, for both the comparable companies and the taxpayer, the excise duty paid was to be adjusted from sales as well as costs in order to maintain consistency for the purpose of computation of margins.
- On the operating efficiency adjustment, the Tribunal remitted the matter to the file of the TPO, with directions to review the expert opinion and specifically consider the interplay between the material costs and operating expenses of the assessee and the comparable companies due to functional differences between them.
- On the customs duty adjustments, the matter was remanded back to the TPO for further adjudication.
- On the issue of the choice of profit level indicator (PLI) under the TNMM, it was ruled that the taxpayer, being an asset intensive automobile industry company, would consider the depreciation cost itself when initially determining its prices. Hence, the cash PLI or the profit before depreciation and tax to sales was not an appropriate choice of PLI as it would distort the comparability analysis.
- The taxpayer being a manufacturer, marketing expenses incurred were in the normal course of the business and cannot be considered as extraordinary expenses, thus forming part of the operating expenditure.

Editor's note: The above ruling of the Bangalore Tribunal is in contrast with the decision of the Delhi Tribunal in the case of Schefenacker Motherson Ltd v ITO [2009] 123 TTJ 509 (Delhi) wherein the Tribunal accepted the use of the cash PLI as the parameter for the profit margin in order to determine the ALP.

Toyota Kirloskar Motors Pvt Ltd *v* ACIT [TS-732-ITAT-2012 (Bang)]

Arm's length prices of international transaction cannot be determined as NIL by the TPO in relation to international transactions

The taxpayer was engaged in the execution of turnkey contracts involving the design, manufacture, supply, erection and commissioning of sugar plants, cement plants, mining and bulk materials handling equipment, steam generators, etc. The necessary components for the execution of the contracts were obtained from its group companies upon payment of royalties. The taxpayer adopted the TNMM to benchmark its international transactions. During the course of assessment proceedings for FY 2006-07, the TPO took the view that the taxpayer's method of benchmarking the transactions at entity level did not provide an arm's length outcome for the royalty payments. Also, the payment towards liquidity damage was not acceptable. On appeal, the Dispute Resolution Panel (DRP) upheld the adjustments made by the TPO. Aggrieved, the taxpayer appealed before the Tribunal.

On appeal, the Tribunal held as follows:

- Adjustments, if any, should be restricted to the value of the international transactions and not the turnover of the entity on the whole.
- On the issue of royalty payment, the Tribunal held that it is not within the power of the TPO to determine the ALP of an international transaction as zero for the purpose of arriving at the ALP.
- Payments towards liquidity damage made by the taxpayer to its group entities was legitimate expenditure and the taxpayer need not demonstrate that the expenditure incurred was for the business.

The Tribunal upheld the principle that as the price of the international transaction was within the +/-5% range, the adjustments made by the TPO were to be deleted.

Thyssen Krupp Industries Ltd *v* ACIT [TS-721-ITAT-2012 (Mum)]

Various factors to be considered for the application of the comparable uncontrolled price method

The taxpayer was engaged in the exporting of minerals to its AEs. There were also occasional exports made to non-AEs. The taxpayer adopted the TNMM for three products, and the CUP method for the remaining two, for one of which the taxpayer compared its price to AE with the price charged by a competitor. During the course of assessment proceedings, the TPO, compared the price charged to the to AE with the price charged to non-AEs for all the five products sold by the taxpayer and thereby proposed an adjustment to the transfer pricing of the taxpayer. On appeal, the DRP confirmed the adjustment of the TPO. The taxpayer appealed before the Tribunal.

On appeal, the Tribunal ruling in favour of the taxpayer, holding as follows:

- In the assessment of the competitor, the revenue authorities made a comparison with the sales price recorded by the taxpayer and concluded that the comparison was reasonable and no addition was to be made. If an addition was now made in the case of the taxpayer, it would be a sure case of double standards.

- Volume of sales was a very important factor as the price is influenced by volume, frequency and other vital aspects of trade. Almost all of the sales of the taxpayer was made to its Dubai AE (bulk and regular sales), while sale to non-AEs were occasional sales, where the taxpayer was not constrained by considerations (such as volume, etc.) applicable in the case of its AE.
- The taxpayer's sales to its AE were on a free on board (FOB) basis and to non-AEs on a carriage insurance and freight (CIF) basis. There was a difference between the CIF and FOB value of the goods. There was a difference in the risk involved and level of capital deployed. When freight and insurance factors are excluded from the CIF value (for non-AE sales), then that amount is comparable to FOB value (of AE sales). Price variations between AE sales and non-AE sales was predominantly due to the different methods of invoicing.
- There were quality variations in sales to AEs *vis-à-vis* sales to non-AEs, thus impacting their pricing. The chemical analysis filed by the taxpayer demonstrated that different consignments had different chemical compositions and were therefore of different qualities.

Trimex Industries Ltd *v* ITO [TS-659-ITAT-2012 (Chny)]

Taxing of goods and services
Indirect taxes

Case laws

VAT, sales tax, entry tax and professional tax

An inextricable link must exist between transactions to qualify as sale in the course of import

The Delhi HC held that for a transaction to qualify as a sale in the course of import under the first limb of section 5(2) of the Central Sales Tax Act, 1956, there must be an inextricable link or a back-to-back transaction for the sale or purchase occasioning the importing of the goods into India. The HC observed that factors such as passing of title or whether the end user has privity of contract with the supplier or where the consideration flows from are not determinative or decisive on this issue.

ABB Ltd *v* Commissioner, VAT [2012] VIL 83 (Del)

Each assessment year has to be treated as a separate year

The Allahabad HC observed that in tax matters, each AY has to be treated as a separate year and the principles of *res judicata* do not apply to tax matters relating to different AYs.

Radico Khaitan Ltd *v* State of UP [2012] NTN (Vol 50) (34) (Allh)

Notification and circulars

E-payment of tax and e-filing of returns made mandatory in Bihar

The electronic payment of tax, interest or penalty has been made mandatory in Bihar for the following classes of dealers:

- Annual tax payment exceeds INR 0.05 million during the financial year (FY) 2011-12 (effective FY 2012-13)
- Gross turnover during any financial year or part thereof exceeds INR 5 million (effective 8 October 2012)
- Output tax in respect of sales to any one dealer during any one quarter exceeds INR 0.10 million (effective 8 October 2012)

Notification no. Bikri Kar/ Vividh-57/2007-6528 dated 3 October 2012 and Notification no. BikriKar/ Vividh-43/2011-6597 dated 8 October 2012

Case laws

CENVAT

Expenses incurred towards pre-delivery inspection and free servicing not includible in assessable value

The Bombay HC has held that expenses incurred by dealers towards pre-delivery inspection as well as free after sales servicing without reference to the appellant-manufacturer are not includible in the assessable value.

Tata Motors Ltd *v* UOI [2012] 193 ECR 312 (Bom)

CENVAT credit admissible on the insurance policy of a power plant located outside the factory

The Delhi Customs Excise and Service Tax Appellate Tribunal (CESTAT) held that a captive power plant located outside of a factory constituted an integrated part of the manufacturing unit. Therefore, CENVAT credit of service tax paid on the insurance policy for the power plant would be admissible.

Hindalco Industries Ltd *v* CCE [2012] TIOL (1444)

Case laws

Service tax

Compliance services cannot be taxed as 'management consultancy services'

The Delhi CESTAT has held that not every management responsibility can be considered as a management function. Accordingly, though compliance with the law is a part of management responsibility, assistance in this connection cannot be covered under 'in connection with the management of any organisation' in section 65(65) of the Finance

Act, 1994 and taxed as 'management consultancy services'.

Ernst & Young Pvt Ltd *v* CST [2012] 27 STR 462 (Del)

Missing cross-references as to the shipping bills, number and date of the export invoices raised towards custom house agents services are curable defects

The Ahmedabad CESTAT has held that missing cross-references as to the shipping bills, number, and date of export invoices raised towards custom house agents (CHA) services are curable defects and, since these were cured, the refunding of input credit towards CHA services should be available under Notification no 41/2007-ST dated 6 October 2007.

Akanksha Overseas and Rachana Art Prints Pvt Ltd *v* CST [2012] TIOL (1305)

Case laws

Customs and foreign trade policy

Importation without an IEC does not amount to importation of prohibited goods

The Bangalore CESTAT has held that goods imported in the absence of an importer-exporter code (IEC) are not liable for confiscation as importation without IEC does not amount to import of prohibited goods.

CC *v* Port Ware International LLC [2012] 284 ELT 50 (Bang)

Interest is available to the importer after a prescribed period in case the event of sanctioning of a refund claim

The Ahmedabad CESTAT has held that where a refund claim is finally sanctioned by the order of the Tribunal, the importer is entitled to interest from a period starting three months after the date of filing of the refund application.

Gupta Steel *v* CC [2012] 193 ECR 412 (Ahmd)

The benefit obtained from forged documents under the Duty Entitlement Pass Book (DEPB) scrip cannot be passed on to the transferee

The Mumbai CESTAT has held that no benefit of credit of duty available under a DEPB scrip should be passed on to the transferee where the DEPB scrip was obtained by the transferor on the basis of forged documents.

Dow Agrosciences India Pvt Ltd *v* CC [2012] 283 ELT 524 (Mumbai)

Notifications or circulars

Increase in concession from basic customs duty to specified goods when imported from less developed countries

The central government has increased the concessional basic customs duty on specified goods imported from less developed countries (LDCs). These LDCs include countries such as Cambodia, the Maldives, Bangladesh, Myanmar and several African countries.

Notification no. 56/2012 dated 1 October 2012

Cost accountants also allowed to certify documents

The central government has also allowed 'cost accountants' to certify documents under the FTP and procedures, whereas previously only chartered accountants were allowed to certify.

Public notice no. 22 (RE-2012)/ 2009-2014 dated 11 October 2012

Following the rule book
Regulatory developments

FEMA

External commercial borrowing

- ***Eligible borrowers***: The RBI has amended the external commercial borrowing (ECB) policy to include the Small Industries Development Bank of India (SIDBI) as an eligible borrower for receiving ECB for on-lending to the micro, small and medium enterprise development (MSME) sector, as defined under the Micro Small and Medium Enterprise Development (MSMED) Act, 2006.

- ***ECB and trade credits revised-all-in-cost***: The RBI has notified that the all-in-cost ceiling for ECB and trade credit as revised earlier will continue to be applicable until further review. Thus the all-in-cost ceiling presently applicable is as follows:

Average maturity period	All-in-cost ceilings over six months LIBOR*	
	ECB	Trade credits
Up to one year	350 basis points	350 basis points
More than one year and up to three years		
More than three years and up to five years	500 basis points	

AP (DIR Series) Circular no. 39 and 40 dated 9 October2012

Permitted end use	Availment route for ECBs (including the outstanding ECBs)		Currency of on-lending	
On-lending to the MSME sector only for the permissible end-uses provided for under the extant ECB policy	**Automatic**	**Approval**	**INR**	**Foreign currency**
	Up to 50% of SIDBI's owned funds*	Beyond 50% of SIDBI's owned funds*	Foreign currency risk needs to be fully hedged by SIDBI	Beneficiaries need to have a natural hedge by way of foreign exchange earnings. Lending needs to comply with the Regulation 5(5) on borrowing or lending in the Foreign Exchange, Regulations, 2000

**subject to a ceiling of USD 500 million per financial year*

- The above facility is subject to the following terms and conditions: All the other conditions of ECB, such as recognised lender, all-in-cost, average maturity, prepayment, refinancing of existing ECB and reporting arrangements remain unchanged.

AP (DIR Series) Circular no. 48 dated 6 November 2012

Export of goods and services

- ***Supply of goods and services by special economic zones to units in domestic tariff areas against payment in foreign exchange:*** The RBI has permitted authorised dealer (AD) banks to sell foreign exchange to units in domestic tariff areas (DTA) for making payment in foreign exchange to units in special economic zones (SEZ) for services rendered by them (i.e. a unit in a SEZ) to a DTA unit. Earlier, such permission was limited to payments for goods supplied by units in a SEZ to a DTA unit. However, it has to be ensured that the letter of approval (LOA) issued to the SEZ unit by the Development commissioner (DC) of the SEZ contains a provision for the supply of these goods or services by the SEZ unit to the DTA unit and for payment in foreign exchange for such goods or services to the SEZ unit.

AP (DIR Series) Circular no. 46 dated 23 October 2012

- ***Simplification and revision of the Softex procedures:*** The RBI *vide* its AP (DIR Series) circular no 80 dated 15 February 2012, had introduced revised procedure for reporting software export declaration (Softex forms), whereby a software exporter whose annual turnover is at least INR 10 billion or who files at least 600 Softex forms annually on an all-India basis, was eligible to submit a statement in Excel format. However, this was made applicable only to the software technology park of India (STPI) at Bangalore, Hyderabad, Chennai, Pune and Mumbai, effective 1 April 2012. Since the revised procedure is running successfully at the five designated centres, the RBI has stated that the revised procedure will now be implemented in all of the STPIs in India with immediate effect.

AP (DIR Series) Circular no. 47 dated 23 October 2012

- ***Realisation of export proceeds:*** A relaxation of the procedures for realising and repatriating to India the amount representing the full export value of goods or software exported within twelve months from the date of export was available up to 30 September 2012. The RBI has extended the above relaxation effective from 1 October 2012 till to 31 March 2013.

AP (DIR Series) Circular no. 52 dated 20 November 2012

- ***Liasion office or branch office reporting to the income tax authorities:*** Under the extant regulations, a liasion office (LO) or branch office in India were required to furnish a copy of the annual activity certificate (AAC) along with the audited financial statements to the Director General of Income Tax (DGIT). The RBI has clarified that these copies of the AACs submitted to the DGIT should be accompanied by the audited financial statements including receipts and payment accounts. Further, a copy of each renewal of permission granted to LOs by the AD banks should be forwarded by the AD banks to the office of the DGIT.

AP (DIR Series) Circular no. 55 dated 26 November 2012

Financial services

Amendments to the Prevention of Money Laundering Act, 2002

Based on several representations received from full-fledged money changers (FFMCs), regarding difficulties in obtaining documents other than passports and taking into account the procedure followed for money changing in other countries, it has been decided to amend certain instructions. The guidelines regarding correct permanent addresses in the case of foreign tourists has

been revised. Where neither passports contain any address or foreign tourists are not able to produce any proof of address, authorised persons may obtain and keep on record a copy of the passport and visa duly stamped by the Indian immigration authorities and a declaration duly signed from the foreign tourists regarding their permanent address.

RBI Circular - RBI/2012-13/294 A.P. (DIR Series) Circular no. 51 dated 15 November 2012

Liquidity risk management by banks

The RBI has announced guidelines that require commercial banks to reinforce their liquidity risk management policies, as a prelude to their convergence with international regulatory standards under the Basel-III rules. These norms include enhanced guidance on liquidity risk governance, liquidity risk tolerance, measurement, monitoring and the reporting to the RBI on liquidity positions. The banks are advised to conduct stress tests at regular intervals and across different maturities and profiles. The RBI has asked banks to put in place the guidelines on intra-day liquidity risk management strategy by 31 December 2012. Banks have been asked to publicly disclose liquidity information on a regular basis in order to enable market participants to make informed judgments regarding the soundness of the banks' liquidity risk management frameworks and liquidity positions.

RBI Circular - RBI no. 2012-13/285 DBODBP no. 56/21.04.098/ 2012-13 dated 7 November 2012

Permission to banks for membership on SEBI approved stock exchanges

Scheduled commercial banks (SCBs) will now be permitted to become members of SEBI approved stock exchanges for the purpose of undertaking proprietary transactions in the corporate bond market. While doing this, SCBs should satisfy the membership criteria of the stock exchanges and also comply with the regulatory norms laid down by SEBI and the respective stock exchanges.

RBI Circular - RBI/2012-13/277 [DBOD no. FSD.BC. 53/24.01.001/2012-13] dated 5 November 2012

NBFCs to follow standardisation and enhancement of security features in cheque forms

NBFCs accept post dated cheques from their customers for future EMI payments and some such instruments may not be compliant with the cheque truncation system (CTS) 2010 standards. Therefore, NBFCs are required to ensure the replacement of non–CTS-2010 standard compliant cheques with CTS-2010 standard compliant cheques before 31 December 2012.

RBI circular - RBI/2012 13/280 [DNBS.PD/ CC.NO.308/03.10.001/2012-13] dated 6 November 2012

Reduction in cash reserve ratio

The RBI has further reduced the cash reserve ratio (CRR) to be maintained by banks from 4.50 to 4.25% of their net demand and time liabilities (NDTL), effective the fortnight beginning 3 November 2012. This CRR reduction has come into effect less than two months after the CRR was reduced by 25 basis points to 4.50% in September 2012. This will induce INR 175 billion in the Indian economy.

RBI Circular - RBI/2012-13/269 [DBOD no. RetBC.52/12.01.001/2012-13] dated 30 October 2012

Revised guidelines for the rehabilitation of sick micro and small enterprises

The Working Group of the RBI, under the Chairmanship of Dr. K C Chakrabarty recommended a change in the definition of sickness and a procedure for assessing the viability of sick micro and small enterprise (MSE) units, with a view to hasten the process of identification of a MSE unit as sick.

Below are the revised guidelines *vis-à-vis* the existing guidelines:

Sr no	Existing guidelines	New guidelines
1.	A MSE unit is considered sick under the following circumstances: • If any of the borrowing accounts of the unit remains substandard for more than six months i.e. the principal or interest, in respect of any of its borrowing accounts has remained overdue for a period exceeding a year. The requirement of an overdue period exceeding one year will remain unchanged even if the present period for classification of an account as substandard is reduced in due course. • There is erosion in the net worth due to accumulated cash losses to the extent of 50% of its net worth during the previous accounting year. • The unit has been in commercial production for at least two years.	A MSE is considered 'sick' under the following circumstances: • Any of the borrowing account of the enterprise remains a non-performing asset (NPA) for three months or more. • There is erosion in the net worth due to accumulated losses to the extent of 50% of its net worth. • The stipulation that the unit should have been in commercial production for at least two years has been removed.
2.	There is no stipulated time frame for deciding on the viability of a unit.	The decision on the viability of the unit should be taken at the earliest but not later than three months of after becoming sick under any circumstances.
3.	The procedure for declaring a unit unviable is not specified.	The procedure for declaring a unit unviable has been laid down.
4.	While the concept of incipient sickness existed, there was no definition of incipient sickness.	Incipient sickness or a 'handholding stage' is defined.

RBI Circular - RBI/2012-13/273 [RPCD CO MSME & NFS BC 40/06.02.31/2012-2013] dated 1 November 2012

Glossary

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
FY	Financial Year
HC	High Court
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

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

pwc.in

AK 451- February 2013 Spectrum-December.indd
Designed by: PwC Brand and Communications, India