Tax Glimpses 2013

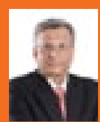
Foreword

We are delighted to present our annual publication, Tax Glimpses 2013.

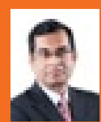
The year 2013 witnessed a number of measures being implemented by the Government to gain control over a fluctuating economy with a number of developments on the legislative and administrative fronts. The Government notified the recommendations of the Shome Committee on the General Anti-Avoidance Rules (GAAR), including procedural aspects, while the Finance Act, 2013, formally incorporated some other provisions into the Income-tax Act, 1961 (the Act). The Parliament also passed the Companies Bill which received the President's assent to be enacted as the Companies Act 2013, vide notification in the official gazette dated 30 August, 2013. Subsequently, 98 sections of the Companies Act were enacted vide notification from 12 September 2013. In this year, the Final Safe Harbour Rules were also released, being an initiative of the Central Board of Direct Taxes (CBDT) designed to reduce litigation and to benefit taxpayers by reducing uncertainty in tax assessments. A comprehensive guidance note and frequently asked questions detailing procedural aspects concerning the unilateral, bilateral or multilateral advance pricing agreement (APA) applications was released to address the commonly asked questions of the applicants. Also, the CBDT prescribed a more practical procedure of issue of Tax Residency Certificates (TRC) enabling claims of treaty benefits.

As a handbook that summarises the year's most important events, Tax Glimpses 2013 brings to you a brief analysis of the pertinent judgements and noteworthy regulatory developments in corporate tax, mergers and acquisitions, transfer pricing and indirect tax law that took place during 2013. The publication also includes a list of various PwC thought leadership items published in 2013, such as news alerts and flashes, newsletters and articles.

We trust you will find Tax Glimpses 2013 useful. As always, we look forward to hearing from you.



Ketan Dalal
Joint Leader, Tax and Regulatory Services



Shyamal Mukherjee
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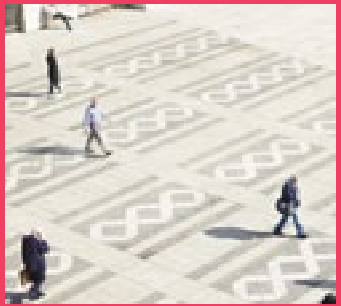


Corporate tax

The corporate tax section gives a brief analysis of pertinent judgements and noteworthy developments in corporate tax under various subjects. To name a few, judgements covering fees for technical services, fees for included services, royalty, employees provident fund, depreciation, capital gains, employees stock option scheme, share allotment, transfer of property, additional information requirement alongside tax residency certificate, and general anti-avoidance rules.

Corporate tax

Case law

Fees for technical services

Virtual presence through website does not create PE in India – Payments to Google/ Yahoo for online advertisements are not taxable in India as Fees for Technical Services either

ITO *v.* Right Florists Pvt. Ltd. [TS-137-ITAT-2013(Kolkata)]

The presence of Google and Yahoo search engines on websites – when their servers are located outside India – did not constitute a business connection or permanent establishment (PE) in India. Payments made to display advertisements along with search results did not constitute equipment royalty. In the absence of any human intervention in the whole process of serving advertisements, payments for this process could not be classified as fees for technical services (FTS). Accordingly, it was held that payments to Yahoo or Google for online advertisement through search engines were not to be subjected to Indian withholding tax and, accordingly, disallowance under section 40(a)(ia) of the Act ought not to have been made.

Facts

The taxpayer, a florist, used the search engines of Google and Yahoo to advertise and to generate business. The taxpayer's advertisements were displayed along with the search results when web searches on the respective search engines were made by members of the public using certain keywords. During the financial year (FY), the taxpayer made payments to Google and Yahoo for its online advertisements, without withholding taxes. The tax officer (TO) held that the advertisement expenses should have been disallowed under section 40(a)(ia) of the Act as the taxpayer had failed to withhold tax or approach the TO under section 195 of the Act before making payments to non-residents.

Held

The Income-tax Appellate Tribunal (the Tribunal), in setting out its decision, analysed in detail the taxability of payments made to Google and Yahoo, keeping in mind the following:

Creation of a PE

The concept of a PE evolved because of traditional commerce, in which a physical presence was required in the source country if any significant level of business was to be carried on. However, with the development of the internet and e-commerce, the correlation between the size of a business and its physical presence has virtually vanished. Making reference to the report of a High Powered Committee on e-commerce transactions, the Tribunal observed that in this virtual world, conventional PE tests fail even when a reasonable level of commercial activity is undertaken by a foreign enterprise. The Tribunal, relying on commentary on the Organisation for Economic Co-operation and Development's (OECD's) Model Convention held that a search engine's presence only through its website would not in itself create a PE in India, since the website is not tangible. The Tribunal observed that a PE would not be created unless the servers on which websites were hosted were also located in the same jurisdiction. Accordingly, Google's and Yahoo's presence in India through websites could not be said to have constituted a PE in India.

Royalty

On determining whether payments for advertisements were taxable as 'royalty', the Tribunal relied on the decision in Pinstorm Technologies (P) Ltd. *v.* ITO [2012] 54 SOT 78 (Mum), in which it was held that payments made to foreign enterprises for online advertisements were not in the nature of 'royalty', as the aforesaid

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decisions held that the advertisement hosting service did not involve any use of or right to use any industrial, commercial or scientific equipment.

Fees for technical services (FTS)

The Tribunal relied on CIT *v.* Bharti Cellular Ltd. [2008] 319 ITR 139 (Del), in which the principle of *noscitur a sociis* was upheld. It was observed that in Explanation 2 to section 9(1)(vii) of the Act, the word 'technical' was sandwiched between the words 'managerial' and 'consultancy'. Hence, the word 'technical' would take its colour from those other two words. Applying this principle, the Tribunal held that even though the nature of online advertising services was highly technical, those services could not be taxed as long as there was no human intervention in them. As the online advertising services were wholly automated and no element of human intervention was involved, the payments could not be categorised as FTS under the Act.

Editor's note

A change in our conceptions of taxation is needed for businesses carried on through e-commerce. E-commerce has challenged the existing principles that underlie determination of PE status, followed by taxation for services rendered to be covered as FIS. Without the element of human intervention, no service can be classified as FTS, either under the Act or under the tax treaties. Although not specifically mentioned in the decision, the Tribunal has approved the view of the Madras Tribunal in its decision in Skycell Communications Ltd. and Anr. v. DCIT [2001] 170 CTR 238 (Mad). However, the Ahmedabad Tribunal in its decision in Canara Bank v. ITO [2008] 305 ITR 189 (Ahd) held that technical services may be classified as FTS even if they are rendered without any human intervention.

Reimbursement of salary costs under secondment agreement not FTS; services rendered by seconded employees do not constitute a service PE

Temasek Holdings Advisors India Pvt. Ltd. *v.* DCIT [2013-TII-163-ITAT-Mumbai]

There is no requirement to withhold taxes under section 195 of the Act at the time of reimbursement of salaries paid to seconded employees when taxes have already been withheld under section 192 of the Act. Furthermore, a service PE of an overseas entity is only formed when that entity renders any kind of service in India through its seconded employees. Where the seconded employees are working under the supervision and control of an Indian company, no service PE can be said to exist.

Facts

The taxpayer was a wholly-owned subsidiary of THPL, a Singapore-based investment firm. The taxpayer rendered advisory services to THPL. THPL had seconded two employees to the taxpayer to assist in providing investment advisory services to THPL. According to the secondment agreement, the employees continued to remain on THPL's payroll; however, they worked under the supervision and control of the taxpayer during the secondment term. THPL incurred the salary costs for the employees on secondment, on which tax was withheld under section 192 of the Act. In addition to the salary costs, THPL incurred other administrative costs related to the seconded employees. According to the secondment agreement, the taxpayer reimbursed THPL for salary and other administrative costs and claimed these reimbursements as deductible expenses. The TO disallowed all of the payments under section 40(a)(ia) of the Act on the grounds that such payments were FTS and should be subject to withholding tax in India.

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Held

There could not be double withholding of taxes, once at the time of payment of the salary and again when reimbursement was made by the taxpayer to THPL. The two seconded employees worked only for the Indian company and were not rendering services on behalf of THPL. Hence, there was no question of rendering managerial or consultancy services by THPL - either directly or through the seconded employees. Therefore, section 9(1)(vii) of the Act was not attracted. Furthermore, the payments made were not covered within the ambit of the 'make available' clause of Article 12(4)(b) of the double taxation avoidance agreement (tax treaty), as THPL neither rendered any services to the Indian company, nor did they make available any kind of technical knowledge, experience, skill or proceeds to the taxpayer. There was no merit in the revenue's contention that a service PE was constituted, as THPL did not render any service in India through the seconded employees. Therefore, the TO's disallowance under section 40(a)(ia) of the Act was cancelled.

Editor's note

The Tribunal agreed with the Delhi HC decision in DIT v. HCL Infosystem Ltd. [2004] 274 ITR 261 (Del) and various other courts that if the Indian company had already withheld and remitted employment-related taxes on salaries paid abroad to seconded personnel under section 192 of the Act, any cross-charge of such salary costs by the Indian company would not attract section 195 of the Act. If the seconded employees did not render any services in India on behalf of the overseas entity, a service PE of the overseas entity was not constituted.

Royalty

Royalty payments for the use of licensed patented technology by a non-resident to another non-resident are not taxable

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

Royalty payment made by one non-resident to another non-resident for the use of patented technology in connection with the manufacture of handsets and network equipment not taxable under section 9(1)(vi)(c) of the Act if the patent was exploited outside India.

Facts

The taxpayer was incorporated in the USA and was engaged in the development and licensing of code division multiple access (CDMA) technology. The taxpayer gave a licence to original equipment manufacturers (OEMs) to use its patented technology. The OEMs were situated outside of India and were not residents of India. Royalty was payable by the OEMs to Qualcomm US for the use of the patented technology in the manufacturing of products. The royalty was determined with reference to the net selling price of the products sold to unrelated wireless carriers worldwide. The OEMs typically paid a lump sum royalty payment in one or more instalments and ongoing royalties based on their sale of products. The OEMs sold products manufactured using the patented technology outside India and also to Indian telecom carriers (Indian carriers). The latter, in turn, sold the products to end-users in India. The TO pointed out that in this case the royalty had not been paid in a lump sum payment but were paid on an ongoing basis, dependent on the volume of sales. In this case, unless the OEM had raised a bill or shipped the goods to a party in India, no royalty would be payable to Qualcomm US. The Commissioner

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of Income-tax (Appeal) (CIT(A)) upheld the order of the TO and held that, in addition to the handsets, the TO failed to tax royalty income earned by the taxpayer on CDMA network equipment.

Held

The Tribunal held that what was important was not whether a right to property was used 'in' or 'for the purpose of' a business, but to determine whether such a business was 'carried on by such a person in India'. Using technology for manufacturing products was different from selling products which were manufactured from the use of the technology for which Qualcomm US had patents. The role of Qualcomm US ended when it licensed its patents on intellectual property rights (IPRs) pertaining to CDMA products for manufacture, and when it collected royalty from the OEMs on these products. Qualcomm US was involved in no activity after this sale and shipment. The title in the goods in the taxpayer's case had passed outside India in accordance with the clauses in the agreement. The OEMs had not carried on business in India, and the OEMs could not have used Qualcomm US's patents for the purpose of such a business in India. A sale to India without any operations being carried out in India would amount to business with India and not business in India. To tax the royalty income earned by the taxpayer, the revenue must show that the OEMs had used Qualcomm's patents for a business carried on in India, or for making or earning income from a source in India which would lead to the taxability of the OEMs. The taxability of Qualcomm US directly depended on the OEMs' taxability in India. If the OEMs' themselves were not brought to tax, to hold that Qualcomm US was taxable did not hold good. The Tribunal observed that in view of the specific clause in the agreement, it was clear that the software did not have an independent use and was an integral part of the hardware, without which the hardware could not function. The software supplied was a copyright and not a right in copyright. Applying the propositions laid down by the High Court (HC) in the cases of DIT *v.* Ericsson AB [2011] 246 CTR 422 (Delhi)/ DIT *v.* Nokia Networks OY [TS-700-HC-2012(Del)] the income from embedded software could not be taxed in India. The Tribunal concluded that the revenue had not proved that the OEMs had used Qualcomm US's patents for the purpose of making or earning income from a source in India. Therefore, the said royalty could not be brought to tax under section 9(1)(vi)(c) of the Act. Finally, the Tribunal held that the applicability of Article 12(7)(b) of the India-US tax treaty was academic since it had held that the amount was not taxable under the Act.

Editor's note

This ruling provides a detailed understanding of the applicability of section 9(1)(vi)(c) of the Act in connection with income arising by way of royalty for non-residents. It lays down the principle that it is for the revenue to prove that royalty was for a business carried on outside India, in order for them to be covered within the ambit of section 9(1)(vi)(c) of the Act. The ruling links taxability of OEMs and software license owners in India by holding that if OEMs are not taxable, the licensors could not be taxable for the same sale.

Time charter and bare boat-cum-demise hire charges held to constitute payment for 'use of ship' covered within meaning of 'royalty'. The term 'equipment' covers a ship

Poompuhar Shipping Corporation Ltd. *v.* ITO; West Asia Maritime Ltd. *v.* ITO; and ADIT *v.* Poompuhar Shipping Corporation [TS-528-HC-2013(Madras)]

Hire charges paid by an Indian charterer under a time charter and bare boat charter-cum-demise agreement constituted 'royalty' within the meaning of Explanation

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2 to section 9(1)(vi) of the Act. The HC also clarified that a ship being the equipment with which the ship-owner operated the business and which the ship-owner commercially exploited, the income arising from chartering the ship was assessable as royalty. Accordingly, tax should have been withheld by the Indian companies under section 195 of the Act on such payments to foreign ship-owners.

Facts

In the appeals involving Poompuhar Shipping Corporation Ltd.

The taxpayer, Poompuhar Shipping Corporation Ltd. (PSC), was a state-owned company engaged in transporting coal from various parts of India to Tamil Nadu. For this purpose, PSC time-chartered ships registered in various foreign countries by entering into agreements in standard time charter form. The decision in this case covered cross-appeals by PSC and the revenue arising from contradictory Tribunal orders for the years under appeal regarding hire charges paid to foreign shipping companies under a time charter arrangement to be considered as payment for use of equipment and hence not 'royalty'. The Tribunal had held that the charges paid by PSC under the time charter agreement were for use and hire of a ship and that they which constituted royalty within the meaning of Explanation 2 under section 9(1)(vi) of the Act ('royalty under the Act'). Accordingly, the taxpayer needed to withhold tax under section 195 of the Act. Consequently, the taxpayer was liable to be treated as a taxpayer-in-default and to suffer proceedings under section 201 of the Act for not withholding tax on the payments. Following the decision in Transmission Corporation of AP Ltd. *v.* CIT [1999] 239 ITR 587 (SC), the Tribunal held that withholding of tax was only a method of tax collection and acted as a check on tax evasion. The TO had also observed that the foreign companies that had hired out the ships had not submitted their tax returns or paid tax on the amount received on hire charges. Therefore, the TO also proceeded to assess the taxpayer in representative capacity under section 163 of the Act as an agent of the foreign shipping companies. The Tribunal held in these proceedings that the transportation of coal from one port to another on a hire basis did not partake of the character of royalty, and therefore did not attract section 9(1)(vi) of the Act. Although PSC could not be assessed as a representative taxpayer, it was still liable to withhold tax under section 195 of the Act and, consequent to its non-withholding of tax, proceedings under section 201 of the Act could be initiated. This case was remitted back to the TO.

In the case of West Asia Maritime Ltd.

The second taxpayer, West Asia Maritime Ltd. (WAM), was a public limited company engaged in the shipping business. It made payments to DMCL, an associated enterprise in Cyprus, towards hire charges under a bare boat charter-cum-demise (BBCD) for use of its ship. The TO held that hire charges paid by WAM amounted to royalty for the use of equipment, i.e. the ship. WAM had the option to purchase the ship by making a balloon payment, which it did not exercise. Since these payments were in the nature of hire charges and not payments towards a purchase transaction, they amounted to royalty for use of equipment paid without withholding tax under section 195 of the Act.

Held

Whether ship is equipment?

The term equipment has not been defined under the Act or in the tax treaties. However, 'plant' has been defined under the Act as embracing within its meaning ships, along with vehicles, books, scientific apparatus

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and surgical equipment used for the purposes of the business or profession. Thus, a ship is equipment forming part of a ship-owner's business. Furthermore, the presence of the word 'any' preceding the word 'equipment' in section 9(1)(vi)(b) of the Act clearly points out the need for construing equipment widely, so that it embraces every article employed by an employer for the purposes of his business. Therefore, a ship is to be treated as plant: equipment with which the ship-owner operated its business and which the ship-owner commercially exploited to earn income from ship chartering.

Whether payment under time charter amounted to royalty?

Under the Act and tax treaties, royalty means considerations that are paid for a use or a right to use. In Rashtriya Ispat Nigam Ltd. *v.* CIT [1990] 77 STC 182 (SC), the Supreme Court (SC) had held that by giving possession to a lessee who had control and custody of the vessel, the condition of use or right to use was satisfied. So long as the lessee had access to the vessel for its economic advantage, the expression 'use or right to use' could not be read restrictively to hold that the consideration paid for the same would not be royalty. Thus, when the use or right to use the ship for an economic benefit was provided, the consideration for use of industrial, commercial and scientific equipment was royalty under the Act. Payments under the time charter being for use of the ship were therefore covered within the meaning of royalty under the Act.

Whether hire charges under a BBCD amounted to royalty?

Under the BBCD, the ship - until it was sold - was a bare boat charter which, in accordance with section 115V(a) of the Act, means hiring of a ship for a stipulated period on terms which give the charterer possession and control of the ship, including the right to appoint the master and crew. The consideration paid periodically by the taxpayer was in the nature of hire charges for use of the vessel, under the agreement, and was not a sale consideration as contended by the taxpayer. The taxpayer had also treated the hire charges as revenue expenditure in its tax return. Therefore, as possession and custody was with the hirer, the payments were liable to be treated as royalty.

Whether test of international traffic is met?

According to Article 8 of the India-Cyprus tax treaty, only payments to foreign shipping companies that operate in international traffic are taxable in the country in which a foreign shipping company has a 'place of effective management'. In this case, the ships operated only along the coastline of India. Hence the test of international traffic was not met. Therefore, Article 8 of the tax treaty could not be invoked to determine whether tax should be withheld on payments to foreign shipping companies.

Whether the foreign shipping companies had a PE in India?

The ship had a place of business at the place where the ship was docked. Since the ship moved from one point to another, as a result of the nature of the business contract, and the movement was integrated, having business and geographical coherence, one could infer that the foreign enterprise had a PE in India. However, the payment was made for hire charges, which were not attributable to the PE but to the use of the ship. The payments were therefore taxable as royalty and not as business profits.

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Simultaneous proceedings initiated for sections 163 and 201 of the Act

An agent is a person who has a business connection with a non-resident in India, or where the non-resident earns income directly or indirectly through or from him. Only under such circumstances can an agent be used to recover taxes payable by the non-resident. When a payer fails to withhold tax or, after withholding tax, fails to deposit the same, the payer is treated as a payer-in-default. The fact that PSC was an agent had no correlation with its status as a payer-in-default. Section 195 of the Act places a responsibility on a person to withhold tax, while section 163 of the Act is for the purpose of assessment only. As both proceedings operated in different spheres, they could be initiated simultaneously.

Editor's note

In this ruling, the HC took the view that the ship was equipment hired by the taxpayers, who had control and custody of the same, and from which they derived economic benefits for their businesses. The HC further held that even a time charter of a ship can be considered as the supply of equipment, for which royalty was payable. This interpretation is not in line with the globally accepted practice in the shipping industry. By holding so, in effect the HC has held that there is no difference between a time charter and a bare boat charter of a ship for the purpose of taxability in India. Furthermore, all of the payments for the BBCD were taxed as royalty. Lastly, the above cases were in respect of vessels used in domestic (within India) traffic: the conclusion might have been different if the vessels were used for international traffic, depending upon the profile of the lessor.

Employees Provident Fund

Allowability of payment of employees' contributions to Employees Provident Fund/ Employees State Insurance Corporation under section 43B of the Act beyond due dates specified in the relevant statutes but before due date of filing the return of income

CIT *v.* Kiccha Sugar Company Ltd. [TS-211-HC-2013(Uttaranchal)]

LKP Securities Ltd. *v.* ITO [TS-203-ITAT-2013(Mumbai)]

Two decisions, one by the HC and the other by a Tribunal, discussed the allowability of employees' contributions to the Employees Provident Fund (EPF) and Employees State Insurance Corporation (ESIC) under section 43B of the Act, if paid before the due date for filing the return of income.

Kiccha Sugar Company Ltd.

Facts

The taxpayer collected the employees contribution to the EPF but did not remit it within the due date prescribed by the relevant legislation (the 15^{th} of the following month). The TO disallowed the payments as the obligations to pay accrued within an accounting year but were discharged in the subsequent accounting year before the due date for filing the tax return. The CIT(A) held that the money was no longer in the hands of the employer and could not be considered as income in the taxpayer's hands.

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Held

The sum received by the taxpayer from his employees towards EPF contributions was the taxpayer's income. Section 36(1)(va) of the Act allows it as a deduction if the contribution received was deposited on or before the due date under the relevant statute. Section 43B(b) of the Act provides that any sum payable by a taxpayer as an employer by way of contribution to any provident fund would be allowed as a deduction irrespective of whether the liability related to a previous year, only in that previous year in which the sum was actually paid by him. The due date referred to in section 36(1)(va) of the Act must be read in conjunction with section 43B(b) of the Act. Therefore, the HC held that payment or contribution made to the EPF authorities any time before filing the return for the year in which the liability to pay accrued would be allowed as a deduction after presentation of evidence that established the payment thereof.

LKP Securities Ltd.

Facts

The taxpayer collected the employer's contribution to the EPF and ESIC but did not remit it within the due date prescribed by the relevant legislation, *viz.* 15th of the following month for EPF contributions and 21st of the following month for payments to the ESIC. The TO disallowed the payments on the basis that they were made beyond the due date given under section 36(1)(va) read with section 2(24)(x) of the Act. The CIT(A) reversed the TO's findings.

Held

The Tribunal observed that section 43B of the Act covered only sums payable by the taxpayer as an employer himself or herself to the EPF/ ESIC. The amendment to section 43B of the Act, pertaining to the extension of the time limit, was not applicable to the employees' contribution. The 'due date', defined in the Explanation to section 36(1)(va) of the Act, is the date by which the employees' contribution has to be credited to the employees' account in the relevant fund under any act, rule, order or notification issued thereunder. Thus, for the payment to be allowable under section 36(1)(va) of the Act, actual payment before the due date is necessary. Furthermore, it was observed that section 43B of the Act provides for an additional qualification stipulating that payment should be 'otherwise allowable under the Act'. The payment, not having been made by the due date under section 36(1)(va) of the Act, was not allowable under the Act. Therefore, there was no scope for application or invocation of section 43B of the Act. Thus, the Tribunal concluded that the deductibility of the aforesaid payments had to be seen only with reference to section 36(1)(va) of the Act and not section 43B of the Act.

Editor's note

These rulings on the subject differ from each other and leave room for further litigation by the tax department and the taxpayer. Overall, however, a favourable view has been taken by the HC, which should be a relief to taxpayers.

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Fees for Included Services

Payment made under a management service agreement is covered within the expression 'fees for included services' – hence it is taxable and subject to withholding tax under section 195

US Technology Resources Pvt. Ltd. *v.* ACIT [TS-511-ITAT-2013(Cochin)]

Payment made under a management service agreement to a non-resident company towards management services rendered by that company, for the purpose of decision-making, treasury, legal matters, etc., would be covered within the expression 'fees for included services' (FIS). Therefore, the taxpayer was liable to withhold tax under section 195 of the Act on such payment.

Facts

The taxpayer was engaged in providing software development services to its customers based in India. It claimed deduction on payments made to the non-resident company towards management services rendered by it. According to the management service agreement between the taxpayer and the non-resident, the latter would provide assistance, advice and support to the taxpayer in management, decision-making, sales and business development, financial decision-making, legal matters, public relations activities, treasury service, risk management service and any other management support as may be mutually agreed between them. The TO disallowed the payments made by the taxpayer on the basis that they were covered within the ambit of consultancy fees and, hence, tax was liable to be withheld under section 195 of the Act.

Held

According to the Memorandum of Understanding to the India-US tax treaty, only consultancy services that are technical in nature are to be included as FIS. The Tribunal observed that in the context of professional management and decision-making processes, the advice and services rendered by the non-resident was used by the taxpayer to take correct and suitable decision towards the achievement of the desired objects and business goals. Similarly, the technical knowledge, experience and skill possessed by the non-resident with regard to financial and risk management was made available in the form of advice or services, which were made use of by the taxpayer in the decision-making processes related to financial matters and risk management. Thus, the information, expertise and training provided by the non-resident had been absorbed by the taxpayer in its decision-making processes and utilised for the purpose of its business. Therefore, the expertise and technology which was made available by the non-resident was a technical service within the meaning of Article 12(4)(b) of the tax treaty.

Editor's note

In light of this ruling, the services of a managerial nature need to pass an acid test/ touchstone of whether these are consultancy/ technical in nature, and whether the services really make available any technical knowledge, skills or experience, etc.

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Depreciation

Client acquisition cost held to be an intangible asset being "business and commercial rights of a similar nature", eligible for depreciation allowance under section 32(1)(ii) of the Act

SKS Micro Finance Ltd. *v.* DCIT [TS-283-ITAT-2013(Hyderabad)]

Payment made for acquiring the customer base was towards acquiring an intangible asset, being "business and commercial rights of a similar nature" and hence eligible for allowance of depreciation under section 32(1)(ii) of the Act.

Facts

The taxpayer, a micro-finance lender, had acquired SKSS through a business transfer agreement by a slump sale during the tax year 2006-07. The total consideration under the business transfer agreement was assigned towards physical/ actual assets and for value creation of the customer base or customer acquisition cost. The taxpayer claimed depreciation allowance at the rate of 25% on this cost, as it was an intangible asset under the provisions of section 32(1)(ii) of the Act. The TO denied the taxpayer's claim on the grounds that the intangible asset which the taxpayer claimed to have acquired, was not covered under any of the identified intangible assets appearing in Income-tax Rules, 1962 (the Rules). The CIT(A), observing that it was intended that depreciation be allowed to only a limited category of intangible assets, held that the customer base acquired could not be considered as know-how, a patent, copyright or trademark, or franchise. Furthermore, the CIT(A) stated that such expenditure was out of the purview of the residuary category of 'business and commercial right or similar property' as it did not relate to intellectual property, whereas section 32(1)(ii) of the Act contemplates depreciation allowance for those licences or rights which are related to intellectual property.

Held

The Tribunal referred to the Memorandum of Understanding between the taxpayer and SKSS and observed that the customer base acquired by the taxpayer was an assured source of economic benefit and provided impetus to the business of the taxpayer as the customers acquired had a proven track record, since they had already been trained, motivated, credit checked and risk-filtered. To interpret the meaning of the expression 'business or commercial right of a similar nature', the Tribunal relied on the judgment in CIT *v.* Simfs Securities Ltd. [2012] 348 ITR 302 (SC) and various other judgments of the Delhi HC referred to in the case of Sharp Business Systems India Ltd. *v.* DCIT [2011] 140 TTJ 607 (ITAT-Del), observing that the words, 'similar' or 'commercial rights' necessarily resulted in an intangible asset that could be asserted as such against the entire world, to qualify for depreciation allowance under section 32(1)(ii) of the Act. Hence, the Tribunal held that, by acquiring the customer base, the taxpayer had acquired "business and commercial rights of a similar nature" and, hence, it was eligible to claim depreciation allowance under section 32(1)(ii) of the Act.

Editor's note

This Tribunal ruling provides a useful precedent for claiming depreciation allowance for residuary/ other categories of intangible assets. While the SC judgement in the case of Simf Securities Ltd. (supa) as clarified the position regarding depreciation allowance on goodwill, the Tribunal ruling is a welcome decision in that it supports the claim of depreciation allowance in respect of other intangible assets which can now be classified under the

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heading "business and commercial rights of a similar nature" and eligible for depreciation allowance under section 32(1)(ii) of the Act.

Capital gains

Interest received for delay in completion of the process of buy-back of shares under open offer to be treated as capital gains and not interest income

Genesis Indian Investment Company Ltd. *v.* CIT(A) [TS-405-ITAT-2013(Mumbai)]

Additional amount received by the taxpayer as interest related to delay in completion of the process of buy-back of shares, was a part of sale consideration and, accordingly, taxed as capital gains and not as interest income.

Facts

The taxpayer, a Mauritian company, was registered with Securities and Exchange Board of India (SEBI) as a sub-account of a registered foreign institutional investor (FII). It held shares in Castrol India Ltd. (a subsidiary of Castrol Ltd., UK). When the taxpayer was acquired by British Petroleum, an open offer was announced for the acquisition of the shares in Castrol India Ltd. British Petroleum approached SEBI for an exemption from the requirement of making a public offer. SEBI granted the exemption, subject to certain conditions. As these conditions were unacceptable, Castrol UK made an open offer to acquire the shares in Castrol India at an offer price that was based on the market price. Subsequently, SEBI directed Castrol UK to revise the offer price based on the market price. This issue was subject to litigation and the HC confirmed the Securities Appellate Tribunal (SAT) order and Castrol UK was directed to fix the market price as the offer price. Also, the HC upheld the SAT order directing interest to be paid on a successful offer at@15% on the open offer price until the actual date of payment of consideration. The taxpayer had tendered shares under the open offer, out of which shares were accepted by Castrol UK. The taxpayer also received an amount as interest at 15% per annum for the delay in the payment of the consideration.

Held

There was a difference between interest that could be treated at par with consideration and interest that was different from compensation/ consideration. If interest was paid as a result of a delay in making the payment, it could not be treated as part of the consideration. The delay for which the taxpayer received interest was the delay in completing the process of the buy-back of shares, and not a delay in paying the determined consideration after the purchase/ sale transaction was over. Relying on CIT *v.* Govinda Choudhury and Sons. [1933] 203 ITR 881 (SC), the Tribunal held that interest paid for the period before the date of an acquisition of shares could not be said to be interest paid due to a delay in the payment of a consideration. Therefore, the additional amount received by the taxpayer was part of the sale consideration and hence had to be treated as capital gains and not as interest income.

Editor's note

The deciding factor in this case was that the interest was payable in relation to the delay in completing the buy-back process after the open offer was announced, and not in relation to delayed payment of consideration. This decision reaffirms the principle that for any payment to be characterised as interest, a debtor-creditor relationship needs to exist.

Corporate tax

Employee Stock Option Scheme

Discount on issue of employees' stock options is allowable as revenue expenditure

Biocon Ltd. *v.* DCIT [TS-322-ITAT-2013(Bangalore)]

Discount on the issue of options under an employee stock option scheme (ESOP) cannot be treated as under-recovery of share premium or capital expenditure and held to be a part of a package of remuneration given to employees - the obligation incurred of issuing shares at a discounted price at a future date in lieu of the employee's services was held to be an allowable deduction under section 37(1) of the Act.

Facts

The taxpayer formulated an ESOP, *viz.* ESOP 2000, which had a vesting period of four years. It granted options to its employees to purchase the shares at face value. The difference between the alleged market price and exercise price was claimed as a deduction on the basis that it was compensation made to the employees to be spread over the vesting period of four years. During the financial year 2003-04, the taxpayer claimed a deduction as 'employee compensation costs' under section 37 of the Act which it claimed represented the discount under ESOP 2000. The TO denied the taxpayer's claim on the grounds that there was no specific provision entitling the deduction on account of such expense under section 37(1) of the Act. Furthermore, the TO took the view that SEBI guidelines could not supersede taxing principles.

Held

The Tribunal answered the questions that were broadly framed as follows:

Whether discount under ESOP is an allowable deduction?

To ascertain whether ESOP expense was a contingent liability, the Tribunal referred to the general terms of ESOP schemes and held that once the employee rendered services in the first year of the relevant scheme, it became obligatory on the part of the company to honour its commitment to allow the vesting of part of the option in that particular year. Hence, the liability was present and was incurred at the end of each year on rendition of services by the employee, even though the quantification may have taken place in a later year. Liability to incur ESOP, if considered - at the macro - level *qua* the group of employees, as against - at the micro level - *qua* each individual employee, was not contingent because, if the options lapsed due for whatever reason, other employees would be eligible for them. The legislature considered a discount on the issue of ESOP to employees to be a fringe benefit or "any consideration for employment" for the purpose of fringe benefit tax, and hence it was not possible to argue to the contrary. Therefore, such a discount was an allowable deduction.

What is the timing and quantum of deduction?

Liability to issue stock options at discount was incurred during the vesting period and the amount of deduction had to be calculated in accordance with the terms of the ESOP scheme, by considering the period in question and percentage of vesting during this period. Hence, it was held by the Tribunal that the discount was deductible over the vesting period on a straight-line basis.

Corporate tax

Subsequent adjustment to discount

Any discount on unvested or unclaimed options should be reversed in the relevant year as they were not employee costs. The provisional liability for discounts which arose or was incurred during the vesting period required adjustment due to the fact that the actual discount could only be determined with respect to the market price of shares when employees exercised their options. Hence, the taxpayer should make a suitable downward or upward adjustment at that time. The total amount of discount premium should be claimed evenly over the vesting period of four years, in contrast to the claim made by the taxpayer that the proportionate part of the discount for the second, third and fourth years should be claimed at the end of the first year, (which was contrary to the SEBI guidelines), and should be determined on a straight-line basis. No accounting principle could be applied, with regard to calculating total income under the Act, which contradicts the Act itself.

Editor's note

The Tribunal's judgement relates to the allowability of discount on the issue of stock options to employees in lieu of services rendered by them. Also, the judgment provides clarity on, and is a useful reference with respect to, the timing of a claim for deduction, and the amount of that claim. Since the decision was made by the Special Bench (SB) of the Tribunal, it will be binding on all benches of the Tribunal.

Share allotment

Share allotment at a premium by a newly incorporated company is neither sham nor income

Green Infra Ltd. *v.* ITO [TS-420-ITAT-2013(Mumbai)]

Share allotment at a premium by a newly incorporated company could not be taxed as income by invoking section 56(1) of the Act. Furthermore, if the genuineness and identity of the depositor was established and the transaction was conducted through banking channels, the transaction could not be taxed under section 68 of the Act.

Facts

The taxpayer was incorporated with a total investment of INR 489.50 million, of which a portion was received by the taxpayer as a share premium on the allotment of shares, as observed by the TO. The taxpayer submitted an internal valuation report using the discounted cash flow (DCF) method and other relevant documents related to the determination of the value of the shares which had been obtained before the issue of the shares. The TO stated that the company had paid-up capital on incorporation and there was no valid basis justifying the valuation of the shares. Also, the TO questioned the application of funds collected *via* the share premium being invested in units, shares of subsidiary companies and bank fixed deposit receipt (FDRs) which, according to the TO, were in violation of section 78 of the Companies Act, 1956. The TO held that receipt from the shareholders and the share premium received was taxable under the head *income from other sources* under section 56(1) of the Act.

Corporate tax

Held

The taxpayer had invested funds to set up three subsidiaries as special purpose vehicles in connection with generating wind energy. Hence, the revenue's contention that the share premium was not utilised for the purpose for which it was received was incorrect. The Tribunal relied on the decisions of the SC in the cases of Punjab State Industrial Corporation Ltd. *v.* CIT [1997] 225 ITR 792(SC) and Brooke Bond India Ltd. *v.* CIT [1997] 225 ITR 798 (SC), in which it had been held that expenditure incurred in issuing shares to increase share capital by a company were capital in nature. The shareholders in all the related transactions in question were directly or indirectly related to the Government of India and the identity of the shareholders had been established beyond reasonable doubt. In addition, the revenue authorities had never questioned the identity of the shareholders. Furthermore, the entire transaction had been carried out through banking channels and hence section 68 of the Act was not applicable.

Editor's note

Where the genuineness of shareholders and depositors was established, the transaction could not be held to be a sham. It is to be noted that this decision was in relation to a transaction which took place before the introduction of section 56(2)(viib) of the Act, which states that if any closely-held company issues shares to a resident person for a consideration higher than the fair market value (FMV) of the shares, then the difference between the FMV and the consideration shall be considered as income in the hands of that company. Furthermore, DCF is prescribed as one of the methods for valuing unquoted equity shares under the Act. The decision is helpful in those cases where the premium on the shares issued by a company is alleged by the revenue to be a sham.

Transfer of Property

Execution of a development agreement by itself does not give rise to transfer under the Act; all conditions laid down in section 2(27)(v) of the Act read with 53A of the Transfer of Property Act need to be fulfilled

Sri. S. Ranjith Reddy & Anr. *v.* DCIT [TS-254-ITAT-2013(Hyderabad)]

For a development agreement to give rise to a transfer as defined in section 2(47)(v) of the Act, the conditions stipulated in section 53A of the Transfer of Property Act, 1882 (TOPA), need to be satisfied.

Facts

The taxpayer, along with his family members, owned a parcel of land. The taxpayer entered into an agreement with Lumbini (the developer) related to the construction of a residential township. According to the agreement, the developer was under an obligation to develop the township at its own cost. Of the total houses constructed, the taxpayer and his family members were entitled to a certain number of houses. The agreement did not provide for grant of possession of the land to the developer. No consideration had passed between the parties as at the date on which the agreement was signed. No construction had taken place during the financial year, nor was there a general power of attorney given by the taxpayer to the developer. The revenue was of the opinion that the execution of a development agreement gave rise to a transfer under section 2(47)(v) of the Act as it was akin to a sale of land agreement. The value of the residential houses to be received by the taxpayer (after deduction of certain costs) should have been taxed as income in the year in which the development agreement was executed. The revenue referred to the Bombay HC decision in Chaturbhuj Dwarakadas Kapadia *v.* CIT [2003] 260 ITR

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491 (Bombay) in which it had been held that the date of transfer, for the purpose of calculating capital gains, is the date in which possession is handed over.

Held

It was not the act of entering into an agreement that mattered, but rather the event of allowing the transferee to enter into possession of the land. The taxpayer had assigned its landed property in favour of the developer vide the agreement between them. There was no sale of property by the taxpayer by virtue of this agreement. The project was a proposed one, while transfer was contemplated only in the case of an existing property. The execution of the agreement did not bring into existence any tangible asset that could be transferred between the parties. In order for a contract to be construed as being 'of the nature referred to in section 53A of TOPA, one of the preconditions was that the transferee should have performed, or be willing to perform, his part of the contract. Unless the party had performed or was willing to perform its obligations under the contract, it could not be said that the provisions of section 53 of TOPA would come into play. No construction took place during the financial year, nor was there a general power of attorney given by the taxpayer to the developer. In such circumstances, only the actual performance of the developer's obligations could have given rise to the situation envisaged in section 53A of TOPA. Since it was not possible to hold that the developer had performed its obligation during the financial year, the condition laid down under section 53A of TOPA was not satisfied during this period. Hence, it could not be said that there was a transfer with respect to which capital gains tax could be levied.

Editor's note

This decision emphasises the principle that the terms of each development agreement and the conduct of the parties has to be examined on a case-by-case basis to evaluate whether a transfer has occurred within the meaning of section 2(47)(v) of the Act.

Circulars and Notifications

Additional information required alongside tax residency certificate

CBDT requires the furnishing of additional information alongside atax residency certificate to claim tax treaty benefits

Notification no. 57/ 2013 [F. No. 142/16/2013-TPL]/SO 2331(E), dated 1 August 2013

The Finance Act, 2012, introduced section 90(4) of the Act which mandates that a non-resident taxpayer to whom a tax treaty applies, shall not be entitled to claim any relief under the tax treaty unless a TRC of his/ her being a resident in any country outside India or specified territory outside India, as the case may be, is obtained from the Government of that country or specified territory. Pursuant to this, Rule 21AB was introduced to prescribe the particulars that were required in the TRC.

Since taxpayers found it a challenge to obtain a TRC with the prescribed particulars, as different territories had different TRC formats, the Finance Act, 2013, amended section 90(4) of the Act omitting the requirement that such particulars be a part of the TRC itself. However, the CBDT, by amending Rule 21AB of the Income-tax (Eleventh Amendment) Rules, 2013, has now inserted into the Finance Act a new form. This Form 10F, (which had earlier existed but which was

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deleted by the Income-tax (Thirty-second Amendment) Rules, 1999), came into effect on 1 April 2013.

Amended Rule 21AB now mandates that non-tax-resident taxpayers provide all such particulars under a self-declaration and not as part of the TRC as had previously been required.

Changes notified in Rule 21AB

A taxpayer will be required to furnish the following information in Form 10F:

- Taxpayer's status (individual, company, firm, etc.)
- Nationality (individual) or country or specified territory of incorporation or registration (in case of others)
- Taxpayer's tax identification number in the country or specified territory of residence, and - if there is no such number - the unique number on the basis of which the person is identified by the government of the country or specified territory of which it claims to be a resident
- Period for which the residential status is claimed, as stated in the TRC
- Address of the taxpayer in the country or specified territory outside India, during the period for which the TRC is applicable
- A taxpayer may not be required to provide the information in Form 10F if that information is contained in the TRC

The taxpayer must keep and maintain such documents as are necessary to substantiate the information required in Form 10F and the revenue authority may require the taxpayer to furnish to it those documents.

Editor's note

The information prescribed under the new Form 10F is essentially the same as that which was prescribed in the TRC. Accordingly, all non-resident taxpayers desiring to claim tax treaty benefits will need to provide this self certified Form 10F to the revenue authorities - as and when called for. However, deductors who are required to withhold tax at source out of any payouts to non-residents must obtain the Form upfront.

Having said this, the new Form 10F may not be required in cases where sums are not taxable under the domestic tax laws of India or where specific revenue dispensations (either under section 195(2)/ 197 of the Act) have been obtained.

General Anti-Avoidance Rules

Rules on application of GAAR provisions notified by Government of India

Notification no. S.O. 2887(E), dated 23 September 2013

The GAAR provisions are incorporated in the Act, and will be effective from 1 April 2016 (tax year 2015-16). Initially a committee was constituted by the CBDT, which has published draft guidelines on the provisions. Subsequently, an Expert Committee was constituted, which submitted a report and the Finance Minister issued a statement setting in January 2013 out the decisions taken by the Government in relation to the GAAR provisions. Some of the decisions stated by the Finance Minister were formally incorporated in the Act by the Finance Act, 2013, and others, including procedural aspects, are now a part of the Rules. The GAAR Rules would be applicable from 1 April 2016. Some of the key points made in the GAAR Rules are as follows.

Corporate tax

Monetary threshold exemption

The GAAR provisions apply only where the tax benefit (to all the parties in aggregate) from an arrangement in a relevant year exceeds INR 30 million.

Exemption for FIIs and P-Note holders

- SEBI-registered FIIs are excluded from the GAAR provisions if they do not receive benefits under a tax treaty entered into by India. Hence, if an FII proposes to receive the benefits of a tax treaty, the GAAR provisions may apply in a case where there is an impermissible avoidance arrangement.
- Investments in FIIs made by non-resident investors by way of offshore derivative instruments (such as Participatory Notes (P-Notes)), directly or indirectly, are excluded from the ambit of the GAAR provisions.

Grandfathering provisions

- The GAAR provisions do not apply to any income earned by any person from a transfer of investments made by that person before 30 August 2010.
- The GAAR provisions do, however, apply to any arrangement, irrespective of the date on which it has been entered into, in respect of the tax benefit obtained from the arrangement on or after 1 April 2015.

On perusal of the grandfathering provisions, there seemed to be some ambiguity in terms of whether investments made prior to 30 August 2010 were grandfathered completely or whether they would be caught in the GAAR net if the tax benefit was obtained on or after 1 April 2015. It appears that income arising after 1 April 2015 from a transfer of investments made prior to 30 August 2010 would be grandfathered, and that the GAAR provisions may not apply to such an arrangement. On the other hand, the GAAR provisions may apply in the case of other arrangements, such as those involving payment of interest, royalty, etc., after 1 April 2015, even if those arrangements were made prior to 30 August 2010. This seems to be consistent with the Finance Minister's statement issued in January 2013. A related issue also arises as to what would be covered within the ambit of the term, "investments", including whether it should be restricted only to investments which are capital assets. Greater clarity on these aspects would be welcome.

Scope of GAAR provisions – applicable only to the alleged "part" of the impermissible avoidance arrangement

The GAAR Rules provide that where only a part of an arrangement is declared to be an impermissible avoidance arrangement, the consequences in relation to tax shall be determined with reference to that part only (and not to the entire arrangement).

Procedural aspects

- The Act currently provides that the Commissioner of Income-tax (CIT) shall issue a notice to the taxpayer setting out the reasons and basis for invocation of GAAR provisions and shall provide the taxpayer with an opportunity of being heard. The GAAR Rules further provide that, in addition to the above, the TO shall also issue a notice to a taxpayer making an objection, recording the reasons and other specified aspects, before making reference to the CIT.

Corporate tax

- The GAAR Rules prescribe the necessary forms related to, and other procedural aspects of, the invocation and application of the GAAR provisions by the tax authorities.

Some clarifications still awaited

Considering the recommendations of the Expert Committee and the statement of the Finance Minister, some key aspects have not yet been addressed. These are:

- The Finance Minister's statement expressed that where GAAR and specific anti-tax avoidance rules (SAAR) are both in force, **only one of them will apply** to a given case, and guidelines will be made regarding the applicability of one or the other. However, no specific guidance has been provided in this context.
- No specific provision has been made to the effect that where an arrangement is treated as an impermissible avoidance arrangement, it would be ensured that the **same income is not taxed twice** in the hands of the same taxpayer in the same year or in different assessment years.
- Clarity is awaited with respect to the aspect of the tax auditor being **required to report any tax avoidance arrangement**.
- Clarification regarding the applicability of the GAAR provisions by way of certain illustrative cases, as were outlined in the draft CBDT guidelines and the Expert Committee's report, has yet to be provided.

Conclusion

These Rules are one further step towards providing certainty on some aspects relating to the application of the GAAR provisions, which had created a lot of ambiguity. Going forward, it would be helpful if the government clarified the unresolved aspects identified above.

The personal tax section provides a brief analysis of pertinent judgements on expatriate taxation and taxability of employee stock option plan.

Personal tax

Personal tax

Case law

Expatriate tax

Taxes borne by an employer on behalf of their employees are a non-monetary perquisite

Contributions made by employers to an employee's home country's mandatory social security, pension and medical insurance schemes are not perquisites

Hypothetical taxes deducted by an employer do not constitute income

Excess tax paid by an employer which is received as a refund by the employee but returned to the employer cannot be taxed in the employee's hands

Consultant's fees paid by employers in relation to tax filing assistance do not constitute a perquisite

CIT *v.* Yoshio Kubo, Short Donald, and others [2013] 36 taxman.com 1 (Delhi)

In this landmark decision, several aspects relating to expatriate benefits were analysed by the HC. Views favourable to the taxpayer were provided.

Facts

The taxpayers were employees of an Indian company on secondment from Japan to India. Since they were under tax equalisation, hypothetical taxes were withheld from their salary and the Indian employer was required to bear their Indian income tax. The taxes so paid by the Indian employer were treated as non-monetary perquisite and were not grossed up, in accordance with section 10(10CC) of the Act. In addition, the employers contributed to the mandatory social security, pension and medical insurance schemes in the employees' home country, and these contributions were not offered to tax by the employees as no benefit was vested in the employees at the time the contributions were made. Also, the employer paid consultancy fees to tax consultants as fees for tax return preparation, representation and rectification and in relation to seeking interim orders, etc. Furthermore, excess tax withheld and deposited by the employer which was received by the employees as a refund, was paid back by the employees to the employer.

The following points were disputed by the revenue and were discussed in the above decision:

- Whether the amount of income tax paid by the employer was a non-monetary perquisite and whether the same is covered within the scope of section 10(10CC) of the Act?
- Whether the contributions to social security, pension and medical insurance were taxable in the hands of the employees?
- Whether hypothetical tax reduced from the employees' salaries had to be added back to compute income tax?
- Whether tax refunds received by the employees and refunded by them to the employer were taxable in their hands?
- Whether consultant's fees paid on behalf of the expatriate employees were taxable in their hands?

Personal tax

Held

The HC held that-

- Tax paid by the employer would qualify as a perquisite within the meaning of section 17(2)(iv) of the Act as it was a sum paid in respect of an obligation which, but for such payment, would have been payable by the employees. Therefore, payment of tax on account of salaries, not by way of monetary payment to the employees, but for or on their account, would be a perquisite under section 17(2)(iv) of the Act. Therefore, the income tax paid by the employer was a non-monetary perquisite, and the same was covered within the scope of section 10(10CC) of the Act.
- The payments to social security, pension and medical insurance schemes were involuntary payments, and no benefits were vested in the employees at the time of contribution. Hence, the payments were not taxable in the hands of the employees at the time of the contribution.
- The employees were only paid a net salary exclusive of hypothetical taxes, and the actual taxes borne by the employer were already included in the taxable salary. Hence, hypothetical tax reduced from the salary of the employees should not be added back to compute income tax.
- Excess tax paid erroneously was refunded to the taxpayers instead of by the employer; the same belonged to the employer, and was paid back to the employer. Every receipt or monetary advantage or benefit in the hands of its recipient was not taxable unless it was established to be due to him. It was held that receipt of money or property which one was obliged to return or repay to the rightful owner, as in the case of a loan or credit, could not be taken as a benefit or as a perquisite. Hence, tax refunds received by the employees refunded by him to the employer were not taxable in his hands.
- Even though the benefit of the consultant's services went to the employees, the fees paid on behalf of the expatriate employees were not taxable in their hands since the employer hired the consultant for its own comfort.

Editor's note

This is a landmark judgement which has addressed a gamut of issues faced by expatriate employees working in India and their employers. This judgement has further affirmed other favourable judgements with respect to the various issues listed above. This ruling will provide a greater level of certainty to employers when computing the taxes of their expatriate staff.

Taxability of ESOP

ESOP benefits to expatriate employee of foreign company who is not a resident of India not chargeable for period he was outside India, even if ESOP was vested and exercised in India

ACIT *v.* Robert Arthur Keltz [2013] 35 taxmann.com 424 (Delhi-Tribunal)

ESOP benefit provided to an expatriate employee who was a resident, but not an ordinary resident should be taxed proportionately with regard to the period of his stay in India.

Personal tax

Facts

The taxpayer was an employee of a US company and was granted stock options on 9 January 2004, when he was outside India. These shares had a vesting period of three years. The taxpayer was deputed to the India liaison office of the US company on 1 April 2006. The stock options vested on 9 January 2007, when he was in India. The taxpayer exercised the stock options on 1 February 2007, when he was still in India and was qualifying as a resident but not an ordinary resident. The shares were allotted outside India and hence could not be considered to have been received in India.

The TO held that as the taxpayer was in India on the date of vesting and exercise of the stock options, the entire benefit thereof was assessable as a perquisite in his hands. However, the CIT(A) held that as the employee had been in India only for a part of the vesting period (i.e. the period from the date of the granting to the date of vesting), only that proportion of the stock option benefit which is attributable to the period spent in India accrued to the employee and was chargeable to tax in India.

Held

The Tribunal held that if a part of the activity carried out by the taxpayer had no relation to any India-specific job or activity, it was not chargeable to tax in India. The taxpayer was in India only for a short period, i.e., 1 April 2006, onwards. Prior to that, he had not provided any service connected with any activity in India. Accordingly, as the taxpayer had not rendered service in India for the whole grant period, and since he was a resident but not ordinary resident, only that proportion of the ESOP perquisite which was relatable to the service rendered by the taxpayer in India was taxable in India.

Editor's note

The Act is silent on the apportionment of a stock perquisite to exclude the portion of the gain that relates to a period of employment outside India. The erstwhile guidelines of fringe benefit tax and the OECD Model commentary recognise the principle of such apportionment. The proportion is to be based on the number of days of employment exercised to the number of days of employment for which stock option income has been derived. This apportionment is applicable to an individual whose residential status is either non-resident or resident but not ordinary resident.

Transfer Pricing

The transfer pricing section analyses pertinent judgements and noteworthy developments in the fast-changing field of transfer pricing. Some of the topics covered are marketing intangibles, quasi-capital contribution, deemed international transactions, royalty payment, tested party, foreign exchange rate fluctuation, contract manufacture, LIBOR, deemed international transactions, tolerance band, advance pricing agreement, practice manual on TP, TP certification, R&D centres, base erosion and profit shifting (BEPS) and safe harbour rules.

Transfer pricing

Case law

Marketing intangibles

SB ruling on marketing intangibles in case of LG Electronics India Pvt. Ltd.

LG Electronics India Pvt. Ltd. *v.* ACIT [2013] 29 taxmann.com 300 (Delhi) (SB)

Transfer pricing (TP) adjustment in relation to the advertising, marketing and promotion (AMP) expenses incurred by the taxpayer in connection with creating or improving the marketing intangible for and on behalf of the associated enterprise (AE) is permissible. Furthermore, earning a mark-up from the AE in respect of AMP expenses incurred on behalf of the AE is also allowable.

Facts

LG Electronics Inc. (LGK or the AE) was a Korean company engaged in the manufacture, sale and distribution of electronic products and electrical appliances. LG Electronics India Pvt. Ltd. (LGI or the taxpayer) was its wholly-owned subsidiary in India. LGI, in the capacity of a licensee, obtained from LGK, i.e., the licensor, a right to use the technical know-how for the manufacture, marketing, sale and services of its products, for which royalties of 1% were agreed. The licensor allowed the licensee, for no charge, to also use its brand name and trademarks (hereafter collectively referred to as the "brand") for products manufactured in India.

During the course of TP assessment proceedings, the transfer pricing officer (TPO) observed that the AMP expenses were 3.85% of the taxpayer's sales. The TPO computed a similar percentage in the case of Videocon Appliances Ltd. (0.12%) and Whirlpool of India Ltd (2.66%) with their arithmetic mean at 1.39%. The difference was considered by the TPO to be excess AMP incurred by the taxpayer on brand promotion for the AE, which for which the AE should have compensated the taxpayer. The TPO thus made an adjustment with regard to the difference. The dispute resolution panel (DRP) concurred with this view and additionally observed that a mark-up (of 13%) on the AMP expenses was also warranted for the opportunity cost of the funds deployed (except where a reimbursement was immediately received after the expense had been incurred) (10.5%) and for the efforts of the taxpayer (2.5%). The taxpayer appealed before the Tribunal.

Held

Existence of transaction

The SB held that an agreement between AEs can be formal or in writing, or informal or oral. The critical test would be the conduct of the parties to the transaction. If the taxpayer had advertised the AE's brand (which, based on the facts, was held to be so in the case in question), then it could be inferred that there was an understanding between the taxpayer and its AE to this effect. Moreover, the disproportionately higher AMP expenses incurred by the taxpayer *vis-à-vis* independent enterprises behaving in a commercially rational manner, lent further credence to this inference. The SB accordingly held that a transaction did exist whereby the taxpayer incurred AMP expenses related to the promotion of the brand which was legally owned by the AE.

Furthermore, the SB made a distinction between the concept of advertising and marketing for the product, which it associated with the licensed manufacturer, and advertising and marketing for the brand, which it associated with the legal owner of the brand. The Tribunal stated that if the licensed manufacturer incurred AMP expenses to promote the value of the brand, as opposed to promoting the product, which it

Transfer pricing

was selling, then to the extent such AMP expenses, as a percentage of turnover, exceeded those of comparable companies, the licensed manufacturer could be said to be rendering a service to the legal owner of the brand, for which a compensation in the form of reimbursement was required.

Economic v. legal ownership

The SB held that economic ownership of a brand was a concept which existed only in a commercial sense. To explain, the SB stated that the taxpayer and the middlemen in a supply chain could be considered as economic owners of a brand only in a commercial sense, as they all exploited the brand in order to furthering their sales. To further explain, the SB hypothesised that if the AE (the legal owner) sold its brand, then the sale consideration would not be shared amongst the economic owners but would vest only with the legal owner. Therefore, the SB eventually held that in the context of the Act, it was only legal (and not economic) ownership which was recognised.

International transactions

In this regard, the Tribunal observed that it was not the revenue's contention that payment made to third parties in India was an international transaction; rather, the taxpayer had provided a brand building service to the AE by incurring the advertisement expenditure. The Tribunal held that: there was a transaction related to the taxpayer creating and improving marketing intangibles for the foreign AE; the foreign AE was a non-resident; the transaction was in the nature of the provision of services. Hence, the Tribunal held that the revenue authorities were fully justified in treating the transactions related to brand building as international transactions on the facts of the case.

Bright line test is not a method permitted under Indian regulations

The Tribunal observed that the bright line test was a tool which could be used to identify the cost of non-routine marketing expenditure incurred by the taxpayer for providing brand building services to its AEs, and not a method for determining the arm's length nature of the transaction. As the taxpayer had not provided the cost of excess marketing expenditure, the revenue has used the bright line test to identify the excess marketing cost, considering the routine AMP expenditure of comparable companies. Furthermore, the Tribunal held that the revenue authorities had applied a mark-up over the non-routine cost to determine the value of brand building service by application of the cost plus method (CPM).

Methods for determining ALP of international transaction

The Tribunal held that the computation of the arm's length price (ALP) of an international transaction at the entity level was inappropriate. The Tribunal appreciated the basic TP principles and held that the correct approach under the transactional net margin method (TNMM) was to consider the operating profit from each international transaction separately, and not the profitability of the taxpayer as a whole at the entity level.

The Tribunal observed that various factors contributed to the earning of profit, by stating that the purchase cost was only one of several other important factors having a bearing on overall profit. All other costs, including the AMP expenses, were independent of the cost of importing raw materials, having some correlation with the overall profit. The Tribunal held that if there

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were several unrelated international transactions, as in the case in question, which had been benchmarked incorrectly by applying the TNMM in an incorrect manner at the entity level, then the remedy lay in correcting that mistake rather than drawing legally unsustainable conclusions by taking that mistake to be a correct legal position. Earning an overall higher profit margin in comparison with other comparable cases could not be considered as a licence for the taxpayer to record other expenses in international transactions without considering the benefit, service or facility provided by such expenses at arm's length.

Determination of ALP

While discussing the determination of the ALP of the international transactions related to AMP expenses, the Tribunal stated that the first thing that must be done was to identify some comparable uncontrolled transactions in order to determine the cost/ value of the international transactions, and then to ascertain the profit mark-up of the comparable uncontrolled transactions.

Relevant factors for determining the cost of the service

The SB stated that companies using a foreign brand could not be accepted as comparable: only comparable domestic companies not using a foreign brand could be accepted. The Tribunal also held that the TPO was not justified in restricting himself only to two comparable cases without verifying or discussing the comparability of cases cited by the taxpayer.

Application of mark-up

The SB upheld the DRP's application of a mark-up in respect of the AMP expenses incurred on behalf of the AE. However, the SB stated that the DRP went wrong in arbitrarily determining the rate of mark-up at 13% without showing how much an independent comparable entity had earned from an international transaction similar to those under consideration.

Expenses to be covered in AMP while determining cost/value

The SB stated that AMP expenses referred only to advertisement, marketing and publicity expenses. While promotion of sales directly led to brand building, those expenses that were directly connected to sales were only sales-specific, and did not result in brand creation, and therefore should not be included in the total AMP expenditure when determining cost of the service.

SB's conclusion

The SB concluded by stating that the TP adjustment in relation to the AMP expenses incurred by the taxpayer in connection with creating or improving the marketing intangible for and on behalf of the AE was permissible. Secondly, earning a mark-up from the AE in respect of AMP expenses incurred on behalf of the AE was also allowable.

However, the SB returned the matter to the TO/TPO, to determine the cost/ value of the international transactions in the first instance, and thereafter the ALP of the international transaction by determining the correct mark-up in light of certain guidelines outlined in the ruling.

Editor's note

The issue of marketing intangibles is one that concerns the fundamentals of economics and TP. Nonetheless, recourse was taken to certain legal arguments which the SB dismissed.

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As regards the merit of the SB's verdict, it is worthwhile to highlight at the very outset that any issue of marketing intangibles requires an in-depth factual analysis, as much depends upon the functional, asset and risk (FAR) profile of each taxpayer and its AEs. A common dictum, on merits, which would apply across the board is accordingly difficult to lay down. Thus, to a great extent, the observations of the SB should be restricted and read in the context of the facts of LGI's case (which, as is clear from the Tribunal's ruling, was a licensed manufacturer). With this proviso in mind our analysis of the key observations made by the SB is as follows:

The SB discarded the concept of economic ownership for the purpose of TP. However, a blanket dismissal of this concept does not seem appropriate for the primary reason that the worth of a brand arises essentially from its usage, and where its value is created or enhanced. If the significant people functions around advertising and marketing are performed by the licensee leading to brand value creation or enhancement, then the licensee becomes, to this extent, the economic owner of the brand. In which case, if the rights of the licensee are impaired at the time the legal owner sells the brand, the licensee may seek compensation for the brand value created or enhanced by it, depending on the terms of the licence agreement, the level of investment made in the brand by the licensee, etc. This analysis finds support in the Guidelines provided by the OECD and the Australian Taxation Office (ATO) on business restructuring in the context of 'exit charges'.

Fundamental TP approaches need to be followed, meaning appreciating the characterisation of entities based on their FAR profile, and, accordingly, selecting the correct tested party. The genesis of the entire dispute around marketing intangibles in the case of licensed manufacturers lies in an incorrect TP approach which selects the wrong "tested party" for the purpose of the benchmarking analysis. The same principle would also apply to entrepreneurial buy-sell companies, whose results should not be tested again against the comparable companies. It is imperative to select the right tested party, and to undertake transaction-by-transaction analysis which demonstrates that the residual profit resides in India.

The Tribunal, while laying down principles regarding the selection of appropriate comparable companies, states that companies using a foreign brand could not be accepted. However, it was not appreciated that taxpayers who were entrepreneurial licensed manufacturers in the first place, could not be tested, either in order to arrive at the ALP of transactions or for the purposes of comparing their AMP expenses.

The Tribunal stated that each international transaction should be separately benchmarked, and that even if under overall TNMM the taxpayer's profitability was higher than the average profit level indicator (PLI) of the comparables, this did not preclude the revenue from looking at each transaction separately. However, as stated earlier, these observations were based upon the facts of a case in which the taxpayer was a licensed manufacturer. The observations of the Tribunal need to be restricted and read in the context of licensed manufacturers, and not distributors.

The SB stated that the mere fact of the taxpayer having spent a higher amount on advertisement in comparison with similarly placed independent entities could not be considered as sufficiently conclusive as to infer that some part of the advertisement expenses were incurred towards brand promotion for the foreign AE. The SB also observed that if any decision taken by the Indian AE was found to be uninfluenced by the overseas AEs, then the transaction was accepted as such by the revenue at its face value. Accordingly, the SB in effect advocated applying the concept of 'key people function' to determine whether there was a provision of service, and who should bear the cost of advertisement.

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The Tribunal specifically mentioned that, based on the facts of the case (wherein the SB had held that the marketing and sales strategy was in effect developed by the group company), it was considered to be a transaction pertaining to provision of a service by the main applicant. Accordingly, it is very important to understand that the SB's ruling does not present a general dictum but is restricted solely to the facts of the LGI case. In cases where it can be demonstrated that there has been no provision of service by the taxpayer by differentiating the facts and circumstances, the observations of the Tribunal would not be applicable.

Concluding remarks

The issue of marketing intangibles is highly dependent on the facts of each case, depending upon the FAR profile of each taxpayer. Thus, a common dictum cannot be laid down on the merits of the issue, applying to taxpayers across the board. A final resolution on the merits of the issue of marketing intangibles is far from being arrived at, particularly for distributors, the facts relating to which were not covered or dealt with by the SB in the case of LGI.

Taxpayers who are entrepreneurs would be well-advised to adopt the correct TP approach when dealing with the issue of marketing intangibles, since necessary characterisation through FAR analysis and selection of the proper 'tested party' (whereby such entrepreneurs would not be required to be tested against other comparables), are the only ways to obtain a proper resolution of the relevant issue.

No separate compensation required for excessive AMP expenses, when distributor receives sufficient profits/ rewards as part of pricing; Tribunal distinguishes SB ruling in case of LG Electronics

In view of the premium earned by the distributor, the Tribunal held that no separate compensation was required for excessive AMP expenditure as the compensation was already embedded in the pricing of goods. In arriving at this conclusion, the Tribunal gave due consideration to the taxpayer's business model and the intensity of functions carried out by it.

Facts

- The taxpayer was primarily engaged in the import and sale of premium segment cars imported as completely built units (CBUs) in India. In addition to this distribution function, it also carried out assembly of completely knocked down (CKD) kits for particular segments of cars, which was tantamount to a value-added distribution function.
- In accordance with an inter-company agreement, the taxpayer was appointed as an importer and distributor of CBUs, CKDs and original automobile parts accessories in India, against payment of an appropriate consideration. The agreement also stipulated that the taxpayer had to advertise, promote sales, establish and supervise an efficient distribution network in India.
- The taxpayer had applied the Resale Price Method (RPM) as the primary method for establishing the arm's length pricing of its imports from its foreign parent. During the TP audit proceedings, the TPO alleged that the taxpayer had incurred excessive AMP expenses

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as a percentage of sales, as compared to its comparables, which implied brand promotion activities and resulted in creating marketing intangibles for its foreign parent. The TPO was of the view that the taxpayer ought to have received reimbursement for the excessive AMPs incurred by it, along with a mark-up from its foreign parent.

- The taxpayer, in its response, submitted an analysis of comparables with a similar functional intensity to its own. Based on the analysis, the taxpayer contended that it was earning higher margins both at gross margin and operating margin levels, as compared to the comparable companies. Thus, it was adequately remunerated by the foreign parent for its increased functional intensity, and no further remuneration was required for its incremental AMP expenses.
- The taxpayer also referred to relevant international guidance on marketing intangibles, such as the OECD TP Guidelines, the OECD's Discussion Draft on Intangibles (Chapter VI of the OECD Guidelines), and the Australian Tax Officer's Guidelines related to Marketing Intangibles) to corroborate its contention that no separate remuneration was required for the AMP expenditure incurred by it when the same was embedded in the pricing of imported goods resulting in higher gross margins.

Held

After considering the rival contentions, the Tribunal's key conclusions were as follows:

- In view of binding precedents set down by the SB ruling as far as the legal TP aspects of AMP transactions were concerned, the Tribunal upheld the fact that AMP was an international transaction and the bright line test was an accepted tool for calculating the ALP.
- The Tribunal observed that the taxpayer had performed the function of sales promotion and advertisement in order to make a dent in the market. It also held that the taxpayer was performing functions of greater intensity and, consequently, it upheld the contention that AMP expenditure over and above that of comparables was non-routine and had assisted in promoting the brand of the foreign parent.
- In view of the premium profits of the taxpayer at both the gross and the net level, the Tribunal was convinced that compensation for non-routine brand building services by the taxpayer was embedded in the pricing of imported goods only, and therefore no separate compensation was required from the foreign principal.
- The Tribunal further directed exclusion of account items such as after-sales support, dealers' and salesmen's bonus, etc. from the calculation of the taxpayer's AMP expenditure.
- The Tribunal also upheld the contention that, in absence of any guidelines or any stipulations in Indian tax laws that ran contrary to international guidance, there was, and could be, no bar to referring to OECD TP Guidelines and International Tax Practices Jurisprudence.

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Editor's note

After a spate of negative rulings on the issue of marketing intangibles following the SB ruling in the case of LG Electronics, this is the first favourable ruling on marketing intangibles at the Tribunal level. In terms of key takeaways, the following points which were acknowledged by the Tribunal in this case ruling are worth remarking:

- *In the first ruling of its kind, the Tribunal has upheld the contention that no separate compensation is needed for excessive AMP expenditure when a distributor receives sufficient profits/ rewards as part of the pricing of goods imported from its foreign principal.*
- *The Tribunal upheld the contention that a judgement or a decision considered as a binding precedent necessarily had to be read as a whole. To decide the applicability of any section, rule or principle underlying the decision or judgement which would be binding as a precedent in a case, an appraisal of the facts of the case in which the decision was rendered is necessary. The scope and authority of a precedent should not be expanded unnecessarily beyond the needs of a given situation.*
- *The Tribunal acknowledged that TP litigation and adjudication was a fact-intensive exercise which necessarily required due consideration of the taxpayer's business model, contractual terms entered into with the AEs, and a detailed FAR analysis, so as to appropriately characterise the transactions and the business model. The Tribunal also supported the view that there could be no straitjacket with respect to deciding a TP matter.*
- *The Tribunal dwelt on this aspect and categorically acknowledged the existence of a fine line of distinction between the FAR profiles of a manufacturer vis-à-vis a distributor. Consequently, the remuneration model and the TP analysis for one could vary from that for the other.*
- *The principle of judicial discipline was reiterated by the Tribunal in the ruling in question.*
- *The Tribunal also affirmed that in the absence of suitable aids or guidelines in Indian tax law or jurisprudence, there was no bar/ prohibition with respect to referring to international jurisprudence/ guidelines.*

Quasi-capital contribution

Tribunal acknowledges economic substance

Micro Inks Limited *v.* ACIT [2013] 36 taxmann.com 50 (Ahmedabad-ITAT)

Interest-free loan provided by the taxpayer to its AE was treated as quasi-capital contribution after considering the regulatory restrictions which the taxpayer was subject to, commercial and business reasons, and the substance of the transactions.

Facts

Micro Inks Limited (MIL or the taxpayer) was engaged in the business of the manufacture and sale of printing inks and other intermediate and allied products. The taxpayer, through its wholly-owned subsidiary, Micro Inks GmbH, Austria, set-up a company by the name of Micro Inks Corporation Inc., (MIC USA) in the USA. MIC USA was established to carry out manufacturing activities, with ingredients supplied by the taxpayer.

During the course of the TP assessment proceedings (AYs 2002-03, 2003-04, 2004-05), the TPO proposed an adjustment on account of an interest-free loan provided by the taxpayer to its AE and interest charged on outstanding receivables from the AE.

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The taxpayer had provided an interest-free loan amounting to USD 3,170,000 to its step-down subsidiary, MIC USA, during the AY 2002-03. An additional interest-free loan of USD 1,000,000 was provided in September 2003. The taxpayer contended that these loans were in the nature of *quasi*-capital contributions and they would not warrant any interest payment. The TPO rejected the taxpayer's stand and adopted the weighted average cost of funds of the taxpayer (11% as per the financial statements) as the arm's length interest rate, and made an adjustment to this effect. The CIT(A) confirmed the TPO's addition on merits, but restricted the adjustment by proposing to apply international bank rates, i.e., either the London Interbank Offered Rate (LIBOR) or the American rate of interest.

Held

The Tribunal held that the loan provided was in the nature of *quasi*-equity. In doing so, the Tribunal commented on the following aspects:

Treatment of interest-free advance as quasi-capital contribution

- The Tribunal appreciated the fact that the taxpayer was unable to inject capital into the AE as a result of regulatory restrictions (Reserve Bank of India (RBI) approval in this particular case) and thus was forced to provide money in the form of a loan through Exchange Earner's Foreign Currency (EEFC) account held abroad, for which no approval was required. Furthermore, immediately after obtaining RBI approval, the loans had been converted into shares (except for an amount of USD 10,000). Also, the RBI approval with respect to converting the loan into equity had been sought from the date when remittance was made. Based on these facts, the Tribunal held that the loan provided by the taxpayer should be treated as a *quasi*-capital contribution.
- The Tribunal differentiated the facts of the case from existing rulings in the cases of Perot Systems TSI India Ltd *v*. DCIT [2010] 130 TTJ 685 (ITAT-Delhi) and VVF Ltd *v*. DCIT (2010 TII 4 ITAT MUM TP). In the case of Perot Systems, it had been observed that if the intention of the taxpayer was to treat the loan as a capital contribution, it could have originally injected the money in the form of equity as there was no restriction stopping it doing so. The Tribunal observed that, in contrast to the Perot case, the taxpayer in this case did have regulatory restrictions which forbade injecting money in the form of capital, on account of which the taxpayer was forced to provide a loan.
- In the case of VVF Ltd., the argument with regard to commercial expediency in respect of advancing interest-free funds was based on the fact that ownership and control of the subsidiary were in the taxpayer's hands. The Tribunal in the present case considered such commercial expediency to be irrelevant as the impact of any such inter-relationship should be neutralised by arm's length treatment.
- The Tribunal observed that in the case in question, the relationship on account of lending of money could not be considered in isolation from the commercial business considerations between the entities. The taxpayer had a significant proportion of its transactions with its AE in the USA. The sustainability of the US entity was crucial to the taxpayer's business interests. Thus, it would be inappropriate to compare the relationship to that of a lender and borrower.

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- The Tribunal further observed that while a LIBOR-plus rate would be appropriate for a loan transaction which was undertaken in order to earn profits from lending money, a similar rate would not be appropriate in the situation in question, because the money had been invested as a quasi-capital contribution for significant and decisive commercial considerations. The Tribunal held that the difference in the nature of the two transactions, i.e. lending of money and quasi-capital contribution, was so fundamental that application of LIBOR or any other bank rate would be inappropriate in the case.
- The Tribunal rejected the revenue's contention that the loan agreement originally did not include a provision regarding the conversion of the loan into equity. It was observed that as the taxpayer was unable to inject capital due to lack of RBI approval, it would have been inappropriate for such a conversion clause to be included in the agreement (i.e. in absence of a formal approval).
- Considering the above, the Tribunal regarded the loan as a *quasi*-capital contribution.

Editor's note

This ruling from the Tribunal is an important and welcome pronouncement in the context of inter-company financial transactions involving the issue of provision of interest-free loans being treated as quasi-equity. The ruling provides much-needed guidance to taxpayers, being one of the first rulings that laid down principles for considering loans as quasi-equity. The Tribunal has clearly differentiated the facts of this case from those prior rulings (i.e. VVF Ltd. and Perot Systems), thereby laying down a principle that in cases where, due to regulatory restrictions, the taxpayer is forced to inject money in the form of a loan, it is the substance of the transaction that needs to be appreciated. It is noteworthy that the Tribunal, while judging the loan to be a quasi-capital contribution, has also taken into account the conversion of loans into equity post regulatory approval, and the commercial considerations between the entities.

For taxpayers faced with situations involving interest-free loans, it is therefore important to carefully consider the nature of the commercial considerations, the terms of conversion, and any regulatory dimensions that have a bearing on the intra-group financial arrangements.

Deemed international transactions

Section 92B(2)of the Act not applicable (i) where transaction is between domestic entities, or (ii) where global agreement has no role in/ effect on relevant transaction

Kodak India Pvt. Ltd *v.* ACIT [2013] 37 taxmann.com 233 (Mumbai-ITAT)

Provisions of section 92B(2) of the Act cannot apply to transactions between domestic entities. Furthermore, the mere presence of a global agreement did not imply that it had an influence or effect on, or role in, the transaction in question.

Facts

Kodak India Pvt. Ltd. (the taxpayer) sold its medical imaging business to Carestream Health India Pvt. Ltd. (Carestream India). In its return of income, the taxpayer disclosed the sale as a transaction between domestic entities. However, the TPO proceeded to determine the ALP of this transaction by invoking section 92B(2) of the Act, on the basis that this sale transaction was an international transaction as it had been undertaken

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pursuant to a larger sale transaction in which the taxpayer's holding company sold its medical imaging business to the holding company of Carestream India, on a global basis.

Held

The Tribunal ruled in favour of the taxpayer, and the following key principles emerge from the ruling:

- After examining the provisions of section 92(1), section 92A(1) and section 92B(1) of the Act, and the relevance of the phrase, "for the purposes of sub-section (1)" in section 92B(2) of the Act, as well as the intent of this deeming provision, the Tribunal concluded that section 92B(2) of the Act could not be read independently of section 92B(1) of the Act, and thus section 92B(2) of the Act could not apply to transactions between domestic entities.
- Though the sale transaction in India was a consequence of the global agreement between the holding companies, it was nevertheless concluded from an analysis of the facts and a review of the underlying agreements, that there was no prior agreement and/ or the terms and conditions of the sale transaction in India were not dictated by the global agreement. The global agreement did not have any role in/ effect on the sale transaction in India. Applicability of section 92B(2) of the Act could therefore not be triggered on this account either.
- The matter could not be returned to the TPO for determination of the ALP if in the first instance itself the TPO had ignored the relevant mandatory provisions of law. Such an action by the TPO had an impact on its jurisdiction.
- The ALP must be determined only based on the prescribed methods and not on any other method.

Editor's note

Applicability of section 92B(2)

A ruling relating to applicability of section 92B(2) of the Act, which preceded this particular one, was the ruling in the case of Swarnandhra IJMII Integrated Township Development Company Pvt. Ltd. v. DCIT [ITA no.2072/ Hyd/2011]. However, the facts in Swarnandhra (supra) and in this case are different. Nonetheless, both these rulings, on one particular aspect, lay down the same judicial precedent, that is: non-applicability of section 92B(2) of the Act to transactions between domestic entities. However, it is worth noting that the mechanics of arriving at this conclusion in both these rulings were not exactly the same. In the present case, the Tribunal discussed the provisions of section 92(1), section 92A(1) and section 92B(1) of the Act, and the inter-linkage between them, to establish that they all related to an international transaction between AEs, where both the AEs were non-residents, or at least one of them was. Furthermore, in analysing the relevance of the phrase, "for the purposes of sub-section (1)" in section 92B(2) of the Act, and also the intent of this deeming provision, the Tribunal concluded that section 92B(2) of the Act could not be read independent of section 92B(1) of the Act, and thus section 92B(2) of the Act could not apply to transactions between domestic entities.

Having said that, there are two other, and very critical, preconditions for the applicability of section 92B(2) of the Act, in the absence of which section 92B(2) of the Act ceases to apply. Before discussing these, it is helpful to reproduce the relevant text of section 92B(2) of the Act which reads as follows:

*"...if there exists a **prior agreement** in relation to the*

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relevant transaction <u>between such other person and the AE</u>, ***or*** *the* ***terms*** *of the relevant transaction are* ***determined in substance*** *<u>between such other person and the AE</u>."*

Evidently, the preconditions are: (i) the existence of a prior agreement between the other entity and the AE in relation to the relevant transaction, or (ii) AE involvement in determining the terms of the transaction. In the case in question, in the first instance, there was no connect which had been established either between Kodak India and Carestream Inc. or between Carestream India and Kodak US – a prerequisite underlying both the preconditions (as is clear from the underlined text in the quotation above).

As regards, precondition (ii), the Tribunal accepted, based on a review of the facts and underlying agreements, that the terms of the sale transaction in India had not been determined with any AE involvement. As for precondition (i), the Tribunal acknowledged that the sale transaction in India was a consequence of the global agreement regarding the sale between the holding companies. However, the mere presence of the global agreement did not dissuade the Tribunal from examining whether or not the global agreement in fact had any influence or effect on the sale transaction in India. This position taken by the Tribunal was an important one, i.e., even if a prior agreement exists, it must have an influence or effect on or role in the transaction in question in order for precondition (i) to be satisfied.

Accordingly, section 92B(2) of the Act may not apply where there are appropriate underlying agreements and all other documentation which supports the independent nature of the relevant transaction (separated from any AE involvement). Needless to say, the conduct of the parties would necessarily have to conform to the underlying agreements and other supporting documentation.

Determination of ALP

In many recent and past verdicts, the Tribunals have restored matters to the TPOs for reconsideration. However, the Tribunal in the present case did not agree to do so because the TPO in the first instance itself had ignored the mandatory provisions of law, and according to the Tribunal, this had an impact on the TPO's jurisdiction. The precedent set by the Tribunal in this case, may, going forward, provide guidance to Tribunals before they proceed to restore matters to TPOs.

Royalty payment

Suzuki Brand not benefitted by piggy-backing on Maruti; Royalty addition deleted

Maruti Suzuki India Ltd. *v.* ACIT [TS-212-ITAT-2013(Del)-TP]

Artificially splitting the royalty paid by the taxpayer to its AE into royalty for use of technology and for use of brand name is not acceptable. Considering the various facts of the case, including that the taxpayer and the AE were unrelated entities at the time they entered into a licence agreement, and that the same terms and conditions were in force during the relevant financial year, the royalties paid had to be accepted as reflecting an ALP.

Facts

- Maruti Suzuki India Limited (the taxpayer or MSIL), incorporated in 1981, started its business operations in 1982 as a 100% Government of India (GOI) company. SMC (Suzuki Motor Corporation, Japan), Japan, was selected as MSIL's business partner in 1982 and held a 54.21% share in MSIL as at 31 March 2005. SMC is a licensed manufacturer engaged in the business of manufacturing passenger cars in India.

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- MSIL entered into a licence agreement with SMC for the manufacture of specified models of cars using the licensed information and licensed trademark. Under the agreement, MSIL made composite royalty payments for the rights and licences granted by SMC.
- The TPO held that the royalty paid by MSIL was towards use of technology as well as towards use of a trademark/ brand name, and divided the total royalty payments into royalty for use of technology and for use of trademark. For the purpose of splitting the royalty, the TPO took into consideration the research and development expenses and advertisement and marketing expenses incurred by SMC.
- The TPO determined the ALP of the royalty, allegedly paid for use of the brand name, as nil, on the basis that Suzuki was a weak brand.
- The TPO also made an adjustment to the advertisement, marketing and sales promotion expenses incurred by MSIL, holding these to have been incurred for promotion of the brand owned by the AE.
- These adjustments were confirmed by the DRP.
- The MSIL approached the Tribunal appealing the order passed by the TO.

Held

- SMC was not in a position to control MSIL in 1982, and as the same terms and conditions were in force during the relevant financial year, the licence agreements could be said to be at arm's length.
- The royalty was paid by MSIL to obtain a licence to manufacture licensed products. Other rights, such as the right to use the technology, knowhow and trade mark, were linked to the core right to manufacture and sell the licensed products.
- The Tribunal accepted the contention of MSIL that the licence agreement was a composite/ non-severable agreement and, relying upon the decision of the SC in the case of Vodafone International Holdings B.V. *v.* UOI[2012] 17 taxmann.com 202 (SC), the Tribunal held that it was not open for the revenue to split a composite agreement.
- The Tribunal also agreed with the taxpayer that MSIL's entire manufacturing activity and business was based and founded on the licence agreement, without which MSIL's business would cease to exist and the entire operations would come to a halt.
- The decision to use the Suzuki brand name was taken by the taxpayer in order to advance its own commercial interest and Suzuki was a renowned international brand.
- The Tribunal accordingly deleted the adjustment made by the TPO on account of payment of royalty by MSIL to SMC.
- On the issue of the adjustment on account of AMP expenses, the Tribunal referred the matter back to the TPO for adjudication in light of the decision of the SB in the case of LG Electronics India Ltd. *v.* ACIT [2013] 29 taxmann.com 300 (Delhi - Trib.) (SB).

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Tested Party

After considering divergent judicial views, the Tribunal has upheld a selection of a foreign AE as a tested party, in accordance with international best practices

General Motors India P Ltd *v.* DCIT [2013] 37 taxmann.com 403 (Ahmedabad-ITAT)

The tested party should be the least complex entity for which reliable data in respect of itself, and in respect of comparables, is available. The tested party can be a local entity or a foreign AE.

Facts

General Motors India Pvt. Ltd. (the taxpayer) was engaged in the manufacture and trading of automobiles and automobile parts. The taxpayer entered into several international transactions with its AEs. The key international transaction under dispute was the purchase of CKD kits from General Motors Daewoo Auto & Technology (GMDAT), an AE. The taxpayer adopted a transaction-by-transaction approach, to benchmark its international transactions (in doing so the taxpayer drew support from section 92(1) of the Act, para 3.9 of the OECD Guidelines, and various judicial precedents, which prefer a transaction-by-transaction approach over an aggregated approach.). In respect of the purchase of CKD kits transaction, the taxpayer selected the AE (i.e., GMDAT) as the tested party and benchmarked using foreign comparables. The TPO rejected this approach and proposed an adjustment by selecting the taxpayer as the tested party instead and benchmarking it against local comparables. The DRP upheld the TPO's approach. The taxpayer appealed to the Tribunal.

The key contentions raised by both the taxpayer and the revenue, primarily revolved around two aspects, *viz.*, the functional profile of the taxpayer *vis-à-vis* that of the AE and data on foreign AE and foreign comparables.

Held

The Tribunal acknowledged that the tested party should be the least complex entity for which reliable data in respect of itself and in respect of comparables was available. The Tribunal accepted that the tested party could be the local entity or a foreign AE, and upheld the selection of the foreign AE as a tested party. In doing so, the Tribunal:

- placed reliance on the United Nations (UN) TP Manual (Paras 5.3.3.1. and 10.4.1.3.) and judicial precedents in the cases of Development Consultants, Mastek Ltd., AIA Engineering, Ranbaxy Laboratories, and Sony India (Development Consultants P Ltd *v.* DCIT [2008] 115 TTJ 577 (Kolkata), Mastek Ltd. *v.* ACIT [2012] 53 SOT 111 (Ahmedabad), AIA Engineering Ltd. *v.* ACIT [2012] 50 SOT 134 (Ahmedabad), Ranbaxy Laboratories Ltd. *v.* ACIT [2008] 110 ITD 428 (Delhi), and Sony India Pvt. Ltd. *v.* DCIT [2008] 114 ITD 448(Delhi). In respect of judicial precedents, the Tribunal agreed with the majority view and, accordingly, rejected the direct applicability of the divergent decision in the case of Onward Technologies Ltd. *v.* DCIT [2013] 35 taxmann.com 584 (Mumbai-ITAT) to the case in question;
- acknowledged the taxpayer's submissions that all financial details of comparable companies and segmental data of the AE had been furnished and were reliable;
- found inconsistency in the stand taken by the TPO where, in another transaction, the TPO had proposed an adjustment by selecting a foreign AE as the tested party; and

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- rejected the TPO's argument that foreign comparables did not fall within his jurisdiction and he could therefore neither call for any additional information nor scrutinise their books of accounts etc. In this regard, the Tribunal stated that revenue could obtain all relevant information from across the globe by using technology or by directing the taxpayer to furnish the same.

Editor's note

The principle of "tested party" is enshrined in the fundamentals of TP. However, lack of guidance in this regard in the Indian TP regulations has led to divergent views being taken by Indian judicial authorities. In a welcome decision, the Tribunal has, after considering divergent views in the past, eventually ruled in accordance with international best practices embodied in the OECD Guidelines, US TP regulations and, now, the UN TP Manual.

Although this was not explicitly discussed, by accepting the AE as the tested party the Tribunal implicitly accepted the relatively more complex/ entrepreneurial characterisation of the taxpayer vis-à-vis the foreign AE. Notably, the characterisation of the entities was only with respect to the international transaction (the purchase of CKD kits), and not with respect to the entities as a whole. This is an important point. It may be noted that, in the case in question, the revenue evaluated the AE on an entity-wide basis and thus found it to be more complex than the taxpayer. However, in a transaction-by-transaction approach, as was adopted by the taxpayer in this case, the tested party must be selected with respect to that particular transaction only.

To decide which is the lesser or more complex entity, a detailed FAR analysis must precede the selection of the tested party. Particularly when a foreign AE is selected as the tested party, that FAR analysis must be elaborately documented and it is important for taxpayers to be able to substantiate the selection. In regard to substantiating the selection, support might be drawn from various industry factors and trends. For example, in the case in question, the auto industry in which the taxpayer operates has been faced with sluggish demand and rising input costs. These trends have compelled industry players to focus on controlling costs and one effective way to achieve this has been to indigenise/ localise, which is a lengthy process spanning several years. Therefore, in this case, besides the routine functions of manufacturing, procurement, etc., the taxpayer was said to have been faced with significant market risks, and was also undertaking R&D on its own account (for indigenisation, etc.). All this substantially raised the risk profile of the taxpayer vis-à-vis the foreign AE, and made the foreign AE an obvious choice for tested party.

Data availability in respect of the foreign AE and foreign comparables is the other important requisite when selecting a foreign AE as tested party. Notably, to establish reliability of the data, the Tribunal has, in the present case, placed importance on an independent audit and review of such data.

Foreign exchange rate fluctuation

Tribunal endorses adjustment to account for foreign exchange rate fluctuation

Honda Trading Corp. India Pvt. Ltd. *v.* ACIT [2013] 34 taxmann.com 299 (Delhi-ITAT)

Necessary adjustments arising from huge and abnormal fluctuation in foreign exchange may be allowed to the taxpayer.

Transfer pricing

Facts

Honda Trading Corp India Pvt. Ltd. (the taxpayer) was engaged in the buy-sell of certain automotive components. The taxpayer had determined and agreed its sales price charged to customers, after considering the past six months' foreign exchange rate (INR to Thai Baht). However, the taxpayer's imports from its AE were undertaken at the exchange rate prevalent on the date of transaction (the spot rate). Contrary to the taxpayer's expectations, owing to sudden political and economic reform in Thailand, the INR depreciated *vis-à-vis* the Thai Baht, thereby making imports costlier. However, the sale price had been fixed with customers and could not be changed. Since imports became costlier and the sale price did not change, the taxpayer incurred losses. To eliminate the impact of depreciation in the INR, the taxpayer proposed an adjustment and submitted that it would have earned a high profit margin (higher than that of comparables) had the INR not depreciated. The TPO disregarded the adjustment put forth by the taxpayer, and made a TP adjustment.

Held

The Tribunal acknowledged the depreciation in the INR to be an important factor materially affecting the price in the open market. The Tribunal held that for a credible comparison with comparables, the difference on account of foreign exchange rate fluctuation in favour of the Thai Baht and against the INR should have been removed, and the margin of the taxpayer should have been accordingly adjusted. Thus, the Tribunal directed the revenue authorities that necessary adjustments pertaining to the huge and abnormal fluctuation in foreign exchange may be allowed to the taxpayer.

Editor's note

After providing its in-principle sanction of adjustments on account of working capital, risk, capacity utilisation and depreciation, the Tribunal has, with this ruling, endorsed the need to adjust for foreign exchange rate fluctuation which can have a material impact on prices. This endorsement by the Tribunal is positive and indeed well-timed as Indian importers are already feeling the effect of continued depreciation in the INR on their margins.

The mechanics of how this adjustment is to be made were not discussed in this case. However, having received the Tribunal's sanction, there is now a need to develop a robust methodology based on sound economic principles.

Contract Manufacture

Royalty payout upheld – taxpayer not a contract manufacturer

Samsung India Electronics Private Limited *v.* ACIT [TS-168-ITAT-2013(Del)-TP]

Tribunal agreed with the taxpayer that it operated as a fully-fledged licensed manufacturer and not as a contract manufacturer and upheld the royalty payout by the taxpayer as being at arm's length.

Facts

Samsung India Electronics Private Ltd. (the taxpayer) paid royalty to Samsung Electronics Company Ltd., Korea (Korea AE). Royalty was paid (at 8%) on sales to AEs, as well as on sales to non-AEs. The TPO held that the taxpayer was a contract manufacturer. On this basis, the TPO objected to the royalty paid on export sales to AEs, and determined their arm's length value to be nil.

Held

Transfer pricing

The Tribunal agreed with the taxpayer that it operated as a fully-fledged licensed manufacturer, and not as a contract manufacturer. The Tribunal eventually held in favour of the taxpayer and deleted the adjustment. In doing so, the Tribunal primarily relied upon the submissions made by the taxpayer, of which the following are noteworthy:

The FAR profile of the taxpayer was similar for sales made to AEs and those made to non-AEs.

Sale prices and terms agreed to with AEs were driven by open market conditions, and were dependent on the outcome of negotiations between the AEs and the taxpayer. Furthermore, if the taxpayer obtained better terms from non-AEs it would transact with the non-AE, in the manner of any prudent business.

"Contract manufacturer" has not been defined under the Act. Accordingly, the definition of contract manufacturer given in the OECD Guidelines (para 7.40) was relied upon.

The Tribunal stated that in the present case, Korea AE kept a close watch on the quality of the raw-materials and the production process. However, it did not determine the quantity of production and the terms of sales. Furthermore, there was no assurance that the taxpayer's entire production would be purchased.

AE sales were to fellow subsidiaries, for which royalty was paid to Korea AE. Owing to the fact that the taxpayer sold to other AEs, Korea AE could not be deprived of its right to earn an arm's length return on such sales, in return for the R&D investments it had made over the years.

As stated in the OECD Guidelines (para 6.17), in some circumstances the price of intangibles may be included in the price of goods transacted with AEs and, consequently, any additional royalty paid by the buyer would have to be disallowed. However, in the case in question, the TPO had accepted that the transaction value of the purchase of raw materials and consumables was at arm's length, using the TNMM.

Editor's note

It has been rightly held that Korea AE cannot be deprived its right to earn an arm's length return for the R&D investments it had made. However, the important question is: "who should pay the royalty?" Royalty would not be paid by a contract manufacturer. Instead, they should be paid by the entity which exploits the intellectual property and which also retains the residual profits arising from such exploitation and manufacturing (i.e., a licensed or an entrepreneur manufacturer).

In the present case, while agreeing that the taxpayer was a licensed manufacturer, and also upholding its royalty payout, the Tribunal acknowledged two factual aspects: the similarity in the FAR profile of the taxpayer with respect to AEs and non-AEs; and the negotiated and market-driven nature of prices charged to AEs. These are certainly notable observations in the context of a licensed manufacturer. However, it is key that a taxpayer be able to demonstrate these factual aspects.

Separately, when evaluating the transaction of royalty, the Tribunal's reference to OECD Guidelines (para 6.17) is pertinent, as it highlights an important consideration when pricing intangibles.

Transfer pricing

LIBOR

Tribunal rules that LIBOR is an average rate

The Development Bank of Singapore *v.* DDIT (IT) [TS-112-ITAT-2013(Mum)-TP]

The benefit of the 5% range is available to the taxpayer since London Inter Bank Offered Rate (LIBOR) is an average rate and not a single rate.

Facts

- The Development Bank of Singapore (the taxpayer) was a multinational bank engaged in banking operations in India. During tax year 2001-02, the taxpayer had entered into lending and borrowing transactions with its head office and branches in which it had received interest/ made interest payments. The benchmarking of the interest payments on borrowings was not disputed.
- With respect to interest received, the taxpayer had earned interest income of INR 2.776 million at varying rates. The taxpayer benchmarked the interest rate charged on a transaction by comparing it to the relevant LIBOR[1] rate on the transaction date, as extracted from the Reuters database.
- There was no transaction where the difference in the rate actually charged and the LIBOR rate was greater than 5%.

During TP assessment proceedings, the TPO did not dispute the applicability of LIBOR as a basis for benchmarking. However, it was concluded that LIBOR was a single rate, and therefore the benefit of the 5% range should not be available to the taxpayer.

- The TPO proceeded to make an adjustment of INR 0.05 million, being the differential arrived at for lending transactions where the rate charged was lower than the LIBOR rate.
- However this addition was subsequently deleted by the CIT(A).

Held

LIBOR being an average rate

- The Tribunal held that the benefit of the 5% range should be available to the taxpayer and stated that the deletion of the adjustment by the CIT(A) was justified (in accordance with the first proviso to section 92C(2) of the Act which is valid for tax year 2002-03.)
- This was on account of the fact that LIBOR could not be considered, in itself, to be a rate at which a bank was willing to borrow/ lend, but an average of rates at which various banks offer to borrow/ lend. Based on the documents placed on record by the taxpayer and the revenue, the definition of LIBOR (*source:* Wikipedia) and how LIBOR rates were calculated was dwelt upon in detail by the Tribunal.
- As a result of the above, the Tribunal deduced that LIBOR was nothing but an arithmetical mean of rates and could not be characterised as one price determined under the comparable uncontrolled prices (CUP) method.

1. LIBOR is calculated each day by Thomson Reuters, to whom major banks submit their estimated cost of borrowing unsecured funds for 15 periods of time (ranging from overnight to 12 months) in ten currencies. It is essentially a benchmark, giving an indication of the average rate at which a leading bank can obtain unsecured funding in the London interbank market for a given period, in a given currency. LIBOR therefore represents the lowest real-world cost of unsecured funding in the London market.

Transfer pricing

Single price ALP also entitled to tolerance band

- While deliberating on the issue at hand, the Tribunal also gave its observations on the amended proviso to section 92C(2) of the Act, substituted by the Finance (No. 2) Act, 2009[2], which was effective from 1 October 2009 (including for any assessment or reassessment proceedings open as at that date).
- Keeping in view the language used in the amended proviso, the Tribunal noted that the benefit of the range would extend not only to a situation where more than one ALP was determined by the most appropriate method, but also where only one price is determined as the ALP. (The erstwhile tolerance band of 5% substituted *vide* notification no. 30/2013 [F.NO.500/185/2011-FTD-I], dated 15 April 2013, which, for tax year 2012-13, announced a band of 1% for wholesale traders and 3% for others)
- However, since the taxpayer's case was relevant to the tax year 2002-03, it would be governed by the single proviso to section 92C(2) of the Act as it stood prior to the amendment.

2. The relevant excerpts of the section have been reproduced below:
"(2) The most appropriate method referred to in sub-section (1) shall be applied for determination of arm's length price, in the manner as may be prescribed:
[Provided that where more than one price is determined by the most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices:
Provided further that if the variation between the arm's length price so determined and price at which the international transaction has actually been undertaken does not exceed [such percentage of the latter.....], the price at which the international transaction has actually been undertaken shall be deemed to be the arm's length price]"

Editor's note

This ruling of the Tribunal is an important and welcome pronouncement in the context of the benchmarking of financial market transactions and other similar situations, where a single published market rate is used as a CUP. However, there are certain important aspects which need to be kept in perspective, considering industry practices and the manner in which banks normally operate:

- *Market prices move during the day and thus there will be variations in the benchmark rates extracted/ captured at different points of time. In such situations, where the transacted rate falls outside the tolerance band, banks should seek recourse to their internal control procedures to demonstrate the ALP. Banks have internal control mechanisms which govern the rate at which they undertake financial market transactions such as lending/ borrowing. There is usually a pre-defined tolerance band beyond which a transaction cannot be undertaken and in the event that this threshold is crossed (for reasons such as sudden market volatility), clarification/ substantiation is required. These mechanisms are applicable to both third parties and AEs, and help ensure that such transactions are entered into at market rates.*
- *Similar to the analysis undertaken to determine whether LIBOR is a single rate or an average rate, an evaluation needs to be undertaken for other financial market transactions where the rate is derived from a database. This would include rates for foreign exchange transactions (such as spot and forward contracts), fixed deposits, debt instruments, etc.*
- *Though LIBOR continues to be the primary benchmark for short term interest rates globally, one would need to observe the developments in this area closely, given the recent controversy surrounding the LIBOR rate.*

Transfer pricing

Other than the primary outcome with respect to LIBOR being an average and not a single rate, the observations of the Tribunal on the amended proviso to section 92C(2) of the Act are also very significant, especially for taxpayers who have been denied the benefit of the tolerance band on account of single price.

Deemed international transactions

Section 92B(2) of the Act not applicable to transactions between domestic entities

Swarnandhra IJMII Integrated Township Development Co. Pvt. Ltd. *v.* DCIT [TS-762-ITAT-2012 (HYD)-TP]

TP provision would not be applicable where the joint venture (JV) company and the taxpayer are domestic entities, and there was a direct rendering of services by the JV to the taxpayer and not to the AE by way of using JV as an intermediary. Furthermore, as both taxpayer and JV company are domestic entities, the transaction between them cannot be termed an international transaction.

Facts

Swarnandhra IJMII Integrated Township Development Company Pvt. Ltd. (the taxpayer) was a JV company of Andhra Pradesh Housing Board (APHB) and an Indian company, IJM (India) Infrastructure Ltd (IJMII). IJMII in turn is a part (a subsidiary) of a foreign group of companies, *viz.*, IJM Group (the AE). During the year, the taxpayer entered into transactions with IJMII which the revenue held to be international transactions under section 92B(2) of the Act, as it believed that the terms were, in substance, determined between the taxpayer and the AE.

Held

The Tribunal ruled in favour of the taxpayer and held that the transaction under dispute did not fall under section 92B(2) of the Act, for the following reasons:

- As both parties were residents, the transaction between them was not an international transaction and thus the basic premise for invoking section 92B(2) of the Act did not arise.
- It was a direct transaction between IJMII and the taxpayer and not one with the AE by way of using IJMII as an intermediary.
- Owing to the active participation of a government body (APHB) in the functioning of the taxpayer, it could not be said that the AE influenced the terms of the transaction.

In addition, the Tribunal clarified that section 92A(1) of the Act provided broad parameters for defining AE, while section 92A(2) of the Act listed specific situations in this regard. The deeming fiction created by section 92B(2) of the Act was in addition to the one created under section 92A(2) of the Act. Section 92B(2) of the Act thus had to be read as an extension of section 92A(2) of the Act, and not as an extension of section 92B(1) of the Act. Furthermore, the fiction embodied in section 92B(2) of the Act was transaction-specific and did not apply to all transactions between the enterprise and the unrelated person.

Editor's note

This is undoubtedly a significant ruling which addresses a controversial legal TP issue which has been often debated since the TP regulations were enacted. In the past, there have been different views taken on whether the application of section 92B(2) of the Act is restricted

Transfer pricing

to international transactions only, or whether it also applies to transactions between domestic entities. In this regard, the Tribunal has categorically held that section 92B(2) of the Act does not apply to transactions between domestic entities, and the pre-condition of there being an international transaction has to be satisfied if section 92B(2) of the Act is to be applied. One of the reasons stated by the Tribunal for drawing this conclusion is the amendment introduced vide *the Finance Act, 2012, for prospective applicability of TP provisions to domestic transactions. However, this reasoning does not seem appropriate as the scope of the said domestic transactions is very specific and does not really cover a scenario involving section 92B(2). Also, the underlying objective of the respective provisions is not exactly the same.*

While arriving at its conclusion, the Tribunal also provided clarity on, and insight into, certain pertinent matters. The Tribunal elucidated that the applicability of section 92B(2) of the Act is to particular transactions only, and such transactions do not make the transacting entities 'associated' for the entire tax year. Further, the Tribunal ruled out the possibility of external influence when a government body actively participates in the functioning of an organisation – this is certainly useful guidance when evaluating 'determined in substance' for the purpose of section 92B(2) of the Act.

In another observation, the Tribunal established a link between section 92A(2) of the Act and section 92B(2) of the Act, which is quite insightful. According to the Tribunal, section 92B(2) of the Act defines the parameters for an 'AE relationship', which is over and above the parameters outlined in section 92A(2) of the Act, and hence section 92B(2) of the Act has been regarded as an extension of section 92A(2) of the Act, rather than an extension of section 92B(1) of the Act.

Furthermore, in the case in question, the Tribunal considered the disputed transaction to be a 'direct' transaction which was between the taxpayer and the other entity, and was not carried further with the AE. The applicability of section 92B(2) of the Act has thus been ruled out in the case of 'direct' transactions, where there is no 'intermediary'. The entity interposed between the taxpayer and the AE was considered to be an 'intermediary' by the Tribunal, which essentially acts as a 'pass-through' entity between the taxpayer and its AE, adding little or no value. In this regard, although this was not clarified by the Tribunal, it may nonetheless be inferred that not all 'pass-through' arrangements would be subject to section 92B(2) of the Act, as there could be certain arrangements which are so structured for genuine business reasons, and not solely to avoid tax. On the other hand, even if the interposed entity is not characterised as a 'pass-through' entity, this does not mean that section 92B(2) of the Act would not apply.

On a separate note, it is worth highlighting that section 92B(2) of the Act requires that the taxpayer be transacting with an unrelated person ('a person other than an AE'). In the present case, IJMII cannot be said to be 'unrelated' to the taxpayer, as it had a majority and significant shareholding of 51% in the taxpayer. However, this aspect was not discussed in the ruling. This is possibly because the Tribunal upfront dismissed application of section 92B(2) of the Act on the basis that IJMII and the taxpayer were both domestic entities, and it did not, therefore, need to traverse beyond that.

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Circulars and Notifications

Tolerance band

Tolerance band for financial year 2012-13 notified – 1% for wholesale traders and 3% for others

Prior to the Finance Act, 2011, the second proviso to section 92C(2) of the Act provided for a tolerance band of 5% with respect to the arithmetic mean for the purpose of computing the ALP. *Vide* Finance Act, 2011, which was effective from tax year 2011-12 (financial year2012-13), this tolerance band of 5% was replaced with variable percentages for different industries to be notified by the Central Government from time to time.

Thereafter, the Finance Act, 2012, further amended the tolerance band for tax year 2012-13 and onwards. The upper limit of the tolerance band was not to exceed 3% , i.e., the transaction was to be considered at arm's length if the difference between the TP and arithmetic mean did not exceed the number as notified by the Government, subject to an upper limit of 3%. The Government has now issued a notification for tax year 2012-13 (tax year 2013-14), which specifies the tolerance band to be 1% for wholesale traders and 3% in all other cases. There is, however, no clarification provided in the notification as to which taxpayers would be classified as 'wholesale traders'. The term 'wholesale trader' could have a wide connotation in common commercial parlance, and therefore requires clarification.

Advance Pricing Agreement

CBDT publishes APA Guidance with FAQs

In the Union Budget 2012, the Finance Minister introduced the APA provisions with effect from 1 July 2012. The CBDT, in an announcement in the official gazette, dated 31 August 2012, had introduced detailed rules providing the necessary forms for application of a unilateral, bilateral or multilateral APA.

The CBDT has now published a comprehensive Guidance Note and Frequently Asked Questions (FAQs) (the Note) detailing the procedural aspects concerned with the unilateral, bilateral or multilateral APA applications. The Note also addresses applicants' most commonly asked questions. Throughout the Note, the CBDT has demonstrated a positive and open-minded approach in defining the procedural and practical aspects of the APA process.

The Note will serve as a very handy guide to potential APA applicants, providing practical insights to the approach, process and the expectations of the APA office.

Based on our first round of discussions with the APA office, PwC's experience of the procedural aspects have shown them to be in line with the procedures set out in the Note.

Some of the key points addressed in the Note are worth highlighting:

- A unilateral APA application can be converted into bilateral APA before finalisation of the APA.
- In cases where bilateral/ multilateral negotiations fail, the taxpayer has an option to opt for a unilateral APA or even multilateral APA not involving the country with which agreement could not be reached.
- APA authorities will look at the evidence and information submitted by taxpayers with an open mind, despite past litigation.

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- Tax administration has no particular preference for bilateral APAs over unilateral APAs. The decision lies with the taxpayer.
- Since APA is transaction-specific, taxpayers can request unilateral APAs for some transactions and bilateral APAs for others.
- Taxpayers can file APA requests relating to profit attribution to PEs.
- A request for pre-filing consultation cannot be refused by the APA office.
- While it is the taxpayer's decision to cover certain transactions *versus* others, if one transaction is intrinsically linked with another or several others in such a manner that it cannot be benchmarked independently, then both/ all transactions may need to be covered.

Practical Manual on TP

UN releases final version of its "Practical Manual on TP for Developing Countries"

The UN recently released the final version of its "Practical Manual on TP for Developing Countries" (the Manual). The content of the final version is largely similar to that of the draft manual which was released in October 2012.

The foreword to the Manual clearly states that, owing to the widespread reliance by both developing and developed countries on the OECD TP Guidelines for Multinational Enterprises and Tax Administrations, July 2010 (the OECD TP Guidelines), consistency with these Guidelines has been sought.

The Manual has ten chapters. Chapter 10 is a special case, with the Foreword to the Manual and the Preamble to Chapter 10, clarifying that Chapter 10 contains country-specific perspectives on TP administrative practices prevalent in four countries, *viz.*, Brazil, China, India (referred to as the India chapter), and South Africa, as described by representatives of those countries. Accordingly, as is stated in the Foreword and the Preamble, no consensus on Chapter 10 has been sought and the chapter does not reflect the official view of the UN.

The India chapter, which is a part of Chapter 10, primarily discusses some of the emerging TP issues in India as described by the Indian tax administration. Some of the India issues are discussed in the Manual, while others are not addressed at all. A detailed analysis thereof was provided in our news alert released last year, dated 11 October 2012, (when the draft manual was published).

As regards the first nine chapters – we provide a broad summary of their content below:

Chapter 1 – An Introduction to TP

Apart from providing an introduction to TP, TP methods, and determination of ALP, Chapter 1 briefly touches upon some transfer issues, *viz.*, intangibles, intra-group services, cost contribution arrangements, and use of secret comparables. In particular:

The Manual (in Chapter 1 and also later in Chapter 3) cautions against the use of secret comparables, unless tax authorities disclose the data to taxpayers so that taxpayers can defend themselves. Notably, this is more or less in line with OECD's views and also the judiciary's view in India.

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As for intangibles, apart from a brief overview in Chapter 1, there is no detailed discussion on the subject elsewhere in the Manual. Moreover, intangibles are categorised as 'trade intangibles' and 'marketing intangibles', a categorisation which is out of line with the OECD's discussion draft on intangibles, wherein the proposed definition of intangibles has witnessed a significant change. This categorisation seems dated as compared to the definition of intangibles introduced in the Indian TP legislation.

Chapter 1 also recognises certain specific challenges that many developing countries face in dealing with TP issues. These challenges are discussed in more detail in subsequent chapters, and include lack of reliable comparables, scarce tax administration resources having requisite knowledge and skill sets, and location savings.

Chapter 2 – Business Framework

This chapter examines the business framework (both operational and legal) under which multinational enterprises (MNEs) are organised, and in this regard, acknowledges the relevance and importance of a 'value chain' analysis.

Chapter 3 – The General Legal Environment

This chapter provides an overview of the various legal aspects surrounding the TP legislation of different countries. These include (i) the legislative approach (which, according to the Manual, can be self assessment driven or driven by tax administration); (ii) definition of AEs (which, according to the Manual, can be defined by the degree of control); (iii) coverage of transactions (which, according to the Manual, would generally be all transactions); (iv) availability/ priority of TP methods (the Manual emphasises that the UN does not provide any hierarchy of methods); (v) burden of proof (the Manual provides examples of countries where burden of proof lies with the taxpayer, *viz.*, India, US, Canada, Australia, and South Africa, and examples of countries where burden of proof lies with the tax administration, *viz.*, France, Germany, the Netherlands, and Japan); (vi) dispute resolution mechanisms (the Manual highlights the importance of mutual agreement procedure (MAP) and bilateral APAs).

Chapter 4 – Establishing TP Capability in Developing Countries

Chapter 4 discusses the importance of establishing TP capability within the tax administration in developing countries. In so doing, the Manual emphasises the need to (i) identify current capabilities and fill the gaps; (ii) improve co-operation and cross-working between policy making (which typically resides with the Ministry of Finance) and tax administration; (iii) ensure professional and effective relationships with taxpayers; (iv) put in place a risk-based approach to compliance; (v) put in place a team with diverse competencies and skill sets (economists, lawyers, accountants, database experts, business process experts, etc.).

Chapter 5 - Comparability Analysis

This chapter propagates a practical approach to ascertaining the degree of comparability. The comparability factors listed in this chapter are similar to those outlined by the OECD. However, the practical guidance provided in chapter 5 is greater than that provided in the OECD TP Guidelines. Some noteworthy aspects covered in this chapter are as follows:

It is stated that lack of comparables does not imply that the transaction is not at arm's length – it is possible to use 'imperfect comparables'. At the same time, 'cherry picking' of comparables is discouraged, and in this context, outright rejection of loss-making comparables is also discouraged.

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In respect of losses incurred by taxpayers, the guidance highlights the need to understand the reasons for losses. It is emphasised that an analysis of functions performed and risks assumed by the taxpayer *vis-à-vis* its AEs needs to be undertaken.

Items of further note are: (i) the examples provided in relation to control over risk and the consequent allocation of risk (and returns) (the examples are in the context of R&D activities); (ii) the discussion of location savings and location specific advantages; (iii) the discussion of business strategies. All these have been discussed in detail along with an analysis of their relevance in the Indian context, in our previous alert dated 11 October 2012.

Chapter 6 – TP Methods

This chapter outlines the TP methods and describes the approach to selecting a particular method. It also provides the strengths and weaknesses of the methods, and situations in which they can be used. The chapter provides greater practical guidance on the application of TP methods than is given in the OECD TP Guidelines.

Chapter 7 – Documentation

Chapter 7 outlines some existing international guidelines on TP documentation, and offers practical guidance on TP documentation rules and procedures, including examples of special considerations (such as exemptions) for small and medium sized enterprises (SMEs): the exemption offered by India from TP documentation where transaction value is less than INR 10 million is quoted as one of the examples of such considerations.

Chapter 8 – Audits and Risk Assessment

This chapter highlights the need for tax administrations to appropriately organise and staff TP audits. It emphasises the need for risk-based assessment, and in this regard also provides guidance on commonly agreed risk indicators.

Chapter 9 – Dispute Avoidance and Resolution

Chapter 9 describes different means to avoid TP disputes – through domestic and cross-border dispute avoidance mechanisms, including unilateral APAs, bilateral APAs, MAP, and developing co-operative relationships between tax administration and taxpayers, and their advisors.

TP certification

Indian TP certification – Revised form to increase taxpayer reporting requirements

Background

Taxpayers are required to obtain and file an annual TP certification in Form 3CEB by 30 November, following the end of the financial year. In 2012, the Indian TP regulations were amended *inter alia*, in respect of the following:

Clarification that '*international transaction*' includes transactions relating to intangibles, capital financing, guarantees, receivables, business restructuring, etc.;

TP provisions were extended to '*specified domestic transactions*' entered into after 1 April 2012;

Penalty at 2% of transaction value introduced for non-reporting of transactions in Form 3CEB.

Transfer pricing

Furthermore, in recent audits, Indian authorities have made TP adjustments for the issue of equity shares, disregarding taxpayer arguments that such issues do not qualify as international transactions subject to TP.

Changes notified to Form 3CEB

In respect of transactions entered into during FY 2012-13, a new Form 3CEB has been announced. The key additional reporting requirements are summarised below:

In respect of international transactions, apart from aligning the form with the expanded definition of international transactions, separate requirements have been introduced for the following kinds of transaction:

- Guarantees
- Issues of equity shares
- Business restructuring/ re-organisations
- Deemed international transactions

In respect of Specified Domestic transactions, a separate section has been introduced in the Form which requests the following information:

- Details of the AEs, including business description
- Nature of relationship
- Description of the transaction, along with quantitative details
- TP methodology
- Certain consequential amendments have also been notified in the regulations due to introduction of domestic TP.

Way forward

The new Form 3CEB is applicable to all TP Certificates issued for FY 2012-13. Form 3CEB needs to be filed electronically. Taxpayers need to be aware of the expanded TP reporting requirements in managing their compliance for FY 2012-13 and future years.

Notification nos. 41/2013 and 42/2013, dated 11 June 2013

R&D centres

CBDT issues revised guidance on contract R&D centres

Background

Pursuant to the recommendations of the Rangachary Committee (appointed to review 'Taxation of Development Centres and the IT sector'), the CBDT at first issued two circulars: (i) Circular 3[3] on identification of contract R&D service providers with insignificant risk and (ii) Circular 2[4] on application of the profit split method (PSM).

Based on representations received from the industry regarding the two circulars, the CBDT subsequently issued Circular 5[5] which withdrew Circular 2, and which amended Circular 3 and reissued it as Circular 6[6].

3 Circular 3/ 2013 dated March 26, 2013
4 Circular 2/ 2013 dated March 26, 2013
5 Circular 5/ 2013 dated June 29, 2013
6 Circular 6/ 2013 dated June 29, 2013

Transfer pricing

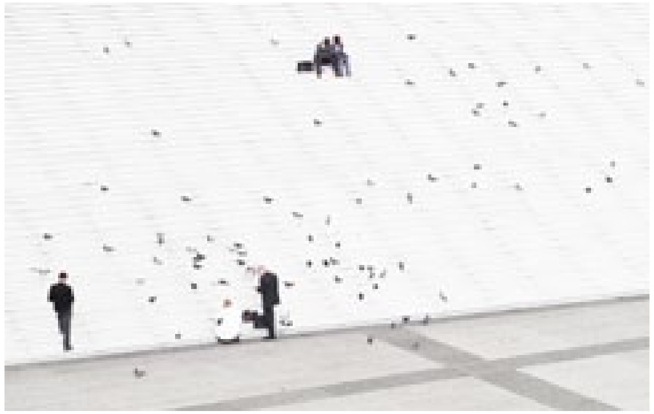
Circular 5 notifies withdrawal of Circular 2

From a reading of the press release issued on 29 June 2013 together with Circular 5, it is apparent that Circular 2 has been withdrawn primarily because it gave the impression that there was a hierarchy amongst the methods listed in section 92C of the Act, and that PSM was the preferred method in cases involving unique intangibles or multiple interrelated international transactions. Furthermore, it was considered that provisions of the Act and the Rules were themselves quite comprehensive and clear, and provided sufficient guidance on selection of the most appropriate method (MAM).

Circular 3 amended and reissued as Circular 6

Circular 6 recognises that R&D centres set up by foreign companies can be classified into three broad categories based on their FAR, as follows:

1. Centres which are entrepreneurial in nature;
2. Centres which are based on cost-sharing arrangements; and
3. Centres which undertake contract research and development.



According to Circular 6, in the first case, the development centre performs significantly important functions and assumes substantial risks. In the third case, the FAR are minimal, while the second case falls between the first and third cases.

The distinction between kinds of centre which is drawn by Circular 6, based on FAR, is more real and practical.

Having made this distinction, the CBDT proceeds to provide guidelines for identifying Indian development centres (IDC) which fall into the third category, i.e., contract R&D centres with insignificant risks. In this regard:

- The usage of the term ‘guidelines’ in Circular 6, as against ‘conditions’ in Circular 3, is worth noting, and implies that Circular 6 is meant to provide guidance rather than provide a mandate.
- This is supported by the fact that Circular 6 does not require all guidelines to be ‘cumulatively’ satisfied, as was required by Circular 3.
- Moreover, Circular 6 requires the first level TOs to ‘have regard to’ the guidelines and to take a decision based on the totality of facts and circumstances of the case.

Clearly, the approach being propagated by the CBDT is more rational and less stringent, with an emphasis on the overall conduct and substance of the parties and the arrangement.

In-principle, the guidelines in Circular 6 are not substantially different from the conditions in Circular 3. However, modifications have been made in order to simplify and provide greater clarity. A comparative analysis of the conditions/ guidelines in Circular 6 *vis-à-vis* Circular 3 is provided below (the changes made in the circulars have been italicised for ease of reference):

Transfer pricing

Circular 3 Conditions	Circular 6 Guidelines	Remarks
Economically significant functions to be performed by foreign principal (FP). *Economically insignificant functions to be performed by IDC.*	Economically significant functions performed by FP (through its employees or through its AEs) *would include critical functions such as conceptualisation and design of the product and providing strategic direction and framework.* IDC to perform *work assigned to it by FP*.	Greater clarity provided on what is meant by 'economically significant functions'. In addition, in order to achieve greater simplicity, the reference to *'economically insignificant functions'* in the context of IDC has been removed, and the amended circular 6 simply states that *IDC will perform work assigned to it by the FP*.
FP to provide funds/capital and other economically significant assets including intangibles. *IDC does not use any other economically significant assets including intangibles.*	FP or its AEs to provide funds/ capital and other economically significant assets including intangibles. *FP (or its AE) also provides remuneration to IDC.*	In a contract R&D centre, as against an entrepreneurial set-up or a cost sharing arrangement, it would be the FP who would remunerate the IDC. This is possibly the reason why in Circular 6 "*Foreign Principal (or its AE) also provides remuneration to IDC*" has been added.
FP not only has the capability to control or supervise, but actually controls or supervises R&D through its strategic decisions to perform core functions as well as monitor activities on a regular basis. IDC works under direct supervision of FP.		No significant change
FP assumes and controls risks. IDC does not assume/ has no economically significant realised risks.		No significant change

Transfer pricing

Circular 3 Conditions	Circular 6 Guidelines	Remarks
If FP is located in a jurisdiction which is widely perceived to be a low or no tax jurisdiction, it will be presumed that it is not controlling the risk. However, IDC may disprove this to the satisfaction of revenue authorities.	If FP is located in a jurisdiction widely perceived to be a low or no tax jurisdiction, it will be presumed that it is not controlling the risk. However, IDC may disprove this to the satisfaction of revenue authorities. *Low tax jurisdiction to mean any country or territory notified under section 94A of the Act or any other country or territory notified for the purpose of Chapter X of the Act.*	Greater clarity provided on the meaning of the term 'low or no tax jurisdiction'.
Ownership right (legal or economic) on outcome of research vests with the FP and not with the IDC.		No significant change
In respect of all the above, emphasis is on conduct and not merely on the terms of contract.		No significant change
Circular 3 was silent on selection of MAM.	Section 92C of the Act, Rules 10A to 10C of the Rules, and above guidelines set out in Circular 6 to be borne in mind when selecting MAM.	In addition to the Act and the Rules, guidance in Circular 6 also now needs to be considered when selecting the MAM for R&D centres.

Alignment with international best practices

The CBDT has clearly attempted to align with international best practices. In the old Circular 3 as well as in the new Circular 6, the emphasis on substance and conduct over contract, is in line with international guidance provided by the OECD and the UN.

In addition, with regard to ascertaining whether or not the IDC is a contract R&D centre with insignificant risk, the CBDT has focussed on the FAR and related aspects of control, decision making, supervision, monitoring, capability, funds, etc. These aspects are precisely those considered by the OECD and the UN when discussing contract R&D centres. The focus of the OECD and the UN in this regard is in fact more on who exercises control over risk, as compared to other factors. Therefore, by removing the condition of 'cumulative' compliance, the CBDT has in a way moved the guidance in Circular 6 closer to international guidance.

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Overall a positive development

Overall, the withdrawal of Circular 2 and amendment of Circular 3 is a very welcome and proactive. It is apparent from the above analysis that the changes made by the CBDT are meant to simplify and to rationalise, and to enhance clarity and provide greater certainty.

In fact, since the guidance provided for contract R&D centres is based on fundamentals of TP, the same principles could even apply to other contract services entities of foreign companies, thereby clearing the air for many.

From all the above steps taken by the CBDT, the intent of the Indian Government is evident, and the signal being sent out is obvious – India means business and is committed to attracting foreign investment.

Base Erosion and Profit Shifting

OECD reveals highly anticipated action plan on Base Erosion and Profit Shifting (BEPS)

In brief

On 19 July 2013, the OECD issued its Action Plan regarding Base Erosion and Profit Shifting (BEPS) at the G20 leadership meeting of finance ministers in Moscow. The OECD states that "fundamental changes are needed to effectively prevent double non-taxation," which, the OECD argues, is harmful to governments, individual taxpayers, and large and small businesses.

The Action Plan proposes 15 action points to be addressed over the next 18-24 months, which can be grouped into four general categories: (i) general actions directed at addressing BEPS, (ii) transparency and disclosure actions, (iii) tax treaty-related actions, and (iv) PE and TP actions.

In detail

General actions directed at addressing BEPS

The Action Plan proposes the following steps and timelines for addressing BEPS generally:

- Address tax challenges of the digital economy (12-18 months),
- Neutralise effects of hybrid mismatch arrangements (12-18 months),
- Strengthen controlled foreign corporation (CFC) rules (24 months),
- Limit base erosion via interest deductions and other financial payments (24 months), and
- Counter harmful tax practices more effectively, taking into account transparency and substance (24 months)

Observation: The OECD has not carried out significant work on CFC rules in the past. The expansion of the OECD's focus into this area of international taxation underscores the ambitious agenda of the Action Plan. Moreover, the digital economy remains an area of focus as the OECD attempts to apply theories of taxation to e-commerce in a holistic manner that addresses both direct and indirect taxation effects. At the heart of the discussion lies the fact that companies may have a significant digital presence in a country without there being a nexus for taxation.

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Transparency and disclosure actions

The Action Plan proposes the following steps and timelines for these issues:

- Establish methodologies to collect and analyse data on BEPS and actions to address it, and
- Require taxpayers to disclose their aggressive tax planning arrangements.

Tax treaty-related actions

The Action Plan proposes the following steps and timelines for addressing tax treaty-related issues:

- Prevent tax treaty abuse,
- Make dispute resolution mechanisms more effective, and
- Develop a multilateral instrument.

PE and TP actions

The Action Plan proposes the following steps and timelines for these issues:

- Prevent artificial avoidance of PE status (24 months),
- Assure that TP outcomes are in line with value creation with regard to intangibles (12-14 months); risk and capital (24 months); and other high-risk transactions (24 months), and
- Re-examine TP documentation (12-18 months).

The Action Plan places a close focus on substance and this comes through in various ways like the PE rule, re-characterisation, ownership of intangibles and focus of legal contracts for risk shifting, aligning TP with value creation activities.

With regard to PE issues, the OECD plans to consider changes to the definition of PE to prevent avoidance of PE status. However, the Action Plan is committed to providing clarification of, rather than wholesale amendment to, the PE concept. In particular, the OECD plans to explore use of commissionaire arrangements that may stem from an outbound shift of profits from the country where sales take place without substantive changes in functions. It will also look into the use of more specific exemptions for certain activities (such as those of a preparatory and ancillary nature) from the definition of PEs.

On the TP of intangibles, the OECD plans to adopt a ‘broad and clear’ definition of intangibles and update the existing guidance on cost contribution arrangements (known as cost sharing agreements or CSAs in the US). In particular, the OECD plans to develop rules to ensure that inappropriate returns will not accrue to an entity solely because it has contractually assumed risks or has provided capital. The main point of emphasis is ensuring that TP outcomes are in line with value creation.

It is not specified whether value creation *lies with those people or entities that possess the expertise and agency to credibly oversee entrepreneurial risk* as highlighted in the OECD’s Discussion Draft on Intangibles, published in June 2012, or whether the OECD is seeking to introduce a new concept by which to apply the arm’s length standard. The launch of an update to the 2012 Discussion Draft on Intangibles is imminent as it is expected to be released by 1 August, 2013. Expectations are that “important functions” will be key in reaping intangible-related returns.

In areas of TP identified by the OECD as “other high-risk transactions,” the OECD plans to clarify the circumstances in which such transactions can be re-characterised. It is to be noted that during the Business

Transfer pricing

Restructuring project that resulted in Chapter 9 of the OECD TP Guidelines in 2010, it was clearly stated that re-characterisation would need to remain limited to exceptional cases. This implied that adjustments under TP rules and principles would be more common, as opposed to non-recognition or re-characterisation. It looks as if the Action Plan may signal a swing by the pendulum in the other direction.

In addition, the OECD plans to clarify the application of TP methods, particularly profit splits, in the context of global value chains, and provide protection against “common types of base eroding payments, such as management fees and head office expenses”.

With regard to TP documentation, the Action Plan points to the asymmetry of information between taxpayers and tax administrations as a key issue in the administration of TP rules. While recognising that differences in TP documentation requirements have led to increased transaction costs for businesses, the OECD plans to develop documentation rules that will require MNEs to provide all relevant governments with information regarding global allocation of income, economic activity, and taxes “according to a common template”.

Observation

The OECD notes that while the arm’s length principle has effectively and efficiently allocated the income of multinationals among taxing jurisdictions, it is subject to use and misapplication in order to “separate income from economic activities that produce that income”. As a result, in its TP action points the OECD states that “special measures, either within or beyond the arm’s length principle, may be required with respect to intangible assets, risk and over capitalisation to address these flaws”.

The takeaway

As it has done since its inception, the OECD is promoting international cooperation as an effective solution to problems raised by competing tax jurisdictions operating in a global environment. Further, the Action Plan’s two-year timeline reflects a sustained effort to engage with all stakeholders, including governments, businesses, and civil society, during this OECD initiative. While the OECD has taken the lead in addressing BEPS in an organised and systematic manner, it ultimately will be the responsibility of individual nations to collaborate and agree upon the OECD’s recommendations.

Safe Harbour Rules

A snapshot of the Final Safe Harbour rules is provided below.

Applicability:

- The Safe Harbour (SH) rules shall be applicable for a period of five fiscal years beginning from FY 2012-13 (i.e., tax assessment year 2013-14 onwards).
- The SH rules are voluntary. Taxpayers can opt for a period not exceeding five years by filing the relevant form (Form 3CEFA) with the TO. The form has to be filed with the TO before the due date for filing of a return, and the return must be filed on or before the date on which the Form 3CEFA is furnished.
- Before filing the return of income for the relevant FYs, taxpayers opting for SH are required to submit to the TO a statement providing details of eligible transactions, their quantum and the SH rate/s.
- The option can be held to be invalid if there is a change in facts, and after giving the taxpayer the opportunity.

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- A taxpayer can opt out of the SH rules for any of the subsequent years falling within the period of five years, by furnishing a declaration to this effect to the TO.

SH rates:

S. No	Eligible International Transaction	Safe Harbour Rates
1.	Software development services*	• If annual transaction value exceeds INR 5 billion, then SH rate** is 22% • If annual transaction value is up to INR 5 billion, then SH rate** is 20%
2.	Information technology enabled services*	
3.	Knowledge process outsourcing (KPO) Services*	SH rate** is 25%
4.	Advancing of intra-group loans by Indian companies to their wholly owned subsidiaries (outbound intra-group loans)	Interest rate is equal to or greater than the base rate of State Bank of India as on 30th June of the relevant previous year, *plus*: • 150 basis points (loan does not exceed INR 500 million) • 300 basis points (loan exceeds INR 500 million)
5.	Provision of corporate guarantees*** by Indian companies to their wholly owned subsidiaries (outbound guarantees)	• If the amount guaranteed is up to INR 1 billion, the SH rate of commission is 2% p.a. of the guaranteed amount • If the amount guaranteed exceeds INR 1 billion, the SH rate of commission is 1.75% p.a. of the guaranteed amount, subject to the wholly owned subsidiary being rated to be of adequate to highest safety by an agency registered with SEBI
6.	Contract R&D services with insignificant risks	Software development - SH rate** is 30% Generic pharmaceutical drugs - SH rate** is 29%
7.	Manufacture and export of automotive components****	Core automotive components – SH rate** is 12% Non-core automotive components – SH rate** is 8.5%

** With insignificant risks. KPO defined as requiring application of knowledge and advanced analytical and technical skills.*

*** Operating Profit (OP) / Operating Expenses (OE)*

**** Does not include letter of comfort, implicit corporate guarantee, and performance guarantee.*

***** Where 90% or more of total turnover is OEM sales.*

Transfer pricing

Procedural aspects:

- TO will verify the eligibility of the taxpayer/ international transaction and acceptability of transfer price in accordance with the SH Rules and pass the order.
- TO may refer such verification to TPO.
- Any rejection of the option exercised by the taxpayer shall be by way of a reasoned order and the taxpayer shall have a right to file an objection with the Commissioner against an adverse finding regarding the eligibility.
- The SH rules provide for a time bound procedure for determination of the eligibility of the taxpayer and the international transactions.
- Time limits of two months from the end of the month in which the application/ reference/ objection, has been received, are prescribed:
  - for the TO to refer the case to the TPO;
  - for the TPO to pass an order determining the validity of the option exercised by the taxpayer; and
  - for the Commissioner to pass an order on the objection received from the taxpayer
- It is further provided that if any of the authorities fail to adhere to the prescribed time limit, the option exercised by the taxpayer shall be considered valid.
- If no option for SH has been exercised by the taxpayer, or where the option exercised is held to be invalid, then routine compliance and assessment procedures would apply, and determination of the ALP shall not have regard to the SH rates.

Some other points worth highlighting:

- These rules do not cover Specified Domestic Transactions (i.e., domestic TP).
- Documentation as per Section 92D of the Act and Accountant's Report in Form 3CEB as per Section 92E of the Act will continue, despite adoption of SH rules.
- No comparability adjustments are permitted, and the benefit of tolerance band (+/- 3 % or 1%) is not made available.
- A taxpayer opting for SH rules will not be entitled to invoke MAP.
- The nature of services under each of the eligible international transactions is definitive and not inclusive.
- The description of an eligible taxpayer with insignificant risk is in line with criteria prescribed in Circular No. 6/2013 dated 29 June, 2013.
- Definitions of operating income and expenses are provided along with certain exceptions.
- These rules specifically exclude international transactions with no tax or low-tax jurisdictions (countries where the maximum rate of income tax is less than 15%) and areas announced under section 94A of the Act.

PwC observations:

SH rates are not ALPs but are in the nature of presumptive taxation. They generally encourage taxpayers to opt for these rates as a compromise, in return for avoiding protracted litigation. Therefore, safe harbours typically include a premium payable by taxpayers. Hence, it is

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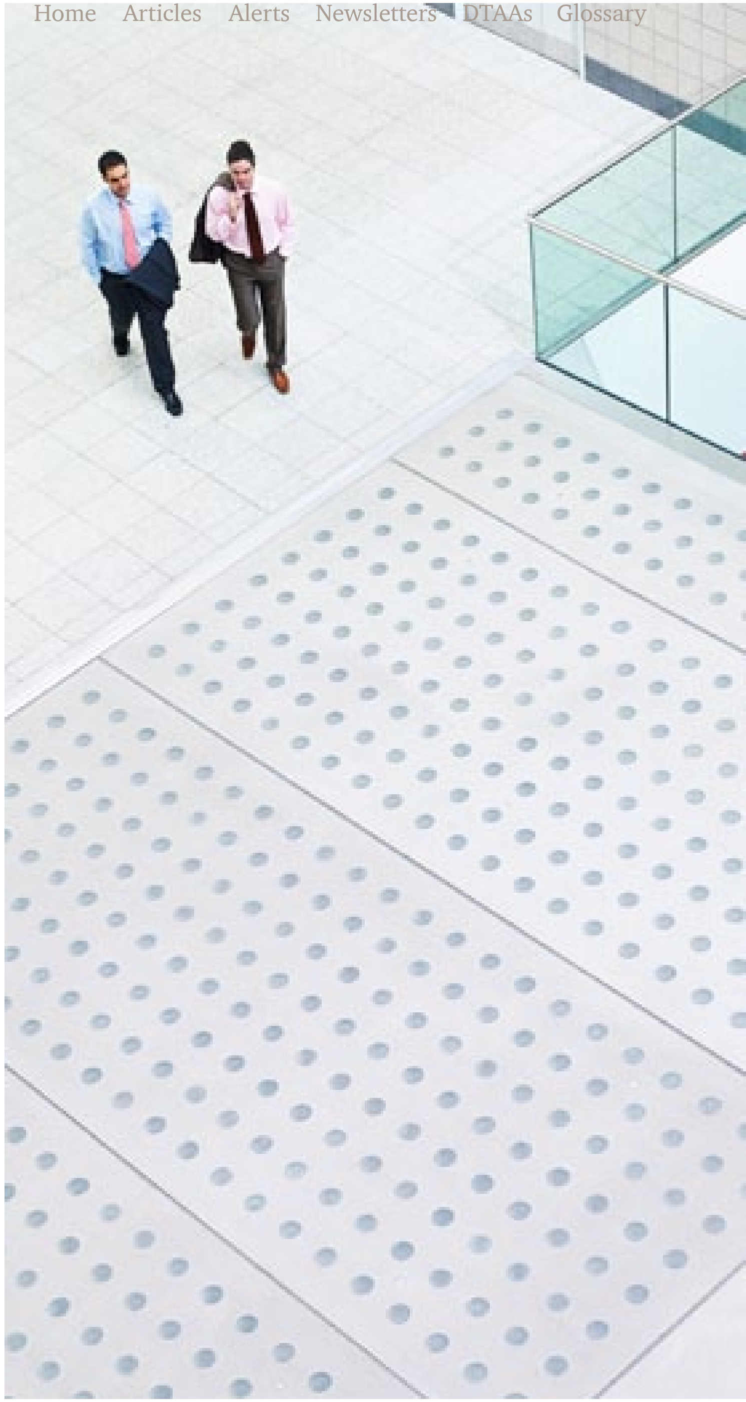
common to see a bit of conservatism from the Government, as one would observe in similar rules issued by other countries around the world.

Given the Indian SH rates, one envisages that very few multinational companies with operations around the world will opt for these rules, which could disturb their global arrangements. The rates are not attractive enough for large captive service providers. This is because they would face economic double taxation, as revenue authorities of the headquarter countries are unlikely to accept the high mark-ups under India's unilateral SH rules. In fact, one would have hoped that in the current times, given the weakening Rupee, the Indian Government could have provided lower SH rates, in order to garner more foreign exchange for the country, by boosting exports at a minimal compliance cost for taxpayers.

The large captive players in the fields of IT, ITES, KPO, contract R&D, etc., may now seriously consider the option of APAs, particularly bilateral APAs, for better up-front resolution of TP issues in India.

While taxpayers can opt for either unilateral or bilateral APAs for proper resolution of their TP models, a bilateral APA would be preferable, since the bilateral APA team would operate under fewer than would a unilateral APA team, since they would be involved in bilateral negotiations with other sovereign countries; and taxpayers would have the opportunity to plead resolution for mark-ups at convenient convergence points of inter-quartile ranges (as per the practice followed by other countries) and arithmetic mean (as per the provisions enshrined in the Indian TP regulations), as opposed to the restricted usage of the arithmetic mean in a unilateral APA.



The indirect tax section offers an analysis of judgements and other noteworthy developments in indirect tax under various Acts, like Customs, foreign trade policy, excise, service tax and value added tax.

Indirect tax

Indirect taxes

Case law

Customs/Foreign Trade Policy

Non-supply of documents relied upon by the Department as confirmation of the demand of duty amounts to violation of natural justice

In Abhirup Exports Pvt. Ltd. *v.* UOI [2013-TIOL-65-HC-MUM], the Bombay HC held that an order confirming duty demand could not be passed when the document relied upon was not supplied to the taxpayer, as this would amount to violation of natural justice.

Education cess is levied on the component of custom duties which is not exempted vide a notification

The SC , in UOI *v.* Adaniwilmar Ltd. [2013-TIOL-16-SC], upheld the order passed by Gujarat HC holding that education cess had to be levied only on that component of the customs duties which had not been exempted vide an exemption notification.

Technical function should be the basis for determining the classification of imported goods

The Tribunal, in CC *v.* Larsen & Toubro Ltd. [2013-TIOL-548-CESTAT-MAD], held that the classification of imported goods had to be determined on the basis of the technical function of the imported goods.

Payment made in relation to technical know-how cannot be included in the assessable value if it is not a condition of the sale of imported goods

The Tribunal, in Johnson & Johnson Ltd. *v.* CC [2013 (292) ELT 111], held that where technical know-how was used for value addition in India and not in respect of raw materials imported, payment for it was not to be included in the assessable value of imported goods as it was not a condition of sale.

Excise

Freight charges not to be included in assessable value where goods are sold from the factory gate

In India Thermit Corporation Ltd. *v.* CCE [2013 (287) ELT 473], the Tribunal held that when the goods were sold at the factory gate, the freight charges were not to be included in the assessable value even if the excess amount is collected from the customer towards transportation charges.

Cenvat credit can be availed suo moto after a favourable order from appellate authority is obtained

The Tribunal, in CCE *v.* Vardhman Acrylics Ltd. [2013 (197) ECR 433] held that *suo moto* re-credit of duty, which was reversed during the period which the case was pending, could be taken after a favourable order from the appellate authority was obtained.

Cenvat credit cannot be denied if the excise duty is not discharged by the supplier of inputs

The Jharkhand HC, in CCE *v.* Tata Motors Ltd. [2013 (290) ELT 538], held that the Cenvat credit could not be denied on the ground of non-payment of duty by the input supplier as the buyer of inputs was not expected to verify the accounts of the supplier or to find out from the Department whether duty had actually been paid on inputs.

Extended period of limitation cannot be invokved in case of voluntary disclosure of non-payment of duty

The Gujarat HC, in CCE *v.* Gujarat Glass Pvt. Ltd. [2013 (290) ELT 538], held that the extended period of limitation was not applicable when the taxpayer voluntarily disclosed the facts of non-payment of duty and paid the duty on demand.

Indirect taxes

Service Tax

International roaming service provided to customers of Foreign Telecommunication Service providers qualify as export of service

A two-member bench of the Tribunal, in Vodafone Essar Cellular Ltd. *v.* CCE [2013-TIOL-566-CESTAT-MUM], held that when the services were rendered to a third party at the behest of the customer, the third party could not be held to be the recipient of the services. The Tribunal, accordingly, held that since the customer (the recipient of services) was located outside India, irrespective of the fact that the third party was located in India, the services would qualify as export.

The Tribunal principally relied upon the landmark judgment of the Tribunal in Paul Merchants Ltd *v.* CCE [2012-TIOL-1877-CESTAT-DEL] and reiterated the concept that 'the customer's customer cannot be your customer'.

The brief facts of the case are that Vodafone had been rendering international roaming services to foreign telecommunication service (FTS) providers in relation to their international roaming subscribers coming to India. The point in question was whether the "recipient" of the services provided by Vodafone was the FTS provider or the subscriber of the FTS provider visiting India on international roaming.

The Tribunal observed that the direct beneficiary of the services provided by Vodafone would be the FTS provider who would be billing their international roaming subscribers abroad, and since the FTS provider was located outside India, the services of Vodafone, subject to fulfilling other conditions relevant to export of services, would qualify as export.

Sharing of services in relation to office personnel between sister concerns is not a provision of service per se and hence not liable to service tax

The Tribunal, in Paramount Communication Ltd. *v.* CCE [2013-TIOL-37-CESTAT-DEL] held that where the two sister concerns shared the services of some office personnel and expenses thereof, merely because of the fact that payments to employees were made by one concern followed by an inter-company settlement of expenses did not mean that one concern was rendering services to other. Such payments could not be taxed as consideration for 'supply of manpower' services.

Use of trademark without transferring the right to sub-let subject to service tax and not VAT

The Kerala HC, in Malabar Gold Pvt. Ltd. *v.* Commercial Tax Officer [2013-TIOL-512-HC-KERALA-ST], held that the royalty received by the franchiser for allowing the franchisee to use the trademark without the right to transfer or sub-let, would be liable to service tax under 'franchisee services'. Since there was no transfer of 'right to use', liability to pay value added tax (VAT) did not arise.

FOC supplies do not form part of the gross amount for the purpose of levy of service tax

The Tribunal, in Bhayana Builders Pvt. Ltd. *v.* CST [2013-TIOL-1331-CESTAT-DEL-LB], held that the goods and materials supplied free of cost (FOC) by a service recipient to the provider of taxable construction services would not form part of the gross amount for the purpose of levying service tax.

Indirect taxes

VAT

State Government has the constitutional right to levy VAT on sale of flats in the State

A larger bench of the SC, in Larsen & Toubro Ltd. *v.* State of Karnataka and Anr. [2013-VIL-03-SC-LB], held that a contract for the sale of flats where the consideration was to be received in installments linked to the construction is a species of works contract. Accordingly, the State Government had the constitutional right to levy VAT on a sale of flats in the State.

The two-judge bench of the SC referred this matter to the larger bench to reconsider the legal position laid down by the two-judge bench of the SC in the matter of K Raheja Development Corporation *v.* State of Karnataka [2005] 5 SCC 162 (SC). In this case, the SC had held that the developer, under such contracts, undertook to build for flat purchasers, and that the construction was for and on behalf of the purchaser, and it was a 'works contract'. Accordingly, the State Government could levy VAT, irrespective of the eventual transaction of sale of immovable property in flats.

On the above reference, the larger bench held that the legal position as pronounced by the two-judge bench in K Raheja Development Corporation case was the correct legal position. The dominant nature test was held to be not applicable in the case.

As a result, the position in the Raheja judgment was reaffirmed.

Grant of right to use a trade mark against the payment of royalty treated as a deemed sale is liable to VAT

The Kerala HC, in Malabar Gold Ltd. *v.* Commercial Tax Officer and others [2013-44-PHT-1-Ker], held that a grant of a right to use a trade mark under a franchise arrangement against the payment of royalty was liable to sales tax as a deemed sale under the VAT laws. The position would remain the same irrespective of the fact that the taxpayer had paid service tax on the transaction.

Photography contracts are service contracts and not works contracts

The Allahabad HC, in Commissioner Trade Tax *v.* Instant Auto Colour Lab [2013-NTN-Vol 51-1], relying on the SC decision in C.K. Jidheesh *v.* Union of India and others [2005-13-SC-37], held that photography contracts were service contracts and not works contract with respect to levying VAT as there was no element of sale in the photography papers transferred during the rendition of photography services.

No VAT Liability exists on contractor if sub-contractor has paid VAT on its turnover

The Karnataka HC, in Smt. Geetha D. Raju *v.* State of Karnataka [2013-58-VST-180-Kar.], held that in a works contract transaction, where part of a contract was sub-contracted to a third party, the property in goods, in respect of work executed by the sub-contractor, was transferred directly to the contractee through the principle of accretion. Therefore, once the sub-contractor had paid VAT on its turnover, the same could not be added to the contractor's turnover when computing his tax liability. The Karnataka HC relied on the landmark decision of the SC in State of Andhra Pradesh *v.* Larsen & Toubro Ltd [2008-17-VST-1].

Indirect taxes

Provision of telecom towers and shelter to telecom operators on sharing basis cannot be taxable under VAT as 'transfer of right to use goods'

The Delhi HC, in Indus Towers Limited *v.* UOI & Others [Writ Petition(C) 4976/2011], held that provision of telecom towers and shelter ('passive infrastructure') to telecom operators on a sharing basis could not be taxable under VAT as a transfer of a right to use goods as the activity did not involve a transfer of control and possession of passive infrastructure from one telecom operator to another.

Circulars and Notifications

Customs/Foreign Trade Policy

Goods imported against SFIS scrips can be transferred on completion of three years from the date of their procurement.

Notification no. 30 (RE-2012)/2009-2014, dated 1 August 2013

The Central Government has provided that the goods imported or procured against the Served from India Scheme (SFIS) scrips can be transferred on completion of three years from the date of import or procurement of such goods.

Payment of EDD should not be insisted upon by the authorities pending SVB investigation in relation to goods imported by EOU/STP/EHTP units

Commissioner of Customs, Bangalore C.No. VIII/48/70/2011-Cus Tech., dated 21 January 2013

The Bangalore Commissionerate has clarified that payment of extra duty deposit (EDD) at 1% should not be insisted upon by the Customs authorities pending a Special Valuation Branch (SVB) investigation in relation to the goods imported by EOU/STP/EHTP units. Furthermore, the Commissionerate clarified that in all such cases the EDD shall be debited in a B-17 bond and the final adjustment of duty foregone, if any, shall be made in such a bond upon the finalisation of provisional assessment.

Purchase order can be accepted as 'deed of contract' for the purpose of registration with Customs authorities under Project Import Scheme

Commissioner of Customs, Bangalore C.No. VIII/48/70/2011-Cus Tech., dated 21 January 2013

The Central Government has clarified that a purchase order can be accepted as a 'deed of contract' for the purpose of registration with Customs authorities in terms of Project Import Regulations, 1986.

Excise

Goods cleared against specified duty credit scrips shall not be treated as clearance of exempted goods

Circular no. 973/07/2013-CX, dated 4 September 2013

The CBEC has clarified that goods cleared against specified duty credit scrips issued to an exporter would not be treated as clearance of exempted goods, and hence payment of an amount under rule 6(3) of Cenvat Credit Rules, 2004 was not applicable.

Indirect taxes

Service Tax

Introduction of Service Tax Voluntary Compliance Encouragement Scheme, 2013

Notification no. 10/2013-ST and Circular N0 169/4/2013-ST, dated 13 May 2013, Circular no. 170/5/2013, dated 8 August 2013

A scheme has been introduced by the Government to encourage taxpayers and non-payers to come forward and pay off past 'tax dues' without interest, penalty and prosecution. Some of the highlights of the scheme are as follows:

- The scheme requires declaration of true liability and payment of 'tax dues' within a stipulated time frame, in order to receive immunity from interest, penalty and prosecution.
- 'Tax dues' have to be paid in cash; CENVAT credit cannot be utilised to pay tax dues.
- The rollowing preconditions must be satisfied before the benefits available under the Scheme can be received:
  - No search, audit, issue of summons or enquiry was been initiated or was pending as at 1 March 2013;
  - No show cause notice or any determination order has been issued with regard to the issue on which the applicant is making an application under the scheme;
  - The true service tax liability is disclosed in the periodical service tax returns in respect of which appropriate service tax has not been discharged by the applicant.

Upfront exemption from payment of service tax is granted to units located in SEZs and to SEZ developers

Notification no. 12/2013-ST, dated 1 July 2013

The Central Board of Excise and Customs (CBEC) has introduced a new scheme to grant an up-front exemption of service tax levied on specified services received by special economic zone (SEZ) units and SEZ developers which are 'used exclusively for the authorised operations'.

Exemption from payment of service tax granted on taxable services provided against duty credit scrips issued under chapter 3 of FTP

Notification no. 6/2013, 7/2013 and 8/2013-ST, dated 18 April 2013

The CBEC has exempted the taxable services provided against duty credit scrips issued under Chapter 3 of the FTP, namely 'Focus Market Scheme', 'Focus Product Scheme' and 'Videsh Krishi and Gram Udyog Yojana', by a person located in the taxable territory.

Indirect taxes

VAT

Composition Scheme for works introduced under Delhi VAT

The Government of Delhi has introduced a Composition Scheme for payment of tax by registered dealers engaged exclusively in carrying out works contracts in Delhi.

The scheme allows works contractors to choose from two different options f. Under 'Scheme A', the contractor is not allowed to purchase or sell any goods or supplies from outside Delhi, while 'Scheme B' allows the contractor to procure goods to be used exclusively in the execution of the works contract in Delhi, from outside Delhi or to import from outside India.

The scheme also gives an option to works contractors already paying taxes under the notified composition scheme or the general composition scheme provided under section 16 of the Delhi VAT Act, 2004, to shift over to the new scheme subject to the conditions of the scheme.

The rates of tax under the two options are given below:

Nature of Works	Scheme A	Scheme B
1) Civil contracts 2) Repair and maintenance of movable property(annual maintenance contracts) 3) Others	3%	6%
4) Builders selling units before completion (including the value of land)	1%	3%
5) Specified works such as printing, textile processing, re-treading of old tyres	2%	3%

Notification no. 3(13)/Fin.(Rev-I)/2012-13/dsvi/180, dated 28 February 2013

The regulatory section contains noteworthy developments on foreign direct investment, exchange control regulations, export and import, overseas direct investments, new sectoral regulations, company law and SEBI pronouncements and announcements.

Regulatory

Regulatory

Foreign Direct Investment (FDI)

FDI Policy

In a major liberalisation measure, the Department of Industrial Policy and Promotion (DIPP), in Press Note 6, eased foreign investment caps in the following sectors:

Sr. No.	Sector	Existing		Proposed	
		Cap	Route	Cap	Route
1.	Petroleum and natural gas and refining (PSU)	49%	Foreign Investment Promotion Board (FIPB)	49%	Automatic
2.	Commodity exchanges	49%*	FIPB	49%	Automatic
3.	Power exchanges	49%*	FIPB	49%	Automatic
4.	Stock exchanges, depositories, corporation	49%*	FIPB	49%	Automatic
5.	Asset reconstruction companies	Up to 49%	FIPB	Up to 49%	Automatic
		49% to 74%	FIPB	49% to 100%	FIPB
6.	Credit information companies	Up to 49%	FIPB	74%	Automatic
7.	Single Brand Retail Trade (SBRT)	Up to 49%	FIPB	Up to 49%	Automatic
		49% to 100%	FIPB	49% to 100%	FIPB
8.	Telecom services	Up to 49%	Automatic	Up to 49%	Automatic
		49% to 74%	FIPB	49% to 100%	FIPB
9.	Courier services	100%	FIPB	100%	Automatic
10.	Tea sector, including tea plantations	100%**	FIPB	100%	FIPB
11.	Defence production	26% (No FII investment)	FIPB	Above 26%***	CCS
12. The test marketing window has been removed since it has lost its relevance since the opening up of the retail sector.					
** FDI -26% - FIPB, FII - 23% - Automatic route*					
*** Divestment of 26% to the Indian partner within five years*					
**** - CCS may approve proposals on a case-by-case basis beyond 26% which may result in access to modern and state-of-the-art technology in the country.*					

Source: Press note 6 dated August 22, 2013

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"Control" redefined

The DIPP, in press note 4, has amended the definition of control. In order to ensure that 'effective' control lies in the hands of resident Indian citizens, with respect to sectors subject to FDI caps and conditions, the term, 'control' has been redefined to now mean, *"the right to appoint a majority of the directors or to control the management or policy decisions in that company by virtue of their shareholding or management rights or shareholders agreements or voting agreements".*

Source: Press note 4 dated August 22, 2013

FDI in retail

In order to encourage foreign investment and to provide clarity on investment conditionalities on FDI in multi brand retail trade (MBRT), the DIPP has, in press note 5 dated 22 August, 2013, released a set of liberalisation measures and clarifications. These include:

- The 30% of sourcing will be reckoned only with reference to the front-end store and a MBRT entity cannot engage in any other form of distribution
- The sourcing condition pertains only to manufactured and processed products. Procurement of fresh produce is not covered by this condition
- Entire investment in back-end infrastructure has to be additionality. The entity can invest only in greenfield assets and it will not be possible to acquire supply chain/ back-end assets or stakes from an existing entity
- Investment in the equity of the existing infrastructure company will not be counted towards the fulfillment of the conditionality of 50% investment in back-end infrastructure
- Investment towards back-end infrastructure can be made across all states, irrespective of whether FDI in MBRT is allowed in that state or not
- An MBRT entity is not envisaged as undertaking wholesale activity
- Wholesale trading/ cash and carry trading cannot be considered to be providing back-end infrastructure
- Investments in multiple infrastructure companies would not count towards fulfillment of condition of investing 50% in the back-end infrastructure
- FDI policy in MBRT is subject to the applicable State/ Union Territory laws/ regulations. The State Governments have the prerogative of imposing additional conditions accordingly
- Back-end infrastructure so developed can be used across the states by any entity.
- A franchisee model is not permissible, in accordance with the extant FDI policy on MBRT
- Once a unit is treated as "small industry", it shall continue to be treated as such even after a subsequent increase in plant and machinery expenditure above the limit of US$ 2 million
- Foreign-owned MBRT stores are allowed in cities with a population of less than one million in states which have allowed companies with FDI to set up stores in the MBRT sector.

Source: Press note 5 dated August 22, 2013

DIPP guidelines made operational

RBI has made operational the DIPP guidelines introduced in 2009 for the calculation of total foreign investments into Indian companies, transfer of

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ownership and the control of Indian companies and downstream investments made by Indian companies, as follows:

- Investments made prior to 13 February 2009, in accordance with guidelines existing at that time, will not require any modification. All other investments after that date will come under the ambit of these new guidelines.
- For investments made between 13 February 2009 and 21 June 2013, the Indian companies are required to inform the RBI of non-compliance with the prescribed regulatory framework, if any, on or before 1 October 2013.
- A first-level Indian company receiving FDI needs to ensure compliance with the FDI conditionalities for downstream investment made in subsidiary companies at the second level, and so on.
- A first-level Indian company needs to obtain an annual certificate from its statutory auditor with regards to the status of compliance with the aforesaid guidelines. A clean report will need to be mentioned in the director's report and a qualified report will need to be immediately reported to the RBI.

Source: Press note 6 dated August 22, 2013

Reporting of issue of/ transfer of shares to/ by a Foreign Venture Capital Investor (FVCI)

The RBI has clarified that wherever a SEBI-registered FVCI makes investment in an Indian company, under an FDI scheme in the terms of Schedule 1 of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 (Inbound Regulations), such investments have to be reported in form FC-GPR/ FC-TRS.

Where the investment is under Schedule 6 of the Inbound Regulations, no FC-GPR/ FC-TRS reporting is required. Such transactions would be reported by the custodian bank in the monthly reporting format, as prescribed by RBI.

Accordingly, in order to avoid double transaction recording, forms FC-GPR and FC-TRS have been revised.

Source: AP (DIR Series) Circular no 110 dated 12 June 2013

Acquisition of shares of a listed Indian company on stock exchanges under FDI scheme

The RBI has liberalised the FDI policy to allow non-residents, including non-resident investors (NRIs), to acquire shares of listed companies on recognised stock exchanges through a registered broker, provided the NRI has already acquired, and continues to hold control, in accordance with the SEBI Takeover Code.

Source: AP (DIR Series) Circular no 38 4 September 2013

Amendment of guidelines for calculation of total foreign investment in Indian companies, transfer of ownership and control of the Indian companies and downstream investment

The RBI has clarified that the facility of making downstream investments through internal accrual is available to all Indian companies, and not just to an Indian company engaged in the activity of investing in the capital of another Indian company.

Source: AP (DIR Series) Circular no 42 12 September 2013

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Issuing bank guarantee on behalf of a person resident outside India for FDI transactions

The RBI has permitted authorised dealer (AD) bankers to issue a bank guarantee, without the prior approval of the RBI, on behalf of a non-resident acquiring shares or convertible debentures of an Indian company through open offers, delisting, or exit offers, provided the following conditions are met:

- The transaction is in compliance with the provisions of the SEBI Takeover Code
- The guarantee of the AD banker is covered by a counter guarantee of a bank of international repute and is co-terminus with the offer period.

Source: AP (DIR Series) Circular no 37 5 September 2013

Exchange Control Regulations

External Commercial Borrowing

For general corporate purposes

Eligible borrowers may now receive external commercial borrowing (ECB) from their foreign equity holder in order to **meet expenses towards general corporate purposes under the approval route.** This will be subject to compliance with certain conditions, such as the following:

- A minimum paid-up equity of 25% should be held directly by the lender.
- Repayment of the principal shall commence only after completion of a minimum average maturity of seven years; no prepayment will be allowed before maturity.

All other aspects of extant the ECB guidelines shall remain unchanged.

Source: AP (DIR Series) Circular no 31 dated 4 September 2013

For the hotel industry

Indian companies in the hotel sector which have a project size of INR 2.5 billion or more (irrespective of geographical location) have been permitted to receive ECBs under the approval route for: repayment of outstanding rupee loan(s), ECBs received from domestic banking systems for capital expenditure incurred earlier and/ or for fresh rupee capital expenditure.

Key conditions under this liberalised window are as follows:

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

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Source: AP (DIR Series) Circular no 78 dated 21 January 2013

Corporates under investigation

In 2009, RBI prohibited corporates under investigation by any law-enforcing agencies (such as Directorate of Enforcement, etc.) from accessing ECB under the automatic route.

The RBI has reviewed these norms and has permitted all entities to receive ECBs under the automatic route, notwithstanding pending investigations, adjudications and appeals by the law enforcing agencies, without prejudice to the outcome of such investigations, adjudications or appeals.

The AD bank or the RBI needs to inform the agencies concerned that the entity is availing the ECB, by sending them an endorsed copy of the approval letter.

Source: AP (DIR Series) Circular no 87 dated 5 March 2013

Funding import of services, technical know-how and licence fees though Foreign Debt – for manufacturing and infrastructure sectors

The RBI has permitted eligible Indian borrowers in the manufacturing and infrastructure sectors to use ECB proceeds for payment towards import of services, technical know-how and payment of licence fees in the nature of capital expenditure under the existing policy framework, subject to compliance with the following key conditions:

- The service provider and Indian borrower company must have signed an agreement
- The Indian borrower company must provide a declaration that the entire expenditure on newly permitted end use will be capitalised and that it forms part of the project cost
- The Indian borrower company must certify the original invoice raised by the service provider based on the payment schedule in the agreement

Source: AP (DIR Series) Circular no 119 dated 26 June 2013

Relaxation in the policy for receiving ECB for low cost affordable housing projects

The RBI has notified the following key amendments to the existing ECB guidelines for low cost affordable housing projects under the Approval route:

1. Change in eligibility criteria

- Developers/ builders – Minimum three years of experience (previously five years) in undertaking residential projects.
- Housing Finance Companies (HFCs) – Requirement of having minimum paid-up capital of not less than INR 500 million as per latest audited balance sheet has been withdrawn.

2. Hedging of ECB

Developers, builders and HFCs (previously only HFCs) shall swap the availed ECB into Rupees for the entire maturity, on a fully hedged basis.

3. Procedural formalities

HFCs, when making applications, are required to submit a certificate from a National Housing Bank (NHB) certifying the prescribed criteria.

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4. Extension of time limit

This scheme was extended for the financial years 2013-14 and 2014-15, with a ceiling of USD 1 billion in each of the two years, and is subject to review thereafter.

Source: AP (DIR Series) Circular no 113 dated 24 June 2013

Credit enhancement of domestic debt

The RBI has permitted prescribed non-resident entities to provide credit enhancement to domestic debt raised through the issue of INR bonds/ debentures by all borrowers (currently only infrastructure development and infrastructure finance companies are permitted) eligible to raise ECB under the automatic route.

Also, the minimum average maturity of the underlying debt instruments has been reduced from seven to three years.

Source: AP (DIR Series) Circular no 120 dated 26 June 2013

Extension/ withdrawal of various ECB schemes

- Telecom Sector - ECB for refinancing 3G spectrum rupee loans

  This scheme has been extended up to 31 March 2014 to re-finance rupee loans obtained in order to pay for a 3G spectrum which are outstanding in the books of accounts of telecom operators.

- Civil aviation sector - ECB for working capital

  Window extended till 31 December 2013.

- Buyback/ prepayment of Foreign Currency Convertible Bonds

  Window extended till 31 December 2013.

- ECB in Renminbi

  Given that facility of ECB in Renminbi had remained unutilised so far, this facility has been discontinued.

Source: AP (DIR Series) Circular nos. 114, 116, 115 and 117 dated 25 June 2013

10 billion USD scheme: extended for repayment of rupee loans availed for outbound investments

The RBI has liberalised the existing ECB - 10 billion USD scheme whereby Indian companies who are consistent foreign exchange earners and are engaged in the manufacturing, infrastructure (as defined under FEMA) or hotel sectors (having total project costs of INR 25 billion or more, irrespective of their geographical location) can receive ECBs for repayment of outstanding rupee loan(s) received from the domestic banking system for capital expenditure or for fresh rupee capital expenditure under the **approval route**. The scheme is now available to Indian companies in selected sectors which have acquired assets overseas, subject to the following terms and conditions:

Eligible borrowers: Companies operating within sectors such as manufacturing, infrastructure or hospitality and which have an overseas JV, Wholly Owned Subsidiaries (WOS) or overseas assets.

Additional end use: Repayment of term loans having average residual maturity of five years and above or credit facilities received from domestic banks for overseas investment.

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Amount: Maximum permissible ECB shall be the higher of the following:

- 75% of the average foreign-exchange earnings **realised during the past three financial years**
- 75% per cent of the average foreign exchange earnings **estimated from the JV, WOS or assets abroad for next three financial years**.

The monetary ceilings under this scheme of USD 3 billion for an individual company or a group, and USD 10 billion overall for an ECB, will continue to apply.

Repayment: ECB liability shall be repaid out of the foreign exchange earnings from the JV, WOS or assets abroad.

Foreign exchange earnings: For the purpose of this scheme, foreign exchange earnings will be reckoned as past earnings in the form of dividends and repatriated profits, as well as other foreign exchange inflows like royalty, technical know-how, fees, etc received from the overseas JV, WOS or assets.

Source: AP (DIR series) Circular no 12 dated 15 July 2013

Enhanced ECB limit and relaxed end-use and hedging norms for infrastructure finance NBFCs

- In accordance with the extant guidelines of the RBI, infrastructure finance Non Banking Financial Company – Infrastructure Finance Companies (NBFC-IFCs) are permitted to receive ECB of up to 50% of their owned funds under the automatic route and above 50% of their owned funds under the approval route. The end-use permitted is for on-lending to the infrastructure sector as defined, along with a requirement to hedge their entire currency risk.
- The RBI has enhanced the ECB limit for NBFC-IFCs under the automatic route from 50% of their owned funds to 75% of their owned funds, including the outstanding ECB. Receiving ECB beyond 75% of their owned funds will be permitted under the approval route. Also, the hedging requirement for currency risk has been reduced from 100% of the exposure to 75% of the exposure.

Source: AP (DIR Series) Circular no 69 dated 7 January 2013

Export and Import

Export of goods and services - write-off of unrealised export dues

The RBI has amended the existing policy on the write-off of unrealised export proceeds. This policy is set out below:

- By an exporter (other than Status Holder Exporter) - up to 5% of **the total export proceeds realised** during the previous calendar year
- By Status Holder Exporters - up to 10% of the **total export proceeds realised** during the previous calendar year
- 'Write-off' by Authorized Dealer bank - up to 10% of **the total export proceeds realised** during the previous calendar year.

Conditions to be fulfilled to write off export dues

- The relevant amount has remained outstanding for more than one year.
- Benefit of self write-off can be received subject to the fulfilment of various conditions establishing the *bona fides* of the transaction and production

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of a chartered accountant's certificate giving the required details.

- The Chartered Accountant certificate is required to certify export proceeds realised during the **preceding calendar year** as compared to the previous **three financial years** with respect to the write-off, with AD bank's approval.

Source: AP (DIR Series) Circular no 88 dated 12 March 2013

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

The RBI has, in consultation with the GOI, reduced the period for the realisation and repatriation to India of the amount representing the full value of goods or software exported from 12 months to 9 months from the date of export, with effect from 20 May 2013, till 30 September 2013.

The provisions in this regard for a unit situated in a SEZ, where no time limit for the realisation and repatriation to India was specified, as well as exports made to warehouses established outside India (the specified period of realisation being 15 months from the date of export) were unchanged.

Source: AP (DIR series) Circular no 105 dated 20 May 2013

Processing and settlement of export-related receipts facilitated by Online Payment Gateways

RBI has increased the value per transaction for export-related remittances received through Online Payment Gateway Service Providers from USD 3,000 to USD 10,000.

Source: AP (DIR Series) Circular no 109 dated 11 June 2013

Realisation and repatriation period for entities other than SEZ units

The RBI has clarified that the recently reduced period of nine months for the realisation of export proceeds will be applicable from 1 April 2013 onwards.

Source: AP (DIR series) Circular no 14 dated 22 June 2013

Overseas Direct Investments

Overseas direct investments - clarification

With respect to certain structures that have been created by eligible Indian parties under the overseas direct investments (ODIs) automatic route to facilitate trading in currencies, securities and commodities[1], the RBI has clarified that any overseas entity having equity participation directly or indirectly shall not offer such products without the RBI's specific approval, since the Indian rupee is not fully convertible and such products could have implications for managing the country's exchange rate.

Source: AP (DIR Series) Circular no 100 dated 25 April 2013

Revision of "financial commitment" ceiling

The RBI has notified modifications in the present ceilings for ODIs under the **automatic route.**

1. including financial products linked to Indian rupee such as non-deliverable trades involving foreign currency, rupee exchange rates, stock indices linked to the Indian market, etc.

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Entity	Old limit	Revised limit
Total ODI by an Indian party in all its **JVs** or **WOSs** abroad, engaged in any *bona fide* business activity	400%*	100%*
Total ODI by an Indian company, investing in overseas unincorporated entities in the energy and natural resources sectors	400%*	100%*

*of the net worth of the Indian party or company as at the date of the last audited balance sheet

Henceforth, ODI in excess of 100% of the net worth will be considered under the **approval route**.

It has been notified that the amended provisions will apply with immediate effect to all fresh ODI proposals on a prospective basis, but will not apply to the existing JVs or WOSs set up under the extant regulations.

Source: AP (DIR Series) Circular no 23 dated 14 August 2013

LRS for resident individuals

Following the recent depreciation of the rupee, the RBI has initiated a spate of measures, including restricting outbound remittances under the Liberalised Remittance Scheme window available to resident individuals.

- The erstwhile limit of USD 200,000 per financial year (April to March) has been reduced to USD 75,000 per financial year with immediate effect
- Acquisition of immovable property outside India (directly or indirectly) will not be allowed under the LRS scheme

In addition to the above points, the RBI has also permitted eligible resident individuals to access the LRS window to acquire or set up overseas a JV or WOS (which is an operating company) outside India for *bona fide* business activities, by making remittance under the LRS within the USD 75,000 USD limit, with effect from 5 August, 2013. The key aspects of this change are summarised below:

- The overseas JV or WOS should be an operating entity not having any step-down subsidiary and should be engaged in a *bona fide* business activity other than in real estate, banking or financial services.
- The overseas JV or WOS should not be located in countries that have been identified as 'non co-operative countries and territories'.
- Investment should be made through equity shares and **Compulsorily Convertible Preference Shares (CCPS)**. However, any other financial commitment to or on behalf of the JV or WOS is prohibited.
- Investments can be disinvested (partially or fully) after one year has elapsed from the date of making the first remittance by way of transfer/ or sale or by way of liquidation or a merger of the JV or WOS. However, no write-off will be permitted pursuant to the disinvestment.
- Resident individuals need to comply with following requirements as applicable to Indian parties making ODI:
  - Receiving share certificates or any other document as evidence of investment in the foreign entity within the given time frame;
  - Compliance with valuation norms;
  - Reporting requirements, viz., filing of Form ODI, Form APR and reporting any alteration

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in the share holding pattern within the given time frame;

- Repatriation to India of all dues receivable from the foreign entity within the given time frame.

Source: AP (DIR Series) Circular no 24 dated 14 August 2013 and Notification no FEMA 263/RB-2013 dated 5 March 2013

Sectoral Regulations

Telecommunications

Unified licensing regime

As envisaged by NTP 2012, Department of Telecommunications (DoT) has unveiled the Unified Licence regime. Under this regime, corporates will be required to obtain only a single licence, rather than the multiple licences they previously had to obtain for different classes of services and service areas. Key features of this licence include:

- **Delinking**: Spectrum will be delinked in all future licences.
- **Merger**: Licences to be merged if licencee holds any other licencse(s) for the services covered under unified licences.
- **Cross ownership prohibited**: No licensee or its promoters can directly or indirectly have a stake in another licensee having access to a spectrum in the same service area.
- **Broadcasting**: Licensees should not provide broadcasting or Direct-To-Home (DTH) services under this licence and should apply for a separate licence to offer such services. Internet Protocol Television (IPTV) is, however, permitted.
- **Cable operators as franchisees**: Cable operators can be appointed as franchisees to establish and operate rural telephone exchanges. They are also allowed to provide internet services by using the networks of authorised cable operators as a last mile link.

The net worth, entry fees, Performance Bank Guarantee (PBG), Financial Bank Guarantee (FBG) and license fees are listed below:

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Conditions	Basic criteria for obtaining unified licence with authorisation for access service only in one circle	Additional requirement for undertaking Service Authorisation (Access service) per circle	Unified licence (All services) (NLD, ILD, VSAT, PMRTS, GMPCS, ISP, Resale IPLC on Pan India basis)
Net worth	2.5	2.5	25
Entry fee	1	1 (0.5 for NE and J&K)	15
FBG	2	2	44
PBG	10	10	220
Licence fee (as % age of Adjusted Gross Revenue)	8%	8%	8%

Source: DoT

Telecommunications Mobile Number Portability (Fifth Amendment) Regulations, 2013 for Corporate Numbers

The Telecom Regulatory Authority of India (TRAI) has issued Telecommunication Mobile Number Portability

Regulations, laying down the framework for the implementation of mobile number portability in India. The regulation has constantly been amended, based on the feedback received from customers as well as service providers.

In line with this continued amendment, the TRAI has introduced changes in relation to mobile number portability for corporate numbers. The salient features proposed in the amendment are listed below:

- Up to 50 corporate numbers of a service provider can be ported to another service provider. This can be done through a letter of authorisation from the authorised signatory of the corporate mobile numbers, in a single porting request.
- A copy of the no objection certificate from the authorised signatory will be sent by the recipient operator to the donor operator, along with other requisite details.

The porting request must be forwarded within 48 hours by the recipient operator for corporate mobile numbers. For individual porting requests, the limit continues to be 24 hours.

Source: TRAI Press Release dated 22 July 2013

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Notice Inviting Application (NIA) for January 2014 auction of 900 and 1800 MHz spectrum

Highlights

- The award of spectrum in the 1800MHz and 900MHz bands will be conducted as a single process.
- The block size of the spectrum will be 200KHz (0.2 MHz) of the 1800MHz band and 1.0MHz of the 900 MHz band. Each new entrant will have to bid for a minimum of 5Mhz while existing licensees can bid for as low as 0.6MHz.
- All applicants will be considered new entrants for the 900MHz band as the incumbents' licences/ spectrum holding will expire in November 2014. Also, there will be no reservation for incumbents in the 900MHz band.

Liberalised spectrum

- There are no restrictions on the technology to be adopted for providing services within the scope of the service licence using spectrum blocks allotted through this auction.
- The government has decided 'in principle' to permit spectrum trading. Details will be issued in due course.
- Spectrum won in the auction can be shared with other licensees provided all spectrum holding in that band is liberalised. Existing spectrum holding can be converted to liberalised spectrum by paying a one-time spectrum charge (pro-rated) for the remaining life of the licence/ spectrum.

Spectrum availability

- In the 900 MHz band, spectrum available for auction is 14 MHz in Kolkata and 16 MHz in Mumbai and Delhi. This implies that a maximum of two applicants can obtain spectrum in Kolkata while a maximum of three can obtain spectrum in Mumbai and Delhi (minimum spectrum that an applicant has to win in the 900 MHz auction is 5 MHz). In the 900 MHz band, 7.2 MHz of spectrum is reserved for Mahanagar Telecom Nigam Limited/ Bharat Sanchar Nigam Limited in all three circles.
- In the 1800MHz band, available spectrum varies for each circle. Uttar Pradesh (West), Bihar and Jammu and Kashmir circles have 2.4 MHz, 4.2 MHz and 6.2 MHz of spectrum available, respectively. Kerala, Orissa and Tamil Nadu have 28 MHz, 28 MHz and 30.2 MHz, respectively. Most other circles have 11 MHz to 28 MHz of frequency.

Payment terms

- A successful applicant will have the option to pay just 33% or 25% (in case of 1800 MHz and 900 MHz bands, respectively) upfront, i.e. within ten days of the end of the auction.
- The rest of the payment is to be made in ten equal installments after two years of moratorium, based on the Net Present Value principle, using the SBI base rate (currently 10%).
- Based on the reserve price and spectrum availability, the entire available spectrum for auction is valued at INR 491 billion (INR 49.1 thousand crore).

Source: DoT

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Broadcasting

TRAI recommendation paper on Monopoly/Market Dominance in Cable TV Services

There are currently no restrictions in the area of operation and accumulation of interest in terms of market share in a city, district, State or country, by individual Multi System Operators (MSOs) and Local Cable Operators (LCOs) in the cable TV sector. It has been observed in some States that a single entity has, over a period of time, acquired several MSOs and LCOs, virtually monopolising the cable TV distribution.

With cable TV networks being the dominant platforms and with growing concerns about monopolisation of the market in some areas, on 26 November, 2013, the TRAI issued its recommendation paper on the means to control monopoly/market dominance in cable TV services. Some of the salient features of the recommendations are:

(i) A State is to be considered as the relevant market for assessing monopoly/ market dominance of MSOs;

(ii) Market dominance is to be determined on the basis of market share in terms of the number of active subscribers of MSOs in the relevant market;

(iii) The threshold value of the market share prescribed (Herfindahl–Hirschman Index (HHI) should not be more than 2500), beyond which an MSO should not be allowed to build market share;

(iv) Any M&A amongst MSOs or between an MSO and LCO in a relevant market, will require the prior approval of a regulator, which shall be granted subject to prescribed conditions based on HHI benchmarks;

(v) Control has been specifically defined – an entity is said to 'control' an MSO/ LCO and the business decisions thereby taken, if the entity, directly or indirectly:

(a) owns at least 26% of the total share capital (indirect shareholding to be determined using the proportionate rule); or

(b) exercises *de jure* control by means of not less than 50% of voting rights, or appoints more than 50% of the members of the board of directors or controls the management or affairs; or

(c) exercises *de facto* control through contracts and/ or understandings that enable the entity to control the business decisions of the MSO/ LCO

(vi) MSOs must disclose following information on their websites:

(a) ownership pattern;

(b) list of MSOs/ LCOs that are part of the group in the relevant market

(c) details of the chairman, directors, CEO, CFO; and

(d) state-wise geographical area coverage details

(vii) MSOs must submit the following information on an annual basis to MIB and TRAI

(a) shareholding pattern, any changes in the same to be reported within 30 days of such change;

(b) copy of shareholder agreements etc.;

(c) details of MSOs/ LCOs that are part of the group;

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(d) entities which control the group of MSOs/LCOs;

(e) details of the chairman, directors, CEO, CFO; and

(f) State-wise details of active subscribers (to be provided on a quarterly basis);

An amendment to the Cable TV Network Rules would need to be undertaken to incorporate the above rules, thereby making it mandatory for MSOs to comply with those Rules.

Source: TRAI recommendation dated 26 November 2013

Renewal of DTH licences

In September 2013, the MIB sought the recommendations of the TRAI on certain terms and conditions for the renewal of Direct-to-Home (DTH) licences. Considering the time constraints, the TRAI has requested additional time to examine the matter, but in the interim has recommended the following additional conditions:

- Renewal of existing bank guarantees
- An undertaking to comply with the final policy

Source: TRAI recommendation paper dated September 2013

Proposal to further liberalise FDI caps

To counter the current account deficit, the Indian Government has been focussing on attracting a greater FDI flow into the country. To this end, through an inter-ministerial consultation process, the Ministry of Information and Broadcasting and the TRAI have agreed to further increase FDI limits in the broadcasting sector. The TRAI issued its recommendation paper on 22 August, proposing the following FDI limits:

- FDI in carriage services (HITS, DTH, MSOs undertaking digitisation, teleport, mobile TV): 100% FDI (FDI beyond 49% with Government approval)
- Up-linking of news channels from India: increase in FDI from the current 26 to 49% under the Government approval route
- FM radio: increase in FDI from 26 to 49%, but under the Government approval route
- Down-linking and up-linking of non-news channels: to maintain status quo; i.e. maintain 100% FDI under the FIPB approval route

It is important to note that this recommendation will be applicable only once the Government announces the changes in due course.

Source: TRAI recommendation paper dated 22 August 2013

Consultation paper on DTH tariff regulations

A consultation paper has been issued by the TRAI on the obligation for a DTH operator to provide a compulsory offer to its subscribers, a standard tariff package (list provided in the annexure) for equipment supplied to customers' premises. A DTH operator shall give customers an option to acquire customer premises equipment either through an outright purchase, a hire purchase or on a rental basis.

Currently, operators offer to their subscribers various types of Consumer Premises Equipments with different features and capabilities such as a recording facility, internet or broadband compatibility, high definition or 3D reception capability etc, in addition to basic functionalities. These wide variations in terms of features and costs oblige the customer to purchase

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specific CPE without understanding the CPE's requirements. Therefore, a standard tariff package is provided only for the basic or vanilla CPEs, meant for the reception of an SDTV, conforming to the relevant standards set by the Bureau of Indian Standards.

Source: TRAI Consultation Paper

Pharmaceuticals

Drug (Price Control) Order (DPCO) 2013

The Department of Pharmaceuticals has issued the Drug (Price Control) Order (DPCO) 2013, authorising the National Pharmaceutical Pricing Authority to regulate prices of drugs on India's NLEM 2011, using new market-based rules. The new policy will control around 30% of the domestic pharmaceutical market.

Under the 1995 Order, drug prices were determined on a cost-plus basis, which was subsequently replaced by the simple average of current prices, in which manufacturers were given a margin. To safeguard the manufacturer from the fluctuating prices of ingredients and other input costs, the present policy provides for an increase in prices every year, according to the wholesale price index. A 10 % increase will be allowed on non-essential medicines.

To ensure the regular supply of medicines, the Government has the authority to allow manufacturers to continue production for a period of one year. Manufacturers also need to inform the Government six months prior to cessation of production.

Provisions set out in the present Order will not be applicable to the following manufacturers:

- A manufacturer producing a new drug patented under the Indian Patent Act 1970 and not produced elsewhere
- A manufacturer producing a new drug in the country by a new process, developed through indigenous R&D and patented under the Indian Patent Act 1970
- A manufacturer producing a new drug involving a new delivery system, developed through indigenous R&D, for a period of five years from the date of its marketing approval in India

Source: Notification no S.O. 1221(E) dated 15 May 2013

SEZs

CBDT clarification on issues relating to export of computer software and direct tax incentives

The CBDT in 2013 issued clarifications regarding issues relating to the export of computer software and the direct tax incentives applicable in this regard.

We set out a summary of the CBDT clarification below:

Issue # 1

On-site software development qualifies as an export activity for tax benefits under sections 1oA, 10 AA and 10B of the Act

The CBDT has clarified that software developed abroad at a client's location will be eligible under 10A, 10AA and 10B of the Act as these would amount to 'deemed exports'. Furthermore, since the benefits under these provisions can be received by units or undertakings under specified schemes in India, it is necessary that a direct and intimate nexus or connection exist between the development of software carried out abroad and the eligible unit set up in India. Also, such development should be pursuant to a contract between the client and the eligible unit.

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Issue # 2

Whether receipts from deputation of technical manpower for on-site software development abroad is eligible for deductions u/s 1oA, 10 AA and 10B of the Act

The CBDT has clarified that sections 10A, 10AA and 10B of the Act clearly provide that profits and gains derived from 'services for development of software' outside India will be deemed as profits derived from exports.

Furthermore, it has clarified that profits earned from the deployment of technical manpower at the client's location abroad specifically for software development work, pursuant to a contract, will be eligible for tax benefits provided that deputation is for the purpose of development of computer software and all prescribed conditions are fulfilled.

Issue# 3

Whether it is necessary to have a separate MSA for each contract and to what extent it is relevant

The CBDT has clarified that tax benefits under sections 10A, 10AA and 10B of the Act will not be denied merely on the grounds that a separate and specific MSA does not exist for each Statement of Work (SOW). The SOW will normally prevail over MSA in determining the tax benefits, unless the AO is able to establish that there has been a splitting up or reconstruction of a business already in existence or there has been non-compliance with any other condition.

Issue # 4

Whether R&D activities form part of 'computer software' stipulated under Explanation 2 to Sections 10A and 10B

The services covered under the notification, in particular 'engineering and design', do not have the in-built elements of R&D. However, the CBDT has clarified that any R&D activity embedded in engineering and design will also be covered under the notification for the purpose of Explanation 2 to Sections 10A and 10B of the Act.

Issue # 5

Whether tax benefits under sections 10A, 10AA and 10B of the Act will continue to remain available in the case of a slump sale of a unit or undertaking

The CBDT has clarified that the claim for exemption cannot be denied to an otherwise eligible undertaking on the sole grounds of a change in ownership of the undertaking, and the tax holiday will be available for the unexpired period at the applicable rates, subject to the fulfilment of prescribed conditions.

It was further clarified that while the tax benefits will be available under a slump sale, the vital factors determining the slump sale (how it has been made, what is its nature, etc.) will require further examination. Also, it is important that the slump sale should not result in splitting up or reconstruction of a business already in existence.

Issue # 6

Whether it is necessary to maintain separate books of accounts for eligible units claiming tax benefits under sections 10A and 10B of the Act

The CBDT has clarified that there is no requirement in law to maintain separate books of accounts, and hence the same cannot be insisted upon. However, the TO may, for the purpose of verifying the tax deduction, ask for such details or information so as to enable him

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to verify the claim and quantum of exemption if so required.

Issue # 7

Whether tax benefits under section 10AA of the Act can be enjoyed by an eligible SEZ unit consequent to its transfer from one SEZ to another

The CBDT has clarified that a tax holiday should not be denied as a result of the physical relocation of an eligible SEZ unit from one SEZ to another, provided the relocation has the approval of the Board of Approval (in accordance with instruction no 59 of the Department of Commerce) and all prescribed conditions under the Act are satisfied. Furthermore, it has been clarified that the unit so relocated will be eligible to receive tax benefits for the unexpired period, as applicable.

Issue # 8

Whether new units or undertakings set up in the same location where there is an existing eligible unit or undertaking amount to an expansion of existing unit or undertaking

The CBDT has clarified that it requires further examination and verification as to whether the setting up of a new unit or undertaking, eligible for exemptions under sections 10A, 10AA or 10B of the Act, in a location, where a unit is already existing, amounts to an expansion of such already existing units.

However, it has clarified that such fresh units would not make the unit ineligible for tax benefits as long as necessary approvals from competent authorities have been obtained with regard to setting up the units; the unit has been formed by splitting up or reconstruction of the business; and the unit fulfils all other conditions prescribed in the relevant provisions of law.

Source: CBDT Circular dated 17 January 2013

The Karnataka HC ruling on exemption of MAT and DDT for SEZs

The HC (in the case of Mindtree Ltd *v.* Union of India) has held that levying the Minimum Alternate Tax (MAT) and DDT on SEZs (both developers and units) was constitutionally valid and in the public interest.

A petition was filed by M/s Mindtree Ltd (*in consortium*) challenging the constitutional validity of withdrawing exemptions on the ground that huge investments (including borrowings) had already been made for setting up SEZs based on promises that the Government had made under the SEZ Act and specific provisions in the Act. It was also contended that levying the MAT and DDT would affect cash inflows of SEZ developers and units and this was opposed to the doctrines of promissory estoppel and legitimate expectation.

The HC dismissed the petition and upheld the government's decision, stating the following:

- The Finance Minister (FM) has complete powers to amend the SEZ Act, even though it comes under the Ministry of Commerce and Industry.
- The powers are derived from the Rules of the Lok Sabha which specify that 'minister' includes any minister and, as such, the FM is competent to move a bill seeking amendment to the SEZ Act.
- Depending on the exigencies of the financial year, the Parliament has the legislative competence to introduce a new charge of tax, even by incorporating it in any statute other than the Act.
- The amendment introducing the MAT and the DDT was brought in to remove the inequality between SEZ and non-SEZ companies.

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- The impugned amendment did not transgress any of the fundamental rights of the petitioner bestowed under the Constitution.
- The doctrine of promissory estoppel did not preclude the legislature from exercising its legislative powers.
- Courts needed to decline in their enforcement of this doctrine if it resulted in great hardship to the Government, and was prejudicial to public interest.

In summary, the HC, through this judgement, has laid down an important principle that the doctrine of promissory estoppel does not apply to the legislature and that any minister (including the FM) has powers to seek amendments to an act, including the SEZ Act.

Source: Karnataka HC ruling in the case of Mindtree Ltd. v. UOI dated 17 June 2013

Expansion of existing SEZ unit by setting up a new unit

The Board of Approval (BoA) has recently approved the proposal of a unit for expansion in another SEZ, thus facilitating free movement of people and contracts between the two units. This is subject to the new unit being set up under fresh approval and on the commitment that the income tax benefits will be co-terminus with that of the existing SEZ. Hence, these benefits will be available only for the remaining unexpired period.

Source: BoA Meeting

Exit from SEZs

Exit from SEZs is allowed in accordance with the extant SEZ laws and the terms and conditions prescribed by the BoA. While in the past proposals for exit and de-notification have been considered and approved by the BoA, henceforth it has been directed that in relation to all such cases wherein de-notification has been approved by the BoA, the relevant information has to be sent to the CBDT and CBEC for their necessary action.

Source: BoA Meeting

The MoC amends the SEZ Rules

To revive the interest in SEZs, the Ministry of Commerce (MoC) on 18 April 2013, announced a series of measures in the annual supplement (2013-14), FTP 2009-14. The key changes proposed included reduction in minimum land area requirements for multi-products and sector-specific SEZs, doing away with the minimum area requirement for IT or information technology enabled services (ITeS) SEZs, a graded scale for the minimum land area criteria, sector broad-banding, land vacancy issues and exit policies for SEZ units.

To bring these changes into effect, the MoC on 12 August 2013, amended the SEZ Rules, 2006.

Definition of ‘sector’ under the SEZ Rules expanded

The term ‘sector’ was defined in the earlier SEZ Rules as *“one or more products or one or more services falling under a category such as engineering, textiles and garments, pharmaceuticals and chemicals, handicrafts, gem and jewellery, electronics hardware and software, including information technology enabled services and bio-technology”.*

To further explain what constitutes a ‘single sector’, a new proviso has been inserted in the SEZ Rules. It states that *“provided various categories comprising their products or services that are similar or compatible with each other and including related ancillary services,*

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R&D services of the sector and additional combination of products and services of similar or compatible nature approved by the BoA shall constitute a single sector".

While the above addition may broaden the definition of a 'single sector', it should be noted that it is subject to further interpretation and any combination of products and services of a similar or compatible nature that constitutes a 'single sector' and is approved by the BoA.

Minimum contiguous land area requirement reduced

Under the revival package announced in April this year, the Government of India has decided to reduce the minimum land area requirement by half, being 50% of the existing requirement for specified SEZs. It further proposed to do away with the minimum land area requirement for IT/ ITeS SEZs and instead have only a minimum built-up processing area.

Under the amended SEZ Rules, the minimum contiguous land area requirement for multi-product and sector-specific SEZs has been reduced by half. For IT or ITeS SEZs, there is no minimum land area requirement and the developer will be required to meet only the minimum built-up processing area criteria. While the minimum land area requirement for IT or ITeS SEZs has been done away with, the minimum land area requirement for electronic hardware and software (including ITeS) remains unchanged (10 hectares). In addition, such zones will be required to fulfil the minimum built-up processing area requirement applicable to IT or ITeS SEZs.

Under the amended SEZ Rules, a new sector, agro-based food processing, has been brought under the 10-hectare category with a minimum built-up processing area of 40,000 square meters.

Addition of a sector to a sector-specific SEZ or SEZ for one or more services, ports or airports

Under the amended SEZ Rules, the developer of an SEZ for sector-specific or one or more services or in a port or airport will be allowed to add an additional sector to an existing SEZ for every contiguous 50-hectare land parcel.

Incentives on additions made to pre-existing structures on a land parcel to be used for SEZs

Under the earlier SEZ Scheme, land parcels with pre-existing structures not in commercial use were considered as vacant land for the purposes of setting-up and notifying an SEZ. However, developers carrying out any addition to such pre-existing structures were not eligible for duty benefits.

Under the amended SEZ Rules, developers or co-developers proposing to use land parcels with existing structures, which are non-operational, and thereafter to make additions to those structures (such as ports, manufacturing units or structures on which no commercial, industrial or economic activity is in progress), will be eligible for duty benefits akin to any other activity in the SEZ.

Also, the authorised operations carried out on this infrastructure shall be eligible for fiscal incentives in a similar way to the eligibility for any new infrastructure in an SEZ.

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Transfer of assets by SEZ unit upon exit or sale

Under the earlier SEZ Scheme, Rule 19(2) of the SEZ Rules, 2006, provided that the Unit Approval Committee (UAC) may approve the proposals for a change of entrepreneur of an approved unit, if the incoming entrepreneur takes over the assets and liabilities of the existing unit.

The new SEZ Rules have amended the above provision and have introduced Rule 74A which deals with the transfer of the SEZ unit assets upon exit or sale.

An SEZ unit may choose to opt out of the SEZ scheme by transferring its assets and liabilities to another person by way of transfer of ownership (including sale of SEZ unit), provided the following conditions are complied with:

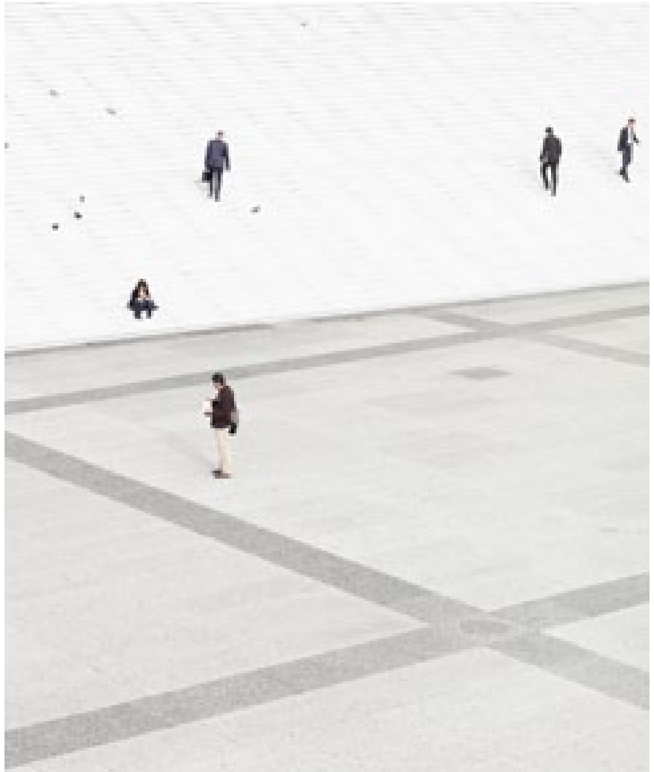
- The unit has a valid Letter of Approval and the land's lease is for not less than five years, as on the date of transfer.
- The unit has been operational for a minimum period of two years after the commencement of production, as on the date of transfer.
- The sale or transfer will be subject to the approval of the UAC.
- The transferee fulfils all eligibility criteria that are applicable to a unit.
- The applicable duties and liabilities, if any, as applicable under Rule 74 and the export obligations of the transferor unit, shall be transferred to the transferee unit.

Source: Notification no G.S.R. 540(E) dated 12 August 2013

Food/ Agro

Guidelines for obtaining an approval for a food product

The Indian food regulator, FSSAI, announced in May 2013 a set of new guidelines to be followed for product approvals applicable to operators in the food sector. Although advisories for this have been issued in the past, given the complexities involved in the food sector and the timelines for obtaining product approval, the regulator has issued these new guidelines, which supersede earlier advisories, especially for food products for which standards are not specified in the Food Safety and Standards (FSS) Act.



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We have provided below a summary of the procedures laid down in the new guidelines:

Sr. No	Nature of the food product	Prescribed guidelines
1.	Food products having the following attributes: • Safety of ingredients is known and permitted under the FSS regulation, 2011/ Codex and by other global regulatory bodies like the European Union (EU), Food Standards Australia New Zealand (FSANZ) and the United States Food and Drug Administration (USFDA) etc. • The food product does not contain plants or botanicals or substances of animal origin.	• Application in form 1(a) to be made by an Food Business Operator (FBO) along with an affidavit and a list of documents as prescribed (refer to the annexure below) • The product approval division of the FSSAI will grant product approval on satisfactory submission and scrutiny of documentation.
2	Food products having the following attributes: • Safety of ingredients is known and permitted under the FSS regulation, 2011/Codex and by other global regulatory bodies like the EU, FSANZ and USFDA etc. • The food product contains ingredients including plants or botanicals or substances of animal origin.	• These food products shall be considered for either a product approval or a no objection certificate (NoC). • Application in Form 1(b) to be made by an FBO along with an affidavit and a list of documents as prescribed (refer to the annexure below) • Product approval will be granted after a safety assessment has been completed. • An NoC will be granted to food products on the market, after a licence has already been granted under a previous order or act.
3	Food products similar to the food products mentioned in point 2, i.e., that contain ingredients, including plants or botanicals or substances of animal origin, except that the safety of the ingredients is insufficient to make a safety determination.	• To be referred to the respective scientific panels. • Application in Form 1(c) to be made by an FBO along with an affidavit and a list of documents as prescribed (refer to the annexure below) • Product approval will be granted or denied, based on the risk assessment carried out by scientific panels.

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4	Food items where the safety of its ingredients and their conditions of use are published by the FSSAI or products whose ingredients are standardised or permitted under FSSR 2011.	• Application in Form 1(d) to be made by an FBO along with an affidavit and a list of documents as prescribed (refer to the annexure below). • Such food products will not require any safety assessment except for authorisation of the ingredients contained.

Source: Guidelines issued by FSSAI dated 17 May 2013

Aerospace and Defence

Guidelines for FDI in the civil aviation sector

The Director General of Civil Aviation (DGCA) has released guidelines for FDI. According to the guidelines, the regulator will continue to apply the 49% foreign investment limit in the aviation sector, which includes both FDI and FII investments. FDI policy in the civil aviation sector will be subject to the Aircraft Act and Aircraft Rules.

Source: Letter No. AV13011/10/96-DT dated 28 February 2013

Government of India has allowed FDI in defence beyond 26%, subject to conditions

The Government of India has liberalised the FDI policy in the defence sector to allow foreign investment of more than 26% in cases which involve transfer of 'state-of-the-art' technology with the objective of combating the Current Account Deficit.

Revised FDI Policy

FDI in defence production up to 26% will be allowed as per existing guidelines.

FDI beyond 26% will be allowed on a case-by-case basis which ensure access to modern and state-of-the-art technology in the country and will be subject to approval from the Cabinet Committee on Security (CCS).

Important additional conditions:

- Investment by FIIs through portfolio investment will not be permitted.
- Based on the recommendation of the Department of Defence Production (DoDP) and FIPB, approval of the CCS will be sought by the DoDP in respect of

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cases that are likely to result in access to modern and 'state of the art' technology in the country.

Ministry of Defence promulgates Defence Procurement Procedure 2013

The Ministry of Defence (MoD) on June 1, 2013 revised the Defence Procurement Procedure for acquisition of capital goods and announced the Defence Procurement Procedure 2013 (DPP 2013).

The revised DPP lays down greater emphasis on indigenisation and provides for prioritisation of various categories for capital acquisitions –

(1) "Buy (Indian)"

(2) "Buy & Make (Indian)"

(3) "Make (Indian)"

(4) "Buy & Make with transfer of technology (ToT)"

(5) "Buy (Global)"

Any proposal to select a particular category must state reasons for excluding the higher preferred category/ categories.

Source: Defence Procurement Procedure 2013 (DPP 2013) dated 1 June 2013

DIPP notified the list of defence products requiring an industrial licence

The DIPP, Ministry of Commerce & Industry, has recently released the list of defence products that will require an industrial licence.

The defence product list is based on Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Goods Technologies. However, the Wassenaar clauses on technology and software have been removed from the list. This confirms that defence software and technology will not require an industrial licence.

The detailed list can be accessed from the link below:

http://dipp.nic.in/English/Investor/Investers_Gudlines/defenceProducts_LicencingRequired_26April2013.pdf

Source: DIPP release dated 26 April 2013

Office Memorandum issued by Department of Defence, Ministry of Defence to keep 'services' related paragraph in abeyance

The Department of Defence, Ministry of Defence (MoD) issued an Office Memorandum (OM) on 23 May 2013 to keep 'services' related paragraphs of the Defence Procurement Procedure in abeyance.

According to the OM, the orders for keeping in abeyance services-related paragraphs will come into force with immediate effect for all Requests for Proposals (RFPs) issued on or after the date the OM was issued, as well as in respect of RFPs already issued but where the last date for submission of technical and commercial bids is not yet over.

The OM will also apply to the provisions Defence Procurement Procedure 2013 (Refer OM dated 26 July 2013).

Source: MoD OM dated 26 July 2013

Education

Foreign universities will be allowed to open campuses in India

In a press release, the MHRD, the administrative ministry which formulates policies on education, has sent a proposal to the DIPP and Department of Economic Affairs (DEA) to permit foreign universities to open campuses in India.

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The MHRD has almost finalised the rules under which Foreign Educational Institutions (FEIs) can set up campuses and issue foreign degrees. The rules will be issued as the Union Grant Commission (the establishment and operation of campuses of Foreign Educational Institutions) Rules. (The Union Grant Commission (UGC) is entrusted with the responsibilities of co-ordinating, determining and maintaining standards in institutions of higher education).

Under the proposed rules, FEIs will be allowed to set up campuses in India once they are notified as FEPs by the UGC. FEIs will be allowed to set up a company as a section 25 company under the Indian Companies Act, 1956, being a non-profit entity.

Eligibility conditions that must be fulfilled by FEIs:

- Be ranked among top 400 universities, globally
- Should be a not for profit legal entity
- Should have been in existence for at least twenty years
- Must be accredited by a reliable agency of the particular country
- Alternatively, an internationally accepted system of accreditation can be adopted

Each FEI will be notified as an FEP if that FEI maintains a corpus of not less than INR 250 million and satisfies the above conditions. Furthermore, the degrees awarded by these FEPs will be treated as foreign degrees and the same shall be deemed equal to degrees awarded by the Association of Indian Universities as per their system.

Both the DIPP and the DEA have supported the proposal.

Once the regulations are in place, it will be possible for foreign universities to open up campuses in India and to provide foreign degrees.

Source: Ministry of Human Resource Development

UGC regulations

The UGC has notified regulations for the promotion and maintenance of standards for academic collaborations between FEIs and Indian educational institutes (IEIs). These regulations will be called the *UGC (Promotion and Maintenance of Standards of Academic Collaborations between Indian and Foreign Educational Institutes) Regulations, 2012* (Regulations). These regulations shall apply to all FEIs and IEIs operating in India through collaboration and offering programmes leading to an award of a degree or post-graduate diploma. However, these regulations shall not apply to technical institutions. Where an IEI or FEI has existing collaborative arrangements, they will be required to comply with these regulations within six months from the date the regulations come into force (i.e. 21 September 2013).

Electronics

National Electronics Policy

Amendment in the definition of capital expenditure – Modified Special Incentives Scheme (M-SIPS)

The M-SIPS guidelines earlier defined capital expenditure to include the total cost of land and building up to 2% for being eligible for incentives. Henceforth, for the purpose of calculation of financial incentives, the entire capital expenditure that has been incurred on building and cost of land (up to 2%) will be considered when determining incentives.

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Notification of green-field clusters

The government has recently notified 12 probable greenfield Electronic Manufacturing Clusters (EMCs) spanning various states.

State	Location
Andhra Pradesh	E-city Hyderabad
	Maheshwaram
	Puttandoddi village District Mehboob Nagar
	Pydi Bhimavaram District Srikakulam
Tamil Nadu	Hosur
Rajasthan	Bhiwadi
Madhya Pradesh	Bhopal
	Gwalior
	Indore
	Jabalpur
West Bengal	Naihati
	Falta

Source: DEITY, Electronics Policy

Financial services

Guidelines for licensing of new banks in the private sector

The RBI issued draft guidelines on the licensing of new private sector banks in August 2011. Taking into account the feedback received from stakeholders and recent amendments to the Banking Regulation Act, 1949, the RBI issued the much awaited final guidelines on 22 February 2013. Some key highlights of the guidelines are as follows:

Eligible promoters: Entities or groups in the private sector owned and controlled by residents, public sector entities and promoter groups with existing NBFCs can set up a bank through a wholly-owned Non-Operating Financial Holding Company (NOFHC).

'Fit and proper' criteria: Entities or groups should have a past record of sound credentials and integrity, be financially sound and have had a successful track record for a decade. To ascertain if an entity or group is fit and proper, the RBI may seek feedback from other regulators and enforcement and investigative agencies.

Corporate structure of the NOFHC:

- Not more than 10% of shares shall be held by promoters or relatives, including entities in which promoters or relatives hold more than 51%.
- 51% or more shareholding shall be held by group companies having public shareholding of more than 51%.
- The NOFHC should hold all regulated financial entities of the group (in which the group has significant influence or control).
- An activity that can be undertaken departmentally by the bank should be undertaken by the bank itself.
- Certain activities must be conducted through a JV, subsidiary, associate, which will be held by the NOFHC.
- The corporate structure should not impede ring-fencing of the financial services entities held by the NOFHC.
- Entities held by the NOFHC should be regulated by respective regulators.
- The NOFHC should not be permitted to set up a new financial services entity for three years, except

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where a subsidiary, JV, or associate of a bank is legally required or permitted to do so by the RBI.

- Shares of the NOFHC shall not be transferred to any entity outside the promoter group, and any change in shareholding in excess of 5% should be subject to the approval of the RBI.

Minimum voting equity capital requirements for banks and shareholding by the NOFHC:

- The initial minimum paid-up voting equity capital for a bank shall be INR 5 billion.
- The NOFHC shall initially hold a minimum of 40% of paid-up voting equity capital of the bank, with a lock-in of five years.
- If further capital is raised within the 5-year lock-in, the NOFHC should continue to hold at least 40%.
- The NOFHC's shareholding in excess of 40% should be brought down to 40% within three years, to 20% within 10 years, and to 15% within 12 years.
- The minimum capital adequacy ratio of 13% should be maintained for at least three years, subject to upward revision by the RBI. On a consolidated basis, the NOFHC should maintain a minimum capital adequacy ratio of 13% for at least three years.
- The bank shall ensure its shares are listed on stock exchanges within three years of the commencement of its business

Regulatory framework: The NOFHC shall be registered as an NBFC with the RBI with financial entities (held by the NOFHC) being regulated by the respective regulators.

Foreign shareholding in the bank: The aggregate non-resident shareholding in the new bank shall not exceed 49% for the first five years (notwithstanding the current FDI limit of 74%). For the first five years, no non-resident should hold more than 5% of voting equity, directly or indirectly.

Prudential norms

- It should be applicable both on a stand-alone as well as a consolidated basis.
- 25% of the profits should be transferred to the reserve fund each year (on a stand-alone basis).
- Utilisation up to 1.25 times of its paid up equity and free reserves is permitted (on a stand-alone basis).
- The NOFHC has to adhere to Basel II/ III norms as promulgated by the RBI (on a consolidated basis).

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Exposure norms

Particulars	Within Promoter Group		Outside Promoter Group	
	Investment	Credit	Investment	Credit
Standalone NOFHC	Only in entities under it	Only to entities under it	Prohibited	Prohibited
Consolidated NOFHC	N.A	N.A	Restricted to 10% of consolidated capital	As per exposure norms
Bank	Prohibited	Prohibited	Subject to prescribed rules	As per exposure norms
Residual financial entities under NOFHC	Prohibited	Prohibited	Equity instruments of other NOFHCs prohibited	Not expressly prescribed in the final guidelines

Other conditions for the bank:

- The board of the bank should have majority independent directors.
- An arm's length relationship with the promoter group should be maintained.
- Acquisition resulting in aggregate shareholding of any individual, group or entities greater than 5% will require the prior approval of the RBI.
- Shareholding of any individual, group or entities other than by the NOFHC in excess of 10% (directly or indirectly) is prohibited.
- The bank shall open at least 25% of its branches in unbanked rural centres (population up to 9,999 as per the latest census).
- Banks promoted by groups having 40 per cent or more assets/ income from non-financial business will require the RBI's prior approval for raising paid-up voting equity capital beyond INR 10 billion for every block of INR 5 billion
- In case of the conversion of a NBFC into a bank/ setting up of a bank by a NBFC, permission to convert existing branches of an NBFC to be granted only in tier 2-6 cities. Tier 1 conversion requires RBI approval
- The bank shall comply with the priority sector lending targets and sub-targets as applicable to existing domestic banks

Source: Press Release: 2012-2013/1421 dated 22 February 2013

Entry of CICs in insurance business

Considering the unique business models of core investment companies (CICs), the RBI has notified *vide* circular dated 1 April 2013, guidelines for their entry into the insurance business. The provisions of the guidelines issued by the RBI are as follows:

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Eligibility criteria

- Owned funds of the CIC to be at least INR 5 billion
- Level of Non Performing Asset (NPA) to be maximum 1% of total advances
- CIC must have had net profit for three consecutive years

All other applicable rules and regulations of the Insurance Regulatory and Development Authority (IRDA) or central government need to be complied with.

Key conditions

- Eligible CIC permitted to set up JV company for undertaking insurance business with risk participation
- Maximum equity contribution in the JV company as per the approval of the IRDA
- CICs permitted to invest up to 100% of equity of the insurance company either individually or together with its other non-financial group entities
- More than one CIC permitted to participate in equity of insurance JV (subject to satisfaction of eligibility criteria and other prescribed conditions) where a foreign partner contributes 26% of equity with approval of the IRDA or FIPB
- CICs proposing to participate in insurance business as investors or on risk participation basis need to obtain prior RBI approval (exempt CICs will not require prior RBI approval)

Source: DNBS(PD) CC.No.322/03.10.001/2012-13 dated 1 April 2013

RBI relaxes collateral rules for foreign investors

- The RBI, in consultation with the SEBI, has relaxed collateral rules for FIIs, in Circular No. 90 dated 14 March 2013.
- FIIs are permitted to use their investments in corporate bonds as collateral in the cash segment and government securities, and corporate bonds as collaterals in the Future & Options (F&O) segment, in addition to the already permitted collateral.
- Henceforth, FIIs will be eligible to offer government securities or corporate bonds (acquired by FIIs in accordance with provisions of Schedule 5 to Notification no FEMA, 20 dated 3 May 2000), cash and foreign sovereign securities with AAA ratings in both cash and F&O segments.

Source: AP (DIR Series) Circular no 90 dated 14 March 2013

Investment by SEBI-registered FIIs in government securities and corporate debt in India

RBI has, *vide* a circular dated 24 January 2013, notified changes with respect to foreign investment in India by SEBI-registered FIIs in government securities and corporate debt. The key changes are as follows:

Government securities:

- Sub-limit for investment in dated government securities increased from USD 10 billion to USD 15 billion
- Three-year residual maturity of government securities at the time of first purchase for the above sub-limit shall not be applicable (i.e. not applicable for the entire sub-limit of USD 15 billion)

Regulatory

Corporate debt:

- Limit for investment in corporate debt (other than in the infrastructure sector) increased from USD 20 billion to USD 25 billion except for investment in certificate of deposits and commercial papers
- One year lock-in period of 22 billion USD limit (comprising the limits of infrastructure bonds of USD 12 billion and USD 10 billion for non-resident investment in Infrastructure Debt Funds (IDFs)) within the overall limit of USD 25 billion for foreign investment in infrastructure corporate bond has been dispensed with
- Five-year residual maturity requirement for investments by Qualified Foreign Investors (QFIs) within the USD 3 billion limit has been modified to three years original maturity

Source: AP (DIR Series) Circular no 94 dated 1 April 2013

Company Law and SEBI

Company Law

Companies Act 2013 enacted as law

The Companies Act, 2013 (the 2013 Act) was given the assent of the President of India on 29 August 2013, and published in the Official Gazette on 30 August 2013. Ministry of Corporate Affairs (MCA) has initiated the process of implementing the 2013 Act, in consultation with the regulatory authorities concerned, the Ministry of Law and Justice, and other stakeholders.

Of the 460 sections under the 2013 Act, 98 sections have already been brought into force with effect from 12 September 2013. The draft Rules, which were made available for public comments and consultation, are being finalised by the MCA and are expected to be notified by the end of this fiscal year, 2013-2014.

The 2013 Act introduces significant changes in the provisions related to governance, e-management, compliance and enforcement, disclosure norms, auditors and mergers and acquisition. The 2013 Act also introduces new concepts like a one-person company, small companies, a dormant company, class action suits, registered valuers, and places an emphasis on mandatory corporate social responsibility spending.

The key highlights of the 2013 Act are summarised below.

Accounts

- Books of accounts may be kept in electronic form
- A financial year can be only from April-March. However, a holding company or a subsidiary of a company incorporated outside India may apply to the National Company Law Tribunal (NCLT) for a different financial year
- The 2013 Act provides for re-opening or re-casting of the books of accounts of a company, pursuant to an order of a Court or Tribunal
- Consolidated financial statements are mandatory for any company having a subsidiary, associate or JV

Regulatory

Audits and Auditors

- Maximum number of audits: restricted to 20 companies (no exemption for private limited companies).
- Auditors of a company shall not provide directly or indirectly certain specified services to the company, its holding and subsidiary company, such as internal audit, management services, etc.
- An auditor is to report to the Central Government if there is any reason to believe that an "offence involving fraud is being committed or has been committed against the company by its officers or employees".
- Auditors shall conform to both the accounting standards (ICAI) and auditing standards (NFRA) introduced by the Central Government.
- Members may decide to rotate auditors at regular intervals.

Related Party Transactions

Board approval is required for related party transactions, which include:

- The sale, purchase or supply of any goods or materials
- Selling or buying of property of any kind
- Leasing of property of any kind
- Receiving or rendering of any services
- A related party's appointment to any office or place of profit in the company, its subsidiary or associate company
  - A special resolution must be passed in certain classes of companies
  - Interested members cannot vote in such a special resolution
  - A board report to shareholders must include the details of related party transactions and justifications for those transactions

Bonus Shares

- Codifies the law for unlisted companies
- Bonus shares can be issued only from free reserves, a securities premium and a capital redemption reserve
- Bonus shares cannot be issued by capitalising a revaluation reserve

Declaration of Dividends

- There is no mandatory transfer of profits to reserves
- There is no locking of funds in general reserves, a larger amount is therefore available for distribution as dividends
- Interim dividends can be declared:
- From surplus in the Profit & Loss Account as well as Profits for the current financial year
- In case of a YTD loss at quarter end, the rate of dividend cannot exceed the last three years' average dividend

Directors

- At least one director on the Board must be a person who has stayed in India for not less than 182 days in the previous calendar year
- Every director must attend at least one Board meeting in a financial year
- Approval of financial statements and Board report cannot take place by video conferencing or other audio visual means

Regulatory

- Companies can have a maximum of 15 directors. No approval is required for appointing Directors beyond 15, the same can be done after passing a special resolution.
- A person cannot become a director in more than 20 companies. Of these 20, she/he cannot be a director in more than ten public companies.
- Directors are required to mandatorily forward their resignation along with detailed reasons for resignation to the Registrar within 30 days of resignation, in the prescribed manner.

Loans to Directors

- Provisions with respect to Loans to Directors apply to all companies, including private companies. Currently, the provision is applicable to public companies only and a Regional Director's prior approval for such loans is required.
- Company shall not, directly or indirectly, advance any loan including a loan represented by book debt, or give any guarantee or provide any security in connection with any loan to any of its directors or to any other persons in whom the director is interested.
- Loans or guarantees provided by holding company to or on behalf of its subsidiary are no longer exempt.
- Exemption from the applicability of this provision:
  - Loans to a managing or whole time director
  - As a part of the conditions of service extended to all its employees; or
  - Pursuant to any scheme approved by members by special resolution
  - Loan, guarantee or security provided in the ordinary course of business, subject to conditions

Disclosure of Interest by Directors

- Every director must disclose in the Board meeting his/her interest in any company or companies or bodies corporate, firms, or other association of individuals, which shall include the shareholding, in the prescribed manner.
- This disclosure must be made in:
  - The first board meeting in which s/he participates as director
  - The first board meeting in every financial year
  - Whenever there is any change in respect of a disclosure already made
- Every director shall disclose his/her interest, whether directly or indirectly, in a contract or arrangement:
  - with a body corporate in which directors hold more than 2% shareholding, or is a promoter, manager, CEO of that body corporate; or
  - with a firm or other entity in which, the director is a partner/ owner/ member, as the case may be
- Such a director shall not participate in such a meeting.

Regulatory

Corporate Social Responsibility (CSR)

- Any company meeting any of the following criteria during any financial year needs to mandatorily spend towards CSR 2% of average net profits during every block of three years, with the first block ending 31st March 2014:
  - Net worth – INR 5 billion; or
  - Turnover – INR 10 billion;
  - Net Profit – INR 50 million
- The company must constitute a CSR Committee with a minimum of three directors, including one independent director
- A Board report should specify the reasons for not spending the amount, in the event of failure to do so
- Net profit to be considered before tax, and to exclude profits of foreign branches
- And exhaustive list of activities is specified under Schedule VII of Draft Rules

Management and Administration

- The Annual Return must provide information up to the date of closure of the financial year and not up to the Annual General Meeting
- The first annual general meeting of a company shall be held within nine months from the closure of its first financial year, instead of 18 months from the date of the incorporation
- Provisions of postal ballot shall be applicable to all companies, whether listed or unlisted
- The register of members should separately indicate equity and preference shareholders residing in and outside India

Loans and Investments

- Loans, guarantees and security given to any person will be covered
- Shareholders’ approval through special resolution will be required for transactions beyond the higher of:
  - 60% of share capital, free reserve and securities premium; and
  - 100% of free reserves and securities premium
- Such loans, guarantees/ security includes:
  - A loan to any person or any other body corporate
  - A guarantee or security in connection to a loan to any person or any other body corporate
  - The acquisition of securities of any other body corporate
- The rate of interest on the loan granted shall not be lower than the prevailing yield of a 1/3/5/10 year Government security closest to the tenure of the loan.

Multi-Layer Structures

- Investment through more than two layers of investment companies is not permitted
- Acquisition of foreign companies having multiple layers is permitted, if it is in accordance with the laws of the foreign country in question
- Investment company means a company whose principal business is the acquisition of shares, debentures or other securities

Regulatory

Fast Track Merger

- The 2013 Act contemplates simplification of the merger process for specified small companies, and for mergers between holding companies and their wholly-owned subsidiaries:
  - 'Small company' is defined to mean a 'private company' whose
    - Paid-up capital does not exceed INR 5 million – 50 million; or
    - Turnover as per its last profit and loss account does not exceed INR 20 million – 200 million
    - The benefit of a fast track merger is not available to small public companies.
  - All types of companies whether public or private are eligible.

Approval of Scheme

- Must takes place at a general meeting by members holding at least 90% of the total number of shares; and
- By a majority holding 9/10th in value of creditors or class of creditors in meeting or in writing
- Merging companies must file a declaration of solvency with the Registrar of Companies
- Deemed dissolution of transferor company on registration of scheme by Central Government
- Merger process complete on registration of the Scheme

Cross Border Mergers

- Indian companies will be permitted to merge with foreign companies – both inbound and outbound
- Cross-border mergers will be permitted with companies in prescribed foreign jurisdictions
- Central Government will make rules in consultation with the RBI; prior approval of the RBI will be required
- Consideration may be either in cash or depository receipts

Minority Squeeze-outs

- A majority shareholder holding a > 90% stake can acquire a minority at a prescribed valuation
- The valuation needs to be carried out by a registered valuer
- A minority also have an option to *suo moto* to tender their shares in such a case

Objections by Shareholders/ Creditors

- Objections to compromise/ arrangement can be made only by persons:
  - Holding 10% shares or more, or
  - Having 5% or more of the total outstanding debt
- Currently, any shareholder, creditor or other interested person can raise objections

Regulatory

Buy-back of Shares

- Multiple buy-backs within a financial year are no longer permitted.
- A buy-back is now not prohibited if a default in repayment of deposits is remedied, and a period of three years has elapsed after the default ceased to subsist

Redemption of Preference Shares

- Period of redemption can exceed 20 years in the case of scheduled infrastructure projects, viz. tele-communications, power, petroleum and natural gas projects, etc.
- Compulsory redemption on an annual basis
- A company with insufficient profits may replace/ redeem the existing preference shares with a further issue of an equivalent amount of preference shares, with the consent of:
  - 3/4th in value of such preference shares; and
  - Approval of the NCLT

Sale of Business

- Specific provisions are applicable for the sale/ lease of an undertaking/ substantially the whole of an undertaking by a company
- Private companies are also required to obtain shareholders' approval for a sale/ lease of an undertaking
- Objective criterion introduced to define the following term:
  - Undertaking: division in which the company has invested 20% of its net worth, or division which generates 20% of the total income of the company

Financial Statements

- Accounts can be prepared in electronic form.
- All companies having one or more subsidiaries need to prepare Consolidated Financial Statements (CFS) in the same form and manner as the financial statements of the holding company.
- Statutory format for preparing standalone financial statements mandated for CFS as well
- For purposes of the preparation of CFS, subsidiary includes associates and JVs
- Share in profit/ loss and net assets of each subsidiary, associate and JV to be presented as additional information.
- A list of subsidiaries/ associates/ JVs not consolidated should be disclosed, along with reasons for this lack of disclosure

Revision of Accounts

Voluntary revision

- Revision of financial statements/ Board report possible if the Board of Directors are of the view that the financial statements / Board report are not in accordance with section 129 or section 134 of the 2013 Act.
- Revision can be made only for any of the three preceding financial years, with the approval of the NCLT
- When permitting the revision of financial statements / Board reports, the NCLT will give notice to shareholders and will permit the revision only after considering their representations.
- Detailed reasons for revision must be disclosed in the Board report.

Regulatory

- Revision cannot be made more than once in a year.
- Application to the NCLT needs to be filed within two weeks of the Board meeting.
- A Copy of a Tribunal Order must be filed with the Registrar of Companies (RoC) within 30 days.
- Approval of shareholders is required after Tribunal approval.
- The revised financial statements are to be filed with RoC.
- All subsequent financial statements are also to be revised.

Mandatory revision

- The company will need to mandatorily re-open its books and recast its financials if the NCLT determines that the relevant earlier accounts of the company were prepared in a fraudulent manner, or the affairs of the company were mismanaged

Miscellaneous

- In the case of a private company, the maximum number of members has increased from 50 to 200
- Provisions prohibiting insider trading have been introduced
- NBFCs will be governed by RBI rules
- A company cannot accept a deposit from persons other than its members. Furthermore, shareholders' approval is required when accepting deposits
- Provisions introduced regarding an offer of sale of shares by certain members and Global Depository Receipts and an extended facility of shelf prospectus

Central Government notified 98 sections of the Companies Act 2013

The Central Government appointed the 12th day of September, 2013 as the date on which 98 sections of the Companies Act, 2013 (18 of 2013) come into force; and with a view to facilitating proper administration of the 2013 Act, it was clarified that under:

- **Sub-section (68) of section 2:** The RoC may register those Memorandums and Articles of Association received up to 12 September 2013 as per the clause defining 'private company' under the Companies Act, 1956, without referring to the definition of a private company under the 2013 Act.
- **Section 102:-** For all companies which have issued notices of general meetings on or after 12 September 2013, the statement to be annexed to the notice shall comply with additional requirements as prescribed in section 102 of the 2013 Act.
- **Section 133:-** Till the Standards of Accounting or any addendum thereto is prescribed by Central Government in consultation with, and on the recommendation of, the National Financial Reporting Authority (NFRA), the existing accounting standards notified under the Companies Act 1956, shall continue to apply.
- **Section 180:-** In respect of requirements of special resolution under Section 180 of the 2013 Act as against ordinary resolution required by the Companies Act 1956, if notice for any such general meeting was issued prior to 12 September 2013, then such resolution may be passed in accordance with the requirement of the Companies Act 1956.

The Central Government has further advised that until a date is notified by the Central Government under sub-section (1) of section 434 of the 2013 Act for the transfer of all matters, proceedings or cases to

Regulatory

the National Company Law Tribunal and the Board of Company Law Administration will continue to be handled by those bodies.

SEBI

SEBI released draft REITs regulations for public comment

SEBI released draft Real Estate Investment Trusts (REITs) regulations in a press release dated 10 October 2013, for public comments

Key conditions of the proposed regulations are:

- REITs to be set up as trusts under the Indian Trust Act, 1882, and have certain prescribed parties such as SEBI-registered trustee, sponsor, manager and principal valuer.
- Listing of units shall be mandatory for all REITs
- Minimum assets under the REITs to be INR 10 billion for coming out with an offer
- Minimum initial offer size of INR 2.5 billion and minimum public float of 25%
- Minimum subscription size shall be INR 0.2 million and the unit size shall be INR 0.1 million.
- REIT may raise funds from any investors, resident or foreign
- Additionally, the draft regulations have set out the disclosure requirements and responsibilities of parties such as trustees, sponsors, managers and principal valuers.

Source: SEBI Draft REITs Regulations dated 10 October 2013

SEBI (Foreign Portfolio Investors) Regulations, 2013

SEBI has, in its Board meeting dated 5 October 2013, considered and approved the draft SEBI (Foreign Portfolio Investors) Regulations, 2013.

Earlier (in October 2012), SEBI had formed a Committee on the Rationalisation of Investment Routes and Monitoring of Foreign Portfolio Investments. This Committee submitted its recommendations in July 2013.

SEBI (Foreign Portfolio Investors) Regulations, 2013, have been framed, keeping in view the provisions of SEBI (Foreign Institutional Investors) Regulations, 1995, the Qualified Foreign Investors (QFIs) framework and the recommendations of the Committee on Rationalisation of Investment Routes and Monitoring of Foreign Portfolio Investments.

The salient features of the FPI Regulations are:

- These Regulations introduce a new class of investors - Foreign Portfolio Investors (FPIs)
- Existing FIIs, Sub Accounts and QFIs shall be merged and shall be identified as FPIs.
- FPIs have been divided into following categories:
    - Category I Foreign Portfolio Investor - Government and Government-related foreign investors etc;
    - Category II Foreign Portfolio Investor - Appropriately regulated broad-based funds, appropriately regulated entities, broad-based funds whose investment manager is appropriately regulated, university funds, university-related endowments, pension funds etc;

Regulatory

  - Category III Foreign Portfolio Investor - all others not eligible under Category I and II FPIs.

- Existing FIIs and Sub Accounts will continue to buy, sell or otherwise deal in securities under the FPI regime.
- Existing QFIs will continue to buy, sell or otherwise deal in securities till one year from the date of notification of FPI regulations. In the meantime, they will need to obtain FPI registration.
- FPIs will be granted permanent registration, and will be permitted to invest in all those securities in which FIIs are permitted to invest.
- Category I and Category II FPIs will be allowed to issue, or otherwise deal in offshore derivative instruments (ODIs), directly or indirectly. However, the FPI needs to be satisfied that such ODIs are issued only to persons who are regulated by an appropriate foreign regulatory authority, after ensuring compliance with Know Your Customer norms.

Source: SEBI PR No. 99/2013 dated October 5, 2013

This section has a brief analysis of pertinent judgements on several M&A related tax issues including capital gains, business income, depreciation on royalty payments, disallowance of expenditure incurred, set-off of losses, transfer of immovable property under the guise of transfer of shares, tax avoidance, slump sale, depreciation pursuant to slump sale, continuity of tax holiday after slump sale, transfer of industrial undertakings, merger of wholly-owned subsidiary into its holding company, valuation of shares, and takeover code.

Mergers and Acquisitions

Mergers and Acquisitions

Case law

Business Income

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

DCIT *v.* A.S.P. Software Solutions Ltd. [2013] 152 TTJ 739 (Hyderabad-ITAT)

Where shares received against assignment of debt taken over and there is immediate sale thereof, such shares is taxable as "business income". Net proceeds from sale of shares (at loss) acquired in lieu of debt is not capital in nature and is taxable as business loss. The Act does not permit the changing or questioning of the sale price of shares sold.

Facts

LVS Power Ltd. (LVS) had an accumulated debt along with interest of INR 784 million. Due to its failure to pay the debt, the same was assigned to the taxpayer (a major shareholder of LVS) through various debt assignment deeds with the financial institutions and by entering into a Memorandum of Understanding (MoU) with LVS Power Ltd. The taxpayer recovered INR 337 million from LVS and was allotted shares worth INR 445 million (8.9 million shares at INR 50 per share). The taxpayer paid INR 336.7 million in cash to financial institutions in full settlement of their debt and made a profit of INR 42.20 million.

The shares allotted were subsequently sold by the taxpayer in the same year to two business relations of the MD and the majority shareholder for INR 4 per share and INR 3.75 per share respectively, aggregating to INR 3.46 million. The taxpayer made a net profit of INR 9.5 million in the entire transaction. The taxpayer offered INR 6.37 million to tax as business income after setting-off the brought-forward depreciation.

The TO disregarded the subsequent transaction between the related parties and made an addition of INR 422 million by considering the allotment of shares at INR 50 per share. The TO further contended that the activity of taking over a debt was natural, and thus the entire profit on debt assignment was assessable as business income. The CIT(A) held that the TO was not correct in disregarding the subsequent sale transaction. The CIT(A) re-determined the sale price at INR 10 per share (instead of INR 4/ 3.75 by taxpayer and INR 50 by the TO) and made an addition of INR 64.3 million.

Held

The Tribunal, relying on the Mumbai Tribunal judgment in Rupee Finance & Management(P) Ltd *v.* ACIT [2009] 120 ITD 539 (Mumbai-ITAT), did not accept the re-determined value and held that the CIT(A) had gone beyond his jurisdiction in re-determining the value even though the TO himself did not re-compute the sale price. The gains brought to tax by the TO in the debt assignment were nullified by the loss on the sale of shares. Accordingly, the Tribunal deleted the TO's addition.

Editor's Note

The decision is relevant in the context of the sale value of shares because sometimes such financial arrangements are important in keeping a company alive and it is not right to consider that the transactions are collusive in nature. There is no concept of imputing a sales consideration in case of shares. Also, loss on transfer of shares cannot be considered as capital in nature because, in debt assignment, the shares received in lieu of the debt become stock-in- trade and sale thereof results in a business loss.

Mergers and Acquisitions

Set off of losses

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

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

In cases of multiple amalgamations, conditions under section 72A of the Act have to be analysed for each amalgamating company separately for set-off of the accumulated losses of the amalgamating company. The requirement to furnish form No. 62 certifying the achievement of prescribed conditions will arise for the first time only on achieving 50% installed capacity of the amalgamating company within four years from the end of four years.

Facts

Bayer TPU Pvt. Ltd (BTPU) and Bayer Specialty Products Pvt. Ltd. (BSPPL) were amalgamated with the taxpayer, Bayer Material Science Pvt. Ltd, in tax year 2004-05. The taxpayer initially claimed set-off of accumulated loss of INR 125.3 million under section 72A of the Act with respect to two amalgamating companies, but later reduced it to INR 77.3 million on account of amalgamation of BTPU alone.

The TO held that the taxpayer had not complied with the conditions of section 72A of the Act and, hence, disallowed the set-off of losses. The TO held that the taxpayer disposed of 43.79% of the assets of the amalgamating company in the first year and, thus, failed to hold 3/4 of the book value of fixed assets continuously for five years, as required under section 72A of the Act. Also, the taxpayer had failed to achieve 50% of the installed capacity of the amalgamating company as required under Rule 9C(a) of the Rules and failed to furnish the certificate of particulars of production in the prescribed Form No. 62. The TO also held that the taxpayer had failed to substantiate that the amalgamation was carried out in order to ensure the revival of the business of the amalgamating company.

On appeal by the taxpayer, the CIT(A) upheld the TO's order.

Held

On further appeal, the Tribunal held that the TO had erred in calculating the disposal of assets at 43.79% by including the disposal of BSPPL's along with those of BTPU. The Tribunal held that the conditions under section 72A of the Act were *qua* the amalgamating company whose losses were sought to be set-off and carry carried forward by the amalgamated company. If there were two or more amalgamations in a year, then the amalgamated company was required to prove satisfaction of these conditions in order to receive benefit under section 72A of the Act in respect of each such company separately. Furthermore, the taxpayer can achieve 50% of the installed capacity in any year before the end of four years from the date of amalgamation, and the requirement of furnishing Form no. 62 would arise for the first time only when the amalgamated company fulfilled the condition of achieving 50% installed capacity within four years from the date of amalgamation.

Accordingly, the Tribunal held that since the year under consideration was not the fourth year from the date of amalgamation and the taxpayer had not achieved the desired production level, both these conditions were pre-mature and were not required to be examined at this stage.

Furthermore, the Tribunal held that on a conjoint reading of section 72A(2) and (3) of the Act provided that the taxpayer was entitled to set-off and carry forward the brought-forward business losses and unabsorbed depreciation of the amalgamating company

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from the first year of the amalgamation. However, if the conditions prescribed under section 72A of the Act were not fulfilled within the prescribed time, the set-off allowed in the previous year(s) would be deemed to be the income of the amalgamated company of the last year stipulated, for the purposes of such conditions.

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

Editor's Note

This decision makes clear that compliance with the conditions prescribed under section 72A of the Act in the case of amalgamation of multiple companies must be analysed with respect to each amalgamating company separately. It also clarifies that achievement of 50% installed capacity can take place anytime during the prescribed period of four years whereas the set-off of losses is available from the very first year of amalgamation.

Depreciation on royalty payments

Royalty paid for brand acquisition eligible for depreciation under section 32; marketing know-how fee allowed as revenue expenditure

CIT *v.* M/s. Glenmark Pharmaceutical Ltd. [TS-13-HC-2013(Bombay)]

The royalty payment made by the taxpayer to acquire a brand formed part of the cost of acquisition of the brand and was entitled to depreciation under section 32 of the Act. Furthermore, a fee paid towards marketing know-how would result in improving the profits of the business and hence was allowed as revenue expenditure.

Facts

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

The TO disallowed these expensed claimed by the taxpayer.

On appeal by the taxpayer, the CIT(A) allowed the taxpayer's claims for deduction of non-compete fees as revenue expenditure and allowed depreciation on royalty payment. The CIT(A) also treated expenditure towards marketing know-how as capital expenditure, holding that the benefit derived out of it was of an enduring nature.

The Tribunal upheld the CIT(A)'s order with respect to the non-compete fee and depreciation on royalty payments. However, it allowedthe marketing know-how fee also as revenue expenditure on the grounds that it enabled the taxpayer to facilitate and augment its profit-earning capacity.

Held

On appeal by the Revenue, the HC observed that the Tribunal passed the order on the non-compete fee without any discussion. The HC therefore returned the matter to the Tribunal to pass an order giving reasons.

Furthermore, the HC held that marketing know-how would lead to improvement in the existing business and market strategy resulting in higher sales and profitability. The HC relied on its own decision in the case of USV Ltd. *v.* Jt. CIT (ITA No. 376/Mum/2001) and allowed the marketing know-how fee as revenue expenditure.

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As regards the depreciation on royalty, the HC upheld the Tribunal's order that the royalty payment made by the taxpayer was a part of the cost of the brand and accordingly allowed the same.

Editor's Note

This decision is important with respect to the allowance of depreciation on royalty payments for acquisition of brands. It is also important to take note of the HC's view that acquisition of marketing know-how led to an improvement in marketing strategy and the profitability of the business and hence was in the nature of revenue expenditure.

Transfer of immovable property under the guise of transfer of shares

Provisions of section 50C of the Act not applicable to transfer of shares

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

Section 50C of the Act will not apply to transfer of shares by the taxpayer for the purposes of capital gains computation as the provisions of section 50C of the Act are deeming provisions which have to be interpreted strictly in relation to transfer of land or building or both.

Facts

The taxpayer was a shareholder of Kamala Mansion Pvt. Ltd. (KMPL). KMPL owned two flats. The taxpayer sold shares of KMPL to a third party and offered gains arising from the sale of shares to tax as long term capital gains. The transferee also injected an additional sum into KMPL to clear the loans given by the taxpayer (as directors) to KMPL.

The TO held that by the transfer of shares of KMPL, the taxpayer had effectively transferred immovable property and treated the transaction as a case eligible for piercing the corporate veil. Accordingly, considering the aforesaid transfer as a sale of land and building, the TO held that the sales consideration should be equal to the value of immovable properties adopted for stamp duty purposes, in accordance with section 50C of the Act. Furthermore, the TO considered the injection into the KMPL by the transferee as an additional consideration and, accordingly, increased the sale consideration. The CIT(A) confirmed the order of the TO.

Held

The Tribunal held that the taxpayer had transferred shares of KMPL and not land and building. Further, the taxpayer did not have full ownership of the flats which were owned by KMPL. Also, the company was deriving income, taxable under the head 'income from house property' for over a decade. Considering that the provisions of section 50C of the Act are deeming provisions, they had to be interpreted strictly. Furthermore, the Tribunal noted that transfer of shares was never a part of the assessment of the Stamp duty Authorities of the State Government. Since the provisions of section 50C of the Act do not apply to the transfer of shares, the Tribunal upheld the taxpayer's computation and ordered in favour of the taxpayer.

Furthermore, with respect to repayment of the loan by the company to the taxpayer, the Tribunal held that the transaction of the injection of money was between the transferee and the company. The dues received by the taxpayer from the company could not be equated with the additional sales consideration. Accordingly, the Tribunal allowed the appeal, accepting the grounds raised by the taxpayer.

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Editor's Note

In this case, the Tribunal has clarified that the deeming provisions are to be interpreted strictly in accordance with the spirit of the provisions. Accordingly, section 50C of the Act cannot be applied to a transfer of shares.

Slump Sale

Transfer of business without monetary consideration not taxable as a 'slump sale' under Section 2(42C) of the Income tax Act, 1961

ITO *v.* M/s Zinger Investments (P) Ltd. [TS-437-ITAT-2013(Hyderabad)]

Transferring the manufacturing division with all its assets and liabilities (under the scheme of arrangement as approved by the HC) without monetary consideration would not be considered as a slump sale under section 50 B read with section 2(42C) of the Act. Accordingly, capital gains on such a transfer of business without monetary consideration would not attract any tax.

Facts

The taxpayer had transferred its manufacturing division to M/s Novapan Industries Ltd. (Novapan) under a scheme of arrangement under sections 391 to 394 of the Companies Act, 1956. The scheme of arrangement was approved by the HC of Arunachal Pradesh with effect from 1 April 2006.

As consideration for the transfer of the division, Novapan had allotted shares amounting to INR 68.1 million to the taxpayer's shareholders and transferred certain investments of INR 252.4 million to the taxpayer. The TO held that the transfer of the manufacturing division was in essence a slump sale and the capital gains arising from the above transfer should be brought to tax under the provision of section 50B of the Act. The TO adopted the sales consideration as the value of the shares allotted i.e. of INR 68.1 million together with the value of investments transferred i.e. INR 252.4 million. Computing long-term capital gains, the TO deducted the cost of acquisition of INR 68.1 million, being the net worth of the undertaking, from the sale consideration.

Held

To qualify as a slump sale, two conditions had to be satisfied, *viz.*, (1) there had to be a transfer of one or more undertakings as a result of the sale; and (2) the sale had to be for a lump-sum consideration without value being assigned to individual assets and liabilities.

No money consideration was involved in the transfer of the manufacturing division. The presence of a money consideration is an essential element of a sale transaction. Relying on the SC ruling in the case of Motors and General Stores [1967] 66 ITR 692 (SC) and R.R. Ramakrishna Pillai [1967] 66 ITR 725 (SC) and also the Tribunal ruling in Avaya Global Connect Ltd. *v.* ACIT [2008] 26 SOT 397 (Mumbai-ITAT), the Hyderabad, held that the transfer of the manufacturing division could not be considered a slump sale within the meaning ascribed under section 2(42C) of the Act. Accordingly, the above transfer should not attract tax under section 50B of the Act.

Tax Avoidance

Loss on forfeiture of shares purchased from sister concern not a 'sham' and allowed as capital loss

JDP Shares & Finance P Ltd. *v.* DIT [TS-842-ITAT-2012(Mumbai)]

Procedural discrepancies found in the books of a company cannot be used against its shareholder. This is covered by the doctrine of indoor management once it is safely

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presumed that the necessary formalities are complied with when the shares are transferred to the name of a person. Additionally, the mere fact that the taxpayer did not pay call money on shares purchased from a sister company does not by itself imply that the transaction was a sham.

Facts

The taxpayer, JDP Shares Pvt. Ltd., purchased 1,00,000 shares of Instrument Explorer.com Pvt. Ltd. (IEPL) from its sister concern at a premium of INR 92.50 over the face value of INR 10. The shares were paid to the extent of INR 78.50 only and a sum of INR 7,500 was spent on stamp charges. Thus, the total cost of 1,00,000 shares came to a total of INR 7.86 million. However, the financial position of IEPL was not good and, therefore, it did not pay the 6th and 7th call money instalments. The shares were ultimately forfeited, resulting in a short term capital loss in tax year 2003-04.

The TO found that initially 1,76,000 shares were purchased by a group entity *viz.*, Pivotal Securities Pvt. Ltd. which were transferred to another group company, Sunidhi Consultancy Services Pvt. Ltd., against some money owed to it. Subsequently, 1,00,000 shares were transferred to the taxpayer which was not recorded properly by IEPL. Subsequently, the taxpayer did not pay the call money on the shares and the shares were forfeited. In this regard, the TO held that the group of taxpayer had already decided to not pay the call money and the taxpayer had purchased the shares of the company from its sister company in order to reduce its tax liability. Therefore, the TO disallowed the short-term capital loss, treating the entire transaction as sham.

Held

The Tribunal observed that the taxpayer and IEPL were not connected even remotely. Further, the Tribunal noted that IEPL had confirmed the forfeiture of shares made by it and that Sunidhi Consultancy Services also booked a loss on the balance shares held by it in IEPL which was accepted by the revenue in the assessment proceedings. Accordingly, the Tribunal held that since no cogent material was available on record to prove the theory of the TO that the transaction was not genuine and was undertaken to reduce the tax liability, the TO's allegation that the transaction was a sham could not be accepted.

The Tribunal also noted that the fact that a survey was conducted at IEPL's office could not lead to a conclusion that the transactions were not genuine. In this regard, the Tribunal held that procedural discrepancies found at IEPL's end could not be used against the taxpayer, as this was covered by the 'doctrine of indoor management' by which a shareholder could not be held liable for any procedural lapse by the company of which he was the shareholder.

Accordingly, the Tribunal ruled in favour of the taxpayer.

Editor's Note

It is interesting to note that the Mumbai Tribunal held that a transaction can be regarded as a sham or colourable device to reduce tax liability only if there is sufficient material on record to prove the same. Furthermore, the Tribunal has upheld the applicability of the 'doctrine of indoor management' to relieve the taxpayer as a shareholder of liability with respect to discrepancies at the company's end to record the transfer of shares.

Mergers and Acquisitions

Capital Gains

Transfer of complete control over an asset decides chargeability of capital gains and not execution of agreement

Rajat Lal *v.* CIT [ITA No. 6 of 2005 (Allahabad-HC)]

As per the agreement, since shares were to be physically transferred only on payment of full consideration, it could not be said that there was any 'transfer' as contemplated by section 2(47) of the Act at any time before payment of full consideration.

Facts

The taxpayer, along with his wife, owned shares of a company M/s Rajendra Lal Shadhi Lal Co. (P) Ltd. (RLS). RLS owned two flats in Mumbai which were let out to SRF Ltd. In tax year 1996-97, the taxpayer and his wife jointly entered into an agreement to transfer the entire share capital of RLS to SRF Ltd for a total consideration of INR 50 million, to be settled in three instalments. As per the agreement, all the shares of RLS were to be transferred to the buyer's name in the records of RLS upon payment of the first instalment. However, the share certificates would be kept in the custody of mutually-decided solicitors until discharge of the final instalment.

In the return of income for tax year 1996-97, the taxpayer did not offer capital gains accruing on transfer of shares of RLS to tax, on the grounds that the transfer took place only on payment of a final instalment in tax year 2000-01.

The TO contended that the transaction amounted to a 'transfer' under section 2(47) of the Act in tax year 1996-97 and hence was chargeable to capital gains tax in tax year 1996-97. On appeal by the taxpayer, the CIT(A) ruled in favour of the taxpayer. However, the Tribunal upheld the contentions of the revenue. The taxpayer filed an appeal before the HC.

Held

The HC noted that, as per the agreement, shares would be physically transferred only on payment of the full price without which the transferee did not have any right to deal with or transfer shares or any assets of RLS. The intention of the parties was only to transfer the voting interest and controlling power in the company on execution of the agreement. The rights of ownership of shares were withheld in such a manner that the transferor was not entitled to transfer shares.

The buyer continued to enjoy the immovable property after the payment of the first instalment in its capacity as a tenant and not pursuant to the transfer of shares.

It was thus held that since shares were to be physically transferred to the buyer company only after payment of the full price, it could not be said that there was any transfer in the property as contemplated under section 2(47) of the Act in tax year 1996-97.

Editor's Note

The decision is important since it highlights the principle that the date of agreement or change in records of a company is not relevant when deciding the date on which 'transfer' can be said to have taken place, for applying section 2(47) of the Act. The facts of the case and the intention of the parties also plays an important role in determining the date of transfer.

Depreciation pursuant to slump sale

Transfer of all assets and liabilities of one unit of the holding company to its subsidiary amounts to succession

Sree Jayajothi & Co. Ltd *v.* CIT [2012-TIOL-976-HC-MAD-IT]

Where the taxpayer transferred one of its unit to its 100 per cent subsidiary company with all assets and liabilities at book value, it was regarded as succession under section 170 of the Act and the taxpayer was entitled to depreciation based on the number of days for which the asset was held.

Facts

The taxpayer-company was engaged in the business of the manufacture and sale of cotton yarn. It had two units, Units A and B. In 1996, the taxpayer formed a WOS and transferred all the assets and liabilities of Unit B at book value (as on the date of transfer) to the WOS on 1 November 1996.

The taxpayer claimed depreciation on the opening written down value (WDV) of the depreciable assets of Unit B proportionately for seven months from April to October, 1996, relying on the fourth proviso to section 32(1) of the Act (as applicable in tax year 1997-98). The subsidiary also claimed depreciation proportionately for the remaining five months at 50% of the normal rate, since the assets were held for less than 180 days.

The TO disallowed the taxpayer's depreciation claim on the grounds that since the assets were transferred during the year under consideration, the opening WDV should be reduced by the value at which the assets were transferred, and depreciation could be allowed only on the balance amount.

The CIT(A) held that the subject transfer was covered under 'succession' and, accordingly, allowed the taxpayer's depreciation claim.

The Tribunal, however, over-ruled the order of the CIT(A) and held that the subject transfer involved a sale of assets and liabilities from one entity to the other and not succession since both the entities continued to exist after the slump sale. Therefore, proportionate depreciation could not be allowed to the taxpayer.

Held

The HC, on reading various provisions of sections 43(6)(c), 170 and 32 (1) of the Act, observed that the transfer of Unit B by the taxpayer to its WOS was a case of succession of business otherwise than on death under the provisions of section 170 the Act, and was not a transaction of sale.

The HC also observed that the entire unit had to be taken as one before succession and the aggregate deduction had to be calculated at the prescribed rates as if the succession had not taken place, and such deduction, thereafter, had to be apportioned between the predecessor and the successor company in the ratio of the number of days during which the assets were used by each.

Editor's Note

This is an important ruling dealing with permissibility of depreciation for the transferor company on the transfer of an undertaking being regarded as succession under section 170 of the Act.

Mergers and Acquisitions

Continuity of tax holiday after slump sale

Tax holiday under Section 10B is undertaking specific and available after slump sale for the balance unexpired period as change in ownership cannot be construed as splitting up or reconstruction

Woco Motherson Elastomer Ltd. *v.* DCIT [TS-200-ITAT-2013(Delhi)]

A tax holiday benefit under section 10B of the Act cannot be denied for the unexpired eligible period when the whole of the eligible undertaking is transferred pursuant to a slump sale, as the undertaking existed in the same place, form and substance, and carried on the same business before and after the slump sale.

Facts

The taxpayer, Woco Motherson Elastomer, purchased an existing undertaking comprising of 100% Export Oriented Unit (EOU/ Undertaking), on a slump basis from M/s Motherson Sumi Systems Ltd (MSSL). Prior to the slump sale, MSSL received a tax holiday under section 10B of the Act for in respect of this undertaking. After the slump sale, the taxpayer continued to claim the benefit of the tax holiday under section 10B of the Act in respect of the EOU in its return of income for the balance of the unexpired period.

The TO denied the benefit claimed by the taxpayer on the grounds that the EOU was formed by splitting up or reconstruction of the existing business of MSSL. Also, the plant and machinery being used by the taxpayer was previously used by MSSL and was transferred to the taxpayer. Furthermore, the TO contended that the taxpayer had made domestic sales from the EOU and therefore it could not be considered as a 100% EOU for the purpose of claiming the tax holiday under section 10B of the Act.

The CIT(A) upheld the TO's order.

Held

On appeal by the taxpayer, the Tribunal (Delhi) held that this was not a case where a part of plant and machinery or other assets belonging to an undertaking were transferred but where the whole of the undertaking, consisting of all assets and liabilities, was acquired as a going concern by the taxpayer. Since it was a transfer of the whole undertaking, it could not be said that the taxpayer carried on the business with transferred machinery or plant previously used by another person. The Tribunal relied on the ruling of the Delhi Bench in ITO *v.* Heartland Delhi Transcription & Services Pvt. Ltd. [ITA No. 1551 to 1553/Del/2008] in which deduction under section 10B of the Act had been allowed in a case with similar facts, observing that the emphasis under that section was on the undertaking and not on the taxpayer.

The Tribunal also relied upon the decision of Samsung India Software India Pvt. Ltd. [I.T.A. No. 399/Bang/ 2012] and held that mere organisational change was not grounds for disallowing a tax holiday under section 10B of the Act. The undertaking existed in the same place, form and substance, and carried on the same business before and after the legal change in character and form of the organisation. Formerly, it was a part of MSSL and presently, it was an independent taxpayer. However, notwithstanding the change in organisational status, the same unit continued to function.

Furthermore, the TO's objection that some part of the sale was effected in the domestic area did not disentitle the taxpayer from claiming deduction under section 10B, unless the undertaking was deleted from the category of 100% EOU under the Development Regulation Act, 1951.

The Tribunal therefore held that a change in the ownership of a business or an undertaking consequent

Mergers and Acquisitions

to a slump sale could not be regarded as splitting up or reconstruction of the business for the purpose of section 10B of the Act.

Editor's Note

This decision is relevant to entities which have undertakings enjoying tax deductions under various provisions of the Act which are pari-materia to section 10B of the Act, and which have undergone change of ownership, or may be subject to restructuring involving the transfer of an undertaking.

Deviation from Accounting Standard

Deviation from an Accounting Standard (AS) is permissible in a scheme of amalgamation, provided necessary disclosures are made in the transferee-company's financial statements

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

Deviation from AS-14 is permissible under section 211(3B) of the Companies Act, 1956, in a scheme of amalgamation, provided necessary disclosure are made in the transferee-company's financial statements

Facts

The petitioner-companies filed a petition under sections 391 to 394 of the Companies Act, 1956 seeking sanction of a scheme of amalgamation of seven companies with Milestone Tradelinks Pvt. Ltd. (the transferee-company). All petitioners filed an application for dispensing with requirement of meeting of equity shareholders, preference shareholders and unsecured creditors, in view of the consent affidavits from all the stakeholders, which the Court accepted, and further noted that there were no secured creditors of the petitioner-companies.

On the issue of notices to the Regional Director (RD) and Official Liquidator (OL), the OL did not have any reservation with respect about the scheme. However, the RD raised an objection on the accounting treatment, which was not in compliance with AS-14 as announced by the Central Government. Under the scheme, the amount of amalgamation reserve arising after recording all assets and liabilities of the transferor-companies would be treated as a free reserve available for distribution of dividends. The RD observed that amalgamation reserve, being capital in nature, was not available for dividend distribution and asked that the HC direct strict compliance with AS-14.

Held

The Gujarat HC, relying on judgments in the cases of Hindalco Industries Ltd., Sutlej Industries Ltd. and Adhishree Tradelinks Pvt. Ltd., noted that the fact that the shareholders had unanimously approved the Scheme and that the transferee-company had stated in an affidavit filed by it that it shall make all necessary disclosures in its Financial Statements as enumerated under section 211(3B) of the Companies Act, 1956. It had then sanctioned the scheme, as it appeared that the scheme was in the interests of the shareholders and creditors of the respective petitioner-companies.

Editor's Note

The HC has further affirmed that it is a well established principle that a scheme of amalgamation must be in the interests of the shareholders and creditors of the respective petitioner-companies. So long as that was the case, compliance with accounting standards may not be mandatory if appropriate disclosures were made in the financial statements. Also, the scheme should not be against public interest.

Mergers and Acquisitions

Transfer of industrial undertakings

Benefit under section 80-I available on transfer of undertaking pursuant to merger

CIT *v.* Bhuwalka Steel Industries Ltd. [2013] 255 CTR 516 (Karnataka)

Where an industrial undertaking which was being run by a company got amalgamated with the taxpayer-company, it was not a case of transfer. The taxpayer was entitled to deduction under section 80-I of the Act in respect of profits earned from industrial undertaking despite the prohibitions contained in section 80I(2)(ii) of the Act.

Facts

Pursuant to the Scheme of Amalgamation approved by the Karnataka HC on 8 August, 1995, an industrial undertaking that was being run in the name and style of M/s. AA Alloys Ltd., a limited company, got amalgamated with the taxpayer-company with effect from 1 April 1994.

In its return of income filed for tax year 1995-96, the taxpayer-company claimed a benefit under section 80-I of the Act with respect to the sum of INR 2.19 million on the ground that this was profit earned by the industrial undertaking which was hitherto being run by amalgamating company in the name of M/s. AA Alloys Ltd and was being carried on by the taxpayer-company after 1 April 1994.

The TO held that it was a case of transfer of machinery to a new business and therefore, the taxpayer was not eligible for deduction under section 80-I of the Act in view of the restriction imposed under section 80I(2)(ii) of the Act. However, the appellate authorities allowed the taxpayer's claim for deduction under section 80-I on the ground that amalgamation of a company did not come within the scope of definition of 'transfer' under section 2(47) of the Act. Aggrieved by the order, the revenue filed an appeal with the HC.

Held

The HC relied on its own decision rendered in the case of CIT *v.* Master Raghuveer Trust [1985] 151 ITR 368 (Kar) wherein it had held that allotment of shares without consideration on amalgamation of a company in which the taxpayer has a shareholding did not amount to transfer within the meaning of section 2(47) of the Act for the purpose of levying capital gains tax. The HC also relied on the SC judgment in the case of Saraswati Industrial Syndicate Ltd. *v.* CIT [1990] 186 ITR 278 (SC), and held that the taxpayer was entitled to deduction under section 80-I unless it was hit by non-fulfilment of any of the requirements in terms of section 80-I(2) of the Act because the income was of the same taxpayer and not of the other company, as the said company had ceased to exist as on 1 April 1994, and there was no income attributable to this company after this date.

The HC therefore held that the amalgamation did not come within the scope of 'transfer' as defined in section 2(47) of the Act, and therefore, benefit under section 80I of the Act would be allowed to the taxpayer.

Editor's Note

This is one of the first judgments which have upheld the continuity of tax deduction under 80-I of the Act pursuant to amalgamation. This judgment may also be relied on for taking benefit of and upholding the continuity of tax holding under section 80-IB, 80-IC of the Act, etc. because the provision limiting continuity of tax holiday pursuant to amalgamation is contained in section 80-IA of the Act.

Mergers and Acquisitions

Merger of wholly-owned subsidiary into its holding company

There is no requirement to initiate separate proceedings or file 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

Reliance Jamnagar Infrastructure Ltd., ***In re*** **[2012] 27 Taxmann 228 (Gujarat)**

Where a scheme of amalgamation provided for transfer of all assets and liabilities of subsidiary transferor-company to holding transferee-company and such transfer did not affect rights of its members or creditors and did not involve reorganisation of share capital of transferee company, no separate application necessary to be filed by transferee-company under section 391 or section 394 of the Companies Act, 1956 where an application has been filed by its WOS.

Facts

Reliance Jamnagar Infrastructure Ltd., the transferor-company having registered office in Gujarat, filed an application with the Gujarat HC for merger with its holding company, Reliance Industries Ltd. (RIL), the transferee-company having registered office in Maharashtra. The Gujarat HC passed an order dispensing with the need to hold a meeting of equity shareholders, preference shareholders and secured creditors. A meeting of unsecured creditors was ordered, which was approved by a majority of unsecured creditors present and voting.

The OL raised no objections against the scheme. The Regional Director (RD) raised an objection that the transferee was required to file a separate petition in the Bombay HC and that the dispensation of the requirement of filing the petition before the HC was without jurisdiction.

Held

The HC took into consideration the principles laid down in various judgments of the Bombay HC in Ahmedabad Manufacturing and Calico printing Co. Ltd. [1972 42 CC 211], Sharat Hardware Industries Pvt. Ltd. [1978 48 CC 23], and Mahaamba Investments Ltd. [2001 105 CC 16], wherein it was held that where a scheme involved the following:

- Cancellation of entire shareholding of the petitioner subsidiary company;
- There was no reorganization of the share capital of the transferee-company;
- No compromise or arrangement with shareholders or creditors of the transferee-company was involved;
- Involved transfer of all assets & liabilities of the petitioner subsidiary company to the transferee holding company; and
- Net worth of both, the transferor and transferee-company was positive;

there was no requirement for transferee-company to initiate separate proceedings, and file separate petitions under sections 391-394 of the Companies Act, 1956.

In view of the above, the HC rejected the RD's objections and 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 was exercising jurisdiction in the transferor's matter.

Editor's Note

The court needs to be satisfied that the proposed scheme of amalgamation would be in the interests of the transferor and transferee companies, their members and creditors. Since, the scheme would not affect the interest of members and creditors of the transferor and transferee companies, no separate petition needs to be filed by the holding company as the same would result in duplication of proceedings.

SEBI

SEBI has issued a circular on revised requirements for stock exchange and listed companies undertaking a scheme of arrangement under the Companies Act, 1956

Circular No. CIR/CFD/DIL/5/2013 issued on 4 February 2013 read with Circular No. CIR/CFD/DIL/8/2013 issued on 21 May 2013

SEBI has introduced a revised set of requirements for stock exchange and for listed companies for implementation of a scheme of arrangement under the Companies Act, 1956. Further, SEBI has stipulated additional disclosures/ procedural compliances/ clarifications for the stock exchange and for listed companies.

Existing guidelines

On 3 September 2009, SEBI *vide* Circular no. SEBI/CFD/SCRR/01/2009/03/09 had prescribed certain requirements for seeking exemption under Rule 19(7) of the Securities Contract (Regulation) Rules, 1957 (SCRR) from strict enforcement of Rule 19(2)(b) of the SCRR by listed companies. Rule 19(2)(b) of the SCRR prescribes certain public offer compliances. Any unlisted company desirous of getting its equity shares listed after merger/ demerger/ amalgamation etc. is required to seek an exemption from applicability of Rule 19(2)(b) of the SCRR.

Revised guidelines

The salient features of the Circular are as under -

- *Applicability*

Applicable to all listed companies undertaking a Scheme of Arrangement for Reduction of Share Capital/ Amalgamation/ Merger/Demerger/ Reconstruction under Companies Act, 1956.

- *Documentation requirements*

A listed company proposing to undertake any scheme is required to submit the draft scheme to the designated stock exchange along with the following documents:

– Valuation report from an independent Chartered Accountant (not required in cases where there is no change in the shareholding pattern of the listed company/ resultant company);
– Report from the audit committee recommending the scheme;
– Fairness opinion by a merchant banker;
– Pre- and post-Scheme shareholding pattern of the transferee-unlisted entity;
– Audited financials for last 3 years of the transferee-unlisted entity;
– Complaints Report summarising the status of complaints received and their status;
– Compliance with clause 49 of the listing agreement.

- *Observation letter*

The designated stock exchange shall issue the observation letter to the company after incorporating the comments received from SEBI.

The company is required to incorporate this observation letter in the notice sent to the shareholders seeking approval of the scheme.

- *Shareholders approval*

Approval by public shareholders with a simple majority through postal ballot and e-voting is required in specific cases. For all other cases, listed entities are required to furnish an undertaking certified by their auditor and duly approved by their Board, clearly stating the reasons for non-applicability of requirement of postal ballot and e-voting.

- *Second approval from stock exchange*

The listed company is required to submit the court approved scheme with SEBI for relaxation from strict enforcement of the conditions mentioned under Rule 19 of the SCRR. Such application has to be accompanied by the following documents:

– Copy of the approved Scheme;

– Result of voting by the shareholders;

– Statement explaining the changes in the approved Scheme *vis-à-vis* the draft Scheme;

– Status of compliance with Observation Letter;

– Complaints report in the prescribed format.

Editor's Note

The new guidelines are certainly welcome, considering the Regulator's objective of having better corporate governance and investor protection. However, the precise time frame within which the stock exchange and the Regulator are required to issue the observation letter is still not clear. While the guidelines are self-explanatory and unambiguous, it needs to be seen whether the proposed process can be completed within a reasonable time period, in order to protect the interests of all stakeholders as also of minority shareholders.

SEBI gives leeway to three year holding clause in inter se transfer among promoter group entities for receiving exemption

Weizmann Forex Limited [CFD/PC/IG/CB/23756/12]

Acquisition pursuant to inter se *transfer of shares amongst persons named as promoters will be available even if one of the transferors and one of the transferees hold the shares of the target company for a period of more than three years prior to the date of transfer.*

Facts

Weizmann Forex Ltd. (WFL) was a company listed on the stock exchange. The HC had sanctioned a scheme of arrangement. As per the scheme, Weizmann Forex Ltd and Karma Energy Ltd. (subsidiary companies of a listed company Weizmann Ltd.) were amalgamated with Weizmann Ltd. Further, the foreign exchange business undertaking and power business undertaking were de-merged into Chanakya Holdings Ltd. (CHL) and Karma Wind Power Ltd. (KWPL) respectively. CHL and KWPL were renamed as WFL and Karma Energy Ltd.

The shares of the resulting companies were listed on a stock exchange. The Promoter and a few other promoter group entities intended to transfer part of their equity shareholding in WFL to other promoter group companies.

All the proposed transferors held shares in Weizmann Ltd for more than 3 years, and one of them had held shares in WFL and Weizmann Ltd. for more than 3 years. One of the transferee-companies held the shares in WFL and Weizmann Ltd. for more than 3 years. However, the other transferee-company did not hold the shares in WFL and Weizmann Ltd. for over 3 years.

Held

As per the SEBI takeover code, one of the conditions for claiming exemption with regard to *inter se* transfer of shares among promoters was that the transferor(s) as well as the transferee(s) should have been holding the shares in the target company collectively for a period of at least 3 years before the proposed acquisition. In the instant case, though all the transferors had been holding shares in the target company for more than three years, only one of the transferees held shares in the target company for more than 3 years. The condition of 3 years shareholding would have been satisfied only when all transferor(s) as well as the transferee(s) collectively held shares for over 3 years.

Editor's note

The message SEBI has given in this informal guidance, when it exempted Weizmann Forex from the obligation to make an open offer for inter se *transfer of shares despite one of the transferees not holding shares in the company for more than 3 years is that the condition of 3-year shareholding by the transferees prior to the proposed acquisition (by* inter se *transfer) would be deemed to have been fulfilled if all the transferees collectively held shares for over 3 years, provided other conditions for availing the exemption were fulfilled.*

Valuation of shares

The Guidelines issued by the RBI for valuation are not relevant for computing capital gains

Zeppelin Mobile System GmbH *v.* ADIT [2013] 32 taxmann.com 250 (Delhi)

In case of transfer of shares from a non-resident to a resident, the RBI guidelines prescribed under Foreign Exchange Management Act (FEMA) regulations being relevant for remittance of money only, are not binding for the purposes of the Act.

Facts

The taxpayer, M/s. Zeppelin Mobile Systems Gmbh, a German tax resident, had an Indian subsidiary called Zeppelin Mobile Systems India Ltd., a closely-held unlisted Indian company. During tax year 2007-08, the taxpayer sold part of the shares held by it in its Indian subsidiary to M/s. Sintex Industries Ltd. at a price of INR 390 per share.

The TO was of the view that the sale consideration of the shares should have been INR 400 per share based on valuation norms prescribed by the RBI, as against the actual sale consideration of INR 390 per share, and proposed an addition for the differential consideration of INR 28,73,000.

The DRP also confirmed the TO's order, observing that the RBI guidelines were binding on the taxpayer.

Mergers and Acquisitions

Held

The Tribunal (Delhi) held that the RBI guidelines were addressed to the AD Banks. Thus, the duty to examine the compliance of the guidelines lay squarely within the purview of the 'AD Banks' and not the Income-tax Authorities.

Further, the Tribunal observed that no objection was raised by the RBI to the rate of INR 390 per share; indeed, the RBI had accorded its approval. Further, the transferee, i.e. Sintex Industries Limited, had not denied the rate of INR 390 per share. Such rate also stood admitted in the MoU between the taxpayer and Sintex Industries Ltd.

Accordingly, the Tribunal held that nothing adverse or detrimental to the taxpayer's case had been brought on record by the authorities. Neither the MOU nor the remittance certificate had been adverted to by the DRP. Accordingly, the Tribunal ordered in favour of the taxpayer.

Editor's Note

The decision highlights the principle that since the RBI guidelines have been issued specifically for FEMA purposes, the FEMA authorities are the only competent authorities to take appropriate action against the taxpayer for any breach of guidelines relating to share valuation under FEMA regulations. Those guidelines were not relevant for computing capital gains under section 48 of the Act.

Disallowance of expenditure incurred

No disallowance of expenditure can be made on ad hoc basis if investment is made from own surplus funds; section 14-A read with rule 8D cannot be applied retrospectively

Torrent Power Ltd. *v.* ACIT [2012] 34 CCH 241 (Ahmedabad-ITAT)

Considering that rule 8D of the Rules was applicable from tax year 2008-09, and in the present case, the tax year involved was 2006-07, no disallowance could be made by applying rule 8D. Further, interest expenses could not be disallowed on ad hoc *basis without pin-pointing any expenditure incurred for earning exempt income.*

Facts

For tax year 2006-07, the taxpayer company declared exempt income comprising of tax-free interest on bonds and dividend income. During scrutiny assessment proceedings, the TO disallowed 1% of the interest expenditure on *ad hoc* basis on the ground that it had been incurred for earning exempt income. The CIT(A) enhanced the addition by computing the disallowance under section 14A of the Act read with rule 8D of the Rules. The taxpayer filed an appeal before the Tribunal.

In another issue, two group companies of the taxpayer merged with the taxpayer-company. Upon merger, the taxpayer claimed depreciation on the premium paid for acquisition of leasehold land from group companies. The TO disallowed the depreciation claimed, treating the payment of premium as capital in nature. The CIT(A) upheld the TO's order.

Mergers and Acquisitions

Held

The Ahmedabad Tribunal, relying on the judgment of Delhi Tribunal in Maxopp Investment Ltd *v.* CIT [2011] 15 taxmann.com 390 (Delhi), held that rule 8D of the Rules was applicable from tax year 2008-09. Since the issue in this case pertained to the tax year 2006-07, and the TO had not pin-pointed any expenditure which the taxpayer had incurred directly for earning exempt income, no disallowance could be made by applying rule 8D of the Rules.

With respect to depreciation claimed on the premium paid for acquisition of leasehold land, the Tribunal remitted the matter back to the TO to decide the case after giving reasonable opportunity of hearing to the taxpayer, and after considering the judgment of the Gujarat HC in DCIT *v.* Sun Pharmaceuticals Inc. Ltd. [2010] 329 ITR 479 (Guj.), where lease rent paid was held to be revenue expenditure.

Editor's Note

The Tribunal gave its decision with respect to applicability and method of disallowance prescribed under section 14A of the Act read with rule 8D of the Rules when no cogent document or material was available to the TO to directly relate any expenses to the exempt income, and due to non-applicability of rule 8D of the Act in the relevant tax year. With respect to depreciation on premium paid for acquisition of leasehold land, the Tribunal gave partial relief to the taxpayer by remanding the matter back to the TO.

Takeover Code

Disclosure as promoters with stock exchange for 3 years is a pre-requisite for claiming exemption for inter se transfer under the Takeover Code

Commercial Engineers and Body Builders Company Limited [Informal guidance no. CFD/PC/IG/ 27088/ OW/2012]

In case of inter-se transfer between promoters, exemption from the Takeover Code would be available only if the company has furnished its share-holding pattern with the stock exchange for at least 3 years prior to such transfer of shares.

Facts

The shares of the target company were listed in October, 2010. AG and KG were disclosed as promoters in the filings with the stock exchange since listing, i.e., for the last 2 years. AG intended to transfer 17.61% stake to KG.

The target company sought informal guidance on whether the *inter se* transfer from AG to KG would qualify for exemption under the said regulation. The appellant submitted that AG and KG had been shareholders for a period exceeding 3 years. It contended that since company was listed in October 2010, it was impossible for the company to make such disclosure for the period prior to that. Further, the intent behind the 3-year condition was to curb the malpractice of introduction of new entities as qualifying parties (in the erstwhile Takeover code), which was not the case here.

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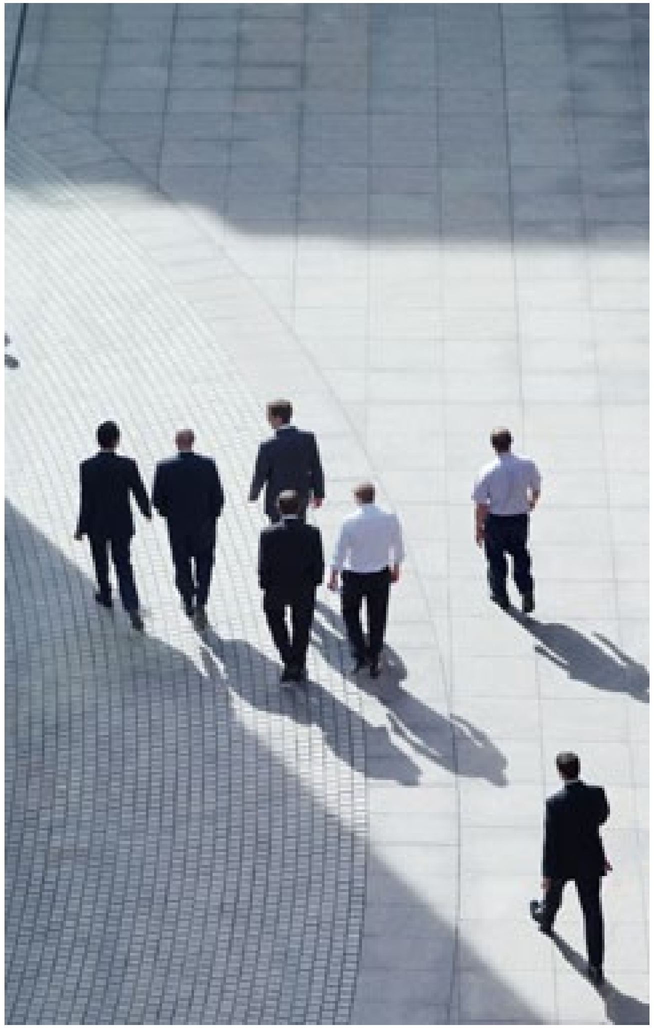
Held

The Board held that regulation 10(1)(a)(ii) of the Takeover Code provided an exemption from open offer requirement pursuant to *inter se* transfer amongst promoters, provided that they had been disclosed as promoters in the shareholding pattern filed with stock exchange for not less than 3 years prior to the proposed acquisition. It further held that the regulation clearly stated that the exemption would be available only if the persons were named as promoters for a continuous period of 3 years prior to the proposed acquisition in filings with the stock exchange. Since, in the instant case, the shareholding pattern was available only for two years, *prima facie*, the promoters did not qualify for the exemption.

Editor's note

This judgement throws light on the fact that transfer of shares of a listed company between two promoters shall be eligible for inter se *exemption under the Takeover code only if both, the seller and the buyer, are named as promoter for at least 3 years prior to the acquisition in the filings with the stock exchange. However, in a subsequent matter of Weizmann Forex Ltd. (summarised above), SEBI allowed* inter se *exemption on transfer of shares of a company which was listed for a less than two years and was formed pursuant to a de-merger of a listed company, by reckoning the period of holding from the date of acquisition of the shares in the de-merged company and not from the date of listing of the target company.*



Articles

List of Articles from 1 January 2013 to 31 December 2013

Sn	Particulars of Articles/ TL Publications	Where Published	Date of publication	Contributor/ Author Names
1	Commission agents do not promote sale?	Business Standard	14-Jan-13	Vivek Mishra
2	Enlarging the scope of 'force of attraction' rule	Hindu Business Line	14-Jan-13	Sandeep Ladda
3	Is a higher contribution to PF good for employees?	Times of India	14-Jan-13	Kuldeep Kumar
4	Revamping the mergers framework	Hindu Business Line	14-Jan-13	Ganesh Raju
5	Tax treatment of leases still a vexed issue	Hindu Business Line	14-Jan-13	Pallavi Singhal
6	Foreign investors vs local taxmen	Financial Express	16-Jan-13	Shyamal Mukherjee
7	Govt makes the right move on GAAR	Hindu Business Line	18-Jan-13	Sandeep Chaufla
8	Jewellery, car attract wealth tax too	Hindu Business Line	27-Jan-13	Shakti Chawla
9	Are you planning to sell a factory?	Business Standard	28-Jan-13	Vivek Mishra
10	Estate Duty: Sword of Damocles Over India	Economic Times	6-Feb-13	Ketan Dalal
11	Will deferral make life easier?	Business Standard	11-Feb-13	Rahul Garg
12	Taxation should be equitable	Business Standard	13-Feb-13	Nikhil Bhatia
13	The anomaly in retirement plans	Business Standard	14-Feb-13	Kuldip Kumar
14	Change in excise rate unlikely	Business Standard	15-Feb-13	Vivek Mishra
15	Mr Rich, please do not die	Financial Express	15-Feb-13	Hemal Uchat and Abhijeet Shah
16	Is it worth it or can we scrap it?	Business Standard	16-Feb-13	K Venkatachalam
17	Budget 2013: Perfect pitch for helicopter shots	Hindu Business Line	18-Feb-13	K Venkatachalam
18	Drawing a fair share of tax from multinational firms	Hindu Business Line	18-Feb-13	Indraneel R Chaudhury
19	Heralding glad tidings?	Business Standard	18-Feb-13	Vivek Mishra
20	Reimbursement of transportation charges: A peculiar situation	Business Standard	18-Feb-13	Vivek Mishra
21	Tax holiday: Go the extra mile	Hindu Business Line	18-Feb-13	Nehal Sampat
22	It's a bad time to bring back estate duty	DNA	19-Feb-13	Shailesh Monani and Gaulish Zaoba
23	Could be a foe of investment	Business Standard	20-Feb-13	Kaushik Mukerjee
24	Arm's length expectations	Business Standard	21-Feb-13	Sanjay Tolia
25	Wanted: Clear laws on taxation of cloud computing	Hindu Business Line	25-Feb-13	Kaushik Mukerjee
26	Higher tax rate on royalty may impact import costs	Hindu Business Line	1-Mar-13	Kaushik Mukherjee
27	No Change in Anything, So No Reason to Smile	Economic Times	1-Mar-13	Kuldip Kumar
28	FM had fewer options in cutting fiscal deficit, stimulating growth	Financial Express	2-Mar-13	R Muralidharan
29	GAAR deferred but not its rigour	Hindu Business Line	2-Mar-13	Kaushik Mukherjee

Sn	Particulars of Articles/ TL Publications	Where Published	Date of publication	Contributor/ Author Names
30	On path to better tax governance?	Business Standard	11-Mar-13	Vivek Mishra
31	Buying back shares not easy on the wallet	Hindu Business Line	25-Mar-13	Hemal Uchat
32	Mauritius: Tax haven, or only pretty beaches?	Hindu Business Line	25-Mar-13	Vikram Bapat
33	When service tax is greater than the restaurant service	Hindu Business Line	25-Mar-13	B.Sriram
34	CBDT issues circulars on transfer pricing	Mint	29-Mar-13	Rahul Mitra
35	Digital signature: Next step on indirect tax	Business Standard - Personal Finance	29-Apr-13	Vivek Mishra
36	Promoting disputes	Hindu Business Line	29-Apr-13	Ananthanarayanan S.
37	Service tax: Golden opportunity to come clean	Hindu Business Line	29-Apr-13	Pramod Bhatia
38	Tax clarity on R&D contracts	Hindu Business Line	29-Apr-13	Pallavi Singhal
39	Mergers & amalgamations: Practical issues in Cenvat	Business Standard - Personal Finance	13-May-13	Vivek Mishra
40	Domestic Transfer Pricing – Analysing the impact on Tax Holiday undertakings	International taxation magazine	20-May-13	Darpan Mehta, Jay Mankad and Sujay Thakkar.
41	Treat mergers, amalgamations practically	Business Standard - Personal Finance	27-May-13	Vivek Mishra
42	Being fair to each other's investment	Hindu Business Line	3-Jun-13	Radhakishan Rawal
43	In se@rch of tax on ads	Hindu Business Line	3-Jun-13	Saurav Bhattacharya
44	Taxman comes to grips with e-commerce	Hindu Business Line	3-Jun-13	Kaushik Mukerjee
45	Undervaluation of Shares & secondary adjustments	BNA Transfer Pricing International Journal	4-Jun-13	Rahul K Mitra and Devendra Gulati
46	Indian chapter in the form of country responses to the issue of Base Erosion & Profit Shifting	BNA Transfer Pricing International Journal	4-Jun-13	Bipin Pawar, Utpal Sen and Deepanjan Mitra
47	How your perks are taxed	Hindu Business Line	9-Jun-13	Shuddhasattwa Ghosh
48	Similar contracts can have different taxes	Business Standard - Personal Finance	10-Jun-13	Vivek Mishra
49	MRO contracts need proper documentation	Business Standard - Personal Finance	24-Jun-13	Vivek Mishra
50	"Karnataka HC Rules On Taxability Of Liaison Office"	Money Control - The Firm	24-Jun-13	Nikhil Rohera
51	Transfer Pricing Perspectives - Recent judicial developments on significant issues	International Fiscal Association's IFA-WRC Conference, 2013	5-Jul-13	Sanjay Tolia, Darpan Mehta, Jay Mankad and Vinay Desai
52	"Applicability of service tax depends on place of consumption"	Business Standard	7-Jul-13	Vivek Mishra
53	"An uncommon demerger"	Business Line	7-Jul-13	Sunil Gidwani

Sn	Particulars of Articles/ TL Publications	Where Published	Date of publication	Contributor/ Author Names
54	More people will now meet the taxman online	Business Line	7-Jul-13	M. G. Ramachandran and Aravinda A. Garikipati
55	"Regulator homes in"	Business Line	7-Jul-13	Shinjini Kumar
56	"Service tax on restaurants and hotels not Constitutional"	Business Standard	21-Jul-13	Vivek Mishra
57	Home not far	The Telegraph	29-Jul-13	Kaushik Mukherjee
58	BEPS Action Plan on Treaty Abuse and Impact on India-Mauritius Treaty	TaxSutra	31-Jul-13	Rahul Garg
59	"Why the Turnover Filter Special Bench ought to re-frame questions!"	TaxSutra	31-Jul-13	Rahul K Mitra and Darpan Mehta
60	"Dept View on Loss Set off Too Little Too Late?"	TaxSutra	5-Aug-13	Sandeep Ladda, Amit G Jain and Jigar M Mehta
61	Tribunal rules that Libor is an average rate	BNA Tax Planning International Journal	8-Aug-13	Dhaivat Anjaria, Bhavik Timbadia and Yohaan Alexander
62	Foreign rejig equals local tax	Hindu Business Line	11-Aug-13	Suresh V Swamy and Jesal S. Lakdawala
63	The ebb and flow of FDI fortunes	Hindu Business Line	12-Aug-13	Goldie Dhama and Sahil Gupta
64	The 'extra factor' of a brand	Hindu Business Line	12-Aug-13	Rakesh Mishra
65	VAT is payable on transfer of right to use	Business Standard	19-Aug-13	Vivek Mishra
66	Is it equity or is it a loan?	Financial Express	30-Aug-13	Dhaivat Anjaria and Bhavik Timbadia
67	India's Positions on OECD commentary - Recent judicial development	BNA Tax Planning International Journal	1-Sep-13	Sunil Gidwani, Geeta Bhatia and Siddharth Ajmera
68	Rs 1.27 lakh cr of indirect taxes locked up in litigation?	Business Standard	1-Sep-13	Vivek Mishra
69	More burden on India Inc	Hindu Business Line	16-Sep-13	Ketan Dalal
70	Protecting the revenue base	Hindu Business Line	16-Sep-13	Aravind Srivatsan
71	Safe harbour rules: Falling short	Hindu Business Line	16-Sep-13	Rakesh Mishra and Madhawi Rathi
72	Location Savings	IBFD	16-Sep-13	Bipin Pawar and Shlipa Udeshi
73	Tax Experts' react to final Safe Harbour Rules	TaxSutra	19-Sep-13	Rahul K Mitra
74	Service export norms get clarity	Financial Express	20-Sep-13	Vivek Mishra and Tajinder Singh
75	Impact of GAAR rules on FIIs	TaxSutra	1-Oct-13	Gautam Mehra and Nehal D Sampat
76	Govt takes first step towards bringing in GAAR regime, notifies rules	VC Circle.com	4-Oct-13	Suresh V Swamy
77	Pain or privilege	The Telegraph	7-Oct-13	Sushmita Basu and Amit Patni
78	Tribunal ruling on Sogo Shosha companies_Relevance of Berry Ratio not considered	TaxSutra	11-Oct-13	Rahul K Mitra
79	Tweak tax laws for easier cross-border mergers	Financial Express	11-Oct-13	Ashutosh Chaturvedi and Amit Agarwal
80	Will Cyclone_Companies Act_leave after effects on MAT	TaxSutra	18-Oct-13	Vishal J Shah

Sn	Particulars of Articles/ TL Publications	Where Published	Date of publication	Contributor/ Author Names
81	M Damodaran, former chairman of Sebi shows how to boost business in India	Economic Times	19-Oct-13	Ketan Dalal
82	Closing the tax litigation tap	Hindu Business Line	20-Oct-13	K Venkatachalam
83	Crossing the tax borders	Hindu Business Line	20-Oct-13	Aravind Srivatsan
84	Mauritius-New chapter on economic substance	Hindu Business Line	20-Oct-13	Pallavi Singhal and Vikash Dhariwal
85	"Safe Harbours - Can they calm the troubled waters for captive service providers for MNCs in India ?"	International taxation magazine	24-Oct-13	Rahul K Mitra and Soumitra Chakraborty
86	Ruling of Mumbai Tribunal in case of Varian India Pvt. Ltd. - India Branch Agency Permanent Establishment constitution - Life saving jacket: Documentation!	International taxation magazine	24-Oct-13	Sandeep Ladda, Poonam Prabhu and Rachna Gurnani
87	Indian chapter in the form of country response to the issue relating to OECD's white paper on transfer pricing documentation	BNA Transfer Pricing International Journal	30-Oct-13	Indraneel R Chaudhury, Suchint Majmudar, Ganesh Krishnamurthy and Shilpa S
88	Safe Harbours - Can they calm the troubled waters for captive service providers for MNCs in India?	International Taxation	Oct-13	Rahul K Mitra and Soumitra K Chakraborty
89	Ruling of Mumbai Tribunal in case of Varian India Pvt. Ltd. - India Branch Agency Permanent Establishment constitution - Life saving jacket: Documentation !	International Taxation	Oct-13	Sandeep Ladda, Poonam Prabhu and Rachna Gurnani
90	Mauritius gears up for Indian GAAR	Financial Express	8-Nov-13	Nikhil Rohera and Ravindra Agrawal
91	Cyprus faces taxman's ire	Hindu Business Line	25-Nov-13	Kaushik Mukerjee and Gaurav Bajoria
92	Partners in tax avoidance	Hindu Business Line	25-Nov-13	Sandip Mukherjee and Kaushik Saranjame
93	Preference shares to take the limelight	Business Standard	25-Nov-13	Hemal Uchat and Abhijeet Shah
94	Reducing the tax baggage on international secondments	Hindu Business Line	25-Nov-13	Pramod Banthia and Keyur J Shah
95	Verizon Ruling:Taxability Of Bandwidth Payments	Money Control - The Firm	27-Nov-13	Sandeep Chaufla and Prabhat Lath
96	Bombay HC Sends Vodafone TP Case to DRP	Money Control - The Firm	2-Dec-13	Rahul K Mitra
97	Gift amounts over Rs 50,000	Financial Express	10-Dec-13	Nilesh Mody
98	Marketing Intangibles - A Tale of three ITAT rulings!	TaxSutra	23-Dec-13	Kunj Vaidya and Nishant Saini
99	Have we missed the DTC bus?	Hindu Business Line	30-Dec-13	Vikram Bapat
100	Seeking a writ remedy in tough tax times	Hindu Business Line	30-Dec-13	Pallavi Singhal

List of News Alerts/Flashes from 1 January 2013 to 31 December 2013

Sn	Date	Topic	Case name / Notification / Circular number
1	2-Jan-13	Amount paid to a non-resident 'net of taxes' to be grossed up at the 'rates in force'	Bosch Ltd *v.* ITO [2012] 28 taxmann.com 228 (Bang-Tribunal)
2	4-Jan-13	Section 92B(2) not applicable to transactions between domestic entities	Swarnandhra IJMII Integrated Township Development Co. Pvt. Ltd. *v.* DCIT [TS-762-ITAT-2012 (HYD)]
3	9-Jan-13	India signs social security agreements with Finland, Canada and Sweden	India signs social security agreements with Finland, Canada and Sweden: http://moia.gov.in/services.aspx?ID1=285&id=m4&idp=81&mainid=73
4	14-Jan-13	Revision proceedings valid despite in-depth examination of claim by tax officer	Cairn Energy India Pvt Ltd *v.* DIT [TS-921-ITAT-2012(CHNY)]
5	14-Jan-13	Update on India General Anti-Avoidance Rules	Key Takeaways from the Finance Minister's Press Statement on the General Anti-Avoidance Rules (GAAR) provisions
6	17-Jan-13	Book adjustments constitutes "actual payment" for the purpose of section 43B of the Income-tax Act, 1961	CIT *v.* Shakti Spring Industries Pvt. Ltd. [TS-4-HC-2013(JHAR)]
7	18-Jan-13	Lessor eligible to claim depreciation on leased vehicles as it is the owner and the user	I.C.D.S. Ltd. *v.* CIT [TS-8-SC-2013]
8	21-Jan-13	Clarification on direct tax benefits under sections 10A, 10B and 10AA of the Act relating to export of computer software	CBDT Circular no. 01/2013 dated 17 January 2013
9	22-Jan-13	External commercial borrowing for hotel industry	Reserve Bank of India (RBI) Circular No. A.P. (DIR Series) Circular No. 78 dated 21 January, 2013
10	24-Jan-13	Special Bench ruling on marketing intangibles in case of LG Electronics India Pvt. Ltd.	LG Electronics India Pvt. Ltd. *v.* ACIT [2013] 29 taxmann.com 300 (Delhi) (SB)
11	25-Jan-13	Transfer of shares through a share transfer agreement including indirect transfer of immovable property does not invoke deeming fiction of section 50C	Irfan Abdul Kader Fazlani *v.* ACIT [TS-21-ITAT-2013 (Mum)]
12	28-Jan-13	Applicability of a tax treaty to a limited partnership in Germany is governed by the specific provisions of the relevant tax treaty and not by the OECD commentary	DIT (IT) *v.* Chiron Behring GmbH & Co. [TS-12-HC-2013 (BOM)]
13	30-Jan-13	No disallowance of depreciation on brand items for not withholding tax; Disallowance on failure to withhold tax on royalty payment under section 40(a)(i) not applicable as it does not cover computer software referred to in Explanation 4 to section 9(1)(vi)	SKOL Breweries Ltd *v.* ACIT [TS-20-ITAT-2013(Mum)]
14	1-Feb-13	Expenditure incurred outside the R & D facility is eligible for benefit of weighted deduction	Cadila Healthcare Ltd *v.* Addl CIT [2013] 29 taxmann.com 229 (Ahd)
15	4-Feb-13	Exemption from open offer obligation will be available on inter se transfer amongst promoters under the SEBI Takeover Code where transferor(s) as well as transferee(s) collectively hold shares of the target company for a period of at least three years	SEBI informal guidance CFD/PC/IG/CB/2three756/12 dated 25 October, 2012
16	6-Feb-13	SEBI modifies modus operandi for listed companies proposing to enter into scheme of arrangement under sections 391-394 or 101 of the Companies Act, 1956. The Regulator has drawn new set of guidelines, driven with the motive of better corporate governance	SEBI Circular: CIR/CFD/DIL/5/2013 issued on 4 February 2013

Sn	Date	Topic	Case name / Notification / Circular number
17	7-Feb-13	Royalty income held to be taxable on receipt basis under the tax treaty	Johnson & Johnson *v.* ADIT(IT) [TS-39-ITAT-2013(Mum)]
18	8-Feb-13	Income from investments under discretionary portfolio management scheme taxable as capital gains and not as business income	Salil Shah Family Pvt. trust *v.* ACIT [TS-40-ITAT-2013 (Mum)]
19	11-Feb-13	Royalty payment for use of licensed patent technology by a non-resident to another non-resident not taxable	Qualcomm Incorporated *v.* ADIT [TS-35-ITAT-2013(DEL)]
20	13-Feb-13	Revisionary powers available to CIT invalid where AO adopts 'either perfectly correct or a possible view'	Reliance Communications Ltd *v.* ACIT [TS-48-ITAT-2013(Mum)]
21	13-Feb-13	Fee towards IT support services not taxable as royalty or fees for technical services under the India-Australia tax treaty	Sandvik Australia Pty. Ltd. *v.* DDIT [TS-46-ITAT-2013(Pune)]
22	26-Feb-13	Service Tax Return Form ST 3 revised	Service Tax Notification No. 01/2013 dated 22 February, 2013
23	26-Feb-13	CBDT notifies form for claiming TDS refund and modifies existing TDS forms	CBDT Notification No. 11 Date of Issue: 19/2/2013
24	6-Mar-13	Composition Scheme for the Works Contractors introduced under Delhi VAT	Delhi VAT Notification No. 3(13)/Fin.(Rev-I)/2012-13/dsvi/180 on 28 February, 2013
25	12-Mar-13	Capital gains arising out of transfer of shares of a non-resident company between two non-residents not taxable in India and lifting of corporate veil is not warranted	Sanofi Pasteur Holding SA *v.*The Department of Revenue [TS-57-HC-2013(AP)]
26	21-Mar-13	Application for stay cannot be treated as meaningless formalities and should be objectively and dispassionately disposed off at an early stage	Society of the Franciscan (Hospitaller) Sisters *v.* DDIT (Exemptions) [TS-102-HC-2013(BOM)]
27	29-Mar-13	CBDT circulars on application of profit split method and on identification of contract R&D service provider with insignificant risk	CBDT circulars 2 of 2013 and 3 of 2013
28	2-Apr-13	Retrospective amendment bringing the 'provision for diminution in the value of any asset' within the ambit of minimum alternate tax held to be constitutionally valid	Whirlpool of India Ltd *v.*UOI [TS-101-HC-2013(DEL)]
29	10-Apr-13	International in-bound roaming service – Export of services	Vodafone Essar Cellular Ltd. *v.* CCE [2013-TIOL-566-CESTAT-MUM]
30	18-Apr-13	Highlights of the Annual Supplement 2013-14 to Foreign Trade Policy	Annual Supplement to Foreign Trade Policy 2009-14, dated 18 April 2013
31	22-Apr-13	Tolerance band for FY 2012-13 notified – 1% for wholesale traders and 3% for others	CBDT Circular No.30/2013, dated 15 April 2013
32	23-Apr-13	RBI guidelines issued for FEMA purposes only, not relevant for computing capital gains under the Income tax act	Zeppelin Mobile System GmbH. *v.* Add DIT [2013] 32 taxmann.com 250 (Del-Trib)
33	23-Apr-12	Commission paid for procuring export orders not taxable in India despite withdrawal of Circulars	Gujarat Reclaim & Rubber Products Ltd. *v.* Add CIT [TS-153-ITAT-2013(Mum)]
34	30-Apr-13	Virtual presence through websites do not create PE in India - Payment to Google / Yahoo for online advertisements are not taxable in India as Fees for Technical Service either	ITO *v.* Right Florists Pvt. Ltd. [TS-137-ITAT-2013 (Kol)]
35	2-May-13	Key amendments to Finance Bill, 2013	
36	3-May-13	Section 92B(2) not applicable where (i) transaction is between domestic entities (ii) global agreement has no role in/ effect on relevant transaction	Kodak India Pvt. Ltd. *v.*ACIT [TS-93-ITAT-2013(Mum)]
37	14-May-13	Finance Act, 2013 has received the assent of the President of India	

Sn	Date	Topic	Case name / Notification / Circular number
38	17-May-13	Tribunal endorses adjustment to account for foreign exchange rate fluctuation	Honda Trading Corporation India Pvt. Ltd *v.* ACIT [TS-135-ITAT-2013(DEL)-TP]
39	17-May-13	CBDT publishes APA Guidance with FAQs	http://www.incometaxindiapr.gov.in/incometaxindiacr/contents/tpi/Advance-Pricing-Agreement-Guidance-with-FAQs-(TPI-43).pdf
40	20-May-13	Service Tax Voluntary Compliance Encouragement Scheme, 2013	Circular No. 169/4 /2013 - ST
41	21-May-13	Tribunal rules that LIBOR is an average rate	The Development Bank of Singapore *v.* DDIT (IT) [TS-112-ITAT-2013(Mum)-TP]
42	24-May-13	Tax holiday under section 10B is undertaking-specific and available post slump sale as change in ownership cannot be construed as reconstruction	Woco Motherson Elastomer Ltd. *v.* DCIT [TS-200-ITAT-2013 (Del)]
43	27-May-13	TDS not applicable on reimbursement of salary and other associated costs of deputed employees	CMS (India) Operations and Maintenance Co Pvt Ltd *v.* ITO [TS-204-ITAT-2013 (CHNY)]
44	28-May-13	Revised Circular for requirements for listed companies undertaking scheme of arrangement	SEBI Circular No. CIR/CFD/DIL/8/2013 dated 21 May 2013
45	29-May-13	Allowability of the payment of employees' contributions to EPF/ESIC under section 43B beyond due dates specified in the relevant statutes, but before due date of filing the return of income	CIT *v.* Kichha Sugar Company Ltd [TS-211-HC-2013 (Utt)] & LKP Securities Ltd *v.* ITO [TS-203-ITAT-2013 (Mum)]
46	3-Jun-13	The set-up date of a business is the date on which its first essential activity is initiated	CIT *v.* Dhoomketu Builders and Development Pvt. Ltd. [TS-190-HC-2013(DEL)]
47	4-Jun-13	Salary payments to non-residents to be allowed as a deduction in the previous year in which withholding tax is paid	Tianjin Tianshi India Pvt. Ltd v. ITO [TS-217-ITAT-2013(Del)]
48	4-Jun-13	United Nations releases final version of its "Practical Manual on Transfer Pricing for Developing Countries"	UN TP Practice Manual
49	5-Jun-13	The CBDT notifies new rules for tax withholding on immovable property with a transaction value of INR five million or more under section 194-IA	CBDT Notification no. SO 1404(E), dated 31 May 2013
50	7-Jun-13	No withholding tax under section 194C on payments by multi-system operators to channel companies	ITO *v.* Bal Kishan Gupta [TS-213-ITAT-2013 (AGR)]
51	13-Jun-13	Indian transfer pricing certification – Revised form to increase taxpayer reporting requirements	CBDT Notification nos. 41/2013 and 42/2013 dated 11 June 2013
52	13-Jun-13	Provisions of section 145A of the Income-tax Act should be scrupulously followed for valuing inventory to determine the correct taxable income	Hercules Pigment Industry *v.* ITO [TS-218-ITAT-2013(Mum)]
53	14-Jun-13	No income accrues or arises in India to a non-resident assessee on carrying out sourcing activities for its affiliates or buyers through a liaison office established in India; Activities limited to quality check to make goods suitable for international ma	CIT *v.*Nike Inc [TS-248-HC-2013(Kar)]
54	17-Jun-13	Execution of a development agreement by itself does not give rise to transfer under the Income-tax Act; all conditions laid down in section 2(47)(v) of the Income-tax Act read with section 53A of the Transfer of Property Act need to be fulfilled	Sri S. Ranjith Reddy *v.* DCIT [TS-254-ITAT-2013(HYD)]
55	17-Jun-13	Sale of a company's shares cannot be treated as sale of immovable property held by that company merely because the transaction escaped taxation	Bhoruka Engineering Inds. Ltd. *v.* DCIT [TS-252-HC-2013(KAR)]
56	18-Jun-13	Operational subsidies are eligible for tax holiday if there is a direct link between the subsidies and manufacturing activities	CIT *v.* Meghalaya Steels Ltd. [TS-241-HC-2013(Gauh)]

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57	21-Jun-13	Amendments by the Finance Act 2011 to levy minimum alternate tax and dividend distribution tax on units operating in special economic zones (SEZs) (including units engaged in development or operation or maintenance of SEZs) held to be constitutionally val	Mindtree Ltd. *v.* Union of India [2013] 34 taxmann.com 250 (Karnataka)
58	26-Jun-13	SEBI has notified amendments to the existing share buy-back regulations - Norms set to be tightened	SEBI Press Release No.60/2013
59	27-Jun-13	Changes in the Indian Exchange Control Regulations	A.P. (DIR Series) Circular No. 108 dated June 11, 201
60	28-Jun-13	Subsequent amendments in TDS law doesn't alter liability for amounts already credited	Wifi Networks Ltd. *v.* DCIT [TS-282-ITAT-2013(Bang)]
61	1-Jul-13	CBDT issues revised guidance on contract R&D centres	CBDT Circular 5/ 2013 (dated June 29, 2013); Circular 6/ 2013 (dated June 29, 2013)
62	3-Jul-13	Client acquisition cost held to be an intangible asset being "business and commercial rights of similar nature", eligible for depreciation allowance under section 32(1)(ii) of the Income-tax Act	SKS Micro Finance Ltd. *v.* DCIT [TS-283-ITAT-2013(Hyd)]
63	3-Jul-13	Service tax exemption on services received by SEZ units and the developer	Service tax Notification No. 12/2013 on 1 July 2013
64	3-Jul-13	Taxpayer is eligible to claim depreciation on an asset not registered in its name, but under its dominion control, and utilised for its business purposes	Swagat Infrastructure Ltd. *v.* JCIT [TS-287-ITAT-2013(Ahd)]
65	8-Jul-13	Operationalisation of the guidelines for foreign investment in India	A.P. (DIR Series) Circular No.01 dated July 4, 2013
66	9-Jul-13	Royalty payout upheld – taxpayer not a contract manufacturer	Samsung India Electronics Private Limited *v.* ACIT [2013] 34 taxmann.com 299 (Delhi - Trib.),
67	12-Jul-13	India appoints a new Competent Authority	CBDT Order No.176/2013
68	17-Jul-12	External Commercial Borrowing – USD 10 billion scheme extended for repayment of Rupee loan availed for outbound investment	A.P. (DIR Series) Circular No. 12 dated July 15, 2013
69	18-Jul-13	Enhancement in foreign investment caps	FIPB Press Note No.6 (2013 series)
70	23-Jul-13	Discount on issue of Employee's stock options is allowable as revenue expenditure	Biocon Ltd. *v.* DCIT [TS-322-ITAT-2013(Bang)]
71	25-Jul-13	PwC's views on OECD's recently announced Action Plan on the Base Erosion and Profit Shifting	OECD's action plan on BEPS
72	31-Jul-13	Where the associated enterprise, which is also a dependent agent PE, is remunerated at arm's length, nothing further remains to be attributed to the PE	ANL Singapore Pte. Ltd *v.* DDIT(IT) [TS-194-ITAT-2013(Del)-TP]
73	1-Aug-13	OECD White Paper on Transfer Pricing Documentation proposes coordinated approach based on a two-tier structure	OECD
74	1-Aug-13	OECD Project on Intangibles: Revised Discussion Draft released	OECD
75	3-Aug-13	Another step towards economic reforms - FDI Policy liberalisation	Press Release dated 1 August 2013 issued by the Press Information Bureau, Government of India Press notes 4, 5 and 6 (2013 series) dated 22 August 2013 issued by Department of Industrial Policy and Promotion, Government of India
76	5-Aug-13	Benefit under section 80-IB of the Income-tax Act, 1961 shall be available for each eligible unit, without setting off losses from other eligible units	Shriram Properties Pvt. Ltd. *v.* ACIT [TS-334-ITAT-2013(CHNY)]
77	8-Aug-13	CBDT prescribes furnishing of additional information along with Tax Residency Certificate to claim tax treaty benefits	CBDT Notification no. 57/ 2013 [F. No. 142/16/2013-TPL]/SO 2331(E), dated 1 August 2013

Sn	Date	Topic	Case name / Notification / Circular number
78	9-Aug-13	Suzuki Brand not benefitted by piggybacking on Maruti, Royalty addition deleted	M/s Maruti Suzuki India Limited [ITA No. 5237/Del/2011]
79	12-Aug-13	After considering divergent judicial views, Tribunal upholds selection of foreign AE as tested party in accordance with international best practices	General Motors India P Ltd *v.* DCIT [ITA nos. 3096/Ahd/2010 and 3308/Ahd/2011]
80	12-Aug-13	HC holds in favour of expatriate taxpayers on taxability of several items	Yoshio Kubo *v.* CIT [2013] 36 taxmann.com 1 (Delhi)
81	13-Aug-13	Interest-free loans: Tribunal acknowledges economic substance	Micro Inks Ltd. *v.*ACIT [2013] 36 taxmann.com 50 (Ahd - Trib)
82	13-Aug-13	CBDT notifies revised Forms 15CA and 15CB to increase reporting requirements on payments to non-residents	CBDT Notification No. 58 dated August 5, 2013
83	13-Aug-13	The Department of Commerce amends the SEZ Rules	Circular
84	15-Aug-13	CBDT releases Draft Safe Harbour Rules	CBDT Notification: http://incometaxindia.gov.in/archive/BreakingNews_DraftSafe_14082013.pdf
85	22-Aug-13	Changes in the Indian Exchange Control Regulations - LRS and ODI	A.P. (DIR Series) Circular No. 24 dated August 14, 20132. A.P. (DIR Series) Circular No. 23 dated August 14, 20133. Notification No. FEMA.263/RB-2013 dated March 05, 2013
86	23-Aug-13	No separate compensation necessary for excessive AMP when sufficient profits received by distributor as part of pricing; SB ruling in LG Electronics case distinguished	Marketing Intangibles Delhi Tribunal
87	3-Sep-13	Agreement on social security with the Republic of Hungary comes into force on 1 April 2013	Circular No. HO No. IWU/7(10)2008/Hungary/9829 dated 29/08/2013
88	4-Sep-13	PwC Netherlands' Newsflash on Unilateral Changes in Dutch International Tax Policy	PwC Netherlands Alert
89	5-Sep-13	External Commercial Borrowings - end use liberalisation - general corporate purposes	A.P. (DIR Series) Circular No. 31 dated September 4, 2013
90	6-Sep-13	Overseas Direct Investments ('ODI') – Clarification with respect to revised guidelines	A.P. (DIR Series) Circular No. 30 dated September 4, 2013.
91	10-Sep-13	Interest received for delay in completion of the process of buy-back of shares under open offer to be treated as capital gains and not interest income	Genesis Indian Investment Company Ltd. *v.* CIT(A) [TS-405-ITAT-2013 (Mum)]
92	10-Sep-13	Share allotment at premium by a newly incorporated Company is neither sham nor income	Green Infra Ltd. *v.* ITO [TS-420-ITAT-2013(Mum)]
93	12-Sep-13	Acquisition of shares of listed Indian Company on Stock Exchange under the Foreign Direct Investment scheme	A.P. (DIR Series) Circular No. 30 dated September 4, 2013
94	12-Sep-13	Liberalised Remittance Scheme – Clarification with respect to revised guidelines	A.P. (DIR Series) Circular No. 32 dated September 4, 2013
95	13-Sep-13	Compensation for takeover of key employees on contract cancellation is a capital receipt	3i Infotech Ltd. *v.* ACIT [TS-417-ITAT-2013(Mum)]
96	17-Sep-13	Transfer of business without monetary consideration not taxable as 'slump sale' under section 50B read with section 2(42C) of the Income-tax Act, 1961	ITO *v.* M/s Zinger Investments (P) Ltd [TS-437-ITAT-2013(Hyd)]
97	18-Sep-13	External Commercial Borrowing ('ECB') – Clarity on definition of Infrastructure sector	FEMA Notification No.281 dated July 19, 2013 with effect from September 12, 2013 (date of publication in the Official Gazette)
98	19-Sep-13	Changes made in the Final Safe Harbour Rules	CBDT Notification: 73/2013, Dated: September 18, 2013
99	19-Sep-13	For provident fund contributions, canteen allowance paid to all permanent employees of a company to be included as part of basic wages	M/s Whirlpool of India Ltd *v.* Regional PF Commissioner [W.P.(C.) 7729/1999] dated 22.07.2013 (Delhi HC)

Sn	Date	Topic	Case name / Notification / Circular number
100	20-Sep-13	The Delhi VAT (Amendment) Act, 2013 – Severely enhanced penalties	Delhi VAT (Notification No.F.14(5)/LA-2013/cons2law/65 dated 9 Sep, 2013 and Notification No. F.3(14)Fin.(Rev.-I)2013-14/ds VI/703 dated 11 Sep, 2013)
101	26-Sep-13	Reimbursement of salary costs under secondment agreement not FTS; services rendered by seconded employees do not constitute a Service PE	Temasek Holdings Advisors India Pvt. Ltd. v. DCIT [2013-TII-163-ITAT-MUM-INTL]
102	27-Sep-13	Rules on application of GAAR Provisions Notified by Government of India	Notification No. 75 dated: 23/9/2013
103	30-Sep-13	Protocol to India-Australia Tax Treaty	Notification No. 74/2013 (F. No. 503/1/2009-FTD-II) dated 20 September 2013
104	1-Oct-13	SC larger bench rules in that VAT arises on sale of flats	K Raheja Development Corporation *v.* State of Karnataka (2005) 5 SCC 162
105	11-Oct-13	SEBI releases Draft REIT Regulations	SEBI Press Release No. 101/2013, http://www.sebi.gov.in/cms/sebi_data/attachdocs/1381398382013.pdf
106	17-Oct-13	Long-term capital gains on transfer of listed securities by a non-resident in an off-market transaction to be taxed at 10%	Cairn UK Holdings Ltd *v.* DIT [2013] 38 taxmann.com 179 (Delhi)
107	21-Oct-13	Borrower's credit analysis core to loan decision - Tribunal upholds profit attribution to PEs of banks @ 20% of fee component	Credit Lyonnais *v.* ADIT (International Taxation) Rg-1 [ITA No.1935/Mum/2007, and ITA No.2032/Mum/2007, Assessment Year 2002-03] and [ITA No.2401/Mum/2009, ITA No.2384/Mum/2009 andC.O.No.205/Mum/2009 for Assessment Year 2003-04]
108	25-Oct-13	Due date' for electronically furnishing of audit reports and corresponding income tax returns extended to 31 October 2013	CBDT Order F. No. 225/117/2013 ITA II dated 24 October 2013
109	28-Oct-13	Payment made under a management service agreement is covered within the expression 'fees for included services' – hence taxable and subject to withholding tax under section 195	US Technology Resources Pvt. Ltd. *v.* ACIT [ITA No.222/Coch/2013, AY 2007-08, ITAT-Cochin]
110	28-Oct-13	Time charter and bare boat charter-cum-demise hire charges held as payment for 'use of ship' covered within meaning of 'royalty' - term 'equipment' includes ship	Poompuhar Shipping Corporation Ltd. *v.* ITO; West Asia Maritime Ltd. *v.* ITO; and Asst Director of Income-Tax *v.* Poompuhar Shipping Corporation [TS-528-HC-2013(Mad)]
111	6-Nov-13	Hiring employees of foreign holding/group companies cannot be taxed as 'manpower supply service'	Volkswagen India Pvt Ltd *v.* CCE (2013-TIOL-1640-CESTAT-MUM)
112	8-Nov-13	Loss incurred on forward contracts to hedge losses on forex receivables is a business loss, and not a speculative loss	London Star Diamond Company (I) Pvt. Ltd. *v.* DCIT [2013] 38 taxmann.com 338 (Mum-Trib)
113	14-Nov-13	Request for refund of Excess TDS deposited has been enabled on TRACES	TRACES Circular
114	14-Nov-13	The Tamil Nadu VAT (Fifth Amendment) Act, 2013	Notification No. G.O.Ms. No. 139; No. II(2)/CTR/850(e)/2013 dated 8 November, 2013
115	18-Nov-13	Existence of arrangement which results in more than ordinary profits is necessary to invoke section 80IA(10)	ITO *v.* Zydus Nycomed Healthcare Pvt. Ltd [TS-553-ITAT-2013(Mum)]

Sn	Date	Topic	Case name / Notification / Circular number
116	28-Nov-13	Change in shareholding triggers section 79 of the Income-tax Act 1961 even if within the group	Just Lifestyle Pvt Ltd *v.* DCIT [TS-562-ITAT-2013(Mum)]
117	1-Dec-13	HC gives option to Vodafone to again file writ if DRP decision 'patently illegal'	Vodafone India Services (P) Ltd. *v.*UOI [2013] 39 taxmann.com 201 (Bombay)
118	4-Dec-13	Cyprus-India update - Press release issued by the Cyprus Ministry of Finance	http://www.moi.gov.cy/moi/pio/pio.nsf/All/381EC9C535F82086C2257C360036556A?Opendocument
119	5-Dec-13	Going concern applies to 'transfer', not to the 'demerged unit'	KBD Sugars & Distilleries Ltd *v.* ACIT [TS-595-ITAT-2013 (Bangalore-Trib.)]
120	9-Dec-13	Income of Foreign Institutional Investors from dealing in derivatives taxable as capital gains and not business income	Platinum Asset Management Ltd. *v.* DDIT [TS-610-ITAT-2013(Mum)]
121	10-Dec-13	External Commercial Borrowing for Special Purpose Vehicles in infrastructure sector	A.P. (DIR Series) Circular No. 78 dated December 3, 2013
122	11-Dec-13	Bank guarantees and corporate guarantees distinguished / Naked bank quotes not good external CUP's	Glenmark Pharmaceuticals Limited *v.* ACIT [TS-329-ITAT-2013(Mum)-TP]
123	16-Dec-13	Clear and unambiguous direction must to initiate penalty proceedings	CIT *v.* M/s MWP Ltd [TS-617-HC-2013(KAR)]
124	18-Dec-13	Draft CENVAT credit rule on distribution of input service credit by ISD	Circular No. F. No. 354/246/2012-TRU, http://www.cbec.gov.in/draft-circ/dft-amdmt-cenvatrules.htm
125	24-Dec-13	Special Bench ruling on LG Electronics is applicable to all classes of assessees, whether they are licensed manufacturers or distributors, irrespective of their risk profile	Casio India Co. (P) Ltd. I.T.A. No. 6135/Del/2012 & I.T.A. No. -5166/Del/2012

Newsletters

PwC thought leadesrhip - Newsletters released from 1 January 2012 to 31 December 2013

Sn	Month	Title
1	January	PwC Refresh - January 2013
2	January	PwC India Spectrum - January 2013
3	January	PwC Indirect Tax Newsletter - January 2013
4	January	PwC Customs, FTP & WTO Newsletter - January 2013
5	February	PwC Refresh - February 2013
6	February	PwC India Spectrum - February 2013
7	February	PwC Indirect Tax Newsletter - February 2013
8	February	PwC Customs, FTP & WTO Newsletter - February 2013
9	March	PwC Refresh - March 2013
10	March	PwC India Spectrum - March 2013
11	March	PwC Indirect Tax Newsletter - March 2013
12	March	PwC Customs, FTP & WTO Newsletter - March 2013
13	April	PwC Refresh - April 2013
14	April	PwC India Spectrum - April 2013
15	April	PwC Indirect Tax Newsletter - April 2013
16	April	PwC Customs, FTP & WTO Newsletter - April 2013
17	May	PwC Refresh - May 2013
18	May	PwC India Spectrum - May 2013
19	May	PwC Indirect Tax Newsletter - May 2013
20	May	PwC Customs, FTP & WTO Newsletter - May 2013
21	June	PwC Refresh - June 2013
22	June	PwC India Spectrum - June 2013
23	June	PwC Indirect Tax Newsletter - June 2013
24	June	PwC Customs, FTP & WTO Newsletter - June 2013
25	July	PwC Refresh - July 2013
26	July	PwC Indirect Tax Newsletter - July 2013
27	July	PwC Customs, FTP & WTO Newsletter - July 2013
28	August	PwC Refresh - August 2013
29	August	PwC Indirect Tax Newsletter - August 2013
30	August	PwC Customs, FTP & WTO Newsletter - August 2013
31	September	PwC Refresh - September 2013
32	September	PwC India Spectrum - August-September 2013
33	September	PwC Indirect Tax Newsletter - September 2013
34	September	PwC Customs, FTP & WTO Newsletter - September 2013
35	October	PwC Indirect Tax Newsletter - October 2013
36	October	PwC Customs, FTP & WTO Newsletter - October 2013
37	November	PwC India Spectrum - October-November 2013
38	November	PwC Indirect Tax Newsletter - November 2013
39	November	PwC Customs, FTP & WTO Newsletter - November 2013
40	December	PwC Refresh - November-December 2013
41	December	PwC Indirect Tax Newsletter - December 2013
42	December	PwC Customs, FTP & WTO Newsletter - December 2013

List of Tax Information Exchange Agreements (TIEAs)

Sn	Country	Notification No. and Date	Date when signed	Date of coming into force
1	Bermuda	Notification No. 5/2011 [F. NO. 503/2/2009-FTD-I], dated 24-1-2011	7 October 2010	3 November 2010
2	Bahamas	Notification No. 25/2011 [F.NO. 503/6/2009-FTD-I], dated 13-5-2011	11 February 2011	11 February 2011
3	Isle of Man	Notification No. 26/2011 [F.NO. 503/01/2008 - FTD-I], dated 13-5-2011	4 February 2011	17 March 2011
4	British Virgin Islands	Notification No. 54/2011 [F.NO. 503/10/2009-FTD-I], dated 3-10-2011	9 February 2011	22 August 2011
5	Cayman Islands	Notification No.61/2011[F.NO.503/03/2009-FTD-I]/S.O. 2902(E), dated 27-12-2011	22 August 2011	8 November 2011
6	Jersey	Notification No. 26/2012 [F. NO. 503/6/2008-FTD-I]/S.O. 1541(E), dated 10-7-2012	8 November 2011	8 March 2012
7	Gibraltar	Notification No. 28/2013 [F. No. 503/11/2009-FTD-I]/S.O. 924(E), dated 01-04-2013	8 March 2012	11 March 2013
8	Guernsey	Notification No. 30/2012 [F. NO. 503/1/2009-FTD-I]/SO 1782(E), dated 9-8-2012	11 March 2013	11 June 2012
9	Liberia	Notification No. 32/20012-FT&TR-II [F.NO. 503/02/2010-FT&TR-II]/SO 1877(E), dated 17-8-2012	11 June 2012	30 March 2012
10	Monaco	Notification No.43/2012[F.NO.503/04/2009-FT&TR-II]/SO 2427(E), dated 10-10-2012	30 March 2012	3 April 2013

List of Social Security Agreements (SSA)

Sn	Country Name	Date when signed	Date of coming into force
1.	Belgium	3 November 2006	1 September 2009
2.	Germany	8 October 2008	1 October 2009
3.	Hungary	3 February 2010	1 April 2013
4.	Switzerland	3 September 2009	29 January 2011
5.	Luxembourg	30 September 2009	1 June 2011
6.	France	30 September 2008	1 July 2011
7.	Denmark	17 February 2010	1 May 2011
8.	Korea	19 October 2010	1 November 2011
9.	Netherlands	22 October 2009	1 December 2011

Signed but not notified

- *Czech Republic – On 8 June 2010*
- *Norway – On 29 October 2010*
- *Finland – On 12 June 2012*
- *Canada – On 6 November 2012*
- *Japan – On 16 November 2012*
- *Sweden – On 26 November 2012*
- *Austria – 4 February 2013*
- *Portugal – 4 March 2013*
- *Germany – 12 October 2011*

Double Taxation Avoidance Agreements

Sn	Country	Notification No. and Date	Date when signed	Date of coming into force
1	Albania	Notification No. 2/2014 [F. No. 501/1/2003-FTD-I]/SO 47(E), dated 6-1-2014	8 July 2013	6 January 2014
2	Armenia	Notification No. GSR 800E, dated 8-12-2004	31 October 2003	1 April 2005
3	Australia	Notification No. GSR 60(E), dated 22-1-1992	25 July 1991	1 April 1992
4	Austria	Notification No. GSR 682(E), dated 20-9-2001	8 November 1999	1 April 2002
5	Bangladesh	Notification No. GSR 758(E), dated 8- 9-1992	27 August 1991	1 April 1993
6	Belarus	Notification No. GSR 392(E), dated 17-7-1998	27 September 1997	1 April 1999
7	Belgium	Notification No. GSR 632(E), dated 31-10-1997, as amended by Notification No. SO 54(E), dated 19-1-2001. Earlier agreement was entered into vide GSR 323(E), dated 6-6-1975 which was later amended by GSR 321(E), dated 2-3-1988. Circular No. 553, dated 13-2-1990 dealt with the old agreement.	26 April 1993	1 April 1998
8	Botswana	Notification No. 70/2008-FTD, dated 18-6-2008	8 December 2006	1 April 2008
9	Brazil	Notification No. GSR 381(E), dated 31-3-1992	26 April 1988	1 April 1993
10	Bulgaria	Notification No. GSR 205(E), dated 9-5-1996	26 May 1994	1 April 1996
11	Canada	Notification No. SO 28(E), dated 15-1-1998. Earlier agreement was entered into vide GSR 1108(E), dated 25-9-1986, as amended by GSR 635(E) dated 24-6-1992. Circular No. 638, dated 28-10-1992 dealt with this agreement.	11 January 1996	1 April 1998
12	China	Notification No. GSR 331(E), dated 5-4-1995	18 July 1994	1 April 1995
13	Cyprus	Notification No. GSR 805(E), dated 26-12-1995	13 June 1994	1 April 1993
14	Czech Republic	Notification No. GSR 811(E), dated 8-12-1999	1 October 1998	1 April 2000
15	Denmark	Notification No. GSR 853(E), dated 25-9-1989	8 March 1989	1 January 1990
16	Egypt (U.A.R.)	Notification No. GSR 2363, dated 30-9-1969	20 February 1969	1 January 1969
17	Estonia	Notification No. 27/2012 [F.NO.503/02/1997- FTD-1]/SO NO. 1677(E), dated 25-7-2012	19 September 2011	1 April 2013
18	Ethiopia	Notification No. 14/2013 [FT & TR-II/F. No. 503/01/1996-FT&TR-II], dated 21-02-2013	25 May 2011	8 July 2013
19	Finland	Notification No. 36/2010 [F. NO. 501/13/1980-FTD-I], dated 20-5-2010	15 January 2010	1 April 2011
20	France	Notification No. 9602 [F. No. 501/16/80-FTD], dated 6-9-1994, as amended by Notification No. SO 650(E), dated 10-7-2000	29 September 1992	1 April 1995
21	Georgia	Notification No. 4/2012[F.NO.503/05/2006-FTD.I], dated 6-1-2012	24 August 2011	1 April 2012
22	Germany	Notification No. SO 836(E), dated 29-11-1996. Earlier an agreement was entered with Federal German Republic vide GSR 1090, dated 13-9-1960 and vide GSR 107(E), dated 2-3-1990 and agreement was entered with German Democratic Republic. Circular No. 659, dated 8-9-1993.	19 June 1995	1 April 1997
23	Greece	Notification No. GSR 394, dated 17-3-1967	11 February 1965	1 April 1964

Sn	Country	Notification No. and Date	Date when signed	Date of coming into force
24	Hashemite Kingdom of Jordan	Notification No. GSR 810(E), dated 8-12-1999	20 April 1999	1 April 2000
25	Hungary	Notification No. GSR 197(E), dated 31-3-2005	3 November 2003	1 April 2006
26	Iceland	Notification No. S.O. 241(E), dated 5-2-2008	23 November 2007	1 April 2008
27	Indonesia	Notification No. GSR 77(E), dated 4-2-1988	7 August 1987	1 April 1988
28	Ireland	Notification No. 45/2002 [F. No. 503/6/99-FTD], dated 20-2-2002	6 November 2000	1 April 2002
29	Israel	Notification No. GSR 256(E), dated 26-6-1996	29 January 1996	1 April 1994
30	Italy	Notification No. GSR 189(E), dated 25-4-1996. Earlier agreement was entered into vide GSR 608(E), dated 8-4-1986	19 February 1993	1 April 1996
31	Japan	Notification No. GSR 101(E), dated 1-3-1990, as amended by Notification Nos. SO 753(E), dated 16-8-2000 (w.r.e.f. 1-10-1999), SO 1136(E), dated 19-7-2006, w.r.e.f. 28-6-2006 and SO 2528(E), dated 8-10-2008, w.e.f. 1-10-2008	7 March 1989	1 April 1990
32	Kazakhstan	Notification No. GSR 633(E), dated 31-10-1997	9 December 1996	1 April 1998
33	Kenya	Notification No. GSR 665(E), dated 20-8-1985	12 April 1985	1 April 1985
34	Korea	Notification No. GSR 111(E), dated 26-9-1986, as amended by GSR 986(E), dated 20-12-1990	19 July 1985	1 April 1984
35	Kuwait	Notification No. SO 2000(E), dated 27-11-2007	15 June 2006	1 April 2008
36	Kyrgyz Republic	Notification No. GSR 75(E), dated 7-2-2001	13 April 1999	1 April 2002
37	Libyan Arab Jamahiriya	Notification No. GSR 22(E), dated 1-7-1982	2 March 1981	1 Jan 1983
38	Lithuania	Notification No. 28/2012 [F. No. 503/02/1997-FTD-1], dated 25-7-2012	26 July 2011	1 April 2013
39	Luxembourg	Notification No. 78/2009 [F. No. 503/1/96-FTD-I], dated 12-10-2009	2 June 2008	1 April 2010
40	Malaysia	Notification No. 07/2013 [F. No. 506/123/84-FTD-II], dated 29-1-2013	9 May 2012	1 April 2013
41	Malta	Notification No. SO 761(E), dated 22-11-1995	28 September 1994	1 April 1996
42	Mauritius	Notification GSR No. 920(E), dated 6-12-1983	24 August 1982	1 April 1983
43	Mongolia	Notification No. SO 635(E), dated 16-9-1996	22 February 1994	1 April 1994
44	Montenegro	Notification No. 4/2009 [F.NO. 503/1/1997-FTD-I]/S.O. 96(E), dated 7-1-2009	8 February 2006	1 April 2009
45	Morocco	Notification No. GSR 245(E), dated 15-3-2000	30 October 1998	1 April 2001
46	Mozambique	Notification No. 30/2011-FT&TR-II [F.NO.501/152/2000-FT&TR-II], dated 31-5-2011	30 September 2010	1 April 2012
47	Myanmar	Notification No. 49/2009-FT & TR-II [F. NO. 504/10/2004-FT & TR-II], dated 18-6-2009	2 April 2008	1 April 2010
48	Namibia	Notification No. GSR 196(E), dated 8-3-1999	15 February 1997	1 April 2000
49	Nepal	Notification No. 20/2012 [F.NO.503/03/2005-FTD-II], dated 12-6-2012	27 November 2011	1 April 2013
50	Netherlands	Notification No. GSR 382(E), dated 27-3-1989 as amended by Notification No. SO 693(E), dated 30-8-1999 and Notification No. 2/2013, dated 14-1-2013	30 July 1988	1 April 1989
51	New Zealand	Notification No. GSR 314(E), dated 27-3-1987, as amended by GSR 477(E), dated 21-4-1988 and GSR 37(E), dated 12-1-2000	17 October 1986	1 April 1987
52	Norway	Notification No. GSR 810(E), dated 8-12-1999	20 April 1999	1 April 2000
53	Oman (Sultanate of)	Notification No. GSR 197(E), dated 31-3-2005	3 November 2003	1 April 2006

Sn	Country	Notification No. and Date	Date when signed	Date of coming into force
54	Philippines	Notification No. GSR 173(E), dated 2-4-1996 and as amended by Notification No. SO 125(E), dated 2-2-2005	12 February 1990	1 April 1995
55	Poland	Notification No. GSR 72(E), dated 12-2-1990	21 June 1989	1 April 1990
56	Portuguese Republic	Notification No. GSR 542(E), dated 16-6-2000, as corrected by Notification No. SO 673(E), dated 25-8-2000 and GSR 597(E), dated 20-9-2005	11 September 1998	1 April 2001
57	Qatar	Notification No. GSR 96(E), dated 8-2-2000	7 April 1999	1 April 2001
58	Romania	Notification No. GSR 80(E), dated 8-2-1988	10 March 1987	1 April 1988
59	Russian Federation	Notification No. 10677 [F. No. 501/6/92-FTD], dated 21-8-1998. Earlier agreement was entered into vide GSR 812(E), dated 4-9-1989, as amended by GSR 952(E), dated 30-12-1992.	25 March 1997	1 April 1999
60	SAARC	Notification No. 3/2011 [SO 34(E)] -FTD-II [F.NO. 500/96/97-FTD-II], dated 10-1-2011	13 November 2005	
61	Saudi Arabia	Notification No. 287/2006-FTD [F.No. 501/7/91-FTD], dated 17-10-2006	25 January 2006	1 April 2007
62	Serbia	Notification No. 5/2009 [F.No. 503/1/797-FTD-1]/S.O. 97(E), dated 7-1-2009	8 February 2006	1 April 2009
63	Singapore	Notification No. GSR 610(E), dated 8-8-1994 as amended by Notification SO 1022(E), dated 18-7-2005	24 January 1994	1 April 1994
64	Slovenia	Notification No. GSR 344(E), dated 31-5-2005	13 January 2003	1 April 2006
65	South Africa	Notification No. GSR 198(E), dated 21-4-1998	4 December 1996	1 April 1998
66	Spain	Notification No. GSR 356(E), dated 21-4-1995	8 February 1993	1 April 1996
67	Sri Lanka (Ceylon)	Notification No. GSR 342(E), dated 19-4-1983	27 January 1982	1 April 1979
68	Sudan	Notification No. GSR 723(E), dated 1-11-2004	22 October 2003	1 April 2005
69	Sweden	Notification No. GSR 705(E), dated 17-12-1997. Earlier agreement was entered into vide GSR 38(E), dated 27-3-1989.	24 June 1997	1 April 1998
70	Swiss Conferderation	Notification No. GSR 357(E), dated 21-4-1995, as amended by Notification No. GSR 74(E), dated 7-2-2001, 62/2011, dated 27-12-2011 w.e.f. 1-4-2012	2 November 1994	1 April 1995
71	Syrian Arab Republic	Notification No. 33/2009-FTD-II [F.NO. 503/7/2005-FTD-II], dated 30-3-2009	18 June 2008	1 April 2009
72	Tajikistan	Notification No. 58/2009 [FT & TR-II [F.No. 503/10/95-FT & TR-II], dated 16-7-2009	20 November 2008	1 April 2010
73	Tanzania	Notification No. 8/2012 [FT & TR-II/F. No. 503/02/2005-FTD-II], dated 16-2-2012	27 May 2011	1 April 2012
74	Thailand	Notification No. GSR 915(E), dated 27-6-1986	22 March 1985	1 April 1987
75	Trinidad & Tobago	Notification No. GSR 720(E), dated 26-10-1999	8 February 1999	1 April 2000
76	Turkey	Notification No. SO 74(E), dated 3-2-1997	31 January 1995	1 April 1994
77	Turkmenistan	Notification No. GSR 567(E), dated 25-9-1997	25 February 1997	1 April 1998
78	U. A. E.	Notification No. GSR 710(E) [No. 9409 (F. No. 501/3/89-FTD)], dated 18-11-1993, as amended by Notification No. SO 2001(E), dated 28-11-2007. Earlier agreement was entered into vide GSR 969(E), dated 8-11-1989.	29 April 1992	1 April 1994

Sn	Country	Notification No. and Date	Date when signed	Date of coming into force
79	Uganda	Notification No. GSR 666(E), dated 12-10-2004	30 April 2004	1 April 2005
80	Ukraine	Notification : GSR 24(E), dated 11-1-2002	7 April 1999	1 April 2002
81	United Kingdom of Great Britain and Northern Ireland	Notification No. GSR 91(E), dated 11-2-1994	25 January 1993	1 April 1994
82	United Mexican States	Notification No. 86/2010 [F. NO. 503/4/91-FTD-I], dated 26-11-2010	10 September 2007	1 April 2011
83	United States of America	Notification No. GSR 990(E), dated 20-12-1990.	12 September 1989	1 April 1991
84	Uzbekistan	SO No. 2689(E), dated 7-11-2012	29 July 1993	1 April 1993
85	Vietnam	Notification No. GSR 369(E), dated 28-4-1995, as amended by Notification No. 9860 [F.No. 503/7/91-FTD], dated 12-9-1995	7 September 1994	1 April 1996
86	Zambia	Notification: No. GSR 39(E), dated 18-1-1984	5 June 1981	1 April 1978

List of Limited Tax Treaties

Sn	Country	Notification
1	Afghanistan	Notification No. GSR 514(E), dated 30-9-1975
2	Ethiopia	Notification No. GSR 8(E), dated 4-1-1978 as corrected by Notification No. GSR 159(E), dated 2-3-1978
3	Iran	Notification No. GSR 284(E), dated 28-5-1973
4	Lebanon	Notification Nos. GSR 1552 and 1553, dated 28-6-1969
5	Maldives	Notification No. 3/2011 [SO 34(E)] --FTD-II [F.NO. 500/96/97-FTD-II], dated 10-1-2011
6	Pakistan	Notification No. GSR 792(E), dated 29-8-1989
7	Peoples Democratic Republic of Yemen	Notification No. GSR 857(E), dated 12-8-1988
8	SAARC Countries	Notification No. 3/2011 [SO 34(E)] -FTD-II [F.NO. 500/96/97-FTD-II], dated 10-1-2011

Glossary

AE	Associated enterprise
ALP	Arm's length price
AMP	Advertising, Marketing and Promotion
AY	Assessment Year
CBDT	Central Board of Direct Taxes
CENVAT	Central Value Added Tax
CESTAT	Customs, Excise and Service-tax Appellate Tribunal
CIT	Commissioner of Income-tax
CIT(A)	Commissioner of Income-tax (Appeals)
CPM	Cost Plus Method
CUP	Comparable Uncontrolled Price
DCF	Discounted Cash Flow
DRP	Dispute Resolution Panel
EPF	Employee Provident Fund
ESIC	Employee State Insurance Commission
ESOP	Employee Stock Option Plan
FAR	Functions, Assets and Risk
FDR	Fixed Deposit Receipt
FII	Foreign Institutional Investors
FIS	Fees for Included Services
FMV	Fair Market Value
FTS	Fees for Technical Services
FY	Financial Year
GAAR	General Anti-Avoidance Rules
GoI	Government of India

HC	High Court
IPR	Intellectual Property Rights
LIBOR	London Inter Bank Offered Rate
MAP	Mutual Agreement Procedure
OECD	Organisation for Economic Co-operation and Development
PE	Permanent Establishment
PLI	Profit Level Indicator
PSM	Profit Split Method
RBI	Reserve Bank of India
RPM	Resale Price Method
SAAR	Special Anti-Avoidance Rules
SAT	Securities Appellate Tribunal
SB	Special Bench
SC	Supreme Court
SEBI	The Securities and Exchange Board of India
The Act	The Income-tax Act, 1961
Tax treaty	Double Taxation Avoidance Agreement
The Tribunal	The Income-tax Appellate Tribunal
TNMM	Transaction Net Margin Method
TO	Tax Officer
TOPA	Transfer of Property Act, 1882
TP	Transfer Pricing
TPO	Transfer Pricing Officer
TRC	Tax Residency Certificate
VAT	Value Added Tax

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