Tax Glimpses - 2012

www.pwc.in

Foreword

We are delighted to present our annual publication, Tax Glimpses 2012.

We are pleased to bring you a brief analysis of the pertinent judgments and noteworthy regulatory developments in corporate tax, mergers and acquisitions and indirect tax which took place in 2012. This publication also incorporates a listing (with weblink connect wherever available) of various PwC Thought Leadership initiatives such as news alerts, newsletters and articles published during 2012.

The year 2012 saw much activity on the judicial, legislative and administrative fronts. The following developments were particularly significant:

- A landmark judgement was delivered by the Supreme Court in the case of Vodafone International BV.
- The Union Budget introduced tax reforms, such as the introduction of General Anti-Avoidance Rules (GAAR), Advance Pricing Agreements, retrospective amendments relating to indirect transfers of shares and royalty and provisions relating to domestic transfer pricing.
- The Direct Taxes Code, 2010 was postponed.
- The Parthasarathi Shome Committee Reports on GAAR and the indirect transfer of shares were released.
- P Chidambaram assumed charge as Finance Minister.
- As Finance Minister, Chidambaram issued a call to reduce the rigours of the GAAR, to make them more taxpayer friendly.
- Draft guidelines and rules were released by the CBDT relating to Advance Pricing Agreements, employees' provident fund guidelines, the valuation methodology for computing fair market value under section 56(2)(viib) of the Act, draft tax accounting standards, social security agreements, tax information exchange agreements, to name just a few.

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

Ketan Dalal
Joint Leader, Tax and
Regulatory Services

Shyamal Mukherjee
Joint Leader, Tax and
Regulatory Services

Contents

Corporate tax

Corporate tax

Corporate Tax

Royalties/PE
Fees for technical services
Presumptive taxation
Taxability of Turnkey contracts
Capital gains
Permanent establishment
Representative assessment
Circulars and notifications

Personal Tax

Mergers and Acquisitions

Transfer Pricing

Indirect Taxes

Regulatory

Royalties/PE

Embedded software

Payment for supply of software embedded in hardware not taxable as 'royalties' even after retrospective amendment

Facts

The assessee, a Finland-based company, is a leading manufacturer of advanced telecommunication systems and equipment (GSM equipment) which are used in fixed and mobile phone network. It was maintaining a liaison office (LO) as well as a subsidiary, in India (Nokia India Pvt. Ltd (NIPL)). It had supplied GSM equipment to various telecom operators in India, on a principal-to-principal basis. Installation of this equipment was undertaken by its subsidiary, NIPL, under independent contracts with the Indian telecom operators, while its LO was carrying out advertising and other preparatory and auxiliary activities as permitted by the Reserve Bank of India (RBI).

The tax officer (TO) held that the LO and NIPL constituted permanent establishments (PE) of the assessee in India. It further held that the software embedded in the equipment supplied by the assessee would be taxable as 'royalties' under section 9(1)(vi) of the Act, or under Article 13 of the India-Finland tax treaty.

The Commissioner of Income-tax (Appeals) (CIT(A)) and the Income-tax Appellate Tribunal (the Tribunal) rejected the TO's order taxing the payment towards software embedded in equipment as royalty. However, it treated NIPL as assessee's PE in India.

High Court order

Existence of PE in India

- The Tribunal observed that the LO had not carried out any business activity for the assessee in India and its role was limited to assisting the assessee in preliminary and preparatory work. The LO had obtained permission from the RBI and the latter had not found that there was any violation of the rules on the part of the LO. Thus, the LO did not constitute the assessee's PE in India.
- The assessee contended that the Tribunal's conclusion that NIPL was a PE of the assessee was based on, and the result of, various factual errors in the order of the lower authorities and was therefore an erroneous conclusion. The revenue authorities denied this contention. The matter was returned to the Tribunal for fresh consideration. The Tribunal would also adjudicate on the attribution of income.

Taxability of software payment as royalties

- The HC rejected the revenue's contention that, on account of retrospective amendments to the definition of 'royalties' by the Finance Act, 2012 (i.e. which stipulated that a consideration for a transfer of a 'user right' in software would be royalties), the question of use of a 'copyrighted article' or actual copyright does not arise as the right to use a piece of software itself is a part of the copyright and the existence of any further right to make copies is irrelevant.
- The HC also relied on the decision in the case of Siemens Aktiongesellschaft [2009] 310 ITR 320 (Bom) in which it was held that the amendment made to the Act cannot be read into the tax treaty.

DIT v Nokia Networks OY [TS-700-HC-2012(Del)]

Based on similar facts, in the case of DIT v Ericsson Radio System AB [TS-769-HC-2011(Del)], it was held that a taxable event which related to the supply of equipment took place outside India since the title of the equipment, along with the associated risks, was passed on to the buyer outside the country. Therefore, it could not be held that, when it supplied the equipment in which the software was embedded the assessee had rendered technical services which could be deemed to accrue or arise in India.

Furthermore, the equipment installation contracts undertaken by the assessee's subsidiary in India were independent, since the assessee was not deriving any profit out of it. No business connection arises merely because the installation contractors were the assessee's subsidiaries and therefore as there was no business connection, the question of a PE did not arise.

Royalty/PE

Duration of preparatory services to be included when computing the period for determining whether there is a PE in India

Facts

The applicant, a tax resident of Singapore, entered into a contract with Indian Oil Corporation Ltd (IOCL) relating to the installation of a terminal for the discharge of crude oil from sea vessels to an onshore tank. Another contract was also in effect, under which Larsen & Toubro (L&T) appointed ONGC to carry out installation and construction work which was sub-contracted to the applicant.

Corporate tax

Issues

The applicant sought an advance ruling on the taxability of the payments received under the above two contracts and contended the following:

- Both the contracts were for installation work (i.e. construction and mining work) and, hence, were covered by the exception provided in Explanation 2 to section 9(1)(vii) of the Act.
- The applicant did not make available to IOCL of IOCL technical knowledge, skills, know-how. Hence, the income cannot be considered as fees for technical services (FTS) under section 9(1)(vii) of the Act.
- Therefore, business income would only be taxable if there was the existence of a PE in India.
- Since the installation work continued in India for less than 183 days and the applicant did not have any office or premises in the country, no PE was in existence in India, under the terms of Article 5 of the Double Taxation Avoidance Agreement (the tax treaty) between India and Singapore.

The applicant also contended that the activities carried out under the contract with L&T were connected to prospecting, extraction or production of mineral oils and, in the absence of a PE in India, there would be no liability under the provisions of section 44BB of the Act.

AAR ruling

- The Authority for Advance Rulings (AAR) observed that, in the case of IOCL, since only 25% of the receipts were received for installation work and the rest were related to the use of the vessels to carry out the installation work, the contract was not for installation work. Even though it was a composite contract, IOCL was paying for each of the items separately.
- In the case of Ishikawajma-Harima Heavy Industries Ltd v DIT [2007] 288 ITR 408 (SC), it was held that where the consideration of each portion of the contract is separately specified, the receipts are independently taxable on the basis of the source and nature of the receipt.
- In the case of State of Madras v Richardson & Cruddas Ltd [1968] 21 STC 245 (SC), it was held that mobilisation and de-mobilisation expenses relate to use of equipment for undertaking installation work. Hence it is taxable as royalty under Article 12(3)(b) of tax treaty.
- As the installation work was ancillary and subsidiary to the use of equipment and the enjoyment of the right to use that equipment, the payment for installation work was taxable as FTS under Article 12(4)(a) of the tax treaty.
- Further, as per the contract with L&T, the scope of work included various preparatory services, including surveys, drawings, engineering, etc. These services go went beyond installation work and included pre-and-post installation services.
- Under Article 5(5) of the tax treaty, an enterprise shall be deemed to have a PE if it provides ‘services or facilities’, in connection with exploration, exploitation or extraction of mineral oils, for a period of more than 183 days in a contracting state.
- The duration during which such preparatory activities or facilities are carried out cannot be excluded when calculating the duration of a PE in India under Article 5(5) of the tax treaty.
- Since the activities of the applicant, including the preparatory services, extended beyond 183 days, they constituted a PE as per the deeming provisions of Article 5(5) of the tax treaty and were liable to tax under section 44BB of the Act.

Global Industries Asia Pacific Pte Ltd v DIT [TS-89-AAR-2012]

Outsourcing contracts

Outsourcing contracts transferred to an Indian company not taxable

Facts

The assessee-T&C Ltd, a UK-based company, entered into various business process outsourcing (BPO) contracts outside India related to rendering IT services to various non-resident companies. The contracts were further sub-contracted to WNS India, an Indian company.

The assessee took over T&C Ltd’s business, including the BPO contracts, and sold them to WNS India for a consideration. Consequently, WNS India became solely responsible for the obligations under the various BPO contracts.

The revenue authorities held that since the BPO contracts were a revenue generating asset, consideration for its transfer was taxable as income in the hands of the assessee. Furthermore, 10% of the consideration in respect of the BPO contracts was attributable to the assessee’s services PE in India, as per Article 7 of the India-UK tax treaty, since the assessee had a service PE in India in relation to management services rendered by it to WNS India.

Corporate tax

Tribunal order

- The BPO contracts were executed with non-resident companies outside India. Therefore, they were capital assets situated outside India.
- Hence, consideration on the transfer of the BPO contracts or assets cannot be treated as income deemed to accrue or arise in India.
- As regards the applicability of Article 7 of the tax treaty, it was observed that the service PE in India had no involvement in the acquisition of the BPO contracts or its subsequent transfer to WNS India. Therefore, consideration received against such contracts cannot be treated as income attributable to the assessee's PE in India.

Hence, the consideration was not taxable in the hands of the assessee, either under the provisions of section 9 of the Act or under Article 7 of the tax treaty.

WNS Global Services (UK) Ltd v ADIT [2012-TII-23-ITAT-MUM-INTL]

Course fee

Income of a foreign university from distance learning course are not royalties

Facts

The assessee company was engaged in marketing, promotion and provision of certain ancillary services to Tower Innovative Learning Solutions Inc (TILS), USA, a wholly-owned subsidiary of Cornell University (Cornell), USA. The assessee also assisted in registering students for courses offered by Cornell and in collecting the combined fees. TILS entered into an affiliate agreement with the assessee for marketing, promotion and other specified ancillary services relating to the courses offered by Cornell in India. The affiliate agreement provided the assessee with a limited, non-exclusive, non-transferable, non-sub-licensable right and licence to market, promote and provide certain ancillary services connected with the offering and distribution of distance learning courses by Cornell.

The assessee made an application under section 195(1) of the Act requesting a nil tax withholding certificate on the grounds that the payment made to Cornell was business income and, in the absence of TILS having a PE in India, such payments were not taxable.

After considering the agreement entered into between the parties, the TO held that the assessee was liable to withholding tax on the payment made, under the terms of Article 12 of the India-USA tax treaty, since the payments made to TILS were in the nature of royalties. The CIT(A) upheld the order of the TO on the grounds that the payments made for the right to use the TILS trademarks, service marks, logos, etc., together with the associated licence, and the limited non-exclusive, non-transferable, non sub-licensable right to offer and distribute courses by TILS, were in the nature of payments for the right to use a trademark or a copyright.

Tribunal order

- The assessee was assigned the role of marketing the courses, assisting in the registration process, collecting combined fees and providing infrastructure to enable registered students to access the course content on a website.
- Cornell owned the right to, title and interest in the courses.
- According to the end-user agreement, the students received the right to access the course material by using their unique login ID and the assessee did not obtain the use or right to use any copyright or literary work.
- Also, it was not for the use or right to use a patent, trademark, design, plan, secret formula or process, etc.
- The affiliate agreement related to the pooling of resources by way of an agreement in which the respective roles and responsibilities had been assigned and the fee sharing of the parties were set out.
- Therefore, the payment made to TILS by the assessee was not for any kind of service but was for apportionment of fees. This could not considered as royalties as defined under Article 12 of the tax treaty.

Hughes Escort Communications Ltd v DCIT [TS-158-ITAT-2012(Del)]

Subscription

Payments received under a software distribution agreement will be taxable as royalties

Facts

The taxpayer, Citrix Systems Asia Pacific Pty Ltd (Citrix), a resident of Australia, entered into a software distribution agreement with I Ltd for the distribution of computer hardware and software. Under this agreement, the orders placed by I Ltd were directly delivered to end-users who downloaded the software from Citrix's servers. The price paid for the software was paid by I Ltd, after deducting its own commission. I Ltd also facilitated the Citrix subscription programme with the existing customers. This programme involved a package of support services, including product version updates. All transactions between the applicant and I Ltd were on a principal-to-principal basis. The issue before the AAR was whether payments made by I

Corporate tax

Ltd to Citrix under the software distribution agreement were to be taxed as royalties under section 9 of the Act and under the India-Australia tax treaty (Australia treaty).

AAR ruling

- The AAR ruled that the payment received by Citrix under the software distribution agreement was taxable as royalties under the Act and under the Australian treaty since it granted the right to download and receive version updates.
- The AAR observed that when an owner sells software he also sells the right to use the software. It rejected the applicant's contention that the transfer was of a copyrighted article and not of a copyright and held that the payment was in the nature of royalties and I Ltd was required to withhold tax as per the Australian treaty.
- The AAR placed reliance on the rulings in the cases of IMT Labs (India) Pvt. Ltd., In re (287 ITR 450), Airport Authority of India, In re (304 ITR 216), Millenium IT Software Ltd (AAR No.835 of 2009) and the Karnataka HC's decision in Samsung Electronics Co Ltd (TS-696-HC-2011(Kar)), in which it was held that payment for software will be taxable as royalties.

Citrix Systems Asia Pacific Pty Ltd In re [TS-82-AAR-2012]

In ITO v People Interactive (I) Pvt. Ltd. [TS-129-ITAT-2012], the Mumbai Tribunal held that payments for hosting a website cannot be treated as royalties. The taxpayer was the host of a website which provided information about matrimonial alliances on payment of a subscription amount. It received information technology services from a company called R Inc. The Tribunal held that the payment made to R Inc was business income and not royalties. Also, in the absence of a PE in India, this payment was not taxable. Reliance was placed on the decision in the case of Asia Satellite Telecommunications Ltd [TS-29-HC-2011 (Del)] where it was observed that when equipment was not under the control of the assessee, payments made for receiving services were not royalties under the Act or the India-USA tax treaty. Therefore, tax withholding was not required under section 195 of the Act, as was held by the Supreme Court (SC) in the case of GE Technology Centre P. Ltd [2010] 327 ITR 456 (SC).

In ONGC v ITO [TS-846-ITAT-2012(Del)], the Delhi Tribunal held that payment by the assessee for accessing information from a website was royalties, both under the Act and the India-UK tax treaty. The assessee was engaged in the business of prospecting for hydrocarbons to augment India's oil security. Accordingly, it participated in oil exploration, production and development activities for which it subscribed to the website of a company, W Ltd. This subscription was in the nature of a non-transferable licence, possessed by the assessee, for downloading the information. The Tribunal held that information available to the assessee was licensed information. Accordingly, subscription fees paid by the assessee were covered by the definition of royalties under section 9(1)(vii) of the Act and Article 13(3) of the India-UK treaty. Accordingly, the subscription was liable to withholding tax. In this regard, the assessee placed reliance on Wipro Limited [Ts-701-HC-2011(Kar)] and differentiated this from the ruling in the case of Dun and Bradstreet Espana SA [2005] 271 ITR 99(Kar).

The AAR, in the case of Acclerys KK, In re [TS-119-AAR-2012], has held that payments received by a non-resident for the sale of a software application to end-users through an independent reseller in India were taxable as royalties under Article 12 of the Indo-Japan tax treaty. In light of the ruling in the case of Citrix Systems (above), the AAR ruled that software cannot be used without the use of the copyright embedded in it. Accordingly, the payment for such use will be constitute payment of royalties and will be chargeable to tax.

Telecasting

Payment to non-resident for satellite up-linking and telecasting programmes not royalties or fees for technical services

Facts

The assessee, a tax resident of India, is engaged in the business of the production and distribution of internet media. It entered into an agreement with Shan Satellite Public Co Ltd (SSA), a tax resident of Thailand, for relating to satellite up-linking and telecasting programmes.

The expenditure incurred in this respect was claimed as broadcasting and telecasting expenditure. In addition, consultancy charges were also paid by the assessee to SSA.

The TO considered the payments made by the assessee to SSA to constitute fees for consultancy charges within the meaning of FTS as defined in Explanation 2 of section 9(1)(vii) of the Act. The TO held that since there was a failure on the part of the assessee to withhold tax under section 195 of the Act from the payment made to SSA, it was liable to disallowance under section 40(a)(i) of the Act.

On appeal, the CIT(A) held that the assessee company had received a highly sophisticated technical service from SSA and the payment for such services was taxable as FTS under section 9(1)(viii) of the Act read with Explanation 2 of that Act. The CIT(A) also held that the uplinking or downlinking of the signals for broadcast was possible only by use of the scientific equipment owned by SSA and the amount paid for such use was alternately chargeable to tax in India as royalty as per Article 12 of the India-Thailand tax treaty.

Corporate tax

Tribunal order

- Where the assessee had no control over or possession of the equipment, it cannot be said that the payment made to SSA was for the use or right to use any industrial, commercial or scientific equipment. Hence, this payment was not taxable as FTS under section 9(1)(vii) of the Act.
- In this regard, reliance was placed on the decision in the case of Asia Satellite Telecommunication Co Ltd [2011] 332 ITR 340 (Del), in which it was held that while providing transmission services, the control of the satellite or the transponder always remains with the satellite operator and the customers are merely given access to the transponder's capacity.
- Since the customer does not utilise the process or equipment involved in its operations, the charges paid cannot be treated as royalties under the tax treaty.
- Therefore, the payment related to the provision of the facility constituted SSA's business income and was covered by Article 7 of the India–Thailand tax treaty. There is no need to take recourse to Article 22 of the tax treaty with Thailand which covers only those items of income not covered expressly by any other article of the tax treaty with Thailand.
- Hence, the payments to SSA were not liable to withholding tax under section 195 of the Act and the disallowance made under section 40(a)(i) of the Act was to be deleted.

Channel Guide India Ltd v ACIT [TS-662-ITAT-2012(Mum)]

Based on similar facts, the same view was taken in the case of Times Global Broadcasting Co Ltd v DCIT [2012-TII-11-ITAT-MUM-INTL] in which it was held that payment made to a non-resident towards transponder hire charges cannot be treated as royalties since the process of amplifying and relaying the programmes was carried out through the satellite which was not situated in the Indian airspace. Therefore, no process had taken place in India.

In the above cases, the Tribunal observed that the assessee cannot be held liable to withhold tax as a result of subsequent amendments made in the Act which have a retrospective effect.

Shrink-wrapped software

Income from sale of shrink-wrapped software not taxable as royalties

Facts

The assessee, a US tax resident, is engaged in distributing software to end-users through its distributors or sub-distributors in India, under a distribution agreement which also contains an end-user licence agreement. The assessee did not offer the income from the sale of shrink-wrapped software to tax.

The tax authorities held that the end-user was granted a licence to use the software. Hence, the amount was taxable as royalties under Article 12(3) of the India-USA tax treaty.

It was also held that the decision of Delhi HC in the case of DIT v Ericsson AB [TS-769-HC-2011(DEL)] was in the context of the sale of equipment in which software was embedded, and was not a case of the sale of shrink-wrapped software. Hence, the decision in that case is was not applicable to the assessee's case.

Tribunal order

- The Mumbai Bench of the Tribunal, relying on the cases of Dassault Systems KK, In re [TS-126-AAR-2010] and Ericsson AB [TS-769-HC-2011(DEL)], held that income from the sale of shrink-wrapped software was not taxable as royalties as a result of the distinction between copyright and copyrighted article.
- Reliance was placed on sections 14(a)(i) and (vi) of the Copyright Act, 1957, under which only reproduction and adaptation for the purpose of commercial exploitation was said to be a copyright and therefore consideration in this regard considered as royalties. Accordingly, consideration paid merely for 'right to use' cannot be held to be royalties.

DDIT v Solid Works Corporation [TS-76-ITAT-2012 (Mum)]

In a similar case, ACIT v Sonata Information Technology Ltd [TS-683-ITAT-2012(Mum)], the Mumbai Tribunal, relying on the decision in the case of Solid Works, held that the payment made by a resident for the purchase of software from a resident company was not considered as royalties and, hence, not liable to tax withholding under section 194J of the Act.

The above two rulings were in favour of the assessee. However, the Karnataka HC, in the case of CIT v Synopsis International Old Ltd [TS-182-HC-2010(KAR)], held that the sale of shrink-wrapped software is taxable as

Corporate tax

royalties, following the decision in the case of CIT v Samsung Electronics Co Ltd [TS-696-HC-2011(KAR)].

The assessee, an resident of the Republic of Ireland, entered into a technical licence agreement (TLA) with its US parent, Synopsis US (SUS). Under the TLA, SUS was the owner of the copyright in the software and granted a licence to the assessee to commercially exploit the intellectual property rights in certain geographies. SUS also required the assessee to enter into an end-user licence agreement with the customers to protect its rights in the product and documentation, and the intellectual property in the software.

The tax authorities taxed the income from the supply of software received from Indian customers as royalties under section 9(1)(vi) of the Act. The Tribunal reversed the order of the TO. The assessee contended that that the consideration was for 'off-the-shelf' software, in the nature of a copyrighted article, and there was no transfer of any right in the copyright.

The HC held that the intention of the provisions was not to exclude the consideration paid for the use of the copyrighted article. To constitute royalties under the Act, it is not necessary that there should be a transfer of exclusive right in the copyright but a transfer of 'any interest in the right' and payment for a grant of a licence constitutes royalties under the Act. Thus, it was irrelevant that the consideration was for the transfer of copyright or of a copyrighted article.

Accordingly, even if there was no transfer of an exclusive right in copyright, transfer of intellectual property was equivalent to transfer of a copyright and the receipts were taxable as royalties.

Right to use know-how

Consideration for right to use know-how for a limited period taxable as royalties in the absence of any outright transfer

Facts

The assessee, a Swedish company, entered into an agreement with Atlas Copco (I) Ltd in March 1985 to supply technical know-how for manufacturing screw type air compressors and also to render technical assistance in manufacturing activities. Under the agreement, a lump sum consideration was payable in three instalments to the assessee by Atlas Copco (I) Ltd. The assessee contended that the lump sum consideration received was capital in nature and, hence, not taxable.

The TO contended that the lump sum consideration was taxable in India as royalties under the terms of Article 7 of the India-Sweden tax treaty. The CIT(A) and the Tribunal confirmed the order of the TO.

HC order

- The HC noted that the assessee had received the money for providing a right to use know-how for a specified period, and there was no outright transfer of the know-how.
- It held that if the assessee retained all the rights in the know-how for itself and it was only the limited right to use it which was provided under the agreement, then the consideration was nothing but royalties received as payment for the right to use the know-how for a limited period. It was held that the payment to allow a right to use know-how constitutes royalties under the in terms of Article 7 of the India-Sweden tax treaty (which existed at that time).

Atlas Copco AB of Sweden v. CIT [TS-15-HC-2012(BOM)]

Film distribution rights

Receipts for granting film distribution rights not royalties

Facts

The assessee, a non-resident company, is engaged in the production and distribution of films. It entered into an agreement with Warner Bros Pictures (I) Pvt. Ltd. (WBPIPL) relating to the granting of exclusive rights distribute cinematographic films to WBPIPL, on a payment of royalties. The WBPIPL withheld tax on the royalties amount. The assessee claimed a refund in the tax return on the grounds that consideration for sale, distribution and exhibition of cinematograph films is excluded from the definition of royalties under section 9(1)(vi) of the Act, as well as under Article 12(3) of the India-US tax treaty. Hence, it such a consideration is not taxable. The TO assessed the royalties income by applying Article 12(2) of the India-US tax treaty at the rate of 15%.

Tribunal order

- The Tribunal noted that Explanation 2(v) to section 9(1)(vi) excludes payment received for sale, distribution and exhibition of cinematographic films from the definition of royalties. Further, the term royalties defined in Article 12 of the India-US tax treaty does not include payment of a consideration for the use of any copyright or literary, artistic or scientific work, including cinematographic films or work on films, tape or other means of production, for use in connection with radio or TV broadcasting. Therefore, the Tribunal held that the amount received by the assessee was not royalty under the Act or under the tax treaty.
- It also held that the amount was not taxable as business income since the assessee did not have a PE in India. The Indian company had acted independently in obtaining the rights. Hence, the provisions of relating to an agency PE were not to be invoked.

ADIT v Warner Brothers Pictures Inc [TS-787-ITAT-2011(Mum)]

Corporate tax

Facts

The applicant is an Indian company which has a network of retail fuel stations in India. The applicant entered into a cost contribution agreement (CCA) with a Shell Group company (a group company) to provide general business support services which were in the nature of advisory management support services. The applicant sought an advance ruling on the following:

- Whether the payments made by the applicant to the group company to receive general business support services under the CCA will constitute income under provisions of the Act.
- If the said payment is considered as income, whether that payment will amount to FTS as per the provisions of the India-UK tax treaty.

The applicant contended that the services received by it did not make available any technical knowledge, skills, experience, etc. which would enable it to apply the technology independently. There was no element of income involved since the agreement was only a 'cost contribution arrangement'.

AAR ruling

- The activities under the CCA covered all types of activities, which included the core activities of a retail business. Any advice that helps the taking of a decision of a commercial nature constitutes technical or consultancy services.
- Advisory services will be consultancy services if an element of expertise or special knowledge on the part of the consultant is established.
- The AAR opined that 'make available' means that the recipient of the service should be in a position to derive an enduring benefit and be in a position to utilise the knowledge or know-how in future on his own. It is not necessary that this making available should be specifically provided for in the service agreement.
- The applicant contended that it became the owner of any know-how generated through the services which enabled it to use any intellectual property generated from the business support services, independent of the service provider. Hence, the services under the agreement were clearly made available to the applicant and were in the nature of FTS.
- As the payment related to the rendering of services by the group company was taxable as FTS, the applicant was required to withhold tax under section 195 of the Act even where there was no PE.

Shell India Markers Pvt. Ltd., In re [TS-58-AAR-2012]

IT support services

IT support services by a non-resident using equipment under its control in India is taxable as FTS

Facts

- The assessee, an Indian subsidiary of a non-resident company, is engaged in the supply and commissioning of electric equipments for the transmission and distribution of power. The non-resident company proposed to enter into an IT-sharing services agreement (IT agreement) with the assessee, to provide IT support services in areas such as WAN, IBM Lotus Notes (email software), license user rights and application support.
- The assessee filed an application before the AAR seeking a ruling on the taxability of payment made for the services. The assessee contended that the payment was in the nature of reimbursement to the non-resident company and hence is not chargeable to tax as royalties or FTS.

AAR ruling

- The AAR noted that the payment under the IT agreement was not in the nature of reimbursement, since it was stated in the agreement that the non-resident company had the capacity and resources to provide and coordinate the IT services.
- Again, in the absence of any details, the equipment may be owned by the non-resident company and, even if it hires the equipment, it would be under the exclusive control of the non-resident company.
- The AAR also held that the existence of a computer server amounts to the existence of a PE of the assessee in India, in terms of Article 5(2) of the India-France tax treaty and the OECD Model Commentary, which provides that a PE may exist if the business of the enterprise is carried on mainly through automatic equipment and the activities of the personnel are restricted to setting up, operating, controlling and maintaining such equipment.
- The AAR, relying on the decision in the case of Perfetti Van Melle Holding B.V., In re [TS-723-AAR-2011], held that since the IT services were provided to the assessee and the services were applied in running the assessee's business and since the employees of the assessee were also equipped to operate these systems on their own after the completion of the IT agreement, the services were 'made available' since the assessee was in a position to derive an enduring benefit and was in a position to utilise the knowledge in the future on its own. Therefore, the AAR held that the payment for the services was in the nature of FTS.

AREVA T&D India Ltd., In re [TS-81-AAR-2012]

Corporate tax

Geophysical survey

Payment made for airborne geophysical survey services is not FTS

Facts

The assessee is engaged in the business of prospecting for and mining diamonds and other minerals. It had entered into an agreement with F BV Netherlands (Fugro), to carry out an airborne geophysical survey, which required specialised equipment and personnel for the collection of high-quality data to select kimberlite rocks. Consequently, the assessee made a payment to Fugro for conducting the airborne survey without withholding any tax, contending that though the data provided by Fugro was useful for further operations, Fugro had not 'made available' the technical know-how for conducting the survey.

High Court order

The HC observed that though the nature of the services rendered by Fugro was technical in nature, it was liable to tax under section 9(1)(vii) of the Act. However, under the India-Netherlands tax treaty, payment of any amount would be considered as FTS only if such services made available any technical knowledge, expertise, skills, know-how or process to the service receiver. The Tribunal relied on the SC decision in the case of UOI v. Azadi Bachao Andolan [TS-5-SC-2003] in holding that the provisions of the tax treaty would override the provisions under the Act.

In this case, the technical services provided by Fugro would not enable the assessee to undertake any future survey. There was no enduring benefit from the technical knowledge provided. Accordingly, although Fugro rendered technical services under section 9(1)(vii) of the Act, payment for the same could not be considered as FTS under the Netherlands treaty. Hence, the assessee was not liable to withhold tax under section 195 on the payment made to Fugro.

CIT v. De Beers India Minerals Pvt. Ltd. [TS-312-HC-2012 (Kar)]

Balanced Scorecard

Consideration for the implementation of Balanced Scorecard system taxable as FTS under the Singapore treaty

Facts

The tax payer is a Singapore resident engaged in developing a Balanced Scorecard (BSC), which is a strategic performance management tool. The services were provided to Indian companies, and involved these companies downloading licensed software from designated websites and a team being sent by the taxpayer to develop the BSC. The taxpayer contended that the fees received were in the nature of business income under the India-Singapore tax treaty (Singapore tax treaty). In the absence of a PE, the fees received were not taxable. The TO divided the consideration into two parts and assessed the sale of software as royalties and the professional fees as FTS. The TO's order was confirmed by the DRP.

Tribunal order

The Tribunal held that the BSC system was customised to the requirements of the clients and not 'off-the-shelf' software. It held that the taxpayer was making available technical knowledge and skills to the companies and the BSC system did not become redundant after the expiry of the agreement with the Indian companies. Hence, the assessee had made available technical knowledge and skills to the clients for using the BSC for their business. Accordingly, under the Singapore tax treaty, the fee received was taxable as FTS.

Organisation Development Pte Ltd. v. DDIT (International Taxation)[TS-86-ITAT-2012-CHNY]

Presumptive taxation

Income from seismic data procurement and processing services relating to oil exploration taxable under section 44BB

Facts

OHM Ltd., a UK company, is engaged in providing geophysical services to the oil and gas exploration industry. It has secured contracts with two companies P LLC and CGG SA relating to providing seismic services for an offshore exploration block in India.

The assessee applied for a certificate under section 197 of the Act to withhold tax at a lower rate of 4.223% under the provisions of section 44BB of the Act. On rejection of the application for the certificate under section 197 of the Act, the assessee filed an application before the AAR claiming that the activities were directly related to exploration relating to and prospecting of mineral oil and were covered by section 44BB of the Act. The AAR ruled that the seismic services were taxable under section 44BB of the Act at an effective rate of 4.223%. The revenue filed a writ petition before the HC on the issue of whether seismic services in India would be taxable under section 44BB or section 44DA of the Act.

High Court order

The HC upheld the ruling of the AAR, holding that section 44BB is a specific provision relating to computing income of non-residents from services or facilities provided in connection with prospecting for and extraction or

Corporate tax

production of mineral oil in India. Section 44DA of the Act is a more general and broader provision relating to the assessment of income of a non-resident as royalties or FTS connected with the PE of the non-resident.

Further, amendments made by introducing provisos to both the sections indicate that the sections are exclusively applicable, since both the sections have a different mode of computation. The court held that a harmonious construction of the aforesaid sections was necessary so that the provisions of both the sections are not rendered redundant.

Accordingly, the Court upheld the view taken by the AAR that the specific provisions would override the general provisions. Therefore, the seismic services would be taxable under section 44BB of the Act.

DIT v. OHM Ltd. [TS-879-HC-2012]

Taxability of turnkey contracts

Looking at the nature of a transaction, consortium bidding and executing a turnkey project gives rise to an association of persons and consideration in this respect is income taxable in India

Facts

- The Bangalore Metro Rail Corporation Ltd. (BMRC) had tendered a contract for the design, manufacture, supply, installation, testing and commissioning of signalling, train control and communication systems to a consortium involving the assessee (a tax resident of France), its subsidiaries Alstom Projects India Ltd. (APIL), Thales Security Solutions and Services, SA, Portugal (Thales) and Sumitomo Corporation, Japan (Sumitomo).
- The parties to the consortium were jointly and severally bound by the terms of the tender and liable to the BMRC for fulfilling the obligations under the contract.

AAR ruling

- The AAR, relying on the decision in the case of Vodafone International Holdings BV v.UOI [2012] 341 ITR 1 (SC), held that the revenue authorities have to look at the transaction as a whole and not to adopt a dissecting approach. It also held that the basic principle in the interpretation of a contract is to read it as a whole and to construe all its terms in the context of what object the implementation of the contract was intended to achieve and what purpose it was intended to attain.
- Merely because the members have divided the obligations among themselves does not alter the status of those entering into the contract (i.e. the status of an association of persons (AOP)).
- The contract was for installing the signalling and communication system for the metro rail and not only for the supply of offshore equipment and has to be read as a whole and cannot be split-up.
- The source of the receipt was the contract with the BMRC and not the contract inter se or the understanding among the members of the consortium. The members had jointly prepared the bid and had come together in order to execute the project if their tender was accepted. They were jointly responsible for performing the entire work. The common object was to perform the contract and earn income.
- Accordingly, the AAR held that the consortium was liable to be taxed as an AOP.

Alstom Transport SA, In re [TS-387-AAR-2012]

The AAR has, in the case of Linde AG (Linde Engineering Division), In re [TS-170-AAR-2012], which was relied upon at the time the decision in the case of Alstom Transport S A (above) was announced, held that the fact that a design or machinery was to be supplied offshore did not determine the situs of the contract. The AAR also held that the internal division of work responsibility and other terms and conditions under the consortium (MOU) agreement between the parties could not be referred to to in order to interpret the rights and obligations under the contract with the Indian entity. The AAR held that the contract was held to be indivisible since the situs of the contract was in India. Therefore, the amount receivable was received by an AOP and was taxable in India.

Splitting of a project into a set of contracts for offshore and onshore components not to be disregarded

Facts

The assessee, a non-resident Chinese company, has a project office in India. It entered in to two contracts: one with WBPDC Ltd. and another with DP Ltd., for setting up turnkey thermal power projects. The assessee submitted its tax return (which recorded a loss) offering income from onshore activities to tax but did not offer income from offshore activities to tax on the grounds that this income is not liable to tax in India. In doing so, the assessee relied on the decision in the case of Ishikawajima-Harima Heavy Industries Ltd. v. DIT [2007] 288 ITR 408 (SC).

During the course of assessment proceedings, the TO noticed that each of these contracts was divided into two parts. The onshore activities were performed and the consideration was received in India by the project office of the assessee in India, and the consideration for offshore supplies was received by the assessee outside India. The TO also noted that there was a ‘cross-fall breach clause’ which treats the non-performance of one contract

Corporate tax

as a breach of the whole contract. On that basis, the TO held that the contracts were artificially split-up to avoid taxation on income in India and, accordingly, treated the contracts as integrated and one for the purpose of taxation. The DRP confirmed the order of the TO.

Tribunal order

The Tribunal noted that the TO had treated the two contracts as integrated merely on the grounds that the assessee has incurred a loss on onshore activities. It held that although the 'cross-fall breach clause' undoubtedly indicates that the 'offshore supplies contract' and 'onshore services and supplies contract' are required to be viewed as an integrated contract, it could not be argued held that the onshore services and supplies contract is was understated to avoid tax in India. This would be the case if the offshore activities showed unreasonable profits and onshore services and supplies resulted in unreasonable losses.

The Tribunal also held that the observations made in the case of Alstom Transport SA, In re [TS-387-AAR-2012] regarding looking at the transaction as a whole and not adopting a dissecting approach can be applied in all cases in which separate contracts are entered into for offshore supplies and onshore services. However, these observations are certainly applicable in cases in which the values assigned to the onshore services are prima facie unreasonable vis-à-vis the values assigned to the offshore supplies which make no economic sense when viewed apart from the offshore supplies contract.

It was noted in this case that all the activities, i.e. onshore as well as offshore, had resulted in huge losses due to the inordinate delay in the project which the DRP had also considered. The TO had proceeded on the basis that profits had been made on offshore supplies outside the ambit of taxation in India. Therefore, the Tribunal returned the case back to the TO for a fresh adjudication, to examine whether the assessee had incurred overall losses on the contracts.

Dongfang Electric Corporation v. DDIT [TS-434-ITAT-2012(Kol)]

The Delhi Tribunal, in the case of National Petroleum Construction Company v. ADIT [TS-756-ITAT-2012(DEL)], has held that in the case of a UAE tax resident assessee, which had entered into an umbrella contract, if the consideration for offshore and onshore activities is stated separately and is agreed between the parties and the assessee at the time of awarding the contract, the contract may be construed as a divisible contract. The Tribunal held that in this case, only the part of the profits attributable to the PE in India is taxable and the profits from offshore supplies cannot be taxable since the terms of the contract provided a right to withdraw or abandon the contract. However, the company or the contractor was not liable to make the entire payment or refund the amount received, which accrued only on completion of the contract. Hence, the contract could not be regarded as a turnkey contract and only the profits attributable to the PE in India can be taxed in India.

In another case, that of SEPCO III Electrical Power Construction Corporation, In re [TS-60-AAR-2012], the AAR held that consideration received by the assessee, a Chinese company, from the offshore supply of equipment, including design, engineering, procuring and transportation activities, to an Indian company is not taxable by virtue of the binding decision of the SC in the case of Ishikawajima-Harima Heavy Industries Ltd. v. DIT [2007] 288 ITR 408 (SC). The AAR also rejected the contention of the revenue authorities that the assessee had a continued presence in India since, because a substantial part of the contract amount was allocated to civil and erection purposes, the applicant had to coordinate with the relevant contractors relating to pre-commissioning activities and to provide assistance and support to the relevant contractors at all times during a period of 90 days.

Capital gains

A transfer of shares or other interests pursuant to a family arrangement is not a transfer for purpose of capital gains tax

Facts

The assessee was party to a family arrangement relating to certain personal and family properties. On account of a dispute between family members, the matter was referred to arbitration.

Under a settlement suggested by the arbitrator, the assessee transferred his share in the partnership firm to other members who, in turn, transferred their shares to the assessee. The TO treated the settlement as a 'transfer' and held that the assessee was liable to pay capital gains tax. The CIT(A) confirmed the order of the TO. On appeal, the Tribunal held that the family arrangement made in accordance with the suggestions of the arbitrator did not amount to a 'transfer', and hence the assessee was not liable to pay any capital gains tax.

High Court order

- The HC placed reliance on the case of CGT v. K N Madhusudhan [Gift Tax Appeal Nos. 1&2/2008] in which the following was held:
  - 'Transfer' does not include partition or family settlement as defined under the Act.

- Since every member had a pre-existing title to the property which was the subject matter of a the transaction (the partition) an adjustment of shares and crystallisation of the respective rights in family properties took place and this could not be construed as a transfer under the law.

- The Tribunal had held, on consideration of the settlement agreement between the parties, that the transaction was a family arrangement.
- Accordingly, it was concluded that the there was no transfer in respect of shares transferred under the family arrangement and, hence, no liability to pay capital gains tax arose.

CIT v. R Nagaraja Rao [TS-222-HC-2010(Kar)]

Permanent establishment

Inherent right of the state of residence to tax global income remains where business is carried on through a PE

Facts

The assessee, a tax resident of India, is engaged in providing telecommunication services in India and abroad. It had earned business income from numerous projects undertaken in various foreign countries through its PEs in the respective countries. However, the tax payer did not include the business income from the foreign countries in its income taxable in India since it was exempt from tax under the respective tax treaties.

The TO held that the business income attributable to the PEs was liable to be taxed in India under Article 7 of the respective tax treaties. The CIT(A) upheld the order of the TO.

On appeal to the Tribunal, it was held that under the provisions of section 5 of the Act, India had an inherent right to tax the global income of its residents. Article 7 of all the relevant tax treaties consisted of two parts: (a) 'shall be taxable only', giving the 'state of residence' an exclusive right to tax the assessee's business income, and (b) 'may be taxed' giving the 'other contracting state', where the PE is situated, a right to tax the tax payer's business income.

Therefore, even though all the tax treaties applicable to the tax payer use the phrase 'may be taxed', the inherent right of taxing global business income in India remains.

Accordingly, the Tribunal held that where the tax treaty contains the phrase 'may be taxed', the state of residence would have an inherent right to tax the global income of tax payer in India and also the income attributable to the PEs of the tax payer in the foreign countries.

Telecommunications Consultants India Ltd. v. ACIT [TS-185-ITAT-2012 (Del)]

Another decision on a similar issue was given in the case of DCIT v. Essar Oil Ltd. [TS-461-ITAT-2011]. In this case, the tax payer, E Ltd, had branches in Qatar and Oman which were treated as PEs of the tax payer. The Tribunal held that the tax payer was not taxable in India in respect of the income of the foreign PEs, under Article 7 of the tax treaties with Qatar and Oman.

The Tribunal observed that by using the expression 'may also be taxed' in the other state, the contracting parties permitted only 'the other state', i.e. the state in which the income was of sourced, to tax the income and precluded the state of residence from taxing the income.

Representative assessment

Taxability of income in the hands of a non-resident not a relevant consideration to determine whether a resident is an agent of a non-resident

Facts

The assessee had entered into agreements with a non-resident, Airline Rotables Ltd., UK (ARL) relating to obtaining aircraft components.

It had requested the TO to issue a nil tax withholding certificate in relation to the payments to be made to ARL. However, the TO did not grant a nil tax withholding certificate, holding that ARL had a PE in India and, accordingly, business income attributable to the PE would become taxable in India.

During the course of the assessment proceedings relating to ARL, the TO relied on the findings of the TO, estimated ARL's income attributable to the PE and taxed the same as business income. The CIT(A) upheld the findings of the TO. The Tribunal held that ARL did not have a PE in India and, therefore, the income was not taxable as business profit in India.

While the assessment proceedings relating to ARL were pending, the TO also issued a notice to the assessee treating it as an agent or representative assessee of ARL under section 163(1)(b) and 163(1)(c) of the Act. On appeal, the CIT(A) reversed the order of the TO and held that the assessee cannot be considered as an agent of ARL.

Tribunal order

- The purpose of section 163 of the Act is to enable revenue authorities to proceed and impose a vicarious liability on a person regarded as an agent, in the event that income is found to be taxable in the hands of the non-resident.
- The provisions of section 163 of the Act do not require that the liability of the non-resident to pay tax should be established before initiating proceedings against a person under section 163 of the Act in order to

Corporate tax

treat it as an agent or representative assessee of the non-resident.

- The taxability of income in the hands of a non-resident was to be determined in separate assessment proceedings, i.e. one in relation to payment made directly in the hands of the non-resident (section 166 of the Act) or another in relation to payment made in the hands of the person treated as an agent of the non-resident (section 160 of the Act read with section 163 of the Act).
- A person is to be regarded as an agent of the non-resident if any of the parameters specified in section 163(1)(a) to (d) of the Act are satisfied.
- In this case, the assessee was to be treated as an agent of ARL, for the following reasons:
  - Sufficient nexus existed between ARL's business and the assessee as envisaged under section 163(1)(b) of the Act.
  - ARL was in receipt of income from the assessee for services rendered, as envisaged under section 163(1)(c) of the Act.

It was further held that an order under section 163 of the Act was not an assessment order. Hence, there was no merit in the assessee's contention that simultaneous proceedings against the principal, as well as the agent, cannot be initiated.

ADIT v. Jet Airways (India) Pvt. Ltd. [2012] 19 taxmann.com 37 (Mum)

One may note that in the case of Vodafone International Holdings B.V. v. UOI [TS-23-SC-2012], a similar issue was dealt with by the SC ruling in the favour of the assessee:

Facts

The Hutchison Group (Hong Kong) owned a stake in CGP Ltd., a Cayman Islands company, which in turn was holding 67% interest in an Indian operating company Hutchison Essar Ltd (HEL). Vodafone International Holdings B.V. (VIH), a Dutch entity, acquired 100% shares in CGP Ltd. from Hutchison group, which amounted to an indirect acquisition of an interest in the Indian entity, HEL.

The revenue authorities treated VIH as a representative assessee of Hutchison group under section 163(1)(c) of the Act and proceeded against it for non-withholding of tax under section 195 of the Act in respect of a sale consideration paid to Hutchison group for acquiring CGP and consequently HEL.

The SC held the following:

In respect of tax withholding obligation under section 195 of the Act

Section 195 of the Act only applies if payment is made by a resident to a non-resident. In the case in question, the sale transaction was an outright sale between two non-residents, of a capital asset (CGP shares) outside India.

Since VIH had no tax presence in India in relation to this sale transaction, VIH cannot be brought under the jurisdiction of the Indian tax authorities and the tax withholding provisions under section 195 of the Act would not apply to VIH.

In respect of the representative assessee proceedings

In order to invoke section 163(1)(c) of the Act, income must be deemed to have accrued or arisen in India. The capital asset transferred (i.e. shares in CGP Ltd.) was not situated in India and, hence, VIH cannot be proceeded against under section 163 of the Act.

Circulars and notifications

Approval of foreign currency borrowings

CBDT clarifies the approval mechanisms for applying a lower withholding tax rate to foreign currency loans.

Section 194LC has been inserted into the Finance Act, 2012, which provides for tax withholding at 5% on interest payment on foreign borrowings by an Indian company. This section provides for lower withholding tax at the rate of 5% of interest subject to fulfilment of the following conditions:

1. Amount borrowed in foreign currency either under a loan agreement or by issue of long-term infrastructure bonds, approved by the central government.
2. Monies borrowed or bonds issued during the period from 1 July 2012 to 30 June 2015.
3. Monies borrowed or bonds issued during the period from 1 July 2012 to 30 June 2015.
4. The rate of interest should be approved by the CG.
   - The Central Board of Direct Taxes (CBDT), in order to mitigate the associated compliance burden, issued a circular prescribing compliance with the conditions outlined in A, B and C below to utilise borrowings under the automatic route, without approval from the CG.

Corporate tax

5. **In respect of loan agreements**
   - The borrowing of money should be under a loan agreement.
   - The monies borrowed by the Indian company should comply withexternal commercial borrowings (ECB) regulations (section 6(3)(d) of the FEMS, 1999 read with notification no FEMA3/2000-RB viz. Foreign Exchange Management (Borrowing or Lending in Foreign exchange) Regulations 2000, dated 3 May 2000) either under the automatic route or under the approval route.
   - The borrowing company should have obtained a loan registration number (LRN) issued by the RBI.
   - No part of the borrowing has taken place under the agreement before 1 July 2012.
   - It should not be a restructuring of an existing agreement for borrowing in foreign currency solely for the purpose of taking benefit of reduced withholding tax rates.
   - The end use of the funds should comply with other conditions laid down by the RBI under ECB regulations.

     – **For issue of long-term infra bonds**
       - The bonds issued by the Indian company should be authorised under ECB regulations either under the automatic route or under the approval route.
       - The bonds issue should have a LRN issued by the RBI.
       - The term ‘long-term’ means that the bonds to be issued should have an original maturity term of three years or more.
       - The bond issue proceeds should be utilised in the infrastructure sector only (infrastructure sector shall have the same meaning as assigned under the ECB regulations).

     – **Rate of interest**
       - The CG has approved the interest rate for the purpose of section 194LC as any rate of interest which is within the all-in-cost ceilings specified by the RBI under ECB regulations applicable to borrowing by loan agreement or through a bonds issue.
6. In the case of other long-term infrastructure bonds, where the Indian company receives subscription of foreign currency bonds, and the issue is not covered under ECB regulations, approval, for the purpose of section 194LC shall be on a case- by-case basis. Also, an application shall be made by the Indian company to Member (IT) CBDT with relevant details of the purpose, period and rate of interest in respect thereof.

Circular no 7/2012, F No. 142/17/2012-SO(TPL) dated 21 September 2012

Retrospective amendments

Clarification regarding reopening of completed assessments as a result of retrospective amendments by the Finance Act, 2012

The Finance Act, 2012 has introduced certain clarificatory amendments with retrospective effect relating to the following:

- Indirect transfer of shares according to Explanation 4 and Explanation 5 of section 9(1)(i) of the Act which has been inserted with retrospective effect from 1 April 1962.
- Taxability of royalty according to Explanations 4, 5 and 6 of section 9(1)(vi) of the Act which has been inserted with retrospective effect from 1 June 1976.

The CBDT has clarified that completed assessments would not be reopened on account of the above retrospective amendments under the following circumstances:

- The assessment proceedings under section 143(3) of the Act have been completed before 1 April 2012.
- No notice for reassessment under section 148 of the Act read with section 147 of the Act has been issued prior to that date.

However, any assessment or any order which stands validated due to the clarificatory amendments would be enforced.

Set-up of institutional mechanism

CBDT sets up institutional mechanism for forming departmental view on contentious legal issues

The CBDT has set up the following institutional mechanisms to formulate ‘departmental views’ on contentious legal issues to provide clarity on contentious legal issues, promote consistency of approach on a given issue and reduce litigation.

Central technical committee

A standing committee in the Board known as the ‘Central Technical Committee (CTC) on Departmental View’ with prescribed members will be set up. The senior-most member shall act as chairman of the CTC in its meetings and may also invite any officer of the department conversant with the matter for relevant inputs and deliberations.

Corporate tax

The secretariat

A secretariat will be formed to assist the CTC which shall be headed by the DIT(Research)/CIT(OSD) under the supervision and control of the DGIT(L&R). The secretariat will conduct research and provide inputs necessary for the CTC to deliberate upon the issues and formulate the 'departmental view' for consideration of the Board.

Regional technical committee

Each CCIT (CCA) shall constitute a 'Regional Technical Committee' (RTC) comprising the prescribed members to discuss the legal issues at the local level.

Identification of contentious legal issues

Any issues considered as contentious and having wide implications shall be referred to the RTC as and when they are identified. The possible sources to identify such issues may include the following:

- The administrative CIT
- The CIT(DR)
- The CIT(A)

In addition to the above, any officer may refer an issue considered contentious to the secretary of the RTC through the CIT concerned. The RTC may also pick up any issue for consideration suo motu.

Procedure at RTC

The secretary of the RTC shall submit the references for consideration of the RTC. No reference is to be pending for more than two months.

The RTC shall examine the issue with reference to the relevant provisions of the Income-tax Act and the judicial decisions available on the issue. The RTC shall refer the issue to the CTC in the following circumstances:

- If there are conflicting interpretations by Tribunal/HC/AAR in respect of a statutory provision
- If the interpretation of a statutory provision by Tribunal/HC/AAR defeats the legislative intent
- If the dispute involves substantial revenue or has wide ramifications
- If the issue involved is resulting in large scale litigation,
- If there is any other reason for referring the issue to the CTC

The proposals to the CTC should include the following:

- A brief referral note specifying the controversy.
- Copies of relevant orders e.g. orders of the AO, CIT(A), ITAT, High Court etc. as may be available.

Work process of the CTC

- The secretariat may receive references for the consideration of the CTC from CBDT, RTCs and DsIT (L&R).
- The CTC may also pick up any issue for consideration suo motu.
- The proposal shall be first processed by the secretariat as may be directed by the committee to enable it to formulate the departmental view, taking into account various aspects and divergent opinions on the issue.
- The committee shall take up references to formulate the 'departmental view' considering their relative importance. However, the reference received from the Board shall be prioritised.
- The committee shall examine the issue under consideration and form a tentative view, which may be circulated to the RTC seeking their response, who may also obtain a response from the CTC.
- The final draft will be prepared and sent for examination by the circular group of the Board.

Dissemination of 'departmental view'

- The 'departmental view' approved by the Board will be issued as a circular under section 119 of the IT Act.
- Where any HC decides an issue contrary to the 'departmental view', the 'departmental view' shall not be operative in the area falling in the jurisdiction of the relevant HC.
- However, the CCIT concerned should immediately bring the judgment to the notice of the CTC, which shall examine the judgment as a matter of priority to decide whether the filing of SLP to the Supreme Court will be an adequate response or to call for some legislative amendment.

This institutional mechanism comes into force from 29 August 2012.

Notification no - F no. 279/M-61/2012-ITJ dated 28 August 2012

Personal tax

Taxability of employee's secondment expenses

Reimbursement of employee relocation expenses paid by foreign company is not taxable

Facts

The tax payer, G Ltd, provides data processing and other IT-enabled services to H Ltd. The tax payer had made certain payments to H Ltd. towards reimbursement of relocation expenses and expenses on employee awards on which no tax was withheld. The TO contended that H Ltd. provided consultancy services and the payment was made along with a mark up and was therefore subject to withholding tax.

Tribunal order

The Tribunal, on the basis of evidence produced by the tax payer, held that the payments made to H Ltd. were in the nature of reimbursement of actual expenses and included no income element. In this regard, reliance was placed on the decision in GE India Technology Centre Pvt. Ltd. [TS-140-SC-2010] in which it was held that there was no obligation to withhold tax unless the sum payable to a non-resident was chargeable under the Act. Also, reference was made to the case of Mahindra and Mahindra Ltd. v. DCIT [2009] 30 SOT 374 (Mum)(SB), in which it was held that there was no obligation to withhold tax where there was no element of income involved.

Global E-Business Operations Pvt. Ltd. v. Deputy DCIT (IT) [TS-499-ITAT-2012 (Bang)]

In ITO v. PQR India [TS-258-ITAT-2012(Bang)], the Bangalore Tribunal held that reimbursement of salary costs under a secondment agreement was not fees for included services (FIS) under the India-US treaty and would not be subject to withholding tax. The Tribunal, relying on the decision in the case of IDS Software Solutions India (P) Ltd v. ITO [2009] 122 TTJ 410 (Bang), held that the secondee was an employee of the assessee, subject to tax under section 192, and was not rendering any technical services. Therefore, there was no requirement to withhold tax on the salary. This ruling did not consider the decision of Verizon Data Services India (P) Ltd. [2011] 337 ITR 192 (AAR), in which it was held that managerial services rendered by deputed employees qualify as FIS under the India-US treaty.

In Abbey Business Services (India) Pvt. Ltd v. DCIT [TS-532-ITAT-2012(Bang)], a similar issue was the subject of a decision by the Bangalore Tribunal which held that reimbursement of salary and other administrative costs under a secondment agreement were not FTS. It was observed that the assessee was the real and economic employer of the seconded employees and the reimbursement of salary costs and other administrative expenditure was without any profit element and was taxed under the Act or Article 13 of the India-UK tax treaty. Therefore, there was no requirement to withhold tax and there would be no disallowance under section 40(a)(i) of the Act.

In Avion Systems Inc. v. DDIT [TS-370-ITAT-2012], the Mumbai Tribunal held that deputation of technicians was not a simple supply of manpower but was taxable as FIS. The Payment in this respect was taxable as FIS since the assessee was not a general recruiting agency but was providing specialised personnel because of its expertise in the field of telecommunications. The assessee was providing technical personnel and 'making available' the expertise of the assessee. Accordingly, the receipts were taxable as FIS.

In Centrica India Offshore Pvt. Ltd., In re [TS-163-AAR-2012], the AAR ruled that an employee secondment arrangement gave rise to a service PE for the overseas entity under the India-UK tax treaty. Under a secondment agreement (SA) between the applicant and its overseas subsidiaries, employees were seconded to work under the control and supervision of the applicant. The AAR ruled that, under the SA, the employees' right to remuneration related to the overseas entities. The applicant had no obligation to pay salary and, hence, the seconded employees created a service PE for the foreign company. In this regard, reliance was placed on the SC decision in the case of DIT v. Morgan Stanley [TS-5-SC-2007] and Verizon Data Services India Pvt. Ltd., In re [TS-236-AAR-2011]. Accordingly, tax was liable to be deducted when payments were made to overseas entities.

Mergers and Acquisitions

Mergers and Acquisitions

Corporate Tax
Personal Tax
Mergers and Acquisitions
Capital Gains
Depreciation
Gift of shares
Tax exemptions/planning
Corporate law developments
GAAR
Transfer Pricing
Indirect Taxes
Regulatory

Capital gains

Indirect transfer of capital assets situated in India not subject to capital gains tax

Facts

The Hutchison Group owned interest in an Indian operating company (HEL) through numerous overseas holding companies based in Mauritius and the Cayman Islands, including HTIL and CGP, two group companies based in the Cayman Islands. In 2007, Vodafone International BV (VIH) acquired sole ownership of CGP from HTIL, resulting in an indirect transfer of shares of HEL. No taxes were withheld by VIH under section 195 of the Income-tax Act (the Act) when making payment to HTIL, on the grounds that the transaction was not taxable in India. VIH received a notice from the revenue authorities to show cause as to why it should not be treated as an assessee-in-default for failure to withhold tax. The authorities contended that there was a transfer of a controlling interest in HEL, its shares were indirectly transferred and the transfer of CGP shares was a tax avoidance scheme. VIH filed a writ petition with the Bombay HC. The latter dismissed the writ petition and VIH filed a special leave petition before the SC.

SC order

- The case of McDowell and Co Ltd. v. CTO [1985] 154 ITR 148 (SC) relates only to tax evasion through the use of colourable devices or dubious methods. Relying on Azadi Bachao Andolan v UOI [2003] 263 ITR 706 (SC), the SC held that a taxpayer is entitled to approach his affairs in such a manner as to ensure that his taxes are the lowest possible. Thus, not all tax planning is illegal. The task of the court is to 'look at' the transaction as a whole, in order to ascertain its true character, and not to adopt a dissecting approach.
- The expression 'directly or indirectly', contained in section 9 the Act, relates to income and not to a transfer of a capital asset. Thus, section 9 does not extend to indirect transfers.
- A controlling interest is a right embedded in shares and is not a separate property unless this is provided for in the statute. Accordingly, a transfer of a controlling interest in HEL from HTIL to VIH through a transfer of CGP shares cannot be dissected in such a way as to support the view that it is a transfer of a controlling interest in Mauritius entities and then HEL.
- Furthermore, the parties did not agree a separate price in respect of the shares in CGP share and other rights and emoluments. Therefore, it is not open to the revenue to split the payment between these items.
- It was also held that the purpose of the CGP was not only to hold shares in subsidiaries but also to enable a smooth transition of the business. Thus, it cannot be said that CGP had no commercial purpose.

On this basis, the SC disagreed with the conclusions arrived at by the Bombay HC and quashed the tax demand imposed.

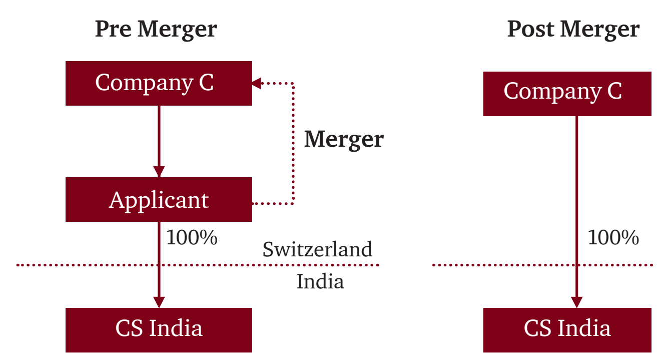
Vodafone International Holding B V v. UOI [TS-23-SC-2012]

Vesting of shares of an Indian company pursuant to an overseas upstream merger is not liable to capital gains tax

Facts

The applicant, Credit Suisse (International) Holding, a company incorporated in Switzerland, is a wholly-owned subsidiary (WOS) of another Swiss company, C1 (the parent company). The applicant had a WOS in India, Credit Suisse Services (India) Pvt. Ltd. (CS India).

The applicant intended to merge with its parent company by way of a merger by absorption, under the provisions of the Swiss Merger Act. Consequent to this, all the assets and liabilities of the applicant would be taken over by the parent company and no consideration would flow from the parent to the applicant.



Mergers and Acquisitions

The issues before the AAR were as follows:

- Whether capital gains will arise under section 45 of the Act in the hands of the applicant due to the vesting of the shares of its Indian subsidiary with its parent company.
- If capital gains will arise, whether exemption from capital gains tax under section 47(via) of the Act will be available to the applicant.

AAR ruling

The AAR held that there would be no capital gain by the applicant in India as a result of the merger, for the following reasons:

- Section 2(47) of the Act defines 'transfer' to include sale, exchange or relinquishment of an asset or the extinguishment of any right therein. Thus, a change in the ownership of the shares, from the applicant to the amalgamated company, will involve a transfer.
- The taxability of the transaction will depend on whether the merger is an amalgamation under section 2(1B) of the Act and whether section 47(via) exempts it.
- Since the shareholders of the merging applicant company will not become shareholders of the amalgamated company, condition (iii) of section 2(1B) requiring shareholders holding at least 75% of the value of the shares of the amalgamating company to become shareholders of the amalgamated company, will not be satisfied.
- While section 47(via) of the Act contains reduction with respect to the proportion of shareholding required, the condition itself cannot be met and accordingly the exemption will not be available to the applicant.
- However, while the transaction will attract section 45 of the Act, the AAR held that in view of the ruling in the case of Dana Corporation, In re [AAR No 788 of 2008], capital gains are not determinable under section 45 and section 48 of the Act. Accordingly, there will be no capital gains as a result of the merger.

Credit Suisse (International) Holding AG, In re [TS-626-AAR-2012]

Capital gains on direct and indirect transfer of shares of Indian company by Mauritius tax resident not taxable in India under the India-Mauritius tax treaty

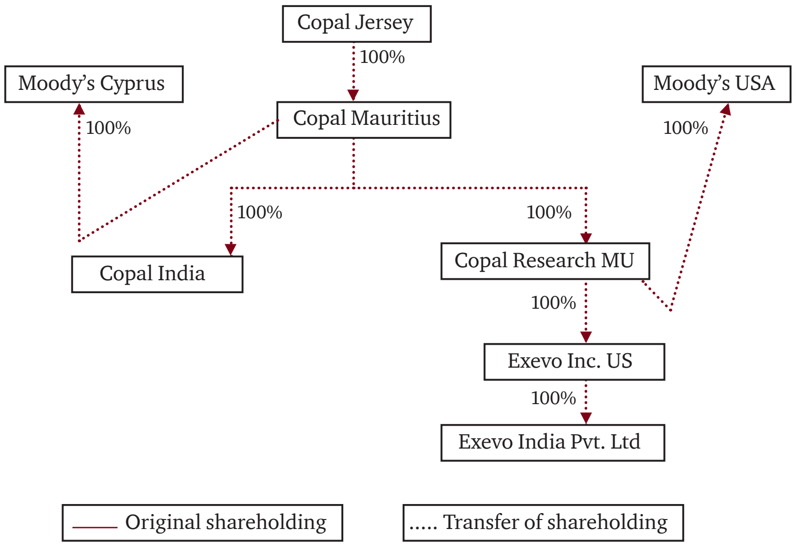
Facts

Copal Partners Ltd., Jersey (Copal Jersey), held 100% shares in Copal Research Ltd., Mauritius (Copal Mauritius). The latter, in turn, held 100% shares in Copal Research India Pvt. Ltd., India (Copal India) and Copal Market Research Ltd., Mauritius (Copal Research MU). Copal Research MU held 100% shares in Exevo Inc US, which in turn held 100% shares in Exevo India Pvt. Ltd., India (Exevo India). Both Copal Mauritius and Copal Research MU held tax residency certificates (TRCs) issued by the Mauritius revenue authorities.

The following transactions were undertaken by Copal:

- Sale of shares in Copal India by Copal Mauritius to Moody's Group Ltd. (Moody's Cyprus)
- Sale of shares in Exevo Inc US by Copal Research MU to another US company– Moody's Analytics, Inc (Moody's USA)

The applicant sought an AAR ruling as to whether capital gains arising on the transfer were liable to tax in India.



Mergers and Acquisitions

Corporate Tax
Personal Tax
Mergers and Acquisitions
Capital Gains
Depreciation
Gift of shares
Tax exemptions/planning
Corporate law developments
GAAR
Transfer Pricing
Indirect Taxes
Regulatory

AAR ruling

- The AAR, relying on the SC decision in the case of UOI v Azadi Bachao Andolan [2003] 263 ITR 706 (SC), held that what is relevant in the context of the tax treaty is not whether the income is actually taxed in Mauritius, but whether, in terms of the tax treaty, it can be taxed in Mauritius.
- The AAR also held that the effective management of the companies takes place in the location where the board of directors (BOD) functions. There was nothing on record to show that the management of the Mauritius companies was not with its BOD. Accordingly, the AAR held that the transferor companies were tax residents of Mauritius.
- In the case of a company which is an independent legal entity, the theory of beneficial ownership does not prevail over the apparent legal ownership. A company recognises the recorded owner of the shares and not the person on whose behalf those shares may have been held.
- Accordingly, the AAR held that the capital gains flowing Copal Mauritius (on direct transfer of shares of Copal India) and Copal Research MU (on indirect transfer of shares of Exevo India) would not be taxable in India by virtue of Article 13(4) of the tax treaty.

Moody's Analytics Inc, In re [2012] 24 Taxmann 41 (AAR)

Capital gains on transfer of shares in Indian company by a Mauritius company holding valid tax residency certificate, is not chargeable to tax under the India-Mauritius tax treaty

Facts

The applicant, Dynamic India Fund, is a company incorporated in Mauritius. Dynamic India Fund is registered with the Securities Exchange Board of India (SEBI) as a foreign venture capital investor. The applicant held a valid TRC from the Mauritius revenue authorities and did not have a PE in India. The control of the applicant's affairs took place in Mauritius and decisions were taken by the BOD from Mauritius.

The applicant is a WOS of Dynamic India Fund II (DIF II), another company based in Mauritius. DIF II pools funds from investors all over the world and invests them as capital in the applicant.

The applicant invested the funds received in this way in the shares of Indian companies. It held the shares with the intention of generating long-term capital appreciation. These shares were reflected as investment in its books.

The issue before the AAR was whether such transfer of shares is chargeable to tax in India.

AAR ruling

- The AAR held that there is no material on record to show that routing of the investments by the applicant through Mauritius is a scheme for tax avoidance in India. Also, there were inadequate records to show that the applicant's decisions were taken from India.
- Further, relying on the SC's decision in the case of UOI v Azadi Bachao Andolan [2003] 263 ITR 706 (SC)), the AAR held that what is relevant in the context of the tax treaty is not whether the income is actually taxed in Mauritius, but whether, in terms of the tax treaty, it can be taxed in the country.
- In the light of the above, the capital gains arising on the transfer of shares held in Indian companies will not be taxable in India under Article 13(4) of the India-Mauritius tax treaty.

Dynamic India Fund, In re [TS-513-AAR-2012]

Transfer pricing provisions apply even though transfer of shares in an Indian company by a Mauritius company is not subject to tax under the India-Mauritius tax treaty

Facts

The applicant, Castleton Investment Ltd., a company incorporated in Mauritius, holds shares in an Indian company. The applicant proposes to transfer its investment in the Indian company at fair value to an associated enterprise in Singapore (Singapore AE), through an off-market transaction.

The issues before the AAR were as follows:

- Will capital gains arising on the transfer of shares be taxable in India?
- Will transfer pricing (TP) provisions be applicable, if the transaction is not taxable in India?
- Should taxes be withheld on the consideration paid to the applicant in relation to the transfer of shares?
- Is the applicant required to file a return of income under section 139 of the Act if the transfer of shares is not taxable in India?
- Will the minimum alternate tax (MAT) provisions under section 115JB of the Act be applicable to the applicant?

Mergers and Acquisitions

AAR ruling

- The AAR, relying upon the ruling of the SC in the case of UOI v. Azadi Bachao Andolan [2003] 263 ITR 706 (SC), held that a transfer of the shares of an Indian company by a Mauritius company is not subject to capital gains tax in India under Article 13(4) of India-Mauritius tax treaty.
- The AAR held that, as per section 92 of the Act, TP provisions are applicable to 'any income arising from an international transaction', and that the word income had a wide connotation. Accordingly, TP provisions were applicable to all international transactions, irrespective of whether or not the ultimate gain or income is taxable in India. The AAR, relying upon the decision of the SC in the case of GE Technology Centre Pvt. Ltd. v. CIT [2010] 327 ITR 456 (SC), ruled that there is no obligation to withhold tax, if income is not chargeable to tax under the provisions of the Act.
- The obligation under section 139 of the Act does not simply disappear on account of the non-taxability of the income under the beneficial provisions of the tax treaty. Therefore, the Mauritian company is required to submit its tax return in India.
- Further, since the MAT provisions under the Act do not distinguish between Indian and foreign companies, the MAT provisions apply to foreign companies.

Castleton Investment Ltd., In re [TS-607-AAR-2012]

Buy-back of shares by WOS taxable as capital gains

Facts

The applicant (a German company) had a WOS in India in which it held a 99.99% stake, with the balance of 0.01% held through its nominees. The Indian company proposed to buy-back shares from the applicant. The buy-back would result in a transfer of shares of the Indian company from the applicant to the Indian company.

The applicant approached the AAR for a ruling as to whether a transfer to the WOS of the shares of the Indian company by the applicant, in the course of the proposed buy-back of shares, will be exempt from tax in India in the hands of the applicant, in view of the provisions of section 47(iv) of the Act.

AAR ruling

- Section 46A of the Act provides that if a shareholder receives any consideration from any company for the purchase of its own shares, then, subject to the provisions of section 48 of the Act, the difference between the cost of the acquisition and the value of the consideration received by the shareholder shall be deemed to be the capital gains flowing to that shareholder.
- Section 45 of the Act is a general provision dealing with the transfer of all capital assets. On the other hand, section 46A of the Act can be understood as a special provision dealing with the purchase of company's own shares by a company. Thus, section 46A of the Act would supersede the general provisions of section 45 of the Act. Therefore, there appears to be no reason to go into an enquiry as to whether section 46A of the Act is a charging section or not.
- Accordingly, section 46A of the Act will be applicable in a case of a buy-back of shares. Further, section 46A of the Act is not subject to section 47 of the Act, which at best only overrides section 45 of the Act.
- Additionally, exemption under section 47(iv) of the Act postulates that a company must hold 100% shares in its subsidiary Indian company, either directly or through its nominees. Since other companies were holding shares in the Indian company as nominees of the applicant, alongside the applicant, it cannot be postulated that the applicant held 100% of the shares in the Indian company.
- Hence, the proposed buy-back of shares will be taxable as capital gains under section 46A of the Act and would not be exempt under section 47(iv) of the Act.

RST, In re [TS-162-AAR-2012]

Applicability of capital gains tax, transfer pricing provisions and exemption under section 47(iv) on buy-back of shares of an Indian company

Facts

The applicant, Armstrong World Industries Mauritius Multiconsult Ltd., is a tax resident of Mauritius and a WOS of Armstrong World Industries Ltd., UK (Armstrong UK). Armstrong World Industries India Pvt. Ltd. (Armstrong India) is a subsidiary of the applicant. The latter held a 99.97% stake in Armstrong India and the remaining stake was held by Armstrong UK. Armstrong India proposed to buy-back a part of its shares from the applicant (under section 77A of the Companies Act, 1956).

The issues before the AAR were as follows:

- Whether the applicant is liable to capital gains tax in India on the buy-back of such shares by Armstrong India.

Mergers and Acquisitions

- Whether the transfer of Armstrong India's shares by the applicant to the latter (in the course of the proposed buy-back of shares) will be exempt from capital gains tax in India in view of section 47(iv) of the Act.
- Whether the proposed buy-back of shares will attract the transfer pricing provisions of the Act.

AAR ruling

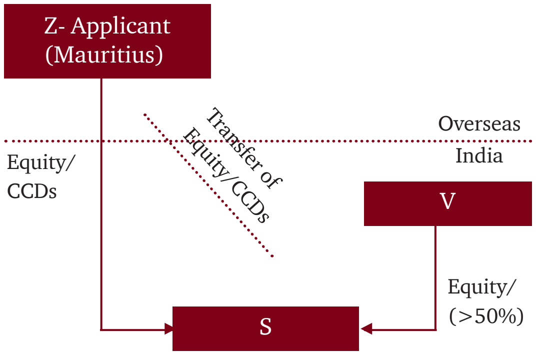
- The AAR ruled that sufficient evidence had not been produced by the income tax authorities to substantiate the argument that the investments were made through the applicant, a Mauritius company, to take advantage of the India-Mauritius tax treaty and to avoid tax in India. Relying on the SC's decision in the case of UOI v Azadi Bachao Andolan [2004] 10 SCC 1 (SC), the AAR held that, based on the facts presented, the assessee was eligible to claim the benefits of the India-Mauritius tax treaty and capital gains will not be taxable in India.
- The AAR, placing reliance on the ruling in the case of RST In re [AAR 1067 of 2011], held that the benefit of section 47(iv) of the Act will not be available as the entire share capital of Armstrong India was not held by the assessee but was jointly held by the assessee and Armstrong UK.
- The AAR also placed reliance on the ruling in Castleton Investment Ltd. In re [AAR 999 of 2010] in holding that the transaction was an international transaction between related parties and the TP provisions would be applicable to such a transaction.

Armstrong World Industries Mauritius Multiconsult Ltd., In re [TS-628-AAR-2012]

Gains arising on sale of compulsorily convertible debentures re-characterised as interest, benefit of capital gains exemption under the India-Mauritius tax treaty denied

Facts

The applicant, a Mauritius based company, entered into a shareholders' agreement (SHA) and with 'V', an Indian company, and a share subscription agreement (SSA) with V's its subsidiary, 'S'. Pursuant to the SHA, the applicant invested money in S in the form of equity shares and zero percent compulsorily convertible debentures (CCDs). The applicant was given a put option to sell and V was given a call option to acquire the equity shares and CCDs at a pre-determined price, at specified intervals. V exercised the call option to purchase the entire stake held by the applicant in S which resulted in capital gains in the hands of the applicant.



The issue before the AAR was whether the gain on the sale by the Mauritius company of equity shares and CCDs in an Indian company is exempt under Article 13(4) of the India-Mauritius tax treaty.

AAR ruling

- The SHA provided for the calculation of the purchase price after including accrued return on the cost of investment within the range of 20% to 30%, compounded quarterly, depending on the period of holding of the investment by the applicant.
- The aforementioned method of calculating the purchase price constituted 'interest', falling within the definition of interest both under the Act and the treaty as the definition of 'interest' was wide enough to cover any type of income payable on debentures.
- The conversion of debentures into equity at the end of the specified period constituted a constructive repayment of debt. Hence, the amount paid by V was towards debt and the interest thereon.
- The AAR also noted that S did not exercise any power in managing its own affairs and was controlled and managed by V. Thus, S and V were the identical. It was for V to demonstrate commitment to pay the debt and the amount paid by it was clearly towards the debt taken by S from the applicant.
- Accordingly, the AAR held that the appreciation in the value of CCDs was in the nature of payment of interest and was taxable under Article 11 of the tax treaty.

Z, In re [TS-198-AAR-2012]

Gift of shares prior to June 2010 treated as capital receipt, exempted under section 47(iii)

Facts

The assessee, an Indian Company, and British India Steam Navigation Co (BISNCL), a UK-based company, are WOSs of Peninsular and Oriental Steam Navigation Co (UK). BISNCL held shares in an Indian company, Hill Park Ltd. (HPL). By virtue of this holding, BISNCL was BISNCL became the owner of three residential flats. During assessment year (AY) 2008-09, BISNCL gifted the shares in HPL to the assessee, and this involved gifting the flats as well.

The assessee claimed exemption on a gift of shares and flats under section 47(iii) of the Act.

The TO treated the gift of shares as a colourable transaction and treated the receipt of the flats as 'income from other sources' under section 56(1), on the grounds that the basic condition for making gifts, that of love and affection, does not exist between artificial entities. The TO also held that the transfer was made for business convenience but was only presented as a gift.

The CIT(A) upheld the order of the TO and treated the gift as income. It held that the income is taxable as profits and gains from business and profession under section 28(iv) of the Act.

Tribunal order

- Since gift is not defined in the Act, the Tribunal imported its meaning from the Transfer of Property Act, 1882, and observed that there is no restriction that a 'gift' can be made only between natural persons out of love and affection. Therefore, a company can gift shares and although such a transaction may appear to a 'strange' transaction it cannot be treated as a 'non-genuine' transaction.
- The Tribunal also held that a company can gift shares as long as the articles of association of the company and the laws of the country where it is incorporated permit it to do so. In this case, it was factually established that BISNCL was authorised to make the gift.
- The Tribunal held that the gift of shares received constitutes a receipt of capital and it cannot be said to be a benefit or perquisite arising from business. Inter-group gifts do not necessarily imply business dealings.
- The Tribunal also examined the recent amendments to section 56 of the Act treating gifts of shares between companies as other income. The Tribunal held that these amendments are applicable to transactions carried out after June 2010. Therefore, they were not attracted to the case in question.
- Accordingly, the Tribunal held that the gift of shares constituted a receipt of capital and not taxable in view of the specific exemption available under section 47(iii) of the Act.

DP World Pvt. Ltd. v. DCIT [TS-767-ITAT-2012(Mum)]

Depreciation

Goodwill arising on amalgamation is an asset eligible for depreciation

Facts

YSN Shares and Securities Pvt. Ltd. (YSN) amalgamated with the assessee in accordance with a scheme sanctioned by the HC of Bombay and Calcutta. The excess consideration paid over the value of the net assets acquired from YSN was considered as goodwill arising on amalgamation. Tax depreciation on goodwill was claimed, treating the goodwill as an intangible asset under section 32 of the Act. The TO rejected the claim on the basis that goodwill is not an intangible as defined in Explanation 3 to section 32(1) of the Act, and the assessee had not paid any consideration for the same.

The CIT(A) and the Tribunal ruled in favour of the assessee and noted that in the process of amalgamation, the assets and liabilities of YSN were transferred to the assessee for a consideration and the difference between the cost of assets and the amount paid constituted goodwill. Thus, it was held that the assessee, in the process of amalgamation had acquired a capital right in the form of goodwill, because of which the market worth of the assessee was increased. This aspect was not challenged by the tax department during a further appeal before the HC. The HC affirmed the claim of the assessee and the department appealed to the SC.

SC order

- The SC held that Explanation 3 to section 32(1) of the Act states that the expression 'asset' means an intangible asset, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of a similar nature.
- The principle of ejusdem generis will strictly apply when interpreting the said expression which is mentioned in Explanation 3(b). The SC accordingly held that goodwill will fall under the expression 'any other business or commercial right of a similar nature' under 32(1)(ii) of the Act.
- As well as holding the above, the SC also observed that the department had not challenged the fact that the assessee acquired a capital right in the form of goodwill in the process of amalgamation.

Mergers and Acquisitions

- In Taj Sats Air Catering Ltd. v. CIT [TS-682-HC-2012 (Bom)], the assessee, Taj Sats Air Catering Ltd. purchased a catering business on a slump-sale, from Indian Hotels Company Ltd. As per the valuation report, the consideration was apportioned to assets and goodwill which was capitalised in the books of account, and depreciation was claimed under section 32 of the Act.
- The tax authorities disallowed the depreciation on goodwill which was confirmed by the Tribunal.
- The HC, relying on the SC's decision in the case of CIT v Smifs Securities Ltd., held that the assessee was entitled to make depreciation. The HC acknowledged the goodwill as an intangible asset eligible for depreciation under section 32 of the Act.

CIT v Smifs Securities Ltd. [TS-639-SC-2012]

Gift of shares

AAR doubts genuineness of inter-corporate gifts, terms them a strange transaction

Facts

The applicant, Orient Green Power Pte. Ltd., is a company incorporated in Singapore. The applicant has investments in the following two companies in India:

- 99.61% in Orient Green Power Ltd. (Orient India)
- 49.75% in Bharath Wind Farm Ltd. (Bharath India).

The balance stake in Bharath India is held by Orient India. The applicant transferred its 49.75% stake in Bharath India to Orient India, without consideration, as a 'gift', by executing a gift deed on 30 January, 2010.

The issue raised for the AAR's consideration was whether the transfer to Orient India of shares in Bharath India by the applicant without consideration would qualify for exemption under section 47(iii) of the Act.

AAR ruling

- The AAR observed that an oral gift between two corporations is a strange transaction and could only be aiding tax avoidance.
- In its view, gifts involve an individual, a joint Hindu family or any other human agency, since section 47(iii) of the Act specifically deals with cases of 'any transfer of a capital asset through a gift, or a will or an irrecoverable trust'. Also, transactions between corporations are specifically covered by sections 47(iv) and 47(v) of the Act, dealing with transactions between a holding company and its subsidiary.
- Accordingly, the AAR was of the view that a gift of shares by companies should not be covered within the ambit of exemption provided section 47(iii) of the Act.
- However, the AAR declined to give a final ruling on this matter and referred the matter to the assessing authorities for further examination.

Orient Green Power Pte Ltd. In re [TS-608-AAR-2012]

Gift of shares by shareholders to a company not a sham transaction and the subsequent sale results in capital gains

Facts

The assessee, Nadatur Holdings and Investments Pvt. Ltd., was incorporated as an investment company. Two directors of the company transferred to the assessee shares in Infosys Technologies Ltd. by way of a gift, under a gift deed. Out The assessee sold some of these shares and the balance of the shares was shown as investment in its books.

Income arising on sale of such shares was treated as capital gains by the assessee and was accordingly offered to tax in its tax return. The TO held that a gift of shares to a company by its shareholders amounted to gifting to oneself and hence was not a genuine transaction. Further, the TO noted that the main object of the company was to deal in shares and, therefore, the TO assessed the gains on sale of shares as business income. On appeal, the CIT(A) and the Tribunal ruled in favour of the assessee. The revenue authorities filed an appeal before the Karnataka HC.

High Court order

The HC held as follows:

- In common parlance, a gift is a transfer by one person to another, of existing movable or immovable property made voluntarily and without consideration, and includes the deemed transfer or conversion of any property.
- The gift of shares to the assessee was a valid and genuine transaction as the assessee was a separate legal entity and there was no restriction on the gifting of shares by the shareholders to the company.
- The HC observed that the assessee was only an investment company engaged in buying, acquiring, investing in and holding shares and merely because the company earned profits from the sale of shares did

Mergers and Acquisitions

Corporate Tax
Personal Tax
Mergers and Acquisitions
Capital Gains
Depreciation
Gift of shares
Tax exemptions/planning
Corporate law developments
GAAR
Transfer Pricing
Indirect Taxes
Regulatory

not mean that the company is engaged in the trading of shares.

- Furthermore, the HC relied on the SC ruling in the case of CIT v. Sutlej Cotton Mills Supply Agency [1975] 110 ITR 706 (SC) and G. Venkataswamy Naidu and Co. [1959] 35 ITR 594 (SC) and held that a solitary sale of shares by the assessee could not be treated as constituting a trade or business in shares.

CIT v. Nadatur Holdings and Investments Pvt. Ltd. [TS-656-HC-2012 (KAR)]

Tax exemption/planning

Change in ownership would not constitute reconstruction and tax holiday available after slump sale

Facts

- Indian Organic Chemicals Ltd. (IOCL), the assesee, had set up Sonata Software Division, which consisted of two parts: (i) a software technology park (STP) undertaking, eligible for exemption under section 10A of the Act; and (ii) A non-STP undertaking.
- IOCL transferred its software division as a going concern in a slump sale to the assessee.
- The assessee claimed exemption under section 10A of the Act in respect of the income from the STP undertaking.
- The TO denied the exemption claimed by the assessee under section 10A on the following grounds:
- The STP undertaking was formed by the splitting up or reconstruction of a business already in existence, as the same business was carried on by IOCL before it was carried on by the assessee.
  - All the assets and liabilities, including plant and machinery, previously used were transferred to the assessee.
- The CIT(A) upheld the order of the TO. However, the Tribunal held that where an ongoing business is transferred lock-stock-and-barrel by one assessee to another assessee, the principle relating to reconstruction, splitting up and transfer of plant and machinery cannot be applied.

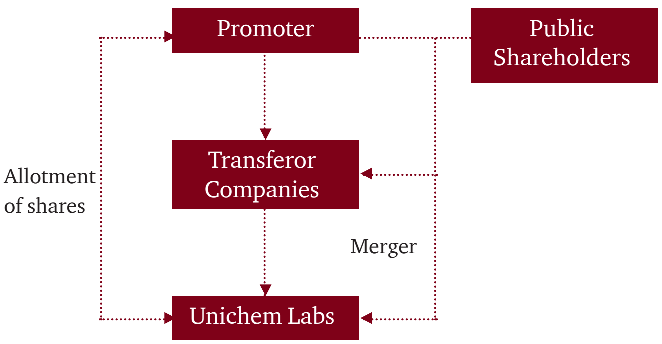
High Court order

- The HC relied on the decision of the division bench in CIT v. Gaekwar Foam & Rubber Company [1959] 35 ITR 662 (Bom) (which was also approved by the SC in Textile Machinery Corporation Ltd v. CIT [1977] 107 ITR 195 (SC)), in which the following was held:
  - If substantially the same business is carried on by substantially the same persons, this would amount to reconstruction.
  - Where the ownership of a business or undertaking changes, this would not be regarded as reconstruction.
- In this case in question, the entire business of the software undertaking was transferred as a 'going concern' to the assessee. Thus, the undertaking of the assessee was not formed by a splitting up of the business and therefore the exemption under section 10A was available to the assessee for the unexpired period of the tax holiday.

CIT v. Sonata Software Ltd. [TS-164-HC-2012(BOM)]

Tax planning within the legal framework of the law is permissible

Facts



Mergers and Acquisitions

Corporate Tax
Personal Tax
Mergers and Acquisitions
Capital Gains
Depreciation
Gift of shares
Tax exemptions/planning
Corporate law developments
GAAR
Transfer Pricing
Indirect Taxes
Regulatory

- Five companies (transferor companies) were being merged into Unichem Laboratories Ltd. (Unichem Labs), a listed company, under a scheme of arrangement.
- The assets of the transferor companies predominantly consisted of shares in Unichem Labs.
- The scheme provided for the cancellation of shares held by the transferor companies in Unichem Labs and the allotment of shares to the shareholders of the transferor companies, i.e. promoters.
- A minority shareholder of Unichem Labs objected to the scheme, on the grounds that the objective of the scheme was to avoid capital gains tax on the transfer of shares held by the transferor companies in Unichem Labs to the promoters.

High Court order

The HC held as follows:

- The object of the scheme is legitimate. It provides long-term stability and transparency. Furthermore, it is permissible under the law and is not a colourable device designed to avoid tax.
- Every transaction or arrangement which is permissible under the law which has the result of reducing the tax burden of an assessee should not be treated as a tax avoidance device (reliance was placed on the SC decision in case of UOI v. Azadi Bachao Andolan [2004] 10 SCC 1 (SC)).
- Unichem Labs cannot be at fault if the objective was to be achieved through one of the alternate options available.
- In the case of UOI v. Ambalal Sarabhai Enterprises Ltd [1984] 147 ITR 294 (Guj), the Gujarat HC sanctioned the scheme, despite the fact that the transaction incidentally led to a reduction in tax costs.
- Relying on the judgement of the Division Bench of the Bombay HC in the case of Sterlite Industries (India) Ltd. [2003] 45 SCL 475 (Bom), the HC held that the income-tax authorities are not required to be heard while sanctioning a scheme under sections 391 to 394 of the Companies Act, 1956.

AVM Capital Services Pvt. Ltd. [TS-512-HC-2012 (BOM)]

Transaction within four corners of law can be treated as 'sham' and 'colourable device' by looking at 'human probabilities'

Facts

The assessee, Killick Nixon Ltd., had provided a guarantee of INR 100 crore to Vysya Bank Ltd. for extending financial facilities to another group company. When the guarantee was invoked, the assessee agreed to transfer the land it owned in FY 2000-01 to the bank at a substantial gain. In the same year, these gains were set off against short-term and long-term capital loss arising from sale of shares.

The TO disallowed the set-off of loss stating that the transaction was a 'sham'. In this regard, it was noted by the TO that in FY 1999-00, the assessee received funds from group entities and made investments in its subsidiary companies at a premium of INR 140 per share, although the fair value was less than INR 25 per share. These funds were then transferred by the subsidiary companies to another group company.

Thereafter, in the relevant year, the assessee sold the shares at a value of INR 5 per share and the loss which arose was set off against gain on sale of land. Thus, the TO concluded that the assessee was conscious of the gain on sale of land, and therefore, sold the shares at a loss. Thus, the TO disallowed the capital loss on the sale of shares.

The CIT(A) and the Tribunal upheld the findings of the TO and rejected the transaction involving investment in subsidiaries and sale of their shares, considering this to be a sham.

High Court order

The HC relied on the decision of SC in case of Vodafone International B.V.I v. UOI [2012] 204 Taxman 408 (SC) in holding that as the transaction undertaken by the taxpayer was a sham, it could not be considered a part of tax planning or legitimate reduction of tax liability. Thus, the HC concluded that the sale and purchase of shares by the assessee to consider the capital loss was a sham transaction.

Killick Nixon Ltd v. DCIT [TS-148-HC-2012(BOM)]

Mergers and Acquisitions

Corporate Tax
Personal Tax
Mergers and Acquisitions
Capital Gains
Depreciation
Gift of shares
Tax exemptions/planning
Corporate law developments
GAAR
Transfer Pricing
Indirect Taxes
Regulatory

Negative net worth to be added to sale consideration for determining capital gains on slump sale

Facts

- The assessee company is engaged in the business of real estate, investment, manufacturing of transmission line towers and undertaking turnkey projects in India and abroad. In a scheme of arrangement under the Companies Act, 1956, the assessee transferred its power transmission business (the undertaking) to KEC International Ltd. by way of a slump sale, for a consideration of INR 143 crore. In its audit report, the company declared the net worth of the undertaking as a negative sum of INR 1570 million.
- The assessee relied on the ruling in the case of Zuari Industries v. ACIT [2007] 105 ITD 569 (Mum) and Paperbase Co. Ltd. v. CIT [2008] 19 SOT163 (Del) and offered the sale consideration of INR 143 crore as long-term capital gains under section 50B of the Act.
- The TO computed capital gains of INR 300 crore on the slump sale of the undertaking (declared sales consideration of INR 143 crore plus additional liabilities taken over amounting to INR 157 crore).

Tribunal order

- The Tribunal held that in determining the full-value of the consideration, only the 'amount actually received or accruing' is relevant and not what 'ought to have been received' or the 'fair market value of the capital asset'.
- The expressions 'net worth' and 'cost' used in section 50B of the Act are in the context of an undertaking and refer to 'all assets minus all liabilities'. Section 50B contemplates the computation of 'cost of acquisition and cost of improvement' of the undertaking which includes within its ambit 'the liabilities of such undertaking or unit or division'.
- If the book value of all the liabilities is more than the book value of all the assets, it is quite natural that the capital gains on the transfer of the undertaking will be more than the full value of the consideration because the value of liabilities undertaken by the transferee is embedded in the undertaking and has the effect of reducing the full value of the consideration.
- Therefore, in the case of a slump sale of an undertaking having negative net worth, the negative net worth cannot form part of the full value of consideration. However, this value does need to be added to the sale consideration when computing capital gains.

DCIT v. Summit Securities Ltd. [TS-140-ITAT-2012(Mum)]

Corporate law developments

Company law

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

The Ministry of Corporate Affairs has amended the Companies (Central Government's) General Rules and Forms, 1956, by inserting Rule 4BBB which came into effect on 12 August 2012. Rule 4BBB contains a procedure for changing the registered office of a company from one state to another under the provisions of section 17 of the Companies Act, 1956. This procedure was earlier laid down in the Company Law Board Regulations, 1991.

The important changes in the process of changing a registered office under Rule 4BBB are summarised below:

- Changes relating to filing a petition: A company which wishes to change its registered office from one state to another is required to file a petition before the regional director in prescribed forms: Form 1 and Form 24AAA. Under the erstwhile regulations, it was required that an application be filed with the Company Law Board and no specific form was prescribed for filing this application.
- Change in cut-off date for certain documents: The cut-off date for the list of creditors and debenture holders which it is required be filed along with the petition (which must state the name, address and the amount due to these creditors or debenture holders), shall not precede the date the petition is filed by more than one month (it had previously been two months).

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

Scheme of arrangement for transfer of passive infrastructure assets for nil consideration without transfer of liabilities

Facts

Vodafone Essar Gujarat Limited (VEGL) had filed a scheme of arrangement under sections 391 to 394 of the Companies Act, 1956 for demerger of its passive infrastructure assets (PIA) (without transfer of liabilities) from seven group companies to Vodafone Essar Infrastructure Ltd. (VEIL) for a nil consideration. The scheme had been rejected by the Gujarat HC in December 2010 and a revision petition was filed by VEGL with the division bench of Gujarat HC.

Mergers and Acquisitions

The income-tax authorities (ITA) challenged the scheme, contending that its sole object was to avoid payment of tax by transferring PIA to VEIL at nil consideration and subsequently merging VEIL with Indus. Further, since no liabilities were transferred, the transfer was not a demerger for tax purposes.

High Court order

The Gujarat HC considered the following two factors: (i) whether the ITA have locus standi to raise objections to the scheme and (ii) whether the sole object of the scheme was avoidance of tax.

The HC held as follows:

- Since there are dues payable by VEGL to the ITA, the ITA are creditors of VEGL and accordingly have locus standi in terms of raising objections to the scheme.
- The sole object of the scheme was not tax avoidance as there are commercial benefits of the proposed transaction (such as improved quality of services to customers, maximisation of business value and conversion of non-revenue generating assets into revenue generating assets) and the reconstruction is in line with government policies and global trends.
- There is no bar that restrains a transaction from being treated differently under different laws and, accordingly, the transfer by way of the scheme can be treated as a gift (and not demerger) under the Income-tax Act.
- The same scheme has been approved by other HCs and similar contentions of the ITA have been quashed by Delhi HC.

Accordingly, the scheme was approved by the HC. It further noted that pending proceedings by the tax authorities against the transferor company shall not be affected in view of the HC's sanctioning of the scheme.

Vodafone Essar Gujarat Ltd. v. DIT [Company Petition no 183 of 2009]

Objection by third parties to a scheme of arrangement to be considered independently

Facts

Essar Telecommunications Holdings Pvt. Ltd. (the transferor) proposed to amalgamate with India Securities Ltd. (the transferee) such that the entire undertaking of the transferor would be transferred to the transferee. The scheme was sanctioned by the shareholders of both companies. The regional director's report stated that SEBI had forwarded it a letter received from Vodafone International B.V. (objector) stating that it should also be admitted as a party to the petition. The transferor indirectly held a 100% stake in ETHL Communications Holding Ltd. (ECHL) which in turn holds 10.97% stake in Vodafone Essar Ltd (VEL), the remaining stake being held by the objector.

The Income Tax Department (ITD) also objected to the scheme stating that a tax demand was pending against the transferor's holding company.

High Court order

The HC held that the only parties who can object to the scheme are either the shareholders or the creditors of the company. The provisions of section 391 of the Companies Act, 1956, does not envisage the filing of objections by a third party whose rights might be affected by a scheme of arrangement. A remedy with regard to enforcement of rights by third parties was to be independently availed of and could not be a reason to object to the scheme of arrangement. The HC thus held that since VEL was neither a creditor nor a shareholder of the transferor or the transferee company, it could not file the application. Furthermore, the HC also rejected the objection of the ITD stating that no claim was pending against the transferor and transferee company.

It was held that the only objection which could be raised by any person in response to a notice could be with respect to the legality of the scheme or to its being in violation of any law. In the absence of any violation, merely because certain rights of a third party were going to be affected, could not be a reason to permit a third party to file an objection to the scheme.

Essar Telecommunications Holdings Pvt. Ltd. and India Securities Ltd. [2012] 106 CLA 95 (Chennai)

Stamp duty

Court order sanctioning a scheme of amalgamation or demerger is an instrument and conveyance liable to stamp duty

Facts

A scheme of amalgamation under section 391 to 394 of the Companies Act, 1956, was filed by Emami Biotech Ltd. in the state of West Bengal. The assessee contended that an order of the court will not amount to an 'instrument' unless this is specifically provided for and since there is no specific entry relating to mergers in the schedule of the West Bengal Stamp Act, an order of the court cannot amount to an instrument on which stamp duty can be levied.

Mergers and Acquisitions

High Court order

To determine the applicability of the SC's decision in the case of Hindustan Lever Ltd. v. State of Maharashtra [2004] 9 SCC 438(SC), the HC compared the relevant provision of the Bombay Stamp Act, 1958, with the West Bengal Stamp Act, 1964, and observed that the definition of an 'instrument' in both Acts was similar and observed that the ratio of SC's decision in the case of Hindustan Lever Ltd. would be applicable in the present case.

The HC relied on the SC's observations in the Hindustan Lever case and held that an order passed under section 394 of the Companies Act, 1956, is based on the agreement (consent) which would make such an order an instrument which is leviable to stamp duty.

The court also referred to its earlier judgment in the case of Gemini Silk Ltd. v. Gemini Overseas Ltd. [2003] 114 Comp Cas 92 (Cal.) in which it had held that orders sanctioning schemes in the state of West Bengal would be subject to stamp duty. The court also referred to the judgments of the Allahabad, Delhi and Madras HCs, rendered after the SC's pronouncement in the Hindustan Lever case.

The court, thus, held that an order sanctioning a scheme under section 394 of the Act falls within the description of the words 'instrument' and 'conveyance' within the meaning of the West Bengal Stamp Act and that the scheme is subject to stamp duty.

In respect of the notification dated 16 January 1937, providing remission of stamp duty under Article 23 (which applies to conveyance) of Schedule I to the Indian Stamp Act, 1889, the court held that the said notification is not applicable in West Bengal as the state legislature, by an overt act, has taken Article 23 outside the purview of Schedule I and placed it in Schedule IA to the West Bengal Stamp Act, 1964.

Emami Biotech Ltd. v. State of West Bengal [Company Application No. 777 of 2011]

SEBI

Manner of achieving minimum public shareholding

SEBI has directed the promoters of listed entities to dilute their stake so as to meet the minimum public shareholding (25% for private sector companies and 10% for PSU's) requirements. Accordingly, SEBI has made amendments to clause 40A of the equity listing agreement vide circular CIR/CFD/DIL/1/2012 dated February 8, 2012, and circular CIR/CFD/DIL/11/2012 dated 29 August, 2012.

To facilitate compliance by listed entities with the minimum shareholding requirements within the specified time, SEBI initially allowed the following methods:

- Issuance of shares to public through prospectus
- Offer for sale of shares held by the promoters to public through prospectus
- Sale of shares held by promoters through the secondary market under the terms of SEBI Circular CIR/MRD/DP/18/2012 dated 18 July 2012
- Institutional placement programme (IPP) under terms of Chapter VIIIA of SEBI (ICDR) Regulations, 2009, as amended.

The following additional avenues have now also been made available to promoters, to assist them in complying with the regulations:

- Rights issue to public shareholders, with promoters/ promoter group shareholders forgoing their rights entitlement
- Bonus issue to public shareholders, with promoters/ promoter group shareholders forgoing their bonus entitlement

The shares would be allotted only to public shareholders under such rights and bonus issues.

Furthermore, listed entities desirous of seeking any relaxation from the available methods or achieving the minimum shareholding requirement through other means may seek the regulator's approval for the same.

Mergers and Acquisitions

Different promoter groups cannot be deemed to be persons acting in concert (PAC) unless they share common objective or purpose of a substantial acquisition of shares of a target company

Facts

The target company (TC) had two promoter groups, and there was a serious rift amongst them. The TC converted share warrants held by the promoters into equity shares and one promoter group also acquired the shares of the TC from the market. On conversion of the aforesaid warrants and acquisitions from the market, the shareholding of the promoter group, increased from an aggregate 53.36% to 55.18%, which resulted in the triggering of an open offer under the SEBI (Substantial Acquisition of Shares & Takeover) Regulations, 2011 (Takeover Code).

However, no public announcement was made by the appellants in this regard. The Board issued a show cause notice for the same. The appellants denied that they were PAC within the meaning of the Takeover Code on the grounds that there was serious rift between promoters.

The issue in consideration is whether co-promoters of TC, merely by reason of being co-promoters, can be presumed to be PAC.

SAT order

The Securities Appellate Tribunal (SAT), relying on the decision of the SC in the case of Daiichi Sankyo Co. Ltd. [2010] 103 SCL 1 (SC), observed that there can be no PAC unless the different groups share the common objective or purpose of a substantial acquisition of the shares of the target company. The idea of a PAC is not that it is a fortuitous relationship coming into existence by accident or chance. Furthermore, there is sufficient evidence to show that there were disputes between the promoter groups and the onus was on the Board to prove otherwise.

Accordingly, the SAT set aside the impugned order and referred the matter to the Board for it to issue a fresh order.

Nikhil Mansukhani [SAT Order dated 11 May, 2012]

Indirect transfer of shares in TC by way of settlement in a trust pursuant to a family arrangement is exempt with respect to Takeover Code

Facts

Dr. Reddy's Holdings Ltd. (DRHL) was one of the promoters of Dr. Reddy's Laboratories Limited (Target Company or TC) and held 23.08% in the TC. Dr. Reddy's family held 83.17% shares in DRHL. Dr Reddy's family proposed to transfer their holding in DRHL to a private family trust (in which Dr Reddy's family members are the trustees), by way of gift or settlement.

Pursuant to the transfer, the shareholding of the acquirer (i.e. the family trust) along with the promoters would go up to 25.61%, which would result in the triggering of an open offer under the SEBI Takeover Code.

Exemption from making the open offer in terms of regulation 3(1) of the Takeover code, was sought under regulation 11(1).

SEBI order

SEBI granted an exemption to the acquirer from the requirement of making an open offer on the grounds that the transaction was taking place between the same set of individuals (i.e. the trustees of the family trust and promoters of the TC). Moreover, pursuant to the aforementioned indirect acquisition there will be no change in the promoter's shareholding and also in the control or management of the TC. Thus, the indirect acquisition will not affect or prejudice the interests of the public shareholders of the TC in any manner.

Dr. Reddy's Laboratories Ltd [Exemption order dated 3 May 2012]

Competition law

The Competition Commission (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2012

- Amendments to Schedule I - Categories of combinations which are ordinarily not likely to cause an appreciable adverse effect on competition in India and for which notification need not normally be filed are as follows:
  - Acquisition without control of up to 25% (earlier 15%) of the total shares/voting rights
  - Acquisition of share or voting rights pursuant to buyback of shares and subscription to rights issue of shares, not leading to acquisition of control

Mergers and Acquisitions

Corporate Tax
Personal Tax
Mergers and Acquisitions
Capital Gains
Depreciation
Gift of shares
Tax exemptions/planning
Corporate law developments
GAAR
Transfer Pricing
Indirect Taxes
Regulatory

- New categories: Merger/amalgamation involving holding company and its subsidiary; and/or mergers/amalgamations involving subsidiaries, wholly owned by enterprises belonging to the same group

- Applicability of Forms I or Form II
  - The indicative list of instances of combinations in relation to which the former Form I could be filed was removed.
  - Two indicative instances where Form II is preferred for filing:
  - Where the parties to the combination are engaged in
    - a similar business and the combined market share after such a combination exceeds 15% of the relevant market; and
    - different levels of the production chain in different markets and their individual or combined market share exceeds 25% of the relevant market.
- Form I requires the following additional information:
  - Value of assets and turnover, in a tabular form
  - Information earlier covered under Part II to be provided in all cases
  - Copies of approval of the proposal of the merger or amalgamation by the board of directors and/or other document executed in relation to the acquisition or acquiring of control
- Summary of the combination to be filed separately along with Form I or II (in at least 2,000 words):
  - The summary should not include any confidential information, but must include details of the business, value of cumulative assets or turnover, respective markets of operations, proposal agreements and the likely impact of combination on the competition.
- The fees for Form I and Form II have been increased to INR 1 million and INR 4 million respectively.
- Form III is to be filed by a public financial institution, financial institutional investor, bank or venture capital fund, where the acquisition is pursuant to any covenant of a loan or investment agreement.
  - Supporting document to be filed with From III: Certified copy of such loan agreement or investment agreement
  - Delayed filing of Form III with CCI: Can be condoned, at CCI's discretion

Competition Commission of India approves the amalgamation of Mauritius subsidiary into its Indian holding company

Facts

Tata Chemicals Ltd (TCL) proposed to merge its 100% subsidiary, Wyoming I (Mauritius) Pvt. Ltd. (Wyoming), a Mauritian company, with itself. In this regard, TCL and Wyoming (collectively parties to the combination) filed a notice with the Competition Commission of India (CCI) under Competition Act, 2002, for the proposed combination.

The parties to the proposed combination made the following preliminary submissions that the proposed combination did not require the filing of a notice with the CCI:

- The definition of the enterprise does not require notification of transactions between a parent company and its subsidiaries as they are effectively a single economic enterprise.
- The proposed combination, being an outbound stream of acquisition by TCL, would be exempt under Item 10 of Schedule I of the Combination Regulations.
- If the proposed combination related to acquisition of assets of Wyoming by TCL, the same would be exempt under Item 8 of Schedule 1
- The preliminary submissions were considered and replied to as follows:
  - A subsidiary is a separate legal entity and would therefore constitute a separate enterprise under section 2(h).
  - Item 10 in Schedule I relates to combinations taking place entirely outside India with an insignificant local nexus and effect on markets in India. Since the parties to the proposed combination meet the threshold relating to assets or turnover in India and TCL is an Indian party, the exemption would not be applicable.
  - Item 8 to Schedule I relates to acquisition and since the proposed combination is pursuant to a scheme of amalgamation, the exemption under Item 8 would not be available. Therefore, the merger required a notification to the CCI.

Thus, the parties are required to give notice of the proposed combination under the Competition Act, 2002.

Mergers and Acquisitions

Ruling

Upon notification, the CCI made the following observations:

- Both TCL and Wyoming are engaged in different business activities and there is no horizontal overlap or vertical relationship between them.
- Ultimate control over the activities carried on by TCL and Wyoming before and after the proposed combination, remained with the management of TCL.

Considering the above, the CCI held that the proposed combination is not likely to have an appreciable adverse effect on competition in India and it approved the proposed combination.

GAAR

Expert Committee Report on General Anti Avoidance Rules

The General Anti Avoidance Rules (GAAR) were incorporated into the Finance Act, 2012, in order to provide a basic framework for application of the GAAR. The GAAR are a broad set of provisions which grant powers to authorities to invalidate any arrangement where one of the main purposes is to obtain a tax benefit.

In this regard, it was provided in the Act that GAAR provisions would be applied in accordance with such guidelines and subject to such conditions and in a manner as may be prescribed.

A committee was therefore constituted which published draft guidelines on 28 June, 2012. Subsequently, the Prime Minister of India constituted an expert committee, under the chairmanship of Dr. Parthasarathi Shome, to provide recommendations on implementation of the GAAR.

Dr. Shome's report was released on 1 September 2012. The following were the major recommendations of Dr. Shome's expert committee:

- The GAAR provisions should be applicable prospectively.
- Implementation of the GAAR should be deferred for three years, so that they will be applicable from FY 2016-17.
- A monetary threshold of 30 million INR in terms of tax benefit (excluding interest) to a taxpayer in a year should be used for the applicability of the GAAR provisions. Furthermore, the tax benefit should be considered separately for each arrangement unless the arrangements are interlinked or connected with each other.
- Consideration of the tax consequences should be limited only to the impermissible part of an arrangement.
- The GAAR provisions should not be applicable to every tax avoidance arrangement unless it is abusive, contrived and artificial. The committee also recommended a negative list, to make it clear when the GAAR would not be invoked.
- There should be grandfathering of existing investments (though not of arrangements) so that these regulations are not invoked on their subsequent sale.
- TRC should be sufficient for accepting the residential status of a Mauritian company.
- The GAAR should not be invoked where Specific Anti Avoidance Rules (SAAR) are applicable or where anti-avoidance provisions are already present in the tax treaty
- The GAAR provisions should not apply to a foreign institutional investor (FII) it is taxed according to domestic law provisions.
- When determining the tax consequences of an impermissible avoidance arrangement, a corresponding adjustment should be allowed in the case of the same taxpayer in the same year as well as in different years, as the case may be. However, a corresponding adjustment should not be allowed in the case of any other taxpayer.
- The administration of the AAR should be strengthened so that an advance ruling may be obtained within the time frame of six months.

Transfer pricing

Transfer pricing

International update

India chapter of the United Nation's draft Practical Manual on Transfer Pricing for Developing Countries

Intent of the draft Manual and its guiding principles

The United Nations (UN) recently released eight draft chapters of its Practical Manual on Transfer Pricing for developing countries (the UN TP Manual or the Manual). Also included in the Manual are a foreword and a draft chapter (Chapter 10) containing country-specific perspectives that explain the transfer pricing (TP) administrative practices prevalent in four countries: Brazil, China, India subsequently referred to as the India chapter) and South Africa.

The Manual intends to address the need of developing countries for clearer guidance on the policy and administrative aspects of applying TP analysis. Such guidance is intended to assist policy makers and administrators in dealing with complex TP issues, and to assist taxpayers in their dealings with tax administrations.

The Manual has been developed based on the following key guiding principles:

- It is a practical rather than a legislative model.
- It reflects the realities for developing countries, and addresses real issues in a practical way.
- It is geared to the administrative limitations in some countries and their deficits in information, skills and resources.
- It aims to leverage the experience of other developing countries.

Notably, the foreword to the Manual clearly states that owing to the widespread reliance on the Organisation for Economic Co-operation and Development Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, July 2010 (OECD TP Guidelines) by both developing and developed countries, consistency with these Guidelines has been sought.

As for Chapter 10, the foreword to the Manual clarifies that this chapter is different from the other chapters as it represents an outline of the administrative practices in a particular country as described by the representatives of those countries. Accordingly, as further stated in the foreword, no consensus on Chapter 10 has been sought, and thus this chapter does not reflect the official view of the UN.

The India chapter primarily discusses some of the emerging TP issues in India as described by the Indian tax administration. Some of the India issues have been discussed in the UN TP Manual, while others have not been addressed at all. The issues discussed in the India chapter are listed below:

- Use of contemporaneous data
- Allocation of risks
- Arm's length range
- Comparability adjustments
- Location savings
- Intangibles
- Intra-group services
- Financial transactions
- Dispute resolution

For detailed analysis of each of the above issues please refer to our News Alert dated 11 October 2012.

OECD releases discussion draft for revision of Chapter VI (intangibles) of OECD TP Guidelines

In mid-2010, the OECD announced the launch of a new project focusing on TP issues involving intangible property that is expected to be completed in 2013. On 6 June 2012, the OECD published the first public discussion draft on the 'Revision of the Special Considerations for Intangibles in Chapter VI of the OECD Transfer Pricing Guidelines' (the discussion draft). The discussion draft contains proposed revisions to Chapter VI of the OECD Guidelines. The final publication will be made after considering public comments and will replace the existing Chapter VI of the OECD Guidelines.

The purpose of the proposed Chapter VI is to provide guidance on the determination of arm's length conditions/prices for transactions involving the use of or transfer of intangibles. The discussion draft has been broadly divided into the following four sections:

Part A - Identification of specific intangibles

Part B - Identification of parties entitled to retain the return derived from the use or transfer of intangibles

Part C - Nature of the controlled transactions and whether they involve the use of intangibles and/or lead to the transfer of intangibles

Transfer pricing

Corporate Tax
Mergers and Acquisitions
Transfer Pricing
International Update
Case laws
Indirect Taxes
Regulatory

Part D - Remuneration paid between independent parties for the use or transfer of such intangibles.

For further details please refer to our News Alert dated 14 June, 2012

Case laws

Sharing of net revenue consistently in controlled and uncontrolled transactions held as a valid comparable uncontrolled price

Facts

- Agility Logistics Pvt. Ltd (the taxpayer) is a logistics service provider, offering a comprehensive portfolio of international, domestic and specialised freight-handling services.
- For the freight-forwarding transactions, the taxpayer adopted a policy of sharing the net revenue (i.e. amounts billed to the customers less third party costs) between the origin and the destination companies in a 50:50 ratio. Since the policy was consistently applied in controlled and uncontrolled transactions, the taxpayer adopted the comparable uncontrolled price (CUP) method to determine the arm's length price (ALP) of the net revenue share payments to and receipts from its AEs.
- During the course of assessment proceedings, the transfer pricing officer (TPO) rejected the CUP method by stating that the application of the 50:50 model between the origin and destination companies in different geographical locations would not provide a realistic comparison owing to differences in economic conditions and policies of the governments, which would affect costs and profitability. He also contended that the agreements between the related and unrelated parties were entered into on a profit-split basis, and not on the basis of a rate.

Tribunal order

- The CUP method was regularly adopted by the taxpayer.
- The terms and conditions in the agreements with AEs and third parties were substantially the same and the profit-split information contained in all the agreements is typical to the industry.
- Geographical differences are not material so far as they apply to the logistics industry.
- Accordingly, the Tribunal confirmed the order of the CIT(A) and upheld the use of the CUP method to benchmark the international transactions of the taxpayer.

ACIT v. Agility Logistics Pvt. Ltd. [TS-47-ITAT-2012 (Mum)]

CUP is the most appropriate method for determining the ALP of interest on loans

Facts

- The taxpayer (Aithent Technologies Pvt. Ltd.) is engaged in the development and sale of software to its US subsidiary, i.e. its AE. The AE undertakes the functions of marketing and customisation while the taxpayer is responsible for contract execution and product development.
- During financial year (FY) 2001-02, in addition to the primary international transaction of sale of software to its AE, the taxpayer had given interest-free loans (denominated in USD) to its AE periodically, amounting to INR 73.9 million.
- The taxpayer had considered the transactional net marginal method (TNMM) the most appropriate method for benchmarking both transactions. With respect to the loan transaction, the taxpayer had inferred that no external uncontrolled price was available.
- Therefore, to benchmark the transaction, a notional interest amount of INR 3.15 million was deducted from the software development income while computing the operating margin earned by the taxpayer on the international transaction of sale of software (the taxpayer had made an assumption that the loan would fetch an interest rate of 10% as per the lending rate authorised by the RBI). As the margin was better than that of the comparables, the taxpayer concluded that both the transactions met the arm's length standard.
- During the course of TP assessment proceedings, the TPO concluded that the loan transaction was an entirely separate transaction, not in conjunction with the primary activity of the taxpayer, and hence merited a separate analysis.
- The TPO proceeded to make an adjustment of INR 3.15 million, being the notional interest cost considered, to the income of the taxpayer which was subsequently upheld by the CIT(A).

Tribunal order

- The Tribunal held that it was indisputable that the loan transaction was an independent transaction, requiring the determination of an ALP.
- Relying on the decision of the Delhi Tribunal in the case of Perot Systems TSI (I) Ltd. v. DCIT [2010] 37 SOT 358 (Del), the Tribunal opined that the CUP method was the most appropriate method to ascertain the ALP of the loan transaction.

Transfer pricing

- Furthermore, as observed in that case, the Tribunal held that whether the funds were advanced out of interest-bearing funds or interest of interest-free advances or were commercially expedient to the taxpayer or not was wholly irrelevant.
- For the purpose of applying the CUP method, the following factors are relevant: assessment of the credit quality of the borrower, estimation of a credit rating and evaluation of the terms of the loan such as the period of loan, amount, currency, interest rate basis, and any additional inputs such as convertibility and finally the estimation of the arm's length terms of the loan based upon the key comparability factors and internal and/or external comparable transactions.
- Considering that neither the taxpayer nor the revenue had examined the applicability of the CUP method as the most appropriate method, the Tribunal restored the matter to the file of the TO/ TPO for fresh adjudication with direction to recompute the ALP, following the CUP method, keeping in view various judicial pronouncements.

Aithent Technologies Pvt. Ltd. v. ITO [2012] 134 ITD 521 (Del)

Bad debts not a factor relevant to determination of ALP for royalty

Facts

- The taxpayer (CA Computer Associates India Pvt. Ltd.) had entered into a software distribution agreement with CA Management Inc. (CAMI), whereby the taxpayer was appointed as a distributor of CAMI's products (software) to third parties in India. Under the agreement, the taxpayer was liable to pay an annual royalty on all amounts invoiced, at the rate of 30%.
- There was no dispute regarding the rate of royalty. However, royalty on sales written off as bad debts was disallowed by the TPO/ TO. The amount of bad debts included those arising on sales where the software had not worked at all or where there were complaints regarding the quality of the products. Thus, it was held that such cases should be dealt with on the basis that no sales had been made, and therefore, royalty need not be paid to that extent.
- Aggrieved, the taxpayer appealed before the CIT(A), who rejected the taxpayer's appeal, and made similar observations as those made by the TPO/ TO. Aggrieved with the CIT(A)'s decision, the taxpayer appealed before the Tribunal.

Tribunal order

The Tribunal concluded that non-recovery of sales value from third party customers does not have an impact on the determination of the ALP in respect of the royalty transactions.

High Court order

- The HC, ruled in favour of the taxpayer and confirmed the decision of the Tribunal and held as follows:
  - Section 92C of the Income-tax Act, 1961 (the Act) does not, either expressly or impliedly, consider bad debts to be a relevant factor in determining the ALP for royalty. Also, in the absence of any statutory provision, bad debts cannot be a factor relevant to the determination of ALP of the royalty transaction.
  - Once the revenue authorities accept that the rate of royalty was not under dispute, there can be no reduction in the value of royalty on account of bad debts.
  - Unless there was an agreement to the contrary, the vendor or licensor is not concerned with the recovery of sale price from third parties. The two are distinct, unconnected transactions. The purchaser's/licensee's obligation to pay royalty is not dependent upon the recovery of its sale price from customers.

CIT v. CA Computer Associates India Pvt. Ltd. [2012] 252 CTR 164 (Mum)

ALP for sourcing services: Cost-based remuneration model adjudged most appropriate for a limited risk procurement support service provider

Facts

- GAP International Sourcing (India) Pvt. Ltd. (GIS India or the taxpayer) is a group company of the famous retail brand GAP; the taxpayer was engaged in facilitating the sourcing of apparel from India for its group companies.
- The taxpayer adopted the TNMM to benchmark the service fee determined at full cost plus 15% from the foreign group company for its TP documentation for FYs 2005-06 and 2006-07.
- During the TP audits, the TPO disregarded the Functional, Asset and Risk (FAR) profile and characterisation of GIS India by assuming that the FAR profile of the taxpayer was substantially higher than those of limited risk support service providers. The TPO alleged that a cost-plus form of remuneration did not take into account substantial intangible

assets owned by the taxpayer. These intangibles were primarily construed by the TPO to be in the nature of human asset intangibles, supply chain intangibles and location savings.

- Based on this, the TPO ascertained that the taxpayer ought to have earned a commission of around 5% on the free-on-board (FOB) value of the goods procured by the group companies. Accordingly, the TPO imposed TP adjustments of INR 2.36 billion and INR 2.63 billion for FYs 2005-06 and 2006-07, respectively.
- The TP adjustments resulted in imputed returns on the operating expenses of the taxpayer to the extent of 830% and 660% for FYs 2005-06 and 2006-07, respectively.
- The Dispute Resolution Panel (DRP) upheld the entire adjustment made by the TPO. The taxpayer appealed before the Tribunal against the total addition of INR 4.99 billion made for FYs 2005-06 and 2006-07.

Tribunal order

FAR related

- FAR analysis gives the basis of characterisation, for example a manufacturer, service provider, distributor, etc., with further sub-characterisation including a low-risk service provider, high-risk service provider, full-fledged manufacturer, contract manufacturer, etc. This characterisation is important for determining the ALP.
- The revenue authorities had not given any facts, material, evidence, or examples to support their claim regarding the taxpayer's FAR, i.e., that of being a risk-bearing entity.
- No human intangibles were created for the following reasons:
  - The revenue authorities provided no supporting material and only made generalised assertions to demonstrate that any or a few of the employees were acclaimed personalities or were indispensable in the garment procurement trade. Their work profile did not entail decision-making or entrepreneurial roles.
  - The taxpayer's employees were engaged in preordained support activities according to set guidelines and their qualifications were general and routine.
- No supply chain intangibles were created for the following reasons:
  - The revenue authorities had no discernible basis.
  - The taxpayer's roles, activities and suppliers were already identified and the taxpayer merely followed instructions.
- No separate or additional allocation was called for on account of location savings for the following reasons:
  - A newspaper report by itself cannot assume the character of comparable data.
  - Location savings in a developing economy arise to an industry as a whole and there was nothing on record to show that the taxpayer was the sole beneficiary.
  - Sourcing from low-cost countries was done in the face of stiff competition, by providing lower costs to end customers. Furthermore, the location savings advantage was passed onto end customers.
  - If comparables were in the jurisdiction of the tested party, then location savings, if any, would be reflected in the profitability of the comparables used for benchmarking.
- The Tribunal considered the documentation submitted by the taxpayer providing evidence of its FAR (handbook, guidelines, instructions) to conclude that the taxpayer had a lack of authority or discretion to deviate from the policies/procedures prescribed by the principal AE, and eventually held GAP India to be a low-risk procurement support service provider.
- The choice of method and profit level indicator (PLI), should not lead to manifestly absurd results, as that would lead to the creation of aberrations (abnormal profits or high losses), which should be avoided as they would reflect an adversarial approach on the part of the tax administration.
- The ALP should reflect the commercial and economic realities of the industry.
- Remuneration models of procurement service providers include the percentage (commission) of the value of goods procured and the cost plus mark-up. Regardless of the model however, negotiated terms would serve the best interests of both parties. Market forces will interact and lead to reasonably acceptable profitability.
- For adopting a remuneration model based on the FOB value of goods, the revenue authorities should have produced comparables for the procurement service providers that follow a percentage-based model and earn an exorbitant mark-up on costs. For preordained support services, a percentage-based model with no significant value-added functions cannot be followed. Thus, the functional profile of the taxpayer was different from that that in the case of Li & Fung India Pvt. Ltd.

Transfer pricing

- Cost-based remuneration was appropriate for a non-risk-bearing procurement support service provider and hence, the Tribunal held that the arm's length cost plus mark-up for the taxpayer should be 32% for the both FYs 2005-06 and 2006-07 by resorting to a commission-based model of 5% on the FOB value of goods procured by the AE directly from Indian vendors.

GAP International Sourcing (India) Pvt. Ltd. v. ACIT [TS-667-ITAT-2012 (Del)]

Editor's note: *This case was overseen by PwC India TP Leader, Rahul K. Mitra.*

Mean advertising spend of a company in the same industry cannot be the ALP for advertising expenditure to be incurred by the taxpayer, and this is also not the correct application of TNMM

Facts

- Genom Biotech Pvt. Ltd. (the taxpayer) is engaged in the manufacturing and export of pharmaceutical products. Its AEs are located in Cyprus, and its international transactions with its AEs were export of pharmaceutical products and reimbursement of business promotion expenditure.
- The TPO accepted the former transaction, but proposed an adjustment to the latter by curtailing business promotion expenditure reimbursed by the taxpayer to its AEs at 10% of total sales, as it believed that the business promotion expenditure incurred by the taxpayer was unusually high (at 60.33% of sales).
- The TPO alleged that the earnings in India were being transferred to the AEs as they were located in a tax haven. Since the taxpayer ultimately sold in the Ukraine market but routed the sales through its Cyprus AEs, the TPO urged the TO to investigate the business promotion expenditure as it "appeared doubtful" at first glance.
- The TPO rejected the CUP method adopted by the taxpayer and instead applied the TNMM. The TPO compared the advertising and marketing (A&M) expenses incurred by 17 top pharmaceutical companies with the business promotion expenditure incurred by the taxpayer.
- The arithmetic mean of the A&M expenses as a percentage of sales for all 17 companies were compared by the TPO to the business promotion expenditure of the taxpayer as a percentage of sales. The TPO proposed an adjustment to the taxpayer's business promotion expenditure, which was in excess of 10% of sales. Aggrieved with the TPO's order, the taxpayer appealed to the CIT(A).
- The CIT(A) deleted the addition.
- Aggrieved with the order of the CIT(A), the revenue authorities appealed before the Tribunal.

Tribunal order

- No method can be rejected without giving cogent reasons. The TPO has to explain why the CUP method is not applicable, and why the TNMM was considered appropriate. In the immediately preceding AY, the TPO had accepted the method adopted by the taxpayer.
- Taking the arithmetic mean of the percentage of A&M expenditure of the top 17 pharmaceutical companies as the industry average and applying this as the arm's length percentage of expenditure that should be incurred by the taxpayer is not the correct application of the TNMM. Such an arithmetic mean cannot be the ALP. Furthermore, there is nothing common that has been brought out between the taxpayer and these companies, i.e., no analysis of the type of drug, nature of markets, period of advertisement, etc.
- The primary benefit of the A&M expenditure belongs to the taxpayer (the manufacturer of the product), and the expense should also be incurred by the taxpayer.
- The TPO's role is limited to determining the ALP, while the TO is required to evaluate the genuineness of expenditure and compute the total income relating to the ALP.
- Permission granted by the RBI, payments being audited and routed through banking channels, and the TPO not producing evidence to show that money paid to AEs was partly returned to the taxpayer, are not grounds based on which an appeal can be allowed or a TP adjustment determined.

ACIT v. Genom Biotech Pvt. Ltd. [TS-326-ITAT-2012 (Mum)]

For attribution of profits to a PE, the TO cannot apply Rule 10 without rejecting the TP study for correct reasons

Facts

- The taxpayer, a project office of Hyundai Rotem Company, Korea (the taxpayer), provided liaison, co-ordination, and administrative support services to its head office, in connection with a contract being executed in India. The income of the project office was computed on a cost-plus 9% basis, and this was supported by a TP study.

- There are three years under consideration, i.e., AY 2002-03, 2003-04 and 2004-05. A TP study was undertaken for each of these years. For AY 2004-05, the TPO accepted the TP study carried out by the taxpayer and found the international transactions to be at arm's length. However, in the case of AY 2002-03 and AY 2003-04, the case was not referred by the TO to the TPO.
- The TO did not accept the cost-plus methodology adopted by the taxpayer and instead determined the income by applying Rule 10. The TO adopted a global formulary apportionment approach in order to determine the income attributable to the project office.
- Aggrieved, the taxpayer appealed to the CIT(A) who upheld the TO's approach. Aggrieved, the taxpayer appealed before the Tribunal.

Tribunal order

- For the purpose of computing income of a PE, the methodology provided under TP Regulations (sections 92 to 92F of the Act read with Rules 10A to 10E of the Income-tax Rules, 1962 (the Rules)) is preferred over the procedure provided under Rule 10 of the Rules read with section 9 of the Act.
- Rule 10 can be applied in cases where the income of the PE cannot be definitely ascertained and the TO has to demonstrate this. The TO cannot simply proceed to apply Rule 10 without rejecting the TP study undertaken by the taxpayer. For rejecting the TP study, the TO must provide reasons and evidence.
- Profits attributable to a PE shall be determined by the same method each year unless there is sufficient reason not to do so. Reliance in this case was placed on Article 7(5) of the India-Korea tax treaty and the fact that the revenue authorities had accepted the taxpayer's methodology in subsequent AYs.

Hyundai Rotem Company v. ADIT [TS-612-ITAT-2012 (Del)]

Resale price method (not TNMM) is appropriate for distribution; losses are on account of business strategy; and there is no motive to shift profits as margins of AEs are all reasonable

Facts

- The taxpayer (L'oreal India Pvt. Ltd.) is a 100% subsidiary of L'oreal SA France and is engaged in manufacturing and distribution of cosmetics and beauty products. The taxpayer's business was accordingly segregated into manufacturing and distribution segments, which have been separately benchmarked for TP purposes.
- No adjustment was made by the TPO in respect of the manufacturing segment.
- However, in respect of the distribution segment, i.e. in respect of the international transaction of purchase of finished goods, the taxpayer had applied the resale price method (RPM) benchmarking the gross margin of the taxpayer at 4o.80% against that of the comparables at 14.85%. The TPO rejected the application of the RPM by the taxpayer and instead adopted the TNMM. An adjustment was made on the basis of the operating margin of comparables at 0.36%, as against the taxpayer's loss of (-) 19.84%.
- Aggrieved, the taxpayer appealed to the CIT(A). The CIT(A) deleted the adjustment, aggrieved with which the revenue authorities appealed to the Tribunal.

Tribunal order

- There was no hierarchy of methods. The RPM is one of the standard methods and is the most appropriate when the taxpayer buys products from its AEs and sells to unrelated parties without any further processing or value addition (with reliance placed upon the OECD TP Guidelines).
- Losses incurred by the taxpayer were on account of the business strategy of the taxpayer and the initial years of the distribution activity, rather than the non-arm's length TP.
- The taxpayer had no motive to shift profits as the AEs earn reasonable margins of 2% to 4% (or even less) on their supplies to the taxpayer (with reliance placed on certificates from the AEs indicating the margin earned).
- The RPM had been accepted by the TPO in the preceding as well as the succeeding AYs and should therefore be acceptable in the current year as well.

ACIT v. L'oreal India Pvt. Ltd. [TS-703-ITAT-2012 (Mum)]

Tribunal upholds important TP principles on characterisation and rewards for selling activity

Facts

- Mastek Ltd (taxpayer) is a global software solutions provider and provides offshore and onsite solutions to clients. It had a subsidiary called Mastek Ltd in UK (MUK), which acted as a distributor for the software solutions of the taxpayer in the UK and earned a return on sales (operating margins).

Transfer pricing

- In its TP analysis, the taxpayer selected MUK as the tested party and benchmarked the return on sales with comparable distributors.
- During the course of assessment proceedings, the TPO re-characterised MUK as a pure marketing service provider by stating that the functions of MUK were purely marketing activities and MUK did not bear any inventory, foreign exchange and profit risk. The TPO accordingly considered comparable marketing service providers and applied their operating profit/value-added expenses (OP/VAE) to MUK's VAE and computed a TP adjustment.
- The DRP upheld the order of the TPO. Aggrieved, the taxpayer appealed before the Tribunal.

Tribunal order

- Agreements between parties based on commercial expediency cannot be disregarded without assigning a cogent reason or unless the agreement was not genuine.
- Based on the facts, MUK was not merely a customer-facing entity but was in a position to negotiate with customers and handle the scope and timing of deliverables. MUK had successfully endeavoured to improve the revenue generation and had among other things, paid commission to its employees on sales. Furthermore, MUK had assumed market and credit risk. Consequently, MUK had acted as a distributor rather than as a marketing service provider. Accordingly, the return on sales to benchmark MUK was a reliable PLI.
- Furthermore, the return-on-sales methodology created an incentive for MUK to generate more revenue which considered the respective advantages of both the parties necessitated by the significant share of revenue generated by the taxpayer from the UK.
- The Tribunal noted that the distributors were not always required to have a fluctuating percentage of profit. In other words, a fixed percentage of profit would still lead to a fluctuating level of absolute profits based on the sales generated.
- Relying on the UK HMRC Guidance, the Tribunal concluded that distributors would need to be compensated on a return-on-sales basis and not on a cost-plus basis.
- The OECD TP guidelines emphasise functional similarities over product similarities and accordingly, the taxpayer's comparability analysis identifying comparable distributors of software products was appropriate.

Mastek Ltd v. DCIT [TS-693-ITAT-2012 (Ahd)]

CUP upheld to be the most appropriate method for benchmarking broking transactions; arithmetic mean and not weighted average to be considered for determining ALP; adjustments for differences in volume and functions need to be considered

Facts

- RBS Equities (India) Ltd (the assessee) is engaged in the business of broking and trading in shares as a corporate member of the Bombay Stock Exchange and the National Stock Exchange. The assessee had provided stock broking services to its AE, which is a foreign institutional investor (FII).
- In the TP documentation, the assessee had used the TNMM as the most appropriate method (MAM) to benchmark the said transaction.
- During the course of the assessment proceedings, the TPO held the CUP as the MAM to benchmark the said transaction and made an adjustment by using the simple average broking commission rate commission rate charged to the top 10 FIIs against the weighted average commission rate charged to the AE by the assessee.
- The assessee contended that if the CUP was to be used as the MAM, then appropriate adjustments should be made for differences in volume, marketing function and research function.
- The CIT(A) upheld the order of TPO.

Tribunal order

- For stock broking services rendered by the taxpayer to the AE (an FII), the use of the CUP method over the TNMM was upheld, primarily owing to the availability of an internal CUP. Another factor which may have been considered relevant by the Tribunal was that the taxpayer was undertaking trades for the AEs and FIIs, which operated from similar geographies, without being present in India, and their perception of the Indian market in terms of risks and rewards would be the same.
- The first proviso to section 92C refers to the arithmetic mean. There was nothing to suggest that the volume of relevant transactions has to be taken for computing such arithmetic mean.
- There is no provision in the statute that allows taking the weighted average arithmetic mean for determining the ALP. Therefore, the taxpayer's contention to adopt the weighted average arithmetic mean of brokerage rate of comparables (the top 10 FIIs), as against the simple average arithmetic mean of such rates taken by the TPO, cannot be accepted.

Transfer pricing

- Following Rule 10B(1)(a)(ii), the claim of the taxpayer for adjustment for marketing function, research function and differences in volumes should be considered on their merits after verifying details and documentary evidence submitted by the taxpayer in support.

RBS Equities (India) Ltd v. ACIT [TS-661-ITAT-2012 (Mum)

Managing directors' remuneration should be allocated between tax holiday units; implications under domestic transfer pricing provisions need to be considered

Facts

- Nahar Spinning Mills Ltd (the taxpayer) operated nine different units, of which the taxpayer claimed deductions under section 10B of the Act for two units (referred to as 'tax holiday units' or 'eligible units').
- The managing director's (MD) remuneration was debited to the main unit and no part of this expense was allocated to the tax holiday units.
- The AO held that the assessee had claimed an excessive deduction by not allocating the MD's remuneration to the tax holiday units and recomputed the tax holiday profits.
- The CIT(A) upheld the order of the AO.

Tribunal order

- Sections 80-IA(8) and 80-IA(10) of the Act are not applicable in this case.
- Section 80-IA(8) of the Act applies where goods and services held for the purpose of eligible business are transferred to any other business carried on by the taxpayer (or vice versa). In the taxpayer's case, goods and services had not been transferred between the units of the taxpayer and accordingly section 80-IA(8) of the Act should not apply.
- Section 80-IA(10) of the Act refers to the close connection between the taxpayer carrying on eligible business and any other person. Accordingly, a transaction of re-allocation of the MD's remuneration from one unit of the taxpayer to another is not covered by section 80-IA (10) of the Act.
- However, under the provisions of section 10B, all expenditure relating to the eligible unit should be deducted while computing the eligible profits derived from the undertaking. Thus, the remuneration paid to the MD, being a common expenditure, should be allocated to the eligible units for computing tax holiday profits.

PwC observations

This ruling suggests that the allocation of common expenditure to tax holidays units, to the extent that it does not qualify as 'provision of services', is not covered by section 80-IA(8) of the Act.

Consequently, while taxpayers will need to adopt a scientific approach to determine the allocation of common expenses and maintain documentation supporting them, such transactions may not be covered under the recently specified domestic transaction provisions.

In such cases, taxpayers are advised to develop and maintain the following documents to help defend the allocation:

- An appropriate cost allocation policy
- A description of the nature of costs and an explanation as to why these do not qualify as 'provision of services'.

This approach will help taxpayers address the implications of the onerous compliance requirements enforced through domestic transfer pricing provisions.

Nahar Spinning Mills Ltd v. JCIT [TS-622-ITAT-2012(Chd)]

More profit from related parties than unrelated parties does not itself make the profit 'more than ordinary' (electricity board rates also used as support); profit comparison to be done for 'individual' related parties

Facts

- OPG Energy Pvt Ltd (the taxpayer) claimed a deduction under section 80-IA of the Act, which was restricted by the AO, who claimed that the taxpayer had earned more than ordinary profits by selling to related parties at a higher price than that charged by unrelated parties. The Tribunal, while ruling in favour of the taxpayer, laid down the following principles:
  - If a taxpayer earns more profit from related parties in comparison to unrelated parties, that does not by itself make the profit from related parties 'more than ordinary'.
  - Profit realised by the taxpayer by charging rates to related parties lower than the rate charged by a government undertaking (a state electricity board) cannot be said to be 'more than ordinary'.
  - Comparison of profit realised from one or more related parties must be undertaken for each party separately.

Transfer pricing

PwC observations

- While comparing the profits of the taxpayer, the Tribunal has considered profits derived from rates charged to unrelated parties and those charged by a state electricity board. The profit of the taxpayer derived from rates in between these two benchmarks, i.e., higher than the former and lower than the latter. The Tribunal, therefore, in essence, considered a 'range' of profits to conclude that the taxpayer was not earning 'more than ordinary profits'.
- Notably, the terminology used in section 80-IA(10) of the Act is 'ordinary profits' (in the plural) rather than just 'ordinary profit' (in the singular), thereby implying the use of a 'range' rather than a single reference point. Hence, it may be inferred that the legislation itself endorses the use of a 'range'.
- However, in light of the recent amendments made by the Finance Act, 2012, the existing transfer pricing regulations have been made applicable to the determination of profits from transactions of tax holiday units with closely connected person/s. The regulations provide for a concept of an 'arithmetic mean' with a narrow tolerance band. In fact, had the 'arithmetic mean' been applied instead of the approach adopted by the Tribunal, it could have been detrimental to the taxpayer.
- Accordingly, from the taxpayer's perspective, one would expect a liberal interpretation of transfer pricing regulations when applied to determine the 'more than ordinary profits' earned by tax holiday units.
- Comparison of profits realised from 'individual' related parties as has been considered by the Tribunal in this instant case may pose practical difficulties and may not always be feasible or even required.

OPG Energy Pvt Ltd v DCIT [TS-382-ITAT-2012 (Chennai)]

Various factors to be evaluated when pricing guarantee commission; universal application of a particular rate rejected, and instead, internal CUP accepted

Facts

- Everest Kanto Cylinder Ltd (the taxpayer) provided a guarantee for a loan taken by its AE. For this, the taxpayer charged 0.5% guarantee commission to the AE.
- The TPO rejected 0.5% and applied 3% as the arm's length guarantee commission.
- The CIT(A) upheld the adjustment made by the TPO.
- Aggrieved, the taxpayer appealed before the Tribunal.

Tribunal order

- In view of the amendment to the definition of an international transaction introduced by the Finance Act, 2012, provision of guarantee is an international transaction. Thus, the methods prescribed in the statute become applicable for determining its arm's length price.
- Charging of guarantee commission varies from transaction to transaction, and is dependent on the terms and conditions of the loan, risk undertaken, relationship between the bank and the client, economic and business interests, etc.
- A universal application of 3% for guarantee commission cannot be upheld in every case, and the use of a naked quote, available on the taxpayer's website, as an external comparable, is inappropriate.
- A guarantee commission of 0.5% charged to the AE was accepted based on an internal comparable of 0.6% guarantee commission paid by the taxpayer to its local bank for a letter of credit arrangement. The difference of 0.1% was ignored as it was considered to derive from the difference in the rate of interest charged under the two arrangements.

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

Weighted deduction available for R&D expenditure incurred outside the approved facility

Profit of tax holiday unit computed by considering 'actual' sale price and costs attributable to it, including HO costs allocation

Facts

- Cadila Healthcare Ltd, the taxpayer, was in the business of manufacturing and trading pharmaceuticals goods, diagnostic kits, medical instruments, etc. The taxpayer had a unit at Baddi, Himachal Pradesh, for which it was claiming a deduction under section 80-IC of the Act. The taxpayer also had a unit in Goa, for which the taxpayer was claiming a deduction under section 80-IB of the Act.
- During the course of assessment proceedings, the AO proposed the following adjustments to the total income:

Transfer pricing

- Disallowance of weighted deduction under section 35(2AB) of the Act claimed by the company with respect to expenditure incurred on clinical trials and a bio-equivalence study conducted outside the approved R&D facility.
- Curtailment of the amount of deduction claimed by the company under sections 80-IC and 80-IB of the Act in relation to its Goa and Baddi units respectively as the AO believed that these units were earning abnormally high profits.

- According to the AO, the indirect cost had not been allocated to these units.
- According to the AO, the units carried out manufacturing activity and transferred the goods to the marketing division in the head office. Therefore, they should have been entitled to the remuneration of cost and a reasonable profit.
- The AO, accordingly, computed profits attributable to the manufacturing activity alone.
- These disallowances were upheld by the DRP.

Tribunal order

- Weighted deduction under section 35(2AB) of the Act is available on the expenditure incurred by the taxpayer on clinical trials and the bio-equivalence study conducted outside the approved R&D facility.
- Deduction under section 80-IB and section 80-IC of the Act is available on the profit earned by the eligible unit from the overall activity, and the AO cannot segregate manufacturing and sale activity to compute deductions under the respective sections.
- The relevant provision in the Act does not suggest that the eligible profit should be computed first by transferring the product at an imaginary sale price to the head office for the head office to then sell the product in the open market. There is no such concept of segregation of profit. Profit of an undertaking is always computed by taking into account the sale price of the product in the market.

PwC observations

This decision is relevant for pharmaceutical companies where some part of the R&D process is carried out outside the approved facility.

Furthermore, in relation to the tax holiday claim, the following principles have been laid out:

- To compute a price for the transfer of goods or services from a unit enjoying tax holiday to the non-eligible unit of the taxpayer, an 'actual' transfer is a pre-condition.
- Where the sale from the unit enjoying tax holiday is the only source of income, the profit of the unit should be computed by considering the sale price of goods or services and costs attributable to effect such a sale (including allocation of head office costs).
- Effective FY 2012-13, transfer pricing provisions will apply to transactions involving the transfer of goods and services undertaken by units enjoying tax holiday to non-eligible units of the taxpayer. Accordingly, the above principles laid down by the Tribunal will need to be followed in consonance with transfer pricing regulations.

Cadila Healthcare Ltd v. Addl CIT [TS-354-ITAT-2012 (Ahd)]

Income from a domestic related party cannot be adjusted by applying transfer pricing provisions under section 40A(2) of the Act

Facts

- Durga Rice and Gen Mills, the taxpayer, is in the business of running a rice mill and selling rice bran. During the year, the taxpayer sold rice bran to its domestic related party. The AO challenged the rate used claiming it was lower than the rate charged by other independent third parties for the sale of a similar product. The AO accordingly proposed to adopt a higher rate based on available comparable prices.
- The taxpayer contended that the sale value of rice bran depends on its quality and that the sales made to the domestic related party were at comparable rates. The AO rejected the taxpayer's arguments and made an adjustment to the profit of the taxpayer by considering the average sale price realised by independent parties. Aggrieved, the taxpayer appealed to the CIT(A), who upheld the findings of the AO.
- The taxpayer appealed before the Tribunal against the order of CIT(A).

Transfer pricing

Tribunal order

- It is settled law that section 40A(2) of the Act cannot be applied to add to the difference in the value of sales made to a domestic related party. Section 40A(2) of the Act is restricted to disallowance of expenditure value.
- Relying on the findings of the Supreme Court in the case of CIT v. Glaxo Smithkline Asia (P) Ltd [2010] 195 Taxman 35 (SC), the Tribunal held that the CBDT (Revenue) also acknowledges that suitable amendments are required to be made to section 40A(2) of the Act if transfer pricing provisions are required to be applied to domestic transactions between related parties and adjustments on account of the difference in sale value effected by the taxpayer in comparison to the fair market value are undertaken. Given this, the provisions of section 40A(2) of the Act cannot be attracted in the taxpayer's case.

PwC observations

- The ruling of the Tribunal clearly brings out the principle that the provisions of section 40A(2) of the Act do not grant powers to the AO to adjust income reported by a taxpayer from domestic related parties.
- Following the observations of the Supreme Court in the case of Glaxo Smithkline Asia (P) Ltd (above), the Finance Act, 2012 has amended section 40A(2) of the Act to provide that transfer pricing provisions will apply to determine the reasonableness of expenditure incurred in relation to domestic related parties. Accordingly, compliance with related transfer pricing provisions would have to be undertaken, with effect from 1 April 2012.
- It is relevant to note that these amendments have not extended the scope of section 40A(2) of the Act to income earned from domestic related parties. In fact, the Memorandum to the Finance Bill, 2012 explaining the amendments, noted that extending transfer pricing requirements to all domestic transactions will lead to increases in the compliance burden on all assessees, which is undesirable.
- Taxpayers earning income from related parties should, however, be cognisant of a potential adverse impact to a group where a related party making payment to a taxpayer faces a disallowance of the payment under section 40A(2) of the Act but a corresponding reduction in income is not available to the taxpayer. A holistic review of the pricing policy of transactions between domestic related parties and a coordinated effort towards robust transfer pricing documentation is of paramount importance.

Durga Rice and Gen Mills v. AO [TS-446-ITAT-2012 (Chandi)]

Indirect taxes

Case laws

Service tax

Retrospective applicability of service tax on renting immovable property services is within the legislative competence of Parliament

Against the order of the Delhi HC in the case of Home Solution Retail India Ltd v. UOI [2009 (237) E.L.T. 209], a special leave petition (SLP) was filed and was pending before the SC. However, the legislature, without waiting for the decision of the SLP, amended the definition of 'taxable service' defined under the renting of immovable property service by the Finance Act 2010. 'Taxable service' was defined to include 'any service provided or to be provided to any person, by any other person, by renting of immovable property'. This amendment was given retrospective effect from 1 June 2007. This amendment as well as its retrospective effect was under challenge. The main argument was that the amendment was not clear but creates a substantive liability of taxation upon service providers. The Madhya Pradesh HC in Entertainment World Developers Ltd v. UOI [2012 (25) S.T.R. 231] held that Parliament's right to legislate and create liabilities or rights with retrospective effect can be curtailed only by a restriction placed upon the legislative power of Parliament by the provisions of the Constitution of India. No provision of the Constitution was shown which restricts the right of Parliament to legislate retrospectively creating a tax liability. Therefore, retrospective applicability of service tax on the renting on immovable services was within the legislative competence of Parliament.

Service tax paid on exempt services can be claimed as refund

The Mumbai Customs, Excise and Service Tax Appellate Tribunal (CESTAT) in the case of Crown Products Pvt Ltd v. CCE [2012] TIOL (975)] has held that there is no bar in the Finance Act 1994 (service tax) on the assessee from paying tax on exempt services and claiming refund thereafter afterwards. It was also held that section 5A(1A) of the Central Excise Act, 1944 prohibits the payment of tax in respect of exempted goods and not service tax on services.

The term 'business' need not necessarily imply a profit element

The Punjab & Haryana HC in the case of Punjab Ex-Servicemen Corporation v. UOI [2012 (25) S.T.R. 122] held that for taxing statutes the term 'business' need not necessarily imply a profit element and would cover all services undertaken as a matter of occupation.

Trademark licensing agreement is not a 'transfer of right to use' or 'sale of goods'

In the case of Eicher Good Earth Ltd v. CST [2012-TIOL-579], the Delhi CESTAT held that a trademark licensing agreement is not a 'transfer of right to use' or 'sale of goods' but only a permission for temporary use of the trademark which continues to be the property of the licensor and is chargeable to service tax under the category of intellectual property services.

Income tax paid in India on behalf of a foreign service provider is to be included in the 'gross amount for payment of service tax on a reverse charge basis

In the case of TVS Motor Company Ltd v. CCE [2012] TIOL (1639), the Madras CESTAT held the following:

- The liability to pay service tax on services received from outside India on a reverse charge basis under section 66A of the Finance Act, 1994 arises only from 18 April 2006.
- Where the consideration for such services are paid net of taxes, the amount of income tax directly deposited by the service receiver in India on behalf of the foreign service provider should be included in the gross amount for service tax valuation purposes.

Permitting the use of a trademark, though on a permanent basis, would still qualify as 'intellectual property rights' services

The Delhi CESTAT in the case of Eicher Good Earth Ltd v. CST [2012] (28) S.T.R. (279) has held that the transaction of permitting the use of the trademark 'Eicher' for limited purposes but permanently, while it still remains the property of the licensor and the licensee is bound by the conditions of transfer in perpetuity, would qualify as 'intellectual property right' services and be liable to service tax.

Customs and foreign trade policy

Refund of special additional duty cannot be denied where imported goods are given to consumers on a right to use basis

The Delhi CESTAT in the case of CC v. Reliance Communications Infrastructure Ltd [2012-TIOL-499], held that the refund of special additional duty (SAD) cannot be denied where imported goods are not sold but are given to consumers on a 'right to use' basis since the transfer of the right to use is covered under the definition of sale provided under various sales tax/value added tax (VAT) acts and is considered as deemed sale.

Indirect taxes

Customs duty is levied according to the rates applicable to software

The Bangalore CESTAT in the case of Bharti Airtel Ltd v. CC [2012 -TIOL-746], held that the value of software is to be included in the value of the hardware, in the case software is pre-loaded on hardware to arrive at the assessable value for the purposes of the levy of customs duty. The duty so levied will be according to the rates applicable to hardware.

SAD is applicable in the case of a VAT exemption

In American Power Conversion Pvt Ltd v. CCE [2012 (280) ELT 139], the Bangalore CESTAT held that where an export-oriented unit has been given special dispensation by the state government from the levy of VAT or sales tax, such units will not be exempt from SAD on domestic tariff area clearances. This is on the basis that such units do not fulfil the condition of exemption notification, which stipulates that to be exempt from SAD the goods should not be exempt from VAT or sales tax.

Importer is entitled to claim the benefit under the a notification that provides the higher benefit

While relying on the decision of the SC ruling in various cases, the Ahmedabad CESTAT, in the case of CC v. Mangalam Alloys Ltd [2012-TIOL-737] held that where there are two exemption notifications that cover goods, the importer is entitled to the benefit of the exemption notification that gives him or her higher relief.

Customs authorities cannot unilaterally alter the amount of a duty entitlement pass book scheme scrip issued by DGFT authorities on the basis of export documents

The Bangalore CESTAT, in the case of Dr Reddy's Laboratories Ltd v. CC [2012] (284) ELT (545) has held that the freight charges including fuel surcharge charges, security charge for carrier, etc. are to be deducted from the cost insurance freight value in order to arrive at the free on board value of exported goods. Furthermore, the customs authorities cannot unilaterally alter the amount of duty entitlement pass book scheme scrip issued by the DGFT authorities on the basis of export documents. Such modification can be done only by referring the matter to the DGFT authorities.

VAT

Delhi VAT provisions do not provide for a sub-contractor's deduction from the main contractor's turnover

The Delhi HC in the case of Larsen and Toubro Ltd and another v. UOI [(2012) VIL-40-DEL] upheld the validity of the Delhi VAT provision which does not provide for a sub-contractor's deduction in the hands of the main contractor as such deduction is available through a separate mechanism of claiming input tax credit of the VAT charged by the sub-contractor.

Goods kept in a customs bonded warehouse deemed to be outside the customs frontier of India

The SC in the case of Hotel Ashoka v. ACCT [(2012) VIL 03 (SC)] held that sales by duty free shops situated at international airports both to inbound and outbound passengers were made before/after the goods have crossed the customs frontiers of India. Consequently, such sales are not liable to sales tax as they qualify as sale in the course of imports/exports covered by section 5 of the CST Act 1956.

Import of goods for leasing purposes in India are not liable to VAT

The Madras HC in case of State of Tamil Nadu v. Karnataka Bank Ltd [(2012) 50 VST 93 (Mad)] held that transactions involving import of goods from outside India for leasing to an Indian client on a monthly rental basis qualify as 'lease in the course of import' so long as there exists an inextricable link between the import of goods and their subsequent lease in India.

Sale and lease back transaction structured to raise funds to carry out business in substance is a financial transaction not liable to VAT

The Karnataka HC in the case of State of Karnataka v. Khoday India Ltd [2012-52-VST-204] held that a sale and lease back transaction executed to raise the requisite funds for carrying out business is in substance a loan transaction not liable to VAT. The Court has the power to scrutinise the documents and determine the nature of the transaction, whatever be the form of the documents.

Indirect taxes

Free of cost replacement of spare parts is liable to sales tax

The Mumbai HC in the case of Navnit Motors Pvt Ltd v. State of Maharashtra [2012 (47) VST 511] relying on the SC decision in Mohd. Ekram Khan and Sons v. Commissioner of Trade Tax [(2004) 136 STC 515 (SC)] held that the transactions involving free of cost replacement of spare parts under the warranty arrangement where the cost of such spare parts are subsequently reimbursed by the manufacturer by issue of a credit note are covered under the definition of sales and hence liable to sales tax.

Excise

Central value-added tax credit cannot be denied on capital goods used initially in the manufacture of exempted goods

The Karnataka HC in the case of CCE v. Kailash Auto Builders Ltd [2012 (280) ELT (949)] held that central value added tax (CENVAT) credit on capital goods used for the manufacture of a dutiable and exempted final product cannot be denied merely because in the beginning such capital goods were used only in the manufacture of exempted goods.

CENVAT credit is admissible on goods transport agency services used for bringing empty containers

In Century Rayon v. CCE [2012 (280) ELT 561], the Mumbai CESTAT has held that CENVAT credit is admissible on goods transport agency services used for bringing empty containers to the factory and thereafter transporting the loaded containers to the port of export and not splitting these charges will not disentitle the CENVAT credit.

Cost accountant's report can be referred to where the transaction value is not the sole consideration

The SC in the case of Fiat India Pvt Ltd [2012-TIOL-58-SC-CX] held that selling cars at a wholesale price which is less than the cost of production, even if it is to counter the competition in the market, cannot be considered as sale at a normal price. Since here the 'transaction value' is not the sole consideration and the assessing authority was not able to derive value for the extra consideration, there is nothing wrong in their resorting to best judgement assessment and arriving at a value, on the basis of the cost accountant's report.

Circulars and notifications

Service tax

Introduction of negative list approach

Entry 97 of List I of the VII schedule of Article 246 of the Constitution of India entrusts upon a residuary power to the central government the ability to formulate laws which have not been included in List I or II of the said schedule. The central government in the year 1994 introduced entry no. 92C 'tax on services'. Chapter V of the Finance Act, 1994 encompasses the provision relating to the taxation of services. The said regime evolved over a period of years with the scope of taxable services expanding to 118 services. The Budget 2012 ushered a new system of taxation of services, commonly known as the 'negative list approach'. The Central Board of Excise & Customs (CBEC) has come out with a series of notifications to appoint 1 July 2012 as the effective date for applicability of service taxation based on the 'negative list' approach.

Important changes under the said approach are as follows:

- The earlier provisions related to classification of services of the Finance Act 1994 have been made inoperative and are replaced with the concept of the negative list approach.
- The government also defined the term 'service', which also included defining the term 'declared service' and excluded certain transactions.
- Service tax shall now be levied on all services 'provided or agreed to be provided' in the taxable territory, other than the services specified in the negative list and mentioned in the mega exemption notification wherein outright exemption from service tax has been provided to 39 services.
- The concept of 'bundled services' was also introduced.
- The government replaced the Export of Service Rules 2005 and Taxation of Services (provided from outside India and received in India) Rules 2006 (commonly known as Import Rules) by a set of 14 new rules known as 'Place of Provision of Service Rules 2012' by means of which the place of provision of a service would be determined.

Indirect taxes

- The government has also removed the concept of composition scheme under the work contract service.
- The government has also introduced the reverse charge mechanism on certain domestically procured services.
- Amendments have been made in the Point of Taxation Rules, 2011 so as to bring them in line with the new regime of service tax.

Service tax notification no(s). 19/2012 to 23/2012 dated 5 June 2012, 25/2012, 26.2012, 28/2012 and 30/2012 dated 20 June 2012

No service tax on amounts of foreign currency remitted to India from overseas

The CBEC has clarified that there is no service tax to be levied per se on amounts of foreign currency remitted to India from overseas. It is merely a transaction in money, excluded from the definition of 'service' effective from 1 July 2012.

Circular no 163/14/2012-ST dated 10 July 2012

Customs/foreign trade policy

Refund of terminal excise duty available on deemed exports can be claimed by the recipient of goods on production of documents

The central government has provided that the refund of terminal excise duty (TED) available on deemed exports can also be claimed by the recipient of the goods on production of an appropriate disclaimer to be obtained from the supplier of goods specified in form ANF-8. This public notice shall be effective from 1 March 2011. The format of ABF-8 has also been issued.

Public notice no 21 (RE-2012)/ 2009-2014 dated 21 November 2012

List of products eligible for concessional basic customs duty amended

The central government has amended the list of products eligible for concessional basic customs duty on their import under the following agreements:

- India-Japan Free Trade Agreement
- South Asian Free Trade Agreement
- India-ASEAN Free Trade Agreement
- India-Malaysia Comprehensive Economic Cooperation Agreement
- Customs notification no 124/2011 to 128/2011 dated 30 December 2011

CENVAT

Interest not payable on use of wrong CENVAT credit

The government substituted the words ‘taken or utilised wrongly’ by the words ‘taken and utilised wrongly’ in Rule 14 of CENVAT Credit Rules, 2004 so as to provide clarity on the applicability of interest on the wrong use of CENVAT credit. This implies that if a person avails CENVAT credit and subsequently utilises it, then the interest shall be payable from the date of utilisation. If he or she reverses it, no interest shall be payable.

Excise notification 18/2012 dated 17 March 2012

Regulatory

Regulatory

FEMA

Contraventions

Compounding of contraventions under FEMA

For the purpose of achieving operational convenience, the RBI has stipulated that the following contraventions under FEMA will be compounded by its Regional Offices:

Contraventions for compounding	Amount involved in contravention	Possible action
• Delay in reporting of inward remittance (Sub-regulation 9(1)(A) of Schedule I to FEMA 20/2000-RB) • Delay in filing of form FC-GPR (Sub-regulation 9(1)(B) of Schedule I to FEMA 20/2000-RB) • Delay in issue of shares beyond 180 days (Sub-regulation 8 of Schedule I to FEMA 20/2000-RB)	Without any limit	Ahmedabad, Bangalore, Chennai, Hyderabad, Kolkata, Mumbai or New Delhi
• Delay in reporting of inward remittance (Sub-regulation 9(1)(A) of Schedule I to FEMA 20/2000-RB) • Delay in filing of form FC-GPR (Sub-regulation 9(1)(B) of Schedule I to FEMA 20/2000-RB)	Up to INR 10 million	Bhopal, Bhubaneshwar, Chandigarh, Guwahati, Jaipur, Jammu, Kanpur, Kochi, Patna or Panaji
Contravention not covered above, as per provisions of FEMA		Central Office of RBI, Mumbai

To bring about uniformity and completeness in compounding applications, the RBI has specified a format for relevant information, documentation and undertaking to be submitted by applicants. This applies to contravention of the regulations mentioned above as well as regulations pertaining to overseas direct investments, external commercial borrowings (ECB) and branch/liaison offices.

AP (DIR Series) circular No. 11 dated 31 July 2012

Regulation and Management of FEMA

Trade credits for imports of capital goods by infrastructure sector

The RBI has permitted companies in the infrastructure sector (where “infrastructure” is as defined under the extant guidelines on ECB to avail trade credit up to a maximum period of five years (enhanced from three years) for import of capital goods subject to the following:

- Minimum period of trade credit must be at least fifteen months. However, it should not be in the nature of short-term roll-overs
- AD (Authorised Dealer) banks will not be permitted to issue letters of credit, guarantees, letter of undertaking, letter of comfort in favour of overseas supplier, bank and financial institution for the extended period beyond three years
- All-in-cost ceilings shall remain at 350 basis points over six months LIBOR for the respective currency.

A.P. (DIR Series) circular No. 28 dated 11th September, 2012

Revised format for annual return on foreign liabilities and assets reporting by Indian companies to be filed on or before 15 July 2012

The RBI has issued a circular on 15 March 2011 whereby Indian companies which have received FDI (Foreign Direct Investment) and/or made overseas investments are required to submit an annual return on foreign liabilities and assets.

The RBI has now provided a revised format of the annual return in a soft form with in-built validations. The soft forms should be filled, validated and sent by e-mail by 15 July annually.

A.P. (DIR Series) RBI/2011-12/613 circular no. 133 dated 20 June 2012

RBI re-opens foreign currency convertible bonds buyback window

The RBI has continued its scheme of prepayment/buyback of foreign currency convertible bonds (FCCB). The RBI now will consider proposals from Indian companies for buyback of FCCBs under the approval route subject to the following conditions:

- The buyback value of FCCBs is at a minimum discount of 5% on the accreted value.

Regulatory

- In the case the issuer is planning to raise a foreign currency borrowing for buyback of FCCBs, all applicable rules/ regulations relating to foreign currency borrowing under FEMA will need to be complied with.
- Other general conditions stipulated in paragraph 5 of RBI's AP (DIR Series) circular no 39 dated 8 December 2008 such as:
    - extant guidelines should be complied with,
    - FCCB should be registered with the RBI,
    - no proceedings for contravention of FEMA against the company should exist, etc

The facility is effective from the date of the circular and the entire process of buyback should be completed by 31 March 2013 after which the scheme lapses.

On completion of the buyback, a report giving details of buyback, such as the outstanding amount of FCCBs, accreted value of FCCBs bought back, rate at which FCCBs bought back, amount involved, and source/s of funds may be submitted, through the designated AD bank to the RBI.

A P (DIR) circular no 1 dated 5 July 2012, circular 64 dated 5 January, 2012

External Commercial Borrowing

External Commercial Borrowing - Repayment of Rupee loans and/ or fresh Rupee capital expenditure – USD 10 billion scheme

As per the extant guidelines, the maximum permissible ECB that can be availed of by an individual company under the scheme is limited to 50 per cent of the average annual export earnings realised during the past three financial years.

On a review, it has been decided:

- to enhance the maximum permissible limit of ECB that can be availed of to 75 per cent of the average foreign exchange earnings realised during the immediate past three financial years or 50 per cent of the highest foreign exchange earnings realised in any of the immediate past three financial years, whichever is higher;
- in case of Special Purpose Vehicles (SPVs), which have completed at least one year of existence from the date of incorporation and do not have sufficient track record/past performance for three financial years, the maximum permissible ECB that can be availed of will be limited to 50 per cent of the annual export earnings realised during the past financial year; and
- The maximum ECB that can be availed by an individual company or group, as a whole, under this scheme will be restricted to USD 3 billion.

A.P. (DIR Series) circular No. 26 dated 11th September, 2012

ECB for replacing bridge finance availed by infrastructure companies

Presently, infrastructure companies are allowed to import capital goods by availing of short-term credit (including buyers or suppliers' credit) in the nature of bridge finance under the approval route provided the bridge finance is replaced by an ECB with the prior approval of the RBI.

Thus, it required RBI approval at two stages i.e while availing bridge finance and while replacing it with ECB

A.P. (DIR Series) Circular No. 27 dated 11th September, 2012

The RBI has liberalised the ECB policy to permit replacement of bridge finance (in the nature of buyers' or suppliers' credit) by an ECB under the automatic route, provided it is refinanced before the maximum permissible period of trade credit and the bill of entry is available for verification.

Relaxation in ECB-liability (debt)-equity ratio and percentage of shareholding: Automatic route

ECB can be availed by successful bidders under the automatic route from their ultimate parent company (holding directly or indirectly minimum paid-up equity of 25%) for payment of 2G spectrum fees without any maximum ECB liability (debt)-equity ratio.

Bridge finance facility: Automatic route

Short term foreign currency loan in the nature of bridge finance can be availed under the automatic route for making upfront payment towards 2G spectrum allocation. The borrower can, under the automatic route, replace the short-term loan with a long term ECB, which is raised within a period of 18 months from the date of the drawdown of bridge finance.

These relaxations would enable the successful bidders to avail ECB under the automatic route and facilitate the payment of spectrum allocation.

External Commercial Borrowing - Liberalisation and rationalisation

It has been decided to further rationalise and liberalise the extant guidelines as under:-

- Enhancement of refinancing limit for Power Sector Indian companies

Regulatory

in the power sector will be allowed to utilise 40 per cent of the fresh ECB raised towards refinancing of the Rupee loan/s availed by them from the domestic banking system, under the approval route, subject to the condition that at least 60 per cent of the fresh ECB proposed to be raised should be utilised for fresh capital expenditure for infrastructure project(s). All other terms and conditions relating to refinancing of Rupee loans mentioned in A.P. (DIR Series) Circular No. 25 dated September 23, 2011 remain unchanged.

- ECB for maintenance and operation of toll systems for roads and highways

ECBs would also be allowed for capital expenditure under the automatic route for the purpose of maintenance and operations of toll systems for roads and highways provided they form part of the original project.

A. P. (DIR Series) circular No. 111 dated 20th April, 2012

External Commercial Borrowing - Refinancing/rescheduling of ECB

On a review, it has been decided that the borrowers desirous of refinancing an existing ECB can raise fresh ECB at a higher all-in-cost/reschedule an existing ECB at a higher all-in-cost under the approval route subject to the condition that the enhanced all-in-cost does not exceed the all-in-cost ceiling prescribed as per the extant guidelines.

A.P. (DIR Series) Circular No. 112 dated 20th April 2012

External Commercial Borrowing - Civil Aviation Sector

As per the extant guidelines, availing of ECB for working capital is not a permissible end-use. On a review of the policy related to ECB and keeping in view the announcement made in the Union Budget for the year 2012-13, it has been decided to allow ECB for working capital as a permissible end-use for the civil aviation sector, under the approval route, subject to the following conditions:

- Airline companies registered under the Companies Act, 1956 and possessing scheduled operator permit license from Director General for Civil Aviation (DGCA) for passenger transportation are eligible to avail of ECB for working capital;
- ECB will be allowed to the airline companies based on the cash flow, foreign exchange earnings and its capability to service the debt;
- The ECB for working capital should be raised within 12 months from the date of issue of the circular;
- The ECB can be raised with a minimum average maturity period of three years; and
- The overall ECB ceiling for the entire civil aviation sector would be USD one billion and the maximum permissible ECB that can be availed by an individual airline company will be USD 300 million. This limit can be utilized for working capital as well as refinancing of the outstanding working capital Rupee loan(s) availed of from the domestic banking system. Airline companies desirous of availing of such ECBs for refinancing their working capital Rupee loans may submit the necessary certification from the domestic lender/s regarding the outstanding Rupee loan/s.

A. P. (DIR Series) Circular No. 113 dated 24th April, 2012

External Commercial Borrowing - Low cost affordable housing projects

- RBI has allowed ECB for low cost affordable housing projects as a permissible end-use, under the approval route. ECB can be availed of by developers/builders for low cost affordable housing projects. Housing Finance Companies (HFCs)/National Housing Bank (NHB) can also avail of ECB for financing prospective owners of low cost affordable housing units.

AP (DIR Series) Circular No. 61

Outbound regulations

Liberalisation in overseas direct investment by resident individuals

The RBI has liberalised the guidelines for outbound investment by resident individuals on considering the recommendations of the committee that reviewed the facilities for individuals under the FEMA.

The highlights of the recommendations adopted are as follows:

- It is clarified that if resident individuals acquire the shares of a foreign company towards professional services or in lieu of directors' remuneration, they are required to obtain general permission from the RBI, provided the value of the shares is within the overall ceiling prescribed for resident individuals under the liberalised remittance scheme which is presently USD 200,000.
- Resident individuals are required to obtain general permission from the RBI for acquiring qualification shares of an overseas company for holding the post of a director provided:

Regulatory

- The number of qualification shares does not exceed the prescribed limit in the host country
- The value of shares is within the prescribed ceiling under the liberalised remittance scheme, which is presently USD 200,000
- With respect to resident individuals acquiring shares in a foreign company through the employee stock option plan, the RBI has removed the condition regarding the foreign company's direct or indirect equity stake in the Indian company, leaving the other conditions unchanged and requiring general permission from the RBI.

A.P. (DIR Series) circular no 97 dated 28 March 2012

Inbound Investment

QFIs permitted to invest in equity shares of listed Indian Companies

The RBI has permitted qualified foreign investors (QFI) to invest in equity shares of Indian listed companies through SEBI registered DPs or recognized brokers on recognised stock exchanges in India. The key features are as under:

- ***Eligibility:*** Non-resident investors from jurisdictions that are compliant with Financial Action Task Force (FATF) standards and signatories to International Organization of Securities Commission (IOSCO) are eligible to invest.
- ***Investment can be made on repatriation basis in eligible transactions:***
  - Acquisition of shares over stock exchange.
  - Acquisition of shares which are offered to public i.e. through Initial Public Offer (IPO).
  - Acquisition of rights shares, bonus shares, or equity shares on account of stock split/consolidation or equity shares on account of amalgamation, demerger.
- Investment limits: Individual and aggregate ceiling is 5% and 10% respectively. This limit shall be over and above NRI and FII limit. However, these investments will be subject to overall sectoral caps prescribed under the FDI policy.
- ***Pricing:*** The pricing of all eligible transactions and investment shall be in accordance with applicable SEBI guidelines.
- ***Transfer:*** QFIs can sell the above shares over the stock exchange, under a buy-back scheme, offer for sale, public offer triggered under takeover code provisions.

A.P. (DIR Series) Circular No.66 dated January 13, 2012

Prior intimation of raising aggregate foreign institutional investors/non-resident investor limits for investment under portfolio investment schemes is required

The RBI through a circular has clarified that an Indian company raising the aggregate FII investment limit of 24% to the sectoral cap or statutory limit, as applicable, or raising the aggregate NRI investment limit of 10% to 24% should communicate this to the RBI immediately, along with a certificate from the company secretary stating that all relevant provisions of the extant FEMA regulations and the FDI policy (as amended from time to time) have been complied with.

Additionally, the RBI has stated the manner in which it monitors applicable ceilings on investments by FIIs, NRIs and persons of Indian origin (PIOs) in Indian companies on a daily basis.

For effective monitoring of foreign investment ceiling limits, the RBI has fixed cut-off points that are two percentage points lower than the actual ceilings. When the aggregate net purchases of equity shares of the company of FIIs, NRIs and PIOs reaches the cut-off point of two percentage points below the overall limit, the RBI cautions all designated bank branches not to purchase any more equity shares of the respective company on behalf of any FIIs, NRIs or PIOs without prior approval of the RBI.

On receipt of proposals through link offices, the RBI gives clearances on a first-come-first-served basis to further invest until such investments in companies reach the respective limits, as applicable.

On reaching the aggregate ceiling limit, the RBI advises all designated bank branches to stop purchases on behalf of their FIIs, NRIs and PIOs clients. The RBI also informs the general public about the 'caution' and 'stop purchase' advise in relation to these companies through a press release.

A.P.(DIR Series) circular no. 94 dated 19 March 2012

Foreign Direct Investment

Foreign direct investments retail trading

The consolidated Foreign Direct Investment (FDI) policy effective 10 April 2012 (circular 1 of 2012) was amended with effect from 20 September 2012 through press notes (2012 series).

Regulatory

- FDI in retail trading [press notes 4 and 5 (2012 series)] Single-brand product retail trading (SBRT)
  - 100% FDI is allowed for undertaking single brand retail trading with prior government approval. In case FDI is up to 51%, sourcing from India is not mandatory. However, beyond 51%, sourcing of 30% of the value of goods purchased should be done from India preferably micro, small and medium enterprises (MSME), and village and cottage industries.
  - It is aimed at attracting investment in production and marketing, improving the availability of goods for consumers and enhancing the competitiveness of Indian enterprises.
  - The product should be of a single brand. It should be sold under the same brand internationally and should be branded during manufacturing.
  - The foreign investor should be the owner of the products.
  - Only one non-resident entity, whether the owner or franchisee or Licensee/ sub-licensee of the brand, shall be permitted to undertake SBRT in India for that specific brand, through an agreement, with the brand owner.
  - The onus for ensuring compliance will be the responsibility of the Indian entity carrying out SBRT in India.
  - Retail trading in any form by means of e-commerce will not be permissible for companies with FDI engaged in the activity of SBRT.
  - Applications will specifically indicate product categories proposed to be sold under a 'single brand'. Any addition to the product will require the fresh approval of the government.
- Multi-brand retail trading (MBRT)
  - FDI in MBRT is permitted for all products up to 51% with government approval.
  - Fresh agricultural produce, including fruits, vegetables, flowers, grains, pulses, fresh poultry, fish and meat products, may be unbranded.
  - The minimum amount to be brought in as FDI by the foreign investor will be USD 100 million.
  - At least 50% of total FDI brought in shall be invested in 'backend infrastructure' within three years of the first tranche of FDI. 'Backend infrastructure' will include capital expenditure on all activities, excluding that on front-end units, investment made towards processing, manufacturing, distribution, design improvement, quality control, packaging, logistics, storage, warehouse, agriculture market produce infrastructure, etc. However, expenditure on land cost and rentals, if any, will not be counted for the purposes of backend infrastructure.
  - At least 30% of the value of procurement of manufactured, processed products purchased shall be sourced from Indian 'small industries' which have a total investment in plant and machinery not exceeding USD 1 million. This valuation refers to the value at the time of installation, without providing for depreciation. Furthermore, if at any point in time this valuation is exceeded, the industry shall not qualify as a 'small industry' for this purpose.
  - This procurement requirement will have to be met, in the first instance, as an average of five years' total value of the manufactured, processed products purchased, beginning 1 April of the year during which the first tranche of FDI is received. Thereafter, it will have to be met on an annual basis.
  - Retail trading in any form by means of e-commerce will not be permissible for companies with FDI engaged in the activity of MBRT.
  - Retail sales outlets may be set up only in cities with a population of more than 10 lakh according to the 2011 Census, which may also cover an area of 10 kms around the municipal or urban agglomeration limits of such cities. However, in the case of states and union territories not having cities with a population of more than 10 lakh according to the 2011 Census, retail sales outlets may be set up in cities of their choice, preferably the largest city, which may also cover an area of 10 kms around the municipal and urban agglomeration limits of such cities.
  - The government will have the first right to the procurement of agricultural products.
  - This policy is an enabling policy only and the state governments and union territories will be free to take their own decisions with regard to the implementation of the policy.

In both SBRT and MBRT, the quantum of domestic sourcing will be self-certified by the company, to be subsequently checked, by statutory auditors, from the duly certified accounts which the company will be required to maintain.

Applications seeking permission of the government for FDI in retail trading of single-brand or multi-brand products will be made to the Secretariat for Industrial Assistance (SIA) in the Department of Industrial Policy and Promotion (DIPP).

Regulatory

Corporate Tax
Mergers and Acquisitions
Transfer Pricing
Indirect Taxes
Regulatory
FEMA
SEBI

FDI in civil aviation [press note 6 (2012 series)] Salient features of the FDI policy in the civil aviation sector

Contraventions for compounding	Amount involved in contravention	Possible action
Scheduled air transport service/ domestic scheduled passenger airline	49% FDI (100% for NRIs)	Automatic
Non-scheduled air transport service	74% FDI (100% for NRIs)	Up to 49% - automatic 49% to 74% - government approval
Helicopter services/seaplane services requiring DGCA approval	100%	Automatic

Other conditions

- Air transport services will include domestic scheduled passenger airlines, non-scheduled air transport services, helicopter and seaplane services.
- Foreign airlines are allowed to participate in the equity of companies operating cargo airlines, helicopter and seaplane services, in accordance with the limits and entry routes.
- Foreign airlines are also, henceforth, allowed to invest in the capital of Indian companies operating scheduled and non-scheduled air transport services, up to the limit of 49% of their paid-up capital. Such investment would be subject to the following conditions:
  - It would be made under the government approval route.
  - The 49% limit will subsume FDI and FII investment.
  - The investment so made will need to comply with the relevant regulations of SEBI, such as the Issue of Capital and Disclosure Requirements (ICDR) Regulations/ Substantial Acquisition of Shares and Takeovers (SAST) Regulations, as well as other applicable rules and regulations.
  - A scheduled operator's permit can be granted only to a company if it meets the following requirements:
    - It is registered and has its principal place of business within India.
    - The chairman and at least two-thirds of the directors are citizens of India.
    - Substantial ownership and effective control of the company is vested in Indian nationals.
- All foreign nationals likely to be associated with Indian scheduled and non-scheduled air transport services, as a result of such investment, shall be cleared from a security viewpoint before deployment.
- All technical equipment that might be imported into India as a result of such investment shall require clearance from the relevant authority in the Ministry of Civil Aviation.

FDI in the broadcasting sector [press note 7 (2012 series)] Salient features of the FDI policy in the broadcasting sector

FDI policy broadcasting content services

Particulars	Percentage FDI	Means of entry
Terrestrial broadcasting (FM radio) subject to conditions specified by Ministry of Information and Broadcasting	26%	Government approval
Uplinking of ‘news and current affairs’ TV channels	26%	Government approval
Uplinking of non-‘news and current affairs’ TV channels/ downlinking of TV channels	100%	Government approval

FDI policy broadcasting content services

Particulars	Percentage FDI	Means of entry
• Teleports (setting up of uplinking HUBs/ teleports) • Direct-to-home (DTH) • Cable networks (multi-system operating at national or state or district level and undertaking upgradation of networks towards digitalisation and addressability) • Mobile TV • Headend-in-the sky (HITS) • Broadcasting service	74%	Up to 49%- automatic Exceeding 49% to 74% - government approval
Cable networks (other MSOs not undertaking upgradation of networks towards digitalisation and addressability and local cable operators (LCOs))	49%	Automatic route

Regulatory

Corporate Tax
Mergers and Acquisitions
Transfer Pricing
Indirect Taxes
Regulatory
FEMA
SEBI

Other conditions

- FDI for uplinking and downlinking TV channels will be subject to compliance with the relevant uplinking and downlinking policy announced by the Ministry of Information and Broadcasting from time to time.
- The foreign investment limit in companies engaged in the above activities shall include, in addition to FDI, investment by FIIs, NRIs, foreign currency convertible bonds (FCCBs), American depository receipts (ADRs), global depository receipts (GDRs) and convertible preference shares held by foreign entities.

Additional security conditions

- Key executives of the company
  - The majority of directors on the board of the company shall be Indian citizens.
  - The chief executive officer (CEO), chief officer in-charge of technical network operations and chief security officer should be resident Indian citizens.
- Security clearance would be required for the following:
  - The company.
  - All directors on the board.
  - Key executives like MD, CEO, CFO, CSO, CTO, and shareholders who individually hold 10% or more paid-up capital in the company.
  - All foreign personnel likely to be deployed for more than 60 days in a year by way of appointment, contract, and consultancy or in any other capacity for installation, maintenance, operation or any other services prior to their deployment. The security clearance is required to be obtained every two years.

FDI in power exchanges [press note 8(2012 series)] Salient features of the FDI policy in the power sector

Particulars	Percentage FDI	Means of entry
Power exchanges registered under Central Electricity Regulatory Commission (Power Market) Regulations, 2010	49% (FDI and FII) subject to 26% - maximum FDI 23% - maximum FII	For FDI – government route For FII investment – automatic route

Other conditions

- FII purchases shall be restricted to a secondary market only.
- No non-resident investor or entity, including persons acting in concert, will hold more than 5% of the equity in the company.

Also, the foreign investment should be in compliance with SEBI regulations, other applicable laws and regulations, and security and other conditions.

Department of Industrial Policy and Promotion - Press Note 2 of 2012

The DIPP has clarified that any strategic downstream investment made by a bank owned or controlled by non-residents or a non-resident entity made under Corporate Debt Restructuring (CDR) or other loan restructuring mechanism shall not be treated as indirect foreign investment.

This will allow private banks with overseas control to restructure their corporate debt, something they were hitherto unable to do due to the FDI policy norms. However, ‘strategic downstream investment’ in subsidiaries will count towards computation of indirect foreign investment.

Press note 3 of 2012

The Government of India has issued Press Note 3 permitting investment from Pakistan. Some of the key aspects provided in the notification include:

- Citizen of Pakistan or an entity incorporated in Pakistan is permitted to make investment in India, with prior government approval
- Defence, space and atomic energy sectors are however excluded from this window available to citizens and companies incorporated in Pakistan

Other Circulars

Relaxation of valuation norms for a newly incorporated company

- The Indian Exchange Control regulations requires subscription of equity shares, compulsorily convertible preference shares or compulsorily convertible debentures (equity instrument) of an Indian company by foreign investors under the FDI Scheme to be in compliant with the valuation norms.
- As per the present valuation norms, issue price of equity instrument by an unlisted Indian company cannot be less than its fair value as determined by a SEBI registered merchant banker or a chartered accountant as per the discounted free cash flow method.

Regulatory

- The RBI has now carved out an exception to the above regulations whereby non-residents (including non-resident Indians) proposing to make investment in an Indian company in compliance with the provisions of the Companies Act, 1956, by way of subscription to the Memorandum of Association i.e. the initial share capital, can make such investments at face value.
- The above liberation would enable newly incorporated Indian subsidiaries of foreign entities to issue equity instruments at face value without applying discounted free cash flow valuation method.

AP (DIR Series) Circular No. 36 dated 26 September, 2012

Setting up of step-down (operating) subsidiaries by Non Banking Financial Companies (NBFC) having foreign investment

- Presently, only 100% foreign owned NBFCs with a minimum capitalisation of 50 million USD were permitted to set up a step-down subsidiary for specific NBFC activities, without any restriction on the number of operating subsidiaries and without bringing in additional capital.
- The minimum capitalisation condition as mandated by para 3.10.4.1 of the DIPP circular 1 of 2012 on Consolidated FDI Policy, therefore, shall not apply to downstream subsidiaries.
- It has now been decided to extend the above facility even to NBFCs which have foreign investment above 75% and below 100%.

Press Note No. 9 (2012 Series) dated 3rd October 2012

Liaison Office

Liaison office (LO)/branch office (BO) /project office (PO) in India - additional reporting requirement

Report needs to be submitted to the Director General of Police (DGP) of the State concerned in which the office is established within five working days of the Indian office becoming functional.

In case the foreign entity has set up more than one office in India, such report needs to be submitted to each DGP having jurisdiction on the state where the office is established.

A. P. (DIR Series) Circular No. 35 dated 25th September, 2012

Annual filing by all Indian offices (new and existing both)

The above report also needs to be filed with the DGP concerned on an annual basis along with a copy of the AAC/AR, as the case may be.

A. P. (DIR Series) Circular No. 35 dated 25th September, 2012

Submission of annual statement by a non-resident having a LO

According to section 285 of the Act, a NR having a LO is required to submit an annual statement with the assessing officer within a period of 60 days. In this regard, Rule 114DA of the Income tax Rules, 1962 ('the Rules') provides for an annual statement to be provided along with a digital signature in Form 49C which shall be verified by a chartered accountant. The Director General of Income tax (Systems) shall specify the procedure for filing the annual statement. The salient features of the annual statement are as follows:

- India specific details relating to the non-resident such as address of the NR in India, permanent account number of the NR, date of opening of the LO.
- Nature of activities undertaken by the LO
- Date of RBI approval of the LO
- Date of submitting the annual activity certificate for the financial year to the RBI
- Details of all purchases, sales of material and services from/to Indian parties during the year by the NR person (not limited to transactions made by the LO)
- Name and designation of the officer-in-charge for each office of the NR person in India
- Details of salary/compensation payable outside India for any employee working in India
- Total number of employees working in the LOS including those employees drawing salary of 50,000 INR or above
- Names and addresses of the top five parties in India
- Details of products or services for which liaising activity is done by the LO
- Details of any other entity for which liaising activity is done by the LO
- Details of group entities present in India as branch offices/companies/ LLPs
- Details of other LOs in India

Notification No.5/2012[F.NO.142/25/2011-SO(TPL)], Dated 6-2-2012

Regulatory

Corporate Tax
Mergers and Acquisitions
Transfer Pricing
Indirect Taxes
Regulatory
FEMA
SEBI

Establishment of BO/LO in India by foreign entities

The RBI through circular 31/2012 dated 17 September 2012 has clarified that entities such as foreign non-government organisations/foreign government bodies/departments are required to apply to the RBI for prior permission to establish an office in India, whether a PO or otherwise. It should be noted that according to notification no FEMA 95/2003, dated 2 July 2003, a foreign company may open a project office in India provided it has secured a contract from the Indian Government to execute a project in India.

A.P.(DIR Series) circular no. 31 dated 17 September 2012 and notification no. FEMA 95/2000-RB dated 2 July 2003

Sectoral Guidelines

Telecommunications

Revised license fee

- Department of Telecommunication (DoT) has revised the annual license fee rate of annual gross revenue for ISPs, UASL/CMTS/Basic service licence category A, B, C, ILD and NLD services.
- Following is a tabular representation of license fee rate applicable till 31 March 2013 and post 31 March 2013:

Sl. No.	Type of license	Annual license fee rate as a percentage of AGR	
		For the period from 1 July 2012 to 31 March 2013	For the year 2013-14 and onwards
1	ISP	4	
	ISP – Internet telephony	7	8
2	UASL/ CMTS/ Basic service licence		
	Category A	9	
	Category B	8	
	Category C	7	8
3	ILD service licence	7	8
4	NLD service licece	7	8

Supreme Court judgement cancelling telecom licenses

The SC, in a landmark judgment, cancelled 122 UASL with 2G spectrum letters issued on or after January 10, 2008 during the tenure of the then Telecom Minister, Mr. A. Raja. This order came on a plea by a NGO, Centre for Public Interest Litigation (represented by advocate Mr Prashant Bhushan), Common Cause and distinguished citizens. These licenses (bundled with spectrum) were “quashed” by the court after finding that their allocation was done in an “illegal” manner. According to Comptroller and Auditor General’s (CAG) report, there was a loss of INR 1.76-lakh crore to the exchequer on account of licenses being given in 2008 at 2001 prices, without an auction. A brief synopsis of the order is as follows:

- The above direction shall become operative after 4 months from the date of order viz February 02, 2012
- Within 2 months from the date of order, Telecom Regulatory Authority of India (TRAI) shall make fresh recommendations for grant of license and allocation of spectrum in 2G band in all 22 service areas by auction
- Central Government to consider the recommendations of TRAI and take appropriate decision within the next 1 month

Financial Services

Investment in Indian venture capital undertakings and/or domestic venture capital funds by SEBI registered foreign venture capital investors permitted

The RBI has permitted foreign venture capital investors (FVCIs) to invest in the eligible securities (equity, equity-linked instruments, debt, debt instruments, debentures) of an Indian venture capital undertakings (IVCU) or venture capital fund (VCF), and units of schemes or funds set up by a VCF, by way of private arrangement or by purchase from a third party subject to terms and conditions as stipulated in Schedule 6 of Foreign Exchange Management (transfer or issue of security by a person resident outside India), Regulations, 2000.

Additionally, the RBI has clarified that FVCIs are permitted to invest in securities on a recognised stock exchange subject to the provisions of the SEBI (FVCI) Regulations, 2000.

A.P. (DIR Series) circular no 93 dated 19 March 2012

Regulatory

SEBI (Alternative Investment Funds) Regulations 2012 announced (PR No. 62/2012)

On 1 August 2011, the SEBI issued a concept paper for the proposed introduction of SEBI (alternative investment funds) Regulations for public comments. Considering the need for regulating unregulated funds, ensuring systematic stability, increasing market efficiency and encouraging formation of new capital and investor protection, the SEBI announced the Alternative Investment Funds Regulations on 2 April 2012.

The key features of the regulations are as follows:

Registration

- To function as an alternative investment fund (AIF), it is mandatory to obtain a certificate of registration from SEBI.
- For existing AIFs, registration is to be done within six months, which may be extended to a further six months in special cases

Categories for registration are as follows:

Category I: comprises AIFs which invests in start-up or early stage ventures or social ventures or small and medium enterprises (SMEs) or infrastructure or other sectors or areas which the government or regulators consider as socially or economically desirable and shall include venture capital funds, SME funds, social venture funds, infrastructure funds and other AIFs such as a venture capital company or venture capital fund as specified in section 10(23FB) of the Act.

Category II: comprises AIFs which do not fall into category I and III and which do not undertake leverage or borrowing other than to meet day-to-day operational requirements and as permitted by these regulations. AIFs under this category include private equity funds or debt funds for which no specific incentives or concessions are given by the government or any other regulator.

Category III: comprises AIFs which employ diverse or complex trading strategies and may employ leverage including through investment in listed or unlisted derivatives. AIFs under this category includes hedge funds or funds which trade with a view to make short-term returns or such other funds which are open ended and for which no specific incentives or concessions are given by the government or any other regulator.

Conditions and restrictions

Investment in all categories of AIF would be subject to the following conditions:-

- AIF may raise funds from any investor by way of issue of units.
- AIF shall have a corpus of not less than INR 200 million.
- Minimum investment by an investor in the AIF shall not be less than 10 million INR.
- Manager or sponsor must have a continuing interest in the AIF of not less than 2.5 % of the corpus or 50 million INR, whichever is lower.
- An AIF scheme cannot have more than 1000 investors.
- Category I and II AIFs cannot invest more than 25% of the corpus in one investee-company.
- Category III AIF cannot invest more than 10% of the corpus in one investee company.

Further additional conditions have been specified in respect of venture capital funds, SMEs, social venture funds and infrastructure funds covered by the categories mentioned above.

Banking Laws (Amendment) Bill, 2011 ('the bill') passed by Lok Sabha

The Lok Sabha (Lower House of Parliament) recently passed the Banking Laws (Amendment) Bill, 2011 ('Bill'). A much awaited measure as it formed a precondition for Reserve Bank of India ('RBI') to issue final guidelines for licensing of new banks in the private sector. The key highlights of the Bill are as under:

- RBI will have the power to supersede the boards of banks, appoint directors and chairman, inspect the books of associate companies of banks.
- RBI to impose such conditions as it deems necessary while granting an approval for acquisition of 5 percent or more of paid up share capital of a banking company
- Shareholders' voting rights increased to 26 percent from the existing 10 percent (in case of private sector bank) and to 10 percent from the existing 1 percent (in case of public sector banks).
- The Bill contained a proposal to exempt bank mergers and acquisitions from the purview of Competition Commission of India ('CCI'). The Finance Minister, however, clarified that the banking sector is not outside the CCI's purview. Thus, bank mergers and acquisitions will need to be approved by both RBI and CCI.
- Existing regulatory regime requiring RBI approval for all share transfers beyond 5 percent and upto 10 percent to continue
- Mergers and Acquisitions in banking will continue to be monitored and approved by the banking regulator

Notification no. (DSM/RS/Ka) (Release ID: 91116) dated 21st December, 2012

Regulatory

IRDA (Issuance of Capital by General Insurance Companies) Regulations, 2012 (draft regulation) issued

The Insurance Regulation and Development Agency (IRDA) issued draft regulations for issue of capital to enable non-life insurers to tap capital markets.

Key highlights of the draft regulation are as follows:

- Mandatory prior approval of IRDA required before General Insurance Companies (GIC) approaches SEBI for public issue of shares. Approval to be valid for a period of one year from the date of issue
- Approval will be granted based on GIC's financial position, its capital structure and regulatory record
- Issue of capital only to be in the form of fully paid equity shares. Any other form of capital to require prior IRDA approval
- Additionally, while granting approval, IRDA may prescribe the following:
  - The extent to which the promoters shall dilute their respective shareholding
  - The maximum subscription which could be allotted to any class of foreign investors
  - Minimum lock-in period for the promoters from the date of allotment of shares

Issued by IRDA under exposure drafts dated 18 September, 2012

Amendments to Insurance Laws (Amendment) Bill 2008 approved by Cabinet

Based on the recommendations of the Standing Committee on Finance, the Cabinet has approved certain necessary amendments to the Insurance Laws (Amendment) Bill, 2008 which is currently pending in Rajya Sabha (upper house of Parliament). Some of the key amendments are as follows:

- Foreign equity cap to be kept at 49%.
- Foreign reinsurers to be permitted to open branches in India for reinsurance business only.
- Capital requirement for health insurance companies to be reduced to INR 50 crores. Health insurance policies to cover sickness benefits on account of domestic and international travel.
- Constitution of a separate Motor Vehicle Insurance and Compensation Legislation.
- Period within which a policy can be repudiated on grounds of misstatement to be 3 years from the date of issue of such policy.
- Public sector GICs and GICs to be permitted to raise capital from the market provided Government ownership of 51% maintained.

Notification by PIB: SH/SKS (Release ID: 88152) dated 4th October 2012

The Non-Banking Financial Company–Factors (Reserve Bank) Directions, 2012

Pursuant to the notification of the Factoring Regulation Act, 2011 issued by the government in January 2012, a new category of NBFCs viz. Non-Banking Financial Company–Factors has been introduced by the RBI along with specific directions to govern this activity.

Some of the key features of these directions are:

- Mandatory registration with RBI as an NBFC-Factor.
- Minimum NOF of INR 5 crores.
- NBFC-Factors to satisfy '75:75 asset income pattern', i.e. financial assets in the factoring business should constitute at least 75 percent of its total assets and its income derived from the factoring business should not be less than 75 percent of its gross income.
- Applicability of NBFC Prudential Norms to NBFC Factors.
- Existing NBFCs satisfying the prescribed asset income pattern may approach RBI along with certificate of registration and auditor's certificate for change in classification within six months from the date of RBI notification.
- NBFC-Factors intending to deal in forex through export or import factoring required to make an application to the Foreign Exchange Department of RBI for permission to deal in forex and adhere to the terms and conditions prescribed.

Amendment to Non Banking Financial Company - Micro Finance Institutions directions

Post issue of framework for Non Banking Finance Company–Micro Finance Institution (NBFC-MFI), such NBFCs have been making representations to RBI regarding difficulties in complying with the existing RBI framework for NBFC-MFIs. Considering the representations, the RBI issued certain amendments in the provisions related to NBFC-MFIs on the following key aspects:

- Existing NBFCs to approach the RBI immediately for a change in Certificate of Registration (CoR). Existing NBFCs to seek registration

Regulatory

by 31 October 2012 (provided Net Owned Funds (NOF) of INR 3 crore by 31 March 2013 and NOF of INR 5 crore by 31 March 2014 is maintained). Failure to comply with minimum NOF requirements will restrict sending to the MFI sector to 10% of the total assets. Also, new companies should meet the INR 5 crore NOF criteria.

- At least 85% of assets to be 'qualified assets' originating on or after 1 July 2012. Also, income generation target reduced from 75 to 70% of the total loans.
- A borrower can be the member of only one self-help group (SHG) or one joint liability groups (JLG) or borrow as an individual.
- Conditions such as annual household income, total indebtedness, membership of SHG or JLG, borrowing sources as well as percentage of qualifying assets and income-generating asset needs to be followed.
- The 26% cap on interest prescribed earlier has been relaxed provided average interest rate does not exceed the borrowing cost plus margin during a financial year. Individual loans may exceed the limit of 26% provided deviation from mean interest rate is not more than +/- 4%.
- The MFIs can approach their boards to fix internal limits to avoid concentration in specific geographic locations
- Fair practices code as issued by the RBI needs to be followed.
- Each MFI needs to be a member of at least one SRO.
- Primarily, the MFI is responsible for adequate monitoring of compliance with the Directions. Lending banks and SROs also need to ensure compliance with system practices.

RBI/2012-2013/140 DNBS (PD) CC. No. 297/Factor/22.10.91/ 2012-13 dated 23rd July, 2012

Guidelines for overseas investments by CICs

The RBI has issued the final Core Investment Companies - Overseas Investment (Reserve Bank) Directions 2012 ('CIC Outbound Directions'). The CIC Outbound Directions are in addition to the existing directions prescribed by Foreign Exchange Department for overseas investment. These Directions are applicable to all CICs whether registered with the RBI or not.

Some of the key provisions are detailed below:

Financial sector investment

- Overseas investment in financial sector permitted only for RBI registered CICs ('CICs-ND-SI') through prior approval of RBI. Financial sector defined to mean a sector/service regulated by a financial sector regulator.
- Overseas investment in financial sector permitted only in regulated entities abroad

Non-financial sector investment

- CICs-ND-SI permitted to make overseas investment in non-financial sector without any RBI approval subject to reporting requirements as prescribed.
- Exempted CICs permitted to make overseas investment in non- financial sector without any RBI approval and without complying with the CIC outbound directions.

Eligibility criteria

- CICs making overseas investment need to have an adjusted net worth ratio of at least 30% (in the manner prescribed) before and after making the overseas investment.
- Non-performing asset level of CICs not to exceed 1% of net advances.
- CICs need to have a three year profitability track record and satisfactory performance during its existence.

Limits on overseas investment

- Aggregate overseas investment of a CIC not to exceed 400% of its owned funds and aggregate overseas investment in financial sector not to exceed 200% of its owned funds.
- Overseas investment in financial/non-financial sector restricted to the CICs financial commitment (i.e. contribution by way of equity investment, loan and 50% of guarantees issued to or on behalf of overseas JV/WOS.

Opening of Branches/ JV/ WOS abroad

- CICs not permitted to set up branches overseas. Existing branches of CICs need to approach RBI within 3 months for a review.
- Overseas JV/WOS (Wholly owned subsidiary) of CICs not to be shell companies (i.e. having no significant assets or operations) and not to be used as vehicle for raising resources for creating assets in India for India operations.
- Parent entity's liability towards JV/WOS to be disclosed in the balance sheet of JV/WOS including whether it is equity/loan/guarantee with details of nature and amount of guarantee.

Corporate Tax
Mergers and Acquisitions
Transfer Pricing
Indirect Taxes
Regulatory
FEMA
SEBI

Opening of representative offices

- CICs permitted to set-up representative offices abroad with prior approval of RBI for the purpose of liaison work, undertaking market study and research but not for any activity involving outlay of funds
- No line of credit permitted to be extended for representative offices

Other general conditions

- Overseas investments by CICs not permitted in prohibited activities as prescribed under FEMA.
- CICs permitted to issue guarantees/letter of comfort to the overseas subsidiary engaged in non-financial activity.
- CICs need to ensure that investments made abroad do not result in creation of complex structures. Maximum two tiers permitted in a structure where a non-operating holding company required offshore. Existing CICs having more than one non operating holding company need to report to RBI for a review.
- Annual statutory auditor certificate to be submitted to RBI by April 30 every year certifying compliance with CIC outbound directions.

RBI/2012-13/314 DNBS (PD) CC.No.311/03.10.001/2012-13 dated 6th December 2012

Draft guidelines on NBFC sector based on Usha Thorat Committee Recommendations

Based on the recommendations made by the Usha Thorat Committee and subsequent feedback, the RBI issued draft guidelines for NBFC and has invited feedback and views on the same by 10 January, 2013. Key provisions proposed are:

Entry point norms

- Based on issuance of CoR, NBFCs to be classified as registered and exempted NBFCs.
- Pre-requisite for NBFC registration - NOF of minimum INR 2 crore plus satisfaction of principal business criteria (PBC) plus assets of minimum INR 25 crore.
- PBC to qualify as an NBFC to be as follows:
  - Financial entities having assets of minimum INR 1000 crore - financial assets to be minimum 50% of total assets or financial income to be minimum 50% of total income.
  - Other companies not accepting deposits - Financial assets of minimum INR 25 crore plus financial assets and financial income of minimum 75% respectively.
- PBC for asset financing companies (AFCs) to be redefined in alignment with that of the revised PBC for NBFCs (existing 60% replaced with 75%).
- Exemption from RBI registration available for NBFCs (other than for deposit taking NBFCs) with -
  - Assets below INR 25 crore whether accepting public funds or not.
  - Assets below INR 500 crore and not accepting public funds, directly or indirectly.
- Foreign owned companies to obtain CoR from RBI before commencing any non-banking financial activity.

Transition mechanism for existing NBFCs

- Non-deposit taking NBFCs with assets below Rs. 25 crore required to
  - approach RBI within 3 months with a road map for achieving assets of minimum INR 25 crore within 2 years; and
  - obtain fresh CoR within 6 months thereafter.
- All existing NBFCs to achieve financial assets of minimum Rs. 25 crore within 2 years with prescribed milestones (March 2014 - 65% and March 2015 - 75%).
- Deposit taking NBFCs failing to achieve 75% threshold by March 2015 not permitted to accept/renew fresh deposits and need to repay existing deposits within the time frame as may be decided by RBI.

Multiple NBFCs in a group (part of a corporate group or floated by common set of promoters)

- Total assets to be aggregated for determination of systemically important NBFCs i.e. INR 100 crore and for application of prudential norms (to be applied to each NBFC in a group)
- Definition of 'group' widened to include -
  - group entities as per all Indian Accounting Standards, promoter-promotee as per SEBI listed company guidelines.
  - entities with common brand name.
  - investee companies in which equity shareholding is minimum 20%.

Regulatory

Corporate Tax
Mergers and Acquisitions
Transfer Pricing
Indirect Taxes
Regulatory
FEMA
SEBI

Captive NBFCs (having at least 90% of total assets as financing of parent company's products)

Tier I capital to be minimum 12% for capital adequacy purposes (existing Captive NBFCs to achieve within 3 years).

Government NBFCs

Required to comply with revised regulatory framework at the earliest if qualifying as NBFCs

Liquidity requirements

Need to maintain high quality liquid assets such that there is no liquidity gap in 1-30 day bucket.

Liquid assets to include cash, bank deposits available within 30 days, money market instruments maturing in 30 days, investment in actively traded debt securities (valued at 90% and carrying at least an AA or equivalent rating)

Prudential norms

- Tier I Capital for capital adequacy purposes
  - Minimum 12% - For Captive NBFCs and NBFCs having more than 75% assets towards lending/investment to sensitive sectors namely capital market, commodities and real estate.
  - Minimum 10% - For all other NBFCs
  - Existing NBFCs to achieve the above within 3 years
- Risk weights for Capital Market Exposures ('CME') and Commercial Real Estate Exposures ('CRE')
  - For NBFCs in a bank group - same as specified for banks.
  - For other NBFCs (other than Captive NBFCs and NBFCs having exposure to sensitive sectors) - raised to 150% for CME and 125% for CRE.
- Asset Classification and Provisioning Norms (including for standard assets)
  - To be made similar to that for banks and to be implemented in a phased manner as prescribed (One-time adjustment of repayment schedule permitted and not to be considered as restructuring).
  - Standard assets provisioning raised from 0.25% to 0.4%.
- Deposit – Taking NBFCs (including AFCs)
  - To be credit rated without which not permitted to accept deposits (existing unrated NBFCs given a period of 1 year to get rated).
  - Limits for deposit acceptance reduced from 4 times to 2.5 times NOF (existing AFCs to be provided specific time period for compliance during which renewal/fresh deposit acceptance not permitted.

Corporate Governance and Disclosures

- Prior RBI approval required for change in control or transfer of shareholding (for all NBFCs)
  - In case of change in control and / or increase of shareholding of 25% or more of paid up equity capital by individuals or groups, directly or indirectly
  - In case of acquisitions/mergers under section 391-394 of the Companies Act, 1956 by or of an NBFC (before approaching the Courts)
  - Acquisitions in ordinary course of business by an underwriter, a stock broker and a merchant banker excluded from approval

CEO Appointment and related matters

- For NBFCs with assets of INR 1000 crore and above
  - Prior RBI approval for appointment of CEOs.
  - Restriction of maximum 15 directorships for every director in an NBFC (public or private) i.e. similar to that prescribed under section 275 of the Companies Act, 1956.
  - Compliance with clause 49 of SEBI's listing agreement on corporate governance including induction of independent directors.
- NBFCs with assets of INR 100 crore and more but less than INR 1000 crore encouraged to adopt Clause 49 principles in their governance practices.

Fit and proper criteria for directors

All NBFCs with assets of Rs 100 crore and above and deposit taking NBFCs - To have a policy for ascertaining fit and proper criteria for appointment of directors based on guidelines as prescribed and comply with prescribed periodic reporting.

Disclosures in financial statements – notes to account

- For all registered NBFCs - registration with other regulator(s), any credit ratings assigned by rating agencies and penalties, if any levied by any regulator.

Regulatory

- For NBFCs with assets of INR 1000 crore and above (whether listed or not)
  - Compliance with mandatory disclosures under Clause 49 of SEBI listing agreement.
  - Provision coverage ratio, liquidity ratio, asset liability profile, extent of financing of parent company products, NPAs/movement of NPAs, details of all off-balance sheet exposures, structured products issued as also securitisation/assignment transactions and other disclosures as prescribed.
  - For unlisted NBFCs - above disclosures to be made available on their websites.

Remuneration and compensation

- NBFCs with assets of INR 1000 crore and above - to mandatorily constitute a Remuneration Committee to decide on compensation of executives in accordance with guidelines (to be issued separately).
- NBFCs with assets below INR 1000 crore - encouraged to adopt such practices.

Foreign investment in NBFC Sector under the FDI scheme

The RBI vide its circulars has clarified that 'leasing and financing' activities – one of the 18 NBFC activities for foreign investment purposes covers only financial leases. Operating leases do not fall within the purview of NBFC activities and thus, foreign investment is permitted in operating leases, without minimum capitalisation restrictions, under the FDI scheme.

Investment by way of private arrangement in Indian venture capital undertakings and/or domestic venture capital funds by SEBI registered foreign venture capital investors permitted

- The RBI has permitted FVCIs to invest in the eligible securities (equity, equity-linked instruments, debt, debt instruments, debentures) of an IVCUs or VCFs, and units of schemes or funds set up by a VCF, by way of private arrangement or by purchase from a third party subject to terms and conditions as stipulated in Schedule 6 of Foreign Exchange Management (transfer or issue of security by a person resident outside India), Regulations, 2000.
- Additionally, the RBI has clarified that FVCIs are permitted to invest in securities on a recognised stock exchange subject to the provisions of the SEBI (FVCI) Regulations, 2000

FII investment in 'to-be-listed' debt securities

In line with the SEBI circular dated 26 November, 2010 allowing FIIs to invest in 'to-be-listed' debt securities, the RBI has now permitted SEBI registered FIIs/sub-accounts of FIIs (together referred to as 'FIIs') to invest in primary issues of NCDs/ bonds subject to the following conditions:

- Such NCDs/ bonds are committed to be listed within 15 days of investment by FIIs.
- Where such NCDs/bonds issued to FIIs are not listed within 15 days of issue, the FII has to immediately sell the bonds/NCDs to a third party or the issuer.
- The terms of offer to the FII must contain a clause that the issuer of such debt securities must immediately redeem / buy back the securities from the FII if the debt securities are not listed within the prescribed time frame of 15 days.

Revision in the framework for QFI investment in equity shares and mutual fund schemes

Further to its earlier circular in January 2012, the SEBI revised the framework for QFI investments on. Some of the key changes, including modification to the definition of QFI, are mentioned below:

- QFI resident in a non-signatory country to IOSCO's Multilateral Memorandum of Understanding (MMoU) may also qualify as a QFI, provided such a country has a bilateral MMoU with the SEBI.
- QFI not be a person resident of India. The definition of 'person' and 'resident' in a country are the same as those in the FEMA and the Act.

Additionally, the SEBI has amended the existing QFI circular (January 2012) as under:

- Investment by QFIs in the same company through both FDI and QFI routes not to exceed 5% of paid-up equity capital (all classes of equity shares having separate and distinct ISIN) of the company at any point of time.
- QFIs allowed to make fresh purchases (through a single demat account) of eligible securities, out of sale, redemption or dividend proceeds of any of the eligible securities.
- QFI may appoint a custodian (qualified Depository Participant (DP)) of QFI and registered as a custodian with SEBI) of securities, who would be obligated to perform clearing and settlement of securities on behalf of QFI client.

Regulatory

- QFIs must invest in all eligible securities through a single non-interest bearing rupee account.

Circular CIR/ IMD/ FII&C/ 13/ 2012 dated June 07, 2012

Investment by QFIs in Indian corporate debt securities

RBI has recently permitted QFIs to invest in debt securities in India on repatriation basis, subject to an overall limit of USD 1 billion.

Under this scheme, QFIs can invest through SEBI-registered QDPs in listed NCDs, listed bonds of Indian companies, listed units of mutual fund debt schemes and 'to be listed' corporate bonds. For this purpose, a QFI may open a single non-interest bearing rupee account for settlement of transactions relating to purchase and sale of eligible securities and may also open a demat account with a QDP.

RBI/2012-13/134 A. P. (DIR Series) Circular No. 7 dated 16th July, 2012

Foreign investment limit for Asset Reconstruction Companies reviewed

The foreign investment in Asset Reconstruction Company ('ARC') has been enhanced from 49% to 74% vide Government's press release issued recently.

The key changes/conditions as listed in the Press Release are as follows:

- Foreign investment limit of 74% in ARC to be a combined limit of FDI and FII. Hence, the prohibition on investment by FII in ARCs has been removed.
- No sponsor to hold more than 50% of the shareholding in an ARC either by way of FDI or by routing through an FII.
- Total shareholding of an individual FII in an ARC shall not exceed 10% of the total paid-up capital.
- Limit of FII investment in Security Receipts (SRs) to be enhanced from 49% to 74% of each tranche of scheme of SRs.
- Individual limit of 10% for investment of a single FII in each tranche of SRs issued by ARCs has been dispensed.
- Investment by FIIs in SR need to be within the FII limit on corporate bonds prescribed from time to time and subject to the sectoral caps under the extant FDI regulations
- Foreign investment in ARCs would need to comply with the FDI policy in terms of entry route conditionality and sectoral caps

DSM/RS/ka (Release ID: 91117) dated 21st December 2012

SEBI

Exemptions from 100% promoter(s) holding shares in dematerialised form

The SEBI had earlier mandated that 100% promoter(s) holding should be in dematerialised form. On receiving representations from various companies on issues relating to dematerialisation of promoters holdings, the SEBI in consultation with stock exchanges allowed exemption in respect of the following promoters from compliance with 100% promoter(s) holding in dematerialised form. This circular is effective from 30 April 2012. The following are the instances when exemption would be considered:

- Promoter(s) have sold their shares in a physical mode and the same have not been lodged for transfer with the company.
- The entire or partial shareholding of promoters or the promoter group is under judicial deliberation before any court or tribunal.
- Shares cannot be converted into dematerialised form due to the death of any of the promoter(s).
- Shares allotted to promoter(s) that await final approval for listing and where such pendency is less than 30 days, or shares received on final listing are pending for conversion to dematerialised form and where such pendency is less than 15 days.

SEBI/Cir/ISD/1/2012 dated 30 March 2012

Amendment to SEBI (Portfolio Managers) Regulations, 2012 to increase the minimum investment amount under portfolio management scheme

To protect the interests of small and retail investors investing under the Portfolio Management Services (PMS) route, the SEBI has enhanced the minimum investment amount per investor from INR 5 lakh to INR 25 lakh. This has been done to limit retail investors' exposure and accessibility to PMS. Additionally, portfolio managers have been debarred from holding unlisted securities (in addition to the existing restriction on holding listed securities) belonging to portfolio accounts, in their own names on behalf of clients. Both amendments are applicable to fresh investments by existing or new investors from the date of the circular.

Regulatory

Compensation guidelines for key managerial personnel of private sector and foreign banks operating in India

The RBI, subsequent to the draft guidelines, has issued the final guidelines regulating compensation payable to full-time directors, chief executive officers, risk takers and control function staff by private sector and foreign banks. According to these guidelines, from FY 2012-13, the private sector and foreign banks operating in India would be required to obtain a prior approval from the RBI to grant remuneration to full-time directors and chief executive officers.

The highlights of the guidelines are as follows:

- Private sector banks
  - Private banks are required to adopt a comprehensive compensation policy covering all employees and conduct an annual review of this.
  - The board of directors of banks should constitute a remuneration committee of the board to oversee the framing, review and implementation of the compensation policy of the bank.
  - The compensation structure includes fixed and variable pay, deferred compensation, employees stock option plan and bonus.
  - Disclosure is required to be made on remuneration in the annual financial statements under the prescribed format.
- Foreign banks
  - Head offices of foreign banks operating in India are to submit a declaration to the RBI confirming compliance with the financial stability board (FSB) principles and standards regarding the compensation structure for its employees in India.
  - For foreign banks with a head office situated in a country that has not adopted the FSB principles, the compensation guidelines of private banks would be applicable.

DBOD no BC. 72/29.67.001/2011-12 dated 13 January 2012

Registration of pension funds for private sector guidelines, 2012

The Pension Fund Regulatory and Development Authority (PFRDA) has recently issued guidelines for registration of pension funds in the private sector. The key eligibility criteria for an applicant are as follows:

- Sponsor must be a company in the financial services sector regulated by any of the financial services sector regulators in India (i.e. RBI, SEBI, IRDA, and PFRDA).In case the applicant is a JV company, at least one of the shareholders/sponsors should falls under the financial sector regulators.
- Monthly AAUM should not be less than INR 8,000 crores in the preceding 12 months ending with the month of application and such AAUM should not be less than INR 2,000 crores. This criteria should be met by any one of the sponsors in case the application is made by a JV company.
- Sponsor’s assets under management shall not include investments in its own assets, investment advisory services or any other similar activity.
- Sponsors must have a positive net worth during the immediately preceding five years with a net profit record of three years immediately preceding the application.
- Applicant should be a ‘fit and proper’ person.

An applicant can make an application and obtain in-principle approval from PFRDA, provided the applicant satisfies the criteria laid down under the guidelines. The applicant can then approach PFRDA for formal registration within three months from the date of such in-principle clearance. The registration certificate, once granted, may be reviewed annually or within such period as may be specified.

PFRDA: Change in central government investment model for the corporate sector

- Under the NPS-corporate sector model, corporate have been provided the option to select the central government investment model if the investment option is exercised by them for their employees.
- In terms of the PFRDA Circular no PFRDAICIR/1/PFM/1 dated 31 August, with effect from 1 November 2012, the private PFMs will be free to decide the investment management fee within the upper ceiling of 0.25% per annum prescribed by the PFRDA at present.
- Due to this differential fee offered by the PFMs from 1 November 2012, the new corporate-CG scheme will be introduced with effect from 1 November 2012. The scheme will follow the central government investment guidelines issued from time to time. The salient features will be as under:
  - This scheme will be offered only by public sector PFMs, who have obtained registration under the PFRDA (Registration of Pension Funds for Private Sector) Guidelines - 2012.

Regulatory

- The system of distribution of funds among three PFMs, as at present, will no longer be available for corporate under the CG scheme and the corporate will have to choose only one PFM offering this scheme.

* Existing corporate sector subscribers under the CG scheme:

- The existing three public sector PFMs (SBI, UTI and LIC) offering the CG scheme will introduce the corporate-CG scheme with effect from 1 November 2012 with units of face value of INR 10 and an initial Net Asset Value (NAV) of INR 10 per unit. The funds and assets in the existing CG scheme with respect to corporate will be transferred to the new scheme and proportionate units in the new corporate CG scheme will be allotted.
- The existing corporate under the CG scheme are allowed a period of 60 days from 1 November 2012 i.e. up to 31 December 2012 to choose any one PFM for shifting their assets. Till such time, the fee chargeable to them will be as applicable to central government employees, whereafter charges applicable to the private sector shall be levied.

Articles

PwC Thought Leadership - Articles published

SN	Particulars of Articles/TL Publications	Where Published	Date/Month of Publication	Contributor/Author Names
1	Domestic transfer pricing - A new Chapter in India's TP Landscape	Taxmann's International Taxation Magazine	1-Apr-2012	Tarun Arora and Manish Sabharwal
2	Tax and Legal updates	SICC (Swiss India Chamber of Comm) bulletin.	Summer publication 2012	Mayur Desai
3	India's Retail Trading Sector - Some Recent Developments	PwC Italy newsletter	1-Apr-2012	Akash Gupt and Sahil Gupta
4	Interview on Cable TV digitization	www.mxmindia.com	1-May-2012	Sahil Gupta
5	The Indian Kaliedoscope - Emerging trends in Retail	PwC Thought leadership	1-Sep-2012	Goldie Dhama and Sahil Gupta
6	Overview of tax framework in India	Decoding the Indian Aerospace and Defence Sector	September 2012	Kamal Abrol and Amit Singhal
7	Things to remember while filing Tax Returns	The Economic Times	26-Jun-2012	Kuldip Kumar
8	Understanding the New Tax Form	The Economic Times	18-Apr-2012	Kuldip Kumar
9	How should you deal with Income from Other Sources	Mint	5-Jul-2012	Kuldip Kumar
10	What to watch out for while filling up new ITR forms	The Financial Express	17-Apr-2012	Chander Talreja
11	Should employed assesses file income tax returns at all?	Mint	14-Mar-2012	Kuldip Kumar
12	Tax deduction in line with liability	Outlook Money	14-Mar-2012	Kuldip Kumar
13	Advantage high- income group	The Indian Express	14-Mar-2012	Kuldip Kumar
14	The new proposed tax slab	Business World	14-Mar-2012	Kuldip Kumar
15	Steps to e-filing income tax returns	Business Standard	14-Mar-2012	Kuldip Kumar
16	Pre-budget expectations on personal taxation	Reuters	14-Mar-2012	Shuddhasattwa Ghosh
17	Budget 2012: Benefits to individuals	Reuters	14-Mar-2012	Shuddhasattwa Ghosh
18	Budget 2012, new income tax slabs and more: A ready reckoner	Reuters	14-Mar-2012	Shuddhasattwa Ghosh
19	Tax borne by an employer - A non monetary perk	The Hindu Business Line	14-Mar-2012	Shuddhasattwa Ghosh
20	Retro Is Not The New 'In'!	The Firm-Moneycontrol.com	14-Mar-2012	K Venkatachalam
21	Service returned with reverse charge	The Hindu Business Line	August 2012	S Ananthanarayanan
22	How budget affects your finances	The Hindu Business Line	18-Mar-2012	Kaushik Mukerjee and Ravi Jain
23	Tax challenges for foreign enterprises in India	The Hindu Business Line	6-May-2012	Kaushik Mukerjee and Ravi Jain
24	To look a 'gift' share in the mouth	The Hindu Business Line	NA	Chengappa Ponnappa
25	Widening the minimum tax net	The Hindu Business Line	4-Aug-2012	Anand Kakarla and Archana Korlimarla
26	Service tax and negative list	The Hindu Business Line	9-Apr-2012	Pramod Banthia
27	A broader transfer pricing code	The Hindu Business Line	6-May-2012	Rakesh Mishra
28	Depreciation on goodwill	The Hindu Business Line	22-Oct-2012	Madhukar Dhakappa and Sunaina Agarwal
29	Too wide a net for indirect transfers	The Hindu Business Line	6-May-2012	S Ramanujam and Ganesh Raju
30	From McDowell to Vodafone	The Hindu Business Line	12-Mar-2012	Indraneel R Chaudhury

PwC Thought Leadership - Articles published

SN	Particulars of Articles/TL Publications	Where Published	Date/Month of Publication	Contributor/Author Names
31	Asia Pacific Tax Notes	PwC Hongkong Website and APTN Publication	June-12	Pallavi Singhal and Vikash Baheti
32	Withholding tax provisions relating to non-residents	The Hindu Business Line	1-Jul-2012	Pallavi Singhal and Vikash Dhariwal
33	Discord on software taxability	The Hindu Business Line	29-Jan-2012	Pallavi Singhal and Vikash Dhariwal
34	Casting the tax net wide	The Hindu Business Line	6-Apr-2012	Indraneel R Chaudhury
35	Fuzzy logic on annual maintenance contracts	The Hindu Business Line	4-Jun-2012	B. Sriram and M. Harisudhan
36	New Tax pitfalls for Multinational acquisitions and restructuring in the age of fiscal shortfall	Acquisition International Journal	August-12	Garry Stone and Ajith Choradia
37	Plugging tax leakages in tough times	The Hindu Business Line	27-Aug-2012	M G Ramachandran
38	A matter of substance	The Hindu Business Line	1-Jul-2012	K Venkatachalam
39	Is Affordable housing a Reality now in India?	Tax Indiaonline	27-Apr-2012	Anand Kakarla and Tikam Jain
40	Finance Bill 2012 redefines Royalty	Tax Indiaonline	28-Mar-2012	Anand Kakarla and Archana Korlimarla
41	Widening the minimum tax net	The Hindu Business Line	8-Apr-2012	Anand Kakarla and Archana Korlimarla
42	Taxing foreign investor's profits on exit	The Economic Times	2-Aug-2012	Vivek Mehra
43	Tax-optimising your supply chain: the Franchise Model (Part 3 of the 3 series Article) - discusses the implementation issues of this model in selected territories including Argentina, Brazil, Germany, France, India, Russia and US, where Swiss is the Franchisor	Bloomberg BNA - Tax Planning International Review (Vol. No. 39 No. 10)	October-12	Sanjay Tolia, Shilpa Udeshi and Hitesh Chauhan
44	GAAR: End of Strategic tax planning?	Tax Indiaonline	16-Apr-2012	Vijayashree R and Rahul Sarda
45	Tax residency certificate: A must for claim of benefits under DTAAs	Tax Indiaonline	26-Mar-2012	Vijayashree R
46	Methods of relief under tax treaties	Outlook Money	12-Jan-2012	Sundeep Agarwal and Hitesh Sharma
47	Navigating tax laws as investment travels overseas	The Hindu Business Line	4-Jun-2012	Saloni S. Khandelwal
48	No Liability for Service Tax - But Still Pay Income-tax On It!	Petrofed	April-June 2012 quarter edition	Shailesh Monani and Bhavin Sheth
49	Tax Ramifications to a Foreign Corporation of using a service provider in the Host Country – India	Tax Management International Forum	1-Sep-2012	Shailesh Monani and Chandresh Bhimani
50	Article on investment banking	BNA Transfer Pricing International Journal	October-12	Dhaivat Anjaria, Bhavik Timbadia and Bhavika Desai
51	GAAR in UK - A carefully planned approach	International Taxation	July 2012	Dheeraj Chaurasia and Parul Sarin
52	Vodafone - unintended consequences	International Taxation	July 2012	Dheeraj Chaurasia and Mallika Patney
53	GAAR-Recommendations of Parthasarathi Shome Committee	Current Tax Reporter (2012) 253 CTR (Articles) 34	October-12	Sangeeta Jain

PwC Thought Leadership - Articles published

SN	Particulars of Articles/TL Publications	Where Published	Date/Month of Publication	Contributor/Author Names
54	Indian chapter on several unique aspects of transfer pricing	BNA	March-12	Rakesh Mishra, Madhawi Rathi, Ganesh Krishnamurthy, Abhishek Shukla and Umesh Rao
55	Indian chapter on Country Guide - Part II	BNA	May-12	Rahul K Mitra, Munjal Almoula, Prasad Pardiwalla, Gaurav Haldia
56	Global Procurement Companies in India – Transfer Pricing Challenges and the Way Ahead	BNA	August-12	Rahul K Mitra, Amitava Sen and Rajneesh Verma
57	Indian chapter in the form of country responses to six rulings of Indian Tax Tribunals, published in Bloomberg BNA Transfer Pricing Forum	BNA	October-12	Sanjay Tolia, Tarun Arora, Ruhi Mehta and Shikha Gupta
58	CFC -Is this last resort?	Business Standard	1-Feb-12	Ashutosh Chaturvedi and Dheeraj Chaurasia
59	Indian MnA - Taxing times ahead	BNA	1-Feb-12	Praveen Bhambani and Dheeraj Chaurasia
60	Beneficial ownership	BNA	November-12	K Venkatchalam and Dinesh Khator

Alerts

PwC Thought Leadership - Alerts released

Sr. No	Issue	Ruling / Notification etc.	Date
1	External Commercial Borrowings denominated in Indian Rupees - hedging facilities for non-resident lenders	A.P. (Dir Series) Circular No. 27 dated 23 September 2011	02 January 2012
2	Section 10A deduction is available to a new unit even though STPI approval refers to it as expansion of existing unit	ACIT v. Symantec Software India Pvt. Ltd. [TS-765-ITAT-2011(PUN)]	03 January 2012
3	No 'business connection' constituted in India for sale of GSM systems and payment for embedded software held as not in the nature of 'royalty'	DIT v. Ericsson Radio System AB [TS-769-HC-2011 (DEL)]	04 January 2012
4	Payment for back-office finance support services not fees for technical services	Shell Technology India Private Limited [TS-760-AAR-2011]	04 January 2012
5	Income received by a foreign company for granting film distribution rights not 'royalty'	ADIT v. Warner Brothers Pictures Inc. [TS-787-ITAT-2011(Mum)]	05 January 2012
6	Application for advance ruling by the payer not maintainable when the same issue is pending in proceedings for the payee	Nuclear Power Corporation of India Ltd., In re [TS-761-AAR-2011]	05 January 2012
7	Comparable uncontrolled price is the most appropriate method for determining the arm's length price of interest on loans	Aithent Technologies Pvt. Ltd. v. ITO [2010-TII-134-ITAT-DEL-TP]	06 January 2012
8	Amendment / Clarification to external commercial borrowing guidelines under automatic route	A.P. (DIR Series) Circular No. 64 dated 5 January 2012	09 January 2012
9	Loss on sale of shares of wholly owned subsidiary deductible as business loss	DCIT v. Colgate Palmolive India Limited (ITA No: 5485/Mum/2009)	10 January 2012
10	Loss on sale of shares of wholly owned subsidiary deductible as business loss	ACIT v. Maersk Gloal Service Centre (India) Pvt. Ltd. [2011-TII-133-ITAT-Mum-TP]	12 January 2012
11	No penalty for inadvertent reporting of income	Thomas Garbarek & others, C/o. Daimler Chrysler India v. DCIT [TS-798-ITAT-2011 (PUN)]	13 January 2012
12	No dependent agent permanent establishment where Indian agents have independent business without authority to conclude contracts	DDIT v. Western Union Financial Services Inc. [TS-5-ITAT-2012 (Del)]	16 January 2012
13	Acceptance of forwarders' cargo receipt in lieu of bill of lading in export transactions	A.P. (DIR Series) Circular No. 65 dated 12 January 2012	17 January 2012
14	Qualified Foreign Investors regime for investment in equity shares	-	17 January 2012
15	Gains arising on equity share transactions carried out by a portfolio manager taxable as business income	Radials International v. ACIT (ITA No.: 1368/Del/2010)	17 January 2012
16	Restrictions on deductibility of expenses to apply even if income assessable as business income and not as fees for technical services under tax treaty	DIT v. Rio Tinto Technical Services TY Ltd. [2012-TII-01-HC-DEL-INTL]	19 January 2012
17	Liberalisation in hedging commodity price risks on overseas exchange/markets	A.P. (DIR Series) Circular No. 68 dated 17 January, 2012	19 January 2012
18	Landmark Supreme Court verdict in the Vodafone case	S.L.P. (C) No. 26529 of 2010	21 January 2012
19	Tax withholding applicable for payment towards manufacture of goods based on specification, know-how and brand	CIT v. Nova Nordisk Pharma India Ltd. [TS-29-HC-2012 (Kar)]	01 February 2012
20	Sharing of net revenues consistently in controlled and uncontrolled transactions held as a valid comparable uncontrolled price	Agility Logistics Pvt. Ltd.[2012] 136 ITD 46 (MUM.)	01 February 2012
21	Overseas subsidiary with single shareholder is a separate legal entity for tax purposes	AIA Engineering Ltd v. Add CIT [TS-30-ITAT-2012 (Ahd)]	02 February 2012
22	Attribution of profits to permanent establishment in India in addition to arm's length remuneration paid to Indian agent upheld	ADIT v. MTV Asia LDC [TS-52-ITAT-2012 (Mum)]	07 February 2012

PwC Thought Leadership - Alerts released

Sr. No	Issue	Ruling / Notification etc.	Date
23	Business support services of advisory nature under a cost contribution agreement are consultancy services liable to tax withholding	Shell India Markets Pvt. Ltd., In re [TS–58–AAR-2012]	07 February 2012
24	Trading by way or re-export of imported goods from an Special Economic Zone eligible for tax holiday	DCIT v. Goenka Diamonds and Jewellers Ltd [TS-57-ITAT-2012(JPR)]	08 February 2012
25	Convention on Mutual Administrative Assistance in Tax Matters as amended by the 2010 Protocol signed by India on 26 January 2012	-	08 February 2012
26	Simplification of procedure for External Commercial Borrowings	A.P. (DIR Series) Circular No. 75 dated 7 February, 2012	09 February 2012
27	Tax issues relating to assignment of keyman insurance policy to a keyman	In the case of three assesses namely, Escorts Heart Institute & Research Centre Ltd, Rajan Nanda, Naresh Trehan [TS-809-HC-2011 (DEL)]	09 February 2012
28	IT support services provided by foreign company using hardware in India taxable as business profits	AREVA T&D India Ltd. In re [TS-81-AAR-2012]	20 February 2012
29	Liberalisation in procedures relating to export and import	Source: A.P. (DIR Series) Circular No.81 and 82 dated 21 February 2012	23 February 2012
30	Write off of urban advances by a bank is available without any limit	Catholic Syrian Bank Ltd. v. CIT [TS-91-SC-2012]	24 February 2012
31	Court order sanctioning a scheme of amalgamation or demerger is an instrument and conveyance liable to stamp duty	Emami Biotech Ltd. and others v. State of West Bengal [Company Application No. 777 of 2011]	27 February 2012
32	Competition Commission of India amends Combination Regulations	-	29 February 2012
33	Ruling on characterisation and reward for selling activity and other transfer pricing matters	Mastek Ltd. v. ACIT [2012] 21 taxmann.com 173 (AHD.)	01 March 2012
34	Furnishing of annual statement to tax department in relation to Liaison Offices of non-residents	CBDT Notification No. 5/2012 dated 6 February, 2012	01 March 2012
35	Negative net worth to be added to sale consideration for determining capital gains on slump sale	DCIT v. Summit Securities Limited [TS-140-ITAT-2012 (Mum)]	12 March 2012
36	No tax withholding on remittance by Indian head office to foreign branch; Tax holiday available on sales made by Indian head office to foreign branch	Semantic Space Technologies Ltd, v. DCIT,[TS-144-ITAT-2012(HYD)]	14 March 2012
37	Report of the Standing Committee on Finance on DTC 2010 – Analysis of key recommendations	Standing Committee on Finance (the Committee or SCF)	15 March 2012
38	PwC Analysis publication on the Union Budget 2012	India Union Budget 2012	16 March 2012
39	Buy-back of shares by wholly-owned subsidiary taxable as capital gains	RST, In re [AAR. No. 1067 of 2011]	20 March 2012
40	Key amendments in TP Regulations by the Union Budget 2012	Finance Bill 2012	20 March 2012
41	Tax holiday available to a developer involved in mere development of infrastructure facility	GVPR Engineers Ltd. Hyd. v. ACIT [TS-143-ITAT-2012(HYD)]	21 March 2012
42	Income of a foreign university from distance learning course is not treated as royalty	Hughes Escort Communications Ltd. v. DCIT [TS-158-ITAT-2012(DEL)]	22 March 2012
43	Secondment agreement gives rise to a service PE and withholding tax despite no economic employment relationship	Centrica India Offshore Private Ltd In. re.[TS-163-AAR-2012]	26 March 2012
44	Tax reassessment invalid where the assessee has made requisite disclosures in the tax return	Indivest Pte Ltd. v. ADIT [2012-TS-166-BOM(HC)]	27 March 2012
45	'Looking at' the nature of transaction, consortium bidding and executing a turnkey project is taxable as association of persons, the contract cannot be dissected for tax purposes	Linde AG, Linde Engineering Division v.DCIT [TS-170-AAR-2012]	27 March 2012
46	Tax Holiday under section 10A available post slump sale as change in ownership is not to be construed as reconstruction	CIT v. Sonata Software Ltd. [TS-164-HC-2012(BOM)]	28 March 2012

PwC Thought Leadership - Alerts released

Sr. No	Issue	Ruling / Notification etc.	Date
47	Power sector reforms- SEZ guidelines revised	1. Vide Notification No P.6/3/2006-SEZ dated 21 March, 2012 2. Notification No.P.6/3/2006-SEZ.1 dated 27 February, 2009	28 March 2012
48	Overseas direct investment by an Indian party– rationalisation	A.P. (DIR Series) Circular No. 96 dated 28 March, 2012	30 March 2012
49	Liberalisation in case of overseas direct investment by resident individuals	A.P. (DIR Series) Circular No. 97 dated 28 March, 2012	30 March 2012
50	India Exchange Control - Liberalisation	A.P. (Dir Series) Circular No. 98, 99 and 100 dated 30 March 2012	03 April 2012
51	Key requirements of new tax return forms for financial year 2011-12	CBDT Notification No. S.O. 626 (E) dated 28 March 2012 for tax year 2011-2012	04 April 2012
52	Payment towards dredging operations does not constitute royalty and no withholding tax applicable	DDIT v. Dharti Dredging and Infrastructure Ltd. [2012-TII-22-ITAT-HYD]	05 April 2012
53	Business and commercial rights acquired on slump sale are eligible for tax depreciation	Areva T & D India Ltd. v. CIT [TS-189-HC-2012(DEL)]	05 April 2012
54	Gains on sale of Compulsory Convertible Debentures by a Mauritian entity re-characterised as 'interest'	Z , In re [AAR No. 1048 of 2011]	12 April 2012
55	High Court's decision on royalty discussing criteria for allowability and taxpayer's commercial prudence	CIT v. EKL Appliances Ltd [TS-206-HC-2012(Del)]	12 April 2012
56	Transfer of shares or other interests pursuant to a family arrangement is not a transfer and hence not liable to capital gains tax	CIT v. R Nagaraja Rao [TS-222-HC-2012(KAR)]	13 April 2012
57	Transfer of business undertaking under a Court approved scheme taxable as slump sale and hence liable to capital gain tax	SREI Infrastructure Finance Ltd., [TS-237-HC-2012(DEL)]	20 April 2012
58	Taxability of income in the hands of a non-resident not a relevant consideration for treating a resident to be an agent of a non-resident	ADIT v.Jet Airways (India) Pvt. Ltd. [2012] 19 taxmann.com 37 (Mum)	23 April 2012
59	Benefit granted to a charitable institution cannot be automatically extended to the substantially amended objects of the institution	The Board of Control for Cricket in India v. ACIT [TS-251-ITAT-2012]	23 April 2012
60	Deeming provisions under section 50C applicable only on capital assets and not on sale of land held as stock-in-trade	CIT v. Kan Construction and Colonizers Pvt. Ltd. [TS-252-HC-2012(ALL)]	24 April 2012
61	Liberalistaion in External Commercial Borrowing guidelines	A.P. (DIR Series) Circular No. 111 and 112 dated April 20, 2012 and Circular No. 113 dated 24 April 2012	26 April 2012
62	No withholding tax on reimbursement of salary costs of personnel under a secondment agreement	ITO v.PQR India [TS-258-ITAT-2012(Bang)]	27 April 2012
63	Deduction under section 10A of the Act is to be allowed at business profits level	CIT v. Black and Veatch Consulting Pvt. Ltd. [TS-260-HC-2012(BOM)]	27 April 2012
64	Revenue sharing under a franchisee agreement not liable to withholding tax	CIT v. Career Launcher India Ltd. [TS-257-HC-2012 (Del)]	30 April 2012
65	Itemised sale of assets, in substance, held to be a slump sale taxable under section 50-B	Mahindra Engineering & Chemical Products Ltd v.ITO [TS-253-ITAI-2012 (Mum)]	02 May 2012
66	Commission for reinsurance of risk not taxable as fees for technical services	DIT v. International reinsurance broker [TS-271-HC-2012(Del)]	04 May 2012
67	RPM (not TNMM) appropriate for distribution; losses are on account of business strategy; & no motive to shift profits as margins of associated enterprises are reasonable	ITO v. L'oreal India Pvt. Ltd. [TS-293-ITAT-2012 (Mum)]	04 May 2012
68	Additional depreciation cannot be denied to the assessee merely on the ground that electricity is not an article or thing	N.T.P.C. Ltd. v. DCIT [TS-291-ITAT-2012 (DEL)]	09 May 2012

PwC Thought Leadership - Alerts released

Sr. No	Issue	Ruling / Notification etc.	Date
69	"Ordinary profits" v. "Arm's length price" for tax holiday units	Visual Graphics Computing Services (India) Pvt. Ltd. v. ACIT [TS-274-ITAT-2012 (Chny)]	11 May 2012
70	Subscription fees received for social media monitoring services for market intelligence taxable as royalty	ThoughtBuzz Pvt. Ltd., In re [TS-300-AAR-2012 (Del)]	11 May 2012
71	Recent amendments notified by the Reserve Bank of India	-	15 May 2012
72	Only "controlled" transactions of tested party and only "similar" "uncontrolled" transactions of comparables to be considered	Microsoft Corporation, Inc. v. Office of Tax and Revenue ; Case No. 2010-OTR-00012 (1 May 2012)	16 May 2012
73	Mean of advertising spend of companies in same industry cannot be ALP for advertising expenditure to be incurred by taxpayer, and is also not correct application of TNMM	ACIT v. Genom Biotech Pvt. Ltd. [TS-326-ITAT-2012(Mum)]	21 May 2012
74	Benefit of indexation available on redemption of redeemable preference shares	CIT v. Enam Securities Pvt Ltd [TS-324-HC-2012 (Bom)]	21 May 2012
75	Payment made for airborne geophysical survey services is not FTS	CIT v. De Beers India Minerals Pvt. Ltd. [TS-312-HC-2012 (Kar)]	23 May 2012
76	Revenue cannot question the business/commercial expediency behind transactions; it can only ascertain whether the transaction is at arm's length	Ericsson India Pvt. Ltd. v. DCIT [TS-319-ITAT-2012 (DeL)]	24 May 2012
77	Internal guidelines and updated FAQs released on the Indian provident fund and pension scheme applicable to international workers	-	29 May 2012
78	No PE created by liaison office in absence of any violation noted by RBI	Metal One Corporation v. DDIT [TS-356-ITAT-2012(DEL)]	31 May 2012
79	Payment to foreign company for R&D cost allocation taxable under the Income-tax Act, 1961 and the India-Germany Tax Treaty	"A" Systems [AAR No. P of 2010]	31 May 2012
80	Advertisement collection agent of foreign telecasting company does not create a PE; arm's length remuneration to agents extinguishes further attribution to PE	DDIT (IT) v. B4U International Holdings Ltd. [TS-358-ITAT-2012 (Mum)]	01 June 2012
81	Reduction in share of partners on reconstitution of firm is not relinquishment of right and hence, not a taxable transfer	CIT v. P N Panjawani [TS-351-HC-2012(Kar)]	01 June 2012
82	Inspection and boroscoping activity carried out in India not taxable; Turbine overhaul services taxable as it grants non-exclusive royalty free license	Solar Turbines International Company, In re [TS-367-AAR-2012]	04 June 2012
83	Consideration received for providing technical personnel taxable as fees for included services under India-US tax treaty	Avion Systems Inc v. DDIT [TS-370-ITAT-2012 (Mumbai)]	05 June 2012
84	Weighted deduction available for R&D expenditure incurred outside the approved facility; Profit of tax holiday unit computed by considering 'actual' sale price and costs attributable thereof, including HO costs allocation	Cadila Healthcare Ltd. v. ACIT [TS-354-ITAT-2012 (Ahd)]	08 June 2012
85	Indian subsidiary undertaking group's international express business in India constitutes a permanent establishment	Aramex International Logistics Pvt Ltd, In re [TS-388-AAR-2012]	12 June 2012
86	Disallowance under section 14A not applicable to income of SEZ units eligible for tax holiday deductions	Meditap Specialities Pvt. Ltd. v. ACIT [TS-393-ITAT-2012 (Mum)]	13 June 2012
87	Consortium creates an association of person, and income from it as a whole, taxable in India	Alstom Transport SA, In re [TS-387-AAR-2012]	13 June 2012
88	Shipping magazines rates accepted as CUP for charter hire payment for vessels after suitable comparability adjustments	Reliance Industries Ltd v. ACIT [TS-368-ITAT-2012(Mum)]	14 June 2012
89	OECD releases discussion draft for revision of Chapter VI (Intangibles) of OECD TP Guidelines	-	14 June 2012
90	OECD releases Discussion Draft on Safe Harbours	-	14 June 2012

PwC Thought Leadership - Alerts released

Sr. No	Issue	Ruling / Notification etc.	Date
91	More profit from related than unrelated parties does not itself make it 'more than ordinary' (Electricity Board rates also used as support); profit comparison to be done for 'individual' related parties	OPG Energy Pvt. Ltd. v DCIT, Chennai [TS-382-ITAT-2012 (CHYN)]	19 June 2012
92	Same income cannot be taxed twice	R Natarajan v.. ACIT [TS-386-ITAT-2012(CHNY)]	19 June 2012
93	Supplementary Memorandum on official amendments moved in the Finance Bill, 2012	-	21 June 2012
94	Relaxation of external commercial borrowing norms – Manufacturing and infrastructure sector borrowers	-	27 June 2012
95	Domestic law prevails if no provision exists for a particular head of income under the tax treaty	DCIT v. TVS Electronics Ltd. [TS-421-ITAT-2012 (Chny)]	29 June 2012
96	Income from domestic related party cannot be adjusted by applying transfer pricing provisions under section 40A(2) of the Act	Durga Rice & Gen Mills v. AO [TS-446-ITAT-2012(Chandi)]	29 June 2012
97	Draft guidelines regarding implementation of General Anti Avoidance Rules in terms of section 101 of the Income-tax Act, 1961	http://www.pib.nic.in	02 July 2012
98	Splitting of a project into a set of contracts for offshore and onshore components not be disregarded	Dongfang Electric Corporation v. DDIT [TS-434-ITAT-2012 (Kol)]	03 July 2012
99	Purchasing shares at a very high price and selling them at a lower price to a group concern within a short span of time - not a genuine transaction, capital loss disallowed	Premier Synthetic industries v ITO [TS-444-HC-2012 (Mad)]	05 July 2012
100	Sale of shares by the promoters not sale of investment but sale of entire business and thus taxable as business income	Sumeet Taneja v. ACIT [TS-412-ITAT-2012 (Chandi)]	05 July 2012
101	Definition of excluded employee expanded for special provisions applicable to international workers under the Indian social security regulations	Notification F. No. S-35025/09/2011/Ss-II dated 24 May, 2012 - Ministry of Labour and Employment. [Source : http://www.epfindia.com/Circulars/Y2012-13/Coord_EPFSch_IW_3927.pdf]	06 July 2012
102	Income from Container Freight Stationbe eligible for deduction under section 80-IA(4) of the Income-tax Act, 1961	All Cargo Global Logistics Ltd v. DCIT [TS-345-ITAT-2012(Mum)]	09 July 2012
103	RBI re-opens foreign currency convertible bonds buyback window	RBI's AP(DIR Series) Circular No. 1 dated 5 July 2012	09 July 2012
104	Time charter hire charges not taxable as 'royalty' but subject to deemed taxability under section 172 of the Income-tax Act, 1961	Poompuhar Shipping Corporation Ltd. v. ADIT[2012] 53 SOT 451 (Chennai)	09 July 2012
105	Surplus arising on amalgamation by adopting purchase method of accounting not taxable as business income under section 28(iv) of the Income-tax Act, 1961	Spencer and company Ltd. v. ACIT [2012] 21 taxmann.com 459 (Chennai)	11 July 2012
106	Transfer of shares to parent company at book value cannot be treated as a sham	Euro RSCG Advertising Pvt. Ltd. v. ACIT [TS-496-ITAT-2012 (Mum)]	18 July 2012
107	No capital gains tax on transfer of shares held in Indian companies : Supreme Court decision in the case of Azadi Bachao Andolan upheld	Dynamic India Fund I, In re[TS-513-AAR-2012]	20 July 2012
108	Bad debts not a factor relevant to determination of arm's length price for royalty	CIT v. CA Computer Associates India Pvt. Ltd.[2012] 252 CTR 164 (BOM.)	20 July 2012
109	Tax planning within the legal framework of the law is permissible	AVM Capital Services Pvt. Ltd. [TS-512-HC-2012 (Mum)]	23 July 2012
110	Tax holiday continues post merger, benefit attached to the undertaking and not to ownership	Renuga Textiles Mills Ltd. v.CIT [TS-517-HC-2012 (Mad.)]	27 July 2012
111	ESOP cost accounted in books as per SEBI guidelines held to be staff welfare expenditure and eligible for deduction	CIT v. PVP Ventures Ltd [TS-514-HC-2012(Mad)] & CIT v. Spray Engineering Device Ltd. [TS-516-ITAT-2012(Chand)]	27 July 2012
112	Reimbursement of salary and other administration costs under secondment agreement not Fees for Technical Services and not liable to tax withholding	Abbey Business Services (India) Pvt. Ltd. v. DCIT [TS-532-ITAT-2012(Bang)]	31 July 2012

PwC Thought Leadership - Alerts released

Sr. No	Issue	Ruling / Notification etc.	Date
113	Consideration on sale of shares chargeable to tax in the year of transfer, notwithstanding that a part of the consideration is deferred	Ajay Guliya v. ACIT [TS-520-HC-2012 (Del)] & ITO v. Indira R Shete [TS-562-ITAT-2012 (Mum)]	03 August 2012
114	Penalty not leviable where assessee provides a bona fide explanation or where assessee made error under a bona fide belief	Emilio Ruiz Berdejo, C/o Tetra Pak India Ltd v DCIT [TS-547-ITAT-2012 (PUN)]	06 August 2012
115	Taxability of salary received in India for overseas services and 'tax year' to be followed under a tax treaty when tax years of countries are different	Bholanath Pal v. ITO [2012] 52 SOT 369 (BANG.)	07 August 2012
116	Special Leave Petition not permitted directly before the Supreme Court against the ruling of the Authority for Advance Tax Rulings	Columbia Sport swear Company v. DIT [TS-549-SC-2012]	07 August 2012
117	HO's allocation of R&D costs fully deductible, section 44C restriction inapplicable	John Wyeth & Brother Ltd. v. ACIT [TS-567-ITAT-2012 (Mum)]	08 August 2012
118	Capital gains on direct and indirect transfer of shares of Indian company by Mauritius tax resident not taxable in India under India-Mauritius DTAA; In case of corporate owners, legal ownership of shares outweighs beneficial ownership for determining taxability of capital gains	Moody's Analytics Inc, USA., In re [2012] 24 taxmann.com 41 (AAR)	08 August 2012
119	Tax paid by employer on behalf of employees qualifies as 'non-monetary' perquisite – exempt from tax	DIT (IT) v. Sedco Forex International Drilling Inc & others [TS-603-HC-2012 (UTT)]	14 August 2012
120	Cancellation of registration of a cricket association trust upheld as its activities were for commercial puposes and were not charitable in nature	Mumbai Cricket Association v. DIT(Exemption), Mumbai [TS-590-ITAT-2012- (Mum)]	16 August 2012
121	AAR doubts genuineness of inter-corporate gifts, calls it a strange transaction	Orient Green Power Pte Ltd. In re [TS-608-AAR-2012]	17 August 2012
122	Transfer pricing, minimum alternate tax and filing of return applicable to capital gains earned by foreign company eligible for exemption under tax treaty	Castleton Investment Ltd, In re [TS-607-AAR-2012]	21 August 2012
123	For attribution of profits to PE, AO cannot simply apply Rule 10 without rejecting TP study for proper reasons	Hyundai Rotem Company v. Asst. DIT [TS-612-ITAT-2012 (DEL)]	23 August 2012
124	Formation conditions under section 10A of the Income-tax Act to be tested in the first year of claim	CIT v. Western Outdoor Interactive Pvt. Ltd. [TS-614-HC-2012(Bom)]	23 August 2012
125	Consideration for repairs and refurbishment of damaged turbines paid to non-residents not 'fees for technical service'	ADIT v. BHEL-GE-Gas Turbine Servicing Pvt. Ltd. [TS-576-ITAT-2012 (Hyd.)]	23 August 2012
126	Vesting of shares of an Indian company pursuant to an overseas upstream merger not liable to capital gains tax - exemption under section 47(via) is not available due to inability to satisfy one of the prescribed conditions	Credit Suisse (International) Holding AG, In re[TS-626-AAR-2012]	27 August 2012
127	Capital gains earned by an Indian resident on sale of shares of a Sri Lankan entity not taxable in India	Apollo Hospital Enterprises Ltd. v. DCIT [TS-609-ITAT-2012(CHNY)]	27 August 2012
128	Goodwill arising on amalgamation is an 'asset' eligible for depreciation	CIT v.Smifs Securities Ltd. [TS-639-SC-2012]	28 August 2012
129	Application to Authority for Advance Rulings does not lie where a tax return is submitted before making the application	NetApp BV, Sin Oceanic Shipping ASA. In re., [TS-619-HC-2012 (Del)]	28 August 2012
130	Advance Pricing Agreement Rules notified	-	31 August 2012
131	Expert Committee Report on General Anti Avoidance Rules	-	03 September 2012
132	Applicability of capital gains tax, transfer pricing provisions and exemption under section 47(iv) on buyback of shares of an Indian company	Armstrong World Industries Mauritius Multiconsult Ltd., In re[TS-628-AAR-2012]	03 September 2012

PwC Thought Leadership - Alerts released

Sr. No	Issue	Ruling / Notification etc.	Date
133	Payment for satellite up-linking and telecasting programmes not royalty or fees for technical services	Channel Guide India Ltd. v. ACIT [TS-662-ITAT-2012(Mum)]	04 September 2012
134	Adjustment of excess contributions made to pension fund of Indian employees holding certificate of coverage and deputed to a country with which India has a social security agreement is allowed	http://www.epfindia.com/Circulars/Y2012-13/IWU_16266.pdf	06 September 2012
135	AAR rejects application as the share arrangement flouted the SEBI guidelines and impaired public interest even though no tax avoidance motive existed	Mahindra-BT Investment Co. (Mauritius) Ltd. , In re [2012] 24 taxmann.com 296 (AAR)	07 September 2012
136	Managing Director's remuneration should be allocated between tax holiday units; implications under domestic transfer pricing provision need to be considered	Nahar Spinning Mills Ltd. v. JCIT [TS-622-ITAT-2012(Chandi)]	07 September 2012
137	Payment for acquisition of capacity in undersea cables taxable as royalty	Dishnet Wireless Ltd., In re [2012] 24 taxman.com 298 (AAR)	07 September 2012
138	PwC Transfer Pricing Resource - Answering queries - Indian Advance Pricing Agreement Scheme	-	07 September 2012
139	Installation services inextricably linked to supply of equipment not taxable under the India-Canada tax treaty though can be taxed under the Act	DCIT v. Dodsal Pvt. Ltd. [TS-675-ITAT-2012(Mum)]	10 September 2012
140	Goodwill is an intangible asset eligible for depreciation	Taj Sats Air Catering Ltd. v. CIT [TS-682-HC-2012(Bom)]	11 September 2012
141	Gift of shares by shareholders to the company not a sham transaction and the subsequent sale results in capital gains	CIT v. Nadatur Holdings and Investments Pvt. Ltd. [TS-656-HC-2012 (KAR)]	12 September 2012
142	Section 10A deduction available before setting-off domestic tariff area unit's current year as well as brought forward loss	CIT v. TEI Technologies Pvt. Ltd. [TS-665-HC-2012(Del)]	12 September 2012
143	PwC India Regulatory News Alert - Liberalisation of External Commercial Borrowing and Trade Credit Policy	-	13 September 2012
144	Sale of 'pledged' shares at a loss to a group company to offset gains is not a 'colourable transaction'	ACIT v. Biraj Investment Pvt. Ltd. [2012] 24 Taxmann.com 273 (Guj)	13 September 2012
145	Retrospective amendment in domestic law cannot be read into tax treaty - payment for supply of software embedded in hardware not taxable as 'royalty' even after retrospective amendment	DIT v. Nokia Networks OY [TS-700-HC-2012 (Del)]	14 September 2012
146	Determination of taxable income of a life insurance company in accordance with section 44 of, read with Rule 2 in the First Schedule to, the Act	ICICI Prudential Insurance Co. Ltd. v. ACIT (ITA No. 6854, 6855, 6856 and 6059 of 2010)	18 September 2012
147	CUP upheld to be the most appropriate method for benchmarking broking transactions; arithmetic mean and not weighted average to be considered for determining ALP; adjustments for differences in volume and functions need to be considered	RBS Equities (India) Ltd, (Formerly known as ABN AMRO Asia Equities (India) Ltd. v. ACIT [I.T.A. No. 3077/Mum/2009] for AY 2003-04 and [I.T.A. No. 1236/Mum/2010] for AY 2005-06	18 September 2012
148	Relief granted by High Court on errors by revenue while processing withholding tax credit and in granting tax refund	Court on its own motion v. CIT [TS-677-HC-2012(Del)]	18 September 2012
149	Maintenance of separate books of accounts for tax holiday unit not a pre-requisite to avail deduction under section 80HH/80I of the Act	CIT v. Bongaigaon Refinery and Petrochemical Ltd. [TS-695-SC-2012]	20 September 2012
150	Arm's length price for sourcing services – cost based remuneration model adjudged most appropriate for limited risk procurement support service provider	GAP International Sourcing (India) Pvt. Ltd v. ACIT [ITA Nos. 5147/Del/2011(AY 2006-07) and 228/Del/2012 (AY 2007-08)]	20 September 2012
151	Extraordinary profits does not necessarily imply that business transacted was 'arranged' so as to result in high profits	CIT v. Schmetz India Pvt. Ltd. [TS-702-HC-2012 (Bom)]	01 October 2012
152	Delhi High Court lays down law on re-opening of income-tax assessments under section 147 of the Income-tax Act, 1961	CIT v. Usha International Ltd. [TS-259-HC-2012(DEL)]	03 October 2012
153	India chapter of UN's draft Practical Manual on TP for Developing Countries	-	11 October 2012

PwC Thought Leadership - Alerts released

Sr. No	Issue	Ruling / Notification etc.	Date
154	Expert Committee Report on Retrospective Amendments Relating to Indirect Transfer	-	17 October 2012
155	Unabsorbed depreciation allowed to be set off against long-term capital gains	Suresh Industries Pvt Ltd v. ACIT [TS-771-ITAT-2012 (Mum)]	17 October 2012
156	Gift of shares by a foreign company prior to June 2010 treated as capital receipt, exempted under section 47(iii) of the Act	DP World Pvt Ltd v. DCIT [TS-767-ITAT-2012(Mum)]	17 October 2012
157	International workers from social security agreement countries allowed to withdraw provident fund early	Notification No. F.No.S-35025/09/2011-SS-II dated 5 October, 2012 of the Ministry of Labour and Employment, Government of India	19 October 2012
158	Indian chapter on "Country responses to six rulings of Indian Tax Tribunals"	-	05 November 2012
159	Draft Tax Accounting Standards issued by the Central Board of Direct Taxes	-	19 November 2012
160	Updated FAQs released on Indian provident fund and pension scheme applicable to International workers	-	23 November 2012
161	External commercial borrowing for 2G spectrum allocation	-	27 November 2012
162	Various factors to be evaluated while pricing guarantee commission - universal application of a particular rate rejected, and instead, internal CUP accepted	Everest Kanto Cylinder Ltd. v. DCIT [TS-714-ITAT-2012(Mum)-TP]	27 November 2012
163	Deduction under section 10B is to be allowed before set-off of brought forward loss and unabsorbed depreciation	ACIT v. Charon Tec P. Ltd [TS-841-ITAT-2012(CHNY)]	04 December 2012
164	CBDT notifies valuation methodology for computing FMV under section 56(2)(viib) of the Act	-	07 December 2012
165	Income from seismic data procurement and processing services relating to oil exploration taxable under the presumptive scheme	OHM Ltd. In re [2011-TII-10-ARA-INTL]	12 December 2012
166	Recent guidelines issued by Employees' Provident Fund Organisation on the definition of basic wages and conducting inquiry	-	12 December 2012
167	Social Security Agreement signed between India and Japan	-	13 December 2012

India Spectrum

Sr. No.	Issue	Date
1	PwC Newsletter : India Spectrum - January 2012	31 January 2012
2	PwC Newsletter : India Spectrum - February 2012	13 March 2012
3	PwC Newsletter : India Spectrum - March 2012	09 April 2012
4	PwC Newsletter : India Spectrum - April 2012	21 May 2012
5	PwC Newsletter : India Spectrum - May 2012	06 June 2012
6	PwC Newsletter : India Spectrum - June 2012	03 August 2012
7	PwC Newsletter : India Spectrum - July 2012	06 September 2012
8	PwC Newsletter : India Spectrum - August 2012	30 September 2012
9	PwC Newsletter : India Spectrum - September 2012	31 October 2012
10	PwC Newsletter : India Spectrum - October 2012	02 November 2012

DTAAs

List of Tax Information Exchange Agreements (TIEAs)

Sr. No.	Country	Date of notification
1	Bermuda	Notification No. 5/2011 [F. No. 503/2/2009-FTD-I], dated 24 January 2011
2	Bahamas	Notification No. 25/2011 [F. No. 503/6/2009-FTD-I], dated 13 May 2011
3	Isle of Man	Notification No. 26/2011 [F. No. 503/01/2008 - FTD-I], dated 13 May 2011
4	British Virgin Islands	Notification No. 54/2011 [F. No. 503/10/2009-FTD-I], dated 3 October 2011
5	Cayman Islands	Notification No.61/2011[F. No.503/03/2009-FTD-I]/S.O. 2902(E), dated 27 December 2011
6	Jersey	Notification No. 26/2012 [F. No. 503/6/2008-FTD-I]/S.O. 1541(E), dated 10 July 2012
7	Guernsey	Notification No. 30/2012 [F. No. 503/1/2009-FTD-I]/SO 1782(E), dated 9 August 2012
8	Liberia	Notification No. 32/20012-FT&TR-II [F. No. 503/02/2010-FT&TR-II]/SO 1877(E), dated 17 August 2012

Social Security Agreements

Sr. No.	Country	Effective Date
1	Belgium	1 September 2009
2	Germany	1 October 2009
3	Switzerland	29 January 2011
4	Luxembourg	1 June 2011
5	France	1 July 2011
6	Denmark	1 May 2011
7	Korea	1 November 2011
8	Netherlands	1 December 2011

SSAs signed but not notified:

Hungary – On 3 February 2010

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

Double Taxation Avoidance Agreements

Sr. No.	Country	Date of notification
1.	Armenia	GSR No. 800(E)/8-12-2004
2.	Australia	GSR No. 60(E)/22-1-1992
3.	Austria	GSR No. 682(E)/20-9-2001
4.	Bangladesh	GSR No. 758(E)/8-9-92
5.	Belarus	GSR No. 392(E)/17-7-98
6.	Belgium	GSR No. 323(E)/6-6-75 corrected by 416(E)/18-7-75; supplemented by 321(E)/2-3-88; 632(E)/31-10-97; SO 54(E)/19-1-2001
7.	Botswana	S.O.1494(E)/18.6.2008
8.	Brazil	GSR No. 381(E)/31-3-92
9.	Bulgaria	GSR No. 205(E)/9-5-96
10.	Canada	GSR No. 1108 (E)/25-9-86 amended by 635(E)/24-6-92; Circular No. 638/28-10-92; 28(E)/15-1-98
11.	China	GSR No. 331(E)/5-4-95; 574(E)/4-8-95
12.	Cyprus	GSR No. 805(E)/26-12-95
13.	Czech Republic	GSR No. 811 (E)/8-12-99
14.	Czechoslovakia	GSR No. 526 (E)/25-5-87 corrected by 659(E)/ 24-7-90
15.	Denmark	GSR No. 853(E)/25-9-89
16.	Egypt (U.A.R.)	GSR No. 2363/30-9-69;
17.	Federal Republic of Germany	GSR No. 1090/ 13-9-60 supplemented by F. No. 504/2-9-72 and 680(E)/26-8-85 amended by 609(E)/30-6-87
18.	Finland	GSR No. 786(E)/20-11-84 amended by 495(E)/13-8-98
19.	France	GSR No. 260/18-2-1970 corrected by 394/17-3-71 replaced by 681(E)/ 7-9-94; amended by SO 650(E)/10-7-2000, S.O.2106(E)/12.8.2009
20.	Germany Democratic Republic (GDR East German)	GSR No. 107(E)/2-3-90 applicable up to 31-12-90 (Circular No. 639/8-9-93)
21.	Georgia	S.O.34(E) dated 6.1.2012
22.	Greece	GSR No. 394 dated 17-3-67
23.	Hungary	GSR No. 282(E)/13-3-87 corrected by 623(E)/9-7-90; GSR No. 197(E)/ 31-3-2005
24.	Iceland	GSR No.241(E)/5.2.2008
25.	Indonesia	GSR No. 77(E)/4-2-88 corrected by 540(E)/3-5-88
26.	Ireland	GSR No. 105(E)/20-2-2002 and addendum No. 212(E)/ 19-3-2002
27.	Israel	GSR No. 256(E)/26-6-96
28.	Italy	GSR No. 608(E)/8-4-86 corrected by 346(E)/31-3-87
29.	Italy (revised)	GSR No. 189(E)/25-4-96
30.	Japan	GSR No. 101(E)/1-3-90, S.O.1136(E)/28.6.2006
31.	Jordan (Hashemite Kingdom)	GSR No. 810(E)/8-12-99
32.	Kazakstan	GSR No. 633(E)/31-10-97
33.	Kenya	GSR No. 665(E)/20-8-85

Sr. No.	Country	Date of notification
34.	Kuwait	GSR No.2001(E)/28.11.2007
35.	Kyrgyz Republic	GSR No. 75(E)/7-2-2001
36.	Libyan Arab Jamahiriya	GSR No. 484(E)/1-7-82
37.	Luxembourg	No. 78/12-10-2009
38.	Malaysia	GSR No. 167(E)/1-4-77; GSR No. 667(E)/12-10-2004
39.	Malta	GSR No. 761(E)/22-11-95
49.	Mauritius	GSR No. 920(E)/6-12-83 corrected by 816(E)/18-12-84
41.	Mongolia	SO No. 635(E)/16-9-96
42	Montenegro	No.96(E)/7.1.2009
43.	Morocco	GSR No. 245(E)/15-3-2000
44.	Myanmar	S.O.1518(E)/18.6.2009
45.	Namibia	GSR No. 196(E)/8-3-99,
46.	Nepal	GSR No. 1146(E)/5-12-88
47.	Netherlands	GSR No. 382(E)/27-3-89; modified by 693(E)/30-8-99
48.	New Zealand	GSR No. 314(E)/27-3-87 corrected by 477(E)/21-4-88
49.	Norway	GSR No. 756(E)/9-9-87 corrected by 1024(E)/24-10-88
50.	Oman (Sultanate of)	GSR No. 563(E)/23-9-97
51.	Pakistan	GSR No. 28/10-12-1947, 28-12-47 Not operative from A.Y. 1972-73
52.	Philippines	GSR No. 173(E)/2-4-96
53.	Poland	GSR No. 72(E)/12-2-90
54.	Portuguese Republic	GSR No. 542(E)/16-6-2000
55.	State of Qatar	GSR No. 96(E)/8-2-2000
56.	Romania	GSR No. 80(E)/8-2-88
57.	Russian Federation	GSR No. 507(E)/21-8-98
58.	SAARC	No.3/11/10.1.2011
59.	Serbia	S.O.97(E)/7.1.2009
60.	South Africa	GSR No.198(E)/21.4.1998
61.	Singapore	GSR No. 22(E)/18-1-82 corrected by 371(E)/8-9-92 replaced by 610(E)/8-8-94 S.O.2031(E) dated 1.9.2011
62.	Slovenia	GSR No. 344(E)/31.5.2005 (2005)
63.	Spain	GSR No. 356(E)/21-4-95
64.	South Korea	GSR No. 1111(E)/26-9-86 modified by 986(E)/ 20-12-90; 198(E)/21-4-98
65.	Sri Lanka (Ceylon)	GSR No. 342(E)/19-4-83 corrected by 788(E)/20-11-84
66.	Sudan	GSR No. 723(E)/1-11-2004
67.	Sweden	GSR No. 38(E)/27-3-89; 705(E)/17-12-97

Sr. No.	Country	Date of notification
68.	Switzerland	GSR No. 357(E)/21-4-95; 74(E)/7.2.2001
69.	Swiss Federation	S.O,2093(E) dated 27.12.2011
70.	Syria (Syrian Arab Republic)	GSR No. 508(E)/25-6-85; 884(E)/30.3.2009
71.	Taipei	S.O.2040(E) dated 2.9.2011
72.	Tajikistan	GSR No.1758(E)/16.7.2009
73.	Tanzania	GSR No. 559(E)/16-10-81 corrected by 451(E)/8-6-82
74.	Thailand	GSR No. 915(E)/27-6-86 corrected by 478(E)
75.	Trinidad & Tobago	GSR No. 720(E)/26-10-99
76.	Turkey	GSR No. 74(E)/3-2-97
77.	Turkmenistan	GSR No. 567(E)/25-9-97
78.	U. A. E.	GSR No. 710(E)/18-11-93; No.2001(E)/28.11.2007
79.	United Kingdom of Great Britain and Northern Ireland	GSR No. 612(E)/23-11-81; corrected by GSR 772(E)/24-12-82; 91(E)/11-2-94
80.	United Mexican States	S.O.2846(E)/26.11.2010
81.	United States of America	GSR No. 990(E)/20-12-90 corrected by 342(E)/12-7-91
82.	United State of Soviet Russia	GSR No. 812(E)/4-9-89 amended by 952(E)/30-12-92; 507(E)/21-8-98
83.	Uganda	GSR No. 666(E)/12-10-2004
84.	Ukraine	GSR No. 24(E)/11-1-2002
85.	Uzbekistan	SO No. 790(E)/13-11-96
86.	Vietnam	GSR No. 369(E)/28-4-95
87.	Zambia	GSR No. 39(E)/18-1-84

List of Limited Tax Treaties

Sr. No.	Country	Notification
1	Afghanistan	GSR 514(E), dated 30.09.1975
2	Ethiopia	GSR 8(E), dated 04.01.1978 as corrected by Notification No. GSR 159(E), dated 02.03.1978
3	Iran	GSR 284(E), dated 28.05.1973
4	Lebanon	Nos. GSR 1552 and 1553, dated 28.06.1969
5	Maldives	SO 34(E), dated 10.01.2011 by Notification No. 3/2011
6	Pakistan	GSR 792(E), dated 29.08.1989
7	Peoples Democratic Republic of Yemen	GSR 857(E), dated 12.08.1988
8	SAARC Countries	SO 34(E), dated 10.01.2011 by Notification No. 3/2011

Glossary

AAR	Authority for advance rulings
AD	Authorised Dealer
ADR	American Depository Receipts
AE	Associated enterprise
AIF	Alternate Investment Fund
ALP	Arm's length price
AOP	Association of persons
ARC	Asset Reconstruction Company
AY	Assessment year
BO	Branch Office
CAG	Comptroller and Auditor General
CBEC	Central Board of Excise & Customs
CENVAT	Central value added tax
CESTAT	Customs, Excise and Service Tax Appellate Tribunal
CIC	Core Investment Companies
CIT(A)	Commissioner of Income-tax (Appeals)
CME	Capital Market Exposure
CoR	Certificate of Registration
CRE	Commercial Real Estate Exposure
CUP	Comparable uncontrolled price
DIPP	Department of Policy and Promotion
DGCA	Director General for Civil Aviation
DGP	Director General of Police
DoT	Department of Telecommunication
DP	Depository Participant
DRP	Dispute Resolution Panel
ECB	External Commercial Borrowings
FCCB	Foreign Currency Convertible Bonds
FDI	Foreign Direct Investment
FEMA	Foreign Exchange Management Act, 1999
FII	Foreign institutional investor
FMV	Fair market value
FOB	free-on-board
FTS	Fees for technical services
FVCI	Foreign Venture Capital Investor
FY	Financial year
GAAR	General Anti-abuse rule
GIC	General Insurance Companies
GDR	Global Depository Receipt
HC	High Court
HFC	Housing Finance Company
HO	Head office
ICDR	Issue of Capital and Disclosure Requirements regulations
IVCU	Indian Venture Capital Undertakings
LO	Liaison office
LLP	Limited Liability Partnership
MAM	Most appropriate method
MBRT	Multi Brand Retail Trading
MoU	Memorandum of Understanding
MSME	Micro Small and Medium Enterprises
MMoU	Multilateral Memorandum of Understanding
NBFC	Non-Banking Financial Companies
NHB	National Housing Bank
NR	Non-resident
NOF	Net Owned Fund
PE	Permanent establishment
PLI	Profit level indicator
PFRDA	Pension Fund Regulatory and Development Authority
PMS	Portfolio Management Services
PO	Project office
QFI	Qualified Institutional Investor
RBI	The Reserve Bank of India
RPM	Resale price method
SAD	Special additional duty
SAT	Securities appellate tribunal
SAST	Substantial Acquisition of Shares and Takeover Regulations
SC	Supreme Court
SEBI	The Securities Exchange Board of India
SIA	Secretariat for Industrial Assistance
SLP	Special leave petition
SPV	Special Purpose Vehicle
STP	Software technology park
TED	Terminal excise duty
The Act	The Income-tax Act, 1961
The Rules	The Income tax Rules, 1962
The tax treaty	Double Taxation Avoidance Agreement
The Tribunal	The Income-tax Appellate Tribunal
TNMM	Transaction net margin method
TO	Tax officer
TP	Transfer pricing
TPO	Transfer pricing officer
TRC	Tax residency certificate
TRAI	Telecom Regulatory Authority of India
VAT	Value added tax
VCF	Venture Capital Fund
WOS	Wholly owned subsidiary

Notes

Notes

About PwC

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

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

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

You can connect with us on:

facebook.com/PwCIndia

twitter.com/PwC_IN

linkedin.com/company/pwc-india

youtube.com/pwc

pwc.in

AK 287 January 2013 Tax Glimpses.indd
Designed by: PwC Brand and Communications, India