Tax Glimpses 2014

pwc

Foreword

I am delighted to present our annual publication, Tax Glimpses 2014.

2014 witnessed the long-awaited general elections that marked the installation of a new Government at the Centre. After about 200 days in power (as we close this Issue), the government has sent out an unequivocal message to the world, that it will be business-friendly, and a speedy decision maker, by clearing several pending projects that were earlier stalled. The big challenge before the new government is to marry the high expectations with the reality of the magnitude and number of problems faced, and hard decisions to take to kick the country into a higher growth orbit.

On the corporate tax front, recent developments show an encouraging trend. To achieve a non-adversarial tax regime, the CBDT has issued a consolidated instruction to its officers. The long-running issue relating to taxability of 'indirect transfers' under the Indian tax law saw the taxpayer prevailing in a marquee HC decision – first, of the Delhi HC in the case of Copal Research Limited, which prescribed a threshold of 50% for triggering capital gains tax in India. Additionally, in two Bombay HC decisions in Vodafone India Services Private Limited and Shell India Markets Private Limited, the HC held that issue of shares at premium by the taxpayer in favour of its associated enterprise did not give rise to 'income' from an International transaction chargeable to tax in India, and therefore Transfer Pricing provisions did not apply.

Further, the SEBI released the much awaited REITs and InvITs. These regulations could provide a positive push to Indian Capital Markets by making another avenue of investing in real estate, and Real Estate & Infrastructure sectors, by providing a new way of raising funds.

As a handbook that captures the year's events, this publication brings to you a brief analysis of the important judgements and noteworthy regulatory developments in corporate tax, mergers and acquisitions, transfer pricing and indirect tax during 2014. This publication also includes a listing (with web-links wherever available) of various PwC Thought Leadership initiatives, such as news alerts and flashes, newsletters and articles published during 2014.

Trust you will find this useful. As always I look forward to hearing from you.

Shyamal Mukherjee
Leader, Tax and Regulatory Services

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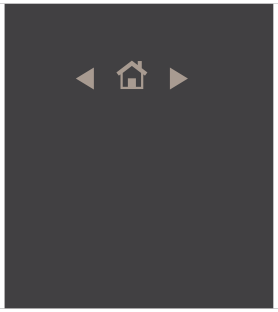

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Case law

Indirect transfer

Delhi High Court's landmark ruling on 'Indirect transfer' taxation

DIT(International Tax) *v.* Copal Research Limited [TS-509-HC-2014(Delhi)]

On examining the taxability of 'indirect transfer', the HC adjudicated on the applicability of Explanation 5 to section 9(1)(i) of the Act, and also interpreted the term 'substantially', to hold that it would cover transfer of shares of a company incorporated overseas which derived more than 50% of their value from assets situated in India.

Facts

Copal Partners Limited, Jersey (Copal–Jersey), held 100% of the shares in Copal Research Limited, Mauritius (CRL). CRL, held 100% of the shares in Copal Research India Private Limited, India (CRIL). Further, CRL also held 100% of shares in Copal Market Research Limited, Mauritius (CMRL). CMRL Mauritius in turn held 100 % shares in Exevo Inc., USA, (Exevo Inc. US). Exevo Inc. US held 100% of the shares in Exevo India Private Limited, India (Exevo India). Three separate share purchase agreements (SPAs) were signed between Copal Group (sellers) and Moody's Group (buyers) which had the following effects:

- ***Transaction I*:** Sale of 100% shares of CRIL by CRL to Moody's Group Cyprus Limited (Moody's Cyprus) (SPA–I entered on 3 November 2011);
- ***Transaction II:*** Sale of 100% shares of Exevo Inc. US by CMRL to Moody's Analytics Inc., USA (Moody's–USA), (SPA–II entered on 3 November 2011); and
- ***Transaction III:*** Sale of 67% shares of Copal - Jersey to Moody's–UK, (SPA–III entered on 4 November 2011).

On these facts, advance ruling was sought by the sellers and the buyers on the question of taxability in India of gains arising from Transaction 1 and 2, and consequently corresponding tax withholding obligations if any, on the respective buyer. The AAR passed a common order in favour of the applicants by holding that capital gains arising on sale of shares pursuant to Transaction 1 and 2 shall not be chargeable to tax in India, and consequently there shall not be any withholding obligation.

Held

The contention of the Revenue that the entire structure had been evolved only with the object of avoiding tax was devoid of any merits as the organisation structure was in existence over a period of time. The transaction structure as suggested by the Revenue, i.e., sale of shares at Copal–Jersey level alone, would not give the same commercial results *vis-à-vis* actual transaction, and therefore the allegation that the transaction at Mauritius level was made to avoid an incidence of tax in India needed to be ruled out. The funds flow involved payment of dividends (from consideration received by CRL and CMRL as a result of Transaction 1 and Transaction 2) to Copal Group shareholders as well as to banks and financial institutions who were also shareholders in Copal Jersey. This would not have been possible without Transaction 1 and Transaction 2. Even if transactions were to be examined at Jersey level (ignoring SPA 1 and SPA 2), no taxability could arise in India, as:

- Only a fraction of the value of shares of Copal–Jersey derived its value indirectly from Companies in India (i.e. CRIL and Exevo-India);
- There could be no recourse to Explanation 5 to enlarge the scope of section 9(1) of the Act so as to cast the net of tax on gains or income that could arise from transfer of an asset situated outside India, which derived bulk of its value from assets outside India;
- The expression "substantially" in Explanation 5 to section 9(1)(i) of the Act introduced by the Finance Act, 2012 with retrospective effect from 1 April 1962 would necessarily have to be read as synonymous to "principally", "mainly" or at least "majority". Thus, this should represent more than 50 % threshold (*for this the HC referred to the draft report of Shome Committee on retrospective amendment, Direct Taxes Code Bill (2010), and the UN and OECD Model Conventions in connection with Articles relevant to capital gains*); and
- Gains arising from sale of shares of a company incorporated overseas, which derived less than 50% of its value from assets situated in India, would not be taxable under section 9(1)(i) of the Act read with Explanation 5 thereto.

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The Revenue was unable to show that the effective management of the companies was not where the Board of Directors of the company was situated. The fact that the companies were rendering services to related parties would not render the companies to be considered as non-existent or give justification for lifting the corporate veil. CRL and CMRL were Mauritian resident companies, as these were managed by their respective Boards of Directors.

Editor's note

The Delhi HC upheld the AAR's ruling on non-taxability of gains arising from sale of shares by Mauritian companies (that held shares in Indian companies, either directly or indirectly). While upholding the decision of the AAR, the Delhi HC, has interpreted the 'indirect transfer' provisions in the light of section 9(1)(i) of the Act, and the term 'substantially' by relating the term to the context and intent of that section, while also relying on OECD/ UN Model commentaries. The commercial rationale behind the transaction, including the adverse effect it would have if it were done as suggested by the Revenue, was amply considered by the HC in rejecting the Revenue's writ petition.

Permanent Establishment

Supply of telecom equipment by overseas group company as a part of a turnkey project creates a PE

Nortel Networks India International Inc. *v.* Dy.DIT [TS-355-ITAT-2014(Delhi-Tribunal)]

The Indian group company, rendering pre and post-sale activities as a part of an indivisible contract which was assigned to an overseas group company, was held to qualify as a PE for the latter. Also, profit on supply of equipment, which was part of a turnkey project, would be attributable to the PE in India.

Facts

The taxpayer was part of the Nortel Group, which was a leading supplier of hardware and software for GSM cellular radio telephones system. Nortel Networks India Private Limited (Nortel India), had entered into a contract with Reliance Infocomm (customer) for a composite agreement of supply and services, and had assigned the same to the taxpayer immediately, without any consideration. The equipment supplied was originally acquired from Nortel Network Limited (Nortel Canada), which was also part of the Nortel Group. Also, Nortel Canada had a LO in India.

The performance of the contract was guaranteed by the group. During the course of assessment proceedings, the taxpayer's unaudited accounts were submitted, which reflected a gross loss and also very little general and administrative expenditure. Based on these, the TO observed that the taxpayer did not have any technical, financial or infrastructural capability to execute the contracts. Being a turnkey project, the contract was indivisible into supply and distinct services. Though Nortel India assigned the contract to the taxpayer, the responsibilities for negotiating, securing and executing the contract were given to Nortel India. Thus, there was a combined effort between the taxpayer and Nortel India for the project. The taxpayer argued that equipment sale and installation were separate contracts. As the sales were completed before they reached India, the profit attributable to sale could not be taxed in India. The TO concluded that the taxpayer had a PE in India, for the following reasons:

- Nortel India and Nortel Canada LO constituted a fixed place PE as per the tax treaty;
- The premises of Nortel India were used by the Nortel Group as a sales outlet and for soliciting orders;
- As Nortel India was involved in installation activity for the taxpayer, the same constituted an Installation PE;
- Expatriates of various entities of the Nortel Group supervised the installation activity, hence creating a supervisory PE;
- As an expatriate employee stayed in India and rendered services for Nortel India for longer than the limit specified in the tax treaty, a service PE was created; and
- Nortel India had procured the orders and executed the same with the aid of the group companies. The accounts of Nortel India also reflected that it was performing agency functions for the taxpayer and was dependent on the group technically and financially.

For the purpose of attributing profits, the TO relied on the global accounts of the Nortel Group, which showed a gross margin of 42.6%, and allowed 5% for general expenditure. The CIT(A) held that the activities of the taxpayer constituted a fixed place PE, installation PE, service PE and dependent agent PE. Nortel India and the place in which the equipment was assembled and installed constituted the taxpayer's fixed

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place PE. The CIT(A) rejected the taxpayer's contention that those were not at its disposal. Further emphasis was given to the following admitted facts:

- Only Nortel India was involved in both pre-supply and installation activity;
- Once the contract was signed, it was assigned to the taxpayer without any consideration; and
- Employees and other personnel from group companies were carrying out installation activity in India.

The revenue further contended that the taxpayer's entire business in India had been taken care of by its associated enterprise, i.e. Nortel India, by getting the order, installing the equipment and performing after-sales services. Only supply of the equipment was done by the taxpayer, which could not be separated, as it was a part of the works contract. Also, when Nortel India assigned the contract to the taxpayer, the whole risk and responsibility also passed to the taxpayer. Hence, Nortel India was dependent on the taxpayer. The CIT(A) directed the TO to arrive at profit attribution based on 50% net profit margin after deduction of allowable expenditure, relying on Rule 10 of the Rule. It was decided that attribution had to be made on a case-by-case basis and could not be compared with another case.

Held

The Tribunal held that the taxpayer constituted a PE in India. The contract was a turnkey contract and was indivisible. The taxpayer only performed the equipment supply portion of the contract, which was incidental to other activities. Nortel India performed negotiation, installation, product delivery and post-sale services. It was evident that Nortel India was used by the taxpayer for its functions. The LO performed all kinds of services for group companies, including the taxpayer, thereby making its place available to the taxpayer. The taxpayer's contention that the title of equipment passed to the customer outside India was incorrect, as equipment remained in the taxpayer's virtual possession until it was installed and an acceptance test carried out. Personnel from various group companies were deputed to India and worked under Nortel India, discharging functions relating to installation activity. Nortel India acted as a service provider to the taxpayer and also a sales outlet by carrying out various post-sale service activities.

With respect to profit attribution, the Tribunal upheld the order of the CIT(A) based on the fact that the taxpayer's PE had performed extensive functions in India and attribution was made taking this into consideration.

Editor's note

This ruling once again underlines the point that substance and facts of each case would determine existence of a PE and attribution of profits to it. Relying on past judicial precedents will not be of help where the factual matrix is different.

Technical and supervisory services do not create a PE in the absence of an independent site operation

GFA Anlagenbau Gmbh *v.* Dy.DIT/ ADIT [TS-383-ITAT-2014(Hyderabad-Tribunal)]

Rendition of supervisory services cannot constitute a PE, if such services are not in connection with building, construction or assembly activities of the taxpayer.

Facts

The taxpayer, a foreign company incorporated in Germany, was engaged in the activities of supervision, construction and commissioning of plant and machinery for steel and allied plants in India. The taxpayer rendered services to multiple clients in India by engaging foreign technicians at the work sites in India. The total stay of technicians on one of the projects exceeded 183 days. The taxpayer categorised the receipts from such activities as FTS under the provisions of section 9(1)(vii) of the Act, read with Article 12 of the India-Germany tax treaty. The taxpayer's technicians stayed in India until the completion of the work, exceeding 183 days, and their income tax returns were also filed in India. Considering this, the TO was of the view that the taxpayer had a PE in India, according to Article 5 of the tax treaty, and concluded that its income was liable to be taxed under the head 'business profits', in accordance with Article 7 of the tax treaty. The TO disallowed all the expenditure and taxed all receipts. On appeal, the DRP did not accept the taxpayer's contentions. Pursuant to the DRP's instructions, the TO allowed a 50% deduction from the gross receipts as an expenditure in connection with the execution of contracts. The TO, applying the provisions of section 44DA of the Act, applied a 40% tax rate (excluding surcharge and cess), treating the income as business profits.

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Held

The Tribunal relied on the decision of the jurisdictional HC in the case of Clouth Gummiwerke Aktiengesellschaft *v.* CIT [1999] 238 ITR 861 (Andhra Pradesh HC), and concluded that the supervisory activities were covered within the ambit of section 9(1)(vii) of the Act as FTS. It was observed that the concept of "fixed place of business" was no different from the general provision of Article 5(1) of Model Conventions and tax treaties. Hence, it was also held that such supervisory activities did not constitute a fixed place of business under section 92F(iiia) of the Act, as the taxpayer rendered its services at the project sites of its clients and did not own or operate such sites independently. It relied on the Delhi Tribunal Special Bench decision in the case of Motorola Inc *v.* DCIT [2005] 95 ITD 269 (Delhi)(SB), where it was held that technicians were not operating from a fixed place in the taxpayer's custody and hence, it could not be said that the taxpayer had a fixed place of business in India for its supervisory activities under Article 5(1) of the tax treaty. The Tribunal also held that supervisory activities by themselves could not constitute a PE under Article 5(2)(i) of the tax treaty, if they were not in connection with the taxpayer's building, construction or assembly activities. In the given case, the taxpayer was only providing supervisory services which were technical in nature, and hence, was taxable as FTS under Article 12 of the tax treaty. While adjudicating on these issues, the Tribunal observed that unless the contracts were otherwise linked with each other, they had to be individually assessed with respect to the duration of stay test.

Editor's note

This ruling once again reiterates the position on PEs, which is in line with international tax commentaries and the OECD Model Convention.

Information on social networking site - LinkedIn, admissible as additional evidence for determination of PE

GE Energy Parts Inc. *v.* ADIT [TS-400-ITAT-2014(Delhi-Tribunal)]

LinkedIn profiles of employees of the GE Group were considered as additional evidence in determining whether the concerned GE Group entities have PEs in India through their offices or Indian affiliate.

Facts

The LO of one of the overseas entities of GE Group was set up in India according to RBI regulations to act as a communication channel between the foreign enterprise and its customers in India. The tax authorities conducted an investigation at the LO premises, and found that the LO was carrying out income-generating activities in India, which were not permissible under RBI regulations. It was also found that various expatriates were acting as business heads for the Indian operations and that certain employees were actively involved in concluding sales for the overseas entities of GE in India. The tax authorities alleged that a PE of the overseas entity may have resulted as a consequence of these activities. The tax authorities sought details of the expatriate employees from the Indian affiliate and did not get an adequate response. In the absence of the necessary information, the tax authorities adduced the details of various expatriate employees that were available on the social networking website LinkedIn as additional evidence in this case. This evidence was not produced before the lower authorities but was presented for the first time during the proceedings before the Tribunal.

Held

The Tribunal admitted the LinkedIn profiles as additional evidence on the basis that they had a considerable bearing on the subject of the appeal. The Tribunal held that the LinkedIn profiles were not in the nature of hearsay because it was the employees themselves who had given all the relevant details, and these details related to them. These details were akin to statements given by a person and no third party was involved in creating them. The taxpayer could not be permitted to first scupper the investigations/ inquiries by not furnishing the necessary information and then claim benefit out of that. It was true that neither party could make out a new case by adducing additional evidence. However, where the additional evidence only supplemented the information on the basis of which a factual finding was to be arrived at, and did not supersede the information, then the Tribunal could, and should, look into those details. Admission of such evidence, though not conclusive, is binding and decisive unless it is successfully withdrawn or proved to be erroneous. Hence, the taxpayer was free to refute the information contained in the profiles by bringing on record contrary facts to dislodge the

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claims made in relation to the LinkedIn profiles. The Tribunal, in its interim order, had admitted the profiles as evidence on which to decide on the existence of a PE, but has not yet concluded on the existence of a PE. The fact of whether a PE exists or not was the subject of an ongoing appeal, which had been fixed for further hearing.

The interim order of the Tribunal has been stayed by the jurisdictional HC, barring the tax authorities from producing or placing reliance on the LinkedIn profiles of past and present GE employees as evidence.

Editor's note

The use of social network platforms, like LinkedIn, by corporate employees has increased in recent times. Employees post content such as the company they currently work for, their past employers, job profiles, job achievements and employment functions. These details are in the public domain and can be accessed by anyone. Such innovative measures demonstrate the tax authorities' additional efforts towards mining for information from open platforms and their probable use in tax assessments and appellate proceedings. Moreover, this case also emphasises the importance of filing all information sought by the tax officer at the first stage of assessment. One of the significant reasons as to why additional evidence was admitted by the Tribunal was that the taxpayer had not filed all the details sought at the assessment stage. As a measure of abundant caution, employers should make sure that employees do not post inaccurate/ misleading facts about their jobs, functions and related facts about the company. Appropriate screening of employees' profiles may be suggested to avoid unintended tax challenges.

Use of hotel rooms for the purpose of business could result in a PE

Renoir Consulting Limited *v.* DyDIT [2014] 64 SOT 28 (Mumbai-Tribunal)

Emergence of a PE for a foreign company by virtue of rendering certain services to its Indian customers has been analysed. The foreign company was held to constitute a PE through the hotel rooms used by its personnel when in India, notwithstanding the fact that the location of the top management is based outside India. On attribution, the Tribunal has principally upheld the allowability of expenditure on the basis that the beneficial provisions of the tax treaty would supersede the provisions of the domestic law.

Facts

The taxpayer was a company registered in Mauritius. It received income from its Indian customer, that is, M/s. Godfrey Philips India Limited (GPI) towards rendering of certain services. The services included the formulation as well as the implementation of the performance index programme (PIP) for improving the management performance quotient of GPI by enhancing operating parameters such as reducing costs, improving work methods and services, providing efficient management control, in respect of the business carried out by GPI. The personnel of the taxpayer were sent to India to carry out the services under the contract with GPI. However, the place of management of the taxpayer was situated in Mauritius. The implementation programme was to be carried over eighty weeks in three phases.

For AY 1997-98

The TO, while passing the assessment order, held that the taxpayer constituted a PE in India, on the basis of the contracts with GPI and accordingly, income from GPI was taxable in India. On appeal by the taxpayer, the Tribunal referred the matter back to the TO along with the ancillary issue of allowance of expenditure. In the set-aside proceedings, both the TO and the CIT(A) were of the view that a PE existed for the taxpayer in India. On the expenditure claimed, the CIT(A) enhanced the disallowance on both direct as well as indirect expenses, based on the documentation provided by the taxpayer and relying upon a comparable case.

For AY 1999-2000

In the assessment order, the TO had disallowed salary expenses under section 40(a)(iii) of the Act and the head office expenses were restricted to 5% as per section 44C of the Act. The CIT(A) held that both sections would not apply to a non-resident who could seek refuge under the beneficial provisions of the India-Mauritius tax treaty. Aggrieved by the CIT(A)'s order, both the taxpayer as well as the Revenue approached the Tribunal on the question of existence of PE and allowability of expenditure respectively.

Appeals in respect of AY 1997-98 and 1999-2000 were taken up together owing to similarity of facts and issues.

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Held

The Tribunal noted that in general, a fixed place PE had the following elements built therein: the *situs* test (there must be a fixed place), *locus* test (located in a certain territorial area), *tempus* test (should last for a certain period of time), *ius* test (certain right to use the fixed place) and business activity test (activities performed must be of a business character). Based on facts, the work being done by the personnel deputed to India and examination of the agreements entered into between the taxpayer and GPI, the Tribunal noted that the taxpayer's claim of the services being preparatory and auxiliary in nature was completely inconsistent with the *modus operandi* followed. The Tribunal also clarified that the fixed place could well constitute a PE despite such user being proscribed from using it for carrying on business. Also, a fixed place PE was not confined to be a place where the top management and key personnel of the taxpayer was located. In the instant case, some place was always at the disposal of the taxpayer or its employees during the entire period of their stay in India, and the personnel could not be working in a vacuum. The Tribunal accordingly held that the hotel where the taxpayer's personnel stayed also served as their work place, since the communications, which formed a major part of their work, as well as the communication facilities, were provided by the hotel itself. Reliance by the taxpayer on the rulings in the case of CIT *v.* Visakhapatnam Port Trust [1983] 144 ITR 146 (Andhra Pradesh HC) and Airlines Rotables Limited *v.* Jt DIT(International Taxation) [2011] 44 SOT 368 (Mumbai-Tribunal) was distinguished on facts and law by the Tribunal. Thus, the Tribunal held that the taxpayer had a fixed place PE in India through the use of hotel room(s) for carrying out business activities.

On attribution, the Tribunal referred to the SC ruling in the case of DIT (International Taxation) *v.* Morgan Stanley & Company [2007] 292 ITR 416 (SC) and held that economic nexus was an important aspect of the principle of attribution of profits, and remanded the matter back to the TO. The Tribunal noted that the claim of the expenditure was restricted since the taxpayer had failed to produce the relevant evidence. The taxpayer's plea that the records being old, could not be traced and furnished, was not accepted by the Tribunal since the taxpayer was in appeal right from the passing of the assessment order in the first instance. With regard to the disallowance of expenditure under section 40(a)(iii) of the Act and restriction of the HO expenditure under section 44C of the Act, the Tribunal noted that the ground was covered in favour of the taxpayer by a co-ordinate bench ruling in the taxpayer's own case, and was also supported by the CBDT Circular No.333 of 1982.

Editor's note

While determination of PE is dependent upon the fact matrix of each case, the legal proposition brought out by this ruling can have wide ramifications for other foreign companies sending their personnel to India. Even in the absence of a service PE clause in the relevant tax treaty, mere presence of such personnel in India can be deemed to constitute a fixed place PE. The clarification provided by the Tribunal on the aspect of what constitutes a "fixed place PE" appears to be in line with the OECD Model Tax Convention. The Tribunal has clarified that any fixed place with a commercial connotation could constitute a fixed place PE. The location of the management is not relevant in this regard.

On attribution, the Tribunal has principally upheld the allowability of expenditure under Article 7 of the India-Mauritius tax treaty; however, the computation thereof would need to be backed up by documentary evidence.

Association of Persons

Delhi HC rules on constitution of an AOP and the taxability of offshore supplies and services in a turnkey contract

Linde AG, Linde Engineering Division *v.* DCIT [TS-226-HC-2014(Delhi)]

A consortium formed by the applicant with another non-resident, for bidding for and execution of a turnkey contract, did not constitute an AOP under the Act. Further, the decision dealt with the following related aspects in a typical consortium arrangement such as – (a) The impact of withdrawal of Instruction No. 1829 issued by the CBDT (dealing with taxation of power projects); (b) Precedential value of AAR rulings; (c) Taxation of AOPs (with non-resident members) under the tax treaty; (d) The application of the 'look at' principle versus the dissecting approach; and (e) Taxability of offshore supply and services (inextricably linked to the supply).

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Facts

ONGC Petro Additions Limited (OPAL) floated a tender notice for carrying out all activities and services required for the design, engineering, procurement, construction, installation, commissioning and handing over of the plant on a lump sum turnkey basis for the Dual Feed Cracker and Associated Units of the Dahej Petrochemical Complex. Linde, along with Samsung Engineering Company Limited (Samsung), through a MoU, decided to bid for this contract and work as a consortium. Subsequent to the MoU, Linde and Samsung entered into an Internal Consortium Agreement (ICA) which specified that the scope of work of Linde and Samsung were separate and independent. The tender submitted by the consortium of Linde and Samsung (the consortium) was accepted and the contract was awarded to it. Pursuant to that, the consortium entered into a formal agreement with OPAL for the aforementioned scope of work. The taxpayer filed an application under section 197 of the Act claiming that no portion of the amount to be paid in respect of the supply of equipment, material and spares and in respect of basic and detailed engineering services was liable to withholding tax in India as the supply and work was carried out offshore and payments were received offshore and hence not subject to tax in India. The TO rejected the application and the taxpayer thereafter filed an application before the AAR. The AAR noted that the contract was awarded by OPAL to the consortium as a whole, as a lump sum, indivisible turnkey contract, and not to independent members of the consortium individually. Furthermore, the liability of the taxpayer and Samsung was joint and several. Thus, it held that the consortium of the taxpayer with Samsung constituted an AOP. The AAR also ruled that as the contract was indivisible and the consortium constituted an AOP, the income received/ receivable by the taxpayer for the offshore supply of equipment, materials and spares and for offshore supply of drawings and designs relating thereto were taxable in India.

Held

Essential features of an AOP

The HC referred to various judicial precedents, to interpret the term AOP, and laid down that the essential features for an association to be considered an AOP, namely, (a) two or more persons must constitute it; (b) constituent members must have come together for a common purpose; (c) association must move by common action and there must be some scheme of common management; and (d) cooperation and association amongst the constituent members must not be perfunctory and/or merely in form. The association amongst members must be real and substantial, which is sufficient to treat the association as a separate homogenous taxable entity.

Consortium of taxpayer and Samsung does not constitute an AOP

The consortium arrangement was for the limited purpose of presenting a common face and complying with the conditions laid down by OPAL, with no intention to form an association. The work to be performed by both members was separate, definite and divisible. None of the members had any role to play with respect to the scope of work allocated to the other member. The payments to be made for separate items of work were specified in the contract and the consideration was to be paid directly to the concerned member in accordance with separate invoices raised by them. Mere joint and several liability towards a third party was not sufficient to constitute an AOP. Under the ICA, each member was responsible for deficiency in its scope of work. Neither party exercised control over the quality of the equipment/ plant supplied by the other, or exercised any control with respect to the quality of the work executed. There was no pooling of resources to form a common management, despite the appointment of project directors for overall co-ordination. Therefore, based on the aforementioned, the HC held that there was insufficient degree of joint action between Linde and Samsung, either in execution or management of the project to constitute an AOP.

On the other related aspects, the HC held that Instruction No. 1829 issued by the CBDT, although withdrawn, did indicate the correct understanding of law in respect of the taxability of an AOP under the Act. However, the applicability of the Instruction needed to be viewed in relation to the relevant AYs during which this was in force. The AAR was bound by "principles of law" as laid down in earlier rulings rendered on similar facts. The taxation of an AOP, being a separate taxable entity, was not prohibited by the provisions of the tax treaty.

Accrual of income in a turnkey contract

The contract was an indivisible one. However, for the purpose of tax, the contract did specify the amounts that were payable with respect to the various activities carried out by the aforesaid parties. Income could accrue or arise at various

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stages and on account of varied activities. The subject matter of taxation was not the contract between the parties, but the income that the taxpayer derived from the contract. Thus, the *situs* of the object of the contract would not be as relevant as determination of the *situs* where the taxpayer's income had accrued or arisen. In cases where a contract entailed only a part of the operations to be carried out in India, the taxpayer would not be liable for that part of the income that arose from operations conducted outside India. In such a case, the income from the venture would have to be appropriately apportioned, as held by the SC in the case of Ishikawajima-Harima Heavy Industries *v.* DIT [2007] 288 ITR 408 (SC). In the present case, there was no controversy which involved lifting of the corporate veil or looking at any scheme to find whether a transaction was a sham or had any substance. The controversy only revolved around the *situs* of the income accruing or arising from the contract, and hence the application by the AAR of the SC decision in the case of Vodafone International Holdings BV *v.* UOI [2012] 6 SCC 613 (SC) was out of context.

Taxability of offshore supplies

The equipment and materials were manufactured and procured outside India, and the title to these was also transferred outside India. Accordingly, the income attributable to the supply thereof could not be brought to tax under the Act, relying on the decision in the case of Ishikawajima-Harima Heavy Industries (*supra*).

Taxability of offshore services

Submissions of the taxpayer with regard to offshore services being inextricably linked with the manufacture and fabrication of the equipment to be supplied overseas had not been evaluated by the AAR. Relying on the AAR ruling in the case of Rotem Company *v.* DIT [2005] 279 ITR 165 (AAR), the HC held that if the services relating to the design and engineering were inextricably linked to, and formed an integral part of, the manufacture and fabrication of the offshore supply, then such services rendered by the taxpayer would not be taxable as FTS under the Act. Otherwise, the income from offshore services would be taxable as FTS under the Act. In the event the offshore services were held to be FTS under the Act, then this would be assessable as FTS under Article 12 of the tax treaty, subject to determination of the PE. In case it was found that the taxpayer had a PE in India at the time the services were rendered, then income attributable to the PE would be taxable as business profits. On the factual aspects related to the above, the HC remanded the matter back to the AAR, to be decided based on the above principles.

Editor's note

This HC decision is a welcome judgement on AOP taxation, and a significant one from an EPC contract perspective. The conclusion reached on constitution of an AOP is a critical one, and reiterates the need for a close re-look at bid documents, consortium agreements and the contract. Furthermore, the re-affirmation of (non use of) the dissecting approach by the HC in the context of taxability of offshore supply and services is relevant for the EPC business.

Royalty

Payment to HO for data processing charges not 'royalty' under the India-Belgium tax treaty; such expense cannot be clubbed under HO expenses under section 44C

ADIT *v.* Antwerp Diamond Bank NV [TS-150-ITAT-2014(Mumbai-Tribunal)]

*Charges paid to the taxpayer (HO) by its Indian branch for data processing work done on software owned by the taxpayer was not 'royalty' under Article 12(3) of the India-Belgium tax treaty. As the payment was not qua **use or for right to use** software exclusively by the Indian branch. The payment was also fully deductible as it fell outside the purview of HO expenses under section 44C of Act as they were directly related to the taxpayer's banking business. It further held that the definition of 'royalty' as amended retrospectively by Explanations 4 and 5 to section 9(1)(vi) of the Act could not be read into, or influence the definition of, Article 12(3) of the tax treaty.*

Facts

The taxpayer, a bank incorporated in Belgium, operated through a branch in India. The taxpayer claimed HO expenses as reimbursements, attributable to its banking business operation in India. The expenses were classified as general administrative expenses and data processing cost. The Indian branch reimbursed the HO data processing charges attributable to the Indian banking business for *pro rata* use of the banking software owned by the HO, under an agreement that gave it a license for royalty-free, non-transferable right to use software purchased by the HO. The TO disallowed the entire HO expenses under section 40(a)(i) of the Act

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relying upon various decisions. According to the TO, the payment made by the taxpayer was towards reimbursement of cost to HO and was in the nature of '*royalty*'. Hence, the taxpayer was required to withhold tax under section 195 of the Act. On appeal, the CIT(A) directed the TO to modify the assessment and delete the double disallowance. The general administrative expenses were to be allowed under section 44C of the Act dealing with HO expenses deductibility. Further, the data processing cost relating directly to banking business was not covered within the ambit of general administrative expenses and hence, had to be treated as business expenses.

Held

Definition of '*royalty*' as per Article 12(3)(a) of the tax treaty provided that only when the payment of any kind was received as consideration for 'use' of or 'the right to use' any copyright of any item or for various terms used in the said Article, could it be held to be '*royalty*'. The aforementioned definition of '*royalty*' was exhaustive and not inclusive, and hence, it had to be given the meaning as contained in the Article itself. If the taxpayer claimed the application of the tax treaty, then the definition and scope of 'royalty' given in the domestic law would not apply. Once taxpayer opted for the benefit of the tax treaty, there was no requirement to resort to the definition and scope of 'royalty' as provided in section 9(1)(vi) of the Act. This proposition (that section 9(1)(vi) of the Act, should not be looked into.) had been squarely covered in the decisions, DIT *v.* Nokia Networks AY [2012] 253 CTR 417 (Delhi HC) and DIT *v.* Ericsson AB [2012] 343 ITR 470 (Delhi HC). The character of payment towards '*royalty*' depended upon the independent 'use' or the 'right to use' of the computer software, which was a kind of copyright. In the present case, the payment made by the branch was not for 'use' or 'right to use' software, which was being exclusively done by the HO, installed in Belgium. The branch did not have any independent right to use, or control over, the computer software, but it simply sent the data to the HO for getting it processed. The branch was only reimbursing the cost of processing of such data to the HO, which had been allocated on *pro rata* basis. Such reimbursement of payment was not covered within the ambit of definition of 'royalty' within Article 12(3)(a) of the tax treaty. To be covered within its ambit, the branch should have had exclusive and independent **use or right to use** the software, and payment had to be made as consideration for such usage. There was no such **right** that had been acquired by the branch in relation to the usage of software, because the HO alone had the exclusive right of the license to use the software. Thus, the reimbursement of data processing cost to the HO was not covered within the ambit of the definition of '*royalty*' under Article 12(3)(a) of the tax treaty. Therefore, the Tribunal held that the payments made by the branch to the HO towards reimbursement of cost of data processing could not be held to be covered within the scope of the expression, '*royalty*' under Article 12(3)(a) of the tax treaty. As the data processing cost paid by the taxpayer was not royalty, there was no requirement for withholding tax on such payment. Therefore, section 40(a)(i) of the Act would not apply. Furthermore, the data processing cost pertained to allocation of expenses incurred by the HO on *pro rata* basis for the banking application software acquired by the HO. Such expenditure was not covered within the meaning of 'HO expenses' as provided in section 44C of the Act. The nature of expenses as given in section 44C of the Act had to be necessarily in the nature of executive and general administrative expenses only.

Editor's note

The decision clarifies the tests to be applied for characterisation of data processing as 'royalty' or otherwise in the context of tax treaties. The Tribunal has, in this context, brought back the focus of the tests as to whether or not payment made is for "use" of or "right to use" of software. The decision has also reaffirmed the rule that the domestic law cannot be applied where the taxpayer has relied on the tax treaty.

Prosecution proceedings

Initiation of prosecution proceedings under section 276CC of the Act for failure to file a return of income upheld by the SC

Sasi Enterprises *v.* ACIT [TS-43-SC-2014(SC)]

Prosecution proceedings under section 276CC of the Act for failure to file a RoI could be initiated even while appellate proceedings were pending.

Facts

The taxpayer, a registered partnership firm, did not file its RoI for AY 1991-92 and 1992-93 by the relevant due dates under section 139(1) of the Act, nor did it file a belated RoI under section 139(4) of the Act within the prescribed time limit. A survey was conducted on the taxpayer, and consequently a

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notice under section 148 of the Act was served on the taxpayer directing it to file its RoI. The taxpayer did not file its RoI in response to this notice either. Therefore, the TO concluded a best judgement assessment under section 144 of the Act, and determined the tax demand for both the above AYs. The partners, in their individual RoIs for AYs 1991-92 and 1992-93, had disclosed the fact that the accounts of the taxpayer were not finalised and its ROIs not filed. Similarly, the two partners of the taxpayer-firm did not file their individual RoIs for AY 1993-94 under sections 139(1) and (4) of the Act or even in response to a notice under section 142(1)(i) of the Act, and, accordingly, the TO concluded a best judgement assessment under section 144 of the Act, and determined the tax demand for the aforementioned AY. The taxpayer and its partners litigated the best judgement assessments and the matters were finally settled at the Tribunal in the years 2004 to 2008. In the meantime, prosecution proceedings under section 276CC of the Act were initiated against the taxpayer and its partners in the year 1997, the continuance of which was upheld by the HC.

Held

On the taxpayer's primary contention that initiation of prosecution proceedings under section 276CC of the Act were *ex facie* without jurisdiction, the SC held that prosecution proceedings under section 276CC of Act may be initiated where a taxpayer had failed to file an RoI within the due date as required under sections 139(1), 142(1)(i) or 148 of the Act. The language of section 276CC of the Act was clear, that once a taxpayer has committed a default in filing an RoI within the due date, prosecution proceedings under section 276CC of the Act could be initiated, and pendency of appellate proceedings was no bar for initiation of the prosecution proceedings. Further, disclosure by the partners in their individual RoIs of the fact that the taxpayer was carrying on business and had income but had not filed its RoI pending finalisation of accounts did not obliterate the default in filing RoI so as to create a bar for initiation of prosecution proceedings under section 276CC of the Act.

Editor's note

This recent SC ruling reiterates the law of the land on initiation of prosecution proceedings under section 276CC of the Act. With the Revenue tightening its procedures to identify non-filers of RoIs the risk of the Revenue initiating prosecution proceedings will need to be borne in mind in respect of past defaults. Going forward, taxpayers may be able to mitigate the risk by filing a RoI within its due date, or at least within the same AY, which gives statutory protection from initiation of prosecution proceedings.

Grant of stay

Tribunal has no power to grant stay beyond 365 days; no prohibition on High Courts (in a writ jurisdiction) to issue directions and grant interim stay even beyond 365 days

CIT *v.* Maruti Suzuki (India) Limited [TS-103-HC-2014(Delhi)]

The Tribunal has no power to grant stay beyond a period of 365 days even where the delay in disposing the appeal is not attributable to the taxpayer. In such cases, the taxpayer can approach HC through the writ jurisdiction and thereby seek interim stay, as the HC has inherent powers to issue necessary directions and grant stay for a period beyond 365 days.

Facts

The tax department filed a writ petition before the Delhi HC against the orders passed by the Tribunal extending stay on recovery of demand beyond 365 days.

Held

The HC noted that the ratio laid down by the Bombay HC [Narang Overseas Private Limited *v.* ITAT and others [2007] 295 ITR 22 (Bombay HC)] was similar to the ratio laid down by the SC in the case of Commissioner of Customs and Central Excise, Ahmedabad *v.* Kumar Cotton Mills Private Limited [2005] 180 E.L.T 434 (SC) on similar provisions of the Central Excise Act, 1944. In that case, the issue was examined and the SC held that the amendment could not be construed as punishing the taxpayer for acts beyond their control. The HC took note of the decision of the Karnataka HC in the case of CIT *v.* Ecom Gill Coffee Trading Private Limited [2012] 252 CTR 281 (Karnataka HC), which dealt with the interpretation of provisos to section 254(2A) of the Act after the amendment *vide* Finance Act, 2008. The said amendment had made a substantial difference and had to be duly noted as reflecting a different legislative intent consequent to the amendment. Accordingly, the Karnataka HC dissented from the decision of the Bombay HC [Narang Overseas (*supra*)]. The HC observed that the SC (in Kumar Cotton Mills Private Limited

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(*supra*)) had drawn a distinction and held that the proviso did not prohibit the Tribunal from extending the interim order beyond 365/ 180 days if the taxpayer was not at fault. However, the Legislature, in view of the said judgement, has specifically introduced and added the words, "not attributable to the taxpayer". This amendment/ substitution made in the third proviso are significant. These words are not redundant or inconsequential, and in fact have been added in view of the ratio and the reasoning given in the aforesaid SC and HC decisions. The provision will ensure that the Tribunal would try and dispose off and decide appeals within 365 days of the grant of the stay order. Having said the above, the HC held that it had the power to grant and extend stay beyond the period of 365 days where the appeal was pending before the Tribunal. The constitutional power and right was available and had not, and cannot, be curtailed. The powers of the HC under Article 226 and 227 formed a part and parcel of the basic structure of the Constitution of India, and it could not be overwritten and nullified, as held by the SC in L. Chandra Kumar *v.* Union of India [1997] 3 SCC 261 (SC). The HC also held that, in cases where the stay period of 365 days was expiring, taxpayers could exercise writ jurisdiction and file stay extension/ application, and the tax department should examine, and in appropriate cases, make a statement before the Tribunal that no coercive steps would be taken to recover the demand as the delay was occasioned and attributable to their fault and lapse. In view of the aforementioned, the HC summarised as under:

- With effect from 1 October 2008, the Tribunal could not extend stay beyond 365 days from the date of first order of stay.
- In case the default and delay was due to lapse on the part of the tax department, the Tribunal was at liberty to conclude the hearing and decide the appeal, if there was a likelihood that the duration of stay would extend beyond 365 days.
- Third proviso to section 254(2A) of the Act did not bar the tax department from making a statement that they would not take coercive steps to recover the impugned demand, and on such statement, it would be open to the Tribunal to adjourn the matter at the request of the tax department.

Editor's note

It may be noted that there are now two adverse HC rulings, being the Karnataka HC decision in the case of Ecom Gill (supra) and this case decided by the Delhi HC. Both have examined the provisions existing as on date. Bombay HC (CIT v. Ronuk Industries Limited [2011] 333 ITR 99 (Bombay)), however, has taken a contrary view in the matter in favour of the taxpayer. There will be an increase in the number of writ petition filings before the HC pleading for extension of stay on recovery of demand. Further, it will also have a cascading effect and the Tribunal will be required to expedite the matters promptly.

In our experience, it is observed that there are matters which are stayed by the Tribunal as an identical issue is pending before a SB of the Tribunal or a larger Bench of the HC. This decision will impact such cases as well, where again the delay in disposing the appeal in such cases is not attributable to the taxpayer. It may be worth mentioning, though, that the Bombay HC (Jethamal Faujimal Soni v. ITAT [2011] 333 ITR 96 (Bombay)) has held that the Division Bench of the Tribunal should not wait for the decision of the Special Bench and should decide the matter on merits. The HC has not examined the constitutional validity of the provisos to section 254(2A) of the Act and the issue is left open.

Prospective *v.* retrospective

SC provides clarity on prospective versus retrospective operation of tax amendments

CIT *v.* Vatika Township Private Limited [TS-573-SC-2014(SC)]

The proviso to section 113 of the Act levying a surcharge on undisclosed income had a prospective effect as Parliament specifically chose to make the proviso effective from 1 June 2002. Imposing a retrospective levy on the taxpayer would have caused undue hardship. The SC elaborated general principles concerning interpretation of amendments with retrospective effect, relying on a host of Indian and foreign judgements.

Facts

Search and seizure operations were carried out on the taxpayer under section 132 of the Act, and accordingly, a notice under section 158BC of the Act was issued, requiring the taxpayer to furnish its return of income for the block period 1 April 1989 to 10 February 2000. The block

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assessment was completed by the TO at a total undisclosed income of INR 8,518,819 with a levy of tax thereon, but no surcharge. Based on the insertion of section 113 of the Act by the Finance Act, 1995 and the Circular No. 717 dated 14 August 1995 of the CBDT, the CIT was of the opinion that a surcharge should have been levied under section 113 of the Act. Therefore, a notice under section 263 of the Act was issued to the taxpayer and, in consequence, the TO was directed to levy surcharge at 10%. On appeal by the taxpayer, the Tribunal allowed the appeal, stating that the proviso to section 113 of the Act was not declaratory or clarificatory, and therefore was prospective in nature. The HC dismissed the Revenue's appeal and held that the proviso to section 113 of the Act, inserted by the Finance Act, 2002, was prospective in nature and therefore, could not be made applicable in the instant case of block assessment from 1 April 1989 to 10 February 2000.

Held

On whether the scheme of Chapter XIV-B of the Act is a complete machinery in itself (Para 27):

Section 4 of the Act was a charging section made applicable to the '*total income of the previous year*'. As per section 5 read with section 2(45) of the Act, total income included all income received, or deemed to be received, in any '*previous year*'. Furthermore, as per section 3 read with section 2(34) of the Act, '*previous year means the financial year immediately preceding the AY*'. Chapter XIV-B of the Act was not relatable to any previous year, but was for a block period of 6 years or 10 years, as the case may be. Chapter XIV-B of the Act stipulated all aspects of a block assessment, beginning from the charging section to the completion of the assessment. Even the rate of tax was prescribed under section 113 of the Act. Therefore, Chapter XIV-B of the Act was a complete machinery in itself. Notwithstanding the provisions of section 4 of the Act, the legislature had introduced a separate charging section, section 158BA(2) of the Act, *vide* the Finance Act, 1995 to assess the undisclosed income. This move of the legislature had to be assigned some value; otherwise, there was no necessity to make a separate provision in the form of section 158BA(2) of the Act.

On general principles of retrospectivity (Para 30):

Legislation differed as to its meaning and implications according to the intent of the lawmaker. Legislation may physically consist of words printed on paper. However, it was conceptually more than an ordinary text. It was not like a series of statements found in a work of fiction/ non-fiction, or in any court judgement. A technique was required to draft a piece of legislation and to interpret it. One of the established rules of interpretation was that unless explicitly stated, a piece of legislation is presumed not to be intended to have a retrospective operation. The idea behind such a rule was that a current law should govern current activities. The principle of *lex prospicit non respicit*, which means that 'The Law looks forward and not backward', was upheld. Retrospective legislation was contrary to the general principle that 'legislation introduced for the first time need not change the character of past transactions carried out upon the faith of the then existing law. The obvious basis of the principle against retrospectivity was the principle of 'fairness', which must be the basis of every legal rule. Legislations which modified accrued rights or imposed disabilities were to be treated as prospective in nature unless they were accounting for an obvious omission, or explaining a former legislation. The doctrine of fairness was a relevant factor when construing a statute that conferred a benefit without inflicting a corresponding detriment. Accordingly, it had to be given a retrospective operation. In the instant case, the proviso added to section 113 of the Act was not beneficial to the taxpayer. On the contrary, the provision was onerous to the taxpayer. Therefore, under the normal rule of presumption, the proviso did not have a retrospective effect.

On whether the proviso to section 113 of the Act could be treated as declaratory/ statutory/ curative in nature having a retrospective effect (Para 38):

A declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts were generally held to be retrospective. In the absence of clear words indicating that the amending Act was declaratory, retrospective effect could not be resorted to, particularly when the pre-amended provisions were clear and unambiguous. The TOs were indeterminate about the date of the levy of surcharge, considering the varying rates of surcharge from Finance Act 1995 to Finance Act 2003 with reference to the – (a) rates provided in the Finance Act of the year in which the search was initiated, or (b) year in which the search was concluded, or (c) year in which block assessment procedures were initiated, or (d) year in which

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the block assessment order was passed. The court re-phrased the conceptualisation of tax so as to include a computation provision to attract the charging section. Applying this analogy, the Court held that in the absence of a particular date to levy the surcharge *vis-a-vis* the varying rates to be applied, the proviso to section 113 of the Act was not clarificatory. Any ambiguity in the tax laws must be resolved against the imposition of tax and in the favour of the taxpayer. Accordingly, lack of clarity regarding the rate of surcharge and the date of levy would not automatically lead to levy of surcharge on the undisclosed income under the existing provisions of the Act, thereby making the insertion of the proviso to section 113 of the Act retrospective. The 'Notes on Clauses' appended to the Finance Bill, 2002 clearly stated that the amendment would take effect from 1 June 2002 and could only be meant to have prospective effect. Furthermore, the SC also held that there were certain other amendments in the Finance Bill 2002 specifically making them applicable retrospectively, e.g., section 92F of the Act (as the amendment was clarificatory). Thus, the decision taken by the legislature to insert the proviso from 1 June 2002 was a conscious one. This was further reinforced by the Circular no. 8 of 2002 dated 27 August 2002 of the CBDT and the proviso to section 2(3) of the Finance Act, 2003, which specified that the provisions of section 113 of the Act shall be increased by a surcharge in the case of block assessment, and would be prospective in nature, i.e., w.e.f. 1 June 2002. The charge in respect of the surcharge that was created by the Finance Act 2003 for the first time was clearly a substantive provision, and hence had been construed as having prospective effect. There was no intent of the Parliament to suggest otherwise, nor any material which purported it to be clarificatory. Any amendment to a taxing statute was intended to remove any hardship caused to taxpayers, and not to the tax department. Based on the above, the conclusion of the Division Bench in CIT *v.* Suresh N Gupta [2008] 4 SCC 362 (SC), treating the proviso as clarificatory and giving it retrospective effect, was held to be incorrect and was overruled.

Editor's note

In determining whether a provision is applicable prospectively or retrospectively, attention would be required to be paid to the language of the amending statute, the legislature's intent, the memorandum to the relevant Finance Act, and the hardship the amendment would cause to the taxpayer.

Place of effective management

Benefit of Article 8 is available under the India-Cyprus tax treaty as long as the enterprise is registered and has headquarters in Cyprus

Shaan Marine Services Private Limited *v.* DDIT [TS-327-ITAT-2014(Pune-Tribunal)]

'Effective management' has been clearly defined in Article 8 of the India-Cyprus tax treaty to mean that if the enterprise was registered and had headquarters in a certain country, the effective management would be situated in that country.

Facts

The taxpayer was an agent of Glendive Enterprises Limited (Glendive), a company registered in Cyprus. Glendive was a tax resident of Cyprus and had obtained a TRC from the Cyprus tax authorities to this effect. Glendive had entered into an agreement with Arabian Resources FZC, Sharjah UAE (Arabian) for making available a ship for transport of Bauxite ore from India to Sharjah. For this purpose, Glendive entered into an agreement with Aquavita for chartering a ship. Furthermore, Glendive appointed the taxpayer as its agent for handling the loading at the Indian port and obtaining clearances from various departments like customs, income-tax and immigration. The taxpayer filed a return of income in India under section 172 of the Act as an agent of Glendive. In the return, the taxpayer declared *nil* income by virtue of Article 8 of the India-Cyprus tax treaty. The TO observed that (a) Glendive had paid the amount payable to Aquavita on the same day on which it received the amount from Arabian; (b) the TRC alone would not be sufficient to conclude that Glendive's place of effective management was in Cyprus; (c) Glendive had only one shareholder; and (d) only one person had signed as the chairman and secretary on the minutes. The TO held that Glendive was a one-person company with no office and no staff, and that it was interposed as a charterer to take advantage of the India-Cyprus tax treaty. The TO further held that the effective management of Glendive was not in Cyprus and that the benefit of Article 8 of the India-Cyprus tax treaty could not be given in this case. Thus, the TO held that Glendive was taxable in India under section 172(4) of the Act and he taxed the taxpayer as an agent of Glendive. The CIT(A) confirmed the TO's order. He relied on paragraph 24 of the OECD commentary on Article 4 of the OECD Model

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Convention to determine the place of effective management (the place from where the actual services rendered by the company had to be seen). Accordingly, the CIT(A) held that the effective management of Glendive was not in Cyprus, and hence Article 8 of the India-Cyprus tax treaty did not apply in this case.

Held

The Tribunal observed that Glendive was a one-person company with no branches anywhere, with only an office establishment in Cyprus. The Tribunal observed that Glendive had played a definite role in transporting the ore by ship from India to Sharjah, which was evident from the fact that all contracts and the bill of lading were in Glendive's name. The Tribunal held that the authorities had tried to re-write these contracts, which was not permissible. The Tribunal further held that if the authorities were of the opinion that it was the income of Glendive, then it had to be noted that Glendive did not have any establishment outside Cyprus. Accordingly, such income arose to Glendive in Cyprus only. If the authorities were of the view that Glendive was only a paper company and was interposed only to claim India-Cyprus tax treaty benefit, then the income should accrue to Aquavita. With regard to the place of effective management, the Tribunal held that 'effective management' was clearly defined in Article 8 of the India-Cyprus tax treaty to mean that if the enterprise was registered and had headquarters in a certain country, the effective management would be situated in that country. Reliance on the OECD commentary could be placed to interpret tax treaties where 'effective management' was not defined. In view of the above, the Tribunal concluded that the CIT(A) erred in holding that Glendive's income was taxable under section 172(4) of the Act in the taxpayer's hands and the India-Cyprus tax treaty benefits were not available to Glendive.

Editor's note

This decision reaffirms the settled principle that legally binding agreements between unrelated parties cannot be disregarded.

Treaty override

Karnataka HC's passing remark on treaty override by domestic law

Vodafone South Limited *v.* DDIT [TS-173-HC-2014(Karnataka)]

It was observed that the sovereign power of Parliament extended not only to making, but also to 'breaking' a tax treaty, and that 'unilateral cancellation' of tax treaty through an amendment to domestic law, subsequent to conclusion of a tax treaty, was a recognised sovereign power. The HC commented that if, after the tax treaty came into force, an Act of Parliament was passed which contained a provision contrary to the tax treaty, the scope and effect of the legislation could not be curtailed by the tax treaty.

Facts

The taxpayer, a telecom operator in South India, entered into agreements with various non-resident telecom operators (NTOs) for providing bandwidth and interconnect capacity outside India. These agreements were covered under tax treaties signed by India with different countries. The taxpayer had also paid a sum to one NTO for transfer of a portion of bandwidth capacity on an optical fibre line which the NTO had rights to, on a long-term basis, for which a sum was paid to the NTO company. The taxpayer contended that sums paid to the NTO were not taxable in its hands, and hence there was no requirement to withhold tax. Particularly, the taxpayer argued that since the taxpayer claimed the benefit of the tax treaty, a subsequent retrospective amendment of section 9(1)(vi) of the Act to make the sums paid taxable could not affect the taxpayer's prior claim under the tax treaty. The payments made under these agreements were claimed by the TO to be covered by the retrospectively amended section 9(1)(vi) and section 9(1)(vii) of the Act, and therefore had to be treated as 'royalty' or FTS, subject to withholding tax under section 195 of the Act. As no tax had been deducted, the taxpayer was treated as being in default and a demand notice and an order levying penalty under section 201(1) and interest under section 201(1A) of the Act read with section 195 of the Act were issued, requiring the taxpayer to pay the sum demanded. The taxpayer filed two appeals against the orders before the Tribunal, which held that the taxpayer was not entitled to stay of collection.

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Held

The HC agreed that under section 90(2) of the Act, the tax treaty provisions will override the provisions of the Act if they were more beneficial. In the context of the claim of the taxpayer under the tax treaty, the HC noted in paragraphs 45 and 46 of its order that the sovereign power of Parliament extended not only to making but also to 'breaking' a tax treaty, and that 'breaking' of tax treaty through an amendment to domestic law, subsequent to conclusion of a tax treaty, was a recognised sovereign power. The HC also commented that if, after the tax treaty came into force, an Act of Parliament was passed which contained a provision contrary to the tax treaty, the scope and effect of the legislation could not be curtailed by the tax treaty. The HC held that a detailed discussion was required as to whether section 90(2) of the Act was of such nature as to nullify all Acts of Parliament which create tax liability under the Act.

Editor's note

The above comments of the HC on tax treaty override were clearly not germane to the questions before the HC, and can at best be considered as obiter dicta and not as ratio decidendi. Nevertheless, these comments have brought sharply into focus the issue of whether a domestic law amendment can override beneficial provisions of a tax treaty. Indeed, there is a good case to say that the HC's casual observations on treaty override do not even qualify as obiter dicta as it is not even an observation that leads to, or is germane to, the case in hand, because the Court itself has said in para 47 that "any observation made on the above issues shall … not be construed as an expression on merit of those contentions…". Incidentally, on the merits of the issue, the Madras HC, in the case of Verizon Communications Singapore Pte. Limited v. ITO [TS-577-HC-2013(Madras)], and the Mumbai Tribunal in the case of Viacom 18 Media Private Limited v. ADIT [TS-179-ITAT-2014(Mumbai-Tribunal)], have concluded that the tax treaty definition of the term, 'royalty' within the tax treaties were more or less identical with the amended domestic law definition thereof. This issue is still under litigation, and is not yet settled. There is a lot of litigation currently riding on whether retrospective amendments like the ones made by Finance Act, 2012, to the domestic law can override tax treaty benefits. This proposition is almost certain to come up again in many more cases. There are several cogent arguments, listed below, against the proposition that domestic law passed after a tax treaty has been signed cannot affect benefits available under the tax treaty.

Section 90(1) of the Act effectively make the tax treaties a part of the domestic law, that will override other provisions of domestic law to the extent they are beneficial to the taxpayer (see also section 90(2) of the Act). India's domestic tax laws do not currently contain any provision to the effect that a later amendment will override treaty provisions. A tax treaty is a bilateral commitment and any change therein should be carried out with proper notice to the partner country, and not unilaterally by amending, or introducing a new provision in, the domestic law. This is in line with the Vienna Convention. Though India is not a signatory to the Vienna Convention, several Indian Courts have followed the principles enshrined therein as these principles have long been accepted as a source of customary international law, and therefore are useful to rely on whenever a matter of cross-border tax is considered. Article 26 of the Vienna Convention lays down the principle of pacta sunt servanda – every tax treaty in force is binding upon the parties to it and must be performed by them in good faith. Article 27 of the Vienna Convention provides that a signatory to a tax treaty may not invoke the provisions of its internal law as justification for its failure to perform a tax treaty. Both these Articles frown on the concept of a subsequent amendment to the domestic tax law overriding provisions of a tax treaty.

Tax treaty override is possible only in exceptional cases of abuse covered within the General Anti Avoidance Rules provisions. This proposition (that tax treaty benefits are not affected by later amendments) has been accepted by the Andhra Pradesh HC in the Sanofi Pasteur Holding SA v. The Department of Revenue [TS-57-HC-2013(Andhra Pradesh)]. The SC is expected to hear the appeal in this case soon. If it is considered that the tax treaty provisions are overridden by later amendments to the domestic law, then such an interpretation would render section 90(2) of the Act, and indeed, the tax treaty itself, otiose and redundant.

Capital gains

Gains on sales of equity shares and compulsorily convertible debentures characterised as capital gains and not as interest income

Zaheer Mauritius *v.* DIT [TS-464-HC-2014(Delhi)]

Gains arising on sales of equity shares and CCDs should be characterised as capital gains.

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Facts

Zaheer Mauritius was a company incorporated in Mauritius and was a tax resident of Mauritius. It was engaged in investing in Indian companies undertaking construction and development activities in India. SH Tech Park Developers Private Limited (the JV company), an Indian company, was incorporated as a wholly owned subsidiary of Vatika Limited (Vatika). Zaheer Mauritius entered into a Securities Subscription Agreement and a SHA with Vatika and the JV company to invest in the JV company by subscribing to equity shares and CCDs. The SHA recorded the terms of the relationship between Zaheer Mauritius, Vatika and the JV company and their *inter se* rights and obligations, including matters relating to transfer of equity shares and the management and operation of the JV company. The SHA also ascribed a call option to Vatika to buy the securities from Zaheer Mauritius and a put option to Zaheer Mauritius to sell the securities to Vatika. Vatika exercised the call option, and purchased all the CCDs and some of the equity shares from Zaheer Mauritius. Zaheer Mauritius filed an application under section 197 of the Act before the TO, requesting a *nil* withholding tax certificate in relation to the transfer of CCDs and shares. However, the TO held that the gains on the transfer of equity shares and CCDs would be treated as interest, and that tax at 20% (*plus* applicable surcharge and education cess) should be withheld. Zaheer Mauritius filed an application before the AAR to obtain a ruling on whether the gains arising on the sale of equity shares and CCDs were exempt from capital gains tax in India under Article 13(4) of the India-Mauritius tax treaty. The AAR ruled that the gains were taxable as interest within the meaning of section 2(28A) of the Act and Article 11 of the tax treaty.

Held

The HC stated that under normal circumstances, gains arising on the transfer of a debenture held as a capital asset by the transferor would be taxable as capital gains, and not interest. The HC found that the AAR's conclusion (that returns on the investment should be taxed as interest income) had been based on the facts that – (a) there was a fixed rate of return on the investment; (b) the JV company's affairs were controlled by Vatika/ its shareholders; and (c) the transaction was structured as an investment in equity shares and CCDs to avoid tax. The HC observed that the clauses in the SHA relating to the call/ put options could not be read to mean that Zaheer Mauritius was entitled to a fixed return on its investments. Merely because an investment agreement provided an exit option to the investor, this would not change the nature of the investment made. The HC held that it was common in any joint venture agreement for the co-venturers to include covenants for buying each other's stakes. Although the SHA enabled Zaheer Mauritius to exit the investment by receiving a reasonable return on it, this could not be read to mean that the CCDs were fixed-return instruments. Zaheer Mauritius also had the option to continue with its investment as an equity shareholder in the JV company (following the conversion of the CCDs into equity shares). Based on the reading of the corporate governance and other related clauses in the SHA, the HC observed that the affairs of the JV company were managed separately and distinctly from those of Vatika. The HC acknowledged that in accordance with the foreign direct investment guidelines, CCDs were the most appropriate way of routing investments in the JV company. In such circumstances, it ought not to be readily inferred that the entire structure of the transaction was designed solely for the purposes of avoiding tax. The HC considered that if the gains were considered as interest paid by Vatika, they would also qualify as deductible expenditure in the hands of Vatika. In view of this, it would be an error to conclude that the transaction had been structured to avoid tax. The HC, relying on the principles laid down by the SC in the case of Vodafone International Holdings BV *v.* Union of India and Anr [2012] 341 ITR 1 (SC), held that there was no reason to ignore the legal nature of the CCDs or to lift the corporate veil to treat the JV company and Vatika as a single entity.

Editor's note

This HC ruling reinforces the position that gains arising on the transfer of CCDs should be taxed as capital gains. By adopting a holistic view of the transaction, the HC has emphasised the importance of the "look at test" to ascertain the true nature of transactions. If there are sufficient commercial reasons for structuring a transaction in a particular way, the form of the transaction should be respected, and the legal nature of the transaction should not be ignored.

Corporate tax

Insurance premium

Insurance premium paid under a Keyman insurance policy which is not a pure life insurance policy not a deductible expense

F.C. Sondhi & Company (India) Private Limited *v.* DCIT [TS-243-ITAT-2014(Amritsar-Tribunal)]

Insurance premium paid under a Keyman insurance policy, which was not a pure life insurance policy, was not a deductible expense.

Facts

The taxpayer had taken three policies on the life of its key persons. Out of the three policies, two were ULIP and one was a policy with guaranteed additions for five years and with profits thereafter. The premium paid under these policies was treated as an expense under the head, Keyman insurance policy, in the Profit and Loss Account. The taxpayer claimed the premium paid as a deductible expense while offering its income to tax. In the assessment, the aforesaid claim was disallowed.

Held

In the appeal, the Amritsar bench of the Tribunal decided the issue against the taxpayer. The subject policies were in the nature of investment plans, and not pure life insurance policies being taken on the life of another person. Therefore, these policies were not covered within the ambit of the definition of the term 'Keyman Insurance Policy' provided in Explanation to clause (c) of section 10(10D) of the Act. Both, the TO and the CIT(A), were correct in their findings that the circulars dated 27 April 2005 and 30 January 2006 issued by the IRDA required insurance companies to issue only term insurance policies as 'Keyman Insurance Cover'. These circulars were clarificatory in nature and therefore, the contention of the taxpayer that the circulars did not apply to its case as the policies in its case were issued prior to the date of circulars, could not be accepted. Out of the total premium paid, only a fraction of the premium was meant for risk cover and the balance was used for investment in units and therefore, the premium paid could not be claimed as business expenditure.

Editor's note

While the higher appellate authorities may not approve this view, the tax authorities may rely on this ruling to treat the amount received under the investment type of products as not entitled to exemption under section 10(10D) of the Act, and to limit the deduction under section 80C of the Act to the portion of premium relating only to risk cover.

Notification/ Circulars

Non-adversarial tax regime

CBDT has issued instructions to Income-tax Officers - an attempt towards a non-adversarial tax regime

Press Release No. F. No. 279/Misc./52/2014-(ITJ)

In the endeavour to achieve a non-adversarial tax regime the CBDT has issued a consolidated instruction to its officers on 7 November 2014. The CBDT has directed its officers of the Income-tax Department to adhere to the following guidelines-

- Emphasis has been laid on cleanliness in office, punctuality, timeliness in appointments and avoiding unnecessary adjournments.
- Although less than 1% of the tax returns submitted are selected for scrutiny, this area of work has often drawn adverse comments. Supervisory officers have been directed to be more pro-active in monitoring and guiding assessments to ensure that high-pitched assessments without proper basis are not made, and lengthy questionnaires or summons are not issued without application of mind. Further, they have been directed to inspect and review the work of officers in charge of such assessments with the objective of capacity building and improving quality of work.
- Scrutiny cases selected on the basis of Annual Information Report/ CIB (Forms requiring submission of information to tax authorities about transactions like large payments against credit cards, purchase of immovable property, high value share transactions, high value bank deposits, etc.) / Form 26AS would ordinarily be restricted to such information. Wider scrutiny should be only after sanction from Principal Commissioner of Income-tax/ Commissioner of Income-tax in specified cases.

Corporate tax

- Refunds should be granted in accordance with Instruction No. 5 of 2013 already issued that provide for grant of credit of tax withheld on the basis of evidence submitted by the taxpayer.
- Instructions with regard to recovery/ stay of demand and grant of instalments have been reiterated to ensure that no coercive action is undertaken without disposal of applications for stay.
- In remand cases, the CIT(A) must specify the aspect needing verification. The practice of forwarding entire documents/ taxpayer submissions for the TO's comments should cease. TO will be required to submit remand report only when the remand is on a specific matter.
- Senior officers have been directed to ensure that even when the tax effect exceeds limits laid down, appeals filed are based only on merit and not merely on the tax effect.
- Decision to file reference before HC will be taken by two CCsIT including the CCIT in jurisdiction the matter lies, to minimise references where substantial question of law does not exist, or the question of law was not correctly drafted. If the two CCsIT disagree, the Principal CCIT/ CCIT (CCA) will decide, except where the matter lies in his jurisdiction, in which case the CCIT-II shall decide.
- Supervisory authorities have been directed to ensure an effective grievance redressal system and that grievances are disposed off within specified time limit.
- Supervisory authorities have been entrusted with the task of ensuring that summons are issued only in deserving cases, with appropriate clarity to whom it's addressed.

Editor's note

This is a welcome beginning by the tax authorities towards achieving a non-adversarial tax regime.

REIT and InvIT

REIT and InvIT Regulations - A Synopsis

Notification Nos. LAD-NRO/GN/2014-15/11/1576 and LAD-NRO/GN/2014-15/10/1577

Background

The SEBI has released the much awaited REIT and InvIT regulations. This could provide a positive push to the Indian Capital Markets and Real Estate & Infrastructure sectors. It could also create liquidity to some extent for Real Estate and Infrastructure players. Further, it would provide investors an opportunity to invest in Indian stabilised assets through an Indian listed platform. The key features of the final REIT and InvIT regulations are summarised below:

REITs

- REITs can invest in SPVs which are set up as limited liability partnerships.
- Definition of real estate now does not specifically exclude transferable development rights.
- Developer sponsors to demonstrate a track record of completion of two projects.
- Concept of multiple sponsors (maximum 3) introduced.
- Net worth requirements for sponsors enhanced [(a) collectively INR 1 billion; (b) each sponsor INR 200 million].
- Mandatory transfer of entire holding in SPV to REIT by the sponsor (subject to any legal and regulatory restrictions).
- 25% lock-in to be computed on post-issue basis.
- Minimum asset value reduced to INR 5 billion.
- Withdrawal of single project REIT concept - there should be at least two projects.
- Investment in completed and rent-generating assets reduced from 90% to 80%.
- 90% distribution to be computed on net distributable cash flows (in compliance with applicable laws).

InvITs

- Differentiation between infrastructure assets with rental/ leasehold income is done away with - all assets which qualify as 'infrastructure' will be eligible under InvIT.
- Concept of multiple sponsors (maximum 3) introduced.
- Net worth requirements for each sponsor enhanced to INR 1 billion.
- Sponsor lock-in (a) 25% - three years; (b) above 25% - one year.
- No concept of re-designated sponsor. Appears to have relaxed continued lock-in requirements after three year for sponsors.

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- Minimum subscription amount for investors enhanced to INR 1 million.
- Eligibility criteria laid out for inclusion of under-construction projects (both PPP & Non-PPP).
- One year lock-in for investors (other than sponsors) holding units prior to initial public offer.
- Investment manager restricted from earning any remuneration other than specified in offer documents.

Withholding tax on service tax

No TDS on service tax on payments made/ due to resident payee if service tax component is indicated separately in the agreement/ contract

CBDT Circular No. 1/2014, F. No. 275/59/2012-IT(B)

The CBDT had previously issued a Circular No. 4/ 2008 dated 28 April 2008 wherein it was clarified that tax had to be deducted at source under section 194-I of the Act on the amount of rent paid/ payable without including the service tax component.

The CBDT received representations seeking clarification whether this principle could be extended to other provisions of the Act also.

The Rajasthan HC, in the case of CIT (TDS) *v.* Rajasthan Urban Infrastructure (ITA No. 235, 222, 238 and 239 of 2011), held that tax was not required to be deducted on the service tax component under section 194J of the Act if the amount of service tax was to be paid separately and was not included in the fees for professional services or technical services as per the terms of the agreement between the payer and the payee. The CBDT, in the light of the aforesaid representation and the decision of the Rajasthan HC, examined the matter afresh and decided that wherever, in terms of the agreement/ contract between the payer and the payee, the service tax component comprised in the ***amount payable to a resident*** is indicated separately, the tax shall be deducted at source under Chapter XVII-B of the Act on the amount paid/ payable without including the service tax component.

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ESOP income

Despite no employer-employee relationship, ESOP income is taxable as salary

ACIT *v.* Chittaranjan A. Dasannacharya [TS-560-ITAT-2013(Bangalore-Tribunal)]

Facts

The taxpayer was in employment in India with Aerospace Systems Private Limited (ASPL) and went on deputation as an independent consultant to SIRF Technology, USA (SIRF) for the period of 1995 to 1998. SIRF granted stock options to him on 4 October 1996 under its stock option plan. He exercised his right under the stock option plan in March, 2006, received 7,000 shares of SIRF, and sold them on the same day in a 'Cashless Exercise'. He contended that since he was an employee of ASPL and not SIRF, there was no employer-employee relationship, and hence the income could not be taxed as Salaries. Thus, the gains were considered by him as capital gains arising on a transfer of stock options. Also, he contended that the stock options were held for nearly ten years from the grant date. Hence, the entire stock income of INR 12.7 million was offered as long-term capital gains. The taxpayer invested part of the consideration in the construction of a residential property and claimed a benefit of INR 6.2 million under section 54F of the Act. His submissions were rejected and the TO considered that 'employee', according to the ESOP plan, included a consultant who performed services for the company or its subsidiaries. The TO also contended that the difference between the sale price of shares and the FMV of shares on the date of the exercise was a short-term capital gain, and hence denied the exemption under section 54F of the Act.

Held

The Tribunal relied on the case of Sumit Bhattacharya *v.* ACIT [2008] 300 ITR (AT) 347 (Mumbai-SB), wherein it had been held that even in the absence of an employer-employee relationship, income on SAR was assessable under the head 'Salaries'. In the present case, the Tribunal noted that under the ESOP plan of SIRF, independent consultants had to be considered as "employees" for purposes of grant of the benefit. The Tribunal observed that the first event of taxability was triggered on the date when the option to acquire the shares was exercised. Up to that time, the taxpayer had no right to any shares of SIRF. The benefit arising to an employee (being the difference between the FMV and exercise price on the date of exercise) would be subject to tax as salary income, negating the taxpayer's arguments regarding the lack of 'employer-employee' relationship.

The Tribunal noted that the option to purchase shares could only be exercised, not alienated. To fall under the head capital gain, there must be a transfer of a capital asset. It was concluded that the exercise of options to acquire shares was not capable of being assessed under the head capital gain, as there was no transfer of capital assets.

It was further held that the income had to be treated as taxable under salaries. The next event of taxability under the stock options arose on the sale/ transfer of shares. The difference between the sale price and the FMV on the date of exercise would be treated as a capital gain under section 45 of the Act. As the shares were sold on the same day that the options were exercised, the Tribunal held the gain to be "short term". Consequently, exemption under section 54F of the Act was denied.

With regard to the levy of interest under section 234B of the Act, the Tribunal ruled in favour of the taxpayer by confirming that as the income was assessed as a salary, it was the employer's duty to deduct tax at source. The taxpayer could not be penalised for non-deduction of tax at source by the employer. The Tribunal also deleted the penalty levied under section 271(1)(c) of the Act, as the employee had furnished all facts with regard to stock options, and the benefit he received.

Residential status

Where a taxpayer had come to India after leaving employment outside India, stay in India would not be considered as a visit

Mrs. Smita Anand, China, *In re* [2014] 42 taxmann.com 366 (AAR-New Delhi)

Where the taxpayer came to India after leaving employment outside India, and had stayed in India for sixty days or more during the previous year, and for three hundred and sixty five days or more within four preceding financial years, the taxpayer could be considered as a tax resident in India.

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Facts

The taxpayer, an Indian citizen, worked with Hewitt India until September 2007, and then joined Hewitt China in October 2007. During her employment in China, she visited India, and her stay in India in a particular financial year never exceeded 182 days and she qualified as a non-resident. She returned to India on 12 February 2011, after resigning from her employment in China with effect from 31 January 2011. During FY 2010-11, her total number of days in India was 119 days and her total number of days in India during the preceding four FYs was 407 days. She claimed to be a non-resident. In the FY 2010-11, the taxpayer realised proceeds from an exercise of ESOPs and RSUs which were awarded by Hewitt China while she was employed and rendered services in China. The entire grant, vesting and exercise of the ESOPs and RSUs happened during the course of her exercise of employment with Hewitt China. The proceeds received in the US were remitted to India. The taxpayer sought an advance ruling on whether the proceeds from ESOPs and RSUs were taxable in India ,considering that she considered herself to be a non-resident in India under the terms of Explanation (b) to section 6(1)(c) of the Act, which provided that "any Indian citizen or person of Indian origin who being outside India, comes to a visit to India in any previous year, the "sixty days" limit mentioned in section 6(1)(c) of the Act will be substituted with "one hundred and eighty two days".

Held

The taxpayer's case did not fall under Explanation (b) to section 6(1)(c) of the Act as she came to India after resigning from China and therefore, having fulfilled the requirements of section 6(1)(c) of the Act, her status was that of a resident in India. The AAR also opined that the taxpayer's reason for staying in India (to visit relatives and friends) would not be covered by 'visit' under Explanation (b), as she came to India after resigning from employment in China. Furthermore, the taxpayer's contention that her stay in India was a visit because she held an employment visa until March 2012, and was actively searching for jobs outside India, was also discarded by the AAR, which declared that such activities were not necessarily proof of intent of a visit, as a person staying in India also undertook these activities. The AAR also rejected the applicability of the case law cited (i.e. Anurag Chaudhary, *In re* [2010] 322 ITR 293(AAR) and Manoj Kumar Reddy Nare *v.* ITO [2009] 132 TTJ 328(Bangalore-Tribunal) on the basis that the facts of the taxpayer's case were different. Consequently, the AAR concluded that the proceeds remitted to India on conversion of ESOPs and RSUs awarded to the taxpayer by her employer in China were taxable in India.

Scope of income

Salary income accrues where services are rendered and, if brought into India after accrual abroad, it is not taxable on receipt basis

Arvind Singh Chauhan *v.* ITO [2014] 42 taxmann.com 285 (Agra-Tribunal)

Salary received by a non-resident working on a vessel plying international routes was not taxable in India, as the salary accrued outside India. The taxpayer had the lawful right to receive his salary outside India and therefore, merely its subsequent deposit or remittance by the employer into his bank account in India did not imply that the salary was received in India. The Tribunal also held that receiving an appointment letter in India did not imply that the taxpayer had the right to receive the salary in India.

Facts

For the AY 2009-10, the taxpayer was employed with Executive Ship Management Pte Ltd, Singapore (ESM-S). He worked on merchant vessels and tankers plying international routes. In addition to the salary income from ESM-S, the taxpayer also received bank interest and a pension from the Indian Army, his former employer. The taxpayer's number of days in India during the previous year relevant to AY 2009-10 was less than 182 days. He accordingly qualified as a non-resident for Indian tax purposes. In the tax return filed by the taxpayer, his bank interest and pension income were offered to tax in India on a receipt basis under section 5 of the Act. However, his salary income was not offered to tax as it related to services performed outside India. During the detailed tax scrutiny assessment, the TO brought the salary income under the ambit of income taxable in India and made an addition to the taxpayer's total income. The TO also made an addition to the interest income earned and credited to his NRE account. The CIT(A) upheld the order of the TO. The taxpayer filed an appeal before the Tribunal against the order of the CIT(A).

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Held

The Tribunal held that salary was a compensation paid for services rendered by an employee and therefore the location of its accrual was the location where the services were provided. Unless the services were rendered, no such right accrued to the employee. The taxpayer had the right to receive a salary income when he rendered the services, and not when he simply received an appointment letter. The Tribunal held that when salary had already accrued outside India, thereafter, a mere arrangement for remitting salary to India did not constitute receipt of salary in India so as to trigger taxability under section 5(2) of the Act.

Editor's Note

In this judgement, the Tribunal has reached an important conclusion that mere receipt of salary income will not make it taxable in India if the services are rendered outside India, and the salary is paid by a foreign employer.

Capital gains indexation

Indexed cost of acquisition to be determined by providing indexation on each instalment in case property is purchased under instalments payment scheme

Anuradha Mathur *v.* ACIT [TS-222-ITAT-2014 (Delhi-Tribunal)]

Facts

The taxpayer, an individual, became a member/ shareholder of a society to purchase a flat under a drawing-of-lots scheme and made payment through instalments for the purchase of the property. The taxpayer had entered into an agreement and paid the first instalment during FY 1989-90 and also paid the subsequent instalments until FY 1995- 96. The draw of lot was held on 17 March 1996 and the taxpayer finally got the possession of the flat on 1 August 1997. The taxpayer disclosed LTCG on the sale.

According to the TO, since possession of flat was given on 1 August 1997 indexation of cost of acquisition was to be allowed from FY 1997-98, i.e. the year of the flat allotment. Accordingly, the TO recomputed the LTCG. On appeal to the CIT(A), the taxpayer's plea was rejected on the grounds that mere ownership of shares did not confer the benefit to enjoy the flat, unless the same had been physically handed over, and hence the TO was correct in treating the date of possession as the date on which the house was vested in the control of the taxpayer.

Aggrieved by the CIT(A)'s order, the taxpayer preferred an appeal before the Tribunal. The taxpayer argued that indexation should be allowed from the date of the first instalment, on the entire cost, i.e., instalments. The taxpayer submitted that by virtue of the definition of 'indexed cost of acquisition' under section 48 of the Act, indexation was to be applied from the year in which the asset was 'held' by the taxpayer. It was further submitted that the taxpayer became a member of a cooperative society, acquired the shares and held an interest in the allotment of the flat. The taxpayer argued that being a shareholder, she had the right to make a part payment for the flat as determined by the society. The taxpayer contended that the word 'held' in ordinary parlance included a right in the form of acquisition of flat. The learned counsel on behalf of the taxpayer submitted that the payments made by the taxpayer over a period were towards the right of holding the flat. Hence, these instalments should have been considered for suitable indexation.

Held

The Tribunal held that there was no case to allow indexation on the entire cost of acquisition from the date of payment of first instalment i.e. FY 1989-90, thus rejecting the taxpayer's argument. The meaning of the word, 'held', could not be extended to part payments which were not even paid by the taxpayer. However, there was no dispute that the taxpayer made part payment by way of instalments towards the acquisition of the flat by becoming shareholder and the member of society through a recognised and bye-laws approved method, of a co-operative housing society.

The individual payments of the actual amounts for holding an asset deserved to be indexed from the date of actual payment of each instalment. Thus, instead of extreme stands from the revenue and the taxpayer, the Tribunal held that indexation should have been allowed from the date of payment of each instalment. The TO was directed to re-work the LTCG by providing indexed cost of acquisition of the actual payment of each instalment.

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Notification/ Circulars

Social security

Amendments introduced in Indian social security schemes – statutory wage ceiling increased from INR 6,500 to INR 15,000 per month

http://epfindia.com/Circulars/Y2014-15/Coord_SchemeAmendment_13637.pdf

The Finance Minister in his budget speech announced the increase of the statutory wage ceiling from the existing level of INR 6,500/ month to INR 15,000/ month as well as the payment of a minimum pension of INR 1,000/ month for all members of the pension scheme. Recently, the Ministry of Labour and Employment, Government of India (MLE) issued notifications and made amendments to the EPF Scheme, 1952, EPS, 1995 and EDLI Scheme, 1976 effective from 1 September 2014.

The amendments in EPF, EPS and EDLI are summarised below

EPF

The definition of 'excluded employee' has been amended. Now, employees drawing pay greater than INR 15,000/ month will qualify as excluded employees. Earlier the ceiling was INR 6,500/ month.

- Employees drawing a salary of up to INR 15,000/ month are now mandatorily required to become enrolled as members of the EPF. Therefore, those employees who were earlier drawing a salary exceeding INR 6,500/ month and not contributing to the PF shall have to be enrolled under the EPF effective 1 September 2014 (salary capped at INR 15,000/ month).

EPS

- New EPF members enrolled on or after 1 September 2014 and having a salary of more than INR 15,000/ month at the time of joining, will not become members of the EPS. Accordingly, the entire contribution of 24% (from the employee and employer) will go to the provident fund account of the employee. These members are also not eligible for pension benefits under the scheme.
- The amount of contribution by the Central Government to the pension fund has been increased to a maximum of INR 174/ month (1.16 % of INR 15,000). Earlier it was calculated at INR 6,500/ month.
- With effect from 1 September 2014 wherever the employer and employees have opted to contribute on a salary exceeding INR 6,500/ month, such an employer and employee will have to exercise a fresh option (within six months or an extended period by the authorities) to contribute on a salary exceeding INR 15,000/ month, subject to the conditions that the member would have to contribute the Central Government's share of contribution at 1.16% on the salary exceeding INR 15,000/ month from his/ her share of contribution. In the case of failure, contribution to the EPS will be limited to 8.33% of INR 15,000/ month effective 1 September 2014.
- To determine the pensionable salary on or after 1 September 2014 the period for calculating the average monthly pay has been increased from 12 months to 60 months. Similarly, the pensionable salary would be calculated on a *pro-rata* basis separately for the period up to 31 August 2014 and for the subsequent period, using the wage ceiling of INR 6,500 and INR 15,000/ month respectively.
- The minimum pension for members of the EPS and widow(er)/ nominee/ dependent parent has been fixed at INR 1,000/ month for the FY 2014-15.
- The withdrawal benefit under Table D (non-completion of eligible service period by the employee) should be now calculated on the weighted average of the wages at the end of every wage ceiling period.

EDLI

In all cases of EDLI claims, where the death of the member occurs on or after 1 September 2014, the benefit shall be calculated on the enhanced wage limit of INR 15,000/ month and the amount will be further increased by 20 % to

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determine the total benefit under the scheme.

Editor's note

The increase in the wage limit is a welcome step and has been pending for a long time. This may not only increase the overall pension benefits but also increase the insurance coverage in the event of the death of a member during service. Having a minimum guaranteed pension will help low-earning employees in their old age from a social security perspective.

As new employees (joining on or after 1 September 2014) having a salary of INR 15,000/ month or more are excluded from the EPS, this will encourage them to go for alternative pension plans, e.g. the National Pension System, for their pension needs.

Employers having employees earning a salary between INR 6,500/ month and INR 15,000/ month (where contributions were being made on INR 6,500/ month) now have to contribute more to EPF/ EPS. The net take-home pay of employees will be also impacted due to the higher contribution.

It may be noted that the wage ceilings under the EPF and EPS are not applicable for international workers, as they are governed by special provisions of these schemes. Therefore, the above changes have a very limited impact on international workers who are working in India with covered establishments.

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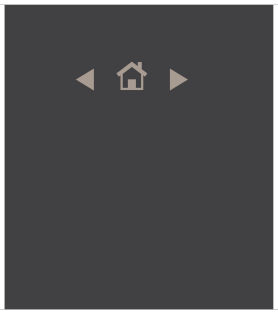

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Non-compete fee

The transaction value for the sale of shares cannot be substituted with FMV

CIT *v.* Wintac Limited [2013] 40 taxmann.com 534 (Karnataka)

The amount forfeited on account of the cancellation of a Sale Agreement in excess of the agreement amount was held to be a revenue receipt liable to tax. It was also held that the non-compete fee received in order to discontinue the business for three years was a capital receipt not liable to tax. As regards a transaction for the sale of share, the HC held that in the absence of any finding that the transaction was a colourable device, the price of shares could not be substituted with the FMV.

Facts

During the AY 2001-02, Wintac Limited (the taxpayer) entered into an agreement for sale of its two units to Tumkur Chemicals Limited (TCL) for INR 57.5 million. Subsequently, the agreement was cancelled, and the taxpayer forfeited INR 11 million from the advance paid by TCL. The taxpayer treated the amount as a capital receipt, not liable to tax. However, the TO treated the same as a revenue receipt liable to tax.

The taxpayer also received INR 40 million from Recon Health Care Limited (RHC) towards a non-compete fee to discontinue the business for three years, and treated this as a capital receipt. However, the TO treated the amount as a revenue receipt liable to tax.

Further, the taxpayer received INR 250 million from RHC towards the transfer of technical know-how, which was offered to tax by the taxpayer in its return. However, during assessment proceedings, the taxpayer claimed the amount as a capital receipt exempt from tax. The TO rejected the revised claim and taxed the same amount as a revenue receipt.

During FY 1997-98 and FY 2000-01, the taxpayer acquired equity shares of its subsidiary. During FY 2000-01, these shares were sold to its Managing Director at 1% of the cost paid. Upon the sale of these shares, the taxpayer claimed long term capital loss of INR 31 million and short term capital loss of INR 9.9 million. The TO rejected the taxpayer's claim on the ground that the transaction was between interested parties, and the taxpayer had failed to adduce evidence that valuation of shares was done at arm's length.

Held

With regard to the forfeited amount of INR 11 million, the HC referred to the agreement with TCL and noted that upon the purchaser's failure to perform his part of the contract, the vendor was entitled to claim INR 3 million as liquidated damages from the advance consideration. Accordingly, the HC held that according to the agreement, the taxpayer was entitled to forfeit only a sum of INR 3 million and that the remaining amount of INR 8 million had to be treated as a revenue receipt chargeable to tax.

With regard to non-compete fees, the HC relied on the SC ruling in Guffic Chemic Private Limited *v.* CIT [TS-97-SC-2011] and ruled in the taxpayer's favour. It held that the non-compete fee received to discontinue the business for three years was a capital receipt not liable to tax.

For calculating capital gains on the sale of shares of the subsidiary, the HC referred to section 48 of the Act, and noted that there was no provision to substitute the consideration received with FMV of the asset sold. The HC also noted that the subsidiary was making a loss, and that the taxpayer's corporate guarantee to the Bank and its suppliers had been invoked. The taxpayer sold the shares to stabilise its financial position. Accordingly, the HC confirmed the Tribunal's finding and held that long-term and short-term capital loss be allowed as claimed to the taxpayer.

With regard to technical know-how, the HC relied on the Madras HC ruling in the case of Indo Tech Electric Company *v.* DCIT [2011] 237 CTR 227 (Madras HC) wherein it was held that 'technical know-how' was an intangible asset liable to be taxed under the head, 'capital gains'. Accordingly, the HC ruled in the favour of the revenue and held that this was chargeable to capital gains tax.

Editor's note

The decision reaffirms the positions regarding the imputation of fair value in cases of the sale of shares, as well as treatment of non-compete fees paid upon the discontinuation of a business.

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A non-compete fee paid akin to a commercial right is eligible for depreciation

Pentasoft Technologies Limited *v.* DCIT [TS-578-HC-2013(Madras)]

The non-compete fee paid by the taxpayer to strengthen its rights with respect to other intangibles such as patents, trademarks, etc., acquired upon purchase of business, is an intangible asset eligible for depreciation under section 32 of the Act.

Facts

The taxpayer company entered into an agreement with Pentamedia Graphics Limited (PGL) for acquiring the software development and training division of PGL for INR 6260.80 million. The consideration included INR 1800 million paid towards the non-compete fee, INR 3642.1 million towards brand IPRs and INR 818.7 million towards the excess of the transfer price over fixed assets.

The taxpayer claimed depreciation on IPRs and the non-compete fee for AYs 2001-02 and 2002-03. The TO rejected the taxpayer's claims. The CIT(A) reversed the TO's order. On further appeal, the Tribunal upheld the CIT(A)'s order in relation to IPRs but reversed the order in relation to the non-compete fees.

The taxpayer filed an appeal before the HC against the Tribunal's order.

Held

After going through the facts of the case, the HC held that the non-compete fee was paid by the buyer under a composite agreement to strengthen its rights over copyrights, trademarks, etc., acquired as a part of the transaction, and to prevent the transferor from using these. Thus, the HC held that the non-compete clause under the agreement should be read as a supporting clause to the transfer of copyrights and trademarks, etc.

In view of the above, the HC held that the non-compete fee paid by the taxpayer was a part of a bundle of other intangible rights obtained upon the purchase of the software development and training division of PGL, and was therefore eligible for depreciation under section 32 of the Act.

Editor's note

This is a landmark ruling which may be welcome news for companies who pay non-compete fees as part of a purchase consideration. This also provides guidance on whether the non-compete fee paid is capital or revenue in nature. However, we would like to highlight that the Tribunal in the case of Mylan Laboratories Limited v. ACIT [TS-24-ITAT-2014(Hyderabad-Tribunal)] and the Chennai Tribunal in the case of Arkema Peroxides India Private Limited v. ACIT [ITA.No.2212/ Mad/ 2006] have given unfavorable rulings, holding that "the non-compete fee does not represent any intangible asset, such as, know-how, patents, copyrights, trademarks, licenses, franchises, etc.". Therefore litigation on such a matter cannot be ruled out.

Capital Gains

The transfer of revaluation gains on land to current accounts of partners, and the treatment of such current account balances as loans in books of the converted company, breaches the conditions of section 47(xiii) of the Act

K.T.C. Automobiles Private Limited *v.* DCIT [2014] 41 taxmann.com 160 (Cochin-Tribunal)

Facts

The taxpayer-firm was a dealer of Hyundai Motors. The taxpayer converted the partnership firm into a private limited company and claimed exemption from capital gains on the transfer of assets of the partnership firm to the newly-formed private limited company in accordance with section 47(xiii) of the Act. During this process, the taxpayer revalued land and credited the revaluation amount to the partners' current accounts. These transfers to the current accounts were treated as loans in the books of the converted private limited company.

A question arose as to the taxability of such transfer of assets from a partnership firm to the newly-formed private limited company.

The taxpayer contended that the transfer was for business purposes. According to the taxpayer, the conversion was undertaken at the insistence of the firm's principal and its bankers. The taxpayer rebutted the revenue's claim that the transfer and revaluation was a mechanism to transfer the gains of appreciation of the land to the partners.

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Held

The Tribunal held that according to section 47(xiii) of the Act, to avail the exemption from capital gains, there were two pivotal conditions: *firstly*, all the assets and liabilities before the transfer should become the assets and liabilities of the private limited company, and, *secondly*, the partners of the firm should not receive any benefit other than the shares of the private limited company in the ratio of their capital account upon such a transfer. In the present case, the land was revalued and gains were credited to the current accounts of the partners, which were then treated as loans in the company's books, thereby breaching these conditions and creating a new liability in the books of the company. Also, by treating the transfers to current accounts as loans, in substance the partners became entitled to interest on these loans, and could redeem these loans from the company whenever they wished.

Based on the above, the Tribunal held that such a conversion was liable to capital gains tax as the conditions of section 47(xiii) of the Act had not been satisfied.

Editor's note

This ruling aims at curbing accounting techniques being used by taxpayers to transfer gains to partners without paying any taxes.

Money distributed to retiring partners on retirement not taxable in firm's hands

CIT *v.* Dynamic Enterprises [2013] 40 taxmann.com 318 (Karnataka)

Money distributed to retiring partners upon retirement would not attract capital gains tax in the firm's hands under section 45(4) of the Act.

Facts

The taxpayer, a partnership firm, came into existence in 1985. The firm was reconstituted in 1987, whereby land was purchased with the capital contributed by the new partner. The firm was again reconstituted in 1993, whereby five partners belonging to another business group were inducted into the firm. Before reconstitution, the assets of the firm were revalued. In 1994, the old partners of the firm retired through a deed of retirement and received money in accordance with the enhanced value of the property. The TO held that the retirement and introduction of new partners was merely a device adopted to transfer the immovable property held by the firm. Accordingly, the TO treated the reconstitution of the firm in 1994 as a transfer of property from the old firm to the new firm and held it taxable in the hands of the firm as capital gains under section 45(4) of the Act.

Held

The assets purchased by the firm were the property of the firm and did not stand in for the names of the individual partners. Further, to attract capital gains under section 45(4) of the Act, there should be the transfer of a capital asset from the firm to the retiring partner, whereby the firm ceases to have any right in the transferred asset and the retiring partner acquires absolute right in the asset. In the present case, the retiring partners were given money against the balances in their capital accounts, and no capital assets were transferred to them. The firm did not cease holding the immovable property, and its right in the property remained unaffected. Hence, no capital gains arose in the hands of the firm and section 45(4) of the Act should not apply.

Editor's note

This is a guiding decision for analysing the tax impact in the hands of a firm upon retirement of a partner. However, since the question did not involve the taxability of money distributed in the hands of the retiring partners, it is not clear whether the Act envisages any tax impact on retirement of partners in the retiring partners' hands.

Capital gains to be calculated by taking FMV as the cost of acquisition, where the cost of acquisition to previous owner is not ascertainable

Thakur Dwara Shri Krishanji Maharaj Handiyaya *v.* CIT [TS-291-HC-2014(Punjab&Haryana)]

In a case where the cost of acquisition of a capital asset to the previous owner could not be ascertained, it had to be equal to FMV on the date of acquisition or on a specified date, i.e. 1 April 1981 at the discretion of the taxpayer; and capital gains had to be calculated accordingly on the sale of such an asset.

Facts

The taxpayer received agricultural land in Barnala by way of a gift from the Maharaja of Patiala. During FY 2005-06, the said land was acquired by the Improvement Trust, Barnala for a compensation of INR 27.8 millions. Since the Maharaja of

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Patiala did not incur any cost on the acquisition of such land, the taxpayer claimed that the cost of acquisition of the land in the hands of previous owner, i.e. the Maharaja of Patiala, could not be ascertained and accordingly such sale of land was not taxable under section 45 of the Act.

The TO rejected the claim of the taxpayer and by applying the provisions of section 55(3) of the Act, calculated capital gains by adopting the FMV as on 1 April 1981 as the cost of acquisition of the land.

While the taxpayer received relief at the first appellate level, the Tribunal, relying on the HC decision in the case of CIT *v.* Raja Malwinder Singh [2011] 334 ITR 48 (P&H), reversed the first appellate order. Aggrieved, the taxpayer filed an appeal to the HC.

Held

The HC relied on the ruling of the Full Bench in the case of Raja Malwinder Singh (*supra*) in which it was held that even in a case where the cost of acquisition of the asset to the previous owner could not be ascertained, section 55(3) of the Act statutorily prescribed the cost to be equal to the market value on the date of acquisition. If the value could not be ascertained, it had to be equal to market value on a specified date, i.e. 1 April 1981 at the discretion of the taxpayer. Accordingly, the HC ruled in favour of the Revenue.

Editor's note

The Punjab and Haryana HC relied on the decision in the case of Raja Malwinder Singh (supra), in which it distinguished the decision of the SC in the case of CIT v. B. C. Srinivasa Setty [1981] 128 ITR 294 (SC) and held that if the cost of acquisition of asset to the previous owner was not ascertainable, the capital gains would have to be calculated by taking the cost of acquisition as FMV of the asset on the date of acquisition of the asset or on the specified date, i.e. 1 April 1981 at the discretion of the taxpayer.

No capital gains under section 45(4) when property is not transferred by firm to retiring partners

CIT *v.* Karnataka Agro Chemicals [TS-465-HC-2014(Karnataka)]

Facts

The taxpayer was a partnership firm which revalued its assets and recognised goodwill and credited it to the current accounts of the four partners proportionately. Out of the four partners, two partners retired in the same year. The retiring partners were paid the actual amount due to them, including their share of goodwill.

The TO brought this goodwill to tax as long-term capital gains in accordance with the provisions of section 45(4) of the Act. Upon appeal before the CIT(A), it was held that there is no transfer within terms of section 45 and section 2(47) of the Act, and it was a case of goodwill arising from revaluation of assets. Goodwill was carried in the balance sheet and there was no transfer of any assets by the firm to the retiring partners.

On appeal to the Tribunal by the Revenue, the Tribunal upheld the CIT(A)'s order.

Aggrieved, the Revenue preferred an appeal before the HC.

Held

The HC held that to attract the provisions of section 45(4) of the Act, there should be transfer of the capital asset from the firm to retiring partners, and the firm should cease to have any right in the property which is so transferred. In other words, the right to the property should be relinquished and the retiring partners should acquire absolute title to the property.

In the instant case, the taxpayer did not transfer any right in the capital asset in favour of the retiring partners. Consequently, the taxpayer's right to the property is not reliquished.

Thus, ruling in favour of the taxpayer, the HC dismissed the Revenue's appeal.

Editor's note

This is a ruling by Karnataka HC which rightly distinguishes that section 45(4) does not apply in cases where no property is transferred by the firm to the retiring partners.

Long-term capital loss on the sale of shares of a group company, partly to a related buyer and partly to an unconnected third party buyer, is allowed

ITO *v.* J.M. Morgan Stanley Private Limited [TS-690-ITAT-2013(Mumbai-Tribunal)]

Long-term capital loss on the sale of shares cannot be denied

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where the transactions of sale and purchase of shares were not made with the ulterior motive of creating an artificial loss. The shares were sold to unconnected independent parties who held them for a substantial period of time, and no benefit was derived by the taxpayer from such transactions.

Facts

J. M. Morgan Stanley (the taxpayer) was an investment banking company which was also engaged in providing financial advisory services. The taxpayer filed its return of income for AY 2004-05 claiming a loss of INR 276.4 million on sale of Optionally Convertible Preference Shares (the shares) of a group company. These shares were purchased on 27 March 1999 at a premium of INR 200 per share and were sold on 14 May 2003 at INR 3.30 per share. The shares were sold to one Mr. X, who was associated with the taxpayer as Chairman. Mr. X sold 50% of the shares at INR 3.72 per share to a company wholly owned by promoters (including his family) of the taxpayer, who subsequently sold the shares to a third party. The balance 50% shares were sold to another unconnected third party, which ultimately sold them to a listed group company.

The TO disallowed the loss in the hands of the taxpayer by invoking the SC ruling in the case of McDowell & Company *v.* Commercial tax officer [1985] 154 ITR 148 (SC) and concluded that the entire transaction of the purchase and sale of shares was a colourable device fabricated by the taxpayer for creating an artificial loss with the sole purpose of avoiding tax payment by setting off the amount against future income.

The CIT(A) upheld the taxpayer's claim, considering that independent third parties had held the shares for a substantial period of time, and that the taxpayer had received no benefit on account of these transactions.

Held

There was no case of circular transactions, since the shares had been purchased by third parties and had been held by them for a substantial time before being sold at a profit. 50% of the shares sold by the taxpayer were held by an outside corporate entity totally unconnected with the taxpayer, and the balance 50% were held by a listed group company, which never came back to the taxpayer. The share valuation had been done by an independent Chartered Accountant, and the TO had not challenged it by carrying out his own valuation.

The principle laid down by the SC in the case of McDowell & Company (*supra*) was not applicable in the taxpayer's case, as there was no benefit derived either by the taxpayer or the group. The Tribunal distinguished the rulings of the Calcutta HC in the case of *CIT v. L.N. Dalmia [1994] 207 ITR 89 (Calcutta HC)* and Kolkata Tribunal in the case of *Edward Keventer Private Limited v. DCIT [2004] 89 ITD 347 (Kolkata-Tribunal)* on facts. In the taxpayer's case, shares were not only transferred to third parties totally unconnected with the taxpayer, but had also been held by those parties for a considerable time, and never came back to the taxpayer. Thus, the Tribunal upheld the CIT(A)'s order allowing the taxpayer's claim of capital loss.

Editor's note

This ruling by the Mumbai Tribunal reinstates the fact that genuine transactions undertaken without any ulterior motive shall be allowed by the tax authorities. This judgement is reassuring for taxpayers undertaking genuine transactions with commercial considerations.

Long-term capital gains on the transfer of listed securities in an off-market transaction by a non-resident are to be taxed at the lower rate of 10%

Pan-Asia iGATE Solutions, Mauritius, *In re* [TS-296-AAR-2014]

The AAR, in the case of Pan-Asia iGATE Solutions (applicant), held that LTCG on the sale of listed shares in an off-market transaction by a non-resident will be taxable at lower rate of 10%.

Facts

The applicant proposed to purchase equity shares of Patni Computer Systems Limited (listed on Indian stock exchanges) from iSolutions Inc., USA in an off-market transaction. iSolutions Inc. had earlier purchased these shares in foreign currency. The applicant approached AAR to determine the rate at which tax should be deducted on payment to the non-resident i.e. iSolutions, for purchase of listed equity shares of an Indian company.

Held

As per the first proviso to section 48 of the Act, a non-resident who had initially utilised foreign currency to acquire shares was taxed after taking into consideration exchange rate fluctuations. The second proviso to section 48 of the Act

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allows indexation benefit which neutralises inflation. However the second proviso was not available in cases where the benefit of the first proviso was availed. Therefore these two provisos operate independently and had different purpose and objectives.

As per the first proviso to section 112(1) of the Act, LTCG on the transfer of listed securities (on which STT is not paid), or units or zero coupon bonds, is taxed at a beneficial rate of 10% without giving indexation benefit under the second proviso to section 48 of the Act. However, the first proviso to section 112(1) of the Act is available to a taxpayer even if he has availed benefit under the first proviso to section 48 of the Act.

Relying on the Delhi HC ruling in the case of Cairn UK Holding Limited *v.* DIT [TS-510-HC-2013(Delhi)], the AAR held that the applicant should withhold tax on LTCG arising to a non-resident seller at a lower rate of 10%.

Editor's Note

The ruling reaffirms the view held in Cairn UK Holding Limited (supra) that a non-resident taxpayer is liable to a lower tax rate of 10% in determining its capital gains tax liability on the sale of listed securities in an off-market transaction.

Depreciation

The classification of intangibles as goodwill or as copyrights/ licenses, would not affect the quantum of depreciation, as goodwill is also an intangible asset and eligible for depreciation

DCIT *v.* Worldwide Media Private Limited [TS-56-ITAT-2014 (Mumbai-Tribunal)]

Facts

The taxpayer was a joint venture company between Bennett, Coleman & Company Limited (BCCL) and BBC Worldwide Limited (BBC) and was engaged in the business of the printing, distribution and marketing of magazines and in organising events. During AY 2004- 05, the taxpayer acquired a magazines and events division from BCCL at a price of INR 910 million on a slump sale basis. Of this amount, INR 110 million was attributable to the business' net current assets and the balance was paid towards the acquisition of copyrights and trademarks. The taxpayer claimed depreciation on the value of these newly-acquired intangible assets.

The TO invoked the provisions of ***Explanation 3 to section 43(1) of the Act***, and held that some part of the purchase consideration was for goodwill. The TO estimated the value of goodwill at INR 250 million and disallowed depreciation on that amount.

Held

The Mumbai Tribunal observed that the key aspect to consider was that the Revenue had not disputed the purchase consideration or its attribution towards the value of current assets. What had been disputed was the classification of the intangible assets as copyright or trademark or goodwill and the allowability of tax depreciation in that regard. The Tribunal went on to say that they did not agree with the taxpayer's contention that no goodwill had arisen as a result of the transaction. The Tribunal held instead that goodwill could also be in the form of copyrights, patents, trademarks, etc. However, since there was no difference in the rate of depreciation for goodwill and copyrights/ trademarks, the dispute regarding classification was immaterial and inconsequential.

The Tribunal held that the issue of tax deductibility of depreciation on goodwill had been settled by the SC in the case of CIT *v.* Smifs Securities Limited [2012] 348 ITR 302 (SC).

Since depreciation is allowed at 25% on goodwill as well as on copyrights and trademarks, the very premise of invoking the provisions of Explanation 3 to section 43(1) of the Act was vitiated. Thus, the Tribunal allowed depreciation on the entire amount attributable to the acquisition of intangibles.

Editor's note

The Mumbai Tribunal followed the ruling of SC in the case of Smifs Securities Limited (supra) and allowed depreciation on goodwill/ copyrights and trademarks, thus removing any doubt as to the applicability of an SC decision being clear guidance in support of a depreciation claim in respect of goodwill.

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Consideration paid for acquiring 'licenses and client base' under a merger scheme constitutes 'business and commercial rights of similar nature', eligible for depreciation under section 32(1)(ii)

Cosmos Co-op Bank Limited *v.* DCIT [TS-47-ITAT-2014(Pune-Tribunal)]

The Pune Tribunal, relying on the Areva T&D India Limited v. DCIT [2012] 208 Taxman 252 (Delhi HC) and Hyderabad Tribunal ruling in SKS Micro Finance Limited v. DCIT [TS-283-ITAT-2013(Hyderabad-Tribunal)], held that excess consideration paid under a merger scheme by an taxpayer for acquiring licenses and a client base, constituted 'business and commercial rights of similar nature', and hence was eligible for depreciation under section 32(1)(ii) of the Act.

Facts

The taxpayer, pursuant to a merger scheme, took over four banks along with their assets and liabilities including customer accounts, employees, licenses and other statutory approvals of the merged banks. The taxpayer paid INR 266.8 million in excess of the net worth of the undertakings acquired. The taxpayer took a position that the excess consideration paid towards various business advantages was in the nature of an 'intangible asset' under section 32(1)(ii) of the Act and, therefore, eligible for depreciation.

Held

The Tribunal observed that pursuant to the merger, the taxpayer had taken over the entire business apparatus of the merged banks including its client base, operational branches, statutory licenses, etc. In interpreting the expression 'business or commercial rights of similar nature', the Tribunal relied on the judgements of Areva T&D and SKS Micro Finance (*supra*), wherein the taxpayers were allowed depreciation on 'client base', 'business or commercial rights' in the nature of business claims, business information, know-how etc.

The Tribunal noted that the method of accounting for merger cannot determine the claim for depreciation for tax purposes. The Tribunal held that the excess sum paid over the net worth of the merged banks represented 'business and commercial rights' and was eligible for depreciation under section 32(1)(ii) of the Act.

Editor's Note

The Tribunal ruling provides a useful precedent for claiming depreciation for residuary/ other category of intangible assets pursuant to merger schemes. The Pune Tribunal decision is in line with the SC judgement in the case of Smifs Securities Limited (supra) that had clarified the position regarding depreciation allowance on goodwill pursuant to merger.

Capital account

The amount received by retiring partners in excess of their capital account balance is a capital receipt not chargeable to tax

ACIT *v.* P. Sivakumar [2014] 43 taxmann.com 211 (Chennai-Tribunal)

The amount received by retiring partners in addition to the settlement of their capital accounts is their share in the value of the business and is a capital asset (which may also include goodwill) and, as such, is a non-taxable capital receipt.

Facts

During 2007-08, the taxpayer retired from a partnership firm. The taxpayer was paid a certain amount in addition to the amount lying in his capital account. While completing the assessments, the TO invoked section 28(va) of the Act and treated the amount received in excess of the capital account as business income, as all the partners had agreed to discontinue any activity in relation to any business. On appeal, the CIT(A) held that this agreement was in the nature of a family arrangement and therefore could not be taxed by relying on the Madras HC decision in case of CIT *v.* Kay Arr Enterprises [2008] 299 ITR 348 (Madras HC).

Held

The Tribunal observed that it would not be proper to hold that this was a case of family settlement, as the retirement of the taxpayers did not stop the partnership business. Therefore, the decision in the case of Kay Arr Enterprises (*supra*) may not have direct application to the case.

The amount received over and above the balance lying in the capital accounts was capital in nature. When an amount received was capital in nature, courts have consistently held that the amount could not be brought to tax. The amount received by the taxpayer was his/ her share in the value of the

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business. The share in the value of the business (which may also include goodwill) was a capital receipt and, in the light of judicial pronouncements, such receipts were not liable to capital gains taxation. The retirement deed executed did not prevent the taxpayer from carrying on business activities and, therefore, section 28(va) of the Act was not applicable. There was no element of profit in the additional payments as the profit to the date of retirement had been worked out and the respective shares had been credited to the capital accounts of the partners. Even if, for the sake of argument, there was an element of profit, such profit would not be taxable in the hands of the partners by virtue of section 10(2A) of the Act since the profit would have been taxed at the firm level already.

Thus, the Tribunal held that the additional payments made to retiring partners were neither in the nature of profit or income under section 28(va) of the Act, nor were they taxable capital receipts.

Editor's note

This case highlights the treatment of additional payments received by partners at the time of retirement. In this regard, it is useful to also refer to the case of ACIT v. N. Prasad [TS-40-ITAT-2014 (Hyderabad-Tribunal)] in which it was held that such additional payments were not payments related to relinquishing or extinguishing the rights of the partners over any assets of the firm, nor were they payments towards goodwill.

Interest expenditure

Interest expenditure incurred in relation to earning income eligible for deduction under chapter VI-A is tax deductible

CIT *v.* Banaskantha District Cooperative Milk Producers' Union Limited [TS-193-HC-2014 (Gujarat)]

Facts

The taxpayer was a co-operative society engaged in the business of procuring, processing, manufacturing and supplying milk and milk products. During AY 2005-06, the taxpayer claimed deduction under section 80P(2)(d) of the Act on account of interest and dividend income derived by the taxpayer from its investments in co-operative societies. The taxpayer had also claimed a deduction of interest expense incurred on borrowed funds.

The TO disallowed the interest expense by invoking section 14A of the Act on the ground that the same had been incurred in relation to income which did not form part of total income chargeable to tax.

Upon appeal by the taxpayer, the CIT(A) deleted the disallowance under section 14A of the Act by giving detailed reasoning. Upon appeal by the revenue, the Tribunal upheld the CIT(A)'s decision by relying on the Chennai Tribunal's decision in the case of ACIT *v.* Tamil Nadu Silk Producers Federation Limited [2007] 105 ITD 623 (Chennai-Tribunal) wherein it had been held that section 14A could not be applied to the provisions of Chapter VI-A.

Held

The HC observed that, while calculating the total income chargeable to tax, deductions permissible under Chapter VI-A resulted in the reduction of the total income, which could not be compared with income which was exempt from tax and did not form part of the total income at all under the Act. Thus, there was a marked difference between the exempt income and income eligible for deductions provided under Chapter VI-A.

The HC further observed that section 14A of the Act had been introduced retrospectively with effect from 1 April 1962 for the purpose of calculating total income under Chapter IV, and any expenditure in relation to exempted income would not be allowed as a deduction. However, there was no reference in section 14A of the Act to deductions under Chapter VI-A while calculating the total income.

The HC also noticed that the taxpayer had sufficient funds of its own as compared to the quantum of its investments in shares of co-operative societies. Following the ratio of Delhi HC ruling in the case of CIT *v.* Kribhco [TS-522-HC-2012(Delhi)] decided on an identical question of applicability of section 14A of the Act in relation to deductions under Chapter VI-A, the HC upheld the Tribunal's order in favour of the taxpayer.

Editor's note

This is a ruling by the Gujarat HC which rightly distinguishes that section 14A of the Act disallowance does not apply in cases of income in respect of which deduction is availed under Chapter VI – A of the Act.

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Interest-free loans

Interest-free loans to partners of a LLP at the time of conversion of a company into a LLP would disentitle LLP from capital gains exemption – gains to be calculated on the book value of assets transferred and not market value

Aravali Polymers LLP *v.* JCIT [TS-385-ITAT-2014(Kolkata-Tribunal)]

Facts

Aravali Polymers Private Limited (Aravali Polymers) was converted into a LLP under section 56 of the Companies Act and the taxpayer, Aravali Polymers LLP (Aravali LLP), came into existence. Aravali Polymers held 3.18 million shares of East India Hotels Limited which were transferred to Aravali LLP. Aravali Polymers also had reserves and surplus amounting to INR 30 million on the date of conversion. Post-conversion, the taxpayer sold 0.3 million shares for INR 530 million. The taxpayer also gave interest-free loans of INR 500 million to the partners in their profit-sharing ratio. While filing its RoI, the taxpayer offered capital gains on sale of equity shares of East India Hotels Limited and also claimed an exemption under section 47(xiiib) of the Act.

The TO held that there was a violation of provisos (c) and (f) of section 47(xiiib) of the Act on granting interest-free loans and consequently held that section 47A(4) of the Act relating to withdrawal of exemption would be triggered. The TO adopted the market value of the shares in East India Hotels Limited for calculating capital gains in the hands of LLP.

Held

- There was contravention of proviso (f) to section 47(xiiib) of the Act since an interest-free loan had been granted to the partners in their profit-sharing ratio out of the accumulated reserves standing at the date of conversion;
- The exemption under section 47 (xiiib) of the Act was not available to the taxpayer, since the conversion and violation of section 47(xiiib) of the Act took place in the same AY. Hence, instead of section 47A(4) of the Act, section 45 of the Act would apply;
- Accordingly, in calculating capital gains on the transfer of assets to the LLP, the value at which the assets were taken over by the LLP would be the sale price; and the cost of acquisition was to be taken as per the books of the erstwhile company.

Editor's note

This is the first ruling post-introduction of LLP provisions in the Act and provides some guidance on how the exemption from capital gains can be availed or rather, in what circumstances could there be a clear violation of the conditions set out in the exemption provision.

Slump sale *v.* Exchange

The transfer of a business undertaking as a going concern against share/ bond issue is not a 'slump sale'

CIT *v.* Bharat Bijlee Limited [TS-270-HC-2014 (Bombay)]

The Bombay HC upheld the decision of the Tribunal that the transfer of a business undertaking as a going concern against bonds/ preference shares issued was not a slump sale, but an exchange.

Facts

The taxpayer, Bharat Bijlee Limited, transferred its lift division to Tiger Elevators Private Limited (TEPL) during AY 2005-2006 by way of slump sale under an HC-approved scheme of arrangement. As consideration for the transfer, preference shares and bonds were allotted by TEPL to the taxpayer.

The taxpayer claimed that the transfer was an 'exchange' and not a 'sale', and therefore, was not taxable as a slump sale. However, this was not accepted by the TO, who treated the transaction as a slump sale taxable under section 50B of the Act.

Held

The Bombay HC, while relying on the findings and observations of the Tribunal, held that the entire scheme of arrangement envisaged the transfer of the lift division as not being for any monetary consideration. Thus, it was a case of exchange and not sale. The Tribunal's finding that the transfer of the lift division came within the purview of transfer under section 2(47) of the Act, but could not be said to be a slump sale under section 2(42C) of the Act, was correct, and the appeal did not raise any substantial question of law.

The HC reaffirmed the Tribunal's finding that in this case, the consideration was not determined and decided among the parties in terms of money, but in terms of allotment or issue of shares/ bonds.

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Editor's Note

The Bombay HC's ruling, in upholding the Mumbai Tribunal's decision, has reaffirmed the difference between a slump sale and an exchange. It is pertinent to mention that taxability on transfer would follow accordingly; whether a transaction is an exchange or not would depend on the facts of each case.

Income of trusts

Income of overseas discretionary trusts is held to be not taxable in the hands of its beneficiaries until distributed or received by them

Commissioner of Wealth-tax *v.* Estate of Late HMM Vikramsinhji of Gondal [TS-258-SC-2014]

The SC held in the above case that the taxpayer, a beneficiary of a discretionary trust, was not assessable in respect of income of the trust until such income was disbursed to the beneficiary by the trustees.

Facts

The ex-Ruler of Gondal, Vikramsinhji, executed two deeds of settlement (trust deeds) in the United Kingdom on 1 January 1964 for the benefit of (a) the settlor, (b) his children, and (c) the wife or widow of (a) or (b). The settlor also appointed a trustee for the two trusts who, under the trust deed, had the power to exercise discretion to disburse the income to the beneficiaries. During his lifetime, the settlor included the whole of the income arising from these trusts in his returns of income and wealth. After the settlor's death, the said income was also included in the income tax and wealth tax returns filed by his son Jyotendrasinhji, the taxpayer in the present case, for AY 1970-71. Thereafter, the taxpayer took the stand that income from these trusts was not includible in his income. The taxpayer also took the stand that inclusion of the said income in the returns submitted by his father for AYs 1964-65 to 1969-70 and by himself for AY 1970-71 was a mistake.

Held

The HC noted the following distinguishing features, namely (i) the taxpayer had not admitted to having received the income; (ii) the taxpayer had not received the said income; (iii) the taxpayer had not shown it as taxable income in the returns for all the years under appeal; and (iv) the income had been retained in the trust and had not been disbursed to the beneficiaries. Applying Snell's Principle of Equity, the HC held that a discretionary trust was one which gave a beneficiary no right to any part of the income of the trust property, but vested in the trustees a discretionary power to pay him, or apply for his benefit, such part of the income as they thought fit. Merely because the settlor, and after his death, his son (the taxpayer) did not exercise their power to appoint the trustees, the character of the subject trust did not get altered.

The SC, agreeing with the HC's view, held that the trust in question was a discretionary trust. Therefore, the SC concluded that the income/ wealth of the trust could not be assessed in the taxpayer's hands until the time the discretion to distribute had been exercised by the trustees.

Editor's note

The case highlights the point that the income of an overseas discretionary trust shall not be taxable in the hands of a beneficiary until distributed.

Revenue *v.* Capital receipt

Consideration for transfer of sales tax incentive is taxable as a revenue receipt

Sun-N-Sand Hotels Private Limited *v.* DCIT [TS-6-ITAT-2014(Mumbai-Tribunal)]

The Tribunal held that the income derived from the sale of an incentive is different from a subsidy received from the Government directly. Consequently, consideration for transfer of 'sales tax incentive' was held not to be a capital receipt and taxable as revenue receipt.

Facts

The taxpayer, Sun-N-Sand Hotels Private Limited, invested INR 100 million in wind power generation to set up two wind farms in Maharashtra. Maharashtra State Government policy on wind power provided that investment in plants and machinery, new buildings, etc. in the wind power project would qualify as eligible investment for availing sales tax benefit, and that one-sixth of the investment every year would be the sales tax benefit.

As per the policy, the sales tax benefit was transferable to a third party to whom electricity was sold by the Company. The taxpayer had already claimed tax benefit under the aforementioned scheme and was eligible for sales tax

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exemption of INR 16.6 million for AY 2003-2004 to AY 2006-2007. The taxpayer then sold the sales tax entitlement to Grasim Industries Limited.

Held

The Mumbai bench of the Tribunal observed that on perusal of the agreement it was evident that the consideration received was not a sales tax benefit/ incentive, but consideration for transfer of its entitlement. The consideration received on the transfer of sales tax incentive was nothing but a benefit arising from business and was therefore a taxable revenue receipt.

Editor's note

When a subsidy is received from the Government, it has been held to be a capital receipt as per judicial precedents, but transfer/ trading involving an incentive/ benefit has been held to be taxable as a revenue receipt in this case. By contrast, in a similar issue relating to the sale of Certified Emission Reductions (CER), the Hyderabad bench of the Tribunal, in the case of My Home Power Limited, held the proceeds to be a capital receipt. With the ongoing emphasis on development of renewable energy sector, such cases are bound to arise frequently before the judicial authorities, and taxability of the same continues to be a vexed issue.

Minority buyout out

Minority buyout through capital reduction under section 100 of the Companies Act, 1956

Cadbury India Limited – Company petition 1072 of 2009 (Bombay)

The Companies Act, 1956 provides a window of capital reduction which enable companies to provide an exit to their minority shareholders. The court had to ensure that the scheme was in the public interest, fair, just, not unreasonable, and does not unfairly discriminate against, or prejudice a class of shareholders. Valuation should be fair and reasonable and devoid of evident faults.

Facts

The global policy of Cadbury Plc, UK (Cadbury's ultimate parent) was to operate globally, only through wholly-owned subsidiaries or branches. Cadbury India Limited (Cadbury) operated as a wholly-owned subsidiary of Cadbury Schweppes Overseas Limited (Cadbury Schweppes) from 1948 to 1977.

However, Government policy changes in 1977 required Cadbury Schweppes to dilute its shareholding. Post the economic liberalisation, the promoters of Cadbury made open offers at INR 500 per share, as a result of which Cadbury Group's collective equity stake in Cadbury rose to 93.47%, and subsequently, the shares of Cadbury were delisted from the NSE and BSE in 2003. Later, Cadbury made a series of buy-backs during 2006-09 pursuant to which Cadbury Group's shareholding increased to 97.58%.

In November 2009, Cadbury convened an extraordinary general meeting in accordance with section 100 of the Companies Act, 1956 for passing a special resolution approving the reduction of capital. The special resolution was passed with an overwhelming majority (99.96%). Subsequently, Cadbury filed the petition for capital reduction in December, 2009. Cadbury obtained valuation reports from two independent valuers and offered INR 1,340 per share to non-promoter shareholders. No separate class meeting of minority shareholders was convened. Various shareholders objected that INR 1,340 per share was not a fair and adequate compensation and thus questioned the valuation obtained by Cadbury.

Held

HC clearly laid down following key doctrines to enable the smooth exit of minority shareholders in a fair and reasonable manner:

- Section 100 of the Companies Act, 1956 laid down three conditions: 1) the articles of association must permit reduction of share capital; 2) it was approved by a special resolution; and 3) such a resolution was sanctioned by court.
- The court needed to ensure that 1) the scheme was not against the public interest; 2) the scheme was fair and just, and not unreasonable; and 3) the scheme did not unfairly discriminate against or "prejudice" meant a class of shareholders. The court also observed that "prejudice" means a concerted attempt to force the entire class of shareholders to divest themselves of their holdings at a rate far below what was reasonable, fair and just.
- The court should consider the minimum following three tests: 1) is fair and reasonable value being offered to minority shareholders?; 2) have the majority of minority

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shareholders voted in favour of the resolution?; 3) was the valuation fair, reasonable and devoid of evident faults? (these tests were also relied on in the case of Sandvik Asia Limited *v.* Bharat Kumar Padamsi & Ors [Company Petition No. 478 of 2003]).

The court also observed that valuation was not an exact science. It was always and only an estimation, a best judgement assessment. For an objector to challenge a valuation, it must be shown that the assumptions were so evidently erroneous that the end result was wrong, unfair and unreasonable.

The court evaluated the contentions raised by the objectors and found them to be untenable and allowed the petition with valuation of INR 2,014.50 per share as arrived at by the court-appointed valuer.

Editor's note

The HC clearly laid down the key doctrines for a minority buyout in this Order, which have also been discussed in the earlier decisions in the case of Sandvik Asia Limited v. Bharat Kumar Padamsi and Others (supra). This should enable the smooth exit of minority shareholders in a fair and a reasonable manner, thus making it a win-win situation for both, the public shareholders and the company.

Notifications/ Circulars

Amalgamation/ arrangement

The RD is required to invite the comments of the IT Department and other sectoral regulators in cases involving amalgamation/ arrangement

Circular No. 1/2014 dated 15 January 2014

The MCA, in its general circular no. 1/2014, dated 15 January 2014 has introduced an initiative wherein the RD is required to invite specific comments/ inputs from the IT Department and other sectoral regulators within 15 days of receipt of notice under section 394A of the Companies Act, 1956, in cases involving amalgamation or arrangement.

In the light of a recent case where the RD failed to present the objections of the IT Department in a case involving amalgamation/ reconstruction, the MCA has decided to widen the scope of the RD's representation under section 394A of the Companies Act, 1956 with effect from 15 January 2014.

The RD will now be required to invite the specific comments/ views of the IT Department in cases involving arrangement/ compromise (under section 391 of the Companies Act, 1956) or reconstruction/ amalgamation (under section 394 of the Companies Act, 1956) within 15 days of receipt of notice under section 394A of the Companies Act, 1956, before filing his report to the HC. In addition, the RD must also, if it appears necessary, obtain and examine feedback from other sector regulators in particular cases.

This circular has emphasised that it is not for the RD to decide the correctness or otherwise of the objections/ views of the IT Department or other sector regulators. However, if the RD has any compelling reason to doubt the correctness of such views, a reference must be made to the MCA for taking up the matter before filing the representation under section 394A of the Companies Act, 1956.

If no response from the IT Department is forthcoming, the RD can presume that the IT Department has no observations/ objections to the action proposed under sections 391 or 394 of the Companies Act, 1956.

Editor's note

This Circular is in line with the provisions under the Companies Act, 2013 (yet to be announced). In order to comply with this Circular, the RD should also seek to obtain additional time from the HC, in order to provide his representations.

Disallowance of expenses

Disallowance of expenses under section 14A of the Act in cases where corresponding exempt income has not been earned during the FY

CBDT Circular No. 5/2014 dated 11 February 2014

Clarifications

- The CBDT has clarified that the legislative intent behind the introduction of section 14A of the Act was to allow only that expenditure which relates to the earning of taxable income and it therefore follows that expenses relating to earning of exempt income have to be considered for disallowance, irrespective of whether any such income has been earned during the FY or not.
- The above position was clarified by the use of the term 'includible' in the headings to section 14A of the Act -

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"Expenditure incurred in relation to income not includible in total income" and also in the heading to Rule 8D of the Rules, which indicates that it is not necessary that exempt income should be included in a particular year's income in order for disallowance to be triggered.

- Furthermore, section 14A of the Act does not use the words "income of the year" but "income under the Act". This also indicates that, in order to invoke disallowance under section 14A of the Act, it is not material that the taxpayer should have earned such exempt income during the financial year under consideration.
- The above position is further substantiated by the language "the average of the value of investment, income from which does not or shall not form part of the total income", as used in Rule 8D(2) clauses (ii) and (iii) of the Rules.

Editor's Note

By issuing this Circular, the CBDT has tried to address the controversy around this matter, and to clarify its view that to invoke disallowance under section 14A of the Act it is not necessary to have exempt income during that particular financial year. Considering the fact that CBDT circulars are not binding on taxpayers and the judiciary, it will be interesting to see how the judiciary positions itself on this matter after this circular has been released.

Amalgamation/ demerger schemes

CBDT circular directs CITs to send objections/ comments to RD, MCA, on proposed merger/ amalgamation/ demerger schemes

Circular No. F.No. 279/Misc./M-171/2013-ITJ dated 11 April 2014

Discussion

In a recent case of proposed amalgamation, the IT Department noted that the scheme was being carried out with retrospective effect, in order to avail the set-off of losses against the profits of another company, thus, adversely impacting on public revenue.

The department filed an intervention application opposing such amalgamation before the HC. However, the HC rejected the application on the ground that the department had no *locus standi* in the matter and that the power in this regard has been delegated to the RD, MCA.

Taking cognizance of the above issue, the MCA has issued Circular No. 1/2014 dated 15 January 2014 to RDs which lays down that the RD, while furnishing his report to the HC on the proposed scheme, has to seek comments of the IT Department within 15 days of receipt of the notice, to ensure that the proposed scheme has not been designed to defraud the revenue or is otherwise prejudicial to the interests of the revenue.

Accordingly, the CBDT issued a circular directing CITs to send their comments/ objections, if any, on any proposed scheme to the concerned RD.

Editor's note

MCA, vide its circular, has provided an advance opportunity to the IT Department to provide their objections/ comments on proposed schemes and accordingly, corporates need to be mindful of this development.

TDS

CBDT clarifies that TDS under section 195 is applicable only to the taxable portion and not to whole sum

CBDT Instruction No. 2/ 2014

The CBDT has issued directions to all CCITs and Director Generals of IT applicable in cases where the taxpayer fails to withhold tax under section 195 of the Act. In such situations, the TO shall determine the appropriate portion of the sum chargeable to tax as mentioned in section 195(1) of the Act and ascertain the tax liability. On this amount, the deductor shall be deemed to be the taxpayer-in-default under section 201 of the Act. The appropriate portion of the sum chargeable to tax will depend on the facts and circumstances of each case, taking into account the nature of remittances, the income component therein and other factors relevant to determining the appropriate portion.

The directions are in the wake of the recent SC rulings in the cases of GE India Technology Private Limited *v.* CIT [2010] 7 taxmann.com 18 (SC) and Transmission Corporation of AP Limited *v.* CIT [1999] 239 ITR 587 (SC) which indicate that tax has to be withheld under section 195(1) of the Act only on the portion of foreign remittance that represents the sum "*chargeable to tax*" in India, and not on the entire sum.

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Union Budget 2014 - Highlights

Withholding taxes on foreign currency borrowings

Interest payments on money borrowed by an Indian company in foreign currency under a loan agreement or by way of the issue of long-term infrastructure bonds (from 1 July 2012 to 1 July 2015) are subject to tax withholding @ 5%. It has now been proposed to extend the beneficial withholding tax rate of 5% to interest on borrowings by way of the issue of other long-term bonds as well. It is also proposed to extend the window for making such eligible borrowings up to 1 July 2017. This amendment is effective from 1 October 2014.

Characterisation of income in the case of FII

The definition of 'capital asset' has been amended in order to bring certainty to the characterisation of income arising from transactions in securities by FII. Any investment in securities by FIIs as per the SEBI regulations would be treated as a capital asset and thus liable to tax as capital gains.

Holding period of unlisted securities (including shares and mutual funds)

Until recently, shares, listed securities, units of UTI/ mutual funds and zero coupon bonds were treated as long-term capital assets if held for more than 12 months.

Now, unlisted shares and securities and units of mutual funds (other than equity oriented mutual funds) will need to be held for more than 36 months to be treated as a 'long term capital asset'.

The Finance Budget 2014 has proposed the following taxation regime for BT registered as an InvIT or REIT, the units of which will be listed on a recognised stock exchange:

Taxation on contribution of shares in company to the BT for units in the BT

- Capital gains on contribution of shares in the Indian company SPV by the transferor to the BT in exchange for units in the BT shall be deferred. The tax liability will arise at the time of the disposal of such units by the transferors;
- Minimum Alternate Tax may continue to apply on the transferor on book profits arising on such swap of shares
- The preferential capital gains regime (consequential to levy of the STT) available in respect of units of BT will not be available to the transferor in respect of these units at the time of disposal;
- For calculating the capital gains in the hands of the transferor on the sale of such units, the cost of the units shall be deemed to be the cost of acquisition to the transferor of the shares of SPVs contributed;
- The holding period of shares in the SPV, prior to the contribution of shares in the BT, shall also be included in the holding period of such units.

Taxation regime for the BT, SPV and unit holders

Interest Income

- Income by way of interest received by the BT from the SPVs will be accorded a pass-through status – such interest income shall not be taxable in the hands of the BT and there shall be no withholding tax at the level of the SPV;
- Distribution of such income by BT to the unit holders will attract withholding tax @5% in the case of payment to non-resident unit holders and @10% in case of payment to a resident unit holder;
- Interest income received by the resident unit holders shall be taxable at the normal rates;

Dividend Income

Dividend distributed by the SPV shall be subject to DDT - such dividend shall be exempt from tax in the hands of BT and unit holders

Capital gains earned by the BT

Capital gains on disposal of assets by the BT shall be taxable in the hands of the BT at the applicable rates. Going forward, distribution of such income would be exempt in the hands of the unit-holders

Other Income streams of BT

- Income of the BT, other than capital gains, dividend and interest income from SPVs, shall be taxable at the maximum marginal rate. Going forward, distributions of such income would be exempt in the hands of the unit-holders
- Capital gains on the transfer of units of BT through stock exchanges would be liable to STT. Gains earned by unit holders on such sale of units would be exempt from tax if

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the units qualify as long-term capital assets. A lower rate of 15% (plus applicable surcharge and cess) would be applicable to short-term capital assets. The gains will be treated as long-term if the unit is held for more than 36 months; otherwise it is taxable as short-term

- Where BT takes an external commercial borrowings, then the beneficial rate of 5% shall be available under section 194LC on interest payment to non-resident lenders

Related party transactions

Related party transactions – Key amendments and clarifications

General Circular No. 30/ 2014 dated 17 July 2014 and Notification dated 14 August 2014

The MCA has made clarifications and amendments in the context of approval of related party transactions under the Companies Act 2013 which are as follows:

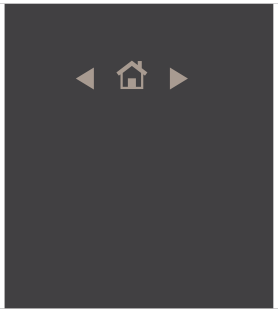
	Criteria	Amendments
1	Paid-up share capital threshold	Minimum threshold based on share capital removed (earlier limit INR 100 million)
2	Sale purchase or supply of any goods or material (directly or through agent)	10% of the turnover of the company or rupees INR 1000 million whichever is lower (earlier limit > 25% of annual turnover)
3	Selling or otherwise disposing of, or buying property of any kind (directly or through agent)	10% of net worth of the company or INR 1000 million whichever is lower (earlier limit > 10% of net worth)
4	Leasing of property of any kind	10% of net worth of the company or 10% of turnover or INR 1000 million (earlier limit > 10% of net worth or 10% of turnover)
5	Availing or rendering of any service	10% of the turnover of the company or INR 500 million whichever is lower (earlier limit > 10% of net worth)
6	Appointment to any office or place of profit in the company, its subsidiary company or associate company	No change i.e. remuneration exceeds INR 0.25 million per month
7	Underwriting the subscription of any securities to the company or derivatives thereof	No change i.e. remuneration exceeds 1% of net worth

It is also clarified that the limits shall apply for all companies and for transactions 2 to 5 above, to be entered into either individually or taken together with the earlier transactions during a FY.

Other clarifications

- A member would be considered as a related party only with reference to a contract/ arrangement for which the 'said special resolution' is being passed;
- Transactions arising out of compromises, arrangements, and amalgamations that are dealt with under the specific provisions of the Companies Act, 1956/ the Companies Act, 2013 will not attract the requirements of section 188 the Companies Act 2013;
- Contracts that were entered into by a company before 1 April 2014 in compliance with section 297 of the Companies Act, 1956 will require fresh approval only after the expiry of the original term of such contracts or if any modifications are made in such contracts.

1
Analysing tax issues
Corporate tax



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Assessing personal tax
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Case law

Share issue transaction

Issue of shares – out of TP rigours – Rules Bombay HC

Vodafone India Services Private Limited *v.* Union of India [2014] 50 taxmann.com 300 (Bombay)

The much-awaited ruling of the Bombay HC in the context of the Writ Petition filed by Vodafone India Services Private Limited (VISPL or the taxpayer) has been released. The taxpayer had challenged the following TP adjustments made by the Revenue:

- *alleged undervaluation of shares issued by VISPL in favour of its AE; and*
- *imputing of notional interest on such alleged undervaluation of shares, by treating the shortfall as loan advanced by VISPL to its AE.*

The taxpayer in the first Writ Petition (WP No.1877 of 2013) challenged these adjustments as being patently illegal and without jurisdiction. This was on the ground that the purported undervaluation could never have been brought under the ambit of taxation by taking course to TP, as the same was on capital account. The HC directed the DRP to decide the taxpayer's preliminary issue of jurisdiction. Consequent to this direction, the taxpayer made its submissions before the DRP. However, the DRP held the alleged undervaluation of shares as 'income' chargeable to tax. Further, it imputed notional interest on such alleged undervaluation by treating it as deemed loan.

Against this order of the DRP, the taxpayer filed a second writ petition before the HC. In this petition, the Bombay HC categorically held that issue of shares at a premium by the VISPL in favour of its AE did not give rise to any "income" from an International Transaction, and therefore, there was no need to invoke TP provisions.

Facts

- On 21 August 2008, VISPL issued 2,89,224 equity shares of the face value of INR 10 each at a premium, at INR 8,509 per share to its AE. This resulted in VISPL receiving a total consideration of INR 2.46 billion from its AE on issue of shares. The FMV of the equity shares at INR 8,519 per share was determined by VISPL in accordance with the Capital Issues (Control) Act, 1947.
- However, according to the TO and TPO, VISPL ought to have valued each equity share at INR 53,775, and hence, the shortfall in premium to the extent of INR 45,256 per share resulted into total shortfall of INR 13.09 billion.
- Both, the TPO and the TO held, on application of the TP provisions contained in Chapter X of the Act, that this amount of INR 13.09 billion was income chargeable to tax in the hands of VISPL.

They further held that this amount of INR 13.09 billion was required to be treated as deemed loan given by VISPL to its AE, and periodical interest thereon was to be charged to tax as interest income of INR 883.5 million in the FY 2008-09 i.e. AY 2009-10.

Held

Scope/ objective of TP Provisions

- A plain reading of section 92(1) of the Act very clearly brought out that "income" arising from an International Transaction was a condition precedent for application of Chapter X of the Act.
- TP provisions in Chapter X of the Act were to ensure that in case of international transaction between AEs, neither the profits were understated, nor losses overstated. They did not replace the concept of Income or Expenditure as normally understood in the Act, for the purposes of Chapter X of the Act.
- The objective of Chapter X of the Act was certainly not to punish multinational enterprises and/ or AEs for doing business *inter se*.
- ALP was meant to determine the real value of the transaction entered into between AEs. It was a re-computation exercise to be carried out only when income arose in case of an international transaction between AEs. It did not warrant re-computation of a consideration received/ given on capital account.

Income under section 2(24) – whether includes capital receipt?

- It could not be disputed that income would not in its normal meaning under the Act include capital receipts unless specified. (Followed the Bombay HC ruling in Cadell Weaving Mill Company Private Limited *v.* CIT [2001] 249 ITR 265 (Bombay) upheld by the SC in CIT *v.* D.P. Sandu Brothers Chembur Private Limited [2005] 273

Transfer Pricing

ITR 1 (SC).

- The amount received on issue of shares was admittedly a capital account transaction not separately brought within the definition of Income, except in cases covered section 56(2)(viib) of the Act *(Section 56(2)(viib) of the Act seeks to tax a company in which public are not substantially interested, in respect of the consideration received from a resident on sale of shares, which is in excess of the FMV of the shares, as income from other sources)*. Therefore, absent express legislation, no amount received, accrued, or arising on capital account transaction could be subjected to tax as income.
- Parliament had consciously not brought to tax amounts received from a non-resident for issue of shares, as it would discourage capital inflow from abroad.
- Neither the capital receipts received by the taxpayer on issue of equity shares to its AE, a non-resident entity, nor the alleged shortfall between the so called fair market price of its equity shares and the issue price of the equity shares, could be considered as "income" within the meaning of the expression as defined under the Act.
- A transaction on capital account or on account of restructuring would become taxable to the extent it impacts income, i.e., under-reporting of interest received or over-reporting of interest paid or claim of depreciation, etc. It was only that income which had to be adjusted to the ALP.
- The issue of shares at a premium was a capital account transaction and not income.

Notional income v. Real income

Reliance by the Revenue upon the definition of international taxation in sub clauses (c) and (e) of Explanation (i) to section 92B of the Act to conclude that income had to be given a broader meaning to include notional income, as otherwise Chapter X of the Act would be rendered otiose/ meaningless, was held to be far-fetched.

Provisions of Chapter X – whether charging or machinery provisions?

- In the absence of a charging section in Chapter X of the Act, it was not possible to read a charging provision into Chapter X of the Act *(Followed the SC ruling of* CIT *v.* Vatika Township Private Limited [2014] 49 taxmann.com 249 (SC)).
- Chapter X of the Act was a machinery (computational) provision to arrive at the ALP of a transaction between AEs.
- The substantive charging provisions were in sections 4, 5, 15 (salaries), 22 (income from house property), 28 (profits and gains of business), 45 (capital gain) and 56 (income from other sources). Even income arising from international transactions between AEs had to satisfy the test of income under the Act and had to find its home in one of the above heads, i.e., charging provisions.

Revenue's reliance on section 92(2) of the Act

Section 92(2) of the Act dealt with a situation where two or more AEs entered into an arrangement whereby, if they were to receive any benefit, service or facility, then the allocation, apportionment or contribution towards the cost or expenditure had to be determined in respect of each AE having regard to the ALP. It would have no application in VISPL's case where there was no occasion to allocate, apportion or contribute any cost and/ or expenses between the taxpayer and the AE.

Revenue's reliance on section 56 of the Act – income from other sources

Although section 56(1) of the Act would permit including within its head all income not otherwise excluded, it did not provide for taxing a capital account transaction of issue of shares as was specifically provided for in section 45 or section 56(2)(viib) of the Act and included within the definition of income in section 2(24) of the Act.

Conclusion

Issue of shares at a premium by VISPL to its AE did not give rise to any "income" from an international transaction. Therefore, there was no need to invoke TP provisions.

Editor's note

The judgement delivered by Bombay HC in favour of the taxpayer saves it from the rigours of the ongoing high-pitched TP litigation. It is a welcome judgement as the transaction of issue of shares by VISPL was nothing but a capital account transaction, and consequently the share premium, if any, ought to be a

Transfer Pricing

capital receipt. The TP provisions permit a transaction to be re-quantified but not to be re-characterised. Hence, there was no question of the transaction resulting in 'income' taxable in India. The judgement will not only serve as a precedent in the legal arena but will also lend a much needed boost to foreign investors. The judgement brings relief to numerous companies who are saddled with such unnecessary adjustments. It is timely in view of our Prime Minister's invitation to the world to manufacture and invest in India. This will certainly help in boosting the "Make in India" campaign and the overall investment climate of the country.

Shell follows Vodafone on issue of shares – Chapter X applies when income arises and is chargeable to tax

Shell India Markets Private Limited *v.* ACIT [2014] 51 taxmann.com 519 (Bombay)

Jurisdiction to apply Chapter X of the Act would occasion only when income arises out of an international transaction and such income is chargeable to tax under the Act. Further, the fact that the taxpayer chose not to declare issue of shares to its AEs in Form 3CEB as in its understanding it fell outside the scope of Chapter X of the Act, now stands vindicated by the decision of the HC in the case of Vodafone India Services Private Limited (Vodafone decision). Moreover, mere non-filing of Form 3CEB on the part of the taxpayer would not give jurisdiction to the Revenue to tax an amount which it does not have jurisdiction to tax.

Facts

The taxpayer had issued equity shares to its AEs at face value. Since the taxpayer believed that no income arose from this transaction, it did not report the transaction in Form 3CEB. During the course of TP assessment proceedings, the TPO noticed the transaction of issue of shares. The TPO alleged short receipt of consideration for issue of shares and made an adjustment for the difference between the ALP consideration (as computed by the TPO) and the consideration based on face value (as had been received by the taxpayer). The TPO also added an interest amount on the short receipt. The total adjustment amount was INR 15,220 crores (USD 2537 million).

Aggrieved, the taxpayer filed a writ petition before the HC on the issue of jurisdiction, i.e., the jurisdiction of Revenue to bring to tax amount received on capital account, *viz.,* issue of equity shares to its AEs under Chapter X of the Act. As a matter of abundant caution, the taxpayer also filed objections against the draft assessment order before the DRP on various issues including the issue of jurisdiction. However, before the HC, the taxpayer undertook to withdraw such objections, and therefore the HC considered it to be a fit case to be heard on merits.

Held

Alternative remedy

- The taxpayer had itself undertaken to withdraw its objections before the DRP on the issue of jurisdiction, and the HC had accepted such undertaking before considering the issue on merits.
- The issue under consideration in the instant case had been decided in the Vodafone decision (WP 871 of 2014; 368 ITR 1(Vodafone-IV)), which would be binding on all authorities within the State till the SC took a different view on it. Therefore, in view of the fact that the Revenue did not dispute that the issue on merits stood covered by the Vodafone decision, it would serve no useful purpose by directing the taxpayer to prosecute its objections before the DRP and the DRP then disposing the same in accordance with the Vodafone decision.

Transaction not disclosed in Form 3CEB

- In the Vodafone decision, the Revenue contended that as the taxpayer therein had filed Form 3CEB in respect of issue of shares to AEs, it had submitted to the jurisdiction of Chapter X of the Act and could not then contend that taxing the shortfall on capital account was without jurisdiction. In the instant case, an exactly opposite stand was being taken by the Revenue, i.e., failure on part of the taxpayer to disclose the transaction in its Form 3CEB should itself disentitle the taxpayer to any relief from the HC. The Revenue is expected to be consistent and not change its stand from case to case.
- In the instant case, the taxpayer chose not to declare issue of shares to its AEs in Form 3CEB as in its understanding it fell outside the scope of Chapter X of the Act. This view now stood vindicated by the HC decision in the Vodafone decision. If the taxpayer did not file a particular transaction in Form 3CEB when so required to be filed, the consequences of the same as provided in the Act would

follow. However, the mere non-filing of Form 3CEB on the taxpayer's part would not give jurisdiction to the Revenue to tax an amount which it did not have jurisdiction to tax.

Change in shareholding – business restructuring/ re-organisation?

In the present facts, this issue need not be examined because the jurisdictional requirement for Chapter X of the Act to apply is that income must arise, and following Vodafone decision, no income had arisen in the instant case. Thus, the jurisdictional requirement for application of Chapter X of the Act was not satisfied.

In conclusion

As held in the Vodafone decision, the jurisdiction to apply Chapter X of the Act would occasion only when income arose out of an international transaction and such income was chargeable to tax under the Act. The issues raised in the present petition were identical to the issues which arose for consideration before the HC in the Vodafone decision. Therefore, following the Vodafone decision, the TPO's order in the instant case, on the issue under consideration, was set aside.

Editor's note

Following the Vodafone decision, the HC has in no uncertain terms concluded in the instant case that jurisdiction to apply Chapter X of the Act would occasion only when income arises out of an international transaction and such income is chargeable to tax under the Act. Accordingly, the HC's decision suggests that for Chapter X to apply the twin conditions of income arising from an international transaction and its chargeability to tax under the Act, should be satisfied.

Another notable observation made by the HC is in relation to reporting/ disclosure of an international transaction in the Form 3CEB in the absence of applicability of Chapter X. The HC in the instant case has held that the taxpayer's position of not declaring the transaction of issue of shares to its AEs in Form 3CEB (since the taxpayer believed that the transaction fell outside the scope of Chapter X of the Act), is a position which has been upheld by the HC in the Vodafone decision. Impliedly, if the taxpayer believes that a transaction does not fall within the scope of Chapter X (i.e., income does not arise and it is not chargeable to tax under the Act), the taxpayer may take a position to not report/ disclose such transaction in its Form 3CEB. The HC additionally states that when a taxpayer does not file a transaction in Form 3CEB "when it is required to be filed" then the consequences as provided in the Act would follow. A conjoint reading of the above statements of the HC suggests that a taxpayer would be "required to" report/ disclose a transaction in Form 3CEB, when such transaction falls within the scope of Chapter X of the Act (i.e., income arises from such international transaction and the same is chargeable to tax under the Act), and not otherwise.

Most appropriate method

Tribunal upholds PSM over TNMM; adopts residual profit benchmarking considering each entity's contribution

Global One India Private Limited *v.* ACIT [2014] 31 ITR(T) 722 (Delhi-Tribunal)

Upheld use of Residual PSM over TNMM and accepted allocation of residual profits based on relative contribution of each enterprise. Also accepted the taxpayer's alternative argument that if the PSM, as applied by the taxpayer, did not fall within the strict definition of PSM provided in Rule 10B(1)(d) of the Rules, then the same could be considered as the "other method" (sixth method), as provided in Rule 10AB of the Rules, and be applied retrospectively as the insertion of the sixth method could be considered as curative in nature.

Facts

- Global One, or the Equant Group of companies (the taxpayer), was engaged in providing services of seamless connectivity and transmission of data for their global customers.
- Since, as per the Group's management, each of the subsidiaries would participate in and contribute unique intangibles; and/ or transactions between them were so inter-related, the same could not be examined separately to determine ALP of any single transaction under any "one-sided" testing. The Group adopted residual PSM as the TP method for all its subsidiaries situated across the world, by:
  - first providing standard or routine returns for the routine functions performed by each subsidiary; and thereafter,
  - splitting the overall residual profits/ losses of the Group amongst the various subsidiaries in proportion

to actual costs incurred by each of the subsidiaries, after giving common weightages to the three significant intangibles or intangible-creating functions, which were owned or performed respectively, by the various subsidiaries, namely - sales and marketing operations; network assets and operations; and field operations.

Held

- The taxpayer argued that the facts of the case clearly suggested that taxpayer contributed to and participated in unique intangibles, being the valuable network of the Global One Group; and further, the transactions between Global One India and its foreign AEs were so inter-related that the same could not be examined separately to determine ALP of any single transaction under any "one-sided" testing. Thus, Global One India could not be held to be a service provider for being subjected to TNMM. On the other hand, its case *per se* fell within the ambit of PSM.
- The Tribunal accepted the aforesaid factual matrix presented by the taxpayer, with the resultant corollary that the case of Global One India *per se* fell within the ambit of PSM.
- The taxpayer admitted before the Tribunal that Indian TP regulations [Rule 10B(1)(d) of the Rules] prescribed that a taxpayer could adopt:
  - either a contribution PSM, *viz.*, where the entire system profits are split amongst the various AEs who are parties to the transactions in question, or
  - a residual PSM, *viz.,* where each of the AEs who are parties to the transactions in question are first assigned routine/ basic returns for the routine functions performed by them; and thereafter, the residual profits are split amongst the AEs

in a manner that, whether or not a taxpayer adopted a contribution PSM or a residual PSM, the profits would need to be split amongst the various AEs who are parties to the transactions in question, on the basis of reliable external market data which indicated how unrelated parties would have split such profits in similar circumstances. In other words, as per the plain reading of Rule 10B(1)(d) of the Rules, a contribution or residual PSM would need to be supplemented by a comparable PSM.

- PSM prescribed by the rules of India was quite unique, as compared to both OECD and UN TP guidelines, in that both OECD and UN provided flexibility to the taxpayer to adopt any of the following sub-methods under the overall PSM, namely - (a) contribution PSM, (b) residual PSM or (c) comparable PSM, whereas the Indian Rules mandatorily required a taxpayer to adopt a comparable PSM to supplement either a contribution or residual PSM.
- Such prescription by the Indian TP regulations, to mandatorily use comparable PSM to split entrepreneurial profits, actually would make the PSM virtually redundant in most cases, since it was not possible to obtain reliable market data on third party behaviour in the matter of splitting profits, except in some rare cases of joint venture arrangements. However, in cases of transactions involving either contribution or exploitation of intangibles by all parties to the transaction, or where such transactions were extremely inter-related, of the types as in the case of Global One Group, where knowledge of third party behaviour is impossible to possess, but where the case otherwise deserves the treatment of PSM, then the prescription to mandatorily use a comparable PSM would render the whole machinery of PSM under the Indian TP regulations a nullity; and impossible to be implemented.
- Therefore, the taxpayer argued that where a case deserved to be otherwise covered by either a contribution PSM or residual PSM, then it should not be denied such methodology merely due to the fact that the Indian TP regulations provided for the mandatory usage of comparable PSM as a supplement to contribution PSM or residual PSM. This is because impossibility of performance provided under a statute had to be dispensed with; and a purposive interpretation, which would give "life & force" to the statute without changing its basic fabric, should be adopted. Therefore, in deserving cases, as in the case of Global One India, a residual PSM had to be applied, without resorting to comparable PSM.
- The Tribunal accepted the above arguments relating to applicability of residual PSM as above.
- The Tribunal also accepted the taxpayer's following alternative arguments in respect of the "other method" as introduced by CBDT with effect from 1 April 2012:

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- the sixth or "other method", as introduced by the CBDT with effect from 1 April 2012, i.e. on and from the AY 2012-13 through insertion of Rule 10AB, read with clause (f) of Rule 10B(1) of the Rules, was an omnibus or residual one, in the sense that it referred to any method, which took into account the price charged or paid or which would have been charged or paid for similar uncontrolled transactions with or between non-AEs, under similar circumstances. This method was meant to remove lacunae and hardships latent in the existing Act and Rules, where the definitions accorded to the existing 5 methods, as contained in clauses (a) to (e) of Rule 10B(1) of the Rules, would not have catered to any and every situation of computing the ALP. The Indian Revenue and judicial authorities would have needed to make alterations to the definitions of any of the existing methods to fit in any other plausible and robust method for determination of ALP, within the overall texture or scheme of the TP regulations of India.
- the insertion of the "other method" by the Indian Government, in exercise of the delegated authority granted by the Act, was a curative measure to remove unintended lacunae or hardships existing in the Rules. As per SC rulings, a curative amendment had to be given retrospective operation, though it might have been inserted in the statute book with prospective effect.
- though the "other method" was introduced with effect from 1 April 2012 through the insertion of Rule 10AB, read with clause (f) of Rule 10B(1) of the Rules, given its curative nature, as discussed above, the same needed to be held to have retrospective effect, i.e. to be operative since the inception of the TP regulations of India, thus covering the AYs involved in the case of Global One India, namely AYs 2007-08 and 2008-09.
- Thus, in view of the fact that the insertion of the "other method" might need to be construed with retrospective effect from AY 2002-03, given its curative nature, the case of Global One India would in any event, be covered by such "other method" and accepted even for the AYs under consideration, namely AYs 2007-08 and 2008-09.

Editor's note

This is a landmark ruling by the Tribunal wherein the application of PSM has been dealt with great maturity. The Tribunal not only accepted the purposive interpretation for a meaningful application of Residual PSM, but also accepted the taxpayer's alternative argument that if the PSM, as applied by the taxpayer, did not fall within the strict definition of PSM provided in Rule 10B(1)(d), then the same could be considered as the "other method" (sixth method), as provided in Rule 10AB of the Rules, and be applied retrospectively as the insertion of the sixth method could be considered as curative in nature.

Comparability analysis

SB refrains from bifurcating KPOs and BPOs, yet allows dissection of ITES based on functional mapping

For comparability analysis in the ITES sector, in order to attain 'relatively equal degree of comparability', the first step would be to apply a broad functionality test and select potential comparables at the ITES sector level. Further dissection or classification of ITES services could be done so as to select the entities having a 'relatively equal degree of comparability'. However, the ITES services could not be further bifurcated or classified as BPO and KPO services for the purpose of comparability analysis.

Potential comparables which satisfied comparability conditions could not be excluded merely on the ground that their profit was abnormally high. Also, abnormally high profit margin should trigger further investigation to ascertain the reasons for the same.

Facts

The taxpayer was engaged in providing IT and ITES services to its AEs. The ALP determination of these international transactions was in dispute. The taxpayer had selected TNMM as the most appropriate method to benchmark these transactions. The TPO, however, rejected the taxpayer's TP study and proceeded to determine ALP on his own. The taxpayer objected before the DRP. Eventually, a set of 10 comparables, with an operating profit/ total cost ratio of 28.04% (after allowing working capital adjustment), was finalised to benchmark both, IT and ITES services being provided by the taxpayer.

In its appeal before the SB, the objections raised by the

taxpayer essentially related to selection of comparables. The taxpayer objected to itself being compared with KPO companies when in fact it was providing low-end services as a BPO service provider. The taxpayer also objected to high profit margin companies being included in the set of comparables. In line with these objections, two questions were framed for the SB to address. The SB's ruling on both these questions is detailed below.

Question 1

Whether, for the purpose of determining ALP of international transactions of the taxpayer involved in providing back office support services to their overseas AEs, companies performing KPO functions should be considered as comparable?

Held

1. Broad functionality test

Under TNMM, comparability had to be judged with reference to FAR as provided in Rule 10B(2)(b) of the Rules. The specific characteristics of property or services as provided in Rule 10B(2)(a) were not that relevant to judge comparability when applying TNMM. The emphasis was on functional similarity than on product similarity, and depending on the facts and circumstances of the case, it may be acceptable to broaden the scope of comparability analysis to include uncontrolled transactions involving products that were different, but where similar functions were undertaken. *(Reliance placed on paras 1.38, 1.40, 1.41, and 2.68 to 2.75 of OECD TP Guidelines (OECD Guidelines). Reliance also placed on Chapter II, Part III, section B-2, and sections A-1, A-2, A-5 of Chapter III, of OECD Guidelines.)*

Therefore, when performing a comparability analysis in cases belonging to ITES sector, and in order to attain 'relatively equal degree of comparability', the first step would be to apply a broad functionality test and select potential comparables at the ITES sector level. The common thread that ran through companies engaged in ITES was that rendering of these services involved extensive use of information technology.

2. Whether further dissection, bifurcation or classification of ITES can be done?

The next issue that arose was whether further dissection or bifurcation of ITES was possible for rejecting or selecting the potential comparables.

There was no bar in the Indian TP regulations to exclusion of certain entities selected as potential comparables after applying broad functionality test, by further applying the functional test at narrow or micro level in order to attain 'relatively equal degree of comparability'.

In fact, Rule 10B(3) clearly provided for further exclusion of comparables selected by applying the test/ criteria given in Rule 10B(2), if there was any difference found between the enterprises entering into transactions which materially affected the cost charged or the profit arising from such transaction in the open market.

Further, even the OECD Guidelines in paragraph 3.56 stated that in some cases, all comparable transactions examined would not have a 'relatively equal degree of comparability'. It was suggested that where it was possible to determine that some uncontrolled transactions had a 'lesser degree of comparability' than others, they should be eliminated.

In view of the above, further dissection or classification of ITES services could be done depending on facts and circumstances of each case, so as to select the entities having a 'relatively equal degree of comparability'.

'Relatively equal degree of comparability' could be achieved by comparing the functional profile (principal functions) of the tested party with that of the potential comparables which were selected based on broad functionality test. The ones with lesser degree of comparability had to be eliminated.

3. Whether further classification can be done into BPO and KPO?

Based on material placed before the SB, the SB observed as follows:
(The SB referred to a report filed by the interveners, and prepared by National Skill Development Corporation (NSDC) on Human Resource and Skill Requirements in the IT and ITES Sector (2022). The SB also referred to an article, viz., "KPO - An Emerging Opportunity for Chartered Accountants" published in 2006 in the Journal "The Chartered Accountants". The SB noted the following from this report and article: - (i) skill sets required for BPO services were very different from KPO services (ii) Indian BPO industry was moving up the value chain through KPO service offerings (iii) While BPOs would contribute large volumes, KPOs would be a "value play" (iv) Unlike conventional BPOs, where the focus was on process expertise, the focus in

KPO was on knowledge expertise (v) KPO required domain expertise and high-end qualifications (vi) KPO required moving away from the simple execution of standardised processes to the implementation of processes that demanded advanced analytical and technical skills together with some decision-making)

- Even though there appeared to be a difference between BPO and KPO services, the line of difference was very thin.
- Although BPO services were generally referred to as low-end services while KPO services were referred to as high-end services, the range of services rendered by the ITES sector was so wide that a classification of all these services either as low-end or high-end was not always possible. Even within the KPO segment, the level of expertise and special knowledge required to undertake different services could be different.
- While KPO was termed as an upward shift of the BPO industry in the value chain, it had also been stated that the evolution of majority of Indian BPO sector had given rise to KPOs. BPO trying to upgrade to KPO was likely to render both, BPO as well as KPO services, in the process of evolution. Such entity therefore could not be considered strictly either as a BPO or KPO – it would provide mixed services, and determining exact portion of BPO and KPO services may not be possible in absence of relevant data maintained by the entity. Also, it may not be possible to create a third category which was somewhere in between BPO and KPO.
- KPO segment was referred to as a growing area, moving beyond simple voice services, suggesting thereby that only the simple voice and data services were the low-end services of BPO sector while anything beyond that was KPO services. The definition of ITES given in the safe harbour rules, on the other hand, included *inter alia* data search integration and analysis services and clinical database management services, excluding clinical trials. These services, which were beyond the simple voice and data services, were not included in the safe harbour definition of KPO services.

Accordingly, the SB concluded that keeping in view the large number of services falling under ITES; the difficulty in classifying these services either as low-end BPO services or high-end KPO services; the difficulty in creating a third category of entities falling in between BPO and KPO; and lesser degree of comparability even within BPO and KPO sector – the ITES services could not be further bifurcated or classified as BPO and KPO services for the purpose of comparability analysis. There could exist significant overlap between the ITES activities or functions with some activities/ functions being very fact-sensitive. Introducing an artificial segregation within ITES may lead to creation of more problems in the comparability analysis than solving them.

4. Conclusion on Question 1 in the context of the taxpayer:

In general:

The answer to whether companies performing KPO functions should be considered as comparable to a taxpayer providing back office support services would depend on the facts and circumstances of each case. If a taxpayer was found to have provided low-end back office support services like voice or data processing services as a whole, or substantially the whole, then companies providing mainly high-end services by using their specialised knowledge and domain expertise could not be considered as comparables.

On specific comparables:

Based on a detailed examination of the functional profile of the taxpayer, only a small proportion (10%) of the services rendered by it were not in the nature of low-end services such as voice or data processing as they required some degree of special knowledge and domain expertise. Moreover, these services were only incidental to the main services rendered by the taxpayer, which could be classified as low-end back office support services. The qualifications and profile of the work force employed by the taxpayer also supported this classification.

Based on a detailed examination of the functional profile of Mold-Tek Technologies Limited (*engaged in providing engineering and design services with specialisation in civil, structural and mechanical engineering*). and eClerx Services Limited (*engaged in data analytics, operations management, audits and reconciliation, metrics management and reporting services*), it could be concluded that these companies were engaged in providing high-end services involving special knowledge and domain expertise, unlike the taxpayer who was essentially a low-end services provider. It would thus be

difficult to attain 'relatively equal degree of comparability' between these companies and the taxpayer, and these companies should therefore be excluded from the list of comparables.

Editor's note

- *Based on material filed before it, the SB makes the following key observations:*
  - *There is only a thin line of differentiation between KPOs and BPOs*
  - *Since the range of ITES is so wide, classifying the services into high-end and low-end may not always be possible.*
  - *BPOs try and upgrade to KPOs, and in this process of evolution, one company may at one time do both KPO and BPO activities, making it difficult to identify that company as either a KPO or a BPO.*

These are some of the practical challenges recognised and acknowledged by the SB, in view of which, the SB refrains from bifurcating ITES into KPOs and BPOs.

- *Although the SB does not segregate KPOs and BPOs, it nonetheless allows broadening of the scope of a comparability analysis when applying TNMM to include companies where functions undertaken are similar to the tested party even if products are different. The SB also sanctions the dissection of ITES at a narrow or micro level based on mapping of functional profile (principal functions) so as to achieve 'relatively equal degree of comparability' – uncontrolled transactions having 'lesser degree of comparability' are to be eliminated. The SB appreciates that such mapping of principal functions would be a fact-sensitive and a fact-intensive exercise. Notably, a couple of key facts considered by the SB while deciding in the context of the taxpayer were (i) whether or not the services rendered required specialised knowledge and domain expertise, and (ii) what were the qualifications and profile of the work force.*
- *By not setting forth any stringent criteria for segregating KPO from BPO, but yet allowing the broadening of scope of a comparability analysis and a dissection of ITES at a micro level, the SB has provided sufficient flexibility to taxpayers for selecting or rejecting comparables based on a fact-specific analysis. It is recommended that taxpayers leverage from this flexibility and make the most of it, particularly when justifying their selection or rejection of comparables in any dispute resolution forum.*

Question 2:

Whether, based on the facts of the taxpayer's case, companies earning abnormally high profit margin should be included in the list of comparable cases for the purpose of determining the ALP of international transactions?

Held

After taking into consideration guidance provided in OECD Guidelines (*as per para 2.63 of the OECD Guidelines, where one or more of potential comparables had extreme results consisting loss or unusual high profits, further examination would be needed to understand the reasons for extreme results.), precedent decisions (BP India Services Private Limited, 24/7 Customer. Com Private Limited, Trilogy E-Business Software India Limited, and Stream International Services Private Limited*) and the Indian TP Regulations, the SB concluded as follows:

- Potential comparables which satisfied comparability conditions could not be excluded merely on the ground that their profit was abnormally high. The exclusion or inclusion would depend on the facts and circumstances of each case.
- Abnormally high profit margin should trigger further investigation. Such investigation would be to ascertain reasons for unusually high profit, and to determine whether earning of high profit reflected a normal business condition, or whether it was the result of some abnormal conditions prevailing in the relevant year.
- The profit margin earned by such an entity in the immediately preceding year(s) may also be taken into consideration to find out whether the high profit margin represented the normal business trend.
- If the high profit margin did not reflect normal business conditions, the high profit margin making entity should not be included in the list of comparables.
- Other observations made by the SB in the context of Question 2:
  - When measuring central tendency or averages (as also contemplated by the Indian TP Regulations), 'arithmetic mean' had to be taken as the sum of values

of all observations divided by number of observations. This was regardless of the dictionary meaning of 'arithmetic mean'.

- Extreme values at both ends of the spectrum would not materially affect the arithmetic mean and such extreme values were taken care of when the arithmetic mean was used as a measure of central tendency.
- In precedent decisions such as in the cases of BP India Services Private Limited, 24/7 Customer.com Private Limited, Trilogy E-Business Software India Limited, and Stream International Services Private Limited, the Tribunal had ruled in favour of the Revenue in relation to the issue under consideration in Question 2, and in doing so the Tribunal passed well discussed and well reasoned orders after taking into consideration not only the relevant Indian TP Regulations but also the relevant OECD Guidelines.

Editor's note

- *The SB has rightly held that companies with abnormally high margins should trigger further investigation, i.e., reasons for abnormally high margins should be investigated. The SB has then, in all fairness, opined against selection of companies with high profit margins which do not reflect 'normal business conditions'. This principle should apply equally to taxpayers and the Revenue. Therefore, if the Revenue introduces companies with abnormally high margins, then the onus should lie with the Revenue to establish that abnormally high margins have arisen in the normal course of business, and that there is no extraordinary factor contributing to the same.*
- *It is worth noting that during the course of the SB proceedings, an important argument was raised by the taxpayer, which the SB, however, did not opine upon. The taxpayer referred to paragraph 55.10 of CBDT Circular No. 14 (252 ITR (St.) 103) of 2001, wherein the purpose of arithmetic mean is explained. A reading of paragraph 55.10 clearly indicates that the expectation of the legislature is that there would not be any significant diversion between various ALPs if the different sets of comparable data are equally reliable. In essence, the legislature does not contemplate outliers in a reliable comparable set. The application of the above can be better explained by means of an example. Let's assume the comparable set to be the following:*

Comparable	Comparable 1	Comparable 2	Comparable 3	Comparable 4
Margins (%)	13	9	17	56

If the SB's diktat were to be followed, then abnormal margins of comparable 4 would need to be investigated further, say by examining past profitability trends, which may reveal the following:

Comparable 4's margins (%)	Year 1	Year 2	Year 3	Year under consideration
	13	21	18	56

Going by the above trend, the margins of Comparable 4 for the year under consideration do not appear to reflect normal business conditions, and Comparable 4 may thus need to be rejected in line with the SB ruling.

However, instead, the past profitability trends may possibly reveal the following:

Comparable 4's margins (%)	Year 1	Year 2	Year 3	Year under consideration
	54	49	58	56

If past profitability trends reveal the above, then, it may not be possible to reject Comparable 4 going by the SB's diktat, because Comparable 4's high margin in the year under consideration seems like a normal phenomenon. However, following paragraph 55.10, Comparable 4 may still be liable for rejection, as it continues to be an outlier, whereas the legislature does not contemplate outliers in a reliable comparable set.

Accordingly, the argument taken by the taxpayer around paragraph 55.10 was a very valid argument, and taxpayers are advised to continue to take such an argument in assessment/ judicial proceedings.

Corporate guarantees

Corporate guarantee not an international transaction

Bharti Airtel Limited *v.* ACIT [2014] 43 taxmann.com 150 (Delhi-Tribunal)

Held that corporate guarantee issued to an AE was not an international transaction. Also held that, it was unreasonable and inappropriate to treat share application money pending allotment for a long time, as being in the nature of interest-free loan to the AE.

Issue 1 - Corporate guarantee

Facts

The taxpayer issued a corporate guarantee to a bank on behalf of its AE, for which it did not incur any costs. In its TP study, the taxpayer determined 0.65% p.a. to be an arm's length commission for issuing the guarantee, which the TPO rejected and instead determined the arm's length commission to be 4.68% p.a. This was upheld by the DRP. Aggrieved, the taxpayer appealed to the Tribunal.

One of the key arguments taken by the taxpayer before the Tribunal was that a corporate guarantee issued by a taxpayer, which did not involve any costs to the taxpayer, could not be subjected to ALP adjustment as it did not come under the ambit of Indian TP regulations. The Tribunal considered only this ground and ruled in favour of the taxpayer, thereby deleting the TP adjustment. The Tribunal's ruling is summarised below.

Held

While ruling in favour of the taxpayer, the Tribunal held as follows:

- In order to attract the ALP adjustment, a transaction had to be an 'international transaction' under section 92B of the Act. The Explanation to section 92B of the Act, inserted with retrospective effect from 1 April 2002, was clarificatory in nature and hence did not alter the basic character of the definition of 'international transaction' under section 92B of the Act. Therefore, this explanation must be read in conjunction with the main provisions embodied in section 92B of the Act.
- The international transactions in clauses (a), (b) and (d) of the Explanation were already explicitly covered in section 92B(1) of the Act. It was only the clauses (c) and (e) of the Explanation that were not explicitly covered, and thus fell under the residuary clause that covered "any other transaction having a bearing on profits, incomes, losses, or assets of such enterprises". Therefore, if a transaction had to be covered by clauses (c) and (e), the transactions had to be such as to have a bearing on profits, incomes, losses or assets of such enterprise. When a taxpayer extended assistance to an AE, which did not cost it anything, and for which the taxpayer could not have realised money by giving it to someone else during the course of its normal business, such an assistance or accommodation did not have any bearing on its profits, income, losses or assets, and, therefore, was outside the ambit of 'international transaction' under section 92B(1) of the Act.
- In any event, the onus was on the revenue authorities to demonstrate that the transaction was of such a nature as to have "bearing on profits, income, losses or assets" of the enterprise. There was no effort made to discharge this onus in the instant case. There had to be some material on record to indicate, even if not to establish it to the hilt, that an intra-group international transaction had some impact on profits, income, losses or assets.
- The impact on profits, incomes, losses or assets could be immediate or in future [as contemplated in clause (e)], but it could not be contingent or hypothetical – it had to be on a real basis. In the context of guarantee, a liability could arise for the guarantor if a default took place – however, this was a hypothetical situation and, based on this hypothesis, the guarantee could not be said to be an international transaction.
- There had been decisions taken in the past which dealt with quantum of ALP adjustments in guarantee charges, but in none of these cases had the scope of 'international transactions' under section 92B(1) of the Act come up for examination. A judicial precedent could not be an authority for dealing with a question which had not even come up for consideration in that case *(Supreme Court in the case of CIT v. Sun Engineering Works Private Limited [1992] 198 ITR 297 (SC))*. Accordingly, the conclusion reached in the instant case was based on interpretation of

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the legal provisions under section 92B of the Act. Further, no judicial precedent contrary to such interpretation of the legal provisions had been cited by the Revenue.

Issue 2 – Share application money

Facts

The taxpayer made payments to its AE towards share application money, which did not get converted into equity for a long time after the initial payment. The TPO objected to the taxpayer not having earned any interest for the period before which the allotment of shares eventually took place. Since the capital was blocked for a long time, the TPO deemed the share application money to be an interest-free loan to the AE for the period from the initial payment to the date on which the shares were actually allotted, and ALP adjustment was made for interest thereon. This was upheld by the DRP. Aggrieved, the taxpayer appealed to the Tribunal.

Held

The Tribunal ruled in favour of the taxpayer and held that it was unreasonable and inappropriate to treat the transaction as being in the nature of interest-free loan to the AE. In concluding so, the Tribunal made the following observations:

- The situation in the current case was not the same as an interest-free loan granted on commercial basis between the share applicant and the company to which capital contribution was made. There was also no provision in the law enabling a deeming fiction, so as to deem share application money to be interest-free loan.
- The transaction under consideration was of capital subscription, and its character was not in dispute. Yet, it has been treated as being in the nature of interest-free loan. It was not open to the revenue authorities to re-characterise the transaction unless it was found to be a sham or bogus transaction. There were no specific powers vested in the TPO to re-characterise the transaction. Re-characterisation could be done by revenue authorities when the transactions were found to be substantially at variance with the stated form. In the present case, it could not be held that this was a bogus transaction because the subscribed share capital had indeed been allotted to the taxpayer. The transaction was thus genuine.
- There was no finding, in the instant case, as to what was the reasonable and permissible time period for allotment of shares. Thus, even if one was to assume that there was an unreasonable delay in allotment of shares, the capital contribution could have, at best, been treated as an interest-free loan for the period of 'inordinate delay' and not the entire period between the date of making the payment and date of allotment of shares.
- Even if ALP had to be determined in respect of such deemed interest-free loan on allotment of shares under the CUP method, as has been claimed to have been done in this case, it should have been done on the basis of what would have been interest payable to an unrelated share applicant if, despite having made the payment of share application money, the applicant was not allotted the shares. This could be determined by the relevant statute. However, the TPO, in the instant case, had not brought on record anything to show what interest an unrelated share applicant would have received for the period between making the share application payment and allotment of shares. Thus, the very foundation of the ALP adjustment was devoid of legally sustainable merits.
- Decisions in cases of VVF Limited *(ITA No.673/Mum/2006, ITAT Mumbai, AY 2002-03)* and Perot Systems TSI India Limited *v.* DCIT *([2010] 37 SOT 358 (Delhi-Tribunal))* could be distinguished as they were not cases in which capital contribution was deemed to be an interest-free loan.

Editor's note

For corporate guarantees issued to overseas AEs, apart from resorting to legal arguments as taken by the taxpayer in the instant case, it would nonetheless be advisable for taxpayers with similar transactions to agree the terms based on commercial and TP principles. In this regard, international best practices of considering shareholding nature of functions, creditworthiness of borrower, implicit/ explicit support, comparable intra-group financial arrangements, etc. may be considered. It would be prudent to follow such an approach also because the verdict of the Tribunal in the instant case is based on legal principles, which could possibly be overturned by either clarifications/ amendments to the law (as has happened in the past) and/ or by intervention at higher judicial forums.

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As for the transaction of share application money, the decision of the Tribunal is certainly welcome as the Tribunal dissented to its re-characterisation as a loan, and appreciated the legitimacy and substance of the transaction.

Concrete evidence

Tribunal recognises difficulty in providing 'concrete' evidence in respect of services provided against management fee

TNS India Private Limited *v.* ACIT [2014] 32 ITR(T) 44 (Hyderabad-Tribunal)

In principle, allowed the claim of management fees. Acknowledged evidence filed by the taxpayer and also recognised difficulty in providing 'concrete', evidence in respect of services provided against management fee.

Facts

The taxpayer was engaged in conducting quantitative and qualitative market research. It had entered into several international transactions with its AEs, of which the disputed transaction was that of payment of management fee. The other international transactions were accepted as having ALP, after being aggregated and benchmarked using TNMM. The TPO challenged the management fee transaction and determined its ALP to be NIL.

The following facts in respect of the management fee transaction are worth noting:

- As a part of its business strategy, the Group had centralised key management functions in AEs which were set up exclusively for this purpose. These AEs provided management services, and were non-profit entities.
- The services/ process/ know-how/ systems/ knowledge were available to the taxpayer on a real-time and continuous basis through the Group intranet.
- The taxpayer received the advantage of specialisation, skills and expertise, know-how and technology, which was developed in-house by the Group in all core areas of its business of market research. Other benefits were in the form of global consistency in business practices, economies of scale, and improvements in efficiency.
- As documentary evidence to counter the TPO's challenge, the taxpayer submitted the following:
  - documentation including a detailed description of services received from AEs;
  - inter-company service agreement;
  - financial statements and tax return of AEs;
  - confirmation that such payments had been made by other group companies too (average management fee as a percentage of sales paid by other group companies was 6.07%, which was higher than 4.5% paid by the taxpayer);
  - basis of allocation of costs by the global headquarters and regional headquarters; and
  - details of withholding tax on management fee payments.

Held

- Providing concrete evidence with reference to services provided in the nature of specific activities in day-to-day business was difficult as they were not tangible in nature. However, by the way business is conducted, one could perceive the same. Unless the TPO observed the role of AEs in the taxpayer's business, it would be difficult to place on record the sort of advice given in day-to-day operations. Accordingly, the TPO's contention that services were not rendered, was not acceptable.
- Taxpayer had placed a lot of evidence in support of its claim. The detailed write-up of services provided and benefit received, as provided by the taxpayer, had neither been contradicted by the Revenue authorities, nor had they specified any other evidence that would satisfy them.
- The role of a TPO was to determine the ALP of a transaction. By rejecting outright the entire payment of management fee, the TPO went beyond his jurisdiction. In the guise of determination of ALP, the TPO could not question the business decision of payment and determine that no services were rendered. [*Reliance placed on Delhi HC ruling in case of CIT v. EKL Appliances Limited [2012] 345 ITR 241 (Delhi)*].
- While determining the PLI for the taxpayer under TNMM, the management fee transaction had been considered. After paying management fee, the taxpayer's PLI under TNMM was higher than that of comparables. Considering

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this, adjustment on account of management fee was not proper.

- Inter-company service agreement was entered into in an earlier year and the taxpayer had been paying and claiming management fee in earlier and later years.
- The management fee amount was within the norms prescribed for payment of fees to various group companies of similar nature.

In view of the above, the Tribunal, in principle, allowed the claim of management fees. However, it observed that since the TPO had not examined whether or not the payment of management fee was in accordance with the pricing methodology laid out in the inter-company service agreement, the matter relating to quantification of the claim was restored back to the TPO.

Editor's note

- *The Tribunal's recognition of the fact that it could be difficult to put forth 'concrete' evidence to prove rendering of services and benefits received, as they may not be tangible in nature, is indeed the most reassuring and welcome outcome of this verdict. Interestingly, to drive home this point the Tribunal has made a very apt comparison of the role of management services in a business, with the role of an anaesthetist in an operation conducted by a surgeon. To explain, the Tribunal has stated that there may be evidence of an operation in the form of scars etc. However, the role of an anaesthetist before the operation and after gaining consciousness was difficult to prove.*
- *It is worth noting that documentary evidence filed by the taxpayer in the instant case was not only acknowledged by the Tribunal, but was also considered by it to be in plenty. Needless to say, taxpayers in general, would need to maintain documentation specific to their own set of facts. However, just as it happened in the instant case, if documentary evidence is robust, it would become difficult for the Revenue authorities to either contradict the evidence or suggest any additional evidence to be filed. This could significantly fortify a taxpayer's position in an appeal, and is thus a key takeaway from this decision.*
- *From the ruling, it appears that the TNMM, using the aggregation approach, has been accepted by the Tribunal as a corroborative methodology to justify the management fee. The message, therefore, is that when building up a defense for management fee transactions, it may be worthwhile to also undertake a TNMM analysis of the post-management fee net profit.*

Royalty

TPO not justified in recalculating royalty based on his own interpretation of term, 'Net Sales'

Akzo Nobel Chemicals (India) Limited *v.* DCIT [TS-45-ITAT-2014(Pune-Tribunal)-TP]

Held that the TPO was not justified in recalculating royalty based on his own interpretation of term 'Net Sales' as the 'Net Sales' formula considered by the taxpayer was not found to be inconsistent with, or violative of, the respective Government or RBI guidelines.

Facts

- The taxpayer was primarily engaged in the business of manufacturing and sale of speciality chemicals which acted as polymerization initiators. The international transactions with its AEs were segregated into (i) Manufacturing segment, which comprised of import of raw materials, export of finished goods, import of bulk raw material for trading and repacking and payment of royalty; and (ii) Marketing and sales support segment, for the purposes of benchmarking under the TNMM.
- The taxpayer had entered into a technical collaboration agreement with its AE and paid royalty on net sales at the rate of 5% for domestic sales and 8% for export sales. These rates were approved by the Government Authorities for a period of seven years. The royalty amounts paid to the AE were computed on 'Net Sales' in accordance with the provisions of Foreign Exchange Control Manual of RBI.
- During assessment proceedings, with respect to the royalty payment, the TPO made an addition of INR 9,166,061 by:
  - Rejecting the method adopted by the taxpayer for computing 'Net Sales' for the purpose of computing royalty amount
  - Concluding that the cost of certain raw materials, which were constituent chemicals (not having any value addition during the manufacturing process followed by the taxpayer) and equivalent to the

expression of bought out components *(as referred in the royalty computation prescribed in the provisions of Foreign Exchange Control Manual of RBI)*, should be deducted from the sales value to arrive at the 'Net Sales' on which royalty is to be computed;

- Disregarding the taxpayer's contention that the 'Net Sales' computation adopted by the TPO was in contradiction to the prescribed formula for 'Net Sales';
- Considering the royalty rate(s) agreed by another group company, i.e. Tianjin Akzo Nobel Peroxides China (TANPC), with its AE as comparable rate(s) for determining the ALP of the royalty payment made by the taxpayer;

- As regards transactions pertaining to export of finished goods, in respect of a product 'Trigonox 25C75', which had been sold to the AE as well as to third parties in India, the TPO concluded that an internal CUP existed, and had accordingly made an addition of INR 1,134,000 to the export price of this product sold to the AE (after comparing prices charged to the AEs with those charged to third parties).
- Aggrieved by the TPO's order, the taxpayer moved an application with the DRP which however upheld the TPO's order without providing any cogent reasons. Aggrieved by the DRP's order, the taxpayer filed an appeal with the Tribunal.

Held

Payment of Royalty

- The action of the TPO in re-working the amount of royalty based on his interpretation of 'Net Sales' was incorrect and impermissible.
- The terms and conditions of the royalty agreement used for computing the royalty amount were approved by the Government of India and it was mandated for the taxpayer that the calculations of royalty be subject to the relevant provisions of Foreign Exchange Control Manual of RBI.
- Further, leveraging on the principles laid down by Delhi HC in the case of CIT *v.* EKL Appliances Limited [2012] 345 ITR 241 (Delhi), which in turn leveraged on the OECD guidelines, the Pune Tribunal held that in the facts of the case of the taxpayer, TPO had to examine the international transactions as entered into by the it, and should not have disregarded the actual transaction.
- The Tribunal took cognisance of the fact that the entire gamut of royalty payment by the taxpayer to the AE was in accordance with the Foreign Technology Collaboration agreement, which was duly approved by Government of India in accordance with its policies which were applicable across the spectrum (i.e. to all enterprises in the country).
- Accordingly, the Tribunal held that the TPO was not justified in recalculating royalty based on his own interpretation of term 'Net Sales' as the 'Net Sales' formula considered by the taxpayer was not found to be inconsistent with, or violative of, the respective Government or RBI guidelines.
- The Tribunal held that bought-out components meant such material on which no further processing was required and were directly fitted into the final product. In this regard, the Tribunal stated that the relevant raw materials in the instant case, which were classified as constituent materials by TPO, underwent processing and were irretrievable once the final product was manufactured, and hence these raw materials could not be equated with bought-out components.
- With respect to application of CUP method by the TPO for benchmarking the royalty transaction, the Tribunal held that the comparable transaction picked by the TPO was a controlled transaction, and could not be considered for comparability analysis under the CUP method. In addition to the same, the Tribunal also held that on account of differences in the agreement period and the list of products covered in the two agreements, the royalty rates of TANPC could not be considered.

Export of finished goods

- The Tribunal held that there was no infirmity on the TPO's part in invoking the CUP method because identical products were sold to the AE and to third parties. However, the Tribunal held that certain level of adjustments were required to be made to the CUP considered by the TPO for comparison purposes. The following were the differences for which an adjustment should have been made:

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- volume of sales;
- export to AE *vis-a-vis* domestic sale to third party being to the direct customer (difference in position in the value chain);
- a portion of the profit being retained by the AE for its functions performed;
- the benefit on account of export linked schemes;
- incurring of marketing/ selling cost on domestic sales;
- difference in credit terms; etc.

- Accordingly, the Tribunal considered the adjusted price of INR 300 per kg (on *ad hoc* basis) instead of INR 365 per kg, i.e., the price at which goods were sold to third parties, for computing the ALP for Trigonox 25C75.

Editor's note

This ruling by the Pune Tribunal is a landmark ruling, setting the precedent which will enable taxpayers to challenge intervention by tax authorities in royalty computation methodologies prescribed by another Government Authority. The Ruling also reiterates the principle that the TPO has to examine international transactions as have been entered by the taxpayer. Further, with respect to export of finished goods, it would have been more appropriate to reject the application of CUP method on the premise that reliable and accurate adjustments could not be made to nullify the impact of transactional differences on the price of a particular product, rather than making adjustments on ad hoc basis.

Market value

Tribunal elucidates the concept of 'market value' for claiming tax holiday by captive power units

Shree Cement Limited *v.* Add.CIT [2014] 31 ITR(T) 513 (Jaipur-Tribunal)

Tribunal has, in the context of power generating units, elucidated the concept of 'market value' in terms of explanation to section 80-IA(8). It has negated the 'best' market value concept adopted by the Revenue. Further, the discretion to adopt any market value (so long as it is a 'market value'), without restrictions, has been granted to the taxpayer.

Facts

The taxpayer manufactured cement in Rajasthan by sourcing power from its captive power unit and the State Electricity Grid. The taxpayer claimed tax holiday under section 80-IA(8) of the Act in respect of its captive power unit. For the purpose of claiming tax holiday, the taxpayer considered the rate at which power was sold by an independent power supplier to Distribution Power Companies in Rajasthan, and also Power Exchange Prices, i.e., the taxpayer considered external comparable prices as the 'market value' for claiming the tax holiday.

In its original return, the taxpayer had selected the rate at which its cement unit purchased electricity from the State Electricity Grid ('Grid rate' or internal comparable price) as 'market value'. However, in its revised return, the taxpayer enhanced its tax holiday claim under section 80-IA(8), by replacing the internal comparable price (Grid rate) with external comparable prices as 'market value'.

The TO disallowed the enhanced tax holiday claim and considered the Grid rate as the 'best' market value, which was upheld by the CIT(A). Aggrieved, the taxpayer appealed before the Tribunal.

Held

The Tribunal, by placing reliance on the judicial precedents in the cases of Aztec Software & Technology Services Limited *v.* ACIT [2007] 107 ITD 141 (Bangalore-Tribunal)(SB); ACIT *v.* Maersk Global Service Centre (I) Private Limited [2011] 133 ITD 543 (Mumbai-Tribunal); and CIT *v.* Vegetable Products Private Limited [1973] 88 ITR 192 (SC), deleted the disallowance made by the TO, and held as follows:

- Once the revised return was validly filed by the taxpayer and accepted by the TO, the original return became *non-est,* as it was completely substituted by the revised return.
- The value adopted by the taxpayer, be it value as per independent third party trading transactions, or as per the Power Exchange, or the Grid rate, or any other independent transaction (for the relevant period and relevant area) constituted 'market value' in terms of explanation to section 80-IA(8).

However, the value at which the State Grid or a third party purchased power from the captive power unit (which is the surplus power not required by the cement unit) did not constitute 'market value' in terms of explanation to section 80-IA(8). Here, it was the 'principle' which was the deciding factor.

- The Revenue sought to infer that the Grid rate was the 'best' market value in the present context. However, there was no concept of 'best' market value in law, and the taxpayer could not be compelled to select only such value as market value. Any such attempt by the Revenue was clearly beyond the explicit provisions of section 80-IA(8).
- Where a basket of market values was available for the relevant period and relevant geographical area where the eligible tax holiday unit was situated, the law did not put any restriction on the taxpayer as to which market value to adopt. It was entirely the taxpayer's discretion to adopt any one of them as market value. The option favourable to the taxpayer could be adopted. If the value adopted by the taxpayer corresponded to 'market value' as per explanation to section 80-IA(8), it was not permissible for the Revenue to re-compute profits and gains of the eligible unit by substituting the same with any other 'market value'.
- Specifically in this case, the taxpayer had adopted actual transactions undertaken by independent entities, and the volume of transactions was also substantial, which showed that the taxpayer had not handpicked transactions.

Editor's note

The Tribunal has, in the context of power generating units, elucidated the concept of 'market value' in terms of explanation to section 80-IA(8). It has negated the 'best' market value concept adopted by the Revenue. Further, the discretion to adopt any market value (so long as it is a 'market value') without restrictions has been granted to the taxpayer. These are undoubtedly significant outcomes of this decision, and that too in favour of the taxpayer. Having said that, our comments on some of the specific points made by the Tribunal are as follows:

- *The Tribunal has held that the rate at which the State Grid purchases power from the captive power unit of the taxpayer cannot be considered as 'market value', and that this is based on 'principle'. The 'principle' referred to in the decision is not explained. However, the 'principle' could be that the rate of 'surplus power supplies' cannot be compared to the rate of 'supplies made pursuant to regular demand' from the cement unit. This is a general economic principle typically followed in pricing, i.e., suppliers tend to price surplus products or services more liberally than products or services which are in demand, and hence the Tribunal may have considered them to be incomparable.*
- *When explaining what constitutes 'market value' in terms of explanation to section 80-IA(8), the Tribunal has approved of market values pertaining to a relevant 'period'. This is an important observation in light of the fact that section 80-IA(8) refers to market value on the 'date' of transfer. By sanctioning the use of market values pertaining to a relevant 'period', rather than being fixated to a 'date', the Tribunal has allowed a liberal and far more practical interpretation of this particular provision of the section.*
- *Notably, this Tribunal ruling relates to an AY before introduction of domestic TP provisions to tax holiday units. From the AY 2013-14 onwards, the below-mentioned principles laid down by the Tribunal in this case would need to be aligned with the TP provisions, and with principles and ratios laid down in TP jurisprudence:*
  - *The Tribunal in this case has held that where a basket of market values are available, it is the taxpayer's discretion to adopt any one of them, which is favourable to the taxpayer. However, TP provisions, for the purpose of determination of ALP, prescribe the 'arithmetic mean' of all comparable prices, rather than any 'one price' which is most favourable.*
  - *Further, the Tribunal in this case has upheld the use of an external comparable, and has stated that as long as it constitutes a 'market value' in terms of explanation to section 80-IA(8), the Revenue is not permitted to substitute the same with an internal comparable. However, in some of the judicial precedents in the context of an international TP scenario, Tribunals have preferred internal comparables over external comparables.*

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Functional analysis

Tribunal lays down fundamental differences between merchant banking and private equity fund related activities and accepts markup earned by taxpayer for sub-advisory services

Xander Advisors India Private Limited *v.* ACIT [TS-361-ITAT-2014(Delhi-Tribunal)-TP]

Functions performed by a merchant banker is not comparable to the functions performed by a private equity fund wherein the former is a capital raising/ advisory related service and the latter being investment related business. The Tribunal has also explicitly distinguished the role of the Fund, the Manager and the Sub-advisor in the investment management value chain.

Facts

The taxpayer was engaged in rendering advisory services to its AE in Mauritius for AY 2008-09. In relation to such services, the functional profile of the taxpayer *vis-à-vis* its AE was articulated as under:

- Evaluation of investment opportunities by the taxpayer;
- Receipt of inputs from AE on the proposed opportunity;
- Conducting detailed research based on direction from AE;
- Presentation of analysis in form of Investment Memo to the AE;
- Decision by the AE and;
- Post investment support service rendered by the taxpayer

For the afore-mentioned activity, the taxpayer was compensated with a mark-up of 20% of actual costs.

In the TP study report, the taxpayer had used a set of 17 comparables for benchmarking purposes. However, the TPO selected 7 comparables from the taxpayer's set to determine the ALP in relation to the advisory activity of the taxpayer. Further, the DRP also confirmed the set of comparables selected by the TPO.

Therefore, the taxpayer preferred an appeal before the Tribunal contesting removal of three companies on account of functional differences. Before the Tribunal, the taxpayer characterised itself as a private equity fund, and held that the disputed companies were merchant bankers and hence not comparable.

Held

Ruling in favour of the taxpayer, the Tribunal directed exclusion of the three disputed companies and set aside the matter before the TPO for determining the ALP considering the balance set of four companies.

Some key takeaways from the Tribunal ruling that are worth highlighting have been produced below:

- The Tribunal acknowledged that merchant bankers are not comparable to private equity fund on account of the following factors:

Merchant Banking activity	Private Equity Fund related activity
• Involves finance raising and consultancy based activity • Includes project/ corporate counseling in areas of capital restructuring, amalgamations, mergers, takeovers, etc. • Includes broking and portfolio management	• Comprises of collecting funds for investment in or buying of companies • Involves making investment decision and managing acquired companies • Remuneration is in the form of management fees

  Based on the above analysis of both the activities, the Tribunal held that merchant banking was a **capital raising/ advisory service related activity** whereas private equity was an **investment related business**.

- The Tribunal has held that the taxpayer was a sub-advisor in the value chain and rejected the taxpayer's characterisation of a private equity fund. In doing so, the Tribunal differentiated the role of a fund, a manager and a sub-advisor in the value chain as under:-
  - **Fund:** Responsible for private equity investment
  - **Manager:** Provides overall investment advice
  - **Sub-advisor:** Provides general advisory services to Manager
- In relation to the companies contested by the taxpayer, the Tribunal held that companies engaged in financial restructuring, syndication of debt/ loan, equity placement and Merger and Acquisition advisory activities are not comparable to advisory services of the taxpayer. The Tribunal has also held that where only a portion of the

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income component was comparable to the taxpayer's activity, and no segment level information was available, then such companies should not be considered in the benchmarking analysis.

- Further, the Tribunal held that the taxpayer ought to be allowed an opportunity to exclude companies inadvertently considered as a part of the comparable set in the TP Study.

Editor's note

- *This is the first ruling wherein the Tribunal has laid down key fundamental differences between a merchant banker and a private equity model.*
- *Though the taxpayer characterised itself as a private equity fund, the Tribunal held that the nature of activities performed by the taxpayer were akin to that of a sub-advisor in the value chain. It further held that that it is the real character of the transaction, and not merely the nomenclature, that is important in performing a robust comparability analysis.*
- *This ruling re-emphasises principles emerging from prior rulings such as Carlyle India Advisors Private Limited ITA NO. 7901/ MUM/ 2011 (AY 2007-08) and ITA No. 7367/ Mum/2012 (AY 2008-09), which explicitly distinguishes merchant bankers from investment advisors, and, importantly, distinguishes the role of the Fund, the Manager and the Advisor, as different constituents in the investment management value chain. In this space, that has seen significant debate on characterisation and litigation around pricing models/ mark-ups, the aforesaid Ruling provides important guidance on the matter.*

Tax holiday unit

No TP adjustment if the exempt income is lower than the income determined in accordance with the arm's length principle

Motif India Infotech Private Limited *v.* ACIT [2014] 44 taxmann.com 467 (Ahmedabad-Tribunal)

No TP adjustment required to be made on exempt income since the exempt income declared was lesser than the income determined in accordance with the arm's length principle. This was based on the premise that there was no erosion of the tax base. Further, where international transactions entered into by the taxpayer gave rise to exempt income, the provisions contained in the Indian TP Regulations (ITPR) would need to be applied to ensure that the profits claimed as exempt by the taxpayer were not in excess of the profit determined in accordance with the ALP.

Facts

The taxpayer operated as an offshore BPO service provider rendering services to its AEs. It had claimed deduction under section 10A of the Act in its return of income for AY 2006-07. A reference to the TPO was made by the TO and, during the course of the TP assessment proceedings, the taxpayer contended that the ITPR did not apply to it, since it was enjoying a tax holiday under section 10A of the Act. Reliance in this regard was placed on the ruling given by the Bangalore Tribunal Bench in the case of Philips Software Centre Private Limited *[2008] 26 SOT 226 (Bangalore-Tribunal)*. The TPO, however, rejected the taxpayer's contention and held that the margin earned by the taxpayer (i.e. 17.89%) was lower than that of comparable companies (i.e. 34.26%), and hence proposed a TP adjustment for the difference in the margins. The TO passed the draft assessment order incorporating the adjustment proposed by the TPO.

The taxpayer filed its objections against the draft assessment order before the DRP, which was rejected, and the TP adjustment was upheld. Aggrieved by this, the taxpayer was in appeal before the Tribunal.

Held

- There was no specific provision contained in the Act which provided that the ITPR were not applicable where the income was exempt under section 10A of the Act.
- In a situation where the income from an international transaction was exempt from tax in India, it could not be alleged that the taxpayer had arranged its affairs in a manner so as to show lesser taxable income in India. However, it could be alleged that the taxpayer had arranged its affairs in a manner so as to reflect more exempt income in India.
- A harmonious reading of the provisions contained in section 92C(4) of the Act and the CBDT Circular No. 14/2001 indicated that in a case where international transactions entered into by a taxpayer resulted in income

which was exempt from tax in India, the ITPR had to be applied to ensure that no excess exempt income was disclosed by the taxpayer, and the deduction under section 10A of the Act was allowed only to the extent of profit computed in accordance with the arm's length principle.

- On the basis of the above, the Tribunal held that in the instant case, the taxpayer had declared lesser exempt income, and no taxable base in India was eroded since it earned a lesser margin *vis-a-vis* the comparable companies. Hence, no TP adjustment needed to be made in the instant case.

Editor's note

- *This ruling seems to differ from the previous judicial precedents on this issue. The Tribunal has ruled that in the case of a taxpayer having an exempt income (by virtue of enjoying a tax holiday), the provisions of ITPR would be applicable to determine whether any excess exempt income has been disclosed by the taxpayer, on which the tax holiday should be denied. However, where such a taxpayer's transfer price is less than the ALP resulting in lesser profits (i.e. excess exempt income is not declared), then no TP adjustment needs to be made on the difference, since there is no erosion of the tax base in India.*
- *The above interpretation would however result in rendering the specific provisions contained in section 92C(4) redundant. The language of section 92C(4) is clear that no deduction shall be allowed with respect to the income enhanced on account of determination of ALP under the TP provisions. When the language of section 92C(4) is very clear, there ought not be any need to interpret the provision of section 92C(4) by looking at the intent of the legislation to introduce TP provisions.*
- *Furthermore, the provisions under section 80-IA(8) and 80-IA(10) of the Act seek to ensure that there is no excess income which is claimed as deductible under the tax holiday provisions by the taxpayer. It seems that the Tribunal has not taken cognisance of the aforesaid provisions while commenting that the TP provisions would help in ascertaining if the taxpayer has claimed any excess exempt income.*
- *The observation of the Tribunal in this ruling seems to suggest that in the case of a taxpayer enjoying a tax holiday, the profit determined in accordance with the ALP should be assumed to be the ordinary profit for computing the exemption. In this regard it would be pertinent to note that Tribunals in various cases have held that the ALP as determined under the ITPR cannot be equated with the term, 'ordinary profits', and consequently, deduction under section 10A of the Act cannot be restricted to the arm's length profit determined by the TPO (Visual Graphics Computing Services (India) Private Limited v. ACIT [TS-274-ITAT-2012 (Chennai)]; Weston Knowledge Systems & Solutions India Private Limited v. ITO [TS -269-ITAT-2012 (Hyderabad)]; Tweezerman (India) Private Limited v. ACIT [2010] 133 TTJ 308 (Chennai-Tribunal)).*

In view of the above, this ruling by the Tribunal may have a far-reaching impact, and could result in TOs placing reliance thereon for disallowing profits earned by taxpayers enjoying a tax holiday, in cases where the exempt profit declared exceeds the profit computed in accordance with the ALP determined by the TPO. Taxpayers having tax holiday units need to consider the impact of this ruling, especially where the eligible profit for a tax holiday is more than the profit determined in accordance with the ALP.

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Notifications/ Circulars

APA

India signs it's first 5 APAs in record time

Ministry of Finance Press release dated 31 March 2014

The Indian APA program has been the fastest to sign the initial APAs within one year of them being applied. The professional and open approach of the APA authorities with the guidance of the Finance Ministry, CBDT and Competent Authority have been enablers in this early success of the Government's APA program.

We understand that 5 APAs have been signed by CBDT. PwC has acted as lead advisers in 2 out of the 5 APAs signed under the India APA program.

The APA program is covered by confidentiality provisions under the Act. However, CBDT may disclose general information about the program, such as (i) the number and type of applications, (ii) number of agreements pending, in process and concluded or (iii) transfer pricing methods employed while concluding an APA. The disclosure may be in a form not to reveal taxpayers' identity, trade secrets, and proprietary or confidential business or financial information.

Generally, an APA is valid upto 5 years and the Act provides for renewal, revision or cancellation of an APA under certain circumstances.

During the 5-year period, the taxpayer is required to file an annual report to confirm compliance with the terms of the APA. The tax authorities shall then conduct limited audit of the taxpayer to ensure compliance with the terms of the APA.

The APA program is an important step towards providing certainty to International and Indian investors.

Tolerance band

Ministry of Finance notifies tolerance band for FY 2013-14

CBDT Notification No. 45 of 2014, dated 3 September 2014

The Ministry of Finance has notified the tolerance band for FY 2013-14 (AY 2014-15).

It is 1% for wholesale trading and 3% for others. The term "wholesale trading" has been defined to mean:

"an international transaction or specified domestic transaction of trading in goods, which fulfils the following conditions, namely:-

- purchase cost of finished goods is eighty percent or more of the total cost pertaining to such trading activities; and
- average monthly closing inventory of such goods is ten percent or less of sales pertaining to such trading activities."

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Service tax

Hiring employees of foreign holding and other group companies on a full-time employment basis is not liable for service tax

Volkswagen India Private Limited *v.* CCE (2013-TIOL-1640-CESTAT-Mumbai)

The Mumbai CESTAT held in this case that the arrangement for hiring employees of foreign holding and other group companies on a full-time employment basis created an employer-employee relationship between the appellant and the employees hired. Despite the fact that a portion of the salary of such employees had been paid at their home location through the concerned holding/ group company, the reimbursement of this cost to the concerned foreign companies by the appellant could not be held liable for service tax under 'manpower supply services'.

Order rejecting application under the Service Tax Voluntary Compliance Encouragement Scheme, 2013 (STVCES) is an appealable order

Barnala Builders & Property Consultant *v.* DCCEST (2013-TIOL-1016-HC-P&H-ST)

The Punjab & Haryana HC held that the order passed by the designated authority, rejecting the application under the STVCES, was appealable under section 86 of the Finance Act, 1994.

Splitting of different activities under a composite contract for classification under different service categories is not allowed

Associated Soapstone Distributing Company Private Limited *v.* CCE (2013-TIOL-1850-CESTAT-Delhi)

The Delhi CESTAT held that though separate consideration was paid for different activities of site formation, excavation, clearance, earthmoving, etc., in the contract, the real essence of the contract was to render mining services. Accordingly, it was held to be a composite contract and the splitting of different activities for classification under different service categories was not allowed.

E-commerce transaction services provided through a website which facilitated the sale and purchase of goods held to be taxable under "Business Auxiliary Service"

CCE *v.* Ebay India Private Limited (2014-TIOL-243-CESTAT-Mumbai)

The Mumbai Tribunal held that e-commerce transaction services provided through a website which facilitated the sale and purchase of goods over the internet would be taxable under 'business auxiliary service' (BAS) and not under 'online data access and/ or retrieval services'.

The Tribunal further held that the listing fee charged towards 'banner advertising' on an e-commerce website could not be classified under BAS, and had to be classified as 'sale of space or time for advertisement services', and would be taxable only with effect from 1 May 2006.

Tribunal's order on whether or not an activity can be considered a service, appealable only before the SC

CST and Others *v.* Ernst and Young Private Limited and Others (2014-TIOL-263-HC-Delhi-ST)

The Delhi HC has held that an appeal against the order of CESTAT, where the question involved was whether or not an activity could be considered a service, related to 'rate of tax'. Accordingly, the order was appealable before the SC only, and not before the HC.

Levy of service tax on supply of food and beverages by hotels, restaurants, etc. held to be constitutional

Indian Hotels and Restaurant Association and Others *v.* UoI and Others (2014-TIOL-498-HC-Mumbai-ST)

A two member bench of the Bombay HC upheld the constitutional validity of the levy of service tax on the supply of food and beverages by hotels, restaurants, etc.

The Bombay HC ruled against the decision of the Kerala HC in Kerala Classified Hotels and Resorts Association *v.* UoI (2013-TIOL-533-HC-Kerala-ST).

Rule 5(2) held ultra vires, no general audit to be conducted

Travelite (India) *v.* UoI and Others (2014-TIOL-1304-HC-Delhi-ST)

The Delhi HC quashed rule 5A(2) of the Service Tax Rules, 1994 that provided for a general audit by officers or by

Indirect taxes

an audit party designated by the Commissioner or the Comptroller and Auditor General of India (CAG). The only type of audit contemplated under section 72A of the Finance Act, 1994 was held to be the special audit to be conducted under specified circumstances only. Accordingly, Rule 5A was held beyond the legal power of section 72A and section 94(1) of the Finance Act, 1994.

Technical support including the marketing of products in India for a foreign holding company qualifies as export

Microsoft Corporation India Private Limited *v.* CST (2014-TIOL-1964-CESTAT-Delhi)

The Delhi Tribunal held by a majority decision that the business auxiliary services in the nature of technical support rendered by the Indian subsidiary for the foreign holding company, including the marketing of products in India, qualified as export of services as under the erstwhile provisions of the Export of Services Rules, 2005 and would not be liable to tax.

Customs/foreign trade policy

Principle of unjust enrichment is not applicable to a case of refund of penalty

Veekay Products Private Limited *v.* CC [2013] (296) ELT (363)

The Mumbai CESTAT held that the refund of a fine or penalty amount could not be credited to the Consumer Welfare Fund, as the principle of unjust enrichment as in the case of a refund of duty, was not applicable in the case of refund of a penalty amount.

Benefits available to DTA units became applicable to Export Oriented Unit post fulfilment of duty obligation

Ginni International Limited *v.* CC (2013-TIOL-1570-CESTAT-Delhi)

The Delhi CESTAT held that the benefit available to DTA units became applicable to an EOU unit once it had discharged the duty obligation even before approval for final de-bonding.

Directorate General of Foreign Trade (DGFT) has no power to legislate as this power lies with the Central Government and cannot be delegated to the DGFT

Alstom India Limited *v.* UOI (2014-TIOL-223-HC-Ahmedabad-EXIM)

The Gujarat HC held that the DGFT had no power to legislate, as the power to frame Duty Drawback Rules could be exercised by the Central Government only and could not be delegated to the DGFT.

Refund of SAD is admissible where a declaration of non-availment of SAD is not made on a sales invoice, when the dealer is a non-registered dealer under excise

Fossil India Private Limited *v.* CC (2014 (301) ELT 268)

The Bangalore Tribunal held that the refund of SAD of Customs was admissible even when a declaration of the non-availment of SAD was not made on a sales invoice, when the dealer was a non-registered dealer under excise.

Items imported could not be said to be unassembled articles in completely knocked down form to be classified as assembled articles, where they undergo manufacturing and processing activity to create finished goods

CC *v.* D-Link India Private Limited [2014-TIOL-669-CESTAT-Mumbai]

The Mumbai Tribunal held that where the items imported underwent manufacturing and processing activity, the items imported could not be said to be unassembled articles in completely knocked down form that were to be classified as assembled articles. These had to be treated as parts and components as these were subjected to manufacturing to create finished goods.

Rebate of duty not allowable in cases where goods were exported without payment of duty even if duty was paid after export

Sandhar Automotives *v.* Joint Secretary, GoI (2014 (305) ELT 193)

The Delhi HC held that rebate of duty was not allowable in cases where goods were exported without payment of duty, even if the duty was paid after export, as it would not be in compliance with the condition for claiming rebate, *viz.* the export of goods after the payment of excise duty.

Indirect taxes

VAT/ sales tax/ entry tax/ professional tax

Recorded DVDs and CDs are taxable at the residual rate and not at the concessional VAT rate applicable to information technology products

Makdani Entertainment [2012] NTN (Vol 53-57)

The Commissioner of Uttar Pradesh has clarified that recorded DVDs and CDs used for entertainment were different from information technology products which cover DVDs and CDs within their ambit. Therefore, recorded DVDs and CDs were taxable at the residual VAT rate and not at the concessional VAT rate applicable to IT products.

Optional service charges recovered from buyers for extended warranty benefit will not be included in the sale price

Commissioner of Commercial Tax *v.* Seagram India Private Limited (2013-NTN-Vol 53-283)

The Rajasthan HC held that optional service charges recovered from buyers who intend to avail the benefit of the extended warranty period could not be included in the sale price. The Court observed that the definition of sale price clearly envisaged only that amount which was paid or payable to a dealer as consideration for the sale of goods (including the amount charged for anything done by the dealer in respect of goods at the time of, or before, the delivery of goods) be included in the sale price. The optional service charges were recovered for future acts and not for goods delivered, and thus could not be included in the sale price.

Permission to use a trade mark on a non-exclusive basis is not liable for VAT as it is not deemed to be a sale

Commissioner of Commercial Tax *v.* Seagram India Private Limited (2013-NTN-Vol 53-283)

The Allahabad HC held that no VAT could be levied on the grant of permission to use a trade mark on a non-exclusive basis. A transaction relating to the permitting of use of a trade mark had to be treated as a mere license of a trade mark, and would not be deemed to be a sale involving a transfer of a right to use the trade mark. The HC relied on the landmark SC decision in Bharat Sanchar Nigam Ltd *v.* UOI (2006-3- SCC-1).

Writ jurisdiction should not be exercised against show-cause notice

Hindustan Coca-Cola Beverages Private Limited *v.* State of UP (2014-67- VST-435)

The Allahabad HC held that a writ jurisdiction should not be exercised against a show-cause notice as the person to whom the show-cause notice was issued had the opportunity to address his grievance by submitting his reply to the authority concerned.

Sales by duty free shops at international airport to inbound passengers qualify as sales in the course of imports into India

State of Karnataka *v.* Flemingo Duty Free Shop Private Limited (2014-68-VST-398-Karnataka)

The Karnataka HC held that sales by a duty free shop situated at an international airport to inbound passengers were made before the goods had crossed the customs frontiers of India. Consequently, such sales were not liable to sales tax as they qualified as sales in the course of imports into India, covered by section 5 of the Central Sales Tax Act, 1956. The Karnataka HC relied on the SC decision in Hotel Ashoka *v.* Assistant CCT and Anr (2012-VIL-03-SC).

SIM cards used for providing telephone services are not liable to sales tax

Bharat Sanchar Nigam Limited *v.* State of Himachal Pradesh (2014-VIL-93-Himachal Pradesh)

The Himachal Pradesh HC held that no sales tax would be leviable on the supply of SIM cards to subscribers, as a SIM card had no intrinsic value and it was supplied to the customer for providing telephone services. The Court relied on the SC decision in the case of Idea Mobile Communication Limited (2011-VIL-17-SC-ST).

Contract for manufacture, supply and installation of lifts was a works contract and not a contract for sale

Kone Elevators India Private Limited *v.* State of Tamil Nadu [2014] 45 taxmann.com 150 (SC), 2014-TIOL-57-SC-CT-CB

A 5-judge bench of the SC, on a writ petition, held that the transaction of manufacture, supply and installation of lifts was a works contract and not a contract for the sale of lifts. The

Indirect taxes

decision has been taken by majority rule with four members ruling in favour of the decision versus one against. The SC has reversed the principles laid down by a three-member bench of the SC in the case of Kone Elevator India Private Limited reported at (2005-3-SCC 389, 2005-TIOL-30-SC-CT-LB).

The SC in the instant case held that the "dominant nature test" or "overwhelming component test" were not applicable to the transaction in hand. After the lifts were assembled and installed with skill and labour at site, it became a permanent fixture of the building, and hence it was not a case of sale of chattel or a chattel being attached to another chattel.

Supply of food and beverages to employees through a canteen run according to the requirements of the Factories Act should be held liable to pay VAT

TVS Motors Company Limited *v.* State of Karnataka (2014-VIL-185-Karnataka)

The Karnataka HC held that the supply of food and non-alcoholic beverages to employees and guests at subsidised rates through a canteen run by the company as under the requirements of the Factories Act fell under the definition of 'business' under the Karnataka VAT laws. Accordingly, the company was held liable to pay VAT on the consideration received from employees for the supply of food and non-alcoholic beverages irrespective of the profit or loss on such supplies.

Full input tax deduction allowed to the taxpayer on the sale of a taxable final product and exempt by-products

State of Karnataka *v.* MK Agro Tech Private Limited (2014-TIOL-1624-HC-Karnataka-VAT)

The Karnataka HC in the case of MK Agro Tech Private Limited held that the sale of taxable final products and exempt by-products did not attract provisions of partial rebate claim, and the taxpayer was allowed the benefit of a full input tax deduction.

The taxable event in the transfer of goods on a right to use basis is the grant of the right, and not the receipt of periodical lease rentals

State of Karnataka *v.* Lease Plan India Limited (2014-VIL-249-Karnataka)

The Karnataka HC held that the taxable event in the right to use goods occurred when the goods were transferred from the lessor to the lessee on a right to use basis, and not upon the receipt of periodical lease rentals. Accordingly, no VAT was payable on lease rentals received after the introduction of the KVAT Act in respect of the transfer of rights to use cars during the erstwhile Karnataka Sales Tax Act regime.

Excise

Process of printing and lamination on plastic/ polyester films amounts to 'manufacture'

Paper Products Limited *v.* CCE (2014-TIOL-373-CESTAT-Mumbai-Tribunal)

The Mumbai Tribunal held that the process of printing and lamination on plastic/ polyester films etc. amounted to manufacture as it changed the character of the films for end users.

Retention of 75% of sales tax amount under the Sales Tax Incentive Scheme treated as an additional consideration for the levy of excise duty

CCE *v.* Super Synotex (India) Limited (2013 (301) ELT 273)

The SC held that retention of 75% of the sales tax amount under the Sales Tax Incentive Scheme would be treated as an additional consideration, and subject to central excise duty, since deduction of sales tax was available only when it was actually paid to the Sales Tax Department.

Compensation for delay in supply of goods can be reduced while computing transaction value

CCE *v.* Victory Electricals Limited (2013 (298) ELT 534)

A Larger Bench of the Chennai Tribunal held that the value payable after factoring in any liquidated damages contractually stipulated for delayed supply would be the transaction value for a levy of excise duty.

Indirect taxes

Placing warranty stickers and chassis number on pre-packed goods does not amount to manufacture

Beltek (India) Limited *v.* CCE (2014-TIOL-184-CESTAT-Delhi)

The Delhi Tribunal held that when goods were already packed and bore MRP stickers at the stage of being imported, the activity of merely placing warranty stickers and pasting chassis numbers onto them would not amount to 'manufacture' under section 2(f)(iii) of the Act.

Eligibility of credit on capital goods had to be determined with reference to the dutiability of the final product on date of receipt of such goods

Global Oil Industries Limited *v.* CCCE&ST [2014-TIOL-594-CESTAT-Bangalore]

The Bangalore Tribunal held that eligibility of credit had to be determined with reference to the dutiability of the final product on the date of receipt of capital goods and hence, credit would not be admissible if final products were exempted on the date of receipt of such capital goods.

Capital goods received by a job worker under a leave and licence agreement with the principal were eligible for credit

CCE *v.* Ilgin Automotive Private Limited (2014 (299) ELT 129)

The Madras HC held that capital goods received by a job worker under a leave and licence agreement with the principal were eligible for credit even if the job worker was not the owner of said capital goods.

Transfer of accumulated CENVAT credit permissible in case of de-bonding of 100% EOU to DTA unit

Matrix Laboratories Ltd *v.* CCE (2014-TIOL-2090-CESTAT-Mumbai)

The Mumbai Tribunal held that the transfer of accumulated CENVAT credit was permissible in the case of de-bonding of a 100 % EOU to a DTA unit.

Notifications/ Circulars

Service tax

Rate of exchange to be applied according to generally accepted accounting principles

Notification No. 19/2014-Service Tax dated 25 August 2014

A new rule 11 has been inserted in the Service Tax Rules, 1994 which provides that the rate of exchange applicable shall be the rate of exchange according to the generally accepted accounting principles on the date when the point of taxation arises in terms of the Point of Taxation Rules, 2011.

No service tax is payable on the amount of foreign currency remitted to India from overseas by a foreign MTSO

Circular No. 180/6/2014-Service Tax dated 14 October 2014

The CBEC has clarified that no service tax would be payable on the amount of foreign currency remitted to India from overseas by foreign MTSO. However, the following services would be liable to tax in this regard:

- Representation services or services rendered in the capacity of an agent by India bank/ entity to MTSO;
- Services rendered by the bank/ agent/ sub-agent to an ultimate beneficiary or bank in India, for which a separate consideration has been charged.

Services rendered by a JV to its members and vice-versa are liable to tax

Circular No. 179/5/2014-Service Tax dated 24 September 2014

The Central Government has clarified that:

- taxable services provided for consideration by the JV to its members or vice versa, and between the members of the JV are liable to tax;
- if the cash calls/ capital contributions by members of JV are merely transactions in money, they would not be liable to tax.

Indirect taxes

VAT

WCT-TDS rate increased in Haryana

Notification No.S.O.67/H.A.6/2003/ S.24/2014 dated 20 June 2014

Effective 24 June 2014 the rate of the Works Contract Tax-Tax Deductible at Source (WCT-TDS) has been increased from 4% to 5%.

Notices, summons and orders to be issued electronically under Delhi VAT

Order No. 3(366)/Policy/ VAT/2013/1235-1245 dated 17 January 2014

With effect from 17 January 2014 notices, summons and orders shall be issued through electronic means, which includes pasting on the web-page of the dealer, SMS alerts and emails at the registered email ID of the dealer. The issue of notices, summons and orders through an electronic medium shall be treated as on par with the service of documents through registered post.

Customs/ foreign trade policy

SAD of Customs is payable on stock transfers from SEZ/ FTWZ units to DTA

Circular no. 44/2013-Customs dated 30 December 2013

The Central Government has clarified that a Customs SAD is payable on clearances from SEZ/ Free Trade and Warehousing Zone (FTWZ) units to the DTA that are in the nature of stock transfer, as no sales tax/ VAT can be levied on such a transaction. Previously, the Unit Approval Committee of Noida SEZ, in its meeting and minutes of 1 April 2013 had given its view that SAD is exempt on stock transfer from a SEZ/ FTWZ, subject to fulfilment of conditions.

BCD concession increased on the import of specified goods into India under the India-Japan CEPA

Customs Notification No. 09/ 2014 dated 1 April 2014

The Central Government has reduced the basic customs duty (BCD) on the import of specified products from Japan under the India-Japan Comprehensive Economic Partnership Agreement (CEPA). This notification is effective from 1 April 2014.

The quantity of input to be allowed under advance authorisation/ duty free import authorisation shall be in proportion to the quantity of input actually used/ consumed in production

Notification No. 90(RE-2013)/2009-14 dated 21 August 2014

The Central Government has provided that the quantity of input to be allowed under advance authorisation/ duty free import authorisation shall be in proportion to the quantity of input actually used/ consumed in production.

Excise

Clarification on the implications of SC's ruling in Fiat case

Circular No. 979/03/2014 dated 15 January 2014

The CBEC has come out with a Central Excise circular to clarify the implications of the SC's ruling in CCE *v.* Fiat India Private Limited and Another (2012-TIOL-58-SC-CX) on the valuation of manufactured goods sold at a price lower than the cost of manufacturing.

The CBEC has clarified that the Fiat ruling had a unique fact pattern and could not be applied to all cases where the goods have been sold at a price lower than the cost of manufacturing. The field formations are advised to consider, during the investigation audit, aspects such as the percentage of loss, the duration for which the product has been sold at a loss, and whether such sales are contrary to standard and accepted business practices.

It has further clarified that for proceedings involving similar fact patterns initiated before the Fiat ruling, the extended period of limitation would not apply. However, after the date of ruling, if a manufacturer continues to declare transaction value contrary to the outcome of the ruling, the same would amount to a willful misstatement, which would attract the extended period of limitation.

Indirect taxes

Excise duty concession granted to the capital goods and automotive sector has been further extended

The Central Government has come out with central excise tariff Notification No. 6/2014 on 25 June 2014 to further extend the period of excise duty concession that was granted under Central Excise Tariff Notification No. 12/2012 dated 17 March 2012 to capital goods, consumer non-durable goods and motor vehicles, from 30 June 2014 to 31 December 2014.

The Notification No. 12/2012-CE as amended by Notification No. 4/2014-CE dated 17 February 2014 had reduced the rate of excise duty on the following goods:

Description of products	Existing rate	New rate
All goods falling under Chapter 84 and 85 (Capital goods and consumer non -durable goods)	12%	10%
Small cars, two and three wheelers	12%	8%
SUVs	30%	24%
Large and mid-segment cars	27%/ 24%	24%/ 20%

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Regulatory developments

Foreign Direct Investment (FDI)

Liberalisation of FDI norms in Construction Development Sector

Press Note 10 (2014) series dated 3 December 2014

The DIPP has notified revised norms for FDI in Construction Development Sector. Following are the key highlights of the revised policy:

- No minimum land area requirement for serviced plots
- In case of construction development projects, a minimum floor area of 20000 sqmts needs to be developed under each project
- FDI of USD 5 million should be brought in within 6 months of commencement of project i.e. the date of approval of the building plan/ layout plan by the relevant statutory authority
- Investor will be allowed to exit on completion of project or after development of truck infrastructure
- FIPB can consider proposals on case-to-case basis for where the exits is contemplated before the completion of the project
- Project constituting minimum 30% of the total project cost for low cost affordable housing exempted from minimum area and FDI requirements

Simplification of procedure to issue Industrial License

Press Note 9 (2014) Series dated 20 October 2014

The Government has liberalised the industrial licensing regime whereby the following changes have been brought in the procedure:

- Increase in validity period of Industrial License – After the initial validity of 3 years, two extensions of 2 years each shall be allowed
- Increase in validity period of Industrial License - Two extensions of 2 years each in initial validity of 3 years shall be allowed up to 7 years
- Removal of stipulation of annual capacity in the Industrial License - Annual capacity for defence items for Industrial License has been deregulated provided the licensee shall submit half yearly production returns to DIPP and Department of DoDP, MoD in the prescribed format (to be notified separately)
- Sale of Defence items to Government entities without approval of MoD - The Licensee shall be allowed to sell defence items to Government entities under the control of Ministry of Home Affairs, state governments, Public Sector Undertakings and other valid defence licensed companies without prior approval of DoDP. Sale of items to other entities would continue to be under prior permission from DoDP, MoD.

FDI in Railways infrastructure

Press Note 8 (2014) Series dated 27 August 2014 issued by DIPP and release dated 20 November 2014 issued by Ministry of Railways

100% FDI under the automatic route has been permitted in construction, operation and maintenance of the following railway infrastructure activities, subject to sectoral guidelines of the Ministry of Railways:

- Suburban corridor projects through PPP
- High-speed train projects
- Dedicated freight lines
- Rolling stock including train sets, and locomotive/ coaches manufacturing and maintenance facilities
- Railway electrification
- Signalling systems
- Freight terminals
- Passenger terminals
- Infrastructure in industrial parks pertaining to railway lines/ sidings including electrified railway lines and connectivity to main railway lines
- Mass rapid transport systems

Proposals involving FDI beyond 49% composite cap in areas that are sensitive from the security point of view would require consent from the CCS on a case-to-case basis.

The Ministry of Railways has also issued sectoral guidelines specifying 17 activities in the railways sector where FDI can be brought in up to 100%. The sectoral guidelines also provide a listing of potential Railway projects where FDI is

Regulatory developments

contemplated by the Ministry of Railways. The proposals for bringing FDI (not requiring administrative approvals from Ministry of Railways) would need to be submitted to Advisor (Infrastructure), Railway Board for consideration.

Review of FDI policy in Defence sector

Press Note 7 (2014) Series dated 26 August 2014

FDI in defence production would be allowed up to 49% under the Government approval route. FDI beyond the limit of 49% would be allowed on a case-to-case basis for proposals resulting in access of modern and state-of-the-art technology subject to approval from the CCS. Other key changes are as follows:

- Applicant to have Indian management and control - no condition of 51% equity ownership by a single largest Indian shareholder
- Chief Executives/ Chief Security Officer to be resident Indian citizens
- Investee/ JV company to be self-sufficient in areas of product design and development
- No minimum capitalisation
- Composite FDI limit of 49% to include all kinds of foreign investments i.e., FDI, FIIs, FPIs, NRIs, FVCIs and QFIs regardless of the foreign investment window under which the funds have been brought in
- Portfolio investments permitted under automatic route subject to 24% limit

Adoption of NIC 2008 for FDI purposes

Press Note 4 (2014) Series dated 26 June 2014 issued by DIPP

In order to align the industrial classification for FDI purposes with international standards, DIPP will use NIC Code 2008 in place of NIC code 1987.

List of Defence items requiring Industrial License

Press Note 3 (2014) Series dated 26 June 2014

The DIPP has set out the items which require an IL. The list has to be read in conjunction with Entry No. 13 of Schedule II of the Notification No. S.O.477 (E) dated 25 July 1991 as amended by Notification No. S.O. 11(E) dated 3 January 2002.

Dual use items, having military as well as civilian applications, other than those specially mentioned in the list, would not require an IL. The complete list can be viewed here: http://dipp.nic.in/English/acts_rules/Press_Notes/pn3_2014.pdf

FDI Policy in Insurance sector

Press Note 2 (2014) Series dated 4 February 2014

In order to align the FDI Policy with the provisions of Insurance Act, 1938, insurance brokers, third party administrators and surveyors and loss assessors have also been brought within the Insurance sector activities where FDI upto 26% is permitted under the automatic route. It has further been clarified that the cap of 26% is a composite cap including FDI, FII and NRI investments.

FDI in pharmaceutical sector - Non-compete clause

Press Note 1 (2014) Series dated 26 June 2014

The Government has announced that FDI in Pharmaceutical sector would be permitted without any "non-compete" clause in the underlying agreements. Such clause may be permitted only in special circumstances with the approval of FIPB.

Issue of Partly Paid Shares and Warrants by Indian Company to Foreign Investors

A.P. (DIR Series) Circular No. 3 dated 14 July 2013

Issue of Partly paid shares and warrants to a non-resident was permitted under the Government approval route as such instruments were not covered within the definition of 'capital' as defined under FEMA regulations. RBI, upon a review of the policy, has recognised partly paid shares and warrants as part of 'capital' allowed to be issued under Automatic route for FDI, Portfolio and NRI investment subject to compliance with the relevant sectoral caps and conditions. Key conditions with respect to issue of such instruments are as follows:

- **Pricing and receipt of balance consideration –** Issue price to be determined upfront with 25% of the total consideration amount (including share premium, if any), to be received upfront. Balance shall be received within a period of 12 months (barring a few cases) in case of partly paid shares and 18 months in case of warrants
- **Reporting requirements –** Receipt of initial remittance to be reported in Advance Reporting Form and issue and transfer of shares/ warrants to FDI or Portfolio investors to be reported in Form FC-GPR/ FC-TRS and LEC respectively

Regulatory developments

- **Onus of compliance -** Indian investee company shall be responsible for compliance with the prescribed conditions

Revised pricing guidelines issued by RBI

A. P. (DIR Series) Circular No. 4 dated 15 July 2014

RBI had earlier this year allowed capital instruments i.e. shares, compulsorily convertible preference shares and compulsorily convertible debentures to be issued with underlying options subject to a minimum lock-in period of 1 year. The exit price in case of exercise of underlying option was also prescribed by RBI.

As a measure to align the pricing methodologies with internationally accepted standards, RBI announced a revision in the pricing guidelines as applicable for issue and transfer of capital instruments to foreign investors. While pricing guidelines as applicable in case of issue/ transfer of capital instruments by a listed company would remain same, the following changes have been brought in case of unlisted companies:

- Issue of capital instruments with or without optionality clause should be at a price worked out as per any internationally accepted pricing methodology on arm's length basis
- Exit from instruments by exercising options attached should not result in a fixed return to the investor. Pricing at the time of exit should be computed as per internationally accepted pricing methodology (in case of listed company, such price is the market valuation of share/ debenture)

Issue of non-convertible or redeemable bonus preference shares/ debentures to non-residents from the general reserve under a Scheme of Arrangement

A.P. (DIR Series) Circular No. 84 dated 6 January 2014

The RBI has permitted Indian companies to issue non-convertible or redeemable preference shares/ debentures as a bonus to the non-resident equity shareholders as distribution from general reserve under a Scheme of Arrangement approved by a court in India under the provisions of the Companies Act. The same shall also require a no-objection from the Income Tax Authorities.

Issue of non-convertible or redeemable preference shares and optionally/ partially convertible debentures, otherwise than by way of bonus, will continue to be governed by ECB regulations.

FDI in LLP - operational guidelines issued by RBI

FEMA Notification No. 298/ 2014 dated 13 March 2014 published *vide* Official Gazette No. 190(E) dated 19 March 2014 and RBI/2013-14/566 A.P. (DIR Series) Circular No. 123 dated 16 April 2014

The RBI has operationalised the guidelines in relation to FDI in LLPs. Key provisions of the notification have been summarised below:

- Investment route - Direct or indirect foreign investment (regardless of the nature of 'ownership' or 'control' of an Indian Company) shall require Government/ FIPB approval.
- Pricing Guidelines -
  - Capital contribution or acquisition/ transfer of profit shares: At a price more than or equal to the fair price worked out as per an internationally accepted valuation norm (Fair Price)
  - Transfer of capital contribution or profit share:
    1. Transfer from a resident to a non-resident – At a price more than or equal to the fair price of the capital contribution/ profit share of the LLP
    2. Transfer from a non-resident to resident – At a price less than or equal to the fair price of the capital contribution/ profit share of the LLP
  - Valuation certificate shall be issued by the Chartered Accountant or by a practicing Cost Accountant or by an approved valuer from the panel maintained by the Central Government.

Regulatory developments

- Reporting Requirements - To the Regional office of the RBI through the AD banks

Transaction to reported	Due date for reporting
Capital contribution by way of acquisition	Within 30 days of receipt of funds in prescribed form (RBI shall allot Unique Identification Number in this regard)
Transfer of the capital contribution/ profit share	Within 60 days from the date of receipt of funds in the prescribed form

- Existing LLPs which have already received foreign investment are required to comply with the applicable reporting requirement within 30 or 60 days, as applicable, from 16 April 2014

Exchange Control

ECB

ECB Policy – Parking of ECB proceeds

A.P. (DIR Series) Circular No. 39 issued on 21 November 2014

The RBI has permitted AD banks to allow eligible ECB borrowers to park ECB proceeds (both under the automatic and approval routes) in term deposits with AD Banks in India for a **maximum period of 6 months** pending utilisation for permitted end uses. The facility will be subject to the following conditions:

- The applicable guidelines on eligible borrower, recognised lender, average maturity period, AIC, permitted end uses, etc. should be complied with
- No charge in any form should be created on such term deposits
- Such term deposits should be exclusively in the name of the borrower
- Such term deposits should be available to be liquidated as and when required

ECB denominated in Indian rupees

A.P. (DIR Series) Circular No. 25 dated 3 September 2014

The RBI has permitted recognised non-resident ECB lenders to extend loans in INR subject to prescribed conditions, which *inter alia* include:

- lender should mobilise INR through swaps undertaken with an AD bank in India. For this purpose, the recognised ECB lender can set up a representative office in India by following the applicable process
- AIC of such ECBs should be commensurate with the prevailing market conditions

Refinancing of ECB at lower all-in-cost – simplification of procedure

A.P. (DIR Series) Circular No. 21 dated 27 August 2014

Presently, cases of refinancing existing ECB by raising fresh ECB where new AMP of the fresh ECB is more than the residual maturity of outstanding ECB are considered by the RBI under the approval route.

The RBI has now delegated this power to AD banker, subject to the following key conditions:

- AIC of fresh ECB should be less than that of the AIC of existing ECB
- Refinancing needs to be undertaken before the maturity of the existing ECB; and
- Consent of the existing lender is obtained

It is pertinent to note that overseas branches/ subsidiaries of Indian banks are not permitted to extend ECB for refinancing an existing ECB. Further, this facility is also extended to those cases where existing ECBs were raised under the approval route provided the amount of the new ECBs is eligible to be raised under the automatic route.

ECB from Direct/ Indirect Foreign Equity Holder and Group Companies – Liberalisation

RBI/2013-14/594 A.P. (DIR Series) Circular No. 130 dated 16 May 2014

The RBI has now delegated powers to the AD banks to permit the following proposals *under the automatic route*:

Regulatory developments

Sr. No.	Borrower	Lender	Purpose
1	Companies in manufacturing, infrastructure, hotels, hospitals and software sectors	Indirect equity holders Group companies (ECB from direct equity holders already permitted under automatic route)	Permissible purposes as per RBI's directions
2	Companies in manufacturing, infrastructure, hotels, hospitals and software sectors	Direct equity holders	General Corporate Purposes (including working capital requirements)
3	Companies in 'miscellaneous service' sectors (Miscellaneous services mean companies engaged in training activities (but not educational institutes), research and development activities and companies supporting infrastructure sector. Companies doing trading business, companies providing logistics services, financial services and consultancy services are, however, not covered under the facility)	Direct equity holders Indirect equity holders Group companies	Permissible purposes as per RBI's directions
4	Change of lender when the ECB is from direct/ indirect equity holders or group companies		Permissible purposes as per RBI's directions

Re-scheduling of ECB - Simplification of procedure

RBI/2013-14/584 A.P. (DIR Series) Circular No. 128 dated 9 May 2014

The RBI has delegated power to AD banks to approve re-scheduling of ECB due to changes in draw-down and/ or repayment schedule. This relaxation is subject to the following key conditions:

- Any changes in AIC to be permitted only in case of change in AMP due to re-scheduling of ECB. There should not be any increase in the rate of interest and no additional cost (in foreign currency/ Indian rupees);
- Revised AIC and AMP should be in conformity with minimum prescribed limits;
- Such re-scheduling will be allowed only once, before the maturity of the ECB; and
- Changes to be reported in Form 83 to RBI

Refinance/ Repayment of Rupee loans raised from the domestic banking system

RBI/2013-14/585 A.P. (DIR Series) Circular No. 129 dated 9 May 2014

The RBI has permitted refinancing/ repayment of rupee loans availed from the domestic banking system by raising ECB under the following windows subject to prescribed conditions

- Take-out financing scheme;
- Repayment of existing rupee loans for companies in infrastructure sector;
- Repayment of existing rupee loans for consistent forex earners (USD 10 billion window); and
- Spectrum allocation.

Considering that in cases where ECB is availed from overseas branches/ subsidiaries of Indian banks, the risk remains within the Indian banking system, the RBI has prohibited availing ECB from overseas branches/ subsidiaries of Indian banks for the above purposes.

Liberalisation of definition of Infrastructure sector

Notification No. FEMA 281/ 2013 dated 19 July 2013 notified *vide* G.S.R No. 627(E) dated 12 September 2013 and A.P. (DIR Series) Circular No. 85 dated 6 January 2014

The RBI has expanded the ambit of the transport sector of Infrastructure for the purpose of ECB by including 'Maintenance, Repairs and Overhaul' (MRO) as a part of airport infrastructure. Accordingly, MRO services which are distinct from the related infrastructure services will be considered as a part of the sub-sector of airport in the transport sector of Infrastructure and thereby eligible to avail ECB both under the automatic/ approval route.

Regulatory developments

Exports and Imports

Period of realisation and repatriation of export proceeds

A.P. (DIR Series) Circular No. 37 dated 20 November 2014

In order to bring consistency in the period of realisation applicable to various exporters, the RBI has clarified after due deliberations that the period of realisation and repatriation of export proceeds shall be nine months from the date of export for all exporters of goods/ software/ services including exports by units in SEZs, Status Holder Exporters, EOUs, Units in EHTPs, STPs & BTPs until further notice.

Project and Service exports

A.P. (DIR Series) Circular No. 11 dated 22 July 2014

Presently, project exports and deferred service exports proposals for contracts exceeding USD 100 million in value required approval of a working group (consisting of representatives from Exim bank, ECGC & RBI). In addition, the relevant forms to obtaining post award approvals were required to be submitted within 30 days of entering into the contract.

The RBI has now dispensed with the working group and allowed the AD banks/ Exim Bank to consider awarding post-award approvals without any monetary limit and permit subsequent changes within the relevant FEMA guidelines/ regulations. Hence, the requirement of submitting the forms for seeking post award approval is no longer applicable.

Long Term Export Advances for a maximum tenor of 10 years

A.P. (DIR Series) Circular No. 132 dated 21 May 2014

The RBI has liberalised the policy and permitted export advance up to a maximum tenor of 10 years for Long Term Service Contracts for exporters having a minimum of 3 years satisfactory track record. Key conditions of this window are summarised below:

- Firm, irrevocable supply orders should be in place. The contract should clearly specify the nature, amount and delivery timelines of products over the years and penalty in case of non-performance or contract cancellation. Product pricing should be in consonance with prevailing international prices.
- Such export advances shall not be permitted to be used to liquidate Rupee loans, which are classified as NPA as per the RBI asset classification norms.
- Double financing for working capital for execution of export orders should be avoided
- The rate of interest payable, if any, should not exceed LIBOR plus 200 basis points

Merchanting Trade Transactions – Revised Guidelines

RBI/2013-14/545 A.P. (DIR Series) Circular No. 115 dated 28 March 2014

The RBI has issued revised guidelines on Merchanting Trade Transactions. Key changes introduced through these guidelines are summarised below:

- Goods should not enter the domestic tariff area and the state of the goods should not transform
- Compliance with foreign trade policy to be ensured as on the date of shipment (earlier, on the date of contract)
- Short-term credit can be availed only to the extent such transaction is not backed by advance remittance for the export leg
- Payment for import leg cannot be made out of the balances in Exchange Earners Foreign Currency account
- Names of defaulting merchanting traders where outstanding reach 5% of their annual export earnings would be caution-listed
- Short-term deployment of advances against the export leg may be allowed for the intervening period in an interest bearing account (earlier, short term deployment limited to the purpose of import only was permitted)
- Advance payments for the import leg of up to USD 0.2 million per transaction beyond advance towards exports is now permitted based on the commercial judgement of AD bank (earlier, against bank guarantee from international bank of repute);
- LoC to the supplier is permitted against confirmed export order keeping in view the outlay and completion of the transaction within 9 months.

The revised guidelines shall come into effect for merchanting trade transactions initiated after 17 January 2014.

Regulatory developments

Third party payments for export/import transactions

A.P. (DIR Series) Circular No. 100 dated 4 February 2014

The RBI had earlier permitted Indian entities to make payments towards import of goods to a third party and receive payment towards export of goods and software from a third party subject to certain conditions which included having a firm irrevocable order backed by a tripartite agreement.

The RBI has now done away with the requirement of a firm irrevocable order backed by a tripartite agreement in cases where documentary evidence for circumstances leading to third party payments/ name of the third party mentioned in the irrevocable order/ invoice have been produced to the AD banks.

ODI

Routing of funds raised abroad to India

A.P. (DIR Series) Circular No. 41 dated 25 November 2014

RBI has clarified that:

- Indian companies or their AD Category-I banks are not allowed to issue any direct or indirect guarantee or create any contingent liability or offer any security in any form for such borrowings by their overseas holding/ associate/ subsidiary/ group companies except for the purposes explicitly permitted in the relevant Regulations.
- Further, funds raised abroad by overseas holding/ associate/ subsidiary/ group companies of Indian companies with support of the Indian companies or their AD Category-I banks as mentioned at (i) above cannot be used in India unless it conforms to the general or specific permission granted under the relevant Regulations.
- Indian companies or their AD Category-I banks using or establishing structures which contravene the above shall render themselves liable for penal action as prescribed under FEMA, 1999.

FC by Indian Party under ODI – Restoration of limit

A.P. (DIR Series) Circular No. 1 dated 3 July 2014

The RBI has now reinstated the earlier FC limit for overseas investment to 400% of the net worth of the Indian party as per the last audited balance sheet. This limit was reduced to 100% of net worth of the Indian party *vide* the RBI circular released in August 2013.

However, the FC exceeding USD 1 billion (or its equivalent) in a FY will require prior RBI approval even though the total financial commitment is within the permissible limits.

Outbound Investment by LLP

Notification No. 299/ 2014-RB dated 24 March 2014 w.e.f. 7 May 2014

The RBI has now included LLP within the meaning of the term 'Indian Party' which would be permitted to make outbound investment.

Miscellaneous

RBI Approval for establishment of LO/ BO/ PO in India by foreign entities and transfer of assets of LO/ BO /PO at the time of closure

A.P. (DIR Series) Circular No. 145 dated 18 June 2014 and A.P. (DIR Series) Circular No. 93 dated 15 January 2014

The RBI notified that citizens of Hong Kong or Macau desirous of setting up a LO/ BO/ PO or any other place of business in India shall now require prior specific approval from RBI.

Further, the RBI has also delegated powers to AD banks to process applications for transfer of assets of LO/ BO/ PO to a JV/ WOS or any other entity in India pursuant to closure of such LO/ BO/ PO subject to provision of prescribed information/ documentation including a valuation certificate by a Chartered Accountant confirming transfer of assets at WDV. Cases of transfer of assets by LO/ BO/ PO at instances other than closure will still continue to require an approval from the RBI.

Compounding of Contraventions under FEMA, 1999

RBI/2013-14/553 A.P. (DIR Series) Circular No. 117 dated 4 April 2014, A.P. (DIR Series) Circular No. 23 dated 2 September 2014 and A.P. (DIR Series) Circular No. 36 dated 16 October 2014

The RBI has delegated further powers to compound the following contraventions under FEMA to its regional offices (except for Kochi and Panaji) without any limit on the amount of contravention:

- Violation of pricing guidelines for issue of shares;
- Issue of ineligible instruments such as non-convertible debentures, partly paid shares, shares with optionality clause, etc.; and

Regulatory developments

- Issue of shares without approval of RBI or FIPB respectively, wherever required
- Delay in submission of FC-TRS in case of transfer of shares from resident to non-resident and *vice versa*, taking on record transfer of shares by investee company, in the absence of certified form FC-TRS.

Furthermore, the RBI has removed the monetary cap of INR 10 million to compound the following contraventions under FEMA by Bhopal, Bhubaneshwar, Chandigarh, Guwahati, Jaipur, Jammu, Kanpur, Patna regional offices:

- Delay in reporting inward remittance received for issue of shares;
- Delay in filing form FC-GPR after issue of shares; and
- Delay in issue of shares/ refund of share application money beyond 180 days, mode of receipt of funds, etc.;

Additionally, three divisions of Foreign Investment Division (FID) *viz.* LO/ BO/ PO division, Non Resident Foreign Account Division (NRFAD) and Immovable Property (IP) division have been transferred to FED, CO Cell, RBI New Delhi w.e.f. 15 July 2014. Accordingly, the officers attached to the FED, CO Cell, New Delhi office are now authorised to compound the contraventions, without any limit on the amount of contravention, as under:

- Acquisition and transfer of immovable property outside India
- Acquisition and transfer of immovable property in India
- Establishment in India of BO, LO or PO
- Contraventions falling under Foreign Exchange Management (Deposit) Regulations , 2000

Kochi and Panaji ROs can compound the above contraventions for amount of contravention below INR 10 million only and the remaining contraventions shall be dealt by FEMA (CEFA), Mumbai.

Liberalised Remittance Scheme

A.P. (DIR series) Circular No. 138 dated 3 June 2014 and A.P. (DIR Series) Circular No.5 dated 17 July 2014

The limit under the LRS for resident individuals has been enhanced from USD 75,000 to USD 125,000. Accordingly, the AD Category–I banks have been allowed to remit up to USD 125,000 per FY, under the aforementioned Scheme for any permitted current or capital account transaction or a combination of both. Further, it is clarified that the Scheme can now be used for acquisition of immovable property outside India.

Hold, own, transfer foreign assets under section 6(4) of FEMA – Clarification

A.P. (DIR Series) Circular No. 90 dated 9 January 2014

A person resident in India is permitted to hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if that currency, security or property was acquired, held or owned by that person when he was resident outside India or was inherited from a person who was resident outside India.

The RBI has clarified that the following will be covered under this permission:

- Foreign currency accounts opened and maintained by such a person when he was non-resident;
- Income earned through:
  - Employment or business or vocation outside India taken up or commenced while such a person was non-resident, or
  - Investments made while such a person was non-resident,
  - Gifts or inheritance received while such a person was resident outside India;
- Foreign exchange, including any income arising therefrom and conversion or replacement or accrual to the same, held outside India by a person resident in India acquired by way of inheritance from a person resident outside India

Persons resident in India can freely utilise all their eligible assets abroad as well as income on such assets or sale proceeds thereof received after their return to India for making any payments or to make any fresh investments abroad without approval of the RBI. However, the cost of such investments and/ or any subsequent payments received therefore needs to be met exclusively out of funds forming part of the eligible assets held by them. Further, the transaction should not be in contravention of extant FEMA provisions.

Annexures

Articles

PwC Thought Leadership Articles

Sn	Particulars of Articles/ TL Publication	Where published	Date of publication	Author names
1	Look before you lend	The Financial Express	08 January 2014	Dhaivat Anjaria and Archit Kotwal
2	Need to look beyond non-compete clause	The Financial Express	16 January 2014	Akash Gupt and Manish K Tyagi
3	How safe is the harbour	The Financial Express	17 January 2014	Dinesh Supekar and Amit Dhadphale
4	Is it feasible to do away with income tax	The Economic Times	20 January 2014	Kuldip Kumar
5	Managing management fees	The Financial Express	30 January 2014	Nikhil Rohera and Rakesh Jain
6	Indian chapter in the form of country response to the issue relating to “implicit support” in the context of intra-group financial transactions	Bloomberg BNA	30 January 2014	Rahul K Mitra, Aditya Hans, and Devendra Gulati
7	Easing up foreign investment	The Financial Express	07 February 2014	Suresh Swamy and Siddharth Ajmera
8	E Funds ruling - A silver lining for contract service providers	Taxsutra	11 February 2014	Rahul K Mitra
9	Exchange risks	The Financial Express	14 February 2014	Dinesh Supekar and Rahul Mehta
10	Vote on Account 2014 - Mutual funds - Looking back at the regulatory landscape and the road ahead	The Economic Times	16 February 2014	Nehal Sampat and Dipesh Jain
11	Excise Duty Cut on Cars a Welcome Move	The Economic Times	18 February 2014	Vivek Mishra
12	Why it doesn’t make sense to withdraw your PF amount	The Financial Express	25 February 2014	Prakash Hegde
13	AAR versus tax authorities	The Financial Express	28 February 2014	Milan Shah and Darshan Shah
14	Selecting PLI - relevant factors for consideration	Taxsutra	03 March 2014	Kunj Vaidya
15	Reassessment Conundrum - Will SC break the logjam	Taxsutra	04 March 2014	Aravind Srivatsan and Deepti Chabria
16	Marketing Intangibles issue - How to deal with quandary post SB ruling	Taxsutra	10 March 2014	Rahul K Mitra
17	Opening up e-commerce to FDI can be game changer	Money Control	11 March 2014	Akash Gupt
18	Understanding applicability of cash profit ratio as PLI	Taxsutra	13 March 2014	Kunj Vaidya and A Balaji
19	Time to go SOCIAL and incentivize SPENDS	Taxsutra	13 March 2014	Aravind Srivatsan and Pravesh Jain
20	Putting PE determination on a firm footing	The Financial Express	14 March 2014	Sandeep Chaufla and Prabhat Lath
21	Stay by tribunal, not beyond 365 days	The Financial Express	25 March 2014	Shailesh Monani and Gaurish Zaoba
22	APA way out of share issue, intangibles?	Taxsutra	03 April 2014	Sanjay Tolia and Utpal Sen
23	Holes in the DTC net	The Financial Express	11 April 2014	Rahul Garg
24	Five points that spook India Inc	Business Standard	13 April 2014	Rahul Garg
25	New banks, different banking agenda	The Economic Times	16 April 2014	Shinjini Kumar
26	Misplaced priorities	The Financial Express	22 April 2014	Sushmita Basu and Amit Patni
27	Tackling profit-shifting	The Financial Express	26 April 2014	Suresh Swamy and Siddharth Ajmera
28	Enterprises must become more vigilant	The Financial Express	28 April 2014	Sandeep Ladda
29	SC Rules On ‘Contract of Sale’ vs ‘Works Contract’	Money Control	10 May 2014	Vivek Mishra and Tajinder Singh
30	Whose employee is she, anyway	The Financial Express	23 May 2014	Pallavi Singhal and Vikash Dhariwal
31	AAR stirs the pot in Steria - Implications decoded	Taxsutra	30 May 2014	Aravind Srivatsan
32	Tax tangles for investors	The Financial Express	06 June 2014	Sunil Gidwani and Snehal Mehta
33	Modi govt should usher in an industrial revolution in India	Business Today	16 June 2014	Vivek Mehra

Sn	Particulars of Articles/ TL Publication	Where published	Date of publication	Author names
34	Eliminate uncertainty, reduce litigation	The Financial Express	23 June 2014	Rahul Garg
35	Budget must fix indirect tax administration	The Financial Express	27 June 2014	Vivek Mishra and Tajinder Singh
36	Banking the new economy	Mint	30 June 2014	Shinjini Kumar
37	Budget 2014 - The IT-BPO Industry Wishlist	Business World	04 July 2014	Sandeep Ladda, Nirav Shah and Anand Patel
38	Making royalty payments less taxing	The Financial Express	07 July 2014	Vivek Mehra
39	Fillip To Manufacturing Sector	Money Control	07 July 2014	Vivek Mishra and Tajinder Singh
40	Will 'Inter-quartile Range' replace 'Arithmetical Mean' this budget?	Taxsutra	07 July 2014	Sanjay Tolia
41	Making India A Global Manufacturing Hub	Business World	08 July 2014	Vivek Mehra
42	Key indirect tax expectations by the IT sector	The Economic Times	09 July 2014	Kunal Wadhwa
43	Tax Neutrality Of Corporate Restructuring	Business World	09 July 2014	Ketan Dalal
44	Make it less taxing	The Hindu Business Line	09 July 2014	Indraneel Roy Chaudhary
45	Follow the TARC's line for effective dispute-resolution	The Financial Express	10 July 2014	Ketan Dalal
46	Budget 2014-15 - Introduction of fundamental reforms in TP	Taxsutra	11 July 2014	Rahul K Mitra
47	Tax troubles likely to lessen	The Financial Express	12 July 2014	Shyamal Mukherjee
48	REITs and InvIT - Is Indian law in line with global best practices	Taxsutra	16 July 2014	Gautam Mehra and Anish Sanghvi
49	Budgeting for education	The Financial Express	21 July 2014	Dhiraj Mathur
50	Budget round-up….let's pause and reflect	Taxsutra	22 July 2014	Sanjay Tolia and Ruhi Mehta
51	New RBI rules for banks will be an interesting externality to watch out for	The Indian Express	23 July 2014	Shinjini Kumar
52	Clarity on Charity - I	Taxsutra	30 July 2014	Nikhil Bhatia, Poonam Prabhu and Kruti Shah
53	Roll back of APAs - Making them work!	Taxsutra	30 July 2014	Darpan Mehta, Sabine Wahl and Abhay Saboo
54	Revival or death knell	The Financial Express	01 August 2014	Sandip Mukherjee and Kaushik Saranjame
55	Clarity on Charity - II	Taxsutra	01 August 2014	Nikhil Bhatia, Poonam Prabhu and Kruti Shah
56	Intra-group services and shareholder activities	Bloomberg BNA	06 August 2014	Rahul K Mitra, Aditya Hans, and Ashish Shah
57	The dawn of a new era	The Financial Express	08 August 2014	Rahul K Mitra and Aditya Hans
58	HC on LG Korea's India PE - 31 Unconsidered aspects	Taxsutra	18 August 2014	Rahul K Mitra
59	Good News For Indirect Transfers	Money Control	23 August 2014	Nikhil Rohera and Ravindra Agrawal
60	Realty remains a popular choice	Mint	25 August 2014	Kuldip Kumar
61	Dealing with the promiscuous shopper	Business Standard	08 September 2014	Sandeep Ladda
62	Priority of Dues - A Judicial Pinnacle over a Legislative Debacle	Taxsutra	10 September 2014	Satish S and Shiladitya Dash
63	Improving capacity is key to financial empowerment	The Economic Times	10 September 2014	Shinjini Kumar
64	Big Brother and the Indian law	Business Standard	15 September 2014	Kanchun Kaushal and Rajesh Haldipur
65	Mindteck case – Approving benevolence of CBDT circular on loss set off	Taxsutra	17 September 2014	Sandeep Ladda
66	Bringing clarity to indirect transfers	The Financial Express	03 October 2014	Sandeep Chaufla and Nitin Vaid
67	Will risk taking marketing distributors be eligible for 3% tolerance range?	Taxsutra	06 October 2014	Rahul K Mitra and Tanuj Sarda
68	No case for VAT on e-commerce	The Financial Express	13 October 2014	Vivek Mishra
69	Let Vodafone TP ruling be the final word	The Financial Express	15 October 2014	Shyamal Mukherjee
70	Source of Income – Understanding the undefined	Taxsutra	15 October 2014	Radhakishan Rawal
71	CBDT Circular No.14 on Manpower Movement - Is it a case of too little	Taxsutra	23 October 2014	Aravind Srivatsan and B Nagaraj

Sn	Particulars of Articles/ TL Publication	Where published	Date of publication	Author names
72	Thumbs Up to Berry Ratio - But can Tribunal 'masterpiece' aid non 'Sogo Shosha' distributors?	Taxsutra	02 November 2014	Rahul K Mitra
73	The Storming Cloud	Broadcast and Cablesat Magazine	October, 2014	Sandeep Ladda and Milan Shah
74	Comparable Uncontrolled Price (CUP) method – Introduction and Analysis	Bombay Chartered Accountant Journal	October, 2014	Darpan Mehta and Sujay Thakkar
75	Taxation issues in Cross border restructuring	International Taxation Magazine	September, 2014	Pallavi Singhal, Vikash Dhariwal and Monika Baid
76	Intra group financial transactions	International Taxation Magazine	September, 2014	Dhaivat Anjaria, Bhavik Timbadia and Abir Mukherjee
77	Royalty Payments to AEs and Related Controversies	International Taxation Magazine	September, 2014	Sandeep Puri
78	Navigating Key Issues in Indian TP	Tax Notes International	15 September 2014	Rachesh Kotak, Ajit Jain and Jimit Parikh
79	Tuning to the Right Frequency!	Broadcast and Cablesat Magazine	August, 2014	Rahul Charkha
80	Loss is not lost - SEZ and STPI taxation	International Taxation Magazine	August, 2014	Sandeep Ladda, Poonam Prabhu & Kruti Shah
81	Royalty or FTS-tax treaty override - A dichotomy	International Taxation Magazine	July, 2014	Sandeep Ladda, Nirav D Shah, Rachna Gurnani and Ashish Tripathi
82	Profit Split Method - Making it work	International Taxation Magazine	June, 2014	Sanjay Tolia and Ruhi Mehta
83	Profit attribution service PEs - concepts and practicalities	International Taxation Magazine	July, 2014	Sanjay Tolia and Amitava Sen
84	Taxability of transaction in the absence of FTS clause in the treaty	International Taxation Magazine	July, 2014	Jayant Jain
85	Budget 2014-From stagnation to growth through stability and certainty	International Taxation Magazine	July, 2014	Sandeep Ladda and Nirav D Shah
86	Union Budget 2014: Good days ahead for taxpayers in matters of TP	International Taxation Magazine	July, 2014	Rahul K Mitra and Devendra Gulati
87	Indian outbound IT companies-TP perspectives	International Taxation Magazine	June, 2014	Darpan Mehta, Jay Mankad and Mohit Parekh
88	The Watershed report	Business India	July, 2014	Ketan Dalal
89	Managing Assets in India	International Tax Review		Gautam Mehra, Nehal Sampat and Neha Shah
90	Tax issues for foreign banks in an ever changing landscape	International Tax Review		Sunil Gidwani, Nehal Sampat and Dipesh Jain
91	Taxation of Services and Cross Border withholding issues	IBFD - Bulletin for International Taxation	April/ May 2014	Radhakishan Rawal
92	Companies Act 2013-from business to compliance	IMA CFO Connect		Ketan Dalal
93	Admission of advance ruling application by AAR	IFA Conference (Bangalore)	February, 2014	Shailesh Monani, Sonia Agarwal, Gaurish Zaoba
94	Analysis of Poompuhar Shipping ruling	IFA Conference (Bangalore)	February, 2014	Aravind Srivatsan, Niranjan Govindekar
95	Intangibles and Transfer Pricing in India	IFA Conference (Bangalore)	February, 2014	Rakesh Mishra, Abhishek Shukla
96	APAs in Indian context	IFA Conference (Bangalore)	February, 2014	Amitava Sen
97	Tax morality	IFA Conference (Bangalore)	February, 2014	Nitin Karve
98	The black money catch	The Financial Express	05 November 2014	Rahul Garg
99	SC in Anglo-French Textile - Synonymity of 'accrue' & 'arise'!	Taxsutra	28 October 2014	Nitin Karve
100	The hurdles to making in India	The Hindu Business Line	12 November 2014	Vivek Mehra
101	The dancer on the horse	Business World - The SME Whitebook 2014-15	November, 2014	Alok Saraf and Abhijeet Shah
102	Activity-based NBFC rules mark new shift	The Economic Times	19 November 2014	Shinjini Kumar
103	CUP' is wide! - Expanding the applicability of the CUP method	Taxsutra	26 November 2014	Darpan Mehta and Prasad Pardiwala
104	OECD's draft on 'low value-adding intra-group services' – Will it be accepted in India?	Taxsutra	28 November 2014	Rahul K Mitra
105	Tax morality in the virtual world	The Financial Express	28 November 2014	Milan Shah and Manisha Arora
106	Issue of shares - out of TP rigours - Rules Bombay High Court	International Taxation Magazine	November, 2014	Kuntal Kumar Sen and Raju Vakharia
107	Related Party Dealings - Decoded and Simplified	International Taxation Magazine	November, 2014	Sanjay Tolia, Ruhi Mehta and Jay Mankad
108	Tinkering with PE exemption under BEPS - How much would OECD actually gain?	Taxsutra	08 December 2014	Rahul K Mitra
109	The Three Iconic Ladies - Bacha F. Guzdar, Bai Shrinibai Kooka & Dhun Dadabhoy Kapadia	Taxsutra	09 December 2014	Nitin Karve

Alerts

Sn	Date	Issue	Ruling/ Notification/ Circular
1	6 January 2014	Consultation Paper released by SEBI on Infrastructure Investment Trusts	Consultation Paper released by SEBI on Infrastructure Investment Trusts
2	9 January 2014	SEBI (Foreign Portfolio Investors) Regulations, 2014	SEBI (Foreign Portfolio Investors) Regulations, 2014
3	16 January 2014	Clarification on the implications of Apex court's ruling in Fiat case	CCE v. Fiat India Private Limited and Anr (2012-TIOL-58-SC-CX)
4	17 January 2014	No TDS on service tax on payments made/ due to resident payee if service tax component is indicated separately in the agreement/contract	CBDT Circular No. 4-2008 dated 28-04-2008
5	20 January 2014	Consideration for transfer of sales tax incentive taxable as revenue receipt	Sun-N-Sand Hotels Private Limited v. DCIT [TS-6-ITAT-2014(Mum)]
6	20 January 2014	Employees' contribution to EPF/ESIC beyond due dates specified in the relevant statutes disallowed even if deposited before the due date of filing the tax return	CIT v. Gujarat State Road Transport Corporation [2014] 41 taxmann.com 100 (Gujarat-HC)
7	27 January 2014	Section 10A/10B of the Act deduction available on income incidental to carrying on business of the undertaking, post amendment by Finance Act 2001	Motorola India Electronics Private Limited [TS-683-HC-2013(Karnataka)]
8	29 January 2014	Loss on redemption of investment in units of Mutual Fund incurred on account of commercial expediency, deductible as expenditure under section 37(1) of the Act	Canara Bank v. ACIT [TS-685-HC-2013(Karnataka)]
9	31 January 2014	Inclusion of statutory liability for the purpose of computing gross receipts under section 44BB - Reference for constitution of Larger Bench	Hallibutron Offshore Service Inc v. ACIT [ITA No. 41 of 2009, Uttarakhand HC]
10	3 February 2014	Development Agreement – willingness to perform critical to invoke transfer	M/s. Fibars Infratech Private Limited v. ITO [ITA No. 477/Hyd/2013] AY 2007-08
11	3 February 2014	Tribunal elucidates the concept of 'market value' for claiming tax holiday by captive power units	Shree Cement Limited v. Add.CIT [ITA No. 503/JP/2012, ITAT Jaipur]
12	6 February 2014	Consideration paid for acquiring 'licenses and client base' under a merger scheme is a 'business and commercial rights of similar nature', eligible for depreciation under section 32(1)(ii) of the Income-tax Act	The Cosmos Co-op Bank Limited v. DCIT [TS-47-ITAT-2014(Pune)]
13	7 February 2014	Tribunal recognises difficulty in providing 'concrete' evidence in respect of services provided against management fee	TNS India Private Limited v. ACIT [TS-21-ITAT-2014(Hyderabad)-TP]
14	13 February 2014	Long term capital loss on sale of shares of a group company partly to a related buyer and partly to an unconnected third party buyer allowed	ITO v. J.M. Morgan Stanley Private Limited [TS-690-ITAT-2013(Mumbai)]
15	14 February 2014	Initiation of prosecution proceedings under section 276CC of the Act for failure to file a return of income upheld by the Supreme Court	Sasi Enterprises v. ACIT [TS-43-SC-2014]
16	17 February 2014	Interim Budget 2014 – amendments relating to indirect taxes	Interim Budget 2014
17	18 February 2014	Interim Budget 2014	Interim Budget 2014
18	19 February 2014	Indian High Court rules against contract service provider constituting India PE of foreign principal	DIT v. E Funds IT Solution [TS-63-HC-2014(Delhi)]
19	26 February 2014	Tribunal has no power to grant stay beyond a period of 365 days; no prohibition on High Courts (in a writ jurisdiction) to issue directions and grant interim stay even beyond 365 days	CIT v. Maruti Suzuki (India) Limited (W.P (Civil) No. 5086 / 2013) & CIT v. Income tax Appellate Tribunal & Bose Corporation India Private Limited (W.P (Civil) No. 5003 / 2013)
20	28 February 2014	TPO not justified in recalculating royalty based on his own interpretation of term, 'Net Sales'	Akzo Nobel Chemicals (India) Ltd v. DCIT [TS-45-ITAT-2014(Pune)-TP]
21	13 March 2014	Corporate guarantee not an international transaction	Bharti Airtel Limited v. ACIT (ITA No. 5816/Del/2012, [2014] 43 taxmann.com 150 (Delhi-Trib.), AY 2008-09)
22	14 March 2014	Consideration for offshore supply of equipment not taxable in India though service consideration in-built in offshore equipment supply price to be taxed	POSCO Engineering & Construction Company Limited v. ADIT [TS-108-ITAT-2014(Delhi)]

Sn	Date	Issue	Ruling/ Notification/ Circular
23	19 March 2014	Karnataka High Court rejects notional adjustment of section 80-IA unit's losses prior to initial assessment year	CIT v. Shri Anil H Lad [TS-140-HC-2014(Karnataka)]
24	20 March 2014	Supreme Court allows section 244A interest to tax deductor as 'compensation' for excess taxes deducted	Union of India v. Tata Chemicals Limited [2014] 43 taxmann.com 240 (SC)
25	24 March 2014	Payment to HO for data processing charges not 'royalty' under the India-Belgium tax treaty; such expense cannot be clubbed under HO expenses under section 44C	ADIT v. Antwerp Diamond Bank NV [TS-150-ITAT-2014(Mumbai)]
26	24 March 2014	Provisions of section 56(2)(vii)(c) not to apply to issue of additional shares on pro rata basis	Sudhir Menon HUF v. ACIT [TS-146-ITAT-2014(Mumbai)]
27	25 March 2014	SB refrains from bifurcating KPOs and BPOs, yet allows dissection of ITES based on functional mapping	
28	26 March 2014	Date of signing of agreement to buy immovable property to be considered for calculating period of holding and not date of allotment / confirmation letter	Gulshan Malik v. CIT [2014] 43 taxmann.com 200 (Delhi-HC)
29	31 March 2014	India signs it's First 5 APAs in record time	
30	2 April 2014	No Transfer Pricing adjustment if the exempt income is lower than the income determined in accordance with the arm's length principle	Motif India Infotech Private Limited v. ACIT [TS-88-ITAT-2014(Ahmedabad)-TP]
31	7 April 2014	Factual situation relevant for allowing deduction under section 80-IB of the Income-tax Act, 1961	CIT v. M/s Abad Constructions Private Limited [TS-178-HC-2014(Kerala)]
32	10 April 2014	Policy for Foreign Direct Investment in Limited Liability Partnership	RBI notification laying down the guidelines in relation to Government of India's Press Note 1 of 2011 permitting FDI in LLP
33	14 April 2014	Karnataka HC's passing remark on treaty override by domestic law	Vodafone South Limited v. DDIT [TS-173-HC-2014(Karnataka)]
34	15 April 2014	Release of retention money against a bank guarantee does not result in accrual of income in receiver's hands unless right to receive income exists at the time of receipt	Amarshiv Construction Private Limited v. DCIT [TS-191-HC-2014(Gujarat)]
35	17 April 2014	EPFO introduces online application for a certificate of coverage and issues guidelines on matters of Indian social security	Recent changes introduced by EPFO for online application of a certificate of coverage (COC) and guidelines issued on matters of Indian social security
36	18 April 2014	Tribunal upholds PSM over TNMM; adopts residual profit benchmarking considering each entity's contribution	Global One India Private Limited v. ACIT [TS-115-ITAT-2014(Delhi)]
37	22 April 2014	Use of hotel rooms for the purpose of business could result in a permanent establishment	Renoir Consulting Limited v. Dy DIT (IT) [TS-211-ITAT-2014(Mumbai)]
38	30 April 2014	Delhi High Court rules on constitution of an Association of Persons (AOP) and the taxability of offshore supplies and services in a turnkey contract	Linde AG, Linde Engineering Division v.DCIT [TS-226-HC-2014(Delhi)]
39	30 April 2014	Non-deduction of tax in accordance with the provisions of the Income-tax Act, 1961 should not result in imposition of penalty under section 271(1)(c)	HDFC Asset Management Company Limited v. ITO [TS-212-ITAT-2014(Mumbai)]
40	2 May 2014	Method of settlement is of no consequence for the purposes of deduction of tax at source where the payee is a non-resident	Right Tunnelling Company Limited v. ADIT [TS-220-ITAT-2014(Delhi)]
41	5 May 2014	Delhi High Court upholds AAR ruling on secondment agreement giving rise to Service PE and withholding tax obligations	Centrica India Offshore Private Limited v. CIT & Ors. [TS-237-HC-2014(Delhi)]
42	8 May 2014	Apex Court's larger bench rules on "Contract for Sale" v "Works Contract" in Kone Elevator case	Kone Elevator India Private Limited v. State of Tamil Nadu and ors (2014-TIOL-57-SC-CT-CB)
43	13 May 2014	Maintenance contracts that involve services that are fairly simple would attract withholding under section 194C; vehicle hiring cost would have to be segregated into car rental and payment for other services for the purpose of tax withholding	ITO v. Bharat Sanchar Nigam Limited [TS-257-ITAT-2014(Mumbai)]
44	17 May 2014	ECB from Direct / Indirect Foreign Equity Holders and Group Companies to be approved by AD Banks (including ECB for General Corporate Purposes permitted from Direct Equity Holders)	RBI Circular No. 130 dated 16 May 2014 concerning External Commercial Borrowings

Sn	Date	Issue	Ruling/ Notification/ Circular
45	19 May 2014	Transfer of a business undertaking as a going concern against share/ bond issue not 'slump sale'	CIT v. Bharat Bijlee Limited [TS-270-HC-2014(Bombay)]
46	20 May 2014	Beneficiaries not taxable for income of overseas discretionary trusts not distributed or received by them	Commissioner of Wealth-tax v. Estate of Late HMM Vikramsinhji of Gondal [TS-258-SC-2014]
47	26 May 2014	Amounts paid to Banks and Financial Institutions as 'guarantor' of a joint venture company, not deductible as business expenditure	LML Limited v. JCIT [TS-280-ITAT-2014(Mumbai)]
48	29 May 2014	Hedging of probable currency risk by importers - Liberalisation	Reserve Bank of India Circular No. 135 dated 27 May, 2014
49	5 June 2014	Long-term capital gains on transfer of listed securities in an off-market transaction by a non-resident to be taxed at lower rate of 10%	Pan-Asia iGATE Solutions, Mauritius, In re [TS-296-AAR-2014]
50	9 June 2014	Employers cannot be forced to contribute over and above the statutory wage limit	-
51	11 June 2014	Benefit of Article 8 of the India-Cyprus tax treaty is available as long as the enterprise is registered and has headquarters in Cyprus	Shaan Marine Services Private Limited v. DDIT [TS-327-ITAT-2014(Pune)]
52	12 June 2014	Transfer of assets of Liaison Office/ Branch Office/ Project Office at the time of closure	Reserve Bank of India Notification No. FEMA 295/ 2014 dated 30 May, 2014
53	13 June 2014	Profit on sale of rural agricultural land to be excluded from book profit for calculating MAT	The Nilgiri Tea Estate Ltd v. ACIT [TS-345-ITAT-2014 (Cochin)]
54	24 June 2014	New guidelines for approval of in-house R&D centers and submission of report under section 35(2AB) issued	Guidelines for approval of in-house research and development (R&D) centres and submission of prescribed report under section 35(2AB) of the Income-tax Act, 1961
55	26 June 2014	Excise Duty concession granted to capital goods and automotive sector has been further extended	Central Excise tariff Notification No. 6/2014 on 25 June, 2014
56	30 June 2014	Supply of telecom equipment by overseas group company as a part of a turnkey project will create a Permanent Establishment	Nortel Networks India International Inc. v. DDIT [TS-355-ITAT-2014(Delhi)]
57	1 July 2014	Recurring expenditure incurred for 'brand building' is revenue expenditure and deductible in the year of incurrence	Fine Jewellery (India) Limited v. ACIT [TS-371-ITAT-2014(Mumbai)]
58	2 July 2014	Reinvestment of capital gain yield from sale of residential property in India to purchase residential property abroad held eligible for deduction under section 54	N Ranganathan v. ITO [ITA No. 863/Mds/2014]
59	4 July 2014	Technical and supervisory services does not create a PE in the absence of an independent site operation	GFA Anlagenbau Gmbh v. DDIT/ ADIT [TS-383-ITAT-2014(Hyderabad)]
60	10 July 2014	PwC India Tax News Flash - Union Budget 2014 - Indirect Tax Proposals	-
61	10 July 2014	PwC India Tax News Flash - Union Budget 2014 - Direct Tax Proposals	-
62	15 July 2014	RBI amends pricing guidelines - Valuation of shares as per internationally accepted pricing methodology on arm's length basis	Amended pricing guidelines for valuation of shares as per internationally accepted pricing methodology on arm's length basis
63	17 July 2014	RBI recognises partly paid up shares and warrants as permissible instruments for foreign investments	Circular issued by the Reserve Bank of India to recognise partly paid up shares and warrants as permissible instruments for foreign investments
64	17 July 2014	EPFO issues directions for preparatory activities to effect the proposed changes on enhancement of statutory wage limit from INR 6,500 to INR 15,000	Notification issued by the EPFO for directions to its regional offices for preparatory activities to effect the proposed changes on enhancement of statutory wage limit
65	18 July 2014	A limitation period is applicable to section 201(1)/ (1A) proceedings even though no time limit was prescribed	DIT(IT) v. Mahindra & Mahindra Limited [TS-404-HC-2014(Bombay)]
66	21 July 2014	SEBI (Infrastructure Investment Trusts) Regulations, 2014	Draft regulation issued by the SEBI on the infrastructure investment trusts
67	24 July 2014	Information on social networking site - LinkedIn, admissible as additional evidence for determination of permanent establishment	GE Energy Parts Inc. v. ADIT [TS-400-ITAT-2014(Delhi)]

Sn	Date	Issue	Ruling/ Notification/ Circular
68	24 July 2014	Insurance premium paid under a Keyman insurance policy which is not a pure life insurance policy not a deductible expense	F.C. Sondhi & Company (India) Private Limited v. DCIT [TS-243-ITAT-2014(Amritsar)]
69	25 July 2014	Revenue earned by a non-resident from providing seismic services taxable under section 44BB if such income is effectively connected with PE of non-resident in India	PGS Geophysical AS v. ADIT [TS-436-HC-2014(Delhi)]
70	25 July 2014	Gift of shares in a subsidiary by a company is not regarded as transfer under section 47(iii) of the Act and hence not liable to capital gains tax	Redington (India) Limited v. JCIT [TS-419-ITAT-2014(Chennai)]
71	28 July 2014	Finance (No. 2) Bill, 2014 passed in Lok Sabha – Changes in direct tax proposals explained	Amendments to the Finance (No. 2) Bill, 2014 proposed and passed in the Lok Sabha
72	5 August 2014	Gains on sales of equity shares and compulsorily convertible debentures characterised as capital gains and not as interest income	Zaheer Mauritius v. DIT [TS-464-HC-2014(Delhi)]
73	8 August 2014	Cadbury minority buyout approved	Cadbury India Limited – Company petition 1072 of 2009
74	8 August 2014	Sale of shares to JV partner at a loss is not a colourable transaction	CIT v. Siel Limited [TS 470-HC-2014(Delhi)]
75	18 August 2014	Deduction under section 80-IB in subsequent years allowed to an SSI post 'formative conditions'	Ace Multi Axes Systems Limited v. DCIT [TS-484-HC-2014(Karnataka)]
76	27 August 2014	Delhi High Court's landmark ruling on taxation of 'indirect transfer'	DIT (International Tax) v. Copal Research Limited, Mauritius [TS-509-HC-2014(Delhi)]
77	2 September 2014	Amendments introduced in Indian social security schemes - statutory wage ceiling increased from INR 6,500 to INR 15,000 per month	http://epfindia.com/Circulars/Y2014-15/Coord_SchemeAmendment_13637.pdf
78	2 September 2014	Social Security Agreement between India-Czech Republic comes into force with effect from September 1, 2014	Recent Employees Provident Fund Organisation (EPFO) notifications about the Social Security Agreement between India-Czech Republic
79	9 September 2014	Deduction under section 10A cannot be denied to a taxpayer unless an 'arrangement' as required under section 80-IA(10) is proved	A. T. Kearney India Private Limited v. ACIT [TS-527-ITAT-2014(Delhi)]
80	12 September 2014	BPO businesses are set-up upon commencement of training of employees	Omniglobe Information Tech India Private Limited v. CIT [TS-526-HC-2014(Delhi)]
81	17 September 2014	Compensation received for a transaction declared void ab initio is a capital receipt not chargeable to tax	DCIT v. Winsome Yarns Limited [TS-546-ITAT-2014(Chandigarh)]
82	18 September 2014	OECD's agreed recommendations on BEPS 2014 deliverables: Few surprises - but no let up	OECD BEPS
83	23 September 2014	OECD Report on BEPS Action Plan 6 - Treaty Abuse	OECD BEPS
84	23 September 2014	OECD guidance on Transfer Pricing Aspects of Intangibles: Revised Chapters I, II and VI of the OECD Transfer Pricing Guidelines	OECD BEPS
85	24 September 2014	OECD finalises guidance on transfer pricing documentation and country-by-country reporting	OECD BEPS
86	26 September 2014	Supreme Court provides clarity on prospective versus retrospective operation of tax amendments	CIT v. Vatika Township Private Limited [TS-573-SC-2014]
87	27 September 2014	REIT and InvIT Regulations - A Synopsis	Notification Nos. LAD-NRO/GN/2014-15/11/1576 and LAD-NRO/GN/2014-15/10/1577 dated 26 September 2014
88	1 October 2014	Ministry of Finance notifies tolerance band for FY 2013-14	CBDT Notification No. 45/ 2014, dated 23 September 2014
89	12 October 2014	Issue of shares – out of TP rigours – Rules Bombay High Court	Vodafone India Services Private Limited v. UOI (WP No. 871 of 2014, Bombay High Court)
90	27 October 2014	MCA clarification: Trust/ trustee not barred from being a partner in an Limited Liability Partnership	Clarification with regard to Trust/ trustee as a partner in the Limited Liability Partnerships, Circular No. 37/ 2014
91	30 October 2014	International workers now can receive Indian social security benefits in their overseas bank accounts	http://epfindia.com/Circulars/Y2014-15/IWU_BankingAgree_IW_19453.pdf
92	31 October 2014	Liberalization of FDI norms in Construction Development Sector	PIB Release dated 29 October 2014 - Review of FDI policy in construction development sector
93	5 November 2014	Income earned by a fund set up as a revocable trust to be taxed only in the hands of the beneficiaries as per the provisions of sections 61 to 63	DCIT v. India Advantage Fund-VII [ITA No. 178/Bang/2012]

Sn	Date	Issue	Ruling/ Notification/ Circular
94	6 November 2014	Release of BEPS Discussion Draft: Proposed modifications to Transfer Pricing Guidelines relating to low value-adding intra-group services	OECD BEPS
95	10 November 2014	CBDT has issued instructions to Income-tax Officers - an attempt towards a non-adversarial tax regime	CBDT Press Release dated 7 November 2014
96	12 November 2014	GST update: Outcome of the recent meeting of the Empowered committee of State Finance Ministers	
97	13 November 2014	Tribunal lays down key fundamental differences between merchant banking and private equity fund related activities and accepts mark up earned by the taxpayer for sub-advisory services	Xander Advisors India Private Limited v. ACIT [TS-361-ITAT-2014(Delhi)-TP]
98	20 November 2014	CBEC issued clarification regarding re-availment of CENVAT credit post expiry of 6 months	CBEC Circular No. 990/14/2014-CX-8 dated November 19, 2014
99	22 November 2014	Madras High Court provides clarity on taxation of bareboat charter hire charges	CIT v. Van Oord ACZ Equipment BV [TS-695-HC-2014(Madras)]
100	28 November 2014	Shell follows Vodafone on issue of shares – Chapter X applies when income arises and is chargeable to tax	Shell India Markets Private Limited v. ACIT [2014] 51 taxmann.com 519 (Bombay HC)
101	4 December 2014	No disallowance under section 14A unless exempt income is earned during the year	Commissioner of Income-tax-IV v. Holcim India Private Limited [TS-640-HC-2014(Delhi)]
102	4 December 2014	Liberalisation of FDI norms in Construction Development Sector	Press Note 10 of 2014

Newsletters

PwC India Newsletters

India Spectrum

Sn	Issue
1	PwC Newsletter: India Spectrum - December - January 2014
2	PwC Newsletter: India Spectrum - February - March 2014
3	PwC Newsletter: India Spectrum - April - May 2014
4	PwC Newsletter: India Spectrum - June - July 2014
5	PwC Newsletter: India Spectrum - August - September 2014
6	PwC Newsletter: India Spectrum - October - November 2014

Refresh

Sn	Issue
1	PwC Newsletter: Refresh - January - February 2014
2	PwC Newsletter: Refresh - March - April 2014
3	PwC Newsletter: Refresh - May - June 2014
4	PwC Newsletter: Refresh - July - August 2014

Customs, FTP and WTO

Sn	Issue
1	PwC Newsletter: Customs, FTP and WTO - January 2014
2	PwC Newsletter: Customs, FTP and WTO - February 2014
3	PwC Newsletter: Customs, FTP and WTO - March 2014
4	PwC Newsletter: Customs, FTP and WTO - April 2014
5	PwC Newsletter: Customs, FTP and WTO - May 2014
6	PwC Newsletter: Customs, FTP and WTO - June 2014
7	PwC Newsletter: Customs, FTP and WTO - July 2014
8	PwC Newsletter: Customs, FTP and WTO - August 2014
9	PwC Newsletter: Customs, FTP and WTO - September 2014
10	PwC Newsletter: Customs, FTP and WTO - October 2014
11	PwC Newsletter: Customs, FTP and WTO - November 2014

Indirect Taxes

Sn	Issue
1	PwC Newsletter: Indirect taxes - January 2014
2	PwC Newsletter: Indirect taxes - February 2014
3	PwC Newsletter: Indirect taxes - March 2014
4	PwC Newsletter: Indirect taxes - April 2014
5	PwC Newsletter: Indirect taxes - May 2014
6	PwC Newsletter: Indirect taxes - June 2014
7	PwC Newsletter: Indirect taxes - July 2014
8	PwC Newsletter: Indirect taxes - August 2014
9	PwC Newsletter: Indirect taxes - September 2014
10	PwC Newsletter: Indirect taxes - October 2014
11	PwC Newsletter: Indirect taxes - November 2014

Tax Treaties

List of Tax Information Exchange Agreements (TIEAs)

Sr No	Country	Notification No. and Date	Date when signed	Date of coming into force
1	Argentina	Notification No. 22/2013 [F.NO. 504/3/2010-FTD-II]/SO 824(E), dated 22-3-2013	21 November 2011	28 January 2013
2	Bahamas	Notification No. 25/2011 [F.NO. 503/6/2009-FTD-I], dated 13-5-2011	11 February 2011	11 February 2011
3	Bahrain	Notification No. 44/2013[F.No.501/03/1994-FT&TR-II]/SO 1766(E), dated 19-6-2013	31 May 2012	11 April 2013
4	Bermuda	Notification No. 5/2011 [F. NO. 503/2/2009-FTD-I], dated 24-1-2011	07 October 2010	03 November 2010
5	Belize	Notification No. 3/2014 [F. No. 503/4/2012-FTD-I], dated 7-1-2014	18 September 2013	25 November 2013
6	British Virgin Islands	Notification No. 54/2011 [F.NO. 503/10/2009-FTD-I], dated 3-10-2011	09 February 2011	22 August 2011
7	Cayman Islands	Notification No.61/2011[F.NO.503/03/2009-FTD-I]/S.O. 2902(E), dated 27-12-2011	21 March 2011	08 November 2011
8	Gibraltar	Notification No. 28/2013 [F. No. 503/11/2009-FTD-I]/S.O. 924(E), dated 01-04-2013	01 February 2013	11 March 2013
9	Guernsey	Notification No. 30/2012 [F. NO. 503/1/2009-FTD-I]/SO 1782(E), dated 9-8-2012	20 December 2011	11 June 2012
10	Isle of Man	Notification No. 26/2011 [F.NO. 503/01/2008 - FTD-I], dated 13-5-2011	04 February 2011	17 March 2011
11	Jersey	Notification No. 26/2012 [F. NO. 503/6/2008-FTD-I]/S.O. 1541(E), dated 10-7-2012	03 November 2011	08 May 2012
12	Principality of Liechtenstein	Notification No. 30/2014[F.No.503/4/2009-FTD-I], dated 6-6-2014	28 March 2013	01 April 2013
13	Liberia	Notification No. 32/20012-FT&TR-II [F.NO. 503/02/2010-FT&TR-II]/SO 1877(E), dated 17-8-2012	03 October 2011	30 March 2012
14	Macau, China	Notification No.43/2012[F.No.503/04/2009-FT&TR-II]/SO 2427(E), dated 10-10-2012	03 January 2012	16 April 2013
15	Monaco	Notification No.43/2012[F.NO.503/04/2009-FT&TR-II]/SO 2427(E), dated 10-10-2012	31 July 2012	03 April 2013
16	San Marino		Signed on 19 December 2013	Not yet in force.
17	St. Maarten		Signed on 27 October 2012	Not yet in force.

List of Social Security Agreements

Sr No	Country	Date when signed	Date of coming into force
1	Belgium	03 November 2006	01 September 2009
2	Germany (On Social Insurance)	08 October 2008	01 October 2009
3	Hungary	03 February 2010	01 April 2013
4	Switzerland	03 September 2009	29 January 2011
5	Luxembourg	30 September 2009	01 June 2011
6	France	30 September 2008	01 July 2011
7	Denmark	17 February 2010	01 May 2011
8	Korea	19 October 2010	01 November 2011
9	Netherlands	22 October 2009	01 December 2011

List of Social Security Agreements: Signed but not notified

• Norway – 29 October 2010	• Portugal – 4 March 2013
• Canada – 6 November 2012	• Germany (On Social Security) – 12 October 2011
• Japan – 16 November 2012	• Quebec – 26 November 2013
• Sweden – 26 November 2012	• Czech Republic - 9 June 2010
• Austria – 4 February 2013	• Finland - 12 June 2012

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	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

List of Double Taxation Avoidance Agreements

Sr No	Country	Notification No. and Date	Date when signed	Date of coming into force
1	Albania	Notification No. 2/2014 [F. No. 501/1/2003-FTD-I]/SO 47(E), dated 6-1-2014	08 July 2013	01 April 2014
2	Armenia	Notification No. GSR 800E, dated 8-12-2004	31 October 2003	01 April 2005
3	Australia	Notification No. GSR 60(E), dated 22-1-1992	25 July 1991	01 April 1992
4	Austria	Notification No. GSR 682(E), dated 20-9-2001	08 November 1999	01 April 2002
5	Azerbaijan		20 November 1988	01 April 1990
6	Bangladesh	Notification No. GSR 758(E), dated 8- 9-1992	27 August 1991	01 April 1993
7	Belarus	Notification No. GSR 392(E), dated 17-7-1998	27 September 1997	01 April 1999
8	Belgium	Notification No. GSR 632(E), dated 31-10-1997, as amended by Notification No. SO 54(E), dated 19-1-2001. Earlier agreement was entered into vide GSR 323(E), dated 6-6-1975 which was later amended by GSR 321(E), dated 2-3-1988.	26 April 1993	01 April 1998
9	Bhutan	NOTIFICATION NO. 42/2014 [F.NO.503/4/2004-FTD-II], dated 5-9-2014	04 March 2013	01 April 2015
10	Botswana	Notification No. 70/2008-FTD, dated 18-6-2008	08 December 2006	01 April 2008
11	Brazil	Notification No. GSR 381(E), dated 31-3-1992	26 April 1988	01 April 1993
12	Bulgaria	Notification No. GSR 205(E), dated 9-5-1996	26 May 1994	01 April 1996

Sr No	Country	Notification No. and Date	Date when signed	Date of coming into force
13	Canada	Notification No. SO 28(E), dated 15-1-1998. Earlier agreement was entered into vide GSR 1108(E), dated 25-9-1986, as amended by GSR 635(E) dated 24-6-1992. Circular No. 638, dated 28-10-1992 dealt with this agreement.	11 January 1996	01 April 1998
14	China (People's Republic of China)	Notification No. GSR 331(E), dated 5-4-1995	18 July 1994	01 April 1995
15	Croatia		12 February 2014	Not yet in force.
16	Chinese Taipei (Taiwan)		12 July 2011	01 April 2012
17	Colombia	Notification No. 44/2014 [F.No. 501/3/99-FTD-II]	13 May 2011	07 July 2014
18	Cyprus	Notification No. GSR 805(E), dated 26-12-1995	13 June 1994	01 April 1993
19	Czech Republic	Notification No. GSR 811(E), dated 8-12-1999	01 October 1998	01 April 2000
20	Denmark	Notification No. GSR 853(E), dated 25-9-1989	08 March 1989	01 January 1990
21	Egypt (United Arab Republic)	Notification No. GSR 2363, dated 30-9-1969	20 February 1969	01 January 1969
22	Estonia	Notification No. 27/2012 [F.NO.503/02/1997- FTD-1]/SO NO. 1677(E), dated 25-7-2012	19 September 2011	01 April 2013
23	Ethiopia	Notification No. 14/2013 [FT & TR-II/F. No. 503/01/1996-FT&TR-II], dated 21-02-2013	25 May 2011	08 July 2013
24	Fiji	NOTIFICATION NO.35/2014 [F.NO.503/11/2005-FTD-II], dated 12-8-2014	30 January 2014	01 April 2015
25	Finland	Notification No. 36/2010 [F. NO. 501/13/1980-FTD-I], dated 20-5-2010	15 January 2010	01 April 2011
26	France	Notification No. 9602 [F. No. 501/16/80-FTD], dated 6-9-1994, as amended by Notification No. SO 650(E), dated 10-7-2000	29 September 1992	01 April 1995
27	Georgia	Notification No. 4/2012[F.NO.503/05/2006-FTD.I], dated 6-1-2012	24 August 2011	01 April 2012
28	Germany	Notification No. SO 836(E), dated 29-11-1996. Earlier an agreement was entered with Federal German Republic vide GSR 1090, dated 13-9-1960 and vide GSR 107(E), dated 2-3-1990 and agreement was entered with German Democratic Republic.	19 June 1995	01 April 1997
29	Greece	Notification No. GSR 394, dated 17-3-1967	11 February 1965	01 April 1964
30	Hungary	Notification No. GSR 197(E), dated 31-3-2005	03 November 2003	01 April 2006
31	Iceland	Notification No. S.O. 241(E), dated 5-2-2008	23 November 2007	01 April 2008
32	Indonesia	Notification No. GSR 77(E), dated 4-2-1988	07 August 1987	01 April 1988
33	Ireland	Notification No. 45/2002 [F. No. 503/6/99-FTD], dated 20-2-2002	06 November 2000	01 April 2002
34	Israel	Notification No. GSR 256(E), dated 26-6-1996	29 January 1996	01 April 1994
35	Italy	Notification No. GSR 189(E), dated 25-4-1996. Earlier agreement was entered into vide GSR 608(E), dated 8-4-1986	19 February 1993	01 April 1996
36	Japan	Notification No. GSR 101(E), dated 1-3-1990, as amended by Notification Nos. SO 753(E), dated 16-8-2000 (w.r.e.f. 1-10-1999), SO 1136(E), dated 19-7-2006, w.r.e.f. 28-6-2006 and SO 2528(E), dated 8-10-2008, w.e.f. 1-10-2008	07 March 1989	01 April 1990
37	Jordan	Notification No. GSR 810(E), dated 8-12-1999	20 April 1999	01 April 2000
38	Kazakhstan	Notification No. GSR 633(E), dated 31-10-1997	09 December 1996	01 April 1998
39	Kenya	Notification No. GSR 665(E), dated 20-8-1985	12 April 1985	01 April 1985
41	Korea, (Republic of)	Notification No. GSR 111(E), dated 26-9-1986, as amended by GSR 986(E), dated 20-12-1990	19 July 1985	01 April 1984
42	Kuwait	Notification No. SO 2000(E), dated 27-11-2007	15 June 2006	01 April 2008
43	Kyrgyz Republic	Notification No. GSR 75(E), dated 7-2-2001	13 April 1999	01 April 2002
44	Latvia	NOTIFICATION NO.12/2014 [F.NO.503/02/1997-FTD-I], dated 5-3-2014	18 September 2013	April 1,2014
45	Libya	Notification No. GSR 22(E), dated 1-7-1982	02 March 1981	01 January 1983
46	Lithuania	Notification No. 28/2012 [F. No. 503/02/1997-FTD-1], dated 25-7-2012	26 July 2011	01 January 2013
47	Luxembourg	Notification No. 78/2009 [F. No. 503/1/96-FTD-I], dated 12-10-2009	02 June 2008	01 April 2010

Sr No	Country	Notification No. and Date	Date when signed	Date of coming into force
48	Macedonia		17 December 2013	Not yet in force.
49	Malaysia	Notification No. 07/2013 [F. No. 506/123/84-FTD-II], dated 29-1-2013	09 May 2012	01 April 2013
50	Malta	Notification No. SO 761(E), dated 22-11-1995	28 September 1994	01 April 1996
51	Mauritius	Notification GSR No. 920(E), dated 6-12-1983	24 August 1982	01 April 1983
52	Mexico	Notification No. 86/2010 [F. NO. 503/4/91-FTD-I], dated 26-11-2010	10 September 2007	01 April 2011
53	Moldova		20 November 1988	01 April 1990
54	Mongolia	Notification No. SO 635(E), dated 16-9-1996	22 February 1994	01 April 1994
55	Montenegro	Notification No. 4/2009 [F.NO. 503/1/1997-FTD-I]/S.O. 96(E), dated 7-1-2009	08 February 2006	01 April 2009
56	Morocco	Notification No. GSR 245(E), dated 15-3-2000	30 October 1998	01 April 2001
57	Mozambique	Notification No. 30/2011-FT&TR-II [F.NO.501/152/2000-FT&TR-II], dated 31-5-2011	30 September 2010	01 April 2012
58	Myanmar	Notification No. 49/2009-FT & TR-II [F. NO. 504/10/2004-FT & TR-II], dated 18-6-2009	02 April 2008	01 April 2010
59	Namibia	Notification No. GSR 196(E), dated 8-3-1999	15 February 1997	01 April 2000
60	Nepal	Notification No. 20/2012 [F.NO.503/03/2005-FTD-II], dated 12-6-2012	27 November 2011	01 April 2013
61	Netherlands	Notification No. GSR 382(E), dated 27-3-1989 as amended by Notification No. SO 693(E), dated 30-8-1999 and Notification No. 2/2013, dated 14-1-2013	30 July 1988	01 April 1989
62	New Zealand	Notification No. GSR 314(E), dated 27-3-1987, as amended by GSR 477(E), dated 21-4-1988 and GSR 37(E), dated 12-1-2000	17 October 1986	01 April 1987
63	Norway	Notification No. 24/2012 [F.NO. 505/3A/81-FTD-I], dated 19-6-2012	02 February 2011	01 April 2012
64	Oman	Notification No. SO 563(E), dated 23-9-1997	02 April 1997	01 April 1998
65	Philippines	Notification No. GSR 173(E), dated 2-4-1996 and as amended by Notification No. SO 125(E), dated 2-2-2005	12 February 1990	01 April 1995
66	Poland	Notification No. GSR 72(E), dated 12-2-1990	21 June 1989	01 April 1990
67	Portuguese Republic	Notification No. GSR 542(E), dated 16-6-2000, as corrected by Notification No. SO 673(E), dated 25-8-2000 and GSR 597(E), dated 20-9-2005	11 September 1998	01 April 2001
68	Qatar	Notification No. GSR 96(E), dated 8-2-2000	07 April 1999	01 April 2001
69	Romania	Notification No. GSR 80(E), dated 8-2-1988	08 March 2013	01 April 2014
70	Russian Federation	Notification No. 10677 [F. No. 501/6/92-FTD], dated 21-8-1998. Earlier agreement was entered into vide GSR 812(E), dated 4-9-1989, as amended by GSR 952(E), dated 30-12-1992.	25 March 1997	01 April 1999
71	Saudi Arabia	Notification No. 287/2006-FTD [F.No. 501/7/91-FTD], dated 17-10-2006	25 January 2006	01 April 2007
72	Serbia and Montenegro	Notification No. 5/2009 [F.No. 503/1/797-FTD-1]/S.O. 97(E), dated 7-1-2009	08 February 2006	01 April 2009
73	Singapore	Notification No. GSR 610(E), dated 8-8-1994 as amended by Notification SO 1022(E), dated 18-7-2005	24 January 1994	01 April 1994
74	Slovak Republic		27 January 1986	01 April 1985
75	Slovenia	Notification No. GSR 344(E), dated 31-5-2005	13 January 2003	01 April 2006
76	South Africa	Notification No. GSR 198(E), dated 21-4-1998	04 December 1996	01 April 1998
77	Spain	Notification No. GSR 356(E), dated 21-4-1995	08 February 1993	01 April 1996
78	Sri Lanka	Notification No. GSR 342(E), dated 19-4-1983	22 January 2013	01 April 2014
79	Sudan	Notification No. GSR 723(E), dated 1-11-2004	22 October 2003	01 April 2005
80	Sweden	Notification No. GSR 705(E), dated 17-12-1997. Earlier agreement was entered into vide GSR 38(E), dated 27-3-1989.	24 June 1997	01 April 1998

Sr No	Country	Notification No. and Date	Date when signed	Date of coming into force
81	Switzerland	Notification No. GSR 357(E), dated 21-4-1995, as amended by Notification No. GSR 74(E), dated 7-2-2001, 62/2011, dated 27-12-2011 w.e.f. 1-4-2012	02 November 1994	01 April 1995
82	Syria	Notification No. 33/2009-FTD-II [F.NO. 503/7/2005-FTD-II], dated 30-3-2009	18 June 2008	01 April 2009
83	Tajikistan	Notification No. 58/2009 [FT & TR-II [F.No. 503/10/95-FT & TR-II], dated 16-7-2009	20 November 2008	01 April 2010
84	Tanzania	Notification No. 8/2012 [FT & TR-II/F. No. 503/02/2005-FTD-II], dated 16-2-2012	27 May 2011	01 April 2012
85	Thailand	Notification No. GSR 915(E), dated 27-6-1986	22 March 1985	01 April 1987
86	Trinidad & Tobago	Notification No. GSR 720(E), dated 26-10-1999	08 February 1999	01 April 2000
87	Turkey	Notification No. SO 74(E), dated 3-2-1997	31 January 1995	01 April 1994
88	Turkmenistan	Notification No. GSR 567(E), dated 25-9-1997	25 February 1997	01 April 1998
89	Uganda	Notification No. GSR 666(E), dated 12-10-2004	30 April 2004	01 April 2005
90	Ukraine	Notification : GSR 24(E), dated 11-1-2002	07 April 1999	01 April 2002
91	United Arab Emirates	Notification No. GSR 710(E) [No. 9409 (F. No. 501/3/89-FTD)], dated 18-11-1993, as amended by Notification No. SO 2001(E), dated 28-11-2007. Earlier agreement was entered into vide GSR 969(E), dated 8-11-1989.	29 April 1992	01 April 1994
92	United Kingdom	Notification No. GSR 91(E), dated 11-2-1994	25 January 1993	01 April 1994
93	United States	Notification No. GSR 990(E), dated 20-12-1990.	12 September 1989	01 April 1991
94	Uruguay	NOTIFICATION NO. 53/2013 [F.NO.500/138/2002-FTD-II]/SO 2081(E), dated 5-7-2013	08 September 2011	April 1,2014
95	Uzbekistan	SO No. 2689(E), dated 7-11-2012	29 July 1993	01 April 1993
96	Vietnam	Notification No. GSR 369(E), dated 28-4-1995, as amended by Notification No. 9860 [F.No. 503/7/91-FTD], dated 12-9-1995	07 September 1994	01 April 1996
97	Zambia	Notification: No. GSR 39(E), dated 18-1-1984	05 June 1981	01 April 1978

Glossary

AAR	Authority for Advance Ruling
AD	Authorised Dealer
ADR	American Depository Receipts
AE	Associated enterprise
AIC	All-in-cost
ALP	Arm's length price
AMP	Average Maturity period
AOP	Association of persons
AY	Assessment year
APA	Advance pricing agreement
BO	Branch office
BT	Business trust
BPO	Business process outsourcing
CBDT	Central Board of Direct Taxes
CBED	Central Board of Excise and Customs
CCDs	Compulsorily convertible debentures
CENVAT	Central value added tax
CESTAT	Customs, Excise and Service Tax Appellate Tribunal
CIB	Central information branch
CIC	Core investment companies
CIT	Commissioner of Income-tax
CIT(A)	Commissioner of Income-tax (Appeals)
CCIT	Chief Commissioner of Income-tax
CSS	Cabinet Committee on Security
CUP	Comparable uncontrolled price
DDT	Dividend distribution tax
DIPP	Department of Industrial Policy and Promotion
DoDP	Department of Defence Production
DRP	Dispute resolution panel
DTA	Domestic tariff area
ECB	External commercial borrowings
EDLI	Employees' Deposit Linked Insurance Scheme, 1976
EOU	Export oriented unit
EPC	Engineering Procurement Construction
EPF	Employees' Provident Fund
EPS	Employees' Pension Scheme
ESOP	Employees stock option plan
FAR	Functions assets and risks
FC	Financial Commitment
FDI	Foreign direct investment
FEMA	Foreign Exchange Management Act, 1999
FII	Foreign institutional investor
FIPB	Foreign Investment Promotion Board
FIRC	Foreign inward remittance certificate
FMV	Fair market value
FPI	Foreign Portfolio Investors
FTS	Fees for technical services
FTWZ	Free trade and warehousing zone
FVCI	Foreign Venture Capital Investor
FY	Financial year
GDR	Global Depository Receipts
GSM	Global System for Mobile Communications
HC	High court
HO	Head office
IL	Industrial license
IPR	Intellectual property right
IT	Income-tax
IT	Information technology
ITES	Information technology enabled services
IRDA	Insurance Regulatory and Development Authority
InvIT	Infrastructure Investment Trusts
JV	Joint venture

KPO	Knowledge process outsourcing
KYC	Know your customer
LC	Letter of credit
LIBOR	London Inter Bank Offered Rate
LLP	Limited liability partnership
LO	Liaison office
LRS	Liberalised remittance scheme
LTCG	Long-term capital gains
MCA	Ministry of Corporate Affairs
MTSO	Money transfer service operators
MoD	Ministry of Defence
MoU	Memorandum of understanding
NIC	National Industrial Classification
NRI	Non-resident Indian
NoC	No objection certificate
NPA	Non-performing asset
OECD	Organisati0n for Economic Cooperation and Development
ODI	Overseas direct investments
PE	Permanent establishment
PF	Provident fund
PLI	Profit level indicator
PO	Project office
PPP	Public-private partnership
PSM	Profit split method
QFI	Qualified Foreign Investor
RBI	The Reserve Bank of India
RD	Regional director
RoE	Return of Equity
RoI	Return of income
REIT	Real estate investment trust
RSU	Restricted stock units
SAD	Special additional duty of customs
SAR	Stock appreciation rights
SB	Special bench of Income-tax Appellate Tribunal
SC	Supreme court
SEBI	The Securities and Exchange Board of India
SEZ	Special economic zone
SHA	Shareholder's agreement
SPV	Special purpose vehicle
STT	Securities transaction tax
The Act	The Income-tax Act, 1961
The Rule	The Income-tax Rules, 1962
The tax treaty	Double taxation avoidance agreement
The Tribunal	The Income-tax Appellate Tribunal
TDS	Tax deducted at source/ withholding tax
TNMM	Transactional net margin method
TO	Tax officer
TP	Transfer pricing
TPO	Transfer pricing officer
TRC	Tax residency certificate
UN	United Nations
ULIP	Unit-link insurance plan
VAT	Value added tax
Vienna Convention	Vienna Convention on the Law of Treaties
WOS	Wholly owned subsidiary

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Our Offices

Ahmedabad
President Plaza, 1st Floor Plot No 36
Opp Muktidham Derasar, Thaltej Cross Road,
SG Highway, Ahmedabad, Gujarat 380054
Phone +91-79 3091 7000

Bangalore
6th Floor, Tower 'D', The Millenia
1 & 2, Murphy Road, Ulsoor,
Bangalore 560 008
Phone +91-80 4079 6000

Chennai
8th Floor, Prestige Palladium Bayan
129-140 Greams Road,
Chennai 600 006, India
Phone +91 44 4228 5000

Hyderabad
Plot no. 77/A, 8-2-624/A/1, 4th Floor,
Road No. 10, Banjara Hills,
Hyderabad 500034, Andhra Pradesh
Phone: +91 40 4424 6000

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

Mumbai
PwC House, Plot No. 18A,
Guru Nanak Road - (Station Road),
Bandra (West), Mumbai - 400 050
Phone +91-22 6689 1000

New Delhi/ Gurgaon
Building No. 10, 17th Floor,
Tower – C, DLF Cyber City,
Gurgaon -122002
Phone : +91-124 330 6000

Pune
7th Floor, Tower A - Wing 1,
Business Bay, Airport Road,
Yerwada, Pune – 411 006
Phone +91-20 4100 4444

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