Price ₹ 100/-per copy

A Monthly Journal of
The Chamber of Tax Consultants

The Chamber's Journal

June - 2014

Vol . II | No. 9

Your Monthly Companion on Tax & Allied Subjects

Hospitality Industry - II

NEW

Log on to the Chambers' revamped website
www.ctconline.org
Online Payment for Membership Renewal can be done through Website.

Other Contents

- Direct Taxes
- International Taxation
- Indirect Taxes
- Corporate Laws
- Other Laws
- Best of the Rest
- Economy & Finance
- The Chamber News

THE CHAMBER OF TAX CONSULTANTS

HEAVEN BE OUR GUIDE

THE CHAMBER'S JOURNAL
TRANSFORMING INFORMATION INTO KNOWLEDGE
HOSPITALITY INDUSTRY II
JUNE- 2014 VOL . II | NO.9

Extra ordinary General Meeting held on 27th May, 2014
"to adopt the changes to the Rules & Regulations of the Chamber"

CA Yatin Desai explaining the changes to the Rules & Regulations of the Chamber.
Seen from L to R : S/Shri CA Manoj Shah, Immediate Past President, CA Paras Savla, Vice President, Kishor Vanjara, Keshav Bhujle, and CA Sujal Shah, Past Presidents

DELHI CHAPTER

Seminar on Companies Act – 1 held on 3rd May & 7th May, 2014

CA Suhit Agarwal, Co-ordinator, Delhi Chapter welcoming the Speaker. Seen from L to R: S/Shri Assem Chawla, CA C. S. Mathur, Chairman, Delhi Chapter, V. P. Verma, Past President, Advisor, Delhi Chapter, CA Lalit Kumar, Faculty

CA Inder Mohan Singh addressing the Members. Seen from L to R : S/Shri Satyajit Gupta, Faculty, CA C. S. Mathur, Chairman, Delhi Chapter, CA Yatin Desai, President, CA Paras Savla, Vice President

Section of delegates

INTERNATIONAL TAXATION COMMITTEE

Study Circle on International Taxation held on 12th May, 2014 on the subject "US Tax and Reporting Compliance affecting Indian Americans"

CA Lloyd Pinto addressing the members.

CONTENTS

Vol. II No. 9
June – 2014

The Chamber of Tax Consultants
3, Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai – 400 020
Phone : 2200 1787 / 2209 0423 • Fax : 2200 2455
E-Mail: office@ctconline.org • Website : http://www.ctconline.org.

The Chamber's Journal

MEMBERSHIP FEES & JOURNAL SUBSCRIPTION (REVISED FEES AND SUBSCRIPTION FROM 2014-15)

Sr. No.	Membership Type		Fees	Service Tax 12.36%	Total
1.	Life Membership Additional Optional subscription charges for Annual Journal	` `	11000 900	1359 0	12359 900 ` 13259
2.	Ordinary Members Entrance Fees Annual Membership Fee, including subscription for Journal	`	200 1900	24 235	224 2135 ` 2359
3.	Associate Membership Entrance Fees Membership Fees including Subscription for Journal	`	1000 2000	123 247	1123 2247 ` 3370
4.	Student Membership Entrance Fees Journal Subscription	`	250 700	31 0	281 700 ` 981
5.	Non-members Journal Subscription	`	1800	0	1800 ` 1800

Editorial

Friends, while penning this editorial, I realised that though the temperature has not gone down and monsoon is also delayed, still there is a change in the atmosphere. There is optimism in air without any apprehension. The new government is in place with comfortable majority. It has no need to make uncomfortable adjustments in the name of coalition compulsions. The Government is headed by a person who has worked his way to the top and has been selected by the people of this country. He is in the office not because any chance or accident. For this I congratulate the electorate of this country. A true leader lays down the agenda for the nation and the society. He turns focus to future being firmly grounded in present. His actions inspire confidence and his approach shows that he has a vision for the nation and the society. The Hon'ble Prime Minister Shri Narendra Modi's conduct, immediately after the election results, has given a glimpse of the above-mentioned qualities. I join the Members of CTC in congratulating Shri Narendra Modi and wish him all the success.

I, along with all fellow members of CTC, congratulate our Honorary Member Shri Arun Jaitley for being appointed as Finance Minister of India. We expect that the new government shall give due importance to the voice and suggestions of the professional bodies like CTC by interacting with us directly. We hope that the Finance Minister shall rationalise the taxation laws. The insertion of several sections into the Income-tax Act, 1961 in the name of anti-evasion provisions has generated more litigation than revenue.

The Special Story for the present issue of Chamber's Journal is Part-II of the Hospitality industry. The eminent authors have devoted their time and energy to bring out this issue. I thank all the authors of this issue for their support.

K. GOPAL
Editor

From the President

Dear Members,

Citizens of India have given their verdict in a most unpredictable but convincing manner. Many of pre poll predictions and astrologers were of the opinion that there will not be a clear majority. But, voters had some other thoughts. They have given clear majority and mandate to BJP that 'we do not want any excuses, we want performance and governance'. I feel that the new Government under leadership of Hon'ble Prime Minister Shri Narendra Modi has started well by taking some bold and innovative steps. We hope that the *Modi Sarkar* delivers what is expected from it. In fact, the global radar is now set on India, waiting for the next move. The time will tell how the Government performed but before that the Stock Exchanges have already put its bet on the new Government and scaled all-time high. We are all eager to see "New India".

At Chamber, we had convened an Extraordinary General Meeting of members for approval of amendments in the Rules and Regulations of the Chamber. The meeting was well attended and purposeful discussion took place. I am happy to inform that the amendments to Rules & Regulations were passed unanimously at the meeting. I once again thank the Committee for the efforts and all Past Presidents for their meaningful direction and active participation.

The Chamber had planned to come out with a publication on Transfer Pricing. The articles to the publication will be contributed by more than fifty authors. The publication is reviewed by CA Karishma Patharphekar and CA Sanjay Tolia and the same is at an advance stage. CA Paresh Shah, Chairman International Taxation Committee and CA Natwar Thakrar are burning midnight oil to see that the publication sees light of the day by end of this month.

This year too, the Chamber has received an invitation from Ministry of Finance to discuss suggestions/ recommendations in respect of tax issues pertaining to different sectors for the forthcoming Direct and Indirect Tax Budget 2014-15. I, along with a delegation of five other members, attended and represented before members of CBDT and CBEC. I am glad to inform that we received a very patient hearing. The members were also very receptive and responsive to our representation. For the benefit of members, the representation made before the Ministry will be uploaded on the website of the Chamber. I also feel Honoured to state that Hon'ble Shri Arun Jaitley, who is the Honorary Member of the Chamber, has been conferred with important portfolios in the Ministry including Finance and Defence.

The Chamber's activities are continuing with more and more vigour and velocity. This month too, is full of activities such as, International Tax Conference at Hyderabad, Study Course on Companies Act, 2013 spread over five days and ten sessions, publication on Transfer Pricing, so on and so forth.

The Chamber's Journal for the month is on Hospitality Industry. This is the second and concluding part of the issue. I congratulate President-elect CA Paras Savla who has designed the issue.

'Parivartan hi prakruti ka niyam hai', since my last communication, various changes at many levels have taken place, change in Government, change in Rules and Regulations of the Chamber and now change of Presidentship of the Chamber……in the forthcoming Annual General Meeting. CA Paras Savla, President elect will take charge of the Chamber. I congratulate him and wish him a great success. I assure him my full support during his tenure. I am confident that under his leadership, the Chamber will scale greater heights.

While thinking about laying down my office, I have mixed feelings. Feeling of accomplishment for putting efforts at the same time feeling of failure for there is still a lot to be done, feeling of wisdom for learning so many things at the same time feeling of ignorance that there is so much to learn, feeling of affection and fellowship for making so many friends and acquaintances at the same time feeling of estrangement that now there may be less interaction with them.

During my tenure, I have received support from various quarters which I had not imagined that so many forces are there with me. I received guidance from Past Presidents, backing from Managing Council Members, assistance from Office Bearers, compliments from Team Chamber, accolades from Members, blessings from elders, encouragement from friends, co-operation from partners, comfort from family members, attention and honour from other organisations, respect and reputation from Society and strength and endurance from Almighty God. Personally, I learnt to manage time and understood others point of view. I was like a frog of the well who knew nothing of the great ocean. After being part of the Chamber, I do feel that I have widened my horizon.

I would like to make a special mention of dedicated staff of the Chamber. During my six years as Office Bearer in different capacities, I have demanded so many irrelevant and mindless things from Hitesh Manager, but every time he has provided me with smile. Aarti has been excellent with journal and other matters. Manisha and Anand are very efficiently handling accounts and events. I have received lots of support from Suresh, Jaydeep, Rajan and Rajesh. I am aware that the entire staff is working under tremendous pressure as work has increased. But due to shortage of space, we could not increase the requisite staff. A least we could do is to rearrange the office to accommodate more staff. The renovation work at the Chamber's office is slated to be completed in a week.

With the sense of great gratitude, one last time through this communication, I salute the spirit of each one of you and wish you and Chamber a great years of education ahead.

With laying down my office, I may not remain as occupied as before. But, my heart was always and will always beat for Chamber. I remember a couplet by Majrooh Sultanpuri from film *Mamta*, jn vee jn nce ceneJeÀe JeÀjie yeve JeÀ JeÀuee, yeve JeÀ meyee, yeeie-S-JeÀeÀe ce ……

YATIN DESAI
President

The Chamber of Tax Consultants

Vision Statement

The Chamber of Tax Consultants (The Chamber) shall be a powerhouse of knowledge in the field of fiscal laws in the global economy.

The Chamber shall contribute to the development of law and the profession through research, analysis and dissemination of knowledge.

The Chamber shall be a voice which is heard and recognised by all Government and Regulatory agencies through effective representations.

The Chamber shall be pre–eminent in laying down and upholding, among the professionals, the tradition of excellence in service, principled conduct and social responsibility.


CA Daksha Bakxi & CA Oscar Dsa

Hospitality Sector – Tax Challenges / Issues – Direct Tax

Hospitality industry is one of the upcoming industries in India. Now one can see presence of global brands of hospitality industry practically in all parts of India. Along with the complex business models of this industry, typical tax issues related to hospitality industry come to the fore, especially in relation to the cross-border and virtual business dealings. This chapter sets out the key mechanics of the business models followed in this sector and its related taxation aspects and controversies.

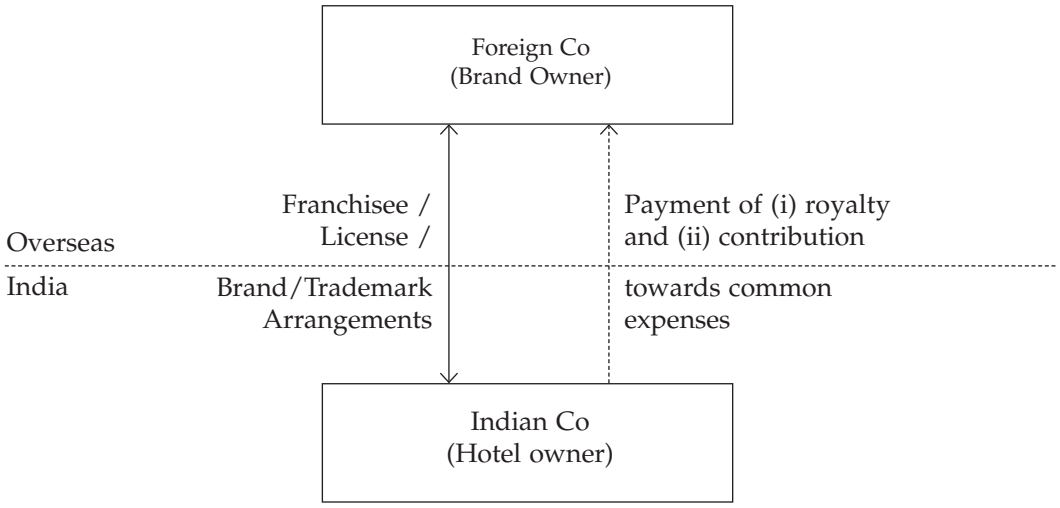
Business Models

Some of the common business models that are followed in the hospitality sector are as follows:

1. Brand/Trade mark Licensing Arrangements

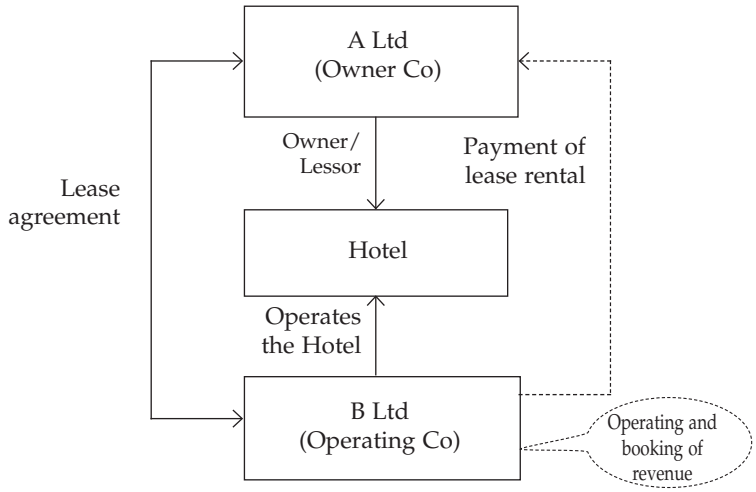
Indian companies enter into a franchise/ brand/ trade mark license agreement with the foreign company, usually a multinational chain of hotels, owning a hotel brand to use the brand in relation to the Indian hotels owned by the Indian companies. Thus, while the brand is owned by the international hotel chain, the hotel itself is owned by the Indian company and run by it in accordance with the standards, terms and conditions mandated by the franchise or the trade mark license agreement.

The licensee/ franchisee may also undertake to spend a specified amount on onshore advertising of the brand/ trademark and to make contributions to the fund maintained by the offshore trademark owner to be used by the latter to meet common expenses in relation to brand promotion and development internationally. Such promotional and marketing activities have twofold benefits (i) the overseas contribution to advertising fund increases the visibility and the business of the Indian franchisee (ii) local advertising expense helps build the brand in India.



2. Leasing Model

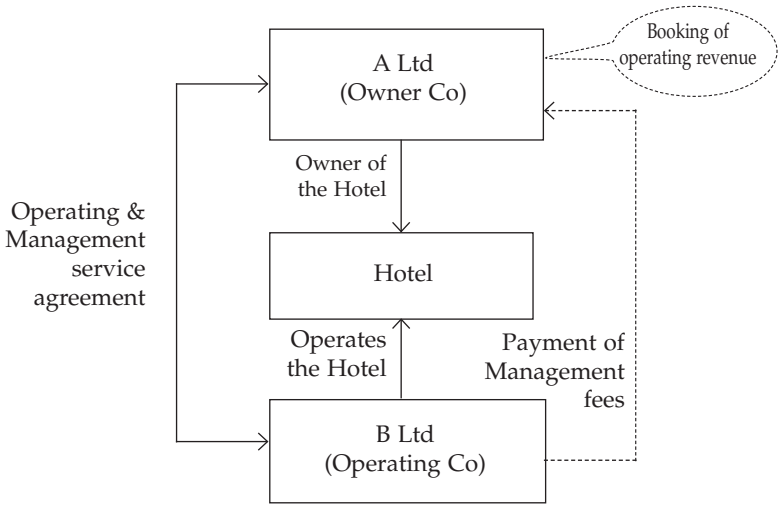
A company (lessee) may take a hotel on lease from the company owning the hotel (lessor) and operate the hotel so leased. The lessor earns the fixed and/ or variable lease rentals from the lessee and all the revenues and expenses of operating the hotel accrue to the lessee operating company.



3. Operations and Management ("O&M") Arrangements

The company owning the hotel appoints another company (operating company) for operating and managing the hotel. The operating company gets paid management fees while all the revenues and expenses of operating the hotel accrue to the owner company. Such arrangement may also include foreign company entering into O&M Arrangement with the Indian company to run and manage the hotels. Such arrangement may involve personnel of foreign company coming to India.

We discuss below some of the key tax related challenges/issues revolving around the arrangements discussed above in the light of the general taxation principles and related judicial precedents:



A. Direct taxation Aspects

1. Availability of tax incentives

Various incentives have been granted under the Income-tax Act, 1961 **("IT Act")** to the hospitality sector to promote its growth. Hotels constructed in certain specified areas are eligible for profits based deduction (i.e. tax holiday) for a certain number of years subject to fulfilment of prescribed conditions. However, the assessee is liable to pay minimum alternate tax ("MAT") at 18.5% on the book profits. The MAT so paid can be carried forward for 10 years and can be set off against the normal tax liability. Further, IT Act also provides for investment based deductions (i.e. cost based deductions including capital expenditure but excluding any expenditure incurred on acquisition of land or goodwill or financial instrument) subject to prescribed conditions.

The tax incentives for the hospitality sector under the IT Act are summarised in the table below:

	Profit based tax incentive (section 80-IE)	**Investment based tax incentive (section 35AD)**
Eligible business	Two-star or above category hotel in specified North-Eastern States the business of which commences before 1 April 2017	Building and operating a new two star or above category hotel anywhere in India
Tax incentive	100% of profits for 10 years	Deduction of capital expenditure (other than expenditure on land, goodwill or financial instrument) and pre-commencement expenditure.

The aforesaid incentives are available subject to fulfilment of specified conditions such as the eligible business should be new and should not be set up by splitting up or reconstructing an existing business. Further, the investment based incentive is available to a taxpayer engaged in the business of building and operating a new hotel. Therefore, in cases where an entity does not build a hotel but takes it on lease and operates it or an existing building is refurbished to create a heritage hotel, the availability of these incentives would be doubtful and thus, could

pose a challenge. If investment based deduction (under section 35AD) is claimed the assessee is not allowed to claim tax holiday (under section 80IE). It would be interesting to note that The Direct Taxes Code, 2013 also aims to provide investment based deductions.

2. Taxation of leasing income

As far as the lessor of hotel property is concerned, the question that may arise is under what head the lease rental should be taxed. Would it be income from business or income from house property or is it income from other sources? This is important since the rules for computation of income under each head are different.

There are contrary judicial precedents on the topic and the crucial factor in deciding the head of income would be the intention of the claimant supported by its deed and action. The well-established and recognised principle of law is that no precise test can be laid down to ascertain which head would the income (referred to by whatever nomenclature—lease amount, rent or licence fee) received by an assessee from leasing or letting out the assets fall. It is a mixed question of law and fact and has to be determined from the point of view of a businessman on the facts and in the circumstances of each case, including true interpretation of the agreement under which the assets are let out.

Where the assessee earned income out of exploitation of the property by letting it out for earning rent income and there was neither commercial activity nor business activity carried out by it to earn such income, the Courts have held that the income earned could not be taxed under the head of 'business income' but would be income from 'house property'[1].

Further, where the assessee let out the property for smooth carrying of business with an intention to commercially exploit the immovable property, the income was taxed as income from business and profession[2].

3. Taxation of expenditure incurred on renovation

Another burning issue for the hospitality industry is deductibility of expenditure incurred on renovation and repairs. These are the expenses that this sector needs to incur on a continuous basis to maintain the standard of their property and service levels. The deductibility would typically depend upon whether it is characterised as revenue or capital in nature. Once again, this determination is fact specific and prone to litigation.

In the case of Asian Hotels Limited[3] where the main dispute related to certain expenditure incurred by the taxpayer in relation to the 'renovation and refurbishment programme', the Tribunal observed that where an expenditure is incurred in relation to profit-making structure itself, as distinct from profit of the business and the expenditure is on fixed assets, such as building, machinery and plant, furniture, that expenditure would be classified as capital expenditure and would not be allowed as revenue expenditure. Based on this reasoning, the expenditure which was incurred for carrying on taxpayer's existing business was not allowed as revenue expenditure. Further, fee paid by the assessee to another company to conceptualise, plan and supervise the assessee's 'Renovation & Refurbishment Project' was to be disallowed

1. *Keyaram Hotels (P.) Ltd. vs. ACIT (2008) 173 Taxman 262 (Madras); Ocean Structures (P.) Ltd. vs. ACIT (2008) 170 Taxman 42 (Delhi)*
2. *Sateo Securities & Financial Services Ltd. vs. ITO (2009) TIOL 265 (Mumbai Tribunal); Everest Hotels Ltd. vs. CIT (1978) 114 ITR 779 (Calcutta)*
3. *Asian Hotels Ltd. vs. DCIT (2006) 101 ITD 247 (Delhi)*

as that company was engaged by the assessee right from the very beginning of the said project and the fees paid to it was inextricably linked with the overall project which is in the nature of capital asset. Clearly, there is a case to argue that the building in case of hospitality industry is its business tool and any expense incurred for upkeeping and improvement of the building is necessarily in the nature of increasing its income NOT with the intention to increase the value of the property BUT necessarily with the intention to increase the marketability of the property by clients who may prefer the hotel over the property of the competitor. Thus, it is in the nature of expense directed to increase revenue.

4. Management Fees

The company operating the hotel under the O&M contract receives operation and management fees from the owner company. The question that arises is whether the services provided are in the nature of fees for 'works contract' attracting deduction of tax at source at 2% under section 194C or it is in the nature of 'fees for technical and professional services', attracting deduction of tax at source at 10% under 194J. It is to be noted that the term 'professional services' is specifically defined under section 194J and if the services provided under the O&M do not fall within the purview of technical consultancy or interior decoration or advertising or a profession which is notified by the Central Board of Direct Taxes **("CBDT")**, then the same should not attract deduction at source at the rate of 10%. Section 194C is widely worded to cover *payments for carrying out any work (including supply of labour for carrying out any work) in pursuance of a contractor* and the service recipient. The reality could be that there is a mix of services provided under the O&M contract. It may be therefore necessary for the relevant parties to break down the nature of services into those which fall under the definition of 'technical and professional services' and those which fall within the meaning of 'works contract' and also allocate the fees to each category separately. This would avoid the payer taking a conservative view of deducting tax at 10%, resulting in a significant cash flow disadvantage to the service provider. The industry practice in this regard is fragmented and there is a case for standardising the same. May be there is a case to make a representation before the CBDT as to the fact that such contracts should fall within the list of 'works contract' so as to remove the uncertainty and consequent litigation.

B. International taxation aspects

1. Payments on franchise agreements

Typically, the franchise agreement in this area would involve the use of the brand names of international brand of hotels and thus there is a significant amount of such payments which are in the nature of cross-border payments, involving a non-resident recipient. A franchise arrangement involves the following payments by the franchisee to the franchisor:

(i) One time/ lump sum franchise fees;

(ii) Regular royalty payments as a percentage of the revenue of the franchisee;

(iii) Marketing contribution payments.

Considering that a franchise arrangement principally involves licencing of a brand, the tax authorities may treat all the payments under a franchise agreement as being in nature of royalty and thus, in a case where the franchisor is a non-resident, require withholding tax on such payments even in absence of the franchisor having a taxable presence in India, even without recognising and distinguishing them as listed above. While the payments under (i) and (ii) could pretty much be characterised as pertaining to the licencing of the brand name and hence 'royalty', the issue arises in case of the payments for those under (iii).

It is not surprising that the marketing contribution payments to non-residents have been a subject matter of litigation,

especially where tax was not withheld from such payments, treating them as mere re-imbursement. The parties generally take a position that such marketing contributions for offshore marketing are not taxable in India either as royalty or as business income if the recipient foreign entity does not have a taxable presence in India. The argument is that such payment is not for the right to use any intellectual property, know how or intangible asset. These issues have been dealt with in some judicial pronouncements which are discussed below:

- The taxability of payments towards marketing contribution was ruled upon by the Authority of Advance Rulings **("AAR")** in the case of *International Hotel Licencing Company*[4]. In this case, the assessee, a non-resident company (Service Co.), was engaged in the business of conducting international advertising, marketing and sales programs for Marriott chain of hotels to promote them in the foreign markets. Marriott group entities entered into various agreements with an Indian company in connection with the setting up of an Indian hotel. The Service Co entered into an agreement called 'International Marketing Program Participation Agreement' **("IMPPA")** with the Indian company as per which the Service Co was to provide advertising space in magazines, newspapers and other printed media and electronic media outside India. The consideration payable by the Indian Company was described as an annual contribution equal to 1.5% of the gross revenues of the hotel by way of **'reimbursement of expenses'** that the Service Co would incur for conducting and coordinating the international marketing activities for Marriott chain of hotels.

  The AAR ruled that the amounts received by the Service Co from the Indian Company in connection with the marketing and business promotion activities conducted outside India would be taxable in India as the Service Co had business connection in India and the existence of source of income in India is immaterial. The AAR also observed that the Service Co was providing managerial and consultancy services and thus, fall within the purview of fee for technical services (FTS).

- In another case where payments towards marketing service fee and reimbursement of expenses were made by an Indian entity to an international chain of hotels under an International Sales & Marketing Agreement, the tax officer had disallowed the same holding that unless the payer obtained a withholding tax certificate under section 195 of the IT Act from the tax officer, deduction of the tax was mandatory. On subsequent appeal before the Tribunal, the Tribunal passed an order in favour of the Assessee.[5] The Tribunal observed that in the present case there were two types of payments that were made by the taxpayer to the international hotel chain: one related to services rendered outside India and the other related to reimbursement of expenses. In view of the definition of royalty under the IT Act, the Tribunal observed that the sales and marketing services rendered outside India could not be regarded as royalty. The Tribunal further observed that the services rendered by the international hotel chain did not involve rendering of any managerial, technical or consultancy services in India and therefore, could not be regarded as FTS. Therefore, the

4. (2007) 288 ITR 534 (AAR)
5. *ACIT vs. V.M. Salgaocar & Bro Pvt. Ltd. (TS-100-ITAT-2014 (Panji))*

payment received by the international hotel chain could not be deemed to accrue and/or arise in India. It was also observed by the Tribunal that under Article 12 of the Tax Treaty between India and USA, FTS is defined to mean payment of any kind to any person in consideration for rendering of any technical or consultancy services if such services make available technical knowledge, experience, skill, know-how or technical design. The Tribunal observed that the international hotel chain was not making available sales and marketing services to the taxpayer and thus, does not fall within the purview of FTS under the treaty.

- In another case a non-resident company[6] by virtue of an international sales and marketing agreement that it had entered into with an Indian hotel company for providing marketing services outside India, had received marketing fees from the Indian hotel company on which tax was deducted at source by the Indian hotel company. The non-resident taxpayer contended that since the marketing services were rendered outside India, they were not taxable in India and therefore claimed refund of the tax that was deducted at source by the Indian company. The taxpayer had also separately received royalty from the Indian hotel company and some other hotels, which was offered to tax in India. However, the Tax Officer held that marketing fee received by the assessee from the Indian hotel company was taxable as royalty in terms of Article 12 of Tax Treaty between India and Netherlands. Observing that a payment which, according to Tax Officers facilitated brand building/creation, did not qualify as a 'royalty', the Tribunal held that marketing fee was not taxable as royalty. The Tribunal redirected the matter to the tax officer to consider the taxability of the amount under Article 7 (Business profits) of the tax treaty as the taxability would be attracted in India if the non-resident carried on business in India through a permanent establishment **("PE")** situated in India. Such taxability would be restricted to the profits attributable to the PE.

It can be seen that the judicial forums are not aligned or consistent in ascertaining the taxability of the payment for marketing contribution made to an offshore company. However, the rulings do provide an insight into the arguments as to what could and could not be taxable in India, based on the parameters including the following:

- The relationship of the entity with which the contract is entered into. This would also determine whether transfer pricing is applicable. If the foreign entity is also providing other services, then there could be risk of clubbing.
- The exact nature and description of the services provided. The marketing services would have twofold effect for the Indian hotel company: (i) increase their popularity and reach outside India for attracting clients from outside India into their facilities in India; and (ii) increase the brand value of the hotel facility outside India.
- The manner in which the payment is made: whether a fixed component of revenue received from clients coming from offshore jurisdictions or a percentage of total revenue of the hotel.
- The jurisdiction of the marketing services company.

6. *Marriott International Licencing Co BV vs. DDIT (2014) 43 taxmann.com 272 (Mumbai Tribunal)*

- Whether the contract with the Indian hotel company is negotiated by the Indian hotel company or is supplied by the offshore brand owner

This would then enable to bring some amount of certainty to the determination of taxability of such payments.

2. Onshore marketing expenditure borne by Indian franchisee/ licensee

Lately expenditure incurred by an Indian entity in relation to advertising, marketing and promotion (**AMP** expenditure) has been subjected to significant transfer pricing adjustments in case of arrangements involving an Indian entity exploiting the trade mark/brand name owned by the overseas associated enterprise. In the absence of any specific provisions of law in this regard, the position is evolving on the basis of the judicial pronouncements[7].

Where the tax authorities consider that more than reasonable AMP expenditure is incurred by an Indian entity when compared to entities engaged in similar business, the excessive expenditure is deemed as having been spent on creating or maintaining marketing intangible for the offshore entity and thus, as a provision of service by the Indian entity to the offshore brand owner. Consequently, in the absence of an arm's length remuneration for such service, the excessive AMP expenditure along with an arm's length mark-up thereon is added to the income of the Indian entity.

3. Payments to non-resident consultants for advisory services

The taxability and corresponding withholding tax implications of such payments would depend upon the nature of services and the scope of taxability of such fee under the applicable tax treaty. In the case of *Viceroy Hotels Limited*[8] where a non-resident imparted advisory services with respect to work of design, documentation, preparation of floor plan, lighting layouts, the Tribunal held in light of the provisions of the India-UK tax treaty that the same could not be considered to be technical services as there was no transfer of technology but only rendition of service for installation of electrical fittings. Consequently, it was held that there was no requirement to withhold tax.

4. Online payment for offshore hotel rooms

Considering the wide usage of digital facilities to make bookings online, there may arise an issue as regards the withholding tax implications of the payments made to a non-resident by Indian hotels for making such bookings. In the case of *Jetways Travels Private Limited*[9] it was held that in the absence of a foreign hotel having a taxable presence in India or it performing any services in India, the payments made by a resident should not attract withholding tax in India.

5. Payment to a non-resident agent rendering services outside India

Typically, the organisers of food and wine shows, fairs or exhibitions engage agents outside India to attract foreign participants to secure participation in such shows. In an application before the AAR, in the case of *Rajiv Malhotra*[10], the applicant who was a proprietor of Marketing Services agency based in India was organising a food and wine show in India and wanted to appoint agents abroad to provide information to foreign participants in respect of their participation in the show in India and for booking space in the exhibition. The agents

7. *Maruti Suzuki India Ltd vs. ACIT (2010) 328 ITR 210 (Delhi); L.G. Electronics India Pvt. Ltd. (2013) 22 ITR(Trib) 1; Ford India Pvt. Ltd. I.T.A. No. 2089/Mds/2011*
8. *The ACIT vs. Viceroy Hotels Limited and Viceroy Hotels Limited vs. The ACIT (2012) 18 ITR(Trib) 282 (Hyderabad)*
9. Case of Jetways Travels Pvt. Ltd. – ITA No 3447/Del/2010
10. Shri Rajiv Malhotra (2006) 284 ITR 564 (AAR)

would be rendering services abroad in the territory allotted to them and would be entitled to receive commission abroad for the services so rendered to foreign participants. Since the services were to be rendered by the non-resident agents outside India and the payments were also receivable by the agents abroad, the applicant contended that the agents were not liable to tax in India and thus, there should not be any withholding tax on such payments. The AAR ruled that the fact that non-resident would be rendering services outside India and also getting payment outside India, were wholly irrelevant considerations. Since the source of income was situated in India, the agents would be liable to income tax and consequently the applicant was liable to withhold tax in India.

6. Cross-border movement of personnel

This is another highly litigious area and may pose tax concerns for the employer foreign entity, Indian entity making payments to the expats and expats themselves. At the time when foreign parties enter the Indian market, they depute their employees to India. The presence of employees in India for longer period of time may result in existence of PE in India. Where the expatriate continues to remain the employee of the foreign company and is seconded to the Indian company to perform his employment in India, two sets of tax issues arise: (i) taxability of the employee himself; and (ii) taxability of his foreign employer.

While the employee would be undoubtedly taxable in India since the source of his employment is the performance of the services in India, the taxability of his employer is a subject of significant uncertainty and prone to litigation. The continued employment with the foreign company can result in the employee becoming a taxable business presence of the foreign employer in India. The issue then arises is whether the employee is carrying out the business activities of the foreign company in India or the activities of the Indian company to which he is seconded. Albeit, this issue requires examination of facts.

In a recent decision by the Delhi High Court in the case of *Centrica India Offshore Pvt. Ltd.*[11], the Court has held that the seconded employee from Canadian and UK Group companies created PE. The Court rejected the argument that Indian company was economic employer and that salary payment made was merely reimbursement. In this case the Court also concluded that the real employer continued to be the foreign companies and deputed employees' work could not be regarded as stewardship. It can be seen that this is based on the specific facts of the case. Suffice to point out that in cases where secondment arrangement is envisaged in the arrangements between parties under the cross-border agreements, the same needs to be done carefully to ensure certainty of taxation with regard to such secondment.

Conclusion

Since the hospitality sector in India is a fast growing sector and has attracted tremendous international interest, it is imperative that from a taxation perspective, the arrangements along with business models selected are carefully structured, documented and practically implemented. Where one of the parties to the arrangements is a non-resident, the complexity and contentious nature of tax implications multiply which need to be proactively evaluated so that the expected financial outcome is not outweighed by the tax demands and disputes.

11. TS-237-HC-2014(DEL)

CA Nilesh Vichare & CA Noomit Rangwani

Recent Investment in Hospitality Sector (Including PE)

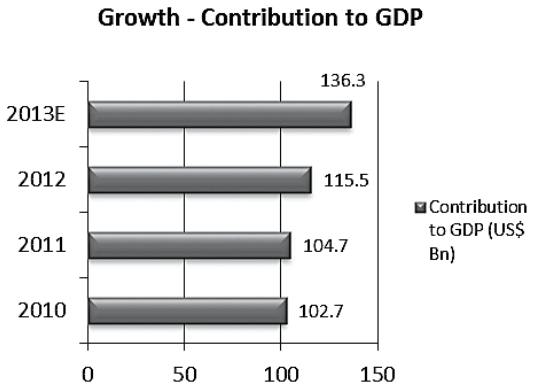
Background

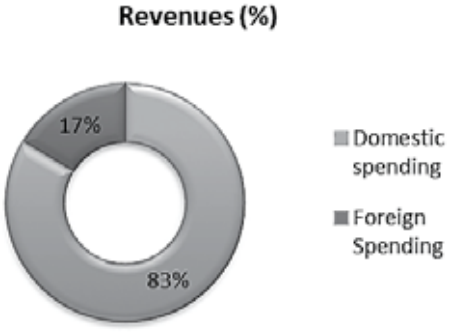
The Indian tourism and hospitality industry has emerged as one of the key drivers of growth among the services sectors in India.

The Indian hospitality industry comprises two segments — one being travel (business, leisure, visiting friends and relatives, religious, meetings and conferences) and other being different forms of outlets for eating out (restaurants, fine dining, quick service restaurants (QSRs), takeaways, or any other form of unorganised eateries).

The Indian hospitality sector has been growing at a cumulative annual growth rate of 14 per cent every year adding significant amount of foreign exchange to the economy.

The contribution by the travel and tourism industry to the country's gross domestic product (GDP) is expected to rise to ` 4.35 trillion (US $ 72.17 billion) in 2024.





Road ahead

India's travel and tourism industry is expected to grow by about 7.3 per cent in 2014, according to WTTC. The market size of tourism and hospitality industry in India is anticipated to touch US$ 418.9 billion by 2022.

The domestic hospitality sector expects 52,000 new hotel rooms to be added in

five years (2013–17), according to a survey by real estate consultancy, Cushman & Wakefield. This will lead to a rise of over 65 per cent in total hotel inventory in India. The National Capital Region (NCR) is expected to contribute around one-third to the total expected hotel rooms supply during the period.

Hospitality Investment in India: A Challenge, yet an Opportunity

Although investment in hospitality ventures in India promises good return on investment (ROI), it requires huge capital investment and accordingly, the first hurdle for any developer is arranging finance/debt for the project. Availability of debt for such projects depends on various factors.

Meeting the huge capital investment requirements by a single person or developer may be difficult and hence availability of debt is crucial.

India will need approximately 188,500 additional hotel rooms by 2021 to meet projected demand, according to a HVS white paper, which also states that, assuming a loan-to-cost ratio of 1:1 for the $ 25.5 billion requirement, financial institutes would need to lend $ 12.75 billion in the next ten years for the construction of these hotel rooms. It is to be noted that the figures presented above are deflated as they only highlight the construction cost.

Given these projections for the number of rooms and the funding required for them, the potential for investment is huge. More importantly, the profitability and returns are strong as well. The returns in in India are expected to be much higher than those in developed markets.

Although investments in Greenfield projects offer maximum return, there are few challenges on the way. These are:

- Valuations for operational properties in India are very high and do not offer a significant returns to a rational investor
- High land prices in key Tier I markets, coupled with related issues on land ownership and titles. The land titles and the governing development norms are at times unclear and require detailed legal and technical due diligence
- Obtaining approvals is time consuming and obscure as a process, especially for institutional investors
- Exit options for investments in India are also limited. The importance of exit options are more so necessary for private equity investment, where a clear exit strategy is decided even before investment is made in a company. The existing regulations do not allow presence of Real Estate Investment Trust which is a viable exit option in mature markets. Further, India has not seen too many sales of individual hotel assets or portfolios

Another issue is the time taken for completion of hotel projects. Hotels that are typically completed and operational within 24 months internationally take almost 48 months in India. There are numerous barriers—different property laws from one state to another, difficulties in acquiring land, property disputes, high interest rates, poor access to funding and insufficient infrastructure that shackle growth.

Given these challenges, the best options to invest for a foreign player is through hospitality focused

private equity funds who understand locally the dynamics of the industry

Importance of Private Equity for the Hospitality Sector

Private equity financing has some important advantages over other forms of funding:

First and foremost, Private Equity firms are much more hands on, and will help to re-evaluate every aspect of the business to see how to maximise its value. The hospitality sector brings with it a number of inherent challenges such as –

- Inadequate supply of quality talent
- High talent attrition to competitors
- Low employee productivity
- High cost of developing property
- Multiple approvals from government bodies
- Poor connectivity

Considering the dynamics and various challenges in the sector, the presence of individuals with industry expertise and knowledge are essential to overcome and sustain over the vibrant environment. PE investors bring in such diversity and expertise to unlock the potential in this sector

Creating value in a business is the key to the Private Equity model. As soon as it houses the investment, it will discuss with the Company's management team and work out the best strategy to take the business forward and drive growth. A well chalked out plan drawn keeping in mind the best interest of the Investors and the management is an ideal platform for growth in the sector

PE portfolio companies often have an investment team member, or members, specifically responsible for ensuring that the environmental, social and governance standards of the portfolio company adhere to the responsible investment code of the private equity backer. By creating value in the companies in which it invests, more so in the hospitality sector, it plays a vital role by building better, more sustainable hospitality business. It creates jobs and delivers genuine growth.

The rising land prices in India and the high financing costs have resulted in high room tariffs and long gestation periods for achieving break even. Private equity investment provides substantial amount of funding for a longer period which is ideal for the highly capital intensive hospitality sector.

Individual partners in the private equity firm often have their own money invested as well, and make additional money from performance fees if they make a profit, so they have strong personal incentives to increase the investee company's value.

This combination of expertise, major funding and incentives can be very powerful. A 2012 study by The Boston Consulting Group found that more than two-thirds of private equity deals resulted in the company's annual profits growing by at least 20%, and nearly half the deals generated profit growth of 50% a year or more

Exit Options for PE investors

As discussed earlier, a clear exit strategy is decided by PE firms even before an investment is made. The common exit strategies for PE firms are —

Initial Public Offering (IPO) – It is a more popular strategy, where the PE investor is likely to realise the highest return on investment, however, it has its disadvantages as the valuation is subject to fluctuations and other market risks for a certain time (lock-in period) after IPO is carried out

Trade sale – Sale of shares held in a company to a trade buyer, i.e. a third party often operating in the same industry as the company itself. This method is preferred by private equity providers mainly because it provides a complete and immediate exit from the investment.

Drag Along and Tag Along rights – While Tag along gives a shareholder the right (but not necessarily the obligation) to exit along with another shareholder usually on the same price and terms, however, Drag along gives the investing shareholder on exit, the right to force the other investor(s) to also exit usually on the same price and terms

SME Exchange – An untapped opportunity

SME Exchange is a stock exchange dedicated for trading the shares/securities of SMEs. BSE is the first-one to seize the initiative followed by NSE.

The SME exchange is an ideal source of generating funds for the hospitality sector, especially in smaller cities. The few advantages are

- SME companies with post issue paid-up capital up to 25 crore can list on the SME Exchange.
- Equity Financing will lower the Debt burden leading to healthier balance sheet and lower financing cost
- Enhance company's visibility among investors and masses. Further, the media coverage can provide company with reputed profile and credibility leading to increase in the value of its shares
- Exit option provides an incentive for greater venture capital participation and thus reduces their lock-in period
- Simplified listing norms to specifically suit SMEs

In light of above, listing on SME exchange provides a great and simplified opportunity to entrepreneurs to raise equity capital for growth and expansion. It also provides immense opportunity to the investors to identify and invest at early stage and also provides the necessary liquidity for their investment and an exit option.

Snapshot of the Regulatory policy in India- An incentive for investment in the Sector

A. FEMA Perspective

Under the Consolidated FDI Policy (effective from April 1, 2014) under regulation 6.2.11, the Government has permitted 100% FDI in the sector under the automatic route for FDI into construction and development projects including construction of hotels and resorts, recreational facilities, and city and regional-level infrastructure

B. Income Tax Perspective

Section 35AD of the Income-tax Act, 1961 allows a deduction in respect of the whole of any expenditure of capital nature incurred for the purpose of a business, in the nature of building and operating a new hotel of two-star or above category as classified by the Central Government. Further, it also provides that in case transfer of the operations (without change in ownership of hotel) the investor shall still be eligible for deduction of the capital expenditure incurred, which makes this an ideal scenario for PE investment.

(A detailed discussion on the various laws impacting the hospitality industry has been covered separately in this publication)

Recent Investments & Developments

The foreign direct investment (FDI) inflows in hotel and tourism sector during April 2000 to January 2014 stood at US $ 7,013.29 million, as per the data released by Department of Industrial Policy and Promotion (DIPP).

The following are some of the major investments and developments in the Indian tourism and hospitality sector:

➢ **Wonderla Holidays IPO**

Objective – To raise funds to set up an Amusement park in Hyderabad and for general corporate purposes

Transaction – Wonderla Holidays entered the primary market offering 1.45 crore equity shares (including anchor portion of 2,175,000 equity shares) of face value of ` 10 each in a price band of ` 115-125, which could raise ` 181 cr. at the upper price band

Transaction result – The IPO was subscribed 38.06 times and opened 31.8% higher on listing from its issue price of ` 125

Analysis – Despite the slowdown in the IPO market, analysts opine that the demand for Wonderla's IPO was very robust because of its niche business model, good management and good operating and governance model

In case of HNIs, who have been awry in IPOs in recent times, the Wonderla IPO saw 160 times subscription in the HNI category

This exhibits a strong market sentiment for the hospitality sector.

➢ **Thomas Cook Group (TCG), Sterling Holiday to merge in ` 870 crore deal**

Objective – Sterling Holidays Resorts India Ltd. posted a series of losses over the years and had a total debt of 24.75 crores as on Sept. 2013 and is in need of funding, while Thomas Cook's larger vision is to build a robust business portfolio in India.

Transaction – The multistage deal involves the following:

- o TCG will invest ` 187 crores through preferential allotment giving it 23% stake in Sterling Holiday.
- o TCG will then acquire 23% stake from key Sterling shareholders for ` 176 crores.
- o This triggers the mandatory open offer (price fixed at ` 98) for another 26% stake as per regulatory norms, for which TCG will pay ` 230 crores.
- o Further, there will be a merger between the two companies at a defined swap ratio of 120:100

Analysis – Aggregate value of the two companies is around ` 3,000 crores. TCG will get access to Sterling Holiday's 19 resorts spread across 16 destinations in the country. It can now offer these resorts to its customers by clubbing them with its tour packages. With the Sterling Acquisition, TCG is looking to provide end to end travel solutions to customers and to build a holiday behemoth which will take holidays to a larger population.

➢ **Hilton Worldwide signs management agreement with Palm Grove Beach Hotels Pvt. Ltd.**

Objective – To launch the first Conrad hotel in India.

Transaction – Hilton Worldwide announced the signing of a management agreement with Palm Grove Beach Hotels Pvt. Ltd., a part of the K. Raheja Constructions Group. Conrad Hotels & Resorts is a part of the luxury brand of Hilton Worldwide's portfolio of brands – will be launched in Pune, Maharashtra next year

Other recent investments & developments

➢ Xander Group Inc. has picked up stake, over the past few years, in hotels such as Sinclairs in Ooty, Devi Garh in Udaipur, Marriott Hotel and Convention Center in Pune, Devi Ratn in Jaipur and so on.

Like Xander, whose retail unit Virtuous Retail plans to build several high-end malls across the country, global firm Duet Group, which manages more than $ 2.7 billion of equity, has invested hugely in Indian hospitality.

- Gurgaon-based real estate developer Bestech Group signed an agreement with Carlson Rezidor Group to develop 43 hotels in India under the brand Park Inn by Radisson by 2024
- Private equity major Blackstone, global investment firm the Xander and Bengaluru-based realtor Shriram Properties are in the race to acquire the stressed asset of Blue Horizon Hotels Pvt. Ltd., which comprises an under construction hotel-cum-retail mall in the city, for close to ` 425-460 crore
- Duet Hotels, which has nine mid-scale hotel properties under its portfolio and is developing over a dozen more, is eyeing an entry into smaller cities to penetrate deeper as against its current focus on metro and tier I cities. Part of private equity fund manager Duet Group, Duet Hotels focuses on developing mid-scale and upper mid-scale hotels in the country. Its business strategy is to come in as an owner of hotel properties which are in turn run through management contracts
- Indian hotel chain Lemon Tree Hotels is planning to enter the luxury segment. The company is in talks with two luxury brands in the US and Asia. Lemon Tree is keen on acquisitions to expedite its growth.

  Marriott International plans to open a dozen hotels in India by 2015, adding to its existing count of 23 properties. At present they have about six to eight definite openings in 2014.
- Muthoot Leisure and Hospitality Services, the hospitality division of the Muthoot Group, has announced the acquisition of Costa Rica's high-end property – Xandari Resort & Spa. This is the first acquisition by an Indian hospitality company in Central America.

Investments by "institutional investors" are currently funding 20-25% of the new hotels that will be built in the country over the next five years. They bring a disciplined approach to developing hotels, focusing on maximising return on investment and optimising exit strategies, this is a departure from the past trend of hotels being financed either by high net worth individuals or real estate companies.

Armed with market research and due diligence, such investors ensure that unfeasible projects are not developed on a whim and that new supply is not added to markets indiscriminately. As part of their drive to reduce input costs, these investors are questioning the brand standards dictated by hotel companies and the relevance or requirements for some of them.

With an estimated shortfall of 2 lakh rooms, branded hotels in India have a goldmine of opportunity before them. However, luxury chains will likely face more challenges in the face of the Eurozone crisis, inflation, slower domestic growth, downgrades, politics, low occupancy, etc.

However, a rapidly growing work force, higher domestic travel and interest from institutional investors will make mid-segment and budget hotels far more lucrative than ever.

Roma Gandhi, M.sc.*

Education in Hospitality Industry

HISTORICAL OVERVIEW

The growth story of the Indian hospitality industry started in the 1980s, when several prestigious hotels were developed to cater to the Asiad Games in New Delhi. Until about ten years ago, however, the hospitality industry in India continued to be characterised by its extremely limited choice of options. There was a very limited availability and lesser quality of hotels in cities beyond the usual suspects: Delhi, Mumbai, Kolkata, Chennai, and Bengaluru. Other aspiring hospitality markets have been gradually catching up, such as Ahmedabad, Jaipur, Goa, Hyderabad and Pune.

On the other hand, introduction of hospitality in the West was originally started by the Romans. Facilities offering hospitality to travellers have been a feature of the earliest civilisations. In Greco-Roman culture hospitals for recuperation and rest were built at thermal baths. During the Middle Ages various religious orders at monasteries and abbeys would offer accommodation for travellers on the road.

The precursor to the modern hotel was the inn of medieval Europe, possibly dating back to the rule of Ancient Rome. These would provide for the needs of travellers, including food and lodging, stabling and fodder for the traveler's horse(s) and fresh horses for the mail coach. For a period of about 200 years from the mid-17th century, coaching inns served as a place for lodging for coach travelers (in other words, a roadhouse). Coaching inns stabled teams of horses for stagecoaches and mail coaches and replaced tired teams with fresh teams. Traditionally they were seven miles apart but this depended very much on the terrain.

Some English towns had as many as ten such inns and rivalry between them was intense, not only for the income from the stagecoach operators but for the revenue for food and drink supplied to the wealthy passengers. By the end of the century, coaching inns were being run more professionally, with a regular timetable being followed and fixed menus for food.

Inns began to cater for richer clients in the mid-18th century, and consequently grew in grandeur and the level of service provided. One of the first hotels in a modern sense was opened in Exeter in 1768, although the idea only really caught on

* She is a Lecturer in Resource Management at the Dr. B.M.N. College of Home Science, Matunga

in the early 19th century. In 1812 Mivart's Hotel opened its doors in London, later changing its name to Claridge's.

Hotels proliferated throughout Western Europe and North America in the 19th century, and luxury hotels, including Tremont House in Boston, Massachusetts, which was a luxury hotel, and the first to provide indoor plumbing and Astor House in the United States, Savoy Hotel in the United Kingdom and the Ritz chain of hotels in London and Paris, began to spring up in the later part of the century, catering to an extremely wealthy clientele.

A hotel was considered to be an establishment that provides lodging paid on a short-term basis. The provision of basic accommodation, in times past, has been replaced by rooms with modern facilities, including en-suite bathrooms and air conditioning or climate control. Additional common features found in hotel rooms are a telephone, an alarm clock, a television, a safe, a mini-bar with snack foods and drinks, and facilities for making tea and coffee. But now, luxury features include bathrobes and slippers, a pillow menu, twin-sink vanities, and Jacuzzi bathtubs. Larger hotels may provide additional guest facilities such as a swimming pool, fitness center, business center, childcare, conference facilities and social function services.

The hospitality industry was generally restricted to the hotel industry because this was the one major area it catered to. Over the years the industry has developed many facets extending to and including the Travel industry, Aviation industry, Cruising industry, Restaurant industry, Recreation and Attractions, Clubs, Gaming and Entertainment, Meetings, Conventions, Events and Expositions.

WHAT MAKES HOSPITALITY DIFFERENT?

The hospitality and tourism industry includes multiple segments, all interrelated yet discrete, including lodging, food service, contract services, gaming services, private clubs, meeting planning, theme parks, suppliers and hospitality education, amongst others. The single factor common to each of these segments is dependence upon the successful provision of service as a means of generating revenue for the bottom line. It is difficult to imagine a billion dollar industry that produces a commodity that cannot even be seen – service to people – but that is an accurate description of today's hospitality industry. The very essence of the hospitality industry is interacting with people; a career in the hospitality industry includes this, the very core of the industry.

HOSPITALITY MANAGEMENT AS A FIELD OF STUDY

Today, there is a pool of specialisations offered in the Education sector. One such specialisation which is giving an array of choices and a bright future to the aspiring professionals is the field of Hospitality Management.

The hospitality industry is vast and very diverse. Hospitality Management is the study of the hospitality industry. A degree in the subject may be awarded either by a university college dedicated to the studies of hospitality management or a business school with a relevant department. Degrees in hospitality management may also be referred to as degrees in hotel management, hotel and tourism management, or hotel administration.

Hospitality management is both a field of work and a field of study. It covers hotels, restaurants, cruise ships, amusement parks, destination marketing organisations, convention centers, and country clubs. Several large corporations involved with the hospitality industry, and management companies offer internship programs, management training programs, and direct placements into all sort of operational, non-operational departments of hospitality and tourism sector for students majoring in Hospitality and Tourism Management. People who are interested in careers in the industry may

opt to pursue it as a field of study so that they can start their careers on solid footing.

Some people develop careers in hospitality management by working from the ground up. They get experience in various low level positions before gradually being promoted into supervisory positions, and eventually attain managerial status. For people who plan to work with a single organisation for life, this method can be a great way to advance, as it familiarizes them with all of the nuances of the organisations they work for and gives them a better idea of the amount of work involved at all levels to run a facility like a busy resort.

Hospitality industry has boomed in India since the past few years and Hotel management as a career has gained popularity. As a result, many hotel management colleges are coming up all over the country. These colleges have established themselves in cities and educational hubs like Pune, Mumbai, Bangalore, Chennai, Delhi, etc and offer good infrastructure along with strong alliances and tie-ups in the hotel and catering industry for placements.

Hospitality education is a field of multidisciplinary study which brings the perspectives of many disciplines, especially those found in the social sciences, to bear on particular areas of application and practice in the industry. It is a field devoted to preparing students, generally for management positions in hospitality.

Hospitality students benefit from the merging of several different content areas. These content areas are often either classified by a sub-segment of the hospitality industry (e.g. Food service or lodging) or by functional area: such as accounting, marketing or management information systems. The course content, in the Institutes offering this area of study, has undergone revision over the years keeping pace with the dynamics of the industry. The present day student is trained to keep pace with the field of Information Technology, also.

In order to compete on an international stage in the field of Hospitality Education - modern equipment, up-to-date curriculum and dedicated faculty is essential and imperative to attain and maintain global standards. Clearly, it has reached an important stage in its development, as evidenced by the increasing number of new academic programs, increased specialisation of faculty members, the increase in academic journals devoted to hospitality, and the strengthening relationship between educational institutions and industry. Above all, hospitality education is finally getting the respect, as a field of study, which it has deserved for so long. Much of this new found respect is due to the array of professional activities with which hospitality professors are involved like research, consultations and trade associations.

CAREER OPTIONS

Today's education relating to the Hospitality Industry, with its wide scope of study, has thrown up an array of career options, viz.,

- Managers in Hotel and Allied industry
- Air Hostess
- Hospitality Executives
- Restaurant Managers
- Captains & Stewards
- Banquets Manager
- Front Office Manager
- Guest Relations Manager
- Faculty in Hotel Management
- Catering Officers in Cruise lines / Shipping company
- Front Office Jobs
- Event Managers
- Travel Agencies
- Human Resource Managers

B.V. Jhaveri, *Advocate*

DIRECT TAXES
Supreme Court

Sale proceeds of scrap is not 'turnover' for deduction u/s. 80HHC

CIT vs. Punjab Stainless Steel Industries [364 ITR 144 (SC)]

1. The assessee respondent was a manufacturer and exporter of stainless steel utensils. In the process of manufacturing stainless steel utensils, some portion of the steel remains unused which is treated as scrap and the respondent assessee disposed of the said scrap in the local market and the income arising from the said sales is also reflected in the Profit & Loss Account. For the purpose of availing deduction u/s. 80HHC, the assessee had not included the sale proceeds of scrap in the total turnover. According to the Revenue, the sale proceeds from the scrap should have been included in the total turnover as the respondent assessee was also selling scrap and that was also part of the sale proceeds. The respondent assessee had objected to the aforestated suggestion of the Revenue, because inclusion of the sale proceeds of scrap into the total turnover would reduce the amount deductible u/s. 80HHC of the Act.

2. The accounting method followed by the respondent assessee was approved by the High Court. The Revenue filed SLP to the Supreme Court.

3. Dismissing the appeal of the Revenue, their Lordships of the Supreme Court observed that the term 'turnover' has neither been defined in the Act nor has been explained in the circulars of the CBDT. In these circumstances one has to look at the meaning of the term 'turnover' in ordinary accounting or commercial parlance.

4. Their Lordships further held that in ordinary accounting parlance, as approved by all accountants and auditors, the terms 'sales' when reflected in the Profit & Loss Account, would indicate sale proceeds from sale of the articles or things in which the business unit is dealing. When some other thing like old furniture or capital asset, in which the business unit is not dealing are sold, the sale proceeds therefrom would not be included in 'sales' but it would be shown separately. In simple words, the word 'turnover' would mean only the amount of sale

proceeds received in respect of the goods in which the assessee is dealing in. So far as the scrap is concerned, the sale proceed from the scrap may either be shown separately in the Profit & Loss Account or may be deducted from the amount spent by manufacturing unit on the raw material. The raw material, which is not capable of being used for manufacturing utensils will have to be either sold as scrap or might have to be recycled in the form of sheets of stainless steel, if the manufacturing unit is also having its re-rolling plant. If it is not having such a plant the manufacturer would dispose of the scrap of steel to someone who would recycle the said scrap into steel so that the said steel can be reused.

5. Their Lordships held that when scrap is sold the sale proceeds of the scrap cannot be included in the term 'turnover' for the reason that the respondent assessee is engaged primarily in manufacturing and selling of steel utensil and not scrap of steel. Therefore the proceeds of such scrap would not be included in 'sales' in the Profit & Loss Account of the respondent assessee.

6. Their Lordships further observed as under:

"In addition to the above factors, which we have considered for understanding the meaning of the term "turnover", we should not miss the purpose with which the said term has been incorporated in section 80HHC of the Act.

"The intention behind the enactment of section 80HHC of the Act was to encourage export so as to earn more foreign exchange. For the said purpose, the Government wanted to encourage businessmen, traders and manufacturers to increase the export so as to bring more foreign exchange in our country. If the purpose is to bring more foreign exchange and to encourage export, we are of the view that the Legislature would surely like to give more benefit to persons who are making an effort to help our nation in the process of bringing more foreign exchange. If a trader or a manufacturer is trying his best to increase his exports, even at the cost of his business in a local market, we are sure that the Government would like to encourage such a person. In our opinion, once the Government decides to give some benefit to someone who is helping the nation in bringing foreign exchange, the Revenue should also make all possible efforts to encourage such traders or manufacturers by giving such business units more benefits as contemplated under the provisions of law."

Important principles of law on taxation of discretionary & specific trusts

CIT vs. Estate of Late Hmm Vikramsinhji of Gondal [Civil Appeal No. 2312 of 2007, dated 16th April, 2014]

The ex-Ruler of Gondal Shri Vikramsinhji executed three deeds of settlement (trust deeds) in the USA & UK. These trusts were created for the benefit of (a) the Settlor, (b) the children and remoter issue for the time being in existence of the Settlor and (c) any person for the time being in existence who is the wife or widow of the Settlor or the wife or widow or husband or widower of any of them, the children and remoter

issue of the Settlor. During his life time, the settlor, Shri Vikramsinhji, was including the whole of the income arising from these trusts in his returns of income. The said income was also included in the two returns filed by his son Jyotendrasinhiji for the A.Y. 1970-71. Thereafter, the assessee took the stand that the income from these trusts is not includible in his income. Jyotendrasinhiji also took the stand that inclusion of the said income in the returns submitted by his father for the A.Ys 1964-65 to 1969-70 and by himself for the assessment year 1970-71 was under a mistake. Clause 3 of the deeds of settlement executed in U.K. leaves at the discretion of the trustees to disburse benefits to the beneficiaries. The endorsement made in the returns, as noted above, shows that income was retained by the trustees and not disbursed. The Tribunal while considering clause 3(2) and clause 4 of the U.K. Trust Deeds observed that if the trusts were really intended to be discretionary, the trustees had a duty cast on them to ascertain the relative needs and personal circumstances of all the beneficiaries and to allocate the income of the trusts, among them from time to time, according to the objects of the trusts, however, the telltale facts bring out the intention of the settlor to treat the trust property as his own. The settlor and after his death his son have been showing the income of foreign trusts in the returns of income filed from time to time. Had the trust deeds been really understood by the trustees and the beneficiaries as discretionary by virtue of the operation of clause 3, one would have expected the state of affairs to have been different. Consequently, the Tribunal held that due to failure on the part of the Maharaja to appoint discretion exercisers as per clause 3(2), clause 4 has become operative and the U.K. trusts have to be held to be specific trusts.

The High Court did not agree with the Tribunal's view and held that on interpretation of the relevant clauses of the deeds of settlement executed in U.K., character of the trusts was discretionary and not specific.

Dismissing the appeal of the Revenue, the Supreme Court held as under:

> "A discretionary trust is one which gives a beneficiary no right to any part of the income of the trust property, but vests in the trustees a discretionary power to pay him, or apply for his benefit, such part of the income as they think fit. The trustees must exercise their discretion as and when the income becomes available, but if they fail to distribute in due time, the power is not extinguished so that they can distribute later. They have no power to bind themselves for the future. The beneficiary thus has no more than a hope that the discretion will be exercised in his favour. Having regard to the above legal position about the discretionary trust which is also applied by this Court in the earlier judgment and the fact that the income has been retained and not disbursed to the beneficiaries, the view taken by the High Court cannot be said to be legally flawed. Merely because the settlor and after his death, his son did not exercise their power to appoint the discretion exercisers, the character of the subject trusts does not get altered. The two U.K. trusts continued to be 'discretionary trust' for the subject assessment years. The High Court has taken a correct view that the value of the assets cannot be assessed on the estate of the deceased Settlor (Snell's Principles of Equity, 28th Edition, Page 138 followed)."



Ashok Patil, Mandar Vaidya & Priti Shukla
Advocates

DIRECT TAXES
High Court

1] Non-explanation of source of share capital – Reopening valid – Section 69 vis-à-vis 147 of the IT Act.

Sushrut Institute of Plastic Surgery vs. DCIT [2014] 45 taxmann.com 117 (Allahabad)

For relevant year assessee filed its return which was processed under section 143(1). Subsequently, Assessing Officer found that there was increase in value of current assets which remained unexplained. Assessing Officer further found that DVO had estimated total investment in construction of building at higher amount as against investment declared by assessee. Accordingly, reassessment proceedings were initiated. It was noted that during relevant year there was increase in share capital and investment in building but assessee could not explain source of same. Apart from DVO's report, there were sufficient reasons for Assessing Officer to believe that income chargeable to tax had escaped assessment and, therefore, validity of impugned reassessment proceedings was held justified.

2] As long as the Ruler continues to occupy the palace, whether by actually utilising it or by keeping it vacant, it shall be for the purpose of section 10(19A) deemed to be in his occupation

CIT vs. Maharao Bhim Singh of Kota [2014] 45 taxmann.com 350(Raj)

The question of law in High Court was "whether the rental income received by a Ruler from part of the palace, which was declared as his official residence, would be exempt from tax under section 10(19A) of Income-tax Act (the Act')? Allowing the appeal the court held that Section 10(19A) of the Act clearly provides that the annual value of any one palace which is in the occupation of a ruler would be exempt from tax. The court held that the Apex Court in case of *Mohammad Ali Khan vs. Commissioner of Wealth-tax [1997] 92 Taxmann 52 (SC)* had ruled (in the context of Wealth Tax Act) that if any portion of a building was let out to a tenant, it couldn't be said to be in the occupation of the Ruler. Hence, to claim exemption under Wealth Tax Act, the Ruler should have occupation over the building. The Court also held that there was substantial similarity in the language of section 5(1)(iii) of the Wealth-Tax Act and section 10(19A) of the Act on all relevant aspects, except that the word "building" has been substituted by "Palace" in the latter Act. Therefore, the ratio of Mohammad Ali Khan (supra) was squarely applicable to this particular case also. The Court further held that section 10(19A) of the Act postulates exemption from income-tax on "the annual value of any one palace in the occupation of the Ruler". Thus, so long as Ruler continues to occupy the palace, whether by actually utilising it or by keeping it vacant, it shall be, for the purpose of section 10(19A) of the Act, deemed to be in his occupation. He, however, would disentitle himself to the exemption from income-tax on the annual value of such part of the palace, possession and/or control of which he has parted with in favour of the tenant.

3] Revised monetary limits for filing of an appeal as specified by CBDT through

an instruction of 2011 would not apply to all pending appeals

CIT vs. Shambhubhai Mahadev Ahir [2014] 44 taxmann.com 344 (Gujarat)

Whether the view taken by the High Court [in case of *CIT vs. Sureshchandra Durgaprasad Khatod (HUF) [2013] 31 taxmann.com 74 (Gujarat)]* that the instructions of 2011 of the Board providing for revised monetary limits for filing the appeals, would apply to all pending cases, irrespective of the date of filing of such appeals was correct? Dismissing the appeal the court held that the clause 11 of the instructions of 2011 specifically states that "this instruction will apply to appeals filed on or after 9th February 2011. However, the cases where appeals have been filed before 9th of February, 2011 will be governed by the instructions on this subject, operative at the time when such appeal was filed". There was no ambiguity in the instructions of 2011 as regards its applicability, and it had been made clear that if those appeals were not filed after the dates mentioned in those instructions, the fate of the appeals would be governed in accordance with the instructions prevailing on the date of presentation of such appeals. The court further said that it could not be held that even if an appeal was filed prior to February 9, 2011 the same would be barred notwithstanding the fact that at the time of filing such appeal, the same was not barred by the then instructions of the CBDT. The view taken in case of Durgaprasad Kathod [HUF] (supra) could not be accepted because in that decision, the well-settled principle relating to literal construction was not followed. From the language of the enabling provisions of the statute, it was clear that no power had been conferred on the CBDT to make the pending appeals or references filed in accordance with the then existing law infructuous by issuing any such direction or instruction with retrospective effect. The CBDT being fully conscious of its limitation had given clear prospective effect to those instructions in paragraph 11 of the instructions. Thus, the conclusion arrived at by the High Court was in conflict with the existing law of the land.

4] When section 54E was not at all applicable, reopening of case lacked validity on the basis of the said grounds

Dhruv Parulbhai Patel vs. ACIT [2014] 45 taxmann.com 20 (Gujarat)

The assessee sold a residential property and claimed exemption under section 54. He deposited unutilised amount with the State Bank of India. The Assessing Officer reopened the case on ground that verification of case record revealed that assessee was allowed exemption of capital gain income under section 54E. But he invested in State Bank of India term deposit for 40 days up to 366 days i.e., for less than three years and he was not entitled to get exemption under section 54E for investment less than three years. The assessee filed writ Petition in High Court. Allowing the Writ Petition, the Court held that there was nothing conclusive on record to suggest that the question of assessee's claim for exemption from capital gain under section 54 was examined by the Assessing Officer. The Assessing Officer in the reasons recorded desired to disallow the claim on the ground that as required under section 54E, the assessee did not invest the surplus for a minimum period of 36 months. Though through the affidavit-in-reply, it was pointed out that reference to section 54E was mere typographical error and the intention was to refer to section 54 such stand was wholly incorrect. The fact that reference under section 54E was not an error, manifested from the reasons recorded. It referred to the requirement of investing the surplus fund for minimum period of 36 months. Such requirement flowed from section 54E and not section 54. Section 54 in fact requires the assessee to acquire a new unit within a year or build himself within three years. In the later case he has to invest the surplus in specified investments. This was, thus, not a mere typographical error but a conscious decision on the part of the Assessing Officer to disallow the exemption claimed, for breach of the requirement of section 54E. What, thus, emerged from the above discussion was that the reasons on which the notice for reopening was issued lacked validity. Section 54E was neither applicable nor sought to be applied by the assessee. The question of denying any such claim under the said provision for breach of condition therein, therefore, simply did not arise. The court also held that it is well-settled that notice for reopening has to be sustained and supported only on the basis of reasons recorded by the Assessing Officer and not with the help of extraneous ground, material or possible improvement.


Jitendra Singh & Sameer Dalal
Advocates

DIRECT TAXES
Tribunal

REPORTED DECISIONS

1. Reassessment – Notice under section 148 issued without obtaining requisite sanction under section 151 of the Act – Notice under section 148 of the Act is bad in law. A.Y. 2003-04

Mrs. Amina Rasool vs. ITO (2014) 102 DTR (Asr.) (Trib.) 305

The A.O. issued notice under section 148 of the Act on 23-1-2008, without obtaining the requisite sanction from the Jt. CIT/ Addl. CIT as per the provisions of section 151 of the Act. The sanction was taken by the A.O. on 30-3-2009 i.e. after the issuance of notice under section 148 of the Act. The assessee challenged the validity and legality of the notices issued under section 148 of the Act. The first Appellate Authority without appreciating the facts and circumstances of the case confirmed the action of the A.O. in issuing the notice under section 148 of the Act. The assessee being aggrieved carried the matter before the Amritsar Bench of Hon'ble Appellate Tribunal. The Appellate Tribunal has allowed the appeal of the assessee and held that the Jt. CIT/Addl. CIT having recorded the satisfaction as contemplated under section 151(2) long after issuance of notice under section 148 of the Act, the impugned notice was bad in law and consequently, the reassessment proceedings are quashed.

2. Business expenditure – Allowability under section 37(1) – month-wise details of expenditure as well as entire module, bills and vouchers relating to the expenses were produced before the A.O. – *ad hoc* disallowance out of travelling and conveyance is not justified. A.Y. 2009-10

Gillette India Ltd vs. ACIT (2014) 102 DTR (Jp.) (Trib.) 377

The assessee during the year incurred expenses totalling to ` 9,94,33,712/-. The A.O. made ad-hoc disallowance of ` 50,00,000/- out of the same on the ground that the assessee expenses were not supported by documentary evidence. The assessee before the Dispute Resolution Panel explained that it has furnished the month-wise details of expenses, bills and vouchers for verification. However, the A.O. while making the disallowance has not asked for the details of any specific expenses. The assessee further explained that the expenses were subjected to FBT and no part of expenditure is disallowed in the earlier or subsequent assessment years. The Dispute Resolution Panel after considering the

explanation as well as the evidence furnished by the assessee directed the A.O. delete the *ad hoc* disallowance. The department being aggrieved by the order passed by the Dispute Resolution Panel preferred an appeal before the Hon'ble Appellate Tribunal. The Appellate Tribunal upheld the direction of the Dispute Resolution by observing that A.O. having admitted that the assessee has produced entire module, bills and vouchers of travelling and conveyance expenses for verification as desired, *ad hoc* disallowance made by the A.O. on the ground that the assessee has not filed supporting evidence to justify the claim of deduction cannot be sustained.

3. Exemption under section 10A – Adjustment of brought forward losses – exemption is to be allowed before adjustment of brought forward losses. A.Y. 2007-08

S.R.A. Systems Ltd. vs. ACIT (2014) 103 DTR (Chennai) (Trib.) 28

The A.O. while finalising the assessment under section 143(3) r.w.s. 92C(4) and section 144(5) of the Act restricted the claim of the assessee with respect to the exemption under section 10A of the Act by adjusting the brought forward losses of the earlier assessment years. The assessee challenged the action of the learned A. O. before Chennai Bench of the Appellate Tribunal. Hon'ble Appellate Tribunal relying on the decision of the Appellate Tribunal in assessee's own case for earlier assessment year 2005-06 allowed the claim of the assessee and held that the exemption under section 10A of the Act is allowable before setting of of the brought forward losses.

4. Penalty – Levy of concealment penalty under section 271(1)(c) on the additional income offered during the course of survey – The order sheet noting does not indicate initiation of any penalty proceedings – The A.O. levied the penalty without making any observation in the assessment order with respect to the amount of concealment or satisfaction for initiation of proceedings – penalty not leviable. A.Y. 2007-08

Godavari Townships (P.) Ltd. vs. DCIT (2014) 103 DTR (Viz.) (Trib) 1

The assessee filed its return of income for A.Y. 2007-08 on 18-10-2007. Thereafter, the assessee's premises were subjected to survey action under section 133A of the Act on 11-9-2008. During the course of survey, the statement of one of the directors was recorded, wherein he has declared certain additional income and offered the same for tax. The assessee in pursuance to the additional income declared during the course of survey proceedings revised its return of income on 28-11-2008 and offered the additional income of ` 1,50,69,196/- for tax. The A.O. finalized the assessment on the basis of revised return filed by the assessee. Subsequently, the A.O. initiated penalty proceedings under section 271(1)(c) of the Act. The assessee in response to the Show Cause Notice replied that there is no wilful concealment of income or filing of inaccurate particulars of income under section 271(1)(c) of the Act. Hence, initiation of concealment penalty may be dropped. However, the A.O. proceeded to levy the penalty.

On appeal, the first Appellate Authority confirmed the action of the A.O. in levying the concealment penalty. The assessee being aggrieved by the order of the first Appellate Authority preferred an appeal before the Hon'ble Visakhapatnam Bench of the Appellate Tribunal. The Tribunal deleted the penalty levied by the A.O. by observing as under: AO having made the assessment by accepting the additional income declared in the revised return which was

offered by the assessee during the survey under section 133A and not recorded any satisfaction in the assessment order that there is concealment of income nor followed the procedure under section 274 with reference to the grounds mentioned in section 271(1)(c) by stating whether the notice issued is for concealment of income or for furnishing of inaccurate particulars of income, the conditions for imposing penalty are not satisfied and therefore, no penalty under section 271(1)(c) can be imposed on the assessee.

UNREPORTED DECISIONS

1. Capital gains – Transfer – Section 2(47) of the Income-tax Act, 1961 - Assessee entered into an agreement for development of land with a developer according to which developer was to develop property as per the approved plan and deliver a part of constructed area to assessee – However, the developer had not done anything to discharge the obligations cast upon it during the year – Capital gains could not be brought to tax for the year under consideration merely on basis of signing of development agreement. A.Y.: 2006-07

Binjusaria Properties (P.) Ltd. vs. ACIT – [I.T.A. No. 157 / Hyd / 2011; Order dated 4-4-2014; Hyderabad Bench]

During year under consideration the assessee entered into an agreement for development of land with a developer in terms of which, developer had to develop property according to approved plan and hand over certain portion of constructed area to assessee. Further, the assessee in terms of agreement received a refundable deposit, the said deposit was to be refunded on the complete handing over of the area falling to the share of the assessee however, in the event of failure on the part of the assessee in refunding such deposit, the same was liable to be adjusted at the time of final delivery, by the developer against the area to be handed over to the assessee applying a mutually agreeable rate.

In the course of assessment the Assessing Officer held that as transfer had taken place in terms of development agreement-cum-General Power of Attorney the assessee was liable to pay capital gain tax in the assessment year in question.

The short issue before the Tribunal in the appeal filed by the assessee was, whether capital gain was assessable in the year in which the development agreement was entered into that is, in the current assessment year, as done by the Assessing Officer, or in the relevant subsequent year in which the area duly developed and constructed coming to the share of the assessee-owner was handed over to the assessee.

The Tribunal after going through the development agreement-cum-General Power of Attorney executed between the developer and the assessee found that the said agreement indicated that what was handed over by the assessee to the developer was only a 'permissive possession', thus, it was only upon receipt of consideration in the form of developed area by the assessee in terms of the development agreement, the capital gains becomes assessable in the hands of the assessee.

Further, the Tribunal held that, the assessee had fulfilled its part of the obligation under the development agreement, but the developer had not done anything to discharge the obligations cast on it under the development agreement during the year under consideration, on this count also, the capital gains could not be brought to tax in the year under appeal, merely on the basis of signing of the development agreement during relevant assessment year.

2. Capital gain – Exemption – Section 54 F of Income-tax Act, 1961 – Mere booking of two residential houses before the date of transfer would not provide ownership rights to assessee – The assessee could not be deemed to be owning two residential houses on date of transfer for the purpose of disallowing exemption under section 54F of the Act.

Further, investment in new house by payment of booking amount would be deemed valid investment for purposes of claiming exemption under section 54F of the Act. A.Y.: 2009-10

Ram Prakash Miyan Bazaz vs. Dy. CIT – [I.T.A. No. 182 / Jp / 2013; Order dated 5-5-2014; Jaipur Bench]

During the year, Rajasthan State Industrial Development and Investment Corporation Ltd. acquired the land owned by the assessee jointly with other members of his family. The assessee accordingly, computed his income under the head 'Long term capital gain' after claiming exemption under section 54F of the Act.

During the assessment proceedings the Assessing Officer called for the details regarding the assessee's claim of deduction under section 54 F of the Act. The Assessing Officer noted that apart from the new property purchased by the assessee he owned two residential houses, on the date of transfer of the original asset. As against this, the assessee submitted that he neither possessed nor owned these houses as he had merely paid advance booking amount for these flats, on the date of transfer of original asset. However, the Assessing Officer concluded that the assessee is not eligible for exemption under section 54F of the Act as at the time of acquisition of land by the State Government the assessee owned more than one residential house. Therefore, according to the Assessing Officer assessee does not fulfil the primary condition for claiming exemption under section 54F of the Act. Further, the Assessing Officer noted that advance payment made for the purchase of new residential flat cannot treated as investment/utilization of the capital gain in the purchase of a residential house also. Thus, on both these counts, the Assessing Officer rejected the assessee's claim of exemption under section 54F of the Act.

On appeal the Tribunal held that proviso to section 54F(1) provides that if assessee owns more than one residential house, other than the new asset, on the date of transfer of the original asset then he will not be entitled to exemption. Owning of a residential house at the time of transfer of the original asset has different meaning and acquisition of new asset 'which is equivalent to purchase of new residential house' has entirely different meaning, and it is erroneous to giving the same meaning to the residential house owned at the time of transfer of the original asset and the investment made out of the capital gain in the purchase or construction of new house, which has been defined as 'new asset' in the Act. When a flat is booked the person has only a 'right to acquire' and this right is not equivalent to 'own' a house. Therefore, by mere booking of flats, it could not be said that assessee had ownership of the flats. Thus, in the present case assessee did not own more than one residential house on the date of transfer of original asset as he had only booked flat and paid advance for the same. Further, as regard to purchase of new residential house the Tribunal held that the provision does not lay down a condition that a new house should either be complete or it should be purchased as a complete habitable house. The aim of the statute is to direct the minds of the society towards purchasing

new residential houses so that the menace of shortage of houses is tackled to some extent. Thus, the amount paid towards booking is to be treated for 'construction' for the purpose of section 54F of the Act.

3. Capital Gain – Exemption - Section 54 F of Income-tax Act, 1961 – Profit arising on sale of agricultural land held in name of wife of assessee which had been assessed in hands of assessee, deduction claimed under section 54F of the Act could not be denied on ground that new residential property was purchased in name of assessee. A.Y.: 2008-09

Hardev Singh vs. ITO - [I.T.A. No.: 683 / Chd/ 2012; Order dated 25-2-2014; Chandigarh Bench]

In the year 1999 the assessee purchased agricultural land in the name of his wife out of his own funds. During the year under consideration the land was sold and the sale proceeds of the said land were deposited in the account of the assessee. However, the long term capital gain was not declared in the return of income. However, during the course of assessment proceedings, the assessee contended that he had 'nil' income from long term capital gains as on sale of the agricultural land, as he had made an investment in a flat on which it had also incurred additional cost of construction/renovation.

The Assessing Officer included the income from long term capital gains on sale of the agricultural land in the hands of the assessee however, he denied the exemption claimed under section 54F of the Act. The Assessing Officer was of the view that the agricultural land was in the name of the wife of the assessee and the new property was in the name of the assessee as such the assessee was not entitle for exemption under section 54F of the Act.

On appeal the Tribunal held that as the profit arising on sale of agricultural land held in name of wife of assessee had been assessed in hands of assessee, assessee's claim of exemption under section 54 F of the Act with respect to investment of capital gains in new flat could not be denied.

4. Penalty – Section 271(1)(c) of the Income tax Act, 1961 – Additional income surrendered by assessee, in revised return of income – Accepted by department – Penalty under section 271(1)(c) of the Act on surrendered amount not leviable. A.Ys: 2000-01 & 2002-03 to 2004-05

Poonam Marble (P.) Ltd. vs. Dy. CIT – [(2014) 62 SOT 137 (Jodhpur) (URO)]

A search operation was conducted at business and residential premises of assessee. During the search operation various documents which were found and seized indicated that assessee had made unaccounted sales. The amount of said unaccounted sales was declared by the assessee in revised return filed by it, thereafter, assessment was completed accepting the revised return. The Assessing Officer however imposed penalty under section 271(1) (c) of the Act on such additions.

On appeal the Tribunal held that as the additional income was disclosed by assessee in revised return which was accepted by Assessing Officer in its entirety and other additions were made merely on estimated basis by applying gross profit rate declared by assessee itself. As such, penalty under section 271(1)(c) of the Act on said additional income declared in the revised return was not leviable.

CA Sunil K. Jain

DIRECT TAXES
Statutes, Circulars & Notifications

Notifications

Section 36(1)(xii) of the Income-tax Act, 1961 – Other deductions – Expenditure incurred by – Notified Corporate Body

The Central Government notified the *National Bank for Agriculture and Rural Development (PAN: AAACT4020G)* for providing and regulating credit and other facilities for promotion of agriculture and rural development, subject to the following conditions, namely. – (i) The expenditure, claimed as deductible under the Income-tax Act, is incurred for the objects and purposes authorised by the National Bank for Agriculture and Rural Development Act. (ii) Such expenditure is not in the nature of capital expenditure; (iii) Such expenditure is not eligible for deduction under any other provision of the Income-tax Act; and (iv) A separate account of the expenditure claimed under the said clause is maintained by the National Bank for Agriculture & Rural Development.

The notification shall be applicable with effect from Assessment Year 2013-14 onwards, relevant to F.Y. 2012-13 in which the application seeking notification u/s. 36(1)(xii) of the Income-tax Act, 1961 was filed.

(Notification No. 25/2014 - Dated 29-4-2014)

Substitution of Application Forms 49A and 49AA for PAN

The Central Board of Direct Taxes made the rules to amend the Income-tax Rules, 1962, as the Income-tax (5th Amendment) Rules, 2014 to come into force on the date of their publication in the Official Gazette whereby in Appendix II, for Forms 49A and 49AA, new Forms have been substituted, regarding application for allotment of permanent account number [in the case of Indian citizens/Indian companies/entities incorporated in India/ unincorporated entities formed in India] and application for allotment of permanent account number [individuals not being a citizen of India/entities incorporated outside India/ unincorporated entities formed outside India] respectively.

(Notification No. 26/2014 dated 16-5-2014)

Section 10(48) of The Income-tax Act, 1961 – Exemptions – Foreign Company Selling Codeine

Phosphate In India – Notified Foreign Company

The Central Government, for the purpose of above section and having regard to the national interest, notified for the purposes of the said clause (a) M/s. Temad, 28th km Karaj Makhsous Road, Iran, as the foreign company; (b) Codeine Phosphate as the goods; and (c) the Memorandum of Understanding entered into between the Government Opium and Alkaloid Factories (GOAF) and M/s. Temad, Iran on the 21st September, 2013, duly approved by the Central Government, as the agreement provided that the said foreign company shall not engage in any activity in India, other than the receipt of income in India under the agreement aforesaid on account of the sale of Codeine Phosphate. The Notification shall be deemed to have come into effect from the 1st day of April, 2014.

(Notification No. 27/2014 Dated 23-5-2014)

Circulars

Section 80-IA (III) (4) of the Income-tax Act – Deductions – Profits and Gains from industrial undertakings, or Enterprises engaged in Infrastructure Development, etc. – Eligibility of deduction under Section 80-IA for unexpired period

Section 80-IA of the Income-tax Act deals with deduction in respect of profits & gains derived by an undertaking or enterprise engaged in developing, operating and maintaining any infrastructure facility, industrial park etc. The undertakings or enterprises eligible for availing deduction under this section have been specified under sub-section (4) of the said section and can broadly be classified as under:- (i) Enterprise carrying on the business of developing or operating & maintaining or developing, operating & maintaining infrastructure facilities [ref: 80-IA(4)(i)]; (ii) Undertaking providing basic or cellular telecommunication services [ref : 80-IA(4)(ii)]; (iii) Undertaking which develops, develops & operates or maintains & operates an industrial park or SEZ [ref: 80-IA(4)(iii)]; (iv) Undertaking set up for generation / generation & distribution of power or laying of network/ renovation or modernisation of network of transmission / distribution lines [ref: 80-IA(4)(iv)] Or set up for reconstruction or revival of power generation plant [ref: 80-IA(4)(v)].

The provisions of section 80-IA of the Act also include conditions which are necessary to be met for being eligible for deduction. These include conditions prescribed under sub-section (3) of section 80-IA according to which the undertakings at (ii) and (iv) above should not, inter-alia, be formed by splitting up or reconstruction of an existing business. The proviso to clause (i) and clause (iii) of sub-section (4) of section 80-IA deal with the situation where operation & maintenance of infrastructure facility or operation & maintenance of industrial park/ SEZ respectively is transferred to another enterprise in the manner provided therein and the transferee undertaking can avail deduction for the unexpired period. Sub-section (12A) of section 80-IA of the Act provides that where the enterprise or undertaking of an Indian Company entitled to the deduction under the said section is transferred on or after 1-4-2007 in a scheme of amalgamation or demerger, no deduction shall be available to the amalgamated or the resulting company.

The vital factor in determining the eligibility criteria for availing deduction u/s. 80-IA in

above cases would be verification of factual issues so as to ascertain whether (a) there has been splitting up or reconstruction of a business already in existence, (b) transfer is in accordance with the proviso to clause (i) or clause (iii) of sub-section (4) of section 80-IA, or (c) transfer of an enterprise or undertaking is in a scheme of amalgamation or demerger. It is however clarified that if an enterprise or undertaking develops an infrastructure facility, industrial park or special economic zone, as the case may be, and transfers it to another enterprise or undertaking for operation and maintenance in accordance with the proviso to clause (i) or clause (iii) of sub-section (4) of section 80-IA of the Act and this transfer is not by way of amalgamation or demerger, the transferee shall be eligible for the deduction for the unexpired period. [For example, if the 'transferor' has availed of the deduction for development of an infrastructure facility for 6 years and thereafter transfers it to the 'transferee' for operation and maintenance; such transferee will be eligible for deduction for remaining 4 years.] It is further clarified that profit for the purposes of deduction in the case of transferee shall also be computed in accordance with sub-sections (5) to (10) of section 80-IA of the Act.

(Circular No. 10/2014, dated 6-5-2014)

INSTRUCTIONS

Section 264 of The Income-tax Act, 1961 – Revision of other orders – Administrative supervision of orders passed under Section 264

Under Section 264 of the Income Tax Act, the Commissioner of Income Tax (CIT) may, either of his own motion or on an application made by the assessee, revise an order passed by an authority subordinate to him. The CIT may, before revising such, order, make enquiry or cause such enquiry to be made and subject to the provisions of the Act, pass such order which is not prejudicial to the assessee. The statutory function under section 264 of the Act performed by the CIT is required to be reported by the CIT and also appraised by the supervisory Officers. Therefore, it issued the following guidelines to be complied forthwith in respect of orders passed under section 264 of the Act:—

(a) The CIT shall prepare a brief of the orders passed under section 264 of the Act and report the same to the principal Chief Commissioner of Income-Tax/Chief Commissioner of Income-Tax (CCIT) in the monthly DO letter along with a copy of such order. (b) The Pr. CCIT/ CCIT shall report the number of orders passed under section 264 of the Act by the CSIT under his/her jurisdiction along with his/her observation in relation to any order, if deemed fit, to the Zonal Member of the CBDT in the monthly DO letter. The Pr CCIT/CCIT shall also communicate his/her observation to the CIT.

(Instruction No.11/2014 dated 16-5-2014)

Press Releases

Section 92CC of the Income-tax Act, 1961 – Advance Pricing Agreement – Signing of first batch of 5 Unilateral Advance Pricing Agreements (APA) on 31-3-2014 by CBDT and highlighting features of whole scheme of APA

The CBDT has signed the first batch of 5 unilateral Advance Pricing Agreements (APA). The agreements cover a period of 5 years from A.Y. 2014-15 to A.Y. 2018-19 and

specify the arm's length price for the covered international transactions entered into by the taxpayers. These agreements cover a range of international transactions, including interest payments, corporate guarantees, non-binding investment advisory services and contract manufacturing. The agreements pertain to different industrial sectors including pharmaceuticals, telecom, exploration and financial services.

The agreements provide a complete certainty to the taxpayers for 5 years with regard to the covered international transactions.

The whole scheme of APA has been designed with the intention of creating a taxpayer friendly environment in transfer pricing matters and to minimise the transfer pricing disputes. Before filing the APA applications, taxpayers are given the opportunity to share their expectations from the APA process during the pre-filing consultations and the APA team shares a broader understanding of the forthcoming APA procedure.

Having received an APA application, the APA team works towards establishing the appropriate economic analysis of the covered international transactions which also involves a site visit i.e. physical verification of the business of the applicant with regard to the said transactions. It is this detailed fact finding exercise which lends credibility to the determination of arm's length price under the APA. The APA team furnishes a report incorporating functions, assets and risk (FAR) analysis which is further examined at length by the CBDT before its submission for the final approval of the Central Government.

(Press Release No - Dated 31-3-2014)

46 countries, including India, besides the European Union, meeting under the auspices of OECD, adopted a Declaration on Automatic Exchange of Information in tax matters

On May 6, 2014, 46 countries, including India, besides the European Union, meeting under the auspices of the OECD, adopted a Declaration on Automatic Exchange of Information in Tax Matters.

Switzerland was one of the 46 countries. The Declaration recognises that investments kept offshore by taxpayers should not go untaxed. It stresses that a key aspect of cooperation between tax administrations is effective exchange of information on automatic basis subject to appropriate safeguards. The Declaration has referred to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters that has been signed by over 60 countries including almost all OECD countries and all G-20 countries. Switzerland is a signatory to the Convention but it is reported that Switzerland has not yet ratified the Convention. The Declaration called upon all countries to sign and ratify the multilateral Convention.

India has signed the multilateral Convention and, as stated above, is also a signatory to the Declaration adopted on May 6, 2014. In days to come all major financial centres will be parties to an effective exchange of information on automatic basis. It also intends to continue to pressure Switzerland to ratify the Multilateral Convention on Mutual Administrative Assistance in Tax Matters as well as abide by its obligations under the Declaration that it signed on May 6, 2014.

(Press Statement, Dated 12-5-2014)


CA Tarunkumar Singhal & CA Sunil Moti Lala

INTERNATIONAL TAXATION
Case Law Update

A] AUTHORITY FOR ADVANCE RULING

I. Sales promotion services rendered by 'G' for promotion of books and brand name of applicant in Sri Lanka were not technical services as defined in the Act – Such payments were not taxable in India as Article 14 of India-Sri Lanka DTAA provided that such income would be taxable only in the country in which services were rendered.

Oxford University Press, In re [2014] 45 taxmann.com 282 (AAR)

Facts

1 The applicant, Oxford University Press, was an Indian branch of Oxford University Press, U.K. It was engaged in publishing, printing and reprinting of educational books for schools, Universities, and other educational institutions.

2 The applicant appointed Ms. Geetha, a resident of Columbo, Sri Lanka and designated her as "Resident Executive" as per letter of appointment for a period of 12 months commencing on 1st June, 2011 in lieu of payment of monthly remuneration and reimbursement of expenses which are remitted to her bank account maintained in Columbo.

3 The role of Ms Geetha was basically marketing executive that involves promotion of sale of books published by the applicant. The applicant submitted that all the activities undertaken by her are entirely in Sri Lanka and no part of activities are to be taken by her in India.

4 The applicant approached the Hon'ble AAR to determine taxability of such remuneration in India.

Ruling

1 The Hon'ble AAR observed that the services rendered by the Ms. Geetha were basically for promotion of books and brand name of the applicant in Sri Lanka, which were just sales promotion activities. The job description fits in more with a marketing executive than anything else.

2 It observed that there was no definition of technical services in India-Sri Lanka Double Taxation Avoidance Agreement ("the DTAA") and, therefore, provisions of the Income-tax Act, 1961 ("the Act") shall be referred to examine if the payment was fees for technical services. The services rendered by 'G' did not fall

under any of the items mentioned in the Explanation 2 to Section 9(1)(vii) of the Act i.e., managerial, technical or consultancy services. Thus the services rendered by her are, therefore, not technical services as defined in the Act.

3 The Hon'ble AAR further observed that there was no dispute regarding status of Ms Geetha that is resident in Sri Lanka and non-resident in India and the services rendered outside India. The payments are made in Sri Lanka. Thus the payment made to Ms Geetha was not taxable either under the Act or the DTAA.

4 It further held that this payment would also be covered under the scope of Article 14 of DTAA. However, in view of Article 14 of the DTAA, it would be taxable only in the country in which she had rendered the services, i.e., Sri Lanka.

II. Benefit of Proviso to Section 112(1) is allowable to non-resident availing of benefit of first proviso to Section 48 of the Act

Pan-Asia iGATE Solutions, In re [2014] 45 taxmann.com 322 (AAR)

Facts

1 The Applicant, a Mauritian company, purchased 1,82,55,396 listed equity shares of Patni Computer Systems Ltd., an Indian company, from iSolutions, Inc. USA and entered into Share Purchased Agreement dated 10th January, 2011.

2 ISolutions purchased the original equity shares of Patni in foreign currency. It passed a resolution on 28th December, 2010 wherein its Board of Directors proposed to sell the equity shares (which include both originally acquired equity shares purchased in May, 2000 as well as bonus shares acquired up to August, 2003) of Patni to the applicant. iSolutions held the aforesaid shares of Patni for a period of more than 12 months.

3 The applicant sought advance ruling on the issue whether tax had to be deducted at 10% under section 195 on long-term capital gain arising to such non-resident as per proviso to Section 112(1) of the Act.

Ruling

1 The Hon'ble AAR relying on the judgment of the Delhi High Court in the case of *Cairn UK Holdings Ltd. [2013] 359 ITR 268 (Delhi)* directed the Mauritian Company to deduct tax at source at the rate of 10% under proviso to Section 112(1) of the Act.

III. Employer's contribution to the superannuation fund assures only future benefit to employees and they do not get any vested right at the time of making contribution to the fund – Therefore, such contribution could not be treated as taxable perquisite in the hands employee until they are entitled to receive it

Royal Bank of Scotland, In re [2014] 45 taxmann.com 283 (AAR)

Facts

1 The applicant, Royal Bank of Scotland, was established in Netherlands. Its Indian branch established a superannuation fund for providing pension to its eligible employees under a 'Defined Benefit Plan'.

2 The applicant sought an advance ruling on the issue whether tax was to be deducted under Section 192 of the Act on the contribution made to the superannuation fund (for an amount exceeding ` 1,00,000 per employee) as perquisite.

3 The Revenue contended that as per Section 17(2)(vii) of the Act, any contribution

made by employer to the superannuation fund in excess of ` 1,00,000 was to be treated as perquisite in the hands of an employee. Hence, the applicant was liable to deduct tax at source under Section 192 of the Act.

Ruling

1 The Hon'ble AAR observed that Accounting Standard 15 defines 'Defined Benefit Plan' as a plan in which amount contributed was invested to earn some return to ensure that employees would get pension as per the pre-defined formula.

2 It held that Employer's contribution to the superannuation fund assures only future benefit to employees and they didn't get any vested right at the time of making contribution to the fund. Thus, such contribution could not be treated as taxable perquisite in the hands employee until he was entitled to receive it.

3 It further held that mere insertion of a Section 17(2)(vii) of the Act didn't make any significant departure from this aspect. Thus, the applicant wasn't required to deduct tax at source on contribution made to superannuation fund.

IV. Protocol or Memorandum can be made use of for interpreting provision of the Treaty – It will be inappropriate to import words, phrases or clauses that aren't available into the Treaties between two Sovereign nations, on the basis of Treaties with another countries – In absence of 'make available' clause in India-France DTAA, the same cannot be imported into the DTAA in view of the protocol

Steria (India) Limited, In re [2014] 45 taxmann.com 281 (AAR)

Facts

1 The applicant, a public limited company registered under the laws of India, is a leading provider of IT driven business services for its client's core business processes.

2 It entered into a Management Services Agreement with Groupe Steria SCA, a partnership firm incorporated as per the laws of France, whereby Steria France provides various management services to the Applicant with a view to rationalise and standardise the business conducted by the applicant in India in accordance with the international best practices.

3 The services, were provided by Steria France through telephone, fax, e-mail etc. and no personnel of Steria France would visit India for provision of such services. The relationship between Steria India and Steria France is that of independent contractors.

4 The applicant sought an advance ruling on the taxability of the payments made by it to Steria France under the agreement for the services provided.

Ruling

1 The Hon'ble AAR observed that the it was not disputed by the learned counsel for the applicant that the services rendered were in the nature of technical services as defined in the Act and the India-France Double Taxation Avoidance Agreement ("the DTAA").

2 It held that the applicant's contention that though there is no 'make available' clause in the India-France Treaty, the make available clause in the India-UK DTAA, which was signed much after 1st September, 1989, is applicable in the India-France DTAA by virtue of the protocol signed between India and France is not acceptable.

3 The Hon'ble AAR relied on the ruling of the AAR in case of *Perfetti Van Melle Holding B.V. [2012] 342 ITR 200 (AAR)*. It observed that a Protocol cannot be treated as the same with the provisions contained in the treaty itself, though it may be an integral part of the Treaty. Protocol to the said DTAA puts restrictions on the rates and 'make available' clause cannot be read in the items.

4 It further observed that the Notification ratifying the protocol did not include anything about the 'make available' provision. Had the intention of the Protocol or the Government been to include 'make available' clause in the DTAA between India and France, it would have been done so in the said Notification. Protocol or Memorandum of Association can be made use for interpreting provision of the Treaty. It will not be correct/proper to import words, phrases or clause, that are not available into the Treaties between two Sovereign nations, on the basis of Treaties with another countries.

5 Accordingly, it held that the payments made by the applicant for the services rendered would come under the definition of fees for technical services both under the Act and the DTAA and would be liable to tax in India.

B] HIGH COURT JUDGMENT

V. Commission paid to the agent was not hit by Article 18(2) of India-UK DTAA, and, therefore, income arising to agent couldn't be said to be taxable in India – Reimbursement of air travel expenses in connection with artists' India visit not liable to TDS

DIT v. Wizcraft International Entertainment (P) Ltd. [2014] 45 taxmann.com 24 (Bombay)

Facts

1 The assessee, an event management company, had engaged the services of an agent, Mr. Colin Davie, to bring artists to India. It paid remuneration to the artists, to the agent and reimbursed expenses in connection with the visit and performance of artists in India.

2 The AO was of the view that any payment made to the artists or their agent should be treated as consideration payable to the artist only. Further, according to the AO, the income of the artist had to be taxed in the State in which activities were organised which, in present case, was India. It noted that tax had been deducted on the amounts paid to the artists, no tax was deducted on payments made to the agent or for expenses. Thus the AO proceeded to treat the assessee as a defaulter for neither deducting tax nor filing return of income as a representative assessee.

3 On appeal the CIT(A) and the Hon'ble ITAT held that reimbursement of expenses to artists do not constitute income derived by these artists from their personal activities so as to be taxable under Article 18 of the Indo-UK Double Taxation Avoidance Agreement ("the DTAA").

4 On appeal, the Hon'ble ITAT held that the agreements with the Artists and the understanding with Mr. Colin Davie would indicate that the payment of commission to him was not covered by the Article 18 of the DTAA. Mr. Colin Davie did not perform any services in India, but they were rendered outside India and therefore commission income to the agent was not liable to tax in India. As regards the reimbursement of expenses to artists it held that the same do not constitute income derived by these artists from their personal activities so as to be taxable under Article 18 of the DTAA.

5 Aggrieved, the Revenue filed an appeal to the Hon'ble High Court.

Judgment

1 The Hon'ble High Court noted that the Hon'ble Tribunal had correctly understood that the limited controversy was with regard to 2 issues i.e. reimbursement of expenses to performing artists and requirement of tax deduction on payments made to the agent, Mr. Colin Davie.

2 It observed that the Hon'ble Tribunal, after considering the factual position, provisions of Article 18 of the DTAA and rival contentions, concluded that the payment made to the artists, the reimbursement has been completely misconstrued inasmuch as the agreements with the artists and the understanding with Mr. Colin Davie would indicate that the payment of commission to him is not covered by the Article 18 of the DTAA.

3 As regards the reimbursement of expenses in connection with artists' visit and performance in India, the Hon'ble High Court noted that the Hon'ble Tribunal had recorded a finding of fact that the amount reimbursed was towards air travel which was supported by documents. Accordingly, tax was not required to be deducted from such amounts.

VI. No TDS on telecast rights payment between non-residents absent economic link

DIT v. Set Satellite (Singapore) Pte. Ltd. [Income Tax Appeal No. 1676 of 2011 Order dated 28th April 2014 Bombay High Court]

Facts

1 The assessee, a Singapore based company and Singapore tax resident, is engaged in the business of acquiring rights in television programmes, motion pictures and sports events and exhibiting the same on its television channels from Singapore.

2 Pursuant to 2002 agreement signed with Global Cricket Corporation Private Limited (GCC), another Singapore based company, assessee received telecast rights. The licensed territory included India.

3 The Revenue claimed that TDS was applicable on payment by assessee to GCC. However, the Appellate Commissioner as well as ITAT held that the payment for cricket rights was made only for broadcasting operations of the assessee which were carried out from Singapore.

4 Aggrieved, the Revenue filed an appeal to the Hon'ble High Court raising two issues on whether payment for acquiring telecast rights are in the nature of "royalty" covered by Explanation 2 under Section 9(1)(vi)(c) of the Act and the effect of Article 12(7) of the India-Singapore Double Taxation Avoidance Agreement.

Judgment

1 The Hon'ble High Court dismissing Revenue's appeal, held that no substantial question of law arose from the Hon'ble ITAT order.

2 On the merits of transaction, it observed the factual position that the liability for the payment was incurred by the assessee in connection with the broadcasting operations in Singapore. Further, that had no connection with the marketing activities carried out through its alleged permanent establishment in India. The Hon'ble High Court held that there was no economic link between the payment and Indian operations and such link was entirely with the assessee's head office in Singapore.

3 It also noted that the fact that payment to GCC could not be said to have been incurred in connection with the assessee's

permanent establishment (PE) in India nor borne by Indian PE. It also held that payer was not a resident of India.

4 The Hon'ble High Court thus concluded that the conclusion reached by Hon'ble ITAT was possible, given the nature of the agreement between the payer and the Singapore party, the economic link which had been traced from the transactions and which had been the subject matter of the agreement.

VII. The term 'used' as specified in Article 5 of India-USA DTAA does not include 'ready to use' as specified by the Income-tax Act – When 'rig' was lying 'ready for use', it could not be considered as 'used' for purpose of said Article 5.

DIT vs. R & B Falcon Offshore Ltd. [2014] 44 taxmann.com 400 (Uttarakhand)

Facts

1 The assessee, a non-resident, brought in a rig and operated the said rig for and on account of its clients in India. Those rigs were deployed for such purpose on dates, as were furnished by the assessee and the same were remained unused during the dates as furnished by the assessee on account of maintenance and repair.

2 The AO felt that Article 5(2)(j) of the the India-USA Double Taxation Avoidance Agreement ("the DTAA") used the word "used" without furnishing meaning to the said word and, accordingly, meaning thereof should be culled out from the Income-tax Act, 1961, which includes 'ready for use' and felt that even during the time of repair and maintenance, the rig was lying ready for use and, as such, the rig having been used for more than 120 days during the relevant assessment years, the assessee, in the form of the said rig, had a permanent establishment in India in terms of Article 5(2)(j) of the DTAA.

3 The CIT(A) confirmed the order of the AO. However, on appeal the Hon'ble ITAT reversed the finding of the CIT(A) and AO.

4 Aggrieved, the Revenue filed an appeal to the Hon'ble High Court.

Judgment

1 The Hon'ble High Court noted that the Hon'ble ITAT after considering Article 5(2)(j) of the DTAA held that the word 'used' has been sufficiently explained in the Agreement requiring no further explanation and, for that matter, there is no scope of entering into the Income-tax Act, inasmuch as, the word 'used' has been used in conjunction of 'an installation or structure for exploration or exploitation of natural resources and only if so used for a period of more than 120 days in 12 month period' and, thereby, made it absolutely clear that the Agreement meant user of installation and structure for exploration or exploitation of natural resources and not merely being ready for use.

2 The Hon'ble High Court concurring with the view of the Hon'ble ITAT dismissed the appeal of the Revenue.

VIII. Overseas entity was the real employer of seconded employees when Indian entity had only the right to terminate the secondment without conferring the right to terminate the original employment – Reimbursement of salary of seconded employees to the overseas entities could not be characterised as stewardship and was to be regarded as FTS when they rendered quality control services till

the necessary skills were acquired by the resident employee group

Centrica India Offshore (P.) Ltd. vs. CIT [2014] 44 taxmann.com 300 (Delhi)

Facts

1 The Petitioner, Centrica India Offshore (P) Ltd. ('Centrica India'), incorporated in India, was wholly owned subsidiary of Centrica Plc (a company incorporated in the UK). British Gas Trading Ltd. ('BSTL') and Director Energy Marketing Ltd., Canada ('DEML') were other subsidiaries of Centrica Plc ('Overseas entities').

2 These overseas entities outsourced their back office support functions like debt collections, consumers' billings, monthly jobs to third party vendors in India. To ensure that the Indian vendors complied with quality guidelines, the Centrica India was established in India.

3 To seek the support in the initial years, Centrica India entered into a secondment agreement with these overseas entities, wherein employees continued to remain on the payrolls of the overseas entities. The employees so seconded were to work under Centrica India's direct control and supervision. Overseas entities were not responsible for any error or omission of work of such employees. The petitioner further entered into individual agreements with each such employee. The petitioner was required to reimburse salary costs to the overseas employers.

4 Petitioner offered to tax, salaries paid to every seconded employee in India and filed Income-tax Returns in India after dispatching appropriate taxes.

5 AAR ruled against the petitioner by holding that:

(a) reimbursement of salary cost by the petitioner is in the nature of income accrued to the overseas entities;

(b) the services rendered by seconded employees are managerial in nature but such services will not come within the purview of Article 13.4 of the India–UK DTAA or Article 12.4 of India-Canada DTAA. Therefore, consideration paid by the Petitioner to the overseas entities cannot be held to be fees for technical services;

(c) the overseas entities constitute Service PE under the relevant DTAA on account of employees deputed by overseas entities to the Petitioner under the terms of Secondment Agreement; and

(d) Tax is liable to be deducted at source under Section 195 of the Act on amount paid/payable by Petitioner to overseas entities under the Secondment Agreement.

6 Aggrieved, the petitioner filed a writ petition before the Hon'ble Delhi High Court.

Judgment

Fees for Technical Services

1. In this case, the overseas entities have, through the seconded employees, undoubtedly provided 'technical' services to Centrica India, especially since that expression expressely includes the provision of the services of the personal. When it was established that not only technical services were performed, but the enterprise also 'made available' the skills behind that service to the other party as the secondees were not only providing services to Centrica India, but rather tiding Centrica India through the initial period, and ensuring that going forward,

the skill set of Centrica India's other employees is built and these services may be continued by them without assistance. In essence, the secondees were imparting their technical expertise and know-how into the other regular employees of Centrica India.

2. The nature of the services rendered by Centrica India was in the nature of "business support services" and was covered within the fold of "technical or consultancy" services.

3. The Centrica India and seconded employees were to oversee the quality of service rendered by vendors to the overseas entities, which would fall within the scope of the technical or consultancy services.

Service Permanent Establishment

4. None of the documents placed on record revealed that the petitioner could terminate the secondment arrangement, there was no entitlement or obligation clearly spelt out, whereby the petitioner had to bear the salary cost of these employees. The secondees could not sue the petitioner for default in payment of their salary.

5. All direct costs of such seconded employee's, social security plans, other benefits and costs were ultimately to be paid by the overseas entity. The petitioner was given the right to terminate the secondment only, excluding the right to terminate the original employment relationship (the services of the secondee vis-à-vis the overseas entities).

6. Employment relationship between the secondee and the overseas organization at no point of time is terminated, nor is Centrica India given any authority to even modify that relationship.

7. Further, the Hon'ble Delhi High Court harped on the ratio of the Hon'ble Supreme Court in the case of *Morgan Stanley and Co., In re (2006) 284 ITR 260 (SC)*, wherein Hon'ble Apex Court has observed that in the situation, MSCO is rendering services through its employees to MSAS, the Department is right in its contention that under the above situation, there exists a Service PE in India (MSAS).

8. After considering the decision in the case of *DIT vs. E-Funds IT Solutions [2014] 42 taxmann.com 50 (Delhi)*, it was observed that the nature of activity undertaken by the employees was determinative of whether it constituted a service. In the present case, the overseas entities outsourced their back office support functions to third party vendors in India. The seconded employees were to oversee quality control of the work of such vendors. This work could not be characterised as mere stewardship.

9. What could have been left to the petitioner to do was, in fact, being done through the seconded employees, whose expertise and training lent quality and content to the Indian entity. Therefore, it was held that the real employer of these seconded employees continued to be the overseas entity concerned.

Reimbursement

10. Relying on the decision of Authority for Advance Ruling in the case of AT and S India Pvt. Ltd., it was observed that absence of mark-up cannot negate the nature of transaction. This would mean that in any circumstance where service are provided between related parties, the demand of only as much money as has been spent is providing the service would remove the tax liability altogether. This is clearly an incorrect reasoning that

conflates liability to tax with subsequent deductions that may be claimed.

Diversion of income by overriding title

11. No argument could be made that such payment is affected by the doctrine of diversion of income by overriding title. If that be the case, then, the fact that the payment under the secondment agreement was styled as reimbursement, and limited on facts to that, without any additional charge for the service, could not be hit by that doctrine either. The money paid by Centrica India to the overseas entity accrues to the overseas entity, which may or may not apply it for payment to the secondees, based on its contractual relationship with them. This, at the very least, is independent of the relationship and payment between Centrica India and the overseas entity.

C] TRIBUNAL DECISIONS

IX. Fixed Place PE – Services rendered by a Mauritian company for improving the management performance of an Indian company, through its employees, having some place at its disposal, constitutes fixed place PE in India – In favour of the Revenue

Renoir Consulting Ltd. vs. DDIT [TS-211-ITAT-2014 (Mum.)] / 2014-TII-45-ITAT-MUM-INTL Assessment Year: 1999-2000

Facts

1 The assessee, a company being a tax resident in Mauritius had business in India, of applying the Renoir Performance Improvement Programme (RPIP), designed by it, for improving the management performance quotient of an enterprise by enhancing the operating parameters, as reducing costs, improving the work methods/services, providing efficient management control, etc.

2 The projects undertaken by the assessee for its clients in India were aimed at improving the market share and also the improved financial results. Accordingly, the total consideration receivable by the assessee would be for (i) Development and improvement programme and (ii) Providing information and scientific knowledge.

3 The assessee received an amount from an Indian company, on contract/s executed in India. The assessee claimed that there was no Permanent Establishment (PE) in India under the India-Mauritius tax treaty (the tax treaty), and therefore, the business income earned from GPI could not be brought to tax in India. The assessee relied on the decision of Andhra High Court in the case of *CIT vs. Visakhapatnam Port Trust [1983] 144 ITR 146 (AP)* and the co-ordinate bench decision in the case of *Airlines Rotables Ltd. vs. JDIT [2011] 44 SOT 368 (Mum.)* to support its stand. However, this amount was assessed as business income by the Assessing Officer (AO) on the grounds that the assessee has a PE in India.

Decision

The Tribunal held in favour of the Revenue as follows:

1 The word 'permanent' in the term 'permanent establishment' does not signify a permanent character, or that the right to use the place should be perpetual, but that there must be a certain degree of permanence. A fixed place would include a movable place of business, viz. a petroleum drilling rig may constitute a PE if it is moved frequently from one location to another.

2 How the fixed place or the right to use the same is secured is of little significance and the same may be owned, rented or otherwise acquired in any other manner. The establishment must have a commercial coherence or purpose, without the same, the enduring quality would be immaterial.

3 Even the securing of the relevant contract, valued at over INR 75 million (GBP 1.276 million), would require extensive execution and thus, presence in India. The project required a deep conviction on the part of the customer/ client of the continued presence over the period of the contract, which is itself indefinite, inasmuch as each subsequent phase would ensue only on the satisfactory completion of the preceding one.

4 The 'base documents' submitted by the assessee outlines that the application of RPIP would require that GPI share ideas which would be combined with that of the assessee. The clients, as the GPI, would be unaware of RPIP whose theory, mechanics, methodologies, etc. would be required to be explained to their personnel, and the assessee would be required to participate actively in its implementation, and thus responsible for its success. Accordingly, constant interaction at all levels, or at least up to the senior management level, between the personnel of the contracting parties is contemplated.

5 In this project, the initial exchanges and interactions are to form the basis of the preliminary analysis and proposals, followed by a detailed study. The study is to be followed by its actual implementation. Constant feedback viz. formal and informal, on a regular and defined basis, and review, is also contemplated. This would ensure that the correctives and changes, validating or revising the assumptions made, are applied, and thereby the implementation stays on course, towards the desired objective. Accordingly, it is essentially an interactive exercise which assumes various forms, viz. interviews, interactions, exchanges, meetings, training sessions, seminars, etc., as suitable for the specific objective at hand. The initial understanding of the project had crystallised into a definite programme of implementation on the basis of regular interactions between the parties, which requires the assessee's presence in India.

6 The top management's role was to provide strategic guidance and policy framework to the extent required for the project at hand. Further, the assessee continues its same personnel for the sake of better and smooth implementation of the project. The continued presence of the assessee, and not of its particular person is relevant.

7 The contention of the assessee that the personnel are operating from different places, hence there is no fixed place of business, is not acceptable since the location in case of a field job, as of a salesman, has necessarily to be a shifting one. Such location is being fixed in terms of its operating parameter/s, and the continued physical presence in India at the different locations as warranted by the exigencies of the contract.

8 A fixed place of business, as contemplated in the definition of PE under Article 5 of the tax treaty, does not imply or is confined to a place where the top management of the company

is located. A branch of an enterprise may be its PE. It is for the assessee to specify as to how and from where it has performed its work during its continued stay of 874 man-days for the consultants and 81 days for the principal consultants, since it was in the intimate knowledge of its affairs.

9 The communications between assessee's personnel in India and the head office has been carried out in India from a place in the vicinity of the place of the stay. Further, whether the communication has taken place from the hotel room through the medium of internet using laptops – a tangible asset/s, by the personnel, or similar facilities provided by the hotel or by a retail outlet providing such services is immaterial. Based on the modus operandi to be adopted, the regular interviews, interactions, meetings, training sessions and seminars, etc., both by the consultants and the principal consultants at the GPI's premises, is as much a part of the work undertaken by the assessee, as is the independent collection, collation, analysis and review, etc. of the data/information being sought from the organisation during any phase of the project management.

10 The stated deliverables for the projects are in complete harmony and sync with the stated objectives of the RPIP. Accordingly, the services rendered by the assessee were not merely preparatory and auxiliary services though contended by the assessee. Based on the work nature/profile and the modus operandi followed, it is concluded that some place is at the disposal of the assessee or its employees during the entire period of the stay in India. Accordingly, there is a fixed place PE of the assessee in India.

Other relevant decision

Convergys Customer Management Group Inc vs. ADIT (2013-TII-88-ITAT-DEL-INTL)

X. Payments to a non-resident company for transmission of bulk SMS – Whether amount to Fees for Technical Service – Held : No – In assessee's favour.

DCIT v. Velti India Pvt. Ltd. [TS-203-ITAT-2014 (CHNY)] Assessment Year: 2009-10

Facts

1 The assessee incurred expenditure for transmission of bulk SMS and made payments to the telecom service providers. The assessee contended that such services were not technical services, and hence not liable to Tax Deducted at Source (TDS).

2 The Assessing Officer (AO) disallowed the deduction for such payments by invoking the provisions of Section 40(a)(i) of the Act. On appeal, the Commissioner of Income Tax (Appeals) [CIT(A)] deleted the disallowance made by the AO.

3 The assessee received advance income from its customers and recognised the income in the subsequent year in which services were rendered. The AO held that there is no liability attached to the assessee in the event of failure to render the contracted services and therefore, assessed the advances as income in the year of receipt. However, the CIT(A) deleted the addition.

Decision

The Tribunal held in assessee's favour as follows:

1 The carrier i.e., Clickatel is a medium for sending bulk SMS and as such cannot be

considered to be rendering any technical services.

2 Based on the decision of the Supreme Court and the Delhi High Court in the case of *CIT vs. Bharti Cellular Ltd. [2009] 319 ITR 139 (Del.)*, it was held that these services do not involve human intervention, and hence such services cannot be regarded as FTS.

3 The Tribunal also placed reliance on the decision of the Madras High Court in the case of *Verizon Communications Singapore Pte Ltd. vs. ITO [2013] 39 taxmann.com 70 (Mad)* wherein it was held that collection of fees for usage of standard facility would not amount to payment made for providing technical services.

4 Clickatel, a non-resident carrier, rendered services outside India and no part of the payment to them is chargeable to tax in India.

The Tribunal thus held that payment made by the assessee to Clickatel is not FTS and no tax withholding is required to be made on such payments.

Other relevant decisions

a. *Clearwater Technology Services (P.) Ltd vs. ITO [2012] 27 taxmann.com 238 (Bang.)*

b. *Skycell Communications Ltd. vs. DCIT [2001] 251 ITR 53 (Mad.)*

XI. Payment by an Indian animation film production company to foreign sub-contractor for creating 'production material' – Whether Fees for Technical Services – Held: No – In favour of the assessee

M/s. DQ Entertainment (International) Pvt. Ltd. Hyderabad vs. DDIT 2014-TII-33-ITAT-HYD-INTL Assessment Year: 2007-08

Facts

1 The assessee is engaged in the business of production of 2D and 3D animation films for the overseas companies like Walt Disney, Columbia, DIC Animation, etc., (the overseas clients). The assessee gets orders from these companies for production of animation films at their requisition of scheduled deliverables.

2 The assessee subcontracted/outsourced some episodes or part of an episode to foreign sub-contractors (i.e. Hong Kong entity and Chinese entity) out of the orders received by it from some of the overseas clients. In this regard, the assessee entered into an 'Outsourcing Facilities Agreement' with foreign sub-contractors. As per the terms of the agreement, the sub-contractor has to provide 'production work'/'production material' to the assessee by availing the necessary production premises, facilities, personnel, materials, services and expertise.

3 The assessee claimed that the payments made to these foreign sub-contractors are in the course of business activity and they do not have any business connection or Permanent Establishment (PE) in India. Also, the income did not arise in India under the deeming provisions of Section 9(1)(vii) of the Act. Accordingly, the payments are not taxable in India.

4 The Assessing Officer (AO) held that the production material was not available off the shelf with the foreign sub-contractor. The property was created by sub-contractor on request of the assessee. So substance of contract is not supply of goods but supply of service. The payments were considered as FTS under Section 9(1)(vii) of the Act and since the assessee failed to withhold taxes on such

payments, demand under Section 201 and 201(1A) of the Act was raised.

Decision

The Tribunal held in the assessee's favour as follows:

1 There was no element of any technical services in the production of animation films nor in the production of a part or certain episodes of an animation film. The payments received by the assessee from overseas clients for the similar work executed by it were neither subjected to withholding of tax nor was it called upon to file its return by those countries. Had it been otherwise, the assessee itself would have suffered withholding of tax in the hands of overseas clients at one point of time or other.

2 The Delhi Tribunal in the case of *Sheraton International Inc. vs. DDIT [2007] 107 ITD 120 (Del)* has observed that job undertaken by one party for the other party for supply of any goods or services may involve utilisation of the knowledge, information and expertise of the party undertaking the said job. However, such utilisation cannot be a reason to treat the services so rendered, of technical or consultancy in nature, making any technology available to other party. Further, this decision was upheld by the Delhi High Court in the case of *DIT vs. Sheraton International Inc. [2009] 313 ITR 267 (Del).*

3 Section 9(1)(vii)(b) of the Act provides two categories of income (fees) i.e. (a) in a business carried on by a resident outside India; or (b) for the purpose of making or earning any income from any source outside India. The first category of income doesn't refer to any source, whereas the second category of income refers to any source outside India. Assessee's business with its overseas clients constitutes a business carried on by resident outside India, making the assessee to satisfy the first category of income.

4 Perusal of the clause of the agreement with overseas client relating to jurisdiction for resolving any dispute between the assessee and the overseas client indicated that the jurisdiction of the Courts/arbitration shall be only at such place where the overseas client is located. The contracts are all entered into by the assessee outside India making it exposed to the respective foreign law and therefore, as per the governing laws of the foreign countries it has to be viewed that the contract itself is the 'source of income' as per the decision of the Supreme Court in the case of *CIT vs. Kunwar Trivikram Narain Singh [1965] 57 ITR 29 (SC)*

5 The actual viewership of the animation films produced and supplied to overseas clients is in fact located outside India. It is only source of income which is located outside India and for earning this income only, it made payments to sub-contractors.

6 There is a direct nexus between the payments made by the assessee to foreign sub-contractor and the amounts received or receivable from the overseas client. Therefore, it has been held that the provisions of Section 9(1)(vii)(b) of the Act would be applicable to the facts of the present case.

7 Reference was made to the Delhi Tribunal ruling in the case of *Lufthansa Cargo India (P) Ltd., vs. DCIT [2004] 91 ITD 133 (Del)* wherein the Delhi Tribunal elaborating the word 'source' was stated that it may encompass the payer of

income or the activity which gives rise to the income. It was stated that source could not refer to the payer but only to the activity, which resulted in the income. It was explained that the source is the activity which results into the income. If the source of any income is situated in India, then it is irrelevant whether the business carried on by such non-resident is in India or elsewhere.

8 Accordingly, there was no liability to deduct tax while making payments to the foreign sub-contractors under Section 195 of the Act. Consequently, the demand raised by the AO under Section 201 of Act was deleted.

Other relevant decisions

CIT vs. Havells India Ltd. [2012] 352 ITR 376 (Del.)

XII Whether reimbursement of data processing cost taxable as royalty – Held: No – Section 9(1)(vi) or Article 12(3) of India-Belgium DTAA

ADIT vs Antwerp Diamond Bank NV Engineering Centre [2014] 44 taxmann.com 175 (Mumbai - Trib.)
Assessment Year: 2004-05

Facts

1 The assessee, a bank incorporated in Belgium, operating through branch in India. The HO of the assessee has acquired its main banking application software from an Indian software company. Subsequently, when the branch was set up in India, the software licence was amended to allow the branch to use same software by making it assessable through the server located at Belgium.

2 The branch sends its data to the Belgium server from where the data gets processed as per the requirement of the banking operations. Since the branch was using the IT resources situated at Belgium, it reimburses the cost of the data processing to the HO on pro rata basis for the use of the said resources.

3 During the year under consideration, the assessee claimed HO expenditure of INR 12.41 million attributable to its banking business operations in India. These expenditures were classified as general administrative expenditure of INR 9.01 million and data processing cost of INR 3.40 million.

4 The assessee claimed that the general administrative expenditure as well as data processing cost, paid to the HO, were in the nature of reimbursement of expenditure. However, the Assessing Officer (AO) held that the assessee was providing services in the nature of commercial or scientific knowledge, to the Indian branch, which was in the nature of royalty and therefore, the assessee was required to deduct tax at source. However, since the assessee did not deduct tax, the payment would be disallowed under Section 40(a)(i) of the Act.

5 The Commissioner of Income Tax (Appeals) [CIT(A)] held that the data processing cost paid by the assessee to the HO does not amount to 'royalty' and, hence, there was no liability to deduct tax. Consequently, the payment cannot be disallowed under Section 40(a)(i) of the Act.

6 The CIT(A) held that the data processing cost of INR 3.40 million does not fall within the ambit of general administrative expenditure under Section 44C of the Act, because the data processing is an expenditure which is directly related to the business

of banking and is, therefore, outside the purview of general administrative expenditure. Accordingly, such expenditure was allowed as business expenditure. However, CIT(A) held that the payment of INR 9.01 million are towards general and administrative expenditure, therefore the same will be allowed in accordance with the provisions of Section 44C of the Act.

Decision

The Tribunal held in favour of the assessee as under

1 Perusal of the agreement between the branch and HO indicates that only HO has the non-exclusive non-transferable rights to use the computer software and it does not have any right to assign, sub-licence or otherwise transfer the licence. Therefore, the payment by the branch for use of computer software was not the right in the copyright but only for doing the work from the said software which subsist in the copyright of the software.

2 Perusal to the definition of royalty under Article 12(3)(a) of the tax treaty indicates that, when the payment of any kind is received as a consideration for the 'use' of or 'the right to use' of any of the copyright of any item or for various terms used in the said Article, then only it can be held to be for the purpose of 'royalty'. The said definition of 'royalty' is exhaustive and not inclusive and, therefore, it has to be given the meaning as contained in the Article itself and no other meaning should be looked upon.

3 If the assessee is relied on the definition of royalty under the tax treaty, the definition and scope of 'royalty' given in the domestic law should not be read into or looked upon.

4 The character of payment towards royalty depends upon the independent 'use' or the 'right to use' of the computer software, which is a kind of copyright. However, in the present case, the payment made by the branch is not for 'use' of or 'right to use' of software which is being exclusively done by the HO only. The branch sends the data to the HO for getting it processed and it was reimbursing the cost of processing of such data to the HO on *pro rata* basis.

5 It is not the case of the tax department that the HO has provided any copyright of software or any copyrighted article developed by the HO for the exclusive use of the assessee for which the assessee is making the payment along with the mark-up exclusively for the purpose of royalty.

6 If the payment for licence of the software which is installed in the HO is being made by the HO, then any allocation of cost and reimbursement thereof by the branch to the HO cannot be termed as independent payment for the purpose of royalty.

7 To fall within the definition of royalty under the tax treaty, the payment should be exclusively *qua* the use or the right to use the software exclusively by the branch. The character of the payment under the royalty transactions depends upon the rights that the transferee acquires in relation to the use and exploitation of the software programme. In the present case, there was no such right has been acquired by the branch in relation to the usage of software, because the HO alone has the exclusive right of the licence to use the software.

8 The conclusion drawn by the Mumbai Tribunal in the case of *Kotak Mahindra*

Primus Ltd. vs. DDIT [2007] 11 SOT 578 (Mum) is applicable to the facts of the present case.

9 The decisions of the Madras High Court in the case of *Poompuhar Shipping Corporation Ltd. vs. ITO [2014] 360 ITR 257 (Mad)* and *Verizon Communication Singapore Pte Ltd. vs. ITO [2013] 263 CTR 497 (Mad.)* are not applicable to the facts of the present case because once the assessee has opted for the benefit of the tax treaty, there was no need to refer the definition and the scope of 'royalty' under Section 9(1)(vi) of the Act. The said amendment cannot be read into the tax treaty as given in Article 12(3) of the tax treaty. In order to support its stand, the Tribunal relied on various decisions as under:

- *CIT vs. Siemens Aktiongesellschaft [2009] 310 ITR 320 (Bom.)*
- *DIT vs. Nokia Network OY [2012] 253 CTR 417 (Del.)*
- *DIT vs. Ericison AB [2012] 343 ITR 470 (Del.)*

10 Accordingly, it has been held that the payment made by the branch to the HO towards reimbursement of cost of data processing cannot be held to be royalty under Article 12(3)(a) of the tax treaty. Consequently, there was no requirement to deduct tax on such payment and therefore, the disallowance under Section 40(a)(i) of the Act will not apply.

11 Perusal of the various decisions like *IAC vs. Goodricke Group Ltd. [1985] 12 ITD 1 (Mum.) (SB)*, *DDIT vs. Stock Engineer and Contractors B.V. [2009] 27 SOT 452 (Mum.)* indicates that the HO expenditure are restricted to executive and general administrative expenditure only, as defined in Explanation (iv) to Section 44C of the Act.

12 The data processing cost pertains to allocation of expenditure incurred by the HO on *pro rata* basis for the banking application software acquired by the HO. Such expenditure does not fall within the meaning of 'Head Office Expenditure' as provided in Section 44C of the Act. The nature of expenditure as given in Section 44C of the Act has to be necessarily in the nature of executive and general administrative expenditure only.

13 Accordingly, while relying on various decisions, the Tribunal upheld the CIT(A)'s order where it was held that the data processing cost does not fall within the ambit of general administrative expenditure under Section 44C of the Act and such expenditure was allowed as business expenditure. Further the balance payment towards general and administrative expenditure, were allowed in accordance with the provisions of Section 44C of the Act.

Other relevant decisions regarding impact of amendment to the definition of Royalty u/s 9(1)(vi) of the Act:

- *IAC vs. Goodricke Group Ltd. [1985] 12 ITD 1 (Cal.) (SB)*
- *DDIT vs. Stock Engineer and Contractors B.V. [2009] 27 SOT 452 (Mum.)*
- *B4U International Holdings Ltd. vs. DCIT [2012] 52 SOT 545 (Mum.)*
- *Channel Guide India Ltd. vs. ACIT [2012] 25 taxmann.com 25 (Mum.)*

CA. Hasmukh Kamdar

INDIRECT TAXES
Central Excise and Customs – Case Law Update

PENALTY

Naveen Jain vs. Commissioner of Central Excise, Kanpur [2014 (302) E.L.T. 241 (Tri.-Del.)]

In this case, a personal penalty of Rs. 97,990/- was imposed under Rule 13 of CENVAT Credit Rules on a Director of a private limited company for wrong availment of Cenvat Credit by the said company.

The assessee filed this Appeal to Hon. Tribunal.

It was submitted on behalf of the assessee that Rule 13 of Cenvat Credit Rules, 2002 under which penalty has been imposed cannot be invoked for imposing a penalty on Director of a company because under the said Rule, penalty can be imposed only on the person who availed wrong Cenvat credit. The director of the company did not avail any Cenvat credit and it is only the assessee company which availed Cenvat credit and penalty has already been imposed on the company.

On behalf of the Department it was submitted that when a company commits an offense a person in charge of the company is also responsible for such offence and to absolve himself such person has to prove that the offence was committed without his knowledge and then only there is a case for waiving penalty of the Director of the Company. In the Case, the appellant has not proved that the offence was committed without his knowledge.

The Hon.ble Tribunal observed noted that Rule 13 of CENVAT Credit Rules, 2002, during the relevancy period was as follows.

"13. Confiscation and penalty. –

(1) If any person, takes CENVAT credit in respect of inputs or capital goods, wrongly or without taking reasonable

steps to ensure that appropriate duty on the said inputs or capital goods has been paid as indicate in the document accompanying the inputs or capital goods specified in Rule 7, or contravenes any of the provisions of these rules in respect of any inputs or capital goods, then, all such goods shall be liable to confiscation and such person, shall be a liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention has been committed, or ten thousand rupees, whichever is greater.

(2) In a case, where the CENVAT credit has been taken or utilized wrongly on account of fraud, willful misstatement, collusion or suppression of facts, or contravention of any of the provision of the Act or the Rules made thereunder with intension to evade payment of duty, then, the manufacturer shall also be liable to pay penalty in terms of the provisions of Section 11AC of the Act.

(3) Any order under sub-rule (1) or sub-rule (2) shall be issued by the Central Excise Officer following the principles of natural justice."

After considering the arguments on both the sides. The Hon'ble Tribunal observed that the provisions of Rule 13 of CENVAT Credit Rules, 2002 was applicable only to the person who availed CENVAT credit and Penalty under the said Rule cannot be imposed on the Director of Company which availed CENVAT credit wrongly.

Accordingly, the appeal filed by the appellant was allowed by setting aside the penalty imposed on the appellant in this case.

Appeal was allowed.

Ability wins the esteem of the true men, luck that of the people.

– La Rochefoucauld

A man who knows the price of everything and the value of nothing.

Oscar Wilde

Nikita Badheka, *Advocate*

INDIRECT TAXES
VAT Update

A Maharashtra State Budget Proposals

The State Finance Minister has presented the budget on 5-6-2014. The highlights of the proposals relating to MVAT Act and allied laws are given hereunder. Please note these are only extract of speech showing proposals. **The real text of changes will be made available by way of Amendment Bill.**

1. **Refund to purchasing Dealers:** The purchasing Dealers who have paid the tax as they were denied setoff u/s. 48(5) on account of selling dealer not paying the tax, will get refund if the tax is recovered from the selling Dealers

2. **Check Post:** To augment the State revenue, some of the Border Check posts (u/s. 67 of MVAT Act) will be made operational. These Check posts are equipped with latest technology. The facility will be given to the dealers to upload information of incoming and outgoing goods. The information will be useful to Sales Tax department, State Excise and Transport Department for curbing tax evasion.

3. **Registration limit** : Turnover limit for registration under MVAT Act is to be increased from 5 lakhs to 10 lakhs. The dealers whose turnover is below 10 lakhs in previous year can apply for cancellation before 30th Sept., 2014 and their RC will be cancelled w.e.f. 1-10-2014.

4 **Late returns fees** : Late filing of Returns even by a day invites penalty of ` 5,000/- presently. This is proposed to be reduced to ` 2,000/- if the returns are filed within one month of due date.

5 **Last chance to defaulters - Non-filers - Late fee for returns not filed up to 1-4-2014 :** The returns pending on 1-4-2014 can be filed with full payment of tax, interest and late fee of ` 1,000/-. In such cases no further penalty will be levied for late filing of returns.

6 **Provision for guidance from Commissioner u/s. 23(9) to be deleted** : This was one of the beneficial provisions. It is proposed to delete this.

7 **Cancellation of ex parte order** : If the application for cancellation of assessment order is not decided within three months, it shall be deem to be cancelled.

8. **Separate Assessment for separate types of returns :** A provision is being made to provide separate assessment for different types of returns.

9. **Intimation of Business Audit** : Intimation of business audit to be made mandatory.

10. Retrospective Amendment proposed for recovery of Sugarcane Purchase tax.

11. **CST concessions to be reviewed** : It is proposed that all the notifications issued under CST Act, regarding tax concessions would be reviewed and unnecessary notifications would be rescinded.

12. **Composition for retailer** : The scheme for composition for retailers to be simplified by giving retailers option to pay 1% on total turnover or 1.5% on taxable turnover in lieu of VAT payable.

13. **CST declarations** : The CST provisions require the declarations to be filed within 3 months from the end of the period. On account of declarations receipt pending over years, large amount of recovery is pending. It is therefore proposed if the Appeal is filed beyond two years from the end of the assessment year, no stay shall be granted without full payment of tax due on account of such declarations. Even if the Appeal is filed before the end of two years and the missing declarations are not filed within two years, the stay granted to such amounts shall be vacated. This will apply to all the Appeals filed from 1st July, 2014.

14. **Penalty:** It is proposed to delete the provision requiring permission of the superior officer for levy of penalty beyond 5 lakhs. If the assessment is done after 8 years the penalty may be imposed while passing such assessment order. The quantum of penalty if leviable shall not exceed the tax amount but shall not be less than 25% of tax amount.

15 **Penal additional interest u/s. 30(4):** It is proposed that if the additional tax liability on account of audit or in proceedings is less than 10% of the tax paid with the returns, then the additional interest shall not be payable. This provision will not apply to the additional tax liability on account of non-production of declarations.

16 **Tax Collected at Source:** Provisions related to tax collected at source applicable to auction of sand is proposed to be made applicable to other minor minerals.

17 **Limits of VAT audit limit enhanced :** It is proposed to enhance the limit for compulsory Audit report u/s. 61 to ` 1 crore w.e.f. from F.Y 2013-14. No turnover limit was prescribed for liquor dealers till now, it is proposed to make the turnover limit applicable to liquor dealers also. To determine the 1 Cr limit, the turnover of sales of the goods transferred to other States otherwise than by way of sales would be included.

18 Presently the Commissioner of sales Tax u/s. 61(2) has power to condone the delay if the report is filed within 1 month of the due date. This power is proposed to be deleted.

19 It is proposed to reduce or exempt the late fee payable for delay in filing the return under Profession Tax.

20 **Luxury Tax :** It is proposed to enhance the exemption limit for luxury tax from

tariff of ` 750 to ` 1,000/- per day. The tariff exceeding ` 1,000 but up to 1,500, the luxury tax would be @ 4% and for the tariff exceeding ` 1,500/- the luxury tax would be at 10%.

21 **Tourism Policy :** Under the Tourism Policy 2006 all the Hotels in Zone A i.e. Mumbai and Mumbai Suburban district, corporation areas of Navi Mumbai, Thane, Pune and Pimpri Chinchwad are eligible for incentives under Luxury tax. However the Hotel industry in this area is well developed with high occupancy levels. Considering this it is proposed that eligible hotels in Zone B and C would be exempt under the Scheme from Luxury Tax. In case of expansion the exemption would be available only on account of increase in capacity due to additional investment. The exemption would be proportionate to such increased capacity. There would be no concession if there is no increase in capacity of these hotels.

22 YASHADA is an institute which provides quality training to officers and employees of State Government. This institute is proposed to be exempt from Luxury Tax.

23 **Exemption from Sugarcane Purchase Tax:** In order to assist the recession hit Sugar Industry and to help enable decent remuneration to the cane farmers, it was decided to exempt Sugarcane Purchase tax for the year 2013-14. A provision is being made enabling the notification for the same in the Sugarcane Purchase Tax Act.

24 **Enhancement in Profession Tax Act limit:** Minimum Salary Limit under PT Act was fixed at ` 5,000/-. It is proposed to enhance the minimum salary limit to 7,500/-. Mentally retarded people who are employed in various professions are proposed to be exempt from Profession Tax.

25 VAT on spares of aeroplane is proposed to be exempt. To give boost to MIHAN project at Nagpur.

26 **Film Industry** : Sale or lease of Copyright in films for exhibition in theatres is exempt from May 11. It is proposed to make this exemption applicable for the past periods. i.e. 1-4-2005 to 30-4-2011.

27 **Rate of tax on cotton** : The rate of tax on cotton is proposed to be reduced to 2% from 5% presently being charged.

28 Roasted gram and dalwa (dahlia?) is proposed to be made tax free.

29 **Rate of tax of notified capital goods:** VAT is proposed to be reduced to 5%. On sale of notified capital goods to departments of State and Central governments.

30 **Stainless Steel :** To overcome the decision of Bansal Wire (SC) relating to stainless steel wires, etc. it is proposed that the goods which are held as not declared goods by the SC shall bare the same rate of tax as declared goods with retrospective effect from 1-4-2005.

31 Unmanufactured tobacco sold against C form would be exempt from payment of tax under CST Act.

32 The maximum limit of stamp duty for the instruments mentioned in Article 6(1)(b) and 6(2)(b) of Schedule 1 to Maharashtra Stamp Act is to be up to ` 10 lakh.

CA. Bharat Shemlani

INDIRECT TAXES
Service Tax – Case Law Update

1. Services

Commercial or Industrial Construction Service

1.1 Engineers India Technical Services vs. CC&CE, Raipur 2014 (34) STR 358 (Tri.-Del.)

The appellant in this case sub-contractor claimed that, since principal contractor has remitted the tax on entire consideration they are not liable to pay tax. The Tribunal held that, Finance Act clearly enjoins remittance of service tax by every taxable service provider at every stage of taxable service. Fact of rendering of service at various stages or by various agencies not to alter trajectory of legal provisions.

Steamer Agent Service

1.2 Marine Container Service (South) P. Ltd. vs. CCE(ST) Tirunelveli 2014 (34) STR 383 (Tri.-Chennai)

The appellant in this case collected excess amount when space booked through steamer agent for other shipping line. The Tribunal held that, there is no evidence that services were rendered to a shipping line and payment received from shipping line for space booked by another agent and therefore demand under steamer agent's service is not maintainable.

Consulting Engineer Service

1.3 Amit Nagindas Vora vs. CST, Mumbai 2014 (34) STR 391 (Tri.-Mumbai)

The Tribunal in this case held that, since the assessee is only matriculate and not holding any professional degree in engineering recognised by law, hence not liable to service tax under Consulting Engineers Service. Further, obtaining patent for new compact oil cooler and transfer of right to use patent to client for consideration of royalty payment is liable to service tax w.e.f. 10-9-2004 under IPR Service.

1.4 Duraline Corporation vs. CCE&C, Goa 2014 (34) STR 398 (Tri.-Mumbai)

The department in this case sought to tax supply of technical know-how consisting of patents, secret information relating to processes, permissions to use of trade mark under Consulting Engineer Service. The Tribunal held that, services are liable under IPR Service and period of dispute is well before levy of service tax on IPR and therefore demand is not sustainable in law.

Information Technology Software Service

1.5 Tata Technologies Ltd. vs. CCE, Pune-I 2014 (34) STR 404 (Tri.-Mumbai)

In this case there was tripartite agreement between assessee, Tata Technologies (TTL,

Korea) and Tata Daewoo Commercial Vehicle Co. Ltd. (TDCVL) to provide ITS Service. Services were provided by TTL Korea to TDCVL and invoices raised for the same. The TTL Korea discharged VAT/GST liability at the time of supply of service. The Tribunal held that, question of subjecting same transaction to service tax in India does not arise. Further it is held that, offshore services provided by the appellant to TDCVL amounts to export of service in terms of rule 3(2)(a) of ESR, 2005.

Management Consultancy Service

1.6 CLSA India Ltd. vs. CST, Mumbai 2014 (34) STR 407 (Tri.-Mumbai)

The appellant registered under merchant banking service category and discharging service tax liability for activities undertaken for period 2001 onwards on private placement of shares not listed in any recognised stock exchange. The department sought to tax them under Management Consultancy Service for the period prior to 2001. The Tribunal held that, no advice or technical assistance relating to conceptualising, devising, development, modification, rectification or upgradation of working system of organisation is rendered therefore, classification is without basis and not in accordance with law.

Manpower Recruitment or Supply Agency Service

1.7 Bhogavati Janseva Trust vs. CCE, Kolhapur 2014 (34) STR 410 (Tri.-Mumbai)

In this case appellant entered into in agreements with contractors for providing manpower for harvesting and transportation of sugarcane and consideration was paid on sugarcane supplied on tonnage basis. The Tribunal held that, no element of manpower supply or recruitment to sugar factory, therefore services cannot be classified under impugned category. Since sugarcane is input for sugar factory, the said services can be classified under BAS as services incidental or ancillary to procurement of inputs.

Works Contract Service

1.8 Larsen & Toubro Ltd. vs. State of Karnataka 2014 (34) STR 481 (SC)

The Supreme Court held that, Building Contract is specie of works contract and in performance of contract for construction of buildings, goods (chattels) like cement, concrete, steel, bricks, etc. are intended to be incorporated in structure and even though they lost their identity as goods. Hence it is liable to tax under Article 366(29A)(b) of Constitution of India. Taxing sale of goods element in works contract was permissible even after incorporation of goods provided tax was directed to value of goods at time of incorporation and did not purport to tax transfer of immovable property. The explanation introduced in MVAT Act, 2002 taxing building contract is constitutionally valid.

Restaurant Service

1.9 Indian Hotels & Restaurant Association vs. UOI 2014 (34) STR 522 (Bom.)

The High Court has held that, service tax on restaurants is distinct tax, which cannot be equated with tax on sale or purchase of goods, hence Parliament is fully competent to impose a tax on service under Article 248 of Constitution of India read with Entry 97 of List I of VII Schedule and it cannot be said to have encroached on power of State Legislature to impose tax on sale or purchase of goods under Entry 54 of List II.

Outdoor Caterer Service

1.10 Indian Coffee Workers Co-op. Society Ltd. vs. CCE&ST Allahabad 2014 (34) STR 546 (All.)

The Hon'ble High Court in this case held that, supply of food, edibles and beverages

to persons using canteen provided by NTPC and LANCO within their own establishment is liable to service tax under Outdoor Caterer Service. Further, it is held that, assessee may be paying VAT on sale of goods on supply of food and beverages, would not exclude them from liability of payment of Service Tax in respect of taxable service provided by assessee as outdoor caterer. It is also held that, when contrary judicial views were holding field, case for imposition of penalty has not made out.

2. Interest/Penalties/Others

2.1 Business Process Outsourcing (I) Pvt. Ltd. vs. CC&ST, Bengaluru 2014 (34) STR 364 (Tri.-Bang.)

The Tribunal in this case held that, the order in appeal limiting the refund claim under Notification No. 5/2006-ST subsequent to 14-3-2006 is not sustainable in view of Bombay High Court decision in case of WNS Global Service (P) Ltd. 2011 (22) STR 609 (Bom.). It is further held that, date on which consideration is received, whether in part or full or advance is the date to form basis for calculation of date of export.

2.2 Subin Telecom vs. CCE. Rajkot 2014 (34) STR 389 (Tri.-Ahmd.)

The appellant in this case taken registration belatedly and paid service tax and filed returns after pointed out by the department but before issue of SCN and also paid late fees for filing returns in advance. The Tribunal held that, case is squarely covered under section 73(3) and therefore penal provisions under section 78 cannot be attracted.

Also refer to *Gujarat Ambuja Exports Ltd. vs. CCE&ST, Ahmedabad 2014 (34) STR 445 (Tri.-Ahmd.)*

2.3 CCE, Pune-II vs. Christopher John Louzado 2014 (34) STR 395(Tri.-Mumbai)

The Tribunal in this case held that, in view of section 2(7) of Sales of Goods Act, 1930, mutual funds are goods and in view of AP High Court judgment in Karvy Securities Ltd. 2006 (2) STR 481 (AP), benefit of Notification No. 13/2003-ST is available to commission agent of mutual funds.

2.4 D.R. Meghe vs. CCE, Nagpur 2014 (34) STR 396(Tri.-Mumbai)

The appellant in this case became aware of the order when recovery proceedings initiated by range office and thereafter obtained certified copy and filed appeal within condonable period of three months after expiry of statutory time limit. The Tribunal held that, there is merit in assessee's contention and delay ought to be condoned.

2.5 Bharat Heavy Electricals Ltd. vs. CCE, Nagpur 2014 (34) STR 430 (Tri.-Mumbai)

The Tribunal in this case held that, Notification No. 1/2006-ST is not stipulating any condition for non-availment of CENVAT credit to be satisfied uniformly in all cases without exception. In view thereof the appellant is rightly entitled to benefit under impugned notification for contracts where input credit not taken prior to 1-3-2006 and input/input service tax where credit on or after 1-3-2006. Further, the notification is not stipulating for uniform exercise of option to avail/non-avail CENVAT credit for all contracts executed by assessee.

It is also held that, discharge of service tax liability through accumulated CENVAT credit on non-abated portion of value is totally different matter and no bar/restriction so long as credit taken on inputs, capital goods or input services used in rendering service in contract.

2.6 Bechtel India Pvt. Ltd. vs. CCE, Delhi 2014 (34) STR 437 (Tri.-Del.)

The Tribunal in this case observed that, section 11B is made applicable for refund claim under rule 5 of CCR, 2004 as per condition no. 6 of Notification No. 5/2006-CE(NT). It is held that, in case of export of service, export is complete when foreign exchange received in India and therefore relevant date is date of receipt of foreign exchange.

2.7 Andrew Telecom (I) Pvt. Ltd. vs. CCE&CE, Goa 2014 (34) STR 562 (Bom.)

The appellant in this case inadvertently paid tax on export of services for the period May, 2004 to March, 2006 in May, 2006. Relying on department's clarification they have submitted refund claim on 28-4-2010. The High Court held that, the case is covered by the provisions of section 11B of CEA, 1944 r.w.s. 83 of FA, 1994 and refund claim was not sustainable as it was filed beyond one year from the date of payment of tax. Distinction between unconstitutional and illegal levy or both being treated at par, cannot indicate any grave error of law or perversity when refund claim has been rejected on ground of limitation.

2.8 State Bank of India vs. CST, Mumbai-I 2014 (34) STR 579 (Tri.-Mumbai)

The appellant in this case filed refund claim on 4-3-2009. After receiving deficiency memo, complete refund claim in all respects has been filed on 26-3-2009. The Tribunal held that, interest on refund commences three months after the date of removal of deficiency claim i.e. from 26-3-2009 till the date of receipt of refund.

2.9 Radico Khaitan Ltd. vs. CST, Delhi 2014 (34) STR 586 (Tri.-Del.)

The appellant in this case deposited service tax in respect of advance received, however said services were not provided on account of cancellation of an agreement. They refunded the entire advance received along with service tax. They have claimed refund of service tax refunded. The Tribunal held that, denial of refund on the sole technical ground that same was not shown in Balance Sheet as receivable from Revenue cannot be held to be just and fair. Irrespective of non-reflection of tax amount in balance sheet the same is required to be refunded inasmuch as the same was not required to be paid by assessee.

3. CENVAT Credit

3.1 JBF Industries vs. CCE&ST, Vapi 2014 (34) STR 345 (Tri.-Ahmd.)

The appellant in this case claimed CENVAT credit on input services used in the manufacture of job worked goods (exempt under Notification No. 214/86-CE). The department sought to deny the same. The Tribunal held that, provisions of rule 6(1) of CCR, 2004 cannot be invoked for denying CENVAT credit on input services used by appellant factory for manufacture of job worked goods under Notification No. 214/86-CE. The job work activity of appellant is amounting to manufacture and is not one of providing any service.

3.2 Badrika Motors (P) Ltd. vs. CCE&ST, Bhopal 2014 (34) STR 349 (Tri.-Del.)

In this case, the department disallowed credit of service tax paid on GTA service used for transport of two wheelers and spares on the ground that, services of Authorised Service Station and Business Auxiliary Service provided by the appellant have no nexus with the remittance made for GTA Service. The Tribunal held that, input service means any service used by provider of taxable service for providing output service. No precise arithmetic correlation required between input and output service. Tax on GTA service was remitted for transport of two wheelers and spares and this is sufficient and proximate nexus for availing CENVAT credit on GTA service for utilising in output service provided.

3.3 Panchmahal Steel Ltd. vs. CCE&ST, Vadodara 2014 (34) STR 351 (Tri.-LB.)

The appellant used CENVAT credit for payment of service tax liability on GTA service under RCM. The department denied the adjustment on the ground that, discharge by manufacturer of excisable goods as deemed service provider without providing actual service is not allowed. The Larger Bench held that, credit availed for manufacturing activities could be used for payment of service tax on GTA service, even if input/input services/ capital goods were not utilised for providing taxable service. There was no bar/restriction for such utilisation of CENVAT account.

3.4 Bharat Sanchar Nigam Ltd. vs. CCE, Salem 2014 (34) STR 378 (Tri.-Chennai)

The appellant in this case claimed CENVAT credit on the basis of Advice of Transfer Debit (ATD) supported by Xerox copies of original invoices. The Tribunal observed that, existence of original invoices, its genuineness and used of goods at the sites has not been disputed. Considering the commercial practice necessary for procuring the goods, it is held that credit is not deniable for procedural lapse.

3.5 Ultra Tech Cement Ltd. vs. CCE, Jaipur-II 2014 (34) STR 426 (Tri.-Del.)

The assessee in this case claimed CENVAT credit of service tax paid on removal of non-excisable coal fly-ash emerging from Captive Power Plant generating electricity consumed captively for manufacture of excisable goods. The Tribunal observed that, captive power plant is unable to operate without removal of ash and such removal is connected with production of power, which in turn having nexus with manufacturing of final product. Therefore, CENVAT credit is admissible.

3.6 CCE, Jaipur-II vs. Hindustan Zinc Ltd. 2014 (34) STR 440 (Tri.-Del.)

In this case the customer's of appellant withhold part payment of service provided as performance guarantee while availed CENVAT credit of full payment. The department applying rule 4(7) of CCR, 2004 disallowed proportionate amount of CENVAT credit to the extent input service payment retained. The Commissioner (A) relying on Boards Circular No. 122/3/2010-ST dated 30-4-2010 allowed full CENVAT credit as service provider paid service tax on total billed amount including amount not received. The Tribunal held that, the rationale behind rule 4(7) is to prevent situation where CENVAT credit is availed on the basis of invoice issued by service provider even when service tax not paid by him for reason of delay in receipt of payment from service recipient. In the present case, rule 4(7) is not applicable as service tax is paid by service provider on full value, even though part payment withheld as per terms of contract.

3.7 Klipco Pvt. Ltd. vs. CCE, Mumbai-V 2014 (34) STR 461 (Tri.-Mumbai)

The Tribunal in this case held that, commission paid to agent for selling finished goods having direct nexus with business activity and therefore entitled to input service credit.

3.8 Sundaram Brake Linings vs. CCE, Chennai-II 2014 (34) STR 583 (Tri.-Chennai)

The Tribunal in this case held that, accident and medical insurance premium of employees is in relation to manufacturing activity and with broad definition of input service. However, accident and medical insurance premium for family members of employees does not have direct nexus with manufacturing activity and does not qualify as input services. Since dispute is about interpretation of law there is no *mala fide* intention on part of assessee, hence not liable to penalty.

Also refer to *Samruddhi Cement Ltd vs. CCE, Jaipur-II 2014 (34) STR 592 (Tri.-Del.)*

3.9 Birla Corporation Ltd. vs. CCE, Lucknow 2014 (34) STR 589 (Tri.-Del.)

The Tribunal in this case held that, just extraction of fly ash generated in Thermal Power Plant could not be said to be manufacture of fly ash by assessee. Hence rule 6(1) of CCR, 2004 could not be applied on ground that fly ash was exempt product and therefore, assessee could not be denied credit of service tax on erection, installation & commissioning, repairing and maintenance and insurance of fly ash extraction plant.

3.10 Jenson & Nicholson (India) Ltd. vs. CCE, Noida 2014 (34) STR 596 (Tri.-Del.)

The Tribunal in this case held that, financial services provided by SBI Capital Market Ltd. in respect of techno-economic feasibility of rehabilitation and modalities of finance has nexus with manufacturing business covered by activities relating to business.

3.11 Sunbell Alloys Co. of India Ltd. vs. CCE&C, Belapur 2014 (34) STR 597 (Tri.-Mumbai)

The appellant being job worker undertaking re-packing, re-labelling of goods imported by ISD, availed CENVAT credit of input service distributed by ISD not being manufacturer himself. The Tribunal observed that, in the present case, manufacturer is the job worker undertaking processing of goods supplied by importer and service received by importer/distributor not input services. It is held that definition of ISD also implies office of manufacturer of final product and job worker is separate and independent legal entities not belonging to importer/distributor and not entitled to availment of CENVAT credit distributed by another legal entity as per provisions of rule 2(m) r.w.r. 7 of CCR, 2004.

3.12 CCE, Jaipur vs. Hindustan Zinc Ltd. 2014 (34) STR 609 (Tri.-Del.)

The assessee in this case availed CENVAT credit of service tax paid on GTA service availed for bringing cement inside the mines for repair/renovation of cavities. The Tribunal held that, credit admissible as mines to be treated as factory are in view of decision of the Apex Court in case of Vikram Cement 2006 (197) ELT 145 (SC).

3.13 ADC India Communications Ltd. vs. CCE, Bengaluru 2014 (34) STR 637 (Tri.-Bang.)

The Tribunal in this case held as under

- Assessee was not liable to reverse CENVAT credit on such inputs written off on 31-3-2007 for Income Tax purposes as requirement for same was introduced for the first time w.e.f. 11-5-2007 by insertion of sub-rule 5(B) of rule 3 of CCR, 2004.
- Pest Control and AMC for ST plant for sewage disposal, AMC for air conditioners for instrumentation room for testing of products, AMC for computer used for manifold purposes in connection with manufacture and clearance of products are input services and have nexus with manufacture/clearance of excisable goods.
- Since statutory liability under section 46 of Factories Act, 1948 does not exist in case where assessee does not have more than 250 or more employees/workers during material period, appellant is not entitled to claim CENVAT credit of service tax paid on catering service.

Janak C. Pandya, *Company Secretary*

CORPORATE LAWS
Company Law Update

Case Law #1

[2014] 184 Comp Cas 1 (SC)
[In the Supreme Court of India]
Chatterjee Petrochem Co. and Another vs. Haldia Petrochemicals Ltd.

A party which is not a signatory to an original agreement which provides for arbitration clause shall not render arbitration clause invalid due to execution of supplemental agreement and it did not effect novation of contract.

Brief facts

This application has been filed by Chatterjee Petrochem (Mauritius) Co. **("Applicant" or "CPMC")** against the suit filed by the Haldia Petrochmeicals Ltd. **("HPL")** before the High Court at Kolkata praying that the arbitration clause in the agreement entered into by the CPMC, HPL, West Bengal Industrial Development Corporation **("WBIDC")** and Government of West Bengal **("WB")** be declared as void. Further, it has asked for permanent injunction for initiating / continuing with any arbitration proceedings by the applicant.

CPMC, HPL, WBIDC and WB had entered into an agreement and clause 15 of the said agreement provides for arbitration clause. As per said agreement, any dispute, difference or claims arising between the parties shall first be settled as per the Rules of Arbitration of the International Chamber of Commerce ("ICC").

The submission made by the applicant is as follows.

a. Validity or existence of the arbitration agreement is to be decided by the Arbitration Tribunal ("AT") as per ICC rules and civil court has no jurisdiction on the same. In its support reliance was placed on Supreme Court decision in *Yograj Infrastructure Ltd. vs. Ssang Yong Engineering and Construction Co. Ltd. [2011] 9 SCC 735*, where it was held that arbitration shall be held as per agreement.

b. Original agreement, which is the principal agreement, cannot be novated by the subsequent supplemental agreement as, the supplemental agreement did not create any independent legal right.

c. The suit filed to restrain the foreign arbitration is in violation of section 5 of the A&C Act and same is contrary to law. The reliance was placed on three-judge Bench judgment of Supreme Court in *Bhatia International vs. Bulk Trading S.A. [2002] 4 SCC 105.*

d. The Part I of the A & C Act is also applicable to international arbitration as per the decisions in *Venture Global Engineering vs. Satyam Computer Services Ltd., [2008] 4 SCC 190* and thus judicial intervention cannot be allowed.

In response, the following submissions are made by the respondent.

a. The parties had contracted out of earlier agreement and legal liability is redefined in supplemental agreement.

b. The supplemental agreement provides the exclusive jurisdiction to courts in Kolkata for any dispute from said agreement.

c. The subsequent agreement has created new rights and liabilities which also includes the parties which were not part of original agreement. The new agreement therefore provides for new mechanism of dispute resolution.

d. The matter has been extensively litigated before CLB and High Court and applicant has raised their right for arbitration.

e. Reliance was placed on various judgments such as "*Chloro Controls (I) P. Ltd. vs. Seven Trent Water Purification*", "*Bajaj Auto Ltd. vs. TVS Motor Co. Ltd.*, "*Dhariwal Industries Ltd. vs. M.S.S. Food Products*", etc.

f. The suit is filed under section 9 of the Code of Civil Procedure, 1908 and not under section 45 of the A & C Act. The judgment of Supreme Court in "*Smt. Ganga Bai vs. Vijay Kumar [1974] 2 SCC 393, 397* was referred as to inherent right of every person to bring suit of a civil nature. ..." and seven-judge constitutional bench judgment in *S.B.P. and Co. vs. Patel Engineering Ltd. [2005] 128 Comp Cas 465, 483 (SC).*

The issues before the court are as follows:

1. Whether subsequent agreement giving exclusive jurisdiction to court of Kolkata nullifies the scope of arbitration under original agreement?

2. Is the suit filed by the respondent is maintainable and

3. What order to pass?

Judgments and reasoning

In case of first question, the Court has upheld the application. Court has upheld that arbitration clause is valid and permanent injunction is unsustainable in law.

Court while rejecting the submission of the respondents, ruled that suit is liable to be dismissed. The court has also set aside the observation made by the single judge and division bench of High Court of Kolkata stating that by subsequent agreement, the principal agreement is novated.

The Court has looked at the agreement and side letter exchange between the parties. The Court has observed that by supplemental agreement, the CPMC is become the guarantor and does not change the rights and responsibilities of the parties. The letter written by CPMC to WBIDC provides that subsequent agreement shall not prejudice any of parties' rights under principal agreement and all terms and conditions shall continue to remain valid.

Court has also reviewed the supplemental agreement which provides that ".....Courts at Kolkata alone shall have jurisdiction in all matters relating to this agreement". The court has opined that "this agreement" means the subsequent agreement and does not by any means referring to the principal agreement.

For second and third questions, the Court has rejected the contention of the respondents as to civil rights and filing suit under the Code of Civil Procedure and not under A & C Act. Court has observed that arbitration clause is continuing under principal agreement and

that section 5 of the A&C Act is also applicable to Part II of the Act as well. Court has also observed that existence of non-signatory to the principal agreement does not jeopardise the arbitration clause in any manner. The reliance was placed on the judgment by three-Judge Bench in *"Chloro Controls (I) P. Ltd. vs. Severn Trent Water Purification Inc. [2013] 181 Comp Cas 339, 397 (SC).*

Court has directed the parties to resolve the disputes through arbitration as per the terms mentioned in principal agreement under ICC rules.

Case Law #2

[2014] 184 Comp Cas 17 (CLB)
[Before the Company Law Board – Kolkata Bench]
Kishorilal Agarwal and Others vs. Alliance Engineers P. Ltd and Others.

If the conditions mentioned in the articles of association for transfer of shares have not been complied, then the transferee cannot claimed the ratification of register of members for registering their name and cannot file petition for oppression and mis-management in terms of section 399 of the Act.

Brief Facts

This petition has been filed by Kishorilal Agarwal and Others **("Petitioner")** against Alliance Engineers P. Ltd. **("Company")** and Others (collectively **"Respondents"**) under section 11, 186, 235, 397, 398 and various other sections of the Companies Act, 1956 ("Act"). The petition is for transfer of shares, oppression and mismanagement and for investigation in the affairs of the Company.

The following submission is made by the petitioners.

Petitioners, who all are individuals and holds around 39% share capital of the company but not yet registered as members. The company was in bad financial conditions and dues payable to employees and bank was pending for a long time. In order to ensure payment of all dues and also payment of bank loans, the six directors who are also employees of the company have approached to the two respondents to take over all assets and liabilities of the company. They have also requested the two respondents to manage the affairs of the company. As per understanding, five out of six directors have resigned and two respondents have been appointed as additional directors. As per the agreement, some of the employees have agreed to resign with certain financial package and two respondents will pay the money by certain dates. However, two respondent directors have failed to make payments as promised.

As respondents failed to make promised payments, some of employees have approached the petitioner No. 1 and Guru Forging and Agrico P. Ltd. ("Guru"), which is owned by the petitioners to bail out them out of financial trouble. Guru has a land plot next to the property of the Company. Guru and petitioner have paid dues of 28 employees and also negotiated with banks for payment. In turn, 28 employees have transferred their shares to the Petitioner. When, petitioner visited the registered office of the company to settle the matter, they have found that some third party has occupied the premises claiming that they have paid huge amount to two respondents for the same. Petitioner claimed as follows:

a. The duly executed transfer deeds for transfer of 39% shares sent to the registered office were returned undelivered.

b. Two respondents have wrongly filed Form No. 2 with their own digital signature for allotment of 25,400 equity shares to themselves.

c. They have appointed respondent No. 3 as an additional director.

d. Not calling AGM for last 3 years and filing of accounts.

e. Valuable properties are being alienated/ sold and transferred.

f. They have taken away all books of account and other records of the company and at present, no records are available.

Based on various other incidences, petitioner had made various allegations against the company and three respondents.

In response, various counter allegations were made against the petitioner, like illegal occupation of company's premises with the help of ex-workers, damage to properties and stocks, illegal removal of company's properties, creation of disturbance for not allowing management to enter the factory premises and many other allegations were also made. It is submitted that the respondents have made complaints to various authorities for the above acts of the petitioner.

It is further alleged that the transferor of the shares as well as Guru are not made party to this petition and hence it is adversely hit by the non-joinder of above parties as transfer of shares are vogue and manufactured.

As the petitioner is not the shareholder of the company on this ground alone, petition is liable to dismiss.

Judgments and reasoning

CLB has rejected the petition on the grounds that same is not maintainable on the preliminary issue of eligibility of the petitioner under section 399 of the Act to file such petition.

CLB has reviewed the provisions of the transfer of shares in the articles of association of the company as to compliance of certain pre-conditions for transfer of shares. It has observed that certain provisions like, prior approval of the board for transfer, offering of shares to other shareholders at price, fixation of price by the board or auditor etc., were not complied with. Further, for ratification of register under section 111 of the Act, petitioner has not complied with such conditions and they should have moved to CLB for the same. CLB has also relied on the judgment in case of *Srikanta Datta Narasimharaja Wadiyar vs. Venkateswara Real Estate Enterprises P. Ltd. [1990] 68 Comp Cas 216 (Karn.)*. CLB has observed that in certain exceptional circumstances, petitioner may invoke sections 397 and 398 even though they are not members but have indisputable and unchallengeable title to membership. CLB has observed that in present case, no such thing is happened.

CLB has also observed another lacunae in the present petition. It has observed that the non-joinder of the necessary party in the petition as provided in proviso to Order 1, rule 9 of the Code of Civil Procedure, 1908. The said code required the due care must be taken that necessary party to suit is present before the court be as plaintiff or defendant otherwise suit or proceedings will have to fail.

The CLB has referred the judgment in the case of *Chatterjee Petrochem (I) P. Ltd. vs. Haldia Petrochemicals Ltd. [2011] 167 Comp Cas 373 (SC)* and noted that as held therein, failure on part of respondents to adhere to the terms of MoU is purely a private contractual disputes and cannot be brought under the preview of sections 397 and 398 of the Act.

CLB has also looked into various other allegations like non-payment of money for shares allotted, transfer of registered office etc., which petitioner is not able to prove. CLB has concluded that said allegations do not constitute oppression to any member or group of members.

CA. Mayur Nayak, CA. Natwar Thakrar &
CA. Pankaj Bhuta

OTHER LAWS
FEMA Update

In this article, we have discussed recent amendments to FEMA through Circulars issued by RBI

1. Foreign Direct Investment (FDI) in India – Reporting mechanism for transfer of equity shares/ fully and mandatorily convertible preference shares/ fully and mandatorily convertible debentures

A non-resident (NR) [including NRI], who has acquired and continues to hold control in an Indian company in accordance with SEBI (Substantial Acquisition of shares and Takeover) Regulations, is permitted, under the FDI scheme, to acquire shares of that company on a stock exchange in India through a registered broker. The form FC-TRS is required to be submitted to the AD Category-I bank within 60 days from the date of receipt of the amount of consideration. The onus of submission of the form FC-TRS within the given timeframe is cast upon the transferor / transferee, whoever is resident in India. Further, as per extant practice, the AD Category-I bank is required to seek approval from the Reserve Bank of India, Central Office before certifying the form FC-TRS received by them beyond the prescribed period of 60 days. The IBD/FED or the nodal office of the bank has to submit a consolidated monthly statement in respect of all the transactions reported by the branches together with copies of the FC-TRS forms received from the branches to Foreign Exchange Department, Reserve Bank of India, Foreign Investment Division, Central Office, Mumbai in a soft copy (in MS- Excel).

RBI has now rationalised the existing procedure in cases where the NR investor including an NRI acquires shares on the stock exchanges as mentioned above and now the investee company would have to file form FC-TRS with the AD Category-I bank.

Also, in order to facilitate operational convenience, RBI has advised the AD Category-I bank to approach Foreign Exchange Department of the Regional Office concerned to regularise the delay in submission of form FC-TRS, beyond the prescribed period of 60 days and in all other cases, form FC-TRS shall continue to be scrutinised at AD bank level as per extant practice.

The AD banks shall continue to comply with the prescribed consolidated reporting requirements.

(A.P. (DIR Series) Circular No. 127 dated 2nd May, 2014)

(This is a welcome relaxation to exempt NR/NRI investors from filing FC-TRS when shares are transferred through stock exchange. However, the procedure will also cast additional burden on the company whose shares are being transferred to comply with the formalities)

2. External Commercial Borrowings (ECB) Policy: Re-schedulement of ECB – Simplification of procedure

Hitherto, AD Category – banks were permitted to approve changes / modifications in the drawdown / repayment schedule of the ECBs already availed, both under the approval and the automatic routes, subject to the conditions. However, any elongation / rollover in the repayment on expiry of the original maturity of the ECB required the prior approval of the Reserve Bank.

RBI has now delegated the power to the designated AD Category-I bank to allow re-schedulement of ECB due to changes in draw-down schedule and / or repayment schedule with the following conditions:

i. Changes, if any, in all-in-cost (AIC) is only on account of the change in average maturity period (AMP) due to re-schedulement of ECB and post re-schedulement, the AIC and the AMP are in conformity with applicable guidelines. There should not be any increase in the rate of interest and no additional cost (in foreign currency / Indian Rupees) should be involved.

ii. The re-schedulement is allowed only once, before the maturity of the ECB.

iii. If the lender is an overseas branch of a domestic bank, the prudential norms applicable on account of re-schedulement should be complied with.

iv. The changes on account of re-schedulement should be reported to DSIM through revised Form 83.

v. The ECB should be in compliance with all applicable guidelines related to eligible borrower, recognised lender, AIC, AMP, end-uses, etc.

vi. The borrower should not be in the default/ caution list of RBI and should not be under the investigation of Directorate of Enforcement.

The facility will be available for **ECBs raised both under the automatic and approval routes.** Provisions of this Circular do not apply to FCCBs.

(A.P. (DIR Series) Circular No. 128 dated 9th May, 2014)

(This is a welcome relaxation by the RBI which will not only reduce its burden but will also save procedural hassles for the borrowers)

3. External Commercial Borrowings (ECB) Policy – Refinance / Repayment of Rupee loans raised from domestic banking system

As per the External Commercial Borrowings (ECB) Policy eligible Indian companies are permitted to refinance / repay the Rupee loans, raised by them from the domestic banking system, by raising ECB from recognised lenders, subject to conditions.

Circular DBOD.No.BP.BC.107/21.04.048/2013-14 dated April 22, 2014 issued by the Department of Banking Operations and Development (DBOD) of RBI in terms of which repayment of Rupee loans availed of from domestic banking system through ECBs extended by overseas branches/ subsidiaries of Indian banks is not permitted.

The issue has been examined and it has been decided that eligible Indian companies will not be permitted to raise ECB from overseas branches / subsidiaries of Indian banks for the purpose of refinance / repayment of the Rupee

loans raised from the domestic banking system in respect of the following:

a. Scheme of take-out financing;

b. Repayment of existing Rupee loans for companies in infrastructure sector;

c. Spectrum allocation;

d. Repayment of Rupee loans

(A.P. (DIR Series) Circular No. 129 dated 9th May, 2014)

(This move suggests RBI confidence about strengthening of Indian rupee as the ECB guidelines, especially refinancing of rupee loans, were relaxed at a time when Indian rupee was passing through some pressure)

4. External Commercial Borrowings (ECB) from Foreign Equity Holder – Simplification of Procedure

As per the extant ECB policy, ECBs from direct foreign equity holders (FEHs) are considered both under the automatic and the approval routes, as the case may be. ECBs from indirect equity holders and group companies and ECBs from direct FEH for general corporate purpose are, however, considered under the approval route. Further, any request for change of the ECB lender in case of FEH requires RBI's approval.

As a measure of simplification of the existing procedure, it has now been decided to delegate powers to AD banks to approve the following cases under the automatic route:

i) Proposals for raising ECB by companies belonging to manufacturing, infrastructure, hotels, hospitals and software sectors from indirect equity holders and group companies.

ii) Proposals for raising ECB for companies in miscellaneous services from direct/ indirect equity holders and group companies. 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.

iii) Proposals for raising ECB by companies belonging to manufacturing, infrastructure, hotels, hospitals and software sectors for general corporate purpose. ECB for general corporate purpose (which includes working capital financing) is, however, permitted only from direct equity holder.

iv) Proposals involving change of lender when the ECB is from FEH – direct/ indirect equity holders and Group Company.

(A.P. (DIR Series) Circular No. 130 dated 16th May, 2014)

(This is a welcome relaxation by the RBI which will not only reduce its burden but will also save procedural hassles for the borrowers)

5. Overseas Direct Investments – Limited Liability Partnership (LLP) as Indian Party

RBI has notified that a Limited Liability Partnership (LLP), registered under the Limited Liability Partnership Act, 2008 (6 of 2009), will be considered as an "Indian Party" under clause (k) of Regulation 2 of Notification No. FEMA 120/ RB-2004 dated July 7, 2004 (Foreign Exchange Management (Transfer or Issue of Any Foreign Security) (Amendment) Regulations, 2004).

Accordingly, an LLP, can henceforth undertake financial commitment to / on behalf of a JV/ WOS abroad in terms of the extant

FEMA provisions under Regulation 6 (and regulation 7, if applicable) of the Notification No. FEMA 120/ RB-2004 dated July 7, 2004 (Foreign Exchange Management (Transfer or Issue of Any Foreign Security) (Amendment) Regulations, 2004).

(A.P. (DIR Series) Circular No. 131 dated 19th May, 2014)

(This is a welcome relaxation by the RBI which will now allow/encourage LLPs to make outbound investments)

6. Export of Goods – Long Term Export Advances

Prior approval of the Reserve Bank is required to be obtained by an exporter for receipt of advance where the export agreement provides for shipment of goods extending beyond the period of one year from the date of receipt of advance payment. Also, AD Category- I banks have been permitted to allow exporters to receive advance payment for export of goods which would take more than one year to manufacture and ship and where the 'export agreement' provides for the same.

It has been decided to permit AD Category-I banks to allow exporters having a minimum of three years' satisfactory track record to receive long term export advance up to a maximum tenor of 10 years to be utilised for execution of long term supply contracts for export of goods subject to the conditions as under:

i) Firm irrevocable supply orders should be in place. The contract with the overseas party/buyer should be vetted and 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.

ii) Company should have capacity, systems and processes in place to ensure that the orders over the duration of the said tenure can actually be executed.

iii) The facility is to be provided only to those entities, who have not come under the adverse notice of Enforcement Directorate or any such regulatory agency or have not been caution listed.

iv) Such advances should be adjusted through future exports.

v) The rate of interest payable, if any, should not exceed LIBOR plus 200 basis points.

vi) The documents should be routed through one Authorized Dealer bank only.

vii) Authorised Dealer bank should ensure compliance with AML / KYC guidelines and also undertake due diligence for the overseas buyer so as to ensure it has good standing /sound track record.

viii) Such export advances shall not be permitted to be used to liquidate Rupee loans, which are classified as NPA as per the Reserve Bank of India asset classification norms.

ix) Double financing for working capital for execution of export orders should be avoided.

x) Receipt of such advance of USD 100 million or more should be immediately reported to the Trade Division, Foreign Exchange Department, Reserve Bank of India, Central Office, 5th Floor, Amar Building, Mumbai under copy to the concerned Regional Office of the Reserve Bank of India as per the provided format. (As per Annex-I attached in this circular).

Authorized Dealer banks are required to issue bank guarantee (BG)/Stand by Letter of Credit (SBLC) for export performance, the following guidelines may also be adhered to:

a) Issuance of BG/SBLC, being a non-funded exposure, should be rigorously evaluated as any other credit proposal keeping in view, among others, prudential requirements based on board approved policy. Such facility will be extended only for guaranteeing export performance.

b) BG/SBLC may be issued for a term not exceeding two years at a time and further rollover of not more than two years at a time may be allowed subject to satisfaction with relative export performance as per the contract.

c) BG/SBLC should cover only the advance on reducing balance basis.

d) BG/SBLC issued from India in favour of overseas buyer should not be discounted by the overseas branch/subsidiary of bank in India.

e) Authorised Dealer bank should duly evaluate and monitor the progress made by the exporter on utilisation of the advance and submit an Annual Progress Report to the Trade Division, Foreign Exchange Department, Reserve Bank of India, Central Office, 5th Floor, Amar Building, Mumbai under copy to the concerned Regional Office of the Reserve Bank of India in the provided format (as per Annex-II attached in this circular) within a month from the close of each financial year.

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

(This is a welcome move by RBI, which would boost exports of capital goods & other goods with the long-term supply contracts as cheap and assured long term finance will encourage exporters to enter into contracts for export of goods which involve huge finance and take considerable time to manufacture)

7. Import of Gold by Nominated Banks / Agencies / Entities

It has now been decided to modify the guidelines for import of Gold by the nominated banks/agencies/entities. The revised guidelines are as under:

In modification of guidelines for import of Gold, RBI has permitted that Star Trading Houses/ Premier Trading Houses (STH/PTH) which are registered as nominated agencies by the Director General of Foreign Trade (DGFT) may now import gold under 20:80 scheme subject to the following conditions:

i) The STH/PTH should have imported gold prior to the introduction of 20:80 scheme. STH/PTH should get the required verification done by the Department of Customs at any port where they have imported gold consignment in the past.

ii) The first lot of gold under this scheme would be based on the highest monthly import during any of the last 24 months prior to the RBI's notification dated August 14, 2013, subject to a maximum of 2,000 Kgs.

iii) As in the case of other nominated agencies, the eligible quantity may be imported by STH/PTH from any port, subject to their eligibility limit / maximum quantity allowed to them.

iv) For proper compliance, before import, they must submit the import plan, port-wise and quantity-wise, to the concerned Customs office, where the verification of the figures of past performance was done. This information will be sent to all the other ports from which imports are permitted. The overall discipline of exporting 20% of each imported consignment before the next consignment is imported will be equally applicable to such STH/PTH importers.

Also, it has now been decided to permit the nominated banks, to give Gold Metal Loans (GML) to domestic jewellery manufacturers out of the eligible domestic import quota of 80% to the extent of GML outstanding in their books as on March 31, 2013.

(A.P. (DIR Series) Circular No. 133 dated 21st May, 2014)

8. Deferred Payment Protocols dated April 30, 1981 and December 23, 1985 between Government of India and erstwhile USSR

In terms of A.P. (DIR Series) Circular No. 80 dated December 16, 2013 the Rupee value of the Special Currency Basket was indicated as ` 83.564155 effective from December 12, 2013.

Upon further revision, RBI has fixed the Rupee value of the Special Currency Basket at ` 80.603699 with effect from May 21, 2014.

(A.P. (DIR Series) Circular No. 134 dated 26th May, 2014)

9. Crystallisation of Inoperative Foreign Currency Deposits

Under the Reserve Bank (Depositor Education and Awareness Fund) Scheme, 2014 formulated by the RBI, credit balances of any account in India with a banking company which has not been operated for a period of ten years or any deposit or any amount remaining unclaimed for more than ten years within a period of three months from the expiry of ten years shall be credited to the fund.

With reference to Notification No. FEMA.10A/2014-RB relating to inoperative foreign currency deposits issued by the RBI,

Authorised Dealer banks shall crystallise, that is, convert the credit balances in any inoperative foreign currency denominated deposit into Indian Rupee, in the manner indicated below:

(i) In case a foreign currency denominated deposit with a fixed maturity date remains inoperative for a period of three years from the date of maturity of the deposit, at the end of the third year, the authorised bank shall convert the balances lying in the foreign currency denominated deposit into Indian Rupee at the exchange rate prevailing as on that date. Thereafter, the depositor shall be entitled to claim either the said Indian Rupee proceeds and interest thereon, if any, or the foreign currency equivalent (calculated at the rate prevalent as on the date of payment) of the Indian Rupee proceeds of the original deposit and interest, if any, on such Indian Rupee proceeds.

(ii) In case of foreign currency denominated deposit with no fixed maturity period, if the deposit remains inoperative for a period of three years (debit of bank charges not to be reckoned as operation), the authorised bank shall, after giving a three month notice to the depositor at his last known address as available with it, convert the deposit from the foreign currency in which it is denominated to Indian Rupee at the end of the notice period at the prevailing exchange rate. Thereafter, the depositor shall be entitled to claim either the said Indian Rupee proceeds and interest thereon, if any, or the foreign currency equivalent (calculated at the rate prevalent as on the date of payment) of the Indian Rupee proceeds of the original deposit and interest, if any, on such Indian Rupee proceeds.

(A.P. (DIR Series) Circular No. 136 dated 28th May, 2014)


Ajay Singh & Suchitra Kamble, *Advocates*

BEST OF THE REST

1. Banker's liens– Gold loan – Repaid by borrower – Bank can still retain gold ornaments offered as security on premise that borrower has not discharged liability in respect of another personal loan availed by him which is without security: Contract Act, 1872, Ss. 171, 174

The Petitioner availed a personal loan of ` 25,000/- from the Canara Bank agreeing to repay the same with interest in equated monthly installments in a span of three years. The personal loan was availed on the basis of a demand promissory note executed by the petitioner in favour of the Bank and no security of any sort was obtained at the time of the transaction. The petitioner also availed a gold loan of ` 85,000/- from the Bank on pledging 46.700 grams of gold and agreeing to clear the same with interest. The Petitioner asserts that he is willing to clear the gold loan in its entirety and that the Bank is bound to release the gold ornaments pledged without retaining it as security for the personal loan.

The writ petition was filed seeking for a direction to the Bank to release the gold ornaments pledged by the petitioner on clearing only the gold loan. The Bank contends that the amounts due in the personal loan and the gold loan are not paid by the Petitioner and the gold ornaments cannot be released without the petitioner discharging the entire liability. The Bank relied on Section 171 of the Indian Contract Act, 1872 to exercise its right of lien and retain as security the gold ornaments pledged for amounts due from the petitioner.

The High Court observed that "Lien in its primary sense is a right in one man to retain that which is in his possession belonging to another until certain demands of the person in possession are satisfied. In this primary sense it is given by law and not by contract" as per the Halsbury's Law of England. "A banker's lien on negotiable securities has been judicially defined as 'an implied pledge'. A banker has, in absence of agreement to the contract, a lien on all bills received from a customer in the ordinary course of banking business in respect of any balance that may be due from such customer."

Section 171 of the Act and following the dictum in Syndicate Bank's case AIR 1992 SC 1066 to hold that the Bank is entitled to retain as security the gold ornaments pledged till the personal loan is also cleared. Thus

the court held that the bank has a general lien over all forms of security including gold ornaments deposited by or on behalf of the borrower in ordinary course of banking business for the general balance of account due from him. The general lien can be exercised when there is a bailment of gold ornaments by way of security for the repayment of a debt and certainly not in respect of goods entrusted to bank for safe custody in a locker.

Nakulan vs. The Deputy General Manager, Canara Bank, Kollam & Ors. AIR 2014 Kerala 64

2. Transfer of land by ostensible owner – Protection under S. 41 – Claim for right, title in land by plaintiff on account of transfer of land by virtue of sale deed – Failure to prove that he acted in good faith taking reasonable care to ascertain power to transfer land – Plaintiff not entitled to protection u/s. 41 of Act: Transfer of Property Act, 1882, S. 41

The appellant i.e. Plaintiff instituted the suit praying for declaration of his right, title and interest and confirmation of possession and permanent injunction, over a plot of land contending that it has been purchased by predecessor-in-interest of the defendants, by a registered deed of sale and since then he has been possessing the land by constructing house and residing thereby paying taxes and revenues.

The defendants contested the suit by denying the claim of the plaintiff and contending *inter alia* that the predecessor-in-interest of the defendants never sold the land, who had no right to do so, the suit land being inherited property of the defendant Nos. 1 and 2. The defendants have also pleaded that the plaintiff was the permissible occupier with condition that as and when he is asked to vacate the land the same would be vacated, who however, despite the demand raised by the defendants refused to vacate the suit land. The Trial Court had dismissed the suit by holding that since the predecessor-in-interest do not have right title and interest over the suit land, he could not transfer the same and hence by sale deed, the plaintiff could not acquire the right, title and interest in the property as the land being the inherited property of the Defendant Nos. 1 and 2.

The appellant i.e. Plaintiff filed appeal before the High Court. The High Court observed that Section 41 of the Act provides that where, with the consent express or implied of the persons interested in immovable property a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it provided the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith. Four conditions are required to be pleaded and proved to constitute a valid transfer by ostensible owner, namely:

a. that the transferor is the ostensible owner,

b. that he is so by consent express or implied, of the real owner,

c. that transfer is for consideration and

d. that the transferee has acted in goodfaith and took reasonable care to ascertain that the transferor had power to transfer.

Order 6, Rule 2(1) CPC provides that every pleading shall contain statement in a concise

form of the material facts on which the party pleading relies for his claim or defence as the case may be, but not the evidence by which they are to be proved. It is a settled position of law that no amount of evidence led by the parties can be read in the absence of the relevant pleadings either in the plaint or in the written statement.

In the present case though the Plaintiff claims the right, title and interest contending that the predecessor-in-interest who had title has transferred the land in favour of the Plaintiff by a sale deed and he has acquired the right, title and interest in the property, but there is no pleading as to predecessor-in-interest is an ostensible owner of the property, that he is so by consent, express or implied, of the real owner; and that the plaintiff acted in good faith, taking reasonable care to ascertain that the predecessor-in-interest has power to transfer. Thus in absence of the evidence and pleadings to that effect the appeal was dismissed.

Ms. Baby Rani Deb & Ors. vs. Manik Dey & Ors. AIR 2014 Guwahati 56

3. Redemption of mortgage – Mortgagor intended to redeem mortgage after sale was confirmed and made absolute by issuance of sale certificate – Right of mortgagor to redeem mortgage lost, once sale made absolute on issuance of sale certificate – Rejection of application proper.- Transfer of Property Act, 1882, S. 60 – Civil P. C., 1908, O. 34, R.5

The Predecessor-in-Interest of the petitioner was the absolute owner of the premises and put the said property as collateral security with the opposite party No. 1 i.e. bank against the cash credit availed by the petitioner No. 2. The petitioner No. 2 committed default in repayment which led the bank to declare the said amount non-performing assets. Bank issued notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and subsequently took a symbolic possession of the said property. The Bank proceeded to sale the said property kept as a co-lateral security and fixed the sale. The opposite party No. 3 to 4 were declared as a highest bidder and the sale certificate was issued. The predecessor-in-interest filed an application before the Debt Recovery Tribunal alleging that the property have been sold at much lower price. The Debt Recovery Tribunal rejected the said application. The said order is assailed by the Petitioners before the Debt Recovery Appellate Tribunal wherein the appeal was dismissed.

The High Court in the Revisional application held that the controversy involved in the present case is whether an application under Order 34, Rule 5 of the Code of Civil Procedure for redemption of the mortgage is maintainable notwithstanding the confirmation of sale in favour of the purchaser. The Apex Court in case of Maganlal (AIR 1989 SC 2113) held that in a suit for redemption of a mortgage then the mortgage by conditional sale or an anomalous mortgage, the mortgagor has right of redemption even after the sale has taken place but before the confirmation thereof becomes absolute. In the aforesaid matter it was factually found that the sale did not become absolute as the order has been challenged in an appeal which is pending. In the above backdrop, it was held that the application for redemption of the mortgage at the instance of a mortgagor is maintainable under Order 34, Rule 5 of the Code.

However in the present case the sale cannot be reopened at the instance of the petitioner after it is made absolute. The right of the mortgagor to redeem the mortgage is lost, once the sale is made absolute on issuance of the sale certificate. Hence the Petition was dismissed.

Bishnu Devi Shaw vs. Federal Bank Ltd. AIR 2014 Kolkata 90

4. Enrolled Advocate – Removal/ suspension of name from roll – Decision to be taken by Bar Council which is competent authority – Public Service Commission lacks any such authority: Retainership agreement did not establish employer-employee relationship – Advocates Act, 1961, S. 6

The Public Service Commission, West Bengal issued advertisement for holding West Bengal Judicial Service Examination, 2013. The appellant/petitioner submitted an application in prescribed format in response to the aforesaid advertisement. In the said application form, the appellant petitioner disclosed that he was in full time engagement in a law firm as an associate. In view of the aforesaid disclosure, respondent Commission refused to treat the appellant as an eligible candidate for participating in the Examination and refused to issue admit card. The appellant/petitioner submitted representation referring to Rule 49 of the Bar Council of India Rules for allowing to appear in the Examination upon treating him as an eligible candidate. The Public Service Commission did not pass any order. The appellant thereafter filed writ petition wherein the appellant was allowed to appear for the examination at the interim stage. The appellant was successful in the examination but was not called for interview as since the writ petition in meanwhile was dismissed. Therefore, the appellant/petitioner preferred appeal before the Division bench of the High Court.

The High Court held that the single judge while deciding the matter did not decide the issues in their correct perspective and erroneously upheld the decision of the Public Service Commission Authorities holding that appellant/petitioner is not eligible to appear the examination. After scrutinising the retainership agreement including the enrollment certificate issued by the Bar Council, the High Court was of the opinion that the retainership agreement of the appellant with the respective law firms could not be treated as full-time employment against monthly salary since the appellant herein was never appointed by the law firms and appellant did not receive any monthly salary as appellant accepted the retainership fees only for providing his services.

The retainership agreement did not establish employer-employee relationship between the appellant and the concerned Lawyer's Firm/ Solicitors Firm. The appellant being the retainer could not appear before any court of law prejudicing the interests of the law firm which had retained the appellant herein but legally there was no bar for the said appellant to appear before any court of law without prejudicing the interests of the concerned law firm since the retainership agreement between the parties could not debar the appellant from appearing before a court of law so long the said appellant is enrolled as an advocate in the roll of the Bar Council, West Bengal. Hence the Appeal was allowed.

Souvik Mukherjee vs. State of West Bengal AIR 2014 Kolkata 85

5. Penalty – Sale of Foreign Currency by one full-fledged money changer (FFMC) to other – Imposition of penalty unjustified. Foreign Exchange Regulation Act, 1973, S. 50

The appellants are the company and the Executive Director of the Company. The respondent issued a show cause notice against the appellants, wherein it was alleged that the appellant sold foreign currency through unauthorised persons deputed by M/s Hotel Zam Zam in violation of sections 6(4), 6(5), 7 & 8 of the Foreign Exchange Regulation Act, 1973 (hereinafter called "FERA") as well as paragraph 3 of the Memorandum of FLM issued by RBI.

The appellants were called upon to show-cause why penalty should not be imposed against them under section 50 of FERA read with sections 49 (3) & (4) of Foreign Exchange Management Act. Subsequently, the respondent imposed a penalty of ` 50,000/- each on both the appellants. The appellants preferred appeals before the Appellate Tribunal for Foreign Exchange, which were also dismissed. The orders of the Original Authority, as well as the Appellate Authority, were the subject matter of challenge before the Division Bench of the High Court. The Division Bench having confirmed the orders of the lower authority, as well as the Tribunal, the appellants filed appeals before the Apex Court.

The Hon'ble Court observed that only violation or contravention related to the stipulations contained in paragraph 3 read with Section 6(4) and 6(5) of FERA. The variation in the rates of purchase value of the foreign currency was not the basis for the ultimate conclusion about the contravention held against the Appellants. Therefore, keeping aside the said aspect, on examination of the contravention held proved against the appellants, a reference to paragraph 9 could be made. Wherein under paragraph 9 of the FLM as between the money changers, a free hand has been given for purchase and sale of any foreign currency notes, etc. in rupee value.

The Apex Court held that Para 3 of FLM issued by RBI provides that any licensed money-changers should allow transaction of its money-changing business in its premises only through such persons who are the listed authorised officials as certified by the office of the Reserve Bank under whose jurisdiction such money-changer operates their business. By paragraph 9 of the FLM as between the money-changers, a free hand has been given for purchase and sale of any foreign currency notes, etc. in rupee value. The only restriction imposed therein is that the Indian rupee value of the foreign currency should not be paid by way of cash, but should always be paid in the form of an instrument such as banker's cheque/pay order/demand draft etc., or by debiting to the purchasers' bank account. When under paragraph 9 such a free hand has been given to the money-changers, namely, FFMCs in the matter of purchase of foreign currency, etc., by making payments in the form of negotiable instruments under the relevant statutes and when transaction of sale of foreign currency has taken place between two full-fledged money-changers, payment was made by pay order and the transaction was negotiated by authorised officials of the two, simply because foreign currency was handed over to purchaser by some person, it cannot be said that the transaction was in contravention of para 3 of FML and S. 6 so as to impose penalty. The appeals are allowed

Tulip Star Hotels Ltd. vs. Special Director of Enforcement AIR 2014 Supreme Court 1028

CA. Rajaram Ajgaonkar

ECONOMY AND FINANCE

CHANGE OF GUARD

As expected, the month of May turned out to be very eventful for India. The rule of UPA came to an end after a massive election victory of NDA. Though there was expectation of change of equation in the Parliament, such a massive mandate in favour of the NDA was not expected by most people. A possibility of the NDA coming to power had gradually boosted the sentiments in India over the last three months. After the exit polls, the certainty increased. The election mandate convincingly displayed to the world that India is one of the most matured democracies. It also confirmed the fact that economic well being matters for a matured democracy, inspite of differences in religion, geographies, caste and financial status. Industry wanted a change for a better business environment. The common man wanted a change for control of inflation. Even the poor wanted a change for upliftment of their economic status. Citizens were tired of promises followed by inaction. They were hurt due to the policy paralysis. They were concerned of the scams and all of them were dreaming of a new India. The mandate came overwhelmingly for change. Now it is the responsibility of the new Government to fulfil the promises made. The times are difficult but nothing is impossible in a great country like India. Change is expected and it will happen. The only million dollar question is how fast will it happen?

The world markets continued their upswing. The US economy has accelerated as anticipated and Europe will slowly turn around. Unexpectedly, Chinese data is not as depressing as it was expected to be and there is a fair hope of growth. On the whole, the world economies are on an upswing. The financial uncertainty has reduced. Risks are becoming more palatable. The world currently is quiet on the social as well as political front, which is very supportive for the economic growth. Indices of many stock exchanges across the world are near their highs. The circumstances are suggesting that the best is yet to come. The global investment cycle is already on an upswing and it is likely to accelerate. The days of stagnation, unemployment and miseries generated therefrom are left behind. The mood will remain upbeat unless some new miseries are created in some part of the world due to political or social unrest. The overall prospects are positive and time seems to be suitable for

investors to be more aggressive in search of better returns over the months to come.

The Indian economy is expected to emerge out of the uncertainties in the near future. The lack of quick decision making and sometimes retrograde decision making has created uncertainty in the minds of businesses. The rate of investment growth had slowed down and many companies were looking outside India for expansion. Over the last few years, laws were made stricter to catch hold of the uncouth but while doing so, the overzealous law makers had not adequately gauged the impact it could have on honest businesses and investors therein. Laws were made complicated to catch the negative elements in the society but such laws became a deterrent for the growth of the well deserved. More and more power was granted to the bureaucracy, which resulted in red tapism and possibilities of corruption. Affluent investors were gauging their risks pertaining not only to their money but a possibility of criminal charges being pressed against them for petty lapses; and pursued aggressively by the bureaucracy. In the last few years, we have heard of arrests of a lot of reputed people in the society for various reasons and probably society does not believe that all of them were justified. The rich investors have an option to remain on the sidelines till such time the fundamentals improve. However, a growing economy like India cannot afford to witness such inaction, which poses great Risk to the economic development and well-being of the society. A change was needed but no solution for the same was forthcoming. Bureaucracy was unable to find the solution and politicians were unwilling to take the risk. As the obvious result, Indian economy started to struggle, lost its steam and started growing at a rate lower than 5%, which could have been easily ramped up. Today there are hopes of change and the change is expected to come fast. It is essential for investors to remember that great changes do not happen easily. Excessive expectations may not only cause distortion but can cause massive loss of sentiment and wealth.

The upward march of Indian stock markets, which started at the beginning of the year, continued even in the month of May. It accelerated in unprecedented fashion till the election results were announced. Thereafter, the markets have continued their upward move though some experts have started feeling that the markets are over bought. The stock markets have risen too quickly on expectations and the levels are not supported by fundamentals in many cases. The stock prices started easing during the last week of the month but the sentiment remains bullish. Many investors who invested in the stocks in the month of March and April or even in the first half of May could gain good appreciation and many of them could book decent profits. Those who waited for the election results to buy have also gained modestly. The correction in the stock prices, which may emerge in near future, may be a temporary phase. There is a fear of over expectation. A correction may be just around the corner. It is not only justifiable but also desirable for the next upward move of the stock markets and the equity investors should not panic when it comes. A gradual upswing is expected to emerge thereafter and equity in India is likely to be the best performing asset class over the next few years. Many investors are not only bullish but super bullish on the Indian stock markets over the coming years. Some are expecting a secular bulls market over the forthcoming decade. The bull run is likely to persist but it will not be without its ups-and-downs. The structural changes needed in the economy

for controlling inflation, reducing the trade gap and the budgetary deficit are yet to be implemented. They need to be given priority and the policy makers need to successfully handle the issues. The positive sentiment will help the policy makers to take the corrective measures, which sometimes may appear harsh, but Indians seem to be in the mood to bite the bullet for a better future. The expectations for the performance are higher than ever before. The new Government cannot afford to fail in its delivery. It cannot even afford to miss out on public perception. If it is successful in its endeavour, the economy will boost up in the next couple of years and equity investors can make great fortune. The volatility is high and the swings are large. The interest rates are high and so are the expectations of returns. Still, it is likely that equities will deliver better returns than most of the other asset classes over the next three years. This asset class is also more attractive due to the tax exemptions available for dividend and long term capital gains made on the shares disinvested on stock markets.

It should be kept in mind that the current valuations of Indian stocks are based on expectations and not on performance. The economy is struggling even today but the new Government is expected to make changes in the policies and get results. The stock markets in India seem to have already discounted the positive news and the valuations are fairly high. Still there is an upward momentum as a lot of stocks are expected to gain due to the improved economy. It is possible that expectations are running faster than the ability of the Government to mend the economy. If the reforms do not happen as fast as expected, there is a possibility of a reaction in the market. The one side momentum of the market is not sustainable over a long period and there has to be some correction. Whether it will come sooner or later and how deep will it be is the question and a matter of speculation. This guess work will be called by a number of names such as research, technical analysis, study of fundamentals etc. All these activities are of predicting the future and therefore they are subject to uncertainty. When the stock valuations are not cheap, investors need to be selective and they should make efforts to select the right stocks and not to get carried away by tips. It is also essential that they should not over commit or over leverage themselves to invest in stocks based on a feel good factor, which has recently developed. A wise investor needs to remain solvent before markets come in line with his rationale. Less savvy investors should invest in equity or equity oriented mutual funds with Systematic Investment Plan. In long-term, such an approach turns out to be superior to impulsive buys.

The economy is giving signals of turning around but the data does not suggest that the turnaround has happened. Inflation seems to be taming but it has not tamed to the desired level; and there is no certainty that it will not bounce back, if the pressure put on it by the monetary policy is let up a bit. The policy interest rates may not come down immediately as advocated by some section of economists. The high fixed deposit rates may continue to remain so for some more time before they start easing. If the interest rates remain stable, the possibility of an appreciation in bond prices becomes limited. Investors can continue their allocations to fixed deposits and bonds as done earlier and there does not appear to be any need to re-align the portfolio of these two asset classes. In the recent years, fixed deposits were one of the best performing asset class due to dullness in equities and properties. Though the preference may get shifted to equity, reduction in investment in the two asset classes may not be desirable at this time, except to a limited extent.

Property prices have dropped in the weaker locations but they continue to remain strong in the markets, wherein the builder lobby is strong. The main supplier of this asset class, namely the builders are not ready to drop the prices. A drop in prices is a natural phenomenon of demand-supply economics but the prices have been maintained steady by the builders. Some of them are defaulting but yet not buckling and reducing the prices. They are citing high costs of land and material as the reason for not reducing the prices. Many of them have sustaining powers due to funds supplied by influential and well connected investors. Though the economy may start improving, the property prices may not become very bullish in the near future. Continuation of high interest regime can also be one of the dampening factors for improvement of demand for properties. Investors need to be cautious while investing in this asset class, especially when the asset is not bought for personal use but is purchased for fair returns and appreciation.

Bullion continues to remain weak and its current prospects look subdued. Gold has dropped quite a bit from its peak over the last few months and silver has performed worse. The revival of the global economies does not augur well for the appreciation of gold or silver prices in the international markets. Further, the strengthening of the Indian currency against the US Dollar can become a dampener as the cost of imported gold may get reduced. With the improvement in balance of payment position of India and strengthening of the Rupee, the Government may reduce the import duty on gold, which was raised last year for curtailing gold imports. This may make landed price of gold cheaper than before. All these circumstances pose a risk for prices of bullion. It may be advisable for the investors to stay away from this asset class and even reduce the allocation to this asset class for better returns and appreciation over the short as well as medium term.

The strengthening of the Indian Rupee in the range of 58-59 Rupees a Dollar is a welcome change. It will reduce the Rupee value of non-flexible Indian imports such as crude oil and coal. However, if the Rupee continues to appreciate on the back of foreign fund inflows, it may cause risk to Indian exports as they will become less competitive. It is likely to be the endeavour of the Government as well as the Reserve Bank of India (RBI) to keep the value of the Rupee stable and not allow it to appreciate quickly. For doing so, the RBI will have to buy Dollars by paying Rupees to the exporters, thereby pumping in more liquidity in the economy. Such sterilisation can cause pressure on inflation. Therefore, the RBI will have to do a tight rope walk to be able to stabilise the currency at the required level. Otherwise it can push up inflation and reduce exports, thereby hampering economic growth.

The investment climate has substantially improved in India and sentiments are quite positive. More and more investment opportunities are likely to emerge, not only for investors, but also for businesses; and wealth creation can improve in the country. It is essential for investors not only to gauge the opportunities but also to firmly seize them. It is the time for retail investors to come back to the market. It is time for the investors for increasing the allocation to equity. India may be entering the golden period of its growth, and those who miss the bus may curse themselves for life.

NOTICE OF THE ANNUAL GENERAL MEETING

Notice is hereby given that the Eighty Seventh Annual General Meeting of THE CHAMBER OF TAX CONSULTANTS will be held at Terrace Hall, West End Hotel, New Marine Lines, Mumbai-400 020 on Friday, 4th July, 2014 at 4.30 p.m. to transact the following business:

AGENDA

1. To consider the Annual Report of the Managing Council for the year 2013-14.
2. To consider and adopt the audited accounts for the year ended 31st March, 2014.
3. To appoint auditors for the year 2014-15 and fix their honorarium.
4. To declare results of the election of President and thirteen Members of the Managing Council.
5. To transact any other business with permission of the Chair.

FOR AND ON BEHALF OF THE MANAGING COUNCIL

Sd/-

Place : Mumbai
Dated : 16th April, 2014

HITESH SHAH
HINESH DOSHI
Hon. Jt. Secretaries

Office: 3, Rewa Chambers, 31, New Marine Lines, Mumbai – 400 020.

Notes:

1. As per the decision taken at 85th Annual General Meeting, Annual Report would be circulated in electronic form only. It would also be available on the Chamber's website **after 9th June, 2014.** Any member desiring physical copy can send written request and get it collected from Chamber's office **after 9th June, 2014**. Alternatively, they can also send written request for sending it by post or courier.
2. If there is **no quorum by 4.30 p.m.**, the meeting will be adjourned for half an hour and the members present at such adjourned meeting shall form the quorum.
3. The members are requested to send their queries, in writing, if any, on the Statements of Accounts and Annual Report for the year 2013-14 to the Hon. Jt. Secretaries **at least four days** before the day of the Annual General Meeting.


CA Hitesh R. Shah & CA Hinesh R. Doshi, *Hon. Jt. Secretaries*

THE CHAMBER NEWS

Congratulations

The President and Managing Council Members of the Chamber, Congratulate Mr. Arun Jaitleyji, Honorary Member of The Chamber of Tax Consultants for being appointed as Finance Minister of India.

Important events and happenings that took place between 9th May, 2014 and 8th June, 2014 are being reported as under.

I. ADMISSION OF NEW MEMBERS

1) The following new members were admitted in the Managing Council Meeting held on 3rd June, 2014.

LIFE MEMBERSHIP

1	Shri Thakore Milin Dilip	CA	Mumbai
2	Shri Ved Parag Shamji (Tr. from Ord. to Life)	CA	Mumbai
3	Shri Shetty Jayprakash Babu	CA	Mumbai
4	Shri Upadhyay Ram Baboo	Advocate	Mumbai
5	Shri Devani Jimit Kishor	CA	Mumbai
6	Shri Mehta Hardik Dipak	CA	Mumbai
7	Shri Desai Yatin Kirtanlal (Tr. from Ord. to Life)	CA	Mumbai
8	Shri Shirsat Rajesh Ramakant	ITP	Mumbai

ORDINARY MEMBERSHIP

1	Shri Radadia Hiren Ravjibhai	CA	Mumbai
2	Miss Sayta Dhruti Jaykumar	CA	Mumbai
3	Shri Sundarrajan Jeychandran J.	CA	Mumbai
4	Shri Barlota Samip Parasmal	CA	Mumbai
5	Shri Surti Navroz Abdulhusein	ITP	Mumbai
6	Shri Agrawal Navin Purshottam	CA	Thane
7	Miss Savla Richa Dhirajlal	CA	Mumbai
8	Shri Erra Srinivas Hari Mohan	FCA, ISA	Kakinada

9	Shri Jogani Mitul Sudhirkumar	CA	Mumbai
10	Shri Khairnar Kaustubh Dattatray	Advocate	Pune
11	Shri Somane Omprakash Kapurchand	CA	Nashik
12	Shri Gupta Jitendra Jagdish	CA	Thane
13	Shri Gazi Munir Abdul Latif	ITP	Mumbai
14	Shri D.I. Suresh Babu	CA	Basavangudi
15	Shri Yadav Avdhesh Siyaram	CA	Ulhasnagar
16	Shri Shah Ishan Nitin	CA	Mumbai
17	Shri Dalal Shaileen Vinod	CA	Mumbai
18	Shri Agarwal Umesh S.	CA	Mumbai
19	Shri Dave Ygnesh Hasmukh	ITP	Thane

STUDENT MEMBERSHIP

1	Shri Parmar Ankit Kirit	B.Com	Mumbai
2	Shri Gupta Raghavindra Vimal	Law Student	Mumbai

ASSOCIATE MEMBERSHIP

1	Bhansali and Shah	Mumbai

II. PAST EVENTS/PROGRAMMES

Sr. No.	*Events*	*Date / Subjects*
1.	**Extra Ordinary General Meeting**	**27th May, 2014** *To Consider adoption of the changes to the Rules & Regulations of the Chamber*

Sr. No.	*Programme Name / Committee/Venue*	*Date / Subjects*	*Chairman / Speakers*
1.	**Study Circle & Study Group Committee**		
A)	***Study Circle on International Taxation Meetings***	**12th May, 2014** US Tax and Reporting	CA Lloyd Pinto
2.	**International Taxation Committee**		
A)	***Transfer Pricing Study Circle Meeting*** Venue: 2nd Floor, Kilachand Hall. IMC.	**16th June, 2014** Methods of Computing ALP under Transfer Pricing	Group Leader : CA Kinjal Shah & CA Kirit Dedhia

III. FUTURE PROGRAMMES

Sr. No.	*Programme Name / Committee/Venue*	*Date / Subjects*	*Chairman / Speakers*
1.	**Direct Taxes Committee**		
	Intensive Study Group on Direct Taxes (For ISG Members only)	**11th June, 2014** Recent Important Judgments under Direct Taxes	Mr. Rahul Hakani, Advocate

Sr. No.	*Programme Name / Committee/Venue*	*Date / Subjects*	*Chairman / Speakers*
2.	**Corporate Members Committee**		
A)	***Study Course on the Companies Act, 2013*** Venue: Conference Room, 20 Down Town, Eros Bldg, Churchgate, Mumbai- 400 020	**12th, 13th, 24th, 27th & 28th June, 2014** Inaugural Session Incorporation Process Private Companies, One Person Companies and Small Companies & Section 8 Companies Action Plan and Transitional provisions under the Act Management, Administration and General Meeting Roles and Responsibilities of Director, Independent Director, Managing Director and Key Managerial Personnel and Board Procedure – Sessions - I & II Accounts & Audit Related Parties Transactions Corporate Social Responsibility Penalties, Prosecution, Class Actions, Suits and Other Penal provisions	 CS Janak Pandya CA Sanjeev Shah CS Mahavir Lunawat CS Rishikesh Vyas CA Mukund M. Chitale, Former President ICAI CS Savithri Parekh CA P. R. Ramesh CA Himanshu Kishnadwala CA Rakesh Agarwal, Vice President, Reliance Industries Ltd. Mr. Sanjay Buch, Solicitor & Advocate
3.	**International Taxation Committee**		
A)	***8th Residential Conference on International Taxation, 2014*** Venue : Novotel Hyderabad Convention Centre	**19th June, 2014 to 22nd June, 2014** *A) Group Discussion*	
		• Case Studies on taxability of EPC contracts and related issues of AOP, Consortium, offshore services and presumptive tax provisions including Sections 44BBB, 44DA & 44BB	Dr. Anita Sumanth, Advocate
		• Structuring of FDI – Interplay with other laws	CA Anup P. Shah

Sr. No.	*Programme Name / Committee/Venue*	*Date / Subjects*	*Chairman / Speakers*
		• Case Studies on International Taxation and Transfer Pricing	CA H. Padamchand Khincha
		B) Brains' Trust	
		• On Practical Issues in International Taxation	CA K. C. Devdas – Chairman Brains' Trustees : Mr. Nitesh Joshi, Advocate & CA Jayesh Sanghvi
		C) Papers for Presentation	
		• Emerging controversies in Taxation of Software, IPRs & E-Commerce (Tax and Non-Tax Issues)	Shri Arvind Datar, Sr. Advocate
		• International Tax structuring under GAAR and other Anti Abuse Provisions including OECD's BEPS action plan – Way Forward	CA Shefali Goradia
		• International Tax structuring under GAAR and other Anti Abuse Provisions including OECD's BEPS action plan – Way Forward	CA Vijay Iyer
B)	***Transfer Pricing Study Circle Meeting (Only for TP Study Circle Members)*** Venue: 2nd Floor, Kilachand Hall. IMC	**16th June, 2014** Methods of Computing ALP under Transfer Pricing ***(This meeting is continuation of earlier meeting held on 23rd April, 2014)***	Group Leader : CA Kinjal Shah & CA Kirit Dedhia
C)	***FEMA Study Circle Meeting***	**Last Week of June, 2014** **The details will be announced in due course**	
4.	**Study Circle & Study Group Committee**		
	Study Group Meeting Venue: 2nd Floor, Babubhai Chinai Committee Room, IMC.	**16th June, 2014** Recent Judgment under Direct Taxes	Group Leader : Mr. Keshav Bhujle, Advocate

Sr. No.	*Programme Name / Committee/Venue*	*Date / Subjects*	*Chairman / Speakers*
5.	***87TH ANNUAL GENERAL MEETING*** West End Hotel, New Marine Lines, Mumbai- 400 020	**4th July, 2014**	

IV. Renewal Notice – 2014-15

The renewal fees for Annual Membership, Subscription of The Chamber's Journal, Study Group and Study Circles meeting and Other Subscription for the financial year 2014-15 was due for payment on 1st April, 2014. **Pl renew you membership to avoid uninterrupted service of the Chamber's Journal.**

The details of the Fees are as under:

		Fees	Service Tax & Cess *	Total
1.	Membership Renewal Fees (for 1 year including Chamber's Journal)	` 1,900/-	` 235/-	` 2,135/-
2.	The Chamber's Journal Subscription (For Life Members)	` 900/-	—	` 900/-
3.	The Chamber's Journal Subscription (For Non-Members)	` 1,800/-	—	` 1,800/-
4.	Associate Membership	` 2,000/-	` 247/-	` 2,247/-
5.	Student Membership	` 250/-	` 31/-	` 281/-
6.	The Chamber's Journal Subscription (For Students)	` 700/-	—	` 700/-
7.	Study Group (Direct Taxes)	` 2,200/-	` 272/-	` 2,472/-
8.	Study Circle (Direct Taxes)	` 1,500/-	` 186/-	` 1,686/-
9.	Study Circle (Indirect Taxes)	` 1,200/-	` 148/-	` 1,348/-
10.	Study Circle (International Tax)	` 1,500/-	` 186/-	` 1,686/-
11.	Study Circle (Allied Laws)	` 1,200/-	` 148/-	` 1,348/-
12.	Self Awareness Series	` 600/-	` 74/-	` 674/-
13.	Intensive Study Group on Direct Tax	` 1,500/-	` 186/-	` 1,686/-
14.	Intensive Study Group on International Taxation	` 2,000/-	` 247/-	` 2,247/-
15.	All Study Circle & Study Group Meetings ` 11,700/- Less : 10% Discount ` 1,170/- (*) (Sr. Nos. 7 to 14)	` 10,530/-	` 1,303/-	` 11,833/-
16.	Study Circle (Sr. Nos. 8 and 11) (Direct Tax & Allied Laws Combined)	` 2,200/-	` 272/-	` 2,472/-

V. Forthcoming Journal by Journal Committee

The Chamber's Journal for the month of July, 2014 will cover topic on ***"Corporate Governance".***

DON'T BE SURPRISED IF PEOPLE CALL YOU A DIRECT TAX GENIUS!

CCH™
a Wolters Kluwer business

DIRECT TAX ONLINE

Presenting a brain bank on **Direct Taxes** that is available at your fingertips. It's a one stop destination for tax researchers.

www.cchtaxonline.com

- Approximately **73,000 plus cases** reported in ITR, CTR, DTR, TAXMAN, TTJ, ITD, SOT and ITR Tribunal with high quality headnotes
- **Most comprehensive Commentary** cross- linked to the cases and integrated with the statutes
- **Case laws** from **1933 onwards**
- **Comprehensive Analysis of important cases with backward and forward linkages** - whether a case has been referred, distinguished, dissented, relied or over ruled
- **Complete and up-to-date** Acts/Rules/ Circulars/ Notification/Orders.
- **Special Leave Petitions**
- **Articles by Experts**
- **Ready Reckoner**: quick access to tax information such as tax rates, due dates etc.
- **Expert comments on controversial issues**
- **Trending Topics**
- **Direct Tax Tracker:** Frequent & Quality updates
- **High quality content** powered with **superior technology** enhances your product usage and search experience

To learn more about Direct Tax Online and for a **FREE TRIAL,** visit **www.cchtaxonline.com** or Contact:

Wolters Kluwer India Pvt Ltd.
10th Floor, Tower C, Building No.10, Phase-II,
DLF Cyber City, Gurgaon-122002, Haryana
Email: **marketing@cchindia.co.in**
Phone: 0124 - 4960937/68

Scan the QR code to visit our website

THE CHAMBER'S JOURNAL

Posted at the Mumbai Patrika Channel
Sorting Office, Mumbai 400 001.
Date of Posting: 15th & 16th June 2014

No. MA/MR/South-365/2013-15
R.N.I. No. MAHENG/2012/47041
Date of Publishing 12th of Every Month

Printed and Published by Shri. Kishor D. Vanjara on behalf of The Chamber of Tax Consultants, 3 Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai - 400 020 and Printed at Finesse Graphics & Prints Pvt. Ltd., 309 Parvati Industrial Premises, Sun Mill Compound, Lower Parel (W), Mumbai - 400 013. Tel: 4036 4600 and published at The Chamber of Tax Consultants, 3, Rewa Chambers, Ground Floor, 31, New Marine Lines, Mumbai - 400 020.