INDIA JURIS

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Safe Harbour Rules notified to reduce Transfer Pricing disputes

On 18th September 2013, Government of India has notified Safe Harbour Rules "SHR" which are expected to reduce transfer pricing disputes and benefit large companies and multinationals. The determination of arms length price under Income Tax Act is subject to these SHR. Safe Harbour Rule, means circumstances in which the Income-tax Authority shall accept the transfer price declared by the Assessee. The Ministry of Finance, India has inserted SHR by way of Rules 10TA to Rule 10TG in the Income-tax Rules, 1962.

Key Takeaways

1. The SHR shall be applicable for 5 assessment years beginning from assessment year 2013-14.

2. An Assessee can opt for the SHR regime for a period of his choice but not exceeding 5 assessment years. This option can be exercised by filing of Form 3CEFA which has been prescribed in the rules.

3. In case of transactions in the nature of routine ITES and ITS activities the earlier ceiling of Rs. 100 crore (Rs.10 million) has been removed. Transactions up to Rs. 500 crore (Rs.50 million) have been provided Safe Harbour margin of 20% and transaction above Rs.500 crore (Rs.50 million) have been provided Safe Harbour margin of 22%. Similarly, the ceiling of Rs. 100 crore (Rs.10 million) provided for transactions in the nature of corporate guarantee has been removed. The Safe Harbour would be available in case of transactions above Rs 100 crore (Rs.10 million) only if the wholly owned subsidiary has been rated to be of adequate to highest safety by a rating agency registered with SEBI. The Safe Harbour margin for such transactions above Rs. 100 crore (Rs.10 million) has been reduced to 1.75% of the amount guaranteed.

4. The definition of Knowledge process outsourcing (KPO) has been rationalized to provide reasonable distinction from routine business process outsourcing activity. The Safe Harbour operating margin has been reduced from 30% to 25%. Further the ceiling in respect of KPO transactions has been removed.

5. The Safe Harbour provisions would be available only if the Assessee satisfies the eligibility conditions provided in the rules and in respect of such international transactions which are eligible for Safe Harbour as provided in the rules.

6. The rules provide for a time bound procedure for determination of the eligibility of the Assessee and the international transactions. Any rejection of the option exercised by the Assessee shall be by way of a reasoned order passed after hearing the Assessee. The Assessee shall have a right to file an objection with the Commissioner against adverse finding regarding the eligibility. The Commissioner shall thereafter decide about the validity of the option exercised by the Assessee.

7. In case the action is not taken by any of the authorities within the following time lines provided in the rules the option exercised by the Assessee shall be treated as valid,:-

    a. the reference by the Assessing Officer (AO) to the Transfer Pricing Officer (TPO) shall be made within a period of two months from the end of the month in which Form No.3CEFA is received by him;

    b. the TPO shall pass an order determining the validity of the option exercised by the Assessee within a period of two months from the end of the month in which reference from AO is received by him;

    c. the Commissioner shall pass an order on the objection received from the Assessee within a period of two months from the end of the month in which the objection has been received by him.

8. Once the option exercise by the Assessee is held to be valid it shall remain so for the period opted unless the Assessee voluntarily opts out of Safe Harbour regime by furnishing a statement to this effect to the Assessing Officer.

9. The Assessee shall be required to submit a statement regarding the quantum of international transaction, its nature and the operating margins or rate of interest or commission for the relevant assessment years covered under the period for which Safe Harbour is option is exercised.

10. The option exercised by the Assessee can be held invalid in an assessment year following the initial assessment year only if there is change in the facts and circumstances relating to the eligibility of the Assessee or of the international transaction. However, such withdrawal shall be done only after providing opportunity of being heard to the Assessee. The Assessee has a right to file his objection with the Commissioner, who shall after hearing the Assessee determine the validity of the option.

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Ministry of Corporate Affairs notifies 98 Sections of the Companies Act, 2013

On 12th September 2013, the Ministry of Corporate Affairs took the first step towards enforcing the new Companies Act, 2013 and notified 98 Sections out of 470 sections of the Companies Act, 2013 and henceforth, these sections have come into effect. The Central Government in exercise of its powers under sub-section (3) of Section 1 of the Companies Act, 2013 has declared the commencement of these sections. The ministry is implementing the new law in phases and the notified sections do not require rules for their implementation. Of these notified sections, sections with respect to National Company Law Tribunal And Appellate Tribunal has been brought into force so that the government may appoint the officials of these bodies and these may start functioning at the earliest. However, what is interesting to note is that Section 465 of the new legislation, which repeals the Companies Act, 1956, has not been notified. Among the notified sections some of the sections, which have invited debate and may have great consequences are as follows:

- **Definition of "Body Corporate" or "Corporation" under Section 2 (11)**
  In the new definition of "Body Corporate" or "Corporation" as compared to the old definition a corporation sole has been excluded. It means that now one person company forms part of the new Act.

- **Definition of "Branch Office" under Section 2 (14)**
  The definition provided under the new Act is much simpler and also, now, it is at the discretion of the company to specify which its branch office is.

- **Definition of "Officer" under Section 2 (59)**
  The new definition is modified to include key management personnel under the term 'Officer'.

- **Definition of "Subsidiary Company" or "Subsidiary" under Section 2 (87)**
  Definition of Subsidiary has been changed to include the companies controlled via preference share capital; whereas, earlier provisions were restricted to the equity share capital. Moreover, the new Act also restricts the end number of subsidiaries which a holding company can have.

- **Refusal of registration and appeal against refusal under Section 58**
  Section 58 of the new Companies Act now clears the ambiguity surrounding the enforcement of private arrangements/contracts containing restrictive transfer conditions (like put option, call options etc.) and makes it possible to enforce such arrangements.

- **Statement to be annexed to notice under Section 102**
  Section 102 requires additional disclosures to be made with respect to special business to be transacted at a general meeting. It is now required to disclose not only the names of the interested parties but also the nature and extent of interest of directors, managers, key managerial personnel and relatives of directors, manager and key managerial personnel in the explanatory statement to be annexed to the notice calling such general meetings.

- **Restrictions on powers of Board under Section 180**
  As compared to the old corresponding section 293 of the Companies Act, 1956, the restrictions laid under section 180 of the Companies Act, 2013 are applicable to all companies including the private companies, thus the privileges which were enjoyed by private companies earlier are taken away.

- **Loan to directors, etc. under Section 185**
  This section expressly prohibits companies from advancing loans/guarantees, etc., whether directly or indirectly, to its directors (including directors of holding company) or entities in which such directors are interested, which was earlier allowed under the Companies Act, 1956, with the prior approval of the Central Government.

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FIIs/QFIs permitted to invest in Government Debt without auction mechanism

SEBI vide circular CIR/IMD/FIIC/15/ 2013 dated September 13, 2013 regarding Government Debt Limit Allocation Mechanism for FIIs/QFIs has permitted FIIs/QFIs to invest in Government Debt without purchasing debt limits till the overall investment reaches 90%. Once this 90% limit is reached, auction mechanism shall be initiated for allocation of the remaining limits, as currently in place for FII investments in Corporate Debt. Presently FIIs/QFIs have to purchase the debt limits through the auction mechanism.

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Liberalization of definition of Infrastructure Sector for ECB purposes

The definition of Infrastructure Sector is liberalized and widened for the purposes of External Commercial Borrowings ("ECB"). The expanded infrastructure sector and sub-sectors for the purpose of ECB include the following:

a. Energy which will include:

i. electricity generation,
ii. electricity transmission,
iii. electricity distribution,
iv. oil pipelines,
v. oil/gas/liquefied natural gas (LNG) storage facility (includes strategic storage of crude oil) and
vi. gas pipelines (includes city gas distribution network);

b. Communication which will include:

i. mobile telephony services / companies providing cellular services,
ii. fixed network telecommunication (includes optic fibre / cable networks which provide broadband / internet) and
iii. telecommunication towers;

c. Transport which will include:

i. railways (railway track, tunnel, viaduct, bridges and includes supporting terminal infrastructure such as loading / unloading terminals, stations and buildings),
ii. roads and bridges,
iii. ports,
iv. inland waterways,
v. airport and
vi. urban public transport (except rolling stock in case of urban road transport);

d. Water and sanitation which will include:

i. water supply pipelines,
ii. solid waste management,
iii. water treatment plants,
iv. sewage projects (sewage collection, treatment and disposal system),
v. irrigation (dams, channels, embankments, etc.) and
vi. storm water drainage system;

e. (i) mining, (ii) exploration and (iii) refining;

f. Social and commercial infrastructure which will include:

i. hospitals (capital stock and includes medical colleges and para medical training institutes),
ii. Hotel Sector which will include hotels with fixed capital investment of Rs. 200 crore and above, convention centres with fixed capital investment of Rs. 300 crore and above and three star or higher category classified hotels located outside cities with population of more than 1 million (fixed capital investment is excluding of land value),

iii. common infrastructure for industrial parks, SEZs, tourism facilities,
iv. fertilizer (capital investment),
v. post harvest storage infrastructure for agriculture and horticulture produce including cold storage,
vi. soil testing laboratories and
vii. cold chain (includes cold room facility for farm level pre-cooling, for preservation or storage or agriculture and allied produce, marine products and meat.

Necessary amendments to the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000 dated May 3, 2000 have been issued vide Notification No. FEMA 281/2013-RB dated July 19, 2013 notified vide G.S.R. No. 627(E) dated September 12, 2013.

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Guidelines on downstream investment by Indian companies

The Guidelines for calculation of total foreign investment in Indian companies, transfer of ownership and control of Indian companies and downstream investment by Indian companies is amended to specify that the downstream investment by an Indian company, which is not owned and/ or controlled by resident entity/ies, into another Indian company, would be in accordance/compliance with the relevant sectoral conditions on entry route, conditionalities and caps, with regard to the sectors in which the latter Indian company is operating.

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Export of Goods and Services - Simplification and Revision of Declaration Form for Exports of Goods/Softwares

In order to simplify the existing form used for declaration of exports of Goods/Softwares, a common form called "Export Declaration Form" (EDF) has been devised to declare all types of export of goods from Non-EDI ports and a common "SOFTEX Form" to declare single as well as bulk software exports. The EDF will replace the existing GR/PP form used for declaration of export of Goods. The procedure relating to the exports of goods through EDI ports will remain the same and SDF form will be applicable as hitherto.

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