

Tax & Corporate News Bulletin

Vol. IV, No. 2, June - July, 2008



From the Editor's Desk...

Vaish Associates added yet another feather in its cap by acting as the exclusive Legal Advisors to Ranbaxy and the Singh family (the Promoters) in the largest ever deal in Indian Pharmaceuticals Industry. Pursuant to the deal, Daiichi Sankyo of Japan will acquire the entire shareholding of the Promoters in Ranbaxy and further seek to acquire the majority of the voting capital of Ranbaxy at a price of Rs.737 per share with the total transaction value expected to be between US\$3.4 to US\$4.6 billion.

On FDI Policy front, the Government, through Press Note 7 of 2008 dated June 16, 2008, has issued a revised and consolidated Policy on FDI. The Reserve Bank of India, as a part of its annual exercise, issued Master Circulars on July 1, 2008, thereby consolidating the regulatory position till that date.

In an important development, there has been news in some quarters that Government is considering to scarp Press Note # 1 (of 2005 series). This should give further fillip to the FDI inflow in the country, as the provisions of Press Note # 1 are considered to be a deterrent to the foreign investors. The scrapping of Press Note # 1 would allow the foreign investors to have an exit route without any insistence of a No Objection Certificate (NOC) from the local partner, which is applicable to all joint ventures set up before 12th January 2005. However, inter-ministerial issues are to be addressed before the Press Note #1 is actually scrapped. Let's keep our fingers crossed.

Yours truly,

Hitender Mehta
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For Private Circulation

INCOME-TAX

Income from assignment of trademarks outside India, taxable in India - AAR

The Authority for Advance Ruling (the 'AAR') in case of *Foster's Australia Ltd. 217 CTR 21* has ruled that income arising on assignment of exclusive and perpetual license for use of trademark in India would be deemed to accrue or arise in India irrespective of the fact that the assignment was made by the foreign owner of the trademark in favour of another foreign company overseas.



In this case, Foster's Australia entered into Indian market, in the year 1997, by granting exclusive license to an Indian company, which was the part of the Foster's group of companies. The license was for an exclusive right to use the trademark within the territory of India. During the year 2006, Foster's Australia revoked that license and entered into another agreement for transfer of all right, title and interest in trademark and brand name in India to another company in UK, through the deed executed in Australia.

The AAR observed that commercial use of marketing intangibles trademark and brand, aided by marketing and advertising efforts, resulted in creation of a valuable intangible asset in India and even if some of these marketing intangibles are used elsewhere, their existence in India cannot be denied.

The AAR ruled that the trademark is a territorial intellectual property and fetched its value by reason of its distinguished identity in market segment unlike intellectual property in the nature of know-how or patent. So the situs of a trademark/ brand name is in a state where its market exists. Therefore, income arising from transfer of such a property situated in India, is deemed to accrue or arise in India and accordingly taxable in India.

The aforesaid decision has far reaching ramifications in as much as the situs of a marketing intellectual property has been held to be in the territory in which it is used/ licensed instead of the place of location of the owner.

The reasoning given in the above case is very similar to the stand taken by the Revenue in Vodafone's case, which is pending adjudication before the Bombay High Court and the outcome of which is much awaited.

Delhi High Court decision on the time limit for TDS verification proceedings

In a major relief to the persons liable to deduct and deposit tax at source (TDS), the Delhi High Court in a recent decision rendered in the case of *CIT v. NHK Japan Broadcasting Corporation (ITA No.*

7603 of 2007), vide order dated April 23, 2008, held that TDS verification proceedings under section 201(1)/(1A) of the [Indian] Income-tax Act, 1961 (the 'Act'), cannot be initiated after the expiry of the period of 4 years from the end of the relevant financial year.

The Revenue has been known to have, in absence of any time limit in the statute, initiated TDS verification proceedings going back even ten or more years, putting the assessee to lot of inconvenience and avoidable hardship. The aforesaid decision, hopefully, would restrain the Revenue from initiating TDS verification proceedings where more than four years from the end of the relevant financial year have expired.

Payments for certification programmes – Not taxable in India



In the case of *KnoWerX Education (India) (P) Ltd. v. DIT: [2008] 301 ITR 207*, M/s KnoWerX Education (India) Private Limited (the 'applicant') had sought ruling on the question whether the examination fee collected by it on behalf of two

professional organizations in USA and remitted to those two organizations is liable to be treated as the 'income' of the said foreign entities liable to tax in India and consequently, whether the applicant was required to deduct tax at source from such payments under section 195 of the Act.

The AAR held that the amount remitted by the applicant to the foreign entities in relation to their certification programmes constituted business income and could be taxed in India only if the foreign entities had permanent establishment (PE) in India. There was no real dispute that the foreign entities did not have any fixed place PE in terms of Article 5(1) or 5(2) of the Indo-US Double Taxation Avoidance Agreement (the 'Treaty'). The issue was whether the applicant could be said to constitute agency PE of the foreign entities under Article 5(4) of the Treaty.

After due examination it was held by the AAR that the applicant did not constitute agency PE of the foreign entities in India and thus, payments for certification programmes made to a non-resident are not taxable in India.

Lower rate of tax of 10% on capital gains available to non-residents, holds AAR

The AAR in the case of *In re. McLeod Russel India Ltd.: [2008] 168 TAXMAN 175*, has re-affirmed the view taken in the case of *In re. Timken France SAS: [2007] 294 ITR 513*, that the benefit of the reduced rates of tax payable on long-term capital gains under the proviso to section 112(1) of the Act is available not only to resident assessee but also to non-resident assessee on the sale of originally acquired shares as well as the bonus shares.

EXCISE AND SERVICE TAX

Provisional Attachment of Property Rules, 2008 under Excise and Service Tax

Central Board of Excise and Customs (CBEC) has notified the rules laying down the procedure for provisional attachment of property belonging to a person on whom a notice has been served under section 11A(1) or section 11D(2) of the Central Excise Act, 1944 or section 73(1) and section 73A (3) of the Finance Act, 1994. Separate Rules have been notified under Excise and Service Tax.

The rules provide that where it is found expedient for the purpose of protecting the revenue, the Central Excise officer shall forward the proposal to attach the property to the Commissioner of Central Excise after due verification in the format annexed to the rules. The Commissioner may cause the service of the notice for provisional attached if he is satisfied that the circumstances demand so, giving such a person the opportunity to make submissions within fifteen days of the service of the notice.

[Source: Circular No. 874/12/2008-C.E. dated June 30, 2008 and Notification No. 30/2008- Service tax dated July 1, 2008]

Exemption from Service tax on supply of goods carriage without transferring right of possession and effective control

CBEC has exempted the taxable service of **supply of goods carriage without transferring right of possession and effective control of such goods carriage** [referred to in section 65 (105) (zzzz)] provided by any person to a goods transport agency ('GTA') for use by the said GTA to provide any service to a customer in relation to transport of goods by road in the said goods carriage [referred to in section 65(105)(zzp)] from the whole of the Service tax leviable thereon.



[Source: Notification No. 29/2008- Service Tax dated June 26, 2008]

Operationalization of Service Tax Dispute Resolution Scheme

CBEC has issued the Dispute Resolution Scheme Rules, 2008 which brings into force the Dispute Resolution Scheme, 2008 as introduced in the Union Budget 2008-09. The Rules prescribe the forms for furnishing the declaration in respect of tax arrears and amount payable under the Scheme. The Scheme comes into effect from July 1, 2008.

[Source: Notification No. 28/2008- ST dated June 4, 2008]

FOREIGN TRADE POLICY/FEMA/ RBI

Consolidation of policy on FDI

The Department of Industrial Policy & Promotion (DIPP), Ministry of Commerce & Industry has issued a revised and consolidated policy on Foreign Direct Investment (FDI) under Press Note 7 of 2008. The Press Note summarizes the FDI policy and regulations applicable in various sectors and activities including all policy revisions issued vide Press Note 5 of 2006, Press Note 2 of 2007, and 3 of 2007 and other policy changes upto March 31, 2008. The Policy is available at www.dipp.nic.in

[Source: Press Note # 7 (2008) dated June 16, 2008]

Master Circulars updated

As an annual practice RBI has on July 1, 2008 notified the revised and updated Master Circulars consolidating the notifications/guidelines/instructions/directives/ issued by on various subjects under respective heads. To read the updated Master Circulars please visit www.rbi.org.in.

Liberalization of ECB Policy

The RBI has modified some aspects of the ECB Policy as indicated below:

- a) At present, borrowers proposing to avail ECB up to USD 20 million for Rupee expenditure for permissible end-uses require prior approval of the Reserve Bank under the Approval Route. It has been decided that, henceforth,
 - i. borrowers in infrastructure sector may avail ECB up to USD 100 million for Rupee expenditure for permissible end-uses under the Approval Route;
 - ii. in the case of other borrowers, the existing limit of USD 20 million for Rupee expenditure for permissible end-uses under the Approval Route has been enhanced to USD 50 million.
- b. The all-in-cost ceilings in respect of ECB are modified as follows:

Average Maturity Period	All-in-Cost ceilings over 6 Months LIBOR*	
	Existing	Revised
Three years and up to five years	150 bps	200 bps
More than five years	250 bps	350 bps

[* for respective currency of credit or applicable benchmark]

The above changes will apply to ECB both under the automatic route and the approval route and will come into force with immediate effect. All other aspects of ECB policy such as USD 500 million limit per company per year under the automatic route, eligible borrower, recognized lender, end-use of foreign currency expenditure for import of capital goods and overseas

investments, average maturity period, prepayment, refinancing of existing ECB and reporting arrangements remain unchanged.

[Source: RBI/2007-08/339 A.P. (DIR Series)
Circular No. 43 dated May 29, 2008]

External Commercial Borrowings (ECB) by Services Sector Liberalization

ECB guidelines have been amended and liberalized by RBI so as to allow entities in the service sector viz. hotels, hospitals and software companies to avail ECB up to USD 100 million, per financial year, for the purpose of import of capital goods under the Approval Route. All other aspects of ECB policy shall remain unchanged. It was also clarified that the existing guidelines on trade credit, allowing companies including those in the services sector, to avail trade credit up to USD 20 million per import transaction, for a period less than 3 years, for import of capital goods, shall continue. This amendment is effective from the date of publication i.e. June 2, 2008.



[Source: Circular No 46/RBI, RBI/2007-08/346,
dated June 2, 2008]

Time Extension for realization and repatriation of export proceeds

In terms of Foreign Exchange Management (Export of Goods and Services) Regulations, 2000 the amount representing the full export value of goods or software exported should be realized and repatriated to India within six months from the date of export.

Upon the representations received from Exporters / Trade bodies to extend the period of realization of export proceeds in view of the external environment, the RBI, announced in the Annual Policy Statement for the Year 2008-09 (para 134) to enhance the present period of realization and repatriation to India from six months to twelve months from the date of export, subject to review after one year. The provisions in regard to period of realization and repatriation to India of the full export value of goods or software exported by a unit situated in Special Economic Zone (SEZ) as well as exports made to warehouses established outside India with the permission of Reserve Bank remain unchanged.

[Source: RBI/2007-08/354 A. P. (DIR Series)
Circular No. 50 dated June 3, 2008]

Overseas direct investment by registered trust/ society

With a view to liberalize the policy on overseas investments, the Registered Trusts and Societies engaged in manufacturing/ educational sector have now been allowed to make investment in the same sector(s) in a Joint Venture or Wholly Owned Subsidiary outside India, with the prior approval of RBI and after satisfying the eligibility criteria laid down for the same.

The eligibility criteria broadly lays down that such a Trust/ Society should be registered, should have been in existence for three years, AD banks should be satisfied that they are KYC compliant, they should not come under the adverse notice of any Regulatory/ Enforcement agency and there should not be any restriction for the proposed investment overseas under the trust deed or the Memorandum of Association and other rules and regulations (as applicable).

[Source: RBI/2007-08/ 387 A. P. (DIR Series)
Circular No. 53 dated June 27, 2008]

Revision in reporting procedure under FDI Scheme



The RBI has vide Circular No. 44 dated May 30, 2008 has made changes in the reporting framework under the Foreign Direct Investment (FDI) Scheme in order to capture the details of FDI in a more comprehensive manner by revising form FC-GPR (Annexure I of the Circular). The major changes are as follows-

- (i) A standard format for reporting of the receipt of the amount of consideration for issue of shares/ convertible debentures has also been prescribed (Annexure II of the Circular).
- (ii) A format for the KYC report on the non-resident investor from the overseas bank remitting the amount required to be submitted along with the form FC-GPR has also been introduced (Annexure III of the Circular). The KYC report should, henceforth, be submitted at the time of reporting the receipt of the amount of consideration from the non-resident investor.

Accordingly, Indian companies are required to report the details of the receipt of the amount of consideration for issue of shares / convertible debentures in Annex II, together with a copy/ies of the FIRC/s evidencing the receipt of the remittance along with the KYC report on the non-resident investor in Annex III, through an AD Category I bank, not later than 30 days from the date of receipt of the amount of consideration. The report would be acknowledged by the Regional Office concerned, which would allot a Unique Identification Number (UIN) for the amount reported. The details of the issue of shares / convertible debentures should, henceforth, be reported in the revised form FC-GPR (Annex I).

- (iii) It is also clarified that the annual report of all investments which is to be filed in Part-B of the revised form FC-GPR, which is hitherto to be submitted by June 30 every year, would now have to be submitted by July 31 every year.

[Source: RBI/2007-08/342A.P. (DIR Series)
Circular No. 44 dated May 30, 2008]

Asset classification norm for infrastructure projects

The RBI revised the asset classification norms in respect of infrastructure projects. As per the revision, if the infrastructure projects were financed by banks after May 28, 2002, the date of completion of the project should be clearly spelt out at the time of financial closure of the project and if the date of commencement of commercial production extended beyond a period of two years after the date of completion of the project, the account would be treated as sub-standard. These instructions would come into force w.e.f. March 31, 2008.



[Source: RBI/ 2007-08/ 316 dated May 8, 2008]

Foreign Companies can't escape Press Note #1 of 2005- Required to obtain NOC from the Indian Partner afresh for same business under new entity

Foreign Investment Promotion Board (FIPB) rejected the USD 15 million investment proposal for setting up a wholly owned subsidiary by Federal Mogul Corp and refused to consider the individual agreement entered between Federal Mogul Corp and its Indian partners Talbros Automotive Components (TACL). FIPB in its ruling stated that foreign firms will not be allowed to by-pass Press Note 1 of 2005 even if they were to have a prior agreement with its Indian Partner allowing the foreign partner to invest directly or indirectly in other ventures in India in the 'same field'. The foreign partner will have to obtain a 'no objection certificate' (NOC) afresh from the Indian partner for undertaking the same business under a new corporate entity.

SEBI/ CORPORATE LAWS

Public Offer and Listing of Securitized Debt Instruments Regulations

SEBI has notified the SEBI (Public Offer and Listing of Securitized Debt Instrument) Regulations, 2008 (the 'SEBI Regulations') which lays down the broad parameters for eligibility of the issuer and the other conditions for listing of securitized debt instruments. The SEBI Regulations shall be applicable to the public offer and listing of securitized debt instruments.

[Source: Notification No. LAD-NRO/GN/2008/12/126567 dated May 26, 2008]

FII investments in Debt Securities

The Government has reviewed the ECB Policy and has increased the cumulative debt investment limits from US \$3.2 billion to US \$5 billion, and US \$1.5 billion to US \$3 billion for FII investments in Government Securities and Corporate Debt, respectively. The enhanced limits shall be allocated among the FIIs on a 'first come

first served' basis, subject to a ceiling of US \$200 million per registered entity.

[Source: Circular No. IMD/FII & C/ 29 /2007 dated June 6, 2008]



In continuation of the said Circular, SEBI has (vide Circular no. IMD/27/2008 dated January 31, 2008) notified the methodology for allocation of debt limit of FII investment, which stated that the limit should be utilised within 15-days from the date of the allocation. It has now been decided to grant a period of upto 5 business days for replacement of the disposed off/ matured debt instrument/ position. The respective custodians shall monitor and provide information of the unutilised limit on an event basis upon expiry of the 5 day period. Any unutilised limit shall stand withdrawn and the same shall be allocated to the next waitlisted entity. It is further clarified that switch by way of sell off and replacement between Government securities and corporate debt would not be allowed due to individual limits applicable for these investments.

[Source: Circular No. IMD/FII&C/30/2008 dated July 4, 2008]

Recession of Circular relating to creation, modification and satisfaction of Charges

During the transition period of switching over from manual filing to e-filing (through MCA-21), an order was passed by the Company Law Board (CLB) on August 3, 2007 authorizing the Central Government to accept documents relating to registration, modification and satisfaction of charges up to a period of 300 days from the date of event by levying additional fee prescribed in Section 611(2) of the Companies Act, 1956 (the 'Act') i.e., not exceeding 10-times the amount of fee specified in Schedule X. Thereupon, the Ministry of Corporate Affairs (MCA) issued General Circular No. 13/ 2007 dated September 27, 2007 and made the above CLB order effective from October 27, 2007.

Now, consequent to the Central Government's application seeking for permission to withdraw the said Circular, the CLB has vide Order dated May 7, 2008 allowed the Central Government to withdraw the same and reinstate the position as it stood prior to October 27, 2007.

The MCA has now issued a fresh General Circular No. 1/2008 dated July 1, 2008, which provides that the documents filed on the portal (www.mca.gov.in), on or after July 6, 2008 for registration/ modification of the charge or for giving of intimation of payment or satisfaction thereof after a period of 60-days or 30-days respectively, shall not be registered by the concerned Registrar until the delay is condoned by the CLB.

[Source: General Circular No: 1 /2008 dated July 1, 2008]

IMPORTANT DATES WITH REGULATOR (S)

COMPLIANCE CHECKLIST

July - August 2008

Sr. No	PARTICULARS	Sections/ Rules Clauses, etc	Acts/Regulations, etc.	Compliance Due Date	To whom to be submitted
A. INCOME TAX					
1	Quarterly statement of TDS for quarter ended 30th June 2008 in Form 24Q , 26Q and 27Q (+Declaration in Form 27A, in case of e-filing)	Section 192/ 193/ 194/ 194E/ 195/ 196A read with Rule 31A / 37A	Income-tax Act, 1961 & Income-tax Rules, 1962	July 15, 2008	Income-tax Authorities
2	Deposit of TDS on payments/ credits to Contractors/ Advertising/ Professional service in July, 2008	Section 194C	Income-tax Act, 1961	August 7, 2008	Income-tax Authorities
3	Deposit of TDS on payment of Commission or brokerage in July, 2008	Section 194H	Income-tax Act, 1961	August 7, 2008	Income-tax Authorities
4	Deposit of TDS on fees for professional or technical services, or royalty in July, 2008	Section 194J	Income-tax Act, 1961	August 7, 2008	Income-tax Authorities
5	Deposit TDS on salaries paid for July 2008	Section 192	Income-tax Act, 1961	August 7, 2008	Income-tax Authorities
B. CENTRAL EXCISE & SERVICE TAX					
6	Pay Service Tax in Challan TR-6 collected during the previous month by persons other than individuals, proprietors and partnership firms (July)	Rule 6	Service Tax Rules, 1994	August 5, 2008	Service Tax Authorities
7	Submission of CENVAT Return (July)	Rule 9(7)	CENVAT Rules, 2002	August 10, 2008	Excise Authorities
C. SEBI & CORPORATE LAWS					
8	Submission of Quarterly Compliance report (April to June)	Clause 49	Listing Agreement	July 15, 2008	Stock Exchange
9	Submission of audited/ un-audited, quarterly financial results	Clause 41	Listing Agreement	July 31, 2008	Stock Exchange
10	Submission of Limited Review Report (in case of un-audited financial results above)	Clause 41	Listing Agreement	August 31, 2008	Stock Exchange
D. FEMA/ RBI					
11	Annual Report of all investments in Form FC-GPR part B	Schedule I, para	Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000	July 31, 2008	Regional Office of RBI

VAISH ACCOLADES

Vaish acts as Legal Advisor to Ranbaxy in the largest ever deal in Indian Pharmaceuticals Industry



On June 11, 2008, Ranbaxy Laboratories Limited ('Ranbaxy'), among the top 10 generic companies in the world and India's largest pharmaceutical company, and Daiichi Sankyo Company Limited ('Daiichi'), one of the largest pharmaceutical companies in Japan, entered into a binding Share Purchase and Share Subscription Agreement (the 'SPSSA').

It was entered into between Daiichi, Ranbaxy and the Singh family, the largest and controlling shareholders of Ranbaxy (the 'Sellers'), pursuant to which Daiichi will acquire the entire shareholding of the Sellers in Ranbaxy and further seek to acquire the majority of the voting capital of Ranbaxy at a price of Rs. 737 per share with the total transaction value expected to be between US\$3.4 to US\$4.6 billion (currency exchange rate: US \$=Rs. 43). On the post closing basis, the transaction would value Ranbaxy at US\$8.5 billion.

Vaish Associates acted as the exclusive Legal Advisors to Ranbaxy and the Singh family in the transaction. Vaish team was led by **Mr. Bomi Daruwala** (Partner).

Strafford Publications Inc., USA - organises Teleconference Program on "Real Estate Investment in India: Mitigating Complex Legal Risks, Seizing New Opportunities"

Hitender Mehta was invited to address a Live 90-Minutes Teleconference Program on "**Real Estate Investment in India - Mitigating Complex Legal Risks, Seizing New Opportunities**" held on June 25, 2008 organized by Strafford Publications Inc., Atlanta, USA. Attorneys, in-house legal counsels and business executives from US were the major participants.

NLU Jodhpur nominates Hitender Mehta on its Advisory Board

Hitender Mehta has been nominated on the Advisory Board of the National Law University, Jodhpur.

ICSI-NIRC seminar on "New Dimensions under Labour Laws and Industrial Relations"

Gunjan Mishra contributed an article titled "Gratuity under the Indian Legal System-A Legal Analysis" for the ICSI-NIRC seminar on "**New Dimensions under Labour Laws and Industrial Relations**" held on June 21, 2008 at New Delhi.

ASSOCHAM International Conclave on Special Economic Zones



Hitender Mehta was invited by ASSOCHAM to address its International Conclave on "**Special Economic Zones: What Will Drive Them?**" held on July 9, 2008 at New Delhi. He spoke on the sub-theme "SEZ Experience Sharing & Operational Issues".

Hitender Mehta & Sowmya Suman contributed an article titled "**Stamp Duty on Special Economic Zones - Issues and Implications**" for ASSOCHAM's International Conclave on SEZs held on July 9, 2008 at New Delhi.

NFCG-ICSI Seminar on "Corporate Compliance Management" at Chandigarh

Hitender Mehta was invited to address the National Seminar on "**Corporate Compliance Management**" organized jointly by National Foundation for Corporate Governance (NFCG) & the Institute of Company Secretaries of India (ICSI) on July 19, 2008 at Chandigarh. His topic was "**Practical Tips for conducting Due Diligence & Experience Sharing**".

Sincerely Yours ...

Thanks for sending the newsletter which serves as a good roundup of the legal developments. The quality of the write-ups is truly top class.

Rajesh Gupta
Associate Director –Taxation
Xerox India Limited

.....

The Newsletter published by your esteemed organization is immensely useful & informative of all updates in the Corporate & Taxation world. Kindly keep it up.

Praveen Sharma
KLJ Group

.....

Your Bulletin is comprehensive in coverage and brief, to the point.....Very useful!!!

R. Sachidanandan
Varroc Group

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