Tax & Corporate News Bulletin

VAISH ASSOCIATES ADVOCATES
Delhi • Mumbai • Gurgaon • Bengaluru
Celebrating 40 years of professional excellence

Vol. VII, No. 1, April-May 2011

From the Editor...

Dear Reader,

The Ministry of Corporate Affairs (MCA) has been in the news for flurry of welcome initiatives recently undertaken. A number of green initiatives have also been undertaken. What was long been awaited for, has become a reality now.

Noteworthy green initiative include allowing participation of shareholders and directors in the meetings through electronic mode, sending notices/ annual reports through email, issue of certificates in e-form by ROCs, etc. Further, it is learnt that the efforts are underway to create a common repository, which will host the financial statements of the companies. Anyone interested to see the financial statement of a company, would be able to download from such common repository. Not only these initiatives would significantly reduce the cost and efforts, but the lesser use of papers would go a long way to contribute to a cleaner environment.

Series of initiatives have been undertaken towards better financial reporting and disclosures. Implementation of IFRS is underway and reporting in XBRL has been mandated.

There have been certain clarifications concerning the Limited Liability Partnerships (LLPs). A Committee of Group of Experts has been constituted by the MCA to examine the simplification of LLP Act, Rules and approach/ methodology for promoting LLPs and matters related thereto.

More importantly, MCA has, through constitution of a Committee, pro-actively undertaken an exercise to identify tax issues arising out of convergence of Companies Act, 1956, IFRS, Direct Taxes Code, and Goods and Services Tax.

The change of guards at the MCA has brought a refreshing change. Let's partner in making a better India!

Yours truly,

Hitender Mehta
hitender@vaishlaw.com

Inside...

For further details, please contact....

Ajay Vohra
ajay@vaishlaw.com

Vinay Vaish
vinay@vaishlaw.com

Bomi F. Daruwala
bomi@vaishlaw.com

INCOME TAX

Obligation of a non-resident company claiming exemption under the Treaty to file tax return in India

The Authority for Advance Rulings ("AAR"), in case of *VNU International BV (AAR 871 of 2010)* has ruled that non-resident companies, claiming exemption from tax in India applying tax treaty provisions, are required to file return of income in India.

In addition, the applicant also sought a ruling in respect of whether the applicant would be required to file a return of income in India if it was found that the capital gains were not taxable in India. The contention of the applicant was that such capital gains were not taxable in India by virtue of Article 13(5) of the India Netherlands Double Tax Avoidance Agreement ("the Treaty" or "India Netherlands DTAA"), which provided that in case, capital gains arising to a resident of Netherlands from sale of shares of an Indian company to a non-resident shall be taxable only in Netherlands. As regards the issue of filing of return of income in India, the applicant relied on the earlier rulings of the AAR in the cases of *Venenburg Group B V (289 ITR 464), Dana Corporation (321 ITR 178)* and *Amiantit Intl Holding Ltd (322 ITR 678),* wherein it was held that section 139(1) of the Income Tax Act, 1961 ("the Act"), which mandates the filing of return of income, is a machinery provision and would not apply in the absence of liability to tax in India.

The AAR accepted the contention of the applicant as regards the capital gains being not liable to tax in India. However, as regards the issue of filing return of income, the AAR ruled as follows:

- As per the third proviso of Section 139(1) of the Act, every company is required to file its return of income, whether it has an income or a loss. The applicant, being a foreign company, is covered within the definition of a company under Section 2(17) of the Act.
- There is no dispute that the income arising from the sale of shares is liable to be tax in India by virtue of Section 5(2) of the Act, although the right to tax the same is vested with Netherlands by virtue of the Treaty. Therefore, once the income is taxable under the Act and is excluded only under the Treaty, it is difficult to accept the contention that no return is to be filed.
- Wherever it is not necessary to file a return of income, the legislature has expressly provided so, for example, Section 115AC of the Act. If power to tax is granted it is difficult to appreciate the argument that when the resulting income is nil, there is no obligation to file return of income.

Comments: There have been some rulings in the past wherein it has been held that if the assessee claims its income as exempt from tax, it cannot, on that ground, not file the return and that the return is required to be filed, so that the Revenue can examine whether the claim of exemption is valid or not. There are specific sections in the Act, e.g., Sections 115A, 115AB, 115AC, 115BBA etc., which provide that a non-resident is not required to file return of income in prescribed circumstances. However, recently, the AAR in case of Venenburg Group and Amiantit Intl Holding Ltd. (*supra*) had ruled that Section 139(1) of the Act is merely a machinery section and would apply only where the transaction entered into by the foreign taxpayer is liable to be tax in India.

The AAR has now ruled that where a foreign company claims Treaty exemption, it is required to file a return of income in India. Though the ruling is binding only on the applicant who sought the ruling, it has persuasive effect.

Foreign companies including liaison offices of foreign companies, claiming exemption from tax in India under the Treaty, would be well advised to take note of the aforesaid ruling and consider filing tax return in India.

Karnataka High Court relies on the Vodafone ruling to uphold the power of the Revenue to lift the corporate veil

In the case of *Richter Holding Ltd. v DIT [WP 7716/2011],* the Karnataka High Court has held that in appropriate cases, corporate veil may be lifted to look into the real nature of transaction for tax purposes.

Comments: The aforesaid decision follows the ruling of the Bombay High Court in the case of the Vodafone on the issue of jurisdiction of the Revenue to examine offshore transaction involving change of control of Indian business. While the Court has not expressed final opinion on the merits of the issue, it made an important observation that the Revenue could lift the

corporate veil to examine the real transaction. The Supreme Court's verdict in the Vodafone's case would certainly be keenly awaited, considering that Revenue has issued notices in several similar cases, which are likely to come up before the Courts in the near future and the foreign investment community would want to have certainty in this regard. It may be noted that the Direct Tax Code Bill contains express provisions relating to taxation of such offshore transactions if certain conditions are fulfilled.

AAR rules on taxability and applicability of transfer pricing provisions to shares transferred for nil consideration

The AAR in A.A.R. Nos. 1006 & 1031 of 2010 has held that the transaction of transfer of shares by a foreign parent of shares held in its Indian subsidiary for a wholly owned subsidiary outside India, for nil consideration, was not taxable in India.

Comments: The AAR, in its ruling, has made some far reaching observations regarding transfer of shares without consideration not resulting in taxable income in the hands of the transferor and even transfer pricing provisions not applying in such a case. The ruling would clear the air in relation to tax treatment of transaction involving transfer of shares under business reorganization. However, AAR has not gone into the question of whether such a transaction can be said to be gift under Section 47(iii) of the Act and therefore specifically exempt from tax. Further, the issue whether provisions of Section 56 of the Act per se would apply in such a transaction was not examined. The aforesaid are important issues which are open and would require consideration in an appropriate case.

Scheme of de-merger not to be rejected on grounds of alleged tax evasion

In the case of Vodafone Essar Ltd., in Company petition no. 334/2009, Hon'ble Delhi High Court, while approving the scheme, held that avoidance of capital gains can be no reason for not sanctioning a scheme which is otherwise lawful or valid and as long as there was no allegation of violation of any provisions of the Companies Act. The High Court observed that the Revenue, in any case, was free to examine all aspects of the de-merger from tax perspective.

Comments: The aforesaid decision of the Delhi High Court is in contrast with the earlier decision of the Gujarat High Court. The Gujarat High Court while examining the same scheme (as in the present case) in the case of one of the transferor companies held that the scheme could not be sanctioned since it was designed to avoid tax. Considering that the Delhi High Court has left the issue of examination of tax aspects of the scheme, open for the Revenue, it cannot be said in view of the High Court's approval, it is not open for the Revenue to go into the issue whether the scheme was designed to avoid tax and, if yes, the same can be ignored. The companies proposing to enter into similar schemes are well advised to consider the tax implications beforehand, to avoid the planning/ calculations going awry in case Revenue were to view the same adversely.

Taxability of loans/ advances made by a company in certain cases

In a batch of matters reported as *CIT vs. Ankitech Private Limited,* the Delhi High Court has held that where loans/ advances are made by company, in which a person holds more than 10% shares, to a concern in which such shareholder is substantially interested (holding 20% or more shares in such concern), the amount of loan advanced can be brought to tax in the hands of the shareholder only and not the concern receiving the loan, in terms of section 2(22)(e) of the Act.

Arguments in the above batch of matters were led by Mr. Ajay Vohra assisted by Ms. Kavita Jha.

Wireline Logging Services: Eligibility for investment allowance u/s 32A and deduction u/s 80-IA of the Income Tax Act, 1961

In a recent decision reported as *CIT v. HLS India Limited,* the Delhi High Court has held that wireline logging services provided by the company amounted to manufacture entitling the company to claim investment allowance under Section 32A on the plant and machinery installed therein and also deduction under Section 80-IA of the Act in respect of profits derived from the eligible undertakings providing such services.

Further equipment owned by the assessee and used below the ground was held entitled to 100% depreciation, otherwise available to machinery used in mineral oil concerns, below the ground.

The matter was argued by Mr. Ajay Vohra assisted by Ms. Kavita Jha.

Transfer Pricing Cases

(Some of the recent transfer pricing cases argued by our Chambers)

Birlasoft India Limited v. DCIT

Delhi Bench of the Tribunal in the case of *Birlasoft India Ltd. v. DCIT (ITA No. 3839/Del/2010)* held that for undertaking benchmarking analysis applying Transactional Net Margin Method (TNMM), the Transfer Pricing Officer (TPO) has no mandate to have recourse to external comparables when internal comparables are available.

Global Logic India Pvt. Ltd. v. ACIT

Delhi Bench of the ITAT in the case of *Global Logic India Pvt. Ltd. v. CIT (ITA No. 6082/Del/2010)* held that if the percentage of related party transaction to total revenue of a comparable is more than 25%, the comparable cannot be considered as un-controlled comparable and the same has to be excluded from the list of comparables finally selected by the TPO, notwithstanding even if this claim was raised for the first time before the Tribunal.

Sapient Corporation Ltd. v. DCIT

Delhi Bench of the Tribunal in the case of *Sapient Corporation Ltd. v. DCIT (ITA No. 5263/Del/2010)* held that if loss making companies were excluded, Zenith Infotech Limited, a predominately software product company , earning abnormally high profit margin should also be removed from the comparables. The fact the assessee has himself included in the list of comparables, initially cannot act as estoppel, particularly in light of the fact that assessing officer has only chosen the companies which are showing profits and has rejected the other companies which showed loss.

CORPORATE LAWS/SEBI

Appointment of LLP as the Auditor of a Company

The Ministry of Corporate Affairs (MCA) has paved the way for the appointment of LLP, as the Auditor of a company.

MCA has notified that LLP, which is a Body Corporate as per the Limited Liability Partnership Act 2008, shall not be treated as Body Corporate for the purpose of Section 226(3)(a) of the Companies Act, 1956. The MCA has, thus, taken LLP out of the purview of the Body Corporate under Section 226(3)(a) of the Companies Act, 1956. As a result, LLP can now be appointed as the Auditor of a company.

MCA has further clarified that for the purpose of notification dated May 23, 2011, the 'LLP of Chartered Accountants' will not be treated as body corporate for the limited purpose of Section 226(3)(a) of the Companies Act, 1956.

(Source: Notification dated May 23, 2011 and General Circular 30A/2011 dated May 26, 2011)

Clarification on applicability of provisions of Sections 108-A to 108-I of the Companies Act, 1956

Sections 108-A to 108-I of the Companies Act, 1956 were inserted in the Companies Act, 1956 through Monopolies and Restrictive Trade Practices (Amendment) Act, 1991. As MRTP Act, 1969 stands repealed, the legal validity of these provisions i.e. Sections 108-A to 108-H of Companies Act, 1956 has been examined by the MCA in consultation with Ministry of Law & Justice and it has been observed that after repeal of the MRTP Act, 1969, the provisions of Sections 108-A to 108-I of the Companies Act, 1956 have become redundant and will have no legal force.

(Source: General Circular No. 30/2011 dated May 23, 2011)

Participation of Shareholders at General Meetings through electronic mode

With an objective to secure larger participation and curbing cost borne by shareholders in attending meetings, the MCA has now allowed participation by shareholders through electronic mode. The company may provide for this facility. Notice must be provided to the shareholders specifying the availability of electronic mode of participation and other necessary information in this regard. Quorum shall have to be physically present at the meeting. MCA has also laid down certain responsibilities for the Company to effectively conduct such meetings.

(Source: MCA General Circular No. 27/2011 dated May 20, 2011)

Participation of Directors in Meetings of Board/ Committee through electronic mode

The MCA has clarified that the Directors of a company may participate in the meetings through electronic mode, i.e., using video conferencing facility. The notice of the meeting must also inform the availability of participation through electronic mode seeking confirmation of Director's preference as to the mode. The Director must attend at least one meeting of the Board/ Committee physically in a financial year. The MCA has laid down a procedure for such participation in addition to the normal procedure.

(Source: MCA General Circular No. 28/2011 dated May 20, 2011)

Marking a Company as 'having Management Dispute' by the Registrar of Companies

In the present electronic MCA-21 system, there is a facility with the Registrar of Companies (ROC) to mark a company "marked as having management dispute" on the basis of complaints received. This marking creates an alert and the documents are not approved and remain in the registry as work-in-process till it is demarked by the ROC. In order to bring uniformity of practices by all ROCs, it is clarified that the ROCs shall use this facility as under: –

i) The Registrar of Companies shall mark a company as having management dispute in only those cases where the court or Company Law Board has directed to maintain the status-quo with reference to any e-forms including status of Directors in the company, or

ii) The Court or Company Law Board has granted any injunction or stay in taking the document on record and Registrar of Companies is a party in such court cases and/or the directions have been issued to the Registrar of Companies.

In other matter, where the Registrar of Companies is not a party and such orders have been passed and has not been served to the Registrar of Companies, it is for the parties to comply to such orders and in case of non-compliances, the law shall take its own course.

(MCA General Circular No. 19/2011, dated May 02, 2011)

Appointment of agency for providing electronic platform for electronic voting under the Companies Act, 1956

The Ministry of Corporate Affairs (MCA) has taken a "Green Initiative in the Corporate Governance" by allowing paperless compliances by the companies after considering Sections 2, 4, 5, and 81 of the Information Technology Act, 2000 for the purpose of legal validity of compliances under Companies Act, 1956 through electronic mode.

Section 192A of the Companies Act, 1956 read with Companies (Passing of the Resolution by Postal Ballot) Rules, 2001 already recognizes voting by electronic mode for postal ballot. Some of the listed companies have already started using electronic platform of certain agencies for providing and supervising the electronic platform for electronic voting.

In order to have secured electronic platform for capturing accurate electronic voting processes, it is clarified that the agency appointed for providing and supervising electronic platform for electronic voting shall be an agency duly approved by the MCA.

It is further clarified that for the above purpose, National Securities Depository Limited and Central Depository Services (India) Ltd are being are being approved by the MCA subject to the condition that they obtain a certificate from Standardization Testing and Quality Certification Directorate, Department of Information Technology, Ministry of Communications & Information Technology, Government of India.

(Source: MCA Circular No.21/2011 dated May 02, 2011)

Service of documents in electronic form

Service of documents in electronic form is now an accepted mode of service under the "Certificate of Posting" as provided for under Section 53 of the Companies Act, 1956. A company in order to be compliant with the provision has to send financial statements through e-mail to members after obtaining their e-mail addresses. The documents shall also be made available on the website with a newspaper advertisement to that effect.

(Source: Circular No. 17-18/2011 dated April 21, 2011)

Professionals to ensure correct e-filing

The MCA has entrusted practicing professionals registered as members of the professional bodies, namely – ICSI, ICAI and ICWAI with the responsibility of certifying documents filed by them with the MCA in electronic mode to ensure the integrity of documents. Professionals are responsible for submitting/ certifying documents (to be signed digitally by them) and system would accept most of these documents online without approval by Registrar of Companies or other officers of the Ministry. Along with the company and its officers they shall also be held responsible and liable to penal action for any fraudulent filing.

(Source: MCA General Circular No. 14/2011 dated April 08, 2011)

Appointment of Director's relative in the place of profit

Appointment for an office or place of profit in a company of a Director's relative which carries a monthly remuneration exceeding ₹ 2,50,000 p.m. shall require approval of the Central Government. Earlier, this limit was ₹ 50,000 p.m.

Further, it is not necessary for independent Directors to constitute the Selection Committee (for such selection and appointment) for an unlisted company. Also, it is not necessary for independent Directors and outside experts to constitute such committee for a private company.

(Source: GSR 303(E) dated April 06, 2011)

Formation of LLPs by practicing CAs/ CWAs/ CSs

MCA has clarified that the word "Partnership" wherever occurring in the Chartered Accountants Act, 1949, the Cost and Works Accountants Act, 1959 and the Company Secretaries Act, 1980 shall *mutatis mutandis* be construed as including those limited liability partnerships where all the partners are natural persons (individuals). The word "partner" shall also be construed accordingly.

With this clarification, the Chartered Accountants Act, 1949, the Cost and Works Accountants Act, 1959 and the Company Secretaries Act, 1980 would not require any amendment in order to allow their members-in-practice to form limited liability partnerships.

(Source: MCA General Circular No. 10/2011 dated April 04, 2011)

Filing of Balance Sheet and Profit & Loss Account in XBRL mode

MCA has mandated the filing of Balance Sheet and Profit & Loss Account of all companies listed in India and companies having paid-up capital of ₹ 5 crore and above or a turnover of ₹ 100 crore or above in eXtensible Business Reporting Language (XBRL) mode, a language for the electronic communication of business which is looked upon as a cost effective, faster, more reliable and more accurate mode of handling data.

(Source: MCA General Circular No. 09/2011 dated March 31, 2011)

Particulars of Employees in the Board Report

The Companies (Particulars of Employees) Rules, 1975 provided for inclusion of names of employees earning remuneration of ₹ 24,00,000 p.a. (for whole time employees) or ₹ 2,00,000 p.m. (for those employed in part) in the Board Report.

The aforesaid remuneration limit has been raised to ₹ 60,00,000 p.a. and (for whole time employees) or ₹ 5,00,000 p.m. (for those employed in part).

Further, the Government companies shall also be required to comply with this requirement.

(Source: GSR 289(E) dated March 31, 2011)

Prosecution of Directors

Penal actions were being initiated against certain directors who were not charged with the responsibility of compliance with various provisions of the Companies Act viz., independent directors, Government nominee directors, etc.

MCA has clarified that the Registrar must take extra caution in examining cases where such directors are being identified as officers-in-default. No such Directors shall be held liable for any act of omission or commission by the company which occurred without his knowledge or without his consent or connivance.

There should be proper application of mind on the part of Registrar of Companies in deciding whether a person to be implicated is an 'officer-in-default' by examining the Annual Return, Form 32 and DIN database available in the Registry.

The Regional Director must be consulted in case of any doubts as to Director or officer's liability.

Cases pending against such Directors must be re-looked keeping in mind the parameters laid down in this Circular.

(Source: MCA General Circular No. 8/2011 dated March 25, 2011)

Adjustment of Differential Pricing Amount at the time of application

Presently, the effect such differential pricing, if any, in a public issue, is being given to the eligible investors only at the stage of allotment of specified securities and not at the time of filing an application for such allotment. This takes away certain benefits from the investors such as lower cash outflow at a price net of

discount, the ability to apply for more shares with the same cash outlay, etc.

In order to address this issue, it has been decided to allow investors eligible for differential pricing in public issues to make payment at a price net of discount, if any, at the time of bidding itself. It is, inter alia, clarified that -

a. Merchant Bankers have to ensure that appropriate disclosures are given in the offer document / application forms to the effect that investors eligible for discount can make payment after adjusting the discount, if any.

b. For the ease of calculation by investors, it is preferable that discount, if any, is stated in absolute rupee terms subject to maximum discount, as per SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009, that can be given at the issue price.

c. Stock Exchanges must ensure that appropriate provisions for discount adjustment are provided in the bidding platform.

d. Whenever the net payment (post discount) is more than ₹ 2 Lacs, the bidding system should be capable of ensuring that such applications are not eligible for discount.

This circular shall be applicable on Red Herring Prospectus/ Prospectus filed with Registrar of Companies on or after June 15, 2011.

([Source: Circular No. CIR/CFD/DIL/2/2011 dated May 16, 2011)

FEMA/ FDI POLICY

Overseas Direct Investment – Liberalisation / Rationalisation

With a view to bring operational flexibility to Indian corporates having overseas investments, the following amendments have been brought about by RBI in relation to overseas direct investment:

(1) Considering the utility of performance guarantees in project executions abroad and the risks attached to such instruments, it has been decided that only 50% of the amount of performance guarantees will be considered, as against 100% of the amount of performance guarantees under the existing provisions, for computing financial commitment of an Indian company in respect of its JV/ WOS abroad, i.e., the limit of 400% of the net worth of the Indian party. Further, time period for completion of the contract may be considered as the validity period of such performance guarantees. However, prior approval of RBI must be taken if the 400% net worth limit is exceeded at the time of remittance of funds abroad on account of invocation of performance guarantees.

(2) Subject to reporting requirements specified by RBI, listed Indian companies with WOS abroad/ 50% stake in overseas JVs are now permitted to write off capital (equity/ preference shares) and other receivables upto 25% of the equity investment in such WOS abroad/ overseas JV under automatic route. Further, unlisted companies are permitted to write off capital and other receivables upto 25% of the equity investment in such WOS abroad/ overseas JV under the approval route.

(3) Under the existing provisions, disinvestment involving "write off" is permitted, inter alia, by listed Indian companies with a net worth of not less than ₹ 100 Crore. In partial modification of the same, it has now been decided to include listed Indian companies with net worth of less than ₹ 100 Crore and investment in an overseas JV/ WOS not exceeding USD 10 million, for disinvestment involving write off under the automatic route.

Currently, Indian companies are permitted to issue corporate guarantees on behalf of their first level step down operating JV/ WOS set up by their JV/ WOS operating as SPV under the automatic route subject to conformance with the prescribed investment limits. It has now been decided that irrespective of whether the direct operating subsidiary is SPV or an operating company, issue of guarantee to the first generation step down operating company is permitted under the automatic route, subject however to the prescribed investment limits and reporting requirement of RBI. Further, guarantees can be issued on behalf of second generation or subsequent level operating subsidiaries under the approval route.

(Source: A.P. (DIR Series) Circular No. 69 RBI/ 2010-11/ 548 dated May 27, 2011)

Pledge of shares for business purposes

Under the extant FEMA regulations, powers have been delegated to the Authorised Dealer Category-I (AD Category-I) banks to convey 'no objection' to the resident eligible borrowers under the extant External Commercial Borrowings (ECB)

guidelines for pledge of shares held by the promoters, in accordance with the Foreign Direct Investment (FDI) policy, in the borrowing company/ domestic associate company of the borrowing company as security for the ECB, subject to certain conditions. Pledge of shares in respect of all other FDI related transactions requires the prior permission of the Reserve Bank.

The extant FEMA regulations have since been reviewed and it has been decided to further liberalise, rationalise and simplify the processes associated with FDI flows to India and reduce the transaction time. Accordingly, it has been decided to delegate powers to the AD Category–I banks to allow pledge of shares of an Indian company held by non-resident investor/s in accordance with the FDI policy in the following cases subject to compliance with the conditions indicated below:

i) Shares of an Indian company held by the non-resident investor can be pledged in favour of an Indian bank in India to secure the credit facilities being extended to the resident investee company for *bona fide* business purposes subject to the following conditions:

   1. in case of invocation of pledge, transfer of shares should be in accordance with the FDI policy in vogue at the time of creation of pledge;
   2. submission of a declaration/ annual certificate from the statutory auditor of the investee company that the loan proceeds will be / have been utilized for the declared purpose;
   3. the Indian company has to follow the relevant SEBI disclosure norms; and
   4. pledge of shares in favour of the lender (bank) would be subject to compliance with the Section 19 of the Banking Regulation Act, 1949.

ii) Shares of the Indian company held by the non-resident investor can be pledged in favour of an overseas bank to secure the credit facilities being extended to the non-resident investor/ non-resident promoter of the Indian company or its overseas group company, subject to the following conditions:

   1. loan is availed of only from an overseas bank;
   2. loan is utilized for genuine business purposes overseas and not for any investments either directly or indirectly in India;
   3. overseas investment should not result in any capital inflow into India;
   4. in case of invocation of pledge, transfer should be in accordance with the FDI policy in vogue at the time of creation of pledge; and
   5. submission of a declaration/ annual certificate from a Chartered Accountant/ Certified Public Accountant of the non-resident borrower that the loan proceeds will be/ have been utilized for the declared purpose.

(Source: A. P. (DIR Series) Circular No. 57 Dated May 02, 2011)

Opening of Escrow Accounts for FDI transactions

Except for certain cases, opening/ maintaining of Escrow accounts for FDI related transactions requires prior approval from the Reserve Bank of India (RBI).

It is observed that the Escrow mechanism facilitates FDI transactions in cases where parties to the share purchase agreement desire to complete the due diligence process before they finalize the agreement for the same and accordingly, there is a time lag between payment of purchase consideration and the receipt of the shares. To provide operational flexibility and ease the procedure for such transactions, it has been decided to permit AD Category–I banks to open and maintain, without prior approval of the RBI, non-interest bearing Escrow accounts in Indian Rupees in India on behalf of residents and/or non-residents, towards payment of share purchase consideration and/ or provide Escrow facilities for keeping securities to facilitate FDI transactions subject to the prescribed terms and conditions.

It has also been decided to permit SEBI authorised Depository Participants, to open and maintain, without prior approval of the RBI, Escrow accounts for securities subject to the prescribed terms and conditions.

In both cases, the Escrow agent shall necessarily be an AD Category-I bank or SEBI authorised Depository Participant (in case of securities' accounts). These facilities will be applicable for both issue of fresh shares to the non-residents as well as transfer of shares from/ to the non-residents.

(Source: A. P. (DIR Series) Circular No. 58 dated May 02, 2011)

FCRA comes into force w.e.f. May 1, 2011

Foreign Contribution Regulation Act, 2010 (FCRA) has been notified to come into force with effect from May 1, 2011. FCR Rules, 2011 have also come into force from May 1, 2011.

Key features of FCRA include the following:

- Concept of 'permanent' registration done away with; A five-year registration is provided so that dormant organisations do not continue. All the existing registered organisations are deemed to be on a five-year validity from now.
- 'Person' has been defined in a broader sense.
- Organisations of political nature cannot receive foreign funds.
- Ceiling on administrative expenses has been prescribed.
- Procedure for suspension and cancellation of registration has been prescribed.
- Statutory role provided for banking sector in regulation.
- Time limits have been provided for accountability of officials.
- To deal with bona fide mistakes of NGOs, provision has been made for 'compounding' of offences.

VAISH ACCOLADES

Ajay Vohra, Managing Partner, was invited to –

- address at IBC Global Conference held on May 23-25, 2011 in Singapore. Mr. Vohra gave presentation on "Use of Double Tax Treaties in India" which included the following:
  - Residency and tie-breaker rule under Tax treaties
  - Choice of jurisdiction looking at: tax laws, privacy, probate and inheritance laws
  - Direct Taxes Code - implications
- address on the subject *"The Legal System in India : A Boon or Bane for Growth?"* at the 15th Wharton India Economic Forum organized on April 22, 2011 by The Wharton School, University of Pennsylvania in Philadelphia, USA.

Hitender Mehta, Partner has been nominated as –

- Chairman of the *Committee on Direct Taxes and Legal Issues* formed by Export Promotion Council of EOUs and SEZs (EPCES) Developers' Panel.
- Member of the *"Group of Experts to examine the simplification of LLP Act, Rules and approach/methodology for promoting Limited Liability Partnerships and matters related thereto"* constituted by the Ministry of Corporate Affairs, Government of India vide office order dated May 9, 2011.
- Member of the *"Committee to identify tax issues arising out of convergence between the Companies Act, 1956, IFRS, DTC and GST and matters related thereto"* formed by the Ministry of Corporate Affairs, Government of India vide office order dated May 9, 2011.

Satwinder Singh, Partner was invited to –

- address on the subject *"Practical Aspects of Changes in the Consolidated FDI Policy"* at the study circle meeting organized by North Delhi Study Group of NIRC of ICSI on April 24, 2011.
- coordinate the national seminar on *"Value Creation through Mergers and Acquisitions"* organised by ASSOCHAM on April 6, 2011 and steer two technical sessions.
- address training session of senior officers of Ministry of Corporate Affairs on the issues relating to *"Winding-up, Role of CLB in Management Disputes and Corporate Restructuring"* organised by the Indian Institute of Corporate Affairs on March 26, 2011.

Welcome Aboard!

Archana Gupta, has recently been inducted in the Transfer Pricing team as 'Principal Associate'. Archana earlier worked with KPMG, PWC and RSM. Prior to joining Vaish, she was heading the Transfer Pricing team at Delhi Office of BDO. She brings with her a rich experience of carrying out complex transfer pricing analysis, including transfer pricing planning, compliance (robust documentation) to audit (representation & appeal).

Vaish advises on Pre-IPO ₹ 50 crore Sabre investment in Super Religare Labs

Mumbai offices of Vaish Associates advised on a pre-IPO sale of a stake in India's largest diagnostics player Super Religare Laboratories to Sabre Partners for ₹ 50 crore ($11m).

Vaish Corporate and Infrastructure Partner Martand Singh along with Senior Associate Yatin Narang led for Super Religare Laboratories which divested 4.16 per cent of its post-investment equity share capital to Sabre Partners.

It was a joint investment by Sabre Capital, Spring Healthcare India Trust and Spring Healthcare (P) Ltd referred collectively as Sabre Partners.

The current transaction follows last month's investment of Avigo PE Investments in Super Religare Laboratories as a part of its pre-IPO private fund raising effort, which too was advised by Vaish Associates.

Vaish advises on SRL Pre-IPO placement of ₹ 100 crore from Avigo PE

Vaish Associates have advised on the ₹ 100 crore ($22.5m) pre-IPO private equity investment by Avigo into Super Religare Laboratories.

Avigo took a 9.27 per cent equity share in the company, which is looking to issue 28 million shares through an IPO while hoping to raise a total of ₹ 160 crore of funds before the IPO through private placements of 8 million shares.

Martand Singh, Partner, represented Super Religare, which is one of India's largest radiology service providers in India, assisted by senior associates Amitjivan Joshi and Yatin Narang.

Vaish advises on PE fund raising for PolicyBazaar.com

Gurgaon office of Vaish Associates advised on the private equity fund raising by ETech Aces Marketing & Consulting from Intel Capital and existing investor Info Edge.

Vaish Associates' Gurgaon office Head and Partner, Hitender Mehta along with Senior Associate Akshay Saxena represented ETech Aces Marketing & Consulting, which owns insurance aggregation portal PolicyBazaar.com.

The legal work involved due diligence, negotiating and finalizing the share purchase agreement and other ancillary agreements and issuing closing opinion on the transaction.

Vaish advises on Continental's Indian tyre purchase

Vaish Associates advised on German tyre manufacturer Continental AG's full buy-out of Modi Tyres. Vaish Associates' Mumbai and Delhi offices led by Partners Bomi Daruwala and Vinay Vaish advised Continental AG's wholly-owned subsidiary on the corporate law and due diligence aspects respectively. Mumbai team consisted of Head of Real Estate Practice Amit Bhandari and Senior Associate Ann M Jose while Vaish's Delhi team had Head of Competition Law Practice M M Sharma, Principal Associate Manish Tully and Senior Associate Gaurav Jaggi.

The legal work involved was extensive due diligence of the seller company and focusing on the critical issues concerning the deal along with structuring, negotiating and finalizing of the share purchase and other ancillary agreements. The deal was complex as the Seller (Modi Rubber Limited) was previously declared to be a sick industrial company and later ceased to be so vide a scheme passed by BIFR. The closing is subject to compliance of conditions precedent.

Continental is already present in India in the automotive components and ancillary business. With the acquisition of Modi Tyres Company Limited, Continental will further strengthen its presence in India. The Continental group had a collaboration with Modi Tyres in India since 1974.

WLG Spring 2011 Conference at Seoul, South Korea

Hitender Mehta and **Sandhya Iyer, Partners** represented the Firm at the World Law Group (WLG) Spring Conference held at Seoul, South Korea from May 12 - 14, 2011.

Overseas Trip to Beijing, China

Vaish Associates took all its professional associates for an offsite to Beijing from May 14 to 17, 2011.

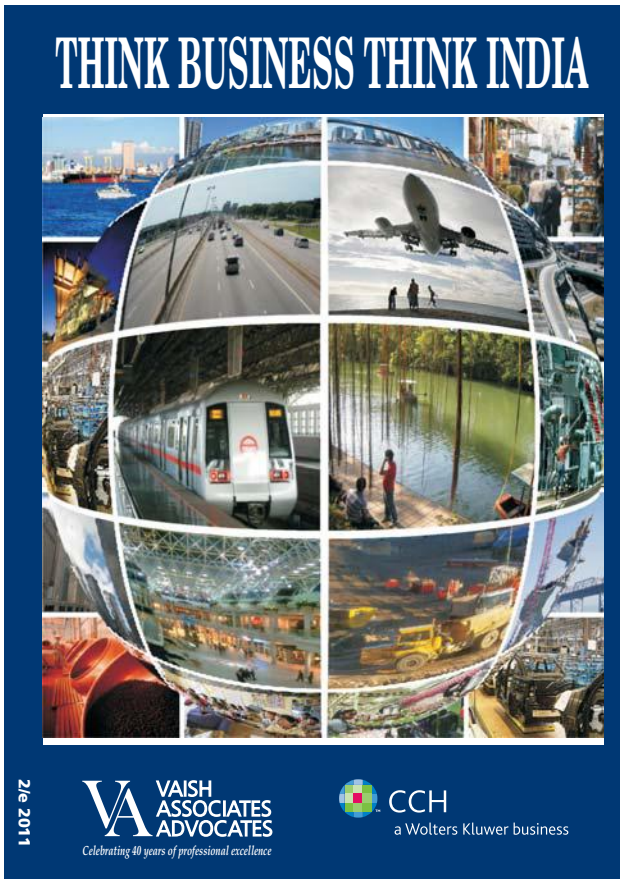
Seen in picture: Vaish Team at Beijing

IMPORTANT DATES WITH REGULATOR (S)

COMPLIANCE CHECKLIST

May-June, 2011

Sr. No	PARTICULARS	Sections/ Rules Clauses, etc	Acts/ Regulations, etc.	Compliance Due Date	To whom to be submitted
A.	**INCOME TAX**				
1	Deposit TDS from Salaries paid for May, 2011	Section 192	Income-tax Act, 1961	June 7, 2011	Income-tax Authorities
2	Deposit TDS from Contractors' Bill, Payment of Commission or Brokerage, Professional/ Technical Services Bills/ Royalty made in May, 2011	Section 194-H Section 194-I Section 194-C Section 194-J	Income-tax Act, 1961	June 7, 2011	Income-tax Authorities
3	Issue certificate in prescribed form for TDS during financial year ending March 31, 2011	Section 203	Income-tax Act, 1961	May 31, 2011 (Salaries)	Income-tax Authorities
B.	**CENTRAL EXCISE & SERVICE TAX**				
4	Pay Service Tax in Form TR-6, collected during May, 2011 by persons other than individuals, proprietors and partnership firms	Rule 6	Service Tax Rules, 1994	June 5, 2011 (June 6, 2011 in case of e-mayments)	Service Tax Authorities
5	Submission of CENVAT Return for May, 2011	Rule 9(7)	CENVAT Credit Rules, 2004	June 10, 2011	Excise Authorities
6	Pay Central Excise duty on the goods removed from the factory or the warehouse during May, 2011	Rule 8	Central Excise Rules, 2002	June 5, 2011	Excise Authorities
C.	**SEBI & CORPORATE LAWS**				
7	Submission of limited review report (in case of unaudited financial results) for the quarter ended March 31, 2011	Clause 41	Listing Agreement	May 31, 2011	Stock Exchange
8	Intimation of board meeting date for taking on record the annual financial results	Clause 41	Listing Agreement	7 days in advance	Stock Exchange
D.	**LABOUR LAWS**				
9	Payment of Employees' Provident Fund (EPF) dues for May, 2011	Para 38	EPF Scheme, 1952	June 15, 2011	Provident Fund Authorities
10	Monthly return of Provident Fund for the previous month (May, 2011) w.r.t. international workers	Para 36	EPF Scheme, 1952	June 15, 2011	Provident Fund Authorities
11	Monthly return of Provident Fund for the previous month (May, 2011) (other than international workers)	Para 38	EPF Scheme, 1952	June 25, 2011	Provident Fund Authorities



Think Business Think India is meant for global as well as Indian investors, legal consultants, corporate advisors and all those, who are exploring India as an investment destination. This is meant to be a concise guide for doing business in India. The second edition of the book has been updated up to April 1, 2011.

This book seeks to address the issues as well as concerns that an investor has / may have before establishing commercial presence in India. These issues may pertain to general understanding of India as a country, the Judiciary, the Legislative and the Executive organs of India's governance structure, the latest Foreign Trade Policy, tax laws, labour and industrial laws, intellectual property laws, and important considerations for expatriates working in India.

The book contains, inter alia, write-ups on the following:

- Advantage India
- Trade and Competition Policy
- Foreign Investment Regulatory Framework
- Labor, Industrial and Environmental Laws
- Fiscal and Commercial Laws
- Intellectual Property Laws
- Information Technology Law
- Establishing commercial presence in India
- Incorporating a Company in India
- Incorporating a Limited Liability Partnership
- Setting up of a legal structure for a non-profit entity in India
- Practical aspects of doing business in India

The book has been edited by **Mr Vinay Vaish** and **Mr Hitender Mehta,** Partners of Vaish Associates.

We may be contacted at:

DELHI
Flat Nos. 5-7
10, Hailey Road
New Delhi - 110001, India
Phone: +91-11-4249 2525
Fax: +91-11-2332 0484
delhi@vaishlaw.com

IP & IT laws Division
903, 9th Floor, Indraprakash Bldg
21, Barakhamba Road
New Delhi - 110001, India
Phone: +91-11-4249 2525
Fax: +91-11-4352 3668
ipitlaws@vaishlaw.com

Indirect Tax Division
1105, 11th Floor
Tolstoy House
Tolstoy Marg
New Delhi - 110001, India
Phone: +91-11-4925 2525
Fax: +91-11-4351 8415

MUMBAI
106, Peninsula Centre
Dr. S. S. Rao Road, Parel
Mumbai - 400012, India
Phone: +91-22-4213 4101
Fax: +91-22-4213 4102
mumbai@vaishlaw.com

GURGAON
803, Tower A, Signature Towers
South City-I, NH-8
Gurgaon - 122001, India
Phone: +91-124-454 1000
Fax: +91-124-454 1010
gurgaon@vaishlaw.com

BENGALURU
Royal Arcade No. 6, 80 Ft. Road
Koramangala Industrial Area
Bengaluru - 560 095, India
Phone: +91-80-4228 8501-02
Fax: +91-80-4228 8503
bangalore@vaishlaw.com

Editor: Hitender Mehta
Editorial Team: Bomi F. Daruwala, Hemant Puthran, P. Sandhya, Rupa Radhakrishnan, Rupesh Jain

www.vaishlaw.com