Tax & Corporate News Bulletin

Vol. VIII, No. 2 • June-July, 2012

VAISH ASSOCIATES ADVOCATES
Delhi • Mumbai • Gurgaon • Bengaluru

INCOME TAX

AAR ruling on circumstances in which a group company can be treated as a permanent establishment

In a recent ruling, in the case of *Aramex International Logistics Pvt. Ltd. (AAR no 1061 of 2011),* the Authority for Advance Rulings held that on the facts of the case, the Indian group company of a foreign entity constituted Permanent Establishment (PE) in India of the latter.

In the aforesaid case, the taxpayer, a Singapore company, was part of Aramex group, which is engaged in the business of door-to-door delivery of express shipments and related transport services. The taxpayer entered into an agreement with an Indian group company for the performance of shipment transport services within and outside India. While the taxpayer was responsible for transportation of packages outside India, the Indian subsidiary was responsible for transportation of packages in India. The agreement was on a non-exclusive basis and none of the parties were entitled to act as agent of the other.

The taxpayer did not have any office, equipment, employee or agent in India and did not carry out operations in India. Therefore, the taxpayer claimed that it did not have a PE in India and no part of the receipts from outbound and inbound consignments was taxable in India.

The AAR, negating the contention of the taxpayer, held the Indian group company of the taxpayer was its PE in India, due to the following reasons:

- Aramex group could not have completed its business of sending goods to India without an Indian presence. This presence in India could be achieved through an independent entity or through a subsidiary. If the entity is an independent and uncontrolled entity, then there is no PE if the requirements in Article 5(2) of the Double Tax Avoidance Treaty are not satisfied. However, if a 100% subsidiary is created for the purpose of attending to the business of the group, the subsidiary must be taken to be a PE of the group in India.
- Since the entire business of the group in India was being carried on through the Indian subsidiary, it could not be said that it was only the business of the Indian subsidiary that was being carried on in India. As the Indian subsidiary has a fixed place of business in India and the business of the applicant is carried on through it, the conditions prescribed in Article 5(1) of the relevant Treaty are satisfied.
- The subsidiary is also a 'dependent agent' PE under Article 5(8) because it habitually

CONTENTS

secures orders in India wholly for the Aramex group and concludes contracts for the group. The exception in Article 5(10) of the Treaty, *viz.,* the fact that a subsidiary carries on business shall not of itself constitute that company a PE of the foreign company does not apply because it is not a case of the subsidiary carrying on "its business" in India but it is a case of the entire group carrying on business in India through the subsidiary. Mere fact that the Indian subsidiary has been described as an independent entity in the agreements does not change the factual position that control was being exercised over it by the principal.

Comments: Every subsidiary or entity is incorporated with to carry on some business. To say that a subsidiary incorporated in one jurisdiction, which renders services to the parent company incorporated in the other jurisdiction, carries on business of the latter, would be to disregard the corporate form of organization. It is the subsidiary, which, in the course of carrying out its business, renders services to the parent for a consideration.

The AAR, while holding that the Indian group company is a PE of the taxpayer, has ignored several important aspects of the matter.

Para 10 of Article 5 of the relevant Treaty provides that mere fact that the parent exercise control over the subsidiary will not make the subsidiary a PE of its parent. The aforesaid provision seeks to highlight that mere exercise of control is not enough to hold a subsidiary to be a PE and certain other factors need to be considered, e.g. whether the subsidiary is acting as a dependent agent of the parent or is a fixed place of business through which the parent is carrying out its business, etc. The AAR ruling proceeds on the assumption that the group company in India was not an independent entity, merely because it was held by the parent. By that token, all 100% subsidiaries would form PE of the foreign parent. As regards agency PE, the AAR has ignored an important fact that neither of the parties were authorized to act as agent of the other nor any of them had the authority to bind the other. The ruling, thus, does not appear to have laid down the correct position in law.

Business income cannot be taxed as 'other income' under the Treaty

The Kolkata Bench of the Income Tax Appellate Tribunal (ITAT) has, in case of *CIT v. Andaman Sea Food Pvt. Ltd. (ITA no. 1412/Kol/2011)* ruled on taxability of business income as 'other income' in the absence of PE of the foreign enterprise in India.

In this case, the taxpayer, an Indian company, paid consultancy fees to a Singapore company on which tax was not deducted at source in India. The assessing officer held that the consultancy fees was assessable as "fees for technical services" under Section 9(1)(vii) of the Act. Before the Tribunal, the Revenue took an alternative plea that even if the impugned payment was not taxable as 'fee for technical services' under Article 12 of the Treaty, and could not be taxed as 'business income' under Article 7 since there was, indisputably, no PE in India of the Singapore company, the impugned payment was taxable under Article 23 of the Treaty. Article 23 of the Treaty provides that items of income not expressly dealt with in the preceding Articles of the Treaty, were to be taxed in accordance with the domestic tax laws of the respective states.

Negating the contention of the Revenue, the ITAT held as follows:

- While the consultancy fees may constitute "fees for technical services" under Section 9(1)(vii) of the Act, it does not fall within the ambit of that term under the India-Singapore DTAA because it does not "make available any technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein". Following the decisions of Delhi High Court in case of *Guy Carpenter* and Karnataka High Court in case of *De Beers,* it had to be held that the impugned payments did not fall within the description of 'fee for technical services under the Treaty.
- Article 23 of the Treaty applies only to "items of income which are not expressly mentioned in the foregoing Articles of this Agreement". It is a residuary clause and does not apply to items of income which can be classified under Articles 6-22 whether or not taxable under these articles. Therefore, income from consultancy services, which cannot be taxed under Article 7, 12 or 14 because the conditions laid down therein are not satisfied, cannot be taxed under Article 23 either.

Comments: In an earlier decision, Delhi Bench of the Tribunal in case of *ACIT v. Paradigm Geophysical Pty. Ltd.: 122 ITD 155,* had held that payment in the nature of "fee for technical services" made to a non-resident was not taxable in India since the relevant Treaty did not contain separate provision for taxation of 'fees for technical

services' and therefore, the fee fell for consideration under Article 7 of the Treaty. Since the non-resident had no PE in India, the payment was held not to be taxable in India. The further question, as to whether such income could be taxed as other income in such a situation, was not raised in that case. The aforesaid decision reinforces the position that that if an item of income is dealt with under the specific Article of a tax treaty, then the residual clause cannot be invoked, irrespective of whether or not, the said item of income fulfills the conditions specified in the relevant Article for taxation in the source country.

AAR rules on principles of taxation of EPC contracts in light of Vodafone decision

In a recent ruling, in case of *Alstom Transport SA (AAR 958 of 2010),* the AAR held the offshore suppliers forming part of Turnkey EPC project to be liable to tax in India applying the decision of the apex court in the case of *Vodafone International Holdings: 341 ITR 1.*

In the case before the AAR, the taxpayer, a foreign company, entered into a consortium agreement with three other companies for the submission of a joint bid in response to the Bangalore Metro Rail Corporation Ltd's (BMRC) tender for, "design, manufacture, supply, installation, testing & commissioning of signaling/ train control and communication systems". The consortium parties were jointly and severally liable to BMRC for the performance of all obligations under the contract. However, the respective obligations of the parties were split up and each party was separately responsible for its own profit/ loss. The bid was accepted by BMRC and a contract between BMRC and the Consortium was entered into. The taxpayer, relying decisions of the Supreme Court in the case of *Ishikawajima–Harima (supra)* and *Hyundai Heavy Industries (supra),* argued before the AAR that the income derived by it from offshore supply of plant and materials was not taxable in India as the title to the goods had passed, and payment was received, outside India. It was also contended that since each consortium member had separate responsibility and was accountable for its own profit/ loss, the fact that the contract with BMRC was joint, did not make the consortium an Association of Persons ("AOP").

The AAR rejected the contentions of the taxpayer and held as follows:

- Though in cases of *Ishikawajima–Harima* and *Hyundai Heavy Industries (supra),* it was held that that a composite contract was capable of being dissected and it was open to the assessee to raise the contention that parts of the contract should be treated separately for the purpose of deciding whether income from the performance of part of the contract arose onshore or offshore and that part of the income attributable to offshore transaction cannot be taxed in India, this is no longer good law in view of the larger bench decision in the case of *Vodafone International Holdings* where it was held that the transaction has to be "looked at" as a whole and not by adopting a dissecting approach. The basic principle in interpretation of a contract is to read it as a whole and to construe all its terms in the context of the object sought to be achieved. Reading parts of the contract as imposing distinct obligations is not the proper way to understand a composite contract;
- Contract entered into with BMRC was a composite one for the design, manufacture, supply, installation, testing & commissioning of signaling system for which a lump sum consideration was paid. Such a contract cannot be split up into separate parts, consisting of independent supply or sale of goods and for installation at the work site, leading to the commissioning and so on. Therefore, income from the contract was held to be taxable in India.
- The taxpayer and other consortium members constituted an Association of persons (AOP) since they came together for meeting the obligations arising out of the tender floated by BMRC. The effect of their coming together with a common object to earn income by performing common obligations cannot be got rid of by the members trying to separate the work among themselves or getting the tenderer to make separate payments. In other words, once the parties came together with a common object to bid for the contract and to earn income from execution of contract, it would not matter as to what was the relationship between the parties inter se.

Comments: The AAR, while holding that the contract has to be viewed as one applying the decision of the Supreme Court in *case of Vodafone (supra),* followed its earlier ruling in case of *Roxar Maximum Reservoir Performance (AAR 977 of 2010).* It is pertinent to note that the principle of apportionment, as explained by the Supreme Court in *Ishikawajima's case (supra),* is laid down in the statute itself (Ref. Explanation 1(a) to Section 9(1)(i) of the Act), wherein it has been provided that in case of a business of which all operations are not carried out in India, the income of the business deemed to accrue or arise in India

shall be only such part of the income as is reasonably attributable to the operations carried out in India. The AAR seems to have ignored the fact that whether the composite contract is split into several contracts or not, and irrespective of whether the 'look at' approach is adopted, the principle of apportionment necessarily has to be applied, as mandated under the statute, in cases where part of operations are carried out outside India by a non-resident. To this extent, the ruling does not appear to lay down the correct position of law.

As regards the issue of AOP, the AAR seems to have been influenced by the fact that the bid was made jointly by consortium members and each of the consortium members was liable to the customer for non-performance under any of the contracts. What the AAR seems to have ignored is the fact that AOP is in the nature of joint venture or joint enterprise carried out by several persons with a common objective. The intent of the parties to carry out a joint venture is inferred from the terms of the contract between them and other relevant factors such as whether there is sharing of profits from the overall work done, whether the scope of work and execution thereof is independent, whether the co-operation between them is merely for better execution of the contract or there is an intent to carry out business in common or there is common management, etc. Merely coming together to bid for a contract, while the parties retain their separate roles and responsibilities under the contracts cannot be said to result in an AOP. The aforesaid ruling of the AAR is contrary to several other earlier rulings of the AAR, wherein the consortium formed to bid for turnkey EPC contract, was not held to give rise to an AOP. The foreign contractors bidding for EPC contracts, as part of consortium, need to be extra cautious and take adequate steps to ensure that AOP is not formed.

CBDT issues draft guidelines on General Anti-Avoidance Rules (GAAR)

The Central Board of Direct Taxes has recently released draft guidelines for implementing GAAR, for public debate. It may be recalled that GAAR were introduced in the Income-tax Act, *vide* Finance Act, 2012, and would come into effect from April 1, 2013. Some of the important features of the draft guidelines are summarized below:

(i) Statutory forms, which shall be used to invoke GAAR, have been prescribed.

(ii) It has been clarified that GAAR will apply to income accruing or arising on or after April 1, 2013.

(iii) GAAR will not be invoked in case of FIIs, where the FIIs do not opt to take benefit of the Double Taxation Avoidance Treaties, and subject themselves to tax under the Income Tax Act.

(iv) GAAR will ordinarily not be invoked where Specific Anti-avoidance rules (SAAR) already exist. However, in exceptional cases, GAAR may be invoked even in respect of transactions where SAAR exist.

(v) GAAR will be invoked only in respect of transactions where tax benefit is in excess of a monetary threshold. The monetary threshold may be prescribed in due course.

(vi) GAAR may be invoked in the following cases (illustrative):

- Sale and leaseback transaction
- Raising of funds through connected parties in certain cases based on source of funds and location of connected parties in low tax jurisdictions, etc.;
- Investment into India through an intermediary holding company located in low tax jurisdiction where the intermediary holding company does not have any other business;
- Transfer of shares held in an Indian joint venture company by intermediary non-resident company to another group company, where the intermediary non-resident company is located in low tax jurisdiction and voting rights etc of shares held by such intermediary company are exercisable by its parent, which is located in another jurisdiction;
- Assignment of loan granted by a foreign bank to its branch outside India, which is resident of a country with which India has a Treaty which provides for no deduction of tax at source on interest;
- Transaction of import of goods into India for the purposes of re-export, where the Indian entity importing the goods exports such goods to its subsidiary located in a low tax jurisdiction outside India, where the day to day management of subsidiary is carried on in India;
- Allotment of shares at preferential price, to a concern related to an employee, who was entitled to receive bonus or salary, in lieu of such bonus or salary.
- Buyback of shares, where the company buying back the shares was distributing dividends regularly till the introduction of dividend distribution tax but has since stopped distributing dividends.

(vii) GAAR may not be invoked in the following cases (illustrative):

- An undertaking set up in a backward area to take benefit of tax holiday provisions, unless the benefit is misused by diverting production or business from taxable unit to the exempt unit;
- A company set up in India by a foreign investor through

an intermediary holding company located in a low tax jurisdiction, as long as the intermediary holding company has its own business, sufficient manpower and capital, etc., and carries on its own business in its country of incorporation;

- Merger of loss making entities into profit making entities and vice-versa;
- Sale vs. lease of asset;
- Raising of loan funds through unconnected parties, where equity could have been raised;
- Intra-group cost sharing arrangements, since they will be covered by transfer pricing regulations.

Comments: While the move to restrict applicability of GAAR to transactions involving tax benefit above a certain monetary threshold is welcome, no such ceiling has been prescribed as yet. In case of FIIs and other investors investing in India through low-tax jurisdictions, the draft guidelines provides for taking away the benefits provided by the relevant Double Taxation Avoidance Treaty. Also, the proposal to retain power to apply GAAR even where SAAR exists has the potential of making SAAR redundant. Overall, the draft guidelines do not provide much-needed certainty in tax regime, which is necessary for creating a positive investment climate. The draft guidelines fall well short of expectations and it remains to be seen whether and to what extent the guidelines are revised to make them more investor friendly/ taxpayer friendly before their implementation.

SERVICE TAX

Exemption on services provided to SEZ authorized operations

The services received either by any unit located in a Special Economic Zone (SEZ) or the developer of SEZ and used for authorized operations is exempted from the whole of the service tax leviable under Section 66B of the Finance Act, 1994 and education cess and secondary and higher education cess leviable thereon, w.e.f. July 1, 2012; subject to prescribed conditions.

The exemption will be provided by way refund of the service tax paid on specified services (i.e. services approved by the Approval Committee of the concerned SEZ). However, in case the specified services are wholly consumed within the SEZ, then the option not of paying service tax *ab initio* may be exercised.

In case, the specified services received by the unit of in or developer of SEZ, are not wholly consumed within SEZ, then maximum refund shall be restricted to the extent of the ratio of export turnover of goods and services multiplied by the service tax paid on services other than wholly consumed services to the total turnover for the given period to which the claim relates.

[Source: Notification no. 40/2012- ST dated. June 20, 2012]

Rebate of the whole of the duty paid on excisable inputs or the whole of the service tax and cess paid on all input services

The services that has been exported (except to Nepal and Bhutan) in terms of Rule 6A of the Services Tax Rules, 1994 shall be granted rebate of the whole of the duty paid on excisable inputs or the whole of the service tax and cess paid to all input services, used in providing the service exported, w.e.f. July 1, 2012, provided:

(i) the duty on the inputs (rebate of which has been claimed) has been paid to the supplier;

(ii) the service tax and cess (rebate of which has been claimed) have been paid on the input services to the provider of service. However, if the person is himself liable to pay for any input services; he should have paid the service tax and cess to the Central Government.

(iii) the total amount of rebate of duty, service tax and cess ('rebate') admissible is not less than ₹ 1000/-.

(iv) no CENVAT credit has been availed of on inputs and input services on which rebate has been claimed.

(v) in case where rebate is claimed, but the duty , service tax and cess has not been paid or the service has not been exported, or CENVAT credit has been availed on inputs and input services; then rebate paid shall be recoverable with interest as per the provisions of Section 73 and 75 of the Finance Act, 1994.

[Source: Notification no. 39/2012- ST dated June 20, 2012]

Exemption to small service providers

The taxable services of aggregate value not exceeding ₹ 10 lacs in any financial year shall be exempt from the whole of the service tax leviable thereon under Section 66B of the Finance Act, 1994, w.e.f. July 1, 2012, subject to following conditions:

(i) the provider of taxable service has the option not to avail the exemption and pay service tax on the taxable services provided by him and such option, once exercised in a financial year, shall not be withdrawn during the remaining part of such financial year;

(ii) the provider of taxable service shall not avail the CENVAT credit of service tax paid on any input services, under Rule 3 or Rule 13 of the CENVAT Credit Rules, 2004 ("said rules"), used for providing the said taxable service, for which exemption is availed;

(iii) the provider of taxable service shall not avail the CENVAT credit

under Rule 3 of the said rules, on capital goods received, during the period in which the service provider avails exemption;

(iv) the provider of taxable service shall avail the CENVAT credit only on such inputs or input services received, on or after the date on which the service provider starts paying service tax, and used for the provision of taxable services for which service tax is payable;

(v) the provider of taxable service who avails this exemption shall be required to pay an amount equivalent to the CENVAT credit taken by him, if any, in respect of such inputs lying in stock or in process on the date on which the exemption is availed;

(vi) the balance of CENVAT credit lying unutilized in the account of the taxable service provider after deducting the amount mentioned above, if any, shall not be utilized in terms of provision under sub-rule (4) of Rule 3 of the said rules and shall lapse on the day exemption is availed;

(vii) where a taxable service provider provides one or more taxable services from one or more premises, the exemption shall apply to the aggregate value of all such taxable services and from all such premises and not separately for each premises or each services;

(viii) the aggregate value of taxable services rendered by a provider of taxable service from one or more premises, does not exceed ₹ 10 lakh in the preceding financial year.

The following shall, however, not be subject to exemption:

(i) taxable services provided by a person under a brand name or trade name, whether registered or not, of another person; or

(ii) such value of taxable services in respect of which service tax shall be paid by such person and in such manner as specified under sub-section (2) of Section 68 of the said Act read with Service Tax Rules, 1994

[Source: Notification no. 33/2012- ST dated June 20, 2012]

Exemption of specified services received by the exporter of the goods

W.e.f July 1, 2012, the service provided to an exporter of goods for transport of the export of goods by goods transport agency in a goods carriage from any container freight station or inland container depot to the port or airport, as the case may be, from where the goods are exported; or service provided to an exporter in relation to transport of the goods by goods transport agency in a goods carriage directly from their place of removal, to an inland container depot, a container freight station, a port or airport, as the case may be, from where the goods are exported; has been exempted from the whole of the service tax leviable thereon under Section 66B of the Finance Act, 1994 ("said Act") provided that the exporter shall have to produce the consignment note, by whatever name called, issued in his name.

[Source: Notification no. 31/2012- ST dated June 20, 2012]

Exemption on property tax paid on immovable property

The taxable service of renting of an immovable property, from the service tax leviable thereon under Section 66B of the Finance Act, 1994, as is in excess of the service tax calculated on a value which is equivalent to the gross amount charged for renting of such immovable property less taxes on such property, namely property tax levied and collected by local bodies, shall be exempted w.e.f. July 1, 2012, subject to prescribed conditions.

[Source: Notification no. 29/2012- ST dated. June 20, 2012]

Place of Provision of Services Rules, 2012

The Central Government has made rules for the purpose of determination of the place of provision of the services called as the Place of Provision of Services Rules, 2012, which shall come into force from July 1, 2012.

The rules made are:

(i) The place of provision of a service shall be the location of the recipient of service. But, if the location of the service receiver is not available in the ordinary course of business, the place of provision shall be the location of the service provider.

(ii) The place of provision of following services shall be the location where the services are actually performed, namely:

(a) The services provided in respect of goods that are required to be made physically available by the recipient of service to the provider of service, or to a person acting on behalf of the provider of service, in order to provide the service, shall be the location where the services are actually performed.

But when such services are provided from a remote location by way of electronic means the place of provision shall be the location where goods are situated at the time of provision of service. However this sub-rule shall not apply where a service provided in respect of goods that are temporarily imported into India for repairs, reconditioning or re-engineering for re-export, subject to conditions as may be specified in this regard.

(b) Services provided to an individual, represented either as the recipient of service or a person acting on behalf of the recipient, who require the physical presence of the receiver or

the person acting on behalf of the receiver, with the provider for the provision of the service.

(iii) The place of provision of services provided directly in relation to an immovable property shall be the place where the immovable property is located or intended to be located.

(iv) The place of provision of services provided by way of admission to, or organization of, a cultural, artistic, sporting, scientific, educational, or entertainment event, or a celebration, conference, fair, exhibition, or similar events, and of services ancillary to such admission, shall be the place where the event is actually held.

(v) Where any of the above mentioned services is provided at more than one location, including a location in the taxable territory, its place of provision shall be the location in the taxable territory where the greatest proportion of the service is provided.

(vi) Place of provision of services where provider and recipient are located in taxable territory shall be the location of the recipient of service.

(vii) The place of provision of following services shall be the location of the service provider:

(a) Services provided by a banking company, or a financial institution, or a non-banking financial company, to account holders;

(b) Online information and database access or retrieval services;

(c) Intermediary services;

(d) Service consisting of hiring of means of transport, up to a period of one month.

(viii) The place of provision of services of transportation of goods, other than by way of mail or courier, shall be the place of destination of the goods.

(ix) The place of provision in respect of a passenger transportation service shall be the place where the passenger embarks on the conveyance for a continuous journey.

(x) Place of provision of services provided on board a conveyance during the course of a passenger transport operation shall be the first scheduled point of departure of that conveyance for the journey.

(xi) The central government is empowered to notify any description of service or circumstances in which the place of provision shall be the place of effective use and enjoyment of a service.

[Source: Notification no. 28/2012- ST dated June 20, 2012]

Exemption to services for the official use of foreign Diplomatic Mission

The taxable services provided by any person, for the official use of a foreign diplomatic mission or consular post in India, or for personal use or for the use of the family members of diplomatic agents or career consular officers posted therein have been exempted from whole of the service tax leviable under Section 66B of the Finance Act, 1994, w.e.f. July 1, 2012 subject to prescribed conditions.

[Source: Notification no. 27/2012- ST dated June 20, 2012]

Mega exemption

The central government has exempted a total of 39 taxable services from the whole of the service tax leviable thereon under Section 66B of the Finance Act, 1994 ("said Act"), w.e.f. July 1, 2012 this notification supersedes 'mega exemption' notification no. 12/2012-ST dated March 17, 2012. Some of the significant changes are:

(i) Renting of immovable property to an educational institution which is exempted from service tax is now exempted;

(ii) Services of a subcontractor have been exempted if provided to a contractor who is providing exempted works contract services;

(iii) The exemption relating to construction and related services provided to a government or local authority has been extended to include such services provided to a governmental authority; the scope of the services exempted has been extended to include commissioning, installation, completion and fitting out;

(iv) Construction and related services provided for civil structures or other original works under the Jawaharlal Nehru Urban Renewal Mission or the Rajiv Awaas Yojna have been exempted;

(v) The exemption relating to construction and related services provided for other than industry/ commerce has been revised, and now also excludes such services provided for buildings used for commerce, industry, or any other business or profession;

(vi) Ropeway, cable car and aerial tramway have been exempted;

(vii) Construction and related services for a structure meant for funeral, burial or cremation of deceased have been exempted;

(viii) Legal services provided to a business entity with a turnover of upto ₹ 10 lacs in the previous financial year have been exempted;

(ix) The scope of exempted charitable activities has been expanded.

[Source: Notification no. 25/2012- ST dated June 20, 2012]

CENTRAL EXCISE

Refund of CENVAT credit

The CBEC has laid down that refund of CENVAT Credit under Rule 5 of the CENVAT Credit Rules, 2004, shall be subjected to the following safeguards, conditions and limitations, namely:-

(a) the manufacturer or provider of output service shall submit not more than one claim of refund under this rule for every quarter. Provided that a person exporting goods and service simultaneously, may submit two refund claims one in respect of goods exported and other in respect of the export of services every quarter.

(b) in this notification, quarter means a period of three consecutive months with the first quarter beginning from April 1 of every year, second quarter from July 1, third quarter from October 1 and fourth quarter from January 1of every year.

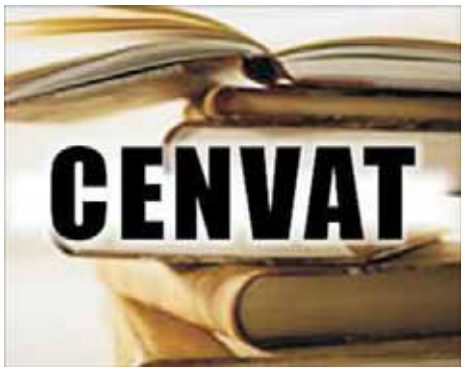
(c) the value of goods cleared for export during the quarter shall be the sum total of all the goods cleared by the exporter for exports during the quarter as per the monthly or quarterly return filed by the claimant.

(d) the total value of goods cleared during the quarter shall be the sum total of value of all goods cleared by the claimant during the quarter as per the monthly or quarterly return filed by the claimant.

(e) in respect of the services, for the purpose of computation of total turnover, the value of export services shall be determined in accordance with clause (D) of sub-rule (1) of rule 5 of the said rules.

(f) for the value of all services other than export during the quarter, the time of provision of services shall be determined as per the provisions of the Point of Taxation Rules, 2011.

(g) the amount of refund claimed shall not be more than the amount lying in balance at the end of quarter for which refund claim is being made or at the time of filing of the refund claim, whichever is less.



(h) the amount that is claimed as refund under Rule 5 shall be debited by the claimant from his CENVAT credit account at the time of making the claim.

(i) In case the amount of refund sanctioned is less than the amount of refund claimed, then the claimant may take back the credit of the difference between the amount claimed and amount sanctioned.

[Source: 1Notification No. 27 /2012-CE (N.T.) dated June 18, 2012]

RBI / FEMA

Buyback/ Prepayment of Foreign Currency Convertible Bonds (FCCBs)

The Reserve Bank of India (RBI) has decided to continue the scheme of buyback of FCCBs subject to certain modifications. Henceforth, RBI will consider proposals from Indian companies for buyback of FCCBs under the *approval route* subject to following conditions:

a) The buyback value of the FCCBs shall be at a minimum discount of 5 % on the accreted value.

b) In case the Indian company is planning to raise a foreign currency borrowing for buyback of the FCCBs, all FEMA rules/ regulations relating to foreign currency borrowing shall be complied with.

c) All other terms and conditions as stipulated in Paragraph 5 of A.P. (DIR Series) Circular no. 39 dated December 8, 2008 will continue to be applicable.

d) This facility shall come into force with immediate effect and the entire process of buyback should be completed by March 31, 2013 after which the scheme discontinues.

[Source: A. P. (DIR Series) Circular No.1 dated July 5, 2012]

Online reporting of Overseas Direct Investment in Form ODI

RBI shall communicate the Unique Identification Number (UIN) in respect of cases under the automatic route to the Authorised Dealer Category - I (AD)/ Indian Party through an auto generated e-mail to the email-id made available by the AD/ Indian Party. Accordingly, with effect from June 1, 2012, the auto generated email, giving the details of UIN allotted to the JV/ WOS under the automatic route, should be treated as confirmation of allotment of UIN, and no separate letter will be issued by the RBI to the Indian party and AD bank confirming the allotment of UIN. Further, it has been specified that the subsequent remittances under the automatic route and remittances under the approval route are to be reported online in Part II of form ODI, only after receipt of the email communication/ confirmation conveying the UIN.

[Source: RBI/2011-2012/585 A. P. (DIR Series) Circular No. 131 dated May 31, 2012]

External Commercial Borrowings (ECB) – Rationalization of Form-83

RBI has rationalized the Form-83 for obtaining Loan Registration Number (LRN) to reflect the liberalization and rationalization measures that have been carried out over a period of time. Accordingly, borrowers desirous of obtaining Loan Registration Number (LRN) with effect from July 1, 2012 may submit Form-83 in the revised format.

[Source: RBI/2011-12/620 A. P. (DIR Series) Circular No. 136 dated June 26, 2012]

CORPORATE LAWS / SEBI

Reduction of Time-line for Transfer of Equity Shares and Prescription of time-line for transfer of Debt Securities

In consultation with Registrars Association of India (RAIN), Stock Exchanges and market participants, SEBI has reduced the time-line for registering the share transfer from 30 days to 15 days. The same time-line shall also be applicable for transfer of debt securities.

[Source: CIR/MIRSD/8 /2012 dated July 5, 2012]

Enhancement of limit of FII Investment in Government debt long term and corporate debt long term infra category

The RBI, *vide* its circular dated June 25, 2012 had decided to enhance the existing limit for investment by SEBI registered Foreign Institutional Investors (FIIs) in Government debt by a further amount of USD 5 billion taking the overall limit for FII investment in Government debt from USD 15 billion to USD 20 billion. Accordingly, in partial amendment to Para 1 of the SEBI circular CIR/IMD/FII&C/18/2010 dated November 26, 2010; the current limit of USD 5 billion for FII investment in Government securities with 5 year residual maturity shall be enhanced to USD 10 billion. Further, the residual maturity for the said USD 10 billion limit will stand reduced from aforesaid 5 years to 3 years.

Further, the conditions for the limit of USD 22 billion for FII investment in corporate debt long term infra category, including the sub-limit of USD 5 billion with one year lock-in/ residual maturity requirement and USD 10 billion for non resident investment in infrastructure debt funds ("IDFs") (which are all within the overall limit of USD 25 billion for investment in infrastructure corporate bonds) have been changed as under:

(i) The lock-in period for investments under this limit has been uniformly reduced to one year; and

(ii) The residual maturity of the instrument at the time of first purchase by an FII/ eligible IDF investor would be at least fifteen months.

[Source: SEBI Circular no. CIR/ IMD/ FII&C/ 15/ 2012 dated June 26, 2012]

Revision in framework for Qualified Foreign Investor (QFI) investment in Equity Shares and Mutual Fund schemes

On a review and in consultation with the Government of India and RBI, SEBI has decided to revise the definition of QFI as under:

QFI shall mean a person who fulfills the following criteria:

- Resident in a country that is a member of Financial Action Task Force (FATF) or a member of a group which is a member of FATF; and
- Resident in a country that is a signatory to IOSCO's MMOU or a signatory of a bilateral MOU with SEBI.

Provided that, the person is not resident in a country listed in the public statements issued by FATF from time to time on-

(i) jurisdictions having a strategic Anti-Money Laundering/ Combating the Financing of Terrorism (AML/ CFT) deficiencies to which counter measures apply,

(ii) jurisdictions that have not made sufficient progress in addressing the deficiencies or have not committed to an action plan developed with the FATF to address the deficiencies.

Provided further that, such person is not resident in India.

Provided further that, such person is not registered with SEBI as Foreign Institutional Investor or Sub-account or Foreign Venture Capital Investor.

[Source: SEBI Circular no. CIR/ IMD/ FII&C/ 13/ 2012 dated June 7, 2012]

Exemption from mandatory cost audit

The exemption from mandatory cost audit has been extended to all units located in the specified zones such as Special Economic Zones (SEZs), Export Processing Zones (EPZs) and Free Trade Zones (FTZs) and also 100% Export Oriented Units (EOUs), subject to the prescribed conditions.

[Source: MCA General Circular no. 11/2012 dated May 25, 2012]

Guidelines for declaring a financial institution as 'Public Financial Institution'

MCA has revised the criteria for declaring a financial institution as a Public Financial Institution ("PFI") under Section 4A of the Act as follows:

(i) A company/ corporation should be established under a special Act or Companies Act, 1956;

(ii) Main business of the company should be industrial/ infrastructural financing;

(iii) The Company must be in existence for at least 3 years and its financial statements should show that its income from industrial/ infrastructural financing activities exceeds 50% of its total income;

(iv) The minimum net-worth of the company should be ₹ 1000 crore;

(v) The company is registered as an Infrastructure Finance Company (IFC) with Reserve Bank of India (RBI) or as a Housing Finance

Company (HFC) with National Housing Bank (NHB);

(vi) No objection certificate from RBI/NHB, in the case of IFC/HFC, with regard to supervisory concerns, if any, must be obtained and enclosed with the application;

(vii) Such IFCs/ HFCs, after being declared as PFIs are required to disclose in their audited financial statements that they are complying with the directions and conditions laid down by MCA.

[Source: MCA General Circular no. 10/2012 dated May 21, 2012]

SEBI (Alternative Investment Funds) Regulation, 2012

SEBI has notified alternative investment funds ("AIF") regulations on May 21, 2012 to regulate unregulated funds with a view to systemic stability, increasing market efficiency, encouraging formation of new capital and consumer protection.

Any fund established or incorporated in India in the form of a trust or a company or a limited liability partnership or a body corporate which, is a privately pooled investment vehicle which collects funds from investors, whether Indian or foreign, for investing it in accordance with a defined investment policy for the benefit of its investors and which is not covered under the SEBI (Mutual Funds) Regulations, 1996, SEBI (Collective Investment Schemes) Regulations, 1999 or any other regulations of the Board to regulate fund management activities shall be considered as an AIF and shall be required to get itself registered with SEBI under the SEBI (AIF) Regulations.

Family trusts, ESOP Trusts, employee welfare trusts or gratuity trusts, holding companies, other special purpose vehicles not established by fund managers, including securitization trusts, regulated under a specific regulatory framework, funds managed by securitization company or reconstruction company and any such pool of funds which is directly regulated by any other regulator in India have been excluded from the purview of SEBI (AIF) Regulations.

SEBI (Venture Capital Fund) Regulations, 1996 ("VCF Regulations") have been repealed by SEBI (AIF) Regulations. However, the existing venture capital funds will continue to be regulated by VCF Regulations till the existing fund or scheme managed by the fund is wound up.

[Source: SEBI Circular No. LAD-NRO/GN/2012-13/04/11262 dated May 21, 2012]

Investor Education and Protection Fund (Uploading of information regarding unpaid and unclaimed amounts lying with companies) Rules, 2012

Every company (including Non-banking Financial Companies and Residuary Non-banking Companies) shall, within 90 days after the date of holding of Annual General Meeting or the date on which such meeting should have been held as per the provisions of Section 166 of the Companies Act, 1956 ("Act") and every year thereafter till completion of the seven year period, identify the unclaimed amounts as referred to in Section 205C (2) of the Act, separately furnish and upload on its own website, the Ministry of Corporate Affairs (MCA) website and any other website as may be specified by the government, a statement or information through e-Form 5 INV, separately for each year containing the prescribed information duly verified and certified by practicing CA/ CS/ CWA or by the statutory auditors of the company.

Provided that, for the financial year ended March 31, 2011, the information shall be filed latest by July 31, 2012.

[Source: MCA notification no. G.S.R. 352(E) dated May 10, 2012]

Filing offer documents under SEBI (ICDR) Regulations, 2009

In partial modification of SEBI Circular CIR/CFD/DIL/9/2010 dated October 13, 2010, the draft offer documents in respect of issues of size up to ₹ 500 crore shall be filed by the Merchant Bankers with the concerned regional office of SEBI under the jurisdiction of which the registered office of the issuer company falls. Where the issue size is more than ₹ 500 crore, the filing of the documents shall be done with the Mumbai regional office.

(Source: SEBI Circular no. CIR/CFD/DIL/5/2012 dated May 3, 2012)

COMPLIANCE CHECKLIST

July - August, 2012

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 July, 2012	Section 192	Income Tax Act, 1961	August 7, 2012	Income Tax Authorities
2	Deposit TDS from Contractors Bill, Payment of Commission or Brokerage, Professional/ Technical Services Bills/ Royalty made in July, 2012.	Section 194-H Section 194-I Section 194-C Section 194-J	Income Tax Act, 1961	August 7, 2012	Income Tax Authorities
B.	**CENTRAL EXCISE & SERVICE TAX**				
3	Pay Service Tax in Form TR-6, collected during July, 2012 (by persons other than individuals, proprietors and partnership firms).	Rule 6	Service Tax Rules, 1994	August 5, 2012 (August 6, 2012 in case of e-payments)	Service Tax Authorities
4	Submission of CENVAT Return for July, 2012	Rule 9(7)	CENVAT Credit Rules, 2004	August 10, 2012	Excise Authorities
5	Pay Central Excise duty on the goods removed from the factory or the warehouse during July, 2012	Rule 8	Central Excise Rules, 2002	August 5, 2012 (August 6, 2012 in case of e-payments)	Excise Authorities
C.	**SEBI & CORPORATE LAWS**				
6	Submission of audited / unaudited quarterly financial results	Clause 41	Listing Agreement	August 14, 2012	Stock Exchange
7	Submission of limited review report (in case of unaudited financial results) for the quarter ended June 30, 2012	Clause 41	Listing Agreement	August 14, 2012	Stock Exchange
D.	**LABOUR LAWS**				
8	Payment of monthly Employees' Provident Fund (EPF) dues.	Para 38	EPF Scheme, 1952	Within 15 days from close of every month	Provident Fund Authorities
9	Monthly return of Provident Fund for the previous month w.r.t. international workers.	Para 36	EPF Scheme, 1952	Within 15 days from close of every month	Provident Fund Authorities
10	Monthly return of Provident Fund for the previous month (other than international workers)	Para 38	EPF Scheme, 1952	Within 25 days from close of every month	Provident Fund Authorities

For further details, please contact...

Ajay Vohra
ajay@vaishlaw.com

Bomi F. Daruwala
bomi@vaishlaw.com

Vinay Vaish
vinay@vaishlaw.com

Editor:
Hitender Mehta
hitender@vaishlaw.com

Editorial Team:
Bomi F. Daruwala
Gautam Chopra
Hemant Puthran
Rupa Radhakrishnan
Rupesh Jain
Shilpi Shivangi

Disclaimer:

While every care has been taken in the preparation of this News Bulletin to ensure its accuracy at the time of publication, Vaish Associates assumes no responsibility for any errors which despite all precautions, may be found therein. Neither this bulletin nor the information contained herein constitutes a contract or will form the basis of a contract. The material contained in this document does not constitute/ substitute professional advice that may be required before acting on any matter. All images, pictures, logos and trade marks appearing in the newsletter are property of their respective owners.

Contact Details :

www.vaishlaw.com

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

1st Floor, Mohan Dev Building
13, Tolstoy Marg
New Delhi - 110001, India
Phone: +91-11-4929 2525
Fax: +91-11-2332 0484
delhi@vaishlaw.com

1105, Tolstoy House
Tolstoy Marg
New Delhi - 110001, India
Phone: +91-11-4925 2525
Fax: +91-11-4351 8415
delhi@vaishlaw.com

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
Unit no. 305, Prestige Meridian-II,
Building No. 30, M. G. Road,
Bengaluru - 560001, India
Tel: +91-80-40903581/ 88 /89
Fax: +91-80-40903584
bangalore@vaishlaw.com