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HIGHLIGHTS IN THIS EDITION

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- Contribution to share capital including premium, being on capital account, is not charge able to tax as income and Transfer Pricing provisions are not attracted

- Approval of Long Term Bonds and rate of interest for the purpose of section 194LC

- Clarification on allowability of deduction under section 10A/10AA on transfer of technical manpower from an existing unit to a new SEZ unit

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Saskia Bonenberger
Executive Director
WTS India

Dear Reader,

Last week two documents from tax authorities came coincidently the same day on my desk. They were quite contradictory. On the one hand the Central Board of Direct Taxes issued internal guidelines towards achieving a non- adversial tax regime. For example the following points were requested :

1. Respect appointments with taxpayer without delays
2. Improving quality of assessments
3. Timely assessment and supervision
4. Address Taxpayer´s grievances
5. Grant refunds based on evidences submitted by taxpayers
6. Restricting scope of scrutiny
7. Issuing summons only in critical cases

On the other hand at the same time I got for a client a notice, asking for detailed information concerning Withholding Tax. A lot of our clients got these requests and to fulfill what is demanded would cost at least 4 days work plus hearing. The issue was just that the deducted Witholding tax (TDS) from the company was not as high as in the previous period. There might be a lot of reasons for this, starting from less employees or less costs. The question is a more general one, how much burden can the government shift to the entrepreneurs and is it not their duty to check this? On the other side, do we really have to answer all the questions in such a detail, as it was asked in the form? It went like a mass notice out, was not especially adjusted to the client´s special case apart from the comparative figures of Withholding Tax payments.

I personally think, one should be careful, as every new information you give can lead to new questions. On the other hand, companies should start to be prepared that more and more scrutiny will be digitally too and so pre-checks in audits and critical analysis of plausibility in a way the tax authorities might do it, could be the best way to really comply with the requirements and to be sure that no surprise hits. In Europe it took the tax authorities more than ten years to scrutinize digitally, but as availability of data and technology is with them, it became more and more part of the scrutiny. Punctuality, quality of assessments were not an issue, but scope of scrutiny with new tools will be broadened, one should be prepared, that it might reach India too.

Yours sincerly

I. Contribution to share capital including premium, being on capital account, is not chargeable to tax as income and Transfer Pricing provisions are not attracted |

Author: Jatinder Singh, New Delhi

In a much awaited recent decision, the Bombay High Court in the case of Vodafone India Services Pvt. Ltd., a wholly owned subsidiary of Vodafone Tele-Services (India) Holdings Limited, a non-resident company, has held that the Transfer Pricing Regulations cannot be applied in relation to contribution towards Share Capital, whether or not including a premium, by the holding company.

In this case, the tax officer had disputed the premium at which the shares were issued by the Indian subsidiary to its holding company, a foreign associated enterprises (''AE''). As per the Assessing Officer and Transfer Pricing Officer, the company should have issued shares at a much higher premium than that on which the same were issued. The shortfall was treated as income chargeable to tax and attracting Transfer Pricing adjustment.

The Assessing Officer also treated the shortfall as deemed loan to A.E. on which notional interest was calculated and charged to tax.The Hon'ble High Court after analysing various provisions of Indian Income-tax Act held that amount received on issue of Share Capital including premium, is on capital account and not of revenue nature, which can be subjected to tax as income.

It also held that the Transfer Pricing provisions will not apply to such transaction, as it does not give rise to any income chargeable to tax, from an admitted international transaction.It accordingly quashed all the orders of Revenue Authority and decided the matter in favour of Vodafone.

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I. Approval of Long Term Bonds and rate of interest for the purpose of section 194LC | *Author: Jatinder Singh, New Delhi*

Under the provisions of Sec 194LC, any interest paid by a specified company to a non-resident in respect of borrowing made in foreign currency from sources outside India between 1 July 2012 and 1 July 2017, under a loan agreement approved by the Central Government, is taxable at a concessional rate of 5%. Further, the concessional rate of withholding tax has been extended by the Finance (No 2) Act, 2014 to borrowing by way of any long term bonds (not limited to a long term infrastructure bond), if the borrowing is made on or after 1st day of October, 2014 but upto 1st July, 2017, subject to the approval of the Central Government.

The Central Board of Direct Taxes (CBDT) vide Circular No.15/2014 dated 17th October 2014 with the approval of Central Government has conveyed the approval of the Central Government for the section 194LC in respect of long term bonds which satisfy the following conditions:

- The bond issue at any time on or after 1st day of October, 2014 but before the 1st day of July, 2017.

- The bond issue by the Indian Company should comply with the relevant ECB regulations.

- The bond issue should have a loan Registration Number issued by the Reserve Bank of India (RBI).

- The term "long term" means that the bond issued should have original maturity term of three years or more.

Further, the Central Government has also approved the interest rate for the purpose of section 194LC in respect of borrowing by way of issue of long term bonds including long term infrastructure bond as any rate of interest which is within

the All-in-cost ceilings specified by the RBI under ECB regulations as is applicable to the borrowing through a long term bond issue having regard to the tenure thereof.It has also been clarified that consequent to the amendment to section 194LC, the approval of the Central Government contained in Circular No. 07/2012 with regard to the pre-amended section, in so far as they apply to borrowings by way of a long agreement, shall be valid for the borrowings made on or before 30th June, 2017 instead of 30th June, 2015 as mentioned in the said Circular.

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II. Clarification on allowability of deduction under section 10A/10AA on transfer of technical manpower from an existing unit to a new SEZ unit | *Author: Jatinder Singh, New Delhi*

Section 10AA of the Income-tax Act, 1961 inter alia provides for deduction in respect of the profits derived by a unit set up in SEZ from export of computer software or from providing any ITES services. The said deduction available to a new SEZ unit is subject to certain conditions including:

- it is not formed by the splitting up, or the reconstruction of a business already in existence;
- it is not formed by the transfer to a new business, of machinery or plant previously used for any purpose.

It was observed that there were cases of transfer/ re-deployment of technical manpower from existing units of an assessee engaged in computer software development to its new SEZ unit, which are being considered by assessing officers as splitting up or reconstruction of the existing business. This results in denial of benefit under section 10AA of the Act. The CBDT vide Circular No. 12/2014 dated July 18, 2014 had earlier clarified that in the case of assessees engaged in the development of software or in providing IT Enabled Services in SEZ units, mere transfer or re-deployment of existing technical manpower from an existing unit to a new SEZ unit in the first year of commencement of business will not be construed as splitting up or reconstruction of an existing business, provided the number of technical manpower so transferred does not exceed 20 per cent of the total technical manpower actually engaged in developing software at any point of time in the given year in the new unit. Representations were received stating that the aforesaid limit of 20% is inadequate and is restrictive in nature. In view of this, the CBDT has re-examined the matter. In supersession of the Circular No. 12/2014 dated 18th July, 2014, it has now been decided that the transfer or re-deployment of technical manpower from existing unit(s) to a new unit located in SEZ, in the first year of commencement of business, shall not be construed as splitting up or reconstruction of an existing business, provided the number of technical manpower so transferred as at the end of the financialyear does not exceed 50 per cent of the total technical manpower actually engaged in development of software or IT enabled products in the new unit. Further, in the alternative, if the assessee (enterprise) is able to demonstrate that the net addition of the new technical manpower in all units of the assessee (enterprise) is at least equal to the number that represents 50% of the total technical manpower of the new SEZ unit during such previous year, deduction under section 10A/10AA wouldnot be denied provided the other prescribed conditions are also satisfied.

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TAX INDIRECT TAX
SERVICE TAX
Recent Notifications

I. Levy of service tax on activities involved in relation to inward remittances from abroad to beneficiaries in India through MTSOs- reg. | *Author: Shashank Goel, New Delhi*

Vide Circular No. 180/06/2014-ST, dated October 14, 2014, it is clarified that there is no service tax per se on the foreign exchange remitted to India from outside for the reason that money does not constitute a service and that conversion charges or fee levied for sending such money would also not be liable to service tax as the person sending money and the company conducting the remittance are both located outside India. However when The foreign money transfer service operator (MTSO), conducting remittances to beneficiaries in India, have appointed Indian Banks/financial entities as their agents in India who provide agency /representation service to such MTSO for furtherance of their service to a beneficiary in India and the agents are paid a commission or fee by the MTSOfor their services, such service provided by an agent, located in India (in taxable territory), to Money Transfer Service Operator (MTSO) is liable to service tax.
[Source: Circular No. 180/06/2014-ST, dated October 14, 2014]

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I. Services to Foreign Principals for marketing in India is an export of service |

Author: Shashank Goel, New Delhi

Microsoft India (Pvt) Ltd had entered into a "Market Development Agreement" with Microsoft Operations Pvt Ltd of Singapore (herein after referred as "MO") under which the former will use its best efforts to further the interest of MO and maximize the markets for Microsoft products in India, and neighboring countries. Microsoft (India) was treating such income as export of service (under Business Auxiliary Service) and therefore did not pay any service tax on the income received.The Department contended that the Services cannot be considered as export of services as the Appellant was performing the Services in India which were used in India for furtherance of business of MO.Accordingly, a Service tax demand of Rs. 256 Crore was confirmed on September 23, 2008. The Hon'ble CESTAT, Delhi on the appeal filed by the Appellant ordered a pre-deposit of Rs. 70 Crores. Against this order of CESTAT on pre-deposit, Microsoft India filed a Writ Petition before the Hon'ble Delhi High Court, which did not find it a fit case for interferenceand the matter went back to the Hon'ble CESTAT, Delhi.In CESTAT, there was a difference of opinion between the two Hon'ble Members and therefore, the matter was referred to a lager bench of CESTAT, Delhi. The Hon'ble CESTAT, by majority view, rejected the contention of the Department and decided the case in favour of the Appellant and held that the marketing operations done by the Appellant in India cannot be said to be at the behest of any Indian customer. As such, the Services were provided by the Appellant to MO to be used by them at Singapore, even for the purpose of the sale of their product in India, have to be held as export of service. The Board Circular No. 111/05/2009-ST dated February 24, 2009 also clarifies that the phrase 'used outside India' appearing in Rule 3(1)(iii), as it existed then, is to be interpreted to mean that the benefit of the services should accrue outside India. It was accordingly held by the Larger Bench that the Services provided by the Appellant were delivered outside India and as such were used there and thus, are covered by the provisions of the Export Rules and are not liable to Service tax.It may be noted that the judgment pertains to period prior to February 27, 2010. Under the 'Negative list' regime, the law has undergone major change. Effective October 1, 2014, the place of provision of services provided by an intermediary in relation to promotion of sale of goods between the actual supplier and the buyer of goods, shall be the location of service provider, which in this case is India and hence may suffer service tax.
[Source: Microsoft Corporation (I) (P) Ltd. Vs. Commissioner of Service Tax, New Delhi (2014-TIOL-1964-CESTAT-DEL)]

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FOREIGN EXCHANGE MANAGEMENT ACT

I. Compounding of Contraventions under Foreign Exchange Management Act ('FEMA'), 1999 | *Author : Rakhi Chanana, New Delhi*

1.1 As part of the ongoing process of delegating powers to the Regional Offices ('ROs') of the Reserve Bank of India ('RBI'),
regarding compounding of contraventions of FEMA, it has been decided by RBI to delegate further powers to all ROs
(except Kochi and Panaji) as under:

S. No.	FEMA Regulation	Brief Description of Contravention
1.	Regulation 10 A (b)(i) read with paragraph 10 of Schedule I to FEMA 20/2000-RB dated May 3, 2000	Delay in submission of form FC-TRS on transfer of shares from Resident to Non-Resident.
2.	Regulation 10 B(2) read with paragraph 10 of Schedule I to FEMA 20/2000-RB dated May 3, 2000	Delay in submission of form FC-TRS on transfer of shares from Non-Resident to Resident.
3.	Regulation 4 of FEMA 20/2000-RB dated May 3, 2000	Taking on record transfer of shares by investee company, in the absence of certified form FC-TRS.

1.2 Further, work of three divisions of Foreign Investment Division (FID) viz. Liaison/Branch/ Project office (LO/ BO/ PO) division, Non Resident Foreign Account Division (NRFAD) and Immovable Property (IP) Division has also been transferred to Foreign Exchange Department ('FED'), CO Cell, RBI, 6, Sansad Marg, New Delhi- 110001 with effect from July 15, 2014. Accordingly, the officers attached to the FED, CO Cell, New Delhi office are now authorised to compound the contraventions as under:

S. No.	FEMA Regulation	Brief Description of Contravention
1.	FEMA 7/2000-RB, dated 3-5-2000	Contraventions relating to acquisition and transfer of immovable property outside India
2.	FEMA 21/2000-RB, dated 3-5-2000	Contraventions relating to acquisition and transfer of immovable property in India
3.	FEMA 22/2000-RB, dated 3-5-2000	Contraventions relating to establishment in India of Branch office, LiaisonOffice or project office
4.	FEMA 5/2000-RB, dated 3-5-2000	Contraventions falling under Foreign Exchange Management (Deposit Regulations , 2000

1.3 This is to be noted that the powers to compound the contraventions as mentioned above have been delegated without any limit on the amount of contravention. Kochi and Panaji ROs can compound the above contraventions for amount of contravention below Rupees one hundred lakh (Rs.1,00,00,000/-). The contraventions of Rupees one hundred lakh (Rs.1,00,00,000/-) or more under the jurisdiction of Panaji and Kochi ROs and all contraventions of FEMA other than those covered by Paras 1.1 and 1.2 above, will continue to be compounded by Cell for Effective Implementation of FEMA (CEFA), FED, 5th floor, Amar Building, Sir P.M. Road, Mumbai – 400 001.
[Source: A.P. (DIR Series) Circular No. 36 dated October 16, 2014]

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IMPORTANT DATES TO REMEMBER

Particulars	Date
Deposit of TDS for the month of November, 2014	December 7, 2014
Deposit of Service Tax for the month of November, 2014	December 5, 2014 (bye-payment – December 6, 2014)

DISCLAIMER