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PRACTITIONER ARTICLES

[1]. INDIA - KEY AMENDMENTS TO THE FINANCE BILL, 2015 - *BY JAIRAJ PURANDARE, CHAIRMAN, JMP ADVISORS PRIVATE LIMITED, MUMBAI*

The Finance Bill, 2015 ("the Bill") was presented in the Lok Sabha (the lower house of the Indian Parliament) on 28 February 2015. It was passed by the Lok Sabha on 30 April 2015 with 41 amendments, including some new proposals. The Bill was passed by the Rajya Sabha (the upper house of the Indian Parliament) on 7 May 2015 and now awaits the assent of the President of India for the Bill to come into force as a law.

Some key highlights of the amendments to the Finance Bill, 2015 are discussed in this article.

Provisions to combat black money

Amendments are proposed to the Foreign Exchange Management Act, 1999 ("FEMA").

It is proposed to insert sub-s (1A) in s 13 of the FEMA to provide that if a person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, in contravention of the provisions of the FEMA, a penalty of up to 3 times the amount involved in such contravention shall be levied.

It is proposed to insert sub-s (1B) in s 13 to provide that during a proceeding under s 13(1A), if the adjudicating authority deems fit, he may, after recording the reasons in writing, recommend for the initiation of prosecution. If the Director of Enforcement is satisfied, he may after recording the reasons in writing, direct prosecution by filing a complaint against the accused, by an officer not below the rank of Assistant Director.

It is proposed to insert sub-s (1C) in s 13 to provide that, in case the person against whom the above prosecution is initiated is found guilty of having acquired any foreign exchange, foreign security or immovable property, situated outside India of aggregate value exceeding the value as prescribed, then in addition to the penalty imposed as above, the person will be punished with imprisonment which may extend up to 5 years and with a fine.

It is proposed to insert sub-s (1D) in s 13 to provide that no court shall take cognizance of an offence except on a complaint in writing by an officer not below the rank of Assistant Director.

Under new s 37A of the FEMA, it is proposed that the order of the competent authority confirming seizure of equivalent asset in India shall continue till the disposal of the adjudication proceedings. However, if at any stage the aggrieved person discloses the fact of such foreign exchange, foreign security or immovable property and brings back the same into India, then the same shall be taken into account on receipt of an application from the aggrieved person and after providing an opportunity of hearing to the person. The representatives of the Director of Enforcement shall then pass an order as they deem fit, including setting aside of such seizure.

Direct taxes amendments

Most direct tax proposals in the amendments to the Bill are effective from FY 2015-16 unless otherwise specifically stated.

Definition of income widened

It is now proposed to expand the definition of income by inserting a new clause (xviii) in s 2(24) of the Income-tax Act, 1961 ("the Act"), to include any assistance in the form of a subsidy, grant, cash incentive, duty drawback, waiver, concession or reimbursement by the Central Government or a State Government or any authority or body or agency in cash or kind. However, if the same is taken into account in determining cost of an asset, then the said amount is to be excluded from "income".

Provisions relating to residential status

It was proposed to amend s 6 of the Act to provide that a foreign company would be considered as a tax resident in India if its place of effective management was in India at any time in that year. It is now proposed to delete the words "at any time", thereby easing the norms prescribed for Place Of Effective Management ("POEM") in this regard.

Incentives to fund managers of offshore funds

In order to encourage fund management activities in India, a specific regime was proposed under s 9A of the Act.

This regime provides that, in case of an eligible investment, the fund management activity carried out through an eligible fund manager on Indian soil acting on behalf of such fund shall not constitute a business connection in India, subject to specified conditions.

It is now proposed that, of the specified conditions, the following conditions will *not be applicable* to an investment fund set up by the Government or the Central Bank of a foreign state or a Sovereign fund, or such other fund as the Central Government may, subject to conditions, if any, by notification in the Official gazette, specify in this behalf:

- The fund has a minimum of 25 members who are, directly or indirectly, not connected persons.
- Any member of the fund along with connected persons shall not have any participation interest, directly or indirectly, in the fund exceeding 10%.
- The aggregate participation interest, directly or indirectly, of 10 or less members along with their connected persons in the fund, shall be less than 50%.

Minimum Alternate Tax ("MAT")

It was proposed to exclude Foreign Institutional Investors ("FIIs") from the levy of MAT prospectively in respect of income in the nature of capital gains arising on transactions in securities [other than short term capital gains arising out of transactions on which Securities Transaction Tax ("STT") was not paid]. This amendment raised concerns on the applicability of MAT provisions to other incomes of FIIs and certain incomes of foreign companies and could have acted as a deterrent to foreign investment in India.

It is now proposed to extend the relief from MAT to FIIs as well as foreign companies which do not have any business presence in India in respect of income in the nature of capital gains on transactions in securities, interest, royalty or fees for technical services.

Similarly, the current proposals relating to taxation of capital gains extended to the sponsor of Business Trusts led to uncertainty regarding the applicability of MAT provisions. It is now proposed to exclude the following items in the computation of book profits:

- Notional gain or loss arising on transfer of shares of a Special Purpose Vehicle ("SPV") to a Business Trust in exchange of units of the Business Trust.
- Notional gains or losses resulting from any change in the carrying amount of the units of the Business Trust.

However, the gain or loss arising on the transfer of such units of the business trust (received in exchange of the shares of the SPV), based on the cost of shares exchanged or the carrying amount of the shares at the time of exchange, where such shares are carried at a value other than the cost through profit or loss account, is to be taken into consideration for the computation of book profits.

Period of holding of units in a consolidating scheme

It is now proposed to insert sub-clause (hd) to s 2(42A) of the Act to provide that in case of transfer of units in a consolidating scheme of a mutual fund, the period for which the units in the consolidating scheme were held by the taxpayer is also to be included.

Global Depository Receipt ("GDR") norms

Sub-clause (he) is proposed to be inserted in s 2(42A) of the Act to provide that in the case of redemption of GDRs, the period of holding of shares will be reckoned from the date on which such request for redemption is made.

It is also proposed to insert a new sub-s (2ABB) in s 49 of the Act, to provide that in case of shares acquired by a non-resident on redemption of GDRs, the cost of acquisition of the shares shall be the price of the shares prevailing on any recognised stock exchange on the date on which a request for such redemption was made.

Tax reliefs and incentives

Interest on borrowed capital

Section 36(1)(iii) of the Act provides for deduction of the amount of interest on capital borrowed. As per the proviso to s 36(1)(iii), no deduction is allowed for interest pertaining to the period from the date on which the capital was borrowed till the date on which the asset was first put to use, in case of capital borrowed for acquisition of an asset for the extension of existing business or profession.

It is now proposed to amend the proviso to s 36(1)(iii) to provide that interest paid on capital borrowed for acquisition of an asset, for the period beginning from the date on which the capital is borrowed till the date on which the asset is first put to use will not be allowed as deduction, irrespective of whether the capital is borrowed for the acquisition of an asset for extension of an existing business or not.

Write off of bad debts

Bad debts of a business are allowed as a deduction under s 36(1)(vii) of the Act in the year in which they are written off in the books of accounts, subject to the condition that the amount of bad debts has been considered as an income in the books of accounts. However, due to the introduction of Income Computation and Disclosure Standards ("ICDS"), an amount may be offered to tax without being recorded in the books of account. In this case, no deduction would be allowable as the said debts have not been recorded in books of accounts.

Accordingly, in order to remove such difficulties, it is now proposed that bad debts shall be allowed as a deduction even if they are not recorded in the books of account, provided these have been offered to income tax in accordance with ICDS.

Mandatory filing of return of income

The requirement of mandatorily filing the return of income is now proposed to be extended to a resident other than not ordinarily resident in India, who is otherwise not required to file the return of income, if he:

- holds, as a beneficial owner or otherwise, any asset (including any financial interest in any entity) located outside India or has signing authority in any account located outside India; or
- is a beneficiary of any asset (including any financial interest in any entity) located outside India.

This provision is in congruence with the provisions of the "The Undisclosed Foreign Income and Assets (Imposition of Tax) Bill, 2015".

Goods and Services Tax ("GST")

The Finance Bill, 2015 had proposed to put into place a modern indirect tax regime by way of the much awaited GST rollout by 1 April 2016. The Constitution (122nd Amendment) (GST) Bill, 2014

required to implement GST was passed by the Lok Sabha on 6 May 2015. This Bill is also required to be passed by the Rajya Sabha with 2/3rd majority and is required to be ratified by 50% of the States. Based on the demand of the opposition parties, this Bill has now been referred to a select committee of the Rajya Sabha. The select committee is required to submit its report on the last day of the first week of the monsoon session of the Parliament.

Service tax

As per the provisions of s 76 of the Finance Act, 1994 ("the Finance Act"), if the amount of service tax and interest is paid within a period of 30 days, no penalty is imposable. It is now also proposed that proceedings in respect of such cases would be deemed to be concluded.

The said section also provides that, if the amount of penalty is paid within a period of 30 days, then the benefit of paying reduced penalty can be availed by the taxpayer. It is now proposed that, in cases where the Commissioner (Appeals), the Appellate Tribunal or the court modifies the amount of service tax payable and increases the penalty, the period of 30 days (for the purpose of reduced penalty) in such cases is to be considered from the date of the order of the Commissioner (Appeals), the Appellate Tribunal or the court. Similar amendments are also proposed to be made under s 78 of the Finance Act.

Under s 78, it was proposed to impose penalty at the rate of 100% of the amount of service tax where any service tax had not been levied or paid or was short levied or short paid or erroneously refunded by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any provisions. It is now proposed to reduce the rate of penalty to 50% instead of 100% only for the cases recorded in the specified record (as defined) between 8 April 2011 and the date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive).

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[2]. AUSTRALIA TARGETS 30 MULTINATIONALS RE AVOIDING A TAXABLE PRESENCE IN AUSTRALIA – *BY TERRY HAYES, SENIOR TAX WRITER, THOMSON REUTERS*

The Australian Government announced in its 2015-16 Federal Budget on 12 May 2015 that it would take action against multinational enterprises (MNEs) that it says are avoiding a taxable presence in Australia. It will introduce what it calls a tax integrity multinational anti-avoidance law. Draft legislation has also been released on implementing this announcement.

Australia's general anti-avoidance rule, Part IVA of the ITAA 1936, is to be amended to introduce what the Government calls a tax integrity multinational anti-avoidance law to deal with the activities of 30 identified multinational companies who the Government says are artificially avoiding having a taxable presence in Australia. These companies, the Government says, are diverting profits earned in Australia away from Australia to no or low tax jurisdictions.

The Government says the current Pt IVA is not adequate to deal with this type of tax avoidance by multinational entities. The general rule currently requires that arrangements have been entered into for the purpose of obtaining an Australian tax benefit. It may be possible for multinational entities to argue that these global arrangements are entered into for the purpose of avoiding tax in other

countries where the Australian tax benefit is relatively small. This would often be the case where the Australian sales of multinational entities are a relatively small part of their global business, the Government said.

The new measure is intended to target situations in which:

- a foreign multinational supplies goods or services to Australian customers and books that revenue offshore;
- the activities of an Australian entity are integral to the Australian customer's decision to purchase the goods or services;
- the profits from Australian sales are subject to low or no global tax; and
- one of the principal purposes of the arrangements is to obtain a tax benefit.

Where the measure applies, the Commissioner of Taxation may cancel the Australian tax benefits obtained in connection with the scheme.

This measure will only apply where the non-resident's annual global revenue is greater than AUD$1 billion.

Date of effect

The new law will apply to tax benefits obtained from 1 January 2016 (under both new and existing schemes).

Key features of proposed changes

The strengthened Pt IVA measures will apply to schemes if under or in connection with the scheme:

- a non-resident entity derives income from the making of a supply of goods or services to Australian customers, with an entity in Australia supporting that supply; and
- the non-resident avoids the attribution of the income from the supply to a permanent establishment (PE) in Australia.

For the multinational anti-avoidance law to apply, it must be reasonable to conclude that the division of activities between the non-resident entity, the Australian entity, and any other related parties has been designed so as to ensure that the relevant taxpayer is not deriving income from making supplies that would be attributable to the PE in Australia.

Additionally, the relevant taxpayer, who entered into or carried out the scheme, must have done so for the principal purpose or for one of the principal purposes of enabling a taxpayer to obtain a tax benefit, or both to obtain a tax benefit and to reduce other tax liabilities under Australian law (other than income tax) or under a foreign law.

Where a scheme is captured by the multinational anti-avoidance law, the Commissioner will have the power to look through the scheme and apply the tax rules as if the non-resident entity had been making a supply through an Australian PE. This includes the business profits from the supply that would have been attributable to an Australia PE and obligations arising (for the relevant taxpayer or another taxpayer) under royalty and interest withholding tax.

To reduce compliance costs and provide certainty, the new measure only applies to non-resident entities that have annual global revenue of over AU$1 billion in the relevant income year in which they sought to obtain a tax benefit under the scheme.

In addition, the multinational anti-avoidance law will only apply to non-resident entities that are, or

have a related entity (or entities) in their corporate structure that are, subject to no corporate tax or a low corporate tax rate (either under the law of a foreign country or through preferential regimes).

Carve-outs to this condition will apply where the non-resident can show that:

- the activities of the entity in that jurisdiction (or of each of those entities if there is more than one entity in a no or low tax jurisdiction) are not related directly or indirectly to the Australian supply; or
- the entity (or each of the entities in the no or low tax jurisdiction) has substantial economic activity in the no or low tax jurisdiction in relation to those Australian supplies relative to the profits subject to no or low corporate tax in that jurisdiction.

What entities will be subject to new rules?

The new anti-avoidance law will only target the largest multinational entities or groups. Furthermore, it only targets multinational entities that ultimately return a substantial proportion of the profit from Australian sales to no or low tax jurisdictions (ie jurisdictions where no corporate tax, or a low corporate tax rate, is applied).

The new law will not apply unless BOTH the "***global revenue threshold***" and the "***no or low tax condition***" are satisfied.

- The ***global revenue threshold*** will be met if the non-resident entity (or the non-resident's global group) has an annual global revenue that exceeds AUD$1 billion in the income year in which they operated the scheme to obtain a tax benefit or reduce their tax liability. The extent of the multinational entity's corporate structure is to be determined in accordance with specified recognised accounting principles.
- The ***no or low tax condition*** will be met if the non-resident (or an entity in their global group) has activities in a no or low corporate tax jurisdiction. That is, if any of the activities of the non-resident (or an entity in their global group) enjoy a zero or low corporate tax rate in a foreign jurisdiction, either under the foreign law or through preferential arrangements with the foreign government, this condition will be met. This condition will also be met where income from activities of the non-resident (or entity in their global group) is stateless and not subject to corporate income tax in any country. However, the no or low tax condition ***will not be met*** if the non-resident can show that their activities (or the activities of the entity in their global group) in the no or low tax jurisdiction are either unrelated to the Australian supply or that the activity amounts to substantial economic activity relative to the profits that are subject to no or low tax in that jurisdiction.

Determining the threshold for non-residents that are members of a global group

The global revenue threshold will also determined differently depending on whether the non-resident is part of a global group or not. A "global group" means a group of entities across different jurisdictions that are consolidated in accordance with accounting standards. The Government says the intention is that the concept of "global group" captures groups of corporations where there is a parent entity and a number of subsidiaries (which may be in different jurisdictions) and the parent entity exercises influence or control over the subsidiaries.

If the non-resident is part of a global group, then the annual global revenue of the group in which the non-resident is a member will be determined (with respect to the relevant income year) by either the total revenue of the latest audited consolidated financial statement (that applies to the non-resident) or, in absence of such a statement, what the Commissioner reasonably estimates to be the global revenue of the non-resident's global group.

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ASEAN TAX NEWS AND UPDATES

MALAYSIA

[3]. IRB RELEASES REVISED TAX AUDIT FRAMEWORK

The Malaysian Inland Revenue Board (IRB) has released its revised Tax Audit Framework (Amendment 1/2015).

Under Malaysia's Self-Assessment System, tax audit is a primary activity of the IRB. It is aimed at enhancing voluntary compliance with the tax laws and regulations. A taxpayer can be selected for an audit at any time. However, it does not necessarily mean that a taxpayer who is selected for an audit has committed an offence.

The revised framework has been issued to ensure that tax audits are carried out in a fair, transparent and impartial manner. The framework outlines the rights and responsibilities of audit officers, taxpayers and tax agents in respect of a tax audit. Generally, this framework aims to:

- assist audit officers to carry out their tasks efficiently and effectively; and
- assist taxpayers in fulfilling their obligations.

The revised framework discusses:

- What is an audit?
- The objective of an audit.
- Years of assessment covered.
- Selection of cases.
- How a tax audit is carried out.
- Rights and responsibilities.
- Offences and penalties.
- Complaints.
- Appeals.

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[4]. NO GST ON PREPAID MOBILE PHONE LOADS

The Malaysian Government has clarified that mobile prepaid load users will not be levied GST on loads purchased. However, they will be taxed on usage, *MalayMail Online* reported.

The Communications and Multimedia Minister Datuk Seri Ahmad Shabery Cheek said that users who purchase an RM10 mobile prepaid reload will receive an RM10 credit upon activation but will subsequently be taxed on their usage of each call and text message as well as data.

He said the Government is of the view that it is fairer to collect taxes after the user used the prepaid load service.

The pricing of prepaid reloads was among the most visible signs of confusion following the implementation of the GST, after telecommunication companies raised prices to incorporate the tax, despite public directives from Deputy Finance Minister Datuk Ahmad Maslan not to do so.

However, the Malaysian Communications and Multimedia Commission (MCMC) said prepaid reload coupons will still be sold with GST added to the price.

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INDONESIA

[5]. LOWER TAX RATES SOUGHT TO ATTRACT INVESTORS

In order to attract more investors to the country, Indonesia is thinking of lowering its tax rate from 25% to 17.5%, according to a report by Reuters.

The tax Ministry said that if the tax rate difference is reduced (Singapore has a 17% corporate tax rate), there may be more incentives for multi-national companies that are operating in regional to shift their investment to Indonesia directly.

Being one of the countries with the lowest collection rate in the region, it also aims to boost tax collections.

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PHILIPPINES

[6]. FAQS ON WITHDRAWAL CERTIFICATES FOR REMOVAL OF PETROLEUM PRODUCTS

The BIR has issued a memorandum answering several Frequently Asked Questions (FAQs) relative to the issue of a Withdrawal Certificate (WC) for every removal of petroleum products from the refinery, depot, or any storage facility as clarified under Revenue Memorandum Circular (RMC) No. 50-2014.

Some of the information reiterated or clarified is information needed to be indicated in the WC form; to whom the WC should be distributed; removal of different petroleum products by a single WC; and sufficiency of a Delivery Report to Support a WC provided such was registered in compliance with BIR Revenue Regulation (RR) No. 18-2012.

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VIETNAM

[7]. NEW EXPORT TAX ON GOLD SET

The Ministry of Finance (MoF) imposed a new export tax on gold jewellery, in which an export duty on gold jewellery that is more than 95% pure increased from 0% to 2%. It however, maintains 0% duty on all gold jewellery below 95% purity. (*Vietnam News*)

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[8]. TRADE COOPERATION BETWEEN VIETNAM AND INDIA STRENGTHENED

In a recent forum attended by scientists, managers and businessmen from Vietnam and India respectively, a communiqué from Prime Minister Tan Dung's visit to India was highlighted, stating the 2 governments pledged to develop the comprehensive strategic partnership and foster all-around cooperation between the 2 nations.

The Trade cooperation commitment consists of 5 pillars: politics, economics, energy, security and national defence.

The further cooperation intends to improve the inter-trade of both countries from US$ 5.4 billion in 2014 to US$ 7 billion in 2015, and US$ 15 billion by 2020. (*General Department of Taxation*)

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BROADER REGIONAL TAX NEWS

CHINA

[9]. CHINA AND RUSSIA SIGN THE DOUBLE TAX AGREEMENT PROTOCOL

On 8 May 2015, Administrator of the State Administration of Taxation (SAT), WANG Jun, and Russian Minister of Finance, Anton Siluanov, signed a Protocol on amending the double tax agreement (DTA) between the 2 countries.

With the execution of the Protocol, the principle of interest taxation is changed from taxing right sharing between the host state and the source state to exclusive taxing right enjoyed the host state with tax exemption granted by the source state. It will further relieve the tax burden on taxpayers of the 2 countries and reduce financing cost between China and Russia.

Source: Thomson Reuters CHECKPOINT™ WORLD

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[10]. CHINA PILOTS TAX INCENTIVES FOR COMMERCIAL HEALTH INSURANCE BUYERS

China has released detailed guidelines to pilot the preferential personal income tax policies for commercial health insurance buyers. Pre-tax reductions for premium payments of less than 2,400 Yuan (USD392) per year for qualified employees are offered by the trial program according to the joint statement released by the Ministry of Finance, State Administration of Tax and the China Insurance Regulatory Commission.

The State Council encouraged the public to purchase private health insurance to improve employee welfare. Each province was required to nominate a city that will try out the preferential policies while the program will be promoted throughout Beijing, Shanghai, Tianjin and Chingqing. (*China.org*)

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INDIA

[11]. IMPORTANT CBDT DIRECTIVE ON APPLICABILITY OF MAT TO FOREIGN COMPANIES

The CBDT has issued a letter dated 11 May 2015 on the issue of "Imposition of Minimum Alternate Tax (MAT) on foreign companies particularly FIIs". The CBDT has stated that in the light of the constitution of the Justice A. P. Shah Committee to look into the issue of applicability of MAT and the statement made by the Finance Minister on the issue in the Rajya Sabha, no coercive action should be taken for recovery of demand already raised. It is also stated that issue of fresh notices for reopening of cases and completion of assessment should also be put on hold unless the case is getting barred by limitation.

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[12]. FOREIGN INVESTOR GROUP MULLS CHALLENGE INDIA'S MAT

The Hong Kong based Asia Securities Industry and Financial Markets Association (ASIFMA) is considering challenging a controversial tax in India's Supreme Court.

The challenge, which should be filed on or before mid-June, pertains to an existing Supreme Court case, filed by Mauritius-based Castleton Investment Ltd. The court case is seen as a test case on the legitimacy of extending the so-called minimum alternate tax (MAT), which was intended to ensure companies inside India paid a minimum tax rate, to foreign investors' gains.

Reuters said that the government has conceded that MAT will not apply to such gains from April 2015, but the tax authority is pursuing claims for past years.

Tax authorities began issuing MAT notices to foreign portfolio investors late last year and have so far sent claims for just 6 billion rupees (US$94 million), but investors fear the final bill could run to billions of dollars.

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[13]. CABINET APPROVES REVISING OF DTA BETWEEN INDIA AND SOUTH KOREA

The Union Cabinet, chaired by Prime Minister Narendra Modi, recently gave its approval for revising the Double Tax Agreement (DTA) which was signed in 1985, between India and South Korea.

The revised DTA will provide tax stability to the residents of India and Korea and facilitate mutual economic cooperation as well as stimulate the flow of investment, technology and services between the 2 countries.

The revised DTA will provide for source based taxation of capital gains, provisions for making adjustments to profits of associated enterprises on the basis of arm's length principle, provides for residence based taxation of shipping income, provisions for service of permanent establishment, rationalises tax rates in the Articles on Dividends, Interest and Royalties and Fees for Technical Services.

The agreement further incorporates provisions for effective exchange of information and assistance in collection of taxes between tax authorities and also incorporates limitation of benefits provisions, to ensure that the benefits of the Agreement are availed of by genuine residents of both countries.

Source: Thomson Reuters CHECKPOINT™ WORLD

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[14]. DEPENDENT AGENT PERMANENT ESTABLISHMENT - INDIA-MAURITIUS DTA

The Bombay High Court has held that the Indian agent of foreign company cannot be regarded as a "Dependent Agent Permanent Establishment" if the agent has no power to conclude contracts: *DIT v B4U International Holdings Limited*.

The case concerned the 2001-02, 2004-05 and 2005-06 assessment years. The assessee is a foreign company incorporated in Mauritius. It had filed its residency certificate declaring that its business was telecasting of TV channels such as B4U Music, MCM etc. During the relevant year, its revenue from India consisted of collections from time slots given to advertisers from India. The details filed by the assessee revealed there was a general permission granted by the Reserve Bank of India to act as advertisement collecting agents of the assessee. The permissions were granted to M/s. B4U Multimedia International Limited and M/s. B4U Broadband Limited.

In the computation of income filed along with the return, the assessee claimed that as it did not have a permanent establishment (PE) in India, it was not liable to tax in India under Article 7 of the DTA between India and Mauritius. The argument further was that the agents of the assessee have marked the ad-time slots of the channels broadcasted by the assessee for which they have received remuneration on an arm’s length basis. Thus, in the light of the Central Board of Direct Taxes Circular No 23 of 1969, the assessee argued its income was not taxable in India.

The TRibunal said the conditions of Circular 23 were fulfilled. Therefore, Explanation (a) to s 9(1)(i) of the IT Act will have no application. The Assessing Officer did not accept the contentions of the assessee. However, the Tribunal noted that paragraph 5 of Article 5 of the DTA indicates that an enterprise of a contracting State will not be deemed to have a PE in the other contracting State merely because it carries on business in that State through a broker, general commission agent, or any other agent of independent status, where such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted exclusively or almost exclusively on behalf of that enterprise, he will not be considered an agent of an independent status within the meaning of this paragraph.

The Tribunal held that the assessee carries out the entire activities from Mauritius and all the contracts were concluded in Mauritius. The only activity which is carried out in India is incidental or auxiliary / preparatory in nature which is carried out in a routine manner as per the direction of the principal without application of mind and hence B4U is not a dependent agent. Nearly 4.69% of the total income of B4U India is commission / service income received from the assessee company and, therefore, also it cannot be termed as a dependent agent. As far as the alternate contentions are concerned, it was held that the assessee and B4U India were dealing with each other on arm's length basis. 15% fee is supported by Circular No.742. Thus it was held that no further profits should be taxed in the hands of the assessee. The DIT appealed.

The High Court dismissed the appeal.

The Court said if the agent is remunerated at arm's length basis, no further profit can be attributed to the foreign company. It is doubtful whether retrospective amendment to s 9(i)(vi) can apply the DTA, the Court said.

According to the Court:

- As per the agreement between the assessee and B4U, B4U India is not a decision maker nor has it the authority to conclude contracts. Further, the Revenue has not brought anything on record to prove that agent has such powers and from the agreement any such conclusion could not have been drawn.
- The India-Mauritius DTA requires that the first enterprise in the first mentioned State has and habitually exercised in that State an authority to conclude contracts in the name of the enterprise unless his activities are limited to the purchase of goods or merchandise for the enterprise is a condition which is not satisfied. Therefore, this is not a case of B4U India being an agent with an independent status.
- The findings of the Supreme Court judgment in *Morgan Stanley & Co*. that there is no need for attribution of further profits to the PE of the foreign company where the transaction between the 2 is at arm's length but this was only provided that the associate enterprise was remunerated at arm's length basis taking into account all the risk taking functions of the multinational enterprise. Thus, assuming B4U India is a dependent agent of the assessee in India it has been remunerated at arm's length price and, therefore, no profits can be attributed to the assessee.
- The argument that the transponder charges being a consideration and process as clarified in terms of Explanation (6) to s 9 of the IT Act, the assessee was obliged to deduct tax at source under s 195 and having not deducted the same, there has to be a disallowance under section 40(a)(i) of the IT Act was not required to be answered.

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[15]. AMOUNTS PAID FOR USING TELECOM SYSTEM NOT FEES FOR TECHNICAL SERVICES IF NO PROFIT ELEMENT

The Bombay High Court has held that the amount paid by Indian entities as "share of cost" of utilizing automated telecommunications system is not assessable as "fees for technical services" if there is not profit element in it: *DIT v A. P. Moller Maersk A/S*.

The case concerned the 2001-02 assessment year. The assessee had 3 agents working for it viz. Maersk Logistics India Limited (MLIL), Maersk India Private Limited (MIPL) and Safmarine India (Pvt) Limited (SIPL). These agents would book cargo and act as clearing agents for the assessee. In order to help them in this business, the assessee had procured and maintained a global telecommunication facility called MaerskNet which is a vertically integrated communication system. The agents would incur pro rata costs for using the said system and the agents' share of the cost was, therefore,

recovered from these three agents.

According to the assessee, it was merely a system of cost sharing and hence the payments received by the assessee from MIPL, MLIL and SIPL were in the nature of reimbursement of expenses. However, the AO and CIT(A) held that the amounts paid by these 3 agents to the assessee was consideration / fees for technical services rendered by the assessee and taxable in India under Article 13(4) of the DTA and assessed tax at 20% under s 115A of the Income Tax Act, 1961.

The assessee submitted before the Tribunal that without this system, it was not possible to conduct international shipping business efficiently and in having the system set up, the assessee had incurred costs. A share of this cost would have to be borne by each of the agents which utilise the system and, accordingly, these pro rata costs relatable to each of the agents was billed to the agents and these amounts were thus paid. It was merely a "charging back" to the agent, proportionate costs of the global shipping communications system and did not, in any manner, amount to rendering of any technical services. The Tribunal accepted the contention of the assessee. The department appealed.

The High Court dismissed the appeal. It said there was no finding by the AO or the Commissioner that there was any profit element involved in the payments received by the assessee from its Indian agents. On the other hand, having considered the various submissions, the Court was of the view that no technical services as contemplated by the Act have been rendered in the instant case.

The Court considered that the Tribunal has correctly observed that utilization of the Maersk Net Communication system was an automated software based communication system which did not require the assessee to render any technical services. It was merely a cost sharing arrangement between the assessee and its agents to efficiently conduct its shipping business. The Maersk Net used by the agents of the assessee entailed certain costs reimbursement to the assessee. It was part of the shipping business and could not be captured under any other provisions of the Income Tax Act except under DTA, the Court said.

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TAIWAN

[16]. PREFERENTIAL TAX TREATMENT REINSTATED BY CHINA STATE COUNCIL – TAIWAN EXCHANGE

Taiwan's Strait Exchange Foundation (SEF) has welcomed news that the China's State Council reinstated the preferential tax treatment on Taiwan-invested companies in China.

SEF said that such action was an indication that China attaches great importance to Taiwanese businesses operating there.

Last year, China's State Council issued a directive for all local governments to withdraw their investment tax incentives to allow the central government to set up an integrated investment administration system. This action caused Taiwanese firms to be directly hit since they had long enjoyed tax incentives that other foreign companies in China don't have.

SEF sent letters seeking reconsideration, and on 22 April 2015, Chinese Premier Li Keqiang himself had given assurance that the preferential treatment will be reinstated to the Taiwanese companies. (*Focus Taiwan News Channel*)

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TAX NEWS OF WIDER INTEREST

BEPS NEWS

[17]. AUSTRALIA NOT WAITING FOR BEPS FINALISATION

In its 2015-16 Federal Budget on 12 May 2015, the Australian Government announced that "Australia is not waiting for the rest of the world to agree to all 15 items of the Action Plan" and is now taking the next step, consistent with the directions of the G20 and OECD dialogue.

The Government said Australia is acting now to commence implementation of 4 of the key actions it delivered as G20 President to stop multinational tax avoidance.

1 Country-by-Country reporting

Australia will implement the OECD's Country-by-Country (CbC) reporting from 1 January 2016. It believes this measure will be a "game changer" in helping expose multinational tax avoiders.

For the first time, multinationals will be required to provide tax authorities with a global picture of their operations including income and tax paid in every country they operate in. This information will be shared between tax authorities.

2 Treaty Abuse rules

Countries enter into tax treaties with each other to facilitate trade and investment. Tax treaties aim to avoid double taxation, but some taxpayers exploit treaty rules to avoid taxation altogether.

The OECD has developed a plan to tackle this problem. While Australia already includes anti-abuse rules in its tax treaties, the Government says it will act now to incorporate the OECD's recommendations into Australian treaty practice.

3 Anti-Hybrids rules

Different tax rules in different countries can allow multinationals to claim a tax deduction in one country but not pay tax in the other. The OECD has developed a draft plan to tackle this. Australia will be one of the first countries to act on these draft rules.

The Government has asked the Board of Taxation to consult on the implementation of these rules.

4 Harmful Tax Practices and Exchange of Rulings

Some countries provide secret or preferential tax deals to multinationals to attract their business, which can be harmful to other countries. The OECD has found Australia does not engage in any harmful tax practices.

The ATO has commenced exchange of information on secret tax deals provided to multinationals by other countries that may contribute to tax avoidance in Australia.

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[18]. PUBLIC COMMENTS RELEASED ON BEPS ACTION 11 (DATA ANALYSIS)

On 16 April 2015, interested parties were invited to comment on the discussion draft on Action 11 (Data Analysis) of the BEPS Action Plan. The OECD has now released the comments received.

The input will be discussed during a public consultation at the OECD Conference Centre on 18 May 2015 from 10:00 to 15:45.

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EU NEWS

[19]. Q&A DISCUSS DIGITAL SINGLE MARKET STRATEGY FOR VAT

The European Commission (EC) has released a series of "questions and answers" about the Digital

Single Market Strategy proposal, mentioning its strategy on VAT.

According to the Q&As, legislative proposals to reduce the administrative burden on businesses arising from different VAT regimes will be made by the Commission in 2016. It will include extending the prevailing single electronic registration and payment mechanism to cross-border online sales of physical goods; introducing a universal EU-wide simplification measure of VAT threshold to aid small start-up e-commerce businesses; allowing home country controls and single audit of cross-border businesses for VAT purposes; and removing the VAT exemption for importation of small consignments from third world country suppliers.

The press release also explained that the VAT exemption on small consignments had turned into an expensive tax subsidy in favour of imports to the disadvantage of domestic and intra-EU sales. Big market players benefited from the exemption and not small operators. Distortions resulting from the exemption, according to the Q&A, had cost EU business a turnover of up to EUR4.5 billion annually. With the introduction of a single electronic registration and payment, the Commission explained that VAT could be accounted for an earlier stage than customs clearance by exporters and carriers; and this is one other reason why VAT exemptions can be removed.

The Commission also mentioned that it will explore ways to address the tax treatment of digital books and online publications in relation to the work being done on the adoption of a definitive VAT regime. The Communication on the main features of the definitive VAT regime is scheduled to be adopted next year.

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AUSTRALIA

[20]. AUSTRALIA TO IMPLEMENT OECD TRANSFER PRICING DOCUMENTATION STANDARDS FROM JAN 2016

In its 2015-16 Budget, the Australian Government announced that it will implement the OECD's new transfer pricing documentation standards from 1 January 2016. The Government said it will provide the ATO with AUD$11.3 million over the forward estimates period to implement the new standards.

Under the new documentation standards, the ATO will receive the following information on large companies that operate in Australia:

- a Country-by-Country Report showing information on the global activities of the multinational, including the location of its income and taxes paid;
- a master file containing an overview of the multinational's global business, its organisational structure and its transfer pricing policies; and
- a local file that provides detailed information about the local taxpayer's intercompany transactions.

Together, these reports are intended to provide the ATO with a global picture of how multinational entities operate, assisting it to identify multinational tax avoidance.

This measure will apply to companies with global revenue of AUD$1 billion or more.

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[21]. AUSTRALIA TO DOUBLE PENALTIES FOR TAX AVOIDANCE AND PROFIT SHIFTING

In its 2015-16 Federal Budget on 12 May 2015, the Government announced that it will double the maximum administrative penalties that can be applied by the Tax Commissioner to large companies that enter into tax avoidance and profit shifting schemes. The increased penalties, under Sch 1 to the *Taxation Administration Act 1953*, are designed to help deter tax avoidance and will apply for income years commencing on or after 1 July 2015. This measure is estimated to have an unquantifiable gain

to revenue over the forward estimates period, the Government said.

Penalties will not change for taxpayers who have a "reasonably arguable" tax position, as defined under Sch 1.

This measure will apply to companies with global revenue of AU$1 billion or more.

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[22]. PUBLIC TAX TRANSPARENCY CODE

To complement Country-by-Country reporting, which will provide enhanced information to tax authorities, the Australian Government announced in its 2015-16 Budget that it will also work with businesses to develop a code on the public disclosure of greater tax information by large corporates.

The Government believes the code will provide support and confidence in Australia's tax system by large corporates taking the lead and being more transparent to help educate the public.

The Government has asked the Board of Taxation to lead the development of this transparency code. Progress will be monitored and the Government will consider further changes to the law if required.

The Government says it would like more companies, particularly large multinationals operating in Australia, to publicly disclose their tax affairs. In developing the code, the Government says MNEs will need to consider what information is disclosed and how it is disclosed.

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[23]. AUSTRALIA TO IMPOSE A GST "NETFLIX" TAX ON OFFSHORE INTANGIBLE SUPPLIES FROM 1 JULY 2017

The Australian Government announced in its 2015-16 Budget that it will impose GST on offshore intangible supplies to Australian consumers with effect from 1 July 2017. The measure has been dubbed by the media as the "Netflix" tax. The Government also released draft legislation which contains the details of the changes.

The broad details of the tax are as follows:

- the tax will be imposed on intangible supplies such as supplies of digital content, games, software – but will also extend to services performed offshore for customers in Australia;
- the liability for the GST will rest either with the supplier or the operator of an electronic distribution service, ie a reverse charge mechanism is not to be utilised;
- GST will be imposed at a rate of 10% on the value of the supply, eg a supply valued at A$1,367 will attract A$137 of GST (rounded);
- at this stage, it would appear all supplies will be caught, regardless of the value of the supply (eg even a A$10 supply will be liable for the tax). However, there is scope for this to be changed by regulation later on;
- only supplies made to consumers who are not registered or required to be registered will be caught, or those entities who are registered but do not acquire the supply for a creditable purpose (ie business-to-business transactions will be exempt); and
- the measures will apply to supplies made on or after 1 July 2017.

The legislation will amend the GST law to make all supplies of things other than goods or real property connected with Australia (or "the indirect tax zone") where they are made to an Australian consumer: proposed s 9-25(5)(d). The issue of registration is to be dealt with later by regulation. This means that supplies which were previously outside the Australian GST net because they were not connected with Australia and were supplied by an unregistered entity will now be a taxable supply.

This change will result in supplies of digital products, such as streaming or downloading of movies, music, apps, games, e-books, as well as other services such as consultancy and professional services, receiving similar GST treatment whether they are supplied by a local or foreign supplier.

It will only apply if a supply is made to an Australian consumer. An "Australian consumer" is an entity which is an Australian resident (below) and either (proposed s 9-25(7)):

- the entity is not registered or required to be registered for GST; or

the entity does not acquire the supply to any extent for the purpose of an enterprise they carry on (ie not for a creditable purpose).

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BRAZIL

[24]. BRAZIL ANNOUNCES ANTI-DUMPING DUTIES ON PRODUCTS FROM CHINA AND SOUTH KOREA

The Chamber of Foreign Trade (CAMEX) of Brazil has announced new anti-dumping duties on products from companies in China, South Korea, Germany, the United States and the United Kingdom.

Anti-dumping duties will be imposed on imports of ferrite magnets, used in manufacturing DC motors, from certain exporters from China and South Korea, according to CAMEX. The duties range from USD1,987.45 to USD3,382.60 per ton for Chinese manufacturers and from USD117.38 to USD2,461 per ton for South Korean companies will be in place for five years. Duties ranging from USD1.12 to USD2.59 per ton for a period of 5 years, on the other hand, will be levied on imports of radial construction truck tires from certain exporters from China.

CAMEX also announced that duties will be applied to imported plastic tubes for blood collection from certain suppliers in Germany, China, the US and the UK. The duties will be applied at ad valorem rates ranging from 11.1% to 93.3 percent for German suppliers, 49.5% to 638.1% for Chinese suppliers, 45.3% to 86.5% for US suppliers, and 71.5% to 482.8% for UK suppliers – all of which will remain in effect for a period of five years. (*TaxNews.com*)

[NOTE: From time to time, the *ASEAN Tax Bulletin* will contain cross-references to different Issues of the Bulletin. They will appear as, for example, 2014 ATB 10 [12] – this means Issue 10 para [12] of the 2014 *ASEAN Tax Bulletin*.]

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